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jurcit[32004L0018* or 32004L0017* or 32004R1874* or 31989L0665* or 31992L0013* or 31993L0036* or 31997L0052* or 32001L0078* or 31993L0037* or 31992L0050* or 31993L0038* or 31998L0004* or 31977L0062* or 31980L0767* or 31988L0295* or 31971L0305* or 31978L0669* or 31989L0440* or 31993L0004* or 31990L0531* or 31994L0022*]

European Court of Justice web site:

Law relating to enterprises

Updated to: 8 February 2010

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Appeal brought on 3 October 2009 by Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE against the order of the Court of First Instance (Fourth Chamber) delivered on 2 July 2009 in Case T-279/06: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Banque centrale européenne BCE

(Case C-401/09 P)

Language of the case: English

Parties

Appellant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (represented by: N. Korogiannakis and M. Dermitzakis, Δικηγόροι)

Other party to the proceedings: European Central Bank

Form of order sought

The applicant claims that the Court should:

Set aside the decision of the Court of First Instance;

Annul the decision of the European Central Bank to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

Order ECB to pay the applicant's legal and other costs and expenses incurred in connection with the initial procedure, even if the current Appeal is rejected as well as those of the current Appeal, in case it is accepted.

Pleas in law and main arguments

The appellant submits that the defendant's objection of inadmissibility, submitted together with the defence, should have been declared inadmissible due to the fact that it does not comply with article 114 of the rules of procedure of the CFI which expressly provides that such an objection must be submitted "by a separate document". The appellant also submits that, by accepting the objection of inadmissibility and failing to comment on the appellant's arguments with respect to the objection, the CFI infringed article 36 of the Statute of the Court of Justice.

In the appellant's view the CFI was wrong when it held that European Dynamics, because its bid was unacceptable, had no legal interest in seeking review of the decision of the contracting authority. The appellant also argues that the CFI erred by considering that it was necessary for the appellant to obtain an Arbeitnehmerüberlassungsgenehmigung (AÜG) in order to offer its services lawfully.

Finally the appellant submits that the CFI failed to apply the relevant legal provisions concerning the duty of the contracting authority to provide reasons for its decision.

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ORDONNANCE DU PRÉSIDENT DE LA COUR

23 février 2010(1)

«Radiation»

Dans l'affaire C-290/09,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Tribunale amministrativo regionale per la Sardegna (Italie), par décision du 10 juillet 2009, parvenue à la Cour le 27 juillet 2009, dans la procédure

Telecom Italia SpA

contre

Regione autonoma della Sardegna,

en présence de:

Space SpA et Passamonti Srl e.a.,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M J. Mazák, entendu,

rend la présente

Ordonnance

1 Par lettre du 12 janvier 2010, le greffe de la Cour a transmis à la juridiction de renvoi l'arrêt rendu le 23 décembre 2009 dans l'affaire C-305/08, CoNISMa (non encore publié au Recueil), en l'invitant à bien vouloir lui indiquer si, à la lumière de cet arrêt, elle souhaitait maintenir son renvoi préjudiciel.

2 Par lettre du 4 février 2010, parvenue au greffe de la Cour le 8 février, le Tribunale amministrativo regionale per la Sardegna a informé la Cour qu'il n'entendait pas maintenir son renvoi préjudiciel.

3 Dans ces conditions, il y a lieu d'ordonner la radiation de la présente affaire du registre de la Cour.

4 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, le président de la Cour ordonne:

L'affaire C-290/09 est radiée du registre de la Cour.

Fait à Luxembourg, le 23 février 2010.

Le greffier
R. Grass

Le président
V. Skouris

1 Langue de procédure: l'italien.

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Order of the President of the Court of 23 February 2010 (reference for a preliminary ruling from the Tribunale Amministrativo per la Sardegna - Italy) - Telecom Italia SpA v Regione autonoma della Sardegna, opposing Space SpA and Passamonti Srl and Others

(Case C-290/09) [1]

Language of the case: Italian

The President of the Court has ordered that the case be removed from the register.

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1 -

2 - OJ C 233, 26.9.2009.

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Reference for a preliminary ruling from the Tribunale Amministrativo per la Sardegna (Italy), lodged on 27 July 2009 - Telecom Italia SpA v Regione autonoma della Sardegna

(Case C-290/09)

Language of the case: Italian

Referring court

Tribunale Amministrativo per la Sardegna

Parties to the main proceedings

Claimant: Telecom Italia SpA

Defendant: Regione autonoma della Sardegna

Questions referred

Must the provisions of Directive 2004/18/EC [1] on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts that are referred to in section 10 [of the order for reference] be interpreted as precluding a temporary grouping of undertakings, the members of which include a State agency of the kind described in section 12 [of the order for reference], from taking part in a tendering procedure for the award of a contract for a service such as the documentation, dissemination and implementation of the 'Homogeneous System of Visual Identity of the Cultural Sites and Institutions: Cultural Heritage of Sardinia', the subject of the tendering procedure advertised by the Sardinia Region?

Are the provisions of Italian law contained in Article 3(22) and (19) of the Public Contracts Code, enacted by Legislative Decree No 163/2006 (which provide, respectively, that 'the term "economic operator" shall include a contractor, supplier, service provider or a group or consortium of these' and 'the terms "contractor", "supplier" and "service provider" shall mean any natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) formed pursuant to Legislative Decree No 240 of 23 July 1991, which "offers on the market", respectively, the execution of works or a work, the supply of products or the provision of services'), and in Article 34 of that Public Contracts Code (which lists the entities allowed to participate in public procurement procedures) contrary to Directive 2004/18/EC if interpreted as restricting participation in tendering procedures to professional providers of such services and as excluding public entities the primary objects of which are not-for-profit, such as research?

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[1] - OJ 2004 L 134, p. 114.

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Action brought on 7 July 2009 - Commission of the European Communities v Republic of Cyprus

(Case C-251/09)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: C. Zadra and I. Khatzigiannis)

Defendant: Republic of Cyprus

Form of order sought

declare that the Republic of Cyprus has failed to fulfil its obligations under Articles 4(2) and 31(1) of Directive 93/38/EEC [1] and Article 1(1) of Directive 92/13/EEC; [2]

order the Republic of Cyprus to pay the costs.

Pleas in law and main arguments

The Arkhi Ilektrikou Kiprou (Electricity Authority of Cyprus) is stated to have infringed Directives 93/38/EEC and 92/13/EEC in the course of the tendering procedure under reference number 40/2005 which related to a contract for the design, supply and construction of the fourth unit of the Vasilikos Power Station.

The Commission submits that the infringement of Articles 4(2) and 31(1) of Directive 93/38 is due to the grounds for rejection of the complainant's tender and acceptance of that of the other tenderer on the basis of a criterion which was not referred to clearly in the call for tenders.

So far as concerns the infringement of Directive 92/13, a measure relating to procedure, the Commission submits (i) that, inasmuch as the contracting authority itself created by its conduct a state of uncertainty as to the interpretation to be given to the grounds which resulted in the rejection of the complainant's tender, it infringed Directive 92/13 as interpreted in the light of the objective of effectiveness pursued by that directive, and (ii) that the contracting authority cannot give reasons for its decision by simply referring to the evaluation reports.

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[1] - Council Directive of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

[2] - Council Directive of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

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Reference for a preliminary ruling from the Markkinaoikeus (Finland) lodged on 15 June 2009 - Mehiläinen Oy, Suomen Terveystalo Oyj v Oulun kaupunki

(Case C-215/09)

Language of the case: Finnish

Referring court

Markkinaoikeus

Parties to the main proceedings

Applicants: Mehiläinen Oy, Suomen Terveystalo Oyj

Defendant: Oulun kaupunki

Questions referred

Is an arrangement by which a municipal contracting authority concludes with a private undertaking in the form of a company which is separate from it a contract establishing a new undertaking in the form of a share company, on an equal share basis both in terms of ownership and of power of control, from which the municipal contracting authority commits itself, when setting up the company, to purchasing occupational health and wellbeing services for its own staff, on an overall assessment, an arrangement which must be put out to tender, on the ground that the general contract is a contract for the procurement of services within the meaning of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts and public service contracts[1], or is the arrangement to be regarded as the establishment of a joint venture and the transfer of the business activity of a municipal enterprise to which that directive and the consequent obligation to put out to tender are not applicable?

Should any significance in this case also be attached

(a) to the fact that the City of Oulu, as a municipal contracting authority, has undertaken to acquire in return for consideration the services referred to above over a four-year transitional period, after which the municipal contracting authority intends, according to its decision, once again to put out to tender the occupational health care services it requires;

(b) to the fact that, prior to the arrangement in question, most of the turnover of the municipal enterprise that was part of the City of Oulu organisation came from occupational health care services other than those produced for the City's own employees;

(c) to the fact that the founding of the new company has been organised with the intention of transferring as a capital contribution the activity of the municipal enterprise, which comprises the production of occupational health care services both for the City's employees and for private customers?

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[1] - OJ 2004 L 134, p. 114

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Action brought on 31 December 2009 - De Post v Commission

(Case T-514/09)

Language of the case: English

Parties

Applicant: De Post NV van publiek recht (Brussel, Belgium) (represented by: R. Martens and B. Schutyser, lawyers)

Defendant: European Commission

Form of order sought

the annulment of the decision of the Publications Office of the European Union to award the contract referred to in the invitation to tender No 10234 "Daily transport and delivery of the Official Journal, books, other periodicals and publications" (OJ 2009/S 176-253034) to "Entreprises des Postes et Télécommunications Luxembourg" and not to the applicant, as notified to the latter on 17 December 2009;

in the event that, at the time of the rendering of the judgment, the Publications Office would have already signed the contract with Entreprises des Postes et Télécommunications Luxembourg pursuant to invitation to tender No 10234, a declaration that this contract is null and void;

an award of damages as compensation for the loss that the applicant has incurred as a consequence of the contested decision, provisionally estimated at EUR 2 386 444,94, to be increased by the moratory and compound interest as from the date of the filing of this application;

an order that the European Commission pays the costs of the proceedings, including the expenses for legal counsel incurred by the applicant.

Pleas in law and main arguments

By means of its application, the applicant seeks on the one hand, the annulment of the decision of the Publications Office of the European Union (hereinafter "the Publications Office") of 17 December 2009, to award the contract referred to in the invitation to tender No 10234 "Daily transport and delivery of the Official Journal, books, other periodicals and publications" (OJ 2009/S 176-253034), to Entreprises des Postes et Télécommunications Luxembourg (hereinafter "Post Luxembourg") and, consequently, not to award the contract to the applicant and, on the other, compensation of an estimated amount of 2.386.444,94 EUR for the damages allegedly suffered by the applicant following the rejection of its tender.

In support of its application, the applicant puts forward a single plea in law, consisting of four parts.

The first and only plea in law raised by the applicant points at the alleged infringement by the Publications Office of the principles of transparency and equal treatment of tenderers contained in Article 15 TFEU and in Article 89 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (hereinafter "the Financial Regulation")[1], to the infringement of the obligation to award the contract on the basis of an evaluation of the selection criteria contained in Article 100(1) of the Financial Regulation, to its failure to adequately state the reasons for its decision (breach of Article 296 TFEU) and to the several manifest errors of assessment it has allegedly made, thus invalidating its decision that the tender of Post Luxembourg, and not that of the applicant, is the economically the most advantageous tender.

In the first part of the plea in law, the applicant claims that the Publications Office has failed to base its decision on an evaluation of the selection and award criteria, in breach of Article 100 (1) of the Financial

Regulation.

In the second part of the plea in law, the applicant argues that the Publications Office has applied various sub criteria in its evaluation of the tenders that were not contained in the tender specifications and has thus violated the principle of transparency as laid down in Article 15 TFEU and Article 89 pf the Financial Regulation.

In the third part of its plea, the applicant claims that the Publications Office has applied the open-ended technical award criteria in an inconsistent manner, effectively removing all transparency from the evaluation process.

In the fourth part of its plea, the applicant contends that the Publications Office, in violation of Articles 15, 296 TFUE, 89 of the Financial Regulation as well as the general procedural requirements of the duty to state reasons and of transparency, has not provided an adequate an unequivocal statement of reasons for its evaluation of the tenders, the motivation of the decision allegedly being contradictory and vitiated by manifest errors of assessment.

Further, the applicant submits that since the contested decision is vitiated by breaches of European law, the Publications Office has committed a fault and is thus liable under Article 340 TFUE. In fact, the applicant claims that due to the decision to award the contract to Post Luxembourg instead of the applicant, the latter has incurred a serious loss, consisting of a chance to have the contract awarded to it and of all the expenses made by it relating to the preparation and the drafting of the tender, as well as in defending its position.

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[1] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

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Action brought on 24 November 2009 - JSK International Architekten und Ingenieure v ECB

(Case T-468/09)

Language of the case: German

Parties

Applicant: JSK International Architekten und Ingenieure GmbH (Frankfurt am Main, Germany) (represented by: J. Steiff and K. Heuvels, lawyers)

Defendant: European Central Bank

Form of order sought

Annul the ECB's award decision of 6 August 2009 and the decision on the complaint of 14 September 2009 by the body within the ECB responsible for review proceedings;

declare that (i) the annulled award decision is to be replaced by the award of the contract to the applicant, (ii) in the alternative, that the procedure by which the contract was awarded is to be repeated from the moment tenderers were invited to submit bids, this time to include JSK's bid, (iii) in the final alternative, to repeat the procedure by which the contract was awarded from the very beginning;

only in the alternative - and only if, as is not likely, the applications under 1 and 2 above are dismissed - award the applicant damages in the amount of its positive interest (lost profit), provisionally estimated to amount to EUR 900 000; in the alternative, in the amount of its negative interest (cost of preparing the tender), provisionally estimated to amount to EUR 80 000;

order the defendant to pay the costs of the proceedings and the extrajudicial costs necessarily incurred by the applicant in taking the appropriate legal action (lawyers' fees and expenses);

grant the applicant unrestricted access to the files, which has been denied to date.

Pleas in law and main arguments

By its claims, the applicant takes issue with, on the one hand, the decision of the ECB's award committee of 6 August 2009 to reject the bid submitted by the applicant in response to the call for tenders in respect of coordination and site management tasks relating to the new ECB building in Frankfurt am Main (T109 Bauleiter), and, on the other hand, the decision of the body within the ECB responsible for review proceedings of 14 September 2009 to reject the applicant's complaint brought against that award decision. In the alternative, the applicant has applied for damages.

In support of its application, the applicant submits, first, that the award decision contains errors because of a conflict of interests. In this respect, the applicant alleges that there has been an infringement of the principle of good administration within the meaning of Article 41 of the Charter of Fundamental Rights of the European Union.

Second, the applicant submits that the failure to consider its bid constitutes an error of law and takes issue with the fact that its bid was excluded on grounds of inadequacy and low quality.

Finally, the applicant claims that procedural rights were infringed with respect to transparency and the right to legal protection, such as an infringement of the right of access to the file.

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Order of the President of the General Court of 20 January 2010 - Agriconsulting Europe v Commission

(Case T-443/09 R)

(Application for interim measures - Public procurement - Tendering procedure - Rejection of a tender - Application for suspension of operation and for interim measures - Loss of opportunity - Absence of serious and irreparable damage - No urgency)

Language of the case: Italian

Parties

Applicant: Agriconsulting Europe SA (Brussels, Belgium) (represented by: F. Sciaudone, R. Sciaudone and A. Neri, lawyers)

Defendant: European Commission (represented by: A. Bordes and L. Prete, acting as Agents)

Re:

Application for interim relief concerning the tendering procedure EuropeAid/127054/C/SER/Multi relating to short-term services in the exclusive interest of third countries benefiting from European Commission external aid.

Operative part of the order

1. *The application for interim measures is dismissed.*

2. *The costs are reserved.*

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Judgment of the General Court of 27 January 2010 — REWE Zentral v OHIM — Grupo Corporativo Teype (Solfrutta)

(Case T-331/08) [1]

(Community trade mark — Opposition proceedings — Application for Community word mark Solfrutta — Earlier Community word mark FRUTISOL — Relative grounds for refusal — Likelihood of confusion — Partial refusal of registration — Article 8(1)(b) of Regulation (EC) No 40/94 (now Article 8(1)(b) of Regulation (EC) No 207/2009))

(2010/C 63/82)

Language of the case: English

Parties

Applicant: REWE Zentral AG (Cologne, Germany) (represented by: M. Kinkeldey and A. Bognár, lawyers)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: A. Folliard-Monguiral, Agent)

Other party to the proceedings before the Board of Appeal of OHIM intervening before the General Court: Grupo Corporativo Teype, SL (Madrid, Spain)

Re:

Action brought against the decision of the Second Board of Appeal of OHIM of 21 May 2008 (Case R 1679/2007-2) relating to opposition proceedings between Grupo Corporativo Teype, SL and REWE-Zentral AG.

Operative part of the judgment

The Court:

1. *Annuls the decision of the Second Board of Appeal of OHIM of 21 May 2008 (Case R 1679/2007-2);*

2. *Orders OHIM to pay the costs.*

[1] OJ C 260 of 11.10.2008.

Order of the President of the General Court of 20 January 2010 — Agriconsulting Europe v Commission

(Case T-443/09 R)

(Application for interim measures — Public procurement — Tendering procedure — Rejection of a tender — Application for suspension of operation and for interim measures — Loss of opportunity — Absence of serious and irreparable damage — No urgency)

(2010/C 63/83)

Language of the case: Italian

Parties

Applicant: Agriconsulting Europe SA (Brussels, Belgium) (represented by: F. Sciaudone, R. Sciaudone and A. Neri, lawyers)

Defendant: European Commission (represented by: A. Bordes and L. Prete, acting as Agents)

Re:

Application for interim relief concerning the tendering procedure EuropeAid/127054/C/SER/Multi relating to short-term services in the exclusive interest of third countries benefiting from European Commission external aid.

Operative part of the order

1. *The application for interim measures is dismissed.*

2. *The costs are reserved.*

Action brought on 30 November 2009 — Fercal Consultadoria e Serviços v OHIM

(Case T-474/09)

(2010/C 63/84)

Language in which the application was lodged: Portuguese

Parties

Applicant: Fercal — Consultadoria e Serviços, Ltda (Lisbon, Portugal) (represented by: A. Rodrigues, lawyer)

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Action brought on 4 November 2009 - Agriconsulting Europe v Commission

(Case T-443/09)

Language of the case: Italian

Parties

Applicant: Agriconsulting Europe SA (Brussels, Belgium) (represented by: F. Sciaudone, R. Sciaudone and A. Neri, lawyers)

Defendant: Commission of the European Communities

Form of order sought

Annul the contested decision.

Order the Commission to pay compensation for the damage suffered.

Order the Commission to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant in the present action is a leading management consultancy providing technical advisory services for international development projects. It is bringing an action against the Commission's decision in connection with the award of Lot No 11 in contract notice EuropeAid/127054/C/SER/multi (OJ S 128 of 4 July 2008) not to include among the six economically most advantageous bids that submitted by the consortium of which the applicant was the leading participant and to award that lot to other tenderers.

The applicant puts forward the following pleas in support of its application for annulment:

distortion of the evidence and the factual circumstances. The contested decision rejected the applicant's bid on the basis that the 'declarations of exclusivity' of three experts in its bid were also to be found in other bids and it was therefore necessary to exclude them from the evaluation. That conclusion is vitiated in so far as it failed to take account of the experts' statements denying that some of those declarations had any value, on the one hand, or actually claiming that they were false, on the other;

misinterpretation of the consequences to be drawn from the non-compliance of the 'declarations of exclusivity' and infringement of the principle of legal certainty, in so far as the defendant imposed the penalty laid down for cases in which more than one declaration of exclusivity is signed on all the tenders, without considering the role and responsibilities of the company or the expert;

infringement of legal requirements, of the principle of sound administration and the principal of proportionality, in so far as the defendant failed to exercise the power conferred on it to request clarification where there is some ambiguity concerning some aspect of the tender before confirming that errors exist which may affect the validity of a tender.

The applicant,which also submits that there has been infringement of the obligation to state reasons, seeks, in addition, compensation for the damage suffered on grounds of non-contractual liability for unlawful acts or, in the alternative, for lawful acts.

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ORDER OF THE PRESIDENT OF THE THIRD CHAMBER OF THE GENERAL COURT

24 March 2010 (1)

(Removal from the register)

In Case T-428/09,

Berenschot Groep BV, established in Utrecht (Netherlands), represented by B. O'Connor, Solicitor,

applicant,

v

European Commission, represented by A. Bordes and L. Prete, acting as Agents,

defendant,

ANNULMENT of the Commission decision of 11 August 2009 rejecting the tender submitted by the applicant in the EuropAid/127054/C/SER/Multi call for tenders procedure, concerning the multiple framework contract relating to the provision of short-term services in the exclusive interest of third countries benefiting from Commission External Aid (OJ 2008/S 90-121428) and annulment of the Commission decision rejecting in part the applicant's request for access to the report of the evaluation committee in that procedure.

1 By letter lodged at the Registry of the General Court on 8 March 2010, the applicant informed the Court, in accordance with Article 99 of the Rules of Procedure, that it wished to discontinue proceedings. It sought no order as to costs.

2 By letter lodged at the Registry of the Court on 16 March 2010, the defendant informed the Court that it has no observations for discontinuance. It sought no order as to costs.

3 The third subparagraph of Article 87(5) of the Rules of Procedure provides that, where proceedings are discontinued and costs are not applied for, the parties are to bear their own costs.

4 The case will therefore be removed from the register and, in the absence of any claim in that regard, the parties ordered to bear their own costs.

On those grounds,

THE PRESIDENT OF THE THIRD CHAMBER OF THE GENERAL COURT

hereby orders:

1. Case T-428/09 is removed from the register of the General Court.

2. Each party shall bear its own costs.

Luxembourg, 24 March 2010.

E. Coulon J. Azizi

Registrar President

1 Language of the case: English.

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Action brought on 22 October 2009 - Berenschot Groep v Commission

(Case T-428/09)

Language of the case: English

Parties

Applicant: Berenschot Groep BV (Utrecht, Netherlands) (represented by: B. O'Connor, solicitor)

Defendant: Commission of the European Communities

Form of order sought

declare the application admissible;

annul unreasoned decision of the Commission of 11 August 2009 not to rank the tender submitted by the applicant as one of the seven most economically advantageous tenders and in consequence no to retain the consortium led by the applicant in respect of the service tender procedure "Multiple Framework contract to recruit short-term services in the exclusive interest of third countries benefiting from European Commission External Aid";

enquire into the conduct of the tender and the exercise of the vigilance in relation to tenderers suspected of fraud;

annul the decision of 21 October 2009;

make any additional order which the Court considers necessary;

order the Commission to pay the costs.

Pleas in law and main arguments

In the present case, the applicant seeks the annulment of the defendant's decision not to retain the bid it submitted as a part of consortium in response to a call for an open tender (EuropAid/127054/C/SER/multi) for service provision for "Multiple Framework contract to recruit short-term services in the exclusive interest of third countries benefiting from European Commission External Aid"[1]. Furthermore, the applicant seeks annulment of the Commission decision of 21 October 2009 granting partial access to the evaluation reports regarding the said tender procedure.

In support of its claims the applicant puts forward the following pleas in law.

First, it submits that the evaluation committee did not assess properly the experts included in the applicant's tender. In its view, the evaluation committee made a manifest error of assessment by marking the experts of the consortium led by the applicant unreasonably. Furthermore, the applicant argues that the evaluation committee and the Commission did not provide any explanation on the grading system for individual curriculum vita nor did they explain why the applicant's experts have scored so poorly. If the evaluation committee used no objective criteria when making its assessments, the Commission has not ensured that the principles of equal treatment of the tenderers, transparency, fair competition and good administration have been complied with. The evaluation report provided by the Commission on 21 October 2009 did not remedy the lack of information, as it was limited to the presentation of the final scores obtained by the applicant.

Second, the applicant claims that the Commission infringed Article 7(1) of Regulation 1049/2001[2] in that it did not respond to the applicant's request to access the documents in the time-limits set by this article. It also contends that the Commission infringed the principle of good administration, as the evaluation report has not been provided timely enough to enable the applicant to properly exercise its rights under Article 230 EC.

Third, the applicant submits that the Commission has not complied with its obligations under Article 94 of the financial regulation[3] and under Decision 2008/969[4] in that it did not take steps to protect the integrity of the Community's budget by not excluding the tenderers suspected of fraud from the award of the contract in question.

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[1] - OJ 2008/S 90121428

[2] - Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43

[3] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

[4] - Commission Decision of 16 December 2008 on the Early Warning System for the use of authorising officers of the Commission and the executive agencies (OJ L 2008 344, p. 125)

Pleas in law and main arguments

The measures are actionable, for they are decisive and definitive in nature and have binding effect, and the parties have capacity to bring proceedings.

Both measures are marred by:

Absolute lack of powers: the defendant is not the 'pouvoir adjudicateur' (the contracting authority), because there is no contractual provision whatsoever to support the defendant's conduct. The defendant thus not only lacks powers, but also any competence in these proceedings.

Breach of essential procedural requirements, in particular, the duty to state reasons: as provided for in Article 253 of the Treaty, reasons must be given for Community measures. In accordance with the case-law, the reasoning must be express, clear, coherent and relevant. The measure may not be implied or based on tacit grounds, nor may it be clothed in obscurity. There must be no contradiction between the grounds or between the grounds and the enacting terms. The contested decisions lack any grounds whatsoever. There is also a breach of the essential procedural requirement of an indication of the legal remedies.

infringement of the rules of the Treaty, that is to say, of Articles 211 to 219, of the defendant's own internal regulations and of the principle '*pacta sunt servanda*'.

Action brought on 27 August 2009 — Müller-Boré & Partner v OHIM — Popp and Other (MBP)

(Case T -338/09)

(2009/C 267/132)

Language in which the application was lodged: German

Parties

Applicant: Müller-Boré & Partner (Munich, Germany) (represented by: C. Osterrieth and T. Schmitz, lawyers)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Other parties to the proceedings before the Board of Appeal of OHIM: E. Popp (Munich, Germany), W. E. Sajda (Munich), J. Bohnenberger (Munich), V. Kruspig (Munich)

Form of order sought

— Annulment the decision of the Fourth Board of Appeal of OHIM of 23 June 2009 in Case R 1176/2007-4 and amendment of it so as to reject the appeal and objection in their entirety;

— Order OHIM to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: The applicant

Community trade mark concerned: the word mark 'MBP' for services in Classes 35 and 42 (Application No. 1 407 857)

Proprietor of the mark or sign cited in the opposition proceedings: E. Popp, W. E. Sajda, J. Bohnenberger and V. Kruspig

Mark or sign cited in opposition: the word mark 'ip_law@mbp.' for services in Class 42 (Community Trademark No. 667 105) and the special trade name 'mbp.de.' under German trade mark law

Decision of the Opposition Division: Rejected the opposition

Decision of the Board of Appeal: Opposition upheld in part

Pleas in law: Infringement of Article 8(1)(b) of Regulation (EC) No 207/2009 [1],] since there is no likelihood of confusion between the trade marks at issue.

[1] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

Action brought on 19 August 2009 — Evropaïki Dynamiki v Publications Office of the European Union

(Case T-340/09)

(2009/C 267/133)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athènes, Greece) (represented by: N. Korogiannakis and M. Dermitzakis, lawyers)

Defendant: Publications Office of the European Union

Form of order sought

— Annul the OPOCE's decision to reject the bids of the applicant, filed in response to the open call for tenders No 10017 "CORDIS" Lot B "Editorial and Publishing Services" and Lot C "Provision of New Digital Information Services" and to select the bid of the applicant filed in response to the open call for tenders No 10017 "CORDIS" Lot E "Development and Maintenance of Core Services", for the award of the above procurement

contract as third contractor in the cascade mechanism (OJ 2008/S 242-321376 as amended by OJ 2009/S 40-057377), communicated to the applicant by a letter dated 9 June 2009 and all further related decisions of the OPOCE including the one to award the respective contracts to the successful contractors;

— order the OPOCE to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 7 215 405 (EUR 5 291 935 for Lot B, EUR 975 000 for Lot C and EUR 948 470 for Lot E);

— order the OPOCE to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

By means of this application the applicant seeks the annulment of the decision of OPOCE to: a) reject the bids of the applicant, filed in response to the open call for tenders No 10017 "CORDIS" Lot B "Editorial and Publishing Services" and Lot C "Provision of New Digital Information Services", b) select the bid of the applicant filed in response to the open call for tenders No 10017 "CORDIS" Lot E "Development and Maintenance of Core Services", for the award of the above procurement contract as third contractor in the cascade mechanism (OJ 2008/S 242-321376 as amended by OJ 2009/S 40-057377).

The applicant claims, first, concerning Lot B, that the treatment between tenderers was discriminatory, since one of the members of the winning consortium did not comply with the exclusion criteria and should, accordingly, have been found to be in serious breach of its contractual obligations towards the Commission. Moreover, the applicant claims that Articles 93(1)(f) and 94 of the Financial Regulation [1] and the principle of good administration have been infringed by the contracting authority and that the Commission should have imposed sanctions provided for by Article 96 of the Financial Regulation and Articles 133a and 134b of its Implementing Rules [2].

Second, the applicant claims that the contracting authority has failed to disclose the relative merits of the successful tenderer.

Third, the applicant submits that the Commission has made several manifest errors of assessment while evaluating its tender and submits that it has infringed the principle of equal treatment while introducing new award criteria not specified in the Tender Specifications ("TS"). Furthermore, the applicant contends that the contracting authority infringed Article 148(1) and (3) of the Implementing Rules, as well as the principle of good administration.

Concerning Lot C, the applicant submits that the treatment between tenderers was discriminatory since one of the members of the third in the cascade mechanism consortium did not comply with the exclusion criteria and should have been found to be in serious breach of previous contracts. Secondly, the applicant claims that the contracting authority has failed to disclose the relative merits of the successful tenderer and has infringed the Principle of good administration.

Concerning Lot E, the applicant argues that one of the members of the winning consortium did not comply with the exclusion criteria because it should have been declared in serious breach of a previous contract and that another one of the members of the same consortium should have been excluded from all tenders for two years because it was found guilty for illegal activities. Moreover, the applicant contends that one of the members of the winning consortium uses non WTO/GPA [3] contractors, infringing the TS of the call for tenders, the principles of transparency and of non discrimination, as well as Articles 106 and 107 of the Financial Regulation. The applicant contends that non WTO/GPA member companies should neither be allowed, nor participate to European Institutions' Call for tenders directly or indirectly, nor undertake as a subcontractor any work falling under the Financial Regulation or Directive 2004/18/EC [4].

Finally, the applicant claims that the contracting authority failed to state reasons conducted several manifest errors of assessment, introduced new award criteria not specified in the TS and infringed while evaluating its tender and that of another tenderer the principle of equal treatment.

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[1] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

[2] Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended by Commission Regulation (EC,Euratom) No 478/2007 of 23 April 2007 (OJ 2007 L 111, p. 13)

[3] Multilateral Agreement on Government Procurement concluded within the World Trade Organisation

[4] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)

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DOCUMENT DE TRAVAIL

ORDONNANCE DU TRIBUNAL (première chambre)

5 février 2010 (1)

« Recours en annulation – Délais – Irrecevabilité manifeste »

Dans l'affaire T-319/09,

Pro humanum, établie à Varsovie (Pologne), représentée par M^e^ H. Izdebski, avocat,

partie requérante,

contre

Commission européenne,

partie défenderesse,

ayant pour objet une demande de constatation de l'existence, en raison de la violation des dispositions de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114), d'irrégularités dans la procédure d'appel d'offres PO/200905/WAR, concernant les services d'accueil pour le centre d'information de la représentation de la Commission européenne en Pologne (JO 2009/S 26036813), dans le cadre de laquelle l'offre soumise par la partie requérante a été rejetée par la décision de la Commission du 26 mai 2009,

LE TRIBUNAL (première chambre),

composé de M^me^ I. Wiszniewska-Białecka (rapporteur), président, MM. F. Dehousse et H. Kanninen, juges,

greffier : M. E. Coulon,

rend la présente

Ordonnance

Procédure et conclusions de la partie requérante

1 Par requête déposée au greffe du Tribunal le 10 août 2009, la partie requérante a introduit le présent recours.

2 Elle conclut à ce qu'il plaise au Tribunal constater l'existence d'irrégularités dans la procédure d'appel d'offres PO/200905/WAR, concernant les services d'accueil pour le centre d'information de la représentation de la Commission européenne en Pologne, dans le cadre de laquelle l'offre soumise par la partie requérante a été rejetée par la décision de la Commission du 26 mai 2009.

En droit

3 Aux termes de l'article 111 du règlement de procédure du Tribunal, lorsque le recours est manifestement irrecevable, le Tribunal peut, sans poursuivre la procédure, statuer par voie

d'ordonnance motivée.

4 En l'espèce, le Tribunal s'estime suffisamment éclairé par les pièces du dossier et décide, en application de cet article, de statuer sans poursuivre la procédure.

5 En premier lieu, dans la mesure où le présent recours doit être compris en ce sens que la partie requérante demande au Tribunal de déclarer que la procédure d'appel d'offres PO/200905/WAR était entachée d'irrégularités, il convient de rappeler qu'il n'existe pas de voie de droit permettant au juge de rendre un jugement déclaratoire visant à déclarer une procédure d'appel d'offre comme étant entachée d'irrégularités.

6 En second lieu, dans la mesure où le présent recours doit être compris en ce sens que la partie requérante demande au Tribunal d'annuler la décision de la Commission du 26 mai 2009 rejetant son offre soumise dans le cadre de l'appel d'offres PO/200905/WAR, il y a lieu de rappeler que, aux termes de l'article 230, cinquième alinéa, CE, le recours en annulation doit être formé dans un délai de deux mois à compter, suivant le cas, de la publication de l'acte attaqué, de sa notification au requérant ou, à défaut, du jour où celui-ci en a eu connaissance. Conformément aux dispositions de l'article 102, paragraphe 2, du règlement de procédure, le délai de recours doit être augmenté d'un délai de distance forfaitaire de dix jours.

7 Selon une jurisprudence constante, ce délai de recours est d'ordre public, ayant été institué en vue d'assurer la clarté et la sécurité des situations juridiques et d'éviter toute discrimination ou traitement arbitraire dans l'administration de la justice, et il appartient au Tribunal de vérifier, d'office, s'il a été respecté (voir, notamment, arrêts de la Cour du 23 janvier 1997, Coen, C–246/95, Rec. p. I-403, point 21, et du Tribunal du 18 septembre 1997, Mutual Aid Administration Services/Commission, T–121/96 et T–151/96, Rec. p. II–1355, points 38 et 39).

8 En l'espèce, il ressort des éléments du dossier que l'acte attaqué a été notifié à la partie requérante le 26 mai 2009. Conformément aux dispositions mentionnées au point 6 ci-dessus, le délai pour l'introduction d'un recours en annulation contre cette décision a expiré deux mois et dix jours après cette date, soit le 5 août 2009.

9 Il s'ensuit que le recours en tant qu'il vise à l'annulation de la décision de la Commission du 26 mai 2009, déposé au greffe du Tribunal le 10 août 2009, a été introduit hors délai.

10 Par lettre du greffier du Tribunal du 13 octobre 2009, la partie requérante a été invitée à présenter ses observations sur le respect du délai de recours.

11 Par lettre du 19 octobre 2009, la partie requérante a invoqué l'article 11, paragraphe 3, des Instructions au greffier (JO 2007, L 232, p. 1) pour demander la « restitution » du délai de recours. Les difficultés rencontrées pour identifier un avocat en mesure de la représenter devant le Tribunal, ainsi que ses moyens financiers limités, constitueraient des circonstances exceptionnelles au sens de cet article.

12 À cet égard, il y a lieu de constater que l'article 11, paragraphe 3, des Instructions au greffier ne trouve pas à s'appliquer au délai de recours dans la mesure où cette disposition concerne une prorogation d'un délai fixé par le greffier et non pas d'un délai prévu à l'article 230, cinquième alinéa, CE.

13 Par ailleurs, les arguments invoqués par la partie requérante dans sa lettre du 19 octobre 2009 n'établissent pas l'existence d'un cas fortuit ou de force majeure permettant de déroger au délai de recours sur la base de l'article 45, second alinéa, du statut de la Cour de justice, applicable à la procédure devant le Tribunal en vertu de l'article 53 dudit statut. Ils n'établissent pas non plus la survenance d'une erreur excusable, qui, selon une jurisprudence constante, serait susceptible de justifier la recevabilité d'un recours introduit après l'expiration du délai prévu à l'article 230, cinquième alinéa, CE (voir ordonnance de la Cour du 8 novembre 2007, Belgique/Commission, C-242/07 P, Rec. 2007 p. I9757, point 29 et la jurisprudence citée).

14 Il résulte de l'ensemble des considérations qui précèdent que le recours doit être rejeté comme étant manifestement irrecevable, sans qu'il soit nécessaire de le signifier à la partie défenderesse.

Sur les dépens

15 La présente ordonnance étant adoptée avant la notification de la requête à la partie défenderesse et avant que celle-ci n'ait pu exposer des dépens, il suffit de décider que la partie requérante supportera ses propres dépens, conformément à l'article 87, paragraphe 1, du règlement de procédure.

Par ces motifs,

LE TRIBUNAL (première chambre)

ordonne :

1) Le recours est rejeté.

2) Pro humanum supportera ses propres dépens.

Fait à Luxembourg, le 5 février 2010.

Le greffier

E. Coulon

Le président

I. Wiszniewska-Białecka

1 Langue de procédure : le polonais.

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Action brought on 22 July 2009 - Evropaïki Dynamiki v Commission

(Case T-298/09)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and M. Dermitzakis, lawyers)

Defendant: Commission of the European Communities

Form of order sought

annul the Commission's decisions to select the bids of the applicant, filed in response to the open Call for Tenders EAC/01/2008 for external service provision for educational programmes (ESP-ISEP) Lot 1 "IS Development and Maintenance" and Lot 2 "IS Studies, Testing, Training and Support" (OJ 2008/S 158-212752) second contractor in the cascade mechanism, communicated to the applicant by two separate letters dated 12 May 2009 and all further related decisions of Commission including the one to award the respective contracts to the successful contractors;

order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 9.554.480;

order the Commission to pay the applicant's legal costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In the present case, the applicant seeks the annulment of the defendant's decision to select its bids, submitted in response to a call for an open tender for external service provision for educational programmes (ESP-ISEP) (EAC/01/2008), as second contractor in the cascade mechanism and to award the respective contracts to the successful contractors. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims, the applicant puts forward the following pleas in law.

First, the applicant claims that the defendant infringed the principles of good administration and equal treatment as it failed to observe the exclusion criteria provided for by Articles 93(1) and 94 of the financial regulation[1] by not excluding from the tender proceeding one of the members of the winning consortium being in breach of its contractual obligations to the defendant. By doing so, the defendant infringed as well Articles 133a and 134 of the implementing rules[2].

Second, the applicant submits that the defendant infringed Article 100(2) of the financial regulation as it failed to properly state reasons. In the applicant's opinion, the comments given by the Commission were generic, misleading and vague.

Third, the applicant contends that the Commission has illegally extended the validity of the tenders in violation of Article 130 of the financial regulation and in violation of the principles of good administration, transparency and equal treatment.

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[1] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

[2] - Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended by Commission Regulation (EC,Euratom) No 478/2007 of 23 April 2007 (OJ 2007 L 111, p. 13)

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Action brought on 22 July 2009 - Evropaïki Dynamiki v EASA

(Case T-297/09)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and M. Dermitzakis, lawyers)

Defendant: European Aviation Safety Agency

Form of order sought

annul the EASA's decisions to select the bids of the applicant, filed in response to the open Call for Tenders EASA.2009.OP.02 Lot 1, Lot 2, Lot 3 and Lot 5 on ICT services (OJ 2009/S 22-030588) as second and third contractor in the cascade mechanism, communicated to the applicant by four separate letters dated 12 May 2009, 8 July 2009, 13 July 2009 and 15 July 2009 and all further related decisions of EASA including the one to award the contract to the successful contractors;

order the EASA to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 6.100.000;

order the EASA to pay the applicant's legal costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In the present case, the applicant seeks the annulment of the defendant's decision to select its bids submitted in response to a call for an open tender for ITC services (EASA.2009.OP.02) as second and third contractor in the cascade mechanism and to award the contract to the successful contractors. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims, the applicant puts forward the following pleas in law.

First, the applicant claims that the defendant infringed the principle of good administration and equal treatment as it failed to observe the exclusion criteria provided for by Articles 93(1) and 94 of the financial regulation[1] by not excluding from the tender proceeding one of the members of the winning consortium being accused by national authorities and even accepting to be guilty for illegal activities and specifically for fraud, corruption, bribery, in the context of contract awarded from public authorities in the European Union and internationally, as well as for falsifying its books and one other winning contractor being in serious breach of its contractual obligations in its relations with the European Commission. By doing so, the defendant infringed as well Articles 133a and 134 of the implementing rules[2] and Article 45 of directive 2004/18/CE[3].

Furthermore, the applicant invokes the defendant's alleged professional misconduct arising from the potential usage of non WTO/GPA subcontractors by one of the winning tenderers.

Second, the applicant submits that the defendant committed manifest errors of assessment and that it failed to state reasons in breach of the financial regulation and its implementing rules as well as in breach of directive 2004/18/CE3 and of Article 253 EC. It states that the defendant also infringed the principle of equal treatment as one of the winning tenderers had not complied with the tender specifications.

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[1] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

[2] - Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1)

[3] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)

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Action brought on 16 July 2009 - Trasys v Commission

(Case T-277/09)

Language of the case: English

Parties

Applicant: Trasys (Woluwe-Saint-Lambert, Belgium) (represented by: M. Martens and P. Hermant, lawyers)

Defendant: Commission of the European Communities

Form of order sought

Annul the Commission Decision, notified to the applicant by a letter dated 9 June 2009, rejecting the applicant's tender for Lots C and E in the call for tender No 10017 and awarding contract to the successful contractors;

Order the Commission to pay the costs.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decisions to reject its bid submitted for Lots C and E in response to a call for an open tender for support of the Publications Office and its CORDIS unit in the provision of publishing and communication services[1] and to award the contract to the successful contractor.

In support of its claims the applicant puts forward four pleas in law.

First, the applicant contends that the defendant infringed the principle of transparency laid down in Articles 100 and 89(1) of the financial regulation[2] by unreasonably limiting access to essential information and in consequence depriving the applicant of the opportunity to gain a proper understanding of the method used to evaluate the tenders and of the reasons why its tender was rejected.

Second, the applicant alleges that its bid has been subject to a tender assessment methodology which is contrary to the principles set out in Article 89(1) of the financial regulation such as the principles of equal treatment and transparency.

Third, it claims that the tender specifications were not clear enough and that the last clarifications were provided too late by the contracting authority and, as a consequence, the applicant was not in the position to plan its tender and to take into account the way in which the assessment would be made.

Fourth, the applicant submits that its bid has been subject to an unreasonable and disproportional evaluation by the contracting authority leading to the errors of assessment which vitiate the final decision.

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[1] - JO 2008/S 242-321376

[2] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

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Action brought on 16 June 2009 - Evropaïki Dynamiki v Commission

(Case T-247/09)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and M. Dermitzakis, lawyers)

Defendant: Commission of the European Communities

Form of order sought

annul the Commission's decision to reject the bid of the applicant, filed in response to the open Call for Tenders AO 10186 for the "Production and dissemination of the Supplement to the Official Journal of the European Union: TED website, OJS DVD-ROM and related Offline and Online media" (OJ 2009/S 2-001445), communicated to the applicant by a letter dated 7 April 2009, and all further decisions of the Commission including the one to award the contract to the successful contractor;

order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 1.490.215,58;

order the Commission to pay the applicant's legal costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decision to reject its bid submitted in response to a call for an open tender for services of production and dissemination of the Supplement to the Official Journal of the European Union: TED website, OJS DVD-ROM and related Offline and Online media (AO 10186) and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims the applicant puts forward following pleas in law.

First, the applicant claims that the defendant committed various and manifest errors of assessment and that it refused to provide any justification or explanation to the applicant in breach of the financial regulation[1] and its implementing rules as well as in breach of directive 2004/18[2] and of Article 253 EC. It states that the Commission never informed the applicant on the relative merits of the winning tenderer as it was obliged, despite the applicant's written request. In the applicant's opinion the comments given by the Commission were vague, unsubstantiated and telegraphic and do not constitute reasonable motivation. The applicant further argues that the Commission corrected ex-post the motivation of the contested decision after the evaluation committee reviewed its report and decided to remove a comment regarding the successful tenderer.

Second, the applicant claims that the defendant infringed Articles 106 and 107 of the financial regulation as well as the principles of transparency and of non-discrimination by not excluding tenderers relying on work performed in non WTO/GPA countries; should it allow this participation, the applicant contends that it should proceed on a fair, transparent and non-discriminatory manner, clarifying the selection criteria it would use for excluding certain companies or accepting others.

Third, the applicant claims that the defendant committed manifest errors of assessment in respect of the applicant's bid in comparison with other tenderers and that it failed to state reasons as the negative

considerations given by the evaluation committee in respect to the applicant's bid were vague and unsubstantiated.

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[1] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

[2] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)

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Action brought on 8 June 2009 - Evropaïki Dynamiki v Commission

(Case T-236/09)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and M. Dermitzakis, lawyers)

Defendant: Commission of the European Communities

Form of order sought

annul Commission's decision to reject the bid of the applicant, filed in response to the open Call for Tenders RTD-R4-2007-001 Lot 1 for the "On-site development expertise (intra-muros)" and for Lot 2 "Off-site development projects (extra-muros) (OJ 2007/S 238-288854) communicated to the applicant by two separate letters dated 27 March 2009 and all further decisions of the Commission including the one to award the contract to the successful contractor;

order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 69.445.200 (33.271.920 for Lot 1 and 36.173.280 for Lot 2);

order the Commission to pay the applicant's legal costs and expenses incurred in connection with this application, even if current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decisions to reject its bid submitted in response to a call for an open tender for external service provision for development, studies and support of information systems (RTD-R4-2007-001-ISS-FP7) both for Lot 1 for the "On-site development expertise (intra-muros)" and for Lot 2 "Off-site development projects (extra-muros) and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims the applicant puts forward following pleas in law.

First, the applicant claims that the defendant committed various and manifest errors of assessment and that it refused to provide any justification or explanation to the applicant in breach of the financial regulation[1] and its implementing rules as well as in breach of directive 2004/18[2] and of Article 253 EC.

Second, the applicant claims that the defendant infringed the financial regulation by obliging tenderers to extend their tenders against their will. In addition, the applicant argues that even if one assumed that the defendant had right to do so, *quod non*, it was in violation of the principles of good administration, transparency and equal treatment that it decided to proceed with the completion of the award process even after the expiration of the extension as, in the applicant's opinion, no contract can be signed when one or more tenders are not valid anymore.

Third, the applicant claims that the outcome of the procedure laid down by the call for tenders was distorted by leakage of information associated with an attempt to impede the applicant from exercising its rights.

Further, the applicant puts forward specific arguments in respect of each lot.

In respect of the Lot 1, the applicant claims that the defendant infringed the principles of equal treatment and of good administration as it failed to observe the exclusion criteria provided for by Articles 93(1) and 94 of the financial regulation regarding one of the members of the winning consortium which was in breach of its contractual obligations to the defendant. Furthermore, the applicant submits that the winning tenderer was allowed illegally to use resources from companies based in non WTO/GPA countries and that this practice is illegal.

In respect of the Lot 2, the applicant argues that the defendant should not allow tenderers subcontracting to non WTO/GPA countries to participate in the biding proceedings; should it do so, the applicant contends that it should proceed on a fair, transparent and non discriminatory manner, clarifying the selection criteria it would use for excluding certain companies or accepting others. Therefore, in the applicant's opinion, the defendant applied particularly discriminatory approach failing to describe the selection criteria it used to select tenderers. Furthermore, it submits that the defendant failed to observe the exclusion criteria provided for by Articles 93(1) and 94 of the financial regulation and Articles 133a and 134 of the implementing rules and Article 45 of Directive 2004/18 and intending to exclude from public procurement companies that have either been condemned or that have been involved in illegal activities such as fraud, corruption, briberies and professional misconduct. The applicant submits that in the present case the winning tenderer has acknowledged its involvement to the above activities and has been condemned by the German courts.

Finally, the applicant also claims that the defendant committed several manifest errors of assessment in respect of both lots and regarding the quality of the tenderer's proposal for the overall management of the service, for ordering services and for delivery of services as well as the tenderer's technological proposal in the domain of the lots.

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[1] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

[2] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)

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Action brought on 27 May 2009 - Astrim and Elyo Italia v Commission

(Case T-216/09)

Language of the case: Italian

Parties

Applicants: Astrim SpA (Rome, Italy) and Elyo Italia Srl (Sesto San Giovanni, Italy) (represented by: M. Brugnoletti, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Annul the Commission's decision which found to be incomplete the bid submitted by the applicant group in response to call for tenders No 2008 - C04 005 for a contract to provide services covering the maintenance of the Joint Research Centre, [1] communicated by letter of 27 March 2009 and supplemented by a communication of 3 April 2009, together with all subsequent and related decisions, including the decision to award the tender to other undertakings.

In the alternative, annul point 17 of call for tenders No 2008 - C04 005, in so far as it laid down a general criterion for elimination from the tendering procedure.

Order the Commission to pay the costs.

Pleas in law and main arguments

The applicants in this case seek the annulment of the decision by which the Commission eliminated the bid they submitted in response to call for tenders No 2008 - C04 005 for a contract to provide services covering the maintenance of the Joint Research Centre and awarded the contract to other companies.

The applicants put forward three grounds in support of their application:

By the first ground, the applicants submit that the Commission infringed point 17 of the invitation to tender, Articles 92 and 89 of Council Regulation No 1605/2002 [2] and the principles of transparency and equal treatment in so far as it decided to exclude the applicants' bid on the basis of the incorrect assessment that it was incomplete since a number of prices were not stated, whereas the applicant group deliberately chose to offer a price of zero.

By their second ground, the applicants maintain that adequate reasons are not given for the elimination provision, in so far as point 17 of the invitation to tender does provide for automatic elimination where one part of the bid has not been completed but simply provides that elimination is possible, leaving the Commission free to decide whether or not to eliminate the tenderer. Since such a decision is discretionary, adequate reasons must be given for it, which was not the case as regards the elimination provision adopted by the Commission.

By the third ground, which is relevant only in the event that the Court does not uphold the first two grounds, the applicants seek the annulment of point 17 of the invitation to tender on the ground that it infringes Articles 92 and 89 of Council Regulation No 1605/2002 in so far as that point lays down a general elimination criterion.

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[1] - OJ 2008/S 2008-274999 of 25 October 2008.

[2] - Council Regulation No 1605/2002 (EC, Euratom) of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

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ORDER OF THE PRESIDENT OF THE SIXTH CHAMBER OF THE COURT OF FIRST INSTANCE

9 July 2009 (1)

(Removal from the register)

In Case T-180/09,

Lionbridge International, established in Dublin (Ireland), represented by C. Thomas, C. Kennedy-Loest, Solicitors and N. Pourbaix, lawyer,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and E. Manhaeve, acting as Agents,

defendant,

APPLICATION for annulment of the Commission decision to exclude the applicant from the award of the contract concerned by the call for tenders
'B-Brussels - Translation of documents relating to the policies and administration of the European Union' (OJ 2008/S 219494 219517), following a finding by the contracting authority of grave professional misconduct.

1 By letter lodged at the Registry of the Court of First Instance on 24 June 2009, the applicant informed the Court in accordance with Article 99 of the Rules of Procedure of the Court of First Instance that it wished to discontinue proceedings and requested, pursuant to Article 99 of the Rules of Procedure, that each party bears its own costs.

2 By letter lodged at the Registry of the Court on 7 July 2009, the defendant informed the Court that it had no objection to the discontinuance and that it agreed with the applicant's request that each party bears it own costs.

3 The first subparagraph of Article 87(5) of the Rules of Procedure provides that a party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the observations of the other party on the discontinuance.

4 The third subparagraph of Article 87(5) of the Rules of Procedure provides that, where proceedings are discontinued and costs are not applied for, the parties are to bear their own costs. In the present case, the defendant agreed with the applicant's request that each party bears it own costs.

5 The case will therefore be removed from the register and having regard to the fact that the defendant did not request the applicant to bear the entire costs of the proceedings, each party shall bear its own costs.

On those grounds,

THE PRESIDENT OF THE SIXTH CHAMBER OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Case T-180/09 is removed from the register of the Court of First Instance.

2. Each party shall bear its own costs.

Luxembourg, 9 July 2009.

E. Coulon — A. W. H. Meij

Registrar — President

1 Language of the case: English.

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Action brought on 19 February 2009 - Evropaïki Dynamiki v Commission

(Case T-86/09)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and P. Katsimani, lawyers)

Defendant: Commission of the European Communities

Form of order sought

annul the Commission's decision to reject the bid of the applicant, filed in response to the open Call for Tender MARE/2008/01 for the "Provision of computer and related services, including the maintenance and development of DG MARE information systems"[1] communicated to the applicant by letter dated 12 December 2008 and all further related decisions including the one to award the contract to the successful contractor;

order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 2 520 000;

order the Commission to pay the applicant's legal costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decision to reject its bid submitted in response to a call for an open tender MARE/2008/01 for the "Provision of computer and related services, including the maintenance and development of DG MARE information systems" and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages on account of the tender procedure.

In support of its claims the applicant puts forward four pleas in law.

First, it argues that the defendant infringed the principle of equal treatment as it failed to observe the exclusion criteria provided for by Articles 93(1) and 94 of the financial regulation[2] regarding one member of the winning consortium and it discriminated against the applicant by not offering it access to all the available technical documentation and the source code which was only available to the incumbent contractor. The applicant further considers that the weighting ration for the application of the award criterion of the "most economically advantageous offer" practically neutralised the impact of the effect of the price in breach of the provisions of the financial regulation. Moreover, the applicant claims that the defendant based the evaluation of its offer on different criteria than those presented in the tender specifications, thus infringing the obligation of transparency.

Second, the applicant contends that the defendant failed to provide sufficient motivation of its decision in particular regarding quality criteria 2 and 3 in violation of the principle of transparency.

Third, the applicant raises doubts as to the fact that the members of the evaluation committee acted despite being in conflict of interests and therefore in violation of a procedural requirement.

Fourth, the applicant claims that the defendant committed several manifest errors and misused its power of assessment.

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[1] - OJ 2008/S 115-152936

[2] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, p. 1)

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Action brought on 9 February 2009 - Alfastar Benelux v Conseil

(Case T-57/09)

Language of the case: English

Parties

Applicant: Alfastar Benelux (Ixelles, Belgium) (represented by: N. Keramidas, lawyer)

Defendant: Council of the European Union

Form of order sought

annul the Council's decision to reject the bid of the applicant, filed in response to the open call for Tender UCA-218-07 for the provision of "Technical maintenance - help desk and on site intervention services for the PC's, printers and peripherals of the general secretariat of the Council"[1] communicated to the applicant by letter dated 1 December 2008 and all further related decisions of the Council including the one to award the contract to the successful contractor;

order the Council to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 2 937 902 or the proportion of the above amount according to the date of annulment of the above decision of the Council;

order the Council to pay the applicant's legal costs and expenses incurred in connection with this application, even if current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decision to reject its bid submitted in response to a call for an open tender UCA-218-07 for the provision of "Technical maintenance - help desk and on site intervention services for the PC's, printers and peripherals of the general secretariat of the Council" and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims the applicant puts forward four pleas in law.

First, it argues that the defendant committed several manifest errors of assessment concerning: the absence of certification of the winning tenderer, the absence of NATO security clearance of the personnel of the winning tenderer, the fact that the winning tenderer did not dispose of the personnel offered, the qualifications of the personnel of the winning tenderer as opposed to those of the applicant, the knowledge transfer marks and the evaluation of the number of staff proposed by the tenderers.

Second, the applicant claims that the defendant failed to observe its obligations for equal treatment of the candidates and transparency.

Third, it submits that the call for tender included numerous inconsistencies and inaccurate information.

Last, the applicant contends that the defendant infringed its obligation to motivate its acts.

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[1] - OJ 2008/S 91-122796

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Action brought on 30 January 2009 - Evropaïki Dynamiki v Commission

(Case T-49/09)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and P. Katsimani, lawyers)

Defendant: Commission of the European Communities

Form of order sought

annul the Commission's decision to reject the bid of the applicant, filed in response to the open call for tender REGIO-A4-2008-01 for the "Maintenance and development of the Directorate-General for Regional Policy's Information System"[1] communicated to the applicant by letter dated 21 November 2008 and all further related decisions including the one to award the contract to the successful contractor;

order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 4 520 845.05;

order the Commission to pay the applicant's legal costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decision to reject its bid submitted in response to a call for an open tender REGIO-A4-2008-01 for the "Maintenance and Development of the Directorate-General for Regional Policy's Information System" and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims the applicant puts forward four pleas in law.

First, it argues that the Commission infringed the principle of equal treatment by introducing *a posteriori* the criteria which were unknown to the tenderers and by using a discriminatory evaluation formula.

Second, the applicant contends that the evaluation committee did not provide sufficient motivation of its decision.

Third, the applicant submits that the Commission failed to observe essential procedural requirements by introducing a complementary evaluation committee.

Fourth, the applicant claims that the defendant based its evaluation of the applicant's tender on unfounded considerations and assumptions thus committing serious and manifest errors of assessment and misusing its power.

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[1] - OJ 2008/S 117-155067

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Action brought on 9 January 2009 - Evropaïki Dynamiki v Commission

(Case T-17/09)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, lawyer)

Defendant: Commission of the European Communities

Form of order sought

annul Commission's decision to reject the bid of the applicant, filed in response to the open Call for Tender VT/2008/019 - EMPL EESSI for the "Informatics services and products in the contest of the EESSI (Electronic Exchange of Social Security Information) project"[1] communicated to the applicant by letter dated 30 October 2008 and all further related decisions including the one to award the contract to the successful contractor;

order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of 883 703,5 EUR;

order the Commission to pay the applicant's legal costs and expenses incurred in connection with this application, even if current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decision to reject its bid submitted in response to a call for an open tender VT/2008/019 - EMPL CAD A/17543 for the informatics services and products in the context of the EESSI (Electronic Exchange of Social Security Information) project and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims the applicant puts forward four pleas in law.

First, it argues that the winning tenderer enjoyed a privileged treatment from the Commission in the context of numerous other contracts and that it was favoured in the case of the present call for tenders. Further the applicant claims that it was systematically discriminated by the defendant in the same context.

Second, the applicant submits that the Commission failed to observe the rules concerning the exclusion criteria of the tender specifications and therefore infringed Articles 93 and 94 of the financial regulation[2] and Articles 133a and 134 of its implementing rules as well as Article 45 of Directive 2004/18/EC[3].

Third, the applicant claims that the defendant committed several manifest errors of assessment in evaluation of the applicant's tender by the Evaluation Committee.

Fourth, the applicant contends that the defendant based its evaluation of the applicant's tender on general and arbitrary considerations, failed to motivate its decision and in this context committed several manifest errors of assessment.

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[1] - OJ 2008/S 111-148231

[2] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, p. 1)

[3] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, p. 114)

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Action brought on 6 January 2009 - Dredging International and Ondernemingen Jan de Nul v EMSA

(Case T-8/09)

Language of the case: English

Parties

Applicant: Dredging International NV (Zwijndrecht, Belgium) and Ondernemingen Jan de Nul NV (Hofstade-Aalst, Belgium) (represented by: R. Martens, lawyer)

Defendant: European Maritime Safety Agency (EMSA)

Form of order sought

annul EMSA's decision to reject the tender from the Joint Venture Oil Combat (JVOC) constituted by the applicants and to award the contract to the successful contractor;

declare that the contract signed between EMSA and the successful contractor pursuant to procurement procedure EMSA/NEG/3/2008 is null and void;

award damages as compensation for the loss that JVOC has incurred as a consequence of the contested decision, provisionally estimated at 725 500 EUR, to be increased by the moratory interest as from the date of the filing of this application;

order that the Commission pay the costs of the proceedings, including the expenses for legal counsel incurred by JVOC.

Pleas in law and main arguments

In the present case the applicants seek the annulment of the defendant's decision to reject their bid submitted in response to a call for a tender EMSA/NEG/3/2008 (Lot 2: North Sea) regarding the service contracts for stand-by oil recovery vessel(s)[1] and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of their claims, the applicants put forward four pleas in law.

First, they argue that by refusing to provide the applicants with the information they requested regarding the reasons for rejection of the bid submitted by them and on the characteristics and relative advantages of the bid of the successful contractor the defendant infringed Article 135(2) of the Regulation[2], Article 253 EC and the essential procedural requirements of duty to state reasons and of respect for the rights of defence. The applicants further claim that the defendant failed to suspend the signature of the contract with the successful tenderer pending the exchange of relevant information with the applicants by which it violated Article 105(2) of the financial regulation[3] and Article 158a(1) of the Commission Regulation N° 2342/2002[4].

Second, the applicants submit that the defendant committed manifest errors of assessment while evaluating the bid submitted by the successful tenderer by which it infringed the principles of equal treatment and non-discrimination as stated in Article 89 of the financial regulation.

Third, the applicants contend that the defendant committed several manifest errors of assessment in its decision to reject the applicants' bid for the reason of non compliance with Article 12.2 of the tender sp

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Reference for a preliminary ruling from the Anotato Dikastirio Kiprou (Cyprus) lodged on 22 December 2008 - Simvoulio Apokhetevseon Levkosias v Anatheoretiki Arkhi Prosforon

(Case C-570/08)

Language of the case: Greek

Referring court

Anotato Dikastirio Kiprou (Supreme Court of Cyprus)

Parties to the main proceedings

Applicant: Simvoulio Apokhetevseon Levkosias (Nicosia Sewage Council)

Respondentt: Anatheoretiki Arkhi Prosforon (Tenders Review Authority)

Question referred

Does Article 2(8) of Directive 89/665/EC recognise contracting authorities as having a right to judicial review of cancellation decisions by bodies responsible for review procedures which are not judicial bodies?

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Reference for a preliminary ruling from the Rechtbank Assen (Netherlands) lodged on 22 December 2008 - 1. Combinatie Spijker Infrabouw/De Jonge Konstruktie; 2. Van Spijker Infrabouw B.V.; 3. De Jonge Konstruktie B.V. v Provincie Drenthe

(Case C-568/08)

Language of the case: Dutch

Referring court

Rechtbank Assen

Parties to the main proceedings

Applicants: 1. Combinatie Spijker Infrabouw/De Jonge Konstruktie

2. Van Spijker Infrabouw B.V.

3. De Jonge Konstruktie B.V.

Defendant: Provincie Drenthe

Questions referred

1 (a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665/EEC [1] be interpreted as meaning that they have not been complied with if the legal protection to be afforded by national courts in disputes relating to tendering procedures governed by European law is impeded by the fact that conflicting decisions may arise under a system in which both administrative courts and civil courts may have jurisdiction with respect to the same decision and its consequences?

(b) Is it permissible in this context for the administrative courts to be confined to forming an opinion and ruling on the tendering decision, and if so, why and/or under what conditions?

(c) Is it permissible in this context for the Algemene wet bestuursrecht (Netherlands General Law on Administrative Law), which, as a rule, governs applications for access to the administrative courts, to exclude such applications in the case of decisions concerning the conclusion of a contract by the contracting authority with one of the tenderers, and if so, why and/or under what conditions?

(d) Is the answer to Question 2 of relevance in this context?

2 (a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665/EEC be interpreted as meaning that they have not been complied with if the only procedure for obtaining a rapid decision is characterised by the fact that it is in principle geared to a rapid mandatory measure, that lawyers have no right to exchange views, that [no] evidence is, as a rule, presented in other than written form and that statutory rules on evidence are not applicable?

(b) If not, does this also apply if the decision does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision?

(c) Does it make a difference in this context if the decision is binding only on the parties to the proceedings, even though other parties may have an interest?

3. Is it compatible with Directive 89/665/EEC for a court, in interim relief proceedings, to order the contracting public authority to take a tendering decision which is subsequently deemed, in proceedings on the substance, to be contrary to tendering rules under European law?

4 (a) If the answer to the previous question is in the negative, must the contracting public authority be

deemed liable in that regard, and if so, in what sense?

(b) Does the same apply if the answer to that question is in the affirmative?

(c) If that authority is required to pay damages, does Community law set criteria for determining and estimating those damages, and if so, what are they?

(d) If the contracting public authority cannot be deemed liable, is it possible, under Community law, for some other person to be shown to be liable, and on what basis?

5. If it in fact appears to be impossible, or extremely difficult, under national law and/or with the aid of the answers to the above questions to attribute liability, what must the national court do?

_____

[1] - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

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JUDGMENT OF THE COURT (Eighth Chamber)

3 December 2009 (*)

(Appeal – Regulations (EC, Euratom) Nos 1605/2002 and 2342/2002 – Public contracts awarded by the Community institutions on their own account – Error in the evaluation committee's report – Obligation to state reasons for the rejection of the tender's bid)

In Case C–476/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 28 October 2008,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis, dikigoros,

appellant,

the other party to the proceedings being:

European Commission, represented by M. Wilderspin and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Eighth Chamber),

composed of R. Silva de Lapuerta, President of the Seventh Chamber, acting as the President of the Eighth Chamber, E. Juhász (Rapporteur) and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 September 2009,

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

gives the following

Judgment

1 By its appeal, Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE ('Evropaïki Dynamiki') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 10 September 2008 in Case T-59/05 *Evropaïki Dynamiki* v *Commission* ('the judgment under appeal'), by which the Court of First Instance:

– dismissed the action brought by Evropaïki Dynamiki for annulment of the decision of the Commission of the European Communities of 23 November 2004 not to accept the tender submitted by the appellant in the tendering procedure for the provision of development, maintenance and related support services for the financial information systems of the Directorate-General for Agriculture (DG AGRI), and to award the contract to the successful tenderer ('the decision at issue');

– ordered the Commission to bear its own costs and to pay one fifth of the costs incurred by

Evropaïki Dynamiki, and

– ordered Evropaïki Dynamiki to bear four fifths of its costs.

Legal context

2 The award of service contracts by the Commission is governed by the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation') and by the provisions of Title V of Part One of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) ('the Implementing Rules'). That body of provisions is based on the Community directives on the subject, in particular, in the case of public service contracts, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended.

3 Article 100 of the Financial Regulation provides:

'1. The authorising officer shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

2. The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

4 Article 149(2) of the Implementing Rules provides:

'The contracting authority shall, within not more than 15 calendar days from the date on which a written request is received, communicate the information provided for in Article 100(2) of the Financial Regulation.'

Background

5 The facts are set out in paragraphs 10 to 33 of the judgment under appeal, as follows:

'10 The applicant [Evropaïki Dinamiki] is a company incorporated under Greek law, active in the area of information technology and communications.

11 By a contract notice of 24 March 2004, published in the Supplement to the *Official Journal of the European Union* (OJ 2004 S 59) under reference 2004/S 59-050031, the Commission issued a call for tenders relating to development, maintenance and support services for financial information systems of the Directorate-General for Agriculture (DG AGRI). The outcome of that tender process was to be the signing of a framework contract for a period of 36 months, renewable for a period of 12 months.

...

14 Section 9 of the tender specifications, relating to the evaluation of tenders and award of the contract, is worded as follows:

"9. Evaluation of tenders and award of the contract

...

9.3. Evaluation of tenders – award criteria

The Commission will award the contract after comparing the tenders in the light of the following criteria:

9.3.1. Award criteria

– Quality of the tenderer's proposal in terms of completeness, clarity and concision, relevance of information and documentation provided, lack of ambiguity (20%);

– The proposed methodology and the organisation of the services to cover the needs of the Commission/DG AGRI; in particular, the measures proposed to ensure the timely availability of adequate resources for the proposed skills, and an effective and efficient project management and communication with the DG AGRI (40%);

– The quality control of the delivered services and the guarantees offered to respect the proposal (40%).

The assessment of each individual quality criterion should be at least 50% of the maximum scoring set for that criterion. Those [tenders] which will not receive these minimum scorings shall be rejected.

The overall assessment (sum of points for all criteria) should be at least 65 points out of 100. Those offers which will not receive this minimum overall scoring shall be rejected, even if they received the minimum scoring for each individual criterion.

…

9.3.2. Price criteria

…

9.4. Award of the contract

The contract will be awarded to the tender with the highest Performance/Price ratio (best value-for-money procedure) …"

…

16 On 25 March 2004 the applicant expressed its interest in taking part in the call for tenders in question and asked to be sent the contract tender documents. Those documents were sent to the applicant on 30 March 2004.

17 By registered post of 14 April 2004 the applicant sent to the Commission an initial request for clarification in respect of some of the specifications in the tender documents.

18 On 16 April 2004 the applicant sent to the Commission a second and third request for additional clarification relating to the selection and award criteria set out in the tender specifications.

19 The Commission replied to those requests by letter of 20 April 2004.

20 On the same day, in the light of the Commission's reply, the applicant requested additional clarification.

21 The Commission replied to that request by letter of 21 April 2004.

22 On the same day, the applicant sent to the Commission a fresh request for clarification.

23 The Commission replied to the applicant's final request by e-mail on 22 April 2004, stating that it could not answer the questions put to it because they had arrived after the date fixed for that purpose in section 7.6 of the tender specifications, namely six days before the closing date for submission of tenders.

24 On 26 April 2004, the deadline for receipt of tenders, the applicant, in consortium with Software AG Belgium SA … , submitted a proposal in the tendering procedure at issue.

25 The 12 tenders received by DG AGRI were examined by an evaluation committee set up for that purpose and comprising 6 officials from 4 Directorates–General of the Commission. The contract was awarded on the criterion of which offer was the best value–for–money. The evaluation committee checked that the tenders submitted satisfied the exclusion and selection criteria and then declared the 12 tenders to be eligible for the award phase. Of the 12 tenders, only 2, which did not obtain the minimal total score of 65 points required by the tender specifications, were eliminated. The results of the evaluation as regards the applicant's tender and that of the successful tenderer, showing the points awarded on each quality criterion, and the weighted prices of each of those tenders, can be presented as follows:

Tenderer	Weighted price (EUR)	Points out of 100	Points/price (rounded to four decimal places)	Rank
[Evropaïki Dynamiki]	381.40	74.33	0.1949	4
IBM [Belgium SA]	393.03	90.70	0.2308	1

26 By letter of 23 November 2004, sent on 30 November 2004, the Commission informed the applicant of the result of the evaluation of its tender and of the fact that it had not been successful in so far as it "did not achieve the highest quality/price ratio according to which the [contract] was awarded".

27 By fax and registered letter of 2 December 2004 the applicant asked the Commission to provide it, within 15 calendar days from receipt of its request, with the following information:

– the identity of the successful tenderer, and of any partners or subcontractors and, where appropriate, the percentage of the market to be allocated to it or them;

– the score awarded on each award criterion concerning the applicant's technical offer and that of the successful tenderer;

– the content of the evaluation committee's report;

– information as to how the applicant's tender compared with that of the successful tenderer and, in particular, the scores awarded to the applicant's financial offer and that of the successful tenderer.

28 By letter in reply of 10 December 2004, sent on 13 December 2004, the Commission informed the applicant that the successful tenderer was IBM Belgium SA … , and that ARHS Developments SA was the subcontractor. The Commission annexed an extract from the evaluation committee's report relating to the applicant's tender and that of the successful tenderer, while stating that, in order to protect the legitimate business interests of other tenderers, it was not possible to send to it a complete copy of that report, which contained information relating to other tenders which had been submitted but had been unsuccessful. The annexed extract from the evaluation committee's report indicated the points obtained by the applicant and the successful tenderer on each of the quality criteria in the light of which the tenders had been assessed. The annexed extract also contained the general observations of the evaluation committee arising from comparison of the applicant's tender with that of the successful tenderer, in the following terms:

"[The applicant's offer is a] good but rather general offer, more a collection of best practices than tailored to the specific aspects of DG AGRI addressed by the tendering specifications (notably, the guarantees offered to cope with the business aspects of financial systems)."

29 As regards the successful tender, the evaluation committee considered that it was a "very good offer, concise and clear" and that it covered well "both technical and business aspects". The committee added:

"The offer conveys the assurance of the ability of the tenderer to cope successfully with the challenges in the field of financial [IT systems] at DG AGRI."

30 By fax and registered letter of 29 December 2004 the applicant requested from the Commission more precise information as to why its tender had been rejected and the contract awarded to another tenderer. The applicant also set out certain comments and objections on

the process of evaluation of its tender and of that of the successful tenderer, in the light of the quality criteria, and taking account of the information given by the Commission in its letter of 10 December 2004.

31 By fax and registered letter of 30 December 2004 the applicant sent to the Commission certain information on the financial standing of ARHS Developments which it had obtained through market research conducted in the interim. The applicant asked the Commission to open an investigation to check and confirm that information and, if appropriate, to take it into consideration in the tendering procedure at issue.

32 By letter of 13 January 2005 the Commission informed the applicant that it acknowledged receipt of its letters of 29 and 30 December 2004, while adding that the questions raised needed to be examined carefully and that a reply would be provided within the following six weeks.

33 By letter dated 26 January 2005, sent on 7 February 2005, the Commission replied to those letters. The applicant acknowledged receipt on 9 February 2005.'

The action before the Court of First Instance and the judgment under appeal

6 By application lodged at the Registry of the Court of First Instance on 2 February 2005, Evropaïki Dynamiki sought the annulment of the decision at issue and an order that the Commission should pay the costs.

7 The Court of First Instance dismissed that action as being unfounded and ordered the appellant to bear four fifths of its costs.

Forms of order sought by the parties before the Court

8 By its appeal, the appellant claims that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue, and

– order the Commission to pay the costs of the appeal and, even if it is dismissed, the costs of the proceedings at first instance.

9 The Commission contends that the Court should:

– dismiss the appeal, and

– order the appellant to pay the costs relating to the appeal and confirm the judgment under appeal concerning the costs relating to the proceedings before the Court of First Instance.

The appeal

10 In support of its appeal, Evropaïki Dynamiki puts forward two pleas in law, the first alleging a failure to state reasons and the second, which is divided into two parts, alleging an error of law.

The first plea

Position of the parties

11 The appellant claims that the Court of First Instance refused to recognise an evident discrepancy between the award criteria as set out in section 5.2 of the evaluation committee's report and those mentioned in section 5.4 of that report. By treating that difference as a typographical error, acknowledged as such by the Commission, and by holding that it had no effect on the decision taken by the evaluation committee, the Court of First Instance relied solely on a simple unilateral oral

declaration made at the hearing by an agent of the Commission, who obtained that information from an official of DG AGRI present at that hearing, and who was not a member of the evaluation committee. That assertion is not supported by any evidence and no such evidence can be deduced from the evaluation committee's report, which actually demonstrates the contrary. Consequently, the Court of First Instance infringed its duty to state reasons by not explaining the basis on which it relied in order to hold that the evaluation committee had applied the three qualitative award criteria which had been defined in advance and set out in the tender specifications in accordance with the requirements of the legislation.

12 The Commission states that the criteria used by the evaluation committee, notwithstanding the typographical error affecting in that respect section 5.4 of evaluation committee's report, were those mentioned in section 5.2 of that report. Those criteria are identical to those included in the document sent to the members of the evaluation committee explaining the method to be followed for the selection of tenders and subsequently adopted in the form of a table in section 5.4 of that report. The Court of First Instance was thus correct to take as its basis the explanations supplied by the Commission and therefore correctly stated the reasons for its decision in paragraph 112 of the judgment under appeal.

Findings of the Court

13 It is apparent from the documents before the Court that there is a patent error in the evaluation committee's report at issue. The award criteria set out in section 5.2 of the non-confidential version of that report are not the same as those referred to in section 5.4 of that same report.

14 In that regard, the Commission maintained before the Court of First Instance, as well as in paragraphs 4 to 7 of its response before the Court of Justice, that that difference resulted from a simple drafting error and that the three subparagraphs of section 5.4 of that report, mentioning the incorrect evaluation criteria, were not those which were determinative in the evaluation of the tenders. The table set out in section 5.4 of the report, following the incorrect subparagraphs, which includes the scores awarded to each tender for each of the qualitative criteria and their weighting, clearly shows that those criteria, as well as their weighting, correspond to those which are set out in section 5.2 of the evaluation committee's report at issue and to paragraph 9.3.1 of the tender specifications.

15 The Court of First Instance accepted the Commission's contention, in paragraphs 112 and 113 of the judgment under appeal, by holding that that typographical error was of no relevance, since the evaluation committee had applied the three qualitative award criteria which had been determined in advance and set out in the tender specifications in accordance with the requirements of the legislation.

16 In accordance with the case-law of the Court, it is for the Court of First Instance alone to assess the value which should be attached to the items of evidence adduced before it (see Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66, and Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 29).

17 The Court of First Instance cannot, subject to its obligation to observe general principles and the Rules of Procedure relating to the burden of proof and the adducing of evidence and not to distort the true sense of the evidence, be required to give express reasons for its assessment of the value of each piece of evidence presented to it, in particular where it considers that that evidence is unimportant or irrelevant to the outcome of the dispute (see Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 51).

18 It does not appear that the Court of First Instance, by holding that the error in section 5.4 of the evaluation committee's report was of no relevance as regards the procedure for the award of the public services contract at issue, failed to comply with that obligation.

19 The award criteria were recorded in paragraph 9.3.1 of the tender specifications, then in paragraph 3.3 of the method of evaluation intended for the evaluation committee and, finally, in section 5.2 of the evaluation committee's report. In application of those criteria, a summary table of the tenders and the ranking of the tenderers, in which the appellant came in fourth place, were drawn up by the evaluation committee in section 5.4 of the evaluation report, precisely where reference is made to the incorrect evaluation criteria. It follows that the Court of First Instance was correct to hold that the typographical error in section 5.4 was of no relevance as regards the tender procedure.

20 Consequently, the appellant's complaint that the Court of First Instance relied solely on an oral declaration made at the hearing by an agent of the Commission on the basis of information obtained from an official of DG AGRI of the Commission present at the hearing, and who was not a member of the evaluation committee, has no basis.

21 In any event, an agent of the Commission appointed in accordance with the first sentence of Article 19 of the Statute of the Court of Justice represents the Commission at the hearing before the Court of First Instance and, on that basis, may, at that hearing, make statements on behalf of that institution. For the purposes of assessing the value of such a statement, there is nothing to be gained by making enquiries as to the source, within that institution, from which that agent obtained the information.

22 In the light of the above, it must be held that, by holding that the appellant had not succeeded in establishing to the requisite legal standard that the Commission had committed a manifest error of assessment and, thus, that the typographical error in section 5.4 of the evaluation committee's report had not affected the procedure for the award of the contract in question, the Court of First Instance correctly stated the reasons for its decision.

23 Consequently, the present plea must be rejected as unfounded.

The second plea

The second part of the plea

– Position of the parties

24 In the second part of its second plea, which should be examined first, the appellant criticises the finding of the Court of First Instance that the evaluation committee's statement of reasons rejecting its tender, which was sent to it by letter of the Commission dated 10 December 2004, was adequate. The lack of detail relating to the scores and the few general comments from the evaluation committee's report did not enable the appellant to prepare its defence satisfactorily.

25 The Commission submits that the Court of First Instance did not err in law by holding that the extracts from the non-confidential version of the evaluation committee's report specifying the name of the successful tenderer, the relative advantages of its tender in the light of the three quality criteria, the details of the calculation by which the quality/price ratio of the tenders was determined, their ranking and the general observations comparing the appellant's tender with that of the successful tenderer constitute adequate reasons for the rejection of the appellant's tender. In addition, the fact that the reasons given were succinct and that, initially, the entire report was not communicated, but that fuller explanations were provided subsequently, does not call into question the adequacy of those reasons.

– Findings of the Court

26 It should be noted that the Commission's letter of 10 December 2004, as the Court of First Instance states in paragraphs 126 to 129 of the judgment under appeal, provides information on several points in reply to the appellant's request for detailed explanations, namely the name of the successful tenderer and of the subcontractor, the advantages of the successful tender in comparison with that of the appellant in the light of the three qualitative award criteria laid down in the tender specifications and the comparison of the tenders with regard to price. The information communicated was presented in the form of three tables. The first table enables the appellant's tender to be compared with that of the successful tenderer in the light of the qualitative criteria and their weighting. The second table analyses, by way of a written summary, the appellant's tender in comparison with that of the successful tenderer. The third table analyses the quality/price ratio of the appellant's tender, by comparing it with the successful tender.

27 Thus, it is apparent from that letter of 10 December 2004 that the appellant's tender had not been ranked, on any of the three qualitative criteria set out in the tender specifications, ahead of the successful tender. In addition, it is apparent from the third table that, in the final ranking, the appellant's tender was placed in fourth position.

28 Consequently, it must be held that the information communicated by the Commission to the appellant satisfies the requirements laid down in Article 100(2) of the Financial Regulation and Article 149(2) of the Implementing Rules.

29 The Court of First Instance therefore correctly applied the relevant provisions.

30 The second part of the second plea must therefore be rejected as unfounded.

The first part of the plea

– Position of the parties

31 In the first part of its second plea, the appellant objects that the Court of First Instance, while finding that the Commission was late in replying to its additional requests of 29 and 30 September 2004, by letter dated 26 January 2005, actually sent on 7 February 2005, held that that delay had not affected the appellant's rights of defence with respect to the decision at issue. Consequently, by holding that that plea did not amount to a sufficient reason for annulling that decision, despite a flagrant breach of the duty of diligence and the principle of good administration, the Court of First Instance failed to apply the relevant provisions of Community law and the principles of transparency and equal treatment.

32 The Commission states that the late reply which it gave to the appellant, although constituting a breach of the duty of diligence and good administration, nevertheless did not affect the appellant's rights of defence with respect to the decision at issue. All the necessary information was communicated to the appellant before the expiry of the period within which it could challenge that decision. Consequently, in the opinion of the Commission, the Court of First Instance did not err in law as it is alleged to have done.

– Findings of the Court

33 The Court of First Instance held in paragraphs 151 to 158 of the judgment under appeal that, by not replying to the appellant's requests of 29 and 30 December 2004 within a reasonable period of time, the Commission had failed in its duty of diligence and good administration. However, the finding of such a breach, in the view of the Court of First Instance, did not suffice to render the decision at issue unlawful nor to have it annulled, in so far as the Commission's delay in replying to the appellant's requests did not affect the appellant's rights of defence with respect to that decision.

34 Since, as was held in paragraphs 26 and 28 of this judgment, the Commission's letter of 10 December 2004 provided the information requested, the appellant's subsequent requests of 29 and 30 December 2004 and the Commission's reply of 26 January 2005 do not play any role in the consideration of the substance of the case.

35 Therefore, although the Commission failed in its duty of diligence and good administration by being late in replying to those requests, the fact remains that the appellant already had the necessary information in order to protect its rights of defence with respect to the decision at issue.

36 The first part of the second plea must therefore be rejected as unfounded.

37 In those circumstances, the appeal must be dismissed in its entirety as unfounded.

Costs

38 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Evropaïki Dynamiki and the latter has been unsuccessful, Evropaïki Dynamiki must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to pay the costs.

[Signatures]

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* Language of the case: English.

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Judgment of the Court (Eighth Chamber) of 3 December 2009 - Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission

(Case C-476/08 P) [1]

(Appeal - Regulations (EC, Euratom) Nos 1605/2002 and 2342/2002 - Public contracts awarded by the Community institutions on their own account - Error in the evaluation committee's report - Obligation to state reasons for the rejection of the tender's bid)

Language of the case: English

Parties

Appellant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (represented by: (N. Korogiannakis, dikigoros)

Other party to the proceedings: European Commission (represented by: M. Wilderspin and E. Manhaeve, Agents)

Re:

Appeal brought against the judgment of the Court of First Instance (Third Chamber) of 10 September 2008 in Case T-59/05 *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE* v *Commission of the European Communities* by which the Court of First Instance dismissed an action for the annulment of the Commission's decision of 23 November 2004 rejecting the tender submitted by the appellant in the tendering procedure relating to the provision of development, maintenance and related support services for the financial information systems of the Directorate-General for Agriculture and of the decision awarding the contract to another tenderer - Obligation to state reasons for the rejection of a submitted tender

Operative part of the judgment

The Court:

1. Dismisses the appeal;

2. Orders Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to pay the costs.

_____

[1] - OJ C 19, 24.1.2009.

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Appeal brought on 6 November 2008 by Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE against the judgment of the Court of First Instance (Third Chamber) delivered on 10 September 2008 in Case T-59/05: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities

(Case C-476/08 P)

Language of the case: English

Parties

Appellant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (represented by: N. Korogiannakis, P. Katsimani, Δικηγόροι)

Other party to the proceedings: Commission of the European Communities

Form of order sought

The appellant claim that the Court should:

Set aside the decision of the Court of First Instance;

annul the decision of the Commission (DG Agriculture) to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

order the Commission to pay the applicant's legal and other costs and expenses incurred in connection with the initial procedure, even if the current Appeal is rejected as well as those of the current Appeal, in case it is accepted

Pleas in law and main arguments

The appellant bases its appeal against the judgment T-59/05 of the Court of First Instance on the following grounds:

It is submitted that the Court of First Instance committed a breach of procedure by refusing to recognise an evident discrepancy between the award criteria as set out in section 5.2 of the EvCo Report and those mentioned in section 5.4 of the same Report and by misinterpreting the relevant procedural rules on the burden of proof. More specifically, the Court of First Instance does not refer to any evidence in support of its qualification as "typographical error" of an obvious discrepancy, and no such evidence can by any means be deduced from the content of the Evaluation Report itself.

Further, the judgment fails to observe the consequences of the Commission's infringement of its duty of diligence and of the principle of good administration. Since the Court of First Instance, despite observing that the Commission infringed the rule of law, did not proceed into annulling the Commission's Decision on this ground, the Court of First Instance undoubtedly failed in applying the relevant provisions.

It is submitted that the Court of First Instance also failed to apply the relevant provisions on the duty of the contracting authority to provide reasons, which would lead it to annul the award decision; only scores and some general comments from the Evaluation Report have been submitted to the Appellant by the letter of 10th December 2004. In this sense the Court of First Instance distorted the evidence adduced before it, and for this reason its judgment should be annulled.

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JUDGMENT OF THE COURT (Third Chamber)

28 January 2010 (*)

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

In Case C-456/08,

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

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

applicant,

v

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

defendant,

THE COURT (Third Chamber),

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

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

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

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

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by reason of the rules on time-limits in the national legislation regulating the exercise of the right of tenderers to judicial review in public procurement procedures and by failing to notify the award decision to the complainant in the procurement procedure in question, Ireland has failed to fulfil its obligations, concerning the applicable time-limits, under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1) ('Directive 89/665'), as interpreted by the Court, and, concerning the lack of notification, under Article 1(1) of Directive 89/665, as interpreted by the Court, and Article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 93/37').

Legal context

Community legislation

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

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

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

> 'The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
>
> (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
>
> (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
>
> (c) award damages to persons harmed by an infringement.'

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

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

National legislation

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

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

Background to the dispute and pre-litigation procedure

6 The National Roads Authority ('the NRA') is a public authority responsible for the construction and maintenance of roads in Ireland.

7 SIAC Construction Limited ('SIAC') is a limited liability company established in Ireland, which carries on business in the construction sector.

8 The NRA published a call for interest in the *Official Journal of the European Communities* on 10 July 2001 to design, build, finance and operate the Dundalk Western Bypass. The contractor was required to establish a public-private partnership with the NRA and to operate that section of motorway for approximately 30 years.

9 In December 2001, four candidates were invited to proceed to negotiations.

10 Of those four candidates, two were selected in April 2003 to proceed to more intensive negotiations: these were a consortium called EuroLink, of which SIAC formed part, and a consortium called Celtic Roads Group ('CRG').

11 On 8 August 2003, the NRA invited EuroLink and CRG to submit a best and final offer.

12 By letter of 14 October 2003, EuroLink was informed that the NRA had decided to designate CRG as the preferred tenderer. That letter from the NRA pointed out that this was not a rejection of the offer submitted

by EuroLink. The letter explained that the NRA would proceed with discussions with CRG, potentially leading to the award of the contract for the project in question. However, if such discussions were to terminate without a contract being awarded, the NRA reserved the right to invite EuroLink to enter into discussions with it in place of CRG.

13 On 9 December 2003, the NRA decided to award the contract in question to CRG.

14 On 5 February 2004, the NRA signed the contract with CRG. A notice to that effect was displayed on the NRA website on 9 February 2004. The contract award notice was published in the *Official Journal of the European Union* on 3 April 2004.

15 On 8 April 2004, SIAC brought an action for damages before the High Court of Ireland. It complained, inter alia, first, of the selection of the negotiated procedure and, secondly, of certain irregularities which, in its view, had occurred at the stage of introducing and evaluating the best and final offers. With regard to limitation periods, SIAC claimed that the date on which the period for bringing an action began to run was the date on which the contract with CRG was signed, that is to say, 5 February 2004.

16 The High Court took the view that the relevant grounds for bringing the action arose on the date on which the consortium to which SIAC belonged was informed of the identity of the preferred tenderer, namely 14 October 2003. SIAC, it ruled, ought to have brought its action no later than three months after that date, in accordance with Order 84A of the RSC. The High Court, by its judgment of 16 July 2004, accordingly dismissed SIAC's action as being out of time.

17 SIAC submitted a complaint to the Commission. The latter sent a letter of formal notice to Ireland on 10 April 2006, to which that Member State replied on 30 May 2006.

18 On 15 December 2006, the Commission sent an additional letter of formal notice to Ireland, which replied on 21 February 2007.

19 As it was not satisfied by the explanations which it had received, the Commission sent Ireland a reasoned opinion on 1 February 2008, inviting that Member State to take the measures necessary for compliance within a period of two months. Ireland replied to that reasoned opinion on 25 June 2008.

20 As it considered that reply to be unsatisfactory, the Commission brought the present action.

The action

The first head of claim

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

Arguments of the parties

22 The Commission submits that notification of the public contract award decision to the unsuccessful candidates and tenderers is required under Article 8(2) of Directive 93/37. It also submits that, in the context of Directive 89/665, complete legal protection presupposes an obligation to inform candidates and tenderers of the award decision.

23 The communication to EuroLink, by letter from the NRA of 14 October 2003, of the fact that CRG had been designated as the preferred tenderer was not, the Commission contends, tantamount to a rejection of the offer submitted by EuroLink. That letter cannot therefore be regarded as constituting the notification of the award decision provided for in Directive 89/665 and in Article 8(2) of Directive 93/37.

24 Since it is common ground that SIAC did not receive notification of the final award of the contract at issue, the requirements of those provisions were not complied with.

25 Ireland accepts the obligation on Member States to ensure prompt notification to candidates and tenderers of decisions taken on contract awards. It argues that it has faithfully transposed Article 8(2) of Directive 93/37, which lays down that obligation, into its domestic legal order. The Commission, moreover, is not claiming that the relevant Irish legislation does not comply with the requirements of Community law.

26 With regard to the contract relating to the Dundalk motorway bypass, Ireland accepts that communication of the preferred tenderer to EuroLink on 14 October 2003 does not constitute notification of the decision to award the contract.

27 Ireland claims, however, that, as is apparent from the judgment of the High Court of Ireland of 16 July 2004, it was, as of 14 October 2003, clear to SIAC that a decision had been taken to award the contract. SIAC must have been aware that the NRA was engaged in the process necessary to conclude a contract with CRG. In Ireland's view it follows that, in the circumstances of the present case, no injustice was caused by the lack of notification of the final decision to award the contract.

28 Ireland submits that, as its national law faithfully transposes the Community rules on notification of decisions concerning the award of public contracts, Ireland cannot be considered to have failed in its obligations under Community law on the basis of a single incident of non-notification.

Findings of the Court

29 Article 8(2) of Directive 93/37 requires contracting authorities to inform candidates and tenderers promptly of the decisions taken on contract awards. Notification to unsuccessful candidates and tenderers of the public contract award decision is mandatory under that provision.

30 That same obligation also arises under Article 1(1) of Directive 89/665, inasmuch as the possibility of bringing an effective action against award decisions can be ensured only if all candidates or tenderers are informed in good time of those decisions (see, to that effect, judgment of 24 June 2004 in Case C-212/02 *Commission* v *Austria*, paragraph 21, and Case C-444/06 *Commission* v *Spain* [2008] ECR I-2045, paragraph 38).

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

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

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

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

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

36 That argument cannot be accepted.

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

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

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

40 That argument also cannot be accepted.

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

Germany, paragraph 27).

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

The second head of claim

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

The first part of the second head of claim

– Arguments of the parties

44 The Commission states that it is difficult for tenderers to know which decision by the contracting authority they have to challenge and on which date the period for challenging that decision begins to run. The Commission argues that that uncertainty is attributable to the wording of Order 84A(4) of the RSC and its uncertain interpretation.

45 The Commission asserts that the expression 'a decision to award or the award of a public contract' used in Order 84A(4) of the RSC refers to decisions which may be challenged and that that provision makes no reference to earlier interim decisions taken by the contracting authority. In its judgment of 16 July 2004, the High Court took the view that that provision applies not only to the decision to award a contract or to the award of such a contract, but also to decisions taken by contracting authorities in respect of public procurement procedures.

46 In the Commission's view, the national legislation in question appears not to be in line with the fundamental principle of legal certainty and the requirement of effectiveness envisaged by Directive 89/665, which is an application of that principle, since tenderers are left in uncertainty as to their situation when they intend to bring an action against an award decision taken by a contracting authority in a two-stage procedure in which the final award decision is taken after a tenderer has been selected.

47 The Commission argues that it must be made clear to tenderers whether Order 84A(4) of the RSC applies not only to decisions to award contracts, but also to interim decisions taken by a contracting authority during the tendering procedure, including those concerning the selection of the preferred tenderer.

48 Ireland points out that Article 1 of Directive 89/665 requires Member States to ensure that there are effective legal remedies against all decisions taken by contracting authorities in public procurement procedures and not only against decisions to award contracts in those procedures. In Ireland's view, the Irish courts interpret and apply Order 84A(4) of the RSC in accordance with those requirements. The High Court's judgment of 16 July 2004 in particular states clearly that that provision allows proceedings to be brought against any decision taken by contracting authorities in a public procurement procedure, which is entirely consistent with Article 1 of Directive 89/665.

49 With regard to the date from which the period for challenging an interim decision by a contracting authority begins to run, Ireland observes that Directive 89/665 requires that it be possible for decisions taken by contracting authorities to be reviewed rapidly. An application can be examined expeditiously only if both parties to the dispute are obliged to act quickly in the relevant proceedings. That objective could not be attained if the parties were allowed to await formal notification of the award decision before bringing proceedings, even though they have all the elements of fact and law necessary for bringing such an action.

50 Ireland submits that, if a tenderer could simply await notification of a formal decision not to award it the contract in question, despite knowing that it was not going to be awarded the contract, as found by the High Court in the case which gave rise to its judgment of 16 July 2004, significant delay would ensue for the review of all decisions by contracting authorities.

– Findings of the Court

51 The Court has already held that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a period laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the period in question is reasonable (Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraph 50 and case-law cited).

52 That case-law is based on the consideration that the full implementation of the objective sought by Directive

89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thereby obliging the contracting authority to restart the entire procedure in order to correct such infringements (*Lämmerzahl*, paragraph 51).

53 On the other hand, national limitation periods, including the detailed rules for their application, should not in themselves be such as to render virtually impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law (*Lämmerzahl*, paragraph 52).

54 Order 84A(4) of the RSC provides that 'an application for the review of a decision to award or the award of a public contract' must be made within a specified period.

55 However, as occurred in the dispute which gave rise to the High Court's judgment of 16 July 2004, the Irish courts may interpret that provision as applying not only to the final decision to award a public contract but also to interim decisions taken by a contracting authority during the course of that public procurement procedure. If the final decision to award a contract is taken after expiry of the period laid down for challenging the relevant interim decision, the possibility cannot be excluded that an interested candidate or tenderer might find itself out of time and thus prevented from bringing an action challenging the award of the contract in question.

56 According to the Court's settled case-law, the application of a national limitation period must not lead to the exercise of the right to review of decisions to award public contracts being deprived of its practical effectiveness (see, to that effect, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 72; Case C-327/00 *Santex* [2003] ECR I-1877, paragraphs 51 and 57; and *Lämmerzahl*, paragraph 52).

57 As observed by the Advocate General in point 51 of her Opinion, only if it is clear beyond doubt from the national legislation that even preparatory acts or interim decisions of contracting authorities at issue in public procurement cases start the limitation period running can tenderers and candidates take the necessary precautions to have possible breaches of procurement law reviewed effectively within the meaning of Article 1(1) of Directive 89/665 and to avoid their challenges being statute-barred.

58 Accordingly, it is not compatible with the requirements of Article 1(1) of that directive if the scope of the period laid down in Order 84A(4) of the RSC is extended to cover the review of interim decisions taken by contracting authorities in public procurement procedures without that being clearly expressed in the wording thereof.

59 Ireland disagrees with this finding, contending that the application of such a period for challenging interim decisions corresponds to the objectives of Directive 89/665, in particular the requirement of rapid action.

60 It is true that Article 1(1) of Directive 89/665 requires Member States to ensure that decisions taken by contracting authorities may be reviewed effectively and as rapidly as possible. In order to attain the objective of rapidity pursued by that directive, Member States may impose limitation periods for actions in order to require traders to challenge promptly preliminary measures or interim decisions taken in public procurement procedures (see, to that effect, *Universale-Bau and Others*, paragraphs 75 to 79; Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraphs 30 and 36 to 39; and *Lämmerzahl*, paragraphs 50 and 51).

61 However, the objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to create a legal situation that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (see, to that effect, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 24, and Case C-221/94 *Commission* v *Luxembourg* [1996] ECR I-5669, paragraph 22).

62 The abovementioned objective of rapidity does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of ensuring effective review proceedings laid down in Article 1(1) of Directive 89/665.

63 The extension of the limitation period under Order 84A(4) of the RSC to interim decisions taken by contracting authorities in public procurement procedures in a manner which deprives the parties concerned of their right of review satisfies neither the requirements of legal certainty nor the objective of effective review. Interested parties must be informed of the application of limitation periods to interim decisions with sufficient clarity to enable them effectively to bring proceedings within the periods laid down. The failure to provide such information cannot be justified on grounds of procedural rapidity.

64 Ireland submits that the Irish courts interpret and apply Order 84A(4) of the RSC in conformity with the requirements of Directive 89/665. This argument refers to the significant role played by case-law in common-law countries such as Ireland.

65 It should be noted in this regard that, according to the Court's settled case-law, although the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be reproduced in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient, it is nevertheless necessary that that legal context be sufficiently clear and precise as to enable the parties concerned to be fully informed of their rights and, if necessary, avail themselves of those rights before the national courts (judgment of 29 October 2009 in Case C-474/08 *Commission* v *Belgium*, paragraph 19 and case-law cited).

66 Order 84A(4) of the RSC, however, does not satisfy those requirements inasmuch as it allows national courts to apply, by analogy, the limitation period which it provides for challenges to public contract award decisions to challenges to interim decisions taken by contracting authorities in the course of those procurement procedures, in respect of which no express provision was made by the legislature for that limitation period to apply. The resulting legal situation is not sufficiently clear and precise to exclude the risk that concerned candidates and tenderers may be deprived of their right to challenge decisions in public procurement matters handed down by a national court on the basis of its own interpretation of that provision.

67 It follows that the first part of the second head of claim is well founded.

The second part of the second head of claim

– Arguments of the parties

68 The Commission points out that Order 84A(4) of the RSC requires actions to be brought 'at the earliest opportunity and in any event within three months'. The Commission takes the view that that formulation leaves tenderers in uncertainty when they consider exercising their right under Community law to bring proceedings against a decision of a contracting authority. Indeed, tenderers would discover what interpretation will be given to the formulation 'at the earliest opportunity' only after their action has been brought and the competent court has exercised its discretion in interpreting that provision. Such a situation runs counter to the principle of legal certainty.

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

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

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

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

– Findings of the Court

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

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

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

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

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

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

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

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

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

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

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

– by reason of the fact that the NRA did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and

– by maintaining in force Order 84A(4) of the RSC, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined,

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

Costs

84 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Ireland and the latter has been unsuccessful, Ireland must be ordered to pay the costs.

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

1. Declares that:

– by reason of the fact that the National Roads Authority did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and

– by maintaining in force Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument N° 374 of 1998, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined,

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

obligations under Article 1(1) of Directive 89/665, as amended by Directive 92/50;

2. Orders Ireland to pay the costs.

[Signatures]

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* Language of the case: English.

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Judgment of the Court (Third Chamber) of 28 January 2010 - Commission of the European Communities v Ireland

(Case C-456/08) [1]

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

Language of the case: English

Parties

Applicant: Commission of the European Communities (represented by: G. Zavvos, M. Konstantinidis and E. White, agents)

Defendant: Ireland (represented by: D. O'Hagan, agent, A. Collins, SC)

Re:

Failure of Member State to fulfil obligations - Infringement of Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) - Infringement of Article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) - Notification of the decision awarding the contract - Duty to state clearly the time-limit for bringing an action against a decision awarding a public contract

Operative part of the judgment

The Court:

Declares that:

by reason of the fact that the National Roads Authority did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and

by maintaining in force Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument No 374 of 1998, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined,

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

2. Orders Ireland to pay the costs.

_____

[1] - OJ C 313, 6.12.2008.

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OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 October 2009 [1](1)

Case C–456/08

Commission of the European Communities
v
Ireland

(Failure of a Member State to fulfil obligations – Public works contracts – Directives 93/37/EEC and 89/665/EEC – Obligation of the contracting authority to inform an unsuccessful tenderer of the award decision – Review procedures under national law – Effective legal protection – Decisions open to challenge – Limitation periods – Length of the period – Requirement to bring proceedings 'at the earliest opportunity')

I – Introduction

1. This action for failure to fulfil obligations gives the Court an opportunity to develop its case-law on the remedies available to unsuccessful tenderers in public procurement procedures.

2. First, the Commission criticises Ireland on the ground that in a specific individual case an Irish authority, awarding a road construction project, did not inform the unsuccessful consortium of tenderers of the final award decision.

3. Second, the Commission and Ireland dispute whether the time-limits laid down in Irish procedural law are formulated sufficiently clearly, precisely and predictably to enable effective review of the decisions of contracting authorities.

4. As regards the second issue, the present case has points of contact with Case C–406/08 *Uniplex (UK)*, in which I also deliver my Opinion today.

II – Legal context

A – *Community law*

5. The Community law context of the present case is defined by Directives 93/37/EEC (2) and 89/665/EEC. (3)

6. Article 8(2) of Directive 93/37, as amended by Directive 97/52/EC, (4) contains the following provision:

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

such decisions.'

7. Article 1 of Directive 89/665, as amended by Directive 92/50/EEC, (5) (6) provides:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC … decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

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

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.' (7)

B – *National law*

8. As regards national law, first the Irish European Communities (Award of Public Authorities' Contracts) Regulations 2006 (8) ('the APAC Regulations') and second the Irish Rules of the Superior Courts (9) ('the RSC') are relevant to the present case.

9. Regulation 49 of the APAC Regulations reads, in extract, as follows:

'(1) As soon as practicable after reaching a decision about entering into a public contract or framework agreement or admission to a dynamic purchasing system, a contracting authority shall inform candidates and tenderers of the decision by the most rapid means of communication possible (such as by electronic mail or by telefax). …

…

(5) A contracting authority shall not enter into a public contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed of the contract award decision in accordance with paragraph (1).

…'

10. Order 84A(4) of the RSC (10) provides as follows:

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

III – Facts and pre-litigation procedure

11. The Irish National Roads Authority ('NRA') is an authority responsible for the construction and maintenance of roads in Ireland.

12. On 10 July 2001 the NRA published in the *Official Journal of the European Communities* a call for interest in the design, building, financing and operation of the Dundalk Western Bypass motorway. The contractor was to establish a public-private partnership (11) with the NRA and operate the motorway for a period expected to be 30 years.

13. In December 2001 the NRA invited four interested parties to proceed to negotiations. In April 2003 the NRA selected two of them to proceed to more intensive negotiations, namely the EuroLink consortium and the Celtic Roads Group consortium. On 8 August 2003 the NRA invited those

consortia to submit a 'best and final offer'.

14. By letter of 14 October 2003, EuroLink was informed by the NRA that it had decided to select Celtic Roads Group as the preferred tenderer. The letter pointed out, however, that EuroLink's offer had not been rejected. If the further discussions with Celtic Roads Group did not lead to the award of a contract, the NRA reserved the right to invite EuroLink to enter into discussions with it in place of Celtic Roads Group.

15. On 9 December 2003 the NRA decided to award the contract to Celtic Roads Group. The contract was signed on 5 February 2004. From 9 February 2004 a notice to that effect was displayed on the NRA website, and a notice of the award was also published in the *Official Journal of the European Union* on 3 April 2004.

16. On 8 April 2004 SIAC Construction Limited ('SIAC'), an undertaking which belonged to the unsuccessful EuroLink consortium, brought an action for compensation in the High Court of Ireland, based on various alleged defects in the award procedure.

17. By judgment of 16 July 2004, (12) the High Court dismissed the action as out of time. Contrary to the view taken by SIAC, the High Court considered that SIAC must have known the grounds for its claim at the latest by 14 October 2003, when EuroLink was informed by the NRA of the identity of its preferred tenderer. In accordance with Order 84A(4) of the RSC, SIAC should have brought its action at the latest three months from that date.

18. SIAC thereupon complained to the Commission. In its complaint it alleged inter alia that it had not been informed at any time by the NRA of its award decision.

19. Following that complaint, the Commission first sent the Irish authorities an administrative letter on 15 November 2004, asking for further information on the facts. Ireland's answer of 25 April 2005 was not capable of dispelling the Commission's doubts. A letter of formal notice was thereupon sent by the Commission to Ireland on 10 April 2006, and a supplementary letter of formal notice on 15 December 2006, to which Ireland replied by letters of 30 May 2006 and 21 February 2007 respectively.

20. Since, however, Ireland's explanations still failed to satisfy the Commission, it issued a reasoned opinion within the meaning of the first paragraph of Article 226 EC on 1 February 2008, and required Ireland to take the necessary steps to comply with the reasoned opinion within two months. On 25 June 2008 Ireland replied to the reasoned opinion, stating inter alia that an amendment to the national laws, regulations and administrative provisions was being considered in the course of the transposition of Directive 2007/66. However, that answer too did not appear to the Commission to be adequate.

IV – Forms of order sought by the parties and procedure before the Court

21. By a pleading of 14 October 2008, received at the Court on 20 October 2008, the Commission brought the present action against Ireland under the second paragraph of Article 226 EC.

22. The Commission asks the Court to:

– declare that, by way of the rules on time-limits in the national legislation regulating the exercise of the right of tenderers to judicial review in public procurement procedures and by failing to notify the award decision to the complainant against that award decision, Ireland has failed to fulfil its obligations, concerning the applicable time-limits, under Article 1(1) of Directive 89/665 as interpreted by the Court and, concerning the lack of notification, under Article 1(1) of Directive 89/665 as interpreted by the Court and Article 8(2) of Directive 93/37; and

– order Ireland to pay the costs.

23. Ireland contends for its part that the Court should:

– dismiss the action; and

– order the Commission to pay the costs.

24. The Court received written submissions on the Commission's action, followed by oral argument, on 24 September 2009. (13)

V – Assessment

25. The Commission's action will be well founded if Ireland has failed to fulfil one of its obligations under the EC Treaty. Those obligations include, in accordance with the third paragraph of Article 249 EC and Article 10 EC, the duty to achieve the results aimed at by Community directives.

26. In the present case the Commission bases its action on two pleas. The first plea concerns an individual case: it relates to the alleged failure to inform the unsuccessful consortium of tenderers of the award decision for the Dundalk Western Bypass motorway construction project. The second plea goes beyond that individual case: it denounces as contrary to Community law the provision of Irish law on the time-limits for seeking remedies, as laid down in Order 84A(4) of the RSC.

A – *First plea: failure to notify the award decision*

27. By its first plea, the Commission accuses Ireland of a failure to fulfil its obligations under Article 1(1) of Directive 89/665 and Article 8(2) of Directive 93/37, consisting in the fact that the NRA did not inform the unsuccessful tenderer, in accordance with those provisions, of its award decision concerning the Dundalk Western Bypass motorway construction project.

28. Both the Commission and Ireland tacitly assume that the Dundalk Western Bypass motorway construction project put out to tender by the NRA was a public works contract for the purposes of Directive 93/37.

29. The NRA as the contracting authority was therefore obliged under Article 8(2) of Directive 93/37 to inform tenderers or candidates promptly of its decision on the award of that contract.

30. The same obligation also arises under Article 1(1) of Directive 89/665, because effective legal protection against award decisions can only be ensured if all candidates or tenderers are informed in good time and in detail of precisely those decisions. (14)

31. It is not disputed, however, that in the present case the NRA never formally informed EuroLink, the unsuccessful consortium of tenderers to which SIAC belonged, of its decision to award the road construction project in question to the competing consortium Celtic Roads Group.

32. Nor could the announcement of 9 February 2004 on the NRA's website and the notice of 3 April 2004 in the *Official Journal of the European Union* provide an adequate substitute. They merely informed the public of the final conclusion of the contract between the NRA and Celtic Roads Group. But in order to make effective legal protection possible for the unsuccessful candidates or tenderers, they should have been informed in good time before the contract was concluded – instead of being informed only after the creation of a fait accompli – about the NRA's award decision. (15)

33. The NRA thus failed to comply with its obligations to provide information under Article 8(2) of Directive 93/37 and Article 1(1) of Directive 89/665 with respect to the Dundalk Western Bypass motorway construction project.

34. Ireland objects that in the present case SIAC none the less suffered no injustice. In view of the circumstances of the particular case, at no time was there any uncertainty for SIAC as to the tenderer to which the NRA would award the contract. Ireland refers here to the NRA's letter of 14 October 2003, in which the EuroLink consortium was informed of the selection of Celtic Roads Group as the preferred tenderer. From that time at the latest, SIAC must in Ireland's view have been aware that – 'except in very exceptional circumstances' (16) – an award decision would be made in favour of Celtic Roads Group. On this point, Ireland expressly adopts the reasoning of the High Court of Ireland in the national review proceedings. (17)

35. This objection fails, however. In its letter of 14 October 2003 the NRA did not notify any final award decision; it even expressly informed EuroLink that its offer had not been rejected. The selection of a 'preferred tenderer' by NRA may already have been an important decision as to the direction to take, but it did not involve a definitive determination of a tenderer. The NRA expressly

reserved the right to invite EuroLink to enter into discussions in the place of Celtic Roads Group at a later date if appropriate. EuroLink could therefore assume for the time being that it was not yet completely out of the running.

36. Apart from that, in an action under Article 226 EC for failure to fulfil obligations, which is objective in nature, it is in any case irrelevant whether actual damage or other adverse effects have occurred as a result of the conduct of official bodies of a Member State. (18)

37. Ireland stresses, finally, that its national law is in harmony with the obligations under Community law to provide information; these are correctly transposed in Article 49(1) of the APAC Regulations. In those circumstances, an individual case in which no information was given on the award decision cannot be stigmatised as a breach of Community law.

38. This argument of Ireland is also unconvincing, however. First, it is by no means undisputed whether Article 49(1) of the APAC Regulations in fact correctly transposes the obligations under Community law to provide information; separate proceedings for failure to fulfil obligations are pending against Ireland on this point. (19) Second, it is settled case-law that, in an action for failure to fulfil obligations, not only can the compatibility of a Member State's laws, regulations and administrative provisions with Community law be examined, an infringement of Community law by the national bodies in a specific individual case can also be ascertained. (20)

39. Altogether, I therefore conclude that the Commission's first plea is well founded.

B – *Second plea: rules on time-limits for legal remedies in Irish procedural law that are contrary to Community law*

40. By its second plea, the Commission accuses Ireland of an infringement of Article 1(1) of Directive 89/665, consisting in the fact that Order 84A(4) of the RSC regulates the limitation period for applications in review procedures in a way which conflicts with the requirements of Community law.

41. Directive 89/665 makes no express provision on the time-limits that apply to review procedures under Article 1 of the directive. (21) However, the Court has consistently held that the Member States may in the exercise of their procedural autonomy introduce reasonable limitation periods for bringing proceedings, provided that they comply with the principles of equivalence and effectiveness. (22) Those two principles are also reflected in Article 1 of Directive 89/665, the principle of equivalence in Article 1(2) and the principle of effectiveness in Article 1(1). (23)

42. In the present case it is the principle of effectiveness that is the focus of interest. *That* Ireland can lay down limitation periods for applications for the review of decisions of contracting authorities is not in dispute. (24) The dispute between the parties concerns merely certain details of the national rules on limitation. The essential issue is whether those rules are sufficiently clear to make *effective review* within the meaning of Article 1(1) of Directive 89/665 possible. The Commission denies this. It refers to lack of clarity in connection with determining the kinds of decisions against which challenges must be brought within the period laid down by Order 84A(4) of the RSC, and to lack of clarity as regards the duration of that period.

1. Determination of the kinds of decisions to which the limitation period applies (first part of the second plea)

43. By the first part of its second plea, the Commission complains that there is legal uncertainty as to the kind of procurement law decisions against which challenges must be brought within the period laid down by Order 84A(4) of the RSC. According to its wording, Order 84A(4) of the RSC applies only to the review of 'a decision to award or the award of a public contract'. In practice, however, according to the Commission, the scope of that provision is extended also to interim decisions, so that applications for their review can likewise be brought only within the period laid down by Order 84A(4) of the RSC.

44. The facts relied on by the Commission in this respect are not in dispute. Both the submissions of Ireland in the present proceedings for failure to fulfil obligations and the judgment of the High Court of Ireland on the Dundalk Western Bypass motorway construction project (25) confirm that the period laid down in Order 84A(4) of the RSC is in practice applied by the competent Irish authorities not only to challenges to final decisions ('a decision to award or the award of a public contract') but also to challenges to interim decisions taken by contracting authorities. (26)

45. It is very much in dispute between the parties, however, whether Order 84A(4) of the RSC, as interpreted and applied by the national authorities, complies with the requirements of Article 1(1) of Directive 89/665.

46. Article 1(1) of Directive 89/665 requires that decisions of contracting authorities may be reviewed 'effectively and, in particular, as rapidly as possible' for breaches of procurement law.

47. To achieve that objective of the directive, the Member States must, in accordance with the third paragraph of Article 249 EC in conjunction with Article 10 EC, take all appropriate measures, both general and particular. According to settled case-law, they must establish a specific legal framework in the area in question. (27) They must make the situation in national law sufficiently precise, clear and transparent for individuals to be able to ascertain their rights and obligations. (28)

48. Moreover, the same follows from the principle of legal certainty, which is a general legal principle forming part of the Community legal order, and must be observed by the Member States when they exercise their powers within the scope of Community law. (29) According to settled case-law, one of the requirements of legal certainty is that rules of law must be clear, precise and predictable in their effects, especially where they may have negative consequences for individuals and undertakings. (30)

49. For a limitation rule such as that in Order 84A(4) of the RSC, the requirements of clarity, precision and predictability apply especially. An unclear limitation provision is liable to entail substantial negative consequences for individuals and undertakings. If a tenderer or candidate misses a deadline for bringing proceedings under Order 84A(4) of the RSC, he is barred from complaining of possible breaches of procurement law and loses the possibility of subjecting the award decision in question to a review. He is no longer entitled to go to court to obtain the public contract as such or at least compensation for the public contract he has lost. (31)

50. Yet the application of a limitation period must precisely not lead to the exercise of the right to review of award decisions being deprived of its practical effectiveness. (32)

51. Only if it is clear beyond doubt that even preparatory acts of contracting authorities or the interim decisions at issue in the present case start the limitation period under Order 84A(4) of the RSC running can tenderers and candidates take the necessary precautions to have possible breaches of procurement law reviewed effectively within the meaning of Article 1(1) of Directive 89/665 and to avoid their challenges being statute-barred.

52. In this context, I regard it as incompatible with the requirements of Article 1(1) of Directive 89/665 for the scope of the limitation period under Order 84A(4) of the RSC to be extended in Ireland to the review of interim decisions, without that being clearly expressed in the wording of the provision. This is because the effects of the limitation rule, in particular the extent of its preclusive effect, cannot be predicted with sufficient certainty by tenderers and candidates in award procedures. The objective of effective review of decisions taken by contracting authorities, prescribed by Article 1(1) of Directive 89/665, is thereby undermined.

– Ireland's objection that a time-limit for challenging interim decisions corresponds to the objectives of Directive 89/665, in particular the requirement to act rapidly

53. Ireland contends that under Directive 89/665 and the case-law on that directive all decisions taken by contracting authorities are open to challenge. The extension of the limitation rule in Order 84A(4) of the RSC to interim decisions is in harmony with the requirements of Community law. Moreover, Directive 89/665 is based on a requirement to act rapidly. Article 1(1) demands not only effective review but also review that is carried out as rapidly as possible of decisions of contracting authorities. The review of all decisions taken by contracting authorities must therefore be subject to the time-limit laid down by Order 84A(4) of the RSC. If it were permissible for unsuccessful tenderers to wait until the issue of the final award decision and make all their complaints then, there would be a risk of lengthy legal uncertainty and a considerable loss of time in connection with the award of public contracts. Furthermore, in Ireland's view, it would become impossible to remedy possible infringements of procurement law while an award procedure was still under way.

54. In this connection, it must be observed that Ireland is of course free to provide for limitation periods for procurement law review of preparatory acts and inter

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Action brought on 20 October 2008 - Commission of the European Communities v Ireland

(Case C-456/08)

Language of the case: English

Parties

Applicant: Commission of the European Communities (represented by: G. Zavvos, M. Konstantinidis and D. Kukovec, Agents)

Defendant: Ireland

The applicant claims that the Court should:

Declare that, by way of the rules on time limits in the national legislation regulating the exercise of the right of tenderers to judicial review in public procurement procedures and by failing to notify the award decision to the complainant in the award decision in question, Ireland has failed to fulfil its obligations under, concerning the applicable time limits, Article 1(1) of Council Directive 89/665/EEC[1] on the application of review procedures to the award of public supply and public work contracts as interpreted by the Court and, concerning the lack of notification, under Article 1(1) of Directive 89/665/EEC as interpreted by the Court and Article 8(2) of council directive 93/37/EEC[2] on the coordination of procedures for the award of public works contracts.

order Ireland to pay the costs.

Pleas in law and main arguments

In the Commission's view Irish law does not appear to be in line with the fundamental principle of legal certainty and the requirement of effectiveness under directive 89/665/EEC which is an application of this principle, since tenderers are left in uncertainty as to their position if they intend to challenge an award decision of a contracting authority in two-phase award procedures where a preferred bidder is selected prior to the final award decision. Ireland must take measures to ensure that tenderers have clarity and certainty as to which decision of the contracting authority they may challenge and from which date time limits are to be considered. It must be made clear to tenderers if Order 84A applies not only to the award decisions but also to interim decisions of a contracting authority taken during the contract award procedure (e.g. regarding the selection of the preferred bidder), with the effect that the circumstances embodied in the interim decision cannot be challenged following the lapse of the time limit reckoned from that interim decision nor may the award decision be challenged on the basis of the circumstances already embodied in the interim decision.

Order 84A requires that actions need to be brought "at the earliest opportunity and in any event within three months". The Commission considers that this formulation leaves tenderers in uncertainty regarding their position when they consider making use of their Community law right to effective legal remedy against a decision of a contracting authority. In the Commission's view it needs to be made clear for tenderers which deadline applies for bringing an action against the contracting authority's decisions and that, with a view to the obligation to respect the fundamental principle of legal certainty, the applicable time limit needs to be a fixed one which can be interpreted in a clear and foreseeable manner by all tenderers.

_____

[1] - OJ L 395, p. 33.

[2] - OJ L 199, p. 42.

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JUDGMENT OF THE COURT (Second Chamber)

23 December 2009 (*)

(Failure of a Member State to fulfil obligations – Directives 89/665/EEC and 92/13/EEC – Public supply and public works contracts – Review procedure against a contract award decision – Guarantee of effective review – Minimum period to be ensured between notification to the unsuccessful tenderers of the decision to award a contract and the signature of the contract concerned)

In Case C–455/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 October 2008,

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

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent,

defendant,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Grass,

having regard to the written procedure,

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

gives the following

Judgment

1 By its application, the European Commission sought a declaration from the Court that, by adopting Article 49 of Statutory Instrument No 329 of 2006 ('S.I. No 329 of 2006') and Article 51 of Statutory Instrument No 50 of 2007 ('S.I. No 50 of 2007'), Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time tenderers are fully informed of the reasons for the rejection of their offer, the standstill period for the conclusion of the contract has already expired, and that, by so doing, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1), and Articles 1(1) and 2(1) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities

operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as interpreted by the Court in its judgment in Case C-81/98 *Alcatel Austria and Others* [1999] ECR I–7671 and its judgment of 24 June 2004 in Case C–212/02 *Commission* v *Austria*.

Legal context

Community legislation

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

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC … , decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.'

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

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

4 Article 1(1) of Directive 92/13 provides:

'The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field [of] procurement or national rules implementing that law as regards:

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

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

5 Article 2(1) of that directive provides:

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

either

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

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the

periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

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

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

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.'

6 The above provisions of Directives 89/665 and 92/13 were amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), which entered into force on 9 January 2008 and the time-limit for the transposition of which expired on 20 December 2009.

National legislation

S.I. No 329 of 2006

7 Article 49 of S.I. No 329 of 2006, which, Ireland submits, transposes into Irish law Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), states:

'(1) As soon as practicable after reaching a decision about entering into a public contract or framework agreement or admission to a dynamic purchasing system, a contracting authority shall inform candidates and tenderers of the decision by the most rapid means of communication possible (such as by electronic mail or by telefax). If the authority notifies its decision by electronic mail or telefax, it shall confirm the decision in writing if a candidate or tenderer so requests.

...

(3) As soon as possible, and in any event no later than 15 days after the date on which a contracting authority receives a request to do so, the authority shall inform:

(a) a candidate whose application is rejected of the reasons for the rejection, or

(b) a tenderer whose tender is rejected of the reasons for the rejection (including, in a case referred to in Regulation 23(9) or (10), the reasons for the authority's decision of non-equivalence or that the works, supplies or service do not meet the authority's performance or functional requirements), or

(c) a tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

...

(5) A contracting authority shall not enter into a public contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed of the contract

award decision in accordance with paragraph (1).'

S.I. No 50 of 2007

8 Article 51 of S.I. No 50 of 2007, the purpose of which, Ireland submits, is to transpose into Irish law Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), provides:

'(1) As soon as possible after reaching a decision about

(a) entering into a framework agreement or awarding a regulated contract, or

(b) admission to a dynamic purchase system,

a contracting entity shall notify candidates and tenderers of the decision by the most rapid available means of communication, such as electronic mail or fax.

...

(4) A contracting entity that has rejected a candidate's application shall, as soon as practicable and in any case within 15 days after receiving a request to do so, inform the candidate of the reasons for the rejection.

(5) A contracting entity that has rejected a tenderer's tender shall

(a) when notifying the tenderer in accordance with paragraph (1), indicate the principal reason, or reasons, why the tender is not the selected tender;

(b) as soon as practicable, and in any case within 15 days after receiving a request from a tenderer that has made an admissible tender, inform that tenderer of

(i) the characteristics and relative advantages of the selected tender, and

(ii) the name of the successful tenderer or parties to the framework agreement.

...

(8) A contracting entity may not enter into a regulated contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed, in accordance with paragraph (1), of the decision to award the contract to that tenderer.'

Pre-litigation procedure

9 It is clear from the contents of the file submitted to the Court that Directives 89/665 and 92/13 were transposed into Irish law by Statutory Instrument No 309 of 1994 ('S.I. No 309 of 1994') and by Statutory Instrument No 104 of 1993, respectively.

10 By letter of 17 May 2001, the Commission asked the Irish authorities for information relating to the implementation of Directive 89/665 which, according to the judgment in *Alcatel Austria and Others*, requires the Member States to establish effective review procedures that are as rapid as possible to ensure the setting aside of any decision taken unlawfully by a contracting authority at the stage where infringements can still be rectified.

11 The Irish authorities replied, by letter of 27 July 2001, that the body designated to review appeals against contracting authorities' unlawful decisions was the High Court, which had the power, among others, to declare the disputed contract void. According to those authorities, although S.I. No 309 of 1994 lacks a specific provision concerning the notification of the contract award decision, there is a 'general policy' to notify the unsuccessful tenderers of that decision at the same time as the successful tenderer is notified of it. Despite the voluntary nature of that notification and the lack of a standstill period between that notification and the conclusion of the contract, unsuccessful tenderers have ample time to initiate appropriate review procedures.

12 By letter of 18 October 2002, the Commission gave Ireland formal notice to submit, within two months, its observations with regard to the three specific obligations arising from the judgment in *Alcatel Austria and Others*, that, first, the contract award decision must be distinct from the conclusion of the contract and amenable to review by a court, second, that decision must be notified to all the participants in the procedure and, third, a reasonable period must be prescribed between that decision and the conclusion of the contract so as to allow tenderers to commence proceedings concerning the decision.

13 Since the Commission considered the Irish authorities' reply of 7 January 2004 to be unsatisfactory, it issued, by letter of 1 April 2004, a reasoned opinion in which it invited Ireland to take the measures necessary to comply with the opinion within two months from its notification.

14 In its reply of 6 August 2004, Ireland stated that it envisaged amending its law in accordance with the arguments set out in the reasoned opinion and, at a meeting held on 5 November 2004, specified that it would do so as part of the transposition of Directives 2004/17 and 2004/18.

15 The final draft of the legislation envisaged, in so far as it concerned the transposition of Directive 2004/18, was communicated to the Commission on 22 September 2005. On 17 July 2006, Ireland notified the Commission of S.I. No 329 of 2006 as legislation transposing Directive 2004/18.

16 Since it considered that those measures did not comply with the requirements of the judgment in *Alcatel Austria and Others*, and that no measures had been adopted to give effect to the same requirements arising from *Commission* v *Austria* regarding the special sectors covered by Directive 2004/17, the Commission sent Ireland an additional letter of formal notice on 15 December 2006.

17 Ireland replied to the additional letter of formal notice on 13 March 2007. That reply was considered unsatisfactory by the Commission, inasmuch as the Irish authorities acknowledged the need to amend their legislation but referred to no concrete measures which they intended to take or any timetable for adopting such measures.

18 By letter of 1 February 2008, the Commission served Ireland with an additional reasoned opinion, in which it concluded that Ireland had failed to fulfil its obligations in the terms of the action, as set out in paragraph 1 of the present judgment.

19 Ireland replied to the additional reasoned opinion by a letter of 17 March 2008, in which it stated that, as the matters at issue were thenceforth dealt with in Directive 2007/66, it would comply with the reasoned opinion by making the necessary revisions to its legislation prior to the time-limit for transposing that directive, namely 20 December 2009.

20 Since it was not satisfied with that response, the Commission decided to bring the present action.

The action

Arguments of the parties

21 The Commission submits that it follows from paragraphs 34 and 43 of the judgment in *Alcatel Austria and Others* that Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 require the Member States to establish effective review procedures that are as rapid as possible to enable unsuccessful tenderers to have any decision taken unlawfully by the contracting authority set aside at the stage where infringements can still be rectified. Similar obligations arise from the corresponding articles of Directive 92/13 (see *Commission* v *Austria*, paragraph 23). It follows that a reasonable period must elapse between the time when the contract award decision is communicated to unsuccessful tenderers and the conclusion of the contract with the successful tenderer, in order, in particular, to allow an application to be made for interim measures prior to such conclusion.

22 However, neither Article 49 of S.I. No 329 of 2006 nor Article 51 of S.I. No 50 of 2007 satisfies those requirements. Those provisions do not ensure that tenderers are fully informed of the reasons for the refusal of their tender so as to put them in a position, in sufficient time before the expiry of the standstill period for the conclusion of the contract with the successful tenderer, to consider whether the decision awarding the contract is valid.

23 Whilst it is true that Directive 2007/66 deals with those questions by codifying and detailing the requirements in the field, that is irrelevant because the Irish legislation covered by the present action does not comply with Directives 89/665 and 92/13. Those directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty, which demand that where a directive is intended to create rights for individuals, the beneficiaries of those rights can ascertain their full extent.

24 Ireland admits that the requirements arising from Directives 89/665 and 92/13, as interpreted by the Court in *Alcatel Austria and Others* and *Commission* v *Austria*, have not been incorporated into its national law. It submits, however, that it would not be appropriate to declare that it has failed to fulfil its obligations in the manner alleged, since the precise extent of those obligations had not been clearly defined at the time when it adopted the measures necessary for the transposition of Directives 2004/17 and 2004/18 into Irish law. In addition, Ireland submits that Directive 2007/66 deals directly with the questions raised in the present action, and it proposed to adopt the measures necessary to transpose the latter directive into Irish law prior to 20 December 2009.

25 Ireland adds that it has taken steps to ensure that the measures required by the Commission are henceforth carried out in practice. It observes that it informed the Commission that all public purchasers are registered on the national public procurement website. All those purchasers, as well as members of a wide network of public procurement managers and other procurement officials have been reminded of the need to have award decisions reasoned with sufficient information to enable a tenderer to decide within the standstill period preceding the conclusion of the contract whether an award appears valid or there are justifiable grounds for seeking a review. That information was notified to the Commission by letter of 14 March 2008.

Findings of the Court

26 As is clear from the Court's case-law, the provisions of Directives 89/665 and 92/13, which are intended to protect tenderers against arbitrary decisions by the contracting authority, seek to reinforce existing arrangements for ensuring effective application of the Community rules on the award of public contracts, in particular where infringements can still be rectified (see, particularly, *Commission* v *Austria*, paragraph 20). The objective of those directives is to ensure that unlawful decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible (see, particularly, Case C–444/06 *Commission* v *Spain* [2008] ECR I–2045, paragraph 44).

27 The Court has held, in particular, that the Member States are required to ensure that the contracting authority's decision, prior to the conclusion of the contract in a tender procedure, as to the bidder with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages (see, particularly, *Alcatel Austria and Others*, paragraph 43).

28 The complete legal protection which must be ensured before the conclusion of the contract presupposes, in particular, the duty to inform the tenderers of the award decision before such conclusion so that they may have a real possibility of initiating review proceedings. That same protection requires provision to be made for the unsuccessful tenderer to examine in sufficient time the question of whether the award decision is valid, which means that a reasonable period must pass between the moment when the contract award decision is notified to the unsuccessful tenderers and the conclusion of the contract, in order to allow them, in particular, to bring an application for interim measures until the conclusion of the contract (see to that effect, particularly, *Commission* v *Austria*, paragraphs 21 and 23; *Commission* v *Spain*, paragraphs 38 and 39; and the judgment of 11 June 2009 in Case C–327/08 *Commission* v *France*, paragraphs 41 and 56). Therefore, the fact that there is the option of bringing proceedings for the annulment of the contract itself is not such as to compensate for the impossibility of challenging the mere act of awarding the contract concerned, before the contract is concluded (*Commission* v *Spain*, paragraph 45).

29 However, as Ireland admits, S.I. No 329 of 2006 and S.I. No 50 of 2007 do not meet those requirements.

30 First, Article 49 of S.I. No 329 of 2006 provides that tenderers must be informed of the decision to award a public contract by the most rapid means of communication possible, as soon as practicable after the contracting authority has made its decision. From the date of such information, the standstill period which must elapse before the conclusion of the contract must be at least 14 days. However, under the terms of the same provision, the contracting authority is required to state the

reasons for the rejection of a tender only if it receives an express request to do so, and then only 'as soon as possible, and in any event no later than 15 days' after its receipt of the request.

31 As Ireland accepts, it follows that the standstill period may already have expired when an unsuccessful tenderer is fully informed of the reasons for the rejection of its tender. Yet, as the Commission maintains, the reasons for the decision to reject the tender must be communicated at the time of the notification of that decision to the tenderers concerned and, in all cases, in sufficient time before the conclusion of the contract, in order to allow the unsuccessful tenderers to bring, in particular, an application for interim measures until such conclusion.

32 Secondly, Article 51 of S.I. No 50 of 2007 provides that the unsuccessful tenderers are to be informed, at the time when the award decision is notified, of 'the principal reason, or reasons, why [their] tender is not the selected tender'. However, as the Commission maintains, the discretion which that provision allows the contracting authority is such that unsuccessful tenderers are at risk of receiving incomplete information and very generally formulated explanations concerning the rejection of their tender, so that they are prevented from examining the validity of the award decision in sufficient time.

33 Indeed, since the standstill period preceding the conclusion of the contract with the successful tenderer is 14 days, whereas the period allowed the contracting authority to inform the unsuccessful tenderers of the 'characteristics and relative advantages of the selected tender' is 15 days after receiving a request to do so, by the time that tenderers are fully informed of the reasons for the rejection of their tender, the standstill period preceding the conclusion of the contract may already have expired.

34 As is clear from paragraph 31 of the present judgment, the reasons for the decision to reject their tender must be communicated to the tenderers concerned in sufficient time before the conclusion of the contract, in order to allow the unsuccessful tenderers to bring, in particular, an application for interim measures until such conclusion.

35 Ireland observes that it will comply with the requirements arising from Articles 1 and 2 of Directives 89/665 and 92/13 as part of the implementation of Directive 2007/66, which must be effected by 20 December 2009 at the latest, that meanwhile it has taken steps to ensure that those requirements are carried out in practice and that it would be inappropriate for the Court to uphold the present action, since the precise extent of the requirements in question was not clearly defined before delivery of the judgment in *Alcatel Austria and Others*.

36 However, none of those arguments can lead to the dismissal of the present action.

37 In response to the argument based on the transposition of Directive 2007/66 into Irish law, it is sufficient to point out that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State at the end of the period laid down in the reasoned opinion. The Court cannot take account of any subsequent changes (see, particularly, *Commission* v *Austria*, paragraph 28).

38 As regards the argument based on the steps undertaken by Ireland so that the requirements under Directives 89/665 and 92/13 are carried out in practice, it need merely be recalled that, according to established case-law, the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (see, particularly, Case C–225/97 *Commission* v *France* [1999] ECR I–3011, paragraph 37), that the incompatibility of national legislation with Community provisions can be remedied for good only by means of binding national provisions having the same legal force as those which must be amended (see, particularly, Case C–160/99 *Commission* v *France* [2000] ECR I–6137, paragraph 23), and that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting fulfilment of the obligations owed by the Member States in the context of transposition of a directive (see, particularly, Case C–508/04 *Commission* v *Austria* [2007] ECR I–3787, paragraph 80).

39 As for the argument that the relevant Community legislation lacked clarity before delivery of the judgment in *Alcatel Austria and Others*, it is appropriate to point out that, according to settled case-law, the interpretation which the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and

applied from the time of its coming into force (see, particularly, Case C-453/00 *Kühne & Heitz* [2004] ECR I–837, paragraph 21). In other words, a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force (see, particularly, Case C–2/06 *Kempter* [2008] ECR I–411, paragraph 35).

40 Furthermore, the objective of the pre-litigation procedure provided for in Article 226 EC is precisely to give the Member State concerned an opportunity to comply, as appropriate, with its obligations under Community law (see, particularly, Case C–490/04 *Commission* v *Germany* [2007] ECR I–6095, paragraph 25).

41 As Ireland admits, when the period laid down in the reasoned opinion expired, Irish law still did not satisfy the requirements arising from Articles 1(1) and 2(1) of Directives 89/665 and 92/13, as interpreted by the Court in its judgments in *Alcatel Austria and Others* and in Case C–212/02 *Commission* v *Austria*.

42 Having regard to the foregoing considerations, it must be held that, by adopting Article 49 of S.I. No 329 of 2006 and Article 51 of S.I. No 50 of 2007, Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time that tenderers are fully informed of the reasons for the rejection of their offer, the standstill period preceding the conclusion of the contract may already have expired, and that, by so doing, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) of Directives 89/665 and 92/13.

Costs

43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful, Ireland must be ordered to pay the costs.

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

1. Declares that, by adopting Article 49 of Statutory Instrument No 329 of 2006 and Article 51 of Statutory Instrument No 50 of 2007, Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time that tenderers are fully informed of the reasons for the rejection of their offer, the standstill period preceding the conclusion of the contract may already have expired, and that, by so doing, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, and Articles 1(1) and 2(1) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

2. Orders Ireland to pay the costs.

[Signatures]

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* Language of the case: English.

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Judgment of the Court (Second Chamber) of 23 December 2009 - European Commission v Ireland

(Case C-455/08) [1]

(Failure of a Member State to fulfil obligations - Directives 89/665/EEC and 92/13/EEC - Public supply and public works contracts - Review procedure against a contract award decision - Guarantee of effective review - Minimum period to be ensured between notification to the unsuccessful tenderers of the decision to award a contract and the signature of the contract concerned)

Language of the case: English

Parties

Applicant: European Commission (represented by: G. Zavvos and M. Konstantinidis, Agents)

Defendant: Ireland (represented by: D. O'Hagan, Agent)

Re:

Failure of a Member State to fulfil obligations - Infringement of Articles 1(1) and 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) - Infringement of Articles 1(1) and 2(1) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) - Obligation to provide under national law for an effective and rapid review procedure enabling unsuccessful tenderers to procure the annulment of a decision awarding a contract - Time-limits for bringing proceedings

Operative part of the judgment

The Court:

1. Declares that, by adopting Article 49 of Statutory Instrument No 329 of 2006 and Article 51 of Statutory Instrument No 50 of 2007, Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time that tenderers are fully informed of the reasons for the rejection of their offer, the standstill period preceding the conclusion of the contract may already have expired, and that, by so doing, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, and Articles 1(1) and 2(1) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

2. Orders Ireland to pay the costs.

_____

[1] - OJ C 32, 7.2.2009.

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ORDER OF THE PRESIDENT OF THE COURT

21 April 2009 (*)

(Intervention)

In Case C–455/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 October 2008,

Commission of the European Communities, represented by G. Zavvos, M. Konstantinidis and D. Kukovec, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, with an address for service in Luxembourg,

defendant,

THE PRESIDENT OF THE COURT,

after hearing the Advocate General, P. Mengozzi,

makes the following

Order

1 By application lodged at the Registry of the Court on 20 March 2009, the Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg, requested leave to intervene in Case C–455/08 in support of the form of order sought by Ireland.

2 The application for leave to intervene was made in accordance with Article 93(1) of the Rules of Procedure, and is submitted pursuant to the first paragraph of Article 40 of the Statute of the Court of Justice.

On those grounds, the President of the Court hereby orders:

1. **The Kingdom of Spain is granted leave to intervene in Case C-455/08 in support of the form of order sought by Ireland.**

2. **A period shall be prescribed within which the intervener is to state in writing the pleas in support of the form of order which it seeks.**

3. **The Registrar shall ensure that copies of all the procedural documents are served on the intervener.**

4. **The costs are reserved.**

Luxembourg, 21 April 2009.

R. Grass
Registrar

V. Skouris
President

* Language of the case: English.

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ORDER OF THE PRESIDENT OF THE COURT

6 August 2009 (*)

(Withdrawal of an intervention)

In Case C–455/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 October 2008,

Commission of the European Communities, represented by G. Zavvos, M. Konstantinidis and D. Kukovec, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, with an address for service in Luxembourg,

defendant,

supported by:

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

intervener,

THE PRESIDENT OF THE COURT,

after hearing the Advocate General, P. Mengozzi,

makes the following

Order

1 By letter lodged at the Registry of the Court on 25 June 2009 (email of 24 June), the Kingdom of Spain informed the Court that it was no longer going to intervene in the present case.

2 By letter lodged at the Registry of the Court on 10 July 2009, the applicant informed the Court that it had no observations to submit in that regard.

3 The defendant did not submit any observations on the withdrawal within the time allowed for that purpose.

4 Under Article 69(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs.

On those grounds, the President of the Court hereby orders:

1. The Kingdom of Spain is removed as an intervener in the proceedings.

2. The Kingdom of Spain shall bear its own costs.

Luxembourg, 6 August 2009.

R. Grass	V. Skouris
Registrar	President

* Language of the case: English.

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Action brought on 17 October 2008 - Commission of the European Communities v Ireland

(Case C-455/08)

Language of the case: English

Parties

Applicant: Commission of the European Communities (represented by: G. Zavvos, M. Konstantinidis and D. Kukovec, Agents)

Defendant: Ireland

The applicant claims that the Court should:

declare that, by way of Article 49 of S.I. No. 329 of 2006, the Irish transposition measure for Directive 2004/18/EC[1], and Article 51 of S.I. no. 50 of 2007, the Irish transposition measure for Directive 2004/17/EC[2], Ireland has established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way, which in practice may imply that by the time tenderers are fully informed of the reasons for the rejection of their offer, the standstill period for the conclusion of the contract has already expired;

thereby, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) of Directive 89/665/EEC[3] and Articles 1(1) and 2(1) of Directive 92/13/EEC[4] as interpreted by the European Court of Justice in its judgments handed down in case C-81/98[5] (the "Alcatel judgment") and in case C-212/02[6] (Commission v. Austria").

order Ireland to pay the costs of this action.

Pleas in law and main arguments

Irish S.I. No. 329

Article 49 of the Irish S.I. No. 329, which is the Irish transposition measure of Directive 2004/18/EC, requires that tenderers be informed of the award decision by the most rapid means of communication as soon as practicable after the contracting authority took the decision. Calculated from the date on which tenderers were informed of the award decision, the standstill period which needs to elapse before the conclusion of the contract must be at least 14 days.

However, under the Irish law, the contracting authority is required to give the reasons for the rejection of a tender only when it receives such a request. The contracting authority must provide the reasons "as soon as possible and in any event no later than 15 days". In the Commission's view, this means that the standstill period may have already lapsed by the time an unsuccessful tenderer is fully informed of the reasons for the rejection of his offer.

In order to comply with the requirements that derive from the case law of the Court of Justice in its Alcatel judgement and in Commission vs Austria it is essential to ensure that the award decision is reasoned in due time to allow it to be the subject of an effective appeal, undertaken within the standstill period. The Commission submits that the Irish rules are not in line with this requirement as they do not guarantee that tenderers are informed of the reasons for the rejection of their offer in due time and well before the expiry of the standstill period. This impedes the tenderers' right to effective legal remedies, as required by directive 89/665/EEC.

Irish S.I. No. 50 of 2007

According to article 51 of S.I. No. 50 of 2007, which is the Irish transposition measure of directive 2004/17/EC, when contracting entities notify tenderers of the award decision they must indicate to the

unsuccessful tenderers the "principal reason, or reasons, why the tender is not the selected tender". The "characteristics and the relative advantages of the selected tender" shall be communicated by the contracting entity to the unsuccessful tenderers "as soon as practicable, and in any case within 15 days" after receiving a request to do so. The standstill period is 14 days, calculated from the notification of the award decision. In the Commission's view this means that the standstill period might already have lapsed by the time an unsuccessful tenderer is fully informed of the reasons for the rejection of his offer.

The Commission submits that, regarding award procedures covered by directives 2004/17/EC and 92/13/EEC, the Irish legislation establishes the rules for the notification of tenderers in a manner that restricts the unsuccessful tenderers' right to effective legal remedies and is not in conformity with the remedies directives in force, directives 89/665/EEC and 92/13/EEC, as interpreted by the Court of Justice.

_____

[1] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts OJ L 134, p. 114

[2] - Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors OJ L 134, p. 1

[3] - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts OJ L 395, p. 33

[4] - Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors OJ L 76, p. 14

[5] - C-81/98 - Alcatel Austria AG and others, Siemens AG Österreich, Sag-Schrack Anlagentechnik AK v. Bundesministerium für Wissenschaft und Verkehr - judgment of 28 October 1999

[6] - C-212/02 - Commission v. Republic of Austria - judgment of 24 June 2004

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ORDER OF THE COURT (Sixth Chamber)

20 May 2009 (*)

(Reference for a preliminary ruling – Inadmissibility)

In Case C-454/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal in Northern Ireland (United Kingdom), made by decision of 8 September 2008, received at the Court on 16 October 2008, in the proceedings

Seaport Investments Limited

v

Department of the Environment for Northern Ireland,

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen and C. Toader (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Articles 3, 5 and 6 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30).

2 The reference was made in the course of proceedings between Seaport Investments Limited and the Department of the Environment for Northern Ireland concerning the lawfulness of the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004.

3 The reference for a preliminary ruling from the Court of Appeal in Northern Ireland comprises an order that merely indicates that the questions set out in the schedule thereto are to be referred to the Court of Justice.

4 In that schedule, the national court referred the following questions to the Court for a preliminary ruling:

‘(1) On the proper construction of Directive [2001/42] where a State authority which prepares a plan falling within Article 3 is itself the authority charged with overall environmental responsibility in the Member State, is it open to the Member State to refuse to designate under Article 6(3) any authority to be consulted for the purposes of Articles 5 and 6?

(2) On the proper construction of the directive, where the authority preparing a plan falling within Article 3 is itself the authority charged with overall environmental responsibility in the Member State, is the Member State required to ensure that there is a consultation body which will be designated that is separate from that authority?

(3) On the proper construction of the directive, may the requirement in Article 6(2) to the effect that the authorities referred to in Article 6(3) and the public referred to in 6(4) be given an early and effective opportunity to express their opinion “within appropriate timeframes”, be transposed by rules which

provide that the authority responsible for preparing the plan shall authorise the time-limit in each case within which opinions shall be expressed, or must the rules transposing the directive themselves lay down a time-limit, or different time-limits for different circumstances, within which such opinions shall be expressed?'

5 In addition, the order for reference is accompanied by a covering letter, enclosing the notice of the appeal by the Department of the Environment for Northern Ireland before the Court of Appeal in Northern Ireland; the order of 13 November 2007 of the High Court of Justice in Northern Ireland, Queen's Bench Division; and also the two judgments of that court of 7 September and 13 November 2007 against which the appeal has been lodged.

Admissibility of the reference for a preliminary ruling

6 It should be recalled that it has been consistently held that the procedure provided for by Article 234 EC is an instrument for cooperation between the Court of Justice and the national courts, by means of which the Court of Justice provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them (see, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and the orders in Case C-361/97 *Nour* [1998] ECR I-3101, paragraph 10, and of 21 January 2005 in Case C-75/04 *Hanssens and Others*, paragraph 6).

7 In the context of that cooperation, it is for the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 16; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; and the order of 1 December 2005 in Case C-116/05 *Dhumeaux et Cie and Others*, paragraph 19).

8 Nevertheless, the Court has pointed out many times that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, inter alia, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; Case C-470/04 *N* [2006] ECR I-7409, paragraph 69; and the order of 5 May 2008 in Case C-386/07 *Hospital Consulting and Others*, paragraph 31).

9 The Court has also stressed that it is important for the national court to set out the precise reasons why it was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling (see, inter alia, the orders in Case C-9/98 *Agostini* [1998] ECR I-4261, paragraph 6; of 13 July 2006 in Case C-166/06 *Eurodomus*, paragraph 10; and *Hospital Consulting and Others*, paragraph 32).

10 Since it is the order for reference which serves as the basis of the proceedings before the Court, it is for the national court to explain, in the order for reference itself, the factual and legislative context of the main proceedings, the reasons which have led the court to raise the question of the interpretation of certain provisions of Community law in particular, and the connection which it establishes between those provisions and the national law applicable to the case (see, to that effect, the orders in Case C-116/96 REV *Reisebüro Binder* [1998] ECR I-1889, paragraph 8, and Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraphs 23 and 24).

11 In that connection, it should be noted that the information provided in orders for reference serves not only to enable the Court to give helpful answers but also to give the governments of the Member States and the other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that that opportunity is safeguarded, bearing in mind that under that provision only the orders for reference are notified to the interested parties, accompanied by a translation into the official language of each Member State (see Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6, and the orders in *Laguillaumie*, paragraphs 14 and 24; *Hanssens and Others*, paragraph 10; and *Dhumeaux et Cie and Others*, paragraph 22).

12 In the present case, it is clear that the order for reference does not contain any information setting out the legislative and factual context of the main proceedings, since the Court of Appeal in Northern Ireland merely appended to the letter accompanying the order for reference documents relating to the proceedings before the national courts. In addition, the referring court does not set out sufficiently clearly and precisely the reasons for its uncertainty as to the interpretation of Articles 3, 5 and 6 of Directive 2001/42.

13 In those circumstances, it must be held, pursuant to Articles 92(1) and 103(1) of the Rules of Procedure,

that the reference for a preliminary ruling is manifestly inadmissible.

Costs

14 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Sixth Chamber) hereby orders:

The reference for a preliminary ruling made by the Court of Appeal in Northern Ireland by decision of 8 September 2008 is manifestly inadmissible.

[Signatures]

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* Language of the case: English.

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JUDGMENT OF THE COURT (Third Chamber)

28 January 2010 (*)

(Directive 89/665/EEC – Procedures for review of the award of public contracts – Period within which proceedings must be brought – Date from which the period for bringing proceedings starts to run)

In Case C-406/08,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice (England and Wales), Queen's Bench Division (United Kingdom), made by decision of 30 July 2008, received at the Court on 18 September 2008, in the proceedings

Uniplex (UK) Ltd

v

NHS Business Services Authority,

THE COURT (Third Chamber),

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

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

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

after considering the observations submitted on behalf of:

– Uniplex (UK) Ltd, by M. Sheridan, Barrister, and A. Stanic, Solicitor,

– NHS Business Services Authority, by R. Williams, Barrister,

– the United Kingdom Government, by I. Rao, acting as Agent, and K. Smith, Barrister,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, and A. Collins SC,

– the Commission of the European Communities, by E. White and M. Konstantinidis, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1) ('Directive 89/665'), with regard to the date from which the period for bringing proceedings starts to run in public procurement cases.

2 The reference has been made in the context of a dispute between Uniplex (UK) Ltd ('Uniplex') and NHS Business

Services Authority ('NHS') concerning the conclusion of a framework agreement.

Legal context

Community legislation

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

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

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

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

5 Article 41(1) and (2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) provides:

'1. Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities.

2. On request from the party concerned, the contracting authority shall as quickly as possible inform:

– any unsuccessful candidate of the reasons for the rejection of his application,

– any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 23, paragraphs 4 and 5, the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

– any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken may in no circumstances exceed 15 days from receipt of the written request.'

National legislation

6 Regulation 47(7)(b) of the Public Contracts Regulations 2006 ('the 2006 Regulations'), adopted in order to implement Directive 89/665 into domestic law, provides:

'Proceedings under this regulation must not be brought unless –

...

(b) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 Uniplex, a company established in the United Kingdom, is the sole distributor in that Member State of haemostats manufactured by Gelita Medical BV, a company established in the Netherlands.

8 NHS is part of the National Health Service, the State-owned and -operated public health service in the United Kingdom. It is a contracting authority for the purposes of Directive 2004/18.

9 On 26 March 2007 NHS launched a restricted tendering procedure for the conclusion of a framework agreement for the supply of haemostats. A notice to that effect was published in the *Official Journal of the European Union* on 28 March 2007.

10 On 13 June 2007, NHS issued an invitation to tender to five suppliers, including Uniplex, which had expressed interest in that framework agreement. Tenders were to be submitted by 19 July 2007.

11 The award criteria, with the relevant weighting to be given to each, set out in the tendering documentation sent to the tenderers, were as follows: price and other cost effectiveness factors (30%); quality and clinical acceptability (30%); product support and training (20%); delivery performance and capability (10%); product range/development (5%); and environmental/sustainability (5%).

12 Uniplex submitted its tender on 18 July 2007.

13 On 22 November 2007, NHS sent to Uniplex a letter indicating that it had decided to conclude a framework agreement with three tenderers. Uniplex was notified that it would not be awarded a framework agreement, as it had obtained the lowest marks of the five tenderers which had been invited to submit, and which had submitted, bids. That letter set out the award criteria, with the corresponding weighting, and indicated the names of the successful tenderers, the range of the successful scores and Uniplex's evaluated score.

14 According to that letter, the range of the successful scores was between 905.5 and 971.5, whereas Uniplex had obtained a score of 568.

15 The letter of 22 November 2007 also informed Uniplex of its right to challenge the decision to conclude the framework agreement in question, of the mandatory 10-day standstill period that would apply from the date of notification of that decision to conclusion of the framework agreement, and of Uniplex's entitlement to seek an additional debriefing.

16 Uniplex requested a debriefing by e-mail dated 23 November 2007.

17 NHS replied on 13 December 2007 by providing details of its approach to the evaluation of the award criteria as to characteristics and relative advantages of the successful tenders in relation to Uniplex's tender.

18 That letter stated, inter alia, first, that Uniplex had been given a score of zero for price and other cost effectiveness factors because it had submitted its list prices. All the other tenderers had offered discounts on their list prices. Secondly, with respect to the delivery performance and capability criterion, all tenderers which were new to the haemostats market in the United Kingdom received a score of zero for the sub-criterion relating to customer base in the United Kingdom.

19 On 28 January 2008, Uniplex sent NHS a letter before action alleging a number of breaches of the 2006 Regulations. Uniplex claimed in that letter that time did not start to run for the bringing of proceedings until 13 December 2007. Uniplex requested a reply from NHS by 13 February 2008, but added that if NHS took the view that time did not run from that date, it should reply by 6 February 2008.

20 By letter dated 11 February 2008, NHS notified Uniplex that there had been a change of circumstances. It had been discovered that the bid of Assut (UK) Ltd was non-compliant and that B. Braun UK Ltd, which had been placed fourth under the evaluation of tenders, had been awarded a position on the framework agreement in place of Assut (UK) Ltd.

21 NHS responded to Uniplex's letter before action by letter dated 13 February 2008, denying the various allegations made by Uniplex. In that letter, NHS also asserted, as a preliminary point, that the events giving rise to Uniplex's complaints had occurred no later than 22 November 2007, which was the date on which the decision not to include Uniplex in the framework agreement had been communicated to it. NHS asserted that 22 November 2007 was the latest date from which time began to run for the purposes of Regulation 47(7)(b) of the 2006 Regulations.

22 Uniplex responded by letter on 26 February 2008. In that letter, it continued to maintain that the period for bringing proceedings under the 2006 Regulations did not begin to run until 13 December 2007.

23 On 12 March 2008, Uniplex brought proceedings before the High Court of Justice (England and Wales), Queen's Bench Division, inter alia seeking, first, a declaration that NHS had breached the applicable public procurement rules and, second, damages.

24 The High Court of Justice (England and Wales), Queen's Bench Division, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'Where an economic operator is challenging in national proceedings the award of a framework agreement by a contracting authority following a public procurement exercise in which he was a tenderer and which was required to be conducted in accordance with Directive 2004/18/EC (and applicable implementing national provisions), and is in those proceedings seeking declarations and damages for breach of applicable public procurement provisions as regards that exercise and award:

(a) is a national provision such as Regulation 47(7)(b) of the Public Contracts Regulations 2006 which states that those proceedings are to be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period, to be interpreted, in light of Directive 89/665/EEC, Articles 1 and 2, and the Community-law principle of equivalence and the Community-law requirement for effective legal protection, and/or the principle of effectiveness, and having regard to any other relevant principles of EC law, as conferring an individual and unconditional right upon the tenderer against the contracting authority such that the time for the bringing of proceedings challenging such a tender exercise and award starts running as from the date when the tenderer knew or ought to have known that the procurement procedure and award infringed EC public procurement law or as from the date of breach of the applicable public procurement provisions; and

(b) in either event how is a national court then to apply (i) any requirement for proceedings to be brought promptly and (ii) any discretion as to extending the national limitation period for the bringing of such proceedings?'

The questions referred

The first question

25 By its first question, the national court asks, in essence, whether Article 1 of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules starts to run from the date of the infringement of those rules or from the date on which the claimant knew, or ought to have known, of that infringement.

26 The objective of Directive 89/665 is to guarantee the existence of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures. However, Directive 89/665 contains no provision specifically covering time-limits for the applications for review which it seeks to establish. It is therefore for the internal legal order of each Member State to establish such time-limits (Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 71).

27 The detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665 (*Universale-Bau and Others*, paragraph 72).

28 It is for that reason appropriate to determine whether, in the light of the purpose of Directive 89/665, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on individuals by Community law (*Universale-Bau and Others*, paragraph 73).

29 In that regard, it should be recalled that Article 1(1) of Directive 89/665 requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (*Universale-Bau and Others*, paragraph 74).

30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

31 It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an

infringement of the applicable provisions and as to the appropriateness of bringing proceedings.

32 It follows that the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see, to that effect, *Universale-Bau and Others*, paragraph 78).

33 This conclusion is supported by the fact that Article 41(1) and (2) of Directive 2004/18, which was in force at the time of the facts in the main proceedings, requires contracting authorities to notify unsuccessful candidates and tenderers of the reasons for the decision concerning them. Such provisions are consistent with a system of limitation periods under which those periods start to run from the date on which the claimant knew, or ought to have known, of the alleged infringement of the provisions applicable in the field of public procurement.

34 The same conclusion is also supported by the amendments made to Directive 89/665 by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), even though the period for transposition of that directive did not expire until after the facts in the main proceedings had occurred. Article 2c of Directive 89/665, introduced by Directive 2007/66, provides that the decision of the contracting authority is to be communicated to each candidate or tenderer, accompanied by a summary of the relevant reasons, and that the period for making an application for review expires only after a specified number of days following that communication.

35 The answer to the first question accordingly is that Article 1(1) of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

The second question

36 The second question consists of two parts. The first concerns the interpretation of Directive 89/665 in relation to a requirement under national law that proceedings be brought promptly. The second relates to the effects which that directive has on the discretion conferred on the national court to extend periods within which proceedings must be brought.

The first part of the second question

37 By the first part of the second question, the national court asks, in essence, whether Directive 89/665 is to be interpreted as precluding a provision, such as Regulation 47(7)(b) of the 2006 Regulations, which requires that proceedings be brought promptly.

38 As observed in paragraph 29 of this judgment, Article 1(1) of Directive 89/665 requires Member States to guarantee that decisions of contracting authorities can be subjected to effective review which is as swift as possible. In order to attain the objective of rapidity pursued by that directive, Member States may impose limitation periods for actions in order to require traders to challenge promptly preliminary measures or interim decisions taken in public procurement procedures (see, to that effect, *Universale-Bau and Others*, paragraphs 75 to 79; Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraphs 30 and 36 to 39; and Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraphs 50 and 51).

39 The objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (see, to that effect, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 24, and Case C-221/94 *Commission* v *Luxembourg* [1996] ECR I-5669, paragraph 22).

40 Furthermore, the objective of rapidity pursued by Directive 89/665 does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of effective review proceedings laid down in Article 1(1) of that directive.

41 A national provision such as Regulation 47(7)(b) of the 2006 Regulations, under which proceedings must not be brought ‘unless … those proceedings are brought promptly and in any event within three months’, gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made ‘promptly’ within the terms of that provision.

42 As the Advocate General observed in point 69 of her Opinion, a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665.

43 It follows that the answer to the first part of the second question is that Article 1(1) of Directive 89/665 precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

The second part of the second question

44 By the second part of the second question, the national court asks, in essence, which effects follow from Directive 89/665 in respect of the discretion conferred on the national court to extend periods within which proceedings must be brought.

45 In the case of national provisions transposing a directive, national courts are bound to interpret national law, so far as possible, in the light of the wording and purpose of the directive concerned in order to achieve the result sought by that directive (see Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113).

46 In the present case, it is for the national court, as far as is at all possible, to interpret the domestic provisions establishing the limitation period in a manner which accords with the objective of Directive 89/665 (see, to that effect, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 63, and *Lämmerzahl*, paragraph 62).

47 In order to satisfy the requirements in the answer given to the first question, the national court dealing with the case must, as far as is at all possible, interpret the national provisions governing the limitation period in such a way as to ensure that that period begins to run only from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question.

48 If the national provisions at issue do not lend themselves to such an interpretation, that court is bound, in exercise of the discretion conferred on it, to extend the period for bringing proceedings in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules.

49 In any event, if the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying those provisions, in order to apply Community law fully and to protect the rights conferred thereby on individuals (see, to that effect, *Santex*, paragraph 64, and *Lämmerzahl*, paragraph 63).

50 The answer to the second part of the second question is accordingly that Directive 89/665 requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.

Costs

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

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

1. Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

2. Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national

provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

3. Directive 89/665, as amended by Directive 92/50, requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, as amended by Directive 92/50, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.

[Signatures]

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* Language of the case: English.

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Judgment of the Court (Third Chamber) of 28 January 2010 (Reference for a preliminary ruling from the High Court of Justice (Queen's Bench Division) - United Kingdom) - Uniplex (UK) Ltd v NHS Business Services Authority

(Case C-406/08) [1]

(Directive 89/665/EEC - Procedures for review of the award of public contracts - Period within which proceedings must be brought - Date from which the period for bringing proceedings starts to run)

Language of the case: English

Referring court

High Court of Justice (Queen's Bench Division)

Parties to the main proceedings

Applicant: Uniplex (UK) Ltd

Defendant: NHS Business Services Authority

Re:

Reference for a preliminary ruling - High Court of Justice (Queen's Bench Division) - Interpretation of Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) - National legislation providing for a period of three months in which to apply for review - Date from which time begins to run - Date on which the Community provisions relating to the award of public contracts were infringed or date on which the complainant became aware of that infringement

Operative part of the judgment

1. Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

2. Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

3. Directive 89/665, as amended by Directive 92/50, requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, as amended by Directive 92/50, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.

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[1] - OJ C 301, 22.11.2008.

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OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 October 2009 [1](1)

Case C–406/08

Uniplex (UK) Ltd
v
NHS Business Services Authority

(Reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division, Leeds District Registry (United Kingdom))

(Public procurement – Directive 89/665/EEC – Review procedure under national law – Effective legal protection – Limitation periods – Point at which time starts running – Whether the applicant knew or 'ought to have' known of the breach of procurement law – Requirement that proceedings be brought 'promptly')

I – Introduction

1. This reference for a preliminary ruling from the High Court of Justice of England and Wales (2) gives the Court of Justice of the European Communities an opportunity to develop its case-law on the remedies available to unsuccessful tenderers in public procurement procedures.

2. It is acknowledged that the Member States may lay down appropriate limitation periods for remedies of this kind. Clarification is required, however, in particular on the question of the time from which those limitation periods may start to run: the time at which the alleged breach of procurement law occurred, or the time at which the unsuccessful tenderer knew or should have known of the breach. This problem, whose practical effects should not be underestimated, arises in the context of a provision of English law under which the period for bringing applications for review starts to run regardless of the unsuccessful tenderer's knowledge of the breach of procurement law, and any extension of the period is at the discretion of the national court.

3. As regards the legal issues raised, the present case has certain points of contact with Case C–456/08 *Commission* v *Ireland*, in which I also deliver my Opinion today.

II – Legal context

A – *Community law*

4. The Community law context of the present case is defined by Directive 89/665/EEC, (3) as amended by Directive 92/50/EEC. (4) (5)

5. Article 1 of Directive 89/665 provides as follows:

‘1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC … decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

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

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.’ (6)

6. In addition, Article 2(1) of Directive 89/665 contains the following provision:

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

…

(b) either set aside or ensure the setting-aside of decisions taken unlawfully …

(c) award damages to persons harmed by an infringement.’

B – *National law*

7. For England, Wales and Northern Ireland, Directive 89/665 was transposed by Part 9 of the Public Contracts Regulations 2006 (‘the PCR 2006’), (7) Regulation 47 of which provides, in extract, as follows:

‘(1) The obligation on –

(a) a contracting authority to comply with the provisions of these Regulations, other than regulations …, and with any enforceable Community obligation in respect of a public contract, framework agreement or design contest …

…

is a duty owed to an economic operator.

…

(6) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court.

(7) Proceedings under this regulation must not be brought unless –

(a) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that contracting authority or concessionaire and of its intention to bring proceedings under this regulation in respect of it; and

(b) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

…

(9) In proceedings under this regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into.'

III – Facts and main proceedings

8. Uniplex (UK) Ltd (8) is a company established in the United Kingdom and an economic operator for the purposes of Directive 2004/18 and the PCR 2006. It is the sole distributor in the United Kingdom of haemostats manufactured by the Netherlands company Gelita Medical BV.

9. NHS Business Services Authority (9) is part of the public health service of the United Kingdom, the National Health Service, which is owned and operated by the State. It is a contracting authority for the purposes of Directive 2004/18 and the PCR 2006.

10. On 26 March 2007 NHS Business Services invited tenders, in a restricted procedure, for a framework agreement for the supply of haemostats to National Health Service institutions. (10) A notice to that effect was published in the *Official Journal of the European Union* on 28 March 2007.

11. By letter of 13 June 2007, NHS Business Services addressed an invitation to tender to five interested parties, including Uniplex. The deadline for the submission of tenders was 19 July 2007. Uniplex submitted its tender on 18 July 2007.

12. On 22 November 2007 Uniplex was informed by NHS Business Services in writing that awards had finally been made to three tenderers, but that Uniplex would not be awarded a framework agreement. The letter also set out the award criteria, the names of the successful tenderers, the evaluated score of Uniplex, and the range of the evaluated scores achieved by the successful tenderers. According to the criteria applied by NHS Business Services, Uniplex had achieved the lowest evaluated score of the five tenderers which had been invited to submit and had submitted bids. In the letter Uniplex was also informed of its right to challenge the award decision and to seek further information.

13. In reply to a separate request by Uniplex of 23 November 2007, NHS Business Services on 13 December 2007 gave details of its method of evaluation with reference to its award criteria, and also of the characteristics and relative advantages of the bids of the successful tenderers compared with the Uniplex tender.

14. On 28 January 2008 Uniplex sent NHS Business Services a letter before action alleging various breaches of the public procurement rules.

15. By letter of 11 February 2008, NHS Business Services informed Uniplex that the situation had changed. It had been found that the tender by Assut (UK) Ltd did not comply with the requirements, and B. Braun (UK) Ltd, which had been placed fourth in the evaluation of the tenders, had been included in the framework agreement instead of Assut (UK) Ltd.

16. After a further exchange of correspondence between Uniplex and NHS Business Services, in which inter alia the starting point of the period for bringing proceedings was disputed, Uniplex on 12 March 2008 commenced proceedings in the High Court, the court making the present reference. It seeks inter alia a declaration of the alleged breaches of procurement law, damages from NHS Business Services in respect of those breaches, and – if the court has jurisdiction to make such an order – an order that NHS Business Services award Uniplex a framework agreement.

17. The referring court is uncertain whether Uniplex brought its action in time and, if not, whether it should exercise its discretion to extend the period for bringing proceedings under Regulation 47(7)(b) of the PCR 2006.

IV – Order for reference and procedure before the Court

18. By order of 30 July 2008, received at the Court on 18 September 2008, the High Court stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling:

Where an economic operator is challenging in national proceedings the award of a framework agreement by a contracting authority following a public procurement exercise in which he was a

tenderer and which was required to be conducted in accordance with Directive 2004/18 (and applicable implementing national provisions), and is in those proceedings seeking declarations and damages for breach of applicable public procurement provisions as regards that exercise and award:

(a) is a national provision such as Regulation 47(7)(b) of the PCR 2006 which states that those proceedings are to be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the court considers that there is good reason for extending the period, to be interpreted, in light of Articles 1 and 2 of Directive 89/665 and the Community law principle of equivalence and the Community law requirement for effective legal protection, and/or the principle of effectiveness, and having regard to any other relevant principles of EC law, as conferring an individual and unconditional right upon the tenderer against the contracting authority such that the time for the bringing of proceedings challenging such a tender exercise and award starts running as from the date when the tenderer knew or ought to have known that the procurement procedure and award infringed EC public procurement law or as from the date of breach of the applicable public procurement provisions; and

(b) in either event how is a national court then to apply

(i) any requirement for proceedings to be brought promptly and

(ii) any discretion as to extending the national limitation period for the bringing of such proceedings?

19. In the procedure before the Court, in addition to Uniplex and NHS Business Services, the United Kingdom Government, Ireland and the Commission of the European Communities made written and oral observations. (11) The German Government also took part in the hearing.

V – Assessment

20. By its two questions, the High Court seeks essentially to know what requirements derive from Community law for the interpretation and application of limitation periods in the public procurement review procedure.

21. Directive 89/665 makes no express provision on the time-limits that apply to review procedures under Article 1 of the directive. (12) However, the Court has consistently held that the Member States may in the exercise of their procedural autonomy introduce reasonable limitation periods for bringing proceedings, provided that they comply with the principles of equivalence and effectiveness. (13) Those two principles are also reflected in Article 1 of Directive 89/665, the principle of equivalence in Article 1(2) and the principle of effectiveness in Article 1(1). (14)

22. In the present case it is the principle of effectiveness that is the focus of interest. *That* the United Kingdom can lay down limitation periods for applications for the review of decisions of contracting authorities is not in dispute. (15) The dispute between the parties concerns merely certain details of the interpretation and application of the national rules on limitation. They disagree on whether a limitation provision such as that in Regulation 47(7)(b) of the PCR 2006 has due regard to the requirements of Community law. In this connection the referring court wishes to know

– whether it may take as the point when time starts running the date of the breach of procurement law, or must take the date when the applicant knew or ought to have known of the breach (first question),

– whether in a review procedure it may dismiss an action as inadmissible if it has not been brought ‘promptly’ (first part of the second question), and

– how it should exercise its discretion with respect to a possible extension of time (second part of the second question).

23. It depends on the answers to those questions whether or not the referring court must regard the application brought by Uniplex in the main proceedings as brought in time within the meaning of Regulation 47(7)(b) of the PCR 2006.

24. I shall start by addressing the first question (see Section A below) and the second part of the

second question (see Section B below), which are closely connected, before turning to the first part of the second question (see Section C below).

25. Contrary to the oral submissions of NHS Business Services, the United Kingdom and Ireland, it cannot be decisive for the answer to those questions that a provision such as Regulation 47(7)(b) of the PCR 2006 may reflect a long tradition in the Member State concerned.

26. Certainly, when requirements of Community law are being interpreted, attention should indeed always be paid to whether they can be fitted into national law with as little friction as possible. For all that, the Court's primary function is to ensure that in the interpretation and application of European Community law the law is observed (first paragraph of Article 220 EC) and – working together with the national courts – to give effect to the rights that individuals derive from Community law.

A – *Relevance of knowledge of the breach of procurement law for determining when time starts running (first question)*

27. By its first question, the referring court seeks essentially to know whether it may take as the point when the limitation period starts running in review procedures under procurement law the date of the breach of procurement law, or must take the date when the applicant knew or ought to have known of the breach.

28. The opinions of the parties differ on this point. Uniplex, the German Government and the Commission take the view that, at least with reference to legal remedies that do not affect the validity of contracts, no limitation period may start before the applicant knew or ought to have known of the alleged breach of procurement law. By contrast, NHS Business Services, the United Kingdom Government and Ireland insist that the running of time cannot depend on whether the applicant knew or ought to have known of a breach of procurement law; it suffices to give the national courts a discretion to extend the limitation period.

29. The latter view is reflected in the practice of both the English courts (16) and the Irish courts. (17) According to that case-law, the period for review of a procurement decision starts to run, in accordance with Regulation 47(7)(b) of the PCR 2006, (18) regardless of whether the tenderer or candidate concerned knew or ought to have known of the breach of procurement law complained of. The applicant's lack of knowledge of the breach of procurement law may at most be relevant to extending the period, and in that respect is one of a number of aspects which the national court takes into account when exercising its discretion. (19)

30. Against the background of this dominant practice of the English courts, (20) it will be discussed below whether it is compatible with the requirements of Community law for a limitation period such as that in Regulation 47(7)(b) of the PCR 2006 to start running regardless of whether the applicant knew or ought to have known of the breach of procurement law in question.

31. Article 1(1) of Directive 89/665 requires it to be possible for decisions taken by contracting authorities to be reviewed for infringements of procurement law 'effectively and, in particular, as rapidly as possible'. That is an expression both of the principle of effectiveness ('effectively') and of the requirement of rapid action ('as rapidly as possible'). Neither of those concerns may be put into practice at the expense of the other. (21) A fair balance between them must instead be struck, and this is to be assessed in the light of the type and consequences of the particular legal remedy and the rights and interests of all parties concerned.

32. In my Opinion in *pressetext Nachrichtenagentur* I have previously suggested a solution based on a differentiation between primary and secondary legal protection. (22)

– The difference between primary and secondary legal protection

33. If a remedy is aimed at having a contract already concluded with a successful tenderer declared void (*primary legal protection*), it is reasonable to lay down an absolute limitation period of comparatively short duration. The particularly severe legal consequence of the invalidity of an already concluded contract is justification for laying down a period that also runs regardless of whether the applicant knew, or at least ought to have known, that the award of the contract was contrary to procurement law. Both for the contracting authority and for its contractual partner, there is a clear need, deserving of protection, for legal certainty with respect to the validity of the contract that has been concluded. (23) The requirement of review 'as rapidly as possible' within the meaning

of Article 1(1) of Directive 89/665 therefore carries particular weight in the field of primary legal protection.

34. It is otherwise if a remedy is directed merely at a declaration of an infringement of procurement law and possibly an award of compensation (*secondary legal protection*). Such a remedy does not affect the existence of a contract already concluded with a successful tenderer. The contractual partners' need for certainty of planning and their interest in performing the public contract swiftly are not affected. Accordingly, there is no occasion to subject applications for secondary legal protection to the same strict limitation periods as applications for primary legal protection. On the contrary, the aim of effective review which Article 1(1) of Directive 89/665 imposes on the Member States argues in favour of giving more weight to the legal protection interests of the unsuccessful tenderer or candidate, and hence in favour of more generous limitation periods which do not start running until the person concerned knows or ought to know of the alleged breach of procurement law. (24)

35. Contrary to the view taken by NHS Business Services and the United Kingdom Government, such a differentiation between primary and secondary legal protection does not lead to 'lack of transparency' and 'legal uncertainty'. Nor is it suitable only for cases such as *pressetext Nachrichtenagentur* in which a contracting authority makes a 'direct award' with no prior notice of the award.

36. The distinction between primary and secondary legal protection is, rather, of general validity. It makes it possible to strike a fair balance between 'effective review' and 'review as rapidly as possible', and is sketched out in Directive 89/665 itself. Even in the original version of the directive, a distinction is drawn in Article 2(1)(b) and (c) between the setting-aside of unlawful decisions on the one hand and the awarding of compensation on the other. In future, Articles 2d, 2e and 2f of Directive 89/665, as amended by Directive 2007/66, will show more plainly this distinction between primary and secondary legal protection, also and particularly with respect to limitation periods. (25)

37. The present case concerns not primary but only secondary legal protection. That becomes especially clear if one looks at the introductory words to the questions formulated by the High Court. That passage speaks exclusively of applications for a declaration of a breach of procurement law and for the award of compensation. That is the context of the questions referred. (26)

38. There is therefore no reason to subject the applications brought by Uniplex in the main proceedings to the same strict limitation periods that might perhaps apply to applications for a declaration of the invalidity of a contract or indeed for a contracting authority to be ordered to enter into a contract.

– Time running from when the applicant knew or 'ought to have' known of the breach of procurement law

39. The principle of effectiveness, as expressed in Article 1(1) of Directive 89/665, requires that a limitation period for claims for compensation and applications for declarations of breaches of procurement law may not start to run until the time when the applicant knew or ought to have known of the alleged breach of procurement law. (27)

40. The Court has also expressed this in *Universale-Bau and Others*: (28) it considers that the spirit and purpose of rules on limitation are to ensure that unlawful decisions of contracting authorities, *from the moment they become known to those concerned*, (29) are challenged and corrected as soon as possible. (30)

41. It is of course for the referring court to ascertain the time from which the person concerned knew or ought to have known of a breach of procurement law. (31) In order to give a useful answer, however, the Court may, in a spirit of cooperation with national courts, provide all the guidance that it regards as necessary. (32)

42. The mere fact that a tenderer or candidate has learnt that his tender has been unsuccessful does not yet mean that he knows of any breach of procurement law. Consequently, that fact on its own cannot yet set any limitation periods running for applications for secondary legal protection. As Uniplex correctly submits, an unsuccessful tenderer or candidate for his part could also not rely, in an application for review, on the mere statement that his tender had not been accepted.

43. Only once the unsuccessful tenderer or candidate has been informed of the essential reasons

for his being unsuccessful in the award procedure may it generally be presumed that he knew or in any case ought to have known of the alleged breach of procurement law. (33) Only from then on is it possible for him sensibly to prepare a possible application for review and to estimate its chances of success. (34) Before receiving such reasons, on the other hand, the person concerned cannot as a rule effectively exercise his right to a review. (35)

44. Directive 2004/18 accordingly lays down already today, in Article 41(1) and (2), that contracting authorities must inform unsuccessful tenderers and candidates of the reasons for their rejection. To the same effect, Article 2c of Directive 89/665, inserted by Directive 2007/66, provides for future cases that the communication of the contracting authority's decision to each tenderer or candidate must be accompanied by a summary of the relevant reasons, and that any limitation periods for applications for review may not expire until a certain number of calendar days after that communication.

45. Merely for the sake of completeness, it may be mentioned that the time when the period starts running for bringing a claim for compensation must not be made to depend on the fact that the applicant knew or ought to have known of the *damage* incurred by him. (36) The damage that follows from a breach of duty sometimes comes to light only after some delay. Waiting for knowledge of the damage would thus run counter to the principle of review 'as rapidly as possible' within the meaning of Article 1(1) of Directive 89/665. In return, however, it must be made possible for the tenderer or candidate concerned, if necessary, first to make an application for a declaration of a breach of procurement law and then to quantify the damage and claim compensation in subsequent proceedings.

– The national court's discretion to grant an extension of the limitation period

46. NHS Business Services, the United Kingdom and Ireland object that effective legal protection does not necessarily require, however, that the limitation periods for seeking remedies in review proceedings run only from the time when the tenderer or candidate concerned knew or ought to have known of the alleged infringement of procurement law. They submit that a provision such as Regulation 47(7)(b) of the PCR 2006 ensures effective legal protection by giving the national court a discretion to extend, if appropriate, the period for bringing proceedings.

47. That argument does not convince me.

48. Article 1(1) in conjunction with Article 1(3) of Directive 89/665 gives any person who has or had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement an *individual right* to review of the decisions of the contracting authority. (37) As I explain in the parallel case of *Commission* v *Ireland*, the effective assertion of such a claim cannot be made to depend on the discretion of a national body, not even the discretion of an independent court. (38)

49. Regulation 47(7)(b) of the PCR 2006 does not give the national court any legal criteria for the exercise of its discretion as regards a possible extension of time. At the hearing before the Court, all the parties moreover agreed in submitting that the applicant's lack of knowledge of a breach of procurement law is only one of several aspects which influence the national court's assessment. Thus lack of knowledge *may* lead to an extension of the period, but this is not mandatory. Furthermore, the national court may, as Ireland observes, limit an extension of time to specific complaints and refuse it for others, so that an action by the unsuccessful tenderer or candidate may well be only partially admissible.

50. It thus becomes unpredictable for the person concerned in the individual case whether it will be worth his while to claim a legal remedy. Such a legal position may deter unsuccessful tenderers or candidates – especially those from other Member States – from asserting their legal right to review of the decisions of contracting authorities. The objective of effective review, as prescribed by Article 1(1) of Directive 89/665, cannot be achieved with certainty in those circumstances.

– Practical problems in determining whether an applicant 'knows' or 'ought to know'

51. NHS Business Services and the United Kingdom further assert that it will lead to considerable practical problems if a limitation period does not start running until the date on which the unsuccessful tenderer or candidate knew or ought to have known of the alleged breach of procurement law. It is not easy, for example, to assess what the knowledge must relate to in the particular case or at what time it was acquired or from when it must be presumed.

52. It suffices to point out here that the same practical problems also arise if a court, when exercising its discretion as to a possible extension of time, has to consider the time from which the applicant knew or ought to have known of the breach of procurement law he complains of. A provision such as Regulation 47(7)(b) of the PCR 2006 cannot avoid such practical problems; it merely treats them from a different point of view.

– The deterrent effect of actions for compensation

53. Ireland also objects that an overgenerous approach to time-limits for bringing actions for compensation may have a highly deterrent effect on contracting authorities (a 'chilling effect') and cause considerable delay to award procedures. This submission was adopted at the hearing by NHS Business Services and the United Kingdom.

54. This argument is also unconvincing, however.

55. Successful actions for compensation by unsuccessful tenderers or candidates may undoubtedly entail a substantial financial burden for the contracting authority. This risk is, however, the price to be paid by a contracting authority so that effective legal protection in connection with the award of public contracts can be provided. Any attempt to minimise the attendant financial risks for the contracting authority will necessarily be at the expense of effective legal protection.

56. A too restrictive approach to the conditions for obtaining secondary legal protection would ultimately also jeopardise the achievement of the objectives of the review procedure. Those objectives do not only include the provision of legal protection for the tenderers and candidates concerned. The review procedure is in fact also intended to have a disciplinary effect on contracting authorities, by ensuring that the rules of European procurement law – in particular the requirement of transparency and the prohibition of discrimination – are observed and any infringements penalised.

57. Merely in passing, it may be observed that not even a limitation rule such as Regulation 47 (7)(b) of the PCR 2006 is capable of excluding the chilling effect mentioned. As already noted, that provision leaves it in the discretion of the national court to extend the limitation periods for unsuccessful tenderers or candidates, especially where they had no previous knowledge of the alleged infringement of procurement law. This possibility of an extension of time may thus lead to the contracting authority, long after the contract has been concluded with the successful tenderer or candidate, still being exposed to the risk of claims for compensation. Because of the unpredictability of the exercise of judicial discretion, this risk is if anything more difficult for the contracting authority to calculate in the context of Regulation 47(7)(b) of the PCR 2006 than with a rule under which the limitation period starts to run as soon as the person concerned knows or ought to know of the alleged breach of procurement law.

B – *The national court's discretion to grant an extension of time (second part of the second question)*

58. The second part of the second question is closely connected with the first question. The referring court essentially wishes to know what steps it should take if an unsuccessful tenderer or candidate did not initially know of the alleged breach of procurement law, and was not in a position in which he ought to have known of it, so that he could not make an application for review within the three-month period under Regulation 47(7)(b) of the PCR 2006.

59. According to settled case-law, the courts of the Member States are required to interpret and apply national law consistently with directives. (39) Specifically with respect to procurement review procedures, they must interpret the national provisions laying down a limitation period, as far as is at all possible, in such a way as to ensure observance of the principle of effectiveness deriving from Directive 89/665. (40)

60. As I have explained in connection with the first question, (41) limitation periods for actions for declarations and compensation in connection with public contracts may not start to run until the time when the applicant knew or ought to have known of the alleged breach of procurement law. The referring court must therefore do whatever lies within its jurisdiction to achieve that objective. (42)

61. Consequently, the referring court is required above all to deal with the limitation period under Regulation 47(7)(b) of the PCR 2006, in harmony with the directive, in such a way that in the

case of proceedings for declarations and compensation it does not already start to run from the time of the breach of procurement law, but only from the time at which the applicant knew or ought to have known of that breach of procurement law.

62. Should Regulation 47(7)(b) of the PCR 2006 not be amenable to such an interpretation, then the referring court would *as an alternative* have to look, in the context of its discretion to extend the time-limit, for a solution that was compliant with the directive. The aim of effective review as prescribed by Article 1(1) of Directive 89/665 would then lead to the national court's discretion being as it were 'reduced to zero'. It would thus be *obliged* to grant an extension of time to an applicant such as Uniplex.

63. That extension of time would have to be at least long enough for the applicant to have available for the preparation and submission of his claim, from the point at which he knew or ought to have known of the alleged infringement of procurement law, the three months mentioned in Regulation 47(7)(b) of the PCR 2006. In addition, the national court of course remains free to grant, in the exercise of its discretion, having regard to the circumstances of the individual case, a more generous extension of time, if it considers this necessary in order to arrive at a fair solution.

C – *The requirement to apply for review promptly (first part of the second question)*

64. By the first part of its second question, the referring court wishes essentially to know whether in review proceedings it can dismiss an action as inadmissible if it has not been submitted 'promptly'.

65. According to the limitation provision in Regulation 47(7)(b) of the PCR 2006, an application for review is only admissible if it is brought 'promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose'. This requirement to initiate the review procedure promptly apparently allows the English court, in its discretion, to dismiss applications for review as inadmissible even before the expiry of the three-month period. At the hearing before the Court, the parties to the main proceedings and the United Kingdom Government agreed (43) that in their practice the English courts do in fact make use of this possibility of dismissing an application on the ground of 'lack of promptness'. (44)

66. The application of a limitation period must not, however, lead to the exercise of the right to review of award decisions being deprived of its practical effectiveness. (45)

67. Article 1(1) of Directive 89/665 requires that it must be possible for decisions of contracting authorities to be reviewed 'effectively and, in particular, as rapidly as possible'. As I explain in more detail in my Opinion in Case C–456/08 *Commission* v *Ireland*, (46) in order to achieve that aim of the directive the Member States must create a clear legal framework in the field in question. They are obliged to establish a sufficiently precise, clear and transparent legal position, so that individuals can know what their rights and obligations are.

68. For a limitation rule such as Regulation 47(7)(b) of the PCR 2006, the requirements of clarity, precision and predictability apply to a special degree. Lack of clarity with respect to the applicable time-limits is liable, in view of the threat of an action being time-barred, to entail serious harmful consequences for individuals and undertakings.

69. A limitation period such as that under Regulation 47(7)(b) of the PCR 2006, the duration of which is placed at the discretion of the competent court by the criterion 'promptly', is not predictable in its effects. The tenderers and candidates concerned are uncertain as to how much time they have to prepare their applications for review properly, and they are scarcely able to estimate the prospects of success of such applications. The objective imposed by Article 1(1) of Directive 89/665 of effective review of decisions taken by the contracting authorities is thereby missed. (47)

70. In consequence, the national courts may not declare an application for review, brought within the three-month period under Regulation 47(7)(b) of the PCR 2006, inadmissible on the ground of 'lack of promptness'. They are obliged to interpret and apply the provisions of national law in a manner consistent with the directive. (48) With regard specifically to review procedures under procurement law, they must – as already mentioned – interpret the national rules laying down a limitation period, as far as is at all possible, in such a way as to ensure observance of the principle of effectiveness deriving from Directive 89/665. (49)

71. In this connection I may point out that a criterion of promptness need not necessarily be understood in the sense of an independent limitation period. If a provision combines an indication of time expressed in days, weeks, months or years with the word 'promptly' or a similar expression, that addition can also be interpreted as emphasising the need for rapid action and reminding applicants of their responsibility, in their own interests, for taking the necessary steps as early as possible, in order best to protect their interests. (50)

72. Against that background, the referring court will have to examine whether the criterion of acting 'promptly' in Regulation 47(7)(b) of the PCR 2006 can be interpreted to the effect that it does not constitute an independent barrier to admissibility but merely contains a reference to the need for rapidity.

73. Should it not be possible to interpret Regulation 47(7)(b) of the PCR 2006 to that effect, in compliance with the directive, the national court is obliged to apply Community law to its full extent and to protect the rights it confers on individuals, if necessary by disapplying any provision whose application would in the particular case lead to a result contrary to Community law. (51)

VI – Conclusion

74. On the basis of the above considerations, I propose that the Court give the following answers to the reference for a preliminary ruling from the High Court of Justice:

(1) Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts requires that a limitation period for applications for a declaration of an infringement of procurement law and for actions for compensation does not start to run until the time at which the applicant knew or ought to have known of the alleged infringement of procurement law.

(2) Article 1(1) of Directive 89/665/EEC precludes a limitation provision which allows the national court in its discretion to dismiss applications for a declaration of an infringement of procurement law and actions for damages as inadmissible by reference to a requirement to bring proceedings promptly.

(3) The national court is obliged to do whatever lies within its jurisdiction to achieve a result compatible with the aim of Directive 89/665/EEC. If such a result cannot be achieved by way of interpreting and applying the limitation rule in a manner consistent with the directive, the national court is obliged to leave that rule unapplied.

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1 – Original language: German.

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2 – High Court of Justice of England and Wales, Queen's Bench Division, Leeds District Registry.

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3 – Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

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

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5 – The latest amendments to Directive 89/665 made by Directive 2007/66 are not relevant to the present case, as the period for their transposition lasts until 20 December 2009 (Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31); see in particular

Article 3(1)).

6 – The reference in Article 1(1) of Directive 89/665 to Directive 77/62 is to be read as a reference to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114; corrigendum at OJ 2004 L 351, p. 44). This follows from Article 82(2) of Directive 2004/18 in conjunction with Article 33(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

7 – SI 2006 No 5, in force from 31 January 2006.

8 – 'Uniplex'.

9 – 'NHS Business Services'.

10 – The award procedure was carried out by an authorised agent of NHS Business Services, known as NHS Supply Chain.

11 – The hearing in the present case took place on the same day as that in Case C–456/08 *Commission* v *Ireland*.

12 – See also my Opinion in Case C–454/06 *pressetextNachrichtenagentur* [2008] ECR I–4401, point 154. In future, however, Article 2c of Directive 89/665, as amended by Directive 2007/66, will define basic Community law requirements for national time-limits for applications for review.

13 – See, for example, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C–231/96 *Edis* [1998] ECR I–4951, paragraphs 20 and 35; Case C–30/02 *Recheio – Cash & Carry* [2004] ECR I–6051, paragraph 18; and Case C–40/08 *AsturcomTelecomunicaciones* [2009] ECR I–0000, paragraph 41.

14 – See my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, point 155.

15 – See on this point Case C–470/99 *Universale-Bau and Others* [2002] ECR I–11617, in particular paragraphs 71 and 76; Case C–327/00 *Santex* [2003] ECR I–1877, paragraph 52; and Case C–241/06 *Lämmerzahl* [2007] ECR I–8415, paragraph 50.

16 – The referring court cites the judgment of the Court of Appeal of England and Wales (Dyson LJ) of 13 July 2001 in *JobsinCoUKplc* v *Department of Health* [2001] EWCA Civ 1241, [2001] EuLR 685, paragraphs 23 and 28 (that judgment related to the predecessor to Regulation 47(7)(b) of the PCR 2006, whose content was identical); see also the judgment of the High Court of Justice of England and Wales, Queen's Bench Division, (Langley J) of 17 November 1997 in *KeymedLtd* v *Forest Healthcare NHSTrust* [1998] EuLR 71, at p. 92.

17 – Ireland refers in its written observations to the judgment of the High Court of Ireland

(Clarke J) of 2 May 2006 in *Veolia Water UK* v *Fingal County Council (No 1)* [2006] IEHC 137, [2007] 1 IR 690, paragraphs 28 to 54.

18 – In Ireland there is an essentially similar rule on limitation periods under Order 84A (4) of the Rules of the Superior Courts (SI No 374 of 1998). That rule is the subject of the action by the Commission for failure to fulfil obligations in Case C–456/08 *Commission* v *Ireland*, in which I am also delivering my Opinion today.

19 – The observations of Dyson LJ in *Jobsin Co UK plc* v *Department of Health*, cited in footnote 16, which are quoted in the order for reference, are illuminating in this respect: 'A service provider's knowledge is plainly irrelevant to the question whether he has suffered or risks suffering loss or damage as a result of a breach of duty owed to him by a contracting authority. … Knowledge will often be relevant to whether there is good reason for extending time within which proceedings may be brought, but it cannot be relevant to the prior question of when the right of action first arises' (paragraphs 23 to 28 of the judgment). At the hearing before the Court, the parties were in agreement that the national court is not obliged to grant such an extension of time.

20 – There appear also to be judges in England who differ from this approach. At the hearing before the Court, the judgment of the High Court of Justice of England and Wales, Queen's Bench Division, (Coulson J) of 8 May 2009 in *AmaryllisLtd* v *HMTreasury* [2009] EWHC 962 (TCC) was mentioned in this connection.

21 – See also my Opinion of today's date in Case C–456/08 *Commission* v *Ireland*, point 56.

22 – See, on this and the following, my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, points 161 to 171.

23 – See my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, point 162.

24 – See my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, points 163 to 167.

25 – If a contract is to be declared invalid, Articles 2d and 2f(1) of Directive 89/665, as amended by Directive 2007/66, are relevant. If, on the other hand, compensation is to be awarded, Articles 2e and 2f(2) in conjunction with Article 2c of Directive 89/665, as amended by Directive 2007/66, apply.

26 – That is also supported by Regulation 47(9) of the PCR 2006. NHS Business Services admittedly points out that in the main proceedings Uniplex made more extensive claims. However, in relation to the factual and legal context of references for preliminary rulings, the Court must proceed from the statements made by the referring court (settled case-law; see Joined Cases C–482/01 and C–493/01 *Orfanopoulos and Oliveri* [2004] ECR I–5257, paragraph 42, and Case C–244/06 *DynamicMedien* [2008] ECR I–505, paragraph 19).

27 – See my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, point 171.

28– Cited in footnote 15, paragraph 78.

29 – This is also clear in the French version of *Universale-Bau and Others*, French being the language in which the judgment was drafted and deliberated on: *dès qu'elles sont connues des intéressés* (judgment cited in footnote 15, paragraph 78).

30 – Interestingly, NHS Business Services leaves out precisely this paragraph 78 of the judgment in *Universale-Bau and Others*, although it otherwise cites the full text of the relevant passage of the Court's reasoning (paragraphs 74 to 79).

31 – The parties to the main proceedings disagree as to whether Uniplex ought to have known of the alleged infringements of procurement law from the letter of 22 November 2007 or only from the letter of NHS Business Services of 13 December 2007 (see points 12 and 13 above). After reading those two letters, it seems to me that the first of them confines itself to extremely general statements from which an unsuccessful tenderer can hardly work out why he was unsuccessful and whether procurement law was applied correctly. The second letter, on the other hand, contains at least two statements which arouse the suspicion that infringements of procurement law were committed. First, Uniplex is given a zero mark in the category 'Price and other cost-effectiveness factors' because it offered only its list price; the contracting authority appears to have completely ignored the fact that one tenderer's list price may be lower than another's discount price, and that what ultimately matters is the comparison of the prices actually offered. Second, all tenderers who had not previously been active in the market for haemostats in the United Kingdom were apparently marked at zero in the category 'UK customer base', which suggests covert discrimination against tenderers from other countries. In the end, however, it will be the task of the referring court to make the necessary findings in this respect.

32 – Case C–49/07 *MOTOE* [2008] ECR I–4863, paragraph 30, and Case C–142/05 *Mickelsson and Roos* [2009] ECR I–0000, paragraph 41; to the same effect, Case C–328/91 *Thomas and Others* [1993] ECR I–1247, paragraph 13.

33 – The same may apply if a tenderer or candidate complains of a breach of procurement law and his complaint is rejected by the contracting authority with reasons being given.

34 – To that effect, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Case C–75/08 *Mellor* [2009] ECR I–0000, paragraph 59; see also my Opinion in Case C–186/04 *Housieaux* [2005] ECR I–3299, point 32, and my Opinion in *Mellor*, especially point 31.

35 – Opinion of Advocate General Poiares Maduro in Case C–250/07 *Commission* v *Greece* [2009] ECR I–0000, point 28.

36 – That the term 'occurrence of the damage' was used in the first sentence of point 167 of my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, is an editing mistake. The correct version is that it suffices that the person concerned knew or ought to have known of the alleged *infringement of procurement law*, as follows from points 169 and 171 of that Opinion.

37 – To that effect, Case C–15/04 *Koppensteiner* [2005] ECR I–4855, paragraph 38, and *Lämmerzahl*, cited in footnote 15, second sentence of paragraph 63.

38 – See my Opinion of today's date in Case C–456/08 *Commission* v *Ireland*, point 75.

39 – On the principle of interpretation in conformity with directives generally, see Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 26, Joined Cases C–397/01 to C–403/01 *Pfeiffer and Others* [2004] ECR I–8835, paragraph 113, and Case C–268/06 *Impact* [2008] ECR I–2483, paragraph 98; on Directive 89/665 specifically, see also *Santex*, paragraph 63, and *Lämmerzahl*, paragraph 62, both cited in footnote 15.

40 – *Santex*, cited in footnote 15, paragraph 62.

41 – See points 31 to 46 above.

42 – See *Pfeiffer and Others*, paragraphs 118 and 119, and *Impact*, paragraph 101, both cited in footnote 39.

43 – Ireland submitted in the present proceedings for a preliminary ruling that the essentially identical limitation rule in Irish law (in accordance with Order 84A(4) of the Rules of the Superior Courts, an application for review must be made 'at the earliest opportunity and in any event within three months') does not produce any such effects. Nevertheless, in the proceedings for failure to fulfil obligations which are being heard in parallel to the present case, Ireland indicated that in certain circumstances an application for review may under Irish law be dismissed as out of time even if it has been made within the three-month period (see on this point my Opinion of today's date in Case C–456/08 *Commission* v *Ireland*, point 70).

44 – At the hearing before the Court, the parties mentioned in this connection inter alia the judgment of the High Court of Justice of England and Wales, Queen's Bench Division, (Cooke J) of 4 November 2004 in *M Holleran Ltd* v *Severn Trent Water Ltd* [2004] EWHC 2508 (Comm), [2005] EuLR 364.

45 – To that effect, *Universale-Bau and Others*, in particular paragraph 72, *Santex*, paragraphs 51 and 57, and *Lämmerzahl*, paragraphs 52, all cited in footnote 15; on procedural rules generally, see Joined Cases C–21/03 and C–34/03 *Fabricom* [2005] ECR I–1559, paragraph 42.

46 – See points 47 to 49 of that Opinion, with references to the case-law.

47 – See my Opinion of today's date in Case C–456/08 *Commission* v *Ireland*, point 71.

48 – See on this point the case-law cited in footnote 39.

49 – *Santex*, cited in footnote 15, paragraph 62.

50 – See the examples in my Opinion in Case C–456/08 *Commission* v *Ireland*, point 68. In procurement law too, the concept of a 'duty of diligence, which falls to be categorised more as an obligation as to means than an obligation as to results', is not unknown (Case C–250/07 *Commission* v *Greece* [2009] ECR I–0000, paragraph 68).

51 – Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24; *Santex*, cited in footnote 15, paragraph 64; and *Lämmerzahl*, cited in footnote 15, paragraph 63.

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Reference for a preliminary ruling from High Court of Justice (England and Wales) (Queen's Bench Division), Leeds District Registry, made on 18 September 2008 - Uniplex (UK) Ltd v NHS Business Services Authority

(Case C-406/08)

Language of the case: English

Referring court

High Court of Justice (Queen's Bench Division)

Parties to the main proceedings

Applicant: Uniplex (UK) Ltd

Defendant: NHS Business Services Authority

Questions referred

Where an economic operator is challenging in national proceedings the award of a framework agreement by a contracting authority following a public procurement exercise in which he was a tenderer and which was required to be conducted in accordance with Directive 2004/18/EC[1] (and applicable implementing national provisions), and is in those proceedings seeking declarations and damages for breach of applicable public procurement provisions as regards that exercise and award:

(a) is a national provision such as Regulation 47(7)(b) of the Public Contracts Regulations 2006 which states that those proceedings are to be brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period, to be interpreted, in light of Directive 89/665/EEC[2], Articles 1 and 2, and the Community law principle of equivalence and the Community law requirement for effective legal protection, and/or the principle of effectiveness, and having regard to any other relevant principles of EC law, as conferring an individual and unconditional right upon the tenderer against the contracting authority such that the time for the bringing of proceedings challenging such a tender exercise and award starts running as from the date when the tenderer knew or ought to have known that the procurement procedure and award infringed EC public procurement law or as from the date of breach of the applicable public procurement provisions; and

(b) in either event how is a national court then to apply (i) any requirement for proceedings to be brought promptly and (ii) any discretion as to extending the national limitation period for the bringing of such proceedings?

_____

[1] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ L 134, p. 114

[2] - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts OJ L 395, p. 33

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JUDGMENT OF THE COURT (Fourth Chamber)

23 December 2009 (*)

(Public works contracts – Directive 2004/18/EC – Articles 43 EC and 49 EC – Principle of equal treatment – Groups of undertakings – Prohibition on competing participation in the same tendering procedure by a 'consorzio stabile' ('permanent consortium') and one of its member companies)

In Case C–376/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 2 April 2008, received at the Court on 18 August 2008, in the proceedings

Serrantoni Srl,

Consorzio stabile edili Scrl

v

Comune di Milano,

intervening parties:

Bora Srl Costruzioni edili,

Unione consorzi stabili Italia (UCSI),

Associazione nazionale imprese edili (ANIEM),

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as the President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Commission of the European Communities, by C. Zadra and D. Recchia, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service

contracts (OJ 2004 L 134, p. 114), Articles 39 EC, 43 EC, 49 EC and 81 EC, and the general principles of equal treatment and proportionality.

2 The reference was made in the course of proceedings between the construction company Serrantoni Srl ('Serrantoni') and the Comune di Milano (Municipality of Milan), regarding the decision of the Comune di Milano to exclude Serrantoni from participating in a procedure for the award of a public works contract.

Legal context

Community legislation

3 Recital 2 in the preamble to Directive 2004/18 states:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'

4 Article 2 of that directive provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 4 of the directive, under the heading 'Economic operators', provides:

'1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

...

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.'

6 In accordance with the version of Article 7(c) of Directive 2004/18 in force at the material time as a result of the adaptation effected by Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333, p. 28), Directive 2004/18 applied to public works contracts which had a value exclusive of value added tax estimated to be equal to or greater than EUR 5 278 000.

7 Article 45 of that directive, headed 'Personal situation of the candidate or tenderer', provides in paragraph 2:

'Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.'

National legislation

8 Legislative Decree No 163 of 12 April 2006 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC (Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) (Ordinary Supplement to GURI No 100 of 2 May 2006, 'Legislative Decree No 163/2006'), governs, in their entirety, the procedures in Italy for the award of public works contracts, public service contracts and public supply contracts. Article 34 of that legislative decree, as amended by Legislative Decree No 113 of 31 July 2007, entitled 'Entities to which public contracts may be awarded', provides in paragraph 1:

'1. Without prejudice to the restrictions expressly provided for, the following entities are entitled to participate in the procedures for the award of public procurement contracts:

…

(b) consortia of producers' and workers' cooperatives … and consortia of artisan/handicraft businesses …;

(c) permanent consortia, constituted as joint venture companies …, between individual contractors (including artisans), commercial companies or partnerships or producers' and workers' cooperatives, in accordance with the provisions of Article 36;

…

(f) entities which have entered into a European Economic Interest Group [EEIG] …;

(f a) economic operators … established in other Member States and constituted according to the applicable legislation of the Member State concerned.'

9 Article 36(1) of Legislative Decree No 163/2006 provides:

'"Permanent consortia" ("consorzi stabili") mean those … which, by a decision of their respective management, have agreed to participate jointly in public works contracts, public service contracts and public supply contracts, for a period of not less than five years, creating a joint undertaking structure for that purpose.'

10 Article 36(5) of Legislative Decree No 163/2006, in the version in force at the material time, provided:

'… a permanent consortium may not participate in the same award procedure as members of that consortium; in the event of failure to comply with this provision, Article 353 of the Criminal Code shall apply …'.

11 Article 37(7) of that legislative decree, in the version in force at the material time, provided:

'… The consortia referred to in Article 34(1)(b) are required to specify in the tender the members for which the consortium is competing: those members are precluded from participating, in any other form, in the same tendering procedure; in the event of infringement, both the consortium and the member shall be excluded from the procedure; in the event of failure to comply with this provision, Article 353 of the Criminal Code shall apply …'

12 Under Article 353 of the Criminal Code, the failure to comply with the above prohibition is punishable by up to two years' imprisonment and, in certain circumstances by up to five years' imprisonment, and by a fine.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 In 2007 the Comune di Milano issued a call for tenders relating to the award of a works contract concerning 'emergency and rationalisation measures for district registry offices, lot V'. On 27 September 2007, the Comune di Milano decided to exclude Serrantoni, a member of the permanent consortium Consorzio stabile edili Scrl, as well as the permanent consortium itself, from the tendering procedure for breach of Article 36(5) of Legislative Decree No 163/2006. On the basis of the same provision, the Comune di Milano also ordered the documents to be forwarded to the Public Prosecutor's office for the application of Article 353 of the Criminal Code, and awarded the contract to another company.

14 Serrantoni and the permanent consortium to which it belongs brought an appeal before the referring court against that decision of the contracting authority, submitting that Article 36(5) of Legislative Decree No 163/2006 is incompatible with Article 4 of Directive 2004/18, Articles 39 EC, 43 EC, 49 EC and 81 EC, and with the principle of non-discrimination.

15 The referring court points out, first of all, that the national legislation at issue in the main proceedings makes a distinction between permanent consortia, on the one hand, and consortia of producers' and workers' cooperatives and consortia of artisan/handicraft businesses, on the other. As regards permanent consortia, there is an absolute prohibition on the consortium and the companies forming part thereof participating in the same procedure simultaneously by separate tenders, on pain of automatic exclusion from the procedure and criminal sanctions. As regards the consortia of producers' and workers' cooperatives and consortia of artisan/handicraft businesses, that prohibition applies only to the consortium and the company in whose interests that consortium submitted a tender in the tendering procedure in question. That court observes that, in the case at issue in the main proceedings, the permanent consortium in question did not participate in the call for tenders in Serrantoni's interests.

16 The referring court notes, next, that the different forms of consortium referred to above do not exhibit any differences in respect of their aims and organisation that would justify such unequal treatment. All those forms of consortium are characterised by a common organisation for the purposes of instituting cooperation between the member companies in order to reduce management costs, to optimise their respective economic results and to increase their competitiveness in relation to public contracts. The referring court therefore asks whether the difference in treatment in question is compatible with the principle of non-discrimination and with the Community requirement to ensure the widest possible participation in public tendering procedures.

17 The referring court also asks whether that difference in treatment is compatible with Article 4 of Directive 2004/18, to the extent that the exclusion in question is based solely on the fact that the entity takes the legal form of a permanent consortium, and with Articles 39 EC, 43 EC, 49 EC and 81 EC. That discrimination is moreover of particular importance since the institution of consortia has been amply provided for in the legal systems of the other Member States and finds expression at the Community level in the form of European Economic Interest Groupings (EEIGs).

18 Lastly, the referring court points out that the absolute prohibition in question is based exclusively on a formal aspect, that is to say whether a company forms part of a particular type of group. The legislation in question makes no call for a specific assessment of the mutual influence exerted

between consortium and member company but, on the contrary, posits an abstract presumption of mutual interference. Thus, that court notes, even if the consortium is not participating in the tendering procedure in the interests of the company concerned, is not using the company for the execution of the contract, and therefore has no agreement with that company concerning the submission of the tender, the absolute prohibition is applicable. It therefore asks whether that absolute prohibition may be justified by an overriding requirement in the general interest relating to the need to ensure that public tendering procedures are properly conducted, and whether it does not go far beyond its objective.

19 In the light of those considerations, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the correct application of Article 4 of Directive 2004/18 … impeded by the provisions of national law laid down in Article 36(5) of Legislative Decree No 163/2006 …, under which:

– where a member of a consortium participates in a tendering procedure for a public contract, the consortium itself is automatically excluded from participation solely on the ground that it has a particular legal form (that of a permanent consortium) rather than another, essentially identical, legal form (that of a consortium of producers' and workers' cooperatives or a consortium of artisan/handicraft businesses); and

– where a permanent consortium participates in a tendering procedure for a public contract, and where it has declared that it is competing on behalf of other companies and that it will entrust the works to other companies if it is awarded the contract, a company is automatically excluded from participation solely on the formal ground that it is a member of that consortium?

(2) Is the correct application of Articles 39 EC, 43 EC, 49 EC and 81 EC impeded by the provisions of national law laid down in Article 36(5) of Legislative Decree No 163/2006 …, under which:

– where a member of a consortium participates in a tendering procedure for a public contract, the consortium itself is automatically excluded from participation solely on the ground that it has a particular legal form (that of a permanent consortium) rather than another, essentially identical, legal form (a consortium of producers' and workers' cooperatives or a consortium of artisan/handicraft businesses), and

– where a permanent consortium participates in a tendering procedure for a public contract, and where it has declared that it is competing on behalf of other companies and that it will entrust the works to other companies if it is awarded the contract, a company is automatically excluded from participation solely on the formal ground that it is a member of that consortium?'

The questions referred for a preliminary ruling

20 First of all, it should be observed that, as is clear from the file submitted to the Court, the value of the contract to which the award procedure at issue in the main proceedings relates is considerably lower than the threshold laid down in Article 7(c) of Directive 2004/18. Consequently, that contract does not fall within the scope of the procedures laid down in that directive.

21 None the less, it should be recalled that the fact that the value of a contract is below the threshold set by the Community rules does not, however, mean that that contract is not subject at all to the application of Community law.

22 It is clear from the Court's settled case-law that, in the context of the award of a contract with a value below that threshold, the fundamental rules of the Treaty and in particular the principle of equal treatment must be complied with. The distinguishing feature in relation to contracts with a value above the threshold prescribed by the provisions of Directive 2004/18 is that only the latter are subject to the strict special procedures laid down in those provisions (see, to that effect, Joined Cases C–147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I–3565, paragraphs 19 and 20).

23 That interpretation is confirmed by recital 2 in the preamble to Directive 2004/18, which states that the award of all contracts concluded in the Member States on behalf of bodies with the status of a contracting authority must comply with the basic rules of the Treaty, and in particular with those concerning freedom of movement of goods and services, the right of establishment and the fundamental principles deriving therefrom, such as the principles of equal treatment, proportionality and transparency.

24 However, according to the case-law of the Court, the application of the fundamental rules and general principles of the Treaty to procedures for the award of contracts below the threshold for the application of Community provisions is based on the premiss that the contracts in question are of certain cross-border interest (*SECAP and Santorso*, paragraph 21 and case-law cited).

25 In that connection, the Court has already pointed out that it is for the referring court to carry out a detailed assessment of all the relevant facts concerning the contract in question in order to determine whether there is certain cross-border interest (*SECAP and Santorso*, paragraph 34). In the present case, the answers to the questions referred take as their premiss that it is none the less for the referring court to ascertain whether the contract in question involves certain cross-border interest.

The first question

26 By this question, the referring court asks whether Article 4 of Directive 2004/18 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that both a permanent consortium and its member companies are automatically excluded from participating in a procedure for the award of a public contract and face criminal sanctions where the member companies have submitted tenders in competition with that consortium's tender in the context of the procedure in question, even if the consortium's tender was not submitted on behalf and in the interests of those companies.

27 In that connection, as has been noted in paragraph 20 of this judgment, the contract at issue in the main proceedings does not fall within the scope of the procedures laid down in that directive, since its value is below the threshold laid down in Article 7(c) of Directive 2004/18.

28 Accordingly, there is no need to answer the question referred by the national court.

The second question

29 By this question, considered in the light of the reference for a preliminary ruling taken as a whole, the referring court asks whether the general principles of equal treatment and proportionality deriving from Articles 43 EC and 49 EC and Articles 39 EC and 81 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that both a permanent consortium and its member companies are automatically excluded from participating in a procedure for the award of a public contract and face criminal sanctions where the member companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if that consortium's tender was not submitted on behalf and in the interests of those companies.

30 As regards the Treaty articles to which the national court refers, it should be noted, first of all, that the exclusion at issue in the main proceedings has no connection with freedom of movement for workers, or with agreements between undertakings or decisions by associations of undertakings, within the meaning of Articles 39 EC and 81 EC. There is therefore no need for the Court to give an answer with regard to those articles.

31 As regards the principles of equal treatment and transparency, the Member States must be recognised as having a certain amount of discretion for the purpose of adopting measures intended to ensure compliance with those principles, which are binding on contracting authorities in any procedure for the award of a public contract (see, to that effect, Case C–213/07 *Michaniki* [2008] ECR I-0000, paragraph 44).

32 Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it, situations propitious to conduct liable to bring about breaches of those principles (see *Michaniki*, paragraph 56).

33 However, in accordance with the principle of proportionality, which constitutes a general principle of Community law (see, inter alia, Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47), the measures adopted by the Member States must not go beyond what is necessary to achieve that objective (see, to that effect, *Michaniki*, paragraphs 48 and 61, and Case C-538/07 *Assitur* [2009] ECR I-0000, paragraphs 21 and 23).

34 First, as regards the principles of equal treatment and of proportionality, it should be noted that the legislation at issue in the main proceedings provides for the automatic exclusion from participation in a public tendering procedure in the event of simultaneous and competing tenders submitted by a permanent consortium and by one or more companies forming part thereof.

35 In that connection, it must be pointed out that the automatic exclusion at issue in the main proceedings is only applicable to permanent consortia and the companies of which they are composed, and not to other forms of consortium, such as consortia of producers' and workers' cooperatives and consortia of artisan/handicraft businesses. As regards the latter forms of consortium, the exclusion is applicable, in accordance with Article 37(7) of Legislative Decree No 163/2006, only where competing tenders are submitted by the consortium in question and by those of its member companies on whose behalf the consortium itself has submitted a tender.

36 In that connection, the referring court notes that all those forms of consortium are essentially identical and do not exhibit any differences in respect of their aims and organisation that would justify such unequal treatment.

37 It must therefore be found that the automatic exclusion measure at issue in the main proceedings, which concerns only the permanent consortium form and its member companies and is applicable in the event of competing tenders, regardless of whether the consortium concerned participates in the public tendering procedure in question on behalf and in the interests of the companies which have submitted a tender, constitutes discrimination against that form of consortium, and does not therefore comply with the principle of equal treatment.

38 It should be added that, even if the treatment in question applied without distinction to all forms of consortium, or the national court found that there were objective elements which distinguished the situation of permanent consortia from that of other forms of consortium, a rule requiring automatic exclusion, such as the rule at issue in the main proceedings, would not in any event be compatible with the principle of proportionality.

39 A rule of that kind involves an irrebutable presumption of mutual interference in cases in which a consortium and one or more of its member companies have submitted competing tenders in the same procedure for the award of a public contract, even where the consortium in question has not participated in the procedure on behalf and in the interests of those companies, without either the consortium or the companies concerned being afforded the possibility of showing that their tenders were drawn up completely independently and that there is therefore no risk of influencing competition between tenderers (see, to that effect, *Michaniki*, paragraph 67, and *Assitur*, paragraph 30, in relation to the public contracts falling within the scope of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

40 A systematic rule of exclusion, which also entails an absolute obligation on the contracting authorities to exclude the entities concerned, even in cases in which the relationship between those entities has no effect on their conduct in the context of the procedures in which they have participated, is contrary to the Community interest in ensuring the widest possible participation by tenderers in a call for tenders, and goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency (see, to that effect, *Assitur*, paragraphs 26 to 29, with regard to public contracts falling within the scope of Directive 92/50).

41 Second, it should be noted that, in accordance with the settled case-law of the Court, Articles 43 EC and 49 EC preclude any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to prohibit, impede or render less attractive the exercise by Community nationals of the freedom of establishment and the freedom to provide services guaranteed by those provisions of the Treaty (see, to that effect, Case C–299/02 *Commission* v *Netherlands* [2004] ECR I–9761, paragraph 15, and Case C-433/04 *Commission* v *Belgium* [2006] ECR I–10653, paragraph 28).

42 As the Commission of the European Communities rightly observes, a national rule such as that at issue in the main proceedings, which provides that permanent consortia and their member companies may be automatically excluded, is likely to have a dissuasive effect on economic operators established in other Member States, that it so to say, first, on operators wishing to establish themselves in the Member State concerned through the establishment of a permanent consortium, possibly composed of national and foreign companies, and, second, on operators intending to join consortia of that kind already in existence, in order to be able to participate more easily in public tendering procedures launched by the contracting authorities of that Member State and thereby be able to offer their services more easily.

43 A national measure of that kind which is likely to have a dissuasive effect on economic operators established in other Member States constitutes a restriction within the meaning of Articles 43 EC and 49 EC (see, to that effect, *Commission* v *Belgium*, paragraph 29), all the more so as that dissuasive effect is heightened by the risk of criminal sanctions which are laid down in the national legislation at issue in the main proceedings.

44 However, a restriction such as that at issue in the main proceedings may possibly be justified in so far as it pursues a legitimate objective in the public interest, and to the extent that it is suitable for securing the attainment of the objective and does not go beyond what is necessary in order to attain it.

45 In the present case, it must be found that, notwithstanding its legitimate objective of combating possible collusion between the consortium concerned and its member companies, the restriction in question cannot be justified since, as is clear from paragraphs 38 to 40 of this judgment, it goes beyond what is necessary to achieve that objective.

46 The answer to the second question must therefore be that Community law must be interpreted as precluding national legislation, such at that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in Article 7(c) of Directive 2004/18 but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if the consortium's tender was not submitted on behalf and in the interests of those companies.

Costs

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

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

Community law must be interpreted as precluding national legislation, such at that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in Article 7(c) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if the consortium's tender was not submitted on behalf and in the interests of those companies.

[Signatures]

* Language of the case: Italian.

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Judgment of the Court (Fourth Chamber) of 23 December 2009 (reference for a preliminary ruling from the Tribunale amministrativo regionale per la Lombardia (Italy)) - Serrantoni Srl, Consorzio stabile edili Scrl v Comune di Milano

(Case C-376/08) [1]

(Public works contracts - Directive 2004/18/EC - Articles 43 EC and 49 EC - Principle of equal treatment - Groups of undertakings - Prohibition on competing participation in the same tendering procedure by a 'consorzio stabile' ('permanent consortium') and one of its member companies)

Language of the case: Italian

Referring court

Tribunale amministrativo regionale per la Lombardia

Parties to the main proceedings

Applicants: Serrantoni Srl, Consorzio stabile edili Scrl

Defendant: Comune di Milano

Intervening parties: Bora Srl Construzioni edili, Unione consorzi stabili Italia (UCSI), Associazione nazionale imprese edili (ANIEM),

Re:

Reference for a preliminary ruling - Tribunale amministrativo regionale per la Lombardia - Interpretation of Articles 39 EC, 43 EC, 49 EC and 81 EC and of Article 4 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) - National legislation providing for the automatic exclusion of member companies of a consortium of economic operators, where the consortium itself participates in the procedure.

Operative part of the judgment

Community law must be interpreted as precluding national legislation, such at that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in Article 7(c) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if the consortium's tender was not submitted on behalf and in the interests of those companies.

_____

[1] - OJ C 327, 20.12.2008.

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Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia (Italy) lodged on 18 August 2008 - Serrantoni Srl and Consorzio Stabile Edile Scrl v Comune di Milano

(Case C-376/08)

Language of the case: Italian

Referring court

Tribunale Amministrativo Regionale per la Lombardia

Parties to the main proceedings

Applicants: Serrantoni Srl and Consorzio Stabile Edile Scrl

Defendant: Comune di Milano

Questions referred

1. Is the correct application of Article 4 of Directive 2004/18/EC [1] of 31 March 2004 impeded by the provisions of national law laid down in Article 36(5) of Legislative Decree No 163 of 12 April 2006, as amended by Legislative Decree No 113 of 31 July 2007, under which:

- where a member of a consortium participates in a tendering procedure for a public contract, the consortium itself is automatically excluded from participation solely on the ground that it has a particular legal form (that of a permanent consortium) rather than another, essentially identical, legal form (that of a grouping of producers' and workers' cooperatives or a grouping of artisan/handicraft businesses); and

- where a permanent consortium participates in a tendering procedure for a public contract, and where it has declared that it is competing on behalf of other companies and that it will entrust the works to other companies if it is awarded the contract, a company is automatically excluded from participation solely on the formal ground that it is a member of that consortium?

2. Is the correct application of Articles 39, 43, 49 and 81 of the Treaty establishing the European Community impeded by the provisions of national law laid down in Article 36(5) of Legislative Decree No 163 of 12 April 2006, as amended by Legislative Decree No 113 of 31 July 2007, under which:

- where a member of a consortium participates in a tendering procedure for a public contract, the consortium itself is automatically excluded from participation solely on the ground that it has a particular legal form (that of a permanent consortium) rather than another, essentially identical, legal form (a grouping of producers' and workers' cooperatives or a grouping of artisan/handicraft businesses), and

- where a permanent consortium participates in a tendering procedure for a public contract, and where it has declared that it is competing on behalf of other companies and that it will entrust the works to other companies if it is awarded the contract, a company is automatically excluded from participation solely on the formal ground that it is a member of that consortium?

_____

[1] - GU L 134, p. 114.

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ARRÊT DE LA COUR (troisième chambre)

11 juin 2009 (*)

«Manquement d'État – Directives 89/665/CEE et 92/13/CEE – Procédures de recours en matière de passation de marchés publics – Garantie d'un recours efficace – Délai minimal à respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la signature du contrat relatif à ce marché»

Dans l'affaire C–327/08,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 17 juillet 2008,

Commission des Communautés européennes, représentée initialement par MM. D. Kukovec et G. Rozet, puis par ce dernier et M. M. Konstantinidis, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République française, représentée par MM. G. de Bergues et J.–C. Gracia, en qualité d'agents,

partie défenderesse,

LA COUR (troisième chambre),

composée de M. A. Rosas, président de chambre, MM. J. N. Cunha Rodrigues (rapporteur), J. Klučka, M^{me} P. Lindh et M. A. Arabadjiev, juges,

avocat général: M. P. Mengozzi,

greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que:

– en adoptant et en maintenant en vigueur l'article 44-I du décret n° 2005–1308, du 20 octobre 2005, relatif aux marchés passés par les entités adjudicatrices mentionnées à l'article 4 de l'ordonnance n° 2005–649 du 6 juin 2005 relative aux marchés passés par certaines personnes publiques ou privées non soumises au code des marchés publics (JORF du 22 octobre 2005, p. 16752), l'article 46-I du décret n° 2005–1742, du 30 décembre 2005, fixant les règles applicables aux marchés passés par les pouvoirs adjudicateurs mentionnés à l'article 3 de l'ordonnance n° 2005–649 (JORF du 31 décembre 2005, p. 20782), et l'article 80–I–1° du décret n° 2006-975, du 1er août 2006, portant code des marchés publics (JORF du

4 août 2006, p. 11627, ci-après le «code des marchés publics»), dans la mesure où ces dispositions prévoient la possibilité pour les pouvoirs adjudicateurs et/ou entités adjudicatrices de réduire le délai raisonnable à respecter entre la notification de la décision d'attribution du marché aux soumissionnaires et la signature du marché sans aucune limite de temps et sans aucune condition objective fixée préalablement par la réglementation nationale, et

– en adoptant et en maintenant en vigueur l'article 1441–1 du nouveau code de procédure civile, tel que modifié par le décret n° 2005–1308, dans la mesure où cette disposition prévoit un délai de dix jours pour la réponse du pouvoir adjudicateur et/ou de l'entité adjudicatrice concernés interdisant tout référé précontractuel avant ladite réponse et sans que ce délai suspende le délai à respecter entre la notification de la décision d'attribution du marché aux soumissionnaires et la signature du marché,

la République française a manqué aux obligations qui lui incombent en vertu des directives 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395, p. 33), telle que modifiée par la directive 92/50/CEE du Conseil, du 18 juin 1992 (JO L 209, p. 1, ci-après la «directive 89/665»), et 92/13/CEE du Conseil, du 25 février 1992, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des règles communautaires sur les procédures de passation des marchés des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO L 76, p. 14), telles qu'interprétées par la Cour dans ses arrêts du 28 octobre 1999, Alcatel Austria e.a. (C–81/98, Rec. p. I–7671), et du 24 juin 2004, Commission/Autriche (C–212/02), et plus particulièrement en vertu des articles 2, paragraphe 1, de la directive 89/665 et 2, paragraphe 1, de la directive 92/13.

Le cadre juridique

La réglementation communautaire

2 L'article 1er de la directive 89/665 prévoit:

«1. Les États membres prennent, en ce qui concerne les procédures de passation des marchés publics relevant du champ d'application des directives 71/305/CEE, 77/62/CEE et 92/50/CEE […], les mesures nécessaires pour garantir que les décisions prises par les pouvoirs adjudicateurs peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible, dans les conditions énoncées aux articles suivants, et notamment à l'article 2 paragraphe 7, au motif que ces décisions ont violé le droit communautaire en matière de marchés publics ou les règles nationales transposant ce droit.

[…]

3. Les États membres assurent que les procédures de recours sont accessibles, selon des modalités que les États membres peuvent déterminer, au moins à toute personne ayant ou ayant eu un intérêt à obtenir un marché public de fournitures ou de travaux déterminé et ayant été ou [risquant] d'être lésée par une violation alléguée. En particulier, ils peuvent exiger que la personne qui souhaite utiliser une telle procédure ait préalablement informé le pouvoir adjudicateur de la violation alléguée et de son intention d'introduire un recours.»

3 L'article 2, paragraphe 1, de la même directive dispose:

«Les États membres veillent à ce que les mesures prises aux fins des recours visés à l'article 1er prévoient les pouvoirs permettant:

a) de prendre, dans les délais les plus brefs et par voie de référé, des mesures provisoires ayant pour but de corriger la violation alléguée ou d'empêcher d'autres dommages d'être causés aux intérêts concernés, y compris des mesures destinées à suspendre ou à faire suspendre la procédure de passation de marché public en cause ou de l'exécution de toute décision prise par les pouvoirs adjudicateurs;

[…]»

4 L'article 1er de la directive 92/13 est libellé comme suit:

«1. Les États membres prennent les mesures nécessaires pour assurer que les décisions prises par les entités adjudicatrices peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible, dans les conditions énoncées aux articles suivants, et notamment à l'article 2 paragraphe 8, au motif que ces décisions ont violé le droit communautaire en matière de passation des marchés ou les règles nationales transposant ce droit en ce qui concerne:

a) les procédures de passation des marchés relevant de la directive 90/531/CEE

et

b) le respect de l'article 3 paragraphe 2 point a) de ladite directive, dans le cas des entités adjudicatrices auxquelles cette disposition s'applique.

[…]

3. Les États membres veillent à ce que les procédures de recours soient accessibles, selon des modalités que les États membres peuvent déterminer, au moins à toute personne ayant ou ayant eu un intérêt à obtenir un marché déterminé et ayant été ou risquant d'être lésée par une violation alléguée. En particulier, ils peuvent exiger que la personne qui souhaite l'application d'une telle procédure ait préalablement informé l'entité adjudicatrice de la violation alléguée et de son intention d'introduire un recours.»

5 L'article 2, paragraphe 1, de la même directive dispose:

«Les États membres veillent à ce que les mesures prises aux fins des recours visés à l'article 1er prévoient les pouvoirs permettant:

soit

a) de prendre, dans les délais les plus brefs et par voie de référé, des mesures provisoires ayant pour but de corriger la violation alléguée ou d'empêcher que d'autres préjudices soient causés aux intérêts concernés, y compris des mesures destinées à suspendre ou à faire suspendre la procédure de passation de marché en cause ou l'exécution de toute décision prise par l'entité adjudicatrice

[…]

soit

c) de prendre, dans les délais les plus brefs, si possible par voie de référé et, si nécessaire, par une procédure définitive quant au fond, d'autres mesures que celles prévues aux points a) et b), ayant pour but de corriger la violation constatée et d'empêcher que des préjudices soient causés aux intérêts concernés; notamment d'émettre un ordre de paiement d'une somme déterminée dans le cas où l'infraction n'est pas corrigée ou évitée.

[…]»

6 Les troisième, quatrième et huitième considérants de la directive 2007/66/CE du Parlement européen et du Conseil, du 11 décembre 2007, modifiant les directives 89/665 et 92/13 (JO L 335, p. 31), précisent:

«(3) Les consultations des parties concernées ainsi que la jurisprudence de la Cour de justice ont révélé un certain nombre de faiblesses dans les mécanismes de recours existant dans les États membres. En raison de ces faiblesses, les mécanismes visés par les directives 89/665/CEE et 92/13/CEE ne permettent pas toujours de veiller au respect des dispositions communautaires, en particulier à un stade où les violations peuvent encore être corrigées. Ainsi, il conviendrait de renforcer les garanties de transparence et de non-discrimination que ces directives cherchent à assurer afin que la Communauté dans son ensemble puisse bénéficier pleinement des effets positifs de la modernisation et de la simplification des règles relatives à la passation des marchés publics auxquelles ont abouti les directives 2004/18/CE [du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO

L 134, p. 114)] et 2004/17/CE [du Parlement européen et du Conseil, du 31 mars 2004, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des services postaux (JO L 134, p. 1)]. Il convient donc d'apporter aux directives 89/665/CEE et 92/13/CEE les précisions indispensables pour atteindre les résultats recherchés par le législateur communautaire.

(4) Parmi les faiblesses relevées figure notamment l'absence, entre la décision d'attribution d'un marché et la conclusion dudit marché, d'un délai permettant un recours efficace. Cela conduit parfois les pouvoirs adjudicateurs et les entités adjudicatrices désireux de rendre irréversibles les conséquences de la décision d'attribution contestée à précipiter la signature du contrat. Afin de remédier à cette faiblesse, qui compromet gravement la protection juridictionnelle effective des soumissionnaires concernés, c'est-à-dire les soumissionnaires qui n'ont pas encore été définitivement exclus, il y a lieu de prévoir un délai de suspension minimal, pendant lequel la conclusion du contrat concerné est suspendue, que celle-ci intervienne ou non au moment de la signature du contrat.

[…]

(8) De tels délais de suspension minimaux n'ont pas vocation à s'appliquer si la directive 2004/18/CE ou la directive 2004/17/CE n'impose pas la publication préalable d'un avis de marché au *Journal officiel de l'Union européenne,* plus particulièrement dans les cas d'urgence impérieuse visés à l'article 31, paragraphe 1, point c), de la directive 2004/18/CE ou à l'article 40, paragraphe 3, point d), de la directive 2004/17/CE. Dans de tels cas, il suffit de prévoir des procédures de recours efficaces après la conclusion du contrat. De même, un délai de suspension n'est pas nécessaire si le seul soumissionnaire concerné est celui auquel le marché est attribué et en l'absence de candidats concernés. Dans ce cas de figure, il n'y a plus d'autre partie prenante à la procédure de passation de marché qui aurait intérêt à recevoir la notification et à bénéficier d'un délai de suspension lui permettant d'exercer un recours efficace.»

7 L'article 1er de la directive 2007/66 remplace les articles 1er et 2 de la directive 89/665 par le texte suivant:

«*Article premier*

[…]

4. Les États membres peuvent exiger que la personne qui souhaite faire usage d'une procédure de recours ait informé le pouvoir adjudicateur de la violation alléguée et de son intention d'introduire un recours, pour autant que cela n'ait pas d'incidence sur le délai de suspension visé à l'article 2 *bis*, paragraphe 2, ou sur tout autre délai d'introduction d'un recours visé à l'article 2 *quater*.

5. Les États membres peuvent exiger que la personne concernée introduise en premier lieu un recours auprès du pouvoir adjudicateur. Dans ce cas, les États membres veillent à ce que l'introduction dudit recours entraîne la suspension immédiate de la possibilité de conclure le marché.

Les États membres décident des moyens de communication adéquats, y compris les télécopieurs ou les moyens électroniques, qu'il convient d'utiliser pour introduire un recours conformément au premier alinéa.

La suspension visée au premier alinéa ne prend pas fin avant l'expiration d'un délai d'au moins dix jours calendaires à compter du lendemain du jour où le pouvoir adjudicateur a envoyé une réponse si un télécopieur ou un moyen électronique est utilisé, ou, si un autre moyen de communication est utilisé, avant l'expiration d'un délai d'au moins quinze jours calendaires à compter du lendemain du jour où le pouvoir adjudicateur a envoyé une réponse, ou d'au moins dix jours calendaires à compter du lendemain du jour de réception d'une réponse.

[…]

Article 2 bis

[…]

2. La conclusion du contrat qui suit la décision d'attribution d'un marché relevant du champ

d'application de la directive 2004/18/CE ne peut avoir lieu avant l'expiration d'un délai d'au moins dix jours calendaires à compter du lendemain du jour où la décision d'attribution du marché a été envoyée aux soumissionnaires et candidats concernés si un télécopieur ou un moyen électronique est utilisé ou, si d'autres moyens de communication sont utilisés, avant l'expiration d'un délai d'au moins quinze jours calendaires à compter du lendemain du jour où la décision d'attribution du marché est envoyée aux soumissionnaires et candidats concernés, ou d'au moins dix jours calendaires à compter du lendemain du jour de réception de la décision d'attribution du marché.

[…]»

8 L'article 2 de la directive 2007/66 apporte au texte de la directive 92/13 des modifications analogues à celles mentionnées au point précédent.

9 En vertu de son article 4, la directive 2007/66 est entrée en vigueur le 9 janvier 2008. Aux termes de l'article 3, paragraphe 1, premier alinéa, de cette directive, les États membres doivent mettre en vigueur les dispositions législatives, administratives et réglementaires nécessaires pour se conformer à celle-ci au plus tard le 20 décembre 2009.

La réglementation nationale

10 L'article 44-I du décret n° 2005–1308 prévoit:

«Pour les marchés et accords-cadres passés selon une des procédures formalisées, l'entité adjudicatrice avise, dès qu'elle a fait son choix sur les candidatures ou sur les offres, tous les autres candidats du rejet de leurs candidatures ou de leurs offres, en indiquant succinctement les motifs de ce rejet.

Un délai d'au moins dix jours est respecté entre la date à laquelle la décision de rejet est notifiée aux candidats dont l'offre n'a pas été retenue et la date de signature du marché ou de l'accord-cadre.

En cas d'urgence ne permettant pas de respecter ce délai de dix jours, ce délai est réduit dans des proportions adaptées à la situation.»

11 L'article 46-I du décret n° 2005–1742 dispose:

«Pour les marchés et accords-cadres passés selon une des procédures formalisées, le pouvoir adjudicateur avise, dès qu'il a fait son choix sur les candidatures ou sur les offres, tous les autres candidats du rejet de leurs candidatures ou de leurs offres, en indiquant succinctement les motifs de ce rejet.

Un délai d'au moins dix jours est respecté entre la date à laquelle la décision de rejet est notifiée aux candidats dont l'offre n'a pas été retenue et la date de signature du marché ou de l'accord-cadre.

En cas d'urgence ne permettant pas de respecter ce délai de dix jours, ce délai est réduit dans des proportions adaptées à la situation.»

12 L'article 80-I-1° du code des marchés publics est libellé comme suit:

«Pour les marchés et accords-cadres passés selon une des procédures formalisées, le pouvoir adjudicateur avise, dès qu'il a fait son choix sur les candidatures ou sur les offres, tous les autres candidats du rejet de leurs candidatures ou de leurs offres, en indiquant les motifs de ce rejet.

Un délai d'au moins dix jours est respecté entre la date à laquelle la décision de rejet est notifiée aux candidats dont l'offre n'a pas été retenue et la date de signature du marché ou de l'accord-cadre.

En cas d'urgence ne permettant pas de respecter ce délai de dix jours, il est réduit dans des proportions adaptées à la situation.»

13 L'article 1441–1 du nouveau code de procédure civile, tel que modifié par l'article 48–1° du décret n° 2005–1308 (ci-après l'«article 1441-1 du code de procédure civile»), dispose:

«Toute personne habilitée à introduire un recours dans les conditions prévues au 1° de l'article 24 et au 1° de l'article 33 de l'ordonnance n° 2005-649 du 6 juin 2005 relative aux marchés passés par les personnes publiques ou privées non soumises au code des marchés publics doit, si elle entend engager une telle action, mettre préalablement en demeure, par lettre recommandée avec demande d'avis de réception, la personne morale tenue aux obligations de publicité et de mise en concurrence auxquelles est soumise la passation du contrat de s'y conformer.

En cas de refus ou d'absence de réponse dans un délai de dix jours, l'auteur de la mise en demeure peut saisir le président de la juridiction compétente ou son délégué, qui statue dans un délai de vingt jours.»

La procédure précontentieuse

14 Le 21 mars 2005, la Commission a adressé une lettre de mise en demeure à la République française par laquelle elle attirait l'attention de cette dernière sur le problème de la conformité avec le droit communautaire de certaines dispositions de la réglementation nationale relative à la protection juridictionnelle des soumissionnaires en matière de passation de marchés publics. Le 15 décembre 2006, la Commission a adressé au même État membre une lettre de mise en demeure complémentaire. Les autorités françaises ont répondu à celle-ci par lettre du 8 mars 2007.

15 N'étant pas convaincue par cette réponse, la Commission a, le 1er février 2008, émis un avis motivé invitant la République française à prendre les mesures nécessaires pour s'y conformer dans un délai de deux mois à compter de la réception de celui-ci.

16 La République française a répondu à cet avis motivé par lettre du 29 avril 2008. N'étant pas satisfaite de cette réponse, la Commission a décidé d'introduire le présent recours.

Sur le recours

17 Sans soulever formellement une exception d'irrecevabilité, la République française invoque des arguments qui laissent entendre que le présent recours serait dépourvu d'objet. Il convient d'examiner cette question en premier lieu.

Sur la question de savoir si le recours est dépourvu d'objet

Argumentation des parties

18 La République française relève que la directive 2007/66 a créé pour les États membres de nouvelles obligations en matière de suspension de la conclusion du marché et de recours précontractuels visant précisément à régler les situations qui font l'objet du présent recours. Dès lors, la transposition de cette directive dans l'ordre juridique français aurait pour effet de rendre ce recours sans objet.

19 Ledit État membre indique que la procédure de transposition de la directive 2007/66 en droit français est en cours. Le nouveau régime des recours instauré par cette directive serait complexe et nécessiterait une approche globale, comprenant également les matières faisant l'objet du présent recours.

20 La Commission soutient que la transposition de la directive 2007/66 est dépourvue de pertinence au regard du présent recours. Elle fait valoir que le délai imparti dans l'avis motivé pour mettre la réglementation nationale en conformité avec les directives 89/665 et 92/13 a expiré le 1er avril 2008 et que cette réglementation, qui met en cause l'effet utile de ces directives, demeurera en vigueur jusqu'à l'adoption des mesures nécessaires à la transposition de la directive 2007/66, à savoir jusqu'au 20 décembre 2009 au plus tard.

Appréciation de la Cour

21 La République française suggère que la mise en œuvre imminente de la directive 2007/66 prive d'objet le présent recours qui reproche à cet État membre de ne pas avoir transposé dans son ordre juridique les directives 89/665 et 92/13.

22 Selon une jurisprudence constante, l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre en cause telle qu'elle se présentait au terme du délai fixé dans l'avis motivé (voir, notamment, arrêt du 21 février 2008, Commission/Italie, C–412/04, Rec. p. I–619, point 42 et jurisprudence citée).

23 À cet égard, il est constant que, à la date à laquelle le délai fixé dans l'avis motivé est venu à expiration, les directives 89/665 et 92/13 ainsi que la législation française y afférente trouvaient encore à s'appliquer et, partant, un recours fondé sur le défaut de transposition de ces directives n'était pas dépourvu d'objet.

24 La République française laisse en outre entendre que le présent recours n'a aucune utilité pratique dans la mesure où, même si les griefs soulevés par la Commission étaient retenus par la Cour, les mesures d'exécution conséquentes ne pourraient être prises que dans le cadre global de la mise en œuvre de la directive 2007/66.

25 Ces considérations concernent l'opportunité de l'introduction du présent recours.

26 Selon une jurisprudence constante de la Cour, c'est à la Commission qu'il incombe d'apprécier l'opportunité d'agir contre un État membre, les considérations qui déterminent ce choix ne pouvant affecter la recevabilité du recours (arrêt du 8 décembre 2005, Commission/Luxembourg, C–33/04, Rec. p. I–10629, point 66 et jurisprudence citée).

27 Par conséquent, il convient d'examiner le recours de la Commission au fond.

Sur le premier grief

Argumentation des parties

28 Le troisième alinéa des articles 44–I du décret n° 2005–1308, 46–I du décret n° 2005-1742 et 80-I-1° du code des marchés publics (ci-après les «dispositions litigieuses») prévoient en des termes identiques que, «[e]n cas d'urgence ne permettant pas de respecter ce délai de dix jours, ce délai est réduit dans des proportions adaptées à la situation».

29 La Commission fait valoir que la notion d'urgence mentionnée dans les dispositions litigieuses n'est pas définie, mais est au contraire laissée à l'appréciation discrétionnaire du pouvoir adjudicateur ou de l'entité adjudicatrice sans qu'aucune condition objective soit requise. S'il semble résulter du libellé de ces dispositions que le pouvoir adjudicateur ou l'entité adjudicatrice ne saurait aller jusqu'à supprimer purement et simplement le délai en question, rien ne semblerait en revanche interdire de réduire celui-ci à une durée minimale.

30 La Commission soutient en outre qu'il n'existe aucune garantie réglementaire que le nombre de jours de réduction dudit délai sera porté à la connaissance des soumissionnaires, ces derniers pouvant ne pas être informés de la durée exacte de ce délai.

31 Selon la Commission, les dispositions litigieuses introduisent un important degré d'insécurité juridique pour les soumissionnaires et compromettent l'objectif des directives 89/665 et 92/13 qui est, comme cela ressort du point 38 de l'arrêt Alcatel Austria e.a., précité, de mettre en place des recours efficaces et rapides ayant pour objet les décisions illégales du pouvoir adjudicateur à un stade où les violations peuvent encore être corrigées.

32 Pour la Commission, le délai de dix jours à respecter entre la notification de la décision d'attribution du marché aux soumissionnaires et la signature du marché est un délai minimal pour l'introduction d'un recours utile, raison pour laquelle il n'est envisageable de raccourcir ce délai que dans des circonstances objectives exceptionnelles.

33 La République française argue que les dispositions litigieuses encadrent strictement les possibilités de réduction du délai à respecter entre la notification des soumissionnaires et la signature du marché. Dès lors que ces dispositions prévoient que le délai en question ne peut être réduit que dans des proportions adaptées à la situation, cette réduction ne serait pas laissée à l'entière discrétion des pouvoirs adjudicateurs, ces derniers pouvant être appelés à justifier, devant le juge, du caractère raisonnable de la réduction.

34 Selon ledit État membre, les dispositions litigieuses sont conformes aux exigences des arrêts précités Alcatel Austria e.a. ainsi que Commission/Autriche. Étant donné que ces dispositions ne permettent la réduction dudit délai que dans des proportions adaptées à la situation, cette réduction serait raisonnable au sens de ces arrêts.

35 La République française considère que la conformité au droit communautaire des dispositions litigieuses est confirmée a contrario par les dispositions de la directive 2007/66. En effet, les directives 89/665 et 92/13 ne contiendraient aucune disposition relative à la durée du délai à respecter par le pouvoir adjudicateur entre la notification des soumissionnaires et la signature du contrat, le délai minimal obligatoire de dix jours n'ayant été institué que par la directive 2007/66. Dès lors, les pouvoirs adjudicateurs ne seraient soumis, jusqu'à l'expiration du délai accordé aux États membres pour la transposition de cette dernière directive, qu'à la règle posée par la Cour dans les arrêts précités Alcatel Austria e.a. ainsi que Commission/Autriche.

Appréciation de la Cour

36 Il convient de relever d'emblée qu'aucune disposition des directives 89/665 ou 92/13 ne précise un délai que le pouvoir adjudicateur ou l'entité adjudicatrice seraient tenus de respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la conclusion du contrat relatif à ce marché.

37 La précision d'un tel délai a été introduite pour la première fois par la directive 2007/66, dans le but exprès de remédier à l'absence de disposition à cet égard dans les directives 89/665 et 92/13, comme cela ressort du quatrième considérant de la directive 2007/66.

38 Par conséquent, contrairement à ce qu'affirme la Commission, l'existence d'un délai minimal de dix jours à respecter entre la notification des candidats et soumissionnaires et la conclusion du marché ne peut pas être déduite des termes des directives 89/665 et 92/13.

39 Les directives 89/665 et 92/13 n'interdisent pas explicitement que le délai à respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la signature du contrat soit réduit en cas d'urgence. Il ne découle pas non plus du système et de l'objectif des directives 89/665 et 92/13 que celles-ci interdisent par principe toute réduction dudit délai en cas d'urgence.

40 Cette conclusion est confirmée par le fait que la directive 2007/66 ne prévoit pas de délai de suspension minimal dans les cas d'urgence impérieuse visés aux articles 31, point 1, sous c), de la directive 2004/18 et 40, paragraphe 3, sous d), de la directive 2004/17, comme cela est précisé au huitième considérant de la directive 2007/66.

41 En tenant compte de l'effet utile des directives 89/665 et 92/13, la Cour a précisé qu'un délai raisonnable doit s'écouler entre le moment où la décision d'attribution du marché est notifiée aux soumissionnaires évincés et la conclusion du contrat, afin de permettre à ces derniers, notamment, d'introduire une demande de mesures provisoires jusqu'à ladite conclusion (arrêts Commission/Autriche, précité, point 23, et du 3 avril 2008, Commission/Espagne, C–444/06, Rec. p. I-2045, point 39).

42 Selon les termes des dispositions litigieuses, le délai de suspension visé par celles-ci ne peut être réduit, en cas d'urgence, que «dans des proportions adaptées à la situation».

43 Il ressort de cette formulation que l'éventuelle réduction dudit délai doit être conforme au principe de proportionnalité et doit pouvoir être justifiée au regard de la situation à laquelle font face le pouvoir adjudicateur ou l'entité adjudicatrice. Ceux-ci sont donc tenus d'adapter la réduction du délai à l'intensité de l'urgence à laquelle ils sont confrontés.

44 Les dispositions litigieuses prévoient, en substance, que, en effectuant une réduction du délai de recours en cas d'urgence, le pouvoir adjudicateur ou l'entité adjudicatrice doivent néanmoins laisser un délai raisonnable aux opérateurs évincés pour leur permettre de présenter un recours.

45 Dans ces conditions, la Commission n'a pas démontré que les dispositions litigieuses portent atteinte aux exigences des directives 89/665 et 92/13.

46 Dès lors, il y a lieu de rejeter le premier grief de la Commission.

Sur le second grief

Argumentation des parties

47 La Commission fait valoir que l'article 1441–1 du code de procédure civile, dans la mesure où il instaure une phase préalable de mise en demeure obligatoire et non suspensive du délai à respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la signature du marché, revient à priver ce délai de tout effet utile.

48 Le délai de dix jours prévu audit article 1441-1 pour répondre à la mise en demeure ne serait pas conforme aux directives 89/665 et 92/13, dans la mesure où il interdit tout référé précontractuel avant cette réponse et court en même temps que le délai de suspension de la signature du marché, qui est, lui aussi, de dix jours. Il en résulterait l'impossibilité pour les candidats et soumissionnaires évincés de faire usage du référé précontractuel dans les cas où la réponse ou l'absence de réponse ne serait connue qu'à la date de l'expiration de ce délai de dix jours et où le contrat serait signé à cette date.

49 La République française rappelle que les articles 1er, paragraphe 3, des directives 89/665 et 92/13 permettent aux États membres d'exiger qu'une personne qui souhaite introduire un recours informe préalablement le pouvoir adjudicateur ou l'entité adjudicatrice de la violation alléguée et de son intention d'introduire un recours. En revanche, ces dispositions ne prévoiraient pas qu'une telle information préalable doit avoir un effet suspensif.

50 La jurisprudence de la Cour n'imposerait pas non plus un tel effet suspensif. Les arrêts précités Alcatel Austria e.a. ainsi que Commission/Autriche seraient sans pertinence au regard du présent grief puisqu'ils ne concerneraient pas l'obligation pour les États membres de prévoir le caractère suspensif des recours gracieux adressés aux pouvoirs adjudicateurs ou aux entités adjudicatrices.

51 Ledit État membre soutient également que les pouvoirs adjudicateurs et les entités adjudicatrices sont tenus par les dispositions nationales de respecter le droit des candidats et soumissionnaires évincés d'exercer un recours sous la forme du référé précontractuel. Toute tentative pour priver les opérateurs économiques de leur droit au recours pourrait donner lieu à la censure du juge, bien que le contrôle de celui-ci n'intervienne qu'après la conclusion du contrat.

Appréciation de la Cour

52 Les articles 1er, paragraphe 3, des directives 89/665 et 92/13 autorisent les États membres à exiger qu'une personne souhaitant introduire un recours contre un pouvoir adjudicateur ou une entité adjudicatrice informe préalablement ceux-ci de la violation alléguée et de son intention d'introduire un recours, sans prévoir qu'une telle démarche a un effet suspensif.

53 Il n'est pas contesté que l'article 1441–1 du code de procédure civile est conforme auxdites dispositions dans la mesure où il prévoit que le candidat ou soumissionnaire auquel a été notifié le rejet de sa candidature ou de son offre doit, s'il entend introduire un référé précontractuel, préalablement mettre en demeure le pouvoir adjudicateur ou l'entité adjudicatrice.

54 La Commission critique l'article 1441-1 du code de procédure civile dans la mesure seulement où il assortit cette mise en demeure obligatoire d'un délai de réponse de dix jours pendant lequel le délai, également fixé à dix jours, que le pouvoir adjudicateur ou l'entité adjudicatrice sont tenus de respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la conclusion du contrat n'est pas suspendu. Selon la Commission, cette réglementation a pour effet de priver ce dernier délai de son effet utile.

55 Il convient de constater que, tout en prévoyant un délai de dix jours pour répondre à une mise en demeure, l'article 1441–1 du code de procédure civile exclut tout référé précontractuel avant que n'intervienne la réponse à cette mise en demeure et que ce délai court en même temps que le délai de suspension de la signature du contrat prévu par la législation française, délai qui est lui aussi de dix jours. Il en résulte l'impossibilité pour les candidats et soumissionnaires évincés d'introduire un référé précontractuel dans les cas où, d'une part, la réponse à la mise en demeure n'est donnée qu'après l'expiration dudit délai de dix jours et où, d'autre part, le contrat a été signé entre-temps.

56 Ainsi qu'il résulte du point 41 du présent arrêt, il découle des directives 89/665 et 92/13 qu'un délai

raisonnable doit s'écouler entre le moment où la décision d'attribution du marché est notifiée aux candidats et soumissionnaires évincés et la conclusion du contrat, afin de permettre à ces derniers d'introduire une demande de mesures provisoires avant la conclusion du contrat.

57 Or, l'article 1441-1 du code de procédure civile n'est pas compatible avec les directives 89/665 et 92/13 ainsi interprétées, dans la mesure où il peut avoir pour effet, dans certaines circonstances, de ne laisser, entre la notification de ladite décision aux candidats et soumissionnaires évincés et la conclusion du contrat, aucun délai permettant à ceux-ci d'introduire un recours juridictionnel.

58 Contrairement à ce que fait valoir la République française, la possibilité de présenter une demande de référé précontractuel n'est pas suffisamment garantie par l'existence d'un contrôle juridictionnel a posteriori. L'effet utile des directives 89/665 et 92/13 est mis en cause dès lors que le seul recours possible est celui devant les juges du fond. En effet, dans le cas où le contrat a déjà été signé, le fait que le seul contrôle juridictionnel prévu soit un contrôle a posteriori revient à exclure la possibilité d'introduire un recours à un stade où les violations peuvent encore être corrigées, conformément à la jurisprudence de la Cour (voir arrêt Alcatel Austria e.a., précité, point 38).

59 Dans ces conditions, il y a lieu de conclure que le second grief est fondé.

60 Par conséquent, il convient de constater que, en adoptant et en maintenant en vigueur l'article 1441–1 du code de procédure civile, dans la mesure où cette disposition prévoit, pour la réponse du pouvoir adjudicateur ou de l'entité adjudicatrice à une mise en demeure, un délai de dix jours excluant tout référé précontractuel avant ladite réponse et sans que ce délai suspende le délai à respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la signature du contrat, la République française a manqué aux obligations qui lui incombent en vertu des directives 89/665 et 92/13.

Sur les dépens

61 En vertu de l'article 69, paragraphe 3, du règlement de procédure, la Cour peut répartir les dépens ou décider que chaque partie supporte ses propres dépens si les parties succombent respectivement sur un ou plusieurs chefs. La Commission et la République française ayant chacune succombé en l'un des griefs faisant l'objet du présent recours, il convient de condamner chaque partie à supporter ses propres dépens.

Par ces motifs, la Cour (troisième chambre) déclare et arrête:

1) En adoptant et en maintenant en vigueur l'article 1441–1 du nouveau code de procédure civile, tel que modifié par l'article 48–1° du décret n° 2005–1308, du 20 octobre 2005, relatif aux marchés passés par les entités adjudicatrices mentionnées à l'article 4 de l'ordonnance n° 2005–649 du 6 juin 2005 relative aux marchés passés par certaines personnes publiques ou privées non soumises au code des marchés publics, dans la mesure où cette disposition prévoit, pour la réponse du pouvoir adjudicateur ou de l'entité adjudicatrice à une mise en demeure, un délai de dix jours excluant tout référé précontractuel avant ladite réponse et sans que ce délai suspende le délai à respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la signature du contrat, la République française a manqué aux obligations qui lui incombent en vertu des directives 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux, telle que modifiée par la directive 92/50/CEE du Conseil, du 18 juin 1992, et 92/13/CEE du Conseil, du 25 février 1992, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des règles communautaires sur les procédures de passation des marchés des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications.

2) Le recours est rejeté pour le surplus.

3) La Commission des Communautés européennes et la République française

supportent chacune leurs propres dépens.

Signatures

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* Langue de procédure: le français.

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Documents relating to the same case

Judgment of the Court (Third Chamber) of 11 June 2009 – Commission v France

(Case C–327/08)

Failure of a Member State to fulfil obligations – Directives 89/665/EEC and 92/13/EEC – Review procedures concerning the award of public contracts – Guarantee of effective review – Minimum period to be ensured between notification to the unsuccessful candidates and tenderers of the decision to award a contract and the signature of the contract concerned

1. *Actions for failure to fulfil obligations – Examination of the merits by the Court – Situation to be taken into consideration – Situation on expiry of the period laid down in the reasoned opinion (Art. 226 EC) (see para. 22)*

2. *Actions for failure to fulfil obligations – Right of the Commission to bring judicial proceedings – Assessment of the expediency of taking action – To be exercised at its discretion (Art. 226 EC) (see para. 26)*

3. *Approximation of laws – Review procedures in respect of the award of public supply and public works contracts in the water, energy, transport and telecommunications sectors – Directives 89/665 and 92/13 – Member States under an obligation to provide for review procedures in respect of decisions awarding contracts (Council Directives 89/665 and 92/13) (see paras 39, 41, 43-44)*

4. *Approximation of laws – Review procedures in respect of the award of public supply and public works contracts in the water, energy, transport and telecommunications sectors – Directives 89/665 and 92/13 – Member States under an obligation to provide for review procedures in respect of decisions awarding contracts (Council Directives 89/665 and 92/13) (see paras 55-58, 60, operative part)*

Failure of a Member State to fulfil obligations – Infringement of Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC (OJ 1992 L 209, p. 1) and of Article 2(1) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) – Minimum time-limit to be complied with between the notice of award of contract to the candidates and tenderers and the signature of the relevant contract.

e part

The Court:

1. Declares that, by adopting and maintaining in force Article 1441-1 of the new Code of Civil Procedure, as amended by Article 48-1° of Decree No 2005-1308 of 20 October 2005 concerning contracts awarded by the contracting authorities referred to in Article 4 of Order No 2005-649 of 6 June 2005 on contracts awarded by certain

public bodies or private persons not subject to the Public Procurement Code, in so far as that provision imposes on the contracting authority or entity a ten-day period within which to respond to a formal challenge – the bringing of any pre-contractual proceedings before that response being precluded – and where that period does not have the effect of suspending the period which must be ensured between the notification to the unsuccessful candidates and tenderers of the decision to award the contract and the signature of that contract, the French Republic has failed to fulfil its obligations under Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

2. Dismisses the action as to the remainder;

3. Orders the Commission of the European Communities and the French Republic to bear their own costs.

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Judgment of the Court (Third Chamber) of 11 June 2009 - Commission of the European Communities v French Republic

(Case C-327/08) [1]

(Failure of a Member State to fulfil obligations - Directives 89/665/EEC and 92/13/EEC - Review procedures concerning the award of public contracts - Guarantee of effective review - Minimum period to be ensured between notification to the unsuccessful candidates and tenderers of the decision to award a contract and the signature of the contract concerned)

Language of the case: French

Parties

Applicant: Commission of the European Communities (represented by: G. Rozet, D. Kukovec and M. Konstantinidis, Agents)

Defendant: French Republic (represented by: G. de Bergues and J.-Ch. Gracia, Agents)

Re:

Failure of a Member State to fulfil obligations - Breach of Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50/EEC (OJ 1992 L 209, p. 1), and of Article 2(1) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) - Minimum period to be ensured between notification to the candidates and tenderers of the decision to award a contract and the signature of the contract concerned

Operative part of the judgment

The Court hereby:

Declares that, by adopting and maintain

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Action brought on 17 July 2008 - Commission of the European Communities v French Republic

(Case C-327/08)

Language of the case: French

Parties

Applicant: Commission of the European Communities (represented by: G. Rozet and D. Kukovec, Agents)

Defendant: French Republic

Form of order sought

Declare that:

by adopting and maintaining in force Article 44-1 of Decree No 2005-1308 of 20 October 2005, Article 46-1 of Decree No 2005-1742 of 30 December 2005 and Article 80-1-1 of Decree No 2006-975 of 1 August 2006, in so far as those provisions provide for the possibility for contracting authorities and/or contracting entities to reduce the reasonable time-limit to be complied with between the notice of tender and the signature of the contract without any limit in time and without any objective condition laid down previously in the national legislation,

and

by adopting and maintaining in force Article 144-1 of the new Code of Civil Procedure, as amended by Decree No 2005-1308 of 20 October 2005, in so far as that provision provides for a time-limit of 10 days for the response from the contracting authority and/or the contracting entity concerned prohibiting any precontractual interim measures before that response and without that time period having any suspensory effect on the time-limit to be complied with between the notice of tender and the signature of the contract,

the French Republic has failed to fulfil its obligations under Directive 89/665/EEC [1] and Directive 92/13/EEC [2], as interpreted by the Court of Justice in Case C-81/98 *Alcatel* and Case C-212/02 *Commission* v *Austria* and, more specifically, Article 2(1) of Directive 89/665/EEC and Article 2(1) of Directive 92/13/EEC.

order the French Republic to pay the costs.

Pleas in law and main arguments

The Commission puts forward two pleas in law in support of its action.

By its first plea, the Commission criticises the defendant for having allowed contracting authorities, in urgent cases, to reduce to under 10 days the minimum time-limit to be complied with between the notice of award of tender to all tenderers and the signature of the relevant contract. The urgency referred to in the French legislation is left to the discretion of the contracting authority, without any objective condition being required. However, that same legislation contains no guarantee that the number of days by which the time-limit is reduced will be brought to the attention of the tenderers, which could lead to those tenderers bringing precontractual proceedings against a decision to award a contract at a stage when the relevant contract has already been signed. Such a situation is clearly contrary to the objective pursued by Directives 89/665//EEC and 92/13/EEC, supported by the Court's case-law, consisting in putting in place effective and rapid remedies targeting unlawful decisions by contracting authorities at a stage when there is still time to correct violations.

By its second plea, the Commission also criticises the defendant for having disregarded the practical effectiveness of those directives by providing in the French legislation for a compulsory preliminary phase of formal notice to the contracting authority, which does not have a suspensory effect on the time-limit to

be complied with between the notice of award of contract and the signature of the relevant contract. Since an unsuccessful tenderer may not bring an action during the time for responding to the formal notice, equivalent to 10 days, a response given by the contracting authority upon expiry of that time-limit deprives the unsuccessful tenderer of all effective legal remedies, because by that time the contract will have already been signed.

_____

[1] - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

[2] - Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

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JUDGMENT OF THE COURT (Fourth Chamber)

23 December 2009 (*)

(Public service contracts – Directive 2004/18 – Concepts of 'contractor', 'supplier' and 'service provider' – Concept of 'economic operator' – Universities and research institutes – Group ('consorzio') of universities and public authorities – Where the primary object under the statutes is non-profit-making – Admission to a procedure for the award of a public contract)

In Case C–305/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 23 June 2008, received at the Court on 4 July 2008, in the proceedings

Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)

v

Regione Marche,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting for the President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

– the Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa), by I. Deluigi, avvocato,

– the Czech Government, by M. Smolek, acting as Agent,

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

– the Commission of the European Communities, by C. Zadra and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(2)(a) and (8), first and second subparagraphs, of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference was made in proceedings between the Consorzio Nazionale Interuniversitario per le Scienze del Mare (National Inter-University Marine Sciences Consortium, 'CoNISMa') and the Regione Marche (the Marche Region) relating to the latter's decision not to admit the consortium to

a procedure for the award of a public services contract.

Legal context

Community legislation

3 Recital 4 in the preamble to Directive 2004/18 states as follows:

'Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.'

4 Article 1(2)(a) of Directive 2004/18 is worded as follows:

'"Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.'

5 Article 1(8) of Directive 2004/18 provides as follows:

'The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term "economic operator" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

...'

6 Article 1(9) of Directive 2004/18 is worded as follows:

'"Contracting authorities" means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A "body governed by public law" means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

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

...'

7 Article 4 of Directive 2004/18, entitled 'Economic Operators', provides as follows:

'1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

...

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be

required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.'

8 Article 44 of Directive 2004/18, entitled 'Verification of the suitability and choice of participants and award of contracts', provides in the first paragraph thereof as follows:

'Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.'

9 Article 55 of Directive 2004/18, entitled 'Abnormally low tenders', is worded as follows:

'1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.'

National legislation

10 Article 3(19) and (22) of Legislative Decree No 163 of 12 April 2006 establishing the Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Public Works Contracts, Public Supply Contracts and Public Service Contracts Code implementing Directives 2004/17/EC and 2004/18/EC) (GURI No 100 of 2 May 2006, ordinary supplement) ('Legislative Decree No 163/2006') provides as follows:

'19. The terms "contractor", "supplier" and "service provider" mean a natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) formed pursuant to Legislative Decree No 240 of 23 July 1991, which offers on the market, respectively, the execution of works or a work, the supply of products or the provision of services.

...

22. The term "economic operator" shall include a contractor, a supplier, a service provider or a group or consortium of these.'

11 Article 34 of Legislative Decree No 163/2006 provides, under the heading 'Entities to which public contracts may be awarded (Articles 4 and 5 of Directive 2004/18)', as follows:

'1. Without prejudice to the restrictions expressly provided for, the following entities are entitled

to participate in procedures for the award of public procurement contracts:

(a) individual commercial operators, including artisans, commercial companies and partnerships and cooperatives;

(b) consortia of production- and labour-cooperatives … and … consortia of artisans …;

(c) permanent consortia, constituted inter alia as joint venture companies for the purpose of Article 2615b of the Civil Code, between individual contractors (including artisans), commercial companies or partnerships or production- and labour-cooperatives, in accordance with the provision in Article 36;

(d) special purpose groupings of competitors, whose members include the entities referred to in subparagraphs (a), (b) and (c) …;

(e) ordinary consortia of competitors referred to in Article 2602 of the Civil Code whose members include the entities referred to in subparagraphs (a), (b) and (c) of the present paragraph, including those constituted as companies or partnerships …;

(f) entities who have entered into a European Economic Interest Group (EEIG) contract …;

…'

12 After the material events of the main proceedings had occurred, Legislative Decree No 152 of 11 September 2008 (GURI No 231 of 2 October 2008) added the following subparagraph (f bis) to the above list:

'economic operators within the meaning of Article 3(22), established in other Member States and constituted according to the applicable legislation of the Member State concerned.'

13 Lastly, Article 2082 of the Italian Civil Code provides that a 'commercial operator' (*imprenditore*) is any person who, in a professional capacity, engages in economic activity on an organised basis in order to produce or exchange goods or services.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 It is apparent from the order for reference that the Regione Marche organised a public tendering procedure for the award of a service contract entailing the acquisition of marine and seismic stratigraphic data and the taking of core borings and samples from the sea along the coastline between Pesaro and Civitanova Marche.

15 CoNISMa applied to participate in that procedure. After expressing reservations as to whether CoNISMa was eligible to participate in the tendering procedure in question, the contracting authority decided to exclude it by Decisions 4, 18 and 23 of 23 April 2007.

16 CoNISMa challenged its exclusion by way of an extraordinary petition to the President of the Italian Republic, a special procedure provided for by the Italian legal system, arguing that if Article 34 of Legislative Decree 163/2006 were interpreted as meaning that it contains an exhaustive list, not including universities and research institutes, and that such bodies are therefore not eligible to participate in a procedure for the award of a public contract, such an interpretation would be incompatible with Directive 2004/18. In the framework of that extraordinary petition, the Ministero dell'ambiente e della tutela del territorio (Italian Ministry of the Environment and Protection of the Territory) requested an opinion of the Consiglio di Stato (Council of State), for which provision is made under the relevant national legislation.

17 The Consiglio di Stato observes that, in order to deliver its opinion, it must establish whether an inter-university group, such as CoNISMa, can be regarded as an 'economic operator' within the meaning of Directive 2004/18 and, accordingly, whether it may take part in a tendering procedure for the award of a public service contract such as that at issue in the main proceedings. The referring court expresses reservations in that connection, on the basis of the following considerations.

18 The Consiglio di Stato states, as a preliminary point, that CoNISMa is a group ('consorzio') of 24

Italian universities and three ministries. According to its statute, it is non-profit-making and its object is to promote and coordinate research and other scientific activities and their applications in the field of marine sciences among the member universities. It can take part in tendering procedures and other procedures for competitive tendering organised by public authorities and by companies operating in the public and private sphere. Its activities are financed primarily by grants awarded by the Ministry for Universities and Research and other public authorities as well as by Italian or foreign public and private bodies.

19 The Consiglio di Stato refers, first, to Article 1(c) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) — to which Directive 2004/18 was the successor — which provides that 'service provider shall mean any natural or legal person, including a public body, which offers services' and observes that that wording appears to indicate an intention to restrict the possibility of concluding contracts with contracting authorities to entities which are engaged 'in an institutional capacity' in the activity corresponding to the service to be provided under the contract in question. If that approach is adopted, with the exception of private economic operators, tendering procedures are open only to public bodies which provide, for pecuniary gain, the services covered by that contract, in accordance with the function ascribed to them by the legal system, university bodies thus being excluded. That approach would appear to have been confirmed by the Court in Case C–220/05 *Auroux and Others* [2007] ECR I–385, paragraph 44, which held that Community legislation on public contracts applied to the person concerned 'as an economic operator active on the market'. That approach also appears to have been followed in Article 3(19) of Legislative Decree No 163/2006, which provides that a service provider is an economic operator 'which offers' services 'on the market'.

20 Second, the Consiglio di Stato points out that the position adopted on this question in Italian case-law is not without ambiguity. Certain courts have taken the view that public tendering procedures are open to natural and legal persons operating as a business and to public bodies which offer, in accordance with their institutional organisation, services similar to those covered by the tendering procedure. From that perspective, universities cannot be included in such categories of private and public undertakings, since their institutional remit is to develop teaching and research activities. Following a different approach, it has been held that public universities and consortia of such universities can take part in procedures for the award of public service contracts, provided that the provision of services in question is compatible with their institutional objectives and the provisions laid down in their statutes.

21 The Consiglio di Stato refers, thirdly, to the position adopted by the regulatory authority for public contracts, which distinguishes between economic operators and entities, such as non-economic public bodies, universities and university departments, which do not fall into the former category because their purpose is not to carry out economic activity, which is characterised by the creation of wealth. Such entities cannot therefore take part in public tendering procedures unless they set up companies expressly for that purpose by exercising the autonomy granted to universities under national legislation. That view is confirmed by Article 34 of Legislative Decree No 163/2006, which contains an exhaustive list of the entities authorised to take part in public tendering procedures.

22 By way of justification of its reservations, the Consiglio di Stato refers, lastly, to the Court's case-law, according to which Community public procurement rules must be interpreted by reference to a criterion of a functional nature, so that the fundamental principle of effective competition is not circumvented (Case C–337/06 *Bayerischer Rundfunk and Others* [2007] ECR I–11173). With regard in particular to public service contracts, the Court has drawn attention to the principal objective of the Community rules in this field, namely the free movement of services and the opening-up to the widest possible undistorted competition in all the Member States (Case C–26/03 *Stadt Halle and RPL Lochau* [2005] ECR I–1, paragraphs 44 and 47).

23 In the light of that case-law, the Consiglio di Stato states that the admission of universities, research institutes and consortia of those bodies to public tendering procedures may infringe the principle of free competition in two respects. First, it could potentially remove from the open market a number of public contracts, to which ease of access would in practice be hampered for a not inconsiderable proportion of ordinary undertakings. Second, it would place the contractor in a position of unfair advantage, guaranteeing it economic security provided by the constant and predictable flow of public finance, which is not available to other economic operators. However, the Consiglio di Stato takes the view that a restrictive interpretation of the concept of 'economic operator', which is dependent on the stable presence of such an operator 'on the market', thus precluding universities, research institutes and consortia of such bodies from taking part in public tendering procedures, would seriously undermine cooperation between public and private entities

and between researchers and commercial operators and ultimately constitute a restriction on free competition.

24 In the light of the foregoing, the Consiglio decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the provisions of Directive 2004/18/EC ... be interpreted as precluding a consortium made up solely of Italian universities and State bodies … from taking part in a tendering procedure for the award of a service contract such as that for the acquisition of geophysical data and marine samples?

(2) Are the provisions of Italian law contained in Article 3(22) and (19) and Article 34 of Legislative Decree No 163/2006, which provide, respectively: that "the term 'economic operator' shall include a contractor, supplier, service provider or a group or consortium of these" and "the terms 'contractor', 'supplier' and 'service provider' shall mean any natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) ..., which 'offers on the market', respectively, the execution of works or a work, the supply of products or the provision of services", contrary to Directive 2004/18/EC … if interpreted as restricting participation in tendering procedures to professional providers of such services and excluding entities whose primary objects are non-profit-making, such as research?'

The questions referred

25 It should be noted, first, that, according to the Court's case-law, when it issues an opinion in the context of an extraordinary petition, such as that in the main proceedings, the Consiglio di Stato constitutes a court or tribunal for the purposes of Article 234 EC (Joined Cases C–69/96 to C–79/96 *Garofalo and Others* [1997] ECR I–5603, paragraph 27).

Question 1

26 By this question, the Consiglio di Stato asks, in essence, whether Directive 2004/18 must be interpreted as precluding a consortium made up solely of universities and public authorities from taking part in a public tendering procedure for the award of a service contract.

27 As is apparent from the order for reference, the provisions of Directive 2004/18 considered to be relevant by the national court are, in particular, those in Article 1(2)(a) and (8), first and second subparagraphs, because those provisions refer to the concept of 'economic operator'. Moreover, according to the order, the consortium in question is, for the most part, non-profit-making and does not have the organisational structure of an undertaking or a regular presence on the market.

28 For the purposes of answering that question, it should be pointed out, first, that the provisions of Directive 2004/18 do not contain a definition of 'economic operator' and, second, do not distinguish between tenderers on the basis of whether they are primarily profit-making and nor do they expressly preclude entities such as that in question in the main proceedings. However, considered in the light of the Court's case-law, those provisions contain sufficient indications for it to be possible to give a useful answer to the referring court.

29 For instance, recital 4 in the preamble to Directive 2004/18 makes it clear that 'a body governed by public law' can participate as a tenderer in a procedure for the award of a public contract.

30 Similarly, the first and second subparagraphs of Article 1(8) of the directive grant the status of 'economic operator' not only to any natural or legal person but also, expressly, to any 'public entity' or group consisting of such entities offering services on the market. The concept of 'public entity' may also, therefore, include bodies which are not primarily profit-making, are not structured as an undertaking and do not have a continuous presence on the market.

31 Moreover, paragraph 1 of Article 4 of Directive 2004/18, which is entitled 'Economic operators', prohibits Member States from providing that candidates or tenderers who, under the rules of the Member State in which they are established, are entitled to provide the services covered by the contract notice, are to be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they are required to be either natural or legal persons. Nor does that

provision distinguish between candidates and tenderers on the basis of whether they are governed by public or private law.

32 As regards the question raised by the referring court concerning a possible distortion of competition due to the participation in a public tendering procedure by entities, such as the applicant in the main proceedings, which enjoy a position of unfair advantage vis-à-vis private economic operators on account of the public finance which they receive, it should be noted that recital 4 in the preamble to Directive 2004/18 imposes an obligation on Member States to ensure that the participation of a body governed by public law in a public tendering procedure does not cause such a distortion. That obligation also applies with regard to entities such as the applicant.

33 Reference should be made in that connection to the obligations upon and options available to contracting authorities under Article 55(3) of Directive 2004/18 in cases involving abnormally low tenders where the tenderer has obtained State aid. The Court has also recognised that, in certain specific circumstances, the contracting authorities are required, or at the very least permitted, to take into account the existence of subsidies, and in particular of aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid (see, to that effect, Case C–94/99 *ARGE* [2000] ECR I–11037, paragraph 29).

34 However, the fact that an economic operator may enjoy an unfair advantage because it receives public finance or State aid cannot justify the exclusion of entities, such as the applicant in the main proceedings, from a public tendering procedure a priori and without further consideration.

35 It follows from the above considerations that the Community legislature did not intend to restrict the concept of 'economic operator which offers services on the market' solely to operators which are structured as a business or to impose specific conditions which can restrict access to tendering procedures, from the outset, on the basis of the legal form and internal organisation of the economic operator.

36 That interpretation finds support in the Court's case-law.

37 The Court has thus held that one of the primary objectives of Community rules on public procurement is to attain the widest possible opening-up to competition (see, inter alia, to that effect *Bayerischer Rundfunk and Others*, paragraph 39) and that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders (Case C–538/07 *Assitur* [2009] ECR I–0000, paragraph 26). It should be added that the widest possible opening-up to competition is contemplated not only from the point of view of the Community interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question (see, to that effect, with regard to abnormally low tenders, Joined Cases C–147/06 and C–148/06 *SECAP and Santorso* [2008] ECR I–3565, paragraph 29).

38 In that spirit of opening up public contracts to the widest possible competition, the Court has also held that Community rules governing that field are applicable when the entity with which a contracting authority plans to conclude a contract for pecuniary interest is itself also a contracting authority (see, to that effect, *Stadt Halle and RPL Lochau*, paragraph 47 and the case-law cited). According to Article 1(9) of Directive 2004/18, a contracting authority is an entity not having an industrial or commercial character which performs a task in the general interest. As a general rule, such a body does not pursue gainful activity on the market.

39 Similarly, the Court has held that Community rules preclude any national legislation which excludes candidates or tenderers entitled under the law of the Member State in which they are established to provide the services in question from the award of public service contracts with a value greater than the threshold for the application of the relevant directives, solely on the ground that those candidates or tenderers do not have the legal form corresponding to a specific category of legal persons (see, to that effect, Case C–357/06 *Frigerio Luigi and C.* [2007] ECR I–12311, paragraph 22).

40 Moreover, it should be noted that, according to the Court's case-law, first, the mere fact that contracting authorities allow bodies which receive subsidies enabling them to submit tenders at prices appreciably lower than those of competing, unsubsidised, tenderers to take part in a procedure for the award of a public contract does not amount to a breach of the principle of equal

treatment and, second, if the Community legislature had intended to require contracting authorities to exclude such tenderers, it would have stated this explicitly (*ARGE,* paragraphs 25 and 26).

41 Finally, the Court's case-law also provides that Community rules do not require that, in order to be classed as a contractor – that is, an economic operator – a person who enters into a contract with a contracting authority must be capable of direct performance using his own resources. The person in question need only be able to arrange for execution of the works in question and to furnish the necessary guarantees in that connection (see, to that effect, Case C–399/98 *Ordine degli Architetti and Others* [2001] ECR I–5409, paragraph 90).

42 It therefore follows from both Community rules and the Court's case-law that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors, is eligible to submit a tender or put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis and whether or not it is subsidised by public funds. As the Czech Government correctly observed, whether such an entity is actually able to satisfy the conditions laid down in the contract notice must be assessed at a later stage in the procedure, by applying the criteria set out in Articles 44 to 52 of Directive 2004/18.

43 It should be added that the effect of a restrictive interpretation of the concept of 'economic operator' would be that contracts concluded between contracting authorities and bodies which are primarily non-profit-making would not be regarded as 'public contracts', could be awarded by mutual agreement and would thus not be covered by Community rules on equal treatment and transparency, which would be inconsistent with the aim of those rules.

44 Moreover, as the Consiglio di Stato stated, such an interpretation would undermine cooperation between public and private entities and between researchers and commercial operators and constitute a restriction of competition.

45 In the light of the foregoing, the answer to the first question must be that the provisions of Directive 2004/18, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, which refer to the concept of 'economic operator', must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market – such as universities and research institutes and consortia made up of universities and public authorities – to take part in a public tendering procedure for the award of a service contract.

Question 2

46 By this question, the Consiglio di Stato asks, in essence, whether the provisions of Directive 2004/18, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, preclude national legislation transposing that directive into national law where such legislation is interpreted as restricting participation in public procurement procedures to service providers who offer services on the market on a systematic and commercial basis and excluding entities, such as universities and research institutes, which are primarily non-profit-making.

47 It should be noted, as is apparent from the wording of Article 4(1) of Directive 2004/18, that the Member States have a discretion as to whether or not to allow certain categories of economic operators to provide certain services.

48 Accordingly, as the Commission correctly observed, the Member States can regulate the activities of entities, such as universities and research institutes, which are non-profit-making and whose primary object is teaching and research. They can, inter alia, determine whether or not such entities are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes.

49 However, if and to the extent that such entities are entitled to offer certain services on the market, the national legislation transposing Directive 2004/18 into domestic law cannot prevent them from taking part in public procedures for the award of contracts for the provision of those services. Such a prohibition would be incompatible with the provisions of Directive 2004/18, as interpreted in connection with the examination of the first question referred.

50 In such a situation, it is for the national court to interpret domestic law, so far as possible, in the light of the wording and the purpose of Directive 2004/18 with a view to achieving the results sought by the latter, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive, setting aside, if necessary, any contrary provision of national law (see Case C-414/07 *Magoora* [2008] ECR I-0000, paragraph 44).

51 The answer to the second question must therefore be that Directive 2004/18 must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.

Costs

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

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

1. **The provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, which refer to the concept of 'economic operator', must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market – such as universities and research institutes and consortia made up of universities and public authorities – to take part in a public tendering procedure for the award of a service contract.**

2. **Directive 2004/18 must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.**

[Signatures]

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* Language of the case: Italian.

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Judgment of the Court (Fourth Chamber) of 23 December 2009 (reference for a preliminary ruling from the Consiglio di Stato (Italy)) - Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche

(Case C-305/08) [1]

(Public service contracts - Directive 2004/18 - Concepts of 'contractor', 'supplier' and 'service provider' - Concept of 'economic operator' - Universities and research institutes - Group ('consorzio') of universities and public authorities - Where the primary object under the statutes is non-profit-making - Admission to a procedure for the award of a public contract)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Applicant: Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)

Defendant: Regione Marche

Re:

Reference for a preliminary ruling - Consiglio di Stato - Interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) - Exclusion of non-profit-making entities whose objects include research, such as universities, from a tendering procedure for the award of a public service contract for the acquisition of geophysical data

Operative part of the judgment

The provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, which refer to the concept of 'economic operator', must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market - such as universities and research institutes and consortia made up of universities and public authorities - to take part in a public tendering procedure for the award of a service contract.

Directive 2004/18 must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.

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[1] - OJ C 247, 27.09.2008.

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OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 3 September 2009 (1)

Case C-305/08

Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)
v
Regione Marche

(Reference for a preliminary ruling from the Consiglio di Stato (Italy))

(Public service contracts – Directive 2004/18/EC – Procedure for the award of public procurement contracts – Concept of 'economic operator' – Exclusion of non-profit-making entities whose objects include research, such as universities)

1. The present reference for a preliminary ruling from the Consiglio di Stato (Council of State) (Italy) concerns the interpretation of the concept of 'economic operator', set out in particular in the second paragraph of Article 1(8) of Directive 2004/18/EC. (2) The referring court seeks to know whether non-profit-making entities which are not necessarily present on the market on a regular basis, in particular universities and research institutes as well as groups (consortia) of those universities and research institutes and State bodies, are allowed to participate in a public service tendering procedure in relation to the acquisition of geophysical data and marine samples. In addition, the referring court asks whether a restrictive interpretation of the national legislation, which provides that the above entities are excluded from such participation, is contrary to the Directive.

I – Legal framework

A – *Community law*

2. Article 1(2)(a) of the Directive provides that '"Public contracts" are contracts for pecuniary interest concluded in writing between one or more *economic operators* and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive'. (3)

3. According to Article 1(8) of the Directive:

'the terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term "*economic operator*" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

…' (4)

4. Article 4 of the Directive is entitled '*Economic operators*' and states:

'1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

...

2. Groups of *economic operators* may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.' (5)

5. Finally, Article 44(1) of the Directive provides under the heading 'verification of the suitability and choice of participants and award of contracts' that 'contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the *economic operators* not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3'. (6)

B – *National law*

6. Article 3(19) and (22) of the Public Contracts Code, enacted by Legislative Decree No 163 of 12 April 2006, (7) provides, respectively that 'the terms "contractor", "supplier" and "service provider" shall mean any natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) formed pursuant to Legislative Decree No 240 of 23 July 1991, which "offers on the market", respectively, the execution of works or a work, the supply of products, or the provision of services' and that 'the term "*economic operator*" shall include a contractor, supplier, service provider or a group or consortium of these'. (8)

7. Article 34 of Legislative Decree No 163/2006 provides, under the heading 'Entities to which public contracts may be awarded …':

'1. Without prejudice to the restrictions expressly provided for, the following entities are entitled to participate in the procedure for the award of public procurement contracts:

(a) individual commercial operators, including artisans, commercial companies and partnerships and cooperatives;

(b) consortia of production- and labour-cooperatives … and … consortia of artisans …;

(c) permanent consortia, constituted inter alia as joint venture companies ..., between individual contractors (including artisans), commercial companies or partnerships or production- and labour-cooperatives, …;

(d) special purpose groupings of competitors, whose members include the entities referred to in subparagraphs (a), (b) and (c) …;

(e) ordinary consortia of competitors ..., whose members include the entities referred to in subparagraphs (a), (b) and (c) of the present paragraph, including those constituted as companies or partnerships…;

(f) entities who have entered into an [EEIG] …;

…'

8. It was only after the material events of the main proceedings had occurred, and therefore also after the adoption of the order of the referring court on 23 April 2008, that Legislative Decree No 152 of 11 September 2008 (9) added the following subparagraph to the above list: '(f bis) economic operators within the meaning of Article 3(22), established in other Member States and constituted according to the applicable legislation of the Member State concerned'.

II – Factual and procedural background and the questions referred

9. The Regione Marche (the Marche Region), in its capacity as a contracting authority, organised a public service tendering procedure in relation to the acquisition of geophysical data and marine samples. The Consorzio Nazionale Interuniversitario per le Scienze del Mare (National Inter-University Marine Sciences Consortium, 'CoNISMa') applied to participate, but was ultimately excluded from that procedure.

10. CoNISMa challenged its exclusion by way of an extraordinary petition to the President of the Italian Republic. In the framework of that extraordinary petition, the Ministero dell'ambiente e della tutela del territorio (Italian Ministry of the Environment and Protection of the Territory) requested an opinion of the Consiglio di Stato. The referring court needs to establish whether an inter-university group, such as CoNISMa, constitutes an 'economic operator' within the meaning of the Directive and, if so, whether it may take part in a tendering procedure such as the one at issue in the main proceedings. In that regard, the referring court expresses doubts on the basis of the following considerations.

11. The Consiglio di Stato states that CoNISMa is a group (consortium) of 24 universities and three ministries. According to its statute, the consortium is non-profit-making and seeks to promote and coordinate research and other scientific activities and their applications in the field of marine sciences between the member universities. However, its statute provides that it may participate in public tendering procedures. The consortium is financed primarily from funds provided by the Ministry for Universities and Research. In the referring court's view, the tendering procedures in question are open only to public bodies that supply the services which are the subject of the contract in accordance with their official functions and in a manner which is consistent with the profit-making functions they are assigned by the rules governing them.

12. Thus the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the provisions of Directive 2004/18/EC ... be interpreted as precluding a consortium made up solely of Italian universities and State bodies, [such as CoNISMa], from taking part in a tendering procedure for the award of a service contract such as that for the acquisition of geophysical data and marine samples?

(2) Are the provisions of Italian law contained in Article 3(22) and (19) and Article 34 of the Public Contracts Code, enacted by Legislative Decree No 163/2006, which provide, respectively: that "the term 'economic operator' shall include a contractor, supplier, service provider or a group or consortium of these" and "the terms 'contractor', 'supplier' and 'service provider' shall mean any natural or legal person, or body without legal personality, including [an EEIG] ..., which 'offers on the market', respectively, the execution of works or a work, the supply of products or the provision of services", contrary to Directive 2004/18/EC if interpreted as restricting participation in tendering procedures to professional providers of such services and excluding entities whose primary objects are non-profit-making, such as research?'

III – Assessment

A – *Principal arguments of the parties*

13. According to CoNISMa, the applicant in the main proceedings, the national legislation, which excludes entities that are not 'contractors' according to an exhaustive list contained in Article 34 of Legislative Decree No 163/2006, must be interpreted in the light of the Directive. Article 1(8) of the Directive expressly includes 'public entities' among contractors, suppliers or service providers. Article 4 of the Directive provides that candidates entitled to provide the relevant service are not to be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons. A fortiori, a candidate should not be rejected on the ground that he is not a 'contractor'. CoNISMa states that that approach is confirmed by the fact that after the Commission of the European Communities had taken action in the form of opening administrative procedure No 2007/2309 (10) against the Italian Republic concerning a failure to fulfil obligations, the Italian Government inserted in Article 34(1) of Legislative Decree No 163/2006 the new subparagraph (f bis) referred to above. In CoNISMa's view, this reform expressly abolished the requirement that economic operators established in other Member States be a 'contractor'. Furthermore, that reform replaced the term 'undertakings' used in

the Legislative Decree with the term 'economic operators'.

14. The Czech Government argues, in essence, that if the Directive intended to establish a distinction between economic public bodies, which carry out a certain economic activity, and non-economic ones, it would have included a statement to that effect. Therefore, the Czech Government proposes that the first question should be answered in the negative.

15. The Austrian Government contends inter alia that the Community rules on public procurement are applicable where a contracting authority intends to award a contract for pecuniary interest to a legally distinct entity, whether the latter is itself a contracting authority or not. It follows that contracting authorities may take part in public tendering procedures both as tenderers or as candidates, a point which should apply a fortiori to tenderers who are not contracting authorities but whose objects are non-profit-making and which do not act exclusively in accordance with market forces.

16. The Commission submits essentially that according to Article 1(8) of the Directive and the Court's case-law, public bodies and contracting authorities in general may take part in a public tendering procedure as tenderers and may therefore be considered as economic operators within the meaning of the Directive. Furthermore, no provision of the Directive precludes universities and consortia of universities from being considered economic operators and from accessing Community tender procedures.

17. As regards the second question, all the above parties argue, in substance, that it should be answered in the affirmative.

B – *Appraisal*

18. By its two questions, which should be considered together, the referring court asks essentially whether non-profit-making entities which are not necessarily present on the market on a regular basis, (11) such as CoNISMa – that is to say, universities and research institutes as well as groups (consortia) of those universities and research institutes and State bodies (12) – are entitled to participate in a public service tendering procedure and may be considered to constitute an 'economic operator' within the meaning of the Directive. Should the national legislation be interpreted restrictively as precluding the above entities from participating, the referring court asks whether such interpretation is contrary to the Directive. In that respect, it is sufficient to point out that the Court interprets Community law and not national law. (13)

19. I shall first consider the wording of the relevant provisions.

20. Despite the reference to 'economic operators' in, inter alia, Article 1(2)(a), the Directive does not contain a precise definition of that concept. Article 1(8) of the Directive provides only that that term 'is used merely in the interest of simplification' and means 'any natural or legal person or *public entity* or group of such persons and/or bodies which offers on the market … works[,] products or services'. (14)

21. In that regard, I consider that the fact that Article 1(8) of the Directive refers to those who 'offer services on the market' does not signify an intention to restrict the category of public bodies eligible to conclude contracts with contracting authorities solely to those bodies which are engaged (as an undertaking) in the activity involved in the service to be provided by the selected contractor and whose objects are profit-making. In order to be considered an economic operator it is not essential to offer services on the market on a continuous and systematic basis.

22. In my view, the Directive clearly does not require any particular legal form and it contains no requirement to the effect that an economic operator qualify as an undertaking or needs to have profit-making objects or a stable or regular presence on the market.

23. The Directive merely provides that an 'economic operator' means inter alia any public entity which offers on the market the execution of works, products or services. It says nothing more.

24. In that connection, as the Commission has pointed out, by not providing any indications as to the required characteristics and/or legal form of economic operators allowed to participate in tendering procedures, the Community legislature did not wish to define that concept in a way which would introduce particular conditions and thus limit access to tender procedures in such a way.

25. In addition, it should be pointed out that Article 4(1) of the Directive provides that 'candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons'. Then, as regards groups of economic operators, Article 4(2) of the Directive continues that 'in order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form …'.

26. It follows from the foregoing considerations, and not least from the wording of Article 1(8) of the Directive in particular, that public entities, such as the entity involved in the main proceedings, constitute 'economic operators' and may, in principle, participate in public service tendering procedures.

27. The above approach is confirmed by the *travaux préparatoires* to the Directive. (15)

28. Here, one may perhaps draw a parallel with the well-established concept of an undertaking under Community competition law.

29. This may also be opportune due to the fact that the Directive stresses that the concept of 'economic operator' is used merely in the interest of simplification. In addition, it is obvious that competition law and rules guaranteeing fair competition in tendering procedures are related.

30. Therefore it is instructive to recall the *Höfner and Elser* (16) line of case-law on the concept of 'undertaking', in the context of competition law, which 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. Furthermore, the Court has held that 'any activity consisting in offering goods or services on a given market is an economic activity'. (17) Here, the remark of Advocate General Jacobs that 'an activity does not necessarily cease to be economic simply because there is no aim to make a profit' is particularly apt. (18)

31. My interpretation of the concept of 'economic operator' is also confirmed by the Court's case-law relating to public procurement.

32. First of all, there is case-law (19) where the Court has stated that the Community rules on public contracts apply to 'an economic operator [who is] active on the market'. However, I consider that one should not infer from that statement that an economic operator must have a stable or regular presence on the market.

33. On the contrary, in my view, the concept of 'economic operator' must be interpreted broadly in order to include any person who offers services on the market, whether he does so for the first time or merely on an isolated or occasional basis.

34. Indeed, as the Commission has pointed out, the above is not prejudicial to the quality of the service provided since Article 44 of the Directive provides that contracts are to be awarded only after the contracting authorities have checked the economic operators' economic and financial standing as well as their professional and technical knowledge or ability.

35. A broad interpretation of the concept of 'economic operator' is also in line with the Court's case-law to the effect that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders. (20)

36. Regard should also be had in this context to the judgments in *Teckal*, (21) *ARGE*, (22)*Stadt Halle and RPL Lochau*, (23) and *Auroux and Others*, (24) where the Court ruled, inter alia, that Community legislation on public procurement is applicable even in cases where the contractor is itself a contracting authority. (25) Therefore, a contracting authority may also be considered to constitute an 'economic operator' within the meaning of the Directive. This also supports my broad interpretation of that concept in the present case.

37. The referring court expressed concerns specifically with regard to CoNISMa's non-profit-making objects. In that connection, in *Commission* v *Italy*, (26) the Court ruled, first, that the fact that an association is non-profit-making does not exclude it from carrying out an activity of an economic nature and from constituting an undertaking under the Treaty provisions relating to competition.

38. Next, the Court recalled the ruling in *ARGE* (27) and held that the fact that, as their employees work on a voluntary basis, such bodies tend to be able to submit tenders at prices appreciably lower than those of other tenderers does not preclude them from participating in an award procedure for a public service contract covered by Directive 92/50. Therefore, the Court concluded that the contract at issue in that case was not excluded from the concept of public service contracts within the meaning of Article 1(a) of Directive 92/50, by reason of the fact that the associations at issue were of a non-profit-making nature. (28)

39. Furthermore, in order to address the referring court's concerns that the consortium would allegedly not be able to offer the professionalism and capability of a typical business as well as the sophisticated machinery and highly-skilled operators required for the service concerned, it is sufficient to recall the case-law where the Court held that it makes no difference if the tenderer himself cannot or does not intend to carry out the contract itself provided that it can demonstrate that it actually has available to it the resources, of subsidiaries or third parties and whatever the nature of its legal link with those companies, (29) which are necessary for carrying out the contract.

40. In that connection, the Directive does not allow a contracting authority to exclude a public body, such as CoNISMa, from taking part in a tendering procedure, the reason being that the question whether an economic operator is entitled to take part in such a procedure is to be examined in the framework of Articles 44 to 52 of the Directive. In other words, as the Czech Government has argued, the possibility of taking part in a tendering procedure by way of submitting a bid should be distinguished from the assessment of that bid in the framework of a subsequent qualification phase of the procedure.

41. In addition, the referring court considers that participation in tendering procedures by consortia of public bodies, such as CoNISMa, may infringe the principle of free competition in two respects. First, such participation could potentially remove from the open market a number of public contracts, to which ease of access would be at least hampered for a not inconsiderable proportion of ordinary undertakings due to the consortium's widespread network of business-referral points. Secondly, it would place the contractor in a position of unfair advantage because of the economic security provided by the constant and predictable flow of public finance which is not available to other economic operators, who must rely solely on their ability to earn revenue from their offering on the market.

42. First, as regards the alleged widespread network of business-referral points, I do not consider that argument particularly decisive, not least since CoNISMa explained in its observations that its only seat is in Rome and the offices of its various members do not play any role in public tendering procedures.

43. Secondly, with regard to the argument that CoNISMa would be placed in a position of unfair advantage because of the public finance available to it – quite apart from CoNISMa's explanation that its commercial activity is self-funding – I agree with the Czech Government and the Commission that it is sufficient to refer to the Court's case-law to the effect that that element is not an obstacle to participation in tendering procedures. (30) In particular, the Court has held that public bodies, specifically bodies receiving subsidies from the State which might enable them to submit tenders at prices appreciably lower than those of other, unsubsidised, tenderers, are expressly authorised (31) to participate in a procedure for the award of a public procurement contract. Indeed, the Directive which is pertinent in the case in the main proceedings also expressly authorises public bodies, funded in some cases out of the public purse, to participate in procedures for the award of public procurement contracts.

44. It may be noted here that Article 55(3) of the Directive concerning 'abnormally low tenders' provides that 'where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time-limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact'. (32)

45. In that regard, the Directive states, in the fourth recital in the preamble, that 'Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers'.

46. To conclude, Article 1(8) of the Directive, and in particular the concept of 'economic

operator', should be interpreted as not precluding a consortium such as the one in the main proceedings from taking part in a public service tendering procedure. (33) It follows that the Directive precludes national legislation which excludes such entities from participation, provided that they are otherwise entitled under the relevant national legislation to offer products, services or works on the market.

47. In that regard, it is for the national court to determine, taking into account all the relevant circumstances of the case before it, whether the relevant national legislation is compatible with the Directive, disapplying, if necessary, any contrary provision of domestic law. (34)

IV – Conclusion

48. Therefore, I suggest that the Court answer the questions of the Consiglio di Stato as follows:

(1) Article 1(8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and in particular the concept of 'economic operator', should be interpreted as not precluding a consortium, such as the one in the main proceedings, from taking part in a tendering procedure for the award of a service contract pertaining to services the consortium is entitled to carry out under the relevant national legislation.

(2) Directive 2004/18 precludes national legislation which excludes entities whose primary objects are non-profit-making, such as research, from participating in tendering procedures, provided that those entities are entitled under the relevant national legislation to offer works, products or services on the market.

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1 – Original language: English.

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2 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) ('the Directive').

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3 – Emphasis added.

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4 – Idem.

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5 – Idem.

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6 – Idem.

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7 – GURI No 100 of 2 May 2006, ordinary supplement, ('Legislative Decree No 163/2006'). Procedures for the award of public works contracts, public supply contracts and public service contracts are currently governed, in their entirety, by this decree.

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8 – Emphasis added.

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9 – GURI No 231 of 2 October 2008.

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10 – CoNISMa claims that the Commission criticised the list in Article 34 of Legislative Decree No 163/2006, stating that it 'does not appear to allow the participation in tendering procedures of operators with a legal form different to those mentioned in

the list. In particular, this article does not appear to allow the participation of other public entities or bodies governed by public law in the sense of the public procurement directives'.

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11 – The Consiglio di Stato refers in this respect to CoNISMa's presence on the market as not being on a 'regular' or 'stable' basis. However, CoNISMa's statute expressly provides that it may participate in tendering procedures and that is why I qualify the statement with the inclusion of 'necessarily'. In fact, CoNISMa argues that it regularly participates in public tendering procedures.

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12 – I would note here that CoNISMa disputes the fact that it is also composed of State bodies. However, suffice it to say that the questions referred for a preliminary ruling are considered within the factual and legal context as set out by the referring court. The Court does not take account of observations from interested parties within the meaning of Article 23 of the Statute of the Court which take issue with that context. See Case C–153/02 *Neri* [2003] ECR I–13555, paragraphs 33 to 36; see also Case C–145/03 *Keller* [2005] ECR I–2529, paragraphs 32 to 34. In any event, my conclusion in the present opinion applies whether or not the consortium is also composed of State bodies.

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13 – As regards the wording of the second question, it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of national law with Community law or to interpret national law. The Court is, however, competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see Case C–213/07 *Michaniki* [2008] ECR I–0000, paragraphs 51 and 52 and the case-law cited).

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14 – Emphasis added.

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15 – The proposal for the Directive explained, under 'justification' for the wording of what eventually became Article 1(8), that the 'new concept [of an economic operator] has become necessary because of the insertion of the three public sector Directives into a single text'. The *travaux préparatoires* to the Directive also state that 'the only purpose of [that] term is for conciseness' and that it stands for 'opérateur économique' in French or 'ondernemer' in Dutch and that in English it effectively means 'undertaking'. They continue by stating that 'in the event of serious transcription problems, systematic use could be made, despite the ponderous style, of "supplier, provider of services and contractor"'.

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16 – Case C–41/90 [1991] ECR I–1979, paragraph 21. See, inter alia, also Case C–205/03 P *FENIN* v *Commission* [2006] ECR I–6295, paragraph 25; and, more recently, Case C–280/06 *ETI and Others* [2007] ECR I–10893, paragraph 38 and the case-law cited.

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17 – See Case C–113/07 P *Selex Sistemi Integrati* v *Commission and Eurocontrol* [2009] ECR I–0000, paragraph 69. See also Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C–35/96 *Commission* v *Italy* [1998] ECR I–3851, paragraph 36; C–309/99 *Wouters and Others* [2002] ECR I–1577, paragraph 47; Case C–222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I–289, paragraph 108; Case C–237/04 *Enirisorse* [2006] ECR I–2843, paragraph 29; and

FENIN v *Commission*, cited in footnote 16, paragraph 25.

18 – Case C–5/05 *Joustra* [2006] ECR I–11075, point 84. See also the Opinion of Advocate General Poiares Maduro in *FENIN* v *Commission*, cited in footnote 16, 'even if no profit-making activity is carried on, there may be participation in the market capable of undermining the objectives of competition law' (point 14). Concerning the relevance of the fact that an organisation is non-profit-making in assessing the economic nature of an activity, see Joined Cases C–159/91 and C–160/91 *Poucet and Pistre* [1993] ECR I–637, paragraph 10; Case C–35/96 *Commission* v *Italy*, cited in footnote 17, paragraph 37; and Joined Cases C–180/98 to C–184/98 *Pavlov and Others* [2000] ECR I–6451, paragraphs 76 and 77.

19 – See Case C–220/05 *Auroux and Others* [2007] ECR I–385, paragraph 44.

20 – See, to that effect, *Michaniki*, cited in footnote 13, paragraph 39; and Case C–538/07 *Assitur* [2009] ECR I–0000, paragraph 26. See also Case C–26/03 *Stadt Halle and RPL Lochau* [2005] ECR I–1, paragraph 47.

21 – Case C–107/98 [1999] ECR I–8121, paragraph 50 et seq.

22 – Case C–94/99 [2000] ECR I–11037, paragraph 40.

23 – Cited in footnote 20, paragraph 47.

24 – Cited in footnote 19.

25 – Concerning a case where a university is potentially a contracting authority, see Case C–380/98 *The University of Cambridge* [2000] ECR I–8035. With regard to the concept of a contracting authority, see Tizzano, A., 'La notion de "pouvoir adjudicateur" dans la jurisprudence communautaire', in Monti, M., Prinz Nikolaus von und zu Liechtenstein, Vesterdorf, B., Westbrook, J., Wildhaber, L. (Eds.), *Economic Law and Justice in Times of Globalisation*, Nomos, Baden-Baden, 2007, pp. 659–669.

26 – Judgment of 29 November 2007 in Case C–119/06, paragraphs 37 to 41 and the case-law cited. The judgment concerned Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

27 – Cited in footnote 22, paragraphs 32 and 38.

28 – Concerning the non-profit-making argument, see also Case C–126/03 *Commission* v *Germany* [2004] ECR I–11197, paragraphs 18 and 19; and Case C–84/03 *Commission* v *Spain* [2005] ECR I–139, paragraphs 38 to 40; as well as the Opinion of Advocate General Kokott in *Auroux and Others*, cited in footnote 19, point 54.

29 – See Case C–389/92 *Ballast Nedam Groep* [1994] ECR I–1289 ('*Ballast Nedam Groep I*'), paragraph 11 et seq.; Case C–176/98 *Holst Italia* [1999] ECR I–8607, paragraph 25 et seq.; and Case C–399/98 *Ordine degli Architetti and Others* [2001] ECR I–5409 ('*La Scala*'), paragraphs 88 to 96.

30 – See *ARGE*, cited in footnote 22, paragraph 24 et seq.

31 – At the time, by Directive 92/50.

32 – In this respect, see also *ARGE*, cited in footnote 22.

33 – In that connection, as the Commission has pointed out, a Member State may of course govern the activities of non-profit-making persons whose primary object is research and, if necessary, may limit the possibility for such persons to offer services on the market. None the less, the Member State in question must recognise persons established in other Member States entitled under the law of the Member States concerned to carry out the relevant service activity as constituting 'economic operators', whether they be universities, research institutes or groups made up of these, acting with or without a profit-making purpose. The referring court does not refer to any Italian legislation which would establish the above limitations for entities such as the one in the main proceedings.

34 – See, to that effect, Case C–357/06 *Frigerio Luigi & C.* [2007] ECR I–12311, paragraph 28, which refers to Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11, and Case C–208/05 *ITC* [2007] ECR I–181, paragraphs 68 and 69.

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Reference for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 4 July 2008 - CoNISMa (Consorzio Nazionale Interuniversitario per le Scienze del Mare) v Regione Marche

(Case C-305/08)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Applicant: CoNISMa (Consorzio Nazionale Interuniversitario per le Scienze del Mare)

Defendant: Regione Marche

Questions referred

Must the provisions of Directive 2004/18/EC [1] on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts that are referred to in section 1 above be interpreted as precluding a consortium made up solely of Italian universities and state bodies, as described in section 8 above, from taking part in a tendering procedure for the award of a service contract such as that for the acquisition of geophysical data and marine samples?

Are the provisions of Italian law contained in Article 3(22) and (19) and Article 34 of the Public Contracts Code, enacted by Legislative Decree No 163/2006, which provide, respectively: that 'the term "economic operator" shall include a contractor, supplier, service provider or a group or consortium of these' and 'the terms "contractor", "supplier" and "service provider" shall mean any natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) formed pursuant to Legislative Decree No 240 of 23 July 1991, which "offers on the market", respectively, the execution of works or a work, the supply of products or the provision of services', contrary to Directive 2004/18/EC if interpreted as restricting participation in tendering procedures to professional providers of such services and excluding entities whose primary objects are not-for-profit, such as research?

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[1] - OJ L 2004 134, p. 114

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JUDGMENT OF THE COURT (Third Chamber)

10 December 2009 (*)

(Failure of a Member State to fulfil obligations – Directive 2004/18/EC – Procedures for the award of public contracts – National legislation providing for a single procedure for the award of the contract defining needs and of the ensuing marché d'exécution – Compatibility with that directive)

In Case C–299/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 July 2008,

European Commission, represented initially by D. Kukovec and G. Rozet, and subsequently by G. Rozet and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues, J.–C. Gracia and J.–S. Pilczer, acting as Agents,

defendant,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting as President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Arabadjiev, Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2009,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities is asking the Court to declare that, by adopting and keeping in force Articles 73 and 74-IV of the Code des marchés publics (the Public Procurement Code) adopted by Decree No 2006-975 of 1 August 2006 (Official Journal of the French Republic of 4 August 2006, p. 11627), inasmuch as those provisions lay down a procedure for the award of so–called *marchés de definition* (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a *marché d'exécution* (a public works, supply or service contract) to one of the holders of the initial *marchés de définition* without opening it afresh to competition or, at most, by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

Legal context

Community legislation

2 Recital 3 in the preamble to Directive 2004/18 states:

'Such [Community] coordinating provisions [of national procedures for the award of contracts] should comply as far as possible with current procedures and practices in each of the Member States.'

3 Article 2 of the Directive provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

4 According to Article 28 of the Directive:

'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.'

5 Article 29 of Directive 2004/18, entitled 'Competitive dialogue', provides:

'1. In the case of particularly complex contracts, Member States may provide that where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the latter may make use of the competitive dialogue in accordance with this Article.

A public contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender.

2. Contracting authorities shall publish a contract notice setting out their needs and requirements, which they shall define in that notice and/or in a descriptive document.

3. Contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.

4. Contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option.

5. The contracting authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask them to submit their final tenders on the basis of the solution or

solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

These tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.

7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and shall choose the most economically advantageous tender in accordance with Article 53.

At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

8. The contracting authorities may specify prices or payments to the participants in the dialogue.'

6 Article 31 of Directive 2004/18 states:

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

...

(3) for public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates[;] in the latter case, all successful candidates must be invited to participate in the negotiations;

...'

7 The first subparagraph of Article 80(1) of the Directive is worded as follows:

'The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof.'

National legislation

8 The code des marchés publics (Public Procurement Code), in the version thereof resulting from Decree No 2004-15 of 7 January 2004 (Official Journal of the French Republic of 8 January 2004, p. 703), which entered into force on 10 January 2004, provided in the third paragraph of Article 73 as follows:

'Provisions supplied under several *marchés de définitions* having the same subject–matter, concluded upon completion of a single procedure and awarded simultaneously, may be awarded, without a further tendering process, to the supplier of the chosen solution. In such cases, the amount of the provisions to be compared with the thresholds takes account of the cost of the definition studies and the estimated amount of the *marché d'exécution*.'

9 The Public Procurement Code, as adopted by Decree No 2006–975, which entered into force on 1 September 2006, contains inter alia the following provisions:

'Article 73

If the public entity is unable to specify the aims and performances which the contract must meet, the techniques to be used, and the human and material resources required, it may resort to *marchés de definition*.

The purpose of such contracts is to explore the possibilities and conditions for establishing a

contract subsequently, if necessary through production of a model or demonstrator. They must also enable the price level of the provisions to be estimated and calculated, as well as the different phases of the performance schedule.

In the framework of a single procedure, contracts for the performance of services following several *marchés de définition* having the same subject-matter and awarded simultaneously are awarded after being opened to competition limited to the holders of the initial *marchés de définition*, in accordance with the following provisions:

1. The public contract notice defines the subject-matter of the *marchés de définition* awarded simultaneously and the subject-matter of the subsequent *marché d'exécution*;

2. The public contract notice defines the criteria for the selection of applications. Those criteria take into account the capacities and competences required of the candidates both for the *marchés de définition* and for the subsequent *marché d'exécution*;

3. The public contract notice defines the criteria for the selection of offers for the *marchés de définition* awarded simultaneously and the criteria for the selection of offers for the subsequent *marché d'exécution*;

4. The amount of the provisions to be compared with the thresholds takes account of the cost of the definition studies and the estimated amount of the *marché d'exécution*;

5. The number of *marchés de définition* awarded simultaneously in the framework of the present procedure may not be lower than three, subject to a sufficient number of candidates.

The contract or framework agreement is awarded by the tenders committee for the local authorities or after the opinion of the tenders committee for the State, for the public health bodies and the public social or medical-social bodies.'

Article 74

...

IV. In the framework of a single procedure, the contract or framework agreement of project-management following several *marchés de définition* having the same subject-matter and awarded simultaneously may be awarded after being opened to competition limited to the holders of the initial *marchés de définition*, under the conditions laid down in the third paragraph of Article 73.

...'

The pre–litigation procedure

10 By letter of 18 October 2004, the Commission sent the French Republic a first letter of formal notice concerning Articles 73 and 74–III of the Public Procurement Code, as amended by Decree No 2004-15. Following the amendment of those provisions by Decree No 2006-975, the Commission sent an additional letter of formal notice to that Member State on 15 December 2006.

11 As it was not satisfied with the French Republic's replies, on 29 June 2007 the Commission sent a reasoned opinion to the French Republic, calling on it to take the measures necessary to comply with that opinion within two months of its receipt.

12 Taking the view that that Member State's replies to the reasoned opinion were not satisfactory, the Commission decided to bring the present action.

The action

Arguments of the parties

13 The Commission claims that Articles 73 and 74-IV of the Public Procurement Code, as adopted by Decree No 2006-975, allow a contracting authority to award a *marché d'exécution* (a public works,

supply or service contract) to one of the holders of the initial *marchés de définition* without opening it afresh to competition or, at most, by opening it to competition limited to those holders as soon as the conditions provided for in the third paragraph of Article 73 have been met. Those articles of the Public Procurement Code infringe the provisions of Directive 2004/18 by allowing a contract to be awarded on the basis of mutual agreement, or with limited competition, in situations not provided for by the Directive.

14 The Commission maintains that *marchés de définition* as provided for by those national provisions do not make it possible, as a general rule, to establish at the outset, with sufficient precision, the subject-matter of the *marché d'exécution*, the criteria for selecting tenderers or those for awarding the contract in question. It follows that the procedure for the award of *marchés de définition* resulting from those provisions runs counter to the principle of transparency laid down in Article 2 of Directive 2004/18. That procedure creates a situation of legal uncertainty for both contracting authorities and operators.

15 According to the Commission, the procedure for the award of *marchés de définition* is neither a competitive dialogue nor a framework agreement within the meaning of Articles 29 and 32 of Directive 2004/18. Nor is such a procedure a design contest under which it is possible, under certain conditions, to award the ensuing service contract on the basis of mutual agreement in accordance with Article 31(3) of the Directive.

16 The French Republic claims that the national provisions in issue are not incompatible with Articles 2, 28 or 31 of Directive 2004/18. The latter, it argues, is a coordinating directive and does not lay down a uniform and exhaustive body of Community rules. Consequently, the fact that competition may be limited when the *marchés d'exécution* are being awarded is compatible with that directive. The procedure for the award of *marchés de définition* complies with the principles on the right of establishment and the freedom to provide services laid down by the EC Treaty and set out in Article 2 of that directive, since the Member States remain free to maintain or adopt substantive and procedural rules in regard to public contracts.

17 The French Republic argues that it is possible for the subject-matter and criteria of the subsequent *marché d'exécution* to be established from the launch of the procedure for the award of the *marchés de définition*. There are many situations, such as those involving certain urban development contracts, in which the subject-matter and criteria for the award of the *marché d'exécution* are sufficiently independent of the *marchés de définition* that they can already be determined at the initial stage of the *marchés de définition*.

18 The French Republic adds that Directive 2004/18 sets out two procedures with characteristics which are analogous to those of the procedure for the award of *marchés de definition* provided for by the Public Procurement Code, as adopted by Decree No 2006–975, namely the framework agreement and the competitive dialogue. By those two procedures, the Community legislature itself established complex procedures by which contracts are opened to competition in two stages. Since that directive does not lay down a uniform and exhaustive body of Community rules, the national legislature can also establish specific provisions providing for contracts to be opened to competition in two stages, provided that those provisions comply with the principle of transparency laid down in Article 2 of that directive.

19 If the Court were to take the view that the body of rules established by that directive is exhaustive, the French Republic submits, in the alternative, that the procedure for the award of *marchés de definition* set out in the Public Procurement Code can be regarded as constituting a variation on the competitive dialogue procedure.

Findings of the Court

20 By its form of order, the Commission is asking the Court to declare that the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18 by adopting and keeping in force Articles 73 and 74-IV of the Public Procurement Code adopted by Decree No 2006-975, inasmuch as those provisions lay down a procedure for the award of *marchés de definition* under which it is possible for a contracting authority to award a *marché d'exécution* to one of the holders of the initial *marchés de définition* 'without opening it afresh to competition' or, at most, by opening it to competition limited to those holders.

21 It is appropriate to examine the alleged failure to fulfil obligations under Article 31 of Directive 2004/18. According to the Commission, that failure stems from the fact that the procedure for the

award of *marchés de définition* allows contracts to be awarded on the basis of mutual agreement in circumstances which are not provided for by point 3 of Article 31 of the Directive.

22 In this respect, it is settled case–law that the question whether a Member State has failed to fulfil obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C–64/01 *Commission* v *Greece* [2002] ECR I-2523, paragraph 7, and Case C–456/05 *Commission* v *Germany* [2007] ECR I-10517, paragraph 15).

23 It is common ground that the version of Article 73 of the Public Procurement Code resulting from Decree No 2004-15 which allowed *marchés d'exécution* to be awarded 'without a further tendering process' was no longer in force on the date of expiry of the two-month period laid down in the reasoned opinion. On that date, that version of Article 73 had been replaced by a new version resulting from Decree No 2006–975.

24 It is clear from the wording of the third paragraph of Article 73 of the Public Procurement Code, as adopted by Decree No 2006-975, that *marchés d'exécution* are awarded solely 'after being opened to competition limited to the holders of the initial *marchés de définition*'. On the date on which the period laid down in the reasoned opinion expired, *marchés d'exécution* were thus not awarded by means of the negotiated procedure within the meaning of point 3 of Article 31 of Directive 2004/18.

25 It follows that the Commission's action must be dismissed in so far as it seeks a declaration by the Court that the procedure for the award of *marchés de définition* allows a contracting authority to award a *marché d'exécution* to one of the holders of the *marchés de définition* 'without opening it afresh to competition' and in so far as it claims that there has been a failure to fulfil obligations under Article 31 of that directive.

26 The action does, however, retain a purpose in so far as the Commission complains that the French Republic has failed in its obligations under Articles 2 and 28 of Directive 2004/18 by adopting and keeping in force Articles 73 and 74-IV of the Public Procurement Code adopted by Decree No 2006-975, inasmuch as those provisions lay down a procedure for the award of *marchés de definition* under which it is possible for the contracting authority to award a *marché d'exécution* to one of the holders of the initial *marchés de définition* by opening it to competition limited to those holders.

27 In its statement in defence, the French Republic submits that Directive 2004/18 is only a coordinating directive, which leaves Member States free to maintain or adopt rules in regard to public contracts other than those provided for by that directive.

28 That line of argument cannot be accepted. Whilst it is true that Directive 2004/18 does not seek to establish complete harmonisation of the rules governing public procurement in the Member States, the fact remains that the procedures for the award of public contracts that the Member States are permitted to use are listed exhaustively in Article 28 of that directive.

29 Under Article 28, contracting authorities are required to award their public contracts by applying either the open or restricted procedure, or, in the specific circumstances expressly provided for in Article 29 of Directive 2004/18, the competitive dialogue or, in the further alternative, in the specific circumstances referred to expressly in Articles 30 and 31 thereof, a negotiated procedure. The award of public contracts by means of other procedures is not permitted by that directive.

30 A different conclusion cannot be inferred from Joined Cases 27/86 to 29/86 *CEI and Bellini* [1987] ECR 3347.

31 Admittedly, in the first sentence of paragraph 15 of that judgment, the Court held that Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) did not lay down a uniform and exhaustive body of Community rules. However, in the following sentence of that paragraph 15, the Court stated that, although Member States remained free to maintain or adopt substantive and procedural rules in regard to public contracts, they had to do so within the framework of the common rules contained in that directive.

32 Furthermore, in paragraph 17 of *CEI and Bellini*, the Court made it clear that it was ruling in the light of the state of harmonisation of Community law at the time of delivery of its judgment.

However, the second paragraph of Article 28 of Directive 2004/18, which had no equivalent in Directive 71/305, specifically lists the procedures which contracting authorities must apply in awarding their contracts.

33 It follows that, in the framework of the common rules currently in force, Member States are no longer free to adopt award procedures other than those specified by Directive 2004/18.

34 Accordingly, the French Republic's arguments that it is possible for a Member State to adopt contract award procedures which are not provided for by Directive 2004/18, but which exhibit characteristics analogous to those of certain procedures referred to by that directive, must be rejected.

35 However, it is necessary to examine the argument, put forward by the French Republic in the alternative, that the procedure for the award of *marchés de definition* provided for by the Public Procurement Code, as adopted by Decree No 2006–975, constitutes a form of implementation of the competitive dialogue procedure provided for in Article 29 of Directive 2004/18.

36 It must be acknowledged that there is a degree of proximity between the objectives pursued by the competitive dialogue procedure and those of the procedure for the award of *marchés de definition*. Each of those procedures was designed to enable the contracting authority to define initially the specific subject–matter of a contract and the technical means for performing it.

37 However, there is a fundamental difference between those two procedures. The difference is that the competitive dialogue is a procedure for the award of one single contract, whereas the procedure for the award of *marchés de définition* relates to the award of several contracts of different natures, namely *marchés de définition*, on the one hand, and one or more *marché d'exécution*, on the other.

38 That difference by itself makes it impossible for the procedure for the award of *marchés de definition* to be interpreted as a form of implementation of the competitive dialogue procedure.

39 The Commission also pleads a failure to fulfil obligations under Article 2 of Directive 2004/18, which requires contracting authorities to treat economic operators equally and non–discriminatorily and to act in a transparent way.

40 In this respect, the Court notes that the purpose of the procedure for the award of *marchés de definition*, as adopted by Decree No 2006-975, is to award two types of contracts, namely *marchés de définition* and *marchés d'exécution*, the latter being awarded after being opened to competition limited to the holders of the former alone. Accordingly, economic operators who might be interested in participating in *marchés d'exécution*, but who are not holders of one of the *marchés de définition*, are discriminated against in comparison with those holders, contrary to the principle of equality, which is laid down as a principle for the award of contracts in Article 2 of Directive 2004/18.

41 Moreover, both the principle of equal treatment and the obligation of transparency which flows from it require the subject-matter of each contract and the criteria governing its award to be clearly defined (see, to that effect, Case C-340/02 *Commission* v *France* [2004] ECR I-9845, paragraph 34).

42 The French Republic has put forward a number of examples of procedures for the award of *marchés de definition* in which, in its view, the subject–matter of the *marché d'exécution* could be defined with a certain degree of precision already at the stage of the launch of the procedure for the award of the *marchés de définition*.

43 However, *marchés de définition* and *marchés d'exécution* appear by their nature to have different subject–matters, namely, first, a study and design project in which the needs of the contracting authority are defined and, second, the actual provision of supplies, services or works defined in advance. The national provisions the subject of complaint are not, however, capable of ensuring that, in all cases, the subject–matter and award criteria of both *marchés de définition* and the *marché d'exécution* can be defined from the beginning of the procedure.

44 It follows that the procedure for the award of *marchés de définition* laid down by Articles 73 and 74-IV of the Public Procurement Code, as adopted by Decree No 2006-975, is not consistent with Article 2 of Directive 2004/18.

45 Consequently, by adopting and keeping in force Articles 73 and 74-IV of the Public Procurement Code, adopted by Decree No 2006-975 of 1 August 2006, inasmuch as those provisions lay down a procedure for the award of *marchés de definition* under which it is possible for the contracting authority to award a *marché d'exécution* (a public works, supply or service contract) to one of the holders of the initial *marchés de définition* by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2 and 28 of Directive 2004/18.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the French Republic and the latter has, in essence, been unsuccessful, the French Republic must be ordered to pay the costs.

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

1. **Declares that, by adopting and keeping in force Articles 73 and 74-IV of the Public Procurement Code, adopted by Decree No 2006-975 of 1 August 2006, inasmuch as those provisions lay down a procedure for the award of marchés de definition (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a marché d'exécution (a public works, supply or service contract) to one of the holders of the initial marchés de définition by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2 and 28 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;**

2. **Dismisses the remainder of the action;**

3. **Orders the French Republic to pay the costs.**

[Signatures]

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* Language of the case: French.

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Judgment of the Court (Third Chamber) of 10 December 2009 - European Commission v French Republic

(Case C-299/08) [1]

(Failure of a Member State to fulfil obligations - Directive 2004/18/EC - Procedures for the award of public contracts - National legislation providing for a single procedure for the award of the contract defining needs and of the ensuing marché d'exécution - Compatibility with that directive)

Language of the case: French

Parties

Applicant: European Commission (represented by: D. Kukovec, G. Rozet and M. Konstantinidis, Agents)

Defendant: French Republic (represented by: G. de Bergues, J.C. Gracia and J.-S. Pilczer, Agents)

Re:

Failure of a Member State to fulfil obligations - Breach of Articles 2, 28 and 31 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) - Use of the negotiated procedure without publication of a contract notice in situations not provided for in Directive 2004/18 - Distinction between *marchés de définition* (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract), subject to the rules of the Directive, and public works, supply or service contracts, not subject to those rules - Breach of the principles of transparency and equal treatment.

Operative part of the judgment

The Court:

1. Declares that, by adopting and keeping in force Articles 73 and 74-IV of the Public Procurement Code, adopted by Decree No 2006-975 of 1 August 2006, inasmuch as those provisions lay down a procedure for the award of *marchés de definition* (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a *marché d'exécution* (a public works, supply or service contract) to one of the holders of the initial *marchés de définition* by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2 and 28 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;

2. Dismisses the remainder of the action;

3. Orders the French Republic to pay the costs.

_____

[1] - OJ C 272, 25.10.2008.

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OPINION OF ADVOCATE GENERAL
Mazák
delivered on 22 September 2009 (1)

Case C–299/08

Commission of the European Communities
v
French Republic

(Failure of a Member State to fulfil its obligations – Directive 2004/18/EC – Public procurement – Use of the negotiated procedure without publication of a contract notice in situations not provided for in the directive – Distinction between marchés de définition and public works, supply or service contracts)

1. By its present action, brought under Article 226 EC, the Commission is asking the Court to declare that, by adopting and keeping in force Articles 73 and 74-IV of the Code des marchés publics (2) ('the contested provisions'), inasmuch as those provisions lay down a procedure for the award of so-called *marchés de définition* (3) under which it is possible for the contracting authority to award an ulterior *marché d'exécution* (a public works, supply or service contract) to one of the holders of the initial *marchés de définition* without opening it afresh to competition or, at most, by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18/EC. (4)

I – Legal context

A – *Community law*

2. Article 2 of the Directive provides under 'Principles of awarding contracts' that 'contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

3. Article 28 of the Directive, under 'Use of open, restricted and negotiated procedures and of competitive dialogue', provides:

'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.'

4. The Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 31 January 2006.

B – *National law*

5. The CMP 2006, which entered into force on 1 September 2006, provides inter alia as follows:

‘Article 73

If the public entity is unable to specify the aims and performances the contract must meet, the techniques to be used, and the human and material resources required, it may resort to *marchés de définition*.

The purpose of such contracts is to explore the possibilities and conditions for establishing a contract subsequently, if necessary through production of a model or demonstrator. They must also enable the price level of the provisions to be estimated and calculated, as well as the different phases of the performance schedule.

In the framework of a single procedure, the performance of the contract following several *marchés de définition* having the same subject-matter and awarded simultaneously are awarded after being opened to competition limited to the holders of the initial *marchés de définition*, in accordance with the following provisions:

1 The public contract notice defines the subject-matter of the *marchés de définition* awarded simultaneously and the subject-matter of the subsequent *marché d’exécution*;

2 The public contract notice defines the criteria for the selection of applications. Those criteria take into account the capacities and competences required of the candidates both for the *marchés de définition* and for the subsequent *marché d’exécution*;

3 The public contract notice defines the criteria for the selection of offers for the *marchés de définition* awarded simultaneously and the criteria for the selection of offers for the subsequent *marché d’exécution*;

4 The amount of the provisions to be compared with the thresholds takes account of the cost of the definition studies and the estimated amount of the fulfilment contract;

5 The number of *marchés de définition* awarded simultaneously in the framework of the present procedure may not be lower than three, subject to a sufficient number of candidates.

The contract or framework agreement is awarded by the tenders committee for the local authorities or after the opinion of the tenders committee for the State, for the public health bodies and the public social or medical-social bodies.’

‘Article 74

IV. In the framework of a single procedure, the contract or framework agreement of project-management following several *marchés de définition* having the same subject-matter and awarded simultaneously may be awarded after being opened to competition limited to the holders of the initial *marchés de définition*, under the conditions laid down in the third paragraph of Article 73.’

II – Procedure

6. On 18 October 2004, the Commission sent the French Republic a first letter of formal notice and on 12 December 2006, it sent an additional letter of formal notice. As the Commission was not satisfied with the French Republic’s replies, it issued a reasoned opinion on 27 June 2007. Since the Commission considered that the failure to fulfil obligations was persisting and it was not satisfied with the replies it received, the Commission decided to bring this action. Both parties submitted oral argument at the hearing, which took place on 10 June 2009.

III – Assessment

A – *Principal arguments of the parties*

7. The Commission submits that France permits the award of contracts on the basis of mutual agreement, or with limited competition, in situations not provided for by the Directive. In the Commission’s view, it is impossible by definition for the subject-matter and criteria for the award of

a public procurement contract to be known precisely at a moment where the project has not yet been defined and where the *marchés de définition* have not yet been executed. The *marché de définition* and the *marché d'exécution* are two entirely distinct types of public procurement contract and may not be awarded by way of a single procedure. According to the Commission, the procedure for the award of *marchés de définition* comes neither under the competitive dialogue nor under the framework agreement within the meaning of Articles 29 and 32 of the Directive and it cannot be analysed as a derivation of the competitive dialogue.

8. The French Government submits that the contested provisions are not incompatible with the Directive, which is merely a coordinating directive. In its view, it is possible for the subject-matter and criteria of the ulterior *marché d'exécution* to be established from the launch of the *marchés de définition*. Furthermore, the French Government submits that the Directive has foreseen two procedures with characteristics analogous to those of the French procedure for the award of *marchés de définition* – the framework agreement and the competitive dialogue. Thus the Community legislature itself instituted complex procedures where contracts are opened to competition in two stages, without however being exhaustive.

B – *Appraisal*

1. General remarks

9. The Commission argues that, by drawing a distinction between *marchés de définition* and *marchés d'exécution* and by allowing, in certain circumstances, the award of the latter to one of the holders of the initial *marchés de définition* without again opening them to competition or, at the very least, by opening them to competition limited only to those holders, the French legislation disregards the fundamental principles of equality and transparency inherent to the Directive. Here it should be pointed out that the argument concerning the *marchés de définition* not being opened to any competition would appear to pertain to the wording of the provisions in the CMP 2004. (5) Thus, I will consider the Commission's argument as it pertains to the contested provisions – that is to say the CMP 2006 which was meant to transpose the Directive into national law – to the effect that these open the *marchés d'exécution* to competition limited only to holders of the initial *marchés de définition* and that in situations not provided for by the Directive.

2. On the exhaustive nature of Article 28 of the Directive

10. In that regard, in their submissions the parties have discussed at length whether or not the list of procedures for the award of public contracts, contained in Article 28 of the Directive, is exhaustive in nature since it clearly does not make provision for the *marchés de définition*.

11. Here the French Government argues that, in view of the third recital in the preamble to the Directive and Article 28, the Directive did not mean to abolish all the specific national procedures. Referring to the Court's ruling in *CEI and Others*, (6) concerning Council Directive 71/305/EEC, (7) the French Government claims that 'the Member States remain free to maintain or adopt substantive and procedural rules in regard to public … contracts on condition that they comply with all the relevant provisions of Community law and, in particular, the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services'. (8)

12. Indeed, it is quite clear from the title of the Directive and from the second and third recitals in its preamble that the Directive's aim is to coordinate national procedures for the award of public contracts. Therefore, it does not lay down a uniform and exhaustive body of Community rules on the matter. Hence, within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public contracts on condition that they comply with all the relevant provisions of Community law. However, the fact that the Directive has not brought about a complete harmonisation of the rules governing procedures for the award of public contracts does not mean that some of its provisions should not be understood as having exhaustively regulated certain matters.

13. First, suffice it to note that the French Government cannot rely on the *CEI and Others* case-law because Article 28 of Directive 2004/18 substantially differs from Article 2 of Directive 71/305 – the Community legislature has complemented Article 28 of the Directive with a completely new second paragraph which plays a decisive role for the case at hand.

14. Secondly, there are certain factors which convincingly suggest that the procedures referred

to in Article 28 of the Directive are to be regarded as exhaustive. In general, the wording of that paragraph exhibits none of the features to be observed in what is commonly known as an open list. On the contrary, that paragraph enumerates not only the two standard procedures but also two exceptional procedures thus leaving no room for another kind of interpretative completion of the list of procedures. Nor does the Directive as a whole contain any provision which would allow such a completion.

15. As I will explain below, the procedure for the award of *marchés de définition* clearly differs from the procedures set out in the Directive and cannot be assimilated to any provision of the Directive. In fact, the French Government explicitly recognised in its defence and in its rejoinder that the *marchés de définition* have not been provided for in the Directive.

16. The procedures which the Directive does provide for are the following. As is clear from the second paragraph of Article 28 of the Directive, the Community legislature has set out two procedures which should, as a general rule, be followed by contracting authorities. These are the open and the restricted procedures and they may be referred to as standard or normal procedures. Next, the competitive dialogue may be considered to constitute a special or exceptional procedure whose implementation and conditions are specified in Article 29 of the Directive. (9) Likewise, the negotiated procedure, with or without publication of the contract notice, may be considered as special or exceptional in nature with conditions specified in Articles 30 and 31 of the Directive. (10)

17. However, the French Government submits that, in fact, there are certain specific award procedures provided for by the Directive in Chapter V under 'Procedures' which are not mentioned in Article 28 of the Directive. The French Government refers to framework agreements, dynamic purchasing systems and public works contracts: particular rules on subsidised housing schemes. These are provided for in Articles 32, 33 and 34 of the Directive respectively.

18. In that regard, first, framework agreements and dynamic purchasing systems constitute specific forms of contracts or variations of existing procedures. They are not distinct new forms of award procedures for public contracts which are, as such, provided for in Article 28 of the Directive. In addition, it follows from the wording of Articles 32(2) and 33(2) of the Directive that the contracting authorities are obliged to follow the rules of procedure referred to in Article 28 of the Directive. Secondly, with regard to the rules on subsidised housing schemes, the title of Article 34 clearly shows it concerns 'particular rules' and not rules of procedure as such. Rather, it constitutes an exception to the provisions pertaining to the general procedure. Indeed, the very existence of Article 34 of the Directive and of the particular rules which it sets out would militate in favour of the view that the list of award procedures in Chapter V of the Directive should be considered to be exhaustive.

19. In this context it may be noted in passing that in its submissions the French Government also argues the merits and the *raison d'être* of the procedure for the award of *marchés de définition* notably with regard to complex contracts where contracting authorities are 'unable to specify the aims and performances the contract must meet, the techniques to be used, and the ... resources required'. (11) It is apparent from the *travaux préparatoires* for the Directive that the Community legislature was aware of such concerns. (12) As a result, the Community legislature did include among the award procedures for public contracts a new procedure in the form of the competitive dialogue but it did not decide to include the procedure for the award of *marchés de définition*. (13)

20. In addition, the French Government also tries to defend its case by arguing that the *marchés de définition* should be considered analogous to two procedures which are provided for in the Directive – the framework agreement and the competitive dialogue. As regards the former, its opening to competition may be divided into two stages where the last stage is open to competition limited to the successful holders of the first contract and which allows it to further specify the terms of the second contract. As regards the latter, the procedure for the award of *marchés de définition* allows a contracting authority to draw up the conditions of a contract whose selection criteria had been established. Thus, according to the French Government, the Community legislature instituted complex procedures where contracts are opened to competition in two stages, without however being exhaustive.

21. That argumentation shall not prosper. Suffice it to point out that it is not disputed by the French Government that the procedure for the award of *marchés de définition* comes neither under the competitive dialogue nor under the framework agreement within the meaning of Articles 29 and 32 of the Directive. Competitive dialogue and framework agreements are forms of contracts subject to specific provisions. Recognising their specificity, the Community legislature provided for rules which guarantee that principles set out in Article 2 of the Directive remain respected.

22. Should the list in Article 28 of the Directive be held to be exhaustive, the French Government submits, in the alternative, that the procedure for the award of *marchés de définition* should be analysed as a derivation of the competitive dialogue procedure. It would appear that the French Government raised this argument in the alternative for the first time in its defence before the Court. Prior to that that government had defended the opposite thesis to the effect that *marchés de définition* did not come under the competitive dialogue procedure and were not provided for by the Directive. Indeed, those very submissions have raised numerous differences between the two procedures. In any event, I consider that that argument is not helpful to the French Government's case. Suffice it to point out that the two procedures differ in important aspects, not least because the competitive dialogue is a procedure for the award of a single contract, while the procedure for the award of *marchés de définition* is aimed at awarding two contracts where the second is awarded after being opened to competition limited to the holders of the initial contract.

3. Treating economic operators equally and non-discriminatorily and in a transparent way

23. In any event, even if we were to accept the consideration that one may, under certain conditions, adjust the procedures enumerated in Article 28 of the Directive, having regard to the nature and functioning of the procedure for the award of *marchés de définition*, it is to be noted that this procedure not only cannot be classified under Article 28 of the Directive but is contrary to the principles referred to in the second recital in the preamble to the Directive and in Article 2 of the Directive. (14)

24. Contrary to what the French Government argues, in my view the Commission is correct when it submits that it is virtually impossible by definition for the subject-matter and criteria for the award of a public procurement contract (*marché d'exécution*) to be known precisely at a moment where the project has not yet been defined and where the *marchés de définition* have not yet been executed. The *marchés de définition* and the *marché d'exécution* are two entirely distinct types of public procurement contract, which, it would appear, has never been contested by the French Government. Each has its own subject-matter and award criteria and, on those grounds, both contracts must comply with the stipulations of the Directive and may not be awarded by way of a single procedure. In other words, since the *marché d'exécution* has its own subject-matter and award criteria it should be subjected to competition and not simply reserved for the holders of the initial *marchés de définition*.

25. The Court held in *Commission* v *France* ('*Le Mans*') (15) that 'the French Government submits … that the option, set out in the notice …, of awarding the contract relating to the second phase to the successful candidate in the design contest releases the contracting authority from the obligation to publish another notice prior to the award of that contract'. The Court then stated that 'that argument cannot be accepted. The principle of equal treatment of service providers … and the principle of transparency which flows from it … *require the subject-matter of each contract and the criteria governing its award to be clearly defined*'. (16)

26. In the same judgment, the Court continued: 'that obligation exists where the subject-matter of a contract and the criteria selected for its award must be regarded as decisive for the purposes of determining which of the procedures provided for in the Directive is to be implemented and assessing whether the requirements related to that procedure have been observed.' Thus the Court concluded that 'in the present case the mere option of awarding the contract relating to the second phase according to criteria laid down in respect of a different contract, that is the one related to the first phase, does not amount to awarding the contract in accordance with one of the procedures laid down in the Directive.'

27. In the case which concerns us here, in its defence before the Court, the French Government has recognised itself that in the above judgment 'the Court gave a negative verdict on a procedure which is analogous [to the *marchés de définition*]'. In my view, it is clear that the *marchés de définition* do not, as a general rule, allow the second contract's (i.e. *marché d'exécution*) subject-matter, criteria for the selection and award to be initially established with sufficient precision in order to meet the requirements specified in the above judgment. The reason for that is the fact that the aim of the initial *marchés de définition* is in fact precisely to define the subject-matter and the tender conditions of the ulterior *marché d'exécution*.

28. Therefore, the procedure for the award of *marchés de définition*, pursuant to the contested provisions, runs counter to the principle of transparency laid down in Article 2 of the Directive. This procedure creates a situation of legal uncertainty both for contracting authorities and for economic operators, because of the risk of litigation which is inherent to it.

29. The French Government contests the argument in point 27 above and submits that the aim of the *marchés de définition* is to only define all the technical specifications of the ulterior contract and not its subject-matter. However, suffice it to state that the very wording of Article 73 of the CMP 2006 does not support that: its second paragraph provides that 'the purpose of such contracts is to explore the possibilities and conditions for establishing a contract subsequently, if necessary through production of a model or demonstrator'. Moreover, even though it may be the case in certain situations that the *marchés de définition* merely define the technical specifications, the procedure in question in fact certainly allows the tender conditions of the *marché d'exécution* to be completed or even drawn up in their entirety.

30. Furthermore, the French Government insists that it is possible for the subject-matter and criteria of the ulterior *marché d'exécution* to be established from the launch of the *marchés de définition*. The argument goes, there are many cases where the criteria for selection of candidatures for *marché d'exécution* are sufficiently independent from the *marchés de définition* in order for the former to be defined already at the stage of the *marchés de définition*. In its submissions to the Court, the French Government has furnished three examples of such cases.

31. In any event, it should be pointed out, first, that the French Government has accepted at the hearing that in fact problems do arise – clearly there are cases where the *marchés de définition* do not merely serve to define technical specifications but are instead used to complete or draw up the tender conditions of the *marché d'exécution*. Three examples of such cases were provided by the Commission before the Court. I consider that the French Government has failed to prove that the contested provisions allow in all cases and at all times transparency and sufficient clarity to be guaranteed to the effect that 'the subject-matter of [the *marché d'exécution*] and the criteria governing its award [are] clearly defined'. (17) In any event, a mere general definition such as 'urban development of city district X' – which it would appear is very often the only possible definition that may be given at the stage of invitations for tenders for the *marchés de définition* – most certainly does not meet the standard required by the Court in *Commission* v *France* ('*Le Mans*'). (18)

32. Last but not least, I consider it important to point out that the procedure for the award of *marchés de définition* is based on a bias. While the whole tenor of the Directive is that the promotion of competition between economic operators should be protected, the *marchés de définition* address only a certain type of economic operators – those and only those that have both design and construction capabilities. By its nature, the procedure for the award of *marchés de définition* makes such a pre-selection among all the potential economic operators. I consider that to be contrary to the spirit of Community public procurement rules. It is clear that regardless of how the *marchés de définition* develop in a particular case, the solution provided by the procedure will always result in a tender that is limited in nature.

33. It follows from the above considerations that the contested provisions permit the award of contracts with limited competition in situations not provided for by the Directive and they cannot be justified by any of the exceptions laid down by the Directive.

IV – Costs

34. Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

V – Conclusion

35. In the light of the foregoing considerations, I propose that the Court:

(1) declare that, by adopting and keeping in force Articles 73 and 74–IV of the Code des marchés publics (Public Procurement Code) adopted by Decree No 2006-975 of 1 August 2006, inasmuch as those provisions lay down a procedure for the award of *marchés de définition* (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a public works, supply or service contract to one of the holders of the initial *marchés de définition* by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures

for the award of public works contracts, public supply contracts and public service contracts;

(2) order the French Republic to pay the costs.

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1 – Original language: English.

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2 – Public Procurement Code as adopted by Decree No 2006–975 of 1 August 2006 (*Official Journal of the French Republic* No 179 of 4 August 2006, p. 11627) and which entered into force on 1 September 2006 ('the CMP 2006').

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3 – These are public contracts for designing the parameters, including the purpose, of a public works, supply or service contract, and are also referred to as 'design solutions tenders' or 'project definition contracts'. I note that only a procedure with several *marchés de définition* is at issue here – applicable where the conditions in Article 73 (3) of the CMP 2006 are met – and not one where a single *marché de définition* is awarded.

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4 – Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) ('the Directive' or 'Directive 2004/18').

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5 – The Public Procurement Code as adopted by Decree No 2004-15 of 7 January 2004 (*Official Journal of the French Republic* No 6 of 8 January 2004, p. 703) ('the CMP 2004') which since has been replaced by the CMP 2006.

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6 – Joined Cases 27/86 to 29/86 [1987] ECR 3347.

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7 – Directive of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682).

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8 – *CEI and Others*, cited in footnote 6, paragraph 15. See also Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 20. The French Government submits that that case-law may be transposed to Directive 2004/18 notably because the second recital in the preamble to Directive 71/305 has become the third recital in the preamble to Directive 2004/18 and Article 2 of Directive 71/305 has become Article 28 of Directive 2004/18.

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9 – Cf. Trepte, P., *Public procurement in the EU. A Practitioner's Guide*, 2nd edition, Oxford 2007, p. 427, footnote 187.

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10 – That reading is confirmed by the *travaux préparatoires* for the Directive. The proposal for the Directive explained, to justify the wording of Article 28 of the Directive, that 'a new paragraph 2 has been added, which explicitly states the principle that the open procedure and the restricted procedure are the standard procedures. A new paragraph 3 [which was eventually merged with paragraph 2] describes the exception, which is that contracting authorities may only use the negotiated procedure in the specific cases and under the specific conditions listed in Articles 29, 30 and 31'.

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11 – See Article 73 of the CMP 2006.

12 – The proposal for the Directive, page 6, stated that 'in the case of particularly complex contracts … purchasers are well aware of their needs but do not know in advance what … the best technical solution for satisfying those needs [is]. Discussion of the contract and dialogue between purchasers and suppliers is therefore necessary in such cases. But the standard procedures laid down by the public sector Directives … leave very little scope for discussion during the award of contracts and are therefore regarded as lacking in flexibility in situations of this type.'

13 – One of the reasons for that could be that the inclusion of *marchés de définition* was considered as not necessary since that procedure is similar in nature to the new competitive dialogue procedure – transposed into French law in Article 67 of the CMP 2006 as a completely autonomous procedure – which appears to address the same concerns.

14 – My position would appear to be supported by the French legal doctrine. See, most recently, for instance, Monjal, P.-Y., 'Le droit communautaire applicable aux marchés publics locaux français: quelques interrogations en forme d'inquiétude', *Revue du Droit de l'Union européenne*, No 4, 2008, pp. 729-738. For a case pertaining to *marchés de définition*, see also, for instance, judgment of the French Conseil d'État of 3 March 2004, No 258272, in 'Société Mak System'.

15 – Case C–340/02 [2004] ECR I–9845, also referred to as the '*La Chauvinière*' case, paragraphs 33 to 36 and the case-law cited.

16 – Emphasis added.

17 – Cited in footnote 15, paragraph 34.

18 – Case cited in footnote 15. Cf. Arrowsmith, S., *The Law of Public and Utilities Procurement*, Thomson, Sweet & Maxwell, London, 2005, p. 448: 'the current directives … contain no express requirement for precise specifications in open or restricted procedures. However, the transparency principle may imply such a requirement. For example, it is probably not acceptable simply to state a requirement for tenders for "a school" without giving a clear indication of, for example, the number of pupils and the main type of facilities required. Reasonable precision needs to be established at the latest at the time of invitation to tenders'.

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Action brought on 4 July 2008 - Commission of the European Communities v French Republic

(Case C-299/08)

Language of the case: French

Parties

Applicant: Commission of the European Communities (represented by: G. Rozet and D. Kukovec, acting as Agents)

Defendant: French Republic

Form of order sought

Declare that, by adopting and keeping in force Articles 73 and 74-IV of the Code des marchés publics (Public Procurement Code) adopted by Decree No 2006-975 of 1 August 2006, inasmuch as those provisions lay down a procedure for the award of *marchés de definition* (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the awarding authority to award a public works, supply or service contract to one of the holders of the initial *marchés de definition* without opening it afresh to competition or, at most, by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; [1]

order the French Republic to pay the costs.

Pleas in law and main arguments

By its action, the Commission alleges that the defendant permits the award of contracts on the basis of mutual agreement - or with limited competition - in situations not provided for by Directive 2004/18/EC. By drawing a distinction between *marchés de definition* and public works, supply or service contracts and by allowing, in certain circumstances, the award of the latter contracts to one of the holders of the initial marchés de definition without again opening them to competition or, at the very least, by opening them to competition limited only to those holders, the French legislation disregards the fundamental principles of equality and transparency inherent to Directive 2004/18/EC. In the Commission's view, it is impossible by definition for the subject-matter and criteria for the award of a public procurement contract to be known precisely before the project itself has been defined. The *marché de definition* and the public works, supply or service contract are two entirely distinct types of public procurement contract, each having its own subject-matter and criteria for award and, on those grounds, they must both comply with the stipulations of Directive 2004/18/EC.

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[1] - OJ L 134, p. 114

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JUDGMENT OF THE COURT (Fourth Chamber)

6 May 2010 (*)

(Directive 92/50/EEC – Public service contracts – Service concessions – Mixed contract – Contract including the transfer of a block of shares in a public casino business – Contract under which the contracting authority entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in upgrading the casino premises and improving the surrounding area – Directive 89/665/EEC – Decision of the contracting authority – Effective and rapid remedies – National procedural law – Criteria for the award of damages – Prior annulment of the unlawful act or omission or a finding of its nullity by the competent court – Members of a consortium in a public procurement procedure – Decision adopted in the context of that procedure by an authority other than the contracting authority – Action brought, individually, by some members of the consortium – Admissibility)

In Joined Cases C–145/08 and C–149/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 15 February 2008, received at the Court on 9 April 2008, in the proceedings

Club Hotel Loutraki AE,

Athinaïki Techniki AE,

Evangelos Marinakis

v

Ethniko Simvoulio Radiotileorasis,

Ipourgos Epikratias,

intervening parties:

Athens Resort Casino AE Simmetokhon,

Ellaktor AE, formerly Elliniki Tekhnodomiki TEV AE,

Regency Entertainment Psikhagogiki kai Touristiki AE, formerly Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE,

Leonidas Bompolas (C-145/08)

and

Aktor Anonimi Tekhniki Etairia (Aktor ATE)

v

Ethniko Simvoulio Radiotileorasis,

intervening party:

Mikhaniki AE (C–149/08),

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 June 2009,

after considering the observations submitted on behalf of:

– Club Hotel Loutraki AE, by I.K. Theodoropoulos and S.A. Pappas, dikigoroi,

– Athens Resort Casino AE Simmetokhon and Regency Entertainment Psikhagogiki kai Touristiki AE, formerly Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE, by P. Spiropoulos, K. Spiropoulos and I. Drillerakis, dikigoroi,

– Ellaktor AE, formerly Elliniki Tekhnodomiki TEV AE by V. Niatsou, dikigoros,

– Aktor ATE, by K. Giannakopoulos, dikigoros,

– the Greek Government, by A. Samoni-Rantou, E.–M. Mamouna and I. Dionisopoulos, acting as Agents,

– the Commission of the European Communities, by M. Patakia and D. Kukovec, acting as Agents,

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

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of the relevant provisions, in the light of the facts of the disputes in the main proceedings, of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50 ('Directive 89/665'), and general principles of European Union law on public contracts and, in particular, the principle of effective judicial protection.

2 The references have been made in proceedings between private undertakings and natural persons and Ethniko Simvoulio Radiotileorasis (National Radio and Television Council; 'ESR'), an authority which, in accordance with national legislation, has the power and the obligation to check whether persons having the status of owner, partner, main shareholder, member of an administrative organ or management executive of an undertaking tendering in a public procurement procedure present certain aspects of incompatibility as provided for in that legislation and, therefore, must automatically be excluded from the procedure.

Legal context

European Union legislation

3 Pursuant to Article 1(a) of Directive 92/50:

'[P]ublic service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority …

…'

4 Article 2 thereof provides:

'If a public contract is intended to cover both products within the meaning of [Council] Directive 77/62/EEC [of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1)] and services within the meaning of Annexes I A and I B to this Directive, it shall fall within the scope of this Directive if the value of the services in question exceeds that of the products covered by the contract.'

5 Article 3 of that directive provides:

'1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.

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

...'

6 Under Article 8 of Directive 92/50:

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

7 Article 9 of that directive provides:

'Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

8 Article 14 forms part of Title IV of that directive, which concerns the common rules in the technical field and deals with the technical specifications which are to be given in the general documents or the contractual documents relating to each contract, and Article 16 forms part of Title V, which governs the common advertising rules.

9 Annex IB to Directive 92/50, entitled 'Services within the meaning of Article 9', includes:

'...

17 Hotel and restaurant services

...

26 Recreational, cultural and sporting services

27 Other services'.

10 Finally, Article 26(1) of that directive provides:

'Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.'

11 Article 1 of Directive 89/665 provides:

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

2. Member States shall ensure that there is no discrimination between undertakings claiming

injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

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

12 Under Article 2 of that directive:

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

...

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

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

...'

National legislation

13 Directive 89/665 was transposed into Greek law by Law 2522/1997 providing judicial protection during the phase preceding the award of public supply, public works and public services contracts (FEK A' 178).

14 Article 2 of that Law, entitled 'Extent of judicial protection', provides:

'1. Every person concerned who has or had an interest in being awarded a particular public works, supply or services contract and has suffered or may suffer damage through the infringement of Community or domestic legislation shall be entitled to seek, as more specifically laid down in the following articles, interim judicial protection, the annulment, or a finding of invalidity, of the unlawful act of the contracting authority and the award of damages.

...'

15 Article 4 of that Law, entitled 'Annulment or a finding of invalidity', provides:

'1. The person concerned shall be entitled to seek the annulment, or a finding of invalidity, of every act or omission of the contracting authority which infringes a rule of Community or domestic

law on the procedure that precedes the award of the contract. …

2. If the court declares an act or omission of the contracting authority void after the contract is awarded, and unless the award procedure has been suspended as a measure of interim relief, the contract itself is not affected. In that case the applicant may seek damages in accordance with the provisions of the following article.'

16 Article 5 of Law 2522/1997, entitled 'Claim for damages', provides:

'1. A person concerned who has been excluded from participation or from the award of public works, supplies or services, in breach of a rule of Community or domestic law, shall be entitled to claim damages from the contracting authority, pursuant to Articles 197 and 198 of the Civil Code. Any provision that excludes or restricts that claim shall be inapplicable.

2. In order for damages to be awarded, it is necessary that the unlawful act or omission first be annulled, or found invalid, by the court having jurisdiction. An action for a finding of invalidity and an action for damages may be combined in accordance with the generally applicable rules.'

17 Articles 197 and 198 of the Civil Code, to which the abovementioned provision refers, provide for liability 'arising from negotiations', that is to say the obligation to pay damages in the event that the parties incur unwarranted expense in the course of a procedure with a view to conclusion of a contract.

18 Presidential Decree 18/1989 codifies the laws relating to the Simvoulio tis Epikratias (FEK A' 8). Article 47 thereof, entitled 'Legitimate interest', provides:

'1. An individual or a legal person who is affected by an administrative act, or whose legitimate interests, including non-financial interests, are affected by that act, has the right to bring an action for annulment.

…'

19 Law 2206/1994 governs the 'Creation, organisation, operation, control of casinos, etc.' (FEK A' 62). Under Article 1(7) of that Law, entitled 'Grant of casino licences':

'Casino licences are to be granted by decision of the Minister for Tourism following a public international tendering procedure organised by a seven-member commission.'

20 Article 3 of that Law, entitled 'Operation of casinos', provides:

'Casinos are subject to State control.

…'

21 Article 14(9) of the Greek Constitution and Implementing Law 3021/2002 (FEK A' 143) institute a system of restrictions applicable to the conclusion of public contracts with persons who are active or who have holdings in the media sector. That system establishes a presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract. That incompatibility also extends to natural persons who are related to a certain degree.

22 Law 3021/2002 provides, in essence, that, before issuing acceptance of a tender for or awarding a public contract and, in any event, before the public contract is signed, the contracting authority must apply to ESR for a certificate attesting that the conditions of incompatibility laid down in that law are not fulfilled. The decision of ESR is binding on the contracting authority, but may be subject to an action for annulment by persons having *locus standi*, including public authorities.

23 In its judgment in Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraphs 1 and 2 of the operative part, the Court held that, although European Union law does not preclude legislation which pursues the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, it does preclude, from the point of view of the principle of

proportionality, the setting up of an irrebuttable presumption of incompatibility such as that laid down in the national legislation at issue.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C–145/08

24 It is apparent from the order for reference that, by decision of 10 October 2001, the competent interministerial committee decided to privatise Elliniko Kazino Parnithas AE ('EKP'), a subsidiary of Ellinika Touristika Akinita AE ('ETA'), an undertaking wholly owned by the Greek State. The contract notice published in October 2001 provided for an initial preselection stage to determine which tenderers met the conditions set out in that notice. The highest bidder, which would be invited to sign the contract, was to be selected at a subsequent stage. In the course of the first stage, the Koinopraxia Kazino Attikis consortium and the Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE – Elliniki Tekhnodomiki AE consortium were preselected.

25 Following an additional notice published in April 2002, the terms of the contract to be signed were settled as follows:

The contract is a mixed contract and includes:

– an agreement under which ETA would sell 49% of the shares in EKP to a 'single purpose limited company' ('AEAS'), to be set up by the successful tenderer;

– an agreement under which AEAS would undertake to implement a development plan, to be completed within 750 days of obtaining the necessary planning permission. That development plan was to comprise refurbishing the casino and enhancing the facilities offered by its operating licence, refurbishing and improving two adjoining hotel units and developing stretches of surrounding land of a surface area of approximately 280 hectares. Performance of that work constitutes part of the price payable for the acquisition of 49% of the shares in EKP;

– an agreement between ETA and AEAS under which the latter would acquire the right to appoint the majority of EKP's board of directors and thus to administer the company in accordance with the terms of the contract;

– an agreement under which AEAS would take over management of the casino business, in return for payment, which will be paid by ETA. As that remuneration, AEAS would receive a sum no greater than a scaled percentage of the annual operating profits (decreasing from 20% of profits up to EUR 30 million to 5% of profits over EUR 90 million) and 2% of turnover;

– as manager, AEAS would manage the casino business in such a way as constantly to maintain a luxurious environment offering high-level services and in a manner profitable for EKP. In concrete terms, the management profit before tax should not be less than a total of EUR 105 million for the first five financial years following entry into force of the contract. The net profit was to be shared between ETA and AEAS according to the percentage of the capital in EKP they each hold;

– Since EKP is the only casino business currently operating in the province of Attica, the contract provides that, in the event that another casino were lawfully established within that geographical area within 10 years from the date of entry into force of the contract, it would have to compensate AEAS by paying, as damages, a sum equal to 70% of the price of the transaction. The amount of the compensation would be reduced by one tenth each year with effect from the entry into force of the contract;

– with regard to management of the casino business, the contract would terminate at the end of the 10th year from taking effect.

26 Since the Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE – Elliniki Tekhnodomiki AE consortium was the highest bidder in the procedure in question, it was designated the successful tenderer. Before signature of the contract, ETA informed ESR of the identity of the owners, partners, major shareholders and management executives of the successful tenderer in order to obtain a certificate that none of them fell within one of the cases of incompatibility as provided for in Article 3

of Law 3021/2002. By certificate issued on 27 September 2002, ESR confirmed that none of those persons fell within such a case of incompatibility.

27 That act of the ESR constitutes the subject-matter of an action for annulment brought by only three of the seven members comprising the consortium 'Koinopraxia Kazino Attikis', which was not awarded the contract. The applicants have submitted that a member of the consortium to which the contract was awarded fell within one of the cases of incompatibility laid down in the national legislation and that, accordingly, the award of the contract should be annulled.

28 The national court points out that the contract at issue is a mixed contract, containing, on the one hand, one aspect relating to the sale of shares by ETA to the highest bidding tenderer, which aspect, as such, is not covered by the European Union rules on public contracts, and, on the other, one aspect relating to a service contract to be concluded with the highest bidding tenderer, which assumes the obligations of managing the casino business. The aspect which concerns the transfer of shares is, according to the national court, the most important of the mixed contract. In addition, that contract also includes an aspect relating to a works contract, since the successful tenderer assumes the obligation of performing the works referred to in the order for reference, for the transferred shares as part payment. The national court notes that that aspect is entirely ancillary to the 'services' aspect of the contract.

29 In that context, the national court asks whether the view can be taken that the 'services' aspect of the contract at issue constitutes a public service concession contract, which is not subject to the European Union rules. In that regard, it is necessary to ascertain to what extent the successful tenderer bears the risks of organising and operating the services in question, having regard also to the fact that those services relate to activities which, in accordance with the national rules by which they are governed, can be subject to exclusive and special rights.

30 In the event that the Court were to hold that the part of the disputed contract concerning the management of the casino constitutes a public service contract, the national court asks whether an action for annulment brought at national level is covered by the guarantees provided for in Directive 89/665, having regard to the fact that the main object of the contract, that is to say, the sale of shares in EKP, does not fall within the scope of Community rules on public contracts and that contracts having such services as their objects, which fall within Annex I B to Directive 92/50, must be awarded in accordance with Articles 14 and 16 of that directive, which solely include obligations of a procedural nature. Nevertheless, the national court asks whether, despite that restricted aspect of the obligations, the principle of equal treatment of participants in a contract award procedure, the safeguarding of which is the objective of Directive 89/665, also applies in such cases.

31 If the Court were to consider that an action for annulment such as that in the main proceedings does fall within the scope of Directive 89/665, the national court asks whether European Union law precludes a national procedural rule, such as that in Article 47(1) of Presidential Decree 18/1989, as interpreted by that court, under which those who participate in a public procurement procedure as a consortium can bring an action for annulment against acts in the context of that procedure only together and jointly, failing which the action is dismissed as inadmissible.

32 The national court refers in that regard to the judgment of the Court in Case C–129/04 *Espace Trianon and Sofibail* [2005] ECR I–7805, paragraph 22, pursuant to which a national procedural rule which requires an action for annulment of a contracting authority's decision awarding a public contract to be brought by all the members of a tendering consortium does not limit the availability of such an action in a way contrary to Article 1(3) of Directive 89/665.

33 The national court asks, however, whether that conclusion which, in that judgment, concerned an action for annulment against the decision of a contracting authority to award a public contract, is also valid in respect of all forms of judicial protection guaranteed by the directive, in particular of claims for damages. That issue is connected with the fact that, in the present case, the national legislature, exercising the power conferred on the Member States by Article 5(2) of Directive 89/665, by adopting Article 5(2) of Law 2522/1997, made the award of damages subject to the prior annulment of the allegedly unlawful act.

34 The combination of that provision with the procedural rule in Article 47(1) of Presidential Decree 18/1989, as interpreted by the national court, makes it impossible for any individual member of a consortium which unsuccessfully participated in a contract award procedure not only to seek annulment of the act adversely affecting them jointly but also to apply to the competent court to obtain compensation for any damage they have suffered individually. In the present case, the

competent court in respect of actions for annulment is the Simvoulio tis Epikratias (Council of State), while in respect of damages, a different court has jurisdiction.

35 In that context, the national court points out that whether each member of a consortium can apply to the competent court for damages therefore depends on whether all other members of the consortium wish to bring an action for annulment, when the loss suffered by the members of the consortium individually as a result of its failure to win the contract may differ in accordance with the degree to which the members incurred expenses for the purposes of participating in that contract. Consequently, the interest of each member of the consortium in seeking annulment of a decision can also be different. Thus, it is permissible to ask whether, in such a procedural context, the principle of effective judicial protection laid down by Directive 89/665 is upheld.

36 The national court notes finally that, in accordance with the national procedural rules concerning the general right to compensation for losses caused by unlawful acts of the State or public legal persons, it is the court having jurisdiction for the award of damages which also reviews, as an incidental matter, the legality of the administrative act, and not a different court as is the case of actions for annulment brought in respect of public procurement procedures. It therefore asks whether the procedures intended to ensure that rights derived from European Union law are upheld are less favourable than those which ensure that similar or analogous rights derived from national law are upheld.

37 Lastly, the national court states that its current interpretation of Article 47(1) of Presidential Decree 18/1989, that only all members of a consortium, acting jointly, have *locus standi* to seek annulment of an act forming part of a procedure for the award of a public contract, constitutes a reversal of its settled case-law, in accordance with which the members could bring individual actions.

38 In parallel, it points out the particular context of the main proceedings, that is to say that, initially, the action at issue was brought by the consortium as a whole and by its seven members before the Fourth Chamber of the Simvoulio tis Epikratias. That Chamber declared the action inadmissible with regard to the consortium and four of its members on the ground that they had not properly authorised their lawyer to act and, with regard to the three remaining members of the consortium, it referred the case, in the light of its importance, to the full court. Thus, the Fourth Chamber applied the case-law still valid at that time, in accordance with which an action brought by some members of a consortium was also admissible.

39 Nevertheless, the decision on inadmissibility made by the Fourth Chamber with regard to the action brought by the consortium as a whole and by four of its members was definitive, such that there is no remedy available from the proceedings pending before the full court of the national court. That court therefore asks whether that reversal of its case-law is compatible with the principle of a right to a fair hearing, which is a general principle of European Union law and also set out in Article 6 of the European Convention on Human Rights, signed in Rome on 4 November 1950 ('ECHR'), and with the principle of protection of legitimate expectations.

40 Having regard to the foregoing considerations, the Simvoulio tis Epikratias, sitting as a full court, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does a contract by which the contracting authority entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in the upgrading of the casino premises and the commercial exploitation of the possibilities offered by the casino's licence, and which contains a term under which the contracting authority is obliged to pay the contracting undertaking compensation should another casino lawfully operate in the wider area in which the casino in question operates, constitute a concession, not governed by … Directive 92/50 …?

2. If the first question is answered in the negative, does a legal action which is brought by persons who have participated in the procedure for the award of a public contract of mixed form providing inter alia for the supply of services subject to Annex I B to … [Directive 92/50] …, and in which they plead breach of the principle of equal treatment of participants in tender procedures (a principle affirmed by Article 3(2) of that directive), fall within the field of application of … [Directive 89/665] …, or is its application precluded inasmuch as, in accordance with Article 9 of … [Directive 92/50], only Articles 14 and 16 of the latter apply to the procedure for the award of the abovementioned contract for the supply of services?

3. If the second question is answered in the affirmative, accepting that a national provision in

accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act awarding the contract, and not consortium members individually, is not in principle contrary to Community law and specifically to … [Directive 89/665] …, and that that still applies where the legal action has initially been brought by all the members of the consortium jointly but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

4. When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with … [Directive 89/665] …, interpreted in the light of Article 6 of the [ECHR] as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?'

Case C–149/08

41 The city of Thessaloniki decided to organise a public procurement procedure for the award of a contract entitled 'Construction of Thessaloniki town hall and an underground car park'. By decision of the municipal committee of 1 July 2004, the contract was awarded to the consortium of Aktor ATE, Themeliodomi AE and Domotekhniki AE. With a view to conclusion of the contract, the contracting authority informed ESR, in accordance with the national legislation in force, of the identity of the persons having the status of owner, partner, main shareholder or management executive of the companies forming the abovementioned consortium to obtain a certificate that none of them fell within any case of incompatibility as provided for in Article 3 of Law 3021/2002.

42 After having found that a member of the board of directors of Aktor ATE did fall within a case of incompatibility as set out in the national legislation, ESR, by document of 1 November 2004, refused to issue the certificate necessary for signature of the contract. The appeal brought by Aktor ATE against that refusal by ESR was dismissed by decision of that body of 9 November 2004. It is against those two negative decisions that, of the three companies comprising the consortium to which the contract was awarded, only Aktor ATE has brought an action for annulment before the national court, on the basis of the existing case-law of that court which regarded actions brought individually by members of a temporary association as admissible.

43 In those circumstances, the Simvoulio tis Epikratias, sitting as a full court, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Accepting that a national provision in accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act awarding the contract, and not consortium members individually, is not in principle contrary to Community law and specifically to … Directive 89/665 …, and that that still applies where the legal action has initially been brought by all the members of the consortium but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

2. When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with … Directive 89/665 … , interpreted in the light of Article 6 of the [ECHR] as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?'

44 By order of the President of the Court of 22 May 2008, Cases C–145/08 and C–149/08 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred

The questions referred in Case C–145/08

45 By its questions concerning the application of Directive 92/50 to a contract such as that at issue in the main proceedings, the national court asks whether Directive 89/665 applies to the present case, given that its application presupposes that one of the directives on public contracts referred to in Article 1 of Directive 89/665 is applicable. Thus, it is appropriate to consider those questions together and to ascertain whether such a contract falls within the scope of one of the directives referred to in that article.

46 It is apparent from both the detailed points in the order for reference and the classification of the transaction at issue in the main proceedings by the national court that that transaction is a mixed contract.

47 That contract comprises, essentially, an agreement under which ETA would sell 49% of the shares in EKP to AEAS ('the "sale of shares" aspect'), an agreement under which AEAS would take over management of the casino business, in return for payment ('the "services" aspect') and an agreement under which AEAS would undertake to implement a development plan, comprising refurbishment of the casino and two adjoining hotel units and development of stretches of surrounding land ('the "works" aspect').

48 It follows from the case-law of the Court that, in the case of a mixed contract, the different aspects of which are, in accordance with the contract notice, inseparably linked and thus form an indivisible whole, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract (see, to that effect, Case C–3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 19; Case C–331/92 *Gestión Hotelera Internacional* [1994] ECR I–1329, paragraphs 23 to 26; Case C–220/05 *Auroux and Others* [2007] ECR I–385, paragraphs 36 and 37; Case C–412/04 *Commission* v *Italy* [2008] ECR I–619, paragraph 47; and Case C–536/07 *Commission* v *Germany* [2009] ECR I–0000, paragraphs 28, 29, 57 and 61).

49 That conclusion is valid irrespective of whether or not the aspect constituting the main object of a mixed contract falls within the scope of the directives on public contracts.

50 Consequently, it is appropriate to consider whether the mixed contract at issue in the main proceedings constitutes an indivisible whole and, if so, whether, because of its main object, as a whole it falls within the scope of one of the directives referred to in Article 1 of Directive 89/665 which govern public contracts.

51 Firstly, that contract forms part of a partial privatisation of a public casino business, which was decided upon at a national level by the competent interministerial committee and was launched by a single invitation to tender.

52 It is apparent from the case file, in particular from the conditions in the additional notice published in April 2002, that the mixed contract at issue in the main proceedings is in the form of a single contract relating jointly to the sale of shares in EKP, the acquisition of the right to nominate the majority of the members of the board of directors of EKP, the obligation to assume management of the casino business and to offer high-level services in a profitable manner, and the obligation to refurbish and improve the sites concerned and surrounding land.

53 Those findings demonstrate the need to conclude that mixed contract with a single partner which has both the financial capacity necessary to purchase the shares in question and professional experience in operating a casino.

54 It follows that the various aspects of that contract must be understood as constituting an indivisible whole.

55 Secondly, it is apparent from the findings made by the national court that the main object of the mixed contract was the sale, to the highest bidder, of 49% of the shares in EKP and that the 'works'

aspect of that transaction and the 'services' aspect, irrespective of whether the latter constitutes a public service contract or a service concession, were ancillary to the main object of the contract. The national court has also pointed out that the 'works' aspect was entirely ancillary to the 'services' aspect.

56 That assessment is confirmed by the documents submitted to the Court.

57 There can be no doubt that, where there is a purchase of 49% of the shares of a public undertaking such as EKP, that operation constitutes the main object of the contract. The point must be made that the income which AEAS would obtain as a shareholder appears to be significantly greater than the remuneration which it would obtain as a service provider. In addition, AEAS would receive that income for an unlimited time, while the management activity would cease after 10 years.

58 It follows from the foregoing considerations that the different aspects of the mixed contract at issue in the main proceedings constitute an indivisible whole, of which the aspect relating to the transfer of shares constitutes the main object.

59 The transfer of shares to a tenderer in the context of a privatisation of a public undertaking does not fall within the scope of the directives on public contracts.

60 Moreover, that is rightly pointed out in point 66 of the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final).

61 In point 69 of its abovementioned Green Paper on public-private partnerships, the Commission points out that it is necessary to ensure that such a capital transaction does not in reality conceal the award to a private partner of contracts which might be termed public contracts or concessions. Nevertheless, in the present case, there is nothing in the documents to cast doubt on the nature of the transaction at issue in the main proceedings, as categorised by the national court.

62 Having regard to the foregoing considerations, the conclusion must be that a mixed contract of which the main object is the acquisition by an undertaking of 49% of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and the performance of works does not, as a whole, fall within the scope of the directives on public contracts.

63 That conclusion does not preclude the fact that such a contract must observe the basic rules and general principles of the Treaty, in particular those on the freedom of establishment and the free movement of capital. However, there is no reason in the present case to consider the question of observance of those rules and principles, given that the result of such an examination could in no way lead to a finding that Directive 89/665 applies.

64 In the light of the foregoing, there is no need to answer the other questions referred in Case C–145/08.

The first question referred in Case C–149/08

65 By this question, the national court wishes to know, in essence, whether Directive 89/665 precludes a national rule, as interpreted by that court, under which only all members of a tendering consortium may bring an action against a decision of a contracting authority to award a contract, such that the members of that consortium, individually, are deprived not only of the possibility of having a decision of the contracting authority annulled, but also of the possibility of seeking compensation for individual damage suffered as a result of irregularities in the contract award procedure in question.

66 In order to answer that question, it must be noted that the act of which annulment is sought before the national court emanates from ESR, that is to say, an authority other than the contracting authority which organised the public procurement procedure at issue in the main proceedings.

67 It is apparent from the terms of Directive 89/665, commonly referred to as the 'Remedies Directive', that the protection granted by that directive covers the acts or omissions of contracting authorities.

68 Thus, it is clear from the wording of the fifth recital in the preamble to the directive and Article 1(1) thereof that they refer to measures to be taken in respect of decisions of contracting authorities. Similarly, under Article 1(3), Member States may require that a person seeking a review must have previously notified the contracting authority of the alleged infringement, so that that authority may remedy it. Furthermore, Article 3(2) of that directive gives the Commission the power to notify the contracting authority concerned of the reasons which have led it to conclude that, in a public procurement procedure, an infringement has been committed and to request its correction.

69 Accordingly, the conclusion must be that disputes relating to decisions of an authority such as ESR are not governed by the review system laid down by Directive 89/665.

70 However, the decisions of ESR are liable to have a certain effect on the conduct, or even the outcome, of a public procurement procedure, since they can lead to the exclusion of a tenderer, even a successful tenderer, who individually is characterised by one or another of the incompatibilities as laid down in the relevant national rules. Thus, those decisions are not devoid of interest in respect of the proper application of European Union law in that area.

71 In the present case, it is apparent from the information supplied by the national court that ESR's decision, which led to the applicant in the main proceedings being deprived of the award of the public contract at issue when it had been designated as the successful tenderer, was, in that applicant's opinion, adopted in breach of the provisions of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and of the principles arising under the primary legislation of the European Union.

72 The applicant in the main proceedings submits that, by the application of the contested national rules, it was prevented not only from seeking annulment of ESR's allegedly unlawful decision, which led to its exclusion from the procedure at issue in the main proceedings, but also from seeking damages for the loss caused by that decision. Thus it was deprived of its right to effective judicial protection.

73 In that regard, it is important to note that the principle of effective judicial protection is a general principle of European Union law (see, to that effect, Case C–432/05 *Unibet* [2007] ECR I–2271, paragraph 37 and the case-law cited).

74 The Court has consistently held that, in the absence of Community rules governing the matter, it is for each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness) (see, to that effect, Case C–268/06 *Impact* [2008] ECR I–2483, paragraphs 44 and 46 and the case-law cited).

75 With regard to the principle of equivalence, it is apparent from the information supplied by the national court that, in accordance with the domestic law governing in general compensation for losses caused by unlawful acts of the State or public legal persons, it is the court having jurisdiction for the award of damages which also reviews, as an incidental matter, the legality of the administrative act complained of, which can lead, from an action brought individually by a natural person, to an award of compensation if the basic conditions laid down to that effect are met.

76 However, so far as concerns public contracts, an area covered by European Union law, those two types of jurisdiction, that is to say, on the one hand, the jurisdiction to annul or find the invalidity of an administrative act and, on the other, the jurisdiction to award compensation for the loss suffered, are, in the national law at issue in the main proceedings, held by two different courts.

77 Thus, in the area of public contracts, the combination of Article 5(2) of Law 2522/1997, which makes the award of damages subject to the prior annulment of the allegedly unlawful act, and Article 47(1) of Presidential Decree 18/1989, in accordance with which only all members of a consortium have *locus standi* to seek annulment of an act forming part of a procedure for the award of a public contract, means, as the national court points out, that it is impossible for any member of a consortium, acting individually, not only to seek annulment of the act adversely affecting it but also to apply to the competent court to obtain compensation for any damage it has suffered individually, whereas that does not appear to be impossible in other areas, by virtue of the rules of domestic law applicable to applications for compensation for loss caused by an unlawful act of a

public authority.

78 With regard to the principle of effectiveness, it must be held that, by the application of the contested national rules, a tenderer such as the applicant in the main proceedings is deprived of any opportunity to claim, before the competent court, compensation for any damage it has suffered by reason of a breach of European Union law by an administrative act likely to have influenced the conduct and even the outcome of a public procurement procedure. Such a tenderer is thus deprived of effective judicial protection of the rights in that area of the law which it has under European Union law.

79 As the Advocate General observed in points 107 to 116 of her Opinion, it is important to note, in that regard, that the present situation differs from that which gave rise to the judgment in *Espace Trianon and Sofibail*. While that case concerned an action for annulment against a contract award decision which deprived the tendering consortium as a whole of the contract, the present case concerns an application for compensation for loss allegedly caused by an unlawful decision of an administrative authority which found that such an incompatibility existed, under the relevant national rules, in the case of the only applicant tenderer.

80 Having regard to the foregoing, the answer to the first question referred in Case C–149/08 is that European Union law, in particular the right to effective judicial protection, precludes a national rule, such as that at issue in the main proceedings, interpreted as meaning that the members of a temporary association, tenderer in a public procurement procedure, are deprived of the possibility of seeking, individually, compensation for the loss which they suffered individually as a result of a decision adopted by an authority, other than the contracting authority, involved in that procedure in accordance with the applicable national rules, which is such as to influence the conduct of that procedure.

81 In the light of that answer, there is no need to answer the second question referred in Case C–149/08.

Costs

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

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

1. **A mixed contract of which the main object is the acquisition by an undertaking of 49 % of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and the performance of works does not, as a whole, fall within the scope of the directives on public contracts.**

2. **European Union law, in particular the right to effective judicial protection, precludes a national rule, such as that at issue in the main proceedings, interpreted as meaning that the members of a temporary association, tenderer in a public procurement procedure, are deprived of the possibility of seeking, individually, compensation for the loss which they suffered individually as a result of a decision adopted by an authority, other than the contracting authority, involved in that procedure in accordance with the applicable national rules, which is such as to influence the conduct of that procedure.**

[Signatures]

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* Language of the case: Greek.

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OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 29 October 2009 (1)

Joined Cases C–145/08 and C–149/08

Club Hotel Loutraki AE
Athinaïki Techniki AE
Evangelos Marinakis
v
Ethniko Simvoulio Radiotileorasis
Ipourgos Epikratías

and

Aktor ATE
v
Ethniko Simvoulio Radiotileorasis

(References for a preliminary ruling from the Simvoulio tis Epikratias (Greece))

(Public procurement – Contract comprising a transfer of shares and a service element – Classification – Review procedures for the award of contracts – National rule precluding individual appeals by members of an ad hoc consortium lacking legal personality – Change in case-law)

Introduction

1. These two factually and procedurally complex cases, which have been joined by the Court, raise questions of Community public procurement law concerning, in particular, the Remedies Directive (2) and the Services Directive. (3)

2. The ultimate issue in both cases concerns the admissibility of an action, brought by an individual member of an ad hoc consortium without legal personality which was unsuccessful in its bid for a contract, seeking annulment of a decision taken in the course of an award procedure.

3. The Court has already held that the Remedies Directive does not preclude a national rule to the effect that, where the members of such a consortium wish to bring an action against the decision awarding the contract, they must all act together and the action must be admissible in respect of each of them individually. (4)

4. However, the situation in the present cases has the added features that the decision challenged is not the final award but a preliminary decision on eligibility to be awarded the contract,

taken not by the contracting authority but by a distinct regulatory authority, and that the decision is of specific relevance to only one member of the consortium and/or its annulment is sought with a view not to obtaining the final award but to being able to seek damages in respect of alleged irregularities in the decision. The issue is further complicated by the fact that national case-law has changed during the course of the proceedings, so that an action which might initially have been admissible can no longer be admissible.

5. Those issues are raised in relation to the Remedies Directive. The applicability of that directive is dependent on a contract's falling within the scope of, inter alia, the Services Directive or the Works Directive. (5) Its applicability is not in doubt in the second case, where the contract is agreed to be subject to the Works Directive. It is, however, less certain in the first case, where the Services Directive may or may not be applicable, depending on whether the award in question is classified as a service contract or a service concession (which would not fall within its scope).

6. A prior question in the first case is therefore how to classify the contract in issue, namely, a mixed contract in which: a public authority sells 49% of the shares in a public casino at a price offered by the highest bidder, to whom it hands over management of the casino and the right to appoint the majority of its directors; that management is remunerated by a percentage of the operating profits; the successful bidder undertakes to implement an improvement and modernisation plan; and the public authority, if it operates any other casino in future within the region concerned, undertakes to compensate the successful bidder.

7. A further issue concerns the extent to which the availability of the remedy in question may be required by fundamental rules and principles of Community law, even if the Remedies Directive does not apply.

Legislative background

Community legislation

The Services Directive (92/50)

8. Article 1(a) defines public service contracts as

'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'

to the exclusion of, in particular, public supply contracts and public works contracts, and contracts awarded in the water, energy, transport and telecommunications sectors, all of which are governed by other directives. A number of other types of contract, defined by their subject-matter, are also excluded, but they do not appear relevant for present purposes. Under Article 1(b), contracting authorities are defined as

'the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'

and, under Article 1(c), a service provider is

'any natural or legal person, including a public body, which offers services'.

9. Article 2 provides that, if a public contract is intended to cover both supplies and services, it is to fall within the scope of the directive if the value of the services exceeds that of the products.

10. Article 3(1) requires contracting authorities to apply procedures adapted to the provisions of the directive, and Article 3(2) requires them to ensure that there is no discrimination between service providers.

11. Article 8 stipulates that contracts for services listed in Annex I A (6) are to be awarded in accordance with the provisions of Titles III to VI, (7) while, under Article 9, contracts for services listed in Annex I B are to be awarded in accordance with Articles 14 and 16, which are in Titles IV and V respectively. Under Article 10, contracts for services listed in both annexes are to be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of those listed in Annex I B and, in other cases, in accordance with

Articles 14 and 16.

12. Article 14 concerns, essentially, technical specifications to be included in the general or contractual documents in each case, and Article 16 concerns publication of a notice of the award of a contract.

13. None of the services listed in Annex I A appears relevant to the question of classification raised in the first of the present cases. Annex I B, however (to which only Articles 14 and 16 apply), includes (17) 'Hotel and restaurant services', (26) 'Recreational, cultural and sporting services' and (27) 'Other services'. It is common ground that the services in issue fall within one or more of those categories.

14. Article 26(1) provides: 'Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.' (8)

The Remedies Directive (89/665)

15. Although the title of the Remedies Directive still refers only to public supply and public works contracts, it was none the less amended by the Services Directive to cover contracts falling within the scope of the latter.

16. Following that amendment, (9) Article 1 provides:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of [inter alia, the Works and Services Directives], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

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

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

17. Article 2 provides, in particular:

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

...

5. The Member States may provide that where damages are claimed on the grounds that a

decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

...'

National law

Casino licences

18. Under Article 1(7) of Law 2206/1994 governing casinos, (10) casino licences are to be granted following a public international tendering procedure organised by a seven-member commission. In accordance with Article 3, casinos are subject to State control.

Ineligibility for award of public contracts

19. Law 3021/2002, implementing Article 14(9) of the Greek Constitution, provides for restrictions on the award of public contracts to persons having active interests in the news media sector. It establishes an irrebuttable presumption of incompatibility as between the status of owner, partner, major shareholder or management executive of an undertaking active in that sector and that of owner, partner, major shareholder or management executive of an undertaking which is awarded a works, supply or services contract by the State or by a legal entity in the public sector (the presumption extending also to certain family members). (11)

20. Before awarding or signing the contract, the contracting authority must obtain from the Ethniko Simvoulio Radiotileorasis (National Council for Radio and Television, the 'ESR') a certificate that there is no such incompatibility. Failure to do so renders the contract null and void. The ESR's decision is binding, but may be challenged in the courts by any person with an interest.

21. In its recent judgment in *Michaniki*, (12) the Court held that such an irrebuttable presumption was precluded by Community law, even if it pursued the legitimate objectives of equal treatment of tenderers and of transparency in award procedures. The Court did not, however, state that Community law would preclude a rebuttable presumption of the kind described.

Remedies in procurement procedures

22. The Remedies Directive is transposed in Greece by Law 2522/1997, Article 2(1) of which provides that any person having an interest in the award of a public works, supply or services contract and liable to be adversely affected by a breach of Community or national law may, in accordance with certain detailed rules, apply to the courts for interim relief, for annulment, or a finding of invalidity, of the unlawful act, and for damages.

23. Article 4(1) of the same law specifies that the right to seek annulment or a finding of invalidity applies when the alleged breach of Community or national law concerns any step in the procedure leading up to the award. Article 4(2) provides that, if an act or omission of the contracting authority is declared void after the contract is awarded, and unless the award procedure has been suspended as a measure of interim relief, the contract itself is not affected; in that case the applicant may seek damages in accordance with Article 5.

24. Article 5(1) specifies that the right to seek damages is governed by Articles 197 and 198 of the Civil Code (providing for liability in damages arising out of negotiations) and that any provision

excluding or restricting that right is inapplicable. Article 5(2) provides (in accordance with Article 2 (5) of the Remedies Directive) that damages cannot be awarded unless the competent court has first annulled the unlawful act or omission in question or made a finding of invalidity, but allows an action for a finding of invalidity and an action for damages to be combined in accordance with the generally applicable rules.

25. Article 47(1) of Presidential Decree 18/1989, codifying the laws relating to the Simvoulio tis Epikratias (Council of State) allows any natural or legal person whose legitimate interests are affected by an administrative act to seek its annulment.

26. In a line of chamber decisions dating from 1992, that court (which appears to have sole jurisdiction to rule on the validity of public procurement procedures) consistently interpreted that provision in such a way as to allow an action for annulment of the award of a public contract to be brought by individual members of a consortium taking part in the procedure. In the course of the main proceedings in the present two cases, however, the court in plenary formation has decided that such an action is inadmissible unless brought jointly by all the members of the consortium (on the ground, essentially, that only the consortium as constituted for the purposes of the procedure could be awarded the contract if the original award were annulled). That interpretation, in conjunction with Article 5(2) of Law 2522/1997, has implications for the availability of an action for damages in respect of an irregularity in the procedure brought by an individual member of the consortium.

Facts, procedure and questions referred

Case C-145/08

27. In October 2001, the competent interministerial committee decided to privatise Elliniko Kazino Parnithas AE ('EKP', a subsidiary of Ellinika Touristika Akinita AE, 'ETA'), a casino undertaking wholly owned by the Greek State. The notice of invitation to tender provided for an initial preselection stage to determine which tenderers met the conditions set out. The successful tenderer was to be selected at a subsequent stage. Two consortia were preselected.

28. The terms were set out in detail in a draft contract annexed to a supplementary notice in April 2002. (13)

29. Article 3 of those terms stated that the contract was to be a 'mixed' contract comprising, in summary, four agreements under which, respectively:

– ETA would sell (49% of the) shares in EKP to 'AEAS' (a 'single purpose limited company' to be set up by the successful tenderer); (14)

– AEAS would acquire the right to appoint the majority of EKP's board of directors and thus to administer the company in accordance with the terms of the contract;

– AEAS would take over the management of the casino business, in return for payment;

– AEAS, as administrator of EKP and as manager of the casino business, would undertake vis-à-vis ETA to implement a development plan to be approved by EKP's board of directors.

30. The development plan was to comprise refurbishing the casino and enhancing the facilities offered, refurbishing and improving two adjoining hotel units and developing stretches of surrounding land, all to be completed within 750 days of obtaining planning permission.

31. Article 14 of the draft contract concerned AEAS's management of the casino and remuneration thereof. Essentially, the management was to be prudent, entirely in accordance with the law and financially profitable for EKP (Article 13(7) specified in addition that EKP was to be administered in such a way as to achieve an annual pre-tax profit of at least EUR 105 000 000 in the first five years). In return, AEAS would receive a sum no greater than a scaled percentage of the annual operating profits (decreasing from 20% of profits up to EUR 30 000 000 to 5% of profits over EUR 90 000 000) and 2% of turnover.

32. Under Article 21(1) of the draft contract, if ETA were to operate lawfully any other casino in

the same region (Attica) within 10 years from the date of effect of the contract, it would have to pay AEAS compensation equal to 70% of the price of the shares acquired in EKP by AEAS, reduced by one tenth each year.

33. Under Article 23(1), the contract would terminate at the end of the 10th year from taking effect. (15)

34. The contract was awarded to a group led by Hyatt Regency Xenodocheiaki kai Touristiki (Thessaloniki) AE (now renamed Regency Entertainment Psychagogiki Touristiki AE) ('Regency'). ETA therefore sought and obtained from the ESR a certificate that none of the owners, partners, major shareholders or management executives of the undertakings in the consortium presented any incompatibility as provided for in Law 3021/2002.

35. An action for annulment of the ESR's decision, in which it is alleged that a management executive of one member of the Regency consortium did have an incompatible connection with the news media sector (being the son of a major shareholder in a Greek media group), is now before the Simvoulio tis Epikratias.

36. The action was lodged in the name of the unsuccessful tendering consortium and all seven of its members. A chamber of the Simvoulio tis Epikratias dismissed it in so far as it was brought by the consortium as a whole and by four of its members, because they did not appear and the lawyer had not been duly authorised to act on their behalf. In so far as the action was brought by the remaining three members, including Club Hotel Loutraki ('Loutraki'), the chamber referred the case to the plenary court in view of its importance. In doing so, the chamber applied the then settled case-law under which an action brought by certain members of a consortium could be admissible. Its ruling of inadmissibility as regards the other applicants is now irrevocable and cannot be reviewed in the procedure before the plenary court, which has – in the meantime – reversed the previously settled case-law. (16)

37. As regards the substance of the action, the Simvoulio tis Epikratias points out that the contract is mixed, in that it comprises (i) a sale of shares to the successful tenderer which, as such, is not subject to Community procurement rules, (ii) a service contract to be concluded with that tenderer, who undertakes the management of the casino premises and (iii) an undertaking to carry out certain works. Of the three parts, according to the referring court, (i) is the main purpose of the contract, (ii) is ancillary and (iii) is the least important.

38. The referring court wonders whether part (ii) of the contract can be classified as a public service *concession*, not subject to Community directives. That might depend on the extent to which the successful tenderer bears the risk in operating the services concerned, bearing in mind that they relate to activities which, under national law, may be subject to exclusive or special rights. It could also be relevant that running a casino has never in any way constituted a *public* service in Greek law – although the term 'public service' might have to be defined as a concept of Community law.

39. If the Court should consider that part (ii) of the contract is a public service contract, the national court then wonders whether the action for annulment of the ESR's decision falls within the scope of the Remedies Directive. The services concerned fall within Annex I B to the Services Directive, and contracts for such services are subject only to Articles 14 and 16 of the directive, which impose procedural obligations. The referring court none the less wonders whether the principle of equal treatment of tenderers, which the Remedies Directive is designed to protect, applies also in such cases.

40. If the Remedies Directive does apply, the national court notes that, according to *Espace Trianon and Sofibail*, (17) a national rule which requires an action for annulment of a decision awarding a public contract to be brought by all the members of a tendering consortium is not contrary to that directive. However, it wonders whether that applies to all types of judicial protection guaranteed by the directive, in particular to claims for damages. The combination of the various national rules means that individual members of an unsuccessful tendering consortium are prevented not only from seeking annulment of the act adversely affecting them jointly but also from obtaining compensation for any damage they have suffered individually. Their ability to seek redress is thus dependent on the will of the other members of the consortium, whose interest in obtaining reparation may be different.

41. The issue is complicated by the fact that, pursuant to Article 2(5) of the Remedies Directive, Greece has made a claim for damages in the field of public procurement conditional on prior

annulment of the unlawful act, with different courts having jurisdiction over the two matters – the Simvoulio tis Epikratias is competent as regards validity, whereas the ordinary courts are competent in damages. That is in contrast to the general situation concerning reparation for damage caused by unlawful acts of the State or of public bodies, where the court hearing the claim for damages also reviews the legality of the administrative act.

42. It might therefore be considered that a procedure intended to safeguard rights deriving from Community law was less favourable than a procedure to safeguard comparable rights deriving from national law.

43. Finally, the Simvoulio tis Epikratias wonders whether the procedural situation, in which the current case-law requires an action of the kind in question to be brought jointly by all members of a consortium but the action as brought by only three members had been declared admissible under previous case-law, is compatible with the right to a fair hearing, as a fundamental principle of Community law and as set out in Article 6 of the European Convention on Human Rights, and with the principle of protection of legitimate expectations.

44. The Simvoulio tis Epikratias therefore seeks a preliminary ruling on the following questions:

'(1) Does a contract by which the contracting authority entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in the upgrading of the casino premises and the commercial exploitation of the possibilities offered by the casino's licence, and which contains a term under which the contracting authority is obliged to pay the contracting undertaking compensation should another casino lawfully operate in the wider area in which the casino in question operates, constitute a concession, not governed by [the Services Directive]?

(2) If [question 1] is answered in the negative: does a legal action which is brought by persons who have participated in the procedure for the award of a public contract of mixed form providing inter alia for the supply of services subject to Annex I B to [the Services Directive], and in which they plead breach of the principle of equal treatment of participants in tender procedures (a principle affirmed by Article 3(2) of that directive), fall within the field of application of [the Remedies Directive], or is its application precluded inasmuch as, in accordance with Article 9 of [the Services Directive], only Articles 14 and 16 of the latter apply to the procedure for the award of the abovementioned contract for the supply of services?

(3) If [question 2] is answered in the affirmative: [(18)] accepting that a national provision in accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act awarding the contract, and not consortium members individually, is not in principle contrary to Community law and specifically to [the Remedies Directive], and that that still applies where the legal action has initially been brought by all the members of the consortium jointly but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

(4) When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with [the Remedies Directive], interpreted in the light of Article 6 of the European Convention on Human Rights as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?'

Case C-149/08

45. In 2004, in the context of a public works procurement procedure for the construction of a town hall and underground car park, (19) the city of Thessaloniki awarded the contract to a consortium comprising the companies Aktor ATE ('Aktor'), Themeliodomi AE and Domotechniki AE. The ESR, consulted on the existence of a possible incompatibility within the meaning of Law

3021/2002, found that a major shareholder of a company which was one of Aktor's major shareholders did have an incompatible connection with the news media sector (being the son of a major shareholder in a Greek media group (20)), and refused to issue a certificate for the consortium. Aktor, alone of the members of the consortium, requested the ESR to reconsider its decision and has now applied to the Simvoulio tis Epikratias for review of the ESR's dismissal of that request. It did so on the basis of the existing case-law allowing such actions to be brought by individual members of a consortium. However, the plenary court, in the course of its consideration of both this and the *Loutraki* case, has overturned that case-law, with the effect that it is no longer possible for Aktor to seek to resolve the problem.

46. In that regard, the case thus raises similar issues to those in Case C–145/08. The Simvoulio tis Epikratias therefore seeks a preliminary ruling on two questions, identical to questions 3 (with the exception of th

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ORDONNANCE DU PRÉSIDENT DE LA COUR

22 mai 2008(*)

«Jonction»

Dans l'affaire C-145/08,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Symvoulio tis Epikrateias (Grèce), par décision du 15 février 2008, parvenue à la Cour le 9 avril 2008, dans la procédure

Club Hotel Loutraki AE e. a.,

contre

Ethniko Symvoulio Radiotileorasis,

Ypourgos Epikrateías,

en présence de:

Athens Resort Casino AE Symmetochon e. a.,

et dans l'affaire C-149/08,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Symvoulio tis Epikrateias (Grèce), par décision du 15 février 2008, parvenue à la Cour le 11 avril 2008, dans la procédure

AKTOR A.T.E.

contre

Ethniko Symvoulio Radiotileorasis,

en présence de:

Michaniki A.E.,

LE PRÉSIDENT DE LA COUR,

le premier avocat général, M. M. Poiares Maduro, entendu,

rend la présente

Ordonnance

1 Les demandes préjudicielles portent sur l'interprétation des articles 3, paragraphe 2, 9, 14 et 16 la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation

des marchés publics de services (JO L 209, p.1) et des articles 1, paragraphe 3, et 2 de la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 665, p.33).

2 Les affaires susmentionnées étant connexes par leur objet, il convient, conformément à l'article 43 du règlement de procédure, de les joindre aux fins de la procédure écrite et orale ainsi que de l'arrêt.

Par ces motifs, le président de la Cour ordonne:

Les affaires C-145/08 et C-149/08 sont jointes aux fins de la procédure écrite et orale ainsi que de l'arrêt.

Fait à Luxembourg, le 22 mai 2008

Le greffier Le président

R. Grass V. Skouris

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* Langue de procédure: le grec.

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Reference for a preliminary ruling from the Simvoulio tis Epikratias (Greece) lodged on 9 April 2008 - Club Hotel Loutraki AE, Athinaïki Tekhniki AE and Evangelos Marinakis v Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias

(Case C-145/08)

Language of the case: Greek

Referring court

Simvoulio tis Epikratias

Parties to the main proceedings

Claimants: Club Hotel Loutraki AE, Athinaïki Tekhniki AE and Evangelos Marinakis

Defendants: Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias

Questions referred

Does a contract by which the contracting authority entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in the upgrading of the casino premises and the commercial exploitation of the possibilities offered by the casino's licence, and which contains a term under which the contracting authority is obliged to pay the contracting undertaking compensation should another casino lawfully operate in the wider area in which the casino in question operates, constitute a concession, not governed by Directive 92/50/EEC?

If the first question referred for a preliminary ruling is answered in the negative: does a legal action which is brought by persons who have participated in the procedure for the award of a public contract of mixed form providing inter alia for the supply of services subject to Annex I B to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209), and in which they plead breach of the principle of equal treatment of participants in tender procedures (a principle affirmed by Article 3(2) of that directive), fall within the field of application of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395), or is its application precluded inasmuch as, in accordance with Article 9 of Directive 92/50/EEC, only Articles 14 and 16 of the latter apply to the procedure for the award of the abovementioned contract for the supply of services?

If the second question referred for a preliminary ruling is answered in the affirmative: accepting that a national provision in accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act awarding the contract, and not consortium members individually, is not in principle contrary to Community law and specifically to Directive 89/665, and that that still applies where the legal action has initially been brought by all the members of the consortium jointly but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with Directive 89/665/EEC, interpreted in the light of Article 6 of the European Convention on Human Rights as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?

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Reference for a preliminary ruling from the Simvoulio tis Epikratias (Greece) lodged on 11 April 2008 - Aktor Anonimi Tekhniki Etairia (Aktor A.T.E.) v Ethniko Simvoulio Radiotileorasis

(Case C-149/08)

Language of the case: Greek

Referring court

Simvoulio tis Epikratias

Parties to the main proceedings

Claimant: Aktor Anonimi Tekhniki Etairia (Aktor A.T.E.)

Defendant: Ethniko Simvoulio Radiotileorasis

Intervener: Mikhaniki A.E.

Questions referred

Accepting that a national provision in accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act awarding the contract, and not consortium members individually, is not in principle contrary to Community law and specifically to Directive 89/665, and that that still applies where the legal action has initially been brought by all the members of the consortium but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with Directive 89/665/EEC, interpreted in the light of Article 6 of the European Convention on Human Rights as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?

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JUDGMENT OF THE COURT (Grand Chamber)

13 April 2010 (*)

(Service concessions – Award procedure – Obligation of transparency – Subsequent replacement of a subcontractor)

In Case C–91/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Landgericht Frankfurt am Main (Germany), made by decision of 28 January 2008, received at the Court on 28 February 2008, in the proceedings

Wall AG

v

Stadt Frankfurt am Main,

Frankfurter Entsorgungs- und Service (FES) GmbH,

intervener:

Deutsche Städte Medien (DSM) GmbH,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.–C. Bonichot, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, K. Schiemann, J. Malenovský, A. Arabadjiev and J.–J. Kasel, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 9 June 2009,

after considering the observations submitted on behalf of:

– Wall AG, by H.–J. Otto, Rechtsanwalt, and C. Friese and R. von zur Mühlen, Justitiare,

– Stadt Frankfurt am Main, by L. Horn and J. Sommer, Rechtsanwälte, and B. Weiß, Justitiar,

– Frankfurter Entsorgungs- und Service (FES) GmbH, by H. Höfler, Rechtsanwalt,

– Deutsche Städte Medien (DSM) GmbH, by F. Hausmann and A. Mutschler-Siebert, Rechtsanwälte,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the Danish Government, by B. Weis Fogh, acting as Agent,

– the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,

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

– the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

– the United Kingdom Government, by S. Ossowski, acting as Agent, and J. Coppel, Barrister,

– the Commission of the European Communities, by D. Kukovec, B. Schima and C. Zadra, acting as Agents,

– the EFTA Surveillance Authority, by N. Fenger, B. Alterskjær and L. Armati, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 43 EC and 49 EC, the principles of equal treatment and non-discrimination on grounds of nationality, and the consequent requirement of transparency, in connection with the award of service concessions.

2 The reference was made in the course of proceedings between Wall AG ('Wall') and Stadt Frankfurt am Main ('the City of Frankfurt') concerning the award of a service concession for the operation and maintenance of certain public lavatories in that city.

Legal context

3 Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 1980 L 195, p. 35), as amended by Commission Directive 2000/52/EC of 26 July 2000 (OJ 2000 L 193, p. 75) ('Directive 80/723'), provides:

'1. For the purpose of this Directive:

...

(b) "public undertakings" means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it;

...

2. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:

(a) hold the major part of the undertaking's subscribed capital; or

(b) control the majority of the votes attaching to shares issued by the undertaking; or

(c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.'

4 Under Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1) ('Directive 92/50'):

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

Body governed by public law means any body:

– established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

– having legal personality and

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

...'

5 Article 17 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) provides:

'Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).'

6 The first subparagraph of Article 80(1) of Directive 2004/18 provides:

'The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof.'

7 According to the first paragraph of Article 82 of that directive:

'Directive 92/50/EEC, except for Article 41 thereof, and Directives 93/36/EEC and 93/37/EEC shall be repealed with effect from the date shown in Article 80, without prejudice to the obligations of the Member States concerning the deadlines for transposition and application set out in Annex XI.'

The main proceedings and the questions referred for a preliminary ruling

8 Wall markets advertising in public streets and open spaces, and for that purpose carries out inter alia the production, installation, maintenance and cleaning of public lavatories.

9 Frankfurter Entsorgungs- und Service GmbH ('FES'), a limited liability company, is a legal person governed by private law, whose objects in accordance with its statutes are waste disposal, waste management, urban cleansing and traffic safety, on behalf of public authorities and private persons. The City of Frankfurt holds 51% of the shares in FES, the remaining 49% being held by a private undertaking. Decisions of the shareholders' meeting of FES require a three-quarters majority. Of the 16 members of the supervisory board of FES, half are appointed by the shareholders. The workers appoint eight members and each of the two shareholders four members. The City of Frankfurt has the right to propose the chairman of the supervisory board, who has a casting vote if the votes are equal. FES employs approximately 1 400 employees, about 800 of whom carry out work concerning the City of Frankfurt.

10 FES achieves a net turnover of EUR 92 million with the City of Frankfurt and EUR 52 million with other persons governed by private and public law. Of the net turnover achieved by FES with the City of Frankfurt in 2005, EUR 51.3 million related to waste disposal and EUR 36.2 million to urban cleansing.

11 On 18 December 2002 the City of Frankfurt called by a 'voluntary EU-wide notice' in the city's official gazette for applications to take part in a competition for the conclusion of a service concession contract relating to the operation, maintenance, servicing and cleaning of 11 municipal public lavatories for a period of 16 years. Two of those 11 public lavatories, namely those at Rödelheim station and Galluswarte, were to be newly built. The consideration for those services was solely the right to charge a fee for the use of the installations and to make use, during the period of the contract, of advertising spaces on and in the lavatories and in other public spaces in the city of

Frankfurt.

12 On 4 July 2003 the City of Frankfurt invited interested undertakings to submit tenders. A draft service concession contract was annexed to the invitation, clauses 18(2) and 30(4) of which stated that a change of subcontractor was permitted only with the consent of the city.

13 Tenders were submitted by Wall, FES and three other undertakings also established in Germany.

14 According to the order for reference, FES gave the following description of the concepts relating to its offer: 'Introduction – … The call for tenders by the City of Frankfurt gives FES … an opportunity, together with an efficient and experienced partner such as [Wall], both to renew the buildings and the network of the public lavatories and to present a realistic refinancing scheme which takes account of its responsibility towards employees. … Galluswarte – … In consultation with the authorities, a fully automated City-WC from [Wall] will be integrated beneath the suburban railway bridge. … Bahnhof Rödelheim – Since the lavatories at Rödelheim station will be demolished in the course of redeveloping the open space, in accordance with current plans a fully automated City-WC from [Wall] will be integrated. … Safety concept – … the City-WCs have a fully automated self-cleaning system. Concepts for advertising – … Marketing of the advertising surfaces will be carried out by FES's partner [Wall] as an experienced advertising specialist operating worldwide … Advertising media used – The modern and aesthetic products of [Wall] will be used.'

15 Wall holds several patents relating to the method of functioning of the City-WCs.

16 On 18 March 2004 Wall was excluded from the award procedure and its tender was rejected.

17 On 9 June 2004 the concession was awarded to FES. A corresponding contract was concluded between FES and the City of Frankfurt on 20 and 22 July 2004, valid until 31 December 2019 ('the concession contract'). According to the order for reference, FES's concepts, as they resulted from the negotiations, were agreed as components of the contract. However, in its written observations, the City of Frankfurt asserts that the points mentioned in the FES concept were not incorporated in the concession contract. Only the designation of Wall as one of FES's subcontractors was incorporated.

18 An examination of the wording of the concession contract, submitted with the national court's case-file, shows that Wall was designated as a subcontractor with no further details of its products or services being included in the contract.

19 Clause 18(2) of the concession contract provided that FES was to carry out the construction work for the public lavatories using its own means and/or by means of subcontractors, including Wall. That clause stated that a change of subcontractor was allowed only with the written consent of the City of Frankfurt.

20 Clause 30(4) of the contract stated that Wall was the subcontractor of FES for the advertising services covered by the concession. That clause provided that a change of subcontractor was allowed only with the written consent of the City of Frankfurt.

21 On 5 January 2005 Wolf was requested by FES to submit an offer for the advertising services which were the subject of the concession awarded to FES. FES also invited Deutsche Städte Medien GmbH ('DSM') to submit such an offer.

22 By letter of 15 June 2005, FES then asked the City of Frankfurt to give its consent, as regards the use of the advertising spaces, to a change of subcontractor to DSM. On 21 June 2005 the city agreed to the change of subcontractor.

23 FES awarded those services to DSM, and on 21 June 2005 concluded a contract with DSM which provided for the payment by DSM to FES of an annual remuneration of EUR 786 206.

24 On 28 July 2005 FES invited offers for the supply of two Wall City-WCs. Wall made an offer, but on 7 September 2005 it was informed by FES that FES had received a more competitive offer, and consequently could not take Wall's offer into consideration.

25 By letter of 10 October 2005, FES asked the City of Frankfurt for consent to a change of subcontractor, in accordance with the concession contract, so that those public lavatories could be

supplied not by Wall but by other companies.

26 On 19 December 2005 the City of Frankfurt replied to FES that it did not have to deal with the question of a change of subcontractor for the public lavatories, since it understood that FES now wished to carry out the work itself under its own responsibility. The city stated on this occasion that it understood that the standards set out in the contractual documents would be complied with.

27 Wall brought an action before the referring court, asking it to order FES to refrain from performing the contract relating to the advertising services concluded with DSM and from concluding and/or performing any contract with a third party for the construction of the two public lavatories which were to be newly built. Wall also sought for the City of Frankfurt to be ordered to refrain from consenting to the conclusion of a contract between FES and anyone other than Wall for the construction of those two public lavatories. In the alternative, it asked for the City of Frankfurt and FES to be ordered jointly and severally to pay it EUR 1 038 682.18 plus interest.

28 In those circumstances, the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Are the principle of equal treatment expressed inter alia in Articles 12 EC, 43 EC and 49 EC and the prohibition in Community law of discrimination on grounds of nationality to be interpreted as meaning that the consequent duties of transparency for public authorities, namely to use an appropriate degree of advertising to enable the award of service concessions to be opened up to competition and the impartiality of the procurement procedure to be reviewed (see the judgments of the Court of Justice in Case C–324/98 *Telaustria and Telefonadress* [2000] ECR I–10745, paragraphs 60 to 62; Case C–231/03 *Coname* [2005] ECR I–7287, paragraphs 17 to 22; Case C–458/03 *Parking Brixen* [2005] ECR I–8585, paragraphs 46 to 50; Case C–410/04 *ANAV* [2006] ECR I–3303, paragraph 21; and Case C–260/04 *Commission* v *Italy* [2007] ECR I–7083, paragraph 24), require national law to provide an unsuccessful tenderer with a claim to an order restraining an imminent breach of those duties and/or prohibiting the continuation of such a breach of duty?

2. If Question 1 is answered in the negative: Do those duties of transparency form part of the customary law of the European Communities, in the sense that they are already applied continually and constantly, equally and generally, and are recognised as a binding rule by those concerned?

3. Do the duties of transparency mentioned in Question 1 require, in the case also of an intended amendment to a service concession contract – including the substitution of a subcontractor whose identity was emphasised in the tender – that the negotiations on this point are again opened up to competition with an appropriate degree of advertising, and what would be the criteria for requiring such an opening up?

4. Are the principles and duties of transparency mentioned in Question 1 to be interpreted as meaning that in the case of service concessions, in the event of a breach of duty, a contract concluded as a result of the breach and intended to create or amend a continuing obligation must be terminated?

5. Are the principles and duties of transparency mentioned in Question 1 and Article 86(1) EC, referring also if necessary to Article 2(1)(b) and (2) of [Directive 80/723] and Article 1(9) of [Directive 2004/18], to be interpreted as meaning that an undertaking is subject to those duties of transparency, as a public undertaking or contracting authority, if

– it was set up by a regional or local authority for the purpose of waste disposal and street cleaning but also operates in the free market,

– it belongs to that regional or local authority to the extent of a 51% holding, but decisions of shareholders can be taken only by a three-quarters majority,

– the regional or local authority appoints only a quarter of the members of the supervisory board of the undertaking, including the chairman, and

– it achieves more than half its turnover from bilateral contracts for waste disposal and

street cleaning in the territory of that regional or local authority, which reimburses itself by means of municipal taxes on its residents?'

Consideration of the questions referred

Preliminary observation

29 The main proceedings concern, first, the decision of FES to change its subcontractor for the advertising services that were the subject of the concession awarded to FES by the City of Frankfurt, the contract embodying that change having been concluded with the consent of the city on 21 June 2005, and, second, the intention of FES to award the construction of two public lavatories to an operator other than Wall. That intention was expressed in a letter of 10 October 2005, in which FES asked the City of Frankfurt to agree to a change of subcontractor for that work. By letter of 19 December 2005, the city replied to FES that it did not have to deal with the question of a change of subcontractor for the public lavatories, since it understood that FES now wished to carry out the work itself under its own responsibility. That reply is interpreted in the order for reference as meaning that the City of Frankfurt gave its consent to the change of subcontractor for the supply of the two public lavatories. In view of that interpretation, 19 December 2005, the date of the letter by which the City of Frankfurt is taken to have consented to the change of subcontractor requested by FES, should be taken as the reference date for considering the reference for a preliminary ruling.

Question 3

30 By its third question, which should be considered first, the referring court asks whether the principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 12 EC, 43 EC and 49 EC and the consequent obligation of transparency require, where an amendment to a service concession contract – including the case where the amendment is intended to replace a specific subcontractor on whom weight was laid during the procedure – is envisaged, the reopening up to competition of the relevant negotiations by ensuring an adequate degree of advertising and, if so, how such an opening up to competition should be done.

31 That question concerns the application of those provisions and principles in a situation in which, in connection with the performance of a service concession contract, it is intended to replace one of the subcontractors of the holder of the concession.

32 Since Articles 43 EC and 49 EC are specific applications of the general prohibition of discrimination on grounds of nationality laid down in Article 12 EC, there is no need to refer to Article 12 EC in order to answer the question (see, to that effect, Joined Cases C–397/98 and C–410/98 *Metallgesellschaft and Others* [2001] ECR I–1727, paragraphs 38 and 39, and Case C–105/07 *Lammers & Van Cleeff* [2008] ECR I–173, paragraph 14).

33 As European Union law now stands, service concession contracts are not governed by any of the directives by which the legislature has regulated the field of public procurement (see *Coname*, paragraph 16, and Case C–347/06 *ASM Brescia* [2008] ECR I–5641, paragraph 57). However, the public authorities concluding them are bound to comply with the fundamental rules of the EC Treaty, including Articles 43 EC and 49 EC, and with the consequent obligation of transparency (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 to 62; *Coname*, paragraphs 16 to 19; and *Parking Brixen*, paragraphs 46 to 49).

34 That obligation of transparency applies where the service concession in question may be of interest to an undertaking located in a Member State other that in which the concession is awarded (see, to that effect, *Coname*, paragraph 17; see also, by analogy, Case C–507/03 *Commission* v *Ireland* [2007] ECR I–9777, paragraph 29, and Case C–412/04 *Commission* v *Italy* [2008] ECR I–619, paragraph 66).

35 That the service concession at issue in the main proceedings may be of interest to undertakings located in a Member State other than the Federal Republic of Germany follows from the order for reference, in that the referring court states that the call for applications was announced in the official gazette of the City of Frankfurt at 'EU-wide' level, and that it considers that a breach of the obligation of transparency could constitute discrimination, at least potentially, against undertakings in other Member States.

36 The obligation of transparency to be complied with by public authorities concluding service concession contracts consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to allow the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed (see *Telaustria and Telefonadress*, paragraphs 60 to 62; *Parking Brixen*, paragraphs 46 to 49; and *ANAV*, paragraph 21).

37 In order to ensure transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a service concession contract could in certain cases require the award of a new concession contract, if they are materially different in character from the original contract and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, by analogy with public contracts, Case C–337/98 *Commission* v *France* [2000] ECR I–8377, paragraphs 44 and 46, and Case C–454/06 *pressetext Nachrichtenagentur* [2008] ECR I–4401, paragraph 34).

38 An amendment to a service concession contract during its currency may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted (see, by analogy, *pressetext Nachrichtenagentur*, paragraph 35).

39 A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain.

40 The referring court observes that in the concept annexed to the offer submitted to the City of Frankfurt by FES, FES stated that it would use City-WCs from Wall. According to the referring court, it is likely that in that case the concession was awarded to FES because of the identity of the subcontractor it had introduced.

41 It is for the national court to establish whether the situations described in paragraphs 37 to 39 above are present.

42 If, in making that assessment, the referring court were to conclude that an essential element of the concession contract was being altered, all necessary measures would have to be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which might extend to a new award procedure. If need be, a new award procedure would have to be organised in a manner appropriate to the specific features of the service concession involved, and would have to ensure that an undertaking located in another Member State had access to sufficient information on that concession before it was awarded.

43 The answer to Question 3 is therefore that, where amendments to the provisions of a service concession contract are materially different in character from those on the basis of which the original concession contract was awarded, and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, all necessary measures must be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which may extend to a new award procedure. If need be, a new award procedure should be organised in a manner appropriate to the specific features of the service concession involved, and should ensure that an undertaking located in another Member State has access to sufficient information on that concession before it is awarded.

Question 5

44 By its fifth question, which should be taken second, the referring court asks essentially whether, in the light of Article 86(1) EC, in conjunction if necessary with Article 2(1)(b) and (2) of Directive 80/723 and Article 1(9) of Directive 2004/18, an undertaking with characteristics such as those of FES which is the holder of a concession is bound by the obligation of transparency flowing from Articles 43 EC and 49 EC and by the principles of equal treatment and non-discrimination on grounds of nationality, when concluding a contract relating to services within the scope of the concession granted to it by the public authority.

45 More precisely, the referring court wishes to know whether Article 86(1) EC is relevant for defining

the scope of that obligation of transparency.

46 As to Article 86(1) EC, it suffices to note that that provision is addressed solely to the Member States, not directly to undertakings.

47 To establish whether an entity with characteristics such as those of FES may be equated to a public authority bound by the obligation of transparency, some aspects of the definition of 'contracting authority' in Article 1(b) of Directive 92/50 on public service contracts should be taken as guidance, to the extent that they correspond to the requirements produced by the application to service concessions of the obligation of transparency flowing from Articles 43 EC and 49 EC.

48 Those articles and the principles of equal treatment and non-discrimination on grounds of nationality, and the consequent obligation of transparency, pursue the same objectives as Directive 92/50, in particular the free movement of services and their opening up to undistorted competition in the Member States.

49 It must accordingly be ascertained whether two conditions are satisfied: first, that the undertaking in question is effectively controlled by the State or another public authority, and, second, that it does not compete in the market.

50 As regards the former condition, the order for reference states that, although the City of Frankfurt holds 51% of the capital of FES, that holding does not enable it effectively to control the management of that company. A majority of three quarters of the votes is needed for a decision of a general meeting of shareholders.

51 Moreover, the other 49% of the capital of FES is held not by one or more other public authorities but by a private undertaking which, as such, follows considerations proper to private interests and pursues objectives other than the public interest (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 50).

52 In addition, on the supervisory board of FES, the City of Frankfurt has only a quarter of the votes. The fact that it has the right to put forward a candidate for the post of chairman of the supervisory board, who has a casting vote if the votes are equal, is not enough to allow it to exercise a decisive influence over FES.

53 In those circumstances, the condition of effective control by the State or another public undertaking is not satisfied.

54 As regards the second condition mentioned in paragraph 49 above, the referring court observes that more than half of FES's turnover derives from bilateral contracts for waste disposal and street cleaning in the city of Frankfurt.

55 Such a relationship is analogous to that which exists in normal commercial relations formed by bilateral contracts freely negotiated between the contracting parties (see, to that effect, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 25).

56 It may be concluded, moreover, from the order for reference that FES operates competitively in the market, as follows from the fact that it derives a large part of its income from activities carried out with public authorities other than the City of Frankfurt and with private undertakings operating in the market, and from the fact that it competed with other undertakings to obtain the concession at issue in the main proceedings.

57 In those circumstances, the second condition for equating an undertaking with a public authority is not satisfied either.

58 The referring court also asks the Court about the possible application of Directive 80/723.

59 In that it relates to the transparency of financial relationships between the Member States and public undertakings, that directive does not apply as such to the subject-matter of Question 5.

60 The answer to Question 5 is therefore that, where an undertaking which is the holder of a concession concludes a contract for services within the scope of a concession it has been awarded

by a regional or local authority, the obligation of transparency deriving from Articles 43 EC and 49 EC and from the principles of equal treatment and non-discrimination on grounds of nationality does not apply if that undertaking

– was set up by the regional or local authority for the purpose of waste disposal and street cleaning but also operates in the market,

– belongs to that regional or local authority to the extent of a 51% holding, but decisions of shareholders can be taken only by a three-quarters majority of votes at a general meeting of the company,

– has only a quarter of the members of its supervisory board, including the chairman, appointed by the regional or local authority, and

– obtains more than half its turnover from bilateral contracts for waste disposal and street cleaning in the territory of that regional or local authority, which reimburses itself by means of municipal taxes on its residents.

Questions 1, 2 and 4

61 By its first, second and fourth questions, which should be examined together, the referring court essentially asks whether the principles of equal treatment and non-discrimination on grounds of nationality enshrined by Articles 43 EC and 49 EC and the consequent obligation of transparency require the national authorities to terminate a contract entered into in breach of that obligation and the national courts to give a tenderer whose offer has not been accepted the right to a restraining order to prevent an imminent breach or to put an end to an existing breach of that obligation. The referring court also asks whether that obligation may be regarded as part of the customary law of the European Union.

62 As noted in paragraph 33 above, service concession contracts are not governed, in the present state of European Union law, by any of the directives regulating the field of public procurement.

63 According to the Court's case-law, in the absence of European Union rules, it is for the domestic legal system of each Member State to regulate the legal procedures for safeguarding rights which individuals derive from European Union law (see, to that effect, Case C–432/05 *Unibet* [2007] ECR I–2271, paragraph 39 and the case-law cited).

64 Such procedures must be no less favourable than similar domestic procedures (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by the law of the European Union (principle of effectiveness) (see, to that effect, *Unibet*, paragraph 43 and the case-law cited).

65 It follows that the principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 43 EC and 49 EC and the consequent obligation of transparency do not require the national authorities to terminate a contract or the national courts to grant a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from that obligation in such a way that those procedures are no less favourable than similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult.

66 The referring court raises, finally, one further question. It considers that a purely judge-made development of the law cannot constitute a protective law giving rise to liability under the German Bürgerliches Gesetzbuch (Civil Code). Only customary law constitutes a rule of law within the meaning of that code. Citing the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), the referring court states that the recognition of customary law requires prolonged usage that is permanent and consistent, equal and general, and is accepted as a binding rule of law by the individuals concerned.

67 In the national court's opinion, however, the obligation of transparency defined in the case-law of the Court is so recent that it cannot be regarded as having the status of customary law, as defined in the preceding paragraph.

68 It must be observed here that the obligation of transparency derives from the law of the European Union, in particular Articles 43 EC and 49 EC (see, to that effect, *Coname*, paragraphs 17 to 19). Those provisions, whose observance the Court ensures, have direct effect in the domestic legal systems of the Member States and take precedence over any contrary provision of national law.

69 By virtue in particular of Article 4(3) TEU, all the authorities of the Member States must ensure the observance of the rules of European Union law within the sphere of their competence (see, to that effect, Case C–2/06 *Kempter* [2008] ECR I–411, paragraph 34 and the case-law cited).

70 It is for the national court to interpret the national law which it has to apply, as far as is at all possible, in a manner which accords with the requirements of European Union law and, in particular, ensures that the obligation of transparency is observed (see, to that effect, Case C–327/00 *Santex* [2003] ECR I–1877, paragraph 63 and the case-law cited).

71 In the light of the foregoing, the answer to Questions 1, 2 and 4 is that the principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 43 EC and 49 EC and the consequent obligation of transparency do not require the national authorities to terminate a contract or the national courts to make a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from that obligation in such a way that those procedures are no less favourable that similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult. The obligation of transparency flows directly from Articles 43 EC and 49 EC, which have direct effect in the domestic legal systems of the Member States and take precedence over any contrary provision of national law.

Costs

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

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

1. **Where amendments to the provisions of a service concession contract are materially different in character from those on the basis of which the original concession contract was awarded, and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, all necessary measures must be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which may extend to a new award procedure. If need be, a new award procedure should be organised in a manner appropriate to the specific features of the service concession involved, and should ensure that an undertaking located in another Member State has access to sufficient information on that concession before it is awarded.**

2. **Where an undertaking which is the holder of a concession concludes a contract for services within the scope of a concession it has been awarded by a regional or local authority, the obligation of transparency deriving from Articles 43 EC and 49 EC and from the principles of equal treatment and non-discrimination on grounds of nationality does not apply if that undertaking**

   – **was set up by the regional or local authority for the purpose of waste disposal and street cleaning but also operates in the market,**

   – **belongs to that regional or local authority to the extent of a 51% holding, but decisions of shareholders can be taken only by a three-quarters majority of votes at a general meeting of the company,**

   – **has only a quarter of the members of its supervisory board, including the chairman, appointed by the regional or local authority, and**

– **obtains more than half its turnover from bilateral contracts for waste disposal and street cleaning in the territory of that regional or local authority, which reimburses itself by means of municipal taxes on its residents.**

3. **The principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 43 EC and 49 EC and the consequent obligation of transparency do not require the national authorities to terminate a contract or the national courts to make a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from that obligation in such a way that those procedures are no less favourable that similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult. The obligation of transparency flows directly from Articles 43 EC and 49 EC, which have direct effect in the domestic legal systems of the Member States and take precedence over any contrary provision of national law.**

[Signatures]

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* Language of the case: German.

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CONCLUSIONS DE L'AVOCAT GÉNÉRAL
M. YVES Bot
présentées le 27 octobre 2009 (1)

Affaire C–91/08

Wall AG
contre
Stadt Frankfurt am Main,
Frankfurter Entsorgungs- und Service GmbH

[demande de décision préjudicielle formée par le Landgericht Frankfurt am Main (Allemagne)]

«Principes généraux du droit communautaire – Concession de services – Principe d'égalité de traitement des soumissionnaires – Obligation de transparence – Attribution à une entité à capital mixte – Notion de 'pouvoir adjudicateur' – Organisme de droit public – Modification subséquente d'un terme du contrat de concession – Changement de sous–traitant – Protection juridictionnelle effective – Modalités procédurales nationales – Reconnaissance d'un pouvoir d'injonction – Résiliation du contrat»

1. Par le présent renvoi préjudiciel, le Landgericht Frankfurt am Main (Allemagne) s'interroge, en substance, sur la portée de l'obligation de transparence et sur les conséquences qu'il convient de tirer de sa violation dans le cadre d'une procédure de passation d'une concession de services.

2. Cette demande a été présentée dans le cadre d'un litige opposant l'entreprise Wall AG (2) à la Stadt Frankfurt am Main (ville de Francfort–sur–le–Main) et à l'entreprise Frankfurter Entsorgungs- und Service GmbH (3) au sujet de l'exécution d'une concession pour l'exploitation, la maintenance et l'entretien de toilettes publiques sur le territoire de cette ville.

3. Cette affaire va permettre à la Cour de préciser les conditions dans lesquelles le pouvoir adjudicateur peut consentir à une modification du contrat de concession, au cours de son exécution, sans méconnaître la portée de l'obligation de transparence.

4. Elle va également offrir à la Cour l'opportunité de préciser les conditions dans lesquelles le respect de cette obligation s'impose à une entité à capital mixte constituée dans le cadre d'un partenariat public–privé.

5. Enfin, les questions posées par le Landgericht Frankfurt am Main permettront à la Cour de préciser les modalités du contrôle juridictionnel des décisions qui ont été adoptées dans le cadre des concessions de services. En particulier, la Cour devra examiner si, lorsque la juridiction nationale compétente constate la violation de l'obligation de transparence dans le cadre d'une procédure de passation d'une concession de services, le droit communautaire requiert des États membres qu'ils reconnaissent, dans le chef de leur juridiction nationale, un pouvoir d'injonction à l'égard des parties au contrat.

I – Le cadre juridique communautaire

A – *Le droit primaire*

6. Le traité CE ne restreint pas la liberté des États membres de conclure des contrats de concession de services pour autant que les modalités d'octroi de ceux–ci soient compatibles avec les dispositions qui instaurent et garantissent le bon fonctionnement du marché unique.

7. Ainsi, comme tout acte étatique fixant les conditions auxquelles une prestation d'activités économiques est subordonnée, l'octroi d'une concession doit respecter les principes consacrés par le traité en matière de droit d'établissement (article 43 CE) et de libre prestation des services (article 49 CE) et doit se soumettre aux règles interdisant toute discrimination en raison de la nationalité (article 12, premier alinéa, CE).

8. L'octroi d'une concession doit, en outre, respecter les principes que la Cour a dégagés sur la base de ces dispositions, et en particulier les principes d'égalité de traitement et de transparence dont nous expliquerons la portée ci–après. Si cette jurisprudence porte notamment sur le contentieux des contrats de marchés publics, il n'en demeure pas moins que les principes qui s'en dégagent ont une portée qui dépasse le simple cadre desdits contrats. Nous partons de la prémisse que ces principes sont également applicables à d'autres situations, et en particulier aux concessions.

B – *Le droit dérivé*

9. Au stade actuel du droit communautaire, les contrats de concession de services ne font l'objet d'aucune réglementation dérivée (4). Néanmoins, les dispositions adoptées dans le cadre des directives en matière de passation des marchés publics permettent d'apprécier certaines modalités de passation de ce type de contrats.

1. La réglementation relative à la coordination des procédures de passation des marchés publics de services

10. La notion de «pouvoirs adjudicateurs» a tout d'abord été définie à l'article 1er, sous b), de la directive 92/50/CEE (5). Conformément à son huitième considérant, celle–ci s'applique aux «marchés publics de services» (6) et, de ce fait, exclut de son champ d'application les concessions de services. La directive 92/50 vise à supprimer les entraves à la libre circulation des services et des marchandises et tend à protéger les intérêts des opérateurs économiques qui souhaitent offrir des biens ou des services aux pouvoirs adjudicateurs établis dans un autre État membre (7).

11. L'article 1er, sous b), de cette directive définit la notion de «pouvoirs adjudicateurs» comme suit:

«sont considérés comme *'pouvoirs adjudicateurs'*, l'État, les collectivités territoriales, les organismes de droit public, les associations formées par une ou plusieurs de ces collectivités ou de ces organismes de droit public.

Par 'organisme de droit public', on entend tout organisme:

– créé pour satisfaire spécifiquement des besoins d'intérêt général ayant un caractère autre qu'industriel ou commercial

et

– ayant la personnalité juridique

et

– dont soit l'activité est financée majoritairement par l'État, les collectivités territoriales ou d'autres organismes de droit public, soit la gestion est soumise à un contrôle par ces derniers, soit l'organe d'administration, de direction ou de surveillance est composé de membres dont plus de la moitié est désignée par l'État, les collectivités territoriales ou d'autres organismes de droit public.

[…]»

12. La notion de «concession de services» a ensuite été définie à l'article 1er, paragraphe 4, de la directive 2004/18/CE (8), qui refond l'ensemble des dispositions relatives à la passation des marchés publics de services, de fournitures et de travaux (9).

13. Aux termes de cette disposition, une concession de services est un «contrat présentant les mêmes caractéristiques qu'un marché public de services, à l'exception du fait que la contrepartie de la prestation des services consiste soit uniquement dans le droit d'exploiter le service, soit dans ce droit assorti d'un prix».

14. En outre, cette directive reprend en des termes identiques, à son article 1er, paragraphe 9, la définition de la notion d'«organisme de droit public», visée à l'article 1er, sous b), deuxième alinéa, de la directive 92/50.

2. La directive 89/665/CEE

15. La directive 89/665/CEE (10) permet un accroissement substantiel des garanties de transparence et de non-discrimination dans le cadre de l'ouverture des marchés publics à la concurrence en obligeant les États membres à mettre en place des procédures de recours efficaces et rapides en cas de violation des dispositions des directives «marchés publics» (11). Conformément à l'article 1er de cette directive, ces procédures doivent être accessibles, selon des modalités que les États membres peuvent déterminer, à toute personne ayant ou ayant eu un intérêt à obtenir un marché public déterminé et ayant été ou risquant d'être lésée par une violation alléguée.

16. Compte tenu de la brièveté des procédures de passation des marchés publics, lesdites procédures doivent, conformément à l'article 2 de la directive 89/665, permettre non seulement un traitement urgent des violations alléguées et l'adoption de mesures provisoires, mais également l'annulation des décisions illégales et l'indemnisation des personnes lésées. Cette disposition est rédigée comme suit:

«1. Les États membres veillent à ce que les mesures prises aux fins des recours visés à l'article 1er prévoient les pouvoirs permettant:

a) de prendre, dans les délais les plus brefs et par voie de référé, des mesures provisoires ayant pour but de corriger la violation alléguée ou d'empêcher d'autres dommages d'être causés aux intérêts concernés, y compris des mesures destinées à suspendre ou à faire suspendre la procédure de passation de marché public en cause ou de l'exécution de toute décision prise par les pouvoirs adjudicateurs;

b) d'annuler ou de faire annuler les décisions illégales […]

c) d'accorder des dommages-intérêts aux personnes lésées par une violation.

[…]

6. Les effets de l'exercice des pouvoirs visés au paragraphe 1 sur le contrat qui suit l'attribution d'un marché sont déterminés par le droit national.

[…]»

17. Ainsi que nous l'avons indiqué, la directive 89/665 a été modifiée par la directive 2007/66. Celle-ci tend à renforcer l'efficacité des procédures de recours nationales et précise les cas dans lesquels un contrat conclu en violation des règles de procédure de passation des marchés publics doit être dépourvu d'effets.

3. La directive 80/723/CEE

18. L'article 2 de la directive 80/723/CEE (12) est rédigé dans les termes suivants:

«1. Aux fins de la présente directive, on entend par:

[…]

b) ‘entreprise publique’, toute entreprise sur laquelle les pouvoirs publics peuvent exercer directement ou indirectement une influence dominante du fait de la propriété, de la participation financière ou des règles qui la régissent;

[…]

2. L’influence dominante des pouvoirs publics sur l’entreprise est présumée lorsque, directement ou indirectement, ceux–ci:

a) détiennent la majorité du capital souscrit de l’entreprise ou

b) disposent de la majorité des voix attachées aux parts émises par l’entreprise ou

c) peuvent désigner plus de la moitié des membres de l’organe d’administration, de direction ou de surveillance de l’entreprise.»

II – Les faits et la procédure au principal

19. Nous résumerons de la manière suivante les faits qui semblent pertinents aux fins de notre raisonnement.

20. Le contrat en cause dans la présente affaire est un contrat de concession de services au sens de l’article 1er, paragraphe 4, de la directive 2004/18. Ce contrat a été conclu entre la Stadt Frankfurt am Main qui est considérée, en tant que collectivité territoriale, comme un «pouvoir adjudicateur» au sens de l’article 1er, sous b), de la directive 92/50 et l’entreprise FES. Ledit contrat a pour objet l’exploitation, la maintenance et l’entretien de onze toilettes publiques situées sur le territoire de la Stadt Frankfurt am Main et comporte la reconstruction de deux toilettes publiques situées dans les gares de Rödelheim et de Galluswarte, ce qui constitue des services au sens de l’article 8 et de l’annexe I A de cette directive.

21. Le contrat en cause a été conclu pour une durée de seize ans. FES, qui est l’entrepreneur principal, n’est pas rémunérée par la Stadt Frankfurt am Main, mais perçoit une redevance versée par les usagers et dispose du droit d’exploiter, à titre exclusif, les supports des toilettes à des fins publicitaires. Ce mode de rémunération implique que FES prend en charge le risque d’exploitation des services en question.

22. Cette concession a été attribuée à FES sur la base de l’offre économiquement la plus avantageuse. Les offres remises par les entreprises, dont celles de FES et de la requérante, ont été évaluées au regard d’une pluralité de critères d’attribution énoncés dans l’appel d’offres. Ainsi qu’il ressort de l’ordonnance de renvoi, chacun de ces critères était pondéré et figure dans l’ordre décroissant de l’importance qui leur était attribuée par la Stadt Frankfurt am Main (13).

23. Dans le cadre de son offre, FES a présenté la requérante comme étant sa sous–traitante en ce qui concerne les prestations publicitaires et la fourniture des modules de toilettes nécessaires à la réalisation des services concédés. Elle s’est notamment prévalue de la renommée mondiale et de l’expertise technique de celle–ci dans ces secteurs. La Stadt Frankfurt am Main a retenu l’offre de FES.

24. À la suite de la conclusion du contrat de concession les 20 et 22 juillet 2004, FES a invité la requérante ainsi que l’intervenante, la Deutsche Städte Medien GmbH (14), à présenter des offres le 5 janvier 2005, pour la fourniture de prestations publicitaires, et le 28 juillet 2005, pour la fourniture de modules de toilettes. Les offres de la requérante ont été écartées.

25. En application de l’article 30, IV, du contrat de concession, FES a demandé à la Stadt Frankfurt am Main de consentir au changement de sous–traitant. Cette dernière n’a présenté aucune objection et a, par ailleurs, précisé que, malgré ce changement, les standards décrits dans le cahier des charges seraient respectés.

26. Devant la juridiction nationale, la requérante reproche à la Stadt Frankfurt am Main d’avoir méconnu l’obligation de transparence en autorisant ledit changement, procédant ainsi à une

modification essentielle du contrat de concession conclu avec FES.

III – Le renvoi préjudiciel

27. Le Landgericht Frankfurt am Main a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes:

«1) Convient–il d'interpréter le principe d'égalité de traitement et le principe communautaire de non–discrimination en raison de la nationalité, consacrés par les articles 12 [CE], 43 [CE] et 49 [CE], en ce sens que les obligations de transparence en découlant pour les autorités publiques et consistant à ouvrir, pour l'adjudication des concessions de services, la concurrence avec un degré de publicité adéquat et à permettre le contrôle de l'impartialité de la procédure d'adjudication [(15)] imposent que le droit national accorde au soumissionnaire dont l'offre n'a pas été retenue le droit d'obtenir une injonction visant à prévenir une violation imminente de ces obligations et/ou à faire cesser une telle violation?

2) En cas de réponse négative à la première question préjudicielle, les obligations de transparence [susmentionnées] relèvent–elles du droit coutumier des Communautés européennes en ce sens qu'elles sont déjà appliquées de manière durable, permanente, égale et générale, et reconnues comme règles contraignantes par les sujets de droit concernés?

3) Les obligations de transparence mentionnées dans la première question préjudicielle imposent–elles également, lorsqu'il est envisagé de modifier un contrat de concession de services – y compris lorsque cette modification vise à remplacer un sous–traitant précis, sur lequel l'accent a été mis lors du concours –, d'ouvrir à nouveau à la concurrence les négociations y relatives en garantissant un degré de publicité adéquat et, le cas échéant, selon quelles modalités une telle ouverture à la concurrence devrait–elle être réalisée?

4) Les principes et les obligations de transparence mentionnés dans la première question préjudicielle doivent–ils être interprétés en ce sens que, en cas de manquement s'agissant d'une concession de services, le contrat conclu à la suite de ce manquement et visant à créer ou à modifier des obligations d'une durée indéterminée doit être résilié?

5) Convient–il d'interpréter les principes et les obligations de transparence visés dans la première question préjudicielle et l'article 86, paragraphe 1, CE, pris conjointement, le cas échéant, avec l'article 2, paragraphes 1, sous b), et 2, de la directive 80/723 […] et l'article 1er, paragraphe 9, de la directive 2004/18 […], en ce sens qu'une entreprise, en tant qu'entreprise publique ou pouvoir adjudicateur, est liée par ces obligations de transparence lorsque:

– elle a été créée par une collectivité territoriale aux fins de l'élimination des déchets et du nettoyage de la voirie, mais qu'elle est également active sur le marché libre;

– elle appartient à ladite collectivité territoriale à hauteur de 51 %, les décisions de gestion ne pouvant cependant être adoptées qu'à la majorité des trois quarts;

– ladite collectivité territoriale ne nomme qu'un quart des membres du conseil de surveillance de l'entreprise en question, le président du conseil de surveillance compris, et que

– plus de la moitié de son chiffre d'affaires provient de contrats synallagmatiques relatifs à l'élimination des déchets et au nettoyage de la voirie sur le territoire de ladite collectivité territoriale, cette dernière les finançant par les impôts locaux versés par ses administrés?»

28. Des observations écrites et orales ont été fournies par les parties au principal, mais également par la Commission des Communautés européennes, l'Autorité de surveillance de l'Association européenne de libre–échange (AELE) ainsi que six États membres (16).

IV – L'objet des questions préjudicielles

29. Nous débuterons notre étude du présent renvoi préjudiciel par l'examen des troisième et cinquième questions préjudicielles, relatives à la portée de l'obligation de transparence.

30. Par sa troisième question, la juridiction de renvoi demande à la Cour si une telle obligation impose au pouvoir adjudicateur une nouvelle procédure de mise en concurrence lorsque l'entrepreneur principal, auquel la concession a été attribuée, souhaite, pour l'exécution de celle-ci, recourir aux services d'un sous-traitant différent de celui dont il s'est prévalu lors de la remise de son offre. En outre, par sa cinquième question, la juridiction de renvoi se demande si un entrepreneur principal tel que FES, qui est constitué sous la forme d'une entité à capital mixte, peut également être qualifié de «pouvoir adjudicateur» au sens de la directive 92/50, soumis, en tant que tel, au respect de l'obligation de transparence.

31. Après l'examen de ces deux premières questions, nous poursuivrons notre analyse par l'étude des première, deuxième et quatrième questions préjudicielles qui concernent, en substance, les modalités du contrôle juridictionnel des décisions adoptées dans le cadre des concessions de services.

32. Ces trois dernières questions ne sont pertinentes que dans le cas où le juge national considérerait que la Stadt Frankfurt am Main et/ou FES ont compromis la transparence de la procédure en procédant à un changement de sous-traitant au cours de l'exécution du contrat de concession en cause.

V – Analyse

33. Avant d'entamer notre examen, il nous semble important de rappeler les grandes lignes de la jurisprudence relative à l'obligation de transparence. Bien que cette jurisprudence concerne en partie les marchés publics, celle-ci a été élaborée à partir des principes du traité et nous semble donc pertinente pour l'application du droit communautaire aux concessions de services.

A – *Les grandes lignes de la jurisprudence relative à l'obligation de transparence*

34. Il ressort d'une jurisprudence constante que l'obligation de transparence constitue une expression concrète et spécifique du principe d'égalité de traitement.

35. La Cour considère depuis longtemps que ce principe appartient aux principes fondamentaux du droit communautaire (17) dont le respect s'impose aux États membres dès lors qu'ils agissent dans le champ d'application du droit communautaire. Ledit principe exige que des situations comparables ne soient pas traitées de manière différente, à moins qu'une différenciation ne soit objectivement justifiée (18). Il figure au nombre des droits fondamentaux dont la Cour assure le respect (19).

36. En qualité de principe général du droit communautaire, le respect du principe d'égalité de traitement lie les États membres lorsqu'ils mettent en œuvre des réglementations communautaires. Par suite, ceux-ci sont tenus, dans toute la mesure du possible, d'appliquer ces réglementations dans des conditions qui ne méconnaissent pas les exigences découlant de la protection des droits fondamentaux dans l'ordre juridique communautaire (20).

37. La Cour a eu l'occasion de préciser la portée du principe d'égalité de traitement dans le cadre des marchés publics dans les arrêts Commission/Danemark et Commission/Belgique (21), dont la jurisprudence a ensuite été transposée aux concessions de services (22).

38. Le principe d'égalité de traitement entre les soumissionnaires a pour objectif de favoriser le développement d'une concurrence saine et effective entre les entreprises candidates. Le respect de ce principe doit permettre de garantir une comparaison objective des offres et s'impose à tous les stades de la procédure. Tous les soumissionnaires, indépendamment de leur nationalité, doivent disposer des mêmes chances dans la formulation des termes de leurs offres (23). Autrement dit, les règles du jeu doivent être connues de tous les soumissionnaires potentiels et doivent s'appliquer à tous de la même manière.

39. Selon le juge communautaire, le respect du principe d'égalité de traitement des soumissionnaires implique l'absence de discrimination en raison de la nationalité et une obligation de transparence qui doit permettre à l'autorité publique concédante de s'assurer que ce principe est

respecté (24).

40. La Cour a précisé la portée de l'obligation de transparence dans les arrêts précités Telaustria et Telefonadress ainsi que Parking Brixen. Selon le juge communautaire, cette obligation a essentiellement pour but de garantir l'absence de risque de favoritisme et d'arbitraire de la part du pouvoir adjudicateur. Ladite obligation consiste à garantir, en faveur de tous les soumissionnaires potentiels, un degré de publicité adéquat de la procédure d'adjudication permettant ainsi une ouverture à la concurrence et le contrôle de l'impartialité de la procédure. Elle implique également que toutes les conditions et les modalités de la procédure d'attribution soient formulées de manière claire, précise et univoque dans l'avis de marché ou dans le cahier des charges. Cela doit permettre à tous les soumissionnaires raisonnablement informés et normalement diligents d'en comprendre la portée exacte et de les interpréter de la même manière. Cela doit également permettre au pouvoir adjudicateur de vérifier si les offres des soumissionnaires correspondent effectivement aux critères régissant le marché en cause (25).

41. Un examen de la jurisprudence de la Cour démontre le lien étroit existant entre l'obligation de transparence et le principe d'égalité de traitement. La première vise à assurer l'effet utile du second en garantissant les conditions d'une concurrence saine. Puisque le principe d'égalité de traitement constitue, en tant que tel, un principe général du droit communautaire, le respect de l'obligation de transparence qui en constitue une expression concrète et spécifique s'impose aux États membres dans la même mesure.

B – *Sur la portée de l'obligation de transparence*

1. Sur la portée ratione materiæ de l'obligation de transparence

42. Par sa troisième question, la juridiction de renvoi demande à la Cour si l'obligation de transparence impose au pouvoir adjudicateur une nouvelle procédure de mise en concurrence lorsque l'entrepreneur principal, auquel la concession a été attribuée, souhaite, pour l'exécution de celle–ci, ne plus recourir aux services du sous–traitant présenté lors de la remise de l'offre.

43. Pour répondre à cette question, il nous semble important d'examiner la manière selon laquelle l'obligation de transparence doit s'appliquer compte tenu des caractéristiques propres de la concession de services. En effet, celle–ci présente des différences essentielles avec les marchés publics de services dans sa finalité et dans son mode d'exécution.

44. Quel que soit son degré de complexité et de sophistication, un marché public de services s'analyse généralement comme l'achat par une personne publique d'un service et vise une prestation ponctuelle fournie par une entreprise. En revanche, la concession de services est un mode de gestion déléguée d'un service public, par laquelle la personne publique confie à un prestataire extérieur à l'administration la gestion d'une activité d'intérêt général et la responsabilité de celle–ci vis–à–vis des usagers, et ce pour une durée significative. Le pouvoir adjudicateur, que ce soit une collectivité publique ou un organisme de droit public, cesse de gérer le service et transfère la responsabilité de son organisation au concessionnaire (26). Celui–ci exploite le service à ses frais et prend en charge les risques d'exploitation y afférents, sa rémunération étant assurée par la perception d'une redevance versée par les usagers du service.

45. L'application du droit communautaire à ce mode de gestion contractuel d'un service d'intérêt général doit tenir compte de différents impératifs.

46. Au stade de la conclusion du contrat, il est nécessaire de concilier l'obligation de transparence avec la liberté importante dont dispose le pouvoir adjudicateur dans l'appréciation des offres et dans la détermination de celle qui est économiquement la plus avantageuse. L'offre économiquement la plus avantageuse est celle qui apporte la meilleure réponse économique, au sens global du terme, aux besoins exprimés par la collectivité publique, compte tenu des critères qui ont été retenus et de leur pondération. Le pouvoir adjudicateur doit pouvoir choisir le prestataire de services qui, par ses références, la qualité de son offre, la connaissance qu'il a du secteur et la confiance qu'il inspire, paraît lui apporter le maximum de garanties de bonne exécution du service. La spécificité de la concession de services autorise donc un choix du prestataire à partir d'une gamme de critères larges, privilégiant le critère de l'intuitu personæ. Cette liberté de choix ne signifie pas pour autant que l'attribution de la concession doive s'opérer de façon arbitraire et discriminatoire. Afin de prévenir la corruption et d'assurer une meilleure transparence de la vie économique et des procédures publiques, le juge a encadré ladite liberté en se fondant sur les

principes régissant les procédures de passation des marchés publics. Ainsi, la liberté de négociation et de décision subsiste, mais elle doit s'exercer dans le respect d'une obligation préalable de publicité et de mise en concurrence permettant une sélection transparente du candidat et assurant une égalité de traitement entre les soumissionnaires (27).

47. Ensuite, au stade de l'exécution du contrat, il est nécessaire de concilier l'obligation de transparence avec l'intérêt du service public, qui exige, dans certaines circonstances, d'adapter et de modifier le contrat.

48. Comme nous l'avons indiqué, le concessionnaire prend en charge l'organisation du service ainsi que les risques d'exploitation y afférents. Compte tenu du caractère complexe et à long terme de la concession de services, le concessionnaire doit disposer de la marge de manœuvre suffisante pour s'adapter aux conditions du marché et aux changements qui peuvent intervenir dans l'environnement économique, technique ou juridique de la concession. Les contraintes imprévisibles et les incidents d'exécution qui sont inévitables dans les investissements de longue durée requièrent donc des parties une flexibilité particulière et un esprit de coopération. Les causes de renégociation des contrats sont donc multiples. Néanmoins, certaines peuvent être une source d'abus si elles conduisent à bouleverser l'économie du contrat, rendant illusoires la transparence de la procédure et la mise en concurrence préalable des soumissionnaires. Il est donc nécessaire d'apprécier si la modification envisagée constitue un simple avenant au contrat, justifié par des motifs légitimes, ou si elle aboutit finalement à la conclusion d'un nouveau contrat qui, conformément aux principes fondamentaux du droit communautaire, doit faire l'objet d'un degré de publicité adéquat et d'une nouvelle procédure de mise en concurrence.

49. Dans un arrêt Commission/France (28), la Cour a jugé que les modifications qui sont apportées à un contrat de marché public, pendant la durée de sa validité, constituent une nouvelle passation de marché lorsqu'elles «présentent des caractéristiques substantiellement différentes par rapport [aux négociations] déjà menées et sont, en conséquence, de nature à démontrer la volonté des parties de renégocier les termes essentiels du contrat» (29).

50. La Cour a précisé la portée de ce motif dans l'arrêt pressetext Nachrichtenagentur (30) en visant quatre hypothèses dans lesquelles ce type de modifications peut être considéré comme substantiel.

51. La première hypothèse est celle dans laquelle la modification introduit des conditions dans le contrat qui, si elles avaient figuré dans la procédure de passation initiale, auraient permis l'admission de soumissionnaires autres que ceux initialement admis ou auraient permis de retenir une offre autre que celle initialement retenue.

52. La deuxième hypothèse est celle dans laquelle la modification étend le marché, dans une mesure importante, à des services qui n'étaient pas initialement prévus.

53. La troisième hypothèse vise une situation dans laquelle la modification change l'équilibre économique du contrat en faveur de l'adjudicataire du marché d'une manière qui n'était pas prévue dans les termes du marché initial.

54. La quatrième hypothèse vise, enfin, la situation dans laquelle un nouveau cocontractant se substitue à celui auquel le pouvoir adjudicateur avait initialement attribué le marché. Cette modification constitue un changement de l'un des termes essentiels du marché public, à moins, selon la Cour, que cette «substitution ait été prévue dans les termes du marché initial, par exemple au titre de la sous-traitance».

55. Ainsi que nous l'avons indiqué, le contrat de concession de services conclu entre la Stadt Frankfurt am Main et FES autorise, à son article 30, IV, le changement de sous-traitant à la condition que le pouvoir adjudicateur consente à celui-ci. En l'occurrence, cette procédure a été respectée.

56. Dans la présente affaire, la question est donc de savoir si, malgré l'existence de cette clause et le respect de la procédure y afférente, le changement de sous-traitant constitue, au sens de la jurisprudence communautaire, une modification de l'un des termes essentiels de la concession de services concernée.

57. Cette appréciation est délicate dans la mesure où la Stadt Frankfurt am Main a elle-même consenti à cette modification en considérant que les standards décrits dans le cahier des charges seraient respectés. Néanmoins, compte tenu des circonstances particulières dans lesquelles ce changement est intervenu, nous pensons que la juridiction nationale doit s'assurer que l'acte par lequel cette collectivité a autorisé cette modification n'aboutit pas à contourner le principe d'égalité de traitement des soumissionnaires et l'obligation de transparence qui en découle.

58. Aux fins de cet examen, il nous semble important de rappeler les termes dans lesquels le concessionnaire peut recourir à la sous-traitance.

59. Compte tenu de la complexité et de la durée des contrats de concession, le concessionnaire peut décider de sous-traiter tout ou partie de l'exécution du contrat conclu avec le maître d'ouvrage. Il est admis que le choix du sous-traitant est un acte discrétionnaire relevant des prérogatives de l'entrepreneur. Cette liberté de choix est le corollaire de la règle selon laquelle le concessionnaire conserve l'entière responsabilité de l'exécution de la concession, le sous-traitant n'étant d'ailleurs lié qu'avec lui par un contrat qui, étant conclu entre deux personnes privées, est de droit privé.

60. Néanmoins, pour être régulière, la sous-traitance doit faire l'objet d'une acceptation par le pouvoir adjudicateur soit à l'occasion de la conclusion du contrat, soit au cours de l'exécution de celui-ci. C'est à cette occasion que le pouvoir adjudicateur vérifie les capacités techniques et économiques du sous-traitant (31).

61. Lorsque le sous-traitant est présenté lors de la remise de l'offre, c'est la notification de la concession qui emporte acceptation du sous-traitant. Généralement, le pouvoir adjudicateur peut refuser d'agréer une entreprise en qualité de sous-traitant lorsque celle-ci est, par exemple, dans une situation irrégulière sur le plan fiscal ou social ou qu'elle ne dispose pas des capacités suffisantes pour mener à bien l'exécution des prestations qui lui sont confiées.

62. La sous-traitance n'est pas limitée à celle annoncée lors de la remise de l'offre. Au cours de l'exécution du contrat, l'entrepreneur principal peut recourir à d'autres sous-traitants ou changer de sous-traitants pour des motifs légitimes tenant, par exemple, à la qualité effective de ses prestations ou à sa situation financière. Cela lui permet d'adapter ses prestations ou de se libérer, conformément aux dispositions du sous-traité, d'une entreprise qui ne donne pas satisfaction.

63. Lorsque le changement de sous-traitant est prévu dans les termes du contrat et que le pouvoir adjudicateur consent lui-même à cette modification, il est, en principe, difficile de soutenir que ce changement modifie, en soi, un terme essentiel de la concession et impose une nouvelle procédure de mise en concurrence.

64. En effet, en donnant son accord, le pouvoir adjudicateur considère que l'identité du sous-traitant n'est pas essentielle au vu de l'objet de la concession et que les prestations confiées à l'entrepreneur principal seront réalisées conformément au cahier des charges, indépendamment de cette modification. Une telle situation peut se rencontrer lorsqu'il existe, sur le marché en cause, de nombreuses entreprises offrant des prestations de nature et de qualité équivalentes.

65. En outre, lorsque le pouvoir adjudicateur prévoit que certaines conditions de l'attribution du contrat peuvent être ajustées après le choix du concessionnaire et qu'il prévoit expressément dans le cahier des charges cette possibilité d'adaptation, de même que ses modalités d'application, alors toutes les entreprises intéressées à participer à la concession en ont connaissance dès le départ et se trouvent ainsi sur un pied d'égalité au moment de formuler leurs offres.

66. Néanmoins, cette modification du contrat de concession peut apparaître critiquable dans une situation telle que celle en cause au principal.

67. En effet, le changement de sous-traitant intervient sans motif légitime, après la conclusion du contrat et avant l'exécution des premières prestations, alors même que le concessionnaire s'est prévalu de la renommée et de l'expertise technique du sous-traitant lors de la remise de son offre.

68. Selon nous, une telle pratique, si elle est admise par le pouvoir adjudicateur, viole l'obligation de transparence et le principe d'égalité de traitement des soumissionnaires. En agissant

ainsi, le pouvoir adjudicateur soustrait l'offre de FES, telle qu'elle a été modifiée, à un examen sérieux et transparent des différentes candidatures, ce qui est susceptible de procurer à l'entreprise un avantage injustifié pour l'obtention du contrat.

69. Premièrement, il n'est pas exclu que la Stadt Frankfurt am Main ait préféré une offre autre que celle initialement présentée par FES si celle-ci ne s'était pas prévalue, au titre de la sous-traitance des prestations publicitaires, des nombreuses qualités de la requérante, une «partenaire […] performant[e] et expérimenté[e]», une «spécialiste du domaine publicitaire expérimentée et active dans le monde entier», dont les «produits [sont] modernes et esthétiques» (32).

70. Il ressort clairement de l'ordonnance de renvoi que c'est la présentation de la requérante comme sous-traitante qui a permis à FES d'obtenir le contrat de concession en cause. En effet, le choix en faveur de FES s'est opéré compte tenu de ses prétentions en matière publicitaire puisqu'elle a obtenu, au titre de ce critère d'attribution, 27,3 points, alors que sa principale concurrente, qui est intervenante dans la présente affaire, en a obtenu 20,1. En ce qui concerne les autres critères, la Stadt Frankfurt am Main a accordé autant de points, si ce n'est plus, à l'intervenante. Il résulte donc des documents à notre disposition que la présence de la requérante dans l'offre globale de FES a eu un caractère déterminant dans l'octroi de la concession.

71. Deuxièmement, le comportement de FES qui, après l'obtention du contrat de concession, poursuit les négociations relatives à la sous-traitance des prestations publicitaires et de la fourniture des modules de toilettes (33), pour en fin de compte écarter la requérante sans aucun motif légitime (34), fait apparaître son offre initiale, telle qu'acceptée par la Stadt Frankfurt am Main, comme une offre de façade dont l'économie globale n'avait d'autre but que d'évincer les concurrents sérieux afin d'obtenir la concession, mais avec la volonté, immédiatement manifestée, de l'exécuter ensuite dans des conditions économiques et techniques différentes de celles exposées dans l'offre et qui seules avaient été soumises à la concurrence.

72. Par conséquent, au vu de l'ensemble de ces éléments, tels qu'ils nous apparaissent au travers de l'ordonnance de renvoi, nous pensons que ce changement de sous-traitant intervenu avant même l'exécution des premières prestations et sans qu'il ait été argué de la moindre difficulté d'ordre technique ou financière devait obligatoirement être précédé d'une nouvelle procédure de mise en concurrence. En autorisant un tel changement de sous-traitant sans avoir satisfait aux exigences de publicité et de mise en concurrence requises par le droit communautaire, la Stadt Frankfurt am Main a donc, selon nous, violé l'obligation de transparence.

73. En effet, même si, dans le cadre des concessions, les fonds publics sont effectivement moins engagés que dans le cadre des marchés publics, il n'en reste pas moins que la procédure de passation d'une concession de services doit garantir aux collectivités publiques ainsi qu'aux usagers la meilleure qualité de service, et ce sur la base d'une appréciation sérieuse et transparente des différentes candidatures, respectueuse du principe d'égalité de traitement des soumissionnaires.

74. Si la juridiction de renvoi, au vu de l'ensemble des éléments du dossier, devait confirmer cette analyse des faits, il nous semble qu'elle devrait tirer toutes les conséquences qui s'imposent d'une telle violation.

75. Par conséquent, nous proposons à la Cour de répondre à la juridiction de renvoi que, lorsque, dans le cadre d'une procédure de passation d'une concession de services, l'identité du sous-traitant est un élément essentiel sur lequel le pouvoir adjudicateur s'est fondé pour attribuer la concession, l'obligation de transparence requiert des États membres qu'ils organisent une nouvelle procédure de mise en concurrence lorsque le concessionnaire souhaite procéder à un changement de sous-traitant avant même l'exécution des premières prestations et sans qu'il ait été avancé de raisons légitimes. Il appartient à la juridiction nationale compétente d'apprécier si le nom, la renommée et l'expertise technique du sous-traitant que FES a présenté lors de la remise de son offre ont été un élément essentiel sur lequel la Stadt Frankfurt am Main s'est fondée pour attribuer la concession à cette entreprise.

2. Sur la portée ratione personæ de l'obligation de transparence

76. Par sa cinquième question, la juridiction de renvoi demande si une entreprise telle que FES, eu égard à ses caractéristiques exposées dans la décision de renvoi, doit être considérée comme un

«pouvoir adjudicateur» au sens de l'article 1er, sous b), de la directive 92/50 ou comme une «entreprise publique» au sens de l'article 2 de la directive 80/723, qui, en tant que telle, serait soumise au respect de l'obligation de transparence lors de la passation d'une concession de services.

77. La juridiction de renvoi se réfère aux directives susmentionnées dans la mesure où, en ce qui concerne les concessions de services, aucun texte de droit dérivé n'a défini, avec précision, les entités sur lesquelles pèse l'obligation de transparence.

78. Nous pensons que l'absence d'une telle réglementation n'est pas préjudiciable dès lors que les principes qui ont été dégagés sur ce point dans le cadre des marchés publics peuvent, selon nous, être transposés aux concessions de services.

79. En effet, il nous semble important de retenir une définition uniforme de la notion de pouvoir adjudicateur, dans la mesure où cette notion est censée viser l'ensemble des entités publiques susceptibles de confier la prestation d'activités économiques à un tiers, et ce indépendamment du type de contrat conclu, que ce soit dans le domaine des marchés publics ou dans celui des concessions de services publics. À cet égard, il est intéressant de rappeler que le champ d'application de la directive 92/50 est déterminé non pas selon la nature de l'opération en cause, mais selon la personnalité de celui qui la propose, puisque tous les marchés passés par un pouvoir adjudicateur doivent être attribués en conformité avec les principes fixés par cette directive.

80. En revanche, la référence à la notion d'«entreprise publique» visée à l'article 2 de la directive 80/723, relative, nous le rappelons, à la transparence des relations financières entre les États membres et les entreprises publiques, nous semble beaucoup moins pertinente. Compte tenu des éléments que nous allons indiquer dans le cadre de l'examen relatif à la notion d'organisme de droit public, la juridiction nationale pourra néanmoins apprécier, pour le cas où elle l'estimerait nécessaire, si une entreprise telle que FES est susceptible d'être qualifiée d'«entreprise publique» (35).

a) Sur la notion d'«organisme de droit public» au sens de la directive 92/50

81. Avant de rappeler les différentes conditions visées par la directive 92/50 pour qu'une entité soit qualifiée de «pouvoir adjudicateur», il est intéressant de relever, à titre liminaire, que FES est une entreprise d'économie mixte créée dans le cadre d'un partenariat public–privé (36). La Stadt Frankfurt am Main détient 51 % des parts de cette entreprise.

82. Cette affaire offre donc à la Cour l'opportunité de préciser si une telle entité est susceptible de constituer un «organisme de droit public» au sens de la directive 92/50, soumis, en tant que tel, au respect des principes fondamentaux du traité.

83. Avant d'entamer cet examen, il est nécessaire de préciser ce que recouvre la notion de partenariat public–privé.

84. Ce partenariat est un mécanisme associant un capital public normalement majoritaire à un capital privé minoritaire dans une structure juridique en principe soumise aux règles communes du droit commercial. Les partenaires publics et privés établissent ainsi une entité à capital mixte, qui peut prendre la forme d'une société d'économie mixte, en mesure d'exécuter des marchés publics ou de prendre en charge, dans le cadre d'une concession, un service public local. Ainsi que l'a relevé la Commission dans une communication récente (37), la caractéristique de cette coopération, le plus souvent à long terme, est le rôle dévolu au partenaire privé qui participe aux différentes phases du projet en cause (conception, exécution et exploitation), supporte des risques traditionnellement pris en charge par le secteur public et contribue souvent au financement du projet (38).

85. Il n'en reste pas moins que cette entité à capital mixte ne constitue pas, au sens de la jurisprudence de la Cour, une structure de gestion «interne» d'un service de la collectivité publique. Ainsi, lorsque le pouvoir adjudicateur attribue un marché public ou une concession à ce type d'entité, il doit respecter l'ensemble des règles applicables aux marchés publics et aux concessions, qu'elles découlent du traité ou du droit dérivé (39).

86. Il convient, à présent, d'examiner les différentes conditions visées à l'article 1er, sous b), de la directive 92/50 pour qu'une entité soit qualifiée d'«organisme de droit public».

87. Aux termes de l'article 1er, sous b), deuxième alinéa, de la directive 92/50, un organisme de droit public est un organisme qui doit être doté de la personnalité juridique, avoir été créé pour satisfaire spécifiquement des besoins d'intérêt général qui sont dépourvus de caractère industriel ou commercial et dont les activités, le financement ou les organes de direction sont sous la dépendance étroite de l'État, d'une collectivité territoriale ou d'un autre organisme de droit public.

88. Ainsi que la Cour l'a jugé de manière constante, ces trois conditions ont un caractère cumulatif de sorte que, en l'absence d'une seule de ces conditions, un organisme ne saurait être qualifié d'«organisme de droit public» et, partant, de «pouvoir adjudicateur» au sens de la directive 92/50 (40).

89. En outre, eu égard à l'objectif que poursuivent les directives en matière de passation des marchés publics, la Cour considère que la notion d'organisme de droit public doit recevoir une interprétation fonctionnelle (41).

b) Sur l'examen des éléments constitutifs d'un organisme de droit public

90. En l'occurrence, la personnalité juridique de FES n'est pas contestée. Les doutes portent sur les deux autres exigences établies par la directive 92/50.

i) Sur la vocation de FES à satisfaire spécifiquement des besoins d'intérêt général dépourvus de caractère industriel ou commercial

91. Il est constant, tout d'abord, que FES a bien été créée pour satisfaire spécifiquement des besoins d'intérêt général (42), puisqu'elle est chargée, depuis son origine, de la gestion et de l'élimination des déchets ainsi que du nettoyage urbain sur le territoire de la Stadt Frankfurt am Main (43). Ces activités relèvent indéniablement de l'intérêt général. Ainsi que l'a déjà jugé la Cour dans l'arrêt BFI Holding (44), ces besoins font partie de ceux qui ne peuvent pas être totalement satisfaits par des entreprises privées dans la mesure où ils sont jugés nécessaires pour des raisons de santé publique et de protection de l'environnement, motif pour lequel l'État entend conserver à leur égard une influence déterminante (45).

92. Il importe maintenant de vérifier si de tels besoins d'intérêt général ont un caractère autre qu'industriel ou commercial. Cette question est, en revanche, plus délicate.

93. Il existe une jurisprudence abondante sur la manière dont il convient d'apprécier l'existence de ces besoins (46). Selon la Cour, il est nécessaire de prendre en compte un ensemble d'éléments juridiques et factuels qui peuvent s'avérer pertinents, tels que les circonstances qui ont pu présider à la création de l'organisme concerné ou les conditions dans lesquelles il exerce son activité. À cet égard, la Cour précise qu'il importe de vérifier si cet organisme exerce ses activités dans des conditions normales de marché (47). À cette fin, la Cour examine la situation de la concurrence sur le marché des produits et des services pour lesquels ledit organisme a été créé. Si l'existence d'une concurrence peut constituer un indice du fait qu'un besoin d'intérêt général revêt un caractère industriel ou commercial, cet indice n'est pas suffisant (48). Il est encore nécessaire d'examiner si l'organisme poursuit un but lucratif, s'il supporte les pertes liées à l'exercice de son activité et s'il bénéficie d'un financement public pour l'exercice de l'activité en cause (49).

94. Nous ne disposons pas d'éléments suffisants dans le dossier pour apprécier avec justesse l'ensemble de ces circonstances. C'est à la juridiction de renvoi, qui seule possède une connaissance approfondie du dossier, qu'il appartiendra de les examiner. Nous indiquons néanmoins quelques éléments utiles.

95. En ce qui concerne les circonstances ayant présidé à la création de cet organisme, il nous semble important de tenir compte des particularités du marché de la collecte et du traitement des déchets qui est l'une des activités pour lesquelles FES a été créée.

96. Le marché de la collecte et du traitement des déchets a connu un essor considérable, en particulier avec le durcissement du cadre normatif relatif à la gestion, à la valorisation des déchets et à la prévention des nuisances pour l'environnement. Ce durcissement a eu pour conséquence directe d'augmenter les coûts de la collecte et du traitement des déchets, tout en rendant l'activité plus complexe et plus technique. Face à ces contraintes, les collectivités locales ont, pour une grande majorité d'entre elles, choisi de déléguer cette activité à des entreprises spécialisées qui ont pu profiter pleinement du développement de ce marché.

97. Ces éléments nous amènent à penser que la création de cette entité n'a donc pas été motivée par la recherche de bénéfices. Si ladite activité engendre, en réalité, des bénéfices importants, il n'en reste pas moins que la recherche de ces bénéfices ne constituait pas, en tous les cas, l'objectif principal de la création de FES. Lesdits éléments valent a fortiori pour les activités de nettoyage urbain, qui, contrairement aux activités de collecte et de traitement des déchets, donnent lieu à une valorisation moindre.

98. En ce qui concerne les conditions dans lesquelles FES exerce son activité, et en particulier l'état de la concurrence dans les secteurs de la collecte et du traitement des déchets ainsi que du nettoyage urbain, le juge de renvoi devrait examiner si FES évolue dans un marché concurrentiel sur lequel exercent de véritables concurrents ou si elle se trouve, au contraire, dans une situation de quasi-monopole de fait tenant, par exemple, à son statut d'«opérateur historique» (50) ou à l'existence de barrières à l'entrée sur le marché. L'absence de concurrence réelle n'est pas une condition nécessaire aux fins de la qualification de FES en tant qu'organisme de droit public, mais elle pourrait constituer un indice au soutien du fait que FES participe à la satisfaction d'un besoin d'intérêt général dépourvu de caractère industriel ou commercial.

99. En outre, le fait que FES accomplisse, outre sa mission d'intérêt général, d'autres activités lucratives n'est pas pertinent pour la solution du litige au principal. En effet, la Cour juge que la qualité d'organisme de droit public ne dépend pas de l'importance relative de la satisfaction de besoins d'intérêt général ayant un caractère autre qu'industriel ou commercial dans l'activité de l'organisme concerné. Si l'entreprise continue à se charger de ces besoins, alors la Cour juge sans pertinence le fait que l'entreprise exerce d'autres activités lucratives, et ce quelle que soit la part de ces activités dans le chiffre d'affaires global de l'entreprise (51).

100. Par ailleurs, si FES présente sur le plan juridique peu de différences avec une société anonyme détenue par des opérateurs privés dans la mesure où elle supporte les risques économiques liés à son activité et peut également être déclarée en faillite, il ressort de l'ordonnance de renvoi que la Stadt Frankfurt am Main ne permettrait pas qu'une telle situation se produise. Nous relevons, en outre, que cette collectivité perçoit auprès de ses administrés une taxe communale afin de financer les paiements versés à FES pour l'élimination des déchets et le nettoyage de la voirie.

101. Au vu de ces éléments, nous serions donc enclin à penser que FES a été créée pour satisfaire spécifiquement des besoins d'intérêt général dépourvus de caractère industriel ou commercial.

102. Néanmoins, afin de cerner la nature exacte des besoins pris en charge par cette entreprise, c'est à la juridiction de renvoi, qui seule dispose des éléments pertinents, qu'il appartient d'apprécier les conditions dans lesquelles FES exerce son activité et, en particulier, l'état de la concurrence dans les secteurs pour lesquels cette entreprise a été créée.

ii) Sur la condition relative à une dépendance étroite de l'organisme à l'égard de l'État, d'une collectivité territoriale ou d'autres organismes de droit public

103. Nous rappelons que, aux termes de l'article 1er, sous b), deuxième alinéa, troisième tiret, de la directive 92/50, cette condition vise les trois critères alternatifs suivants:

– soit l'activité est financée majoritairement par l'État, les collectivités territoriales ou d'autres organismes de droit public,

– soit la gestion est soumise à un contrôle par ces derniers,

– soit l'organe d'administration, de direction ou de surveillance est composé de membres dont plus de la moitié est désignée par l'État, les collectivités territoriales ou d'autres organismes de droit public.

104. Il est constant que la Stadt Frankfurt am Main détient 51 % du capital de FES, soit la majorité de celui-ci. Si cette détention peut effectivement faire présumer d'une influence dominante de la collectivité publique sur l'entreprise, il n'est pas évident que cette influence se traduise dans les modalités de fonctionnement et de gestion de celle-ci.

105. Nous examinerons, tout d'abord, les modalités de gestion de cette entreprise dans la mesure où la Stadt Frankfurt am Main dispose d'un droit de veto à l'assemblée générale, qui, selon les

modalités dans lesquelles il est exercé, est susceptible de conférer à la collectivité un contrôle de fait de la gestion de l'entreprise.

– Sur le critère relatif au contrôle de gestion de l'organisme concerné

106. En vertu d'une jurisprudence constante, ce critère vise le cas dans lequel un organisme se trouve dans une situation de dépendance à l'égard des pouvoirs publics, équivalente à celle qui existe lorsqu'un des deux autres critères alternatifs est rempli. Cette dépendance doit permettre aux pouvoirs publics d'influencer les décisions de cet organisme en matière de marchés publics (52) ou, par analogie, en matière de concessions.

107. L'arrêt Adolf Truley, précité, constitue une illustration des cas dans lesquels la Cour juge que ce critère est satisfait. Dans cette affaire, l'office de contrôle de la collectivité publique était habilité à vérifier non seulement le bilan annuel de l'organisme concerné, mais également sa gestion en cours, sous l'angle de l'exactitude des chiffres, de la régularité, de la recherche d'économies, de la rentabilité et de la rationalité. Cet office était par ailleurs autorisé à visiter les locaux d'exploitation et les installations de cet organisme et pouvait rapporter les résultats de ces contrôles aux organes compétents ainsi qu'aux actionnaires de la société et à la collectivité. Selon la Cour, de telles prérogatives permettaient donc un contrôle actif de la collectivité publique sur la gestion dudit organisme.

108. Dans le cadre de la présente affaire, la juridiction de renvoi doit tenir compte de l'ensemble des circonstances de fait ou de droit qui pourrait permettre à la Stadt Frankfurt am Main d'exercer une influence déterminante sur l'activité de FES. En l'occurrence, nous pensons qu'elle devrait s'intéresser aux modalités dans lesquelles cette collectivité exerce à l'assemblée générale de cette entreprise le droit de veto qui est attaché à son actionnariat majoritaire. À cet égard, la juridiction de renvoi doit examiner l'importance de ce droit en prenant en considération les décisions sur lesquelles il peut être appliqué et en examinant les éventuelles conditions restrictives à son utilisation.

109. En effet, si la collectivité ne peut pas imposer de décisions (53), il n'en reste pas moins qu'elle peut exercer un contrôle exclusif de FES si elle est en mesure de s'opposer aux décisions stratégiques de l'entreprise relatives à la politique commerciale de celle–ci, à la nomination des administrateurs, au budget ou au plan d'entreprise. Si la juridiction de renvoi démontre que la Stadt Frankfurt am Main peut, en exerçant son droit de veto, s'opposer à des décisions capitales pour la stratégie commerciale de FES et créer une situation de blocage du processus décisionnel de cette entreprise, alors la Stadt Frankfurt am Main dispose d'une influence déterminante sur la gestion de FES et, par conséquent, d'un contrôle de fait.

110. Dans ces conditions, afin de cerner la mesure exacte dans laquelle la gestion de FES est contrôlée par la Stadt Frankfurt am Main, il appartient à la juridiction de renvoi d'apprécier si la collectivité publique peut exercer une influence déterminante sur la gestion de l'entreprise à travers le droit de veto qui lui est reconnu en tant qu'actionnaire majoritaire.

111. Au cas où le juge de renvoi estimerait que ce droit de veto ne permet pas à la Stadt Frankfurt am Main de contrôler la gestion de cette entreprise, il lui appartiendra d'examiner les deux autres critères.

– Sur le critère relatif au financement majoritaire par la collectivité territoriale

112. La Cour a précisé la portée de cette condition dans l'arrêt University of Cambridge, précité. Selon elle, seules les prestations qui financent ou soutiennent, au moyen d'une aide financière versée sans contre-prestation spécifique, les activités de l'entité concernée peuvent être qualifiées de «financement public». En revanche, les sommes que verse un pouvoir adjudicateur en contrepartie de prestations contractuelles ne relèvent pas de cette catégorie (54).

113. La Cour a également indiqué que le terme «majoritairement» doit être interprété comme signifiant «plus de la moitié» et que l'appréciation de ce pourcentage de financement public doit porter sur l'ensemble des revenus dont bénéficie l'organisme en question, y compris ceux résultant d'une activité commerciale, et que le calcul doit être opéré sur une base annuelle.

114. En l'occurrence, il ressort de l'ordonnance de renvoi que plus de la moitié du chiffre d'affaires annuel de FES provient des contrats synallagmatiques conclus avec la Stadt Frankfurt am Main pour

la collecte et le traitement des déchets ainsi que pour le nettoyage urbain. Les sommes que verse cette collectivité sont donc la contrepartie des prestations contractuelles offertes par FES et ladite collectivité a bien entendu un intérêt économique à l'accomplissement de celles-ci. Si une telle relation contractuelle peut effectivement entraîner une dépendance de FES par rapport à la collectivité, cette dépendance a, selon la Cour, une autre nature que celle qui résulte d'une simple prestation de soutien et doit être assimilée à celle existant dans le cadre de relations commerciales normales (55).

115. Au vu de ces éléments, il nous semble que les versements effectués par la Stadt Frankfurt am Main à FES ne constituent donc pas un financement public au sens de la jurisprudence précitée.

– Sur le critère relatif à la composition de l'organe d'administration, de direction ou de surveillance

116. L'ordonnance de renvoi ne précise pas la composition et le mode de désignation des membres du conseil d'administration et des membres de la direction de FES. La juridiction de renvoi nous indique seulement que la Stadt Frankfurt am Main nomme un quart des membres du conseil de surveillance, ainsi que le président de celui-ci qui dispose, en cas d'égalité des votes, d'une voix prépondérante (56). Cela n'est donc pas suffisant pour permettre de satisfaire ce critère.

117. Au vu de l'ensemble de ces éléments, nous pensons qu'une entité à capital mixte, telle que FES, créée dans le cadre d'un partenariat avec la Stadt Frankfurt am Main, constitue un «organisme de droit public» au sens de l'article 1er, sous b), deuxième alinéa, de la directive 92/50 lorsqu'il est démontré, d'une part, que cette entité satisfait à des besoins d'intérêt général qui sont dépourvus de caractère industriel ou commercial et, d'autre part, que sa gestion et sa direction sont sous la dépendance étroite de la collectivité publique.

118. Ladite entité répond à des besoins d'intérêt général au sens de l'article 1er, sous b), deuxième alinéa, premier tiret, de la directive 92/50 lorsqu'elle se charge de la collecte et du traitement des déchets ainsi que du nettoyage urbain sur le territoire de la collectivité publique. Afin d'évaluer si ces besoins sont dépourvus de caractère industriel ou commercial, il appartiendra à la juridiction nationale compétente d'apprécier les conditions dans lesquelles FES exerce son activité, et en particulier l'état de la concurrence dans ces secteurs.

119. Une telle entité est sous la dépendance étroite de la collectivité publique au sens de l'article 1er, sous b), deuxième alinéa, troisième tiret, de la directive 92/50 lorsque sa gestion et ses organes de direction, d'administration ou de surveillance sont contrôlés par cette dernière. Afin de cerner la mesure exacte dans laquelle la gestion de FES est contrôlée par la Stadt Frankfurt am Main, il appartiendra à la juridiction nationale compétente d'apprécier si la collectivité publique peut, à travers le droit de veto dont elle dispose à l'assemblée générale ou à travers la composition desdits organes de l'entreprise, assurer un contrôle actif sur la gestion de cette entité et influencer, de la même manière, ses décisions en matière de passation des concessions de services.

C – *Sur le pouvoir d'injonction du juge national en cas de violation de l'obligation de transparence*

120. Par ses première et quatrième questions, le Landgericht Frankfurt am Main interroge la Cour sur les modalités du contrôle juridictionnel des décisions qui ont été adoptées dans le cadre des concessions de services. En particulier, la juridiction de renvoi se demande si, dans des circonstances telles que celles en cause au principal, le droit communautaire requiert des États membres qu'ils reconnaissent, dans le chef de leur juridiction nationale, un pouvoir d'injonction à l'égard des parties qui ont conclu un contrat de concession en violation de l'obligation de transparence.

121. Dans la présente affaire, la requérante ne conteste pas la décision par laquelle la Stadt Frankfurt am Main a attribué la concession de services à FES. En revanche, elle conteste la décision par laquelle l'administration a autorisé, sur le fondement de l'article 30, IV, du contrat de concession, le changement de sous-traitant au cours de l'exécution de ce contrat. Selon la requérante, en agissant ainsi, la Stadt Frankfurt am Main aurait méconnu l'obligation de transparence en procédant à une modification essentielle dudit contrat sans avoir satisfait aux exigences de publicité et de mise en concurrence requises par le droit communautaire.

122. Ce contentieux ne vise donc pas la formation du contrat de concession, mais son exécution.

Par son action, la requérante demande au juge national de prévenir une nouvelle violation de l'obligation de transparence en enjoignant à l'administration de ne pas autoriser de changement de sous-traitant en ce qui concerne la fourniture et l'entretien des toilettes publiques qui devront être installées dans les gares de Kornmarkt, de Galluswarte et de Rödelheim. De la même façon, elle lui demande d'enjoindre à FES de ne pas conclure de nouveau contrat de sous-traitance portant sur les prestations susvisées. Afin de régulariser les conditions d'exécution de la concession de services, la requérante demande également au juge national d'enjoindre à l'administration et, le cas échéant, à FES de résilier les contrats conclus en violation de l'obligation de transparence.

123. Afin de répondre aux questions posées par le juge de renvoi, il est nécessaire de rappeler les termes dans lesquels la juridiction nationale est tenue d'assurer la protection des droits que les justiciables tirent du droit communautaire.

1. Remarques liminaires

124. En l'état actuel de son développement, le droit communautaire ne réglemente pas la manière dont les États membres doivent assurer l'exécution des décisions de justice et sanctionner les violations à l'obligation de transparence qui ont été commises dans le cadre de l'exécution d'une concession de services. Afin d'apprécier la mesure dans laquelle les États membres sont donc tenus de reconnaître un pouvoir d'injonction à leurs juges nationaux, il est nécessaire de se référer aux principes qui gouvernent l'ordre juridique communautaire, et en particulier au principe de primauté du droit communautaire et à celui de l'autonomie procédurale des États membres.

125. Le principe de primauté du droit communautaire commande aux États membres de sanctionner de façon effective les manquements à l'obligation de transparence commis dans le cadre d'une procédure de passation d'une concession de services.

126. En effet, nous rappelons que l'obligation de transparence constitue une expression concrète et spécifique d'un principe général de droit dont le respect s'impose aux États membres dès lors qu'ils agissent dans le champ d'application du droit communautaire. Une telle obligation crée, dans le chef des justiciables, des droits qui doivent pouvoir faire l'objet d'une protection juridictionnelle effective de la part du juge national. Ce dernier doit donc être en mesure de garantir la pleine exécution de sa décision de justice et doit pouvoir adopter des sanctions effectives, proportionnées et dissuasives afin d'assurer la pleine efficacité du droit communautaire.

127. Cela est notre postulat de départ.

128. En revanche, en l'absence de réglementation communautaire, nous pensons qu'il est conforme au principe de l'autonomie procédurale des États membres de laisser à ces derniers le soin de fixer les pouvoirs dont doit disposer le juge national pour assurer l'exécution de ses décisions juridictionnelles et sanctionner les violations à l'obligation de transparence lors de la passation d'un contrat de concession. Un tel renvoi aux règles de procédure nationales des États membres qui devraient, bien entendu, respecter les principes d'équivalence et d'effectivité, nous semble plus conforme à la jurisprudence constante de la Cour qui est respectueuse de l'autonomie procédurale des États membres.

129. Il résulte de cette jurisprudence que, en l'absence de réglementation communautaire, il appartient à l'ordre juridique interne de chaque État membre de désigner les juridictions compétentes et de régler les modalités procédurales des recours en justice destinés à assurer la sauvegarde des droits que les justiciables tirent du droit communautaire, étant entendu que ces modalités ne sauraient être moins favorables que celles concernant des recours similaires de nature interne (principe d'équivalence) ni rendre en pratique impossible ou excessivement difficile l'exercice des droits conférés par l'ordre juridique communautaire (principe d'effectivité) (57).

130. C'est à la lumière de ces considérations qu'il y a lieu de répondre aux questions posées par la juridiction de renvoi.

2. Appréciation

131. Par ses première, deuxième et quatrième questions, la juridiction de renvoi demande, en substance, à la Cour si l'obligation de transparence doit être interprétée en ce sens que les États membres sont tenus de reconnaître au juge national un pouvoir d'injonction à l'égard des parties à un litige, afin d'assurer le respect de cette obligation. La juridiction de renvoi interroge également la

Cour sur le point de savoir si le juge national est tenu d'enjoindre aux parties de résilier le contrat conclu en violation de ladite obligation (58).

132. Le pouvoir d'injonction est la possibilité donnée au juge d'enjoindre à une partie de faire ou de ne pas faire tel acte qu'il détermine, éventuellement sous la sanction d'une astreinte. Le juge saisi d'un litige peut ainsi donner l'ordre à un particulier ou à l'administration de prendre une mesure dans un sens déterminé lorsque le jugement implique nécessairement que l'une des parties au litige prenne cette mesure. Ce pouvoir constitue un instrument utile pour assurer l'exécution des décisions de justice et pour faire face aux difficultés et au refus d'exécution de la chose jugée.

133. Le principe selon lequel le juge national peut adresser une injonction ne fait l'objet d'aucune réglementation communautaire à l'heure actuelle. En outre, ce principe n'est pas appliqué de façon uniforme dans les États membres, notamment lorsque l'injonction est adressée à l'administration.

134. En Allemagne, comme au Royaume–Uni, ce pouvoir d'injonction du juge à l'égard de l'administration est acquis. Le juge allemand dispose d'un pouvoir général d'injonction à l'égard de l'administration. De même, le juge britannique peut adresser des injonctions de faire ou de ne pas faire à l'égard de toutes les administrations, à l'exception du gouvernement et de ses collaborateurs immédiats. La question a été plus longtemps discutée par le juge administratif français en raison d'une conception traditionnelle de la séparation des pouvoirs. Cette conception fait aujourd'hui l'objet de nombreuses exceptions depuis l'adoption de la loi du 8 février 1995 (59).

135. Comme nous l'avons indiqué, en l'état actuel du droit communautaire, c'est dans le cadre de leur ordre juridique interne et conformément aux principes d'effectivité et d'équivalence que les États membres doivent déterminer la nécessité et, le cas échéant, les conditions dans lesquelles le pouvoir d'injonction doit être reconnu. Dans cette mesure, les États membres doivent se fonder sur les principes qui sont à la base de leur système juridictionnel national. Ils doivent examiner la mesure dans laquelle ce pouvoir d'injonction s'insère dans l'ensemble des voies de droit existantes et doivent tenir compte des pouvoirs qui sont déjà conférés au juge national. Dans le cadre de cette appréciation, les États membres doivent être soucieux de garantir la pleine exécution des décisions de justice qui ont été rendues quant à l'existence des droits invoqués sur le fondement du droit communautaire. En poursuivant cet objectif, les États membres doivent tendre à garantir la pleine efficacité du droit communautaire et à assurer la protection des droits qu'il confère aux justiciables.

136. À cet égard, enjoindre la résiliation du contrat, si elle n'est pas commandée par le droit communautaire, peut apparaître comme la sanction la mieux à même d'assurer l'efficacité du droit communautaire et la protection des droits des justiciables. Cela peut notamment être le cas lorsqu'il s'agit d'une violation particulièrement grave des dispositions du droit communautaire, comme celles exigeant une publicité adéquate ou une mise en concurrence préalable des soumissionnaires. À cet égard, nous pouvons nous inspirer des dispositions que le législateur communautaire a adoptées dans ce cadre, à l'article 2 quinquies inséré par la directive 2007/06 (60).

137. Dans son ordonnance de renvoi, le Landgericht Frankfurt am Main soutient que la Stadt Frankfurt am Main était tenue de résilier le contrat de concession de services à la modification duquel elle avait consenti.

138. Pour soutenir son point de vue, la juridiction de renvoi fait valoir que les principes dégagés par le législateur communautaire à l'article 2 de la directive 89/665 et réaffirmés par la Cour dans l'arrêt Commission/Allemagne (61) sont applicables par analogie aux procédures de passation des concessions de services.

139. Dans cet arrêt, la Cour, saisie sur le fondement de l'article 228 CE, a condamné la République fédérale d'Allemagne pour ne pas avoir résilié un contrat relatif à l'élimination des déchets de la ville de Brunswick (Allemagne), conclu en méconnaissance de la directive 92/50. La République fédérale d'Allemagne s'est fondée sur les dispositions de l'article 2, paragraphe 6, second alinéa, de la directive 89/665 pour soutenir que les réparations dont pouvaient bénéficier les entreprises lésées suffisaient à sanctionner le manquement commis par le pouvoir adjudicateur. La Cour n'a pas suivi ce raisonnement. Selon elle, cette disposition règle le rapport existant entre un État membre et ses ressortissants, mais elle ne règle pas la relation entre un État membre et la Communauté et ne permet donc pas à celui–ci d'échapper à sa propre responsabilité en droit communautaire. En maintenant les effets du contrat en cause, le manquement de la République fédérale d'Allemagne a donc perduré et l'atteinte à la libre prestation des services risquait de subsister pendant toute la durée d'exécution de celui–ci. Selon la Cour, la résiliation du contrat s'imposait donc non seulement pour garantir la pleine exécution d'un arrêt constatant un manquement, mais également pour

assurer le respect du droit communautaire.

140. Contrairement à la juridiction de renvoi, nous ne pensons pas que les principes dégagés dans le cadre du contentieux des marchés publics soient purement et simplement transposables au contentieux des concessions de services, et ce pour deux raisons.

141. Premièrement, nous rappelons que les États membres n'ont pas souhaité légiférer en ce qui concerne la procédure de passation des concessions de services, et ce contrairement aux nombreux textes qui ont été adoptés dans le cadre de la passation des marchés publics. Nous ne pouvons donc pas faire fi de l'absence de réglementation communautaire en la matière et appliquer, par analogie, les règles précises et contraignantes visées dans la directive 89/665.

142. Deuxièmement, il nous semble délicat d'apprécier de la même façon les conséquences qu'il convient de tirer d'un manquement à l'obligation de transparence selon qu'il s'agit d'un marché public ou d'une concession de services publics. En effet, dans le cas de cette dernière, les sanctions ne doivent pas avoir seulement pour objet d'assurer le respect de la légalité ou de sanctionner un comportement fautif du pouvoir adjudicateur. Elles ont aussi et peut-être surtout pour objet d'assurer le bon fonctionnement des services publics et de préserver l'intérêt général à la satisfaction duquel le contrat concourt.

143. Ainsi, l'injonction, si elle doit notamment assurer la pleine efficacité du droit communautaire, devrait pouvoir faire l'objet d'une appréciation au cas par cas par le juge national. L'objet de celle-ci devrait être apprécié compte tenu de tous les aspects pertinents d'une affaire, tels que le comportement du pouvoir adjudicateur, la nature de l'illégalité commise et l'ensemble des intérêts susceptibles d'être lésés, en particulier l'intérêt général.

144. Dans le cadre de la présente affaire, le principe selon lequel le juge national peut adresser une injonction est acquis en Allemagne. Il ressort de l'ordonnance de renvoi que le juge national peut exercer ce pouvoir en vertu de l'article 1004, paragraphe 1, du code civil allemand (Bürgerliches Gesetzbuch, ci-après le «BGB») (62), dans deux types de situations:

– lorsqu'une personne est lésée en raison d'une atteinte à des intérêts protégés par la loi, tels que la vie, l'intégrité corporelle et la personnalité, la santé, la liberté et la propriété, ou

– lorsqu'une personne est lésée en raison de la violation d'une «loi visant à protéger autrui» au sens de l'article 823, paragraphe 2, du BGB.

145. Dans le cadre du présent litige, il incombera au juge de renvoi de vérifier si le droit procédural national, et, en l'occurrence, l'article 823, paragraphe 2, du BGB, permet à la juridiction compétente d'adresser à l'administration une injonction lorsque celle-ci a violé l'obligation de transparence et de lui enjoindre de résilier le contrat conclu avec FES et de ne plus consentir à un changement de sous-traitant (63).

146. À cette fin, il lui appartiendra, premièrement, d'apprécier si cette obligation constitue, au sens de ladite disposition, une «loi visant à protéger autrui». Ainsi que l'a expliqué le juge de renvoi dans les motifs de sa deuxième question préjudicielle, tel sera le cas si ladite obligation constitue un principe du droit coutumier.

147. Nous rappelons à la juridiction de renvoi que l'obligation de transparence est une expression du principe général d'égalité de traitement. Ce dernier appartient aux principes fondamentaux du droit communautaire et trouve directement sa source dans les dispositions du traité (64). Il crée des droits au profit des particuliers et s'impose à toutes les autorités des États membres lorsqu'elles mettent en œuvre le droit communautaire. Par la suite, celles-ci sont tenues, dans toute la mesure du possible, d'appliquer ce droit dans des conditions qui ne méconnaissent pas les exigences découlant de la protection des droits fondamentaux dans l'ordre juridique communautaire. Dans le cadre de la présente affaire, la juridiction nationale sera donc tenue d'interpréter, dans toute la mesure du possible, les règles nationales reconnaissant au juge un pouvoir d'injonction de manière à assurer la pleine efficacité du droit communautaire et à garantir la protection des droits que la requérante tire de celui-ci.

148. Si la juridiction de renvoi considère que l'obligation de transparence constitue bien, au sens de l'article 823, paragraphe 2, du BGB, une «loi visant à protéger autrui», celle-ci devra alors s'assurer

que les conditions dans lesquelles le juge national peut adresser une injonction en cas de violation de l'obligation de transparence sont équivalentes à celles prévues dans le cadre d'un litige fondé sur la méconnaissance du droit interne. Il lui appartiendra également de s'assurer que ces modalités ne rendent pas pratiquement impossible ou excessivement difficile l'exercice des droits conférés par l'ordre juridique communautaire.

149. Dans le cadre du présent litige, l'objectif est de garantir la pleine efficacité du droit communautaire en sanctionnant de façon effective les manquements à l'obligation de transparence et en prévenant une violation imminente de celle-ci par une nouvelle application abusive de la clause de sous-traitance figurant à l'article 30, IV, du contrat de concession.

150. C'est compte tenu de cet objectif qu'il appartiendra au juge de renvoi d'apprécier s'il y a lieu d'enjoindre à la Stadt Frankfurt am Main et, le cas échéant, à FES de résilier les contrats conclus en violation du droit communautaire. À cet égard et ainsi qu'il ressort de l'ordonnance de renvoi, le Landgericht Frankfurt am Main soutient que la violation de l'obligation de transparence est susceptible de constituer un motif sérieux de résiliation du contrat de concession, au sens de l'article 314 du BGB (65).

151. C'est également compte tenu de cet objectif qu'il lui appartiendra d'apprécier s'il y a lieu d'enjoindre à l'administration ainsi qu'à FES de ne pas procéder, dans des circonstances telles que celles du litige au principal, à un changement de sous–traitant en ce qui concerne la fourniture et l'entretien des toilettes publiques qui devront être installées dans les gares de Kornmarkt, de Galluswarte et de Rödelheim.

152. Par conséquent, nous proposons à la Cour de répondre à la juridiction de renvoi que, lorsque la juridiction nationale compétente constate la violation de l'obligation de transparence dans le cadre d'une procédure de passation d'une concession de services, le droit communautaire, en l'état actuel, ne requiert pas des États membres la reconnaissance au profit de cette juridiction d'un pouvoir d'injonction à l'égard des parties au litige. Il appartient à l'ordre juridique interne de chacun des États membres de définir, en conformité avec les principes communautaires d'équivalence et d'effectivité, les modalités procédurales permettant au juge national compétent d'assurer la pleine efficacité du droit communautaire et la pleine exécution de la décision de justice qui a été rendue quant à l'existence des droits invoqués sur le fondement de celui-ci.

VI – Conclusion

153. Au vu des considérations qui précèdent, nous proposons à la Cour de répondre de la manière suivante aux questions préjudicielles posées par le Landgericht Frankfurt am Main:

«1) Lorsque, dans le cadre d'une procédure de passation d'une concession de services, l'identité du sous–traitant est un élément essentiel sur lequel le pouvoir adjudicateur s'est fondé pour attribuer la concession, l'obligation de transparence requiert des États membres qu'ils organisent une nouvelle procédure de mise en concurrence lorsque le concessionnaire souhaite procéder à un changement de sous–traitant avant même l'exécution des premières prestations et sans qu'il ait été avancé de raisons légitimes. Il appartient à la juridiction nationale compétente d'apprécier si le nom, la renommée et l'expertise technique du sous–traitant que la Frankfurter Entsorgungs- und Service GmbH a présenté lors de la remise de son offre ont été un élément essentiel sur lequel la Stadt Frankfurt am Main s'est fondée pour attribuer la concession à cette entreprise.

2) Une entité à capital mixte, telle que la Frankfurter Entsorgungs- und Service GmbH, créée dans le cadre d'un partenariat avec la Stadt Frankfurt am Main, constitue un 'organisme de droit public' au sens de l'article 1er, sous b), de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services, telle que modifiée par la directive 2001/78/CE de la Commission, du 13 septembre 2001, lorsqu'il est démontré, d'une part, que cette entité satisfait à des besoins d'intérêt général qui sont dépourvus de caractère industriel ou commercial et, d'autre part, que sa gestion et sa direction sont sous la dépendance étroite de la collectivité publique.

Ladite entité répond à des besoins d'intérêt général au sens de l'article 1er, sous b), deuxième alinéa, premier tiret, de la directive 92/50, telle que modifiée, lorsqu'elle se charge de la collecte et du traitement des déchets ainsi que du nettoyage urbain sur le territoire de la collectivité publique. Afin d'évaluer si ces besoins sont dépourvus de caractère

industriel ou commercial, il appartiendra à la juridiction nationale compétente d'apprécier les conditions dans lesquelles la Frankfurter Entsorgungs- und Service GmbH exerce son activité et, en particulier, l'état de la concurrence dans ces secteurs.

Une telle entité est sous la dépendance étroite de la collectivité publique au sens de l'article 1er, sous b), deuxième alinéa, troisième tiret, de la directive 92/50, telle que modifiée, lorsque sa gestion et ses organes de direction, d'administration ou de surveillance sont contrôlés par cette dernière. Afin de cerner la mesure exacte dans laquelle la gestion de la Frankfurter Entsorgungs- und Service GmbH est contrôlée par la Stadt Frankfurt am Main, il appartiendra à la juridiction nationale compétente d'apprécier si la collectivité publique peut, à travers le droit de veto dont elle dispose à l'assemblée générale ou à travers la composition desdits organes de l'entreprise, assurer un contrôle actif sur la gestion de cette entité et influencer, de la même manière, ses décisions en matière de passation des concessions de services.

3) Lorsque, dans le cadre d'une procédure de passation d'une concession de services, la juridiction nationale compétente constate la violation de l'obligation de transparence, le droit communautaire, en l'état actuel, ne requiert pas des États membres la reconnaissance au profit de cette juridiction d'un pouvoir d'injonction à l'égard des parties au litige. Il appartient à l'ordre juridique interne de chacun des États membres de définir, en conformité avec les principes communautaires d'équivalence et d'effectivité, les modalités procédurales permettant au juge national compétent d'assurer la pleine efficacité du droit communautaire et la pleine exécution de la décision de justice qui a été rendue quant à l'existence des droits invoqués sur le fondement de celui-ci.»

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1 – Langue originale: le français.

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2 – Ci–après la «requérante».

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3 – Ci–après «FES».

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4 – Actuellement, le droit communautaire dérivé ne contient que des règles applicables aux concessions de travaux passées dans les secteurs classiques.

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5 – Directive du Conseil du 18 juin 1992 portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), telle que modifiée par la directive 2001/78/CE de la Commission, du 13 septembre 2001 (JO L 285, p. 1, ci–après la «directive 92/50»).

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6 – Aux termes de l'article 1er, sous a), de cette directive, il s'agit de «contrats à titre onéreux, conclus par écrit entre un prestataire de services et un pouvoir adjudicateur». Au sens de ladite directive, un marché public de services comporte une contrepartie qui est payée directement par le pouvoir adjudicateur au prestataire de services.

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7 – Arrêt du 1er février 2001, Commission/France (C–237/99, Rec. p. I–939, points 41 et 42 ainsi que jurisprudence citée).

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8 – Directive du Parlement européen et du Conseil du 31 mars 2004 relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114).

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9 – Respectivement, en ce qui concerne les marchés publics de services, la directive

92/50; en ce qui concerne les marchés publics de fournitures, la directive 77/62/CEE du Conseil, du 21 décembre 1976 (JO 1977, L 13, p. 1), et, en ce qui concerne les marchés publics de travaux, la directive 71/305/CEE du Conseil, du 26 juillet 1971 (JO L 185, p. 5), ci–après, ensemble, les «directives 'marchés publics'».

10 – Directive du Conseil du 21 décembre 1989 portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395, p. 33), telle que modifiée par la directive 92/50, ci–après la «directive 89/665». Cette directive a été modifiée en dernier lieu par la directive 2007/66/CE du Parlement européen et du Conseil, du 11 décembre 2007 (JO L 335, p. 31).

11 – Alors que l'article 1er de la directive 89/665 visait uniquement les procédures de passation des marchés publics de travaux et de fournitures, la directive 2007/66 étend son champ d'application aux marchés publics de services.

12 – Directive de la Commission du 25 juin 1980 relative à la transparence des relations financières entre les États membres et les entreprises publiques ainsi qu'à la transparence financière dans certaines entreprises (JO L 195, p. 35), telle que modifiée par la directive 2000/52/CE de la Commission, du 26 juillet 2000 (JO L 193, p. 75, ci–après la «directive 80/723»).

13 – Dans l'ordre: prétentions limitées en matière publicitaire (30 %), pertinence du projet de l'opérateur (toilettes publiques) (15 %), caractère plausible du projet publicitaire (10 %), pertinence du projet en matière de sécurité (10 %), facilité d'utilisation des toilettes publiques (10 %), utilité des toilettes publiques (10 %), intégration des toilettes publiques dans l'environnement urbain (5 %), esthétique des toilettes publiques (5 %) et incidence des toilettes publiques sur l'environnement (5 %).

14 – Cette entreprise n'est autre que la Ströer City–Marketing GmbH, sa principale concurrente dans l'obtention de la concession (ci–après «DSM»).

15 – La juridiction de renvoi se réfère aux arrêts du 7 décembre 2000, Telaustria et Telefonadress (C–324/98, Rec. p. I–10745, points 60 à 62); du 21 juillet 2005, Coname (C–231/03, Rec. p. I–7287, points 17 à 22); du 13 octobre 2005, Parking Brixen (C–458/03, Rec. p. I–8585, points 46 à 50); du 6 avril 2006, ANAV (C–410/04, Rec. p. I–3303, point 21), et du 13 septembre 2007, Commission/Italie (C–260/04, Rec. p. I–7083, point 24).

16 – Le Royaume de Danemark, la République fédérale d'Allemagne, le Royaume des Pays–Bas, la République d'Autriche, la République de Finlande et, enfin, le Royaume–Uni de Grande–Bretagne et d'Irlande du Nord.

17 – Arrêt du 19 octobre 1977, Ruckdeschel e.a. (117/76 et 16/77, Rec. p. 1753, point 7).

18 – Voir, notamment, arrêts du 25 novembre 1986, Klensch e.a. (201/85 et 202/85, Rec. p. 3477, point 9), ainsi que du 12 décembre 2002, Rodríguez Caballero (C–442/00,

Rec. p. I–11915, point 32 et jurisprudence citée).

19 – Arrêt Rodríguez Caballero, précité (point 32).

20 – Ibidem (point 30 et jurisprudence citée).

21 – Voir, respectivement, arrêts du 22 juin 1993, Commission/Danemark (C–243/89, Rec. p. I–3353, points 37 à 39), et du 25 avril 1996, Commission/Belgique (C–87/94, Rec. p. I–2043, notamment points 51 à 56). Voir, également, arrêt du 29 avril 2004, Commission/CAS Succhi di Frutta (C–496/99 P, Rec. p. I–3801, point 108 et jurisprudence citée).

22 – Voir arrêt Parking Brixen, précité (point 48).

23 – Voir arrêt Commission/Belgique, précité (points 54 à 56). Dans cette affaire, la Cour a ainsi reconnu que ledit principe s'oppose à ce qu'une entité adjudicatrice prenne en compte une modification apportée aux offres initiales d'un seul soumissionnaire, ce dernier étant avantagé par rapport à ses concurrents.

24 – Voir arrêts précités Commission/CAS Succhi di Frutta (point 109 et jurisprudence citée), ainsi que Parking Brixen (point 49 et jurisprudence citée).

25 – Arrêts précités Telaustria et Telefonadress (points 61 et 62), ainsi que Parking Brixen (point 111).

26 – Arrêt du 26 avril 1994, Commission/Italie (C–272/91, Rec. p. I–1409).

27 – Ainsi que l'a relevé le Parlement européen, le respect de ces règles «peut constituer un instrument efficace pour prévenir les entraves inopportunes à la concurrence, en permettant dans le même temps aux pouvoirs publics de fixer eux-mêmes et de contrôler les conditions à remplir en termes de qualité, de disponibilité, de normes sociales et de protection de l'environnement» (résolution du Parlement européen sur le Livre vert sur les services d'intérêt général [P5_TA (2004)0018, point 32]).

28 – Arrêt du 5 octobre 2000 (C–337/98, Rec. p. I–8377).

29 – Points 44 et 46.

30 – Arrêt du 19 juin 2008 (C–454/06, Rec. p. I–4401, points 35 à 37 et 40).

31 – Voir arrêt du 18 mars 2004, Siemens et ARGE Telekom (C–314/01, Rec. p. I–2549, points 45 et 46), relatif à une procédure de passation d'un marché public.

32 – Ordonnance de renvoi, p. 5 et 6.

33 – Alors que le contrat de concession a été conclu avec la Stadt Frankfurt am Main les 20 et 22 juillet 2004, FES a invité la requérante et l'intervenante à présenter des offres pour les prestations publicitaires et pour la fourniture de modules de toilettes respectivement les 5 janvier et 28 juillet 2005. C'est à ce stade que la requérante a été écartée en tant que sous-traitante.

34 – En l'occurrence, nous ne voyons aucun élément dans le dossier permettant de penser que FES pouvait se prévaloir d'un motif légitime pour ne pas recourir aux services du sous-traitant qu'elle a présenté lors de la remise de son offre. Comme le relève le juge de renvoi, ce changement n'est pas compréhensible dans la mesure où la requérante a proposé à FES une rémunération annuelle largement supérieure à celle de l'intervenante.

35 – Les conditions visées à l'article 2 de la directive 80/723 pour qu'une entité soit qualifiée d'«entreprise publique» recoupent celles visées à l'article 1er de la directive 92/50 pour qu'une entité soit qualifiée de «pouvoir adjudicateur».

36 – Voir, à cet égard, le site Internet de l'entreprise: www.fes-frankfurt.de/profil (rubriques «profil» et «chronik»).

37 – Communication interprétative de la Commission concernant l'application du droit communautaire des marchés publics et des concessions aux partenariats public-privé institutionnalisés (PPPI), du 5 février 2008 [C(2007)6661].

38 – Page 2.

39 – Depuis son arrêt du 11 janvier 2005, Stadt Halle et RPL Lochau (C-26/03, Rec. p. I-1), relatif à l'attribution d'un marché public de services à une société d'économie mixte, la Cour a considéré que la participation d'une entreprise privée, fût-elle minoritaire, dans le capital d'une société à laquelle participe également le pouvoir adjudicateur en cause exclut que ce pouvoir adjudicateur puisse exercer sur cette société un contrôle analogue à celui qu'il exerce sur ses propres services (point 49). Voir, également, arrêt ANAV, précité (points 30 à 32 et jurisprudence citée).

40 – Voir arrêt du 11 juin 2009, Hans & Christophorus Oymanns (C-300/07, non encore publié au Recueil, point 48 et jurisprudence citée).

41 – Arrêt du 10 avril 2008, Ing. Aigner (C-393/06, Rec. p. I-2339, point 37 et jurisprudence citée).

42 – Selon une jurisprudence établie, il doit s'agir de besoins que, pour des raisons liées à l'intérêt général, l'État ou une collectivité territoriale choisissent en général de satisfaire eux-mêmes ou à l'égard desquels ils entendent conserver une influence déterminante (arrêt Ing. Aigner, précité, point 40 et jurisprudence citée). La Cour a ainsi reconnu que tel est le cas de la fabrication d'imprimés officiels tels que les passeports, les permis de conduire ou les cartes d'identité (arrêt du 15 janvier 1998, Mannesmann Anlagenbau Austria e.a., C-44/96, Rec. p. I-73), de l'entretien des forêts nationales (arrêt du 17 décembre 1998, Commission/Irlande, C-353/96, Rec. p. I-8565), de la gestion d'une université (arrêt 3 octobre 2000, University of

Cambridge, C–380/98, Rec. p. I–8035) ou bien encore de la gestion d'un réseau public de télécommunication (arrêt Telaustria et Telefonadress, précité).

43 – Dans l'arrêt du 12 décembre 2002, Universale–Bau e.a. (C–470/99, Rec. p. I–11617), la Cour a reconnu que l'organisme ne doit pas nécessairement avoir été chargé de cette mission dès l'origine.

44 – Arrêt du 10 novembre 1998 (C–360/96, Rec. p. I–6821).

45 – Points 51 à 53.

46 – Nous visons, en particulier, les arrêts du 10 mai 2001, Agorà et Excelsior (C–223/99 et C–260/99, Rec. p. I–3605); du 27 février 2003, Adolf Truley (C–373/00, Rec. p. I–1931); du 22 mai 2003, Korhonen e.a. (C–18/01, Rec. p. I–5321), et les arrêts précités BFI Holding, Mannesmann Anlagenbau Austria e.a. ainsi que Ing. Aigner.

47 – Arrêt Ing. Aigner, précité (point 41 et jurisprudence citée).

48 – Dans l'arrêt Adolf Truley, précité, la Cour a considéré que l'existence d'une concurrence développée ne permet pas, à elle seule, de conclure à l'absence d'un besoin d'intérêt général ayant un caractère autre qu'industriel ou commercial (point 61).

49 – Arrêt Korhonen e.a., précité (points 55 à 59).

50 – Nous précisons, d'après le site Internet de FES, que cette entreprise tire ses origines de l'Office municipal pour la gestion des déchets et le nettoyage urbain.

51 – Arrêts précités Mannesmann Anlagenbau Austria e.a. (points 25, 26 et 31); BFI Holding (points 55 et 56), ainsi que Ing. Aigner (point 47 et jurisprudence citée).

52 – Voir arrêt Adolf Truley, précité (point 69 et jurisprudence citée).

53 – Nous notons que l'assemblée générale de FES ne peut adopter de décision qu'à la majorité des trois quarts. Si la Stadt Frankfurt am Main détient 51 % du capital de cette entreprise, cette participation n'est donc pas suffisante pour lui permettre d'adopter seule des décisions dans le cadre de cette assemblée.

54 – Points 21 et 24. Dans cette affaire, le financement public correspondait aux bourses destinées aux étudiants et aux subventions versées pour promouvoir les travaux de recherche de l'université, et non aux versements effectués par l'État en contrepartie de prestations de services accomplies par l'université.

55 – Arrêt University of Cambridge, précité (point 25).

56 – Ce conseil, comme son nom l'indique, a pour mission de contrôler et de surveiller la gestion de la société. Très souvent, le conseil de surveillance peut assurer un

contrôle d'opportunité comme de régularité, en opérant, notamment, les vérifications qu'il juge opportunes ou en présentant à l'assemblée générale ses observations sur les comptes annuels de la société. Il peut également disposer de pouvoirs particuliers lui permettant, par exemple, de nommer des membres du directoire ou son président, ou encore d'autoriser la cession de participations. Le président du conseil de surveillance assume généralement deux types de fonctions tenant généralement à la convocation du conseil et à la surveillance des débats. Le rôle et les fonctions du conseil de surveillance sont précisés par la loi et codifiés dans les statuts de la société dont nous ne disposons pas (voir Cozian, M., Viandier, A., et Deboissy, F., *Droit des sociétés,* 17e édition, Litec, Paris, 2004, p. 286 et 287).

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57 – Arrêt du 15 avril 2008, Impact (C–268/06, Rec. p. I–2483, points 44 et 46 à 48 ainsi que jurisprudence citée).

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58 – Cette quatrième question préjudicielle est formulée de telle manière que nous ignorons si le contrat visé par le juge de renvoi est le contrat de concession de services conclu entre la Stadt Frankfurt am Main et FES ou le contrat de sous-traitance conclu par la suite entre le concessionnaire et DSM. En effet, il ressort de l'ordonnance de renvoi que la requérante ne conteste pas la décision par laquelle la Stadt Frankfurt am Main a attribué la concession de services à FES. Elle ne demande donc pas la résiliation du contrat de concession conclu avec cette dernière entreprise. En revanche, la requérante conteste la décision par laquelle la Stadt Frankfurt am Main a autorisé, sur le fondement de l'article 30, IV, du contrat de concession, le changement de sous-traitant. Par son action devant le juge national, la requérante vise, en substance, à priver d'effet le contrat de sous-traitance conclu entre FES et DSM. Quant à la juridiction de renvoi, elle soutient dans son ordonnance que la Stadt Frankfurt am Main était tenue de résilier le contrat de concession de services à la modification duquel elle avait consenti. Dans le doute, nous considérerons que cette question vise les deux hypothèses.

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59 – Loi n° 95–125 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative (JORF du 9 février 1995). Voir articles L–911–1 à L–911–3 du code de justice administrative.

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60 – En vertu de cette disposition, un marché doit être déclaré en tout ou en partie dépourvu d'effets lorsqu'il a été conclu sans qu'un avis de marché ait été préalablement publié au *Journal officiel de l'Union européenne*, ou lorsque le soumissionnaire lésé n'a pas eu la possibilité d'engager un recours précontractuel ou dans le cas très particulier des marchés fondés sur un accord-cadre ou sur un système d'acquisition dynamique visés par la directive 2004/18. L'article 2 sexies inséré par la directive 2007/66 permet néanmoins aux États membres de prévoir des sanctions de substitution, compte tenu notamment de la gravité de la violation, du comportement du pouvoir adjudicateur et, le cas échéant, de la portée de l'annulation des obligations contractuelles. Il peut s'agir de pénalités financières ou d'un abrègement de la durée du marché.

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61 – Arrêt du 18 juillet 2007 (C–503/04, Rec. p. I–6153, points 29 à 36).

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62 – Cette disposition est rédigée comme suit:

«Si l'atteinte à la propriété résulte d'une cause autre que la dépossession ou la rétention, le propriétaire peut demander à l'auteur du trouble de mettre fin à l'atteinte en question. Si une nouvelle atteinte à la propriété est à craindre, le propriétaire peut

engager une procédure d'injonction.»

Il ressort de l'ordonnance de renvoi que ladite disposition a été appliquée par analogie à d'autres atteintes (et, en particulier, aux atteintes portées à la vie, à l'intégrité corporelle, à la personnalité, à la santé et à la liberté) et à certains comportements illégaux.

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63 – Voir, notamment, arrêts Rodríguez Caballero, précité (point 30 et jurisprudence citée); du 27 février 2003, Santex (C–327/00, Rec. p. I–1877, points 62 et 63), ainsi que du 13 mars 2007, Unibet (C–432/05, Rec. p. I–2271, point 44).

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64 – Voir arrêt Parking Brixen, précité (points 48 et 49).

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65 – Aux termes de cette disposition, «[c]haque partie peut, pour un motif sérieux, résilier un contrat à durée indéterminée sans être tenue de respecter un délai de préavis. Il y a motif sérieux lorsque, eu égard aux circonstances de l'espèce et après avoir mis en balance les intérêts des deux parties, il ne peut pas être raisonnablement attendu de la partie qui résilie qu'elle maintienne la relation contractuelle jusqu'au terme convenu ou jusqu'à l'expiration d'un délai de préavis».

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Reference for a preliminary ruling from the Landgericht Frankfurt am Main (Germany) lodged on 28 February 2008 - Wall AG v Stadt Frankfurt am Main, Frankfurter Entsorgungs- und Service GmbH (FES)

(Case C-91/08)

Language of the case: German

Referring court

Landgericht Frankfurt am Main

Parties to the main proceedings

Applicant: Wall AG

Defendants: Stadt Frankfurt am Main, Frankfurter Entsorgungs- und Service GmbH (FES)

Other party to the proceedings: DSM Deutsche Städte Medien GmbH

Questions referred

Are the principle of equal treatment expressed inter alia in Articles 12 EC, 43 EC and 49 EC and the prohibition in Community law of discrimination on grounds of nationality to be interpreted as meaning that the consequent duties of transparency for public authorities, namely to use an appropriate degree of advertising to enable the award of service concessions to be opened up to competition and the impartiality of the procurement procedure to be reviewed (see the judgments of the Court of Justice in Case C-324/98 *Telaustria*, paragraphs 60 to 62; Case C-231/03 *Coname*, paragraphs 17 to 22; Case C-458/03 *Parking Brixen*, paragraphs 46 to 50; Case C-410/04 *ANAV*, paragraph 21; and C-260/04 *Commission* v *Italy*, paragraph 24), require national law to provide an unsuccessful tenderer with a claim to an order restraining an imminent breach of those duties and/or prohibiting the continuation of such a breach of duty?

If Question 1 is answered in the negative: Do those duties of transparency form part of the customary law of the European Communities, in the sense that they are already applied continually and constantly, equally and generally, and are recognised as a binding rule by those concerned?

Do the duties of transparency mentioned in Question 1 require, in the case also of an intended amendment to a service concession contract - including the substitution of a subcontractor who was mentioned as part of the tender - that the negotiations on this are again opened up to competition with an appropriate degree of advertising, or what would be the criteria for requiring such an opening up?

Are the principles and duties of transparency mentioned in Question 1 to be interpreted as meaning that in the case of service concessions, in the event of a breach of duty, a contract concluded as a result of the breach and intended to create or amend a continuing obligation must be terminated?

Are the principles and duties of transparency mentioned in Question 1 and Article 86(1) EC, referring also if necessary to Article 2(1)(b) and (2) of the Transparency Directive 80/723/EEC [1] and Article 1(9) of the Procurement Coordination Directive 2004/18/EC, [2] to be interpreted as meaning that an undertaking is subject to those duties of transparency, as a public undertaking or contracting authority, if

it was set up by a regional or local authority for the purpose of waste disposal and street cleaning but also operates in the free market,

it belongs to that regional or local authority to the extent of a 51% holding, but decisions of shareholders can be taken only by a three-quarters majority,

the regional or local authority appoints only a quarter of the members of the supervisory board of the undertaking, including the chairman, and

it achieves more than half its turnover from bilateral contracts for waste disposal and street cleaning in the territory of that regional or local authority, which reimburses itself by means of municipal taxes on its residents?

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[1] - Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, OJ 1980 L 195, p. 35; Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ 2000 L 193, p. 75.

[2] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134, p. 114.

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Order of the Court of First Instance of 16 June 2008 - Cyprus v Commission

(Case T-122/08) [1]

Language of the case: Greek

The President of the First Chamber has ordered that the case be removed from the register.

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[1] - OJ C 142, 7.6.2008.

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Action brought on 29 December 2008 - Evropaïki Dynamiki v Commission

(Case T-591/08)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and P. Katsimani, lawyers)

Defendant: Commission of the European Communities

Form of order sought

annul EUROSTAT's decision to select the bid of the applicant, filed in response to the open Call for Tenders for the "Statistical Information Technologies", Lot 2 "SDMX development" and Lot 3 "SDMX support" as second contractor of the cascade mechanism (OJ 2008/S 120-159017) communicated to the applicant by two separate letters dated 17 October 2008 and all further related decisions of EUROSTAT including the one to award the contract to the successful contractor;

order EUROSTAT to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 4 326 000;

order EUROSTAT to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

By means of its application the applicant seeks the annulment pursuant to Article 230 EC of the decisions of EUROSTAT to select the bid of the applicant, filed in response to the open Call for Tenders for the "Statistical Information Technologies", Lot 2 "SDMX development" and Lot 3 "SDMX support" as second contractor of the cascade mechanism (OJ 2008/S 120-159017) which were communicated to the applicant by two separate letters dated 17 October 2008, as well as the award of damages pursuant to Article 235 EC.

The applicant claims that EUROSTAT committed various manifest errors of assessment, whereas fundamental rules and principles of public procurement have been allegedly infringed by the contracting authority. It is submitted that the evaluation of the applicant's tender was deficient, that EUROSTAT failed to state reasons, denied to address the applicant's detailed administrative appeal and associated observations and that it did not present the results of its internal examination to the applicant.

The applicant further submits that the treatment of the candidates was discriminatory; that the exclusion criteria were not complied with by one of the members of the winning consortium and that Articles 93(1) and 94 of the Financial Regulation were infringed. Moreover, the applicant contends that should the Court find that the defendant infringed the Financial Regulation and/or the principles of transparency and of equal treatment, given the fact that the Court will rule on the application - in all likelihood - after the contract has been fully executed, the applicant requests monetary compensation EUR 4 326 000 from EUROSTAT, corresponding to its estimated gross profit from the public procurement procedure Lot 2 and Lot 3, should it have been awarded the contract.

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Action brought on 22 December 2008 - Evropaïki Dynamiki v Commission

(Case T-589/08)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, P. Katsimani, M. Dermitzakis, lawyers)

Defendant: Commission of the European Communities

Form of order sought

annul the decisions of the Commission to evaluate the applicant's bids as not successful and award the contracts to the successful contractor;

order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of 920 000 EUR to be increased up to 1 700 000 EUR depending on the final amount of the CITL project;

order the Commission to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decisions to reject its bids submitted in response to a call for an open tender ENV.C2/FRA/2008/0017 regarding the "Emission Trading Scheme - CITL/CR"[1] and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims the applicant puts forward two pleas in law.

First, it argues that the Commission committed several manifest errors of assessment while evaluating the three bids submitted by the applicant to the three Lots of the tender respectively.

Second, the applicant submits that the Commission failed to observe the principles of transparency and equal treatment and therefore infringed relevant provisions reflecting these principles such as Articles 92 and 100 of the financial regulation[2]. Moreover, the applicant argues that the contracting authority infringed its obligation to sufficiently state reasons for its decision. It claims as well that the Commission failed to provide it with additional information that it requested after the award decision regarding the merits of the successful tenderer. Furthermore, the applicant submits that the contracting authority applied criteria that were not set out in advance and thus were unknown to the candidates.

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[1] - OJ 2008/S 72-096229

[2] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, p. 1)

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DOCUMENT DE TRAVAIL

ARRÊT DU TRIBUNAL (troisième chambre)

26 mars 2010 (*)

« Marchés publics de services – Procédure d'appel d'offres communautaire – Programme de modélisation de l'occupation des sols – Rejet de l'offre d'un soumissionnaire – Recours en annulation – Intérêt à agir – Recevabilité – Critères d'attribution »

Dans l'affaire T–577/08,

Proges – Progetti di sviluppo Srl, établie à Rome (Italie), représentée par M^e^ M. Falcetta, avocat,

partie requérante,

contre

Commission européenne, représentée par MM. N. Bambara et E. Manhaeve, en qualité d'agents, assistés de M^e^ A. Dal Ferro, avocat,

partie défenderesse,

ayant pour objet une demande d'annulation de la décision de la Commission du 29 octobre 2008 de ne pas retenir l'offre soumise par la requérante dans le cadre d'un appel d'offres portant sur la mise en œuvre d'un programme de modélisation de l'occupation des sols ainsi qu'une demande de réparation du préjudice subi par la requérante,

LE TRIBUNAL (troisième chambre),

composé de M. J. Azizi, président, M^me^ E. Cremona et M. S. Frimodt Nielsen (rapporteur), juges,

greffier : M. J. Palacio González, administrateur principal,

vu la procédure écrite et à la suite de l'audience du 25 novembre 2009,

rend le présent

Arrêt

Faits à l'origine du litige

1 Par un avis de marché du 14 juin 2008, publié au Supplément au *Journal officiel de l'Union européenne* (JO 2008, S 115), la Commission des Communautés européennes a lancé l'appel d'offres DG ENV.G.1/SER/2008/0050 visant à adjuger le marché de services intitulé « Modélisation de l'occupation des sols – mise en œuvre ».

2 L'objectif de ce marché est de « réaliser, à l'aide d'outils de modélisation et de bases de données existants, une série d'évaluations des scénarios stratégiques ayant une répercussion sur l'occupation des sols dans l'U[nion européenne] qui soient centrés sur les arbitrages mettant en jeu l'occupation des sols et les impacts environnementaux ».

3 Le point 3.3 du cahier des charges, joint à l'avis de marché, indique les critères sur la base

desquels l'attribution du marché est effectuée. Outre le prix indiqué pour l'exécution du contrat, cette attribution tient compte, aux termes dudit point, des critères suivants :

« – Critère d'attribution n° 1 – Compréhension (maximum 30 points) : Ce critère sert à évaluer si le soumissionnaire a compris toutes les questions en jeu ainsi que la nature du travail à réaliser et le contenu des produits finals ;

– critère d'attribution n° 2 – Méthode (maximum 40 points) : Ce critère sert, d'une part, à évaluer dans quelle mesure la méthode proposée permet de traiter de manière réaliste et structurée les questions sur lesquelles repose l'offre et, d'autre part, à déterminer si les méthodes proposées correspondent aux besoins décrits par la Commission ;

– critère d'attribution n° 3 – Gestion du projet et disponibilité (maximum 30 points) : Les offres seront évaluées du point de vue de la qualité de l'organisation de l'équipe, du temps attribué à chacun des membres de l'équipe et de la disponibilité des ressources nécessaires pour permettre l'exécution des tâches contractuelles. L'offre doit contenir une description claire de ces aspects. »

4 Les soumissionnaires doivent obtenir au moins 18, 24 et 18 points pour les premier, deuxième et troisième critères respectivement et totaliser un minimum de 65 points (point 3.4 du cahier des charges). Les offres qui remplissent chacun des critères et qui ont recueilli au moins 65 points seront considérées comme techniquement satisfaisantes. Le prix sera alors divisé par le nombre total de points attribués pour obtenir le quotient prix/qualité. Le contrat sera attribué au soumissionnaire ayant présenté l'offre dont le quotient prix/qualité est le plus faible (point 6 du cahier des charges).

5 Trois offres ont en l'espèce été présentées : les soumissionnaires étaient, respectivement, le centre de recherche d'une université néerlandaise (ci-après le « centre de recherche ») et trois sous-traitants, la requérante, Proges – Progetti di sviluppo Srl, sans sous-traitant, ainsi qu'une troisième entité, avec trois sous-traitants. Seules deux de ces trois offres, celles du centre de recherche et du troisième soumissionnaire, ont obtenu une note suffisante au stade de l'évaluation au regard des critères d'attribution.

6 Il ressort du procès-verbal du comité d'évaluation, dont une copie a été transmise par la Commission à la requérante en annexe à la défense, que celle-ci n'a pas obtenu les notes minimales requises, et ce tant pour chaque critère d'attribution du marché que pour le total des points. Ses notes étaient de 8 points sur 30 pour la compréhension du projet, de 9 points sur 40 pour la méthode et de 10,6 points sur 30 pour la gestion du projet et la disponibilité. La note totale obtenue par la requérante, soit 27,6 points pour un minimum requis de 65 points, a donc eu pour effet de l'exclure de l'étape suivante portant sur l'évaluation de la proposition économique.

7 Par lettre du 29 octobre 2008, la Commission a indiqué à la requérante que son offre n'avait pas été sélectionnée ainsi que les raisons pour lesquelles cette offre n'avait pas satisfait aux critères d'attribution (ci-après la « décision attaquée »). Cette lettre indiquait également que des informations complémentaires pouvaient être communiquées sur demande. La requérante a présenté une demande en ce sens le 10 novembre 2008. La Commission, par lettre du 18 novembre 2008, lui a communiqué le nom de l'attributaire du marché ainsi que des informations sur la note obtenue par ce dernier et sur les critères d'attribution utilisés par le comité d'évaluation.

Procédure et conclusions des parties

8 Par requête déposée au greffe du Tribunal le 23 décembre 2008, la requérante a introduit le présent recours.

9 Sur rapport du juge rapporteur, le Tribunal (troisième chambre) a décidé d'ouvrir la procédure orale. Dans le cadre des mesures d'organisation de la procédure, les parties ont été invitées à répondre à une série de questions et la Commission à produire une série de documents auxquels il était fait référence dans l'avis de marché.

10 Par lettre de la requérante du 10 novembre 2009 et par lettre de la Commission du 9 novembre 2009, les parties ont présenté leurs réponses aux questions du Tribunal et la Commission a produit les documents demandés.

11 Les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions posées par le Tribunal lors de l'audience du 25 novembre 2009.

12 La requérante conclut à ce qu'il plaise au Tribunal :

– annuler la décision attaquée et adopter toutes les mesures qui en découlent, notamment en ce qui concerne la réparation des dommages ;

– condamner la Commission aux dépens.

13 La Commission conclut à ce qu'il plaise au Tribunal :

– rejeter le recours en tant qu'irrecevable ou non fondé ;

– condamner la requérante aux dépens.

En droit

Sur la recevabilité

Sur le défaut d'intérêt à agir de la requérante

14 La Commission soutient que le recours est irrecevable pour défaut d'intérêt à agir. En l'absence d'une demande d'annulation visant explicitement la décision d'attribution du marché litigieux au soumissionnaire retenu à l'issue de l'évaluation des offres, le présent recours devrait être déclaré irrecevable dans son ensemble. La Commission invoque, à cet égard et par analogie, l'arrêt du Tribunal du 17 février 2000, Micheli e.a./Commission (T–183/97, Rec. p. II–287, points 33 à 54).

15 Le Tribunal relève que la requérante dispose bien d'un intérêt à agir à l'encontre de la décision attaquée, dès lors que la Commission y rejette l'offre qu'elle lui avait présentée en vue d'obtenir le marché litigieux. La décision attaquée met donc un terme aux chances de la requérante d'obtenir l'attribution du marché pour lequel elle avait soumissionné, la Commission considérant que l'offre proposée ne satisfait pas aux trois critères d'attribution définis par l'avis de marché.

16 Cette appréciation n'est pas remise en cause par la solution retenue dans l'arrêt Micheli e.a./Commission, point 14 supra (points 33 à 54). Dans cette affaire, les requérants demandaient l'annulation d'une décision arrêtant une liste de réserve relative à des propositions d'actions pouvant bénéficier d'un financement communautaire. Cette décision avait pour conséquence d'exclure leur proposition d'action. Pour conclure qu'il n'y avait plus lieu de statuer sur le recours, le Tribunal a examiné les deux types d'intérêt à agir évoqués par les requérants. Sur le premier type d'intérêt, qui consistait en la défense du prestige scientifique des requérants, le Tribunal a relevé que leur capacité scientifique n'avait pas été prise en considération, directement ou indirectement, lors de l'exclusion de leur proposition de la liste de réserve. Sur le second type d'intérêt, lié à la réalisation de la proposition pour laquelle ils demandaient un financement communautaire, le Tribunal a indiqué que, en toute hypothèse, la proposition litigieuse ne pouvait pas bénéficier des fonds communautaires, puisqu'ils étaient épuisés et ne pouvaient être affectés à la liste de réserve. Le raisonnement suivi par le Tribunal dans l'arrêt Micheli e.a./Commission, point 14 supra, s'explique dès lors au vu des circonstances de cette affaire et n'est pas susceptible, en tant que tel, d'être appliqué en l'espèce, le présent recours concernant un appel d'offres pour lequel il ne peut y avoir qu'un seul attributaire et non des propositions d'actions pouvant bénéficier d'une contribution communautaire.

17 Par ailleurs, si la décision attaquée devait être annulée, cela pourrait avoir une incidence sur la légalité de la décision d'attribution du marché litigieux, qui est intervenue à un stade postérieur à celui du rejet de l'offre de la requérante, sans que cette offre ait été examinée (voir points 5 à 7 ci-dessus). Dans cette hypothèse, il appartiendrait à la Commission de prendre les mesures que comporterait l'exécution d'un tel arrêt. L'annulation de la décision attaquée serait également susceptible d'avoir des conséquences en ce qui concerne une éventuelle demande en réparation du préjudice subi.

18 La première fin de non-recevoir avancée par la Commission doit donc être rejetée.

Sur l'absence de clarté de la requête

19 La Commission fait valoir que le recours est au moins partiellement irrecevable du fait de son insuffisante clarté au regard des prescriptions de l'article 44, paragraphe 1, du règlement de procédure du Tribunal. À la lecture de la requête, il ne serait pas possible de comprendre clairement de quelles violations de règles matérielles, de quelle contradiction manifeste ou de quel détournement de pouvoir la Commission serait coupable. Ces griefs seraient mentionnés dans la requête sans être précisés par la suite. Par ailleurs, l'absence de clarté et de précision des éléments exposés par la requérante en ce qui concerne la dénaturation du contenu de son projet ne permettrait pas à la Commission de comprendre en quoi elle aurait violé l'avis de marché. La même observation vaudrait pour la demande de réparation formulée dans les conclusions de la requête.

20 Le Tribunal rappelle que, en vertu de l'article 44, paragraphe 1, sous c), du règlement de procédure, toute requête doit indiquer l'objet du litige et l'exposé sommaire des moyens invoqués. Indépendamment de toute question de terminologie, cette présentation doit être suffisamment claire et précise pour permettre à la partie défenderesse de préparer sa défense et au Tribunal d'exercer son contrôle juridictionnel. Afin de garantir la sécurité juridique et une bonne administration de la justice, il est nécessaire, pour qu'un recours soit recevable au regard de cette disposition, que les éléments essentiels de fait et de droit sur lesquels celui-ci se fonde ressortent, à tout le moins sommairement, mais d'une façon cohérente et compréhensible, de la requête elle-même (ordonnance du Tribunal du 28 avril 1993, De Hoe/Commission, T–85/92, Rec. p. II–523, point 20).

21 S'il convient d'admettre que l'énonciation des moyens du recours n'est pas liée à la terminologie et à l'énumération du règlement de procédure et que la présentation de ces moyens, par leur substance plutôt que par leur qualification légale, peut suffire, c'est à la condition toutefois que lesdits moyens se dégagent de la requête avec suffisamment de netteté. En outre, la seule énonciation abstraite des moyens dans la requête ne répond pas aux exigences du règlement de procédure et les termes « exposé sommaire des moyens », qui y sont employés, signifient que la requête doit expliciter en quoi consiste le moyen sur lequel le recours est basé (ordonnance De Hoe/Commission, point 20 supra, point 21).

22 En l'espèce, la requête se fonde sur les éléments de droit suivants : « Dénaturation du contenu du projet – violation de règles matérielles – contradiction manifeste – détournement de pouvoir. »

23 Ainsi que le fait valoir la Commission, la lecture de la requête ne permet pas de comprendre de quelle contradiction manifeste ou de quel détournement de pouvoir la Commission serait responsable. Faute pour la requérante d'avoir exposé, de manière même sommaire, ces moyens ou éléments de droit, le Tribunal doit donc les déclarer irrecevables au regard de l'article 44, paragraphe 1, sous c), du règlement de procédure.

24 De même, il n'est pas possible à la lecture de la requête de comprendre clairement quelles sont les règles matérielles prétendument violées dans la présente affaire, à l'exception de l'avis de marché, qui y est évoqué plusieurs fois. Cette indication ne peut donc se comprendre que comme renvoyant à un moyen tiré de la violation des dispositions de l'avis de marché, lequel complète le moyen tiré de la dénaturation du contenu du projet présenté par la requérante auquel la requête fait plusieurs fois précisément référence.

25 La requête doit ainsi être comprise, comme cela a été confirmé par la requérante lors de l'audience, comme visant à obtenir l'annulation de la décision attaquée en ce que la Commission dénaturerait le contenu du projet présenté par la requérante et violerait les dispositions de l'avis de marché.

26 En outre, à supposer même que le Tribunal considère que le chef de conclusions de la requérante visant à obtenir l'annulation de la décision attaquée et l'adoption de toutes les mesures qui en découlent, notamment en ce qui concerne la réparation des dommages, puisse être interprété en ce sens qu'il concerne, d'une part, une demande d'annulation de la décision attaquée et, d'autre part, une demande en réparation du préjudice subi, force est de constater qu'une telle demande en réparation ne fait pas l'objet de la moindre précision de la part de la requérante. Or, une requête visant à la réparation de dommages causés par une institution doit contenir les éléments qui permettent d'identifier le comportement que la requérante reproche à l'institution, les raisons pour lesquelles elle estime qu'un lien de causalité existe entre le comportement et le préjudice qu'elle prétend avoir subi ainsi que le caractère et l'étendue de ce préjudice (arrêts du Tribunal du 10 juillet 1997, Guérin automobiles/Commission, T-38/96, Rec. p. II-1223, point 42, et du 3 février 2005, Chiquita Brands e.a./Commission, T-19/01, Rec. p. II–315, point 65).

27 Il y a donc lieu de déclarer irrecevable le présent recours en ce qui concerne la demande en réparation du préjudice subi, pour autant qu'il puisse être considéré qu'une telle demande ait été présentée par la requérante.

28 En conséquence, le présent recours n'est recevable qu'en ce qui concerne les moyens pris de la dénaturation du projet présenté par la requérante et de la violation de l'avis de marché, lesquels peuvent être réunis dans le cadre de l'appréciation du fond.

Sur le fond

29 En substance, la requérante critique, dans le cadre de son argumentation relative à la dénaturation de son projet et à la violation de l'avis de marché, l'évaluation faite par la Commission de chacun des trois critères d'attribution mentionnés dans le cahier des charges (voir point 3 ci-dessus).

Sur l'évaluation du premier critère d'attribution

30 Le premier critère d'attribution du marché visait à « évaluer si le soumissionnaire a compris toutes les questions en jeu ainsi que la nature du travail à réaliser et le contenu des produits finals » (point 3.3 du cahier des charges). Pour être considéré comme techniquement apte, le soumissionnaire devait obtenir au moins 18 points sur un maximum de 30 points (point 3.4 du cahier des charges).

31 La décision attaquée indique ce qui suit en ce qui concerne ce critère :

« Critère d'attribution nº 1 : compréhension (min. 18 – max. 30 points)

L'offre témoigne d'une très mauvaise compréhension des questions en jeu ainsi que de la nature du travail à réaliser et du contenu des produits finals. L'offre se focalise exclusivement sur la définition d'un système DPSIR [Drives-Pressure-State-Impacts-Responses]. La page 10 de l'offre suggère même l'utilisation potentielle de modèles d'occupation des sols, alors que l'objet du marché consistait justement à bâtir un modèle d'occupation des sols et à mener l'évaluation de scénarios… »

32 Cette explication, communiquée à la requérante dans la décision attaquée, est reprise du procès-verbal du comité d'évaluation des offres. Il ressort de ce procès-verbal que la requérante a obtenu la note de 8 points sur 30 en ce qui concerne le premier critère d'attribution, tandis que l'offre retenue a obtenu une note de 27,4 points sur 30.

33 En réponse à la demande faite en ce sens par la requérante, la Commission, dans une lettre du 18 novembre 2008, lui a indiqué les raisons pour lesquelles l'offre du centre de recherche avait été choisie. Ces raisons, connues de la requérante quand elle a introduit son recours, ne sont pas contestées dans la présente affaire.

– Arguments des parties

34 La requérante fait valoir que la Commission, dans la décision attaquée, lui reproche « de manière contradictoire, confuse et généralisée » d'avoir présenté une offre qui témoigne d'une « très mauvaise compréhension des questions en jeu ainsi que de la nature du travail à réaliser et du contenu des produits finals ». Selon la requérante, son offre n'avait pas pour objet de proposer un nouveau modèle d'occupation des sols, mais précisait plutôt, avec au moins douze pages d'explications, le modèle qu'elle avait examiné en fonction de ce qui était indiqué dans l'avis de marché. Celui-ci était donc parfaitement compris. La requérante conteste également l'appréciation selon laquelle « l'offre se focalise exclusivement sur la définition d'un système DPSIR ». Cette appréciation dénaturerait le contenu de son offre, qui se concentrerait sur plusieurs autres projets. Elle serait aussi techniquement erronée et non motivée. Enfin, la requérante considère que l'appréciation selon laquelle « la page 10 de [son] offre suggère même l'utilisation potentielle de modèles d'occupation des sols, alors que l'objet du marché consistait justement à bâtir un modèle d'occupation des sols et à mener l'évaluation de scénarios », est erronée.

35 La Commission conteste cette analyse en relevant que l'offre de la requérante n'expliquait pas la manière dont celle-ci entendait concrètement élaborer le modèle demandé.

– Appréciation du Tribunal

36 Selon une jurisprudence constante, à la lumière de laquelle seront examinées toutes les évaluations

critiquées dans la présente affaire, le pouvoir adjudicateur dispose d'un large pouvoir d'appréciation quant aux éléments à prendre en considération en vue de la prise de décision de passer un marché sur appel d'offres et le contrôle du Tribunal doit se limiter à la vérification du respect des règles de procédure et de motivation ainsi que de l'exactitude matérielle des faits, de l'absence d'erreur manifeste d'appréciation et de détournement de pouvoir (arrêts du Tribunal du 27 septembre 2002, Tideland Signal/Commission, T–211/02, Rec. p. II–3781, point 33, et du 6 juillet 2005, TQ3 Travel Solutions Belgium/Commission, T–148/04, Rec. p. II–2627, point 47).

37 En l'espèce, il convient de relever que l'offre de la requérante se limite à reproduire les différents éléments constitutifs décrits dans le cahier des charges pour indiquer, sans démonstration technique probante, que cette offre permettrait de répondre à ce qui était demandé dans l'avis de marché.

38 L'objectif du marché litigieux était de « réaliser, à l'aide d'outils de modélisation et de bases de données existants, une série d'évaluations des scénarios stratégiques ayant une répercussion sur l'occupation des sols dans l'U[nion] qui soient centrés sur les arbitrages mettant en jeu l'occupation des sols et les impacts environnementaux » (point 1.2 du cahier des charges).

39 Dans ce cadre, l'une des principales tâches du contractant était de définir le cadre de modélisation selon les recommandations prévues par le cahier des charges (voir point 1.3.A du cahier des charges). Ce cadre devait répondre aux besoins des différentes directions générales de la Commission, notamment en termes d'évaluation ex ante et d'analyses d'impact. Il devait également permettre d'estimer les incidences sur les plans économique, environnemental et social des modifications de l'occupation des sols à différentes échelles allant de l'Union au troisième niveau de la nomenclature d'unités territoriales statistiques (NUTS-3). Le contractant devait également définir des scénarios de références et des scénarios stratégiques sur la base des critères énoncés dans le cahier des charges (voir point 1.3.B du cahier des charges).

40 Le modèle d'occupation des sols demandé dans l'avis de marché devait donc démontrer sa capacité à coordonner les différentes instances compétentes en matière d'occupation des sols et à assurer l'interface vers et entre les différentes bases de données existantes. Le cahier des charges se référait à cet égard aux différentes méthodologies, outils et bases de données permettant déjà d'évaluer les incidences environnementales, économiques et sociales d'un large éventail d'options stratégiques affectant des modifications, à grande échelle, d'occupation des sols dans l'Union (voir point 1.1 du cahier des charges et la série de documents auxquels il était fait référence dans l'avis de marché produite par la Commission en réponse à une demande faite en ce sens par le Tribunal).

41 Or, force est de constater que l'offre de la requérante ne fournit pas d'éléments permettant de comprendre de quelle manière elle entend concrètement élaborer le modèle demandé. Cette offre n'expose pas comment le modèle envisagé est susceptible d'assurer l'interface vers les différentes bases de données existantes, ni comment les scénarios prévus seront développés et évalués. L'offre de la requérante reste trop vague et imprécise afin de permettre notamment d'apprécier le cadre de modélisation envisagé pour satisfaire à l'avis de marché. La reproduction du contenu de certaines des spécifications techniques définies par le cahier des charges ne saurait démontrer qu'une offre présente le degré de compréhension requis du soumissionnaire.

42 À titre d'illustration, on peut relever, comme le fait la Commission dans ses écritures sans être contredite par la requérante, que l'offre de cette dernière ne prend pas en considération les différents niveaux d'intégration évoqués par le cahier des charges, qui vont de l'Union à l'échelon NUTS-3. De même, l'examen des données présentées dans les tableaux illustratifs 2.1 à 3.5 de l'offre permet de constater qu'elles ne concernent pas le territoire de l'Union, mais ceux du Yemen et du Brésil. C'est à bon droit que la Commission considère qu'aucun élément ne permet de comprendre en quoi ces données et le modèle utilisé pour les rassembler pourraient répondre aux objectifs définis dans l'avis de marché.

43 Par ailleurs, de manière générale, il y a lieu de relever que l'offre de la requérante n'explique pas comment le modèle envisagé et les exemples fournis sont à même de satisfaire les besoins des directions générales de la Commission en ce qui concerne l'évaluation antérieure ou postérieure des impacts environnementaux, économiques et sociaux en matière d'utilisation des sols compte tenu des différents scénarios d'évolution économique, démographique et climatique qui sont à envisager. C'est ainsi à bon droit que la Commission relève qu'il peut sembler paradoxal d'indiquer, en page 12 de l'offre, que l'accent est mis sur la « simplicité d'utilisation de ce modèle par des usagers non spécialisés », comme cela est requis par l'avis de marché, tout en ajoutant aussitôt que « pour fonctionner correctement, ce modèle nécessite des bases de données et des modèles de simulation qui devront être développés et gérés par des usagers sectoriels expérimentés ». Le cahier des

charges prévoyait, à cet égard, que l'interface du module demandé soit adaptée aux besoins des utilisateurs finals à la Commission et qu'elle constitue un « système analytique facile à utiliser » (point 1.3.A du cahier des charges), or l'offre ne précise pas comment le système proposé pourrait répondre à cette demande.

44 Il ne peut donc être reproché au comité d'évaluation d'avoir considéré que « l'offre témoigne d'une très mauvaise compréhension des questions en jeu ainsi que de la nature du travail à réaliser et du contenu des produits finals ».

45 En ce qui concerne la critique de la requérante relative à l'appréciation contenue dans la décision attaquée selon laquelle son « offre se focalise exclusivement sur la définition d'un système DPSIR », il y a lieu de relever que cette appréciation n'est pas à prendre au pied de la lettre comme le fait valoir la requérante en expliquant, dans sa réponse écrite à une question du Tribunal sur ce point, que seuls 3 des 43 paragraphes de son offre font expressément référence au système DPSIR, mais au sens large.

46 Cette appréciation reprend ainsi, en substance, l'affirmation faite par la requérante dans son offre s'agissant de la « définition du cadre de modélisation » :

« Le cadre de modélisation que nous proposons reprend la logique du DPSIR, tout en proposant un développement innovant de celle-ci qui vise à la rendre plus efficace dans l'analyse des dynamiques socioéconomiques et environnementales, en empruntant à cet effet des approches conceptuelles et méthodologiques largement utilisées dans d'autres disciplines (c'est-à-dire le développement de bases de données et les applications logicielles). Nous décrirons ci-après en quoi consiste la logique innovante que nous utilisons, en montrant dans le même temps comment celle-ci se rattache au cadre DPSIR et de quelle façon elle intègre et accroît les possibilités de ce dernier. »

47 L'appréciation contenue dans la décision attaquée ne dénature donc pas le contenu de l'offre de la requérante. Cette appréciation n'est également pas, comme l'affirme la requérante, non motivée et techniquement erronée. Elle ne fait que synthétiser le contenu du cadre de modélisation proposé dans l'offre de la requérante. Il importe peu, à cet égard, que, comme le fait observer la requérante, « le DPSIR a[it] été développé et couramment utilisé par l'Agence européenne pour l'environnement », ce que, au demeurant, la Commission ne conteste nullement.

48 En ce qui concerne l'appréciation contenue dans la décision attaquée selon laquelle « la page 10 de l'offre de [la requérante] suggère même l'utilisation potentielle de modèles d'occupation des sols, alors que l'objet du marché consistait justement à bâtir un modèle d'occupation des sols et à mener l'évaluation de scénarios », il y a lieu de relever que ladite page indique que la requérante construira une « plate-forme logicielle unique pour gérer les différents modèles d'occupation des sols disponibles de manière interdépendante et interconnectée », sans toutefois que les modalités techniques de cette réalisation soient précisées.

49 Cette observation du comité d'évaluation reprise dans la décision attaquée vise seulement à indiquer, comme le fait valoir à juste titre la Commission, que l'offre ne permet pas de comprendre comment les objectifs définis par le cahier des charges sont susceptibles d'être concrètement atteints par le modèle proposé par la requérante.

50 Cette observation, comme celles qui la précèdent, ne dénature pas le contenu de l'offre de la requérante pas plus qu'elle ne viole l'avis de marché. L'appréciation qui sous-tend cette observation est d'ailleurs confirmée par l'affirmation faite par la requérante dans la réplique, où elle indique que « non seulement elle n'a entendu proposer aucun nouveau modèle d'occupation des sols, mais, en plus, elle a précisé, avec au moins douze pages d'explications, le modèle qu'elle aurait examiné en fonction de ce qui était indiqué dans l'avis de marché », alors que l'objectif de l'avis de marché n'était pas d'« examiner » un modèle, mais d'en créer un nouveau, à savoir un cadre de modélisation capable de compléter et d'intégrer les données obtenues dans le cadre de projets de recherche précédents en matière d'occupation des sols compte tenu de différents scénarios d'évaluation.

51 Il ressort de ce qui précède que les griefs de la requérante relatifs à l'appréciation de son offre au regard du premier critère d'évaluation doivent être rejetés.

Sur l'évaluation du deuxième critère d'attribution

52 Le deuxième critère d'attribution du marché visait « d'une part, à évaluer dans quelle mesure la

méthode proposée permet[tait] de traiter de manière réaliste et structurée les questions sur lesquelles repos[ait] l'offre et, d'autre part, à déterminer si les méthodes proposées correspond[ai]ent aux besoins décrits par la Commission » (point 3.3 du cahier des charges). Pour être considéré comme techniquement apte, le soumissionnaire devait obtenir au moins 24 points sur un maximum de 40 points (point 3.4 du cahier des charges).

53 La décision attaquée indique ce qui suit en ce qui concerne ce critère :

« Critère d'attribution nº 2 : méthode (min. 24 – max. 40 points)

À cause de la mauvaise compréhension à laquelle il a été fait référence ci-dessus, la méthode proposée se concentre exclusivement sur les flux d'utilisation des sols et sur une simulation SIG [système d'information géographique]. L'offre ne fournit aucune explication en ce qui concerne l'intégration des différents modèles. »

54 Cette explication, communiquée à la requérante dans la décision attaquée, est reprise du procès-verbal du comité d'évaluation des offres. Il ressort de ce procès-verbal que la requérante a obtenu la note de 9 points sur 40 en ce qui concerne le deuxième critère d'attribution, tandis que l'offre retenue a obtenu une note de 34,8 points sur 40.

55 En réponse à la demande faite en ce sens par la requérante, la Commission, dans une lettre du 18 novembre 2008, lui a indiqué les raisons pour lesquelles l'offre du centre de recherche avait été choisie. Ces raisons, connues de la requérante quand elle a introduit son recours, ne sont pas contestées dans la présente affaire.

– Arguments des parties

56 La requérante soutient que la décision attaquée dénature son offre en ce que la Commission soutiendrait qu'elle n'a pas entendu proposer le développement d'un modèle d'occupation des sols, mais s'est contentée d'en suggérer l'utilisation éventuelle. Or, son projet indiquerait explicitement qu'un modèle d'occupation des sols intégrant les différents modèles issus du sixième programme-cadre de recherche serait développé. De plus, onze pages de l'offre seraient consacrées à l'explication des méthodes d'intégration des différents modèles d'occupation des sols requis par l'avis de marché et à l'exposé d'exemples concrets.

57 La Commission conteste cette analyse en se référant au contenu de l'offre de la requérante.

– Appréciation du Tribunal

58 En ce qui concerne l'allégation selon laquelle l'évaluation présentée dans la décision attaquée serait erronée parce que la méthode proposée ne se concentrerait pas exclusivement sur les flux d'utilisation des sols et sur une simulation SIG, il convient de relever que, dans son offre, la requérante se limite à formuler des affirmations générales sans les étayer par une véritable description des modèles proposés ou des modalités concrètes selon lesquelles elle entend se servir des données existantes et intégrer les modèles proposés. Cette offre ne fait que fournir des éléments qui ne permettent qu'une simple représentation graphique des flux d'occupation des sols, ce que démontrent d'ailleurs les différentes illustrations qui y sont présentées. Le modèle d'occupation des sols suggéré ne correspond donc pas au modèle demandé dans l'avis de marché, qui doit démontrer sa capacité à coordonner les différentes instances compétentes en matière d'occupation des sols et à assurer l'interface vers et entre les différentes bases de données existantes.

59 En ce qui concerne l'allégation selon laquelle l'évaluation précitée serait erronée parce que onze pages de l'offre seraient consacrées à l'explication des méthodes d'intégration des différents modèles d'occupation des sols requis par l'avis de marché, force est de constater que lesdites pages ne contiennent pas d'explication détaillée et concrète relative à une telle intégration. La description fournie reste très générale et les exemples indiqués ne sont pas directement pertinents eu égard à l'objet du marché litigieux, ainsi qu'il a déjà été exposé dans le cadre de l'appréciation des arguments relatifs à l'évaluation du premier critère (voir point 41 ci-dessus).

60 Il ressort de ce qui précède que les griefs de la requérante relatifs à l'appréciation de son offre au regard du deuxième critère d'évaluation doivent être rejetés.

Sur l'évaluation du troisième critère d'attribution

61 Au titre du troisième critère d'attribution du marché, « les offres [devaient être] évaluées du point de vue de la qualité de l'organisation de l'équipe, du temps attribué à chacun des membres de l'équipe et de la disponibilité des ressources nécessaires pour permettre l'exécution des tâches contractuelles », les offres devant « contenir une description claire de ces aspects » (point 3.3 du cahier des charges). Pour être considéré comme techniquement apte, le soumissionnaire devait obtenir au moins 18 points sur un maximum de 40 points (point 3.4 du cahier des charges).

62 La décision attaquée indique ce qui suit en ce qui concerne ce critère :

« Critère d'attribution nº 3 : gestion de projet et disponibilité (min. 18 – max. 30 points)

Le soumissionnaire propose une équipe compacte, en expliquant comment les tâches principales seront attribuées à chaque membre. Cependant, il existe de sérieuses inquiétudes quant à la disponibilité du personnel, notamment en ce qui concerne une prétendue implication à plein temps du directeur général pendant la durée du projet : dans une large mesure, cela paraît irréaliste. De plus, comme aucun détail n'est fourni à propos des ressources qui seront allouées à chaque tâche, il n'est pas possible d'appréhender convenablement l'approche et la gestion de la mise en œuvre du projet. Un autre point, qui revêt la même importance, concerne la composition de l'équipe et ses compétences professionnelles ; celle-ci justifie d'une expérience très limitée dans le domaine de la modélisation de l'occupation des sols, et plus exactement dans le développement d'outils d'assistance basés sur le SIG. Le défaut de représentativité géographique des membres de l'équipe doit également être noté, auquel il faut ajouter une très faible expérience des projets européens. »

63 Cette explication, communiquée à la requérante dans la décision attaquée, est reprise du procès-verbal du comité d'évaluation des offres. Il ressort de ce procès-verbal que la requérante a obtenu la note de 10,6 points sur 30 en ce qui concerne le troisième critère d'attribution, tandis que l'offre retenue a obtenu une note de 27,4 points sur 30.

64 En réponse à la demande faite en ce sens par la requérante, la Commission, dans une lettre du 18 novembre 2008, lui a indiqué les raisons pour lesquelles l'offre du centre de recherche avait été choisie. Ces raisons, connues de la requérante quand elle a introduit son recours, ne sont pas contestées dans la présente affaire.

– Arguments des parties

65 Premièrement, la requérante soutient que la Commission, dans la décision attaquée, relève, « de manière injustifiée et péremptoire », que l'implication de son directeur dans l'exécution du projet ne serait pas réaliste. Au contraire, le curriculum vitae du directeur, joint à l'offre de la requérante, démontrerait qu'il a toujours participé à la totalité de ses projets de manière active et satisfaisante. De plus, la taille de la requérante ne laisserait aucun doute quant à la faisabilité de l'investissement à plein temps de son directeur dans la réalisation d'un projet de quatorze mois. L'avis de marché ne prévoirait d'ailleurs aucune limite de taille en ce qui concerne les entreprises participantes.

66 Deuxièmement, la requérante soutient que l'affirmation contenue dans la décision attaquée selon laquelle son personnel impliqué dans le projet ne bénéficierait pas d'une représentativité géographique suffisante est dépourvue de toute pertinence au regard de l'avis de marché, qui prévoit que la sélection se fera en considération du meilleur rapport qualité/prix.

67 Troisièmement, la requérante fait valoir que l'affirmation selon laquelle elle aurait une expérience limitée des projets européens ne renvoie pas à un élément exigé par l'avis de marché. Une évaluation menée sur cette base serait arbitraire et discriminatoire. Les expériences européennes ne seraient pas plus déterminantes que les expériences auprès des Nations unies et de l'Union internationale pour la conservation de la nature mises en avant par la requérante. Par ailleurs, le centre de recherche déclarerait sur son site Internet que 80 % du chiffre d'affaires de son département « Recherche internationale » provient de financements octroyés dans le cadre du sixième programme de recherche de l'Union, d'où doivent être tirés les modèles à utiliser pour le développement du modèle d'occupation des sols faisant l'objet de l'avis de marché. Le marché serait ainsi attribué à une société qui a déjà reçu des financements communautaires dans le cadre du programme dont on souhaite utiliser les résultats.

68 La Commission conteste cette analyse.

– Appréciation du Tribunal

69 À titre liminaire, il convient de rappeler que, pour être évaluée au regard du troisième critère d'attribution, l'offre soumise devait, aux termes du point 3.3 du cahier des charges, contenir une description claire de la qualité de l'organisation de l'équipe, du temps attribué à chacun de ses membres et de la disponibilité des ressources nécessaires pour permettre l'exécution des tâches contractuelles. À cet égard, la Commission relève, dans la décision attaquée, qu'« aucun détail n'est fourni à propos des ressources qui seront allouées à chaque tâche, [et qu']il n'est pas possible d'appréhender convenablement l'approche et la gestion de la mise en œuvre du projet ».

70 Cette appréciation n'est pas contestée par la requérante, qui se limite à contester les appréciations exposées dans la décision attaquée en ce qui concerne la disponibilité de son personnel, et notamment du directeur général, sa représentativité géographique et son expérience des projets européens.

71 Il y a donc lieu de tenir compte de cette appréciation non contestée dans le cadre de l'examen de l'évaluation effectuée par la Commission au titre du troisième critère d'attribution.

72 En ce qui concerne l'allégation selon laquelle ce serait « de manière péremptoire et injustifiée » que le comité d'évaluation a considéré qu'« il existe de sérieuses inquiétudes quant à la disponibilité du personnel, notamment en ce qui concerne une prétendue implication à plein temps du directeur général pendant la durée du projet : dans une large mesure, cela paraît irréaliste », il convient de relever que la « disponibilité des ressources » est expressément mentionnée dans le cahier des charges au nombre des différents éléments permettant d'évaluer les offres dans le cadre du troisième critère d'attribution.

73 La requérante ne peut donc reprocher à la Commission d'avoir pris en compte des données relatives à la disponibilité des ressources humaines dans son évaluation. À ce titre, la petite taille de la requérante et le faible nombre de personnes y travaillant permettent effectivement de supposer, en l'absence de détails fournis sur ce point dans son offre, qu'il pourrait lui être difficile d'assumer le marché en cause compte tenu de ses autres activités. Ces observations valent tout particulièrement pour son directeur général, la Commission prenant soin d'indiquer que ce ne sont pas ses compétences qui sont mises en cause, mais simplement sa disponibilité pour le projet compte tenu de ses autres obligations en tant que dirigeant d'entreprise.

74 Ce premier grief doit donc être rejeté.

75 En ce qui concerne les affirmations du comité d'évaluation selon lesquelles « le défaut de représentativité géographique des membres de l'équipe doit également être noté, auquel il faut ajouter une très faible expérience des projets européens », il convient de relever que, à la différence de la disponibilité des ressources, la notion de représentativité géographique et l'expérience des projets européens ne sont pas mentionnées dans le cahier des charges au nombre des différents éléments permettant d'évaluer les offres dans le cadre du troisième critère d'attribution.

76 Lors de l'audience, la Commission a indiqué que ces éléments ne renvoient pas à de nouveaux critères d'attribution, appliqués de manière discriminatoire. Il se serait seulement agi, pour le comité d'évaluation, d'apprécier l'offre de la requérante dans le cadre du troisième critère d'attribution. Aucun de ces éléments n'aurait été invoqué pour contester à la requérante toute possibilité de mener à bien le marché, comme celle-ci l'affirmerait sans autre forme de démonstration.

77 Quels que soient les doutes que peuvent susciter l'argumentation présentée par la Commission lors de l'audience, il y a lieu de relever que, à supposer même que la requérante se soit vu attribuer le maximum de points au regard du troisième critère d'attribution (30 points sur 30), cela ne suffirait pas pour lui permettre d'atteindre le minimum de points requis par l'appel d'offres. En effet, dans cette hypothèse, la requérante n'aurait obtenu que 8, 9 et 30 points, soit 47 points sur les 65 requis pour que son offre soit considérée comme techniquement satisfaisante.

78 En conséquence, même si le Tribunal jugeait les griefs relatifs au troisième critère d'attribution en partie fondés en ce qui concerne les appréciations relatives à la représentativité géographique des membres de l'équipe et à l'expérience des projets européens, ces griefs devraient tout de même être rejetés comme inopérants au vu du rejet des griefs de la requérante en ce qui concerne le premier et le deuxième critères d'attribution.

79 Enfin, il convient de relever que l'observation de la requérante en ce qui concerne les fonds

communautaires prétendument octroyés par le passé au centre de recherche est sans incidence sur l'appréciation de l'évaluation du comité d'évaluation en ce qui concerne le projet de la requérante, seule évaluation à faire l'objet de la présente affaire.

80 Il ressort de ce qui précède que les griefs de la requérante relatifs à l'appréciation de son offre au regard du troisième critère d'évaluation doivent être rejetés.

81 Au vu de l'ensemble des considérations qui précèdent, il convient donc de rejeter le présent recours.

Sur les dépens

82 Aux termes de l'article 87, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La requérante ayant succombé, il y a lieu de la condamner aux dépens, conformément aux conclusions de la Commission.

Par ces motifs,

LE TRIBUNAL (troisième chambre)

déclare et arrête :

1) Le recours est rejeté.

2) Proges – Progetti di sviluppo Srl est condamnée à supporter ses propres dépens ainsi que ceux de la Commission européenne.

Azizi Cremona Frimodt Nielsen

Ainsi prononcé en audience publique à Luxembourg, le 26 mars 2010.

Signatures

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* Langue de procédure : l'italien.

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Action brought on 23 December 2008 - Proges v Commission

(Case T-577/08)

Language of the case: Italian

Parties

Applicant: Proges srl (Rome, Italy) (represented by: M. Falcetta, lawyer)

Defendant: Commission of the European Communities

Forms of order sought

Annul the contested decision, thereby giving rise to all consequential measures, including compensation for damages;

- Order the defendant to pay the costs of the proceedings, together with all related fees and expenses.

Pleas in law and main arguments

The present action is brought against the measure by which the Commission declined to award the applicant the contract covered by invitation to tender ENV.G.1./SER/2008/0050 for the creation of land use models and, in particular, for the assessment of environmental impact.

In support of its claims, the applicant submits that:

the decision was incorrect in so far as it stated that the applicant's bid focused exclusively on the Driving force-Pressure-State-Impact-Response (DPSIR) model; in any event, the tender specifications specifically require the integrated use of 'social, economic and environmental institutional indicators of land use changes', with DPSIR being the most internationally established tool for the management and integration of such indicators. Moreover, DPSIR has been developed and properly used by the European Environment Agency. The tool in fact proposed by the applicant is a DPSIR model updated in accordance with an innovative methodology and already successfully used in several projects of the United Nations and the International Union for the Conservation of Nature (IUCN);

contrary to what is stated in the contested decision, it is specifically stated in the applicant's bid that a land use model will be developed integrating the various models arising from the Sixth Framework Research Programme;

there is no reason to doubt the appropriateness of involving the applicant's director in the implementation of the project;

geographical representativeness is rightly not referred to in the invitation to tender since the project is not concerned with development, integration and/or inter-European cohesion. Furthermore, it is not understood on what basis, for the purposes of assessing a company, European experience is deemed more valuable than the United Nations and IUCN experience possessed by the applicant.

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there is no reason to doubt the appropriateness of involving the applicant's director in the implementation of the project;

geographical representativeness is rightly not referred to in the invitation to tender since the project is not concerned with development, integration and/or inter-European cohesion. Furthermore, it is not understood on what basis, for the purposes of assessing a company, European experience is deemed more valuable than the United Nations and IUCN experience possessed by the applicant.

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Action brought on 8 December 2008 - Evropaïki Dynamiki/Commission

(Case T-554/08)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athènes, Greece) (represented by: N. Korogiannakis, P. Katsimani and M. Dermitzakis, lawyers)

Defendant: Commission of the European Communities

Form of order sought

annul DG TAXUD's decision to reject the bid of the applicant, filed in response to the open Call for Tender TAXUD/2007/AO-005 (TIMEA) for the "Provision of services for the Community computer applications in the customs, excise and taxation areas" (OJ 2008/S 203-268728) which was communicated to the applicant by letter dated 26 September 2008 and all further related decisions of the Commission including the one to award the contract to the successful contractor;

order DG TAXUD to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 7 638 125;

order DG TAXUD to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

By means of its application the applicant seeks the annulment pursuant to Article 230 EC of the European Commission's (DG TAXUD) decision to reject the bid filed by the applicant in response to the open Call for Tenders TAXUD/2007/AO-005(TIMEA) for the "Provision of services for the Community computer applications in the customs, excise and taxation areas" (OJ 2008/S 203-268728) which was communicated to the applicant by letter dated 26 September 2008, as well as the award of damages pursuant to Article 235 EC.

The applicant claims that the Evaluation Committee committed various manifest errors of assessment with regards to the evaluation of the tender. According to the applicant, the Evaluation Committee deviated from the standard policy of the Commission and ignored the provisions included in the tender specifications of TIMEA, which suggest that the contracting authorities should contact the tenderer in the context of the selection phase of a Call for Tenders, and ask for additional information or clarifications. It is further submitted that Article 100 of the Financial Regulation and the principles of good administration and of legitimate expectations were breached by the contracting authority. In addition, the applicant claims that the contracting authority misused its powers and violated the principles of transparency and equal treatment provided for in Article 93(1) of the Financial Regulation.

The applicant claims that the defendant failed to provide the applicant with an adequate analysis of the outcome of the verifications carried out further to the applicant's comments on the evaluation report.

The applicant contends that the defendant used abusively the selection criteria in order to de-select the applicant's tender. By doing so, it infringed Articles 134(2) and 148(3) of Commission Regulation (EC, Euratom) No 2342/2002[1], as well as Article 32(2) of Directive 92/50[2].

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[1] - Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1)

[2] - Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1)

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Action brought on 8 December 2008 - Evropaïki Dynamiki/Commission

(Case T-554/08)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athènes, Greece) (represented by: N. Korogiannakis, P. Katsimani and M. Dermitzakis, lawyers)

Defendant: Commission of the European Communities

Form of order sought

annul DG TAXUD's decision to reject the bid of the applicant, filed in response to the open Call for Tender TAXUD/2007/AO-005 (TIMEA) for the "Provision of services for the Community computer applications in the customs, excise and taxation areas" (OJ 2008/S 203-268728) which was communicated to the applicant by letter dated 26 September 2008 and all further related decisions of the Commission including the one to award the contract to the successful contractor;

order DG TAXUD to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 7 638 125;

order DG TAXUD to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

By means of its application the applicant seeks the annulment pursuant to Article 230 EC of the European Commission's (DG TAXUD) decision to reject the bid filed by the applicant in response to the open Call for Tenders TAXUD/2007/AO-005(TIMEA) for the "Provision of services for the Community computer applications in the customs, excise and taxation areas" (OJ 2008/S 203-268728) which was communicated to the applicant by letter dated 26 September 2008, as well as the award of damages pursuant to Article 235 EC.

The applicant claims that the Evaluation Committee committed various manifest errors of assessment with regards to the evaluation of the tender. According to the applicant, the Evaluation Committee deviated from the standard policy of the Commission and ignored the provisions included in the tender specifications of TIMEA, which suggest that the contracting authorities should contact the tenderer in the context of the selection phase of a Call for Tenders, and ask for additional information or clarifications. It is further submitted that Article 100 of the Financial Regulation and the principles of good administration and of legitimate expectations were breached by the contracting authority. In addition, the applicant claims that the contracting authority misused its powers and violated the principles of transparency and equal treatment provided for in Article 93(1) of the Financial Regulation.

The applicant claims that the defendant failed to provide the applicant with an adequate analysis of the outcome of the verifications carried out further to the applicant's comments on the evaluation report.

The applicant contends that the defendant used abusively the selection criteria in order to de-select the applicant's tender. By doing so, it infringed Articles 134(2) and 148(3) of Commission Regulation (EC, Euratom) No 2342/2002[1], as well as Article 32(2) of Directive 92/50[2].

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Action brought on 3 December 2008 - Evropaïki Dynamiki v ECHA

(Case T-542/08)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, P. Katsimani, and M. Dermitzakis, lawyers)

Defendant: European Chemicals Agency

Form of order sought

annul European Chemicals Agency's decision to reject the bid of the applicant, filed in response to the open Call for Tender ECHA/2008/24 for the "Development of a Chemical Safety Assessment tool" (OJ 2008/S 115-152918), communicated to the applicant by an undated letter received by the applicant on 25 September 2008 and all subsequent decisions of ECHA including that to award it to the successful contractor;

order ECHA to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 1 500 000;

order ECHA to pay the applicant's legal costs incurred in connection with this application even if the current application is rejected.

Pleas in law and main arguments

By means of its application, the applicant seeks the annulment of the European Chemicals Agency's ("ECHA") decision which was notified to it by way of a letter on 25 September 2008 informing the applicant that its bid submitted in the framework of the contract ECHA/2008/24 for the "Development of a Chemical Safety Assessment tool" (OJ 2008/S 115-152918) had not been selected and that the contract had been attributed to TRASYS SA.

The applicant claims that the Evaluation Committee committed multiple errors of assessment in relation to the award criteria, whereas fundamental rules and basic principles of public procurement were allegedly infringed by the contracting authority. Moreover, it is submitted that the ECHA misused its powers in the tender evaluation, infringed the Financial Regulation, and/or the principles of transparency and of equal treatment and that it used vague terms or insufficient motivation to substantiate its decision. Finally, the applicant contends that the defendant breached an essential procedural requirement, deriving from Article 158a of Commission Regulation (EC, Euratom) No 478/2007[1], providing for a standstill period before signing the contract with the successful tenderer. The applicant claims that the defendant has deliberately delayed communicating with the applicant in order to be able to finalise the signature of the contract with the wining tenderer before it received any comments from the applicant, thus annulling the spirit and purpose of the standstill period.

In addition, the applicant requests monetary compensation equal to EUR 1 500 000, corresponding to the estimated gross profit from the aforementioned public procurement procedure, should it have been awarded the contract. The applicant submits that its claim for damages is based upon its substantiated arguments that there has been a sufficiently serious breach of a superior rule of law for the protection of the individual and that the institutions concerned manifestly and gravely disregarded the limits on the exercise of their powers.

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[1] - Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2007 L 111, p. 13)

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ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

23 January 2009 (*)

(Application for interim measures – Public procurement – Rejection of a tender – Application for suspension of operation of a measure – Loss of opportunity – No urgency)

In Case T–511/08 R,

Unity OSG FZE, established at Sharjah (United Arab Emirates), represented by C. Bryant and J. McEwen, Solicitors,

applicant,

v

Council of the European Union, represented by G. Marhic and A. Vitro, acting as Agents,

European Union Police Mission in Afghanistan (EUPOL Afghanistan), established in Kabul (Afghanistan),

defendants,

APPLICATION for suspension of operation of the decision taken by EUPOL Afghanistan in the course of a tendering procedure to reject the applicant's tender and to award to another tenderer the contract for the provision of guarding and close protection services in Afghanistan,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Background to the dispute, procedure and forms of order sought by the parties

1 In December 2007, the European Union Police Mission in Afghanistan (EUPOL Afghanistan), established pursuant to Council Joint Action 2007/369/CFSP of 30 May 2007 (OJ 2007 L 139, p. 33), had entered into a contract with the applicant, Unity OSG FZE, for the provision of security services. That contract was valid until 30 November 2008.

2 At the end of September 2008, EUPOL Afghanistan published a service procurement notice relating to the provision of guarding and close protection services in Afghanistan, which was intended to replace the then contract as from 1 December 2008 for an initial duration of 12 months, with the possibility of an extension. The purpose of the contract was, essentially, to ensure the full and continued protection of all EUPOL Afghanistan staff in the city of Kabul and other areas of Afghanistan, and the security services required included guarding, close protection and residential security. It was estimated that fulfilment of the obligations under the contract would require approximately 67 positions of diverse categories, involving some 118 persons.

3 Having submitted a request to participate in the tendering procedure and received an invitation to tender, the applicant submitted its tender on 12 November 2008, that is, within the period

prescribed in that regard.

4 On 23 November 2008, the applicant received a letter from EUPOL Afghanistan informing it that its tender had been rejected and that the contract had been awarded to ArmorGroup ('the contested decision'). By letter of 24 November 2008, the applicant protested to EUPOL Afghanistan against its elimination from the procedure and indicated that it intended to challenge the award of the contract.

5 The applicant took the view that there had been unlawful contact between EUPOL Afghanistan and ArmorGroup during the procurement procedure in question, and brought an action for annulment of the contested decision by application lodged at the Registry of the Court of First Instance on 27 November 2008.

6 By a separate document lodged at the Court Registry on the same date, the applicant brought the present application for interim measures in which it claims, in essence, that the President of the Court should:

– suspend the operation of the contested decision, pursuant to Article 105(2) of the Rules of Procedure of the Court of First Instance, pending the adoption of a final order in the present proceedings for interim measures and, in any event, until the Court has ruled on the main action;

– order any such other forms of interim relief considered appropriate;

– order the Council and EUPOL Afghanistan to pay the costs.

7 In its written observations on the application for interim measures, lodged at the Court Registry on 5 December 2008, the Council contends that the President of the Court should:

– dismiss the application for interim measures;

– order the applicant to pay the costs.

8 EUPOL Afghanistan did not lodge any pleading.

9 On 1 December 2008, the President of the Court put questions to the parties in writing. The applicant and the Council replied to those questions within the prescribed period.

Law

10 Under Articles 242 EC and 243 EC in conjunction with Article 225(1) EC, the judge hearing an application for interim measures may, if he considers that circumstances so require, order that application of an act contested before the Court of First Instance be suspended or prescribe any necessary interim measures.

11 Article 104(2) of the Rules of Procedure provides that an application for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Thus, suspension of the operation of an act or interim measures may be ordered if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as it must, in order to avoid serious and irreparable harm to the applicant's interests, be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court in Case C–268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I–4971, paragraph 30).

12 In addition, in the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a preestablished scheme of analysis within which the need to order interim measures must be assessed (orders of the President of the Court in Case C–149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I–2165, paragraph 23, and of 3 April

2007 in Case C–459/06 P(R) *Vischim* v *Commission*, not published in the ECR, paragraph 25).

13 Finally, it is important to note that Article 242 EC lays down the principle that actions do not have suspensory effect (orders of the President of the Court in Case C–377/98 R *Netherlands* v *Parliament and Council* [2000] ECR I–6229, paragraph 44, and Case T–191/98 R II *Cho Yang Shipping* v *Commission* [2000] ECR II–2551, paragraph 42). It is only in exceptional cases, therefore, that the judge hearing an application for interim measures may order that application of an act contested before the Court be suspended or prescribe interim measures.

14 Having regard to the documents in the case, the President considers that he has all the information needed in order to rule on the present application for interim measures and that it is not necessary first to hear oral argument from the parties.

15 In the circumstances of the present case, it is necessary to consider, first, whether the condition of urgency is satisfied.

Arguments of the parties

16 The applicant submits that, if its application for interim measures is dismissed, it will suffer serious and irreparable damage as a result of the implementation of the contract at issue, which was due to commence on 1 December 2008. In view of various factors relating to the nature of the contract and the applicant's position as incumbent contractor, it will be affected in a manner that distinguishes it from other unsuccessful tenderers and will suffer harm for which it cannot adequately be compensated by the award of pecuniary damages, since the harm will be much more than merely financial.

17 The nature of the former contract and the new contract is, according to the applicant, such that the handover between contractors will entail a significant upheaval for the applicant. It will be obliged to move equipment and personnel out of Afghanistan and redeploy them elsewhere or to sell its equipment and dismiss its staff. Accordingly, personnel who were due to arrive in Afghanistan on 4 December 2008 could not travel there and the applicant will be obliged to redeploy them elsewhere or to terminate their contracts of employment, which will involve significant upheaval, given the scale and nature of the contracts concerned.

18 Furthermore, the applicant's ability to perform the contract will be irremediably prejudiced, even if it secures the annulment of the contested decision. The applicant's tender was submitted on the basis of the local experience of its personnel, its situation in Kabul and its equipment. If the contract between EUPOL Afghanistan and ArmorGroup is implemented as planned, the applicant will be obliged to minimise the resulting financial impact by selling its equipment, releasing its employees or redeploying them elsewhere. Having done so, the applicant will, in the event of a new tendering procedure, not be in a position to submit a tender of equivalent strength to that which it had submitted. Moreover, the applicant will no longer have its premises in Kabul available as a base from which to operate and its position will therefore be disadvantaged.

19 The applicant further submits that its ability to retain its security licence in Afghanistan will be irremediably prejudiced. The retention of that licence effectively depends on the applicant's participation in contracts such as that at issue in the present case. Moreover, if it loses its security licence, the applicant's capacity to carry out other work in Afghanistan will be affected as a result.

20 Finally, the loss of the contract at issue will cause serious damage to the reputation of the applicant as the incumbent contractor. That is particularly apparent when combined with the possible loss of the applicant's security licence. Those effects cannot be adequately quantified or compensated by the award of damages at a later stage.

21 The Council contends that the claims put forward by the applicant do not meet the required standard of proof that it will suffer serious and irreparable damage before a decision is reached in the main action. Consequently, the condition relating to the urgency of the interim measures applied for is not satisfied.

Findings of the President

22 It must be noted that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to

the party applying for those measures. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind (see orders of the President of the Court in Case T–151/01 R *Duales System Deutschland* v *Commission* [2001] ECR II–3295, paragraph 187; Case T–195/05 R *Deloitte Business Advisory* v *Commission* [2005] ECR II–3485, paragraph 124; and of 25 April 2008 in Case T–41/08 R *Vakakis* v *Commission*, not published in the ECR, paragraph 52 and case-law cited).

23 Where harm depends on the occurrence of a number of factors, it is enough for that harm to be foreseeable with a sufficient degree of probability (orders of the President of the Court of Justice in Case C–335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I–8705, paragraph 67, and of the Court of First Instance in Case T–369/03 R *Arizona Chemical and Others* v *Commission* [2004] ECR II–205, paragraph 71; see also, to that effect, order in Case C–280/93 R *Germany* v *Council* [1993] ECR I–3667, paragraphs 32 to 34). However, the applicant is still required to prove the facts which are deemed to attest to the probability of serious and irreparable damage (orders in *Arizona Chemical and Others* v *Commission*, paragraph 72, and *HFB and Others* v *Commission*, paragraph 67).

24 It is therefore necessary to consider whether, in the present case, the applicant has established with a sufficient degree of probability that it will suffer serious and irreparable damage if the interim measures it seeks are not granted.

25 As regards the seriousness of the damage pleaded in the present case, it must be noted that this is said to have been suffered on the occasion of a tendering procedure for the award of a contract. However, the purpose of such a procedure is to enable the authority concerned to select from a number of competing tenders that which appears to the authority to comply best with predetermined selection criteria. Moreover, the Community body which initiates such a procedure has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award the contract (Case T–145/98 *ADT Projekt* v *Commission* [2000] ECR II–387, paragraph 147; Case T–169/00 *Esedra* v *Commission* [2002] ECR II–609, paragraph 95; and Joined Cases T–376/05 and T–383/05 *TEA-CEGOS and Others* v *Commission* [2006] ECR II–205, paragraph 50).

26 Therefore, a company taking part in a tendering procedure never has an absolute guarantee that it will be awarded the contract, but must always keep in mind the possibility that the contract could be awarded to another tenderer. Under those circumstances, the adverse financial consequences which the company in question would suffer as a result of the rejection of its tender have, generally, to be considered to be part of the normal commercial risk which each company active in the market must face (order of the Judge hearing the application for interim measures of 14 September 2007 in Case T–211/07 R *AWWW* v *Eurofound*, not published in the ECR, paragraph 41).

27 It follows that the loss of an opportunity to be awarded and to perform a public contract forms an integral part of exclusion from the tendering procedure in question and cannot be regarded as constituting in itself serious damage, whether or not a specific assessment is made of the seriousness of the precise prejudice alleged in each case considered (see, to that effect, order in *Deloitte Business Advisory* v *Commission*, paragraph 150).

28 Therefore, the applicant undertaking's loss of an opportunity to be awarded and to perform the contract in the tendering procedure would constitute serious damage if it had shown to the requisite legal standard that it would have been able to derive sufficiently sizeable benefits from the award and performance of that contract. Furthermore, the seriousness of material damage must be assessed inter alia in the light of the size of the applicant undertaking (see, to that effect, order in *Deloitte Business Advisory* v *Commission*, paragraphs 151 and 156 and case-law cited).

29 In the present case, it must be held that the applicant has not produced any evidence at all to permit the inference, particularly in the light of its size, that the loss which it may suffer would be sufficiently serious to justify interim measures being ordered. In particular, it has not described the global, regional or local nature of its business of providing security services, indicating whether it was part of a group of undertakings which operate in a number of geographical markets or whether, on the contrary, the bulk of its turnover was achieved through EUPOL Afghanistan. However, as regards essential elements of fact and law establishing urgency, such information, substantiated by numerical data, should have been included in the application for interim measures (see, to that effect, orders of the President of the Court in Case T–236/00 R *Stauner and Others* v *Parliament and*

Commission [2001] ECR II–15, paragraph 34; Case T–306/01 R *Aden and Others* v *Council and Commission* [2002] ECR II–2387, paragraph 52; and Case T–85/05 R *Dimos Ano Liosion and Others* v *Commission* [2005] ECR II–1721, paragraph 37).

30 Therefore, in the absence of relevant evidence in the application for interim measures, the President is not in a position to determine whether, for the applicant, the loss of an opportunity to obtain the income arising from the performance of the contract in question would be sufficiently serious to justify ordering interim measures.

31 It should be added that the pecuniary damage claimed by the applicant cannot be regarded as being irreparable, or even reparable only with difficulty, since it may be the subject of subsequent financial compensation. The applicant has, in particular, failed to show that it would be unable to obtain such compensation by means of an action for damages under Article 288 EC (see, to that effect, order of the President of the Court in Case T–303/04 R *European Dynamics* v *Commission* [2004] ECR II–3889, paragraph 72 and case-law cited).

32 It is true that the applicant maintains that its damage cannot be adequately compensated by the award of pecuniary damages. However, the applicant submitted a tender for the contract at issue. It would be possible, therefore, in any future damages action, to compare that tender with the tender accepted by EUPOL Afghanistan (see, to that effect, order of the President of the Court of 15 July 2008 in Case T–202/08 R *CLL Centres de langues* v *Commission*, not published in the ECR, paragraph 79).

33 In that context, it is apparent from the recent case-law of the Court of Justice that, where the Court of First Instance awards damages on the basis of the economic value attributed to the damage suffered as a result of a loss of income, that reparation is, generally, capable of complying with the requirement to ensure that the individual damage actually suffered by the party concerned because of the particular unlawful acts of which it was the victim is fully compensated (see, to that effect, Case C–348/06 P *Commission* v *Girardot* [2008] ECR I–833, paragraph 76).

34 It follows from this that, should the applicant be successful in the main action, an economic value can be attributed to the damage suffered as a result of the loss of the opportunity to win the disputed tender procedure, which is capable of complying with the requirement that the individual damage actually suffered be fully compensated (see, to that effect, order in *Vakakis* v *Commission*, paragraph 67).

35 In the light of the foregoing, the interim measures sought could be justified in the circumstances of the present case only if it were apparent that in the absence of such measures the applicant would be in a situation which could endanger its very existence or irretrievably alter its position in the market (see, to that effect, order in *European Dynamics* v *Commission*, paragraph 73).

36 The applicant has not, however, adduced proof that, in the absence of the interim measures sought, it would be liable to be placed in such a situation.

37 The applicant has failed to provide data concerning its size and financial situation (see paragraph 29 above). Moreover, although the applicant submits that, if it did not obtain the contract at issue, it would suffer serious upheaval owing to the fact that it would have to move equipment out of Afghanistan, redeploy or dismiss its staff and give up its premises in Kabul, these are mere assertions which are not substantiated by any evidence that could lead the President to conclude that the applicant's existence will be endangered until the Court rules on the main action.

38 Furthermore, as regards in particular the argument that the applicant would be obliged to dismiss some of its employees, it is settled case-law that, in order to establish that the condition of urgency is met, an applicant is required to show that the suspension of operation sought is necessary in order to protect his own interests. However, in order to establish urgency, an applicant cannot plead damage to an interest which is not personal to him, such as for example to the rights of third parties (see order of the President of the Court in Case T–316/04 R *Wam* v *Commission* [2004] ECR II–3917, paragraph 28 and case-law cited). Therefore, the damage suffered by the applicant's employees cannot properly be invoked in order to substantiate the urgency of the suspension of operation sought. It is not damage to interests which are personal to the applicant (see, to that effect, orders of the President of the Court of 2 August 2006 in Case T–69/06 R *Aughinish Alumina* v

Commission, not published in the ECR, paragraph 81, and in Case T–31/07 R *Du Pont de Nemours (France) and Others* v *Commission* [2007] ECR II–2767, paragraphs 147 and 168).

39 In so far as the applicant pleads damage to its reputation, suffice it to note that participation in a public tendering procedure, by nature highly competitive, involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial. Where an undertaking has been unlawfully eliminated from a tendering procedure, there is even less reason to believe that it is liable to suffer serious and irreparable harm to its reputation, since its exclusion is unconnected with its competences and the subsequent annulling judgment will in principle allow any harm to its reputation to be made good (see order in *Deloitte Business Advisory* v *Commission*, paragraph 126 and case-law cited).

40 The applicant also maintains that the damage it will suffer is not confined to financial damage. In that regard, it complains of the risk of losing its security licence in Afghanistan and its capacity to carry out other work in that country if it were to lose the contract at issue. Nevertheless, again, these are mere assertions which are not substantiated by any evidence capable of being reviewed by the President. In particular, the applicant has failed to adduce evidence to show that the loss alone of the contract at issue would prevent it from being able to provide other security services on the same scale in the future or from participating in any tendering procedures launched by EUPOL Afghanistan in that sphere.

41 In any event, the applicant states that, without interim measures, any remedy granted to it after 30 November 2008 (date of the end of its contract with EUPOL Afghanistan) will have little practical effect and that its position will be irrevocably altered from 1 December 2008 (commencement date of the contract between EUPOL Afghanistan and ArmorGroup). Thus the applicant itself claims that, after those dates, the damage will have been caused and consequently cannot be 'prevented', as referred to in the case-law cited in paragraph 22 above, by the adoption of the interim measure sought. However, the purpose of proceedings for interim relief is not to ensure reparation for damage (orders of the President of the Court in Case T–47/03 R *Sison* v *Council* [2003] ECR II–2047, paragraph 41, and of 27 August 2008 in Case T–246/08 R *Melli Bank* v *Council*, not published in the ECR, paragraph 53).

42 Having regard to the foregoing, it must be concluded that the applicant has not established with the requisite degree of probability that, if the President does not grant the interim measures applied for, it will suffer serious and irreparable harm.

43 Therefore, the application for interim measures must be dismissed for lack of urgency, and there is no need to consider whether the application may be deemed admissible and, if so, whether the other conditions for the grant of the suspension of operation sought are satisfied.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 23 January 2009.

E. Coulon	M. Jaeger
Registrar	President

* Language of the case: English.

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Documents relating to the same case

Order of the President of the Court of First Instance of 23 January 2009 – Unity OSG FZE v Council and EUPOL Afghanistan

(Case T-511/08 R)

Application for interim measures – Public procurement – Rejection of a tender – Application for suspension of operation of a measure – Loss of opportunity – No urgency

1. *Application for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Prima facie case – Urgency – Cumulative nature – Order of examination and method of verification – Discretion of the judge dealing with the application for interim relief (Arts 225 EC, 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 11-12)*

2. *Application for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Urgency – Serious and irreparable damage – Burden of proof (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 22-23)*

3. *Application for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Urgency – Serious and irreparable damage (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 27-28)*

4. *Application for interim measures – Conditions of admissibility – Application – Formal requirements – Statement of the pleas in law establishing a prima facie case for granting the measures sought (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2) and (3)) (see para. 29)*

5. *Application for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Serious and irreparable damage – Financial loss (Arts 242 EC, 243 EC and 288 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 31, 33-34)*

6. *Application for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Serious and irreparable damage – Financial loss (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 35-37)*

7. *Application for interim measures – Suspension of operation of a measure – Conditions for granting – Urgency – Serious and irreparable damage – Burden of proof (Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see para. 38)*

8. *Application for interim measures – Suspension of operation of a measure – Conditions for granting – Serious and irreparable damage (Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see para. 39)*

APPLICATION for suspension of the operation of the decision, taken by EUPOL Afghanistan in the context of a call for tenders, to reject the applicant's tender and to award the contract for the provision of guarding and close protection services in

Afghanistan to another tenderer.

e part

The Court:

1. Dismisses the application for interim measures;

2. Reserves the costs.

Order of the President of the Court of First Instance of 23 January 2009 — Pannon Hőerőmű v Commission

(Case T-352/08 R)

(Interim measures — State aid — Commission decision declaring State aid granted by Hungary in favour of certain electricity producers by way of electricity purchasing agreements incompatible with the common market — Application for stay of execution — Lack of urgency — Balancing of interests)

(2009/C 82/44)

Language of the case: Hungarian

Parties

Applicant: Pannon Hőerőmű Energiatermelő, Kereskedelmi és Szolgáltató Zrt. (Pannon Hőerőmű Zrt.) (Pécs, Hungary) (represented by: M. Kohlrusz, P. Simon and G. Ormai, lawyers)

Defendant: Commission of the European Communities (represented by: C. Giolito and K. Talabér-Ritz, acting as Agents)

Re:

Application for stay of execution of Article 2 of Commission Decision C(2008) 2223 final of 4 June 2008 on State aid granted by the Republic of Hungary by way of electricity purchasing agreements.

Operative part of the order

1. *The application for interim measures is rejected.*

2. *Costs are reserved.*

Order of the President of the Court of First Instance of 23 January 2009 — Unity OSG FZE v Council and EUPOL Afghanistan

(Case T-511/08 R) ([1])

(Application for interim measures — Public procurement — Rejection of a tender — Application for suspension of operation of a measure — Loss of opportunity — No urgency)

(2009/C 82/45)

Language of the case: English

Parties

Applicant: Unity OSG FZE (Sharjah, United Arab Emirates) (represented by: C. Bryant and J. McEwen, Solicitors)

Defendants: Council of the European Union (represented by: G. Marhic and A. Vitro, Agents) and European Union Police Mission in Afghanistan (EUPOL Afghanistan) (Kabul, Afghanistan)

Re:

Application for suspension of the operation of the decision, taken by EUPOL Afghanistan in the context of a call for tenders, to reject the applicant's tender and to award the contract for the provision of guarding and close protection services in Afghanistan to another tenderer.

Operative part of the order

1. *The application for interim measures is dismissed.*

2. *Costs are reserved.*

([1]) OJ C 32, 7.2.2009.

Action brought on 3 October 2008 — CISAC v Commission

(Case T-442/08)

(2009/C 82/46)

Language of the case: English

Parties

Applicant: International Confederation of Societies of Authors and Composers (CISAC) (Neuilly-sur-Seine, France) (represented by: J.-F. Bellis and K. Van Hove, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul Article 3 of the Commission decision of 16 July 2008 relating to a proceeding under Article 81 EC and Article 53 EEA (Case COM/C2/38.698 — CISAC); and

— order the Commission to pay the costs.

Pleas in law and main arguments

By means of this application, the applicant seeks the annulment, pursuant to Article 230 EC, of Article 3 of the Commission decision of 16 July 2008 (Case COM/C2/38.698 — CISAC), determining that 24 of CISAC's EEA based societies engaged in a concerted practice in violation of Article 81 EC and Article 53 EEA 'by coordinating the territorial delineations of the reciprocal representation mandates granted to one another in a way which limits a licence to the domestic territory of each collecting society'.

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Action brought on 27/11/2008 - Unity OSG FZE/Conseil et EUPOL Afghanistan

(Case T-511/08)

Language of the case: English

Parties

Applicant: Unity OSG FZE (Dubai, United Arab Emirates) (represented by: C. Bryant and J. McEwen, lawyers)

Defendants: Council of the European Union and European Union Police Mission in Afghanistan ("EUPOL Afghanistan")

Form of order sought

Annul the decision of the European Union Police Mission in Afghanistan ("EUPOL Afghanistan") (i) to reject the applicant's tender in relation to the contract for provision of guarding and close protection services in Afghanistan, (ii) to award the contract to another tenderer as communicated to the applicant by letter of 23 November 2008;

order the defendant to bear the applicant's costs pursuant to Article 87 of the Rules of Procedure of the Court of First Instance.

Pleas in law and main arguments

On 19 December 2007, the applicant entered into a contract with the European Union Police Mission in Afghanistan[1] ("EUPOL Afghanistan") for the provision of security services. In September 2008, EUPOL Afghanistan issued a public procurement notice concerning the provision of guarding and close protection services which was published[2] on the European Commission's website in relation to the "EuropeAid" programme and in accordance to the provisions of Title V of Part One of the Financial Regulation 1605/2002[3] ("the Financial Regulation") and the detailed rules for the implementation of the Financial Regulation contained in Commission Regulation 2342/2002[4].

The applicant seeks the annulment of the decision of EUPOL Afghanistan of 23 November 2008, by which the applicant was informed that its tender had not been successful and that the contract would be awarded to Armor Group, on the basis of the following grounds:

First, the applicant claims that the defendant infringed the principles of equal treatment and non-discrimination provided for in Article 89(1) of the Financial Regulation.

Second, the applicant submits that the conditions applicable to contacts between the contracting authority and tenderers during the procurement process as set out in Article 99 of the Financial Regulation and in Articles 120(2)(d) and 148 of the Implementing Rules have been infringed.

Third, the applicant contends that the requirement to advertise a contract opportunity first in the *Official Journal of the European Union*, before being advertised elsewhere, as set out in Article 121 of the Implementing Rules, was infringed. According to the applicant, this requirement was infringed since the contract was advertised on the EuropAid website first, rather than in the Official Journal.

Fourth, the applicant submits that the requirement to respect the minimum time-limits under the accelerated restricted procedure laid down in Article 142(1) of the Financial Regulation has been infringed.

Fifth, the applicant claims that the defendant failed to respect the requirement set out in Article 158(a) of

the Implementing Rules, for a standstill period between the decision on contract award and signature of the contract. In addition, the applicant puts forward that the defendant failed to provide an adequate statement of reasons, in accordance with Article 253 EC.

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[1] - Established on 30 May 2007, pursuant to Council Joint Action 2007/369/CFSP (OJ 2007 L 139, p.33)

[2] - The notice was published in the supplement to the Official Journal of 7 October 2008, 2008/S 194-255613

[3] - OJ 2002 L 248, p. 1

[4] - OJ 2002 L 357, p. 1

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Action brought on 6 October 2008 - Evropaïki Dynamiki v BEI

(Case T-461/08)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athènes, Greece) (represented by: N. Korogiannakis and P. Katsimani, lawyers)

Defendant: European Investment Bank

Form of order sought

Annul the decision of the European Investment Bank to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

Order the European Investment Bank to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 1 940 000.00;

Order the European Investment Bank to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

By means of its application pursuant to Articles 230 EC and 235 EC, the applicant seeks, on one hand, the annulment of the decision of the European Investment Bank of 26 July 2008 to reject the bid of the applicant filed in response to the open Call for Tenders "EIB-Assistance in the Maintenance Support and Development of the loans front Office system (SERAPIS) at the European Investment Bank" (OJ 2007/S 176-215155), and on the other hand, compensation for damages.

The applicant claims that the outcome of the tender has not been communicated to it and that it came only incidentally to its knowledge that a contract award notice had been published in the Official Journal[1] of 26 July 2008. The applicant argues that the contested decision was taken by the defendant in violation of the principles of transparency and of equal treatment, and of the relevant provisions of the EIB's Guide for Procurement and the EC law on public procurement. It is submitted moreover that by not notifying the applicant of its award decision, by failing to provide sufficient justification of its decision to award the contract to another tenderer, by setting criteria that result in unequal treatment, by mixing selection and award criteria, by using a discriminatory evaluation formula of a ratio 75%/25%, the defendant allegedly failed to ensure undistorted competition through repeated infringements of the obligation of transparency and equal treatment.

The applicant furthermore claims that should the Court find that the defendant infringed the community law of public procurement and/or principles of legal transparency and of equal treatment, the applicant requests monetary compensation equal to 50% of EUR 3 880 000.00 (EUR 1 940 000.00) from EIB, corresponding to the estimated gross profit from the aforementioned public procurement procedure, should the contract have been awarded to the applicant.

The applicant further requests the Court to condemn the defendant to pay the applicant's legal costs even if the Court rejects the application, in accordance with Article 87(3)(b) of the Rules of Procedure of the Court of First Instance, since it considers that it was the defendant's deficient evaluation of the applicant's tender, as well as the failure to state reasons and inform the applicant timely on the relative merits of the successful tenderer that forced the applicant to seek legal redress before this Court.

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[1] - OJ 2008/S 144-192307

Further, it is submitted that the Commission misapplied Article 88(2) EC and Article 14(1) of Regulation (EC) No 659/1999 in targeting Elliniki Nafpigokataskevastiki, which was not the beneficiary of the aid, by ordering it to stop the Indemnification Guarantee.

Also, the applicants claim that the Commission's argument alleging circumvention of the *effet utile* of recovery wrongly relies on the assumption that circumvention occurs by the simple granting of the Indemnification Guarantee.

Finally, the applicants submit that the Commission misapplied Article 296 EC in that it does not allow HSY to carry on a certain degree of civil activities which are of an ancillary nature in order to sustain the operation of the whole shipyard.

(1) This consortium founded Elliniki Nafpigokataskevastiki in order to harbour the holding in HSY.
(2) HDW is wholy owned by ThyssenKrupp Marine Systems which also acquired Ferrostaaal's shares in Elliniki Nafpigokataskevastiki in 2005.

Action brought on 1 September 2008 — Evropaïki Dynamiki v Office for Official Publications of the European Communities

(Case T-387/08)

(2008/C 301/83)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, lawyer)

Defendant: Office for Official Publications of the European Communities

Form of order sought

— Annul the decision of the Office for Official Publications of the European Communities (OPOCE) to reject the bid of the applicant, filed in response to open Call for Tender AO 10185 for 'Computing Services — maintenance of the SEI-BUD/AMD/CR systems and related services' (OJ 2008/S 43-058884) communicated to the applicant by letter dated 20 June 2008 and to award the contract to the successful contractor;

— Order OPOCE to pay the applicant's damages suffered on account of the tendering procedure in question in the amount of EUR 1 444 930;

— Order OPOCE to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decision to reject its bid submitted in response to a call for an open tender AO 10185 regarding the 'Computing Services — maintenance of the SEI-BUD/AMD/CR systems and related services' and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages on account of the tendering procedure.

In support of its claims the applicant argues that by awarding the aforementioned tender to another bidder the defendant failed to comply with its obligations foreseen in the financial regulation (1), its implementing rules and Directive 2004/18/EC (2) as well as with the principles of transparency, equal treatment and proportionality.

The applicant moreover submits that the contracting authority infringed its obligation, foreseen in the above mentioned applicable rules, to sufficiently state reasons for its decision. Furthermore, the applicant alleges that the contracting authority used the criteria that were not expressively included in the call for tender, mixed evaluation with award criteria, therefore infringing the tender specifications, and committed several manifest errors of assessment which resulted in the rejection of the applicant's bid.

The applicant requests, hence, that the decision to reject its bid and to award the contract to the successful tenderer be annulled and that the defendant is ordered to pay, in addition to the applicant's legal expenses related to the proceedings, the damages suffered by the applicant on account of the tendering procedure.

(1) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, p. 1).
(2) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, p. 114).

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Action brought on 3 December 2008 - Evropaïki Dynamiki v ECHA

(Case T-542/08)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, P. Katsimani, and M. Dermitzakis, lawyers)

Defendant: European Chemicals Agency

Form of order sought

annul European Chemicals Agency's decision to reject the bid of the applicant, filed in response to the open Call for Tender ECHA/2008/24 for the "Development of a Chemical Safety Assessment tool" (OJ 2008/S 115-152918), communicated to the applicant by an undated letter received by the applicant on 25 September 2008 and all subsequent decisions of ECHA including that to award it to the successful contractor;

order ECHA to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 1 500 000;

order ECHA to pay the applicant's legal costs incurred in connection with this application even if the current application is rejected.

Pleas in law and main arguments

By means of its application, the applicant seeks the annulment of the European Chemicals Agency's ("ECHA") decision which was notified to it by way of a letter on 25 September 2008 informing the applicant that its bid submitted in the framework of the contract ECHA/2008/24 for the "Development of a Chemical Safety Assessment tool" (OJ 2008/S 115-152918) had not been selected and that the contract had been attributed to TRASYS SA.

The applicant claims that the Evaluation Committee committed multiple errors of assessment in relation to the award criteria, whereas fundamental rules and basic principles of public procurement were allegedly infringed by the contracting authority. Moreover, it is submitted that the ECHA misused its powers in the tender evaluation, infringed the Financial Regulation, and/or the principles of transparency and of equal treatment and that it used vague terms or insufficient motivation to substantiate its decision. Finally, the applicant contends that the defendant breached an essential procedural requirement, deriving from Article 158a of Commission Regulation (EC, Euratom) No 478/2007[1], providing for a standstill period before signing the contract with the successful tenderer. The applicant claims that the defendant has deliberately delayed communicating with the applicant in order to be able to finalise the signature of the contract with the wining tenderer before it received any comments from the applicant, thus annulling the spirit and purpose of the standstill period.

In addition, the applicant requests monetary compensation equal to EUR 1 500 000, corresponding to the estimated gross profit from the aforementioned public procurement procedure, should it have been awarded the contract. The applicant submits that its claim for damages is based upon its substantiated arguments that there has been a sufficiently serious breach of a superior rule of law for the protection of the individual and that the institutions concerned manifestly and gravely disregarded the limits on the exercise of their powers.

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[1] - Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2007 L 111, p. 13)

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ORDONNANCE DU TRIBUNAL (cinquième chambre)

2 juin 2009 (*)

« Recours en annulation – Marchés publics de services – Appel d'offres concernant l'extension et la remise à niveau du bâtiment Konrad Adenauer à Luxembourg – Rejet de l'offre d'un soumissionnaire – Annulation de la procédure de passation du marché – Non-lieu à statuer »

Dans l'affaire T–524/08,

AIB-Vinçotte Luxembourg (AVLUX ASBL), établie à Luxembourg (Luxembourg), représentée par M^e^ R. Adam, avocat,

partie requérante,

contre

Parlement européen, représenté par M^me^ M. Ecker et M. D. Petersheim, en qualité d'agents,

partie défenderesse,

ayant pour objet une demande d'annulation de la décision du Parlement, du 2 octobre 2008, rejetant l'offre soumise par la requérante dans le cadre d'un appel d'offres concernant l'extension et la remise à niveau du bâtiment Konrad Adenauer à Luxembourg (JO 2008, S 193-254240),

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (cinquième chambre),

composé de MM. M. Vilaras, président, M. Prek (rapporteur) et V. M. Ciucă, juges,

greffier : M. E. Coulon,

rend la présente

Ordonnance

Cadre juridique

1 La passation des marchés publics des institutions communautaires est assujettie aux dispositions du titre V de la première partie du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1), tel que modifié (ci-après le « règlement financier »), ainsi qu'aux dispositions du titre V de la première partie du règlement (CE, Euratom) n° 2342/2002 de la Commission, du 23 décembre 2002, établissant les modalités d'exécution du règlement financier (JO L 357, p. 1), tel que modifié (ci-après les « modalités d'exécution »).

2 L'article 100, paragraphe 2, du règlement financier dispose :

« Le pouvoir adjudicateur communique à tout candidat ou soumissionnaire écarté les motifs du rejet de sa candidature ou de son offre et, à tout soumissionnaire ayant fait une offre recevable et qui en fait la demande par écrit, les caractéristiques et les avantages relatifs de l'offre retenue ainsi que le nom de l'attributaire.

Toutefois la communication de certains éléments peut être omise dans les cas où elle ferait obstacle

à l'application des lois, serait contraire à l'intérêt public, porterait préjudice aux intérêts commerciaux légitimes d'entreprises publiques ou privées ou pourrait nuire à une concurrence loyale entre celles-ci. »

3 L'article 101 du règlement financier dispose :

« Le pouvoir adjudicateur peut, jusqu'à la signature du contrat, soit renoncer au marché, soit annuler la procédure de passation du marché, sans que les candidats ou les soumissionnaires puissent prétendre à une quelconque indemnisation.

Cette décision doit être motivée et portée à la connaissance des candidats ou des soumissionnaires. »

4 L'article 149, paragraphes 1 et 2, des modalités d'exécution prévoit :

« 1. Les pouvoirs adjudicateurs informent dans les meilleurs délais les candidats et les soumissionnaires des décisions prises concernant l'attribution du marché ou d'un contrat-cadre ou l'admission dans un système d'acquisition dynamique, y inclus les motifs pour lesquels ils ont décidé de renoncer à passer un marché ou un contrat-cadre ou à mettre en place un système d'acquisition dynamique pour lequel il y a eu mise en concurrence ou de recommencer la procédure.

2. Le pouvoir adjudicateur communique, dans un délai maximal de quinze jours calendrier à compter de la réception d'une demande écrite, les informations mentionnées à l'article 100, paragraphe 2, du règlement financier. »

Antécédents du litige et procédure

5 Par courrier du 7 avril 2008, le Parlement européen a informé la requérante, AIB-Vinçotte Luxembourg (AVLUX ASBL), qu'il envisageait la passation d'un marché public relatif à un « Projet d'extension du bâtiment Konrad Adenauer à Luxembourg » contenant deux lots, à savoir le lot A (mission de surveillance des nuisances dues aux travaux) et le lot B (mission d'organisme de contrôle agréé).

6 La requérante a présenté son offre le 19 mai 2008.

7 Par courrier du 2 octobre 2008 (ci-après la « décision attaquée »), le Parlement a informé la requérante que son offre n'avait pas été retenue et qu'il lui était possible d'obtenir, sur demande écrite, les caractéristiques et les avantages relatifs à l'offre retenue ainsi que le nom de l'attributaire du marché.

8 Par courrier du 3 octobre 2008, la requérante a sollicité du Parlement des informations concernant les caractéristiques et les avantages de l'offre retenue ainsi que le nom de l'attributaire du marché.

9 Par courrier du 9 octobre 2008, le Parlement a communiqué à la requérante le nom des attributaires ainsi que des informations relatives à leur classement et à celui de la requérante.

10 Par courrier du 16 octobre 2008, la requérante a énoncé certains arguments qui, selon elle, iraient à l'encontre d'une telle attribution et a demandé une suspension de la procédure d'adjudication en vue d'un examen complémentaire de son offre.

11 Par courrier du 29 octobre 2008, le Parlement a informé la requérante que, en vertu du principe de précaution, il avait provisoirement suspendu la signature du contrat avec l'attributaire du marché afin de pouvoir analyser les motivations développées dans le courrier de la requérante du 16 octobre 2008. Cependant, il a considéré qu'aucun des arguments développés dans ledit courrier ne lui paraissait être de nature à remettre en cause l'attribution du marché. Il a dès lors fixé un délai de cinq jours ouvrables pour que la requérante puisse lui fournir des éléments nouveaux, faute de quoi il procéderait à la signature du contrat.

12 Par courrier du 6 novembre 2008, la requérante a communiqué au Parlement les raisons pour lesquelles l'attribution du lot B du marché en cause ne pouvait pas, selon elle, être conforme aux critères du cahier des charges et a demandé une comparaison objective des deux offres, à savoir la sienne et celle de l'attributaire.

13 Par courrier du 28 novembre 2008, le Parlement a informé la requérante que la signature du contrat avec l'attributaire du lot B du marché avait été suspendue et que l'analyse de ses arguments était en cours. En outre, il lui a demandé des informations complémentaires concernant son offre.

14 Par requête déposée au greffe du Tribunal le 2 décembre 2008, la requérante a introduit le présent recours visant à l'annulation de la décision attaquée.

15 Par courrier du 30 janvier 2009, le Parlement a informé la requérante qu'il avait décidé d'annuler la procédure de passation du marché en cause.

16 Par acte séparé déposé au greffe du Tribunal le 12 février 2009, le Parlement a déposé une demande de non-lieu à statuer.

17 Le 9 mars 2009, la requérante a déposé des observations sur la demande de non-lieu de statuer.

Conclusions des parties

18 La requérante conclut à ce qu'il plaise au Tribunal :

– annuler la décision attaquée ;

– lui réserver tous les autres droits, voies, moyens et actions, et notamment la condamnation du Parlement à des dommages et intérêts en rapport avec le préjudice subi ;

– condamner le Parlement aux dépens.

19 Dans sa demande de non-lieu à statuer, le Parlement conclut à ce qu'il plaise au Tribunal :

– constater que le recours est devenu sans objet et qu'il n'y a plus lieu de statuer ;

– régler les dépens conformément à l'article 87, paragraphe 6, du règlement de procédure du Tribunal.

20 Dans ses observations sur la demande de non-lieu à statuer, la requérante conclut à ce qu'il plaise au Tribunal :

– donner acte à la requérante qu'elle se rapporte à la sagesse du Tribunal quant au bien-fondé de la demande de non-lieu à statuer ;

– condamner le Parlement aux dépens de la procédure y compris les frais d'avocat exposés par la requérante ;

– à titre subsidiaire, si les frais d'avocat n'étaient pas remboursables au titre des dépens, condamner le Parlement au paiement des frais au titre des frais frustratoires et vexatoires ;

– lui réserver tous les autres droits, voies, moyens et actions, et notamment la condamnation du Parlement à des dommages et intérêts en rapport avec le préjudice subi.

En droit

21 La demande de non-lieu à statuer du Parlement soulève un incident de procédure qu'il convient, en vertu de l'article 114, paragraphe 3, du règlement de procédure, de régler sans ouvrir la procédure orale, le Tribunal s'estimant suffisamment éclairé par les pièces du dossier.

22 Il y a lieu de relever que, en l'espèce, la procédure d'attribution du marché litigieux n'a pas été achevée, l'appel d'offres litigieux ayant été annulé par le Parlement le 30 janvier 2009. Cette décision a été communiquée à la requérante par courrier recommandé.

23 À cet égard, il convient d'observer que le règlement financier et les modalités d'exécution ne

comportent aucune disposition imposant expressément au pouvoir adjudicateur qui a procédé à un appel d'offres de mener à son terme une procédure d'attribution d'un marché (voir, en ce sens et par analogie, arrêt de la Cour du 18 juin 2002, HI, C–92/00, Rec. p. I–5553, point 41 ; ordonnance de la Cour du 16 octobre 2003, Kauppatalo Hansel, C–244/02, Rec. p. I–12139, point 30, et arrêt du Tribunal du 17 décembre 1998, Embassy Limousines & Services/Parlement, T–203/96, Rec. p. II–4239, point 55). Il ressort, en particulier, de l'article 101 du règlement financier, de l'article 149, paragraphe 1, des modalités d'exécution, ainsi que du point 7 de la lettre d'invitation à soumissionner du 7 avril 2008, d'une part, que le pouvoir adjudicateur peut, jusqu'à la signature du contrat, soit renoncer au marché, soit annuler la procédure de passation du marché, sans que les candidats ou les soumissionnaires puissent prétendre à une quelconque indemnisation et, d'autre part, que cette décision doit être motivée et portée à la connaissance des candidats ou des soumissionnaires dans les meilleurs délais. Lesdites dispositions ne prévoient pas, en outre, que la décision de renoncer au marché ou d'annuler la procédure de passation du marché soit limitée aux cas exceptionnels ou soit nécessairement fondée sur des motifs graves (ordonnance du Tribunal du 19 octobre 2007, Evropaïki Dynamiki/EFSA, T–69/05, non publiée au Recueil, point 51 ; voir également, en ce sens et par analogie, arrêts de la Cour du 16 septembre 1999, Fracasso et Leitschutz, C–27/98, Rec. p. I–5697, points 23 et 25 ; HI, précité, point 40, et ordonnance Kauppatalo Hansel, précitée, point 29).

24 En l'espèce, il y a lieu de constater que, par l'adoption de la décision du 30 janvier 2009 annulant l'appel d'offres, le Parlement a rendu la décision attaquée caduque, dès lors qu'il n'existait plus de marché à attribuer. Il a adopté cette décision, après avoir estimé qu'aucune des offres soumises ne répondait pleinement aux objectifs du marché. Dans sa demande de non-lieu à statuer, il a ainsi énoncé qu'il s'était avéré que le soumissionnaire retenu par la décision attaquée ne détenait pas la capacité d'exécuter l'ensemble du marché, parce qu'il ne disposait pas de tous les agréments nécessaires à la totalité des contrôles, tandis que l'offre de la requérante avait été considérée comme inacceptable, puisque le prix qu'elle proposait dépassait très largement les estimations du Parlement.

25 Dans ces circonstances, la caducité de la décision attaquée, qui a engendré sa disparition de l'ordre juridique communautaire, produit des effets équivalant à ceux d'un arrêt d'annulation, sans préjudice du droit de la requérante de contester, le cas échéant, dans le cadre d'un recours distinct, la légalité de la décision d'annulation de l'appel d'offres. En effet, un arrêt qui annulerait la décision attaquée n'entraînerait aucune conséquence juridique supplémentaire par rapport aux conséquences découlant de sa caducité. La requérante ne conserve, dès lors, aucun intérêt à obtenir l'annulation de la décision attaquée. Il s'ensuit que le présent recours est devenu sans objet et que, par conséquent, il n'y a plus lieu de statuer (voir, en ce sens, ordonnance Evropaïki Dynamiki/EFSA, précitée, point 53, et la jurisprudence citée).

26 En ce qui concerne le deuxième chef de conclusions de la requête, la requérante, en faisant valoir qu'elle veut se réserver « tous autres droits, voies, moyens et actions », indique uniquement qu'elle entend se réserver la possibilité d'exercer d'autres recours.

27 À cet égard, il y a lieu de relever que le contentieux communautaire ne connaît pas de voie de recours permettant au juge de « donner acte » à une partie de ce qu'elle se réserve le droit de former un recours (arrêt du Tribunal du 14 février 2001, Sodima/Commission, T–62/99, Rec. p. II–655, point 28).

28 Partant, le deuxième chef de conclusions de la requête est irrecevable.

29 À la lumière des considérations qui précèdent, il y a lieu de constater que le recours est devenu sans objet et qu'il n'y a plus lieu de statuer.

Sur les dépens

30 Selon l'article 87, paragraphe 6, du règlement de procédure, en cas de non-lieu à statuer, le Tribunal règle librement les dépens.

31 La requérante estime avoir tout fait pour éviter une procédure devant le Tribunal, contrairement au Parlement. Elle considère que l'annulation de la procédure de passation du marché en cause a été décidée uniquement en raison des observations et des contestations qu'elle a émises. Par ailleurs,

elle estime que cette décision d'annulation serait fondée sur une « analyse approfondie de l'ensemble des pièces du dossier », que le Parlement n'aurait effectuée qu'après le dépôt du présent recours en annulation.

32 En l'espèce, le Parlement a suspendu la signature du contrat avec le soumissionnaire initialement choisi sur la base des contestations de la requérante. Cette dernière a introduit le présent recours dans le délai prévu par l'article 230 CE. C'est donc dans ces circonstances que le Parlement a procédé à une analyse approfondie de l'ensemble des pièces du dossier et a adopté la décision d'annulation du marché en cause.

33 Au vu de ces considérations, le Tribunal estime qu'il sera fait une juste appréciation des circonstances de l'espèce en décidant que le Parlement supportera l'ensemble des dépens.

Par ces motifs,

LE TRIBUNAL (cinquième chambre)

ordonne :

1) Il n'y a plus lieu de statuer sur le présent recours.

2) Le Parlement européen est condamné aux dépens.

Fait à Luxembourg, le 2 juin 2009.

Le greffier	Le président
E. Coulon	M. Vilaras

* Langue de procédure : le français.

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Order of the Court of First Instance of 2 June 2009 - AVLUX v Parliament

(Case T-524/08) [1]

(Action for annulment - Public service contracts - Call for tenders for the refurbishment and extension of the Konrad Adenauer Building, Luxembourg - Rejection of a tenderer's offer - Annulment of the public procurement procedure - No need to adjudicate)

Language of the case: French

Parties

Applicant: AIB-Vinçotte, Luxembourg (AVLUX ASBL) (Luxembourg, Luxembourg) (represented by: R. Adam, lawyer)

Defendant: European Parliament (represented by: M. Ecker and D. Petersheim, Agents)

Re:

Application for annulment of the European Parliament's decision of 2 October 2008 rejecting the offer made by the applicant in connection with a call for tenders for the refurbishment and extension of the Konrad Adenauer Building, Luxembourg (OJ 2008 S 193-254240)

Operative part of the order

1. *There is no longer any need to adjudicate on the present proceedings.*

2. *The European Parliament is ordered to pay the costs.*

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[1] - OJ C 44, of 21.2.2009.

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Action brought on 2 December 2008 - AIB-Vinçotte Luxembourg v Parliament

(Case T-524/08)

Language of the case: French

Parties

Applicant: AIB-Vinçotte Luxembourg ASBL (Luxembourg, Luxembourg) (represented by R. Adam, lawyer)

Defendant: European Parliament

Form of order sought

annul the decision of the European Parliament of 2 October 2008 rejecting the offer made by the applicant in connection with call for tenders INLO - A - BATI LUX - 07 268 & 271 - 00 for the refurbishment and extension of the Konrad Adenauer Building, Luxembourg,

reserve to the applicant all other rights, remedies, pleas and actions, in particular an order that the Parliament pay damages in connection with the loss incurred;

in any event, order the Parliament to pay the costs.

Pleas in law and main arguments

The applicant contests the Parliament's decision to reject its offer submitted in connection with the call for tenders for lot B of the contract relating to the projected extension and refurbishment of the KAD building in Luxembourg - Tasks of an approved inspection body (OJ 2008 S 193-254240).

In support of its application, the applicant puts forward four pleas in law:

manifest error of assessment on the part of the Parliament, in that (i) the association to which the contract was awarded did not have the necessary authorisations to perform the tasks requested, as required in the tender specifications, and (ii) that association's offer stated a price that was abnormally low having regard to the criteria in the specifications;

infringement of the obligation to state reasons, in that (i) the Parliament did not state the specific benefits of the offer accepted in comparison with the applicant's offer, thus not enabling the applicant to identify the reasons why its offer was not accepted, and (ii) the applicant was not put in a position to know whether the assessment committee met and, if so, what its conclusions were;

infringement of the principles of diligence, good administration and transparency, as the Parliament failed to provide the explanations requested within a reasonable time;

infringement of the provisions of the administrative specifications, in that neither the contested decision nor the subsequent letters mentioned remedies.

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ORDONNANCE DU TRIBUNAL (sixième chambre)

16 décembre 2009 (*)

« Radiation »

Dans l'affaire T–333/08,

Bull SAS, établie aux Clayes-sous-Bois (France),

Unisys Belgium, établie à Bruxelles (Belgique),

Tata Consultancy Services (TCS) SA, établie à Capellen (Luxembourg),

représentées par M^es^ B. Lombaert et M. van der Woude, avocats,

parties requérantes,

contre

Commission européenne, représentée par MM. E. Manhaeve et N. Bambara, en qualité d'agents, assistés de M^e^ C. Erkelens, avocat,

partie défenderesse,

ayant pour objet l'annulation de la décision de la Commission du 4 juin 2008 de rejeter l'offre soumise par les requérantes dans le cadre de la procédure d'appel d'offres concernant le marché public intitulé « DIGIT/R2/PO/2007/024 – Prestation de services gérés », ainsi que de la décision de ne pas attribuer le marché pour cause d'offre insatisfaisante et d'ouvrir une procédure négociée pour l'attribution du marché concerné,

LE TRIBUNAL (sixième chambre),

composé de MM. A. W. H. Meij, V. Vadapalas et T. Tchipev (rapporteur), juges,

greffier : M. E. Coulon,

rend la présente

Ordonnance

Faits, procédure et arguments des parties

1 Par lettre du 4 juin 2008 (ci-après l'« acte attaqué »), la Commission des Communautés européennes a notifié aux requérantes, Bull SAS, Unisys Belgium et Tata Consultancy Services (TCS) SA, le rejet de l'offre qu'elles avaient soumise dans le cadre de la procédure d'appel d'offres DIG IT/R2/PO/2007/024, au motif qu'elles n'avaient pas passé le stade de l'évaluation financière des offres, en raison de prix anormalement bas. La Commission a précisé qu'elle avait décidé de ne pas attribuer de contrat à la suite de cet appel d'offres. Elle a indiqué qu'elle entamerait une procédure négociée afin d'attribuer ce contrat, conformément à l'article 127, paragraphe 1, sous a), du règlement (CE, Euratom) n° 2342/2002 de la Commission, du 23 décembre 2002, établissant les modalités d'exécution du règlement (CE, Euratom) n° 1605/2002 du Conseil portant règlement financier applicable au budget général des Communautés européennes (JO L 357, p. 1, ci-après les « modalités d'exécution »). Les soumissionnaires ayant participé à l'appel d'offres public infructueux

seraient invités à participer à cette procédure négociée. Les requérantes recevraient en temps utile les documents visant ladite procédure.

2 Par requête déposée au greffe du Tribunal le 11 août 2008, les requérantes ont demandé l'annulation de l'acte attaqué.

3 Par lettre déposée au greffe du Tribunal le 26 mai 2009, les requérantes ont informé le Tribunal, conformément à l'article 99 du règlement de procédure du Tribunal, qu'elles se désistaient de leur recours et ont demandé que chacune des parties supporte ses propres dépens.

4 Par lettre déposée au greffe du Tribunal le 4 juin 2009, la Commission a fait savoir au Tribunal qu'elle ne s'opposait pas à ce désistement. Elle a cependant demandé au Tribunal que les requérantes soient condamnées à supporter ses dépens, outre leurs propres dépens, conformément à l'article 87, paragraphe 5, premier alinéa, du règlement de procédure. La Commission précise qu'il n'existe aucun accord entre les parties à cet égard.

5 Par lettre déposée au greffe du Tribunal le 12 juin 2009, les requérantes ont indiqué que leur désistement était justifié par la circonstance que, au terme de la procédure négociée PN/2008/057 lancée par l'acte attaqué, le marché litigieux leur avait été finalement attribué. Les requérantes font cependant valoir que, alors que l'acte attaqué avait selon elles été adopté de manière irrégulière, leur désistement était la conséquence de l'adoption régulière d'une nouvelle décision à la suite de la modification du cahier des charges dans le cadre de la procédure négociée. Il ne serait dès lors pas équitable qu'elles doivent supporter les dépens de la Commission. Les requérantes soutiennent également que, à cause de l'acte attaqué, elles ont dû attendre une année entière et investir des moyens supplémentaires aux fins de la nouvelle procédure d'examen des offres.

6 Par lettre déposée au greffe du Tribunal le 29 juillet 2009, la Commission a contesté les arguments des requérantes.

7 Premièrement, l'affirmation des requérantes selon laquelle la procédure négociée se serait substituée à la précédente procédure irrégulière serait manifestement erronée. Selon la Commission, la nouvelle décision d'attribution prise dans le cadre de la procédure négociée n'aurait ni annulé ni remplacé l'acte attaqué. Elle ne l'aurait pas non plus modifié dans la mesure où il s'agissait d'une « décision distincte et nouvelle ».

8 Deuxièmement, la Commission conteste l'affirmation des requérantes selon laquelle cette institution aurait modifié son cahier des charges dans le cadre de la mise en œuvre de la procédure négociée. Elle fait valoir qu'une telle modification est explicitement interdite par l'article 127, paragraphe 1, sous a), des modalités d'exécution. Au surplus, les requérantes n'auraient apporté aucune preuve concrète à l'appui de l'affirmation susvisée. En tout état de cause, contrairement à l'offre initiale, la nouvelle offre ne serait pas entachée des mêmes irrégularités, ce qui aurait permis à la Commission d'attribuer le marché litigieux aux requérantes.

9 Troisièmement, le fait que les requérantes ont dû attendre une année entière et investir des moyens supplémentaires aux fins de la nouvelle procédure ne saurait être une conséquence de l'acte attaqué.

Appréciation du Tribunal

10 Les requérantes ayant fait connaître par écrit au Tribunal qu'elles se désistaient de leur recours, il y a lieu, conformément à l'article 99 du règlement de procédure, d'ordonner la radiation de l'affaire du registre et de statuer sur les dépens.

11 Selon l'article 87, paragraphe 5, premier alinéa, du règlement de procédure, la partie qui se désiste de son recours est condamnée aux dépens, s'il est conclu en ce sens par l'autre partie. Toutefois, à la demande de la partie qui se désiste, les dépens sont supportés par l'autre partie, si cela apparaît justifié en vertu de l'attitude de cette dernière.

12 Il appartient donc aux requérantes d'établir que la Commission a adopté une attitude qui justifierait sa condamnation aux dépens de l'instance (voir, en ce sens, ordonnance du Tribunal du 22 octobre 1996, Carvel et Guardian Newspapers/Conseil, T–19/96, Rec. p. II–1519, point 24).

13 Il convient, en premier lieu, de relever que les requérantes n'établissent pas en quoi l'attitude adoptée par la Commission pourrait justifier la condamnation de celle-ci aux dépens. En effet, les requérantes ont présenté leur demande de désistement après avoir été informées, dans le cadre de la procédure négociée, qu'elles étaient les attributaires du marché litigieux. L'acte attaqué a été adopté par la Commission dans le cadre de la procédure ouverte DIGIT/R2/PO/2007/024 et non lors de la mise en œuvre de la procédure négociée PN/2008/057.

14 Il convient, en deuxième lieu, de relever que, bien que la procédure négociée ne puisse être engagée par la Commission qu'en présence de situations spécifiques, telles que celles d'offres irrégulières ou inacceptables soumises en réponse à une procédure ouverte et préalablement clôturée, prévues à l'article 127, paragraphe 1, sous a), des modalités d'exécution, il n'en reste pas moins qu'elle constitue une procédure autonome et distincte de toute autre procédure de passation de marchés et, en particulier, de la procédure ouverte, au sens de l'article 91 du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1).

15 En l'espèce, l'attribution du marché litigieux aux requérantes est intervenue au terme de la procédure négociée et non au terme de la procédure ouverte initialement contestée par les requérantes. C'est dans le cadre de la procédure négociée, à laquelle tous les soumissionnaires à la procédure d'appel d'offres ont été invités à participer, que les requérantes ont soumis à la Commission une nouvelle offre, différente de l'offre initiale, qui leur a permis ensuite de se voir attribuer le marché litigieux par la Commission. De plus, la procédure ouverte a été clôturée le 29 mai 2008 préalablement à l'ouverture de la procédure négociée.

16 Certes, ainsi que les requérantes le font valoir, leur désistement résulte du fait qu'elles se sont vu finalement attribuer le marché litigieux. Cependant, cette nouvelle décision d'attribution a été prise par la Commission dans le cadre de la procédure négociée, dans le respect des dispositions pertinentes en matière de marchés publics prévues dans le règlement n° 1605/2002 et dans les modalités d'exécution. À cet égard, il convient de relever que l'argument des requérantes tiré de la modification du cahier des charges n'a pas été étayé. En outre, cet argument est inopérant, dans la mesure où il se rapporte à la régularité du déroulement de la procédure négociée, laquelle présentait un caractère autonome par rapport à la procédure initiale ayant abouti à l'adoption de l'acte attaqué, ainsi qu'il a déjà été relevé (voir point 14 ci-dessus).

17 Les requérantes n'ont dès lors pas établi que le comportement de la Commission n'était pas conforme à l'article 127, paragraphe 1, sous a), des modalités d'exécution, lorsqu'elle a décidé d'engager une procédure négociée, après l'échec de la procédure ouverte. En particulier, les requérantes n'ont avancé aucun élément permettant de supposer qu'il existait, ainsi qu'elles le suggèrent, un lien entre l'irrégularité alléguée de l'acte attaqué et l'engagement de la procédure négociée.

18 Dans ces circonstances, contrairement à ce que les requérantes prétendent, aucun élément ne permet de conclure que la Commission a adopté une attitude justifiant qu'elle supporte les dépens en application de l'article 87, paragraphe 5, premier alinéa, deuxième phrase, du règlement de procédure.

19 Au vu de tout ce qui précède, il y a lieu de condamner les requérantes aux dépens de l'instance, conformément à l'article 87, paragraphe 5, premier alinéa, première phrase, du règlement de procédure.

Par ces motifs,

LE TRIBUNAL (sixième chambre)

ordonne :

1) L'affaire T–333/08 est radiée du registre.

2) Bull SAS, Unisys Belgium et Tata Consultancy Services (TCS) SA sont condamnées à supporter leurs propres dépens, ainsi que ceux exposés par la Commission européenne.

Fait à Luxembourg, le 16 décembre 2009.

Le greffier

E. Coulon

Le président

A. W. H. Meij

* Langue de procédure : le français.

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Order of the General Court of 16 December 2009 - Bull and Others v Commission

(Case T-333/08) [1]

Language of the case: French

The President of the Sixth Chamber has ordered that the case be removed from the register.

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[1] - OJ C 285, 8.11.2008.

Order of the Court of First Instance of 9 September 2008 — Marcuccio v Commission

(Case T-143/08) ([1])

(Civil service — Social security — Refusal of the application for reimbursement of 100 % of certain medical expenses incurred by the applicant)

(2008/C 285/77)

Language of the case: Italian

Parties

Applicant: Luigi Marcuccio (Tricase, Italy) (represented by: G. Cipressa, lawyer)

Defendant: Commission of the European Communities (represented by: J. Currall, C. Berardis-Kayser, Agents and A. Dal Ferro, lawyer)

Re:

Inter alia, an application for annulment of the decisions of the office responsible for settling claims of the Joint Sickness Insurance Scheme of the European Communities refusing to pay 100 % of certain medical expenses incurred by the applicant or to reimburse the expenses for a medical visit in accordance with the rules applicable to consultations of medical experts, and an application that the Commission be ordered to pay certain medical expenses for the applicant.

Operative part of the order

1. *The action is dismissed as inadmissible.*

2. *The parties are ordered to bear their own costs.*

([1]) OJ C 223 of 22.9.2007 (formerly Case F-20/07).

Order of the Court of First Instance of 9 September 2008 — Marcuccio v Commission

(Case T-144/08) ([1])

(Staff case — Social security — Rejection of a claim for reimbursement of 100 % of certain of the applicant's medical expenses)

(2008/C 285/78)

Language of the case: Italian

Parties

Applicant: Luigi Marcuccio (Tricase, Italy) (represented by: G. Cipressa, lawyer)

Defendant: Commission of the European Communities (represented by: J Currall and C. Barnardis-Kayser, Agents, and A. Dal Ferro, lawyer)

Re:

Inter alia, an application, first, for annulment of the Commission decision refusing the applicant's claim for reimbursement of 100 % of certain medical expenses incurred and, secondly, for an order that the Commission pay him EUR 89,56 by way of additional reimbursement of medical expenses or as compensation for loss.

Operative part of the order

1. *The action is dismissed as inadmissible.*

2. *Each party shall bear its own costs.*

([1]) OJ C 235, 6.10.2007 (formerly Case F-84/06).

Action brought on 11 August 2008 — Bull and Others v Commission

(Case T-333/08)

(2008/C 285/79)

Language of the case: French

Parties

Applicants: Bull SAS (Les Clayes-sous-Bois, France), Unisys Belgium SA (Brussels, Belgium) and Tata Consultancy Services (TCS) SA (Capellen, Luxembourg) (represented by: B. Lombaert and M. van der Woude, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— Annul the contested decision, namely:

  — the rejection of the tender of Consortium B-Trust

  — the decision not to award the contract

  — the decision to open a negotiated procedure;

— order the Commission to pay the costs.

Pleas in law and main arguments

The applicants challenge the Commission's decision to reject their tender submitted in connection with the call for tenders procedure concerning contract 'DIGIT/R2/PO/2007/024 — Managed services provision' (OJ 2007 S 159 — 197776) and the decision not to award the contract in the absence of satisfactory tenders and to open the negotiated procedure.

In support of their application, the applicants claim, first of all, that the contested decision was not taken in compliance with the rules for the conferral of powers within the Commission, since the decision was taken by an 'Acting Head of Unit'. The applicants take the view that it was not established that the author of the measure was in fact entitled to adopt such a decision in the Commission's name.

Secondly, the applicants submit that the Commission infringed its obligation to state reasons by not setting out, in its decision, the grounds on which it considered that certain prices in the applicant's tender were unusually low and that the tender did not comply with the relevant legal provisions in the event of performance of the contract in Brussels or Luxembourg.

Finally, the applicants consider that the Commission infringed the procedure for checking that the prices were lawful, in so far as (i) the Commission excluded the applicant's tender on the basis of the procedure in respect of unusually low prices, whereas the tender was financially sound, (ii) the Commission did not take into account the reasons provided by the applicants and (iii) the contested decision was not based on an accurate account of the facts.

Appeal brought on 14 August 2008 by Marianne Timmer against the order of the Civil Service Tribunal delivered on 5 June 2008 in Case F-123/06 Timmer v Court of Auditors

(Case T-340/08 P)

(2008/C 285/80)

Language of the case: French

Parties

Appellant: Marianne Timmer (Saint-Sauves-d'Auvergne, France) (represented by F. Rollinger, lawyer)

Other party to the proceedings: Court of Auditors of the European Communities

Form of order sought by the appellant

— Annul the order of 5 June 2008 in Case F-123/06 *Marianne Timmer* v *Court of Auditors*;

— Uphold the claim for compensation for loss suffered;

— Uphold the claim for costs against the Court of Auditors.

Pleas in law and main arguments

By this appeal, the applicant seeks annulment of the order of the Civil Service Tribunal of 5 June 2008 in Case F-123/06 *Timmer* v *Court of Auditors* whereby the Tribunal dismissed as inadmissible her action claiming, first that the Tribunal should annul her staff reports for the period 1984 to 1997 along with the connected and/or subsequent decisions, including that appointing the reporting officer concerned to the position of Head of the Dutch Unit in the Translation Department of the Court of Auditors and, second, a claim for damages to compensate for the loss allegedly suffered.

In support of her appeal, the applicant relies on six pleas in law alleging:

— distortion the facts capable of being inferred from the evidence submitted to the Tribunal and error in assigning the burden of proof;

— distortion of the applicant's request to the appointing authority of 29 July 2005 concerning compliance with Article 14 of the Staff Regulations of Officials of the European Communities in the version in force prior to the modification thereof by the entry into force Regulation No 723/2004 [1] inasmuch as that request did not seek the re-examination of the applicant's staff reports as indicated at paragraph 37 of the order under appeal;

— error in the legal classification of the pre-litigation complaint of 26 February 2006, the aim of which was the annulment of the staff reports and the decision on the applicant's career and not 'taking into account of numerous other new facts' (paragraph 41 of the order under appeal);

— failure to state reasons for the decision to reject the complaint;

— in the alternative, failure to state sufficient reasons for that decision to reject, inasmuch as the Tribunal should have examined the insufficiency of the reasons stated;

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ORDONNANCE DU PRÉSIDENT
DE LA TROISIÈME CHAMBRE DU TRIBUNAL

16 novembre 2009 (1)

« Radiation »

Dans l'affaire T-252/08,

Tipik Communication Agency SA, établie à Bruxelles (Belgique), représentée par M^es^ É. Gillet, L. Levi et C. Dubois, avocats,

partie requérante,

contre

Commission des Communautés européennes, représentée par M. N. Bambara et M^me^ S. Petrova, en qualité d'agents, assistés de M^e^ J. Stuyck, avocat,

partie défenderesse,

ayant pour objet, d'une part, l'annulation de la décision de la Commission, du 18 avril 2008, rejetant l'offre soumise par la partie requérante dans le cadre de l'appel d'offres intitulé « Communication via EUROPA – Site Internet officiel de l'UE et autres produits d'information et de communication imprimés et en ligne gérés par la direction générale de la Communication de la Commission européenne – Assistance éditoriale, graphique, technique et dans le domaine de la traduction à la conception, à la production et à la maintenance » (JO 2007, S 193 234221), ainsi que de la décision d'attribuer le marché à un autre soumissionnaire et, d'autre part, une demande de dommages et intérêts.

1 Par lettre déposée au greffe du Tribunal le 5 octobre 2009, la partie requérante a informé le Tribunal, conformément à l'article 99 du règlement de procédure du Tribunal, qu'elle se désistait de son recours et a demandé, en application de l'article 87, paragraphe 5, dudit règlement, que la partie défenderesse soit condamnée aux dépens.

2 Par lettre déposée au greffe du Tribunal le 19 octobre 2009, la partie défenderesse a fait savoir au Tribunal qu'elle ne s'opposait pas à la demande de désistement et a demandé que la partie requérante soit condamnée à l'ensemble des dépens, incluant ses propres dépens et les dépens supportés par la Commission.

3 Selon l'article 87, paragraphe 5, premier alinéa, du règlement de procédure, la partie qui se désiste est condamnée aux dépens, s'il est conclu en ce sens par l'autre partie dans ses observations sur le désistement. Toutefois, à la demande de la partie qui se désiste, les dépens sont supportés par l'autre partie, si cela apparaît justifié en vertu de l'attitude de cette dernière. En l'espèce, les pièces du dossier ne démontrent pas, de la part de la partie défenderesse, un comportement justifiant la condamnation de celle-ci aux dépens.

4 Il y a donc lieu de rayer l'affaire du registre et de condamner la partie requérante aux dépens.

Par ces motifs,

LE PRÉSIDENT DE LA TROISIÈME CHAMBRE DU TRIBUNAL

ordonne :

1) L'affaire T-252/08 est rayée du registre du Tribunal.

2) La partie requérante supportera ses propres dépens et ceux de la partie défenderesse.

Fait à Luxembourg, le 16 novembre 2009.

Le greffier — Le président

E. Coulon — J. Azizi

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1 Langue de procédure : le français.

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Order of the Court of First Instance (Third Chamber) of 16 November 2009 - Tipik v Commission

(Case T -252/08) [1]

Language of the case: French

The President of the Court of First Instance (Third Chamber) has ordered that the case be removed from the register.

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[1] - C 209, 15.8.2008.

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Action brought on 26 June 2008 - Tipik v Commission

(Case T-252/08)

Language of the case: French

Parties

Applicant: Tipik Communication Agency SA (Brussels, Belgium) (represented by: E. Gillet, L. Levi and C. Dubois, lawyers)

Defendant: Commission of the European Communities

Form of order sought

Annul the decision of the Commission, the date of which is unknown, by which it was decided to reject the tender submitted by the applicant in the award procedure for the public service contract concerning, inter alia, the EUROPA Internet site (PO/2007-31/C2);

Annul the decision of the Commission, the date of which is unknown, by which it was decided to award that public contract to the consortium led by the company *European Service Network*;

Order the defendant to indemnify the applicant for the loss suffered by reason of the adoption of those irregular decisions, which amounts to EUR 5 063 773.29, together with late-payment interest to run from the date of the judgment to be delivered by the Court of First Instance until payment in full. The rate of late-payment interest to be applied is to be calculated on the basis of the rate fixed by the European Central Bank for main refinancing operations, applicable during the period concerned, increased by three points;

Order the defendant to pay the costs.

Pleas in law and main arguments

The applicant contests the decision of the Commission to reject its tender submitted in the context of the invitation to tender for the contract entitled 'Communication via EUROPA - the official website of the EU and other online and printed information and communication products managed by the Directorate-General Communication of the European Commission - editorial, graphical and technical and translation assistance in design, production and maintenance' (OJ 2007 S 193-234221), and the decision to award the contract to the consortium led by European Service Network. In addition, the applicant seeks compensation for the loss allegedly caused by the errors committed by the Commission.

In support of its action, the applicant submits, principally, that the Commission should have excluded the consortium led by European Service Network from the procedure for the award of the contract, since one of the members of that consortium had been declared to be in serious breach of its contractual obligations in respect of a contract intended for services of OPOCE similar to those which are the subject-matter of the contract at issue.

In the alternative, the applicant submits that the Commission has committed a manifest error of assessment when examining the tender submitted by the consortium led by European Service Network in that it awarded to it the same mark as the applicant for the quality criterion, although it could not be certain as to the capacity of that consortium to supply satisfactory technical solutions in that regard.

The applicant submits that those irregularities are such as to render the Commission liable since, on the one hand, it committed an error and, on the other, it seriously and manifestly disregarded the limits imposed on its discretion.

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ORDER OF THE PRESIDENT OF THE EIGHT CHAMBER
OF THE COURT OF FIRST INSTANCE

3 February 2009 (*)

(Removal from the register)

In Case T-239/08,

Comtec Translations Ltd, established in Leamington Spa (United Kingdom), represented initially by L. R. Scott and E. Bentley, Solicitors, and subsequently by L. R. Scott,

applicant,

v

Commission of the European Communities, represented by E. Manhaeve and N. Bambara, acting as Agents, assisted by A. Nucara, lawyer,

defendant,

APPLICATION for annulment of the Commission's Decision of 16 April 2008 rejecting the applicant's tender submitted in response to the call for tenders for the translation of documents relating to the policies and administration of the European Union from all EU official languages into English (call for tender No FL-GEN07-EN) (OJ 2007 S 180- 219517).

1 By letter lodged at the Registry of the Court of First Instance on 12 December 2008, the applicant informed the Court in accordance with Article 99 of the Rules of Procedure of the Court of First Instance that it wished to discontinue proceedings. The applicant opposed that it would be ordered to pay the costs in view of its fragile and limited resources.

2 By letter lodged at the Registry of the Court on 13 January 2009, the defendant informed the Court that it had no objections concerning the discontinuance of the proceedings and requested that, pursuant to Article 87(5) of the Rules of Procedure, the applicant be ordered to bear the costs.

3 The first subparagraph of Article 87(5) of the Rules of Procedure provides that a party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the observations of the other party on the discontinuance. However, upon application by the party who discontinues or withdraws from proceedings, the costs shall be borne by the other party if this appears justified by the conduct of that party. In the present case, the case-file does not show conduct on the part of the defendant such as to justify ordering the latter to pay the costs.

4 The case will therefore be removed from the register and the applicant be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE EIGHT CHAMBER
OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Case T-239/08 is removed from the register of the Court of First Instance.

2. The applicant shall bear its own costs and those incurred by the defendant.

Luxembourg, 3 February 2009.

E. Coulon — M. E. Martins Ribeiro

Registrar — President

* Language of the case: English.

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Order of the Court of First Instance of 3 February 2009 - Comtec Translations v Commission

(Case T-239/08) [1]

Language of the case: English

The President of the Eighth Chamber has ordered that the case be removed from the register.

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[1] - OJ C 209, 15.8.2008.

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Action brought on 13 June 2008 - Comtec Translations v Commission

(Case T-239/08)

Language of the case: English

Parties

Applicant: Comtec Translations Ltd (Leamington Spa, United Kingdom) (represented by: L. R. Scott and E. Bentley, Solicitors)

Defendant: Commission of the European Communities

Form of order sought

Annul the decision letter and remit the applicant's bid for reconsideration;

Order the Commission to pay the applicant's costs.

Pleas in law and main arguments

By the present action the applicant seeks the annulment of the Commission's Decision of 16 April 2008 rejecting its tender submitted in the framework of the tender procedure for the conclusion of framework contracts for the translation of documents relating to the policies and administration of the European Union from all EU official languages into English (call for tender No FL-GEN07-EN)[1]. The reason given for not retaining the applicant's tender was insufficient technical or professional capacity and lack of, or insufficient proven professional experience.

In support of its action the applicant puts forward a single plea in law. It claims that the administrative procedure has been conducted irregularly and that its procedural rights have not been observed. The applicant submits that it has successfully provided translation into English within the Commission for several years in the framework of contracts previously signed and regularly renewed for which it has received satisfactory rankings regarding the quality of the services. The applicant claims that the evaluation committee's decision took no or no proper account of the successful performance of the applicant in submitting translation assignments to the Commission for 12 years neither it took into consideration the documents evidencing the technical and professional qualifications of the applicant's staff, quality managers and sub-contractors.

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[1] - Contract notice published : OJ 2007 S 180 - 219517

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ORDONNANCE DU PRÉSIDENT
DE LA SEPTIÈME CHAMBRE DU TRIBUNAL

2 septembre 2008 (*)

« Radiation »

Dans l'affaire T-202/08,

Centre de langues à Louvain-la-Neuve et -en -Woluwe (CLL Centres de langues), établi à Louvain-la-Neuve (Belgique), représenté par M^es^ F. Tulkens et V. Ost, avocats,

partie requérante,

contre

Commission des Communautés européennes, représentée par MM. N. Bambara et E. Manhaeve, en qualité d'agents,

partie défenderesse,

ayant pour objet l'annulation de la décision de la Commission, du 23 mai 2008, rejetant l'offre soumise par le requérant dans le cadre de la procédure d'appel d'offres ADMIN/D1/PR/2008/004 concernant le marché « Formations linguistiques pour le personnel des institutions, organes et agences de l'Union européenne (UE) implantés à Bruxelles ».

1 Par requête déposée au greffe du Tribunal le 5 juin 2008, la partie requérante a introduit le présent recours.

2 Par acte séparé, déposé au greffe le même jour, la partie requérante a introduit une demande en référé visant, en substance, à permettre à la partie requérante de participer à la procédure d'appel d'offres en question et à suspendre la décision d'exclusion de la Commission jusqu'à ce que le Tribunal se soit prononcé sur le recours en annulation dirigé contre cette décision.

3 Par ordonnance du président du Tribunal du 15 juillet 2008, CLL Centres de Langues/Commission (T-202/08 R, non publiée au Recueil), la demande en référé a été rejetée et les dépens ont été réservés.

4 Par lettre déposée au greffe du Tribunal le 31 juillet 2008, la partie requérante a informé le Tribunal, conformément à l'article 99 du règlement de procédure du Tribunal, qu'elle se désistait de son recours. Elle n'a pas conclu sur les dépens.

5 Par lettre déposée au greffe du Tribunal le 7 août 2008, la partie défenderesse a fait savoir au Tribunal qu'elle ne souhaite pas s'opposer à ladite demande de radiation. Toutefois, la partie défenderesse a souligné qu'il n'existait aucun accord entre les parties sur les dépens. Elle a demandé que la partie requérante soit condamnée aux dépens, conformément à l'article 87, paragraphe 5, du règlement de procédure, relatifs au recours en annulation ainsi qu'à la procédure en référé.

6 Selon l'article 87, paragraphe 5, premier alinéa, du règlement de procédure, la partie qui se désiste est condamnée aux dépens, s'il est conclu en ce sens par l'autre partie dans ses observations sur le désistement.

7 Il y a donc lieu de rayer l'affaire du registre et de condamner la partie requérante aux dépens, y

compris ceux afférents à la procédure en référé.

Par ces motifs,

LE PRÉSIDENT DE LA SEPTIÈME CHAMBRE DU TRIBUNAL

ordonne :

1) L'affaire T-202/08 est rayée du registre du Tribunal.

2) La partie requérante supportera les dépens, y compris ceux afférents à la procédure en référé.

Fait à Luxembourg, le 2 septembre 2008 .

Le greffier	Le président
E. Coulon	N. J. Forwood

* Langue de procédure : le français.

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ORDONNANCE DU PRÉSIDENT DU TRIBUNAL

15 juillet 2008 (*)

« Référé – Marchés publics – Procédure communautaire d'appel d'offres – Rejet d'une demande de participation – Demande de sursis à exécution et de mesures provisoires – Défaut de fumus boni juris – Perte d'une chance – Absence de préjudice grave et irréparable – Défaut d'urgence »

Dans l'affaire T–202/08 R,

Centre de langues à Louvain-la-Neuve et -en-Woluwe (CLL Centres de langues), établi à Louvain-la-Neuve (Belgique), représenté par M^es^ F. Tulkens et V. Ost, avocats,

partie requérante,

contre

Commission des Communautés européennes, représentée par MM. N. Bambara et E. Manhaeve, en qualité d'agents, assistés de M^e^ P. Wytinck, avocat,

partie défenderesse,

ayant pour objet une demande de mesures provisoires visant, en substance, à permettre au Centre de langues à Louvain-la-Neuve et -en-Woluwe (CLL Centres de langues) de participer à la procédure d'appel d'offres ADMIN/D1/PR/2008/004 concernant le marché « Formations linguistiques pour le personnel des institutions, organes et agences de l'Union européenne (UE) implantés à Bruxelles » et à suspendre la décision d'exclusion de la Commission jusqu'à ce que le Tribunal se soit prononcé sur le recours en annulation dirigé contre cette décision,

LE PRÉSIDENT DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

Antécédents du litige

1 Par un avis de marché publié le 4 mars 2008 (ADMIN/D1/PR/2008/004), la Commission a lancé un appel d'offres, en application du titre V (« Passation des marchés publics ») de la première partie du règlement (CE, Euratom) nº 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1, ci-après le « règlement financier »), pour la prestation de services dans le domaine des formations linguistiques pour le personnel des institutions, organes et agences de l'Union européenne (UE) implantés à Bruxelles.

2 À cette fin, elle a choisi d'attribuer le marché selon la procédure restreinte au sens de l'article 122, paragraphe 2, du règlement (CE, Euratom) nº 2342/2002 de la Commission, du 23 décembre 2002, établissant les modalités d'exécution du règlement financier (JO L 357, p. 1), tel que modifié par le règlement (CE, Euratom) nº 1261/2005 de la Commission, du 30 juillet 2005 (JO L 201, p. 3, ci-après le « règlement d'exécution »). En vertu de cette disposition, le marché sur appel à la concurrence est restreint lorsque tous les opérateurs économiques peuvent demander à participer et que seuls les candidats satisfaisant aux critères de sélection et invités par les pouvoirs adjudicateurs peuvent présenter une offre.

3 Le marché en cause est constitué de dix lots correspondant chacun à l'enseignement d'une langue ou d'un groupe de langues. L'avis de marché prévoit la conclusion d'un contrat d'une durée de 48 mois à compter de la date d'attribution du contrat. Ce contrat, qui sera attribué au soumissionnaire ayant remis l'offre économiquement la plus avantageuse, est destiné à remplacer, à partir du mois de janvier 2009, un contrat portant sur des services d'enseignement semblables que la Commission avait, en 2004, attribué au requérant, le Centre de langues à Louvain-la-Neuve et -en-Woluwe (CLL Centres de langues).

4 S'agissant des conditions de participation à la procédure en cause, l'avis de marché prévoit, au point III.2.1, que « les demandes de participation se font par lettre envoyée avant l'expiration de la date ou du délai visé au point IV.3.4 du présent avis », ce dernier point énonçant la date limite suivante : « 8.4.2008 (16 :00) ». Le point VI.3.2 de l'avis de marché attire expressément l'attention des intéressés sur le fait qu'ils doivent « présenter leur demande de participation en respectant strictement les conditions indiquées au point III.2 du présent avis, c'est-à-dire : […] envoyer leur candidature par lettre avant l'expiration de la date ou du délai visé au point IV.3.4 ». Le point VI.3.2 poursuit en précisant que « [l]es candidatures incomplètes pourront être écartées d'office ».

5 Ainsi qu'il ressort du procès-verbal d'ouverture des candidatures établi le 10 avril 2008 par la commission d'ouverture, quinze demandes de participation ont été introduites, dans le respect de la date limite précitée et en conformité avec les modalités prescrites dans le règlement d'exécution et l'avis de marché.

6 Le 18 avril 2008, soit dix jours après la date limite d'envoi des candidatures, la demande de participation du requérant est parvenue à la Commission. Cette demande portait sur les lots 2, 3, 4, 6, 7, 8, 9 et 10 du marché en cause.

7 Dans une lettre du 24 avril 2008, le requérant a expliqué ce dépôt tardif par le fait que, à la suite d'un « malentendu administratif », il n'avait pris connaissance de l'avis de marché que le 17 avril 2008. Le requérant a estimé que, en raison du caractère non contraignant du délai indiqué pour le dépôt des demandes de participation, la Commission avait le pouvoir, voire l'obligation, d'admettre la demande qu'il avait introduite le 18 avril, étant donné que son exclusion, alors qu'il avait en 2004 remporté un marché identique en déposant l'offre économiquement la plus avantageuse, affaiblirait sensiblement le niveau de concurrence.

8 Ainsi qu'il ressort du procès-verbal de réception et d'évaluation des candidatures établi le 20 mai 2008 par le comité d'évaluation, la Commission a exclu cinq candidatures, dont celle du requérant, des suites de la procédure.

9 Par lettre du 23 mai 2008, reçue le 27 mai 2008, la Commission a informé le requérant que sa candidature n'avait pas été retenue, au motif que sa demande de participation avait été déposée hors délai, soit le 18 avril 2008, alors que la date limite de dépôt avait été fixée au 8 avril 2008, à 16 heures (ci-après la « décision attaquée »).

Procédure et conclusions des parties

10 Par requête déposée au greffe du Tribunal le 5 juin 2008, le requérant a introduit un recours visant à l'annulation de la décision attaquée. Il reproche à la Commission, en substance, d'avoir estimé à tort qu'elle ne disposait d'aucun pouvoir d'appréciation quant à l'admission de sa candidature, bien que l'avis de marché ne prévoie pas de sanction en cas de demande de participation tardive, et d'avoir violé le principe de proportionnalité.

11 Par actes séparés déposés au greffe du Tribunal le même jour, le requérant a introduit une demande de procédure accélérée, au titre de l'article 76 bis du règlement de procédure du Tribunal, ainsi que la présente demande en référé, dans laquelle il conclut à ce qu'il plaise au président du Tribunal :

– ordonner à la Commission, au titre de l'article 105, paragraphe 2, du règlement de procédure, à titre provisoire et dans l'attente du prononcé de l'ordonnance qui mettra fin à la présente procédure de référé, de lui communiquer immédiatement le cahier des charges et de l'autoriser à participer pleinement à la phase d'appel d'offres ;

– suspendre la décision attaquée, jusqu'à ce que le Tribunal se soit prononcé sur le recours visant à l'annulation de cette décision ;

– accorder toutes autres mesures jugées appropriées ;

– condamner la Commission aux dépens.

12 Par ordonnance du 9 juin 2008, adoptée au titre de l'article 105, paragraphe 2, du règlement de procédure, il a été sursis à l'exécution de la décision attaquée jusqu'à la date de l'ordonnance mettant fin à la présente procédure de référé, d'une part, et ordonné à la Commission de communiquer immédiatement au requérant le cahier des charges relatif à la procédure d'appel d'offres litigieuse et de lui permettre de présenter une offre pour les lots 2, 3, 4, 6, 7, 8, 9 et 10 du marché en cause, d'autre part.

13 En exécution de cette ordonnance, la Commission a, le 10 juin 2008, transmis au requérant le cahier des charges en cause.

14 En outre, par lettre du même jour, la Commission a, sur demande du président du Tribunal, communiqué le calendrier prévisionnel des différentes étapes de la procédure d'appel d'offres en question.

15 Dans ses observations écrites sur la demande en référé, déposées au greffe du Tribunal le 18 juin 2008, la Commission conclut à ce qu'il plaise au président du Tribunal :

– rejeter la demande de suspension de la décision attaquée ;

– condamner le requérant aux dépens.

En droit

16 En vertu des dispositions combinées des articles 242 CE et 243 CE, d'une part, et de l'article 225, paragraphe 1, CE, d'autre part, le Tribunal peut, s'il estime que les circonstances l'exigent, ordonner le sursis à l'exécution d'un acte attaqué devant lui ou prescrire les mesures provisoires nécessaires.

17 L'article 104, paragraphe 2, du règlement de procédure dispose que les demandes de mesures provisoires doivent spécifier l'objet du litige, les circonstances établissant l'urgence, ainsi que les moyens de fait et de droit justifiant à première vue (fumus boni juris) l'octroi de la mesure provisoire à laquelle elles concluent. Ces conditions sont cumulatives, de sorte que les demandes de mesures provisoires doivent être rejetées dès lors que l'une d'elles fait défaut [ordonnance du président de la Cour du 14 octobre 1996, SCK et FNK/Commission, C–268/96 P(R), Rec. p. I–4971, point 30].

18 En outre, dans le cadre de cet examen d'ensemble, le juge des référés dispose d'un large pouvoir d'appréciation et reste libre de déterminer, au regard des particularités de l'espèce, la manière dont ces différentes conditions doivent être vérifiées ainsi que l'ordre de cet examen, dès lors qu'aucune règle de droit communautaire ne lui impose un schéma d'analyse préétabli pour apprécier la nécessité de statuer provisoirement [ordonnances du président de la Cour du 19 juillet 1995, Commission/Atlantic Container Line e.a., C–149/95 P(R), Rec. p. I–2165, point 23, et du 3 avril 2007, Vischim/Commission, C–459/06 P(R), non publiée au Recueil, point 25].

19 Eu égard aux éléments du dossier, le juge des référés estime qu'il dispose de tous les éléments nécessaires pour statuer sur la présente demande de mesures provisoires, sans qu'il soit utile d'entendre, au préalable, les parties en leurs explications orales.

Sur le fumus boni juris

Arguments des parties

20 Selon le requérant, la décision attaquée est illégale, dans la mesure où elle est fondée sur la thèse incorrecte selon laquelle les demandes de participation tardives doivent automatiquement être écartées. Cette thèse négligerait le fait que, en l'absence de disposition contraire contenue dans les règlements applicables ou dans l'avis de marché en cause, le pouvoir adjudicateur a la possibilité d'admettre les candidatures tardives. Or, la Commission aurait commis une erreur de droit en refusant d'exercer le pouvoir d'appréciation dont elle dispose en la matière.

21 En effet, l'exclusion du requérant n'aurait été imposée ni par l'article 123, paragraphe 3, ni par l'article 143, paragraphe 1, du règlement d'exécution. Ces dispositions ne viseraient qu'à éviter que le pouvoir adjudicateur ne sollicite des candidatures après l'expiration du délai fixé, en violation du principe d'égalité, ou qu'il n'ouvre des offres avant l'expiration de ce délai, d'une part, et à permettre au pouvoir adjudicateur de fixer des modalités pour la communication des demandes de participation, d'autre part. Par ailleurs, alors que l'avis de marché en cause prévoit, au point VI.3.2, une sanction consistant à écarter les candidatures « incomplètes », une telle sanction radicale ne serait pas prévue pour les candidatures tardives.

22 Dans ce contexte, il conviendrait de faire une distinction entre une offre tardive et une demande de participation tardive. Si le strict respect du délai de dépôt d'une offre sert le double but d'éviter des fraudes et de garantir un traitement égal de tous les soumissionnaires, aucune de ces finalités n'entrerait en jeu lorsqu'il s'agit du délai de dépôt d'une demande de participation, étant donné qu'il n'y aurait pas de risque de fraude à ce stade de la procédure et que le délai imparti pour le dépôt des demandes de participation ne serait pas un délai pertinent pour le jeu de la concurrence.

23 Le requérant ajoute que la décision attaquée ne satisfait pas à l'obligation de motivation en ce que, premièrement, la Commission n'y indique pas pour quelle raison elle a omis de faire usage de son pouvoir d'admettre sa demande de participation, deuxièmement, elle s'est fondée sur une disposition non pertinente, à savoir l'article 143, paragraphe 1, du règlement d'exécution, qui ne traite que des modalités de communication, et, troisièmement, elle n'indique pas les voies de recours ouvertes au requérant.

24 Enfin, le requérant considère que la décision attaquée viole le principe de proportionnalité, la Commission ayant rejeté sa candidature, alors qu'elle aurait pu l'examiner, sans que cela ait perturbé le processus de sélection ou porté atteinte à l'égalité entre les candidats. Cette décision serait également contraire à l'article 123, paragraphe 1, du règlement d'exécution, qui prévoit que le nombre de candidats admis à soumissionner doit être suffisant pour assurer une concurrence réelle. En effet, l'exclusion du requérant, qui avait déposé l'offre économiquement la plus avantageuse en 2004, affaiblirait de manière très sensible le niveau de concurrence.

25 La Commission rétorque que la situation litigieuse, à savoir le dépôt tardif de candidature, est le résultat d'une négligence du requérant lui-même. La demande en référé viserait à réparer les conséquences de cette négligence. Cependant, passer outre ladite négligence porterait atteinte aux principes d'égalité des candidats, de transparence, de sécurité juridique ainsi que de protection de la confiance légitime et mettrait en péril le bon fonctionnement de la procédure.

26 La fixation d'une date limite pour le dépôt des candidatures serait conforme aux articles 140 et 143 du règlement d'exécution, selon lesquels les demandes de participation doivent être présentées avant une telle date.

27 Le grief tiré d'une violation de l'article 123, paragraphe 1, du règlement d'exécution méconnaîtrait que la finalité d'organiser des marchés publics aux meilleures conditions de concurrence possibles doit être conciliée avec le principe d'égalité d'accès aux marchés publics ainsi qu'avec les principes de transparence et de non-discrimination (considérant 26 du règlement d'exécution). Or, le respect de ces principes commanderait que les demandes non conformes aux modalités de remise prescrites dans l'avis de marché soient en principe écartées. La circonstance que le requérant a déposé l'offre économiquement la plus avantageuse lors du marché passé en 2004 ne pourrait lui donner un droit acquis à bénéficier d'un traitement de faveur.

28 S'agissant du grief tiré d'une insuffisance de motivation, la Commission estime avoir indiqué toutes les circonstances ayant motivé le rejet de la demande de participation du requérant, cette motivation ayant permis à ce dernier d'identifier les raisons du rejet de sa candidature et de défendre ses droits, ce qu'il aurait d'ailleurs fait. En outre, elle permettrait au juge communautaire d'exercer son contrôle.

29 Contrairement aux affirmations du requérant, la référence à l'article 143, paragraphe 1, du règlement d'exécution serait parfaitement pertinente, puisque la décision attaquée est motivée par le non-respect des modalités de remise des demandes de participation fondées sur cette disposition. Ces modalités de remise (télécopieur, envoi recommandé, dépôt direct) seraient décrites au point III.2.1 de l'avis de marché ; elles comporteraient l'indication selon laquelle les demandes de participation se font « par lettre envoyée avant l'expiration de la date ou du délai visé au point IV.3.4 ».

30 Enfin, l'indication des voies de recours ne relèverait pas de l'obligation de motivation au sens de l'article 253 CE. En tout état de cause, le requérant aurait été parfaitement au courant des voies de recours qui lui étaient ouvertes et n'aurait eu aucune difficulté à introduire son recours.

Appréciation du juge des référés

31 Afin de déterminer si la condition relative au fumus boni juris est remplie en l'espèce, il y a lieu de procéder à un examen prima facie du bien-fondé des griefs invoqués par le requérant à l'appui du recours principal et donc de vérifier si les arguments quant à la prétendue illégalité de la décision attaquée présentent un tel caractère sérieux qu'ils ne sauraient être écartés dans le cadre de la présente procédure en référé (voir, en ce sens, ordonnance du juge des référés du Tribunal du 28 septembre 2007, France/Commission, T–257/07 R, non encore publiée au Recueil, point 59, et la jurisprudence citée).

32 En l'espèce, le requérant reproche à la Commission, par son premier grief, d'avoir commis une erreur de droit en s'abstenant d'exercer le pouvoir d'appréciation dont elle disposerait en l'espèce et dans l'exercice duquel elle aurait pu, voire dû, admettre sa candidature tardive, étant donné qu'aucune disposition n'aurait imposé son exclusion de la procédure litigieuse.

33 À cet égard, il suffit de constater qu'aucun élément du dossier ne permet, à première vue, de conclure que la Commission aurait renoncé à exercer un éventuel pouvoir d'appréciation et qu'elle aurait « automatiquement » rejeté comme tardive la demande de participation du requérant. Au contraire, ainsi qu'il ressort de la décision attaquée, celle-ci a été adoptée « [a]près examen des demandes de participation reçues ». Par ailleurs, en réponse à un courrier du requérant du 30 mai 2008, la Commission a, par lettre du 3 juin suivant, motivé le maintien de cette décision par la nécessité « d'assurer le plein respect du principe d'égalité de traitement des candidats et de sécurité juridique », après avoir déclaré que ledit courrier du requérant avait « fait l'objet d'une étude approfondie ».

34 Il s'ensuit que le premier grief ne saurait, à première vue, être retenu dans la mesure où le requérant excipe d'une erreur de droit.

35 Cependant, il convient encore d'examiner s'il apparaît, prima facie, que la Commission, en rejetant la candidature du requérant comme étant hors délai, a commis une erreur manifeste d'appréciation dans l'exercice de son prétendu pouvoir d'appréciation.

36 Dans ce contexte, le requérant ne conteste pas que le pouvoir adjudicataire puisse fixer des délais et des dates limites. Il fait, cependant, valoir que la réglementation communautaire applicable ne confère à ces délais et dates limites aucun caractère contraignant, au moins pour ce qui est des demandes de participation.

37 Toutefois, une lecture des textes pertinents n'est, à première vue, pas de nature à confirmer cette thèse du requérant.

38 Ainsi, l'article 140 du règlement d'exécution place sur un pied d'égalité les offres et les demandes de participation en prévoyant, de manière globale, des « délais de réception des offres et demandes de participation ». Si ladite disposition souligne que ces délais sont des délais minimaux, en imposant au pouvoir adjudicataire de les fixer de manière suffisamment longue – le requérant ne reproche d'ailleurs pas à la Commission d'avoir fixé un délai minimal de réception trop court dans le cadre de la présente procédure –, il semble à priori évident que même de tels délais minimaux ont nécessairement un terme qu'il convient de respecter.

39 Ensuite, l'article 145, paragraphe 1, du règlement d'exécution énonce que ne sont ouvertes par le pouvoir adjudicataire que « les demandes de participation et offres qui ont respecté les dispositions de l'article 143 » du même règlement. Or, le paragraphe 1 dudit article 143, après avoir prévu que les modalités de remise des demandes de participation étaient déterminées par le pouvoir adjudicataire (lettre, moyen électronique ou télécopieur), renvoie à la « date limite » prévue, notamment, à l'article 140 du règlement d'exécution.

40 S'il est vrai que ce renvoi est opéré en ce qui concerne la confirmation, par lettre ou par moyen électronique, de demandes de participation faites par télécopieur, il paraît évident que la portée de cette date limite ne peut être réduite à la seule hypothèse d'une demande faite par télécopieur, mais doit être valable pour tous les moyens de communication admis dans le cadre d'une même

procédure de passation d'un marché public, et ce d'autant plus que, en vertu de l'article 143, paragraphe 1, du règlement d'exécution, les différents moyens de communication doivent avoir un caractère non discriminatoire. Or, l'avis de marché en cause en l'espèce prévoit, au point III.2.1, que les demandes de participation se font par lettre ou par télécopieur. Il s'ensuit que la date limite fixée pour le dépôt de ces demandes doit être identique pour l'un et l'autre de ces moyens de communication.

41 Ainsi que la Commission l'a relevé à juste titre, les moyens de communication décrits à l'article 143, paragraphe 1, du règlement d'exécution et repris dans l'avis de marché, au point III.2.1, apparaissent indissociables du délai dans lequel les demandes de participation doivent être déposées : si le délai de dépôt n'est pas respecté, les modalités de communication prescrites sur la base dudit article ne semblent en effet pas non plus pouvoir être respectées.

42 Il résulte prima facie de ce qui précède que la Commission pouvait se fonder, à juste titre, sur les articles 140, 143 et 145 du règlement d'exécution pour fixer, dans l'avis de marché en cause, une date limite pour le dépôt des demandes de participation, soit le 8 avril 2008, à 16 heures, au plus tard, et pour décider que celles déposées hors délai seraient, le cas échéant, exclues de la procédure pour méconnaissance de l'article 143 dudit règlement.

43 Dans ce contexte, ne saurait être retenu l'argument du requérant selon lequel l'avis de marché ne prévoit aucune sanction pour les candidatures tardives. En effet, en prévoyant, au point VI.3.2, que « [l]es candidatures incomplètes pourront être écartées d'office », l'avis de marché permet manifestement l'exclusion des candidatures tardives, ces dernières étant les candidatures les plus incomplètes imaginables.

44 Enfin, il importe de rappeler que le requérant, dans sa correspondance avec la Commission au cours de la procédure précontentieuse, s'est borné à expliquer par un « malentendu administratif » le non-respect de la date limite de dépôt prévue dans l'avis de marché, sans invoquer l'existence d'un cas fortuit, d'une force majeure ou d'une erreur excusable (voir point 7 ci-dessus).

45 Dans ces circonstances, il convient de conclure que, à première vue, la Commission, après avoir constaté que les demandes de participation qui avaient été présentées avant cette date limite étaient au nombre de quinze (voir point 5 ci-dessus), pouvait écarter la candidature du requérant, eu égard aux principes de sécurité juridique et d'égalité de traitement des candidats, sans commettre une erreur manifeste d'appréciation.

46 Par conséquent, le premier grief soulevé par le requérant ne saurait permettre d'établir l'existence d'un fumus boni juris.

47 Il en va de même pour ce qui est du grief tiré d'une violation de l'obligation de motivation, en ce que, dans la décision attaquée, la Commission n'indiquerait pas pour quelle raison elle s'est abstenue de faire usage de son pouvoir d'admettre la demande de participation du requérant et elle se serait fondée sur une disposition non pertinente, à savoir l'article 143, paragraphe 1, du règlement d'exécution. Ainsi qu'il vient d'être exposé, d'une part, ledit article apparaît tout à fait pertinent dans le présent contexte et, d'autre part, rien ne semble a priori permettre de conclure que la Commission aurait omis de faire usage de son prétendu pouvoir d'appréciation en rejetant la candidature du requérant.

48 Dans la mesure où le requérant fait encore grief à la Commission de ne pas avoir indiqué, dans la décision attaquée, les voies de recours qui lui étaient ouvertes, il suffit de relever qu'aucune disposition expresse du droit communautaire n'impose aux institutions une obligation générale d'informer les destinataires de leurs actes des recours juridictionnels ouverts ni des délais dans lesquels ils peuvent être exercés (ordonnance de la Cour du 5 mars 1999, Guérin automobiles/Commission, C-153/98 P, Rec. p. 1441, points 13 et 15 ; arrêt du Tribunal du 24 février 2000, ADT Projekt/Commission, T-145/98, Rec. p. II-387, point 210). En tout état de cause, l'avis de marché en cause mentionne, au point VI.4.1, l'instance chargée des procédures de recours.

49 S'agissant du grief tiré d'une violation du principe de proportionnalité, à première vue la Commission a pu considérer à bon droit qu'une admission de la candidature du requérant qui, en raison de son caractère tardif, n'était pas conforme aux règles imposées à tous les candidats aurait risqué de porter atteinte aux principes d'égalité de traitement et de transparence consacrés par l'article 98, paragraphe 1, du règlement financier. Dans une telle hypothèse, le requérant aurait en effet bénéficié d'un temps de préparation plus long que les autres candidats et sa candidature aurait été admise bien que ne respectant pas toutes les conditions de participation, alors que d'autres

candidatures ne respectant pas non plus l'ensemble de ces conditions auraient été rejetées. Compte tenu de la nécessaire mise en balance des principes généraux en cause, il ne semble donc pas, à première vue, que la décision attaquée soit contraire au principe de proportionnalité.

50 En ce qui concerne le grief pris d'une violation de l'article 123, paragraphe 1, du règlement d'exécution, force est de constater que le premier alinéa de cette disposition, selon lequel le nombre de candidats invités à soumissionner ne peut être inférieur à cinq, ne semble manifestement pas avoir été violé, le nombre des candidats susceptibles d'être invités à soumissionner étant largement supérieur à cinq. Par ailleurs, ainsi que la Commission l'a fait observer, ce nombre de cinq ne paraît aucunement constituer un minimum absolu, étant donné que l'article 123, paragraphe 3, du règlement d'exécution permet au pouvoir adjudicataire de continuer la procédure même s'il ne reste plus qu'un seul candidat (« en invitant le ou les candidats »).

51 S'agissant enfin du troisième alinéa de l'article 123, paragraphe 1, du règlement d'exécution, aux termes duquel le nombre de candidats admis à soumissionner doit, en tout état de cause, être suffisant pour assurer une concurrence réelle, il convient de relever que tout indique, à première vue, que le nombre des candidats susceptibles d'être admis à soumissionner sera, en l'espèce, suffisant pour assurer une telle concurrence.

52 En tout état de cause, ainsi que la Commission l'a précisé, la question de savoir s'il existe suffisamment de candidats autorisés à soumissionner ne saurait, prima facie, remettre en cause la légalité d'une décision constatant qu'un candidat donné n'a pas déposé de demande de participation conforme aux modalités prescrites à l'article 145 du règlement d'exécution et dans l'avis de marché et que ce candidat n'est donc pas autorisé à participer aux étapes suivantes de la procédure. En effet, la question du nombre suffisant de candidats admis à soumissionner est examinée à un stade ultérieur, postérieur à celui de l'examen de la conformité des demandes déposées. À cette occasion, le pouvoir adjudicataire peut d'ailleurs être amené à renoncer au marché en cause et à en organiser un nouveau, s'il estime que le nombre des candidats n'est pas suffisant pour assurer une concurrence effective (voir, en ce sens, arrêt du Tribunal du 26 février 2002, Esedra/Commission, T–169/00, Rec. p. II–609, points 202 et 203).

53 Il résulte de ce qui précède que, sans préjudice des appréciations à effectuer dans le cadre du litige au principal, les griefs avancés par le requérant dans la présente procédure en référé ne permettent pas en l'état d'établir l'existence d'un fumus boni juris.

54 Ce n'est donc qu'à titre surabondant qu'il sera procédé ensuite à l'examen de l'urgence.

Sur l'urgence

Arguments des parties

55 Le requérant fait valoir qu'il risque de subir un préjudice grave et irréparable si les mesures provisoires demandées ne sont pas accordées. En effet, dès le mois de janvier 2009, date d'expiration de son contrat en cours avec la Commission, sa position sur le marché des langues en Belgique serait modifiée de manière irrémédiable. Par conséquent, un arrêt d'annulation survenant après cette date ne pourrait réparer le préjudice subi. Le requérant estime, par ailleurs, qu'il y a lieu d'écarter, pour le contentieux relatif aux marchés publics, la règle selon laquelle un préjudice est réparable s'il est susceptible de faire l'objet d'une compensation financière ultérieure.

56 En tout état de cause, à défaut d'adoption des mesures provisoires sollicitées, il serait impossible pour le requérant d'obtenir une réparation financière, dans l'hypothèse où la procédure au principal aboutirait ensuite à l'annulation de la décision attaquée. En effet, cette décision empêcherait le requérant de remettre une offre, de sorte qu'il ne pourrait jamais être comparé aux candidats admis à participer. Cela signifierait que, même si la décision attaquée était ultérieurement annulée, le contrat ne pourrait jamais être attribué au requérant.

57 Il aurait, certes, été jugé que des dommages et intérêts en réparation du préjudice subi peuvent constituer une réparation adéquate. Le montant d'une telle indemnisation serait, toutefois, fonction du préjudice économique engendré par la décision illégale, d'une part, et des chances que le requérant aurait eu d'obtenir le marché si la décision illégale n'avait pas été adoptée, d'autre part. En l'espèce, s'il est possible de calculer le manque à gagner subi par le requérant pour chacun des lots pour lesquels il a postulé, il serait extrêmement difficile, à défaut d'offre pouvant être comparée aux offres sélectionnées, de démontrer quelles auraient été ses chances d'obtenir le marché s'il avait été admis à présenter une offre. La possibilité théorique d'obtenir une telle indemnisation,

incalculable en l'espèce, ne pourrait donc assurer une protection adéquate des intérêts du requérant en cas d'annulation.

58 Le requérant affirme que, en l'absence des mesures provisoires sollicitées, son existence et sa position sur le marché seront mises en péril dès le mois de janvier 2009. Son élimination entraînerait pour lui une perte financière considérable, correspondant à [*confidentiel*] (1) de son chiffre d'affaires total actuel. Comme le démontrerait son bilan pour l'année 2007, les cours dispensés au sein des institutions communautaires dans le cadre du marché attribué en 2004 correspondraient à un chiffre d'affaires annuel de [*confidentiel*] euros, sur un chiffre d'affaires total de [*confidentiel*] euros, soit [*confidentiel*] % de ce chiffre d'affaires total. Or, le marché en cause serait d'une importance identique, voire supérieure, au marché en cours d'exécution.

59 À la suite de cette réduction d'activités, le requérant devrait se défaire, faute de travail, d'une équipe d'environ [*confidentiel*] formateurs (sur un total d'environ [*confidentiel*] formateurs actifs), qui seraient aujourd'hui affectés exclusivement ou quasi exclusivement à l'enseignement des langues au sein des institutions communautaires et qui, en l'absence des mesures provisoires sollicitées, seraient dispersés à la fin de la relation contractuelle avec lesdites institutions. Par conséquent, à défaut de telles mesures, la décision attaquée aurait déjà produit des conséquences irréversibles avant qu'elle ne soit annulée.

60 En ce qui concerne plus particulièrement les « langues rares » (lots 7, 8 et 9 du marché en cause), auxquelles seraient affectés [*confidentiel*] formateurs, et les formations spécialisées pour traducteurs (lot 10 du marché en cause), auxquelles seraient affectés [*confidentiel*] formateurs, la mise en place de cette équipe d'enseignants aurait nécessité dix années d'investissements du requérant. Pour la plupart de ces langues, les cours donnés au sein des institutions communautaires représenteraient la très grande majorité, voire la quasi-totalité, de la demande à Bruxelles (Belgique). Le fait d'avoir constitué, en vue des marchés passés avec les institutions communautaires, une équipe très qualifiée enseignant ces langues aurait permis au requérant de proposer également un enseignement de ces langues aux particuliers et aux entreprises. À la suite de son exclusion du marché en cause, le requérant serait dans l'impossibilité de maintenir son offre dans ce domaine. De la même manière, le départ des formateurs spécialisés affaiblirait très sensiblement la possibilité pour le requérant de participer à d'autres marchés publics similaires.

61 Le requérant ajoute que le fait de travailler pour les institutions communautaires lui a permis d'être un « choix naturel » pour les enseignants de diverses nationalités venant s'installer en Belgique. La perte de la relation contractuelle avec ces institutions affecterait l'image du requérant dans le milieu des formateurs professionnels et sa capacité de recruter des enseignants de qualité à l'avenir. Le requérant devrait également se défaire de [*confidentiel*] employés, sur un total de [*confidentiel*], affectés à l'organisation des formations pour le personnel des institutions communautaires. En outre, il aurait développé un logiciel informatique spécifique pour les institutions communautaires. Ces investissements seraient tous perdus à la suite de l'élimination du requérant.

62 Il serait donc évident que la perte [*confidentiel*] de son chiffre d'affaires aurait des conséquences profondes sur la solidité financière du requérant et mettrait en péril son existence. De même, sa position sur le marché serait irrémédiablement modifiée en raison de la réduction drastique de son offre de langues, du départ d'[*confidentiel*] de ses formateurs et de [*confidentiel*] % environ de son personnel de gestion ainsi que de la difficulté de concourir à l'avenir pour des marchés similaires.

63 Selon la Commission, le requérant ne démontre pas en quoi un futur arrêt d'annulation dans la procédure au principal ne constituerait pas une réparation adéquate de son dommage. Ainsi, il n'exposerait pas qu'il serait impossible pour la Commission d'organiser, à la suite d'un tel arrêt, un nouvel appel d'offres pour se conformer à son obligation de prendre les mesures nécessaires pour protéger de manière appropriée les intérêts du requérant. Le requérant n'établirait donc pas l'existence d'un préjudice grave et irréparable.

64 Le requérant ne démontrerait notamment pas que, en l'absence de suspension de la décision attaquée, son existence serait mise en péril. Ainsi, la seule circonstance que le marché avec les Communautés européennes représente environ [*confidentiel*] de son chiffre d'affaires ne suffirait pas à cet égard, d'autant plus que le requérant bénéficie encore actuellement de cette source de chiffre d'affaires, et ce jusqu'en janvier 2009. Le requérant disposerait aussi d'une clientèle très diversifiée, constituée tant de particuliers que d'entreprises et d'institutions, ce qui lui permettrait largement de maintenir ses activités jusqu'à l'issue de la procédure au principal.

65 Quant à l'argument selon lequel sa structure serait irrémédiablement atteinte en cas de perte du

marché, la Commission se réfère à des offres d'emploi publiées sur le site Internet du requérant pour constater que ce dernier travaille régulièrement, voire essentiellement, avec des indépendants ou indépendants complémentaires, y compris en matière de « langues rares ». La Commission en conclut que le requérant peut facilement réduire ou augmenter la masse de ses collaborateurs sans pour autant mettre sa structure ou son existence en péril. S'agissant des « langues rares » et notamment du lot 9, intitulé « arabe, japonais, mandarin, russe et autres langues hors Union européenne non mentionnées dans le lot 8 », il ne paraîtrait guère crédible de soutenir que seules les institutions communautaires seraient intéressées par ces langues. La preuve en serait que le requérant recherche actuellement des collaborateurs pour les cours adultes (hors institutions communautaires) dispensés dans ces langues. S'agissant des investissements, ils auraient été réalisés en vue de l'exécution des marchés antérieurs et devraient avoir été amortis dans ce cadre.

66 La Commission conclut que, compte tenu de la souplesse de sa méthode de travail, le requérant n'établit pas que l'absence des mesures provisoires sollicitées mettrait en péril son existence ou l'empêcherait de maintenir son offre dans les domaines en cause ou de reconquérir une fraction appréciable des parts de marché perdues.

Appréciation du juge des référés

67 Il y a lieu de rappeler que le caractère urgent d'une demande en référé doit s'apprécier par rapport à la nécessité qu'il y a de statuer provisoirement afin d'éviter qu'un préjudice grave et irréparable ne soit occasionné à la partie qui sollicite les mesures provisoires. C'est à cette dernière partie qu'il appartient d'apporter la preuve qu'elle ne saurait attendre l'issue de la procédure au principal sans avoir à subir un préjudice de cette nature (voir ordonnances du président du Tribunal du 15 novembre 2001, Duales System Deutschland/Commission, T–151/01 R, Rec. p. II–3295, point 187 ; du 20 septembre 2005, Deloitte Business Advisory/Commission, T–195/05 R, Rec. p. II–3485, point 124, et du 25 avril 2008, Vakakis/Commission, T–41/08 R, non publiée au Recueil, point 52, et la jurisprudence citée).

68 Lorsque le préjudice dépend de la survenance de plusieurs facteurs, il suffit qu'il apparaisse comme prévisible avec un degré de probabilité suffisant [ordonnance du président du Tribunal du 16 janvier 2004, Arizona Chemical e.a./Commission, T–369/03 R, Rec. p. II–205, point 71 ; voir également, en ce sens, ordonnances de la Cour du 29 juin 1993, Allemagne/Conseil, C–280/93 R, Rec. p. I–3667, points 32 à 34, et du président de la Cour du 14 décembre 1999, HFB e.a./Commission, C–335/99 P (R), Rec. p. I–8705, point 67]. La partie requérante demeure cependant tenue de prouver les faits qui sont censés fonder la perspective d'un tel dommage grave et irréparable (voir, en ce sens, ordonnance Arizona Chemical e.a./Commission, précitée, point 72 ; voir, également, ordonnance HFB e.a./Commission, précitée, point 67).

69 Il convient donc d'examiner si, en l'espèce, le requérant a démontré avec un degré de probabilité suffisant qu'il subira un préjudice grave et irréparable si les mesures provisoires qu'il sollicite ne lui sont pas octroyées.

70 S'agissant de la gravité du préjudice invoqué en l'espèce, il importe de rappeler que ce dernier serait subi à l'occasion d'une procédure d'appel d'offres pour l'attribution d'un marché. Or, une telle procédure a pour objet de permettre à l'autorité concernée de choisir, parmi plusieurs offres concurrentes, celle qui lui paraît le plus conforme aux critères de sélection prédéterminés. L'autorité communautaire qui institue une telle procédure dispose, par ailleurs, d'un large pouvoir d'appréciation quant aux éléments à prendre en considération en vue de la prise de la décision de passer le marché (arrêts ADT Projekt/Commission, précité, point 147, et Esedra/Commission, précité, point 95 ; arrêt du Tribunal du 14 février 2006, TEA-CEGOS e.a./Commission, T–376/05 et T–383/05, Rec. p. II–205, point 50).

71 Une entreprise qui participe à une telle procédure n'a, dès lors, jamais la garantie absolue que le marché lui sera adjugé, mais doit toujours tenir compte de l'éventualité de son attribution à un autre soumissionnaire. Dans ces conditions, les conséquences financières négatives pour l'entreprise en question, qui découleraient du rejet de son offre, font, en principe, partie du risque commercial habituel auquel chaque entreprise active sur le marché doit faire face (voir, en ce sens, ordonnance du juge des référés du Tribunal du 14 septembre 2007, AWWW/FEACVT, T–211/07 R, non publiée au Recueil, point 41).

72 Il s'ensuit que la perte d'une chance de se voir attribuer et d'exécuter un marché public est

inhérente à l'exclusion de la procédure d'appel d'offres en cause et ne saurait être regardée comme constitutive, en soi, d'un préjudice grave, indépendamment d'une appréciation concrète de la gravité de l'atteinte spécifique alléguée dans chaque cas d'espèce (voir, en ce sens, ordonnance Deloitte Business Advisory/Commission, précitée, point 150).

73 Il convient d'ajouter que, selon une jurisprudence bien établie (voir ordonnance du président du Tribunal du 1er février 2001, Free Trade Foods/Commission, T-350/00 R, Rec. p. II-493, point 59, et la jurisprudence citée), l'urgence à ordonner une mesure provisoire doit résulter des effets produits par l'acte litigieux et non d'un manque de diligence du demandeur de ladite mesure. En effet, il incombe à ce dernier, au risque de devoir supporter lui-même le préjudice comme faisant partie des « risques de l'entreprise », de faire preuve d'une diligence raisonnable pour en limiter l'étendue.

74 En application de cette jurisprudence, la partie qui demande l'octroi d'une mesure provisoire doit supporter également des préjudices dont elle prétend qu'ils sont susceptibles de mettre en péril son existence même ou de modifier de manière irrémédiable sa position sur le marché.

75 Or, en l'espèce, il est de fait que le requérant était seul responsable de ce que sa demande de participation a été déposée dix jours après l'expiration du délai clairement imposé à cet effet dans l'avis de marché (voir points 4 et 6 ci-dessus). Le requérant n'a pas contesté que, dans l'avis de marché, la Commission avait laissé aux candidats un délai suffisant pour se manifester. En outre, le requérant, qui entretenait des relations contractuelles de longue date avec la Commission et qui avait obtenu le marché de formation linguistique précédent, était particulièrement bien placé pour savoir, en opérateur économique prudent et averti, qu'un nouvel avis devait être publié au courant de l'année 2008. Par ailleurs, il a lui-même déclaré qu'il avait de longue date préparé son dossier de candidature dans l'attente du renouvellement du marché précédent.

76 Il s'ensuit que la situation à l'origine de la présente demande en référé est le résultat d'une négligence du requérant. Ce dernier s'est borné à faire état d'un « malentendu administratif », sans établir ni même invoquer devant l'autorité adjudicatrice ou devant le juge des référés l'existence d'un cas fortuit, d'une force majeure ou d'une erreur excusable, qui aurait éventuellement pu être susceptible de permettre une dérogation à l'application stricte de la date limite fixée dans l'avis de marché.

77 Par conséquent, dès lors que le préjudice allégué en l'espèce serait, dans sa totalité, causé par l'absence de diligence du requérant lui-même, il ne saurait, indépendamment de sa prétendue gravité, justifier l'urgence à ordonner les mesures provisoires demandées.

78 S'agissant du préjudice d'ordre financier invoqué, il convient d'ajouter qu'il ne saurait être regardé comme irréparable, ou même difficilement réparable, dès lors qu'il peut faire l'objet d'une compensation financière ultérieure. Le requérant n'a, notamment, pas établi qu'il serait empêché d'obtenir une telle compensation par voie d'un éventuel recours en indemnité en vertu de l'article 288 CE (voir, en ce sens, ordonnance du président du Tribunal du 10 novembre 2004, European Dynamics/Commission, T-303/04 R, Rec. p. II-3889, point 72, et la jurisprudence citée).

79 Le requérant fait, certes, valoir qu'il serait extrêmement difficile, à défaut d'offre pouvant être comparée aux offres sélectionnées, de démontrer quelles auraient été ses chances d'obtenir le marché s'il avait été admis à présenter une offre (impossibilité de démontrer l'existence du lien de causalité requis). Il y a cependant lieu de rappeler que, le 10 juin 2008, le requérant s'est vu communiquer par la Commission le cahier des charges et qu'il a été autorisé, par l'ordonnance du 9 juin 2008, à présenter une offre pour les lots 2, 3, 4, 6, 7, 8, 9 et 10 du marché en cause (voir point 12 ci-dessus). Il serait donc possible, dans le cadre d'un éventuel futur litige indemnitaire, de comparer cette offre avec celle retenue par le pouvoir adjudicataire.

80 Il s'ensuit que, dans l'hypothèse où le requérant obtiendrait gain de cause au principal, il pourrait être attribué une valeur économique au préjudice qu'il a subi en raison de la perte de la chance de remporter le marché en cause, valeur économique qui est susceptible de satisfaire à l'obligation de réparation intégrale du dommage individuel effectivement subi (voir, en ce sens, ordonnance Vakakis/Commission, précitée, point 67). Or, il résulte d'une jurisprudence récente de la Cour que, lorsque le Tribunal accorde des dommages et intérêts sur la base de la valeur économique attribuée au préjudice subi en raison d'un manque à gagner, cette réparation est en principe susceptible de satisfaire à l'exigence d'assurer la réparation intégrale du préjudice individuel que la partie concernée a effectivement subi du fait des actes illégaux particuliers dont elle a été victime (voir, en ce sens, arrêt de la Cour du 21 février 2008, Commission/Girardot, C-348/06 P, non encore publié

au Recueil, point 76).

81 Au vu de tout ce qui précède, il y a lieu de conclure que la condition relative à l'urgence n'est pas remplie.

82 En conséquence, la demande en référé doit être rejetée pour défaut tant de fumus boni juris que d'urgence.

Par ces motifs,

LE PRÉSIDENT DU TRIBUNAL

ordonne :

1) La demande en référé est rejetée.

2) Les dépens sont réservés.

Fait à Luxembourg, le 15 juillet 2008.

Le greffier	Le président
E. Coulon	M. Jaeger

* Langue de procédure : le français.

1 – Données confidentielles occultées.

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Documents relatifs à la même affaire

Ordonnance du président du Tribunal du 15 juillet 2008 – CLL Centres de langues/Commission(affaire T-202/08 R)

« Référé – Marchés publics – Procédure communautaire d'appel d'offres – Rejet d'une demande de participation – Demande de sursis à exécution et de mesures provisoires – Défaut de fumus boni juris – Perte d'une chance – Absence de préjudice grave et irréparable – Défaut d'urgence »

1. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi - « Fumus boni juris » - Urgence - Caractère cumulatif (Art. 225 CE, 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 16-18)*

2. *Référé - Sursis à exécution - Conditions d'octroi - « Fumus boni juris » - Examen prima facie des moyens invoqués à l'appui du recours principal - Décision de la Commission d'exclure d'une procédure d'appel d'offres une candidature tardive (Art. 242 CE; règlement de procédure du Tribunal, art. 104, § 2; règlement de la Commission nº 2342/2002, art. 140, 143 et 145) (cf. points 31-45)*

3. *Référé - Sursis à exécution - Conditions d'octroi - « Fumus boni juris » - Examen prima facie des moyens invoqués à l'appui du recours principal - Décision de la Commission d'exclure d'une procédure d'appel d'offres une candidature tardive (Art. 242 CE; règlement de procédure du Tribunal, art. 104, § 2; règlement de la Commission nº 2342/2002, art. 123, § 1 et 3, et 145) (cf. points 47-53)*

4. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi - Urgence - Préjudice grave et irréparable (Art. 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 67-68, 70-72)*

5. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi – Urgence (Art. 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 73-77)*

6. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi - Préjudice grave et irréparable - Préjudice financier (Art. 242 CE, 243 CE et 288 CE; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 78- 80)*

Objet

Demande de mesures provisoires visant, en substance, à permettre au Centre de langues à Louvain-la-Neuve et -en-Woluwe (CLL Centres de langues) de participer à la procédure d'appel d'offres ADMIN/D1/PR/2008/004 concernant le marché « Formations linguistiques pour le personnel des institutions, organes et agences de l'Union européenne (UE) implantés à Bruxelles » et à suspendre la décision d'exclusion de la Commission jusqu'à ce que le Tribunal se soit prononcé sur le recours en annulation dirigé contre cette décision.

Dispositif

1) La demande en référé est rejetée.

2) Les dépens sont réservés.

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Order of the President of the Court of First Instance of 15 July 2008 - CLL Centres de Langues v Commission

(Case T-202/08 R)

(Application for interim measures - Public procurement - Community tendering procedure - Rejection of application to participate - Application for suspension of operation and interim measures - No prima facie case - Loss of opportunity - No serious and irreparable damage - No urgency)

Language of the case: French

Parties

Applicant: Centre de langues à Louvain-la-Neuve et -en-Woluwe (CLL Centres de Langues) (Louvain-la-neuve, Belgium) (represented by: F. Tulkens and V. Ost, lawyers)

Defendant: Commission of the European Communities (represented by: N. Bambara and E. Manhaeve, agents and by P. Wytinck, lawyer)

Re:

Application for interim measures, essentially to permit the Centre de langues à Louvain-la-Neuve et -en-Woluwe (CLL Centres de Langues) to participate in the tendering procedure ADMIN/D1/PR/2008/004 regarding the contract 'Language training for staff at the European Union (EU) institutions, bodies and agencies in Brussels' and to suspend the Commission's decision to exclude it until the Court has ruled on the action for annulment of that decision.

Operative part of the order

1. *The application for interim measures is rejected.*

2. *Costs are reserved.*

_____

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Action brought on 5 June 2008 - CLL Centre de langues v Commission

(Case T-202/08)

Language of the case: French

Parties

Applicant: Centre de langues à Louvain-la-Neuve et -en-Woluwe (CLL Centre de langues) (Louvain-la-Neuve, Belgium) (represented by: F. Tulkens and V. Ost, lawyers)

Defendant: Commission of the European Communities

Form of order sought

Annul the rejection decision;

Order the Commission to bear its own costs and to pay those incurred by CLL.

Pleas in law and main arguments

The applicant disputes the Commission's decision to reject its application to participate in invitation to tender ADMIN/D1/PR/2008/004 regarding language training for staff at the European Union (EU) institutions, bodies and agencies in Brussels (OJ 2008 S 44-060121), on the ground that the application was submitted after the deadline stated in the contract notice.

In support of its action, the applicant submits that the contested decision is based on an incorrect supposition that the awarding authority is required to reject all late applications to participate. The applicant takes the view, on the contrary, that the awarding authority has a margin of discretion in that regard.

Furthermore, the applicant submits that the contested decision is not sufficiently reasoned, since the Commission has not explained why it has not exercised its discretionary powers.

Finally, the applicant raises a plea alleging breach of Article 123 of the implementing rules, [1] according to which the number of candidates invited to tender must be sufficient to ensure genuine competition, and the disproportionate nature of the rejection of the applicant's application.

_____

[1] - Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, p. 1).

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JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

10 December 2009 (*)

(Public procurement – Community tendering procedure – Construction of a reference materials production hall – Rejection of a tender – Action for annulment – Interest in bringing proceedings – Admissibility – Interpretation of a condition laid down in the contract documents – Compliance of a tender with the conditions laid down in the contract documents – Exercise of the power to request clarification of tenders – Action for damages)

In Case T–195/08,

Antwerpse Bouwwerken NV, established in Antwerp (Belgium), represented initially by J. Verbist and D. de Keuster, and subsequently by J. Verbist, B. van de Walle de Ghelcke and A. Vandervennet, lawyers,

applicant,

v

European Commission, represented by E. Manhaeve, acting as Agent, and by M. Gelders, lawyer,

defendant,

APPLICATION for (i) annulment of the decision of the Commission rejecting the tender submitted by the applicant in a restricted public procurement procedure concerning the construction of a reference materials production hall in the grounds of the Institut des matériaux et mesures de référence (Institute for Reference Materials and Measurements) in Geel (Belgium) and awarding the contract to another tenderer and (ii) compensation for the damage purportedly suffered by the applicant by reason of that decision of the Commission,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President, M. Prek and V.M. Ciucă, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2009,

gives the following

Judgment

Legal context

1 Articles 27(1), 89(1), 91(1), 99, 100(2) and 101 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1) ('the Financial Regulation'), provide:

'Article 27

1. Budget appropriations shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness.

...

Article 89

1. All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.

...

Article 91

1. Procurement procedures shall take one of the following forms:

(a) the open procedure;

(b) the restricted procedure;

(c) contests;

(d) the negotiated procedure;

(e) the competitive dialogue.

...

Article 99

While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers must satisfy conditions ensuring transparency and equal treatment. They may not lead to amendment of the conditions of the contract or the terms of the original tender.

...

Article 100

...

2. The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.

Article 101

The contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation.

The decision must be substantiated and be brought to the attention of the candidates or tenderers.'

2 Articles 122, 138, 139, 148 and 158a of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1), as amended by Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005 (OJ 2005 L 201, p. 3), Commission Regulation (EC, Euratom) No 1248/2006 of 7 August 2006 (OJ 2006 L 201, p. 3), and Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (OJ 2007 L 111, p. 13) ('the Implementing Regulation') provide:

'Article 122

Types of procurement procedure

(Article 91 of the Financial Regulation)

1. Contracts shall be awarded by call for tender, using the open, restricted or negotiated procedure after publication of a contract notice or by negotiated procedure without prior publication of a contract notice, where appropriate following a contest.

2. Calls for tenders are open where all interested economic operators may submit a tender ...

Calls for tenders are restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 135 and invited simultaneously and in writing by the contracting authorities may submit a tender ...

The selection phase may be repeated for each individual contract, … or may involve drawing up a list of potential candidates under the restricted procedure referred to in Article 128.

...

Article 138

Award arrangements and criteria

(Article 97(2) of the Financial Regulation)

1. Without prejudice to Article 94 of the Financial Regulation, contracts shall be awarded in one of the following two ways:

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.

...

Article 139

Abnormally low tenders

(Article 97(2) of the Financial Regulation)

1. If, for a given contract, tenders appear to be abnormally low, the contracting authority shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received. ...

Article 148

Contacts between contracting authorities and tenderers

(Article 99 of the Financial Regulation)

1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

...

3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.

...

Article 158a

Standstill period before signature of the contract

(Article 105 of the Financial Regulation)

1. The contracting authority shall not sign the contract or framework contract, covered by Directive 2004/18/EC, with the successful tenderer until 14 calendar days have elapsed.

That period shall run from either of the following dates:

(a) the day after the simultaneous dispatch of the award decisions and decisions to reject;

(b) where the contract or framework contract is awarded pursuant to a negotiated procedure without prior publication of a contract notice, the day after the contract award notice referred to in Article 118 has been published in the *Official Journal of the European Union*.

If necessary, the contracting authority may suspend the signing of the contract for additional examination if this is justified by the requests or comments made by unsuccessful or aggrieved tenderers or candidates or by any other relevant information received. The requests, comments or information must be received during the period set in the first subparagraph. In the case of suspension all the candidates or tenderers shall be informed within three working days following the suspension decision.

Except in the cases provided for in paragraph 2, any contract signed before the expiry of the period set in the first subparagraph shall be null and void.

Where the contract or framework contract cannot be awarded to the successful envisaged tenderer, the contracting authority may award it to the following best tenderer.

…'

3 Articles 2 and 28 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) provide as follows:

'Article 2

Principles of awarding contracts

Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

Article 28

Use of open, restricted and negotiated procedures and of competitive dialogue

In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. …'

Background to the dispute

4 With a view to the construction of a reference materials production hall in the grounds of the Institut des matériaux et mesures de référence (Institute for Reference Materials and Measurements) (IMMR) in Geel (Belgium), the Commission of the European Communities decided to award a public procurement contract ('the contract'). It opted for a restricted procedure within the meaning of the second subparagraph of Article 122(2) of the Implementing Regulation and, after publication of a contract notice on 31 May 2006, it launched a restricted call for tenders for that construction.

5 The applicant – Antwerpse Bouwwerken NV – took part in that procedure, as did Company C and two other undertakings. They were sent the contract documents, the administrative annex to which states, at point 25, that the contract is to be awarded to the cheapest tender, and that:

'Failure to state all the prices required in the take-off ["cost estimation summary"] will result in exclusion. That also applies where alterations are made to the [cost estimation summary] in response to comments submitted in good time by the tenderers.'

6 On 21 September 2007, the applicant submitted its tender. The tender price was EUR 10 315 112.32.

7 On 5 November 2007, the Commission Evaluation Committee drafted an initial evaluation report on the tenders submitted. That report states, inter alia, that '[Company C] has given a Unit Price for Item 03.09.15B but omitted to include it in the Global Price. EUR 973.76 should be added, giving a new total of EUR 9 728 946.14'; that '[Company C] also omitted to give a Unit price for Item E.9.26'; that '[n]o omissions were found in the tender of [the applicant]'; that '[Company C] and [other undertakings] all omitted to give prices for some items'; that, for that reason, '[their tenders] have to be considered non-conform'; and that, 'therefore the only conform offer was submitted by [the applicant]'. In view of that conclusion, the Evaluation Committee proposed that the contract be awarded to the applicant.

8 By letter of 27 February 2008, the applicant was informed by the Commission that:

– its tender had been selected for the award of the contract, while, nevertheless, its attention was drawn to the fact that no obligation was thereby placed on the Commission, given that the competent Commission departments may at any time abandon the idea of a procurement contract or cancel the award procedure, without the applicant being entitled to claim any compensation whatsoever;

– the contract could not be signed until after the expiry of a two-week period and the Commission reserved the right to suspend its signing of the contract pending additional examination should this be justified in the light of requests or comments made by the unsuccessful tenderers or of any other relevant information received.

9 In reply to a letter of 3 March 2008 from Company C requesting detailed explanations for the rejection of its tender, the Commission stated by letter of 10 March 2008 that Company C's tender had been rejected because it did not comply with the conditions laid down in the contract documents and in the administrative annex thereto. In that letter, the Commission included an extract from the evaluation report of 5 November 2007 stating, inter alia, that Company C had omitted to quote a price for Item E 9.26 of the cost estimation summary.

10 By letter of 11 March 2008, received by the Commission on the following day, Company C stated that the price for Item E 9.26 of the cost estimation summary – missing from its tender – could clearly be deduced from the price bid for Item E 9.13 in that summary, which was worded identically. Company C also submitted that it would be manifestly unjust, imprudent and contrary to the principle of economy to reject its tender on that ground alone, particularly as the price for Item E 9.26 accounted only for a tiny proportion of the total value of the contract.

11 By letter of 12 March 2008, the Commission informed the applicant that one of the unsuccessful tenderers had provided information which justified suspension of the signing of the contract, in accordance with Article 158a(1) of the Implementing Regulation.

12 By letter of 16 April 2008, the Commission asked Company C to confirm that its tender was to be understood as meaning that the price bid for Item E 9.26 of the cost estimation summary was the same as that for Item E 9.13 of the summary – that is to say, EUR 903.69 – and that, when that price was taken into consideration together with that for Item 03.09.15B, which Company C had mistakenly omitted to include in the calculation of the overall bid price, the overall price was EUR 9 729 849.83.

13 By two letters dated 22 April 2008 and received by the Commission on the same day, Company C confirmed that that understanding of its tender was correct.

14 On 23 April 2008, the Evaluation Committee drew up a new evaluation report on the tenders submitted, in which it states, inter alia, in point 3.2.1.3, that '[Company C] omitted to give a Unit price for Item E 9.26', but that 'in a clarification letter they mentioned that the price could be retrieved from item E 9.13 [(EUR 903.69)] since it is exactly the same item'. The Evaluation Committee adds that, '[b]ased on this clarification … EUR 903.69 should be added to their original offer', and that, '[a]s per the … Commission Legal Service, this event should be considered as a

clarification to the offer and not as a modification'. The Evaluation Committee accordingly proposed that the contract be awarded to Company C. In that new evaluation report, the applicant's tender is presented as only the third cheapest tender.

15 By letter of 29 April 2008, received on 5 May 2008, the Commission informed the applicant that, ultimately, its tender had not been selected for award of the contract, on the ground that its bid price 'was higher than that bid by the successful tenderer'.

16 By letter of the same day, the Commission informed Company C that it had been awarded the contract.

17 In reply to a request made by the applicant, the Commission informed it, by letter of 6 May 2008, of the following additional reasons:

'When this voluminous file was first examined, you appeared to be the successful tenderer despite the fact that your price was noticeably higher than that of the successful tenderer. The reason for the initial rejection of that tenderer's tender was that no price could be found for a certain low-price item. That was also the position in the case of two other tenderers. Consequently, those tenders were initially regarded as non-compliant.

During the standstill period provided for in Article 158a of the [Implementing] Regulation, the other tenderers pointed out that the missing prices were in fact to be found in their tenders. As a consequence, the standstill period was suspended so that an additional examination could be carried out. It emerged from that examination that the prices, initially missing, were in fact stated and that those undertakings had therefore submitted compliant tenders. Accordingly, it was necessary to re-examine all the tenders. Given that one of those undertakings had submitted the cheapest tender, it has been selected as the successful tenderer in this procurement procedure.'

18 By letter of 15 May 2008, received by the applicant on the following day, the Commission sent the applicant a copy of the evaluation reports of 5 November 2007 and 23 April 2008.

Procedure and forms of order sought by the parties

19 By application lodged at the Registry of the Court on 30 May 2008, the applicant brought the present action. By separate document lodged on the same day, the applicant requested that the case be decided under the expedited procedure, pursuant to Article 76a of the Rules of Procedure of the Court; that request was refused by decision of 9 July 2008.

20 By another separate document lodged on 30 May 2008, the applicant also applied for interim relief in accordance with Article 243 EC and Article 104 et seq. of the Rules of Procedure, that action being registered as Case T–195/08 R. By order of the President of the Court of 15 July 2008 in Case T–195/08 R *Antwerpse Bouwwerken* v *Commission*, not published in the ECR, the application for interim relief was dismissed.

21 Acting upon a report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, asked the Commission to reply in writing to a question and to produce certain documents. The Commission complied with that request.

22 At the hearing on 10 June 2009, the parties presented oral argument and answered the questions put by the Court.

23 The applicant claims that the Court should:

– annul the decision, contained in the Commission's letter of 29 April 2008 as supplemented by its letter of 6 May 2008, rejecting the tender submitted by the applicant, and the Commission's decision of 23 April 2008 awarding the contract to Company C, notified to the applicant by letter of the Commission of 15 May 2008;

– declare the Commission to be non-contractually liable for the damage suffered by the applicant, to be quantified at a later date;

– order the Commission to pay the costs.

24 In the reply, the applicant assessed the damage suffered at EUR 619 000 and reserved the right to re-assess the damage in the course of the proceedings.

25 The Commission contends that the Court should:

– dismiss the action as inadmissible or, failing which, as unfounded;

– order the applicant to pay the costs.

The application for annulment

The subject-matter of the dispute

26 By its first head of claim, the applicant seeks annulment of (i) the Commission's decision of 29 April 2008 rejecting its tender and (ii) the Commission's 'decision' of 23 April 2008 awarding the contract to Company C. The applicant was informed of the latter decision by letter of the Commission of 15 May 2008.

27 Nevertheless, it is clear, as was pointed out in paragraph 18 above, that, by letter of 15 May 2008, the Commission merely sent the applicant the evaluation reports of 5 November 2007 and 23 April 2008 and that those reports do not contain any decision on the part of the Commission, but only proposals made by the Evaluation Committee concerning the award of the contract to the applicant and to Company C, respectively, which are not binding upon the Commission (see, to that effect, Case C–27/98 *Fracasso and Leitschutz* [1999] ECR I–5697, paragraphs 33 and 34, and Case T–145/98 *ADT Projekt* v *Commission* [2000] ECR II–387, paragraph 152).

28 It should also be borne in mind that provisional measures intended to pave the way for the decision awarding a public procurement contract, which is a decision drawn up under an internal procedure involving several stages, cannot themselves be contested in an action for annulment. Such an action can be brought only against the measures which definitively lay down the position of the Commission upon the conclusion of that internal procedure (see, to that effect, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10, and Joined Cases T–10/92 to T–12/92 and T–15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II–2667, paragraph 28), that is to say, in the present case, the decision rejecting the tender submitted by one tenderer and the decision awarding the contract to another tenderer.

29 It should also be observed that, in response to a request from the Court for a copy of its decision awarding the contract to Company C, the Commission stated that, at the material time, it was not the practice of the competent department to adopt a formal award decision but that, on the basis of the recommendations made in the evaluation report and after seeking a favourable opinion from an internal committee, that department forwarded to the successful tenderer the decision awarding it the contract and notified to the other tenderers the decision rejecting their tenders. At the hearing, the parties confirmed that point, which was recorded in the minutes.

30 In those circumstances, it must be concluded that the applicant's first head of claim is to be understood as seeking the annulment of the Commission's decision of 29 April 2008 awarding the contract to Company C and rejecting the applicant's tender ('the contested decision'). By letters of the same day, both Company C and the applicant were informed of that decision (see paragraphs 15 and 16 above).

Admissibility

Arguments of the parties

31 The Commission points out that the applicant's tender was only the third lowest tender. Consequently, if the Court were to uphold the action, the contract would be awarded to the tenderer ranked second lowest, and not to the applicant. Accordingly, the applicant has no interest in bringing the present action, which should on that ground be dismissed as inadmissible.

32 The applicant maintains that this preliminary plea of inadmissibility must be rejected for the reasons set out in the order in Case T–195/08 R *Antwerpse Bouwwerken* v *Commission*, paragraph 20 above (paragraphs 21 to 25).

Findings of the Court

33 It should be borne in mind that, according to settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure (Case T–310/00 *MCI* v *Commission* [2004] ECR II–3253, paragraph 44 and the case-law cited). In order for such an interest to be present, the annulment of the contested measure must of itself be capable of having legal consequences (Joined Cases T–480/93 and T–483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II–2305, paragraph 59 and the case-law cited) and the action must be likely, if successful, to procure an advantage for the party who has brought it (see, to that effect, Case C–50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I–6677, paragraph 21).

34 It must therefore be determined whether, in the present case, annulment of the contested decision is likely to procure an advantage for the applicant. The Commission contends that that is not the case, since, if the contested decision were to be annulled, the Commission would be entitled to award the contract to the tenderer whose tender was ranked second lowest rather than to the applicant, whose tender was ranked third lowest.

35 While it is indeed true that, if Company C's tender had to be rejected because of failure to comply with the conditions laid down in the contract documents, that would not automatically result in the contract being awarded to the applicant, it is also true that, although the Commission states in the evaluation report of 23 April 2008 that the undertaking ranked second lowest had omitted – just like Company C – to state a price for certain items in the cost estimation summary, the Commission nevertheless, in the light of the explanations provided by that undertaking, treated its tender (EUR 10 140 841.12) as being in compliance with the conditions laid down in the contract documents.

36 By the sole plea in law put forward in support of its application for annulment, the applicant disputes precisely the Commission's conclusion that an undertaking which had omitted to state in its tender the price for certain items in the cost estimation summary may none the less have its tender treated as being in compliance with the conditions laid down in the contract documents, in the light of the explanations provided by that undertaking.

37 It follows that, if Company C's tender were rejected because of the defect relied upon by the applicant, the Commission could be legally prevented from awarding the contract to the undertaking ranked second lowest, whose tender is liable to be vitiated by the same omission as the tender submitted by Company C. Accordingly, the undertaking ranked second lowest cannot be an impediment to the award of the contract to the applicant. As a consequence, the applicant has an interest in bringing proceedings and its application for annulment is admissible.

Substance

Arguments of the parties

38 By its sole plea in law, the applicant alleges infringement of Article 91 of the Financial Regulation, Articles 122, 138 and 148 of the Implementing Regulation and Articles 2 and 28 of Directive 2004/18. The applicant notes that the contract was awarded upon the conclusion of a restricted procurement procedure, as is stated, moreover, in points 2 and 4.2 of the administrative annex to the contract documents. It is also apparent from point 25 of that annex that there was a single award criterion – the price bid by each tenderer – and that all the prices requested in the cost estimation summary must be stated, 'otherwise the tenderer will be excluded'.

39 Furthermore, under a restricted procedure, negotiation between the contracting authority and the tenderers is not possible. Nor may tenderers amend or supplement their tenders after submitting them. Consequently, a tender which does not comply with the conditions laid down in the contract documents must perforce be rejected by the contracting authority. Otherwise, the power to ask for clarification concerning tenders would be in breach of the principle of non-discrimination as between tenderers and the obligation of transparency under Article 2 of Directive 2004/18, which applies in the present case by virtue of the contract documents.

40 Furthermore, in Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 37, the Court of Justice held that the principle of the equal treatment of tenderers requires that all the tenders comply with the terms of the contract documents, so as to ensure an objective comparison of the various tenders submitted. That requirement would not be met if tenderers were permitted to enter reservations in their tenders which allowed them to depart from the 'basic terms' of the contract documents.

41 It is also apparent from the evaluation reports that, contrary to the clear instructions in point 25 of the administrative annex to the contract documents, the cost estimation summary was not completed in full in the tender submitted by Company C, since no price was quoted for Item E 9.26. That is why, in the evaluation report of 5 November 2007, the Evaluation Committee proposed that Company C's tender be rejected as failing to comply. In the evaluation report of 23 April 2008, however, the Evaluation Committee had altered its position, following the intervention on the part of Company C.

42 Such intervention is prohibited under a restricted procedure within the meaning of Article 122(2) of the Implementing Regulation, during which negotiation between the contracting authority and the tenderers is not permissible. Contrary to the opinion delivered by the Commission Legal Service, referred to in point 3.2.1.3 of the evaluation report of 23 April 2008, the letter of 22 April 2008 from Company C cannot be regarded as clarification, since it does not relate to an element which was already included in that undertaking's tender, but seeks rather to supplement that tender by inserting a price which did not appear there. In reality, the Commission allowed Company C to amend the tender which it had submitted, even though such amendment is prohibited under the restricted procedure followed in the present case.

43 Failure to quote a price for an item in the cost estimation summary cannot be regarded as a clerical error for the purposes of Article 148(3) of the Implementing Regulation, even if the missing price can be deduced from the price quoted for another item in that summary. That is confirmed by the fact that, in the evaluation report of 5 November 2007, the Evaluation Committee had already corrected a clerical error in Company C's tender – where it had omitted to take into consideration, for the purposes of calculating the overall price bid, the price quoted for Item 03.09.15 B in the cost estimation summary – and, as a result, the overall price was increased by EUR 973.76.

44 According to the applicant, the fact that Company C was permitted to supplement the tender which it had submitted constitutes a 'procedural error'. The Commission does not have any discretion in that regard and is under a duty to apply the rules of procedure strictly. Established case-law to the effect that the Commission has a broad discretion for the purposes of assessing the tenders submitted in a contract award procedure is irrelevant in the present case, which concerns a 'procedural error' and not a manifest error of assessment. For the same reason, the principle of proportionality is not applicable in the present case.

45 Even supposing that the Commission had discretion as to whether to take an incomplete cost estimation summary into account, it erred in that it decided to exclude the tenderer concerned and to inform the applicant that it had won the contract, and then changed its position and awarded the contract to that tenderer, following the latter's intervention. Moreover, according to the applicant, that conclusion is unaffected by the fact that, in its letter of 27 February 2008, the Commission reserved the right to suspend signing the contract with the applicant, since, after being told that it would be awarded the contract, the applicant had to take certain necessary action – such as refraining from taking part in other procurement procedures – in order to be ready to commence the construction works under the contract.

46 The applicant further submits that, although it is indeed correct that the wording of Items E 9.13 and E 9.26 in the cost estimation summary was identical, the fact remains that the price quoted by Company C for the second of those items cannot be deduced from the price quoted for the first. The same wording appears in other items in the summary, namely, Items E 9.05, E 9.22, E 9.31, E 9.37 and E 9.43. The applicant quoted different prices for each of those items. Since it was not possible to deduce the price bid by Company C for Item E 9.26, its tender should have been rejected by the Commission as incomplete, in accordance with the initial proposal of the Evaluation Committee.

47 Lastly, the applicant submits that the contested decision fails also to comply with the principle of transparency referred to in Article 2 of Directive 2004/18, since certain passages in the copies of the evaluation reports provided were obscured without objective justification. Consequently, the applicant maintains that, since it was not fully informed, the 'standstill period' provided for in Article 158a of the Implementing Regulation has not yet commenced.

48 The Commission contests the applicant's arguments.

Findings of the Court

49 According to the case-law, the Commission has a broad discretion with regard to the factors to be taken into account for the purposes of deciding to award a contract following an invitation to tender (Case T–169/00 *Esedra* v *Commission* [2002] ECR II–609, paragraph 95, and Joined Cases T–376/05 and T–383/05 *TEA-CEGOS and Others* v *Commission* [2006] ECR II–205, paragraph 50). In that context, the Commission also has a broad discretion in determining both the content and the application of the rules applicable to the award of a contract following a call for tenders (*TEA-CEGOS and Others* v *Commission*, paragraph 51).

50 In addition, although a contracting authority is required to draft the conditions relating to a call for tenders clearly and with precision, it is not required to make advance provision for all the situations, however rare, which could in practice arise (order of 20 April 2007 in Case C–189/06 P *TEA-CEGOS and STG* v *Commission*, not published in the ECR, paragraph 30).

51 A condition laid down in the contract documents must be interpreted in the light of its subject-matter, broad logic and wording (see, to that effect, order in *TEA-CEGOS and STG* v *Commission*, paragraph 50 above, paragraph 46). Where there is doubt, the contracting authority concerned may gauge the applicability of such a condition by conducting an examination of each individual case, taking into account all the relevant factors (see, to that effect, order in *TEA-CEGOS and STG* v *Commission*, paragraph 50 above, paragraph 31).

52 Furthermore, given the broad discretion enjoyed by the Commission, as referred to in paragraph 49 above, review by the Courts must be limited to checking that the rules governing the procedure and the stating of reasons have been complied with; that the facts are correct; and that there has been no manifest error of assessment or misuse of powers (see *TEA-CEGOS and Others* v *Commission*, paragraph 49 above, paragraph 50 and the case-law cited).

53 In the context of such a review, it is for the Court to determine, inter alia, whether the interpretation attributed by the Commission, as contracting authority, to a condition laid down in the contract documents is correct (see, to that effect, order in *TEA-CEGOS and STG* v *Commission*, paragraph 50 above, paragraph 46).

54 It should also be noted that Article 148(3) of the Implementing Regulation empowers the institutions to contact tenderers in the event that some clarification is required in connection with a tender, or if clerical errors contained in the tender must be corrected. It follows that that provision cannot be interpreted as imposing, in the exceptional, limited circumstances which it identifies, a duty on the institutions to contact tenderers (see, by analogy, Case T–19/95 *Adia interim* v *Commission* [1996] ECR II–321, paragraphs 43 and 44).

55 It can be otherwise only if, by virtue of the general principles of law, that power has evolved into an obligation on the part of the Commission to contact a tenderer (see, to that effect and by analogy, *Adia interim* v *Commission*, paragraph 54 above, paragraph 45).

56 That is the position, inter alia, where a tender has been drafted in ambiguous terms and the circumstances of the case, of which the Commission is aware, suggest that the ambiguity probably has a simple explanation and is capable of being easily resolved. In principle, it would be contrary to the requirements of sound administration for the Commission to reject the tender in such circumstances without exercising its power to seek clarification. It would be contrary to the principle of equal treatment to accept that, in such circumstances, the Commission enjoys an unfettered discretion (see, to that effect, Case T–211/02 *Tideland Signal* v *Commission* [2002] ECR II–3781, paragraphs 37 and 38).

57 In addition, the principle of proportionality requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous and that the disadvantages caused must not be disproportionate to the aims pursued (Case C–157/96 *National Farmers' Union and Others* [1998] ECR I–2211, paragraph 60). That principle requires that, when the contracting authority is faced with an ambiguous tender and a request for clarification of the terms of the tender would be capable

of ensuring legal certainty in the same way as the immediate rejection of that tender, the contracting authority must seek clarification from the tenderer concerned rather than opt purely and simply to reject the tender (see, to that effect, *Tideland Signal* v *Commission*, paragraph 56 above, paragraph 43).

58 However, it is also essential, in the interests of legal certainty, that the Commission be able to ascertain precisely what a tender submitted in the course of a procurement procedure means and, in particular, to determine whether the tender complies with the conditions set out in the contract documents. Thus, where a tender is ambiguous and the Commission is not in a position to establish, quickly and efficiently, what it actually means, that institution has no choice but to reject the tender (*Tideland Signal* v *Commission*, paragraph 56 above, paragraph 34).

59 Lastly, it is ultimately for the Court to determine whether a tenderer's replies to requests from the contracting authority for clarification can be regarded as explanations of the terms of the tender or whether those replies go beyond clarification and modify the substantive terms of the tender in relation to the conditions laid down in the contract documents (see to that effect, *Esedra* v *Commission*, paragraph 49 above, paragraph 52).

60 In the present case, it must first be determined whether, in a situation where a tenderer has omitted to quote, in the cost estimation summary accompanying its tender, the price for a particular item, the condition laid down in point 25 of the administrative annex to the contract documents must be interpreted as meaning that rejection of the tender is mandatory, as the applicant essentially submits, or whether, as the Commission submits, the tender cannot be rejected where there is a simple explanation for the clerical omission in question and the missing price can be deduced, easily and with certainty, from the price bid for another item in that summary.

61 In that regard, it should be noted that the condition laid down in point 25 of the administrative annex to the contract documents is intended to provide the contracting authority – in the present case, the Commission – with a detailed explanation regarding the way in which the overall price bid for the contract by each tenderer is broken down into individual prices for the various operations covered by that contract.

62 It must also be held, in the light of the clarifications on that subject provided by the parties at the hearing, that the obligation on each tenderer to quote a price for all the items in the cost estimation summary is intended to enable the Commission easily to verify the precise nature of the overall price bid by each tenderer and to determine whether it is normal, in accordance with Article 139(1) of the Implementing Regulation. Lastly, that obligation is intended to facilitate adaptation of the overall price bid for the contract in the event that additional work proves necessary, after the contract has been awarded, in the course of performance.

63 However, as regards the condition laid down in point 25 of the administrative annex to the contract documents, attainment of the above objectives is in no way affected by the Commission's interpretation of that provision to the effect that a tender is not incomplete and need not be rejected if the missing price for a particular item can be deduced with certainty from the price quoted for another item in the same cost estimation summary or, at the very least, after obtaining clarification of the terms of that tender from the tenderer who submitted it.

64 As the Commission states, in the latter situation, it is not a matter of inserting a new price bid in the cost estimation summary for the item concerned; rather, it is simply a matter of explaining the terms of the tender, in order to make it clear that the price bid for a particular item is to be understood as also having been bid for every other identical or similar item.

65 In such a case, a purely literal and strict interpretation of the condition laid down in point 25 of the administrative annex to the contract documents, as proposed by the applicant, would lead to the rejection of economically advantageous tenders because of clerical errors which are obvious and insignificant, a course of action which – as the Commission rightly points out – cannot, in the long run, be reconciled with the 'principle of economy' referred to in Article 27 of the Financial Regulation.

66 In the light of those considerations, it is necessary, next, to determine whether the Commission was correct in taking the view that the price quoted by Company C for Item E 9.26 of the cost estimation summary could, in the present case, be deduced with certainty from the price quoted by Company C for another item in the cost estimation summary, a view which led the Commission not to reject the tender submitted by that undertaking as failing to comply with the conditions laid down

in the contract documents.

67 In that regard, it should be borne in mind that, on being informed of the Commission's decision to award the contract to the applicant, Company C initially asked the Commission, in accordance with Article 100(2) of the Financial Regulation, for details of the grounds on which its tender had been rejected. Once informed of those grounds, Company C, acting in accordance with Article 158a(1) of the Implementing Regulation and within the time-limits laid down in that provision, submitted observations in which it asked the Commission to award it the contract on the ground that the price for Item E 9.26 was not missing from the cost estimation summary accompanying its tender, since that price could easily be deduced from the price bid for Item E 9.13 (see paragraphs 9 and 10 above).

68 It should also be noted that it is apparent from the extracts of the summaries which accompanied the tenders submitted by the applicant and by Company C – produced by the Commission at the request of the Court – that Items E 9.05, E 9.13, E 9.22, E 9.26, E 9.31, E 9.37 and E 9.43 are all worded identically and concern an identical installation, that is to say, a semi-automatic switching centre for gas cylinders.

69 The difference between the seven items referred to above lies, first, in the location of the installation in question, since each item refers to a different site or laboratory. However, at the hearing, the parties stated that the location of that installation was not liable to affect its cost or, in consequence, the price bid for the corresponding item by each tenderer.

70 Secondly, those seven items can also be distinguished according to the type of gas for which the installation in question will be used. Thus, the installations covered by Items E 9.05, E 9.22, E 9.31, E 9.37 and E 9.43 will be used for non-combustible gases. On the other hand, the installations covered by Items E 9.13 and E 9.26 will be used for propane, which is a combustible gas.

71 At the hearing, the Commission stated – without being contradicted by the applicant – that the combustible or non-combustible nature of the gas concerned was liable to affect the cost of the installation in question and, therefore, the price bid for the corresponding item by each tenderer. The Court does indeed find that the extract of the cost estimation summary which accompanied the applicant's tender reveals that it bid the same price (EUR 880.69) for each of Items E 9.05, E 9.22, E 9.31, E 9.37 and E 9.43, which concern non-combustible gases, and a different price (EUR 1 016.92) for both Item E 9.13 and Item E 9.26, which concern a combustible gas.

72 With regard to Company C, it is apparent from the cost estimation summary which accompanied its tender that it also bid the same price (EUR 782.63) for each of Items E 9.05, E 9.22, E 9.31, E 9.37 and E 9.43. In addition, it bid EUR 903.69 for Item E 9.13, while it quoted no price in the cost estimation summary which accompanied its tender for Item E 9.26.

73 It should also be noted that, both in the applicant's tender and in that of Company C, the price bid for the installation in question, when it is intended to be used for non-combustible gases, represents 86.60% of the price bid for the same installation when it is intended to be used for propane, a combustible gas.

74 It follows that the Commission was right to find that the omission of a price for Item E 9.26 in the cost estimation summary accompanying Company C's tender constituted a simple clerical error in that tender or, at the very least, an ambiguity having a simple explanation and capable of being easily resolved. In the light of the points raised in paragraphs 68 to 73 above, the obvious conclusion is that the missing price for Item E 9.26 of the cost estimation summary for Company C's tender cannot be different from the price bid by that undertaking for Item E 9.13 (EUR 903.69) and that it was a mere oversight that Company C did not state that price for Item E 9.26.

75 In those circumstances, the Commission was entitled, in accordance with Article 148(3) of the Implementing Regulation and without failing to have due regard to the condition laid down in point 25 of the administrative annex to the contract documents, to request clarification from Company C regarding the terms of its tender.

76 It matters little that the request for clarification from Company C was made after it had submitted observations on the rejection of its tender. As the Commission rightly points out, if the Commission were not entitled, following the submission of observations under Article 158a(1) of the Implementing Regulation, to request clarifications which it considered necessary and, where appropriate, to withdraw its decision awarding the contract and to award it to another tenderer, that

provision would be entirely devoid of meaning.

77 After obtaining, in response to its request for clarification from Company C, confirmation from that undertaking that its tender was indeed to be read in such a way that the price bid for Item E 9.26 was the same as that bid for Item E 9.13 (see paragraphs 12 and 13 above), the Commission rightly concluded that the tender complied with the conditions laid down in the contract documents and subsequently awarded the contract to Company C, since its tender was the cheapest.

78 The argument put forward by the applicant is not such as to call that conclusion into question. First, it should be noted that, contrary to the applicant's submissions, the Commission did not commence prohibited negotiations with Company C with a view to amending the tender submitted by that undertaking, but merely exercised its power under Article 148(3) of the Implementing Regulation to request clarification of the terms of that tender.

79 Secondly, with regard to the applicant's argument alleging breach of the principle of equal treatment as between tenderers, set out in both Article 2 of Directive 2004/18 and Article 89(1) of the Financial Regulation, it should be noted that that principle cannot prevent the Commission from exercising its power under Article 148(3) of the Implementing Regulation to ask for clarification concerning tenders, after opening those tenders, since it is stated that the Commission is obliged to treat all tenderers in a similar manner with regard to the exercise of that power (see, to that effect and by analogy, *Tideland Signal* v *Commission*, paragraph 56 above, paragraph 38).

80 In the present case, the Commission acted consistently with the principle of equal treatment of tenderers, since it did not request clarification only from Company C; rather, it requested clarification from all those whose tenders contained, in particular, the same error as that submitted by Company C, that is to say, which omitted to quote prices for certain items in the cost estimation summary accompanying their tenders (see paragraphs 7 and 17 above). The applicant was not asked to provide such clarification because it was unnecessary, since there was no price missing from the cost estimation summary accompanying its tender. Nevertheless, as is apparent from the evaluation report of 23 April 2008, the fact remains that the Evaluation Committee also made certain corrections to the applicant's tender, which led to a slight reduction in the overall price bid.

81 Lastly, it is necessary to reject the applicant's argument, summarised in paragraph 47 above, alleging that certain passages of the copies of the evaluation reports provided were obscured, in breach of the principle of transparency, with the consequence that the standstill period before signature of the contract, provided for in Article 158a(1) of the Implementing Regulation, has not yet commenced.

82 In that regard, it should first be noted that, at the hearing, the applicant was unable to explain the relevance of that standstill period to the present case, it having been established that there is no dispute whatsoever that the action was brought in good time.

83 Next, it should be noted that the applicant's request, to which the Commission responded by sending copies of the evaluation reports, was made after the contested decision was adopted. As a consequence, the question whether or not the Commission's response to that request was complete cannot have any bearing on the lawfulness of the contested decision, which is the only decision to which the application for annulment relates.

84 Lastly, it should be noted, in any event, that the principle of transparency, referred to in both Article 89(1) of the Financial Regulation and Article 2 of Directive 2004/18, must be reconciled with the protection of the public interest, of legitimate business interests of public or private undertakings, and of fair competition: that is the reason for the provision made in the second subparagraph of Article 100(2) of the Financial Regulation, under which it is possible to refuse to disclose certain details to a rejected tenderer, where non-disclosure is necessary to ensure that those requirements are satisfied.

85 It follows from all of the foregoing considerations that the sole plea in law put forward by the applicant in support of its application for annulment is unfounded and that, in consequence, that application must be dismissed.

The application for damages

Arguments of the parties

86 The applicant submits that the Commission unlawfully authorised Company C to amend or supplement its tender after that tender had been submitted, in breach of the provisions relied on in the application for annulment. That breach is sufficiently clear, since the Commission manifestly and gravely misused its discretion to evaluate the tenders and infringed higher-ranking rules of law intended to protect the interests of individuals, including, inter alia, the principles of non-discrimination and of transparency. Moreover, the damage suffered by the applicant is a direct consequence of the irregularities committed by the Commission. That damage is also imminent and foreseeable with a sufficient degree of certainty.

87 The applicant additionally submits that its application for damages is admissible. According to the applicant, uncertainty as to the extent of the damage suffered does not render inadmissible an action for damages brought on the basis of the second paragraph of Article 288 EC. It is apparent from settled case-law that quantification of the damage is to be reserved if, at the time when the action for damages is held to be well founded, the information needed in order to calculate the amount of the damage is not yet available. It follows, in the submission of the applicant, that the admissibility of an action for damages is not conditional upon the existence, at the time when the action is brought, of a precise calculation of the extent of the damage purportedly suffered.

88 The applicant states that it had attempted to secure the contract by means of an action for interim relief, and that it brought the main proceedings even though the outcome of the action for interim relief was not yet known. For the time being, therefore, it confined itself in the application to claiming that the Commission should be declared liable and reserved the right not to provide an assessment of the amount of the damage suffered until later. According to the applicant, it is also obvious that the purported damage is imminent and sufficiently certain, since it is common ground that its turnover will fall if it does not carry out the contract. Such a fall in turnover indisputably has a negative impact on its profits for the relevant financial year. Furthermore, Belgian legislation applies a flat rate to that damage, setting it at 10% of the value of the contract. The applicant has also produced a report from its company auditor, in which the damage which it has suffered is set at EUR 619 000, and it reserves the right to carry out, if necessary, a re-assessment of the damage. The rights of the defence of the Commission are in no way infringed, since the Commission can always enter, by way of defence, pleas relating to the applicant's assessment of the damage.

89 The Commission contends, principally, that the claim for damages is inadmissible, since the applicant merely claims that the Court should recognise the existence of the purported damage which the applicant has suffered on account of the Commission's conduct, without quantifying that damage. In Case T-461/93 *An Taisce and WWF UK* v *Commission* [1994] ECR II-733, paragraphs 42 and 43, the Court held that such a head of claim was inadmissible.

90 In the alternative, the Commission contends that the claim for damages must be dismissed as unfounded, since none of the three conditions required by the case-law is satisfied in the present case.

Findings of the Court

91 It is settled case-law that, in order for a claim for damages brought under the second paragraph of Article 288 EC to be well founded, a number of conditions must be satisfied: the alleged conduct on the part of the institution must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the purported damage (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44). If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

92 In the present case, it has already been found on examination of the application for annulment that the contested decision is in no way unlawful.

93 Consequently, since the condition relating to the unlawfulness of the conduct of the Commission is not satisfied, the claim for damages must be dismissed as unfounded, without it being necessary to give a ruling as to admissibility.

Costs

94 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those of the proceedings for interim relief, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders Antwerpse Bouwwerken NV to pay the costs, including those relating to the proceedings for interim relief in Case T–195/08 R.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 10 December 2009.

[Signatures]

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* Language of the case: Dutch.

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Judgment of the General Court of 10 December 2009 - Antwerpse Bouwwerken v European Commission

(Case T-195/08) [1]

(Public procurement - Community tendering procedure - Construction of a reference materials production hall - Rejection of a tender - Action for annulment - Interest in bringing proceedings - Admissibility - Interpretation of a condition laid down in the contract documents - Compliance of a tender with the conditions laid down in the contract documents - Exercise of the power to request clarification of tenders - Action for damages)

Language of the case: Dutch

Parties

Applicant: Antwerpse Bouwwerken NV (Antwerp, Belgium) (represented initially by: J. Verbist and D. de Keuster, and subsequently by: J. Verbist, B. van de Walle de Ghelcke and A. Vandervennet, lawyers)

Defendant: European Commission (represented by: E. Manhaeve, acting as Agent, and by M. Gelders, lawyer)

Re:

Application for, firstly, annulment of the decision of the Commission rejecting the tender submitted by the applicant in a restricted public procurement procedure concerning the construction of a reference materials production hall in the grounds of the Institut des matériaux et mesures de référence (Institute for Reference Materials and Measurements) in Geel (Belgium) and awarding the contract to another tenderer and, secondly, compensation for the damage purportedly suffered by the applicant by reason of that decision of the Commission

Operative part of the judgment

The Court:

Dismisses the action;

Orders Antwerpse Bouwwerken NV to pay the costs, including those relating to the proceedings for interim relief in Case T 195/08 R.

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[1] - OJ C 183, 19.7.2008.

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DOCUMENT DE TRAVAIL

ORDONNANCE DU PRÉSIDENT DU TRIBUNAL

15 juillet 2008 (*)

« Référé – Marchés publics – Procédure communautaire d'appel d'offres – Rejet d'une offre – Demande de sursis à exécution et de mesures provisoires – Recevabilité – Intérêt à agir – Perte d'une chance – Absence de préjudice grave et irréparable – Défaut d'urgence »

Dans l'affaire T–195/08 R,

Antwerpse Bouwwerken NV, établie à Anvers (Belgique), représentée par M^es^ J. Verbist et D. de Keuster, avocats,

partie requérante,

contre

Commission des Communautés européennes, représentée par M. E. Manhaeve, en qualité d'agent, assisté de M^e^ M. Gelders, avocat,

partie défenderesse,

ayant pour objet une demande de mesures provisoires formée dans le cadre d'une procédure d'appel d'offres lancée par la Commission pour la construction d'un bâtiment,

LE PRÉSIDENT DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

Antécédents du litige

1 Par un avis de marché publié le 31 mai 2006, la Commission a lancé un appel d'offres, en application du titre V (« Passation des marchés publics ») de la première partie du règlement (CE, Euratom) nº 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1, ci-après le « règlement financier »), pour la construction d'une salle de production de matériaux de référence sur le terrain de l'Institut des matériaux et mesures de référence (IMMR) à Geel (Belgique).

2 À cette fin, elle a choisi d'attribuer le marché selon la procédure restreinte au sens de l'article 122, paragraphe 2, du règlement (CE, Euratom) nº 2342/2002 de la Commission, du 23 décembre 2002, établissant les modalités d'exécution du règlement financier (JO L 357, p. 1, ci-après le « règlement d'exécution »). En vertu de cette disposition, le marché sur appel à la concurrence est restreint lorsque tous les opérateurs économiques peuvent demander à participer et que seuls les candidats satisfaisant les critères de sélection et qui y sont invités simultanément et par écrit par les pouvoirs adjudicateurs peuvent présenter une offre.

3 La requérante, Antwerpse Bouwwerken NV, et trois autres entreprises ont participé à cette procédure. Elles se sont vu transmettre le cahier des charges, dont l'annexe administrative prévoit, en son point 25, que le marché sera attribué à l'offre la moins disante, en précisant :

« [T]ous les prix demandés sur le métré récapitulatif doivent être indiqués sous peine d'exclusion. Cela vaut également pour d'éventuelles modifications du métré intervenant à la suite de remarques déposées en temps utile par les candidats. »

4 Le 21 septembre 2007, la requérante a déposé son offre. Le prix offert s'élevait à 10 315 112,32 euros.

5 Par courrier du 27 février 2008 – signé par un des assistants « Finance et contrats » de l'unité « Support de gestion » de la direction IMMR au sein de la direction générale « Centre commun de recherche » –, la Commission a informé la requérante que :

– son offre avait été retenue pour l'attribution du marché, en attirant, toutefois, son attention sur le fait que cela ne créait aucune obligation à la charge de la Commission, étant donné que les services compétents de celle-ci pouvaient toujours renoncer au marché ou annuler la procédure de passation du marché, sans que la requérante puisse prétendre à une quelconque indemnisation ;

– le contrat ne pouvait être signé qu'à l'expiration d'un délai de deux semaines et que la Commission se réservait le droit de suspendre sa signature pour examen complémentaire si les demandes ou commentaires formulés par des soumissionnaires écartés, ou toute autre information pertinente reçue, le justifiaient.

6 Par lettre du 12 mars 2008, signée par le même assistant « Finance et contrats », la Commission a informé la requérante que l'un des soumissionnaires écartés avait fourni des informations de nature à justifier la suspension de la signature du contrat, conformément à l'article 158 bis, paragraphe 1, du règlement d'exécution, tel que modifié par le règlement (CE, Euratom) nº 478/2007 de la Commission, du 23 avril 2007 (JO L 111, p. 13).

7 Aux termes de cette disposition, le pouvoir adjudicateur peut suspendre la signature du contrat pour examen complémentaire lorsqu'il reçoit, dans un délai de quatorze jours à compter du lendemain de la date de notification simultanée des décisions d'attribution et de rejet des demandes, commentaires ou informations de la part des soumissionnaires écartés et que ces demandes, commentaires ou informations le justifient.

8 Par courrier du 29 avril 2008, signé par le chef de l'unité « Support de gestion » précitée, la Commission a informé la requérante que son offre n'avait finalement pas été retenue pour l'attribution du marché en cause, au motif que le prix offert par la requérante « était plus élevé que celui proposé par le soumissionnaire retenu » (ci-après la « décision du 29 avril 2008 »).

9 En réponse à une demande formulée par la requérante, la Commission lui a indiqué, par lettre du 6 mai 2008, les motifs supplémentaires suivants :

« Lors de la première évaluation de ce volumineux dossier, vous êtes apparu comme le vainqueur bien que votre prix fût sensiblement plus élevé que celui de l'attributaire actuel. La raison du rejet initial de ce candidat résidait dans le fait que, pour un petit poste de prix, le prix n'a pu être trouvé. Cela était également le cas des deux autres candidats. Par conséquent, ces offres ont, dans un premier temps, été considérées comme non conformes.

Pendant la période de statu quo prévue à l'article 158 bis du règlement [d'exécution], les autres candidats ont indiqué que les prix manquants se trouvaient bien dans leurs offres. Par conséquent, la période de statu quo a été suspendue pour examen complémentaire. Il est ressorti de la nouvelle analyse que les prix initialement manquants étaient en effet indiqués et que ces sociétés avaient donc déposé une offre conforme. Il y avait donc lieu de procéder à une nouvelle évaluation de toutes les offres. Étant donné que l'une de ces sociétés avait présenté l'offre la moins disante, elle a été désignée comme attributaire du marché. »

10 En outre, par lettre du 15 mai 2008, la Commission a communiqué à la requérante une copie du rapport d'évaluation du 5 novembre 2007, dans lequel le comité d'évaluation l'avait présentée comme étant le candidat le mieux placé, ainsi qu'une copie du rapport d'évaluation du 23 avril 2008, dans lequel un candidat initialement non retenu était désigné comme étant le candidat le mieux placé (ci-après le « soumissionnaire retenu »).

11 S'agissant du rapport d'évaluation du 5 novembre 2007, il y est énoncé expressément :

« [Le soumissionnaire retenu] a donné un prix unitaire pour le poste 03.09.15 B, mais a oublié de l'inclure dans le prix global. 973,76 euros devraient être ajoutés, ce qui donne un nouveau total de 9 728 946,14 euros.

[Le soumissionnaire retenu] a également oublié de donner un prix unitaire pour le poste E 9.26.

[…]

L'offre [de la requérante] ne comporte aucun oubli.

[…]

Étant donné que [le soumissionnaire retenu] et […] ont tous oublié d'indiquer des prix pour certains postes, leurs offres doivent être considérées comme non conformes. Par conséquent, la seule offre conforme a été déposée par [la requérante]. »

12 Le rapport d'évaluation du 23 avril 2008 énonce, quant à lui :

« [Le soumissionnaire retenu] a oublié de donner un prix unitaire pour le poste E 9.26. Toutefois, dans une lettre explicative, ils ont indiqué que le prix pouvait être déduit du poste E 9.13 (903,69 euros), car il s'agit exactement du même poste. Sur la base de cette explication […], 903,69 euros devraient être ajoutés à l'offre initiale […] cette situation devrait être considérée comme constituant une clarification […] »

13 Ce dernier rapport contient la décision du 23 avril 2008 attribuant le marché en cause au soumissionnaire retenu (ci-après la « décision du 23 avril 2008 »). Selon cette décision, l'offre de la requérante n'apparaît que comme étant la troisième offre la moins disante.

Procédure et conclusions des parties

14 Par requête déposée au greffe du Tribunal le 30 mai 2008, la requérante a introduit un recours visant, en substance, à l'annulation des décisions des 23 et 29 avril 2008 (voir points 8 et 13 ci-dessus), d'une part, et à l'engagement de la responsabilité non contractuelle de la Communauté pour le préjudice subi par la requérante, d'autre part. Elle reproche à la Commission, en substance, d'avoir violé la réglementation pertinente en permettant au soumissionnaire retenu de modifier son offre, après l'ouverture des offres soumises, par l'insertion du prix pour un poste que cette société avait initialement omis d'indiquer.

15 Par actes séparés déposés au greffe du Tribunal le même jour, la requérante a introduit une demande de procédure accélérée au titre de l'article 76 bis du règlement de procédure du Tribunal ainsi que la présente demande en référé, dans laquelle elle conclut à ce qu'il plaise au président du Tribunal :

– surseoir à l'exécution des décisions des 23 et 29 avril 2008 ;

– au cas où le contrat litigieux aurait déjà été conclu, suspendre son exécution jusqu'à ce que le Tribunal ait statué sur l'affaire au principal ;

– arrêter toute mesure provisoire utile ;

– condamner la Commission aux dépens.

16 Dans ses observations écrites déposées au greffe du Tribunal le 11 juin 2008, la Commission conclut à ce qu'il plaise au président du Tribunal :

– rejeter la demande en référé comme irrecevable ou non fondée ;

– condamner la requérante aux dépens.

En droit

17 En vertu des dispositions combinées des articles 242 CE et 243 CE, d'une part, et de l'article 225, paragraphe 1, CE, d'autre part, le Tribunal peut, s'il estime que les circonstances l'exigent, ordonner le sursis à l'exécution d'un acte attaqué devant lui ou prescrire les mesures provisoires nécessaires.

18 L'article 104, paragraphe 2, du règlement de procédure dispose que les demandes de mesures provisoires doivent spécifier l'objet du litige, les circonstances établissant l'urgence, ainsi que les moyens de fait et de droit justifiant à première vue (fumus boni juris) l'octroi de la mesure provisoire à laquelle elles concluent. Ces conditions sont cumulatives, de sorte que les demandes de mesures provisoires doivent être rejetées dès lors que l'une d'elles fait défaut [ordonnance du président de la Cour du 14 octobre 1996, SCK et FNK/Commission, C–268/96 P(R), Rec. p. I–4971, point 30].

19 En outre, dans le cadre de cet examen d'ensemble, le juge des référés dispose d'un large pouvoir d'appréciation et reste libre de déterminer, au regard des particularités de l'espèce, la manière dont ces différentes conditions doivent être vérifiées ainsi que l'ordre de cet examen, dès lors qu'aucune règle de droit communautaire ne lui impose un schéma d'analyse préétabli pour apprécier la nécessité de statuer provisoirement [ordonnances du président de la Cour du 19 juillet 1995, Commission/Atlantic Container Line e.a., C–149/95 P(R), Rec. p. I–2165, point 23, et du 3 avril 2007, Vischim/Commission, C–459/06 P(R), non publiée au Recueil, point 25].

20 Eu égard aux éléments du dossier, le juge des référés estime qu'il dispose de tous les éléments nécessaires pour statuer sur la présente demande de mesures provisoires, sans qu'il soit utile d'entendre, au préalable, les parties en leurs explications orales.

Sur la recevabilité

21 Ainsi qu'il ressort de la décision du 23 avril 2008, l'offre déposée par la requérante n'est que la troisième offre la moins disante. La Commission en déduit que la demande en référé est irrecevable à défaut d'intérêt à agir pour la requérante. En effet, à supposer même que l'offre du soumissionnaire retenu soit écartée de la procédure de passation du marché en cause, la requérante n'en tirerait aucun profit, étant donné que le marché serait attribué non à la requérante, mais à l'entreprise ayant remis la deuxième offre la moins disante.

22 À cet égard, il convient de rappeler que, pour que des mesures provisoires, comme celles sollicitées par la présente demande en référé, puissent être ordonnées, la partie requérante doit, notamment, apporter la preuve de son intérêt à agir, qui constitue la condition essentielle et première de tout recours en justice (voir, en ce sens, ordonnance du président de la deuxième chambre de la Cour du 31 juillet 1989, S./Commission, 206/89 R, Rec. p. 2841, point 8, et ordonnance du président du Tribunal du 27 mars 2003, Linea CIG/Commission, T–398/02 R, Rec. p. II–1139, points 44 et 45). Selon une jurisprudence bien établie, un tel intérêt suppose que l'action en justice puisse, par son résultat, procurer un bénéfice à la partie qui l'a intentée (voir, en ce sens, ordonnance du Tribunal du 30 avril 2007, EnBW Energie Baden-Württemberg/Commission, T–387/04, Rec. p. II–1195, point 96, et la jurisprudence citée).

23 En l'espèce, il ressort du rapport d'évaluation du 23 avril 2008 que l'offre déposée par la requérante (prix global offert : 10 295 995,37 euros) n'est que la troisième offre la moins disante, de sorte qu'une éviction du soumissionnaire retenu n'aurait pas comme conséquence automatique que le marché serait attribué à la requérante. Toutefois, s'agissant de l'entreprise placée en deuxième position (prix global offert : 10 140 841,12 euros), le même rapport d'évaluation précise qu'elle avait, tout comme le soumissionnaire retenu, omis d'indiquer le prix pour certains postes, mais que son offre avait néanmoins été qualifiée par la Commission de conforme aux règles, compte tenu des éclaircissements apportés par cette entreprise.

24 À supposer donc que l'offre du soumissionnaire retenu soit entachée du vice que la requérante lui attribue du fait que cette offre aurait fait l'objet d'une modification ultérieure illégale (voir point 14 ci-dessus), l'offre placée en deuxième position serait susceptible d'être entachée précisément du même vice. Par conséquent, dans l'hypothèse où la décision attribuant le marché au soumissionnaire retenu devrait être déclarée illégale pour cette raison, la Commission pourrait être juridiquement empêchée de l'attribuer à l'entreprise placée en deuxième position, dont l'offre serait susceptible d'être entachée de la même illégalité. Dans ces circonstances, l'entreprise placée en deuxième position ne saurait être un obstacle à ce que le marché revienne à la requérante. Les mesures sollicitées par la présente demande, si elles étaient adoptées, pourraient donc lui procurer un bénéfice.

25 Il s'ensuit que la requérante dispose d'un intérêt à agir et que sa demande en référé est recevable.

Sur le fond

Arguments des parties

– Sur le fumus boni juris

26 La requérante reproche à la Commission, en substance, d'avoir violé les dispositions combinées de l'article 91 du règlement financier ainsi que des articles 122, 138 et 148 du règlement d'exécution et d'avoir enfreint les principes de transparence et d'égalité de traitement des soumissionnaires.

27 En effet, l'offre du soumissionnaire retenu aurait été incomplète, le métré n'ayant pas été entièrement rempli, du fait qu'il manquait un prix pour le poste E 9.26. Cette offre n'aurait donc pas été conforme à la prescription essentielle du point 25 de l'annexe administrative du cahier des charges, selon lequel tous les prix unitaires demandés devaient être indiqués sous peine d'exclusion de l'offre. Or, au lieu d'écarter le soumissionnaire retenu de la procédure, la Commission lui aurait, en violation des règles régissant les appels d'offres, permis de modifier son offre après son dépôt en déclarant que le prix manquant était identique à celui du poste E 9.13 et pouvait donc être déduit de ce dernier. Selon la requérante, cette modification de l'offre ne saurait être qualifiée de simple éclaircissement, étant donné qu'elle ne portait pas sur un élément déjà présent dans l'offre, mais consistait à compléter un prix unitaire manquant.

28 Par ailleurs, il ne serait pas correct de prétendre que le prix du poste E 9.26 pouvait être aisément déduit du prix du poste E 9.13. La description de ces deux postes serait, certes, identique (« centrale de commutation semi-automatique »), mais cette description apparaîtrait également dans d'autres postes, à savoir les postes E 9.05, E 9.22, E 9.31, E 9.37 et E 9.43. Or, les prix de tous ces postes ne seraient aucunement identiques. L'offre du soumissionnaire retenu aurait donc dû être écartée.

29 La Commission estime que son comportement n'est entaché d'aucune illégalité, la réglementation pertinente n'interdisant nullement tout contact entre le pouvoir adjudicataire et les soumissionnaires après l'ouverture des offres. Ainsi, l'article 148, paragraphe 3, du règlement d'exécution permettrait au pouvoir adjudicateur, dans le cas où une offre donnerait lieu à des demandes d'éclaircissement ou s'il s'agit de corriger des erreurs matérielles manifestes dans la rédaction de l'offre, de prendre l'initiative d'un contact avec le soumissionnaire, étant entendu que ce contact ne peut conduire à une modification des termes de l'offre.

30 Selon la Commission, le cas d'espèce correspond à la situation envisagée dans cette disposition, les offres autres que celle de la requérante ayant donné lieu à des demandes d'éclaircissement. L'éclaircissement apporté par le soumissionnaire retenu n'aurait entraîné aucune modification des termes de l'offre remise par cette société, mais n'aurait consisté qu'à corriger et à préciser ladite offre, et ce sur la base d'un élément qui y figurait déjà.

31 Dans la mesure où la requérante soutient que la description des postes E 9.13 et E 9.26 apparaît également dans les postes E 9.05, E 9.22, E 9.31, E 9.37 et E 9.43, sans que les prix offerts pour ces cinq derniers postes soient identiques, la Commission rétorque que, malgré l'identité de la description, il s'agit là de deux catégories de postes nettement différentes : les postes E 9.13 et E 9.26 concerneraient la commutation de gaz combustibles, alors que les postes E 9.05, E 9.22, E 9.31, E 9.37 et E 9.43 concerneraient celle de gaz non combustibles. Or, tant le soumissionnaire retenu que la requérante auraient offert un même prix pour tous les postes à l'intérieur de chacune des deux catégories concernées. Par conséquent, il aurait été admissible de déduire, par voie d'éclaircissement, le prix du poste E 9.26 de celui indiqué pour le poste E 9.13.

32 La Commission ajoute que le fait d'omettre de remplir un seul poste dans le métré récapitulatif ne saurait être qualifié de violation d'une disposition essentielle, le cahier des charges avec ses annexes étant un document extrêmement volumineux et le métré demandant l'indication du prix d'environ 1 500 postes. Le principe de proportionnalité s'opposerait donc à une approche trop sévère en la matière, et ce d'autant plus que le poste E 9.26 en question ne représenterait que 0,0092 % de la valeur totale du marché. Enfin, il conviendrait de tenir compte de la différence sensible de prix total entre l'offre de la requérante (10 295 995,37 euros) et celle du soumissionnaire retenu (9 729 849,83 euros), à savoir 566 145,54 euros. La Commission invoque, à cet égard, le principe d'économie en tant que principe général de bonne gestion financière (article 27 et considérants 3 et 11 du règlement financier).

– Sur l'urgence

33 La requérante fait valoir qu'elle risque de subir un préjudice grave et irréparable si les mesures provisoires demandées ne sont pas prises. En effet, sans l'adoption de ces mesures, l'arrêt prononcé dans la procédure au principal n'aurait plus aucun effet utile étant donné que, au moment de l'annulation des décisions attaquées, le contrat litigieux serait déjà conclu avec le soumissionnaire retenu et aurait déjà reçu une exécution partielle. En outre, cet arrêt, même s'il annulait lesdites décisions, ne réparerait pas entièrement le préjudice causé à la requérante, ce préjudice ne pouvant être réduit à un dommage financier et chiffrable.

34 Dans ce contexte, la requérante précise que, à la suite de la « décision du 27 février 2008 lui attribuant le marché », elle a adapté son planning de travail (notamment en affectant des effectifs à ce projet spécifique) à l'exécution du contrat litigieux, en annulant des projets sur le marché local et surtout en n'acceptant plus de nouveaux contrats. Elle souligne encore la pénurie importante sur le marché du travail d'ouvriers et d'ingénieurs spécialisés qui sont indispensables pour réaliser des marchés comme le contrat litigieux. Au cas où la requérante ne pourrait pas exécuter ledit contrat, elle se verrait obligée de mettre temporairement son personnel spécialisé au chômage technique, ce qui signifierait que ce personnel qualifié serait débauché par ses concurrents ou la quitterait de sa propre initiative, mettant ainsi en danger l'existence de celle-ci.

35 La requérante ajoute que l'attribution du marché en cause constitue, compte tenu de sa spécificité du point de vue technique, une référence importante pour les marchés suivants ayant un objet identique ou similaire. La perte de cette référence représenterait également pour la requérante un préjudice irréparable. Non seulement la spécificité de ce marché (techniques de laboratoire), mais également le maître d'ouvrage, à savoir la Commission, seraient d'une importance significative. D'un point de vue commercial, un maître d'ouvrage prestigieux représenterait une référence excellente pour les adjudicataires dans la perspective de projets futurs.

36 La Commission estime que, par ces arguments, la requérante n'a établi ni la gravité ni le caractère irréparable du préjudice invoqué. La présente demande en référé devrait donc être rejetée pour défaut d'urgence.

Appréciation du juge des référés

37 Dans les circonstances du cas d'espèce, il convient d'examiner d'abord si la condition de l'urgence est remplie.

38 À cet égard, il y a lieu de rappeler que le caractère urgent d'une demande en référé doit s'apprécier par rapport à la nécessité qu'il y a de statuer provisoirement afin d'éviter qu'un préjudice grave et irréparable ne soit occasionné à la partie qui sollicite les mesures provisoires. C'est à cette dernière partie qu'il appartient d'apporter la preuve qu'elle ne saurait attendre l'issue de la procédure au principal sans avoir à subir un préjudice de cette nature (voir ordonnances du président du Tribunal du 15 novembre 2001, Duales System Deutschland/Commission, T–151/01 R, Rec. p. II–3295, point 187 ; du 20 septembre 2005, Deloitte Business Advisory/Commission, T–195/05 R, Rec. p. II–3485, point 124, et du 25 avril 2008, Vakakis/Commission, T–41/08 R, non publiée au Recueil, point 52, et la jurisprudence citée).

39 Lorsque le préjudice dépend de la survenance de plusieurs facteurs, il suffit qu'il apparaisse comme prévisible avec un degré de probabilité suffisant [ordonnance du président du Tribunal du 16 janvier 2004, Arizona Chemical e.a./Commission, T–369/03 R, Rec. p. II–205, point 71 ; voir, également, en ce sens, ordonnances de la Cour du 29 juin 1993, Allemagne/Conseil, C–280/93 R, Rec. p. I–3667, points 32 à 34, et du président de la Cour du 14 décembre 1999, HFB e.a./Commission, C–335/99 P(R), Rec. p. I–8705, point 67]. La partie requérante demeure cependant tenue de prouver les faits qui sont censés fonder la perspective d'un tel dommage grave et irréparable (voir, en ce sens, ordonnance Arizona Chemical e.a./Commission, précitée, point 72 ; voir, également, ordonnance HFB e.a./Commission, précitée, point 67).

40 Il convient donc d'examiner si, en l'espèce, la requérante a démontré avec un degré de probabilité suffisant qu'elle subira un préjudice grave et irréparable si les mesures provisoires qu'elle sollicite ne lui sont pas octroyées.

41 S'agissant de la gravité du préjudice invoqué en l'espèce, il importe de rappeler que ce dernier

serait subi à l'occasion d'une procédure d'appel d'offres pour l'attribution d'un marché. Or, une telle procédure a pour objet de permettre à l'autorité concernée de choisir, parmi plusieurs offres concurrentes, celle qui lui paraît le plus conforme aux critères de sélection prédéterminés. L'autorité communautaire qui institue une telle procédure dispose, par ailleurs, d'un large pouvoir d'appréciation quant aux éléments à prendre en considération en vue de la prise de la décision de passer le marché (arrêts du Tribunal du 24 février 2000, ADT Projekt/Commission, T–145/98, Rec. p. II–387, point 147 ; du 26 février 2002, Esedra/Commission, T–169/00, Rec. p. II–609, point 95, et du 14 février 2006, TEA-CEGOS e.a./Commission, T–376/05 et T–383/05, Rec. p. II–205, point 50).

42 Une entreprise qui participe à une telle procédure n'a, dès lors, jamais la garantie absolue que le marché lui sera adjugé, mais doit toujours tenir compte de l'éventualité de son attribution à un autre soumissionnaire. Dans ces conditions, les conséquences financières négatives pour l'entreprise en question, qui découleraient du rejet de son offre, font, en principe, partie du risque commercial habituel, auquel chaque entreprise active sur le marché doit faire face (voir, en ce sens, ordonnance du juge des référés du Tribunal du 14 septembre 2007, AWWW/FEACVT, T–211/07 R, non publiée au Recueil, point 41).

43 Il s'ensuit que la perte d'une chance de se voir attribuer et d'exécuter un marché public est inhérente à l'exclusion de la procédure d'appel d'offres en cause et ne saurait être regardée comme constitutive, en soi, d'un préjudice grave, indépendamment d'une appréciation concrète de la gravité de l'atteinte spécifique alléguée dans chaque cas d'espèce (voir, en ce sens, ordonnance Deloitte Business Advisory/Commission, précitée, point 150).

44 En conséquence, c'est à la condition que l'entreprise requérante ait démontré à suffisance de droit qu'elle aurait pu retirer des bénéfices suffisamment significatifs de l'attribution et de l'exécution du marché dans le cadre de la procédure d'appel d'offres que le fait, pour elle, d'avoir perdu une chance de se voir attribuer et d'exécuter ledit marché constituerait un préjudice grave. Par ailleurs, la gravité d'un préjudice d'ordre matériel doit être évaluée au regard, notamment, de la taille de l'entreprise requérante (voir, en ce sens, ordonnance Deloitte Business Advisory/Commission, précitée, points 151 et 156, et la jurisprudence citée).

45 En l'espèce, force est de constater que la requérante ne produit pas les éléments permettant de considérer, compte tenu en particulier de sa taille, que la perte qu'elle risque de subir serait suffisamment grave pour justifier l'octroi de mesures provisoires. Dès lors, au regard des éléments figurant dans la demande en référé, le juge des référés n'est pas en mesure de considérer que, pour la requérante, la perte d'une chance de percevoir les revenus résultant de l'exécution du marché en cause serait suffisamment grave pour justifier l'octroi de mesures provisoires.

46 Il en va de même du préjudice financier subi du fait que la requérante aurait, à la suite de la lettre du 27 février 2008 (voir point 5 ci-dessus), adapté son planning de travail à l'exécution du contrat litigieux, en annulant des projets sur le marché local et en n'acceptant plus de nouveaux contrats. À défaut d'éléments chiffrés produits par la requérante, le juge des référés ne saurait vérifier ni la réalité ni la gravité des actes par lesquels la requérante aurait elle-même été conduite à amplifier les conséquences négatives des décisions des 23 et 29 avril 2008.

47 Par ailleurs, tout préjudice causé par des actes que la requérante aurait pris en s'attendant à l'attribution du marché en cause résulterait de son propre comportement négligent. En effet, dans sa lettre du 27 février 2008 précitée, la Commission avait expressément attiré l'attention de la requérante sur le caractère précaire et révocable de cette « attribution ». En outre, la requérante, en opérateur économique prudent et averti, est censée connaître l'article 101 du règlement financier, aux termes duquel « le pouvoir adjudicateur peut, jusqu'à la signature du contrat, soit renoncer au marché, soit annuler la procédure de passation du marché, sans que les candidats ou les soumissionnaires puissent prétendre à une quelconque indemnisation ».

48 Or, selon une jurisprudence bien établie (voir ordonnance du président du Tribunal du 1er février 2001, Free Trade Foods/Commission, T–350/00 R, Rec. p. II–493, point 59, et la jurisprudence citée), l'urgence à ordonner une mesure provisoire doit résulter des effets produits par l'acte litigieux et non d'un manque de diligence du demandeur de ladite mesure. En effet, il incombe à ce dernier, au risque de devoir supporter lui-même le préjudice comme faisant partie des « risques de l'entreprise », de faire preuve d'une diligence raisonnable pour en limiter l'étendue.

49 Il convient d'ajouter que le préjudice d'ordre financier allégué par la requérante ne saurait être

regardé comme irréparable, ou même difficilement réparable, dès lors qu'il peut faire l'objet d'une compensation financière ultérieure. La requérante n'a, notamment, pas allégué qu'elle serait empêchée d'obtenir une telle compensation par voie d'un éventuel recours en indemnité en vertu de l'article 288 CE (voir, en ce sens, ordonnance du président du Tribunal du 10 novembre 2004, European Dynamics/Commission, T–303/04 R, Rec. p. II–3889, point 72, et la jurisprudence citée). Au contraire, dans son recours au principal, elle a expressément formulé des conclusions visant à condamner la Commission à lui réparer le préjudice subi.

50 Dans ce contexte, il résulte d'une jurisprudence récente de la Cour que, lorsque le Tribunal accorde des dommages et intérêts sur la base de la valeur économique attribuée au préjudice subi en raison d'un manque à gagner, cette réparation est en principe susceptible de satisfaire à l'exigence d'assurer la réparation intégrale du préjudice individuel que la partie concernée a effectivement subi du fait des actes illégaux particuliers dont elle a été victime (voir, en ce sens, arrêt de la Cour du 21 février 2008, Commission/Girardot, C–348/06 P, non encore publié au Recueil, point 76).

51 Il s'ensuit que, dans l'hypothèse où la requérante obtiendrait gain de cause au principal, il pourra être attribué une valeur économique au préjudice qu'elle a subi en raison de la perte de la chance de remporter l'appel d'offres litigieux, valeur économique qui est susceptible de satisfaire à l'obligation de réparation intégrale du dommage individuel effectivement subi (voir, en ce sens, ordonnance Vakakis/Commission, précitée, point 67).

52 À la lumière de ce qui précède, les mesures provisoires demandées ne se justifieraient, dans les circonstances de l'espèce, que s'il apparaissait que, en l'absence de telles mesures, la requérante se trouverait dans une situation susceptible de mettre en péril son existence même ou de modifier de manière irrémédiable sa position sur le marché (voir, en ce sens, ordonnance European Dynamics/Commission, précitée, point 73).

53 Or, la requérante n'a pas apporté la preuve que, en l'absence des mesures provisoires sollicitées, elle risquerait d'être placée dans une telle situation.

54 En effet, d'une part, elle s'est abstenue de fournir des données relatives à sa taille et à sa situation financière (voir point 45 ci-dessus). D'autre part, si la requérante fait valoir que, au cas où elle ne pourrait pas exécuter le contrat litigieux, son personnel spécialisé serait débauché par ses concurrents ou la quitterait de sa propre initiative, mettant ainsi en danger l'existence de la requérante, il y a lieu de constater qu'il s'agit là d'une pure affirmation qui n'est étayée par aucun élément de preuve susceptible de conduire le juge des référés à conclure que l'existence de la requérante sera mise en péril jusqu'à ce que le Tribunal statue sur l'affaire au principal.

55 La requérante soutient encore que le préjudice qu'elle subira ne saurait être réduit à un dommage financier et chiffrable, mais revêt aussi un caractère non financier. Ainsi, elle allègue que l'attribution du marché en cause constituerait, compte tenu de sa spécificité du point de vue technique, une référence importante pour les marchés suivants ayant un objet identique ou similaire et que la perte de cette référence représenterait pour la requérante un préjudice irréparable, d'autant plus qu'un maître d'ouvrage prestigieux, tel que la Commission, représenterait une référence excellente pour un adjudicataire dans la perspective de projets futurs.

56 Pour autant que la requérante entende invoquer ainsi une atteinte à sa réputation, il suffit de relever que la participation à une soumission publique, par nature hautement compétitive, implique des risques pour tous les participants et que l'élimination d'un soumissionnaire, en vertu des règles de la soumission, n'a, en elle-même, rien de préjudiciable. Lorsqu'une entreprise a été illégalement écartée d'une procédure d'appel d'offres, il existe d'autant moins de raisons de penser qu'elle risque de subir une atteinte grave et irréparable à sa réputation que, d'une part, son exclusion est sans lien avec ses compétences et, d'autre part, l'arrêt d'annulation qui s'ensuivra permettra en principe de rétablir une éventuelle atteinte à sa réputation (voir ordonnance Deloitte Business Advisory/Commission, précitée, point 126, et la jurisprudence citée).

57 Enfin, s'agissant de la prétendue perte d'une référence majeure à la suite de la perte du marché en cause et de la prétendue difficulté de soumissionner utilement à l'avenir dans le cadre de projets semblables, ainsi que la Commission le fait observer à juste titre, la requérante n'a pas encore acquis de référence par l'existence de la seule lettre du 27 février 2008 qui lui « attribuait » provisoirement le marché en cause, une telle référence n'étant créée que lorsque le contrat a été signé et que le marché a été complètement et convenablement exécuté. En tout état de cause, la requérante n'a pas démontré que cette référence lui était indispensable ni qu'elle serait empêchée à l'avenir de mener à bien d'autres projets de même envergure. Elle n'a en outre pas apporté

d'éléments permettant de conclure qu'elle serait empêchée de participer aux futurs appels d'offres lancés par la Commission en relation avec l'IMMR.

58 Eu égard à ce qui précède, il y a lieu de considérer que la requérante n'a pas établi avec le degré de probabilité requis que, si le juge des référés ne lui accorde pas les mesures provisoires qu'elle sollicite, elle subira un préjudice grave et irréparable.

59 En conséquence, la demande en référé doit être rejetée pour défaut d'urgence, sans qu'il soit besoin d'examiner si les autres conditions d'octroi des mesures provisoires sollicitées sont remplies.

Par ces motifs,

LE PRÉSIDENT DU TRIBUNAL

ordonne :

1) La demande en référé est rejetée.

2) Les dépens sont réservés.

Fait à Luxembourg, le 15 juillet 2008.

Le greffier — Le président

E. Coulon — M. Jaeger

* Langue de procédure : le néerlandais.

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Documents relatifs à la même affaire

Ordonnance du président du Tribunal du 15 juillet 2008 – Antwerpse Bouwwerken/Commission(affaire T-195/08 R)

« Référé – Marchés publics – Procédure communautaire d'appel d'offres – Rejet d'une offre – Demande de sursis à exécution et de mesures provisoires – Recevabilité – Intérêt à agir – Perte d'une chance – Absence de préjudice grave et irréparable – Défaut d'urgence »

1. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi - « Fumus boni juris » - Urgence - Caractère cumulatif - Mise en balance de l'ensemble des intérêts en cause - Ordre d'examen et mode de vérification - Pouvoir d'appréciation du juge des référés (Art. 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 18-19)*

2. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi - Urgence - Préjudice grave et irréparable - Charge de la preuve (Art. 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 38-39)*

3. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi - Préjudice grave et irréparable - Préjudice financier (Art. 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 43-44)*

4. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi – Urgence (Art. 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 2)) (cf. points 47-48)*

5. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi - Préjudice grave et irréparable - Préjudice financier - Préjudice susceptible d'être réparé par l'octroi d'une indemnisation dans le cadre du recours au principal (Art. 242 CE, 243 CE et 288 CE; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 49-51)*

6. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi - Préjudice grave et irréparable - Préjudice financier - Situation susceptible de mettre en péril l'existence de la société requérante ou modifiant de manière irrémédiable sa position sur le marché - Inclusion – Conditions (Art. 242 CE et 243 CE ; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 52-54)*

7. *Référé - Sursis à exécution - Mesures provisoires - Conditions d'octroi - Préjudice grave et irréparable - Décision d'exclusion d'un soumissionnaire d'une procédure d'appel d'offres - Atteinte à sa réputation - Préjudice ne pouvant être considéré comme irréparable (Art. 242 CE et 243 CE; règlement de procédure du Tribunal, art. 104, § 2) (cf. points 56-57)*

Objet

Demande de mesures provisoires formée dans le cadre d'une procédure d'appel d'offres lancée par la Commission pour la construction d'un bâtiment.

Dispositif

1) La demande en référé est

rejetée.

2) Les dépens sont réservés.

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Order of the President of the Court of First Instance of 15 July 2008 - Antwerpse Bouwwerken v Commission

(Case T-195/08 R)

(Application for interim measures - Public procurement - Community tendering procedure - Rejection of tender - Application for suspension of operation and interim measures - Admissibility - Interest in bringing proceedings - Loss of an opportunity - Absence of serious and irreparable damage - No urgency)

Language of the case: Dutch

Parties

Applicant: Antwerpse Bouwwerken NV (Antwerp, Belgium) (represented by: J. Verbist and D. de Keuster, lawyers)

Defendant: Commission of the European Communities (represented by: E. Manhaeve, Agent, assisted by M. Gelders)

Re:

Application for interim measures in the context of the tendering procedure launched by the Commission for the construction of a building.

Operative part of the order

1. *The application for interim measures is dismissed.*

2. *The costs are reserved.*

_____

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Action brought on 30 May 2008 - Antwerpse Bouwwerken v Commission

(Case T-195/08)

Language of the case: Dutch

Parties

Applicant: Antwerpse Bouwwerken NV (Antwerp, Belgium) (represented by: J. Verbist and D. de Keuster, lawyers)

Defendant: Commission of the European Communities

Form of order sought

Annul (i) the decision of 29 April 2008, notified by the Commission by letter of 29 April 2008, received by the applicant on 5 May 2008, by which the Commission informed the applicant that the latter's tender had been unsuccessful, as further explained in a letter from the European Commission of 6 May 2008 and received by the applicant on 8 May 2008, in which the Commission sets out its reasons for its rejection decision, and (ii) the decision of 23 April 2008 on the award of the contract, notified by the Commission by letter of 15 May 2008, received by the applicant on 16 May 2008;

declare the Commission to be non-contractually liable for the damage suffered by the applicant, to be quantified at a later date;

order the Commission to pay the costs.

Pleas in law and main arguments

The applicant submitted a tender in response to the Commission's call for tenders for the construction of a reference materials production hall. [1] Ultimately, the applicant's tender was not selected by the Commission.

The applicant relies in its application on an infringement of Article 91 of Regulation 1605/2002 [2] and of Articles 122, 138 and 148 of Regulation 2342/2002 [3] in conjunction with Articles 2 and 28 of Directive 2004/18/EC. [4]

According to the applicant, it is apparent from the official records of selection of tenders that the successful tender did not comply with an essential tendering specification and that, consequently, it should have been rejected for failure to comply with the conditions of the contract. The intervention by the tenderer of the successful bid was not merely a case of the tender being clarified but of it being supplemented, which was not permissible at that stage of the procedure.

In addition, the decision on the award of the contract does not satisfy the principle of transparency, as essential elements of the assessment records, as provided to the applicant, have been rendered illegible.

———————————

[1] - B-Geel: Construction of a reference materials production hall (2006/S 102-108785).

[2] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

[3] - Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1).

[4] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

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ORDER OF THE COURT OF FIRST INSTANCE (Seventh Chamber)

9 July 2009 (*)

(Action for declaration of failure to act, for annulment and for damages – Public service contracts – Call for tenders concerning consultancy, audit and study services for OHIM – Administrative appeal before the Commission – Implied Commission decision to dismiss – New claims – Connection between the action for a declaration of failure to act and the action for damages – Manifest inadmissibility)

In Case T–188/08,

infeurope, established in Luxembourg (Luxembourg), represented by O. Mader, lawyer,

applicant,

v

Commission of the European Communities, represented by N. Bambara and E. Manhaeve, acting as Agents,

defendant,

first, APPLICATION for a declaration that the Commission failed to act in that it unlawfully failed to annul the decision to award framework contracts under the tendering procedure AO/026/06 of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) for the provision of consultancy, audit and study services, and to terminate the specific contracts concluded under those framework contracts and, in the alternative, APPLICATION for annulment of the alleged implied decision of the Commission to dismiss the applicant's administrative appeal of 13 December 2007 in the context of that tendering procedure and, secondly, APPLICATION for compensation for the harm allegedly suffered as a result of the alleged unlawful omissions on the part of the Commission,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Seventh Chamber),

composed of N.J. Forwood, President, D. Šváby and E. Moavero Milanesi (Rapporteur), Judges,

Registrar: E. Coulon,

makes the following

Order

Legal context

1 Article 118 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (now Article 122 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)), is worded as follows:

'1. The Commission shall check the legality of those acts of the President of the Office in respect of which Community law does not provide for any check on legality by another body and of acts of the Budget Committee attached to the Office pursuant to Article 133.

2. It shall require that any unlawful acts as referred to in paragraph 1 be altered or annulled.

3. Member States and any person directly and personally involved may refer to the Commission any act as referred to in paragraph 1, whether express or implied, for the Commission to examine the legality of that act. Referral shall be made to the Commission within one month of the day on which the party concerned first became aware of the act in question. The Commission shall take a decision within three months. If no decision has been taken within this period, the case shall be deemed to have been dismissed.'

Factual background to the proceedings

2 The applicant, infeurope, is a company specialised in IT services. It participated in the call for tenders AO/026/06 issued by the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) for the purposes of the award of a public contract for consultancy, audit and study services.

3 The call for tenders at issue included two separate lots, the first of which covered OHIM's general activities and the second covered a certain number of technical fields.

4 After examining the tenders, OHIM was to select three tenderers and conclude a framework contract with each of them. If the tenderer ranked first proved unable to supply the services, OHIM was entitled to approach the second tenderer and, if it was also unable to supply the services, to approach the third tenderer.

5 The applicant submitted a tender for both lots. By letter dated 3 September 2007, received by the applicant on 4 September 2007, OHIM informed the applicant that its tender had been ranked third for both lots so that, in accordance with the tender specifications, it was offered a framework contract, as were the other two tenderers selected.

6 By letter of 4 September 2007, the applicant asked OHIM to provide it with more information. By letter of 17 September 2007, OHIM confirmed to the applicant that its tender had been ranked third in the final classification and provided details on the position of its tender with regard to the technical and financial evaluations as compared with those of the other two tenderers selected. By a second letter of 18 September 2007, the applicant requested more details from OHIM, which replied by letter of 21 September 2007 in which it stated the scores awarded to the three tenderers selected in respect of each type of evaluation and also informed the applicant of the identity of the tenderers ranked first and second.

7 Framework contracts were concluded with the first two tenderers in October 2007, then with the applicant on 12 November 2007. The performance of the first specific contracts with the first ranked contractor commenced at the beginning of November 2007.

8 The relevant contract award notice was published in the *Official Journal of the European Union* on 1 December 2007.

9 On 13 December 2007, on the basis of Article 118(3) of Regulation No 40/94, the applicant lodged an administrative appeal with the Commission, requesting the Commission to annul the tendering procedure at issue, the ensuing framework contracts and the specific contracts concluded under those framework contracts and to organise a new tendering procedure. It simultaneously sent a copy of that appeal to OHIM.

10 The Commission did not reply to the applicant's administrative appeal.

Procedure and forms of order sought by the parties

11 The applicant brought this action by application lodged at the Registry of the Court of First Instance on 13 May 2008.

12 By a separate document lodged at the Court Registry on 29 July 2008, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.

13 The applicant submitted its observations on that objection of inadmissibility on 15 September 2008.

14 In its application, the applicant claims that the Court should:

– declare that the Commission has failed to annul the decision awarding the framework contracts under OHIM's tendering procedure AO/026/06;

– declare that the Commission has failed to terminate the specific contracts concluded under those framework contracts;

– order the Commission to pay EUR 35 950, plus 4% interest on EUR 33 050 from 19 December 2006, plus 4% interest on EUR 2 900 from 14 December 2007, plus 8% interest on EUR 35 950 from the date of delivery of the judgment;

– order the Commission to pay EUR 646 631.27, plus 4% interest on that sum from 14 May 2008 and 8% interest thereon from the date of delivery of the judgment;

– order the Commission to pay the costs.

15 In its objection of inadmissibility, the Commission contends that the Court should:

– declare the action inadmissible;

– order the applicant to pay the costs.

16 In its observations on the objection of inadmissibility, the applicant in essence contends that the Court should:

– declare the objection of inadmissibility unfounded;

– in the alternative, in the event of the inadmissibility of the application for a declaration of failure to act, annul the Commission's implied decision to dismiss the applicant's administrative appeal of 13 December 2007.

17 In addition, the applicant requests the Court to order the Commission to produce certain documents relating to the tender evaluation procedure.

Law

18 Under Article 111 of the Rules of Procedure of the Court of First Instance, where an action brought before that court is manifestly inadmissible or manifestly lacking any foundation in law, the Court may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.

19 In the present case, the Court considers itself to have sufficient information from the documents in the file to give a decision without taking further steps in the proceedings.

The application for a declaration of failure to act

20 The applicant has submitted an application for a declaration of failure to act under Article 232 EC. It requests the Court to declare that, despite a request to that effect in its administrative appeal of 13 December 2007, the Commission failed to annul the decision awarding the framework contracts under OHIM's tendering procedure AO/026/06 and to terminate the specific contracts concluded under those framework contracts.

21 The Commission has raised an objection of inadmissibility in support of which it puts forward four pleas alleging, respectively, that there was no failure to act on its part, that the applicant's administrative appeal to the Commission under Article 118 of Regulation No 40/94 was submitted out of time, that the application for a declaration of failure to act was lodged out of time and that the Commission has no power to annul acts of the President of OHIM.

Arguments of the parties

22 First, the Commission submits that Article 232 EC can be applied only where there is a pure omission on the part of the defendant institution where it is under a duty to act. In the present case, there was no failure to act contrary to the Treaty, since the Commission adopted a position, in the form of an implied dismissal, on the administrative appeal lodged by the applicant on 13 December 2007. In this connection it points out that, under Article 118(3) of Regulation No 40/94, if no decision has been taken by the Commission within three months of an administrative appeal lodged against an act of the President of OHIM, the case is deemed to have been dismissed. Therefore, the fact that when this action was brought the Commission had not replied to the applicant's administrative appeal of 13 December 2007 does not constitute a failure to act for the purpose of Article 232 EC and the action is on that basis inadmissible.

23 Secondly, the Commission points out that any person who intends to challenge the legality of an act of the President of OHIM which directly and personally involves it must refer that act to the Commission within one month of the day on which the party concerned first became aware of the act in question. According to the Commission, the act in question for the purposes of Article 118(3) of Regulation No 40/94 is OHIM's decision of 3 September 2007 to award the contract at issue, sent to the applicant on the same day. That decision was received by the applicant on 4 September 2007, the date on which it effectively became aware of the act in question. The Commission infers from this that the administrative appeal should have been lodged within one month of 4 September 2007, so that the administrative appeal of 13 December 2007 was lodged out of time. Therefore, the application for a declaration of failure to act under Article 232 EC is also inadmissible because the administrative appeal under Article 118(3) of Regulation No 40/94 was lodged out of time.

24 Thirdly, the Commission claims that, even if the administrative appeal was lodged in due time, the application for a declaration of failure to act should, in accordance with the second paragraph of Article 232 EC, have been made within four months of the date on which that administrative appeal was lodged, that is to say, on 13 April 2008 at the latest. Since the application in this case was lodged on 13 May 2008, the application for a declaration of failure to act is also inadmissible because it is out of time.

25 Fourthly, the Commission states that it does not have the power to annul or alter any decision taken by OHIM since, under Article 118(2) of Regulation No 40/94, it may only require that acts adopted by the President of OHIM be altered or annulled. Since the Commission did not have the power to adopt the annulment decision requested by the applicant, the latter was not entitled to bring an application for a declaration of failure to act against the Commission under Article 232 EC.

26 The applicant disputes the four grounds of inadmissibility put forward by the Commission.

27 First, the applicant submits that Article 232 EC is to be applied in the present case, since the implied dismissal under Article 118(3) of Regulation No 40/94, which results from the Commission's failure to define its position, does not allow the addressee of the decision to assess the content of that implied dismissal and cannot therefore constitute the definition of a position for the purpose of Article 232 EC.

28 Article 232 EC is also applicable on the ground that the expiry of the three-month period within which the Commission should have taken a decision pursuant to Article 118(3) of Regulation No 40/94 does not exclude the Commission's obligation to act in its capacity as the supervisory body of OHIM in order to ensure the legality of its acts, and the inaction of the Commission did not bring about a distinct change in the applicant's legal position.

29 Secondly, as regards the contention that the administrative appeal was lodged out of time, the applicant submits that the period of one month under Article 118(3) of Regulation No 40/94 should start to run from the time when it became aware of OHIM's infringements, that is to say, in the present case, during November 2007, and not from the receipt of the award decision on 4 September 2007. Therefore, the administrative appeal brought on 13 December 2007 is not out of time.

30 Thirdly, the applicant denies that the application for a declaration of failure to act was submitted out of time. The period of two months during which the institution concerned should define its position, under Article 232 EC, is displaced by the period of three months provided for in Article 118 (3) of Regulation No 40/94. Furthermore, the applicant specifies that the two-month period for the purpose of bringing an application for a declaration of failure to act can start to run only from the implied dismissal referred to in Article 118(3). In the present case, since the administrative appeal was lodged on 13 December 2007, the three-month period for defining a position on the

administrative appeal expired on 13 March 2008 and the period for bringing an action for failure to act expired on 13 May 2008, the date on which this action was brought.

31 Fourthly, the applicant disputes the ground for inadmissibility based on the Commission's alleged lack of power to annul OHIM acts. It submits that it is for the Commission and not OHIM to take a decision on the legality of OHIM's acts. Even if the power to alter or annul an OHIM act rests exclusively with that body, the Commission has the power to take a decision which OHIM must strictly follow.

Findings of the Court

32 Community law provides that, in certain specific instances, silence on the part of an institution is deemed to amount to a decision where the institution has been called upon to express its view and has not done so by the end of a given period. In such cases, by an express provision, laying down a deadline by which an implied decision is deemed to have been taken and prescribing the tenor of the decision, an institution's inaction is deemed to be equivalent to a decision, without calling into question the system of remedies instituted by the Treaty (see, to that effect, Joined Cases T-189/95, T-39/96 and T-123/96 *SGA* v *Commission* [1999] ECR II-3587, paragraph 27).

33 That applies to Article 118 of Regulation No 40/94, which lays down a system for control of the legality of those acts of the President of OHIM in respect of which Community law does not provide for any check on legality by another body. That is true of acts adopted in the context of public procurement.

34 That control is entrusted to the Commission, before which an administrative appeal must be brought within one month of the day on which the party concerned first became aware of the act in question. At the end of that procedure, the Commission is to require, where appropriate, that the acts which it regards as unlawful be altered or annulled. The fact that a time-limit is laid down for bringing an administrative appeal attests to the obligatory nature – which has never been called into question by the applicant – of such an administrative procedure, which is a prerequisite of bringing an action before the Community Courts (see, to that effect and by analogy, Case T-411/06 *Sogelma* v *EAR* [2008] ECR II-0000, paragraphs 60 to 63). The Community legislature did not design the procedure laid down by Article 118 of Regulation No 40/94 as offering individuals an alternative remedy to that of an action before the Community Courts in order to protect their interests, unlike that which was provided for, for example, with regard to bringing a matter before the European Ombudsman, which is an alternative remedy to a direct action before the Community Courts (see, to that effect, order in Case T-294/04 *Internationaler Hilfsfonds* v *Commission* [2005] ECR II-2719, paragraphs 47 and 48).

35 Therefore, an action for failure to act seeking a declaration that the Commission has been guilty of inaction is not admissible in the context of a system such as that established by Article 118 of Regulation No 40/94, in which it is expressly provided that the Commission's inaction results in an implied dismissal. Any declaration that the Commission acted unlawfully is possible only in the context of an action for annulment brought against the final decision of the institution, in which it decides on the merits of the applicant's complaint, both where that decision is express and where it is deemed to have been adopted on the expiry of a specified period.

36 Having regard to the foregoing, and without it being necessary to examine the other grounds of inadmissibility relied on by the Commission, the application for a declaration of failure to act must be dismissed as manifestly inadmissible.

The application for annulment

Arguments of the parties

37 In its observations on the plea of inadmissibility, the applicant submits that, if the Court were to find its application for a declaration of failure to act inadmissible, it should be treated as an application for annulment of the Commission's implied decision of dismissal, which is deemed to have been adopted on the expiry of the period of three months from the day on which the administrative appeal was lodged. The conditions for bringing an action for annulment under Article 230 EC are fulfilled in the present case, since the implied decision is of direct and individual concern to the applicant, and the time-limit for bringing an action under the fourth paragraph of Article 230 EC was complied with in this case, since the action was brought within two months of the expiry of the three-month period after the administrative appeal was lodged on 13 December 2007. The

applicant adds that Articles 230 EC and 232 EC merely prescribe one and the same method of recourse and that the new application for annulment does not in any way change the subject–matter of the proceedings.

Findings of the Court

38 Whilst Article 48(2) of the Rules of Procedure authorises, in certain circumstances, new pleas in law to be introduced in the course of proceedings, that provision cannot in any circumstances be interpreted as authorising the applicants to bring a new claim before the Community judicature and thereby to modify the subject-matter of the proceedings. In that context, it is not permissible to substitute a claim for annulment for the claim for a declaration of failure to act initially brought before the Court (see, to that effect, Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285, paragraph 43 and the case-law cited).

39 It follows that the applicant, which initially applied to the Court on the basis of Article 232 EC, is not entitled to request, even in the alternative, that its initial claim be converted into a claim for annulment on the basis of Article 230 EC and directed against the implied decision of dismissal which is deemed to have been adopted on the expiry of the three-month period after the administrative appeal was lodged on 13 December 2007.

The application for damages

Arguments of the parties

40 According to the Commission, the application for damages is inadmissible on two grounds. First, the action for damages should have been directed against OHIM under Article 114 of Regulation No 40/94 (now Article 118 of Regulation No 207/2009) and, secondly, there is neither a sufficiently serious breach of a rule of law nor a direct causal link between the damage suffered by the applicant and the Commission's inaction.

41 The applicant contends in reply, first, that the action for damages was correctly brought against the Commission as the supervisory body of OHIM and, secondly, that the examination of the conditions relating to whether there is a sufficiently serious breach of a rule of law, damage and a causal link is not relevant at the stage of examining the action's admissibility.

Findings of the Court

42 According to settled case-law, the action for damages was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use conceived with a view to its specific purpose. Thus it has been held that, although actions for annulment and for a declaration of failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action for damages seeks compensation for damage resulting from a measure, whether legally binding or not, or from conduct, attributable to a Community institution or body (see order of 17 October 2007 in Case T-454/05 *Sumitomo Chemical Agro Europe and Philagro France* v *Commission*, not published in the ECR, paragraphs 70 and 71 and the case-law cited).

43 However, an application for damages which is closely connected to an application for a declaration of failure to act is itself inadmissible (see order of 3 May 2004 in Case T-24/04 *Leighton and Others* v *Council and Commission*, not published in the ECR, paragraph 24 and the case-law cited).

44 The Court finds that the present application for damages is closely connected to an application for a declaration of failure to act and to an application for annulment which are manifestly inadmissible, as is apparent from the foregoing explanations.

45 It follows that the application for damages made in these proceedings is itself also manifestly inadmissible.

46 Consequently, the action must be dismissed in its entirety, without it being necessary to rule on the request that certain documents relating to the tender evaluation procedure be produced.

Costs

47 Article 87(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

48 In the present case, since the applicant has been unsuccessful, it must be ordered to pay the Commission's costs in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby orders:

1. The action is dismissed.

2. infeurope shall pay the costs.

Luxembourg, 9 July 2009.

E. Coulon	N.J. Forwood
Registrar	President

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* Language of the case: English.

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Documents relatifs à la même affaire

Ordonnance du Tribunal (septième chambre) du 9 juillet 2009 – infeurope/Commission (affaire T-188/08)

« Recours en carence, en annulation et en indemnité – Marchés publics de services – Appel d'offres concernant la prestation de services de conseil, d'audit et d'étude pour l'OHMI – Recours administratif devant la Commission – Décision implicite de rejet de la Commission – Conclusions nouvelles – Lien entre recours en carence et recours en indemnité – Irrecevabilité manifeste »

1. *Recours en carence - Carence - Notion - Recours administratif contre un acte du président de l'Office de l'harmonisation dans le marché intérieur adopté dans le cadre de la passation de marchés publics - Décision implicite de rejet par la Commission - Exclusion - Irrecevabilité du recours en carence (Art. 232 CE; règlement du Conseil nº 40/94, art. 118) (cf. points 32-36)*

2. *Procédure - Objet du litige - Modification en cours d'instance (Règlement de procédure du Tribunal, art. 48, § 2) (cf. point 38)*

3. *Recours en indemnité - Autonomie par rapport aux recours en annulation et en carence - Irrecevabilité manifeste des recours en annulation et en carence - Demande indemnitaire étroitement liée à la demande en constatation de carence – Irrecevabilité (Art. 288, al. 2, CE) (cf. points 42-44)*

Objet

Premièrement, à titre principal, demande visant à faire constater la carence de la Commission en ce que celle-ci s'est illégalement abstenue d'annuler la décision d'attribution des contrats-cadres à la suite de la procédure d'appel d'offres AO/026/06 de l'Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI) pour la prestation de services de conseil, d'audit et d'étude ainsi que de mettre fin aux accords spécifiques conclus à la suite de ces contrats-cadres et, à titre subsidiaire, demande d'annulation de la prétendue décision implicite de la Commission rejetant le recours administratif de la requérante du 13 décembre 2007 dans le cadre de ladite procédure d'appel d'offres et, deuxièmement, demande visant à obtenir réparation du préjudice prétendument subi à la suite des prétendues omissions illégales de la Commission.

Dispositif

1) Le recours est rejeté.

2) infeurope est condamnée aux dépens.

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Order of the Court of First Instance of 9 July 2009 - infeurope v Commission

(Case T-188/08) [1]

(Action for declaration of failure to act, for annulment and for damages - Public service contracts - Call for tenders concerning consultancy, audit and study services for OHIM - Administrative appeal before the Commission - Implied Commission decision to dismiss - New claims - Connection between the action for a declaration of failure to act and the action for damages - Manifest inadmissibility)

Language of the case: English

Parties

Applicant: infeurope (Luxembourg, Luxembourg) (represented by: O. Mader, lawyer)

Defendant: Commission of the European Communities (represented by: N. Bambara and E. Manhaeve, acting as Agents)

Re:

First, APPLICATION for a declaration that the Commission failed to act in that it unlawfully failed to annul the decision to award framework contracts following the call for tenders procedure AO/026/06 of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) for the provision of consultancy services, audits and studies, and to terminate the specific contracts concluded under those framework contracts and, in the alternative, APPLICATION for annulment of the alleged implied decision of the Commission to dismiss the applicant's administrative appeal of 13 December 2007 in the context of that tendering procedure and, secondly, APPLICATION for compensation for the harm allegedly suffered as a result of the alleged unlawful omissions on the part of the Commission.

Operative part of the order

1. *The action is dismissed.*

2. *infeurope is ordered to pay the costs.*

_____

[1] - OJ C 171, of 5.7.2008.

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Action brought on 13 May 2008 - infeurope v Commission

(Case T-188/08)

Language of the case: English

Parties

Applicant: infeurope SA (Luxembourg, Luxembourg) (represented by: O. Mader, lawyer)

Defendant: Commission of the European Communities

Form of order sought

declare that the European Commission has failed to annul the decision of awarding the framework contracts under the call for tenders procedure AO/026/06 of the OHIM on consultancy services, audits and studies;

declare that the European Commission has failed to terminate the specific contracts concluded under the said framework contracts;

order the European Commission to pay to the applicant the sum of EUR 35 950 plus 4 % interest on the amount of EUR 33 050 from 19 December 2006, plus 4% interest on the amount of EUR 2 900 from 14 December 2007; respectively 8% interest on sum of EUR 35 950 from the date of judgment;

order the European Commission to pay to the applicant the sum of EUR 646 631.27, plus 4% interest on the said sum from 14 May 2008, respectively 8 % interest on the said sum from the date of judgment;

order the European Commission to produce certain documents relating to the procedure for evaluating the tenders;

order the European Commission to pay the costs.

Pleas in law and main arguments

The applicant seeks the declaration that the Commission failed to annul the decision taken by the Office for Harmonisation in the Internal Market (OHIM) awarding multiple framework contracts under the tender procedure AO/026/06 of the OHIM on "E-Alicante: consultancy services, audits and studies"[1] and that it has failed to terminate the corresponding specific contracts under the framework.

The pleas in law and main arguments raised by the applicant are identical to those raised in Case T-176/08 *infeurope* v *Commission*.

_____

[1] - OJ 2006 S 210-223510

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DOCUMENT DE TRAVAIL

ORDONNANCE DU TRIBUNAL (deuxième chambre)

du 25 juin 2008(*)

« Recours en carence – Absence de mise en œuvre par la Commission du mécanisme correcteur prévu à l'article 3, paragraphe 2, de la directive 89/665/CEE – Personnes physiques et morales – Actes les concernant directement – Irrecevabilité manifeste »

Dans l'affaire T–185/08,

VDH Projektentwicklung GmbH, établie à Erkelenz (Allemagne),

Edeka Handelsgesellschaft Rhein-Ruhr mbH, établie à Moers (Allemagne),

représentées par M^e^ C. Antweiler, avocat,

parties requérantes,

contre

Commission des Communautés européennes

partie défenderesse,

ayant pour objet un recours en carence visant à faire constater la carence de la Commission, au motif que celle-ci s'est abstenue, en ce qui concerne la conclusion d'une concession de travaux publics entre la ville de Stolberg et Kaufland Stiftung & Co., ainsi que l'attribution d'un contrat d'entreprise générale par Kaufland Stiftung & Co., de mettre en œuvre sans délai le mécanisme correcteur prévu à l'article 3 de la directive 89/665/CEE et d'adresser à la République fédérale d'Allemagne une notification au titre de l'article 3, paragraphe 2, de ladite directive,

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (deuxième chambre),

composé de M^mes^ I. Pelikánová (rapporteur) président, K. Jürimäe et M. S. Soldevila Fragoso, juges,

greffier : M. E. Coulon,

rend la présente

Ordonnance

Faits, procédure et conclusions

1 La requérante VDH Projektentwicklung GmbH (ci-après « VDH ») est une entreprise d'études de projets et de construction. Elle conçoit, bâtit et développe de grands hypermarchés, notamment pour la requérante Edeka Handelsgesellschaft Rhein-Ruhr (ci-après « Edeka »), une entreprise de vente de produits alimentaires au détail.

2 Fin 2002, les deux requérantes ont marqué leur intérêt pour l'acquisition de plusieurs terrains appartenant à la ville de Stolberg afin d'y construire un hypermarché. Kaufland Stiftung & Co. KG (ci-après « Kaufland ») s'était également montrée intéressée par l'acquisition des terrains et la

construction d'un hypermarché. Les négociations se sont interrompues le 17 février 2003, après qu'il est apparu que les propriétaires de certains autres terrains n'étaient pas prêts à les mettre à disposition.

3 Alors que les requérantes n'avaient plus eu aucun contact avec la ville de Stolberg depuis le 17 février 2003, Kaufland a lancé, début février 2008, les travaux de construction d'un hypermarché sur les terrains en question. Ces travaux de construction avaient apparemment pour base, d'une part, une convention notariée du 31 juillet 2003 fixant des obligations de construction, telle que modifiée par un contrat modificatif du 14 février 2007, et, d'autre part, un contrat d'urbanisme du 11 février 2007.

4 Par lettre du 14 mars 2008, les requérantes ont saisi la Commission d'une demande tendant à l'application du mécanisme correcteur prévu à l'article 3 de la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395, p. 33), telle que modifiée. Elles y font valoir que la ville de Stolberg, Kaufland et l'entreprise générale pour le projet de construction n'ont pas respecté le droit communautaire, dans la mesure où, d'une part, la ville de Stolberg a passé un marché public de travaux sous forme d'une concession de travaux en vue de la construction d'un hypermarché Kaufland par la voie de l'adjudication de fait en faveur de Kaufland, et où, d'autre part, Kaufland a passé un marché public de travaux par la voie de l'adjudication de fait en faveur de l'entreprise générale.

5 Par requête enregistrée le 16 mai 2008, les requérantes ont formé le présent recours.

6 Les requérantes concluent à ce qu'il plaise au Tribunal de constater que la Commission s'est abstenue, en contravention avec le traité,

1. d'engager sans délai le mécanisme correcteur prévu à l'article 3 de la directive 89/665/CEE en ce qui concerne la conclusion d'une concession de travaux publics entre la ville de Stolberg et Kaufland au moyen de la convention du 31 juillet 2003, ainsi qu'au moyen du contrat d'urbanisme du 11 janvier 2007,

2. de notifier sans délai à la République fédérale d'Allemagne, conformément à l'article 3, paragraphe 2, de la directive 89/665/CEE, que la Commission estime que la conclusion d'une concession de travaux publics entre la ville de Stolberg et Kaufland au moyen de la convention du 31 juillet 2003, ainsi qu'au moyen du contrat d'urbanisme du 11 janvier 2007, est constitutive d'une violation claire et manifeste des dispositions du droit communautaire sur les marchés publics, et de demander à la République fédérale d'Allemagne de corriger cette violation par des mesures appropriées,

3. d'engager sans délai le mécanisme correcteur prévu à l'article 3 de la directive 89/665/CEE en ce qui concerne l'attribution, par Kaufland à l'entreprise générale, du contrat d'entreprise générale visant à la construction d'un hypermarché à Stolberg,

4. de notifier sans délai à la République fédérale d'Allemagne, conformément à l'article 3, paragraphe 2, de la directive 89/665/CEE, que la Commission estime qu'une violation claire et manifeste des dispositions du droit communautaire sur les marchés publics est constituée, et de demander à la République fédérale d'Allemagne de corriger cette violation par des mesures appropriées.

En droit

7 Lorsque le Tribunal est manifestement incompétent pour connaître d'un recours ou lorsque celui-ci est manifestement irrecevable ou manifestement dépourvu de tout fondement en droit, le Tribunal, en vertu de l'article 111 de son règlement de procédure, peut, sans poursuivre la procédure, statuer par voie d'ordonnance motivée.

8 En l'espèce, le Tribunal s'estime suffisamment éclairé par les pièces du dossier et décide, conformément à cet article, de statuer sans poursuivre la procédure.

9 S'agissant de la recevabilité du chef de conclusions visant à la constatation d'une carence de la part de la Commission, il importe de souligner que les articles 230 CE et 232 CE ne forment que

l'expression d'une seule et même voie de droit. Il en résulte que, de même que l'article 230, quatrième alinéa, CE permet aux particuliers de former un recours en annulation contre un acte d'une institution dont ils ne sont pas les destinataires dès lors que cet acte les concerne directement et individuellement, l'article 232, troisième alinéa, CE doit être interprété comme leur ouvrant également la faculté de former un recours en carence contre une institution qui aurait manqué d'adopter un acte qui les aurait concernés de la même manière (arrêts de la Cour du 26 novembre 1996, T. Port, C-68/95, Rec. p. I-6065, point 59, et du Tribunal du 10 mai 2006, Air One/Commission, T-395/04, Rec. p. II-1343, point 25).

10 Dans la présente affaire, il convient donc d'apprécier si l'acte juridique à propos duquel les requérantes reprochent à la Commission sa carence les aurait directement et individuellement concernées. Eu égard aux circonstances de l'affaire, il convient d'abord d'apprécier le critère de l'intérêt direct.

11 Il est de jurisprudence constante que, pour concerner directement un requérant privé, au sens de l'article 230, quatrième alinéa, CE, l'acte communautaire entrepris doit produire directement des effets sur la situation juridique de l'intéressé et sa mise en oeuvre doit revêtir un caractère purement automatique et découler de la seule réglementation communautaire, sans application d'autres règles intermédiaires (voir, en ce sens, arrêts de la Cour du 5 mai 1998, Dreyfus/Commission, C-386/96 P, Rec. p. I-2309, point 43, et du Tribunal du 13 décembre 2000, DSTV/Commission, T-69/99, Rec. p. II-4039, point 24).

12 En l'espèce, il résulte de l'article 3 de la directive 89/665/CEE que la procédure qui y est prévue est une procédure purement bilatérale entre la Commission et l'État membre concerné. La notification à laquelle procède la Commission en vertu de l'article 3, paragraphe 2, de cette directive, et que, dans leurs deuxième et quatrième chefs de conclusions, les requérantes lui reprochent de n'avoir pas effectuée, n'a aucune incidence sur leur situation juridique mais oblige simplement l'État membre concerné à faire certaines communications à la Commission dans un délai de 21 jours calendaires.

13 La notification prévue à l'article 3, paragraphe 2, de la directive 89/665/CEE n'impose au surplus à l'État membre concerné aucune obligation de mise en œuvre purement automatique, mais lui laisse un pouvoir de choix quant à son action future. Ainsi en effet qu'il ressort du paragraphe 3 de cette disposition, l'État membre auquel la Commission adresse une notification en vertu du paragraphe 2 dispose de trois possibilités: soit confirmer que la violation a été corrigée, soit expliquer les raisons pour lesquelles celle-ci n'a pas été corrigée, soit encore communiquer une notification indiquant que la procédure de passation de marché a été suspendue. Il résulte en particulier du paragraphe 3, sous b), en combinaison avec le paragraphe 4, que l'État membre concerné n'est pas tenu de prendre d'autres mesures lorsque la violation alléguée fait déjà l'objet d'un recours juridictionnel en vertu de l'article 2, paragraphe 9. Or c'est précisément le cas en l'espèce, ainsi que l'admettent elles-mêmes les requérantes au point 22 de leur requête.

14 Quant à la simple « mise en œuvre » du mécanisme correcteur prévu à l'article 3 de la directive 89/665/CEE, que demandent les requérantes par leurs premier et troisième chefs de conclusions, elle ne les concerne a fortiori pas directement, puisqu'elle n'entraîne à elle seule aucun effet juridique. De tels effets n'interviennent au contraire qu'à la suite d'une notification concrète opérée en vertu du paragraphe 2 de cette disposition.

15 Les requérantes soutiennent être directement et individuellement concernées par cette mise en œuvre du mécanisme correcteur qu'elles demandent, au motif qu'elles conservent un vif intérêt dans l'acquisition des terrains auprès de la ville pour y construire un supermarché, ce qu'elles auraient d'ailleurs dit et répété à la ville de Stolberg. Il existerait ainsi une situation particulière qui les caractériserait par rapport à toute autre personne. Après épuisement de leurs possibilités résidant dans les procédures de recours engagées devant la chambre des marchés publics de la Bezirksregierung Köln, elles ne pourraient obtenir un arrêt des travaux, ainsi que l'interdiction de la poursuite du contrat posant des obligations de construction et du contrat d'entreprise générale, que par l'intervention de la Commission. Elles seraient donc particulièrement concernées par l'intervention qu'elles sollicitent.

16 Ces arguments ne sont toutefois pas de nature à démontrer que les requérantes sont directement concernées par une notification de la Commission au titre de l'article 3, paragraphe 2, de la directive 89/665/CEE.

17 En effet, les requérantes font certes valoir, sur un plan formel, qu'elles sont directement et

individuellement concernées. Leurs arguments se rapportent toutefois uniquement, de par leur contenu, au critère de l'intérêt individuel et non à celui de l'intérêt direct, comme il ressort d'ailleurs de la formulation qu'elles emploient, selon laquelle il existerait « ainsi » une situation particulière qui les caractériserait par rapport à toute autre personne.

Sur les dépens

18 En vertu de l'article 87, paragraphe 2, du règlement de procédure, la partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens.

19 Toutefois, dans la présente espèce, l'ordonnance en vertu de l'article 111 du règlement de procédure est rendue avant que la Commission ait pu conclure sur les dépens. Il y a donc lieu de faire application de l'article 87, paragraphe 3, du règlement de procédure, selon lequel le Tribunal peut répartir les dépens pour des motifs exceptionnels.

20 Les parties requérantes ayant succombé, il y a lieu de les condamner aux dépens.

Par ces motifs,

LE TRIBUNAL (deuxième chambre)

ordonne :

1) Le recours est rejeté comme manifestement irrecevable.

2) Les requérantes supportent leurs propres dépens.

Fait à Luxembourg, le 25 juin 2008.

Le greffier	Le président
E. Coulon	I. Pelikánová

* Langue de procédure : l'allemand.

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Documents relating to the same case

Order of the Court of First Instance (Second Chamber) of 25 June 2008 – VDH Projektentwicklung and Edeka Rhein-Ruhr v Commission

(Case T-185/08)

Actions for failure to act – Commission not implementing the corrective mechanism under Article 3 (2) of Directive 89/665/EEC – Natural and legal persons – Measures of direct and individual concern to them – Manifest inadmissibility

Actions for failure to act – Natural or legal persons – Measures of direct and individual concern to them – Directive 89/665 (Arts 230, fourth para., EC and 232, third para., EC; Council Directive 89/665, Art. 3) (see paras 9-17)

ACTION for a declaration that the Commission unlawfully failed to act in that it failed, in relation to the conclusion of a public works contract between the town of Stolberg and Kaufland Stiftung & Co., and in relation to the award of a general commercial contract by Kaufland Stiftung & Co., to implement without delay the corrective mechanism provided for under Article 3 of Directive 89/665/EEC and to send the Federal Republic of Germany a notification under Article 3(2) of that directive.

e part.

The Court:

1. Dismisses the action as manifestly inadmissible;

2. Orders the applicants to bear their own costs.

WICHTIGER RECHTLICHER HINWEIS: Für die Angaben auf dieser Website besteht Haftungsausschluss und Urheberrechtsschutz.

BESCHLUSS DES PRÄSIDENTEN DES GERICHTS

26. Juni 2008(*)

„Vorläufiger Rechtsschutz – Unzulässigkeit der Klage“

In der Rechtssache T–185/08 R

VDH Projektentwicklung GmbH mit Sitz in Erkelenz (Deutschland),

Edeka Handelsgesellschaft Rhein-Ruhr mbH mit Sitz in Moers (Deutschland),

Prozessbevollmächtigter: Rechtsanwalt C. Antweiler,

Antragstellerinnen,

gegen

Kommission der Europäischen Gemeinschaften, vertreten durch R. Sauer, D. Kukovec und O. Weber als Bevollmächtigte,

Antragsgegnerin,

wegen einstweiliger Anordnung gemäß Art. 243 EG im Zusammenhang mit einer gegen die Kommission gerichteten Untätigkeitsklage

erlässt

DER PRÄSIDENT DES GERICHTS ERSTER INSTANZ
DER EUROPÄISCHEN GEMEINSCHAFTEN

folgenden

Beschluss

1 Die Antragstellerinnen haben mit Klageschrift, die am 16. Mai 2008 bei der Kanzlei des Gerichts eingegangen ist, gemäß Art. 232 EG Untätigkeitsklage mit dem Antrag erhoben, festzustellen, dass die Kommission es pflichtwidrig unterlassen habe, geeignete Maßnahmen an die Bundesrepublik Deutschland zu richten, um die Vergabe eines öffentlichen Bauauftrags durch die Stadt Stolberg an zwei Konkurrenzunternehmen der Antragstellerinnen zu stoppen.

2 Mit besonderem Schriftsatz, der am selben Tag bei der Kanzlei des Gerichts eingegangen ist; haben die Antragstellerinnen gemäß Art. 243 EG den vorliegenden Antrag auf Gewährung einstweiligen Rechtsschutzes eingereicht, mit dem sie im Wesentlichen begehren, der Kommission den Erlass der o.g. Maßnahmen aufzugeben.

3 Die Kommission hat zum vorliegenden Antrag am 11. Juni 2008 Stellung genommen. Sie beantragt, den Antrag zurückzuweisen und den Antragstellerinnen die Kosten aufzuerlegen.

4 Nach Art. 104 § 1 der Verfahrensordnung des Gerichts ist ein Antrag auf Erlass einstweiliger Anordnungen nur zulässig, wenn er von einer Partei eines beim Gericht anhängigen Rechtsstreits gestellt wird und sich auf diesen bezieht. Einem Antrag auf einstweilige Anordnungen kann daher nicht stattgegeben werden, wenn die Klage, mit der dieser Antrag zusammenhängt, unzulässig ist (Beschluss des Präsidenten des Gerichtshofs vom 16. Juli 1993, AEFMA/Kommission, C–107/93 R,

Slg. 1993, I–4177, Randnr. 4).

5 Im vorliegenden Fall hat das Gericht (Zweite Kammer) durch Beschluss vom 25. Juni 2008 die von den Antragstellerinnen erhobene Untätigkeitsklage als offensichtlich unzulässig abgewiesen.

6 Der Antrag auf Gewährung einstweiligen Rechtsschutzes ist daher als unzulässig zurückzuweisen.

Kosten

7 Die im Rahmen des vorliegenden Verfahrens entstandenen Kosten sind antragsgemäß den unterlegenen Antragstellerinnen aufzuerlegen (Art. 87 § 2 der Verfahrensordnung).

Aus diesen Gründen hat

DER PRÄSIDENT DES GERICHTS

beschlossen:

1) Der Antrag auf einstweilige Anordnung wird als unzulässig zurückgewiesen.

2) Die Antragstellerinnen tragen die Kosten des Verfahrens.

Luxemburg, den 26. Juni 2008

Der Kanzler	Der Präsident
E. Coulon	M. Jaeger

* Verfahrenssprache: Deutsch.

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Documents relating to the same case

Order of the President of the Court of First Instance of 26 June 2008 – VDH Projektentwicklung and Edeka Rhein-Ruhr v Commission

(Case T-185/08 R)

Interim measures – Inadmissibility

Applications for interim measures – Conditions of admissibility – Main application dismissed as inadmissible (Art. 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(1)) (see para. 4)

APPLICATION for interim measures under Article 243 EC in relation to an action for failure to act against the Commission.

e part

The Court:

1. Dismisses the application for interim measures as inadmissible;

2. Orders the applicants to bear their own costs.

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ORDER OF THE COURT OF FIRST INSTANCE (Seventh Chamber)

9 July 2009 (*)

(Action for declaration of failure to act, for annulment and for damages – Public service contracts – Call for tenders concerning the maintenance of OHIM's computer systems – Administrative appeal before the Commission – Implied Commission decision to dismiss – New claims – Connection between the action for a declaration of failure to act and the action for damages – Manifest inadmissibility)

In Case T–176/08,

infeurope, established in Luxembourg (Luxembourg), represented by O. Mader, lawyer,

applicant,

v

Commission of the European Communities, represented by N. Bambara and E. Manhaeve, acting as Agents,

defendant,

first, APPLICATION for a declaration that the Commission failed to act in that it unlawfully failed to annul the decision to award framework contracts under the tendering procedure AO/042/05 of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) for software maintenance relating to OHIM core business systems on trade marks and designs, and to terminate the specific contracts concluded under those framework contracts and, in the alternative, APPLICATION for annulment of the alleged implied decision of the Commission to dismiss the applicant's administrative appeal of 2 December 2007 in the context of that tendering procedure and, secondly, APPLICATION for compensation for the harm allegedly suffered as a result of the alleged unlawful omissions on the part of the Commission,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Seventh Chamber),

composed of N.J. Forwood, President, D. Šváby and E. Moavero Milanesi (Rapporteur), Judges,

Registrar: E. Coulon,

makes the following

Order

Legal context

1 Article 118 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (now Article 122 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)), is worded as follows:

'1. The Commission shall check the legality of those acts of the President of the Office in respect of which Community law does not provide for any check on legality by another body and of acts of the Budget Committee attached to the Office pursuant to Article 133.

2. It shall require that any unlawful acts as referred to in paragraph 1 be altered or annulled.

3. Member States and any person directly and personally involved may refer to the Commission any act as referred to in paragraph 1, whether express or implied, for the Commission to examine the legality of that act. Referral shall be made to the Commission within one month of the day on which the party concerned first became aware of the act in question. The Commission shall take a decision within three months. If no decision has been taken within this period, the case shall be deemed to have been dismissed.'

Factual background to the proceedings

2 The applicant, infeurope, is a company specialised in IT services. It participated in the call for tenders AO/042/05 for the award of the contract for software maintenance relating to the core business systems of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) on trade marks and designs, issued by OHIM in July 2006.

3 After examining the tenders, OHIM was to select three tenderers and conclude a framework contract with each of them. If the tenderer ranked first proved unable to supply the services, OHIM was entitled to approach the second tenderer and, if it was also unable to supply the services, to approach the third tenderer.

4 The applicant participated in the procedure at issue and submitted a tender.

5 OHIM adopted the contract award decision for the call for tenders at issue on 12 April 2007. That decision was communicated to the applicant by letter on the same day. In that letter OHIM informed the applicant that its tender had been ranked third so that, in accordance with the tender specifications, it was offered a contract, as were the other two tenderers selected.

6 The applicant acknowledged receipt of that letter in a letter sent to OHIM on 16 April 2007. By the same letter the applicant also asked OHIM to provide it with more information.

7 By letter of 16 April 2007, received by the applicant on 17 April 2007, OHIM informed it of the identity of the other two tenderers selected, confirmed that its tender had been ranked third in the final classification and provided details in a table on the position of its tender with regard to the technical and financial evaluations as compared with those of the other two tenderers selected.

8 In accordance with the award decision, framework contracts were concluded with the first two tenderers in May 2007, then with the applicant on 24 May 2007, and the first specific contracts with the first ranked contractor commenced at the end of July 2007.

9 The relevant contract award notice was published in the *Official Journal of the European Union* on 16 June 2007.

10 On 11 May 2007, on the basis of Article 118(3) of Regulation No 40/94, the applicant lodged its first administrative appeal with the Commission, in which it disputed the legality of OHIM's decisions ranking its tender in third position. The Commission informed the applicant on 3 October 2007 that its appeal had been dismissed.

11 The applicant lodged a second administrative appeal on 2 December 2007, requesting the Commission to annul the tendering procedure at issue as well as the framework contracts and ensuing specific contracts and to organise a new tendering procedure. It simultaneously sent a copy of that appeal to OHIM.

12 The Commission did not reply to the applicant's second administrative appeal.

Procedure and forms of order sought by the parties

13 The applicant brought this action by application lodged at the Registry of the Court of First Instance on 9 May 2008.

14 By a separate document lodged at the Court Registry on 31 July 2008, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.

15 The applicant submitted its observations on that objection of inadmissibility on 30 September 2008.

16 In its application, the applicant claims that the Court should:

– declare that the Commission has failed to annul the decision awarding the framework contracts under OHIM's tendering procedure AO/042/05;

– declare that the Commission has failed to terminate the specific contracts concluded under those framework contracts;

– order the Commission to pay EUR 37 002, plus 4% interest on EUR 31 650 from 29 August 2006, plus 4% interest on EUR 3 650 from 3 December 2007, plus 4% interest on EUR 1 702 from 3 May 2008 and 8% interest on EUR 37 002 from the date of delivery of the judgment;

– order the Commission to pay EUR 1 209 037, plus 4% interest on that sum from 3 May 2008 and 8% interest thereon from the date of delivery of the judgment;

– order the Commission to pay the costs.

17 In its objection of inadmissibility, the Commission contends that the Court should:

– declare the action inadmissible;

– order the applicant to pay the costs.

18 In its observations on the objection of inadmissibility, the applicant in essence contends that the Court should:

– declare the objection of inadmissibility unfounded;

– in the alternative, in the event of the inadmissibility of the application for a declaration of failure to act, annul the Commission's implied decision to dismiss the applicant's administrative appeal of 2 December 2007.

19 In addition, the applicant requests the Court to order the Commission to produce certain documents relating to the tender evaluation procedure.

20 By a document lodged at the Court Registry on 25 August 2008, European Dynamics SA applied to intervene in support of the form of order sought by the Commission.

21 The Commission and the applicant lodged their observations on the application to intervene on 10 and 17 November 2008 respectively.

Law

22 Under Article 111 of the Rules of Procedure of the Court of First Instance, where an action brought before that court is manifestly inadmissible or manifestly lacking any foundation in law, the Court may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.

23 In the present case, the Court considers itself to have sufficient information from the documents in the file to give a decision without taking further steps in the proceedings.

The application for a declaration of failure to act

24 The applicant has submitted an application for a declaration of failure to act under Article 232 EC. It requests the Court to declare that, despite a request to that effect in its administrative appeal of 2 December 2007, the Commission failed to annul the decision awarding the framework contracts under OHIM's tendering procedure AO/042/05 and to terminate the specific contracts concluded under those framework contracts.

25 The Commission has raised an objection of inadmissibility in support of which it puts forward four pleas alleging, respectively, that there was no failure to act on its part, that the applicant's administrative appeal to the Commission under Article 118 of Regulation No 40/94 was submitted out of time, that the application for a declaration of failure to act was lodged out of time and that the Commission has no power to annul acts of the President of OHIM.

Arguments of the parties

26 First, the Commission submits that Article 232 EC can be applied only where there is a pure omission on the part of the defendant institution where it is under a duty to act. In the present case, there was no failure to act contrary to the Treaty, since the Commission adopted a position, in the form of an implied dismissal, on the administrative appeal lodged by the applicant on 2 December 2007. In this connection it points out that, under Article 118(3) of Regulation No 40/94, if no decision has been taken by the Commission within three months of an administrative appeal lodged against an act of the President of OHIM, the case is deemed to have been dismissed. Therefore, the fact that when this action was brought the Commission had not replied to the applicant's administrative appeal of 2 December 2007 does not constitute a failure to act for the purpose of Article 232 EC and the action is on that basis inadmissible.

27 Secondly, the Commission points out that any person who intends to challenge the legality of an act of the President of OHIM which directly and personally involves it must refer that act to the Commission within one month of the day on which the party concerned first became aware of the act in question. According to the Commission, the act in question for the purposes of Article 118(3) of Regulation No 40/94 is OHIM's decision of 12 April 2007 to award the contract at issue, sent to the applicant on the same day. That decision was received by the applicant on 16 April 2007 at the latest, the date on which it effectively became aware of the act in question. The Commission infers from this that the administrative appeal should have been lodged within one month of 16 April 2007, so that the administrative appeal of 2 December 2007 was lodged out of time. Therefore, the application for a declaration of failure to act under Article 232 EC is also inadmissible because the administrative appeal under Article 118(3) of Regulation No 40/94 was lodged out of time.

28 Thirdly, the Commission claims that, even if the administrative appeal was lodged in due time, the application for a declaration of failure to act should, in accordance with the second paragraph of Article 232 EC, have been made within four months of the date on which that administrative appeal was lodged. The case was first referred to the Commission on 11 May 2007, so that the application for a declaration of failure to act should have been made on 11 September 2007 at the latest. Since the application in this case was lodged on 9 May 2008, the application for a declaration of failure to act is also inadmissible because it is out of time.

29 Fourthly, the Commission states that it does not have the power to annul or alter any decision taken by OHIM since, under Article 118(2) of Regulation No 40/94, it may only require that acts adopted by the President of OHIM be altered or annulled. Since the Commission did not have the power to adopt the annulment decision requested by the applicant, the latter was not entitled to bring an application for a declaration of failure to act against the Commission under Article 232 EC.

30 The applicant disputes the four grounds of inadmissibility put forward by the Commission.

31 First, the applicant submits that Article 232 EC is to be applied in the present case, since the implied dismissal under Article 118(3) of Regulation No 40/94, which results from the Commission's failure to define its position, does not allow the addressee of the decision to assess the content of that implied dismissal and cannot therefore constitute the definition of a position for the purpose of Article 232 EC.

32 Article 232 EC is also applicable on the ground that the expiry of the three-month period within which the Commission should have taken a decision pursuant to Article 118(3) of Regulation No 40/94 does not exclude the Commission's obligation to act in its capacity as the supervisory body of OHIM in order to ensure the legality of its acts, and the inaction of the Commission did not bring about a distinct change in the applicant's legal position.

33 Secondly, as regards the contention that the administrative appeal was lodged out of time, the applicant submits that the period of one month under Article 118(3) of Regulation No 40/94 should start to run from the time when it became aware of OHIM's infringements, that is to say, in the present case, during November 2007, and not from the receipt of the award decision on 16 April 2007. Therefore, the administrative appeal brought on 2 December 2007 is not out of time.

34 Thirdly, the applicant denies that the application for a declaration of failure to act was submitted out of time. The period of two months during which the institution concerned should define its position, under Article 232 EC, is displaced by the period of three months provided for in Article 118 (3) of Regulation No 40/94. Furthermore, the applicant specifies that the two-month period for the purpose of bringing an application for a declaration of failure to act can start to run only from the implied dismissal referred to in Article 118(3). In the present case, since the administrative appeal was lodged on 2 December 2007, the three-month period for defining a position on the administrative appeal expired on 2 March 2008 and the period for bringing an action for failure to act expired on 2 May 2008, a time-limit which is to be extended by 10 days on account of distance as provided for in Article 102(2) of the Rules of Procedure, so that the action had to be brought on 12 May 2008 at the latest. Since this action was brought on 9 May 2008, it was therefore not brought out of time.

35 Fourthly, the applicant disputes the ground for inadmissibility based on the Commission's alleged lack of power to annul OHIM acts. It submits that it is for the Commission and not OHIM to take a decision on the legality of OHIM's acts. Even if the power to alter or annul an OHIM act rests exclusively with that body, the Commission has the power to take a decision which OHIM must strictly follow.

Findings of the Court

36 Community law provides that, in certain specific instances, silence on the part of an institution is deemed to amount to a decision where the institution has been called upon to express its view and has not done so by the end of a given period. In such cases, by an express provision, laying down a deadline by which an implied decision is deemed to have been taken and prescribing the tenor of the decision, an institution's inaction is deemed to be equivalent to a decision, without calling into question the system of remedies instituted by the Treaty (see, to that effect, Joined Cases T-189/95, T-39/96 and T-123/96 *SGA* v *Commission* [1999] ECR II-3587, paragraph 27).

37 That applies to Article 118 of Regulation No 40/94, which lays down a system for control of the legality of those acts of the President of OHIM in respect of which Community law does not provide for any check on legality by another body. That is true of acts adopted in the context of public procurement.

38 That control is entrusted to the Commission, before which an administrative appeal must be brought within one month of the day on which the party concerned first became aware of the act in question. At the end of that procedure, the Commission is to require, where appropriate, that the acts which it regards as unlawful be altered or annulled. The fact that a time-limit is laid down for bringing an administrative appeal attests to the obligatory nature – which has never been called into question by the applicant – of such an administrative procedure, which is a prerequisite of bringing an action before the Community Courts (see, to that effect and by analogy, Case T-411/06 *Sogelma* v *EAR* [2008] ECR II-0000, paragraphs 60 to 63). The Community legislature did not design the procedure laid down by Article 118 of Regulation No 40/94 as offering individuals an alternative remedy to that of an action before the Community Courts in order to protect their interests, unlike that which was provided for, for example, with regard to bringing a matter before the European Ombudsman, which is an alternative remedy to that of a direct action before the Community Courts (see, to that effect, order in Case T–294/04 *Internationaler Hilfsfonds* v *Commission* [2005] ECR II-2719, paragraphs 47 and 48).

39 Therefore, an action for failure to act seeking a declaration that the Commission has been guilty of inaction is not admissible in the context of a system such as that established by Article 118 of Regulation No 40/94, in which it is expressly provided that the Commission's inaction results in an implied dismissal. Any declaration that the Commission acted unlawfully is possible only in the context of an action for annulment brought against the final decision of the institution, in which it decides on the merits of the applicant's complaint, both where that decision is express and where it is deemed to have been adopted on the expiry of a specified period.

40 Having regard to the foregoing, and without it being necessary to examine the other grounds of inadmissibility relied on by the Commission, the application for a declaration of failure to act must be dismissed as manifestly inadmissible.

The application for annulment

Arguments of the parties

41 In its observations on the plea of inadmissibility, the applicant submits that, if the Court were to find its application for a declaration of failure to act inadmissible, it should be treated as an application for annulment of the Commission's implied decision of dismissal, which is deemed to have been adopted on the expiry of the period of three months from the day on which the administrative appeal was lodged. The conditions for bringing an action for annulment under Article 230 EC are fulfilled in the present case, since the implied decision is of direct and individual concern to the applicant, and the time-limit for bringing an action under the fourth paragraph of Article 230 EC was complied with in this case, since the action was brought within two months of the expiry of the three-month period after the administrative appeal was lodged on 2 December 2007. The applicant adds that Articles 230 EC and 232 EC merely prescribe one and the same method of recourse and that the new application for annulment does not in any way change the subject–matter of the proceedings.

Findings of the Court

42 Whilst Article 48(2) of the Rules of Procedure authorises, in certain circumstances, new pleas in law to be introduced in the course of proceedings, that provision cannot in any circumstances be interpreted as authorising the applicants to bring a new claim before the Community judicature and thereby to modify the subject-matter of the proceedings. In that context, it is not permissible to substitute a claim for annulment for the claim for a declaration of failure to act initially brought before the Court (see, to that effect, Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285, paragraph 43 and the case-law cited).

43 It follows that the applicant, which initially applied to the Court on the basis of Article 232 EC, is not entitled to request, even in the alternative, that its initial claim be converted into a claim for annulment on the basis of Article 230 EC and directed against the implied decision of dismissal which is deemed to have been adopted on the expiry of the three-month period after the administrative appeal was lodged on 2 December 2007.

The application for damages

Arguments of the parties

44 According to the Commission, the application for damages is inadmissible on two grounds. First, the action for damages should have been directed against OHIM under Article 114 of Regulation No 40/94 (now Article 118 of Regulation No 207/2009) and, secondly, there is neither a sufficiently serious breach of a rule of law nor a direct causal link between the damage suffered by the applicant and the Commission's inaction.

45 The applicant contends in reply, first, that the action for damages was correctly brought against the Commission as the supervisory body of OHIM and, secondly, that the examination of the conditions relating to whether there is a sufficiently serious breach of a rule of law, damage and a causal link is not relevant at the stage of examining the action's admissibility.

Findings of the Court

46 According to settled case-law, the action for damages was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use conceived with a view to its specific purpose. Thus it has been held that, although actions for annulment and for a declaration of failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action for damages seeks compensation for damage resulting from a measure, whether legally binding or not, or from conduct, attributable to a Community institution or body (see order of 17 October 2007 in Case T-454/05 *Sumitomo Chemical Agro Europe and Philagro France* v *Commission*, not published in the ECR, paragraphs 70 and 71 and the case-law cited).

47 However, an application for damages which is closely connected to an application for a declaration of failure to act is itself inadmissible (see order of 3 May 2004 in Case T-24/04 *Leighton and Others* v *Council and Commission*, not published in the ECR, paragraph 24 and the case-law cited).

48 The Court finds that the present application for damages is closely connected to an application for a declaration of failure to act and to an application for annulment which are manifestly inadmissible, as is apparent from the foregoing explanations.

49 It follows that the application for damages made in these proceedings is itself also manifestly inadmissible.

50 Consequently, the action must be dismissed in its entirety, without it being necessary to rule on the request that certain documents relating to the tender evaluation procedure be produced.

51 Since this action must be declared manifestly inadmissible, it is not necessary to rule on the application to intervene submitted by European Dynamics in support of the form of order sought by the Commission (see, to that effect, order in Case C-341/00 P *CNPA and Others* v *Commission* [2001] ECR I-5263, paragraphs 33 to 39).

Costs

52 Article 87(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

53 In the present case, since the applicant has been unsuccessful, it must be ordered to pay the Commission's costs in accordance with the form of order sought by the Commission.

54 In respect of the costs connected with the application to intervene, pursuant to Article 87(6) of the Rules of Procedure, European Dynamics, the applicant and the Commission must be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby orders:

1. The action is dismissed.

2. infeurope shall bear its own costs and pay those incurred by the Commission.

3. It is not necessary to rule on the application to intervene submitted by European Dynamics SA.

4. infeurope, the Commission and European Dynamics shall bear their own costs in connection with the application to intervene.

Luxembourg, 9 July 2009.

E. Coulon — Registrar

N.J. Forwood — President

* Language of the case: English.

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Documents relatifs à la même affaire

Ordonnance du Tribunal (septième chambre) du 9 juillet 2009 – infeurope/Commission (affaire T-176/08)

« Recours en carence, en annulation et en indemnité – Marchés publics de services – Appel d'offres concernant la maintenance des systèmes informatiques de l'OHMI – Recours administratif devant la Commission – Décision implicite de rejet de la Commission – Conclusions nouvelles – Lien entre recours en carence et recours en indemnité – Irrecevabilité manifeste »

1. *Recours en carence - Carence - Notion - Recours administratif contre un acte du président de l'Office de l'harmonisation dans le marché intérieur adopté dans le cadre de la passation de marchés publics - Décision implicite de rejet par la Commission - Exclusion - Irrecevabilité du recours en carence (Art. 232 CE; règlement du Conseil nº 40/94, art. 118) (cf. points 36-40)*

2. *Procédure - Objet du litige - Modification en cours d'instance (Règlement de procédure du Tribunal, art. 48, § 2) (cf. point 42)*

3. *Recours en indemnité - Autonomie par rapport aux recours en annulation et en carence - Irrecevabilité manifeste des recours en annulation et en carence - Demande indemnitaire étroitement liée à la demande en constatation de carence – Irrecevabilité (Art. 288, al. 2, CE) (cf. points 46-48)*

Objet

Premièrement, à titre principal, demande visant à faire constater la carence de la Commission en ce que celle-ci s'est illégalement abstenue d'annuler la décision d'attribution des contrats-cadres, à la suite de la procédure d'appel d'offres AO/042/05 de l'Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI) pour la maintenance des logiciels relatifs aux systèmes de l'activité principale de l'OHMI en matière de marques, dessins et modèles, ainsi que de mettre fin aux accords spécifiques conclus à la suite de ces contrats-cadres et, à titre subsidiaire, demande d'annulation de la prétendue décision implicite de la Commission rejetant le recours administratif de la requérante du 2 décembre 2007 dans le cadre de ladite procédure d'appel d'offres et, deuxièmement, demande visant à obtenir réparation du préjudice prétendument subi à la suite des prétendues omissions illégales de la Commission.

Dispositif

1) Le recours est rejeté.

2) infeurope est condamnée à supporter ses propres dépens ainsi que ceux exposés par la Commission.

3) Il n'y pas lieu de statuer sur la demande en intervention de European Dynamics SA.

4) infeurope, la Commission et European Dynamics supporteront chacune leurs propres dépens liés à la demande en intervention.

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Order of the Court of First Instance of 9 July 2009 - infeurope v Commission

(Case T-176/08) [1]

(Action for declaration of failure to act, for annulment and for damages - Public service contracts - Call for tenders concerning the maintenance of OHIM's computer systems - Administrative appeal before the Commission - Implied Commission decision to dismiss - New claims - Connection between the action for a declaration of failure to act and the action for damages - Manifest inadmissibility)

Language of the case: English

Parties

Applicant: infeurope (Luxembourg, Luxembourg) (represented by: O. Mader, lawyer)

Defendant: Commission of the European Communities (represented by: N.Bambara and E. Manhaeve, acting as Agents)

Re:

First, APPLICATION for a declaration that the Commission failed to act in that it unlawfully failed to annul the decision to award framework contracts under the tendering procedure AO/042/05 of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) for software maintenance relating to OHIM core business systems on trade marks and designs, and to terminate the specific contracts concluded under those framework contracts and, in the alternative, APPLICATION for annulment of the alleged implied decision of the Commission to dismiss the applicant's administrative appeal of 2 December 2007 in the context of that tendering procedure and, secondly, APPLICATION for compensation for the harm allegedly suffered as a result of the alleged unlawful omissions on the part of the Commission.

Operative part of the order

1. *The action is dismissed.*

2. *infeurope shall bear its own costs and pay those incurred by the Commission.*

3. *It is not necessary to rule on the application to intervene submitted by European Dynamics SA.*

4. *infeurope, the Commission and European Dynamics shall bear their own costs in connection with the application to intervene.*

_____

[1] - OJ C 171, of 5.7.2008.

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Action brought on 9 May 2008 - infeurope v Commission

(Case T-176/08)

Language of the case: English

Parties

Applicant: infeurope SA (Luxembourg, Luxembourg) (represented by: O. Mader, lawyer)

Defendant: Commission of the European Communities

Form of order sought

declare that the European Commission has failed to annul the decision of awarding the framework contracts under the call for tenders procedure AO/042/05 of the OHIM on software maintenance;

declare that the European Commission has failed to terminate the specific contracts concluded under the said framework contracts;

order the European Commission to pay to the applicant the sum of EUR 37 002 plus 4 % interest on the amount of EUR 31 650 from 29August 2006, plus 4% interest on the amount of EUR 3 650 from 3 December 2007, plus 4% interest on the amount of EUR 1 702 from 3 May 2 08; respectively 8% interest on sum of EUR 37 002 from the date of judgment;

order the European Commission to pay to the applicant the sum of EUR 1 209 037 plus 4% interest on the said sum from 3 May 2008, respectively 8 % interest on the said sum from the date of judgment;

order the European Commission to produce certain documents relating to the procedure for evaluating the tenders;

order the European Commission to pay the costs.

Pleas in law and main arguments

The applicant seeks the declaration that the Commission failed to annul the decision taken by the Office for Harmonisation in the Internal Market (OHIM) awarding multiple framework contracts for the provision of IT maintenance services under the tender procedure AO/042/05 "E-Alicante: software maintenance relating to OHIM core business systems (management and registration of trade marks and designs)"[1] and that it has failed to terminate the corresponding specific contracts under the framework.

The applicant claims that the tender process as well as the implementation of the specific contracts further to the tender suffer from a series of severe irregularities such as: the irregular award criteria, an incorrect composition of the evaluation committee, the fact that the contracts were awarded after the expiry of the period of tender offers' validity and that the OHIM agreed on various considerable changes to the terms of the specific contracts.

The applicant claims that the OHIM, as contracting authority, had breached the principles of equal treatment, of transparency and of good administration and had misused the instrument of framework contracts. It had further infringed a number of stipulations in the Financial Regulation[2].

The applicant claims that the Commission, as supervisory body of the OHIM[3], had failed to take appropriate action against these infringements. The applicant maintains that the discretion of the Commission whether or not to take action against the breaches of law and establish legality is reduced to

zero thus entailing an obligation to act.

Furthermore, the applicant asks to be compensated for the damages suffered as a result of the irregularities in the said tendering procedure and its subsequent implementation.

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[1] - OJ 2006 S 135-144019

[2] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1

[3] - The Article VI.4.2) of the Contract notice concerning the lodging of the appeals makes reference to the Article 118 of the Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p.1) which stays that "Referral shall be made to the Commission within 1 month of the day on which the party concerned first became aware of the act in question".

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DOCUMENT DE TRAVAIL

ORDONNANCE DU PRÉSIDENT DU TRIBUNAL

11 avril 2008 (*)

« Référé – Avis d'adjudication de marché visant à encourager le développement économique dans la partie septentrionale de Chypre – Demande de sursis à exécution – Défaut d'urgence »

Dans l'affaire T–122/08 R,

République de Chypre, représentée par M. P. Kliridis, en qualité d'agent,

partie requérante,

contre

Commission des Communautés européennes, représentée par MM. P. van Nuffel et I. Zervas, en qualité d'agents,

partie défenderesse,

ayant pour objet une demande de sursis à l'exécution d'un avis d'adjudication adopté par la Commission et visant à encourager le développement économique dans la partie septentrionale de Chypre concernant la mise en place d'une unité de gestion de programme en appui à la mise en œuvre de projets d'investissement dans le domaine de l'eau, des eaux usées et des déchets solides,

LE PRÉSIDENT DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

1 En janvier 2008, la Commission a lancé un avis d'appel d'offres pour l'attribution d'un marché de services dans la partie septentrionale de Chypre, à savoir l'avis EuropeAid/126316/C/SER/CY « Mise en place d'une unité de gestion de programme en appui à la mise en œuvre de projets d'investissement dans le domaine de l'eau, des eaux usées et des déchets solides ». Cet avis (ci-après l'« avis litigieux ») comporte un calendrier pour le déroulement de la procédure d'attribution du marché, selon lequel les manifestations d'intérêt pour présenter des offres devaient être communiquées à la Commission au mois de février 2008, le début de l'exécution du marché étant prévu vers le mois de juillet 2008, de telle sorte que l'attribution du marché et la conclusion du contrat auront probablement lieu avant ce mois de juillet.

2 Le contenu de l'avis litigieux est, en substance, identique à celui des avis qui ont fait l'objet de l'ordonnance du président du Tribunal du 8 avril 2008, Chypre/Commission (T–54/08 R, T–87/08 R, T–88/08 R et T–91/08 R à T–93/08 R, non publiée au Recueil, ci-après l'« ordonnance du 8 avril 2008 »). Il en va de même, d'ailleurs, du cadre juridique et des antécédents du présent litige.

3 Par requête déposée au greffe du Tribunal le 14 mars 2008, la République de Chypre a introduit un recours visant, en substance, à l'annulation de l'avis litigieux.

4 Par acte séparé, déposé au greffe du Tribunal le 19 mars 2008, la République de Chypre a introduit

la présente demande en référé, dans laquelle elle conclut à ce qu'il plaise au président du Tribunal :

– à titre principal, suspendre la procédure d'adjudication et/ou interdire la signature du contrat faisant l'objet de l'avis litigieux jusqu'au prononcé de l'arrêt dans la procédure au principal ;

– à titre subsidiaire, s'il apparaît que le marché a déjà été attribué et/ou que le contrat a déjà été conclu, surseoir à l'exécution de ce contrat jusqu'au prononcé de l'arrêt dans la procédure au principal ;

– ordonner, au titre de l'article 105, paragraphe 2, du règlement de procédure du Tribunal, que la procédure d'attribution du marché ou que l'exécution de celui-ci soit suspendue jusqu'à ce qu'il ait été statué sur les conclusions présentées ci-dessus à titre principal et subsidiaire ;

– prendre toute autre mesure jugée adéquate ;

– condamner la Commission aux dépens.

5 Dans ses observations écrites déposées au greffe du Tribunal le 8 avril 2008, la Commission conclut à ce qu'il plaise au président du Tribunal :

– à titre principal, déclarer la demande en référé irrecevable ;

– à titre subsidiaire, la rejeter comme non fondée ;

– condamner la République de Chypre aux dépens.

6 Il y a lieu de constater que l'argumentation présentée par la République de Chypre pour établir l'urgence ainsi que les moyens de fait et de droit justifiant à première vue (fumus boni juris) l'octroi des mesures provisoires sollicitées est, en substance, identique à celle qu'elle avait présentée dans le cadre des affaires T–54/08 R, T–87/08 R, T–88/08 R et T–91/08 R à T–93/08 R ayant conduit à l'ordonnance du 8 avril 2008. Or, par cette ordonnance, les demandes en référé introduites dans ces affaires ont été rejetées au motif que la condition relative à l'urgence n'était pas remplie.

7 Dans ces circonstances, il y a lieu de renvoyer à la motivation de l'ordonnance du 8 avril 2008 (voir, s'agissant de la faculté pour le juge communautaire de motiver une décision par renvoi à une décision antérieure statuant sur des questions substantiellement identiques, arrêt de la Cour du 25 octobre 2005, Crailsheimer Volksbank, C–229/04, Rec. p. I–9273, points 47 à 49, et arrêt du Tribunal du 11 juillet 2007, Sison/Conseil, T-47/03, non encore publié au Recueil, point 102) et de rejeter également la présente demande en référé.

Par ces motifs,

LE PRÉSIDENT DU TRIBUNAL

ordonne :

1) La demande en référé est rejetée.

2) Les dépens sont réservés.

Fait à Luxembourg, le 11 avril 2008.

Le greffier — Le président

E. Coulon — M. Jaeger

* Langue de procédure : le grec.

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Documents relating to the same case

Order of the President of the Court of First Instance of 11 April 2008 – Cyprus v Commission

(Case T-122/08 R)

Application for interim relief – Procurement notice for a contract to encourage economic development in the northern part of Cyprus – Application for suspension of operation of the notice – No urgency

Applications for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Urgency – Arguments substantially the same as those submitted in an earlier case – Reference to the grounds for the previous decision – No urgency (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 6-7)

APPLICATION for suspension of the operation of a procurement notice issued by the Commission for the encouragement of economic development in the northern part of Cyprus, concerning the establishment of a programme management unit to support the implementation of investment projects in the field of water, waste water and solid waste.

e part

The Court:

1. Dismisses the application for interim relief;

2. Reserves the costs.

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Order of the President of the Court of First Instance of 11 April 2008 - Cyprus v Commission

(Case T-122/08 R)

(Application for interim relief - Procurement notice for a contract to encourage economic development in the northern part of Cyprus - Application for suspension of operation of the notice - No urgency)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis, Agent)

Defendant: Commission of the European Communities (represented by: P. van Nuffel and I. Zervas, Agents)

Re:

Application for suspension of the operation of a procurement notice issued by the Commission for the encouragement of economic development in the northern part of Cyprus, concerning the establishment of a programme management unit to support the implementation of investment projects in the field of water, waste water and solid waste.

Operative part of the order

1. *The application for interim relief is dismissed.*

2. *Costs are reserved.*

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Action brought on 14 March 2008 - Republic of Cyprus v Commission

(Case T-122/08)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis)

Defendant: Commission of the European Communities

Form of order sought

annul the procurement notice under reference EuropeAid/126316/C/SER/CY for the conclusion of a contract entitled 'Establishment of a Programme Management Unit to support the implementation of investments projects in the field of water/wastewater and solid waste', which was published, only in English, on the webpage http://ec.europa.eu/europaid/tender/data/ on or around 4 January 2008, and annul points 5 and 28.2 of the notice;

order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The applicant's pleas in law and main arguments are identical or similar to those advanced in Cases T-91/08, T-92/08 and T-93/08 *Cyprus* v *Commission*.

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Action brought on 10 March 2008 - PC-Ware Information Technologies BV v Commission of the European Communities

(Case T-121/08)

Language of the case: Dutch

Parties

Applicant: PC-Ware Information Technologies BV (Amsterdam, Netherlands) (represented by: L. Devillé, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Declare the action for annulment admissible;

Annul the decision of the Directorate-General of the European Commission, communicated to the applicant by letter of 11 January 2008, which rejected the applicant's tender for public procurement contract DIGIT/R2/2007/022 - LAR 2007 and awarded the contract to the successful tender;

Declare that the Commission's action was unlawful and gives rise to the Commission's liability;

In the alternative, if the contract has already been carried out when the Court gives judgment or the decision can no longer be declared void, order the Commission to pay damages of EUR 654 962.38 as compensation for the loss suffered by the applicant in regard to that procedure;

Order the Commission to pay the costs of the proceedings and other costs even if the action is dismissed.

Pleas in law and main arguments

The applicant took part in public procurement procedure DIGIT/R2/2007/022 - LAR 2007 - Large account reseller Microsoft products (LAR 2007) (OJ 2007 S 183-223062), whose objective was to establish a framework contract for a single source purchase channel, covering the acquisition of Microsoft software products and licences. The applicant contests the Commission's decision to award that contract to another undertaking.

In support of its application, the applicant submits, first, that insufficient reasons are given for the decision. The applicant states that upon the submission of its offer it stated expressly that it gave the highest possible reduction on the basis of Article 40 of the Belgian Law of 14 July 1991 on trade practices and consumer information and protection, which prohibits sales at a loss. The Commission failed to give sufficient reasons in the decision with regard to the application of that prohibition and compliance with the principle of equal treatment.

Secondly, the applicant submits that it is apparent that the successful offer infringes Article 40 of the abovementioned Belgian Law of 14 July 1991. According to the applicant, the Commission should have refused the successful offer pursuant to Article 55 of Directive 2004/18/EC, [1] Article 139(1) and Article 146(4) of Regulation No 2342/2002 [2] and the principles of good administration.

_____

[1] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

[2] - Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p.1).

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Order of the Court of First Instance of 16 June 2008 - Cyprus v Commission

(Case T-119/08) [1]

Language of the case: Greek

The President of the First Chamber has ordered that the case be removed from the register.

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[1] - OJ C 142, 7.6.2008.

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DOCUMENT DE TRAVAIL

ORDONNANCE DU PRÉSIDENT DU TRIBUNAL

11 avril 2008 (*)

« Référé – Avis d'adjudication de marché visant à encourager le développement économique dans la partie septentrionale de Chypre – Demande de sursis à exécution – Défaut d'urgence »

Dans l'affaire T–119/08 R,

République de Chypre, représentée par M. P. Kliridis, en qualité d'agent,

partie requérante,

contre

Commission des Communautés européennes, représentée par MM. P. van Nuffel et I. Zervas, en qualité d'agents,

partie défenderesse,

ayant pour objet une demande de sursis à l'exécution d'un avis d'adjudication adopté par la Commission et visant à encourager le développement économique dans la partie septentrionale de Chypre dans le secteur de l'élevage du bétail,

LE PRÉSIDENT DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

1 En décembre 2007, la Commission a lancé un avis d'appel d'offres pour l'attribution d'un marché de services dans la partie septentrionale de Chypre, à savoir l'avis EuropeAid/125672/C/SER/CY « Assistance technique à l'élevage du bétail ». Cet avis (ci-après l'« avis litigieux ») comporte un calendrier pour le déroulement de la procédure d'attribution du marché, selon lequel les manifestations d'intérêt pour présenter des offres devaient être communiquées à la Commission au mois de février 2008, le début de l'exécution du marché étant prévu vers le mois de juillet 2008, de telle sorte que l'attribution du marché et la conclusion du contrat auront probablement lieu avant ce mois de juillet.

2 Le contenu de l'avis litigieux est, en substance, identique à celui des avis qui ont fait l'objet de l'ordonnance du président du Tribunal du 8 avril 2008, Chypre/Commission (T–54/08 R, T–87/08 R, T–88/08 R et T–91/08 R à T–93/08 R, non publiée au Recueil, ci-après l'« ordonnance du 8 avril 2008 »). Il en va de même, d'ailleurs, du cadre juridique et des antécédents du présent litige.

3 Par requête déposée au greffe du Tribunal le 7 mars 2008, la République de Chypre a introduit un recours visant, en substance, à l'annulation de l'avis litigieux.

4 Par acte séparé, déposé au greffe du Tribunal le 19 mars 2008, la République de Chypre a introduit la présente demande en référé, dans laquelle elle conclut à ce qu'il plaise au président du Tribunal :

– à titre principal, suspendre la procédure d'adjudication et/ou interdire la signature du contrat faisant l'objet de l'avis litigieux jusqu'au prononcé de l'arrêt dans la procédure au principal ;

– à titre subsidiaire, s'il apparaît que le marché a déjà été attribué et/ou que le contrat a déjà été conclu, surseoir à l'exécution de ce contrat jusqu'au prononcé de l'arrêt dans la procédure au principal ;

– ordonner, au titre de l'article 105, paragraphe 2, du règlement de procédure du Tribunal, que la procédure d'attribution du marché ou que l'exécution de celui-ci soit suspendue jusqu'à ce qu'il ait été statué sur les conclusions présentées ci-dessus à titre principal et subsidiaire ;

– prendre toute autre mesure jugée adéquate ;

– condamner la Commission aux dépens.

5 Dans ses observations écrites déposées au greffe du Tribunal le 8 avril 2008, la Commission conclut à ce qu'il plaise au président du Tribunal :

– à titre principal, déclarer la demande en référé irrecevable ;

– à titre subsidiaire, la rejeter comme non fondée ;

– condamner la République de Chypre aux dépens.

6 Il y a lieu de constater que l'argumentation présentée par la République de Chypre pour établir l'urgence ainsi que les moyens de fait et de droit justifiant à première vue (fumus boni juris) l'octroi des mesures provisoires sollicitées est, en substance, identique à celle qu'elle avait présentée dans le cadre des affaires T–54/08 R, T–87/08 R, T–88/08 R et T–91/08 R à T–93/08 R ayant conduit à l'ordonnance du 8 avril 2008. Or, par cette ordonnance, les demandes en référé introduites dans ces affaires ont été rejetées au motif que la condition relative à l'urgence n'était pas remplie.

7 Dans ces circonstances, il y a lieu de renvoyer à la motivation de l'ordonnance du 8 avril 2008 (voir, s'agissant de la faculté pour le juge communautaire de motiver une décision par renvoi à une décision antérieure statuant sur des questions substantiellement identiques, arrêt de la Cour du 25 octobre 2005, Crailsheimer Volksbank, C–229/04, Rec. p. I–9273, points 47 à 49, et arrêt du Tribunal du 11 juillet 2007, Sison/Conseil, T-47/03, non encore publié au Recueil, point 102) et de rejeter également la présente demande en référé.

Par ces motifs,

LE PRÉSIDENT DU TRIBUNAL

ordonne :

1) La demande en référé est rejetée.

2) Les dépens sont réservés.

Fait à Luxembourg, le 11 avril 2008.

Le greffier — Le président

E. Coulon — M. Jaeger

* Langue de procédure : le grec.

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Documents relating to the same case

Order of the President of the Court of First Instance of 11 April 2008 – Cyprus v Commission

(Case T-119/08 R)

Application for interim relief – Procurement notice for a contract to encourage economic development in the northern part of Cyprus – Application for suspension of operation of the notice – No urgency

Applications for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Urgency – Arguments substantially the same as those submitted in an earlier case – Reference to the grounds for the previous decision – No urgency (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 6-7)

APPLICATION for suspension of the operation of a procurement notice issued by the Commission for the encouragement of economic development in the northern part of Cyprus in the field of livestock rearing.

e part

The Court:

1. Dismisses the application for interim relief;

2. Reserves the costs.

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Order of the President of the Court of First Instance of 11 April 2008 - Cyprus v Commission

(Case T-119/08 R)

(Application for interim relief - Procurement notice for a contract to encourage economic development in the northern part of Cyprus - Application for suspension of operation of the notice - No urgency)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis, Agent)

Defendant: Commission of the European Communities (represented by: P. van Nuffel and I. Zervas, Agents)

Re:

Application for suspension of the operation of a procurement notice issued by the Commission for the encouragement of economic development in the northern part of Cyprus in the field of livestock rearing.

Operative part of the order

1. *The application for interim relief is dismissed.*

2. Costs are reserved.

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Action brought on 7 March 2008 - Republic of Cyprus v Commission

(Case T-119/08)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis)

Defendant: Commission of the European Communities

Form of order sought

annul the procurement notice under reference EuropeAid/125672/C/SER/CY for the conclusion of a contract entitled 'Technical Assistance on animal husbandry', which was published, only in English, on the webpage http://ec.europa.eu/europaid/tender/data/ on or around 27 December 2007, and annul points 5 and 28.2 of the notice;

order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The applicant's pleas in law and main arguments are identical or similar to those advanced in Cases T-91/08, T-92/08 and T-93/08 *Cyprus* v *Commission*.

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ORDER OF THE PRESIDENT OF THE SIXTH CHAMBER OF
THE COURT OF FIRST INSTANCE

10 December 2008 (*)

(Removal from the register)

In Case T-56/08,

Stichting IEA Secretariaat Nederland (IEA), established in Den Haag (Netherlands),

Educational Testing Service Global BV (ETS-Europe), established in Amsterdam (Netherlands),

Deutsches Institut für Internationale Pädagogische Forschung, established in Frankfurt am Main (Germany),

Institut zur Qualitätsentwicklung im Bildungswesen (IQB), established in Berlin (Germany),

represented by E. Morgan de Rivery and S. Thibault-Liger, lawyers,

applicants,

v

Commission of the European Communities, represented by
B. Nunzio and E. Manhaeve, acting as Agents, assisted by P. Wytinck, lawyer,

defendant,

APPLICATION for annulment of the Commission decision of
23 November 2007 rejecting the offer submitted by the applicants in the context of a call for tender concerning an European survey on language competences (OJ 2007 S 61-074161), and of the decision to award the contract to another tenderer.

1 By letter lodged at the Registry of the Court of First Instance on
10 November 2008, the applicants informed the Court in accordance with Article 99 of the Rules of Procedure of the Court of First Instance that they wished to discontinue proceedings.

2 By letter lodged at the Registry of the Court on 19 November 2008, the defendant informed the Court that it had no objections to raise concerning the discontinuance of the proceedings. The defendant requested that, pursuant to Article 87(5) of the Rules of Procedure, the applicants be ordered to bear the costs.

3 The first subparagraph of Article 87(5) of the Rules of Procedure provides that a party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the observations of the other party on the discontinuance. In the present case, the defendant has requested that the costs of the proceedings be borne by the applicants. The applicants made no application in relation to costs.

4 The case will therefore be removed from the register and the applicants shall be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE SIXTH CHAMBER OF

THE COURT OF FIRST INSTANCE

hereby orders:

1. Case T-56/08 is removed from the register of the Court of First Instance.

2. The applicants shall bear the costs.

Luxembourg, 10 December 2008.

E. Coulon A. W. H. Meij

Registrar President

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* Language of the case: English.

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Order of the Court of First Instance of 10 December 2008 - Stichting IEA Secretariaat Nederland and Others v Commission

(Case T-56/08) [1]

Language of the case: English

The President of the Sixth Chamber has ordered that the case be removed from the register.

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[1] - OJ C 107, 26.4.2008.

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Action brought on 5 February 2008 - IEA and Others v Commission

(Case T-56/08)

Language of the case: English

Parties

Applicant: Stichting IEA Secretariaat Nederland (IEA) (Amsterdam, Netherlands), Educational Testing Service Global BV (ETS-Europe) (Amsterdam, Netherlands), Deutsches Institut für Internationale Pädagogische Forschung (DIPF) (Frankfurt am Main, Germany), Institut zur Qualitätsentwicklung im Bildungswesen (IQB) (Berlin, Germany) (represented by: E. Morgan de Rivery and S. Thibault-Liger, lawyers)

Defendant: Commission of the European Communities

Form of order sought

Annul in its entirety the decision of the Commission of 23 November 2007 rejecting the tender from the applicant in response to the call for tender No EAC/21/2007 'European survey on language competences', in so far as it infringes EU law and is based on manifest errors of assessment;

annul in its entirety the decision of the Commission awarding the contract related to this call for tender to the SurveyLang Consortium, in so far as it infringes EU law and is based on manifest errors of assessment; and

order, pursuant to Article 87(2) of the Rules of Procedure of the CFI, the Commission to pay the costs of the applicant.

Pleas in law and main arguments

The applicants submitted a bid in response to the defendant's call for tender concerning the 'European survey on language competences' (OJ 2007/S 61-074161), as rectified (OJ 2007/S 109-133727). The applicants contest the defendant's decision of 23 November 2007 to reject their bid and to award the contract to another tenderer.

In support of their application, the applicants submit that the contested decision violates the principle of equal treatment, Article 100(1) of the financial regulation[1] and the tender specifications.

Furthermore, the applicants claim that the Commission committed a manifest error of assessment of the qualitative criteria laid down in the tender specifications, which in turn led to a manifest error of assessment in the setting of the bidders' respective scores.

Finally, the applicants allege that the Commission breached the principle of good administration by failing to exercise due care during the tender procedure.

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[1] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as rectified (OJ 2003 L 25, p. 43).

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ORDONNANCE DU PRÉSIDENT
DE LA PREMIERE CHAMBRE DU TRIBUNAL

du 29 avril 2008(*)

« Radiation »

Dans l'affaire T-54/08,

République de Chypre, représentée par M. P. Kliridis, agent,

partie requérante,

contre

Commission des Communautés Européennes, représentée par MM. I. Zervas et P. van Nuffel, en qualité d'agents,

partie défenderesse,

ayant pour objet une demande d'annulation de l'avis de marché de fournitures concernant la modernisation de la gestion du secteur de l'énergie (« Comptage de l'énergie et compensation d'énergie réactive ») dans la partie septentrionale de Chypre, publié sous la référence EuropeAid/125051/D/SUP/CY (JO 2007/S 227-276201).

1 Par lettre déposée au greffe du Tribunal le 8 avril 2008, la partie requérante a informé le Tribunal, conformément à l'article 99 du règlement de procédure du Tribunal, qu'elle se désistait de son recours. Elle n'a pas conclu sur les dépens.

2 Par lettre déposée au greffe du Tribunal le 23 avril 2008, la partie défenderesse a fait savoir au Tribunal, en application de l'article 87, paragraphe 5, dudit règlement, qu'elle prenait acte du désistement, et a demandé que la partie requérante soit condamnée aux dépens, tant en ce qui concerne le recours au principal que la demande en référé.

3 Selon l'article 87, paragraphe 5, premier alinéa, du règlement de procédure, la partie qui se désiste est condamnée aux dépens, s'il est conclu en ce sens par l'autre partie dans ses observations sur le désistement.

4 Il y a donc lieu de rayer l'affaire du registre et de condamner la partie requérante aux dépens, y compris ceux afférents à la procédure en référé.

Par ces motifs,

LE PRÉSIDENT DE LA PREMIERE CHAMBRE DU TRIBUNAL

ordonne :

1) L'affaire T-54/08 est rayée du registre du Tribunal.

2) La partie requérante supportera les dépens, y compris ceux afférents à la procédure en référé.

Fait à Luxembourg, le 29 avril 2008.

Le greffier

E. Coulon

Le président

V. Tiili

* Langue de procédure : le grec.

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Order of the Court of First Instance of 29 April 2008 - Republic of Cyprus v Commission

(Case T -54/08) [1]

Language of the case: Greek

The President of the First Chamber has ordered that the case be removed from the register.

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[1] - OJ C 79, 29.3.2008.

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Order of the Court of First Instance of 16 June 2008 - Cyprus v Commission

(Case T-87/08) [1]

Language of the case: Greek

The President of the First Chamber has ordered that the case be removed from the register.

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[1] - OJ C 142, 7.6.2008.

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Order of the Court of First Instance of 16 June 2008 - Cyprus v Commission

(Case T-88/08) [1]

Language of the case: Greek

The President of the First Chamber has ordered that the case be removed from the register.

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[1] - OJ C 142, 7.6.2008.

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Order of the Court of First Instance of 16 June 2008 - Cyprus v Commission

(Case T-91/08) [1]

Language of the case: Greek

The President of the First Chamber has ordered that the case be removed from the register.

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[1] - OJ C 142, 7.6.2008.

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Order of the Court of First Instance of 16 June 2008 - Cyprus v Commission

(Case T-92/08) [1]

Language of the case: Greek

The President of the First Chamber has ordered that the case be removed from the register.

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[1] - OJ C 142, 7.6.2008.

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Order of the Court of First Instance of 16 June 2008 - Cyprus v Commission

(Case T-93/08) [1]

Language of the case: Greek

The President of the First Chamber has ordered that the case be removed from the register.

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[1] - OJ C 142, 7.6.2008.

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DOCUMENT DE TRAVAIL

ORDONNANCE DU PRÉSIDENT DU TRIBUNAL

8 avril 2008 (*)

« Référé – Avis d'adjudication de marchés visant à encourager le développement économique dans la partie septentrionale de Chypre – Demandes de sursis à exécution – Défaut d'urgence »

Dans les affaires jointes T–54/08 R, T–87/08 R, T–88/08 R et T–91/08 R à T–93/08 R,

République de Chypre, représentée par M. P. Kliridis, en qualité d'agent,

partie requérante,

contre

Commission des Communautés européennes, représentée par MM. P. van Nuffel et I. Zervas, en qualité d'agents,

partie défenderesse,

ayant pour objet des demandes de sursis à l'exécution de plusieurs avis d'adjudication adoptés par la Commission et visant à encourager le développement économique dans la partie septentrionale de Chypre dans les secteurs de l'énergie, de l'environnement, de l'agriculture, des télécommunications, de l'éducation ainsi que de la gestion des récoltes et de l'irrigation,

LE PRÉSIDENT DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

Cadre juridique

1 L'acte relatif aux conditions d'adhésion à l'Union européenne de la République tchèque, de la République d'Estonie, de la République de Chypre, de la République de Lettonie, de la République de Lituanie, de la République de Hongrie, de la République de Malte, de la République de Pologne, de la République de Slovénie et de la République slovaque, et aux adaptations des traités sur lesquels est fondée l'Union européenne (JO 2003, L 236, p. 33), comporte des protocoles qui, en vertu de son article 60, en font partie intégrante et parmi lesquels figure le protocole n° 10 sur Chypre (JO 2003, L 236, p. 955, ci-après le « protocole n° 10 »).

2 Le protocole n° 10 prévoit en son article 1er, paragraphe 1, que l'application de l'acquis communautaire est suspendue dans les zones de la République de Chypre où le gouvernement chypriote n'exerce pas un contrôle effectif (ci-après les « zones en cause »). Toutefois, aux termes de son article 3, paragraphe 1, rien dans ce protocole n'empêche l'adoption de mesures visant à favoriser le développement économique des zones en cause.

3 C'est pour atteindre cet objectif que le Conseil, en application de l'article 308 CE et donc statuant à l'unanimité, a adopté le règlement (CE) n° **389/2006** , du 27 février 2006, portant création d'un instrument de soutien financier visant à encourager le développement économique de la communauté chypriote turque et modifiant le règlement (CE) n° **2667/2000** relatif à

l'Agence européenne pour la reconstruction (JO L 65, p. 5).

4 Selon l'article 1er, paragraphes 1 et 2, du règlement n° **389/2006** , l'accent est mis sur l'intégration économique de l'île et l'amélioration des contacts entre les deux communautés, l'aide devant bénéficier, notamment, aux collectivités locales et aux instances remplissant des fonctions d'intérêt général dans les zones en cause, tandis que le paragraphe 3 de cet article prévoit expressément que l'octroi de l'aide ne constitue pas une reconnaissance d'une autorité publique autre que le gouvernement chypriote dans les zones en cause.

5 En vertu de l'article 2 du règlement n° **389/2006** , l'aide est notamment utilisée pour favoriser la promotion du développement social et économique, plus particulièrement en ce qui concerne le développement rural, le développement des ressources humaines et le développement régional, ainsi que le développement et la restructuration des infrastructures, plus particulièrement dans les secteurs de l'énergie et des transports, de l'environnement, des télécommunications et de l'approvisionnement en eau. En outre, l'aide est destinée à favoriser la réconciliation, l'instauration d'un climat de confiance et le soutien à la société civile, ainsi que le rapprochement entre la communauté chypriote turque et l'Union européenne.

6 S'agissant des appels d'offres, l'article 9, paragraphe 4, du règlement n° **389/2006** énonce que les fournitures et matériaux acquis au titre d'un contrat financé dans le cadre dudit règlement doivent tous provenir, notamment, du territoire douanier de la Communauté européenne ou des zones en cause.

Antécédents des litiges

7 En novembre et en décembre 2007, la Commission a lancé six avis d'appels d'offres pour l'attribution de marchés dans la partie septentrionale de Chypre, à savoir l'avis EuropeAid/125051/D/SUP/CY « Modernisation de la gestion du secteur de l'énergie – 'Comptage de l'énergie et compensation d'énergie réactive' », l'avis EuropeAid/126225/C/SER/CY « Assistance technique à des travaux de génie civil pour l'infrastructure de gestion des déchets et pour la restauration d'aires de dépôt », l'avis EuropeAid/125242/C/SER/CY « Assistance technique à la mise en œuvre du programme sectoriel relatif au développement rural », l'avis EuropeAid/126172/C/SER/CY « Développement et restructuration de l'infrastructure de télécommunications – 'Formation, développement des capacités et gestion de projets' », l'avis EuropeAid/126111/C/SER/CY « Assistance technique à la reforme en cours du secteur de l'enseignement primaire et secondaire » et l'avis EuropeAid/125671/C/SER/CY « Assistance technique à l'exploitation des récoltes et à l'aménagement pour l'irrigation ».

8 Chacun de ces avis comporte un calendrier pour le déroulement de la procédure d'attribution du marché.

9 En ce qui concerne l'avis EuropeAid/125051/D/SUP/CY faisant l'objet de l'affaire T–54/08 R, la date limite de remise des offres ayant été fixée au 28 janvier 2008, le comité d'évaluation a déjà examiné les offres déposées par les soumissionnaires et conclu qu'aucune offre ne satisfaisait aux prescriptions de l'avis. Celui-ci a donc été déclaré infructueux et la procédure d'adjudication du marché s'est achevée le 22 février 2008 sans qu'aucun soumissionnaire n'ait été retenu.

10 S'agissant des autres avis, les manifestations d'intérêt pour présenter des offres devaient être communiquées à la Commission au mois de janvier 2008, et la présélection des opérateurs invités à présenter une offre était prévue vers le mois de février 2008. Le début de l'exécution des différents marchés est prévu vers les mois de mai et de juin 2008, de telle sorte que l'attribution des marchés et la conclusion des contrats auront probablement lieu au mois d'avril 2008.

11 Le point 5 de chaque avis prévoit que le pouvoir adjudicateur est « la Communauté européenne, représentée par la Commission, au nom et pour le compte de la communauté chypriote turque ».

12 Conformément au point 22 de l'avis faisant l'objet de l'affaire T–54/08 R et au point 30 des autres avis, les avis sont tous fondés sur le règlement n° **389/2006** .

13 Le point 23 de l'avis faisant l'objet de l'affaire T–54/08 R et le point 28 des autres avis sont, en substance, rédigés comme suit :

– le Guide pratique des procédures contractuelles dans le cadre des actions extérieures de la Communauté européenne, applicable au présent marché, mentionne les conventions de financement régulièrement signées par la Commission et le pays tiers bénéficiaire. Ces conventions de financement sont habituellement complétées par des conventions-cadres entre la Commission et le pays bénéficiaire. Ces deux conventions régissent les règles de base suivies pour la mise en œuvre de l'aide financière dans le pays bénéficiaire, notamment les règles relatives à l'établissement et au droit de résidence, aux privilèges et immunités, aux régimes douaniers et fiscaux, ainsi qu'à l'importation et à l'exportation d'équipement et d'autres biens ;

– il n'y a aucune convention de ce type qui soit susceptible de s'appliquer à la communauté chypriote turque. Il n'existe pas de convention similaire avec la République de Chypre, qui est un État membre de l'Union européenne. Toutefois, le bénéficiaire accepte que :

  – l'attributaire soit exempté des droits de douane, des droits à l'importation, des redevances et de la taxe sur la valeur ajoutée (TVA) ou de toute autre taxe grevant les biens qui entrent dans la partie septentrionale de Chypre dans le cadre du marché financé par l'Union européenne. Le bénéficiaire délivre à l'attributaire des lettres d'exemption de tous les droits et taxes d'importation pour tous les biens importés en vue d'être intégrés dans des ouvrages permanents. Il fournit à l'attributaire l'aide nécessaire pour obtenir toutes les exonérations fiscales applicables ;

  – l'attributaire établisse les documents nécessaires, notamment en matière d'exemption, conformément aux exigences fixées par les douanes et par les autres autorités compétentes et à toute autre exigence raisonnable fixée par le pouvoir adjudicateur. L'attributaire est entièrement responsable de la présentation des documents de dédouanement des biens et il sera réputé avoir respecté toutes les procédures applicables (avant de soumettre l'offre) ;

  – les biens importés qui ne sont pas intégrés dans le marché ou utilisés dans le cadre de ce dernier soient réexportés une fois le marché terminé. S'ils ne sont pas exportés ou s'ils sont affectés à d'autres marchés, ils sont soumis aux droits qui leur sont applicables, dont l'attributaire doit s'acquitter ;

  – le paiement et le remboursement des impôts et taxes soient effectués dans la nouvelle livre turque (TRY) ;

  – le soumissionnaire doive prendre connaissance du règlement de la Ligne verte et considérer les implications des mouvements de marchandises à destination et en provenance des régions qui ne sont pas sous le contrôle effectif du gouvernement chypriote : règlement (CE) n° **866/2004** du Conseil, du 29 avril 2004, concernant un régime en application de l'article 2 du protocole n° 10 de l'acte d'adhésion de 2003 (JO L 161, p. 128) ;

  – le bénéficiaire veille à ce que l'attributaire obtienne des certificats d'exemption de la TVA sur le montant du marché ;

  – les biens et matériaux importés via la République de Chypre soient soumis à la TVA conformément à la directive 2006/112/CE du Conseil, du 28 novembre 2006, relative au système commun de TVA (JO L 347, p. 1) ;

  – le bénéficiaire aide l'attributaire à obtenir les licences d'importation nécessaires pour importer des biens dans la partie septentrionale de Chypre. Le pouvoir adjudicateur et le bénéficiaire aident l'attributaire à obtenir les exemptions fiscales et à accomplir les formalités douanières ;

  – le personnel expatrié de l'attributaire, ses employés et ses ouvriers soient exemptés de droits de douane, d'impôt sur le revenu, de taxes et autres charges sur leurs effets personnels et ceux de leur ménage pour autant que, une fois le marché terminé, ils soient exportés ou utilisés dans la partie septentrionale de Chypre conformément à la législation locale. Cette exonération ne s'appliquera pas au personnel local de la communauté chypriote turque et l'attributaire sera tenu de s'acquitter de ses éventuelles obligations en matière de déduction fiscale ;

– le pouvoir adjudicateur et le bénéficiaire aident l'attributaire à obtenir les autorisations nécessaires pour l'importation et la réexportation ultérieure de l'équipement professionnel nécessaire à l'exécution du contrat ;

– le pouvoir adjudicateur aide l'attributaire à obtenir les autorisations nécessaires pour ses salariés affectés à la mise en oeuvre du marché et pour les membres de leur famille proche, afin qu'ils puissent accéder à la partie septentrionale de Chypre, s'y établir, y travailler et en repartir, conformément aux exigences résultant de la nature même du marché ;

– lors de la préparation ou de l'exécution du marché, le soumissionnaire et/ou l'adjudicataire ne prenne aucune mesure susceptible d'impliquer la reconnaissance de toute autorité publique autre que le gouvernement chypriote.

14 Le 22 janvier 2008, la République de Chypre a contesté auprès de la Commission le contenu des avis en cause (ci-après les « avis » ou les « actes attaqués »), en demandant leur retrait et l'arrêt des procédures de passation des marchés.

Procédure et conclusions des parties

15 Par requêtes déposées au greffe du Tribunal les 4, 18 et 22 février 2008, la République de Chypre a introduit des recours visant à l'annulation des actes attaqués ou, tout au moins, du point 5 de chaque acte attaqué, du point 23 de l'acte attaqué dans l'affaire T-54/08 R et du point 28 des actes attaqués dans les autres affaires (ci-après les « dispositions litigieuses »).

16 Par actes séparés, déposés au greffe du Tribunal les 7, 21 et 22 février 2008, la République de Chypre a introduit les présentes demandes en référé, dans lesquelles elle conclut à ce qu'il plaise au président du Tribunal :

– à titre principal, suspendre les procédures d'adjudication et/ou interdire la signature des contrats faisant l'objet des actes attaqués jusqu'au prononcé des arrêts dans les procédures au principal ;

– à titre subsidiaire, s'il apparaît que les marchés ont déjà été attribués et/ou que les contrats ont déjà été conclus, surseoir à l'exécution de ces contrats jusqu'au prononcé des arrêts dans les procédures au principal ;

– ordonner, au titre de l'article 105, paragraphe 2, du règlement de procédure du Tribunal, que les procédures d'attribution des marchés ou que l'exécution de ceux-ci soient suspendues jusqu'à ce qu'il ait été statué sur les conclusions présentées ci-dessus à titre principal et subsidiaire ;

– prendre toute autre mesure jugée adéquate ;

– condamner la Commission aux dépens.

17 Dans ses observations écrites déposées au greffe du Tribunal le 25 février ainsi que les 3 et 7 mars 2008, la Commission conclut à ce qu'il plaise au président du Tribunal :

– à titre principal, déclarer les demandes en référé irrecevables ;

– à titre subsidiaire, les rejeter comme non fondées ;

– condamner la République de Chypre aux dépens.

18 En date du 11 mars 2008, le juge des référés a posé certaines questions aux parties, qui y ont répondu par écrit dans le délai imparti.

En droit

19 Il importe de souligner que l'article 242 CE pose le principe du caractère non suspensif des recours (ordonnance du président de la Cour du 25 juillet 2000, Pays-Bas/Parlement et Conseil, C-377/98 R, Rec. p. I-6229, point 44, et ordonnance du président du Tribunal du 28 juin 2000, Cho Yang Shipping/Commission, T-191/98 R II, Rec. p. II-2551, point 42). C'est donc à titre exceptionnel que le juge des référés ordonne un sursis à exécution sollicité par le requérant.

20 En vertu des dispositions combinées des articles 242 CE et 243 CE, d'une part, et de l'article 225, paragraphe l, CE, d'autre part, le juge des référés peut, s'il estime que les circonstances l'exigent, ordonner le sursis à l'exécution d'un acte attaqué devant lui ou prescrire les mesures provisoires nécessaires.

21 L'article 104, paragraphe 2, du règlement de procédure dispose que les demandes de mesures provisoires doivent spécifier l'objet du litige, les circonstances établissant l'urgence ainsi que les moyens de fait et de droit justifiant à première vue (fumus boni juris) l'octroi de la mesure provisoire à laquelle elles concluent. Ainsi, le sursis à exécution et les mesures provisoires peuvent être accordés par le juge des référés s'il est établi que leur octroi est justifié à première vue en fait et en droit (fumus boni juris) et qu'ils sont urgents en ce sens qu'il est nécessaire, pour éviter un préjudice grave et irréparable aux intérêts du requérant, qu'ils soient édictés et sortent leurs effets dès avant la décision au principal. Ces conditions sont cumulatives, de sorte que les demandes de mesures provisoires doivent être rejetées dès lors que l'une d'elles fait défaut [ordonnance du président de la Cour du 14 octobre 1996, SCK et FNK/Commission, C-268/96 P(R), Rec. p. I-4971, point 30]. Le juge des référés procède également, le cas échéant, à la mise en balance des intérêts en présence (voir ordonnance du président de la Cour du 23 février 2001, Autriche/Conseil, C-445/00 R, Rec. p. I-1461, point 73, et la jurisprudence citée).

22 En outre, dans le cadre de cet examen d'ensemble, le juge des référés dispose d'un large pouvoir d'appréciation et reste libre de déterminer, au regard des particularités de l'espèce, la manière dont ces différentes conditions doivent être vérifiées ainsi que l'ordre de cet examen, dès lors qu'aucune règle de droit communautaire ne lui impose un schéma d'analyse préétabli pour apprécier la nécessité de statuer provisoirement [ordonnances du président de la Cour du 19 juillet 1995, Commission/Atlantic Container Line e.a., C-149/95 P(R), Rec. p. I-2165, point 23, et du 3 avril 2007, Vischim/Commission, C-459/06 P(R), non publiée au Recueil, point 25].

23 Compte tenu des éléments des dossiers, le juge des référés estime qu'il dispose de tous les éléments nécessaires pour statuer sur les présentes demandes de mesures provisoires, sans qu'il soit utile d'entendre, au préalable, les parties en leurs explications orales.

Sur la jonction des affaires T-54/08 R, T-87/08 R, T-88/08 R et T-91/08 R à T-93/08 R

24 Les parties, interrogées par le juge des référés, n'ont pas soulevé d'objections à ce que les six affaires en référé soient jointes aux fins de la présente ordonnance.

25 En considération du fait que les affaires T-54/08 R, T-87/08 R, T-88/08 R et T-91/08 R à T-93/08 R portent sur des faits très similaires et ont un objet connexe, il y a lieu, en application de l'article 50, paragraphe 1, du règlement de procédure, d'ordonner leur jonction aux fins de la présente ordonnance.

Sur les demandes en référé

Arguments des parties

– Sur la recevabilité

26 La Commission a des doutes sur la question de savoir si les avis et, notamment, les dispositions litigieuses peuvent être qualifiés d'actes d'une institution susceptibles de faire l'objet d'un recours en annulation et, par conséquent, d'une demande en référé. En effet, il ne serait pas certain qu'ils produisent des effets juridiques à l'égard de la République de Chypre. En tout état de cause, la Commission se réserve le droit d'exposer, dans le cadre des procédures au principal, son point de vue sur la recevabilité des recours en annulation.

27 La République de Chypre considère que ses recours en annulation sont recevables, car les avis sont

des actes attaquables, à savoir des actes pris par une institution communautaire qui produisent des effets juridiques obligatoires (arrêt de la Cour du 6 mars 1979, Simmenthal/Commission, 92/78, Rec. p. 777) susceptibles d'affecter ses intérêts en modifiant sensiblement sa situation juridique. Elle ajoute qu'il est possible de demander l'annulation d'un avis de marché sans devoir attendre la décision d'attribution (arrêt de la Cour du 12 février 2004, Grossmann Air Service, C–230/02, Rec. p. I–1829, point 28). Enfin, le principe de protection juridictionnelle effective exigerait qu'un recours puisse être introduit à un stade où des infractions peuvent encore être corrigées. Une protection semblable devrait, par analogie, être accordée pour les marchés passés par les institutions communautaires.

– Sur le fumus boni juris

28 La République de Chypre soutient que les dispositions litigieuses sont incompatibles avec le règlement n° **389/2006** , avec le protocole n° 10 et avec l'article 299 CE ainsi qu'avec les obligations qui découlent de règles de droit international contraignant et des résolutions 541 (1983) et 550 (1984) du Conseil de sécurité des Nations unies. Dans les affaires autres que l'affaire T–54/08 R, la République de Chypre ajoute que les actes attaqués n'ont pas été publiés au *Journal officiel de l'Union européenne*, contrairement aux prescriptions de l'article 90 du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1, ci-après le « règlement financier »).

29 La République de Chypre précise que les dispositions litigieuses traitent la communauté chypriote turque comme si elle était une entité étatique autonome dotée d'une personnalité juridique et susceptible de bénéficier de l'aide en cause, alors que cette communauté est une fraction de sa population, à laquelle la Constitution de 1960 donne le droit d'être représentée dans ses institutions. Le règlement n° **389/2006** ne permettrait aucune autre conclusion. Au contraire, l'article 1er, paragraphe 2, de ce règlement définirait les bénéficiaires potentiels de l'aide sans y inclure la communauté chypriote turque en tant qu'entité autonome.

30 La République de Chypre reproche à la Commission de traiter la communauté chypriote turque comme si elle constituait un pays tiers. Dans les dispositions litigieuses, la Commission qualifierait cette communauté de « bénéficiaire » des aides en cause, ce qui reviendrait à la considérer comme un pays tiers. En effet, en vertu de l'article 5 du règlement n° **389/2006** , les actions relevant de ce règlement seraient mises en œuvre conformément au titre IV de la deuxième partie du règlement financier. Dans l'article 166, paragraphe 1, sous a), du règlement financier, le terme « bénéficiaire » serait défini comme étant soit un « pays tiers » soit un « organisme désigné par un pays tiers ». Partant, la communauté chypriote turque n'étant pas un organisme désigné par un pays tiers, force serait de conclure que la Commission la considère comme un pays tiers.

31 En outre, la Commission se comporterait comme si elle reconnaissait l'existence d'autorités publiques représentatives de la communauté chypriote turque sans être pour autant des autorités de la République de Chypre. En effet, les « autorités » visées aux dispositions litigieuses seraient celles de la prétendue « République turque de Chypre du Nord » (ci-après la « RTCN »), alors que cette dernière ne serait reconnue par aucun État, sauf la Turquie, et par aucune institution internationale, le Conseil de sécurité des Nations unies ayant, par ses résolutions 541 (1983) et 550 (1984), invité tous les États à ne pas reconnaître la RTCN, à respecter la souveraineté, l'indépendance, l'intégrité territoriale et l'unité de la République de Chypre et à s'abstenir de faciliter ou d'aider, de quelque manière que ce soit, la RTCN, qu'il qualifie d'entité sécessionniste.

32 En vertu des dispositions litigieuses, l'attributaire serait exempté « des droits de douane, des droits à l'importation, des redevances et de la TVA ou de toute autre taxe grevant les biens qui entrent dans la partie septentrionale de Chypre ». En outre, ces mêmes dispositions indiqueraient que « le bénéficiaire délivre à l'attributaire des lettres d'exemption de tous les droits et taxes d'importation », que « l'attributaire établit les documents nécessaires, notamment en matière d'exemption, conformément aux exigences fixées par les douanes et par les autres autorités compétentes » et qu'il est créé un régime applicable aux importations et aux exportations de biens qui sont intégrés dans le marché ou utilisés aux fins de ce dernier, aux licences d'importation, aux taxes d'importation ainsi qu'à la fiscalité des revenus du personnel étranger et local de l'attributaire.

33 De même, la Commission semblerait reconnaître que, dans les zones en cause, où le marché sera exécuté, il y a une législation et une monnaie autres que celles de la République de Chypre alors que, en vertu de l'article 299 CE et du protocole n° 10, les zones en cause font partie du territoire de la République de Chypre et que, partant, la souveraineté sur ces zones est réservée à la

République de Chypre. De ce fait, la communauté chypriote turque non seulement n'aurait pas la capacité juridique requise pour conclure une convention susceptible de produire des effets contraignants, mais n'aurait même pas qualité pour adopter des actes unilatéraux produisant des effets contraignants sur le territoire de la République de Chypre. Conformément au principe de souveraineté exprimé à l'article 2, paragraphe 1, de la charte des Nations unies, il appartiendrait en principe à chaque État de légiférer sur son territoire et, corrélativement, un État ne pourrait, en principe, unilatéralement imposer des règles obligatoires que sur son propre territoire (ordonnance du Tribunal du 3 juillet 2007, Commune de Champagne e.a./Conseil et Commission, T-212/02, non encore publiée au Recueil, point 89).

34 De surcroît, aux termes des dispositions litigieuses, la Commission coopérerait avec les « autorités » du « bénéficiaire », c'est-à-dire avec la RTCN. Or, une telle coopération serait contraire aux résolutions 541 (1983) et 550 (1984) susmentionnées du Conseil de sécurité des Nations unies. La Communauté serait liée par les obligations qui découlent de la charte des Nations unies (arrêt du Tribunal du 21 septembre 2005, Yusuf et Al Barakaat International Foundation/Conseil et Commission, T-306/01, Rec. p. II-3533, point 243). À cet égard, la résolution 550 (1984) exclurait toute forme de coopération avec les « autorités » de la RTCN ainsi que toute reconnaissance d'« actes » de ces « autorités », comme l'imposition de droits de douane, de taxes d'importation, de redevances, de TVA, et l'exploitation d'aéroports et de ports, etc. Dans son arrêt du 5 juillet 1994, Anastasiou e.a. (C-432/92, Rec. p. I-3087, point 40), la Cour aurait expressément exclu toute coopération avec les autorités d'une entité telle que celle établie dans la partie nord de Chypre. Dans son avis consultatif sur la Namibie, la Cour internationale de justice aurait, quant à elle, souligné que les États membres des Nations unies doivent s'abstenir « de tous actes et en particulier de toutes relations » susceptibles d'aider ou de renforcer des régimes illégaux [avis sur les conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, Rec. CIJ 1971, p. 16, point 133 (2)].

35 La Commission emploierait, dans les dispositions litigieuses, l'expression « biens et matériaux importés via la République de Chypre », laissant ainsi clairement entendre que les zones en cause ne feraient pas partie de la République de Chypre, ce qui serait contraire à la fois au droit international, selon lequel le territoire de la République de Chypre inclurait les zones en cause, et au droit communautaire primaire, à savoir l'article 299 CE et le protocole n° 10. En outre, la Commission ferait allusion au « personnel local de la communauté chypriote turque » et le distinguerait du « personnel expatrié ». En vertu de cette distinction, les Chypriotes grecs seraient des « expatriés », ce qui indiquerait forcément que, pour la Commission, la communauté chypriote turque a sa propre base étatique et sa propre nationalité.

36 Enfin, en prévoyant que le soumissionnaire doit « prendre connaissance du règlement de la Ligne verte et considérer les implications des mouvements de marchandises à destination et en provenance » des zones en cause, la Commission reconnaîtrait que des biens et des personnes physiques peuvent entrer dans les zones en cause et en sortir en passant par les ports et les aéroports qui opèrent illégalement dans ces zones. Ce faisant, la Commission manifesterait un manque de respect pour la souveraineté de la République de Chypre qui, dans l'exercice de ses droits souverains, d'une part, aurait déclaré en 1974 la fermeture des ports d'Ammochostos, de Karavostasio et de Keryneia situés dans les zones en cause et, d'autre part, aurait désigné comme seuls aéroports chypriotes ceux de Larnaca et de Paphos, de sorte que les aéroports créés dans les zones en cause fonctionneraient illégalement. De ce fait, la Commission violerait le droit international, en vertu duquel la réglementation de l'entrée dans les ports et aéroports constitue un droit souverain des États (arrêt de la Cour internationale de justice du 27 juin 1986 dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci, Rec. CIJ 1986, p. 111, point 213).

37 Selon la Commission, il ne ressort nullement du texte des actes attaqués qu'elle reconnaît des autorités publiques autres que le gouvernement légitime de la République de Chypre dans les zones en cause. Au contraire, les dispositions litigieuses indiqueraient expressément que la Commission conclut habituellement des accords-cadres avec les gouvernements des pays bénéficiant d'une aide financière, mais qu'il n'existe pas d'accord avec les zones en cause. Cela prouverait clairement que la Commission ne reconnaît pas l'existence d'une entité pseudo-étatique distincte de la République de Chypre dans les zones en cause. En outre, les dispositions litigieuses imposeraient les mêmes obligations aux soumissionnaires qui participent aux procédures d'adjudication et aux éventuels adjudicataires.

38 Les moyens soulevés par la République de Chypre s'appuieraient essentiellement sur

l'interprétation qu'elle donne des dispositions litigieuses. Or, cette interprétation serait manifestement erronée. En effet, les actes attaqués devraient être interprétés conformément au règlement n° 389/2006, aux termes duquel aucune autre prétendue autorité publique n'est reconnue dans les zones en cause.

39 Selon la Commission, il n'est pas possible de reconnaître de prétendues autres autorités publiques dans les zones en cause par le biais d'avis d'adjudication de marchés. Les dispositions litigieuses auraient simplement pour objet d'informer les soumissionnaires des conditions en vigueur dans les zones en cause, afin qu'ils soient en mesure d'évaluer avec précision leurs dépenses et de mieux préparer leurs offres. Parallèlement, la description complète des conditions locales protégerait la Commission, en tant que pouvoir adjudicateur, contre de futures complications juridiques en cas de mise en demeure de l'adjudicataire : celui-ci ne pourrait justifier ni un retard en invoquant que les conditions locales lui créent des obstacles insurmontables dans l'exécution du marché et que ces conditions locales constituent un événement de force majeure, ni une modification imprévue des conditions qu'il connaissait ou devait connaître lorsqu'il a signé le contrat. La simple description des conditions locales dans le texte d'un tel avis ne pourrait aucunement être considérée comme un acte juridique officiel de reconnaissance de prétendues autorités publiques dans les zones en cause.

40 À supposer même que la description des conditions locales faite dans les dispositions litigieuses soit erronée et ne donne pas une image exacte des difficultés que risque de rencontrer l'adjudicataire lors de l'exécution de ses obligations contractuelles, cela ne signifierait pas forcément que les avis sont contraires au règlement n° 389/2006 et aux autres dispositions mentionnées par la République de Chypre.

41 Enfin, s'agissant du moyen tiré dans les affaires autres que l'affaire T–54/08 R de ce que les actes attaqués n'auraient pas été publiés au *Journal officiel de l'Union européenne*, la Commission allègue que ce moyen résulte apparemment d'un malentendu, lesdits actes ayant tous été publiés au Supplément au Journal officiel. À cet égard, elle renvoie aux copies jointes en annexe à ses observations déposées dans ces affaires.

– Sur l'urgence et la balance des intérêts en présence

42 La République de Chypre estime qu'il existe un grave danger pour sa souveraineté, son indépendance, son intégrité territoriale et son unité que la Commission reconnaisse l'entité sécessionniste dans les zones en cause et/ou encourage sa reconnaissance et/ou la soutienne financièrement, alors que cette entité doit son existence à l'utilisation de la violence par la Turquie et à des actes sécessionnistes illégaux qui ont été condamnés par l'Organisation des Nations unies et par la Communauté. Cela pourrait constituer un précédent pour des actes analogues de reconnaissance et/ou d'encouragement et/ou de soutien accomplis en faveur de l'entité sécessionniste par certains États membres de l'Union européenne et/ou par des pays tiers.

43 Le préjudice éventuel serait irréparable, car non indemnisable, en ce qu'il ne pourrait faire l'objet d'une compensation financière ultérieure (ordonnance du président du Tribunal du 20 juillet 2000, Esedra/Commission, T–169/00 R, Rec. p. II–2951, point 44).

44 Selon la République de Chypre, toute réparation du préjudice deviendra impossible si la Commission peut attribuer les marchés et/ou en commencer l'exécution aux conditions décrites dans les dispositions litigieuses. L'intérêt général de la République de Chypre ne saurait se comparer à l'intérêt économique d'un soumissionnaire lésé par les conditions d'un avis de marché et dont le préjudice économique peut être compensé soit par une indemnisation financière soit en lui permettant de participer à une nouvelle procédure de marché. Partant, la jurisprudence selon laquelle il y a ni urgence ni préjudice irréparable en raison de la probabilité de l'exécution complète ou quasi complète du contrat (ordonnance du président du Tribunal du 27 juillet 2004, TQ3 Travel Solutions Belgium/Commission, T–148/04 R, Rec. p. II–3027, points 53 et 55) serait dénuée de pertinence en l'espèce.

45 Par ailleurs, étant donné la nature du préjudice éventuel et le fait que les marchés peuvent être attribués et même exécutés avant le prononcé des arrêts dans les affaires au principal, la République de Chypre fait observer que, si les mesures demandées ne sont pas adoptées, la pleine efficacité de ces arrêts sera compromise [ordonnance du président de la Cour du 25 mars 1999, Willeme/Commission, C–65/99 P(R), Rec. p. I–1857].

46 S'agissant de la mise en balance des intérêts, la République de Chypre fait valoir que l'exécution

des marchés selon les dispositions litigieuses créerait des faits accomplis qui lui causeraient un préjudice grave et irréparable. En revanche, le pouvoir adjudicateur ne courrait aucun risque. Le préjudice éventuel, uniquement dans l'hypothèse où le pouvoir adjudicateur serait contraint de verser des indemnités aux candidats soumissionnaires, serait d'ordre financier et donc non comparable à celui que subirait la République de Chypre si les mesures provisoires n'étaient pas prises. En toute hypothèse, un tel préjudice ne se produirait pas, puisque, aux termes de l'article 101, premier alinéa, du règlement financier, le pouvoir adjudicateur pourrait, jusqu'à la signature du contrat, soit renoncer au marché, soit annuler la procédure de passation du marché, sans que les candidats ou les soumissionnaires puissent prétendre à une quelconque indemnisation.

47 La Commission estime que le préjudice allégué n'est ni grave ni irréparable. En tout état de cause, dans l'hypothèse où les arrêts dans les affaires au principal annuleraient les actes attaqués, la Commission serait tenue de prendre toutes les mesures nécessaires pour se conformer aux arrêts du Tribunal. Il s'ensuit, selon la Commission, que toute impression erronée qui aurait été donnée jusqu'alors sera définitivement dissipée et le préjudice causé à la République de Chypre sera pleinement réparé.

48 En ce qui concerne la balance des intérêts, la Commission soutient que l'octroi des sursis à exécution sollicités causerait un préjudice grave aux intérêts de tiers qui ne sont pas parties aux litiges et qui n'ont pas été entendus par le juge des référés, à savoir les habitants des zones en cause. Tout retard dans la mise en œuvre des mesures concernées par les contrats pérenniserait le sous-développement structurel et économique de ces zones et les conditions de vie difficiles de leurs habitants.

49 Or, il serait de jurisprudence bien établie que des mesures provisoires ne sont, en principe, pas accordées lorsque leur octroi peut avoir une incidence grave sur les intérêts de tiers qui n'ont pas été entendus par le juge des référés, de telles mesures ne pouvant se justifier que s'il apparaissait que, en leur absence, le requérant serait exposé à une situation susceptible de mettre en péril son existence même (ordonnances du président du Tribunal du 6 juillet 1993, CCE Vittel et CE Pierval/Commission, T-12/93 R, Rec. p. II-785, point 20, et du 17 janvier 2001, Petrolessence et SG2R/Commission, T-342/00 R, Rec. p. II-67, points 51 et 53 ; voir également ordonnance du président de la Cour du 22 mai 1978, Simmenthal/Commission, 92/78 R, Rec. p. 1129, points 18 et 19).

Appréciation du juge des référés

– Sur la recevabilité

50 Selon une jurisprudence constante, la recevabilité du recours au principal ne doit pas, en principe, être examinée dans le cadre d'une procédure de référé sous peine de préjuger l'affaire au principal. Ce n'est que quand l'irrecevabilité manifeste du recours au principal sur lequel se greffe la demande en référé est soulevée qu'il peut s'avérer nécessaire d'établir l'existence de certains éléments permettant de conclure, à première vue, à la recevabilité d'un tel recours [voir, en ce sens, ordonnance du président de la Cour du 12 octobre 2000, Federación de Cofradías de Pescadores de Guipúzcoa e.a./Conseil, C-300/00 P(R), Rec. p. I-8797, point 34 ; ordonnances du président du Tribunal du 15 janvier 2001, Stauner e.a./Parlement et Commission, T-236/00 R, Rec. p. II-15, point 42, et du 8 août 2002, VVG International e.a./Commission, T-155/02 R, Rec. p. II-3239, point 18], un tel examen de la recevabilité du recours au principal étant nécessairement sommaire, compte tenu du caractère urgent de la procédure de référé (ordonnance Federación de Cofradías de Pescadores de Guipúzcoa e.a./Conseil, précitée, point 35).

51 En effet, dans le cadre d'une demande en référé, la recevabilité du recours au principal ne peut être appréciée que de prime abord, et le juge des référés ne doit déclarer cette demande irrecevable que si la recevabilité du recours au principal peut être totalement exclue. En effet, statuer sur la recevabilité au stade du référé lorsque celle-ci n'est pas, prima facie, totalement exclue reviendrait à préjuger la décision du Tribunal statuant au principal (ordonnances du président du Tribunal Petrolessence et SG2R/Commission, point 49 supra, point 17 ; du 19 décembre 2001, Government of Gibraltar/Commission, T-195/01 R et T-207/01 R, Rec. p. II-3915, point 47, et du 7 juillet 2004, Região autónoma dos Açores/Conseil, T-37/04 R, Rec. p. II-2153, point 110).

52 En l'espèce, la Commission, loin de dénoncer l'irrecevabilité manifeste des recours en annulation sur lesquels se greffent les demandes en référé, s'est bornée à exprimer ses doutes à cet égard,

tout en se réservant le droit de soulever la question de la recevabilité dans le cadre des procédures au principal. Dans ces circonstances, et eu égard au contenu des actes attaqués, il n'y a pas lieu pour le juge des référés d'examiner dans le cadre de la présente procédure de référé les doutes avancés par la Commission au regard de la recevabilité des recours au principal (voir, en ce sens, ordonnance du président de la Cour du 17 mars 1986, Royaume-Uni/Parlement, 23/86 R, Rec. p. 1085, point 21).

– Sur le fond

53 Il y a lieu de relever que les États membres sont responsables des intérêts considérés comme généraux sur le plan national, tels que ceux relatifs à la défense de leur souveraineté nationale. Par conséquent, ils peuvent, dans le cadre d'une procédure de référé, faire état d'un préjudice que la mesure communautaire contestée serait susceptible de causer à ces intérêts (voir, en ce sens, ordonnances de la Cour du 29 juin 1993, Allemagne/Conseil, C–280/93 R, Rec. p. I–3667, point 27, et du 12 juillet 1996, Royaume-Uni/Commission, C–180/96 R, Rec. p. I–3903, point 85).

54 En l'espèce, il est constant entre les parties que la République de Chypre est la seule entité étatique de l'île reconnue au niveau international et que les zones en cause font partie de son territoire et relèvent de sa seule souveraineté.

55 La République de Chypre considère néanmoins que les actes attaqués, notamment les dispositions litigieuses, ont, en substance, pour conséquence de traiter – en violation flagrante du droit international et du droit communautaire, notamment de l'article 299 CE, du protocole n° 10 et du règlement n° **389/2006** – la communauté chypriote turque de la même manière qu'une entité étatique indépendante. La République de Chypre estime que la Commission reconnaît ainsi au moins implicitement l'existence dans les zones en cause d'« autorités » qui ne relèvent pas du gouvernement chypriote ainsi que l'existence d'une législation et d'une monnaie autres que les siennes, tout en acceptant le transport de personnes ou de marchandises via des ports et des aéroports que, dans l'exercice de sa souveraineté, elle a déclaré fermés ou dont elle n'autorise pas le fonctionnement. Ce comportement de la Commission risquerait de compromettre sa souveraineté, son indépendance, son intégrité territoriale, son unité et son ordre constitutionnel.

56 Il s'avère donc que le préjudice invoqué par la République de Chypre, à savoir le risque d'une violation de sa souveraineté étatique, consiste précisément en la prétendue méconnaissance, par les actes attaqués, du droit international et du droit communautaire.

57 Eu égard à cette particularité du cas d'espèce, il convient d'examiner conjointement la condition relative à la présence d'un fumus boni juris et celle relative à l'urgence.

58 S'agissant de l'interdépendance entre ces deux conditions, il a certes été jugé que l'urgence doit d'autant plus être prise en considération que le fumus boni juris paraît sérieux (voir, en ce sens, ordonnance Autriche/Conseil, point 21 supra, point 110). Toutefois, la violation éventuelle d'une norme supérieure de droit par un acte ne saurait suffire à établir, par elle-même, la gravité et le caractère irréparable d'un éventuel préjudice causé par cette violation [voir, en ce sens, ordonnances du président de la Cour du 25 juin 1998, Antilles néerlandaises/Conseil, C–159/98 P (R), Rec. p. I–4147, point 62, et Pays-Bas/Parlement et Conseil, point 19 supra, point 45].

59 Par conséquent, il ne suffit pas pour la République de Chypre d'alléguer une atteinte flagrante au droit international et au droit communautaire pour établir la réunion des conditions de l'urgence, à savoir le caractère grave et irréparable du préjudice qui pourrait découler de cette atteinte, mais elle est tenue de prouver les faits qui sont censés fonder la perspective d'un tel préjudice [voir, en ce sens, ordonnance du président de la Cour du 14 décembre 1999, HFB e.a./Commission, C–335/99 P (R), Rec. p. I–8705, point 67 ; ordonnances du président du Tribunal du 15 novembre 2001, Duales System Deutschland/Commission, T–151/01 R, Rec. p. II–3295, point 188, du 25 juin 2002, B/Commission, T–34/02 R, Rec. p. II–2803, point 86, et du 7 juin 2007, IMS/Commission, T–346/06 R, non encore publiée au Recueil, points 121 et 123, et la jurisprudence citée].

60 Compte tenu de ces considérations, il y a lieu d'examiner tour à tour les différents préjudices invoqués par la République de Chypre.

61 Premièrement, s'agissant du préjudice qui serait constitué par le fait que le texte même des actes

attaqués exprime une reconnaissance illégale de la RTCN dans les zones en cause, la Commission a relevé, à juste titre, que ce préjudice s'est déjà produit de façon irréversible lors de la publication desdits actes. À supposer même que les actes attaqués enfreignent effectivement le droit international et le droit communautaire, les sursis à exécution demandés ne seraient donc pas de nature à supprimer rétroactivement le préjudice invoqué. Les mesures provisoires n'étant pas de nature à éviter ce préjudice, il ne saurait être question d'urgence (voir, en ce sens, ordonnance Autriche/Conseil, point 21 supra, points 112 et 113).

62 Deuxièmement, la République de Chypre affirme qu'elle risque de subir un préjudice du fait que le mauvais exemple donné par la Commission pourrait inciter des États membres de la Communauté ou des pays tiers à se comporter pareillement en adoptant, eux aussi, des actes de reconnaissance ou de soutien à l'égard de la RTCN.

63 À cet égard, il suffit de constater à l'instar de la Commission que, à supposer établie l'illégalité de son comportement, il s'agirait là d'un préjudice purement hypothétique, étant donné que sa survenance dépend d'événements futurs et incertains. Or, un tel préjudice ne saurait justifier l'octroi des sursis à exécution demandés (voir, en ce sens, ordonnance Government of Gibraltar/Commission, point 51 supra, points 101 et 105). La République de Chypre n'a produit aucun élément susceptible d'établir, avec un degré de probabilité suffisant, l'imminence des conséquences préjudiciables qu'elle craint. Elle a plutôt admis, en réponse à une question posée par le juge des référés, qu'aucun pays n'avait déclaré publiquement qu'il attribuait au texte des actes attaqués l'interprétation qu'elle lui donnait ou qu'il était disposé à suivre l'exemple supposé de la Commission.

64 Troisièmement, les demandes en référé visent le préjudice causé par la prétendue violation du droit international et du droit communautaire pendant le déroulement des procédures de passation des marchés en cause, notamment à la suite de l'attribution des marchés par la signature des contrats prévus à cet effet et au cours de la mise en œuvre de ces contrats selon les conditions décrites dans les dispositions litigieuses. Ce préjudice est caractérisé par l'application effective des dispositions litigieuses qui entraîne, selon la République de Chypre, un soutien matériel et la reconnaissance illégale, en pratique et à l'instigation de la Commission, de la RTCN et d'autorités ainsi que de réglementations autres que les siennes dans les zones en cause. S'agissant de ce préjudice, il ne saurait être prétendu qu'il s'est déjà irréversiblement produit, ni qu'il est de nature purement hypothétique.

65 Il y a donc lieu d'examiner si la République de Chypre est parvenue à établir, à suffisance de droit, que ce préjudice spécifique avait un caractère grave et irréparable et que la condition relative à l'existence d'un fumus boni juris était, à première vue, satisfaite en ce qui concerne la prétendue illégalité des dispositions litigieuses et de leur mise en œuvre.

66 À cet égard, il convient de rappeler que la Cour, résumant la situation juridique de l'île de Chypre dans son arrêt Anastasiou e.a., point 34 supra (points 40 et 47), a, d'une part, expressément exclu toute coopération administrative avec les autorités d'une entité telle que celle établie dans la partie nord de Chypre, qui n'est reconnue ni par la Communauté ni par les États membres, ceux-ci ne reconnaissant d'autre État chypriote que la République de Chypre, et, d'autre part, jugé que la Communauté n'avait pas le droit d'intervenir dans les affaires intérieures de la République de Chypre, les problèmes résultant de la partition de fait de l'île relevant exclusivement de celle-ci, seul État internationalement reconnu.

67 Or, ainsi que le fait valoir la République de Chypre, le fait pour une institution communautaire telle que la Commission de prévoir dans des textes officiels, destinés à être mis en œuvre dans le cadre d'activités déployées dans les zones en cause, que le pouvoir adjudicateur est la Communauté, représentée par la Commission, « au nom et pour le compte de la communauté chypriote turque » (point 5 de chacun des actes attaqués), pourrait, à première vue, être interprété comme reflétant un soutien à l'entité détentrice des pouvoirs politiques réels dans les zones en cause, d'autant plus que la communauté chypriote turque est considérée comme bénéficiaire de l'aide communautaire octroyée, et ce apparemment sur le modèle des pays tiers qui bénéficient normalement de ce type d'aide.

68 Il convient d'ajouter que les dispositions litigieuses paraissent prévoir que l'exécution, dans les zones en cause, des marchés attribués doit avoir lieu dans le respect d'une législation et d'une monnaie autres que celles de la République de Chypre, l'attributaire étant exempté des taxes grevant les biens qui entrent dans les zones en cause, ce qui revient à ce qu'un régime propre à la communauté chypriote turque et applicable aux importations et aux exportations de biens est pris

en compte, tout comme d'ailleurs une fiscalité particulière des revenus du personnel étranger et local de l'attributaire dans les zones en cause. En outre, il est question d'autorités de cette communauté ainsi que de l'existence de certains actes, comme l'imposition de droits de douane et de taxes. Enfin, la mention de « matériaux importés via la République de Chypre » laisse, à première vue, entendre que les zones en cause ne font pas partie de la République de Chypre, alors que le droit international, l'article 299 CE et le protocole n° 10 prévoient que le territoire de la République de Chypre inclut les zones en cause.

69 Si l'argumentation de la République de Chypre peut donc apparaître suffisamment pertinente pour caractériser un fumus boni juris, on ne saurait, en revanche, affirmer à première vue que la Commission a commis une violation manifeste et grave du droit international et communautaire, de sorte que le prétendu préjudice résultant de cette violation ne saurait être qualifié de grave (voir, par analogie, ordonnance de la Cour du 29 juin 1994, Commission/Grèce, C-120/94 R, Rec. p. I-3037, points 91 et 92).

70 À cet égard, il convient de constater que les actes attaqués, malgré leur caractère officiel, n'ont pas de vocation politique intrinsèque et n'ont pas, notamment, vocation à aborder la problématique de l'éventuelle réunification de l'île de Chypre. Ils ne comportent pas non plus de déclaration par laquelle la Commission reconnaîtrait expressément la communauté chypriote turque ou la RTCN en tant qu'entité détentrice du pouvoir politique dans les zones en cause.

71 Il s'agit de textes de nature technique destinés à fournir aux soumissionnaires des informations utiles leur permettant de décider, en connaissance de cause, de leur participation à la procédure de soumission et de préparer leurs dossiers d'offre. Dans cette optique, il apparaît que les actes attaqués, en employant les formules critiquées ci-dessus, font état de la situation des rapports de force actuels, en vue d'informer les soumissionnaires de la manière la plus complète et fidèle possible, certes de façon ambiguë, mais sans pour autant révéler une atteinte délibérée et manifeste à la souveraineté de la République de Chypre.

72 En particulier, il importe de relever que les actes attaqués contiennent des déclarations expresses, univoques et inconditionnelles aux termes desquelles, d'une part, ces actes n'impliquent la reconnaissance d'aucune autorité publique autre que le gouvernement chypriote dans les zones en cause et, d'autre part, ils obligent les soumissionnaires et les adjudicataires de ne prendre aucune mesure susceptible d'impliquer une telle reconnaissance. Dans ces circonstances, il ne saurait, à première vue, être considéré que les actes attaqués constituent une atteinte grave à la souveraineté de la République de Chypre.

73 En outre, les actes attaqués étant tous explicitement fondés sur le règlement n° **389/2006**, il y a lieu de rappeler que ce règlement prévoit, en son article 1er, paragraphe 3, que l'octroi du soutien financier en question ne constitue pas une reconnaissance d'une autorité publique autre que le gouvernement chypriote dans les zones en cause. De plus, ces actes rappellent que les soumissionnaires et les attributaires doivent être conscients des contextes politique, diplomatique et juridique caractérisant l'île de Chypre et s'abstenir de tout contact de nature politique avec les deux communautés.

74 Enfin, le règlement n° **389/2006** qui a été adopté à l'unanimité, et partant avec l'approbation de la République de Chypre, et dont la légalité n'a pas été remise en cause par celle-ci, emploie, quant à lui, l'expression « communauté chypriote turque » – notamment dans son titre, son considérant 2 ainsi que son article 1er, paragraphe 1, et son article 2, quatrième tiret – d'une manière ambiguë telle qu'il ne saurait être exclu, au moins à première vue, que cette expression, tenant compte de la situation des rapports de force actuels, vise à désigner la partie de la population chypriote regroupée dans les seules zones en cause. Or, le principe d'un soutien financier communautaire à destination de cette communauté n'est pas contesté par la République de Chypre. Par ailleurs, l'article 1er, paragraphe 2, du règlement n° **389/2006** prévoit expressément que ce soutien bénéficie, notamment, aux collectivités locales et aux instances remplissant des fonctions d'intérêt général dans les zones en cause, ce qui semble impliquer, au moins à première vue et compte tenu de la situation prévalant sur l'île, certains contacts avec des entités chargées de fonctions administratives dans la mise en œuvre dudit soutien.

75 S'agissant de l'invocation de l'arrêt Anastasiou e.a. aux points 34 et 66 ci-dessus qui interdirait toute coopération administrative avec la RTCN et toute ingérence dans les affaires intérieures de la République de Chypre, force est de constater que ce ne serait pas la Commission elle-même qui, lors de l'exécution des actes attaqués, procéderait à une coopération administrative directe avec

l'une ou l'autre des « autorités » de la RTCN. Il ne saurait non plus être prétendu que ces actes interviendraient directement dans les affaires intérieures de la République de Chypre.

76 Il résulte de ce qui précède que les illégalités dénoncées par la République de Chypre dans le présent contexte n'entachent que la rédaction et la mise en œuvre des modalités du soutien financier visant à encourager le développement économique de la communauté chypriote turque, dans le cadre et au titre du règlement n° 389/2006 , et que ces illégalités ne sauraient être qualifiées de graves.

77 Par conséquent, le préjudice causé par ces illégalités, à savoir la violation de la souveraineté de la République de Chypre, ne saurait non plus être considéré comme grave.

78 Du reste, ce préjudice n'apparaît pas irréparable. En effet, eu égard à la nature exclusivement morale du préjudice, le juge des référés estime qu'une éventuelle annulation des actes attaqués au terme des procédures au principal en constituerait une réparation suffisante. En effet, de tels arrêts d'annulation mettraient formellement en évidence que la Commission a fait preuve d'un comportement illégal en matière de passation de marchés en portant atteinte à la souveraineté de la République de Chypre, ce qui donnerait satisfaction à cette dernière.

79 Cette solution est confirmée par la mise en balance des intérêts en cause. Ainsi que la Commission l'a relevé à juste titre (voir points 48 et 49 ci-dessus), l'octroi des sursis à exécution sollicités porterait atteinte aux intérêts de tiers qui ne sont pas parties à la présente procédure et n'ont pas été entendus par le juge des référés. En effet, les mesures d'aide communautaire prévues par le règlement n° 389/2006 et lancées par le biais des actes attaqués – relatifs à l'assistance technique dans le domaine écologique, dans le secteur rural, en matière de télécommunications et dans le secteur de l'enseignement – sont d'une grande importance pour la qualité de la vie des habitants des zones en cause. Tout retard dans la mise en œuvre de ces mesures risquerait de pérenniser le sous-développement structurel et économique de ces zones et les conditions de vie difficiles de leurs habitants, d'autant plus que l'aide communautaire vise, aux termes de l'article 2 du même règlement, la promotion du développement social et économique, notamment rural, le développement des infrastructures ainsi que le rapprochement entre la communauté chypriote turque et l'Union européenne.

80 Au vu de tout ce qui précède, il y a lieu de conclure que la condition relative à l'urgence n'est pas remplie, de sorte que les présentes demandes en référé doivent être rejetées, sans qu'il soit nécessaire de se prononcer sur la question de savoir si la République de Chypre conserve un intérêt à demander le sursis à l'exécution de l'avis EuropeAid/125051/D/SUP/CY faisant l'objet de l'affaire T–54/08 R, après que cet avis a été déclaré infructueux (voir point 9 ci-dessus).

Par ces motifs,

LE PRÉSIDENT DU TRIBUNAL

ordonne :

1) Les affaires T–54/08 R, T–87/08 R, T–88/08 R et T–91/08 R à T–93/08 R sont jointes aux fins de la présente ordonnance.

2) Les demandes en référé sont rejetées.

3) Les dépens sont réservés.

Fait à Luxembourg, le 8 avril 2008.

Le greffier — Le président

E. Coulon — M. Jaeger

* Langue de procédure : le grec.

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Documents relating to the same case

Order of the President of the Court of First Instance of 8 April 2008 – Cyprus v Commission

(Joined Cases T-54/08 R, T-87/08 R, T-88/08 R and T-91/08 R to T-93/08 R)

Applications for interim relief – Procurement notices for contracts to encourage economic development in the northern part of Cyprus – Applications for suspension of operation of the notices – No urgency

1. *Applications for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Prima facie case – Urgency – Cumulative nature – Balancing of all the interests involved (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 21-22)*

2. *Applications for interim measures – Conditions of admissibility – Admissibility of main application – Irrelevance – Limits (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(1)) (see paras 50-51)*

3. *Applications for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Serious and irreparable damage – Damage capable of being relied on by a Member State (Arts 242 EC and 243 EC; Rules of Procedure of the Court Instance, Art. 104(2)) (see para. 53)*

4. *Applications for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Serious and irreparable damage – Contested measure infringing a superior rule of law – Condition not automatically fulfilled – Burden of proof (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 58-59)*

APPLICATION for suspension of the operation of a number of procurement notices issued by the Commission for the encouragement of economic development in the northern part of Cyprus, in the fields of energy, the environment, agriculture, telecommunications, education and crop management and irrigation.

e part

The Court:

1. Joins Cases T-54/08 R, T-87/08 R, T-88/08 R and T-91/08 R to T–93/08 R for the purposes of this order;

2. Dismisses the applications for interim relief;

3. Reserves the costs.

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Order of the President of the Court of First Instance of 11 April 2008 - Cyprus v Commission

(Joined Cases T-54/08 R, T-87/08 R, T-88/08 R, T-91/08 R, T-92/08 R and T-93/08 R)

(Applications for interim relief - Procurement notices for contracts to encourage economic development in the northern part of Cyprus - Applications for suspension of operation of the notices - No urgency)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis, Agent)

Defendant: Commission of the European Communities (represented by: P. van Nuffel and I. Zervas, Agents)

Re:

Applications for suspension of the operation of a number of procurement notices issued by the Commission for the encouragement of economic development in the northern part of Cyprus, in the fields of energy, the environment, agriculture, telecommunications, education and crop management and irrigation.

Operative part of the order

1. *Cases T-54/08 R, T-87/08 R, T-88/08 R, T-91/08 R, T-92/08 R and T 93/08 R are joined for the purposes of this order.*

2. *The applications for interim relief are dismissed.*

3. Costs are reserved.

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Action brought on 4 February 2008 - Republic of Cyprus v Commission

(Case T-54/08)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis, lawyer)

Defendant: Commission of the European Communities

Form of order sought

annul the procurement notice under reference EuropeAid/125051/D/SUP/CY for the conclusion of a contract entitled 'Upgrading the Management of the Energy Sector - Energy Metering and Reactive Power Compensation', which was published, only in English, on the webpage http://ec.europa.eu/europaid/tender/data/ on or around 24 November 2007, and annul Articles 5 and 23 of the notice;

order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The applicant submits that the notice is unlawful for the following reasons:

first, because, in issuing the notice, the Commission exceeded and/or infringed its legal basis, to be specific Council Regulation (EC) No **389/2006** of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No **2667/2000** on the European Agency for Reconstruction; [1]

second, because the notice is contrary to and/or incompatible with Article 299 EC, as amended by Article 19 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic ('the 2003 Act of Accession') and Protocol No 10, on Cyprus, to the 2003 Act of Accession; and

third, because the notice is contrary to or incompatible with both obligations flowing from rules of mandatory international law and United Nations Security Council Resolutions 541(1983) and 550(1984).

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[1] - OJ 2006 L 65, p. 5.

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Action brought on 18 February 2008 - Republic of Cyprus v Commission

(Case T-87/08)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis)

Defendant: Commission of the European Communities

Form of order sought

annul the procurement notice under reference EuropeAid/126225/C/SER/CY for the conclusion of a contract entitled 'Technical assistance for engineering works for waste management infrastructure and rehabilitation of dumping sites in the northern part of Cyprus', which was published, only in English, on the webpage http://ec.europa.eu/europaid/tender/data/ on or around 8 December 2007, and annul points 5 and 28.2 of the notice;

order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The applicant submits that the notice is unlawful for the following reasons:

first, because, in issuing the notice, the Commission exceeded and/or infringed its legal basis, to be specific Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction; [1]

second, because the notice is contrary to and/or incompatible with Article 299 EC, as amended by Article 19 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic [2] ('the 2003 Act of Accession') and Protocol No 10, on Cyprus, to the 2003 Act of Accession; [3]

third, because the notice is contrary to or incompatible with both obligations flowing from rules of mandatory international law and United Nations Security Council Resolutions 541(1983) and 550(1984); and

fourth, because the notice was not published in the Official Journal.

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[1] - OJ 2006 L 65, p. 5.

[2] - OJ 2003 L 236, p. 33.

[3] - OJ 2003 L 236, p. 955.

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Action brought on 18 February 2008 - Republic of Cyprus v Commission

(Case T-88/08)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis)

Defendant: Commission of the European Communities

Form of order sought

annul the procurement notice under reference EuropeAid/125242/C/SER/CY for the conclusion of a contract entitled 'Technical assistance to support implementation of the Rural Development Sector Programme', which was published, only in English, on the webpage http://ec.europa.eu/europaid/tender/data/ on or around 6 December 2007, and annul points 5 and 28.2 of the notice;

order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The applicant submits that the notice is unlawful for the following reasons:

first, because, in issuing the notice, the Commission exceeded and/or infringed its legal basis, to be specific Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction; [1]

second, because the notice is contrary to and/or incompatible with Article 299 EC, as amended by Article 19 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic [2] ('the 2003 Act of Accession') and Protocol No 10, on Cyprus, to the 2003 Act of Accession; [3]

third, because the notice is contrary to or incompatible with both obligations flowing from rules of mandatory international law and United Nations Security Council Resolutions 541(1983) and 550(1984); and

fourth, because the notice was not published in the Official Journal.

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[1] - OJ 2006 L 65, p. 5.

[2] - OJ 2003 L 236, p. 33.

[3] - OJ 2003 L 236, p. 955.

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Action brought on 22 February 2008 - Republic of Cyprus v Commission

(Case T-91/08)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis)

Defendant: Commission of the European Communities

Form of order sought

annul the procurement notice under reference EuropeAid/126172/C/SER/CY for the conclusion of a contract entitled 'Development and restructuring of telecommunications infrastructure - Training, Capacity building and Project management', which was published, only in English, on the webpage http://ec.europa.eu/europaid/tender/data/ on or around 12 December 2007, and annul points 5 and 28 of the notice;

order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The applicant submits that the notice is unlawful for the following reasons:

first, because, in issuing the notice, the Commission exceeded and/or infringed its legal basis, to be specific Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction; [1]

second, because the notice is contrary to and/or incompatible with Article 299 EC, as amended by Article 19 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic [2] ('the 2003 Act of Accession') and Protocol No 10, on Cyprus, to the 2003 Act of Accession; [3]

third, because the notice is contrary to or incompatible with both obligations flowing from rules of mandatory international law and United Nations Security Council Resolutions 541(1983) and 550(1984);

fourth, because the notice is contrary to and/or incompatible with the principle of sincere cooperation between the institutions of the European Union and the Member States, as laid down under Article 10 EC; and

fifth, because the notice was not published in the Official Journal.

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[1] - OJ 2006 L 65, p. 5.

[2] - OJ 2003 L 236, p. 33.

[3] - OJ 2003 L 236, p. 955.

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Action brought on 22 February 2008 - Republic of Cyprus v Commission

(Case T-92/08)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis)

Defendant: Commission of the European Communities

Form of order sought

annul the procurement notice under reference EuropeAid/126111/C/SER/CY for the conclusion of a contract entitled 'Technical Assistance to support the ongoing reform of the primary and secondary education sector', which was published, only in English, on the webpage http://ec.europa.eu/europaid/tender/data/ on or around 14 December 2007, and annul points 5 and 28.2 of the notice;

order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The applicant submits that the notice is unlawful for the following reasons:

first, because, in issuing the notice, the Commission exceeded and/or infringed its legal basis, to be specific Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction; [1]

second, because the notice is contrary to and/or incompatible with Article 299 EC, as amended by Article 19 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic [2] ('the 2003 Act of Accession') and Protocol No 10, on Cyprus, to the 2003 Act of Accession; [3]

third, because the notice is contrary to or incompatible with both obligations flowing from rules of mandatory international law and United Nations Security Council Resolutions 541(1983) and 550(1984);

fourth, because the notice is contrary to and/or incompatible with the principle of sincere cooperation between the institutions of the European Union and the Member States, as laid down under Article 10 EC; and

fifth, because the notice was not published in the Official Journal.

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[1] - OJ 2006 L 65, p. 5.

[2] - OJ 2003 L 236, p. 33.

[3] - OJ 2003 L 236, p. 955.

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Action brought on 22 February 2008 - Republic of Cyprus v Commission

(Case T-93/08)

Language of the case: Greek

Parties

Applicant: Republic of Cyprus (represented by: P. Kliridis)

Defendant: Commission of the European Communities

Form of order sought

annul the procurement notice under reference EuropeAid/125671/C/SER/CY for the conclusion of a contract entitled 'Technical Assistance on Crop Husbandry and Irrigation', which was published, only in English, on the webpage http://ec.europa.eu/europaid/tender/data/ on or around 14 December 2007, and annul points 5 and 28.2 of the notice;

order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The applicant submits that the notice is unlawful for the following reasons:

first, because, in issuing the notice, the Commission exceeded and/or infringed its legal basis, to be specific Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction; [1]

second, because the notice is contrary to and/or incompatible with Article 299 EC, as amended by Article 19 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic [2] ('the 2003 Act of Accession') and Protocol No 10, on Cyprus, to the 2003 Act of Accession; [3]

third, because the notice is contrary to or incompatible with both obligations flowing from rules of mandatory international law and United Nations Security Council Resolutions 541(1983) and 550(1984);

fourth, because the notice is contrary to and/or incompatible with the principle of sincere cooperation between the institutions of the European Union and the Member States, as laid down under Article 10 EC; and

fifth, because the notice was not published in the Official Journal.

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[1] - OJ 2006 L 65, p. 5.

[2] - OJ 2003 L 236, p. 33.

[3] - OJ 2003 L 236, p. 955.

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ORDER OF THE PRESIDENT OF THE SEVENTH CHAMBER OF THE COURT OF FIRST INSTANCE

2 July 2008 (*)

(Removal from the register)

In Case T-41/08,

Vakakis International – Symvouloi gia Agrotiki Anaptixi AE, established in Athens (Greece), represented by B. O'Connor, Solicitor,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and G. Boudot, acting as Agents,

defendant,

Annulment of the decision of the Commission of 6 December 2007 not to invite the consortium headed by the applicant to an interview in the tender procedure in EuropeAid/125241/C/SER/CY for the provision of technical assistance to support rural development policy in favour of the Turkish-Cypriot community (OJ 2007/S 46-055815), together with annulment of the decision of the Commission of 21 December 2007 rejecting the tender submitted by the applicant in respect of that tender procedure.

1 By letter lodged at the Registry of the Court of First Instance on 2 June 2008, the applicant informed the Court in accordance with Article 99 of the Rules of Procedure of the Court of First Instance that it wished to discontinue proceedings and requested, pursuant to Article 87(5) of the Rules of Procedure, that it should not bear the costs incurred by the applicant to intervene, Agriconsulting SA.

2 By letter lodged at the Registry of the Court on 13 June 2008, the defendant informed the Court that it had no objection to the discontinuance and requested that, in accordance with Article 87(5) of the Rules of Procedure, the applicant be ordered to pay the costs.

3 The first subparagraph of Article 87(5) of the Rules of Procedure provides that a party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the observations of the other party on the discontinuance. In the present case, the defendant requested that the applicant bear the costs.

4 The case will therefore be removed from the register and the applicant ordered to pay the costs incurred by the defendant.

5 In those circumstances, it is no longer necessary to rule upon the application for leave to intervene lodged by Agriconsulting SA in support of the form of order sought by the defendant.

On those grounds,

THE PRESIDENT OF THE SEVENTH CHAMBER OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **Case T-41/08 is removed from the register of the Court of First Instance.**

2. **The applicant shall bear the costs incurred by the defendant.**

3. **There is no need to rule upon the application for leave to intervene lodged by Agriconsulting SA.**

Luxembourg, 2 July 2008.

E. Coulon — N. J. Forwood

Registrar — President

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* Language of the case: English.

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ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

25 April 2008 (*)

(Community tendering procedure – Interim proceedings – Loss of an opportunity – Locus standi – Admissibility of the main application – Urgency – Measures of inquiry)

In Case T–41/08 R,

Vakakis International – Symvouli gia Agrotiki Anaptixi AE, established in Athens (Greece), represented by B. O'Connor, lawyer,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and G. Boudot, acting as Agents,

defendant,

APPLICATION for an order granting interim measures in the context of the service tender procedure EuropeAid/125241/C/SER/CY for the supply of 'Technical Assistance to Support Rural Development Policy' in the Northern Part of Cyprus,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts and procedure

1 On 13 June 2007, the Commission published a Service Procurement Notice for consultancy services to prepare the Turkish Cypriot community for the implementation of the *acquis communautaire* in the field of rural development policy – call for tenders EuropeAid/125241/C/SER/CY ('the disputed tender procedure').

2 Under the call for tenders, in order to be short-listed, potential candidates for the contract were to apply by 13 July 2007, demonstrating that they fulfilled a number of selection and award criteria, including: economic and financial capacity (turnover of more than EUR 1 million); professional capacity (more than 10 permanent staff working in the field of specialisation); and technical capacity (experience in agricultural rural development programmes).

3 On 31 August 2007, the Commission published the names of the three short-listed candidates, namely: (i) Agriconsulting Europe S.A. ('Agriconsulting'); (ii) Company H; and (iii) Vakakis International S.A. ('Vakakis').

4 On 5 October 2007, the Commission sent an invitation to tender to Vakakis. The deadline for receipt of the tenders was 23 November 2007. That deadline was subsequently extended to 28 November 2007. The invitation to tender included instructions to tenderers specific to the procedure in question, a Draft Contract Agreement and Special Conditions, administrative compliance and evaluation grids, and reference to the Practical Guide to Contract procedures for EC external actions of October 2007 ('the PRAG rules').

5 On 27 November 2007, Vakakis, on behalf of a consortium of seven partners, submitted a detailed tender to the Commission.

6 On 5 December 2007, the Commission wrote to Vakakis seeking clarification of the Vakakis tender proposal. In particular, the Commission sought clarification as to whether Mr H, an expert mentioned in Vakakis' list of non-key experts, was aware that he had been proposed by Vakakis as a non-key expert, and that he was willing to work for the required period.

7 Vakakis responded before the deadline set by the Commission of 6 December 2007 at 14.00 hrs, stating that the Terms of Reference for the project in question did not require the tenderer to provide CVs and letters of commitment in relation to non-key experts. In addition, Vakakis responded that they had put forward only a list of names of experts with whom Vakakis had worked in the past and whom Vakakis could call upon as required. Vakakis further responded that their tender was based on the understanding that non-key experts would be proposed and selected only after the award of the contract, and that, although it had an agreement with the individuals listed in the indicative list of non-key experts to the effect that their names could be put forward indicatively where the position foreseen for them was not that of a key expert, no prior communication or arrangement had been made with them in relation to the specific project in question.

8 On the same day, 6 December 2007, the Commission wrote to Vakakis informing them that the Vakakis consortium would not be invited to interview ('the 6 December decision').

9 On 11 December 2007 Vakakis wrote to the Commission stating that it believed that its exclusion had been based on Vakakis' inclusion of Mr H in the list of non-key experts whilst it understood that Mr H had also been put forward as a key expert in a competing bid. According to Vakakis, exclusion based on this reason constituted an incorrect application of the instructions to tenderers and an infringement of the PRAG rules.

10 On 18 December 2007, the head of unit A3 in the Commission Directorate-General for Enlargement responded that, under the PRAG rules, the work of the evaluation committee was confidential and, furthermore, stressed that the contracting authority, in line with the instructions to tenderers, 'intends to interview two senior experts of each tenderer except for tenderers whose offer receive[s] an insufficient score in the initial technical evaluation'.

11 By letter of 19 December 2007, the Commission informed Agriconsulting that it had been awarded the contract under the disputed tender procedure, subject to the submission by Agriconsulting of evidence relating to Agriconsulting's financial and economic capacity, as well as its technical and professional capacity, according to the selection criteria specified in the procurement notice. That evidence was subsequently provided by Agriconsulting to the Commission.

12 On 21 December 2007, Vakakis received by fax an undated letter from the Commission informing it that it had not been successful in the tender because the technical offer had been considered not to meet the technical criteria sufficiently closely ('the 21 December decision').

13 On the same day, Vakakis wrote to the Commission stating that it believed that there had been administrative irregularities in the disputed tender procedure and questioning the evaluations it had received. By the same letter, Vakakis appealed against the 21 December decision in accordance with Article 16 of the instructions to tenderers. Under the PRAG rules, the Commission has 90 days from the date of receipt of the application to complete the administrative appeal.

14 By application lodged with the Registry of the Court of First Instance on 1 February 2008, registered under number T-41/08, Vakakis brought an action for annulment under Article 230 EC in which it seeks annulment of the 6 December decision and the 21 December decision. By the same application, Vakakis seeks to obtain from the Court of First Instance an order that the Commission provide certain documents relating to the activities of the evaluation committee and to the establishment of the short-list of tenderers.

15 By separate document lodged with the Registry of the Court of First Instance on the same day, registered under number T-41/08 R, Vakakis also made an application for adoption of interim measures and the suspension of the operation of the 6 December decision and of the 21 December decision under Articles 242 EC and 243 EC.

16 By e-mail of 8 February 2008, the Commission informed Agriconsulting that one of the unsuccessful

tenderers had contested the disputed tender procedure before the Court of First Instance. In the same e-mail, the Commission also informed Agriconsulting of its intention not to sign the contract before the decision of this Court on the application for interim measures.

17 By a document lodged at the Registry of the Court of First Instance on 18 February 2008, the Commission submitted its written observations on the application for interim measures.

18 By a document lodged at the Registry of the Court of First Instance on 18 February 2008, Agriconsulting applied for leave to intervene in support of the form of order sought by the Commission.

Forms of order sought

19 The applicant requests the President of the Court of First Instance:

– to declare this application admissible;

– to suspend the 6 December decision;

– to suspend the 21 December decision;

– to propose, to the extent that it lies within the power of the Court so to do, the resumption of the technical evaluation of the tenders submitted in the context of the disputed tender procedure;

– in the event that a contract should be awarded before the application for interim measures has been heard, to suspend the performance of any contract arising from the disputed tender procedure, until such time as the main application before this Court has been decided upon;

– pursuant to Article 65(b) of the Rules of Procedure of the Court of First Instance, to request the Commission to provide certain documents in relation to the activities of the evaluation committee established to review the tenders submitted in the context of the disputed tender procedure as well as the establishment of the short-list of tenderers;

– to adopt all other necessary measures to eliminate the effects of the disputed conduct of the Commission and to take adequate steps to restore the applicant to its original position, or to make any additional order which the President considers necessary.

20 The relief sought by the applicant, although clearly referred to in the appropriate section of its application in the terms set out above, is in fact stated elsewhere in the application to comprise 'the suspension of the continuation of procurement procedure EuropeAid/125241/C/SER/CY, or the suspension of any contract deriving from that procedure'.

21 The Commission contends that the President of the Court of First Instance should:

– dismiss the application for interim measures;

– order the applicant to pay the costs incurred by the Commission.

Law

22 Under Articles 242 EC and 243 EC, in conjunction with Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that application of the act contested before it be suspended or prescribe any necessary interim measures.

23 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim relief must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the relief applied for. Those conditions are cumulative, so that an application for such relief must be dismissed if one of them is not fulfilled (order of the President of

the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30, and order of the President of the Court of First Instance in Case T-350/00 R *Free Trade Foods* v *Commission* [2001] ECR II-493, paragraph 32). The Court hearing the application must also, where appropriate, weigh up the competing interests (order of the President of the Court of Justice in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

24 In addition, in the context of that overall examination, the judge hearing the application has a wide discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order of the President of the Court of Justice in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I–2165, paragraph 23, and order of the President of the Court of Justice of 3 April 2007 in Case C-459/06 P (R) *Vischim* v *Commission*, not published in the ECR, paragraph 25).

25 Furthermore, in the context of that overall examination, the court dealing with the application must exercise the broad discretion enjoyed by it to determine the manner in which those various conditions are to be examined in the light of the specific circumstances of each case (order of the President of the Court of Justice in Case C-393/96 P(R) *Antonissen* v *Commission and Council* [1997] ECR I-441, paragraph 28).

26 The relief sought must additionally be provisional inasmuch as it must not prejudge the points of law or fact in issue or invalidate in advance the effects of the decision subsequently to be given in the main action (order in *Commission* v *Atlantic Container Line and Others*, paragraph 22).

27 In the present case it is necessary to consider, first of all, to what extent the application for interim relief is admissible.

The admissibility of the application for interim relief

Locus standi

– Arguments of the parties

28 In its observations on the application for interim measures, the Commission submits that the entire application is inadmissible since the contested decisions are not addressed to the applicant and are not of direct and individual concern to it. According to the Commission, it is clear from the tender submitted by Vakakis on 27 November 2007 that the bid was made not on behalf of Vakakis International S.A. but rather on behalf of the consortium composed of seven companies listed therein of which the applicant was merely a member. The Commission further argues that the reason why correspondence with the consortium was conducted through Vakakis was that Vakakis had been indicated in section 2 of the Service Tender Submission Form as being the contact person for the consortium. According to the Commission, it follows that, notwithstanding the fact that the decisions in question were sent to Vakakis International S.A., such decisions were in fact addressed to the consortium as a whole and not merely to the applicant.

29 The Commission further contends that when an offer is made on behalf of a consortium, the bid can be seen only as an indivisible whole. Hence, only the consortium as such or an individual member duly authorised to represent the consortium has an interest in challenging the decision rejecting its tender.

30 Finally, according to the Commission, in this case the application is brought by the applicant on its own behalf, the other members of the consortium are not party to the action, nor is there any indication that the other members of the consortium have authorised the applicant to act on their behalf.

31 As stated in the covering letter accompanying the technical offer submitted to the Commission by Vakakis on 27 November 2007, that offer was submitted by Vakakis on behalf of a consortium comprising a number of undertakings, and in the letter Vakakis was indicated as ‘leader’ of the consortium. The cover page of the Technical Offer document indicates that the offer is presented by ‘Vakakis International S.A. in association with’ a number of partners.

32 The applicant claims, on the other hand, that the 21 December decision is addressed directly to

Vakakis and, therefore, that it has standing under the terms of the fourth paragraph of Article 230 EC. As far as the 6 December decision is concerned, this decision is addressed to Vakakis as leader of the consortium. Accordingly, in the applicant's view, Vakakis must be considered to have standing either as the direct addressee of the decision or as a member of a closed class of seven known members of the consortium and to be directly affected by the decision to exclude it or the consortium.

– Findings of the President of the Court of First Instance

33 By virtue of the first subparagraph of Article 104(1) of the Rules of Procedure, an application to suspend the operation of any measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. This rule requires that the main action from which the application for interim measures is derived may be effectively examined by the Court of First Instance.

34 According to settled case-law the issue of the admissibility of the main application should not, in principle, be examined in proceedings relating to an application for interim measures. Where, however, as in this case, it is contended that the main application from which the application for interim measures is derived is manifestly inadmissible, it may prove necessary to establish the existence of certain factors which would justify the prima facie conclusion that the main application is admissible (orders of the President of the Court of Justice in Case 221/86 R *Groupe des droites européennes and Front national* v *Parliament* [1986] ECR 2969, paragraph 19, and in Case 376/87 R *Distrivet* v *Council* [1988] ECR 209, paragraph 21; order of the President of the Court of First Instance in Case T-222/99 R *Martinez and de Gaulle* v *Parliament* [1999] ECR II-3397, paragraph 60).

35 In this case, the President of the Court considers that, based on the observations of the Commission, it is necessary to ascertain whether the application for annulment is likewise manifestly inadmissible.

36 The fourth paragraph of Article 230 EC provides that any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

37 The applicant is seeking annulment of decisions which are either directly addressed to it, or are addressed to it in its role as member and representative of a consortium, whose membership is identifiable in a closed class of seven undertakings.

38 Without prejudice to whether each of the two decisions in question constitutes a challengeable act for the purposes of Article 230 EC, therefore, such decisions, which, together, have the effect of excluding Vakakis and the other six members of the consortium from the disputed tender procedure, are prima facie liable to be of direct and individual concern to Vakakis.

39 Accordingly, the President finds that, as far as the locus standi of the applicant is concerned, prima facie the application for annulment is not manifestly inadmissible and that Vakakis must accordingly be allowed to bring the present proceedings for interim measures before this Court.

Compliance with the formal conditions concerning the documents lodged by the parties

40 It should be noted that the applicant in its application makes references in a general manner to its pleadings in the main proceedings.

41 Since failure to comply with the Rules of Procedure constitutes an absolute bar to proceedings, it is necessary for the President to consider of his own motion whether the relevant provisions of those Rules have been complied with.

42 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the pleas of fact and law establishing a prima facie case for the interim measures applied for.

43 Article 104(3) of the Rules of Procedure states that the application for interim relief is to be made by a separate document and in accordance with the provisions of Articles 43 and 44 of those Rules.

44 It follows, on reading those provisions of Article 104 of the Rules of Procedure together, that an

application for interim relief must be sufficient in itself to enable the defendant to prepare its observations and the judge hearing the application to rule on it, where necessary, without other supporting information. In order to ensure legal certainty and the proper administration of justice, it is necessary, if such an application is to be admissible, that the essential elements of fact and law on which it is founded be set out in a coherent and comprehensible fashion in the application for interim relief itself. While the application may be supported and supplemented on specific points by references to particular passages in documents which are annexed to it, a general reference to other written documentation, even if it is annexed to the application for interim relief, cannot make up for the absence of essential elements in that application (see, for example, order of the President of the Court of First Instance in Case T-306/01 R *Aden and Others* v *Council and Commission* [2002] ECR II-2387, paragraph 52).

45 As the President of the Court ruled in the order in Case T-236/00 R *Stauner and Others* v *Parliament and Commission* [2001] ECR II-15, where some of the grounds contained in the application for interim relief and in the observations submitted in response are not set out in a manner consistent with the requirements of the abovementioned provisions of the Rules of Procedure, those grounds cannot be taken into consideration in order to establish the points of fact and law to which they relate.

46 In the present case, therefore, a decision will be made taking account solely of the arguments put forward by the parties in the pleadings which they have lodged in the proceedings for interim relief, as supported and supplemented on specific points by references to particular, identified, passages in documents which are annexed to them.

The substance of the application for interim relief

Urgency

– Arguments of the parties

47 The applicant takes the view that the condition relating to urgency is satisfied in this case.

48 The applicant submits, first, that if the interim measures applied for are not granted, it is highly probable that the effect of the tender timetable will be that the project which formed the subject-matter of the tender. will have already been performed when this Court's judgment is delivered in the main proceedings. The award of the contract and the completion of the project would render impossible a subsequent re-tender that would repeat the same competitive conditions as those of the contested procedure and, according to Vakakis, without the interim measures applied for, it would permanently lose the possibility to undertake the work covered by the disputed tender procedure. In addition, the applicant submits that even if this were not the case, once work begins on the contract, relations are developed and commitments made with third parties which are very difficult to unwind. This, according to the applicant, would result in Vakakis being deprived of its recognised right to full and effective legal protection.

49 Secondly, regarding the pecuniary damage it is likely to suffer, Vakakis submits that it is next to impossible to quantify the loss of the opportunity to participate in the disputed tender procedure and the negative consequences such a loss of opportunity may give rise to. It follows that there is no form of monetary compensation that can make up for the absence of a possibility to tender for the contract, and, therefore, the harm it is likely to suffer is irreparable. The granting of interim measures in the present case is the only possible remedy that will guarantee that the judgment in the main action has a useful effect.

50 Thirdly, the applicant claims that the alleged unlawful conduct of the Commission, which led to the exclusion of Vakakis from the disputed tender procedure, will prevent it from being able to meet future tender criteria, and, therefore, from being able to participate in future tenders.

51 The Commission, on the other hand, submits that the applicant's assertions in this respect are very general, and that the applicant has not even begun to discharge the burden of showing that any damage that it may suffer in the absence of interim measures would be serious and irreparable within the meaning of the case-law of the Community Courts.

– Assessment of the President of the Court

52 According to settled case-law, the urgency of an application for interim relief must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the relief. It is for that party to prove that it cannot await the outcome of the main proceedings without suffering damage of that kind (see order of the President of the Court of First Instance in Case T-151/01 R *Duales System Deutschland* v *Commission* [2001] ECR II-3295, paragraph 187 and the case-law cited).

53 Where damage depends on the occurrence of a number of factors, it is enough for that damage to be foreseeable with a sufficient degree of probability (order of the President of the Court of First Instance in Case T-369/03 R *Arizona Chemical and Others* v *Commission* [2004] ECR II-205, paragraph 71; see also, to that effect, the orders of the Court of Justice in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, paragraphs 32 to 34, and of the President of the Court of Justice in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67). However, the applicant is still required to prove the facts which are deemed to show the probability of serious and irreparable damage (*Arizona Chemical and Others* v *Commission*, paragraph 72; see also, to that effect, *HFB and Others* v *Commission*, paragraph 67).

54 In that regard, it must be pointed out that, in order to be able to determine whether the damage which applicants fear is serious and irreparable and therefore provides grounds for ordering interim measures, the judge hearing the application must have hard evidence allowing him to determine the precise consequences which the absence of the measures applied for would in all probability entail for each of the undertakings concerned.

55 In the present case, the applicant submits, in essence, that if the contested decisions were annulled and if interim relief were not granted, the contract in issue in the invitation to tender could not be subject to a subsequent re-tender that would repeat the same competitive conditions as those of the contested procedure, and that this loss of opportunity would cause it to suffer serious and irreparable harm.

56 In this regard, it should be pointed out that if the contested decisions were annulled by the Court, the Commission would be required, under the first paragraph of Article 233 EC, to take the necessary measures to comply with the judgment, without prejudice to any obligations resulting from the application of the second paragraph of Article 288 EC (order of the President of the Court of First Instance in Case T–195/05 R *Deloitte Business Advisory* v *Commission* [2005] ECR II–3485, paragraph 128). Such measures could, in principle, include the launch of a new tender process, or the payment of compensation.

57 The President may not therefore prejudge the measures that the Commission might take to comply with a judgment annulling the contested decisions.

58 None the less, the general principle of the right to full and effective judicial protection means that parties before the Courts must be granted interim protection if this is necessary to ensure the full effectiveness of the subsequent definitive judgment, in order to prevent a lacuna in the legal protection afforded by the Community Courts (see, to that effect, order of the Court in Case 27/68 R *Renckens* v *Commission* [1969] ECR 274, the judgments in Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 21, and Joined Cases C–143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I–415, paragraphs 16 to 18; order of the President of the Court of Justice in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46; and order in *Austria* v *Council*, paragraph 111).

59 It must therefore be considered whether it has been shown with a sufficient degree of probability that the applicant is likely to suffer serious and irreparable damage if the interim relief applied for is not granted (see, to that effect, order of the President of the Court of Justice in Case C-180/01 P(R) *Commission* v *NALOO* [2001] ECR I-5737, paragraph 53).

60 In this context, it must first be determined whether, following a judgment annulling the contested decisions, the Commission could organise a new tendering procedure, which would repair the damage caused to the applicant and, if the answer to that question is in the negative, it must be assessed whether the applicant could be adequately compensated.

61 With regard to the possibility of the Commission organising a new tendering procedure, it must be pointed out that the Commission's provisional timetable for the disputed tender procedure provided that the contract would be signed on 7 January 2008 and that the provision of the contracted

services would commence on 1 February 2008. The period of execution of the contract set out in the tender's provisional timetable is 24 months, with a possibility of extending the programme by a further 24 months.

62 Although the Commission has submitted in its observations that a new tender remains a possibility, it is therefore highly unlikely that, following a judgment in which the contested decisions were annulled, which would probably not be delivered until after the contract, or at least a large part of the contract, had been performed, a new tendering procedure would be organised by the Commission. It is unlikely, therefore, that the damage suffered by the applicant could be repaired by means of a new tender.

63 It must therefore be considered whether, and how, the damage suffered by the applicant could be repaired by means of financial compensation.

64 In this regard, it should be pointed out, the applicant contends that compensation in the form of monetary damages would not make good the loss it is likely to suffer in the absence of the interim measures requested, whereas suspension of the disputed tender procedure until the judgment in the main proceedings had been delivered would preserve the possibility of its performing the contract and consequently prevent it from suffering serious and irreparable harm. In particular, the applicant contends, first, that it is next to impossible to quantify the pecuniary damage which Vakakis is likely to suffer due to the loss of opportunity to participate in the disputed tender procedure, and, therefore, that such damage is irreparable. Secondly, according to Vakakis, the exclusion from the disputed tender procedure would prevent it from being able to meet the short-listing criteria of, and thus to participate in, similar tenders in the future. This would prejudice its position permanently and beyond repair.

65 As regards the first claim raised by the applicant, it should be recalled that the principle that the damage actually suffered must be made good in its entirety is a principle of law upheld by the Community judicature (see Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203, paragraph 227). Accordingly, it must be considered whether the damage which the applicant alleges it is likely to suffer could be made good in its entirety notwithstanding the alleged difficulty in quantifying it.

66 In this context it should be recalled that, in cases where damage is not hypothetical or a mere possibility, and the existence of the alleged damage is, therefore, undisputable, it may be possible to put an economic value on such damage despite the continuing uncertainty regarding its exact quantification (see to that effect Case C-243/05 P *Agraz and Others* v *Commission* [2006] ECR I-10833, paragraph 42). Specifically, in relation to loss of opportunity cases, it results from recent case-law of the Court of Justice that the award of damages by this Court on the basis of the attribution of an economic value to the damage suffered as a result of a loss of opportunity is capable, in principle, of complying with the requirement set out in the case-law that the individual damage actually suffered by the party concerned because of the particular unlawful acts of which it was the victim be fully compensated (see to that effect judgment of 21 February 2008 in Case C-348/06 P *Commission* v *Girardot*, not yet published in the ECR, paragraph 76).

67 It follows from the foregoing that, also in this case, should Vakakis be successful in the main proceedings, an economic value could be attributed to the damage suffered as a result of the loss of opportunity to win the disputed tender procedure, which would be capable of complying with the requirement that the individual damage actually suffered be fully compensated. The likelihood of such economic value accurately reflecting the actual damage suffered by the applicant is, on the other hand, an element which the President will consider, if necessary, when balancing the interests at stake.

68 Accordingly, the claim that the damage suffered by the applicant would be serious and irreparable based solely on the principle that it is not possible to quantify the loss of opportunity to participate in the disputed tender procedure and the negative consequences it may have cannot be entertained.

69 Secondly, however, the applicant contends that, in the absence of the interim measures requested, the damage caused by the alleged illegal conduct of the Commission, which led to the exclusion of Vakakis from the disputed tender procedure, would be serious and irreparable since, according to Vakakis, it would be prevented from being able to meet future tender criteria, and, therefore, from being able to participate in future tenders.

70 In particular, the applicant submits that it has focused heavily on providing services of the type

covered by the disputed tender process to the Commission, has carried out projects in Turkey, Serbia, and Cyprus, and depends on the Community for much of its work. Since the criteria for the short-listing of candidates require that a candidate has specific experience in the type of services being tendered for in a determined period prior to the tender, that the tenderer has a minimum annual turnover, and that the tenderer has a specific number of permanent staff, Vakakis claims that losing the opportunity to compete for the contract tendered for is likely to have the result of excluding it from future tenders and, accordingly, to cause serious and irreparable harm to its business.

71 Although it cannot be excluded that consequences of this kind could in principle be deemed to give rise to serious and irreparable harm, as was pointed out by the Commission in its observations, the applicant's assertions in this respect remain very general, hypothetical and unsubstantiated statements, which do not satisfy the condition of foreseeability of harm to the requisite degree of probability. Indeed, the applicant has failed to provide any concrete evidence to support its claims and to establish to the requisite degree of probability that any damage that it may suffer in the absence of interim measures would be serious and irreparable within the meaning of the case-law of the Community judicature.

72 By way of example, the applicant has not brought any concrete evidence to demonstrate that the short-listing requirements mentioned above apply to all tenders in this sector, and has provided no detail in relation to such requirements. Furthermore, no concrete evidence was provided to support the applicant's statement that, should it fail to win the disputed tender process, it would not be in a position to meet the short-listing requirements mentioned above, by reference, for example, to current and projected turnover and employee headcount. Finally, no evidence was provided to demonstrate to the requisite level of probability that the applicant would not be in a position to provide the type of services in question to third parties or that it could focus on other sectors in which it might be active to amortise any losses it may suffer.

73 In the light of the foregoing, it must be held that the applicant has not established to the requisite degree of probability that without the interim measures sought it will suffer serious and irreparable harm.

Measures of inquiry

74 As part of its application for interim measures, the applicant requests the President to adopt measures of inquiry requiring the Commission to produce certain documents in relation to the activities of the evaluation committee established to review the tenders submitted in respect of the disputed tender process, as well as documents relating to the establishment of the short-list of tenderers.

75 The Commission, on the other hand, contends that the measures of inquiry requested are premature and entirely inappropriate in the context of the request for interim measures.

Findings of the President

76 It should first be noted that under the first subparagraph of Article 105(2) of the Rules of Procedure the President of the Court of First Instance is to decide whether a preparatory inquiry is necessary. Article 65 of the Rules of Procedure provides that measures of inquiry include the production of documents. Article 64 of the Rules of Procedure allows the Court to adopt measures of organisation of procedure, including the production of documents or any papers relating to the case.

77 It should next be noted that the documents at issue relate solely to the requirement that there be a prima facie case.

78 As the application for interim measures falls to be dismissed by reason of lack of urgency, without it being necessary to consider whether the other conditions for the grant of such measures are satisfied, in particular the requirement that there be a prima facie case, the President considers that the documents in question are not relevant to the current application for interim measures and that there is therefore no need to adopt the measures regarding the documents at issue which the applicant has applied for.

Application for leave to intervene

79 As Agriconsulting's application is an application for leave to intervene in support of the form of order sought by the Commission and against the form of order sought by the applicant, and

considering that Vakakis' application is hereby dismissed, it is not necessary, in the interest of procedural efficiency, to rule on the request for leave to intervene.

80 In the circumstances of the present case, Agriconsulting must bear its own costs.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. The application for measures of inquiry or organisation of procedure is dismissed.

3. There is no need for a decision on the application for leave to intervene.

4. Costs are reserved, except that Agriconsulting shall bear the costs incurred by it in connection with the submission of its application for leave to intervene.

Luxembourg, 25 April 2008.

E. Coulon	M. Jaeger
Registrar	President

* Language of the case: English.

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Documents relating to the same case

Order of the President of the Court of First Instance of 25 April 2008 – Vakakis v Commission

(Case T-41/08 R)

Community tendering procedure – Interim proceedings – Loss of an opportunity – Locus standi – Admissibility of the main application – Urgency – Measures of inquiry

1. *Applications for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Prima facie case – Urgency – Cumulative nature – Balancing of all the interests involved (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 23-25)*

2. *Applications for interim measures – Conditions of admissibility – Prima facie admissibility of the main action (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(1)) (see para. 34)*

3. *Applications for interim measures – Conditions of admissibility – Application – Formal requirements (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2) and (3) (see paras 42-44)*

4. *Applications for interim measures – Suspension of operation of a measure – Interim measures – Conditions for granting – Urgency – Serious and irreparable damage (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 52-53, 65-66)*

APPLICATION for an order granting interim measures in the context of the service tender procedure EuropeAid/125241/C/SER/CY for the supply of 'Technical Assistance to Support Rural Development Policy' in the Northern Part of Cyprus.

e part

The Court:

1. Dismisses the application for interim measures;

2. Dismisses the application for measures of inquiry or organisation of procedure;

3. Decides that there is no need for a decision on the application for leave to intervene;

4. Reserves the costs, except that Agriconsulting shall bear the costs incurred by it in connection with the submission of its application for leave to intervene.

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Order of the President of the Court of First Instance of 25 April 2008 - Vakakis v Commission

(Case T-41/08 R)

(Community tendering procedure - Interim proceedings - Loss of an opportunity - Locus standi - Admissibility of the main application - Urgency - Measures of inquiry)

Language of the case: English

Parties

Applicant: Vakakis International - Symvouli gia Agrotiki Anaptixi AE (Athens, Greece) (represented by: B. O'Connor, Solicitor)

Defendant: Commission of the European Communities (represented by: M. Wilderspin and G. Boudot, Agents)

Re:

Application for an order granting interim measures in the context of the service tender procedure EuropeAid/125241/C/SER/CY for the supply of 'Technical Assistance to Support Rural Development Policy' in the Northern Part of Cyprus.

Operative part of the order

1. The application for interim measures is dismissed.

2. The application for measures of inquiry or organisation of procedure is dismissed.

3. There is no need for a decision on the application for leave to intervene.

4. Costs are reserved, except that Agriconsulting shall bear the costs incurred by it in connection with the submission of its application for leave to intervene.

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Action brought on 1 February 2008 - Vakakis v Commission

(Case T-41/08)

Language of the case: English

Parties

Applicant: Vakakis International - Symvouli gia Agrotiki Anaptixi AE (Athens, Greece) (represented by: B. O'Connor, Solicitor)

Defendant: Commission of the European Communities

Form of order sought

To declare this application admissible;

to annul the unreasoned decision of the European Commission of 6 December 2007 (Reference No A3 TF TCC(2007)106233) not to invite the consortium led by Vakakis International SA to be interviewed in respect of the service tender procedure "Technical Assistance to Support Rural Development Policy" number EuropeAid/125241/C/SER/CY;

to annul the decision of the European Commission of 21 December 2007 (Reference No A3 TF TCC(2007) 106667) to reject the tender submitted by Vakakis International SA on the basis that it did not meet the technical requirements;

pursuant to Article 65(b) of the Rules of Procedure of the Court of First Instance, to request the Commission to provide certain documents in relation to the activities of the evaluation committee established to review the tenders submitted in respect of the EuropeAid/125241/C/SER/CY tender procedure as well as the establishment of the short list of tenderers;

to make any additional order which the Court considers necessary;

to order the Commission to pay the costs.

Pleas in law and main arguments

The applicant claims that the Commission's letter of 6 December 2007 informing the applicant it would not be invited to interview constitutes a decision which lacks sufficient reasoning in breach of Article 253 EC. Moreover, the applicant submits that this stage is an essential element of the tender procedure to which all tenderers, even those failing to meet the technical standard required, should be invited in order to maintain a competitive environment. Furthermore, the applicant argues that the said decision is legally flawed since it is based on non-compliance with the administrative criteria instead of non-compliance to the technical standard required. This amounts, according to the applicant, to a misuse of powers conferred to the Commission in the framework of the tenders' evaluation procedure.

In addition, and with regards to both the above-mentioned decision and the decision of 21 December 2007, the applicant submits that they are incompatible with the terms of the Practical Guide to Contract Procedures for EC External actions. Finally, the applicant claims that the Commission decision of 21 December 2007 purported to justify an unreasoned earlier decision excluding the applicant from the tender and therefore is legally flawed.

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Action brought on 22 January 2008 - Evropaïki Dynamiki v Commission

(Case T-39/08)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Annul the decision of the Commission to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 441 564.50;

order the Commission to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected;

order the Commission to pay the applicant's legal and other costs and expenses incurred in connection with this application.

Pleas in law and main arguments

The applicant submitted a bid in response to the defendant's call for an open tender concerning hosting, management, enhancement, promotion and maintenance of the Commission's Internet portal on eLearning (elearningeuropa.info) (OJ 2007/S 87-105977). The applicant contests the defendant's decision of 12 November 2007 rejecting the applicant's bid and informing the applicant that the contract would be awarded to another tenderer. The applicant further requests compensation for the alleged damages caused by the tender procedure.

In support of its application, the applicant submits that the defendant committed manifest errors of assessment and failed to state reasons in accordance with Article 253 EC. Furthermore, the applicant alleges that the defendant confused evaluation criteria with award criteria when evaluating the bids and used evaluation criteria that were not disclosed to the tenderers before the deadline for submitting the offers. Finally, the applicant contends that the defendant violated the principle of non-discrimination.

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Action brought on 18 January 2008 - Evropaïki Dynamiki v Commission

(Case T-32/08)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Annul the decision of the Commission to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 65 565;

order the Commission to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In support of its claims the applicant argues that, in the framework of the tendering procedure ENV.A.1/SER/2007/0032 for the "Market analysis in view of developing a new approach for the 'Environment for Young Europeans' website" (OJ 2007/S 83-100898) the European Commission failed to comply with its obligations foreseen in the Financial Regulation[1], its Implementing Rules and Directive 2004/18/EC[2].

The applicant moreover submits that the contracting authority committed several manifest errors of assessment which resulted in the rejection of its bid. Furthermore, the contracting authority allegedly infringed its obligation to state reasons for its decision and, in particular, to inform the applicant on the relative merits of the successful tenderer.

The applicant requests, hence, that the decision of the European Commission to reject its bid and to award the contract to the successful tenderer be annulled and that the defendant is ordered to pay all legal expenses related to the proceedings even in case the application is rejected. In the alternative, since the contract will most probably have been fully executed by the time the Court reaches its decision or if it is no longer possible to annul the decision, the applicant requests monetary compensation (damages) in accordance with Articles 235 and 288 EC.

_____

[1] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, p. 1)

[2] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, p. 114)

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JUDGMENT OF THE COURT (Third Chamber)

10 September 2009 (*)

(Public procurement – Award procedures – Contract relating to a service for the collection, transport and disposal of urban waste – Awarded without any call for tenders – Awarded to a company limited by shares whose capital is wholly owned by public bodies but under whose statutes a private capital holding is possible)

In Case C–573/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 11 October 2007, received at the Court on 28 December 2007, in the proceedings

Sea Srl

v

Comune di Ponte Nossa,

third party:

Servizi Tecnologici Comuni – Se.T.Co. SpA,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues (Rapporteur), J. Klučka and A. Arabadjiev, Judges,

Advocate General: J. Mazák,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 April 2009,

after considering the observations submitted on behalf of:

– Sea Srl, by L. Nola, avvocatessa,

– the Comune di Ponte Nossa, by A. Di Lascio and S. Monzani, avvocati,

– Servizi Tecnologici Comuni – Se.T.Co. SpA, by M. Mazzarelli and S. Sonzogni, avvocati,

– the Italian Government, by R. Adam and subsequently by I. Bruni, acting as Agents, assisted by G. Fiengo, avvocato dello Stato,

– the Czech Government, by M. Smolek, acting as Agent,

– the Netherlands Government, by C. Wissels and C. ten Dam, acting as Agents,

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

– the Polish Government, by A. Ratajczak, acting as Agent,

– the Commission of the European Communities, by M. Konstantinidis and C. Zadra, acting as Agents,

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

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 43 EC, 45 EC, 46 EC, 49 EC and 86 EC.

2 This reference was made in the course of proceedings between Sea Srl ('Sea') and the Comune di Ponte Nossa concerning the award by the latter of a contract for the service of collecting, transporting and disposing of urban waste to Servizi Tecnologici Comuni – Se.T.Co. SpA ('Setco').

Legal context

The relevant provisions of Community law

3 Article 1 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ('the Directive') provides:

'...

2(a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

...

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

4. "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.'

4 Article 20 of the Directive states:

'Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.'

5 Article 28 of the Directive provides that contracts are, without exception, to be awarded by applying the open procedure or the restricted procedure.

6 In accordance with Article 80 of the Directive, the Member States were to bring into force by 31 January 2006 at the latest the provisions necessary to comply with the Directive.

7 Annex II A to the Directive contains a Category 16, concerning 'Sewage and refuse disposal services; sanitation and similar services'.

The relevant provisions of national law and the framework of the company's statutes

8 Article 2341 of the Italian Civil Code provides:

'Whatever form they take, pacts that with a view to rendering the company's situation or management more stable:

(a) have as their purpose to exercise voting rights in companies limited by shares or in their parent companies;

(b) limit the transfer of shares or holdings in parent companies;

(c) have the purpose or effect of exercising, even jointly, a controlling influence over those companies, may not have a duration of more than five years and shall be deemed to be stipulated for that term, even if the parties had agreed on a longer period; pacts shall on their expiry be renewable.

If the duration of the pact is not fixed, every contracting party shall have the right to withdraw from the pact on 180 days' notice.

The provisions of this article shall not apply to measures consisting in agreements to cooperate in the production or exchange of goods or services concerning companies 100% owned by the parties to the agreement.'

9 Article 2355 *bis* of the Civil Code provides:

'If shares are registered or unissued, the company's statutes may make their transfer subject to special conditions and may prohibit it, for a period no longer than five years from the formation of the company or from the introduction of that prohibition.

Provisions of company statutes that purely and simply make the transfer of shares subject to the assent of the company's responsible bodies or to that of other companies shall be null and void unless they provide for an obligation, imposed on the company or the other members, to buy them back, or unless they confer on the transferor a right to withdraw; the provisions of Article 2357 shall continue to apply. The sale price or the dividend on winding-up shall be fixed in accordance with the procedures laid down in and to the extent provided for by Article 2437 ter.

The provisions of the previous subparagraph shall apply in every case in which clauses make subject to special conditions transfers of shares because of death, except when the assent provided for has been granted.

Restrictions on the transfer of shares must be apparent from the document itself.'

10 Article 113(5) of Legislative Decree No 267 laying down the consolidated text of the laws on the organisation of local bodies (testo unico delle leggi sull'ordinamento degli enti locali) of 18 August 2000 (Ordinary Supplement to GURI No 227 of 28 September 2000), as amended by Decree-Law No 269 laying down urgent measures to promote development and correct the state of public finances (disposizioni urgenti per favorire lo sviluppo e per la correzione dell'andamento dei conti pubblici) of 30 September 2003 (Ordinary Supplement to GURI No 229 of 2 October 2003) converted into law, after amendment, by Law No 326 of 24 November 2003 (Ordinary Supplement to GURI No 274 of 25 November 2003) ('Legislative Decree No 267/2000'), provides:

'The service contract is to be awarded in accordance with the rules of the sector and in compliance with the legislation of the European Union, entitlement to provide the service being granted to:

(a) companies with share capital selected by means of public and open tendering procedures;

(b) companies with share capital with mixed public and private ownership in which the private partner has been selected by means of public and open tendering procedures that have ensured compliance with domestic and Community legislation on competition in accordance with the guidelines issued by the competent authorities in specific measures or circulars;

(c) companies with share capital belonging entirely to the public sector on condition that the public authority or authorities holding the share capital exercise over the company control similar to that exercised over their own departments and that the company carry out the essential part of its activities with the controlling public authority or authorities.'

11 Article 1(3) of Setco's statutes is worded as follows:

‘Having regard to the nature of the company, local public authorities as identified in Article 2(1) of Legislative Decree No 267/2000 may be members, as may other public authorities and undertakings possessing legal personality whose activities and experience may provide opportunities for the full attainment of the company’s objects.’

12 Article 1(4) of those statutes states:

‘Participation by private individuals or other bodies is not permitted or, in any event, participation by persons whose holding, even though qualitatively or quantitatively a minority holding, is capable of giving rise to a change in the mechanisms of “similar control” (as defined in the provisions set out below and by Community and domestic law) or to any incompatibility of management with the legislation in force.’

13 Article 3 of Setco’s statutes provides:

‘1. It is the object of this company to manage local public services and intermunicipal local public services concerning only local public authorities awarding those services pursuant to Article 113 et seq. of Legislative Decree No 267/2000 …, and also by way of contract between local authorities.

…

3. The services and works mentioned above:

– may also be performed for private individuals, when that is not contrary to the company’s objects or contributes to their better attainment;

… ’

14 Article 6(4) of those statutes provides:

‘The company may, in order to encourage the widest ownership of shares at local level (by citizens and/or economic operators) or [ownership of shares] by employees, also issue preferential shares …’

15 Article 8 *bis* of those statutes states:

‘1. Contracts for the provision of local public services may be awarded directly, in compliance with the national and Community legislation in force, by members representing local bodies (contracting members) in respect of any or all of the sectors referred to in Article 3 corresponding to the following divisions: Division No 1: Waste; Division No 2: Water; Division No 3: Gas; Division No 4: Tourism; Division No 5: Energy; Division No 6: Public Utility Services.

2. The company shall manage the services for contracting members exclusively and, in any event, within the areas for which those authorities are responsible.

3. The members shall jointly and/or severally exercise the most extensive powers of direction, coordination and supervision over the company’s bodies and organs and, in particular: they may convene the company’s bodies in order to clarify the way in which the local public services are operated; they shall call periodically, and in any event at least twice a year, for reports on service management and on economic and financial progress; they shall exercise forms of management control by means of procedures laid down in the internal regulations of the contracting authorities; they shall give their prior consent, which shall be a prerequisite, for any amendment to the statutes affecting the management of local public services.

4. The departments shall apply the mechanisms of similar control, exercised jointly or separately, in accordance with the rules laid down herein and in the relevant service contracts.

5. The contracting members shall exercise their powers in relation to the divisions to which they have decided to award service contracts directly. In order that those services may be managed effectively, the company bodies and employees shall also be answerable for the activities carried out to the organs identified herein.

6. Control shall be effected by the contracting members not only by means of the shareholders’ privileges as laid down in company law but also by means of: a Joint Supervisory and Guidance Committee for Administrative Policy (“Joint Committee”); a Technical Control Committee (“Technical

Committee") for each division.

7. Non-contracting members may participate, without any voting rights, at the meetings of the Joint Committee and of the Technical Committee for each division. The members of those committees, acting by absolute majority, may decide to exclude non-contracting members from individual meetings or parts of meetings and shall give reasons for so doing in the reports for each meeting.'

16 Article 8 *ter* of Setco's statutes is worded as follows:

'1. The Joint Committee … shall be composed of: a representative for each contracting member, to be chosen from among the authority's legal representative, the delegated executive councillor or a director provisionally acting as such; an official whose task is to provide support and take minutes, who does not have any voting rights, to be appointed jointly by the contracting members at the first meeting and to be chosen from among the secretaries, general managers or managers (or persons responsible for services in bodies that do not have staff with managerial authority) employed by at least one of the contracting bodies.

2. The Joint Committee shall have advisory, supervisory and decision-making powers for the purposes of exercising similar control and, in particular: (a) in relation to the bodies and organs of the company, it shall exercise the powers and prerogatives exercised by the Council, the Executive and the Mayor/Chairman as regards the control of their offices and departments. Control shall be exercised over all aspects of the organisation and performance of the services in respect of which a contract is awarded; (b) it shall lay down guidelines for the divisional sub-committees for the coordinated and unified management of services, including in areas and covering aspects involving more than one division; (c) it shall appoint the representatives of local bodies to the company's board of directors; (d) it shall appoint the chairman of the board of directors and of the board of auditors and shall make provision for their removal from post in the cases set out in these statutes; (e) it shall lay down guidelines for the appointment of the company's directors and general manager; (f) it shall adopt the proposal for a multi-stage programme plan, the multi-annual financial budget, the annual financial budget and the annual activity report; (g) it shall hear the company's top-level management, interviewing at least once a year the chairman and/or the general manger; (h) it shall receive periodically, and at least every six months, reports on the performance of local public services from the company's top-level management; (i) it may delegate some of its powers to one or more Technical Committees, which may vary according to the specific nature of the powers in question; (j) it shall give its prior opinion on the measures taken by directors which are subject to approval at shareholders' meetings in the cases set out in these statutes.

3. The Joint Committee shall meet ordinarily at least once a year and, in exceptional cases, at the request of: (a) one of the contracting members; (b) the company's legal representative.'

17 Article 8 *quater* of those statutes provides:

'1. A Technical … Committee shall be established for each of the following divisions: Division No 1: Waste; Division No 2: Water; Division No 3: Gas; Division No 4: Tourism; Division No 5: Energy; Division No 6: Public Utility Services.

2. The Technical Committee shall be composed of: a representative of each contracting member, to be chosen from among the secretaries, general managers or managers (or persons responsible for services in bodies that do not have staff with managerial authority) employed by at least one of the contracting bodies …

3. The same person may be a member of the Technical Committee of more than one division.

4. The Technical Committee shall, in particular: (a) in relation to the bodies and organs of the company, exercise the powers and prerogatives which are exercised by the technical bodies of the administration over its own departments. Control shall be effected over all aspects of the organisation and performance of the services in respect of which a contract is awarded and shall be limited to the division's areas of competence and shall comply with the Joint Committee's guidelines; (b) support the Joint Committee in decisions relating to the organisation and performance of the services for which the division is responsible; (c) exercise the powers delegated by the Joint Committee; (d) coordinate the company's management control systems; (e) put forward proposals to the Joint Committee or to the bodies of the company for the adoption of measures required to enable the company's activities to be consistent with the objectives of the

contracting authority as set out in the management implementation strategy and the objectives strategy; (f) provide technical and administrative support for the company's activities in accordance with the procedures laid down in the regulations of the contracting authority and/or the agreement governing relations between the company and that authority; (g) report any problems in the management of services and put forward the corrective measures to be taken with regard to municipal regulations and legislative measures governing local public services.'

18 Article 14 of those statutes provides that:

'1. Without prejudice to the prerogatives of the bodies exercising similar, joint and several supervision mentioned in Articles 8 *bis*, 8 *ter* and 8 *quater* above, the ordinary meeting shall decide on all the matters provided for by law and by these statutes, having regard to the directives, guidelines and any instructions given by those bodies in relation to the organisation and management of the public services directly entrusted to the company.

...

3. The following measures taken by directors shall be subject to prior authorisation by the ordinary meeting, on the favourable opinion of the Joint Committee referred to in Article 8 *ter* above with regard to the parts forming part of the organisation and of the operation of local public services:

(a) programme planning, multi-annual and annual balance-sheet estimates and provisional balance-sheet for correction of balance-sheet estimates;

(b) formation of companies whose object is activities supporting or complementary to those of the company; purchase of holdings, even minority holdings, in such companies, and withdrawal from them;

(c) activation of new services provided for by the statutes or termination of those previously carried on;

(d) purchase and transfer of real property and installations, mortgage loans and other such transactions, of whatever kind and nature, involving a financial commitment of more than 20% of the net assets in the last approved balance-sheet;

(e) guidelines for formulating rates and prices for the services provided, when they are not subject to statutory restrictions or are not fixed by the competent bodies or authorities.

...

5. The meeting and the joint committee may give their assent to the performance of the acts referred to in the previous paragraphs, even subject to the condition that certain instructions, obligations or acts must be carried out by the directors. In that case, the administrators shall draw up a report on compliance with those instructions within the period prescribed in the authorising act or, failing that, within 30 days running from the performance of the act in question.

6. Shareholding local authorities representing at least a 20th of the share capital, and every contracting shareholder, through the joint committee, may demand, if they consider that the company has not performed or is not in the process of performing the act in accordance with the authorisation given, the immediate calling of a meeting, pursuant to Article 2367(1) of the Civil Code, in order that the meeting may adopt the measures it considers expedient in the company's interest.

7. Carrying out acts subject to prior consent if the assent of the meeting or of the joint committee in the cases provided by the statutes has not been sought and obtained or failure to carry out the act in accordance with the authorisation given may constitute good cause for the dismissal of the directors.

8. If the board of directors does not intend to perform the act authorised by the meeting, it shall within 15 days of the meeting's decision adopt a reasoned ad hoc decision which must forthwith be sent to the shareholding local authorities and, as regards matters relating to the management of local public services, to the joint committee. The joint committee, so far as decisions relating to the organisation or management of local public services are concerned, may within 30 days of receipt of the communication from the board of directors adopt a decision confirming its opinion and/or its

instructions. The act adopted shall be binding on the board of directors.

...'

19 Article 16 of those statutes states:

'1. The company shall be directed by a board of directors with powers of ordinary and extraordinary administration, without prejudice to the powers which, by virtue of law or of these statutes:

(a) are reserved to the meeting,

(b) are conditional upon prior authorisation by the ordinary meeting,

(c) are reserved to the bodies exercising similar supervision mentioned in Article 8 *bis* et seq. of these statutes.

2. The board of directors shall consist of 3 (three) to 7 (seven) members, appointed by the meeting on the designation of the joint committee mentioned in Article 8 *ter*. In any case, it shall be for the contracting shareholders to appoint directly, to dismiss and replace a number of directors (including the chair of the board of directors) in proportion to the size of their holding and, in any event, more than half of them.

...

6. The board of directors shall adopt decisions relating to the organisation and management of local public services that are the subject of a direct award, in compliance with the guidelines adopted by the supervisory bodies mentioned in Article 8 bis et seq. in these statutes.

...'

The dispute in the main proceedings and the question referred for a preliminary ruling

20 Sea, which was after a tendering procedure awarded the contract for the service of collecting, transporting and disposing of solid urban and similar waste in the territory of the Comune di Ponte Nossa, provided that service for a period of three years, from 1 January 2004 to 31 December 2006.

21 Setco is a company limited by shares, owned by a number of municipalities in the Val Seriana, the majority shareholder being the Comune di Clusone.

22 By decision of 16 December 2006, the Comune di Ponte Nossa decided to become a minority shareholder in Setco with a view to the direct award to that company of the service in question from 1 January 2007.

23 On 23 December 2006 the municipalities holding shares in Setco, including the Comune di Ponte Nossa, adapted Setco's statutes so as to place that company under control similar to that exercised over their own departments, in accordance with Article 113(5)(c) of Legislative Decree No 267/2000.

24 By decision of 30 December 2006, the Comune di Ponte Nossa awarded the contract for the service of collecting, transporting and disposing of solid urban and similar waste in its territory to Setco directly, from 1 January 2007, without any previous tendering procedure.

25 On 2 January 2007 Sea brought an action before the Tribunale amministrativo regionale per la Lombardia (regional administrative court for the region of Lombardy) challenging the decisions of the Comune di Ponte Nossa of 16 and 30 December 2006.

26 Sea claimed, inter alia, that by awarding the service in question directly to Setco, the Comune di Ponte Nossa had infringed Article 113(5) of Legislative Decree No 267/2000 and Articles 43 EC, 49 EC and 86 EC, in so far as it does not exercise over Setco any control similar to that which it exercises over its own departments, as is required for the direct award of a service to an undertaking owned by the contracting authority.

27 The court making the reference considers that certain factors might give rise to doubts whether the Comune di Ponte Nossa exercises over Setco control similar to that which it exercises over its own departments.

28 First, it is possible that private persons might come to hold shares in Setco's capital, even though at present none does. The national court states in this respect that, despite the express exclusion in Article 1(4) of the statutes of any private holders of Setco's capital, such a holding does appear to be possible by virtue of Article 6(4) of the statutes and of Article 2355 *bis* of the Italian Civil Code.

29 Secondly, as regards the powers of control actually devolved on the Comune di Ponte Nossa in relation to Setco, the national court wonders whether control similar to that which that authority exercises over its own departments can exist when it has only a minority holding in that company.

30 In those circumstances, the Tribunale amministrativo regionale per la Lombardia has decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the direct award of a contract for the service of collecting, transporting and disposing of solid urban and similar waste to a wholly publicly owned company limited by shares, whose statutes have been amended as set out in the grounds of the decision, in order to comply with Article 113 of Legislative Decree No 267 of 18 August 2000, compatible with Community law and, in particular, with freedom of establishment or freedom to provide services, the prohibition of discrimination and the obligations relating to equal treatment, transparency and free competition, as referred to in Articles 12 EC, 43 EC, 45 EC, 46 EC, 49 EC and 86 EC?'

Concerning the question referred for a preliminary ruling

31 The first point to be noted is that the award of a service for collecting, transporting and disposing of urban waste, such as that at issue in the main proceedings, may, depending on the particular nature of the consideration for that service, fall within the definition of public service contracts or within that of a public service concession for the purpose of Article 1(2)(d) or Article 1(4) of Directive 2004/18.

32 So far as may be deduced from what is set out in the decision for reference and in the file sent to the Court of Justice by the court making that reference, the contract at issue in the main proceedings might constitute a public service contract, especially by reason of the fact that the contract concluded between Setco and the Comune di Ponte Nossa for the provision of the services in question provides for the Comune to pay Setco consideration for the services supplied by the latter.

33 It is possible for such a contract to fall within the ambit of Directive 2004/18, as being a service contract for the removal of waste belonging to Category 16 of Annex II A to that directive.

34 The decision for reference does not, however, contain the information needed in order to determine whether this is a public service contract or a public service concession or, in the latter case, whether all the conditions for the application of that directive have been satisfied. In particular, it does not make clear whether the amount of the contract at issue in the main proceedings crosses the threshold for application of that directive.

35 On any view, whether the case in the main proceedings concerns a service concession or a public service contract, and whether or not, in the latter case, such a service contract falls within the ambit of Directive 2004/18, are matters that do not influence the reply to be given by the Court of Justice to the question referred for a preliminary ruling.

36 Indeed, according to the Court's case-law, an invitation to tender is not mandatory when a contract for valuable consideration has been concluded with a body distinct from the local authority that is the contracting authority, in a situation in which that authority exercises control over that body, even if the cocontractor is a body legally distinct from the contracting authority, so long as the local body that is the contracting authority exercises over the legally distinct body in question control similar to that which it exercises over its own departments and so long as that body carries out the essential part of its activities with the controlling local authority or authorities (see, to that effect, Case C–107/98 *Teckal* [1999] ECR I–8121, paragraph 50).

37 That case-law is relevant for the interpretation of both Directive 2004/18 and Articles 12 EC, 43 EC, and 49 EC, and also of the general principles of which the latter are the specific expression (see, to that effect, Case C–26/03 *Stadt Halle and RPL Lochau* [2005] ECR I–1, paragraph 49, and Case C–458/03 *Parking Brixen* [2005] ECR I–8585, paragraph 62).

38 It is to be borne in mind that, despite the fact that certain contracts do not fall within the ambit of the Community public procurement directives, the contracting authorities concluding them are bound to comply with the fundamental rules of the Treaty (see, to that effect, Case C–324/98 *Telaustria and Telefonadress* [2000] ECR I–10745, paragraph 60, and the order of 3 December 2001 in Case C–59/00 *Vestergaard* [2001] ECR I–9505, paragraph 20).

39 So far as the award of public service contracts is concerned, contracting authorities must, in particular, comply with Articles 43 EC and 49 EC, and also observe the principles of equal treatment and non-discrimination on grounds of nationality, and the duty of transparency stemming therefrom as well (see, to that effect, *Parking Brixen*, paragraphs 47 to 49, and Case C–410/04 *ANAV* [2006] ECR I–3303, paragraphs 19 to 21).

40 Application of the rules set out in Articles 12 EC, 43 EC and 49 EC, and also of the general principles of which they are the specific expression, is, however, excluded if the local body which is the contracting authority exercises over the contracting entity control similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority or authorities (see, to that effect, *Teckal*, paragraph 50; *Parking Brixen*, paragraph 62; and Case C–480/06 *Commission* v *Germany* [2009] ECR I–0000, paragraph 34).

41 That the contracting entity is a company in no way excludes the application of the exception permitted by the case-law referred to in the previous paragraph. In *ANAV* the Court of Justice accepted that the case-law was applicable to a company limited by shares.

42 The national court observes that, despite the fact that, pursuant to Article 1(3) and (4) of Setco's statutes, access to Setco's capital is reserved to public entities, Article 6(4) of the statutes provides that Setco may issue preferential shares in order to encourage the widest ownership of shares at local level by citizens and economic operators or the ownership of shares by employees.

43 At the hearing, the Comune di Ponte Nossa stated that Article 6(4) ought to have been abrogated when Setco's statutes were amended on 23 December 2006, but that by mistake it had been retained. Again according to the Comune di Ponte Nossa, Article 6(4) has since been abrogated. It is for the national court to determine the truth of those particulars which might mean that it is excluded that Setco's capital could possibly be open to private investors.

44 The decision for reference raises the question whether a contracting authority can exercise over a company in which it holds shares, and with which it means to conclude a contract, control similar to that which it exercises over its own departments in a situation in which it is possible for private investors to enter the capital of the company concerned, even though that has not in fact happened.

45 In order to answer that question it is to be borne in mind that the fact of the contracting authority's holding, together with other public authorities, all the share capital in a contractor company, tends to indicate, but not conclusively, that that contracting authority exercises over that company control similar to that which it exercises over its own departments (see, to that effect, Case C–340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I–4137, paragraph 37, and Case C–324/07 *Coditel Brabant* [2008] ECR I–0000, paragraph 31).

46 In contrast, the holding, even a minority holding, of a private undertaking in the capital of a company in which the contracting authority in question also has a holding too means that, on any view, it is impossible for that contracting authority to exercise over that company control similar to that which it exercises over its own departments (see, to that effect, *Stadt Halle and RPL Lochau*, paragraph 49, and *Coditel Brabant*, paragraph 30).

47 As a general rule, whether there actually exists a private holding in the capital of the company to which the public contract at issue is awarded must be determined at the time of that award (see, to that effect, *Stadt Halle and RPL Lochau*, paragraphs 15 and 52). It may also be relevant to take

account of the fact that, when a contracting authority awards a contract to a company whose entire capital it holds, the national legislation applicable provides for the compulsory opening of that company, in the short term, to other capital (see, to that effect, *Parking Brixen*, paragraphs 67 and 72).

48 Exceptionally, special circumstances may require events occurring after the date on which the contract in question was awarded to be taken into consideration. Such is the case, in particular, when shares in the contracting company, previously wholly owned by the contracting authority, are transferred to a private undertaking shortly after the contract at issue has been awarded to that company by means of an artificial device designed to circumvent the relevant Community rules (see, to that effect, Case C–29/04 *Commission* v *Austria* [2005] ECR I–9705, paragraphs 38 to 41).

49 It is not, admittedly, inconceivable that shares in a company should be sold at any time to third parties. Nevertheless, to allow that mere possibility to keep in indefinite suspense the determination whether or not the capital of a company awarded a public procurement contract is public would not be consistent with the principle of legal certainty.

50 If a company's capital is wholly owned by the contracting authority, alone or together with other public authorities, when the contract in question is awarded to that company, opening of the company's capital to private investors may not be taken into consideration unless there exists, at that time, a real prospect in the short term of such an opening.

51 It follows that, in a situation such as that in the main proceedings, in which the capital of the contracting company is wholly public and in which there is no actual sign of any impending opening of that company's capital to private shareholders, the mere fact that private persons may hold capital in that company is not enough to support the conclusion that the condition relating to control by the public authority has not been satisfied.

52 That conclusion is not shaken by the considerations set out in paragraph 26 of Case C–231/03 *Coname* [2005] ECR I–7287, indicating that the fact that a company such as that concerned in the case giving rise to that judgment is open to private capital prevents it from being regarded as a structure for the 'in-house' management of a public service on behalf of the municipalities which form part of it. In that case, a public service was awarded to a company in which not all, but most, of the capital was public, and so mixed, at the time of that award (*Coname*, paragraphs 5 and 28).

53 It must, however, be made clear that if a contract were to be attributed, without being put out to competitive tender, to a public capital company in the circumstances indicated in paragraph 51 above, the fact that subsequently, but still during the period for which that contract was valid, private shareholders were permitted to hold capital in that company would constitute the alteration of a fundamental condition of the contract, which would require the contract to be put out for competitive tender.

54 Next, the question arises whether, when a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that public authorities which are members of that company exercise over it must, if it is to be classified as similar to the control they exercise over their own departments, be exercised by every one of those authorities individually or whether it may be exercised by them jointly.

55 The case-law does not require the control exercised over the contracting company in such a case to be individual (see, to that effect, *Coditel Brabant*, paragraph 46).

56 In a situation in which several public authorities choose to carry out certain of their public service tasks by having recourse to a company that they own in common, it is usually not possible for one of those authorities, having only a minority holding in that company, to exercise decisive control over the latter's decisions. In such a case, to require the control exercised by a public authority to be individual would have the effect of requiring a competitive tendering procedure in most cases in which such an authority seeks to become a member of a company owned by other public authorities for the purpose of awarding to that company the management of a public service (see, to that effect, *Coditel Brabant*, paragraph 47).

57 Such a result would not be in keeping with the system of Community rules on public procurement and concession contracts. It is accepted that it is open to a public authority to perform the public

interest tasks entrusted to it by relying on its own administrative, technical and other resources, without being obliged to call on outside entities not belonging to its own departments (*Stadt Halle and RPL Lochau*, paragraph 48; *Coditel Brabant*, paragraph 48; and *Commission* v *Germany*, paragraph 45).

58 Public authorities may act in cooperation with other public authorities in making use of that opportunity to rely on their own resources in order to perform their public-service tasks (see, to that effect, Case C–295/05 *Asemfo* [2007] ECR I–2999, paragraph 57, and *Coditel Brabant*, paragraph 49).

59 It must, therefore, be recognised that when several public authorities own a company to which they entrust the performance of one of their public service tasks, the control which those public authorities exercise over that entity may be exercised by them jointly (see, to that effect, *Coditel Brabant*, paragraph 50).

60 With regard to a body that takes its decisions collectively, the procedure used for the taking of those decisions, in particular recourse to a majority decision, is immaterial (see *Coditel Brabant*, paragraph 51).

61 Nor is that conclusion shaken by *Coname*. It is true that the Court considered, in paragraph 24 of that judgment, that a 0.97% interest is so small that it cannot enable a municipality to exercise control over a concessionaire running a public service. However, in that passage of the judgment, the Court was not concerned with the question whether such control could be exercised jointly (*Coditel Brabant*, paragraph 52).

62 Furthermore, the Court has subsequently recognised, in *Asemfo* (paragraphs 56 to 61), that in certain circumstances the condition relating to the control exercised by the public contracting authority could be satisfied where such an authority held only 0.25% of the capital in a public undertaking (*Coditel Brabant*, paragraph 53).

63 It follows that, if a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that the public authorities which are members of that company exercise over it may be classified as similar to the control they exercise over their own departments when it is exercised by those authorities jointly.

64 The question asked by the national court seeks to ascertain also whether decision-making structures such as those provided for by Setco's statutes can enable the shareholder municipalities actually to exercise over the company they own control similar to that which they exercise over their own departments.

65 In order to determine whether the contracting authority exercises over the contracting company control similar to that which it exercises over its own departments, account has to be taken of all the legislative provisions and relevant circumstances

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Affaire C-573/07

Sea Srl

contre

Comune di Ponte Nossa

(demande de décision préjudicielle, introduite par
le Tribunale amministrativo regionale per la Lombardia)

«Marchés publics — Procédures de passation — Marché relatif au service de collecte, de transport et d'élimination des déchets urbains — Attribution sans appel d'offres — Attribution à une société par actions dont le capital social est entièrement détenu par des collectivités publiques mais dont les statuts prévoient la possibilité d'une participation de capital privé»

Sommaire de l'arrêt

Libre circulation des personnes — Liberté d'établissement — Libre prestation des services — Attribution directe d'un marché public de services par une collectivité publique à une société par actions à capital entièrement public
(Art. 43 CE et 49 CE)

Les articles 43 CE et 49 CE, les principes d'égalité de traitement et de non-discrimination en raison de la nationalité ainsi que l'obligation de transparence qui en découle ne s'opposent pas à l'attribution directe d'un marché public de services à une société par actions à capital entièrement public dès lors que la collectivité publique qui est le pouvoir adjudicateur exerce sur cette société un contrôle analogue à celui qu'elle exerce sur ses propres services et que cette société réalise l'essentiel de son activité avec la ou les collectivités qui la détiennent.

Sous réserve de la vérification par la juridiction nationale du caractère opérant des dispositions statutaires concernées, le contrôle exercé par les collectivités actionnaires sur ladite société peut être considéré comme analogue à celui qu'elles exercent sur leurs propres services lorsque :

- l'activité de ladite société est limitée au territoire desdites collectivités et est essentiellement exercée au bénéfice de celles-ci, et

- au travers des organes statutaires composés de représentants desdites collectivités, celles-ci exercent une influence déterminante tant sur les objectifs stratégiques que sur les décisions importantes de ladite société.

(cf. point 90 et disp.)

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Judgment of the Court (Third Chamber) of 10 September 2009 (reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia (Italy)) - Sea s.r.l. v Comune di Ponte Nossa

(Case C-573/07) [1]

(Public procurement - Award procedures - Contract relating to a service for the collection, transport and disposal of urban waste - Awarded without any call for tenders - Awarded to a company limited by shares whose capital is wholly owned by public bodies but under whose statutes a private capital holding is possible)

Language of the case: Italian

Referring court

Tribunale Amministrativo Regionale per la Lombardia

Parties to the main proceedings

Applicant: Sea s.r.l.

Defendant: Comune di Ponte Nossa

Third party: Servizi Tecnologici Comuni - Se.T.Co. SpA

Re:

Reference for a preliminary ruling - Tribunale Amministrativo Regionale per la Lombardia (Italy) - Interpretation of Articles 12 EC, 43 EC, 49 EC and 86 EC - Procedures for the award of public contracts - Public services for the collection, transport and disposal of urban waste - Direct award of a contract to a limited company with share capital belonging entirely to the public sector but where the statutes of that company allow for the possibility of private investment

Operative part of the judgment

It is not contrary to Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it.

Without prejudice to the determination by the court making the reference of the effectiveness of the relevant provisions of the statutes, the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exercise over their own departments in circumstances such as those of the case in the main proceedings, when:

that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit, and

through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions.

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[1] - OJ C 64, 8.3.2008.

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Reference for a preliminary ruling from the Tribunale Amminstrativo Regionale per la Lombardia (Italy) lodged on 28 December 2007 - Sea Srl v Comune di Ponte Nossa

(Case C-573/07)

Language of the case: Italian

Referring court

The Tribunale Amminstrativo Regionale per la Lombardia

Parties to the main proceedings

Applicant: Sea Srl

Defendant: Comune di Ponte Nossa

Question referred

Is the direct award of a contract for the collection, transport and disposal of solid urban and similar waste to a wholly publicly owned limited company, the relevant statutes of which - for the purposes of Article 113 of Legislative Decree No 267 of 18 August 2000 - are set out in the grounds of this order, compatible with Community law and, in particular, with the freedom of establishment or freedom to provide services, the prohibition of discrimination and the obligations relating to equal treatment, transparency and free competition, as referred to in Articles 12 EC, 43 EC, 45 EC, 46 EC, 49 EC and 86 EC?

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Reference for a preliminary ruling from the Tribunale Amminstrativo Regionale per la Lombardia (Italy) lodged on 28 December 2007 - Sea Srl v Comune di Ponte Nossa

(Case C-573/07)

Language of the case: Italian

Referring court

The Tribunale Amminstrativo Regionale per la Lombardia

Parties to the main proceedings

Applicant: Sea Srl

Defendant: Comune di Ponte Nossa

Question referred

Is the direct award of a contract for the collection, transport and disposal of solid urban and similar waste to a wholly publicly owned limited company, the relevant statutes of which - for the purposes of Article 113 of Legislative Decree No 267 of 18 August 2000 - are set out in the grounds of this order, compatible with Community law and, in particular, with the freedom of establishment or freedom to provide services, the prohibition of discrimination and the obligations relating to equal treatment, transparency and free competition, as referred to in Articles 12 EC, 43 EC, 45 EC, 46 EC, 49 EC and 86 EC?

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JUDGMENT OF THE COURT (Fourth Chamber)

19 May 2009 (*)

(Directive 92/50/EEC – First paragraph of Article 29 – Public service contracts – National legislation not allowing companies linked by a relationship of control or significant influence to participate, as competing tenderers, in the same procedure for the award of a public contract)

In Case C–538/07,

REFERENCE for a preliminary ruling under Article 234 EC, by the Tribunale Amministrativo Regionale per la Lombardia (Italy), made by decision of 14 November 2007, received at the Court on 3 December 2007, in the proceedings

Assitur Srl

v

Camera di Commercio, Industria, Artigianato e Agricoltura di Milano,

Third party:

SDA Express Courier SpA,

Poste Italiane SpA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: J. Mazák,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 December 2008,

after considering the observations submitted on behalf of:

– Assitur Srl, by S. Quadrio, avvocato,

– Camera di Commercio, Industria, Artigianato e Agricoltura di Milano, by M. Bassani, avvocato,

– SDA Express Courier SpA, by A. Vallefuoco and V. Vallefuoco, avvocati,

– Poste Italiane SpA, by A. Fratini, avvocatessa,

– the Italian Government, by I.M. Braguglia, acting as Agent, and G. Fiengo, avvocato dello Stato,

– the Commission of the European Communities, by D. Kukovec and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 February 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first subparagraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as well as the general principles of Community law governing public contracts.

2 This reference for a preliminary ruling was made in the course of proceedings between Assitur Srl ('Assitur') and the Camera di Commercio, Industria, Artigianato e Agricoltura di Milano (Milan Chamber of Commerce, Industry, Crafts and Agriculture) concerning the compatibility with the abovementioned provisions and principles of national legislation precluding undertakings linked by a relationship of control or a relationship in which one undertaking exercises decisive influence over the other from participating – separately and as competing tenderers – in the same procedure for the award of a public contract.

Legal context

Community legislation

3 As part of Chapter 2 of Directive 92/50, entitled 'Criteria for qualitative selection', the first paragraph of Article 29 provides:

'Any service provider may be excluded from participation in a contract who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding-up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgement which has the force of res judicata;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under this Chapter.'

4 The second and third subparagraph of Article 3(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), defines the concepts of 'affiliated undertakings' and 'dominant influence' of one undertaking over another. As regards public works concession contracts, it states:

'Undertakings which have formed a group in order to obtain the concession contract, or undertakings affiliated to them, shall not be regarded as third parties.

An "affiliated undertaking" means any undertaking over which the concessionaire may exercise, directly or indirectly, a dominant influence or which may exercise a dominant influence over the concessionaire or which, in common with the concessionaire, is subject to the dominant influence of

another undertaking by virtue of ownership, financial participation or the rules which govern it. A dominant influence on the part of an undertaking shall be presumed when, directly or indirectly in relation to another undertaking, it:

– holds the major part of the undertaking's subscribed capital, or

– controls the majority of the votes attaching to shares issued by the undertakings, or

– can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.'

National legislation

5 Directive 92/50 was transposed into Italian law by Legislative Decree No 157 of 17 March 1995 (GURI No 104 of 6 May 1995, ordinary supplement). That legislative decree does not prohibit undertakings between which there exists a relationship of control or which are affiliated to one another from participating in the same procedure for the award of public service contracts.

6 Article 10(1bis) of Law No 109 of 11 February 1994, the Framework Law on public works (GURI No 41 of 19 February 1994, 'Law No 109/1994) provides:

'Undertakings between which there exists one of the control relationships specified in Article 2359 of the Civil Code may not participate in the same tendering procedure.'

7 Article 2359 of the Civil Code, entitled 'Controlled companies and affiliated companies', provides:

'The following shall be regarded as controlled companies:

(1) companies in which another company holds the majority of the voting rights that may be exercised in ordinary shareholders' meetings;

(2) companies in which another company holds sufficient voting rights to exercise a dominant influence in ordinary shareholders' meetings;

(3) companies which are under the dominant influence of another company by virtue of particular contractual provisions entered into with the latter.

For the purposes of applying points (1) and (2) of the first paragraph, account shall also be taken of votes available to controlled companies, trust companies and intermediaries; no account shall be taken of votes available on behalf of third parties.

Companies over which another company exercises significant influence shall be regarded as affiliated. Such influence shall be presumed on the part of another company where, in ordinary general meetings, it can exercise at least one fifth of the votes, or one tenth if the company shares are quoted on regulated markets.'

8 Procedures for the award of public works contracts, public supply contracts and public service contracts are currently governed, in their entirety, by Legislative Decree No 163 of 12 April 2006 (GURI No 100 of 2 May 2006, ordinary supplement, 'Legislative Decree No 163/2006'). The last paragraph of Article 34 of that legislative decree provides:

'Tenderers between which there exists a relationship of control, of the kind envisaged in Article 2359 of the Civil Code, may not take part in the same tendering procedure. Contracting authorities shall also exclude from such procedures tenderers whose respective tenders are found, on the basis of unambiguous evidence, to be attributable to one and the same decision-making centre.'

The main proceedings and the question referred for a preliminary ruling

9 By notice of 30 September 2003, the Camera di Commercio, Industria, Artigianato e Agricoltura di Milano announced a public invitation to tender for the award, on a lowest-price basis, of a courier-service contract (for collection and delivery of correspondence and miscellaneous documentation) for the Camera di Commercio, Industria, Artigianato e Agricoltura di Milano and its company

CedCamera, for the three-year period 2004 to 2006. The basic bid price was EUR 530 000, excluding VAT.

10 Following examination of the documentation submitted by the tenderers, SDA Express Courier SpA ('SDA'), Poste Italiane SpA ('Poste Italiane') and Assitur were admitted to the tendering procedure.

11 On 12 November 2003, Assitur requested that SDA and Poste Italiane be excluded from the tendering procedure, because of links between those two companies.

12 An inquiry carried out in this connection at the request of the contracts commission showed that the entire share capital of SDA was held by Attività Mobiliari SpA, which in turn was wholly-owned by Poste Italiane. However, given that Legislative Decree No 157 of 17 March 1995, which governs public service contracts, does not prohibit undertakings of which one controls the other from participating in the same procedure for the award of a public contract, and that the inquiry carried out did not bring up any solid and consistent evidence such as to raise any suspicion that the principles of competition and secrecy of tender had, in this instance, been breached the contracting authority decided, by Decision No 712 of 2 December 2003, to award the contract to SDA, which had presented the lowest bid.

13 Assitur brought an action for annulment of that decision before the Tribunale Amministrativo Regionale per la Lombardia. Assitur submitted that, by virtue of Article 10(1bis) of Law No 109/1994 – which, according to Assitur, in the absence of other specific legislation, applies also to service contracts – the contracting authority should have excluded from the procedure to award the contract undertakings linked by a relationship of control, as envisaged by Article 2359 of the Italian Civil Code.

14 The referring court states that Article 10(1bis) of Law No 109/1994, which specifically governs works contracts, establishes a presumption, not open to rebuttal, that the tender of the controlled undertaking was known to the undertaking controlling it. Therefore, the legislature does not regard the relevant economic operators – given that they are closely linked by common interests – as capable of drawing up tenders of the requisite independence, soundness and reliability because they were closely linked to one another by their common interests. Consequently, Article 10(1bis) of Law No 109/1994 precludes undertakings linked in that way from participating in the same tendering procedure and, where they are found to be participating, those undertakings must be excluded from the selection procedure. The referring court also notes that the concept of 'controlled undertaking' in Italian law is analogous to the concept of 'affiliated undertaking', the definition of which is laid down in Article 3(4) of Directive 93/37.

15 The referring court also states that, according to Italian case-law, a rule such as the one laid down in Article 10(1bis) of Law No 109/1994 has the authority of a rule of public policy which is of general application. In actual fact, that rule reflects a general principle which goes beyond the field of public works and applies also to procedures for the award of service and supply contracts, notwithstanding the fact that, in relation to the two latter, no such specific provision exists. The legislature confirmed the approach taken by the case-law when it adopted the last paragraph of Article 34 of Legislative Decree No 163/2006, which currently governs all public contracts; however, that provision does not apply to the present case *ratione temporis*.

16 None the less, the referring court asks whether such an approach is compatible with the Community legal order and, in particular, with Article 29 of Directive 92/50, as interpreted by the Court of Justice in Joined Cases C–226/04 and C–228/04 *La Cascina and Others* [2006] ECR I–1347, paragraphs 21 to 23. That provision, which constitutes an expression of the principle of 'favor participationis' – whereby as many undertakings as possible should take part in the tendering procedure – comprises, according to that judgment, an exhaustive list of the grounds for exclusion from participation in a tendering procedure for the award of a service contract. Those grounds do not include the situation of undertakings linked by a relationship of control or decisive influence.

17 However, the referring court considers that Article 10(1bis) of Law No 109/1994, as a provision intended to penalise any collusion between undertakings in a tendering procedure, is an expression of the principle of free competition. Consequently, it was adopted in strict compliance with the EC Treaty, in particular with Article 81 EC et seq., and is not really inconsistent with Article 29 of Directive 92/50.

18 In those circumstances, the Tribunale Amministrativo Regionale per la Lombardia decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 29 of Directive 92/50 …, in laying down seven grounds for exclusion from participation in procedures for the award of public service contracts, give an exhaustive list of grounds for exclusion and therefore preclude Article 10(1bis) of Law [No 109/1994] (now replaced by Article 34, last paragraph, of Legislative Decree [No 163/2006]) from imposing a prohibition to the effect that undertakings linked by a relationship of control may not participate in the same tendering procedure?’

The question referred for a preliminary ruling

19 For the purpose of answering that question, it must be noted that, according to the case-law of the Court of Justice, the seven grounds for excluding a contractor from participating in a public contract laid down in the first paragraph of Article 29 of Directive 92/50 relate to the professional honesty, solvency and reliability of the tenderer, in other words, his professional qualities (see, to that effect, *La Cascina and Others*, paragraph 21).

20 The Court of Justice emphasised in connection with the first paragraph of Article 24 of Directive 93/37, which reproduces the same grounds for exclusion as those mentioned in the first paragraph of Article 29 of Directive 92/50, that the intention of the Community legislature was to adopt in that provision only grounds for exclusion related to the professional qualities of the tenderer. In so far as it reproduces those grounds for exclusion, the Court considered that list to be exhaustive (see, to that effect, Case C-213/07 *Michaniki* [2008] ECR I-0000, paragraphs 42 and 43, as well as the case-law cited).

21 The Court added that that this exhaustive list does not, however, preclude the option for Member States to maintain or adopt, in addition to the grounds for exclusion, substantive rules designed, in particular, to ensure, as regards public contracts, observance of the principle of equal treatment of all tenderers and of the principle of transparency which constitute the basis of the directives on procedures for the award of public contracts, provided always that the principle of proportionality is observed (see, to that effect, *Michaniki*, paragraphs 44 to 48 and the case-law cited).

22 It is clear that a national legislative measure such as that at issue in the main proceedings is intended to prevent any potential collusion between participants in the same procedure for the award of a public contract and to safeguard the equal treatment of candidates and the transparency of the procedure.

23 It must therefore be considered that the first paragraph of Article 29 of Directive 92/50 does not preclude a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

24 It follows that the compliance with Community law of the national legislation at issue in the main proceedings must be examined again in the light of the principle of proportionality.

25 It should be recalled, in this connection, that the Community rules on public procurement were adopted in pursuance of the establishment of the internal market, in which freedom of movement is ensured and restrictions on competition are eliminated (see, to that effect, Case C–412/04 *Commission* v *Italy* [2008] ECR I–619, paragraph 2).

26 In this context of a single internal market and effective competition it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders.

27 According to the order for reference, the provision at issue in the main proceedings, which is drafted in clear and binding terms, entails for the contracting authorities an absolute obligation to exclude from the procedure for awarding the contract those undertakings which submit separate and competing tenders, if those undertakings are linked by a relationship of control such as that contemplated by the national legislation at issue in the main proceedings.

28 However, it would run counter to the effective application of Community law to exclude systematically undertakings affiliated to one another from participating in the same procedure for the award of a public contract. Such a solution would considerably reduce competition at Community level.

29 Thus, clearly, in so far as it extends the prohibition on participation in the same procedure for the award of a contract to situations in which the relationship of control between the undertakings concerned has no effect on their conduct in the course of such procedures, the national legislation at issue in the main proceedings goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency.

30 Such legislation, which is based on an irrebuttable presumption that tenders submitted for the same contract by affiliated undertakings will necessarily have been influenced by one another, breaches the principle of proportionality in that it does not allow those undertakings an opportunity to demonstrate that, in their case, there is no real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers (see, to that effect, Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraphs 33 and 35, and *Michaniki*, paragraph 62).

31 It should be pointed out in this connection that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Moreover, as the Commission pointed out in its written observations, relationships between undertakings in the same group may be governed by specific provisions, for example, of a contractual nature, such as to guarantee both independence and confidentiality in the drawing-up of tenders to be submitted simultaneously by the undertakings in question in the same tendering procedure.

32 Against that background, the question whether the relationship of control at issue influenced the respective content of the tenders submitted by the undertakings concerned in the same public procurement procedure requires an examination and assessment of the facts which it is for the contracting authorities to carry out. A finding of such influence, in any form, is sufficient for those undertakings to be excluded from the procedure in question. However, a mere finding of a relationship of control between the undertakings concerned, by reason of ownership or the number of voting rights exercisable at ordinary shareholders' meetings is not sufficient for the contracting authority to automatically exclude those undertakings from the procedure for the award of the contract, without ascertaining whether such a relationship had a specific effect on their conduct in the course of that procedure.

33 Having regard to all the foregoing considerations, the answer to the question referred is that:

– the first paragraph of Article 29 of Directive 92/50 must be interpreted as not precluding a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective, and

– Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

Costs

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

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

The first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as not precluding a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided

that such measures do not go beyond what is necessary to achieve that objective.

Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

[Signatures]

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* Language of the case: Italian.

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Case C-538/07

Assitur Srl

v

Camera di Commercio, Industria, Artigianato e Agricoltura di Milano

(Reference for a preliminary ruling from the
Tribunale Amministrativo Regionale per la Lombardia)

(Directive 92/50/EEC – First paragraph of Article 29 – Public service contracts – National legislation not allowing companies linked by a relationship of control or significant influence to participate, as competing tenderers, in the same procedure for the award of a public contract)

Summary of the Judgment

Approximation of laws – Coordination of procedures for the award of public service contracts – Directive 92/50 – Award of contracts
(Council Directive 92/50, Art. 29, first para.)

The first paragraph of Article 29 of Directive 92/50 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that it does not preclude a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

However, Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

It would run counter to the effective application of Community law to exclude systematically undertakings affiliated to one another from participating in the same procedure for the award of a public contract. Such a solution would considerably reduce competition at Community level. Thus, where it extends the prohibition on participation in the same procedure for the award of a contract to situations in which the relationship of control between the undertakings concerned has no effect on their conduct in the course of such procedures, national legislation goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency. Such legislation, which is based on an irrebuttable presumption that tenders submitted for the same contract by affiliated undertakings will necessarily have been influenced by one another, breaches the principle of proportionality in that it does not allow those undertakings an opportunity to demonstrate that, in their case, there is no real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers.

(see paras 23, 28-30, operative part)

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Judgment of the Court (Fourth Chamber) of 19 May 2009 (reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia - Italy) - Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano

(Case C-538/07) [1]

(Directive 92/50/EEC - First paragraph of Article 29 - Public service contracts - National legislation not allowing companies linked by a relationship of control or significant influence to participate, as competing tenderers, in the same procedure for the award of a public contract)

Language of the case: Italian

Referring court

Tribunale Amministrativo Regionale per la Lombardia

Parties to the main proceedings

Applicant: Assitur Srl

Defendant: Camera di Commercio, Industria, Artigianato e Agricoltura di Milano

In the presence of: SDA Express Courier SpA, Poste Italiane SpA

Re:

Reference for a preliminary ruling - Tribunale Amministrativo Regionale per la Lombardia - Interpretation of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) - National legislation precluding undertakings which are linked or controlled from participating individually in public procurement procedures for the supply of services

Operative part of the judgment

1. The first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as not precluding a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

2. Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

_____

[1] - OJ C 37, 09.02.2008.

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OPINION OF ADVOCATE GENERAL
Mazák
delivered on 10 February 2009 (1)

Case C–538/07

Assitur Srl
v
Camera di Commercio, Industria, Artigianato e Agricoltura di Milano

(Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia (Italy))

(Public service contracts – Directive 92/50/EEC – Article 29 – National legislation precluding the simultaneous participation in a tendering procedure of undertakings which are linked by a relationship of control as defined by Article 2359 of the Italian Civil Code – Proportionality)

I – Introduction

1. The Tribunale Amministrativo Regionale per la Lombardia asks the Court to determine whether Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (2) ('Directive 92/50') which lays down seven grounds for exclusion from participation in service contracts, is an exhaustive list and therefore precludes national legislation from imposing a prohibition on the simultaneous participation in a tendering procedure of undertakings which are linked by a relationship of control as defined by Article 2359 of the Italian Civil Code ('Civil Code').

II – Legal framework

A – *Community legislation*

2. As part of Chapter 2 of Title VI of Directive 92/50, entitled 'Criteria for qualitative selection', Article 29 provides:

'Any service provider may be excluded from participation in a contract who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding-up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgment which

has the force of res judicata;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under this Chapter.

...'

B – *Italian legislation*

3. Legislative Decree No 157 of 17 March 1995 implementing Directive 92/50/EEC on public service contracts (attuazione della direttiva 92/50/CEE in materia di appalti pubblici di servizi) ('Legislative Decree No 157/1995'), (3) does not impose any prohibition on the participation of undertakings linked by a relationship of control.

4. Article 10(1bis) of Law No 109, Framework Law on public works (Legge Quadro in materia di lavori pubblici) of 11 February 1994 (4) ('Article 10(1bis) of Law No 109/94'), provides:

'Undertakings between which there exists one of the control relationships specified in Article 2359 of the Civil Code may not participate in the same tendering procedure.'

5. Article 2359 of the Civil Code, entitled 'Controlled Companies and Linked Companies', provides:

'The following shall be regarded as controlled companies:

(1) companies in which another company holds the majority of the voting rights that may be exercised in ordinary shareholders' meetings;

(2) companies in which another company holds sufficient voting rights to exercise a dominant influence in ordinary shareholders' meetings;

(3) companies which are under the dominant influence of another company by virtue of particular contractual provisions entered into with the latter.

For the purposes of applying points (1) and (2) of the first paragraph, account shall also be taken of votes available to controlled companies, trust companies and intermediaries; no account shall be taken of votes available on behalf of third parties.

Companies over which another company exercises significant influence shall be regarded as linked. Such influence shall be presumed on the part of another company where, in ordinary general meetings, it can exercise at least one fifth of the votes, or one tenth if the company shares are quoted on regulated markets.'

6. The last paragraph of Article 34 of the new public contracts code, approved by Legislative Decree No 163/06 of 12 April 2006 (Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) (5) ('Legislative Decree No 163/06') (not applicable to the present case ratione temporis), provides in relation to all contract procedures, that 'tenderers between which there exists a relationship of control, of the kind envisaged in Article 2359 of the Civil Code, may not take part in the same tendering procedure. Contracting authorities shall also exclude from such procedures tenderers whose respective tenders are found, on the basis of unambiguous evidence, to be attributable to one and the same decision-making centre'.

III – The main proceedings and the question referred for a preliminary ruling

7. By notice of 30 September 2003, the Camera di Commercio, Industria, Artigianato e Agricoltura di Milano ('CCIAAM') announced a public invitation to tender for the award, on a lowest-price basis, of a courier-service contract for the three-year period 2004 to 2006 for, inter alia, the CCIAAM, the basic bid price being EUR 530 000, excluding VAT.

8. Following examination of the administrative documentation submitted by the tenderers, SDA Express Courier Spa ('SDA'), Poste Italiane Spa ('Poste Italiane') and Assitur Srl ('Assitur') were admitted to the procedure.

9. On 12 November 2003, Assitur requested that, in accordance with the tendering conditions, which prohibited individual undertakings from also participating as part of a group, SDA and Poste Italiane should be excluded because of their close association.

10. After noting that SDA and Poste Italiane had taken part in the tendering procedure separately, the adjudication committee proceeded to open the bids. The adjudication committee then instructed the person conducting the procedure to check whether there were any links between SDA and Poste Italiane which might constitute an impediment to their participation in the tendering procedure.

11. As a result of the inquiry, it appeared that all the shares in SDA were held by Attività Mobiliari Spa, which in turn was wholly owned by Poste Italiane. The adjudication committee however pointed out that Legislative Decree No 157/1995, which implemented Directive 92/50 in Italy, does not impose any prohibition on the participation of undertakings linked by a relationship of control. The adjudication committee also observed that no solid and consistent evidence had emerged such as to raise any suspicion that the principles of competition and secrecy of tenders had been infringed. The adjudication committee proposed, therefore, that the service contract be awarded to SDA, which had submitted the lowest bid.

12. By Decision No 712 of 2 December 2003, the CCIAAM awarded the contract in question to SDA.

13. In its action before the referring court, Assitur seeks, inter alia, the annulment of the decision of 2 December 2003, as well as a declaration that it is entitled to be the successful tenderer. Assitur claims, inter alia, that the adjudication procedure infringed Article 10(1bis) of Law No 109/94 and the tendering conditions. In particular, Assitur claims that by virtue of Article 10 (1bis) of Law No 109/94, which it considers also applies to service contracts, the contracting authority should have excluded from the procedure those companies in a relationship of control as envisaged by Article 2359 of the Civil Code.

14. The referring court considers that Article 10(1bis) of Law No 109/94 provides in clear terms for the exclusion of companies between which there exists a relationship of control as envisaged by Article 2359 of the Civil Code. There is an irrebuttable presumption that the tender of the controlled company is known to the controlling party. Moreover, the referring court considers that in accordance with the national case-law on the matter, Article 10(1bis) of Law No 109/94 is a rule which protects a vital interest of society ('norma di ordine pubblico') and thus applies not only to public work contracts but also to service and supply contracts. According to the referring court, it would appear therefore that the adjudication committee should have immediately ordered the exclusion of both SDA and Poste Italiane which are manifestly in a relationship of control as envisaged by Article 2359 of the Civil Code.

15. The referring court considers that the national legislative framework outlined above nevertheless raises interpretative problems regarding the compatibility of those rules with Community law, in particular with Article 29 of Directive 92/50 as interpreted by the Court in *La Cascina and Others*. (6) In that case the Court, after stating that Article 29 of Directive 92/50 lays down seven grounds for excluding candidates from participation in a contract, found that the Member States cannot provide for grounds of exclusion other than those mentioned in that provision.

16. The referring court notes however that the rule laid down by Article 10(1bis) of Law No 109/94, the scope of which has been extended by Legislative Decree No 163/06, is intended to penalise the collusive conduct of closely linked undertakings in a tendering procedure. That rule thus enhances the application of the principle of freedom of competition and does not in reality conflict with Article 29 of Directive 92/50.

17. On the basis of those considerations, the Tribunale Amministrativo Regionale per la Lombardia decided, by decision of 5 December 2006, to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 29 of Directive 92/50/EEC, in laying down seven grounds for exclusion from participation in procedures for the award of public service contracts, give an exhaustive list of grounds for exclusion and therefore preclude Article 10(1bis) of Law No 109/94 (now replaced by Article 34, last paragraph, of Legislative Decree No 163/06) from imposing a prohibition to the effect that undertakings linked by a relationship of control may not participate in the same tendering procedure?'

IV – The proceedings before the Court of Justice

18. Written and oral observations were submitted by the CCIAAM, SDA, Poste Italiane, the Italian Republic and the Commission. In addition, Assitur presented oral observations at the hearing of 4 December 2008.

V – Admissibility

19. CCIAAM and SDA consider that the question referred to the Court for a preliminary ruling is inadmissible. CCIAAM considers that it is clear from the order for reference that the referring court considers that there is a lacuna in Article 29 of Directive 92/50 as that provision does not provide for the exclusion of linked companies. The referring court is therefore not seeking an interpretation of Article 29 of Directive 92/50 but rather to add elements to that provision. SDA considers that given that the referring court has not established a link between SDA and Poste Italiane which would lead to a distortion of the tendering procedure, the referring court may not request the Court to rule on the matter. In effect, the question referred seeks solely to establish facts, a competence which lies exclusively with the national court.

20. In accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for by Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling. (7)

21. However, the Court has also stated that, in exceptional circumstances, it must examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. It is settled case-law that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (8)

22. That is not the case here.

23. In my view, it is clear from the order for reference that the Court is being called upon to clarify whether the referring court is required under Community law, and in particular in the light of Article 29 of Directive 92/50 and the case-law thereon, not to apply national legislation which provides for the exclusion from tendering procedures of companies linked by a relationship of control.

24. In the proceedings before the referring court, Assitur claims that, in accordance with Article 10(1bis) of Law No 109/94, the CCIAAM should have excluded from the tendering procedure those companies which formed part of a relationship of control as envisaged in Article 2359 of the Civil Code. The CCIAAM, SDA and Poste Italiane on the other hand claim that pursuant to the judgment of the Court in *La Cascina and Others*, (9) Member States cannot provide for grounds of exclusion of candidates from tendering procedures other than those mentioned in Article 29 of Directive 92/50. The CCIAAM, SDA and Poste Italiane note that Article 29 of Directive 92/50 does not include in its exhaustive list of grounds of exclusion companies linked by a relationship of control. The referring court considers, however, that given that Article 10(1bis) of Law No 109/94 is a provision intended to penalise collusive conduct by companies it enhances the due application of the principle of freedom of competition and is therefore in compliance with, inter alia, Article 81 EC et seq.

25. Clearly, therefore, the question submitted relates to the subject-matter of the main proceedings, as defined by the referring court, and the answer to that question may be useful to that court in enabling it to decide whether the exclusion of companies from the tendering procedure in question pursuant to Article 10(1bis) of Law No 109/94 is in conformity with Community law.

26. Moreover, contrary to the assertion made by SDA, the question referred does not, in my view, seek to establish whether and to what extent SDA and Poste Italiane are in fact related. As SDA has rightly pointed out that is a matter which lies exclusively with the national court.

27. In those circumstances, I consider that the reference for a preliminary ruling should be held by the Court to be admissible.

VI – Substance

A – *Observations submitted to the Court*

28. At the hearing on 4 December 2008, Assitur stated that the list contained in Article 29 of Directive 92/50 is not exhaustive. In a case such as the present where two companies participate in a tender and one of them is 100% controlled by another, their participation must be considered unlawful as it undoubtedly infringes the principle of competition which must be protected.

29. According to CCIAAM, in the absence of any legal provision prohibiting controlled companies from participating in the procurement procedure for the award of public service contracts or any indication to that effect in the tender notice, Poste Italiane and SDA could not be automatically excluded from the procedure for the award of the contract in question. Moreover, the adjudicating authority verified that the relationship between SDA and Poste Italiane was not such as to affect the transparency and correct conduct of the adjudication procedure. A company's mere participation in the capital of another is not sufficient pursuant to Community law for exclusion from a tender where an operational link has not been established.

30. SDA, Poste Italiane and the Italian Republic consider that in accordance with the *La Cascina and Others* (10) case, Article 29 of Directive 92/50, which lays down seven grounds for excluding candidates from participating in a contract, ensures that Member States cannot provide for grounds of exclusion other than those mentioned therein. According to SDA, Article 29 of Directive 92/50 therefore precludes the adoption of national rules such as Article 10(1bis) of Law No 109/94.

31. Poste Italiane also considers that Article 10(1bis) of Law No 109/94 by introducing an absolute presumption of collusion where companies are linked by a relationship of control hinders rather than enhances the principles of competition. That provision prevents the simultaneous participation in a tender of companies where the relationship of control has not in fact resulted in collusion, thereby limiting the number of tenderers.

32. The Italian Republic considers that while Article 29 of Directive 92/50 provides for the exclusion of companies on the basis of their personal (and general) situation, Article 10(1bis) of Law No 109/94 objectively regulates the different tenders by excluding those which are in reality the product of a single decision-making centre and which thus lack the necessary degree of independence, soundness and reliability. The purpose of the provision is to enable the adjudicating authority to ensure that the competitive nature of a tender procedure is effectively guaranteed and that all potential collusion is suppressed. The Italian Republic therefore considers that Article 29 of Directive 92/50 does not preclude the Member States from adopting exclusion clauses in order to deal with other objective situations where a multiplicity of tenders does not guarantee effective competition between those tenders.

33. The Commission considers that pursuant to the judgment in *La Cascina and Others*, Article 29 of Directive 92/50 lays down an exhaustive list of seven grounds for excluding candidates from participation in a contract, which relate to their professional honesty, solvency and reliability. Thus the Member States cannot provide for other grounds of exclusion based on a candidate's professional honesty, solvency and reliability. Article 29 does not however preclude Member States from adopting other grounds of exclusion which are not based on the candidate's professional honesty, solvency and reliability but rather on the need to ensure the correct functioning of the tender procedure and in particular respect for the principle of equality. Given that the offer of a company which is controlled by another will certainly be known and may even be 'controlled' by the latter, Article 10(1bis) of Law No 109/94 is aimed at ensuring effective competition and equal treatment between tenderers. The Commission also highlights the fact that a group of companies

may by means of concerted tenders influence the fixing of the threshold for abnormally low tenders thereby leading to the exclusion of tenderers who are not part of the group.

34. While Article 10(1bis) of Law No 109/94 pursues a legitimate aim of ensuring equal treatment, the Commission considers that it is disproportionate in nature as it does not allow tenderers who are linked by a relationship of control to prove that their offers were in fact drawn up autonomously and without the contents of their offers being known by the controlling company. The Commission therefore considers that the irrebutable presumption contained in Article 10(1bis) of Law No 109/94 may not in fact promote competition.

B – *Assessment*

35. In my view, it is clear from the judgment in *La Cascina and Others* that Article 29 of Directive 92/50 lays down in an exhaustive manner the seven grounds which a Member State may (11) invoke for excluding candidates from participation in a public service contract on the basis of criteria relating to their professional quality, namely, their professional honesty, solvency and reliability. (12)

36. Article 29 of Directive 92/50 therefore entails that the Member States cannot provide for additional grounds of exclusion based on a candidate's professional honesty, solvency and reliability. (13)

37. This approach has in fact been very recently confirmed by the Court in the *Michaniki* case (14) in relation to Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. (15) Article 24 of Directive 93/37 also lays down seven grounds for excluding candidates from participation in a contract on the basis of their professional honesty, solvency and reliability which mirror the grounds contained in Article 29 of Directive 92/50.

38. The exhaustive list of seven grounds set out in Article 29 of Directive 92/50 does not however preclude Member States from maintaining or adopting other rules which are designed, in particular, to ensure, in the field of public contracts, observance of the principle of equal treatment and the principle of transparency. Those principles, which lie at the heart of the directives on procedures for the award of public contracts must be observed by contracting authorities in any procedure for the award of such a contract and mean, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority. A Member State is thus entitled to provide, for exclusionary measures designed to ensure observance of the principles of equal treatment of all tenderers and of transparency in procedures for the award of public contracts aside from the seven grounds for exclusion based on objective considerations of professional quality, which are listed exhaustively in Article 29 of Directive 92/50. (16)

39. As the Member States are best placed to identify, in the light of historical, economic or social considerations specific to them, situations likely to bring about breaches of the principles of equal treatment of all tenderers and of transparency in procedures for the award of public contracts, the Court confirmed in the *Michaniki* case that the Member States are thus granted a certain margin of discretion for the purpose of adopting measures intended to ensure respect for those principles. However, in accordance with the principle of proportionality, which constitutes a general principle of Community law, such measures must not go beyond what is necessary to achieve that objective. (17)

40. It is clear from the order for reference that the Italian legislature sought by the adoption of Article 10(1bis) of Law No 109/94 to ensure the proper and transparent conduct of public procurement procedures. (18) According to the referring court, the Italian legislature considers that the free play of competition and rivalry will be irremediably and adversely affected by the submission of tenders which, although formally deriving from two or more legally distinct companies, can be traced back to a single centre of interests. Pursuant to the order for reference, the Italian legislature considers that this situation arises in those cases where undertakings are controlled or susceptible to significant influence, as envisaged by Article 2359 of the Civil Code. Accordingly, controlled companies cannot be regarded as third parties vis-à-vis the controlling companies and have no standing, therefore, to submit another tender in the same tendering procedure. (19)

41. In my view, it is clear from the above that Article 10(1bis) of Law No 109/94 does not relate

to candidates' professional honesty, solvency and reliability. Despite certain submissions made by the Commission at the hearing on 4 December 2008, I do not consider that Article 10(1bis) of Law No 109/94 is aimed at excluding candidates which in accordance with Article 29(d) of Directive 92/50 have 'been guilty of grave professional misconduct proven by any means which the contracting authorities can justify'. Article 10(1bis) of Law No 109/94 does not in fact address the behaviour of candidates but seeks to pre-empt situations where the very relationship between certain companies participating in tendering procedures would tend to distort that procedure. (20)

42. I therefore consider, on the basis of the information provided by the referring court, that Article 10(1bis) of Law No 109/94 is aimed at ensuring the equal treatment of all tenderers and the transparency of procedures for the award of public contracts and that Community law must be interpreted as not precluding, in principle, the adoption of such national measures. The measure in question must however be compatible with the principle of proportionality. (21)

43. According to the referring court, Article 10(1bis) of Law No 109/94 provides for the exclusion of companies from the tendering procedures where there exists a relationship of control. Moreover, the exclusion which is automatic is based on the presumption that the tender of the controlled company is known to the controlling party. That presumption is not open to rebuttal and thus cannot be overturned even by proof that the controlled company drew up its tender in an entirely independent manner.

44. In my view, a national measure, such as that at issue in the main proceedings, which leads to the automatic exclusion from tendering procedures of certain tenderers is disproportionate in nature as it does not allow tenderers which are linked by a relationship of control to prove that their tenders were in fact drawn up in a manner which would not in fact impair the equal treatment of tenderers and the transparency of procedures for the award of public contracts. (22)

VII – Conclusion

45. In the light of the foregoing considerations, I propose that the Court replies to the Tribunale Amministrativo Regionale per la Lombardia in the following manner:

– Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public service contract. However, Article 29 of that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

– Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, leads to the automatic exclusion from tendering procedures of tenderers between which there exists a relationship of control as defined by national law, without giving them an opportunity to prove that, in the circumstances of the case, that relationship had not led to an infringement of the principles of equal treatment of tenderers and of transparency.

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1 – Original language: English.

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2 – OJ 1992 L 209, p. 1.

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3 – *GURI* No 104 of 6 May 1995, ordinary supplement.

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4 – *GURI* No 41 of 19 February 1994, ordinary supplement.

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5 – *GURI* No 100 of 2 May 2006, ordinary supplement No 107.

6 – Joined Cases C–226/04 and C–228/04 [2006] ECR I–1347.

7 – Case C–145/03 *Keller* [2005] ECR I–2529, paragraph 33, and Case C–119/05 *Lucchini* [2007] ECR I–6199, paragraph 43.

8 – Case C–379/98 *PreussenElektra* [2001] ECR I–2099, paragraph 39; Case C–390/99 *Canal Satélite Digital* [2002] ECR I–607, paragraph 19; and Case C–11/07 *Eckelkamp and Others* [2008] ECR I–0000, paragraph 28.

9 – Cited in footnote 6.

10 – Cited in footnote 6.

11 – Member States are not in fact obliged to adopt such grounds of exclusion as the use of the term 'may' (rather than 'shall') in Article 29 of Directive 92/50 renders their adoption merely facultative. While it may be difficult to reconcile the fact that the adoption of such grounds of exclusion by Member States is facultative with the exhaustive nature of those grounds, the Court confirmed in *La Cascina and Others* that '… Article 29 of Directive 92/50 does not provide in this field for uniform application of the grounds of exclusion mentioned therein at Community level, since the Member States may choose not to apply those grounds of exclusion at all and opt for the widest possible participation in procedures for the award of public contracts or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context the Member States have the power to make the criteria laid down in Article 29 of Directive 92/50 less onerous or more flexible' (see paragraph 23).

12 – See by analogy paragraph 21 of *La Cascina and Others*, cited in footnote 6.

13 – See by analogy paragraph 22 of *La Cascina and Others*, cited in footnote 6.

14 – Case C–213/07 [2008] ECR I–0000, paragraphs 41 to 43.

15 – OJ 1993 L 199, p. 54, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, OJ 1997 L 328, p. 1 ('Directive 93/37').

16 – See to that effect paragraphs 44 to 47 of *Michaniki* and the case-law cited therein. In paragraph 47 of the judgment in *Michaniki*, the Court stated that '[i]t follows that*, in addition* to the grounds for exclusion based on objective considerations of professional quality, which are listed exhaustively in the first paragraph of Article 24 of Directive 93/37, a Member State is entitled to provide for exclusionary measures designed to ensure observance, in procedures for the award of public contracts, of the principles of equal treatment of all tenderers and of transparency' (emphasis added). In my view the use of the terms 'in addition' in the paragraph in question may give the impression that additional grounds may be added to the seven grounds of exclusion contained in Article 24 of Directive 93/37 and by analogy to those contained in Article 29 of Directive 92/50. This was clearly not the intention of the Court. I have used the terms '*aside from*' in the text above, in order to stress that exclusionary measures designed to ensure observance of the principles of equal

treatment of all tenderers and of transparency in procedures for the award of public contracts are of a different specie or nature to the exclusionary grounds contained in Article 24 of Directive 93/37 and Article 29 of Directive 92/50. The fact that Article 24 of Directive 93/37 and Article 29 of Directive 92/50 contain an exhaustive list of grounds for excluding candidates on the basis of their professional quality is, in my view confirmed by Article 45 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). Article 45(2) of Directive 2004/18 replicates the seven grounds concerning professional quality contained in both Article 24 of Directive 93/37 and Article 29 of Directive 92/50. However, an entirely new and distinct category of compulsory grounds for exclusion of candidates is added in Article 45(1) of Directive 2004/18 based, inter alia, on candidates' convictions for participation in organised crime, corruption and fraud.

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17 – See to that effect paragraphs 55, 56 and 48 of *Michaniki* (cited in footnote 14) and the case-law cited therein. While the *Michaniki* case concerns a national provision which establishes a general system of incompatibility between the sector of public works and that of the media and results in the exclusion from the award of public works contracts contractors who are also involved in the media sector, the *ratio* or principles of law underlining that ruling are, in my view, of general application in the field of procedures for the award of public contracts and are by no means specific or limited to the media sector. Thus national provisions which seek to give effect to the principles of equal treatment and transparency and which are proportionate in nature, do not, in principle, contravene the Community rules governing the procedures for the award of public contracts.

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18 – The referring court clearly stated in the order for reference that Article 10(1bis) of Law No 109/94 is a rule laid down for the protection of a vital interest of society ('norma di ordine pubblico'). According to the referring court Article 10(1bis) of Law No 109/94 applies in general and thus to service and supply contracts, irrespective of whether the contracting authority has specifically imposed that provision (see point 14 above).

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19 – The Italian Republic at the hearing referred to the fact that the national measure in question was adopted following a number of scandals which arose in the field of public tenders. In addition, the Commission gave examples in its written and oral pleadings of the manner in which a company which controls another could distort a tendering procedure in which both companies participate.

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20 – Subject to verification by the referring court, Article 10(1bis) of Law No 109/94 does not seem to address collusive behaviour in the sense of Article 81 EC. Article 10 (1bis) of Law No 109/94 appears rather to address situations where two or more formally distinct companies which in fact constitute one economic unit, simultaneously participate in a tendering procedure thereby impairing the equal treatment of all tenderers and the transparency of procedures for the award of public contracts. In the absence, inter alia, of an agreement or concerted practice between undertakings, Article 81 EC does not apply (see Case C–73/95 P *Viho* v *Commission* [1996] ECR I–5457, paragraphs 48 to 51).

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21 – See point 39 above.

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22 – Indeed, the application of such a national measure may have the consequence that persons may be precluded from tendering procedures even though their participation

in the procedure entails no risk whatsoever for the equal treatment of tenderers and the transparency of procedures for the award of public contracts.

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Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia (Italy) lodged on 3 December 2007 - Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano

(Case C-538/07)

Language of the case: Italian

Referring court

Tribunale Amministrativo Regionale per la Lombardia

Parties to the main proceedings

Applicant: Assitur Srl

Defendant: Camera di Commercio, Industria, Artigianato e Agricoltura di Milano

Question referred

Does Article 29 of Directive 92/50/EEC, [1] in laying down seven grounds for exclusion from participation in service contracts, give an exhaustive list of cases of exclusion and therefore preclude Article 10(1bis) of Law No 109/94 (now replaced by Article 34, last paragraph, of Legislative Decree No 136/86) from imposing a prohibition on simultaneous participation in a tendering procedure of undertakings which are linked by a relationship of control?

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[1] - OJ L **1992 209** , p. 1.

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ARRÊT DE LA COUR (troisième chambre)

13 novembre 2008 (*)

«Manquement d'État – Marchés publics – Conception et réalisation d'un tramway municipal – Marché public de travaux – Attribution par la voie d'une procédure visant à l'attribution d'une concession de travaux publics – Violation de la directive 93/37»

Dans l'affaire C–437/07,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 19 septembre 2007,

Commission des Communautés européennes, représentée par MM. C. Zadra et D. Kukovec, en qualité d'agents,

partie requérante,

contre

République italienne, représentée par MM. I. M. Braguglia, en qualité d'agent, assisté de M. G. Fiengo, avvocato dello stato,

partie défenderesse,

LA COUR (troisième chambre),

composée de M. A. Rosas, président de chambre, MM. A. Ó Caoimh, J. N. Cunha Rodrigues (rapporteur), J. Klučka et A. Arabadjiev, juges,

avocat général: M. Y. Bot,

greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, la commune de L'Aquila (Italie) (ci-après la «commune») ayant attribué un marché public de travaux concernant la conception et la réalisation d'une ligne de tramway sur pneus pour le transport en commun public dans cette ville au moyen d'une procédure telle que celle du «financement de projet», visant à l'attribution d'une concession de travaux, et ayant procédé à une modification du projet préliminaire sur lequel se fondait l'appel d'offres, postérieurement à la publication de l'avis de marché, la République italienne a manqué aux obligations qui lui incombent en vertu, respectivement, de la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199, p. 54), notamment de ses articles 7 et 11, ainsi que des articles 43 CE et 49 CE et des principes de transparence et de non-discrimination qui en constituent le corollaire.

Le cadre juridique

La réglementation communautaire

2 L'article 1er, sous a), de la directive 93/37 définit les marchés publics de travaux de la manière suivante:

«les 'marchés publics de travaux' sont des contrats à titre onéreux, conclus par écrit entre, d'une part, un entrepreneur et, d'autre part, un pouvoir adjudicateur défini au point b) et ayant pour objet soit l'exécution, soit conjointement l'exécution et la conception des travaux relatifs à une des activités visées à l'annexe II ou d'un ouvrage défini au point c), soit la réalisation, par quelque moyen que ce soit, d'un ouvrage répondant aux besoins précisés par le pouvoir adjudicateur».

3 L'article 1er, sous d), de ladite directive définit la concession de travaux publics dans les termes suivants:

«la 'concession de travaux publics' est un contrat présentant les mêmes caractères que ceux visés au point a), à l'exception du fait que la contrepartie des travaux consiste soit uniquement dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix».

4 L'article 7 de la directive 93/37 prévoit que, pour passer leurs marchés publics de travaux, les pouvoirs adjudicateurs appliquent soit la procédure ouverte, soit la procédure restreinte et qu'ils peuvent recourir à la procédure négociée dans certains cas exceptionnels, limitativement énumérés. Ces obligations ne s'appliquent pas à l'attribution des concessions de travaux publics.

5 L'article 11, paragraphes 2 et 3, de ladite directive prévoit:

«2. Les pouvoirs adjudicateurs désireux de passer un marché public de travaux par procédure ouverte, restreinte ou négociée dans les cas visés à l'article 7 paragraphe 2 font connaître leur intention au moyen d'un avis.

3. Les pouvoirs adjudicateurs désireux d'avoir recours à la concession de travaux publics font connaître leur intention au moyen d'un avis.»

La réglementation nationale

6 Les articles 37 bis à 37 quater de la loi n° 109, loi-cadre sur les travaux publics (legge quadro in materia di lavori pubblici), du 11 février 1994 (supplément ordinaire à la GURI n° 41, du 19 février 1994, ci-après la «loi n° 109/94») traitent de l'attribution des marchés publics de travaux financés, en tout ou en partie, par des personnes privées.

7 L'article 37 bis de cette loi permet à des personnes privées de présenter aux organismes adjudicateurs des propositions de réalisation de travaux publics ou de travaux d'utilité publique et de signer les contrats correspondants prévoyant le financement et la gestion des travaux.

8 L'article 37 ter de la même loi décrit la procédure de sélection du promoteur. Ainsi, il prévoit que les pouvoirs adjudicateurs évaluent la faisabilité des propositions présentées sous différents aspects: construction, urbanisme, environnement, qualité du projet, fonctionnalité, jouissance de l'ouvrage, accessibilité au public, rendement, coût de gestion et d'entretien, durée de la concession, délais de réalisation des travaux de la concession, tarifs applicables et méthode de révision, valeur économique et financière du plan et contenu du projet de convention. Ces pouvoirs doivent s'assurer qu'aucun élément n'empêche la réalisation de ces propositions et, après avoir examiné et comparé ces dernières et entendu les promoteurs qui le demandent, ils indiquent quelle proposition est d'intérêt public.

9 Dans ce cas, en application de l'article 37 quater de la loi n° 109/94, est mise en œuvre une procédure restreinte destinée à susciter la présentation de deux autres offres. La concession est ensuite attribuée dans le cadre d'une procédure négociée au cours de laquelle la proposition du promoteur initialement sélectionné et ces autres offres sont examinées. Au cours de cette procédure, ledit promoteur peut adapter sa proposition à celle que le pouvoir adjudicateur estime convenir le mieux. Si tel est le cas, il deviendra adjudicataire de la concession.

10 Cette procédure est désignée sous le nom de «financement de projet» («finanza di progetto»).

Les antécédents du litige et la procédure précontentieuse

11 Par décision n° 49, du 29 janvier 2002, la commune a constaté, en application de l'article 37 ter de la loi n° 109/94, la faisabilité et l'intérêt public d'une proposition présentée par le promoteur Raggruppamento CGRT (ci-après «CGRT»), relative à la conception et à la réalisation d'une ligne de tramway sur pneus pour le transport en commun public dans cette ville. Selon cette décision, le montant estimé des travaux était de 33 569 698,44 euros, dont 20 141 819,06 euros, soit 60 % de celui-ci, financés directement par le ministère des Infrastructures et des Transports (Ministero delle Infrastrutture e dei Trasporti) et 13 427 879,38 euros, soit les 40 % restants, financés par CGRT.

12 Par décision n° 212, du 26 mars 2002, la commune a lancé un appel d'offres pour l'attribution d'une concession de travaux en vue de la construction de cette ligne de tramway. L'avis de concession a été publié, notamment, au *Journal officiel des Communautés européennes,* série S, du 25 avril 2002, sous la référence 2002/S 81–063094.

13 Cet appel d'offres s'étant révélé infructueux, la commune a, par décision n° 798, du 27 novembre 2002, attribué cette concession à CGRT. La commune et CGRT ont conclu un contrat en conséquence de cette attribution le 2 décembre 2002.

14 Le point 12, sous c), du préambule de ce contrat indique que la personne qui sera chargée de la gestion du service de tramway par la voie d'un contrat de services à conclure avec la commune devra payer une redevance périodique à CGRT.

15 L'article 5 de ce contrat stipule, en ce qui concerne la rémunération du concessionnaire:

«[...]

Comme mentionné au point 12, sous c), du préambule afin de garantir le respect des prévisions du plan économico-financier joint au projet préliminaire et, partant, la viabilité économique et financière de l'opération, le concessionnaire se verra attribuer à titre de rémunération, outre la contribution publique, le droit d'exploiter la ligne de tramway sur le plan tant opérationnel qu'économique, pendant toute la durée de la concession, ce droit pouvant être assorti de la perception d'une redevance spécifiée dans ledit plan économico-financier et due par le gestionnaire du service qui aura conclu un contrat de services avec le concédant, en contrepartie de ladite exploitation et pour l'utilisation de la ligne de tramway et des ouvrages connexes réalisés par le concessionnaire.

À cette fin, le concédant, eu égard à la nécessité de garantir l'équilibre économico-financier du concessionnaire et au fait qu'il est essentiel, à cet effet, que le gestionnaire du service assure ponctuellement le paiement de la redevance susmentionnée au concessionnaire, s'engage, par la présente convention et pour toute la durée de celle-ci, à prévoir expressément, dans le ou les appels d'offres et les documents annexes pour l'attribution du service de transport public lié à la ligne de tramway et en particulier dans le contrat de services régissant la prestation de ce service, l'obligation pour le gestionnaire du service de payer au concessionnaire ladite redevance, telle qu'indiquée dans le plan économico-financier annexé au projet préliminaire.»

16 D'après les éléments figurant au dossier, le montant de la redevance que le gestionnaire du service de tramway devrait payer à CGRT a été fixé à 1 446 079,32 euros par an pendant une période de trente ans.

17 À la date d'introduction du présent recours, la commune n'avait pas encore désigné de gestionnaire dudit service.

18 Par ailleurs, le projet préliminaire de l'ouvrage, sur lequel se fondait l'appel d'offres, a été modifié dans le projet définitif que CGRT a présenté après la publication de l'avis de concession. Ces modifications ont été approuvées par le ministère des Infrastructures et des Transports par note du 29 septembre 2004.

19 Sans que le coût total de l'ouvrage soit changé, le coût des travaux relevant de la catégorie «bâtiments civils et industriels», estimé à 2 948 695,88 euros dans le projet préliminaire, a été

porté à 7 613 505,11 euros dans le projet définitif, tandis que le coût des travaux relevant de la catégorie «équipements de traction électrique», estimé à 3 956 137,32 euros dans le projet préliminaire, a été porté à 3 140 566,98 euros dans le projet définitif.

20 À la suite d'une plainte relative à l'attribution des travaux en cause, la Commission a pris contact, les 16 et 17 juin 2005, avec les autorités italiennes, lesquelles lui ont fourni certaines informations.

21 N'étant pas satisfaite des réponses données par ces autorités, la Commission a adressé à la République italienne une lettre de mise en demeure le 18 octobre 2005 et un avis motivé le 4 juillet 2006, avant de former le présent recours.

Sur le recours

22 À l'appui de son recours, la Commission invoque deux griefs.

Sur le premier grief

Argumentation des parties

23 La Commission fait valoir, par son premier grief, que le contrat conclu entre la commune et CGRT le 2 décembre 2002 constitue un marché public de travaux au sens du droit communautaire. Certes, la contrepartie des travaux, en l'espèce, consisterait en partie dans le droit d'exploiter l'ouvrage. Cependant, dans la mesure où CGRT n'exploite pas lui-même l'ouvrage, mais perçoit une redevance garantie par un tiers chargé de l'exploitation de celui-ci, CGRT n'assumerait pas le risque financier de cette exploitation. Par conséquent, cette opération ne pourrait être qualifiée de concession de travaux publics. Elle devrait être qualifiée de marché public de travaux et devrait respecter des procédures de passation y afférentes.

24 La passation de ce marché par la voie d'une procédure telle que celle du «financement de projet», qui vise à l'attribution d'une concession de travaux publics, serait contraire aux dispositions de la directive 93/37, et notamment à ses articles 7 et 11.

25 La République italienne estime que, en l'espèce, le schéma de la concession se réalise pleinement. Le concessionnaire réaliserait l'ouvrage moyennant un concours financier fixe ne dépassant pas 60 % du prix de celui-ci. Les risques liés à cette réalisation seraient assumés par le concessionnaire qui ne pourrait rien exiger en dehors de ce concours financier.

26 En ce qui concerne le droit d'exploiter l'infrastructure, le service de transport en commun serait réservé dans la commune à un seul opérateur, à savoir Azienda della Mobilità Aquilana SpA (ci-après «AMA»), celle-ci étant tenue d'appliquer à l'égard des utilisateurs un prix administré et d'utiliser une billetterie intégrée avec les autres services de transport. Pour cette raison, le droit pour CGRT d'exploiter l'ouvrage se transformerait en un droit de percevoir une redevance fixe de la part d'AMA. Il s'agirait là d'une modalité d'exploitation de l'ouvrage qui n'enlève pas à l'opération en cause son caractère de concession de travaux publics.

Appréciation de la Cour

27 Il résulte de l'article 1er, sous d), de la directive 93/37, applicable à la date des faits, que la concession de travaux publics est un contrat présentant les mêmes caractéristiques qu'un marché public de travaux, à l'exception du fait que la contrepartie des travaux consiste soit uniquement dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix.

28 La Commission fait valoir que, en outre, la concession de travaux publics est caractérisée par le fait qu'elle implique un transfert du risque lié à l'exploitation de l'ouvrage vers le concessionnaire.

29 Sur ce point, la Cour a considéré que l'on est en présence d'une concession de services lorsque le mode de rémunération convenu tient dans le droit du prestataire d'exploiter sa propre prestation et implique que celui-ci prenne en charge le risque lié à l'exploitation des services en question (voir arrêt du 18 juillet 2007, Commission/Italie, C-382/05, Rec. p. I-6657, point 34 et jurisprudence citée).

30 Il résulte également de la jurisprudence que l'absence de transfert au prestataire du risque lié à la

prestation des services indique que l'opération visée constitue un marché public de services et non pas une concession de services publics (voir, en ce sens, arrêts du 27 octobre 2005, Contse e.a., C-234/03, Rec. p. I-9315, point 22, et Commission/Italie, précité, points 35 et 37).

31 Ces considérations, établies en ce qui concerne les marchés et concessions de services, valent pour les marchés et concessions de travaux.

32 En l'espèce, si l'article 5 du contrat conclu le 2 décembre 2002 entre la commune et CGRT prévoit que cette dernière se verra attribuer à titre de rémunération, outre la contribution publique, le droit d'exploiter la ligne de tramway en question, il ressort de ce même article 5, du point 12, sous c), du préambule de ce contrat ainsi que des autres éléments du dossier que l'exploitation du tramway doit être assurée par un gestionnaire qui devra conclure un contrat de services, non pas avec le concessionnaire, mais avec le concédant qui fixera le montant à payer au concessionnaire.

33 Le montant de la redevance qui devrait être payée à CGRT par le futur gestionnaire du service de tramway s'élève à 1 446 079,32 euros par an pendant 30 ans. Il résulte des éléments figurant au dossier que ce montant fixe a été calculé pour assurer le paiement à CGRT de la fraction du coût de l'ouvrage, égale à 40 % de ce dernier, dont les pouvoirs publics italiens n'assurent pas directement le versement.

34 Dans une telle situation, CGRT n'assume pas les risques liés à l'exploitation de l'ouvrage en question.

35 Il s'ensuit qu'il convient de qualifier l'opération en cause de marché public de travaux et non pas de concession de travaux publics.

36 Il est constant que, en l'espèce, le montant estimé des travaux envisagés dépasse le seuil d'application de la directive 93/37.

37 Par conséquent lesdits travaux auraient dû être attribués conformément aux procédures prévues par la directive 93/37 pour la passation des marchés publics de travaux.

38 Il est constant que, en l'espèce, la procédure d'attribution appliquée par la commune ne correspond pas à ces procédures.

39 Par conséquent, il convient de considérer le premier grief invoqué par la Commission comme fondé.

Sur le second grief

Argumentation des parties

40 Par son second grief, la Commission affirme que la modification du projet préliminaire de l'ouvrage en cause, sur lequel se fondait l'appel d'offres, après la publication de l'avis de concession, est contraire aux articles 43 CE et 49 CE ainsi qu'aux principes de transparence et de non-discrimination qui en constituent le corollaire.

41 La République italienne estime que ce second grief est dénué de fondement. En effet, l'appel à la concurrence se serait déroulé sur la base d'un projet préliminaire à caractère expérimental et une série d'ajustements techniques se seraient révélés indispensables afin d'assurer la sécurité et la viabilité du projet. Par ailleurs, les modifications techniques qui ont été apportées n'auraient pas altéré les termes globaux de l'opération ni favorisé un opérateur au détriment d'un autre.

Appréciation de la Cour

42 Tel qu'il est présenté dans la requête, le second grief est tiré d'une violation des règles applicables aux concessions, notamment des articles 43 CE et 49 CE, du principe de non-discrimination et de l'obligation de transparence, à l'exclusion des directives communautaires en matière de marchés publics. Au soutien de ce grief, la Commission cite exclusivement des arrêts de la Cour ayant pour objet des concessions et non pas des marchés publics.

43 Ce grief serait opérant dans l'hypothèse où l'opération en cause serait qualifiée de concession de travaux publics et non pas de marché public de travaux, contrairement à ce que la Commission fait valoir dans le cadre de son premier grief.

44 Or, la Cour a accueilli ce premier grief en constatant, au point 30 du présent arrêt, que l'opération en cause constitue un marché public de travaux et non pas une concession de travaux publics.

45 Dans ces conditions, il n'y a pas lieu pour la Cour de se prononcer sur le second grief invoqué par la Commission.

46 Compte tenu de l'ensemble des considérations qui précèdent, il convient de constater que la commune ayant attribué un marché public de travaux concernant la conception et la réalisation d'une ligne de tramway sur pneus pour le transport en commun public dans cette ville au moyen d'une procédure autre que celles prévues pour la passation des marchés publics de travaux par la directive 93/37, la République italienne a manqué aux obligations qui lui incombent en vertu de cette directive.

Sur les dépens

47 En vertu de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République italienne et celle-ci ayant en substance succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (troisième chambre) déclare et arrête:

1) La commune de L'Aquila ayant attribué un marché public de travaux concernant la conception et la réalisation d'une ligne de tramway sur pneus pour le transport en commun public dans cette ville au moyen d'une procédure autre que celles prévues pour la passation des marchés publics de travaux par la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux, la République italienne a manqué aux obligations qui lui incombent en vertu de cette directive.

2) La République italienne est condamnée aux dépens.

Signatures

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* Langue de procédure: l'italien.

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Judgment of the Court (Third Chamber) of 13 November 2008 - Commission of the European Communities v Italian Republic

(Case C-437/07) [1]

(Failure of a Member State to fulfil obligations - Design and construction of a municipal tramway - Public works contract - Award by means of a procedure for the award of a public works concession - Infringement of Directive 93/37)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: C. Zadra and D. Kukovec, Agents)

Defendant: Italian Republic (represented by: I. Braguglia and G. Fiengo, Agents)

Re:

Failure of a Member State to fulfil obligations - Infringement of Articles 43 EC and 49 EC and Articles 7 and 11 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) - Infringement of the principles of transparency and non-discrimination - Public works carried out by means of 'project financing'

Operative part of the judgment

1. *In so far as the Comune di l'Aquila (Municipality of Aquila) awarded a public works contract concerning the design and construction of a rubber tramway for public transport in that town by means of a procedure different to those laid down for the award of public works contracts by Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, the Italian Republic has failed to fulfil its obligations under that Directive;*

2. *The Italian Republic is to pay the costs.*

———————

[1] - OJ C 297, 8.12.2007.

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Action brought on 19 September 2007 - Commission of the European Communities v Italian Republic

(Case C-437/07)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: C. Zadra and D. Kukovec, Agents)

Defendant: Italian Republic

Forms of order sought

The applicant claims that the Court should :

declare that, in so far as the Comune di L'Aquila has awarded a public works contract for the design and construction of a rubber tramway for public transport in the town of L'Aquila by means of a procedure akin to the "project financing" procedure, designed to culminate in the award of a works concession, and amended the preliminary project on which the tenders were to be based after publication of the contract notice, the Italian Republic has failed to fulfil its obligations under Council Directive 93/37/EEC[1] of 14 June 1993 concerning the coordination of procedures for the award of public works contracts and, in particular, Articles 7 and 11 thereof, as well as its obligations under Articles 43 EC and 49 EC and the principles of transparency and non-discrimination which constitute the corollary thereto;

order the Italian Republic to pay the costs.

Pleas in law and main arguments

The Comune di L'Aquila (Municipality of L'Aquila) has awarded a public works contract for the design and construction of a rubber tramway for public transport in the town of L'Aquila by means of a "project financing" procedure designed to culminate in the award of a works concession, not a public works contract. The Comune di L'Aquila also amended - after publication of the contract notice - the preliminary project on which the tenders were to be based.

In the view of the Commission, the agreement between the Comune di L'Aquila and the construction group concerned constitutes a public works contract for the purposes of Community law. In consequence, the award of that contract by means of a procedure akin to the "project financing" procedure, designed to culminate in the award of a works concession, is contrary to the rules laid down in Directive 93/37 and, in particular, to Articles 7 and 11 thereof. Furthermore, the amendment, after publication of the contract notice, of the project on which the tenders were to be based is incompatible with the principles of transparency and non-discrimination, on which the freedom of establishment and the freedom to provide services, as provided for in Articles 43 EC and 49 EC, are based.

_____

[1] - OJ 1993 L 199, p. 54.

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JUDGMENT OF THE COURT (Fourth Chamber)

22 April 2010 (*)

(Failure of a Member State to fulfil obligations – Directive 93/37/EEC – Articles 3 and 11 – Public works concession contracts – Obligations regarding advertising – Extent of the obligations – Contract notice – Description of the object of the concession and of the location of the works – Additional works not expressly set out in the contract notice or in the tender specifications – Principle of equal treatment)

In Case C–423/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 13 September 2007,

European Commission, represented by D. Kukovec and M. Konstantinidis, and by S. Pardo Quintillán, acting as Agents, and by M. Canal Fontcuberta, abogada, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 September 2009,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by failing to include, in the works to be awarded by concession in the concession notice and in the tendering specifications relating to the award of a public concession for the construction, maintenance and operation of the link roads from the A-6 motorway to Segovia and Ávila, and for the maintenance and operation from 2018 of the Villalba-Adanero section of the A-6 motorway, certain works which were subsequently awarded with the contract, including works on the toll-free section of the A-6 motorway, the Kingdom of Spain has failed to fulfil its obligations under Article 3 of Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and, accordingly, under Article 11(3), (6), (7), (11) and (12) thereof, and has infringed the principles of the EC Treaty, in particular those of equal treatment and non-discrimination.

Community legislation

2 Directive 93/37 states, in the fifth recital in the preamble thereto, that, '... in view of the increasing importance of concession contracts in the public works area and of their specific nature, rules concerning advertising should be included in this Directive'.

3 Pursuant to Article 1(c) of that directive:

'a "work" means the outcome of building or civil engineering ... works taken as a whole that is sufficient of itself to fulfil an economic and technical function'.

4 In accordance with the definition in Article 1(d) of that directive:

'"public works concession" is a contract of the same type as that indicated in (a) [concerning public works contracts] except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment'.

5 Article 3 of Directive 93/37 provides:

'1. Should contracting authorities conclude a public works concession contract, the advertising rules as described in Article 11(3), (6), (7) and (9) to (13), and in Article 15, shall apply to that contract when its value is not less than ECU 5 000 000.

...

4. Member States shall take the necessary steps to ensure that a concessionnaire other than a contracting authority shall apply the advertising rules listed in Article 11(4), (6), (7), and (9) to (13), and in Article 16, in respect of the contracts which it awards to third parties when the value of the contracts is not less than ECU 5 000 000. ...

...'

6 Article 11 of Directive 93/37, which forms part of Title III thereof, entitled 'Common advertising rules', provides:

'1. Contracting authorities shall make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold laid down in Article 6(1).

...

3. Contracting authorities who wish to award a works concession contract shall make known their intention by means of a notice.

...

6. The notices referred to in paragraphs 1 to 5 shall be drawn up in accordance with the models given in Annexes IV, V and VI, and shall specify the information requested in those Annexes.

...

7. The contracting authorities shall send the notices referred to in paragraphs 1 to 5 as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities. ...

...

9. The notices referred to in paragraphs 2, 3 and 4 shall be published in full in the *Official Journal of the European Communities* ...

10. The Office for Official Publications of the European Communities shall publish the notices not

later than 12 days after their dispatch. In the case of the accelerated procedure referred to in Article 14, this period shall be reduced to five days.

11. The notice shall not be published in the official journals or in the press of the country of the contracting authority before the date of dispatch to the Office for Official Publications of the European Communities and it shall mention this date. It shall not contain information other than that published in the *Official Journal of the European Communities*.

12. The contracting authorities must be able to supply evidence of the date of dispatch.

...'

7 The annexes referred to in Article 11(6) of Directive 93/37 contain model notices to be published by the contracting authority in the *Official Journal of the European Communities*. Annex IV to that directive concerns public works contracts, Annex V public works concession contracts and Annex VI contains the model notice where the concessionnaire wishes to conclude with third parties contracts for performance of work which have been awarded to it.

8 Article 15 of that directive provides:

'Contracting authorities who wish to award a works concession contract shall fix a time limit for receipt of candidatures for the concession, which shall not be less than 52 days from the date of dispatch of the notice.'

9 Article 61 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), entitled 'Awarding of additional works to the concessionaire', provides:

'This Directive shall not apply to additional works not included in the concession project initially considered or in the initial contract but which have, through unforeseen circumstances, become necessary for the performance of the work described therein, which the contracting authority has awarded to the concessionaire, on condition that the award is made to the economic operator performing such work:

– when such additional works cannot be technically or economically separated from the initial contract without major inconvenience to the contracting authorities, or

– when such works, although separable from the performance of the initial contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works may not exceed 50% of the amount of the original works concession contract.'

10 The Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2) states, in point 3.1.1 thereof, entitled 'Equality of treatment':

'...

[I]n certain cases, the grantor may be unable to specify his requirements in sufficiently precise technical terms and will look for alternative offers likely to provide various solutions to a problem expressed in general terms. In such cases, however, in order to ensure fair and effective competition, the specifications must always state in a non-discriminatory and objective manner what is asked of the candidates and above all the way in which they must draw up their bids. ...'

National legislation

11 Law 8 of 10 May 1972 on the construction, maintenance and exploitation of motorways under concession contracts, in the version in force since 1996 ('the Law on motorways'), provides in the second subparagraph of Article 8(2) thereof:

'... the construction of road infrastructure works, other than those included in the contract but affecting it, which are carried out in the area of impact of the motorway or which are necessary to

organisation of the traffic, whose project and performance, or merely performance, the concessionaire is obliged to carry out as the consideration for the contract, shall form part of the business object of the concessionaire undertaking, …'

12 Royal Decree 597 of 16 April 1999 fixes as 20 km the area of impact of motorways.

The disputed operation

13 The A-6 motorway links Madrid to La Coruña and constitutes the main road axis linking the centre to the north and north-west of Spain. It is common ground that this is one of the major and busiest road arteries in that country. The section of that motorway between Madrid and Villalba is a toll-free section, approximately 40 km long, and crosses an area which is, in fact, urban. The section between the cities of Villalba and Adanero is a toll section, approximately 70 km long ('the toll section of the A-6 motorway'). It is common ground that those two motorway sections have for a long time had very heavy traffic and serious congestion problems.

14 Since 1968, the toll section of the A-6 motorway has been managed under a concession by the undertaking Ibérica de Autopistas SA ('Iberpistas'). That concession was granted until 29 January 2018.

15 By decree of 26 May 1997, the Spanish Ministry of Public Works announced its intention to include in the 'motorway plan', approved by the Spanish Government in February 1997, the construction of motorways connecting the cities of Segovia and Ávila to the A-6 motorway, since, 'having regard to the large traffic flows which currently exist and which cause traffic congestion …, the construction of the motorways connecting those cities with the current A-6 motorway is of exceptional public interest as regards their development'.

16 By notice published in the *Official Journal of the European Communities* (OJ S 115, 16 June 1999) ('the first notice') and by tender specifications approved by decree of 4 June 1999 (BOE No 136, 8 June 1999; 'the first tender specifications'), the Ministry of Public Works, acting as concession-granting authority, opened a procedure with a view to awarding a public works concession. Paragraph 2 of the first notice and clause No 2, paragraph 4, of the first tender specifications, the content of which was identical, set out the object of the concession to be awarded.

17 That object concerned the following works:

– the construction, maintenance and operation of the link roads on the toll section of the A-6 motorway with the cities of Ávila and Segovia,

– the maintenance and operation, from 30 January 2018, of the toll section of the A-6 motorway, for a period to be determined on the basis of the number of vehicles transiting that section,

– construction of the bypass around the city of Guadarrama, a municipality on the toll section of the A-6 motorway, and

– widening of a part of the toll-free section of the A-6 motorway, that is to say the section between Madrid and Villalba. A fourth lane was to be constructed in both directions with a view to increasing the capacity of the A-6 motorway over that section.

18 By decree of 7 July 1999 (BOE No 163, 9 July 1999), the concession-granting authority published new tender specifications ('the second tender specifications'). A new notice was published in the *Official Journal of the European Communities* (OJ S 137, 17 July 1999; 'the second notice'). The preamble to that second decree stated that, 'it is necessary for technical reasons to amend the [first tender] specifications, in order to redefine the object of the concession to be awarded and to make some changes in the definition of the duration of the concession'.

19 Paragraph 2 of the second notice and clause No 2 of the second tender specifications defined the object of the concession as follows:

'1. The construction, maintenance and operation of the toll section of the A-6 motorway, link with Segovia, …

2. The construction, maintenance and operation of the toll section of the A-6 motorway, link with Ávila. …

3. The maintenance and operation of the A-6 toll motorway, Villalba–Adanero section. …'

20 It follows that the second notice and second tender specifications did not mention in the object of the concession the construction of the Guadarrama bypass or the widening of part of the toll-free section of the A-6 motorway.

21 Clause No 3 of the second tender specifications referred to the 'administrative file'.

22 Paragraphs 13 and 16 of clause No 5 of the second tender specifications, the wording of which was the same in the first tender specifications, provided:

'13. Tenderers shall state expressly in their tenders the measures they intend to adopt in connection with the effects of the concession on the road network as a whole, local tourist interests, and the upkeep of monuments of historical or artistic interest, and in connection with the protection and conservation of the countryside and nature, without prejudice to compliance with the legislation in force in those fields.

…

16. Tenderers shall inform the authorities of the measures they propose to take for adequate traffic management between cities in the area affected by the construction of the sections that are the object of the concession, stating which of these measures they intend to implement at their own expense. The creative character and feasibility of these proposals will carry due weight in the award procedure, having regard to the high level of congestion in the areas where traffic will be affected by the roads that are the object of the concession.'

23 Clause No 10 of the second tender specifications, which was identical to that in the first tender specifications, listed the criteria which were to be taken into consideration in awarding the contract. Those criteria included:

– the viability of the tender submitted and the extent of the resources used (point III),

– the measures proposed for traffic and environmental management (point V).

24 Sub-criterion V.i stated:

'[t]he measures proposed for traffic management between cities, including those relating to the installation of a dynamic toll in the area affected by the construction of the sections which are the object of the concession, can obtain up to 75 points for their creativity, viability and efficiency'.

25 Clause No 29 of the second tender specifications stated that, with regard to the toll sections of the A-6 motorway connecting to Ávila and Segovia, the concessionnaire is required to ensure that traffic does not exceed a certain level, expressed in technical terms, at any point on the motorway and is required to widen the road where necessary at its own expense.

26 Finally, clause No 33 of the second tender specifications provided that the duration of the contract would be neither greater than 37 years nor less than 22 years, and that the exact duration of the contract, calculated in years, would be determined having regard to the actual trends in traffic on each of the different sections, which would be estimated 20 years after the commencement of the contract.

27 By virtue of Royal Decree 1724/1999 of 5 November 1999, the concession-granting authority awarded the concession to Iberpistas. Article 5 of that Royal Decree nevertheless provided for works to be carried out in addition to those listed in the second notice and in the second tender specifications. Thus, in addition to the construction of link roads to the toll section of the A-6 motorway with Ávila and Segovia, and the maintenance and operation of the toll section of the A–6 motorway between Villalba and Adanero, the following works were required:

– the construction of a third lane in each direction on the part of the toll section of the A-6

motorway between Villalba and the Valle de los Caídos junction ('works A'),

– the construction of a third reversible lane on the part of the toll section of the A-6 motorway between the Valle de los Caídos junction and the city of San Rafael, including the construction of a new tunnel ('works B'), and

– the construction of a fourth lane in each direction on the toll-free section of the A-6 motorway between Madrid and Villalba ('works C').

28 Works A, B and C are referred to below as 'additional works'.

29 It follows from the foregoing that works C were mentioned in the first notice and the first tender specifications, but not in the second. Works A and B were not mentioned in either the first or the second. With regard to the construction of a bypass around Guadarrama, which was listed in the first tender specifications but not in the second, it was not included in the object of the concession awarded to Iberpistas and in the end were not carried out.

30 It is apparent from the file that the link road between the toll section of the A-6 motorway and Segovia came into operation in 2003 and that the fourth lane on the toll-free section of the A-6 motorway (works C) came into operation on 1 January 2006. It is also apparent from the file that the other works were carried out in the meantime.

31 It is also apparent from a letter from the Spanish authorities, dated 28 November 2001, that the cost of the works expressly mentioned in the second notice and the second tender specifications, that is to say, the link roads between the toll section of the A-6 motorway and Segovia and Ávila, was EUR 151.76 million. That cost does not include that of the maintenance and operation works on the toll section of the A-6 motorway, the concession for which was granted from 30 January 2018. The cost of the three additional works was EUR 132.03 million.

The pre-litigation procedure

32 Being unsure as to the validity of the procedure which led to the grant of the concessions for the additional works in the light of the rules of Directive 93/37, on 30 April 2001 the Commission sent the Kingdom of Spain a letter of formal notice to which the Spanish authorities replied by letter of 27 June 2001. Since it did not consider the explanations given by that Member State to be satisfactory, on 18 July 2002, the Commission issued a reasoned opinion, to which that State replied by letters of 20 September 2002 and 13 March 2003.

33 On 25 July 2003, the Commission sent an additional letter of formal notice to the Kingdom of Spain concerning infringement of the principles of equal treatment and non-discrimination, to which Spain replied by letter of 28 October 2003. On 22 December 2004, the Commission sent an additional reasoned opinion concerning infringement of those principles, to which that Member State replied by letter of 3 March 2005. Not satisfied with that reply, the Commission instituted the present action.

The action

Admissibility

34 The Kingdom of Spain raises two pleas of inadmissibility. Firstly, it submits that the application does not satisfy the requirements of the Rules of Procedure of the Court, since the Commission has not provided evidence that the lawyer representing it is qualified to do so. Moreover, that institution has not shown that that lawyer is authorised to appear in the present case, since she is not acting as an agent of the Commission.

35 Secondly, the Kingdom of Spain raises a plea of inadmissibility alleging that the Commission's application lacks clarity, in so far as it refers without distinction to infringement of Articles 3 and 11 (3), (6), (7), (11) and (12) of Directive 93/37. The only provision of Article 3 capable of being taken into account in the present case is paragraph 1 thereof. In addition, the concession-granting authority entirely fulfilled its obligations under Article 11(3), (7), (11) and (12) of that directive in the present case. Furthermore, Article 11(6) thereof refers to Annexes IV, V and VI to that directive, although only Annex V is applicable to the present case. Accordingly, the subject-matter of the

action is indeterminate.

36 With regard to the first plea of inadmissibility, the Commission was properly represented by three agents assisted by a lawyer. Moreover, the Commission attached to its application a copy of a document certifying that the lawyer in question is authorised to practice, within the meaning of Article 38(2) of the Rules of Procedure of the Court, as a lawyer before a court of a Member State, that is to say, the Kingdom of Spain.

37 In the same way, the second plea of inadmissibility cannot be accepted. It is unequivocally apparent from all the documents lodged before the Court that the action and the complaints of the Commission concern the failure to comply, in the procedure for award of the concession for the works in question, with the advertising obligations imposed on the concession-granting authority by the relevant provisions of Directive 93/37, since not all the works actually awarded and carried out were mentioned in the notice laid down for that purpose by those provisions.

38 Accordingly, in the present case there is no problem of clarity of the subject-matter such as to call into question the admissibility of the action.

39 The possibility that certain of the provisions of Directive 93/37 relied on by the Commission in support of its complaints may prove irrelevant to the present case does not render its action inadmissible.

Substance

Arguments of the parties

40 In essence, the Commission submits that the object of a concession, as described in the notice and in the tender specifications, and the works actually awarded must match. The object of the concession at issue was precisely defined in clause No 2 of the second tender specifications and concerns specific works, that is to say the link roads between the toll section of the A-6 motorway and Segovia and Ávila and the maintenance and operation of that section from 30 January 2018. However, the additional works were not mentioned in either the second notice or the second tender specifications.

41 The Kingdom of Spain's alleged failure to fulfil obligations thus consists, in the view of the Commission, in the fact that the Spanish authorities made a later extension to the object of the concession by awarding to Iberpistas works which had not been advertised and which were outside the geographical area covered by the object of the concession as advertised. That constitutes a failure to fulfil the obligations imposed on the Member States by virtue of the relevant provisions of Articles 3 and 11 of Directive 93/37.

42 The Commission argues that neither the alteration to the object of the concession in the second notice and the second tender specifications nor the wording of clauses No 5(13) and (16) and No 29 of the second tender specifications could give a reasonably aware and informed tenderer to understand that in fact it was requested by the competent authorities to submit proposals for carrying out works such as the additional works. Were that not the case, it would amount to accepting that tenderers could propose work on all the roads in the provinces of Madrid, Segovia and Ávila, since the traffic on those roads could be affected by the works forming the object of the concession.

43 In the view of the Commission, the fact that the additional works were not included in the object of the concession and that an averagely informed tenderer would not be able to deduce from the tender specifications that it could submit proposals relating to the performance of works of such wide scope favoured only Iberpistas, which was already the concessionaire for the toll section of the A-6 motorway and was aware of the real requirements of the awarding authority. However, neither the other candidates nor the potential tenderers could have known all the factors which were to be taken into consideration for award of the concession, which constitutes infringement of the principle of equal treatment of the tenderers.

44 The Kingdom of Spain submits, firstly, that, as is apparent from the second tender specifications, the invitation to tender was governed not only by those specifications but also by all the legislation applicable to invitation to tender procedures, that is to say, by the Law on motorways and by the general tender specifications approved by Decree No 215 of 25 January 1973. The aim of that legislation was to allow, in accord with the implementation of the abovementioned motorways plan,

broad scope for initiatives from private undertakings both when submitting their tenders and during the performance of their activities after award of the concession.

45 That approach was, furthermore, followed when awarding concessions for the construction of other motorways in Spain and, moreover, was confirmed by Article 8 of the Law on motorways which provides for the tenderers to propose additional works, whether inside the area of impact of motorways, in accordance with the definition of that term in national legislation, or outside that area.

46 In the present case, the second tender specifications no longer expressly mention the construction projects for certain works. That amendment was intended to leave it to the initiative and creativity of the private contractors to propose to the concession-granting authorities that works be carried out which would solve the traffic problems on the A-6 motorway, in particular after construction of the new link roads with Ávila and Segovia. In point of fact, the construction of those two new motorways worsened the traffic situation on the route concerned. Proposing a solution to that problem was left to the initiative of the tenderers, as is also apparent from the wording of clause No 5(13) and (16) and clauses No 28 and 33 of the second tender specifications.

47 Secondly, the Kingdom of Spain submits that, in any event, there can be no question in the present case of a failure to fulfil advertising obligations with regard to the award of the additional works. Iberpistas did not carry out those additional works itself, but opened them to invitation to tender and awarded them to third-party undertakings, in accordance with the requirements of publicity and competition laid down in Directive 93/37 and by the Spanish legislation. Those additional works were therefore carried out by third-party undertakings independent of the concessionaire Iberpistas.

48 Thirdly, the Kingdom of Spain points out that the complaints were lodged with the Commission not by unsuccessful tenderers nor by third parties actually or potentially interested in the award of the disputed concession, but by persons and bodies having no professional connection with that concession. Those complainants did not have any interest in the correct application of the rules of competition, but had other motives. All bodies wishing to participate in the procedure had the same information and none of the tenderers or actual or potential interested parties disputed, by complaint, claim or legal action, the result of the procedure. Accordingly, there was equality of treatment.

49 Fourthly, the Kingdom of Spain observes that those complainants, before turning to the Commission, had lodged two actions against the disputed procedure before the Tribunal Supremo, the Spanish Supreme Court, which was in the best position to rule on the question of fact raised in the present case concerning the determination of the reasons for the amendment made in the second contract notice. The Tribunal Supremo dismissed those actions by two judgments of 11 February and 4 October 2003, in which it examined the award of the disputed concession also in the light of Community law and held that the principles of equal treatment and of non-discrimination had been upheld.

Findings of the Court

50 A preliminary point to note is that, although the Commission complains that the Kingdom of Spain has breached Articles 3 and 11(3), (6), (7), (11) and (12) of Directive 93/37, it does not dispute either the fact that a notice of invitation to tender was published or the timing and means of that publication, as laid down in Article 11(7), (11) and (12) of that directive. In addition, it is apparent from its application that, with regard to Article 3 of that directive, the Commission's action relates only to Article 3(1) thereof.

51 In those circumstances, the Commission's action must be examined in the light of Articles 3(1) and 11(3) and (6) only of Directive 93/37.

52 In that regard, it is established that the operation at issue in the present case constitutes a 'public works concession' within the meaning of Article 1(d) of Directive 93/37. In accordance with that provision, the 'public works concession' is a contract of the same type as those concerning 'public works contracts' except for the fact that the consideration for the works consists either solely in the right to exploit the construction or in this right together with payment.

53 In accordance with Article 3(1) of Directive 93/37, should contracting authorities conclude a public works concession contract, the advertising rules as defined inter alia in Article 11(3) and (6) of that

directive are to apply to that contract when its value is not less than ECU 5 000 000.

54 Article 11(3) of that directive requires contracting authorities who wish to award a works concession contract to make known their intention by means of a notice. That notice, as is apparent from Article 11(6), must be drawn up in accordance with the models given in Annex V, and is to specify the information requested therein.

55 The information which that notice must contain includes, in accordance with Section II, entitled 'Object of the contract', of Annex V thereto, the main object and additional objects of the contract, a description of the object of the concession and of the location of the works referred to in the concession, and the quantity and overall scope thereof.

56 That advertising obligation, because it makes it possible to compare the offers which it contains, ensures a level of competition considered satisfactory by the European Union legislature in the field of public works concessions.

57 In that field, it is an expression of the principles of equal treatment and of transparency, with which the awarding authorities are required to comply in all circumstances.

58 By the clear formulation of the terms of the notice, the opportunity must be offered objectively to all potential tenderers, which are informed, experienced and reasonably aware, of forming a concrete idea of the works to be carried out and of their location, and in consequence of drafting their tenders.

59 The vital importance of the notice, as regards both public contracts and works concessions, with regard to the information, in conditions of compliance with the principle of equal treatment, for tenderers from different Member States, is emphasised in Article 11(11) of Directive 93/37, pursuant to which any publication of information at a national level must not contain information other than that published in the *Official Journal of the European Communities*.

60 Having regard, however, to the limited space available in the model concession notice set out in Annex V to Directive 93/37, information on a concession can be set out in detail in the tender specifications which the concession-granting authority must draw up and which constitute the natural complement to the notice.

61 In the present case, it must be held that the additional works to which the complaints of the Commission relate, the value of which very considerably exceed the threshold laid down in Article 3 (1) of Directive 93/37, were not set out in the object of the concession at issue, as defined in the second notice and the second tender specifications.

62 Nevertheless, the Kingdom of Spain submits that the second tender specifications should have been understood as meaning that they referred to the basic rules generally applicable to invitation to tender procedures, in particular the Law on motorways, and should have been interpreted in the light of those rules, the aim of which is to allow tenderers broad freedom to use their initiative. Accordingly, the tenderers should have understood, in the light of Article 8 of that law, that the concession-granting authority was in fact calling on their initiative and creativity with a view to resolving the essential problem, which was the density of the traffic on the A-6 motorway. That problem was well known and clearly apparent from the statistics of the competent national authorities. It is therefore common sense to understand that the concession-granting authority expected such proposals. That expectation is also confirmed by the fact that certain works were no longer listed in the second tender specifications, in order to give more scope to tenderers' initiative, and by the formulation of clauses No 5(13) and (16) and No 29 of the second tender specifications.

63 That argument must be rejected.

64 It must be noted that, for the purposes of clarification of the requirements of a concession, it is sometimes inevitable that the notice or tender specifications refer to the national rules concerning the technical specifications on safety, health, environmental and other requirements. The fact that such a reference is possible cannot, however, enable the concession-granting authority to escape the advertising obligations laid down in Directive 93/37, pursuant to which the object of the concession must be defined in the notice and the tender specifications, which must contain the information referred to in paragraph 55 of the present judgment. Nor can it be accepted that it was necessary to interpret the notice or the tender specifications in the light of such rules in order to discern the true object of a concession.

65 That requirement must be interpreted strictly. Thus, the Court, in the context of a public works contract, has declared unlawful a reference from tender specifications to national legislation concerning the possibility that tenderers may submit variants of their tenders, in accordance with the first and second paragraphs of Article 19 of Directive 93/37, having regard to the fact that the minimum conditions which those variants were to meet were not specified in the tender specifications (see Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraphs 27 to 29). With regard to an obligation of transparency designed to ensure observance of the principle of equal treatment of tenderers, which must be observed in any procurement procedure governed by Directive 93/37, that finding of the Court is also valid as regards works concessions.

66 It should also be added that it is acceptable for the concession-granting authority, having regard to possible particular features of the works which are the object of the concession, to leave some latitude to tenderers' initiative in the formulation of their tenders.

67 However, clauses No 5(13) and (16) and No 29 of the second tender specifications, which replaced the first, cannot be regarded as calling upon the tenderers' initiative with a view to proposing alternatives relating to works other than those clearly identified in the second notice. Clause No 5 (13) does not state, in particular, the location of the measures to be taken to reduce any increase in traffic density caused by carrying out the works referred to in the second notice. In addition, clause No 5(16) merely requests tenderers to propose measures for adequate traffic 'management' between cities 'in the area affected by the construction of the sections that are the object of the concession', without further defining that area. What is more, clause No 29 refers, with insufficient precision, to measures to be taken concerning the toll sections of the A-6 motorway connecting to Ávila and Segovia.

68 It must be held that the tenderers' initiative and alternative tenders, expected by the Spanish Government on the basis that the second tender specifications replaced the first 'for technical reasons' and 'in order to redefine the object of the concession', apart from the fact that they could not be understood by a tenderer reasonably informed and aware in the manner alleged by the Kingdom of Spain, do not relate to the object of the disputed concession, but rather correspond to a general transport policy concern in the Member State involved. Thus, on the basis of such an understanding, as the Commission rightly points out, the tenderers would have been free to propose unlimited works throughout the Autonomous Community of Madrid and the provinces of Ávila and Segovia.

69 In the same way, any possibly well-known problem existing at national level, of which as such potential tenderers established in other Member States cannot be assumed to be aware, cannot be taken into account by tenderers as an implied criterion of definition of the object of a concession and thus have an effect on the importance accorded by the European Union rules to the notice and the tender specifications.

70 In any event, even if it is accepted that all tenderers understood in the same way their freedom to use their initiative, it does not satisfy Directive 93/37 when, without any transparency, a public works concession contract is awarded which includes works referred to as 'additional' which of themselves constitute 'public works contracts' within the meaning of that directive and the value of which exceeds the threshold laid down therein.

71 If the opposite were true, that would mean that those works referred to as 'additional' would avoid the advertising obligation and, consequently, any call for competition. Having regard to the fact that tenderers using their initiative would be entirely free to submit proposals in which they determined the nature, scope and geographical location of the works to be carried out, independently and without any requirement to fulfil a predetermined object, it would not be possible to compare their tenders in any way.

72 In addition, it must be noted that the Kingdom of Spain cannot reasonably derive any support from Article 61 of Directive 2004/18. Putting aside the consideration that that directive is not applicable *ratione temporis* to the present case, clearly the disputed additional works do not constitute, within the meaning of the abovementioned provision, 'additional works not included in the concession project initially considered' for the concession but which have, through unforeseen circumstances, become necessary for the performance of the work described therein.

73 The manner of proceeding adopted by the Kingdom of Spain in the present case cannot be justified either by point 3.1.1 of the Commission interpretative communication on concessions under Community law referred to above. That text relates only to cases where, unable to define its

requirements in sufficiently precise technical terms, a concession-granting authority seeks to obtain alternative tenders intended to resolve a problem expressed in general terms, which is not the case here.

74 Accordingly, the conclusion must be that the additional works were awarded to Iberpistas despite the fact that they were not included in the object of the concession at issue, as described in the second notice and the second tender specifications, which constitutes breach of Articles 3(1) and 11 (3) and (6) of Directive 93/37, read in conjunction with Annex V thereto.

75 As is clear from paragraph 57 of the present judgment, the provisions required appropriate advertising as required by Directive 93/37, constituting an expression of the principles of equal treatment and of transparency. Consequently, there is no need to consider separately the question of a possible breach of those principles.

76 The conclusion in paragraph 74 of the present judgment is not called into question by the argument drawn by the Kingdom of Spain from the fact that Iberpistas did not itself carry out the additional works, but awarded them to third-party undertakings, in accordance with the requirements of publicity laid down in Article 3(4) of Directive 93/37. As the Commission rightly points out, Article 3 of that directive clearly requires both the concession-granting authority and the concessionaire to comply with cumulative and not alternative advertising obligations which must be met by them both, at all stages of the procedure, in order for that provision to remain effective.

77 In the same way, the argument of the Kingdom of Spain that the Commission decided to institute the present proceedings for failure to fulfil obligations following complaints lodged by parties having no connection with the contested procedure, and not by other tenderers actually or potentially interested in the award of the concession at issue, cannot succeed.

78 It is clear from settled case-law that it is for the Commission to determine whether it is expedient to take action against a Member State and what provisions, in its view, the Member State has infringed, and to choose the time at which it will bring an action for failure to fulfil obligations; the considerations which determine its choice cannot affect the admissibility of the action. In that regard, while the bringing and continuation of infringement proceedings is a matter for the Commission in its entire discretion, it is for the Court to consider whether there has been a failure to fulfil obligations as alleged, without its being part of its role to take a view on the Commission's exercise of its discretion (see, to that effect, Case C–33/04 *Commission* v *Luxembourg* [2005] ECR I–10629, paragraphs 65 to 67 and the case-law cited). Furthermore, the fact that other competing tenderers did not contest the procedure to award the disputed concession cannot have any effect on the assessment of the legality of that procedure or on whether the present action is well founded.

79 It must also be held that the argument that the Tribunal Supremo, hearing actions brought against the decision of the concession-granting authority, held by two judgments that there was no breach of the provisions of Directive 93/37 or of the principle of equal treatment and proceeded to assess the facts regarding the clauses of the second tender specifications which fall within the jurisdiction of the national court, is not relevant either for the purposes of adjudicating in these proceedings.

80 It should be borne in mind that the fact that proceedings have been brought before a national court to challenge the decision of a competent authority which is the subject of an action for failure to fulfil obligations and the decision of that court cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of the remedies available through the national courts cannot prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects (see, to that effect, Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraph 9; Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 24; Case C–87/02 *Commission* v *Italy* [2004] ECR I–5975, paragraph 39; and Case C–508/03 *Commission* v *United Kingdom* [2006] ECR I–3969, paragraph 71).

81 In the light of all the above considerations, it must be concluded that, by awarding to Iberpistas, on 5 November 1999:

– the construction of a third lane in each direction on the part of the toll section of the A-6 motorway between Villalba and the Valle de los Caídos junction,

– the construction of a third reversible lane on the part of the toll section of the A-6 motorway between the Valle de los Caídos junction and the city of San Rafael, including the construction

of a new tunnel, and

– the construction of a fourth lane in each direction on the toll-free section of the A-6 motorway between Madrid and Villalba,

without those works having been listed in the object of the public works concession contract, as described in the notice published in the *Official Journal of the European Communities* or in the tender specifications, the Kingdom of Spain has failed to fulfil its obligations under Articles 3(1) and 11(3) and (6) of Directive 93/37, read in conjunction with Annex V thereto.

82 The remainder of the action is dismissed.

Costs

83 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs to be awarded against the Kingdom of Spain and the latter has been unsuccessful in its main pleas, the Kingdom of Spain must be ordered to pay the costs.

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

1. Declares that, by awarding to Iberpistas, on 5 November 1999

– the construction of a third lane in each direction on the part of the toll section of the A-6 motorway between Villalba and the Valle de los Caídos junction,

– the construction of a third reversible lane on the part of the toll section of the A-6 motorway between the Valle de los Caídos junction and the city of San Rafael, including the construction of a new tunnel, and

– the construction of a fourth lane in each direction on the toll-free section of the A-6 motorway between Madrid and Villalba,

without those works having been listed in the object of the public works concession contract, as described in the notice published in the *Official Journal of the European Communities* or in the tender specifications, the Kingdom of Spain has failed to fulfil its obligations under Articles 3(1) and 11(3) and (6) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, read in conjunction with Annex V thereto;

2. Dismisses the action as to the remainder.

[Signatures]

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* Language of the case: Spanish.

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CONCLUSIONS DE L'AVOCAT GÉNÉRAL
M. PAOLO Mengozzi
présentées le 20 octobre 2009 (1)

Affaire C–423/07

Commission des Communautés européennes
contre
Royaume d'Espagne

«Directive 93/37/CEE – Concessions de travaux publics – Violation des règles de publicité ainsi que des principes d'égalité de traitement et de non–discrimination»

1. Le thème du rôle et de la signification des concessions en droit communautaire est notoirement délicat, et leur réglementation jusqu'ici est assez pauvre. Les concessions de travaux publics, au centre de la présente affaire, ont cependant fait l'objet d'interventions explicites du législateur communautaire (2) qui, dans la récente directive 2004/18/CE (3), leur a consacré un titre (4).

2. La situation à propos de laquelle la Cour doit se prononcer en l'espèce ne devra toutefois pas être examinée sur la base du cadre légal créé par cette directive. En effet, du point de vue de l'application dans le temps, les faits en cause relèvent de la directive 93/37/CEE (5). Dans ce texte, les concessions de travaux étaient réglementées de façon beaucoup plus limitée et essentielle.

3. Dans le présent recours en manquement, en particulier, la Commission reproche au Royaume d'Espagne d'avoir enfreint la réglementation communautaire en matière de concession de travaux publics lors de l'attribution de la concession pour la construction et l'entretien, en particulier, de deux nouveaux raccordements de l'autoroute A-6 reliant Madrid à La Corogne.

I – Le cadre légal

4. Les dispositions communautaires pertinentes en l'espèce sont, comme je l'ai déjà rappelé, celles de la directive 93/37/CEE (ci-après la «directive»). En particulier, le cinquième considérant de celle-ci observe: «(…) compte tenu de l'importance croissante des concessions dans les travaux publics et de leur nature spécifique, il est opportun d'inclure dans la présente directive des règles de publicité en la matière». L'intention du législateur a donc été de fixer, en matière de concessions de travaux publics, certains points fondamentaux, laissant pour le reste aux pouvoirs publics une marge d'appréciation plus large que celle dont ils jouissent en matière de marchés.

5. L'article 1er de la directive prévoit:

«Aux fins de la présente directive:

a) les 'marchés publics de travaux' sont des contrats à titre onéreux, conclus par écrit entre, d'une part, un entrepreneur et, d'autre part, un pouvoir adjudicateur défini au point b) et ayant pour objet soit l'exécution, soit conjointement l'exécution et la conception des travaux relatifs à une des activités visées à l'annexe II ou d'un ouvrage défini au point c), soit la réalisation, par quelque

moyen que ce soit, d'un ouvrage répondant aux besoins précisés par le pouvoir adjudicateur;

(…)

d) la 'concession de travaux publics' est un contrat présentant les mêmes caractères que ceux visés au point a), à l'exception du fait que la contrepartie des travaux consiste soit uniquement dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix;

(…)».

6. L'article 3 de la directive s'énonce comme suit:

«Dans le cas où les pouvoirs adjudicateurs concluent un contrat de concession de travaux publics, les règles de publicité définies à l'article 11 paragraphes 3, 6, 7 et 9 à 13 et à l'article 15 sont applicables à ce contrat lorsque sa valeur égale ou dépasse 5 000 000 [EUR]

(…)».

7. Les parties de l'article 11 de la directive que l'article 3 déclare applicables aux concessions de travaux sont les suivantes:

«(…)

3. Les pouvoirs adjudicateurs désireux d'avoir recours à la concession de travaux publics font connaître leur intention au moyen d'un avis.

(…)

6. Les avis prévus aux paragraphes 1 à 5 sont établis conformément aux modèles qui figurent aux annexes IV, V et VI et donnent les renseignements qui y sont demandés.

Les pouvoirs adjudicateurs ne peuvent exiger des conditions autres que celles prévues aux articles 26 et 27 lorsqu'ils demandent des renseignements concernant les conditions de caractère économique et technique qu'ils exigent des entrepreneurs pour leur sélection (annexe IV partie B point 11, annexe IV partie C point 10 et annexe IV partie D point 9).

7. Les avis prévus aux paragraphes 1 à 5 sont envoyés par les pouvoirs adjudicateurs dans les meilleurs délais et par les voies les plus appropriées à l'Office des publications officielles des Communautés européennes. Dans le cas de la procédure accélérée prévue à l'article 14, les avis sont envoyés par télex, télégramme ou télécopieur.

(…)

9. Les avis prévus aux paragraphes 2, 3 et 4 sont publiés in extenso au Journal officiel des Communautés européennes et dans la banque de données TED, dans les langues originales. Un résumé des éléments importants de chaque avis est publié dans les autres langues officielles des Communautés, seul le texte de la langue originale faisant foi.

10. L'Office des publications officielles des Communautés européennes publie les avis douze jours au plus tard après leur envoi. Dans le cas de la procédure accélérée prévue à l'article 14, ce délai est réduit à cinq jours.

11. La publication des avis dans les journaux officiels ou dans la presse du pays du pouvoir adjudicateur ne doit pas avoir lieu avant la date d'envoi à l'Office des publications officielles des Communautés européennes et doit faire mention de cette date. Elle ne doit pas contenir de renseignements autres que ceux publiés au Journal officiel des Communautés européennes.

12. Les pouvoirs adjudicateurs doivent être en mesure de faire la preuve de la date d'envoi**.**

13. Les frais de publication des avis de marchés au Journal officiel des Communautés européennes sont à la charge des Communautés. L'avis ne peut dépasser une page dudit journal, soit environ 650 mots. Chaque numéro dudit journal dans lequel figurent un ou plusieurs avis reproduit le ou les modèles auxquels se réfèrent le ou les avis publiés».

II – Le droit national applicable et les faits à l'origine du litige

A – *Le droit national*

8. La loi n° 8 du 10 mai 1972, relative à la construction, à l'entretien et à l'exploitation des autoroutes au moyen de marchés de concession (ci-après la «Ley de Autopistas»), telle qu'elle est en vigueur depuis 1996, prévoit en particulier, à l'article 8, paragraphe 2, deuxième alinéa, ce qui suit:

«(…) relèvent de l'objet social de la société concessionnaire, outre les activités indiquées au précédent alinéa, la construction de travaux d'infrastructures routières, autres que ceux inclus dans le marché mais ayant une incidence sur celui-ci et qui sont réalisés dans la zone d'influence de l'autoroute ou qui sont nécessaires à l'organisation du trafic, dont le projet et l'exécution, ou la seule exécution, s'imposent au concessionnaire comme contrepartie (…)».

9. L'arrêté royal n° 597 du 16 avril 1999 a fixé à 20 km l'étendue de la zone d'influence des autoroutes.

B – *Les faits*

10. Les faits à l'origine du litige se rapportent au tronçon de l'autoroute A-6 entre les localités de Villalba au sud et d'Adanero au nord. Il s'agit d'un tronçon d'autoroute à péage, extrêmement important, caractérisé par un trafic toujours très intense. Le tronçon de l'A-6 se situant immédiatement au sud de celui-ci, entre Madrid et Villalba, est gratuit et géré par l'État.

11. Depuis 1968, le tronçon de l'autoroute Villalba-Adanero est géré sous forme de concession par la société Ibérica de Autopistas, SA (ci–après «Iberpistas»). Cette concession était, à l'époque des faits en cause, destinée à prendre fin en 2018.

12. La circonstance à l'origine du litige en cause est la décision prise par le gouvernement espagnol de construire deux nouveaux tronçons de l'autoroute afin de connecter l'autoroute A-6 aux villes de Ávila et de Ségovie, qui se trouvent respectivement à l'ouest et à l'est du tronçon Villalba-Adanero.

13. Le décret ministériel du 4 juin 1999, paru au Boletín Oficial del Estado (Journal officiel espagnol, ci-après le «BOE») le 8 juin, a publié un cahier des charges (ci-après le «premier cahier des charges») pour une concession comprenant:

– la construction des deux raccordements entre les villes de Ávila et de Ségovie et l'autoroute A-6, ainsi que l'entretien de ces tronçons pendant une période de 25 à 40 ans;

– l'exploitation du tronçon Villalba-Adanero de l'A-6 à partir de 2018, c'est-à-dire à la date à laquelle la concession en cours de Iberpistas viendra à échéance, et pour une période à déterminer sur la base du nombre moyen de véhicules en transit sur ledit tronçon;

– la construction de la voie de contournement de Guadarrama, sur le tronçon Villalba-Adanero de l'A-6 (environ à mi-chemin entre les deux villes);

– l'élargissement (construction d'une quatrième voie de circulation par sens) du tronçon de l'autoroute entre Madrid et Villalba: il s'agit, comme je l'ai déjà indiqué, du tronçon gratuit, géré par l'État.

14. L'avis de marché correspondant a été publié le 16 juin 1999 au Journal officiel de l'Union européenne.

15. Un nouveau cahier des charges a cependant été approuvé ensuite (ci-après le «second cahier des charges»), le 7 juillet 1999, publié au BOE deux jours plus tard. Ce cahier des charges a remplacé le précédent.

16. En particulier, le décret ministériel d'approbation du second cahier des charges précisait que «pour des raisons d'ordre technique, il y a lieu de modifier ledit cahier, afin de redéfinir l'objet de l'appel d'offres et d'apporter quelques modifications concernant la fixation de la durée de la

concession».

17. Concrètement, le second cahier des charges avait pour objet:

– la construction des tronçons de l'autoroute de raccordement de Ávila et de Ségovie à l'A-6, comme prévu par le premier cahier des charges, à cette différence près que la durée de la concession était désormais fixée entre 22 et 37 ans;

– l'exploitation du tronçon Villalba-Adanero de l'A-6 à partir de 2018, comme prévu au premier cahier des charges, avec ici également quelques modifications quant à la durée de la concession.

18. Comme on le voit, le second cahier des charges ne mentionne plus l'obligation de réaliser le contournement de Guadarrama et la quatrième voie sur le tronçon Madrid-Villalba.

19. Les points suivants figuraient dans la clause 5, tant dans le premier que dans le second cahier des charges:

«(…)

13. Les soumissionnaires indiqueront expressément dans leurs offres les mesures qu'ils se proposent d'adopter en ce qui concerne les effets induits par la concession sur le réseau viaire global, sur l'intérêt touristique de la région et la valorisation des monuments d'intérêt historique ou artistique, ainsi que sur la protection et la conservation du paysage et de la nature, sans préjudice du respect de la réglementation en vigueur dans ces domaines.

(…)

16. Les soumissionnaires exposeront à l'administration les mesures qu'ils envisagent de prendre pour la gestion adéquate du trafic interurbain dans la zone affectée par la construction des tronçons faisant l'objet de la concession, et préciseront celles qu'ils s'engagent à mettre en œuvre à leur charge. La créativité et la viabilité de ces propositions seront évaluées positivement lors de l'attribution du marché, eu égard au degré de congestion élevé des zones sur le trafic desquelles les voies objet du marché auront une incidence».

20. Les critères pour l'adjudication de la concession étaient précisés à la clause 10 du second cahier des charges, qui par ailleurs était identique à la clause 10 du premier cahier des charges. En particulier, l'un de ces critères était relatif à l'évaluation des «mesures proposées pour la gestion du trafic et de l'environnement». Le poids de ce critère était fixé à un maximum de 150 points sur un total de 1250 points possibles.

21. La clause 29, identique également dans le premier et dans le second cahier des charges, s'énonçait:

«En ce qui concerne les tronçons mentionnés aux points 1 et 2 de la clause 2 du présent cahier, le concessionnaire est tenu de veiller à ce qu'en aucun endroit de l'autoroute ne soit dépassé le niveau (de trafic) D (…), il est tenu d'effectuer à ses frais, sans droit à aucune réclamation et suffisamment tôt, les extensions nécessaires à cette fin».

22. Les tronçons visés à la clause 29, c'est-à-dire ceux des points 1 et 2 de la clause 2 du cahier des charges, sont les raccordements de Ávila et de Ségovie à la A-6.

23. Trois soumissionnaires ont présenté une offre, parmi lesquels Iberpistas qui au moment des faits était déjà, comme nous l'avons vu, concessionnaire du tronçon de l'A-6 entre Villalba et Adanero. Aucun des soumissionnaires n'a présenté une solution unique: ils ont tous présenté plusieurs variantes. Iberpistas, en particulier, a présenté neuf variantes différentes.

24. Par décret royal n° 1724 du 5 novembre 1999, la concession a été attribuée à Iberpistas, selon les modalités contenues dans la variante «VT-B, TGE» de son offre.

25. En particulier, l'offre proposée par Iberpistas et qui a été retenue comprenait plusieurs ouvrages supplémentaires par rapport à ce qui était explicitement demandé dans le second cahier des charges:

– construction d'une voie supplémentaire de circulation par sens sur le tronçon de l'A-6 entre Madrid et Villalba (donc sur le tronçon gratuit de l'A-6, relevant de la compétence de l'État);

– construction d'une voie supplémentaire de circulation et d'un nouveau tunnel sur l'A-6, sur le tronçon Valle de los Caídos-San Rafael, au nord de Villalba (c'est-à-dire sur le tronçon de l'A-6 dont Iberpistas était déjà concessionnaire jusqu'en 2018);

– construction d'une voie supplémentaire de circulation par sens sur l'A-6, sur le tronçon Villalba-Valle de los Caídos (donc, ici aussi, sur le tronçon de l'A-6 dont Iberpistas était déjà concessionnaire jusqu'en 2018).

26. Le décret d'adjudication de la concession a fait l'objet, en Espagne, de deux recours juridictionnels distincts, présentés respectivement par un groupe de membres du Parlement, d'une part, et par un syndicat et une association écologiste, d'autre part. Le Tribunal Supremo a prononcé deux décisions en 2003, l'une déclarant irrecevable le premier recours, l'autre rejetant le second au fond.

III – La procédure précontentieuse

27. La phase précontentieuse de la présente procédure a été assez complexe. En effet, la première lettre de mise en demeure envoyée par la Commission aux autorités espagnoles le 30 avril 2001 considérait qu'une partie des circonstances décrites, à savoir l'élargissement du tronçon de l'A-6 entre Madrid et Villalba, gratuit et géré par l'État, n'était pas une concession mais bel et bien un marché de travaux, en raison de l'absence d'un risque dans le chef de l'adjudicataire. Par conséquent, les griefs formulés par la Commission concernaient tant la réglementation des concessions que celle des marchés de travaux: dans les deux cas, les reproches formulés par la Commission concernaient le non-respect des règles de publicité prévues par l'article 11 de la directive 93/37/CEE.

28. Le Royaume d'Espagne a répondu par lettre du 27 juin 2001, contestant toutes les affirmations de la Commission et soutenant, entre autres, la nécessité de considérer que l'ensemble des travaux, y compris ceux sur le tronçon gratuit de l'A-6, relevaient de la concession.

29. Malgré une réunion avec les autorités espagnoles et la communication par celles-ci de documents supplémentaires, la Commission a émis un avis motivé le 18 juillet 2002. Dans celui-ci, la Commission accueillait les observations du Royaume d'Espagne quant à la nécessité d'appliquer seulement la réglementation des concessions, et non celle des marchés de travaux; pour le reste, toutefois, la Commission confirmait les griefs relatifs à la violation des règles de publicité prévues par la directive.

30. Les autorités espagnoles ont répondu à l'avis motivé par lettres du 20 septembre 2002 et du 13 mars 2003.

31. Le 25 juillet 2003, la Commission a envoyé une lettre de mise en demeure complémentaire au Royaume d'Espagne, concernant le non-respect présumé des principes fondamentaux du traité, en particulier ceux relatifs à l'égalité de traitement et à la non-discrimination.

32. Les autorités espagnoles ont répondu à cette nouvelle lettre de mise en demeure le 28 octobre 2003; la Commission, non satisfaite de cette réponse, a adressé un avis motivé complémentaire le 24 décembre 2004, auquel le Royaume d'Espagne a répondu par lettre du 3 mars 2005.

IV – La procédure devant la Cour et les conclusions des parties

33. Estimant que le manquement persistait, la Commission a formé le présent recours, parvenu au greffe le 13 septembre 2007.

34. Après l'échange des observations écrites, les parties ont été entendues à l'audience du 9 septembre 2009.

35. La Commission demande à la Cour de:

– constater qu'en n'incluant pas, parmi les travaux faisant l'objet de la concession, dans l'avis et dans le cahier des charges concernant la passation d'un marché de concession administrative pour la construction, l'entretien et l'exploitation des liaisons de l'autoroute A-6 avec Ségovie et Ávila, ainsi que pour l'entretien et l'exploitation du tronçon Villalba–Adanero sur la même autoroute à partir de 2018, certains travaux qui ont été attribués ultérieurement dans le cadre de la concession, parmi lesquels ceux relatifs au tronçon gratuit de l'A-6, le Royaume d'Espagne a manqué aux obligations qui lui incombent en vertu de l'article 3 et de l'article 11, paragraphes 3, 6, 7, 11 et 12, de la directive 93/37/CEE, et a enfreint les principes du traité CE, notamment le principe d'égalité de traitement et de non–discrimination.

– condamner le Royaume d'Espagne aux dépens.

36. Le Royaume d'Espagne demande à la Cour de:

– rejeter le recours en ce qu'il est irrecevable ou, à titre subsidiaire, en ce qu'il est dénué de fondement;

– condamner la Commission aux dépens.

V – Sur la recevabilité du recours

37. Le Royaume d'Espagne invoque l'irrecevabilité du recours à deux égards. Premièrement, la Commission n'aurait pas démontré le pouvoir de représentation en justice de l'avocat qui a rédigé le recours avec l'agent de la Commission. Deuxièmement, l'objet du recours serait indéterminé, en ce que la requête n'indique pas précisément les règles qui auraient été violées par l'État membre attaqué.

38. Les deux exceptions soulevées par le Royaume d'Espagne sont dénuées de fondement. En ce qui concerne la première, il suffit d'observer que la Commission a annexé à la requête une copie de la carte d'inscription de l'avocat au Barreau. Le guide aux conseils, publié par le greffe de la Cour, indique expressément que ce document satisfait à la condition de l'article 38, paragraphe 3, du règlement de procédure. En outre, il y a lieu d'observer que la Commission est également représentée par son agent. Pour ce qui est de la seconde exception, la Commission a clairement et explicitement indiqué les règles qu'elle estime violées. Du reste, le Royaume d'Espagne les a examinées une à une dans ses moyens de défense. Il ne se pose aucun problème de recevabilité, mais seulement de vérification du fondement des reproches soulevés par la Commission.

39. Le recours est donc recevable.

VI – Sur le manquement

A – *Les positions des parties*

40. La Commission estime que l'Espagne n'a pas respecté, à deux égards, les obligations qui lui incombaient en vertu du droit communautaire. D'une part, il y aurait eu violation de l'article 3 et de l'article 11, paragraphes 3, 6, 7, 11 et 12, de la directive 93/37/CEE. D'autre part, l'adjudication en faveur de Iberpistas serait contraire aux principes fondamentaux du traité, et plus spécialement ceux d'égalité de traitement et de non-discrimination.

1. Les arguments de la Commission

41. Le principal argument soulevé par la Commission pour démontrer la violation de la directive 93/37/CEE se fonde sur la présence, dans l'offre du soumissionnaire retenu, de travaux non prévus dans le cahier des charges: ces travaux seraient, en particulier, d'une valeur globale légèrement inférieure à celle des travaux dont la réalisation était expressément demandée.

42. La Commission observe, en outre, que la formulation du cahier des charges, prescrivant de façon générale aux soumissionnaires d'indiquer les solutions possibles permettant de résoudre le problème du trafic, n'était pas de nature à laisser croire aux participants qu'il était possible de proposer des ouvrages supplémentaires dont l'importance et la localisation seraient comparables à ceux proposés par Iberpistas. En particulier, étant donné que les seuls ouvrages à réaliser

explicitement indiqués dans le second cahier des charges étaient les deux raccordements de Ségovie et de Ávila à la A-6, même les mesures que les soumissionnaires auraient pu proposer en vue de la réduction du trafic n'auraient été que des mesures directement liées à ces deux tronçons. Il n'aurait donc pas été possible d'admettre des offres qui, comme celle qui a été retenue, proposeraient des travaux à un autre endroit, comme les élargissements du tronçon de l'A-6 Villalba–Adanero proposés par Iberpistas.

43. La Commission rejette les arguments du gouvernement espagnol selon lesquels la décision d'annuler le premier cahier des charges et de le remplacer par un second dans lequel ne figurait plus l'indication explicite de certains ouvrages à réaliser aurait rendu évident le fait que les participants devaient proposer des solutions alternatives par rapport à celles prévues dans le cahier des charges initial et ensuite abandonnées. Selon la Commission, rien dans le texte du second cahier des charges ne permettrait de l'interpréter en ces termes. Du reste, les autres soumissionnaires n'auraient proposé que des variantes limitées aux deux raccordements de l'A-6 aux villes de Ávila et de Ségovie.

44. Selon la Commission, enfin, le comportement du Royaume d'Espagne aurait également violé les principes fondamentaux du traité, en particulier ceux d'égalité de traitement et de non-discrimination.

2. La position du gouvernement espagnol

45. Le Royaume d'Espagne conteste fermement les griefs: en particulier, non seulement la Commission n'aurait pas démontré l'existence d'un manquement, mais elle aurait également donné une image déformée des faits.

46. Le gouvernement espagnol souligne, premièrement, les problèmes graves de trafic existant sur l'autoroute A-6 au moment de la publication de l'avis d'appel d'offres. La gravité de ces problèmes, outre qu'elle était notoire, ayant fait l'objet d'informations permanentes dans la presse, aurait également été clairement indiquée et décrite dans des documents officiels des administrations espagnoles, y compris la documentation à la base de l'appel d'offres en cause.

47. La thèse fondamentale du gouvernement espagnol consiste à affirmer que l'existence notoire des problèmes de trafic aurait rendu absolument évident le fait que les soumissionnaires, même si le cahier des charges n'indiquait expressément que la construction des raccordements de l'A-6 aux villes de Ávila et de Ségovie, auraient pu proposer des mesures de réduction du trafic se situant physiquement sur le tronçon Villalba-Adanero de l'A-6, qui devait être concédé au soumissionnaire retenu à partir de 2018, et sur le tronçon de l'A-6 entre Madrid et Villalba. En ce qui concerne, particulièrement, ce dernier tronçon qui, on l'a vu, est gratuit et géré par l'État, le gouvernement espagnol prétend que la possibilité d'intervention sur celui-ci aurait été garantie par la législation nationale. En particulier, la Ley de Autopistas permettrait la réalisation de mesures de réduction du trafic y compris hors de la «zone d'influence» des autoroutes. En tout état de cause, cette zone d'influence serait actuellement fixée à 20 km, de telle sorte que le tronçon de l'A-6 au sud de Villalba serait encore dans la zone d'influence du tronçon de l'A-6 Villalba–Adanero, qui fait explicitement l'objet de la concession.

48. Selon le Royaume d'Espagne, en particulier, la possibilité pour les soumissionnaires de proposer de telles mesures pour le contrôle du trafic ressort aussi des paragraphes 13 et 16 de la clause 5 du cahier des charges.

49. Le choix d'annuler le premier cahier des charges et de le remplacer par le second aurait découlé de la volonté d'accorder plus d'espace à la créativité des soumissionnaires en ce qui concerne les solutions à proposer au problème du trafic. La circonstance que le décret d'approbation du nouveau cahier des charges ait seulement indiqué que la nouvelle version de celui-ci avait été rendue nécessaire par des raisons générales d'ordre technique, sans aucune référence à la nécessité pour les soumissionnaires de remplacer les ouvrages supprimés du premier cahier des charges par leurs propres solutions, s'expliquerait par le caractère normalement bref de tous les arrêtés ministériels d'approbation de cahiers des charges.

50. Le gouvernement espagnol insiste sur le fait que les arguments qu'il propose devant la Cour ont été adoptés par les juridictions nationales et en particulier par le Tribunal Supremo. Étant donné qu'il s'agit d'une appréciation en fait et non en droit, la Cour devrait s'en remettre, en particulier pour ce qui est de l'interprétation du cahier des charges, à ce qui a été constaté sur ce point par la juridiction nationale – même si le gouvernement espagnol reconnaît, dans son mémoire en duplique,

que les conclusions du Tribunal Supremo ne lient pas la Cour.

51. Le Royaume d'Espagne observe par ailleurs que Iberpistas n'a pas procédé à l'exécution directe des travaux prévus mais qu'elle a lancé un appel d'offres en vue de leur adjudication: ainsi, les exigences relatives à la publicité et au respect des principes d'égalité de traitement et de non-discrimination auraient également été respectées, à tout le moins, dans cette phase ultérieure de la réalisation des travaux. À ce propos, le gouvernement espagnol fait référence, en particulier, à l'arrêt Ordine degli Architetti (6), dans lequel la Cour aurait admis la conformité à la réglementation communautaire sur les marchés publics d'une situation où l'appel d'offres n'est pas lancé par les pouvoirs publics mais par un sujet privé à qui les pouvoirs publics confient la réalisation des travaux.

B – *Appréciation*

1. Observations préalables

52. Du point de vue juridique, les circonstances faisant l'objet du présent recours constituent une concession de travaux publics. Comme on l'a vu, la réglementation communautaire définit la concession de travaux publics comme un contrat possédant les mêmes caractéristiques qu'un marché de travaux, à la différence majeure que la contrepartie des travaux consiste dans le droit d'exploiter l'ouvrage réalisé. En outre, ce droit d'exploitation peut aussi être accompagné du paiement d'un prix au concessionnaire: ce prix ne peut toutefois constituer l'élément principal de la contrepartie, puisque dans ce cas il ne s'agirait plus d'une concession, mais d'un marché public (7).

53. Le droit communautaire impose, en matière de concessions, des limites et des prescriptions plus réduites que celles imposées en matière de marchés publics. En particulier, comme on l'a vu à l'occasion de l'exposé du cadre juridique, parmi toutes les règles applicables aux marchés publics, seules celles relatives à la publicité s'appliquent aux concessions.

54. Or, de même qu'il est certain, en l'espèce, que les éléments de fait doivent être qualifiés de concession de travaux, et non de marché, il est tout aussi évident que les travaux en cause devaient être précédés d'un avis d'appel d'offres spécifique, car il ne peuvent être considérés comme un simple «développement» naturel de la concession existante, à Iberpistas, du tronçon de l'autoroute A-6 entre Villalba et Adanero (8). Cette prémisse n'est d'ailleurs contestée par aucune des parties.

2. Éléments dénués de pertinence

55. Avant de procéder à l'examen des questions juridiques au centre de la présente affaire, il est nécessaire, à mon avis, d'évacuer quelques éléments qui ont été largement débattus par les parties mais qui, concrètement, sont dénués de pertinence pour la solution du litige.

a) Les arrêts du Tribunal Supremo

56. Tout d'abord, les références que fait le Royaume d'Espagne aux décisions du Tribunal Supremo, qui a rejeté deux recours introduits au niveau national contre l'attribution de la concession, sont dénuées de pertinence. En effet, comme l'a admis la défense du gouvernement espagnol dans le mémoire en duplique et à l'audience, la jurisprudence de la Cour qui reconnaît à la seule juridiction nationale la compétence d'apprécier les faits et limite l'intervention des juridictions communautaires aux questions de droit ne concerne que les procédures de type préjudiciel, dans lesquelles l'issue finale de l'affaire nationale est le résultat d'une collaboration entre les autorités juridictionnelles nationales et les juridictions communautaires. Par contre, dans une procédure relative à un manquement présumé au droit communautaire par un État membre, la Cour peut apprécier tous les éléments soumis à son attention pouvant être pertinents pour lui permettre de statuer.

57. Du reste, pour statuer sur un manquement présumé, l'État constitue le seul sujet de référence de la Cour, et il est considéré responsable de toutes les violations du droit communautaire qui peuvent lui être imputées, même si en réalité elles sont dues, par exemple, à des entités constitutionnellement indépendantes. Dans cette optique, même la jurisprudence d'une juridiction suprême d'un État membre a été jugée par la Cour constitutive d'une infraction au droit communautaire (9). Par conséquent, il est donc clair que le schéma centré sur l'idée d'une collaboration entre juridiction nationale et juridiction communautaire, qui coopéreraient en vue de la solution du litige, n'est pas applicable en matière de manquement. Il convient de préciser que cela n'implique en aucune façon un manque de respect ou de reconnaissance du rôle des juridictions

nationales: tout simplement, celles-ci n'ont pas un rôle actif dans la procédure au titre de l'article 226 CE.

58. Par ailleurs, il y a lieu d'ajouter que, de toute manière, il n'est certainement pas aisé de tracer, en l'espèce, une ligne nette de démarcation entre l'appréciation des faits et les considérations en droit. En effet, rappelant la constatation par le Tribunal Supremo de la conformité au droit communautaire des avis d'appels d'offres, le Royaume d'Espagne fait référence, plus qu'à des appréciations de fait, à de véritables conclusions en droit formulées par cette juridiction.

b) L'identité des sujets à l'origine de la procédure

59. De la même façon, l'identité des personnes qui, selon le Royaume d'Espagne, seraient à l'origine, par leur dénonciation, du recours formé par la Commission, est dénuée de pertinence. En particulier, il s'agirait des mêmes personnes qui ont également introduit les recours rejetés au niveau national par le Tribunal Supremo. Même si on admet qu'il s'agit des mêmes personnes, il est clair que cela ne peut avoir aucune incidence dans le cadre de la procédure devant la Cour.

60. La circonstance qu'il ne se serait pas agi de participants à la procédure d'adjudication de la concession, mais de certains membres du Parlement, d'un syndicat et d'une association écologiste peut certes indiquer que les motifs de la décision de formuler un recours et/ou une dénonciation ont été, plutôt qu'économiques, politiques ou idéologiques. Il n'en reste pas moins que l'unique objectif de la procédure d'infraction est de déterminer si, d'un point de vue objectif, un État membre a ou n'a pas manqué aux obligations qui lui sont imposées par le droit communautaire. Il n'appartient pas à la Cour d'examiner les motifs personnels des plaignants à l'origine de la procédure, d'autant plus que la décision de formuler un recours en manquement est prise seulement par la Commission, de façon tout à fait libre et autonome. À ce propos, la jurisprudence constante de la Cour affirme non seulement que la Commission n'a pas à démontrer l'existence d'un intérêt à agir, mais également que les considérations qui déterminent le choix d'initier la procédure en manquement sont dénuées de pertinence (10).

c) L'organisation d'un appel d'offres par Iberpistas

61. De même, est également dénuée de pertinence la circonstance, à laquelle fait référence le Royaume d'Espagne dans sa défense, que Iberpistas, après avoir obtenu la concession, ait décidé de ne pas réaliser directement les ouvrages supplémentaires mais de recourir plutôt à un appel d'offres, comme l'imposait d'ailleurs, dans un tel cas, la clause 20 du cahier des charges.

62. Le raisonnement à la base de cette argumentation, que le Royaume d'Espagne a en réalité plutôt explicité dans la phase précontentieuse que dans les observations présentées à la Cour, se fonde sur la possibilité d'appliquer le principe affirmé par l'arrêt Ordine degli Architetti, précité (11).

63. Dans cet arrêt, en particulier, la Cour a affirmé que, en cas de réalisation d'un ouvrage d'équipement par un lotisseur ayant conclu une convention de lotissement avec une administration communale, l'effet utile de la directive 93/37/CEE est également observé si les procédures prévues par la directive sont appliquées, non par l'administration communale, mais par le lotisseur (12).

64. Cependant, il y a lieu d'observer que les circonstances examinées par la Cour dans l'affaire Ordine degli Architetti sont complètement différentes de celles qui font l'objet de la présente procédure. Dans l'arrêt cité, en effet, il s'agissait d'interpréter certaines dispositions du droit italien qui admettent la possibilité de réduire ou d'annuler, à certaines conditions, les contributions aux charges d'équipement lors de l'octroi du permis de construire. En particulier, cette possibilité existait pour ceux qui s'engageaient à réaliser directement les ouvrages d'équipement.

65. La Cour, estimant que la réduction du montant à payer octroyée en échange de la réalisation directe des ouvrages d'équipement constituait de plein droit une compensation pour cette réalisation, a jugé applicable la directive 93/37/CEE, en précisant cependant, comme on l'a vu, que l'effet utile de celle-ci pouvait également être observé si elle était appliquée, non par l'administration communale, mais par le lotisseur réalisant les ouvrages d'équipement.

66. L'élément déterminant à la base de l'arrêt Ordine degli Architetti, comme on le voit, était le fait que l'administration communale n'avait pas la faculté de choisir son cocontractant, étant donné que, par la force des choses, ce cocontractant était nécessairement la personne qui demandait le permis de construire. Par conséquent, admettre la possibilité que ce soit le lotisseur qui applique la directive 93/37/CEE était, concrètement, la seule manière d'assurer la réalisation des objectifs

poursuivis par le législateur communautaire en matière de marchés publics.

67. Par contre, en l'espèce, Iberpistas – loin d'être un cocontractant obligé du gouvernement espagnol – a été choisie et s'est vu attribuer la concession parce qu'elle a été retenue suite à la procédure d'appel d'offres. Il est donc clair que, en l'espèce, la réglementation communautaire relative au choix du cocontractant pouvait être appliquée depuis la première phase de la procédure, à savoir celle du choix du concessionnaire. Partant, la situation n'est pas comparable à celle en cause dans l'arrêt Ordine degli Architetti et celui–ci ne peut donc pas être appliqué, même pas par analogie (13).

d) La valeur des ouvrages supplémentaires

68. Le Royaume d'Espagne et la Commission s'opposent vivement sur la valeur des ouvrages supplémentaires par rapport à la valeur totale de la concession.

69. En particulier, la Commission a calculé dans sa requête que la valeur des ouvrages supplémentaires s'élèverait à 87 % de la valeur des ouvrages principaux, à savoir ceux explicitement indiqués dans l'avis d'appel d'offres. Pour sa part, le Royaume d'Espagne conteste ce calcul et souligne, en particulier, la nécessité d'inclure également dans la valeur des ouvrages principaux la valeur de l'exploitation du tronçon Villalba-Adanero de l'A-6 à partir de 2018. Selon le Royaume d'Espagne, le montant des ouvrages supplémentaires proposés par Iberpistas dans l'offre retenue serait légèrement supérieur à 27 % de la valeur des ouvrages principaux.

70. J'estime toutefois que la quantification exacte de la valeur des ouvrages supplémentaires par rapport à l'objet principal de la concession n'est pas nécessaire ici pour trancher.

71. En effet, d'un côté, les références que font les parties à l'article 61 de la nouvelle directive communautaire en matière de marchés publics, à savoir la directive 2004/18/CE, ne sont pas pertinentes. Cette disposition prévoit que, dans la limite de 50 % du montant des travaux initiaux faisant l'objet de la concession, et dans certaines conditions spécifiques, les dispositions relatives à la publicité prévues pour les concessions de travaux publics ne s'appliquent pas «aux travaux complémentaires qui ne figurent pas dans le projet initialement envisagé de la concession ni dans le contrat initial et qui sont devenus nécessaires, à la suite d'une circonstance imprévue, à l'exécution de l'ouvrage tel qu'il y est décrit, que le pouvoir adjudicateur confie au concessionnaire (…)».

72. Tout d'abord, comme je l'ai déjà observé, la directive 2004/18/CE n'est pas applicable, ratione temporis, en l'espèce. D'autre part, même si on voulait considérer cette disposition comme une simple confirmation d'un principe juridique préexistant (opération d'interprétation qui, soi dit en passant, me semble plutôt faible), il reste que l'article 61 de cette directive fait référence à des travaux «qui sont devenus nécessaires, à la suite d'une circonstance imprévue, à l'exécution de l'ouvrage tel qu'il y est décrit». Partant, il s'agit, c'est évident, d'une situation qui n'est pas présente en l'espèce. La disposition de l'article 61 fait référence à des situations imprévues, survenues après l'adjudication, et non à des faits existant avant l'adjudication.

73. D'autre part, au-delà des divergences relatives à la quantification précise de la valeur des ouvrages supplémentaires, il me semble que l'on peut considérer que la Commission et le Royaume d'Espagne s'accordent sur une donnée factuelle incontournable: dans l'économie globale des faits soumis à l'examen de la Cour, le poids représenté par les ouvrages supplémentaires a été considérable, et certainement pas marginal ou secondaire par rapport à l'objet principal de la concession.

3. La requête de la Commission: observations préalables

74. Même si elle n'est pas irrecevable, comme je l'ai observé ci–dessus, la requête de la Commission est assez imprécise, en particulier lorsqu'elle indique les dispositions qu'elle présume violées. En particulier, dans l'acte introductif, la Commission reproche au Royaume d'Espagne, outre la violation du traité, celle de l'article 3 et, en général, des paragraphes 3, 6, 7, 11 et 12 de l'article 11 de la directive 93/37/CEE.

75. Suite aux objections présentées par le Royaume d'Espagne dans son mémoire en défense, la Commission a précisé dans son mémoire en réplique que, concrètement, il y a lieu de considérer que la requête fait référence à l'article 3, paragraphe 1 et, par conséquent, aux dispositions de l'article 11 auxquelles il fait référence.

76. En particulier, étant donné que la Commission ne conteste ni le fait que l'avis d'appel d'offres a été publié, ni le moment ni les modalités de cette publication, il y a lieu de considérer que les dispositions de la directive qui auraient été violées sont, essentiellement, l'article 11, paragraphes 3 et 6. Plus précisément, la violation résiderait dans la grande disparité entre l'objet de l'avis d'appel d'offres publié et l'objet de la concession effectivement attribuée à Iberpistas. En d'autres termes, il est reproché au Royaume d'Espagne d'avoir publié un avis incomplet ou, alternativement, de ne pas avoir publié un avis pour tous les travaux compris dans la concession attribuée à Iberpistas et non dans l'avis publié.

77. Il y a encore lieu d'observer que les dispositions de la directive doivent être considérées comme l'application pratique, dans le cadre des marchés et des concessions de travaux publics, des principes du traité, en particulier l'interdiction de discrimination et l'obligation d'égalité de traitement (14). Par conséquent, les reproches formulés par la Commission à l'égard du Royaume d'Espagne, quant à une violation de la directive et quant à une violation du traité peuvent être discutés ensemble.

78. Après ces observations préalables, nous pouvons maintenant nous concentrer sur le problème principal, à savoir le prétendu caractère incomplet du cahier des charges publié par les autorités espagnoles. À cette fin, il sera nécessaire de déterminer, premièrement, quelles sont exactement les conditions de publicité d'un avis pour une concession de travaux publics. Une fois cet aspect éclairci, il y aura lieu de voir si ces conditions sont remplies en l'espèce.

4. Les conditions pour un avis en matière de concessions

79. Le premier aspect à éclaircir concerne donc les conditions qu'un avis pour la concession de travaux publics doit remplir, en général.

80. Il n'est pas mis en doute qu'un avis pour un marché de travaux doit contenir une description complète de tous les travaux à réaliser. Cela constitue une conséquence naturelle tant du fait que les concurrents doivent pouvoir proposer un prix pour la réalisation des travaux – ce qui suppose, évidemment, une connaissance exacte de ceux-ci – que du principe plus général, auquel je viens de faire référence, selon lequel les dispositions de la directive constituent la réalisation concrète des principes du traité en matière d'égalité de traitement et d'interdiction de toute discrimination. Du reste, la Cour a affirmé que, justement pour respecter le principe d'égalité de traitement des soumissionnaires, toutes les offres doivent être conformes aux prescriptions du cahier des charges (15).

81. À mon avis, ce principe fondamental en matière de publicité doit être également appliqué aux concessions, dont les appels d'offres devront donc indiquer de façon précise tous les travaux faisant l'objet de la concession. Plusieurs considérations vont dans ce sens.

82. Premièrement, des motifs évidents sont liés à la transparence et à l'égalité de traitement. Ces deux principes, comme on l'a vu, découlent directement du traité, et la Cour les a déclarés applicables, en règle générale, à toutes les concessions, y compris celles qui ne font pas l'objet d'une réglementation spécifique (16).

83. Deuxièmement, la directive prévoit que, parmi les règles applicables aux marchés publics, seules celles relatives à la publicité – ou du moins une partie de celles-ci – sont applicables aux concessions. Admettre que même les quelques règles applicables aux concessions devraient être interprétées différemment, et d'une façon plus restrictive que celles applicables aux marchés publics aboutirait, me semble-t-il, à réduire considérablement l'effet utile du cadre juridique applicable aux concessions.

84. Le fait que le modèle d'avis d'appel d'offres prévu pour les concessions (annexe VI à la directive) soit beaucoup plus bref que celui prévu pour les marchés publics (annexe V à la directive) ne signifie pas que la description des ouvrages à réaliser puisse y figurer d'une façon significativement différente. Du reste, les deux modèles d'avis d'appel d'offres sont pratiquement identiques dans la partie concernant la description de l'objet du marché et celui de la concession (voir la section II de chacun de ces modèles).

85. On retrouve par ailleurs, dans la jurisprudence de la Cour, des affirmations qui mettent sur le même pied, sans mentionner aucune différence, les règles de publicité applicables aux marchés et celles applicables aux concessions (17).

86. Le fait d'imposer qu'un avis d'appel d'offres décrive de façon précise les ouvrages à réaliser ne signifie naturellement pas que soit exclue toute forme de créativité ou de liberté dans les offres présentées. Toutefois, le respect du principe de l'égalité de traitement impose que, dans ce cas, la possibilité soit offerte aux soumissionnaires potentiels de connaître tant l'existence d'une telle marge de liberté, que les limites de celle-ci. À ce propos, il convient de citer un passage de la communication interprétative de la Commission sur les concessions en droit communautaire (18) (ci–après la «communication interprétative»), qui me semble tout à fait correct et fondé:

«En outre, lorsque, dans certains cas, le concédant n'a pas la possibilité de définir ses besoins en termes techniques suffisamment précis, il va alors rechercher des offres alternatives susceptibles d'apporter des solutions différentes à un problème exprimé en termes généraux. Cependant, dans ces hypothèses, le cahier des charges doit toujours, pour assurer une concurrence saine et efficace, présenter de manière non discriminatoire et objective ce qui est demandé aux candidats et surtout les modalités de l'approche qu'ils doivent suivre en préparant leurs offres. De cette manière, chacun des candidats sait à l'avance qu'il a la possibilité de prévoir des solutions techniques différentes. Plus généralement, le cahier des charges ne doit pas comporter d'éléments contraires aux règles et aux principes du traité précités. Les besoins du concédant peuvent aussi être déterminés en collaboration avec des entreprises du secteur dans la mesure où ceci n'a pas pour effet d'empêcher la concurrence» (point 3.1.1, paragraphe 9).

87. Du reste, en matière de marchés, l'article 19 de la directive prévoit explicitement, par le mécanisme des variantes, la possibilité de laisser aux soumissionnaires une certaine marge de liberté dans la présentation de leurs offres. Cependant, dans l'arrêt Traunfellner, la Cour a interprété cet article de façon assez stricte, afin de respecter le principe de l'égalité de traitement entre les soumissionnaires, en excluant par exemple que, pour satisfaire à l'obligation prévue à l'article 19, paragraphe 2, de la directive – qui impose aux pouvoirs adjudicateurs de mentionner dans le cahier des charges les conditions minimales que les variantes doivent respecter – le renvoi opéré par le cahier des charges à une disposition de la législation nationale puisse suffire (19).

88. L'argument du Royaume d'Espagne, selon lequel l'arrêt Traunfellner, précité, ne serait pas applicable en l'espèce, en ce qu'il fait référence à des variantes et non à des ouvrages supplémentaires, ne me paraît pas convaincant. En effet, premièrement, même si on admet que la distinction entre variantes et ouvrages supplémentaires soit fondée, reste le fait que l'arrêt Traunfellner se base sur l'objectif essentiel de garantir l'égalité de traitement des soumissionnaires, et que cet objectif ne peut pas être considéré comme moins pertinent quand il s'agit d'ouvrages supplémentaires que quand il s'agit de variantes. En tout état de cause, cet arrêt, en ce qu'il fait référence à l'article 19 de la directive, c'est-à-dire à une disposition qui n'est pas applicable aux concessions de travaux, n'est pas directement applicable en l'espèce, et doit plutôt être considéré comme une indication et une ligne directrice, du reste extrêmement convaincante.

89. Une autre indication utile, applicable essentiellement par analogie, peut également être déduite de la jurisprudence de la Cour qui, toujours par application du principe de l'égalité de traitement des soumissionnaires, a souligné que, une fois indiqués, les critères d'adjudication d'un marché doivent rester les mêmes tout au long de la procédure (20).

90. En conclusion, un appel d'offres pour l'adjudication d'une concession de travaux publics doit indiquer précisément les ouvrages faisant l'objet de la concession. D'éventuelles variantes et des ouvrages supplémentaires peuvent être admis si cette faculté est indiquée, avec les limites dans lesquelles elle peut être exercée, dans l'avis d'appel d'offres lui-même.

5. Sur l'interprétation du second cahier des charges

91. Une fois éclaircis les critères qu'un appel d'offres pour une concession de travaux doit remplir pour satisfaire aux obligations de publicité imposées par le droit communautaire, il est nécessaire de vérifier si, en l'espèce, le cahier des charges de la concession en cause est conforme à ces critères.

92. J'estime qu'il y a lieu de conclure par la négative, et que la correspondance n'était pas suffisante entre ce qui est indiqué dans le second cahier des charges et les travaux attribués dans la concession à Iberpistas.

93. Premièrement, comme on l'a vu, le gouvernement espagnol estime que le choix de remplacer le premier cahier des charges par le second aurait été motivé par la volonté de laisser plus de marge à la libre initiative des soumissionnaires, afin de définir des solutions adéquates au problème du trafic. Ce gouvernement soutient en outre que les participants à l'appel d'offres

auraient pu aisément comprendre cela. Toutefois, ces arguments ne peuvent pas être acceptés.

94. En effet, il y a lieu d'observer que le préambule du second cahier des charges indique simplement que «pour des raisons d'ordre technique, il y a lieu de modifier ledit cahier, afin de redéfinir l'objet de l'appel d'offres et d'apporter quelques modifications concernant la fixation de la durée de la concession». Il s'agit d'une formulation assez vague, qui est très loin d'indiquer exactement la raison précise qui a entraîné la reformulation du cahier des charges (à l'exception de la modification de la durée de la concession). Au minimum, si la décision d'annuler le cahier des charges précédent se fondait sur la volonté de laisser plus de marge à la libre initiative des soumissionnaires pour la solution des problèmes du trafic, cela aurait pu et dû être indiqué expressément. Cependant, cela n'a pas été le cas.

95. De la même façon, les arguments du gouvernement espagnol selon lesquels la possibilité d'offrir des ouvrages supplémentaires tels que ceux proposés par Iberpistas découlerait de certaines dispositions du cahier des charges ne peuvent pas être accueillis non plus. En particulier, il s'agit des points 13 et 16 de la clause 5 ainsi que de la clause 29 de l'avis d'appel d'offres.

96. Or, en ce qui concerne la clause 29, il suffit d'observer que celle–ci ne vise de façon expresse que les deux raccordements de l'A-6 avec Ávila et Ségovie (21).

97. Une observation analogue peut être émise en ce qui concerne le point 16 de la clause 5 du cahier des charges, qui indique expressément que les mesures pour la gestion du trafic qui auraient pu être proposées à l'administration concernaient «la région affectée par la construction des tronçons faisant l'objet de la concession». La référence à la «construction» de ces tronçons limite donc clairement aux raccordements de l'A-6 à Ávila et Ségovie la région à laquelle se réfère cette disposition.

98. En ce qui concerne le point 13 de la même clause du cahier des charges, il y a lieu de relever qu'il fait référence, de façon générale, aux mesures que les soumissionnaires auraient pu se proposer d'adopter par rapport à une série d'éléments qui doivent typiquement être pris en considération dans le cadre de la réalisation de travaux routiers: non seulement le trafic, mais aussi l'impact possible sur le paysage, l'environnement, le tourisme, etc. Il est clair qu'une telle disposition générale, qui ne fait référence qu'à des réalisations accessoires par rapport aux travaux mentionnés expressément dans le cahier des charges, ne peut pas être considérée comme une publicité qui indiquerait à suffisance comme objet du cahier des charges des travaux de construction de grande importance, y compris du point de vue économique, se situant en outre hors des zones de construction expressément indiquées dans l'avis.

99. En outre, ledit point 13 fait référence aux «effets» de la concession sur le problème global du trafic, mais ne fait pas référence à la localisation des mesures à prendre pour réduire ce problème. Partant, l'argument de la Commission selon lequel, conformément à la rédaction du cahier des charges, les soumissionnaires pouvaient comprendre que ces mesures se rapportaient seulement à la zone des ouvrages dont la construction était expressément prévue, n'est pas à négliger.

100. Enfin, il y a lieu de ne pas perdre de vue que les dispositions qui viennent d'être rappelées sont restées identiques dans le premier et dans le second cahier des charges. Par conséquent, il n'est pas possible de prétendre que, compte tenu de celles-ci, un participant potentiel à l'appel d'offres aurait pu estimer que les choix qu'ont fait les autorités espagnoles d'annuler le premier appel d'offres en éliminant de celui-ci certains travaux était déterminé par une volonté d'obtenir des propositions alternatives par rapport à ces travaux «annulés».

101. Ensuite, en ce qui concerne les arguments supplémentaires invoqués par le Royaume d'Espagne quant à la possibilité d'interpréter le second cahier des charges à la lumière des autres dispositions pertinentes du droit espagnol, qui auraient reconnu une large marge de liberté et de créativité aux soumissionnaires, j'observe ce qui suit.

102. D'une part, en principe, pour les raisons déjà indiquées, j'estime que les principes que la jurisprudence de la Cour a développés quant à la publicité des marchés publics s'appliquent également en matière de concessions. Comme on l'a vu, la Cour a exclu également la légalité d'un avis d'appel d'offres qui, en ce qui concerne l'admissibilité des variantes, contenait un renvoi explicite à la législation nationale (22).

103. D'autre part, même si on voulait admettre, par l'absurde, la possibilité – qui serait tout à fait contraire à la jurisprudence de la Cour – d'un complément implicite à l'appel d'offres sur la base du

droit national, il reste que, à mon avis, l'article 8 de la Ley de Autopistas ne va pas dans le sens de la position du Royaume d'Espagne. En effet, cette disposition, loin de reconnaître aux soumissionnaires potentiels une grande liberté créative pour la présentation des offres, fait référence à des travaux qui, bien que non prévus dans l'objet initial de la concession, «s'imposent au concessionnaire comme contrepartie». En d'autres termes, il semble qu'il s'agisse de travaux qui sont, en tout cas, expressément demandés aux concessionnaires, et non pas librement proposés et réalisés par celui-ci. Par conséquent, il semble inutile de vérifier si, aux termes de la législation nationale, tous les ouvrages supplémentaires proposés par Iberpistas relèvent de la zone d'influence des ouvrages expressément indiqués comme faisant l'objet de la concession.

104. La communication interprétative ne peut pas non plus fournir des arguments dans le sens de la position du gouvernement espagnol. En particulier, comme on l'a vu, bien que dans ce document la Commission admette la possibilité que les soumissionnaires se voient reconnaître une large marge de liberté et de créativité dans leurs offres, elle rappelle également et de manière expresse la nécessité de «présenter de manière non discriminatoire et objective ce qui est demandé aux candidats» (23).

105. En outre, la Commission a montré de façon plutôt convaincante, malgré les arguments opposés du Royaume d'Espagne, que les autres soumissionnaires n'ont pas interprété les clauses relatives à la nécessité de proposer des mesures pour la réduction du trafic de la même façon que Iberpistas. En particulier, toutes les solutions proposées par les autres soumissionnaires se concentraient sur la réalisation d'ouvrages supplémentaires strictement liés aux ouvrages dont la construction était expressément demandée dans le cahier des charges. Il s'agit évidemment d'un fait qui, en soi, n'est pas déterminant, dans la mesure où l'appréciation du cahier des charges par les autres soumissionnaires ne lie certainement pas la Cour. En outre, il ne peut pas être exclu que les autres soumissionnaires aient interprété erronément le cahier des charges. Il s'agit cependant d'un élément qui, en tout état de cause, peut être pris en compte pour décrire de façon complète les circonstances de l'espèce.

106. Enfin, une dernière observation concerne les aspects pratiques découlant de l'interprétation du cahier des charges avancée par Iberpistas et appuyée par le Royaume d'Espagne. Sur la base de l'offre retenue, la société Iberpistas a réalisé, outre les raccordements entre l'autoroute A-6 et les villes de Ávila et de Ségovie, des ouvrages supplémentaires sur le tronçon Villalba-Adanero de la même autoroute, tronçon sur lequel, au moment de l'appel d'offres en cause, une concession était déjà accordée à Iberpistas jusqu'en 2018. Or, il me semble difficile d'imaginer qu'un soumissionnaire autre qu'Iberpistas puisse concrètement proposer, de sa propre initiative et sans aucune indication en ce sens dans le cahier des charges, de réaliser des travaux sur un tronçon de l'autoroute géré par cette société.

VII – Conclusions

107. Eu égard aux considérations qui précèdent, je propose à la Cour de statuer dans les termes suivants:

En n'incluant pas, parmi les travaux faisant l'objet de la concession, dans le cahier des charges concernant la passation d'un marché de concession administrative pour la construction, l'entretien et l'exploitation des liaisons de l'autoroute A-6 avec Ségovie et Ávila, ainsi que pour l'entretien et l'exploitation du tronçon Villalba-Adanero de la même autoroute à partir de 2018, certains travaux qui ont été attribués ultérieurement, le Royaume d'Espagne a manqué aux obligations qui lui incombent en vertu de la directive 93/37/CEE portant coordination des procédures de passation des marchés publics de travaux, et sur la base des principes du traité en matière d'égalité de traitement et de non–discrimination.

Le Royaume d'Espagne est condamné aux dépens.

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1 – Langue originale: l'italien.

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2 – À l'opposé, les concessions de services ne font pas encore l'objet d'une réglementation spécifique, à l'exception de quelques principes importants affirmés par la jurisprudence de la Cour. En particulier, la jurisprudence a affirmé constamment que, bien que n'étant pas expressément soumises à une législation spécifique, les concessions de services doivent respecter les principes fondamentaux du traité et en

particulier le principe de non-discrimination en raison de la nationalité. Voir, en ce qui concerne les services visés par la directive 93/38/CEE, arrêt du 7 décembre 2000, Telaustria et Telefonadress (C-324/98, Rec. p. I-10745, point 60). En ce qui concerne les services visés par la directive 92/50/CEE, voir arrêt du 13 octobre 2005, Parking Brixen (C-458/03, Rec. p. I-8585, point 46 et jurisprudence citée).

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3 – Directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114).

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4 – Il s'agit du titre III, qui comprend les articles 56 à 65.

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5 – Directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199, p. 54).

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6 – Arrêt du 12 juillet 2001, Ordine degli Architetti e.a. (C-399/98, Rec. p. I-5409).

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7 – Dans certains cas concrets, la distinction entre marché public et concession peut être assez difficile. Il s'agit, finalement, d'une compétence de la juridiction nationale: voir arrêt du 13 octobre 2005, Parking Brixen, précité à la note 2 (point 32).

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8 – Voir, à cet égard, l'arrêt du 27 octobre 2005, Commission/Italie, C-187/04 et C-188/04, non publié au Recueil (point 23).

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9 – Arrêt du 9 décembre 2003, Commission/Italie (C-129/00, Rec. p. I-14637, points 29 à 32).

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10 – Voir, par exemple, arrêt du 8 décembre 2005, Commission/Luxembourg (C-33/04, Rec. p. I-10629, points 65 à 67 et jurisprudence citée).

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11 – Voir note 6.

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12 – Idem, point 100.

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13 – Voir, sur la spécificité de la jurisprudence Ordine degli Architetti, et sur le fait qu'elle ne peut pas être appliquée à une situation dans laquelle le cocontractant peut être choisi, arrêt du 20 octobre 2005, Commission/France (C-264/03, Rec. p. I-8831, point 57).

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14 – Voir arrêts du 22 juin 1993, Commission/Danemark, dit «Storebaelt» (C-243/89, Rec. p. I-3353, point 33), et du 18 octobre 2001, SIAC Construction (C-19/00, Rec. p. I-7725, point 33). Ces arrêts font référence à la directive 71/305/CEE antérieure, mais la raison d'être des dispositions reste évidemment la même. Voir également, par exemple, l'arrêt du 25 avril 1996, Commission/Belgique, dit «bus wallons» (C-87/94, Rec. p. I-2043, points 51 et 52), ainsi que, de façon plus générale, l'arrêt Parking Brixen, précité à la note 2 (point 48).

15 – Arrêt Commission/Danemark, précité à la note 14 (point 37).

16 – Voir note 2.

17 – Arrêt du 27 octobre 2005, Commission/Italie, précité à la note 8 (point 19).

18 – JO 2000, C 121, p. 2.

19 – Arrêt du 16 octobre 2003, Traunfellner (C–421/01, Rec. p. I–11941, points 27 à 29).

20 – Arrêts Commission/Belgique, précité à la note 14 (points 88 et 89) et SIAC, précité à la note 14 (points 41 à 43).

21 – Voir points 21 et 22 des présentes conclusions.

22 – Arrêt Traunfellner, précité à la note 19.

23 – Voir point 86 des présentes conclusions.

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Action brought on 13 September 2007 - Commission of the European Communities v Kingdom of Spain

(Case C-423/07)

Language of the case: Spanish

Parties

Applicant: Commission of the European Communities (represented by: D. Kukovec, agent and M. Canal Fontcuberta, abogada)

Defendant: Kingdom of Spain

Form of order sought

declare that, by not including, in the works to be awarded by concession in the concession notice and in the tendering specifications relating to the award of a public concession for the construction, maintenance and operation of the motorway links to Segovia and Ávila, and for the maintenance and operation of the Villalba-Adanero section of the same motorway, works which were subsequently awarded, the Kingdom of Spain has failed to fulfil its obligations under Article 3 and Article 11(3) (6) (7) (11) and (12) of Directive 93/37/EEC[1], and under the principles of the EC Treaty, in particular the principle of equality of treatment and non-discrimination;

order Kingdom of Spain to pay the costs.

Pleas in law and main arguments

Under Royal Decree 1724/99 of 5 November the Ministry for Infrastructure and Transport awarded a public works concession for the construction, maintenance and operation of the following sections of toll motorway: the A-6 toll motorway link to Segovia, and the A-6 toll motorway link to Ávila, and for the maintenance and operation from 2018 of the Villalba-Adanero section of the A-6 toll motorway. In the context of awarding that concession, there were awarded many other works of which notice had not been given, to a value greater than the total value of the published works, and which were in part outside the geographical area of the concession.

First, the Commission claims that the Kingdom of Spain has infringed Article 3 of Directive 93/37 and consequently Article 11(3) (6) (7) (11) and (12) of the same directive by awarding works without prior public notice. The Commission states that all the works awarded should have been published in the Official Journal in accordance with the provisions of Directive 93/37.

Secondly, the Commission considers that there is no information either in the notice or in the tendering specifications which would enable tenderers to bid for works on sections other than the A-6 toll motorway links to Ávila and Segovia such as those which were subsequently awarded. The Commission considers therefore that the Spanish authorities have infringed the principle of equality of treatment by accepting a tender which manifestly did not comply with the essential conditions set out in the published notice and tendering specifications.

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[1] - of the Council of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54)

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JUDGMENT OF THE COURT (Third Chamber)

13 November 2008 (*)

(Public procurement – Tendering procedures – Public service concessions – Concession for the operation of a municipal cable television network – Awarded by a municipality to an inter-municipal cooperative society – Obligation of transparency – Conditions – Whether the control exercised by the concession-granting authority over the concessionaire is similar to that exercised over its own departments)

In Case C–324/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decision of 3 July 2007, received at the Court on 12 July 2007, in the proceedings

Coditel Brabant SA

v

Commune d'Uccle,

Région de Bruxelles-Capitale,

third party:

Société Intercommunale pour la Diffusion de la Télévision (Brutélé),

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues (Rapporteur), J. Klučka and A. Arabadjiev, Judges,

Advocate General: V. Trstenjak,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 April 2008,

after considering the observations submitted on behalf of:

– Coditel Brabant SA, by F. Tulkens and V. Ost, avocats,

– the Commune d'Uccle, by P. Coenraets, avocat,

– Société Intercommunale pour la Diffusion de la Télévision (Brutélé), by N. Fortemps and J. Bourtembourg, avocats,

– the Belgian Government, by J.C. Halleux, acting as Agent, assisted by B. Staelens, avocat,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,

– the Commission of the European Communities, by B. Stromsky and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 49 EC and of the principles of equal treatment and non-discrimination on grounds of nationality, as well as of the concomitant obligation of transparency.

2 The reference was made in the course of proceedings brought by Coditel Brabant SA ('Coditel') against the Commune d'Uccle (Municipality of Uccle; 'the Municipality of Uccle'), the Région de Bruxelles-Capitale and the Société Intercommunale pour la Diffusion de la Télévision (Brutélé) ('Brutélé'), concerning the award by the Municipality of Uccle to an inter-municipal cooperative society of a concession for the management of the municipal cable television network.

Legal context

National law

3 Article 1 of the Law of 22 December 1986 on inter-municipal cooperatives (loi relative aux intercommunales) (*Moniteur belge* of 26 June 1987, p. 9909; 'the Law on inter-municipal cooperatives') provides:

'Two or more municipalities may, in accordance with the provisions of this Law, form associations with specific objects in the municipal interest. Those associations shall hereinafter be referred to as inter-municipal cooperatives.'

4 Article 3 of the Law provides:

'Inter-municipal cooperatives shall be legal persons governed by public law and shall not have a commercial character, irrespective of their form or object.'

5 Article 10 of the Law states:

'Each inter-municipal cooperative shall comprise a general assembly, a governing council and a board of auditors.'

6 Under Article 11 of the Law:

'Irrespective of the proportion of the contributions made by the various parties to the authorised capital, the municipalities shall always hold both the majority of votes and the chairmanship of the various inter-municipal management and control bodies.'

7 Article 12 of the Law on inter-communal municipal cooperatives provides:

'The representatives of the associated municipalities at the general assembly shall be appointed by the municipal council of each municipality from among the municipal councillors, the mayor and the aldermen.

For each municipality, the voting rights at the general assembly shall correspond to the number of shares held.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 From 1969 to 1999, the Municipality of Uccle authorised Coditel to install and operate a cable television network in its territory. On 28 October 1999, the municipality decided to purchase the network with effect from 1 January 2000.

9 To that end, the Municipality of Uccle launched a call for tenders – also by decision of 28 October 1999 – with a view to granting the right to operate the network to a concessionaire. Four companies, including Coditel, submitted tenders.

10 On 25 May 2000, the Municipality of Uccle decided against awarding a concession for the operation of its cable television network, opting instead to sell it.

11 A notice of a call for purchase tenders was published in the *Bulletin des adjudications* on 15 September 2000. Five companies, including Coditel, submitted purchase bids. In addition, Brutélé, an inter-municipal cooperative society, submitted to the Municipality of Uccle an offer of affiliation as an associated member instead of a purchase bid.

12 Since it considered that four of the five bids were inadmissible and that the only admissible bid – Coditel's – was too low, the Municipality of Uccle decided, on 23 November 2000, not to sell the municipal cable television network.

13 Also by decision of 23 November 2000, the Municipality of Uccle decided to become a member of Brutélé, entrusting the latter with the management of its cable television network.

14 The reasons for that decision include, in particular, the following considerations:

'Whereas Brutélé proposes to the Municipality of Uccle that, upon taking up membership, it should constitute an independent operational sub-section with autonomous power of decision;

Whereas that autonomy relates in particular to:

– the choice of programmes transmitted;

– the subscription and connection charges;

– the investment and works policy;

– the rebates or benefits to be granted to certain categories of person;

– the nature of and terms relating to other services to be provided via the network, and the possibility of entrusting the inter-communal cooperative with projects of interest to the municipality that accord with the objects defined in its statutes, such as the creation of a municipal intranet, a website and the training of staff for that purpose.

Whereas within that framework:

– Brutélé would draw up an income statement and balance sheet for activities on Uccle's network;

– [the Municipality of] Uccle would have a director on the governing council of Brutélé and three directors on the board of the Brussels operating sector, one appointee on the board of auditors and one as a municipal expert.

Whereas Brutélé undertakes to cover the entire Uccle network and to increase the capacity of the network so that it can offer, within one year at most, if the municipality so wishes, all the following services:

– expansion of the TV range: additional programmes and "the bouquet";

– pay-per-view programmes;

– internet access;

– voice telephony;

– video surveillance;

– high-speed data transmission;

Whereas the proposed annual fee consists of the following:

(a) fixed fee equal to 10% of the income from basic subscriptions for cable television (on the basis of 31 000 subscribers and an annual subscription fee of BEF 3 400 (before VAT and royalties): BEF 10 540 000 per year);

(b) payment of 5% of the turnover of Canal+ and of the bouquet;

(c) payment of the entire profit on all the services provided.'

15 It is clear from the order for reference that the Municipality of Uccle had to subscribe for 76 shares in Brutélé, in the amount of BEF 200 000 per share. Moreover, the municipality requested, and obtained, from Brutélé the option of withdrawing unilaterally from that inter-municipal cooperative at any time.

16 It is also apparent from the order for reference that Brutélé is an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities. Brutélé is not open to private members. Its governing council consists of representatives of the municipalities (a maximum of three per municipality), who are appointed by the general assembly, which is itself composed of representatives of the municipalities. The governing council enjoys the widest powers.

17 The order for reference further makes clear that the municipalities are divided into two sections, one of which groups together the municipalities in the Brussels region, which may be divided into sub-sectors. Within each sector, there is a sector board consisting of directors appointed by the general assembly, sitting in separate groups representing the holders of shares for each of the sectors, from among candidates proposed by the municipalities. The governing council may delegate to the sector boards its powers with regard to matters affecting the sub-sectors, such as the conditions for the application of charges, the programme of works and investment, the financing thereof, advertising campaigns and problems common to the various sub-sectors within the operational sector. The constitutional bodies under Brutélé's statutes ('the statutory bodies') additionally comprise the general assembly, whose decisions are binding on all members; the Director General; the board of experts, who are municipal officials and equal in number to the directors whom they are tasked with assisting; and the board of auditors. The Director General, the experts and the auditors are appointed by the governing council or the general assembly, as the case may be.

18 Furthermore, according to the order for reference, Brutélé carries out the essential part of its activities with its members.

19 By application lodged on 22 January 2001, Coditel brought an appeal before the Conseil d'État (Council of State) (Belgium), inter alia, for annulment of the decision of 23 November 2000 whereby the Municipality of Uccle became a member of Brutélé. In that appeal, Coditel took issue with the municipality for joining Brutélé and entrusting it with the management of its cable television network, without comparing the advantages of that arrangement with the advantages of granting another operator a concession for running the network. Coditel claimed that, by proceeding in that manner, the Municipality of Uccle had infringed, inter alia, the principle of non-discrimination and the obligation of transparency enshrined in Community law.

20 Brutélé contested that claim, maintaining that it is 'purely' an inter-municipal cooperative whose activities are intended and reserved for the member municipalities and that its statutes allow the Municipality of Uccle, as an operational sub-sector, to exercise immediate and precise control over Brutélé's activities in that sub-sector, identical to the control that that municipality would exercise over its own internal departments.

21 The Conseil d'État takes the view that the affiliation of the Municipality of Uccle to Brutélé does not constitute a public service contract but a public service concession for the purposes of Community law. Although the Community public procurement directives do not apply to public service concessions, the principle of non-discrimination on grounds of nationality implies an obligation of transparency in the award of concessions, in accordance with the case-law of the Court of Justice deriving from the judgment in Case C–324/98 *Telaustria and Telefonadress* [2000] ECR I–10745. In order to satisfy the requirements of Community law, the Municipality of Uccle ought, in principle, to

have issued a call for competition in order to examine whether the award of the concession for its cable television service to economic operators other than Brutélé constituted a more attractive course of action than that chosen. The Conseil d'État asks whether those requirements of Community law are to be set aside in the light of the judgment in Case C-107/98 *Teckal* [1999] ECR I-8121, according to which those requirements do not apply where the concession-granting public authority exercises control over the concessionaire and where the concessionaire carries out the essential part of its activities with that authority.

22 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. May a municipality, without calling for competition, join a cooperative society grouping together exclusively other municipalities and associations of municipalities (a so-called "pure" inter-municipal cooperative) in order to transfer to that cooperative society the management of its cable television network, in the knowledge that the cooperative society carries out the essential part of its activities for and with its own members and that decisions regarding those activities are taken by the governing council and the sector boards within the limits of the delegated powers granted to them by the governing council, those statutory bodies being composed of representatives of the public authorities and the decisions of those bodies being taken in accordance with the vote expressed by the majority of those representatives?

2. Can the control thus exercised over the decisions of the cooperative society, via the statutory bodies, by all the members of the cooperative society – or, in the case of operational sectors or sub-sectors, by some of those members – be regarded as enabling them to exercise over the cooperative society control similar to that exercised over their own departments?

3. For that control to be regarded as similar, must it be exercised individually by each member, or is it sufficient that it be exercised by the majority of the members?'

The questions referred

Questions 1 and 2

23 In the light of the connection between them, Questions 1 and 2 should be examined together.

24 It is apparent from the referral decision that, by becoming a member of Brutélé, the Municipality of Uccle entrusted it with the management of its cable television network. It is also apparent that Brutélé's remuneration comes not from the municipality but from payments made by the users of that network. That method of remuneration is characteristic of a public service concession (Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 40).

25 Public service concession contracts do not fall within the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was applicable at the material time. Notwithstanding the fact that such contracts fall outside the scope of that directive, the authorities concluding them are bound to comply with the fundamental rules of the EC Treaty, the principles of equal treatment and non-discrimination on grounds of nationality, and the concomitant obligation of transparency (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 to 62, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 to 19). Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed (see, to that effect, *Telaustria and Telefonadress*, paragraph 62, and *Coname*, paragraph 21).

26 The application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as of the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority or authorities (see, to that effect, *Teckal*, paragraph 50, and *Parking Brixen*, paragraph 62).

27 As regards the second of those conditions, the national court stated in the order for reference that

Brutélé carries out the essential part of its activities with its members. Accordingly, the scope of the first condition – that the control exercised over the concessionaire by the concession-granting public authority or authorities must be similar to that which the authority exercises over its own departments – remains to be examined.

28 In order to determine whether a concession-granting public authority exercises a control similar to that which it exercises over its own departments, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the concessionaire in question is subject to a control which enables the concession-granting public authority to influence that entity's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that entity (see, to that effect, *Parking Brixen*, paragraph 65, and Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 36).

29 Of the relevant facts which can be identified from the order for reference, it is appropriate to consider, first, the holding of capital by the concessionaire, secondly, the composition of its decision-making bodies, and thirdly, the extent of the powers conferred on its governing council.

30 As regards the first of those facts, it should be borne in mind that, where a private undertaking holds a share of the capital of a concessionaire, this precludes the possibility for a concession-granting public authority to exercise over that concessionaire a control similar to that which it exercises over its own departments (see, to that effect, Case C–26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49).

31 On the other hand, the fact that the concession-granting public authority holds, alone or together with other public authorities, all of the share capital in a concessionaire, tends to indicate – generally, but not conclusively – that that contracting authority exercises over that company a control similar to that which it exercises over its own departments (*Carbotermo and Consorzio Alisei*, paragraph 37, and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 57).

32 It is clear from the order for reference that, in the case before the referring court, the concessionaire is an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities, and is not open to private members.

33 Secondly, it is clear from the file that Brutélé's governing council consists of representatives of the affiliated municipalities, appointed by the general assembly, which is itself composed of representatives of the affiliated municipalities. In accordance with Article 12 of the Law on inter-municipal cooperatives, the representatives at the general assembly are appointed by the municipal council of each municipality from among the municipal councillors, the mayor and the aldermen.

34 The fact that Brutélé's decision-making bodies are composed of representatives of the public authorities which are affiliated to Brutélé shows that those bodies are under the control of the public authorities, which are thus able to exert decisive influence over both Brutélé's strategic objectives and significant decisions.

35 Thirdly, it is evident from the file that Brutélé's governing council enjoys the widest powers. In particular, it fixes the charges. It also has the power – but is under no obligation – to delegate to the sector or sub-sector boards the resolution of certain matters particular to those sectors or sub-sectors.

36 The question arises as to whether Brutélé has thus become market-oriented and gained a degree of independence which would render tenuous the control exercised by the public authorities affiliated to it.

37 In this regard, it should be pointed out that Brutélé does not take the form of a *société par actions*, or a *société anonyme*, either of which is capable of pursuing objectives independently of its shareholders, but of an inter-municipal cooperative society governed by the Law on inter-municipal cooperatives. Moreover, in accordance with Article 3 of that Law, inter-municipal cooperatives are not to have a commercial character.

38 It seems to be apparent from that Law, which is supplemented by Brutélé's statutes, that Brutélé's object under its statutes is the pursuit of the municipal interest – that being the raison d'être for its

creation – and that it does not pursue any interest which is distinct from that of the public authorities affiliated to it.

39 Subject to verification of the facts by the referring court, it follows that, despite the extent of the powers conferred on its governing council, Brutélé does not enjoy a degree of independence sufficient to preclude the municipalities which are affiliated to it from exercising over it control similar to that exercised over their own departments.

40 Those considerations are all the more applicable where decisions relating to the activities of the inter-municipal cooperative society are taken by the sector or sub-sector boards, within the limits of the delegated powers granted to them by the governing council. Where one or more affiliated municipalities are recognised as constituting a sector or sub-sector of that society's activities, the control which those municipalities may exercise over the matters delegated to the sector or sub-sector boards is even stricter than that which they exercise in conjunction with all the members within the plenary bodies of that society.

41 It follows from the foregoing that, subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, the control exercised, via the statutory bodies, by the public authorities belonging to such an inter-municipal cooperative society over that society's decisions may be regarded as enabling those authorities to exercise over that cooperative society control similar to that exercised over their own departments.

42 Accordingly, the answer to Questions 1 and 2 must be that:

– Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality, and the concomitant obligation of transparency, do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities;

– Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments.

Question 3

43 By Question 3, the national court is essentially asking whether, where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is necessary, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for that control to be exercised individually by each of those public authorities or whether it can be exercised jointly by them, decisions being taken by a majority, as the case may be.

44 First, it should be pointed out that, according to the case-law of the Court, where several public authorities control a concessionaire, the condition relating to the essential part of that entity's activities may be met if account is taken of the activities which that entity carries out with all those authorities (see, to that effect, *Carbotermo and Consorzio Alisei*, paragraphs 70 and 71, and *Asemfo*, paragraph 62).

45 It would be consistent with the reasoning underlying that case-law to consider that the condition as to the control exercised by the public authorities may also be satisfied if account is taken of the control exercised jointly over the concessionaire by the controlling public authorities.

46 According to the case-law, the control exercised over the concessionaire by a concession-granting public authority must be similar to that which the authority exercises over its own departments, but

not identical in every respect (see, to that effect, *Parking Brixen*, paragraph 62). The control exercised over the concessionaire must be effective, but it is not essential that it be exercised individually.

47 Secondly, where a number of public authorities elect to carry out their public service tasks by having recourse to a municipal concessionaire, it is usually not possible for one of those authorities, unless it has a majority interest in that entity, to exercise decisive control over the decisions of the latter. To require the control exercised by a public authority in such a case to be individual would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities, such as an inter-municipal cooperative society.

48 Such a result, however, would not be consistent with Community rules on public procurement and concession contracts. Indeed, a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments (*Stadt Halle and RPL Lochau*, paragraph 48).

49 That possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities (see, to that effect, *Asemfo*, paragraph 65).

50 It must therefore be recognised that, where a number of public authorities own a concessionaire to which they entrust the performance of one of their public service tasks, the control which those public authorities exercise over that entity may be exercised jointly.

51 As regards collective decision-making bodies, the procedure which is used for adopting decisions – such as, inter alia, adoption by majority – is of no importance.

52 That conclusion is not undermined by *Coname*. Admittedly, the Court considered in that judgment that a 0.97% interest is so small as to preclude a municipality from exercising control over the concessionaire managing a public service (see *Coname*, paragraph 24). However, in that passage of the judgment, the Court was not concerned with the question whether such control could be exercised jointly.

53 Furthermore, in a later judgment – namely, *Asemfo*, paragraphs 56 to 61 – the Court recognised that in certain circumstances the condition relating to the control exercised by the public authority could be satisfied where such an authority held only 0.25% of the capital in a public undertaking.

54 Consequently, the answer to Question 3 must be that, where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.

Costs

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

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

1. Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality and the concomitant obligation of transparency do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities.

2. **Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments.**

3. **Where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.**

[Signatures]

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* Language of the case: French.

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Judgment of the Court (Third Chamber) of 13 November 2008 (Reference for a preliminary ruling from the Conseil d'État - Belgium) - Coditel Brabant SPRL v Commune d'Uccle, Région de Bruxelles-Capitale

(Case C-324/07) [1]

(Public procurement - Tendering procedures - Public service concessions - Concession for the operation of a municipal cable television network - Award by a municipality to an inter-municipal cooperative society - Obligation of transparency - Conditions - Whether the control exercised by the concession-granting authority over the concessionaire is similar to that exercised over its own departments)

Language of the case: French

Referring court

Conseil d'État

Parties to the main proceedings

Applicant: Coditel Brabant SPRL

Defendant: Commune d'Uccle, Région de Bruxelles-Capitale

Third party: Société Intercommunale pour la Diffusion de la Télévision (Brutélé)

Re:

Preliminary ruling - Conseil d'État - Interpretation of the fundamental principles of primary Community law (principles of non-discrimination and transparency) and of the exceptions to those principles in the area of public service concessions - Concession relating to the operation of a municipal television network - Need for competitive tendering except in those cases where the awarding authority exercises, over the concessionaire, a control similar to that which it exercises over its own departments and where the concessionaire performs the major part of its activities with the authority which controls it

Operative part of the judgment

1. Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality and the concomitant obligation of transparency do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities;

2. Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments;

3. Where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.

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[1] - OJ C 211, 8.9.2007.

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OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 4 June 2008 (1)

Case C–324/07

Coditel Brabant SPRL
v
Commune d'Uccle
and
Région de Bruxelles – Capital

(Reference for a preliminary ruling from the Conseil d'État (Belgium))

(Articles 12 EC, 43 EC und 49 EC – Transparency requirements – Scope of Community procurement law – Public service concession for the management of the cable television network of a regional authority – Inter-municipal cooperation – Quasi in-house performance of tasks – Control similar to that exercised over own departments)

1. The reference by the Conseil d'État (Council of State), Belgium, concerns the scope of Community procurement law. It concerns the question as to whether procurement law is applicable where a regional authority, in this case a municipality, delegates the management of its cable television network to a body that is purely an inter-municipal cooperative entity (2) with the involvement of that municipality, yet without drawing on any private capital. The present case involves inter-municipal cooperation in the form of a cooperative and the questions submitted by the referring court concern the first of the well-known *Teckal* criteria: control similar to that exercised over an entity's own department.

2. In the dispute in the main proceedings the Belgian cable television company Coditel Brabant SPRL ('Coditel') is proceeding against three defendants: the Municipality of Uccle (also 'the municipality'), the cooperative Société Intercommunale pour la Diffusion de la Télévision (inter-municipal company for television broadcasting) ('Brutélé') and the region of Brussels capital, represented by its government.

I – Legal framework

A – *Community law*

3. Article 12(1) EC provides as follows:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

4. Article 43 EC provides as follows:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. …

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.'

5. Article 49(1) EC provides as follows:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

B – *National law*

6. Under Article 162 of the Belgian Constitution, municipalities have the right to form associations.

7. The details of inter-municipal cooperation are governed by the Law on inter-municipal cooperatives (Law of 22 December 1986 on inter municipal cooperatives). Under Article 1 of this Law, in accordance with the provisions of this Law, two or more municipalities may form associations with specific objects in the municipal interest. Article 3 of this Law provides that inter-municipal cooperatives are to be legal persons governed by public law that, irrespective of their form or object, are not to have a commercial character. Article 10 of this Law provides that the component bodies ('statutory bodies') of any inter-municipal cooperative are a general assembly, a governing board and a board of auditors. Under Article 12 of the Law, the general assembly representatives are to be appointed by the municipal council of each municipality from among the municipal councillors, the mayor and the aldermen. It is further laid down therein that for each municipality the voting rights at the general assembly are to correspond to the number of shares held.

II – Facts of the main proceedings and questions referred for a preliminary ruling

8. The cable television network of the Municipality of Uccle was administered by the cable television company Coditel on the basis of contracts dating from 1969 to 1999. As at the end of the contracts on 31 December 1999, the municipality made use of its contractual right to buy the cable television network situated on its territory from Coditel.

9. In October 1999, the Uccle municipal council decided, first, to put out the operation and improvement of the municipal cable television network to tender by a concessionaire for the period from 1 July 2000 to 30 June 2009. Second, the draft was approved for a further additional contract with Coditel to secure the public cable television service pending appointment of the future concessionaire. Finally, provision was made by way of the additional contract for Coditel to administer the network until 31 December 2001.

10. Coditel applied at the end of 1999 for the concession to operate the cable television network of the Municipality of Uccle. At the request of the municipality in April 2000 Coditel also lodged an offer to buy the cable television network, (3) as moreover did the other companies that had participated in the tender.

11. In May 2000, the Uccle municipal council resolved to sell the network rather than grant a concession. Under the terms of the relevant tender Coditel in October 2000 submitted a purchase bid. The prices offered in response to the tender ranged from BEF 750 million to 1 billion; the only offer which was in conformity with the tender and permissible, namely the Coditel bid, was the lowest.

12. Brutélé also responded to the call for tenders but not with a purchase bid but with an offer of affiliation.

13. Since the prices offered to the Municipality of Uccle were clearly lower than the prices

previously mentioned as possible, (4) it resolved by resolution of its municipal council dated 23 November 2000 not to sell the municipal cable television network (first decision challenged in the main proceedings).

14. Also on 23 November 2000, the Uccle municipal council resolved that the municipality should become a member of Brutélé (second decision challenged in the main proceedings). This resolution states inter alia that Brutélé has made an offer of affiliation to the Municipality of Uccle involving the municipal network as capital contribution and the subscription of company shares, the payment of an annual fee (5) together with the offer to create, if it were to join, an independent operational sub-sector of its own with decision-making powers. (6) The municipal council further stated in that resolution that affiliation to Brutélé would produce a number of advantages for the Uccle municipality: autonomy in decision-making, considerable revenues, retention of ownership of the network and agreement of the option of a rapid and uncomplicated withdrawal in the event of a future interesting purchase bid.

15. On 30 November 2000 Coditel lodged with the First Minister of the Government of the Bruxelles-Capitale region substantiated a complaint seeking the setting aside of the resolution of the Uccle municipal council of 23 November 2000 concerning the affiliation of that municipality to Brutélé.

16. On 7 December 2000, the extraordinary general assembly of Brutélé voted in favour of the affiliation of the Municipality of Uccle (third decision challenged in the main proceedings).

17. On 19 December 2000, the First Minister of the Brussels city region informed the Municipality of Uccle that its conditional affiliation (7) with Brutélé gave rise to no objection (fourth decision challenged in the main proceedings). On 2 January 2001 the First Minister of the Bruxelles-Capitale region informed the applicant that he had raised no objection to the affiliation of the Municipality of Uccle with Brutélé.

18. Coditel brought an action on 22 January 2001 for a declaration that the four abovementioned decisions were null and void.

19. In the main proceedings the referring Conseil d'État has already dismissed the proceedings against two of these decisions (the third and fourth contested decisions) as inadmissible. To the extent to which the action is in its view admissible, it is in particular important to assess the decision by which the Uccle municipal council resolved to become a member of Brutélé.

20. By order of 3 July 2007, the Conseil d'État referred the following questions to the Court of Justice:

– May a municipality, without calling for competition, join a cooperative society grouping together exclusively other municipalities and associations of municipalities (a so-called pure inter-municipal cooperative) in order to transfer to that cooperative society the operation of its cable television network, in the knowledge that the cooperative society carries out the essential part of its activities for and with its own members and that decisions regarding those activities are taken by the board of directors and the sector boards within the limits of the delegated powers granted to them by the board of directors, those statutory bodies being composed of representatives of the public authorities and the decisions of those corporate bodies being taken in accordance with the vote expressed by the majority of those representatives?

– Can the control thus exercised over the decisions of the cooperative society, via the statutory bodies, by all the members of the cooperative society – or, in the case of operational sectors or sub-sectors, by some of those members – be regarded as enabling them to exercise over the cooperative society control similar to that exercised over their own departments?

– For that control to be regarded as similar, must it be exercised individually by each member, or is it sufficient that it be exercised by the majority of the members?

21. The referring court explains that the affiliation of the Municipality of Uccle to Brutélé falls not within the sector of public contracts for services but within that of public service concessions. In that connection, even though the Community directives on public contracts are not applicable, the fundamental rules of primary Community law in general and the prohibition on discrimination on

grounds of nationality in particular, which entails inter alia a transparency obligation, do apply.

22. From the referring court's perspective there is much to be said for the fact that the Municipality of Uccle as awarding authority was not entitled directly and immediately to have recourse to affiliation to Brutélé without conducting a tendering procedure or a comparative examination of bids submitted. Specifically, the municipality, in order to satisfy the requirements of Community law, ought to have conducted a fresh tendering procedure in order to examine whether the grant of a concession over its cable television network service to Coditel or another economic operator would not have been a more favourable possibility than that finally chosen.

23. However, in order to enable it to conduct a definitive analysis, it is essential to obtain further clarification as to criteria arising out of the *Teckal* (8) judgment, in particular in regard to the nature of the control exercised by the concession-granting authority over the concessionaire. For under that case law, the transparency requirements under Community law could only be suspended if two conditions that were to be narrowly interpreted were separately met, first that the control exercised by the concession-granting authority over the concessionaire is similar to that exercised over its own departments and, second, that the latter body essentially performs its activity for the authority controlling it.

24. In that connection Brutélé claimed that it was a purely inter-municipal entity whose activities were intended for the affiliated municipalities and reserved to them, and that its statutes permitted the Municipality of Uccle to create an independent operational sub-section of its own with decision-making powers, which enabled the latter to exercise precisely the same direct control over the activities of the cooperative society in this sub-section as over its own departments. The Municipality of Uccle has a member on the governing council of Brutélé and three members on the board of the Brussels operating section, an auditor and a municipal expert. Moreover, the Municipality of Uccle could at any time withdraw from the cooperative entity which was further evidence indicating that it was completely in control of the operation of its cable television network.

25. According to the referring court, the statutes of Brutélé provide that the cooperative members are municipalities together with an inter-municipal body, which in its turn is made up solely of municipalities. The cooperative society is not open to private individuals. The governing council comprises representatives of the municipalities – a maximum of three per municipality – who are appointed by the general assembly which in itself comprises representatives of the municipalities. The governing council has the widest powers. The municipalities are divided into two sections of which one comprises the Brussels region municipalities that may be divided into sub-sectors. Within each sector a sector board is set up consisting of board members appointed on a proposal by the municipalities by the general assembly and sitting in various compositions that reflect proportions of shares held in respect of each sector. The governing council may delegate to the sector boards powers in respect of specific questions concerning the sub-sectors – such as the conditions for the application of tariffs, the extension and investment plan, the financing of investments and advertising campaigns – and problems common to the various sub-sectors within the operational sector. The other statutory bodies are the general assembly whose decisions are binding on all members, the Director General, the board of experts consisting of municipal experts, and the auditors. The Director General, the experts and the auditors are appointed on a case-by-case basis by the governing council or the general assembly, as the case may be.

26. The referring court draws from this the inference that the decision-making autonomy of the Municipality of Uccle is not as comprehensive as Brutélé alleges. For example, the governing council exercises the widest powers whilst this municipality is represented by only one representative. It is true that all decisions are taken by bodies of the cooperative society that consist solely of representatives of affiliated municipalities and inter-municipal bodies, yet that does not result in a situation in which each of those members individually has the same decisive influence in regard to the cooperative society as in the case of an autonomous internal organisation of activity.

27. In light of the second condition arising out of the *Teckal* judgment (9) – 'in the case where … at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities' – the referring court explains that it is not disputed that the cooperative society conducts its activity essentially for its members. On this precondition the referring court has raised no question for a preliminary ruling.

III – Parties' submissions

28. Coditel, the Municipality of Uccle, Brutélé, the Belgian, German and Netherlands

Governments and the Commission of the European Communities submitted written statements pursuant to Article 23 of the Statute of the Court of Justice. They presented oral argument at the sitting on 9 April 2008, with the exception of the Municipality of Uccle, which was not represented.

29. Essentially, all parties agree that this is a case involving the sector of the award of public concessions that is not subject to the directives on procurement but to the general requirement of transparency. (10)

30. Except for *Coditel* all are agreed that the second *Teckal* criterion would appear to be satisfied on the basis of the particulars provided in the request for a preliminary ruling.

31. On the first *Teckal* criterion there are opposing viewpoints.

32. *Coditel* and the C*ommission* consider that this criterion is not satisfied; the direct affiliation of the Municipality of Uccle to the Brutélé cooperative society conflicts with the transparency requirement.

33. *Coditel* points out that before affiliation to Brutélé the Municipality of Uccle had no relationship with the cooperative, with the result that the Teckal case-law is in no way relevant. Moreover, the Municipality of Uccle holds only 8.26% of Brutélé's shares (76 out of a total of 920). In addition, Brutélé provides its services such as cable television, telephone and internet on a commercial basis and in competition with other private service providers. The internal structure of Brutélé is essentially similar to the internal structure of a private undertaking. The Municipality of Uccle does not have the capacity to control Brutélé; rather it is questionable whether there can be actual collective control by the cooperative members owing to the large number of members and possible divergences of interests. In light of the judgment in *Carbotermo*, (11) it is not a determinant factor that 100% of the capital in Brutélé is owned by municipalities and regional authorities. In that connection it is in particular not sufficient that the Municipality of Uccle was granted an operating sub-sector.

34. The C*ommission* also deals in its submissions with the internal decision-making structures of Brutélé and considers in that connection that it is unable to discern a power of decisive influence (12) on the part of an individual municipality such as Uccle. Brutélé's board of directors possesses wide-ranging powers and in particular also determined tariffs. The Municipality of Uccle has in each respect only a shared influence and is not freely in a position to enforce its will, which is however a precondition for satisfying the first Teckal criterion.

35. The *Municipality of Uccle* and *Brutélé*, who conversely are of the view that the first Teckal criterion is satisfied, underscore the aspect of the absolute inter-municipal nature of the cooperative society, both under its statutes and under Belgian law.

36. The *Municipality of Uccle* points out that by its affiliation it retained 'similar control' over the municipal cable television network as laid down in *Teckal*. It should be emphasised that the Court does not allude to 'identical' but to 'similar' control. To require complete and individual control by a municipality over an inter-municipal form of cooperation would render such cooperation impossible, which by definition is dependent on the collaboration of a multiplicity of persons.

37. *Brutélé* makes reference only in the alternative to satisfaction of the first *Teckal* criterion, and points in particular to the judgment in *Asemfo,* paragraphs 57 et seq. Primarily, Brutélé argues that Articles 43 EC and 49 EC and the principles of equal treatment, non-discrimination and transparency are to be interpreted in such a way as not in themselves to preclude a municipality from joining, without calling for competition, a purely inter-municipal cooperative, without any involvement of private capital and as constituted in particular to attain deliberate aims in the municipal and the general interest. It may be inferred from the judgment in *Stadt Halle und RPL Lochau*, paragraph 48, that municipalities are entitled themselves to perform their tasks that are in the general interest. However, to apply the rules of Community procurement law to inter-municipal cooperation would force the municipalities to outsource their functions using the market. Belgian law expressly grants municipalities the option of engaging in inter-municipal cooperation. (13) The relationship between the Municipality of Uccle and the Brutélé cooperative society was not founded in contract but by affiliation which is governed by law and by Brutélé's statutes. Brutélé is purely built on inter-municipal cooperation, according to its statutes is not open to private capital and performs its functions in the interest of the municipalities. The aim of the cooperation is to make available to users as wide as possible a selection of television programmes under the most favourable conditions and in appropriate cases to extend the services offered to radio and various

communications media. Finally and thirdly, Brutélé contends that the Municipality of Uccle within the context of the cooperative society, in particular also through the internal decision-making structure and with the separate sub-sector, exercises the control at issue here that is similar to that exercised over its own departments.

38. The *Belgian Government* is of the opinion that the first question referred is to be replied to affirmatively. Without a tendering procedure a municipality may affiliate itself to a cooperative society such as Brutélé which consists solely of other municipalities and regional authorities, in order to transfer to it the management of its cable television network, if the cooperative conducts its activity essentially only for and with its members, and the decisions in connection with that activity are taken by the governing council and the sector boards, within the limits of the delegated powers granted to them by the governing council, and those statutory bodies being consist of representatives of the public authorities and decisions are passed by a majority of the latter.

39. Brutélé, which is not open to private capital, cannot be regarded as a third party in relation to the Municipality of Uccle. The concession for the cable television network was not awarded externally but retained its internal nature.

40. The other questions referred for a preliminary ruling arise solely out of the fact that inter-municipal cooperation is a form of cooperation, which in the nature of things associates different municipalities that cooperate together. In this connection it should be emphasised that decentralised administrations have the right to opt for cooperation in order to secure efficient management. This involves inter alia cooperation between small and larger regional authorities. In regard to smaller regional authorities there is often an inherent necessity to tackle overlapping tasks jointly in an overarching larger structure. To determine how such cooperation between regional authorities are organised and controlled internally, is a matter for the applicable law and the relevant administrations of the Member States. In this respect there is wide variety of internal models of organisation and control. It cannot be inferred from a form of cooperation that takes account of the different size of the cooperating regional authorities in relation to control that the control is not similar to that exercised over its own departments. In addition it follows from the nature of inter-municipal cooperation that within this context a municipality does not decide on its own but that decisions are taken by majority, indeed with a view to the common purpose. Control by majority decisions may be deemed to constitute 'similar control' within the meaning of the case-law. In regard to the Municipality of Uccle, that is represented in the decision making bodies of Brutélé by its representatives, it may in the final analysis be stated that it exercises over Brutélé a similar control to that exercised over its own departments.

41. The *German Government* is of the view that the principles and rules of procurement law do not apply to a case such as the present one ab initio since both *Teckal* criteria are satisfied. In the case of several 'controlling authorities' those criteria are to be construed as meaning that if the public awarding body jointly owns the contractor together with other legal persons, no dilution of control can be inferred from the jointly exercised control by the various authorities. For example, departments that are organisationally uniform could be established by several regional authorities in common and jointly 'operated'; in such cases it would be aberrant to take the view that the control exercised by individual regional authorities is deficient or incomplete. In German law governing administrative organisation there are many examples of that, thus the financial authorities ('Oberfinzanzdirektionen') are both departments of the Federation and of the Land. In some Länder states district administrative authorities are both departments of the district and at the same time lower state authority of the Land. Many Länder, for example Brandenburg and Berlin operate a joint supreme administrative court ('Oberverwaltungsgericht'). It would be regarded as completely aberrant to assume deficient or incomplete degree of control by the regional authority over authorities that are operated jointly by several regional authorities. Exactly in the same way control exercised over a contractor in the ownership of several public legal persons is jointly exercised but no less effective for that. That is so in the case of Brutélé because only municipalities are involved which jointly exercised their powers of control as over a (joint) department.

42. If, because the public awarding body has to exercise control over the contractor jointly with other principals, one were to conclude that there was inadequate control and the rules of procurement law were therefore applicable, that would have serious consequences for the requisite margin of discretion in the configuration of inter-municipal cooperation. The option in favour of such a form of inter-municipal cooperation would then always be subject to a tendering procedure. That would be to set back inter-municipal cooperation as a form of arrangement for organising the tasks of the State as opposed to the performance of tasks independently, which would render procurement law never applicable. Procurement law would then be exerting an entirely nonsensical pressure on the municipalities to desist in applicable cases from cooperating with other

municipalities. Yet that was never the objective of procurement law. Rather procurement law applies only when the municipality calls on the market for the purposes of fulfilling its tasks.

43. Finally, the German Government points out that the right to municipal self-administration is protected at European level by the European Charter of municipal self-administration. (14) It enshrines the right of municipalities to perform tasks on their own and also to engage in inter-municipal cooperation without first conducting a competitive tendering procedure.

44. The *Netherlands Government* proposes that the reply to the first question referred should be affirmative. On the second question it must be pointed out against the background of the first of the two criteria in the *Teckal* judgment, the subsequent case-law and the particulars contained in the order for reference that in regard to Brutélé the municipalities involved and the municipal associations are in the position to exercise decisive influence. That is borne out by the fact that they jointly hold the whole of the share capital and private capital is excluded. The finding of decisive influence is confirmed by the fact that the municipalities and municipal associations are entirely in control of the decision-making bodies of Brutélé, for the latter comprise their representatives. In that way the municipalities and municipal associations are in a position to exercise decisive influence both on the strategic aims and on important decisions such as for example the fixing of tariffs. Brutélé has no autonomy and therefore cannot be regarded as a third party in relation to the municipalities and municipal associations. As to the third question it should be said that it is sufficient in regard to 'control similar to that exercised over its own departments' for the municipalities and municipal associations concerned to exercise control jointly.

IV – Legal assessment

45. Since the questions referred relate to different aspects of the same question I shall examine them together.

46. The question is whether the affiliation of a municipality such as Uccle to a purely inter-municipal cooperative society such as Brutélé and the attendant transfer or administration of the municipal cable television network to that cooperative is to be regarded as the award of a concession governed by the Community principles of procurement law, or whether it is a situation that can be equated with in-house performance of tasks and is therefore exempt from the requirement to call for tenders. The aspects exercising the referring court concern in particular the internal decision-making structures, that is to say decisions by statutory bodies such as the governing council and sector boards on the one hand and decisions essentially of an individual nature but adopted by way of majority decision-making on the other hand. Can such decision-making structures comply with the criterion in the case-law of 'control similar to that exercised over its own departments'?

47. The referring court considers that dominant control over the cooperative society and its decisions is exercised by the regional authorities jointly by way of the cooperative statutory organs which thereby enjoy a certain autonomy vis-à-vis their members. That does not constitute 'control similar to that exercised over its own departments' and the referring court is therefore inclined to regard the first grounds of action as substantiated.

48. In order to classify the questions it should be stated in advance that, as the referring court has already rightly stated, under settled case-law, none of the Community directives in the sector of public procurement (15) applies (16) to the award of public service concessions. (17) The fact that the situation in the main proceedings occurred in the sector of service concessions and not in the sector of contracts for services, may be inferred from the fact that it is not the regional authority that pays the remuneration for the service provided but that the consideration consists of the right to exploit its own service, (18) which is associated with the assumption of operating risk. (19)

49. Since at the material time in regard to the events in the main proceedings concerning the award of service concessions by public agencies no directive coordinating the proceedings was in existence, (20) the consequences under Community law of the award of such concessions fall to be examined as before solely in light of primary law and in particular of the fundamental freedoms laid down in the EC Treaty. (21)

50. Accordingly requirements are imposed concerning equal treatment and transparency, (22) for the award of public service concessions in particular in regard to the prohibition on indirect discrimination on grounds of nationality under Articles 12 EC, 43 EC and 49 EC, (23) which as a rule render a call for tenders essential.

51. Case law permits an exception for quasi in-house performance of tasks, (24) beginning with *Teckal* (25) and further elaborated (26) and applied to all Community provisions in the sector of public contracts or public service concessions, (27) in the case of a procedure that is configured in such a way as to constitute an internal administrative measure. (28) Under settled case-law a call for tenders is not mandatory – even if the contractual partner is an establishment legally distinct from the public awarding body – if two preconditions are met. First, the public body that is an awarding authority must exercise over the establishment in question a degree of control similar to that which it exercises over its own departments, and, secondly, that establishment must perform its activity essentially for the public body or bodies which own its shares. (29)

A – *First Teckal criterion*

52. It is however necessary to analyse the first requirement, namely the exercise of 'control similar to that over its own departments'.

1. Exclusion of semi-public undertakings

53. It is unmistakeably to be inferred from settled case-law since the judgment in *Stadt Halle und RPL Lochau* (30) that semi-public undertakings are in no way deemed to be entities over which similar control is exercised as over own departments, irrespective of the degree to which the private capital involvement is a minority holding. (31) In that connection it is enough for there to be a possibility of private capital involvement even if there is (as yet) none. (32) An assignment to private persons of shares occurring shortly after the award must also be taken into consideration. (33)

54. In circumstances such as those of the present case the private capital aspect of the question must plainly be answered in the negative. There is no private capital involvement; nor, further, is Brutélé open to private capital.

2. Other relevant circumstances

55. However, it is plain from the case-law that the mere finding that private capital is not involved or permitted does not adequately satisfy in each case the *Teckal* criterion 'similar control to that exercised over its own departments'. (34) It is plainly against this background that the questions of the referring court are to be interpreted.

56. It appears from some of the judgments that deal with the first of the two Teckal criteria that the assessment must 'take account of all the legislative provisions and relevant circumstances'. (35) 'It must follow from that examination that the concessionaire in question is subject to a control enabling the concession-granting public authority to influence the concessionaire's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions.' (36)

57. The range of criteria that may be relevant in this regard is apparent in particular from the judgment in *Parking Brixen*: conversion into a company limited by shares, broadening of the objects of the company, obligatory opening up of the company in the short term to other capital, significant expansion of the geographical area of the company's activities and considerable powers conferred on the administrative board in this judgment taken as a whole meant that the relevant company had in the view of the Court of Justice become market orientated and achieved a degree of autonomy with the result that the concession-granting public authority was not exercising control over the concessionaire similar to that exercised over its own departments. (37)

58. Two basic criteria were therefore plainly decisive in determining the relevant questions in the *Parking Brixen* case: the degree to which the concessionaire was market orientated and the degree of its autonomy. (38) These categories equate to those in the *Teckal* judgment, which, in paragraph 51, also stated as a criterion the degree of independent decision-making capacity present or absent in the relevant body as compared to the public authority or authorities. (39)

59. In its case-law on the *Teckal* criteria thus far the Court of Justice has however only drawn attention in a small number of cases to such further circumstances. In both the cited cases, *Parking Brixen* and *Carbotermo*, several of these factors coincided, only one of which in each case was the transfer of full authority or significant powers to the administrative board.

60. In *Parking Brixen* the Court of Justice took the view that *Stadtwerke Brixen AG* had become so market oriented as to render it difficult for the municipality to control it and listed a total of five reasons why that was so, (40) including the obligatory opening of the company, in the short term, to other capital and the expansion of the geographical area of the company's activities, to the whole of Italy and abroad. (41)

61. In the judgment in *Carbotermo* the possible influence that might be exercised by the Italian municipality in that case, Busto Arsizio, over the decisions of the undertaking AGESP SpA, which was providing a very varied range of services of public utility through the intermediary of a holding company, was an essential factor. (42) The Court stated in this connection that the intervention of such an intermediary may, depending on the circumstances of the case, weaken any control possibly exercised by the contracting authority over a joint stock company merely because it holds shares in that company. (43)

62. It must therefore be observed that in these cases various special circumstances came together which led to an overall view being formed. (44)

3. Mere internal cooperation is generally, though not automatically, exempt from the tendering requirement

63. However, the situations that gave rise to the judgments in *Parking Brixen* and *Carbotermo* may be said to have been one-off cases in which the Court of Justice regarded a boundary as having been crossed and that the outsourcing of general-interest tasks to an entity constituting a pure cooperative association of public bodies, without any participation of private capital, though not automatically, (45) should in principle be regarded as exempt from the tendering requirement. This is supported by the implications of developments in the case-law of the Court of Justice set out below.

64. The exact wording of the *Carbotermo* judgment mentioned above in which there were further circumstances that precluded the situation in that case from being deemed exempt from the tendering requirement, is as follows: '[t]he fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments, as contemplated in paragraph 50 of *Teckal*.' (46)

65. In the subsequent paragraphs of the *Carbotermo* judgment it becomes apparent that this qualification of the words 'without being decisive' constitutes a reference to the further circumstances mentioned namely: dilution of control owing to the intermediary of a holding company even if the capital of the latter is held as to 99.98% by the local or regional authority in question, as well as too far-reaching powers on the part of the boards in both the holding company and in the public limited company established by the holding company, in a situation where the latter were to be entrusted with the performance of tasks. (47) In the view of the Court of Justice, the applicable articles of association did not reserve to the regional authority concerned any control or specific voting powers in order to circumscribe the freedom of action conferred on those boards of directors. The control exercised by the regional authority over those two companies consisted essentially in the latitude conferred by company law on the majority of shareholders, which appreciably limited its power to influence the decisions of those companies. (48)

66. In contrast the more recent judgment in *Asemfo* shows that mere cooperation between municipalities is in general to be regarded as fulfilling the first *Teckal* criterion – 'similar control to that exercised over its own departments' – without further analysis of the internal decision-making structures and majority shareholding relationships being called for. For while the wording reproduced above (49) from the judgment in *Carbotermo* was repeated in the later judgment in *Asemfo* in paragraph 57, it was however slightly changed. The phrase in *Carbotermo* 'without being decisive', was replaced in *Asemfo* by 'generally'. Thus '…tends to indicate, without being decisive …' became '… tends to indicate, generally …'.

67. There are therefore many reasons for taking the view that where the awarding authority or concession-awarding authority, either alone or in conjunction with other public authorities, (50) owns the entire share capital in a body that is awarded a contract or concession this as a rule shows that it or they exercise control over that body as over their own departments within the meaning of paragraph 50 of the judgment in *Teckal*. This rule can be displaced, (51) but, as demonstrated above, (52) only by the concurrence of special circumstances.

4. Criteria for a detailed analysis of the power of control

68. In so far as the question of the power of control enjoyed by individual public authorities within pure cooperative groupings of public authorities plays a role in the case-law of the Court of Justice, the following matters may be deduced.

69. The *Teckal* case already related to a situation of inter-municipal cooperation, (53) in which the question of control against the background of the size of shareholdings was alluded to: it concerned a consortium of 45 municipalities in Reggio Emilia, in which the municipality of Viano, to which the case related, held a 0.9% shareholding. Advocate General Cosmas observed in this regard that it was 'unlikely that it could be maintained that the Municipality of Viano exercises over that consortium the kind of control which an entity exercises over an internal body'. (54) The judgment itself is silent on this point and in particular the criterion for control in paragraph 50 (55) does not go into this aspect. However, it must be noted that the Court of Justice did not in this judgment answer in the negative the question of the power of control enjoyed by a municipality with a relatively small shareholding and voting rights, and thereby allowed the referring court to find that the control criterion was in fact satisfied in the main proceedings.

70. In the meantime, however, this issue was answered to the opposite effect in the *Coname* judgment in 2005 inasmuch as a 0.97% holding in the share capital was adjudged to be insufficient. (56)

71. However, the judgment in *Asemfo* clarified that the size of the shareholding of an individual public body in a cooperative of public bodies no (longer) acts as the relevant yardstick as regards the possibility of control. The Court of Justice expressly stated that even a share in a cooperative of as little as 0.25% of the capital of such a cooperative (1% of the capital was held by four autonomous regions which each held one share) does not prevent the tasks from being regarded as performed on a 'quasi-in house basis' as regards all the bodies which hold shares. (57)

72. Moreover, it is noteworthy in regard to the main proceedings giving rise to the abovementioned judgment that the power of control over the entity entrusted with the relevant tasks clearly lies with the central state administration, which is the main shareholder and not with the four autonomous communities whose shareholdings together amount to 1% of the capital. (58) This fact did not prevent the Court of Justice from regarding the first criterion in *Teckal* as being satisfied not only in the case of the Spanish state but also expressly in the case of the autonomous communities which hold part of the capital. (59) However, on the power of control by the autonomous communities it is not possible to discern from the judgment whether it constitutes a new departure in the case-law or whether rather the particular circumstances of the case were decisive, as seems likely. (60) In any event it is plain that in the case of pure cooperatives of public bodies, excessive importance should not be attached to the question of the internal power of control and determination.

73. From the clarifications in regard to the size of shareholdings it may be inferred, by way of systematic interpretation, (61) and from use of the plural in the wording of the second *Teckal* criterion – 'where … at the same time, the person carries out the essential part of its activities together with the controlling local authority or authorities' – by way of grammatical interpretation, (62) that complete individual power of control on the part of the relevant public authority is not required but that a collective majority power of control is sufficient. (63)

74. The deciding factor ought to be whether the participating public authorities have collectively control over the person in question in this case the Brutélé cooperative, or whether this cooperative acts separately from that collective control.

5. Interim conclusion

75. It is clear from the legal analysis that pure inter-municipal cooperation as a rule ought to be possible without being subject to the tendering requirement, if there are no other specific circumstances which show that the degree of market orientation and the degree of autonomy of the inter-municipal body has exceeded the bounds of inter-municipal cooperation that are neutral in procurement law terms in order to complete tasks that are in the general interest.

76. Even if no legal certainty has been achieved hitherto (64) in relation to the exact boundary affecting criteria such as 'degree of market orientation' and 'degree of autonomy', in other words it is not clear where exactly the boundary of inter-municipal cooperation that is neutral in procurement

law terms is to be drawn in performing tasks in the general interest, there is no indication that cooperation within Brutélé would go beyond those boundaries.

77. It is a matter for the national courts, in this instance the referring court, to weigh up these matters in the specific case. Such an examination ought not in this case to produce a finding that any of the boundaries indicated above had been exceeded. For the internal decision-making structures of Brutélé are characterised by the collective influence of the regional authorities participating by way of majority decision. They exercise their influence not only in the general assembly but also in the governing council, which is made up of representatives of the municipalities. Thus the question of the power of control is already answered adequately and affirmatively. In addition, in relation to the sub-sectors, a preponderance of individual-municipal decisions may in fact discerned. Brutélé's market orientation relates to tasks which are in the general interest such as cable television, telephone and internet and does not suggest that any level that is neutral in procurement law terms was exceeded, notwithstanding the imprecision of the relevant criteria in this connection.

78. Everything therefore points in a case such as this to cooperation between public bodies without any requirement for a tendering procedure.

79. Contrary to the view of Coditel in this context, it is of no significance that Brutélé offers its services to users commercially and is therefore automatically in competition (65) with other private bidders.

6. Value of inter-municipal cooperation

80. Although the questions referred have in my view already been answered, I should like briefly to underscore the conclusion and at the same time to deal with counter arguments advanced by Coditel and the Commission.

81. Public procurement law is and remains one of the most influential policy instruments of the Member States and institutions of the EU in the process of European integration. (66) This potential cannot however be used indiscriminately; rather its purpose must be brought into harmony with the values of other policy areas.

82. If, as the referring court, Coditel and the Commission propose, one were to require the municipalities concerned to have 'comprehensive decision-making autonomy', in the sense that the relevant municipality exercises 'dominance' over the relevant inter-municipal cooperative ('dominance over the cooperative society'), then inter-municipal cooperation would in future be rendered virtually impossible. For it is an important feature of genuine cooperation that decisions are made as equals and that one of the partners in the cooperative does not dominate. It is therefore plain from the observations of Coditel and the Commission in the procedure and at the hearing that the yardsticks proposed by these two parties mean that it is a requirement that an individual regional authority must as it were be able to control a cooperative alone. It is obvious that such a case cannot in fact be regarded as cooperation or collaboration.

83. As stated, that would render virtual impossible even pure inter-municipal cooperation. Inter-municipal cooperating regional authorities would then always have to reckon with the likelihood of having to award their tasks to private third parties making more favourable bids; that would be tantamount to the compulsory privatisation by means of procurement law of public-interest tasks. (67)

84. To construe the first *Teckal* criterion so narrowly would be to attach disproportionate weight to competition-law objectives at the same time as interfering too much with the municipalities' right to self-government and with it in the competences of the Member States. (68)

85. This is rightly emphasised by the governments participating in the proceedings before the Court of Justice. The right to municipal self-government is not reflected only in the legal provisions of the Member States but, as the German Government correctly pointed out, also in the European Charter on Local Self-Government drawn up within the framework of the Council of Europe signed by all EU Member States and also ratified by most of them. (69) Article 263 of the EC Treaty makes provision for the Committee of the Regions comprising representatives of regional and local authorities. Inherent in this provision is a certain recognition of self-government alongside the possibility of providing institutionalised machinery for bringing to bear regional and municipal perspectives. Finally the Treaty of Lisbon (70) stresses the role of regional and local self-

government for the relevant national identity to which heed is to be paid.

86. Municipalities have themselves to decide whether they wish to carry out their general-interest tasks with their own administrative, technical and other means, without being compelled to have recourse to external establishments that do not form part of their own departments, (71) or whether they wish to carry them out with the assistance of an establishment legally distinct from them in their capacity as public entity awarding the contract or concession. If they opt for the second alternative, it is open to them to carry out these tasks of theirs on their own or in 'pure' cooperation with other public authorities (72) 'controlled similarly to their own departments' and with the law on aid and procurement being largely suspended (73) or to tackle them by calling on private capital (74) and/or by increasing market orientation and participating in competition, the latter case entailing a loss of prerogatives. (75) Finally, they have the further alternatives of the classic award to an independent third party or privatisation which in any event do not confer any privilege in regard to competition law.

87. To tackle the many traditional (76) and new (77) tasks of municipalities – and local authorities in general – is, particularly in times of restricted budgets, not always easy, especially for smaller authorities. (78) In addition, many tasks, in particular in the areas of environment and transport are not confined to the municipality. (79) Conversely, inter-municipal cooperation without calling on private capital is owing to its synergistic effects a method used in many Member States for performing public functions in an efficient and cost-effective manner. (80)

B – *Second Teckal criterion*

88. This does not need to be gone into further here: the referring court says no question rises in this regard. (81)

V – Conclusion

89. For those reasons I propose that the Court should reply in the terms set out below to the three questions submitted by the Conseil d'État:

Neither Articles 12 EC, 43 EC and 49 EC nor the principles of equal treatment non-discrimination and transparency preclude a municipality from affiliating to a cooperative society and transferring to it the management of the municipal cable television network without a prior tendering procedure, provided that that municipality exercises over that cooperative similar control to that exercised by it over its own departments and the cooperative society carries on its activity essentially for its members. Where such a cooperative comprises solely municipalities and associations of municipalities (public authorities) – without any private-capital involvement – that indicates in principle that the criterion as to exercise of similar control as that exercised over its own departments is satisfied. In circumstances such as those in the present case, control exercised by way of majority decision over the governing bodies of the cooperative comprising representatives of the municipalities and associations of municipalities is to be deemed to be control similar to that exercised over the municipality's own departments.

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1 – Original language: German.

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2 – The terms 'inter-municipal cooperative' or 'inter-municipal cooperative entity' encompass very different forms of administrative cooperation, of both an informal and formal legal nature (see, Schmidt: *Kommunale Kooperation, Der Zweckverband als Nukleus des öffentlichen Gesellschaftsrechts* [The ad hoc association as the nucleus of the law on public partnerships], Tübingen 2005, p. 2 et seq.). It ranges from ordinary municipal project collaboration to large scale legally institutionalised forms such as for example associations of municipalities or cooperatives. See, the concept of 'situation involving a number of public entities' and 'public-public entities' inter alia in the Opinion of Advocate General Stix-Hackl of 12 January 2006, C–340/04 *Carbotermo andConsorcio Alisei* [2006] ECR I–4137), points 29 et seq.; see also Egger, *Europäisches Vergaberecht* [European Procurement law], 2007, p. 167 et seq.

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3 – Following the request by the Municipality of Uccle Coditel enquired of it whether the offer to buy the network was a criterion in the evaluation of the bids submitted in the context of the tendering procedure for the award of the network operating concession, whether such offer replaced the current tendering procedure and whether it had been addressed to the other participants involved in the tendering procedure. On 28 April 2000, the Municipality of Uccle replied that it had made the same enquiry of four companies that had submitted bids in the context of the tendering procedure, that the offer to buy the network did not replace the tendering procedure and was also not a criterion for evaluating the bids submitted and finally that 'as the College has received a purchase proposal (conditional at present), it considers that this option cannot be excluded a priori and may be one of the factors in the current considerations about the future of the network; hence, before submitting a proposal to the Council for a decision to award (or not to award) an operating concession, it has been decided, in the interests of full information and equality between the candidates, to consult each of them'.

4 – See on that point resolution of the municipal council of 23 November 2000. This difference may doubtless be accounted for by reference to the prevailing economic situation: the share prices of some of the foremost high-technology companies had fallen to a historical low in the previous months, thus rendering conditions for a time extremely unfavourable.

5 – According to the relevant resolution of the municipal council of 23 November 2000, the annual fee payable is made up as follows: (a) fixed fee equal to 10% of the income from basic subscriptions for cable television (on the basis of 31 000 subscribers and an annual subscription fee of BEF 3 400 (before VAT and royalties): BEF 10 540 000 per year); (b) payment of 5% of the turnover of Canal+ and of the bouquet; (c) payment of the entire profit on all the services provided.

6 – In that connection the resolution of the municipal council of 23 November 2000 states as follows:

This autonomy relates, inter alia, to:

– choice of programmes transmitted;

– the subscription and joining rates;

– investment and works policy;

– the rebates or benefits to be granted to specific groups of persons;

– the nature and terms relating to other services to be provided via the network and the possibility of entrusting the inter-municipal cooperative with projects of interest to the municipality that accord with the objectives defined in its statutes, such as the creation of a municipal intranet and a website as well as the training and further training of staff for this purpose.

In this context:

– Brutélé would draw up an accounting and operating balance sheet for activities on

Uccle's network;

– [The Municipality of] Uccle would have a director on the governing council of Brutélé as well as three directors on the board of the Brussels operating sector, one auditor and one municipal expert.

7 – According to the resolution dated 23 November 2000, the affiliation was expressed to be subject to the condition that a resolution be passed by the general assembly of Brutélé, in which all members agreed not to oppose any subsequent withdrawal of the Municipality of Uccle.

8 – Case C–107/98 [1999] ECR I–8121, paragraph 50.

9 – Set out above in footnote 8, paragraph 50.

10 – The Netherlands Government explains that the particulars in the order for reference are not comprehensive enough to be able in fact to evaluate this aspect.

11 – Case C–340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I–4137, paragraph 37.

12 – In this connection the Commission refers to judgments in Case C–458/03 *Parking Brixen* [2005] I–8585, paragraph 65, and *Carbotermo and Consorcio Alisei* (cited in footnote 11 above).

13 – Brutélé refers to the Belgian constitution and to the Belgian law on inter-municipal cooperatives (cited in points 6 and 7 of this Opinion above).

14 – The European Charter on Local Self-Government, opened for signature by the Member States of the Council of Europe on 15 October 1985 in Strasbourg, has been in force since 1 September 1988 (for more particulars see: http://conventions.coe.int).

15 – Inter alia Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). The principal aim of the Community provisions on public contracts is to promote free movement of services and the opening up of undistorted competition in all Member States, see Case C–26/03 *Stadt Halle and RPL Lochau* [2005] ECR I–1, paragraph 44).

16 – Neergaard, 'The Concept of Concession in EU Public Procurement Law versus EU Competition Law and National Law', in: Nielsen/Treumer (ed.), *The New EU Public Procurement Directives*, 2005, points to the fact that there are very different concepts of concessions according to the legal context and that the concept of the concession in Community procurement law differs significantly from the concept in competition law and to some extent also in national law.

17 – See judgments in Cases C–324/98 *Telaustria and Telefonadress* [2000] ECR I–10745 paragraphs 56 and 57; C–231/03 *Coname* [2005] ECR I–7287, paragraphs 9 and 16;

Parking Brixen (cited in footnote 12 above, paragraph 42), and C–382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 29).

18 – See, on the difference between criteria used the judgment in *Telaustria and Telefonadress* (cited in footnote 17 above, paragraph 58). See also legal definition in Article 1(4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) which was not applicable at the time of the events in the main proceedings: ' "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment'. This relates to the operation and maintenance of existing bodies, see, Trepte, Public Procurement in the EU, A Practitioner's Guide, 2007, 4.42. In principle it must be observed that classification as the award of a service concession is an issue that is to be determined in accordance with Community law, see *Commission* v *Italy* (cited in footnote 17 above, paragraph 31).

19 – *Parking Brixen* (cited in footnote 12 above, paragraph 40). See also in more detail Arrowsmith, *The Law of Public and Utilities Procurement*, 2005, 6.62 and 6.63.

20 – The situation was hardly altered by the subsequent Directive 2004/18 (cited in footnote 18 above) since although it defines the concept of a service concession; this none the less does not apply to such concessions under Article 17 of this Directive. See, in more detail, Flamme/Flamme/Dardenne, *Les marchés publics européens et belges*, 2005, p. 19 f.

21 – *Coname* (cited in footnote 17 above, paragraph 16); *Parking Brixen* (cited in footnote 12 above, paragraph 46), and Case C–410/04 *ANAV* [2006] ECR I–3303, paragraph 18 et seq.). Broussy/Donnat/Lambert, Délégations de services publics, *L'actualité juridique – droit administratif* (AJDA) 2005 p. 2340 et seq., p. 2341 suggest that drawing on the principle of non-discrimination creates the risk that procurement law may in the future be expanded well beyond the relevant directives and will even apply to facts where the values do not reach the threshold for the directives to apply.

22 – Trepte, 'Transparency Requirements', in: Nielsen/Treumer (ed.), *The New EU Public Procurement Directives*, 2005, indicates that the concept of transparency in Community procurement law is limited in so far as it relates to the equal treatment of tenderers from the Member States and not to transparency beyond that.

23 – See inter alia *Telaustria and Telefonadress* (cited in footnote 17 above, paragraphs 60 f.); *Coname* (cited in footnote 17 above, paragraphs 18 et seq.), and *Parking Brixen* (cited in footnote 12 above, paragraphs 47 et seq.).

24 – The term is not used uniformly, often the terms (quasi) 'in-house award' or 'in-house business' (in the wider sense) are used.

25 – Cited in footnote 8 above.

26 – See in particular judgments in *Stadt Halle and RPL Lochau* (cited in footnote 15 above, paragraph 49); *Coname* (cited in footnote 17 above, paragraphs 23 to 26);

Parking Brixen (cited in footnote 12 above, paragraph 56 et seq.); *ANAV* (cited in footnote 21 above, paragraph 24); *Carbotermo and Consorzio Alisei* (cited in footnote 11 above, paragraphs 36 and 37); Case C–295/05 *Asemfo* [2007] ECR I–2999, paragraphs 55 to 57, and Case C–220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I–12175 paragraph 58).

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27 – In *Parking Brixen* (cited in footnote 12 above, paragraph 61) the Court of Justice made plain that both the *Teckal* criteria apply not only in the area of Community procurement directives but generally in the area of Community procurement law.

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28 – Flamme/Flamme/Dardenne, cited in footnote 20 above, p. 32, paragraph 20 emphasise referring to paragraphs 49 and 50 of the judgment in *Teckal* (cited in footnote 8 above), that the basis of the exception for 'quasi in-house performance of tasks' is the fact that an entity cannot 'contract with itself'.

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29 – See judgments in *Teckal* (cited in footnote 8 above, paragraph 50); *Stadt Halle and RPL Lochau* (cited in footnote 15 above, paragraph 49); Case C–84/03 *Commission* v *Spain* [2005] ECR I–139, paragraph 38; Case C–29/04 *Commission* v *Austria* [2005] ECR I–9705, paragraph 34; *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 33), and *Asemfo* (cited in footnote 26 above, paragraph 55).

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30 – The much quoted judgment in *Stadt Halle and RPL Lochau* (cited in footnote 15 above) provides at paragraph 49: 'In accordance with the Court's case-law, it is not excluded that there may be other circumstances in which a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority. That is the case where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities (see, to that effect, *Teckal*, [cited in footnote 8 above] paragraph 50). It should be noted that, in the case cited, the distinct entity was wholly owned by public authorities. By contrast, the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments'. Belorgey/Gervasoni/Lambert, 'Qualification de marché public', *AJDA* 2005, p. 1113 et seq., p. 1114, referring to Case C–18/01 *Korhonen and Others* [2003] ECR I–5321, take the view that the judgment in *Stadt Halle* confirmed expressly what the case-law had until then implied.

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31 – See also *Coname* judgments (cited in footnote 17 above, paragraph 26); *Commission* v *Austria* (cited in footnote 29 above, paragraph 46); *ANAV* (cited in footnote 21 above, paragraph 31), and Case C–220/05 *Auroux and Others* [2007] ECR I–389, paragraph 64. It remains unclear how the involvement of private persons or non-profit organisations, for example in the social or cultural fields, is to be regarded (See on this Egger, cited in footnote 2 above, p. 170, paragraph 637).

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32 – In this connection see *Coname* judgments (cited in footnote 17 above, paragraph 26), and *ANAV* (cited in footnote 21 above, paragraphs 30 to 32).

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33 – *Commission* v *Austria* (cited in footnote 29) paragraphs 38 to 42: in a case such as this the award of a contract is to be examined in light of all the steps taken (award

and capital restructuring), and of their purpose.

34 – See, inter alia, also Probst/Wurzel, 'Zulässigkeit von In-house-Vergaben und Rechtsfolgen des Abschlusses von vergaberechtswidrigen Verträgen' [Permissibility of In-house awards and legal consequences of the conclusion of contracts contrary to procurement law], in: *European Law Reporter* 2007, p. 257 et seq., p. 261.

35 – *Parking Brixen* (cited in footnote 12 above, paragraph 65) and *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 36).

36 – *Parking Brixen* (cited in footnote 12 above, paragraph 65) and *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 36).

37 – *Parking Brixen* (cited in footnote 12 above, paragraphs 67 to 70). For a critical view of the merits of the criteria which have the effect that bodies which are operated by public authorities to perform their tasks are tied down to particular legal forms, see Kotschy, 'Arrêts "Stadt Halle", "Coname" et "Parking Brixen"' [The judgments in *Stadt Halle, Coname* and Parking Brixen], *Revue du droit de l'Union européenne* 2005, No 4, p. 845 et seq., p. 853.

38 – Probst and Wurzel (cited in footnote 34 above, p. 261) make the point that the clearer the close connection with the awarding or concession-granting authority, and the more limited the contractor or concessionaire's possibilities to work for third parties commercially in the market, the easier it is to justify the assumption of an in-house business.

39 – *Teckal* (cited in footnote 8 above, paragraph 51).

40 – Ferrari talks in this connection abut indications of independence which is incompatible with the concept of control similar to that exercised over its own departments (Ferrari, '"Parking Brixen": Teckal da totem a tabù?"', in: *Diritto pubblico comparato ed europeo* 2006, p. 271 et seq., in particular p. 273).

41 – *Parking Brixen* (cited in footnote 12 above, paragraph 67). Jennert, in 'Das Urteil "Parking Brixen"' [The judgment in *Parking Brixen*], *Neue Zeitschrift für Baurecht und Vergaberecht* (NZBau) 2005, p. 623 et seq., p. 626, notes that there is no question in such a case of securing the home market by an in-house award that is not subject to the procurement procedure while at the same time participating in competition by supralocal expansion.

42 – Advocate General Stix-Hackl says in her Opinion in *Carbotermo and Consorcio Alisei* (cited in footnote 11 above), at points 22 and 23, that one characteristic of the procedure at issue in this case has to do with the fact that as in the *Stadt Halle* case, the contract was not awarded directly to the entity in which the local authority has a direct shareholding but there is a situation involving an indirect shareholding.

43 – *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 39).

44 – Jennert refers pertinently to the 'overall view' (cited in footnote 41 above, p. 625).

45 – *Commission* v *Spain* (cited in footnote 29 above, paragraph 40).

46 – *CarbotermoandConsorcio Alisei* (cited in footnote 11 above, paragraph 37).

47 – *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraphs 38 to 40).

48 – *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 38).

49 – *Carbotermo and Consorcio Alisei* (cited in footnote 11 above) paragraph 37: 'The fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments, as contemplated in paragraph 50 of *Teckal* [cited in footnote 8 above].'

50 – For majority control is not precluded from the outset, see also Fenoyl, Contrats 'in house' – état des lieux après l'arrêt Asemfo [In-house contracts – situation following *Asemfo*], AJDA 2007, p. 1759 et seq., p. 1761.

51 – Egger (cited in footnote 2 above, p. 169, paragraph 626) rightly speaks of a rebuttable presumption.

52 – See point 55 et seq. of this Opinion.

53 – This is also pointed out by Pape/Holz, 'In-house-transactions exempt from the tendering requirement', *NJW* 2005, p. 2264 et seq. p. 2265. Their perspective is that on a purely formal view a cooperative comprising several public authorities cannot be deemed to be an in-house transaction because owing to the rights of co–determination enjoyed by the other shareholders it could not be determined beyond peradventure that every shareholder could exercise control similar to that exercised over its own departments; yet, on a functional view it was reasonable to regard it as an in-house transaction.

54 – Opinion of Advocate General Cosmas of 1 July 1999 in *Teckal* (cited in footnote 8 above, point 61).

55 – *Teckal* (cited in footnote 8 above).

56 – Judgment in *Coname* (cited in footnote 17 above), paragraphs 23 and 24. In addition, in the main proceedings the company at issue was open – at any rate in part – to private capital, see paragraph 26 of the judgment in *Coname*.

57 – *Asemfo* (cited in footnote 26 above), paragraphs 58 to 60. Paragraph 59 states: 'In that regard, the argument cannot be accepted that that condition is met only for contracts performed at the demand of the Spanish State, excluding those which are the subject of a demand from the Autonomous Communities as regards which Tragsa must be regarded as a third party.' It is clear from paragraph 61 that this finding does not refer to all Spanish autonomous regions, although Tragsa acts for all of them (see the Opinion of Advocate General Geelhoed of 28 September 2006, *Asemfo,* cited in footnote 26 above, points 13 and 14), but to those which hold a

share in the capital of Tragsa.

58 – In *Asemfo* (cited in footnote 26 above, paragraph 13, paragraph 5 therein) it is stated in regard to national law that: 'The functions of organisation, supervision and control concerning Tragsa and its subsidiaries shall be exercised by the Ministerio de Agricultura, Pesca y Alimentación (Ministry of Agriculture, Fisheries and Food) as well as by the Ministerio de Medio Ambiente (Ministry of the Environment)'. Thus competence for control lies with central government and not with the autonomous regions. Thus, Advocate General Geelhoed observes in his Opinion of 28 September 2006 in *Asemfo* (cited in footnote 26 above, point 51), that the autonomous regions themselves exercised no powers of control and that such powers could not be inferred from their capacities as shareholders. Powers of control all resided with the principal shareholder, the Spanish State, that is to say the central government. Thus the judgment itself states in paragraph 51: 'Finally, under Article 3(6) of Royal Decree 371/1999, Tragsa's relations with those public bodies, inasmuch as that company is an instrument and a technical service of those bodies, are not contractual, but in every respect internal, dependent and subordinate.' Furthermore, in paragraphs 59 to 61 arguments quite different from the internal decision-making structures are deployed in regard to the question of the power of control enjoyed by the autonomous regions, such as namely the legal requirement to perform contracts, the fact that tariffs are fixed by the State and that the relationship is not contractual.

59 – The Opinion of Advocate General Geelhoed of 28 September 2006 in *Asemfo* (cited in footnote 26 above) specifically highlights this problematical aspect in detail and finds that there is a complete lack of influence on the part of the regions (point 98 to 101). On the same problem see also Broussy/Donnat/Lambert, 'Actualité du droit communautaire', Marché in house [In-house transactions] *AJDA* 2007 p. 1125 et seq. p. 1126.

60 – As Müller, 'Interkommunale Zusammenarbeit im Weg der In-House-Vergabe?' [Inter–municipal cooperation by way of the in-house transaction?], *Zeitschrift für Vergaberecht und Beschaffungspraxis* (ZVB) 2007, p. 197, p. 202 rightly emphasises, specific circumstances applied, in particular the legal obligation to accept and perform the contracts and the fixing of tariffs by the State. See also Piazzoni, Précisions jurisprudentielles sur les contrats 'in house' [Findings of the courts on in-house contracts], *Revue Lamy de la Concurrence: droit, économie, régulation* 2007, No 12, p. 56 et seq., p. 58, and Mok, 'Hof van Justitie van de Europese Gemeenschappen Case C–295/05', *Nederlanse jurisprudentie; Uitspraken in burgerlijke en strafzaken* 2007, No 417, p. 4413 et seq., p. 4423.

61 – On the systematic interpretation see, in particular, Riesenhuber, *Europäische Methodenlehre* [European Legal Methodology], 2006, p. 253 et seq.

62 – On the grammatical interpretation see, in particular, Riesenhuber, *Europäische Methodenlehre* [European Legal methodology], 2006, p. 250 et seq.

63 – See, amongst others, Dreher, 'Das in-house-Geschäft' [The in-house contract], *NzBau* 2004, p. 14 et seq., p. 17, who puts the emphasis on the lack of any decision-making power on the part of the party awarded the contract. See also Dischendorfer, 'The Compatibility of Contracts Awarded Directly to "Joint Executive Services" with the Community Rules on Public Procurement and Fair Competition: A Note on Case C–295/05, *Asemfo* v *Tragsa*', *Public Procurement Law Review* 2007, p. NA123 et seq., p. NA129.

64 – On the generally lacking legal certainty in regard to a series of unspecified legal concepts and demarcation problems in light of the *Teckal* criteria see, amongst others, also Jennert (cited in footnote 41 above, pp. 625 and 626), who welcomes the increase in legal certainty as a result of the concrete and practical criteria in that judgment. At the same time he points up open questions in particular in regard to the subsequent disposal of shares to private persons by a municipal cooperative mandated long before under the terms of the in-house case-law and suggests that the disposal of shares is subject to the principle of equal treatment and the transparency requirement; Opinion of Advocate General Stix-Hackl of 12 January 2006, *Carbotermo and ConsorcioAlisei* (cited in footnote 11 above), point 17; Söbbeke, 'Zur Konzeption des Kontrollerfordernisses bei vergabefreien Eigenschaften' [On the control requirements in the case of tender-exempt in-house transactions], Die Öffentliche Verwaltung [Public Administration] 2006, p. 996 et seq. p. 997, states that the ill-defined areas that have complicated the application of the in-house principle since the *Teckal* judgment as an exception from the tendering requirement, have been successively reduced by the *Stadt Halle* and *Carbotermo* judgments.

65 – Nor, likewise, is it material to the assessment that such quasi in-house performance of contracts would preclude other undertakings that would also be prepared to take on the relevant work from competing for the contract because this effect is inherent in quasi in-house performance of contracts (Egger, cited in footnote 2 above, p. 163, paragraph 600).

66 – Bovis, *Public Procurement in the European Union*, 2005, p. 240.

67 – See also the Opinion of Advocate General Kokott in *Parking Brixen* (cited in footnote 12 above), point 68. In this connection Calsolaro also notes in his discussion of the *Parking Brixen* judgment that the Court's case-law is probably not to be construed as a duty to engage in outsourcing (Calsolaro, 'S.p.a. in mano pubblica e in house providing La Corte di giustizia CE torna sul controllo analogo: un'occasione perduta?' in: *Foro Amministrativo (Consiglio di Stato)* 2006, p. 1670 et seq., in particular p. 1674).

68 – See also the Opinion of Advocate General Kokott in *Parking Brixen* (cited in footnote 12 above), point 71. It is not the general application of procurement law to public-public entities that interferes with rights to self-administration (see on this, Egger, cited in footnote 2 above, p. 168, paragraph 621), but the excessive application thereof. See also 'Rekommunalisierung und Europarecht nach dem Vertrag von Lissabon', *Wettbewerb in Recht und Praxis* (WRP) 2008, p. 73 et seq., p. 85: municipal self government must be preserved in its basic structures even if it does not have carte blanche to disregard fundamental European freedoms.

69 – Cited in footnote 14 above. Article 6(1) provides that, without prejudice to more general statutory provisions, local authorities must be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.

70 – Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ 2007, C 306, p. 1), Article 3a of the future EU Treaty, not yet in force. In the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ 2008 C115, p. 1) henceforth Article 4 of the EU Treaty, not yet in force.

71 – *Stadt Halle and RPL Lochau* (cited in footnote 15 above), paragraph 48.

72 – Second *Teckal* criterion (carrying on of the activity essentially for the public authority or authorities that hold the shares) in this respect presumably permits to a certain extent third parties to take on tasks. An example of this is (temporary) take–up of capacity but for example also as the judgment in *Asemfo* (cited in footnote 26 above) shows, systematic (regulated by law) taking on of tasks for other public authorities (in that case for all Autonomous Regions of Spain although only four of them have a small shareholding themselves).

73 – Jennert (cited in footnote 41 above), p. 626.

74 – And where appropriate with the assistance of the requisite outside know-how.

75 – Jennert (cited in footnote 41 above), p. 626.

76 – The more or less traditional tasks of municipalities and authorities must include inter alia basic services for example provision of energy and water supplies, public transport and waste disposal, education and cultural establishments and hospitals (for examples, see inter alia, Frenz, cited in footnote 68 above, and Papier, 'Kommunale Daseinsvorsorge im Spannungsfeld zwischen nationalem Recht und Gemeinschaftsrecht', [Communal basic services in the area of tension between national law and Community law] *Deutsche Verwaltungsblätter* (DVBl) 2003, p. 686 et seq.

77 – To define public tasks which are in the general interest as 'state' tasks would be erroneously to fail to take account of the fact that the claims citizens make of their municipalities are undergoing changes particularly over the course of time. In addition the concept of tasks in the general interest in Community procurement law cannot merely be equated with tasks securing existential requirements. Thus for example in the judgement in joined in Joined Cases C–223/99 and C–260/99*Agorà and Excelsior* [2001] ECR I–3605, paragraph 33 et seq.) it was held that the holding of fairs and exhibitions was an activity in the general interest because it was not only the interests of exhibitors and dealers that were involved but also the boost to trade which flows from the information provided to consumers (in the context of the interpretation of Article 1(b) of Directive 92/50 cited in footnote 15 above. At issue was classification as a public law entity, which was not the case in *Agorà and Excelsior,* because the task was held not to be a task of a non-commercial kind).

78 – See also on this Kotschy, cited in footnote 37 above, p. 853.

79 – For many regional authorities overarching tasks with a trans-regional aspect arise for example in the sectors of local public transport, agricultural development and environmental protection; in tackling these tasks cooperation represents a natural and obvious solution. An example of such cooperation is to be found in the case of *Asemfo* (cited in footnote 26 above).

80 – In addition to the submissions of the participating governments see on that also, Söbbeke, cited in footnote 64 above, p. 999; Flömer/Tomerius, Interkommunale Zusammenarbeit unter Vergaberechtsvorbehalt? [Inter–municipal cooperation subject to reservation in respect of procurement law?], *NZBau* 2004, p. 660 et seq.,

p. 661.

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81 – The national court responsible for assessing the case can plainly infer all that is necessary from the judgment in *Carbotermo* (cited in footnote 11 above paragraph 70): 'Where several authorities control an undertaking, the condition relating to the essential part of its activities may be met if that undertaking carries out the essential part of its activities, not necessarily with one of those authorities, but with all of those authorities together.'

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Reference for a preliminary ruling from the Conseil d'Etat, Belgium, lodged on 12 July 2007 - Coditel Brabant v 1. Commune d'Uccle, 2. Société Intercommunale pour la Diffusion de la Télévision (BRUTELE), 3. Région de Bruxelles-Capitale

(Case C-324/07)

Language of the case: French

Referring court

Conseil d'Etat

Parties to the main proceedings

Applicant: Coditel Brabant

Defendants: 1. Commune d'Uccle, 2. Société Intercommunale pour la Diffusion de la Télévision (BRUTELE), 3. Région de Bruxelles-Capitale

Questions referred

1) May a municipality, without calling for competition, join a cooperative society grouping together exclusively other municipalities and associations of municipalities (a so-called pure inter-municipal cooperative) in order to transfer to that cooperative society the operation of its cable television network, in the knowledge that the cooperative society carries out the essential part of its activities for and with its own members and that decisions regarding those activities are taken by the board of directors and the sector boards within the limits of the delegated powers granted to them by the board of directors, those corporate bodies being composed of representatives of the public authorities and the decisions of those corporate bodies being taken in accordance with the vote expressed by the majority of those representatives?

2) Can the control thus exercised over the decisions of the cooperative society, via the corporate bodies, by all the members of the cooperative society - or, in the case of operational sectors or sub-sectors, by some of those members - be regarded as enabling them to exercise over the cooperative society control similar to that exercised over their own departments?

3) For that control to be regarded as similar, must it be exercised individually by each member, or is it sufficient that it be exercised by the majority of the members?

_____

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ORDONNANCE DE LA COUR (septième chambre)

10 avril 2008 (*)

«Marchés publics – Marché public de fournitures et de services – Attribution sans appel d'offres – Attribution par une collectivité territoriale à une entreprise dont elle détient le capital»

Dans l'affaire C–323/07,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Tribunale amministrativo regionale per la Lombardia (Italie), par décision du 13 novembre 1998, parvenue à la Cour le 12 juillet 2007, dans la procédure

Termoraggi SpA

contre

Comune di Monza,

en présence de:

Acqua Gas Azienda Municipale (AGAM),

LA COUR (septième chambre),

composée de M. U. Lõhmus, président de chambre, MM. J. N. Cunha Rodrigues (rapporteur) et J. Klučka, juges,

avocat général: M. J. Mazák,

greffier: M. R. Grass,

la Cour se proposant de statuer par voie d'ordonnance motivée conformément à l'article 104, paragraphe 3, premier alinéa, de son règlement de procédure,

l'avocat général entendu,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 6 de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1).

2 Cette demande a été présentée dans le cadre d'un litige opposant Termoraggi SpA (ci-après «Termoraggi») au Comune di Monza et à Acqua Gas Azienda Municipale (ci-après «AGAM») au sujet de l'attribution à AGAM du service de gestion de la chaleur pour les bâtiments relevant du Comune di Monza, y compris les interventions de maintenance des installations de chauffage.

Le cadre juridique

La réglementation communautaire

3 L'article 1er, sous a) et b), de la directive 92/50 dispose:

«Aux fins de la présente directive:

a) les *'marchés publics de services'* sont des contrats à titre onéreux, conclus par écrit entre un prestataire de services et un pouvoir adjudicateur, […]

[…]

b) sont considérés comme *'pouvoirs adjudicateurs',* l'État, les collectivités territoriales, les organismes de droit public, les associations formées par une ou plusieurs de ces collectivités ou de ces organismes de droit public.

[…]»

4 L'article 2 de ladite directive prévoit:

«Si un marché public a pour objet à la fois des produits au sens de la directive 77/62/CEE et des services au sens des annexes I A et I B de la présente directive, il relève de la présente directive si la valeur des services en question dépasse celle des produits incorporés dans le marché.»

5 Selon l'article 6 de la même directive:

«La présente directive ne s'applique pas aux marchés publics de services attribués à une entité qui est elle-même un pouvoir adjudicateur au sens de l'article 1er point b) sur la base d'un droit exclusif dont elle bénéficie en vertu de dispositions législatives, réglementaires ou administratives publiées, à condition que ces dispositions soient compatibles avec le traité.»

6 L'article 1er, sous a), de la directive 93/36/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures (JO L 199, p. 1) prévoit:

«Aux fins de la présente directive, on entend par:

a) 'marchés publics de fournitures': des contrats conclus par écrit à titre onéreux ayant pour objet l'achat, le crédit-bail, la location ou la location-vente, avec ou sans option d'achat, de produits entre un fournisseur (personne physique ou morale), d'une part, et, d'autre part, un des pouvoirs adjudicateurs définis au point b). La livraison des produits peut comporter, à titre accessoire, des travaux de pose et d'installation.»

La réglementation nationale

7 Aux termes de l'article 23 de la loi n° 142, portant organisation des autonomies locales (legge n. 142, ordinamento delle autonomie locali), du 8 juin 1990 (supplément ordinaire à la GURI n° 135, du 12 juin 1990, ci-après la «loi n° 142/90»):

«1. L'entreprise spéciale est un établissement ['ente strumentale'] de l'entité locale, doté de la personnalité juridique, d'une autonomie d'entreprise et de ses propres statuts, approuvés par le conseil municipal ou provincial.

[…]

6. L'administration locale apporte le capital de dotation, définit les objectifs et les orientations, approuve les actes constitutifs, exerce un contrôle, vérifie les résultats de la gestion, couvre les éventuels coûts sociaux.

[…]»

Le litige au principal et la question préjudicielle

8 Il ressort de la décision de renvoi que Termoraggi est une entreprise spécialisée dans la prestation de services de gestion de la chaleur et dans les travaux de transformation y afférents. Avant 1997, elle a assuré la gestion des installations de chauffage des bâtiments appartenant au Comune di

Monza ou abritant ses bureaux, pour une valeur d'environ 2 milliards de ITL par an.

9 Il ressort du dossier qu'AGAM est une entreprise spéciale du Comune di Monza, au sens de l'article 23 de la loi n° 142/90.

10 Par décision n° 42, du 21 avril 1997, le conseil communal de Monza a décidé de confier à AGAM le service de gestion de la chaleur pour les bâtiments relevant du Comune di Monza, y compris les interventions de maintenance des installations de chauffage. Il a également, par une seconde décision, complété l'objet statutaire d'AGAM en l'habilitant à fournir des services de gestion de la chaleur.

11 Termoraggi a attaqué ces deux décisions devant le Tribunale amministrativo regionale per la Lombardia par un recours, notifié les 21 et 23 juillet 1997, en faisant valoir, notamment, que le service de gestion de la chaleur confié à AGAM doit être qualifié de marché public de services et que, par conséquent, les dispositions de la directive 92/50 trouvent à s'appliquer. Elle soutient, également, que l'exception découlant de l'article 6 de cette directive ne peut être utilement invoquée sous peine de contrariété avec l'article 90 du traité CE (devenu article 86 CE).

12 Le Comune di Monza estime au contraire qu'AGAM exerce une activité de service public dans la mesure où elle contribue à l'entretien d'immeubles eux-mêmes affectés à des missions de service public. Il en déduit qu'AGAM est titulaire de droits spéciaux et exclusifs et, par conséquent, il considère comme inapplicable la législation communautaire relative aux marchés publics. À tout le moins, il fait valoir que l'article 6 de la directive 92/50 le dispensait de l'obligation de mise en concurrence.

13 C'est dans ces conditions que le Tribunale amministrativo regionale per la Lombardia a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante:

«L'article 6 de la directive 92/50 [...] peut–il être considéré comme applicable à la question faisant l'objet de la présente procédure et quelle interprétation doit-on donner du même article afin d'établir la compatibilité des mesures attaquées avec la législation communautaire, dans les termes indiqués dans les motifs?»

Sur la question préjudicielle

14 En vertu de l'article 104, paragraphe 3, premier alinéa, du règlement de procédure, lorsque la réponse à une question posée à titre préjudiciel peut être clairement déduite de la jurisprudence, la Cour peut, après avoir entendu l'avocat général, statuer par voie d'ordonnance motivée.

15 Si un marché public a pour objet à la fois des produits au sens de la directive 93/36 et des services au sens de la directive 92/50, il résulte de l'article 2 de cette dernière directive que ce marché relève de la directive 92/50 si la valeur des services en question dépasse celle des produits incorporés dans le marché, et de la directive 93/36 dans le cas inverse (voir arrêts du 18 novembre 1999, Teckal, C-107/98, Rec. p. I–8121, point 38, ainsi que du 11 mai 2006, Carbotermo et Consorzio Alisei, C-340/04, Rec. p. I–4137, point 31).

16 Il ressort de la décision de renvoi que le marché en cause au principal a pour objet à la fois la fourniture de combustibles, soit des produits au sens de la directive 93/36, et des services d'entretien des installations de chauffage, soit des services au sens de la directive 92/50.

17 Il appartient à la juridiction de renvoi de décider, en fonction de la valeur respective des produits et des services faisant l'objet du marché en cause au principal, si celui-ci relève de la directive 93/36 ou de la directive 92/50.

18 La directive 93/36 s'applique, en principe, aux marchés conclus entre, d'une part, une collectivité territoriale et, d'autre part, une personne juridiquement distincte de cette dernière. Cependant, elle ne s'applique pas dans l'hypothèse où, à la fois, la collectivité territoriale exerce sur la personne en cause un contrôle analogue à celui qu'elle exerce sur ses propres services et où cette personne réalise l'essentiel de son activité avec la ou les collectivités qui la détiennent (voir arrêt Teckal, précité, point 50).

19 Des considérations analogues s'appliquent en ce qui concerne la directive 92/50 (voir arrêt du 11 janvier 2005, Stadt Halle et RPL Lochau, C-26/03, Rec. p. I-1, points 48, 49 et 52).

20 Le dossier soumis à la Cour contient certaines indications desquelles il pourrait être déduit qu'AGAM est sous le contrôle du Comune di Monza et réalise l'essentiel de son activité avec celui-ci.

21 Il appartient à la juridiction de renvoi de vérifier si tel est effectivement le cas dans l'affaire au principal.

22 Dans l'affirmative, il conviendrait de conclure que ni la directive 92/50 ni la directive 93/36 ne sont applicables au marché en cause au principal.

23 Dans la négative, il conviendrait d'examiner si les autres conditions d'applicabilité de ces directives sont réunies. S'agissant de la directive 92/50, il conviendrait d'examiner si les conditions posées à son article 6 sont satisfaites. Une question analogue ne se poserait pas à l'égard de la directive 93/36, celle-ci ne contenant pas de disposition comparable à l'article 6 de la directive 92/50 (voir arrêt Teckal, précité, point 44).

24 Ledit article 6 exclut du champ d'application de la directive 92/50 les marchés publics de services attribués à une entité qui est elle-même un pouvoir adjudicateur sur la base d'un droit exclusif dont elle bénéficie en vertu de dispositions législatives, réglementaires ou administratives publiées, à condition que ces dispositions soient compatibles avec le traité.

25 Il s'ensuit que cette disposition ne trouve à s'appliquer que s'il existe des dispositions législatives, réglementaires ou administratives publiées qui confèrent à l'attributaire un droit exclusif portant sur l'objet du marché attribué.

26 Par conséquent, il convient de répondre à la question préjudicielle en ce sens que:

– les directives 92/50 et 93/36 ne sont pas applicables à un marché conclu entre une collectivité territoriale et une personne juridiquement distincte de cette dernière dans l'hypothèse où, à la fois, la collectivité territoriale exerce sur la personne en cause un contrôle analogue à celui qu'elle exerce sur ses propres services et où cette personne réalise l'essentiel de son activité avec la ou les collectivités qui la détiennent, et

– l'article 6 de la directive 92/50 n'est applicable que s'il existe des dispositions législatives, réglementaires ou administratives publiées qui confèrent à l'attributaire un droit exclusif portant sur l'objet du marché attribué.

Sur les dépens

27 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (septième chambre) dit pour droit:

Les directives 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services, et 93/36/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures, ne sont pas applicables à un marché conclu entre une collectivité territoriale et une personne juridiquement distincte de cette dernière dans l'hypothèse où, à la fois, la collectivité territoriale exerce sur la personne en cause un contrôle analogue à celui qu'elle exerce sur ses propres services et où cette personne réalise l'essentiel de son activité avec la ou les collectivités qui la détiennent.

L'article 6 de la directive 92/50 n'est applicable que s'il existe des dispositions législatives, réglementaires ou administratives publiées qui confèrent à l'attributaire un droit exclusif portant sur l'objet du marché attribué.

Signatures

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* Langue de procédure: l'italien.

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Documents relating to the same case

Order of the Court (Seventh Chamber) of 10 April 2008 – Termoraggi v Comune di Monza

(Case C–323/07)

Public procurement – Public service and public supply contracts – Award without call for tenders – Award by a local authority to an undertaking whose capital it controls

1. *Approximation of laws – Procedures for the award of public supply contracts – Directives 92/50 and 93/36 – Scope (Council Directives 92/50 and 93/36) (see paras 15-22, 26, operative part)*

2. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Exception laid down by Article 6 of the directive – Condition (Council Directive 92/50, Art. 6) (see paras 24-26, operative part)*

Reference for a preliminary ruling – Tribunale Amministrativo Regionale per la Lombardia – Interpretation of Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) – Scope – National provisions attributing, outside of the procedures for the award of public works contracts laid down in the directive, the management of heating installations of certain buildings in a commune to a municipal undertaking.

e part

Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts do not apply to a contract concluded between a local authority and a person legally distinct from it, where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

Article 6 of Directive 92/50 is applicable only if there are laws, regulations or administrative provisions which have been published and which grant the beneficiary an exclusive right concerning the subject–matter of the contract awarded.

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Order of the Court (Seventh Chamber) of 10 April 2008 (reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia (Italy) - Termoraggi SpA v Comune di Monza

(Case C-323/07) [1]

(Public procurement - Public service and public supply contracts - Award without call for tenders - Award by a local authority to an undertaking whose capital it controls)

Language of the case: Italian

Referring court

Tribunale Amministrativo Regionale per la Lombardia

Parties

Applicant: Termoraggi SpA

Defendant: Comune di Monza

Intervener: Acqua Gas Azienda Municipale (AGAM)

Re:

Reference for a preliminary ruling - Tribunale Amministrativo Regionale per la Lombardia - Interpretation of Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) - Scope - National provisions attributing, outside of the procedures for the award of public works contracts laid down in the directive, the management of heating installations of certain buildings in a commune to a municipal undertaking

Operative part of the order

Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts do not apply to a contract concluded between a local authority and a person legally distinct from it, where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

Article 6 of Directive 92/50 is applicable only if there are legislative, regulatory or administrative provisions published which grant the beneficiary an exclusive right concerning the subject-matter of the contract awarded.

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1 -

2 - OJ C 235, 6.10.2007.

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Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia (Italy) lodged on 12 July 2007 - Termoraggi SpA v Comune di Monza and Others

(Case C-323/07)

Language of the case: Italian

Referring court

Tribunale Amministrativo Regionale per la Lombardia

Parties to the main proceedings

Applicant: Termoraggi SpA

Defendant: Comune di Monza and Others

Question referred

Is Article 6 of Directive 92/50/EEC [1] of 18 June 1992 to be regarded as applying to the question at issue in the present proceedings, and what interpretation is to be given to that article for the purposes of determining whether the contested measures are compatible with the Community legislation, in the terms stated in the grounds [of the Order]?

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[1] - OJ L 209 of 24.7.1992, p. 1.

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ARRÊT DE LA COUR (première chambre)

23 avril 2009 (*)

«Manquement d'État – Marchés publics – Directive 2004/18/CE –Procédures de passation des marchés publics de travaux, de fournitures et de services – Transposition incorrecte ou incomplète – Non-transposition dans le délai prescrit»

Dans l'affaire C–292/07,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 15 juin 2007,

Commission des Communautés européennes, représentée par MM. B. Stromsky, D. Kukovec et M. Konstantinidis, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

Royaume de Belgique, représenté par M^me^ D. Haven, puis par M. J.-C. Halleux, en qualité d'agents,

partie défenderesse,

LA COUR (première chambre),

composée de M. P. Jann, président de chambre, MM. M. Ilešič, A. Tizzano, A. Borg Barthet et E. Levits (rapporteur), juges,

avocat général: M^me^ J. Kokott,

greffier: M^me^ R. Şereş, administrateur,

vu la procédure écrite et à la suite de l'audience du 4 décembre 2008,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, en ne prenant pas – et, subsidiairement, en ne communicant pas à la Commission – toutes les dispositions législatives, réglementaires et administratives nécessaires pour se conformer à la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114, et – rectificatif –, JO 2004, L 351, p. 44), tel que modifiée par le règlement (CE) n° 2083/2005 de la Commission, du 19 décembre 2005 (JO L 333, p. 28, ci-après la «directive 2004/18»), le Royaume de Belgique a manqué aux obligations qui lui incombent en vertu de l'article 80 de cette directive.

Le cadre juridique

La directive 2004/18

2 Le premier considérant de la directive 2004/18 est rédigé comme suit:

«À l'occasion de nouvelles modifications, apportées aux directives 92/50/CEE du Conseil du 18 juin 1992 portant coordination des procédures de passation des marchés publics de services [(JO L 209, p. 1)], 93/36/CEE du Conseil du 14 juin 1993 portant coordination des procédures de passation des marchés publics de fournitures [(JO L 199, p. 1)] et 93/37/CEE du Conseil du 14 juin 1993 portant coordination des procédures de passation des marchés publics de travaux [(JO L 199, p. 54)], modifications nécessaires pour répondre aux exigences de simplification et de modernisation formulées aussi bien par les pouvoirs adjudicateurs que par les opérateurs économiques dans le cadre des réponses au Livre vert adopté par la Commission le 27 novembre 1996, il convient, dans un souci de clarté, de procéder à leur refonte dans un seul texte. La présente directive est fondée sur la jurisprudence de la Cour de justice, en particulier la jurisprudence relative aux critères d'attribution, qui précise les possibilités pour les pouvoirs adjudicateurs de répondre aux besoins de la collectivité publique concernée, y compris dans les domaines environnemental et/ou social, pour autant que ces critères soient liés à l'objet du marché, ne confèrent pas une liberté de choix illimitée au pouvoir adjudicateur, soient expressément mentionnés et respectent les principes fondamentaux visés au considérant 2.»

3 Le deuxième considérant de cette même directive énonce:

«La passation des marchés conclus dans les États membres pour le compte de l'État, des collectivités territoriales et d'autres organismes de droit public doit respecter les principes du traité, notamment les principes de la libre circulation des marchandises, de la liberté d'établissement et de la libre prestation de services, ainsi que les principes qui en découlent, comme l'égalité de traitement, la non-discrimination, la reconnaissance mutuelle, la proportionnalité et la transparence. Toutefois, en ce qui concerne les marchés publics dépassant un certain montant, il est recommandé d'élaborer des dispositions en matière de coordination communautaire des procédures nationales de passation de ces marchés qui soient fondées sur ces principes de manière à garantir leurs effets ainsi qu'une mise en concurrence effective des marchés publics. Par conséquent, ces dispositions de coordination devraient être interprétées conformément aux règles et principes précités ainsi qu'aux autres règles du traité.»

4 Le dixième considérant de la directive 2004/18 est libellé dans les termes suivants:

«Un contrat ne peut être considéré comme un marché public de travaux que si son objet vise spécifiquement à réaliser des activités visées à l'annexe I, même si le contrat peut comprendre d'autres services nécessaires à la réalisation de ces activités. Les marchés publics de services, notamment dans le domaine des services de gestion de propriétés, peuvent, dans certains cas, inclure des travaux. Toutefois, ces travaux, pour autant qu'ils sont accessoires et ne constituent, donc, qu'une conséquence éventuelle ou un complément à l'objet principal du contrat, ne peuvent justifier la classification du contrat comme marché public de travaux.»

5 Aux termes du quarante-sixième considérant de la directive 2004/18:

«L'attribution du marché devrait être effectuée sur la base de critères objectifs qui assurent le respect des principes de transparence, de non-discrimination et d'égalité de traitement et qui garantissent l'appréciation des offres dans des conditions de concurrence effective. […]

Afin de garantir le respect du principe d'égalité de traitement lors de l'attribution des marchés, il convient de prévoir l'obligation – consacrée par la jurisprudence – d'assurer la transparence nécessaire pour permettre à tout soumissionnaire d'être raisonnablement informé des critères et des modalités qui seront appliqués pour identifier l'offre économiquement la plus avantageuse. […]»

6 L'article 1er de cette directive est intitulé «Définitions». Il dispose en son paragraphe 2, sous b):

«Les 'marchés publics de travaux' sont des marchés publics ayant pour objet soit l'exécution, soit conjointement la conception et l'exécution de travaux relatifs à une des activités mentionnées à l'annexe I ou d'un ouvrage, soit la réalisation, par quelque moyen que ce soit, d'un ouvrage répondant aux besoins précisés par le pouvoir adjudicateur. Un 'ouvrage' est le résultat d'un ensemble de travaux de bâtiment ou de génie civil destiné à remplir par lui-même une fonction économique ou technique.»

7 L'article 5 de ladite directive prévoit:

«Lors de la passation de marchés publics par les pouvoirs adjudicateurs, les États membres appliquent dans leurs relations des conditions aussi favorables que celles qu'ils réservent aux opérateurs économiques des pays tiers en application de l'accord sur les marchés publics conclu dans le cadre des négociations multilatérales du cycle de l'Uruguay (ci-après dénommé 'l'Accord'). À cette fin, les États membres se consultent sur les mesures à prendre en application de l'Accord, au sein du comité consultatif pour les marchés publics visé à l'article 77.»

8 Aux termes de l'article 9 de cette même directive:

«1. Le calcul de la valeur estimée d'un marché public est fondé sur le montant total payable, hors TVA, estimé par le pouvoir adjudicateur. Ce calcul tient compte du montant total estimé, y compris toute forme d'option éventuelle et les reconductions du contrat éventuelles.

Si le pouvoir adjudicateur prévoit des primes ou des paiements au profit des candidats ou soumissionnaires, il en tient compte pour calculer la valeur estimée du marché.

[…]

8. Pour les marchés publics de services, la valeur à prendre comme base pour le calcul de la valeur estimée du marché est, le cas échéant, la suivante:

a) pour les types de services suivants:

i) services d'assurance: la prime payable et les autres modes de rémunération;

[…]

iii) marchés impliquant la conception: honoraires, commissions payables et autres modes de rémunération.

[…]»

9 L'article 23 de la directive 2004/18 énonce en son paragraphe 2:

«Les spécifications techniques doivent permettre l'accès égal des soumissionnaires et ne pas avoir pour effet de créer des obstacles injustifiés à l'ouverture des marchés publics à la concurrence.»

10 L'article 30 de cette directive, intitulé «Cas justifiant le recours à la procédure négociée avec publication d'un avis de marché», est rédigé dans les termes suivants:

«[…]

2. Dans les cas visés au paragraphe 1, les pouvoirs adjudicateurs négocient avec les soumissionnaires les offres soumises par ceux-ci afin de les adapter aux exigences qu'ils ont indiquées dans l'avis de marché, dans le cahier des charges et dans les documents complémentaires éventuels et afin de rechercher la meilleure offre conformément à l'article 53, paragraphe 1.

3. Au cours de la négociation, les pouvoirs adjudicateurs assurent l'égalité de traitement de tous les soumissionnaires. En particulier, ils ne donnent pas, de manière discriminatoire, d'information susceptible d'avantager certains soumissionnaires par rapport à d'autres.

4. Les pouvoirs adjudicateurs peuvent prévoir que la procédure négociée se déroule en phases successives de manière à réduire le nombre d'offres à négocier en appliquant les critères d'attribution indiqués dans l'avis de marché ou dans le cahier des charges. Le recours à cette faculté est indiqué dans l'avis de marché ou dans le cahier des charges.»

11 L'article 31, point 1), sous c), de la directive 2004/18 prévoit que les pouvoirs adjudicateurs peuvent passer les marchés publics de travaux, de fournitures et de services en recourant à la procédure négociée sans publication préalable d'un avis de marché:

«dans la mesure strictement nécessaire, lorsque l'urgence impérieuse, résultant d'événements imprévisibles pour les pouvoirs adjudicateurs en question, n'est pas compatible avec les délais

exigés par les procédures ouvertes, restreintes ou négociées avec publication d'un avis de marché visées à l'article 30. Les circonstances invoquées pour justifier l'urgence impérieuse ne doivent en aucun cas être imputables aux pouvoirs adjudicateurs».

12 L'article 38, paragraphe 1, de cette directive énonce:

«En fixant les délais de réception des offres et des demandes de participation, les pouvoirs adjudicateurs tiennent compte en particulier de la complexité du marché et du temps nécessaire pour préparer les offres, sans préjudice des délais minimaux fixés par le présent article.»

13 L'article 43 de ladite directive dispose:

«Pour tout marché, tout accord-cadre et toute mise en place d'un système d'acquisition dynamique, les pouvoirs adjudicateurs établissent un procès-verbal comportant au moins:

[…]

d) les motifs du rejet des offres jugées anormalement basses;

[…]»

14 L'article 44 de cette même directive prévoit:

«1. L'attribution des marchés se fait sur la base des critères prévus aux articles 53 et 55, compte tenu de l'article 24, après vérification de l'aptitude des opérateurs économiques non exclus en vertu des articles 45 et 46, effectuée par les pouvoirs adjudicateurs conformément aux critères relatifs à la capacité économique et financière, aux connaissances ou capacités professionnelles et techniques visés aux articles 47 à 52 et, le cas échéant, aux règles et critères non discriminatoires visés au paragraphe 3.

2. Les pouvoirs adjudicateurs peuvent exiger des niveaux minimaux de capacités, conformément aux articles 47 et 48, auxquels les candidats et les soumissionnaires doivent satisfaire.

L'étendue des informations visées aux articles 47 et 48 ainsi que les niveaux minimaux de capacités exigés pour un marché déterminé doivent être liés et proportionnés à l'objet du marché.

Ces niveaux minimaux sont indiqués dans l'avis de marché.

3. Dans les procédures restreintes, les procédures négociées avec publication d'un avis de marché et dans le dialogue compétitif, les pouvoirs adjudicateurs peuvent restreindre le nombre de candidats appropriés qu'ils inviteront à soumissionner, à négocier ou à dialoguer, à condition qu'un nombre suffisant de candidats appropriés soit disponible. Les pouvoirs adjudicateurs indiquent dans l'avis de marché les critères ou règles objectifs et non discriminatoires qu'ils prévoient d'utiliser, le nombre minimal de candidats qu'ils prévoient d'inviter et, le cas échéant, le nombre maximal.

Dans la procédure restreinte, le nombre minimum est de cinq. Dans la procédure négociée avec publication d'un avis de marché et le dialogue compétitif, le nombre minimum est de trois. En tout état de cause, le nombre de candidats invités doit être suffisant pour assurer une concurrence réelle.

Les pouvoirs adjudicateurs invitent un nombre de candidats au moins égal au nombre minimum prédéfini. Lorsque le nombre de candidats satisfaisant aux critères de sélection et aux niveaux minimaux est inférieur au nombre minimal, le pouvoir adjudicateur peut continuer la procédure en invitant le ou les candidats ayant les capacités requises. Dans le cadre de cette même procédure, le pouvoir adjudicateur ne peut pas inclure d'autres opérateurs économiques n'ayant pas demandé de participer ou des candidats n'ayant pas les capacités requises.

4. Lorsque les pouvoirs adjudicateurs recourent à la faculté de réduire le nombre de solutions à discuter ou d'offres à négocier, prévue à l'article 29, paragraphe 4, et à l'article 30, paragraphe 4, ils effectuent cette réduction en appliquant les critères d'attribution qu'ils ont indiqués dans l'avis de marché, dans le cahier des charges ou dans le document descriptif. Dans la phase finale, ce nombre doit permettre d'assurer une concurrence réelle, pour autant qu'il y ait un nombre suffisant de solutions ou de candidats appropriés.»

15 Aux termes de l'article 46, premier alinéa, de la directive 2004/18:

«Tout opérateur économique désireux de participer à un marché public peut être invité à justifier de son inscription au registre de la profession ou au registre du commerce ou à fournir une déclaration sous serment ou un certificat, tels que précisés à l'annexe IX A pour les marchés publics de travaux, à l'annexe IX B pour les marchés publics de fournitures et à l'annexe IX C pour les marchés publics de services, et conformément aux conditions prévues dans l'État membre où il est établi.»

16 L'article 48, paragraphe 2, de cette directive dispose:

«Les capacités techniques des opérateurs économiques peuvent être justifiées d'une ou de plusieurs des façons suivantes, selon la nature, la quantité ou l'importance, et l'utilisation des travaux, des fournitures ou des services:

[…]

f) pour les marchés publics de travaux et de services et uniquement dans les cas appropriés, l'indication des mesures de gestion environnementale que l'opérateur économique pourra appliquer lors de la réalisation du marché;

[…]»

17 Aux termes de l'article 55 de la directive 2004/18:

«1. Si, pour un marché donné, des offres apparaissent anormalement basses par rapport à la prestation, le pouvoir adjudicateur, avant de pouvoir rejeter ces offres, demande, par écrit, les précisions sur la composition de l'offre qu'il juge opportunes.

Ces précisions peuvent concerner notamment:

[…]

d) le respect des dispositions concernant la protection et les conditions de travail en vigueur au lieu où la prestation est à réaliser;

e) l'obtention éventuelle d'une aide d'État par le soumissionnaire.

[…]

3. Le pouvoir adjudicateur qui constate qu'une offre est anormalement basse du fait de l'obtention d'une aide d'État par le soumissionnaire ne peut rejeter cette offre pour ce seul motif que s'il consulte le soumissionnaire et si celui-ci n'est pas en mesure de démontrer, dans un délai suffisant fixé par le pouvoir adjudicateur, que l'aide en question a été octroyée légalement. Le pouvoir adjudicateur qui rejette une offre dans ces conditions en informe la Commission.»

18 L'article 67, paragraphe 2, de la directive 2004/18, figurant dans le titre IV de celle-ci, intitulé «Règles applicables aux concours dans le domaine des services», est libellé comme suit:

«Le présent titre s'applique:

a) aux concours organisés dans le cadre d'une procédure de passation d'un marché public de services;

b) aux concours avec primes de participation et/ou paiements aux participants.

Dans les cas visés au point a), on entend par 'seuil', la valeur estimée hors TVA du marché public de services, y compris les éventuelles primes de participation et/ou paiements aux participants.

Dans les cas visés au point b), on entend par seuil le montant total des primes et paiements, y compris la valeur estimée hors TVA du marché public de services qui pourrait être passé ultérieurement aux termes de l'article 31, paragraphe 3, si le pouvoir adjudicateur n'exclut pas une telle passation dans l'avis de concours.»

19 L'article 68 de cette directive énonce:

«Le présent titre ne s'applique pas:

a) aux concours de services au sens de la directive 2004/17/CE [du Parlement européen et du Conseil, du 31 mars 2004, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des services postaux (JO L 134, p. 1),] qui sont organisés par des pouvoirs adjudicateurs exerçant une ou plusieurs des activités visées aux articles 3 à 7 de ladite directive et qui sont organisés pour la poursuite de ces activités, ni aux concours exclus du champ d'application de ladite directive.

Toutefois, la présente directive continue à s'appliquer aux concours de services qui sont passés par des pouvoirs adjudicateurs exerçant une ou plusieurs des activités visées à l'article 6 de la directive 2004/17/CE et passés pour ces activités, aussi longtemps que l'État membre concerné se prévaut de la faculté visée à l'article 71 de ladite directive pour en différer l'application;

[…]»

20 L'article 72 de ladite directive dispose:

«Lorsque les concours réunissent un nombre limité de participants, les pouvoirs adjudicateurs établissent des critères de sélection clairs et non discriminatoires. Dans tous les cas, le nombre des candidats invités à participer aux concours doit tenir compte du besoin d'assurer une concurrence réelle.»

21 Aux termes de l'article 74, paragraphe 1, de cette même directive, relatif aux décisions du jury:

«Le jury dispose d'une autonomie de décision ou d'avis.»

22 L'annexe I de la directive 2004/18 énumère les activités visées à l'article 1er, paragraphe 2, sous b), de celle-ci, en faisant référence notamment aux codes du vocabulaire commun pour les marchés publics (Common Procurement Vocabulary, CPV), établi par le règlement (CE) n° 2195/2002 du Parlement européen et du Conseil, du 5 novembre 2002 (JO L 340, p. 1), et à leur description en fonction de la nomenclature statistique des activités économiques dans la Communauté européenne, établie par le règlement (CEE) n° 3037/90 du Conseil, du 9 octobre 1990 (JO L 293, p. 1), telle que révisée par le règlement (CE) n° 29/2002 de la Commission, du 19 décembre 2001 (JO L 6, p. 3, ci-après la «NACE» et les «codes NACE»).

23 L'annexe IX de cette directive reproduit la liste des registres professionnels ainsi que les déclarations et certificats correspondant dans quinze États membres.

La réglementation nationale

La loi du 24 décembre 1993

24 L'article 1er, § 1er, premier alinéa, de la loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services (*Moniteur belge* du 22 janvier 1994, p. 1308), telle que modifiée par la loi portant des dispositions diverses du 23 décembre 2005 (*Moniteur belge* du 30 décembre 2005, p. 57301, ci-après la «loi du 24 décembre 1993»), dispose:

«Les marchés publics de travaux, de fournitures et de services au nom des pouvoirs adjudicateurs visés à l'article 4 sont passés avec concurrence et à forfait, suivant les modes prévus au titre II du présent livre, mais sous réserve de ce qui est prévu au § 2 du présent article et à l'article 2.»

25 L'article 5 de cette loi prévoit:

«Au sens du […] titre [II, relatif aux marchés publics de travaux, de fournitures et de services], on entend par:

[…]

– marché public de fournitures: le contrat à titre onéreux conclu entre un fournisseur et un pouvoir adjudicateur et ayant pour objet l'acquisition, par contrat d'achat ou d'entreprise, la location, la location-vente ou le crédit-bail, avec ou sans option d'achat, de produits. Ce contrat peut

comporter à titre accessoire des travaux de pose et d'installation;

[…]»

26 L'article 20 de ladite loi énonce:

«Le concours de projets est une procédure permettant à un pouvoir adjudicateur d'acquérir un plan ou un projet, sur la base d'un choix effectué par un jury. Ce concours donne lieu soit à l'attribution d'un marché public de services, soit, après un appel à la concurrence, au choix d'un ou de plusieurs projets, avec ou sans octroi de primes aux lauréats.»

27 L'annexe 1 de la loi du 24 décembre 1993 décrit les activités professionnelles concernées par les marchés publics de travaux en se référant aux codes NACE en vigueur au moment de l'adoption de cette loi.

L'arrêté royal du 8 janvier 1996

28 L'arrêté royal du 8 janvier 1996 relatif aux marchés publics de travaux, de fournitures et de services et aux concessions de travaux publics (*Moniteur belge* du 26 janvier 1996, p. 1523), tel que modifié par l'arrêté royal du 12 janvier 2006 (*Moniteur belge* du 27 janvier 2006, p. 4528, ci-après l'«arrêté royal du 8 janvier 1996») comporte notamment des dispositions relatives, respectivement, aux marchés publics de travaux (titre I, articles 1 à 26), aux marchés publics de fournitures (titre II, articles 27 à 52) et aux marchés publics de services (titre III, articles 53 à 81).

29 L'article 2 de cet arrêté royal traite du calcul du montant des marchés publics de travaux.

30 S'agissant de ce type de marchés publics, l'article 6, § 4, dispose:

«Pour l'adjudication restreinte, l'appel d'offres restreint et la procédure négociée avec publicité lors du lancement de la procédure au sens de l'article 17, § 3, de la loi [du 24 décembre 1993], les candidats sélectionnés doivent être invités simultanément, par écrit, à présenter leur offre.

Cette invitation comporte au moins:

1° a) le cahier spécial des charges et les documents complémentaires ou, le cas échéant, l'adresse du service auquel le cahier spécial des charges et les documents complémentaires peuvent être demandés et la date limite d'introduction de cette demande;

b) le cas échéant, le montant dû pour l'obtention de ces documents et les modalités de paiement de cette somme;

2° a) la date limite de réception des offres;

b) l'adresse à laquelle elles doivent être transmises;

c) la ou les langues dans lesquelles elles doivent être rédigées;

3° la référence à l'avis de marché;

4° l'indication des documents à joindre éventuellement, soit à l'appui des déclarations vérifiables fournies par le candidat conformément au modèle d'avis figurant à l'annexe 2, B, III, 2 et 3, soit en complément aux renseignements prévus à ces annexes;

5° le ou les critères d'attribution s'ils ne figurent pas dans l'avis.»

31 Les articles 32, § 4, et 58, § 4, de l'arrêté royal du 8 janvier 1996 contiennent des dispositions identiques en ce qui concerne, respectivement, les marchés publics de fournitures et les marchés publics de services.

32 S'agissant des marchés publics de travaux, l'article 7, premier alinéa, de cet arrêté royal prévoit:

«Lorsque les offres ne peuvent être établies qu'après examen d'une documentation volumineuse, ou

à la suite d'une visite des lieux, ou après consultation sur place de documents annexés au cahier spécial des charges, les délais prévus aux articles 5 et 6, § 2, doivent être prolongés de façon adéquate.»

33 Le premier alinéa des articles 33 et 59 dudit arrêté royal contient une disposition identique en ce qui concerne, respectivement, les marchés publics de fournitures et les marchés publics de services.

34 S'agissant des marchés publics de travaux, l'article 9 de l'arrêté royal du 8 janvier 1996 est rédigé dans les termes suivants:

«Pour tout marché passé, le pouvoir adjudicateur dresse un procès-verbal mentionnant au moins:

1° le nom et l'adresse du pouvoir adjudicateur, l'objet et le prix du marché;

2° les noms des soumissionnaires ou des candidats retenus et la justification de ce choix;

3° les noms des candidats ou soumissionnaires exclus et les motifs de leur rejet;

4° le nom de l'adjudicataire et la motivation du choix de son offre ainsi que, si elle est connue, la part du marché qu'il a l'intention de sous-traiter;

5° en cas de recours à la procédure négociée avec ou sans publicité lors du lancement de la procédure, la justification des circonstances visées à l'article 17, § 2 ou § 3, de la loi, propres à motiver le recours à cette procédure.

Ce procès-verbal, ou les principaux points de celui-ci, sont transmis à la Commission européenne à sa demande.»

35 Les articles 35 et 61 de cet arrêté royal contiennent des dispositions identiques en ce qui concerne, respectivement, les marchés publics de fournitures et les marchés publics de services.

36 Les articles 16, 18 et 19 dudit arrêté royal définissent les critères de sélection des soumissionnaires en cas d'adjudication publique ou d'appel d'offres général en ce qui concerne les marchés publics de travaux.

37 Ledit article 16 dispose en son dernier alinéa:

«Les entrepreneurs des autres États membres de la Communauté européenne et, selon les dispositions et conditions de l'acte international les concernant, les entrepreneurs de pays tiers au sens de l'article 24, qui répondent aux qualifications requises, doivent être traités dans les mêmes conditions que les entrepreneurs nationaux. Cette disposition ne s'applique pas aux travaux déclarés secrets ou dont l'exécution doit s'accompagner de mesures particulières de sécurité conformément à des dispositions législatives ou réglementaires en vigueur, ou lorsque la protection des intérêts essentiels de la sécurité du pays l'exige.»

38 Le dernier alinéa des articles 42 et 68 de l'arrêté royal du 8 janvier 1996 contiennent des dispositions similaires à l'égard des fournisseurs et des prestataires de services d'autres États membres et de pays tiers en ce qui concerne, respectivement, les marchés publics de fournitures et les marchés publics de services.

39 Les articles 18 et 19 de cet arrêté royal énumèrent les éléments que peuvent invoquer les entrepreneurs pour justifier de leur capacité financière et économique.

40 S'agissant des marchés publics de travaux, l'article 20, § 2, de l'arrêté royal du 8 janvier 1996 énonce:

«Le pouvoir adjudicateur peut exiger des candidats ou des soumissionnaires la remise de la preuve de leur inscription au registre professionnel ou du commerce conformément aux conditions prévues par la législation du pays où ils sont établis.»

41 Les articles 46, § 2, et 72, § 2, dudit arrêté royal contiennent une disposition identique en ce qui concerne, respectivement, les marchés publics de fournitures et les marchés publics de services.

42 L'article 24 de ce même arrêté royal prévoit:

«Pour les marchés publics de travaux dont le montant estimé hors taxe sur la valeur ajoutée est égal ou supérieur à 5.278.000 EUR, les pays suivants, selon les dispositions et conditions de l'acte international les concernant, bénéficient de l'application des titres II et III du livre premier de la loi [du 24 décembre 1993] et du présent arrêté:

1° l'Islande, le Liechtenstein et la Norvège, en application de l'Accord sur l'Espace économique européen;

2° le Canada, la Corée, les États-unis d'Amérique, Israël, le Japon et la Suisse, en application de l'Accord relatif aux marchés publics conclu dans le cadre de l'Accord général sur les Tarifs douaniers et le Commerce.»

43 Les articles 50 et 79 de l'arrêté royal du 8 janvier 1996 contiennent des dispositions identiques en ce qui concerne, respectivement, les marchés publics de fournitures et les marchés publics de services dont le montant estimé, hors taxe sur la valeur ajoutée, est égal ou supérieur, selon le cas, à 211 000 euros ou à 137 000 euros.

44 Aux termes de l'article 28 de cet arrêté royal, s'agissant des marchés publics de fournitures:

«[…]

Lorsque des marchés présentent un caractère de régularité ou sont destinés à être renouvelés au cours d'une période donnée, le montant estimé se réfère:

1° soit au montant réel total des contrats successifs analogues passés au cours des douze mois ou de l'exercice précédent, corrigé, si possible, pour tenir compte des modifications en quantité ou en valeur qui surviendraient au cours des douze mois suivant le marché initial;

2° soit au montant estimé total des marchés successifs au cours des douze mois suivant la première livraison ou au cours de l'exercice si celui-ci est supérieur à douze mois.

Lorsque des lots sont prévus pour l'acquisition de fournitures homogènes, le montant estimé total des lots doit être pris en compte.

Lorsque des options sont prévues, le montant total maximum de l'achat, de la location, de la location-vente, du crédit-bail, y compris les options, doit être pris en compte comme base de calcul.

[…]»

45 Les articles 42, 44 et 45 dudit arrêté royal définissent les critères de sélection des soumissionnaires en cas d'adjudication publique ou d'appel d'offres général en ce qui concerne les marchés publics de fournitures.

46 L'article 54 du même arrêté royal concerne la fixation du montant estimé des marchés publics de services. Il prévoit:

«Le montant estimé des marchés publics de services inclut la rémunération totale estimée du prestataire de services.

Aux fins de calcul de ce montant, sont pris en compte:

1° pour les services d'assurances, la prime payable;

2° pour les services bancaires et autres services financiers, les honoraires, commissions, intérêts et tous autres modes de rémunération;

3° pour les services impliquant la conception, les honoraires ou la commission.

En cas de services nouveaux consistant dans la répétition de services similaires au sens de l'article 17, § 2, 2°, b, de la loi [du 24 décembre 1993], sont pris en compte le montant total estimé du marché initial ainsi que le montant total estimé pour la suite des services.

[…]

Le montant estimé des marchés de services à passer sans indication d'un prix total se détermine comme suit:

[…]

Lorsque des marchés présentent un caractère de régularité ou sont destinés à être renouvelés au cours d'une période donnée, le montant estimé se réfère :

1° soit au montant réel total des marchés analogues passés pour la même catégorie de services au cours des douze mois ou de l'exercice précédent, corrigé pour tenir compte des modifications en quantité ou en valeur qui surviendraient au cours des douze mois suivant le premier marché;

2° soit au montant estimé total des marchés au cours des douze mois suivant la première prestation, ou pendant la durée du marché si celle-ci est supérieure à douze mois.

Lorsque des options sont prévues, le montant total maximum, y compris les options, doit être pris comme base de calcul.

Lorsqu'un marché a pour objet des services visés à l'annexe 2, A, et à l'annexe 2, B, de la loi [du 24 décembre 1993], il est passé conformément à la présente section lorsque la valeur des services visés à l'annexe 2, A, dépasse celle des services visés à l'annexe 2, B.

Lorsqu'un marché a pour objet des fournitures et des services, il est passé conformément au présent titre lorsque la valeur des services dépasse celle des fournitures.

[…]»

47 Les articles 68, 70 et 71 de l'arrêté royal du 8 janvier 1996 définissent les critères de sélection des soumissionnaires en cas d'adjudication publique ou d'appel d'offres général en ce qui concerne les marchés publics de services.

48 Aux termes de l'article 76, § 2, de cet arrêté royal:

«Lorsque le concours de projets est organisé dans le cadre d'une procédure de passation de marché public de services dont le montant estimé est égal ou supérieur au montant prévu à l'article 53 du présent arrêté et dans tous les cas de concours où le montant total des primes et paiements à verser aux participants est égal ou supérieur aux montants prévus à l'article 53, un avis de concours de projets est publié au *Journal officiel des Communautés européennes*. Le pouvoir adjudicateur doit être à même de faire la preuve de la date de l'envoi.

Cet avis de concours est également publié au Bulletin des Adjudications suivant le même modèle d'avis.

La publication dans le Bulletin des Adjudications ne peut avoir lieu avant la date de l'envoi de l'avis à l'Office des publications officielles des Communautés européennes, et doit faire mention de cette date. Elle ne peut pas contenir de renseignements autres que ceux publiés au *Journal officiel des Communautés européennes*.»

49 Selon l'article 110, § 3, troisième alinéa, de cet arrêté royal:

«Lors de la vérification de prix apparemment anormalement bas, le pouvoir adjudicateur peut prendre en considération des justifications fondées sur des critères objectifs tenant à l'économie du procédé de construction ou de fabrication ou de la prestation de services, ou aux solutions techniques choisies, ou aux conditions exceptionnellement favorables dont dispose le soumissionnaire pour exécuter le marché, ou à l'originalité du produit, du projet ou de l'ouvrage proposé par le soumissionnaire.»

50 L'article 122 bis de l'arrêté royal du 8 janvier 1996 prévoit:

«En cas de procédure négociée avec publicité, lorsque le montant du marché atteint le montant pour la publicité européenne et que l'attribution se fait au soumissionnaire qui a remis l'offre

économiquement la plus avantageuse du point de vue du pouvoir adjudicateur, ce dernier précise la pondération relative de chacun des critères d'attribution. Cette pondération peut éventuellement être exprimée dans une fourchette dont l'écart maximal doit être approprié. Si une telle pondération n'est pas possible pour des raisons démontrables, les critères sont mentionnés dans un ordre décroissant d'importance.»

51 L'annexe 2, B, de cet arrêté royal présente le modèle type d'un avis de marché. Dans les rubriques III.2.2 et III.2.3 d'un tel avis, le pouvoir adjudicateur doit préciser le niveau minimal éventuellement requis en ce qui concerne les capacités économiques, financières et techniques.

52 Dans la rubrique IV.1.3 de cet avis, le pouvoir adjudicateur doit indiquer s'il est susceptible de recourir à une procédure de négociation en phases successives afin de réduire le nombre des solutions ou des offres à négocier.

53 L'annexe 3, A, de l'arrêté royal du 8 janvier 1996 contient le modèle type d'un avis de concours. Conformément à ce modèle, le pouvoir adjudicateur doit préciser, à la rubrique IV.1 d'un tel avis, le type de procédure ainsi que le nombre envisagé de participants au concours. Conformément à la rubrique IV.5.3 de cet avis, ce pouvoir doit indiquer si un contrat de services fera suite au concours. Ledit pouvoir doit de même mentionner à la rubrique IV.5.4 de cet avis si la décision du jury est contraignante.

La procédure précontentieuse

54 N'ayant pas reçu d'information concernant la transposition de la directive 2004/18 en droit belge à l'issue du délai prescrit à l'article 80 de cette dernière, la Commission a, conformément à l'article 226 CE, mis le Royaume de Belgique en demeure de présenter ses observations par une lettre adressée le 27 mars 2006.

55 Dans sa réponse communiquée le 1er juin 2006, cet État membre a informé la Commission de ce que des mesures de transposition étaient en préparation.

56 Estimant que le Royaume de Belgique n'avait pas pris les mesures nécessaires à la transposition de la directive 2004/18 et constatant que, en tout cas, de telles mesures ne lui avaient pas été communiquées, la Commission a émis le 18 octobre 2006 un avis motivé invitant cet État membre à se conformer à cet avis dans un délai de deux mois à compter de la réception de celui-ci.

57 Par diverses lettres parvenues à la Commission les 15 décembre 2006 ainsi que 16 et 27 février 2007, le Royaume de Belgique a notamment communiqué à la Commission le texte de la loi du 15 juin 2006 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services (*Moniteur belge* du 15 février 2007, p. 7355, ci-après la «loi du 15 juin 2006») ainsi que celui de la loi du 16 juin 2006 relative à l'attribution, à l'information aux candidats et soumissionnaires et au délai d'attente concernant les marchés publics et certains marchés de travaux, de fournitures et de services (*Moniteur belge* du 15 février 2007, p. 7388), qui visent à transposer la directive 2004/18.

58 Cependant, considérant que la situation demeurait insatisfaisante, eu égard notamment au fait que l'arrêté royal devant fixer la date d'entrée en vigueur des dispositions de fond de ces lois n'avait pas été adopté, la Commission a décidé, conformément à l'article 226 CE, d'introduire le présent recours.

59 Par lettre du 17 juin 2008, la Cour a, en application de l'article 54 bis du règlement de procédure, demandé, d'une part, à la Commission d'indiquer de manière exhaustive les dispositions de la directive 2004/18 qu'elle considérait comme non transposées en droit belge et, d'autre part, au Royaume de Belgique de vérifier la correspondance entre les dispositions de droit belge dont il alléguait qu'elles ont opéré la transposition de cette directive et les dispositions de celle-ci qui auraient été ainsi transposées. Les parties ont communiqué leur réponse au greffe de la Cour, respectivement, les 4 et 3 septembre 2008.

Sur le recours

Sur l'étendue du recours

60 Dans sa requête, la Commission demandait à la Cour de constater que le Royaume de Belgique avait manqué aux obligations qui lui incombent en vertu de la directive 2004/18 du fait d'une absence totale de transposition de celle-ci en droit interne.

61 Dans son mémoire en défense, le Royaume de Belgique, renvoyant à certaines dispositions nationales adoptées, pour les unes, préalablement à la date d'expiration du délai fixé dans l'avis motivé et, pour les autres, postérieurement à cette date, a allégué qu'il avait assuré une transposition partielle des dispositions de la directive 2004/18 et que, à ladite date, seuls les articles 23, 30, 45, paragraphe 1, 48, paragraphe 5, 49, 50, 53, 57 et 59 de celle-ci n'étaient pas transposés en droit interne.

62 Sur le fondement de ces indications, la Commission a considéré, dans son mémoire en réplique, que le Royaume de Belgique restait toujours en défaut d'avoir transposé entièrement ou correctement l'article 1er de la directive 2004/18 lu en combinaison avec l'annexe I de celle-ci ainsi que les articles 5, 9, 12, 13, 16, 20, 21, 23 à 25, 30, 31, 38, 40, 43 à 46, 48 à 50, 55, 59, 63, 65, 67 à 69, 72 et 74 de cette directive.

63 Dans son mémoire en duplique, s'appuyant sur l'arrêté royal du 23 novembre 2007 modifiant la loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services et certains arrêtés royaux pris en exécution de cette loi (*Moniteur belge* du 7 décembre 2007, p. 60372, ci-après l'«arrêté royal du 23 novembre 2007»), le Royaume de Belgique a estimé que l'ensemble des dispositions de ladite directive nécessitant encore d'être transposées en droit interne l'étaient désormais.

64 Dans sa réponse aux questions écrites adressées aux parties par la Cour et au cours de l'audience, la Commission s'est désistée d'une partie des griefs précédemment formulés et a limité son recours au défaut de transposition ou à la transposition défaillante des dispositions suivantes de la directive 2004/18: article 1er paragraphe 2, sous b), lu en combinaison avec l'annexe I, article 5, article 9, paragraphes 1, seconde phrase, et 8, sous a), i) et iii), article 23, paragraphe 2, article 30, paragraphes 2 à 4, article 31, paragraphe 1, sous c), article 38, paragraphe 1, article 43, premier alinéa, sous d), article 44, paragraphes 2, deuxième alinéa, 3 et 4, article 46, premier alinéa, article 48, paragraphe 2, sous f), article 55, paragraphes 1, second alinéa, sous d) et e), et 3, article 67, paragraphe 2, deuxième et troisième alinéas, article 68, sous a), premier alinéa, article 72 et article 74, paragraphe 1.

Sur le fond

65 À titre liminaire, il y a lieu de constater que, comme l'a fait observer à juste titre la Commission lors de l'audience, la loi du 24 décembre 1993 et l'arrêté royal du 8 janvier 1996, dont se prévaut principalement le Royaume de Belgique, ont été adoptés afin de transposer non pas la directive 2004/18, mais les directives régissant précédemment les procédures de passation de marchés publics, à savoir les directives 92/50, 93/36 et 93/37.

66 Or, la directive 2004/18, qui, ainsi qu'il ressort de son premier considérant, modifie ces procédures afin de répondre aux exigences de simplification et de modernisation formulées par les pouvoirs adjudicateurs et par les opérateurs économiques, présente d'importantes différences par rapport aux directives qu'elle a remplacées, de sorte que la législation nationale ayant transposé ces dernières ne saurait, a priori, refléter les nouvelles dispositions et précisions insérées par le législateur communautaire dans la directive 2004/18.

67 Néanmoins, afin d'examiner le bien-fondé des griefs formulés par la Commission, il convient de procéder à une comparaison des dispositions de la directive 2004/18 avec les mesures législatives, réglementaires et administratives nationales par lesquelles le Royaume de Belgique estime avoir transposé celle-ci.

68 À cet égard, il y a lieu de rappeler, en premier lieu, que, selon une jurisprudence constante, chacun des États membres destinataires d'une directive a l'obligation de prendre, dans son ordre juridique national, toutes les mesures nécessaires en vue d'assurer le plein effet de cette directive, conformément à l'objectif qu'elle poursuit (voir, notamment, arrêts du 26 juin 2003, Commission/France, C–233/00, Rec. p. I–6625, point 75, et du 30 novembre 2006, Commission/Luxembourg, C–32/05, Rec. p. I–11323, point 32).

69 En second lieu, la transposition en droit interne d'une directive n'exige pas nécessairement une

reprise formelle et textuelle des dispositions de celle-ci dans une disposition légale expresse et spécifique, et peut, en fonction de son contenu, se satisfaire d'un contexte juridique général, dès lors que celui-ci assure effectivement la pleine application de cette directive d'une manière suffisamment claire et précise (voir en ce sens, notamment, arrêt du 20 octobre 2005, Commission/Royaume-Uni, C-6/04, Rec. p. I-9017, points 21 et 24, ainsi que du 24 juin 2008, Commission/Luxembourg, C-272/07, point 10).

70 Toutefois, la Cour a itérativement jugé que les dispositions d'une directive doivent être mises en œuvre avec la précision et la clarté requises afin de satisfaire pleinement à l'exigence de sécurité juridique (voir, en ce sens, arrêts précités Commission/Royaume-Uni, point 27, et du 24 juin 2008, Commission/Luxembourg, point 11).

71 C'est à la lumière de ces considérations qu'il convient d'examiner les différents griefs soulevés par la Commission.

Sur le grief tiré d'une transposition défaillante de l'article 1er, paragraphe 2, sous b), de la directive 2004/18 lu en combinaison avec l'annexe I de celle-ci

– Arguments des parties

72 Selon la Commission, la législation belge n'est pas conforme à l'article 1er, paragraphe 2, sous b), de la directive 2004/18, dans la mesure où l'annexe I de celle-ci, à laquelle renvoie cette disposition, n'est pas transposée en droit belge. En particulier, les références aux codes NACE figurant à l'annexe 1 de la loi du 24 décembre 1993 n'auraient pas été adaptées à celles figurant à l'annexe I de ladite directive.

73 Le Royaume de Belgique, tout en reconnaissant que les codes NACE tels que mentionnés à l'annexe I de la directive 2004/18 n'ont pas été repris dans la législation belge, considère que la notion de marché public de travaux recouvre en droit belge celle consacrée par ladite directive.

– Appréciation de la Cour

74 L'article 1er, paragraphe 2, sous b), de la directive 2004/18 définit la notion de «marchés publics de travaux» comme visant des marchés publics ayant pour objet soit l'exécution, soit conjointement la conception et l'exécution de travaux relatifs à une des activités mentionnées à l'annexe I de cette directive ou d'un ouvrage, soit la réalisation par quelque moyen que ce soit d'un ouvrage répondant aux besoins précisés par le pouvoir adjudicateur.

75 Il résulte de cette définition, lue en combinaison avec le dixième considérant de la directive 2004/18, qu'un contrat ne saurait être considéré comme un marché de travaux que si son objet concerne spécifiquement des activités visées à l'annexe I de cette directive (voir par analogie, s'agissant de la directive 93/37, arrêt du 21 février 2008, Commission/Italie, C-412/04, Rec. p. I-619, point 46).

76 Ladite annexe I a ainsi une fonction importante en ce qu'elle constitue la base sur laquelle il est possible de constater qu'un marché donné relève de la notion de «travaux» visée à l'article 1er, paragraphe 2, sous b), de la directive 2004/18.

77 Il s'ensuit qu'un État membre ne peut assurer une transposition correcte de cette disposition en se référant, dans sa législation, à une ancienne version de la NACE qui se distingue sensiblement de la version à laquelle se réfère la directive 2004/18.

78 En outre, il convient de préciser que le fait, souligné par l'État membre défendeur, que la version de la NACE à laquelle se réfère l'annexe I de cette directive a été modifiée après l'expiration du délai fixé à l'article 80 de cette dernière n'implique aucunement que les États membres sont libres de déterminer unilatéralement la définition de la notion communautaire de marchés de travaux.

79 Enfin, il y a lieu de relever que la loi du 15 juin 2006, communiquée par le Royaume de Belgique à la Commission en tant que transposition de la directive 2004/18, mais dont les dispositions substantielles ne sont pas entrées en vigueur, reprend, à son annexe 1, les codes NACE tels qu'ils figurent à l'annexe I de cette directive.

80 Dans ces conditions, ce grief de la Commission est fondé.

Sur le grief tiré d'une transposition défaillante de l'article 5 de la directive 2004/18

– Arguments des parties

81 Selon la Commission, les accords conclus au sein de l'Organisation mondiale du commerce (OMC) sont susceptibles, dans certaines circonstances, de conférer plus de droits aux opérateurs issus de pays tiers parties à ces accords que ne le fait la directive 2004/18 en ce qui concerne ceux des États membres. Partant, il serait indispensable de transposer l'article 5 de ladite directive en droit interne, ce que ne feraient pas les dispositions nationales invoquées par le Royaume de Belgique.

82 Cet État membre considère toutefois que les articles 16, dernier alinéa, 24, 42, dernier alinéa, 50, 68, dernier alinéa, et 79 de l'arrêté royal du 8 janvier 1996 procèdent à la transposition de l'article 5 de la directive 2004/18.

– Appréciation de la Cour

83 Conformément au dernier alinéa des articles 16, 42 et 68 de l'arrêté royal du 8 janvier 1996, les entreprises issues des États membres de la Communauté et, «selon les dispositions et conditions de l'acte international les concernant», celles issues des pays tiers parties aux accords conclus au sein de l'OMC doivent être traitées dans les mêmes conditions que les entreprises belges.

84 Partant, en prévoyant une égalité de traitement entre ces différents opérateurs économiques, la législation belge prescrit nécessairement que les entreprises issues des pays tiers parties aux accords conclus au sein de l'OMC ne peuvent disposer de conditions plus avantageuses que les entreprises issues des États membres.

85 Dans ces conditions, ce grief de la Commission n'est pas fondé.

Sur le grief tiré d'une transposition défaillante de l'article 9, paragraphe 1, seconde phrase, de la directive 2004/18

– Arguments des parties

86 Selon la Commission, en l'état actuel de la législation nationale invoquée par le Royaume de Belgique, s'agissant d'un marché public de fournitures, les reconductions éventuelles ne doivent pas être prises en compte pour le calcul de la valeur estimée d'un tel marché contrairement à ce que prévoit l'article 9, paragraphe 1, seconde phrase, de la directive 2004/18.

87 Le Royaume de Belgique considère que la notion de «reconduction» est recouverte par celle de «contrats successifs» telle qu'elle résulte de l'article 28, deuxième alinéa, de l'arrêté royal du 8 janvier 1996. Cet État membre invoque en outre les articles 2 et 54 de cet arrêté royal.

– Appréciation de la Cour

88 D'une part, s'agissant des dispositions invoquées par le Royaume de Belgique, il convient de constater que seul l'article 28 se rapporte aux marchés publics de fournitures. Toutefois, aucun alinéa de cet article ne vise expressément, s'agissant des méthodes de calcul de la valeur estimée de ces marchés publics, les reconductions de contrat.

89 D'autre part, contrairement à ce qu'affirme le Royaume de Belgique, il ne saurait être admis que les notions de contrats successifs et de reconduction de contrats se confondent, ni même que la première recouvre la seconde. Il convient d'ailleurs de relever que l' article 37, paragraphe 2, de la loi du 15 juin 2006 est consacré à la notion de reconduction de contrat.

90 Or, les éléments, énoncés notamment à l'article 9 de la directive 2004/18, qui entrent dans l'évaluation du montant d'un marché public sont d'autant plus importants que ce montant conditionne l'application des règles contraignantes de passation des marchés publics édictées par cette directive. Dès lors, le renvoi en droit national à la notion de contrats successifs, qui, a priori, ne correspond pas forcément à celle de reconduction de contrat, n'instaure pas une situation juridique suffisamment précise et claire, et ne constitue par conséquent pas une transposition

appropriée de la disposition de cette directive visée dans le présent grief.

91 Dans ces conditions, ce grief de la Commission est fondé.

Sur les griefs tirés d'une transposition défaillante de l'article 9, paragraphe 8, sous a), i) et iii), de la directive 2004/18

– Arguments des parties

92 La Commission considère que les dispositions de droit national invoquées par le Royaume de Belgique ne couvrent pas l'ensemble des éventualités prévues au point a) de l'article 9, paragraphe 8, de la directive 2004/18.

93 Pour le Royaume de Belgique, l'article 54, premier alinéa, de l'arrêté royal du 8 janvier 1996 établit le principe de la prise en compte de la rémunération totale pour estimer le montant d'un marché, tandis que le deuxième alinéa de cet article, qui est incriminé par la Commission, n'a qu'une valeur illustrative.

– Appréciation de la Cour

94 Il convient de préciser que l'article 54, deuxième alinéa, de l'arrêté royal du 8 janvier 1996 a été adopté afin de transposer l'article 7, paragraphe 4, de la directive 92/50, qui limitait la prise en compte des «autres modes de rémunérations» au type de services couvert par le deuxième tiret de cette dernière disposition, à savoir les services bancaires, désormais repris à l'article 9, paragraphe 8, sous a), ii), de la directive 2004/18.

95 Le législateur communautaire ayant jugé utile de préciser dans la directive 2004/18 non seulement pour les services bancaires, mais également pour les types de services visés aux points i) et iii) de son article 9, paragraphe 8, sous a), que le montant estimé du marché public doit prendre en compte les «autres modes de rémunérations», le législateur national doit assurer une transposition précise desdites dispositions de cette directive, notamment pour prévenir le risque d'une interprétation a contrario de l'article 54, deuxième alinéa, 2°, de l'arrêté royal du 8 janvier 1996.

96 Or, la présence d'un rappel général à l'article 54, premier alinéa, de cet arrêté royal, selon lequel le montant estimé des marchés de services inclut la rémunération totale du prestataire de services, ne permet pas d'écarter un tel risque et n'offre dès lors pas la sécurité juridique requise en ce qui concerne les règles spécifiques d'estimation de la valeur d'un marché public prévues à l'article 9, paragraphe 8, sous a), i) et iii), de la directive 2004/18.

97 Dans ces conditions, ces griefs de la Commission sont fondés.

Sur le grief tiré du défaut de transposition de l'article 23, paragraphe 2, de la directive 2004/18

– Arguments des parties

98 Le Royaume de Belgique renvoie, pour la transposition de l'article 23, paragraphe 2, de la directive 2004/18, aux articles 23 et 25 de l'arrêté royal du 23 novembre 2007.

99 La Commission considère que ces dispositions nationales ont été adoptées tardivement.

– Appréciation de la Cour

100 Il convient de rappeler que l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre telle qu'elle se présentait au terme du délai fixé dans l'avis motivé (voir, notamment, arrêts du 6 décembre 2007, Commission/Allemagne, C–258/05, Rec. p. I–10517, point 15, et du 24 juin 2008, Commission/Luxembourg, précité, point 15).

101 Or, en l'espèce, il est constant que l'arrêté royal du 23 novembre 2007 auquel se réfère le Royaume de Belgique a été adopté après l'expiration du délai fixé dans l'avis motivé.

102 Dans ces conditions, ce grief de la Commission est fondé.

Sur les griefs tirés d'une transposition défaillante de l'article 30, paragraphes 2 et 3, de la directive 2004/18

– Arguments des parties

103 Dans le cadre de ces griefs, la Commission fait valoir que la transposition en droit national de l'article 30, paragraphes 2 et 3, de la directive 2004/18, qui n'aurait pas été réalisée en droit belge, revêt une importance toute particulière, du fait que ces dispositions se rapportent à la procédure négociée de passation de marché public.

104 Pour le Royaume de Belgique, lesdites dispositions ne constituent toutefois que le rappel général de la notion de procédure négociée et du principe d'égalité de traitement, et ne nécessitent par conséquent pas de mesures de transposition spécifiques.

– Appréciation de la Cour

105 Il convient de rappeler que la directive 2004/18 prévoit quatre procédures principales pour la passation de marchés publics. L'une d'entre elles est la procédure négociée, dont les modalités sont précisées aux articles 30 et 31 de cette directive.

106 Cette procédure, à laquelle il ne peut être recouru que dans des circonstances limitativement mentionnées par ladite directive, revêt, par rapport aux procédures ouverte et restreinte, un caractère exceptionnel (voir par analogie, s'agissant des directives 93/36 et 93/37, arrêt du 13 janvier 2005, Commission/Espagne, C–84/03, Rec. p. I–139, point 47). En effet, elle reconnaît aux pouvoirs adjudicateurs une marge d'appréciation plus grande que dans le cadre de ces deux dernières procédures.

107 Dans ce contexte, ainsi que l'a souligné la Commission, l'article 30, paragraphe 2, de la directive 2004/18 a pour effet de restreindre cette marge de manœuvre en énonçant que la négociation, qui est l'élément déterminant de la procédure de passation de marché public concernée, vise exclusivement à adapter les offres soumises aux exigences prévues dans l'avis de marché, dans le cahier des charges et dans les documents complémentaires éventuels, dans le but de rechercher la meilleure offre. Dès lors, cette disposition identifie l'objet ainsi que le but de la négociation dans le cadre de la procédure négociée.

108 En outre, l'article 30, paragraphe 3, de la directive 2004/18 impose aux pouvoirs adjudicateurs d'assurer l'égalité de traitement de tous les soumissionnaires durant la phase de négociation.

109 À ce titre, il est de jurisprudence constante que le respect du principe d'égalité de traitement s'impose aux pouvoirs adjudicateurs dans toute procédure de passation de marché public. Un tel devoir correspond à l'essence même de la directive 2004/18 (voir par analogie, s'agissant de la directive 93/37, arrêt du 16 décembre 2008, Michaniki, C–213/07, non encore publié au Recueil, points 44 et 45).

110 Dès lors, eu égard aux spécificités de la procédure négociée et à l'importance du principe d'égalité de traitement dans le domaine des procédures de passation de marché public, le Royaume de Belgique ne saurait alléguer utilement que les dispositions de l'article 30, paragraphes 2 et 3, de la directive 2004/18 sont superfétatoires, de sorte qu'elles ne nécessiteraient pas de mesure de transposition spécifique. En effet, la définition des limites et de l'objectif de la négociation ainsi que l'obligation faite aux pouvoirs adjudicateurs d'assurer le respect du principe d'égalité de traitement des soumissionnaires revêtent une importance toute particulière dans le cadre de la procédure négociée qui justifie une transposition spécifique de ces éléments en droit national.

111 Tel est, au demeurant, l'objet de l'article 26, § 3, de la loi du 15 juin 2006, qui n'est cependant pas entré en vigueur, qui reprend littéralement le texte de l'article 30, paragraphe 3, de la directive 2004/18.

112 Dans ces conditions, ces griefs de la Commission sont fondés.

Sur le grief tiré d'une transposition défaillante de l'article 30, paragraphe 4, de la directive 2004/18

– Arguments des parties

113 La Commission reproche au Royaume de Belgique de ne pas avoir transposé les conditions visées à l'article 30, paragraphe 4, de la directive 2004/18, à savoir, d'une part, l'obligation de mentionner dans l'avis de marché ou le cahier des charges la faculté de procéder en phases successives et, d'autre part, la réduction du nombre d'offres au cours de ces phases par application des critères d'attribution indiqués dans l'un ou l'autre de ces documents.

114 Le Royaume de Belgique considère que le modèle type d'avis de marché contenu à l'annexe 2, B, de l'arrêté royal du 8 janvier 1996, et plus particulièrement la rubrique IV.1.3 de ce modèle, répond au premier des reproches de la Commission. Pour le surplus, cet État membre soutient que les conditions rappelées à l'article 30, paragraphe 4, de la directive 2004/18 sont inhérentes à la notion de marché négocié en droit belge, ainsi qu'en attesterait l'article 122 bis du même arrêté royal.

– Appréciation de la Cour

115 Il convient de constater, premièrement, que le modèle type d'avis de marché figurant à l'annexe 2, B, de l'arrêté royal du 8 janvier 1996 contient, dans la rubrique IV.1.3, un espace dans lequel le pouvoir adjudicateur doit mentionner si la procédure négociée se déroulera en phases successives durant lesquelles le nombre des offres à négocier sera progressivement réduit. Partant, il y a lieu de rejeter le présent grief en tant qu'il se rapporte à cet aspect de l'article 30, paragraphe 4, de la directive 2004/18.

116 Deuxièmement, s'agissant de l'obligation prévue par cette disposition à l'égard du pouvoir adjudicateur quant à l'application des critères d'attribution indiqués dans l'avis de marché ou le cahier des charges en cas de réduction du nombre d'offres au cours des phases successives, force est de constater qu'aucune des dispositions invoquées par le Royaume de Belgique n'impose une telle obligation. Pourtant, eu égard aux spécificités de la procédure négociée en phases successives, qui amène un pouvoir adjudicateur à procéder en plusieurs étapes à la sélection des offres, il est fondamental de rappeler à chaque étape les critères d'attribution qui lient ledit pouvoir.

117 Dans cette mesure, ce grief de la Commission est fondé.

Sur le grief tiré d'une transposition défaillante de l'article 31, paragraphe 1, sous c), de la directive 2004/18

– Arguments des parties

118 La Commission considère que l'article 31, paragraphe 1, sous c), de la directive 2004/18 n'a fait l'objet d'aucune transposition en droit belge.

119 Le Royaume de Belgique invoque pour sa part six arrêts du Conseil d'État (Belgique) qui consacreraient, en ce qui concerne le recours à la procédure négociée, la condition visée par cette disposition et ôteraient dès lors toute nécessité de transposition au travers d'un texte national spécifique.

– Appréciation de la Cour

120 Selon une jurisprudence constante, s'il est vrai que la transposition d'une directive n'exige pas nécessairement une action législative de chaque État membre, il est toutefois indispensable que le droit national en cause garantisse effectivement la pleine application de la directive concernée, que la situation juridique découlant de ce droit soit suffisamment précise et claire, et que les bénéficiaires soient mis en mesure de connaître la plénitude de leurs droits et obligations, et, le cas échéant, de s'en prévaloir devant les juridictions nationales (arrêt du 9 septembre 2004, Commission/Espagne, C–70/03, Rec. p. I–7999, point 15 et jurisprudence citée).

121 En l'espèce, il y a lieu de préciser, à titre liminaire, que, des six arrêts du Conseil d'État invoqués par l'État membre défendeur, un seul reprend expressément la condition visée à l'article 31, paragraphe 1, sous c), de la directive 2004/18.

122 En outre, ainsi que la Cour l'a déjà jugé, une jurisprudence, à la supposer établie, interprétant des dispositions de droit interne dans un sens estimé conforme aux exigences d'une directive ne saurait présenter la clarté et la précision requises pour satisfaire à l'exigence de sécurité juridique (voir arrêt du 10 mai 2001, Commission/Pays-Bas, C–144/99, Rec. p. I–3541, point 21).

123 Il convient d'ailleurs de relever que le législateur belge a estimé nécessaire de transposer littéralement l'article 31, paragraphe 1, sous c), de la directive 2004/18 à l'article 26, § 1, sous c), de la loi du 15 juin 2006, qui n'est cependant pas entré en vigueur.

124 Dans ces conditions, ce grief de la Commission est fondé.

Sur le grief tiré du défaut de transposition de l'article 38, paragraphe 1, de la directive 2004/18

– Arguments des parties

125 Selon la Commission, la législation belge ne contient pas de disposition conforme à l'article 38, paragraphe 1, de la directive 2004/18, permettant une prolongation des délais de réception des demandes de participation et des offres en raison de la complexité du marché envisagé.

126 Le Royaume de Belgique invoque les articles 7, premier alinéa, 33, premier alinéa, et 59, premier alinéa, de l'arrêté royal du 8 janvier 1996 pour affirmer la transposition dudit article 38, paragraphe 1.

– Appréciation de la Cour

127 L'article 38, paragraphe 1, de la directive 2004/18 prévoit l'obligation pour les pouvoirs adjudicateurs de tenir compte, d'une manière générale, pour la fixation des délais concernés, de la complexité du marché et du temps nécessaire pour préparer les offres. À cet égard, cette disposition a remplacé l'article 18, paragraphe 5, de la directive 92/50, qui instaurait une prolongation des délais eu égard à l'importance de la documentation liée à un marché, à la nécessité d'une visite des lieux ou à la consultation sur place de documents annexés au cahier des charges.

128 Or, les dispositions nationales invoquées par le Royaume de Belgique reprennent la disposition de la directive 92/50, sans intégrer la portée générale qu'a introduite le législateur communautaire à l'article 38, paragraphe 1, de la directive 2004/18. En effet, lesdites dispositions nationales prévoient seulement trois cas spécifiques de prolongation des délais de réception, dont ne fait pas partie l'hypothèse de la complexité du marché.

129 Dans ces conditions, ce grief de la Commission est fondé.

Sur le grief tiré du défaut de transposition de l'article 43, premier alinéa, sous d), de la directive 2004/18

– Arguments des parties

130 La Commission soutient que la législation belge ne comporte pas un élément fondamental parmi ceux devant apparaître dans les procès-verbaux visés à l'article 43 de la directive 2004/18, à savoir les motifs du rejet des offres jugées anormalement basses, mentionnés au premier alinéa, sous d), de cet article.

131 S'appuyant sur les articles 9, 35 et 61 de l'arrêté royal du 8 janvier 1996, le Royaume de Belgique considère que cette disposition a été transposée en droit national.

– Appréciation de la Cour

132 Force est de constater qu'aucune des dispositions invoquées par le Royaume de Belgique ne permet de considérer qu'un pouvoir adjudicateur rejetant une offre anormalement basse est contraint de mentionner dans le procès-verbal le motif pour lequel cette offre a été jugée telle.

133 En effet, lesdites dispositions indiquent que le caractère anormalement bas d'une offre est susceptible de constituer en lui-même une motivation suffisante pour rejeter celle-ci.

134 Or, l'article 43, premier alinéa, sous d), de la directive 2004/18 requiert une motivation plus détaillée d'une telle décision de rejet. Ce faisant, le législateur communautaire a entendu limiter le pouvoir d'appréciation des pouvoirs adjudicateurs en ce qui concerne de telles décisions eu égard à l'objectif de transparence que cette directive vise à atteindre, ainsi qu'il ressort de son deuxième considérant.

135 Dans ces conditions, ce grief de la Commission est fondé.

Sur le grief tiré du défaut de transposition de l'article 44, paragraphe 2, deuxième alinéa, de la directive 2004/18

– Arguments des parties

136 La Commission considère qu'aucune disposition de droit belge ne prévoit que l'étendue des informations demandées en ce qui concerne les capacités économiques, financières, techniques et professionnelles ainsi que les niveaux de capacité exigés pour un marché déterminé soient liés et proportionnés à l'objet de celui-ci, conformément à l'article 44, paragraphe 2, deuxième alinéa, de la directive 2004/18.

137 Le Royaume de Belgique fait valoir que cette disposition est transposée par les articles 18, 19, 44, 45, 70 et 71 de l'arrêté royal du 8 janvier 1996 ainsi que par l'annexe 2, B, de cet arrêté royal, eu égard en particulier aux rubriques III.2.2 et III.2.3 du modèle type d'avis de marché constituant cette annexe.

– Appréciation de la Cour

138 Il convient de noter que les dispositions de l'arrêté royal du 8 janvier 1996 invoquées par le Royaume de Belgique concernent les modalités de justification des capacités financière et économique des soumissionnaires. Les rubriques du modèle type d'avis de marché constituant l'annexe 2, B, de cet arrêté royal, mentionnées par cet État membre, renvoient, quant à elle, aux modes d'appréciation des capacités économique, financière et technique.

139 Dès lors, force est de constater que, en droit belge, rien n'oblige un pouvoir adjudicateur à mettre l'étendue et la pertinence des informations demandées en rapport avec l'objet du marché.

140 Or, cette exigence, telle que prévue à l'article 44, paragraphe 2, de la directive 2004/18, revêt une importance toute particulière, puisque, au travers des informations à fournir, c'est la faculté même de participer à une procédure de passation qui est appréciée.

141 Dans ces conditions, ce grief de la Commission est fondé.

Sur les griefs tirés d'une transposition défaillante de l'article 44, paragraphes 3 et 4, de la directive 2004/18

– Arguments des parties

142 La Commission fait valoir que l'article 44, paragraphes 3 et 4, de la directive 2004/18 n'a pas été transposé de façon satisfaisante par le Royaume de Belgique. D'une part, la législation belge n'imposerait aux pouvoirs adjudicateurs ni d'indiquer dans les avis de marché les critères objectifs et non discriminatoires qu'ils envisagent d'utiliser pour réduire le nombre de candidats ni de ne réduire le nombre d'offres que sur le fondement de ces critères. D'autre part, aucune disposition de cette législation ne prévoirait que le nombre réduit d'offres retenues doit permettre d'assurer une concurrence réelle.

143 Le Royaume de Belgique invoque les articles 16, 18, 19, 42, 44, 45, 68, 70 et 71 de l'arrêté royal du 8 janvier 1996 ainsi que certaines rubriques du modèle type d'avis de marché constituant l'annexe 2, B, de cet arrêté royal.

– Appréciation de la Cour

144 Parmi les dispositions invoquées par le Royaume de Belgique au titre de la transposition de l'article 44, paragraphes 3 et 4, de la directive 2004/18, l'annexe 2, B, de l'arrêté royal du 8 janvier 1996, et plus particulièrement la rubrique IV.1.2 du modèle type d'avis de marché constituant cette annexe, conduit le pouvoir adjudicateur à indiquer les critères objectifs de sélection des candidats qu'il doit appliquer.

145 Toutefois, lesdites dispositions ne contiennent aucune restriction de la marge de manœuvre des pouvoirs adjudicateurs liée à l'impératif que le nombre de candidats finalement retenu permette

d'assurer une concurrence réelle. Or, ainsi qu'il ressort des deuxième et quarante-sixième considérants de la directive 2004/18, la garantie de conditions de concurrence effective en matière de marchés publics est un objectif fondamental de cette directive. Le rappel de cette exigence est d'autant plus nécessaire que la phase préalable de sélection des offres ne saurait conduire à ce que le nombre de candidats finalement retenus soit si réduit qu'aucune concurrence effective ne soit possible.

146 Dans cette mesure, ces griefs de la Commission sont fondés.

Sur le grief tiré d'un défaut de transposition de l'article 46, premier alinéa, de la directive 2004/18

– Arguments des parties

147 Selon la Commission, la législation belge ne prévoit pas, contrairement à l'article 46, premier alinéa, de la directive 2004/18, qu'un entrepreneur puisse justifier de son habilitation à exercer l'activité professionnelle concernée par la présentation d'une déclaration sous serment ou d'un certificat conformes aux précisions contenues dans les annexes IX A à IX C de cette directive, lesquelles ne seraient, en outre, pas transposées dans cette législation.

148 Le Royaume de Belgique considère que ledit article 46, premier alinéa, est transposé par les articles 20, § 2, 46, § 2, et 72, § 2, de l'arrêté royal du 8 janvier 1996. S'agissant desdites annexes IX A à IX C, celles-ci ne nécessiteraient pas d'être transposées, dans la mesure où elles ne seraient ni complètes ni actualisées.

– Appréciation de la Cour

149 Il convient de relever que, d'une part, s'agissant des moyens permettant à un opérateur économique de justifier de son habilitation à exercer l'activité professionnelle concernée, les dispositions nationales invoquées par le Royaume de Belgique sont plus restrictives que l'article 46, premier alinéa, de la directive 2004/18, puisqu'elles ne permettent pas qu'une telle justification soit fournie au moyen d'une déclaration sous serment ou d'un certificat.

150 Or, les dispositions communautaires en matière de procédures de passation de marchés publics visent à ouvrir les marchés auxquels elles s'appliquent à la concurrence communautaire, en favorisant la manifestation d'intérêt la plus large possible parmi les opérateurs économiques (voir, en ce sens, s'agissant de la directive 93/38, arrêt du 5 octobre 2000, Commission/France, C–16/98, Rec. p. I–8315, point 108), de sorte qu'un opérateur économique ne saurait être dissuadé de participer à une telle procédure en raison du caractère limité des moyens à sa disposition pour justifier de son habilitation.

151 D'autre part, s'agissant des annexes IX A à IX C de la directive 2004/18, auxquelles se réfère son article 46, le Royaume de Belgique ne saurait exciper de ce que, à la date d'expiration du délai fixé dans l'avis motivé, celles-ci ne concernaient que quinze États membres pour justifier une absence de transposition de ces annexes en droit belge. En effet, le caractère contraignant des dispositions desdites annexes est indépendant du fait que le législateur communautaire n'a pas donné d'indications en ce qui concerne les autres États membres.

152 Dans ces conditions, ce grief de la Commission est fondé.

Sur le grief tiré d'un défaut de transposition de l'article 48, paragraphe 2, sous f), de la directive 2004/18

– Arguments des parties

153 Le Royaume de Belgique renvoie, pour la transposition de l'article 48, paragraphe 2, sous f), de la directive 2004/18, aux articles 12 et 16 de l'arrêté royal du 23 novembre 2007.

154 La Commission considère que ces dispositions nationales ont été adoptées tardivement.

– Appréciation de la Cour

155 Il y a lieu de rappeler que, selon la jurisprudence exposée au point 100du présent arrêt, l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre telle qu'elle se

présentait au terme du délai fixé dans l'avis motivé.

156 Dès lors qu'il est constant que l'arrêté royal du 23 novembre 2007 a été adopté après l'expiration de ce délai, ce grief de la Commission est fondé.

Sur le grief tiré d'un défaut de transposition de l'article 55, paragraphe 1, second alinéa, sous d), de la directive 2004/18

– Arguments des parties

157 Selon la Commission, la législation belge ne mentionne pas une des catégories de précisions sur la composition de l'offre que l'article 55, paragraphe 1, second alinéa, prévoit que le pouvoir adjudicateur peut demander au soumissionnaire ayant présenté une offre apparaissant anormalement basse, à savoir celle relative au respect des dispositions concernant la protection du travail et les conditions de travail en vigueur au lieu où la prestation est à réaliser, figurant au point d) de cette disposition.

158 Le Royaume de Belgique considère que l'article 55, paragraphe 1, second alinéa, de la directive 2004/18 consiste dans une liste exemplative qui ne nécessite pas de mesure de transposition.

– Appréciation de la Cour

159 Il convient d'observer que, premièrement, si la liste contenue à l'article 55, paragraphe 1, second alinéa, de la directive 2004/18 n'est pas exhaustive, elle n'est toutefois pas purement indicative, et ne laisse donc pas les pouvoirs adjudicateurs libres de déterminer quels sont les éléments pertinents à prendre en considération avant d'écarter une offre apparaissant anormalement basse.

160 Deuxièmement, l'article 110, § 3, troisième alinéa, de l'arrêté royal du 8 janvier 1996 transpose seulement les cas de figures visés aux points a) à c) de l'article 55, paragraphe 1, second alinéa, de la directive 2004/18. Ce faisant, il a été adopté afin d'assurer la transposition de l'article 37, deuxième alinéa, de la directive 92/50, dont le contenu a précisément été complété par l'article 55, paragraphe 1, second alinéa, sous d), de la directive 2004/18.

161 Le législateur communautaire ayant estimé utile de mentionner dans cette dernière disposition une précision supplémentaire et, ainsi, de limiter davantage la marge de manœuvre des pouvoirs adjudicateurs en ce qui concerne le rejet d'une offre anormalement basse, le législateur national a l'obligation d'assurer une transposition de ce point.

162 Or, la législation nationale invoquée par le Royaume de Belgique n'assure pas cette transposition.

163 Dans ces conditions, ce grief de la Commission est fondé.

Sur les griefs tirés du défaut de transposition de l'article 55, paragraphes 1, second alinéa, sous e), et 3, de la directive 2004/18

– Arguments des parties

164 Par ces griefs, qu'il convient d'examiner conjointement, la Commission fait valoir que la législation belge ne contenait, à l'expiration du délai prescrit dans l'avis motivé, aucune disposition opérant la transposition de l'article 55, paragraphes 1, second alinéa, sous e), et 3, de la directive 2004/18.

165 Le Royaume de Belgique invoque à cet égard l'article 26 de l'arrêté royal du 23 novembre 2007.

– Appréciation de la Cour

166 Ainsi qu'il a été rappelé aux points 100 et 155 du présent arrêt, l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre telle qu'elle se présentait au terme du délai fixé dans l'avis motivé.

167 Or, il est constant que l'arrêté royal du 23 novembre 2007 a été adopté après l'expiration dudit délai.

168 Dans ces conditions, ces griefs de la Commission sont fondés.

Sur les griefs tirés d'un défaut de transposition de l'article 67, paragraphe 2, deuxième et troisième alinéas, de la directive 2004/18

– Arguments des parties

169 Par ces griefs, la Commission soutient que l'article 67, paragraphe 2, deuxième et troisième alinéas, de la directive 2004/18 n'est pas transposé en droit belge. En effet, d'une part, la législation belge ne prévoirait pas que, pour fixer le seuil à prendre en considération en cas de concours organisé dans le cadre d'une procédure de passation d'un marché public de services, la valeur estimée de ce marché doit inclure les éventuelles primes de participation et/ou paiements aux participants. D'autre part, cette législation n'envisagerait pas non plus que, pour fixer le seuil à prendre en considération en cas de concours avec primes de participation et/ou paiements aux participants, il y a lieu d'ajouter au montant total de ces primes et paiements la valeur du marché public de services qui pourrait être passé ultérieurement.

170 Le Royaume de Belgique considère que les dispositions de la directive 2004/18 visées par le présent grief ont été transposées en droit national par l'article 76, § 2, de l'arrêté royal du 8 janvier 1996 ainsi que par l'annexe 3, A, du même arrêté royal.

– Appréciation de la Cour

171 Il convient de constater, d'une part, que, alors que l'article 67, paragraphe 2, de la directive 2004/18 vise à définir le champ d'application des règles relatives aux concours dans le domaine des services, l'article 76, § 2, de l'arrêté royal du 8 janvier 1996 détermine les cas dans lesquels un avis de concours doit être publié au *Journal officiel des Communautés européennes*. Partant, cette disposition nationale, n'ayant pas le même objet que ledit article 67, paragraphe 2, ne saurait valoir transposition adéquate de ce dernier.

172 D'autre part, le modèle type d'avis constituant l'annexe 3, A, de l'arrêté royal du 8 janvier 1996 comporte certes une rubrique IV.5.3 qui permet au pouvoir adjudicateur d'indiquer si le soumissionnaire retenu se verra attribuer un contrat de services à la suite du concours principal. Il ne résulte toutefois pas de cette annexe que la valeur estimée de ce contrat doit être prise en compte pour déterminer le seuil du marché public concerné.

173 Dans ces conditions, ces griefs de la Commission sont fondés.

Sur le grief tiré d'un défaut de transposition de l'article 68, sous a), premier alinéa, de la directive 2004/18

– Arguments des parties

174 La Commission souligne la nécessité de prévoir, conformément à l'article 68, sous a), premier alinéa, de la directive 2004/18, que sont exclus du champ d'application de cette directive les concours de services au sens de la directive 2004/17. En effet, en l'absence d'une telle règle, un même marché public serait susceptible d'être soumis cumulativement aux règles de ces deux directives. Or, la législation belge ne comporterait aucune disposition ayant cette portée.

175 Le Royaume de Belgique considère que la transposition dudit article 68, sous a), premier alinéa, n'est pas nécessaire, tout risque d'application cumulative des directives susmentionnées étant écarté par la structure de la législation belge, telle qu'articulée par la loi du 24 décembre 1993, organisée en deux livres.

– Appréciation de la Cour

176 Le Royaume de Belgique se contente de renvoyer à la structure de la législation nationale pour alléguer l'absence de nécessité de transposer spécifiquement l'article 68 de la directive 2004/18.

177 Force est toutefois de constater qu'il n'a pas démontré concrètement en quoi la structure de la législation belge permettrait d'éviter tout risque de confusion dans l'application des règles issues des directives 2004/17 et 2004/18. Or, ces dernières comportant des régimes juridiques sensiblement différents, il est indispensable d'assurer une transposition spécifique de la disposition écartant tout

risque d'application cumulative desdites directives.

178 Dans ces conditions, ce grief de la Commission est fondé.

Sur les griefs tirés d'un défaut de transposition de l'article 72 de la directive 2004/18

– Arguments des parties

179 Selon la Commission, aucune des dispositions de l'article 72 de la directive 2004/18 n'a été transposée par le Royaume de Belgique. En effet, la législation belge ne comporterait pas de règle en ce qui concerne les critères de sélection des participants à un concours. À tout le moins, cette législation n'édicterait pas que ces critères doivent être clairs et non discriminatoires. En outre, dans les conditions spécifiques relatives à la sélection des concurrents dans le cadre d'un concours dans le domaine des marchés publics de services, ladite législation n'obligerait pas les pouvoirs adjudicateurs à assurer que, au travers du nombre de candidats invités à participer à un tel concours, une concurrence réelle soit garantie.

180 Pour le Royaume de Belgique, les dispositions visées par ces griefs n'évoquent qu'un principe fondamental rappelé aux articles 1er et 20 de la loi du 24 décembre 1993 et ne nécessitent pas de mesure de transposition spécifique. Au demeurant, la rubrique IV.5.4 du modèle type constituant l'annexe 3, A, de l'arrêté royal du 8 janvier 1996 exige du pouvoir adjudicateur qu'il indique le nombre envisagé de participants retenus ou leurs nombres minimal et maximal.

– Appréciation de la Cour

181 Au travers de l'article 72, première phrase, de la directive 2004/18, le législateur communautaire a entendu, dans le cadre spécifique des concours dans le domaine des marchés publics de services et lorsque le nombre des participants est limité, rappeler l'obligation, pour les pouvoirs adjudicateurs, d'établir, pour la sélection des participants, des critères clairs et non discriminatoires.

182 Partant, s'il est vrai que, dans le cadre des concours, cette obligation s'impose généralement, ledit article 72, première phrase, concerne une situation bien définie pour laquelle il est important de rappeler les conditions auxquelles doivent satisfaire les critères de sélection.

183 Dans ce contexte, l'article 72, seconde phrase, de la directive 2004/18 souligne le caractère déterminant du nombre de candidats invités à participer au concours. En effet, une telle disposition vise à éviter que la phase préalable de sélection des candidats ne se confonde in fine avec la phase finale d'attribution du marché et que toute concurrence réelle lors de cette dernière phase disparaisse.

184 À cet égard, l'obligation faite aux pouvoirs adjudicateurs d'indiquer, le cas échéant, le nombre envisagé de participants retenus ou leurs nombres minimal et maximal, telle qu'elle découle de la rubrique IV.5.4 du modèle type constituant l'annexe 3, A, de l'arrêté royal du 8 janvier 1996, ne saurait valoir transposition adéquate de la restriction de la marge de manœuvre desdits pouvoirs à laquelle procède l'article 72, seconde phrase, de la directive 2004/18. Une telle indication n'assure en effet nullement que le nombre de candidats invités soit suffisamment élevé pour assurer une concurrence réelle.

185 Dans ces conditions, ces griefs de la Commission sont fondés.

Sur le grief tiré d'un défaut de transposition de l'article 74, paragraphe 1, de la directive 2004/18

– Arguments des parties

186 Selon la Commission, la législation belge ne prévoit pas que le jury dispose, conformément à l'article 74, paragraphe 1, de la directive 2004/18, d'une autonomie de décision ou d'avis.

187 Le Royaume de Belgique considère que la rubrique IV.5.4 du modèle type d'avis constituant l'annexe 3, A, de l'arrêté royal du 8 janvier 1996 constitue la transposition dudit article 74, paragraphe 1.

– Appréciation de la Cour

188 Force est de constater que la législation invoquée par le Royaume de Belgique en tant que transposition de l'article 74, paragraphe 1, de la directive 2004/18 se rapporte à la qualité des membres du jury et se limite à prévoir que le pouvoir adjudicateur doit mentionner si la décision du jury est contraignante ou non.

189 Dès lors, ladite législation ne garantit pas l'autonomie de décision ou d'avis du jury. Or, en l'absence d'une telle garantie, c'est la raison même de l'intervention du jury qui est susceptible d'être remise en cause.

190 Dans ces conditions, ce grief de la Commission est fondé.

191 Au vu de l'ensemble des considérations qui précèdent, il convient de constater que, en n'ayant pas pris les dispositions législatives, réglementaires et administratives nécessaires pour transposer, ou pour transposer de façon complète et/ou correcte, l'article 1er, paragraphe 2, sous b), lu en combinaison avec l'annexe I, ainsi que l'article 9, paragraphes 1, seconde phrase, et 8, sous a), i) et iii), l'article 23, paragraphe 2, l'article 30, paragraphes 2 à 4, l'article 31, paragraphe 1, sous c), l'article 38, paragraphe 1, l'article 43, premier alinéa, sous d), l'article 44, paragraphes 2, deuxième alinéa, 3 et 4, l'article 46, premier alinéa, l'article 48, paragraphe 2, sous f), l'article 55, paragraphe 1, second alinéa, sous d) et e), et 3, l'article 67, paragraphe 2, deuxième et troisième alinéas, l'article 68, sous a), premier alinéa, l'article 72 et l'article 74, paragraphe 1, de la directive 2004/18, le Royaume de Belgique a manqué aux obligations qui lui incombent en vertu de celle-ci.

192 Il y a lieu de rejeter le recours pour le surplus.

Sur les dépens

193 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation du Royaume de Belgique et celui-ci ayant succombé en l'essentiel de ses moyens, il y a lieu de le condamner aux dépens.

Par ces motifs, la Cour (première chambre) déclare et arrête:

1) En n'ayant pas pris les dispositions législatives, réglementaires et administratives nécessaires pour transposer, ou pour transposer de façon complète et/ou correcte, l'article 1er, paragraphe 2, sous b), lu en combinaison avec l'annexe I, ainsi que l'article 9, paragraphes 1, seconde phrase, et 8, sous a), i) et iii), l'article 23, paragraphe 2, l'article 30, paragraphes 2 à 4, l'article 31, paragraphe 1, sous c), l'article 38, paragraphe 1, l'article 43, premier alinéa, sous d), l'article 44, paragraphes 2, deuxième alinéa, 3 et 4, l'article 46, premier alinéa, l'article 48, paragraphe 2, sous f), l'article 55, paragraphes 1, second alinéa, sous d) et e), et 3, l'article 67, paragraphe 2, deuxième et troisième alinéas, l'article 68, sous a), premier alinéa, l'article 72 et l'article 74, paragraphe 1, de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, telle que modifiée par le règlement (CE) n° 2083/2005 de la Commission, du 19 décembre 2005, le Royaume de Belgique a manqué aux obligations qui lui incombent en vertu de celle-ci.

2) Le recours est rejeté pour le surplus.

3) Le Royaume de Belgique est condamné aux dépens.

Signatures

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* Langue de procédure: le français.

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Documents relating to the same case

Judgment of the Court (First Chamber) of 23 April 2009 – Commission v Belgium

(Case C–292/07)

Failure of a Member State to fulfil obligations – Public procurement – Directive 2004/18/EC – Procedures for the award of public works contracts, public supply contracts and public service contracts – Incorrect or incomplete transposition – Failure to transpose within the prescribed period

1. *Acts of the institutions – Directives – Implementation by Member States (Art. 249, third para., EC; Council Directive 2004/18) (see paras 68-70, 120, 122)*

2. *Actions for failure to fulfil obligations – Examination of the merits by the Court – Situation to be taken into consideration – Situation on expiry of the period laid down in the reasoned opinion (Art. 226 EC) (see paras 100, 155, 166)*

Failure of a Member State to fulfil obligations – Failure to adopt, within the prescribed period, all the measures necessary to comply with Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

e part

The Court:

1. Declares that by failing to adopt the laws, regulations and administrative provisions necessary to transpose or to transpose completely and/or correctly Article 1(2)(b), in conjunction with Annex I; the second sentence of Article 9(1); Article 9(8)(a)(i) and (iii); Article 23(2); Article 30(2) to (4); Article 31(1)(c); Article 38(1); point (d) of the first paragraph of Article 43; the second subparagraph of Article 44(2); Article 44(3) and (4); the first paragraph of Article 46; Article 48(2)(f); points (d) and (e) of the second subparagraph of Article 55(1); Article 55(3); the second and third subparagraphs of Article 67(2); the first paragraph of point (a) of Article 68; Article 72, and Article 74(1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 2083/2005 of 19 December 2005, the Kingdom of Belgium has failed to fulfil its obligations under that directive;

2. Dismisses the action as to the remainder;

3. Orders the Kingdom of Belgium to pay the costs.

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Judgment of the Court (First Chamber) of 23 April 2009 - Commission of the European Communities v Kingdom of Belgium

(Case C-292/07) [1]

(Failure of a Member State to fulfil obligations - Public procurement - Directive 2004/18/EC - Procedures for the award of public works contracts, public supply contracts and public service contracts - Incorrect or incomplete transposition - Failure to transpose within the prescribed period)

Language of the case: French

Parties

Applicant: Commission of the European Communities (represented by: B. Stromsky, D. Kukovec and M. Konstantinidis, acting as Agents)

Defendant: Kingdom of Belgium (represented by: D. Haven and J.-C. Halleux, acting as Agents)

Re:

Failure of a Member State to fulfil obligations - Failure to adopt, within the prescribed period, all the provisions necessary to comply with Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)

Operative part of the judgment

The Court:

1. *Declares that by failing to adopt the laws, regulations and administrative provisions necessary to transpose or to transpose completely and/or correctly Article 1(2)(b) in conjunction with Annex I; the second sentence of Article 9(1); Article 9(8)(a)(i) and (iii); Article 23(2); Article 30(2) to (4); Article 31(1)(c); Article 38(1); point (d) of the first paragraph of Article 43; the second subparagraph of Article 44(2); Article 44(3) and (4); the first paragraph of Article 46; Article 48(2)(f); points (d) and (e) of the second subparagraph of Article 55(1); Article 55(3); the second and third subparagraphs of Article 67(2); the first paragraph of point (a) of Article 68; Article 72, and Article 74(1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 2083/2005 of 19 December 2005, the Kingdom of Belgium has failed to fulfil its obligations under that directive;*

2. *Dismisses the action as to the remainder;*

3. *Orders the Kingdom of Belgium to pay the costs.*

_____

[1] - OJ C 211, 08.09.2007.

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Action brought on 15 June 2007 - Commission of the European Communities v Kingdom of Belgium

(Case C-292/07)

Language of the case: French

Parties

Applicant: Commission of the European Communities (represented by: B. Stromsky and D. Kukovec, acting as Agents)

Defendant: Kingdom of Belgium

Form of order sought

Declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [1] the Kingdom of Belgium has failed to fulfil its obligations under Article 80 of that directive;

In the alternative:

declare that, by failing to notify the Commission of the laws, regulations and administrative provisions necessary to comply with Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, the Kingdom of Belgium has failed to fulfil its obligations under Article 80 of that directive;

order the Kingdom of Belgium to pay the costs.

Pleas in law and main arguments

The period prescribed for transposition of Directive 2004/18/EC expired on 31 January 2006.

_____

[1] - OJ L 134, p. 114.

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JUDGMENT OF THE COURT (First Chamber)

4 June 2009 (*)

(Failure of a Member State to fulfil obligations – Directive 93/38/EEC – Public contracts in the water, energy, transport and telecommunications sectors – Award of a contract without a prior call for competition – Conditions – Communication of the reasons for the rejection of a tender – Time-limits)

In Case C–250/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 24 May 2007,

Commission of the European Communities, represented by M. Patakia and D. Kukovec, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by D. Tsagkaraki, acting as Agent, and V. Christianos, dikigoros, with an address for service in Luxembourg,

defendant,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano, A. Borg Barthet and J.-J. Kasel (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 October 2008,

after hearing the Opinion of the Advocate General at the sitting on 17 December 2008

gives the following

Judgment

1 By its application, the Commission of the European Communities claims that the Court should declare that, by not publishing a prior call for competition and by being unjustifiably late in replying to a tenderer's request for information concerning the reasons for the rejection of its tender, the Hellenic Republic has failed to fulfil (i) its obligation under Article 20(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1; 'Directive 93/38') to issue a call for competition before launching the procedure for the submission of tenders and (ii) its obligation under Article 41(4) of that directive.

Legal context

2 Article 2 of Directive 93/38 provides:

> ‘1. This Directive shall apply to contracting entities which:
>
> (a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;
>
> (b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.
>
> 2. Relevant activities for the purposes of this Directive shall be:
>
> (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:
>
> ...
>
> (ii) electricity;
>
> ...’

3 Under Article 20 of Directive 93/38:

> ‘1. Contracting entities may choose any of the procedures described in Article 1(7), provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21.
>
> 2. Contracting entities may use a procedure without prior call for competition in the following cases:
>
> (a) in the absence of tenders or suitable tenders in response to a procedure with a prior call for competition, provided that the original contract conditions have not been substantially changed;
>
> ...
>
> (d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time-limits laid down for open and restricted procedures cannot be adhered to;
>
> ...’

4 Article 41(4) of Directive 93/38 provides:

> ‘The contracting entities ... shall, promptly after the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.
>
> ...’

Background to the dispute and the pre-litigation procedure

5 On 2 July 2003, Dimosia Epikhirisi Ilektrismou AE (DEI) (the public power corporation) published a call for tenders for the study, supply, transport, installation and bringing into operation of two similar thermoelectrical units and their auxiliary equipment for the thermoelectric station at Atherinolakkos on the island of Crete (Greece).

6 That first call for tenders was withdrawn after the DEI board of directors found that the tenders received did not satisfy certain criteria, whereupon DEI published a new call for tenders on 26 May 2004, which differed from the first in certain respects. The tenders of the five companies and groups of undertakings which participated in that second tendering procedure were all rejected by the assessment committee as ‘unsuitable’, because they did not comply with various minimum or maximum values corresponding to certain technical parameters required under the contract.

7 By letter of 14 December 2004 ('the letter of 14 December'), the five tenderers who had participated in the second tendering procedure were informed of the withdrawal of that procedure and were called on to submit a 'final financial offer' within 15 days of the receipt of that letter.

8 In the letter of 14 December, DEI explained its decision to use a new procedure by reference to the 'overall history of the case and to:

– the time when the units would be installed,

– the requirement to cover in a timely manner the growing and urgent, since 2007, needs of the island of Crete in electricity,

– the time necessary to install the two new units, namely 29 and 31 months respectively,

– the unforeseen delay in awarding the contract, which was due to the unsatisfactory outcome of the earlier calls for competition'.

9 For that new procedure, the five tenderers concerned were requested to correct the technical discrepancies which had led to the rejection of the tenders in the second procedure. In the case of the other discrepancies pointed out by DEI, the tenderers were to indicate the cost of the corrections needed. It is apparent from the observations of the parties that all those tenderers participated in the new procedure.

10 By letter of 7 February 2005, DEI informed one of the tenderers that its tender had been rejected. That letter did not, however, give any indication of the reasons for that rejection.

11 It emerges from the parties' observations that, after making a number of requests to that end, the tenderer in question received a document on 4 April 2005 informing it in detail of the reasons for that rejection. The action brought by the tenderer against that document was dismissed by judgment of 7 July 2005, whereupon DEI concluded the contract with another on 15 September 2005.

12 On 12 October 2005, the Commission – having formed the view, following a complaint from that tenderer, that the Community public procurement rules had been infringed – sent a letter of formal notice to the Hellenic Republic, which replied by letter of 22 December 2005.

13 Not satisfied with that reply, the Commission sent a reasoned opinion to the Hellenic Republic on 4 July 2006 requesting it to comply with the opinion within two months of its notification.

14 On the view that the Hellenic Republic's reply to that reasoned opinion was unsatisfactory, the Commission decided to bring the present action.

The action

15 In support of its action, the Commission puts forward two pleas in law alleging, respectively, infringement of Article 20(2)(a) and (d) of Directive 93/38 and infringement of Article 41(4) of that directive.

The first plea in law

Arguments of the parties

16 By its first plea, the Commission alleges that the Hellenic Republic has failed to fulfil its obligations under Article 20(2)(a) and (d) of Directive 93/38.

17 According to the Commission, the provisions laid down in Article 20(2) of Directive 93/38 constitute, as is clear from Joined Cases C–462/03 and C–463/03 *Strabag and Kostmann* [2005] ECR I–5397, derogations which must, in accordance with settled case-law, be interpreted strictly. Furthermore, it follows from the case-law that the burden of proof as to the existence of exceptional circumstances warranting recourse to such a derogation lies with the party seeking to rely on it (see, inter alia, Case C–394/02 *Commission* v *Greece* [2005] ECR I–4713, paragraph 33).

18 As regards, first, Article 20(2)(a) of Directive 93/38, the Commission observes that two of the conditions for the application of that provision – namely, that no tender must have been submitted or that the tenders submitted must have been unsuitable, and that the original contract conditions must not have been substantially changed – are not satisfied in the present case.

19 First, the contracting entity incorrectly categorised the tenders as 'unsuitable' whereas they were merely 'irregular'. The Commission submits that the interpretation of the term 'unsuitable' argued for by the Hellenic Republic is much too broad and frustrates the full effectiveness of Article 20(2)(a) of Directive 93/38. If the wording of that provision is compared with that of similar provisions in other directives on public procurement, such as Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), it becomes clear that the term 'unsuitable' has the same meaning in all those directives. Only a tender which is entirely different in substantive terms from that described in the call for tenders should be categorised as 'unsuitable'. According to the Commission, there is a link between the situation where no tender is submitted and the situation where an unsuitable tender is submitted inasmuch as each of those situations could replace the other as a ground for direct refusal. The two situations are equivalent not only as regards their effects, but also as regards the difficulties which they create for the contracting entity, since in both cases the needs of the project in question are not met.

20 Moreover, according to the Commission, the importance of the principle of flexibility in the interpretation of Directive 93/38 should not be overestimated. Although that principle has admittedly influenced the content of the provisions laid down in Directive 93/38, it should not be relied upon in support of an interpretation of those provisions which is contrary to the EC Treaty and to the general principles of equal treatment and transparency.

21 Secondly, during the third tendering procedure, the Commission argues, the contracting entity substantially changed the contract conditions, thereby making some tenders 'irregular'. It follows from the wording of the second call for tenders that, although commercial and financial discrepancies with the call for tenders were not allowed, technical discrepancies owing to particular features of the construction or technical characteristics of the equipment provided might, in certain circumstances, have been acceptable without their correction entailing any financial loss for the tenderer. By contrast, the letter of 14 December shows that, under the third tendering procedure, the participants were required to correct all discrepancies and to bear the cost of doing so. Furthermore, in order to ensure that that requirement was met, the participants had to sign a binding declaration relating to the correction of technical discrepancies in their tenders. That change in the contract conditions meant that the tenders submitted by some tenderers were irregular under the third procedure whereas they would have been valid under the second procedure.

22 In that connection, the Commission states that it is in no way challenging the grounds which led to the complainant's exclusion from the various tendering procedures, but is merely calling into question the lawfulness of the decision by which the contracting entity held that the tenders submitted were 'unsuitable'.

23 As regards, secondly, Article 20(2)(d) of Directive 93/38 – the provision on which, according to the Commission, the contracting entity relied in order to justify its use of a procedure for the award of a contract without a prior call for competition – the Commission states that the application of that provision is conditional upon the existence of 'reasons of extreme urgency brought about by events unforeseeable by the contracting entities'. However, in the present case, it has not been demonstrated by the contracting entity either that there were reasons of extreme urgency or that such reasons had been brought about by unforeseeable events. In that regard, the Commission states, inter alia, that the time of the integration and installation of the units was known prior to the publication of the first call for tenders; that the increase in the electricity needs of the island of Crete was not unexpected; and that the fact that two procedures were withdrawn cannot be regarded as constituting an event unforeseeable by the contracting entity.

24 The Commission adds that the explanations provided by the Hellenic Republic in the course of the infringement proceedings cannot change the statement of reasons put forward by the contracting entity in the letter of 14 December as justification for the rejection of the tenders.

25 As a preliminary point, the Hellenic Republic contends, first, that the special nature of the provisions of Directive 93/38, as compared with the general directives on public procurement contracts, stems from the sensitive nature of the 'excluded sectors' and is demonstrated through the principle of flexibility as set out in recital 45 in the preamble to Directive 93/38, which states that the rules to be applied by the entities concerned should establish a framework for sound commercial practice

and should leave a maximum of flexibility. The contracting entities thus enjoy under Directive 93/38 a discretion broader than that conferred on them under the general directives. The question whether the procedure for the award of a public procurement contract was conducted in accordance with Directive 93/38 must be made in the light of that principle of flexibility.

26 Under Directive 93/38, the three procedures referred to in Article 1(7) thereof are placed, in accordance with the principle of flexibility and the broad discretion conferred on the contracting entity, at exactly the same level. Thus, Article 20(1) of Directive 93/38 leaves the contracting entities free to choose any one of those three procedures, provided that a call for competition has taken place. Since Directive 93/38 differs in this respect also from the other directives referred to by the Commission, the case-law of the Court concerning those other directives cannot be applied by analogy to Directive 93/38.

27 First, the Hellenic Republic contends that the conditions for the application of Article 20(2)(a) of Directive 93/38 are satisfied in the present case.

28 In the first place, during the second call for tenders with a call for competition, tenders were admittedly lodged, but none of those tenders was considered to be 'suitable'. Contrary to the Commission's argument, there is a significant difference between an 'unsuitable' tender and an 'inadmissible or irregular' tender: 'unsuitable' indicates whether the tender complies with the technical specifications fixed by the contracting entity and 'inadmissible or irregular' indicates failure to meet a formal condition for participation in the call for tenders. Furthermore, the interpretation by analogy suggested by the Commission cannot be accepted in view of the substantial differences between the wording of the various provisions relied upon, the Court having held, in paragraphs 90 and 91 of its judgment in Case C–513/99 *Concordia Bus Finland* [2002] ECR I–7213, that only provisions which fall within the same field of Community law and which have substantially the same wording may be interpreted in an identical fashion.

29 The arguments put forward by the Commission against taking the principle of flexibility into account in the interpretation of Directive 93/38 are moreover vague, irrelevant and unsubstantiated. In addition, the Court acknowledged that the contracting entities have a very broad discretion in the context of the procedures referred to in Directive 93/38, when it held in paragraph 34 of its judgment in *Strabag and Kostmann* that the rules set out in Directive 93/38 authorise 'more extensive use of the negotiated procedure'.

30 In the second place, the original contract conditions have not been changed or, in any event, no 'substantial' change has been made. It is apparent from a comparison of the second and third calls for tender that, contrary to the Commission's assertions, they are identical as regards the letter of guarantee relating to the participation, the assessment of the financial offers and the method of payment. Furthermore, a detailed examination of the requirements relating to the technical discrepancies, the costs of correcting those discrepancies and the binding declaration requested from the tenderers shows that those elements also were not changed between the second and third tendering procedures.

31 As regards, secondly, Article 20(2)(d) of Directive 93/38, the Hellenic Republic contends that the Commission misinterpreted the letter of 14 December. That letter unequivocally shows that the contracting entity had decided to choose a procedure without a prior call for competition because of the 'overall history of the case', that is to say, because of the fact that the tenders submitted under the first two procedures were unsuitable. The other explanatory factors referred to in that letter were only mentioned by way of secondary considerations.

32 Moreover, although the withdrawal of a call for tenders does not constitute an event which was unforeseeable by the contracting entity, the fact that, in two consecutive calls for tenders, all the tenders submitted were unsuitable should be regarded as covered by the notion of an 'unforeseeable event'.

33 In any event, the Commission has not proved to the requisite legal standard that the contracting entity relied on the fact that the failure of the preceding two calls for tender was unforeseeable in order to justify having recourse to a procedure without a prior call for competition. Proceedings for failure to fulfil obligations must not be confused with an action for annulment, since the former procedure allows Member States to provide explanations, further information and, where necessary, the reasons for their decisions. In the present case, it is not the validity of the reasons given by the contracting entity which falls to be determined, but whether the Member State concerned can be said to have infringed Directive 93/38.

Findings of the Court

34 At the outset, it should be noted that, as derogations from the rules relating to procedures for the award of public procurement contracts, the provisions of Article 20(2)(c) and (d) of Directive 93/38 must be interpreted strictly and that the burden of proof lies on the party seeking to rely on them (*Commission* v *Greece*, paragraph 33).

35 Since it is clear from Article 20(1) of Directive 93/38, read in conjunction with Article 20(2) of that directive, that Article 20(2) constitutes a derogation from Article 20(1), in that it sets out the situations in which a contracting entity may use a procedure for the award of a contract without a prior call for competition, it must be concluded that not only points (c) and (d) of Article 20(2) of Directive 93/38 must be interpreted strictly, but so must all the other provisions of Article 20(2).

36 That finding is not affected by the arguments of the Hellenic Republic that Directive 93/38, in accordance with recital 45 in the preamble thereto, must leave 'a maximum of flexibility' and authorises more extensive use of the negotiated procedure than permitted, for example, under Directive 93/37.

37 First, as the Advocate General pointed out in point 15 of his Opinion, recital 45 provides guidance as to the aim pursued by the Community legislature through the adoption of Directive 93/38, namely to grant greater flexibility in the context of the public procurement contracts with which that directive is concerned, and consequently it may explain why Directive 93/38, unlike other directives on public procurement, authorises contracting entities to make greater use of the negotiated procedure.

38 Secondly, by stating in recital 46 in the preamble to Directive 93/38 that, as a counterpart for such flexibility and in the interests of mutual confidence, it is necessary to ensure the transparency of public procurement procedures and by providing – as is made quite clear in Article 20(1) of that directive – that use of one of the three award procedures set out in Article 1(7) of the directive must be preceded by a call for competition, the Community legislature has left no room for doubt as to its intention that the option of awarding a public contract without a prior call for competition, in the circumstances specified in Article 20(2) of Directive 93/38, is to be regarded as a derogation from the principle that the award of such a contract must be preceded by a call for competition.

39 It follows that the argument of the Hellenic Republic, according to which the term 'unsuitable' in Article 20(2)(a) of Directive 93/38 must be interpreted broadly, cannot be accepted.

40 It is in the light of those considerations that it is necessary to determine whether, in the present case, the Hellenic Republic has properly demonstrated that the tenders submitted under the second tendering procedure were correctly categorised as 'unsuitable' for the purposes of Article 20(2)(a).

41 The Hellenic Republic contended in this connection that, since the tenders submitted did not, as regards the guaranteed volumes, comply with the technical specifications fixed by the contracting entity in the light of the legislative requirements on the protection of the environment, so that it would not have been possible to bring the thermoelectric station at issue legally into operation, those tenders had to be regarded as 'unsuitable' for the purposes of Article 20(2)(a) of Directive 93/38.

42 It must be held that technical specifications such as those at issue in the present case, which stem from the national and Community legislative requirements on protection of the environment, must be regarded as essential if the installations – the supply and bringing into operation of which is the aim of the contract – are to enable the contracting entity to meet the objectives imposed upon it by legislation.

43 Since the proper completion of the project for which the call for tenders was issued is not possible for the contracting entity if the tenders are not in conformity with those specifications, that non-conformity does not constitute a mere inaccuracy or a mere detail: on the contrary, it must be regarded as precluding those tenders from meeting the needs of the contracting entity.

44 Such tenders must, as the Commission itself conceded before the Court, be categorised as 'unsuitable' for the purposes of Article 20(2)(a) of Directive 93/38.

45 It should be added that, in the present case, there are no grounds for the Commission's fear that contracting entities will circumvent the obligation under Directive 93/38 to issue a call for

competition by setting conditions which are overly strict or impossible to comply with, in order to be able to categorise all the tenders submitted as 'unsuitable' before awarding the contract to another tenderer without a prior call for competition.

46 First, after holding that the tenders submitted during the first procedure with a call for competition did not meet the fixed technical specifications, the contracting entity issued a second call for tenders and thus did not immediately proceed on the basis of Article 20(2)(a) of Directive 93/38.

47 Secondly, in the negotiated procedure which it initiated on the basis of Article 20(2)(a) of Directive 93/38, the contracting entity requested all the candidates which had participated in the second procedure with a call for competition to submit 'financial offers', even though the provisions of Directive 93/38 which relate to the negotiated procedure, and specifically Article 1(7)(c) of that directive, did not require this.

48 Lastly, it has been neither proved nor even claimed that the technical specifications which had been fixed by the contracting entity and which had led that entity to regard the tenders received as unsuitable were overly strict or impossible to comply with.

49 On the contrary, as the Hellenic Republic stated without being contradicted on that point by the Commission, the requirements relating to guaranteed volumes, with which the tenderers were obliged to comply, were finally met by some of the candidates for the award of the contract.

50 In the light of those considerations, it must be held that the contracting entity was entitled to categorise the tenders at issue as 'unsuitable' for the purposes of Article 20(2)(a) of Directive 93/38.

51 In those circumstances, it must also be ascertained whether, as the Commission maintains, the contracting entity – contrary to the terms of Article 20(2)(a) of Directive 93/38 – substantially changed the original contract conditions during the negotiated procedure without a prior call for competition.

52 In that connection, it should be noted that, by analogy with the Court's dicta regarding the renegotiation of contracts already awarded (see Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 35), the amendment of an initial contract condition can be regarded as substantial for the purposes of Article 20(2)(a) of Directive 93/38, inter alia, where the amended condition, had it been part of the initial award procedure, would have allowed tenders submitted in the procedure with a prior call for competition to be considered suitable or would have allowed tenderers other than those who participated in the initial procedure to submit a tender.

53 In so far as the Commission – as emerges from its observations – regards the facts in question as falling clearly within the former of those two situations, it is necessary to examine whether the original contract conditions, the non-conformity with which led the contracting entity to categorise the tenders submitted as unsuitable, were substantially changed in the negotiated procedure.

54 In respect of those conditions, the Hellenic Republic contends, without being contradicted on that point by the Commission, that the tenders submitted under the second procedure with a call for competition were all declared unsuitable because they did not comply with the requirements relating to the guaranteed volumes of waste emissions.

55 It must be stated that, in the third procedure, those requirements were not changed and the contracting entity was obliged, as it was in the first two procedures, to meet those requirements. Furthermore, it is precisely because no discrepancy with those specifications was permissible that the candidates had to submit a binding declaration by which they undertook to bring their tenders into conformity with the requirements set out in the contract notice concerning those guaranteed volumes.

56 As regards the other technical specifications, it should be pointed out that, although some discrepancies with those specifications were acceptable under the second procedure with a call for competition, the costs entailed in correcting those discrepancies could, as the Hellenic Republic contended without being contradicted by the Commission, be left to the tenderers to bear. The fact that, under the third procedure, the tenderers had to bear the costs of correcting the technical discrepancies themselves cannot thus be regarded as a new obligation.

57 During that third procedure, moreover, the tenderers were not required to make the corrections in question, but only to provide an estimate of the total cost of those corrections and to submit a final financial offer. The third procedure thus offered all the tenderers who had participated in the second procedure the possibility of reviewing some of their proposals in the context of a final financial offer and of assessing once again the discrepancies with the technical specifications set out in the call for tenders.

58 It follows that, during the negotiated procedure without a prior call for competition, the contracting entity did not substantially change the original contract conditions for the purposes of Article 20(2)(a) of Directive 93/38.

59 In those circumstances, it must be held that the Commission has failed to prove that the Hellenic Republic infringed Article 20(2)(a) of Directive 93/38. Consequently, the first part of its first plea in law must be rejected.

60 So far as the alleged infringement of Article 20(2)(d) of Directive 93/38 is concerned, it should be recalled that, as is apparent from paragraph 34 of this judgment, Article 20(2)(d) is in the nature of a derogation and the burden of proving that the conditions for its application are fulfilled lies on the party seeking to rely on it.

61 It is sufficient to observe, in this connection, as the Advocate General did in point 25 of his Opinion, that the Hellenic Republic did not invoke Article 20(2)(d) of Directive 93/38 in support of the decision by which DEI awarded the contract at issue without a prior call for competition, but merely stated that that decision had been adopted on the basis of Article 20(2)(a) of Directive 93/38.

62 The Commission cannot legitimately allege that the Hellenic Republic infringed a provision upon which that Member State did not actually rely and, in consequence, the second part of the first plea in law must also be rejected.

63 In those circumstances, the first plea in law relied upon by the Commission must be rejected in its entirety as unfounded.

The second plea in law

Arguments of the parties

64 By its second plea in law, the Commission alleges that the Hellenic Republic has failed to fulfil its obligation under Article 41(4) of Directive 93/38 to, 'promptly after the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender'.

65 In the present case, a period of two months elapsed between the request from the eliminated tenderer and the reply from the contracting entity. The Commission submits that such a period cannot under any circumstances be regarded as a reply provided 'promptly'. With regard to the interpretation of those terms, the Commission refers to the similar provisions laid down in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Directive 93/37 and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), each of which prescribes a period of 15 days.

66 The Hellenic Republic acknowledges that there was some delay in communicating the reasons for rejecting one of the tenders. However, that delay did not frustrate the full effectiveness of Directive 93/38 and did not prevent the tenderer concerned from being able to assert its rights effectively before a court. Moreover, the contract was not signed until the legal action brought by the eliminated tenderer had been dismissed. The Hellenic Republic adds that the periods prescribed by the various directives referred to by the Commission cannot be transposed to the present case since Directive 93/38 does not lay down any specific time-limit and Directive 2004/17 was not yet applicable at the material time.

Findings of the Court

67 As regards this plea in law, it should be pointed out that, in so far as Directive 93/38, unlike the other directives relied on by the Commission in this connection, does not prescribe a specific period within which the candidate or tenderer whose application or tender has been rejected must be informed of the grounds for the rejection, but merely provides, in Article 41(4) thereof, that that communication must be made 'promptly', it is not possible, as the Advocate General pointed out in point 27 of his Opinion, to adopt an interpretation of that provision to the effect that the contracting entity must communicate that information within 15 days of receiving the tenderer's written request.

68 However, it should be stated that, by requiring the contracting entity to communicate the required information 'promptly', the Community legislature placed that entity under a duty of diligence, which falls to be categorised more as an obligation as to means than an obligation as to results. Thus, it is necessary to consider on a case-by-case basis and in the light of the specific characteristics of the procurement contract at issue, in particular its complexity, whether or not the contracting entity concerned communicated that information with the requisite diligence. The fact that a communication may have been sent before the expiry of the period within which the decision to eliminate the application or the tender may be challenged, with the result that the tenderer was in a position to make use of the legal remedies available in order to have a court review the legality of the decision, is only one of a bundle of factors which must be taken into account in order to determine whether a contracting entity has complied with its obligation of diligence under Article 41 (4) of Directive 93/38 and does not, in itself, constitute sufficient evidence in that regard.

69 Since, in the present case, the Hellenic Republic accepts that there was a delay in communicating to the tenderer whose tender was rejected the reasons for that rejection, while asserting that that communication was made in a manner consistent with Article 41(4) of Directive 93/38, it is for that Member State to adduce evidence of objective factors capable of justifying the delay in communicating the information and making it plausible that such a period should have elapsed between the receipt of the tenderer's request and the reply from the contracting entity.

70 The fact remains that, apart from the argument that the period which elapsed did not prevent the tenderer concerned from being able to assert its rights effectively before a court, the Hellenic Republic neither advances any specific information capable of justifying the delay in the communication nor states reasons why, in the present case, a period of two months should be regarded as signifying 'promptly' for the purposes of Article 41(4) of Directive 93/38.

71 In consequence, the second plea in law relied upon by the Commission must be held to be well founded.

72 It must therefore be held that, by being unjustifiably late in replying to a tenderer's request for information concerning the reasons for the rejection of its tender, the Hellenic Republic has failed to fulfil its obligation under Article 41(4) of Directive 93/38.

Costs

73 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 69(3) of those rules, the Court may order that the costs be shared or that the parties bear their own costs if the parties are each unsuccessful on one or more heads of claim. Since the Hellenic Republic and the Commission have been partly unsuccessful in their pleas, each party must be ordered to bear its own costs.

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

1. Declares that, by being unjustifiably late in replying to a tenderer's request for information concerning the reasons for the rejection of its tender, the Hellenic Republic has failed to fulfil its obligation under Article 41(4) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Commission Directive 2001/78/EC of 13 September 2001;

2. Dismisses the action as to the remainder;

3. Orders the Hellenic Republic and the Commission of the European Communities each to

bear their own costs.

[Signatures]

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* Language of the case: Greek.

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Case C-250/07

Commission of the European Communities

v

Hellenic Republic

(Failure of a Member State to fulfil obligations – Directive 93/38/EEC – Public contracts in the water, energy, transport and telecommunications sectors – Award of a contract without a prior call for competition – Conditions – Communication of the reasons for the rejection of a tender – Time-limit)

Summary of the Judgment

1. *Approximation of laws – Procedure for awarding public contracts in the water, energy, transport and telecommunications sectors – Directive 93/38 – Derogations from common rules*

   (Council Directive 93/38, Art. 20(2)(a), (c) and (d))

2. *Approximation of laws – Procedure for awarding public contracts in the water, energy, transport and telecommunications sectors – Directive 93/38 – Derogations from common rules*

   (Council Directive 93/38, Art. 20(2)(a))

3. *Approximation of laws – Procedure for awarding public contracts in the water, energy, transport and telecommunications sectors – Directive 93/38 – Derogations from common rules*

   (Council Directive 93/38, Art. 20(2)(a))

4. *Approximation of laws – Procedure for awarding public contracts in the water, energy, transport and telecommunications sectors – Directive 93/38 – Period for communicating the reasons for the rejection of a tender*

   (Council Directive 93/38, Art. 41(4))

1. As derogations from the rules relating to procedures for the award of public procurement contracts, the provisions of Article 20(2)(c) and (d) of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2001/78 must be interpreted strictly and the burden of proof lies on the party seeking to rely on them.

   Since it is clear from Article 20(1) of Directive 93/38, read in conjunction with Article 20(2) of that directive, that Article 20(2) constitutes a derogation from Article 20(1), in that it sets out the situations in which a contracting entity may use a procedure for the award of a contract without a prior call for competition, it must be concluded that not only points (c) and (d) of Article 20(2) of Directive 93/38 must be interpreted strictly, but so must all the other provisions of Article 20(2).

   (see paras 34-35)

2. Tenders that do not comply with the technical specifications fixed by the contracting entity which stem from the national and Community legislative requirements on protection of the environment must be classified as ‘unsuitable’ for the purposes of Article 20(2)(a) of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2001/78. Such specifications must be regarded as essential if the installations – the supply and bringing into

operation of which is the aim of the contract – are to enable the contracting entity to meet the objectives imposed upon it by legislation. Since the proper completion of the project for which the call for tenders was issued is not possible for the contracting entity if the tenders are not in conformity with those specifications, that non-conformity does not constitute a mere inaccuracy or a mere detail: on the contrary, it must be regarded as precluding those tenders from meeting the needs of the contracting entity.

(see paras 42-44)

3. The amendment of an initial contract condition can be regarded as substantial for the purposes of Article 20(2)(a) of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2001/78 inter alia, where the amended condition, had it been part of the initial award procedure, would have allowed tenders submitted in the procedure with a prior call for competition to be considered suitable or would have allowed tenderers other than those who participated in the initial procedure to submit a tender.

In that regard, a new obligation cannot arise by reason of the fact that, under a new procedure for the award of a contract without a prior call for competition, the tenderers have themselves to bear the costs of correcting the technical discrepancies in relation to the technical specifications set by the contracting entity when, under the previous award procedure with a prior call for competition, some discrepancies with the technical specifications imposed by the contracting entity were acceptable and that the costs entailed in correcting those discrepancies could be left to the tenderers to bear.

(see paras 52,56)

4. In so far as Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors as amended by Directive 2001/78, does not prescribe a specific period within which the candidate or tenderer whose application or tender has been rejected must be informed of the grounds for the rejection, but merely provides, in Article 41(4) thereof, that that communication must be made promptly, it is not possible to adopt an interpretation of that provision to the effect that the contracting entity must communicate that information within 15 days of receiving the tenderer's written request.

However, by requiring the contracting entity to communicate the required information promptly, the Community legislature placed that entity under a duty of diligence, which falls to be categorised more as an obligation as to means than an obligation as to results. Thus, it is necessary to consider on a case-by-case basis and in the light of the specific characteristics of the procurement contract at issue, in particular its complexity, whether or not the contracting entity concerned communicated that information with the requisite diligence. The fact that a communication may have been sent before the expiry of the period within which the decision to eliminate the application or the tender may be challenged is only one of a bundle of factors which must be taken into account in order to determine whether a contracting entity has complied with its obligation of diligence.

It is for the Member State to adduce evidence of objective factors capable of justifying the delay in the communication of the grounds for rejecting the tender and making it plausible that such a period should have elapsed between the receipt of the tenderer's request and the reply from the contracting entity.

Consequently, a Member State which is unjustifiably late in replying to a tenderer's request for information concerning the reasons for the rejection of its tender fails to fulfil its obligations under Article 41(4) of Directive 93/38.

(see paras 67-69, 72 and operative part)

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Judgment of the Court (First Chamber) of 4 June 2009 - Commission of the European Communities v Hellenic Republic

(Case C-250/07) [1]

(Failure of a Member State to fulfil obligations - Directive 93/38/EEC - Public contracts in the water, energy, transport and telecommunications sectors - Award of a contract without a prior call for competition - Conditions - Communication of the reasons for the rejection of a tender - Time-limit)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and D. Kukovec, agents)

Defendant: Hellenic Republic (represented by: D. Tsagkaraki, agent, V. Christianos, dikigoros)

Re:

Failure of a Member State to fulfil obligations - Breach of Articles 4, 20(2) and 41(4) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) - Tender procedure for the study, supply, transport, installation and bringing into operation of two thermoelectric units for the thermoelectric station at Atherinolakkos, Crete

Operative part of the judgment

The Court:

1. *Declares that, by being unjustifiably late in replying to a tenderer's request for information concerning the reasons for the rejection of its tender, the Hellenic Republic has failed to fulfil its obligation under Article 41(4) of Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Commission Directive 2001/78/EC of 13 September 2001;*

2. Dismisses the action as to the remainder;

3. Orders the Hellenic Republic and the Commission of the European Communities each to bear their own costs.

_____

[1] - OJ C 155, 7.07.2007.

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OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 17 December 2008 (1)

Case C-250/07

Commission of the European Communities
v
Hellenic Republic

1. The present action brought by the European Commission against Greece concerns a public procurement contract in relation to a power station on the island of Crete. The Commission argues that the contracting authority, by failing, firstly, to publish a call for tenders and, secondly, to give reasons for the rejection of one of the tenders in a timely manner, has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. (2)

Factual background

2. In July 2003 the Dimosia Epicheirisi Ilektrismou (Public Energy Corporation of Greece, 'DEI') published a call for tenders for the purchase and installation of two thermo-electrical units for the power station of Atherinolakos on the island of Crete. DEI found that the tenders submitted did not comply fully with the terms of the call for tenders, so the project was aborted. In May 2004 a new call for competition for the same project was published, which was slightly different from the first one. All five tenders which were submitted in response to the second call were rejected as 'unsuitable' because they did not fully comply with certain technical specifications, and the procedure was again aborted.

3. On 14 December 2004, without publishing a fresh call for tenders, DEI wrote to the five tenderers who had participated in the second round and asked them to submit within 15 days their 'final financial offers' correcting any discrepancies, especially technical ones, between their earlier tenders and the project specifications. In that letter, DEI explained that it had decided to dispense with a call for competition because of, among other things, 'the overall history of the case'; 'the time necessary to install the two new units, namely 29 and 31 months respectively'; 'the requirement to cover in a timely manner the urgent, since 2007, needs of the island of Crete in electricity'; and 'the unforeseen delay in awarding the contract, which was due to the unsatisfactory outcome of the earlier calls for competition'. All five tenderers that had participated in the second round submitted new tenders.

4. On 7 February 2005 DEI wrote to one of the tenderers rejecting its tender without giving any reasons. That tenderer sent three letters to DEI on 10 and 11 February and 10 March 2005 and two letters to the Ministry of Development on 17 and 31 March 2005 asking to be informed of the reasons for the tender being rejected. DEI finally replied on 4 April 2005. The tenderer then applied to the Monomeles Protodikio Athinon (Court of First Instance, Athens) for an injunction, but its application was dismissed on 7 July 2005. DEI concluded the contract with another tenderer on 15 September 2005.

5. The unsuccessful tenderer lodged a complaint with the European Commission which,

considering that the conduct of the procedure by DEI was incompatible with Community law and taking into account the very high value of the contract, initiated infringement proceedings against Greece. Not being satisfied by the reply of the Greek authorities to its formal letter of notice and reasoned opinion, the Commission brought an action requesting the Court to declare that Greece has failed to fulfil its obligations under Article 20(2)(a), on procurement procedures without a prior call for competition, and Article 41(4), on the obligation to give reasons to unsuccessful tenderers, of Directive 93/38.

I – The absence of a call for competition

6. The applicable provision is Article 20(2)(a) of Directive 93/38 which states: '[c]ontracting entities may use a procedure without prior call for competition in the following cases … in the absence of tenders or suitable tenders in response to a procedure with a prior call for competition, provided that the original contract conditions have not been substantially changed'. As the Greek Government correctly points out, that provision empowers contracting authorities to dispense with the requirement for a call for competition where all three of the following conditions are met: (i) there has already been such a call, (ii) no tenders, or no suitable tenders have been submitted and (iii) the original contract conditions have remained substantially the same.

7. It is clear that, in the present case, the first condition is met. The Government and the Commission disagree as to whether the second and third conditions are also satisfied.

The concept of unsuitable tenders

8. DEI rejected the tenders submitted in response to the second call for competition as 'unsuitable' because they did not comply fully with certain technical specifications. Was it right in its characterisation of the tenders? In other words, how should the term 'unsuitable' be interpreted? This is an important question because the answer to it determines whether the contracting entity may award the contract without publishing a call for tenders. If the submitted tenders can be correctly described as 'unsuitable', then no further call for competition is required; if, on the other hand, the rejected tenders cannot be deemed to be 'unsuitable', the contracting entity is under an obligation to repeat the entire procedure.

9. The Commission takes the view that only a tender which clearly cannot satisfy the needs of the contracting authority falls within the 'unsuitable' category; other discrepancies, of a less serious nature, may justify the rejection of a tender, but cannot render it 'unsuitable' and thus open the way for a contracting authority to award the contract without following the usual competitive procedure. By contrast, the Greek Government argues for a more liberal definition of 'unsuitable'. Placing considerable emphasis on recital 45 in the preamble to the directive, which states that 'the rules to be applied by the entities concerned should establish a framework for sound commercial practice and should leave a maximum of flexibility', it submits that contracting authorities should be allowed a wide margin of discretion in rejecting as 'unsuitable' all tenders which do not satisfy fully the criteria set out in the call for tenders, and then should be able to proceed without a fresh call for competition.

10. I think that the interpretation suggested by the Greek Government is too broad. When assessing how wide a discretion the contracting entities enjoy one should start with the requirements of the Treaty. In *Teleaustria* the Court found that public services concessions were outside the scope of the procurement directives, but held that the contracting entities concluding them were bound by the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, which implies an obligation of transparency. (3) It then went on to explain what the content of this transparency obligation is: '[t]hat obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed'. (4) Accordingly, transparency in public procurement is a requirement of primary Community law and, at the very least, entails some advertising. The importance of advertising is twofold: first, potential tenderers are made aware of the fact that a business opportunity exists, which in turn can lead to an increase in the degree of competition for the contract, as more tenders are likely to be submitted; second, advertising guards against partiality and corruption as it facilitates the review of procurement procedures. (5) In the Court's case-law, transparency is linked to non-discrimination and is seen as a mechanism ensuring compliance with this fundamental principle of Community law. (6)

11. A further point which is relevant for the interpretation of the term 'unsuitable' is that one of the purposes of public procurement rules is the development of effective competition in the market. In its recent judgment in *Commission* v *Italy*, where the Commission claimed that Italy had failed to fulfil its obligations under a number of directives including Directive 93/38, the Court stated that '[t]he directives sought to eliminate practices that restrict competition in general and participation in public contracts by other Member States' nationals, in order to implement inter alia the freedom of establishment and freedom to provide services enshrined in Articles 43 EC and 49 EC respectively'. (7) As the Court explained in an earlier case concerning Directive 93/37/EEC, (8) 'the basic aim of the Directive … is to open up public works contracts to competition. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism'. (9) Effective competition, then, removes barriers that prevent new players from entering the market; benefits contracting entities which can choose from among more tenderers and, thus, are more likely to obtain value for money; and helps maintain the integrity of procurement procedures as such.

12. As the above cases make clear, the requirement for a call for competition is rooted in primary Community law and should be complied with as a matter of course. Awarding contracts without a prior call for tenders may harm not only potential tenderers but also the public, which pays for procurement projects through taxation, and may distort the competitive nature of the public procurement market, undermining the effectiveness of the Treaty rules on fundamental Community freedoms. For this reason, a provision which allows a contracting authority to dispense with a call for tenders should be narrowly construed. Article 20(2) of Directive 93/38 is such a provision. It starts by stating that a contracting entity may award a contract without a prior call for competition and then proceeds to set out exhaustively the cases in which this is possible. The Court has already ruled on the correct interpretative approach to this provision in *Commission* v *Greece*, a case which concerned subsections (c) and (d) thereof, on contracts that for technical or artistic reasons can be executed only by a particular contractor, and cases of extreme urgency respectively: '[i]t should as a preliminary point be noted that, as derogations from the rules relating to procedures for the award of public procurement contracts, the provisions of Article 20(2)(c) and (d) of Directive 93/38 must be interpreted strictly'. (10) The present case falls to be decided under subsection (a) (on the absence of tenders and 'unsuitable' tenders), which should be interpreted in the same strict manner as subsections (c) and (d), given that there is nothing in either the spirit or the letter of Article 20(2) or in the judgment of the Court in *Commission* v *Greece* which could justify a different interpretative approach.

13. In the light of the preceding analysis, the broad construction of the term 'unsuitable' advocated by the Greek Government cannot be accepted. Allowing contracting entities to rely even on minor discrepancies in the submitted tenders in order to reject them as 'unsuitable' means, in practice, giving them sweeping discretion to decide whether a call for competition will be published or not. A contracting entity which wishes to 'indulge in favouritism', to use the language of the Court in *Ordine degli Architetti*, can easily identify a point in relation to which a submitted tender does not comply fully with the contract specifications, reject it as 'unsuitable' and then proceed to award the contract without a prior call for the submission of new tenders. This is especially true of large projects requiring advanced technical expertise where contract specifications are understandably very complex. But that is exactly the danger against which Community procurement rules, whether enshrined in the Treaty or in secondary legislation, are supposed to guard. By contrast, the interpretation offered by the Commission, namely that a tender can be rejected as 'unsuitable' and the contracting entity thus allowed to proceed without a call for competition only where the tender cannot cover the needs of that entity, leaves to the contracting authority enough discretion to assess the submitted tenders while ensuring that Community rules on public procurement are not by-passed.

14. In support of the broad interpretation of Article 20(2)(c) of Directive 93/38 the Greek Government relied heavily on recital 45 in the preamble to the directive which refers to the need for a 'maximum of flexibility' in relation to the procurement rules for utilities. From this, the Government concludes that contracting authorities in this sector are given wide discretion in the application of the provisions of the directive, including the one on 'unsuitable' tenders, and awards of contracts without a prior call for competition. There are two objections to this argument.

15. Firstly, recital 45 is not a free-standing provision of law which can grant rights or impose obligations. Rather it performs, like all preambles to directives, an explanatory function, that is, it is there to assist those interpreting the directive to understand its aims and the spirit in which it was adopted. In the present case, recital 45 explains why the Community legislature adopted, for the utilities sector, a set of procurement rules which are less strict than the ones adopted for other sectors such as services and supplies. More importantly, Article 20(2) itself is an expression of the

more flexible approach applied in the utilities sector, as it allows contracting authorities to proceed without a call for competition in more cases than under the directives regulating other sectors. (11) In other words, it was the Community legislature itself which decided in what way the rules on utilities should be more flexible by enacting the specific provisions of Directive 93/38, and it would be wrong to assume that recital 45 grants to contracting authorities some autonomous flexibility which is additional to the already flexible provisions of the directive.

16. Secondly, as I have already pointed out, the Court has held that advertising is a positive obligation imposed on contracting entities by the Treaty. Departures from that obligation must be expressly prescribed by law and narrowly construed. Even if there were such a general principle of flexibility for the interpretation of Directive 93/38 it could not supersede obligations rooted in primary Community law.

17. Something must be said, finally, about the relationship between the various procurement directives. The Greek Government has forcefully argued against the Commission's suggestion that a parallel reading of the Public Sector Directives may help in the interpretation of Directive 93/38. It claims that the latter directive introduces a system of rules specific to the utilities sector and it would be wrong to compare them with rules governing works or supply contracts. I do not agree with this contention. Only very rarely does one come across isolated legal provisions. Rules need to be placed in context; they become meaningful when read within the wider legal environment in which they operate. In the field of public procurement the Court has often referred to the procurement directives as a body of rules pursuing common aims and resting on common principles. I have already mentioned *Commission* v *Italy* where the Court stated that Directives 92/50, (12) 93/36, (13) 93/37 and 93/38 have the common aim of eliminating anti-competitive practices in public procurement, (14) and there are other recent examples in which the Court has used language indicating that the procurement directives must be approached in a systematic and coherent way. (15) Was the Court then oblivious of the fact that each directive regulates a different area of public procurement and that there are differences in the rules they establish? Clearly not. What the Court meant was that the directives, their differences notwithstanding, constitute a network of rules with the common aim of ensuring that public procurement procedures are fair, open and efficient.

18. To conclude, I think that by characterising the rejected tender as 'unsuitable' and not publishing a call for competition DEI has failed to comply with Article 20(2) of Directive 93/38.

The contract conditions

19. Since the second of the three requirements of Article 20(2)(a) was not satisfied, DEI could not have availed itself of this provision, irrespective of whether the original contract conditions remained the same. However, for the sake of completeness, I will briefly explain why I think that the Commission is right in claiming that there was a substantial amendment to the original terms.

20. The second call for competition stated that discrepancies between the technical specifications required by the contracting authority and those offered by tenderers were not allowed. However, tenders which did not fully comply with those specifications could be accepted provided that any discrepancies were related to the technical characteristics of the machinery the tenderer proposed to use, were listed separately in the tender documents and did not affect the overall performance of the power station. In such a case, the tenderer was under no obligation to correct the discrepancies and bear the additional financial burden. In the third phase of the procedure, though, tenderers were asked to correct any discrepancies their previous tenders contained, themselves bearing the costs, and were required to submit a binding declaration to this effect.

21. The Greek Government argues that Article 20(2) does not prohibit all amendments to the original contract conditions but only those that are 'substantial'. When, at the hearing, the Judge-Rapporteur asked how the Government can reconcile its claim that all five tenders submitted in the second round were unsuitable and that no substantial changes were permitted in the third round with the fact that the contract was finally awarded to one of the five tenderers whose tender was initially rejected, counsel for the Government submitted that the only modifications DEI asked for in the third round concerned the discrepancies in the technical specifications that had been identified in the second round and had led to the rejection of the tender, while the other contract conditions remained the same.

22. I agree with the Government that the relevant criterion is the *substantial* nature of the amendment to the contract conditions, but I am not convinced that the amendment in question was insubstantial or not substantial enough for the purposes of Article 20(2)(a). An important new

condition was introduced in the third phase: tenderers had to correct all discrepancies, themselves covering the costs, while under the terms of the contract notice in the second phase such discrepancies could have been accepted. Clearly, the contracting authority itself considered this new obligation to be of importance, otherwise it would not have asked the participating tenderers to submit binding declarations to this effect. Similarly, from the point of view of tenderers, such an amendment to the conditions of the contract is indeed substantial, as it excludes from the outset those who may not be able or willing to correct the discrepancies in their original tenders and incur the relevant costs. Such amendments to the original conditions of the contract should always be considered 'substantial'. Moreover, as I have already pointed out, a provision which allows a contracting entity to award a contract without a call for competition, such as Article 20(2)(a), must be interpreted strictly, because it introduces an exemption from the Treaty-based rule of transparency. Therefore, contracting entities can dispense with a call for tenders only if the amendments in question clearly cannot affect, actually or potentially, the procurement process. In the present case, the amendment to the contract conditions cannot be said to be insubstantial or not substantial enough for the purposes of Article 20(2)(a).

23. Given that DEI had rejected the five tenders submitted in the second round because they did not comply fully with the required technical specifications, it was in practice impossible to award the contract in the third round to one of those five tenderers without its tender first being modified. Thus, DEI amended the contract conditions in the third round to make certain that tenderers would undertake the obligation to correct any discrepancies and asked them to prepare a new financial offer that would include the relevant costs. Had DEI published a fresh call for competition, this would have been an entirely appropriate procedure. Instead, it invited only specific tenderers to submit tenders, despite the fact that the original contract conditions had been substantially changed. In doing so, it fell foul of Article 20(2)(a) of Directive 93/38.

Urgency

24. Article 20(2)(d) of Directive 93/38 provides that a procedure without a prior call for competition may be used 'in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time-limits laid down for open and restricted procedures cannot be adhered to'. The Commission argues that the way in which DEI's letter to the five tenderers of the second round justified its decision to proceed without a prior call for competition (for example, the references to the 'urgent needs' of Crete for electricity, the 'necessary time to install the two new units', the 'unforeseen delays') implies that it was relying not only on Article 20(2)(a) but Article 20(2)(d) too. The Greek Government disagrees. It submits that from the beginning DEI relied only on Article 20(2)(a) and made clear that the reason it followed the procedure without a call for tenders was because the two previous rounds had failed to produce a satisfactory outcome. This is what was meant by the phrase 'the overall history of the case'. The reference to the urgency of the situation was ancillary, indicating that one of the facts DEI had taken into account was that it had to act quickly.

25. It is true that the way the letter of 14 December 2004 was phrased gives the impression that DEI is invoking urgency as one of the reasons justifying the use of a procedure without a prior call for tenders. However, it is not clear whether this is used as a free-standing justification based on Article 20(2)(d). In any case, given that the Greek Government does not rely on this subsection, the Court does not need to examine the issue any further.

II – The delay in giving reasons

26. Article 41(4) of Directive 93/38 reads as follows: '[t]he contracting entities carrying out one of the activities mentioned in Annexes I, II, VII, VIII and IX shall, promptly after the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer'. The Commission argues that the two-month delay in providing the unsuccessful tenderer with reasons for the rejection of its tender cannot be considered 'prompt' for the purposes of this provision. The Greek Government concedes that there was some delay but claims that the criterion for assessing whether it falls foul of Article 41(4) is whether the tenderer has suffered prejudice in the exercise of its Community rights. Further, counsel for the Government submitted at the hearing that the legislative history of Article 41(4) – the Commission had initially proposed a 15-day period for giving reasons, as in the Public Sector Directives, and when the suggestion was rejected by the European Parliament the term 'promptly' was adopted – indicates that a certain latitude should be granted to contracting authorities when dealing with requests to give reasons for rejecting a tender.

According to the Greek Government, since, in the present case, the unsuccessful tenderer was able to avail itself of a remedy to have the legality of the contracting entity's decision reviewed, it cannot be said that DEI failed to comply with the directive by taking two months to respond to its request.

27. I agree with the Government that the use of the term 'promptly' without a reference to a specific time-limit means that the approach to Article 41(4) should not be too rigid. The fact that the Public Sector Directives explicitly provide for a 15-day period, (16) while Directive 93/38 on utilities does not, implies that the Community legislature deliberately left the question of how quickly a contracting entity should respond to be decided on a case-by-case basis.

28. In assessing what is a 'prompt' reply in any given case, one of the factors to be taken into consideration is whether the tenderer was able to use the remedies made available to him by Community and national law in order to have the legality of the decision reviewed by a court. Indeed, unless the contracting entity explains why a particular tender was rejected, the unsuccessful tenderer cannot know whether it makes sense to challenge the decision and on what grounds this should be done.

29. However, safeguarding the interests of tenderers that participate in a public procurement procedure is only one of the aims pursued by Article 41(4). This provision also serves to safeguard the integrity and efficiency of the procurement process as such; here, the beneficiaries are the contracting entities themselves and, ultimately, the tax-paying public. Therefore, in interpreting the term 'promptly', one should bear in mind that the obligation of contracting entities to provide reasons in a timely manner discourages favouritism and promotes compliance with the requirements of Community law. Article 41(4) constitutes a procedural guarantee which helps to ensure that the reasons given for the rejection of a tender are not a pretext for awarding contracts in an arbitrary manner. In other words, this rule performs a deterrence function: a contracting authority which knows that, immediately after choosing a tender, it will be called upon to justify its choice and explain why the others were rejected is less likely to depart from Community procurement rules.

30. Further, excessive delays in responding to a request for reasons may have significant efficiency costs. For example, in the present case DEI itself had emphasised that the island of Crete was in *urgent* need of additional electricity supplies. However, it delayed the project for two months by not explaining why it had chosen one particular tender and rejected the others. The Greek Government has not offered any reasons for DEI's tardiness, which can hardly be reconciled with the urgent nature of the contract in question. Given that many large projects in various Member States are funded, to some extent, by the Community budget it is reasonable to expect contracting authorities to apply Community procurement rules in a way that takes into account the need for efficiency.

31. It should be noted also that the new Utilities Directive, which replaced Directive 93/38, provides in Article 49(2) that contracting entities are to inform unsuccessful tenderers of the reasons for the rejection of their tenders 'as soon as possible' and that '[t]he time taken to do so may under no circumstances exceed 15 days from receipt of the written enquiry'. The drafters of the directive have themselves assessed what is an acceptable period for giving reasons and have thus removed all discretion from contracting authorities. Admittedly, the present case falls to be decided, *rationae temporis*, under Directive 93/38 and not Directive 2004/17. However, we cannot ignore the fact that the Community legislature has decided that, whatever considerations justified in the past a more flexible approach in relation to this issue in the utilities sector, they no longer exist. Accordingly, utilities are now subject to the same, stricter rule that applies to contracts for goods, supplies and services and provides that under no circumstances may the 15-day period be exceeded. Although the provision is not applicable in this case, it would be clearly artificial to suggest that the Court should ignore it. Ultimately, under Directive 93/38, what constitutes a reasonable delay will have to be decided on a case-by-case basis, bearing in mind the general need for expediency in public procurement which is not limited to the protection of the rights of tenderers. I think, therefore, that the concept of 'prompt' reply should be narrowly construed, taking into account the usual time-limits in other areas of public procurement. I am of the opinion that DEI's failure for two months to provide the unsuccessful tenderer with reasons constitutes – in the absence of any specific justifications for such a delay that clearly exceeds the usual time-limits applicable in public procurement – a breach of Article 41(4) of Directive 93/38.

III – Conclusion

32. I suggest that the Court should declare that, in failing, through DEI, to publish a call for

competition and give promptly to the unsuccessful tenderer reasons for the rejection of its tender, Greece has failed to fulfil its obligations under Articles 20(2) and 41(4) of Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

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1 – Original language: English.

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2 – OJ 1993 L 199, p. 84.

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3 – Case C–324/98 *Teleaustria* [2000] ECR I–10745, paragraphs 60 to 61.

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4 – Ibid., paragraph 62.

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5 – A transparency obligation is expressly imposed on contracting entities by the new procurement directives. Article 2 of the new Public Sector Directive (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)) and Article 10 of the new Utilities Directive (Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)) provide that they should 'act in a transparent way'.

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6 – See, inter alia, Case C–275/98 *Unitron Scandinavia* [1999] ECR I–8291, paragraph 31; Case C–19/00 *SIAC* [2001] ECR I–7725, paragraph 41; Case C–454/06 *pressetext* [2008] ECR I–0000, paragraph 32.

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7 – Case C–412/04 *Commission* v *Italy* [2008] ECR I–0000, paragraph 2.

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8 – Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

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9 – Case C–399/98 *Ordine degli Architetti* [2001] ECR I–5409, paragraph 75. See, to the same effect, Joined Cases C–285/99 and 286/99 *Impresa Lombardini* [2001] ECR I–9233, paragraph 35; and Case C–26/03 *Stadt Halle* [2005] ECR I–1, paragraph 44.

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10 – Case C–394/02 *Commission* v *Greece* [2005] ECR I–4713, paragraph 33.

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11 – As the Commission points out, this approach to 'flexibility' as an explanation of the nature of the procurement rules of Directive 93/38 is supported, by analogy, by recital 28 of the new Utilities Directive which replaced Directive 93/38. It states in relation to postal services: 'contracts awarded by contracting entities providing postal services should be subject to the rules of this Directive, including those in Article 30, which, safeguarding the application of the principles referred to in recital 9, create a framework for sound commercial practice and allow greater flexibility than is offered by Directive 2004/18/EC …'. Here, the new Utilities Directive is compared with the new Public Sector Directive in order to explain in what sense the provisions of the former are more flexible than those of the latter.

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

13 – Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

14 – Case C-412/04 *Commission* v *Italy*, paragraph 2.

15 – See, inter alia, Case C-373/00 *Truley* [2003] ECR I-1931, paragraph 42 ('settled case-law also shows that the purpose of the Community directives coordinating procedures for the award of public contracts is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones'); *pressetext*, paragraph 31 ('It is clear from the case-law that the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States'). Also, in Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 91, the Court held that 'there is no reason to give a different interpretation to two provisions which fall within the same field of Community law and have substantially the same wording'. The criterion, the Court tells us here, is the substance of the provisions to be interpreted; if the substance is the same, the interpretation should be the same.

16 – Article 8(1) of Directive 93/37; Article 7(1) of Directive 93/36; Article 12(1) of Directive 92/50.

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Action brought on 24 May 2007 - Commission of the European Communities v Hellenic Republic

(Case C-250/07)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and D. Kukovec)

Defendant: Hellenic Republic

Form of order sought

declare that, by not first publishing a call for competition and by being unjustifiably tardy in replying to the complainant's request that the reasons for the rejection of its tender be explained, the Hellenic Republic has failed to fulfil its obligation, regarding a call for competition before a procedure for the submission of tenders is embarked upon, under Article 20(2) of Directive 93/38/EEC [1] of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and its obligation under Article 41(4) of Directive 93/38/EEC, as both interpreted by the case-law of the Court of Justice of the European Communities;

order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The Commission received a complaint relating to irregularities in the carrying out of a tender procedure announced by the Dimosia Epikhirisi Ilektrismou (Public Power Corporation; 'the DEI') for the study, supply, transport, installation and bringing into operation of two steam-electric units for the steam electric station at Atherinolakkos, Crete.

The Commission submits that the DEI failed to publish a call for competition, in breach of Article 20(2)(a) of Directive 93/38/EEC, which provides for exceptions provided that conditions that must be interpreted restrictively are met. Specifically, the Commission considers that the DEI interpreted improperly the term 'suitable tenders' and 'substantial change in the conditions of the original contract' in order to justify application of the exception under the foregoing provision.

The Commission also considers that in the case in point it is not possible to rely on reasons of overriding and extreme urgency, or unforeseeable events, within the meaning of Article 20(2)(d), since they are not substantiated by the DEI.

Finally, in the light of the Court's case-law, the Commission considers that there was significant delay regarding a statement of the reasons for rejecting the complainant's tender, in breach of Article 41(4) of Directive 93/38/EEC.

Consequently, the Commission submits that the Hellenic Republic has failed to fulfil its obligations under Articles 20(2) and 41(4) of Directive 93/38/EEC.

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[1] - OJ No L 199, 9.8.1993, p. 84.

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JUDGMENT OF THE COURT (Grand Chamber)

16 December 2008 (*)

(Public works contracts – Directive 93/37/EEC – Article 24 – Grounds for excluding participation in a contract – National measures establishing an incompatibility between the public works sector and that of the media)

In Case C–213/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 8 December 2006, received at the Court on 23 April 2007, in the proceedings

Michaniki AE

v

Ethniko Simvoulio Radiotileorasis,

Ipourgos Epikratias,

interveners:

Elliniki Technodomiki Techniki Ependitiki Viomichaniki AE, successor in law to Pantechniki AE,

Sindesmos Epikhiriseon Periodikou Tipou,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts (Rapporteur), Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann, J. Klučka, A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 March 2008,

after considering the observations submitted on behalf of:

– Elliniki Technodomiki Techniki Ependitiki Viomichaniki AE, successor in law to Pantechniki AE, by K. Giannakopoulos, dikigoros,

– the Sindesmos Epikhiriseon Periodikou Tipou, by K. Drougas, dikigoros,

– the Greek Government, by A. Samoni-Rantou, E.-M. Mamouna, A. Manitakis and I. Dionisopoulos, acting as Agents,

– the Council of the European Union, by A. Lo Monaco, M.-M. Joséphidès and A. Vitro, acting as Agents,

– the Commission of the European Communities, by M. Patakia, D. Kukovec and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 October 2008,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 93/37').

2 The reference was made in proceedings brought by Michaniki AE ('Michaniki'), a company governed by Greek law, against the Ethniko Simvoulio Radiotileorasis (National Radio and Television Council; 'the ESR') and the Ipourgos Epikratias (Minister of State) concerning the decision by which the ESR issued to Pantechniki AE ('Pantechniki'), also a company governed by Greek law, a certificate of conformity, in the context of a procedure for the award of a public works contract.

Legal context

Community provisions

3 Article 6(6) of Directive 93/37, which appears in Title I ('General provisions'), states:

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

4 In Chapter 2 ('Criteria for qualitative selection') of Title IV ('Common rules on participation') of that directive, the first paragraph of Article 24 provides:

'Any contractor may be excluded from participation in the contract who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*;

(d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Chapter.'

National provisions

5 Article 14(9) of the Greek Constitution, which was added by the vote on 6 April 2001 of the seventh revising assembly of the Greek Parliament, provides:

'The ownership, financial standing and means of financing of the media must be disclosed, as stipulated by law.

The measures and restrictions necessary to ensure full media transparency and pluralism shall be specified by law.

It is prohibited to concentrate control of several media of the same or different form.

In particular, it is prohibited to concentrate control of more than one electronic medium of the same form, as specified by law.

The status of owner, partner, main shareholder or management executive of a media undertaking shall be incompatible with the status of owner, partner, main shareholder or management executive of an undertaking which undertakes with the State or a legal person in the public sector in the broad sense to perform works or provide supplies or services.

The prohibition in the previous subparagraph shall also extend to any form of intermediary, such as spouses, relatives or financially dependent persons or companies.

A law shall set out the specific regulations, the sanctions (which may go as far as revocation of a radio or television station's licence and an order prohibiting the signature of, or cancelling, the contract in question), the system of supervision and the guarantees to prevent circumvention of the foregoing subparagraphs.'

6 Law 3021/2002 relating to the restrictions applicable to the conclusion of public contracts with persons who are active in or have interests in media undertakings (FEK A' 143) governs the aspects referred to in the last subparagraph of Article 14(9) of the Constitution.

7 Undertakings 'whose operation is subject to the jurisdiction of the Greek State' fall within the concept of 'media undertaking' within the meaning of Article 1 of that law. Article 1 also sets out the definitions of 'public sector in the broad sense', 'public contracts', 'main shareholder', 'management executives', 'financially dependent persons' and 'intermediaries'.

8 In particular, 'main shareholder' and 'intermediaries' are defined as follows, in Article 1(4) and (7) of Law 3021/2002:

'4. "Main shareholder": a shareholder who, on the basis of the number of shares that he owns, calculated independently or by comparison with the number of shares owned by the other shareholders of the company, on the basis of the voting rights that he holds or other special rights conferred by law or by the statutes of the company or on the basis of general or specific agreements that he has concluded with the company, other shareholders or third parties who are financially dependent on him or act on his behalf, is able to exert a material influence on the decisions taken by the competent bodies or executives of the company as regards the method of management and of general operation of the undertaking concerned.

More specifically, the following shall be deemed to be a main shareholder:

A. A natural or legal person who, regardless of the percentage of the total share capital that he or it owns:

(a) owns a larger number of shares than any other shareholder or a number of shares equal to that held by another shareholder in that case, or

(b) holds, either pursuant to the company statutes or following the transfer of a right of other shareholders in that regard, the majority of voting rights at the general meeting of shareholders, or

(c) has the right, by virtue of law or the statutes of the company or following the transfer of a right of other shareholders in that regard, to appoint or dismiss at least two members of the board of directors or one member where the latter performs the functions of chairman or vice-chairman, of managing, executive or joint director or of general director with executive duties, or

(d) holds a percentage of the total share capital or voting rights equal to at least half the share capital which was represented and voted when the decision of the general meeting of shareholders relating to the election or dismissal of the last board of directors of the company or of the majority of the board members was adopted, or

(e) enters, directly or indirectly, into contracts and into agreements generally with the company which generate revenue or other financial benefits for the company equal to at least one fifth of its gross revenue during the previous year.

B. A natural or legal person who:

(a) owns shares representing at least 5% of the total share capital or

(b) holds voting rights corresponding to at least 5% of the voting rights at the company's general meeting of shareholders.

For the calculation of the percentage of the share capital or voting rights referred to in points A and B of this paragraph, the number of shares or voting rights which belong to or are held by the following shall also be taken into account:

– intermediaries,

– undertakings controlled by the same shareholder,

– another shareholder with whom he has entered into an agreement for the purpose of achieving, by the coordinated exercise of his voting rights, a lasting common company management policy.

Voting rights which are held under a pledge agreement, under an agreement conferring beneficial enjoyment or as a result of a protective measure against the holder of the corresponding shares and the number of shares which he does not own but in respect of which he has a right to receive dividends shall also be taken into account. The number of shares or voting rights which are acquired by inheritance shall be taken into account on expiry of a period of three months from their acquisition.

...

7. "Intermediaries": natural or legal persons who are financially dependent on or who act, under the terms of a general or specific agreement, on behalf or on the recommendation or instruction of another natural or legal person.'

9 Article 2 of Law 3021/2002, entitled 'Prohibition on the award of public contracts to media undertakings', provides:

'1. It is prohibited to award public contracts to media undertakings or to the partners, main shareholders, members of the administrative organs or management executives of such undertakings. It is also prohibited to award public contracts to undertakings whose partners, main shareholders, members of the administrative organs or management executives are media undertakings or partners, main shareholders, members of the administrative organs or management executives of media undertakings.

2. The prohibition on the award of public contracts shall also encompass:

(a) the spouses and relatives in a direct line to an unlimited degree and collaterally up to and including the fourth degree of the natural persons falling within paragraph 1, unless they can prove that they are financially independent of such persons;

(b) any other intermediary;

(c) the partners and main shareholders owning the partners and the main shareholders who fall within paragraph 1;

(d) any natural or legal person who, whilst not a shareholder, controls, directly or indirectly, one or more media undertakings or exerts, directly or indirectly, a material influence on the adoption of the decisions taken by the administrative organs or management executives in relation to the management or general operation of those undertakings.

...'

10 Article 3 of Law 3021/2002, relating to '[i]ncompatibilities', provides:

'1. The status of owner, partner, main shareholder, member of an administrative organ or management executive of a media undertaking shall be incompatible with the status of owner, partner, main shareholder, member of an administrative organ or management executive of an undertaking which enters into public contracts the award of which is prohibited under Article 2, and with the status of partner or main shareholder owning the partners or the main shareholders of that undertaking.

2. The incompatibility provided for in this article shall also apply where the owner, main shareholder, partner, member of an administrative organ or management executive of an undertaking which enters into public contracts is a spouse or relative, in a direct line to an unlimited degree and collaterally up to and including the fourth degree, who is unable to show that he is financially independent of the owner, partner, main shareholder, member of an administrative organ or management executive of a media undertaking; the same shall also apply in any other case in which the abovementioned incompatibilities relate to an intermediary.

...'

11 Article 4 of Law 3021/2002 provides, in essence, that, before issuing acceptance of a tender for or awarding a public contract and, in any event, before the public contract is signed, the contracting authority must apply to the ESR for a certificate attesting that the conditions of incompatibility laid down in Article 3 of that law are not fulfilled, failing which the public contract is void.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 By Decision No 844 of 13 December 2001, the board of directors of Erga OSE AE ('Erga OSE'), a company governed by Greek law, announced an invitation to tender by open procedure for the construction of embankments and technical infrastructure works for the new high-speed, two-track railway line between Corinth and Kiato (Greece), with a budget of EUR 51 700 000.

13 Michaniki and KI Sarantopoulos AE ('Sarantopoulos'), which is also a company governed by Greek law, were among the participants in that procedure.

14 By Decision No 959 of 22 May 2002, the board of directors of Erga OSE awarded the contract relating to those embankment and technical infrastructure works to Sarantopoulos. The latter was subsequently taken over by Pantechniki.

15 Before entering into the contract, Erga OSE, which at the time fell within the 'public sector in the broad sense' within the meaning of Article 1(2) of Law 3021/2002, disclosed to the ESR by letter of 9 October 2002 the information on the identity of the main shareholders, the members of the board of directors and the members of the executive board of Pantechniki, in order to obtain a certificate stating that those persons were not concerned by the incompatibilities laid down in Article 3 of that law.

16 On the basis of Article 4 of Law 3021/2002, the ESR drew up certificate No 8117 of 30 October 2002 attesting that there was no incompatibility in respect of the persons identified in Erga OSE's letter of 9 October 2002 ('the certificate').

17 According to the information in the order for reference, the ESR was of the view that Mr K. Sarantopoulos, a main shareholder and vice-chairman of the board of directors of Pantechniki, was not, despite his status as parent of Mr G. Sarantopoulos, a member of the board of directors of two Greek companies active in the media field, affected by the system of incompatibility established by Articles 2 and 3 of Law 3021/2002, finding that Mr K. Sarantopoulos was financially independent of Mr G. Sarantopoulos.

18 Michaniki applied to the Simvoulio tis Epikratias (Council of State) to have the certificate annulled on the basis of an infringement of Article 14(9) of the Constitution. It submits in particular that Articles 2(2) and 3(2) of Law 3021/2002, on the basis of which the certificate was issued, have the effect of reducing the scope of Article 14(9) of the Constitution and that they are not therefore consistent with that constitutional provision.

19 Pantechniki, whose successor in law is Elliniki Technodomiki Techniki Ependitiki Viomichaniki AE,

and the Sindesmos Epikhiriseon Periodikou Tipou (Association of Magazine Undertakings) were granted leave to intervene in the main proceedings in support of the ESR.

20 The referring court takes the view that in so far as Articles 2(2) and 3(2) of Law 3021/2002 allow a public works contractor to escape the system of incompatibility by demonstrating his financial independence from a relative who is an owner, major shareholder, partner or director of a media undertaking, they infringe Article 14(9) of the Constitution, pursuant to which that contractor, even if financially independent of that relative, is nevertheless required to prove that he has acted independently, on his own account and in his own interest.

21 However, the referring court takes the view that, although that analysis may at this stage be sufficient to decide the case in the main proceedings, reasons of procedural economy justify that, with a view to the possible annulment of the certificate based on the infringement of Article 14(9) of the Constitution by Articles 2 and 3 of Law 3021/2002, it reviews now the compatibility with Community law of that constitutional provision, which allows a public works undertaking to be excluded from a public contract on the ground that its main shareholder has been unable to rebut the presumption applicable to him, as a relative of the owner, partner, main shareholder or director of a media company, that he acted on behalf of that company and not on his own account.

22 In this respect, the referring court states, first, that a majority of its members takes the view that the list of grounds for exclusion set out in Article 24 of Directive 93/37 is exhaustive and, therefore, does not allow the addition of grounds for exclusion such as those flowing from Article 14(9) of the Constitution. It adds that some of its members take the view, by contrast, that, in view of the partial nature of the harmonisation effected by that directive, Article 24 thereof does not prohibit Member States from providing for additional grounds for exclusion concerned in particular, as in the present case, with objectives of public interest connected with the operation of democracy and ensuring pluralism of the press.

23 Second, if Article 24 of Directive 93/37 is not exhaustive, the referring court takes the view that the Member States' discretion to provide for additional grounds for exclusion is subject, in accordance with Community case-law, to conditions relating, first, to there being an objective which is compatible with the general principles of Community law and, second, to observance of the principle of proportionality. It states in this respect that one of its members considers that Article 14(9) of the Constitution does not infringe that principle in view of the fact that the presumption relating to intermediaries is rebuttable and that there is no alternative solution enabling the objectives pursued to be achieved.

24 Third, if Article 24 of Directive 93/37 is exhaustive, or if Article 14(9) of the Constitution cannot be considered to pursue an aim which is compatible with Community law or to be consistent with the principle of proportionality, the referring court doubts that the prohibition imposed on the Member States by that directive on enacting provisions, such as those at issue in the main proceedings, which, for reasons of public interest, establish a system of incompatibility between the field of the media and that of public contracts is consistent with the principles linked to the protection of the normal operation of democracy in the Member States and to ensuring transparency in public procurement procedures, the principle of free and fair competition and the principle of subsidiarity.

25 It states however that a minority of its members has a contrary view, considering that Directive 93/37 contains sufficient safeguards to ensure the transparency of public procurement procedures and to protect those procedures from unlawful influences or corruption.

26 In these circumstances the Simvoulio tis Epikratias decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the list of grounds for excluding public works contractors contained in Article 24 of … Directive 93/37 … exhaustive?

(2) If that list is not exhaustive, does a provision which lays down (in order to protect transparency in the economic functioning of the State) that the status of owner, partner, main shareholder or management executive of a media undertaking is incompatible with the status of owner, partner, main shareholder or management executive of an undertaking contracting to perform a works, supply or services contract for the State, or for a legal person in the public sector in the broad sense, serve purposes which are compatible with the general principles of Community law and is that total prohibition on the award of public contracts to such undertakings compatible with the Community principle of proportionality?

(3) If, within the meaning of Article 24 of Directive 93/37 …, the list of grounds for excluding contractors contained therein is an exhaustive list or if the national provision at issue cannot be construed as serving purposes which are compatible with the general principles of Community law or if, finally, the prohibition introduced in it is not compatible with the Community principle of proportionality, does the above directive, in preventing the inclusion, as grounds for excluding contractors from public works procurement procedures, of cases where the contractor, its executives (such as the owner of the undertaking or its main shareholder, partner or management executive), or intermediaries acting for the said executives, work in media undertakings which are able to exercise an undue influence on the public works procurement procedure, because of the influence which they are able to exert in general, infringe the general principles of the protection of competition and transparency and the second paragraph of Article 5 [EC] which enacts the principle of subsidiarity?'

The Court's jurisdiction and the admissibility of the questions referred for a preliminary ruling

27 The Greek Government disputes the relevance of the questions submitted by the referring court.

28 First, it asserts that the dispute in the main proceedings relates to a purely domestic situation, which concerns Greek operators exclusively. It is therefore doubtful that that case falls within the scope of Directive 93/37 and, consequently, is covered by the Court's jurisdiction to interpret Community law.

29 In this respect, it must however be observed that there is nothing in Directive 93/37 to permit the inference that the applicability of its provisions, in particular the common rules on participation laid down, inter alia, in Article 24 thereof, depends on the existence of an actual link with free movement between Member States. As the Advocate General stated at point 16 of his Opinion, that directive does not make the applicability of its provisions to procedures for the award of public works contracts contingent on any condition relating to the nationality or the place of establishment of the tenderers (see, by analogy, Case C–87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 33).

30 Consequently, and in the light of the fact that the amount of the contract at issue in the main proceedings exceeds the threshold for the application of Directive 93/37, the Court does have jurisdiction in this case to interpret that directive.

31 Second, the Greek Government submits that the dispute pending before the referring court relates solely to the issue of whether provisions of Law 3021/2002 are compatible with Article 14(9) of the Constitution. The interpretation of Community law sought by that court does not therefore satisfy an objective need for the resolution of the dispute.

32 In this respect, it must be recalled that, according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C–415/93 *Bosman* [1995] ECR I–4921, paragraph 59; Case C–466/04 *Acereda Herrera* [2006] ECR I–5341, paragraph 47; and Case C–380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 52).

33 Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C–326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C–145/03 *Keller* [2005] ECR I–2529, paragraph 33; and Case C–13/05 *Chacón Navas* [2006] ECR I–6467, paragraph 32).

34 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C–379/98 *PreussenElektra* [2001] ECR I–2099, paragraph 39; Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 25; and *Chacón Navas*, paragraph 33).

35 That is not so here. In this case, an answer from the Court in response to the reference for a preliminary ruling will provide the referring court with the interpretation necessary for it to resolve the question, which affects the final outcome of the main proceedings, of whether the system of incompatibility between the public works contracts sector and the media sector, established by Article 14(9) of the Constitution and implemented by Law 3021/2002, complies with Community law.

36 Consequently, the reference for a preliminary ruling must be held admissible.

The questions referred

The first question

37 By its first question, the referring court is essentially asking whether the grounds laid down in the first paragraph of Article 24 of Directive 93/37 for excluding participation in a public works contract are exhaustive.

38 The Community directives on public contracts aim to coordinate national procedures in that field (Joined Cases C-226/04 and C-228/04 *La Cascina and Others* [2006] ECR I-1347, paragraph 20). In the case of public works contracts, the second recital in the preamble to Directive 93/37 explicitly emphasises that objective.

39 It is apparent from the second and tenth recitals in the preamble to Directive 93/37 that that coordination seeks the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts and the development, at the Community level, of effective competition in that field, by promoting the widest possible expression of interest among contractors in the Member States (see, to that effect, Case C-225/98 *Commission* v *France* [2000] ECR I-7445, paragraph 34; Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 52; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 34; and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 89).

40 In that context, Article 24 of Directive 93/37, which falls in the title of the directive dealing with the 'common' rules on participation, forms part of a detailed set of criteria for the selection of contractors permitted to submit a tender and for the award of the contract (see, by analogy, Case C-94/99 *ARGE* [2000] ECR I-11037, paragraph 27).

41 In a chapter which deals with the criteria for 'qualitative' selection, Article 24 identifies, in its first paragraph, seven grounds for excluding contractors from participation, relating to the professional qualities of the person concerned, more specifically his professional honesty, his solvency and his economic and financial capacity (see, by analogy, Case 76/81 *Transporoute et travaux* [1982] ECR 417, paragraph 9, and *La Cascina and Others*, paragraph 21).

42 It should be pointed out in this respect, as the Council of the European Union has done, that the approach of the Community legislature was to adopt only grounds for exclusion based on the objective finding of facts or conduct specific to the contractor concerned, such as to cast discredit on his professional reputation or call into question his economic or financial ability to complete the works covered by the public contract for which he is tendering.

43 Accordingly, the first paragraph of Article 24 of Directive 93/37 must be read as listing exhaustively the grounds capable of justifying the exclusion of a contractor from participation in a contract for reasons, based on objective factors, that relate to his professional qualities. That provision therefore precludes Member States or contracting authorities from adding to the list contained in that provision other grounds for exclusion based on criteria relating to professional qualities (see, by analogy, *La Cascina and Others*, paragraph 22).

44 The exhaustive list set out in the first paragraph of Article 24 of Directive 93/37 does not however preclude the option for Member States to maintain or adopt substantive rules designed, in particular, to ensure, in the field of public procurement, observance of the principle of equal treatment and of the principle of transparency entailed by the latter, principles which are binding on contracting authorities in any procedure for the award of a public contract (see, to that effect, *ARGE*, paragraph 24, and Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraph 29).

45 Those principles, which mean, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (see, to that effect, Case C–19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 34, and Case C-448/01 *EVN and Wienstrom* [2003] ECR I–14527, paragraph 47), constitute the basis of the directives on procedures for the award of public contracts (see, inter alia, *Universale-Bau and Others*, paragraph 91, and Case C–315/01 *GAT* [2003] ECR I–6351, paragraph 73), and the duty of contracting authorities to ensure that they are observed lies at the very heart of those directives (see, to that effect, Case C–513/99 *Concordia Bus Finland* [2002] ECR I–7213, paragraph 81, and Joined Cases C–21/03 and C-34/03 *Fabricom* [2005] ECR I–1559, paragraph 26).

46 Article 6(6) of Directive 93/37 states moreover that contracting authorities are to ensure that there is no discrimination between the various contractors.

47 It follows that, in addition to the grounds for exclusion based on objective considerations of professional quality, which are listed exhaustively in the first paragraph of Article 24 of Directive 93/37, a Member State is entitled to provide for exclusionary measures designed to ensure observance, in procedures for the award of public contracts, of the principles of equal treatment of all tenderers and of transparency.

48 However, in accordance with the principle of proportionality, which constitutes a general principle of Community law (see, inter alia, Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47), such measures must not go beyond what is necessary to achieve that objective (see, to that effect, *Fabricom*, paragraph 34).

49 In view of the foregoing, the answer to the first question must be that the first paragraph of Article 24 of Directive 93/37 must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

The second question

50 By its second question, the referring court is essentially asking whether a national provision which establishes an incompatibility between the media sector and the public procurement sector is compatible with the principles of Community law.

51 As a preliminary point, it must be recalled that it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of national law with Community law or to interpret national law. The Court is, however, competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see, inter alia, Case C–292/92 *Hünermund and Others* [1993] ECR I–6787, paragraph 8; Case C-237/04 *Enirisorse* [2006] ECR I–2843, paragraph 24; and *Centro Europa 7*, paragraphs 49 and 50).

52 It is therefore appropriate for the Court, in the present case, to restrict its analysis by providing an interpretation of Community law which will be of use to the referring court, which will have the task of determining the compatibility of the provisions of national law concerned with Community law, for the purposes of deciding the dispute before it.

53 As was noted in paragraph 39 of this judgment, the primary aim of Directive 93/37 is to open up public works contracts to Community competition. The purpose of that directive is to avoid the risk of the public authorities indulging in favouritism (see, to that effect, *Ordine degli Architetti and Others*, paragraph 75, and *Lombardini and Mantovani*, paragraph 35).

54 The Community coordination of procedures for the award of public contracts is designed in particular to avoid both the risk of preference being given to national tenderers whenever a contract is awarded and the possibility that a contracting authority may choose to be guided by considerations which are unrelated to the contract in question (see, to that effect, Case C–380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 17; Case C–237/99 *Commission* v *France* [2001] ECR I-939, paragraph 42; and *Lombardini and Mantovani*, paragraph 36).

55 Against that background, as the Advocate General observed at point 30 of his Opinion, it is appropriate to grant the Member States a certain discretion for the purpose of adopting measures intended to safeguard the principles of equal treatment of tenderers and of transparency, which, as was noted at paragraph 45 of this judgment, constitute the basis of the Community directives on the award of public contracts.

56 Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it (see, to that effect, *La Cascina and Others*, paragraph 23), situations propitious to conduct liable to bring about breaches of those principles.

57 Consequently, Community law does not seek to call into question the assessment of a Member State, in the light of the specific context of that Member State, as to the particular risk that such conduct will arise if, amongst the tenderers for a public works contract, there is an undertaking active in the media sector or connected with persons involved in that sector, and as to the need to take measures to reduce that risk.

58 In this case, the Member State concerned took the view that it could not be ruled out that, in the context of their participation in a procedure for the award of a public contract, media undertakings or public works contractors connected with such an undertaking or with persons owning or running it might seek to use in relation to the contracting authority the influence afforded by their position or their connections in the media sector in order to seek to unlawfully influence the decision awarding that contract, by holding out the prospect of a supportive mass information campaign or, on the contrary, a mass information campaign of a critical nature, depending on whether the decision was favourable or unfavourable to the undertaking.

59 A Member State's desire to prevent the risks of interference of the power of the media in procedures for the award of public contracts is consistent with the public interest objective of maintaining the pluralism and the independence of the media (see, in this respect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 18, and Case C-250/06 *United Pan-Europe Communications Belgiumand Others* [2007] ECR I-11135, paragraphs 41 and 42). Moreover, it serves specifically another such objective, namely that of fighting against fraud and corruption (see, in this respect, Case C-275/92 *Schindler* [1994] ECR I–1039, paragraphs 57 to 60, and Joined Cases C-338/04, C–359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 46).

60 It follows that Community law does not preclude the adoption of national measures designed to avoid, in procedures for the award of public works contracts, the risk of occurrence of practices capable of jeopardising transparency and distorting competition, a risk which could arise from the presence, amongst the tenderers, of a contractor active in the media sector or connected with a person involved in that sector, and thus to prevent or punish fraud and corruption.

61 As was made clear in paragraph 48 of this judgment, it is also necessary for such measures to be compatible with the principle of proportionality.

62 A national provision, such as that at issue in the main proceedings, which establishes a system of general incompatibility between the sector of public works and that of the media, has the consequence of excluding from the award of public contracts public works contractors who are also involved in the media sector on account of a connection as owner, main shareholder, partner or management executive, without affording them any possibility of showing, with regard to any evidence advanced, for instance, by a competitor, that, in their case, there is no real risk of the type referred to in paragraph 60 of this judgment (see, by analogy, *Fabricom*, paragraphs 33 and 35).

63 As the Commission of the European Communities and the Council have asserted, as did Elliniki Technodomiki Techniki Ependitiki Viomichaniki AE at the hearing, such a provision goes beyond what is necessary to achieve the claimed objectives of transparency and equal treatment, by excluding an entire category of public works contractors on the basis of an irrebuttable presumption that the presence amongst the tenderers of a contractor who is also involved in the media sector is necessarily such as to impair competition to the detriment of the other tenderers.

64 The Greek Government drew attention to the possibility stemming from the constitutional provision at issue in the main proceedings of not applying the exclusionary measure to an intermediary – in the form of a spouse, a relative or a financially dependent person or company – of a media undertaking or of a person responsible for such an undertaking if it is demonstrated that the participation of that intermediary in a procedure for the award of a public contract is the result of an autonomous decision which is dictated by the intermediary's own interest alone.

65 However, that possibility is not capable of reconciling the national provision at issue in the main proceedings with the principle of proportionality.

66 Such a possibility does not alter the automatic and absolute nature of the prohibition affecting any public works contractor who is also active in the media sector or connected with natural or legal persons involved in that sector; such a contractor is not concerned by that qualification to the general exclusionary measure provided for in favour of intermediaries.

67 Moreover, a public works contractor who acts as an intermediary of a media undertaking or of a person owning or running such an undertaking will be excluded from the award of a contract without being afforded the possibility of showing, in the event that it is established that he is acting on behalf of that undertaking or that person, that that action is not liable to influence competition between the tenderers.

68 Lastly, the very broad meaning, in the context of the national provision at issue in the main proceedings, of the concepts of main shareholder and intermediaries, as is clear from paragraph 8 of this judgment, serves to reinforce the disproportionate nature of such a provision.

69 In the light of the above, the answer to the second question must be that Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.

The third question

70 In the light of the answers to the first two questions, there is no need to reply to the third question.

Costs

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

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

1. **The first paragraph of Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.**

2. **Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.**

[Signatures]

* Language of the case: Greek.

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Judgment of the Court (Grand Chamber) of 16 December 2008 (Reference for a preliminary ruling from the Simvoulio tis Epikratias - Greece) - Michaniki AE v Ethniko Simvoulio Radiotileorasis, Ipourgos Epikratias

(Case C-213/07) [1]

(Public works contracts - Directive 93/37/EEC - Article 24 - Grounds for excluding participation in a contract - National measures establishing an incompatibility between the public works sector and that of the media)

Language of the case: Greek

Referring court

Simvoulio tis Epikratias

Parties to the main proceedings

Applicant: Michaniki AE

Defendants: Ethniko Simvoulio Radiotileorasis, Ipourgos Epikratias

Interveners in support of the defendants: Elliniki Technodomiki Techniki Ependitiki Viomichaniki AE, successor in law to Pantechniki AE, Sindesmos Epikhiriseon Periodikou Tipou

Re:

Reference for a preliminary ruling - Simvoulio tis Epikratias - Interpretation of Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) - Question of whether or not the list of grounds for excluding a contractor from participation in the contract is exhaustive

Operative part of the judgment

(1) The first paragraph of Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective;

(2) Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.

_____

[1] - OJ C 140, 23.6.2007.

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CONCLUSIONS DE L'AVOCAT GÉNÉRAL
M. M. Poiares Maduro
présentées le 8 octobre 2008 (1)

Affaire C–213/07

Michaniki AE
contre
Ethniko Symvoulio Radiotileorasis,
Ypoyrgos Epikrateias,
Elliniki Technodomiki (TEVAE), anciennement Pantechniki AE,
Syndesmos Epicheiriseon Periodikou Typou, Somateio

[demande de décision préjudicielle formée par le Symvoulio tis Epikrateias (Grèce)]

«Marchés publics – Procédure de passation des marchés publics de travaux – Conditions d'exclusion d'un entrepreneur de la participation au marché»

1. Un État membre peut–il ajouter une cause d'exclusion de la participation aux procédures de passation des marchés publics de travaux à la liste figurant à l'article 24 de la directive 93/37/CEE (2)? À quelles conditions et dans quelles limites? Ces questions qui font, en substance, l'objet du présent renvoi préjudiciel soulèvent la problématique de l'existence et, le cas échéant, de l'étendue du pouvoir normatif dont disposent les États membres lorsqu'existe une harmonisation communautaire. Cette problématique n'est pas inédite. Elle a déjà donné lieu à une jurisprudence fournie. Ce qui fait cependant la singularité de la présente affaire, c'est que la mesure normative nationale en cause est une disposition constitutionnelle. Est–ce de nature à influer sur la teneur de la réponse à apporter? Tels sont les points qui sont au cœur du présent litige.

I – Cadre juridique

A – *La réglementation communautaire*

2. L'article 24 de la directive 93/37 énonce les causes d'exclusion de la participation à un marché de travaux publics. Il est libellé comme suit:

«Peut être exclu de la participation au marché tout entrepreneur:

a) qui est en état de faillite, de liquidation, de cessation d'activités, de règlement judiciaire ou de concordat préventif ou dans toute situation analogue résultant d'une procédure de même nature existant dans les législations et réglementations nationales;

b) qui fait l'objet d'une procédure de déclaration de faillite, de règlement judiciaire, de liquidation, de concordat préventif ou de toute autre procédure de même nature existant dans les législations et réglementations nationales;

c) qui a fait l'objet d'une condamnation prononcée par un jugement ayant autorité de chose jugée pour tout délit affectant la moralité professionnelle de l'entrepreneur;

d) qui, en matière professionnelle, a commis une faute grave constatée par tout moyen dont les pouvoirs adjudicateurs pourront justifier;

e) qui n'est pas en règle avec ses obligations relatives au paiement des cotisations de sécurité sociale selon les dispositions légales du pays où il est établi ou celles du pays du pouvoir adjudicateur;

f) qui n'est pas en règle avec ses obligations relatives au paiement de ses impôts et taxes selon les dispositions légales du pays où il est établi ou celles du pays du pouvoir adjudicateur;

g) qui s'est rendu gravement coupable de fausses déclarations en fournissant les renseignements exigibles en application du présent chapitre.

[…]»

B – *Le droit national*

3. L'article 14, paragraphe 9 de la Constitution grecque de 1975, alinéas 5 et 6 et 7, tel qu'issu de la révision constitutionnelle du 6 avril 2001 dispose:

«La qualité de propriétaire, d'associé, d'actionnaire majeur ou de cadre dirigeant d'une entreprise de médias d'information est incompatible avec la qualité de propriétaire, d'associé, d'actionnaire majeur ou de cadre dirigeant d'une entreprise qui, vis–à–vis de l'État ou d'une personne morale du secteur public au sens large, est chargée de l'exécution de travaux, de fournitures ou de prestations de services.

L'interdiction édictée par l'alinéa précédent vise aussi toutes les personnes faisant office d'intermédiaires, telles que conjoints, parents, personnes ou sociétés économiquement dépendantes.

Une loi détermine les modalités, les sanctions qui peuvent être prises, allant jusqu'au retrait de l'autorisation d'une station de radio ou de télévision et jusqu'à l'interdiction de conclure une convention ou l'annulation de la convention concernée, ainsi que les modalités de contrôle et les garanties visant à éviter que les dispositions des alinéas précédents ne soient pas tournées».

4. En application du septième alinéa de l'article 14, paragraphe 9 de la Constitution grecque, la loi n° 3021/2002, relative aux restrictions à la conclusion de marchés publics avec des personnes actives dans des entreprises du secteur des médias d'information énonce, en substance, une interdiction de passation d'un marché public de travaux avec:

– une entreprise de médias d'information ou un entrepreneur de médias d'information (propriétaire, associé, actionnaire majeur ou dirigeant d'une entreprise de médias d'information);

– une entreprise dont les associés, actionnaires majeurs, membres des organes de gestion ou cadres dirigeants sont des entreprises de médias d'information ou des associés, des actionnaires majeurs, membres d'organes de gestion ou cadres dirigeants d'entreprises de médias d'information;

– un entrepreneur (propriétaire, associé, actionnaire majeur ou dirigeant d'une entreprise de travaux) qui serait *le conjoint ou le parent* du propriétaire, d'un associé, de l'actionnaire majeur ou d'un cadre dirigeant d'une entreprise de médias d'information, à moins que cette personne–là ne démontre qu'elle jouit d'une autonomie économique vis–à–vis de cette personne–ci.

5. La loi n° 3021/2002 ajoute, en substance, qu'avant de procéder à l'attribution d'un marché public, le pouvoir adjudicateur concerné doit, sous peine de nullité du contrat ou du marché public, demander au Conseil national de la radiotélévision (Ethniko Symvoulio Radiotileorasis; ci–après, l'«ESR») l'établissement d'un certificat attestant l'absence de toute incompatibilité prévue par ladite loi.

II – Le litige au principal et le renvoi préjudiciel

6. Par décision du 13 décembre 2001, la société Erga, entreprise publique, a lancé un appel d'offres pour la construction des ouvrages de terrassement et des ouvrages techniques d'infrastructure de la nouvelle ligne ferroviaire à deux voies à grande vitesse entre Corinthe et Kiatos, dont le budget s'élève à 51 700 000 euros. Ont pris part à cette procédure de marché, entre autres, la société Michaniki et la société Sarantopoulos.

7. Le 22 mai 2002, l'entité adjudicatrice a attribué le marché à la société Sarantopoulos qui, par la suite, a été absorbée par la société Pantechniki. Au préalable, ladite entité adjudicatrice avait demandé et obtenu de l'ESR un certificat d'absence d'incompatibilité dans le chef de la société Pantechniki, exigé par la loi grecque n° 3021/2002. L'ESR a, en effet, estimé que, bien que M. K. Sarantopoulos, actionnaire majeur et vice–président du conseil d'administration de Pantechniki, soit un parent (plus exactement le père) de M. G. Sarantopoulos, membre de plusieurs conseils d'administration de sociétés grecques de médias d'information, il ne tombait pas sous le coup des incompatibilités prévues par la législation grecque, étant donné qu'il est économiquement autonome par rapport à M. G. Sarantopoulos.

8. L'entreprise Michaniki, concurrente malheureuse de l'adjudicataire a demandé au Conseil d'État grec l'annulation du certificat d'incompatibilité émis par l'ESR, au motif que les dispositions de la loi n° 3021/2002 sur la base desquelles ledit certificat a été délivré seraient contraires à l'article 14, paragraphe 9 de la Constitution grecque.

9. D'accord avec la requérante au principal, la juridiction de renvoi estime les dispositions législatives contestées, en ce qu'elles permettent à un entrepreneur de travaux publics d'échapper aux incompatibilités qu'elles édictent en démontrant son autonomie économique par rapport à son parent propriétaire, associé, actionnaire ou dirigeant d'une entreprise de médias d'information, contraires à l'article 14, paragraphe 9, de la Constitution, en vertu duquel ledit entrepreneur, quand bien même il serait économiquement autonome par rapport à ce parent, est néanmoins tenu de prouver qu'il n'a pas fait office d'intermédiaire mais a agi de façon autonome, pour son propre compte et dans son propre intérêt.

10. La juridiction de renvoi s'interroge néanmoins sur la compatibilité avec le droit communautaire de ladite disposition constitutionnelle, qui permet d'écarter d'un marché une entreprise de travaux publics au motif que son actionnaire majeur ne serait pas parvenu à infirmer la présomption, pesant sur lui en tant que parent du propriétaire, d'un associé, de l'actionnaire majeur ou d'un dirigeant d'une entreprise de médias d'information, selon laquelle il est intervenu comme intermédiaire de cette entreprise et non pour son propre compte. Il semblerait, en effet, que l'énumération des causes d'exclusion figurant à l'article 24 de la directive 93/37 soit limitative et exclue, par conséquent, l'ajout de motifs d'exclusion tel que celui énoncé par l'article 14, paragraphe 9 de la Constitution grecque. À supposer même que la directive 93/37 n'ait réalisé sur ce point qu'une harmonisation partielle, la légalité au regard du droit communautaire de cas supplémentaires d'exclusion prévus par un État membre serait subordonnée à la poursuite d'un objectif d'intérêt général compatible avec le droit communautaire et au respect du principe de proportionnalité. Enfin, dans le cas où la Cour devrait considérer la liste des causes d'exclusion figurant à l'article 24 de ladite directive comme exhaustive, le juge a quo se demande si la prohibition, qu'il faudrait en déduire, de l'instauration d'un régime d'incompatibilité entre le domaine d'activité des médias d'information et celui des marchés publics ne serait pas attentatoire aux principes liés à la protection du fonctionnement normal du système démocratique, au respect de la transparence dans la passation des marchés publics, au principe d'une concurrence libre et loyale ainsi qu'à celui de subsidiarité.

11. Le juge national du principal a, en conséquence, posé trois questions préjudicielles à la Cour. La première porte sur le caractère limitatif de la liste des causes d'exclusion contenue dans l'article 24 de la directive 93/37. La deuxième a trait à la compatibilité, d'une part avec les principes généraux du droit communautaire du but poursuivi par l'instauration d'une incompatibilité entre la qualité de propriétaire, d'associé, d'actionnaire majeur ou de cadre dirigeant d'une entreprise de médias et celle de propriétaire, d'associé, d'actionnaire majeur ou de cadre dirigeant d'une entreprise qui se voit attribuer un marché public de travaux, de fournitures ou de services, d'autre part avec le principe communautaire de proportionnalité de l'interdiction complète de passation de marchés publics qui en résulte pour les entrepreneurs concernés. La troisième question est relative à la validité de la directive 93/37 au regard des principes généraux de protection de la concurrence, de transparence et du principe de subsidiarité, au cas où ladite directive devrait être entendue comme interdisant de prévoir comme cause d'exclusion d'une entreprise de la procédure de

passation d'un marché public de travaux le cas dans lequel celle-ci, sa direction (soit le propriétaire de cette entreprise, son actionnaire majeur, son associé ou son cadre dirigeant) ou des personnes faisant office d'intermédiaires des dirigeants précités exercent des activités d'entreprises de médias d'information susceptibles de produire une influence illicite sur la procédure de passation de marchés publics de travaux, en jouant de l'influence plus générale dont elles bénéficient.

12. Avant de tenter d'apporter une réponse à ces questions préjudicielles, il convient de se prononcer sur les objections qui ont été soulevées à l'encontre de leur recevabilité.

III – La recevabilité des questions préjudicielles

13. Le gouvernement grec a contesté la compétence de la Cour pour se prononcer sur le présent renvoi, au motif que le litige au principal ne met aux prises que deux entreprises grecques à propos de l'attribution d'un marché par un pouvoir adjudicateur grec. L'affaire en cause au principal ne concernant qu'une situation purement interne à l'État grec, le droit communautaire ne lui serait pas applicable et, partant, les questions préjudicielles tendant à obtenir l'interprétation de ses dispositions ne seraient pas pertinentes. Le gouvernement grec a également mis en doute la pertinence des questions posées, au motif qu'elles n'auraient pas trait à une interprétation du droit communautaire qui réponde à un besoin objectif pour la solution du litige au principal, celui-ci ne portant que sur la compatibilité de la loi grecque avec la Constitution.

14. Pour écarter ces deux objections à la recevabilité du présent renvoi, il pourrait d'emblée être rétorqué au gouvernement grec qu'en vertu d'une jurisprudence constante, «dans le cadre de la coopération entre la Cour et les juridictions nationales instituée par l'article 177 du traité, il appartient au seul juge national, qui est saisi du litige et qui doit assumer la responsabilité de la décision juridictionnelle à intervenir, d'apprécier, au regard des particularités de l'affaire, tant la nécessité d'une décision préjudicielle pour être en mesure de rendre son jugement que la pertinence des questions qu'il pose à la Cour» et qu'«en conséquence, dès lors que les questions posées portent sur l'interprétation du droit communautaire, la Cour est, en principe, tenue de statuer» (3). Cependant, il ressort également de la jurisprudence que, dans des hypothèses exceptionnelles, il appartient à la Cour d'examiner les conditions dans lesquelles elle est saisie par le juge national en vue de vérifier sa propre compétence et qu'elle peut juger une question préjudicielle irrecevable, notamment lorsqu'il apparaît de manière manifeste que l'interprétation du droit communautaire sollicitée n'a aucun rapport avec la réalité ou l'objet du litige au principal ou qu'elle ne répond pas à un besoin objectif pour la décision que le juge national doit prendre dans la procédure pendante devant lui ou encore que le problème est de nature hypothétique (4).

15. S'agissant de la première objection tirée de l'absence de dimension communautaire du litige au principal, il est vrai que la Cour n'est pas compétente pour statuer sur des demandes préjudicielles portant sur des dispositions communautaires dans des situations dans lesquelles les faits au principal se situent en dehors du champ d'application du droit communautaire (5). Or, la Cour a, à plusieurs reprises, rappelé l'inapplicabilité du droit communautaire (6), et en particulier des dispositions du traité relatives à la libre prestation de services et de la réglementation adoptée pour leur exécution (7), aux situations dont tous les éléments se cantonnent à l'intérieur d'un seul État membre et qui, de ce fait, ne présentent aucun facteur de rattachement à l'une quelconque des situations envisagées par le droit communautaire. Dans de telles hypothèses, l'interprétation sollicitée du droit communautaire ne présente aucun rapport avec la réalité ou l'objet du litige au principal et la réponse apportée ne saurait être utile au juge national, à moins que le droit national n'impose de faire bénéficier un de ses ressortissants des mêmes droits que ceux qu'un ressortissant d'un autre État membre tirerait du droit communautaire dans la même situation (8) ou ne renvoie au contenu d'une disposition communautaire pour déterminer les règles applicables à une situation purement interne (9).

16. Cependant, la Cour a toujours répondu à des demandes préjudicielles ayant pour origine des affaires relatives à des marchés publics ou, plus largement, des contrats publics, quand bien même les faits de la cause auraient incliné à conclure à l'existence d'une situation purement interne. C'est vrai, hormis un seul cas (10), lorsque l'interprétation sollicitée portait sur les dispositions de droit primaire, notamment celles relatives à la liberté de prestation de services (11). C'est vrai sans exception lorsqu'elle était relative aux dispositions des directives marchés publics (12). De manière générale, la raison tient aux objectifs mêmes du droit communautaire des contrats publics, qui est de garantir l'accès le plus large possible, sans discrimination en raison de la nationalité, auxdits contrats et de promouvoir une concurrence effective et égale en la matière. Il importe donc peu que toutes les parties à une procédure d'attribution d'un marché donné proviennent du même État membre que le pouvoir adjudicateur, dans la mesure où des entreprises établies dans d'autres Etats

membres auraient également pu être intéressées (13). D'ailleurs, dans cette optique, les directives marchés publics soumettent à leurs dispositions tous les marchés qui dépassent le montant qu'elles fixent, sans condition tenant à la nationalité ou au lieu d'établissement des soumissionnaires (14). Comme pour les autres directives fondées sur l'article 95 CE (anciennement article 100 A CE), leur applicabilité ne saurait dépendre de la question de savoir si les situations concrètes en cause dans les affaires au principal comportent un lien suffisant avec l'exercice des libertés fondamentales de circulation (15). Aussi la première objection du gouvernement grec à la recevabilité du présent renvoi préjudiciel tenant à l'existence d'une situation purement interne ne peut–elle qu'être rejetée.

17. S'agissant du second motif de contestation de la pertinence des questions posées, tiré de ce que l'interprétation sollicitée du droit communautaire ne répondrait pas à un besoin objectif pour la solution du litige au principal, celui–ci ne portant que sur la compatibilité de la loi grecque avec la Constitution, il ne saurait davantage prospérer. Certes, il faut convenir qu'en l'espèce, la mise en évidence de l'incompatibilité des dispositions de la loi n° 3021/2002 avec l'article 14, paragraphe 9 de la Constitution priverait de base légale le certificat d'incompatibilité émis par l'ESR et suffirait donc pour accueillir le recours introduit par la requérante au principal.

18. Néanmoins, comme le juge a quo l'a souligné, un souci d'économie de procédure plaide pour la pertinence, dès ce stade, de la question de la compatibilité de la disposition constitutionnelle en cause avec le droit communautaire. En effet, si la Cour devait estimer ne pas pouvoir répondre à la demande préjudicielle en interprétation et laisser d'abord la juridiction de renvoi trancher la question de la conformité des dispositions de la loi n° 3021/2002 avec l'article 14, paragraphe 9, de la Constitution, il y aurait tout lieu de penser que, si ladite juridiction venait à annuler le certificat en raison d'une violation de la Constitution par cette loi, la question de la compatibilité de la disposition constitutionnelle contestée avec le droit communautaire risquerait fort de revenir tôt ou tard devant la Cour, dans la mesure où l'ESR serait, selon toute probabilité, amené à refuser la délivrance du certificat nécessaire à l'attribution du marché public en cause au motif que l'entrepreneur de travaux publics concerné (M. K. Sarantopoulos) ne sera pas parvenu à établir qu'il ne tombe pas sous le coup de l'incompatibilité énoncée par la Constitution. L'issue finale du litige au principal dépend donc de la conformité au droit communautaire du régime spécifique d'incompatibilité entre le secteur des travaux publics et celui des médias d'information. Il est donc dans l'intérêt d'une économie de procédure de donner dès à présent au juge de renvoi les éléments d'interprétation du droit communautaire lui permettant d'en décider car, s'il devait conclure à la non–conformité au droit communautaire dudit régime, tel qu'édicté par la Constitution et mis en œuvre par la loi n° 3021/2002, il n'aurait d'autre choix, comme le juge a quo en convient, de le laisser inappliqué et, partant, de rejeter la requête de Michaniki et de confirmer l'attribution du marché à Pantechniki.

IV – Les réponses aux questions préjudicielles

A – *Le caractère exhaustif des causes d'exclusion prévues par l'article 24 de la directive 93/37*

19. Par la première question préjudicielle, il est en substance demandé à la Cour si les États membres sont autorisés à prévoir d'autres causes d'exclusion de la participation à un appel d'offres en vue de la conclusion d'un marché public de travaux que celles figurant à l'article 24 de la directive 93/37.

20. Pour contester le caractère limitatif de l'énumération par l'article 24 de la directive 93/37 des motifs d'exclusion, le gouvernement grec objecte que ladite directive s'est bornée à une coordination des procédures nationales d'attribution des marchés publics de travaux et n'a pas procédé à une harmonisation totale dans le domaine des marchés publics de travaux. Il dit certes vrai. La Cour a reconnu qu'il «ressort de l'intitulé et du deuxième considérant de la directive que celle–ci a simplement pour objet la coordination des procédures nationales de passation des marchés publics de travaux, si bien qu'elle ne prévoit pas un régime complet de règles communautaires en la matière» (16). De même, s'agissant de la directive 71/305, elle avait dit pour droit que celle–ci n'établissait pas une réglementation communautaire uniforme et exhaustive (17). Dès lors, «dans le cadre des règles communes qu'elle contient, les États membres restent libres de maintenir ou d'édicter des règles matérielles et procédurales en matière de marchés publics, à condition de respecter toutes les dispositions pertinentes du droit communautaire, et notamment les interdictions qui découlent des principes consacrés par le traité en matière de droit d'établissement et des libres prestations de services» (18). Les exemples de mesures ou de réglementations nationales ajoutant à la réglementation communautaire des marchés publics qui ont été, ainsi, jugées licites sont légion. Qu'il suffise de mentionner la reconnaissance des critères écologique (19) ou de lutte contre le chômage (20) comme critères d'attribution des marchés publics ou l'admission d'une réglementation nationale interdisant la modification, après la soumission d'une offre, de la

composition d'un groupement d'entrepreneurs qui participe à une procédure de passation d'un marché public de travaux (21).

21. Toutefois, le fait que la directive 93/37 n'ait pas procédé à une harmonisation intégrale des règles de passation des marchés publics de travaux ne signifie pas que certaines de ses dispositions ne puissent être analysées comme ayant réglé exhaustivement certains points. Et, de fait, plusieurs éléments militent fortement en faveur du caractère limitatif des cas d'exclusion d'un entrepreneur de la procédure d'attribution d'un marché public de travaux figurant à l'article 24 de ladite directive. Plaident déjà en ce sens les objectifs mêmes de ce texte. La directive 93/37 visant à développer la concurrence dans le domaine des marchés publics de travaux en favorisant la participation la plus large possible aux procédures de passation (22), l'ajout de nouvelles causes d'exclusion des soumissionnaires réduit nécessairement l'accès des candidats auxdites procédures de passation et, partant, restreint la concurrence. Bien plus, telle me semble également être l'orientation jurisprudentielle. Allait déjà en ce sens l'interdiction qui avait été faite aux États membres d'exiger d'un soumissionnaire qu'il fît la preuve de ses capacités techniques, économique et financière et de son honorabilité par d'autres moyens que ceux énumérés par les articles 23 à 26 de l'ancienne directive marché publics de travaux n° 71/305; autrement dit, en particulier, le contrôle de l'existence d'une des incompatibilités mentionnées dans l'article 24 de ladite directive touchant un candidat à un marché public de travaux ne pouvait se faire que sur la base des moyens de preuve exhaustivement prévus (23). Plus topique encore, il a déjà été jugé que les articles 17 à 25 de l'ancienne directive marchés publics de fournitures n° 77/62 énuméraient «exhaustivement et impérativement» les critères de sélection qualitative, –parmi lesquels, à son article 20, ceux liés à l'honorabilité professionnelle du candidat–, et d'adjudication du marché et excluaient, par conséquent, la possibilité de réserver la participation à un marché de fournitures aux seules entreprises dont le capital social était à participation publique majoritaire (24). Enfin et surtout, interprétant l'article 29 de la directive marchés publics de fournitures n° 92/50 qui, en substance, est identique à l'article 24 de la directive 93/37, la Cour a dit pour droit que cette disposition, qui prévoit sept causes d'exclusion de la participation des candidats à un marché, qui se rapportent à l'honnêteté professionnelle, à la solvabilité ou à la fiabilité de ces derniers, «fixe elle–même les seules limites de la faculté des États membres, en ce sens que ceux–ci ne peuvent pas prévoir d'autres causes d'exclusion que celles y indiquées» (25).

22. À cette jurisprudence, le gouvernement grec oppose néanmoins la solution rendue par la Cour dans l'affaire Fabricom (26). Le point en litige portait sur la conformité avec les directives marchés publics d'une réglementation nationale qui interdisait à toute personne qui avait été chargée de la recherche, de l'expérimentation, de l'étude ou du développement de travaux, fournitures ou services relatifs à un marché public de présenter une offre dans le cadre de la procédure d'attribution de ce marché. Loin d'examiner l'incompatibilité instaurée entre la participation à la phase préparatoire d'un marché public et la soumission à ce même marché à la lumière des dispositions desdites directives énumérant les cas d'exclusion de la participation aux procédures d'appels d'offres, en particulier au regard de l'article 24 de la directive 93/37, la Cour s'est bornée à vérifier si la mesure litigieuse tendait à assurer l'égalité de traitement entre tous les soumissionnaires et si la différence de traitement instituée n'était pas disproportionnée au regard de cet objectif.

23. Pareille solution cadre a priori mal avec celles affirmant le caractère limitatif des cas d'exclusion énoncés dans les dispositions pertinentes des directives portant coordination des procédures de passation des marchés publics. La contradiction n'est cependant qu'apparente. Il est vrai que les directives communautaires entendent régler en principe exhaustivement les causes d'exclusion de la participation aux procédures d'attribution des marchés publics. Tel est notamment l'objet de l'article 24 de la directive 93/37. Toutefois, le respect d'autres règles et principes inscrits dans, –ou découlant de–, ladite directive peuvent également exiger l'instauration de cas d'exclusion. Il en est ainsi en particulier du principe d'égalité de traitement entre les candidats à un marché public. En effet, ledit principe, – dont l'obligation de transparence constitue une implication nécessaire (27)–, qui découle des libertés fondamentales d'établissement et de prestation de services (28) et sous–tend l'ensemble de la réglementation communautaire des marchés publics (29) peut justifier l'exclusion de concurrents de la participation à un marché dans la mesure où la concurrence entre prestataires, que tendent à promouvoir les directives en matière de marchés publics et qui suppose la participation la plus large possible aux procédures de passation, n'est effective que si elle intervient dans le respect du principe d'égalité de traitement entre candidats (30). Ainsi et à titre illustratif, il me semble difficile d'envisager que le droit communautaire s'oppose au principe même de l'instauration par un État membre d'une incompatibilité entre l'exercice de certaines fonctions publiques et la candidature à un marché public. Il faut donc admettre que les États membres puissent prévoir des cas d'exclusion autres que

ceux figurant dans la liste de l'article 24 de la directive 93/37, si cela s'avère nécessaire pour prévenir d'éventuels conflits d'intérêt et, donc, pour garantir la transparence et l'égalité de traitement. C'est, d'ailleurs, le sens de l'invitation de l'article 6, paragraphe 6 de la directive 93/37, selon lequel «les pouvoirs adjudicateurs veillent à ce qu'il n'y ait pas de discrimination entre les différents entrepreneurs». Et tel est l'enseignement de l'affaire Fabricom (31). L'incompatibilité entre la participation à la phase préparatoire d'un marché public et la candidature à ce marché prévue par la législation nationale tendait à éviter qu'une personne participant à certains travaux préparatoires puisse influencer les conditions d'un marché dans un sens qui serait ensuite favorable à la présentation de son offre ou puisse être favorisée pour formuler son offre en raison des informations qu'elle aurait, en effectuant lesdits travaux préparatoires, pu obtenir au sujet du marché public en cause (32).

24. Il convient donc de répondre à la première question préjudicielle que la liste des causes d'exclusion d'entrepreneurs de travaux figurant à l'article 24 de la directive 93/37 n'est pas exhaustive.

B – *Les conditions posées aux cas additionnels d'exclusion*

25. La directive 93/37 n'interdit donc pas aux États membres d'ajouter des causes d'exclusion de la participation à un marché public de travaux par rapport à la liste figurant à son article 24, dès lors qu'ils visent à garantir la transparence et l'égalité de traitement.

26. Telle est précisément la justification avancée par le gouvernement grec au soutien de l'incompatibilité entre le secteur des médias et le secteur des travaux publics énoncée par l'article 14, paragraphe 9 de la Constitution grecque. Il soutient que ladite incompatibilité tend à garantir la transparence et l'égalité de traitement dans l'attribution des marchés publics en prévenant toute possibilité pour une entreprise soumissionnaire à un appel d'offres d'user de son pouvoir médiatique pour influencer en sa faveur la décision finale d'adjudication. L'exclusion des entrepreneurs de médias et des entrepreneurs liés à une entreprise de médias prend donc acte du fait qu'ils ont, compte tenu de la pression qu'ils sont à même d'exercer sur l'entité adjudicatrice grâce à leur pouvoir médiatique, plus de chances d'obtenir le marché que leurs concurrents et, partant, ne se trouvent donc pas nécessairement, s'agissant de la procédure d'attribution de ce marché et au regard de l'objectif d'ouverture à la concurrence visé par le droit communautaire en la matière, dans la même situation que ces derniers.

27. Il est vrai que le gouvernement grec fait également valoir que l'incompatibilité prévue par la constitution nationale a aussi pour but la défense du pluralisme de la presse et des médias. Il s'agirait d'éviter qu'un pouvoir adjudicateur ne puisse faire pression sur une entreprise de médias candidate à l'attribution d'un marché de travaux et ainsi s'assurer d'une certaine bienveillance dans la présentation qu'elle donne de sa politique; ou encore, comme cela a été soutenu par le gouvernement grec, il s'agirait de prévenir le fait pour une entreprise de médias, candidate à l'attribution d'un marché de travaux de chercher, par l'engagement ou la pratique d'une présentation bienveillante de la politique des pouvoirs publics, au sacrifice de l'indépendance et du pluralisme de la presse, à influer sur la décision finale d'adjudication du marché. Mais en vérité, dans le contexte particulier de l'attribution des contrats publics, cet objectif proclamé de défense du pluralisme de la presse ne présente qu'un caractère subsidiaire qui n'a pas de réelle autonomie par rapport au but de garantie de la transparence et de l'égalité de traitement. Ce n'est en effet que si et dans la mesure où l'entité adjudicatrice ne respecterait pas, dans le processus de sélection des candidats, des critères objectifs, transparents et non discriminatoires qu'elle pourrait se servir de son pouvoir d'attribution du marché, soit pour exercer une influence sur la politique éditoriale d'une entreprise de médias candidate à l'attribution d'un marché de travaux, soit pour "récompenser" la politique éditoriale de cette entreprise.

28. En d'autres termes, les motifs d'exclusion prévus par le droit grec tendent à prévenir des conflits d'intérêt entre les entités adjudicatrices et les entreprises de médias qui pourraient encourager des pratiques de corruption active et passive de nature à fausser le processus de sélection des adjudicataires de marchés de travaux. Il apparaît donc que des dispositions telles que celles en cause dans l'affaire au principal participent du respect de l'égalité de traitement nécessaire à l'objectif de développement d'une concurrence effective poursuivi par la réglementation communautaire des marchés publics. Il apparaît aussi qu'elles répondent à un besoin en la matière, qui n'était pas couvert par les dispositions de la directive 93/37. En atteste le fait que la directive 2004/18, qui s'est substituée à la directive 93/37, a ajouté de nouveaux cas d'exclusion de la participation aux procédures d'attribution des marchés publics, notamment celui de corruption (33), qui couvrent partiellement l'hypothèse visée par la Constitution grecque.

29. La reconnaissance de cette finalité à l'incompatibilité générale entre le secteur des médias et celui des travaux publics prévue par la Constitution grecque a été contestée par l'une des parties intervenantes au principal dans le cadre de ses observations présentées lors de l'audience. De l'avis de cette dernière, on ne saurait a priori considérer par principe que l'exercice d'une activité économique dans son ensemble puisse menacer la transparence et l'égalité de traitement dans le cadre des procédures de passation des marchés publics. Si l'on devait admettre la légitimité de l'analyse défendue par les autorités grecques, selon laquelle l'exercice de l'activité de médias est susceptible d'influencer la décision d'attribution du marché, un reproche similaire pourrait être adressé à nombre d'autres activités économiques. Notamment une banque, qui serait par ailleurs actionnaire d'une entreprise de travaux publics serait tout autant à même, par le biais de son activité de souscription d'emprunts publics, de faire pression sur l'entité adjudicatrice et d'influer sur sa décision d'attribution du marché.

30. Toutefois, il convient de reconnaître à chaque État membre, sous le contrôle de la Cour, une certaine marge d'appréciation dans la définition des cas d'exclusion appropriés aux fins de garantir la transparence et l'égalité de traitement dans les procédures d'attribution des contrats publics. L'État membre concerné est le mieux à même de mesurer quels sont, dans le contexte national, les conflits d'intérêts les plus susceptibles de surgir et de menacer les principes de transparence et d'égalité de traitement dans le respect desquels les contrats publics doivent être passés. L'appréciation effectuée par les pouvoirs publics grecs les a conduit à craindre, dans le contexte propre à la Grèce, l'existence de conflits d'intérêt qui pourraient conduire au développement de pratiques de corruption active et passive de la part des entités adjudicatrices, s'ils n'excluaient pas les entreprises de travaux liées à des entreprises de médias des procédures de marchés. D'où l'incompatibilité prévue à l'article 14, paragraphe 9 de la Constitution grecque. Dans cette appréciation spécifique de ce que leur paraît devoir requérir le respect, en Grèce, des principes communautaires de transparence et d'égalité de traitement dans l'attribution des contrats publics, les pouvoirs publics grecs font donc, en quelque sorte, valoir une appréciation constitutionnelle nationale. Il ressort alors des motifs de la décision de renvoi qu'un débat est né sur le point de savoir si cette circonstance était de nature à influer sur le jugement de compatibilité avec le droit communautaire de ladite cause d'exclusion.

31. Il est vrai que le respect de l'identité constitutionnelle des États membres constitue pour l'Union européenne un devoir. Ce devoir s'impose à elle depuis l'origine. Il participe, en effet, de l'essence même du projet européen initié au début des années 1950, qui consiste à avancer sur la voie de l'intégration tout en préservant l'existence politique des États. Preuve en est qu'il fut énoncé pour la première fois explicitement à l'occasion d'une révision des traités dont les avancées sur la voie de l'intégration qu'elle prévoyait ont rendu nécessaire aux yeux des constituants son rappel. C'est ainsi que l'article F, paragraphe 1 du traité de Maastricht, devenu l'article 6, paragraphe 3 du traité sur l'Union dispose: «l'Union respecte l'identité nationale de ses États membres». L'identité nationale visée comprend à l'évidence l'identité constitutionnelle de l'État membre. Le confirmerait, s'il en était besoin, l'explicitation des éléments de l'identité nationale tentée par l'article I–5 de la Constitution pour l'Europe et par l'article 4, paragraphe 2 du traité sur l'Union tel qu'issu du traité de Lisbonne. Il appert, en effet, du libellé identique de ces deux textes que l'Union respecte l' «identité nationale (des États membres), inhérente à leurs structures fondamentales politiques et constitutionnelles».

32. De cette obligation imposée à l'Union européenne par les textes fondateurs de respecter l'identité nationale des États membres, y compris dans sa dimension constitutionnelle, la jurisprudence a déjà tiré certaines conséquences. À la lire attentivement, il apparaît qu'un État membre peut, dans certains cas et sous le contrôle bien évidemment de la Cour, revendiquer la préservation de son identité nationale pour justifier une dérogation à l'application des libertés fondamentales de circulation. Il peut d'abord l'invoquer explicitement comme motif légitime et autonome de dérogation. La Cour a, en effet, expressément reconnu que la sauvegarde de l'identité nationale «constitue un but légitime respecté par l'ordre juridique communautaire» (34), même si elle a jugé la restriction en l'espèce disproportionnée, l'intérêt invoqué pouvant être utilement préservé par d'autres moyens. La sauvegarde de l'identité constitutionnelle nationale peut aussi permettre à un État membre de développer, dans certaines limites, sa propre acception d'un intérêt légitime de nature à justifier une entrave à une liberté fondamentale de circulation. Ainsi, à un État membre qui se prévalait de la protection due au principe de la dignité de la personne humaine garantie par sa constitution nationale pour justifier une restriction à la liberté de prestation de services, la Cour a, certes, répondu que la dignité de la personne humaine est protégée dans l'ordre juridique communautaire en tant que principe général du droit. Elle a cependant reconnu à l'État membre une grande liberté pour en déterminer le contenu et la portée selon la conception qu'il se faisait de la protection due à ce droit fondamental sur son territoire, compte tenu des spécificités nationales (35). En conséquence, le fait que la conception du droit fondamental retenue par un État

membre ne soit pas partagée par les autres États membres n'interdit pas audit État membre de s'en prévaloir pour justifier une restriction à la libre prestation de services.

33. Si le respect dû à l'identité constitutionnelle des États membres peut ainsi constituer un intérêt légitime de nature à justifier, en principe, une restriction aux obligations imposées par le droit communautaire, a fortiori peut-il être invoqué par un État membre pour justifier son appréciation des mesures constitutionnelles qui doivent compléter la législation communautaire pour garantir le respect, sur son territoire, des principes et règles qu'elle énonce ou qui la sous-tendent. Faut-il néanmoins le préciser, ce respect dû à l'identité constitutionnelle des États membres ne saurait être compris comme une déférence absolue à l'égard de toutes les règles constitutionnelles nationales. S'il en était ainsi, les constitutions nationales pourraient devenir un instrument permettant aux États membres de s'affranchir du droit communautaire dans des domaines déterminés (36). Bien plus, il pourrait en résulter des discriminations entre États membres en fonction du contenu donné par chacun d'eux à leurs constitutions nationales. De même que le droit communautaire prend en compte l'identité constitutionnelle des États membres, de même le droit constitutionnel national doit s'adapter aux exigences de l'ordre juridique communautaire. En l'espèce, les règles constitutionnelles nationales peuvent être prises en considération, dans la mesure où elles relèvent de la marge d'appréciation dont disposent les États membres pour garantir le respect du principe d'égalité de traitement imposé par la directive. L'exercice de ladite marge d'appréciation doit néanmoins rester dans les limites fixées par ce principe et par la directive elle-même. La règle constitutionnelle nationale est donc pertinente, en l'espèce, pour identifier le contexte national dans lequel le principe d'égalité de traitement entre candidats à un marché public doit s'appliquer, pour déterminer, dans ce contexte, quels sont les risques de conflit d'intérêts et, enfin, pour évaluer l'importance à accorder, dans l'ordre juridique national, à la prévention de ces conflits d'intérêts et, donc, le niveau normatif auquel elle doit intervenir.

34. Le droit communautaire ne s'oppose donc en principe pas à ce qu'un État membre exclue les entrepreneurs de travaux liés aux entrepreneurs de médias des procédures de passation des marchés de travaux aux fins de garantie des principes communautaires de transparence et d'égalité de traitement entre soumissionnaires. Encore faut-il néanmoins que l'incompatibilité ainsi instaurée entre le secteur des travaux publics et celui des médias soit conforme au principe de proportionnalité. Il faut donc qu'elle soit nécessaire et proportionnée à l'objectif de garantie de l'égalité de traitement et, partant, de développement d'une concurrence effective. Si, au contraire, la cause d'exclusion ajoutée par le droit national est définie de telle manière qu'elle englobe un nombre de prestataires potentiels excessif par rapport à ce qui serait nécessaire pour garantir l'égalité de traitement entre soumissionnaires, elle dessert en réalité l'objectif de la directive de développement d'une concurrence effective qu'elle prétend servir. Là encore, une certaine marge d'appréciation doit être concédée à l'État membre pour déterminer l'étendue de l'incompatibilité qui lui semble, dans le contexte national, satisfaire aux exigences du principe de proportionnalité. La nécessité et la proportionnalité du dispositif retenu ne sauraient donc être exclues, au seul motif que ledit dispositif n'aurait pas été adopté par les autres États membres (37).

35. Il reste que cette liberté d'appréciation ne saurait être sans limites. Son exercice est soumis au contrôle du juge. Si c'est en principe au juge national en charge du litige au principal et non à la Cour saisie sur la base de l'article 234 CE d'effectuer pareil contrôle, il apparaît qu'en tout état de cause une incompatibilité d'une étendue telle que celle instaurée par l'article 14, paragraphe 9 de la Constitution grecque n'est pas conforme au principe de proportionnalité. Il en est notamment ainsi, en ce qu'elle englobe tous les entrepreneurs de travaux liés à des entrepreneurs de médias, quelle que soit l'importance de la diffusion desdits médias. Pareille incompatibilité dépasse, en effet, la mesure nécessaire au respect de l'égalité de traitement et, donc, à la sauvegarde d'une concurrence effective, dans la mesure où il semble difficile de soutenir qu'un entrepreneur de médias d'information de diffusion régionale dispose d'un pouvoir médiatique qui lui permettrait de faire pression sur une entité adjudicatrice localisée dans une autre région ou, qu'à l'inverse celle-ci soit encline à faire pression sur un tel entrepreneur. Il en est également notamment ainsi, en ce qu'elle touche tous les entrepreneurs de travaux qui ont un lien de parenté quelconque avec un entrepreneur de médias. Il paraît, en effet, improbable qu'un pouvoir adjudicateur puisse faire pression sur un entrepreneur de médias dont le lien de parenté avec l'entrepreneur de travaux serait éloigné ou qu'à l'inverse un tel entrepreneur de médias fasse pression sur le pouvoir adjudicateur.

36. Il convient donc de répondre à la deuxième question préjudicielle que l'ajout par le droit national d'une cause d'exclusion à la liste figurant à l'article 24 de la directive 93/37 est compatible avec le droit communautaire, dès lors qu'elle tend à garantir la transparence et l'égalité de traitement nécessaires au développement d'une concurrence effective et qu'elle soit conforme au

principe de proportionnalité. Une disposition qui prévoit une incompatibilité générale entre la qualité de propriétaire, d'associé, d'actionnaire majeur ou de cadre dirigeant d'une entreprise de médias et celle de propriétaire, d'associé, d'actionnaire majeur ou de cadre dirigeant d'une entreprise qui, vis–à–vis de l'État ou d'une personne morale du secteur public au sens large, se voit confier l'exécution de travaux ou de fournitures ou la prestation de services, méconnaît le principe de proportionnalité.

37. Compte tenu de la réponse apportée à la deuxième question, il n'y a pas lieu de répondre à la troisième question préjudicielle.

V – Conclusion

38. Au vu des considérations qui précèdent, je suggère à la Cour de répondre de la manière suivante aux questions préjudicielles posées par le Symvoulio tis Epikrateias (Conseil d'État grec):

– La liste des causes d'exclusion d'entrepreneurs de travaux figurant à l'article 24 de la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux n'est pas exhaustive.

– L'ajout par le droit national d'une cause d'exclusion à la liste figurant à l'article 24 de la directive 93/37 est compatible avec le droit communautaire, à la condition qu'elle tende à garantir la transparence et l'égalité de traitement nécessaires au développement d'une concurrence effective et qu'elle soit conforme au principe de proportionnalité. Une disposition qui prévoit une incompatibilité générale entre la qualité de propriétaire, d'associé, d'actionnaire majeur ou de cadre dirigeant d'une entreprise de médias et celle de propriétaire, d'associé, d'actionnaire majeur ou de cadre dirigeant d'une entreprise qui, vis–à–vis de l'État ou d'une personne morale du secteur public au sens large, se voit confier l'exécution de travaux ou de fournitures ou la prestation de services, méconnaît le principe de proportionnalité.

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1 – Langue originale: le français.

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2 – Directive du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199, p. 54).

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3 – Arrêt du 13 mars 2001, PreussenElektra (C–379/98, Rec. p. I–2099, point 38); voir aussi, arrêts du 15 décembre 1995, Bosman (C–415/93, Rec. p. I–4921, point 59), et du 21 janvier 2003, Bacardi–Martini et Cellier des Dauphins (C–318/00, Rec. p. I–905, point 41).

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4 – Voir ordonnances du 16 mai 1994, Monin Automobiles (C–428/93, Rec. p. I–1707), et du 25 mai 1998, Nour (C–361/97, Rec. p. I–3101); arrêts PreussenElektra, précité, point 39; du 15 juin 1999, Tarantik (C–421/97, Rec. p. I–3633, point 33), et du 9 mars 2000, EKW et Wein & Co (C–437/97, Rec. p. I–1157, point 52).

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5 – Voir encore récemment, ordonnance du 16 avril 2008, Club Náutico de Gran Canaria (C–186/07, non encore publiée au Recueil, point 19).

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6 – Voir par exemple, arrêts du 19 mars 1992, Batista Morais (C–60/91, Rec. p. I–2085, points 6 à 9); du 2 juillet 1998, Kapasakalis e.a. (C–225/95 à C–227/95, Rec. p. I–4239, points 17 à 24), et du 11 octobre 2001, Khalil e.a. (C–95/99 à C–98/99 et C–180/99, Rec. p. I–7413, points 70 à 71).

7 – Voir arrêts du 21 octobre 1999, Jägerskiöld (C–97/98, Rec. p. I–7319, points 42 à 44), et du 11 juillet 2002, Carpenter (C–60/00, Rec. p. I–6279, point. 28).

8 – Voir arrêts du 5 décembre 2000, Guimont (C–448/98, Rec. p. I–10663, points 18 à 24); du 5 mars 2002, Reisch e.a. (C–515/99, C–519/99 à C–524/99 et C–526/99 à C–540/99, Rec. p. I–2157, points 24 à 26); du 15 mai 2003, Salzmann (C–300/01, Rec. p. I–4899, points 32 et 33), et du 31 janvier 2008, Centro Europa 7 (C–380/05, non encore publié au Recueil, point 69).

9 – Voir notamment, arrêts du 18 octobre 1990, Dzodzi (C–297/88 et C–197/89, Rec. p. I–3763); du 17 juillet 1997, Leur–Bloem (C–28/95, Rec. p. I–4161), et du 11 décembre 2007, ETI e.a. (C–280/06, Rec. p. I–10893, point 21).

10 – Voir arrêt du 9 septembre 1999, RI.SAN. (C–108/98, Rec. p. I–5219, points 21 à 23).

11 – Voir arrêts du 7 décembre 2000, Telaustria et Telefonadress (C–324/98, Rec. p. I–10745); du 21 juillet 2005, Coname (C–231/03, Rec. p. I–7287); du 13 octobre 2005, Parking Brixen (C–458/03, Rec. p. I–8585); voir aussi mes conclusions dans l'affaire ASM Brescia (C–347/06, arrêt du 17 juillet 2008, non encore publié au Recueil, point 33).

12 – Voir arrêts du 25 avril 1996, Commission/Belgique (C–87/94, Rec. p. I–2043); Telaustria et Telefonadress, précité; du 7 décembre 2000, ARGE (C–94/99, Rec. p. I–11037), et ordonnance du 30 mai 2002, Buchhändler–Vereinigung (C–358/00, Rec. p. I–4685).

13 – Voir en ce sens, arrêt Commission/Belgique du 25 avril 1996, précité, point 33; arrêt Coname, précité, point 17; arrêt Parking Brixen, précité, point 55.

14 – Pour un rappel, dont il découle qu'il ne saurait y avoir d'inapplicabilité de la directive marché public en cause à une situation qui pourrait être considérée comme purement interne, voir arrêt Commission/Belgique, précité, points 31 à 33.

15 – Voir en ce sens, à propos de la directive 95/46/CE du Parlement européen et du Conseil, du 24 octobre 1995, relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, adoptée, comme la directive 93/37, sur le fondement de l'ex–article 100 A du traité CE, arrêts du 20 mai 2003, Österreichischer Rundfunk e.a. (C–465/00, C–138/01 et C–139/01, Rec. p. I–4989, points 39 à 43), et du 6 novembre 2003, Lindqvist (C–101/01, Rec. p. I–12971, points 40 et 41).

16 – Arrêt du 27 novembre 2001, Lombardini et Mantovani (C–285/99 et C–286/99, Rec. p. I–9233, point 33).

17 – Voir arrêts du 20 septembre 1988, Beentjes (31/87, Rec. p. 4635, point 20), et du 9 juillet 1987, CEI et Bellini (27/86 à 29/86, Rec. p. 3347, point 15).

18 – Ibid.

19 – Voir arrêt du 17 septembre 2002, Concordia Bus Finland (C–513/99, Rec. p. I–7213).

20 – Voir arrêt du 26 septembre 2000, Commission/France (C–225/98, Rec. p. I–7445).

21 – Voir arrêt du 23 janvier 2003, Makedoniko Metro et Michaniki (C–57/01, Rec. p. I–1091).

22 – Ainsi qu'il résulte de son préambule et de ses deuxième et dixième considérants, ladite directive tend à éliminer les restrictions à la liberté d'établissement et à la libre prestation des services en matière de marchés publics de travaux en vue d'ouvrir ces marchés à une concurrence effective entre les entrepreneurs des États membres [pour un rappel jurisprudentiel, voir par exemple, arrêts du 27 novembre 2001, Lombardini et Mantovani (C–285/99 et C–286/99, Rec. p. I–9233, point 34); du 12 décembre 2002, Universale–Bau e.a. (C–470/99, Rec. p. I–11617, point 89)].

23 – Voir arrêt du 10 février 1982, Transporoute et travaux (76/81, Rec. p. 417); du 26 septembre 2000, Commission/France (C–225/98, Rec. p. I–7445, point 88).

24 – Arrêt du 26 avril 1994, Commission/Italie (C–272/91, Rec. p. I–1409, point 35).

25 – Arrêt du 9 février 2006, La Cascina e.a. (C–226/04 et C–228/04, Rec. p. I–1347, point 22).

26 – Arrêt du 3 mars 2005, Fabricom (C–21/03 et C–34/03, Rec. p. I–1559).

27 – Voir, notamment, arrêts du 7 décembre 2000, Telaustria et Telefonadress (C–324/98, Rec. p. I–10745, point 61), et du 18 juin 2002, HI (C–92/00, Rec. p. I–5553, point 45); arrêt Universale Bau du 12 décembre 2002, précité, point 91.

28 – Comme la Cour le rappelle à l'occasion: voir explicitement en ce sens, arrêt Beentjes du 20 septembre 1998, précité, point 20; arrêt Commission/France du 26 septembre 2000, précité, point 50.

29 – Voir arrêts Universale–Bau e.a., précité, point 91; HI, précité, point 45; et du 19 juin 2003, GAT (C–315/01, Rec. p. I–6351, point 73).

30 – Comme j'ai déjà eu l'occasion de le souligner (voir mes conclusions dans l'affaire La Cascina e.a. (C–226/04 et C–228/04, arrêt du 9 février 2006, Rec. p. I–1347, point 26) ; voir aussi conclusions de l'avocat général Léger dans l'affaire Fabricom, précitée, points 22 et 36.

31 – Dans laquelle, je le rappelle, était notamment en cause l'interprétation de l'article 6, paragraphe 6 de la directive 93/37.

32 – Voir arrêt Fabricom , précité, points 29 et 30.

33 – Voir l'article 45, sous b) de la Directive 2004/18/CE du Parlement européen et du Conseil du 31 mars 2004 relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, JO L 134, p. 114.

34 – Dans le cadre d'une affaire où l'État membre l'invoquait pour justifier l'exclusion des ressortissants des autres États membres de l'accès aux fonctions de l'enseignement public (voir arrêt du 2 juillet 1996, Commission/Luxembourg, C–473/93, Rec. p. I–3207, point 35).

35 – Voir arrêt du 14 octobre 2004, Omega (C–36/02, Rec. p. I–9609).

36 – Or, faut–il le rappeler, il résulte en principe de la jurisprudence de la Cour qu'un État membre ne saurait invoquer son droit constitutionnel pour s'opposer à l'effet d'une norme communautaire sur son territoire (arrêt du 17 décembre 1970, Internationale Handelsgesellschaft, 11/70, Rec. p. 1125).

37 – Voir arrêt Omega du 14 octobre 2004, précité, points 37 et 38.

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Reference for a preliminary ruling from the Simvoulio tis Epikratias (Council of State) (Greece) lodged on 23 April 2007 - Mikhaniki A.E. v Ethniko Simvoulio Radiotileorasis, Ipourgos Epikpatias; Interveners: Pantekhniki A.E., Sindesmos Epikhiriseon Periodikou Typou

(Case C-213/07)

Language of the case: Greek

Referring court

Simvoulio tis Epikratias

Parties to the main proceedings

Applicant: Mikhaniki A.E.

Defendants: Ethniko Simvoulio Radiotileorasis, Ipourgos Epikpatias; Interveners: Pantekhniki A.E., Sindesmos Epikhiriseon Periodikou Typou

Questions referred

Is the list of grounds for excluding public works contractors contained in Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199) exhaustive?

If that list is not exhaustive, does a provision which lays down (in order to protect transparency in the economic functioning of the State) that the status of owner, partner, main shareholder or management executive of a media undertaking is incompatible with the status of owner, partner, main shareholder or management executive of an undertaking contracting to perform a works, supply or services contract for the State, or for a legal person in the public sector in the broad sense, serve purposes which are compatible with the general principles of Community law and is that total prohibition on the award of public contracts to such undertakings compatible with the Community principle of proportionality?

If, within the meaning of Article 24 of Directive 93/37/EEC, the list of grounds for excluding contractors contained therein is an exhaustive list or if the national provision at issue cannot be construed as serving purposes which are compatible with the general principles of Community law or if, finally, the prohibition introduced in it is not compatible with the Community principle of proportionality, does the above directive, in preventing the inclusion, as grounds for excluding contractors from public works procurement procedures, of cases where the contractor, its executives (such as the owner of the undertaking or its main shareholder, partner or management executive), or intermediaries acting for the said executives, work in media undertakings which are able to exercise an undue influence on the public works procurement procedure, because of the influence which they are able to exert in general, infringe the general principles of the protection of competition and transparency and Article 5(2) of the Treaty establishing the European Community which enacts the principle of subsidiarity?

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JUDGMENT OF THE COURT (Fourth Chamber)

12 November 2009 (*)

(Failure of a Member State to fulfil obligations – Public procurement –Directive 93/38/EEC – Contract notice – Consultancy project – Criteria for automatic exclusion – Qualitative selection and award criteria)

In Case C–199/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 April 2007,

Commission of the European Communities, represented by M. Patakia and D. Kukovec, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by D. Tsagkaraki, acting as Agent, and by K. Christodoulou, dikigoros, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis, and J. Malenovský, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 July 2008,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration that, by introducing *de facto* an additional criterion for automatic exclusion beyond those which are expressly provided for in Article 31(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications (OJ 1993 L 199, p. 84), to the detriment of foreign consultancy firms, and by failing to distinguish in the contest in question between qualitative selection and award criteria, the Hellenic Republic has failed to fulfil its obligations under the Community legislation on public procurement, more specifically Articles 4(2), 31(1) and (2) and 34(1)(a) of the Directive, as interpreted by the Court, the principle of mutual recognition of formal qualifications which applies to the Community law on public procurement and Articles 12 EC and 49 EC.

Legal context

2 Article 2 of Directive 93/38, in the version applicable at the time of the facts of the present case, provided:

‘1. This Directive shall apply to contracting entities which:

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

...

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

...

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

...’

3 Article 14(1)(c)(i) of that directive provided:

‘1. This Directive shall apply to:

...

(c) contracts awarded by contracting entities carrying out activities referred to in Annexes III, IV, V, and VI, provided that the estimated value, net of VAT, is not less than:

(i) ECU 400 000 in the case of supply and service contracts;

...’

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

‘Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers’.

5 Article 31 of that directive read as follows:

‘1. Contracting entities which select candidates to tender in restricted procedures or to participate in negotiated procedures shall do so according to objective criteria and rules which they lay down and which they shall make available to interested suppliers, contractors or service providers.

2. The criteria used may include the criteria for exclusion specified in Article 23 of [Council] Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts [OJ English Special Edition 1971 (II) p. 682] and in Article 20 of [Council] Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [OJ 1977 L 13, p. 1].

3. The criteria may be based on the objective need of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the contract award procedure and the resources required to complete it. The number of candidates selected must, however, take account of the need to ensure adequate competition.’

6 Article 23 of Directive 71/305 and Article 20 of Council Directive 77/62, which were worded in similar terms, set out, under Title IV, Chapter 1, entitled ‘Criteria for qualitative selection’, situations in which a supplier could be excluded from participation in the contract. Those situations relate to either the personal circumstances of the supplier, that is to say, bankruptcy, winding up, suspension of business activities, administration by a court, or conviction, or the conduct of the supplier, that is to say, grave professional misconduct, failure to fulfil obligations relating to the payment of social security contributions or taxes or serious misrepresentation.

7 Those two articles were repeated in Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Article 20 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), which codified Directives 71/305 and 77/62.

8 Article 34(1) of Directive 93/38 provided:

'1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall be:

(a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

(b) the lowest price only.'

9 Finally, Article 2(6) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), in the version applicable at the time of the facts of the present case, headed 'Requirements for review procedures', read as follows:

'The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

10 The wording of that provision is almost identical to that of Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1).

The contract notice in question and the pre-litigation procedure

11 In the present case, the Commission's complaints concern certain terms and conditions appearing in a contract notice issued by ERGA OSE AE ('ERGA OSE'), a public entity owned by the Greek railways body. That notice related to the carrying out of a study concerning property and electro-mechanical projects in connection with the construction of a railway station.

12 The contract notice in question, numbered 2003/S 205-185214 and 2003/S 206-186119, was published on 16 October 2003. The terms and conditions of that notice were based on the national legal requirements then in force, namely Law 716/1977.

13 For the purposes of the examination of this action, the material terms of the disputed contract notice are the following:

'Section III: Legal, economic financial and technical information

...

2.1 Information concerning the individual situation of ... service providers and the formalities necessary to assess their minimum economic and technical capacity:

...

2.1.3 Technical capacity – Supporting evidence required: A. Expressions of interest will be accepted if submitted by:

(a) Greek consultancy firms which are enrolled in the corresponding national register and possess a certificate:

…

(b) Foreign consultancy firms, constituted under the legislation of a Member State of the European Union or the [European Economic Area (EEA)] and which have their central administration, principal place of business or statutory seat within the European Union or the EEA … Foreign consultants must possess formal and substantive qualifications for each category of study corresponding to those required for Greek consultants who are enrolled in the Greek register of Consultants, and consultancy firms must have staff for each category of study corresponding to the staff required for Greek consultancy firms …

It is stressed that foreign consultancy firm/consultants who submitted an expression of interest in [ERGA OSE] tendering procedure in the six months preceding the date of their expression of interest in the present competition and who declared qualifications corresponding to certificate categories different from those now being asked for will not be accepted.

…

Section IV: Procedure

'IV. (1) Nature of procedure: open

…

IV.(2) Award criteria:

The most economically advantageous offer, in conformity with the following criteria …:

Taking account of Article 34(1)(a) of Directive 93/38, the contract will be awarded in accordance with the following criteria:

1. Specific and general experience, in particular design work on similar projects either by consultancy firms or consultants and their scientific staff.

2. Real capacity to conduct a study within the timescale planned together with obligations assumed regarding the carrying-out of other studies and the specific scientific and operational staff proposed to conduct the study in question as well as the equipment in relation to the object of the study,

order of priority: none.

…'

14 Under the Greek system, the certificates of consultancy firms and consultants are categorised according to experience and consultancy undertaken and are registered according to that experience. Foreign consultancy firms and consultants are not required to be so registered. For each contract, specific categories of certificate are required, according to the experience required for that contract.

15 Law 716/1977 has been repealed and replaced by Law 3316/2005.

16 Following a complaint, on 28 June 2005 the Commission wrote to the competent Greek authorities, pointing out that some of the terms of the contract notice in question contravened certain provisions of Directive 93/38 and the principle of non-discrimination on grounds of nationality. The Greek authorities replied by letter of 22 July 2005. After considering that reply, on 18 October 2005 the Commission sent a letter of formal notice to the Hellenic Republic. The two complaints set out in that letter concerned, first, discrimination against foreign consultancy firms or consultants by reason of the formulation of the second paragraph of Section III, point 2(1.3)(b) of the contract notice in question and, second, the lack of distinction between qualitative selection criteria and award criteria in Section IV, point 2 of that notice.

17 Since it did not find the Greek authorities' reply of 14 December 2005 to that letter of formal notice to be satisfactory, on 4 July 2006 the Commission sent a reasoned opinion to the Hellenic Republic, to which the latter replied by letter of 30 August 2006. Unconvinced by that reply, the Commission decided to bring the present action.

The action

Admissibility

18 The Hellenic Republic objects that the action is inadmissible.

19 Firstly, it points out that Law 716/1977, which formed the basis of the contract notice in question, was repealed by a new law before the date on which the time-limit set in the reasoned opinion expired, that is to say, before the point in time at which the question whether there has been a failure to fulfil obligations falls to be assessed. Contract notices issued on the basis of the new law no longer contain clauses such as those in issue in the present case. Proceedings for a declaration of failure to fulfil obligations are not intended to stigmatise a Member State but to enable it to enact legislation which complies with Community law, that objective having now been attained with Law 3316/2005.

20 Secondly, the Hellenic Republic submits, essentially, that Article 2(6) of Directive 92/13 was transposed into Greek law by Article 4(2) of Law 2252/1997, pursuant to which after the contract has been awarded it can no longer be challenged. Accordingly, revocation a posteriori of the contract concluded on the basis of the contract notice in question, which constitutes a one-off contract since it relates to preparation of a study, is not possible, particularly since the award of that contract was upheld by three judicial decisions at national level, delivered in proceedings for interim measures. Thus, the Hellenic Republic suggests, in fact, that the Commission's action has become devoid of purpose.

21 That argument cannot be accepted.

22 Firstly, it must be noted that, as is apparent from both the Commission's application and reply and as it confirmed at the hearing before the Court, the action does not concern incomplete or incorrect transposition of Directive 93/38 into national law, or even a consistent administrative practice based on Law 716/1977 that did not comply with that directive, but rather misapplication of the latter in the procurement procedure in question.

23 The Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations (Joined Cases C–20/01 and C–28/01 *Commission* v *Germany* [2003] ECR I–3609, paragraph 30, and the case-law cited). Accordingly, the repeal of Law 716/1977 and the adoption of a new law before expiry of the time-limit set in the reasoned opinion do not render the present action devoid of purpose.

24 Secondly, it must be pointed out that, in accordance with the case-law of the Court, Article 2(6) of Directive 89/665, the content of which is identical to that of Article 2(6) of Directive 92/13, cannot affect an action brought under Article 226 EC (Case C–503/04 *Commission* v *Germany* [2007] ECR I–6153, paragraph 34). Those directives, by requiring the Member States to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively, cannot be regarded as also regulating the relationship between the Member States and the Community and thus affecting the application of Article 226 EC (see, to that effect, Case C–275/08 *Commission* v *Germany* [2009] ECR I–0000, paragraphs 33 and 35).

25 In any event, the fact that, it might no longer be possible to revoke the contract in question does not render the infringement proceedings devoid of purpose.

26 Furthermore, it must be noted that, when the time-limit of two months prescribed in the reasoned opinion expired, that is to say, on 4 September 2006, the contract at issue had not run its full course, although that is the condition required under the settled case-law of the Court for the

Commission's action to be considered inadmissible (see, inter alia, Case C–394/02 *Commission* v *Greece* [2005] ECR I–4713, paragraph 18, and the case-law cited, and Case C–237/05 *Commission* v *Greece* [2007] ECR I–8203, paragraph 29).

27 It is apparent from the case file that the contract at issue comprised two consultancy projects which were to be carried out by the successful tenderer. Notwithstanding the fact that, as the Hellenic Republic claims, the second project was contingent on the first, it is not disputed that they formed a whole as regards performance of the obligations of the successful tenderer. According to the actual statement of the Hellenic Republic at the hearing before the Court, the second project had not yet been completed and, consequently, delivered to the awarding body on 4 September 2006. Accordingly, at that date, the contract at issue had not run its full course.

28 Having regard to the foregoing considerations, it must be held that the Commission's action is admissible.

Substance

29 It should be noted at the outset that, as is apparent from the documents in the case, ERGA OSE is a public undertaking whose activity involves the operation of public services providing networks in the field of railway transport. It is therefore a contracting entity within the meaning of Article 2(1)(a) and 2(c) of Directive 93/38. In addition, the estimated value of the contract to which the contract notice in question relates is EUR 3 240 000 and therefore greatly exceeds the threshold set in Article 14(1)(c)(i) of that directive. Consequently, the contract award procedure in question falls within the scope of that directive.

30 The complaints raised in the present action relate, firstly, to the clause in Section III, point 2.1.3 (b), second paragraph, of the contract notice in question and, secondly to Section IV, point 2, of that notice.

The clause in Section III, point 2.1.3(b), second paragraph, of the contract notice in question

31 The Commission submits that the clause in Section III, point 2.1.3(b), second paragraph, of the contract notice in question – according to which foreign consultancy firms or consultants who had submitted an expression of interest in ERGA OSE tendering procedures in the six months preceding the date of their expression of interest in the competition and who had declared qualifications corresponding to certificate categories different from those now required would not be accepted – disregarded Article 31(1) and (2) of Directive 93/38, in that it introduced a ground of exclusion additional to those exhaustively authorised by Community law in the field of public procurement. That clause also introduced discrimination against foreign consultancy firms and consultants, in breach of the principle of equal treatment set out in Article 4(2) of Directive 93/38 and resulting from Articles 12 EC and 49 EC. It also fails to have regard to the principle of mutual recognition of diplomas and other evidence of formal qualifications.

32 First of all, it must be pointed out that the Commission does not challenge the Greek system of categorising the certificates of consultancy firms and consultants according to experience and consultancy undertaken, nor their registration according to that experience. Nor does it deny that the Member States have the power to request proof of that experience or the fact that foreign consultancy firms and consultants are not required to be registered and that they may prove their experience in any way.

33 After that preliminary comment, it must be noted, firstly, that the procedure to which the contract notice in question related was an open procedure. Questioned on that point at the hearing, the Commission admitted that Article 31 of Directive 93/38 gave rise to the problem of whether it was applicable to that type of procedure, having regard to the fact that, in paragraph 1 thereof, it expressly refers to restricted and negotiated procedures and not to open procedures. It stated on that occasion that its complaint with regard to the clause in question was essentially based on a breach of Article 4(2) of that directive.

34 In those circumstances, the view must be taken that the Commission has withdrawn its complaint alleging breach, by that clause, of Article 31 of Directive 93/38.

35 Secondly, the clause in question, formulated in clear and unequivocal terms, must be understood as meaning that, if foreign consultancy firms or consultants had taken part in a procedure launched

by the same contracting entity, that is to say, ERGA OSE, in the six months preceding the new tendering procedure and if, in the earlier procedure, they had declared qualifications corresponding to certificate categories different from those being asked for in the new procedure, in accordance with the Greek system of categorising diplomas, they would not be allowed to participate in that new procedure.

36 However, the Hellenic Republic submits that that clause has always been applied to the effect that any interested operator in doubt as to its scope could request clarification from the contracting entity concerned and was entitled to submit evidence, by any appropriate means, that it met the conditions for participation in the procedure in question.

37 In that regard, it is clear that, in accordance with the settled case-law of the Court, the principle of equal treatment entails the principle of transparency. Those principles, which constitute the basis of the Community directives on public procurement, mean, in particular, that tenderers, even potential tenderers, must generally be on an equal footing and have equality of opportunity in formulating the terms of their applications to take part and their tenders (see, to that effect, Case C–470/99 *Universale-Bau and Others* [2002] ECR I–11617, paragraph 93, and Case C–213/07 *Michaniki* [2008] ECR I–0000, paragraphs 44 and 45 and the case-law cited).

38 In particular, potential tenderers must be in a position of equality as regards the scope of the information in a contract notice. It is not consistent with those principles for one category of those concerned to have to request clarification and additional information from the contracting entity as to the actual meaning of the content of a contract notice, where its formulation would leave no room for doubt in the mind of a reasonably well-informed and diligent potential tenderer.

39 In addition, the Court has held that Article 4(2) of Directive 93/38, in prohibiting any discrimination between tenderers, also protects those who were discouraged from tendering because they were placed at a disadvantage by the procedure followed by a contracting entity (Case C–16/98 *Commission* v *France* [2000] ECR I–8315, paragraph 109).

40 It cannot be disputed that the clause in question, with its clear formulation, is likely to have a dissuasive effect on foreign consultancy firms or consultants, as was moreover, the case here.

41 That clause will clearly induce them to think that any difference between the qualifications declared in an earlier procedure launched by the same contracting body and the qualifications required for the procedure to which the contract notice in question relates has the automatic effect of excluding them from participating in that contract.

42 Consequently, a foreign tenderer such as the complainant to the Commission does not enjoy equality of opportunity with non-foreign tenderers because of the clearly dissuasive wording of that clause and the need, despite that wording, to take additional steps to obtain clarification as to the conditions for admission to the tendering procedure.

43 It is therefore clear that the way in which the contract notice in question is worded gives rise to a difference in treatment by reason of the Member State of establishment of those concerned, to the detriment of foreign candidates, and the Hellenic Republic has offered no justification for that difference.

44 Thirdly, in accordance with recital 34 in the preamble to Directive 93/38, ‘the relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in an award procedure or a design contest’.

45 In the present case, it is indeed apparent from the wording of the clause in Section III, point 2.1.3 (b), second paragraph, of the contract notice in question that foreign candidates who had previously submitted an expression of interest in other contract notices issued by the same contracting entity were not, unlike national candidates, able to rely on all their diplomas or professional qualifications before that entity.

46 However, that clause, as it is worded, does not enable it to be asserted that that entity would refuse on principle to take account of diplomas or evidence of professional qualifications issued by another Member State.

47 It follows that the Commission's complaint alleging breach of the Community rules of mutual recognition of evidence of formal qualifications is unfounded.

48 In the light of the foregoing considerations, it must be held that the clause in question does not comply with Article 4(2) of Directive 93/38.

49 In those circumstances, it is not necessary to examine the Commission's other allegations which also seek a finding of such discriminatory treatment.

Section IV, point 2, of the contract notice in question

50 The Commission submits that point 2 of Section IV of the contract notice in question, headed 'Award criteria', confuses, in an unacceptable way, criteria for the qualitative selection of tenderers and criteria for the award of contracts. It submits that Directive 93/38 introduces a system analogous to that established by Directive 92/50, under which two phases of the procedure must be distinguished, the first establishing the tenderer selection criteria and the second consisting of laying down the award criteria for the contract. There are therefore two separate stages to the award procedure which have different objectives, although, according to the Commission, the simultaneous checking of the candidates' suitability and the awarding of the contract is not prohibited.

51 In that regard, it is apparent from case-law that, while the Community directives on public procurement do not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules (see, by analogy, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 15 and 16, and Case C–532/06 *Lianakis and Others* [2008] ECR I–251, paragraph 26).

52 The suitability of tenderers is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical capability (the 'qualitative selection criteria') referred to, in the present case, in Articles 30 and 31 of Directive 93/38 (see, by analogy, *Beentjes*, paragraph 17, and *Lianakis and Others*, paragraph 27).

53 By contrast, the award of contracts is based on the criteria set out, in the present case, in Article 34(1) of that directive, namely, the lowest price or the economically most advantageous tender (see, by analogy, *Beentjes*, paragraph 18, and *Lianakis and Others*, paragraph 28).

54 However, although in the latter case, as is attested by the use of the expression 'for example', Article 34(1) of Directive 93/38 does not set out an exhaustive list of the criteria which may be chosen by the contracting authorities, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract, their choice is nevertheless limited to criteria aimed at identifying the tender which is economically the most advantageous (see, by analogy, *Beentjes*, paragraph 19; Case C–19/00 *SIAC Construction* [2001] ECR I–7725, paragraphs 35 and 36; Case C–513/99 *Concordia Bus Finland* [2002] ECR I–7213, paragraphs 54 and 59; Case C–315/01 *GAT* [2003] ECR I–6351, paragraphs 63 and 64; and *Lianakis and Others*, paragraph 29).

55 Therefore, 'award criteria' do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question (see, by analogy, *Lianakis and Others*, paragraph 30).

56 In the present case, the criteria selected as 'award criteria' by the contracting authority, in point 2 of Section IV of the contract notice in question, relate to the experience and real capacity to ensure proper performance of the contract in question. Those are criteria which concern the tenderers' ability to perform the contract and which therefore do not have the status of 'award criteria' pursuant to Article 34(1) of Directive 93/38, which the Greek Government, moreover, has not seriously disputed.

57 In the light of the foregoing, it must be held that point 2 of Section IV of the disputed contract notice does not comply with Article 34(1) (a) of Directive 93/38.

58 Having regard to all the foregoing considerations, it must be held that, by reason, firstly, of the exclusion, by virtue of Section III, point 2.1.3(b), second paragraph, of the contract notice in

question of foreign consultancy firms or consultants who had submitted an expression of interest in ERGA OSE tendering procedures in the six months preceding the date of their expression of interest in the current competition and who had declared qualifications corresponding to certificate categories different from those now required and, secondly, of the failure to distinguish in Section IV, point 2, of that notice between qualitative selection criteria and award criteria for the contract in question, the Hellenic Republic has failed to fulfil its obligations under Articles 4(2) and 34(1)(a) of Directive 93/38.

59 The application is dismissed as to the remainder.

Costs

60 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(3) of those rules, the Court may nevertheless order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional. Since the Commission and the Hellenic Republic have each been partially unsuccessful in their pleadings, they should bear their own costs.

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

1. Declares that, by reason, firstly, of the exclusion, by virtue of Section III, point 2.1.3 (b), second paragraph, of the contract notice in question issued by ERGA OSE on 16 October 2003, numbered 2003/S 205-185214 and 2003/S 206-186119, of foreign consultancy firms or consultants who had submitted an expression of interest in ERGA OSE tendering procedures in the six months preceding the date of their expression of interest in the current competition and who had declared qualifications corresponding to certificate categories different from those now required and, secondly, of the failure to distinguish in Section IV, point 2, of that notice between qualitative selection criteria and award criteria for the contract in question, the Hellenic Republic has failed to fulfil its obligations under Articles 4(2) and 34(1)(a) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications;

2. Dismisses the remainder of the application;

3. Orders the Commission of the European Communities and the Hellenic Republic to bear their own costs.

[Signatures]

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* Language of the case: Greek.

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Judgment of the Court (Fourth Chamber) of 12 November 2009 - Commission of the European Communities v Hellenic Republic

(Case C-199/07) [1]

(Failure of a Member State to fulfil obligations - Public procurement -Directive 93/38/EEC - Contract notice - Consultancy project - Criteria for automatic exclusion - Qualitative selection and award criteria)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and D. Kukovec, acting as Agents)

Defendant: Hellenic Republic (represented by: D. Tsagkaraki, acting as Agent, and by K. Christodoulou, dikigoros)

Re:

Failure of a Member State to fulfil obligations - Infringement of Articles 4(2), 31(1) and (2) and 34(1)(a) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) and of Articles 12 and 49 EC - Selection of candidates for a restricted or negotiated procedure - Criteria for exclusion

Operative part of the judgment

The Court:

1. Declares that, by reason, firstly, of the exclusion, by virtue of Section III, point 2.1.3(b), second paragraph, of the contract notice in question issued by ERGA OSE on 16 October 2003, numbered 2003/S 205-185214 and 2003/S 206-186119, of foreign consultancy firms or consultants who had submitted an expression of interest in ERGA OSE tendering procedures in the six months preceding the date of their expression of interest in the current competition and who had declared qualifications corresponding to certificate categories different from those now required and, secondly, of the failure to distinguish in Section IV, point 2, of that notice between qualitative selection criteria and award criteria for the contract in question, the Hellenic Republic has failed to fulfil its obligations under Articles 4(2) and 34(1)(a) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications.

2. Dismisses the remainder of the application.

3. Orders the Commission of the European Communities and the Hellenic Republic to bear their own costs.

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[1] - OJ C 197, 2.8.2008.

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OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 9 July 2009 (1)

Case C-199/07

Commission of the European Communities
v
Hellenic Republic

(Treaty infringement proceedings – Public procurement – Procedures of entities operating in the water, energy, transport and telecommunications sectors – Criteria for the exclusion of candidates)

1. In this case which concerns a particular procurement procedure for design and consultancy services organised by the Greek railway authority, the Commission alleges that Greece is in breach of its obligations under Council Directive 93/38/EEC ('the Directive'), (2) the principle of equal treatment embodied in Article 12 EC, Article 49 EC which guarantees the freedom to provide services within the Community, and the principle of mutual recognition of professional qualifications.

Relevant Community legislation

2. Article 12 EC prohibits discrimination on the grounds of nationality.

3. Article 49 EC prohibits restrictions on the freedom to provide services in respect of nationals who are established in a Member State other than that of the person for whom the services are intended.

The Directive

4. The Directive coordinates the procurement procedures of entities which are public authorities or public undertakings (3) operating in the water, energy, transport and telecommunications sectors.

5. The Directive provides for three types of procedure:

– 'open procedures', in which all interested suppliers, contractors or service providers may submit tenders;

– 'restricted procedures', in which only candidates invited by the contracting entity may submit tenders;

– 'negotiated procedures', in which the contracting entity consults suppliers, contractors or

service providers of its choice and negotiates the terms of the contract with one or more of them. (4)

6. 'Design contests' are defined as national procedures which enable a contracting entity to acquire a plan or design selected by a jury after having been put out to competition. (5)

7. Article 4(1) provides that when organising, inter alia, design contests, contracting entities must apply procedures which are adapted to the provisions of the Directive. Article 4(2) states: 'Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

8. Contracts awarded by entities carrying out activities in the transport sector where the estimated value (net of VAT) is not less than EUR 400 000 in the case of supply and service contracts or EUR 5 000 000 in the case of works contracts fall within the scope of the Directive. (6)

9. Articles 30 to 38 (Chapter V of the Directive) cover the qualification, the selection and the award aspects of a procurement procedure. Article 31 provides:

'1. Contracting entities which select candidates to tender in restricted procedures or to participate in negotiated procedures shall do so according to objective criteria and rules which they lay down and which they shall make available to interested suppliers, contractors or service providers.

2. The criteria used may include the criteria for exclusion specified in Article 23 of Directive 71/305/EEC and in Article 20 of Directive 77/62/EEC. (7)

3. The criteria may be based on the objective need of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the contract award procedure and the resources required to complete it. The number of candidates selected must, however, take account of the need to ensure adequate competition.'

10. The criteria on which contracting entities are to base the award of contracts are set out in Article 34, the relevant paragraphs of which provide:

'1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall be:

(a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

(b) the lowest price only.

2. In the case referred to in paragraph 1(a), contracting entities shall state in the contract documents or in the tender notice all the criteria which they intend to apply to the award, where possible in descending order of importance.'

Directive 92/13/EEC

11. Council Directive 92/13/EEC (8) provides that Member States must take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively on the grounds that such decisions have infringed Community law in the procurement field or national rules implementing that law. (9) Article 2(6) of Directive 92/13 provides:

'The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

Background to the infringement proceedings

The contested procedure

12. The following facts are uncontested.

13. On 24 October 2003 notice of a competition for various engineering and associated design services in the context of the development of the Thriaso Pedio complex on the outskirts of Athens ('the contested procedure') was published in the *Official Journal of the European Union*. It was stated to be an open procedure. The contracting entity was ERGA OSE AE.

14. ERGA OSE AE is a public entity which supplies public services in the area of railway transport. The estimated value of the contract for which notice of the contested procedure was issued was EUR 3 240 000; well above the thresholds in Article 14(1)(c) of the Directive.

15. The notice of the contested procedure was issued by the contracting entity in accordance with the national legal requirements then in force, namely Law 716/1977. (10)

16. Section III of the competition notice covered the legal, economic financial and technical information that candidates were required to provide. The relevant terms are set out below:

'...

(2.1) Information concerning the individual situation of ... service providers and the formalities necessary to assess their minimum economic and technical capacity:

(2.1.3) Technical capacity - Supporting evidence required: A. Expressions of interest will be accepted if submitted by

(a) Greek consultancy firms which are enrolled in the corresponding national register and possess a certificate:

...

(b) Foreign consultancy firms, constituted under the legislation of a Member State of the European Union or the EEA and which have their central administration, principal place of business or statutory seat within the European Union or the EEA ... Foreign consultants must possess formal and substantive qualifications for each category of study corresponding to those required for Greek consultants who are enrolled in the Greek register of Consultants, and consultancy firms must have staff for each category of study corresponding to the staff required for Greek consultancy firms

It is stressed that foreign consultancy firm/consultants who submitted an expression of interest in ERGA OSE AE tendering procedure in the six months preceding the date of their expression of interest in the present competition and who declared qualifications corresponding to certificate categories different from those now being asked for will not be accepted.' (11)

17. Section IV of the contested notice covers the procedural aspects of the competition.

'(1) Nature of procedure: open

...

(2) Award criteria:

the most economically advantageous offer, in conformity with the following criteria ...:

Taking account of Article 34(1)(a) of Directive 93/38/EEC, the contract will be awarded in accordance with the following criteria:

1. Specific and general experience, in particular design work on similar projects either by consultancy firms or consultants and their scientific staff.

2. Real capacity to conduct a study within the timescale planned together with obligations assumed regarding the carrying-out of other studies and the specific scientific and operational staff proposed to conduct the study in question as well as the equipment in relation to the object of the study …'

18. It is common ground that the reference to categories of qualifications in clause III 2.1.3.b ('the contested clause') reflects the fact that Greece operates a system of classification of engineers which groups them into categories according to the length, level and complexity of their studies, and further classifies engineering firms in groups according to the classifications of their engineers. A corresponding system of classification did not exist for foreign consultancy firms and consultants; consequently such firms were not obliged to be registered in this way.

Pre-litigation procedure

19. During 2004 the Commission received two complaints from a firm which stated that it did not submit an application for the contested procedure, because it considered itself necessarily excluded on the ground that it was a foreign firm and it had taken part less than six months previously in a competition with the same contracting entity, with a classification different from that asked for in the contested procedure.

20. Examining that complaint, the Commission took the view that the criterion in the contested clause of the competition notice (i) introduced a ground of exclusion additional to those exhaustively listed in Article 31(2) of Directive 93/38 and (ii) discriminated against foreign consultancy firms or consultants in breach of the Greek authorities' obligations under Community law.

21. On 28 June 2005, the Commission wrote to the Greek authorities to investigate the complaint. The Greek authorities replied on 22 July 2005.

22. Dissatisfied with the response that it had received, the Commission sent Greece a letter of formal notice on 18 October 2005.

23. The Greek authorities replied on 14 December 2005. They emphasised that the contested clause did not require foreign firms to register, but merely provided a means of establishing their experience. The Greek authorities contended that ERGA OSE AE had not in fact exclude a foreign firm on the basis of that clause.

24. The Commission considered the response of the Greek authorities to be inadequate, and so issued a reasoned opinion on 4 July 2006. It concluded that the contested clause contravened the Directive, the principle of mutual recognition of diplomas and the principle of equality of treatment, and that it failed to make the distinction between selection and award criteria which is a legal requirement in this field.

25. On 30 June 2006 the Greek authorities provided a response arguing (i) that the national legislation on which the competition notice was based (Law 716/1977) had been changed, so that any infringement action would be inadmissible; (ii) that the contracts had already been awarded to third parties in good faith and therefore could not be annulled; and (iii) that the contested clause had absolutely no effect on freedom of competition.

26. Dissatisfied with the Greek authorities' reply to its reasoned opinion the Commission launched the present infringement proceedings.

Admissibility

27. The Greek authorities argue that the action is inadmissible on three grounds. First, they contend that they complied with the reasoned opinion before its deadline expired. Second, they assert that the scope of the Commission's action extends beyond the objections raised in the pre-litigation procedure. Third, they contend that it is no longer possible to remedy the alleged infringement by annulling the contracts already concluded under the contested procedure, because of certain practical reasons (see points 39 to 41 below) and the effects of Article 2(6) of Directive 92/13.

28. In my view the Commission's action is admissible.

Compliance with the reasoned opinion

Arguments of the parties

29. The Greek authorities argue that they complied with the reasoned opinion before the expiry of its deadline, since Law 716/1977 was repealed and replaced by Law 3316/2005 which outlawed the use of provisions such as the contested clause and clarified the distinction between selection and award criteria.

30. In reply the Commission explains that the subject-matter of the action is not the national legal framework. Therefore, the repeal of Law 716/1977 is irrelevant to the current proceedings.

Assessment

31. I agree with the Commission.

32. Given that the Commission's case is based solely upon the contested procedure, the repeal of Law 716/1977 has no bearing on the substance of the Commission's action and therefore cannot render it inadmissible.

Scope of the action

Arguments of the parties

33. The Greek authorities object that the scope of the action was extended beyond the matters raised during the pre–litigation procedure in two respects. First, they claim that the Commission first raised the complaint that Greece had failed to annul the award procedure in the reasoned opinion, rather than in the letter of formal notice. Second, they argue that the complaint that the violation of Community law is due to a persistent administrative practice is raised for the first time in the Commission's application. Greece also contends that the petitum of the reasoned opinion is vague and imprecise.

34. The Commission explains that the scope of its action is limited to the contested procedure. In its reply, the Commission expressly confirms that it does not allege that the Greek authorities' violation of Community law is due to a persistent administrative practice.

Assessment

35. It is well established that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure; and that consequently the Commission's reasoned opinion and the application must be based on the same grounds. (12)

36. In my view, the Greek Government has failed to demonstrate that the Commission has extended the subject-matter of its action beyond what is set out in the reasoned opinion. The Commission does not seek a declaration that the Greek authorities annul the award procedure. Nor is it alleging a violation of Community obligations due to a persistent administrative practice. (13)

37. The scope of the action is therefore consistent with the pre-litigation procedure.

38. The conditions to be fulfilled for bringing an action under Article 226 EC are likewise well established in the Court's case–law. In essence, the application must state the subject-matter of the proceedings and summarise the pleas in law on which it is based, and the statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. (14)

39. In my opinion the petitum to the reasoned opinion sets out the grounds of the Commission's

complaint in a manner which enables the Greek authorities to be aware of the case against them. I therefore do not agree that the Commission's application is vague and imprecise.

Impossibility of remedying the alleged breach

Arguments of the parties

40. The Greek authorities argue that it is impossible to remedy the alleged infringement for legal and practical reasons.

41. As regards the legal reasons, they contend that the contested procedure cannot be revoked and the contracts which have been awarded under it cannot be annulled at national level. In particular, the national legislation implementing Article 2(6) of Directive 92/13 means that the powers of the body responsible for review are restricted to awarding damages.

42. The Commission argues that Directive 92/13 does not apply to the current action and that Greece cannot therefore rely on it.

43. As regards the practical reasons, the Greek authorities allege that the project is part-financed by the Communities and as such is subject to a timetable which cannot be changed.

44. It is also argued that if the contested procedure were to be annulled and re-run it would distort competition.

Assessment

45. The arguments on the legal effect of annulment relate to the rights and remedies of an injured party at national level. In my view those issues are not relevant to the matters that must be determined in the current infringement proceedings.

46. More particularly, Directive 92/13 requires Member States to ensure that decisions taken by contracting entities may be reviewed effectively at national level for breaches of the Community rules in the public procurement field. (15) It is therefore concerned with remedies in national proceedings where an individual seeks redress before national authorities. Infringement proceedings under Article 226 EC are of an entirely different character. Such actions take place at Community level; and the issue is whether the Member State is in breach of its obligations under Community law. Accordingly, Directive 92/13 is irrelevant to the present proceedings.

47. The Greek authorities have submitted no evidence to substantiate their claims that practical reasons make it impossible to render the contested procedure compliant. It is therefore unnecessary to consider that argument further.

48. In those circumstances the action is admissible.

The declaration sought

49. The Commission seeks a declaration that, by introducing de facto an additional criterion for automatic exclusion beyond those which are expressly provided for in Article 31(2) of the Directive, to the detriment of foreign consultancy firms, and by failing to distinguish in the contest in question between qualitative selection and award criteria Greece has failed to fulfil the obligations flowing from Community legislation on public procurement, more specifically Articles 4(2), 31(1) and (2) and 34(1)(a) of the Directive as interpreted by the Court, the principle of mutual recognition of formal qualifications which is governed by Community law on public procurement and Articles 12 and 49 EC.

50. The grounds on which the declaration is sought give rise to two preliminary remarks.

51. First, the legal and factual basis upon which the declaration is sought must be clear. Secondly, the Commission bears the burden of proof in proceedings under Article 226 EC and must

place before the Court the information to establish that the obligation in question has not been fulfilled. (16)

Substantive arguments of the parties

52. The Commission raises six grounds of complaint which I have grouped together as follows. First, I examine the alleged breach of the criteria concerning qualifications, selection and award procedures. Secondly, I consider the alleged breach of the principles of non-discrimination and transparency.

Breach of the criteria concerning qualifications, selection and award procedures

Article 31(1) and (2) of the Directive

53. Article 31 opens with an express reference to restricted and negotiated procedures. (17) The contested procedure was, however, an open procedure. (18) It is therefore necessary to consider whether, and if so to what extent, the Commission can claim that Greece has breached its obligations under Article 31 during the contested procedure.

54. In response to questions posed at the hearing, the Commission conceded that Article 31 does not expressly refer to the open procedure, but argued that its provisions should apply by analogy. It is not entirely clear what the Commission meant by that; and the Commission did not elaborate further during the oral procedure.

55. However, in its application the Commission refers to *Commission* v *Spain*, (19)*Teckal* (20) and *Commission* v *Spain* (21) in support of its position. In those cases, the Court held that the only permissible exceptions to the scope of application of the public procurement directives are those which are exhaustively and expressly mentioned therein. It may therefore be that the Commission's argument is that the only grounds on which a contracting entity may exclude a candidate from a tendering procedure, irrespective of whether the procedure applied is restricted, negotiated or open, are those expressly listed in Article 31(2).

56. That argument requires one to take the general principle derived from those cases as to when the directives should apply and to use it to redraft a specific provision of a particular directive in order to extend that provision's scope from specific procedures to all procedures.

57. I do not consider that to be appropriate.

58. In the present case, it is common ground that the contested procedure fell within the scope of Directive 93/38. The general principle laid down by the Court in those cases is therefore already satisfied. It seems to me to be entirely different – and impermissible – to use that general principle to rewrite a text that opens with the words, 'Contracting entities which select candidates to tender in restricted procedures or to participate in negotiated procedures …' so as to render everything that follows applicable, not to restricted procedures and negotiated procedures, but to all procedures. The obvious and natural reading is that the provision applies to the two procedures expressly identified. It does not apply to the remaining procedure (the open procedure used to award the contested contract).

59. Three further factors reinforce that interpretation of Article 31.

60. First, if the draftsman had wished what followed the opening words of the article to apply to all procedures, nothing could have been simpler to express. He had only to omit the words 'which select candidates to tender in restricted procedures or to participate in negotiated procedures'.

61. Second, the language used in the next subparagraph (Article 31(2)) strongly suggests that the criteria for exclusion there listed – even for restricted and negotiated procedures – are *not* exhaustive. To illustrate the point: the English text states 'The criteria used *may include* the criteria specified in Article 23 of Directive 71/305/EEC and in Article 20 of Directive 77/62/EEC.' The French text has 'Les critères utilisés *peuvent inclure* ceux d'exclusion énumérés à l'article 23 de la directive 71/305/CEE et à l'article 20 de la directive 77/62/CEE' and the German 'Die angewandten Kriterien können die in Artikel 23 der Richtlinie 71/305/EWG und Artikel 20 der Richtlinie 77/62/EWG

angegebenen Ausschließungsgründe einschließen'. (22) The words 'may include' in the various language versions of the text indicate (so far as I can tell, quite consistently) that the selection criteria referred to are indicative, not exhaustive.

62. Third, that reading is reinforced by the third subparagraph. Article 31(3) contains further permissive language (that contracting authorities 'may' base the criteria for exclusion on a particular ground, not that they 'must') and directly relates the ground there identified ('the objective need to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the contract award procedure and the resources required to complete it') to restricted and negotiated procedures. In open procedures, there is (by definition) no initial reduction of the number of candidates: rather, 'all interested suppliers, contractors or service providers may submit tenders'. (23) The safeguard clause contained in the final sentence of Article 31(3) ('The number of candidates selected must, however, take account of the need to ensure adequate competition') is likewise perfectly intelligible in the context of restricted and negotiated procedures, but meaningless when applied to open procedures. Nothing can 'ensure adequate competition' more than throwing the procedure open to all comers.

63. Finally, the Commission seeks to place some reliance on *La Cascina and Others*. (24) However, I do not agree that that assists the Court in interpreting Article 31 of the Directive. In *La Cascina and Others* the Court held that Article 29 of Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (25) lays down (exhaustively) the seven grounds for excluding candidates from participation in a contract. However, Article 31 of the Directive is structured differently from Article 29 of Directive 92/50. Article 31(1) contains the mandatory elements, which are that candidates shall be selected according to 'objective criteria and rules which they lay down' and provides that contracting entities 'shall make [these] available to interested suppliers, contractors or service providers'. Unlike Article 29, Article 31(2) and (3) then allow Member States some discretion as to the exclusion criteria that they may apply.

64. I therefore conclude that the Commission's complaint that the contested procedure was in breach of Article 31(1) and (2) is misconceived.

Article 34(1)(a) of the Directive

65. The Commission contends that, in breach of their obligations under Article 34(1)(a), the Greek authorities failed to distinguish in this particular contest between qualitative selection criteria and award criteria.

66. In a restricted or negotiated procedure, the tendering procedure comprises two stages: a first stage at which (applying selection criteria) the contracting entity selects the candidates whom it invites to submit applications or to enter into negotiations; and a second stage at which (applying award criteria) the contracting entity decides to whom the contract should be awarded.

67. In an open procedure, the contracting entity merely has to decide (from amongst those interested service providers who submit applications) to whom the contract should be awarded.

68. The contested procedure was an open procedure.

69. It is therefore unclear to me upon what basis the Commission alleges that the contracting entity conducted a two-stage process which involved applying both selection and award criteria.

70. The complainant did not submit an application in the contested procedure, because it considered itself to be excluded automatically by the wording of clause 2.1.3 of section III of the competition notice. The Commission has not placed any evidence before the Court, whether in respect of the contested procedure or other tendering procedures, to substantiate its allegation that the Greek authorities have failed to distinguish between the selection and award criteria.

71. Accordingly, I conclude that this ground of complaint is unfounded.

Breach of the principle of mutual recognition under the Directive

72. The Commission alleges that the Greek authorities have failed to fulfil their obligation to apply the principle of mutual recognition. The Commission identifies no substantive provision of the Directive in support of this contention, but states that it is basing itself upon recitals 34 and 36 in the preamble to the Directive. (26) However, it is settled case-law that the preamble to a Community act does not have binding force. (27)

73. There is therefore no basis for considering that argument further.

74. Therefore, there remain two issues for the Court to consider: whether the Greek authorities are in breach of their Treaty obligations concerning the mutual recognition of formal qualifications and whether the way the contested procedure was handled breached the principles of non-discrimination and transparency (the arguments under Article 4(2) of the Directive and Articles 12 EC and 49 EC).

Mutual recognition of formal qualifications under the Treaty

75. The principle of mutual recognition of formal qualifications is derived from the Court's case-law on freedom of establishment. (28) It is, however, equally applicable to the provision of services. (29)

76. The Commission argues that the effect of the contested clause is to prevent candidates from proving their qualifications and experience on the basis of the rules that would apply in their home Member States.

77. The Greek authorities dispute the Commission's interpretation of the contested clause, contending that establishing proof of technical experience and qualifications is less onerous for foreign than it is for national firms. They assert that no candidate was excluded from participation in the competition on the basis of the contested clause.

78. The complainant itself did not submit an application, because it considered itself necessarily to be excluded from the contested procedure. Whether or not the Greek authorities would have recognised its formal qualifications was therefore never put to the test. Nor has the Commission submitted any evidence to the Court to demonstrate that the contracting entity failed to recognise the formal qualifications of a candidate from another Member State who did submit an application for consideration in the contested procedure.

79. It follows that this ground of complaint should be dismissed as unfounded.

Breach of the principles of non-discrimination and transparency

Article 4(2) of the Directive

80. It is common ground that the contested procedure falls within the scope of the Directive (30) and accordingly that ERGA OSE AE is subject to its rules.

81. Article 4(2) of the Directive provides that contracting entities 'shall ensure' that there is no discrimination between different suppliers, contractors or service providers.

82. In its case-law on public procurement, the Court refers interchangeably to 'the principle of non-discrimination' and 'the principle of equal treatment'. It has stated in terms that the principle of equal treatment lies at the heart of the public procurement directives. (31) It has likewise explained that the principle of non-discrimination in public procurement is a specific enunciation of the eponymous general principle of Community law. (32)

83. The principle of equal treatment implies, in turn, an obligation of transparency which governs all procedures for the award of public contracts, (33) in order to afford to all potential candidates equality of opportunity in formulating their applications to participate. (34)

84. The obligation of transparency requires a contracting entity to ensure that all potential applicants have ready access to the conditions that apply concerning the submission of applications. That includes information on the formal qualifications required of candidates in order to participate.

As the Court stated in *Commission v France*: (35) '... Article 4(2) of the Directive, in prohibiting any discrimination between tenderers, also protects those who are discouraged from tendering because they have been placed at a disadvantage by the procedure followed by a contracting entity'.

85. In that case, the Court held that the publication of *limited information* in the *Official Journal of the European Communities* amounted to discrimination, because those candidates who had access to the additional information published in the national journal were at an advantage since they had the full facts available to them concerning the exact scope of the projected works. (36)

86. Did the Greek authorities satisfy the requirements of Article 4(2) in relation to the contested procedure?

87. The Greek authorities argue that the contested clause does not exclude potential participants. In their view, it merely indicated that diplomas and official attestations, and proof of general technical experience, were required to demonstrate that the tenderer possessed a specified minimal technical competence. Greece argues that foreign consultancy firms or consultants had, indeed, certain advantages over national tenderers, in as much as they were permitted to show that they met the conditions by any appropriate means, including taking account of prior declarations concerning their experience. Moreover, Greece reiterates that any candidate in doubt as to his position had merely to request clarification from the adjudicating authority.

88. The Commission contends that the contested clause can only be interpreted as meaning that foreign design or consultancy firms would be classified according to the classification of previous qualifications submitted to the contracting entity (in the previous six months). The Commission points out that this condition dissuaded the complainant from participating in the contested procedure. The Commission also considers that the contested clause introduced a supplementary condition which is particularly difficult for foreign design or consultancy firms to meet.

89. I agree with the Commission.

90. First, in my view the contested clause was inherently likely to have a dissuasive effect on foreign consultancy firms or consultants, because it indicates (expressly) that they would not be accepted as candidates in certain specific circumstances.

91. Second, the Greek authorities have not shown that information clarifying how the candidature of consultancy firms or consultants would be handled was readily accessible to potential candidates when the competition notice was published.

92. Finally, I do not accept the Greek authorities' argument that, because potential foreign candidates in doubt as to their eligibility could have made enquiries with the contracting entity if they wished to establish their position, there was no dissuasive effect. Transparency requires that the potential tenderer be able to decide, on the basis of the published information readily available to him, whether or not to submit a tender. It is not sufficient that, if he takes the initiative and goes to the trouble and expense of making further detailed enquiries, he can establish the true position. (37) That is so a fortiori where (as here) the published terms of the invitation to tender indicate expressly that a particular category of potential candidates from other Member States, to which he belongs, will be excluded from consideration.

93. It is, moreover, clear that at least one potential candidate (the complainant) was indeed dissuaded from submitting an application.

94. I therefore conclude that the contested procedure failed to meet the requirements of Article 4(2) of the Directive.

Articles 12 and 49 EC

95. Discrimination based on nationality which prevents or hinders the taking up of the freedom to provide services is, of course, prohibited under Article 49 EC – the specific expression, as regards services, of the general prohibition on discrimination based on nationality found in Article 12 EC.

96. However, since the contested procedure falls within the scope of the Directive, it is unnecessary to consider the application of those Treaty provisions of Community law. (38)

Costs

97. Both the Commission and the Greek Government have asked for costs. In my view, the Commission is entitled to succeed on one ground only of its application. The way in which the proceedings have been conducted by the parties has not been particularly helpful to the Court in defining the parameters of the case and clarifying the arguments on which each side relies.

98. Pursuant to the first subparagraph of Article 69(3) of the Rules of Procedure, each party should therefore bear its own costs.

Conclusion

99. I therefore propose that the Court should:

– declare that, by including the contested clause in the competition notice (2003/S 205-185214) without providing further information on the eligibility of foreign consultancy firms or consultants to submit their candidature, the Greek authorities have failed to comply with their obligations under Article 4(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

– dismiss the remainder of the application;

– order each party to bear their own costs.

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1 – Original language: English.

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2 – Directive of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1) and Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1).

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3 – Article 2(1)(a) of the Directive.

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4 – Article 1(7).

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5 – Article 1(16).

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6 – Article 14(1)(c).

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7 – In brief, Article 23 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5) provides that any *contractor*, and Article 20 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (*OJ 1977 L 13, p. 1)* provides that any *supplier*, who is bankrupt, convicted of an offence concerning his professional conduct, has failed to meet his obligations to pay tax or social security or is guilty of serious misrepresentation in supplying information that is requested under either of the two Directives regarding any of those matters, is to be excluded from participation in the contract.

8 – Directive of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

9 – Article 1 of Directive 92/13.

10 – Law 716/1977 was subsequently repealed and replaced by Law 3316/2005.

11 Translated from the contract notice (2003/S 205-185214) which appears in the notice published in the Official Journal. The final paragraph (which I have highlighted for emphasis), is the element which is contested by the Commission and the only part of the contested notice that is referred to in its application.

12 – Case C-195/04 *Commission* v *Finland* [2007] ECR I-3351, paragraph 18 and the case-law cited there.

13 – See for example, Case C-489/06 *Commission* v *Greece* [2009] ECR I-0000, paragraph 48, for those elements that need to be established to demonstrate that a Member State has failed to fulfil its obligations on the basis of an administrative practice.

14 – *Commission* v *Finland,* cited at footnote 12, paragraph 22 and the case-law cited there.

15 – Article 1 of Directive 92/13.

16 – Case C-532/03 *Commission* v *Ireland* [2007] ECR I-11353, paragraph 29 and the case-law cited there.

17 – Article 31(1).

18 – See point 17.

19 – Case C-71/92 [1993] ECR I-5923.

20 – Case C-107/98 [1999] ECR I-8121.

21 – Case C-84/03 [2005] ECR I-139.

22 – See, in similar vein, 'Los criterios empleados podrán incluir ...', 'I criteri utilizzati possono comprendere ...', 'De gehanteerde criteria kunnen ... omvatten', and 'Os critérios utilizados podem incluir ...' in the Spanish, Italian, Dutch and Portuguese language versions.

23 – See Article 1(7), set out at point 5 above, and compare the definitions of open, restricted and negotiated procedures.

24 – Joined Cases C–226/04 and C–228/04 [2006] ECR I–1347, paragraph 22.

25 – OJ 1992 L 209, p. 1.

26 – Recital 34 states that the Community rules on mutual recognition of formal qualifications apply when evidence of such qualification is required for participation in a design contest. Recital 36 states that the principle of mutual recognition applies within the Directive's field of application. It is trite law that the recitals serve to set out the reasons for the substantive provisions, as required by Article 253 EC.

27 – See Case C–136/04 *Deutsches Milch-Kontor* [2005] ECR I–10095, paragraph 32 and the case-law cited there.

28 – See, for example, Case C–340/89 *Vlassopoulou* [1991] ECR I–2357, paragraphs 15 to 17 and Case C–255/01 *Markopoulos and Others* [2004] ECR I–9077, paragraph 63 and the case-law cited there.

29 – It is settled case-law that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against service providers, but also the abolition of any restriction which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where he lawfully provides similar services. See for example, Case C–389/05 *Commission* v *France* [2008] ECR I–0000, paragraph 57.

30 – See point 14.

31 – Case C–213/07 *Michaniki* [2008] ECR I–0000, paragraphs 44 and 45 and the case-law cited there.

32 – Case C–458/03 *Parking Brixen* [2005] ECR I–8585, paragraph 48 and Case 810/79 *Überschär* [1980] ECR 2747, paragraph 16.

33 – See, for example, Case C–87/94 *Commission* v *Belgium* [1996] ECR I–2043, paragraphs 51 to 54; Case C–324/98 *Telaustria and Telefonadress* [2000] ECR I–10745, paragraph 61 and *La Cascina and Others* cited in footnote 24, paragraph 32.

34 – Case C–470/99 *Universale-Bau and Others* [2002] ECR I–11617, paragraph 93.

35 – Case C–16/98 [2000] ECR I–8315, paragraph 109, where the Court examined Article 4(2) of the Directive.

36 – See Case C-16/98 *Commission* v *France*, cited in footnote 35, paragraph 111.

37 – I do not suggest that the transparency obligation is breached where a more detailed information pack can be acquired by the potential tenderer on simple application to the contracting entity: see my Opinion in Case C–241/06 *Lämmerzahl* [2007] ECR I–8415, points 70 to 73.

38 – See, by analogy, Case C–341/05 *Laval* [2007] ECR I–11767, paragraphs 54 and 55.

Questions referred

1. Is Commission Regulation No 314/2002 ([1]) invalid in the light of Article 15 of Council Regulation No 1260/2001 on the common organisation of the markets in the sugar sector ([2]) and in the light of the principles of proportionality and non-discrimination, in that it does not provide, for calculation of the contribution on production, for the exclusion from the financing requirements of those quantities of sugar contained in processed products, which are exported without benefit of an export refund?

2. In the event that the answer to that question is in the negative:

   Is Regulation No 1686/2005 ([3]) invalid in the light of Commission Regulation No 314/2002 and of Article 15 of Council Regulation No 1260/2001 and of the principle of proportionality, in that it fixes a contribution on production for sugar which is calculated on the basis of an 'average loss' per tonne exported, which does not take account of the quantities exported without a refund, although those same quantities are included in the total used for evaluation of the total loss to be financed?

([1]) Commission Regulation (EC) No 314/2002 of 20 February 2002 laying down detailed rules for the application of the quota system in the sugar sector (OJ 2002 L 50, p. 40).
([2]) Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector (OJ 2001 L 178, p. 1).
([3]) Commission Regulation (EC) No 1686/2005 of 14 October 2005 setting the production levies and the coefficient for the additional levy in the sugar sector for the 2004/05 marketing year (OJ 2005 L 271, p. 12).

Action brought on 3 April 2007 — Commission of the European Communities v Federal Republic of Germany

(Case C-192/07)

(2007/C 117/33)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by: M. Condou-Durande and W. Bogensberger, Agents)

Defendant: Federal Republic of Germany

Form of order sought

The applicant claims that the Court should:

— declare that, by not adopting the laws, regulations and administrative provisions necessary to implement Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification ([1]), or, by not informing the Commission of such provisions, the Federal Republic of Germany has failed to fulfil its obligations under that directive;

— order the Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The period prescribed for transposition of Directive 2003/86/EC expired on 3 October 2005.

([1]) OJ 2003 L 251, p. 12.

Action brought on 12 April 2007 — Commission of the European Communities v Hellenic Republic

(Case C-199/07)

(2007/C 117/34)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and D. Kukovec)

Defendant: Hellenic Republic

Form of order sought

— declare that, by introducing de facto an additional criterion for automatic exclusion beyond those which are expressly provided for in Article 31(2) of Council Directive 93/38/EEC ([1]) of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, to the detriment of foreign consultancy firms, and by failing to distinguish in the contest in question between qualitative selection criteria and award criteria, the Hellenic Republic has failed to fulfil obligations flowing from Community legislation on public procurement, more specifically Articles 4(2), 31(1) and (2) and 34(1)(a) of Directive 93/38/EEC, as interpreted by the Court of Justice of the European Communities, the principle of mutual recognition of formal qualifications which is governed by Community law on public procurement, and Articles 12 and 49 of the Treaty;

— order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The Commission received a complaint concerning irregularities in connection with a design contest announced by ERGA OSA AE in 2003 for 'Studies relating to building and electrical-engineering works and installations — first phase of the group of stations in the Thriasio Plain'.

In light of the Court's case-law, the Commission submits that the condition for consultancy firms' participation in the design contest which envisages their grading, in accordance with the Greek system, in classes, and indeed in the 'specified' classes, introduces de facto a ground of exclusion beyond the grounds of exclusion which are expressly mentioned in Article 31(2) of Directive 93/38/EEC, and amounts in some instances to discrimination against foreign consultancy firms, in breach of Article 4(2) of Directive 93/38/EEC.

The Commission also submits that that condition in the foregoing notice of competition infringes the principle of mutual recognition of diplomas, certificates or other evidence of formal qualifications and Articles 12 and 49 EC.

The Commission further contends that the notice of competition does not separate the selection and award stages and confuses the selection criteria with the award criteria, in breach of Articles 31 and 34 of Directive 93/38/EEC.

Finally, the Commission contends that the repeal, relied on by the Greek authorities, of a law previously in force did not eliminate the infringement alleged against it, since it is the misapplication of the relevant Community provisions by the Greek authorities that is at issue, and not a failure adequately to transpose them into Greek law.

Consequently, the Commission submits that the Hellenic Republic has failed to fulfil its obligations under Articles 4(2), 31(1) and (2) and 34(1)(a) of Directive 93/38/EEC and has infringed the principle of mutual recognition of formal qualifications and Articles 12 and 49 EC.

([1]) OJ L 199, 9.8.1993, p. 84.

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ORDONNANCE DU PRÉSIDENT DE LA COUR

23 mai 2008(*)

«Radiation»

Dans l'affaire C-194/07,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Consiglio di Stato (Italie), par décision du 28 novembre 2006, parvenue à la Cour le 4 avril 2007, dans la procédure

SAVA e C. Srl e. a.

contre

Mostra d'Oltremare SpA,

en présence de :

Cofathec Servizi SpA e.a.

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. Y. Bot, entendu,

rend la présente

Ordonnance

1 Par lettre du 11 octobre 2007, le greffe de la Cour a transmis à la juridiction de renvoi l'ordonnance rendue le 4 octobre 2007 dans l'affaire C-492/06, Consorzio Elisoccorso San Raffele (non encore publiée au Recueil), en l'invitant à bien vouloir lui indiquer si, à la lumière de cette ordonnance, elle souhaitait maintenir son renvoi préjudiciel.

2 Par décision du 5 février 2008, parvenue au greffe de la Cour le 13 mai 2008 (fax du 6 mars 2008), le Consiglio di Stato a informé la Cour qu'il retirait sa demande de décision à titre préjudiciel.

3 Dans ces conditions, il y a lieu d'ordonner la radiation de la présente affaire du registre de la Cour.

4 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, le président de la Cour ordonne:

L'affaire C-194/07 est radiée du registre de la Cour.

Fait à Luxembourg, le

Le greffier Le président

* Langue de procédure: l'italien.

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Order of the President of the Court of 23 May 2008 (reference for a preliminary ruling from the Consiglio di Stato - Italy) - SAVA e C. Srl, SIEME Srl, GRADED SpA v Mostra d'Oltremare SpA, Cofathec Servizi SpA and Others

(Case C-194/07) [1]

Language of the case: Italian

The President of the Court has ordered that the case be removed from the register.

_____

1 -

2 - OJ C 140, 23.06.2007.

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Reference for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 4 April 2007 - SAVA e C. S.r.l., SIEME S.r.l. and GRADED S.p.A. v Mostra d'Oltremare S.p.A. and Others

(Case C-194/07)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Applicants: Sava e C. s.r.l., Sieme s.r.l. and Graded S.p.A.

Defendants: Mostra d'Oltremare S.p.A. and Others

Question referred

Where a consortium without legal personality has participated as such in a procedure for the award of a public contract and has not been awarded that contract, is Article 1 of Council Directive 89/665/EEC [1] of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC [2] of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, to be interpreted as precluding the possibility under national law for an individual member of that consortium to bring an action against the decision awarding the contract?

_____

[1] - OJ L 395, p. 33.

[2] - OJ L 209, p. 1.

Order of the Court (Seventh Chamber)
of 27 November 2007
Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar v Commission of the European Communities. Appeal - Admissibility. Case C-163/07 P.

In Case C163/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 23 March 2007,

Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi,

Musa Akar,

established in Ankara (Turkey), represented by Ç. ahin, Rechtsanwalt,

appellants,

the other party to the proceedings being:

Commission of the European Communities, represented by P. van Nuffel and F. Hoffmeister, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Seventh Chamber),

composed of U. Lohmus, President of the Chamber, P. Lindh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

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

1. Dismisses the appeal.

2. Orders Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar to pay the costs.

1. By their appeal the companies Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar ask the Court to set aside the order of the Court of First Instance of the European Communities of 17 January 2007 in Case T129/06 Diy-Mar Insaat Sanayi ve Ticaret and Akar v Commission , not published in ECR, (the order under appeal') dismissing as inadmissible their action which sought, first, annulment of the decision of the Commission MK/KS/DELTUR/(2005)/SecE/D/1614 of 23 December 2005 relating to the award of public works contracts for the construction of educational facilities in the provinces of Siirt and Diyarbakir (the contested decision'), and, secondly, suspension of the operation of the award procedure in question.

Background to the dispute

2. Following publication of a notice of the awarding of a public works contract relating to the construction of educational facilities in the Turkish provinces of Siirt and Diyarbakir (EuropeAid/12160l/C/W/TR), on 21 October 2005 the appellants lodged their application documents with the delegation of the Commission of the European Communities in Turkey.

3. On conclusion of the award procedure, by decision of 29 November 2005 the Commission awarded the contract to the undertaking ILCI Ins. San. Ve Tic, AS. By letter of 2 December 2005, the

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appellants requested that the Commission cancel that decision. The Commission rejected that request by the contested decision, which was contained in a letter of 23 December 2005 sent to the appellants by fax on the same day.

4. The decision included information on legal remedies and drew the appellants' attention to the right available to them under Article 230 EC to bring before the Community courts an action for annulment of the decision awarding the contract, within a period of two months from the date of the letter.

Procedure before the Court of First Instance and the order under appeal

5. Through two lawyers practising in Turkey, on 21 and 23 February 2006 the appellants lodged at the Registry of the Court of First Instance first a version in English and then a version in Turkish of an application for annulment of the contested decision (the first application').

6. Following a letter dated 21 March 2006 from the Registry of the Court of First Instance which informed them that their action could not be dealt with because for the purposes of proceedings they had to be represented by a lawyer authorised to practise before a court of a Member State of the European Union or of another State which is a party to the Agreement on the European Economic Area (the EEA Agreement'), on 6 April 2006 the appellants lodged, through Mr Ç. ahin, a lawyer who is a member of the Düsseldorf bar (Germany), a translation in German of the English language version of the first application.

7. After the Registrar of the Court of First Instance informed Mr ahin that he had omitted to sign the German language version of the application, he provided, on 26 April 2006, a new copy of that version which bore his signature. That is the date on which the action was registered under reference T129/06.

8. On 16 August 2006, the Commission raised an objection of inadmissibility, on the basis of Article 114 of the Rules of Procedure of the Court of First Instance, on the ground that the action was out of time.

9. The appellants claimed that there were circumstances which were such that the irregularities attached to the lodging of their application were excusable.

10. By the order under appeal the Court of First Instance held, first, that the first application did not comply with an essential procedural condition which must be observed if an action is not to be inadmissible, namely the requirement to submit an application bearing the signature of a lawyer authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement, and, second, that such a breach of procedure could not be cured after expiry of the period prescribed for bringing the action. The Court of First Instance held that only the German language version of the application signed by Mr ahin and lodged at the Registry on 26 April 2006 could be considered to be in proper form.

11. In that regard, the Court of First Instance ruled that the action, which had not been validly lodged until 26 April 2006, had to be declared out of time, given that the period prescribed for an action of annulment of the contested decision had expired on 6 March 2006.

12. In response to the appellants' argument that the fact that their action was lodged late, as a consequence of the failure by the Commission to inform them in the contested decision of the rules of representation before the Community courts, constituted an excusable error which precluded the application to them of the time-limits for bringing an action, the Court of First Instance stated that in relation to the time-limits for bringing an action the concept of excusable error had, in accordance with settled case-law, to be interpreted strictly. The Court stated that such an error can concern only exceptional circumstances in which, in particular, the conduct of the

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institution concerned has been such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced trader.

13. In the light of the above, the Court of First Instance held, at paragraph 44 of the order under appeal, that it could not be concluded from the circumstances relied on by the appellants that there had been excusable error on their part.

14. Consequently the Court of First Instance dismissed the action as inadmissible on the ground that it was out of time and ordered the appellants to pay the costs.

The forms of order sought by the parties

15. The appellants claim that the Court should:

- set aside the contested order;

- annul the contested decision;

- alternatively, refer the case back to the Court of First Instance for a ruling on the substance, and

- order the Commission to pay the costs.

16. The Commission contends that the Court should:

- dismiss the appeal by declaring it to be unfounded, and

- order the appellants to pay the costs.

The appeal

17. Under Article 119 of the Rules of Procedure, where the appeal is clearly inadmissible or clearly unfounded, the Court may at any time, acting on a report from the Judge-Rapporteur and after hearing the Advocate General, by reasoned order, and without opening the oral procedure, dismiss the appeal.

18. In support of their appeal, the appellants rely on two grounds of appeal.

The first ground of appeal

Arguments of the parties

19. The appellants' criticism of the Court of First Instance is that it infringed Article 64 of the Rules of Procedure of the Court of First Instance and Article 24 of the Statute of the Court of Justice, which also applies to the Court of First Instance under the first paragraph of Article 53 of the Statute.

20. In essence, the appellants claim that those provisions place on the Community courts the obligation to establish the facts and to act on their own initiative and accordingly, in this case, the Court of First Instance was bound to take action when on 21 and 23 February 2006 it received the first application signed by a lawyer who was not authorised to represent them.

21. According to the appellants, the Court of First Instance was under an obligation, first, to draw their attention to this procedural error, relating to the capacity to represent a party, before expiry of the period prescribed for the lodging of the action, and, secondly, to clarify the facts with which the first application was concerned and to order the Commission to produce the relevant documents and records.

22. For its part, the Commission does not accept that the Court of First Instance was bound to inform the appellants, before expiry of the period laid down by Community law for the bringing of an action for annulment, that the first application signed by two Turkish lawyers did not comply

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with the formal requirements laid down in Articles 19 and 21 of the Statute of the Court of Justice and contends accordingly that the action had not properly been brought before the Court of First Instance.

23. In that regard, the Commission states that, while it is true that the Statute of the Court of Justice and the Rules of Procedure of the Court of First Instance permit non-compliance with certain procedural requirements of an application to be cured, by a procedure of rectification, it is no less true that, even in those cases, the consequence of failure to rectify within the period allowed by the Registrar, as is clear from Article 44(6) of those rules, is that the application is inadmissible.

24. It follows, according to the Commission, that an application such as that in this case, which is vitiated by non-compliance with a requirement in respect of which neither the Statute of the Court of Justice nor the Rules of Procedure of the Court of First Instance provide for any possibility of rectification, is on any view of the matter inadmissible. In the absence of any provision requiring the Court of First Instance to advise the signatories of documents who do not satisfy the requirements of Article 19 of the Statute of the Court of Justice that such a document is not properly before the Court, the Court of First Instance is also not bound to give such advice within a period which enables the applicant to lodge an application within the prescribed period.

Findings of the Court

25. Neither the provisions relied on by the appellants nor any other provision of the Rules of Procedure of the Court of First Instance and of the Statute of the Court of Justice place any obligation on the Court of First Instance to advise the party lodging an action that his application is inadmissible when it has not been signed by a lawyer authorised to appear before the Community courts.

26. While it is true that the Statute of the Court of Justice and the Rules of Procedure of the Court of First Instance provide for the possibility of rectifying an application which does not comply with certain procedural requirements, it is also true that, on any view of the matter, non-compliance with the mandatory condition of representation by a lawyer authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement is not one of the requirements which can be rectified after expiry of the time-limit for bringing an action, in accordance with the second paragraph of Article 21 of the Statute of the Court of Justice and Article 44(6) of the Rules of Procedure of the Court of First Instance.

27. Having regard to the foregoing, the Court must hold that, by not inviting the appellants to rectify their application before expiry of the period for bringing the action at the time of receipt on 21 and 23 February 2006 of the first application signed by a lawyer who was not authorised to appear before the Community courts, the Court of First Instance did not commit any breach of procedure.

28. Accordingly, the first ground of appeal must be dismissed as clearly unfounded.

The second ground of appeal

Arguments of the parties

29. By their second ground of appeal, the appellants claim that the Court of First Instance infringed Community law inasmuch as it disregarded the fact that the contested decision gave information which was incomplete or incorrect on the rules relating to the pursuit of legal remedies. Since that decision did not state either how or by whom an action could be brought and restricted itself to informing those persons to whom it was addressed that there was a legal remedy and that there was a time-limit for pursuit of that remedy, the appellants were led to think that their application could be submitted in Turkish and by themselves. Where the information on the rules applicable

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to the pursuit of legal remedies is missing, incorrect or incomplete, the time-limit in respect of bringing an action for annulment is not two months, but a year.

30. In addition, the appellants claim that nationals of non-member States should receive information on legal remedies which is more comprehensive than that provided to citizens of the Union.

31. The response of the Commission is that under Community law there is neither a general obligation to inform the persons to whom measures are addressed of the legal remedies which are open to th em nor an obligation to state the time-limits for availing themselves thereof.

32. While it is true that it cannot be denied that the Court of Justice and the Court of First Instance might, under Article 45 of the Statute of the Court of Justice, treat the provision by a Community institution of incorrect information on the rules for the pursuit of legal remedies as equivalent to unforeseeable circumstances or force majeure with the consequence that no right of the parties concerned should be prejudiced by the expiry of a time-limit, that does not apply in these proceedings.

33. The contested decision, which restricted itself to providing the information that that there was a legal remedy, what time-limit applied to that remedy and which court had jurisdiction, and which was silent on all the procedural formalities relating to lodging an application, could not have engendered any confusion in the minds of the appellants.

34. Lastly, the Commission rejects the appellants' argument that nationals of non-member States should receive information on legal remedies which is more comprehensive than that given to citizens of the Union, since information deemed correct and sufficient for the latter must also be so when given to nationals of non-member States.

Findings of the Court

35. The Court of First Instance was fully entitled to rule that the fact that the contested decision did not state that legal proceedings could properly be brought only through a lawyer authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement did not lead the appellants to commit an excusable error the consequence of which was that the Community rules of public policy governing time-limits for bringing actions could be set aside for their benefit.

36. As was stated in paragraph 42 of the order under appeal, excusable error can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned had been such as to give rise to a pardonable confusion in the mind of a party concerned acting in good faith and exercising all the diligence required of a normally experienced trader (Case C195/91 P Bayer v Commission [1994] ECR I5619, paragraphs 26 to 28).

37. However, as was determined in paragraphs 43 and 44 of the order under appeal, since the condition that the application must be signed by a lawyer authorised to practise before a court of a Member State is an essential procedural condition laid down by the Statute of the Court of Justice and published, inter alia, in the Selected Instruments taken from the Treaties of the European Union and in the Official Journal of the European Union , the appellants were thus put in a position to be aware of the existence of that condition and cannot reasonably maintain that the conduct of the Commission caused a pardonable confusion in their minds as to the rules relating to their legal representation before the Community courts. In those circumstances, the appellants cannot be considered to have shown all the diligence required of a normally experienced trader.

38. That conclusion cannot be affected by the appellants' argument that the nationals of non-member States should receive information on legal remedies which is more comprehensive than that given to citizens of the Union.

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39. It was the duty of the two lawyers who lodged the first application to read the relevant texts, in particular Article 19 of the Statute of the Court of Justice, and thereby make themselves aware of the rules relating to representation before the Community courts.

40. Consequently, it follows from that analysis that there is no merit in the appellants' claim that the Court of First Instance infringed Community law by declining to hold that their error was excusable.

41. Further, as the Commission correctly states, it is clear from the case-law of the Court that the Community institutions are not subject to any general obligation to inform the persons to whom their measures are addressed of the judicial remedies available or to any obligation to state the time-limits applicable to them (see, to that effect, the order in Case C153/98 P Guérin automobiles v Commission [1999] ECR I1441, paragraph 15).

42. It follows that the second ground of appeal must also be rejected as clearly unfounded.

43. Since both of the appellants' grounds of appeal have been unsuccessful, the appeal must be dismissed.

Costs

44. Under Article 69(2) of the Rules of Procedure, applicable in appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the appellants have been unsuccessful, the latter must be ordered to pay the costs.

DOCNUM	62007O0163
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
DOC	2007/11/27
LODGED	2007/03/23
JURCIT	12001C/PRO/02-A19 : N 39 12001C/PRO/02-A21L2 : N 26 12001C/PRO/02-A24 : N 25 12001C/PRO/02-A53 : N 25 31991Q0530-A44P6 : N 26 31991Q0530-A64 : N 25 31991Q0704(02)-A119 : N 17 61991J0195 : N 36 61998O0153 : N 41 62006B0129 : N 1 36 37

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SUB	Public contracts of the European Communities
AUTLANG	German
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	X TR
PROCEDU	Action for annulment;Appeal
ADVGEN	Poiares Maduro
JUDGRAP	Arabadjiev
DATES	of document: 27/11/2007 of application: 23/03/2007

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Case C-163/07 P

Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi

and

Musa Akar

v

Commission of the European Communities

(Appeal – Public works contracts – Admissibility – Essential procedural conditions – Mandatory representation of natural or legal persons by a lawyer authorised to practise before a court of a Member State – Appeal clearly unfounded)

Summary of the Order

1. *Procedure – Application initiating proceedings – Formal requirements*

(Statute of the Court of Justice, Arts 21, second para., 24 and 53, first para.; Rules of Procedure of the Court of First Instance, Arts 44(6) and 64)

2. *Acts of the institutions – General obligation to inform the addressees of measures of the judicial remedies available and of the time-limits – None*

1. Neither Article 64 of the Rules of Procedure of the Court of First Instance nor Article 24 of the Statute of the Court of Justice, also applicable to the Court of First Instance pursuant to the first paragraph of Article 53 of that Statute, nor any other provision of the Rules of Procedure of the Court of First Instance and of the Statute of the Court of Justice, place any obligation on the Court of First Instance to advise the party lodging an action that his application is inadmissible when it has not been signed by a lawyer authorised to appear before the Community courts.

   While it is true that the Statute of the Court of Justice and the Rules of Procedure of the Court of First Instance provide for the possibility of rectifying an application which does not comply with certain procedural requirements, it is also true that, on any view of the matter, non-compliance with the mandatory condition of representation by a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area is not one of the requirements which can be rectified after expiry of the time-limit for bringing an action, in accordance with the second paragraph of Article 21 of the Statute of the Court of Justice and Article 44(6) of the Rules of Procedure of the Court of First Instance.

   (see paras 25-26)

2. The Community institutions are not subject to any general obligation to inform the persons to whom their measures are addressed of the judicial remedies available or to any obligation to state the time-limits applicable to them.

   (see para. 41)

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Order of the Court of 27 November 2007 - Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar v Commission of the European Communities

(Case C-163/07 P) [1]

(Appeal - Public works contracts - Admissibility - Essential procedural conditions - Mandatory representation of natural or legal persons by a lawyer authorised to practise before a court of a Member State - Appeal clearly unfounded)

Language of the case: German

Parties

Applicants: Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar (represented by: C. Şahin, lawyer)

Other party to the proceedings: Commission of the European Communities (represented by: P. van Nuffel and F. Hoffmeister, Agents)

Re:

Appeal brought against the order of the Court of First Instance (Fourth Chamber) of 17 January 2007 in Case T-129/06 *Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Akar* v *Commission* in which the Court of First Instance dismissed as inadmissible an application for, first, the annulment of the decision of the Commission of 23 December 2005 relating to the award of the public works contract for the construction of educational establishments in the provinces of Siirt and Diyarbakir and, secondly, suspension of the implementation of the procedure in question - No information, in the contested decision, as to the need to be represented by a lawyer qualified to practise before a court of a Member State in the event of proceedings being brought against the contested decision - Regularised application lodged out of time.

Operative part

The appeal is dismissed.

Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar are ordered to pay the costs.

_____

1 -

2 - OJ C 129, 9.6.2007.

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Appeal brought on 26 March 2007 by Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar against the order of the Court of First Instance (Fourth Chamber) of 17 January 2007 in Case T-129/06 Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar v Commission of the European Communities

(Case C-163/07P)

Language of the case: German

Parties

Appellants: Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar (represented by: C. Şahin, lawyer)

Other party to the proceedings: Commission of the European Communities

Form of order sought

set aside the order of the Court of First Instance of the European Communities of 17 January 2007 in Case T-129/06, [1] served on the appellants on 26 January 2007, and annul the contested decision of the respondent of 23 December 2005 No MK/KS/DELTUR/(2005)/SecE/D/1614;

alternatively, to uphold the pleas in law raised by the appellant at first instance and to set aside the order of the Court of First Instance referred to above and annul the contested decision of the respondent of 23 December 2005 No MK/KS/DELTUR/(2005)/SecE/D/1614 in so far as incompatible with those pleas in law;

in the further alternative, to set aside the order of the Court of First Instance referred to above and to refer the matter back to the Court of First Instance;

order the respondent to pay the costs.

Pleas in law and main arguments

The appellants base their appeal against the order of the Court of First Instance on the following grounds.

The Court is not required, in appraising the facts in proceedings before, it to have regard only to the contentions of the parties and to decide the case solely on the basis of evidence put forward by them. Rather, Article 21 of the Statute of the Court of Justice makes it clear that the Courts of the European Communities are under an obligation to appraise the facts of the proceedings and can, on their own initiative, not only take active steps, but are also under a duty to do so when the circumstances require.

Since, in the present case, the Court of First Instance did not assess whether the respondent had set out proper reasons in the contested decision, and the appellants learned only of the failure to observe formal requirements only after one month had expired, that is to say, after the end of the prescribed period, it infringed Article 21 of the Statute of the Court of Justice, Article 64 of its Rules of Procedure and substantive Community law regarding the principles relating to the scope of the presumption of legality of legal acts and the doctrine of the apparent existence of an act. Where acts of the administration contain particularly serious and blatant errors, Community law requires that these be treated as null and void.

Had the appellants been properly informed of the remedies available to them, they would have instructed a qualified lawyer and accordingly brought proceedings within the prescribed period. The contention of the Court of First Instance that the appellants and their Turkish lawyers had not used the care that is required of an applicant who is aware of all relevant matters did not relieve the respondent of the duty to provide details of the remedies that were available.

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[1] - OJ 2007 C 212, p. 29

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DOCUMENT DE TRAVAIL

ORDONNANCE DU TRIBUNAL (première chambre)

du 22 avril 2008 (*)

« Recours en indemnité – Requête introductive d'instance – Exigences de forme – Irrecevabilité manifeste »

Dans l'affaire T-395/07,

Dimosthenis Balatsoukas, demeurant à Athènes (Grèce), représenté par M^e^ S. Lampropoulos, avocat,

partie requérante,

contre

Commission des Communautés européennes,

partie défenderesse,

ayant pour objet une demande en réparation du préjudice prétendument subi par le requérant du fait de l'inaction de la Commission à la suite du dépôt de plusieurs plaintes relatives à l'exclusion alléguée d'économistes et de petites et moyennes entreprises du secteur privé de certains appels d'offres lancés par le ministère grec du Développement, notamment dans le cadre d'une action s'inscrivant dans le troisième cadre communautaire d'appui, destiné à l'amélioration de la compétitivité des entreprises,

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (première chambre),

composé de M^me^ V. Tiili, président, M. F. Dehousse et M^me^ I. Wiszniewska–Białecka (rapporteur), juges,

greffier : M. E. Coulon,

rend la présente

Ordonnance

Faits et procédure

1 En décembre 2005, le requérant, qui serait économiste de formation, aurait saisi le bureau des Communautés européennes en Grèce de deux plaintes relatives à de prétendues violations du droit communautaire par le ministère grec du Développement lors de la publication de certains avis de marchés publics dans le cadre du « programme cofinancé sur la Compétitivité ». Ces avis excluraient la participation à ces marchés du secteur privé de la recherche, dont le requérant relèverait.

2 Ces plaintes auraient été transférées à la Commission en janvier 2006 et enregistrées sous les références « **2006/4227** SG(2006) A/749/2 » et « **2006/4228** SG(2006) A/750/2 ».

3 En juin 2006, le requérant aurait adressé au secrétariat général de la Commission une plainte complémentaire portant sur la même question. En août 2006, la direction générale « Marché intérieur » de la Commission aurait informé le requérant du fait que ses plaintes seraient transmises aux services compétents de la Commission « afin qu'ils vérifient s'ils sont conformes aux règlements applicables ».

4 En septembre 2006, le requérant aurait à nouveau envoyé une lettre à la Commission, explicitant ses plaintes et lui demandant de « les transmettre à toute instance compétente ». En novembre 2006, il aurait adressé une lettre au membre de la Commission en charge de la politique de concurrence, M^{me} Kroes, l'appelant à « l'aider ainsi que tous les citoyens actifs en Grèce pour réagir à cette violation permanente et flagrante des idées de la grande famille européenne qui sont systématiquement violées en Grèce ». Le requérant aurait ensuite été informé du fait que cette dernière lettre avait été transmise à « une personne responsable de la question » et n'aurait depuis reçu aucune réponse de la part de la Commission.

5 Par requête déposée au greffe du Tribunal le 24 octobre 2007, le requérant a introduit le présent recours.

Conclusions de la partie requérante

6 Le requérant conclut à ce qu'il plaise au Tribunal :

– accueillir les moyens du recours et de la demande en indemnité ;

– indemniser le requérant de son manque à gagner qui s'élève à 100 000 euros, au taux d'intérêt légal ;

– enjoindre la Commission de verser au requérant, à titre de préjudice moral, « pour l'atteinte à son existence professionnelle et en tant que citoyen », la somme de 30 000 euros, au taux d'intérêt légal ;

– condamner la Commission aux dépens.

En droit

7 Aux termes de l'article 111 du règlement de procédure du Tribunal, lorsque le recours est manifestement irrecevable, le Tribunal peut, sans poursuivre la procédure, statuer par voie d'ordonnance motivée.

8 En l'espèce, le Tribunal s'estime suffisamment éclairé par les pièces du dossier et décide, en application de cet article, de statuer sans poursuivre la procédure.

9 En vertu de l'article 21, premier alinéa, du statut de la Cour de justice, applicable à la procédure devant le Tribunal conformément à l'article 53, premier alinéa, du même statut, et de l'article 44, paragraphe 1, sous c) et d), du règlement de procédure, la requête doit, notamment, contenir l'objet du litige, les conclusions et l'exposé sommaire des moyens invoqués. Ces éléments doivent être suffisamment clairs et précis pour permettre à la partie défenderesse de préparer sa défense et au Tribunal de statuer sur le recours, le cas échéant sans autres informations. Afin de garantir la sécurité juridique et une bonne administration de la justice, il est nécessaire, pour qu'un recours soit recevable, que les éléments essentiels de fait et de droit, sur lesquels celui-ci se fonde, ressortent, à tout le moins sommairement, mais d'une façon cohérente et compréhensible, du texte de la requête elle-même (ordonnances du Tribunal du 28 avril 1993, De Hoe/Commission, T–85/92, Rec. p. II–523, point 20, et du 21 mai 1999, Asia Motor France e.a./Commission, T–154/98, Rec. p. II–1703, point 49 ; arrêt du Tribunal du 15 juin 1999, Ismeri Europa/Cour des comptes, T–277/97, Rec. p. II–1825, point 29).

10 Pour satisfaire à ces exigences, une requête visant à la réparation des dommages prétendument causés par une institution communautaire doit contenir les éléments qui permettent d'identifier le comportement que le requérant reproche à l'institution, les raisons pour lesquelles il estime qu'un lien de causalité existe entre le comportement et le préjudice qu'il prétend avoir subi, ainsi que le

caractère et l'étendue de ce préjudice. En revanche, une demande tendant à obtenir une indemnité quelconque manque de précision nécessaire et doit par conséquent être considérée comme irrecevable (arrêts de la Cour du 2 décembre 1971, Zuckerfabrik Schöppenstedt/Conseil, 5/71, Rec. p. 975, point 9, et du Tribunal du 10 juillet 1990, Automec/Commission, T–64/89, Rec. p. II–367, point 73, et du 8 juin 2000, Camar et Tico/Commission et Conseil, T–79/96, T–260/97 et T–117/98, Rec. p. II–2193, point 181 ; ordonnance du Tribunal du 5 février 2007, Sinara Handel/Conseil et Commission, T–91/05, Rec. p. II-245, point 87).

11 En l'espèce, par sa demande, le requérant tend à obtenir réparation du préjudice prétendument subi du fait de son exclusion, en tant que soumissionnaire potentiel, d'un nombre d'appels d'offres lancés par le ministère grec du Développement et, dans une mesure incertaine, du fait de l'inaction de la Commission saisie de plusieurs plaintes à ce sujet. Il fait valoir qu'un délai raisonnable se serait écoulé depuis le dépôt des plaintes auprès de la Commission, sans que celle-ci l'informe « au sujet de ses décisions » y relatives, et que le « manque à gagner résultant de son exclusion illégale dépasse les 100 000 euros». En outre, il fait état de la « grave atteinte à son existence professionnelle et humaine » et demande réparation à la Commission, pour le préjudice moral qu'il aurait subi à ce titre. Selon lui, un lien de causalité existerait entre ces préjudices allégués et le fait qu'il aurait été illégalement exclu des avis de marché en cause. Il soutient que le ministère grec du Développement aurait violé de nombreuses dispositions du droit communautaire primaire et que de nombreux règlements communautaires auraient également été violés, sans toutefois préciser l'auteur de ces dernières violations alléguées.

12 Le requérant n'apporte néanmoins aucune preuve pour étayer ses allégations, notamment, sur l'existence des préjudices qu'il aurait subis. Il n'explique pas davantage en quoi un lien de causalité existerait entre un quelconque comportement illégal de la Commission et les préjudices allégués. Au contraire, il fait valoir que le lien de causalité existe entre les préjudices qu'il aurait subis et son exclusion « illégale » des avis de marché en cause. Or, selon le requérant lui-même, ces avis de marché auraient été lancés par le ministère grec du Développement.

13 Dans ces circonstances, il y a lieu de relever que la requête n'identifie pas clairement et de manière non équivoque, cohérente et compréhensible les éléments constitutifs des préjudices allégués ni l'existence d'un lien de causalité entre un quelconque comportement prétendument illégal de la Commission et ces préjudices. Partant, elle ne satisfait pas, à cet égard, aux exigences minimales prévues à l'article 44, paragraphe 1, sous c), du règlement de procédure.

14 Il s'ensuit que le présent recours doit être rejeté comme étant manifestement irrecevable, sans qu'il soit nécessaire de le signifier à la Commission.

Sur les dépens

15 La présente ordonnance étant adoptée avant la notification de la requête à la Commission et avant que celle-ci n'ait pu exposer des dépens, il suffit de décider que le requérant supportera ses propres dépens, conformément à l'article 87, paragraphe 1, du règlement de procédure.

Par ces motifs,

LE TRIBUNAL (première chambre)

ordonne :

1) Le recours est rejeté comme manifestement irrecevable.

2) M. Dimosthenis Balatsoukas supportera ses propres dépens.

Fait à Luxembourg, le 22 avril 2008.

Le greffier — Le président

E. Coulon — V. Tiili

* Langue de procédure : le grec.

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Action brought on 24 September 2007 - Evropaïki Dynamiki v Commission

(Case T-377/07)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (represented by: N. Korogiannakis, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Annul the Commission's decision of the Direction General for Informatics to reject the bid of the applicant - filed in response to the open Call for Tender ENTR/05/86 - Content Interoperability for European eGovernment Services (OJ S128 08/7/2006) communicated to the applicant by letter dated 13 July 2007 and to award the contracts to the successful contractor;

order the Commission (DIGIT) to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected;

order the Commission (DIGIT) to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 3.5 million for lot 2.

Pleas in law and main arguments

The applicant submitted a bid in response to the defendant's call for an open tender for the contract 'content interoperability technologies for European eGovernment services' (OJ 2006/S 128-136080). The applicant contests the decision to reject its bid and to award the contract to another bidder.

The pleas in law and main arguments relied on by the applicant are identical to those relied on in Case T-300/07 *Evropaïki Dynamiki* v *Commission*[1].

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[1] - JO 2007 C 235, p. 22.

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JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

9 February 2010 (*)

(Arbitration clause – 'eContent' programme – Contract relating to a project designed to ensure maximum effectiveness of the programme and the widest possible participation of target groups – Non-performance of the contract – Termination of the contract)

In Case T–340/07,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis, lawyer,

applicant,

v

European Commission, represented by E. Manhaeve, acting as Agent, and by D. Philippe and M. Gouden, lawyers,

defendant,

ACTION brought under Articles 235 EC, 238 EC and 288 EC for an order that the Commission make good damage suffered as a result of its failure to comply with contractual obligations in the context of the performance of the EDC-53007 EEBO/27873 contract relating to the project entitled 'e-Content Exposure and Business Opportunities',

THE GENERAL COURT (Fourth Chamber),

composed of O. Czúcz, President, I. Labucka and K. O'Higgins (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 11 March 2009,

gives the following

Judgment

Background to the dispute

1 On 22 December 2000, the Council of the European Union adopted Decision 2001/48/EC adopting a multiannual Community programme to stimulate the development and use of European digital content on the global networks and to promote linguistic diversity in the information society (OJ 2001 L 14, p. 32).

2 Following a call for proposals launched by the Commission of the European Communities in the context of that multiannual Community programme ('eContent programme'), the applicant, Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, was awarded the project entitled 'e-Content Exposure and Business Opportunities' ('the eEBO project'). The objective of that project was in particular to contribute to achieving the overall aims of the eContent programme by providing a platform to raise public awareness of the activities developed in the context of that programme, to disseminate them and to enable access to them, complementary to the existing measures and means. It was concerned, in particular, with ensuring that the eContent programme was as efficient as possible, increasing the number of participants in the

projects of that programme through the use of various means of mass communication and by efforts in the area of public relations.

3 On 3 July 2002, the European Community, represented by the Commission, concluded with the applicant contract EDC-53007 EEBO/27873 concerning the eEBO project. Under Article 2(1) of that contract, the duration of the project was fixed at 18 months from the day after the date on which the contract at issue was signed, that is to say, from 4 July 2002.

4 The tasks to be fulfilled by the applicant within the context of the eEBO project were, in accordance with Article 1(1) of the contract at issue, defined in Annex I thereto, entitled 'Description of Work' ('the technical annex'). The conditions of performance of those tasks were set out in Annex II to the contract at issue, entitled 'General Conditions' ('the general conditions').

5 The technical annex provided that the project comprised three essential elements: first, the establishment and management of an interactive communication system by means of a public relations and communications centre enabling interaction between the projects financed in the context of the eContent programme, as well as between the participants of those projects and the press; second, the organisation of a think tank designed to create a common vision, to address business opportunities and to enable European industries to establish a strong foothold and high visibility in the digital content sector; and, third, support for the public relations and communications centre and the think tank by the provision of contributions, strategic information, media monitoring and publicity related to the eContent programme.

6 The technical annex also contained a detailed work plan comprising eight parts (work packages) and providing, for each work package, that one or more documents be drawn up and delivered to the Commission according to a predetermined timetable set out in a table in paragraph 4 of that annex.

7 The maximum financial contribution for the eEBO project was fixed at EUR 500 000, in accordance with Article 3 of the contract at issue. The conditions governing reimbursement of the eligible costs were set out in Articles 13 to 16 of the general conditions, which provided in particular that, in order to be eligible, the costs had to 'be incurred during the duration of the project' and that they would be reimbursed only where they were justified by the participant.

8 Under Article 5 of the contract at issue, '[t]he Court of First Instance of the European Communities and, in the case of an appeal, the Court of Justice of the European Communities shall have sole jurisdiction to hear any disputes between the Community, on the one hand, and the contractors, on the other hand, as regards the validity, the application or any interpretation of this contract', which was governed by the law of Luxembourg.

9 Under Article 2(2)(h) of the general conditions, the applicant was required to 'take part in meetings concerning the supervision, monitoring and evaluation of the project which are relevant to [it]'. Article 2(3) provided that the Commission could, in certain circumstances, be assisted by independent experts in the framework of those meetings.

10 Article 5(1) of the general conditions also obliged the applicant to conclude 'membership agreements' with each of the other participants in the eEBO project. Article 5(2) allowed the applicant and the other participants in the eEBO project to conclude subcontracts where necessary for the performance of their work. However, 'the Commission's prior written approval [was] required … where the cumulative amount of the subcontracts of a participant [exceeded] 20% of his estimated eligible costs … or EUR 100 000'.

11 Article 7(3)(b) of the general conditions provided that '[t]he Commission [could] immediately terminate this contract … from the date of receipt of the registered letter with acknowledgement of receipt sent by [it] … where the participant directly concerned [had] not fully performed his contractual obligations despite a written request from the Commission … to remedy a failure to comply with such obligations within a period not exceeding one month'.

12 Article 7(6) provided that 'contractors [were to] take appropriate action to cancel or reduce their commitments, upon receipt of the letter from the Commission notifying them of the termination of the contract …'.

13 Finally, under Article 18(1) of the general conditions, '[t]he Commission, or any representative authorised by it, [could] initiate a technical verification in respect of a participant up to the contract

completion date in order to verify that the project [was] being or [had] been carried out in accordance with the conditions indicated by the contractor'. Article 18(4) added that '[a] report on the technical verification of the project [was to] be sent to the contractor concerned', who could 'communicate his observations to the Commission within a month'.

14 On 12 August 2002, the Commission paid, as an advance, a sum of EUR 150 000 to the applicant, in accordance with Article 3(3) of the contract at issue.

15 By email of 26 November 2002, Mr O., an administrator in the Directorate General ('DG') 'Information Society' of the Commission, requested information from the applicant concerning four technical documents which should have been delivered in the first five months. Mr O. also questioned the applicant as to why the eEBO project had not been presented during a conference in Copenhagen (Denmark). He emphasised the importance of regular coordination with a project relating to an Internet portal connected to the eContent programme ('the PICK project') and suggested that the applicant make all the documents to be delivered accessible via its Internet site in order to 'make … interaction [among the participants of the project] improve a bit'.

16 During a meeting with the applicant's representatives on 4 December 2002, and in the course of a telephone conversation with the eEBO project coordinator on 10 December 2002, the Commission expressed its concerns with regard to certain delays in the progress of the work.

17 On 21 January 2003, during a meeting with the applicant's representatives in Luxembourg, the Commission reiterated its concerns relating to certain delays in the organisation of a think tank summit. It requested that the applicant provide the Commission with a detailed plan indicating all the dates and participants at that event no later than 5 February 2003. The Commission stated that it would otherwise have to renegotiate the contract at issue with the applicant.

18 On 5 February 2003, the applicant presented a detailed plan entitled 'Strategic and operation plan of think tank'.

19 By letter of 6 March 2003, the Commission invited the applicant to present to it, during a review meeting, the work completed during the first nine months of the eEBO project. It also decided to have that review conducted by two independent experts.

20 On 20 March 2003, the review meeting took place in Luxembourg.

21 During a meeting on 28 April 2003, the Commission informed the applicant of the contents of the evaluation report drafted by the two independent experts. By letter of the same day, it also notified the applicant of its decision to initiate the procedure provided for under Article 7 of the general conditions. In that letter, the Commission pointed out that the review of the eEBO project had brought to light the existence of 'very serious' problems, in particular by reason of the accumulation of significant delays in the completion of certain major stages of the project, such as the organisation of a think tank summit. The Commission requested that the applicant and its partners should 'not undertake any new project activities' and should 'make their decision whether, in the light of the present situation, a continued commitment of the human and financial resources engaged so far in this project [were] still justified'.

22 In that letter, the applicant was also invited to take a position on the various points of criticism and to present an action plan for overcoming the problems which had been identified. Finally, the Commission reserved the right to have the requested action plan reviewed by independent experts and to terminate the contract pursuant to the provisions of Article 7 of the general conditions if the proposed action plan was not satisfactory.

23 On 12 May 2003, the applicant submitted to the Commission an action plan to resolve the problems identified. Acknowledging certain problems and some delays, the applicant undertook to adopt 'a constructive approach in order to address the situation' and stated that it had 'undertaken all the necessary actions to remedy the situation'. In particular, it provided a list of events at which the eEBO project would be 'present', a detailed agenda for the organisation of the think tank summit with a fixed date for that summit, and an explanation concerning the noted problems of cooperation with certain consultants and the managers of a separate project.

24 By letter of 16 May 2003, the Commission informed the applicant of its decision to terminate the contract pursuant to Article 7(3)(b) of the general conditions. It indicated that the action plan submitted by the applicant '[did] not address satisfactorily the issues [detected] in the review and

[did] not provide enough elements as to judge what timescale and effort [were] needed to fulfil all the tasks described in the technical annex'. It stated in particular that that action plan did not indicate which measures would be taken to solve the delays which had been identified and when those measures would be adopted. It also observed that no advisory board had been set up, no drafting of theme papers had been undertaken, and no press events had been staged in preparation for the think tank summit.

25 By fax of 27 May 2003, the applicant expressed its surprise at the termination of the contract at issue and its disagreement with several matters mentioned in the letter of 16 May 2003. It claimed that that decision was unfair and completely devastating for its efforts to organise the summit and project. It also pointed out that it had serious grounds for suspecting that some people officially involved with the project were in a conflict-of-interest situation. Moreover, the applicant announced that it would continue to prepare the think tank summit, as the organisation of that summit had already begun and was therefore not covered by the prohibition on undertaking new project activities connected with the eEBO project which had been notified to it by letter of 28 April 2003. Finally, the applicant asserted that all tasks described in the technical annex had already been fulfilled or were going to be fulfilled within the time-limits fixed, and it provided a new detailed agenda for the think tank summit in which that summit was scheduled to be held on 13 June 2003 in Athens (Greece).

26 By letters of 2 and 6 June 2003, the Commission pointed out to the applicant that, as the contract at issue had been terminated, the Commission would not support the organisation of the summit and 'that, naturally, no expenses incurred after the termination of the contract [could] be charged to the contract'.

27 On 13 June 2003, the think tank summit opened in Athens.

28 By letter of 18 July 2003, Mr H.-R., Head of Unit 4 'Information market' within Directorate E 'Interfaces, knowledge and content technologies, Applications, Information market' of DG 'Information Society', thanked the applicant for having sent him a preliminary report at the conclusion of the think tank summit and stated that the outcome of that event 'will certainly contribute to the continued attempts to develop the eContent market'.

29 By letter of 18 December 2003, the applicant reiterated its claim that the decision to terminate the contract at issue was 'absolutely unfair and unjustified', since all the assigned tasks had been successfully implemented. The applicant also requested that the Commission organise a new project review, excluding all officials in a conflict-of-interest situation from any participation in that procedure. Finally, it raised a number of questions concerning the relations which two of its consultants and the two independent experts had had with the Commission's representatives over the course of the previous five years.

30 During a meeting held on 5 February 2004, the applicant stated that Mr V., its managing director, had been the victim of blackmail by its two consultants. It also claimed that one of the two independent experts had a conflict of interest.

31 In view of the applicant's criticisms concerning the alleged 'unfairness' of the decision to terminate the contract at issue and the alleged conflict of interest on the part of one of the independent experts, the Commission ordered an internal audit.

32 On 22 April 2004, the Commission's internal audit service made several preliminary observations. It stated that 'there [was] no material evidence of a conflict of interest regarding the reviewers of the project', that 'even though it [was] highly probable that [one of the independent experts had known the applicant's two consultants], as all of them [had] worked in the framework of [another contract], there [was] no evidence that [the independent expert] [had been] requested by the two others to give a negative opinion on the project during the review' and that the applicant '[had] not yet provided to the Commission any evidence of the "blackmail" from their two consultants, which [had been] referred to during the meeting of 5 February 2004'. The service also stated that, from a technical standpoint, the decision to end the project seemed therefore to be appropriate. Nevertheless, in order to confirm its conclusions, the Commission's internal audit service recommended the appointment of two new independent experts to review the file once more.

33 By letter of 14 June 2004, the Commission notified the applicant of its decision to order a technical verification by two new independent experts in accordance with Article 18 of the general conditions.

34 By letter of 20 July 2004, Ms M., Head of Unit 5 'Cognition' within Directorate E of DG 'Information Society', requested from the applicant additional information concerning the status of its personnel, in particular concerning its two consultants, and the costs charged by the applicant to the contract at issue.

35 The applicant provided that information on 30 July 2004.

36 By letter of 6 October 2004, the Commission thanked the applicant for the information provided and pointed out to it potential irregularities as regards Articles 14 and 15 of the general conditions concerning the use of the two consultants. It also notified the second evaluation report. As that report confirmed the previous review of the project and the fact that the different documents requested for each of the work packages of the technical annex had not been delivered or had been delivered late, the Commission informed the applicant that it would be basing its determination of the eligible costs on that technical verification.

37 By fax of 12 October 2004, the applicant expressed disagreement with the conclusions of the second evaluation report on the ground that, first, it had 'never agreed to the mandate of this committee' and that, secondly, 'experts paid by [the Commission's] own department and who are invited, in practical terms, just to generate a report to validate an unfair decision taken … [the previous] year [could] not be considered as "independent" or impartial'. It also stressed the lack of independence of the first two reviewers of the project.

38 By letter of 12 November 2004, the Commission rejected the applicant's claims and informed the applicant that it had passed to the next step in determining the eligible costs pursuant to Articles 13 and 16 of the general conditions and that it had fixed the eligible costs of the project at EUR 90 515. As an advance payment of EUR 150 000 had been made to the applicant at the beginning of the project, the Commission announced that it would be issuing a recovery order for EUR 59 485.

39 By fax of 9 December 2004, the applicant again called into question the validity of the first evaluation report and expressed its doubts as to the impartiality of the new 'evaluation committee'. It also requested information concerning the calculation of the eligible costs made by the Commission.

40 By letter of 22 December 2004, the Commission responded to the applicant's criticisms and referred to the letter of 12 November 2004 for details of how the eligible costs had been calculated.

41 By fax of 4 January 2005, the applicant reiterated its criticisms, repeated its request for information and proposed a new review by the European Anti-Fraud Office.

42 By letter of 7 March 2005, the Commission responded to the points of criticism set out by the applicant in the fax of 4 January 2005 and stated that it would be issuing a recovery order for the amount of EUR 59 485, pointing out that, in the absence of payment before the date specified, it would add interest and could recover the amount either by offsetting it against any payments due or by enforcing payment.

43 By application lodged at the Registry of the Court on 17 May 2005, the applicant brought an action under Article 230 EC for annulment of the Commission's decisions to terminate the contract at issue, to reimburse an amount of labour costs not exceeding EUR 85 971 and to issue a recovery order for an amount of EUR 59 485. That application was registered as Case T-205/05.

44 By letter of 24 June 2005, the Commission sent a debit note for EUR 59 485 to the applicant, with an expiry date of 7 August 2005.

45 By letter of 8 July 2005, the Commission informed the applicant that it was offsetting the amount stated on the debit note against amounts still owing to the applicant.

46 By a separate document, lodged at the Registry of the Court on 5 August 2005, the Commission raised an objection of inadmissibility in Case T-205/05 under Article 114(1) of the Court's Rules of Procedure. The applicant lodged its observations on that objection on 26 September 2005.

47 By order of 26 February 2007, the Fourth Chamber of the Court ruled that the applicant's action in Case T-205/05 was inadmissible on the ground that 'it [sought] the annulment, pursuant to Article 230 EC, of measures of a purely contractual nature' (order of the Court of 26 February 2007 in Case

T-205/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 56).

48 By application lodged at the Registry of the Court on 4 September 2007, the applicant brought the present action under Articles 235 EC, 238 EC and 288 EC.

49 Acting upon a report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, requested the parties to reply to certain written questions and to provide it with certain documents. The parties complied with those requests within the prescribed period.

50 The parties presented oral argument and replied to the questions put by the Court at the hearing, which took place on 11 March 2009.

Forms of order sought by the parties

51 The applicant claims that the Court should:

– order the Commission to pay it the amount of EUR 172 588.62 constituting unpaid eligible costs incurred in the framework of the contract;

– order the Commission to pay it the amount of EUR 1 000 corresponding 'to the damage suffered [to] its fame and goodwill';

– order the Commission to pay its legal and other costs and expenses incurred in connection with the present action.

52 The Commission contends that the Court should:

– dismiss all the applicant's claims;

– order the applicant to pay the costs.

Law

53 The applicant essentially raises two pleas in law based, firstly, on the failure to comply with contractual obligations and, secondly, on an infringement of the principles of sound administration and transparency, in conjunction with the existence of a conflict of interest.

The first plea based: failure to comply with the contractual obligations

Arguments of the parties

54 The applicant claims in essence that the Commission's decision to terminate the contract at issue is vitiated by manifest errors of assessment, was not adopted in accordance with the procedure laid down by Article 7(3)(b) of the general conditions, and is based on incorrect and unfounded evaluation reports.

55 In the first place, with regard to the allegation that the contract at issue is vitiated by manifest errors of assessment, the applicant submits that the Commission 'terminated the contract [at issue] referring to minor delays which occur in all projects of this type, and for which in any event the responsibility did not lie with [the applicant]'.

56 Firstly, the applicant takes the view that '[t]he alleged delays in the implementation of the [e]EBO project were mainly due to the fact that [it] did not dispose of the adequate [elements] … from the "PICK" project and had therefore to develop itself the technical platform and the IT solutions for numerous applications'. However, in its view, the Commission was responsible for contacting the contractor of the PICK project and insisting on the fulfilment of its contractual obligations.

57 The applicant points out that 'the PICK project contractor was refusing to assist [it] to implement its contractual obligations using all possible means', in particular by refusing to provide it with the

source code for certain software. It also disputes the Commission's arguments justifying that refusal on grounds of intellectual rights and claims that, in any event, the Commission should have informed it in a timely manner that the software module which was supposed to be made available to it was covered by such rights.

58 Secondly, the applicant submits that 'its conflict with [its consultants] and the fact that the Commission was taking their side [were] the only cause[s] of the interruption of the project and in no way the proof of the existence of problems in the performance of the [contract at issue]'. The applicant takes the view that the Commission should have '[taken] the necessary measures in order to assure that [that] situation would not lead to a conflict of interest or to any kind of bias for or against the entities involved'. The failure to perform the contract at issue was the responsibility solely of its consultants, who were 'involved in a [range of Community] funded projects' and 'had close social links with the officials responsible for the project'.

59 In the second place, the applicant submits that the Commission also breached its contractual obligations concerning the organisation of the think tank summit.

60 First, although the applicant never argued that the Commission had a contractual obligation to participate in the organisation of that event, it takes the view that 'it was the responsibility of the Commission to initiate contacts in order to include [that event] in the official agenda' of the Greek Presidency of the European Union in 2003 ('the Greek Presidency'). However, it submits, the Commission failed immediately to contact the Greek Minister for Foreign Affairs to obtain his authorisation to include the think tank summit on the official agenda. According to the applicant, despite its repeated requests, the Commission did not send a letter to the minister until 3 February 2003, that is to say, after a delay of three months. Any delay in the organisation of that summit was therefore attributable to the Commission, since 'the proper execution of the contract [at issue] would require that the Commission undertake the necessary steps to assist the applicant to fulfil its contractual obligations with the Commission and not the contrary'.

61 The applicant further claims that, 'even if [the Commission] had rightfully terminated the [eEBO] project, quod non, [it] should have accepted to reimburse [the costs incurred by the think tank summit] that took place successfully during the Greek Presidency … in compliance [with] the terms of the contract [at issue]'. According to the applicant, by writing a letter to the Greek authorities confirming the applicant's request to have that summit added to the programme of the Greek Presidency, the Commission 'itself accepted and validated the organisation of the event during the Greek Presidency before the termination of the [eEBO] project'. Therefore the Commission could not arbitrarily terminate that project and should 'accept all the responsibilities which arise from the implementation of this event which was requested by the Commission to the Greek Presidency'.

62 Secondly, the applicant argues that the Commission made no comments on or suggested any improvements to the agenda of the event when it was presented. It also takes the view that the Commission committed another breach of the contract at issue by insisting that the think tank summit be held in Rome (Italy) during the Italian Presidency of the European Union in 2003.

63 Thirdly, the applicant challenges the Commission's argument that the event was not international in scope, since it was composed almost exclusively of Greek participants. In its view, 'the event was attended by many representatives of many nationalities' and 'many international market actors, media and media-related projects decided for obvious reasons of [organisational] economy to be present through [sending] their local correspondents, partners or representatives'. The applicant considers that the Commission 'did not do its part of the deal in order to attract further international attention' since it 'did not attend [the think tank summit], it did not advertise it through all its channels and web sites, it did not support it in many ways, etc.'.

64 Finally, the applicant submits that the think tank summit was a genuine success and that, contrary to the Commission's assertion, the summit lasted three days, from 13 to 15 June 2003. Moreover, according to the applicant, no new action was undertaken following the letters from the Commission of 28 April and 16 May 2003. The applicant claims that it 'simply completed all the actions and activities which [had been] triggered [before that first date]'.

65 In the third place, the applicant submits that, contrary to the reviewers' assertions, the requested documents and the applications provided for in the contract at issue were delivered to the Commission.

66 Firstly, the applicant submits that 'the [Commission] never … informed [it] on whether something

was going wrong in the context of the [eEBO] project between July 2002 and early December 2002 and [that the Commission] never criticised [its performance in the framework of the contract at issue as being] against [its] contractual obligations'. In the applicant's view, the same applies 'for the subsequent period after December 2002, when the two experts were threatening and blackmailing [it]'.

67 Secondly, the applicant argues that '[a]lthough entirely developed by [it] and not through the "PICK" project, the technical application [which it] provided … is fully compliant with the terms of the contract [at issue]' and '[a]s a whole … [is] substantially better than the one proposed in the Technical Annex of the contract [at issue]'.

68 Thirdly, the applicant disputes the Commission's argument concerning the delays in respect of the documents to be delivered which had to be produced during the first six months of the project. It claims that the proper performance of the contract justified taking measures a little later in order to take the results of the think tank summit into account, that those delays could, in any event, be easily redressed and that, finally, it provided everything within the time-limits. The applicant also claims that the 'minor' delays observed contributed, in any case, to a 'better implementation of the project'.

69 Fourthly, the applicant submits that 'its work was compliant to the contract [at issue]', that 'all the [elements provided] were compliant to the contract [at issue]' and that '[t]wo progress reports [concerning the eEBO project] containing the necessary elements were submitted [to the Commission]'. According to the applicant, '[a]ll [of those] project systems were made available through [its] own developed platform', but neither those responsible from the Commission nor the independent reviewing experts accessed that platform, though it 'was clearly demonstrated to the reviewers and the Commission project officer, and it [had been] positively embraced'.

70 Finally, with regard to the example presented by the Commission and relating to the failure to present the eEBO project at certain press briefings, the applicant responds that '[s]ince international events take place all the time, there is no foundation [to] the argument that if one event was not covered, no other event of equal or higher significance could replace it in the near future'. According to the applicant, '[it] had the opportunity … to cover a number of subsequent events which were of even higher importance than what … was originally proposed' and, in any event 'it would make more sense to initiate this exercise after [the think tank summit], to take into account its findings and directions'.

71 In the fourth place, the applicant takes the view that the Commission caused it 'significant losses and damages' by 'abusively' deciding to pay only part of the eligible costs on the first cost statement, even though 'the services and [elements] … corresponding to the three cost statements were delivered to [the Commission] in compliance [with] the terms of the contract [at issue]'. The applicant disputes in particular the Commission's refusal to reimburse to it the costs connected with the organisation of the think tank summit. In its view, 'although it is true that [that event] took place after the … termination of the project, [it] was part of the contractual obligations of the parties, it was scheduled far before this decision was taken and it could not have been cancelled a few weeks before it took place'. The applicant also claims that '[t]he Commission has never motivated its decision to reject part of the costs of the project' and 'has not even commented on [the applicant's] argument … that some of the costs paid after the project was terminated could not be avoided any more'.

72 The applicant accordingly takes the view that it is entitled to reimbursement of all the 'allowable costs' which it incurred under the contract at issue, that is to say, the sum of EUR 174 647.65 relating to the first cost statement, the sum of EUR 31 025.81 relating to the second cost statement, and the sum of EUR 57 430.16 relating to the third cost statement, in other words a total amount of EUR 263 103.62, from which it is, however, necessary to deduct the sum of EUR 90 515 paid by the Commission, with the result that the final amount is EUR 172 588.62.

73 Fifthly, the applicant submits that the termination by the Commission of the contract at issue and the absence of its officials at the think tank summit adversely affected its reputation. Accordingly, the applicant claims that it 'was indirectly excluded from any further [eContent sector] programme'. The applicant estimates the amount of damages to its reputation at the 'symbolic' amount of EUR 1 000.

74 The Commission disputes the applicant's arguments.

Findings of the Court

75 First of all, it is apparent from paragraph 34 of the application that the applicant seeks to place in issue both the Community's contractual and its non-contractual liability. However, it must be stated that the arguments raised by the applicant in the context of its first plea relate only to contractual liability.

76 According to case-law, the jurisdiction of the Community Courts under an arbitration clause to determine a dispute concerning a contract falls to be determined solely with regard to Article 238 EC and the terms of the clause itself (Case C-209/90 *Commission* v *Feilhauer* [1992] ECR I-2613, paragraph 13, and judgment of 12 September 2007 in Case T-449/04 *Commission* v *Trends*, not published in the ECR, paragraph 29).

77 It follows that, in the present case, the Court has jurisdiction pursuant to Article 238 EC and the arbitration clause included in Article 5(2) of the contract at issue.

78 Moreover, in accordance with the first paragraph of Article 288 EC, the contractual liability of the Community is governed by the law applicable to the contract in question, that is to say, Luxembourg law, which is designated by the parties in Article 5(1) of the contract at issue.

79 Although the civil law of Luxembourg allows the parties to a contract to make contractual provision for the possibility of unilateral termination in the case where one of the parties fails to fulfil its obligations, that possibility may be subject to judicial review and misuse thereof may lead to the award of damages (Ravarani, G., *La responsabilité civile des personnes privées et publiques*, 2nd edition, Pasicrisie luxembourgeoise, Luxembourg, 2006, paragraph 467, citing, by way of example, a judgment of the *Cour d'appel* of 13 July 2005, No 28210 of the case list).

80 In the present case, Article 7(3)(b) of the general conditions provides that 'the Commission may immediately terminate this contract … from the date of receipt of the registered letter with acknowledgement of receipt sent by [it] … where the participant directly concerned has not fully performed his contractual obligations despite a written request from the Commission, or the coordinator in agreement with the other contractors, or, in the case of a member, the contractor involved, to remedy a failure to comply with such obligations within a period not exceeding one month'.

81 With regard to the formal requirement under Article 7(3) of the general conditions, namely the sending of a 'written request from the Commission … to remedy a failure to comply with [the contractual] obligations within a period not exceeding one month', it should be noted that that condition was fulfilled. In its letter of 28 April 2003, the Commission informed the applicant of a variety of points of criticism raised in the first evaluation report and requested it to present an action plan to resolve the problems identified. Whilst expressly reserving the right to terminate the contract at issue pursuant to Article 7(3)(b) of the general conditions in the event that the action plan proposed should be ineffective, the Commission also pointed out that, if it had to terminate, the letter in question was to be regarded as the written warning required by that article.

82 With regard to the formal requirement under Article 7(3) of the general conditions, namely the fact that the contracting party did not fully perform its contractual obligations, it is necessary to examine in turn the different problems in implementing the contract at issue which have been raised by the Commission.

– The delays in the delivery of certain documents

83 It is clear from the documents in the case-file, and in particular from the evaluation reports, that the applicant did not provide several documents at the precise time laid down in the contract at issue. The applicant itself acknowledged that there had been numerous delays in sending several documents to the Commission. Thus, in a table in paragraph 2.2 of the two six-month progress reports produced by the applicant in accordance with the contract and annexed to the reply, the applicant acknowledges that certain documents were delivered with at least one month's delay. The same is true of its reply of 12 May 2003 to the first evaluation report. In paragraph 8 of the reply, the applicant even asserted that some of those delays had contributed to a 'better implementation of [the] project'.

84 Without rebutting the Commission's detailed contentions concerning those delays, the applicant, by

way of defence, invokes principally hindrances for which it was not responsible and which explain the delays in implementation of the project. The necessary conclusion, however, is that none of those obstacles can justify the applicant's failure to fulfil its own contractual obligations within the respective periods laid down in the contract at issue.

85 First, with regard to the applicant's arguments that the onus was on the Commission to contact the joint contractor of the PICK project and to initiate contacts with the Greek Presidency with regard to the think tank summit, it should be noted that Article 1(1) of the contract at issue expressly states that it was for the contractors to carry out the work set out in the technical annex. The term 'contractor' is defined in Article 1(2) of the general conditions as 'a legal entity, an international organisation or the Joint Research Centre … which has concluded this contract with the Community'. That term therefore excludes the Commission, which signed the contract at issue for and on behalf of the Community. Furthermore, the applicant was the 'coordinator' of the eEBO project and therefore, as such, responsible for the scientific, financial and administrative coordination of all the works in accordance with Article 2(1) of the general conditions.

86 Moreover, as the Commission has correctly pointed out, the description of the tasks in the technical annex demonstrates that it was the applicant which was principally responsible for carrying them out. Therefore, with regard to the think tank summit, for example, paragraph 3.1.4.2 of that annex states that '[e]EBO proposes to organise that conference in cooperation with the Greek Presidency' and, a little later, that '[e]EBO will provide the think tank with logistical and organisational support, and draft the declaration of the summit'. The description of Work package 6 covering that summit is even clearer in that respect: '[eEBO's] senior experts, who will play a major role in the organisation of the summit, will produce a strategic theme paper including a draft declaration. Based on close links to the Greek Government, [the eEBO] experts will be in a position to ensure the highly attractive support of the Greek Presidency'. Finally, the applicant acknowledged in paragraphs 17 and 55 of the reply and during the hearing that it '[had] never argued that the [Commission] had a contractual obligation to participate [in] the organisation of that event'.

87 Secondly, the applicant's argument that it was not itself that had failed to fulfil its obligations, but rather its two consultants, must be rejected. Whatever the legal status of those consultants with respect to the contract at issue, the applicant itself is the party which concluded that contract with the Commission. Consequently, it was responsible for the successful implementation thereof vis-à-vis the Commission.

88 The applicant acknowledges as much in its reply of 12 October 2004 to the second evaluation report, in which it maintains that 'all the personnel involved in the eEBO project from our company are full-time employees or independent consultants who are directly hired by our company, in accordance with the national legislation, [and] they are under the sole technical supervision of our company'. It is likewise stated in Article 6 of the unsigned contract with one of its consultants, which the applicant produced in response to the questions of the Court, that '[the applicant] is [ultimately] responsible for the Project results towards the Commission'.

– The partial failure to carry out certain services

89 In order to rebut the Commission's argument, based on the detailed conclusions of the second evaluation report, to the effect that certain documents were provided only in draft form, the applicant merely repeats several times that those documents 'were consistent with the contract [at issue]' or 'complied with the terms of the contract [at issue]' without producing those documents so as to allow the Court to assess whether they were consistent with the contract at issue. It must therefore be held that the applicant has not adduced concrete evidence capable of demonstrating that it complied fully with its contractual obligations by delivering the required documents.

90 Thus, with regard to the press review to be supplied, the applicant maintains in paragraph 10 of the reply that that review had been completed and was available online. It must, however, be noted that the address provided does not allow access to the document or make it possible to establish the existence of the press review in question. It would, none the less, have been easy for the applicant to attach that document or to provide a CD-Rom as an annex to the application or the reply. The same applies in regard to the database of press contacts.

91 It must also be stated that, contrary to the applicant's claims, it is not correct that the Commission 'never informed [it] on whether something was going wrong in the context of the [eEBO] project between July 2002 and early December 2002, and [that it] never criticised [its performance in the framework of the contract at issue] as being against [its] contractual obligations'. Indeed, Mr O. had

already complained of delays in the delivery of certain documents, including the database and the extranet, in an email sent to the applicant on 26 November 2002.

92 Furthermore, the applicant has adduced no evidence of the positive comments allegedly made by the Commission and the reviewers in connection with its publication and data platform. On the contrary, as the Commission stated in paragraph 65 of the rejoinder, the first evaluation report reached the clear conclusion that the platform was not accessible and that the product presented during the review meeting was not satisfactory. The reviewers also reached that conclusion in the second evaluation report after having noted, for example, that the extranet for the press had still not been provided.

93 Finally, the applicant has failed to demonstrate the soundness of its claim that the Commission and the reviewers waited until 17 December 2007 before attempting to access its platform. Quite to the contrary, it is apparent from an email annexed to the defence that Mr O. had tried to connect to the internet site using the access code and password provided by the applicant since December 2002, but that no connection was possible.

– The complete failure to carry out certain services

94 It should be noted that the applicant does not dispute the fact that it did not take part in the previews of two events, but claims that the refusal to take part must be attributed to its two consultants. However, for the reasons stated above, the applicant cannot avoid responsibility on the basis of the failures of its two consultants.

95 Concerning the promotional leaflets, the quarterly compilation of press releases and kits and the quarterly reports on the electronic content sector, the applicant merely maintains, in paragraphs 11 and 12 of the reply, that they ‘were compliant [with] the terms of the contract [at issue]’. The applicant also claims that the promotional leaflets were distributed ‘in an electronic manner’, but nevertheless did not provide copies of those documents in the context of the present dispute. Furthermore, in its reply to the second evaluation report, the applicant made no comment on the lack of delivery of the other documents referred to above.

96 In regard to the document relating to the qualities of the members of the think tank, the applicant acknowledged in its reply to the second evaluation report that it had not delivered that document because of the difficulties which it had encountered in having the think tank summit included on the agenda of the Greek Presidency.

97 Finally, with regard to the press and project extranet, the applicant maintains, in its reply to the second evaluation report, that this was accessible from the platform which it had created. However, in the absence of evidence as to the existence of that platform, the Court is not in a position to determine whether that claim is well founded.

– The delivery of documents inconsistent with the terms of the contract

98 The Commission submits that the applicant also infringed its obligation to deliver to it each document separately and directly.

99 It follows from Article 2(1)(d) of the general conditions and from Article 4 of the contract at issue that each document was to be delivered on the dates laid down in the contract at issue. That is also apparent from the table establishing the due dates for each document included in the technical annex. For that reason the Commission was justified in claiming, in paragraph 30 of its defence, that ‘[i]t is not enough to argue that the [document] is online somewhere and that it would be [the Commission’s] fault if it did not find it’.

– The think tank summit

100 Paragraph 3.1.4 and Work package 6 of the technical annex provided that the applicant was to organise a think tank summit involving sectoral and political representatives at ‘the highest level’. That summit, to be organised ‘preferably in conjunction with the Greek EU Presidency’, was to last for three days and be chaired by ‘a prominent industry leader’. For Work package 6, three documents had to be delivered: first, a ‘strategic and operational plan’ for the event, to be delivered during the third month of the eEBO project; secondly, the details of the participants at that summit, to be delivered during the sixth month; and, thirdly, a declaration with an ‘impact at European level

and beyond', which had to be supplied after the summit, during the 17th month.

101 First of all, concerning the document entitled 'Strategic and operation plan of think tank', it is apparent from the documents before the Court that this was delivered to the Commission on 5 February 2003, that is to say, at least three months after the due date provided for in the contract at issue.

102 Next, concerning the details of the participants at that summit, the applicant acknowledged in its reply to the second evaluation report that it had never delivered that document.

103 Finally, the declaration with an 'impact at European level and beyond' appears to have been delivered five months early.

104 It should be noted, moreover, that it is not clear that the summit actually lasted three days, as provided for in the contract at issue. The applicant's statements on this point are contradictory. Whilst maintaining in paragraph 15 of the reply that the summit took place in Athens on 13 June 2003, the applicant claims, in paragraph 21 of that same document, that the 'live demonstrations of projects, networking sessions, group meetings, brain-storming sessions, etc.' in reality '[took] place on 13, 14 and 15 June 2003'. Since the applicant bears the burden of proof in this regard, it must be concluded that it has not demonstrated that the summit in fact lasted three days as provided for in the contract at issue.

105 Finally, the Commission also states that the applicant organised that event although it had been, first, requested, by letter of 28 April 2003, 'not [to] undertake any new [eEBO project] activities', second, notified by letter of 16 May 2003 of the termination of the contract at issue and, third, warned in clear terms by letter of 2 June 2003 of the fact that '[that] event [was] not supported by the European Commission and that, naturally, no expenses incurred after the termination of the contract [at issue] [could] be charged to the contract'.

106 It should be noted that Article 7(6) of the general conditions stipulates that 'contractors shall take appropriate action to cancel or reduce their commitments, upon receipt of the letter from the Commission notifying them of the termination of the contract [at issue]'.

107 Consequently, under that article, the applicant ought to have cancelled the summit or, at least, no longer have undertaken further activities after 16 May 2003. The applicant's argument that it did not undertake any new actions and merely completed all the actions and activities which had been commenced before 28 April 2003 is therefore not relevant.

108 Furthermore, contrary to the applicant's claims in paragraph 51 of the application, it is not true that the Commission accepted and validated the organisation of the event by sending a letter to the Greek Presidency on 3 February 2003. As the Commission points out in paragraph 30 of the rejoinder, it is apparent from that letter sent to the Greek Ministry of Economy and Finance that the Commission merely 'confirmed that [the eEBO project] was an EC funded project and that one of the tasks of the project was to organise a … think tank summit in Greece during the Greek EU presidency'.

109 Finally, concerning the applicant's argument that 'the Commission … tried to oblige [it] to transfer against its will the [think tank summit] from Athens to Rome, thus violating the terms of the contract [at issue]', the only document provided in support of those allegations is an email from its two consultants of 20 January 2003. However, it is apparent from that document that the transfer of the event under the Italian Presidency of the European Union in 2003 was merely a proposal to improve the chances of success of the eEBO project. Furthermore, as the Commission points out in paragraph 31 of the rejoinder, that proposal came from the applicant's representatives themselves. In any event, even if the Commission had indeed suggested to the applicant that it organise the think tank summit under the following presidency of the European Union, that would not constitute a breach of the contract at issue, because the description in Work package 6 in the technical annex specifies only that that summit was to be organised 'preferably in conjunction with the Greek EU Presidency'. The summit under the Greek Presidency was therefore not an obligation as to results.

110 Consequently, for the reasons set out above, the applicant has not shown that the Commission acted in breach of its contractual obligations by terminating the contract at issue.

111 Finally, in light of the foregoing considerations, it must be concluded that the Commission acted correctly in law in taking the view that the applicant had not complied in full with its contractual

obligations. In those circumstances, it is not necessary to examine the parties' other arguments as to whether or not it was unlawful for some of the tasks to be subcontracted to the applicant's consultants or as to the more or less international scope of the think tank summit. The contract at issue was therefore not terminated in breach of the contractual terms binding on the parties to the dispute.

112 The first plea must accordingly be rejected.

The second plea: infringement of the principles of sound administration and transparency, and the existence of a conflict of interest

Arguments of the parties

113 The applicant claims that the Commission infringed the principles of sound administration, transparency and conflict of interest on the ground that the independent project reviewers had a conflict of interest and that the Commission treated the applicant unfairly.

114 First, while pointing out that it did not claim that any prior social or professional relations between consultants and Commission officials or reviewers should be forbidden or regarded *a priori* as constituting a cause for concern, the applicant nevertheless takes the view that where such relations exist and a third party alleges that those relations interfere with those officials' assessment, the Commission should act immediately, take the necessary measures and avoid conflicts of interest. The applicant claims that it notified the Commission of the relations between the two experts and certain Commission officials and reviewers and alleges that those relations were the cause of the dysfunctions within the project. According to the applicant, the Commission ought to have taken the necessary measures consisting, at the very least, in organising an independent evaluation of the problems arising from the project, by granting the applicant the basic right to be heard and by conducting an inquiry into its allegations.

115 Secondly, the applicant claims that the Commission interfered in the relations between the two experts and itself, because '[t]he project officer did put pressure (on numerous occasions and repeatedly since December 2002) on [the applicant] to implement the instructions of the two experts which were infringing the terms of the contract'.

116 Thirdly, the applicant maintains that it is the same problems of conflicts of interest which were behind the lack of cooperation with the PICK project.

117 The Commission, first of all, contends that the applicant has not established that Luxembourg law permitted it to rely on the infringement of principles such as sound administration, transparency and conflict of interest in the context of contractual liability. According to the Commission, the action must be dismissed as being inadmissible on the ground that those principles are based on non-contractual liability, which is not applicable where the parties are bound by a contract, as in the present case.

118 Secondly, the Commission contends that, in any event, the principles of sound administration, transparency and conflict of interest were not infringed.

Findings of the Court

119 In the context of the present issue, the applicant appears to raise simultaneously the question of the Community's contractual and non-contractual liability.

120 With regard to the Community's non-contractual liability, it must be stated that, if the applicant takes the view that the Commission's decision to terminate the contract at issue caused it damage, it did not, however, indicate in its application whether the infringement of the principles of sound administration and transparency and the conflict of interest are to be construed as giving rise to non-contractual liability on the part of the Community.

121 Under Article 44(1)(c) of the Court's Rules of Procedure, however, the application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.

122 Pursuant to the case-law, irrespective of any question of terminology, that summary must be

sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if need be without having to seek further information (see, to that effect, Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 31, and order in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49).

123 Consequently, in the absence of a clear and precise summary by the applicant with regard to the Commission's infringement of its obligations under the general principles relating to individuals under Article 235 EC and the second paragraph of Article 288 EC, there is no need to analyse the question of non-contractual liability.

124 Moreover, as the Community institutions are subject to obligations arising under the general principles raised in relation to individuals exclusively within the framework of the exercise of their administrative responsibilities, and as the relationship between the parties is clearly contractual in nature, the applicant can allege only that the Commission breached contractual terms or the law applicable to the contract at issue.

125 In the present case, it is therefore necessary to examine whether the Commission breached its contractual obligations.

– The Commission's obligations in the context of the first evaluation

126 First, it should be pointed out that Article 2(2)(h) of the general conditions allows the Commission to organise review meetings. Article 2(3) authorises the Commission to be assisted by independent experts under three conditions. First, it must take all appropriate steps to ensure that experts assisting it during such a meeting treat the data which is communicated to them as confidential. Next, it must communicate the names of those experts to the contractor prior to the meeting. Finally, it must take into account any objections on the part of the participants based on 'legitimate interests'. The concept of 'legitimate interest' is defined in Article 1(27) of the general conditions as 'any interest, in particular of a commercial nature, of a participant which may be invoked in the cases provided for in [these general conditions] provided that he demonstrates that the damage to that interest is likely, given the circumstances, to cause a specific prejudice that is disproportionate, considering the objectives of the provision in respect of which it is invoked'.

127 In the present case, the Commission cannot be accused of having breached the first condition laid down by Article 2(3) of the general conditions (namely, the adoption of appropriate measures to ensure that the independent experts treat as confidential the information communicated to them) because the first two independent experts both signed a declaration of confidentiality.

128 Concerning, next, the last condition laid down by that article, namely the consideration of the contractor's objections based on legitimate interests, it should be stated that the applicant has not pleaded infringement of any legitimate interest likely to cause a specific prejudice which would be disproportionate within the terms of the general conditions. By taking part in the review meeting of 20 March 2003, the applicant was in a position to express a view on the essential questions which were the subject of the review (see, to that effect, Case T-29/02 *GEF* v *Commission* [2005] ECR II-835, paragraphs 220 and 221) and voluntarily subjected itself to the evaluation committee's assessments (see, to that effect, Case C–114/94 *IDE* v *Commission* [1997] ECR I–803, paragraphs 45 to 54). The applicant was also requested by the Commission to respond in writing to the various points of criticism expressed in the first evaluation report, which it did by submitting an action plan on 12 May 2003. It is apparent from the documents before the Court that the Commission took account of the objections set out by the applicant in that response before terminating the contract at issue and that the applicant was therefore given the opportunity to have a proper and fair hearing.

129 Finally, the second condition laid down by Article 2(3) of the general conditions, namely the communication prior to the review meeting of the names of the independent experts assisting the Commission, was not complied with. Nevertheless, the applicant did not make any comments on the choice of those experts in its formal reply to the first evaluation report of 12 May 2003. In those circumstances, the Commission was entitled to form the view that the applicant had implicitly accepted the appointment of those two independent experts as reviewers.

130 Secondly, according to settled case-law, the existence of professional relations between an official and a third party cannot, in principle, imply that the official's independence is, or appears to be, undermined where that official is called to take a view on a case involving that third party (Case T-89/01 *Willeme* v *Commission* [2002] ECR-SC I-A-153 and II-803, paragraph 58; Case T-137/03

Mancini v *Commission* [2005] ECR-SC I-A-7 and II-27, paragraph 33; and Case T-100/04 *Giannini* v *Commission* [2008] ECR-SC I-A-0000 and II-0000, paragraph 224). The existence of such contacts does not, in itself, establish to the requisite legal standard that the relations between those persons went beyond what is normal (Case T-157/04 *De Bry* v *Commission* [2005] ECR-SC I-A-199 and II-901, paragraph 35).

131 Thus, the mere fact that one of the independent experts responsible for evaluating the eEBO project or certain Commission officials worked with the applicant's consultants on a separate project does not in itself suffice to establish a conflict of interest. In addition, the applicant itself states, in paragraph 45 of the application, that it 'does not argue that any previous social or professional contact between consultants and Commission officials or evaluators should be prohibited or considered *a priori* as dubious'.

132 In the present case, the applicant has not adduced any facts capable of explaining the extent to which the existence of professional relations between its consultants, certain officials and one of the two first reviewers of the eEBO project might have undermined the independence of those reviewers. On the contrary, it is apparent from the file before the Court, and particularly from paragraphs 2 and 3 of the application and from the unsigned contract between the applicant and one of the two independent experts which was produced by the applicant in response to the Court's questions, that the applicant recruited the two consultants because of their good relations with the officials involved in the eContent programme. Furthermore, it is common case that the second independent expert responsible for reviewing the eEBO project never had any professional or personal relations with the applicant's consultants or with the Commission officials responsible for that project.

133 Likewise, the applicant has also adduced no evidence that the Commission officials 'took the side' of its consultants or 'put pressure' on the applicant to carry out the instructions of those consultants. In paragraph 30 of the reply, the applicant refers to 'threats' which it allegedly received from its two consultants. However, it has put forward no evidence to substantiate those allegations.

134 For its part, the Commission stated that it had chosen the independent experts responsible for the review of the eEBO project at random and provided a copy of the declarations of confidentiality and absence of conflicts of interest signed by those experts. The Commission therefore took all the measures necessary to avoid a conflict of interest.

135 As has been pointed out above, it is true that the Commission did not reveal the names of the reviewers prior to the first review meeting of 20 March 2003, as it was required to do by Article 2(3) of the general conditions. Nevertheless, as the Commission correctly noted in its pleadings and in the course of the hearing, that first review was followed by an internal audit, itself followed by a second review carried out by two new independent experts. However, the applicant itself acknowledged during the hearing that the alleged conflict of interest which it had raised related only to the first review.

136 Consequently, in light of the foregoing considerations, the applicant's arguments relating to the Commission's obligations in connection with the first review must be rejected.

– The Commission's obligations in the context of the internal audit

137 The applicant complains that the Commission failed to communicate to it the result of its internal audit carried out in April 2004 and did not invite it to submit its observations.

138 Suffice it to note that the Commission has the right to request an internal audit from its audit service in accordance with Chapter 8 of Title IV of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) (see also Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1)). There is no obligation to communicate the result of such audits to third parties. Furthermore, the internal auditors enjoy complete independence in the performance of their audits, with the result that they can freely decide whom to question and under what conditions. Consequently, the applicant's arguments in that context must be rejected.

– The Commission's obligations in the context of the second review

139 The second review was based on Article 18(1) of the general conditions. Under that article, '[t]he

Commission, or any representative authorised by it, may initiate a technical verification in respect of a participant up to the contract completion date in order to verify that the project is being or has been carried out in accordance with the conditions indicated by the contractor'. Article 18(2) states that '[p]rior to the carrying out of the technical verification, the Commission [had to] communicate to the participants the identity of the authorised representatives who [were] intended to perform the verification' and '[had to] take account of any objection on the part of participants based on legitimate interests'. Finally, Article 18(4) adds that '[a] report on the technical verification of the project [had to] be sent to the contractor concerned', who could 'communicate his observations to the Commission within a month'.

140 In the present case, the Commission in fact notified the identity of the reviewers to the applicant in a letter of 14 June 2004, that is to say, before conducting the technical assessment. The two reviewers also signed declarations of confidentiality and of absence of conflicts of interest. Although the Commission does not appear to have formally requested the applicant to communicate to it its observations on the assessment report within one month, as it ought to have done under Article 18 of the general conditions, suffice it to state that, *de facto*, the applicant was in a position to submit its observations on that report in a letter of 12 October 2004. It should also be noted that, in the letters of 10 November and 22 December 2004, the Commission took those observations into account in concluding that they did not address the problems identified. In those circumstances, the Commission cannot be accused of having breached the terms of the contract at issue.

– The alleged interference of the Commission in the relations between the applicant and its two consultants

141 The applicant submits that the Commission unlawfully interfered in its relations with its two consultants.

142 It must be stated that the applicant has not adduced any evidence in support of its allegations. The only document which it has provided is the transcript of a telephone conversation of 10 December 2002 between Mr O. and one of its employees. However, that document does not in any way indicate that the Commission unlawfully interfered in the relations between the applicant and its consultants. Furthermore, the applicant has provided no evidence showing that the Commission had requested it 'to take actions ([that is to say] execute payments in favour of the consultants which were not in proportion with the quality and the quantity of the services delivered by them), [without regard to] the contractual obligations of the parties'.

143 It follows from the foregoing considerations that the second plea must be rejected as unfounded.

144 In the light of all the above considerations, the action must be dismissed in its entirety.

Costs

145 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to pay the costs.

Czúcz Labucka O'Higgins

Delivered in open court in Luxembourg on 9 February 2010.

[Signatures]

* Language of the case: English.

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Action brought on 4 September 2007 - Evropaïki Dynamiki v Commission

(Case T-340/07)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki (Athens, Greece) (represented by: N. Korogiannakis, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Order the Commission to pay the applicant the amount of EUR 172.588,62 which constitute unpaid eligible costs incurred by the applicant in the framework of contract No EDC-53007 EEBO/27873;

order the Commission to pay the symbolic amount of EUR 1.000 corresponding to the damage suffered at its fame and goodwill;

order the Commission to pay the applicant's legal and other costs and expenses incurred in connection with this application.

Pleas in law and main arguments

This application, pursuant to Articles 238 EC and 235 EC, seeks compensation for damages caused by the decision of the Commission of 16 May 2003 to terminate the contract No EDC-53007 EEBO/27873 signed with the Commission, concerning the project "e-Content Exposure and Business Opportunities" ("EEBO") to be carried out in the framework of the multi-annual Community programme to stimulate the development and use of European digital content on the global networks and to promote linguistic diversity in the information society (2001-2005) and involving M. Fischer and M. Marthinsen in the implementation of the project as external consultants.

In support of its claims the applicant argues that the contracting authority (DG INFSO) decision to terminate the contract contains evident errors of assessment resulting in failure to fulfil its contractual obligations. Moreover, it is submitted that the contested decision was taken in violation of the principles of good administration and transparency and that on several occasions, specific Commission agents failed to eliminate alleged conflicts of interest. In light of the above, the applicant claims to be entitled to compensation for the services rendered as well as to eligible costs incurred in the framework of the execution of the contract including interest from the date these amounts became due.

_____

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ARRÊT DU TRIBUNAL (troisième chambre)

4 juillet 2008 (*)

« Marchés publics de services – Procédure d'appel d'offres communautaire – Entretien et maintenance des équipements automatiques, de la menuiserie et des équipements assimilés des bâtiments du Parlement européen à Bruxelles – Rejet d'une offre – Faute grave en matière professionnelle – Article 93 du règlement (CE, Euratom) n° 1605/2002 »

Dans l'affaire T–333/07,

Entrance Services, établie à Vilvorde (Belgique), représenté par M^es^ A. Delvaux et V. Bertrand, avocats,

partie requérante,

contre

Parlement européen, représenté par M^mes^ M. Ecker et P. López-Carceller, en qualité d'agents,

partie défenderesse,

ayant pour objet une demande tendant à l'annulation de la décision du Parlement de rejeter l'offre soumise par la requérante et d'attribuer le marché à un autre soumissionnaire, dans le cadre de la procédure d'appel d'offres concernant l'entretien et la maintenance des équipements automatiques, de la menuiserie et des équipements assimilés des bâtiments du Parlement à Bruxelles,

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (troisième chambre),

composé de M. J. Azizi, président ; M^me^ E. Cremona et M. S. Frimodt Nielsen (rapporteur), juges,

greffier : M^me^ C. Kristensen, administrateur,

vu la procédure écrite et à la suite de l'audience du 23 mai 2008,

rend le présent

Arrêt

1 L'article 89, paragraphe 1, du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1), dans sa version applicable au litige, c'est-à-dire tel que modifié par le règlement (CE, Euratom) n° 1995/2006 du Conseil, du 13 décembre 2006 (JO L 390, p. 1, ci–après le « règlement financier »), dispose :

« Tous les marchés publics financés totalement ou partiellement par le budget respectent les principes de transparence, de proportionnalité, d'égalité de traitement et de non-discrimination. »

2 Aux termes de l'article 93 du règlement financier :

« 1. Sont exclus de la participation aux procédures de passation de marchés les candidats ou les soumissionnaires :

[…]

b) qui ont fait l'objet d'une condamnation prononcée par un jugement ayant autorité de chose jugée pour tout délit affectant leur moralité professionnelle ;

c) qui, en matière professionnelle, ont commis une faute grave constatée par tout moyen que les pouvoirs adjudicateurs peuvent justifier ;

[…]

2. Les candidats ou soumissionnaires doivent attester qu'ils ne se trouvent pas dans une des situations prévues au paragraphe 1 […]

3. Les modalités d'exécution fixent la durée maximale pendant laquelle les situations visées au paragraphe 1 entraînent l'exclusion des candidats ou soumissionnaires de la participation à un marché. Cette durée maximale ne dépasse pas dix ans. »

3 L'article 94 du règlement financier dispose :

« Sont exclus de l'attribution d'un marché, les candidats ou les soumissionnaires qui, à l'occasion de la procédure de passation de ce marché :

[…]

c) se trouvent dans l'un des cas d'exclusion de la procédure de passation de ce marché visés à l'article 93, paragraphe 1. »

4 L'article 95, paragraphe 1, du règlement financier prévoit qu'une base de données centrale commune, notamment, aux institutions, est créée et gérée par la Commission, dans le respect de la réglementation communautaire relative au traitement des données à caractère personnel. La base de données centrale contient des informations détaillées concernant les candidats et les soumissionnaires qui sont dans l'une des situations visées à l'article 93, à l'article 94 ou à l'article 96, paragraphe 1, sous b), et paragraphe 2, sous a), du règlement financier.

5 Aux termes de l'article 95, paragraphe 3, du règlement financier, les modalités d'exécution prévoient des critères transparents et cohérents propres à assurer l'application proportionnée des critères d'exclusion.

6 L'article 97, paragraphe 1, du règlement financier dispose :

« Les marchés sont attribués sur la base des critères d'attribution applicables au contenu de l'offre, après vérification, sur la base des critères de sélection définis dans les documents d'appel à la concurrence, de la capacité des opérateurs économiques non exclus en vertu des articles 93 et 94 et de l'article 96, paragraphe 2, [sous] a). »

7 L'article 116 du règlement (CE, Euratom) n° 2342/2002 de la Commission, du 23 décembre 2002, établissant les modalités d'exécution du règlement financier (JO L 357, p. 1), dans sa version applicable au litige c'est-à-dire tel que modifié successivement par le règlement (CE, Euratom) n° 1261/2005 de la Commission, du 20 juillet 2005 (JO L 201, p. 3) et par le règlement (CE, Euratom) n° 1248/2006 de la Commission, du 7 août 2006 (JO L 227, p. 3) (ci-après les « modalités d'application »), dispose notamment :

« 3. Les marchés de travaux ont pour objet soit l'exécution, soit conjointement la conception et l'exécution de travaux ou d'ouvrages relatifs à une des activités mentionnées à l'annexe I de la directive 2004/18/CE du Parlement européen et du Conseil, soit la réalisation, par quelque moyen que ce soit, d'un ouvrage répondant aux besoins précisés par le pouvoir adjudicateur. Un ouvrage est le résultat d'un ensemble de travaux de bâtiment ou de génie civil destiné à remplir par lui-même une fonction économique ou technique.

4. Les marchés de services ont pour objet toutes les prestations intellectuelles et non intellectuelles autres que les marchés de fournitures, de travaux et les marchés immobiliers. Ces prestations sont énumérées aux annexes II A et II B de la directive 2004/18/CE.

5. […] Un marché ayant pour objet des services et ne comportant des travaux qu'à titre accessoire

par rapport à l'objet principal du marché est considéré comme un marché de services. »

8 L'article 130, paragraphe 2, sous a), des modalités d'application prévoit que « [l]'invitation à soumissionner […] précise au moins […] a) les modalités de dépôt et de présentation des offres, notamment […] les documents à joindre, y compris les pièces justificatives de la capacité économique, financière, professionnelle et technique visées à l'article 135 si elles ne sont pas précisées dans l'avis de marché, ainsi que l'adresse à laquelle elles doivent être transmises ».

9 L'article 133, paragraphe 2, premier alinéa, des modalités d'application, prévoit que « [d]ans les cas visés à l'article 93, paragraphe 1, [sous …] c) […], du règlement financier, les candidats ou soumissionnaires sont exclus des marchés et subventions pour une durée maximale de deux ans à compter du constat du manquement, confirmé après échange contradictoire avec le contractant ».

10 L'article 135 des modalités d'application prévoit :

« 1. Les pouvoirs adjudicateurs établissent des critères de sélection clairs et non discriminatoires.

2. Les critères de sélection s'appliquent dans toute procédure de passation de marchés afin que soit évaluée la capacité financière, économique, technique et professionnelle du candidat ou du soumissionnaire.

Le pouvoir adjudicateur peut fixer des niveaux minimaux de capacité en deçà desquels des candidats ne peuvent pas être retenus.

3. Tout soumissionnaire ou candidat peut être invité à justifier de son autorisation à produire l'objet visé par le marché selon le droit national : inscription au registre du commerce ou de la profession ou déclaration sous serment ou certificat, appartenance à une organisation spécifique, autorisation expresse, inscription au registre TVA.

[…]

5. L'étendue des informations demandées par le pouvoir adjudicateur pour preuve de la capacité financière, économique, technique et professionnelle du candidat ou soumissionnaire et les niveaux minimaux de capacité exigés conformément au paragraphe 2, ne peuvent aller au-delà de l'objet du marché et tiennent compte des intérêts légitimes des opérateurs économiques, en ce qui concerne en particulier la protection des secrets techniques et commerciaux de l'entreprise. »

11 L'article 137, paragraphe 2, des modalités d'application dispose :

« La capacité technique et professionnelle des opérateurs économiques peut être justifiée, selon la nature, la quantité ou l'importance et l'utilisation des fournitures, services ou travaux à fournir, sur la base d'un ou de plusieurs des documents suivants :

a) l'indication des titres d'études et professionnels du prestataire ou de l'entrepreneur et/ou des cadres de l'entreprise et, en particulier, du ou des responsables de la prestation ou de la conduite des travaux ;

b) la présentation d'une liste :

i) des principaux services et livraisons de fournitures effectués au cours des trois dernières années, indiquant leur montant, leur date et leur destinataire, public ou privé ;

ii) des travaux exécutés au cours des cinq dernières années, indiquant leur montant, leur date et leur lieu. La liste des travaux les plus importants est appuyée de certificats de bonne exécution précisant s'ils ont été effectués dans les règles de l'art et menés régulièrement à bonne fin ;

c) une description de l'équipement technique, de l'outillage et du matériel employés pour exécuter un marché de services ou de travaux ;

d) une description de l'équipement technique et des mesures employées pour s'assurer de la qualité des fournitures et services, ainsi que des moyens d'étude et de recherche de l'entreprise ;

e) l'indication des techniciens ou des organismes techniques, qu'ils soient ou non intégrés à l'entreprise, en particulier de ceux qui sont responsables du contrôle de la qualité ;

f) en ce qui concerne les fournitures, des échantillons, descriptions et/ou photographies authentiques et/ou des certificats établis par des instituts ou services officiels chargés du contrôle de la qualité, reconnus compétents et attestant la conformité des produits aux spécifications ou normes en vigueur ;

g) une déclaration indiquant les effectifs moyens annuels du prestataire ou de l'entrepreneur et l'importance du personnel d'encadrement pendant les trois dernières années ;

h) l'indication de la part du marché que le prestataire de services a éventuellement l'intention de sous-traiter ;

i) pour les marchés publics de travaux et de services et uniquement dans les cas appropriés, l'indication des mesures de gestion environnementale que l'opérateur économique pourra appliquer lors de la réalisation du marché.

Lorsque le destinataire des services et livraisons visés au premier alinéa, [sous] b), i), était un pouvoir adjudicateur, les opérateurs économiques fournissent la justification desdits services et prestations sous la forme de certificats émis ou contresignés par l'autorité compétente. »

12 L'article 52 de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114) prévoit notamment :

« 1. Les États membres peuvent instaurer soit des listes officielles d'entrepreneurs, de fournisseurs ou de prestataires de services agréés soit une certification par des organismes de certification publics ou privés.

[…]

3. L'inscription certifiée par les organismes compétents sur des listes officielles ou le certificat délivré par l'organisme de certification ne constitue une présomption d'aptitude, à l'égard des pouvoirs adjudicateurs des autres États membres, que par rapport à l'article 45, paragraphe 1, et paragraphe 2, [sous] a) à d) et g), à l'article 46, à l'article 47, paragraphe 1, [sous] b) et c), et à l'article 48, paragraphe 2, [sous] a), i), [et sous] b), e), g) et h), pour les entrepreneurs, paragraphe 2, [sous] a), ii), [et sous] b), c), d) et j), pour les fournisseurs, et paragraphe 2, [sous] a), ii), [et sous] c) à i), pour les prestataires de services. »

Faits à l'origine du litige

13 En 2006, le Parlement a publié un appel d'offres relatif à l'entretien et à la maintenance des équipements automatiques, de la menuiserie et des équipements assimilés des bâtiments du Parlement à Bruxelles.

14 À la suite du dépôt, par la requérante, Entrance Services, d'un recours en annulation devant le Tribunal contre la décision du 1er décembre 2006 d'attribuer le marché à Kone Belgium SA (ci-après « Kone »), le Parlement a annulé l'ensemble de la procédure d'appel d'offres par décision du 29 janvier 2007 pour le motif, notamment, que, « sans préjuger du bien-fondé de l'action envisagée par la société Entrance Services, il conv[enait], dans l'intérêt de l'institution, d'annuler la procédure d'appel d'offres et de ne pas signer le contrat envisagé avec [Kone] et d'engager un nouvel appel d'offres ».

15 La requérante s'est alors désistée de son action par courrier adressé au greffe du Tribunal le 5 février 2007.

16 Par avis de marché publié au Supplément au *Journal officiel de l'Union européenne* (JO 2007, S 55), le Parlement européen a lancé un nouvel appel d'offres ouvert portant la référence 2007/S 55-067221. Le marché en cause était identique au marché annulé, c'est-à-dire portait sur l'entretien et la maintenance des équipements automatiques, de la menuiserie et des équipements assimilés des bâtiments du Parlement à Bruxelles.

17 Aux fins de l'évaluation de la capacité technique et professionnelle, le cahier des clauses administratives de l'appel d'offres exigeait – tout comme celui de la première procédure d'appel d'offres – que les soumissionnaires soient agréés dans les catégories D5, D20 et P1 prévues par la loi belge du 20 mars 1991 organisant l'agréation des entrepreneurs de travaux belges *(Moniteur belge* du 6 avril 1991, p. 7 244, ci-après la « loi belge ») et par l'arrêté royal du 26 septembre 1991 fixant certaines mesures d'application de la loi belge (*Moniteur belge* du 18 octobre 1991, p. 23 286, ci-après l'« arrêté royal »), ou leur équivalent dans leur pays d'origine. Il exigeait également que les soumissionnaires jouissent d'un agrément « ISO 9001 » et d'un agrément « VCA », ou leur équivalent dans le pays d'origine.

18 En ce qui concerne la capacité économique et financière des soumissionnaires, il était requis que ceux-ci soient agréés dans la classe 3 prévue par la loi belge et l'arrêté royal ou son équivalent dans le pays d'origine.

19 Conformément à l'article 12 du cahier des charges, le marché devait être attribué au soumissionnaire le moins-disant.

20 Trois offres ont été déposées à la suite de cet appel d'offres.

21 Les offres ont été ouvertes le 10 mai 2007 par la commission d'ouverture, qui les a déclarées conformes. Il est apparu, à cette occasion, que l'offre de la requérante était plus élevée que celle de Kone mais moins élevée que celle du troisième soumissionnaire.

22 Par lettre du 14 mai 2007, la requérante a attiré l'attention du Parlement sur l'implication de Kone dans le cartel des ascenseurs, cette affaire ayant donné lieu à une décision, adoptée par la Commission le 21 février 2007, dans laquelle cette dernière a, notamment, conclu à la violation, par cette entreprise, de l'article 81 CE [décision de la Commission C (2007) 512 final, du 21 février 2007, relative à une procédure d'application de l'article 81 [CE] (Affaire COMP/E-1/38.823 – Ascenceurs et escaliers mécaniques), dont un résumé est publié au Journal officiel du 26 mars 2008, C 75, p. 19].

23 La requérante a exigé que Kone soit, en conséquence, exclue de la procédure d'appel d'offres pour avoir commis une faute professionnelle grave.

24 Par courrier du 15 mai 2007, le Parlement a demandé à la requérante de produire des copies des justificatifs des agréments requis par le cahier des clauses administratives, qui ne figuraient pas dans le dossier de cette dernière.

25 La requérante a répondu à cette demande par courrier du 21 mai 2007 aux termes duquel elle indiquait ce qui suit :

« Catégorie D5

Menuiserie générale – charpentes et escaliers en bois

Les travaux de menuiserie générale seront effectués par une société agréée en 'menuiserie générale' qui effectuera les travaux en sous-traitance et sous notre responsabilité.

[...]

Catégorie P1

Installations électriques des bâtiments, y compris installations de groupes électrogènes, équipements de détection d'incendie et de vol, télétransmissions dans les bâtiments et leur périphérie et installations ou équipements de téléphonie mixte.

Travaux qui ne sont pas repris dans l'appel d'offres, mais font partie du contrat de la société s'occupant de la gestion HVAC de vos immeubles. »

26 Le comité d'évaluation des offres s'est réuni le 21 mai 2007 et a proposé l'attribution du marché à Kone, qui était le soumissionnaire le moins-disant, l'offre de la requérante n'ayant pas été considérée comme recevable, dans la mesure où la requérante ne remplissait pas les critères de sélection techniques et professionnels.

27 À la suite de la réunion du comité d'évaluation, l'un des membres de ce comité a adressé la question suivante au service financier central du Parlement :

« Dans le cadre d'un appel d'offres ouvert que nous avons engagé il y a quelques mois, nous nous apprêtons à établir le [procès-verbal] du comité d'évaluation et de proposer une attribution à notre ordonnateur compétent.

Or, nous sommes confrontés à la difficulté suivante :

Dans le cadre de cette adjudication, l'offre la moins-disante a été remise par [Kone].

Or vous n'ignorez pas que cette dernière a fait l'objet d'une sanction prononcée par la Commission européenne pour des faits d'entente illicite.

Dans ces conditions, auriez-vous l'obligeance de nous faire savoir si, à la suite de la décision prise par la Commission, [Kone] a été inscrite sur la 'black list' des sociétés à exclure ou si, au contraire, nous pouvons lui attribuer le marché. »

28 La réponse du service financier central du Parlement a été la suivante :

« La firme en question n'apparaît pas dans la liste EWS ('liste noire') établie par la Commission.

D'autre part, nous vous rappelons que les sanctions imposées par la Commission dans le cadre de la politique pour la concurrence ne rentrent pas parmi les critères d'exclusion prévus aux articles 93 et 94 [du règlement financier], ni parmi les causes de sanction prévues à l'article 96 [paragraphe 1, de ce même règlement], pourvu que ces sanctions en matière de concurrence ne constituent pas des faits pouvant rentrer en même temps parmi les 'fautes professionnelles graves' prévues à l'article 93 [paragraphe 1, sous c), du règlement financier]. »

29 La décision d'écarter l'offre de la requérante a été communiquée à cette dernière par le Parlement par lettre du 14 août 2007.

30 Par télécopie du 23 août 2007, la requérante a demandé au Parlement de préciser quels étaient les critères de sélection non remplis, ainsi que les caractéristiques et avantages relatifs à l'offre retenue et le nom de l'attributaire du marché.

31 Par télécopie du 31 août 2007, le Parlement a répondu en indiquant, d'une part, que la requérante ne remplissait pas les critères de sélection relatifs aux agréments dans les catégories D5 et P1 et, d'autre part, que l'offre retenue était celle de Kone.

Procédure et conclusions des parties

32 Par acte déposé au greffe du Tribunal le 7 septembre 2007, la requérante a introduit le présent recours.

33 Par acte déposé au greffe le 28 novembre 2007, le Parlement a formé une demande de procédure accélérée en vertu de l'article 76 bis du règlement de procédure du Tribunal.

34 Par courrier enregistré au greffe le 14 décembre 2007, la requérante s'est jointe à cette demande.

35 La demande de procédure accélérée a été accueillie par décision de la troisième chambre communiquée aux parties le 29 janvier 2008.

36 Sur rapport du juge rapporteur, le Tribunal (troisième chambre) a décidé d'ouvrir la procédure orale.

37 Lors de l'audience du 23 mai 2008, les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions posées par le Tribunal.

38 À la suite de l'audience, le Parlement a transmis, par courrier enregistré au greffe le 27 mai 2008, plusieurs documents à propos desquels la requérante a présenté ses observations par courrier enregistré au greffe le 16 juin 2008.

39 La requérante conclut à ce qu'il plaise au Tribunal :

– annuler la décision par laquelle le Parlement a écarté son offre et a attribué le marché à un autre soumissionnaire ;

– condamner le Parlement aux dépens.

40 Le Parlement conclut à ce qu'il plaise au Tribunal :

– rejeter le recours ;

– condamner la requérante aux dépens.

En droit

41 La requérante présente, en substance, trois moyens à l'appui de son recours.

42 Par son premier moyen, la requérante avance que Kone, la société attributaire du marché, aurait dû être exclue de la procédure d'appel d'offres dans la mesure où elle a commis une faute grave en matière professionnelle qui, aux termes de l'article 93, paragraphe 1, sous c), du règlement financier, devait conduire à l'exclusion d'un tel soumissionnaire de la procédure.

43 Par son deuxième moyen, la requérante avance, en substance, que le Parlement a violé les dispositions du règlement financier et des modalités d'application en exigeant, de la part des soumissionnaires, certains agréments pour la réalisation de travaux.

44 Par son troisième moyen, la requérante soutient que Kone et Wycor NV, le troisième soumissionnaire, ne disposaient pas non plus desdits agréments et que le marché a, dès lors, été attribué à Kone en violation du principe d'égalité entre soumissionnaires consacré par l'article 89, paragraphe 1, du règlement financier.

45 À titre liminaire, et en réponse à une allégation de la requérante lors de l'audience, il y a lieu de préciser, concernant l'applicabilité ratione temporis des modalités d'application, telles que modifiées successivement par le règlement n° 1261/2005 et par le règlement n° 1248/2006, que l'article 2 du règlement n° 1248/2006 prévoit que les procédures de passation de marchés publics lancées avant l'entrée en vigueur de ce règlement restent soumises aux règles applicables au moment où ces procédures ont été lancées.

46 Le règlement n° 1248/2006 est entré en vigueur le troisième jour suivant celui de sa publication au *Journal officiel de l'Union européenne*, c'est-à-dire le 22 août 2006.

47 L'appel d'offres sur lequel porte le présent litige a fait l'objet d'un avis de marché publié au Supplément au *Journal officiel de l'Union européenne* du 20 mars 2007 (S 55).

48 La procédure d'appel d'offres ayant, en l'espèce, été lancée après l'entrée en vigueur du règlement n° 1248/2006, c'est dans leur version, telle que modifiée par ce dernier règlement, que les modalités d'application s'appliquent au présent litige.

Sur le premier moyen, tiré de la violation de l'article 10 du cahier des clauses administratives et de l'article 93, paragraphe 1, du règlement financier

Arguments des parties

49 La requérante soutient que Kone, l'attributaire du marché, a été sanctionnée par la Commission, par décision de celle-ci du 21 février 2007, pour avoir participé à des ententes sur le marché de l'installation et de l'entretien des ascenseurs, l'infraction consistant en le trucage des appels d'offres, la fixation des prix, l'attribution des projets, la répartition des marchés et l'échange d'informations commercialement importantes et confidentielles, au moins de 1995 à 2004.

50 L'amende fixée à 70 millions d'euros infligée à Kone a toutefois été réduite de 100 %, cette entreprise ayant été la première à fournir des renseignements sur l'entente en cause.

51 La requérante estime cependant que cette réduction d'amende ne fait pas disparaître l'infraction.

52 La requérante fait valoir, en substance, que, dans ces conditions, Kone avait commis une faute professionnelle grave et qu'elle se trouvait dans une situation d'exclusion visée à l'article 10 du cahier des clauses administratives, reproduisant les termes de l'article 93, paragraphe 1, sous b) et c), du règlement financier et que, partant, le Parlement ne pouvait lui attribuer le marché sans violer ces dispositions.

53 Le Parlement soutient, en substance, d'une part, que Kone ne pouvait être exclue sur la base de l'article 93, paragraphe 1, sous b), du règlement financier, dans la mesure où Kone n'avait pas fait l'objet d'une condamnation prononcée par un jugement ayant autorité de chose jugée.

54 Le Parlement avance, en substance, d'autre part, que l'offre de Kone ne pouvait être exclue sur la base de l'article 93, paragraphe 1, sous c), du règlement financier, dans la mesure où, s'il ne conteste pas la participation de cette entreprise à l'entente sanctionnée par la Commission, il n'en reste pas moins que la gravité de la faute n'apparaît pas constituée au vu des circonstances particulières de l'espèce.

55 En effet, selon le Parlement, Kone ne figurait pas dans la base de données de la Commission, constituée conformément à l'article 95 du règlement financier, comportant les données nominatives des entités qui font l'objet d'une exclusion de l'attribution ou de la participation à des marchés des institutions communautaires ; dès lors le Parlement ne pouvait valablement exclure Kone de la participation à la procédure d'appel d'offres en cause.

56 En outre, le Parlement considère, en substance, que la gravité de la faute n'était pas établie en l'espèce, dès lors que Kone avait fourni des renseignements sur l'entente et avait activement participé à la découverte des faits, son repentir pouvant être considéré comme une circonstance atténuante.

Appréciation du Tribunal

57 L'article 93, paragraphe 1, sous b), du règlement financier prévoit que sont exclus de la participation aux procédures de passation de marchés les candidats ou les soumissionnaires qui ont fait l'objet d'une condamnation prononcée par un jugement ayant autorité de chose jugée pour tout délit affectant leur moralité professionnelle.

58 La décision de la Commission du 21 février 2007 prise à l'encontre de Kone ne constituant pas une condamnation prononcée par un jugement ayant autorité de chose jugée, le premier grief avancé par la requérante, tiré de la violation de cette disposition, ne saurait prospérer.

59 En ce qui concerne le second grief, tiré de la violation de l'article 93, paragraphe 1, sous c), du règlement financier, il convient de rappeler qu'il résulte des dispositions des articles 93 et 94 du règlement financier et de l'article 133 des modalités d'application que le pouvoir adjudicateur, s'il constate, par tout moyen qu'il peut justifier, l'existence d'une faute grave en matière professionnelle commise par un soumissionnaire, doit exclure ce dernier de la procédure de passation de marché. Il en découle une obligation, pour le pouvoir adjudicateur, dès lors que celui-ci est informé, au cours de la procédure, d'une prétendue faute grave en matière professionnelle commise par un soumissionnaire, de vérifier cette information et, si cette faute grave est établie à suffisance de droit, d'exclure le soumissionnaire en question de la procédure. À défaut de précisions à cet égard dans les réglementations pertinentes, il y a lieu de constater que le pouvoir adjudicateur dispose d'une certaine marge d'appréciation en ce qui concerne l'appréciation de la gravité de la faute pouvant être retenue contre le soumissionnaire.

60 En l'espèce, la requérante a informé le Parlement, par lettre du 14 mai 2007, que Kone avait fait l'objet d'une décision par laquelle la Commission sanctionnait une violation par cette entreprise des règles de concurrence.

61 Il incombait dès lors au Parlement, d'une part, d'examiner si les faits repris dans la décision de la Commission pouvaient permettre d'établir l'existence d'une faute grave en matière professionnelle, ce qu'il pouvait constater par tout moyen qu'il pouvait justifier, et, d'autre part, dans l'affirmative, d'exclure Kone de la procédure.

62 La décision de la Commission sanctionnait Kone du fait d'avoir, notamment, truqué des appels

d'offres dans le cadre de marchés publics et le Parlement a admis, lors de l'audience en réponse à une question posée par le Tribunal, que ce type d'acte pouvait constituer une faute grave au sens de l'article 93, paragraphe 1, sous c), du règlement financier. La Commission elle-même, dans la décision du 21 février 2007, qualifie la violation des règles de concurrence commise par les différentes entreprises membres du cartel de « très grave » (points 657 et suivants de la décision de la Commission).

63 Or, c'est notamment en vue de sanctionner ce type de comportement que l'article 93, paragraphe 1, sous c), du règlement financier impose au pouvoir adjudicateur d'exclure la participation de telles entreprises à des marchés publics communautaires.

64 Il ressort par ailleurs de la déclaration de la Commission datée du 21 février 2007, transmise au Parlement par la requérante, que cette entente portait non seulement sur des contrats d'installation mais aussi d'entretien. À cet égard, la Commission a constaté notamment qu'« [e]ntre au moins 1995 et 2004, ces sociétés ont truqué des appels d'offres, fixé les prix, se sont attribuées des projets, se sont réparties les marchés et ont échangé des informations commercialement importantes et confidentielles » et que « [c]ette entente pourrait produire des effets pendant vingt à cinquante ans, car l'entretien est souvent assuré par les sociétés qui ont initialement installé l'équipement ». Or, cette affirmation, qui a été présentée par la requérante à l'audience, n'a pas été mise en doute par le Parlement.

65 Il convient, dès lors, d'examiner les arguments avancés par le Parlement afin de justifier l'absence de constatation d'une faute grave en matière professionnelle commise par Kone.

66 Il y a lieu d'observer, tout d'abord, que c'est à juste titre que le Parlement avance qu'il lui appartenait de vérifier si le soumissionnaire était enregistré dans la base de données de la Commission.

67 Toutefois, le pouvoir adjudicateur ne pouvait s'arrêter à l'absence d'inscription du soumissionnaire dans ladite base dès lors que, conformément à l'article 93, paragraphe 1, sous c), du règlement financier, il pouvait constater par tout moyen l'existence d'une faute grave commise par le soumissionnaire et, le cas échéant, exclure ledit soumissionnaire, conformément à l'article 94 du règlement financier.

68 Il résulte, en effet, des dispositions des articles 93 à 95 du règlement financier que, contrairement à la thèse soutenue par le Parlement, la seule absence d'enregistrement dans la base de données ne saurait créer une présomption irréfragable que le soumissionnaire n'a pas commis de faute grave en matière professionnelle.

69 Par ailleurs, le Parlement, après avoir été informé par lettre de la requérante de faits susceptibles de constituer une faute grave entraînant l'exclusion du soumissionnaire, ne pouvait d'autant moins s'arrêter – après avoir consulté, sans résultat, la base de données de la Commission – à la seule déclaration sur l'honneur communiquée par Kone en vertu de l'article 93, paragraphe 2, du règlement financier.

70 Or, l'analyse des offres, datée du 31 mai 2007, qui a été communiquée par le Parlement en annexe au mémoire en défense, laisse apparaître que le Parlement s'est référé uniquement à la déclaration sur l'honneur transmise par Kone et paraît n'avoir réservé aucune autre suite à la lettre de la requérante l'informant de la décision de la Commission concernant l'infraction aux règles de concurrence, après avoir interrogé la base de données de la Commission. La fiche du procès-verbal d'évaluation relative à Kone mentionne en effet « OK, rien à signaler » sous la rubrique « Recevabilité des offres […] iii) en matière professionnelle, ont commis une faute grave ».

71 Interrogé à cet égard lors de l'audience, le Parlement n'a pas été en mesure de préciser les démarches entreprises par ses services, autres que la consultation de la base de données de la Commission.

72 Or, il ressort par ailleurs d'une pièce déposée par le Parlement lors de l'audience et datée du 31 mai 2007, que le service financier central du Parlement a été interrogé par un membre du comité d'évaluation, afin de savoir si, à la suite de la décision prise par la Commission, Kone avait été inscrite sur la liste des sociétés à exclure ou si, au contraire, le marché pouvait être attribué à Kone. À cette question, le service financier central du Parlement a répondu que Kone n'était pas reprise sur la liste de sociétés à exclure. Par ailleurs, ce service a précisé ce qui suit :

« [N]ous vous rappelons que les sanctions imposées par la Commission dans le cadre de la politique pour la concurrence ne rentrent pas parmi les critères d'exclusion prévus aux articles 93 et 94 [du règlement financier], ni parmi les causes de sanction prévues à l'article 96 [, paragraphe 1, de ce même règlement] pourvu que ces sanctions en matière de concurrence ne constituent pas des faits pouvant rentrer en même temps parmi 'les fautes professionnelles graves' prévues à l'article 93 [, paragraphe 1, sous c), du règlement financier]. »

73 Il apparaît ainsi que la question de la régularité de l'attribution du marché public à Kone a été soulevée au sein même du Parlement et que, même si le service financier central du Parlement s'est retranché derrière les données reprises dans la base de données et a donné une réponse quelque peu équivoque à la question qui lui était posée, il n'en reste pas moins que le comité d'évaluation s'est abstenu de donner une suite réelle au problème qui avait été soulevé en temps utile tant par la requérante que par le service financier central du Parlement.

74 Ainsi, le Parlement a commis une erreur de droit en omettant d'apprécier si le contenu de la décision de la Commission devait entraîner l'exclusion de Kone de la procédure.

75 En outre, l'on ne saurait confondre la faute et la sanction de celle-ci. La décision de la Commission de réduire l'amende pour des motifs tenant à la coopération de l'entreprise dans le cadre de l'enquête relève en effet de l'appréciation de la sanction et non de l'appréciation de la faute commise et n'influe pas sur la gravité de celle-ci.

76 Partant, l'argumentation avancée à cet égard par le Parlement ne saurait prospérer.

77 En conclusion, dans ces circonstances, il y a lieu de considérer que le Parlement ne pouvait s'arrêter à la seule consultation de la base de données et à la déclaration sur l'honneur produite par Kone afin d'examiner si les faits portés à sa connaissance par la requérante constituaient une faute grave en matière professionnelle au sens du règlement financier. Partant, il a violé l'article 93, paragraphe 1, sous c), et l'article 94 du règlement financier et la décision attaquée doit être annulée.

78 À titre surabondant, il y a lieu d'examiner les deuxième et troisième moyens avancés par la requérante.

Sur le deuxième moyen, tiré de la violation des articles 97 et 98 du règlement financier ainsi que de l'article 135, paragraphe 5, et de l'article 137 des modalités d'application

Arguments des parties

79 Le moyen se subdivise en deux branches.

80 Par la première branche de son moyen, la requérante soutient que, en exigeant des soumissionnaires qu'ils justifient de la possession d'un agrément dans les catégories D5, D20 et P1 pour établir leur capacité technique à exécuter le marché, le Parlement a violé les articles 97 et 98 du règlement financier ainsi que l'article 137 des modalités d'application, dans la mesure où, selon cette dernière disposition, la capacité technique des soumissionnaires peut uniquement être vérifiée par la production d'un ou de plusieurs documents mentionnés par cette disposition. La prise en compte de tout autre document que ceux visés à l'article 137 est donc exclue.

81 Lors de l'audience, la requérante a invoqué, à l'appui de cette argumentation, les arrêts de la Cour du 10 février 1982, Transporoute et travaux (76/81, Rec. p. 417), et du 9 juillet 1987, CEI et Bellini (27/86 à 29/86, Rec. p. 3347).

82 La requérante avance en outre que, contrairement à l'article 52, paragraphe 1, de la directive 2004/18, les modalités d'application ne prévoient pas que les institutions européennes peuvent exiger des soumissionnaires qu'ils fassent la preuve de leur capacité technique par la production d'un document attestant de leur inscription sur une liste officielle d'opérateurs agréés par les États membres.

83 Par la seconde branche de son moyen, la requérante soutient que, en exigeant des soumissionnaires qu'ils justifient d'un agrément dans les catégories D5, D20 et P1 pour établir leur capacité technique et professionnelle ainsi que d'un agrément dans la classe 3 pour établir leur capacité économique et financière, et en écartant l'offre de la requérante au motif qu'elle ne fournit

pas la preuve de deux de ces agréments, le Parlement a violé les articles 97 et 98 du règlement financier et l'article 135, paragraphe 5, des modalités d'application.

84 En effet, conformément à l'article 135, paragraphe 5, des modalités d'application, l'étendue des informations demandées par le pouvoir adjudicateur pour prouver la capacité financière, économique, technique et professionnelle du candidat ne pourrait aller au-delà de l'objet du marché.

85 La requérante fait observer que, en exigeant des soumissionnaires qu'ils détiennent un agrément dans les catégories D5, D20 et P1, le Parlement s'est référé à la loi belge et à l'arrêté royal. Or, cette réglementation ne concerne que les marchés de travaux, qui ne peuvent, en principe, être attribués qu'à des entrepreneurs agréés, aux termes des articles 2 et 3 de la loi belge, et non les marchés de fournitures et de services.

86 Aux termes de cette réglementation, la catégorie D5 concernerait les travaux de « menuiserie générale, charpentes et escaliers en bois », la catégorie D20 les travaux de « menuiserie métallique » et la catégorie P1 les « installations électriques des bâtiments, y compris installations de groupes électrogènes, équipements de détection d'incendie et de vol, télétransmissions dans les bâtiments et leur périphérie et installations ou équipements de téléphonie mixte ». La classe 3 permettrait, quant à elle, d'effectuer des marchés de travaux d'une certaine catégorie dont le montant est compris entre 500 000 et 900 000 euros.

87 Selon la requérante, il résulte, par ailleurs, de l'article 5, paragraphe 6, de l'arrêté royal – qui prévoit, notamment, que, « dans le cas où l'ouvrage comprend des travaux de nature différente, dont l'importance relative est plus ou moins égale, celui-ci pourra être classé dans plusieurs des catégories ou sous-catégories concernées » et que, « en toute hypothèse, l'adjudicataire ne devra être agréé que dans l'une des catégories ou sous-catégories prévues » – que, pour un marché, le pouvoir adjudicateur ne peut exiger qu'un seul agrément. Quant à la classe dans laquelle cet agrément doit être produite, elle est déterminée par le montant de la soumission, selon l'article 3, paragraphe 3, de l'arrêté royal.

88 La requérante soutient que, en l'espèce, le contrat de maintenance et d'entretien a été qualifié, conformément à l'article 116, paragraphe 5, deuxième alinéa, des modalités d'application, de contrat de prestations de services dans l'avis de marché, dans la mesure où il portait à titre principal sur des services.

89 Selon la requérante, dès lors que le marché concerné portait à titre principal sur des services, le Parlement ne pouvait exiger des soumissionnaires qu'ils fassent la preuve de leur capacité technique à exécuter un tel marché par la production d'agréments d'entrepreneurs de travaux délivrés sur la base de références relatives à des marchés de travaux, quand bien même le marché comportait à titre accessoire de tels travaux.

90 Les opérateurs intéressés par le marché sont, en effet, selon la requérante, des entreprises prestataires de services qui ne disposent pas d'agréments d'entrepreneurs de travaux.

91 De plus, la requérante allègue que de tels agréments ne permettent pas d'établir la capacité technique du soumissionnaire à exécuter le marché de services concerné.

92 Par ailleurs, la requérante soutient que de tels agréments vont au-delà de l'objet du marché, celui-ci ne comportant aucune tâche visée par la catégorie P1, ce dernier type de tâches étant exécuté par la société chargée de la gestion dite « HVAC » des immeubles.

93 Enfin, selon la requérante, l'article 11 du cahier des clauses administratives, s'appuyant prétendument sur la loi belge, exige trois agréments alors que la loi belge n'autorise les pouvoirs adjudicateurs qu'à en réclamer un seul pour un même marché.

94 Le Parlement conteste ces allégations.

Appréciation du Tribunal

– Quant à la première branche du moyen

95 L'article 135, paragraphe 3, des modalités d'application dispose :

« Tout soumissionnaire ou candidat peut être invité à justifier de son autorisation à produire l'objet visé par le marché selon le droit national : inscription au registre du commerce ou de la profession ou déclaration sous serment ou certificat, appartenance à une organisation spécifique, autorisation expresse, inscription au registre TVA. »

96 Il convient d'avoir égard à la version anglaise de cette disposition, qui est ainsi rédigée :

« Any tenderer or candidate may be asked to prove that he is authorised to perform the contract under national law, as evidenced by inclusion in a trade or professional register, or a sworn declaration or certificate, membership of a specific organisation, express authorisation, or entry in the VAT register. »

97 La version française utilise l'expression « produire l'objet visé par le marché », tandis que la version anglaise emploie les mots « perform the contract » et la version allemande les mots « Erbringung der Auftragsleistung ».

98 Certaines versions linguistiques, telles que les versions en langues néerlandaise, italienne, portugaise et danoise sont alignées sur la version française, tandis que d'autres, telle la version espagnole, sont alignées sur la version anglaise.

99 Il y a lieu ainsi de considérer que, malgré une certaine ambiguïté terminologique, l'article 135, paragraphe 3, des modalités d'application s'applique quel que soit l'objet du marché, qu'il s'agisse d'un marché de travaux ou d'un marché de services. Cette disposition porte, en effet, de manière générale, sur les critères de sélection et il serait incohérent que le paragraphe 3 de cet article ne vise que les exigences applicables aux seuls marchés de travaux, tels que prévus par l'article 116, paragraphe 3, des modalités d'application, dès lors que les marchés de services ou de fournitures peuvent eux aussi être soumis à autorisation, notion entendue au sens large par la disposition en cause.

100 L'article 135, paragraphe 3, des modalités d'application doit alors être interprété en ce sens qu'un agrément constitue une autorisation de produire l'objet visé par le marché ou encore d'exécuter le contrat.

101 Il est par conséquent permis au pouvoir adjudicateur d'exiger des soumissionnaires la preuve de la détention d'agréments dans les catégories de services ou de travaux sur lesquels porte un marché, ainsi que le requiert le Parlement dans le cadre de l'appel d'offres litigieux. Le fait que les agréments concernés aient été demandés par le Parlement sous le titre « Capacité technique et financière » est sans incidence à cet égard.

102 L'article 137 des modalités d'application, que la requérante invoque à l'appui de sa thèse, détermine les modalités selon lesquelles la capacité technique et professionnelle des opérateurs économiques peut être justifiée.

103 Toutefois, la capacité technique et professionnelle d'effectuer des travaux ou des services n'est pas strictement comparable avec l'autorisation ou l'agrément d'effectuer de tels travaux ou de tels services. Une entreprise est en effet susceptible de disposer de la capacité technique et professionnelle d'effectuer un service mais peut ne pas disposer de l'autorisation ou de l'agrément nécessaire à sa participation à des marchés publics pour de tels travaux ou services. La nature indicative ou exhaustive de la liste établie par l'article 137 des modalités d'application apparaît dès lors sans incidence sur la question de savoir si le Parlement était en droit d'exiger des agréments de la part des soumissionnaires.

104 Il y a lieu d'observer, en outre, à titre surabondant, que, selon l'article 3 de la loi belge, un marché public ne peut être attribué qu'à des entrepreneurs agréés ou qui ont fourni la preuve qu'ils remplissent les conditions fixées par ou en vertu de ladite loi. L'agrément ne semble, par conséquent, pas correspondre, en droit belge, à une inscription sur une liste officielle, ainsi que le soutient la requérante, mais constitue bien une condition de participation à un marché public.

105 À titre surabondant, il y a lieu de considérer qu'est sans incidence l'interprétation donnée par la Cour à l'article 26 de la directive 71/305/CEE du Conseil, du 26 juillet 1971, portant coordination des procédures de passation des marchés publics de travaux (JO L 185, p. 5) et, plus particulièrement, son interprétation de la portée de la liste que comporte cette disposition en ce qui concerne la capacité technique et professionnelle des soumissionnaires dans le cadre des marchés publics, dans les arrêts Transporoute et travaux, d'une part, et CEI et Bellini, d'autre part, point 81

supra, dès lors que cette directive a été abrogée par la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199, p. 54), laquelle a, à son tour, été abrogée par la directive 2004/18 et que la formulation des dispositions des modalités d'application, qui résultent d'un règlement, n'est pas exactement identique à celle de l'article 26 de la directive 71/305.

106 La première branche du moyen avancé par la requérante ne saurait dès lors être accueillie.

– Quant à la seconde branche du moyen

107 Premièrement, il y a lieu de relever que le Parlement impose, dans le cadre de l'appel d'offres faisant l'objet du présent litige, que les soumissionnaires établissent qu'ils possèdent un agrément dans les catégories D5, D20 et P1, ou leur équivalent dans leur pays d'origine, un agrément « ISO 9001 » et un agrément « VCA », ou leur équivalent dans le pays d'origine, et, enfin, un agrément dans la classe 3 ou son équivalent dans le pays d'origine.

108 Il en résulte que les soumissionnaires devaient disposer des agréments requis selon le droit de leur pays d'origine – ce pays pouvant être la Belgique – mais il n'en découle pas pour autant que le marché était soumis aux conditions fixées par le droit belge en ce qui concerne l'exigence de tels agréments.

109 En effet, la procédure d'appel d'offres, ayant été lancée par une institution communautaire, était régie par le droit communautaire, et, en l'espèce, par les dispositions du règlement financier et des modalités d'application, et non par le droit belge.

110 La nature et le nombre des agréments requis par le droit belge pour les procédures de passation de marchés publics menées en Belgique sont dès lors sans incidence en l'espèce. En outre, ainsi que le relève à juste titre le Parlement, le droit belge n'empêche pas un entrepreneur de disposer de plusieurs agréments. Tel était, d'ailleurs, le cas des deux autres soumissionnaires.

111 Deuxièmement, il est établi que l'appel d'offres portait sur un marché de services, mais que les travaux y représentaient une part non négligeable. Contrairement à ce qu'a avancé la requérante à cet égard, le Parlement n'a pas soutenu que le marché devrait être requalifié en marché de travaux, mais bien qu'il s'agissait d'un marché de services, quand bien même les travaux occupaient une part prépondérante du marché durant la première année d'exécution du contrat.

112 En premier lieu, il y a lieu d'observer que, dès lors que le marché comporte des travaux, il est indifférent, en ce qui concerne la question de savoir si des agréments peuvent être requis en ce qui concerne les différentes catégories de travaux prévus, de savoir quelle est la proportion de travaux et de services dans le cadre du marché faisant l'objet de l'appel d'offres.

113 En deuxième lieu, il est établi que le marché comportait des travaux visés par les différentes catégories d'agréments requis.

114 Le marché portait en effet sur la maintenance de 14 751 portes normales en bois et de 783 portes RF (résistance au feu) en bois, la maintenance de 2 564 stores électriques métalliques, de 25 éléments de rideaux et de volets intérieurs électriques en métal, de 15 867 stores intérieurs manuels avec des rails et d'autres parties métalliques, de 30 portes automatiques en métal, de 17 portes « sectionnelles » métalliques, de 20 barrières automatiques métalliques et de 414 portes SMS (système modulaire de sécurité) et CA (contrôle d'accès) et la maintenance de 2 564 stores électriques, de 30 portes automatiques, de 17 portes « sectionnelles », de 20 barrières automatiques et de 414 portes SMS et CA.

115 Il y a lieu de relever à cet égard que, tout d'abord, l'agrément dans la catégorie D5 (menuiserie générale, charpentes et escaliers en bois) était relatif à la maintenance de 14 751 portes normales en bois et de 783 portes RF en bois. Ensuite, l'agrément dans la catégorie D20 (menuiserie métallique) correspondait à la maintenance de 2 564 stores électriques métalliques, de 25 éléments de rideaux et de volets intérieurs électriques en métal, de 15 867 stores intérieurs manuels avec des rails et d'autres parties métalliques, de 30 portes automatiques en métal, de 17 portes « sectionnelles » métalliques, de 20 barrières automatiques métalliques et de 414 portes SMS et CA. Enfin, l'agrément dans la catégorie P1 (installations électriques des bâtiments) se justifiait en raison de la maintenance de 2 564 stores électriques, de 30 portes automatiques, de 17 portes « sectionnelles », de 20 barrières automatiques et de 414 portes SMS et CA.

116 Il y a dès lors lieu de considérer que, en exigeant la production d'agréments dans les catégories D5, D20 et P1, le Parlement n'est pas allé au-delà de ce qu'imposait l'objet du marché, ces agréments attestant en effet de la capacité des soumissionnaires à exécuter lesdits travaux.

117 En troisième lieu, quant à l'argument selon lequel l'agrément dans la catégorie P1 (installations électriques des bâtiments) n'est pas pertinent dans la mesure où le marché ne comporte aucune prestation relevant de cette catégorie, il est clairement démenti par la liste des travaux fournie par le Parlement.

118 La requérante a, en outre, soutenu que les travaux relevant de la catégorie P1 faisaient, en réalité, partie du contrat conclu avec la société s'occupant de la gestion HVAC des immeubles du Parlement.

119 Le Parlement a toutefois précisé, lors de l'audience, que la maintenance électrique de ces stores, portes et barrières, ne relevait pas du contrat qu'elle avait conclu avec le prestataire en charge de l'électricité pour les bâtiments du Parlement et que cette tâche faisait donc bien partie de l'objet de l'appel d'offres litigieux.

120 La requérante n'ayant apporté aucun élément à l'appui de ses allégations de nature à démontrer l'inexactitude des affirmations du Parlement à cet égard, il y a lieu de considérer que ce grief est dénué de fondement.

121 Il convient, par conséquent, de conclure que la requérante n'a pas établi qu'il était injustifié que le Parlement exige la possession d'un agrément dans la catégorie P1.

122 En quatrième lieu, il y a lieu d'écarter l'argument de la requérante visant à soutenir que l'exigence de trois agréments pour des marchés de travaux était disproportionnée, eu égard au fait que le marché était, à titre principal, un marché de services.

123 En effet, dans la mesure où les travaux représentaient une part non négligeable du marché en cause et où il est établi que chacun de ces agréments correspondait à une catégorie de travaux devant effectivement être réalisés par l'attributaire du marché, le fait de disposer d'agréments à cet effet et pour chacune de ces trois catégories n'apparaît pas comme une exigence disproportionnée de la part du Parlement.

124 La seconde branche du deuxième moyen doit dès lors être rejetée comme non fondée.

Sur le troisième moyen, tiré de la violation du principe d'égalité de traitement entre soumissionnaires, consacré par l'article 89, paragraphe 1, du règlement financier

Argument des parties

125 La requérante avance que les deux autres soumissionnaires sont des sociétés spécialisées, d'une part, dans la fabrication et la pose des ascenseurs et, d'autre part, dans la fabrication et la pose de portes.

126 La requérante a soutenu, dans la requête, que les deux autres soumissionnaires ne détenaient pas non plus tous les agréments requis par l'article 11 du cahier des clauses administratives.

127 À la suite de l'audience, le Parlement a communiqué copie des agréments qui avaient été accordés par décision ministérielle du 6 novembre 2006 à Wycor et du 6 juillet 2007 à Kone.

128 Le Parlement a, en outre, produit copie d'une lettre, datée du 16 mai 2007, émanant du cabinet du ministre de la Mobilité et des Travaux publics au sein du gouvernement de la Région de Bruxelles-Capitale, confirmant l'introduction des demandes d'agrément par Kone et indiquant que la décision ministérielle entrerait en vigueur le 6 juillet 2007.

129 Le Parlement estime que Kone disposait donc des agréments requis préalablement à l'attribution du marché.

130 La requérante soutient cependant que, lorsque le comité d'évaluation a proposé, le 21 mai 2007, d'attribuer le marché à Kone, celle-ci n'avait pas encore obtenu les agréments requis par le cahier des clauses administratives et que l'on ignore si elle en disposait lors de l'attribution du marché, la

date de la décision d'attribution n'étant pas connue.

131 Dès lors, selon la requérante, en écartant son offre pour le motif qu'elle n'avait pas produit tous les agréments requis et en attribuant le marché à un autre soumissionnaire, alors qu'il se trouvait dans la même situation, le Parlement a violé le principe d'égalité entre soumissionnaires consacré à l'article 89, paragraphe 1, du règlement financier.

Appréciation du Tribunal

132 D'une part, il y a lieu de constater que, contrairement à ce que soutient la requérante, celle-ci et Kone ne se trouvaient pas dans des situations similaires.

133 En effet, la requérante ne disposait pas de l'agrément D5 et contestait la nécessité de disposer de l'agrément P1, ce qu'elle a confirmé par lettre du 21 mai 2007 au Parlement, tandis que, au moment où le comité d'évaluation s'est réuni, celui-ci disposait d'une lettre émanant des autorités belges indiquant à Kone qu'elle disposerait de l'ensemble des agréments requis pour la date du 6 juillet 2007.

134 Le Parlement n'a dès lors pas attribué le marché à un soumissionnaire se trouvant dans la même situation que la requérante.

135 D'autre part, Kone ayant apporté la preuve qu'elle disposerait des agréments au moment de la prise d'effet de la décision d'attribution, le comité d'évaluation a valablement pu considérer qu'elle remplissait les conditions fixées par l'avis de marché à cet égard.

136 Le moyen avancé par la requérante est, dès lors, dépourvu de fondement.

Sur les dépens

137 Aux termes de l'article 87, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. Le Parlement ayant succombé, il y a lieu de le condamner aux dépens, conformément aux conclusions de la requérante.

Par ces motifs,

LE TRIBUNAL (troisième chambre)

déclare et arrête :

1) La décision du Parlement européen de rejeter l'offre soumise par Entrance Services et d'attribuer le marché à un autre soumissionnaire, dans le cadre de la procédure d'appel d'offres concernant l'entretien et la maintenance des équipements automatiques, de la menuiserie et des équipements assimilés des bâtiments du Parlement à Bruxelles, est annulée.

2) Le Parlement est condamné aux dépens.

Azizi Cremona Frimodt Nielsen

Ainsi prononcé en audience publique à Luxembourg, le 4 juillet 2008.

Le greffier Le président

E. Coulon J. Azizi

* Langue de procédure : le français.

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Documents relatifs à la même affaire

Arrêt du Tribunal (troisième chambre) du 4 juillet 2008 – Entrance Services/Parlement (affaire T-333/07)

« Marchés publics de services – Procédure d'appel d'offres communautaire – Entretien et maintenance des équipements automatiques, de la menuiserie et des équipements assimilés des bâtiments du Parlement européen à Bruxelles – Rejet d'une offre – Faute grave en matière professionnelle – Article 93 du règlement (CE, Euratom) n° 1605/2002 »

Marchés publics des Communautés européennes - Procédure d'appel d'offres (Règlement du Conseil nº 1605/2002, art. 93, § 1, c), et 94; règlement de la Commission nº 2342/2002, art. 133) (cf. points 59-77)

Objet

Demande tendant à l'annulation de la décision du Parlement de rejeter l'offre soumise par la requérante et d'attribuer le marché à un autre soumissionnaire, dans le cadre de la procédure d'appel d'offres concernant l'entretien et la maintenance des équipements automatiques, de la menuiserie et des équipements assimilés des bâtiments du Parlement à Bruxelles.

Dispositif

1) La décision du Parlement européen de rejeter l'offre soumise par Entrance Services et d'attribuer le marché à un autre soumissionnaire, dans le cadre de la procédure d'appel d'offres concernant l'entretien et la maintenance des équipements automatiques, de la menuiserie et des équipements assimilés des bâtiments du Parlement à Bruxelles, est annulée.

2) Le Parlement est condamné aux dépens.

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Judgment of the Court of First Instance of 4 July 2008 - Entrance Services v Parliament

(Case T-333/07) [1]

(Public services contracts - Community call for tenders procedure - Repair and maintenance of automatic equipment, joinery and similar equipment in European Parliament buildings in Brussels - Rejection of a tender - Serious error in professional matters - Article 93 of Regulation (EC, Euratom) No 1605/2002)

Language of the case: French

Parties

Applicant: Entrance Services (Vilvorde, Belgium) (represented by: A. Delvaux and V. Bertrand, lawyers)

Defendant: European Parliament (represented by: M. Ecker and P. López-Carceller, acting as Agents)

Re:

Annulment of the decision of the Parliament rejecting the tender submitted by the applicant and awarding the contract to another tenderer in the call for tenders procedure concerning the repair and maintenance of automatic equipment, joinery and similar equipment in European Parliament buildings in Brussels.

Operative part of the judgment

The Court:

Annuls the decision of the Parliament rejecting the applicant's tender and awarding the contract to another tenderer in the call for tenders procedure concerning the repair and maintenance of automatic equipment, joinery and similar equipment in European Parliament buildings in Brussels.

Orders the Parliament to pay the costs.

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[1] - OJ C 269, 10.11.2007.

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Action brought on 7 September 2007 - Entrance Services v Parliament

(Case T-333/07)

Language of the case: French

Parties

Applicant: Entrance Services NV (Vilvoorde, Belgium) (represented by: A. Delvaux and V. Bertrand, lawyers)

Defendant: European Parliament

Form of order sought

Declare the action for annulment admissible;

Annul the decision by which the Parliament rejected the applicant's tender and granted the contract to another tenderer, a decision notified to the applicant on 14 August 2007;

Order the Parliament to pay the costs.

Pleas in law and main arguments

By this action the applicant seeks the annulment of the decision of the Parliament of 14 August 2007 rejecting its tender submitted in the framework of the tender procedure for the conclusion of a contract for repair and maintenance of automatic equipment, joinery and similar equipment in European Parliament buildings in Brussels [(contract for the provision of services 2007-2010) (call for tender No IFIN-BATIBRU-JLD-S0765-00)]. [1]

In support of its action the applicant claims, first, an infringement of Article 10 of the schedule of administrative clauses and of Article 93(1) of the Financial Regulation, [2] in that the Parliament accepted a tender submitted by a tenderer which, according to the applicant, was excluded under Article 10 of the schedule of administrative clauses as a result of a finding by the Commission that it had participated in a cartel.

Second, the applicant maintains that the Parliament infringed Articles 97 and 98 of the Financial Regulation and Article 137 of the Implementing Regulation [3] by requiring tenderers to establish their technical capacity to carry out the contract by means of evidence other than that referred to by those provisions.

Third, the applicant relies on a plea alleging the infringement of Articles 97 and 98 of the Financial Regulation and of Article 135(5) of the Implementing Regulation, in that the Parliament required tenderers to demonstrate their economic and financial capacity to carry out the contract by means of evidence not provided for in those provisions, and in that it rejected the applicant's tender on the ground that it had failed to provide the evidence required.

Finally, the applicant submits that the contested decision should be annulled because it infringes the equality principle laid down in Article 89(1) of the Financial Regulation, in that the Parliament rejected its tender and awarded the contract to another tenderer even though it was in the same situation as the applicant with regard to the non-production of the certifications required by Article 11 of the schedule of administrative clauses.

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[1] - Contract notice published in OJ 2006/S 148-159062.

[2] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

[3] - Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended (OJ 2002 L 357, p. 1).

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Action brought on 31 July 2007 - Evropaïki Dynamiki v Commission

(Case T-300/07)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Annul the Commission's decision of the Direction General for Informatics to reject the bid of the applicant, filed in response to the open Call for Tender ENTR/05/078 - YOUR EUROPE Lot 1 (Editorial Work and Translations) for "Your Europe Portal Management and Maintenance" (OJ 2006/S 143-153057) communicated to the applicant by letter dated 21 May 2007 ("the decision on Lot 1") and to award the contracts to the successful contractor,

annul the Commission's decision (DIGIT) to reject the bid of the applicant filed in response to the open Call for Tender ENTR/05/078 -YOUR EUROPE Lot 2 (Infrastructure Management) for "Your Europe Portal Management and Maintenance" (OJ 2006/S 143-153057) communicated to the applicant by letter dated 13 July 2007 ("the decision on Lot 2") and to award the contracts to the successful contractors;

order the Commission (DIGIT) to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 1 125 000 Euros for Lot 1 and EUR 825 000 Euros for Lot 2;

order the Commission (DIGIT) to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In support of its claims the applicant argues that, in the framework of the tendering procedure ENTR/05/078 YOUR EUROPE Lot 1 (Editorial Work and Translations) for "Your Europe Portal Management and Maintenance" (OJ 2006/S 143-153057) and ENTR/05/078 - YOUR EUROPE Lot 2 (Infrastructure Management) for "Your Europe Portal Management and Maintenance" (OJ 2006/S 143-153057), the contracting authority, DG DIGIT of the European Commission, failed to comply with its obligations foreseen in the Financial Regulation[1], its Implementing Rules and Directive 2004/18/EC[2] as well as the principles of transparency and equal treatment

The applicant moreover submits that the contracting authority committed several manifest errors of assessment which resulted in the rejection of its bid. Furthermore, the contracting authority allegedly infringed its obligation to state reasons for its decision and, in particular, to inform the applicant on the relative merits of the successful tenderer.

The applicant requests, hence, that the decision of the European Commission to reject its bid and to award the contract to the successful tenderer be annulled and that the defendant is ordered to pay all legal expenses related to the proceedings even in case the application is rejected. In the alternative, if the contract has already been executed by the time the Court reached its decision or if it is no longer possible to annul the decision, the applicant requests monetary compensation (damages) of EUR 1 125 000 for Lot 1 and EUR 825 000 for Lot 2 in accordance with Articles 235 and 288 EC.

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[1] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable

to the general budget of the European Communities (OJ L 248, p. 1).

[2] - Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, p. 114).

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ORDONNANCE DU PRÉSIDENT
DE LA TROISIÈME CHAMBRE DU TRIBUNAL

15 octobre 2007 (*)

« Radiation »

Dans l'affaire T-287/07,

cApStAn SPRL, établie à Bruxelles (Belgique), représentée par M^e^ J. Bublot, avocat,

partie requérante,

contre

Commission des Communautés européennes,

partie défenderesse,

ayant pour objet l'annulation de la décision de la Commission, du 22 mai 2007, rejetant l'offre soumise par la requérante dans le cadre d'une procédure d'appel d'offres concernant la post-édition de textes traduits à l'aide du système de traduction automatique de la Commission européenne dans six combinaisons linguistiques (« Services de post-édition PER 2007 ») (JO 2007/S 21-023949),

LE PRÉSIDENT DE LA TROISIÈME CHAMBRE
DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

1 La requérante a déposé, le 25 juillet 2007, une requête au greffe du Tribunal.

2 Par lettre déposée au greffe du Tribunal le 17 septembre 2007, la requérante a informé le Tribunal qu'elle se désistait de son recours. Elle n'a pas présenté de conclusions sur les dépens.

3 Il s'ensuit que, conformément à l'article 99 du règlement de procédure du Tribunal, l'affaire doit être radiée du registre.

4 Conformément à l'article 87, paragraphe 5, troisième alinéa, du règlement de procédure, en cas de désistement et à défaut de conclusions sur les dépens, chaque partie supporte ses propres dépens. Or, en l'espèce, le désistement étant intervenu avant la notification de la requête à la partie défenderesse et avant que celle-ci n'ait pu exposer des dépens, il suffit de décider que la requérante supportera ses propres dépens.

Par ces motifs,

LE PRÉSIDENT DE LA TROISIÈME CHAMBRE DU TRIBUNAL

ordonne :

1) L'affaire T-287/07 est rayée du registre du Tribunal.

2) cApStAn SPRL supportera ses propres dépens.

Fait à Luxembourg, le 15 octobre 2007.

Le greffier	Le président
E. Coulon	J. Azizi

* Langue de procédure : le français.

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Order of the Court of First Instance of 15 October 2007 - cApStAn v Commission

(Case T -287/07) [1]

Language of the case: French

The President of the Third Chamber has ordered that the case be removed from the register.

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[1] - C 223, 22.09.2007

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Action brought on 25 July 2007 - cApStAn v Commission

(Case T-287/07)

Language of the case: French

Parties

Applicant: cApStAn Sprl (Brussels, Belgium) (represented by: J. Bublot, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Annulment of the Commission's rejection decision.

Pleas in law and main arguments

By this action, the applicant seeks the annulment of the Commission's decision of 22 May 2007 rejecting its tender submitted in connection with the tendering procedure 'Post-editing services PER 2007' [1] on account of an absence of evidence of relevant experience.

In support of its application for annulment of the contested decision, the applicant claims that the Commission erred manifestly in its reading of its application because the call for tenders related precisely to its area of activity, which the applicant claims to have stated in its tender. The applicant also states that it had already secured a public contract in that area from the Commission and that the services provided on that occasion were never called in question.

In addition, the applicant claims that the contested decision is based on manifestly incorrect reasons and that that error amounts to a lack of reasoning.

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[1] - OJ 2007/S 21-023949.

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JUDGMENT OF THE COURT OF FIRST INSTANCE (Sixth Chamber)

20 May 2009 (*)

(Public service contracts – Community tender procedure – Transport for Members of the Parliament in chauffeur-driven cars and minibuses during part-sessions in Strasbourg – Rejection of a tenderer's bid – Obligation to state the reasons on which the decision is based – Refusal to disclose the price offered by the successful tenderer – Action for damages)

In Case T–89/07,

VIP Car Solutions SARL, established in Hoenheim (France), represented by G. Welzer and S. Leuvrey, lawyers,

applicant,

v

European Parliament, represented by D. Petersheim and M. Ecker, acting as Agents,

defendant,

ACTION, first, for annulment of the decision by which the Parliament refused to award the applicant the contract in tender procedure PE/2006/06/UTD/1 relating to transport for Members of the Parliament in chauffeur-driven cars and minibuses during part-sessions in Strasbourg and, secondly, for damages,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Sixth Chamber),

composed of A.W.H. Meij, President, V. Vadapalas (Rapporteur) and E. Moavero Milanesi, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 9 December 2008,

gives the following

Judgment

Legal context

1 Procedures for the award of service contracts by the European Parliament are subject to Title V of Part 1 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation') and to Title V of Part 1 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) ('the Implementing Rules'). Those provisions are based on the Community directives in the field, in particular, as regards service contracts, on Council 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended in particular by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1), now repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 Article 100(2) of the Financial Regulation states:

> ‘The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.
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> However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.’

3 Article 149(3) of the version of the Implementing Rules applicable to the facts of the case provides:

> ‘In the case of contracts awarded by the Community institutions on their own account, under Article 105 of the Financial Regulation, the contracting authority shall inform all unsuccessful tenderers or candidates, simultaneously and individually, as soon as possible after the award decision and within the following week at the latest, by mail and fax or e-mail, that their application or tender has not been accepted; specifying in each case the reasons why the tender or application has not been accepted.
>
> The contracting authority shall, at the same time as the unsuccessful candidates or tenderers are informed that their tenders or applications have not been accepted, inform the successful tenderer of the award decision, specifying that the decision notified does not constitute a commitment on the part of the contracting authority.
>
> Unsuccessful tenderers or candidates may request additional information about the reasons for their rejection in writing by mail, fax or e-mail, and all tenderers who have put in an admissible tender may obtain information about the characteristics and relative merits of the tender accepted and the name of the successful tenderer, without prejudice to the second subparagraph of Article 100(2) of the Financial Regulation. The contracting authority shall reply within no more than fifteen calendar days from receipt of the request.
>
> …’

Facts

4 The applicant, VIP Car Solutions SARL, is a hire company providing chauffeur-driven vehicles.

5 In a contract notice published in the Supplement to the *Official Journal of the European Union* of 16 September 2006 (OJ 2006 S 177), the Parliament issued call for tenders PE/2006/06/UTD/1 for chauffeur-driven car and minibus service for Members of the European Parliament during part-sessions in Strasbourg (‘the call for tenders’).

6 Under point IV.2.1 of the invitation to tender the contract was to be awarded to the tender offering best value for money assessed on the following weighted criteria: price (55%), vehicle fleet provided (quantity and quality) (30%), measures taken or specific to the vehicles to meet environmental requirements (7%), staff social policy (6%) and tender presentation (2%).

7 The final date for receipt of tenders or requests to participate was 27 October 2006. Three tenders were deposited within the period prescribed, including that of the applicant. On 6 November 2006 the commission for the opening of tenders declared that the three tenders complied with the invitation to tender.

8 On 30 November 2006, the tender evaluation committee (‘the evaluation committee’) proposed to award the contract to a tenderer other than the applicant; that tenderer having received a total of 566 points, made up as follows: 290 points for the price, 180 points for the vehicle fleet, 42 points for environmental measures, 36 points for social policy and 18 points for tender presentation.

9 The applicant was placed second, with a total of 504 points, made up as follows: 343.5 points for the price, 135 points for the vehicle fleet, 0 points for environmental measures, 18 points for social policy and 8 points for tender presentation.

10 On 3 January 2007, the Parliament awarded the contract to the tenderer proposed by the evaluation

committee ('the successful tenderer').

11 On 9 January 2007, the Parliament sent the following e-mail to the applicant:

> 'Please find attached the letter regarding your tender. You will receive the original of this letter by registered post. Please acknowledge receipt of this [e-mail?].'

12 By means of this unsigned and undated letter attached to the e-mail, the Parliament informed the applicant of the decision not to accept its tender under the invitation to tender ('the contested decision').

13 The contested decision states, inter alia, the following:

> 'The reasons for the rejection of your tender are as follows: tender not tender offering best value for money with regard to the award criteria.
>
> You can obtain additional information on the reasons for the rejection of your tender, without prejudice to a possible legal challenge.
>
> If you apply in writing, you will be able to obtain information on the characteristics and relative advantages of the successful tender and the name of the party to which the contract has been awarded.
>
> However, certain details will not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings ...'

14 By e-mail of 10 January 2007, the applicant replied as follows:

> 'We acknowledge receipt of your [e-mail] regarding the rejection of our tender. However, as you propose, we wish to know the characteristics and relative advantages of the successful tender and the name of the tenderer to which the contract has been awarded. As our tender was not more advantageous in economic terms, could you indicate the hourly rate proposed by the successful company [?]'

15 By letter of 15 January 2007, the applicant again asked the Parliament to notify it of the characteristics and relative advantages of the successful tender, the name of the company to which the contract had been awarded and the price offered by the successful tenderer. It pointed out that at that date it had still not received the original of the registered letter stating that its tender had been rejected.

16 By letter of 23 January 2007, the Parliament replied to the applicant's e-mail of 10 January 2007. Citing Article 100(2) of the Financial Regulation, it recalled the weighted award criteria laid down in the call for tenders and then stated the following:

> 'As the successful tender received the highest marks ... for the above-mentioned criteria taken together (566), it was for that reason classified in first place.
>
> In spite of offering a slightly lower price, your tender received 504 points, and was accordingly placed second.'

17 In that letter the Parliament also notified the applicant of the name of the tenderer to which the contract had been awarded.

18 On 24 January 2007, the Parliament sent the applicant the original of the letter informing it of the decision to reject its tender.

19 By e-mail of 31 January 2007, the Parliament asked the applicant if it had received that letter. By e-mail of the same day the applicant replied that it had not.

20 By letter of 1 March 2007, the applicant pointed out, via its lawyer, that it had offered an exceptional price in the call for tenders and asked for a copy of the bid submitted by the successful tenderer in order to know the price the latter had submitted.

21 By letter of 20 March 2007 addressed to the applicant's lawyer, the Parliament rejected that request, citing the second subparagraph of Article 100(2) of the Financial Regulation, and added the following:

'... We wish to point out that within 48 days of the signing of the contract the call for tender[s] will give rise to the publication, in the *Official Journal of the European Union*, of a contract award notice containing the essential information, such as the price paid.

We note that your "clients know that they had offered an exceptional price".

At any event, we are bound to remind you that price was not the only award criterion. The qualitative and functional criteria are of particular importance for an institution such as ours and may justify a higher cost.

Our assessment "that in spite of offering a slightly lower price" related precisely to that aspect of the invitation to tender; we indicated in particular that although your clients' tender had received the highest score with regard to price, the total score determined by the evaluation committee, which took into account all of the criteria listed in the specifications, did not enable them to win the contract. As they have already been informed, their tender received a total of 504 points, against 566 for that of the tenderer to which the contract has been awarded.'

22 By letter of 23 March 2007, the applicant stated that, since the price criterion counted for 55% in the evaluation of tenders, the award of the contract to a tenderer other than itself was impossible and the refusal to disclose the price offered by the successful tenderer prevented it from verifying the terms on which the contract had been awarded before expiry of the period for bringing proceedings before the Court of First Instance.

23 On 7 April 2007, the contract award notice was published in the Supplement to the Official Journal (OJ 2007 S 69). It indicated that the price offered by the successful tenderer was EUR 26 per hour outside the schedule and EUR 37.50 per hour in accordance with the schedule.

Procedure and forms of order sought

24 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 23 March 2007.

25 As one member of the Chamber was unable to sit in the present case, the President of the Court of First Instance designated another judge to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Sixth Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure laid down in Article 64 of the Rules of Procedure, requested the parties to produce documents. The parties complied with that request within the period prescribed.

27 The parties submitted oral argument and replied to the questions put by the Court at the hearing on 9 December 2008.

28 In its application, the applicant claims that the Court should:

– declare the action admissible;

– annul the contested decision;

– annul all measures adopted subsequently to the contested decision;

– order the Parliament to pay the sum of EUR 500 000 by way of damages;

– order the Parliament to pay one-off costs amounting to EUR 5 000;

– order the Parliament to pay the costs.

29 In its reply, the applicant claims in addition that the Court should:

– instruct the Parliament to organise a proper procedure for calls for tenders.

30 In its defence the Parliament contends that the Court should:

– dismiss the action for annulment;

– dismiss the claim for damages;

– dismiss the application to order the Parliament to pay one-off costs amounting to EUR 5 000;

– order the applicant to pay the costs.

31 In its rejoinder, the Parliament contends in addition that the Court should:

– dismiss the application to instruct it to organise a proper procedure for calls for tenders.

32 At the hearing, in reply to a question from the Court, the applicant withdrew the head of claim in which it had applied for the Parliament to be ordered to pay one-off costs amounting to EUR 5 000; this withdrawal was noted in the minutes of the hearing.

Law

The application for annulment of the contested decision

33 The applicant essentially raises two pleas in law, alleging first infringement of the obligation to provide an adequate statement of reasons and secondly that the refusal to disclose the price offered by the successful tenderer is improper.

The first plea, based on infringement of the obligation to provide an adequate statement of reasons

– Arguments of the parties

34 In its application the applicant notes that in the call for tenders the price criterion counted for 55%, in other words more than half of the total for the award criteria. It emphasises that it offered the lowest price, EUR 31.70 per hour. However, it received only 504 points compared with 566 points for the successful tenderer. The applicant states that it cannot understand this difference in the number of points when it submitted the best tender from the point of view of price. In its view, on mathematical grounds the contract could not be awarded to another tenderer.

35 In its reply, the applicant points out that the Parliament admitted having made a mistake in calculating its total points, which demonstrates that the evaluation committee failed to undertake its duties properly.

36 As regards the criterion of the vehicle fleet, the applicant states that the Parliament had arbitrarily allocated two-thirds of the points to the quantitative aspect and only one-third to the qualitative aspect. It asserts that it had never been informed of that apportionment, which it considers unjustified, as the ownership of the vehicles is not more important than their quality. Since the tenderers all received the same score for the quality criterion, the difference in the number of points between the applicant and the successful tenderer should have been smaller.

37 As regards the criterion relating to environmental measures, the applicant considers it impossible for it to have received a zero score. In fact, like the successful tenderer, it is subject to French legislation on chauffeur-driven transport companies, which requires vehicles to be in an excellent state of mechanical repair and to undergo annual checks. Hence, it maintains that all its vehicles are recent models fitted with particle filters. In its opinion, the difference of 42 points cannot therefore be justified on the sole ground that the tenderer had signed the anti-pollution charter of the Mairie de Paris.

38 With regard to the social policy criterion, one of the two open-ended contracts of the successful

tenderer was, according to the applicant, in fact a fixed-term contract for additional work, or even a temporary contract. The contract in question was entitled 'Intermittent employment contract for an unlimited period', two terms which, in the opinion of the applicant, are antonyms. Moreover, according to the applicant, the employment contracts of both the applicant and the successful tenderer come from the national association of chauffeur-driven vehicle undertakings. Hence the difference in the number of points between the two tenderers was not objectively justified.

39 Finally, the applicant maintains that the tender presentation criterion related to the form of the tender and not to its substance. The tender of the successful tenderer could therefore not be 'unquestionably better' on the basis of that criterion. Furthermore, the applicant was the only one to submit its tender in the form of a DVD in addition to a presentation which complied with all the required formalities. Nevertheless, it received a lower score than the successful tenderer.

40 It its defence, the Parliament states that the award criteria other than the price had a weighting of 45% and could therefore affect the outcome of the evaluation of the various tenders. It maintains that it operated objectively when examining the tenders.

41 In that regard, the Parliament states that the evaluation committee awarded a score in respect of each criterion from 0 to 10, the score obtained then being multiplied by the percentage for the criterion. As regards the two main criteria, namely the price and the quantitative aspect of the vehicle fleet, in order to be objective the evaluation committee decided to evaluate the score of the current contract, which was neutral in relation to the contract to be awarded, and to multiply this first objective score by the ratio between the services provided by the preceding contractor and those offered by each of the tenderers.

42 For the score relating to the price the evaluation committee thus considered that the price under the existing contract, that is to say EUR 33, should be regarded as reasonable and it awarded it a mark of 6. As the prices offered by the applicant and the successful tenderer were respectively EUR 31.70 and EUR 37.50 per hour, the following results were obtained:

– for the applicant: 33: 31.70 x 6 x 55 = 343.5 points;

– for the successful tenderer: 33: 37.5 x 6 x 55 = 290.4 points.

43 With regard to the vehicle fleet criterion, according to the Parliament the evaluation committee considered that the quantitative aspect took precedence and allocated two thirds of the score to it, in other words 20 points. A score of 6 was awarded to the fleet of 60 vehicles offered by the previous contractor. For the applicant the evaluation committee recorded a fleet of 70 vehicles (60 cars and 10 minibuses) and for the successful tenderer a fleet of 60 vehicles. According to the Parliament, for the sake of comparability, account was also taken of the direct availability of the vehicles. In that regard, a coefficient of 0.5 was applied to the applicant's vehicle fleet because 67 of the 70 vehicles were to be leased from another company. This evaluation therefore produced the following results:

– for the applicant: 70: 60 x 6 x 0.5 x 20 = 70 points;

– for the successful tenderer: 60: 60 x 6 x 1 x 20 = 120 points.

44 As regards the criterion relating to the quality of the vehicle fleet, the applicant and the successful tenderer both received a score of 10, which after weighting for this criterion led to the award of the following points:

– for the applicant: 6 x 10 = 60 points;

– for the successful tenderer: 6 x 10 = 60 points.

45 The Parliament admits that the evaluation committee made a mistake in recording 135 points for the criterion relating to the applicant's vehicle fleet. In fact, the number of points was 130, which means that the applicant received a total of 499 points and not 504 points.

46 The Parliament maintains that only the successful tenderer submitted information for the criterion relating to environmental measures, namely that it complied with the anti-pollution charter of the Mairie de Paris and that its vehicles, of recent manufacture, were fitted with particle filters, which

led to the award of the following points:

– for the applicant: 0 x 7 = 0 points;

– for the successful tenderer: 6 x 7 = 42 points.

47 With regard to the social policy criterion, the Parliament asserts that the successful tenderer proposed two types of open-ended employment contracts, one of which was for intermittent staff, whereas the applicant's drivers had only fixed-term employment contracts. The Parliament argues that, taking account of the weighting applied to this criterion, the difference between the two tenders was reflected in the following allocation of points:

– for the applicant: 3 x 6 = 18 points;

– for the successful tenderer: 6 x 6 = 36 points.

48 Finally, as regards the tender presentation criterion, in the opinion of the Parliament the successful tenderer's presentation was undeniably better, so that, having regard to the weighting attached to this criterion, the following points were awarded:

– for the applicant: 4 x 2 = 8 points;

– for the successful tenderer: 9 x 2 = 18 points.

49 The total number of points awarded to each tender was therefore made up as follows:

– for the applicant: 343 + 70 + 60 + 0 + 18 + 8 = 499 points;

– for the successful tenderer: 290 + 120 + 60 + 42 + 36 + 18 = 566 points.

50 The Parliament states that, upon verification, the authorising officer realised that the vehicle fleet of the successful tenderer consisted of 70 vehicles, leading in fact to the award of a total of 586 points.

51 The Parliament thus maintains that the tender of the successful tenderer offered distinct qualitative advantages over that of the applicant, whose tender was better only on price. In that regard, the Parliament notes that the contract was to be awarded to the tenderer offering best value for money. Since the procedure did not involve tenderers being classified solely on the basis of price, the contract could not be awarded directly to the financially lowest tender.

52 In its reply, the Parliament adds that the applicant appears to confuse a lack of objectivity with the discretion of the contracting authority, with regard to which review by the Court of First Instance must be confined to verifying that no manifest error of assessment has been committed.

53 As regards the criterion relating to the vehicle fleet, the Parliament, citing the case-law of the Court of Justice, argues that an evaluation committee may decide to attach specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the notice were prepared, provided first that that decision does not alter the criteria for the award of the contract set out in the contract documents or the contract notice, secondly that it does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation, and thirdly that it was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers. According to the Parliament, the applicant has not shown that these conditions were not met in the present case.

54 As to environmental measures, the Parliament notes that the applicant's tender did not state how it satisfied that criterion, which explains its zero score.

55 Finally, as regards the last award criterion, the Parliament maintains that a presentation in the form of a DVD does not of itself justify considering the applicant's tender as being better presented than that of the successful tenderer. The deciding factor, according to the Parliament, was the attractive and convincing nature of the tender and not the medium.

– Findings of the Court

56 It must be noted at the outset that the Parliament, in the same way as the other institutions, has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. The Court's review of the exercise of that discretion is therefore limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (see, by analogy, Case T–211/02 *Tideland Signal* v *Commission* [2002] ECR II–3781, paragraph 33, and judgment of 10 September 2008 in Case T–465/04 *Evropaïki Dynamiki* v *Commission*, not published in the ECR paragraph 45).

57 Under Article 1 of the administrative specifications of the invitation to tender, the award of the contract in question was governed by the Financial Regulation and the Implementing Rules.

58 Consequently, as regards the statement of reasons for the contested decision by which it rejected the applicant's tender, the Parliament was under an obligation in the present case to apply Article 100 (2) of the Financial Regulation and Article 149(3) of the Implementing Rules.

59 It follows from these articles and from the case-law of the Court of First Instance that the Parliament will meet its obligation to state reasons if it satisfies itself, first, that it has immediately notified all rejected tenderers of the reasons for the rejection of their tender and then provides tenderers who submitted an admissible tender and who expressly request it with the characteristics and relative advantages of the successful tender and the name of the tenderer to which the contract was awarded within fifteen calendar days of receipt of a written request (see, to that effect and by analogy, judgment of 10 September 2008 in Case T–465/04 *Evropaïki Dynamiki* v *Commission*, cited in paragraph 56 above, paragraph 47).

60 Such a manner of proceeding satisfies the purpose of the duty to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its supervisory jurisdiction (Case T–465/04 *Evropaïki Dynamiki* v *Commission*, cited in paragraph 56 above, paragraph 48).

61 Moreover, it must be emphasised that where, as in the present case, a Community institution has broad powers of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to provide adequate reasons for its decisions. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present (Case C–269/90 *Technische Universität München* [1991] ECR I–5469, paragraph 14; Case T–241/00 *Le Canne* v *Commission* [2002] ECR II–1251, paragraphs 53 and 54; and Case T–465/04 *Evropaïki Dynamiki* v *Commission*, cited in paragraph 56 above, paragraph 54).

62 It should also be pointed out that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see Case C–367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I–1719, paragraph 63 and the case-law cited).

63 Finally, the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (Case C–17/99 *France* v *Commission* [2001] ECR I–2481, paragraph 35, and judgment of 12 November 2008 in Case T–406/06 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 47).

64 In this regard, it must be considered that in its application the applicant essentially claims infringement of the obligation to state reasons, in that it was unable to understand why it was not awarded the contract, having offered the lowest price in circumstances where that criterion counted for 55% in the evaluation of tenders. It must also be noted that in its defence the Parliament understood the

applicant's line of argument as complaining that the Parliament had not stated reasons for the contested decision by which it refused to award the contract to the applicant.

65 In any event, according to settled case-law, the statement of the reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded. Accordingly, the fact that a statement of reasons is lacking or inadequate, hindering that review of legality, constitutes a matter of public interest which may, and even must, be raised by the Community judicature of its own motion (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraphs 23 and 24, and judgment of 10 September 2008 in Case T-272/06 *Evropaïki Dynamiki* v *Court of Justice*, not published in the ECR, paragraphs 27 and 28 and the case-law cited).

66 Hence, in the present case, as the applicant submitted an admissible tender within the meaning of Article 149(3) of the Implementing Rules, it is necessary to examine not only the contested decision but also the letter of 23 January 2007 sent to the applicant in reply to its express request for additional information on the decision to award the contract in question, in order to establish whether the Parliament met the requirement to state adequate reasons laid down in the Financial Regulation and in the Implementing Rules.

67 It must be found, first of all, that in the contested decision the Parliament confined itself, in accordance with the first subparagraph of Article 100(2) of the Financial Regulation, to stating the reasons for rejecting the applicant's tender. It indicated that the applicant's tender was 'not the tender offering the best value for money with regard to the award criteria'.

68 Then, in its letter of 23 January 2007, the Parliament merely indicated the following:

> 'As the successful tender received the highest marks ... for the above-mentioned criteria taken together (566), it was for that reason classified in first place.
>
> In spite of offering a slightly lower price, your tender received 504 points, and was accordingly placed second.'

69 Hence, although the Parliament replied within the period laid down in Article 149(3) of the Implementing Rules, it did not give the applicant any information on the characteristics and relative advantages of the successful tender, except that the price proposed by the applicant was slightly lower, despite being required to provide such information under the Financial Regulation and the Implementing Rules.

70 Such a reply does not disclose in a clear and unequivocal fashion the reasoning followed by the Parliament so as, on the one hand, to make the applicant aware of the reasons for the measure and thereby enable it to defend its rights and, on the other, to enable the Court to exercise its power of review.

71 Moreover, in the circumstances of the case, that information was all the more necessary as the price offered by the applicant was lower than that offered by the successful tenderer and the price criterion was allocated a weight of 55% in the overall evaluation of the tenders. Hence, the applicant was not in possession of any fact that would enable it to understand why its tender had not been successful in the tendering procedure.

72 It should be added that the Parliament sent the applicant a further letter on 20 March 2007 in reply to its letter of 1 March 2007.

73 In that regard, according to the case-law, if the institution concerned sends a letter in response to a request from the applicant seeking additional explanations about a decision before instituting proceedings but after the date laid down in Article 149(3) of the Implementing Rules, that letter may also be taken into account when examining whether the statement of reasons in the case in question is adequate. The requirement to state reasons must be assessed in the light of the information which the applicant possessed at the time of instituting proceedings, it being understood, however, that the institution is not permitted to replace the original statement of reasons by an entirely new statement (see to that effect and by analogy, Case T-465/04 *Evropaïki Dynamiki* v *Commission*, cited in paragraph 56 above, paragraph 59).

74 However, it must be stated that the letter of 20 March 2007 contains no information on the characteristics and relative advantages of the successful tender. In fact, the Parliament merely repeated what it had already told the applicant in its letter of 23 January 2007.

75 Finally, it must be noted that the Parliament provided information on the statement of reasons for the contested decision in the course of the court proceedings. In its defence statement it details the points awarded to the applicant and to the successful tenderer for each of the award criteria and the reasons which, in its opinion, justified those scores.

76 However, the fact that the Parliament provided the reasons for that decision in the course of the proceedings does not compensate for the inadequacy of the initial statement of reasons for the contested decision. It is settled case-law that the reasons for a decision cannot be explained for the first time ex post facto before the Court, save in exceptional circumstances which, in the absence of urgency, are not present in this case (see, to that effect, Case T–61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II–1931, paragraph 131, and judgment of 24 September 2008 in Case T–264/06 *DC-Hadler Networks* v *Commission*, not published in the ECR, paragraph 34).

77 It follows from all of the foregoing that the decision by which the Parliament refused to award the contract to the applicant is vitiated by the absence of an adequate statement of reasons in accordance with Article 100(2) of the Financial Regulation and Article 149(3) of the Implementing Rules.

78 Accordingly, the first plea must be upheld.

The second plea, based on the impropriety of the refusal to disclose the price offered by the successful tenderer.

– Arguments of the parties

79 The applicant maintains that the refusal to disclose the price proposed by the successful tenderer is improper. First, according to the applicant, the price offered by that tenderer does not fall within the scope of the second subparagraph of Article 100(2) of the Financial Regulation. The applicant contends that its disclosure would not harm the successful tenderer. Moreover, in a context of transparency, it would be normal to know the precise reasons for the rejection of a tender for a contract of this size.

80 The applicant also points out that the price offered by the successful tenderer had to be published in the Supplement to the Official Journal within 48 days of signature of the contract. Hence, disclosure of that price could not harm the legitimate business interests of the successful tenderer or distort fair competition.

81 The Parliament's refusal to meet the applicant's request also had the effect of shortening the period for bringing proceedings before the Court.

82 The Parliament replies that Article 100(2) of the Financial Regulation does not imply an absolute obligation to disclose the price offered by the successful tenderer. It contends that the 'characteristics and relative advantages of the successful tender' consist rather in a comparative description of the tenders. Accordingly, the contracting authority retains a degree of discretion as regards the information it is required to disclose to the unsuccessful tenderer.

83 Moreover, it is legitimate to regard the price as one of the factors whose disclosure would harm the business interests of an undertaking, within the meaning of the second subparagraph of Article 100 (2) of the Financial Regulation. Such information should therefore be disclosed only as a last resort. The Parliament recognises, however, that the price offered by the successful tenderer was contained in the contract award notice published in the Supplement to the Official Journal.

84 Moreover, the refusal to disclose the price offered by the successful tenderer did not prevent the applicant from bringing proceedings before the Court within the prescribed period.

85 In reply to a question put by the Court at the hearing, the Parliament developed its line of argument by stating that, until publication of the award notice, the contract could still have been annulled as a result of challenges brought before signature of the contract. In that case, non-disclosure of the

price would make it possible to prevent the other tenderers from knowing that aspect of the tender of the successful tenderer, which could therefore resubmit its tender on the same terms.

– Findings of the Court

86 As a preliminary matter, it must be pointed out that the Parliament, in response to the applicant's request of 10 January 2007 for additional information, merely indicated that the price offered by the successful tenderer was slightly higher than the applicant's. That price, that is to say, EUR 26 per hour outside the schedule and EUR 37.50 in accordance with the schedule, was disclosed publicly in the contract award notice of 7 April 2007.

87 However, pursuant to the first subparagraph of Article 100(2) of the Financial Regulation, the Parliament was required to notify the unsuccessful tenderer, upon written request, of the characteristics and relative advantages of the successful tender.

88 Hence, in response to the applicant's written request the Parliament was obliged to inform it of the price offered by the successful tenderer, that price being one of the characteristics and one of the relative advantages of the successful tender, particularly as, in the circumstances of the case, this criterion counted for 55% in the evaluation of the tenders.

89 None of the arguments put forward by the Parliament is capable of calling that finding into question.

90 First, the argument that the contracting authority retains a degree of discretion does not justify its refusal to disclose to the unsuccessful tenderer who requests it in writing the price offered by the successful tenderer. In that regard, the Parliament cannot simply state that the price is not one of the characteristics and relative advantages of the tender of an undertaking to which a contract is awarded where, as indicated above, that criterion counted in the present case for 55% in the evaluation of the tenders.

91 Secondly, while it is true that pursuant to the second subparagraph of Article 100(2) of the Financial Regulation certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings, in its statement of defence the Parliament does not explain how, in the present case, disclosure of the price offered by the successful tenderer would harm its business interests and, moreover, it notes that the price was mentioned in the contract award notice.

92 Thirdly, the argument that the contracting authority may decide, as it is permitted to do under Article 101 of the Financial Regulation, to abandon the procurement or cancel the award procedure before the contract is signed does not absolve the Parliament, in the circumstances of the case, from notifying the applicant of the price offered by the successful tenderer. To accept such an argument would be tantamount to rendering meaningless the obligation to provide a statement of reasons laid down in the first subparagraph of Article 100(2) of the Financial Regulation and in Article 149(3) of the Implementing Rules.

93 In these circumstances, the second plea must be upheld.

94 It follows from all of the foregoing that the contested decision must be annulled.

The application for annulment of measures adopted subsequently to the contested decision

95 In its third head of claim, the applicant asks the Court to annul all the measures adopted subsequently to the contested decision.

96 In this regard, It should be noted that, under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the procedure before the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure, all applications must indicate the subject-matter of the dispute and contain a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to exercise its power of review. In order to guarantee legal certainty and the sound administration of justice, it is necessary that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (orders in Case T–85/92 *De Hoe* v *Commission* [1993] ECR

II–523, paragraph 20, and Case T–294/04 *Internationaler Hilfsfonds* v *Commission* [2005] ECR II–2719, paragraph 23).

97 In the present case, the applicant does not specify the measures to which its third head of claim relates and does not put forward any arguments in support of its request.

98 Accordingly, the third head of claim must be dismissed as inadmissible.

The claim for compensation

Arguments of the parties

99 In its application the applicant claims that the Parliament should be ordered to pay EUR 500 000 in damages.

100 In its reply, the applicant points out that it met all the conditions for award of the contract. Consequently, the Parliament infringed all of the rules of law governing the award of the contract and the applicant's claim for damages is admissible.

101 With regard to the damage sustained, the applicant states that it suffered economically by not being the undertaking to which the contract was awarded. It was unable to benefit from the advantages that it was legitimately entitled to expect.

102 The Parliament contends that the applicant's claim for damages is inadmissible.

Findings of the Court

103 According to settled case-law, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution can be identified, the reasons for which the applicant considers there to be a causal link between that conduct and the damage it claims to have suffered, and the nature and extent of that damage (Case T–38/96 *Guérin automobiles* v *Commission* [1997] ECR II–1223, paragraph 42, and Case T–19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II–315, paragraph 65).

104 In the present case, it must be found that the claim for damages contained in the application, which is merely the subject of a head of claim, lacks even the most basic details.

105 Even supposing that the application stated the evidence from which the conduct alleged against the Parliament can be identified, it is silent as to the nature and character of the alleged damage and the reasons for which the applicant considers there to be a causal link between that conduct and the damage.

106 Furthermore, and even supposing that it would have been admissible to do so, the applicant has not in fact attempted to remedy these omissions in its reply.

107 It follows that as far as the claim for damages is concerned the application does not meet the conditions laid down in Article 44(1) (c) of the Rules of Procedure.

108 In those circumstances, the claim for damages must be declared inadmissible.

The request to instruct the Parliament to organise a proper procedure for calls for tenders

109 At the stage of the reply, the applicant asked the Court to instruct the Parliament to organise a proper procedure for calls for tenders.

110 Under Article 44(1)(c) of the Rules of Procedure an applicant is required to state in the application the subject-matter of the proceedings and the form of order sought. Although Article 48(2) of those rules authorises, in certain circumstances, new pleas in law to be introduced in the course of proceedings, the provision cannot in any circumstances be interpreted as authorising the applicant to bring new claims before the Court and thereby to modify the subject-matter of the proceedings (Case T–28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II–2285, paragraph 43, and

Case T–2/99 *T. Port* v *Council* [2001] ECR II–2093, paragraph 34; see also, by analogy, Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3).

111 It follows that the head of claim requesting that the Court instruct the Parliament to organise a proper procedure for calls for tenders must be dismissed as inadmissible.

112 For the sake of completeness, it should be noted that in an action for annulment founded on Article 230 EC, the jurisdiction of the Community judicature is confined to reviewing the legality of the contested measure and that, according to settled case-law, the Court cannot, in the exercise of its jurisdiction, issue directions to the Community institutions (Case C–5/93 P *DSM* v *Commission* [1999] ECR I–4695, paragraph 36, and Case T–145/98 *ADT Projekt* v *Commission* [2000] ECR II–387, paragraph 83). If the contested measure is annulled, it is for the institution concerned to adopt, in accordance with Article 233 EC, the necessary measures to comply with the judgment annulling that measure (Case T–67/94 *Ladbroke Racing* v *Commission* [1998] ECR II–1, paragraph 200, and *Evropaïki Dynamiki* v *Commission*, cited in paragraph 56 above, paragraph 35).

Costs

113 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament has been unsuccessful, and the applicant has applied for costs, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Sixth Chamber)

hereby:

1. Annuls the decision by which the European Parliament refused to award the contract under tender procedure PE/2006/06/UTD/1 to VIP Car Solutions SARL;

2. Dismisses the action as to the remainder;

3. Orders the Parliament to pay the costs.

Meij Vadapalas Moavero Milanesi

Delivered in open court in Luxembourg on 20 May 2009.

[Signatures]

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* Language of the case: French.

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Case T-89/07

VIP Car Solutions SARL

v

European Parliament

(Public service contracts – Community tender procedure – Transport for Members of the Parliament in chauffeur-driven cars and minibuses during part-sessions in Strasbourg – Rejection of a tenderer's bid – Duty to state reasons – Refusal to disclose the price offered by the successful tenderer – Action for damages)

Summary of the Judgment

1. *European Communities' public procurement – Conclusion of a contract following a call for tenders – Discretion of the institutions – Judicial review – Limits*

2. *Acts of the institutions – Statement of reasons – Obligation – Scope – Decision, in an award procedure for a public service contract, to reject a tender*

   (Art. 253 EC; Council Regulation No 1605/2002, Art. 100(2); Commission Regulation No 2342/2002, Art. 149(3))

3. *Procedure – Application initiating proceedings – Formal requirements*

   (Statute of the Court of Justice, Arts 21, first para., and 53, first para.; Rules of Procedure of the Court of First Instance, Art. 44(1)(c))

4. *Procedure – Application initiating proceedings – Subject-matter of the dispute*

   (Rules of Procedure of the Court of First Instance, Arts 44(1)(c) and 48(2))

5. *Actions for annulment – Jurisdiction of the Community judicature – Claim seeking that directions be issued to an institution – Inadmissibility*

   (Arts 230 EC and 233 EC)

1. The Parliament has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. The Court's review of the exercise of that discretion is therefore limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers.

   (see para. 56)

2. It follows from Article 100(2) of Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities and Article 149(3) of Regulation No 2342/2002 laying down detailed rules for the implementation of the Financial Regulation that the Community institution will meet its obligation to state reasons for its decision, in an award procedure for a public services contract, to reject a tender, if it satisfies itself, first, that it has immediately notified all rejected tenderers of the reasons for the rejection of their tender and then provides tenderers who submitted an admissible tender and who expressly request it with the characteristics and relative advantages of the successful tender and the name of the tenderer to which the contract was awarded within 15 calendar days of receipt of a written request.

Where a Community institution has broad powers of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to provide adequate reasons for its decisions. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.

If the institution concerned sends a letter in response to a request from the applicant seeking additional explanations about a decision before instituting proceedings but after the date laid down in Article 149(3) of Regulation No 2342/2002, that letter may also be taken into account when examining whether the statement of reasons in the case in question is adequate. The requirement to state reasons must be assessed in the light of the information which the applicant possesses at the time of instituting proceedings, it being understood, however, that the institution is not permitted to replace the original statement of reasons by an entirely new statement.

However, the fact that the institution concerned provided the reasons for the decision to reject a tender in the course of the proceedings does not compensate for the inadequacy of the initial statement of reasons for that decision. The reasons for a decision cannot be explained for the first time ex post facto before the Court, save in exceptional circumstances.

(see paras 59, 61, 73, 76)

3. Under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the procedure before the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications must indicate the subject–matter of the dispute and contain a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to exercise its power of review. In order to guarantee legal certainty and the sound administration of justice, it is necessary that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself.

   In that context, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution can be identified, the reasons for which the applicant considers there to be a causal link between that conduct and the damage it claims to have suffered, and the nature and extent of that damage.

(see paras 96, 103)

4. Under Article 44(1)(c) of the Rules of Procedure of the Court of First Instance an applicant is required to state in the application the subject-matter of the proceedings and the form of order sought. Although Article 48(2) of those rules authorises, in certain circumstances, new pleas in law to be introduced in the course of proceedings, the provision cannot in any circumstances be interpreted as authorising the applicant to bring new claims before the Community Courts and thereby to modify the subject-matter of the proceedings.

(see para. 110)

5. In an action for annulment founded on Article 230 EC, the jurisdiction of the Community judicature is confined to reviewing the legality of the contested measure and the Court cannot, in the exercise of its jurisdiction, issue directions to the Community institutions. If the contested measure is annulled, it is for the institution concerned to adopt, in accordance with Article 233 EC, the necessary measures to comply with the judgment annulling that measure.

(see para. 112)

Judgment of the Court of First Instance of 20 May 2009 — VIP Car Solutions v Parliament

(Case T-89/07) [1]

(Public service contracts — Tendering procedure concerning a chauffeur driven car and minibus service for Members of the European Parliament during sessions in Strasbourg — Rejection of a tender — Obligation to state reasons — Refusal to disclose the price proposed by the successful tenderer — Action for damages)

(2009/C 153/68)

Language of the case: French

Parties

Applicant: VIP Car Solutions SARL (Hoenheim, France) (represented by: G. Welzer and S. Leuvrey, lawyers)

Defendant: European Parliament (represented by: D. Petersheim and M. Ecker, Agents)

Re:

First, annulment of the decision of the Parliament to refuse to award to the applicant the public contract which was the subject of tendering procedure PE/2006/06/UTD/1 concerning a chauffeur-driven car and minibus service for Members of the European Parliament during sessions in Strasbourg and, second, a claim for damages.

Operative part of the judgment

The Court:

1. *Annuls the decision by which the European Parliament refused to award to VIP Car Solutions SARL the public contract which was the subject of tendering procedure PE/2006/06/UTD/1;*

2. *Dismisses the action as to the remainder;*

3. *Orders the Parliament to pay the costs.*

[1] OJ C 117, 29.5.2007.

Judgment of the Court of First Instance of 7 May 2009 — Klein Trademark Trust v OHIM — Zafra Marroquineros (CK CREACIONES KENNYA)

(Case T-185/07) [1]

(Community trade mark — Opposition proceedings — Application for the Community word mark CK CREACIONES KENNYA — Earlier Community figurative mark CK Calvin Klein and earlier national figurative marks CK — Relative ground for refusal — No likelihood of confusion — No similarity of the signs — Article 8(1)(b) of Regulation (EC) No 40/94)

(2009/C 153/69)

Language of the case: Spanish

Parties

Applicant: Calvin Klein Trademark Trust (Wilmington, Delaware, United States) (represented by: T. Andrade Boué, I. Lehmann Novo and A. Hernández Lehmann, lawyers)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: Ó. Mondéjar Ortuño, acting as Agent)

Other party to the proceedings before the Board of Appeal of OHIM, intervener before the Court of First Instance: Zafra Marroquineros, SL (Caravaca de la Cruz, Spain) (represented by: J. Martín Álvarez, lawyer)

Re:

ACTION brought against the decision of the Second Board of Appeal of OHIM of 29 March 2007 (Case R 314/2006-2), concerning opposition proceedings between Calvin Klein Trademark Trust and Zafra Marroquineros, SL.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders Calvin Klein Trademark Trust to pay the costs.*

[1] OJ C 170, 21.7.2007.

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Action brought on 23 March 2007 - VIP Car Solutions v Parliament

(Case T-89/07)

Language of the case: French

Parties

Applicant: VIP Car Solutions (Hoenheim, France) (represented by G. Welzer, lawyer)

Defendant: European Parliament

Form of order sought

The Court is asked to:

annul the decision of the European Parliament not to award the contract PE/2006/06/UTD/1 - transport for Members of the European Parliament during sessions in Strasbourg, notified on 24 January 2007;

annul all subsequent acts;

order the Parliament to pay the sum of EUR 500 000 as damages;

order the Parliament to pay the costs of the legal proceedings;

order the Parliament to pay one-off costs amounting to EUR 5 000

Pleas in law and main arguments

The applicant challenges the decision of the European Parliament rejecting its tender in tender procedure PE/2006/06/UTD/1 - transport for Members of the European Parliament during sessions in Strasbourg. [1]

In support of its action, the applicant relies, first, on an infringement of the award criteria contained in the call for tenders, particularly, concerning price inasmuch as it claims to have offered the lowest price and that that criteria should have accounted for 55% in the award of the contract.

Moreover, the applicant asserts that the contested decision breached Article 100 of the Financial Regulation, [2] under which certain details need not be disclosed where disclosure would harm the legitimate business interests of private undertakings or could distort fair competition between those undertakings. According to the applicant, the information which it requested, namely the price offered by the successful tenderer, does not fall within the scope of the Article and, consequently, the refusal to disclose it to the applicant is improper.

_____

[1] - Contract notice 'Chauffeur-driven car and minibus service for Members of the European Parliament during part sessions in Strasbourg', OJ 2006 S 177-187988

[2] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

**Judgment of the Court (First Chamber)
of 24 January 2008**

Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v Dimos Alexandroupolis and Others. Reference for a preliminary ruling: Symvoulio tis Epikrateias - Greece. Directive 92/50/EEC - Public service contracts - Carrying out of a project in respect of the cadastre, town plan and implementing measure for a residential area - Criteria which may be accepted as criteria for qualitative selection' or award criteria' - Economically most advantageous tender - Compliance with the award criteria set out in the contract documents or contract notice - Subsequent determination of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice - Principle of equal treatment of economic operators and obligation of transparency. Case C-532/06.

In Case C532/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 28 November 2006, received at the Court on 29 December 2006, in the proceedings

Emm. G. Lianakis AE,

Sima Anonymi Techniki Etairia Meleton kai Epivlepseon,

Nikolaos Vlachopoulos

v

Dimos Alexandroupolis,

Planitiki AE,

Aikaterini Georgoula,

Dimitrios Vasios,

N. Loukatos kai Synergates AE Meleton,

Eratosthenis Meletitiki AE,

A. Pantazis - Pan. Kyriopoulos kai syn/tes OS Filon OE,

Nikolaos Sideris,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of Chamber, A. Tizzano, A. Borg Barthet, M. Ilei and E. Levits, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

- N. Loukatos kai Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis - Pan. Kyriopoulos kai syn/tes OS Filon OE and Nikolaos Sideris, by E. Konstantopoulou and P.E. Bitsaxis, dikigori,

- the Commission of the European Communities, by M. Patakia and D. Kukovec, acting as Agents,

gives the following

Judgment

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

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Read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.

1. This reference for a preliminary ruling concerns, in essence, the interpretation of Articles 23(1), 32 and 36 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) (Directive 92/50').

2. The reference has been made in the context of two sets of proceedings brought by (1) the consortium of consultancy firms and experts comprising Emm. G. Lianakis AE (universal successor in title to Emm. Lianakis EPE), Sima Anonymi Techniki Etairia Meleton kai Epivlepseon and Nikolaos Vlachopoulos (the Lianakis consortium') and (2) the consortium of Planitiki AE, Aikaterini Georgoula and Dimitrios Vasios (the Planitiki consortium'), against Dimos Alexandroupolis (Municipality of Alexandroupolis) and the consortium of N. Loukatos kai Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis - Pan. Kyriopoulos kai syn/tes (Filon OE) - Nikolaos Sideris (the Loukatos consortium'), concerning the award of a contract to carry out a project in respect of the cadastre, town plan and implementing measure for part of the Municipality of Alexandroupolis.

Legal context

3. Directive 92/50 coordinates the procedures for the award of public service contracts.

4. To that end, the Directive determines which contracts must be subject to an award procedure and the procedural rules to be followed, including, in particular, the principle of equal treatment of economic operators, the criteria for the qualitative selection for operators (qualitative selection criteria') and the criteria for the award of contracts (award criteria').

5. Thus, Article 3(2) of Directive 92/50 provides that [c]ontracting authorities shall ensure that there is no discrimination between different service providers'.

6. Article 23(1) of the Directive provides that [c]ontracts shall be awarded on the basis of the criteria laid down in Chapter 3 [namely Articles 36 and 37], taking into account Article 24, after the suitability of the service providers not excluded under Article 29 has been checked by the contracting authorities in accordance with the criteria referred to in Articles 31 and 32'.

7. According to Article 32 of the Directive:

1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

(a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services;

(b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided:

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(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

(d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the tool, plant or technical equipment available to the service provider for carrying out the services;

(f) a description of the service provider's measures for ensuring quality and his study and research facilities;

...'

8. Article 36 of Directive 92/50 provides:

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) the lowest price only.

2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the contract notice the award criteria which it intends to apply, where possible in descending order of importance.'

The dispute in the main proceedings and the question referred for a preliminary ruling

9. In 2004, the Municipal Council of Alexandroupolis issued a call for tenders for a contract to carry out a project in respect of the cadastre, town plan and implementing measure for the Palagia area, a part of Alexandroupolis with fewer than 2 000 inhabitants. The budget for the project was EUR 461 737.

10. The contract notice referred to the award criteria in order of priority: (1) the proven experience of the expert on projects carried out over the last three years; (2) the firm's manpower and equipment; and (3) the ability to complete the project by the anticipated deadline, together with the firm's commitments and its professional potential.

11. Thirteen consultancies responded to the call for tenders, including in particular the Lianakis and Planitiki consortia, and the Loukatos consortium.

12. During the evaluation procedure, in order to evaluate the tenderers' bids, the project award committee of the Municipality of Alexandroupolis (the Project Award Committee') defined the weighting factors and sub-criteria in respect of the award criteria referred to in the contract notice.

13. Accordingly, it set weightings of 60%, 20% and 20% for each of the three award criteria referred to in the contract notice.

14. In addition, it stipulated that experience (first award criterion) should be evaluated by reference to the value of completed projects. Thus, for experience on projects worth up to EUR 500 000, a tenderer would be awarded 0 points; between EUR 500 000 and EUR 1 000 000, 6 points; between EUR 1 000 000 and EUR 1 500 000, 12 points; and so on up to a maximum score of 60 points for experience on projects worth over EUR 12 000 000.

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15. A firm's manpower and equipment (second award criterion) were to be assessed by reference to the size of the project team. A tenderer would therefore be awarded 2 points for a team of 1 to 5 persons, 4 points for a team of 6 to 10 persons, and so on up to a maximum score of 20 points for a team of more than 45 persons.

16. Finally, the Project Award Committee decided that the ability to complete the project by the anticipated deadline (third award criterion) should be assessed by reference to the value of the firm's commitments. Accordingly, a tenderer would be awarded the maximum score of 20 points for work worth less than EUR 15 000; 18 points for work worth between EUR 15 000 and EUR 60 000; 16 points for work worth between EUR 60 000 and EUR 100 000; and so on down to a minimum score of 0 points for work worth more than EUR 1 500 000.

17. In application of those rules, the Project Award Committee allocated first place to the Loukatos consortium (78 points), second place to the Planitiki consortium (72 points) and third place to the Lianakis consortium (70 points). Consequently, in its report of 27 April 2005, it proposed that the project be awarded to the Loukatos consortium.

18. By decision of 10 May 2005, the Municipal Council of Alexandroupolis approved the Project Award Committee's report and awarded the project to the Loukatos consortium.

19. The Lianakis and Planitiki consortia took the view that the Loukatos consortium could only have been awarded the project as a result of the Project Award Committee's subsequent stipulation of the weighting factors and sub-criteria in respect of the award criteria referred to in the contract notice, and challenged the decision taken by the Municipal Council of Alexandroupolis, initially before the Council itself and subsequently before the Simvoulio tis Epikratias (Greek Council of State; Simvoulio tis Epikratias') on the basis, in particular, of allegations of infringement of Article 36(2) of Directive 92/50.

20. In those circumstances, the Simvoulio tis Epikratias decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

If the contract notice for the award of a contract for services makes provision only for the order of priority of the award criteria, without stipulating the weighting factors for each criterion, does Article 36 of Directive 92/50 allow criteria to be weighted by the evaluation committee at a later date and, if so, under what conditions?'

The question referred for a preliminary ruling

21. By its question, the referring court asks in essence whether, in a tendering procedure, Article 36(2) of Directive 92/50 precludes the contracting authority from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.

22. The Commission submitted in its written observations that, before replying to the question referred, it is necessary to consider whether, in a tendering procedure, Directive 92/50 precludes the contracting authority from taking into account as award criteria' rather than as qualitative selection criteria' the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.

23. In that regard, even if - formally - the national court has limited its question to the interpretation of Article 36(2) of Directive 92/50 in relation to a possible later change to the award criteria, that does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may enable it to rule on the case before it, whether or not reference is made thereto in the question referred (see Case C392/05 Alevizos [2007] ECR I0000, paragraph 64 and the case-law cited).

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24. Accordingly, it is necessary, first of all, to establish the lawfulness of the criteria chosen as award criteria', before considering whether it is possible for the weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice to be set at a later date.

Criteria chosen as award criteria' (Articles 23 and 36(1) of Directive 92/50)

25. It must be borne in mind that Article 23(1) of Directive 92/50 provides that a contract is to be awarded on the basis of the criteria laid down in Articles 36 and 37 of the Directive, taking into account Article 24, after the suitability of the service providers not excluded under Article 29 has been checked by the contracting authorities in accordance with the criteria referred to in Articles 31 and 32.

26. The case-law shows that, while Directive 92/50 does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules (see, to that effect, in relation to works contracts, Case 31/87 Beentjes [1988] ECR 4635, paragraphs 15 and 16).

27. The suitability of tenderers is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical capability (the qualitative selection criteria') referred to in Articles 31 and 32 of Directive 92/50 (see, as regards works contracts, Beentjes , paragraph 17).

28. By contrast, the award of contracts is based on the criteria set out in Article 36(1) of Directive 92/50, namely, the lowest price or the economically most advantageous tender (see, to that effect, in relation to works contracts, Beentjes , paragraph 18).

29. However, although in the latter case Article 36(1) of Directive 92/50 does not set out an exhaustive list of the criteria which may be chosen by the contracting authorities, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract, their choice is nevertheless limited to criteria aimed at identifying the tender which is economically the most advantageous (see, to that effect, in relation to public works contracts, Beentjes , paragraph 19; Case C19/00 SIAC Construction [2001] ECR I7725, paragraphs 35 and 36; and, in relation to public service contracts, Case C513/99 Concordia Bus Finland [2002] ECR I7213, paragraphs 54 and 59, and Case C315/01 GAT [2003] ECR I6351, paragraphs 63 and 64).

30. Therefore, award criteria' do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question.

31. In the case in the main proceedings, however, the criteria selected as award criteria' by the contracting authority relate principally to the experience, qualifications and means of ensuring proper performance of the contract in question. Those are criteria which concern the tenderers' suitability to perform the contract and which therefore do not have the status of award criteria' pursuant to Article 36(1) of Directive 92/50.

32. Consequently, it must be held that, in a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 from taking into account as award criteria' rather than as qualitative selection criteria' the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.

Subsequent stipulation of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice

33. It must be borne in mind that Article 3(2) of Directive 92/50 requires contracting authorities

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to ensure that there is no discrimination between different service providers.

34. The principle of equal treatment thus laid down also entails an obligation of transparency (see, to that effect, in relation to public supply contracts, Case C275/98 Unitron Scandinavia and 3-S [1999] ECR 8291, paragraph 31, and, in relation to public works contracts, SIAC Construction , paragraph 41).

35. Furthermore, it follows from Article 36(2) of Directive 92/50 that where the contract has to be awarded to the economically most advantageous tender, the contracting authority must state in the contract documents or in the contract notice the award criteria which it intends to apply, where possible in descending order of importance.

36. According to the case-law, Article 36(2), read in the light of the principle of equal treatment of economic operators set out in Article 3(2) of Directive 92/50 and of the ensuing obligation of transparency, requires that potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders (see, to that effect, in relation to public contracts in the water, energy, transport and telecommunications industries, Case C87/94 Commission v Belgium [1996] ECR I2043, paragraph 88; in relation to public works contracts, Case C470/99 Universale-Bau and Others [2002] ECR I11617, paragraph 98; and, in relation to public service contracts, Case C331/04 ATI EAC and Others [2005] ECR I10109, paragraph 24).

37. Potential tenderers must be in a position to ascertain the existence and scope of those elements when preparing their tenders (see, to that effect, in relation to public service contracts, Concordia Bus Finland , paragraph 62, and ATI EAC and Others , paragraph 23).

38. Therefore, a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers' attention (see, by analogy, in relation to public works contracts, Universale-Bau and Others , paragraph 99).

39. That interpretation is supported by the purpose of Directive 92/50 which aims to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer services to contracting authorities established in another Member State (see, in particular, Case C380/98 University of Cambridge [2000] ECR I8035, paragraph 16).

40. To that end, tenderers must be placed on an equal footing throughout the procedure, which means that the criteria and conditions governing each contract must be adequately publicised by the contracting authorities (see, to that effect, in relation to public works contracts, Beentjes , paragraph 21, and SIAC Construction , paragraphs 32 and 34; also, in relation to public service contracts, ATI EAC and Others , paragraph 22).

41. Contrary to the doubts expressed by the referring court, those findings do not conflict with the interpretation by the Court of Justice of Article 36(2) of Directive 92/50 in ATI EAC and Others.

42. In the case that gave rise to that judgment, the award criteria and their weighting factors, together with the sub-criteria of those award criteria had in fact been established beforehand and published in the contract documents. The contracting authority concerned had merely stipulated subsequently, shortly before the opening of the envelopes, the weighting factors to be applied to the sub-criteria.

43. In that judgment, the Court held that Article 36(2) of Directive 92/50 does not preclude proceeding in that way, provided that three very specific conditions apply, namely that the decision to do so:

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- does not alter the criteria for the award of the contract set out in the contract documents;

- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and

- was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (see, to that effect, ATI EAC and Others , paragraph 32).

44. It must be noted that in the case in the main proceedings, by contrast, the Project Award Committee referred only to the award criteria themselves in the contract notice, and later, after the submission of tenders and the opening of applications expressing interest, stipulated both the weighting factors and the sub-criteria to be applied to those award criteria. Clearly that does not comply with the requirement laid down in Article 36(2) of Directive 92/50 to publicise such criteria, read in the light of the principle of equal treatment of economic operators and the obligation of transparency.

45. Having regard to the foregoing, the answer to the question referred must therefore be that, read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Directive 92/50 precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.

Costs

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

DOCNUM	62006J0532
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2008 Page 00000
DOC	2008/01/24
LODGED	2006/12/29
JURCIT	31992L0050 : N 3 22 26 39 31992L0050-A03P2 : N 5 33 36 31992L0050-A23P1 : N 1 6 25 32 31992L0050-A31 : N 27 31992L0050-A32 : N 1 7 27 32 31992L0050-A36 : N 1 8 31992L0050-A36P1 : N 28 29 31 32 31992L0050-A36P2 : N 21 23 35 41 43 - 45

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31997L0052 : N 1
61987J0031 : N 26 - 29 40
61994J0087 : N 36
61998J0275 : N 34
61998J0380 : N 39
61999J0470 : N 36 38
61999J0513 : N 29 37
62000J0019 : N 29 34 40
62001J0315 : N 29
62004J0331 : N 36 37 40 41 43
62005J0392 : N 23

SUB	Approximation of laws
AUTLANG	Greek
OBSERV	Commission ; Institutions
NATIONA	Greece
NATCOUR	*A9* Symvoulio tis Epikrateias, tmima 4, apofasi tis 28/11/2006 (3497/2006) ; - Evropaion Politeia 2007 p.359-364
NOTES	Steyger, E.: Administratiefrechtelijke beslissingen ; Rechtspraak bestuursrecht 2008 no 81
PROCEDU	Reference for a preliminary ruling
ADVGEN	Ruiz-Jarabo Colomer
JUDGRAP	Jann
DATES	of document: 24/01/2008 of application: 29/12/2006

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Case C-532/06

Emm. G. Lianakis AE and Others

v

Dimos Alexandroupolis and Others

(Reference for a preliminary ruling from the Simvoulio tis Epikratias)

(Directive 92/50/EEC – Public service contracts – Carrying out of a project in respect of the cadastre, town plan and implementing measure for a residential area – Criteria which may be accepted as 'criteria for qualitative selection' or 'award criteria' – Economically most advantageous tender – Compliance with the award criteria set out in the contract documents or contract notice – Subsequent determination of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice – Principle of equal treatment of economic operators and obligation of transparency)

Summary of the Judgment

1. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Award of contracts*

(Council Directive 92/50, Arts 23(1), 32 and 36(1))

2. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Award of contracts*

(Council Directive 92/50, Art. 36(2))

1. In a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36 (1) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Directive 97/52, from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment and their ability to perform the contract by the anticipated deadline.

   While that directive does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules. The suitability of tenderers is to be checked in accordance with the criteria of economic and financial standing and of technical capability referred to in Articles 31 and 32 of the directive, whereas the award of contracts is to be based on the criteria set out in Article 36(1), namely, the lowest price or the economically most advantageous tender.

   (see paras 26-28, 32)

2. Read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Directive 97/52, precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice. Article 36(2) requires that potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders. Therefore, a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers' attention.

(see paras 36, 38, 45, operative part)

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Judgment of the Court (First Chamber) of 24 January 2008 (reference for a preliminary ruling from the Simvoulio tis Epikratias, Greece) - Emm. G. Lianakis AE, Sima Anonymi Techniki Etairia Meleton kai Epivlepseon, Nikolaos Vlachopoulos v Dimos Alexandroupolis, Planitiki AE, Aikaterini Georgoula, Dimitrios Vasios, N. Loukatos kai Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis - Pan. Kyriopoulos kai syn/tes OS Filon OE, Nikolaos Sideris

(Case C-532/06) [1]

(Directive 92/50/EEC - Public service contracts - Carrying out of a project in respect of the cadastre, town plan and implementing measure for a residential area - Criteria which may be accepted as 'criteria for qualitative selection' or 'award criteria' - Economically most advantageous tender - Compliance with the award criteria set out in the contract documents or contract notice - Subsequent determination of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice - Principle of equal treatment of economic operators and obligation of transparency)

Language of the case: Greek

Referring court

Simvoulio tis Epikratias

Parties to the main proceedings

Applicants: Emm. G. Lianakis AE, Sima Anonymi Techniki Etairia Meleton kai Epivlepseon, Nikolaos Vlachopoulos

Defendants: Dimos Alexandroupolis, Planitiki AE, Aikaterini Georgoula, Dimitrios Vasios, N. Loukatos kai Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis - Pan. Kyriopoulos kai syn/tes OS Filon OE, Nikolaos Sideris

Re:

Reference for a preliminary ruling - Simvoulio tis Epikratias - Interpretation of Article 36 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) - Criteria for awarding contract - Subsequent fixing of the specific weighting for each criterion when the award procedure was already under way

Operative part of the judgment

Read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.

_____

[1] - OJ C 56, 10.03.2007.

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Reference for a preliminary ruling from the Simvoulio tis Epikratias (Greece) lodged on 29 December 2006 - Emm. G. Lianakis AE, Sima Anonimi Techniki Etairia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v Dimos Alexandroupolis, Planitiki A.E., Aikaterini Georgoula, Dim. Vasios, N. Loukatos & Sinergates Anonimi Etairia Meleton, Eratosthenis Meletitiki A.E., A. Pantazis - Pan. Kiriopoulou & Sinergates ('Filon') O.E. and Nikolaos Sideris

(Case C-532/06)

Language of the case: Greek

Referring court

Simvoulio tis Epikratias (Council of State)

Parties to the main proceedings

Applicants: Emm. G. Lianakis AE, Sima Anonimi Techniki Etairia Meleton kai Epivlepseon and Nikolaos Vlachopoulos

Defendants: Dimos Alexandroupolis, Planitiki A.E., Aikaterini Georgoula, Dim. Vasios, N. Loukatos & Sinergates Anonimi Etairia Meleton, Eratosthenis Meletitiki A.E., A. Pantazis - Pan. Kiriopoulou & Sinergates ('Filon') O.E. and Nikolaos Sideris

Question referred

If the tender notice for the award of a contract for services makes provision only for the order of priority of the award criteria, without stipulating the weighting factors for each criterion, does Article 36 of Directive 92/50/EEC [1] relating to the coordination of the procedures for the award of public service contracts allow criteria to be weighted by the evaluation committee at a later date and, if so, under what conditions?

_____

[1] - OJ No L 209, 24.7.1992, p. 1.

Order of the Court (Sixth Chamber) of 4 October 2007

Consorzio Elisoccorso San Raffaele v Elilombarda Srl and Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano. Reference for a preliminary ruling: Consiglio di Stato - Italy. Case C-492/06.

In Case C-492/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 21 February 2006, received at the Court on 28 November 2006, in the proceedings

Consorzio Elisoccorso San Raffaele

v

Elilombarda Srl,

Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano,

THE COURT (Sixth Chamber),

composed of P. Kris, President of the Chamber, L. Bay Larsen (Rapporteur) and J.-C. Bonichot, Judges,

Advocate General: Y. Bot,

Registrar: R. Grass,

the Court, proposing to give its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1. This reference for a preliminary ruling concerns the interpretation of Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1), (Directive 89/665').

2. The reference has been made in the course of proceedings between Consorzio Elisoccorso San Raffaele (the Consorzio') and Elilombarda Srl (Elilombarda'), the leader of a consortium in the process of being formed, regarding a procedure for the award of a public contract.

Legal context

Community legislation

3. Article 1 of Directive 89/665 provides:

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC..., decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules

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which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

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

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

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

...'

5. In the words of Article 26(1) of Directive 92/50:

Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.'

National legislation

6. The national legislation relating to the award of public supply, public works and public services contracts (see, respectively, Law No 109 of 11 February 1994 (GURI No 41, 19 February 1994), Legislative Decree No 358 of 24 July 1992 (GURI No 188, 11 August 1992) and Legislative Decree No 157 of 17 March 1995 (GURI No 104, 6 May 1995)) does not preclude or limit the right of the individual companies forming part of a consortium' or a group of undertakings' to bring an action individually.

7. According to the settled case-law of the Consiglio di Stato (Council of State), undertakings which are members of a consortium or of a group of undertakings have the right to challenge individually the measures relating to the public contract for which they have tendered.

The dispute in the main proceedings and the question referred for a preliminary ruling

8. On 30 November 2004, the Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano published, as contracting authority, a contract notice in respect, inter alia, of a helicopter rescue service by reference to a ceiling of EUR 25 900 000.

9. Two bids were submitted. The first was submitted by Elilombarda acting as leader of a consortium which was in the process of being formed between itself and Helitalia SpA and the second was submitted by the Consorzio, consisting of Elilario Italia SpA and Air Viaggi San Raffaele Srl.

10. On 28 April 2005, the contracting authority awarded the contract to the Consorzio to which the decision was notified by registered letter of 10 May 2005.

11. Elilombarda brought an action against that decision, among others, on its own behalf and acting individually, before the Tribunale amministrativo regionale della Lombardia (Lombardy Regional Administrative Court, the TAR Lombardia').

12. In the context of those proceedings, the Consorzio raised a plea of inadmissibility submitting that the action had been brought not by the consortium in the process of being formed which, according to the Consorzio, alone had standing to bring an action before the court in order to defend its

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interest in being the successful tenderer for that contract, but an individual economic operator which formed part of that consortium.

13. The TAR Lombardia rejected the plea of inadmissibility, citing the case-law of the Consiglio di Stato, and upheld the action, annulling the measures adopted by the contracting authority.

14. The Consorzio lodged an appeal before the Consiglio di Stato which, as a preliminary point, had to examine the decision of the TAR Lombardia relating to the admissibility of the action brought by Elilombarda.

15. In its order for reference, the Consiglio di Stato states, first, that the national legislation relating to the award of public contracts does not preclude or limit the right of the individual undertakings which form part of a consortium to bring an action independently and, secondly, that the TAR Lombardia did apply the principles set out in that regard in the case-law of the Consiglio di Stato.

16. However, the Consiglio di Stato raises the issue of whether, given the Court's judgment in Case C-129/04 Espace Trianon and Sofibail [2005] ECR I-7805, Article 1 of Directive 89/665 precludes an action brought by an individual member of a tendering consortium against a decision awarding a contract.

17. Against that background, the Consiglio di Stato decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Where a consortium without legal personality has participated as such in a procedure for the award of a public contract and has not been awarded that contract, is Article 1 of Council Directive 89/665 ... to be interpreted as precluding the possibility under national law for an individual member of that consortium to bring an action against the decision awarding the contract?'

The question referred for a preliminary ruling

18. Under the first subparagraph of Article 104(3) of the Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, give its decision by reasoned order.

19. By its question, the national court asks whether Article 1 of Directive 89/665 is to be interpreted as precluding the possibility under national law for an individual member of a consortium without legal personality which has participated as such in a procedure for the award of a public contract and has not been awarded that contract to bring an action against the decision awarding that contract.

20. In that regard, it must be borne in mind that, under Article 1(3) of Directive 89/665, Member States are required to ensure that the review procedures provided for by the Directive are available at least' to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of the Community law concerning public contracts or of the national rules transposing that law.

21. It follows that Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of Community law concerning public contracts (see Case C-315/01 GAT [2003] ECR I-6351, paragraph 45 and the case-law cited).

22. In its judgment in Espace Trianon and Sofibail , the Court interpreted Article 1 of Directive 89/665 with regard to a situation in which the national legal order required that an action for annulment of a decision awarding a public contract be brought by all the members forming a tendering consortium.

23. By reference to a situation such as that covered by the questions which had been referred to

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it for a preliminary ruling, the Court pointed out, in paragraphs 19 to 21 of that judgment, that:

- a consortium may be considered to be a person having an interest in obtaining a public contract within the meaning of Article 1(3) of Directive 89/665, as it has demonstrated its interest in obtaining the public contract at issue by tendering for it and that

- nothing in the case in the main proceedings prevented the members of the consortium from together bringing, in their capacity as associates or in their own names, an action for annulment of the disputed decisions.

24. The Court thus arrived at the conclusion, in paragraph 22 of that judgment, that the national procedural rule in question did not limit the availability of an action in a way contrary to Article 1(3) of Directive 89/665.

25. Consequently, the Court held that Article 1 of Directive 89/665 is to be interpreted as not precluding the national law of a Member State from providing that only the members of a consortium without legal personality which has participated, as such, in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract.

26. By so doing, the Court, as correctly observed by Elilombarda and the Commission of the European Communities in their written observations, only established a minimum threshold for the availability of review procedures concerning calls for tender which is guaranteed by Directive 89/665.

27. It in no way precluded other Member States from making those review procedures more widely available under their national laws by enshrining a concept of standing to bring proceedings which is wider than the minimum guaranteed by the directive.

28. In the absence of a specific provision in that regard, it is for the national legal order of each Member State to establish in particular whether and under which conditions standing to bring review proceedings may be extended to companies which are part of a consortium which has tendered as such.

29. In that regard, it must be stated that since there are detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, they must not compromise the effectiveness of Directive 89/665 (see Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 72), the objective of which is to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible.

30. However, contrary to the submission of the Cypriot Government, an interpretation of Article 1 of Directive 89/665 which permits the capacity to bring an action to be extended to each of the members of a consortium which has tendered in a procedure for the award of a public contract does not undermine that objective, but, on the contrary, seems capable of aiding its attainment.

31. Therefore, the answer to the question referred must be that Article 1 of Directive 89/665 is to be interpreted as not precluding the possibility, under national law, for an individual member of a consortium without legal personality which has participated as such in a procedure for the award of a public contract and has not been awarded that contract to bring an action against the decision awarding that contract.

Costs

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

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

Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 is to be interpreted as not precluding the possibility, under national law, for an individual member of a consortium without legal personality which has participated as such in a procedure for the award of a public contract and has not been awarded that contract to bring an action against the decision awarding that contract.

DOCNUM	62006O0492
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page I-08189
DOC	2007/10/04
LODGED	2006/11/28
JURCIT	31991Q0704(02)-A104P3L1 : N 18 31989L0665 : N 21 26 31989L0665-A01 : N 19 22 25 31 31989L0665-A01P3 : N 20 23 24 61999J0470 : N 29 62001J0315 : N 21 62004J0129 : N 22 - 24
SUB	Approximation of laws
AUTLANG	Italian
NATIONA	Italy
NATCOUR	*A9* Consiglio di Stato, ordinanza del 21/02/2006 14/11/2006 (6677/06) ; - rassegna di giurisprudenza e dottrina 2006 p.754-755 (résumé) ; - Giurisprudenza italiana (Recentissime) 2006 p.475 (résumé) ; - Rivista italiana di diritto pubblico comunitario 2006 p.1141-1151 ; - Giornale di diritto amministrativo 2007 p.56
NOTES	Barbieri, Ezio Maria: Il diritto comunitario consente che l'impresa associata in A.T.I. impugni singolarmente il risultato di una aggiudicazione?, Rivista italiana di diritto pubblico comunitario 2006 p.1146-1151

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Bot
JUDGRAP	Bay Larsen
DATES	of document: 04/10/2007 of application: 28/11/2006

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Case C-492/06

Consorzio Elisoccorso San Raffaele

v

Elilombarda Srl

and

Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano

(Reference for a preliminary ruling from the Consiglio di Stato)

(Public procurement – Directive 89/665/EEC – Review procedures concerning the award of public contracts – Persons to whom review procedures must be available – Tender by a consortium – Right of each member of a consortium to bring an action individually)

Summary of the Order

Approximation of laws – Review procedures in respect of the award of public supply and public works contracts – Directive 89/665
(Council Directive 89/665, Art. 1)

Article 1 of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 92/50, is to be interpreted as not precluding the possibility, under national law, for an individual member of a consortium without legal personality which has participated as such in a procedure for the award of a public contract and has not been awarded that contract to bring an action against the decision awarding that contract.

(see para. 31, operative part)

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Order of the Court (Sixth Chamber) of 4 October 2007 (reference for a preliminary ruling from the Consiglio di Stato (Italy)) - Consorzio Elisoccorso San Raffaele v Elilombarda Srl, Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano

(Case C-492/06) [1]

(Public procurement - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Persons to whom review procedures must be available - Tender by a consortium - Right of each member of a consortium to bring an action individually)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties

Applicant: Consorzio Elisoccorso San Raffaele

Defendants: Elilombarda Srl, Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano

Re:

Reference for a preliminary ruling - Consiglio di Stato - Interpretation of Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) - National case-law recognising that an individual member of a tendering consortium has the right to bring an action against the decision awarding the contract

Operative part of the order

Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 is to be interpreted as not precluding the possibility, under national law, for an individual member of a consortium without legal personality which has participated as such in a procedure for the award of a public contract and has not been awarded that contract to bring an action against the decision awarding that contract.

_____

1 -

2 - OJ C 20, 27.01.2007.

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Reference for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 28 November 2006 - Consorzio Elisoccorso San Raffaele v Elilombarda s.r.l.

(Case C-492/06)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Applicant: Consorzio Elisoccorso San Raffaele

Defendant: Elilombarda s.r.l.

Question referred

Where a consortium without legal personality has participated as such in a procedure for the award of a public contract and has not been awarded that contract, is Article 1 of Council Directive 89/665/EEC [1] of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC [2] of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, to be interpreted as precluding the possibility under national law for an individual member of that consortium to bring an action against the decision awarding the contract?

_____

[1] - OJ 1989 L 395, p. 33.

[2] - OJ 1992 L 209, p. 1.

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JUDGMENT OF THE COURT (Fourth Chamber)

19 March 2009 (*)

(Failure of a Member State to fulfil obligations – Directives 93/36/EEC and 93/42/EEC – Public contracts – Procedures for the award of public supply contracts – Hospital supplies)

In Case C–489/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 27 November 2006,

Commission of the European Communities, represented by M. Patakia and X. Lewis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by D. Tsagkaraki and S. Chala, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, R. Silva de Lapuerta, E. Juhász (Rapporteur) and G. Arestis, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2008,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by rejecting tenders in respect of medical devices bearing the CE certification marking, without, in any event, the competent contracting authorities of Greek hospitals having complied with the procedure provided for in Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ 1993 L 169, p. 1), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) ('Directive 93/42'), the Hellenic Republic has failed to fulfil its obligations under Article 8(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1) ('Directive 93/36'), and Articles 17 and 18 of Directive 93/42.

Legal context

Community legislation

2 Article 8(1) to (4) of Directive 93/36 provides:

‘1. The technical specifications defined in Annex III shall be given in the general or contractual documents relating to each contract.

2. Without prejudice to the legally binding national technical rules, in so far as these are compatible with Community law, the technical specifications mentioned in paragraph 1 shall be defined by the contracting authorities by reference to national standards implementing European standards, or by reference to European technical approvals or by reference to common technical specifications.

3. A contracting authority may depart from paragraph 2 if:

(a) the standards, European technical approvals or common technical specifications do not include any provision for establishing conformity or technical means do not exist for establishing satisfactorily the conformity of a product to these standards, European technical approvals or common technical specifications;

(b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment [(OJ 1986 L 217, p. 21)] or Council Decision 87/95/EEC of 22 December 1986 on standardisation in the field of information technology and telecommunications [(OJ 1987 L 36, p. 31)] or other Community instruments in specific service or product areas;

(c) use of these standards, European technical approvals or common technical specifications would oblige the contracting authority to acquire supplies incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to change-over, within a given period, to European standards, European technical approvals or common technical specifications;

(d) the project concerned is of a genuinely innovative nature for which use of existing European standards, European technical approvals or common technical specifications would not be appropriate.

4. Contracting authorities invoking paragraph 3 shall record, wherever possible, the reasons for doing so in the tender notice published in the *Official Journal of the European Communities* or in the contract documents and in all cases shall record these reasons in their internal documentation and shall supply such information on request to Member States and to the Commission.’

3 Annex III to Directive 93/36, entitled ‘Definition of certain technical specifications’, provides:

‘For the purposes of this Directive the following terms shall be defined as follows:

1. Technical specifications: the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical prescriptions shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling.

2. Standard: a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is in principle not compulsory.

3. European standard: a standard approved by the European Committee for standardisation (CEN) or by the European Committee for Electrotechnical Standardisation (Cenelec) as “European standard (EN)” or “Harmonisation documents (HD)” according to the common rules of these organisations.

4. European technical approval: a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. The European agreement shall be issued by an approval body designated for this purpose by the Member State.

5. Common technical specification: a technical specification laid down in accordance with a procedure recognised by the Member States to ensure uniform application in all Member States which has been published in the *Official Journal of the European Communities*.'

4 The third, fifth, eighth, thirteenth, seventeenth and twenty-first recitals in the preamble to Directive 93/42 state:

'Whereas the national provisions for the safety and health protection of patients, users and, where appropriate, other persons, with regard to the use of medical devices should be harmonised in order to guarantee the free movement of such devices within the internal market;

...

Whereas medical devices should provide patients, users and third parties with a high level of protection and attain the performance levels attributed to them by the manufacturer; whereas, therefore, the maintenance or improvement of the level of protection attained in the Member States is one of the essential objectives of this Directive;

...

Whereas, in accordance with the principles set out in the Council resolution of 7 May 1985 concerning a new approach to technical harmonisation and standardisation [(OJ 1985 C 136, p. 1)], rules regarding the design and manufacture of medical devices must be confined to the provisions required to meet the essential requirements; whereas, because they are essential, such requirements should replace the corresponding national provisions; whereas the essential requirements should be applied with discretion to take account of the technological level existing at the time of design and of technical and economic considerations compatible with a high level of protection of health and safety;

...

Whereas, for the purpose of this Directive, a harmonised standard is a technical specification (European standard or harmonisation document) adopted, on a mandate from the Commission, by either [the CEN or Cenelec] or both of these bodies in accordance with Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [(OJ 1983 L 109, p. 8)], and pursuant to the ... general guidelines [on cooperation between the Commission and these two bodies signed on 13 November 1984]; ... whereas, for specific fields, what already exists in the form of European *Pharmacopoeia* monographs should be incorporated within the framework of this Directive; whereas, therefore, several European *Pharmacopoeia* monographs may be considered equal to the abovementioned harmonised standards;

...

Whereas medical devices should, as a general rule, bear the CE mark to indicate their conformity with the provisions of this Directive to enable them to move freely within the Community and to be put into service in accordance with their intended purpose;

...

Whereas the protection of health and the associated controls may be made more effective by means of medical device vigilance systems which are integrated at Community level.'

5 According to Article 1(1) thereof, Directive 93/42 is to apply to medical devices and their accessories. For the purposes of that directive, accessories are to be treated as medical devices in their own right.

6 In accordance with Article 2 of Directive 93/42, Member States are required to take all necessary steps to ensure that medical devices may be placed on the market and/or put into service only if they comply with the requirements laid down in that directive when duly supplied and properly installed, maintained and used in accordance with their intended purpose.

7 Under Article 3 of that directive, the medical devices must meet the essential requirements set out in Annex I to the directive which apply to them, taking account of their intended purpose.

8 Article 4(1) of Directive 93/42 prohibits Member States from creating any obstacle to the placing on the market or the putting into service within their territory of medical devices bearing the CE marking provided for in Article 17 of that directive, which indicate that they have been the subject of an assessment of their conformity in accordance with the provisions of Article 11 thereof.

9 Pursuant to Article 5(1) of Directive 93/42, Member States are to presume compliance with the essential requirements referred to in Article 3 of that directive in respect of medical devices which are in conformity with the relevant national standards adopted pursuant to the harmonised standards the references of which have been published in the *Official Journal of the European Communities*.

10 Article 5(2) thereof states that, for the purposes of Directive 93/42, reference to harmonised standards also includes the monographs of the European *Pharmacopoeia* notably on surgical sutures, the references of which have been published in the *Official Journal of the European Communities*.

11 Article 5(3) of Directive 93/42 refers to Article 6(2) thereof with regard to the measures to be taken by the Member States if a Member State or the Commission considers that the harmonised standards do not entirely meet the essential requirements referred to in Article 3 of that directive.

12 Article 8 of that directive, entitled 'Safeguard clause', is worded as follows:

'1. Where a Member State ascertains that the devices referred to in Article 4(1) and (2)[,] second indent, when correctly installed, maintained and used for their intended purpose, may compromise the health and/or safety of patients, users or, where applicable, other persons, it shall take all appropriate interim measures to withdraw such devices from the market or prohibit or restrict their being placed on the market or put into service. The Member State shall immediately inform the Commission of any such measures, indicating the reasons for its decision and, in particular, whether non-compliance with this Directive is due to:

(a) failure to meet the essential requirements referred to in Article 3;

(b) incorrect application of the standards referred to in Article 5, in so far as it is claimed that the standards have been applied;

(c) shortcomings in the standards themselves.

2. The Commission shall enter into consultation with the parties concerned as soon as possible. Where, after such consultation, the Commission finds that:

– the measures are justified, it shall immediately so inform the Member State which took the initiative and the other Member States; where the decision referred to in paragraph 1 is attributed to shortcomings in the standards, the Commission shall, after consulting the parties concerned, bring the matter before the Committee referred to in Article 6(1) within two months if the Member State which has taken the decision intends to maintain it and shall initiate the procedures referred to in Article 6,

– the measures are unjustified, it shall immediately so inform the Member State which took the initiative and the manufacturer or his authorised representative established within the Community.

3. Where a non-complying device bears the CE marking, the competent Member State shall take appropriate action against whomsoever has affixed the mark and shall inform the Commission and the other Member States thereof.

4. The Commission shall ensure that the Member States are kept informed of the progress and outcome of this procedure.'

13 Article 10 of Directive 93/42 provides:

'1. Member States shall take the necessary steps to ensure that any information brought to their knowledge, in accordance with the provisions of this Directive, regarding the incidents mentioned below involving a Class I, IIa, IIb or III device is recorded and evaluated centrally:

(a) any malfunction or deterioration in the characteristics and/or performance of a device, as well as any inadequacy in the labelling or the instructions for use which might lead to or might have led to the death of a patient or user or to a serious deterioration in his state of health;

(b) any technical or medical reason in relation to the characteristics or performance of a device for the reasons referred to in subparagraph (a), leading to systematic recall of devices of the same type by the manufacturer.

2. Where a Member State requires medical practitioners or the medical institutions to inform the competent authorities of any incidents referred to in paragraph 1, it shall take the necessary steps to ensure that the manufacturer of the device concerned, or his authorised representative established in the Community, is also informed of the incident.

3. After carrying out an assessment, if possible together with the manufacturer, Member States shall, without prejudice to Article 8, immediately inform the Commission and the other Member States of the incidents referred to in paragraph 1 for which relevant measures have been taken or are contemplated.'

14 Article 11 of Directive 93/42 regulates the procedure for assessing the compliance of medical devices with the requirements of that directive. For this purpose, as is stated in the 15th recital in the preamble to that directive, medical devices are grouped into four product classes and the checks to which they are subject are progressively stricter depending on the vulnerability of the human body and taking account of the potential risks associated with the technical design and manufacture of those devices.

15 Article 14b of that directive provides:

'Where a Member State considers, in relation to a given product or group of products, that, in order to ensure protection of health and safety and/or to ensure that public health requirements are observed pursuant to Article [30 EC], the availability of such products should be prohibited, restricted or subjected to particular requirements, it may take any necessary and justified transitional measures. It shall then inform the Commission and all the other Member States giving the reasons for its decision. The Commission shall, whenever possible, consult the interested parties and the Member States and, where the national measures are justified, adopt necessary Community measures in accordance with the procedure referred to in Article 7(2).'

16 Under Article 17(1) of Directive 93/42, medical devices, other than devices which are custom-made or intended for clinical investigations, which are considered to meet the essential requirements referred to in Article 3 thereof must bear the CE marking of conformity when they are placed on the market.

17 Article 18 of that directive states:

'Without prejudice to Article 8:

(a) where a Member State establishes that the CE marking has been affixed unduly, the manufacturer or his authorised representative established within the Community shall be obliged to end the infringement under conditions imposed by the Member State;

(b) where non-compliance continues, the Member State must take all appropriate measures to restrict or prohibit the placing on the market of the product in question or to ensure that it is withdrawn from the market, in accordance with the procedure in Article 8.

... .'

18 Annex I to that directive, entitled 'Essential requirements', states in Part I, entitled 'General requirements':

'1. The devices must be designed and manufactured in such a way that, when used under the conditions and for the purposes intended, they will not compromise the clinical condition or the safety of patients, or the safety and health of users or, where applicable, other persons, provided that any risks which may be associated with their use constitute acceptable risks when weighed against the benefits to the patient and are compatible with a high level of protection of health and safety.

2. The solutions adopted by the manufacturer for the design and construction of the devices must conform to safety principles, taking account of the generally acknowledged state of the art.

In selecting the most appropriate solutions, the manufacturer must apply the following principles in the following order:

– eliminate or reduce risks as far as possible (inherently safe design and construction),

– where appropriate[,] take adequate protection measures[,] including alarms if necessary, in relation to risks that cannot be eliminated,

– inform users of the residual risks due to any shortcomings of the protection measures adopted.

3. The devices must achieve the performances intended by the manufacturer and be designed, manufactured and packaged in such a way that they are suitable for one or more of the functions referred to in Article 1(2)(a), as specified by the manufacturer.

… .'

National legislation

19 Directive 93/36 was transposed into Greek law, principally, by way of Presidential Decree 370 of 14 June 1993 (FEK A' 199/1995). Article 16 of that presidential decree essentially reproduces Article 8 of Directive 93/36.

20 Joint Ministerial Decree DY7/oik.2480, making Greek legislation consistent with Directive 93/42…, of 19 August 1994 (FEK B' 679), transposed that directive into Greek law. In addition, the Ethnikos Organismos Farmakon (the national authority for medicines, 'the EOF') was designated under Article 19(3) of Law 2889/2001 as the competent authority in respect of medical devices.

The pre-litigation procedure

21 The Commission received a complaint according to which certain hospitals in Greece, which organised calls for tenders in order to obtain medical devices, had acted in breach of the obligations under Directive 93/36 in conjunction with Directive 93/42.

22 According to that complaint, certain Greek hospitals rejected tenders in respect of medical devices on grounds of public health, despite the certification of those products with the CE marking and, in any event, without the safeguard procedure provided for by Directive 93/42 being applied.

23 On 20 April 2004, in the context of the investigation of the complaint in question, the Hellenic Republic forwarded to the Commission the EOF's Circular 19384 of 2 April 2004 ('Circular 19384'), which recognised, first, that certain committees responsible for procurement in hospitals had rejected on grounds of non-conformity tenders submitted by companies in respect of numerous medical devices bearing the CE marking, without prior examination by the EOF and noted, second, that in certain cases the non-conformity concerned specifications arbitrarily fixed by the hospitals. That circular served as a reminder of the exclusive legal procedure which those committees were bound to follow and the details of that procedure.

24 By letter of 8 November 2004, the complainant furnished further information indicating that, in spite of distributing Circular 19384, the competent committees of certain hospitals, such as the general hospitals of Komotiní, Messolonghi, Agios Nikolaos of Crete and Heraklion, continued to be in breach of the rules.

25 In the light of that information, the Commission opened infringement proceedings against the Hellenic Republic under Article 226 EC by sending it, on 21 March 2005, a letter of formal notice. In its response of 24 May 2005, that Member State did not contest the fact that certain Greek hospitals were not acting in conformity with relevant Community provisions, but stressed the exceptional nature of the cases referred to by the Commission, which, according to that State, did not attest to the existence of a large-scale, horizontal infringement of Community law in that area.

26 On 19 December 2005, the Commission issued a reasoned opinion setting out the failure of the Hellenic Republic to fulfil its obligations under Article 8(2) of Directive 93/36 and Articles 17 and 18 of Directive 93/42 in relation to the award of public supply contracts for medical devices and calling on that Member State to comply with the opinion within two months of its receipt.

27 In its response of 9 February 2006 to that reasoned opinion, the Hellenic Republic claimed that it had taken the necessary measures to ensure the proper application of Community law and that the cases referred to in that reasoned opinion were exceptions to normal practice. As well as the adoption of Circular 19384, it also stated that systematic checks on the quality of hospital supplies were carried out by the EOF at the request of those hospitals. The Hellenic Republic stated that the national hospitals increasingly comply with the instructions of that body.

28 However, the Commission had knowledge of new information according to which the infringement at issue was still continuing. Moreover, it was apparent from the information received that the EOF was not competent to exercise any administrative control over the hospitals or to impose any penalty on them, and that so far no other body in the Greek legal order had exercised any powers in this area.

29 Taking the view that the Hellenic Republic had failed to fulfil its obligations under Article 8(2) of Directive 93/36 in conjunction with Articles 17 and 18 of Directive 93/42, the Commission brought the present action.

The action

Arguments of the parties

30 The Commission submits that Directive 93/36 establishes a precise framework concerning any contracting authority's definition of technical requirements imposed on devices included in a tender. According to Article 8(2) of that directive, reference to national standards implementing European standards, to European technical approvals or to common technical specifications is obligatory both in the tender notice and in the assessment of conformity of the products which are the subject of the tender. The Commission underlines the fact that derogations from the principle enshrined in Article 8(2) are set out exhaustively in Article 8(3).

31 The Commission maintains that the calls for tenders issued by the Greek hospitals refer, in accordance with Article 8(2) of Directive 93/36, to the requirement of a European technical approval particular to medical devices, that is, the CE marking, which is also laid down in Directive 93/42. None the less, the contracting authorities proceeded to exclude tenders of certain medical devices bearing the CE marking, without such exclusion being covered by one of the categories of derogations provided for by Article 8(3) of Directive 93/36.

32 As regards Directive 93/42, the Commission states that it prescribes in detail the procedures for approving, certifying and placing medical devices on the market, but also for checking them, such as to leave no doubt as to the certified qualitative characteristics and no discretion on the part of the national authorities beyond the framework established by the provisions of the directive.

33 The Commission states that the essential requirements of conformity and safety which apply to medical devices are specified in Annex I to Directive 93/42 and that products bearing the CE marking satisfy all those requirements. Article 3 of that directive, in conjunction with Article 17 thereof, sets out the basis on which the mark of conformity of those devices is legitimate and they may, therefore, circulate freely in the internal market.

34 The Commission maintains that it is possible that certain medical devices, despite bearing the CE marking, are considered by doctors to endanger the health or safety of patients. In that case, the Commission points out that such devices may be rejected by the contracting authorities, but only in the context of the safeguard procedure provided for in Directive 93/42 and described in Circular 19384.

35 The Commission states that instead of applying that safeguard procedure, the contracting authorities proceeded directly to reject the tenders of medical devices bearing the CE marking. The Commission submits that, in one case concerning Heraklion general hospital, the EOF was informed, but its ruling, according to which the medical devices in question had to be accepted, was not complied with.

36 However, according to the Commission, it follows from settled case-law that the existence of a directive approximating the laws of the Member States, such as Directives 93/36 and 93/42, and stating that the compliance of products included in tenders with the technical prescriptions of that directive is necessarily certified by the CE marking, gives rise to the obligation on the part of the Member States to follow the special procedures of that directive where the validity of the certification is disputed.

37 The Commission maintains that, despite the adoption of Circular 19384 and the sending of a reminder on 19 January 2006, that is to say two years later, after the Commission's reasoned opinion, the unlawful conduct of the contracting authorities, as well as the Greek authorities' failure to review those authorities, persist. The Commission notes that the cases of which it is aware are characteristic examples of a practice which seems to be standard in Greek hospitals. The Hellenic Republic's argument based on the existence of national procedures to penalise any notified infringement of the rules on public contracts cannot in any way justify the infringement at issue.

38 The Hellenic Republic submits that hospitals, in their role as contracting authorities, do comply with the relevant provisions of Community law and national law in the area of supplies. It submits that the cases of certain hospitals not acting in accordance with the relevant Community provisions are purely and simply exceptions, from which it cannot be deduced that there is a large-scale horizontal infringement of Community law in the area at issue.

39 The Hellenic Republic maintains, moreover, that the EOF did issue Circular 19384, as well as a reminder on 19 January 2006, relating to the appropriate way of assessing medical devices for the purpose of their supply. Consequently, it took the measures necessary to ensure the proper application of Community law. That Member State explains, furthermore, that the reason why no penalties have yet been imposed on the hospitals which do not comply with the relevant Community provisions is that the body of inspectors of health and welfare services (Soma Epitheoriton Ipiresion Igias kai Pronias) is still undertaking an inquiry into that question.

Findings of the Court

40 It is settled case-law that, where the Commission relies on detailed complaints revealing repeated failures to comply with the provisions of a directive, it is incumbent on the Member State concerned to contest specifically the facts alleged in those complaints (see, to that effect, Case 272/86 *Commission* v *Greece* [1988] ECR 4875, paragraph 19, and Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 46).

41 However, in the present case, the Hellenic Republic has neither provided specific evidence to contradict the allegations made by the Commission nor challenged in substance and in detail the Commission's assertions. That Member State simply acknowledged in its defence and in Circular 19384 that certain hospitals had acted in breach of the relevant Community provisions.

42 Consequently, the facts alleged by the Commission must be regarded as proven.

43 According to the Court's case-law, contracting authorities which have issued an invitation to tender for the supply of medical devices bearing the CE marking cannot reject, on grounds of protection of public health, the tender in respect of such products, directly and without following the safeguard procedure provided for in Articles 8 and 18 of Directive 93/42. If a contracting authority considers that the tender in respect of medical devices bearing the CE marking may compromise public health, it is required to inform the competent authority with a view to setting that safeguard procedure in motion (Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, paragraph 55).

44 It should be observed that the Hellenic Republic also does not dispute the failure of the contracting authorities of the Greek hospitals criticised by the Commission to comply with Article 8(2) of Directive 93/36 and Articles 17 and 18 of Directive 93/42, relating to the procedures for the award of public contracts concerning medical devices bearing the CE marking.

45 By contrast, the Hellenic Republic claims that the cases referred to by the Commission are exceptional and cannot, therefore, constitute an infringement.

46 According to the Court's established case-law, even if the applicable national legislation itself complies with Community law, a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes that law (see, in particular, Case C-278/03 *Commission* v

Italy [2005] ECR I-3747, paragraph 13 and Case C–441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 47).

47 In the present case, as is apparent from the observations of the parties, this action for failure to fulfil obligations is not intended to call into question the compliance of the Hellenic Republic's transposition of Directives 93/36 and 93/42, but is confined to the question of the application of those provisions by the competent Greek authorities.

48 In order for a failure to fulfil obligations to be found on the basis of the administrative practice followed in a Member State, the Court has held that the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice; that administrative practice must be, to some degree, of a consistent and general nature; and, in order to find that there has been a general and consistent practice, the Commission may not rely on any presumption (Case C-156/04 *Commission* v *Greece* [2007] ECR I-4129, paragraph 50 and the case-law cited).

49 It must be pointed out that, according to the information in the file before the Court, the products in question are products fulfilling the requirements of the European *Pharmacopoeia* technical standard and must, by their very nature, be purchased repeatedly and regularly by hospitals and, consequently, with an established degree of regularity.

50 None the less, at least 16 hospital contracting authorities rejected the medical devices in question, during tendering procedures, including the hospitals of Komotiní, Messolonghi, Agios Nikolaos of Crete, Venizeleio-Pananeio of Heraklion, Attica, Agios Savvas, Elpis, Argos, Korgialenio-Benakio, Geniko Nosokomio of Kalamata, Nauplie, P. & A. Kyriakou, Sparta, Panakardiko of Tripoli, Elena Venizelou and Asklipiio Voula.

51 The list of the hospitals mentioned by the Commission shows a variety in the size of the establishments, since some of the largest Greek hospitals such as Agios Savvas, Kyriakou and Asklipiio Voula are referred to, as well as medium-sized hospitals such as Argos, Agios Nikolaos of Crete or Sparta.

52 Moreover, that list refers to establishments with a geographical coverage encompassing the entire country with, in particular, hospitals in Athens, in the Peloponnese and on Crete, but concerns also a wide field of competence, including general hospitals, a children's hospital, a hospital treating cancer-related illnesses and a maternity hospital.

53 Therefore, it can be deduced that the administrative practice of the contracting authorities in question, contrary to Article 8(2) of Directive 93/36 and Articles 17 and 18 of Directive 93/42, demonstrates a certain degree of consistency and generality.

54 Where the Commission has adduced sufficient evidence to show that a Member State's authorities have developed a repeated and persistent practice which is contrary to the provisions of a directive, it is incumbent on that Member State to challenge in substance and in detail the information thus produced and the consequences flowing therefrom (*Commission* v *Ireland*, paragraph 47), which is not so in the present case.

55 Moreover, it is apparent from the file before the Court that the unlawful conduct of the Greek hospital contracting authorities was not sufficiently reviewed and penalised by the competent Greek authorities. The defendant Member State has merely justified the lack of intervention on the part of its services by referring to the fact that the body of inspectors of health and welfare services was, at the time of the proceedings, carrying out an inquiry into the question and that it had not completed its work.

56 In view of the above, it must be declared that, by rejecting tenders in respect of medical devices bearing the CE certification marking, without the competent contracting authorities of Greek hospitals having complied with the procedure provided for in Directive 93/42, the Hellenic Republic has failed to fulfil its obligations under Article 8(2) of Directive 93/36 and Articles 17 and 18 of Directive 93/42.

Costs

57 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs against the Hellenic Republic and the latter has been unsuccessful, the Hellenic Republic must be ordered to pay the costs.

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

1. Declares that, by rejecting tenders in respect of medical devices bearing the CE certification marking, without the competent contracting authorities of Greek hospitals having complied with the procedure provided for in Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, the Hellenic Republic has failed to fulfil its obligations under Article 8(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, and Articles 17 and 18 of Directive 93/42, as amended by Regulation No 1882/2003;

2. Orders the Hellenic Republic to pay the costs.

[Signatures]

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* Language of the case: Greek.

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Case C-489/06

Commission of the European Communities

v

Hellenic Republic

(Failure of a Member State to fulfil obligations – Directives 93/36/EEC and 93/42/EEC – Public contracts – Procedures for the award of public supply contracts – Hospital supplies)

Summary of the Judgment

1. *Approximation of laws – Medical devices – Directive 93/42*

(Council Directives 93/36, as amended by Directive 2001/78, Art. 8(2), and 93/42, as amended by Regulation No 1882/2003, Arts 8, 17 and 18)

2. *Actions for failure to fulfil obligations – Proof of failure – Burden of proof on Commission – Presumptions – Not permissible – Failure to fulfil obligations arising from an administrative practice contrary to Community law*

(Art. 226 EC)

1. Contracting authorities which have issued an invitation to tender for the supply of medical devices bearing the CE marking cannot reject, on grounds of protection of public health, the tender in respect of such products, directly and without following the safeguard procedure provided for in Articles 8 and 18 of Directive 93/42 concerning medical devices, as amended by Regulation No 1882/2003. If a contracting authority considers that the tender in respect of medical devices bearing the CE marking may compromise public health, it is required to inform the competent authority with a view to setting that safeguard procedure in motion.

   In that context, a practice of the contracting authorities, which demonstrates a certain degree of consistency and generality, consisting of rejecting tenders in respect of medical devices bearing the CE certification marking, without the procedure provided for in Directive 93/42 being respected amounts to a failure on the part of a Member State to fulfil its obligations under Article 8(2) of Directive 93/36 coordinating procedures for the award of public supply contracts, as amended by Directive 2001/78, and Articles 17 and 18 of Directive 93/42.

   (see paras 43, 53, 56)

2. In proceedings under Article 226 EC for failure to fulfil obligations, in order for a failure to fulfil obligations to be found on the basis of the administrative practice followed in a Member State, the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice; that practice must be, to some degree, of a consistent and general nature; and, in order to find that there has been a general and consistent practice, the Commission may not rely on any presumption.

   Where the Commission has adduced sufficient evidence to show that a Member State's authorities have developed a repeated and persistent practice which is contrary to the provisions of a directive, it is incumbent on that Member State to challenge in substance and in detail the information thus produced and the consequences flowing therefrom.

   (see paras 48, 54)

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Judgment of the Court (Fourth Chamber) of 19 March 2009 - Commission of the European Communities v Hellenic Republic

(Case C-489/06) [1]

(Failure of a Member State to fulfil obligations - Directives 93/36/EEC and 93/42/EEC - Public contracts - Procedures for the award of public supply contracts - Hospital supplies)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and X. Lewis, acting as Agents)

Defendant: Hellenic Republic (represented by: D. Tsagkaraki and S. Chala, acting as Agents)

Re:

Failure of a Member State to fulfil obligations - Infringement of Article 8(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of Articles 17 and 18 of Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ 1993 L 169, p. 1) - Rejection of medical devices, in the context of calls for tenders for supplies to public hospitals in Greece, on grounds relating to the 'general sufficiency and safety of use' of the devices, notwithstanding their certification with the CE marking, and without, in any event, the procedure provided for in Directive 93/42/EEC being followed

Operative part of the judgment

The Court:

Declares that, by rejecting tenders in respect of medical devices bearing the CE certification marking, without the competent contracting authorities of Greek hospitals having complied with the procedure provided for in Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, the Hellenic Republic has failed to fulfil its obligations under Article 8(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, and Articles 17 and 18 of Directive 93/42, as amended by Regulation No 1882/2003;

Orders the Hellenic Republic to pay the costs.

_____

[1] - OJ C 326, 30.12.2006.

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OPINION OF ADVOCATE GENERAL
Mazák
delivered on 20 November 2008 (1)

Case C–489/06

Commission of the European Communities
v
Hellenic Republic

(Failure of a Member State to fulfil obligations – Free movement of goods – Directives 93/36/EEC and 93/42/EEC – Hospital purchase of medical devices bearing the CE marking – Protective measures – Public supply contract)

1. By this action the Commission asks the Court to declare that, by rejecting tenders in respect of medical devices bearing the CE certification marking, without, in any event, the competent contracting authorities of Greek hospitals having followed the procedure set out in Council Directive 93/42/EEC (the Medical Devices Directive), (2) Greece has failed to fulfil its obligations under Article 8(2) of Council Directive 93/36/EEC (the Public Supply Contracts Directive) (3) and Articles 17 and 18 of Directive 93/42.

I – The legal framework

A – *Community law*

2. With regard to Directive 93/42, as I explain in point 33 of this Opinion, in *Medipac-Kazantzidis* (4) – delivered after the closure of the written procedure in the present case – the Court, in my view, has now settled the issue concerning the obligations of the contracting authorities, and the procedure to be followed by them, in cases such as those complained of in the present proceedings. I therefore do not consider it necessary to set out the whole legal framework of Directive 93/42, as this has been done exhaustively in *Medipac-Kazantzidis*.

3. Paragraphs 1 to 4 of Article 8 of Directive 93/36 respectively provide:

‘1. The technical specifications defined in Annex III shall be given in the general or contractual documents relating to each contract.

2. Without prejudice to the legally binding national technical rules, in so far as these are compatible with Community law, the technical specifications mentioned in paragraph 1 shall be defined by the contracting authorities by reference to national standards implementing European standards, or by reference to European technical approvals or by reference to common technical specifications.

3. A contracting authority may depart from paragraph 2 if:

(a) the standards, European technical approvals or common technical specifications do not include any provision for establishing conformity or technical means do not exist for establishing satisfactorily the conformity of a product to these standards, European technical

approvals or common technical specifications;

(b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC [(5)] … or Council Decision 87/95/EEC [(6)] … or other Community instruments in specific service or product areas;

(c) use of these standards, European technical approvals or common technical specifications would oblige the contracting authority to acquire supplies incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to change-over, within a given period, to European standards, European technical approvals or common technical specifications;

(d) the project concerned is of a genuinely innovative nature for which use of existing European standards, European technical approvals or common technical specifications would not be appropriate.

4. Contracting authorities invoking paragraph 3 shall record, wherever possible, the reasons for doing so in the tender notice published in the *Official Journal of the European Communities* or in the contract documents and in all cases shall record these reasons in their internal documentation and shall supply such information on request to Member States and to the Commission.'

4. Annex III to Directive 93/36, entitled 'Definition of certain technical specifications', provides:

'For the purposes of this Directive the following terms shall be defined as follows:

1. Technical specifications: the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical prescriptions shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling.

2. Standard: a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is in principle not compulsory.

3. European standard: a standard approved by the European Committee for standardisation (CEN) or by the European Committee for Electrotechnical Standardisation (Cenelec) as "European standard (EN)" or "Harmonisation documents (HD)" according to the common rules of these organisations.

4. European technical approval: a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. The European agreement shall be issued by an approval body designated for this purpose by the Member State.

5. Common technical specification: a technical specification laid down in accordance with a procedure recognised by the Member States to ensure uniform application in all Member States which has been published in the *Official Journal of the European Communities*.'

B – *National law*

5. Directive 93/36 was transposed into Greek law, principally, by way of Presidential Decree No 370 (FEK A' 199/1995). Article 16 of that decree essentially reproduces the wording of Article 8 of Directive 93/36.

6. Joint Ministerial Decree No DY7/oik.2480 of 19 August 1994 (FEK B' 679), bringing Greek legislation into line with Directive 93/42, transposed that directive into Greek law.

7. In addition, the Ethnikos Organismos Farmakon (the Greek authority responsible for ensuring the implementation of the Community directives on medical devices, under the Ministry of Health, 'EOF'), was designated under Article 19 of Law No 2889/2001 as the competent authority in respect of medical devices.

II – Facts, pre-litigation procedure and forms of order sought

8. The Commission received a complaint relating to the phenomenon of rejection of medical devices – in particular, surgical sutures – in the context of calls for tenders for supplies to public hospitals in Greece, on grounds relating to the 'general sufficiency and safety of use' of such devices, notwithstanding their certification with the CE marking, (7) and without, in any event, the safeguard procedure provided for in Directive 93/42 being followed.

9. On 20 April 2004, in the context of the Commission's investigation, the Greek authorities forwarded the Commission the EOF's circular, No 19384, of 2 April 2004 ('Circular No 19384'). According to the circular, it was recognised that 'certain committees responsible for procurement in hospitals have … rejected on grounds of non-conformity offers presented by companies and concerning numerous medical devices certified with the CE marking, without the necessary prior examination by the EOF' and that 'in certain cases the non-conformity concerned specifications arbitrarily fixed by the hospitals'. It went on to state that 'the companies concerned had therefore brought the matter before the Greek courts and the competent European institutions which had decided in the companies' favour'. According to the Greek authorities, Circular No 19384 thus served as a reminder of the legal procedure which the committees were bound to follow and the details of that procedure.

10. In the light of the above developments, the Commission services informed the complainant that they intended to close the case. However, by letter of 8 November 2004, the complainant furnished further information indicating that, in spite of distributing the circular, the competent committees of certain hospitals (including, the general hospitals of Komotini, Messolonghi, Agios Nikolaos in Crete and Venizelio-Pananio of Heraklion in Crete) continued to be in breach of the rules.

11. By way of example, in one particular call for tenders, the general hospital of Komotini rejected a large part of the complainant's tender, on the ground that the devices were inappropriate in spite of bearing the CE marking and of the fact that they were produced in accordance with the European Pharmacopoeia. Despite having received the EOF circular, the hospital refused to comply with its directions to send the devices for checking by the EOF.

12. Similarly, the general hospital of Messolonghi rejected the complainant's tender and closed the call for tender without informing the EOF or sending samples for control. A similar pattern of events arose in a tendering procedure conducted by the general hospital of Agios Nikolaos in Crete.

13. Finally, in a case concerning a call for tenders by the general hospital of Heraklion in Crete, although it informed the EOF beforehand, in compliance with the circular, it failed to comply with the EOF's decision, which considered the medical devices to be safe.

14. On the basis of this information, the Commission sent the Hellenic Republic a letter of formal notice on 21 March 2005, and opened formal proceedings under Article 226 EC against that Member State for failure to fulfil obligations.

15. In their response of 24 May 2005, the Greek authorities did not contest the fact that certain Greek hospitals were not acting in conformity with relevant Community provisions, but merely stressed the exceptional character of the cases referred to by the Commission. In their view, those cases did not attest to the existence of a large-scale, horizontal infringement of Community law.

16. On 19 December 2005, the Commission issued a reasoned opinion in which it stated that the Hellenic Republic had failed to fulfil its obligations under Article 8(2) of Directive 93/36 and Articles 17 and 18 of Directive 93/42 in relation to the award of public supply contracts of medical devices and called on that Member State to comply with the reasoned opinion within two months of its notification.

17. In its response of 9 February 2006, Greece argued that it had taken the necessary measures to ensure proper application of Community law and that the cases enumerated in the Commission's reasoned opinion were merely exceptions to the general practice. It also pointed out that Greek legislation as such was consistent with Community law. In addition to Circular No 19384 and the reminder of 19 January 2006, Greece also referred to the fact that, at the hospitals' request, the EOF carried out systematic controls of the quality of supplies. Finally, Greece underlined the fact that compliance by the national hospitals of the EOF's instructions was becoming increasingly systematic.

18. However, on the basis of new information, the Commission learned that the infringement at issue was in fact still continuing. The information suggested that the incidents were anything but isolated and exceptional and, what is more, the contracting authorities were not sanctioned for their unlawful conduct in any way. According to the complainant, instances of compliance by the hospitals were in fact rather rare. Moreover, it became clear from the information made available to the Commission that the EOF was neither competent to exercise any administrative control over the hospitals nor to impose any sanction on them, and that so far no other body (judicial or otherwise) in the Greek legal order had exercised any powers in this area. In support of its claims, the Commission cites a number of decisions by the supreme administrative court, namely the Symvoulio tis Epikrateias (the Council of State), more particularly its 'suspension committee', as examples of a general tendency on the part of the court to reject appeals against the decisions of the contracting authorities which were in breach of the directives and of the circulars applicable in this area.

19. Accordingly, the Commission took the view that the infringement, the facts of which the Greek authorities never contested, persisted, and that the measures taken by the national authorities to end it were neither sufficient nor effective. The Commission thus brought the present action before the Court.

20. Having submitted written pleadings, neither party requested a hearing.

21. The Commission claims that the Court should:

'– declare that, by rejecting tenders in respect of medical devices bearing the CE certification marking, without, in any event, the competent contracting authorities of Greek hospitals having followed the procedure set out in Directive 93/42, the Hellenic Republic has failed to fulfil its obligations under Article 8(2) of Directive 93/36 and Articles 17 and 18 of Directive 93/42;

– order the Hellenic Republic to pay the costs.'

22. The Greek Government contends that the Court should dismiss the application.

III – Assessment

A – *Arguments of the parties*

23. The *Commission* submits that Directive 93/36 coordinating procedures for the award of public supply contracts establishes a precise framework concerning any contracting authority's definition of technical requirements imposed on devices included in an offer. According to Article 8 (2) of that directive, the reference to national standards implementing European standards, to European technical approvals or to common technical specifications is obligatory both in the tender notice and in the evaluation of compliance of the products which are the subject of the tender. The Commission underlines the fact that derogations from the principle enshrined in Article 8(2) are set out exhaustively in Article 8(3).

24. The Commission further maintains that the calls for tenders issued by the Greek hospitals refer to the requirement under Article 8(2) of Directive 93/36 for a European technical approval particular to medical devices, that is, the CE certification marking, which is also laid down in Directive 93/42. None the less, the contracting authorities proceeded to exclude tenders of medical devices bearing the CE marking, even though exclusion on this basis is clearly not one of the derogations provided for by Article 8(3) of Directive 93/36.

25. As regards Directive 93/42 concerning medical devices, the Commission submits that the specific and exclusive procedures – for certifying such devices and placing them on the market, as well as for contesting their suitability – are laid down in such detail that there can be no doubt as to the certified qualitative characteristics nor is there any discretion on the part of the national authorities beyond the framework established by the directive.

26. The Commission argues that the essential requirements of compliance and safety which apply to medical devices are enumerated in Annex I to Directive 93/42 and that products bearing the CE marking meet all those requirements. Article 3, in conjunction with Article 17 of Directive 93/42, sets out the basis for recognising that the devices in question are compliant, and may circulate freely in the internal market.

27. The Commission argues that it may be that certain medical devices, despite bearing the CE marking, are considered by the doctors to endanger the health and safety of patients. In such cases, however, the Commission makes clear that such devices may only be rejected by the contracting authorities in the context of the safeguard procedure provided for in Articles 8 and 18 of Directive 93/42 and described in Circular No 19384.

28. The Commission submits that instead of applying the safeguard procedure the Greek contracting authorities proceeded directly to rejecting the tenders of medical devices bearing the CE marking.

29. However, according to the Commission, it follows from settled case-law that the existence of a directive approximating the laws of the Member States, such as Directives 93/36 and 93/42, and stating that the compliance of the products included in the tenders with all the technical provisions of the directive is necessarily certified with the CE marking, gives rise to the obligation of a Member State to respect the special procedures of the directive concerning disputation of the validity of certification. (8)

30. The Commission maintains that, despite the adoption of Circular No 19384 and the sending of a reminder two years later, the unlawful conduct of the contracting authorities, as well as the Greek authorities' failure to control or sanction it, persists.

31. The *Greek Government* submits that hospitals, in their role as contracting authorities, do comply with the relevant provisions of Community law and of national law in the area of public procurement. It takes the view that the fact that certain hospitals were not acting in accordance with relevant Community provisions merely constitutes an exception to the general rule, from which, however, one should not deduce the existence of a large-scale horizontal infringement of Community law in the area at issue.

32. Moreover, the Greek Government maintains that, in any event, the EOF distributed Circular No 19384 and, on 19 January 2006, Circular No 4051, which both served as a reminder as to how properly to assess devices for the purposes of their supply. Therefore, the EOF took the necessary measures to ensure proper application of Community law. In addition, the Greek Government explains that the reason why it has not yet determined the sanctions to be imposed on hospitals which do not act in accordance with relevant Community provisions is that the inspectors of the Soma Epitheoriton Ipiresion Igias kai Pronias (Health and Welfare Services Inspection Body) are still in the process of carrying out an investigation.

B – *Appraisal*

33. First of all, with regard to Directive 93/42, I would like to refer to the recent case of *Medipac-Kazantzidis* (9) – delivered after the closure of the written procedure in this case – where the Court held that 'a contracting authority, which has issued an invitation to tender for the supply of medical devices and specified that those devices must comply with the European Pharmacopoeia and bear the CE marking, [is precluded] from rejecting, directly and without following the safeguard procedure provided for in Articles 8 and 18 of Directive 93/42, on grounds of protection of public health, the materials proposed, if they comply with the stated technical requirement. If the contracting authority considers that those materials may jeopardise public health, it is required to inform the competent national authority with a view to setting that safeguard procedure in motion.'

34. That part of the present case being settled, the main issue that remains to be analysed is the question of the burden of proof.

35. In this regard, the Commission is seeking to prove, on the basis of certain individual cases, that the conduct of the Greek hospitals, in their capacity as contracting authorities, evinces a consistent administrative practice which is unlawful and which is neither controlled nor sanctioned by the competent authorities. As a result, the Commission is seeking to obtain a finding that Greece has generally failed to fulfil its obligations under Community law.

36. In *Commission* v *Germany*, (10) the Court held that 'a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law'.

37. In that connection, the Court stated in another *Commission* v *Greece* case (11) that 'so far

as concerns the possibility of finding that there has been a failure to fulfil obligations on the basis of the administrative practice followed in a Member State, the Court has already established the applicable criteria. In those circumstances, the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice; that administrative practice must be, to some degree, of a consistent and general nature; and, in order to find that there has been a general and consistent practice, the Commission may not rely on any presumption.'

38. In the present case, the Commission issued the reasoned opinion on 19 December 2005, in which it stated that Greece had failed to fulfil its obligations under Article 8(2) of Directive 93/36 and under Articles 17 and 18 of Directive 93/42 in relation to the award of public supply contracts of medical devices, and called on that Member State to comply with the opinion within two months of its notification.

39. On 9 February 2006, Greece responded to the reasoned opinion and submitted that it had taken the necessary measures to ensure proper application of Community law, inter alia, through the distribution of Circular No 19384 on 2 April 2004 and of the reminder on 19 January 2006, drawing the hospitals' attention to their Community law obligations. In my view, this approach indicates that the Greek Government: (i) accepted the existence of the factual situations underlying the allegations set out in the reasoned opinion; (ii) in seeking to remedy the problem, took further measures (that is, the reminder of 19 January 2006); and (iii) failed to provide any substantive answer to the conduct complained of.

40. In its application, the Commission submits that despite adopting Circular No 19384 and sending the reminder two years later, the unlawful conduct of the contracting authorities, as well as the failure by the Greek authorities to control it, persists. In its view, the cases that were brought to its attention are indicative of what seems to be common practice in Greek hospitals, of the fact that the infringement in question is anything but isolated and exceptional, as maintained by the Greek Government, and that the conduct of the contracting authorities responsible continues to go unchecked.

41. Before considering the merits of the Commission's complaint, I will first deal with the Greek Government's contention that the Commission is not justified in drawing general conclusions as to the existence of a large-scale horizontal infringement of Community law from the examination of specific – regarded by that State as 'exceptional' – cases by presuming alleged systemic failures by Greece to fulfil its obligations.

42. In the ensuing paragraphs, I will seek to establish why, in my view, the alleged infringement may be considered to be of a general and persistent nature.

43. In this connection, I think it would be helpful to set out at length the relevant parts of the judgment in *Commission* v *Ireland* ('Irish Waste case'). (12) In this case, the Court held that whilst it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled, (13) 'the Member States are required, under Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist, in particular, pursuant to Article 211 EC, in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied [(14)] … In this context, account should be taken of the fact that, where it is a question of checking that the national provisions intended to ensure effective implementation of the directive are applied correctly in practice, the Commission [having no] investigative powers of its own in the matter, is largely reliant on the information provided by any complainants and by the Member State concerned [(15)] … It follows in particular that, where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is incumbent on the latter to challenge in substance and in detail the information produced and the consequences flowing therefrom [(16)] … In such circumstances, it is indeed primarily for the national authorities to conduct the necessary on-the-spot investigations, in a spirit of genuine cooperation and mindful of each Member State's duty … to facilitate the general task of the Commission [(17)] … Thus, where the Commission relies on detailed complaints revealing repeated failures to comply with the provisions of the directive, it is incumbent on the Member State to contest specifically the facts alleged in those complaints [(18)] … Likewise, where the Commission has adduced sufficient evidence to show that a Member State's authorities have developed a repeated and persistent practice which is contrary to the provisions of a directive, it is incumbent on that Member State to challenge in substance and in detail the information produced and the consequences flowing therefrom.' (19)

44. Furthermore, in *Commission* v *Italy* (20) the Court held that 'that obligation rests on the

Member States under the duty of genuine cooperation, enshrined in Article 10 EC, throughout the procedure provided for by Article 226 EC'.

45. It is in this context that I shall consider the merits of this case.

46. First of all, as the Court held in *Commission* v *Ireland*, (21) 'the Commission may seek a finding that provisions of a directive have not been complied with because a general practice contrary thereto has been adopted by the authorities of a Member State, using particular situations to shed light on that practice'.

47. In this case, I consider that it is apparent from the documents before the Court that there have been at least 14 instances – known to the Commission – of hospitals acting as contracting authorities in the incorrect and unlawful manner described above.

48. Those 14 cases of alleged infringement of Community law concern the following hospitals: Attica, Athens Agios Savvas, Elpis, Argos, Korgialenio-Benakio Red Cross Hospital of Athens, General Hospital of Kalamata (in the Peloponnese peninsula), the General Hospital of Nafplio, Athens General Children's Hospital P. & A. Kiriakou, Siros (in the Cyclades), the General Hospital of Sparta, General Hospital Panarkadiko of Tripolis, the Elena Venizelou General and Maternity Hospital, the Asklipio General Hospital of Voula Attiki and Kos.

49. It would appear from the documents before the Court that some of the largest hospitals in Greece are included in that list, namely: Attica, Agios Savvas (a well-known cancer hospital), Korgialenio-Benakio, Kiriakou and Elena Venizelou.

50. In addition, I consider that those instances would appear to reflect both a wide geographic coverage and a number of areas of specialisation, including general hospitals, a children's hospital, a cancer treatment hospital and a maternity hospital. (22)

51. In this respect, I agree with the views of Advocate General Geelhoed in his Opinion in *Commission* v *Ireland* (23) that 'although isolated cases may in themselves be sufficient to establish an infringement … a structural infringement suggests that there is a more general practice or a pattern of non-compliance which is also likely to keep recurring. In the case of a directive it implies that the substantive content of the directive, for whatever reason, is not brought into practice and that the result of the directive is not attained within the Member State. An indication of this might be that the practice is not restricted to a particular locality in a Member State, but is more widespread in that more situations which are contrary to the terms of the directive occur simultaneously within the territory of the Member State.' That, indeed, appears to be the case here.

52. Finally, it should be borne in mind, in this respect, that the relevant product in the present proceedings is a product that hospitals need to purchase on a recurrent and regular basis. Therefore, given the nature of the product at issue in the present proceedings – as opposed to one that is purchased on a one-off basis – the general practice complained of by the Commission is, in my view, likely to keep recurring.

53. I therefore consider that, on the basis of the considerations set out in points 45 to 51 above, and the similarity and recurrent nature of the situations in question, there seems to be a generalised and systemic failure on the part of the contracting authorities to comply with Directives 93/36 and 93/42 and on the part of the Hellenic Republic. (24)

54. In the light of the above, it should be noted that once the Commission has adduced sufficient evidence to show that a Member State's authorities have developed a repeated and persistent practice contrary to the provisions of Directives 93/36 and 93/42, it is for that Member State to challenge, in substance and in detail, the information produced and the consequences flowing therefrom.

55. However, the crux of the present case is that the Greek Government has failed to contest any of the claims in relation to any of these hospitals. (25) Moreover, Greece has presented neither arguments nor specific evidence to contradict or to challenge, in substance and in detail, the Commission's allegations.

56. In fact, in Circular No 19384, in the pre-litigation phase and, in particular, in its defence in the present proceedings, the Greek Government recognises the fact that 'certain hospitals acted in

breach of relevant Community provisions'.

57. Therefore, in the light of the Greek Government's failure to contest the Commission's allegations and to provide sufficient evidence in rebuttal, those allegations must be regarded as substantiated. (26)

58. I consider that the Commission has provided sufficient proof of Greece's infringement of Community law. That proof is only reinforced by the fact, apparent from the documents before the Court and not contested by the Greek Government, that the contracting authorities' unlawful conduct is neither controlled nor sanctioned by that Member State.

59. It follows from the case-law cited in point 43 of this Opinion that Greece was required, under Article 10 EC, to facilitate the achievement of the Commission's tasks in proceedings under Article 226 EC.

60. Therefore, instead of simply denying (27) that it is possible, on the basis of the individual cases (which in any event it did not contest), to find a general failure to fulfil obligations, pursuant to its duty under Article 10 EC, Greece should have rather furnished evidence of instances where the two directives at issue were correctly applied. To this end, it should have provided an estimate of the average number of calls for tenders issued annually by a hospital in order to show that the instances known to the Commission were, on the basis of their number, geographical spread and nature of specialisation, indeed exceptional, and that, in relation to all the other cases, no general deficiencies underpinned them. However, in both the pre-litigation phase and its written submissions in these proceedings, the Greek Government manifestly failed to do either.

61. The only and one argument advanced by the Greek Government is that the Commission has failed to prove that the instances known to it are not isolated and exceptional incidents.

62. In my view, having regard to, on the one hand, the number, the geographical spread and the range of specialisation of the hospitals, and, on the other, the fact that they include some of the largest hospitals in Greece, it would appear that the Greek hospitals' conduct amounts to a generalised breach and thus may not be considered to be confined to those 14 instances known to the Commission.

63. Indeed, as the Commission has shown, the number of instances of infringement by the contracting authorities and the failure to control and sanction such conduct at administrative and judicial levels – both generally and in individual cases – lead to a different conclusion from that advocated by Greece. I consider therefore that both the action of the contracting authorities and the practice of the relevant supervisory authorities render the infringement of the lawful procedure systemic in nature.

64. The Commission has demonstrated that the existence of the factual situations which are the subject of the various instances complained of, given their number and nature, can only be explained by a pattern of non-observance of Community law obligations on a larger scale. In such a situation, taken together and seen in context, the instances of conduct complained of cannot be regarded as mere isolated incidents but rather symptomatic of a policy of administrative practice contrary to that Member State's obligations. (28)

65. Indeed, the conduct of public tendering procedures in breach of Directive 93/36 by a large number of hospitals is contrary to the obligations of the Greek authorities under Article 8(2) thereof.

66. The Commission correctly points out that the measures taken by the Greek Government to remedy those infringements, after it had been advised of them by the Commission, merely consist of the EOF's adoption of a regulatory act, namely Circular No 19384, and of the sending of a reminder two years later. It should be noted that the latter was sent on 19 January 2006, one month after the Commission had sent its reasoned opinion to the Greek authorities.

67. However, it is apparent from the documents before the Court that the contracting authorities' unlawful conduct, as well as the failure by the Greek authorities to control and sanction it, persists.

68. In view of the above considerations, I agree with the Commission that the cases brought to its attention constitute examples which are indicative of a common practice in Greek hospitals as

regards the supply of medical devices.

69. The Greek authorities' argument – based on the existence of national (appeal) procedures, which are designed to deal with every infringement relating to public procurement – does not justify breach of the relevant Community rules by the Member State.

70. As the Court stated in *Brasserie du Pêcheur and Factortame*, (29) it 'has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty'.

71. Indeed, a failure to fulfil an obligation ensuing from an administrative practice of a Member State assumes that a particular pattern of behaviour can be discerned on the part of the authorities of the defendant Member State. (30)

72. I am of the view that this is the case here. As appears from the documents before the Court, the administrative practice complained of, illustrated by numerous examples, is clearly, to some degree, of a consistent and general nature and is coupled, at the same time, with a lack of control, enforcement and sanctions. (31) In addition, according to the Commission's submissions, as set out in point 18 of this Opinion, it would appear – as is evident from the general tendency to reject the appeals against the contracting authorities' decisions – that, far from disagreeing with the incorrect and unlawful construction of the applicable provisions by the contracting authorities, the Council of State has rather confirmed it. (32)

73. On this basis, I consider that the administrative practice complained of by the Commission as described above is likely to persist. Moreover, it would appear that such an infringement by the Hellenic Republic is not only liable to have adverse effects on specific interests protected by Directives 93/36 and 93/42 but also, more generally, on the objectives promoted by those directives.

74. Indeed, in the present case the remedy for the situation lies not merely in taking action to resolve a number of individual cases which do not comply with the Community law obligation in question, but in a revision of the general policy and administrative practice of the Member State at issue. (33)

75. In addition, the conclusion – that the administrative practice complained of is clearly, to some degree, of a consistent and general nature, and is coupled with a lack of control, enforcement and sanction – would appear to be paradoxically confirmed by the Greek Government's argument that the sanctions could not (yet) have been imposed, since, at the time of lodging its rejoinder, the investigation by its Health and Welfare Services Inspection Body was still ongoing. In fact, *prima facie*, that investigation would appear unduly protracted, not least because the information that came to light during the administrative procedure under Article 226 EC could have enabled the Greek authorities to further their own investigation. In particular, from the documents before the Court the Commission first informed Greece of the contracting authorities' conduct on 26 September 2003 and Greece lodged its rejoinder on 19 April 2007. Therefore at least three and a half years had elapsed since the date on which Greece was first advised of the conduct at issue.

76. In my view, it should be noted here that the present case manifestly meets the criteria of time (the fact that the situation of non-compliance has existed over a long period of time) and of seriousness (the degree to which the actual situation in the Member State deviates from the result intended to be achieved by the Community obligation). (34)

77. Finally, the action for failure to fulfil obligations is objective and the protracted nature of the authorities' investigation cannot serve to expunge Greece's failure to fulfil its obligations. In *Commission* v *Belgium* (35) the Court stated that it 'has consistently held that a Member State may not plead provisions, practices or circumstances in its internal legal order to justify a failure to comply with obligations under Community directives'.

78. Therefore, it follows from the case-law referred to above that in the absence of evidence to the contrary produced by the Greek Government, the Commission must be held to have demonstrated to the requisite legal standard that by rejecting tenders in respect of medical devices bearing the CE marking, without, in any event, the competent contracting authorities of Greek hospitals having followed the procedure set out in Directive 93/42, Greece has failed to fulfil its obligations under Directives 93/36 and 93/42. (36)

IV – Costs

79. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has applied for costs against Greece.

V – Conclusion

80. I am therefore of the opinion that the Court should:

– declare that, by rejecting tenders in respect of medical devices bearing the CE certification marking, without, in any event, the competent contracting authorities of Greek hospitals having followed the procedure set out in Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, the Hellenic Republic has failed to fulfil its obligations under Article 8(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and Articles 17 and 18 of Directive 93/42 concerning medical devices;

– order the Hellenic Republic to pay the costs.

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1 – Original language: English.

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2 – Directive of 14 June 1993 concerning medical devices (OJ 1993 L 169, p. 1), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) ('Directive 93/42').

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3 – Directive of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1) ('Directive 93/36'). Directive 93/36 was repealed by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). However, it is Directive 93/36 that is pertinent to the facts of the present case.

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4 – Case C–6/05 [2007] ECR I–4557.

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5 – Directive of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (OJ 1986 L 217, p. 21).

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6 – Decision of 22 December 1986 on standardisation in the field of information technology and telecommunications (OJ 1987 L 36, p. 31).

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7 – According to the complaint, the competent committees, usually composed of medical doctors employed by hospitals, claim to be entitled to verify the general sufficiency and safety of use of the medical devices in question, and, taking the view that the CE marking is not a proper and binding guarantee, often discover shortcomings in the standards which, in the committees' opinion, limits or even renders the official CE certificate invalid.

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8 – The Commission refers to Case C–14/02 *ATRAL* [2003] ECR I–4431, paragraphs 50 to 53; Case C–103/01 *Commission* v *Germany* [2003] ECR I–5369, paragraphs 28 and

29; Case C–40/04 *Yonemoto* [2005] ECR I–7755, paragraphs 31 and 32; and the Opinion of Advocate General Sharpston in *Medipac-Kazantzidis*, case cited in footnote 4, points 83 to 87.

9 – Cited in footnote 4, paragraph 55.

10 – Case C–441/02 [2006] ECR I–3449, paragraph 47, referring to Case C–278/03 *Commission* v *Italy* [2005] ECR I–3747, paragraph 13. See also Case C–342/05 *Commission* v *Finland* [2007] ECR I–4713, paragraph 22.

11 – Case C–156/04 [2007] ECR I–4129, paragraph 50, referring to Case C–441/02 *Commission* v *Germany*, cited in footnote 10, paragraphs 49, 50 and 99, and the case-law cited. For a case where the Commission has not shown the existence in a Member State of an administrative practice with the characteristics required by the Court's case-law, see Case C–287/03 *Commission* v *Belgium* [2005] ECR I–3761, paragraph 28.

12 – Case C–494/01 [2005] ECR I–3331, paragraphs 41 to 47. See also Case C–135/05 *Commission* v *Italy* [2007] ECR I–3475, paragraphs 26 to 32. Cf. Lenaerts, K., 'The Rule of Law and the Coherence of the Judicial System of the European Union', *44 CML Rev.* (2007), 1636, fn. 70, who, in turn, refers to Wennerås, P., 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments', *43 CML Rev*. (2006), 31, and Schrauwen, A., 'Fishery, waste management and persistent and general failure to fulfil control obligations: The role of lump sums and penalty payments in enforcement actions under Community law', *18 Journal of Environmental Law* (2006), 289.

13 – See, in particular, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6, and Case C–408/97 *Commission* v *Netherlands* [2000] ECR I–6417, paragraph 15. Cf. also Case 272/86 *Commission* v *Greece* [1988] ECR 4875, paragraph 21.

14 – Case 96/81 *Commission* v *Netherlands*, cited in footnote 13, paragraph 7, and Case C–408/97 *Commission* v *Netherlands*, cited in footnote 13, paragraph 16.

15 – See, by analogy, Case C–408/97 *Commission* v *Netherlands*, cited in footnote 13, paragraph 17.

16 – See to this effect Case C–365/97 *Commission* v *Italy* [1999] ECR I–7773 ('*San Rocco*'), paragraphs 84 and 86.

17 – *San Rocco*, cited in footnote 16, paragraph 85.

18 – See, by analogy, Case 272/86 *Commission* v *Greece*, cited in footnote 13, paragraph 19.

19 – See, by analogy, Case 272/86 *Commission* v *Greece*, cited in footnote 13, paragraph

21, and *San Rocco*, cited in footnote 16, paragraphs 84 and 86.

20 – Case C–135/05, cited in footnote 12, paragraph 32.

21 – Case C–248/05 [2007] ECR I–9261, paragraph 64 and the case-law cited.

22 – It is apparent from the documents before the Court that the practice complained of extends to a number of other hospitals, including: Ipokratio Hospital of Thessaloniki ('one of the largest in the country'), Trikala General Hospital, G. Papanikolaou Hospital of Thessaloniki ('one of the largest in the country'), the University Hospital of Patras, the Greek Navy Hospital in Athens, Agia Sofia Hospital of Athens ('the largest hospital for children in the country'), Kifisia Hospital for Accidents (KAT, 'one of the major hospitals in Athens') and Tzanio Hospital ('the major hospital of Piraeus').

23 – Case C–494/01, cited in footnote 12, point 44.

24 – As opposed, for instance, to Case C–229/00 *Commission* v *Finland* [2003] ECR I–5727, paragraph 53.

25 – Cf. with Case C–494/01 *Commission* v *Ireland*, cited in footnote 12, where Ireland contested the veracity of the majority of the Commission's allegations. Cf. also with Case C–375/90 *Commission* v *Greece* [1993] ECR I–2055, paragraph 34, where, since 'the Hellenic Republic provided detailed information in its written pleadings and at the hearing to show that it had in fact complied with the requirements of Annex III and the Commission did not dispute the accuracy of that information', the Court concluded that the Commission had failed to substantiate its allegation that the provisions of the relevant regulation were infringed.

26 – See Case 272/86 *Commission* v *Greece*, cited in footnote 13, paragraph 21. See also Case C–508/03 *Commission* v *United Kingdom* [2006] ECR I–3969, paragraph 80.

27 – Cf. with what the Court essentially held in Case 272/86 *Commission* v *Greece*, cited in footnote 13, that although it is incumbent on the Commission to prove its allegation, the Member State is not entitled, where the Commission has produced sufficient evidence to show the failure to fulfil obligations, *merely to deny its existence*. The Member State has to contest substantively and in detail the information produced and the consequences thereof. If it does not do so, the allegations must be regarded as substantiated.

28 – See, to that effect, the Opinion of Advocate General Geelhoed in Case C–494/01 *Commission* v *Ireland*, cited in footnote 12, point 55.

29 – Joined Cases C–46/93 and C–48/93 [1996] ECR I–1029, paragraph 20.

30 – Lenaerts, K., Arts, D., Maselis, I., *Procedural Law of the European Union*, 2nd edition, London, 2006, p. 133, section 5-008, citing, for example, Case 21/84 *Commission* v *France* [1985] ECR 1355; Case 35/84 *Commission* v *Italy* [1986] ECR

545; Case C-150/00 *Commission* v *Austria* [2004] ECR I-3887; and Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375.

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31 – Similarly to Case C-494/01 *Commission* v *Ireland*, cited in footnote 12, Greece would appear (i) to have failed generally to create and/or enforce the necessary legal and administrative framework for the proper application and enforcement of provisions of Directives 93/36 and 93/42, as well as (ii) to apply and enforce the provisions *in casu*. Indeed, objectively, there would appear to be a general tendency on the part of the Greek authorities to tolerate situations in which those provisions were not complied with (cf. Case C-494/01 *Commission* v *Ireland*, cited in footnote 12, paragraph 132).

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32 – As regards the compatibility with Community law of a practice related to a 'neutral' provision of national law, in the context of judicial behaviour, see the judgment in Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637. There, the Court set out the circumstances in which a national judicial practice is capable of amounting to a failure by a Member State to fulfil its obligations under Article 226 EC.

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33 – See the Opinion of Advocate General Geelhoed in Case C-494/01 *Commission* v *Ireland*, cited in footnote 12, point 48, where he goes on to say that: 'restricting the remedial action to identified cases of non-compliance would after all leave other situations of non-compliance intact until they too have been identified and challenged … by the Commission in new infringement proceedings … In the meantime a situation contrary to that envisaged by the Community measure persists.'

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34 – Ibid., points 45 and 46.

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35 – Case 301/81 [1983] ECR 467, paragraph 6.

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36 – See, to this effect, *SanRocco*, cited in footnote 16, paragraph 91.

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Action brought on 27 November 2006 - Commission of the European Communities v Hellenic Republic

(Case C-489/06)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and X. Lewis)

Defendant: Hellenic Republic

Form of order sought

declare that, by rejecting tenders in respect of medical devices bearing the CE certification marking, without, in any event, the competent contracting authorities of Greek hospitals having followed the procedure set out in Directive 93/42/EEC, the Hellenic Republic has failed to fulfil its obligations under Article 8(2) of Directive 93/36/EEC of 14 June 1993 [1] coordinating procedures for the award of public supply contracts and Articles 17 and 18 of Council Directive 93/42/EEC of 14 June 1993 [2] concerning medical devices;

order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The Commission received a complaint relating to the phenomenon of rejection of medical devices, in the context of calls for competition for supplies to public hospitals in Greece, on grounds relating to the 'general sufficiency and safety of use' thereof, notwithstanding their certification with the CE marking, and without, in any event, the procedure provided for in Directive 93/42/EEC concerning medical devices being followed.

Under Directive 93/36/EEC coordinating procedures for the award of public supply contracts, the tender procedures must be conducted on the basis of the relevant national technical standards implementing European standards, of European technical approvals or of common technical specifications. The Commission considers that, by deciding in the instances at issue that the CE marking did not constitute an appropriate and binding guarantee of the suitability of the products in the tenders, without any of the prescribed exceptions which justify divergence from the directive's provisions being applicable, the Greek contracting authorities infringed the obligations owed by them in that regard under Article 8(2).

At the same time, the Commission points out an infringement of Directive 93/42/EEC concerning medical devices, which lays down specific and exclusive procedures for certifying such devices and placing them on the market, as well as for contesting their suitability. The information available to the Commission reveals continual breach, by the competent Greek authorities which have rejected tenders, of the legal procedures for checking the suitability of medical devices. None of the stages of the procedure provided for in Article 18 of the directive was observed where the correctness of certification - pursuant to Article 17 of the directive - with the CE marking was disputed.

Also, in the Commission's submission, the Greek authorities' claim that the measures which they have taken to eliminate the abovementioned phenomenon are sufficient is contradicted by the very facts and, in any event, in accordance with the Court of Justice's case-law, the existence of national procedures which are designed to deal with every infringement relating to public procurement does not justify infringement of the relevant Community rules by the Member State.

The Commission considers therefore that the Hellenic Republic has infringed its obligations under Directive 93/36/EEC, in particular Article 8(2), and under Directive 93/42/EEC, in particular Articles 17 and 18.

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[1] - OJ No L 199, 9.8.1993, p. 1.

[2] - OJ No L 169, 12.7.1993, p. 1.

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ARRÊT DE LA COUR (huitième chambre)

18 décembre 2007 (*)

«Manquement d'État – Marchés publics – Violation de l'article 6, paragraphe 3, de la directive 93/36/CE – Principes généraux du traité – Principe d'égalité de traitement et obligation de transparence –Réglementation nationale permettant de recourir à la procédure négociée pour des marchés publics de fournitures portant sur certains matériels médicaux»

Dans l'affaire C–481/06,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 24 novembre 2006,

Commission des Communautés européennes, représentée par M^me^ M. Patakia et M. X. Lewis, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République hellénique, représentée par M^mes^ S. Chala et D. Tsagkaraki, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (huitième chambre),

composée de M. G. Arestis, président de chambre, M^me^ R. Silva de Lapuerta et M. E. Juhász (rapporteur), juges,

avocat général: M. J. Mazák,

greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, en maintenant en vigueur l'article 7, paragraphe 2, de la loi 2955/2001 relative aux «Fournitures des hôpitaux et autres unités de santé des régimes régionaux de santé et de prévoyance et autres dispositions» (FEK A' 256/2.11.2001, ci-après la «loi 2955») et en adoptant les dispositions d'exécution des arrêtés ministériels conjoints DY6a/oik.38611 et DY6a/oik.38609, du 12 avril 2005(FEK 518/19.04.2005), la République hellénique a manqué à l'obligation qui lui incombe en vertu de l'article 6, paragraphe 3, de la directive 93/36/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures (JO L 199, p. 1), telle que modifiée par la directive 2001/78/CE de la Commission, du 13 septembre 2001 (JO L 285, p. 1, ci–après la «directive 93/36»), ainsi qu'à l'obligation d'assurer une concurrence réelle et équitable, telle que définie par la jurisprudence de la Cour.

Le cadre juridique

La réglementation communautaire

2 Conformément à l'article 5 de la directive 93/36, les dispositions de celle-ci prévoyant des mesures de coordination des procédures de passation des marchés publics de fournitures s'appliquent à des marchés dont la valeur dépasse les seuils fixés au paragraphe 1, dudit article 5.

3 L'article 6 de la directive 93/36 prévoit:

«1. Pour passer leurs marchés publics de fournitures, les pouvoirs adjudicateurs appliquent les procédures définies à l'article 1er points d), e) et f) dans les cas énumérés ci-dessous.

2. Les pouvoirs adjudicateurs peuvent passer leurs marchés de fournitures en recourant à la procédure négociée en cas de dépôt de soumissions irrégulières en réponse à une procédure ouverte ou restreinte ou en cas de dépôt de soumissions inacceptables en vertu des dispositions nationales conformes au titre IV, pour autant que les conditions initiales du marché ne soient pas substantiellement modifiées. Les pouvoirs adjudicateurs publient dans ces cas un avis d'adjudication, à moins qu'ils n'incluent dans ces procédures négociées toutes les entreprises qui satisfont aux critères visés aux articles 20 à 24 et qui, lors de la procédure ouverte ou restreinte antérieure, ont soumis des offres conformes aux exigences formelles de la procédure d'adjudication.

3. Les pouvoirs adjudicateurs peuvent passer leurs marchés de fournitures en recourant à la procédure négociée sans publication préalable d'un avis d'adjudication dans les cas suivants:

a) lorsqu'aucune soumission ou aucune soumission appropriée n'a été déposée en réponse à une procédure ouverte ou restreinte, pour autant que les conditions initiales du marché ne soient pas substantiellement modifiées et à condition qu'un rapport soit communiqué à la Commission;

b) lorsque les produits concernés sont fabriqués uniquement à des fins de recherche, d'expérimentation, d'étude ou de développement, cette disposition ne comprenant pas la production en quantités visant à établir la viabilité commerciale du produit ou à amortir les frais de recherche et de développement;

c) lorsque, en raison de leur spécificité technique, artistique ou pour des raisons tenant à la protection des droits d'exclusivité, la fabrication ou la livraison des produits ne peut être confiée qu'à un fournisseur déterminé;

d) dans la mesure strictement nécessaire, lorsque l'urgence impérieuse, résultant d'événements imprévisibles pour les pouvoirs adjudicateurs en question n'est pas compatible avec les délais exigés par les procédures ouvertes, restreintes ou négociées visées au paragraphe 2. Les circonstances invoquées pour justifier l'urgence impérieuse ne doivent en aucun cas être imputables aux pouvoirs adjudicateurs;

e) pour les livraisons complémentaires effectuées par le fournisseur initial et destinées soit au renouvellement partiel de fournitures ou d'installations d'usage courant, soit à l'extension de fournitures ou d'installations existantes, lorsque le changement de fournisseur obligerait le pouvoir adjudicateur à acquérir un matériel de technique différente entraînant une incompatibilité ou des difficultés techniques d'utilisation et d'entretien disproportionnées. La durée de ces marchés, ainsi que des marchés renouvelables, ne peut pas, en règle générale, dépasser trois ans.

4. Dans tous les autres cas, les pouvoirs adjudicateurs passent leurs marchés de fournitures en recourant à la procédure ouverte ou à la procédure restreinte.»

La réglementation nationale

4 L'article 7, paragraphes 1 et 2, de la loi 2955/2001 prévoit:

«Adjudication avec offre de prix par analyse ou par acte.

1. Les besoins des régimes de santé régionaux et de leurs unités décentralisées, ainsi que les besoins des hôpitaux liés aux régimes de santé régionaux, peuvent être couverts par l'organisation

de procédures d'adjudication pour l'achat et la location d'appareils et consommables médicaux, selon la méthode de l'offre, par les fournisseurs, de prix par analyse de laboratoire ou par acte de diagnostic ou de soins. Le prix proposé comprend la cession des appareils, des réactifs, du matériel consommable et l'entretien pour toute la durée du contrat.

[…]

2. Un arrêté conjoint des ministres du Développement, des Finances, de l'Emploi et des assurances sociales et de la Santé et de la prévoyance pourra fixer un prix plafond pour la fourniture, sans adjudication, de certains matériels, qui ne sont pas comparables, ainsi que de matériels dont l'adaptation optimale à l'usage dépend des particularités du malade, tels que les matériels d'ostéosynthèse, d'arthroplastie, les implants intra-oculaires et les valves d'hydrocéphalie.»

5 Sur le fondement de l'article 7, paragraphe 2, de la loi 2955, des arrêtés ministériels conjoints ont été adoptés, lesquels fixent les prix plafonds pour des matériels médicaux y étant énumérés. En particulier, les arrêtés ministériels conjoints DY6a/G.P.73754, du 24 juillet 2002 (FEK 984/31.07.2002), et 8130, du 30 décembre 2003 (FEK B' 1952/30.12.2003), modifiés par la suite par les arrêtés ministériels DY6a/oik.38611 et DY6a/oik.38609, du 12 avril 2005, fixent un prix plafond pour des matériels d'ostéosynthèse, de chirurgie maxillo-faciale, de stimulateurs cardiaques et défibrillateurs, d'électrodes et de matériel de chirurgie cardiaque, ainsi que des filtres d'hémodialyse pour rein artificiel avec les lignes artério-veineuses nécessaires.

Les faits et la procédure précontentieuse

6 La Commission ayant été saisie d'une plainte, son attention s'est portée sur les dispositions de l'article 7, paragraphe 2, de la loi 2955 ainsi que sur celles de l'arrêté ministériel conjoint DY6a/G.P.73754, du 24 juillet 2002, adopté en vertu de cette loi.

7 Estimant que ladite réglementation nationale grecque n'était pas conforme à l'article 6, paragraphe 3, de la directive 93/36, la Commission a engagé à l'encontre de la République hellénique la procédure en manquement prévue à l'article 226 CE en lui adressant, le 18 octobre 2004, une lettre de mise en demeure. Dans leur réponse, les autorités grecques n'ont pas contesté les allégations de la Commission quant à la non-conformité de l'article 7, paragraphe 2, de la loi 2955 avec la directive 93/36 et se sont engagées à abroger cette disposition.

8 En l'absence de mesures appropriées prises par la République hellénique, la Commission lui a, le 19 décembre 2005, adressé un avis motivé l'invitant à s'y conformer dans un délai de deux mois à compter de la réception de celui-ci.

9 Dans sa réponse, du 9 février 2006, la République hellénique a confirmé que les procédures de modification de la réglementation nationale litigieuse seraient achevées à la fin du mois de mai de l'année 2006, date à laquelle une nouvelle loi serait votée par le Parlement grec.

10 N'ayant toutefois reçu aucune communication relative à l'adoption de la nouvelle loi, la Commission a décidé d'introduire le présent recours.

Sur le recours

11 La Commission fait valoir, d'une part, que la réglementation nationale litigieuse est incompatible avec l'article 6, paragraphe 3, de la directive 93/36. D'autre part, elle soutient que cette réglementation viole les principes fondamentaux du traité CE lesquels continuent de s'appliquer même lorsque la valeur estimée d'un marché est inférieure au seuil d'application de la directive 93/36, en particulier l'obligation d'assurer une concurrence réelle et équitable.

12 En premier lieu, il convient de constater que la réglementation nationale litigieuse autorise les pouvoirs adjudicateurs à recourir directement à la procédure négociée en ce qui concerne l'acquisition de catégories entières de produits médicaux sans s'assurer que les exigences établies par l'article 6, paragraphe 3, de la directive 93/36 sont remplies. La République hellénique ne conteste pas que cette réglementation constitue une dérogation à l'obligation d'organiser une procédure d'adjudication dans un cas non visé par ladite disposition.

13 En second lieu, il ressort du silence de la République hellénique qu'elle ne conteste pas que la réglementation nationale litigieuse n'est pas conforme aux obligations découlant des règles fondamentales et des principes généraux du traité, en particulier l'égalité de traitement et l'obligation de transparence.

14 La République hellénique conclut néanmoins au rejet du recours, en faisant valoir que, dans le cadre de la réforme législative relative aux fournitures dans le domaine de la santé, un projet de loi incluant un article relatif à l'abrogation de l'article 7, paragraphe 2, de la loi 2955 va être déposé. Elle précise que le retard est dû aux modifications importantes apportées par ledit projet de loi, qui vise à créer un nouvel environnement juridique dans le domaine très sensible de la santé, et qui garantira tant l'achèvement sans obstacle des procédures de passation de marchés que l'approvisionnement régulier des hôpitaux en matériel indispensable de technique médicale.

15 À cet égard, il suffit de rappeler que, selon une jurisprudence constante, l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre telle qu'elle se présentait au terme du délai fixé dans l'avis motivé (arrêts du 2 juin 2005, Commission/Luxembourg, C-266/03, Rec. p. I-4805, point 36, et du 26 octobre 2006, Commission/Autriche, C-102/06, non publié au Recueil, point 8).

16 Or, la disposition litigieuse étant restée en vigueur à l'expiration du délai imparti dans l'avis motivé, le recours introduit par la Commission doit être considéré comme fondé.

17 Par conséquent, il convient de constater que, en maintenant en vigueur l'article 7, paragraphe 2, de la loi 2955 ainsi que les dispositions d'exécution des arrêtés ministériels conjoints DY6a/oik.38611 et DY6a/oik.38609, du 12 avril 2005, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 6, paragraphe 3, de la directive 93/36 ainsi que des principes généraux du traité, en particulier l'égalité de traitement et l'obligation de transparence.

Sur les dépens

18 En vertu de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République hellénique et cette dernière ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (huitième chambre) déclare et arrête:

1) En maintenant en vigueur l'article 7, paragraphe 2, de la loi 2955/2001 relative aux «Fournitures des hôpitaux et autres unités de santé des régimes régionaux de santé et de prévoyance et autres dispositions» ainsi que les dispositions d'exécution des arrêtés ministériels conjoints DY6a/oik.38611 et DY6a/oik.38609, du 12 avril 2005, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 6, paragraphe 3, de la directive 93/36/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures, telle que modifiée par la directive 2001/78/CE de la Commission, du 13 septembre 2003, ainsi que des principes généraux du traité, en particulier l'égalité de traitement et l'obligation de transparence.

2) La République hellénique est condamnée aux dépens.

Signatures

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* Langue de procédure: le grec.

Judgment of the Court (Eighth Chamber) of 18 December 2007 Commission of the European Communities v Hellenic Republic. Failure of a Member State to fulfil its obligations. Case C-481/06.

DOCNUM	62006J0481
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
DOC	2007/12/18
LODGED	2006/11/24
JURCIT	31993L0036-A06P3 : 32001L0078 :
CONCERNS	Failure concerning 31993L0036 -A06P3 Failure concerning 32001L0078 -
SUB	Freedom of establishment and services ; Right of establishment ; Approximation of laws
AUTLANG	Greek
APPLICA	Commission ; Institutions
DEFENDA	Greece ; Member States
NATIONA	Greece
PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Mazak
JUDGRAP	Juhasz
DATES	of document: 18/12/2007 of application: 24/11/2006

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Documents relatifs à la même affaire

Arrêt de la Cour (huitième chambre) du 18 décembre 2007 – Commission / Grèce(affaire C–481/06)

«Manquement d'État – Marchés publics – Violation de l'article 6, paragraphe 3, de la directive 93/36/CE – Principes généraux du traité – Principe d'égalité de traitement et obligation de transparence –Réglementation nationale permettant de recourir à la procédure négociée pour des marchés publics de fournitures portant sur certains matériels médicaux»

Recours en manquement - Examen du bien-fondé par la Cour - Situation à prendre en considération - Situation à l'expiration du délai fixé par l'avis motivé (Art. 226 CE) (cf. point 15)

Objet

Manquement d'État - Violation de l'art. 6, par. 3, de la directive 93/36/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures (JO L 199, p. 1) ainsi que de l'obligation de garantir une concurrence effective et loyale - Disposition nationale classant en catégories l'ensemble des substances à usage médical et fixant un prix maximal déterminé pour chaque catégorie - Disposition constitutive d'un cadre réglementaire qui permet de recourir à la procédure négociée pour des marchés publics de fournitures portant sur des groupes entiers de produits de cette nature, qui se caractérisent par l'impossibilité d'opérer une comparaison.

Dispositif

1) En maintenant en vigueur l'article 7, paragraphe 2, de la loi **2955/2001** relative aux «Fournitures des hôpitaux et autres unités de santé des régimes régionaux de santé et de prévoyance et autres dispositions» ainsi que les dispositions d'exécution des arrêtés ministériels conjoints DY6a/oik.38611 et DY6a/oik.38609, du 12 avril 2005, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 6, paragraphe 3, de la directive 93/36/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures, telle que modifiée par la directive 2001/78/CE de la Commission, du 13 septembre 2001, ainsi que des principes généraux du traité, en particulier l'égalité de traitement et l'obligation de transparence.

2) La République hellénique est condamnée aux dépens.

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Judgment of the Court (Eighth Chamber) of 18 December 2007 - Commission of the European Communities v Hellenic Republic

(Case C-481/06) [1]

(Failure of a Member State to fulfil obligations - Public procurement - Infringement of Article 6 (3) of Directive 93/36/EC - General principles of the Treaty - Principle of equal treatment and obligation of transparency -National rules allowing use of the negotiated procedure for public supply contracts relating to certain medical equipment)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and X. Lewis, Agents)

Defendant: Hellenic Republic (represented by: S. Chala and D. Tsagkaraki, Agents)

Re:

Failure of a Member State to fulfil obligations - Infringement of Article 6(3) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of the obligation to ensure effective and fair competition - National provision placing all material for medical use into categories and setting a specific maximum price for each category - Provision forming part of a legislative framework which allows use of the negotiated procedure for public supply contracts in respect of whole groups of products of that nature which are not comparable

Operative part of the judgment

The Court:

1. Declares that, by retaining in force Article 7(2) of Law **2955/2001** relating to the 'Supplies of hospitals and other health units of regional health and pension schemes and other provisions' and Joint Ministerial Decisions DY6a/oik.38611 and DY6a/oik.38609 of 12 April 2005, the Hellenic Republic has failed to fulfil its obligations under Article 6(3) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001 and has infringed general principles of the Treaty, in particular equal treatment and the obligation of transparency;

2. Orders the Hellenic Republic to pay the costs.

———————

[1] - OJ C 326, 30.12.2006.

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Action brought on 24 November 2006 - Commission of the European Communities v Hellenic Republic

(Case C-481/06)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and X. Lewis)

Defendant: Hellenic Republic

Form of order sought

declare that, by retaining in force Article 7(2) of Law 2955/2001, and by means of the Joint Ministerial Decisions (DI6a/ik 38611 and DI6a/ik 38609 of 12 April 2005) implementing that provision, the Hellenic Republic has failed to fulfil its obligation flowing from Article 6(3) of Directive 93/36/EEC [1] coordinating procedures for the award of public supply contracts and its obligation, as laid down by the case-law of the Court of Justice of the European Communities, to ensure effective and fair competition;

order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The Commission received a complaint relating to the provision of Greek legislation which has placed all material for medical use into categories and set a specific maximum price for each category. That provision, in conjunction with the joint ministerial decisions implementing it, constitutes a legislative framework which allows the direct award of public supply contracts for whole groups of the foregoing products which are classified as not comparable.

In the light of the case-law of the Court of Justice, the Commission considers that the legislative framework in question is contrary to Article 6(3) of Directive 93/36 coordinating procedures for the award of public supply contracts and to the obligation to ensure effective and fair competition. Inasmuch as that provision is in the nature of an exception, it must be interpreted narrowly and it is not possible to allow direct awards for whole categories of products. Also, contracting authorities must make sure that effective competition is preserved and ensure transparency in the public supply field, which is not possible with direct awards, apart from the exceptional cases laid down in Article 6(3) of Directive 93/36.

The Greek authorities did not contest the Commission's submissions or the existence of the alleged infringement and announced their intention to amend the legislative provision at issue. Nevertheless, no such amendment had been made known up until the date on which the action was brought.

The Commission consequently considers that the Hellenic Republic has failed to fulfil its obligation under Article 6(3) of Directive 93/36 and its obligation to ensure effective and fair competition.

_____

[1] - OJ No L 199, 9.8.1993, p. 1.

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JUDGMENT OF THE COURT (Grand Chamber)

9 June 2009 (*)

(Failure of a Member State to fulfil obligations – Directive 92/50/EEC – No formal European tendering procedure for the award of waste treatment services – Cooperation between local authorities)

In Case C–480/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 24 November 2006,

Commission of the European Communities, represented by X. Lewis and B. Schima, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and C. Schulze-Bahr, acting as Agents, and by C. von Donat, Rechtsanwalt,

defendant,

supported by:

Kingdom of the Netherlands, represented by C.M. Wissels and Y. de Vries, acting as Agents,

Republic of Finland, represented by J. Heliskoski, acting as Agent,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, K. Lenaerts and J.-C. Bonichot (Rapporteur), Presidents of Chambers, A. Borg Barthet, J. Malenovský, J. Klučka and U. Lõhmus, Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2008,

after hearing the Opinion of the Advocate General at the sitting on 19 February 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by reason of the fact that the *Landkreise* (administrative districts) Rotenburg (Wümme), Harburg, Soltau–Fallingbostel and Stade directly concluded with Stadtreinigung Hamburg (City of Hamburg Cleansing Department) a contract for waste disposal without there having been a call for

tenders in the context of a formal tendering procedure at European Community level for that services contract, the Federal Republic of Germany has failed to fulfil its obligations under the combined provisions of Article 8 and Titles III to VI of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

Legal context

Community law

2 Article 1 of Directive 92/50 provides:

'For the purposes of this Directive:

(a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, ...

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

Body governed by public law means any body:

– established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

– having legal personality and

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

...

(c) *service provider* shall mean any natural or legal person, including a public body, which offers services. A service provider who submits a tender shall be designated by the term *tenderer* and one who has sought an invitation to take part in a restricted or negotiated procedure by the term *candidate*.'

3 Pursuant to Article 11(3)(b) of Directive 92/50:

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

...

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

The factual background to the case and the pre-litigation procedure

4 Four *Landkreise* in Lower Saxony, namely Rotenburg (Wümme), Harburg, Soltau-Fallingbostel and Stade, concluded a contract on 18 December 1995 with Stadtreinigung Hamburg relating to the disposal of their waste in the new incineration facility at Rugenberger Damm, with a capacity of 320 000 tonnes per annum. That facility is intended to produce both electricity and heat and its construction was to be completed by 15 April 1999.

5 In that contract, Stadtreinigung Hamburg reserve a capacity of 120 000 tonnes per annum for the four *Landkreise* in question, for a price calculated using the same formula for each of the parties concerned. That price is to be paid to the facility's operator, the other party to the contract with

Stadtreinigung Hamburg, through the intermediary of the latter. The contract is to run for 20 years. The parties agreed to open negotiations five years at the latest before the end of that contract in order to make a decision as to its extension.

6 The contract at issue was concluded directly between the four *Landkreise* and Stadtreinigung Hamburg without following the tendering procedure provided for in Directive 92/50.

7 By letter of formal notice sent on 30 March 2004, pursuant to the first paragraph of Article 226 EC, the Commission informed the German authorities that, by concluding a contract on waste disposal directly, without issuing a call for tenders or conducting a tendering procedure at European level, the Federal Republic of Germany had disregarded the combined provisions of Article 8 and of Titles III to VI of Directive 92/50.

8 By letter of 30 June 2004 to the Commission, the Federal Republic of Germany stated that the contract at issue finalised an agreement on the shared performance of a public service which was the responsibility of the *Landkreise* concerned and the City of Hamburg. That Member State explained that the cooperation at district level at issue, the subject-matter of which was an activity taking place within the ambit of the State, did not affect the market and therefore did not fall within the scope of the law on public procurement.

9 Since it considered, despite these explanations, that the *Landkreise* concerned were public contracting authorities, that the contract on waste disposal was a contract for services for pecuniary interest, concluded in writing, which exceeded the threshold set for the application of Directive 92/50, and that, consequently, it fell within the scope of that directive, the Commission sent a reasoned opinion on 22 December 2004 to the Federal Republic of Germany pursuant to the first paragraph of Article 226 EC.

10 By letter of 25 April 2005, the Federal Republic of Germany reiterated its previous arguments.

11 Taking the view that that line of argument could not refute the claims set out in the reasoned opinion, the Commission decided, under the second paragraph of Article 226 EC, to bring this action.

The action

Arguments of the parties

12 The Commission submits, first, that the *Landkreise* concerned must be regarded as contracting authorities within the meaning of Directive 92/50 and that the contract at issue is a written contract for pecuniary interest exceeding the threshold set for the application of that directive. In addition, waste disposal is an activity classified as a ‘service’ for the purposes of category 16 in Annex IA to that directive.

13 The Federal Republic of Germany contends, for its part, that the contract at issue is the culmination of a transaction internal to the administrative authorities and that, consequently, it does not fall within the scope of Directive 92/50.

14 According to that Member State, the contracting parties concerned must be regarded as providing administrative cooperation in the performance of their public tasks. In that respect, Stadtreinigung Hamburg could be regarded not as a service provider acting in return for payment, but as a body governed by public law responsible for waste disposal and offering administrative cooperation to neighbouring local authorities in return for reimbursement of its operating costs.

15 In this connection, the Kingdom of the Netherlands, like the Federal Republic of Germany, bases its arguments on paragraphs 16 and 17 of the judgment in Case C-380/98 *University of Cambridge* [2000] ECR I-8035, concluding that ‘provision of services’ must be understood as referring exclusively to provision of services which may be offered on the market by operators under certain fixed conditions.

16 Those two Member States submit that the content of the contract at issue goes beyond what is provided for under a ‘service contract’ for the purposes of Directive 92/50, since it requires the *Landkreise* concerned, in return for treatment of waste in the Rugenberger Damm facility, to make available to Stadtreinigung Hamburg, at an agreed rate, landfill capacity which the *Landkreise* do

not themselves use, in order to alleviate the lack of landfill capacity confronting the City of Hamburg.

17 The Federal Republic of Germany also points out that that legal relationship is described in the preamble to the contract as a 'regional cooperation agreement for waste disposal'. It paves the way for cooperation between the contracting parties who, if necessary, will assist each other in the performance of their legal obligation to dispose of waste and will therefore perform that service jointly in the region concerned. It is thus envisaged that, in certain circumstances, the *Landkreise* concerned will agree to reduce, for a specified period, the quantity of waste delivered in the event of the treatment facility malfunctioning. They thus agree to limit their right to performance of the contract.

18 According to the Commission, the services provided in the present case cannot be regarded as administrative cooperation, insofar as the refuse disposal services do not carry out their activities under statute or other unilateral measures, but on the basis of a contract.

19 The Commission adds that the only permitted exceptions to the application of the directives on public procurement are those which are exhaustively and expressly mentioned therein (see, Case C–107/98 *Teckal* [1999] ECR I-8121, paragraph 43, concerning Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1)). It submits that, in Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraphs 38 to 40, the Court confirmed that contracts for horizontal cooperation concluded by local authorities, such as that which the present case concerns, are subject to the law on public procurement.

20 The Federal Republic of Germany disputes that interpretation of the judgment in *Commission* v *Spain*, taking the view that in the case which gave rise to those proceedings the Court did not expressly hold that all agreements concluded between administrative bodies fell within the scope of public procurement law but merely criticised the Kingdom of Spain for its general exclusion of agreements concluded between public law bodies from the scope of that law.

21 Secondly, the Commission does not accept that the Federal Republic of Germany can rely on the 'in house' exception, according to which contracts awarded by a contracting authority where, first, the public body exercises over the other contracting party, which is a person legally distinct from that public body, control similar to that which it exercises over its own departments and in so far as, secondly, that person carries out the essential part of its activities with the public body do not fall within the scope of the public procurement directives (see, to that effect, *Teckal*, paragraphs 49 and 50). According to the Commission, the condition relating to the existence of such control is not fulfilled in the present case, since none of the contracting bodies concerned exercises any power over the management of Stadtreinigung Hamburg.

22 By contrast, the Federal Republic of Germany takes the view that, in the context of the Hamburg Metropolitan Region, the requirement relating to the intensity of the control exercised, which must be measured against the yardstick of the public interest (see, to that effect, Case C–26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 50), is satisfied since the authorities concerned exercise reciprocal control over each other. Any divergence from the objectives jointly defined would cause the cooperation to cease altogether. The principle of 'give and take' implies that Stadtreinigung Hamburg and the *Landkreise* concerned have an interest in maintaining that cooperation and, consequently, in complying with the objectives jointly defined.

23 On the basis of the judgment in Case C-295/05 *Asemfo* [2007] ECR I-2999, the Kingdom of the Netherlands submits that the condition relating to the intensity of the control exercised may be fulfilled even if the control exercised by the public body concerned is more limited than that exercised over its own departments. It does not regard that condition as implying identical control. Only similar control is required.

24 In the Commission's opinion, that judgment does not constitute a relaxation of the case-law resulting from *Teckal*. It finds only that the criterion relating to the intensity of the control exercised may also be satisfied where a specific legal framework establishes a relationship of dependency and subordination, allowing similar control to be exercised by several contracting authorities. That is not the situation in the present case.

25 Thirdly, the Commission submits that the Federal Republic of Germany has not proved that, for technical reasons, solely Stadtreinigung Hamburg was in a position to conclude the contract at issue and that, consequently, it could rely on the derogation provided for in Article 11(3)(b) of Directive 92/50.

26 The Federal Republic of Germany submits that, had a call for tenders been issued, Stadtreinigung Hamburg would not necessarily have been able to submit a tender because, in 1994, that city did not have the capacity to recover waste that could have prompted it to participate in such a call for tenders. It is only in the light of the need of the *Landkreise* concerned to recover their waste, which only later became apparent, and of the assurance that the *Landkreise* would use a future facility that the construction of Rugenberger Damm facility was envisaged.

27 That Member State also points out that the said *Landkreise* were assured that the facility planned by Stadtreinigung Hamburg would be commissioned within a foreseeable period, an assurance that no other tenderer would have been able to provide.

28 Fourthly, the Commission rejects the arguments of the Federal Republic of Germany that the application of Directive 92/50 must be excluded, pursuant to Article 86(2) EC, where, as in the present case, it leads to the performance by public bodies of the task of waste disposal assigned to them being obstructed.

29 The Federal Republic of Germany considers that the interpretation of Directive 92/50 adopted by the Commission would lead, first, to the *Landkreise* concerned being unable to entrust waste disposal – which is a task in the public interest at Community level – to Stadtreinigung Hamburg, and to their having to entrust that task to the operator providing the most economically advantageous offer, without any guarantee that the public service would be carried out satisfactorily or on a permanent basis, and, secondly, to the capacities of the new plant not being used profitably.

30 That Member State points out that if the contract at issue had not been concluded, none of the parties would have been able to perform its public task. The City of Hamburg, in particular, would not have been able to build a facility with extra capacity in order to then try, without any guarantee of success, on economic grounds to sell unused capacity on the market.

Findings of the Court

31 First of all, it must be observed that the Commission's action concerns only the contract concluded between Stadtreinigung Hamburg and four neighbouring *Landkreise* for reciprocal treatment of waste, and not the contract governing the relationship between Stadtreinigung Hamburg and the operator of the Rugenberger Damm waste treatment facility.

32 Pursuant to Article 1(a) of Directive 92/50, public service contracts are contracts for pecuniary interest concluded in writing between a service provider and one of the contracting authorities listed in Article 1(b) of that directive, which includes regional or local authorities such as the *Landkreise* concerned in this action for failure to fulfil obligations.

33 Under Article 1(c) of that directive, the service provider party to the contract may be 'any natural or legal person, including a public body'. Thus, the fact that the service provider is a public entity distinct from the beneficiary of the services does not preclude the application of Directive 92/50 (see, to that effect, *Commission* v *Spain*, paragraph 40, regarding a public supply and works contract).

34 However, the Court's case-law shows that a call for tenders is not mandatory where a public authority which is a contracting authority exercises over the separate entity concerned control similar to that which it exercises over its own departments, provided that that entity carries out the essential part of its activity with the public authority or with other controlling local or regional authorities (see, to that effect, *Teckal*, paragraph 50, and *Stadt Halle and RPL Lochau*, paragraph 49).

35 Likewise, the Court has held, in respect of the delegation by a municipality of a public service to an inter-municipal cooperative the object of which was exclusively to provide services to the affiliated municipalities, that that could legally take place without a call for tenders, since it considered that, notwithstanding the autonomous aspects of that cooperative's management by its board, the affiliated municipalities had to be regarded as together exercising control over it (see, to that effect, Case C-324/07 *Coditel Brabant* [2008] ECR I–0000, paragraph 41).

36 However, it is undisputed in the present case that the four *Landkreise* concerned do not exercise any control which could be described as similar to that which they exercise over their own departments, whether over the other contracting party, namely Stadtreinigung Hamburg, or over the operator of the Rugenberger Damm waste incineration facility, which is a company whose capital consists in

part of private funds.

37 It must nevertheless be observed that the contract at issue establishes cooperation between local authorities with the aim of ensuring that a public task that they all have to perform, namely waste disposal, is carried out. That task relates to the implementation of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), which requires the Member States to draw up plans for waste management providing, in particular for 'appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste', one of the most important of such measures being, pursuant to Article 5(2) of Council Directive 91/156/EEC of 18 March 1991, amending Directive 75/442 (OJ 1991 L 78, p. 32), ensuring that waste be treated in the nearest possible installation.

38 In addition, it is common ground that the contract between Stadtreinigung Hamburg and the *Landkreise* concerned must be analysed as the culmination of a process of inter-municipal cooperation between the parties thereto and that it contains requirements to ensure that the task of waste disposal is carried out. The purpose of that contract is to enable the City of Hamburg to build and operate a waste treatment facility under the most favourable economic conditions owing to the waste contributions from the neighbouring *Landkreise*, making it possible for a capacity of 320 000 tonnes per annum to be attained. For that reason, the construction of that facility was decided upon and undertaken only after the four *Landkreise* concerned had agreed to use the facility and entered into commitments to that effect.

39 The subject-matter of that contract, as expressly indicated in the first clauses thereof, is primarily the undertaking given by Stadtreinigung Hamburg that it would make available annually to the four *Landkreise* concerned a treatment capacity of 120 000 tonnes of waste with a view to thermal utilisation in the Rugenberger Damm facility. As is subsequently stated in the contract, Stadtreinigung Hamburg does not assume any responsibility for the operation of that facility and does not offer any guarantee in that regard. In the event of the facility ceasing to operate or malfunctioning, its obligations are limited to offering replacement capacity, that obligation being conditional, however, in two respects. First, the disposal of the City of Hamburg's waste has to take priority and, secondly, some capacity must be available in other facilities to which Stadtreinigung Hamburg has access.

40 In return for the treatment of their waste in the Rugenberger Damm facility, as described in the preceding paragraph of this judgment, the four *Landkreise* concerned are to pay Stadtreinigung Hamburg an annual fee, the method of calculation and means of payment of which are specified in the contract. The waste delivery and removal capacity are to be agreed upon for each week between Stadtreinigung Hamburg and a representative designated by those *Landkreise*. It is also apparent from the contract that Stadtreinigung Hamburg, which has a right to the payment of damages against the operator of the facility, undertakes, should those *Landkreise* have suffered damage, to defend the latter's interests against that operator by means of litigation if necessary.

41 The contract at issue also provides for some commitments on the part of the contracting local districts that are directly related to the public service objective. While the City of Hamburg assumes responsibility for most of the services forming the subject-matter of the contract concluded between it and the four *Landkreise* concerned, the latter are to make available to Stadtreinigung Hamburg the landfill capacity which they do not use themselves in order to alleviate the lack of landfill capacity of the City of Hamburg. They also agree to take for disposal in their landfill the quantities of slag remaining after incineration that cannot be utilised in proportion to the quantities of waste which they have delivered.

42 Moreover, under the contract, the parties thereto must, if need be, assist each other in the context of the performance of their legal obligation to dispose of waste. It is thus provided, inter alia, that in some circumstances, for example where the facility concerned has temporarily exceeded its capacity, the four *Landkreise* concerned agree to reduce the amount of waste delivered and thus to restrict their right of access to the incineration facility.

43 Lastly, the supply of waste disposal services gives rise to payment to the operator of the facility only. By contrast, the terms of the contract at issue show that the cooperation which the latter establishes between Stadtreinigung Hamburg and the four *Landkreise* concerned does not give rise to any financial transfers between those entities other than those corresponding to the reimbursement of the part of the charges borne by those *Landkreise* but paid by Stadtreinigung Hamburg to the operator.

44 It thus appears that the contract in question forms both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service, namely thermal incineration of waste. That contract was concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility.

45 The Court has pointed out, in particular, that a public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and that it may do so in cooperation with other public authorities (see *Coditel Brabant*, paragraphs 48 and 49).

46 The Commission stated at the hearing, moreover, that, had the cooperation at issue here taken place by means of the creation of a body governed by public law to which the various local authorities concerned entrusted performance of the task in the public interest of waste disposal, it would have accepted that the use of the facility by the *Landkreise* concerned did not fall under the rules on public procurement. It takes the view, however, that, in the absence of such a body for inter-municipal cooperation, a call for tenders should have been issued for the service contract concluded between Stadtreinigung Hamburg and the *Landkreise* concerned.

47 It must be observed though, first, that Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors (see, to that effect, *Stadt Halle and RPL Lochau*, paragraphs 50 and 51).

48 It must, furthermore, be stated that there is nothing in the information in the file submitted to the Court to indicate that, in this case, the local authorities at issue were contriving to circumvent the rules on public procurement.

49 In the light of all those factors, and without there being any need to rule on the other pleas of the Federal Republic of Germany in its defence, the Commission's action must be dismissed.

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Federal Republic of Germany applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]

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* Language of the case: German.

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Case C-480/06

Commission of the European Communities

v

Federal Republic of Germany

(Failure of a Member State to fulfil obligations – Directive 92/50/EEC – No formal European tendering procedure for the award of waste treatment services – Cooperation between local authorities)

Summary of the Judgment

Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Scope
(Council Directive 92/50, Art. 1)

A contract which forms both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service, namely thermal incineration of waste, in so far as it was concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility does not fall within the scope of application of Directive 92/50 relating to the coordination of procedures for the award of public service contracts.

A public authority has the possibility of performing the public interest tasks conferred on it either by using its own resources or in cooperation with other public authorities, without being obliged to call on outside entities not forming part of its own departments. In that connection, first, Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

(see paras 44-45, 47)

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Judgment of the Court (Grand Chamber) of 9 June 2009 - Commission of the European Communities v Federal Republic of Germany

(Case C-480/06) [1]

(Failure of a Member State to fulfil obligations - Directive 92/50/EEC - No formal European tendering procedure for the award of waste treatment services - Cooperation between local authorities)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis and B. Schima, Agents)

Defendant: Federal Republic of Germany (represented by: M. Lumma and C. Schulze-Bahr, Agents, C. von Donat, Rechtsanwalt)

Re:

Failure of a Member State to fulfil obligations - Infringement of Article 8 in conjunction with Titles III, IV, V and VI of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) - Failure to organise a formal European award procedure for the award of waste disposal services by four local authorities (Landkreise) to a public body

Operative part of the judgment

The Court:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

_____

[1] - OJ C 20, 27.01.2007.

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OPINION OF ADVOCATE GENERAL
MAZAK
delivered on 19 February 2009 (1)

Case C–480/06

Commission of the European Communities
v
Federal Republic of Germany

(Public service contracts – Scope of Directive 92/50/EEC – Procedure for the award of public service contracts – Technical reasons)

Introduction

1. In this case, brought under Article 226 EC, the Commission of the European Communities is asking the Court to declare that the Federal Republic of Germany has failed to fulfil its obligations under the combined provisions of Article 8 and Titles III to VI of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, (2) on the ground that the Landkreise (administrative districts) Harburg, Rotenburg (Wümme), Soltau-Fallingbostel and Stade directly concluded with the refuse collection services of the City of Hamburg a contract for waste disposal without there having been a call for tenders in the context of an open or restricted tendering procedure at Community level for that services contract.

2. The rules on procedures for the award of public service contracts introduced by Directive 92/50 constitute one of the measures intended to establish the internal market by contributing to the removal of barriers to the freedom to provide services. It cannot be denied that they constitute measures which benefit both providers of services and their recipients.

3. In the present case, refuse disposal is a service the recipients of which are four administrative districts. In reality, the number of recipients is much greater. The administrative districts in fact are only intermediaries for their inhabitants who are the final recipients of that service. It is worth pointing out that, should it become apparent that a service provider had been chosen contrary to the requirements of Community law, it is those inhabitants whose interests would be harmed most.

I – Legal context

4. Pursuant to Article 1(a) of Directive 92/50, 'public service contracts' are contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of the contracts listed in paragraphs (i) to (ix) of that provision.

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

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

"Body governed by public law" means any body:

– established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

– having legal personality and

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

...'

6. Under Article 1(c) of Directive 92/50, a 'service provider' means any natural or legal person, including a public body, which offers services.

7. Under Article 8 of Directive 92/50, contracts which have as their object services listed in Annex IA are to be awarded in accordance with the provisions of Titles III to VI of that directive. Annex IA covers, under category No 16 'sewage and refuse disposal services; sanitation and similar services'.

8. The structure of Article 11 of Directive 92/50 shows clearly that contracting authorities are to award their service contracts using the open procedure or the restricted procedure, apart from in the cases set out in paragraphs 2 and 3 of that article, where contracting authorities may award their public service contracts either by negotiated procedure, with prior publication of a contract notice (the case referred to in paragraph 2) or a negotiated procedure without prior publication of a contract notice (the case referred to in paragraph 3).

9. Under Article 11(3)(b) of Directive 92/50, contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider.

II – Facts

10. The Commission's action concerns a contract concluded between the administrative districts of Harburg, Rotenburg (Wümme), Sotau-Fallingbostel and Stade ('the districts') on the one hand and the City of Hamburg refuse disposal services on the other ('the contract in dispute').

11. The districts and the City of Hamburg refuse disposal services are bodies governed by public law responsible for waste disposal.

12. The Land of Lower Saxony, in which the districts are situated, the Land of Schleswig-Holstein and the Free and Hanseatic City of Hamburg make up the Hamburg Metropolitan Region.

13. The contract in dispute was concluded on 18 December 1995 directly, without an open or restricted tendering procedure at Community level. It is apparent from the preamble to the contract that the refuse disposal services of the City of Hamburg offered the districts, by letter of 30 November 1994, a partial capacity of 120 000 tonnes per year of the total annual capacity of the waste incineration plant at Rugenberger Damm ('the Rugenberger Damm plant') and the districts accepted that offer by letter of 6 January 1995.

14. In the contract in dispute, the City of Hamburg refuse disposal services agreed to make available to the districts a capacity of 120 000 tonnes per year for the purpose of the incineration of waste in the Rugenberger Damm plant and the districts agreed to pay the City of Hamburg refuse disposal services an annual fee, part of which was fixed and part of which depended on the amount delivered.

15. The contract in dispute provided that its duration was to be 20 years from 15 April 1999 since, at the time the contract was concluded, work on the Rugenberger Damm plant was at the planning stage.

III – Pre-litigation procedure and procedure before the Court

16. The Commission decided to act following a complaint from a citizen who considered that he was paying excessive charges for waste management.

17. Since it took the view that, by directly concluding a contract for waste disposal in which the contracting parties were the districts and the City of Hamburg refuse disposal services without a call for tenders or tendering procedure at Community level, the Federal Republic of Germany might have infringed the combined provisions of Article 8 and Titles III to VI of Directive 92/50, the Commission, on 30 March 2004, sent a letter of formal notice to the Federal Republic of Germany pursuant to Article 226 EC.

18. The Federal Republic of Germany replied by letter of 30 June 2004. It stated that, from its perspective, the contract in dispute was an agreement on the shared performance of a public service which was the responsibility of the districts and the City of Hamburg and that it was a question of cooperation at local district level.

19. Being dissatisfied with the comments of the Federal Republic of Germany, the Commission sent it a reasoned opinion dated 22 December 2004 in which it declared that the contract in dispute fell within the scope of Directive 92/50 and that, consequently, the direct conclusion of the contract between the districts and the City of Hamburg refuse disposal services had infringed that directive.

20. Notwithstanding the arguments set out by the Federal Republic of Germany in its answer to the reasoned opinion of 25 April 2005, the Commission brought the present action, by which it asked the Court to declare that the Federal Republic of Germany had failed to fulfil its obligations under the combined provisions of Article 8 and Titles III to VI of Directive 92/50 and to order the Federal Republic of Germany to pay the costs.

21. On the basis of arguments set out in its defence and rejoinder, the Federal Republic of Germany requested the Court to dismiss the action and to order the applicant to pay the costs.

22. By order of the President of the Court of 14 June 2007, the Kingdom of the Netherlands and the Republic of Finland were given leave to intervene in this case in support of the form of order sought by the Federal Republic of Germany. However, the Republic of Finland has not lodged a statement in intervention.

23. The Federal Republic of Germany requested a hearing. That hearing took place on 11 November 2008 in the presence of the agents of the Federal Republic of Germany and of the Commission.

IV – Analysis

24. In its application, the Commission starts from the hypothesis that the districts are contracting authorities within the meaning of Article 1(b) of Directive 92/50, that the City of Hamburg refuse disposal services are service providers for the purposes of Article 1(c) of Directive 92/50 and that the contract in dispute concluded between the districts and the City of Hamburg refuse disposal services is a public service contract for the purposes of Article 1(a) of Directive 92/50. Since the object of the contract in dispute is a service listed in Annex IA to Directive 92/50 and that it is not one of the cases which would warrant the award of that contract using the negotiated procedure with prior publication of a contract notice (Article 11(2) of Directive 92/50) or use of the negotiated procedure without prior publication of a contract notice (Article 11(3) of Directive 92/50), the contract in dispute could only have been concluded by using, as appropriate, the open procedure or the restricted procedure, in accordance with Article 11(4) of Directive 92/50.

25. I intend to examine the merits of the Commission's complaint in the light of the arguments put forward by the Federal Republic of Germany, in which it does not deny that the contract in dispute was not the subject of a call for tenders, but seeks to establish that the districts were not obliged to issue a call for tenders for the purposes of concluding the contract in dispute, on four grounds.

26. First, the contract in dispute is an example of cooperation between State bodies and, thus, concerns only internal relationships of the organisation of the State in the performance of public tasks. It follows that it does not fall under Directive 92/50. Secondly, the contract in dispute does

not constitute a contract within the meaning of Article 1(a) of that directive. Thirdly, even if the contract at issue should be regarded as a contract for the purposes of Directive 92/50, there is a technical reason, within the meaning of Article 11(3)(b) thereof, on the grounds of which the contract could have been concluded using a negotiated procedure without prior publication of a contract notice. Fourthly, in accordance with Article 86(2) EC, it was not necessary to initiate an open or restricted procedure, given that such a procedure would have prevented the districts and City of Hamburg refuse disposal services from carrying out their duties.

A – *Scope of Directive 92/50*

27. In defence of its position, the Federal Republic of Germany submits that the contract in dispute was a transaction internal to the State which, as a general rule, does not fall within the scope of Directive 92/50. It submits, like the Netherlands Government, that that directive concerns the award of tenders to undertakings and applies only where the State has decided that it does not want to carry out a task itself but to procure the corresponding service on the market.

28. In this connection, the Court has held that the directives on public procurement (3) are, in general, applicable in the case where a contracting authority plans to conclude a contract for pecuniary interest with an entity which is legally distinct from it, whether or not that entity is itself a contracting authority. (4) Likewise, that directive applies both where a contract is awarded for the purposes of fulfilling the task of meeting needs in the general interest and where it is unrelated to that task. (5)

29. However, according to the Court there is an exception to that general rule. The directives on public procurement are not applicable, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority, which is a contracting authority, must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, secondly, that entity must carry out the essential part of its activities with the local authority or authorities which control it. (6)

30. It is moreover in accordance with that derogation that the Court has held that it is impossible automatically to exclude relations established between public law institutions from the scope of those directives on public procurement, regardless of the nature of those relations. (7)

31. In the present case, it is obvious that, as the Federal Republic of Germany states, the contract in dispute is a means of cooperation between State bodies. It does not follow from that fact alone, however, that the contract in dispute does not fall within the scope of Directive 92/50. The opposite finding would be possible only were it to be established that the two conditions set out for the first time in the judgment in *Teckal* are met.

32. As the Federal Republic of Germany correctly points out, there is another option for a public authority falling within the definition of a ‘contracting authority’ for the purpose of Article 1(b) of Directive 92/50 to avoid the application of that directive. That is a situation in which a public authority performs the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. Since in such a case there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority, there is therefore no need to apply the Community rules in the field of public procurement. (8)

33. That means that public authorities are not obliged, when performing tasks in the public interest, to turn to the market to obtain the provision of a service. They have the option of choosing between using their own resources (in which case, Directive 92/50 is not applicable) or turning to the market.

34. In this respect, I do not share the opinion held by the Federal Republic of Germany that, in the present case, cooperation between two distinct State bodies can be considered to amount to the use of the resources of the contracting authority. The City of Hamburg refuse disposal services cannot be regarded as the resources of the districts concerned, which are the contracting authorities.

B – *Public service contracts for the purposes of Article 1(a) of Directive 92/50*

35. The Federal Republic of Germany takes the view that the contract in dispute is not a public

service contract within the meaning of Article 1(a) of Directive 92/50 for three reasons. (9) First, the contract is an internal measure of wider cooperation between State bodies covered by the Hamburg Metropolitan Region. Secondly, the refuse collection services of the City of Hamburg are not, in relation to the contract, service providers but, on the other hand, as the public body responsible for waste disposal, offer administrative assistance to the districts, who also deal with waste disposal. Thirdly, as regards its content, the contract goes beyond a contract for current services.

36. I am of the opinion that those arguments are not such as to cast doubt on the conclusion that the contract entered into between, on the one hand, the four districts and, on the other, the City of Hamburg refuse disposal services is a public service contract within the meaning of Article 1 (a) of Directive 92/50.

37. It is apparent from the Court's case-law that the existence of a contract for the purpose of Article 1(a) of Directive 93/36 requires an agreement between two separate persons. (10)

38. That condition is indeed fulfilled in the present case. Moreover, the subject-matter of the contract in dispute, that is, the incineration of waste, falls within the services covered by category No 16 of Annex IA to Directive 92/50.

39. Since the City of Hamburg refuse disposal services cannot be regarded as the districts' own resources, (11) the application of Directive 92/50 could only be excluded if the two cumulative conditions for the application of the exception which I referred to in point 29 of this Opinion were fulfilled.

40. Thus, it is necessary to examine whether the districts exercise over the City of Hamburg refuse disposal services a control which is similar to that which they exercise over their own departments and whether the City of Hamburg refuse disposal services carry out the essential part of their activities with the districts.

41. The Court has been required on several occasions to consider the condition relating to 'similar control'. It is clear from its case-law that, in order to determine whether a public authority exercises over the other party to the contract a control similar to that which it exercises over its own departments, it is necessary to take account of not only all the legislative provisions but also the relevant circumstances. It must result from that examination that a contracted body is subject to a control which enables the contracting authority to influence that body's decisions. That must be a power of decisive influence over both strategic objectives and significant decisions of that entity. (12)

42. The Federal Republic of Germany submits, in this connection, that the condition of similar control was fulfilled, since the districts concerned exercise a reciprocal control over one another at the level of the Hamburg Metropolitan Region.

43. On this issue, there is nothing to indicate that the districts participate in the City of Hamburg refuse disposal services and thus exercise control over them.

44. Besides, as the Commission correctly observes, the refuse disposal services do not perform their activities for the districts under statute or other public law provisions, but on the basis of a contract. The contract in dispute represents the only legal connection between the districts and the City of Hamburg refuse disposal services and that contract does not make it possible for the districts to exercise control.

45. In my opinion, a general reference to common objectives is clearly insufficient; in order for control to exist, there must be something more substantial.

46. The principle of 'something given for something received', on which cooperation in Hamburg Metropolitan Region is founded according to the Federal Republic of Germany, allows the districts to exercise, at the most, an indirect control over the City of Hamburg refuse disposal services.

47. Since the first condition for the application of the exception is not, in my view, fulfilled, it is unnecessary to examine whether the second has been met. I note, however, that waste disposal represents only part of the activities of the City of Hamburg refuse disposal services.

48. In the light of the foregoing, I can find nothing which indicates that the contract in dispute

does not constitute a public service contract for the purpose of Directive 92/50. That means that it could only lawfully have been awarded in accordance with that directive.

C – *Negotiated procedure without prior publication of a contract notice as an exception to the general rule for the award of public service contracts*

49. In its defence, the Federal Republic of Germany also submits that the only party with which the districts could conclude the contract in dispute was the City of Hamburg refuse disposal services, who had a guaranteed site for the construction of a waste incineration plant. The fact that in the Hamburg Metropolitan Region no other site was available for the construction of such plants and that the existing plants did not have enough capacity available constitutes a technical reason within the meaning of Article 11(3)(b) of Directive 92/50 which would justify the award of a public service contract using the negotiated procedure without prior publication of a contact notice.

50. It is evident from the structure of Article 11 of Directive 92/50 that paragraph 3 is an exception to the general rule in paragraph 4, according to which contracting authorities must award their service contracts using the open procedure or the restricted procedure.

51. In this respect, as an exception to the rules seeking to guarantee the effectiveness of the rights granted by the EC Treaty in the public service contracts sector, Article 11(3) of Directive 92/50 must be interpreted strictly, and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances. (13)

52. The Court has already had to consider the existence of 'technical reasons' in Joined Cases C–20/01 and C–28/01 *Commission* v *Germany*. (14) The Court ruled that a technical reason relating to environmental protection might, in certain circumstances, be taken into consideration in order to assess whether the contract at issue could be awarded to a given supplier. Admittedly, in that judgment the Court did not give an exhaustive definition of technical reasons, but it did define them negatively by stating the facts which did not constitute technical reasons for the purposes of Article 11(3) of Directive 92/50.

53. In *Commission* v *Greece*, (15) the Court held, concerning Article 20(2)(c) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, (16) which includes a rule similar to that set out in Article 11(3) of Directive 92/50, that the application of that provision was subject to two cumulative conditions, namely, first, that there are technical reasons connected to the works which are the subject-matter of the contract and, secondly, that those technical reasons make it absolutely necessary to award that contract to a particular contractor.

54. I am of the view that, having regard to the case-law cited, the Federal Republic of Germany has not proven that the use of Article 11(3) of Directive 92/50 was justified in the present case.

55. If we were to accept the Federal Republic of Germany's line of argument, which is based on Council Directive 75/442/EEC on waste, (17) that would mean that that directive would deprive Directive 92/50 of its full effect.

D – *Directive 92/50 as a factor preventing the districts from performing the task of waste disposal*

56. The Federal Republic of Germany also submits that the only way in which the districts and City of Hamburg refuse disposal services, as public law bodies charged with waste disposal, could undertake their duties was by concluding the contract in dispute. Directive 92/50 obliges the districts to award a contract to the service provider offering the lowest prices or the most economically advantageous offer in an open or restricted procedure. Thus, the obligation stemming from Directive 92/50 to issue the call for tenders in an open or restricted tendering procedure would prevent performance of the duties which the districts and City of Hamburg refuse disposal services are obliged to undertake. By virtue of Article 86(2) EC, it does not apply, as such, to the districts and City of Hamburg refuse disposal services.

57. Article 86(2) EC provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly must be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks

assigned to them. The Court has ruled that, in the case of a provision which allows, in certain circumstances, derogation from the rules of the Treaty, that article is to be interpreted strictly (18) and that it was incumbent on the Member State or the undertaking which sought to rely on that provision to show that the conditions for its application were fulfilled. (19)

58. I am of the opinion that the Federal Republic of Germany has not satisfied the burden of proof imposed on it.

59. It appears that the Federal Republic of Germany's line of argument is based, as regards this issue, on two premisses. First, if the contract in dispute had not existed, neither the districts not the City of Hamburg refuse disposal services would have been able to carry out their duties in relation to waste disposal. The Rugenberger Damm plant was built only as a result of that contract. Secondly, the contract in dispute would not have been concluded if the districts had carried out a call for tenders as part of an open or restricted tendering procedure because, in such a procedure, it would have been necessary to award the contract to the service provider with the lowest prices or the offer which was most economically advantageous.

60. In my opinion, both the first and the second premiss are incorrect.

61. I am not convinced that the contract in dispute was the only means of enabling the performance of the duties in relation to waste disposal. As the Commission correctly points out, the City of Hamburg refuse disposal services could also have offered their available facilities to other takers. (20)

62. Nor do I consider that the application of the open or restricted procedure would have precluded the conclusion of such a contract, in the form in which it was concluded between the districts and the City of Hamburg refuse disposal services, given that, in those procedures, a tender must be awarded to the service provider with the lowest prices or the most economically advantageous offer.

63. The Court has already held that in order to award contracts the contracting authority may rely, where the tender is awarded to the most economically advantageous offer, on various criteria which may change according to the tender at issue, and that each of the award criteria used by the contracting authority to identify the most economically advantageous offer need not necessarily be of a purely economic nature. (21) The Court has explicitly stated that the contracting authority could take into account criteria relating to the preservation of the environment at the various stages of a public procurement procedure. (22)

V – Conclusion

64. In the light of the foregoing, I propose that the Court should rule as follows:

– declare that the Federal Republic of Germany has failed to fulfil its obligations under the combined provisions of Article 8 and Titles III to VI of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, on the ground that the Landkreise of Harburg, Rotenburg (Wümme), Soltau-Fallingbostel and Stade directly concluded with the City of Hamburg refuse collection services a contract for waste disposal and that there had been no call for tenders in the context of an open or restricted tendering procedure at Community level for that services contract;

– order the Federal Republic of Germany to pay the costs;

– order the Kingdom of the Netherlands, as intervener, to pay its own costs.

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1 – Original language: French.

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2 – OJ 1992 L 209, p. 1 ('Directive 92/50').

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3 – These are Directive 92/50, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and

Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54). The three separate directives were repealed and replaced by Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

4 – See Case C–107/98 *Teckal* [1999] ECR I–8121, paragraphs 50 and 51, and Case C–26/03 *Stadt Halle and RPL Lochau* [2005] ECR I–1, paragraph 47.

5 – See, to that effect, Case C–44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I–73, paragraph 32, and *Stadt Halle and RPL Lochau*, cited in footnote 4, paragraph 26.

6 – See *Teckal,* cited in footnote 4, paragraph 50; Case C–337/05 *Commission* v *Italy* [2008] ECR I–0000, paragraph 36 and the cases referred to there; and judgment of 17 July 2008 in Case C–371/05 *Commission* v *Italy*, paragraph 22.

7 – See, to that effect, Case C–84/03 *Commission* v *Spain* [2005] ECR I–139, paragraph 40.

8 – See *Stadt Halle and RPL Lochau*, cited in footnote 4, paragraph 48.

9 – Specifically, Germany puts forward four reasons but, in my opinion, the argument relating to an ‘internal measure’ and that relating to it being ‘part of a wider cooperation’ are closely connected.

10 – See *Teckal*, cited in footnote 4, paragraph 49, and Case C–340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I–4137, paragraph 32.

11 – See point 34 of this Opinion.

12 – See Case C–458/03 *Parking Brixen* [2005] ECR I–8585, paragraph 65; *Carbotermo and Consorzio Alisei*, cited in footnote 10, paragraph 36; *Commission* v *Italy*, cited in footnote 6, paragraph 24; and Case C–324/07 *Coditel Brabant* [2008] ECR I–0000, paragraph 28.

13 – See Joined Cases C–20/01 and C–28/01 *Commission* v *Germany* [2003] ECR I–3609, paragraph 58, and Case C–126/03 *Commission* v *Germany* [2004] ECR I–11197, paragraph 23.

14 – Cited in footnote 13, paragraphs 58 to 67.

15 – Case C–394/02 [2005] ECR I–4713, paragraph 34.

16 – OJ 1993 L 199, p. 84.

17 – OJ 1975 L 194, p. 39.

18 – See Case C–242/95 *GT-Link* [1997] ECR I–4449, paragraph 50, and Case C–340/99 *TNT Traco* [2001] ECR I–4109, paragraph 56.

19 – See Case C–159/94 *Commission* v *France* [1997] ECR I–5815, paragraph 94; *TNT Traco*, cited in footnote 18, paragraph 59; and Case C–162/06 *International Mail Spain* [2007] ECR I–9911, paragraph 49.

20 – That is, it would have been possible for the City of Hamburg refuse disposal services, in its capacity as a contracting authority within the meaning of Article 1(b) of Directive 92/50, to have been placed under an obligation to issue a call for tenders for the missing quantity of waste.

21 – See Case C–513/99 *Concordia Bus Finland* [2002] ECR I–7213, paragraphs 53 and 55.

22 – See *Concordia Bus Finland*, cited in footnote 21, paragraph 57, and Joined Cases C–20/01 and C–28/01 *Commission* v *Germany*, cited in footnote 13, paragraph 60.

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ORDONNANCE DU PRÉSIDENT DE LA COUR

14 juin 2007(*)

«Interventions»

Dans l'affaire C-480/06,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 24 novembre 2006,

Commission des Communautés européennes, représentée par MM. X. Lewis et B. Schima, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République fédérale d'Allemagne, représentée par M. M. Lumma et M^me^ C. Schulze-Bahr, en qualité d'agents, assistés de M. C. von Donat, Rechtsanwalt,

partie défenderesse,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. J. Mazák, entendu,

rend la présente

Ordonnance

1 Par requête déposée au greffe de la Cour le 19 mars 2007, le Royaume des Pays-Bas, représenté par M^me^ C. Wissels, en qualité d'agent, a demandé à intervenir dans l'affaire C-480/06 au soutien des conclusions de la partie défenderesse.

2 Par requête déposée au greffe de la Cour le 21 mars 2007, la République de Finlande, représentée par M. J. Heliskoski, en qualité d'agent, a demandé à intervenir dans l'affaire C-480/06 au soutien des conclusions de la partie défenderesse.

3 Les requêtes en intervention ont été introduites conformément à l'article 93, paragraphe 1, du règlement de procédure, et sont présentées en application de l'article 40, premier alinéa, du statut de la Cour de justice.

Par ces motifs, le président de la Cour ordonne:

1) Le Royaume des Pays-Bas et la République de Finlande sont admis à intervenir dans l'affaire C-480/06 au soutien des conclusions de la République fédérale d'Allemagne.

2) Un délai sera fixé aux parties intervenantes pour exposer, par écrit, les moyens à l'appui de leurs conclusions.

3) Une copie de tous les actes de procédure sera signifiée aux parties intervenantes

par les soins du greffier.

4) Les dépens sont réservés.

Fait à Luxembourg, le 14 juin 2007.

Signatures

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* Langue de procédure: l'allemand

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Action brought on 24 November 2006 - Commission of the European Communities v Federal Republic of Germany

(Case C-480/06)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis and B. Schima, Agents)

Defendant: Federal Republic of Germany

Form of order sought

A declaration that the Federal Republic of Germany has failed to fulfil its obligations under Article 8 in conjunction with Titles III to VI of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, [1] in that the Landkreise Rotenburg (Wümme), Harburg, Soltau-Fallingbostel and Stade concluded a waste disposal services contract with Stadtreinigung Hamburg directly and did not make that service contract subject to a Community-wide open or restricted tender procedure;

An order that the Federal Republic of Germany pay the costs of the proceedings.

Pleas in law and main arguments

On 18 December 1995 four local counties (Landkreise) in Lower Saxony concluded a waste disposal services contract with Stadtreinigung Hamburg (Hamburg city cleaning authority), a body governed by a public law. That contract was concluded without carrying out an award procedure and without a Community-wide call for tenders.

The Landkreise are contracting authorities and the contract at issue is a service contract for pecuniary interest concluded in writing which exceeds the relevant threshold for the application of Directive 92/50/EEC and thus falls within the scope of that directive.

The fact that Stadtreinigung Hamburg as a body governed by public law is itself a contracting authority within the meaning of Directive 92/50/EEC does not alter the fact that the contract in dispute falls within the scope of that directive: as the Court of Justice has expressly declared, the directives on procurement law are always applicable if a contracting authority intends to conclude a contract for pecuniary interest in writing with a body which is distinct, in form, from itself and which has the power to make decisions independently of that authority.

There are no facts apparent which justify a private award of the contract at issue in the form of a negotiated procedure without a prior contract notice.

The Commission also does not agree with the view of the Federal Government that cooperation between local authorities as a product of municipal autonomy is not subject to procurement law, regardless of the legal form which it may take. Municipal autonomy cannot lead to a situation where local authorities are permitted to disregard the provisions on public awards of contracts. In so far as those local authorities were to conclude contracts on the provision of services with other bodies, even if those bodies were also contracting authorities themselves, they would be subject to procurement law. The German Government was also not able to prove that the service contract at issue could only be granted to a specific service provider for technical reasons.

For those reasons the Commission comes to the conclusion that the Federal Republic of Germany infringed Directive 92/50/EEC by directly concluding a waste disposal services contract without carrying out an award procedure and without a Community-wide call for tenders.

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[1] - OJ 1992 L 209, p. 1.

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JUDGMENT OF THE COURT (Third Chamber)

19 June 2008 (*)

(Public procurement – Directive 92/50/EEC – Procedures for the award of public service contracts – Concept of 'award of a contract')

In Case C–454/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesvergabeamt (Austria), made by decision of 10 November 2006, received at the Court on 13 November 2006, in the proceedings

pressetext Nachrichtenagentur GmbH

v

Republik Österreich (Bund),

APA-OTS Originaltext – Service GmbH,

APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, J.N. Cunha Rodrigues (Rapporteur), A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2008,

after considering the observations submitted on behalf of:

– pressetext Nachrichtenagentur GmbH, by G. Estermann, Rechtsanwalt,

– the Republik Österreich (Bund), by A. Schittengruber and C. Mayr, acting as Agents,

– APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung, by J. Schramm, Rechtsanwalt,

– the Austrian Government, by M. Fruhmann and C. Mayr, acting as Agents,

– the French Government, by J.-C. Gracia, acting as Agent,

– the Lithuanian Government, by D. Kriaučiūnas, acting as Agent,

– the Commission of the European Communities, by D. Kukovec and R. Sauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by ('Directive 89/665').

2 The reference was made in the context of proceedings between pressetext Nachrichtenagentur GmbH ('PN'), on the one hand, and the Republik Österreich (Bund), APA-OTS Originaltext – Service GmbH ('APA-OTS') and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung ('APA'), on the other, concerning a contract for press agency services.

Legal framework

Community legislation

3 Article 3(1) of Directive 92/50 provides:

'1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.'

4 Under Article 8 of that directive:

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

5 Article 9 of that directive states:

'Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

6 Article 10 of the same directive provides:

'... Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

7 Article 11(3) of that directive provides:

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

...

(e) for additional services not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the performance of the service described therein, on condition that the award is made to the service provider carrying out such service:

– when such additional services cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities,

or

– when such services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate estimated value of contracts awarded for additional services may not exceed 50% of the amount of the main contract;

(f) for new services consisting in the repetition of similar services entrusted to the service provider to which the same contracting authorities awarded an earlier contract, provided that such services conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4. As soon as the first project is put up for tender, notice must be given that the negotiated procedure might be adopted and the total estimated cost of subsequent services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7. This procedure may be applied solely during the three years following the conclusion of the original contract.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 APA was established in Austria as a limited liability registered cooperative following the Second World War. Almost all of the Austrian daily newspapers as well as the Austrian radio and television broadcasting corporation, ORF, were members of the cooperative. Together with its subsidiaries, APA is the main operator on the news agencies market in Austria and traditionally provides the Republik Österreich (Bund) with various news agency services.

9 PN has been present on the Austrian news agency market since 1999 but has hitherto issued press releases for the Austrian federal authorities to a limited extent only. PN has fewer journalists working for it than APA and does not have available to it such large archives as APA.

10 In 1994, prior to its accession to the European Union, the Republik Österreich (Bund) concluded an agreement ('the basic agreement') with APA relating to the provision of certain services for remuneration. That agreement essentially allows the Austrian federal authorities to access and use current information (the so-called 'basic service'), to request historical information and previous press releases from an APA database, known as 'APADok', and to use the APA original text service, known as 'OTS', both for the information they provide and for the dissemination of their own press releases. The APADok database contains the data from the basic service since 1 January 1988 and the press releases handled by the OTS service since 1 January 1989.

11 The basic agreement was concluded for an indefinite period, subject to a clause by which the parties waived the right to terminate the agreement until 31 December 1999.

12 Article 2(c) of the basic agreement provided:

'For online inquiries for APA information services as defined in Article 1, APA shall bill as licensing revenues for the use of the electronic data processing system, per minute (net) CPU, a price corresponding to the lowest graduated consumer price of the official tariff (currently ATS 67, HT per minute CPU) less 15%.'

13 The agreement also included provisions relating to the date of the first price increase, the maximum amount of each increase and indexation of prices on the basis of the consumer price index for 1986, the reference value being the index figure calculated for 1994. Article 5(3) of the agreement provided inter alia: '... it is expressly agreed that the values of the remuneration provided for in Article 2(a) and (b) shall be guaranteed to be constant. For the calculation of the indexation, the starting point shall be the 86 consumer price index (CPI 86) published by the Austrian Central Statistics Office (ÖSTAT) or the following index replacing it.'

14 In September 2000, APA established a wholly-owned subsidiary, APA-OTS, in the form of a limited liability company. The two companies are bound by a contract excluding profit and loss, which, according to APA and APA-OTS, provides for APA-OTS to be integrated financially, organisationally and economically within APA and for APA-OTS to conduct and manage its business on the basis of instructions from APA. APA-OTS is furthermore required to pass its annual profits to APA, whilst APA has to make good any annual losses incurred by APA-OTS.

15 In September 2000, APA transferred to APA-OTS the operation of its OTS service. This alteration was notified to the Republik Österreich (Bund) in October 2000. An authorised employee of APA gave an assurance to the Austrian authorities that, following that transfer, APA was jointly and severally liable with APA-OTS, and that there would be no change in the overall service performed. The Austrian authorities thereupon authorised the future provision of the OTS service by APA-OTS,

and the remuneration for that service has since then been paid direct to APA-OTS.

16 Furthermore, the provisions of the basic agreement were amended by an initial supplemental agreement signed in 2001 and effective as from 1 January 2002. When the transition was made to the euro, that supplemental agreement adjusted the initial contract, as described in paragraphs 17 to 20 of this judgment.

17 First, the amount of the annual charge for the use of editorial articles and media archives, ATS 10 080 000, was replaced with EUR 800 000. Under the indexation clause, the price for 2002 should have been ATS 11 043 172 (converted to EUR 802 538.61 due to transition to the euro). The decision was made to use not that amount but the rounded-off figure of EUR 800 000, giving a reduction of 0.3%.

18 Secondly, the price fixed for online inquiries for APA information services, which had been ATS 67 per minute, was replaced with a price of EUR 4.87 per minute. Apart from the rounding-off effected at the time of transition to the euro, the basic amount of that price remained unchanged.

19 Thirdly, for the calculation of the indexation, the index calculated for 1994 on the basis of the consumer price index for 1986 was replaced, as reference point, by the index calculated for 2001 on the basis of the consumer price index for 1996. In that regard, the first supplemental agreement amended inter alia amended Article 5(3) of the basic agreement to read as follows:

'It is expressly agreed that the values of the remuneration provided for in Article 2(a) and (b) shall be guaranteed to be constant. For the calculation of the indexation, the starting point shall be the 96 consumer price index (CPI 96) published by the Austrian Central Statistics Office (ÖSTAT) or the following index replacing it.'

20 Fourthly, by way of derogation from that indexation mechanism, some prices were fixed immediately for 2002 to 2004. The price of ATS 8.50 per line for inclusion of press releases in the OTS service was replaced by fixed prices of EUR 0.66 per line for 2002, EUR 0.67 for 2003 and EUR 0.68 for 2004. Had the indexation clause been applied, the price for 2002 should have been ATS 9.31 per line (rounded off to EUR 0.68 per line). The price was thus reduced by 2.94% for 2002 and 1.47% for 2003.

21 A second supplemental agreement, signed in October 2005 and effective as from 1 January 2006, introduced two further amendments to the basic agreement. By that second supplemental agreement, the basic agreement was amended as described in paragraphs 22 and 23 of this judgment.

22 First, the waiver of the right to terminate the agreement, agreed in the basic agreement until 31 December 1999, was agreed once again until December 2008.

23 Secondly, the reduction given on the price for online inquiries for APA information services, fixed at 15% in the basic agreement, was increased to 25%. In that regard, the second supplemental agreement amended Article 2(c) of the basic agreement as follows:

'The following provisions of the [basic agreement as amended by the first supplemental agreement] shall be amended as follows as from 1 January 2006:

1. Article 2(c): the percentage of 15% shall be replaced by 25%.

...'.

24 In 2004, PN offered its news agency services to the Republik Österreich (Bund), but that offer did not lead to the signing of an agreement.

25 By actions brought on 4 and 19 July 2006, PN sought, by way of principal head of claim, a declaration from the Bundesvergabeamt (Federal Procurement Office) that the severing of the basic agreement, following the restructuring of APA in 2000, and the supplemental agreements signed in 2001 and 2005, which it referred to as 'de facto awards', were unlawful and, in the alternative, that the choice of the various award procedures in question was unlawful.

26 In regard to the time-limits for bringing an action, the Bundesvergabeamt points out that, whilst

the transactions complained of date back to 2000, 2001 and 2005, the legal remedy available under domestic law in respect of unlawful awards of contracts, namely an application for a declaration having the effect of dissolving the agreement, was created only subsequently, that is to say with effect from 1 February 2006. The period provided for this legal remedy is six months from the date of the unlawful award. The Bundesvergabeamt deems it appropriate to apply Paragraph 1496 of the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB), under which limitation periods do not run if the requisite legal remedy is not available, provided that such application is compatible with Community law.

27 In those circumstances, the Bundesvergabeamt decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the terms "awarding" in Article 3(1) of Directive 92/50… and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which a contracting authority intends to obtain services in the future from a service provider established as a limited liability company where those services were previously supplied by a different service provider who is the sole shareholder in the future service provider and has control of the future service provider? In such a case is it legally relevant that the contracting authority has no guarantee that throughout the entire period of the original contract the shares in the future service provider will not be disposed of in whole or in part to third parties and moreover has no guarantee that the membership of the original service provider, which is in the form of a co-operative society, will remain unchanged throughout the entire contract period?

(2) Are the terms "awarding" in Article 3(1) of Directive 92/50… and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers amendments to the charges for specified services under the contract and reformulates an index-linking clause, where these amendments result in different charges and are made upon the changeover to the euro?

(3) Are the terms "awarding" in Article 3(1) of Directive 92/50… and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers to amend the contract, first, renewing for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and second, also laying down a higher rebate than before for certain volume-related charges within a specified area of supply?

(4) If the answer to any of the first three questions is that there is an award: is Article 11(3)(b) of Directive 92/50…, or are any other provisions of Community law, such as, in particular, the principle of transparency, to be interpreted as permitting a contracting authority to obtain services by awarding a single contract in a negotiated procedure without prior publication of a contract notice, where parts of the services are covered by exclusive rights as referred to in Article 11(3)(b) of Directive 92/50/EEC? Or do the principle of transparency or any other provisions of Community law require in the case of an award of mostly non-priority services that a contract notice is none the less published prior to the contract award, to enable undertakings in the sectors concerned to assess whether services are in fact being awarded that are subject to an exclusive right? Or do the provisions of Community law relating to the award of public contracts require that in such a case services can only be awarded in separate tender procedures, according to whether they are or are not subject to exclusive rights, in order to allow at least competitive tendering as to part?

(5) If the answer to the fourth question is to the effect that a contracting authority may award services which are not subject to exclusive rights in a single procurement procedure together with services which are subject to an exclusive right: can an undertaking which does not have any right to deal with data that is subject to an exclusive right possessed by an undertaking which has a dominant position in the market establish that in that respect it has the capacity, for the purposes of procurement law, to provide a comprehensive service to a contracting authority, by relying on Article 82 EC and an obligation derived from that provision on the market-dominant undertaking which has the power of disposal over the data and is established in a Member State to provide the data on reasonable conditions?

(6) If the answer to the first, second and third questions is to the effect that the partial contract transfer in 2000 and/or one or both of the contract amendments referred to constituted new awards; and furthermore should the fourth question be answered to the effect that either when awarding a contract for services not subject to exclusive rights by means of a separate award procedure, or when awarding a combined contract (in the present case for press releases, the basic service and rights to use APADok), a contracting authority should have first published a contract notice to ensure that the intended contract award was transparent and capable of being reviewed:

Is "harmed" in Article 1(3) of Directive 89/665… and in Article 2(1)(c) of that directive to be interpreted as meaning that an undertaking in a case such as the present one is harmed, within the meaning of those provisions of Directive 89/665…, simply where he has been deprived of the opportunity to participate in a procurement procedure because the contracting authority did not, prior to making the award, publish a contract notice, on the basis of which the undertaking could have tendered for the contract to be awarded, could have submitted an offer or could have had the claim that exclusive rights were involved reviewed by the competent procurement review body?

(7) Are the Community law principle of equivalence and the Community law requirement for effective legal protection, or the principle of effectiveness, to be interpreted, having regard to any other relevant provisions of Community law, as conferring an individual and unconditional right on an undertaking against a Member State such that it has at least six months from the time when it could have known that a contract award infringed procurement law to bring legal proceedings before the competent national authority to seek damages following the contract award on account of an infringement of Community procurement law, while it must be allowed additional time for periods when it could not make such a claim owing to the absence of a statutory basis in national law, in circumstances where under national law claims for damages based on infringements of national law are normally subject to a limitation period of three years from the date of knowledge of the wrongdoer and of the damage and, in the absence of legal protection in a particular area of law, the limitation period does not (continue to) run?'

The questions referred for a preliminary ruling

28 The Court notes as a preliminary point that, even though the agreement at issue in the main proceedings was concluded prior to the Republic of Austria's accession to the European Union, the relevant Community rules apply to such an agreement as from the date of that State's accession (see, to that effect, Case C–76/97 *Tögel* [1998] ECR I–5357, paragraph 14).

29 By its first three questions, the Bundesvergabeamt asks, essentially, in which circumstances amendments to an existing agreement between a contracting authority and a service provider may be regarded as constituting a new award of a public services contract within the meaning of Directive 92/50.

30 Directive 92/50 does not provide a specific answer to those questions, but it does contain a number of pertinent indications which should be placed in the overall framework of Community rules governing public procurement.

31 It is clear from the case-law that the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States (see Case 26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44). That two-fold objective is expressly set out in the second, sixth and twentieth recitals in the preamble to Directive 92/50.

32 In order to pursue that two-fold objective, Community law applies inter alia the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom (see, to that effect, Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 and 61; and Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraphs 108 and 109).

33 Directive 92/50 implements those principles and that obligation of transparency in respect of contracts coming within its ambit and concerning, either solely or for the most part, services listed in Annex I A thereto, by requiring inter alia certain award procedures. For contracts coming within

its ambit and concerning, either solely or for the most part, services listed in Annex I B thereto, the directive does not impose the same rules for the award procedures, but that category of public contracts nevertheless remains subject to the fundamental rules of Community law and the obligation of transparency resulting therefrom (see, to that effect, Case C-507/03 *Commission* v *Ireland* [2007] ECR I-0000, paragraphs 26, 30 and 31).

34 In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraphs 44 and 46).

35 An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.

36 Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex I A thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.

37 An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

38 It is in the light of the aforegoing considerations that the questions referred to the Court are to be answered.

The first question

39 By its first question, the Bundesvergabeamt is referring to the transfer to APA-OTS in 2000 of the OTS services hitherto provided by APA. It asks, essentially, whether a change in the contractual partner, in circumstances such as those at issue in the main proceedings, is a new award of contract within the meaning of Articles 3(1), 8 and 9 of Directive 92/50.

40 As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting.

41 According to the order for reference, APA-OTS is established as a limited liability company and therefore has separate legal personality from APA, the initial contractor.

42 It is also common ground that, since the OTS services were transferred from APA to APA-OTS in 2000, the contracting authority makes payment for those services directly to APA-OTS, and no longer to APA.

43 However, some of the specific characteristics of the transfer of the activity in question permit the conclusion that such amendments, made in a situation such as that at issue in the main proceedings, do not constitute a change to an essential term of the contract.

44 According to the information in the case-file, APA-OTS is a wholly-owned subsidiary of APA, APA has the power to instruct APA-OTS in the conduct and management of its business and the two companies are bound by a contract under which profit and loss are transferred to and assumed by APA. The case-file also shows that a person authorised to represent APA assured the contracting authority that, following the transfer of the OTS services, APA was jointly and severally liable with APA-OTS and that there would be no change in the overall performance experienced.

45 Such an arrangement is, in essence, an internal reorganisation of the contractual partner, which

does not modify in any fundamental manner the terms of the initial contract.

46 In that context, the Bundesvergabeamt asks whether legal consequences follow from the fact that the contracting authority does not have an assurance that the shares in APA-OTS will not be transferred to third parties at any time during the currency of the contract.

47 If the shares in APA-OTS were transferred to a third party during the currency of the contract at issue in the main proceedings, this would no longer be an internal reorganisation of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract. Such an occurrence would be liable to constitute a new award of contract within the meaning of Directive 92/50.

48 Similar reasoning would apply if the transfer of shares in the subsidiary to a third party was already provided for at the time of transfer of the activities to the subsidiary (see, to that effect, Case C-29/04, *Commission* v *Austria* [2005] ECR I-9705, paragraphs 38 to 42).

49 Until such a development occurs, however, the analysis in paragraph 45 of this judgment remains valid, namely that the situation envisaged is an internal reorganisation of the contractual partner. This conclusion is not affected by the fact that there is no guarantee that the shares in the subsidiary will not be transferred to a third party at any time during the currency of the contract.

50 The Bundesvergabeamt also asks what legal consequences arise from the lack of guarantee, for the contracting authority, that there will be no changes in the composition of the shareholders in the service provider at any time during the currency of the contract.

51 Public contracts are regularly awarded to legal persons. If a legal person is established as a public company listed on a stock exchange, it follows from its very nature that the composition of its shareholders is liable to change at any time. As a rule, such a situation does not affect the validity of the award of a public contract to such a company. The situation may be otherwise in exceptional cases, such as when there are practices intended to circumvent Community rules governing public contracts.

52 Similar considerations apply in the case of public contracts awarded to legal persons established not as publicly-listed companies but as limited liability registered cooperatives, as in the main proceedings. Any changes to the composition of the shareholders in such a cooperative will not, as a rule, result in a material contractual amendment.

53 Accordingly, the conclusion in paragraph 45 of this judgment is not affected by those considerations either.

54 It follows that the answer to the first question must be that the terms ‘awarding’ and ‘awarded’, used in Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation, such as that in the main proceedings, where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.

The second question

55 By its second question, the Bundesvergabeamt refers to the amendments made to the basic agreement by the first supplemental agreement, signed in 2001 and effective as from 1 January 2002. It asks, essentially, whether certain price amendments constitute a new award of a contract for the purposes of Directive 92/50.

56 This question concerns, first, the conversion of prices to euros without changing their intrinsic amount, secondly, the conversion of prices to euros entailing a reduction in their intrinsic amount and, thirdly, the reformulation of a price indexation clause.

57 The answer must be that, where, following the changeover to the euro, an existing contract is changed in the sense that the prices initially expressed in national currency are converted into euros, it is not a material contractual amendment but only an adjustment of the contract to accommodate changed external circumstances, provided that the amounts in euros are rounded off

in accordance with the provisions in force, including those of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1).

58 Where the rounding off of the prices converted into euros exceeds the amount authorised by the relevant provisions, that is an amendment to the intrinsic amount of the prices provided for in the initial contract. The question then arises as to whether such a change in prices constitutes a new award of a contract.

59 It is evident that the price is an important condition of a public contract (see, to that effect, *Commission* v *CAS Succhi di Frutta*, paragraph 117).

60 Amending such a condition during the period of validity of the contract, in the absence of express authority to do so under the terms of the initial contract, might well infringe the principles of transparency and equal treatment as between tenderers (see, to that effect, *Commission* v *CAS Succhi di Frutta*, paragraph 121).

61 Nevertheless, the conversion of contract prices into euros during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract, provided the adjustment is minimal and objectively justified; this is so where it tends to facilitate the performance of the contract, for example, by simplifying billing procedures.

62 In the situation at issue in the main proceedings, the annual fee for the use of editorial articles and media archives was reduced by a mere 0.3% in order to give a round figure to facilitate calculations. Moreover, the per-line prices for inclusion of press releases in the OTS service were reduced by 2.94% and 1.47% for 2002 and 2003 respectively, so that they would be expressed in round figures, also liable to facilitate calculations. Not only did those price adjustments relate to a small amount, but they also operated to the detriment rather than to the advantage of the contractor, who consented to a reduction in the prices which would have resulted from the conversion and indexation rules normally applicable.

63 In such circumstances, it can be found that an adjustment to the prices of a public contract during its currency does not constitute an amendment to the essential conditions of that contract such as to constitute a new award of a contract within the meaning of Directive 92/50.

64 With respect to the reformulation of the indexation clause, the Court notes that Article 5(3) of the basic agreement provided inter alia that '[f]or the calculation of the indexation, the starting point [was to] be the 86 consumer price index (CPI 86) published by the Austrian Central Statistics Office (ÖSTAT) or the following index replacing it.'

65 It follows that the basic agreement had provided for the price index to which it referred to be replaced by a subsequent index.

66 The first supplemental agreement replaced the price index referred to in the basic agreement, namely the 1986 consumer price index (VPI 86) published by ÖSTAT, by a more recent index, namely the 1996 consumer price index (VPI 96), also published by ÖSTAT.

67 As stated in paragraph 19 of this judgment, that supplemental agreement used as a reference point the index calculated for 2001, the year in which it was concluded, instead of the one for 1994, the year in which the basic agreement was concluded. That updating of the reference point is consistent with the updating of the price index.

68 It follows that the first supplemental agreement merely applied the stipulations of the basic agreement as regards keeping the indexation clause up to date.

69 In such circumstances, the Court considers that the reference to a new price index does not constitute an amendment to the essential conditions of the initial agreement such as to constitute a new award of a contract within the meaning of Directive 92/50.

70 It follows that the answer to the second question must be that the terms 'awarding' and 'awarded', used in Articles 3(1) and 8 and 9 of Directive 92/50, must be interpreted as not covering an adjustment of the initial agreement to accommodate changed external circumstances, such as the conversion to euros of prices initially expressed in national currency, the minimal reduction in the prices in order to round them off, and the reference to a new price index where provision was made

in the initial agreement to replace the price index fixed previously.

The third question

71 By its third question, the Bundesvergabeamt refers to the amendments made to the basic agreement by the second supplemental agreement, signed in October 2005 and effective as from 1 January 2006.

72 The Bundesvergabeamt asks, essentially, whether a new award of a contract results, first, from a renewal of the waiver of the right to terminate the contract by notice and, secondly, from an increase in the rebates granted on the prices of certain services covered by the contract.

73 First of all, as regards the conclusion of a new waiver of the right to terminate the contract during the period of validity of a contract concluded for an indefinite period, the Court observes that the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts. Such a practice might, over time, impede competition between potential service providers and hinder the application of the provisions of Community directives governing advertising of procedures for the award of public contracts.

74 Nevertheless, Community law, as it currently stands, does not prohibit the conclusion of public service contracts for an indefinite period.

75 Likewise, a clause by which the parties undertake not to terminate for a given period a contract concluded for an indefinite period is not automatically considered to be unlawful under Community law governing public procurement.

76 As is apparent from paragraph 34 of this judgment, in determining whether the conclusion of such a clause constitutes a new award of contract, the relevant criterion is whether that clause must be regarded as being a material amendment to the initial contract (see, to that effect, *Commission* v *France*, paragraphs 44 and 46).

77 The clause at issue in the main proceedings formally sets out the waiver of any right to terminate the contract during the period from 2005 to 2008.

78 The Court notes, however, that, following the expiry on 31 December 1999 of the waiver of the right to terminate contained in the basic agreement, the contract at issue in the main proceedings could have been terminated at any time, subject to notice being given. It remained in effect, however, for the period from 2000 to 2005 inclusive, since neither the contracting authority nor the service provider exercised their right to terminate the contract.

79 There is nothing in the case-file to indicate that, during the period from 2005 to 2008 covered by the waiver of the right to terminate the contract, the contracting authority would have actually considered terminating the contract during its currency and put it out to tender again if that clause had not been present. Even if it had intended to do so, the time period envisaged by the waiver, namely three years, was not such that it would have been prevented from doing so for an excessive period in relation to the time necessary to organise such a procedure. In those circumstances, it has not been demonstrated that such a waiver of the right to terminate the contract, provided that it is not systematically re-inserted in the contract, entails a risk of distorting competition, to the detriment of potential new tenderers. Consequently, it cannot be held to be a material amendment to the initial agreement.

80 It follows that, in circumstances such as those at issue in the main proceedings, the presence of a waiver of the right to terminate the contract for a period of three years during the period of validity of a services contract concluded for an indefinite period does not constitute a new award of a contract within the meaning of Directive 92/50.

81 Secondly, regarding the higher rebate provided for in the second supplemental agreement, the Court observes that the basic agreement provided, in respect of the services in question, for ‘a price corresponding to the lowest graduated consumer price of the official tariff … less 15%’.

82 According to the information provided to the Court, that reference is to the degressive tariff applied by APA, in application of which the prices of the services in question are reduced when the use of

those services by APA's contractual partner increases.

83 According to the same information, the increase in the rate of the rebates from 15% to 25%, provided for by the second supplemental agreement, is tantamount to applying a lower price. Even though the formal presentation may be different, the reduction of a price and the increase of a rebate have a comparable economic effect.

84 In those circumstances, the increase of the rebate may be interpreted as coming within the ambit of the clauses laid down in the basic agreement.

85 Moreover, an increase in the rebate, which has the effect of reducing the remuneration received by the contractor as compared to what was initially provided for, does not shift the economic balance of the contract in favour of the contractor.

86 Additionally, the mere fact that the contracting authority obtains a greater rebate on part of the services covered by the contract is not liable to entail a distortion of competition to the detriment of potential tenderers.

87 It follows from the foregoing that, in a situation such as that at issue in the main proceedings, the fact of laying down, in a supplemental agreement, rebates greater than those initially provided for on certain volume-related prices within a specific area of supply, is not to be regarded as being a material contractual amendment and therefore is not a new award of a contract within the meaning of Directive 92/50.

88 Consequently, the answer to the third question must be that the terms 'awarding' and 'awarded', used Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation such as that at issue in the main proceedings, where a contracting authority, through the use of a supplemental agreement, agrees with the contractor, during the period of validity of a contract concluded with it for an indefinite period, to renew for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and agrees with it to lay down higher rebates than those initially provided for in respect of certain volume-related prices within a specified area of supply.

89 In the light of the answers given to the first, second and third questions, it is not necessary to answer the fourth, fifth, sixth and seventh questions.

Costs

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

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

1. **The terms 'awarding' and 'awarded', used in Articles 3(1), 8 and 9 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not covering a situation, such as that in the main proceedings, where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.**

2. **The terms 'awarding' and 'awarded', used in Articles 3(1) and 8 and 9 of Directive 92/50, must be interpreted as not covering an adjustment of the initial agreement to accommodate changed external circumstances, such as the conversion to euros of prices initially expressed in national currency, the minimal reduction in the prices in order to round them off, and the reference to a new price index where provision was made in the initial agreement to replace the price index fixed previously.**

3. **The terms ‘awarding’ and ‘awarded’, used Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation such as that at issue in the main proceedings, where a contracting authority, through the use of a supplemental agreement, agrees with the contractor, during the period of validity of a contract concluded with it for an indefinite period, to renew for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and agrees with it to lay down higher rebates than those initially provided for in respect of certain volume-related prices within a specified area of supply.**

[Signatures]

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* Language of the case: German.

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Case C-454/06

pressetext Nachrichtenagentur GmbH

v

Republik Österreich (Bund) and Others

(Reference for a preliminary ruling from the Bundesvergabeamt)

(Public procurement – Directive 92/50/EEC – Procedures for the award of public service contracts – Concept of 'award of a contract')

Summary of the Judgment

1. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Award of a contract – Meaning – Amendments to the provisions of a public contract during the currency of the contract*

(Council Directive 92/50, Arts 3(1), 8 and 9)

2. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Award of a contract – Meaning – Amendments to the provisions of a public contract during the currency of the contract*

(Council Directive 92/50, Arts 3(1), 8 and 9)

3. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Award of a contract – Meaning – Amendments to the provisions of a public contract during the currency of the contract*

(Council Directive 92/50, Arts 3(1), 8 and 9)

1. The terms 'awarding' and 'awarded', used in Articles 3(1), 8 and 9 of Directive 92/50 relating to the coordination of procedures for the award of public service contracts must be interpreted as not covering a situation where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.

Amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted.

Although the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting such a material change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, the fact remains that an internal reorganisation of the contractual partner does not modify in any fundamental manner the terms of the initial contract. Accordingly, when the new contractual partner is a wholly-owned subsidiary of the former contractual partner and the latter has the power to

instruct the subsidiary in the conduct and management of its business and the two companies are bound by a contract under which profit and loss are transferred, such an arrangement does not constitute a change to an essential term of the contract liable to constitute a new award of contract within the meaning of Directive 92/50.

(see paras 34-35, 40, 43-45, operative part 1)

2. The terms 'awarding' and 'awarded', used in Articles 3(1) and 8 and 9 of Directive 92/50 relating to the coordination of procedures for the award of public service contracts must be interpreted as not covering an adjustment of the initial agreement to accommodate changed external circumstances, such as the conversion to euros of prices initially expressed in national currency, a minimal reduction in the prices in order to round them off, and a reference to a new price index where provision was made in the initial agreement to replace the price index fixed previously.

Amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted.

Where, following the changeover to the euro, an existing contract is changed in the sense that the prices initially expressed in national currency are converted into euros, it is not a material contractual amendment but only an adjustment of the contract to accommodate changed external circumstances, provided that the amounts in euros are rounded off in accordance with the provisions in force. Moreover, such a conversion of contract prices into euros during the course of the contract may be accompanied by an adjustment of their intrinsic amount, which may even exceed the amount authorised by the relevant provisions relating to the introduction of the euro, without giving rise to a new award of a contract, provided the adjustment is minimal and objectively justified; this is so where it tends to facilitate the performance of the contract, for example, by simplifying billing procedures. With respect to the reformulation of the indexation clause, the reference to a new price index does not constitute an amendment to the essential conditions of the initial agreement such as to constitute a new award of a contract within the meaning of Directive 92/50 in so far as that reformulation merely applied the stipulations of the basic agreement as regards keeping the indexation clause up to date.

(see paras 34-35, 57-58, 61, 68-69, operative part 2)

3. The terms 'awarding' and 'awarded', used Articles 3(1), 8 and 9 of Directive 92/50 relating to the coordination of procedures for the award of public service contracts must be interpreted as not covering a situation where a contracting authority, through the use of a supplemental agreement, agrees with the contractor, during the period of validity of a contract concluded with it for an indefinite period, to renew for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and agrees with it to lay down higher rebates than those initially provided for in respect of certain volume-related prices within a specified area of supply.

Since the relevant criterion for determining whether the conclusion of a new waiver of the right to terminate the contract constitutes a new award of contract is whether that clause must be regarded as being a material amendment to the initial contract, a clause which does not entail a risk of distorting competition, to the detriment of potential new tenderers, cannot be held to be such an amendment and, therefore, does not constitute a new award of a contract within the meaning of Directive 92/50.

The increase in the rate of the rebates, provided for by a supplemental agreement, having a comparable economic effect to a price reduction and therefore being liable to be interpreted as coming within the ambit of the clauses laid down in the basic agreement, is not to be regarded as being a material contractual amendment and therefore is not a new award of a contract within the meaning of Directive 92/50. Moreover, an increase in the rebate, which has the effect of reducing the remuneration received by the contractor as compared to what was initially provided for, does not shift the economic balance of the contract in favour of the contractor. Additionally, the mere fact that the contracting authority obtains a greater rebate on part of the services covered by the contract is not liable to entail a distortion of

competition to the detriment of potential tenderers.

(see paras 76, 79-80, 83-87, operative part 3)

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Judgment of the Court (Third Chamber) of 19 June 2008 (reference for a preliminary ruling from the Bundesvergabeamt, Austria) - pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext - Service GmbH, APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung,

(Case C-454/06) [1]

(Public procurement - Directive 92/50/EEC - Procedures for the award of public service contracts - Concept of 'award of a contract')

Language of the case: German

Referring court

Bundesvergabeamt, Austria

Parties to the main proceedings

Applicant: pressetext Nachrichtenagentur GmbH

Defendants: Republik Österreich (Bund), APA-OTS Originaltext - Service GmbH, APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung

Re:

Reference for a preliminary ruling - Bundesvergabeamt - Interpretation of Article 82 EC, of Article 3(1), Articles 8 and 9 and Article 11(3)(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), of Article 1(3) and Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) and of general principles of Community law - Contract for services of indefinite duration concluded on behalf of the State with a press agency, regarded as the sole national press agency, outside the procedures for awarding public contracts - Transfer, with the consent of the contracting authority, of performance of various parts of the contract to a company entirely controlled by the service provider, and other contract amendments concerning waiver of the right to termination of the contract by contracting authority, payment for the services provided and the rebate granted to the contracting authority - Whether those subsequent amendments are to be classified as a new 'contract award' necessitating prior publication of a contract notice

Operative part of the judgment

1. The terms 'awarding' and 'awarded', used in Articles 3(1), 8 and 9 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not covering a situation, such as that in the main proceedings, where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.

2. The terms 'awarding' and 'awarded', used in Articles 3(1) and 8 and 9 of Directive 92/50, must be interpreted as not covering an adjustment of the initial agreement to accommodate changed external circumstances, such as the conversion to euros of prices initially expressed in national currency, the minimal reduction in the prices in order to round them off, and the reference to a new price index where provision was made in the initial agreement to replace the price index fixed previously.

3. The terms 'awarding' and 'awarded', used Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation such as that at issue in the main proceedings, where a contracting authority, through the use of a supplemental agreement, agrees with the contractor, during the period of validity of

a contract concluded with it for an indefinite period, to renew for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and agrees with it to lay down higher rebates than those initially provided for in respect of certain volume-related prices within a specified area of supply.

_____

[1] - OJ C 326, 30.12.2006.

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OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 March 2008 [1](1)

Case C–454/06

pressetext Nachrichtenagentur GmbH

(Reference for a preliminary ruling from the Bundesvergabeamt (Austria))

(Public procurement contracts – News agencies – Concept of 'award' – Contractual amendment – Negotiated procedure without prior publication of a contract notice – Exclusivity rights – Proof of standing of the contractor – 'Essential facilities' – Effective legal protection – Directives 92/50/EEC and 89/665/EEC)

I – Introduction

1. In this case the Austrian Bundesvergabeamt (Federal Procurement Office) is referring to the Court of Justice a very comprehensive series of questions on the interpretation of various provisions of Community law in the field of public procurement law. The essential issue is the interpretation of the concept of 'award' in the context of public procurement law. In particular it is necessary to clarify in what circumstances an amendment to an existing contract is to be regarded as the award of a new public service contract, with the result that where appropriate a public procurement procedure must be carried out beforehand and undertakings left out of consideration are to be afforded legal protection.

2. The background to this reference for a preliminary ruling is a bitter dispute relating to the supply of news agency services to the Austrian federal authorities, in which pressetext Nachrichtenagentur, a relatively new supplier on the Austrian market, is taking legal action in relation to contractual relations which traditionally exist between the Republic of Austria and the long-established Austria Presse Agentur and which were the subject of amendments in the years 2000, 2001 and 2005.

II – Legal background

A – *Community law*

3. Community law in this case is governed by two directives in the area of public procurement law, namely:

– **Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts** (2) ('Directive 92/50'); and

– **Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of**

review procedures to the award of public supply and public workscontracts, (3) as amended by Directive 92/50 ('Directive 89/665'). (4)

1. Relevant provisions of Directive 92/50

4. Article 1(f) in the general provisions in Title I of Directive 92/50 contains the following definition:

'[For the purposes of this Directive] negotiated procedures shall mean those national procedures whereby authorities consult service providers of their choice and negotiate the terms of the contract with one or more of them'.

5. Article 3 of Directive 92/50 also in Title I provides as follows:

'1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.

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

...'

6. Title II of Directive 92/50 contains Articles 8 to 10 under the heading 'Two-tier application' which are worded as follows:

'*Article 8*

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

Article 9

Contracts which have as their object services listed in Annex IB shall be awarded in accordance with Articles 14 and 16.

Article 10

Contracts which have as their object services listed in both Annexes IA and IB shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex IA is greater than the value of the services listed in Annex IB. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

7. Title III of Directive 92/50 is headed 'Choice of award procedures and rules governing design contests'. It contains Article 11(3), which contains the following provision:

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

...

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

...'

8. Article 31(3) of Directive 92/50, which is in Title VI, provides as follows:

'If, for any valid reason, the service provider is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

2. Relevant provisions of Directive 89/665

9. Article 1 of Directive 89/665 provides as follows:

'1. The Member States shall take the measures necessary to ensure that, as regards contract

award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles … on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

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

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

10. Article 2 of Directive 89/665 provides as follows:

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

…

(b) either set aside or ensure the setting-aside of decisions taken unlawfully …;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

…

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

…'

B – *National law*

11. The element of Austrian law to be highlighted is Paragraph 331 of the Bundesvergabegesetz (Law on federal procurement) in the version that entered into force on 1 February 2006 (5) (hereinafter referred to as the 'BVergG 2006'), which forms the legal basis for the proceedings for a declaration brought before the Federal Procurement Office, and provides in part as follows:

'(1) Where an undertaking had an interest in the conclusion of a contract within the scope of application of this Federal Law, it may, in so far as it has suffered harm in consequence of the alleged infringement, apply for a declaration that:

1. the decision to make a direct award or to conduct a procurement procedure without prior publication was unlawful on account of a breach of this Federal Law or regulations made under it or on account of an infringement of directly effective Community law, or

…

4. a contract award which has been made directly to an undertaking without any other undertakings having participated in the procedure was manifestly unlawful under this Federal Law.'

12. According to Paragraph 332(2) and (3) of the BVergG 2006, the right to a declaration provided for in Paragraph 331 of the BVergG 2006 lapses not later than six months after the contract has been awarded.

13. It follows from Paragraph 132(3) of the BVergG 2006 that a successful application under Paragraph 331(1)(4) of that law will result in the contractual relationship being void as from the time of a definitive declaration of illegality.

14. The action for damages is to be distinguished from proceedings for a declaration; in the case of the former it is the Austrian civil courts that have jurisdiction rather than the Federal Procurement Office. Under Paragraph 341(2) of the BVergG 2006, an action for damages is admissible only if proceedings for a declaration have been successfully conducted.

III – Facts and main proceedings

15. The factual background to this case as it appears from the information contained in the order for reference may be summarised as follows.

A – *The news agencies involved in the proceedings*

16. Austria Presse Agentur ('APA') was established in Austria after the Second World War (6) in the form of a cooperative society, (7) of which nearly all Austrian daily newspapers and also Austrian broadcaster, ORF, are members. Together with its group companies, APA is the market leader in the news agencies market in Austria and traditionally provides the Republic of Austria with various news agency services.

17. Pressetext Nachrichtenagentur GmbH ('PN') has been active on the Austrian news agencies market since 1999 but has hitherto issued press releases for federal departments to a limited extent only. PN also has fewer journalists working for it than APA and does not have available to it such a large archive as APA. In 2004 PN offered the Republic of Austria news agency services; this offer did not however result in the conclusion of a contract.

B – *The relevant contractual relations between APA and the Republic of Austria*

18. In 1994, prior to its accession to the European Union, the Republic of Austria entered into a basic agreement with APA, relating to the provision of certain services for remuneration. (8) This basic agreement essentially allowed Austrian federal departments to access and use current information (basic service), to use historical information and previous press releases from an APADok database maintained by APA and to use APA's original text service 'OTS', both for its own purposes and for issuing its own press releases. The APADok database contains data from the basic service from 1 January 1988 and OTS releases from 1 June 1989.

19. The basic agreement was entered into for an indefinite period, and provided that neither party would seek to terminate the agreement before 31 December 1999 at the earliest. The basic agreement likewise contained provisions concerning the date of the first price increases, the maximum amount of each increase and the indexation of prices on the basis of the 1986 consumer price index and as reference value the index figure calculated for 1994.

20. In September 2000 APA established a wholly-owned subsidiary APA-OTS Originaltext-Service GmbH ('APA-OTS'). The undertakings are bound by a contract excluding profit and loss, which, according to information from APA and APA-OTS, provides for APA-OTS to be integrated financially, organisationally and from an economic point of view within the APA undertaking and for APA–OTS to proceed in the conduct and management of its business on the basis of instructions from APA. APA-OTS is likewise required to pass its annual surpluses to APA, whilst in return APA has to make good any annual shortfalls incurred by APA-OTS.

21. APA transferred to APA-OTS the operation of its OTS original text service. This alteration was notified to the Republic of Austria in October 2000, and an authorised employee of APA gave an assurance in response to a query by the Federal Chancellery that following the hiving-off APA was operating on a basis of joint and several liability with APA-OTS, and that there would be no change in the 'overall performance experienced'. According to its own statements, the Federal Chancellery thereupon authorised the future provision of OTS services by APA-OTS, and the remuneration for these services was thenceforth paid direct to APA-OTS.

22. In 2001 the remuneration provisions in the 1994 basic agreement were amended by a first supplemental agreement. In addition to the conversion of remuneration from Austrian schillings into euro this supplemental agreement laid down maximum levels of remuneration for the years 2002,

2003 and 2004, (9) which could not be increased, for the inclusion in OTS of releases by federal departments. In addition the indexation clause was adjusted by reference to a new index, a successor index to the one used in the basic agreement.

23. In October 2005 a second supplemental agreement, with effect from 1 January 2006, amended the basic agreement in the version of the first supplemental agreement in two further respects: the reduction in fees for online access from the information services of the APA was increased from 15% to 25%, and the parties agreed a renewal of their waiver of the right to terminate, extending it to 31 December 2008.

C – *The proceedings before the Federal Procurement Office (proceedings for a declaration of illegality)*

24. Before the Federal Procurement Office PN is seeking a legal remedy against acts that in its view contravened procurement law in connection with the involvement of APA-OTS as the service provider for the Republic of Austria and in connection with the two supplemental agreements to the basic agreement between APA and the Republic of Austria.

25. By its applications lodged on 4 and 19 July 2006 PN seeks a declaration by the Federal Procurement Office under Paragraph 331 of the BVergG 2006 that the separation of the contract by the restructuring of APA in 2000, and the supplemental agreements of 2001 and 2005, described by it as 'de facto awards', were unlawful; in the alternative it seeks a declaration that the decision to opt for the procurement procedures at issue was unlawful. (10)

26. In regard to the time-limits for applications the Federal Procurement Office maintains that, whilst the actions complained of dated back to 2000, 2001 and 2005, the legal remedy available under domestic law in respect of unlawful awards of contracts, namely an application for a declaration of illegality having the effect of dissolving the contract, was created only subsequently, that is to say with effect from 1 February 2006. The period provided for this legal remedy is six months from the date of the unlawful award. However, the Federal Procurement Office considers it appropriate to apply Paragraph 1496 of the Allgemeines Bürgerliches Gesetzbuch (General Civil Code – ABGB) under which limitation periods do not run if the requisite legal remedy is not available, provided that such application is compatible with Community law.

IV – Order for reference and proceedings before the Court of Justice

27. By order of 7 November 2006, drawn up on 10 November 2006 and registered at the Court on 13 November 2006, the Federal Procurement Office stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the terms "awarding" in Article 3(1) of Directive 92/50/EEC and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which a contracting authority intends to obtain services in the future from a service provider established as a limited liability company where those services were previously supplied by a different service provider who is the sole shareholder in the future service provider and has control of the future service provider? In such a case is it legally relevant that the contracting authority has no guarantee that throughout the entire period of the original contract the shares in the future service provider will not be disposed of in whole or in part to third parties and moreover has no guarantee that the membership of the original service provider, which is in the form of a cooperative society, will remain unchanged throughout the entire contract period?

(2) Are the terms "awarding" in Article 3(1) of Directive 92/50/EEC and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers amendments to the charges for specified services under the contract and reformulates an index-linking clause, where these amendments result in different charges and are made upon the changeover to the euro?

(3) Are the terms "awarding" in Article 3(1) of Directive 92/50/EEC and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service

providers to amend the contract, first, renewing for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and, second, also laying down a higher rebate than before for certain volume-related charges within a specified area of supply?

(4) If the answer to any of the first three questions is that there is an award:

Is Article 11(3)(b) of Directive 92/50/EEC or are any other provisions of Community law, such as, in particular, the principle of transparency, to be interpreted as permitting a contracting authority to obtain services by awarding a single contract in a negotiated procedure without prior publication of a contract notice, where parts of the services are covered by exclusive rights as referred to in Article 11(3)(b) of Directive 92/50/EEC? Or do the principle of transparency or any other provisions of Community law require in the case of an award of mostly non-priority services that a contract notice is none the less published prior to the contract award, to enable undertakings in the sectors concerned to assess whether services are in fact being awarded that are subject to an exclusive right? Or do the provisions of Community law relating to the award of public contracts require that in such a case services can only be awarded in separate tender procedures, according to whether they are or are not subject to exclusive rights, in order to allow at least competitive tendering as to part?

(5) If the answer to the fourth question is to the effect that a contracting authority may award services which are not subject to exclusive rights in a single procurement procedure together with services which are subject to an exclusive right:

Can an undertaking which does not have any right to deal with data that is subject to an exclusive right possessed by an undertaking which has a dominant position in the market establish that in that respect it has the capacity, for the purposes of procurement law, to provide a comprehensive service to a contracting authority, by relying on Article 82 EC and an obligation derived from that provision on the market-dominant undertaking which has the power of disposal over the data and is established in a Member State to provide the data on reasonable conditions?

(6) If the answer to the first, second and third questions is to the effect that the partial contract transfer in 2000 and/or one or both of the contract amendments referred to constituted new awards; and furthermore should the fourth question be answered to the effect that either when awarding a contract for services not subject to exclusive rights by means of a separate award procedure, or when awarding a combined contract (in the present case for press releases, the basic service and rights to use APADok), a contracting authority should have first published a contract notice to ensure that the intended contract award was transparent and capable of being reviewed:

Is "harmed" in Article 1(3) of Directive 89/665/EEC and in Article 2(1)(c) of that directive to be interpreted as meaning that an undertaking in a case such as the present one is harmed, within the meaning of those provisions of Directive 89/665/EEC, simply where it has been deprived of the opportunity to participate in a procurement procedure because the contracting authority did not, prior to making the award, publish a contract notice, on the basis of which the undertaking could have tendered for the contract to be awarded, could have submitted an offer or could have had the claim that exclusive rights were involved reviewed by the competent procurement review body?

(7) Are the Community law principle of equivalence and the Community law requirement for effective legal protection, or the principle of effectiveness, to be interpreted, having regard to any other relevant provisions of Community law, as conferring an individual and unconditional right on an undertaking against a Member State such that it has at least six months from the time when it could have known that a contract award infringed procurement law to bring legal proceedings before the competent national authority to seek damages following the contract award on account of an infringement of Community procurement law, while it must be allowed additional time for periods when it could not make such a claim owing to the absence of a statutory basis in national law, in circumstances where under national law claims for damages based on infringements of national law are normally subject to a limitation period of three years from the date of knowledge of the wrongdoer and of the damage and, in the absence of legal protection in a particular area of law, the limitation period does not (continue to) run?'

28. In the proceedings before the Court of Justice, PN, APA and APA-OTS, the Republic of Austria and the Commission of the European Communities presented written and oral submissions. Written submissions were also submitted by the Austrian Federal Chancellery in its capacity as a public awarding authority and by the Lithuanian Government. The French Government made oral submissions.

V – Admissibility of the reference for a preliminary ruling

29. Before dealing substantively with the questions referred it is appropriate to make some brief preliminary observations on the admissibility of the reference for a preliminary ruling.

A – *Entitlement of the Federal Procurement Office to make a reference*

30. The Austrian Federal Procurement Office is a permanent body established by law whose competence in procurement cases is mandatory where the federal government is the contracting authority. (11) It reaches a determination in adversarial proceedings on the basis of provisions of Austrian federal law. In that connection it is both the first and last instance. (12) Its members are not bound by instructions in regard to the exercise of the tasks conferred on them and are appointed for at least five years and, in part, for an indefinite period. (13)

31. Accordingly, the Federal Procurement Office is a court within the meaning of Article 234 EC (14) and is entitled to make references for a preliminary ruling to the Court of Justice. The Court of Justice has already on several occasions (15) responded to requests for a preliminary ruling from the Federal Procurement Office. (16)

B – *Admissibility of the reference for a preliminary ruling: general aspects*

32. The criticism expressed by APA and APA-OTS of the complex and not readily comprehensible formulation of the reference for a preliminary ruling does not alter the fact that the questions referred are intelligible overall. The factual and legal framework of the questions is apparent to a sufficient degree from the clarifications given by the Federal Procurement Office in the order for reference, which likewise indicates why those questions were deemed essential to a resolution of the dispute in this case.

33. In particular it may be inferred from the order for reference that the reference for a preliminary ruling is intended to clarify whether in the national proceedings the taking of detailed evidence of particular facts is necessary or whether the dispute in the main proceedings may be determined without such taking of evidence.

34. On that point it should be observed that it is for the national court to decide at what stage of the procedure it should send a reference for a preliminary ruling to the Court of Justice. (17) The determinant factor is that the referring court sufficiently sets out the factual and legal framework underpinning its request for an interpretation of Community law and otherwise gives all information to the Court of Justice which it needs in order to provide a useful answer to this request. (18) Contrary to the view of APA and APA-OTS, that is the case here. Thus there are no objections in general terms to the admissibility of the reference for a preliminary ruling.

C – *Admissibility of the sixth question in particular*

35. However, a specific problem of admissibility arises in respect of the sixth question referred, which concerns the interpretation of the concept of ‘harm’ in Article 1(3) and Article 2(1)(c) of Directive 89/665.

36. In the main proceedings that are brought under Paragraph 331 of the BVergG 2006, the Federal Procurement Office is competent only to make a *declaration of a violation* of the procurement law but not to award *damages*, which is a matter reserved to the Austrian civil courts. (19) Accordingly, it cannot submit to the Court of Justice any questions for a preliminary ruling relating to damages or the criteria for the award thereof. (20)

37. Against that background, the sixth question referred is only admissible to the extent to which it concerns the criteria for admissibility of an application for review under Article 1(3) of Directive 89/665. However, in so far as the sixth question refers to Article 2(1)(c) of Directive 89/665, it is inadmissible since the latter provision directly concerns the grant of damages.

D – *Interim conclusion*

38. Overall, therefore, this reference for a preliminary ruling is admissible save for that part of the sixth question that concerns Article 2(1)(c) of Directive 89/665.

VI – Substantive assessment of the questions referred

39. In substance this extremely extensive reference for a preliminary ruling seeks clarification as to the circumstances under which the amendment of an existing agreement may be deemed to constitute an award of a public service contract with the consequence that an award procedure must be conducted beforehand and legal remedies are available to undertakings not considered.

40. The highly interesting further question whether any limits are set by procurement law or other provisions of Community law to the conclusion of continuing legal obligations without limit as to time is not a matter raised by the present proceedings. Since the basic agreement of 1994 that was entered into for an indefinite period was concluded before the Republic of Austria's accession to the European Union, (21) this problem requires no further discussion, even as a preliminary question. (22)

A – *The first, second and third questions*

41. By its first three questions the Federal Procurement Office seeks to ascertain the circumstances under which amendments to existing contractual relations between a contracting authority and a service provider are to be deemed to constitute a new award of a public service contract within the meaning of Directive 92/50.

42. That problem has not hitherto been discussed in detail in the case-law of the Community Courts. (23)

1. Preliminary observation: the criterion of a material contractual amendment

43. It is above all in the case of contracts for continuing obligations and contracts of long duration that it may become necessary during the currency thereof to adjust their content if contractual provisions – for example, owing to unforeseen changes in external circumstances – prove no longer to be appropriate. Where a contract is brought into line with the altered circumstances, such adjustment may assist the attainment of the aim of the contract.

44. If, however, the original contract concerned a public contract subsequent amendments to its terms always give rise to the question whether an award procedure (a new one, as the case may be) is to be conducted. In that connection a potential area of conflict regularly opens up between the endeavour to ensure an efficient as possible continuation of the conduct of the contract, on the one hand, and the requirement that equal opportunities be maintained for all current and potential awardees, on the other.

45. Fundamentally, it is not precluded from the outset that subsequent amendments to the terms of existing contracts may (once more, in some cases) satisfy the criterion of an award of a public contract with the consequence that an award procedure must be undertaken. For under settled case-law the legal concepts that define the scope of the procurement directives are to be interpreted broadly. (24)

46. However, the interpretation of the concept of an award must in the end be guided by the objectives of the relevant directive. The coordination of the procedures for the award of public contracts is intended to eliminate obstacles to freedom of movement for goods and services and protect the interests of economic operators from other Member States. (25) It is a matter of ensuring that contracting authorities do not give preference to domestic tenderers or applicants and in the award of the contract are not influenced by considerations other than economic ones. (26)

47. Accordingly, Directive 92/50 too has as its principal objective the free movement of services and the opening-up to competition that is undistorted and as comprehensive as possible. (27) That requires a transparent and non-discriminatory method of proceeding in the award of public service contracts, with the result that equal opportunities of all possible service providers are guaranteed.

48. Against the background of that objective, not every amendment, however slight, to contracts

for public services requires a prior award procedure. Only *materialcontractual amendments* which are such as to distort competition on the relevant market and to favour the contracting authority's contractual partner as against other possible service providers justify conducting a new procurement procedure. (28)

49. In particular there must always be a presumption that there has been a material contractual amendment where other service providers might have been deterred from applying for the public contract by the original less favourable terms, or might now in the light of the new contractual terms be interested in applying for the public contract; or where an application by a tenderer who was unsuccessful at that time might be successful under the new contractual terms. (29)

50. These preliminary observations form the basis for my subsequent discussion of the first three questions referred.

2. First question

a) First part of the first question: involvement of APA-OTS

51. In the first part of its first question the Federal Procurement Office essentially seeks to ascertain whether it is to be deemed a new award of an already existing public service contract within the meaning of Directive 92/50 where a contracting authority accepts that the carrying-out of a part of the contract is to be assigned to the awardee's subsidiary company, to which the awardee has a right to issue instructions and which is wholly owned by the awardee, even if its 100% shareholding is not guaranteed to subsist for the whole duration of the contract.

52. The background to this question is the hiving-off by APA in 2000 of the OTS services to its subsidiary company APA-OTS. Irrespective of whether this restructuring within the APA group stemmed from a contract-splitting, a takeover of a contract, novation or subrogation, (30) it is in any event clear that thenceforth the abovementioned services were directly provided, with the approval of the Federal Chancellery, by APA-OTS and that the remuneration therefor was paid directly to APA-OTS.

53. In any event, in regard to practical implementation of the contract in 2000 there was a partial change in service provider.

54. A change in service provider during the currency of a public contract prima facie indicates a material contractual amendment, as an undertaking which did not have to compete with other bidders and whose selection did not depend upon any comparison with any other bidders is, after all, entrusted wholly or in part with the carrying-out of the public contract. Inherent in such a manner of proceeding is the danger of circumvention of procurement law and the concomitant risk of distortion of competition on the relevant market and giving preference to the new service provider over other possible service providers.

55. However, the particular circumstances of the individual case may result in a situation where alterations on the part of the service provider exceptionally do not entail any material contractual amendment. In that respect the two following categories of cases in particular must be considered.

56. The first category of cases concerns the *involvementof subcontractors* by the contractual partner of the contracting authority. In order not to restrict unduly the possible group of service providers Directive 92/50 expressly confers on the contracting authority the possibility of permitting subcontracts to be awarded to third parties. (31) A characteristic feature of this category is that the main supplier retains full contractual liability for performance of the services contract or at any rate remains jointly responsible for it, even after the subcontract has been awarded.

57. The second category concerns *organisational changesof a purely internal nature* on the part of the contractual partner of the contracting authority. That may include the involvement of one of its subsidiary companies in carrying out the contract. How close the connection between the awardee and its subsidiary company has to be does not need to be definitively established in the present case. Such subsidiary companies are caught in any event where they are controlled by the awardee in a manner similar to its own in-house departments. The involvement of the subsidiary company in the carrying-out of the contract is therefore similar, on the part of the service provider, to an in-house transaction, (32) none of the conditions under which the public contract is performed being altered, at any rate from an economic point of view.

58. It is certain in both cases that the alteration in respect of the service provider does not lead to any distortion of competition or therefore to any material contractual amendment.

59. An event such as the transfer in 2000 of the OTS services to APA-OTS is at first sight similar to the award of a subcontract by APA (first category). That view is supported by the fact that the services concerned are henceforth provided by a legal person other than APA, whereby APA itself remains jointly and severally liable for the carrying-out of the public services contract as a whole, including the tasks taken over by APA-OTS.

60. However, on closer inspection an entity such as APA-OTS resembles not so much an autonomous subcontractor of APA as rather a company department of APA. An event such as the involvement of APA-OTS in the carrying-out of the public services contract in 2000 constitutes no more than a purely internal reorganisation by the service provider APA (second category).

61. It is true that part of the services to be supplied by APA is being supplied by another legal person, APA-OTS. However, from an economic point of view, APA-OTS is not a third party, as it is wholly controlled by its parent company APA. Not only the 100% ownership of it by APA, but also APA's right to issue instructions, and an agreement excluding profit and loss ensure that APA-OTS is governed by its parent company like one of the parent company's own departments. Therefore, from an economic point of view, there has been no material change in regard to the conditions for implementing the public contract.

62. The transaction in 2000 thus did not lead to any material contractual amendment; therefore, it did not need to be treated as a (new) award of a public services contract.

63. That is not precluded by the fact that APA's 100% ownership of APA-OTS is not guaranteed for the entire duration of the public contract. (33) It is true that APA could theoretically at any time transfer shares in APA-OTS to third parties. However, only the actually foreseeable events at that time are relevant to the issue of whether there was a material change to the contract and with it a new award of a public services contract in 2000.

64. The principle of legal certainty requires that the obligation to conduct an award procedure must always be evaluated ex ante, that is to say at the time of entry into the transaction. (34) For both from the perspective of the contracting authority and its business partner and from the perspective of competitors not considered, it must be possible to ascertain already at the time of the transaction whether or not an award procedure was to be conducted. Subsequent circumstances may at most be taken into consideration where at the time of the transaction it could have been foreseen that they would occur.

65. It is apparent from the file that at the time of the involvement of APA-OTS in the implementation of the public contract there were no specific indications of any imminent disposal of shares by APA. In these circumstances I maintain my view that a transaction such as that in 2000 gave rise to no material contractual amendment and thus did not require an award procedure to be conducted.

b) Second part of the first question: membership composition of the APA

66. The Federal Procurement Office would also like to know whether in regard to the transaction in 2000 it makes any difference that the members comprising the APA grouping might change during the currency of the contract.

67. Such an alteration will only be significant in terms of procurement law if it results in at least a partial change of service provider and thus constitutes a material contractual amendment.

68. If, for example, the supplier of the service contract is a mere consortium without legal personality, each of its members will normally have rights and obligations through the contract with the contracting authority. Any change in the composition of the consortium can then lead to a situation in which an undertaking that did not have to compete with other bidders and whose selection was not based on a comparison with other possible suppliers is wholly or partly entrusted with implementing the public contract. That – subject to the exceptions described above (35) – would amount to a material contractual amendment. (36)

69. On the other hand, if the service provider is a legal person, it alone will be the contracting

authority's contractual partner; any subsequent changes in the composition of its shareholders will not result in any material contractual amendment. (37)

70. In the present case it is apparent from the file that APA is a 'registered society with limited liability'. It may therefore be assumed that APA has legal personality. Subject to the findings of the Federal Procurement Office on this point, it is only APA itself which is to be regarded as the contractual partner of the Republic of Austria and not the members of the society. In a case such as this, any changes within the membership of the society give rise to no material contractual amendment.

3. Third question

71. By its third question the Federal Procurement Office essentially seeks to ascertain whether it is to be regarded as a new award of a public service contract within the meaning of Directive 92/50 where the contracting authority and the service provider amend a contract for the provision of services during the currency thereof in the following manner:

– a previously agreed waiver of entitlement to give notice which has expired is renewed for a three-year period; and

– certain amounts of remuneration differ from those hitherto agreed because a price rebate increased by 10 percentage points is granted.

72. The background to this question is the second supplemental agreement to the basic agreement agreed in 2005 between APA and the Republic of Austria.

a) First part of the third question: renewal of waiver of entitlement to give notice

73. The first part of the third question relates to the renewal agreed in 2005 by the contractual partners of a waiver of entitlement to give notice which had expired.

74. It would be problematical from the point of view of public procurement law to agree, in addition to a relationship creating continuing obligations, also to a long-term waiver of entitlement to give notice or even to agree that termination by the contracting authority should be altogether excluded. For such an agreement would permanently exclude any competition between the possible service providers and therefore run counter to the aims of the public procurement directives.

75. However, it is otherwise in the case of a waiver of entitlement to give notice, such as the one agreed in 2005, which is limited to three years. Such waiver of entitlement to give notice cannot from the outset be regarded as impermissible in terms of public procurement law. However, it must be examined whether such a waiver ought to have been subject to a public procurement procedure. That depends on whether the waiver of entitlement to give notice is regarded as a material contractual amendment to the existing basic agreement. (38)

76. In order to be categorised as a material contractual amendment, a waiver of entitlement to give notice that is limited to a few years must be liable to distort competition on the relevant market and favour the contracting authority's contractual partner as against other possible service providers. (39)

77. This can only exceptionally be the case when there are concrete reasons for supposing, at the time when the waiver was agreed, that the contracting authority would otherwise have resiled from the existing contract during the currency of the waiver. It is only then that other possible service providers would at all have been able to entertain serious hopes of displacing the current service provider during this period, either wholly or in part.

78. The first observation to be made in this connection is that the contracting authority was under no legal obligation prematurely to terminate an existing contractual relationship that came into existence without infringing applicable law; the accession of the Republic of Austria to the European Union did not create any obligation on the contracting authority to terminate the existing basic agreement or to make a new award in respect thereof. (40) Therefore, whilst it might have been legally possible for the Republic of Austria to terminate the services contract with APA as from the expiry of the originally agreed waiver of entitlement to give notice (1994), it was in no way mandatory for it to do so.

79. Secondly, in 2005 – subject to findings to be made by the Federal Procurement Office – there was no economic incentive for the Republic of Austria during the comparatively foreseeable period of the waiver of the right to terminate, that is to say until the end of 2008, to change to another service provider. As far as can be ascertained, the contracting authority was able reasonably to assume that in the period until 2008 there would be no equivalent offers under more favourable conditions such as to justify the expenditure entailed by making a change.

80. According to the information available, the renewed waiver of the right to terminate agreed in 2005 for a three-year period therefore entailed no risk of a distortion of competition and is therefore not to be regarded as a material amendment to the basic agreement.

b) Second part of the third question: agreement as to higher price reductions

81. The second part of the third question relates to the price reductions agreed in 2005 for online requests to APA's information services. Whilst the basic agreement provided for a price reduction of 15% for this service provided to the Austrian federal departments, a 25% price reduction has applied since the second supplemental agreement.

82. As already mentioned, (41) there can be a new award of an existing public services contract only if a material contractual amendment is carried out. That also applies to amendments to the contractually agreed remuneration. Even if the detailed rules governing payments as such constitute a material part of the contract, (42) not every amendment, however slight, to the originally agreed provisions concerning payment may be automatically regarded as a material contractual amendment.

83. First of all it must be examined whether the increase by 10 percentage points in the originally agreed price reduction constituted an *amendmentto the payment terms* applicable to the public services contract.

84. APA and APA-OTS argue that the 25% price reduction now granted was merely the logical development of existing provisions of the basic agreement. The basic agreement already referred to an APA graduated tariff. The new higher price reduction is to be equated with the introduction of a new lower graduated tariff in the APA price list.

85. In that regard it must be noted that the actual assessment of the relevant facts in the main proceedings is a matter for the Federal Procurement Office. In the order for reference, which for the purposes of these preliminary ruling proceedings sets out the relevant factual framework, (43) the alteration in percentage figures from 15% to 25% is presented as a 'higher discount than before'. This points to an amendment of the payment terms.

86. This assessment is also borne out by the fact that even the initial 15% price reduction referred to the 'lowest graduated tariff'. Even when the basic agreement was entered into in 1994, the contracting authority was therefore granted the most favourable tariff level that was conceivable. Under those circumstances, it is unlikely that the contractual partners at that time were planning to go over to an even more favourable price category or even regarded that as possible. If, in the year 2005, a price reduction enhanced by 10 percentage points is granted which is then applied to the lowest graduated tariff, that points to a genuine price alteration and not just to a logical progression of the calculation of remuneration as laid down in the basic agreement.

87. Such a price amendment may however only be regarded as a *material contractual amendment* if it is actually such as to distort competition on the relevant market and to favour the contractual partner of the contracting authority over and above other service providers.

88. In order to assess this aspect, the extent of the price alteration in respect of the relevant service has to be examined and this price amendment has to be placed in the context of the significance of the public contract as a whole.

89. As regards first of all the price amendment itself, the risk of distortion of competition in the event of price reductions is less than in the event of price increases. For the reduction in remuneration works in favour of the contracting authority and normally improves the economic efficacy of the implementation of the contract.

90. None the less, it cannot be ruled out from the outset that an agreement concerning lower

remuneration may also have a distorting effect on competition. That has been rightly pointed out by the Lithuanian Government.

91. The determinant factor is always the conditions the contracting authority could have achieved on the market *at the time of the contractual amendment*. If, for example, the prices for the service provided for under the agreement have generally fallen on the market since the original award of the public contract, the mere agreement for a lower remuneration than before affords no guarantee of the observance of the principle of competition and of the principle of economic efficacy. The test is rather whether, at the time of the contractual amendment, other possible service providers could have offered the contracting authority the service required at a yet more favourable price.

92. From the information available there is however no specific indication that, in the present case, on implementation of an award procedure the contracting authority could have achieved a price for an equivalent service even more favourable than the price it secured under the second supplemental agreement to the basic agreement with APA as the current service provider.

93. As regards, finally, the significance of the price amendment occurring in relation to the public contract as a whole, it must be borne in mind that the increased rebate was agreed only for one of the services agreed to be provided (the online request service from the information services of APA) and not, for example, for all the services to be provided by APA. Even if a price reduction increased by 10 percentage points is not insignificant in relation to the part-service concerned, in relation to the overall contract it carries significantly less weight.

94. Ultimately, it is for the Federal Procurement Office to make the necessary findings in regard to the significance of the price amendment as regards both the relevant part-service and the public contract in its entirety.

95. On the basis of the information available to the Court, I am not of the view that a price amendment of the kind contained in the second supplemental agreement of 2005 and effected by the increase in discount should be deemed to be a material contractual amendment.

4. Second question

96. By its second question the Federal Procurement Office essentially seeks to ascertain whether it is to be regarded as a new award of a public contract within the meaning of Directive 92/50, where the contracting authority and the service provider amend a services contract existing between them during its currency in such a way that:

– the contractually agreed remuneration on the conversion of the currency is no longer paid in the national currency but in euro,

– the index-linking clause in the contract is updated by the addition of a reference to a successor index of the index previously used, and

– certain remuneration now differs from remuneration previously agreed.

97. The background to this question is the first supplemental agreement of 2001, which provided for those changes to the provisions concerning remuneration.

98. Purely technical adjustments to the contract which have no significant influence on the relationship between the contracting authority and its contractual partner do not even constitute an amendment to the substance of the contract. They cannot, be regarded, a fortiori, as a material contractual amendment which requires the implementation of an award procedure.

99. Where an existing agreement was amended on the occasion of a currency conversion to the euro in such a way that the previously agreed remuneration is to be expressed in the new currency, but without any material increase or reduction, this does not constitute a material contractual amendment but merely a technical adjustment of an existing contract to bring it in line with altered external circumstances. (44) The rounding up or down of the newly calculated amounts in euro that may be necessary under the applicable legal provisions is also subsumed within this technical adjustment.

100. Similarly a reference to an index other than that originally agreed may also be a purely technical contractual adjustment, in so far as both indices are equivalent. The order for reference points to such equivalence by stating that the new index is the successor index to the previous index. The Federal Procurement Office will however also have to satisfy itself that the mode of operation of the new index is equivalent to that of the previous index. That means in particular that the baskets of goods, or other reference quantities, to which the relevant indices relate, must essentially be equivalent.

101. However, if a currency recalculation or an index adjustment is used by the contractual partners as a reason for substantively altering the originally agreed payments, that goes beyond a purely technical amendment in its effects. Then it can no longer be precluded from the outset that there is a material contractual amendment affecting competition between service providers.

102. In the present case the order for reference states that the adjustments to the framework contract made by the first supplemental agreement led to maximum fees being applicable to the inclusion of certain broadcasts by the federal services in the OTS for 2002, 2003 and 2004; those fees could not be increased.

103. The Federal Procurement Office will have to examine whether that represented a material change in comparison with the remuneration agreed in the basic agreement. The relevant factor in that connection is the way in which the indexed remuneration agreed in the basic agreement might, on an objective view, have been expected to progress on the basis of indications available in 2001.

104. If the maximum remuneration laid down for 2002, 2003 and 2004 substantially accords with the prices which in all likelihood would have resulted from application of the index-linking clause in the basic agreement, there is no material contractual amendment. (45) If, conversely, they clearly depart from the price trends to be expected under the basic agreement, it will be necessary to examine the effects of this alteration on competition, in which connection the yardsticks set out above on the second part of the third question (46) apply.

105. On the basis of the information available to the Court, I am in any event of the view that price amendments such as those agreed in the first supplemental agreement were within the parameters of annual price increases foreseeable for 2001; for this reason alone, they did not constitute a material contractual amendment.

B – *Fourth and fifth questions*

106. The fourth and fifth questions, in which the Federal Procurement Office devotes its attention to the applicable award procedure and proof of standing of a service provider, are based on the supposition that the 2000, 2001 and 2005 transactions are in any event to be regarded as awards of a public services contract.

107. On the basis of the information available to the Court, I am of the view that none of these events constituted such an award. (47) Accordingly, I shall examine the fourth and fifth questions merely in the alternative.

1. Fourth question

108. By its fourth question the Federal Procurement Office essentially seeks to ascertain whether a public services contract may be awarded as a single contract in a negotiated procedure without prior publication of a contract notice, if the contract predominantly concerns non-priority services and a right of exclusivity within the meaning of Article 11(3)(b) of Directive 92/50 does not exist for all but only for some of the services to be provided.

a) Priority and non-priority services

109. Directive 92/50 distinguishes in Articles 8 to 10 between priority and non–priority services. The former are defined in Annex IA to the directive and the latter in Annex IB. The background to these provisions is that, owing to their specific nature, contracts for non-priority services a priori are accorded no cross-border significance such as to warrant the conduct of an award procedure. (48)

110. Following the submissions of APA and APA-OTS, the Federal Procurement Office assumes that news agency services such as those agreed to be provided in the present case constitute a mix of

priority and non-priority services, (49) and that the non-priority services clearly predominate in value.

111. If that view is regarded as correct, (50) the public services contract awarded to APA comes overall under the regime for non-priority services (Article 10 of Directive 92/50). That means it is a public contract not subject to any specific public procurement procedure for the purposes of Title III of Directive 92/50. (51)

b) Applicability of the transparency rule

112. Even in procurement procedures for which the public procurement directives provide no specific public procurement procedures, it is none the less settled case-law that the public authorities are bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non–discrimination on grounds of nationality in particular. (52) The Court has clarified only recently that this also applies to the award of contracts concerning non-priority services. (53)

113. Thus, if there is a certain cross-border interest in a contract for non-priority services, the *transparency rule* derived from the fundamental freedoms applies to it and the contract may not be awarded in disregard of all transparency. (54)

114. It will be for the Federal Procurement Office to examine whether there is a clear cross-border interest in the provision of news agency services that form the subject-matter of the contract in the present case. (55) In that connection regard must be had inter alia to the following considerations:

– The fact that a number of news agencies are internationally active suggests that there may be a cross-border interest. The entry onto the market of PN in 1999 shows that the Austrian market is not without interest for new service providers.

– Cooperation agreements currently existing between various news agencies active on their home markets, as mentioned in the oral proceedings, do not from the outset preclude certain of those agencies from seeking to strengthen their future involvement on a market such as the Austrian one by having a local presence of their own.

– Militating against a cross-border interest could be the fact that a large part of the services required by the Austrian federal authorities display specific references to Austria and also to regional events in that country.

c) Substance of the transparency rule

115. Substantively, it follows from the transparency rule that *a sufficient degree of advertising* has to be secured. (56) What precise requirements flow from that rule for awards of contracts for which the directives on procurement lay down no specific award procedures is currently unclear. It is certain only that the transparency rule does not necessarily entail a duty to call for tenders. (57)

116. Ultimately, it is incumbent on the contracting authority to assess in each individual case the requisite degree of advertising in order for the relevant award procedure to be opened up to competition and the impartiality of the public procurement procedure to be reviewed. (58)

117. In general terms the transparency rule should not be interpreted in such a way that an award procedure ought always to be applied which accords with the procurement directives in all particulars. (59) For otherwise the distinction between contract awards within the scope of those directives and those not caught by them would be lost; the financial thresholds laid down by the Community legislature would also largely be deprived of their meaning in such a case.

118. A fortiori, under the transparency rule the requirements for award procedures in respect of which the procurement directives do not require specific award procedures may not be more far reaching than those applicable to the conduct of award procedures for which such procedures are laid down in the directives. (60) For the procurement directives are no more than an illustration of the transparency rule as it applies to certain particularly significant award procedures. (61)

119. In relation to public contracts which wholly or predominantly concern non-priority services the transparency rule can require no greater degree of advertising than for contracts wholly or

predominantly concerning priority services.

120. Contracts for services which, owing to protection of exclusive rights, (62) can be performed only by a specific service provider may always be awarded in a negotiated procedure without any prior notification of the award, irrespective of whether the services concerned are priority or non-priority services. For if Article 11(3)(b) of Directive 92/50 allows such a procedure for priority services, a fortiori, it must be permissible to award non-priority services under this procedure. To that extent the values expressed in Article 11(3) of Directive 92/50 may be transposed to the area of non-priority services. Where Article 11(3) of Directive 92/50 requires no prior notification of the award, no further inference may be drawn from the transparency rule. (63)

121. Reasonable transparency ensuring that the award is opened to competition and a review of the impartiality of the procurement procedure may, in the case of services, as defined in Article 11(3) of Directive 92/50, also be secured by a subsequent publication.

d) Award of a mixed service contract as a single contract

122. It remains to be examined whether a public contract may be awarded in a negotiated procedure as a single contract without any prior publication of the contract notice where an exclusive right within the meaning of Article 11(3)(b) of Directive 92/50 subsists not for all but only for certain of the services to be provided.

123. Article 11(3) of Directive 92/50 derogates from the rules ensuring the effectiveness of the rights conferred by the EC Treaty in relation to public service contracts; as such, it must, as a matter of principle, be interpreted strictly. (64) In relation to awards concerning services taken as a whole, this tends to indicate that recourse may be had to a negotiated procedure without prior publication of a contract notice only in the case of the services specifically covered by Article 11(3).

124. However, a separate award of services under Article 11(3)(b) of Directive 92/50 may be considered only if the public contract is divisible. In that connection it is not merely the theoretical divisibility of the contract which is relevant; attention must also be paid to the intended use and practical efficacy of the services, depending on whether they are supplied separately or by one supplier.

125. In the present case APA and APA-OTS, the Republic of Austria and the Federal Chancellery have persuasively demonstrated the close interconnectedness of the various news agency services agreed under the basic agreement. Thus it is not objectively appropriate for editorial contributions to be provided by one service provider and to transmit reactions to them through the intermediary of another service provider, because it cannot be established with certainty that both service providers serve the same end-users. A report in newspaper A cannot be responded to by a statement in newspaper B. It is also of considerable significance in ensuring that the service is user-friendly to have access to networked databases via a uniform user surface.

126. It cannot be argued that the contractual elements are separable, for example, on the basis of the fact that the OTS services are in the meantime provided by APA-OTS and no longer by APA. As already stated, that amounts to no more than an internal reorganisation on the part of the service provider; from an economic point of view there was no change of service provider, rather APA–OTS is controlled by APA as its own corporate department. (65) The various services also continue to be networked and accessible via a uniform user surface.

127. Subject to an actual assessment by the Federal Procurement Office, all these matters militate against a finding that the contract for services between the Republic of Austria and APA is separable and thus against any obligation for there to be separate awards of items under the contract.

128. That is not altered by the fact that the services contract in this case concerns both priority and non-priority services. As a glance at Article 10 of Directive 92/50 shows, it is by no means necessary for priority and non-priority services to be awarded separately in each case. (66)

129. It would be otherwise only if the contracting authority had assembled the individual services into a single services contract arbitrarily or only for the purpose of circumventing the provisions on award procedures. (67) There are however no indications of this in the present case. On the contrary, from the information available to the Court, there were objective reasons in favour of an award of all the services at issue in a single contract. (68)

e) Interim conclusion

130. In summary the answer to the fourth question may be stated thus:

A public contract for services may be awarded as a single contract under a negotiated procedure without prior publication of a contract notice, if the contract is predominantly for non-priority services and an exclusive right as referred to in Article 11(3)(b) of Directive 92/50 subsists not for all but only for certain of the services to be provided, unless the individual services were assembled into a single contract for services arbitrarily or in order to circumvent procurement provisions.

2. Fifth question

131. By its fifth question the Federal Procurement Office would essentially like to know whether an undertaking may demonstrate its standing to perform a public contract by the mere assertion that another undertaking is obliged under Article 82 EC to make certain data available to it on reasonable conditions.

132. The background to this question is the fact that the provision of news agency services, as sought in this case by the Austrian federal authorities, presupposes access to a comprehensive archive from which inter alia historical information and texts may be obtained. According to the information in the order for reference, PN does not have anything like a historical data archive which would be comparable to that held by APA. Moreover, APA does not grant its competitors access to its archives, in any event not for the purpose of selling on the data obtainable there. It must now be clarified whether PN may contend as proof of its standing within the meaning of Article 31 of Directive 92/50 that it has legal entitlement to access the APA archives, in particular the APADok database.

133. This is an allusion to the doctrine of competition law known as the 'essential facilities doctrine'. Under the relevant case-law, it may be regarded as an abuse under Article 82 EC – albeit only under exceptional circumstances – for a market-dominant undertaking to refuse another undertaking access to essential goods, services or data ('essential facilities'). (69) In such cases Article 82 EC may found a mandatory requirement on the part of the market-dominant undertaking to enter into a contract.

134. However, in the present case it may remain open whether a database such as the APADok archive operated by APA contains data essential to its competitors, that is to say is an 'essential facility', and whether there are exceptional circumstances which would require APA to grant its competitors access on reasonable conditions to its archives.

135. For a service provider which, in regard to its admission to an award procedure, wishes to refer to the resources of other establishments or undertakings has to prove that it can *actually* avail itself of those resources. (70) Otherwise the contracting authority will have before it no persuasive comparison of that service provider's standing with that of other possible service providers. If the contracting authority merely were to trust in the *potential* ability of the service provider to avail itself of those resources, the authority would be running the risk of awarding the contract to an undertaking whose standing would prove, in retrospect, to be deficient, that is in the event of difficulties arising in regard to accessing the requisite resources. At the same time it might be withholding the contract from another undertaking with actual standing. Such conduct would be in keeping neither with the notion of equality as between all possible service providers nor with the principle of efficacy in the award procedure.

136. A news agency such as PN cannot therefore merely assert that it is entitled to access the archives of APA but must specifically prove that such access will actually be granted to it, for instance in the form of an express assurance to that effect or in the form of a licence agreement already entered into. Otherwise it cannot successfully demonstrate its standing in an award procedure by a reference to APA's archives.

137. The often brief time-limits within which a decision must be reached in the award procedure are inimical to clarification, which is frequently time-consuming, of complex legal questions in connection with Article 82 EC and the 'essential facilities doctrine'. The undertaking concerned must bring any dispute on these matters to a conclusion before applying for a public contract.

138. Accordingly, as to the fifth question, I conclude that an undertaking cannot demonstrate its standing to perform a public contract for services by the mere assertion that another undertaking is

obliged under Article 82 EC to make certain data available to it on reasonable conditions.

C – *Sixth and seventh questions*

139. In its sixth and seventh questions the Federal Procurement Office seeks information about the extent of legal protection to be afforded to an undertaking not taken into consideration by a contracting authority. The logical assumption underlying these questions too is that transactions such as those in 2000, 2001 and 2005 are to be regarded as awards of public contracts for services. This is also conceded by the Federal Procurement Office in its order for reference.

140. On the basis of the information available to the Court, I am, as already mentioned, of the opinion that none of these transactions constituted such an award. (71) Accordingly, I am examining the sixth and seventh questions only in the alternative.

1. Sixth question

141. The sixth question referred by the Federal Procurement Office concerns the interpretation of the concept of 'harm' in Article 1(3) and Article 2(1)(c) of Directive 89/665. As already mentioned, (72) this question is admissible only in relation to Article 1(3) of the directive.

142. By its question the Federal Procurement Office is essentially seeking to ascertain whether a review procedure is to be carried out where the applicant claims that it missed the opportunity of participating in an award procedure owing to the fact that there was an unlawful failure to publish a contract notice or whether the applicant must in addition prove its own standing to perform the relevant public contract. Accordingly, it is necessary to elucidate further the *question as to who is entitled to apply for a review*.

143. Article 1(3) of Directive 89/665 permits the Member States to restrict the right to bring an application in relation to a review procedure for the award of public contracts in two respects: (73) on the one hand, through the requirement that the applicant should have an interest in the relevant public contract and, on the other, through the requirement of existing or imminent harm to the applicant. In this way public interest actions and actions brought by applicants with no prospect of success may be excluded.

144. However, that must not affect the practical effectiveness of the directive. (74) The restrictions on the entitlement to bring an action must therefore be construed in the light of the twofold aim of the directive: on the one hand, the individual must be afforded an *effective legal remedy* in connection with the award of public contracts and, on the other, the requisite *review of the lawfulness* of the decisions by contracting authorities must be facilitated.

145. For, as is apparent from the first and second recitals in its preamble, Directive 89/665 seeks to strengthen the means available at national and Community levels in order to secure the actual application of the Community directives in the sphere of public procurement. To that end the Member States are obliged under Article 1(1) of the directive to ensure that unlawful decisions by contracting authorities can be reviewed effectively and as swiftly as possible. (75)

146. Against that background, entitlement to bring an action in procurement review proceedings may not be restricted disproportionately. In particular the *admissibility* of an application for review must not be subject to the same requirements as apply in regard to whether it is *well founded*. (76)

147. It cannot therefore be the case that already at the stage of lodgement of the application the person concerned is required to produce specific evidence of actual harm or that such harm is imminent. In order for there to be entitlement to make an application for review, it must be sufficient that, in addition to the infringement of the law by the contracting authority, the person concerned *persuasively asserts* an interest in the contract at issue and the *possibility* of the occurrence of damage.

148. The possibility of harm to the person concerned must be presumed where it is not manifestly excluded that the applicant would have received the award if the legal infringement alleged had not occurred. Where, as in the present case, the public contract is awarded directly (77) without prior contract notice, it follows from the fact that the person concerned is – allegedly unlawfully – precluded from participating in the award procedure that he may have lost a contract and thus suffered loss. (78)

149. Nor may actual proof of standing be required of the person concerned at the stage of an application for review; in the same way, he cannot be required to provide evidence that he would have received the award if the alleged infringement had not taken place. (79) Otherwise access to the review procedure would be rendered impossible in practice or at any rate excessively difficult. (80) In particular in cases of direct awards such as the present case, it would be barely possible for the person concerned to provide actual proof of standing, since he would have no accurate information about the requirements laid down by the contracting authority because of the lack of a prior contract notice.

150. Only by way of exception may an application for review be rejected as inadmissible *ab initio* by reference to a lack of standing on the part of the person concerned, namely where that lack of standing is so plainly obvious at the time of the application as to require no further examination. Everything else is a question of the merits of the application.

151. On the sixth question I therefore conclude that an application for review under Article 1(3) of Directive 89/665 is admissible if the applicant persuasively asserts an interest in the public contract, the existence of a legal error and the possible harm suffered or about to be suffered. If the contract was awarded without prior publication of a contract notice, it follows from the fact that the person concerned was precluded from participating in the award procedure that he may have suffered harm unless there is a manifest lack of standing on its part.

2. Seventh question

152. By its seventh question the Federal Procurement Office essentially seeks to ascertain whether it is consistent with the principles of equivalence and effectiveness for national law to provide, in the case of an application, in a matter of procurement law, for a declaration of illegality which is a mandatory requirement of a subsequent claim for damages, a limitation period of no more than six months from the date of the award that is alleged to be contrary to procurement law. The Federal Procurement Office also questions whether the principle of effectiveness requires any additional periods in which there was no effective remedy under national law to be added to the abovementioned period of six months.

153. The background to this question is that PN made its applications for review to the Federal Procurement Office only in July 2006, that is to say within six months of the entry into force of the new procedural provisions in Paragraph 331 of the BVergG 2006 on 1 February 2006, yet more than six months after the matters at dispute in this case that date back to 2000, 2001 and 2005. According to the Federal Procurement Office, direct awards ('de facto awards') can be 'proceeded against effectively' in Austria only since the date of entry into force of Paragraph 331 of the BVergG 2006.

154. Directive 89/665 makes no express provision concerning the periods applicable to review proceedings under Article 1 thereof.

155. The starting point for the reply to the question submitted to the Court is therefore the *principle ofprocedural autonomy* enjoyed by the Member States. (81) It is settled case-law that, in the absence of Community rules in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (*principle of equivalence*) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (*principle of effectiveness*). (82) Both principles are also reflected in Article 1 of Directive 89/665; the principle of equivalence in Article 1(2) and the principle of effectiveness in Article 1(1).

156. The *principle of equivalence* is a manifestation of the general principle of equal treatment and non-discrimination, (83) which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. (84)

157. The Commission and APA and APA-OTS rightly pointed to a specific peculiarity in that connection which differentiates review proceedings in procurement matters. Thus, Article 1(1) of Directive 89/665 requires Member States to facilitate *as rapid a review as possible* of infringements of procurement law. In this way, first, effective legal protection is to be ensured and, secondly, legal certainty is to be created as swiftly as possible. In light of this objective, it is justified in the case of

applications for review under Directive 89/665, in appropriate cases, to provide for shorter periods than the limitation periods governing claims for damages under the general domestic legal provisions.

158. The principle of equivalence does not therefore preclude a six-month limitation period for applications for review such as, for example, the one provided for in Paragraph 332(2) and (3) of the BVergG 2006, even if under national law the general limitation period for claims for damages is longer.

159. However, it remains to be examined in the light of the *principleof effectiveness* whether a limitation period, such as that provided for under Austrian law for applications for a declaration, does not render it virtually impossible or excessively difficult for the persons concerned subsequently to assert their rights to claim damages under Article 2(1)(c) of Directive 89/665.

160. In principle it is not contrary to the principle of effectiveness to lay down reasonable limitation periods for bringing legal proceedings, since to do so is an application of the basic principle of legal certainty. (85)

161. The reasonableness of a limitation period is therefore to be adjudged in the light of the nature and legal consequences of the relevant remedy and of the relevant rights and interests of all the persons concerned.

162. Accordingly, in applications for review that seek to have contracts which have already been concluded declared invalid – whether retroactively or for the future – an absolute limitation period of six months is in principle entirely reasonable. (86) For the particularly onerous legal consequences of invalidating a contract already concluded justify laying down a period that runs regardless of whether the applicant was aware, or at least ought to have been aware, that the award of the contract was contrary to procurement law. There is a clear need, both for the contracting authority and for its contract partner, for legal certainty as to the validity of the concluded contract and this should be protected.

163. In relation to a case such as this one, it must however be borne in mind that an absolute limitation period of six months, such as that provided for in Paragraph 332(2) and (3) of the BVergG 2006 for applications for a declaration under Paragraph 331(1) of that law, affects not only those who actually seek the invalidation of a contract that has already been concluded but also those who merely wish to take an essential procedural step in preparation for a subsequent action for damages before the Austrian civil courts.

164. So, if the person concerned only becomes aware more than six months later of the damage he has suffered as a result of an award of a public contract contrary to procurement law without prior publication of a contract notice (direct award or de facto award), he cannot apply to the civil courts even for damages since in order to do so it is mandatory under Paragraph 341(2) of the BVergG 2006 that he should first have applied for a declaration, which, however, by this stage would be time-barred.

165. Therefore, the limitation period in Paragraph 332(2) and (3) of the BVergG 2006 goes beyond its actual scope in also affecting subsequent proceedings for which it is unreasonably stringent. The contracting authority does not have the same need for legal certainty with regard to mere applications for damages as it does with regard to the validity of a contract already concluded.

166. In so far as a Member State avails itself of the possibility provided for in Article 2(2) and (5) of Directive 89/665, and makes the bringing of actions for damages dependent on an earlier successful application for a declaration of invalidity, the relevant limitation periods must be structured and applied in such a way that the actual implementation of the claim for damages is not rendered virtually impossible or excessively difficult. (87)

167. To summarise, the principle of effectiveness requires that the time-limit for an application for a declaration which the applicant is merely making in preparation for bringing an action for damages should not start to run before the applicant was aware or ought to have been aware of the occurrence of the damage. Conversely, in so far as the applicant intends, by such an application for a declaration, also to obtain a ruling that the contract concluded by the public contracting authority is invalid, more stringent time-limits may be laid down which start to run, irrespective of actual or possible awareness of any damage.

168. The national courts must, where possible, interpret national law in such a way that observance of the principle of effectiveness deriving from Directive 89/665 is assured, and if necessary must disapply any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Community law. (88)

169. In a case such as this one, in which there was a direct award without prior publication of a contract notice, this means that the time-limit for the application for a declaration may not start to run until the person concerned was aware or ought to have been aware of the alleged infringement of procurement law, in a case where the application is a necessary precondition of a subsequent action for damages.

170. In its order for reference, the Federal Procurement Office indicates that, in its opinion, a result that complies with Community law can in fact be achieved, first, by applying the newly created remedy in Paragraph 331(1)(4) of the BVergG 2006 to events which occurred before this provision entered into force and, secondly, by calculating the applicable time-limits by reference to specific provisions of general civil law, with the result that they do not start to run until the applicant becomes aware of the damage and are extended by periods when there was no effective remedy.

171. To summarise in regard to the seventh question:

The principle of effectiveness requires that Article 1(1) of Directive 89/665 be interpreted as meaning that a reasonable period must be allowed in the case of an application for review which under national law is a mandatory prerequisite of a subsequent action for damages; that period may not begin to run until the person concerned was aware or should have been aware of the alleged infringement of procurement law, and it must be extended by periods when there was no effective legal remedy. The national court must interpret national procedural law as far as possible so that this result is achieved and, if necessary, must disapply any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Community law.

VII – Conclusion

172. Against the background of the foregoing, I propose that the Court should answer only the first three questions submitted to it by the Austrian Federal Procurement Office as follows:

(1) Generally on the first, second and third questions:

A contract within the scope of Directive 92/50 whose terms are amended during its currency does not require an award procedure to be carried out unless that amendment is material.

(2) Specifically on the first question:

(a) No material contractual amendment can be presumed to have occurred where the contracting authority accepts that performance of a part of a public contract be transferred to the contractor's subsidiary company which is a wholly-owned subsidiary governed by it in the same way as its own in-house departments. That is not altered by the fact that in theory the contractor might at a subsequent time transfer shares in the subsidiary company to third parties.

(b) If the contractor is a legal person, any changes occurring in the composition of its shareholders during the currency of the contract does not constitute a material contractual amendment.

(3) Specifically on the second and third questions:

(a) No material contractual amendment may be presumed where purely technical adjustments of the contract are carried out in light of altered external circumstances; that includes the conversion into euro of remuneration originally expressed in national currency and the reference to a new index which is an equivalent successor index to a previously used index.

(b) Nor is there a material contractual amendment where in the case of a public services contract without limit as to time the parties have agreed not to give notice for three years, unless there is firm evidence that during the abovementioned period the contracting authority would otherwise have terminated the existing contract for legal

or economic reasons.

(c) Whether the alteration of a price for a part of the services to be provided constitutes a material contractual amendment depends on the significance of the price amendment in question, both in relation to the part-service concerned and in relation to the public contract in its entirety.

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1 – Original language: German.

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2 – OJ 1992 L 209, p. 1. This directive was repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). The latter amendment was, however, to be transposed into national law by 31 January 2006 only. Since it was not transposed into Austrian law prior to that date, it is without relevance to the facts of the main proceedings which concern the years 2000, 2001 and 2005.

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3 – OJ 1989 L 395, p. 33.

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4 – Further amendments to this directive are to be found in Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31; 'Directive 2007/66'). The latter amendments only came into force on 9 January 2008 and will have to be transposed by 20 December 2009; they are therefore without relevance to the facts of the main proceedings.

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5 – BGBl. I, No 17/2006.

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6 – A predecessor organisation of the APA, the Österreichische Correspondenz, had already been established in 1849 in Vienna.

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7 – It is apparent from the file that it is a registered cooperative society with limited liability.

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8 – According to information provided by the Federal Chancellery, which is participating in the proceedings, that involves the adjustment of a contractual relationship which has subsisted since 1946.

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9 – These maximum fees are applicable where broadcasts are transmitted online.

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10 – According to the order for reference, PN's main application is based on Paragraph 331(1)(4) and the ancillary application on Paragraph 331(1)(1) of the BVergG 2006.

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11 – Paragraph 291 of the BVergG 2006.

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12 – Second sentence of Paragraph 291(2) of the BVergG 2006.

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13 – Paragraphs 292 and 295 of the BVergG 2006.

14 – On the settled case-law of the Court, see Case C-54/96 *Dorsch Consult* [1997] ECR I–4961, paragraph 23; Case C-53/03 *Syfait and Others* [2005] ECR I–4609, paragraph 29; and Case C–195/06 *Österreichischer Rundfunk* [2007] ECR I-0000, paragraph 19.

15 – See Case C-411/00 *Felix Swoboda* [2002] ECR I–10567, in particular paragraphs 25 to 28; Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I–2549; and Case C-15/04 *Koppensteiner* [2005] ECR I–4855. The current organisation of the Federal Procurement Office on the basis of the BVergG 2006 is, according to the order for reference, essentially the same as at the time of the *Koppensteiner* case.

16 – Similarly the Court recognised a federal procurement supervisory committee, at that time in Germany, as entitled to make a reference (*Dorsch Consult*, cited in footnote 14, paragraph 38).

17 – Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 10; Case C–112/00 *Schmidberger* [2003] ECR I-5659, paragraph 39; and Case C-470/03 *AGM–COS.MET* [2007] ECR I–2749, paragraph 45.

18 – *Schmidberger* (cited in footnote 17), paragraphs 40 and 41.

19 – The Republic of Austria has availed itself of the possibility set out in Article 2(2) of Directive 89/665 of transferring the powers in review proceedings to several bodies.

20 – Case C-315/01 *GAT* [2003] ECR I–6351, paragraph 38.

21 – See Case C-76/97 *Tögel* [1998] ECR I–5357, paragraphs 53 and 54. Unlike the actions which are at issue in these proceedings and date back to 2000, 2001 and 2005, that is to say, within the temporal application of Community law, the procurement directives were not applicable to the basic agreement because in 1994 the Republic of Austria was not a Member State of the European Union.

22 – On the specific problem of the coupling of a contract without limit as to time with a waiver of a right to terminate, see below, in particular point 74 of this Opinion.

23 – A preliminary reference by the German Oberlandesgericht (Higher Regional Court) Rostock did not lead to a judgment of the Court (Case C-50/03, removed from the register on 9 November 2004).

24 – On the broad interpretation of various concepts defining the scope of the procurement directives, see Case C-373/00 *Adolf Truley* [2003] ECR I–1931, paragraph 43; Case C-129/04 *Espace Trianon and Sofibail* [2005] ECR I–7805, paragraph 73; and Case C-119/06 *Commission* v *Italy* [2007] ECR I-0000, paragraph 43.

25 – Case C-360/96 *BFI Holding* [1998] ECR I–6821, paragraph 41, Case C-380/98

University of Cambridge [2000] ECR I–8035, paragraph 16, Case C-507/03 *Commission* v *Ireland* [2007] ECR I-0000, paragraph 27, and Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I–0000, paragraph 38; see also the second and sixth recitals in the preamble to Directive 92/50.

26 – *University of Cambridge* (cited in footnote 25), paragraph 17; *Felix Swoboda* (cited in footnote 15), paragraph 45; and *Bayerischer Rundfunkand Others* (cited in footnote 25), paragraph 36.

27 – Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I–1, paragraphs 44 and 47, and *Bayerischer Rundfunkand Others* (cited in footnote 25), paragraph 39.

28 – To that effect, see also Case C-337/98 *Commission* v *France* [2000] ECR I–8377, paragraphs 46, 50 and 51, and Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I–3801, paragraph 117, where reference is made to *significant* contractual provisions or tender conditions.

29 – Admittedly, it is not always easy in practice to distinguish between material and non-material contractual amendments because that has to be decided on a case-by-case basis. The use of uncertain legal concepts requiring interpretation is however unavoidable in any area of law and is far from unknown in procurement law.

30 – There does not seem to be any consensus between the parties to the main proceedings on this point. Nor does the order for reference use any uniform terminology. However, it is for the Federal Procurement Office to clarify how the translation is to be classified under civil law.

31 – See Articles 25 and 32(2)(c) and (h) of Directive 92/50 and Case C-176/98 *Holst Italia* [1999] ECR I–8607, paragraphs 26 and 27. However, the award of subcontracts for carrying out substantive parts of the contract may be restricted under national law (*Siemensand ARGE Telekom*, cited in footnote 15, paragraph 45).

32 – On the criteria for an in-house transaction, see in particular Case C-107/98 *Teckal* [1999] ECR I–8121, paragraph 50, *Stadt Halle and RPL Lochau* (cited in footnote 27), paragraph 49, Case C–458/03 *Parking Brixen* [2005] ECR I–8585, paragraph 62, and Case C-295/05 *Asemfo* [2007] ECR I–2999, paragraph 55; on the concept of the in-house transaction, see my Opinion in *Parking Brixen*, points 1 and 2.

33 – The same is true of the dissolubility of the profit and loss exclusion agreement.

34 – See my Opinion in *Parking Brixen* (cited in footnote 32), paragraph 56. The question of the actual foreseeability of an assignment of shares to third parties also plays a significant role in Case C-29/04 *Commission* v *Austria* [2005] ECR I–9705, paragraphs 38 to 41; Case C-410/04 *ANAV* [2006] ECR I–3303, paragraphs 30 to 32; and *Parking Brixen* (cited in footnote 32), paragraph 67(c).

35 – See above, points 55 to 58 of this Opinion.

36 – The judgment in Case C-57/01 *Makedoniko Metro and Mikhaniki* [2003] ECR I–1091, paragraph 61, merely clarifies that making provision for the composition of consortia of bidders is within the competence of the Member States. Accordingly, it is for the Member States to determine whether changes in the composition of such consortia are indeed permissible. However that is to be distinguished from the question which is relevant for present purposes, namely whether such changes occurring *after* the contract has been awarded are to be deemed to constitute material amendments to the contract and accordingly satisfy the criteria of an award of a public contract. The latter question is a matter of Community law.

37 – If one wished to treat any change in the ownership of a legal person as giving cause to carry out a new award procedure, the award of public contracts would in the case of listed companies whose shareholders sometimes change on a day-to-day basis be rendered practically impossible.

38 – See above, point 48 of this Opinion.

39 – See above, points 48 and 49 of this Opinion.

40 – In this connection see *Tögel* (cited in footnote 21), paragraphs 53 and 54.

41 – See above, points 48 and 49 of this Opinion.

42 – In this connection see *Commission* v *CAS Succhi di Frutta* (cited in footnote 28), paragraph 117.

43 – Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I–5257, paragraph 42, and Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I–589, paragraph 21.

44 – It is true that an adjustment to the contract on the occasion of the currency conversion would not have been absolutely necessary because the legal framework conditions already existing ensured that all amounts previously expressed in the national currency would in future be understood as euro amounts, without that implying any change in the existing contractual obligations (see also Articles 3 and 5 of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1). However, as APA and APA-OTS correctly point out, an express adjustment to the contract may, in a contract for continuing obligations, such as the contract at issue, be appropriate none the less in order to avoid the increased administrative burden of repeatedly performing a currency conversion.

45 – The maximum line charges agreed in the first supplemental agreement for 2002, 2003 and 2004 are only slightly different. Subject to a closer examination by the Federal Procurement Office, such slight price differences appear to move from year to year within the framework of the general price trends to be anticipated in subsequent years based on projections from 2001.

46 – See above, points 81 to 94 of this Opinion.

47 – See my comments on the first, second and third questions above, points 41 to 105 of this Opinion.

48 – Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraph 25.

49 – APA and APA-OTS are of the opinion that their documentation services are to be assigned to the 'Library services' sector, CPC Reference No 96311 and their OTS services to the 'Electronic message and information services' sector, CPC Reference No 75232.

50 – The order for reference defines the factual framework in which the questions referred are to be answered; see on that point the case-law cited in footnote 43.

51 – Under Article 9 in conjunction with Article 10 of Directive 92/50, only Articles 14 and 16 of the directive are applicable to such contracts, which are of no relevance to the matters at issue here. The other procedural provisions laid down in Directive 92/50, in particular those concerning tenders with prior notification of the award procedure, do not apply to those contracts (Case C–507/03 *Commission* v *Ireland*, cited in footnote 25, paragraphs 23 and 24). However, the prohibition on discrimination in Article 3(2) of Directive 92/50 applies (Case C-234/03 *Contseand Others* [2005] ECR I–9315, paragraph 47).

52 – *Parking Brixen* (cited in footnote 32), paragraph 46; see also Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I–10745, paragraph 60, Case C-231/03 *Coname* [2005] ECR I–7287, paragraph 16, Case C-264/03 *Commission* v *France* [2005] ECR I–8831, paragraph 33, *ANAV* (cited in footnote 34), paragraph 18, and Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, paragraph 33; see also the order of 3 December 2001 in Case C-59/00 *Vestergaard* [2001] ECR I–9505, paragraph 20.

53 – Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraph 29.

54 – Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraph 30; see on the transparency rule also *Telaustria and Telefonadress* (cited in footnote 52), paragraph 62, *Coname* (cited in footnote 52), paragraphs 16 and 17, *Parking Brixen* (cited in footnote 32), paragraphs 46 to 49, and *ANAV* (cited in footnote 34), paragraphs 18 to 21.

55 – Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraphs 29 and 30; to the same effect, see Case C–380/05 *Centro Europa 7* [2008] ECR I–0000, paragraph 67.

56 – *Telaustria and Telefonadress* (cited in footnote 52), paragraph 62; *Coname* (cited in footnote 52), paragraphs 16 and 17; *Parking Brixen* (cited in footnote 32), paragraph 49; and *ANAV* (cited in footnote 34), paragraph 21.

57 – *Coname* (cited in footnote 52), paragraph 21; there is a misunderstanding in *Parking Brixen* (cited in footnote 32), paragraph 50, which in the German version mentions 'Ausschreibung' (tender) which presumably is a mistranslation of the French term

'mise en concurrence' (call for competition).

58 – *Telaustria and Telefonadress* (cited in footnote 52), paragraph 62; *Parking Brixen* (cited in footnote 32), paragraphs 49 and 50; and *ANAV* (cited in footnote 34), paragraph 21. Useful indications are provided in this connection by the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives (OJ 2006 C 179, p. 2).

59 – See my Opinion in *Parking Brixen* (cited in footnote 32), point 37.

60 – In this connection see the Opinions of Advocate General Jacobs in Case C-525/03 *Commission* v *Italy* [2005] ECR I–9405, point 47, of Advocate General Stix-Hackl in Case C-532/03 *Commission* v *Ireland* [2007] ECR I-0000, point 111, and of Advocate General Sharpston in Case C-195/04 *Commission* v *Finland* [2007] ECR I–3351, points 76 and 77; see also my Opinion in *Parking Brixen* (cited in footnote 32), point 46.

61 – In this connection see Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraphs 27 to 29; see also my Opinion in *Parking Brixen* (cited in footnote 32), point 47.

62 – Whether there is such an exclusive right in this case is a matter for the Federal Procurement Office.

63 – In this connection see also the Commission's communication (cited in footnote 58), point 2.1.4.

64 – Case C-126/03 *Commission* v *Germany* [2004] ECR I–11197, paragraph 23, and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I–3609, paragraph 58. See also Article 11(4) of Directive 92/50, according to which an open or restricted procedure must be used 'in all other cases'.

65 – See on this above, points 20, 61 and 62 of this Opinion.

66 – See also *Felix Swoboda* (cited in footnote 15), paragraphs 56 and 60.

67 – *Felix Swoboda* (cited in footnote 15), paragraphs 57 and 60.

68 – See also above, point 125 of this Opinion.

69 – Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission*, *('Magill')* [1995] ECR I–743, paragraphs 49 to 57; Case C-7/97 *Bronner* [1998] ECR I–7791, paragraphs 38 to 47; and Case C-418/01 *IMS Health* [2004] ECR I–5039.

70 – *Holst Italia* (cited in footnote 31), paragraph 29; *Siemens and ARGE Telekom* (cited in footnote 15), paragraph 44; and Case C-126/03 *Commission* v *Germany* (cited in footnote 64), paragraph 22. See for future cases also Article 48(3) of Directive

2004/18 where this case-law has now been codified.

71 – See my comments on the first, second and third questions above, points 41 to 105 of this Opinion.

72 – See above, points 35 to 37 of this Opinion.

73 – The reference to public supply and public works contracts must, since the extension of the scope of Directive 89/665 by Directive 92/50, be interpreted as relating to all public contracts including contracts for services. The fact that only Article 1(1) but not Article 1(3) of Directive 89/665 was amended accordingly seems to be attributable to a drafting oversight on the part of the Community legislature which was corrected for future cases by Directive 2007/66.

74 – Case C-410/01 *Fritsch, Chiari & Partner and Others* [2003] ECR I–6413, paragraphs 31 and 34; Case C-470/99 *Universale-Bau and Others* [2002] ECR I–11617, paragraph 72; and Case C–230/02 *Grossmann Air Service* [2004] ECR I–1829, paragraph 42.

75 – Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 33 and 34; *Fritsch, Chiari & Partner andOthers* (cited in footnote 74), paragraph 30; *Universale-BauandOthers* (cited in footnote 74), paragraph 74; and *Grossmann Air Service* (cited in footnote 74), paragraph 36.

76 – The mere fact that *at the end of the review proceedings* there may be no evidence of actual or potential damage does not in itself militate against the admissibility of the application for review; see in this connection Case C-249/01 *Hackermüller* [2003] ECR I–6319, paragraph 27.

77 – Also known as a ‘negotiated contract’.

78 – See also the Bundesverfassungsgericht (German Federal Constitutional Court) Order of 29 July 2004 (2 BvR 2248/03, end of paragraph 36).

79 – Similarly, see the German Constitutional Court (cited in footnote 78), paragraphs 26 and 29.

80 – Similarly – albeit in relation to the award of compensation for damages – see the Opinion of Advocate General Geelhoed in *GAT* (cited in footnote 20), point 66.

81 – *Universale-Bau and Others* (cited in footnote 74), paragraph 71; on the concept of procedural autonomy, see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67, Case C–212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 95, and Case C-1/06 *Bonn Fleisch* [2007] ECR I-5609, paragraph 41.

82 – Case 13/68 *Salgoil* [1968] ECR 453; Case 33/76 *Rewe-Zentralfinanzand Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraphs 39 and 43; and Joined Cases C–222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR

I-4233, paragraph 28.

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83 – See my Opinion in Case C-268/06 *Impact* [2008] ECR I-0000, paragraph 67; on the principle of equal treatment, see the settled case-law, not least Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56, and Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767, paragraph 63.

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84 – In this connection see also – albeit in relation to the refund of duties – Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 37.

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85 – Settled case-law; see *Rewe-Zentralfinanz and Rewe- Zentral* (cited in footnote 82), paragraph 5, *Edis* (cited in footnote 84), paragraphs 20 and 35, and Case C-30/02 *Recheio – Cash & Carry* [2004] ECR I-6051, paragraph 18; specifically on Directive 89/665, see further *Universale-Bauand Others* (cited in footnote 74), paragraph 76, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 50, and Case C-241/06 *Lämmerzahl* [2007] ECR I-0000, paragraph 50.

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86 – See also Article 2(f)(1)(b) in conjunction with Article 2(d)(1) of Directive 89/665 in the version in Directive 2007/66.

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87 – The significance of the specific structure and practical application of a rule on limitation periods is also emphasised in *Lämmerzahl* (cited in footnote 85), paragraphs 52, 56 and 61.

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88 – *Santex* (cited in footnote 85), paragraphs 62 and 64, and *Lämmerzahl* (cited in footnote 85), paragraphs 62 and 63.

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Reference for a preliminary ruling from the Bundesvergabeamt (Austria) lodged on 13 November 2006 - pressetext Nachrichtenagentur GmbH v 1. Republic of Austria (Bund), 2. APA-OTS Originaltext-Service GmbH, 3. APA AUSTRIA PRESSE AGENTUR, a registered cooperative with limited liability

(Case C-454/06)

Language of the case: German

Referring court

Bundesvergabeamt

Parties to the main proceedings

Applicant: pressetext Nachrichtenagentur GmbH

Respondents: 1. Republic of Austria (Bund), 2. APA-OTS Originaltext-Service GmbH, 3. APA AUSTRIA PRESSE AGENTUR, a registered cooperative with limited liability

Questions referred

Are the terms 'awarding' in Article 3(1) of Directive 92/50/EEC [1] and 'awarded' in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which a contracting authority intends to obtain services in the future from a service provider established as a limited liability company where those services were previously supplied by a different service provider who is the sole shareholder in the future service provider and has control of the future service provider? In such a case is it legally relevant that the contracting authority has no guarantee that throughout the entire period of the original contract the shares in the future service provider will not be disposed of in whole or in part to third parties and moreover has no guarantee that the membership of the original service provider, which is in the form of a co-operative society, will remain unchanged throughout the entire contract period?

Are the terms 'awarding' in Article 3(1) of Directive 92/50/EEC and 'awarded' in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers amendments to the charges for specified services under the contract and reformulates an index-linking clause, where these amendments result in different charges and are made upon the changeover to the euro?

Are the terms 'awarding' in Article 3(1) of Directive 92/50/EEC and 'awarded' in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers to amend the contract, first, renewing for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and second, also laying down a higher rebate than before for certain volume-related charges within a specified area of supply?

If the answer to any of the first three questions is that there is an award:

Is Article 11(3)(b) of Directive 92/50/EEC, or are any other provisions of Community law, such as, in particular, the principle of transparency, to be interpreted as permitting a contracting authority to obtain services by awarding a single contract in a negotiated procedure without prior publication of a contract notice, where parts of the services are covered by exclusive rights as referred to in Article 11(3)(b) of Directive 92/50/EEC? Or do the principle of transparency or any other provisions of Community law require in the case of an award of mostly non-priority services that a contract notice is none the less published prior to the contract award, to enable undertakings in the sectors concerned to assess whether services are in fact being awarded that are subject to an exclusive right? Or do the provisions of Community law relating to the award of public contracts require that in such a case services can only be

awarded in separate tender procedures, according to whether they are or are not subject to exclusive rights, in order to allow at least competitive tendering as to part?

If the answer to the fourth question is to the effect that a contracting authority may award services which are not subject to exclusive rights in a single procurement procedure together with services which are subject to an exclusive right:

Can an undertaking which does not have any right to deal with data that is subject to an exclusive right possessed by an undertaking which has a dominant position in the market establish that in that respect it has the capacity, for the purposes of procurement law, to provide a comprehensive service to a contracting authority, by relying on Article 82 EC and an obligation derived from that provision on the market-dominant undertaking which has the power of disposal over the data and is established in a Member State to provide the data on reasonable conditions?

If the answer to the first, second and third questions is to the effect that the partial contract transfer in 2000 and/or one or both of the contract amendments referred to constituted new awards; and furthermore should the fourth question be answered to the effect that either when awarding a contract for services not subject to exclusive rights by means of a separate award procedure, or when awarding a combined contract (in the present case for press releases, the basic service and rights to use APADok), a contracting authority should have first published a contract notice to ensure that the intended contract award was transparent and capable of being reviewed:

Is 'harmed' in Article 1(3) of Directive 89/665/EEC [2] and in Article 2(1)(c) of that directive to be interpreted as meaning that an undertaking in a case such as the present one is harmed, within the meaning of those provisions of Directive 89/665/EEC, simply where he has been deprived of the opportunity to participate in a procurement procedure because the contracting authority did not, prior to making the award, publish a contract notice, on the basis of which the undertaking could have tendered for the contract to be awarded, could have submitted an offer or could have had the claim that exclusive rights were involved reviewed by the competent procurement review body?

Are the Community law principle of equivalence and the Community law requirement for effective legal protection, or the principle of effectiveness, to be interpreted, having regard to any other relevant provisions of Community law, as conferring an individual and unconditional right on an undertaking against a Member State such that it has at least six months from the time when it could have known that a contract award infringed procurement law to bring legal proceedings before the competent national authority to seek damages following the contract award on account of an infringement of Community procurement law, while it must be allowed additional time for periods when it could not make such a claim owing to the absence of a statutory basis in national law, in circumstances where under national law claims for damages based on infringements of national law are normally subject to a limitation period of three years from the date of knowledge of the wrongdoer and of the damage and, in the absence of legal protection in a particular area of law, the limitation period does not (continue to) run?

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[1] - OJ 1992 L 209, p. 1.

[2] - OJ 1989 L 395, p. 33.

Judgment of the Court (Third Chamber)
of 14 February 2008
Varec SA v Belgian State. Reference for a preliminary ruling: Conseil d'Etat - Belgium. Public procurement - Review - Directive 89/665/EEC - Effective review - Meaning - Balance between the adversarial principle and the right to observance of business secrets - Protection, by the body responsible for the review, of the confidentiality of information provided by economic operators.
Case C-450/06.

In Case C450/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'Etat (Council of State) (Belgium), made by decision of 24 October 2006, received at the Court on 6 November 2006, in the proceedings

Varec SA

v

Belgian State,

intervener:

Diehl Remscheid GmbH & Co.,

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, J.N. Cunha Rodrigues (Rapporteur), J. Kluka, P. Lindh and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Varec SA, by J. Bourtembourg and C. Molitor, avocats,

- the Belgian Government, by A. Hubert, acting as Agent, assisted by N. Cahen, avocat,

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

- the Commission of the European Communities, by B. Stromsky and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2007,

gives the following

Judgment

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

Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, read in conjunction with Article 15(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties

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to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.

1. The reference for a preliminary ruling concerns the interpretation of Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; Directive 89/665').

2. The reference was made in proceedings between Varec SA (Varec') and the Belgian State, represented by the Minister for Defence, concerning the award of a public contract for the supply of track links for Leopard' tanks.

Legal context

Community legislation

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

The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC..., decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4. Article 33 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) repeals Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), and provides that the references to that repealed directive are to be construed as references to Directive 93/36. Similarly, Article 36 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) repeals Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5), and provides that references to Directive 71/305 are to be construed as references to Directive 93/37.

5. Article 2(8) of Directive 89/665 provides:

Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [234 EC] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take

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its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

6. According to Article 7(1) of Directive 93/36, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1; Directive 93/36'):

The contracting authority shall, within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

However, contracting authorities may decide that certain information on the contract award, referred to in the preceding subparagraph, shall be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.'

7. Article 9(3) of Directive 93/36 provides:

Contracting authorities who have awarded a contract shall make known the result by means of a notice. However, certain information on the contract award may, in certain cases, not be published where release of such information would impede law enforcement or otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, public or private, or might prejudice fair competition between suppliers.'

8. Article 15(2) of Directive 93/36 provides:

The contracting authorities shall respect fully the confidential nature of any information furnished by the suppliers.'

9. The provisions of Articles 7(1), 9(3) and 15(2) of Directive 93/36 have been substantially reproduced in Article 6, the fifth subparagraph of Article 35(4), and Article 41(3) respectively of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

National legislation

10. Article 87 of the Decree of the Regent of 23 August 1948 establishing the procedure before the Administrative Section of the Conseil d'Etat (Moniteur belge of 23 to 24 August 1948, p. 6821), provides:

Parties, their advisers and the government commissioner may inspect the case-file at the registry.'

11. According to the third and fourth subparagraphs of Article 21 of the Coordinated Laws on the Conseil d'Etat of 12 January 1973 (Moniteur belge of 21 March 1973, p. 3461):

Where the defendant fails to lodge the administrative file within the prescribed period, without prejudice to Article 21a, the facts alleged by the applicant shall be deemed to have been proven, unless they are manifestly inaccurate.

Where the administrative file is not in the possession of the defendant, he shall inform the Chamber seised of the action accordingly. The Chamber may order that the administrative file be lodged, on penalty of a fine in accordance with Article 36.'

The dispute in the main proceedings and the question referred for a preliminary ruling

12. On 14 December 2001, the Belgian State initiated a contract award procedure in respect of

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the supply of track links for Leopard' tanks. Two tenderers submitted bids, namely Varec and Diehl Remscheid GmbH & Co. (Diehl').

13. When examining those tenders, the Belgian State considered that the tender submitted by Varec did not satisfy the technical selection criteria and that that tender was unlawful. By contrast, it took the view that the tender submitted by Diehl satisfied all the selection criteria, that it was lawful and that its prices were normal. Consequently, the Belgian State awarded the contract to Diehl by decision of the Minister for Defence of 28 May 2002 (the award decision').

14. On 29 July 2002, Varec brought an action for annulment of the award decision before the Conseil d'Etat. Diehl was granted leave to intervene.

15. The file delivered to the Conseil d'Etat by the Belgian State did not include Diehl's tender.

16. Varec requested that that tender be added to the file. The same request was made by the Auditeur of the Conseil d'Etat who was responsible for drawing up a report (the Auditeur').

17. On 17 December 2002, the Belgian State added Diehl's tender to the file, explaining that neither the plans of the whole of the proposed track link nor those of its constituent parts were included. It stated that these had been returned to Diehl in accordance with the specification and at Diehl's request. It further stated that that was why it could not place those documents on the file and that, if it was essential that they be included, it would be necessary to ask Diehl to provide them. The Belgian State also observed that Varec and Diehl are in dispute about the intellectual property rights to the plans in question.

18. By letter of the same date, Diehl informed the Auditeur that the version of its tender that was placed on the file by the Belgian State contained confidential data and information, and that it was objecting on the ground that third parties, including Varec, would be able to peruse those confidential data and information relating to business secrets included in the tender. According to Diehl, certain passages in Annexes 4, 12 and 13 to its tender contain specific data concerning the detailed revisions of the relevant manufacturing plans and also the industrial process.

19. In his report of 23 February 2006, the Auditeur concluded that the award decision should be annulled on the ground that in the absence of the defendant's cooperation in the sound administration of justice and fair proceedings, the only possible sanction is the annulment of the administrative measure whose lawfulness is not established where documents are excluded from inter partes proceedings'.

20. The Belgian State challenged that conclusion and requested the Conseil d'Etat to rule on the issue of respecting the confidentiality of Diehl's tender documents containing information relating to business secrets which had been placed on the file in the proceedings before that court.

21. In those circumstances, the Conseil d'Etat decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Must Article 1(1) of [Directive 89/665], read with Article 15(2) of [Directive 93/36] and Article 6 of [Directive 2004/18], be interpreted as meaning that the authority responsible for the appeal procedures provided for in that article must ensure confidentiality and observance of the business secrets contained in the files communicated to it by the parties to the case, including the contracting authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration?'

Admissibility

22. Varec submits that in order to resolve the dispute before the Conseil d'Etat it is not necessary for the Court to answer the question referred for a preliminary ruling.

23. In that regard, it must be observed that, in proceedings under Article 234 EC, which is based

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on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C326/00 IKA [2003] ECR I1703, paragraph 27; Case C145/03 Keller [2005] ECR I2529, paragraph 33; and Case C419/04 Conseil général de la Vienne [2006] ECR I5645, paragraph 19).

24. Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 Foglia [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Case C379/98 PreussenElektra [2001] ECR I2099, paragraph 39; Case C390/99 Canal Satélite Digital [2002] ECR I607, paragraph 19; and Conseil général de la Vienne , paragraph 20).

25. It must be pointed out that that is not the case here. If the Conseil d'Etat follows the form of order proposed by the Auditeur, it will have to annul the award decision which is before it, without examining the substance of the dispute. On the other hand, if the provisions of Community law which the Conseil d'Etat seeks to have interpreted justify the confidential treatment of the documents of the file at issue in the main proceedings, it will be in a position to examine the substance of the dispute. For those reasons it may be concluded that the interpretation of those provisions is necessary for the resolution of the dispute in the main proceedings.

Merits

26. In the question referred to the Court, the Conseil d'Etat refers both to Directive 93/36 and to Directive 2004/18. Since Directive 2004/18 has replaced Directive 93/36, it is necessary to establish which of the two directives is relevant to the examination of the question referred.

27. It must be borne in mind that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force (see Case C-201/04 Molenbergnatie [2006] ECR I2049, paragraph 31 and the case-law cited).

28. The dispute in the main proceedings concerns the right to the protection of confidential information. As the Advocate General noted in point 31 of her Opinion, such a right is in essence a substantive right, even if its application can have procedural consequences.

29. The right crystallised when Diehl submitted its tender in the award procedure at issue in the main proceedings. Since that date was not specified in the order for reference, it is appropriate to conclude that it falls between 14 December 2001, the date of the call for tenders, and 14 January 2002, the date of the opening of bids.

30. Directive 2004/18 had not yet been adopted at that time. It follows that the provisions of Directive 93/36 must be taken into consideration for the purposes of the dispute in the main proceedings.

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31. There is no provision in Directive 89/665 which expressly governs the protection of confidential information. It is necessary, in that respect, to refer to that directive's general provisions, and in particular to Article 1(1).

32. Article 1(1) provides that the Member States are to take the measures necessary to ensure that, as regards contract award procedures falling within the scope of, inter alia, Directive 93/36, decisions taken by the contracting authorities may be reviewed effectively on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

33. Since the objective of Directive 89/665 is to ensure compliance with Community law in the field of public procurement, Article 1(1) of that directive must be interpreted in the light of the provisions of Directive 93/36 as well as of other provisions of Community law in the field of public procurement.

34. The principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States (see, to that effect, Case C26/03 Stadt Halle and RPL Lochau [2005] ECR I1, paragraph 44).

35. In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.

36. Furthermore, both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.

37. Accordingly, Article 15(2) of Directive 93/36 provides that the contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers.

38. In the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender, and of publishing a notice of the award of a contract, Articles 7(1) and 9(3) of Directive 93/36 give the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.

39. Admittedly, those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.

40. In such circumstances, the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.

41. In such an appeal, the respondent would be the contracting authority and the economic operator whose interests are at risk of being damaged would not necessarily be a party to the dispute or joined to the case to defend those interests. Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators.

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42. In a review, the body responsible for the review procedure assumes the obligations laid down by Directive 93/36 with regard to the contracting authority's respect for the confidentiality of information. The effective review' requirement provided for in Article 1(1) of Directive 89/665, read in conjunction with Articles 7(1), 9(3) and 15(2) of Directive 93/36, therefore imposes on that body an obligation to take the measures necessary to guarantee the effectiveness of those provisions, and thereby to ensure that fair competition is maintained and that the legitimate interests of the economic operators concerned are protected.

43. It follows that, in a review procedure in relation to the award of public contracts, the body responsible for that review procedure must be able to decide that the information in the file relating to such an award should not be communicated to the parties or their lawyers, if that is necessary in order to ensure the protection of fair competition or of the legitimate interests of the economic operators that is required by Community law.

44. The question arises whether that interpretation is consistent with the concept of a fair hearing in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ECHR').

45. As the order for reference shows, Varec claimed before the Conseil d'Etat that the right to a fair hearing means that both parties must be heard in any judicial procedure, that the adversarial principle is a general principle of law, that it has a foundation in Article 6 of the ECHR, and that that principle means that the parties are entitled to a process of inspecting and commenting on all documents or observations submitted to the court with a view to influencing its decision.

46. The Court notes that Article 6(1) of the ECHR provides inter alia that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal...'. The European Court of Human Rights has consistently held that the adversarial nature of proceedings is one of the factors which enables their fairness to be assessed, but it may be balanced against other rights and interests.

47. The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court. However, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest (see Rowe and Davis v The United Kingdom [GC] no 28901/95, º61, ECHR 2000II, and V v Finland no 40412/98, º75, ECHR 2007...).

48. One of the fundamental rights capable of being protected in this way is the right to respect for private life, enshrined in Article 8 of the ECHR, which flows from the common constitutional traditions of the Member States and which is restated in Article 7 of the Charter of fundamental rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) (see, in particular, Case C62/90 Commission v Germany [1992] ECR I2575, paragraph 23, and Case C404/92 P X v Commission [1994] ECR I4737, paragraph 17). It follows from the case-law of the European Court of Human Rights that the notion of private life' cannot be taken to mean that the professional or commercial activities of either natural or legal persons are excluded (see Niemietz v Germany , judgment of 16 December 1992, Series A no 251B, º29; Société Colas Est and Others v France , no 37971/97, º41, ECHR 2002III; and also Peck v The United Kingdom no 44647/98, º57, ECHR 2003I). Those activities can include participation in a contract award procedure.

49. The Court of Justice has, moreover, acknowledged that the protection of business secrets is a general principle (see Case 53/85 AKZO Chemie and AKZO Chemie UK v Commission [1986] ECR 1965, paragraph 28, and Case C36/92 P SEP v Commission [1994] ECR I1911, paragraph 37).

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50. Finally, the maintenance of fair competition in the context of contract award procedures is an important public interest, the protection of which is acknowledged in the case-law cited in paragraph 47 of this judgment.

51. It follows that, in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.

52. The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, Case C-438/04 Mobistar [2006] ECR I6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.

53. To that end, the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets (see, by analogy, Mobistar , paragraph 40).

54. Having regard to the extremely serious damage which could result from improper communication of certain information to a competitor, that body must, before communicating that information to a party to the dispute, give the economic operator concerned an opportunity to plead that the information is confidential or a business secret (see, by analogy, AKZO Chemie and AKZO Chemie UK v Commission , paragraph 29).

55. Accordingly, the answer to the question referred must be that Article 1(1) of Directive 89/665, read in conjunction with Article 15(2) of Directive 93/36, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.

Costs

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

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Opinion of Advocate General Sharpston delivered on 25 October 2007. Varec SA v Belgian State. Reference for a preliminary ruling: Conseil d'Etat - Belgium. Public procurement - Review - Directive 89/665/EEC - Effective review - Meaning - Balance between the adversarial principle and the right to observance of business secrets - Protection, by the body responsible for the review, of the confidentiality of information provided by economic operators. Case C-450/06.

1. The Belgian Conseil d'Etat (Council of State) asks whether a body hearing an appeal concerning the award of a public contract must protect the confidentiality of business secrets while remaining entitled to take account of evidence containing them.

2. The issue highlights the conflict between the right of one party to require production of and access to relevant evidence and that of another to maintain the confidentiality of certain evidence vis-à-vis a business competitor.

Community legislation

3. Article 1(1) of Directive 89/665 (2) requires Member States to ensure that, as regards procedures falling within the scope of the directives coordinating award procedures for public works, supply and service contracts, (3) decisions taken by contracting authorities can be reviewed effectively and as rapidly as possible in accordance with the conditions set out in the remainder of the directive, if it is alleged that Community public procurement law or national implementing rules have been infringed.

4. The directive then sets out conditions to be observed in such review procedures, with a view to ensuring a speedy and efficient outcome in accordance with Community law. However, it is silent in respect of the treatment of confidential information contained in documents submitted or requested as evidence. Under Article 2(8), the review body must follow a procedure in which both sides are heard'.

5. Questions of confidentiality at the award stage in public supply contracts were dealt with, at the time of the award of the contract in the main proceedings, in Directive 93/36, (4) in particular by Article 15(2), which provided: The contracting authorities shall respect fully the confidential nature of any information furnished by the suppliers.' In addition, Articles 7(1) and 9(3) provided for notice to be given of the award, subject to the contracting authority's discretion to withhold certain information where its release, inter alia, would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers'.

6. Directive 93/36 was repealed and replaced with effect from 31 January 2006 by Directive 2004/18, (5) Article 6 of which provides: Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers ..., and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.'

Belgian legislation

Confidentiality of tender documents

7. Article 32 of the Belgian Constitution (6) guarantees public access to administrative documents as a general rule. Among exceptions to that rule is Article 6(1) of the Law of 11 April 1994 on administrative publicity, (7) which allows an authority to refuse access if the interest in granting it is outweighed by the interest in protecting, inter alia, business or manufacturing information of a confidential nature.

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8. The requirement for a public contracting authority to respect the confidentiality of business secrets contained in documents submitted to it is embodied in various provisions of the Belgian legislation covering award procedures - in particular, at the time of the award in issue in the main proceedings, Articles 25(4), 51(4) and 80(4) of the Royal Decree of 8 January 1996 on public works, supply and service contracts and on public works concessions.

9. Since then, the Law of 15 June 2006 on public procurement and certain works, supply and service contracts has been enacted to transpose Directive 2004/18. The first two paragraphs of Article 11 read:

Neither the contracting authority nor any person who, by reason of the duties or functions with which he is entrusted, has knowledge of confidential information relating to a contract or to the award or performance of the contract, communicated by candidates, tenderers, suppliers or service providers, shall divulge any such information. The information concerned shall include in particular technical or commercial secrets and confidential aspects of tenders.

In the event of a review procedure, the review body and the contracting authority shall take care to ensure the confidential nature of the information referred to in the preceding paragraph.'

10. However, like most of the other provisions of that law, Article 11 has not yet entered into force. (8)

Proceedings before the Conseil d'Etat

11. Appeals against decisions in award procedures may be brought before the Conseil d'Etat. In matters of judicial review, procedure before that court is governed in particular by a Decree of the Regent of 23 August 1948 and by the Coordinated Laws of 12 January 1973.

12. Article 6 of the Decree of the Regent requires the defendant authority to lodge the administrative file with the registry within 60 days from service of the application. If the file is not in the possession of that authority, there is further provision for it to be required of the authority which does hold it.

13. Article 87 of the Decree of the Regent provides that parties and their lawyers may inspect the file at the registry, a right which is also affirmed in Article 19 of the Coordinated Laws.

14. Article 21 of the Coordinated Laws allows the applicant to request an order that the defendant authority lodge the administrative file. It further provides that, if the file is not lodged within the time-limit set, the facts alleged by the applicant are to be deemed proven unless they are manifestly inaccurate. The Conseil d'Etat states that the latter provision applies also when only part of the file has not been lodged.

15. It appears from the order for reference that the Conseil d'Etat has consistently held that neither the Law of 11 April 1994 nor the Royal Decree of 8 January 1996 (9) can be relied upon to prevent a court reviewing the validity of an administrative decision from examining documents which are essential for it to be able to assess whether an alleged ground for annulment is well founded. (10)

16. It appears also that no provision governing procedure before the Conseil d'Etat explicitly allows anything in the documents lodged to be treated as confidential vis-à-vis a party to the proceedings.

Facts and procedure

17. The main proceedings arise out of an invitation to tender for the supply of tank track links, issued by the Belgian Defence Ministry. Two bids were received, one from Varec SA (Varec'), the other from Diehl Remscheid GmbH & Co (Diehl'). On 28 May 2002, the contract was awarded to Diehl. The award decision listed a number of technical, administrative and legal grounds for

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excluding Varec's bid but concluded that Diehl satisfied all the selection criteria. That conclusion was based on, inter alia, certain plans and samples annexed to Diehl's bid. At Diehl's request, those items were returned to it after evaluation of the bids.

18. Varec, in its challenge before the Conseil d'Etat, asserts that Diehl's bid did not in fact comply with all the criteria for the award. In order to evaluate that claim, it considers, the plans and samples referred to in the preceding paragraph should be examined as evidence both by the reviewing court and by the party who has asked for that review to take place.

19. However, the file lodged by the defendant contracting authority does not contain the relevant items, because they were returned to Diehl. Diehl, which has intervened in the proceedings, objects to lodging them on the ground that they embody confidential information and business secrets to which it does not wish Varec to have access. The auditeur (11) considers that if the contracting authority does not lodge a complete file, thereby failing in its duty to assist in ensuring proper administration of justice and fair proceedings, there is no alternative but to annul the contested award.

20. In those circumstances, the Conseil d'Etat asks the Court:

Must Article 1(1) of [Directive 89/665/EEC], read with Article 15(2) of [Directive 93/36/EEC], and Article 6 of [Directive 2004/18/EC], be interpreted as meaning that the authority responsible for the appeal procedures provided for in that article must ensure confidentiality and observance of the business secrets contained in the files communicated to it by the parties to the case, including the contracting authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration?'

21. Written observations have been submitted by the Belgian and Austrian Governments and by the Commission. Varec has not submitted observations because, in its view, the answer to the question posed is not necessary in order to resolve the dispute before the Conseil d'Etat.

22. No hearing has been requested and none has been held.

23. It should be added that, by the same judgment, the Conseil d'Etat also asked the Belgian Constitutional Court for a preliminary ruling on the question:

Do Articles 21 and 23 of the Coordinated Laws on the Council of State of 12 January 1973, interpreted as meaning that the confidential documents in the administration's file must be placed in the administrative file and must be communicated to the parties, infringe Article 22 of the Constitution, whether or not read with Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights, where they do not enable business secrets to be safeguarded?' (12)

24. The Constitutional Court delivered its ruling on 19 September 2007.

25. I had originally envisaged delivering this Opinion on 20 September 2007. However, when I learned of the date set for the Constitutional Court's judgment, I considered it preferable, in order best to assist this Court in reaching its decision, to allow myself the opportunity of consulting that judgment first, and consequently postponed the delivery of this Opinion.

26. In its judgment, the Constitutional Court held essentially that it would be contrary to Article 22 of the Constitution, read with Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights, to interpret the provisions in question as precluding a defendant authority from relying on the confidentiality of items in the administrative file in order to prevent their communication to the parties and as precluding the Conseil d'Etat from assessing the alleged confidential nature of such items. However, it would be consistent with those higher norms to interpret the provisions as allowing the defendant authority

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to rely on confidentiality for such purposes and the Conseil d'Etat to assess the confidential nature of the items.

Assessment

Admissibility

27. Varec's view that the answer to the question posed is not necessary in order to resolve the dispute before the Conseil d'Etat - a somewhat surprising view, if Varec originally sought production of the disputed evidence - might be interpreted as implicitly casting doubt on the admissibility of the reference for a preliminary ruling.

28. However, the Court has consistently held that in principle it is for the national courts alone to determine, having regard to the particular features of each case, both the need to refer a question for a preliminary ruling and the relevance of that question'. (13)

29. I see nothing in the circumstances of the present case that would justify calling into question the Conseil d'Etat's assessment that an answer to the question posed is necessary to enable it to give judgment. If Varec's claim is that Diehl's tender did not meet all the criteria for the award of the contract, if it has not withdrawn that claim in respect of the content of the disputed plans and samples, and if Diehl continues to object to Varec's gaining access to those items, then, given the procedural rules applicable in the Conseil d'Etat, an answer to the question referred seems relevant to any decision as to the pursuit of the procedure before that court.

Applicable legislation

30. In view of the Court's case-law to the effect that procedural rules generally apply to all proceedings pending at the time when they enter into force, whereas substantive rules do not usually apply, in principle, to situations existing before their entry into force, (14) it is necessary to consider whether the rules whose interpretation is sought are procedural or substantive.

31. I agree here with the Commission. A right to the protection of confidential information, although it has procedural ramifications, and even though the context in which it arises before the Conseil d'Etat is largely a procedural one, is in essence a substantive right. That right first crystallised, in the main proceedings, when Diehl submitted its tender in the original award procedure. What is at issue now is the ongoing protection of that continuing substantive right.

32. Consequently, the Community law which falls to be interpreted is that in force at the time of the award procedure in 2002, namely Directives 89/665 and 93/36, to the exclusion of Directive 2004/18. (15) It may be added that in any event Article 6 of the latter directive, although more elaborately worded than Article 15(2) of Directive 93/36, contains essentially the same substantive provision, so that the situation after its entry into force is no different.

The question referred

Transparency and effective review

33. Article 1(1) of Directive 89/665 requires Member States to ensure that award decisions can be reviewed effectively. Decisions cannot be reviewed effectively unless the reviewing body has at its disposal all the evidence relevant to assessing whether they were taken in accordance with all the applicable rules and conditions. Transparency, which is an important feature of public procurement procedures, must be guaranteed in order to ensure that public funds are spent honestly and efficiently, on the basis of a serious assessment and without any kind of favouritism or quid pro quo whether financial or political'. (16)

34. Consequently, if it is alleged before a review body acting pursuant to Directive 89/665 that a contract was awarded irregularly, and that information taken into account by the contracting authority

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provides evidence of the irregularity, then the review body can carry out its duty of effective review to the full extent only if it has that information at its disposal.

The right to a fair hearing

35. As this Court has held, it would infringe a fundamental principle of law to base a judicial decision on facts or documents of which the parties, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to state their views. (17)

36. The European Court of Human Rights has also held that a fundamental aspect of the right to a fair hearing in all civil or criminal proceedings is that both parties must be heard and enjoy equality of arms, so that each party must be able to take cognisance of observations or evidence submitted by the other party - or by an independent judicial official, by an administration or by the court whose judgment is appealed against - and to comment on them. (18)

37. Consequently, where a review body takes information into account in its decision, at least the substance of that information, in so far as it affects that decision, should in principle be available also to all the principal parties to the proceedings (19) in order to respect their right to a fair hearing.

38. However, it may be thought that a party's right to a fair hearing is in no way impaired if he is denied access to evidence which is not taken into account to his detriment and which could not have been taken into account in his favour. Such evidence could thus legitimately be withheld from him in order to protect, for example, business secrets, on the basis of a reasonable and duly substantiated application for confidential treatment.

39. Under the European Convention on Human Rights and under the Charter of Fundamental Rights, (20) the right to a fair hearing is an unqualified right. However, it does not follow that the entitlement to disclosure of relevant evidence is likewise an absolute right. The European Court of Human Rights has indeed consistently held, even in the context of criminal proceedings, that evidence may be withheld where that is necessary to preserve the fundamental rights of another individual or to safeguard an important public interest.

40. However, such measures restricting the rights of the defence are permissible only when they are strictly necessary, and any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities. (21)

The right to protection of business secrets

41. Directive 93/36, governing award procedures, explicitly requires contracting authorities to protect tenderers' business secrets, in particular vis-à-vis other tenderers. Directive 89/665, governing review procedures, does not explicitly extend that requirement to review bodies.

42. All the observations submitted (22) express the view that there is none the less an implicit requirement for such bodies to protect business secrets, and I agree. A right to such protection is recognised in principle in Community law.

43. Under Article 41 of the Charter of Fundamental Rights, the right to good administration includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy'. A general obligation to respect business secrecy is imposed on the Community institutions by Article 287 EC, and confirmed in a number of legislative provisions, particularly in the field of competition. That obligation, admittedly, is thus binding only on the Community institutions but, in SEP , (23) the Court made specific reference to the existence of a general principle of the right of undertakings to the protection of their business secrets', of which the Treaty article and subordinate provisions were an expression.

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44. Moreover, where confidentiality is protected at the award stage of a procurement procedure, that protection would be liable to lose all value if it were not ensured equally at any subsequent review stage.

45. To adapt the words of the Court in AKZO Chemie , (24) a failure to protect information submitted as confidential at the award stage of such a procedure would lead to the unacceptable consequence that an unsuccessful tenderer might be inspired to challenge an award - or even to submit a tender manifestly doomed to rejection, with a view to being entitled to challenge the award - solely in order to gain access to a competitor's business secrets.

46. However, as with the entitlement to disclosure of relevant evidence, the right to confidential treatment of information is not absolute. For example, the rights conferred by Article 8(1) of the European Convention on Human Rights, which include the confidentiality of private, and in some circumstances business, correspondence, (25) may pursuant to Article 8(2) be restricted, where necessary and in accordance with the law, in order, inter alia, to protect the rights of others.

Reconciling the conflicting interests

47. It is evident that conflicts are likely to arise between the right to confidential treatment of business secrets, the need for transparency in the field of public procurement, the duty of review bodies to ensure effective review and the right of all parties to a fair hearing.

48. To the extent possible, those interests should obviously be reconciled, although it will not always be feasible to reconcile them fully. In particular, it will in some cases be necessary to restrict one party's right - to require confidential treatment of business secrets or to have access to all the evidence in the file - in order to ensure that the very substance or essence of the other party's right, or the court's power and duty of effective review, is not impaired. However, any restriction must not go beyond what is necessary for that purpose, and a fair balance must be struck between the conflicting rights. (26)

49. Where rights are not absolute, (27) they must be considered in relation to their function. Restrictions may be imposed, provided that they meet objectives of general interest and do not constitute a disproportionate and intolerable interference impairing the very substance of the rights. (28)

50. In award review proceedings of the kind in issue in the present case, the review body could first examine any disputed evidence itself and then place on the file accessible to all the principal parties only such evidence as it judges relevant to deciding the case before it. Evidence which is not placed on the file should not be taken into account. Some evidence might however be placed on the file in a masked, truncated or otherwise edited form in order to protect business secrets, if the court or tribunal concerned considered that full disclosure of the evidence in question would genuinely be detrimental to the legitimate interests of a party which had made an application requesting confidentiality of that information.

51. A reasonable and pragmatic solution could be for the review body to request the party holding the evidence to provide an edited version which could be made available to the other party or parties - subject to the review body's own supervision in order to ensure that only genuinely confidential elements which do not appear decisive to the resolution of the dispute are edited out. In that case, even if the review body has seen evidence concealed from certain parties, it should endeavour not to use that evidence in any way which could infringe those parties' rights to a fair hearing and to equality of arms.

An illustration

52. An example of that type of approach may be seen in the Steel Beams ' cases before the Court

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of First Instance. (29) In March and April 1994, 11 undertakings brought actions for the annulment of a Commission decision under the ECSC Treaty concerning concerted practices by producers of steel beams. The actions were dealt with together and, for part of the procedure, joined.

53. Article 23 of the ECSC Statute of the Court of Justice provided: Where proceedings are instituted against a decision of one of the institutions of the Community, that institution shall transmit to the Court all the documents relating to the case before the Court.'

54. The Commission did not however lodge all the documents until requested to do so by the Court of First Instance. In its covering letter, it stated that some of the documents might contain business secrets or that they fell under the obligation of confidentiality in Article 47 of the ECSC Treaty, (30) so that not all of them should be accessible in their entirety to all the parties. Some of the applicants, however, sought to have access to the whole file.

55. At that time, the Rules of Procedure of the Court of First Instance dealt with confidentiality only in Article 116(2), which allowed confidential documents to be omitted from the case-file communicated to an intervener. Under Article 5(3) of the Instructions to the Registrar, however, parties' lawyers or agents, or persons authorised by them, were entitled to inspect the original case-file, including administrative files produced before the Court, and to request copies or extracts of documents.

56. The Court of First Instance was thus faced with problems very similar to those now faci ng the Conseil d'Etat.

57. In the first of its three orders addressing those problems, that Court rejected the argument that Article 23 of the ECSC Statute, together with the principle audi alteram partem , meant that all parties should have unconditional, unlimited access to the file forwarded by the Commission. It noted that Article 47 of the ECSC Treaty guaranteed the confidentiality of professional, in particular business, secrets in order to protect the legitimate interests of undertakings, and decided that the only way to balance the requirements of Article 23 of the Statute and the adversarial nature of judicial proceedings against the protection of the business secrets of individual undertakings was to examine the specific situation of the undertakings concerned. On that basis, it removed one document from the file, restricted full access to certain documents to one applicant only (the others being entitled to consult a non-confidential version), and reserved a decision on documents classified by the Commission as internal until it had received further information. (31)

58. In a second order made after receiving that information and hearing further argument, the Court of First Instance made it clear that the purpose of Article 23 of the Statute was to enable the Court to exercise its power of review of the legality of the contested decision, having regard to the rights of the defence', and not to guarantee all the parties unconditional and unrestricted access to the administrative file' or to enable the applicants to peruse the files of the institution concerned as they see fit'. (32) It also distinguished the documents transmitted pursuant to Article 23 of the Statute from the case-file constituted in accordance with the Instructions to the Registrar. The parties had access only to the latter, which contained the documents to be taken into consideration in deciding the case. Documents transmitted to the Court but not placed in the case-file remained wholly extraneous to the proceedings' and would not be taken into consideration by the Court in deciding the case. (33) On that basis, it examined the documents in question in the light of the submissions and decided that some were relevant and should be placed on the case-file and communicated to the parties. In a third and final order, it examined two further documents and decided that one of them should be placed on the file. (34)

59. Thus, in a situation of possible conflict between a need to consider all the relevant evidence, a need to allow all parties access to that evidence and a need to protect the confidentiality of

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some of it, the approach taken by the Court of First Instance was (a) to screen the evidence itself at a preliminary stage, (b) to include only the relevant evidence in the case-file, (c) to make all that evidence available to all the parties, subject to the masking' of certain details of certain documents vis-à-vis certain parties, and (d) to take into consideration only the evidence in the case-file to which the parties had access.

60. That solution was adopted, pragmatically and with due regard to each of the interests at stake, in a regulatory context similar to that facing the Conseil d'Etat in the main proceedings. It was subsequently enshrined in the Rules of Procedure of the Court of First Instance. (35)

Conclusions to be drawn

61. Although neither that pragmatic solution nor, a fortiori, the rule laid down in those Rules of Procedure can constitute any binding precedent for a national court, I consider that they provide helpful, practical guidance as to the approach to be taken, which must conform with the rules applicable to that court, in so far as they do not conflict with any higher norm.

62. As regards review bodies functioning in conformity with Directive 89/665, such higher norms include those which flow from that directive and from Directive 93/36 (or now Directive 2004/18), both as interpreted in the light of the right to the protection of business secrets and the right to a fair hearing. The principles to be applied are the following: (a) a party may not refuse to communicate evidence to the review body on the ground of business secrecy; (b) a party communicating evidence to the review body may ask for it to be treated as confidential, in whole or in part, vis-à-vis another party; (c) all principal parties should have access to all evidence relevant to the outcome of the review, in a form adequate to enable them to comment on it; (d) the review body should take care not to use any evidence withheld from one or more principal parties in any way which could infringe those parties' rights to a fair hearing and to equality of arms.

63. The assessment can only be on a case-by-case basis, and must seek to assure the greatest protection of each interest - confidentiality of business secrecy and the right to a fair hearing - which is achievable without impairing the substance of the other, and to strike as fair a balance as is possible between the two.

Final remarks

64. As regards the specific situation confronting the Conseil d'Etat, I would make three final remarks.

65. First, it seems clear that when Article 11 of the Law of 15 June 2006 (36) enters into force, the obligation to protect the confidentiality of business secrets in review proceedings will be explicit in Belgium.

66. Second, I note that, in a case referred to by the Belgian Government in its observations, (37) the Conseil d'Etat appears to have already taken an approach consistent with that which I have outlined above. The case concerned an undertaking's challenge to a decision granting registration of a competitor's medicinal product. The administrative authority lodged two versions of its file with the Conseil d'Etat - a version containing confidential documents relating to the medicinal product and a non-confidential version. The auditeur in his report examined the issue and concluded that the confidential documents should not be available to the applicant. The court decided that it was not necessary to rule on that question, since the application could be conclusively dismissed on a ground which did not involve examination of those documents.

67. Furthermore, the approach taken by the Constitutional Court in its judgment of 19 September 2007 is also largely consistent with the approach set out above. After considering the general principles of the right to a fair hearing in adversarial proceedings, and the right to protection

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of confidentiality of business secrets, that court concluded that the Conseil d'Etat should be able to assess the confidential nature of the information, in order to strike a balance between those two rights.

68. Finally, it appears from the order for reference that Varec may in fact already have had access to at least some of the disputed elements of the file, apparently outside the strict context of the award or review proceedings. If that is so, it might, depending on the actual circumstances, be a factor to be taken into account when deciding whether and to what extent to accord confidential treatment.

Conclusion

69. In the light of all the above considerations, I am of the opinion that the Court should give the following reply to the question raised by the Conseil d'Etat:

Article 1(1) of Council Directive 89/665, read in conjunction with the provisions of Council Directive 93/36 relating to the protection of confidential information, requires a review body

(a) to take cognisance of the whole of the administrative file and other evidence on which the contracting authority based its award and

(b) to accord confidential information the same protection as is accorded to it at the award stage.

Those obligations must be carried out subject to the right to a fair hearing and to equality of arms, which implies in particular that the review body should take care not to use any evidence withheld from one or more principal parties in any way which could infringe those rights.

(1) .

(2) - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(3) - The provision refers to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), and Directive 92/50, cited in footnote 2. Directive 71/305 was however repealed and replaced by Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and Directive 77/62 was repealed and replaced by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1). Since the time of the award in the main proceedings, all the directives concerned have been repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

(4) - Cited in footnote 3, as amended in particular by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1).

(5) - Cited in footnote 3.

(6) - See http:www.senate.be/doc/const_fr.html.

(7) - The search page on http:www.juridat.be/cgi_loi/legislation.pl may be used to consult this and all subsequent Belgian legislation referred to. Since 2003 the Moniteur Belge is no longer

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published in paper form.

(8) - See Article 80, read in conjunction with the amending Law of 12 January 2007.

(9) - Cited above in points 7 and 8 respectively.

(10) - Judgments of 14 December 1999 in Case 84.102, 23 December 1999 in Case 83.593, 21 March 2000 in Case 86.150 and 6 May 2003 in Case 119.018.

(11) - An independent member of the Conseil d'Etat, some but not all of whose functions and duties correspond to those of an Advocate General in this Court.

(12) - The last three provisions cited all guarantee a right to respect for private and family life, widely interpreted as including the protection of confidentiality and as not necessarily excluding activities of a professional or business nature (see, for example, Niemietz v Germany , European Court of Human Rights judgment of 16 December 1992, Series A No 251-B, p. 33, º 29).

(13) - See for example Case C-213/04 Burtscher [2005] ECR I-10309, paragraph 34 and the case-law cited there; in respect of courts of last resort, such as the Conseil d'Etat, see for example Case 283/81 CILFIT [1982] ECR 3415, paragraphs 10 and 11.

(14) - See, for example, Case C-201/04 Molenbergnatie [2006] ECR I-2049, paragraph 31 and the case-law cited there.

(15) - See footnote 3 above.

(16) - Opinion of Advocate General Jacobs in Case C-19/00 SIAC Construction [2001] ECR I-7725, point 33.

(17) - Joined Cases 42/59 and 49/59 SNUPAT v High Authority [1961] ECR 53, at p. 84; Case C-480/99 P Plant and Others v Commission [2002] ECR I-265, paragraph 24.

(18) - See Aksoy (Erolu) v Turkey , No 59741/00, º 21, 31 October 2006, and the case-law cited there. With respect specifically to failure to allow an applicant for judicial review the opportunity to consult evidence in the case-file, see Feldbrugge v the Netherlands , judgment of 29 May 1986, Series A No 99, p. 16, º 44.

(19) - The position as regards interveners, and the public at large, may legitimately differ. Since the request for a preliminary ruling does not concern those aspects, I shall not address them.

(20) - Solemnly proclaimed at Nice in December 2000 by the Parliament, the Council and the Commission (OJ 2000 C 364, p. 1).

(21) - See, for example, V. v Finland , No 40412/98, º 75, 24 April 2007, and the case-law cited there.

(22) - And it will be recalled that Varec has submitted no observations to this Court.

(23) - Case C-36/92P SEP v Commission [1994] ECR I-1911, paragraph 36; my emphasis.

(24) - Case 53/85 AKZO Chemie v Commission [1986] ECR 1965, paragraph 28.

(25) - See footnote 12 above.

(26) - See, for example, in the context of a clash between different rights, Case C-112/00 Schmidberger [2003] ECR I-5659, paragraphs 77 to 81.

(27) - See points 39 and 46 above.

(28) - See, for example, again in the context of different rights, Joined Cases C-20/00 and C

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64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, paragraph 68, Joined Cases C-154/04 and C-155/04 Alliance for Natural Health and Others [2005] ECR I-6451, paragraph 126, and the case-law cited in both.

(29) - Case T-134/94 NMH Stahlwerke v Commission [1999] ECR II-239; Case T-136/94 Eurofer v Commission [1999] ECR II-263; Case T-137/94 ARBED v Commission [1999] ECR II-303; Case T-138/94 Cockerill-Sambre v Commission [1999] ECR II-333; Case T-141/94 Thyssen Stahl v Commission [1999] ECR II-347; Case T-145/94 Unimétal v Commission [1999] ECR II-585; Case T-147/94 Krupp Hoesch v Commission [1999] ECR II-603; Case T-148/94 Preussag Stahl v Commission [1999] ECR II-613; Case T-151/94 British Steel v Commission [1999] ECR II-629; Case T-156/94 Aristrain v Commission [1999] ECR II-645; and Case T-157/94 Ensidesa v Commission [1999] ECR II-707.

(30) - The second paragraph of which prohibited the Commission from disclosing information of the kind covered by the obligation of professional secrecy, in particular about undertakings, their business relations or their cost components'.

(31) - Order in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 NMH Stahlwerke and Others v Commission [1996] ECR II-537, especially at paragraphs 12 to 15 and the operative part.

(32) - Order in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 NMH Stahlwerke and Others v Commission [1997] ECR II-2293, paragraphs 32 and 37.

(33) - Ibid., paragraph 33.

(34) - Order of 16 February 1998 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 NMH Stahlwerke and Others v Commission , not published in the ECR.

(35) - Article 67(3), added on 19 December 2000 (OJ 2000 L 322, p. 4).

(36) - See point 9 above.

(37) - Case 137.993; report of Auditeur Stevens of 22 October 2004, point 3; judgment of the Conseil d'Etat (or Raad van State, since it was a Dutch-language case) of 3 December 2004, point 1.2.

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**Judgment of the Court (Second Chamber)
of 3 April 2008
Commission of the European Communities v Kingdom of Spain. Failure of a Member State to fulfil obligations - Directive 89/665/EEC - Public supply and works contracts - Review procedures for the award of public contracts. Case C-444/06.**

In Case C444/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 26 October 2006,

Commission of the European Communities, represented by X. Lewis, acting as Agent, assisted by C. Fernandez Vicién and I. MorenoTapia Rivas, abogados, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk (Rapporteur) and P. Kris, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

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

gives the following

Judgment

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

1. By failing to lay down a mandatory period for the contracting authority to notify the decision on the award of the contract to all the tenderers and by failing to provide for a mandatory waiting period between the award of the contract and its conclusion, the Kingdom of Spain has failed to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992;

2. Dismisses the action as to the remainder;

3. Orders the Kingdom of Spain to pay two thirds of all the costs. The Commission of the European Communities is ordered to pay the other third.

1. By its application, the Commission of the European Communities asks the Court of Justice to declare that, by failing to provide for a mandatory period for the contracting authority to notify the decision on the award of a contract to all the tenderers, by failing to provide for a mandatory waiting period between the award of the contract and its conclusion and by allowing an annulled contract to continue to have legal effects, the Kingdom of Spain failed to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination

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of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1, the review directive').

Legal context

Community legislation

2. Article 1 of the review directive is worded as follows:

The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

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

3. Article 2(1) of that directive states:

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

4. Article 2(6) of the review directive states:

The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

National legislation

Law on public procurement

5. Article 41(1) of the Law on public procurement (Ley de Contratos de las Administraciones Publicas), approved by Royal Legislative Decree 2/2000 (Real Decreto Legislativo 2/2000) of 16 June 2000 (BOE No 148 of 21 June 2000, p. 21775), as amended by Law No 62/2003 on Fiscal, Administrative

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and Social Measures (ley 62/2003, de medidas fiscales, administrativas y del orden social) of 30 December 2003 (BOE No 313 of 31 December 2003, p. 46874, the Law on public procurement'), provides that the contractor must demonstrate the provision of a definitive guarantee within a period of 15 days from notification to him of the award of the contract.

6. Article 53 of the Law on public procurement states:

Contracts shall be formed by award of the competent contracting authority, irrespective of the procedure or form of award used.'

7. Article 54 of that law states:

1. Public contracts shall be finalised by an administrative document within a period of 30 days from the day following the notification of the award ...'

2. Subject to the exceptions provided for by this Law, their finalisation shall be conditional upon the provision by the undertaking of the guarantees provided for in this law for the protection of the public interest.

3. Where, for reasons for which the contractor is responsible, the contract cannot be finalised within the period laid down, the authority may decide to terminate that contract, subject to the contractor being heard and, where the latter lodges an objection, to a report from the Council of State or an equivalent advisory body in the autonomous region concerned. In such circumstances, the provisional guarantee shall be forfeited and the loss sustained shall be made good.

Where the public authority is responsible for the failure to finalise [the public contract], the contractor shall receive damages for the harm caused by the delay, regardless of whether he is entitled to claim the annulment of the public contract pursuant to Article 111(d).

4. The contract cannot be performed until it has been finalised, save in the cases provided for in Articles 71 and 72.'

8. According to Article 60a of the Law on public procurement, the persons interested in participating in a call for tenders and, in any event, the tenderers, may request the adoption of interim measures with the aim of correcting the alleged infringement of the applicable law or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract.

9. According to Article 65(1) of the Law on public procurement, once definitive, an administrative declaration to the effect that the acts preparatory to the contract or the award of the contract are invalid is to give rise, in all cases, to the invalidity of the contract itself, which is accordingly to be set aside.

10. According to Article 65(3) of that law, if the administrative declaration of invalidity of a contract seriously disrupts public services, provision may be made for the effects of the contract to continue on the same conditions, until urgent measures have been taken to avoid any harm.

11. It follows from Article 93(1) of the Law on public procurement that, once the contracting authority has awarded a public contract, regardless of the procedure followed, the award is to be notified to the participants in the call for tenders and, after the finalisation of the contract, is communicated to the competent authority responsible for keeping the public register of contracts referred to in Article 118 of that law for the purposes provided for in Article 58 thereof.

12. Pursuant to Article 93(5) of that law, the contracting authority is to communicate to any unsuccessful candidate or tenderer who so requests, within a period of 15 days of receipt of that request, the reasons for the rejection of its candidature or its offer, as well as the features of the successful contractor's offer which were decisive in the decision to award the contract to the latter.

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13. Article 83(4) of the implementing rules for the Law on public procurement (Reglamento general de la Ley de Contratos de las Administraciones Publicas), approved by Royal Decree 1098/2001 (Real Decreto 1098/2001) of 12 October 2001 (BOE No 257, of 26 October 2001, p. 39252) provides that the result of the assessment of the tenders submitted is to be notified, indicating the successful bids, the unsuccessful bids and the reasons for rejection.

Law No 30/1992

14. Law No 30/1992 on the rules governing the public authorities and the common administrative procedure (ley 30/1992 de Regimen Jurídico de las Administraciones Publicas y del Procedimiento Administrativo comun) of 26 November 1992 (BOE No 285 of 27 November 1992, p. 40300), as amended by Law No 4/1999 of 13 January 1999, (Law on the common administrative procedure'), provides in Article 58:

1. Decisions and administrative acts affecting their rights and interests shall be notified to the persons concerned, in accordance with the rules provided for in the following article.

2. All notification shall be made in the 10 days following the date on which the act was adopted. It shall contain the full text of the decision and shall state whether or not it is a final administrative decision. It shall give details of the possibilities of review and the body before which any review must be applied for, without prejudice to fact that the persons concerned may bring, where appropriate, any other action which they consider necessary.'

15. According to Article 107(1) of that law, review may be sought of decisions and administrative acts which decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests.

16. Article 111 of that law sets out the interim measures which may be applied for in the context of administrative review proceedings, in particular the suspension of the contested acts.

Background to the dispute and the prelitigation procedure

17. By letter of 30 November 2001, the Commission requested the Kingdom of Spain to submit its observations on the compatibility of the Law on public procurement with the review directive in the light of the impact of Case C81/98 Alcatel Austria and Others [1999] ECR I7671.

18. Since it did not consider the responses given by the Kingdom of Spain, by letter of 27 February 2002, to be satisfactory, the Commission gave it formal notice on 16 October 2002. On 7 July 2004, the Commission, having considered the observations submitted in response to that formal notice by the Kingdom of Spain, issued a reasoned opinion inviting that Member State to take the measures necessary to comply with the opinion within a period of two months from the date of its receipt.

19. In those circumstances, having found that the legislation at issue had not been amended by the end of that period, the Commission decided to bring the present action.

The action

20. The Commission claims that the Spanish legislation infringes Article 2(1)(a) and (b) of the review directive and puts forward three pleas in law, the first two of which should be dealt with together.

The first and second pleas

21. By those pleas, the Commission claims that the national legislation at issue does not comply with the review directive in that certain provisions of that legislation in combination prevent unsuccessful tenderers from effectively instituting review proceedings against a decision to award a contract before the conclusion as such of the contract resulting from it.

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Arguments of the parties

22. According to the Commission, the breach of obligations is established, regardless of the scope of the concept of finalisation' of a contract which appears in the Spanish legislation, that is to say, whether such finalisation is considered to be equivalent to the conclusion as such of the contract or merely to constitute an administrative formality, in which case the conclusion takes place at the same time as the award of the contract.

23. As regards the first view, that is to say that the finalisation of the contract - which, in the Commission's submission, is the moment when the contract fulfils all the legal requirements and when its performance can begin - is equivalent to its conclusion within the meaning of the review directive, the Commission claims that the obligations imposed by that directive have not been fulfilled in that the unsuccessful tenderers do not have the necessary guarantees in order to challenge an unlawful decision to award a contract before the finalisation of the contract resulting from it.

24. According to the Commission, in the absence of an obligation to notify the decision to all the persons concerned at the same time and a waiting period during which the contract cannot be finalised, thereby denying the unsuccessful tenderers the possibility of a reasonable period in which to instigate, before the conclusion of the contract, appropriate review proceedings, the Spanish legislation does not comply with the requirements of the review directive.

25. As regards the second view, according to which the conclusion of the contract takes place at the same time as the award of the contract, finalisation being a mere administrative formality, the Commission claims that the legal problem identified in the assessment of the first view is actually more serious, in that there is no act of awarding the contract in question capable of giving rise to review proceedings independent of the act of concluding the contract relating to that tendering procedure.

26. Since no review proceedings are possible against the act of awarding at a stage earlier than the conclusion of the contract where any infringement of the applicable law may still be corrected and where the tenderer who brings the review proceedings may still hope to become the contractor, the Spanish legislation does not provide complete legal protection before the conclusion of the contract, contrary to the requirements of Article 2(1) of the review directive.

27. At the outset, the Kingdom of Spain defines the scope which should be given, respectively, to the act of awarding the contract and the finalisation of the contract which follows it.

28. That Member State contends that the act of awarding the contract leads, by itself, to the conclusion of the contract awarded, and that contract is treated as existing from the adoption of that act. The act is subject to the formal requirement of notification, which has to be carried out before the contract can produce its effects in respect of the persons concerned.

29. It states that the finalisation of the contract, a mere administrative formality, is of only secondary importance to the act of awarding the contract. That finalisation is, however, a necessary condition for the performance of the contract concerned.

30. According to the Kingdom of Spain, the question whether the Law on public procurement complies with the review directive must be assessed with regard to the review proceedings which can be brought, first, prior to the act of awarding the contract and, second, against that act of awarding the contract itself. That is, moreover, the conclusion of the judgment in Alcatel Austria and Others , which draws a distinction between the stage prior to the conclusion of the contract, in other words the stage before the award of the contract, to which Article 2(1) of the directive applies, and the stage subsequent to its conclusion, in other words the stage which follows the act of awarding the contract, to which the second subparagraph of Article 2(6) of the directive applies.

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31. Spanish law is consistent, according to the Kingdom of Spain, with that distinction. Concerning, first, the measures which precede the award of the contract, the Kingdom of Spain states that a number of review proceedings are possible. Concerning, second, that award itself, it states that the administrative decision prior to that award is notified to all the participants in the tendering procedure in the 10 days following its adoption and that that decision, like any administrative act, may be the subject of review proceedings, pursuant to the law governing the common administrative procedure. That Member State further adds that the suspension of the contested act may be ordered as an interim measure.

32. Lastly, the Kingdom of Spain contends that the definitive conclusion of an act, and thus of a contract, does not preclude the possibility of bringing revocation proceedings against that act itself.

Findings of the Court

33. It should, at the outset, be stated that, in examining this action, it is necessary to take into consideration the explanations of the law provided by the Kingdom of Spain which are not disputed by the Commission. Those explanations are based on the interpretations in the caselaw of the national courts as to the effects which follow from the act of awarding the contract and the finalisation of the contract respectively, since those legal concepts are matters of national law.

34. Thus, the arguments put forward by the Commission in support of the first and second pleas must be analysed in the light of the finding that, according to the law of the Member State in question, first, the act of awarding the contract leads automatically to the formation of the contract to which it relates and, accordingly, determines, of itself, the rights and duties of the parties and, second, the finalisation of that contract is a formality required exclusively so that the contract awarded can be performed, and cannot alter the contract or add to it.

35. According to recitals (1) and (2) in the preamble to the review directive, it seeks to reinforce existing arrangements, at both national and Community levels, for ensuring the effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified.

36. In that regard, Article 1(1) of the review directive requires Member States to put in place review procedures which are effective and as rapid as possible against the decisions taken by the contracting authorities which infringe Community law in the field of public procurement or national rules implementing that law.

37. It follows from the caselaw of the Court that the combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of the directive are to be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages (see Alcatel Austria and Others , paragraph 43).

38. Moreover, the complete legal protection which must accordingly be ensured before the conclusion of the contract pursuant to Article 2(1) of the review directive presupposes, in particular, the duty to inform the tenderers of the award decision before the conclusion of the contract so that they may have a real possibility of initiating review proceedings.

39. That same protection requires provision to be made for the unsuccessful tenderer to examine in sufficient time the question of whether the decision to award is valid. In the light of the

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need to guarantee the effectiveness of the review directive, it follows that a reasonable period must pass between the moment when the award decision is communicated to the unsuccessful tenderers and the conclusion of the contract in order to allow them, inter alia, to bring an application for interim measures until the conclusion of the contract.

40. In this case, it must be pointed out that, first, it is not disputed that the Spanish legislation authorises review proceedings against acts of contracting authorities prior to the award of the public contract. Further, in accordance with Article 107(1) of the Law on the common administrative procedure, the persons concerned are able to initiate review proceedings against the procedural acts where they decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irremediable harm to legitimate rights or interests. In the context of those review proceedings, interim measures can be taken, in particular the suspension of the contested acts.

41. Second, the act of awarding the contract is notified to all the tenderers, in accordance with Articles 58(1) and (2) of the Law on the common administrative procedure and Article 93(1) of the Law on public procurement. That notification must be made according to the rules of general law applicable to administrative acts, namely within the 10 days following the adoption of that act awarding the contract, and must give details of the possibilities of review.

42. However, inasmuch as the act of awarding the contract leads de jure to the conclusion of the contract, it follows that the decision of the contracting authority, by which it chooses the contractor from amongst the tenderers cannot be the subject of specific review proceedings prior to the conclusion as such of that contract.

43. Third, it must be pointed out that the finalisation of the contract may be concurrent with the award of the contract concerned, or follow it within a very short period. The finalisation as, moreover, the Kingdom of Spain acknowledges, is not subject to any minimum period and may occur from the moment that the contractor demonstrates the provision of a definitive guarantee, since the legislation only requires that it be provided at the latest within 15 days of notification of the award of the contract. Therefore, the performance of the contract may commence before the award has been the subject of all the notifications required.

44. It follows that, in certain cases, no effective review proceedings can be brought against the act of awarding the contract before the performance as such of the contract although the objective of the review directive is to ensure that unlawful decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible (see, to that effect, Case C470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 74).

45. Fourth, the fact that there is the option of bringing proceedings for the annulment of the contract itself is not such as to compensate for the impossibility of challenging the mere act of awarding the contract concerned, before the contract is concluded.

46. Consequently, the legislation at issue does not allow unsuccessful tenderers to bring review proceedings in accordance with the requirements of the review directive against the decision to award a public contract resulting from it.

47. The first two pleas are, accordingly, well founded.

The third plea

Arguments of the parties

48. According to the Commission, the review directive is infringed by the exception which seeks to protect public services provided for in Article 65(3) of the Law on public procurement, according to which, if the administrative declaration of invalidity of a contract seriously disrupts public

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services, provision may be made for the effects of that contract to continue, on the same conditions, until urgent measures have been taken to avoid any harm.

49. The Commission claims that those provisions confer on the contracting authority too wide a discretion in respect of the implementation of the administrative decision annulling the award of a contract and, accordingly, the contract resulting from it.

50. It also claims that the provisions at issue may, in a not insignificant number of cases, render ineffective the review proceedings of the unsuccessful tenderers leading to the annulment of the unlawful decisions of the contracting authorities, which is contrary to the Member States' duty to ensure that the review procedures provided for pursuant to Article 1 of the review directive make it possible to annul or to have annulled the unlawful decisions taken by those authorities. The effectiveness of that directive would thus be compromised, inasmuch as the invalidity or the annulment of those decisions would be deprived of any effect.

51. The Kingdom of Spain contends for its part that the contested provisions envisage proceedings only by way of exception against contracts which are declared invalid for reasons of public interest, subject to review by the courts.

52. According to that Member State, the Commission has not established that proceedings against the continuation of contracts annulled in this way constitute a normal situation as regards the application of the legislation at issue.

Findings of the Court

53. In this case, it is not disputed that the preservation of the effects of a contract subject to an administrative declaration of invalidity such as that provided for in the contested national legislation can only occur in the case of a serious disruption to public services.

54. Consequently, as is clear from the wording of Article 65(3) of the Law on public procurement, such preservation is only intended to apply in exceptional cases and pending the adoption of urgent measures. In addition, that preservation applies, as the Kingdom of Spain has stated without being contradicted by the Commission, subject to review by the courts.

55. Thus, it appears that the aim of the provision is not to prevent the enforcement of the declaration of invalidity of a specific contract, but to avoid, where the public interest is at stake, excessive and potentially prejudicial consequences of the immediate enforcement of the declaration, pending the adoption of urgent measures, in order to ensure the continuity of public services.

56. In those circumstances, the Commission has not demonstrated that the contested legislation undermines the requirements of the review directive.

57. Consequently, the third plea must be dismissed as unfounded.

58. Having regard to the foregoing, it must be declared that, by failing to lay down a mandatory period for the contracting authority to notify the decision on the award of the contract to all the tenderers and by failing to provide for a mandatory waiting period between the award of the contract and its conclusion, the Kingdom of Spain has failed to fulfil its obligations under Article 2(1)(a) and (b) of the review directive.

Costs

59. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under Article 69(3) of those Rules, where each of the parties succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

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60. In this dispute account is to be taken of the fact that the Court has not upheld the Commission's action for a declaration of failure to fulfil obligations in its entirety.

61. The Kingdom of Spain must therefore be ordered to pay two thirds of all the costs. The Commission is ordered to pay the other third.

DOCNUM	62006J0444
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2008 Page 00000
DOC	2008/04/03
LODGED	2006/10/26
JURCIT	31989L0665 : N 39 44 56 31989L0665-A01 : N 2 31989L0665-A01P1 : N 36 31989L0665-A02P1 : N 3 38 31989L0665-A02P1LA : N 1 37 58 31989L0665-A02P1LB : N 1 37 58 31989L0665-A02P6 : N 4 31989L0665-A06L2 : N 37 31989L0665-C1 : N 35 31989L0665-C2 : N 35 61998J0081 : N 37 61999J0470 : N 44
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Spanish
APPLICA	Commission ; Institutions
DEFENDA	Spain ; Member States
NATIONA	Spain
NOTES	Razquin Lizarraga, José Antonio: Nueva condena a España por incumplimiento de la directiva sobre recursos en materia de contratos publicos (Comentario a la sentencia del TJCE de 3 de abril de 2008, C-444/06, Comision/España),

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Union Europea Aranzadi 2008 no 4 p.5-8

PROCEDU Action for failure to fulfil obligations

ADVGEN Sharpston

JUDGRAP Makarczyk

DATES of document: 03/04/2008
of application: 26/10/2006

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Case C-444/06

Commission of the European Communities

v

Kingdom of Spain

(Failure of a Member State to fulfil obligations – Directive 89/665/EEC – Public supply and works contracts – Review procedures for the award of public contracts)

Summary of the Judgment

Approximation of laws – Review procedures in respect of the award of public supply and public works contracts – Directive 89/665 – Member States under an obligation to provide for review procedures in respect of decisions awarding contracts
(Council Directive 89/665, Arts 2(1)(a) and (b), and 6, second para.)

A Member State fails to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 92/50, where its legislation fails to provide for a mandatory period for the contracting authority to notify the decision on the award of a contract to all the tenderers or to provide for a mandatory waiting period between the award of the contract and its conclusion.

The combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Directive 89/665 are to be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages. Moreover, the complete legal protection which must accordingly be ensured before the conclusion of the contract pursuant to Article 2(1) of the directive presupposes, in particular, the duty to inform the tenderers of the award decision before the conclusion of the contract so that they may have a real possibility of initiating review proceedings. That same protection requires provision to be made for the unsuccessful tenderer to examine in sufficient time the question of whether the decision to award is valid. In the light of the need to guarantee the effectiveness of Directive 89/665, the objective of which is to ensure that unlawful decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible, it follows that a reasonable period must pass between the moment when the award decision is communicated to the unsuccessful tenderers and the conclusion of the contract in order to allow them, inter alia, to bring an application for interim measures until the conclusion of the contract.

(see paras 37–39, 44, 58, operative part 1)

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Judgment of the Court (Second Chamber) of 3 April 2008 - Commission of the European Communities v Kingdom of Spain

(Case C-444/06) [1]

(Failure of a Member State to fulfil obligations - Directive 89/665/EEC - Public supply and works contracts - Review procedures for the award of public contracts)

Language of the case: Spanish

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis, acting as Agent, and C. Fernandez Vicién and I. Moreno-Tapia Rivas, abogados)

Defendant: Kingdom of Spain (represented by: F. Díez Moreno, Agent)

Re:

Failure of a Member State to fulfil obligations - Breach of Article 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) - National legislation not in conformity with the directive

Operative part of the judgment

The Court:

Declares that, by failing to lay down a mandatory period for the contracting authority to notify the decision on the award of the contract to all the tenderers and by failing to provide for a mandatory waiting period between the award of the contract and its conclusion, the Kingdom of Spain has failed to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992;

Dismisses the action as to the remainder;

Orders the Kingdom of Spain to pay two thirds of all the costs. The Commission of the European Communities is ordered to pay the other third.

_____

[1] - OJ C 326, 30.12.2006.

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Action brought on 26 October 2006 - Commission of the European Communities v Kingdom of Spain

(Case C-444/06)

Language of the case: Spanish

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis, acting as Agent, C. Fernandez Vicién and I. Moreno-Tapia Rivas, lawyers)

Defendan: Kingdom of Spain

Form of order sought

declare that, by failing to provide for a mandatory period within which the contracting authority has to notify the decision on the award of the contract to all the bidders, by failing to provide for a mandatory waiting period between the decision on the award of the contract and its performance and by allowing an annulled contract to continue to have legal effect, the Kingdom of Spain has failed to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665/EEC [1] of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

order Kingdom of Spain to pay the costs.

Pleas in law and main arguments

The Commission considers that the Spanish rule on the review of public contracts is not consistent with Directive 89/665 according to the interpretation given by the Court of Justice in Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671.

In particular, the Spanish legislation:

does not provide for a mandatory period within which the contracting authority has to notify the decision on the award of the contract to all the bidders,

does not provide for a mandatory waiting period between the decision on the award of the contract and its performance and,

allows an annulled contract to continue to have legal effect.

_____

[1] - OJ 1989 L 395, p.33

Judgment of the Court (Fourth Chamber)
of 10 April 2008
Ing. Aigner, Wasser-Wärme-Umwelt, GmbH v Fernwärme Wien GmbH. Reference for a preliminary ruling: Vergabekontrollsenat des Landes Wien - Austria. Public contracts - Directives 2004/17/EC and 2004/18/EC - Contracting entity pursuing activities falling in part within the field of application of Directive 2004/17/EC and in part within that of Directive 2004/18/EC - Body governed by public law - Contracting authority. Case C-393/06.

In Case C393/06,

REFERENCE for a preliminary ruling under Article 234 EC, from the Vergabekontrollsenat des Landes Wien (Austria), made by decision of 17 August 2006, received at the Court on 22 September 2006, in the proceedings

Ing. Aigner, Wasser-Wärme-Umwelt GmbH

v

Fernwärme Wien GmbH,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, E. Juhasz (Rapporteur), J. Malenovsku and T. von Danwitz, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 11 October 2007,

after considering the observations submitted on behalf of:

- Ing. Aigner, Wasser-Wärme-Umwelt GmbH, by S. Sieghartsleitner and M. Pichlmair, Rechtsanwälte,

- Fernwärme Wien GmbH, by P. Madl, Rechtsanwalt,

- the Hungarian Government, by J. Fazekas, acting as Agent,

- the Austrian Government, by M. Fruhmann and C. Mayr, acting as Agents,

- the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

- the Swedish Government, by A. Falk, acting as Agent,

- the Commission of the European Communities, by X. Lewis, acting as Agent, assisted by M. NuñezMüller, Rechtsanwalt,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2007,

gives the following

Judgment

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

1. A contracting entity, within the meaning of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of that directive.

2. An entity such as Fernwärme Wien GmbH is to be regarded as a body governed by public law within

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the meaning of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

3. All contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross financing between those sectors.

1. This reference for a preliminary ruling concerns the interpretation of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2. The reference was made in the course of proceedings between Ing. Aigner, Wasser-Wärme-Umwelt GmbH (Ing. Aigner') and Fernwärme Wien GmbH (Fernwärme Wien') concerning the regularity of a public procurement procedure instituted by the latter.

Legal context

Community legislation

3. Directive 2004/17 coordinates the procurement procedures in specific sectors, that is to say, those of water, energy, transport and postal services. It follows and repealed Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which concerned the same subject-matter.

4. The particular characteristics of the sectors covered by Directive 2004/17 are highlighted in the third recital in the preamble thereto, which states that it is necessary to coordinate procurement procedures in these sectors because of the closed nature of the markets in which the contracting entities concerned operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.

5. The second section of Article 2(1)(a) of Directive 2004/17 and the second section of Article 1(9) of Directive 2004/18 provide that contracting authorities', inter alia, are bodies governed by public law', that is to say

... any body:

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

- having legal personality and

financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative,

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managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law'.

6. In accordance with Article 2(1)(b) of Directive 2004/17:

For the purposes of this Directive,

...

(b) a public undertaking is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.'

7. Article 2(2) of that directive provides:

This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

(b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 3 to 7, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.'

8. Articles 3 to 7 of Directive 2004/17 list the sectors to which the Directive applies. These are gas, heat and electricity (Article 3), water (Article 4), transport services (Article 5), postal services (Article 6) and exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports (Article 7).

9. Article 3(1) of that directive provides:

As far as gas and heat are concerned, this Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat; or

(b) the supply of gas or heat to such networks.'

10. Article 9 of that directive states as follows:

1. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

However, the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding it from the scope of this Directive or, where applicable, Directive 2004/18/EC.

2. If one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned Directive 2004/18/EC and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the abovementioned Directive 2004/18/EC.

...'

11. Article 20(1) of that directive, under the heading Contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country', provides:

This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 or for the pursuit of such

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activities in a third country, in conditions not involving the physical use of a network or geographical area within the Community.'

12. Finally, Article 30 of Directive 2004/17, under the heading Procedure for establishing whether a given activity is directly exposed to competition', provides:

1. Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this Directive if, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question.

...'

13. Title II, Chapter II, Section 3 of Directive 2004/18 lists the contracts which are outside the scope of that directive. These include contracts in the water, energy, transport and postal services sectors. Article 12, dealing with those contracts, provides:

This Directive shall not apply to public contracts which, under Directive 2004/17/EC, are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of that Directive and are awarded for the pursuit of those activities, ...

...'

14. The abovementioned Community legislation was transposed into Austrian law by the Federal law on the award of public procurement contracts (Bundesvergabegesetz) 2006.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15. Fernwärme Wien was established by constituent instrument of 22 January 1969 for the purpose of supplying district heating to homes, public institutions, offices, undertakings etc. in the City of Vienna. For that purpose it uses energy produced by the disposal of waste rather than energy from non-renewable sources.

16. Fernwärme Wien, which has legal personality, is wholly owned by the City of Vienna, which appoints and removes managers and the members of the company's supervisory board and gives them a discharge from responsibility. In addition, through the Kontrollamt der Stadt Wien (Monitoring Office of the City of Vienna), the city is also authorised to monitor the economic and financial management of the company.

17. In parallel to its district heating activities, Fernwärme Wien is engaged in the general planning of refrigeration plants for large real estate projects. In carrying out that activity it competes with other undertakings.

18. On 1 March 2006, Fernwärme Wien instituted a public procurement tendering procedure for the installation of refrigeration plants in a future commercial office complex in Vienna, stating that the Austrian legislation relating to public procurement did not apply to the contract in question. Ing. Aigner participated in this procedure by submitting a tender. Having been informed, on 18 May 2006, that its offer would no longer be considered because of negative references, it challenged that decision before the referring court, submitting that the Community rules on public procurement should be applied.

19. The national court notes that the activities of Fernwärme Wien with regard to the operation

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of a fixed district heating network fall indisputably within the scope of Directive 2004/17. However, its activities with regard to the refrigeration plants do not fall within the field of application of that directive. It therefore asks whether the latter activities are also covered by the provisions of that directive by application, mutatis mutandis , of the principles laid down in Case C44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I73, paragraphs 25 and 26, an approach commonly referred to in legal literature as the contagion theory'. In accordance with the interpretation given by the referring court of that judgment, where one activity carried out by a body falls within the scope of the public procurement directives, all the other activities carried out by that body, irrespective of their possible industrial or commercial character, are also covered by those directives.

20. If the judgment in Mannesmann Anlagenbau Austria and Others refers only to contracting authorities and, more specifically, the concept of bodies governed by public law', in the sense that, where a body meets needs in the general interest, not having an industrial or commercial character, it must be considered a body governed by public law' within the meaning of the Community rules, irrespective of whether it carries out, in parallel, other activities of a different nature, the referring court asks whether Fernwärme Wien constitutes a body governed by public law, that is to say a contracting authority, within the meaning of Directives 2004/17 and 2004/18.

21. Finally, the referring court asks whether, when a body carries out activities not having an industrial or commercial character and, in parallel, activities in competitive conditions, whether it is possible to distinguish the latter activities and not to include them in the scope of the Community rules on public procurement, it is possible to establish a separation between those two types of activities and, accordingly, the absence of economic interference between them. In that regard, the referring court refers to point 68 of the Opinion of Advocate General Jacobs of 21 April 2005 in the case which gave rise, following the withdrawal of the reference for a preliminary ruling, to the order for removal from the register of 23 March 2006 (Case C174/03 Impresa Portuale di Cagliari , not published in the ECR), where it is proposed that the principle arising from the judgment in Mannesmann Anlagenbau Austria and Others be tempered in that manner.

22. Having regard to the foregoing, the Vergabekontrollsenat des Landes Wien (Public Procurement Review Chamber of the Province of Vienna) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Must Directive 2004/17... be interpreted as meaning that a contracting entity which pursues one of the sectoral activities referred to in Article 3 of that directive also falls within the scope of that directive in relation to an activity pursued in parallel under competitive conditions?

2. In the event that this is the case only in respect of contracting authorities: must an undertaking such as [Fernwärme Wien] be characterised as a body governed by public law within the meaning of Directive 2004/17 or Directive 2004/18... if it provides district heating in a given area without any real competition, or must the market for domestic heating, which also includes energy sources such as gas, oil, coal etc., be taken into account?

3. Must an activity pursued under competitive conditions by a company which also pursues activities of a non industrial or non commercial nature be included within the scope of Directive 2004/17 or Directive 2004/18 if, through effective precautions such as separate balance sheets and accounts, cross financing of the activities pursued under competitive conditions can be excluded?'

The questions referred for a preliminary ruling

The first question

23. By this question, the referring court asks whether a contracting entity within the meaning of Directive 2004/17, which carries on activities in one of the sectors listed in Articles 3 to

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7 of that directive, is required to apply the procedure laid down in that directive for the award of contracts to the activities carried out by that entity in parallel, under competitive conditions, in sectors not governed by those provisions.

24. In order to answer that question, it must be noted that Directives 2004/17 and 2004/18 have noteworthy differences with regard both to the entities subject to the rules laid down in those respective directives and to their nature and scope.

25. With regard, firstly, to the entities to which the rules of those directives apply, it should be noted that, unlike Directive 2004/18 which, by virtue of the first subparagraph of Article 1(9) thereof, applies to contracting authorities', Directive 2004/17 refers, in Article 2 thereof, to contracting entities'. It is apparent from Article 2(2)(a) and (b) that Directive 2004/17 applies not only to contracting entities which are contracting authorities', but also to those which are public undertakings' or undertakings which operate on the basis of special or exclusive rights granted by a competent authority of a Member State', in so far as all those entities pursue one of the activities listed in Articles 3 to 7 thereof.

26. Secondly, it follows from Articles 2 to 7 of Directive 2004/17 that the coordination for which it provides does not extend to all spheres of economic activity, but relates to specifically defined sectors, which, moreover, is confirmed by the fact that that directive is commonly referred to as the sectoral directive'. However, the scope of Directive 2004/18 includes almost all sectors of economic life, thus justifying its being commonly known as the general directive'.

27. In such circumstances, it must be stated at this early stage that the general scope of Directive 2004/18 and the restricted scope of Directive 2004/17 require the provisions of the latter to be interpreted narrowly.

28. The boundaries between the fields of application of those two directives are also drawn by explicit provisions. Thus, Article 20(1) of Directive 2004/17 provides that the latter does not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 thereof. The equivalent of that provision in Directive 2004/18 is Article 12(1), which provides that that directive does not apply to public contracts which are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of Directive 2004/17.

29. Thus, the field of application of Directive 2004/17 is strictly circumscribed, which does not permit the procedures laid down therein to be extended beyond that field of application.

30. Consequently, the abovementioned provisions leave no room for application, in the context of Directive 2004/17, of the approach known as contagion theory' which was developed following the judgment in Mannesmann Anlagenbau Austria and Others. That judgment was given by the Court in the context of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), that is to say in an area which at present falls within the ambit of Directive 2004/18.

31. Accordingly, as rightly observed by, inter alia, the Hungarian, Austrian and Finnish Governments and by the Commission of the European Communities, only those contracts awarded by an entity which is a contracting entity' within the meaning of Directive 2004/17, in connection with and for the exercise of activities in the sectors listed in Articles 3 to 7 of that directive, fall within the field of application thereof.

32. Moreover, that is the conclusion which emerges also from Joined Cases C462/03 and C463/03 Strabag and Kostmann [2005] ECR I5397, paragraph 37). In that judgment, the Court held that, if a contract does not concern the exercise of one of the activities governed by the sectoral directive,

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it will be governed by the rules laid down in the directives concerning the award of public supply, works or service contracts, as applicable.

33. Having regard to the foregoing, the answer to the first question must be that a contracting entity, within the meaning of Directive 2004/17, is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of that directive.

The second question

34. By its second question, the referring court asks whether an entity such as Fernwärme Wien is to be regarded as a body governed by public law within the meaning of Directive 2004/17 or of Directive 2004/18.

35. In that regard, it should be borne in mind that, as is apparent from paragraph 5 of this judgment, the provisions of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18 contain identical definitions of the concept of body governed by public law'.

36. It is clear from those provisions that a body governed by public law' is any body which, firstly, was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, has legal personality and, thirdly, is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law. In accordance with the case-law of the Court, those three conditions are cumulative (Case C¡237/99 Commission v France [2001] ECR I939, paragraph 40, and the case-law cited).

37. Furthermore, since the aim of the directives in relation to awarding public contracts is to avoid, inter alia, the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones, the concept of a body governed by public law' must be interpreted in functional terms (Case C337/06 Bayerischer Rundfunk and Others [2007] ECR I0000, paragraphs 36 and 37, and the case-law cited).

38. In the present case, it is common ground that the latter two criteria established by the rules set out in paragraph 36 of the present judgment are fulfilled, given that Fernwärme Wien has legal personality and that the City of Vienna wholly owns the share capital of that entity and monitors its economic and financial management. It remains to be considered whether the entity was established specifically to meet needs in the general interest, not having an industrial or commercial character.

39. With regard, firstly, to the purpose of the establishment of the entity in question and the nature of the needs met, it is appropriate to note that, as is apparent from the documents before the Court, Fernwärme Wien was established specifically for the purpose of supplying district heating to homes, public institutions, offices, undertakings etc. in the City of Vienna by means of the use of energy produced by the destruction of waste. At the hearing before the Court, it was stated that, at present, that heating system serves approximately 250 000 homes, numerous offices and industrial plants and, in practice, all public buildings. To provide heating for an urban area by means of an environmentally-friendly process constitutes an aim which is undeniably in the general interest. It cannot, therefore, be disputed that Fernwärme Wien was established specifically to meet needs in the general interest.

40. In that regard, it is immaterial that such needs are also met or can be met by private undertakings.

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It is important that they should be needs which, for reasons in the general interest, the State or a regional authority generally chooses to meet itself or over which it wishes to retain a decisive influence (see, to that effect, Case C360/96 BFI Holding [1998] ECR I6821, paragraphs 44, 47, 51 and 53, and Joined Cases C223/99 and C260/99 Agorà and Excelsior [2001] ECR I3605, paragraphs 37, 38 and 41).

41. Secondly, in order to ascertain whether the needs met by the entity in question in the main proceedings have a character other than industrial or commercial, account must be taken of all the relevant law and facts such as the circumstances prevailing at the time when the body concerned was established and the conditions under which it exercises its activity. In that regard, it is important to check, inter alia, whether the body in question carries on its activities in a situation of competition (Case C18/01 Korhonen [2003] ECR I5321, paragraphs 48 and 49).

42. As stated in paragraph 39 of the present judgment, Fernwärme Wien was established specifically for the purpose of supplying district heating in the City of Vienna. It is common ground that the pursuit of profit did not underlie its establishment. While it is not impossible that those activities may generate profits distributed in the form of dividends to shareholders of the entity, the making of such profits can never constitute its principal aim (see, to that effect, Korhonen , paragraph 54).

43. With regard, subsequently, to the relevant economic environment or, in other words, the relevant market which must be considered in order to ascertain whether the entity in question is exercising its activities in competitive conditions, account must be taken, as the Advocate General proposes in points 53 and 54 of his Opinion, having regard to the functional interpretation of the concept of a body governed by public law', of the sector for which Fernwärme Wien was created, that is to say the supply of district heating by means of the use of energy produced by the burning of waste.

44. It is clear from the order for reference that Fernwärme Wien enjoys a virtual monopoly in that sector, since the two other undertakings operating in that sector are of negligible size and accordingly cannot constitute true competitors. Furthermore, there is a considerable degree of autonomy in this sector, since it would be very difficult to replace the district heating system by another form of energy, since this would require large-scale conversion work. Finally, the City of Vienna attaches a particular importance to this heating system, not least for reasons of environmental considerations. Thus, having regard to the pressure of public opinion, it would not permit it to be withdrawn, even if that system were to operate at a loss.

45. Having regard to the various indications provided by the referring court and as the Advocate General observes in point 57 of his Opinion, Fernwärme Wien is currently the only undertaking capable of meeting such needs in the general interest in the sector under consideration, so that it might choose to be guided by considerations other than economic ones in the award of its contracts.

46. In the judgments in BFI Holding (paragraph 49) and Agorà and Excelsior (paragraph 38), the Court held that the existence of significant competition may be an indication in support of the conclusion that there is no need in the general interest, not having an industrial or commercial character. In the circumstances of the case in the main proceedings, it is clear from the reference for the preliminary ruling that the criterion requiring the existence of significant competition is far from fulfilled.

47. It must be borne in mind that it is immaterial whether, in addition to its duty to meet needs in the general interest, an entity is free to carry out other profit-making activities, provided that it continues to attend to the needs which it is specifically required to meet. The proportion of profit-making activities actually pursued by that entity as part of its activities as a whole is also irrelevant for its classification as a body governed by public law (see, to that effect,

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Mannesmann Anlagenbau Austria and Others , paragraph 25; Korhonen , paragraphs 57 and 58; and Case C373/00 Adolf Truley [2003] ECR I1931, paragraph 56).

48. In the light of the foregoing considerations, the answer to the second question must be that an entity such as Fernwärme Wien is to be regarded as a body governed by public law within the meaning of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18.

The third question

49. By its third question, the referring court asks whether all contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, are to be subject to the rules of one or the other of those directives if, through effective precautions, a clear separation is possible between the activities carried out by that body to accomplish its task of meeting needs in the general interest and the activities which it carries out in competitive conditions, so that cross financing between the two types of activities can be excluded.

50. It should be borne in mind in that regard that the problem underlying that question was examined by the Court for the first time in the case which gave rise to the judgment in Mannesmann Anlagenbau Austria and Others relating to the interpretation of Directive 93/37 on public works contracts, and that the Court came to the conclusion, in paragraph 35 of that judgment, that all contracts, of whatever nature, entered into by a contracting authority were to be subject to the rules of that directive.

51. The Court reiterated that position, with regard to public service contracts, in the judgments in BFI Holding (paragraphs 55 and 56) and Korhonen (paragraphs 57 and 58) and, with regard to public supply contracts, in the judgment in Adolf Truley (paragraph 56). That position also applies to Directive 2004/18, which represents a recasting of the provisions of all the preceding directives on the award of public contracts which it follows (see, to that effect, Bayerischer Rundfunk , paragraph 30).

52. That conclusion is inescapable also in respect of entities which use an accounting system intended to make a clear internal separation between the activities carried out by them to accomplish their task of meeting needs in the general interest and activities which they carry out in competitive conditions.

53. As the Advocate General points out in points 64 and 65 of his Opinion, there must be serious doubts that, in reality, it is possible to establish such a separation between the different activities of one entity consisting of a single legal person which has a single system of assets and property and whose administrative and management decisions are taken in unitary fashion, even ignoring the many other practical obstacles with regard to reviewing before and after the event the total separation between the different spheres of activity of the entity concerned and the classification of the activity in question as belonging to a particular sphere.

54. Thus, having regard to the reasons of legal certainty, transparency and predictability which govern the implementation of procedures for all public procurement, the case-law of the Court set out in paragraphs 50 and 51 of the present judgment must be followed.

55. Nevertheless, as is apparent from paragraph 49 of the present judgment, the question posed by the referring court at the same time relates to Directives 2004/17 and 2004/18.

56. In that regard, it should be noted that, in the context of the examination of the second question referred for a preliminary ruling, it was held that an entity such as Fernwärme Wien is to be regarded as a body governed by public law within the meaning of Directive 2004/17 or of Directive 2004/18. Furthermore, in examining the first question referred for a preliminary ruling, the Court concluded

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that a contracting entity, within the meaning of Directive 2004/17, is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 thereof.

57. It is appropriate to state that, in accordance with the case-law of the Court, contracts awarded in the sphere of one of the activities expressly listed in Articles 3 to 7 of Directive 2004/17 and contracts which, although different in nature and thus capable normally, as such, of falling within the scope of Directive 2004/18, are used in the exercise of activities defined in Directive 2004/17 fall within the scope of the latter directive (see, to that effect, Strabag and Kostmann , paragraphs 41 and 42).

58. Consequently, the contracts awarded by an entity such as Fernwärme Wien are covered by the procedures laid down in Directive 2004/17 since they are connected with an activity which it carries out in the sectors listed in Articles 3 to 7 thereof. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18.

59. The answer to the third question must therefore be that all contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross-financing between those sectors.

Costs

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

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Case C-393/06

Ing. Aigner, Wasser-Wärme-Umwelt, GmbH

v

Fernwärme Wien GmbH

(Reference for a preliminary ruling from the Vergabekontrollsenat des Landes Wien)

(Public contracts – Directives 2004/17/EC and 2004/18/EC – Contracting entity pursuing activities falling in part within the field of application of Directive 2004/17/EC and in part within that of Directive 2004/18/EC – Body governed by public law – Contracting authority)

Summary of the Judgment

1. *Approximation of laws – Procurement procedures of entities operating in the water, energy, transport and postal services sectors – Directive 2004/17 – Scope*

   (European Parliament and Council Directives 2004/17, Arts 3 to 7 and 20(1), and 2004/18, Art. 12(1))

2. *Approximation of laws – Procurement procedures of entities operating in the water, energy, transport and postal services sectors and public works contracts, public supply contracts and public service contracts – Directives 2004/17 and 2004/18 – Contracting authorities*

   (European Parliament and Council Directives 2004/17, Art. 2(1)(a), second subpara., and 2004/18, Art. 1(9), second subpara.)

3. *Approximation of laws – Procurement procedures of entities operating in the water, energy, transport and postal services sectors and public works contracts, public supply contracts and public service contracts – Directives 2004/17 and 2004/18 – Scope*

   (European Parliament and Council Directives 2004/17 and 2004/18)

1. A contracting entity, within the meaning of Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of that directive.

   Article 20(1) of Directive 2004/17 provides that the latter does not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 thereof. The equivalent of that provision in Directive 2004/18 is the first paragraph of Article 12, which provides that that directive does not apply to public contracts which are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of Directive 2004/17. Thus, the field of application of Directive 2004/17 is strictly circumscribed, which does not permit the procedures laid down therein to be extended beyond that field of application.

   (see paras 28-29, operative part 1)

2. Under the second subparagraph of Article 2(1)(a) of Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and the second subparagraph of Article 1(9) of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, a ‘body governed by public law’ is any body which, first, was

established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, has legal personality and, thirdly, is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law. Those three conditions are cumulative.

An entity established specifically for the purpose of supplying district heating to homes, public institutions, offices, undertakings in a local authority area by means of the use of energy produced by the destruction of waste, which has legal personality and of which the local authority wholly owns the share capital and monitors its economic and financial management, meets the two latter conditions laid down by those directives.

With regard to the first condition, it cannot be disputed that such an entity was established specifically to meet needs in the general interest. To provide heating for an urban area by means of an environmentally-friendly process constitutes an aim which is undeniably in the general interest. In that regard, it is immaterial that such needs are also met or can be met by private undertakings. It is important that they should be needs which, for reasons in the general interest, the State or a regional authority generally chooses to meet itself or over which it wishes to retain a decisive influence.

In order to ascertain whether the needs met by the entity in question have a character other than industrial or commercial, account must be taken of all the relevant law and facts such as the circumstances prevailing at the time when the entity concerned was established and the conditions under which it exercises its activity. In that regard, it is common ground that the pursuit of profit did not underlie its establishment. With regard, subsequently, to the relevant market which must be considered in order to ascertain whether the entity in question is exercising its activities in competitive conditions, account must be taken, having regard to the functional interpretation of the concept of a 'body governed by public law', of the sector for which that entity was created, that is to say, the supply of district heating by means of the use of energy produced by the burning of waste. In the sector under consideration, the entity in question enjoys a virtual monopoly. Furthermore, there is a considerable degree of autonomy in this sector, since it would be very difficult to replace the district heating system by another form of energy, and the local authority in question attaches a particular importance to this heating system, not least for reasons of environmental considerations, such that it would not permit it to be withdrawn, even if that system were to operate at a loss. Thus, since the entity in question is currently the only undertaking capable of meeting such needs in the general interest in the sector under consideration, it might choose to be guided by considerations other than economic ones in the award of its contracts.

It is immaterial whether, in addition to its duty to meet needs in the general interest, an entity is free to carry out other profit-making activities, provided that it continues to attend to the needs which it is specifically required to meet. The proportion of profit-making activities actually pursued by that entity as part of its activities as a whole is also irrelevant for its classification as a body governed by public law.

(see paras 36-45, 47-48, operative part 2)

3. All contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors or Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross financing between those sectors.

(see para. 59, operative part 3)

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Judgment of the Court (Fourth Chamber) of 10 April 2008 (reference for a preliminary ruling from the Vergabekontrollsenat des Landes Wien, Austria) - Ing. Aigner, Wasser-Wärme-Umwelt GmbH v Fernwärme Wien GmbH

(Case C-393/06) [1]

(Public contracts - Directives 2004/17/EC and 2004/18/EC - Contracting entity pursuing activities falling in part within the field of application of Directive 2004/17/EC and in part within that of Directive 2004/18/EC - Body governed by public law - Contracting authority)

Language of the case: German

Referring court

Vergabekontrollsenat des Landes Wien

Parties to the main proceedings

Applicant: Ing. Aigner, Wasser-Wärme-Umwelt GmbH

Defendant: Fernwärme Wien GmbH

Re:

Reference for a preliminary ruling - Vergabekontrollsenat des Landes Wien - Interpretation of Article 2(1) and of Article 3 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and interpretation of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) - Award of contract for heating equipment - The contracting authority is an undertaking controlled by the City of Vienna providing public services (district heating) - Body governed by public law - Assessment of the condition of competition - Application of European market award procedures also to activities carried out under competitive conditions (in the present case, air conditioning systems) - Contamination theory - No cross-subsidies

Operative part of the judgment

1. A contracting entity, within the meaning of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of that directive.

2. An entity such as Fernwärme Wien GmbH is to be regarded as a body governed by public law within the meaning of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

3. All contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those

activities in order to avoid cross financing between those sectors

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[1] - OJ C 310, 16.12.2006.

Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 22 November 2007. Ing. Aigner, Wasser-Wärme-Umwelt, GmbH v Fernwärme Wien GmbH. Reference for a preliminary ruling: Vergabekontrollsenat des Landes Wien - Austria. Public contracts - Directives 2004/17/EC and 2004/18/EC - Contracting entity pursuing activities falling in part within the field of application of Directive 2004/17/EC and in part within that of Directive 2004/18/EC - Body governed by public law - Contracting authority. Case C-393/06.

I - Introduction

1. The Vergabekontrollsenat des Landes Wien (Procurement Review Tribunal of the Province of Vienna) has referred three questions on the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. (2)

2. Those questions provide the Court with the opportunity to delimit the scope of the aforementioned directives and to define, once again, the concept of a body governed by public law' when that body acts as a contracting authority'.

3. The object of this reference for a preliminary ruling is to ascertain whether a public undertaking, as defined in Article 2(1)(b) of Directive 2004/17, is caught by the provisions of that directive when it carries out activities which are not included in Articles 3 to 7 (first question). If the reply to that question is negative, the order for reference asks whether, in any event, such an undertaking must be classified as a body governed by public law' on the grounds that it is engaged, without any real competition, in satisfying needs in the general interest, not having an industrial or commercial character (the supply of district heating in the City of Vienna), which are governed by Directive 2004/18, despite the fact that it also carries out activities in a different market in competitive conditions (second question). Finally, the referring court enquires whether, if the undertaking demonstrated that the two activities are managed financially as watertight compartments, it would not be caught by those provisions (third question).

4. At the heart of those questions lies the infection theory' (formulated in the judgment in Mannesmann Anlagenbau Austria and Others), (3) which states that all the activities of a contracting authority are governed by the procurement directives, unless (qualification introduced by Advocate General Jacobs in the opinion in Impresa Portuale di Cagliari , (4) removed from the register) it can be shown that there is no cross-subsidisation between contracts for activities carried out on the open market and contracts concluded in non-competitive conditions.

5. However, under Austrian law, the Vergabekontrollsenat des Landes Wien does not have the status of a court or tribunal; moreover, appeals against its decisions may be brought before the Verwaltunsgerichtshof (Administrative Court). My stance on the definition of court or tribunal for the purposes of Article 234 EC, which I explained in the opinion in De Coster , (5) being well-known, I feel obliged, in order to avoid inconsistency, to advise the Court to dismiss this reference for a preliminary ruling at the outset.

II - The legal framework

A - Austrian legislation

6. The Wiener Vergaberechtschutzgesetzes (6) (Law of Vienna on remedies in procurement law) confers on the Vergabekontrollsenat des Landes Wien jurisdiction to review the award of contracts by the Province of Vienna and by other contracting authorities in the water, energy, transport and postal services sectors (Paragraph 1).

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7. In accordance with Paragraph 2, that independent administrative chamber exercises jurisdiction at first and sole instance and its decisions are not subject to review by administrative action (subparagraph 2), although a judicial appeal may be brought before the Verwaltunsgerichtshof (subparagraph 4).

8. The Vergabekontrollsenat is composed of seven members, nominated by the Government of the Province for a renewable mandate of six years (Paragraph 3(1)). The members must possess specific economic or technical knowledge in the field of public contracts (Paragraph 3(2)); they must carry out their functions independently and are not bound by any instructions (Paragraph 3(3)), and they do not receive any remuneration (Paragraph 3(4)).

B - Community law

1. Directive 2004/18

9. Directive 2004/18 consolidates the pre-existing secondary legislation in a single text, (7) harmonising at Community level the national procurement procedures in order to bring them into line with the principles of the Treaty which govern the award of public contracts (recitals 1 and 2). The directive governs contracts which it classifies as public' in Article 1(2), which are not excluded by Articles 12 to 18, which are for amounts equal to or greater than those indicated in Article 7, and which are concluded by contracting authorities.

10. Under Article 1(9), contracting authorities' means regional or local authorities, bodies governed by public law, and associations thereof. A body governed by public law' means any body: (1) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (2) having legal personality; and (3)(a) financed, for the most part, by regional or local authorities, or other bodies governed by public law; or (3)(b) subject to management supervision by those bodies; or (3)(c) having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

2. Directive 2004/17

11. Directive 2004/17 (8) pursues a similar aim to that of Directive 2004/18 in respect of supply, works and service contracts (which are defined in Article 1(2)) in certain sectors characterised by their closed nature, due to the grant of special or exclusive rights (recitals 1 to 3).

12. In accordance with Article 2(2), the directive applies to contracting entities' which pursue one of the activities referred to in Articles 3 (gas, heat and electricity), 4 (water), 5 (transport), 6 (postal services) and 7 (exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports), unless those activities are performed under competitive conditions on markets to which access is not restricted (Article 30(1)).

13. In addition to contracting authorities' (which are defined, in Article 2(1)(a), in the same terms as in Directive 2004/18), the directive also classifies public undertakings' as contracting entities'. A public undertaking is any undertaking over which the contracting authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. They exercise such an influence when (1) they hold the majority of the undertaking's subscribed capital, or (2) they control the majority of the votes attaching to shares issued by the undertaking, or (3) they appoint more than half of the undertaking's administrative, management or supervisory body.

14. The directive also defines as contracting entities' organisations which, while they are not contracting authorities' or public undertakings', carry out any of the activities referred to in Articles 3 to 7 on the basis of special or exclusive rights (Article 2(2)(b)).

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15. Article 20(1) excludes from the scope of the directive contracts which the contracting entities award for purposes other than those referred to in Articles 3 to 7.

III - The facts of the main proceedings and the questions referred for a preliminary ruling

16. Fernwärme Wien GmbH is an undertaking established on 22 January 1969 and duly registered in the Vienna Companies Register, so acquiring legal personality. Its object is the supplying of district heating to homes, public institutions, offices, undertakings and other premises in the municipal district of Vienna. Without prejudice to that activity, the company is also engaged, in competition with other operators, in the general planning of refrigeration plants for large real estate projects.

17. Following successive amendments of the founding contract, in which its objects remained unchanged, the undertaking is currently a limited liability company and is wholly owned by Vienna City Council. (9) The Kontrollamt (Monitoring Office) of Vienna checks the undertaking's finances while the municipality, exercising its rights in the general meeting, appoints and removes the directors, approves their management, and does the same in respect of the members of the supervisory board.

18. By announcement in the Amtsblatt der Stadt Wien (Official Journal of the City of Vienna) of 1 March 2006, Fernwärme Wien published an invitation to tender for the construction of a refrigeration plant for an office and shopping centre in Vienna (called TownTown'), stating that national procurement law did not apply.

19. Ing. Aigner, Wasser-Wärme-Unwelt GmbH, which accepted the published conditions, participated in the selection process by submitting two tenders - a main tender and an alternative. On 18 May 2006, Fernwärme Wien informed the applicant that the second tender had been rejected, a decision which the applicant challenged before the Vergabekontrollsenat des Landes Wien.

20. Fernwärme Wien called into question that body's jurisdiction, which is conditional on the defendant undertaking's being a contracting entity' or a contracting authority' for the purpose of Directives 2004/17 and 2004/18. In view of the nature of the dispute before it, the Vergabekontrollsenat des Landes Wien has stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

(1) Must Directive 2004/17/EC... be interpreted as meaning that a contracting entity which carries out activities in the sectors referred to in Article 3... also falls within the scope of that directive in relation to an activity pursued in parallel under competitive conditions?

(2) In the event that this is the case only in respect of contracting authorities: must an undertaking such as Fernwärme Wien Ges.m.b.H. be characterised as a body governed by public law within the meaning of Directive 2004/17/EC or Directive 2004/18/EC if it provides district heating in a given area without any real competition, or must the market for domestic heating, which also includes energy sources such as gas, oil and coal, be taken into account?

(3) Must an activity pursued under competitive conditions by a company which also pursues activities of a nonindustrial or noncommercial nature be included within the scope of Directive 2004/17/EC or Directive 2004/18/EC if, through effective precautions such as separate balance sheets and accounts, crossfinancing of the activities pursued under competitive conditions can be excluded?'

IV - The procedure before the Court of Justice

21. The parties to the main proceedings, the Commission, and the Austrian, Hungarian and Finnish Governments submitted written observations, and the representatives of Ing. Aigner, the Austrian Government and the Commission presented oral argument at the hearing on 11 October 2007.

V - The jurisdiction of the Court of Justice

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22. In HI , (10) the Court held that the Vergabekontrollsenat des Landes Wien must be regarded as a court or tribunal within the meaning of Article 234 EC (paragraph 28). In accordance with its settled case-law on that definition, the Court found that the Vergabekontrollsenat complies with the criteria of being established by law, having compulsory jurisdiction and an inter partes procedure, and applying rules of law (paragraph 26), and that, on account of its composition and functioning, it satisfies the requirements of permanence and independence (paragraph 27).

23. Six months earlier, in my Opinion in De Coster , I criticised that case-law for being too flexible and not sufficiently consistent', (11) and I proposed a change of bearing with a view to taking a firmer course (12) which, by focusing on the raison d'être of the preliminary ruling, would encourage fruitful cooperation between courts.

24. For that purpose, I propose that, as a general rule, Article 234 EC should cover only bodies forming part of the judicial power of every State, when they carry out their judicial duties in the proper sense, including, by way of an exception, those bodies which, while not belonging to that structure, have the final word in the national legal order, provided that they satisfy the requirements laid down in case-law, in particular, the requirements of independence and the adversarial nature of the proceedings.

25. In accordance with that stricter interpretation, the Vergabekontrollsenat des Landes Wien is not included in the definition because it is not part of the Austrian judicial structure (independent administrative chamber') and its decisions, which exhaust the administrative remedies available, may be challenged by judicial action before the Verwaltunsgerichtshof. (13)

26. It is not appropriate to reproduce here the points I made in the De Coster Opinion (paragraphs 75 to 79) concerning the undesirability of an administrative authority, no matter how independent, intervening in a dialogue between courts, and repeated in the Opinion in Case C195/06 Osterreichischer Rundfunk (ORF) (14) (paragraphs 35 to 36). Nor is it appropriate to overlook the fruitful collaboration of the Vergabekontrollsenat des Landes Wien in the interpretation of public procurement law. (15) However, even entering into the realms of legal possibilism, the arguments which justified opening up the preliminary ruling dialogue to bodies which are not strictly judicial in nature lose much of their force in a Community of 27 States at a time when that field of Community law and its interpretation are fully consolidated. (16)

27. Recent developments in case-law reveal (17) greater zeal in identifying the features which define the concept of a court or tribunal, especially independence, allowing a glimpse of a position close to that in De Coster. (18) Thus, in Schmid , (19) the Court held that it lacked jurisdiction to hear a reference from the Berufungssenat V der Finanzlandesdirektion (Fifth Appeal Chamber of the Regional Finance Authority) for Vienna, Lower Austria and Burgenland, while, in Syfait and others , (20) the Court likewise ruled inadmissible a reference from the Epitropi Antagonismou (Greek Competition Commission). (21)

28. That trend is abundantly clear if regard is had to the fact that, in the past, the Court did deal with questions referred for a preliminary ruling by bodies similar to the ones mentioned, such as the Spanish economic and administrative courts (22) and the Spanish Tribunal de Defensa de la Competencia (Competition Court). (23)

29. The years have gone by and the Opinion in De Coster (24) is still quite valid, for which reason, not only for the sake of consistency but also with total conviction, I maintain that the Vergabekontrollsenat des Landes Wien is not a court or tribunal for the purposes of Article 234 EC and I propose that the Court should declare that it lacks jurisdiction to consider the questions which that body has referred for a preliminary ruling.

30. I cherish the hope that the judges whom I address will be persuaded of the virtues of the proposal

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set out in De Coster , (25) but, in case they do not follow my recommendation, I shall now go on to analyse, in the alternative, the substance of the present reference for a preliminary ruling, with the intention of fulfilling my duty, acting with complete impartiality and independence, to deliver an opinion in open court.

VI - Analysis of the questions referred for a preliminary ruling

A - Directives 2004/17 and 2004/18: two routes towards a single objective (first question)

31. Community public procurement law pursues an immediate, limited aim: coordination of the procedures for the award of public contracts. However, as may be deduced from recital 2 in the preamble to Directive 2004/18 and recital 9 in the preamble to Directive 2004/17, and also from the case-law of the Court, (26) that is nothing more than an instrument for the achievement of a more important objective, namely, the development of effective competition in the sector, in the interests of establishing the fundamental freedoms in European integration. The purpose is, therefore, to eliminate barriers to freedom of movement by protecting the interests of economic operators in one Member State who wish to sell goods or services to contracting entities in other Member States. Accordingly, it is necessary to avoid the risk of preference being given to national tenderers (buy national'), excluding the possibility that the body responsible for awarding the contract may be guided by considerations other than economic (27) (for that reason, the essential criterion when awarding a contract is that of the lowest or economically most advantageous tender).

1. A personal dimension

32. Like its predecessors, Directive 2004/18 delimits its scope as follows: subjectively, by defining, on the one hand, the terms contractor', supplier' and service provider', and, on the other, the term contracting authority' (Article 1(8) and (9)); and objectively, by defining public works contracts', public service contracts' and public supply contracts', together with public works concession' and service concession' (Article 1(2) to (4)).

33. So, contracts governed by Directive 2004/18, which are approved by a contracting authority, must be awarded in all the Member States in accordance with the principles and the procedural rules laid down in the directive.

34. The emphasis is thus placed on the personal dimension, since the conclusive criterion is not the nature of the activity but rather who performs it, because all public procurement is subject to the procedural coordination undertaken by the secondary legislation.

35. That requirement is so fundamental that, in Mannesmann Anlagenbau Austria and Others , the Court extended the application of the Community legislation (in that case, Directive 93/37) to all the activities of bodies governed by public law, arguing that the legislature does not make a distinction between contracts relating to needs in the general interest and contracts which are unrelated to that task, and citing the interests of legal certainty (paragraphs 32 and 34).

2. A material harmonisation

36. However, that intersectoral' (the adjective used by the Commission in its written observations) harmonisation was abandoned in Directive 2004/17 which, rather than applying to all the activities of the contracting entities, concerns only those activities set out in Articles 3 to 7.

37. The reason that the subject-matter of Directive 2004/17 is so specific is that, originally, contracts in the water, energy, transport and telecommunications sectors were not harmonised (28) owing to the diverse nature of the legal status (public or private) of the bodies responsible for those services. It was necessary to avoid making those services subject to different systems depending on whether they come under the State, regional or local authorities or other bodies governed by public law, or whether they come under bodies governed by private law, and the hope was that experience

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would provide a definitive solution. (29)

38. The opportunity arose on the adoption of Directive 93/38, which coordinated public procurement procedures in those excluded markets and defined the contracting bodies without reference to their legal status (public or private). The directive also took into account the capacity of national authorities to influence the behaviour of such entities, due to the closed nature of the markets concerned and to the existence of special or exclusive rights, for the purposes of also opening up those markets to competition (recitals 9, 11 and 12). That was the justification for the fact that, in addition to the entities referred to in the standard directives in the field, the scope ratione personae of the directive included public undertakings and affiliated undertakings (Article 1(2) and (3)), and care was taken to specify that such undertakings were governed by the directive only if they carried out activities in the sectors referred to therein (recital 13 (30) and Article 2).

39. Directive 2004/17 follows the same course (recitals 2 and 3) and identifies contracting entities without reference to their legal status (recital 10). Therefore, in addition to contracting authorities, which are identified in the same terms as in Directive 2004/18, the directive defines as contracting entities public undertakings and entities which have special or exclusive rights, provided that they carry out the activities referred to in Articles 3 to 7 (Articles 2(1) and (2) and 20(1)).

40. Accordingly, Directive 2004/17 governs procurement in what are traditionally known as excluded sectors', and its spirit is different to that prompting Directive 2004/18. The conclusive criterion is not the contracting entity but rather the nature of the activity to which the contract concerned relates, and the directive applies only to the sectors concerned.

41. That view is based on a twofold approach. On the one hand, the first paragraph of Article 12 of Directive 2004/18 excludes from its ambit contracts awarded by contracting authorities exercising the activities referred to in Articles 3 to 7 of Directive 2004/17, which draws attention to the importance of the material scope in the application of the latter provision. On the other hand, Directive 2004/17 is aimed at promoting the establishment of free competition, for which reason, pursuant to Article 30(1) thereof, it does not apply where the activities concerned are carried out on markets to which access is not restricted.

42. Therefore, the contracting authorities referred to in Directive 2004/18 are subject to Directive 2004/17 if they fall within its material scope, whereas the same does not apply to public undertakings and the holders of special or exclusive rights per se.

43. Those factors support the view that the infection theory does not apply to the present case. In the Opinion in Mannesmann Anlagenbau Austria and Others , Advocate General Léger pointed out that the scope of Directive 93/37 (and that of Directive 2004/18) is not determined according to the activity in respect of which contracts are awarded but rather by reference to the characteristics of the body entering into the contract (paragraph 81). In other words, whereas Directive 2004/18 focuses on the concept of a contracting authority', in respect of which, for reasons of legal certainty, it is not appropriate to embark on the task of determining which part of the organisation is aimed at meeting needs in the general interest and which part is aimed at other objectives, Directive 2004/17 enables perfect delimitation of the material sphere of the activities of the contracting entities', by providing specific guidelines in that regard in Article 9.

44. To put it another way, if a contracting authority', in the strictest sense, within the meaning of Article 1(9) of Directive 2004/18 and Article 2(1)(a) of Directive 2004/17, invites tenders for activities not mentioned in Articles 3 to 7 of the latter directive, the former will apply. However, if the body which pursues activities outside that sphere is a public undertaking or holds special or exclusive rights (Article 2(1)(b) and 2(b) of Directive 2004/17) neither of the two

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directives applies.

45. In short, I propose that the Court should reply to the first of the three questions submitted by the Vergabekontrollsenat des Landes Wien, declaring that Directive 2004/17 does not govern contracts which contracting entities', within the meaning of Article 2(2), conclude in respect of activities not mentioned in Articles 3 to 7.

46. That solution is founded on Community case-law. In the judgment in Strabag and Kostmann , (31) the Court held that Directive 93/38 (and therefore Directive 2004/17 too) applies to contracting entities' in so far as they carry out activities in the material sectors provided for therein. Otherwise, contracts concluded by those entities are subject, where applicable, to the legislation on public procurement (paragraph 37).

B - The concept of a body governed by public law: the significance of the level of competition in the market (second question)

47. All those who have taken part in these preliminary ruling proceedings are agreed that the contract in the main proceedings concerns an activity of Fernwärme Wien which does not come under Directive 2004/17 (the construction of a refrigeration plant for an office and shopping centre), for which reason, in line with the reply I have proposed to the first question, it is appropriate to ascertain, as the referring court requests, whether the undertaking is a contracting authority because, if it were, it would be governed by Directive 2004/18.

48. Specifically, it is necessary to determine whether Fernwärme Wien is a body governed by public law. It is not in dispute that the undertaking has legal personality and is closely connected with Vienna City Council, which owns its capital, directly and indirectly. The uncertainty concerns the first legislative requirement, which is whether its particular aim is to satisfy needs in the general interest, not having an industrial or commercial character.

49. Further, it is common ground that the object of the undertaking is in the general interest, since it provides a district heating service by means of an environmentally friendly system, such as waste combustion. (32) The core of the dispute is therefore merely to decide whether that service has an industrial or commercial character.

50. For that purpose, it is necessary to take into account all the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activity, (33) including, in particular, the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks, and any public financing of the activity in question. (34)

51. In that connection, it is necessary to examine the effect on the concept of the structure of the sector in which the body concerned carries out its activity. First of all, the wording of the directive makes no reference at all to whether or not there may be competition with private undertakings, (35) a situation which might be indicative that the public interest to be satisfied is industrial or commercial in nature (36) but would be insufficient to exclude considerations other than the economic, (37) since the fact that it pursues its activity in a closed market is not essential for the purposes of identifying a body as one governed by public law. (38)

52. The second question referred by the national court falls within the ambit of that case-law; it seeks to delimit the market concerned with a view to establishing the level of competition, but it starts from an erroneous premiss (which has been adopted by all those who have participated in these preliminary ruling proceedings), as is clear from the considerations I set out in my analysis of the first question.

53. In fact, Directive 2004/18 is founded on a subjective theory, applying to any organisational

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structure which acts as a contracting authority', regardless of the material sphere in which it operates (infection theory), unless it awards contracts that are excluded pursuant to Articles 12 to 18. In the case of bodies governed by public law', the directive requires such bodies to have been specifically established for the purpose of meeting needs in the general interest, not having an industrial or commercial character, so the market to be taken into consideration in order to assess the level of competition and identify whether the activity of such a body is industrial or commercial is the market for which the body was founded, (39) which, in the case of Fernwärme Wien, is the supply of district heating by means of waste combustion.

54. Any other approach would lead to a result at odds with the functional interpretation put forward in Community case-law, (40) thereby compromising the effectiveness of Directive 2004/18. In order to avoid the application of that provision, it would suffice for a body established solely to meet needs in the general interest, not having an industrial or commercial character, to pursue strictly commercial activities while retaining its initial objects, and, when it increases the markets in which it participates, that body would avoid being classified as a body governed by public law, with the result that all its contracts, regardless of their nature, would be concluded free from the requirements of the harmonised Community legislation. In essence, my view supplements the solution in Universale-Bau , (41) which concerned a converse situation in which the undertaking in question had been established for an exclusively private activity and subsequently became responsible for running a public service. In both cases, the functional interpretation is guided by the fact that undertakings which meet needs in the general interest and are capable of operating outside market forces may award contracts without having regard to those forces.

55. Directive 2004/18 leaves no alternative, since, just as the State and regional or local authorities continue to be classified as contracting authorities when they award contracts in open sectors, so do the structures which those regional or local authorities establish with legal personality and under their control for the purposes of meeting needs in the general interest, not having an industrial or commercial character.'

That interpretation is redolent of aspects of the case-law of the Court. In Mannesmann Anlagenbau Austria and Others , the Court noted that the condition that the body must have been established for the specific purpose of meeting such needs does not mean that it may meet only such needs (paragraph 26) and may not engage in other activities, even when such tasks constitute the greater part of its activity, because the legal definition does not take into account the relative importance of such tasks within its overall business (paragraphs 25, 26 and 31). (42)

56. In the light of those considerations, I propose that the Court should inform the Vergabekontrollsenat des Landes Wien that the supply of district heating is the market which it must examine for the purposes of determining whether Fernwärme Wien is to be classified as a body governed by public law', within the meaning of Article 1(9) of Directive 2004/18.

57. In any event, the examination to which the second question relates appears to be immaterial because, in the light of the information set out in the order for reference, regardless of which sector is delimited (district heating alone or heating produced by means of other fuel as well), Fernwärme Wien is currently the only undertaking capable of meeting that need in the general interest, being able to act in line with criteria other than strictly economic, a situation which justifies the intervention of Community law in order to harmonise the award criteria, open up the market to competition, and guarantee its transparency.

C - Whether there has been an infringement of the infection theory (third question)

58. The Commission has failed to grasp correctly the point of the third question. The Vergabekontrollsenat des Landes Wien does not seek to ascertain the importance of the level of competition in the market concerned in order to establish whether the public procurement directives apply, which is the subject-matter

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of the second question. More simply, the referring court asks whether a contracting entity or a contracting authority which carries out in parallel industrial or commercial activities in an open market, is, with regard to the those activities, subject to the 2004 directives if, by using mechanisms such as separate balance sheets and accounts, it eliminates the risk of cross-financing between the different spheres of its business activity.

59. The question is without pertinence so far as Directive 2004/17 is concerned, for, as I have indicated, contracting entities are governed by its provisions only when they carry out activities in the material sectors which form the subject-matter of the directive, unless those activities are pursued in conditions of free competition, in which case, pursuant to Article 30(1), the harmonising provisions of the directive do not apply.

60. The analysis is restricted, therefore, to establishing whether contracting authorities, in particular bodies governed by public law, which carry on activity in both competitive and closed markets, must comply with Directive 2004/18 when they award contracts in open markets in the circumstances set out in the third question (absence of cross-financing).

61. The infection theory is based on the objectives of the Community legislation harmonising public procurement, which are set out in paragraph 31 of this Opinion. The intention is that those who have the capacity to award contracts should be guided by economic criteria, thereby avoiding the temptation to follow other guidelines which give preference to national tenderers to the detriment of foreign ones, so contracting authorities' which, by definition, are capable of avoiding market forces, must in all cases comply with Directive 2004/18. In its definition of a public contract, that directive does not require the contract to be related to the contracting authority's task of meeting needs in the general interest (Article 1(2), in conjunction with Annexes I and II). The Court previously put forward that reasoning in the judgment in Mannesmann Anlagenbau Austria and Others (paragraph 32) in connection with Directive 93/37.

62. As the Court pointed out in paragraph 34 of that judgment, the infection theory is also based on the principle of legal certainty, in accordance with which the definition of a body governed by public law must not take into account the specific proportion of the industrial or commercial activities concerned.

63. In the Opinion in Impresa Portuale di Cagliari (paragraph 68), Advocate General Jacobs suggests an exception for cases where it may be demonstrated that there is complete economic, financial and accounting separation between the different types of activity of a body governed by public law.

64. I see no problem in accepting his suggestion in theory; (43) the prudence which must guide the framers of case-law requires it to be dismissed for, as the Community market now stands, experience teaches us that economic activities and business relationships are highly complex, making it extremely difficult to effect such a radical separation as that proposed by my colleague, which, as the order for reference states, appears possible only between independent undertakings, and, even then, not always. Even if the accounts are kept separately and cross-subsidisation is excluded, the strategic management, the structural decisions and the assets are one and there is nothing to guarantee that the different spheres of activity are watertight or that, in crisis situations, the rules of conduct of a closed market will not have an effect on those of an industrial or commercial activity, leading the contracting body governed by public law to be guided by sub-economic' criteria - a risk which would give rise to the application of the Community provisions harmonising the award of public contracts. Thus, the principle of legal certainty, on which the position of the Court in this area is founded, calls for those rules to be maintained.

65. In that regard, there are also many other practical obstacles, since the burden of proving that the activity concerned is independent from the other sectors of activity falls to the body

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governed by public law', so that it would be necessary to establish a method of reviewing (in advance or a posteriori) the initial decisions on procurement taken by that body and of verifying, first of all, that its different areas of activity are completely separate and, next, that the contract awarded falls within the sector excluded from Community harmonisation; otherwise, it would be possible to exclude at will the application of that body of rules. That approach complicates the intricate Community system of public procurement, (44) and it would not, therefore, be appropriate to adopt a solution which, without bestowing any benefit whatsoever, jeopardises a fundamental principle such as that of legal certainty.

66. In summary, I consider that, in any event, a body governed by public law' falls under Directive 2004/18, regardless of the nature of the contracts it concludes, unless those contracts are expressly excluded by the Directive (Articles 12 to 18).

VII - Conclusion

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

(1) Declare that it lacks jurisdiction to answer the questions referred for a preliminary ruling by the Vergabekontrollsenat des Landes Wien, because that body is not a court or tribunal within the meaning of Article 234 EC.

(2) In the alternative, if it were to hold the reference admissible, declare that:

(a) A contracting entity, within the meaning of Article 2(2) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, is not subject to the provisions of that directive when it carries out activities other than those referred to in Articles 3 to 7 thereof.

(b) The market which must be analysed for the purpose of determining its level of competition and ascertaining whether the undertaking Fenwärme Wien GmbH is a body governed by public law, for the purposes of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, is the market for the supply of district heating in the City of Vienna.

(c) Where tenders are invited by a body governed by public law for the contracts referred to in Directive 2004/18, those contracts are always governed by the provisions of that directive, even when they are performed in competitive conditions.'

(1) .

(2) - OJ 2004 L 134, pp. 114 and 1 respectively.

(3) - Case C44/96 [1998] ECR I73.

(4) - Case C174/03, not published in the European Court Reports (paragraph 68).

(5) - Case C17/00 [2001] ECR I9445.

(6) - LGBl., No 25/2003.

(7) - In the field of public procurement, the approximation of laws began with Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ English Special Edition: Series I Chapter 1971(II), p. 682), which, after a number of amendments, was consolidated under the same title in Directive 93/37/EEC of 14 June 1993 (OJ 1993 L 199, p. 54). The coordination of procedures for the award of public supply contracts was initially governed by Council Directive 77/62/EEC of 21 December 1976 (OJ 1977 L 13, p.

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1) and subsequently by Council Directive 93/36/EEC of 14 June 1993 (OJ 1993 L 199, p. 1). Public service contracts were subject to Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1). Prior to their inclusion in Directive 2004/18, the foregoing provisions were updated in European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1).

(8) - The directive succeeds Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

(9) - A 99.999% stake is held by Wien Energie GMBH and a 0.001% stake by Wiener Stadwerke Holding AG. The former is owned by the latter, whose sole shareholder is the City of Vienna.

(10) - Case C92/00 [2002] ECR I5553.

(11) - Barav, A., Tâtonnement préjudiciel. La notion de juridiction en droit communautaire', Liber amicorum Bo Vesterdorf, Emile Bruylant, Brussels, 2007 (printing underway), draws attention to the ambiguous inconsistency of the caselaw which persists in focusing on characteristics which, for the most part, are neither specific nor exclusive to the concept of a court or tribunal, thereby making it more difficult to define the term correctly.

(12) - Moitinho de Almeida, J.C., La notion de juridiction d`un Etat membre (article 177 du traité CE)', Mélanges F. Schockweiler, Baden-Baden, Nomos Verlagsgesellschaft, pp. 463, 464 and 478, observes that the development of Community case-law has given rise to a number of uncertainties which the Court must resolve.

(13) - That fact is not mentioned in the judgment in HI.

(14) - [2007] ECR I00000.

(15) - By way of example, in addition to HI , attention should also be drawn to Case C470/99 Universale-Bau [2002] ECR I11617.

(16) - In the Opinion in Case C54/96 Dorsch Consult [1997] ECR I4961, Advocate General Tesauro observed that, if a body is not a judicial body, it does not become one simply because there is no better solution' (paragraph 40).

(17) - As I pointed out in the Opinion in Case C259/04 Emanuel [2006] ECR I3089, paragraph 26.

(18) - Sarmiento, D., Poder Judicial e integracion europea. La construccion de un modelo jurisdiccional para la Union, Thomson-Civitas, Madrid, 2004, pp. 201 to 203, analyses the influence of the De Coster Opinion on subsequent case-law.

(19) - Case C516/99 [2002] ECR I4573.

(20) - Case C53/03 [2005] ECR I4609.

(21) - In connection with that administrative body, Lenaers, K., Arts, D., and Maselis, I., Procedural Law of the European Union', Robert Bray editor, London, Sweet & Maxwell, 2006, pp. 40 and 41, describe the transition of the Court of Justice towards a more restrictive construction of the concept of court or tribunal.

(22) - Joined Cases C110/98 to C147/98 Gabalfrisa and Others [2000] ECR I1577.

(23) - Case C67/91 Asociacion Española de Banca Privada and Others [1992] ECR I4785.

(24) - Sarmiento, D., op. cit., p. 200, asserts that the De Coster opinion amounted to the strongest attack on the case-law of the Court of Justice in that area' and that it provides some order in the chaos of the case-law'.

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(25) - Cienfuegos, M., La nocion comunitaria de organo jurisdiccional de un Estado miembro ex artículo 234 del Tratado CE y su necesaria revision', Gaceta Jurídica de la Union Europea y de la Competencia, July/August 2005, No 238, p. 26, warns of the insufficiency of interim solutions, such as making stricter the traditional criterion of the independence of the referring court, by tailoring its application to each individual case, and proposes, in line with the De Coster Opinion, a general alteration of the definition of court or tribunal.

(26) - Inter alia , the judgments in Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraph 18 in fine; Case C360/96 BFI Holding [1998] ECR I6821, paragraph 41; Case C380/98 University of Cambridge [2000] ECR I8035, paragraph 16; and Case C237/99 Commission v France [2001] ECR I939, paragraph 41.

(27) - Judgments in Mannesmann Anlagenbau and Others , paragraph 33; BFI Holding , paragraph 42; University of Cambridge , paragraph 17; and Commission v France , paragraph 42.

(28) - Articles 3(4) and (5) of Directive 71/305 and 2(2) of Directive 77/62.

(29) - Fourth to sixth recitals in the preamble to Directive 71/305 and sixth to eighth recitals in the preamble to Directive 77/62. That view is confirmed in the recital 8 in the preamble to Directive 93/38.

(30) - That recital excludes from the scope of Directive 93/38... activities of those entities which either fall outside the sectors of water, energy and transport services or outside the telecommunications sector, or which fall within those sectors but are nevertheless directly exposed to competitive forces in markets to which entry is unrestricted'.

(31) - Joined Cases C462/03 and C463/03 [2005] ECR I5397, which, by decision of the Court, was decided without an advocate general's opinion.

(32) - The Court has taken a generous approach to the definition of needs in the general interest'. The Court has not restricted the definition to the institutional operation of the State or to the concept of public order (judgments in Mannesmann Anlagenbau Austria and Others paragraph 24, and Case C283/00 Commission v Spain [2003] ECR I11697, paragraph 85), and has extended it to the organisation of fairs, exhibitions and other similar initiatives (judgment in Joined Cases C223/99 and C260/99 Agorà and Excelsior [2001] ECR I3605, paragraphs 33 and 34); to the buying, selling and leasing of properties and the supply of property management services for a local authority (judgment in Case C18/01 Korhonen and Others [2003] ECR I5321, paragraphs 41 and 45); and to the construction of housing intended for selling or leasing to families of low means (judgment in Commission v France , paragraph 47).

(33) - Judgments in Case C373/00 Adolf Truley [2003] ECR I1931, paragraph 66, and Korhonen and Others , paragraphs 48 and 59.

(34) - Judgment in Korhonen and Others , paragraph 59.

(35) - Judgment in BFI Holding , paragraph 40.

(36) - Judgments in BFI Holding , paragraph 49; Agorà and Excelsior , paragraph 38 in fine ; and Adolf Truley , paragraph 60.

(37) - Judgments in BFI Holding , paragraph 43, and Adolf Truley , paragraph 61. According to paragraph 44 of the judgment in BFI Holding , it is hard to imagine any activities that could not be carried on by private undertakings, and therefore the absence of competition would render meaningless the term body governed by public law' used in the directives.

(38) - Judgment in BFI Holding , paragraph 47 in fine.

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(39) - In BFI Holding , the Court noted that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term needs in the general interest' (paragraph 32).

(40) - Judgments in Case C353/96 Commission v Ireland [1998] ECR I8565, paragraph 36; BFI Holding , paragraph 62; Commission v France, paragraph 43; Case C214/00 Commission v Spain [2003] ECR I4667, paragraph 53; and Commission v Spain (C283/00), paragraph 73.

(41) - In that case the Court held that the activities pursued by a body should be taken into account to establish whether the body was established to meet needs in the general interest, not having an industrial or commercial character (paragraph 56).

(42) - For similar reasoning see the judgments in BFI Holding (paragraphs 55 and 56), Adolf Truley (paragraph 56) and Korhonen and Others (paragraph 58).

(43) - In fact, Advocate General Jacobs seeks to transfer to the field of public procurement concepts from the field of State aid which is incompatible with the common market, which is the subject-matter of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17), and of its identically titled predecessor Commission Directive 80/723/EEC of 25 June 1980 (OJ 1980 L 195, p. 35).

(44) - In the Opinion cited (paragraph 60), Advocate General Jacobs draws attention to that complexity, which is also pointed out by the Commission in its Communication - Public procurement in the European Union, COM(98) 143 final, of 11 March 1998, p. 3, and in the Green Paper - Public procurement in the European Union: exploring the way forward, COM(96) 583 final, of 27 November 1996, p. 5, point 2.10, and p. 8, point 3.6.

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AUTHOR	Court of Justice of the European Communities
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JURCIT	11997E-A234 : N 5 22 24 29 67 31971L0305 : N 9 31971L0305-A03P4 : N 37 31971L0305-A03P5 : N 37 31971L0305-C4 : N 37 31971L0305-C5 : N 37 31971L0305-C6 : N 37 31977L0062 : N 9

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62004C0259-N26 : N 27
62006J0195-N35 : N 26
62006J0195-N36 : N 26

SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Competition ; Approximation of laws
AUTLANG	Spanish
NATIONA	Austria
PROCEDU	Reference for a preliminary ruling
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Reference for a preliminary ruling from the Vergabekontrollsenat des Landes Wien (Austria) lodged on 22 September 2006 - Ing. Aigner, Wasser-Wärme-Umwelt GmbH v Fernwärme Wien GmbH

(Case C-393/06)

Language of the case: German

Referring court

Vergabekontrollsenat des Landes Wien

Parties to the main proceedings

Applicant: Ing. Aigner, Wasser-Wärme-Umwelt GmbH

Defendant: Fernwärme Wien GmbH

Questions referred

Must Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [1] (OJ 2004 L 134, p. 1) ('Directive 2004/17/EC') be interpreted as meaning that a contracting entity which pursues one of the sectoral activities referred to in Article 3 of that directive also falls within the scope of that directive in relation to an activity pursued in parallel under competitive conditions?

In the event that this is the case only in respect of contracting authorities: must an undertaking such as Fernwärme Wien GmbH. be characterised as a body governed by public law within the meaning of Directive 2004/17/EC or Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2] (OJ 2004 L 134, p. 114) ('Directive 2004/18/EC') if it provides district heating in a given area without any real competition, or must the market for domestic heating, which also includes energy sources such as gas, oil, coal etc., be taken into account?

Must an activity pursued under competitive conditions by a company which also pursues activities of a non-industrial or non-commercial nature be included within the scope of Directive 2004/17/EC or Directive 2004/18/EC if, through effective precautions such as separate balance sheets and accounts, cross-financing of the activities pursued under competitive conditions can be excluded?

_____

[1] - OJ L, 134, p. 1

[2] - OJ L, 134, p. 114

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ORDONNANCE DU PRÉSIDENT DE LA COUR

15 mai 2007(*)

«Radiation»

Dans l'affaire C-378/06,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Conseil d'État (Belgique), par décision du 31 août 2006, parvenue à la Cour le 15 septembre 2006, dans la procédure

Clear Channel Belgium SA

contre

Ville de Liège,

en présence de :

J.-C. Decaux Belgium SA,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M^me^ J. Kokott, entendu,

rend la présente

Ordonnance

1 Par lettre du 19 mars 2007, parvenue au greffe de la Cour le 22 mars 2007, le Conseil d'État a informé la Cour qu'il n'entendait pas maintenir son renvoi préjudiciel.

2 Dans ces conditions, il y a lieu d'ordonner la radiation de la présente affaire du registre de la Cour.

3 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, le président de la Cour ordonne:

L'affaire C-378/06 est radiée du registre de la Cour.

Fait à Luxembourg, le 15 mai 2007.

Le greffier
R. Grass

Le président
V. Skouris

* Langue de procédure: le français

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Order of the President of the Court of 15 May 2007 (reference for a preliminary ruling from the Conseil d'Etat - Belgium) - Clear Channel Belgium S.A. v City of Liège

(Case C-378/06) [1]

Language of the case: French

The President of the Court has ordered that the case be removed from the register.

_____

1 -

2 - OJ C 261, 28.10.2006.

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Reference for a preliminary ruling from the Conseil d'Etat (Belgium) lodged on 15 September 2006 - Clear Channel Belgium S.A. v City of Liège

(Case C-378/06)

Language of the case: French

Referring court

Conseil d'Etat (Belgium)

Parties to the main proceedings

Applicant: Clear Channel Belgium S.A.

Defendant: City of Liège

Intervener: J.-C. Decaux Belgium S.A.

Questions referred

Does a contract classified as a 'licence in respect of public land' exclude the application of Council Directive 92/50/EEC [1] of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, where, notwithstanding the award by the municipal authority to the contractor of the exclusive right to exploit for profit advertising space on street furniture supplied to the municipal authority, the contract requires the contractor to supply a number of services for the benefit of the authority (provision of street furniture, and of space for municipal posters)?

Where there is no price in the classic sense of that term, may the valuable consideration for the services supplied to the municipal authority consist in the waiver by the authority of advertising revenue from which the financial payments and contributions in kind and display fees provided for in the contract are, as in this case, to be deducted?

3. Does the principal or ancillary nature of the various obligations provided for in the contract have any relevance to the application of the aforementioned directive?'

_____

[1] - OJ L 209, 24.07.1992, p. 1.

**Judgment of the Court (Fourth Chamber)
of 18 December 2007
Frigerio Luigi & C. Snc v Comune di Triuggio. Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy. Directive 92/50/EEC - Public service contracts - National legislation restricting the award of local public services of economic interest to companies with share capital - Compatibility. Case C-357/06.**

In Case C357/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 16 June 2006, received at the Court on 30 August 2006, in the proceedings

Frigerio Luigi & C. Snc

v

Comune di Triuggio,

intervening party:

Azienda Servizi Multisettoriali Lombarda - A.S.M.L. SpA,

THE COURT (Fourth Chamber),

composed of G. Arestis, President of the Eighth Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhasz (Rapporteur), J. Malenovsku and T. von Danwitz, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 October 2007,

after considering the observations submitted on behalf of:

- Frigerio Luigi & C. Snc, by M. Boifava, avvocato,

- the Commission of the European Communities, by C. Zadra and X. Lewis, acting as Agents,

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

gives the following

Judgment

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

Article 26(1) and (2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, precludes national provisions, such as those at issue in the main proceedings, which exclude candidates or tenderers entitled under the law of the Member State concerned to provide the service in question, including those composed of groups of service providers, from submitting a tender, in a procedure for the award of a public service contract with a value greater than the threshold for application of Directive 92/50, solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons, namely that of a company with share capital. It is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in accordance with the requirements of Community law and, in so far as such an interpretation is not possible, to disapply any provision of national law which is contrary to those requirements.

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1. The reference for a preliminary ruling concerns the interpretation of Article 26 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1) (Directive 92/50'), Article 4(1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), Articles 39 EC, 43 EC, 48 EC and 81 EC, Article 9 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) (Directive 75/442'), and Article 7 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

2. That reference has been submitted in the course of proceedings between Frigerio Luigi & C. Snc (Frigerio'), a partnership under Italian law, and the Comune di Triuggio (Municipality of Triuggio) concerning the award of a contract for the operation of environmental hygiene services.

Legal context

Community legislation

3. Directive 92/50 seeks to coordinate procurement procedures for the award of public service contracts. According to the second recital in the preamble thereto, the directive contributes to the progressive establishment of the internal market, which consists of an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

4. The sixth recital in the preamble to that directive states, inter alia, that obstacles to the free movement of services are to be avoided and that, therefore, service providers may be either natural or legal persons.

5. Pursuant to the twentieth recital in the preamble to that directive, in order to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts.

6. Article 26 of Directive 92/50 is worded as follows:

1. Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.

2. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity, shall not be rejected solely on the grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be either natural or legal persons.

3. Legal persons may be required to indicate in the tender or the request for participation the names and relevant professional qualifications of the staff to be responsible for the performance of the service.'

7. Directive 92/50 was repealed, with the exception of Article 41 thereof, with effect from 31 January 2006 and replaced by Directive 2004/18. The wording of Article 26 of Directive 92/50 was essentially reproduced in Article 4 of Directive 2004/18.

National legislation

8. Legislative Decree No 267 laying down the consolidated text of the laws on the organisation of local bodies (testo unico delle leggi sull'ordinamento degli enti locali), of 18 August 2000 (Ordinary Supplement to GURI No 227 of 28 September 2000), as amended by Decree-Law No 269

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laying down urgent measures to promote development and correct the state of public finances (disposizioni urgenti per favorire lo sviluppo e per la correzione dell'andamento dei conti pubblici) of 30 September 2003 (Ordinary Supplement to GURI No 229 of 2 October 2003) converted into law, after amendment, by Law No 326 of 24 November 2003 (Ordinary Supplement to GURI No 274 of 25 November 2003) (Legislative Decree No 267/2000'), regulates, inter alia, the procedure for the award of contracts relating to the operation of local public services of economic interest. Article 113(5) of Legislative Decree No 267/2000 provides:

5. The service contract is to be awarded in accordance with the rules of the sector and the legislation of the European Union, with entitlement to provide the service being granted to:

(a) companies with share capital selected by means of public and open tendering procedures;

(b) companies with share capital with mixed public and private ownership in which the private partner is selected by means of public and open tendering procedures that have ensured compliance with domestic and Community legislation on competition in accordance with guidelines issued by the competent authorities in specific regulations or circulars;

(c) companies with share capital belonging entirely to the public sector on condition that the public authority or authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities'.

9. As regards the specific sector of waste, Article 2(6) of Law No 26 of the Lombardy Region laying down rules for local services of general economic interest - Provisions regarding waste management, energy, use of the subsoil and water resources (disciplina dei servizi locali di interesse economico generale. Norme in materia di gestione dei rifiuti, di energia, di utilizzo del sottosuolo e di risorse idriche) of 12 December 2003 (Ordinary supplement to the Bollettino Ufficiale della Regione Lombardia No 51 of 16 December 2003; Regional Law No 26') provides:

Entitlement to provide services shall be granted to companies with share capital selected by public and open tendering procedures or procedures compatible with national and Community competition rules; ...'

10. Under Article 198(1) of Legislative Decree No 152 on provisions regarding the environment (norme in materia ambiente) of 3 April 2006 (Ordinary Supplement to GURI No 88 of 14 April 2006):

... the municipalities shall continue to manage urban waste and similar waste for disposal on an exclusive basis on the terms referred to in Article 113(5) of Legislative Decree [No 267/2000].'

The factual background and the questions referred for a preliminary ruling

11. By Resolution No 53 of 29 November 2005 (Resolution No 53'), the Municipal Council of the Comune di Triuggio entrusted for a period of five years from 1 July 2006 the operation of environmental hygiene services within the municipality to Azienda Servizi Multisettoriali Lombarda - A.S.M.L. SpA. (ASML').

12. By the same resolution, that Council undertook to acquire a shareholding allowing the municipal administration to become a member for all purposes and also to restructure and regulate, from both the organisational and functional points of view, relations with [ASML] for the purpose of creating for the [Comune di Triuggio] a power of supervision and control of that undertaking comparable to the power it has over its own departments'.

13. Frigerio, which had operated the services in question from 1 January 1996 to 30 June 2006 by way of a temporary joint venture with another partnership under Italian law, brought an action

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against Resolution No 53 before the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court). In that action, it submitted that the Municipal Council of the Comune di Triuggio was not entitled directly to award the contract at issue, but was required to put it out to tender, in accordance with the Community legislation applicable to public procurement and with Article 113(5) of Legislative Decree No 267/2000.

14. The Comune di Triuggio and ASML contended that that action should be dismissed, but also, in the alternative, that it was inadmissible. In this respect, they maintain, inter alia, that the action is inadmissible because of Frigerio's lack of legal interest in bringing proceedings, since that entity, which is constituted in the legal form of a (general) partnership, is not entitled to put itself forward for the award of the contract in question, since Article 113(5) of Legislative Decree No 267/2000 allows only companies with share capital to be awarded local public service contracts, such as the environmental hygiene contract.

15. In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Does Article 4(1) of Directive [2004/18], or the analogous Article 26(2) of Directive [92/50] (in the event that the latter is regarded as the legislative point of reference), according to which candidates or tenderers who, on the basis of the legislation of the Member State in which they are established, are authorised to provide the service at issue may not be rejected solely because, under the provisions in force in the Member State in which the contract is to be awarded, they would be required to be natural persons or legal persons, lay down a fundamental principle of Community law such as to override the formal limitation laid down by Article 113(5) of Legislative Decree No 267/2000 and by Articles 2(6) and 15(1) of Regional Law [No 26], and is it therefore capable of compelling compliance in such a way as to allow persons not having the status of companies with share capital to participate in tendering procedures?

(2) In the event that the Court does not consider the above rules to be the expression of a fundamental principle of Community law, does Article 4(1) of Directive [2004/18] or the analogous Article 26(2) of Directive [92/50] (in the event that the latter is regarded as the legislative point of reference) constitute, rather, an implicit corollary or a derivative principle of the principle of competition, viewed in conjunction with those concerning administrative transparency and non-discrimination on grounds of nationality, and does it therefore, as such, have immediate binding effect and take precedence over any possibly conflicting domestic provisions laid down by Member States to govern public works contracts falling outside the scope of the direct applicability of Community law?

(3) Are Article 113(5) of Legislative Decree No 267/2000 and Articles 2(6) and 15(1) of Regional Law [No 26] compatible with the Community principles set out in Article 39 [EC] (principle of free movement of workers within the Community), Article 43 [EC] (freedom of establishment), Articles 48 [EC] and 81 [EC] (agreements restricting competition)... , and therefore, in the event of a conflict being identified, must the abovementioned national provisions be disapplied as conflicting with Community provisions that have direct binding effect and take precedence over domestic provisions?

(4) Are Article 113(5) of Legislative Decree No 267/2000 and Articles 2(6) and 15(1) of Regional Law [No 26] compatible with Article 9(1) of Directive [75/442] or the analogous Article 7(2) of Directive [2006/12] (in the event that the latter is regarded as the legislative point of reference), which provide, respectively, that... any establishment or undertaking which carries out the operations specified in Annex II A [to Directive 75/442] must obtain a permit from the competent authority referred to in Article 6 [of that directive] and that [t]he plans referred to in paragraph 1 [of Article 7 of Directive 2006/12] may, for example, cover: (a) the natural or legal persons empowered to carry out waste management... ?'

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The questions referred

The first and second questions

16. As a preliminary point, it should be observed that it is settled case-law that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in a case is a matter for the national court (see, inter alia, Case C235/95 Dumon and Froment [1998] ECR I4531, paragraph 25; Case C-13/05 Chacon Navas [2006] ECR I6467, paragraph 32, and Case C251/06 ING. AUER [2007] ECR I-0000, paragraph 19).

17. In this connection, it is apparent from the order for reference, and in particular from the first and second questions referred, that the national court is basing its decision on the premise that the contract at issue in the main proceedings falls within the scope of one of the Community directives on public service contracts, that is, either Directive 92/50 or Directive 2004/18. That premise is also supported by the evidence submitted to the Court, such as Resolution No 53, the text of which is attached to Frigerio's observations and which shows that the value of the contract at issue in the main proceedings is greater than the threshold laid down in those directives. In addition, it is apparent from the observations submitted at the hearing that the consideration for that contract is provided by the Comune di Triuggio, with the result that it cannot be deemed to be a concession of a public service.

18. In those circumstances, and having regard to the fact that that resolution dates from 29 November 2005, it must be held that Directive 92/50 applies ratione materiæ and ratione temporis to the facts of the case in the main proceedings.

19. Therefore, the first and second questions, which should be examined together, should be reformulated as meaning that the referring court is asking, primarily, whether Article 26(2) of Directive 92/50 precludes national provisions, such as those at issue in the main proceedings, which restrict the submission of tenders in a procedure for the award of a public service contract to parties having the legal form of a company with share capital. As a subsidiary question, that court is inquiring as to the consequences of an affirmative answer on the interpretation and application of the national law.

20. In accordance with Article 26(2) of Directive 92/50, the adjudicating authorities may not reject candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity solely on the ground that, under the law of the Member State in which the contract is awarded, they would have been required to be either natural or legal persons.

21. It stems from that provision that the adjudicating authorities also cannot exclude candidates or tenderers who are entitled, under the law of the Mem ber State concerned, to carry out the relevant service activity from a tendering procedure solely on the ground that their legal form does not correspond to a specific category of legal persons.

22. It follows that Article 26(2) of Directive 92/50 precludes any national legislation which excludes candidates or tenderers entitled under the law of the Member State concerned to carry out the relevant service activity from the award of public services contracts with a value greater than the threshold for the application of Directive 92/50 solely on the ground that those candidates or tenderers do not have the legal form corresponding to a specific category of legal persons.

23. Consequently, national provisions such as those at issue in the main proceedings, which restrict to companies with share capital the award of local public service contracts of economic interest with a value greater than the threshold for the application of Directive 92/50, are not compatible

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with Article 26(2) of that directive.

24. As regards the facts at the origin of the dispute in the main proceedings, the file shows that Frigerio brought the action in the main proceedings as the principal entity in a temporary joint venture which had provided environmental hygiene services for the Comune di Triuggio between 1 January 1996 and 30 June 2006.

25. In that regard, it also follows from Article 26(1) of Directive 92/50 that adjudicating authorities cannot require groups of service providers to assume a specific legal form in order to submit a tender.

26. Furthermore, it is not disputed before the Court that, under Italian law, Frigerio was entitled in its legal form, that is to say, as a partnership, to provide the environmental hygiene services. In this respect, the referring court states inter alia that Frigerio is registered as being entitled to operate within the waste sector.

27. As has been pointed out in paragraph 19 of this judgment, the referring court is also inquiring, as a subsidiary question, as to the consequences of a finding that national provisions such as those at issue in the main proceedings are not in conformity with Directive 92/50.

28. Suffice it to note in that regard that, according to established case-law, it is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in conformity with the requirements of Community law. Where such an application is not possible, the national court must apply Community law in its entirety and protect rights which the latter confers on individuals, disapplying, if necessary, any contrary provision of domestic law (see, to that effect, Case 157/86 Murphy and Others [1988] ECR 673, paragraph 11, and Case C208/05 ITC [2007] ECR I181, paragraphs 68 and 69).

29. In the light of the foregoing, the answer to the first and second questions referred is that Article 26(1) and (2) of Directive 92/50 precludes national provisions, such as those at issue in the main proceedings, which exclude candidates or tenderers entitled under the law of the Member State concerned to provide the service in question, including those composed of groups of service providers, from submitting a tender, in a procedure for the award of a public service contract with a value greater than the threshold for application of Directive 92/50, solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons, namely that of a company with share capital. It is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in accordance with the requirements of Community law and, in so far as such an interpretation is not possible, to disapply any provision of national law which is contrary to those requirements.

The third and fourth questions

30. By its third and fourth questions, the referring court is essentially asking whether national provisions such as those at issue in the main proceedings are in conformity with Articles 39 EC, 43 EC, 48 EC and 81 EC and Directives 75/442 and 2006/12.

31. Since, as is apparent from paragraph 18 above, the facts at issue in the main proceedings fall within the scope of application of Directive 92/50 and the interpretation of that directive provides the information necessary to enable the referring court to resolve the case before it, an examination of the abovementioned Community provisions would be of purely academic interest. Consequently, in accordance with established case-law, there is no need to answer the third and fourth questions referred (see, to that effect, Case C-144/04 Mangold [2005] ECR I-9981, paragraphs 36 and 37, and Case C-212/04 Adeneler and Others [2006] ECR I-6057, paragraphs 42 and 43).

Costs

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

DOCNUM	62006J0357
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
DOC	2007/12/18
LODGED	2006/08/30
JURCIT	11997E039 : N 1 15 30 11997E043 : N 1 15 30 11997E048 : N 1 15 30 11997E081 : N 1 15 30 11997E234 : N 16 31975L0442 : N 30 31975L0442-A09 : N 1 31975L0442-A09P1 : N 15 31975L0442-N2A : N 15 31991L0156 : N 1 31992L0050 : N 3 18 27 31 31992L0050-A26 : N 1 6 7 31992L0050-A26P1 : N 25 29 31992L0050-A26P2 : N 15 19 20 23 29 31992L0050-A41 : N 7 32001L0078 : N 1 32004L0018 : N 1 7 17 32004L0018-A04 : N 7 32004L0018-A04P1 : N 15 32006L0012 : N 30 32006L0012-A07 : N 1 32006L0012-A07P1 : N 15 32006L0012-A07P2 : N 15 61986J0157 : N 28 61995J0235 : N 16 62004J0144 : N 31 62004J0212 : N 31 62005J0013 : N 16

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	62005J0208 : N 28 62006J0251 : N 16
CONCERNS	Interprets 31992L0050 -A26P1 Interprets 31992L0050 -A26P2 Interprets 32001L0078 -
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Competition ; Approximation of laws ; Environment
AUTLANG	Italian
OBSERV	Commission ; Institutions
NATIONA	Italy
NATCOUR	*A9* Tribunale Amministrativo Regionale per la Lombardia, ordinanza del 16/06/2006 (117/06)
PROCEDU	Reference for a preliminary ruling
ADVGEN	Ruiz-Jarabo Colomer
JUDGRAP	Juhasz
DATES	of document: 18/12/2007 of application: 30/08/2006

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Case C-357/06

Frigerio Luigi & C. Snc

v

Comune di Triuggio

(Reference for a preliminary ruling from the
Tribunale amministrativo regionale per la Lombardia)

(Directive 92/50/EEC – Public service contracts – National legislation restricting the award of local public services of economic interest to companies with share capital – Compatibility)

Summary of the Judgment

1. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Economic operators*

(Council Directive 92/50, Art. 26(1) and (2))

2. *Community law – Direct effect – Directly applicable provision of the Treaty – Obligations of national courts*

1. Article 26(1) and (2) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78, precludes national provisions which exclude candidates or tenderers entitled under the law of the Member State concerned to provide the service in question, including those composed of groups of service providers, from submitting a tender, in a procedure for the award of a public service contract with a value greater than the threshold for application of Directive 92/50, solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons, namely that of a company with share capital.

2. It is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in accordance with the requirements of Community law and, in so far as such an interpretation is not possible, to disapply any provision of national law which is contrary to those requirements.

(see paras 28, 29, operative part)

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Judgment of the Court (Fourth Chamber) of 18 December 2007 (reference for a preliminary ruling from the Tribunale amministrativo regionale per la Lombardia, Italy) - Frigerio Luigi & C. Snc v Comune di Triuggio

(Case C-357/06) [1]

(Directive 92/50/EEC - Public service contracts - National legislation restricting the award of local public services of economic interest to companies with share capital - Compatibility)

Language of the case: Italian

Referring court

Tribunale amministrativo regionale per la Lombardia (Italy)

Parties to the main proceedings

Applicant: Frigerio Luigi & C. Snc

Defendant: Comune di Triuggio

Intervening party: Azienda Servizi Multisettoriali Lombarda - A.S.M.L. SpA

Re:

Preliminary ruling - Tribunale amministrativo regionale per la Lombardia - Interpretation of Arts 39, 43, 48 and 81 EC, Article 26(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), Article 4(1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), Article 9(1) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39) and Article 7(1) of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9) - Procedure for the award of public service contracts - Environmental hygiene service - Domestic legislation authorising joint stock companies alone to hold contracts for waste management and disposal services

Operative part of the judgment

Article 26(1) and (2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, precludes national provisions, such as those at issue in the main proceedings, which exclude candidates or tenderers entitled under the law of the Member State concerned to provide the service in question, including those composed of groups of service providers, from submitting a tender, in a procedure for the award of a public service contract with a value greater than the threshold for application of Directive 92/50, solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons, namely that of a company with share capital. It is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in accordance with the requirements of Community law and, in so far as such an interpretation is not possible, to disapply any provision of national law which is contrary to those requirements.

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[1] - OJ C 281, 18.11.2006.

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Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia (Italy) lodged on 30 August 2006 - Frigerio Luigi & C. S.n.c. v Comune di Triuggio

(Case C-357/06)

Language of the case: Italian

Referring court

The Tribunale Amministrativo Regionale per la Lombardia

Parties to the main proceedings

Applicant: Frigerio Luigi & C. S.n.c.

Defendant: Comune di Triuggio

Questions referred

Does Article 4(1) of Directive 2004/18/EC, [1] or the analogous Article 26(2) of Directive 92/50/EEC [2] (in the event that the latter is regarded as the legislative point of reference), according to which candidates and tenderers who, on the basis of the legislation of the Member State in which they are established, are authorised to provide the service at issue may not be rejected solely because, under the provisions in force in the Member State in which the contract is to be awarded, they would be required to be natural persons or legal persons, lay down a fundamental principle of Community law such as to override the formal limitation laid down by Article 113(5) of Legislative Decree No 267/2000 and by Articles 2(6) and 15(1) of Regional Lombardy Law No 26 of 12 December 2003, and is it therefore capable of compelling compliance in such a way as to allow persons not having the status of joint stock companies to participate in tendering procedures?

In the event that the Court does not consider the above rules to be the expression of a fundamental principle of Community law, does Article 4(1) of Directive 2004/18/EC or the analogous Article 26(2) of Directive 92/50 (in the event that the latter is regarded as the legislative point of reference) constitute, rather, an implicit corollary or a 'derivative principle' of the principle of competition, viewed in conjunction with those concerning administrative transparency and non-discrimination on grounds of nationality, and does it therefore, as such, have immediate binding effect and take precedence over any possibly conflicting domestic provisions laid down by Member States to govern public works contracts falling outside the scope of the direct applicability of Community law?

Are Article 113(5) of Legislative Decree No 267/2000 and Articles 2(6) and 15(1) of the Regional Lombardy Law of 12 December 2003 compatible with the Community principles set out in Article 39 (free movement of workers within the Community), Article 43 (freedom of establishment), Articles 48 and 81 (agreements restricting competition) of the Treaty establishing the European Community, and therefore, in the event of a conflict being identified, must the abovementioned national provisions be disapplied as conflicting with Community provisions that have direct binding effect and take precedence over domestic provisions?

Are Article 113(5) of Legislative Decree No 267/2000 and Articles 2(6) and 15(1) of the Regional Lombardy Law of 12 December 2003 compatible with Article 9(1) of Directive 75/442/EEC or the analogous Article 7(2) of Directive 2006/12/EC of 5 April 2006 (in the event that the latter is regarded as the legislative point of reference), which provide, respectively, that 'any establishment or undertaking which carries out the operations specified in Annex II A must obtain a permit from the competent authority referred to in Article 6.' and ' SEQ CHAPTER \h \r 1[t]he plans referred to in paragraph 1 may, for example, cover: (a) the natural or legal persons empowered to carry out waste management'?

_____

[1] - OJ L 134, p. 114.

[2] - OJ L 209, p. 1.

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JUDGMENT OF THE COURT (Second Chamber)

3 April 2008 (*)

(Article 49 EC – Freedom to provide services – Restrictions –Directive 96/71/EC – Posting of workers in the context of the provision of services – Procedures for the award of public works contracts – Social protection of workers)

In Case C–346/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Oberlandesgericht Celle (Germany), made by decision of 3 August 2006, received at the Court on 11 August 2006, in the proceedings

Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG,

v

Land Niedersachsen,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J. Makarczyk, P. Kūris, J.–C. Bonichot and C. Toader, Judges,

Advocate General: Y. Bot,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 5 July 2007,

after considering the observations submitted on behalf of:

– Land Niedersachsen, by R. Thode, Rechtsanwalt,

– the German Government, by M. Lumma, acting as Agent,

– the Belgian Government, by A. Hubert, acting as Agent,

– the Danish Government, by J. Bering Liisberg, acting as Agent,

– the French Government, by G. de Bergues and O. Christmann, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, assisted by N. Travers, BL, and B. O'Moore, SC,

– the Cypriot Government, by E. Neofitou, acting as Agent,

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

– the Polish Government, by E. Ośniecka–Tamecka and M. Szymańska, acting as Agents, and by A. Dzięcielak, expert,

– the Finnish Government, by E. Bygglin, acting as Agent,

– the Norwegian Government, by A. Eide and E. Sivertsen, acting as Agents,

– the Commission of the European Communities, by E. Traversa and C. Ladenburger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 49 EC.

2 The reference has been made in the context of proceedings between Mr Rüffert, acting in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG ('Objekt und Bauregie'), and Land Niedersachsen (the *Land* of Lower Saxony), concerning the termination of a works contract which had been concluded between the *Land* and Objekt und Bauregie.

Legal context

Community legislation

3 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), provides in Article 1, entitled 'Scope':

'1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

...

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

...'

4 Under Article 3 of Directive 96/71, entitled 'Terms and conditions of employment':

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision,

and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

...

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

...

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

...

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

...

8. "Collective agreements or arbitration awards which have been declared universally applicable" means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

– collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned,

and/or

– collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

...'

The national legislation

5 The Law of Land Niedersachsen on the award of public contracts (Landesvergabegesetz Nds., 'the Landesvergabegesetz') contains provisions on the award of public contracts in so far as they have a minimum value of EUR 10 000. The preamble to the Law states:

'The Law counteracts distortions of competition which arise in the field of construction and local public transport services resulting from the use of cheap labour and alleviates burdens on social security schemes. It provides, to that end, that public contracting authorities may award contracts for building works and local public transport services only to undertakings which pay the wage laid down in the collective agreements at the place where the service is provided.

...'

6 Under Paragraph 3(1) of the Landesvergabegesetz, headed 'Declaration that the collective agreements will be complied with':

'Contracts for building services shall be awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement at the place where those services are performed and at the time prescribed by the collective agreement. For the purposes of the first sentence, the term "services" means services provided by the principal contractor and by subcontractors. The first sentence shall also apply to the award of transport services in local public transport.'

7 Paragraph 4(1) of the Law, headed 'Use of subcontractors', provides:

'The contractor may assign to subcontractors services for which his establishment is set up only

where the contracting authority has given written consent in a given case. The tenderers are required at the stage they lodge their tenders to state which services are to be devolved to subcontractors. In so far as services are assigned to subcontractors, the contractor must also undertake to impose on the subcontractors the obligations laid down in Paragraphs 3, 4 and 7(2) applicable to contractors and to monitor compliance with these obligations by the subcontractors.'

8 Paragraph 6 of the Law, headed 'Proof', provides:

'(1) A tender shall be excluded from assessment where the tenderer fails to produce the following documents:

...

3. a declaration that the collective agreements will be complied with, pursuant to Paragraph 3.

...

(2) Where the performance of part of a contract is to be assigned to a subcontractor, the proof referred to in subparagraph (1) relating to the subcontractor must also be furnished when the contract is awarded.'

9 Paragraph 8 of the Landesvergabegesetz, headed 'Penalties', provides:

'(1) In order to ensure compliance with the obligations under Paragraphs 3, 4 and 7(2), public contracting authorities shall agree with the contractor for each case of culpable non-fulfilment a contractual penalty of 1%, and in the case of several cases of non-fulfilment a contractual penalty of up to 10%, of the contract value. The contractor shall be obliged to pay a contractual penalty under the first sentence also in the event that there is non–fulfilment on the part of a subcontractor used by it or a subcontractor used by that subcontractor, unless the contractor was not aware or could not have been aware of the non-fulfilment. Where the contractual penalty imposed is disproportionately high, the contracting authority may reduce it to the appropriate amount at the request of the contractor.

(2) The public contracting authorities shall agree with the contractor that failure to satisfy the requirements referred to in Paragraph 3 by the contractor or his subcontractors and any non-fulfilment stemming from gross negligence or repeated non-fulfilment of the obligations laid down in Paragraphs 4 and 7(2) will entitle the contracting authority to terminate the contract without notice.

(3) Where an undertaking is proved to have failed to fulfil its obligations under this Law as a result, at least, of gross negligence or on a repeated basis, the public contracting authorities may exclude it from the award of public contracts within their field of competence for a period of up to one year.

...'

The main proceedings and the question referred for a preliminary ruling

10 According to the order for reference, in autumn 2003, following a public invitation to tender, Land Niedersachsen awarded Objekt und Bauregie a contract for the structural work in the building of Göttingen–Rosdorf prison. The value of the contract was EUR 8 493 331 net of value added tax. The contract contained a declaration regarding compliance with the collective agreements and, more specifically, with that regarding payment to employees employed on the building site of at least the minimum wage in force at the place where those services were to be performed pursuant to the collective agreement mentioned in the list of sample collective agreements under No 1 'Buildings and public works' ('the "Buildings and public works" collective agreement').

11 Objekt und Bauregie used as a subcontractor an undertaking established in Poland. In summer 2004 this undertaking came under suspicion of having employed workers on the building site at a wage below that provided for in the 'Buildings and public works' collective agreement. After investigations had commenced, both Objekt und Bauregie and Land Niedersachsen terminated the contract for work which they had concluded with one another. The latter based the termination inter alia on the fact that Objekt und Bauregie had failed to fulfil its contractual obligation to comply with the collective agreement. A penalty notice was issued against the person primarily responsible at

the undertaking established in Poland, accusing him of paying 53 workers engaged on the building site only 46.57% of the minimum wage laid down.

12 At first instance, the Landgericht Hannover (Regional Court, Hanover) held that Objekt und Bauregie's outstanding claim under the contract for work was offset in full by the contractual penalty of EUR 84 934.31 (1% of the amount of the contract), in favour of Land Niedersachsen. It dismissed the remainder of that undertaking's action.

13 The case having come before it on appeal, the Oberlandesgericht Celle (Higher Regional Court, Celle) considers that the resolution of the dispute turns on whether it is precluded from applying the Landesvergabegesetz, in particular Paragraph 8(1), on the ground that it is incompatible with the freedom to provide services laid down in Article 49 EC.

14 In that regard, the national court notes that the obligations to comply with the collective agreements mean that construction undertakings from other Member States must adapt the remuneration they pay to their workers to the normally higher level in force in the place in the Federal Republic of Germany where the contract is to be performed. Such a requirement causes those undertakings to lose the competitive advantage which they enjoy by reason of their lower wage costs. Consequently, the obligation to comply with the collective agreements constitutes an impediment to market access for persons or undertakings from Member States other than the Federal Republic of Germany.

15 In addition, the national court is uncertain as to whether the requirement to comply with the collective agreements is justified by overriding reasons related to the public interest. More specifically, such a requirement goes beyond what is necessary for the protection of workers. What is necessary for the protection of workers is defined by the mandatory minimum wage which results from the application, in Germany, of the Law on the posting of workers (Arbeitnehmer–Entsendegesetz) of 26 February 1996 (BGBl. 1996 I, p. 227, 'the AEntG'). In the case of foreign workers, the obligation to comply with the collective agreements does not enable them to achieve genuine equality of treatment with German workers but rather prevents workers originating in a Member State other than the Federal Republic of Germany from being employed in Germany because their employer is unable to exploit his cost advantage with regard to the competition.

16 As it took the view that the resolution of the dispute before it required the interpretation of Article 49 EC, the Oberlandesgericht Celle decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does it amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed?'

The question referred for a preliminary ruling

17 By its question, the national court asks essentially whether, in a situation such as that in the main proceedings, Article 49 EC precludes an authority of a Member State from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement in force at the place where those services are performed.

18 As suggested also by a number of the Governments which have submitted observations to the Court, as well as by the Commission of the European Communities, in order to give a useful answer to the national court, it is necessary to take into consideration the provisions of Directive 96/71 when examining the question referred for a preliminary ruling (see, to that effect, Case C–60/03 *Wolff & Müller* [2004] ECR I–9553, paragraph 27, and Case C–275/06 *Promusicae* [2008] ECR I–0000, paragraph 42).

19 As follows from Article 1(3)(a) thereof, Directive 96/71 applies, inter alia, to a situation in which an undertaking established in a Member State posts, in the framework of the transnational provision of

services, workers on its account and under its direction to the territory of another Member State, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in the latter Member State, provided that an employment relationship exists between that undertaking and the employee during the period of the posting. Such appears essentially to be the situation in the main proceedings.

20 In addition, as the Advocate General stated at point 64 of his Opinion, the mere fact that the objective of the legislation of a Member State, in this case the Landesvergabegesetz, is not to govern the posting of workers does not have the effect of precluding a situation such as that in the main proceedings from coming within the scope of Directive 96/71.

21 Pursuant to the first and second indents of the first subparagraph of Article 3(1) of Directive 96/71, with regard to the provision of transnational services in the construction sector, posted workers are to be guaranteed terms and conditions of employment concerning the matters referred to under subparagraphs (a) to (g) of that provision, which include, under subparagraph (c), minimum rates of pay. Those terms and conditions of employment are fixed by laws, regulations or administrative provisions and/or by collective agreements or arbitration awards which have been declared universally applicable. According to the first subparagraph of Article 3(8) of that directive, the collective agreements or arbitration awards within the meaning of that provision are those which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

22 The second subparagraph of Article 3(8) of Directive 96/71 gives Member States in addition the possibility, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, of basing themselves on collective agreements or arbitration awards which are generally applicable to all similar undertakings in the profession or industry concerned or agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.

23 It is necessary to examine whether the rate of pay laid down by a measure such as that at issue in the main proceedings – consisting of a legislative measure adopted by Land Niedersachsen concerning public contracts and seeking to make a collective agreement providing for the rate of pay in question binding, in particular on an undertaking such as the subcontractor Objekt und Bauregie – was fixed in accordance with one of the procedures described in paragraphs 21 and 22 of this judgment.

24 First, a legislative measure such as the Landesvergabegesetz, which does not itself fix any minimum rates of pay, cannot be considered to be a law, within the meaning of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, which fixed a minimum rate of pay, as provided in Article 3(1)(c) of that directive.

25 Second, as to whether a collective agreement such as that at issue in the main proceedings constitutes a collective agreement which has been declared universally applicable within the meaning of the second indent of the first subparagraph of Article 3(1) of Directive 96/71, read in conjunction with the first subparagraph of Article 3(8) of that directive, it is apparent from the case-file submitted to the Court that the AEntG, which seeks to transpose Directive 96/71, extends the application of provisions on minimum wages in collective agreements which have been declared universally applicable in Germany to employers established in another Member State which post their workers to Germany.

26 In answer to a written question from the Court, Land Niedersachsen confirmed that the 'Buildings and public works' collective agreement is not a collective agreement which has been declared universally applicable within the meaning of the AEntG. In addition, the case-file submitted to the Court does not contain any evidence to support the conclusion that that agreement is nevertheless capable of being treated as universally applicable within the meaning of the second indent of the first subparagraph of Article 3(1) of Directive 96/71, read in conjunction with the first subparagraph of Article 3(8) of that directive.

27 Third, regarding the second subparagraph of Article 3(8) of Directive 96/71, it is clear from the actual wording of that provision that it is applicable only where there is no system for declaring collective agreements to be of universal application, which is not the case in the Federal Republic of Germany.

28 In addition, a collective agreement such as that at issue in the main proceedings cannot, in any

event, be considered to constitute a collective agreement within the meaning of the second subparagraph of Article 3(8) and, more specifically, to be a collective agreement, as mentioned in the first indent to that provision, 'generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned'.

29 In a context such as that in the main proceedings, the binding effect of a collective agreement such as that at issue here covers only a part of the construction sector falling within the geographical area of that agreement, since, first, the law which gives it such an effect applies only to public contracts and not to private contracts and, second, the collective agreement has not been declared universally applicable.

30 It follows that a measure such as that at issue in the main proceedings does not fix a rate of pay according to one of the procedures laid down in the first and second indents of the first subparagraph of Article 3(1) and in the second subparagraph of Article 3(8) of Directive 96/71.

31 Therefore, such a rate of pay cannot be considered to constitute a minimum rate of pay within the meaning of Article 3(1)(c) of Directive 96/71 which Member States are entitled to impose, pursuant to that directive, on undertakings established in other Member States, in the framework of the transnational provision of services (see, to that effect, Case C-341/05 *Laval un Partneri* [2007] ECR I-0000, paragraphs 70 and 71).

32 Likewise, such a rate of pay cannot be considered to be a term and condition of employment which is more favourable to workers within the meaning of Article 3(7) of Directive 96/71.

33 More specifically, that provision cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness (see *Laval un Partneri*, paragraph 80).

34 Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision (*Laval un Partneri*, paragraph 81). However, such does not appear to be the case in the main proceedings.

35 It follows that a Member State is not entitled to impose, pursuant to Directive 96/71, on undertakings established in other Member States, by a measure such as that at issue in the main proceedings, a rate of pay such as that provided for by the 'Buildings and public works' collective agreement.

36 That interpretation of Directive 96/71 is confirmed by reading it in the light of Article 49 EC, since that directive seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty.

37 As the Advocate General stated at point 103 of his Opinion, by requiring undertakings performing public works contracts and, indirectly, their subcontractors to apply the minimum wage laid down by the 'Buildings and public works' collective agreement, a law such as the Landesvergabegesetz may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Therefore, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 49 EC.

38 In addition, contrary to the contentions of Land Niedersachsen and a number of the Governments which submitted observations to the Court, such a measure cannot be considered to be justified by the objective of ensuring the protection of workers.

39 As stated at paragraph 29 of this judgment, since this case concerns the rate of pay fixed by a collective agreement such as that at issue in the main proceedings, that rate is applicable, as a result of a law such as the Landesvergabegesetz, only to a part of the construction sector falling within the geographical area of that agreement, since, first, that legislation applies solely to public contracts and not to private contracts and, second, that collective agreement has not been declared universally applicable.

40 The case-file submitted to the Court contains no evidence to support the conclusion that the protection resulting from such a rate of pay – which, moreover, as the national court also notes, exceeds the minimum rate of pay applicable pursuant to the AEntG – is necessary for a construction sector worker only when he is employed in the context of a public works contract but not when he is employed in the context of a private contract.

41 For the same reasons as those set out at paragraphs 39 and 40 of this judgment, the restriction also cannot be considered to be justified by the objective of ensuring protection for independence in the organisation of working life by trade unions, as the German Government contends.

42 Lastly, with regard to the objective of ensuring the financial balance of the social security systems, also raised by the German Government in support of its contention that the effectiveness of the social security system depends on the level of workers' salaries, it does not appear from the case-file submitted to the Court that a measure such as that at issue in the main proceedings is necessary in order to avoid the risk of seriously undermining the financial balance of the social security system, an objective which the Court has recognised cannot be ruled out as a potential overriding reason in the general interest (see, inter alia, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 103 and the case-law cited).

43 Having regard to all of the foregoing, the answer to the question referred must be that Directive 96/71, interpreted in the light of Article 49 EC, precludes an authority of a Member State, in a situation such as that at issue in the main proceedings, from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed.

Costs

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

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

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, interpreted in the light of Article 49 EC, precludes an authority of a Member State, in a situation such as that at issue in the main proceedings, from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement the minimum wage in force at the place where those services are performed.

[Signatures]

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* Language of the case: German.

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OPINION OF ADVOCATE GENERAL
BOT
delivered on 20 September 2007 [1](1)

Case C–346/06

Rechtsanwalt Dr. Dirk Rüffert, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG
v
Land Niedersachsen

(Reference for a preliminary ruling from the Oberlandesgericht Celle (Germany))

(Directive 96/71/EC – Posting of workers in the framework of the provision of services – Collective agreements – Minimum wage – Article 49 EC – Restriction on the freedom to provide services – Procedures for the award of public works contracts – Protection of workers and prevention of social dumping)

1. This reference for a preliminary ruling will allow the Court to build on its existing case-law on the posting of workers in the framework of the provision of services.

2. The question raised by the court making the reference once again calls on the Court to strike a balance between the freedom to provide services, on the one hand, and the overriding requirements of the protection of workers and the prevention of social dumping, on the other.

3. More precisely, the Oberlandesgericht (Higher Regional Court), Celle (Germany), essentially asks the Court to rule whether Community law must be interpreted as precluding national legislation on the award of public contracts that requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, where the collective agreement to which the legislation in question refers is not declared to be of universal application.

4. That question has been raised in the course of a dispute between Rechtsanwalt Dr. Dirk Rüffert, in his capacity as liquidator of the company Objekt und Bauregie GmbH & Co. KG, defendant in the main proceedings, and Land Niedersachsen, applicant and respondent ('the applicant') in the main proceedings, regarding the termination of a works contract between the company and Land Niedersachsen in the context of a public works contract.

5. In this Opinion, I shall show why, in my view, neither Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (2) nor Article 49 EC must be interpreted as precluding a national measure such as the one at issue in the main proceedings.

I – Legal framework

A – *Community law*

6. The first paragraph of Article 49 EC lays down that restrictions on the freedom to provide services within the Community are prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

7. Directive 96/71 aims to promote the freedom to provide services between Member States while ensuring fair competition between undertakings providing services and guaranteeing respect for the rights of workers. (3)

8. Article 1 of that directive, headed 'Scope', is worded as follows:

'1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

...

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting

...'

9. As evidenced by the sixth recital in the preamble to the directive, the Community legislature set out from the finding that, in transnational situations, the employment relationships of posted workers raise problems with regard to the legislation applicable to them.

10. In this regard, the Rome Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, (4) lays down general criteria for determining the law applicable to the employment relationship. (5) For example, Article 3 of the Convention provides that, as a general rule, the parties are free to choose the applicable law. In the absence of choice, the contract of employment is governed, under Article 6(2) of the Convention, by the law of the country in which the employee habitually carries out his work, even if he is temporarily employed in another country.

11. In addition, Article 7 of the Rome Convention lays down, subject to certain conditions, that effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular the law of the Member State within whose territory the worker is temporarily posted. These mandatory rules, which are also known in French as 'lois d'application immédiate' or 'lois de police' that obtain at the place where the work is carried out, are not defined in the Rome Convention.

12. In this context, the contribution of Directive 96/71 is to designate at Community level a number of mandatory rules in transnational posting situations. (6) It is also an expression of the principle of precedence of Community law laid down in Article 20 of the Rome Convention, according to which the Convention does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are contained in Community acts or in national laws harmonised in implementation of such acts. (7)

13. In order to reconcile the different objectives it pursues, Directive 96/71 thus coordinates the laws of the Member States 'in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided'. (8)

14. According to the 17th recital in the preamble to the directive, 'the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers'.

15. These principles are described in detail in Article 3 of that directive, headed 'Terms and conditions of employment', which is worded as follows:

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision, and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex: [(9)]

...

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

...

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

...

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

...

8. "Collective agreements or arbitration awards which have been declared universally applicable" means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

– collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or

– collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

– are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and

– are required to fulfil such obligations with the same effects.

...'

16. Finally, as regards the Community rules on public works contracts, I would point out that at the time of the events that gave rise to the dispute in the main proceedings Council Directive

93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (10) was applicable. (11)

17. Although the purpose of Directive 93/37 is not to organise the execution of contracts, (12) it is nevertheless appropriate to cite Article 23 of that directive, which relates to the information on the working conditions to be respected during the performance of a public contract. That article reads as follows:

'1. The contracting authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the works are to be executed and which shall be applicable to the works carried out on site during the performance of the contract.

2. The contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or those participating in the contract procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the work is to be carried out. This shall be without prejudice to the application of the provisions of Article 30(4) concerning the examination of abnormally low tenders.'

B – *National law*

1. Determination of the minimum wage in the construction industry

18. In Germany, the minimum wage in the construction industry is set by collective bargaining.

19. In this Member State, collective agreements are usually concluded between trade unions and employers' organisations. For a particular industry, they may cover part or all of the territory of the Federal Republic of Germany.

20. The construction industry is governed by a collective agreement of 4 July 2002 laying down a general framework for the construction industry (Bundesrahmentarifvertrag für das Baugewerbe). This collective agreement, which is applicable throughout the Federal Republic of Germany, does not, however, contain rules on minimum rates of pay.

21. These rules are set out in a collective agreement providing for a minimum wage in the construction industry within the Federal Republic of Germany (Tarifvertrag zur Regelung der Mindestlöhne im Baugewerbe im Gebiet der Bundesrepublik Deutschland; the 'TV Mindestlohn') and in specific collective agreements.

a) The TV Mindestlohn

22. At the federal level, the TV Mindestlohn, which applies to undertakings covered by the collective agreement laying down a general framework for the construction industry, sets the level of the minimum wage for two categories according to the employee's level of qualification, and at different levels for 'old' and 'new' *Länder*. It provides that the minimum wage consists of the hourly pay provided for by that agreement and the bonus for the construction industry, which together make up the total hourly pay under the agreement. It also indicates that the right to higher wages under other collective agreements or special agreements is not affected by the provision laying down the total hourly pay under the agreement for categories 1 and 2.

23. The provisions of the TV Mindestlohn were declared to be of universal application by a regulation on working conditions mandatorily applicable in the construction industry (Verordnung über zwingende Arbeitsbedingungen im Baugewerbe).

24. It should be noted that under German law a declaration of universal application means that the collective agreement in question is applicable to all employers and employees in the industry concerned in a defined territory. It therefore extends the scope of such an agreement to employers and employees not belonging to the contracting trade union organisations. The Federal Ministry of Employment may make such a declaration of universal application either under Paragraph 1(3a) of the German Law on the Posting of Workers (Arbeitnehmer-Entsendegesetz) (13) of 26 February

1996 for sectors governed by that law, or under Article 5 of the Law on Collective Agreements (Tarifvertragsgesetz).

25. The TV Mindestlohn is applicable for a limited period. According to the information at my disposal, it appears that the TV Mindestlohn which was applicable at the time of the facts of the dispute in the main proceedings is that of 29 October 2003, which was in force from 1 November 2003 to 31 August 2005. This collective agreement was declared to be of universal application by a regulation of 13 December 2003. (14)

b) The specific collective agreements

26. Most of these specific collective agreements (Entgelttarifverträge) have limited territorial scope. Moreover, they are not normally declared to be universally applicable, which means that they are not all mandatorily applicable to all employees in the industry concerned.

27. According to the written reply from Land Niedersachsen to a question from the Court, the relevant collective agreement in the present case is the collective agreement on wages and professional training allowances (Tarifvertrag zur Regelung der Löhne und Ausbildungsvergütungen) of 4 July 2003, in the version resulting from the amending collective agreement of 29 October 2003. This collective agreement has not been declared to be universally applicable.

28. It is evident from the file that the wage levels set in these specific collective agreements are, in practice, well above the minimum wages required throughout Germany under the TV Mindestlohn. Moreover, the wage scale set out in those agreements is more detailed than that contained in the TV Mindestlohn and sets different wage levels for different groups of activities.

2. The AEntG

29. In Germany, Directive 96/71 was incorporated into national law by the AEntG. Paragraph 1 (1) of that law provides, inter alia, that the legal rules resulting from a collective agreement governing the construction industry which is declared to be universally applicable, which relate to minimum pay, shall also apply to an employment relationship linking an employer established outside Germany and his employee working within the territory covered by that collective agreement. Hence, such an employer must, as a minimum, grant to his posted employee the working conditions established in that collective agreement.

3. The Law of Land Niedersachsen on the award of public contracts

30. The Law of Land Niedersachsen on the Award of Public Contracts (Niedersächsisches Landesvergabegesetz; the 'Landesvergabegesetz') lays down rules for the award of public contracts with a value of EUR 10 000 or more. Its statement of reasons proclaims:

'The Law counteracts distortions of competition which arise in the field of construction and public transport services resulting from the use of cheap labour and alleviates burdens on social security schemes. It provides, to that end, that public contracting authorities may award contracts for building works and public transport services only to undertakings which pay the wage laid down in the collective agreements at the place where the service is provided.'

31. Under Paragraph 3(1) of the Landesvergabegesetz, contracts for building services are awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed.

32. Paragraph 4(1) of that law provides, inter alia, that in so far as services are assigned to subcontractors, the contractor must also undertake to impose on the subcontractors the obligations applicable to him under the said Law and to monitor compliance with these obligations by the subcontractors.

33. Under Paragraph 7(1) of the Landesvergabegesetz, the public contracting authority is entitled to carry out checks to verify compliance with the conditions laid down for the award of contracts. To this end, it may view the wage statements of contractors and subcontractors and the documents concerning the payment of taxes and contributions and the contracts for works concluded between contractor and subcontractor.

34. Paragraph 8 of the Law, which relates to sanctions, reads as follows:

‘(1) In order to ensure compliance with the obligations under Paragraphs 3, 4 and 7(2), public contracting authorities shall agree with the contractor for each case of culpable non-fulfilment a contractual penalty of 1%, and in the case of several cases of non-fulfilment a contractual penalty of up to 10%, of the contract value. The contractor shall be obliged to pay a contractual penalty under the first sentence also in the event that there is non-fulfilment on the part of a subcontractor used by it or a subcontractor used by that subcontractor, unless the contractor was not aware or could not have been aware of the non-fulfilment. Where the penalty imposed is disproportionately high, the contracting authority may reduce it to the appropriate amount at the request of the contractor.

(2) The public contracting authorities shall agree with the contractor that failure to satisfy the requirements referred to in Paragraph 3 by the contractor or his subcontractors and any non-fulfilment stemming from gross negligence or repeated non-fulfilment of the obligations laid down in Paragraphs 4 and 7(2) will entitle the contracting authority to terminate the contract without notice.

(3) Where an undertaking is proved to have failed to fulfil its obligations under this law as a result, at least, of gross negligence or on a repeated basis, the public contracting authorities may exclude it from the award of public contracts within their field of competence for a period of up to one year.

…’

II – The dispute in the main proceedings and the question referred for a preliminary ruling

35. It is apparent from the order for reference that in the autumn of 2003 Land Niedersachsen, following a public invitation to tender, awarded the defendant a contract for the structural work in the building of Göttingen-Rosdorf prison. The amount of the contract was EUR 8 493 331, plus VAT. The contract contained an ‘Agreement on compliance with the provisions of the collective agreement when performing building services’ stipulating in particular the following undertakings made by the defendant:

‘My/our tender is based on the following agreement:

As regards Paragraph 3 of the [Landesvergabegesetz] (Declaration regarding payment of the collectively agreed wage):

In the event that I am awarded a contract, I hereby undertake to pay the workers employed in my undertaking, in managing the work connected with the commissioned services, at least the remuneration prescribed by the collective agreement at the place where these services are performed, as set out in the list of representative collective agreements referred to under No 01 “Construction industry” …

I hereby undertake to impose on the subcontractors the obligations laid down in Paragraphs 3, 4 and 7(2) of the [Landesvergabegesetz] applicable to me and to monitor compliance with these obligations by the subcontractors.

…

I hereby agree that failure to satisfy the requirements referred to in Paragraph 3 of the [Landesvergabegesetz] by me or my subcontractors and any non-fulfilment stemming from gross negligence or repeated non-fulfilment of the obligations laid down in Paragraphs 4 and 7(2) of the [said Law] shall entitle the contracting authority to terminate the contract without notice.’

36. The defendant used the firm PKZ Pracownie Konserwacji Zabytków sp. zoo (‘PKZ’) from Tarnów (Poland) which has a branch in Wedemark (Germany) as a subcontractor.

37. During the summer of 2004, the firm PKZ came under suspicion of having employed Polish workers on the site at a wage below that stipulated in the applicable collective agreement. After investigations had commenced, both the defendant and Land Niedersachsen terminated the contract for work concluded between them. Land Niedersachsen based the termination inter alia on the fact that the defendant had failed to fulfil its contractual obligation to comply with the collective agreements. A punishment order, which contained the accusation that the 53 employees engaged

on the building site had been paid only 46.57% of the statutory minimum wage, was issued to the persons primarily responsible at PKZ.

38. Land Niedersachsen applied for application of the penalty clause, maintaining that the breaches by the subcontractor must have been known to the defendant and that the payment of wages at below the collectively agreed rate constituted a separate infringement for each employee, with the result that a penalty of 10% of the contract value was appropriate.

39. At first instance, the Landgericht Hannover (Regional Court, Hanover) considered that this action was well founded in part. It found that the defendant's claim based on the contract for works had been extinguished by offsetting owing to application of the contractual penalty in the amount of EUR 84 934.31, that is to say 1% of the amount of the contract, and dismissed the remainder of the action.

40. The case went to appeal before the Oberlandesgericht Celle, which explains in its order for reference that resolution of the dispute in the main proceedings turns on whether the Chamber should not apply the Landesvergabegesetz, in particular Paragraph 8(1) thereof, on the ground that it is incompatible with the freedom to provide services laid down in Article 49 EC.

41. The court of reference observes in this regard that the commitment to comply with the collective agreements, which construction companies of other Member States must make under the Landesvergabegesetz, obliges them to adapt the wages they pay to their workers to the normally higher level of remuneration in force at the place where the work is carried out in Germany. As a result, they lose the competitive advantage which they enjoy by reason of their lower wage costs. Consequently, according to the court of reference, the obligation to pay the collectively agreed wage constitutes an impediment to market access for persons or undertakings from other Member States.

42. Furthermore, the court of reference expresses doubt as to whether the obligation to pay the collectively agreed wage is justified by overriding reasons of public interest.

43. It finds in favour of the view that the obligation to pay the collectively agreed wage cannot be considered to meet overriding requirements relating to the public interest. To the extent that it contributes to protecting German building undertakings from competition from other Member States, in the view of the court of reference such an obligation serves an economic purpose, which according to the case-law of the Court cannot constitute an overriding requirement relating to the public interest justifying a restriction on the freedom to provide services.

44. The court of reference further considers that the case-law of the Court of Justice on minimum wages does not apply in the dispute in the main proceedings since the wages and salaries stipulated in the collective agreements, which are required to be paid at the place where the work is carried out, are much higher than the minimum wage applicable on the territory of the Federal Republic of Germany under the AEntG. It deduces that the obligation to comply with these collective agreements exceeds what is necessary to protect workers. It considers that what is necessary to protect workers is defined by the mandatory minimum wage, which must be applied on the territory of the Federal Republic of Germany under the AEntG. Finally, the court of reference adds that, as far as foreign workers are concerned, the obligation to pay the collectively agreed wage does not bring about actual equality with German workers but instead prevents them from being employed in Germany because their employer is unable to exploit his advantage in terms of labour costs.

45. Taking the view that resolution of the dispute in the main proceedings required an interpretation of Article 49 EC by the Court of Justice, the Oberlandesgericht Celle decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does it amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed?'

III – Analysis

46. By this question, the court of reference essentially asks whether the Treaty rules on the freedom to provide services must be interpreted as precluding national legislation, such as the Landesvergabegesetz, that requires contractors and, indirectly, their subcontractors to pay workers

posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, where the collective agreement to which the legislation in question refers is not declared to be of universal application.

47. Land Niedersachsen, the German and Danish Governments, Ireland and the Cypriot, Austrian, Finnish and Norwegian Governments consider essentially that Article 49 EC does not preclude a measure such as the one at issue in the main proceedings. In so far as the measure constitutes a restriction on the freedom to provide services, it is justified inter alia by the objective of worker protection and proportionate to achievement of that objective.

48. The Belgian Government considers that such a restriction may be justified, first where the workers do not enjoy a comparable level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the host State confers a genuine benefit on them, significantly adding to their social protection, and secondly where the application of those rules is proportionate to the public interest objective pursued. According to that government, it is for the court of reference to make that assessment, taking into account all the circumstances of the dispute before it.

49. Some of these governments also examine the question from the point of view of Directive 96/71 and are of the opinion that the directive does not preclude the measure at issue in the main proceedings.

50. The Polish Government, by contrast, takes the view that Directive 96/71 does not justify making the award of a contract subject to the service provider's paying posted workers wages above the minimum rate mentioned in Article 3(1)(c) of that directive. That government points out that it is evident from the order for reference that the levels of remuneration laid down in the collective agreements in force at the place where the services are performed are significantly higher than the minimum defined in the AEntG.

51. In the alternative, the Polish Government maintains that the measure at issue in the main proceedings infringes Article 49 EC. According to that government, it constitutes an unjustified obstacle to the freedom to provide services. It shares the view of the court of reference that the purpose of the Landesvergabegesetz is to shield German building undertakings from competition from other Member States, thereby de facto achieving an economic purpose which, according to the case-law of the Court, cannot justify a restriction on a fundamental freedom. According to the Polish Government, such provisions go beyond what is necessary to combat unfair competition, that objective being adequately attained by the setting of a minimum rate of pay in the AEntG.

52. The Commission of the European Communities considers that the dispute in the main proceedings falls within the scope of Directive 96/71 and that the question referred for a preliminary ruling should therefore be examined first and foremost in the light of that directive. It states that the aim of that directive is to strike a balance between the freedom to provide services and the protection of posted workers. In order to achieve that objective, the Community legislature established, in Article 3 of Directive 96/71, a detailed framework with which the Member States must comply.

53. Since the Federal Republic of Germany has a system for declaring collective agreements to be of universal application, according to the Commission only the first subparagraph of Article 3(8) of the directive is relevant. Under that provision, read in conjunction with the second indent of Article 3(1) of the directive, minimum wages should be set for workers posted to Germany only under collective agreements that have been declared to be of universal application, in other words agreements that must be complied with by all undertakings in the industry or profession concerned and within the territorial scope of such agreements.

54. For that reason, the Commission considers that, in so far as the Landesvergabegesetz requires compliance with a level of remuneration laid down in a collective agreement that has not been declared to be universally applicable, that law must be considered incompatible with Directive 96/71. It would thus fall outside the scope of the guarantees that Community law provides with regard to the minimum remuneration of posted workers and which are harmonised by that directive.

55. The Commission adds that the Law of a *Land* which has the purpose of imposing more demanding terms and conditions of employment solely for posted workers employed in the framework of public contracts, in other words in only one area of economic life, cannot in any event

serve an overriding public interest within the meaning of Article 49 EC nor be an appropriate way of pursuing such an interest.

56. At the hearing, the French Government essentially endorsed the position held by the Commission by maintaining that Article 49 EC and Directive 96/71 do not prevent a Member State from applying to posted workers the minimum wage laid down in a national or local collective agreement, but on condition that the agreement in question has been declared to be universally applicable to undertakings in the industry or territory concerned.

57. In the light of these observations, it should first be noted that, in order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of Community law to which the national court did not refer in its question. (15)

58. With regard first to Directive 93/37, I have indicated above that that directive does not regulate the performance of public contracts. The undertaking that contractors must make under Paragraphs 3(1) and 4(1) of the Landesvergabegesetz to pay their employees at least the remuneration prescribed by the collective agreement in force at the place where the services in question are performed and to impose the same obligation on their subcontractors constitutes, in my view, a contract performance condition. (16)

59. I note, however, that Article 23 of the directive in question is not without interest in the present case because it expresses the notion that the performance of the work following the award of a public contract must comply with the employment protection provisions and the working conditions in force in the place where the work is to be carried out.

60. I shall not, however, go further in interpreting Directive 93/37, because that directive is of no assistance with regard to the central issue raised by the question from the court of reference, namely determination of the employment conditions which may, in compliance with Community law, be imposed for the performance of a public contract in a situation where workers are posted in the framework of the provision of services.

61. Turning now to Directive 96/71, I am of the opinion that the facts in the dispute in the main proceedings, as described in the order for reference, must be held to fall within the scope of that directive, since they correspond to the situation described in Article 1(3)(a) of that directive.

62. To be more precise, we have here a case in which an undertaking established in a Member State, namely PKZ established in Poland, has posted Polish workers, for its account and under its direction, on the territory of another Member State, in the event the Federal Republic of Germany, in the framework of a subcontracting contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in the latter Member State, that is to say the defendant in the main proceedings.

63. Moreover, it is common ground that the facts in the dispute in the main proceedings occurred after the expiry of the period for Member States to transpose Directive 96/71, that is to say after 16 December 1999.

64. It is true that the purpose of the Landesvergabegesetz is not specifically to govern the posting of workers in the framework of the provision of services but rather, in more general terms, the award of public contracts in Land Niedersachsen. Nevertheless, in so far as the Law lays down conditions for the performance of works contracts – in this instance the payment of a minimum wage – which must be applied to the workers employed by the contractor and/or by any subcontractor, including workers posted in the framework of the provision of services, which is the case in the main proceedings, it is necessary to examine the Law in the light of secondary Community law on the posting of workers in the framework of the provision of services.

65. I shall therefore begin by examining whether Directive 96/71 must be interpreted as precluding national legislation, such as the Landesvergabegesetz, which requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, where the collective agreement to which the legislation in question refers is not declared to be universally applicable within the meaning of the first subparagraph of Article 3(8) of that directive.

A – *The interpretation of Directive 96/71*

66. In my opinion, Directive 96/71 cannot be interpreted as precluding a measure such as that at issue in the main proceedings. In order to be convinced of this view, it is necessary to describe the system established by this directive. I shall then examine, in the light of the system described in that way, the arrangements under German law for determining minimum rates of pay in the construction industry.

67. As I have already indicated above, Directive 96/71 is designed to coordinate the laws of the Member States in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided.

68. In adopting that directive, the Community legislature not only appropriated the case-law established over time by the Court on the posting of workers in the framework of the provision of services but also clarified and strengthened it.

69. Since its judgment in *Seco and Desquenne & Giral*, (17) the Court has taken the view that, as a general rule, Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means. (18) This case-law of the Court is reiterated in the 12th recital in the preamble to Directive 96/71.

70. The first contribution of this directive is to make mandatory what until then had been only an option for Member States. The directive thus requires the Member States to apply to undertakings established in another Member State which post workers to their territory in the framework of the transnational provision of services a number of national rules setting terms and conditions of employment covering certain matters.

71. Another contribution of Directive 96/71 is to give substance to the 'nucleus' of protective rules, the application of which the Community legislature wished to guarantee for the benefit of posted workers.

72. Hence, Article 3(1) of the directive lays down the national rules establishing terms and conditions of employment which *cannot be denied* to posted workers in the Member State in which the service is performed.

73. As the Court has recently indicated, the directive establishes 'a list of national rules that a Member State must apply to undertakings established abroad which post workers on that Member State's territory in the framework of the provision of transnational services'. (19) In that sense, they are mandatory protective rules.

74. The listing of these rules by the Community legislature strengthens legal certainty, in that the provider of services established in another Member State is now certain that he will be required to apply a minimum and clearly identifiable basic set of rules on terms and conditions of employment in force in the State where the services are provided. As a corollary, workers posted to a Member State will be able to demand the application of these rules, the mandatory nature of which stems directly from Directive 96/71.

75. These mandatory terms of employment include minimum rates of pay, whether set by law, regulation or administrative provision or, in the case of building work, by collective agreements or arbitration awards which have been declared universally applicable within the meaning of Article 3 (8) of the directive.

76. This category of terms of employment has special features by comparison with the other matters mentioned in Article 3(1) of Directive 96/71, such as maximum work periods and minimum rest periods, health, safety and hygiene at work, and the minimum length of paid annual holidays. Community actions have been developed for the other terms of employment referred to, and in particular it has been possible to harmonise national legislation by means of directives setting minimum requirements. (20) The situation is different with regard to minimum rates of pay, for which no Community measure of this kind yet exists. (21)

77. Although it cannot be said that Community law entirely neglects the question of remuneration, it must therefore be admitted that it does not yet cover the determination of the amount or level of remuneration. (22)

78. The last subparagraph of Article 3(1) of Directive 96/71 testifies to the special nature of minimum rates of pay where it lays down that 'the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted'.

79. Moreover, the application of the 'nucleus' of protective rules mentioned in Article 3(1) of that directive must, in my opinion, be understood to constitute a minimum guarantee for posted workers, who are thus assured that they will at the very least enjoy the benefit of these national rules, which have become mandatory.

80. This other characteristic of the system established by the directive in question is expressed in the very concept of 'a nucleus of mandatory rules for minimum protection' referred to in the 13th recital in the preamble to Directive 96/71.

81. In addition, I would remind the Court that the 17th recital in the preamble to that directive provides that 'the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers'. The first subparagraph of Article 3(7) of the directive translates this intention of the Community legislature by stating that '[p]aragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers'.

82. In my view, there are two aspects to this last provision. First, it means that the mandatory nature of the protective rules in force in the State where the services are performed may be eclipsed by application of the rules in force in the State in which the provider is established if those rules provide for terms and conditions of employment that are more favourable to the posted workers.

83. Secondly, and it is this aspect that is relevant in the present case, Article 3(7) of Directive 96/71 also, in my view, permits the Member State where the services are performed to improve, for the matters referred to in Article 3(1) of the directive, the level of social protection which it wishes to guarantee to workers employed in its territory and which it can therefore apply to workers posted there. Hence, in principle, this provision authorises the implementation of enhanced national protection. (23)

84. It must be pointed out, however, that the implementation of such enhanced national protection must be in accordance with what is permitted under Article 49 EC. (24)

85. If we compare the arrangements under German law for determining minimum rates of pay in the construction industry with the system established by Directive 96/71, as I have just described it, we can draw the following conclusions.

86. I note first that under German law there is a system for declaring collective agreements to be universally applicable. The German arrangements for determining minimum rates of pay in the construction industry must therefore be assessed against the yardstick of Article 3(1) of Directive 96/71, and not in the light of the provisions of the second subparagraph of Article 3(8) of that directive, which caters for the absence of a system for declaring collective agreements to be of universal application.

87. In accordance with Article 3(1) of the directive, Paragraph 1(1) of the AEntG provides inter alia that the legal rules resulting from a collective agreement governing the construction industry which is declared to be universally applicable, which relate to minimum pay, shall also apply to an employment relationship linking an employer established outside Germany and his employee working within the territory covered by that agreement. Hence, such an employer must, as a minimum, grant to his posted employee the working conditions established in that collective agreement.

88. I then wish to remind the Court that the TV Mindestlohn applicable at the time of the facts in the main proceedings, which was declared to be of universal application and covers the territory of the Federal Republic of Germany, sets the level of the minimum wage in the construction industry for two categories according to the employee's level of qualification, and at different levels for 'old' and 'new' *Länder*.

89. This collective agreement, which has been declared to be universally applicable within the meaning of the first subparagraph of Article 3(8) of Directive 96/71, thus forms part of the 'nucleus' of protective rules as defined in Article 3(1) of that directive.

90. At the same time, it must be pointed out that the said collective agreement also indicates that the right to higher wages under other collective agreements or special agreements is not affected by the agreement's provision laying down the total hourly pay for the two categories mentioned above. As authorised by Article 3(7) of the directive in question, the TV Mindestlohn therefore expressly reserves the possibility of applying terms of employment that are more favourable to workers.

91. To be precise, the arrangements under German law for determining minimum rates of pay in the construction industry are also based, as a complement to the TV Mindestlohn, on specific collective agreements, most of which have limited territorial scope and are not normally declared to be universally applicable, thus placing them outside the 'nucleus' of minimum rules of protection as defined in Article 3(1) of Directive 96/71.

92. Does that mean, as the Commission maintains, that undertakings posting workers in the framework of the transnational provision of services cannot be required to comply with such specific collective agreements that have not been declared to be of universal application within the meaning of the first subparagraph of Article 3(8) of the directive in question?

93. I do not think so.

94. I consider that, since the wage levels set in these specific collective agreements are, in practice, well above the minimum rates of pay required on the territory of the Federal Republic of Germany under the TV Mindestlohn, such agreements constitute the implementation of enhanced national protection. As I have previously demonstrated, such enhanced national protection is authorised under Article 3(7) of Directive 96/71.

95. Hence, a national measure, such as the one at issue in the main proceedings, which makes such collective agreements mandatory for posted workers as well, is, in my view, consistent with this directive in that it implements the option open to the Member States under Article 3(7) of the directive in question.

96. Moreover, the fact that a collective agreement that has been declared to be of universal application, such as the TV Mindestlohn, itself generally refers to other collective agreements or special agreements granting the right to higher wages is, in my opinion, consistent with Directive 96/71.

97. The German arrangements for determining minimum rates of pay in the construction industry therefore appear to me to constitute a coherent system that is compatible with Directive 96/71.

98. I therefore take the view that Directive 96/71 must be interpreted as not precluding national legislation, such as the Landesvergabegesetz, which requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, even where the collective agreement to which the legislation in question refers is not declared to be universally applicable within the meaning of the first subparagraph of Article 3(8) of that directive.

99. We must now ascertain whether Article 49 EC must be interpreted as precluding national legislation of the kind involved in the dispute in the main proceedings.

B – *The interpretation of Article 49 EC*

100. It is settled case-law that Article 49 EC requires not only the elimination of all discrimination against service providers established in another Member State on the ground of their nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he

lawfully provides similar services. (25)

101. It has to be stated in this regard that the Court has already ruled that the application of the host Member State's domestic legislation to service providers is liable to prohibit, impede or render less attractive the provision of services by persons or undertakings established in other Member States to the extent that it involves expenses and additional administrative and economic burdens. (26)

102. In the present case, there is barely any doubt, in my view, that a restriction on the freedom to provide services exists.

103. By requiring undertakings performing public works contracts and, indirectly, their subcontractors to pay workers at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, Paragraphs 3(1) and 4(1) of the Landesvergabegesetz may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host State.

104. However, it must be noted that the provisions in question of the Landesvergabegesetz apply without distinction to national providers of services and to those of other Member States. In other words, the obligation to pay the minimum wage laid down in the collective agreement in force in the place where the services are performed applies both to service providers established in Germany and to those established in another Member State.

105. According to equally settled case-law of the Court, such legislation, that is applicable without distinction, may be justified under Article 49 EC where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of the service is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. (27)

106. Overriding reasons relating to the public interest which have been recognised by the Court include the protection of workers. (28)

107. In the name of that overriding reason, the Court has already held that Community law does not preclude Member States from applying their legislation, *or collective labour agreements entered into by both sides of industry*, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means when it emerges that the protection conferred thereunder is not guaranteed by identical or essentially similar obligations by which the undertaking is already bound in the Member State where it is established. (29)

108. The Court has also ruled that the objective of preventing unfair competition by undertakings paying their workers less than the minimum wage may also be taken into consideration as an overriding requirement capable of justifying a restriction on the freedom to provide services. (30) It has also indicated that there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other. (31)

109. In developing this reasoning, the Court recently established an explicit link between its settled case-law recognising the Member States' right to extend their legislation or collective agreements relating to minimum wages to any person who is employed, even temporarily, within their territory, and the justification based on the 'prevention of social dumping'. (32)

110. I have indicated above that the court of reference has doubts as to whether the obligation imposed by the Landesvergabegesetz on contractors and, indirectly, on their subcontractors to comply with the collective agreement in force in the place where the services are performed is justified by overriding reasons of public interest.

111. I remind the Court that, according to the court of reference, the main purpose of the legislation at issue is to protect German building undertakings from competition from other Member States. Such an economic objective cannot constitute an overriding requirement relating to the public interest justifying a restriction on the freedom to provide services.

112. Moreover, the court of reference considers that the obligation to comply, at the place where the services are provided, with a collective agreement laying down minimum rates of pay higher than those applicable on the territory of the Federal Republic of Germany under the AEntG exceeds what is necessary to protect workers. It considers that what is necessary to protect workers is defined by the mandatory minimum wage, which must be applied on the territory of the Federal Republic of Germany under the AEntG.

113. I do not agree with this analysis proposed by the court of reference, which in essence is supported by the Polish Government.

114. I consider, by contrast, that the disputed provisions of the Landesvergabegesetz are appropriate for securing the attainment of the objectives of protecting workers and preventing social dumping and do not go beyond what is necessary in order to attain them.

115. It is true that, according to settled case-law, measures restricting the freedom to provide services cannot be justified by economic aims, such as the protection of national businesses. (33) However, the Court considers at the same time that whilst the intention of the legislature, to be gathered from the political debates preceding the adoption of a law or from the statement of the grounds on which it was adopted, may be an indication of the aim of that law, it is not conclusive. (34) It is for the national court, which enquires as to the true objective pursued by the legislature, to determine whether, viewed objectively, the rules in question ensure the protection of posted workers (35) or, more generally, the prevention of social dumping.

116. Hence, in regard to the national court's observation that the main objective of the legislation at issue in the main proceedings is to protect German construction undertakings from competition from other Member States, it is for that court to verify whether, on an objective view, that legislation secures the protection of posted workers. It is necessary to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection. (36)

117. In order to determine the existence of such a benefit that confers real additional protection on posted workers, (37) the court of reference must assess whether the wage protection these workers already enjoy under the legislation and/or collective agreements in force in the State in which the provider of services is established is equivalent or essentially comparable. In making that assessment, it is the gross amount of wages that must be taken into account. (38)

118. In this regard, it is evident from the order for reference that PKZ is accused of having paid the 53 employees engaged on the building site only 46.57% of the applicable minimum wage. In those circumstances, it appears to be established that compliance with the Landesvergabegesetz would have given these workers genuine additional protection by ensuring that they received a wage that was significantly higher than the wage they would normally be paid in the State in which their employer is established. This law therefore appears to me to ensure the protection of the posted workers.

119. In my view, the Law in question is also an appropriate means of preventing social dumping, in that one of its main aims is to harmonise the terms on which service providers, whether they are established in Germany or not, must pay their workers in the framework of the performance of a public contract. It thus ensures that local workers and posted workers on the same site will be paid equally.

120. The fact that Land Niedersachsen chose to take a specific collective agreement rather than the TV Mindestlohn as the benchmark in its Law on the Award of Public Contracts, with the result that the minimum wage to be paid by contractors and their subcontractors at the place where the services are performed is higher than that normally applicable in the construction industry on the territory of the Federal Republic of Germany, is not, in my view, of itself open to challenge under Community law.

121. First, it is difficult to deny that the guarantee of higher wages for posted workers is an appropriate means of protecting them. (39) Secondly, and on a more general level, it must not be overlooked that the first paragraph of Article 136 EC lays down that '[t]he Community and the Member States, having in mind fundamental social rights …, shall have as their objectives … improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, [and] dialogue between management and labour'.

122. Moreover, the disputed provisions of the Landesvergabegesetz do not, in my opinion, go

beyond what is necessary in order to attain the objectives of worker protection and the prevention of social dumping.

123. The purpose of these provisions is to make it mandatory for service providers involved in the performance of a public contract to pay the rates of remuneration applicable under the specific collective agreement in force at the place where the services are performed. To that end, they provide first that contracts for building services are awarded only to undertakings which undertake in writing to pay their employees, when performing those services, the minimum remuneration prescribed by the collective agreement in force at the place where those services are performed and also undertake to impose the same obligation on their subcontractors. Secondly, breach of that obligation gives rise to graduated sanctions, which may range from the application of a contractual penalty to termination of the contract.

124. In my view, the objectives of worker protection and the prevention of social dumping could not be achieved as effectively by means of less binding rules with a less restrictive effect on the freedom to provide services.

125. In addition, as Ireland indicated in its written observations, (40) there is nothing to indicate that, taking account of relevant indicators such as the cost of living index, the minimum rates of pay required under the specific collective agreement to which the Landesvergabegesetz refers are disproportionate by comparison with the rates set by the TV Mindestlohn.

126. The above analysis cannot, in my view, be brought into question by the Commission's argument that the Law of a *Land* which has the purpose of imposing more demanding terms and conditions of employment solely for posted workers employed in the framework of public contracts, in other words in only one area of economic life, cannot serve an overriding public interest within the meaning of Article 49 EC nor be an appropriate way of pursuing such an interest.

127. As it stated at the hearing, the Commission alleges that the Landesvergabegesetz creates discrimination between workers in the construction industry, depending on whether the prime contractor is public or private. Furthermore, according to the Commission, if the objective of Land Niedersachsen is truly to protect workers, it should extend this type of measure to all workers in the industry.

128. I cannot endorse that line of argument, for the following reasons.

129. First, it was confirmed at the hearing that, unless it is granted delegated powers, Land Niedersachsen does not have competence to declare a collective agreement to be universally applicable. By adopting the disputed provisions of the Landesvergabegesetz, Land Niedersachsen therefore sought to give mandatory force in a field within its competence, namely public procurement, to the collective agreement applicable at the place where the services are performed, regardless of whether it had been declared to be universally applicable.

130. Secondly, the argument that there is therefore discrimination between workers in the construction industry according to whether the prime contractor is public or private is not, in my opinion, relevant from the point of view of Community law.

131. As I have already indicated, the important point is that the Landesvergabegesetz must comply with the principle of non-discrimination on the basis of nationality, and thus make service providers subject to the same obligation to pay the minimum wages applicable at the place where the services are performed, whether they be established in Germany or in another Member State. Put another way, in my view it is crucial that, in the framework of the performance of the same public contract, local workers and posted workers be paid at the same rate. It is here, to my mind, that we must apply the yardstick that will enable us to detect possible discrimination in breach of Community law.

132. Thirdly, while it is true that the aim of public procurement is above all to meet an identified administrative need for works, services or supplies, the award of public contracts also authorises the attainment of other public interest requirements, such as environmental policy or, as in the present case, social objectives. (41)

133. The possibility of integrating social requirements into public procurement contracts has already been recognised by the Court (42) and is now enshrined in Directive 2004/18. Article 26 of that directive, headed 'Conditions for performance of contracts', reads as follows:

‘Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.’ (43)

134. Since the contract performance condition relating to the minimum remuneration of workers laid down in the disputed provisions of the Landesvergabegesetz complies with the principle of non-discrimination on the basis of nationality, and since it complies with the principle of transparency, it must, in my opinion, be considered to be consistent with Community law.

135. As regards the principle of transparency, it is important, in my view, that the collective agreements to be complied with are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for the employer to determine the obligations with which he is required to comply. (44) It is for the court of reference to determine whether that criterion is met in the present case. (45)

IV – Conclusion

136. In the light of all the foregoing considerations, I propose that the Court should give the following answer to the question referred by the Oberlandesgericht Celle:

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and Article 49 EC must be interpreted as not precluding national legislation, such as the Landesvergabegesetz of Land Niedersachsen, on the award of public contracts which requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, if the collective agreement to which the legislation in question refers is not declared to be universally applicable.

It is for the court of reference to verify whether that legislation confers a genuine benefit on posted workers, which significantly augments their social protection, and whether, in the application of that legislation, the principle of transparency of the conditions for the performance of public contracts is respected.

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1 – Original language: French.

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2 – OJ 1997 L 18, p. 1.

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3 – Fifth recital.

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4 – OJ 1980 L 266, p. 1; ‘the Rome Convention’.

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5 – See the seventh to tenth recitals in the preamble to Directive 96/71.

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6 – See the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 25 July 2003 on the implementation of Directive 96/71 in the Member States (COM(2003) 458 final, point 2.3.1.1).

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7 – Eleventh recital.

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8 – Thirteenth recital.

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9 – '[A]ll building work relating to the construction, repair, upkeep, alteration or demolition of buildings'.

10 – OJ 1993 L 199, p. 54. Directive as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1; 'Directive 93/37'). This directive was repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), for which the implementation period expired on 31 January 2006.

11 – It is evident from the order for reference that the value of the public contract at issue in the main proceedings is EUR 8 493 331 before value added tax ('before VAT'), in other words above the threshold for the application of Directive 93/37, which corresponds to the ecu equivalent of 5 million special drawing rights (SDRs), or EUR 6 242 028 (see in this regard 'Values of thresholds under the directives on public procurement applicable from 1 January 2002' (OJ 2001 C 332, p. 21)).

12 – See to that effect the interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (COM(2001) 566 final, p. 16, point 1.6).

13 – BGBl. 1996 I, p. 227; the 'AEntG'.

14 – *Bundesanzeiger* No 242 of 30 December 2003, p. 26093. The collective agreement in question has now been replaced by the TV Mindestlohn of 29 July 2005, which is applicable from 1 September 2005 to 31 August 2008 and was declared to be of universal application by a regulation of 29 August 2005 (*Bundesanzeiger* No 164 of 31 August 2005, p. 13199).

15 – See in particular Case C–60/03 *Wolff & Müller* [2004] ECR I–9553, paragraph 24.

16 – See in this respect the interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, which states that 'contract conditions are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract' and by means of which tenderers 'undertake, when submitting their bids, to meet such conditions if the contract is awarded to them' (p. 17). In order to be compatible with Article 49 EC, such contract conditions must comply with the principle of non-discrimination on grounds of nationality and with the principle of transparency, as we shall see below.

17 – Joined Cases 62/81 and 63/81 [1982] ECR 223.

18 – Paragraph 14.

19 – Case C–490/04 *Commission* v *Germany* [2007] ECR I–0000, paragraph 17. In the same judgment, the Court also indicates that 'Directive 96/71 did not harmonise the material content of those national rules [and that that] content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general

principles of Community law, including therefore … Article 49 EC' (paragraph 19).

20 – See in particular Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9). Under Article 15 of that directive, headed 'More favourable provisions', the directive 'shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers'.

21 – See Rodière, P., *Droit social de l'Union européenne*, LGDJ, Second edition, Paris, 2002, p. 551.

22 – Ibid., pp. 55 and 56. The author nevertheless states that this issue is not immune to possible wage negotiations at European level. Moreover, he notes that, leaving aside the strict determination of the amount or level of wages, 'the principle of wage equality between men and women may have a general impact on the mechanisms for remunerating workers' and that 'other Community regulations may have an effect in the wage field, for example with regard to the organisation of working time'.

23 – The expression used by Moizard, N., *Droit du travail communautaire et protection nationale renforcée – L'exemple du droit du travail français*, Presses universitaires d'Aix-Marseille, Aix-en-Provence, 2000 (see in particular pp. 94 to 96). According to the author, the terms and conditions of employment in the matters referred to in Directive 96/71 are 'minimum domestic rules, with a basis in State or contractual provisions, which under the directive the Member States must ensure are observed as a minimum in the situation of the temporary posting of workers' (p. 95). This idea is also expressed in the 34th recital in the preamble to Directive 2004/18, according to which Directive 96/71 'lays down the minimum conditions which must be observed by the host country in respect of … posted workers'.

24 – I share, in this regard, the analysis put forward by Advocate General Mengozzi in the Opinion he delivered on 23 May 2007 in Case C-341/05 *Laval un Partneri* (pending before the Court), in which he stated that 'although Directive 96/71 accepts that the Member States may apply to a service provider of a Member State that posts workers temporarily to the territory of another Member State terms and conditions of employment that are more favourable for the workers than those referred to in particular in Article 3(1) of [that directive], the granting of that option must nevertheless respect the freedom to provide services guaranteed by Article 49 EC (point 151). Moreover, in its interpretative communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into such contracts, the Commission accepts that in both national and cross-border situations 'provisions more favourable to workers may … also be applied (and must then also be complied with), provided that they are compatible with Community law' (p. 21, point 3.2).

25 – See in particular Case C-490/04 *Commission* v *Germany*, paragraph 63 and the case-law cited.

26 – See in particular *Wolff & Müller*, paragraph 32 and the case-law cited.

27 – See in particular Case C-490/04 *Commission* v *Germany*, paragraphs 64 and 65 and

the case-law cited.

28 – See in particular *Wolff & Müller*, paragraph 35 and the case-law cited. In order to recognise that the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules constitute an overriding requirement, the Court adduced 'conditions specific to that sector' (Case C–272/94 *Guiot and Climatec* [1996] ECR I–1905, paragraph 16, and Joined Cases C–369/96 and C–376/96 *Arblade and Others* [1999] ECR I–8453, paragraph 51).

29 – See in particular Case C–445/03 *Commission* v *Luxembourg* [2004] ECR I–10191, paragraph 29 and the case-law cited, and Case C–168/04 *Commission* v *Austria* [2006] ECR I–9041, paragraph 47.

30 – *Wolff & Müller*, paragraph 41.

31 – Ibid., paragraph 42. The Court is referring here to the fifth recital in the preamble to Directive 96/71, which, in the view of the Court, demonstrates that these two objectives can be pursued simultaneously.

32 – Case C–244/04 *Commission* v *Germany* [2006] ECR I–885, paragraph 61. See, with regard to the evolution of this case-law, Mischo, J., 'Libre circulation des services et dumping social', *Le droit à la mesure de l'Homme*, in Mélanges en l'honneur de Philippe Léger, Pedone, Paris, 2006, p. 435.

33 – Joined Cases C–49/98, C–50/98, C–52/98 to C–54/98 and C–68/98 to C–71/98 *Finalarte and Others* [2001] ECR I–7831, paragraph 39, and Case C–164/99 *Portugaia Construções* [2002] ECR I–787, paragraph 26.

34 – *Portugaia Construções*, paragraph 27 and the case-law cited.

35 – Ibid., paragraph 28 and the case-law cited.

36 – See *Wolff & Müller*, paragraph 38.

37 – *Finalarte and Others*, paragraph 45.

38 – Case C–341/02 *Commission* v *Germany* [2005] ECR I–2733, paragraph 29.

39 – As the German Government indicates in paragraph 63 of its written observations, apart from the fact that specific collective agreements provide for higher minimum rates of pay, it is also interesting to note that the objective of worker protection also lies in the fact that such agreements allow more differentiated and appropriate remuneration according to the work performed. I would remind the Court that the wage scale in such agreements is more detailed than that in the TV Mindestlohn and sets different wage levels for different groups of activities.

40 – Paragraph 26.

41 – See to that effect Martinez, V., ‘Les péripéties du critère social dans l’attribution des marchés publics’, *Contrats publics*, in Mélanges en l’honneur du professeur Michel Guibal, Volume II, Presses de la faculté de droit de Montpellier, 2006, pp. 251 and 252. In particular, the author expresses the notion that public procurement may be a means of combating unemployment and exclusion, in which case it is used as a ‘buttress for generating employment’.

42 – Case 31/87 *Beentjes* [1988] ECR 4635 and Case C–225/98 *Commission* v *France* [2000] ECR I–7445. With regard to this case-law and its assimilation into French law, see Pongérard-Payet, H., ‘Critères sociaux et écologiques des marchés publics: droits communautaire et interne entre guerre et paix’, *Europe*, No 10, October 2004, Étude 10.

43 – Let us also quote the 33rd recital in the preamble to that directive, which states that ‘[c]ontract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents’. In *Beentjes*, the Court had already ruled that in order to meet the directive’s aim of ensuring the development of effective competition in the award of public contracts, ‘the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts’ (paragraph 21).

44 – See to that effect, with regard to criminal prosecutions, *Arblade and Others*, paragraph 43.

45 – I remind the Court in this regard that the undertaking made by the contractor refers to the ‘remuneration prescribed by the collective agreement at the place where these services are performed, as set out in the list of representative collective agreements referred to under No 01 “Construction industry”’.

Judgment of the Court (Fourth Chamber)
of 13 December 2007
Bayerischer Rundfunk and Others v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH. Reference for a preliminary ruling: Oberlandesgericht Düsseldorf - Germany. Directives 92/50/EEC and 2004/18/EC - Public service contracts - Public broadcasting bodies - Contracting authorities - Bodies governed by public law - Condition that the activity of the institution be financed, for the most part, by the State'. Case C-337/06.

In Case C337/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Oberlandesgericht Düsseldorf (Germany), made by decision of 21 July 2006, received at the Court on 7 August 2006, in the proceedings

Bayerischer Rundfunk ,

Deutschlandradio ,

Hessischer Rundfunk ,

Mitteldeutscher Rundfunk ,

Norddeutscher Rundfunk ,

Radio Bremen ,

Rundfunk Berlin-Brandenburg ,

Saarländischer Rundfunk ,

Südwestrundfunk ,

Westdeutscher Rundfunk ,

Zweites Deutsches Fernsehen

v

GEWA Gesellschaft für Gebäudereinigung und Wartung mbH ,

intervening party:

Heinz W. Warnecke, trading under the name of Großbauten Spezial Reinigung,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, R. Silva de Lapuerta, E. Juhasz (Rapporteur) and J. Malenovsku, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2007,

after considering the observations submitted on behalf of:

- Bayerischer Rundfunk, Deutschlandradio, Hessischer Rundfunk, Mitteldeutscher Rundfunk, Norddeutscher Rundfunk, Radio Bremen, Rundfunk Berlin-Brandenburg, Saarländischer Rundfunk, Südwestrundfunk, Westdeutscher Rundfunk, Zweites Deutsches Fernsehen, by B. Mitrenga and K.P. Mailänder, Rechtsanwälte, and by C.-E. Eberle and J. Betz, Justiziare, and by N. Hütt, Referentin im Justiziariat,

- GEWA Gesellschaft für Gebäudereinigung und Wartung mbH, by C. Antweiler and K. P. Dreesen, Rechtsanwälte,

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- the German Government, by M. Lumma, acting as Agent,

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

- the Polish Government, by E. Oniecka-Tamecka, acting as Agent,

- the Commission of the European Communities, by X. Lewis and B. Schima, acting as Agents,

- the European Free Trade Association Surveillance Authority, by B. Alterskjær and L. Young, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2007

gives the following

Judgment

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

1. The first condition of the third indent of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that there is financing, for the most part, by the State when the activities of public broadcasting bodies such as those in the main proceedings are financed for the most part by a fee payable by persons who possess a receiver, which is imposed, calculated and levied according to rules such as those in the main proceedings.

2. The first condition of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that, that, if the activities of public broadcasting bodies such as those in the main proceedings are financed according to the procedures set out when examining the first question, the condition of financing ... by the State' does not require that there be direct interference by the State or by other public authorities in the awarding, by such bodies, of a contract such as that at issue in the main proceedings.

3. Article 1(a)(iv) of Directive 92/50 must be interpreted as meaning that only the public contracts specified in that provision are excluded from the scope of that directive.

1. This reference for a preliminary ruling relates to the interpretation of the first condition of the third indent of the second subparagraph of Article 1(b) and Article 1(a)(iv) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2. The dispute in the proceedings from which the reference has been made is whether the German public broadcasting bodies (Landesrundfunkanstalten) are contracting authorities for the purposes of application of the Community rules on the award of public contracts.

Legal context

Community legislation

3. Under Article 7(1), Directive 92/50 is to apply to public service contracts the estimated value of which, net of VAT, is not less than ECU 200 000.

4. Article 1(b) of Directive 92/50 provides:

[C]ontracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

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

and

- having legal personality

and

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

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

5. That provision is repeated in almost identical terms in Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). The purpose of that directive, as set out in Recital (1) of its preamble, was a recasting within a single measure of the separate directives which applied to the procedures for awarding public contracts in the three areas mentioned above and, under Article 80, the date for transposition of that directive into the legal systems of the Member States was to be no later than 31 January 2006.

6. The German public broadcasting bodies are not mentioned in either the Annex referred to in the last subparagraph of Article 1(b) of Directive 92/50 or Annex III to Directive 2004/18, which is of similar content.

7. Article 1(a)(iv) of Directive 92/50 provides that the following are excluded from its provisions:

[C]ontracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time'.

8. That provision was repeated in identical wording in Article 16(b) of Directive 2004/18.

9. The rationale underlying that provision is set out in the eleventh recital of the preamble to Directive 92/50 where it is stated:

Whereas the award of contracts for certain audiovisual services in the broadcasting field is governed by considerations which make the application of procurement rules inappropriate'.

10. That reason is further explained in Recital 25 of the preamble to Directive 2004/18 which provides:

The awarding of public contracts for certain audiovisual services in the field of broadcasting should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For these reasons, an exception must therefore be made for public service contracts for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme and contracts concerning broadcasting times. However, this exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes... '

National legislation

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11. The abovementioned Article 1(b) of Directive 92/50 has been transposed into national law by Article 98(2) of the Law against restrictions on competition (Gesetz gegen Wettbewerbsbeschränkungen). That provision is identical in content to the Community rules, the sole difference being that, as regards the definition of body governed by public law', the condition that the activities of the body in question be financed for the most part by the public authorities is qualified by the statement that the financing may be undertaken by shareholding in capital or otherwise'.

12. The second subparagraph of Article 5(1) of the German Basic Law is worded as follows:

The freedom of the press and the freedom of reporting by broadcasts and film are guaranteed.'

13. That provision has been consistently interpreted by the highest German courts, in particular by the Bundesverfassungsgericht (Federal Constitutional Court) and the Bundesverwaltungsgericht (Federal Administrative Court), as imposing an absolute prohibition on any interference or any intervention by the public authorities in the management and operation of the public broadcasting bodies and an obligation of strict neutrality in relation to the programme material of those bodies. That provision of the Basic Law is of cardinal importance in the structure of the present German state and aims to ensure that broadcasting does not become a political instrument. It represents a constitutional guarantee of the right to freedom of expression and the right to receive information from a plurality of sources, and also of the existence of public broadcasting bodies and of their financing and development.

14. Those bodies are institutions governed by public law, endowed with legal personality and invested with a remit to serve the public interest. They are independent of the State authorities, self-managed and organised in such a way as to exclude any influence by the public authorities. In accordance with the case-law of the highest German courts, those bodies are not part of the structure of the State.

15. The financing of those bodies is governed by State Treaties (Staatsverträge), that is, treaties entered into by the Federal authority (Bund) and the Länder.

16. Article 11(1) of the State Treaty on broadcasting (Rundfunkstaatsvertrag) provides:

The funds made available for operating costs must enable the public broadcasting bodies to fulfil their constitutional and statutory purposes; and must in particular guarantee the existence of public-law broadcasting and its development.'

17. In accordance with Article 12 of the State Treaty in question, more than half of the needs of the public broadcasting bodies are primarily financed by fees paid by citizens and, for the balance, by advertising and other revenues. In accordance with the caselaw of the Bundesverfassungsgericht, financing by means of a fee is appropriate to the remit of public service broadcasting, satisfies the constitutional guarantee of financing and represents a functional method of financing which ensures that autonomy of programming is protected from any political interference by the State.

18. The detailed procedures for collection of the fee are governed by the State Treaty on the regulation of the broadcasting fee (Staatsvertrag über die Regelung des Rundfunkgebührenwesens) of 31 August 1991, as amended on 11 September 1996 (GVBl. NRW 1996, p. 431, the State Treaty on the broadcasting fee'). Under that State Treaty, it is possession of a broadcasting receiver which gives rise to the obligation to pay the fee. The circumstance that the receiver is not actually used has no bearing on the obligation to pay. Entitlement to the fee lies formally with the regional broadcasting bodies established in the territories of each of the Länder.

19. The regulations on the amount of the fee, calculated by reference to the established financial needs of the public broadcasting bodies, are to be found in the State Treaty on the financing of broadcasting (Rundfunkfinanzierungsstaatsvertrag) of 26 November 1996 (GVBl. NRW 1996, p. 484).

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The amount of the fee is formally approved by the Parliaments and Governments of the Länder.

20. The public broadcasting bodies have established, by means of an administrative agreement, a central agency for the collection of fees, the Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten (the GEZ'). The GEZ is an association governed by public law which has in particular the task of invoicing and collecting the fee. The GEZ has no legal personality and has no capacity to bring legal proceedings but it acts for and on behalf of the various regional public broadcasting bodies. However, as regards recovery of the fee from the citizens, the GEZ issues a notice of liability to the charge, which is to say it acts as an official authority. Similarly, if the fee is not paid, Article 7(6) of the State Treaty on the broadcasting fee provides that notices of arrears of the broadcasting fee are subject to enforcement by administrative proceedings. The regional broadcasting organisation entitled to the funds may send the request for assistance in enforcement directly to the authority having jurisdiction over the place of domicile or habitual residence of the persons liable to pay the fee... '.

21. Monitoring and verification of the financial requirements declared by the public broadcasting bodies are entrusted to an independent commission, the Kommission zur Überprüfung und Ermittlung des Finanzbedarfs der Rundfunkanstalten (Commission for the study and assessment of the financial needs of public broadcasting bodies the KEF'). That commission, consisting of 16 independent experts, receives and examines estimated requirements as submitted by the public broadcasting bodies and discusses them with their representatives. The KEF issues a report at least once every two years, and on that report the Parliaments and Governments of the Länder base their formal decisions on the amount of the fee. That procedure, in which the KEF now has a role, was set up following a judgment of the Bundesverfassungsgericht of 22 February 1994, which ruled that a procedure whereby the decision on the amount of the fee was taken by the First Ministers of the Länder without advice from an independent commission did not guarantee the independence required by the Basic Law.

22. The revenues from the fees are allocated, in particular, to the public broadcasting bodies and to the media authority of the Land concerned.

The main proceedings and the questions referred for a preliminary ruling

23. In August 2005, the GEZ sent a written invitation to 11 cleaning businesses to submit binding tenders for the provision of cleaning services in its premises in Cologne. No formal procedure for the awarding of public contracts compatible with the Community rules took place. The stipulated duration of the contract was from 1 March 2006 until 31 December 2008, the contract being tacitly renewable from year to year. The GEZ estimated the total outlays per annum at more than EUR 400 000.

24. The undertaking GEWA Gesellschaft für Gebäudereinigung und Wartung mbH, one of the cleaning businesses to which the invitation to tender was sent, was informed by the GEZ in November 2005 that it had not been awarded the contract. Since GEWA considered that the GEZ as a contracting authority should have submitted the cleaning contract to an invitation to tender which complied with the Community rules, it brought an action before the public contracts division of the Bezirksregierung (District Administration) of Cologne. That body upheld the action, ruling that the contract at issue was alien to the actual activity of broadcasting and was consequently subject to the Community law relating to public contracts.

25. The public broadcasting bodies appealed against that decision to the public contracts division of the Oberlandesgericht (Higher Regional Court) Düsseldorf, claiming that they were not contracting authorities, given that the public broadcasting service is financed for the most part by the fee paid by the television viewers and that there is no public funding nor public control of that service.

26. The referring court finds that the conditions set out in the first and second indents of the

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second subparagraph of Article 1(b) of Directive 92/50, and in indents (a) and (b) of the second subparagraph of Article 1(9) of Directive 2004/18, on the definition of body governed by public law' are satisfied in this case, inasmuch as the public broadcasting bodies were established specifically to satisfy needs in the general interest, not having an industrial or commercial character and are endowed with legal personality. The court states moreover that, as regards the three conditions to be found respectively, in the third indent of the second subparagraph of Article 1(b) of Directive 92/50 and in indent (c) in the second subparagraph of Article 1(9) of Directive 2004/18, the last two are not satisfied in this case, inasmuch as the public authorities do not exercise any supervision over the management of those bodies and have no influence on appointments to their governing bodies. The issue still to be determined therefore is whether the activity of the bodies in question is financed for the most part by the State or by other contracting authorities, so that they may be regarded as bodies governed by public law' and, consequently, as contracting authorities'.

27. The referring court states that, according to one school of thought in current German case-law and academic writing, the condition of being financed, for the most part, by the State' requires a direct causal link between that financing and the State. That approach takes as its sole criterion whether the State is the origin or source of the funds, which is to say whether the funds come from the State budget, and takes no account either of the fact that the liability of customers to pay the fee is based on a provision of law or of the fact that collection of that fee is carried out by means of a transfer of public authority powers. According to that first approach, direct State financing must also enable the State or other public authorities to exercise a concrete influence on the various procedures for the awarding of contracts by the body in receipt of the financing.

28. According to another school of thought in the case-law and academic writing, one to which the referring court subscribes, the fact that as a matter of law individuals are obliged to pay the fee is sufficient reason to hold that the condition of financing...by the State' of the activity of the public broadcasting bodies in the main proceedings is satisfied. The Community rules on the awarding of public contracts therefore apply to those bodies, which are financed by the mandatory fee and are not therefore subject to the laws of the market. Moreover, to follow that school of thought further, the fact that the State is obliged by the Basic Law to maintain neutrality in relation to the management of those bodies and their programme material does not mean that public contracts entered into by them which are unconnected to their principal purpose remits should not be subject to the Community rules.

29. Having regard to the foregoing, the Oberlandesgericht Düsseldorf decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Where it appears in the first condition of indent (c) of the second subparagraph of Article 1(9) of Directive 2004/18, is the term financed...by the State' to be interpreted as including indirect financing of certain bodies through the payment of fees by persons who possess broadcasting receivers, taking into account the overriding obligation imposed on the State by constitutional law to ensure the independent financing and the existence of those bodies?

(2) If the first question is answered in the affirmative, is the first condition of indent (c) of the second subparagraph of Article 1(9) of Directive 2004/18 to be interpreted as requiring that financing by the State' must involve a direct public influence on the awarding of contracts by the body financed by the State?

(3) If the second question is answered in the negative, is indent (c) of the second subparagraph of Article 1(9) of Directive 2004/18, in the light of Article 16(b) [of that directive], to be interpreted as meaning that the only services excluded from its scope are those services specified in the latter provision, and that included within its scope are other services which are ancillary or secondary but which are not specifically related to programming (by argumentum a contrario)?'

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Concerning the questions referred for a preliminary ruling

Preliminary observations

30. The questions as formulated by the national court make reference to the relevant provisions of Directive 2004/18. Given however that the facts of the case in the main proceedings fall within the scope ratione temporis of Directive 92/50, the Court's examination and answers will relate to the corresponding provisions of Directive 92/50 in the light of certain clarifications made by Directive 2004/18. In any event, the provisions of the latter directive and their underlying principles are identical in content to the provisions and principles of the preceding directives and Directive 2004/18 represents a recasting of pre-existing provisions. Accordingly there is no reasonable justification for a different approach under the new directive.

31. It must also be stated that even though the German system of financing the public broadcasting bodies excludes as a matter of principle the exercise by the public authorities of any political influence whatsoever on those bodies, that fact alone does not mean that the present case should be examined solely from the point of view that it is impossible, by definition, for the State to exercise such influence. For the purposes of uniform interpretation and application of Community law and of the realisation of the objectives of the EC Treaty the Court must also take into account other considerations such as freedom of movement and the opening of the market.

The first question

32. By this question, the Court is requested to interpret the concept of financed, for the most part, by the State' or by another public body, contained in the first condition of the third indent of the second subparagraph of Article 1(b) of Directive 92/50, in order to answer the question whether that condition is satisfied when the activities of public broadcasting bodies such as those involved in the main proceedings are financed for the most part by a fee charged, assessed and collected in accordance with rules such as those involved in the main proceedings.

33. It must first of all be pointed out that, as regards whether the financing is for the most part', it is common ground that, in accordance with the case-law of the Court, that condition is satisfied in this case, since more than one half of the income of the public broadcasting bodies in question comes from the fee at issue in the main proceedings (see, to that effect, Case C380/98 University of Cambridge [2000] ECR I8035, paragraph 30).

34. It must then be stated that the wording of the first condition of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 contains no details as to the procedures for delivering the financing to which that provision relates. Thus, in particular, there is no requirement that the activity of the bodies in question should be directly financed by the State or by another public body failing which the condition attaching to that point is not satisfied. Examination of the financing procedures must therefore not be restricted to those put forward by the various interested parties in this case.

35. With a view to the interpretation of the concept of financed... by the State' or by other public bodies, it is appropriate to refer to the aim of the Community directives in relation to public contracts, as stated in the case-law of the Court.

36. In accordance with that case-law, the aim of the directives in relation to awarding public contracts is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (University of Cambridge , paragraph 17, and case-law there cited).

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37. The Court has restated those objectives, adding that the concept of contracting authority', including a body governed by public law', must be interpreted, in the light of those objectives, in functional terms (Case C237/99 Commission v France [2001] ECR I939, paragraphs 42 and 43, and case-law there cited).

38. The Court has held that the purpose of coordinating at Community level the procedures for awarding public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (University of Cambridge , paragraph 16, and Commission v France , paragraph 41).

39. As regards specifically public service contracts, the Court has emphasised that same primary objective, namely the free movement of services and the opening-up to competition in the Member States which is undistorted and as wide as possible (see, to that effect, Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I1, paragraphs 44 and 47).

40. A method of financing public broadcasting bodies such as that in the main proceedings must be assessed in the light of those objectives and in relation to those criteria, which implies that the concept of financed ... by the State' must also receive a functional interpretation.

41. It must first of all be stated that the fee which provides the greater part of the funding of the activities of the bodies in question has its origin in the State Treaty on broadcasting, in other words in a measure of the State. The fee is provided for and imposed by statute and is not the result of any contractual arrangement entered into by those bodies and the customers. Liability to pay that fee arises out of the mere fact of possession of a receiver and is not in consideration of actual use of the services provided by the bodies in question.

42. It must then be observed that the determination of the amount of the fee is not the product of any contractual relationship between the public broadcasting bodies in the main proceedings and the customers either. Under the State Treaty on the financing of broadcasting, the amount is determined by formal decision of the Parliaments and Governments of the Länder, adopted on the basis of a report drawn up by the KEF in relation to the financial requirements declared by those bodies themselves. The Parliaments and Governments of the Länder are free not to follow the recommendations of the KEF, while respecting the principle of the freedom of broadcasting, but on limited grounds, namely where the amount of the fee represents for the customers a financial burden which is disproportionate with regard to the general economic and social situation, and capable of affecting adversely their access to information (see judgment of the Bundesverfassungsgericht of 11 September 2007 BvR 2270/05, BvR 809/06 and BvR 830/06).

43. Even if the position were that the Parliaments and Governments of the Länder were obliged to follow without qualification the recommendations of the KEF, it would remain the case that this mechanism for fixing the amount of the fee was established by the State, which has thereby transferred public authority powers to a commission of experts.

44. As regards the procedures for the levying of the fee, it is clear from the State Treaty on the broadcasting fee that the latter is recovered by GEZ which, on behalf of the public broadcasting bodies, issues notices of liability to the charge, in other words by act of an official authority. Similarly, if payment is not made on time, notices of arrears are the subject of enforcement by administrative proceedings, and the public broadcasting organisation concerned, as the party entitled to payment, may send the request for enforcement assistance directly to the authority which has jurisdiction. Accordingly, in this respect the bodies in question enjoy the powers of a public authority.

45. The resources thus allocated to those bodies are paid without any specific consideration in

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return, within the meaning of the case-law of the Court (see, to that effect, University of Cambridge , paragraphs 23 to 25). Indeed, no contractual consideration is linked to those payments, since neither the liability to pay the fee nor its amount is the result of any agreement between the public broadcasting bodies and the customers, the latter being obliged to pay the fee provided only that they possess a receiver, irrespective of whether they use the service offered by those bodies. Accordingly, customers must pay the fee, even if they have never made use of the services of those bodies.

46. The argument of the applicants in the main proceedings that the determining factor cannot be that the fee is provided for in a provision of law, otherwise all the doctors, lawyers and architects established in the Federal Republic of Germany would be financed by the State' because the levels of their fees are fixed by the State, is ineffectual. Even though those levels are regulated by the State, the consumer always enters of his own free will into a contractual relationship with the members of those professions and always receives an actual service. In addition, the financing of the activities of members of those professions is neither ensured nor guaranteed by the State.

47. It must be observed, lastly, that, in the light of the functional approach referred to above, as the Commission of the European Communities rightly points out, the assessment made cannot vary according to whether the financial resources pass through the State budget, the State first collecting the fee and then making the fee income available to the public broadcasting bodies, or whether the State grants to those bodies the right to collect the fee themselves.

48. It must therefore be concluded that financing such as that at issue in the main proceedings, which is brought into being by a measure of the State, is guaranteed by the State and is secured by methods of charging and collection which fall within public authority powers, satisfies the condition of financing... by the State' for the purposes of application of the Community rules on the awarding of public contracts.

49. That method of indirect financing is sufficient for the condition on financing... by the State' laid down in the Community legislation to be satisfied and it is not necessary that the State itself establish or appoint a public or private body to the task of collection of the fee.

50. The answer to be given to the first question referred is therefore that the first condition of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that there is financing, for the most part, by the State when the activities of public broadcasting bodies such as those in the main proceedings are for the most part financed by a fee payable by persons who possess a receiver, which is imposed, calculated and levied according to rules such as those in the main proceedings.

The second question

51. By its second question, the referring court asks whether the first condition of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that, if a public broadcasting body is financed according to the procedures set out in the first question referred for a preliminary ruling, the condition of financing... by the State' requires the direct interference of the State or other public authorities when a contract such as that in the main proceedings is awarded by such a body.

52. For the purposes of answering that question, it must first be observed that there is no requirement in the wording of the provision under consideration that, when a particular public contract is being awarded, there be direct intervention by the State or by another public body before the condition of financing... by the State' can be satisfied.

53. As regards, secondly, the criterion of the dependence of a body on the public authorities, developed in the case-law of the Court as regards the three conditions to be found in the third

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indent of the second paragraph of Article 1(b) of Directive 92/50 (see, to that effect, Case C44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I73, paragraph 20), the referring court refers to the above mentioned approach of one school of thought in German case-law and academic writing, to the effect that dependence implies that the public authorities are able to have actual influence on the awarding of various contracts.

54. It must first be observed that the question whether the public broadcasting bodies in the main proceedings are dependent on the public authorities arises only in relation to the awarding of contracts which have no connection to performance of the defined public service remit of those bodies, as guaranteed by the German Basic Law, namely the creation and production of programme material. The contract at issue in the main proceedings does not fall within that particular function of those bodies.

55. It must then be stated that, in this case, as is clear from the considerations elaborated when examining the first question, the very existence of the public broadcasting bodies in question depends on the State. The criterion of the dependence of those bodies on the State is thereby satisfied, and it is not necessary for the public authorities to have any real influence on the various decisions of the bodies in question on the awarding of contracts.

56. That dependence in the broad sense does not exclude the risk, if the Community rules on the awarding of public contracts are not observed, that the public broadcasting bodies in the main proceedings may allow themselves to be guided by considerations other than economic, inter alia, by giving preference to national tenderers or candidates. Those bodies may take such an approach without breaching the requirements laid down by the German Basic Law, which does not prohibit it. As the referring court judiciously observes, the State's obligation of neutrality in relation to the creation of programme material by the bodies in question, as guaranteed by the German Basic Law and interpreted by the Bundesverfassungsgericht, does not require those bodies to be neutral in relation to awarding contracts. Such a risk is contrary to the objectives of the Community rules on the awarding of public contracts set out in paragraphs 38 and 39 of this judgment.

57. The referring court asks in addition what relevance, for the purposes of answering the second question, is to be attributed to the position adopted by the Court in paragraph 21 of University of Cambridge , to the effect that while the way in which a particular body is financed may reveal whether it is closely dependent on another contracting authority, that criterion is however not an absolute one. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as public financing'.

58. In that regard it must be observed that, as regards the relationship of the bodies in question and the consumers, it is clear from paragraphs 23 to 25 of University of Cambridge , that it is possible to categorise as public financing' public outlays to which no consideration in return is contractually linked. As has been determined in paragraph 45 of this judgment, in this case no consideration in return is contractually linked to the resources allocated to the public broadcasting bodies in the main proceedings, since neither the liability to pay the fee nor the amount of the fee is the result of an agreement between those bodies and the consumers, whose obligation to pay the fee arises from the mere fact of their possession of a receiver, even if they never make use of the services of those bodies.

59. Equally, in this case the State obtains no specific consideration in return, given that, as the referring court judiciously states, the financing in the main proceedings serves to offset the obligations engendered by performance of the State's publicservice remit, which is to ensure that citizens receive objective information from a number of audiovisual sources. To that extent, the

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broadcasting bodies in the main proceedings are no different from any other public service which is subsidised by the State for the performance of its tasks in the public interest.

60. The answer to be given therefore to the second question referred is that the first condition of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that, if the activities of public broadcasting bodies such as those in the main proceedings are financed according to the procedures set out when examining the first question, the condition of financing ... by the State' does not require that there be direct intervention by the State or by other public authorities in the awarding, by such bodies, of a contract such as that at issue in the main proceedings.

The third question

61. By its third question, the referring court asks whether Article 1(a)(iv) of Directive 92/50 must, in the light of the third indent of the second subparagraph of Article 1(b) of that directive, be interpreted as meaning that only public contracts relating to the services specified in the former provision are excluded from the scope of that directive.

62. Article 1(a)(iv) of Directive 92/50 provides that that directive does not apply to public contracts for services which fall within the essential function of public broadcasting bodies, namely the creation and production of programme material, for the cultural and social reasons alluded to in the eleventh recital of the preamble to Directive 92/50 and, more explicitly, in recital 25 of the preamble to Directive 2004/18, which render that application inappropriate.

63. That provision, as the Advocate General suggests in point 80 of his Opinion, reflects the same concern as that expressed in the German Basic Law, namely the guarantee that the public broadcasting bodies can accomplish their public service remit with complete independence and impartiality.

64. The provision in question being an exception to the principal objective of the Community rules on the awarding of public contracts, as stated in paragraph 39 of this judgment, namely freedom of movement of services and a market open to competition which is as wide as possible, it must be interpreted strictly. Accordingly, the only public contracts excluded from the scope of Directive 92/50 are those for the services specified in Article 1(a)(iv) of that directive. On the other hand, the Community rules apply in full to public contracts for services which have no connection to the activities which form part of the performance of the publicservice remit, in the proper sense, of the public broadcasting bodies.

65. Support for that approach is found in the above-mentioned recital 25 in the preamble to Directive 2004/18 which states, by way of guidance, in the penultimate sentence, that the exclusion from application of that directive should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of programmes.

66. However, it must be made clear that that those considerations apply only when what is at issue in a particular case is a contract awarded by a body to be regarded as a contracting authority' within the meaning of Article 1(b) of Directive 92/50.

67. The answer to be given therefore to the third question referred is that Article 1(a)(iv) of Directive 92/50 must be interpreted as meaning that only those public contracts which relate to the services specified in that provision are excluded from the scope of that directive.

Costs

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

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p.85-86 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Chronique de jurisprudence communautaire. Marchés publics, L'actualité juridique ; droit administratif 2008 p.249 ; Meisse, Eric: Notion de pouvoir adjudicateur, Europe 2008 Février Comm. no 44 p.22 ; Mok, M.R.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2008 no 162 ; Kan, Alvin: Europäisches Wirtschafts- & Steuerrecht - EWS 2008 p.189-191

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Case C-337/06

Bayerischer Rundfunk and Others

v

GEWA – Gesellschaft für Gebäudereinigung und Wartung mbH

(Reference for a preliminary ruling from the Oberlandesgericht Düsseldorf)

(Directives 92/50/EEC and 2004/18/EC – Public service contracts – Public broadcasting bodies – Contracting authorities – Bodies governed by public law – Condition that the activity of the institution be 'financed, for the most part, by the State')

Summary of the Judgment

1. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Contracting authorities – Body governed by public law*

(Council Directive 92/50, Art. 1(b), second para., third indent)

2. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Scope*

(Council Directive 92/50, Art. 1(a)(iv))

1. Article 1(b) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts provides in its first subparagraph that the expression 'contracting authorities' includes 'bodies governed by public law', and, in its second subparagraph, that a 'body governed by public law' means any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (first indent), having legal personality (second indent), and financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law (third indent).

   Concerning the third indent, the expression 'financed, for the most part, by the State' must be interpreted as meaning that there is such financing when the activities of public broadcasting bodies, with legal personality, invested with a remit to serve the public interest, independent of the State authorities, self-managed and organised in such a way as to exclude any influence by the public authorities, and which are not part of the structure of the State, are for the most part financed by a fee payable by persons who possess a receiver, which is imposed, calculated and levied according to the rules of State treaties concluded for those purposes and is not the result of any contractual arrangement entered into by those bodies and the customers.

   Moreover, where the activities of public broadcasting bodies are financed according to such procedures, the condition of 'financing … by the State' does not require the direct interference of the State or other public authorities when such bodies award public contracts which have no connection with the performance of their public service remit in the proper sense. Given that, in view of their method of financing, the very existence of the public broadcasting bodies in question depends on the State, the criterion of the dependence of those bodies on the State is satisfied, without it being necessary for the public authorities to have any real influence on the various decisions of the bodies in question on the awarding of contracts.

(see paras 41, 50, 54-55, 60, operative part1-2)

2. Article 1(a)(iv) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, which provides that that directive does not apply to public contracts for services which fall within the essential function of public broadcasting bodies, namely the creation and production of programme material, must be interpreted as meaning that only those public contracts which relate to the services specified in that provision are excluded from the scope of that directive.

Since that provision constitutes an exception to the principal objective of the Community rules on the awarding of public contracts, namely freedom of movement of services and a market open to competition which is as wide as possible, it must be interpreted strictly. Accordingly, the only public contracts excluded from the scope of Directive 92/50 are those for the services specified in Article 1(a)(iv) of that directive, namely contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time. On the other hand, the Community rules apply in full to public contracts for services which have no connection to the activities which form part of the performance of the public–service remit, in the proper sense, of the public broadcasting bodies.

(see paras 62, 64, 67, operative part 3)

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Judgment of the Court (Fourth Chamber) of 13 December 2007 (reference for a preliminary ruling from the Oberlandesgericht Düsseldorf - Germany) - Bayerischer Rundfunk, Deutschlandradio, Hessischer Rundfunk, Mitteldeutscher Rundfunk, Norddeutscher Rundfunk, Radio Bremen, Rundfunk Berlin-Brandenburg, Saarländischer Rundfunk, Südwestrundfunk, Westdeutscher Rundfunk, Zweites Deutsches Fernsehen v GEWA Gesellschaft für Gebäudereinigung und Wartung mbH

(Case C-337/06) [1]

(Directives 92/50/EEC and 2004/18/EC - Public service contracts - Public broadcasting bodies - Contracting authorities - Bodies governed by public law - Condition that the activity of the institution be 'financed, for the most part, by the State')

Language of the case: German

Referring court

Oberlandesgericht Düsseldorf

Parties to the main proceedings

Applicants: Bayerischer Rundfunk, Deutschlandradio, Hessischer Rundfunk, Mitteldeutscher Rundfunk, Norddeutscher Rundfunk, Radio Bremen, Rundfunk Berlin-Brandenburg, Saarländischer Rundfunk, Südwestrundfunk, Westdeutscher Rundfunk, Zweites Deutsches Fernsehen

Defendant: GEWA Gesellschaft für Gebäudereinigung und Wartung mbH

Intervener in support of the defendant: Heinz W. Warnecke

Re:

Reference for a preliminary ruling - Oberlandesgericht Düsseldorf - Interpretation of indent (c) of the second subparagraph of Article 1(9) and Article 16(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134 of 30.04.2004, p. 114) - Award of cleaning services by an association of broadcasting bodies indirectly financed by the State without compliance with formal European procurement procedure - Concept of 'contracting authority'.

Operative part of the judgment

The first condition of the third indent of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that there is financing, for the most part, by the State when the activities of public broadcasting bodies such as those in the main proceedings are financed for the most part by a fee payable by persons who possess a receiver, which is imposed, calculated and levied according to rules such as those in the main proceedings;

The first condition of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that, that, if the activities of public broadcasting bodies such as those in the main proceedings are financed according to the procedures set out when examining the first question, the condition of 'financing ... by the State' does not require that there be direct interference by the State or by other public authorities in the awarding, by such bodies, of a contract such as that at issue in the main proceedings;

Article 1(a)(iv) of Directive 92/50 must be interpreted as meaning that only the public contracts specified in that provision are excluded from the scope of that directive.

_____

[1] - OJ C 281, 18.11.2006.

Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 6 September 2007. Bayerischer Rundfunk and Others v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH. Reference for a preliminary ruling: Oberlandesgericht Düsseldorf - Germany. Directives 92/50/EEC and 2004/18/EC - Public service contracts - Public broadcasting bodies - Contracting authorities - Bodies governed by public law - Condition that the activity of the institution be financed, for the most part, by the State'. Case C-337/06.

I - Introduction

1. To think of radio broadcasting as a medium for conveying information would be to reduce it to the feature which is most characteristic of it, while neglecting other features which have more significance in the light of the social and cultural importance which it has acquired in the course of its history. In western societies the association of communication media with current material well-being brings fresh meaning to the Roman maxim panem et circenses , which the Latin poet Juvenal (2) employed to mock the Roman people's acquiescent idleness and lack of interest in matters of politics. (3) Today, a translation of that aphorism could use comfort instead of bread, and television in place of the games of the Roman Circus.

2. No one now contests the immense power of images, which are capable of penetrating into the most remote corners of private life; consequently, in order to avoid the fulfilment of premonitions such as that of George Orwell in his novel 1984 (4) that audiovisual technology become a means of delivering propaganda, governments strive to forge safeguards to ensure a degree of objectivity and independence, at least in public broadcasting.

3. The three questions which the Oberlandesgericht (Higher Regional Court) of Düsseldorf (Germany) has referred to the Court of Justice are set in the context of the struggle to have a public broadcasting service which is sufficient for and compatible with the requirements of a State governed by the rule of law, in particular that of neutrality and respect for the plurality of political options. In Germany, as is clear from the order of reference, that guarantee is sustained, to a great extent, by requiring public broadcasting institutions to collect and manage their own funds, which derive from the obligatory payment of a certain sum chargeable on the mere fact of possessing a radio or a television.

4. That system of funding, which is the consequence of an uncontested public service obligation, raises the question whether those broadcasting bodies should be regarded as contracting authorities' within the meaning of the Community directives on the subject of public procurement, or whether, on the other hand, they should not be so described, and should be exempt from the procedures for public tendering for contracts.

II - Legal framework

A - Community legislation

5. As a preliminary, the referring court has turned to both Article 1(9) of Directive 2004/18/EC, (5) as regards its scope ratione personae, and Article 16(b) as regards its scope ratione materiae. That directive consolidated the rules of public contract tendering at Community level. The court points out that since the prescribed period for adoption of that Directive into national law has expired without the relevant transposition, the case-law of the Bundesgerichtshof (German Supreme Court) leads it to interpret the national rules in the light of any recently adopted Community legislative instrument, though it may not govern the contracting procedure at issue.

6. Even if the reasoning of the Oberlandesgericht is accepted, it is appropriate to consider the wording of Article 1(a) and (b) of Directive 92/50/EC, (6) for two reasons: first, that Article is the basic provision by which the German legislature was guided in adapting its legal order to

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the Community legal order and, consequently, the national legislation refers to that Article; secondly, because the corresponding rules of the consolidated text of Directive 2004/18 are absolutely identical.

7. In order to define its scope ratione personae, Article 1(b) of Directive 92/50, within Title I, on general provisions, considers contracting authorities as:

...

the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.'

A body governed by public law meaning any body:

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

- having legal personality and

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

8. Next, that provision specifies that the lists of bodies or of categories of such bodies governed by public law which fulfil (those) criteria are set out in Annex I to Directive 71/305/EEC (7).... Those lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive; ...'.

9. The same Article 1(a) lists the contracts which fall ratione materiae within the scope of the Directive, and expressly excludes:

...

(iv) contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time;

...'

B - National law

1. Regulation of public procurement

10. The procedures for the award of contracts by German public administrative bodies are incorporated in the Law against anti-competitive practices (Gesetz gegen Wettbewerbsbeschränkungen; (8) the GWB'); Article 1(b) of the Directive, on contracting authorities, has its national counterpart in Paragraph 98(2) of the GWB:

Paragraph 98 Contracting authority

Contracting authorities within the meaning of this chapter are:

1. regional or local authorities and their funds;

2. other legal persons governed by public and private law, established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character if they are financed for the most part by the bodies in sections 1 or 3, whether individually or jointly by shareholding or other means, or if those bodies exercise any control over their management or have appointed more than half the members of one of its administrative or supervisory organs. The foregoing shall also apply when a body falling within section 1 is one which, individually or jointly with others, provides most of the financing or which appoints more than half of the members of the

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administrative or supervisory organs;

3. associations the members of which are included in subsections 1 and 2;

...'

2. The legislation on the fee for public broadcasting

11. According to the order for reference, the financing of the public broadcasting authorities is regulated in Germany by two State Treaties concluded between the Federal State and the Länder. The characteristics of the broadcasting fee are essentially described in the Staatsvertrag über die Regelung des Rundfunkgebührenwesens (State Treaty concerning broadcasting fees; the State Treaty') of 31 August 1981, amended in 1996.

12. Paragraph 2 provides:

(1) The broadcasting fee shall consist of the basic fee and the television fee. Its amount shall be set by the Treaty on financing of broadcasting institutions.

...'

13. Paragraph 4 of the State Treaty provides:

(1) The obligation to pay the broadcasting fee runs from the first day of the month in which possession is taken of a broadcasting receiver.

(2) ...'

14. In turn, Paragraph 7 of the State Treaty governs the distribution of the revenues obtained from the fee:

(1) The income received from the basic fee shall be allocated to the broadcasting institution of the Land and, in the proportion determined in the State Treaty on financing of broadcasting institutions, to Deutschlandradio and to the Landesmedienanstalt (Communications media authority of the Land), in the territory of which a television and radio signal receiver is operational.

(2) The income received from the television fee shall be allocated to the broadcasting institution of the Land and to the extent provided in the Treaty on financing of broadcasting institutions, to the Landesmedienanstalt in the territory of which a television signal receiver is operational, and also to Zweites Deutsches Fernsehen (the second public television channel; ZDF)....

...'

15. The referring court explains that a second Treaty, the Rundfunkfinanzierungsstaatsvertrag (State Treaty on financing of broadcasting institutions; the State Financing Treaty') of 26 November 1996, determines the actual level of the fees, setting their amounts with the consent of the Länder Parliaments.

16. The assessment and calculation of the budgets of the broadcasters is delegated, in accordance with Paragraphs 2 to 6 of the State Financing Treaty, to the Kommission zur Überprüfung und Ermittlung des Finanzbedarfs der Rundfunkanstalten (Commission for the study and assessment of the financial needs of broadcasting institutions; the KEF'), which is independent and which prepares, at least every two years, a report on which the decision as to fees adopted by Parliaments and Governments of the Länder is based (Paragraph 3(5), together with Paragraph 7(2), of the State Financing Treaty).

17. By means of a Regulation of 18 November 1993, on the procedure for the payment of fees of Westdeutscher Rundfunk Köln, adopted pursuant to Paragraph 4(7) of the State Treaty with the consent of the Land Government, the broadcasters of the respective Länder obtain the money constituted

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by the fees from the citizens through the intermediary Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten in der Bundesrepublik Deutschland (the Fee Collection Agency of the public broadcasters of the German Federal Republic; the GEZ') by the exercise of sovereign powers.

III - The facts of the main proceedings and the questions referred for a preliminary ruling

18. The parties which brought an appeal before the Oberlandesgericht of Düsseldorf are the broadcasters of the Länder (the regional broadcasters), the members of the Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands (the association of German regional public broadcasters; the ARD') and the public television organisation ZDF, created by State Treaty of 6 June 1969, and also Deutschlandradio (together: the broadcasters').

19. In 2002 those institutions established the GEZ as an administrative body governed by public law, responsible for collecting and settling the fees in respect of each of the broadcasters of the Länder. Since it lacks legal personality, the GEZ acts in the name of and on behalf of the respective broadcasting institutions.

20. In August 2005, following market research, the GEZ sent a written invitation to 11 businesses to submit binding tenders for the provision of cleaning services in its buildings, and also in the canteen of Westdeutscher Rundfunk (one of the broadcasters included in the ARD) in Cologne, for the period between 1 March 2006 and 31 December 2008, providing for tacit extension from year to year. The value of the contract was estimated at more than EUR 400 000. No Community procedure for the awarding of public contracts compatible with the national provisions and the relevant Directive took place.

21. The company Gesellschaft für Gebäudereinigung und Wartung mbH (GEWA'), the respondent before the Oberlandesgericht of Düsseldorf, and the intervener, Mr Warnecke, responded to the GEZ's invitation to tender with separate offers. The former's offer had the lowest price. By a decision of 9 November 2005, the GEZ's board of directors decided to enter into negotiations with four of the tenderers, including GEWA and the intervener. The decision was also made that the economic feasibility of the each of the offers would be analysed, using the KepnerTregoe method, which allocates specific values in an assessment featuring technical, commercial and risk criteria. In terms of that assessment GEWA's offer was ranked in third place, and the offer of the intervener came first.

22. The GEZ informed GEWA by telephone that it had not been awarded the contract. In a written complaint of 14 November 2001, GEWA accused the GEZ, as the contracting authority, of failure to comply with the rules relating to public contracts, since it had not invited tenders at Community level for the cleaning contract. The GEZ rejected the complaint.

23. GEWA then brought an action, before the Vergabekammer (the court which has jurisdiction over the awarding of public contracts) of the Bezirksregierung (District administration) of Cologne, against the GEZ. GEWA's claim was that the GEZ be ordered to award the cleaning contracts by means of the formal procedure of Part 4 of the GWB or, as an alternative, that there be a new evaluation, subject to the Vergabekammer's ruling on the law.

24. The Court held that the GEZ, as a broadcaster, was a contracting authority within the meaning of Paragraph 98(2) of the GWB, given that such organisations were financed predominantly by means of fees paid by citizens and given that the basic provision of radio and television services, which was patently a public service, was a need in the general interest, not having an industrial or commercial character.

25. The Court held, in addition, that Article 1(a)(iv) of Directive 92/50 excluded only contracts for the acquisition, development, production or co-production of programmes by broadcasters and contracts for broadcasting time, manifestly different in nature from the service at issue in the

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main proceedings.

26. By a decision of 13 February 2006, the Vergabekammer upheld GEWA's action and ordered the GEZ and the broadcasters, if they intended to maintain their invitation to tender, to respect the rules relating to awarding of public contracts and the principles of equal treatment and transparency, and accordingly to make a public invitation to tender at the European level.

27. The regional broadcasters appealed against that decision before the administrative courts and sought its annulment on the ground that the applicant's claim against the GEZ was inadmissible and, in any event, unfounded. In their opinion, since they are public broadcasters, they cannot be regarded as contracting authorities within the meaning of Paragraph 98(2) of the GWB, since the burden of financing public broadcasting is met principally out of the fees paid by the customers.

28. They add that the State control required by Paragraph 98(2) of the GWB is lacking, because the State carries out only limited and secondary legal review. Further, the members of the broadcasters' boards of directors represent various social groups. The lack of any majority in their governing bodies eliminates the possibility of any State influence on the awarding of a public contract.

29. GEWA, on the other hand, defends the decision of the Vergabekammer.

30. Since it considers that the outcome of the proceedings depends on the interpretation of Article 1 of Directive 2004/18, the Vergabesenat of the Oberlandesgericht (the Chamber of the Higher Regional Court of Düsseldorf which has jurisdiction over awarding of public contracts) has decided to stay proceedings and to refer the following questions to the Court of Justice of the European Communities pursuant to the first paragraph of Article 234 EC:

(1) Where it appears in the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50, is the term financed... by the State to be interpreted as including indirect financing of certain bodies through the payment of fees by persons who possess broadcasting receivers, taking into account the overriding obligation imposed on the State by constitutional law to ensure the independent financing and the existence of those bodies?

(2) If the first question is answered in the affirmative, is the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 to be interpreted as requiring that financing by the State must involve a direct public influence on the awarding of contracts by the body financed by the State?

(3) If the second question is answered in the negative, is the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50, in the light of Article 1(a)(iv), to be interpreted to mean that the only services excluded from its scope of application are those services specified in the latter provision, and that included within its scope are other services which are ancillary or secondary but which are not specifically related to programming (by argumentum a contrario)?'

IV - The procedure before the Court of Justice

31. The reference for a preliminary ruling was lodged at the Registry of the Court of Justice on 7 August 2006.

32. Written observations have been submitted by GEWA, the broadcasters, the German, Polish and Austrian Governments, the European Free Trade Association (EFTA') Surveillance Authority and the European Commission.

33. At the hearing on 14 June 2007 oral argument was presented by the legal representatives of the broadcasters and of GEWA, and also by agents of the German Government, of the EFTA Surveillance Authority and of the European Commission.

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V - Analysis of the questions referred for a preliminary ruling

A - Defining the issues

34. Although the referring court has submitted three questions, it appears appropriate to take the first two together, (9) since they both refer to the scope of ratione personae and to the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50. (10)

35. The German broadcasters consider that they are not financed from public funds and claim that an analogy can be drawn between the legislation on the public procurement at issue in these proceedings and Articles 87 EC and 88 EC, on State aid, which require funding through State resources'.

36. However, and on this an observation of the Commission is very apt, I do not consider that the distinct character of the two sets of provisions and the objectives pursued by them permit such an audacious comparison, since, while on the matter of subsidies the EC Treaty aims to avoid any unjustified distortion of competition in a specific market caused by the use of public money, on the matter of public tendering for contracts what is at issue is the inclusion of an authority within the concept of contracting authority' for the purpose of determining whether that body must comply with the public tendering procedures.

37. It may therefore be remarked that those two spheres of law are not based on similar reasoning, and accordingly their comparison by analogy is inappropriate.

38. Lastly, although the third question has no relevance to the classification of the German broadcasters as contracting authorities, as they themselves say in their written observations, its analysis is to some extent useful if the answer to the first question is in the affirmative and the answer to the second question in the negative, since, in requesting interpretation of Article 1(a)(iv) of Directive 92/50, the Oberlandesgericht seeks to discover the scope of ratione materiae, which is logical, although it appears obvious.

B - The first and second questions referred for a preliminary ruling

39. The dispute relates to the German system of providing financial resources to broadcasting institutions. It is accordingly necessary to examine the essential characteristics of the system, to clarify whether the revenues of those bodies are State funded' for the purposes of Directive 92/50 and the case-law of the Court of Justice.

1. An obligation to pay governed by rules of public law

40. The broadcasters maintain that payment of the fee is left entirely to the free will of the consumer, who can avoid payment by doing without a receiver. The German Government expands on this idea, its opinion being that there exists an obligation which directly links the consumer and the broadcasters, and which does not affect the State budgets, since the GEZ collects the fee, and the money ingathered does not enter into the Treasury funds. Both therefore reject, in this case, funding by the State'.

41. However, the alternatives of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 are conceived as a supposition dependent on funding the greater part of which is public. If that premiss is admitted, dependency can be inferred, and it is then unnecessary to require other conditions for application such as, for example, that the financing should cause direct State influence on the awarding of public contracts. The context for assessment of that condition is the second alternative, that referring to control, since the degree of control can be measured. (11)

42. Further, that reflection finds support in the distinction applied in University of Cambridge

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between sums which are disbursed in exchange for a consideration and those which are not, (12) since the intention was to provide guidance to the court which made a reference in that case so that it might determine whether that premiss for the suppositions, namely financing provided for the most part by the State, was satisfied.

43. It follows from the above two points that the second question as it has been presented by the Oberlandesgericht is inappropriate and that it is advantageous to deal with it and the first question together.

44. Returning to the substance of the matter, it is common ground in these proceedings that the fee was established by means of agreements governed by public law (Staatsverträge'), the State Treaty and the State Financing Treaty. (13)

45. It is equally common ground that a Staatsverträge' is a measure governed by the public law of the German legal system. (14)

46. Consequently, the legal relationship which connects the possessor of a radio or television to the broadcasters is governed by public law, taking the form almost of a tax, since the obligation to pay is engendered by the mere possession of a radio or television receiver, a genuine taxable act', characteristic in the charging of any tax, where the television viewer is the inactive subject. It little matters, beyond that, what name the obligation to pay bears under national law. (15)

47. Thus, since both the operation and existence of the broadcasters are bound up with measures of the legislature, the highest form of State control, the reference, in the provision under examination, to financing for the most part by the State as the first alternative is not merely fortuitous but the logical consequence of the fact that economic subordination represents par excellence that close dependency of a body on the State' to which the Court of Justice has referred. (16) Pertinent here is the celebrated phrase of the German jurist von Kirchmann, pointing out that law is not a science, since it requires no more than three words of correction by the legislature' for entire libraries to become waste paper', (17) which highlights moreover the strength of the legislative power.

48. In light of the foregoing, the resources of the broadcasters collected by the GEZ can be categorised as public; additionally, there are those who assign to that collection agency the status of a State institution, notwithstanding its lack of legal personality, adducing its capacity to charge the fee and to collect it by distraint proceedings, (18) powers characteristic of the exercise of functions linked to national sovereignty, which accentuate its public character.

49. However, that character, although it is significant evidence of economic support by the State, is not reliable proof of it, as the broadcasters point out, and it is accordingly appropriate to examine other special features of the German system of subsidy to State broadcasting.

2. Indirect financing

50. The broadcasters and the German Government are at one in the view that Directive 92/50 refers only to payments which are borne directly by the State budget (19) and not to indirect transfers of financial resources from any public institution or another contracting authority. They assert further that in the present case the amount paid by the fee circulates solely between the consumer and the broadcasters, and that there is no intervention by the State, which is not a party to that flow of money.

51. I strongly disagree with such an interpretation.

52. First, the German Government puts emphasis on a simplistic definition of financing as involving delivery', which would comprise only Bank transfers, cheques, bank giros or the physical conveyance of bags of money in an armoured vehicle from the Treasury to the offices of the body in receipt

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of the subsidy.

53. Leaving aside the fact that there is no substantial difference between the situation in which the State ingathers the fee in order to pass it on to the funded institutions and the situation in which the State assigns the power of collection to them, (20) it must not be forgotten that the State itself establishes the structure for the levying of the fee, since it determines the obligation to pay and fixes the amount to be paid by means of an independent commission, the KEF, subject to ratification and possible amendment by the Länder, who have the last word. (21)

54. Secondly, the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 is not restricted to methods of direct financing, since the only qualification of the verb finance' is to be found in the phrase for the most part' (überwiegend', in German; majoritairement' in French; mayoritariamente' in Spanish), and there is no reference to the form, direct or indirect, of implementing the financial contribution to the supported institutions.

55. In conclusion, some support can be inferred from the case-law for the possibility that a State may provide economic support indirectly, since the Court of Justice, in the matter of the second alternative of the third indent of the provision, has recognised indirect control by the State, (22) and that could also be extended to the first alternative, particularly when the three options are equivalent, (23) as the German Government has correctly stated.

3. Financing without consideration

56. In University of Cambridge , referred to above, the Court defined public financing, and introduced a fundamental distinction, namely, whether the institution in receipt of the aid was under an obligation to provide specific consideration, since the criterion for the definition of public financing would be met only if such consideration was lacking. (24)

57. Against that background, and in support of their argument that the consumers pay the broadcasters directly, the broadcasters and the German Government contend that in exchange for that income the customer obtains as specific consideration' the right to receive the images and transmissions broadcast by German public television and radio; they rely on that argument in order to deny that the financing at issue is of a public nature. (25)

58. To rebut that contention, it would be sufficient to make the point that, having regard to their legislative origin, the resources generated by the television fee are not private. The broadcasters and the German Government may respond that, if statutory regulation of the sums paid by the consumer were to determine whether the funds collected were public, the fees of architects, lawyers and doctors would be considered as indirect public expenditure within the meaning of the Directives on public tendering. But, applying their logic, if the assessment of the condition [the first alternative] of public financing were to be concerned only with the private origin of the money, neither the office of trademarks and patents, nor the land ownership records and registers, to mention only some of the institutions where the person affected pays directly for the service which is provided to him by the public authority, nor in brief any tax, would warrant classification as public funds for the purposes of Directive 92/50.

59. Even if one were to maintain that the public funds also were handed over in exchange for the programming broadcast on the State radio and television channels, the argument would have no more weight. The (public) funds paid to the broadcasters neither create nor enhance any dependency similar to that found in normal commercial relationships, since they represent a constitutive measure (26) which permits those institutions to operate, but the State does not expect or receive value in return in the form of specific consideration.

60. In summary, I reject not only the theory that payment of the fee is an obligation borne by

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the customer in exchange for access to public programming, but also the idea that the State receives back consideration for its economic support in the form of the public broadcasting service.

4. An activity free from competition

61. Although it is irrelevant to define what is meant by body governed by public law... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character', (27) the Austrian Government and the EFTA Surveillance Authority are correct to incorporate an examination of the competitive position of the broadcasters in the context of that question referred for a preliminary ruling.

62. Taking account of the system for collection of the broadcasting fee, established by a specific piece of legislation with the rights and powers of public law referred to above (collection of monies and possible compulsory enforcement), it cannot validly be sustained that the generation of financial resources designed to satisfy a need of general interest for public programming, which the broadcasters indisputably provide, is independent of market conditions. The monies which the broadcasters receive from the fee do not come from their running a business in rivalry with their competitors, but are paid by the community, (28) and they are not concerned by the use actually made by the consumers of the audiovisual programmes offered to them.

63. That form of sheltered activity in the market frees the broadcasters of any uncertainty as to their income, since they have the State's guarantee, manifested in the budgets drawn up by the KEF. Accordingly, even if the argument that the origin of the funds is private were accepted, the confident assurance which the broadcasters can have in the arrival of their pecuniary resources does not differ from that which they may have when capital is placed directly at their disposal by the State.

64. In response to my question at the hearing whether that guarantee of funding of the broadcasters which the German Government is constitutionally obliged to provide extends to debts contracted by them, (29) the German Government categorically rejected such a possibility. However, as the Commission pointed out, that question never arises, since the KEF regularly checks the broadcasters' pecuniary needs, and comfortably meets them; indeed, the broadcasters are freed from resorting to private credit in the critical situation of insolvency, which reinforces the public character of the subsidy.

5. Other matters for consideration

65. From all of the foregoing it can be concluded that the economic resources which support the work of the broadcasters are public. None the less, some further reflections may be added.

66. Thus, first, it is established case-law that the autonomous concept of Community law of contracting authority' must be given an interpretation which is both functional (30) and broad, (31) taking account of the fact that the aim is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by contracting authorities, and the possibility that bodies financed or controlled by the State may be guided by considerations other than economic ones. (32)

67. In that context, in response to a question I put to them at the hearing, the broadcasters stated that none of the 11 businesses contacted by the GEZ to submit binding tenders was based in another Member State. That fact alone reveals that the fears of the Community legislature were not unfounded.

68. Secondly, the broadcasters, relying in part on German academic writing, (33) stress the constitutional imperative of impartiality which protects them from any intervention by the public authorities in their management.

69. The excellence of Article 5(1) of the German Constitution, which has succeeded in creating

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a public broadcasting service of quality, needs no comment, but there is no incompatibility between that imperative and the broadcasters' obligation at issue to respect and comply with the procedures for public tendering laid down by the Community directives.

70. Within the observations submitted on this reference for a preliminary ruling, no argument has been adduced to demonstrate that making the broadcasters subject to the procedures of the Directives might endanger their neutrality. Moreover, the freedom of the press enjoyed by broadcasting and its impartiality have never been criteria by which to judge whether bodies governed by public law are contracting authorities. (34)

71. Lastly, it is common ground that the broadcasters receive the vastly predominant part of their financing from the fee as opposed to other sources of income, in particular advertising, which leads to the conclusion that, taking due notice of the explanations offered, the manner in which the broadcasters meet their costs satisfies the requirement, that they should be financed for the most part by the State, of the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50.

6. Response to the first and second questions referred for a preliminary ruling

72. In the light of the foregoing reflections, I invite the Court of Justice to answer the first and second questions of the Oberlandesgericht Düsseldorf as follows: the indirect financing of bodies through the payment of fees by the possessors of radio or television receivers constitutes funding within the meaning of the provision at issue, analysis of which excludes the addition of other criteria, such as, for example, direct State influence on the awarding of public contracts by the body which the State is financing.

C - The third question referred for a preliminary ruling

73. By this question the referring court seeks to know whether Article 1(a)(iv) of Directive 92/50 includes within its scope services which are ancillary and secondary, and are not specifically related to programming.

74. I have already referred to the usefulness of answering this, if the broadcasters are to be categorised as a contracting authority'. In requesting an interpretation of that provision, the Oberlandesgericht seeks to clarify its scope ratione materiae in order to decide whether services for cleaning the premises of such authorities are excluded.

75. The wording of the provision is so clear that it is sufficient to turn to the adage in claris non fit interpretatio. The provision exempts from the requirement of compliance with public tendering procedures contracts closely bound up with the content of radio and television programmes (acquisition, development, production, coproduction and those related to obtaining broadcasting time).

76. Since the above is an exception to the general rule, a strict interpretation is required, to the effect that any other activity ancillary to those expressly listed must be carried out within a contract governed by law, after a public invitation of tenders.

77. That conclusion appears to be supported by the history of the Community legislation, as emerges from comparison of the respective recitals of the grounds of Directives 92/50 and 2004/18. Thus, the 25th recital in the preamble to Directive 2004/18 has added detail to the succinct 11th recital in the preamble to Directive 92/50, including other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme'. On the other hand, it does not extend to supply of technical equipment necessary' to the production of those programmes.

78. Consequently, if specialised technical support cannot find refuge in the exception, nor can cleaning services for the broadcasters' buildings.

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79. In brief, both grammatical and textual analysis militate in favour of using the argumentum a contrario when dealing with the scope ratione materiae of Directive 92/50 in relation to the contracts concluded with the German broadcasters.

80. I will allow myself a final comment, since it is within that provision that the constitutional guarantee of the impartiality of the German broadcasters is found to be respected, rather than in the way in which they are financed; (35) accordingly the Community legislature has provided for the programming exception in order to take account of social and cultural considerations, as is stated in the said 25th recital in the preamble to Directive 2004/18.

VI - Conclusion

81. In accordance with the foregoing, I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Oberlandesgericht of Düsseldorf in the following terms:

(1) On a proper construction of the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the requirement of financing by the State' extends to indirect financing of certain organisations through the payment of fees by those persons who possess broadcasting receivers, and it may not be made subject to other conditions, such as, for example, that the State have a direct influence on the awarding of public contracts by the organisation which it finances.

(2) Article 1(a)(iv) of Directive 92/50 excludes from its scope of application only those services which it specifies, and includes all others which are ancillary and secondary, which are not specific to programming.

(1) .

(2) - Decimus Junius Juvenal (probably born between 55 and 60 AD in Aquino and certainly deceased after 127 AD), author of the Satires , of whose life the only other biographical details are those found in occasional confidences in his own works. At the end of his life, he may have been exiled for a time because of his criticism of the authorities, perhaps because he alluded in one of his poems to Titus Elius Alcibíades, a steward of the emperor Hadrian. (Translator's note: reference to Spanish text not translated.)

(3) - The same people,... now that their votes are not for sale to anyone, have cast aside their worries. Those who previously had the power to make Emperors, generals, commanders of legions, the power to do anything, are now content to covet two things, bread and the Games. ...', Satire X , verses 74-81. (Translator's note: free translation.)

(4) - It is a commonplace to consider that novel, written in 1948 after the trauma of the Second World War, not so much as a diatribe against totalitarianism, but as a warning of the subtlety with which such a regime can be established, through manipulation of the media of communication.

(5) - Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

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

(7) - Council Directive of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L 206, p. 26).

(8) - Since 1 January 1999 the Law in force is that of the Sixth Reform by Law 703-4/1 of 26 August 1998 (BGBl. I, p. 358).

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(9) - This is the approach of the Austrian Government and also of the Polish Government, although the latter deals with them separately.

(10) - In points 5 and 6 of this Opinion this option is explained.

(11) - Case C237/99 Commission v France [2001] ECR I939, paragraph 48 et seq.

(12) - Case C380/98 University of Cambridge [2000] ECR I8035, paragraphs 22 to 25.

(13) - Point 11 et seq. of this Opinion.

(14) - On the legal principles of that State, Maurer, H., Allgemeines Verwaltungsrecht , 12th ed. revised and enlarged, Ed. C.H. Beck, Munich, 1999, p. 352 et seq.

(15) - While the German Government states that the word Gebühr' (tax or levy) is not suitable to describe the obligation to pay, some academic writing ascribes it to tax law as Abgabe' (duty or burden); Boesen, A., Vergaberecht: Kommentar zum 4. Teil des GWB , published by Bundesanzeiger, 1st ed., Cologne, 2000, p. 151, No 73.

(16) - University of Cambridge , paragraph 20, and Commission v France , paragraph 44.

(17) - Von Kirchmann, J.-H., Die Wertlosigkeit der Jurisprudenz als Wissenschaft , Berlin, Springer, 1848.

(18) - Frenz, W., Offentlich-rechtliche Rundfunkanstalten als Beihilfeempfänger und öffentlich Auftraggeber', in WRP - Wettbewerb in Recht und Praxis , 3/2007, p. 269.

(19) - Dreher, M., Offentlich-rechtliche Anstalten und Körperschaften im Kartellvergaberecht', NZBau - Neue Zeitschrift für Baurecht und Vergabe , 6/2005, p. 302.

(20) - Opitz, M., Vergaberechtliche Staatsgebundenheit des öffentlichen Rundfunks?', NVwZ - Neue Zeitschrift für Verwaltungsrecht , No 9/2003, p. 1090.

(21) - Frenz, W., op. cit., p. 272. The broadcasters, in their observations, mention an action on grounds of infringement of the Constitution which is pending before the Bundesverfassungsgericht (German Constitutional Court) directed against the decrease introduced by the Länder on the proposed increase of the rate of the fee.

(22) - Case C306/97 Connemara Machine Turf [1998] ECR I8761, paragraph 34.

(23) - Commission v France , cited above, paragraph 49.

(24) - Paragraph 21 of the judgment.

(25) - Hailbronner, K., Offentliches Auftragswesen', in Grabitz, E./Hilf, M., Das Recht der Europäischen Union , Ed. C.H. Beck, Munich, 2006, B 4, p. 22, No 121.

(26) - According to University of Cambridge , above cited, paragraph 25.

(27) - Case C360/96 BFI Holding [1998] ECR I6821, paragraphs 48 to 50.

(28) - Seidel, I., Offentliches Auftragswesen', in Dauses, M., Handbuch des EU-Wirtschaftsrechts, Editorial C.H. Beck, Munich, 2006, p. 27, No 82; Boesen, A., op. cit., p. 152.

(29) - Until now, the requirement for a public mechanism for the offsetting of debts had been referred to solely in the context of analysis of the first indent of the second subparagraph of Article 1(b) of the Community directives on public contracts, on the condition of the general interest; Joined Cases C223/99 and C260/99 Agorà and Excelsior [2001] ECR I3605, paragraph 40.

(30) - Case C360/96 BFI Holding [1998] ECR I6821, paragraph 62; Case C353/96 Commission v Ireland [1998] ECR I8565, paragraph 36; Case C470/99 Universale-Bau [2002] ECR I11617,

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paragraph 53; Case C373/00 Adolf Truley [2003] ECR I1931, paragraph 41; and Case C283/00 Commission v Spain [2003] ECR I11697, paragraph 73.

(31) - Wollenschläger, F., Der Begriff des öffentlichen Auftraggebers im Lichte der neuesten Rechtsprechung des Europäischen Gerichtshofes', EWS (Europäisches Wirtschafts- und Steuerecht), no 8/2005, p. 345.

(32) - University of Cambridge , paragraph 17; Universale-Bau , paragraph 52; and Adolf Truley , paragraph 42, all cited above.

(33) - Dreher, M., op. cit., p. 303; Hailbronner, K., op. cit., p. 22, No 123.

(34) - Seidel, I., op cit., p. 27, No 82.

(35) - Also Boesen, A., op. cit., p. 152, No 75.

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SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	Spanish
NATIONA	Federal Republic of Germany
PROCEDU	Reference for a preliminary ruling
ADVGEN	Ruiz-Jarabo Colomer
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Reference for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 7 August 2006 - Bayerischer Rundfunk, Deutschland Radio, Hessischer Rundfunk, Mitteldeutscher Rundfunk, Norddeutscher Rundfunk, Radio Bremen, Rundfunk Berlin-Brandenburg, Saarländischer Rundfunk, Südwestrundfunk, Westdeutscher Rundfunk, Zweites Deutsches Fernsehen v GEWA, Gesellschaft für Gebäudereinigung und Wartung mbH

(Case C-337/06)

Language of the case: German

Referring court

Oberlandesgericht Düsseldorf

Parties to the main proceedings

Appellants: Bayerischer Rundfunk, Bayerischer Rundfunk, Deutschland Radio, Hessischer Rundfunk, Mitteldeutscher Rundfunk, Norddeutscher Rundfunk, Radio Bremen, Rundfunk Berlin-Brandenburg, Saarländischer Rundfunk, Südwestrundfunk, Westdeutscher Rundfunk, Zweites Deutsches Fernsehen

Respondent: GEWA, Gesellschaft für Gebäudereinigung und Wartung mbH

Intervening party: Heinz W. Warnecke, trading as Großbauten Spezial Reinigung

Questions referred

Where it appears in the first alternative of letter (c) of the second subparagraph of Article 1(9) of Directive 2004/18/EC [1], is the term 'financed ... by the State' to be interpreted as including indirect financing given to bodies by means of fees imposed, on persons who have receiving equipment available for use, by the State pursuant to the obligation imposed on it by constitutional law to

**Judgment of the Court (Third Chamber)
of 11 October 2007
Lämmerzahl GmbH v Freie Hansestadt Bremen. Reference for a preliminary ruling: Hanseatisches Oberlandesgericht in Bremen - Germany. Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Limitation period - Principle of effectiveness. Case C-241/06.**

In Case C241/06,

REFERENCE to the Court under Article 234 EC by the Hanseatisches Oberlandesgericht in Bremen (Germany), made by decision of 18 May 2006, received at the Court on 30 May 2006, in the proceedings

Lämmerzahl GmbH

v

Freie Hansestadt Bremen,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues (Rapporteur), J. Kluka, P. Lindh and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 28 March 2007,

after considering the observations submitted on behalf of:

- Lämmerzahl GmbH, by A. Kus, Rechtsanwalt,

- the Freie Hansestadt Bremen, by W. Dierks and J. van Dyk, Rechtsanwälte,

- the Republic of Lithuania, by D. Kriauinas, acting as Agent,

- the Republic of Austria, by M. Fruhmann, acting as Agent,

- the Commission of the European Communities, by X. Lewis and B. Schima, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2007,

gives the following

Judgment

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

1. In accordance with Article 9(4) of and Annex IV to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, the contract notice concerning a contract within the scope of that directive must state the total quantity or scope of that contract. The absence of such an indication must be capable of being reviewed under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

2. Directive 89/665, as amended by Directive 92/50, particularly Article 1(1) and (3), precludes a limitation period laid down by national law from being applied in such a way that a tenderer is refused access to a review concerning the choice of procedure for awarding a public contract or

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the estimate of the value of that contract, where the contracting authority has not clearly stated the total quantity or scope of the contract to the person concerned. Those provisions of the directive also preclude such a rule from being extended generally to cover the review of decisions of the contracting authority, including those occurring in stages of an award procedure after the end of that limitation period.

1. This reference for a preliminary ruling concerns the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (Directive 89/665').

2. The reference was made in the context of proceedings between Lämmerzahl GmbH (Lämmerzahl') and the Freie Hansestadt Bremen (Free Hanseatic City of Bremen, Germany) (Bremen') concerning a procedure for the award of a public contract.

Legal context

Community law

3. Article 1 of Directive 89/665 provides:

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

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

4. Under Article 5(1) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1) (Directive 93/36'):

1. (a) Titles II, III and IV and Articles 6 and 7 shall apply to public supply contracts awarded by:

(i) the contracting authorities referred to in Article 1(b),... where the estimated value net of value-added tax (VAT) is not less than the equivalent in [euros] of 200 000 special drawing rights (SDRs);

...

(b) This Directive shall apply to public supply contracts whose estimated value equals or exceeds the threshold concerned at the time of publication of the notice in accordance with Article 9(2).

...'

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5. According to the first sentence of Article 9(4) under Title III of Directive 93/36:

The notices shall be drawn up in accordance with the models given in Annex IV and shall specify the information requested in those models.'

6. The model contract notice in Annex IV to Directive 93/36 includes the following references:

II.2) Quantity or scope of the contract

II.2.1) Total quantity or scope (including all lots and options, if applicable)

...

II.2.2) Options (if applicable). Description and time when they may be exercised (if possible)

...

II.3) Duration of the contract or time-limit for completion

Either : Period in month/s... and/or days... (from the date of award of the contract)

Or: Starting... and/or ending... (dd/mm/yyyy).'

7. Article 10(1) and (1a) of Directive 93/36 provides:

1. In open procedures the time-limit for the receipt of tenders, fixed by the contracting authorities, shall not be less than 52 days from the date of dispatch of the notice.

1a. The time-limit for receipt of tenders laid down in paragraph 1 may be replaced by a period sufficiently long to permit responsive tendering, which, as a general rule, shall be not less than 36 days and in any case not less than 22 days, from the date on which the contract notice was dispatched, if the contracting authorities have sent the indicative notice provided for in Article 9(1), drafted in accordance with the model in Annex IV A (Prior information), to the Official Journal of the European Communities within a minimum of 52 days and a maximum of 12 months before the date on which the contract notice provided for in Article 9(2) was dispatched to the Official Journal of the European Communities , provided that the indicative notice contained, in addition, at least as much of the information referred to in the model notice in Annex IV B (Open procedure) as was available at the time of publication of the notice.'

National law

8. Paragraph 100(1) of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition, the GWB') provides:

This part [of the GWB] applies only to contracts which reach or exceed the values set out in the regulations provided for by Paragraph 127 (threshold values).'

9. Paragraph 107(3) of the GWB provides:

The application is inadmissible where the applicant was already aware during the award procedure of the alleged infringement of the procurement rules and did not immediately complain to the awarding authority. The application is also inadmissible where no complaint is raised about infringements of the procurement rules that are identifiable on the basis of the contract notice with the awarding authority by, at the latest, the end of the period stipulated in the contract notice for bidding or for applications to participate in the award procedure.'

10. Paragraph 127(1) of the GWB provides:

The Federal Government, with the agreement of the Bundesrat, may adopt rules ... for transposing into German law the threshold values of European Community directives relating to the coordination

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of procedures for the award of public service contracts.'

11. Paragraph 2(3) of the Vergabeverordnung (Public procurement regulation), in the version in force at the date of award of the public contract at issue in the main proceedings, provided:

The threshold amount is:

...

for all other supply contracts or service contracts: EUR 200 000.'

The dispute in the main proceedings and the order for reference

12. In March 2005 Bremen issued a national call for tenders regarding standard software for the computerised handling of cases in the adult social service and economic aid field.

13. The time-limit for submission of tenders stated in the contract notice expired on 12 April 2005 at 3p.m.

14. The contract notice relating to that call for tenders did not contain any indication of the estimated value of the contract or of its quantity or scope.

15. The contract notice stated that the contract documents concerning the contract at issue in the main proceedings could be downloaded from Bremen's internet site, the address of which it provided. Those contract documents included the following statement, under the heading Quantities':

Approximately 200 employees in the economic aid area and approximately 45 employees in adult social services, distributed in a decentralised way in 6 social centres, and approximately 65 employees in the central units will work with the system.'

16. However, the application form provided by Bremen for tenderers to submit their prices did not include the total number of licences sought and merely required the unit price of each licence to be given.

17. In response to Lämmerzahl's initial request, Bremen, by letter of 24 March 2005, gave Lämmerzahl certain information, without however indicating the number of licences to be acquired.

18. By a further enquiry Lämmerzahl asked Bremen to indicate to it whether the contracting authority sought to acquire 310 licences, a number arrived at by adding up the numbers stated in the contract documents, namely 200, 45 and 65, and whether a tender in figures should be drawn up relating to the total number of licences. By letter of 6 April 2005, Bremen replied to Lämmerzahl that it should enter the overall price (total price of the costs of supply, costs of maintenance and services)'.

19. On 8 April 2005, Lämmerzahl submitted a tender in the sum of EUR 691 940 gross or EUR 603 500 net.

20. By letter of 6 July 2005, Bremen informed Lämmerzahl that its tender had not been successful because comparison of the tenders submitted had shown that it was not the most economically advantageous.

21. On 14 July 2005, Lämmerzahl sent a letter to the contracting authority in which it claimed, first, that no European call for tenders had been organised and, secondly, that the software tests which it had proposed had not been carried out correctly.

22. On 21 July 2005, Lämmerzahl applied to the Vergabekammer der Freien Hansestadt Bremen (Public Procurement Board of the Free Hanseatic City of Bremen) for a review procedure, claiming that a European tender should have been organised since the threshold of EUR 200 000 had been exceeded. It maintained that it had come to that conclusion only after obtaining legal advice on 14 July 2005 and that, for that reason, its application should be treated as having been brought within the time-limit. As regards the substance, it alleged that the testing procedure had not been properly

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carried out by the contracting authority.

23. By decision of 2 August 2005, the Vergabekammer der Freien Hansestadt Bremen dismissed the application for review as inadmissible. It stated that, even if the threshold figure had been exceeded, the application was inadmissible under the second sentence of Paragraph 107(3) of the GWB, as Lämmerzahl had been in a position to identify the breach complained of in its application from the contract notice. The Vergabekammer also held that, since the application was out of time, Lämmerzahl was also precluded from seeking a remedy from the review bodies with jurisdiction for public procurement.

24. Lämmerzahl complained to the Hanseatisches Oberlandesgericht in Bremen (Hanseatic Higher Regional Court, Bremen). In support of its appeal, it submitted that, contrary to the position adopted by the Vergabekammer der Freien Hansestadt Bremen, it could not be ascertained from the contract notice that the procedure chosen was contrary to the law on the award of public contracts. Bremen replied that, in view of its experience, Lämmerzahl should have noticed that the threshold had been exceeded. Lämmerzahl also repeated its allegation that the testing procedure had been inadequate and submitted that the tender accepted contained an unlawful combined costing arrangement, which should have led to the exclusion of that tender. Bremen disputed those two allegations.

25. Lämmerzahl applied for the suspensory effect of the appeal to be extended pending delivery of judgment on the substance. By decision of 7 November 2005, the Hanseatisches Oberlandesgericht in Bremen rejected that application as unfounded. In that decision, it concurred with the position of the Vergabekammer der Freien Hansestadt Bremen, according to which, in applying the time-bar rule provided for in the second sentence of Article 107(3) of the GWB, Lämmerzahl was to be treated as if the value of the contract at issue was less than the threshold figure of EUR 200 000, which deprived Lämmerzahl of the right to seek a review.

26. Bremen then awarded the contract to Prosoz Herten GmbH, with which it concluded a contract on 6 and 9 March 2006.

27. In the order for reference, the Hanseatisches Oberlandesgericht in Bremen does not state the value of the contract concluded between Bremen and Prosoz Herten GmbH, but indicates that all the tenderers' bids for the first contract option were over EUR 200 000 (between EUR 232 452.80 and EUR 887 300, or EUR 3 218 000) and for the second option only one of the four was under the threshold figure with a tender of EUR 134 050 (excluding licence costs), while the other tenders varied between EUR 210 252.80 and EUR 907 300, or EUR 2 774 800 ...'.

28. Before the Hanseatisches Oberlandesgericht in Bremen, Lämmerzahl maintained that the position adopted by that court in its decision of 7 November 2005 made access to legal remedies excessively difficult, contrary to Directive 89/665.

29. That court states in its order for reference that the specific problem in the case in the main proceedings is the fact that, in the case of breaches of public procurement law which directly affect the value of the contract and, accordingly, the threshold figure, the time-limit applied under the second sentence of Article 107(3) of the GWB leads, according to the case-law of the Kammergericht (Berlin Court of Appeal) which it approved and expanded in its decision of 7 November 2005, to a general curtailment of legal protection.

30. According to the Hanseatisches Oberlandesgericht in Bremen, it follows that, if the estimated contract price is, from the outset, determined unlawfully at too low a level, the person against whom the time-bar is applied loses not only the right to challenge the choice of procedure or the estimate of the contract price, but also the right to be heard with regard to all other infringements which, if considered in isolation, would not be subject to the effects of being out of time and could be reviewed if the contracting authority had proceeded in accordance with the rules.

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31. The Hanseatisches Oberlandesgericht in Bremen is uncertain whether such an application of the national time-bar rules undermines the practical effectiveness of Directive 89/665, and in particular whether it is compatible with Article 1 of that directive.

32. In those circumstances, the Hanseatisches Oberlandesgericht in Bremen decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is it compatible with Directive 89/665, in particular Article 1(1) and (3), for a tenderer to be generally barred from gaining access to a review of a contracting authority's decision to award public contracts because the tenderer through its own fault did not raise an irregularity in the award procedure within the time-limit laid down for that purpose in national law, where the irregularity relates

(a) to the form of invitation to tender selected

or

(b) to the correctness of the determination of the contract price (the estimate is obviously wrong or the method of determination is not sufficiently transparent)

and, on the basis of the contract price as correctly determined or to be determined, it would be possible to review other irregularities in the award procedure that - considered in isolation - would not be time-barred?

(2) Should the details in a tender notice relevant to determination of the contract price be subject to any special requirements so as to enable the conclusion to be drawn from irregularities relating to the estimated contract price that legal protection is generally excluded even if the contract price correctly estimated or to be estimated exceeds the relevant threshold value?'

The questions referred for a preliminary ruling

The second question

33. By its second question, which it is appropriate to examine first, the national court asks, essentially, what requirements are imposed by Community law regarding, first, the information as to the estimated value of a public contract which must appear in the contract notice and, second, the remedies provided for should that information not be provided.

Arguments of the parties

34. Lämmerzahl does not specifically indicate precisely what information as to the value of the contract must appear in the contract notice, but it does insist that, for the purpose of applying a time-limit for seeking review, information cannot be relied on against the person concerned which the contracting authority did not included in the contract notice.

35. The Lithuanian Government is of the view that the contracting authority is required to provide in the contract notice all information concerning the amount of the contract, enabling tenderers objectively to determine whether the value of the contract is above or below the threshold provided for by the Community directives on public procurement.

36. Following similar reasoning, the Commission of the European Communities submits that the conditions for a limitation period to begin to run, to which the contract notice is subject under national legislation, must be applied by the national court in such as way that it is not rendered impossible or excessively difficult for the person concerned to exercise the rights conferred on him by Directive 89/665.

37. Contrary to this reasoning, Bremen and the Austrian Government consider that the Community directives do not require the estimated value of the contract to be stated in the contract notice,

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such a reference not being desirable from the point of view of the proper working of competition.

Findings of the Court

38. According to the material in the case-file, it appears that the contract at issue in the main proceedings is, if not a supply contract, certainly a mixed supply contract and service contract in which the value of the supply predominates. In that event, the relevant provisions are those of the Community directives on public supply contracts, not those on public service contracts.

39. For public supply contracts within the scope of Directive 93/36, the content of the contract notice was governed at the material time by the first sentence of Article 9(4) of and Annex IV to Directive 93/36, those provisions having been replaced subsequently by Article 36(1) of and Annex VII A to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and by Annex II to Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council (OJ 2005 L 257, p. 1).

40. The first sentence of Article 9(4) of Directive 93/36 requires that the notices be drawn up in accordance with the models given in Annex IV to that directive and specify the information requested in those models.

41. The model contract notice in Annex IV provides for reference to the total quantity or scope of the contract (including all lots and options, if applicable).

42. Consequently, a contract notice concerning a public supply contract within the scope of Directive 93/36 must, in accordance with that directive, state the total quantity or scope of the contract to which it relates.

43. If, in a specific case, that requirement is not fulfilled, there is an infringement of Community law in the field of public procurement within the meaning of Article 1(1) of Directive 89/665, such as to give rise to a right of review in accordance with that provision.

44. Consequently, the answer to the second question must be that, in accordance with Article 9(4) of and Annex IV to Directive 93/36, the contract notice concerning a contract within the scope of that directive must state the total quantity or scope of that contract. The absence of such an indication must be capable of being reviewed under Article 1(1) of Directive 89/665.

The first question

45. By its first question, the national court seeks essentially to resolve two problems. First, it asks under what conditions does Community law permit national law to impose a time-limit for applications for review concerning the choice of procedure for awarding a public contract or the estimate of the value of the contract, in other words, acts which occur in the first stages of an award procedure. Second, in the event that such a time-bar rule is permitted, that court wishes to ascertain whether Community law permits it to be extended generally to cover remedies against decisions of the contracting authority, including those occurring in later stages of an award procedure.

Arguments of the parties

46. Lämmerzahl submits that Article 107(3) of the GWB imposes time-limits only for infringements which are identifiable on the basis of the contract notice', a concept which, according to it, should be interpreted strictly. It submits that, in the case in the main proceedings, it was impossible to ascertain from the information in the contract notice that the estimated value of the contract exceeded the threshold in the Community directives and, accordingly, that the national award procedure

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had been chosen wrongly. That its claim was held to be time-barred, even though it could not have ascertained the existence of an infringement of the Community rules on the information provided by the contracting authority, deprived it of an effective remedy and was contrary to Directive 89/665.

47. The Lithuanian Government states likewise that, in accordance with that directive, the persons concerned must be guaranteed an effective remedy. Consequently, where those persons have not received objective and complete information concerning the volume of the public contract at issue, the limitation period can only start to run from the time when they knew or could have known that the procedure chosen was inappropriate. If there is any doubt as to whether the threshold for the application of the Community directives has been reached, Directive 89/665 should be applied.

48. The Austrian Government and the Commission consider that national rules such as those at issue in the main proceedings comply with Directive 89/665, subject to certain conditions. The Austrian Government is of the view that those rules are compatible with that directive only in so far as the limitation period they determine is reasonable and the contracting authority has not, by its conduct, rendered impossible or excessively difficult the exercise of the right to a remedy. For its part, the Commission contends that such national rules are compatible with Community law provided that the tenderer has an effective remedy which allows him to bring a legal action against any infringement of the fundamental rules flowing from the EC Treaty.

49. Bremen is of the view that Directive 89/665, as interpreted by the Court of Justice, permits Member States to determine limitation periods which apply to disputes concerning procedures for the award of public contracts. Article 107(3) of the GWB complies with that directive, even where the contracting authority has given incorrect indications for the purpose of determining the value of the contract. According to Bremen, if it is possible for the tenderer to arrive at a higher estimate of the contract, on the basis of information appearing in the contract notice or even owing to the absence of relevant information, and he does not make a complaint, that does not mean that his right to seek a remedy is excluded in principle.

Findings of the Court

50. As regards the first aspect of that question, it should be pointed out that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable (Case C470/99 Universale-Bau and Others [2002] ECR I11617, paragraph 79, and Case C327/00 Santex [2003] ECR I1877, paragraph 50).

51. That position is based on the consideration that the full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements (Universale-Bau , paragraph 75).

52. On the other hand, the national time-limits for bringing an action, including the detailed rules for their application, should not in themselves be such as to render virtually impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law (Santex , paragraph 55; see also, to that effect, Universale-Bau , paragraph 73).

53. It is therefore necessary to examine whether the application of a time-bar rule such as that at issue in the main proceedings may be considered as being reasonable or, on the contrary, as rendering

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virtually impossible or excessively difficult the exercise of the rights which the person concerned derives from Community law.

54. It is clear from the case-file that, by repeated questions and its own initiatives, Lämmerzahl sought to confirm its conclusion, made on the basis of the tender documentation and with a degree of uncertainty, that the contract concerned 310 licences and training events. However, even the last response from the contracting authority, namely its letter of 6 April 2005, was not very clear, ambiguous and evasive in that regard.

55. A contract notice lacking any information as to the estimated value of the contract, followed by evasive conduct by the contracting authority in response to the questions of a potential tenderer such as that at issue in the main proceedings, must be considered, in view of the existence of a limitation period, as rendering excessively difficult the exercise by the tenderer concerned of the rights conferred on him by Community law (see, to that effect, Santex , paragraph 61).

56. It follows that, even if a national time-bar rule, such as that in the second sentence of Article 107(3) of the GWB, may in principle be considered to comply with Community law, its application to a tenderer in circumstances such as those at issue in the main proceedings does not satisfy the requirement of effectiveness under Directive 89/665.

57. It must be concluded that Directive 89/665, particularly Article 1(1) and (3), precludes a time-bar rule laid down by national law being applied in such as way that a tenderer is refused access to review concerning the choice of procedure for awarding a public contract or the estimate of the value of the contract, where the contracting authority has not clearly stated the total quantity or scope of the contract to the person concerned.

58. With regard to the second aspect of the first question, it must be noted that the second sentence of Article 107(3) of the GWB fixes as the end of the limitation period the expiry of the period for bidding or for applying to participate in the award procedure. Accordingly, it appears that that provision should be applied only to those irregularities capable of being identified before the expiry of those time-limits. Such irregularities may include an incorrect estimate of the value of the contract or a wrong choice of the procedure for the award of the contract. Conversely, they cannot relate to situations which by definition can only arise at later stages of the procedure for the award of the contract.

59. In the case at issue in the main proceedings, the applicant, in addition to lack of information concerning the value of the contract and wrong choice of the award procedure, relies on irregularities affecting the financial presentation of the successful tender and the tests carried out on the software proposed. However, an irregularity in the financial presentation of a tender can be discovered only after the opening of the envelopes containing the tenders. The same consideration applies to the tests of the software proposed. Irregularities of that type can therefore occur only after the limitation period fixed by a rule such as that at issue in the main proceedings has expired.

60. It is clear from the order for reference that, in its decision of 7 November 2005, the Hanseatisches Oberlandesgericht in Bremen applied the time-bar rule at issue in the main proceedings in such a way as to extend it to all decisions capable of being taken by the contracting authority throughout the procedure for the award of a public contract.

61. Such an application of that time-bar rule makes it virtually impossible for the person concerned to exercise the rights accorded him by Community law in respect of the irregularities which can occur only after the expiry of the time-limit for submitting tenders. Accordingly, it is contrary to Directive 89/665, in particular Article 1(1) and (3).

62. When applying domestic law the national court must, as far as is at all possible, interpret

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it in a way which accords with the objective of Directive 89/665 (see, to that effect, Santex , paragraphs 62 and 63).

63. Where an interpretation in accordance with the objective of Directive 89/665 is not possible, the national court must refrain from applying provisions of national law which are at variance with that directive (Case 106/77 Simmenthal [1978] ECR 629, paragraph 24, and Santex , paragraph 64). Article 1(1) of Directive 89/665 is unconditional and sufficiently precise to be relied on against a contracting authority (see, to that effect, Case C15/04 Koppensteiner [2005] ECR I4855, paragraph 38).

64. In the light of the foregoing, the answer to the first question must be that Directive 89/665, particularly Article 1(1) and (3), precludes a limitation period laid down by national law from being applied in such a way that a tenderer is refused access to a review concerning the choice of procedure for awarding a public contract or the estimate of the value of that contract, where the contracting authority has not clearly stated the total quantity or scope of the contract to the person concerned. Those provisions of the directive also preclude such a rule from being extended generally to cover the review of decisions of the contracting authority, including those occurring in stages of an award procedure after the end of that limitation period.

Costs

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

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NOTES Meisse, Eric: Interprétation de la directive recours, Europe 2007 Décembre Comm. no 340 p.26 ; Dischendorfer, Martin: The Application of Limitation Periods under Directive 89/665, Public Procurement Law Review 2008 p.NA41-NA47 ; Pachner, Franz: Keine Präklusion bei falscher Wahl des Vergabeverfahrens infolge zu niedrig geschätzten Auftragswerts, Zeitschrift für Vergaberecht und Beschaffungspraxis 2008 p.358

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ADVGEN Sharpston

JUDGRAP Cunha Rodrigues

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Case C-241/06

Lämmerzahl GmbH

v

Freie Hansestadt Bremen

(Reference for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen)

(Public contracts – Directive 89/665/EEC – Review procedures concerning the award of public contracts – Limitation period – Principle of effectiveness)

Summary of the Judgment

1. *Approximation of laws – Procedures for the award of public supply contracts – Directive 93/36 – Information to be contained in the contract notice*

(Council Directives 89/665, Art. 1(1), and 93/36, Art. 9(4) and Annex IV)

2. *Approximation of laws – Review procedures in respect of the award of public supply and public works contracts – Directive 89/665 – Time-limit for challenging decisions by the contracting authorities and for complaining of irregularities*

(Council Directive 89/665, Art. 1(1) and (3))

3. *Approximation of laws – Review procedures in respect of the award of public supply and public works contracts – Directive 89/665 – Time-limit for challenging decisions by the contracting authorities and for complaining of irregularities*

(Council Directive 89/665, Art. 1(1) and (3))

1. In accordance with Article 9(4) of and Annex IV to Directive 93/36 coordinating procedures for the award of public supply contracts, as amended by Directive 2001/78, the contract notice concerning a contract within the scope of that directive must state the total quantity or scope of that contract. The absence of such an indication must be capable of being reviewed under Article 1(1) of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 92/50 relating to the coordination of procedures for the award of public service contracts.

(see para. 44, operative part 1)

2. Directive 89/665, as amended by Directive 92/50, particularly Article 1(1) and (3) thereof, precludes a limitation period laid down by national law from being applied in such a way that a tenderer is refused access to a review concerning the choice of procedure for awarding a public contract or the estimate of the value of that contract, where the contracting authority has not clearly stated the total quantity or scope of the contract to the person concerned.

A contract notice lacking any information as to the estimated value of the contract, followed by evasive conduct by the contracting authority in response to the questions of a potential tenderer must be considered, in view of the existence of a limitation period, as rendering excessively difficult the exercise by the tenderer concerned of the rights conferred on him by Community law. Even if a national limitation rule may in principle be considered to comply with Community law, its application to a tenderer in such circumstances does not satisfy the requirement of effectiveness under Directive 89/665.

(see paras 55-57, 64, operative part 2)

3. Directive 89/665, as amended by Directive 92/50, particularly Article 1(1) and (3) thereof, precludes a limitation period laid down by national law for actions concerning the choice of procedure for awarding a public contract or the estimate of the value of that contract from being extended generally to cover the review of decisions of the contracting authority, including those occurring in stages of an award procedure after the end of that limitation period.

To apply a rule fixing as the end of the limitation period the expiry of the period for bidding or for applying to participate, in such a way as to extend it to all decisions capable of being taken by the contracting authority throughout the procedure for the award of a public contract, makes it virtually impossible for the person concerned to exercise the rights accorded him by Community law in respect of the irregularities which can occur only after the expiry of the time-limit for submitting tenders, and is accordingly contrary to Directive 89/665.

(see paras 45, 58, 60-61, 64, operative part 2)

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Judgment of the Court (Third Chamber) of 11 October 2007 (reference for a preliminary ruling from the Hanseatisches Oberlandesgericht - Germany) - Lämmerzahl GmbH v Freie Hansestadt Bremen

(Case C-241/06) [1]

(Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Limitation period - Principle of effectiveness)

Language of the case: German

Referring court

Hanseatisches Oberlandesgericht

Parties to the main proceedings

Applicant: Lämmerzahl GmbH

Defendant: Freie Hansestadt Bremen

Re:

Reference for a preliminary ruling - Hanseatisches Oberlandesgericht - Interpretation of Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) - No right to review of a decision of the contracting authority awarding a contract the estimated value of which does not exceed EUR 200 000 - All objections time-barred as a result of a wrong estimate of the contract price at the time of publication of the notice of invitation to tender.

Operative part of the judgment

In accordance with Article 9(4) of and Annex IV to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, the contract notice concerning a contract within the scope of that directive must state the total quantity or scope of that contract. The absence of such an indication must be capable of being reviewed under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;

Directive 89/665, as amended by Directive 92/50, particularly Article 1(1) and (3), precludes a limitation period laid down by national law from being applied in such a way that a tenderer is refused access to a review concerning the choice of procedure for awarding a public contract or the estimate of the value of that contract, where the contracting authority has not clearly stated the total quantity or scope of the contract to the person concerned. Those provisions of the directive also preclude such a rule from being extended generally to cover the review of decisions of the contracting authority, including those occurring in stages of an award procedure after the end of that limitation period.

_____

[1] - OJ C 212, 2.9.2006.

Opinion of Advocate General Sharpston delivered on 7 June 2007. Lämmerzahl GmbH v Freie Hansestadt Bremen. Reference for a preliminary ruling: Hanseatisches Oberlandesgericht in Bremen - Germany. Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Limitation period - Principle of effectiveness. Case C-241/06.

1. The present reference from the Hanseatisches Oberlandesgericht (Hanseatic Higher Regional Court) in Bremen, Germany, essentially asks the Court whether Community law precludes a tenderer from being generally excluded from the right under Directive 89/665 (2) to apply for a review of tender decisions on the ground that it has not challenged, within the time-limit set by national law, a decision which has incorrectly placed the tendering procedure outside the scope of that directive.

2. The claimant in the main proceedings tendered unsuccessfully for a software contract which had been put out to tender under the national procedure. It then complained, first, that there should have been a Community-wide tendering procedure because the relevant threshold value had been exceeded and, second, that the subsequent award decision was unlawful. The complaints were declared inadmissible on the ground that the time-limit for challenging the choice of procedure had expired, so that the review procedure for public contracts falling within the scope of Community law was not available.

3. The reference invites the Court to examine further the circumstances in which the imposition of time-limits for challenging decisions in public tendering procedures may compromise the principle of effectiveness which underlies Directive 89/665.

Relevant legislation

Directive 89/665

4. Directive 89/665 seeks to ensure that the procedures for the award of public works, supply and service contracts laid down in the relevant Community directives are applied effectively. It does this by providing for a system of review procedures and remedies for infringements.

5. The following recitals in the preamble to Directive 89/665 are relevant:

[1] ... Community Directives on public procurement, in particular ... Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, [(3)]... do not contain any specific provisions ensuring their effective application;

[2] ... [T]he existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

[3] ... [T]he opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; ... for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

[4] ...

[5] ... [T]he short duration of the procedures means that the aforementioned infringements need to be dealt with urgently;

...'

6. Article 1 of Directive 89/665 provides:

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives ... 77/62/EEC, and 92/50/EEC, (4) decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly

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as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

2. ...

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

7. Article 2 of Directive 89/665 deals with the remedies that should be available in respect of the reviews. Article 2(7) states that [t]he Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced'.

Directive 93/36 (5)

8. Article 10 of Directive 93/36 lays down, inter alia, the minimum time-limits in open procedures for the receipt of tenders valued above the threshold for applying Community rules. Article 10(1) states that such procedures must remain open for at least 52 days from the sending of the tender notice. That period may be reduced, as a general rule, to a minimum of 36 days, but under no circumstances to less than 22 days, if a prior information notice was published under conditions set out in Article 10(1a).

German legislation (6)

9. Part four of the German Gesetz gegen Wettbewerbsbeschränkungen (Law Against Restrictions on Competition) (GWB') covers the award of public contracts. (7) Paragraph 100(1) states that [t]his part applies only to contracts which reach or exceed the values set out in the regulations provided for by paragraph 127 (threshold values).' (8)

10. Paragraph 107 of the GWB covers applications for review to the procurement board. Paragraph 107(3) of the GWB sets out the time-limits for applying to the procurement board for review of alleged infringements of the procurement rules and states:

The application is inadmissible where the applicant was already aware during the award procedure of the alleged infringement of the procurement rules and did not immediately complain to the awarding authority. The application is also inadmissible where no complaint is raised about infringements of the procurement rules that are identifiable (9) on the basis of the tender notice with the awarding authority by, at the latest, the end of the period stipulated in the tender notice for bidding or for applications to participate in the award procedure.'

11. The Vergabeverordnung (Public Procurement Regulation) (VgV') (10) contains inter alia the threshold values referred to in Paragraph 127(1) of the GWB. (11) At the material time Paragraph 2 of the VgV provided:

The threshold amount is:

...

3. for all other supply or service contracts: EUR 200 000.'

12. Part A of the Verdingungsordnung für Leistungen (Rules for the Placing of Public Supply and Service Contracts by Tender) (VOL/A') (12) contains detailed rules for awarding supply and service contracts by tender. Paragraph 17 relates inter alia to the contents of the tender notice.

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Paragraph 17(1)(2) provides:

The tender notice should at least contain the following details:

...

(c) Nature and scope of the goods or services to be supplied...' (13)

The main proceedings and the reference made

13. On or before 21 March 2005 the defendant in the main proceedings, the Free Hanseatic City of Bremen (Bremen'), issued a national invitation to tender under the VOL/A' for a software contract. (14) The closing date was 12 April 2005. The tender notice contained no quantification of the scope or value of the contract. Under the heading Menge und Umfang' (volume and scope) it stated:

On behalf of the Senator for Employment, Women, Health, Youth and Social Affairs in Bremen, standard software is sought for SGB XII (social service - Adult and Economic Aid) for PC-based case handling to meet the requirements laid down in the tender documents. The tender documents can be downloaded free of charge from www.vergabe.bremen.de. ...'

14. Lämmerzahl GmbH (Lämmerzahl'), the claimant in the main proceedings, is a limited company specialising in software for public authorities. It duly obtained the tender documents, which included the following three documents:

15. First, the document entitled price sheet/price breakdown 1' (the price document') asked tenderers to provide, under the section headed licence contract', unit prices for full licences according to various possible ranges of quantities to be supplied (11-50, 51-100, 101-200, 201-500 licences). There was an alternative request for unit-pricing for read-only licences (1-5, 6-10, 11-50, 51-100 licences). As a further alternative, a price was requested for a Landeslizenz' (State licence). (15) The section headed service contract' asked tenderers to quote for training approximately 300 employees and 10 administrators. Nowhere did the document state the actual number of licences required.

16. Second, the document setting out the object of the tender invitation (the object document') stated that approximately 200 employees in the economic aid area, 45 in social services and 65 in the central units would work with the software system.

17. Third, the table of goods and services' indicated a minimum or estimated volume' of one unit. Again, it failed to indicate the total number of licences required.

18. Lämmerzahl raised four questions relating to the tender documents, to which Bremen replied by letter on 24 March 2005. At that stage, Lämmerzahl did not ask about the number of licences, or the volume or value of the contract.

19. Lämmerzahl then sent Bremen an e-mail on 4 April 2005 requesting further clarification of the tender documents. Its first question asked whether the total prices requested in the offer document and the table of goods and services related to the sum of the prices in the price sheet for the licence contract based on 310 licences (the 310 employees specified in the [object document])' or whether other prices (e.g. maintenance and service costs) should be included. Three of the other questions in Lämmerzahl's e-mail referred to the above-mentioned 310 licences'.

20. Bremen replied by letter on 6 April 2005. In answer to the first question it said that the overall tender price (total price of licence costs, maintenance costs and services) should be entered in the offer document. None of Bremen's answers mentioned or expressly commented on the figure of 310 licences which Lämmerzahl had included in its questions.

21. Lämmerzahl then submitted a tender based on 310 licences, together with training and maintenance,

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for EUR 603 500 net. It was selected for the testing stage along with a rival tenderer, PROSOZ Herten GmbH (PROSOZ').

22. On 6 July 2005 Bremen wrote to Lämmerzahl informing it that it had been unsuccessful because its offer had not been the most economically advantageous.

23. On 14 July 2005 Lämmerzahl sent a written complaint to Bremen and on 21 July 2005 submitted an application for a procurement review. It stated that it had discovered from taking legal advice on 14 July 2005 that Bremen should have issued a Community-wide, rather than a national, invitation to tender because the value of the contract exceeded the EUR 200 000 threshold. It also alleged that its software had not been properly tested.

24. On 2 August 2005 the Third Procurement Board of the City of Bremen (the Board') dismissed the application. It stated that, even if the threshold figure had been exceeded and the wrong tendering procedure had thus been used, such an irregularity was identifiable from the tender invitation. Accordingly, Lämmerzahl's complaints were out of time under Paragraph 107(3), second sentence, of the GWB.

25. Lämmerzahl appealed to the referring court. First, it claimed the irregularity in the choice of procedure had not been identifiable from the tender notice. Second, it repeated its objection to the testing and selection procedure, claiming that the PROSOZ tender was manifestly incomplete and contained an unlawful costing arrangement which should have led to its exclusion (the substantive complaints').

26. By an interim decision of 7 November 2005, the referring court refused to extend the suspensory effect of the appeal because it considered that it did not have any prospect of success. It agreed with the Board that by virtue of the limitation period in Paragraph 107(3), second sentence, of the GWB, Lämmerzahl was out of time in challenging the choice of the national procedure and Bremen's estimate of the contract value. Consequently, the company was precluded from recourse to the GWB review procedure, which was only available for tendering procedures exceeding the threshold value.

27. Bremen then awarded the contract to PROSOZ.

28. In the order for reference, the national court appears to accept that the contract value exceeded the EUR 200 000 threshold. (16) However, it considers that Lämmerzahl is time-barred from access to the GWB review procedure by virtue of Paragraph 107(3), second sentence, of the GWB.

29. In reaching that conclusion, the national court does not rule definitively on the question whether, under national law, identifiable on the basis of the tender notice' means that an irregularity has to be identifiable from the tender notice alone. It considers that, if that phrase can encompass other documents, Lämmerzahl should have realised from the details in the tender documents that the threshold would be exceeded. It should in any event have realised this from its own calculations. If, on the other hand, an irregularity has to be identifiable from the tender notice alone, the very absence of any indication of the contract's scope would in itself constitute an identifiable irregularity, since such an omission would be contrary to Paragraph 17(1)(2)(c) of the VOL/A. (17) It would further prevent a tenderer from verifying the choice of procedure and challenging it if necessary.

30. The national court nonetheless has reservations as to whether its decision of 7 November 2005 might deprive tenderers of their right to an effective review of alleged infringements of Community law, in breach of Article 1 of Directive 89/665. It considers that the limitation set out in Paragraph 107(3), second sentence, of the GWB conforms in principle with the directive in the light of the Court's case-law. (18) However, when the contract value has wrongly been estimated to be below the threshold, failure to complain within the time-limit deprives a tenderer of a review

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not only of that irregularity, but also of its substantive complaints. If a contracting authority is able to deprive an unwary tenderer of substantive protection by committing an identifiable irregularity, there is potential for abuse.

31. The national court also wonders whether the draconian consequences of limitation should only be triggered if the tenderer is able to ascertain unequivocally from the tender notice that the contracting authority is assuming that the contract will fall below the threshold value.

32. In the light of these considerations, the referring court has stayed the main proceedings and referred two questions to the Court:

1. Is it compatible with Directive 89/665/EEC, in particular Article 1(1) and (3), for a tenderer to be generally barred from gaining access to a review of a contracting authority's decision to award public contracts because the tenderer through its own fault did not raise an irregularity in the award procedure within the time-limit laid down for that purpose in national law, where the irregularity relates

(a) to the form of invitation to tender selected

or

(b) to the correctness of the determination of the contract price (the estimate is obviously wrong or the method of determination is not sufficiently transparent)

and where, on the basis of the contract value as correctly determined or to be determined, it would be possible to review other irregularities in the award procedure which, considered in isolation, would not be time-barred?

2. Should the details in a tender notice relevant to determination of the contract price be subject to any special requirements so as to enable the conclusion to be drawn from irregularities relating to the estimated contract price that the protection of primary law is generally precluded even if the correctly estimated contract price exceeds the relevant threshold amount?'

33. Written observations have been submitted by Lämmerzahl, Bremen, Austria, Lithuania and the Commission. Lämmerzahl, Bremen and the Commission also made further observations at the hearing on 28 March 2007.

Admissibility

34. Bremen submits that the conditions for an Article 234 EC reference are not met. What is at issue is the particular application of a national provision whose conformity with Community law is not in doubt.

35. I do not accept that argument. What lies behind the referring court's first question is whether Article 1 of Directive 89/665 precludes the possibility of a general exclusion from the right to review in circumstances such as those in the main proceedings.

36. As to the referring court's second question, it is quite true that the Court cannot provide a list of precisely what should appear in tender notices. (19) However, it is competent to interpret the relevant principles and provisions of Community law in order to help the national court to determine whether these have been infringed in a particular case.

37. The reference is therefore admissible.

The questions

Preliminary

38. The two questions which the referring court asks may be reformulated as follows:

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1. If a tenderer has failed within the time-limit set by national law to challenge a decision incorrectly placing a public tender outside the scope of Community protection, does Directive 89/665 prevent the tenderer from being denied the right conferred by that directive to a review of any further decisions in the tender process?

2. What details should appear on the tender notice so as to enable the conclusion to be drawn that the contract value has been wrongly estimated to fall below the threshold for the protection granted by Directive 89/665?

39. The referring court's second question relates to whether the irregularity in issue can be detected. That question is central to determining whether a limitation period for challenging that irregularity is compatible with Community law. I shall therefore examine the two questions referred together. Most of the parties submitting observations have indeed broadly adopted this approach.

Observations

40. Lämmerzahl submits that while a time-limit such as that contained in Paragraph 107(3), second sentence, of the GWB is in principle compatible with Directive 89/665, it acts as a derogation from the right to review. Accordingly, the phrase identifiable on the basis of the tender notice' must be interpreted narrowly. It cannot extend to the identification of an omission, the challenging of which might lead in turn to the identification of Bremen's error in estimating the contract value. That error - and hence the erroneous choice of procedure - could not be identified from the tender notice. It was thus impossible or excessively difficult for Lämmerzahl to exercise its Community rights.

41. Lithuania considers that where a time-limit starts to run on publication of the tender notice, the rights of tenderers under Community law are protected effectively only if they are provided with full and objective information about the volume of the tender at that point. If they are not, the time-limit should start to run only once they know of, or are in a position to ascertain, the procedural error in question.

42. Bremen considers that Paragraph 107(3), second sentence, of the GWB is compatible with Directive 89/665. The criterion of identifiability ensures that the exercise of a tenderer's Community rights is not made impossible or excessively difficult. Putting the estimated value on the tender notice could distort competition. It is sufficient that the averagely experienced market participant should be able to calculate the contract value from the information provided. At the hearing Bremen pointed out that, even without the right to review under Directive 89/665, general remedies were available under national law. However, it conceded that these were less effective than the procedure under the GWB.

43. Austria considers that a general exclusion from the Community review procedure as a result of failing to challenge the irregularity in question within the time-limit is compatible with Directive 89/665, provided that the particular application of the time-limit does not infringe the principle of effective protection.

44. The Commission adopts a similar position. It notes that the sanction of foreclosure ensures that irregularities are challenged as soon as possible. That is desirable in view of the potential consequences of having to restart the tender procedure. At the hearing, the Commission stated that the failure to challenge an irregularity in time should lead to foreclosure only if the tenderer could identify the irregularity or should have done so had it acted with the care to be expected of an experienced and diligent trader.

45. The Commission also considers that fundamental principles of the EC Treaty such as equality and transparency are applicable even to tenders falling below the Community threshold. (20)

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Assessment

46. The Community principle of effectiveness lies at the core of the protection which Directive 89/665 provides. As the Court has long held, this principle requires that the exercise of rights conferred by Community law must not be rendered virtually impossible or excessively difficult. (21)

47. The first three recitals to Directive 89/665 thus emphasise that the purpose of the directive is to ensure the effective application of the harmonising Community directives on public procurement, by providing a system of remedies for infringements of Community law in the field of public procurement or national rules implementing that law'. Article 1(1) spells out the requirement for effective review of decisions taken by contracting authorities. Article 2(7) provides for decisions taken by the appropriate review bodies to be enforced effectively.

48. The second and fifth recitals stress, however, that public procurement procedures are characterised by their short duration. Any infringements therefore need to be dealt with urgently, at a stage when they can be corrected. Rapidity of review is thus considered to be an aspect of effectiveness and is expressly identified in the third recital and in Article 1(1).

49. Directive 89/665 therefore provides for the possibility of reviewing a decision even before it has caused actual harm. Under Article 1(3), standing is given to any person having or having had an interest in obtaining a particular public supply... contract and who has been or risks being harmed by an alleged infringement' (emphasis added). In the same vein, Article 1(3) permits Member States to require an interested party to give prior notice to the contracting authority of its intention to seek judicial review, underlining the need to try to resolve issues as rapidly as possible.

50. The directive does not expressly authorise the use of limitation periods for applying for review of contracting authorities' decisions. The imposition of time-limits under national implementing legislation is, however, in principle compatible with the requirement for rapid review, since it quickly becomes impractical to reverse such decisions. Moreover, the Court has long recognised that reasonable time-limits constitute an application of the fundamental principle of legal certainty. (22)

51. In Universale-Bau (23) the Court held that Directive 89/665 does not preclude national legislation from setting a reasonable time-limit for bringing an application to review a contracting authority's decision. A time-limit is reasonable if it satisfies both the principle of effectiveness, as laid down by the directive, and the principle of legal certainty. (24)

52. The need to balance these two principles distinguishes limitation periods from derogating provisions, with which Lämmerzahl seeks to equate them. There are many kinds of derogation in Community law, justified for various reasons. Often, such derogations are exceptions to EC Treaty rights or other general principles. As a rule, they are permitted when necessary to protect specific interests. In order to give effect to overriding principles, derogations are typically interpreted restrictively. Limitation periods, on the other hand, strike a balance between the individual's rights and the wider public interest. Since they nevertheless limit rights, they must be examined carefully to determine whether their application in fact undermines the principle of effective protection.

53. The Court undertook such an examination in Santex. (25) There, it elaborated on Universale-Bau and applied criteria established in previous case-law (26) to the question of the reasonableness of time-limits in the context of Directive 89/665. It held that a limitation provision must be examined by reference, in particular, to the role of that provision in the procedure, its progress and its special features, viewed as a whole'. Thus, even if a time-limit per se is not contrary to the principle of effectiveness, its application in the circumstances of a particular case may render it so. (27)

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54. In Grossmann Air Service , the Court indicated that the objectives of speed and effectiveness in Directive 89/665 require an interested party who is aware of an irregularity to challenge it (28) and had scant sympathy for the applicant, who had waited until the award decision before challenging an alleged illegality in the invitation to tender. (29)

55. The criterion of knowledge or awareness of an irregularity on the part of a tenderer underlies not only Grossmann , but also other cases. If a time-limit for challenging an irregularity starts to run before the tenderer has knowledge, or if a tenderer is otherwise penalised for not raising a challenge in a situation where it did not know and could not have known of an irregularity, the principle of effectiveness is undermined. In Santex , the tenderer was not aware of the contracting authority's interpretation of the disputed clause until the relevant time-limit had expired (30) and could not therefore be excluded by the time-limit from seeking review. In GAT , a case not concerned with a time-limit, the Court held that an applicant cannot be denied the right to claim damages for the harm caused by a decision because a previous decision was unlawful. There, the previous decision had not been challenged and the applicant was therefore not necessarily aware of its irregularity. (31)

56. It follows from the Court's case-law set out above that the placing of a time-limit under national law on the exercise of the right to review provided for by Directive 89/665 is compatible with Community law provided that such a time-limit does not render the exercise of that right virtually impossible or excessively difficult. In determining whether that is the case, not only the length of the limitation period but also factors in the review procedure in which the time-limit operates must be examined. Awareness is a key factor. Whilst the objectives of speed and effectiveness in the directive require an interested party that is aware of an irregularity to challenge it, such a party cannot be shut out of its right to review by a time-limit triggered by something of which it could not reasonably have been aware.

57. Can a time-limit still be compatible with Community law if the failure to challenge an irregularity in time also deprives a tenderer of the possibility of challenging any further, subsequent irregularities in the tender process? That is certainly a drastic sanction. Is it a permissible one?

58. It is common ground that the consequence of not challenging the choice of national procedure within the time-limit is that, as a matter of general legal principle, that procedure prevails and the tender procedure falls thereafter outside the scope of the directive. This is to be distinguished from the situation in GAT , where the Court held that, since every decision taken by a contracting authority in a public tender is reviewable under Directive 89/665, a tenderer cannot be denied the right to claim damages for an allegedly illegal award decision on the ground that a previous decision rendered the procedure defective (without, however, taking it outside the scope of the directive). (32)

59. One possibility would be to create an exception to the rule in Universale-Bau and hold that the possibility of challenging a decision which appears wrongly to take the particular tender procedure outside the scope of Community protection cannot be subject to a limitation period. That does not seem to me to be a sensible solution. First, it would upset the balance between effectiveness and legal certainty which Directive 89/665 seeks to achieve. Second, a tenderer might be tempted not to challenge the procedure (which after all could appear to work in its favour by limiting competition), unless or until it discovered, through the award decision, that the right to a review under Directive 89/665 actually mattered to it.

60. Suggesting that a longer time-limit should be required where the consequences of being out of time are draconian seems to me to beg as many questions as it answers.

61. I therefore conclude that a time-limit for challenging decisions in a tender procedure is still

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compatible with the principle of effectiveness, combined with the need for rapidity and legal certainty, even when the consequence of failing to challenge an irregularity within the time-limit removes a tenderer from the protection of the review procedure conferred by Directive 89/665.

62. I turn now to an examination of the time-limit, including its particular features, in the present case.

63. The limitation period fixed in Paragraph 107(3), second sentence, of the GWB runs from the publication of the tender notice until the deadline for submitting offers. In the present case, that period seems to have been at least 23 days. (33) In view of the fact that the Community legislator considers a minimum period of 22 days to be sufficient for preparing and submitting a tender, (34) it would be difficult to argue that 23 days were insufficient for challenging an alleged irregularity. Such a time-limit for bringing a challenge thus does not in principle appear to infringe the principle of effectiveness underlying Directive 89/665, especially in view of the need, underlined in that directive, for a rapid review procedure. (35)

64. However, the particularity of the time-limit specified in Paragraph 107(3), second sentence, of the GWB is that it starts to run if the alleged regularity in question is identifiable on the basis of the tender notice.

65. What, therefore, is the degree or nature of knowledge of an irregularity which may be attributed to a tenderer without breaching the effectiveness principle underlying Directive 89/665?

66. It seems to me that a requirement of actual, or subjective, knowledge on the part of the tenderer would run counter to legal certainty. Furthermore, in circumstances such as those of the present case, it could be difficult to prove that a tenderer had actual knowledge of an irregularity, and a requirement of such proof would hardly be consistent with the need for a rapid review process.

67. It therefore seems preferable to formulate the test in terms of a standard of deemed, or objective, knowledge. The Court already applies an objective standard in respect of tenderers' ability to interpret award criteria against the yardstick of equality of treatment in public procurement, namely the ability of a reasonably well-informed and normally diligent tenderer'. (36) The same formula seems appropriate in the context of what knowledge of an irregularity in the tender procedure it is reasonable to deem a tenderer to possess.

68. A reasonably well-informed and normally diligent tenderer' can be deemed to be experienced in submitting tenders in its particular field. It can also be expected to have a general knowledge and understanding of key legal considerations affecting the markets in which it operates. In the context of the present case, this would entail a general knowledge of national and Community tender procedures and relevant thresholds, including the possibilities for challenging decisions under both procedures and the time-limits for bringing such challenges.

69. What information needs to be available to enable such a tenderer, in circumstances such as those in the present case, to ascertain that the wrong choice of procedure has been used?

70. I do not agree with Bremen that publishing the estimated value of the contract would distort competition. After all, Community public procurement legislation, an important aim of which is to promote competition, requires estimated contract values to be published in some cases. (37)

71. Since the choice of procedure is a function of the estimated total contract value, the information must enable the tenderer to work out that value. This would include not only goods to be supplied, but also the cost of any support, training or maintenance included in the contract scope. I accept Lithuania's submission on this point, namely that nothing less than a clear and full disclosure of the scope or volume of the project will allow a tenderer, on the basis of its own experience and knowledge of market rates, to calculate the estimated total value.

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72. The existence of such an information requirement, combined with the application of the criterion of the knowledge and experience attributable to a reasonably well-informed and normally diligent tenderer, should resolve the referring court's concerns about potential abuse in respect of the ability of a contracting authority to take advantage of an unwary tenderer. (38)

73. I do not think that this information must necessarily appear in the tender notice itself. A tenderer can reasonably be expected to act on references in the notice to other documents, provided it is clearly indicated where these are to be obtained. In this respect, the Court has already ruled that award criteria are compatible with the principle of equal treatment if they are mentioned in the contract documents or contract notice. (39) If the necessary information delineating the scope of the contract is contained in the documents, then the time-limit for challenging an irregularity starts to run only once the tenderer has been able to obtain them, or would have been able to obtain them had it acted promptly.

74. However, I do not think that the mere absence of a stated scope or estimated contract volume from the original tender notice would be sufficient to put a reasonably well-informed and normally diligent tenderer on notice that the contracting authority had wrongly estimated the tender value. Even if that absence constitutes an irregularity in itself, requiring the tenderer to challenge it in order to discover whether it concealed a further irregularity that could affect the tenderer's rights seems to me to render the exercise of those rights excessively difficult, particularly in view of the time-limit. This is a fortiori the case if it is at least open to argument whether the stipulation under Paragraph 17(1)(2)(c) of the VOL/A to publish the scope of the contract is mandatory. (40)

75. It is ultimately for the national court, as sole judge of fact, to decide at what point (if at all) a reasonably well-informed and normally diligent tenderer should have discovered that the wrong procedure had been used. The following observations may nevertheless be of assistance.

76. In the present case, the tender documents could readily be downloaded from the Bremen website. However, it appears that neither the notice itself nor the tender documents stated the scope or volume of the project.

77. It is true that the service contract' part of the price document specified training for about 300 employees and 10 administrators, and that the object document indicated that about 310 employees would work with the system. However, the request to indicate unit prices for different possible ranges of numbers of licences in the licence contract' part of the price document could reasonably have been read as implying that a lower number of licences might be considered or that the final number of licences had not yet been decided (let alone how many licences would be full versus read-only). (41)

78. Lämmerzahl contacted Bremen on at least two occasions to find out more details about the tender invitation. In its second set of questions it made it clear that it was assuming that 310 licences would be required. But this was never expressly confirmed by Bremen. The most that can be said is that Bremen, by not contradicting this figure in its reply of 6 April 2005, tacitly endorsed Lämmerzahl's assumption that around 310 licences were required.

79. In short, it appears that neither the tender notice and documents nor the information which Bremen subsequently provided explicitly indicated how many licences were required. Nevertheless, it is clear that Lämmerzahl went on to submit a tender whose value was three times the threshold for Community-wide tenders.

80. Against that background, it is for the national court to decide whether, in all the circumstances, the application of Paragraph 107(3), second sentence, of the GWB afforded effective protection. This would be the case if the information on the tender notice or documents enabled a reasonably

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well-informed and normally diligent tenderer to discover that the wrong procedure had been used. If it is not possible to interpret this provision in such a way that it is compatible with Article 1(1) of Directive 89/665, the former should be disapplied (42) and the latter, which has direct effect, (43) applied.

Conclusion

81. I accordingly suggest that the Court should combine the two questions referred and answer them as follows:

If a tenderer has failed within the time-limit set by national law to challenge a choice of procedure incorrectly placing a public tender invitation outside the scope of Community protection, Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts does not preclude the tenderer from being excluded from the right provided by that directive to review further decisions in the tender process, provided that the application of the time-limit does not in fact make it virtually impossible or excessively difficult to challenge the choice of procedure in the circumstances. This would be the case if the information available on the tender notice or tender documents were insufficient to enable a reasonably well-informed and normally diligent tenderer to discover that the wrong procedure had been used. It is for the national court to verify this in a given case.

(1) .

(2) - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(3) - (OJ 1977 L 13, p. 1.) This directive was repealed and replaced by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) and Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1). Directive 93/36 was in turn one of the directives repealed and replaced by European Parliament and Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

(4) - See footnote 2. Directive 92/50 was amended by Directives 93/36, 97/52 and 2001/78 and repealed, save for Article 41 (which amended Article 1(1) of Directive 89/665), by Directive 2004/18 (see footnote 3 above). Under Article 2 of Directive 92/50 (and, subsequently, paragraph 2 of Article 1(2)(d) of Directive 2004/18), a contract which includes both supplies and services is considered to be a service contract if the value of services exceeds that of the products supplied. The contract at issue in the present case includes both supplies (software licences) and services (training and maintenance), whose relative values are not clear from the documents in the case file. It is thus uncertain whether it would qualify as a supply or as a service contract. However, the threshold value bringing a contract within the scope of Directive 89/665 is the same in both cases.

(5) - See footnote 3. Similar provisions to Article 10(1) and (1a) of Directive 93/36 are to be found, for public service contracts, in Article 18(1) and (2) of Directive 92/50. Both sets of provisions were subsequently replaced by Article 38(2) and (4) of Directive 2004/18.

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(6) - The translations of the titles and provisions of German legislation cited are my own.

(7) - Gesetz gegen Wettbewerbsbeschränkungen of 26 August 1998, BGBl. I 1998, p. 2521. Part four comprises Paragraphs 97 to 129. It is divided into three sections, the second of which (Paragraphs 102 to 124) covers review procedures.

(8) - Paragraph 127(1) of the GWB empowers the federal government, with the agreement of the Bundesra t (the upper house of the federal parliament), to transpose into German law by means of a regulation the threshold values in Community directives on the coordination of procedures for awarding public contracts.

(9) - [E]rkennbar' in the German original.

(10) - Verordnung über die Vergabe öffentlicher Aufträge, 9 January 2001, BGBl I 2001, p. 110.

(11) - See footnote 8 above.

(12) - 2002 version of 17 September 2002, Bundesanzeiger No 216a. Sections 1 and 2 cover awards respectively below and above the Community threshold. Corresponding paragraphs in each section bear the same number. In each section the wording of Paragraph 17(1)(2)(c) is identical.

(13) - Diese Bekanntmachung soll mindestens folgende Angaben enthalten: ... Art und Umfang der Leistung' in the German original.

(14) - The translations of the parts of the tender notice and tender documents cited are my own.

(15) - In its letter of 6 April 2005 (see point 20 below), Bremen said that a State licence would be for an unlimited number of licences for use in Bremen and Bremerhaven.

(16) - It seems that Bremen had used the national tendering procedure as a result of a valuation of EUR 150 000 (made in 2004) on the basis of 150 rather than 310 licences.

(17) - Lämmerzahl refers to this provision in the VOL/A as non-mandatory'. The referring court states, however, that the word soll' (should') generally indicates an obligation to comply, absent compelling reasons to the contrary. See point 12 above and the footnote thereto. The referring court derives its interpretation of soll' from the General Comments' section at the end of the VOL/A.

(18) - The Court has ruled that the setting of reasonable time-limits for bringing proceedings is compatible with Article 1 of Directive 89/665: Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraphs 75 to 79.

(19) - The Community legislator has imposed certain harmonised requirements in respect of contracts whose value exceeds the relevant threshold: see footnote 3 above.

(20) - In my Opinion in Case C-195/04 Commission v Finland [2007] ECR I-0000, I have dealt at length with this argument.

(21) - See for example Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12 and the case-law cited, and Case C-432/05 Unibet [2007] ECR I-0000, paragraph 43 and the case-law cited.

(22) - See Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 33 and the case-law cited.

(23) - Cited in footnote 18 above.

(24) - Universale-Bau , paragraphs 76 and 77.

(25) - Case C-327/00 Santex [2003] ECR I-1877, paragraphs 49 to 66.

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(26) - Peterbroeck (cited in footnote 21 above), paragraph 14.

(27) - Idem , paragraphs 56 and 57.

(28) - Case C-230/02 Grossmann Air Service [2004] ECR I-1829, paragraph 37.

(29) - The applicant in that case believed that the specifications of the tender invitation discriminated against him. Before the award decision he neither challenged those specifications, nor did he submit a tender. The Court held that a refusal to acknowledge an applicant's interest in obtaining the particular contract in the circumstances of the case did not impair the effectiveness of Directive 89/665.

(30) - Santex , paragraph 60.

(31) - Case C-315/01 [2003] ECR I-6351, paragraphs 53 and 54, and see also point 46 of the Opinion of Advocate General Geelhoed.

(32) - GAT (cited in footnote 31 above), paragraphs 51 to 54.

(33) - See point 13 above.

(34) - See point 8 above.

(35) - Research carried out by the relevant departments of the Court indicates that such time-limits for challenging tender invitations are within the range of limitation periods adopted by other Member States. The following time-limits apply in the countries surveyed which consider a public invitation to tender to be a justiciable act and provide for a review of such an invitation either expressly or as part of a general review system: 7 or 14 days depending on the procedure (Austria, Poland), 14 days (Finland), 15 days (Hungary), one month (Portugal), the deadline for submitting offers (Slovenia), two months (Greece, Spain), three months (Ireland, UK). No time-limit is specified in France and Luxembourg. In Denmark, the Netherlands and Sweden, the tender invitation can be challenged even after the contract is signed.

(36) - Case C-19/00 SIAC [2001] ECR I-7725, paragraph 42. An alternative formulation, from the area of protection of legitimate expectations, is that of a prudent and alert economic operator': see for example Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 v Commission [2006] ECR I-5479. Bremen and the Commission have suggested further possible formulations (points 42 and 44 above).

(37) - See Annex VII A to Directive 2004/18 (footnote 3 above), which came into force after the material events in the present case. In contract notices, the estimated total value of works, supplies or services in framework agreements must be disclosed. In prior information notices for public supply contracts, either the quantity or the value of the products to be supplied must be given.

(38) - See point 30 above.

(39) - SIAC (cited in footnote 36 above), paragraphs 40 and 42.

(40) - See point 29 above in fine.

(41) - The inconsistency between the different ranges of numbers of licences and the figure of 310 employees cannot be fully explained by the permutation possibilities between full and read-only licences. The maximum number of read-only licences for which pricing was requested is 100; and the first three ranges for which full licence pricing is requested fall below the balance (210) which would be required to bring the total to 310.

(42) - See Santex (cited in footnote 25 above), paragraphs 63 to 65 and the case-law cited.

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(43) - See Case C-15/04 Koppensteiner [2005] ECR I-4855, paragraph 38.

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Opinion of Advocate General Sharpston delivered on 7 June 2007. Lämmerzahl GmbH v Freie Hansestadt Bremen. Reference for a preliminary ruling: Hanseatisches Oberlandesgericht in Bremen - Germany. Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Limitation period - Principle of effectiveness. Case C-241/06.

1. The present reference from the Hanseatisches Oberlandesgericht (Hanseatic Higher Regional Court) in Bremen, Germany, essentially asks the Court whether Community law precludes a tenderer from being generally excluded from the right under Directive 89/665 (2) to apply for a review of tender decisions on the ground that it has not challenged, within the time-limit set by national law, a decision which has incorrectly placed the tendering procedure outside the scope of that directive.

2. The claimant in the main proceedings tendered unsuccessfully for a software contract which had been put out to tender under the national procedure. It then complained, first, that there should have been a Community-wide tendering procedure because the relevant threshold value had been exceeded and, second, that the subsequent award decision was unlawful. The complaints were declared inadmissible on the ground that the time-limit for challenging the choice of procedure had expired, so that the review procedure for public contracts falling within the scope of Community law was not available.

3. The reference invites the Court to examine further the circumstances in which the imposition of time-limits for challenging decisions in public tendering procedures may compromise the principle of effectiveness which underlies Directive 89/665.

Relevant legislation

Directive 89/665

4. Directive 89/665 seeks to ensure that the procedures for the award of public works, supply and service contracts laid down in the relevant Community directives are applied effectively. It does this by providing for a system of review procedures and remedies for infringements.

5. The following recitals in the preamble to Directive 89/665 are relevant:

[1] ... Community Directives on public procurement, in particular ... Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, [(3)]... do not contain any specific provisions ensuring their effective application;

[2] ... [T]he existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

[3] ... [T]he opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; ... for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

[4] ...

[5] ... [T]he short duration of the procedures means that the aforementioned infringements need to be dealt with urgently;

...'

6. Article 1 of Directive 89/665 provides:

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives ... 77/62/EEC, and 92/50/EEC, (4) decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly

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as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

2. ...

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

7. Article 2 of Directive 89/665 deals with the remedies that should be available in respect of the reviews. Article 2(7) states that [t]he Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced'.

Directive 93/36 (5)

8. Article 10 of Directive 93/36 lays down, inter alia, the minimum time-limits in open procedures for the receipt of tenders valued above the threshold for applying Community rules. Article 10(1) states that such procedures must remain open for at least 52 days from the sending of the tender notice. That period may be reduced, as a general rule, to a minimum of 36 days, but under no circumstances to less than 22 days, if a prior information notice was published under conditions set out in Article 10(1a).

German legislation (6)

9. Part four of the German Gesetz gegen Wettbewerbsbeschränkungen (Law Against Restrictions on Competition) (GWB') covers the award of public contracts. (7) Paragraph 100(1) states that [t]his part applies only to contracts which reach or exceed the values set out in the regulations provided for by paragraph 127 (threshold values).' (8)

10. Paragraph 107 of the GWB covers applications for review to the procurement board. Paragraph 107(3) of the GWB sets out the time-limits for applying to the procurement board for review of alleged infringements of the procurement rules and states:

The application is inadmissible where the applicant was already aware during the award procedure of the alleged infringement of the procurement rules and did not immediately complain to the awarding authority. The application is also inadmissible where no complaint is raised about infringements of the procurement rules that are identifiable (9) on the basis of the tender notice with the awarding authority by, at the latest, the end of the period stipulated in the tender notice for bidding or for applications to participate in the award procedure.'

11. The Vergabeverordnung (Public Procurement Regulation) (VgV') (10) contains inter alia the threshold values referred to in Paragraph 127(1) of the GWB. (11) At the material time Paragraph 2 of the VgV provided:

The threshold amount is:

...

3. for all other supply or service contracts: EUR 200 000.'

12. Part A of the Verdingungsordnung für Leistungen (Rules for the Placing of Public Supply and Service Contracts by Tender) (VOL/A') (12) contains detailed rules for awarding supply and service contracts by tender. Paragraph 17 relates inter alia to the contents of the tender notice.

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Paragraph 17(1)(2) provides:

The tender notice should at least contain the following details:

...

(c) Nature and scope of the goods or services to be supplied...' (13)

The main proceedings and the reference made

13. On or before 21 March 2005 the defendant in the main proceedings, the Free Hanseatic City of Bremen (Bremen'), issued a national invitation to tender under the VOL/A' for a software contract. (14) The closing date was 12 April 2005. The tender notice contained no quantification of the scope or value of the contract. Under the heading Menge und Umfang' (volume and scope) it stated:

On behalf of the Senator for Employment, Women, Health, Youth and Social Affairs in Bremen, standard software is sought for SGB XII (social service - Adult and Economic Aid) for PC-based case handling to meet the requirements laid down in the tender documents. The tender documents can be downloaded free of charge from www.vergabe.bremen.de. ...'

14. Lämmerzahl GmbH (Lämmerzahl'), the claimant in the main proceedings, is a limited company specialising in software for public authorities. It duly obtained the tender documents, which included the following three documents:

15. First, the document entitled price sheet/price breakdown 1' (the price document') asked tenderers to provide, under the section headed licence contract', unit prices for full licences according to various possible ranges of quantities to be supplied (11-50, 51-100, 101-200, 201-500 licences). There was an alternative request for unit-pricing for read-only licences (1-5, 6-10, 11-50, 51-100 licences). As a further alternative, a price was requested for a Landeslizenz' (State licence). (15) The section headed service contract' asked tenderers to quote for training approximately 300 employees and 10 administrators. Nowhere did the document state the actual number of licences required.

16. Second, the document setting out the object of the tender invitation (the object document') stated that approximately 200 employees in the economic aid area, 45 in social services and 65 in the central units would work with the software system.

17. Third, the table of goods and services' indicated a minimum or estimated volume' of one unit. Again, it failed to indicate the total number of licences required.

18. Lämmerzahl raised four questions relating to the tender documents, to which Bremen replied by letter on 24 March 2005. At that stage, Lämmerzahl did not ask about the number of licences, or the volume or value of the contract.

19. Lämmerzahl then sent Bremen an e-mail on 4 April 2005 requesting further clarification of the tender documents. Its first question asked whether the total prices requested in the offer document and the table of goods and services related to the sum of the prices in the price sheet for the licence contract based on 310 licences (the 310 employees specified in the [object document])' or whether other prices (e.g. maintenance and service costs) should be included. Three of the other questions in Lämmerzahl's e-mail referred to the above-mentioned 310 licences'.

20. Bremen replied by letter on 6 April 2005. In answer to the first question it said that the overall tender price (total price of licence costs, maintenance costs and services) should be entered in the offer document. None of Bremen's answers mentioned or expressly commented on the figure of 310 licences which Lämmerzahl had included in its questions.

21. Lämmerzahl then submitted a tender based on 310 licences, together with training and maintenance,

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for EUR 603 500 net. It was selected for the testing stage along with a rival tenderer, PROSOZ Herten GmbH (PROSOZ').

22. On 6 July 2005 Bremen wrote to Lämmerzahl informing it that it had been unsuccessful because its offer had not been the most economically advantageous.

23. On 14 July 2005 Lämmerzahl sent a written complaint to Bremen and on 21 July 2005 submitted an application for a procurement review. It stated that it had discovered from taking legal advice on 14 July 2005 that Bremen should have issued a Community-wide, rather than a national, invitation to tender because the value of the contract exceeded the EUR 200 000 threshold. It also alleged that its software had not been properly tested.

24. On 2 August 2005 the Third Procurement Board of the City of Bremen (the Board') dismissed the application. It stated that, even if the threshold figure had been exceeded and the wrong tendering procedure had thus been used, such an irregularity was identifiable from the tender invitation. Accordingly, Lämmerzahl's complaints were out of time under Paragraph 107(3), second sentence, of the GWB.

25. Lämmerzahl appealed to the referring court. First, it claimed the irregularity in the choice of procedure had not been identifiable from the tender notice. Second, it repeated its objection to the testing and selection procedure, claiming that the PROSOZ tender was manifestly incomplete and contained an unlawful costing arrangement which should have led to its exclusion (the substantive complaints').

26. By an interim decision of 7 November 2005, the referring court refused to extend the suspensory effect of the appeal because it considered that it did not have any prospect of success. It agreed with the Board that by virtue of the limitation period in Paragraph 107(3), second sentence, of the GWB, Lämmerzahl was out of time in challenging the choice of the national procedure and Bremen's estimate of the contract value. Consequently, the company was precluded from recourse to the GWB review procedure, which was only available for tendering procedures exceeding the threshold value.

27. Bremen then awarded the contract to PROSOZ.

28. In the order for reference, the national court appears to accept that the contract value exceeded the EUR 200 000 threshold. (16) However, it considers that Lämmerzahl is time-barred from access to the GWB review procedure by virtue of Paragraph 107(3), second sentence, of the GWB.

29. In reaching that conclusion, the national court does not rule definitively on the question whether, under national law, identifiable on the basis of the tender notice' means that an irregularity has to be identifiable from the tender notice alone. It considers that, if that phrase can encompass other documents, Lämmerzahl should have realised from the details in the tender documents that the threshold would be exceeded. It should in any event have realised this from its own calculations. If, on the other hand, an irregularity has to be identifiable from the tender notice alone, the very absence of any indication of the contract's scope would in itself constitute an identifiable irregularity, since such an omission would be contrary to Paragraph 17(1)(2)(c) of the VOL/A. (17) It would further prevent a tenderer from verifying the choice of procedure and challenging it if necessary.

30. The national court nonetheless has reservations as to whether its decision of 7 November 2005 might deprive tenderers of their right to an effective review of alleged infringements of Community law, in breach of Article 1 of Directive 89/665. It considers that the limitation set out in Paragraph 107(3), second sentence, of the GWB conforms in principle with the directive in the light of the Court's case-law. (18) However, when the contract value has wrongly been estimated to be below the threshold, failure to complain within the time-limit deprives a tenderer of a review

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not only of that irregularity, but also of its substantive complaints. If a contracting authority is able to deprive an unwary tenderer of substantive protection by committing an identifiable irregularity, there is potential for abuse.

31. The national court also wonders whether the draconian consequences of limitation should only be triggered if the tenderer is able to ascertain unequivocally from the tender notice that the contracting authority is assuming that the contract will fall below the threshold value.

32. In the light of these considerations, the referring court has stayed the main proceedings and referred two questions to the Court:

1. Is it compatible with Directive 89/665/EEC, in particular Article 1(1) and (3), for a tenderer to be generally barred from gaining access to a review of a contracting authority's decision to award public contracts because the tenderer through its own fault did not raise an irregularity in the award procedure within the time-limit laid down for that purpose in national law, where the irregularity relates

(a) to the form of invitation to tender selected

or

(b) to the correctness of the determination of the contract price (the estimate is obviously wrong or the method of determination is not sufficiently transparent)

and where, on the basis of the contract value as correctly determined or to be determined, it would be possible to review other irregularities in the award procedure which, considered in isolation, would not be time-barred?

2. Should the details in a tender notice relevant to determination of the contract price be subject to any special requirements so as to enable the conclusion to be drawn from irregularities relating to the estimated contract price that the protection of primary law is generally precluded even if the correctly estimated contract price exceeds the relevant threshold amount?'

33. Written observations have been submitted by Lämmerzahl, Bremen, Austria, Lithuania and the Commission. Lämmerzahl, Bremen and the Commission also made further observations at the hearing on 28 March 2007.

Admissibility

34. Bremen submits that the conditions for an Article 234 EC reference are not met. What is at issue is the particular application of a national provision whose conformity with Community law is not in doubt.

35. I do not accept that argument. What lies behind the referring court's first question is whether Article 1 of Directive 89/665 precludes the possibility of a general exclusion from the right to review in circumstances such as those in the main proceedings.

36. As to the referring court's second question, it is quite true that the Court cannot provide a list of precisely what should appear in tender notices. (19) However, it is competent to interpret the relevant principles and provisions of Community law in order to help the national court to determine whether these have been infringed in a particular case.

37. The reference is therefore admissible.

The questions

Preliminary

38. The two questions which the referring court asks may be reformulated as follows:

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1. If a tenderer has failed within the time-limit set by national law to challenge a decision incorrectly placing a public tender outside the scope of Community protection, does Directive 89/665 prevent the tenderer from being denied the right conferred by that directive to a review of any further decisions in the tender process?

2. What details should appear on the tender notice so as to enable the conclusion to be drawn that the contract value has been wrongly estimated to fall below the threshold for the protection granted by Directive 89/665?

39. The referring court's second question relates to whether the irregularity in issue can be detected. That question is central to determining whether a limitation period for challenging that irregularity is compatible with Community law. I shall therefore examine the two questions referred together. Most of the parties submitting observations have indeed broadly adopted this approach.

Observations

40. Lämmerzahl submits that while a time-limit such as that contained in Paragraph 107(3), second sentence, of the GWB is in principle compatible with Directive 89/665, it acts as a derogation from the right to review. Accordingly, the phrase identifiable on the basis of the tender notice' must be interpreted narrowly. It cannot extend to the identification of an omission, the challenging of which might lead in turn to the identification of Bremen's error in estimating the contract value. That error - and hence the erroneous choice of procedure - could not be identified from the tender notice. It was thus impossible or excessively difficult for Lämmerzahl to exercise its Community rights.

41. Lithuania considers that where a time-limit starts to run on publication of the tender notice, the rights of tenderers under Community law are protected effectively only if they are provided with full and objective information about the volume of the tender at that point. If they are not, the time-limit should start to run only once they know of, or are in a position to ascertain, the procedural error in question.

42. Bremen considers that Paragraph 107(3), second sentence, of the GWB is compatible with Directive 89/665. The criterion of identifiability ensures that the exercise of a tenderer's Community rights is not made impossible or excessively difficult. Putting the estimated value on the tender notice could distort competition. It is sufficient that the averagely experienced market participant should be able to calculate the contract value from the information provided. At the hearing Bremen pointed out that, even without the right to review under Directive 89/665, general remedies were available under national law. However, it conceded that these were less effective than the procedure under the GWB.

43. Austria considers that a general exclusion from the Community review procedure as a result of failing to challenge the irregularity in question within the time-limit is compatible with Directive 89/665, provided that the particular application of the time-limit does not infringe the principle of effective protection.

44. The Commission adopts a similar position. It notes that the sanction of foreclosure ensures that irregularities are challenged as soon as possible. That is desirable in view of the potential consequences of having to restart the tender procedure. At the hearing, the Commission stated that the failure to challenge an irregularity in time should lead to foreclosure only if the tenderer could identify the irregularity or should have done so had it acted with the care to be expected of an experienced and diligent trader.

45. The Commission also considers that fundamental principles of the EC Treaty such as equality and transparency are applicable even to tenders falling below the Community threshold. (20)

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Assessment

46. The Community principle of effectiveness lies at the core of the protection which Directive 89/665 provides. As the Court has long held, this principle requires that the exercise of rights conferred by Community law must not be rendered virtually impossible or excessively difficult. (21)

47. The first three recitals to Directive 89/665 thus emphasise that the purpose of the directive is to ensure the effective application of the harmonising Community directives on public procurement, by providing a system of remedies for infringements of Community law in the field of public procurement or national rules implementing that law'. Article 1(1) spells out the requirement for effective review of decisions taken by contracting authorities. Article 2(7) provides for decisions taken by the appropriate review bodies to be enforced effectively.

48. The second and fifth recitals stress, however, that public procurement procedures are characterised by their short duration. Any infringements therefore need to be dealt with urgently, at a stage when they can be corrected. Rapidity of review is thus considered to be an aspect of effectiveness and is expressly identified in the third recital and in Article 1(1).

49. Directive 89/665 therefore provides for the possibility of reviewing a decision even before it has caused actual harm. Under Article 1(3), standing is given to any person having or having had an interest in obtaining a particular public supply... contract and who has been or risks being harmed by an alleged infringement' (emphasis added). In the same vein, Article 1(3) permits Member States to require an interested party to give prior notice to the contracting authority of its intention to seek judicial review, underlining the need to try to resolve issues as rapidly as possible.

50. The directive does not expressly authorise the use of limitation periods for applying for review of contracting authorities' decisions. The imposition of time-limits under national implementing legislation is, however, in principle compatible with the requirement for rapid review, since it quickly becomes impractical to reverse such decisions. Moreover, the Court has long recognised that reasonable time-limits constitute an application of the fundamental principle of legal certainty. (22)

51. In Universale-Bau (23) the Court held that Directive 89/665 does not preclude national legislation from setting a reasonable time-limit for bringing an application to review a contracting authority's decision. A time-limit is reasonable if it satisfies both the principle of effectiveness, as laid down by the directive, and the principle of legal certainty. (24)

52. The need to balance these two principles distinguishes limitation periods from derogating provisions, with which Lämmerzahl seeks to equate them. There are many kinds of derogation in Community law, justified for various reasons. Often, such derogations are exceptions to EC Treaty rights or other general principles. As a rule, they are permitted when necessary to protect specific interests. In order to give effect to overriding principles, derogations are typically interpreted restrictively. Limitation periods, on the other hand, strike a balance between the individual's rights and the wider public interest. Since they nevertheless limit rights, they must be examined carefully to determine whether their application in fact undermines the principle of effective protection.

53. The Court undertook such an examination in Santex. (25) There, it elaborated on Universale-Bau and applied criteria established in previous case-law (26) to the question of the reasonableness of time-limits in the context of Directive 89/665. It held that a limitation provision must be examined by reference, in particular, to the role of that provision in the procedure, its progress and its special features, viewed as a whole'. Thus, even if a time-limit per se is not contrary to the principle of effectiveness, its application in the circumstances of a particular case may render it so. (27)

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54. In Grossmann Air Service , the Court indicated that the objectives of speed and effectiveness in Directive 89/665 require an interested party who is aware of an irregularity to challenge it (28) and had scant sympathy for the applicant, who had waited until the award decision before challenging an alleged illegality in the invitation to tender. (29)

55. The criterion of knowledge or awareness of an irregularity on the part of a tenderer underlies not only Grossmann , but also other cases. If a time-limit for challenging an irregularity starts to run before the tenderer has knowledge, or if a tenderer is otherwise penalised for not raising a challenge in a situation where it did not know and could not have known of an irregularity, the principle of effectiveness is undermined. In Santex , the tenderer was not aware of the contracting authority's interpretation of the disputed clause until the relevant time-limit had expired (30) and could not therefore be excluded by the time-limit from seeking review. In GAT , a case not concerned with a time-limit, the Court held that an applicant cannot be denied the right to claim damages for the harm caused by a decision because a previous decision was unlawful. There, the previous decision had not been challenged and the applicant was therefore not necessarily aware of its irregularity. (31)

56. It follows from the Court's case-law set out above that the placing of a time-limit under national law on the exercise of the right to review provided for by Directive 89/665 is compatible with Community law provided that such a time-limit does not render the exercise of that right virtually impossible or excessively difficult. In determining whether that is the case, not only the length of the limitation period but also factors in the review procedure in which the time-limit operates must be examined. Awareness is a key factor. Whilst the objectives of speed and effectiveness in the directive require an interested party that is aware of an irregularity to challenge it, such a party cannot be shut out of its right to review by a time-limit triggered by something of which it could not reasonably have been aware.

57. Can a time-limit still be compatible with Community law if the failure to challenge an irregularity in time also deprives a tenderer of the possibility of challenging any further, subsequent irregularities in the tender process? That is certainly a drastic sanction. Is it a permissible one?

58. It is common ground that the consequence of not challenging the choice of national procedure within the time-limit is that, as a matter of general legal principle, that procedure prevails and the tender procedure falls thereafter outside the scope of the directive. This is to be distinguished from the situation in GAT , where the Court held that, since every decision taken by a contracting authority in a public tender is reviewable under Directive 89/665, a tenderer cannot be denied the right to claim damages for an allegedly illegal award decision on the ground that a previous decision rendered the procedure defective (without, however, taking it outside the scope of the directive). (32)

59. One possibility would be to create an exception to the rule in Universale-Bau and hold that the possibility of challenging a decision which appears wrongly to take the particular tender procedure outside the scope of Community protection cannot be subject to a limitation period. That does not seem to me to be a sensible solution. First, it would upset the balance between effectiveness and legal certainty which Directive 89/665 seeks to achieve. Second, a tenderer might be tempted not to challenge the procedure (which after all could appear to work in its favour by limiting competition), unless or until it discovered, through the award decision, that the right to a review under Directive 89/665 actually mattered to it.

60. Suggesting that a longer time-limit should be required where the consequences of being out of time are draconian seems to me to beg as many questions as it answers.

61. I therefore conclude that a time-limit for challenging decisions in a tender procedure is still

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compatible with the principle of effectiveness, combined with the need for rapidity and legal certainty, even when the consequence of failing to challenge an irregularity within the time-limit removes a tenderer from the protection of the review procedure conferred by Directive 89/665.

62. I turn now to an examination of the time-limit, including its particular features, in the present case.

63. The limitation period fixed in Paragraph 107(3), second sentence, of the GWB runs from the publication of the tender notice until the deadline for submitting offers. In the present case, that period seems to have been at least 23 days. (33) In view of the fact that the Community legislator considers a minimum period of 22 days to be sufficient for preparing and submitting a tender, (34) it would be difficult to argue that 23 days were insufficient for challenging an alleged irregularity. Such a time-limit for bringing a challenge thus does not in principle appear to infringe the principle of effectiveness underlying Directive 89/665, especially in view of the need, underlined in that directive, for a rapid review procedure. (35)

64. However, the particularity of the time-limit specified in Paragraph 107(3), second sentence, of the GWB is that it starts to run if the alleged regularity in question is identifiable on the basis of the tender notice.

65. What, therefore, is the degree or nature of knowledge of an irregularity which may be attributed to a tenderer without breaching the effectiveness principle underlying Directive 89/665?

66. It seems to me that a requirement of actual, or subjective, knowledge on the part of the tenderer would run counter to legal certainty. Furthermore, in circumstances such as those of the present case, it could be difficult to prove that a tenderer had actual knowledge of an irregularity, and a requirement of such proof would hardly be consistent with the need for a rapid review process.

67. It therefore seems preferable to formulate the test in terms of a standard of deemed, or objective, knowledge. The Court already applies an objective standard in respect of tenderers' ability to interpret award criteria against the yardstick of equality of treatment in public procurement, namely the ability of a reasonably well-informed and normally diligent tenderer'. (36) The same formula seems appropriate in the context of what knowledge of an irregularity in the tender procedure it is reasonable to deem a tenderer to possess.

68. A reasonably well-informed and normally diligent tenderer' can be deemed to be experienced in submitting tenders in its particular field. It can also be expected to have a general knowledge and understanding of key legal considerations affecting the markets in which it operates. In the context of the present case, this would entail a general knowledge of national and Community tender procedures and relevant thresholds, including the possibilities for challenging decisions under both procedures and the time-limits for bringing such challenges.

69. What information needs to be available to enable such a tenderer, in circumstances such as those in the present case, to ascertain that the wrong choice of procedure has been used?

70. I do not agree with Bremen that publishing the estimated value of the contract would distort competition. After all, Community public procurement legislation, an important aim of which is to promote competition, requires estimated contract values to be published in some cases. (37)

71. Since the choice of procedure is a function of the estimated total contract value, the information must enable the tenderer to work out that value. This would include not only goods to be supplied, but also the cost of any support, training or maintenance included in the contract scope. I accept Lithuania's submission on this point, namely that nothing less than a clear and full disclosure of the scope or volume of the project will allow a tenderer, on the basis of its own experience and knowledge of market rates, to calculate the estimated total value.

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72. The existence of such an information requirement, combined with the application of the criterion of the knowledge and experience attributable to a reasonably well-informed and normally diligent tenderer, should resolve the referring court's concerns about potential abuse in respect of the ability of a contracting authority to take advantage of an unwary tenderer. (38)

73. I do not think that this information must necessarily appear in the tender notice itself. A tenderer can reasonably be expected to act on references in the notice to other documents, provided it is clearly indicated where these are to be obtained. In this respect, the Court has already ruled that award criteria are compatible with the principle of equal treatment if they are mentioned in the contract documents or contract notice. (39) If the necessary information delineating the scope of the contract is contained in the documents, then the time-limit for challenging an irregularity starts to run only once the tenderer has been able to obtain them, or would have been able to obtain them had it acted promptly.

74. However, I do not think that the mere absence of a stated scope or estimated contract volume from the original tender notice would be sufficient to put a reasonably well-informed and normally diligent tenderer on notice that the contracting authority had wrongly estimated the tender value. Even if that absence constitutes an irregularity in itself, requiring the tenderer to challenge it in order to discover whether it concealed a further irregularity that could affect the tenderer's rights seems to me to render the exercise of those rights excessively difficult, particularly in view of the time-limit. This is a fortiori the case if it is at least open to argument whether the stipulation under Paragraph 17(1)(2)(c) of the VOL/A to publish the scope of the contract is mandatory. (40)

75. It is ultimately for the national court, as sole judge of fact, to decide at what point (if at all) a reasonably well-informed and normally diligent tenderer should have discovered that the wrong procedure had been used. The following observations may nevertheless be of assistance.

76. In the present case, the tender documents could readily be downloaded from the Bremen website. However, it appears that neither the notice itself nor the tender documents stated the scope or volume of the project.

77. It is true that the service contract' part of the price document specified training for about 300 employees and 10 administrators, and that the object document indicated that about 310 employees would work with the system. However, the request to indicate unit prices for different possible ranges of numbers of licences in the licence contract' part of the price document could reasonably have been read as implying that a lower number of licences might be considered or that the final number of licences had not yet been decided (let alone how many licences would be full versus read-only). (41)

78. Lämmerzahl contacted Bremen on at least two occasions to find out more details about the tender invitation. In its second set of questions it made it clear that it was assuming that 310 licences would be required. But this was never expressly confirmed by Bremen. The most that can be said is that Bremen, by not contradicting this figure in its reply of 6 April 2005, tacitly endorsed Lämmerzahl's assumption that around 310 licences were required.

79. In short, it appears that neither the tender notice and documents nor the information which Bremen subsequently provided explicitly indicated how many licences were required. Nevertheless, it is clear that Lämmerzahl went on to submit a tender whose value was three times the threshold for Community-wide tenders.

80. Against that background, it is for the national court to decide whether, in all the circumstances, the application of Paragraph 107(3), second sentence, of the GWB afforded effective protection. This would be the case if the information on the tender notice or documents enabled a reasonably

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well-informed and normally diligent tenderer to discover that the wrong procedure had been used. If it is not possible to interpret this provision in such a way that it is compatible with Article 1(1) of Directive 89/665, the former should be disapplied (42) and the latter, which has direct effect, (43) applied.

Conclusion

81. I accordingly suggest that the Court should combine the two questions referred and answer them as follows:

If a tenderer has failed within the time-limit set by national law to challenge a choice of procedure incorrectly placing a public tender invitation outside the scope of Community protection, Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts does not preclude the tenderer from being excluded from the right provided by that directive to review further decisions in the tender process, provided that the application of the time-limit does not in fact make it virtually impossible or excessively difficult to challenge the choice of procedure in the circumstances. This would be the case if the information available on the tender notice or tender documents were insufficient to enable a reasonably well-informed and normally diligent tenderer to discover that the wrong procedure had been used. It is for the national court to verify this in a given case.

(1) .

(2) - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(3) - (OJ 1977 L 13, p. 1.) This directive was repealed and replaced by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) and Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1). Directive 93/36 was in turn one of the directives repealed and replaced by European Parliament and Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

(4) - See footnote 2. Directive 92/50 was amended by Directives 93/36, 97/52 and 2001/78 and repealed, save for Article 41 (which amended Article 1(1) of Directive 89/665), by Directive 2004/18 (see footnote 3 above). Under Article 2 of Directive 92/50 (and, subsequently, paragraph 2 of Article 1(2)(d) of Directive 2004/18), a contract which includes both supplies and services is considered to be a service contract if the value of services exceeds that of the products supplied. The contract at issue in the present case includes both supplies (software licences) and services (training and maintenance), whose relative values are not clear from the documents in the case file. It is thus uncertain whether it would qualify as a supply or as a service contract. However, the threshold value bringing a contract within the scope of Directive 89/665 is the same in both cases.

(5) - See footnote 3. Similar provisions to Article 10(1) and (1a) of Directive 93/36 are to be found, for public service contracts, in Article 18(1) and (2) of Directive 92/50. Both sets of provisions were subsequently replaced by Article 38(2) and (4) of Directive 2004/18.

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(6) - The translations of the titles and provisions of German legislation cited are my own.

(7) - Gesetz gegen Wettbewerbsbeschränkungen of 26 August 1998, BGBl. I 1998, p. 2521. Part four comprises Paragraphs 97 to 129. It is divided into three sections, the second of which (Paragraphs 102 to 124) covers review procedures.

(8) - Paragraph 127(1) of the GWB empowers the federal government, with the agreement of the Bundesra t (the upper house of the federal parliament), to transpose into German law by means of a regulation the threshold values in Community directives on the coordination of procedures for awarding public contracts.

(9) - [E]rkennbar' in the German original.

(10) - Verordnung über die Vergabe öffentlicher Aufträge, 9 January 2001, BGBl I 2001, p. 110.

(11) - See footnote 8 above.

(12) - 2002 version of 17 September 2002, Bundesanzeiger No 216a. Sections 1 and 2 cover awards respectively below and above the Community threshold. Corresponding paragraphs in each section bear the same number. In each section the wording of Paragraph 17(1)(2)(c) is identical.

(13) - Diese Bekanntmachung soll mindestens folgende Angaben enthalten: ... Art und Umfang der Leistung' in the German original.

(14) - The translations of the parts of the tender notice and tender documents cited are my own.

(15) - In its letter of 6 April 2005 (see point 20 below), Bremen said that a State licence would be for an unlimited number of licences for use in Bremen and Bremerhaven.

(16) - It seems that Bremen had used the national tendering procedure as a result of a valuation of EUR 150 000 (made in 2004) on the basis of 150 rather than 310 licences.

(17) - Lämmerzahl refers to this provision in the VOL/A as non-mandatory'. The referring court states, however, that the word soll' (should') generally indicates an obligation to comply, absent compelling reasons to the contrary. See point 12 above and the footnote thereto. The referring court derives its interpretation of soll' from the General Comments' section at the end of the VOL/A.

(18) - The Court has ruled that the setting of reasonable time-limits for bringing proceedings is compatible with Article 1 of Directive 89/665: Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraphs 75 to 79.

(19) - The Community legislator has imposed certain harmonised requirements in respect of contracts whose value exceeds the relevant threshold: see footnote 3 above.

(20) - In my Opinion in Case C-195/04 Commission v Finland [2007] ECR I-0000, I have dealt at length with this argument.

(21) - See for example Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12 and the case-law cited, and Case C-432/05 Unibet [2007] ECR I-0000, paragraph 43 and the case-law cited.

(22) - See Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 33 and the case-law cited.

(23) - Cited in footnote 18 above.

(24) - Universale-Bau , paragraphs 76 and 77.

(25) - Case C-327/00 Santex [2003] ECR I-1877, paragraphs 49 to 66.

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(26) - Peterbroeck (cited in footnote 21 above), paragraph 14.

(27) - Idem , paragraphs 56 and 57.

(28) - Case C-230/02 Grossmann Air Service [2004] ECR I-1829, paragraph 37.

(29) - The applicant in that case believed that the specifications of the tender invitation discriminated against him. Before the award decision he neither challenged those specifications, nor did he submit a tender. The Court held that a refusal to acknowledge an applicant's interest in obtaining the particular contract in the circumstances of the case did not impair the effectiveness of Directive 89/665.

(30) - Santex , paragraph 60.

(31) - Case C-315/01 [2003] ECR I-6351, paragraphs 53 and 54, and see also point 46 of the Opinion of Advocate General Geelhoed.

(32) - GAT (cited in footnote 31 above), paragraphs 51 to 54.

(33) - See point 13 above.

(34) - See point 8 above.

(35) - Research carried out by the relevant departments of the Court indicates that such time-limits for challenging tender invitations are within the range of limitation periods adopted by other Member States. The following time-limits apply in the countries surveyed which consider a public invitation to tender to be a justiciable act and provide for a review of such an invitation either expressly or as part of a general review system: 7 or 14 days depending on the procedure (Austria, Poland), 14 days (Finland), 15 days (Hungary), one month (Portugal), the deadline for submitting offers (Slovenia), two months (Greece, Spain), three months (Ireland, UK). No time-limit is specified in France and Luxembourg. In Denmark, the Netherlands and Sweden, the tender invitation can be challenged even after the contract is signed.

(36) - Case C-19/00 SIAC [2001] ECR I-7725, paragraph 42. An alternative formulation, from the area of protection of legitimate expectations, is that of a prudent and alert economic operator': see for example Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 v Commission [2006] ECR I-5479. Bremen and the Commission have suggested further possible formulations (points 42 and 44 above).

(37) - See Annex VII A to Directive 2004/18 (footnote 3 above), which came into force after the material events in the present case. In contract notices, the estimated total value of works, supplies or services in framework agreements must be disclosed. In prior information notices for public supply contracts, either the quantity or the value of the products to be supplied must be given.

(38) - See point 30 above.

(39) - SIAC (cited in footnote 36 above), paragraphs 40 and 42.

(40) - See point 29 above in fine.

(41) - The inconsistency between the different ranges of numbers of licences and the figure of 310 employees cannot be fully explained by the permutation possibilities between full and read-only licences. The maximum number of read-only licences for which pricing was requested is 100; and the first three ranges for which full licence pricing is requested fall below the balance (210) which would be required to bring the total to 310.

(42) - See Santex (cited in footnote 25 above), paragraphs 63 to 65 and the case-law cited.

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(43) - See Case C-15/04 Koppensteiner [2005] ECR I-4855, paragraph 38.

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Reference for a preliminary ruling from the Hanseatisches Oberlandesgericht (Germany) lodged on 30 May 2006 - Lämmerzahl GmbH v Freie Hansestadt Bremen

(Case C- 241/06)

Language of the case: German

Referring court

Hanseatisches Oberlandesgericht

Parties to the main proceedings

Applicant: Lämmerzahl GmbH

Defendant: Freie Hansestadt Bremen

Question(s) referred

1. Is it compatible with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, [1] in particular Article 1(1) and (3), for a tenderer to be generally barred from gaining access to a review of a contracting authority's decision to award public contracts because the tenderer wrongfully failed to raise an irregularity in the award procedure within the time-limit laid down for that purpose in national law, where the irregularity relates

(a) to the form of invitation to tender selected

or

(b) to the correctness of the determination of the contract price (the estimate is obviously wrong or the method of determination is not sufficiently transparent)

and a review of other irregularities in the award procedure that - considered in isolation - would not be time-barred would be permissible on the basis of the contract price correctly determined or to be determined?

2. Should the details in a tender notice relevant to determination of the contract price be subject to any special requirements so as to enable the conclusion to be drawn from irregularities relating to the estimated contract price that the protection of primary law is generally precluded even if the correctly estimated contract price exceeds the relevant threshold amount?

———————————

[1] - OJ L 209, p. 1.

**Judgment of the Court (First Chamber)
of 18 December 2007
Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administracion General del Estado. Reference for a preliminary ruling: Audiencia Nacional - Spain. Public procurement - Liberalisation of postal services - Directives 92/50/EEC and 97/67/EC - Articles 43 EC, 49 EC and 86 EC - National legislation allowing public authorities to conclude agreements for the provision of both reserved and non-reserved postal services with a publicly owned company, namely the provider of universal postal service in the Member State concerned, without regard to the rules governing the award of public service contracts. Case C-220/06.**

In Case C220/06,

REFERENCE for a preliminary ruling under Article 234 EC, from the Audiencia Nacional (Spain), made by decision of 15 March 2006, received at the Court on 15 May 2006, in the proceedings

Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia

v

Administracion General del Estado,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, R. Schintgen, A. Borg Barthet, M. Ilei and E. Levits, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 June 2007,

after considering the observations submitted on behalf of:

- the Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia, by J. M. Piqueras Ruíz, abogado,

- the Spanish Government, by F. Díez Moreno, acting as Agent,

- the Belgian Government, by A. Hubert, acting as Agent,

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

- the Commission of the European Communities, by X. Lewis and K. Simonsson, acting as Agents, assisted by C. Fernandez and I. Moreno-Tapia Rivas, abogadas,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2007,

gives the following

Judgment

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

1. Community law must be interpreted as not precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of postal services reserved, in a manner consistent with Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service.

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2. Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service, in so far as the contracts to which that legislation applies

- reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, as amended by Directive 2001/78, and

- constitute contracts within the meaning of Article 1(a) of Directive 92/50, as amended by Directive 2001/78, concluded in writing for pecuniary interest,

which are matters for the national court to establish.

3. Articles 43 EC, 49 EC and 86 EC, as well as the principles of equal treatment, non-discrimination by reason of nationality and transparency, must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of universal postal services, in so far as the contracts to which that legislation applies

- do not reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, as amended by Directive 2001/78, and

- do not in actual fact constitute a unilateral administrative measure creating obligations solely for the provider of the universal postal service and departing significantly from the normal conditions of a commercial offer made by that company,

which are matters for the national court to establish.

1. The reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 49 EC, read in conjunction with Article 86 EC, in the context of the liberalisation of postal services and in light of Community rules governing public service contracts.

2. This reference has been made in the course of proceedings between the Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia (Trade Association of Mail Delivery and Handling Companies, the Asociacion Profesional') and the Administracion General del Estado, Ministerio de Educacion, Cultura y Deporte (State administration, Ministry of Education, Culture and Sport, the Ministerio'), concerning the latter's decision to award, without a public call for tenders, postal services to the Sociedad Estatal Correos y Telégrafos SA (Public corporation for postal and telegraphical services, Correos'), which is the provider of the universal postal service in Spain.

Legal context

Community legislation

Directive 97/67/EC

3. Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14) establishes, pursuant to its Article 1, common rules concerning, inter alia, the provision of a universal postal service within the Community and the

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criteria defining the services which may be reserved for universal service providers.

4. Pursuant to Article 3(1) of Directive 97/67, Member States are to ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.

5. In accordance with Article 3(4) of Directive 97/67:

Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:

- the clearance, sorting, transport and distribution of postal items up to two kilograms,

- the clearance, sorting, transport and distribution of postal packages up to 10 kilograms,

- services for registered items and insured items.'

6. Article 7 of Directive 97/67, which falls under Chapter 3 of the Directive, entitled Harmonisation of the services which may be reserved', provides in paragraphs 1 and 2:

1. To the extent necessary to ensure the maintenance of universal service, the services which may be reserved by each Member State for the universal service provider(s) shall be the clearance, sorting, transport and delivery of items of domestic correspondence, whether by accelerated delivery or not, the price of which is less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category where such category exists, provided that they weigh less than 350 grams....

2. To the extent necessary to ensure the maintenance of universal service, cross-border mail and direct mail may continue to be reserved within the price and weight limits laid down in paragraph 1.'

Directive 92/50/EEC

7. According to Article 1(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p.1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1, Directive 92/50'), public service contracts' means contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of contracts listed in subparagraphs (i) to (ix) of that provision.

8. In accordance with Article 1(b) of Directive 92/50, contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.' Subparagraph (c) of Article (1) defines service provider' as any natural or legal person, including a public body, which offers services'.

9. Article 3(2) of Directive 92/50 specifies that contracting authorities are to ensure that there is no discrimination between different service providers.

10. Article 6 of Directive 92/50 reads as follows:

This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the [EC] Treaty.'

11. Subparagraph (ii) of the second indent of Article 7(1)(a) of Directive 92/50, read in combination with category 4 in Annex I A to the same Directive, provides that it applies to public service contracts covering transport of mail by land and by air which are awarded by the contracting authorities

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listed in Article 1(b) of Directive 92/50, other than those referred to in Annex I to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p.1), and where the estimated value net of VAT is not less than the equivalent in Euros of 200 000 SDR [special drawing rights].

12. Article 7(5) of Directive 92/50 provides:

In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value shall be:

- in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for its duration;

- in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48.'

13. In accordance with Article 8 of Directive 92/50, contracts which have as their object services listed in Annex I A to the Directive shall be awarded in accordance with the provisions of Titles III to VI of the Directive, which means, in particular, that they must be awarded by a call for tenders and made the subject of appropriate publicity.

National legislation

14. According to Law 24/1998 on the universal postal service and the liberalisation of postal services (Ley 24/1998 del Servicio Postal Universal y de Liberalizacion de los Servicios Postales) of 13 July 1998, which transposes Directive 97/67 into Spanish national law, postal services are considered to be services of general interest provided under conditions of free competition. Only the universal postal service is considered to be a public service or is subject to public-service obligations. Article 18 of Law 24/1998 exclusively reserves some services to the provider of universal postal service.

15. The provider of that universal postal service in Spain, namely Correos, is a public limited company whose capital is wholly state-owned.

16. According to Article 11 of the Law on public procurement (Ley de Contratos de las Administraciones Publicas), the consolidated text of which was approved by Royal Legislative Decree 2/2000 (Real Decreto Legislativo 2/2000 por el que se aprueba el texto refundido de la Ley de Contratos de las Administraciones Publicas) of 16 June 2000 (Law on public procurement'), contracts awarded by public authorities shall comply, subject to the exceptions provided for by that Law, with the principles of advertising and competition and, in any event, shall always observe the principles of equal treatment and non-discrimination.

17. It is apparent from Article 206(4) of the Law on public procurement that, as a rule, the award of contracts for the provision of postal services comes, from a contractual point of view, within the scope of public procurement governed by that Law.

18. However, Article 3(1)(d) of the Law on public procurement excludes from its scope of application cooperation agreements which, in accordance with the specific provisions governing them, are concluded by the administration with natural or legal persons governed by private law, in so far as the subject-matter of such agreements does not fall within the scope of public procurement governed by the said Law or by administrative rules.

19. According to the Audiencia Nacional's analysis of the legal context in which the case before it is to be placed, such a cooperation agreement is a legal transaction which is not subject to the statutory rules governing public procurement and, therefore, the principles of competitiveness, advertising and free competition which are a feature of the sphere of public procurement do not

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apply to such a transaction.

20. Article 58 of Law 14/2000 concerning Tax, Administrative and Public Order Measure (Ley 14/2000 de medidas Fiscales, Administrativas y de Orden Social) of 29 December 2000 (Law 14/2000') provides that public authorities may conclude cooperation agreements with Correos such as those referred to in Article 3 of the Law on public procurement, in order to provide services connected with the objects of that company.

21. According to the findings of the Audiencia Nacional, having regard to the objects of Correos as defined in Article 58 of Law 14/2000, the possibility of concluding such cooperation agreements is not limited to non-liberalised or reserved postal services, but covers the management and operation of any postal service. Therefore, the possibility of concluding cooperation agreements is not restricted to the universal postal service and does not, within that universal postal service, distinguish services that are reserved from those that are not.

22. In addition, the Audiencia Nacional states that, in accordance with Article 58 of Law 14/2000, Correos is under an obligation to provide certain postal services. Among Correos' duties is that of providing any services connected with its company objects that may be entrusted to it by the public authorities. Therefore, one of the parties lacks the intention to conclude a contract.

The dispute in the main proceedings and the question referred for a preliminary ruling

23. At the end of a negotiated procedure without a public call for tenders, the Ministerio and Correos signed a cooperation agreement on 6 June 2002 for the provision of postal and telegraphical services (Convenio de colaboracion para la prestacion de servicios postales y telegraficos, the Cooperation Agreement').

24. In accordance with the Cooperation Agreement, Correos is to provide postal and telegraphical services for the Ministerio covering the following items:

- letters (ordinary, registered and express), local, inter-city and international, with no weight or size limit;

- packages (postal, blue and international) with no weight or size limit;

- the express national postal service and international EMS (Express Mail Service'), with no weight or size limit, and

- delivery of books, library material, magazines and the Ministry's Official Gazette nationally (local and inter-city) and internationally (by land and air), with no weight or size limit.

25. Since it depends on turnover, the financial value of the services provided is not specified. The estimate given before the Audiencia Nacional, which is not disputed, is that of a sum of more than EUR 12 020.42 per annum.

26. The Cooperation Agreement was concluded for an indefinite term and was still in force at the date of the order for reference.

27. The Asociacion Profesional brought an appeal before the Ministerio in which it challenged the administrative decision awarding, by means of the Cooperation Agreement, liberalised postal services without a public call for tenders.

28. By decision of 20 March 2003, the Ministerio rejected that appeal on the grounds that the procedure it had adopted to award the postal services was based on the existence of a cooperation agreement, which fell outside the rules governing public procurement and was therefore not subject to the rules relating to advertising and free competition.

29. In this regard, the Ministerio took the view that it had not concluded a contract with Correos

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at all, but that the latter provided its services on the basis of a cooperation agreement concluded pursuant to Article 3(1)(d) of the Law on public procurement and Article 58(2)(5) of Law 14/2000.

30. It is the Ministerio's rejection decision of 20 March 2003 which is the subject of the Asociacion Profesional's action before the Audiencia Nacional.

31. According to the Audiencia Nacional, the outcome of the case before it depends on the interpretation of Community law. The Court may hold that the use of cooperation agreements is incompatible with the rules on advertising and free competition that apply to the award of public contracts, by taking the view that such agreements can only be used in the sphere of postal services reserved by law to the universal service provider, or that they are incompatible with the abovementioned rules, also in that sphere. Should the Court find accordingly, it would have to be concluded that a cooperation agreement like that in issue in this case is contrary to law, and its content would be null and void, either in its entirety or only in so far as it extends beyond those postal services for which the Court considers it could lawfully be used.

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

Are Articles 43 [EC] and 49 [...] EC, in conjunction with Article 86 thereof, as applied within the framework of the liberalisation of the postal services established by Directives 1997/67/EC and 2002/39/EC and within the framework of the rules governing public procurement introduced by the ad hoc directives, to be interpreted as precluding an agreement whose subject-matter includes the provision of postal services, both reserved and non-reserved and, therefore, liberalised, concluded between a department of the State Administration and a state company whose capital is wholly state-owned and which is furthermore, the universal postal service provider?'

On the question for a preliminary ruling

33. As a preliminary point, it must be held that, even though the Audiencia Nacional refers in its question to Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67 with regard to the further opening to competition of Community postal services (OJ 2002 L 176, p. 21), that directive cannot be applied in the main proceedings. Pursuant to Article 2(1) of that directive, Member States were given until 31 December 2002 to transpose the directive into national law.

Admissibility

34. The Spanish Government considers that the question for a preliminary ruling is inadmissible in as far as, in actual fact, the Court is being asked whether the Cooperation Agreement complies with the directives on the award of public service contracts and the liberalisation of postal services, which is a question that falls under the jurisdiction of the national court.

35. It must be held at the outset that neither the wording of the question referred nor the necessary grounds supporting it, as set out in the order for reference, indicate that the Audiencia Nacional asks the Court to decide whether the Cooperation Agreement complies with Community law.

36. In addition, it must be observed that whilst the Court does not have jurisdiction under Article 234 EC to apply the rules of Community law to a particular case or to judge the compatibility of provisions of national law with those rules, it may provide a national court with all the elements relating to the interpretation of Community law which may be useful to it in assessing the effects of the provisions of that law (see Case C181/00 Flightline [2002] ECR I6139, paragraph 20).

37. Therefore, the reference for a preliminary ruling must be considered to be admissible.

Substance

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38. By its question, the Audiencia Nacional asks, essentially, whether Community law must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of both reserved and non-reserved postal services to a public limited company whose capital is wholly state-owned and which is, in that State, the provider of the universal postal service.

Reserved postal services within the meaning of Directive 97/67

39. As a preliminary point, it must be recalled that Article 7 of Directive 97/67 permits Member States to reserve some postal services for the provider(s) of the universal postal service to the extent necessary to ensure the maintenance of that service. Consequently, in so far as postal services are, in a manner consistent with that directive, reserved for a single universal service provider, such services are by necessity not subject to competition, given that no other economic operator is authorised to offer those services.

40. The fact remains that, as regards such reserved services, Community rules in the field of public procurement, which have as their principal objective the free movement of services and the opening-up to undistorted competition in all the Member States, cannot be applied (Case C26/03 Stadt Halle and RPL Lochau [2005] ECR I1, paragraph 44, and Case C340/04 Carbotermo and Consorzio Alisei [2006] ECR I4137, paragraph 58).

41. Therefore, the answer to the question referred must be that Community law must be interpreted as not precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of postal services reserved, in a manner consistent with Directive 97/67, to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service.

Non-reserved postal services within the meaning of Directive 97/67

42. It is only in regard to postal services that are non-reserved within the meaning of Directive 97/67 that it must be examined whether, in concluding a cooperation agreement like the one in issue in the main proceedings, Community rules on public procurement must be observed.

- Directive 92/50

43. In the first place, it must be examined whether an agreement like the one in issue in the main proceedings came within the scope of the directive that is relevant to the public procurement of postal services in the period relevant to the case before the Audiencia Nacional, namely Directive 92/50.

44. Directive 92/50 requires that the award of the public service contracts to which it applies must comply with certain requirements concerning procedure and advertising.

45. According to the actual wording of Article 1(a) of Directive 92/50, a public service contract presupposes the existence of a contract for pecuniary interest concluded in writing between a service provider and a contracting authority within the meaning of Article 1(b).

46. As the Advocate General observed in Point 63 of his Opinion, the Ministerio is indeed a contracting authority and Correos a service provider within the meaning of the provisions referred to in the preceding paragraph. In addition, it is not contested that the Cooperation Agreement was concluded in writing and for pecuniary interest.

47. However, given that the Audiencia Nacional only states that the value of the services provided under the said contract exceeds EUR 12 020.42 per annum, this raises the question whether that figure reaches the threshold of 200 000 SDR laid down in subparagraph (ii) of the second indent of Article 7(1)(a) of Directive 92/50, which, in the period relevant to the main proceedings, amounted

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to EUR 249 681.

48. It is for the Audiencia Nacional to determine whether, in the light of the national provisions that transpose the second indent of Article 7(5) of Directive 92/50, the threshold of EUR 249 681 is reached.

49. Assuming that that threshold is reached, this raises the question whether the Cooperation Agreement is in fact a contract within the meaning of Article 1(a) of Directive 92/50. The Spanish Government submits that the agreement is not contractual but instrumental, given that Correos is unable to refuse to enter into such an agreement, but is under an obligation to accept.

50. In this respect, it must be noted that the definition of a public service contract is a matter of Community law, with the result that the classification of the Cooperation Agreement under Spanish law is irrelevant for the purposes of determining whether it falls within the scope of Directive 92/50 (see, to that effect, Case C-264/03 Commission v France [2005] ECR I-8831, paragraph 36, and Case C-382/05 Commission v Italie [2007] ECR I-0000, paragraph 30).

51. Admittedly, in paragraph 54 of its judgment in Case C-295/05 Asemfo [2007] ECR I-0000, the Court held that the requirement for the application of the directives governing the award of public service contracts relating to the existence of a contract was not met where the State company in issue in the case that gave rise to the judgment had no choice as to the acceptance of a demand made by the competent authorities in question or as to the tariff for its services, a matter which was for the referring court to establish.

52. However, that reasoning must be read in its specific context. It follows on from the finding that, under Spanish legislation, that State company is an instrument and a technical service of the General State Administration and of the administration of each of the Autonomous Communities concerned, the Court having already held, in a context different from that in the case that gave rise to the judgment in Asemfo , that being an instrument and technical service of the Spanish Administration, the company in issue is required to implement only work entrusted to it by the General Administration of that State, the Autonomous Communities or the public bodies subject to them (Asemfo , paragraphs 49 and 53).

53. Correos, as the provider of the universal postal service, carries out an entirely different task, which means in particular that its customers consist of any person wishing to use the universal postal service. The mere fact that that company has no choice as to the acceptance of a demand made by the Ministerio or as to the tariff for its services cannot automatically entail that no contract was concluded between the two entities.

54. In fact, such a situation is not necessarily different from that which arises where a private customer wishes to use services provided by Correos coming within the scope of the universal postal service, since it is in the very nature of the task of a provider of that service that, in such a situation, he is also required to provide the services requested and must do so, if necessary, for a fixed tariff or, in any event, for a price that is transparent and non-discriminatory. There is no question that such a relationship must be called contractual. It is only if the agreement between Correos and the Ministerio were in actual fact a unilateral administrative measure solely creating obligations for Correos ¡- and as such a measure departing significantly from the normal conditions of a commercial offer made by that company, a matter which is for the Audiencia Nacional to establish - that it would have to be held that there is no contract and that, consequently, Directive 92/50 could not apply.

55. In the course of that examination, the Audiencia Nacional will have to consider, in particular, whether Correos is able to negotiate with the Ministerio the actual content of the services it has to provide and the tariffs to be applied to those services and whether, as regards non-reserved

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services, the company can free itself from obligations arising under the Cooperation Agreement, by giving notice as provided for in that agreement.

56. The other arguments submitted by the Spanish Government to show that a cooperation agreement like the one in issue in the main proceedings falls outside the rules on public procurement must also be rejected.

57. The Spanish Government submits, in particular, that the Cooperation Agreement cannot, in any event, be subject to the rules on public procurement because the in-house' criteria laid down in the case-law of the Court are fulfilled.

58. In this regard, it is important to recall that, according to the Court's settled case-law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority which is a contracting authority must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities which control it (see Case C-107/98 Teckal [1999] ECR I8121, paragraph 50; Stadt Halle and RPL Lochau , paragraph 49; Carbotermo and Consorzio Alisei , paragraph 33; and Asemfo , paragraph 55).

59. It is not necessary to analyse in greater detail whether the first of the two conditions referred to in the preceding paragraph is fulfilled, given that it is enough to hold that, in the case in the main proceedings, the second condition is not fulfilled. It is not contested that Correos, as provider of the universal postal service in Spain, does not carry out the essential part of its activities with the Ministerio or with public authorities in general, but that that company provides postal services to an unspecified number of customers of that postal service.

60. The Spanish Government submits however that the relationship between the public authority and a company with exclusive rights is, by its very nature, exclusive, which implies a degree of exclusivity that is higher than in the case of essential activity'. Correos has an exclusive right because the company is required, pursuant to Article 58 of Law 14/2000, to provide public authorities with services connected with its company objects, which includes reserved and non-reserved services.

61. In this respect, it must be held that, assuming that that obligation could effectively be called an exclusive right, a matter which is for the Audiencia Nacional to determine, such a right cannot satisfy, in the context of the analysis that must be carried out in relation to the two conditions recalled in paragraph 58 of the present judgment, the requirement that the relevant service provider must carry out the essential part of its activities with the entity or the entities that control it.

62. That last requirement is aimed particularly at ensuring that Directive 92/50 remains applicable in the event that an undertaking controlled by one or more entities is active in the market and therefore likely to be in competition with other undertakings (see, by analogy, Carbotermo and Consorzio Alisei , paragraph 60). It is not contested that Correos is active on the Spanish postal market, where it is, except as regards reserved services within the meaning of Directive 97/67, in competition with other businesses active in the postal sector, of which, according to the submissions of the Spanish Government, there are approximately 2000.

63. Therefore, it must be held that a cooperation agreement like the one in issue in the main proceedings does not fulfil the conditions noted in paragraph 58 of the present judgment and cannot on that basis fall outside the scope of Directive 92/50.

64. However, the existence of an exclusive right may justify non-application of Directive 92/50

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given that, pursuant to Article 6 of that directive, the Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1 (b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty'.

65. Without there being any need to examine whether Correos fulfils the first of those three conditions set out in Article 6 - concerning the status of Correos as a contracting authority -, and assuming that Correos enjoys, pursuant to Article 58 of Law 14/2000, an exclusive right to provide public authorities with postal services connected with its company objects, it is enough to hold that, in any event, the third of those conditions is not met, namely that the provision granting the exclusive right must be compatible with the Treaty.

66. That national provision - assuming that it does confer on the national provider of the universal postal service the exclusive right to provide to public authorities the postal services that, pursuant to Article 7 of Directive 97/67, are not reserved, and to which this analysis is limited - is incompatible with the purpose of that directive.

67. As is apparent from the case-law of the Court, Member States do not have the option of extending the services reserved for the universal postal service provider pursuant to Article 7 of Directive 97/67, as such extension goes against the purpose of the Directive, which, according to recital 8, aims to establish gradual and controlled liberalisation in the postal sector (Case C240/02 Asempre and Asociacion Nacional de Empresas de Externalizacion y Gestion de Envíos y Pequeña Paquetería [2004] ECR I2461, paragraph 24).

68. This finding applies not only to reserving a service that is horizontal, in other words reserving a certain type of postal service as such, but, in order to ensure the effectiveness of Article 7 of Directive 97/67, also applies to reserving a service which is vertical and which concerns, as is the case in the main proceedings, the exclusive provision of postal services to certain customers. As the Commission of the European Communities observed, applying the Spanish rules in issue in the main proceedings would mean that, in practice, all postal services needed by a Spanish public body could potentially be supplied by Correos, to the exclusion of all other postal operators, which would clearly be contrary to the purpose of Directive 97/67.

69. Therefore, the answer to the question referred must be that Directive 92/50 must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service, in so far as the contracts to which that legislation applies:

- reach the relevant threshold as provided for in Article 7(1) of Directive 92/50 and

- constitute contracts within the meaning of Article 1(a) of Directive 92/50 concluded in writing for pecuniary interest,

which are matters for the national court to establish.

- Requirements under the Treaty for the award of public service contracts

70. In so far as the national legislation in issue in the main proceedings applies to contracts that do not reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, it must, in the second place, be examined whether such legislation meets the requirements under the Treaty for the award of public service contracts.

71. Although certain contracts are excluded from the scope of Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to

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comply with the fundamental rules of the Treaty and the principle of non-discrimination on grounds of nationality in particular (Case C264/03 Commission v France [2005] ECR I8831, paragraph 32 and the case-law cited there).

72. That is particularly the case in relation to public service contracts whose value does not reach the thresholds fixed by Directive 92/50. The mere fact that the Community legislature considered that the strict special procedures laid down in the directives on public procurement are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law (Order in Case C-59/00 Vestergaard [2001] ECR I-9505, paragraph 19, and Commission v France , paragraph 33).

73. Treaty provisions that specifically apply to public service contracts whose value does not reach the thresholds established by Directive 92/50 include, in particular, Articles 43 EC and 49 EC.

74. Besides the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers is also to be applied to such public service contracts even in the absence of discrimination on grounds of nationality (see, by analogy, Case C458/03 Parking Brixen [2005] ECR I8585, paragraph 48, and Case C410/04 ANAV [2006] ECR I3303, paragraph 20).

75. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the contracting public authority to verify that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the public service contract to be opened up to competition and the impartiality of procurement procedures to be reviewed (see, by analogy, Parking Brixen , paragraph 49, and ANAV , paragraph 21).

76. As a rule, a complete lack of any call for competition in the case of the award of a public service contract like that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency (see, by analogy, Parking Brixen , paragraph 50, and ANAV , paragraph 22).

77. Furthermore, it follows from Article 86(1) EC that the Member States must not maintain in force national legislation which permits the award of public service contracts without a call for tenders since such an award infringes Article 43 EC or 49 EC or the principles of equal treatment, non-discrimination and transparency (see, by analogy, Parking Brixen , paragraph 52, and ANAV , paragraph 23).

78. Admittedly, the combined effect of paragraphs (1) and (2) of Article 86 EC is that paragraph (2) of the Article may be relied upon to justify the grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights which are contrary to, inter alia, the provisions of the Treaty, to the extent to which performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community (Case C340/99 TNT Traco [2001] ECR I4109, paragraph 52).

79. It is also necessary to point out that an undertaking like Correos, responsible by virtue of the legislation of a Member State for securing the universal postal service, constitutes an undertaking entrusted with the operation of services of general economic interest for the purposes of Article 86(2) EC (see, to that effect, TNT Traco , paragraph 53).

80. However, even on the assumption that the duty imposed on Correos, pursuant to Article 58 of

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Law 14/2000, to provide public authorities with services connected with its company objects could be considered to be an exclusive right for the benefit of Correos, the fact remains that Article 86(2) EC cannot be used to justify national legislation like that in issue in the main proceedings in so far as it concerns non-reserved postal services within the meaning of Directive 97/67.

81. As the Advocate General observed in paragraph 99 of his Opinion, Directive 97/67 implements Article 86(2) EC with regard to the possibility of reserving certain postal services to the provider of the universal postal service. As recalled in paragraph 67 of this judgment, the Court has already held that Member States do not have the option of extending the services reserved for the universal postal service provider pursuant to Article 7 of Directive 97/67, as such extension goes against the purpose of the Directive, which aims to establish gradual and controlled liberalisation in the postal sector.

82. In this context, it must be recalled that, within the framework of Directive 97/67, account is taken of whether, in order to enable the universal postal service to be carried out under economically acceptable conditions, it is necessary to reserve some postal services to the provider of that universal postal service (Case C162/06 International Mail Spain [2007] ECR I-0000, paragraph 50).

83. Therefore, as regards non-reserved postal services within the meaning of Directive 97/67, to which this analysis is limited, Article 86(2) EC cannot provide the basis for justifying an exclusive right for the provider of the universal postal service to provide such services to public authorities.

84. The Spanish Government submits, however, that the Cooperation Agreement cannot be subject to the rules governing the award of public service contracts because of its nature, which is instrumental rather than contractual. Correos is unable to refuse to enter into a cooperation agreement like the one in issue in the main proceedings, but is under an obligation to accept it.

85. In this respect, it must be noted that, as observed in paragraph 54 of this judgment, only if the Cooperation Agreement is in actual fact a unilateral administrative measure creating obligations solely for Correos and departing significantly from the normal conditions of a commercial offer made by that company - which it is for the Audiencia Nacional to establish - would it have to be held that such a contract falls outside the Community rules on the award of public service contract.

86. As regards the argument of the Spanish Government according to which the Cooperation Agreement cannot be subject to the rules governing public procurement because it concerns an in-house' situation, it is admittedly the case that, in the sphere of public service contracts, the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression, is precluded if the control exercised by the contracting public authority over the entity to which the contract was awarded is similar to that which the authority exercises over its own departments and if that entity carries out the essential part of its activities with the controlling authority (see, by analogy, Parking Brixen , paragraph 62, and ANAV , paragraph 24).

87. However, as held in paragraph 63 of the present judgment, a cooperation agreement like the one in issue in the main proceedings does not fulfil the second of the conditions referred to in the preceding paragraph and therefore cannot, on that basis, fall outside the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression.

88. Therefore, the answer to the question referred must also be that Articles 43 EC, 49 EC and 86 EC, as well as the principles of equal treatment, non-discrimination on grounds of nationality and transparency, must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public

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limited company whose capital is wholly state-owned and which, in that State, is the provider of universal postal service, in so far as the contracts to which that legislation applies

- do not reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, and

- do not in actual fact constitute a unilateral administrative measure creating obligations solely for the provider of the universal postal service and departing significantly from the normal conditions of a commercial offer made by that company,

which are matters for the national court to establish.

Costs

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

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31997L0067 : N 3 32 - 33 41 - 42 62 69 80 - 83
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31997L0067 -A03P04 : N 5
32002L0039 : N 32 - 33
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SUB Freedom of establishment and services ; Free movement of services ; Competition ; Rules applying to undertakings

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Case C-220/06

Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia

v

Administración General del Estado

(Reference for a preliminary ruling from the Audiencia Nacional)

(Public procurement – Liberalisation of postal services – Directives 92/50/EEC and 97/67/EC – Articles 43 EC, 49 EC and 86 EC – National legislation allowing public authorities to conclude agreements for the provision of both reserved and non-reserved postal services with a publicly owned company, namely the provider of universal postal service in the Member State concerned, without regard to the rules governing the award of public service contracts)

Summary of the Judgment

1. *Freedom of movement for persons – Freedom of establishment – Freedom to provide services – Provision of postal services reserved in conformity with Directive 97/67 – Award, without regard to the rules governing the award of public service contracts, to a wholly State-owned public limited company, which is the provider of the universal postal service*

   (Arts 43 EC and 49 EC; European Parliament and Council Directive 97/67)

2. *Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Provision of postal services not reserved within the meaning of Directive 97/67 – Award, without regard to the rules governing the award of public service contracts, to a wholly State-owned public limited company, which is the provider of the universal postal service*

   (Council Directive 92/50; European Parliament and Council Directive 97/67)

3. *Freedom of movement for persons – Freedom of establishment – Freedom to provide services – Provision of postal services not reserved within the meaning of Directive 97/67 – Award, without regard to the rules governing the award of public service contracts, to a wholly State-owned public limited company, which is the provider of the universal postal service*

   (Arts 12 EC, 43 EC, 49 EC and 86 EC; European Parliament and Council Directive 97/67)

1. Community law must be interpreted as not precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of postal services reserved, in a manner consistent with Directive 97/67 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service.

   Article 7 of that directive permits Member States to reserve some postal services for the provider(s) of the universal postal service to the extent necessary to ensure the maintenance of that service. Consequently, in so far as postal services are, in a manner consistent with that directive, reserved for a single universal service provider, such services are by necessity not subject to competition, given that no other economic operator is authorised to offer those services. Therefore, Community rules in the field of public procurement, which have as their principal objective the free movement of services and the opening-up to undistorted competition in all the Member States, cannot be applied.

(see paras 39-41, operative part 1)

2. Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Directive 2001/78, must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 on common rules for the development of the internal market of Community postal services and the improvement of quality of service to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service, in so far as the contracts to which that legislation applies reach the relevant threshold as provided for in Article 7(1) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Directive 2001/78, and constitute contracts within the meaning of Article 1(a) of Directive 92/50, as amended by Directive 2001/78, concluded in writing and for a price, rather than a unilateral administrative measure creating obligations solely for the provider, and which depart significantly from the normal conditions of a commercial offer made by the provider, which is a matter for the national court to establish.

(see paras 54, 69, operative part 2)

3. Articles 43 EC, 49 EC and 86 EC, as well as the principles of equal treatment, non-discrimination by reason of nationality and transparency, must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 on common rules for the development of the internal market of Community postal services and the improvement of quality of service to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of universal postal services, in so far as the contracts to which that legislation applies do not reach the relevant threshold as provided for in Article 7(1) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Directive 2001/78, and do not in actual fact constitute a unilateral administrative measure creating obligations solely for the provider of the universal postal service and departing significantly from the normal conditions of a commercial offer made by the latter, which are matters for the national court to establish.

Moreover, Article 86(2) EC cannot be used to justify such national legislation in so far as it concerns non-reserved postal services within the meaning of Directive 97/67.

Directive 97/67 implements Article 86(2) EC with regard to the possibility of reserving certain postal services to the provider of the universal postal service. Member States do not have the option of extending the services reserved for the universal postal service provider pursuant to Article 7 of Directive 97/67, as such extension goes against the purpose of the Directive, which aims to establish gradual and controlled liberalisation in the postal sector, when, within the framework of Directive 97/67, account is taken of whether, in order to enable the universal postal service to be carried out under economically acceptable conditions, it is necessary to reserve some postal services to the provider of that universal postal service.

(see paras 80-82, 85, 88, operative part 3)

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Judgment of the Court (First Chamber) of 18 December 2007 (Reference for a preliminary ruling from the Audiencia Nacional, Sala de lo Contencioso-Administrativo - Spain) - Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado

(Case C-220/06)[1]

(Public procurement - Liberalisation of postal services - Directives 92/50/EEC and 97/67/EC – Articles 43 EC, 49 EC and 86 EC - National legislation allowing public authorities to conclude agreements for the provision of both reserved and non-reserved postal services with a publicly owned company, namely the provider of universal postal service in the Member State concerned, without regard to the rules governing the award of public service contracts)

Language of the case: Spanish

Referring court

Audiencia Nacional, Sala de lo Contencioso-Administrativo

Parties to the main proceedings

Applicant: Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia

Defendant: Administración General del Estado

Re:

Reference for a preliminary ruling - Audiencia Nacional, Sala de lo Contencioso-Administrativo - Interpretation of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2002/39/EC (OJ 2002 L 176, p. 21) - Agreement concluded without regard to the rules governing the award of public service contracts between a department of the State administration and a publicly owned company covering, in particular, the provision of postal services, including those not reserved to the universal service providers

Operative part of the judgment

Community law must be interpreted as not precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of postal services reserved, in a manner consistent with Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service.

Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service, in so far as the contracts to which that legislation applies

- reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, as amended by Directive 2001/78, and

- constitute contracts within the meaning of Article 1(a) of Directive 92/50, as amended by Directive 2001/78, concluded in writing for pecuniary interest,

which are matters for the national court to establish.

Articles 43 EC, 49 EC and 86 EC, as well as the principles of equal treatment, non-discrimination by reason of nationality and transparency, must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of universal postal services, in so far as the contracts to which that legislation applies

- do not reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, as amended by Directive 2001/78, and

- do not in actual fact constitute a unilateral administrative measure creating obligations solely for the provider of the universal postal service and departing significantly from the normal conditions of a commercial offer made by that company,

which are matters for the national court to establish.

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[1] - OJ C 178, 29.7.2006.

Opinion of Mr Advocate General Bot delivered on 20 September 2007. Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administracion General del Estado. Reference for a preliminary ruling: Audiencia Nacional - Spain. Public procurement - Liberalisation of postal services - Directives 92/50/EEC and 97/67/EC - Articles 43 EC, 49 EC and 86 EC - National legislation allowing public authorities to conclude agreements for the provision of both reserved and non-reserved postal services with a publicly owned company, namely the provider of universal postal service in the Member State concerned, without regard to the rules governing the award of public service contracts. Case C-220/06.

1. May a limited liability company whose capital is wholly state-owned be directly entrusted with the provision of reserved and non-reserved postal services without infringing Community rules governing the award of public service contracts and Article 86(1) EC, read in conjunction with Articles 43 and 49 EC? This, in substance, is the question which the Audiencia Nacional (National High Court, Spain) has referred to the Court of Justice.

2. In this opinion, I will propose to the Court of Justice that it be declared that the rules governing the award of public service contracts, and Article 86(1) EC read in conjunction with Articles 43 and 49 EC, preclude national legislation that directly entrusts a universal service provider with the provision of reserved and non-reserved postal services.

I - Legal framework

A - Community law

1. Primary law

3. Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Article 49 EC prohibits restrictions on freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

4. Article 86(1) EC stipulates that [i]n the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89'.

5. Article 86(2) EC provides for a derogation from the prohibition to enact or maintain in force special or exclusive rights for certain undertakings in cases where the application of the rules of the Treaty obstruct the performance, in law or in fact, of the particular tasks assigned to a public undertaking entrusted with a task of general interest.

2. Directive 97/67/EC

6. For the purpose of the completion of the internal market within which, in particular, the free movement of services must be ensured, and taking account of the need to guarantee the economic and social cohesion of the Community, (2) the Community - by adopting Directive 97/67 - has established a framework for the operation of a minimum general postal service.

7. Directive 97/67 guarantees the existence of a minimum universal postal service and lays down its extent, by giving Member States the opportunity to reserve the provision of some services to a single provider; therefore, those services can be provided under a monopoly.

8. Thus, Directive 97/67 aims to open up the postal sector to competition - gradually and in a controlled manner. (3)

9. According to Article 2(1) of Directive 97/67, postal services are services involving the clearance,

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sorting, transport and delivery of postal items.

10. Pursuant to Article 3(1) of Directive 97/67, universal service' means the right to the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users'.

11. Article 3(4) of Directive 97/67 stipulates that:

Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:

- the clearance, sorting, transport and distribution of postal items up to two kilograms,

- the clearance, sorting, transport and distribution of postal packages up to 10 kilograms,

- services for registered items and insured items'.

12. Directive 97/67 provides a list of services which may be reserved for the universal service provider(s) of each Member State. These include the clearance, sorting, transport and delivery of items of domestic correspondence and incoming cross-border correspondence, whether by accelerated delivery or not, within the weight and price restrictions laid down in that Directive. (4)

13. The derogation from the liberalisation of postal services only applies to mail items weighing less than 350 grams, the price of which is less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category. (5)

14. Pursuant to Article 7(2) of Directive 97/67, to the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve incoming cross-border mail and direct mail, (6) within the same price and weight limits as those set out for services that may be reserved.

15. Directive 97/67 has since been amended by Directive 2002/39/EC. (7)

16. However, Directive 2002/39 entered into force on the day of its publication in the Official Journal of the European Communities , that is to say on 5 July 2002. In the case at issue in the main proceedings, the relevant facts predate that date. Therefore, Directive 2002/39 does not apply in the present case.

3. Directive 92/50/EEC

17. As failure to open up public procurement to competition represents an obstacle to the completion of the internal market and imposes restrictions on the development of competitive European undertakings on world markets, the Community decided to make public service contracts subject to the rules on competition.

18. Article 1(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (8) defines public service contracts as contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.

19. According to Article 6 of Directive 92/50, the Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority... on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

20. Pursuant to subparagraph (ii) of the second indent of Article 7(1)(a) of Directive 92/50, the Directive applies to public service contracts covering, in particular, transport of mail by land and by air which are awarded by the contracting authorities and where the estimated value net of value-added tax is not less than 200 000 special drawing rights (SDRs'). (9)

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B - National legislation

1. Postal services

21. Directive 97/67 was transposed into the Spanish legal system by Law 24/1998 on the universal postal service and the liberalisation of postal services (Ley 24/1998 del Servicio Postal Universal y de Liberalizacion de los Servicios Postales) of 13 July 1998. (10)

22. Pursuant to Article 1 and 2 of that Law, postal services are considered to be services of general interest and the universal postal service is subject to publicservice obligations.

23. Article 18 of that Law reserves some services to the universal postal service provider. The reserved services include:

- the money orders service;

- the clearance, acceptance, sorting, delivery, handling, routing, transport and distribution of inter city items, whether registered or not, of letters and postcards, provided that they weigh 100 grams or less. From 1 January 2006, the weight limit will be 50 grams.

If any other operators are to carry out this kind of activity, in respect of inter city items they must charge users at least three times the amount of the corresponding tariff for an item of correspondence in the first weight step of the fastest standard category, fixed by the universal postal service operator. From 1 January 2006, the price will be at least two and a half times as much.

Domestic or cross border items of direct mail, books, catalogues and periodicals shall not form part of the reserved services.

Document exchange may not be reserved;

- the incoming and outgoing cross border postal service for letters and postcards, with the price and weight conditions established in the second indent; and

- the receipt, as a postal service, of applications, letters and communications which citizens may address to Public Authorities.

2. Public procurement

24. According to Article 11 of the Law on public procurement (Ley de Contratos de las Administraciones Publicas), the consolidated text of which was approved by Royal Legislative Decree 2/2000 (Real Decreto Legislativo 2/2000) of 16 June 2000, (11) contracts awarded by public authorities shall comply with the principles of advertising and competition, subject to the exceptions provided for by that Law, and shall always observe the principles of equal treatment and nondiscrimination.

25. Pursuant to Article 206(4) of the Law on public procurement, transport of mail by land and air is considered to be the subject-matter of a public contract within the meaning of Article 11 of the Law, and is therefore subject to competition rules.

26. Article 3(1)(d) of the Law on public procurement excludes from its scope of application cooperation agreements concluded by the administration with natural or legal persons governed by private law, in so far as the subject-matter of such agreements does not concern public procurement governed by the said Law or by administrative rules.

3. Law 14/2000

27. Article 58 of Law 14/2000 concerning tax, administrative and public order measures (Ley 14/2000 de Medidas Fiscales, Administrativas y del Orden Social) of 29 December 2000 (12) created the Sociedad Estatal Correos y Telégrafos, S.A.' (Correos'). That provision makes it clear that the capital of Correos is held by the State administration. In addition, pursuant to the same

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provision, any disposal of the share capital or any acquisition, either direct or indirect, of shareholdings in that company by persons or entities unconnected with the State administration requires authorisation by legislative decree.

28. Further, according to Article 58, public authorities may conclude cooperation agreements - as referred to in Article 3 of Royal Legislative Decree 2/2000 - with Correos, in order to carry on activity connected with its company objects, that is, in particular, postal services.

II - Facts and main proceedings

29. By a cooperation agreement concluded between the Spanish Ministry of Education, Culture and Sport (the Ministry') and Correos, signed on 6 June 2002 (the Cooperation Agreement') Correos was entrusted with the provision of postal and telegraphical services.

30. Pursuant to Article 1 of the Cooperation Agreement, Correos undertakes to provide the following postal services:

- letters (ordinary, registered and express), local, inter-city and international, with no weight or size limit;

- packages (postal, blue and international) with no weight or size limit;

- national express mail and international express mail service (Express Mail Service' (EMS)), with no weight or size limit; and

- delivery of books, library material, magazines and the Ministry's Official Gazette nationally (local and inter-city) and internationally (by land and air), with no weight or size limit.

31. The Cooperation Agreement specifies that the financial value of the services provided depends on turnover achieved. In any event, the Audiencia Nacional calculates that the value is a sum of more than EUR 12 020.42 per annum.

32. The Cooperation Agreement was awarded without a public call for tenders.

33. For that reason, the Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia (Trade Association of Mail Delivery and Handling Companies, Asociacion Profesional') challenged the administrative decision entrusting the contract to Correos before the Technical General Secretary of the Ministry.

34. By decision of 20 March 2003, the Technical General Secretary of the Ministry dismissed the challenge. Asociacion Profesional appealed against that decision to the Audiencia Nacional.

III - Question referred for a preliminary ruling

35. The Audiencia Nacional decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

Are Articles 43 and 49 of the EC Treaty in conjunction with Article 86 thereof, as applied within the framework of the liberalisation of the postal services established by Directives 97/67 and 2002/39 and within the framework of the rules governing public procurement introduced by the ad hoc Directives, to be interpreted as precluding an agreement whose subject-matter includes the provision of postal services, both reserved and non-reserved and, therefore, liberalised, concluded between a department of the State administration and a State company whose capital is wholly state-owned and which is furthermore, the universal postal service provider?'

IV - Assessment

A - Admissibility

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36. The Spanish Government challenges the admissibility of the question. It contends that, in actual fact, the question seeks an interpretation of the legality of an agreement, which has to be addressed under national law.

37. In its submission, the Spanish Government contends that the question actually put to the Court is apparent from the order for reference. As a matter of fact, the Audiencia Nacional has not asked the Court to interpret Directives 97/67 and 92/50, but rather to state whether the Cooperation Agreement is in conformity with that Community legislation.

38. According to settled case-law, even though it is not for the Court to rule on the compatibility of national rules with the provisions of Community law in proceedings brought under Article 234 EC, since the interpretation of such rules is a matter for the national courts, the Court does have jurisdiction to supply the national courts with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law. (13)

39. With regard to the main proceedings, the Court may not rule on the compatibility of Law 14/2000 with Community law, but it can provide all the guidance as to the interpretation of Community law necessary to enable the Audiencia Nacional to rule on that compatibility.

40. Therefore, I take the view that the question is admissible.

B - Question referred for a preliminary ruling

41. By its question, the national court is essentially asking whether Directives 97/67 and 92/50, and Article 86 EC, read in conjunction with Articles 43 and 49 EC, have to be interpreted as precluding national legislation that allows public authorities to entrust the provision of reserved and non-reserved postal services to a company whose capital is wholly state-owned, without making that allocation subject to the rules governing the award of public service contracts.

42. Effectively, the question here is to establish whether Community law has to be interpreted as precluding a law that prevents would-be service providers from submitting a tender for a contract for reserved and non-reserved postal services and, by the same token, deprives them of the opportunity to be entrusted with that contract.

43. For the purposes of my assessment, I will begin by examining whether Article 7 of Directive 97/67 must be interpreted as meaning that the services provided by Correos are reserved services.

44. Further, on the assumption that the services at issue in the main proceedings are non-reserved services, and therefore subject to the competition rules, I will establish whether Directive 92/50 applies to the public service contract entrusted to Correos. The Court has ruled that the provisions of the EC Treaty relating to freedom of movement are intended to apply to public contracts which are outside the scope of Directive 92/50. (14) Therefore, I must first determine whether that Directive is applicable to the situation at issue in the main proceedings. If that is not the case, the situation must be considered in the light of primary law.

45. Finally, if Directive 92/50 does not apply, I will consider the situation at issue in the main proceedings in the light of primary law, and more specifically the fundamental principles of the Treaty.

1. Interpretation of Article 7 of Directive 97/67

46. The Court has previously been called upon to rule on the interpretation of Article 7 of Directive 97/67. In its judgment in Asempre and Asociacion Nacional de Empresas de Externalizacion y Gestion de Envíos y Pequeña Paquetería (15) the Court already adopted a strict interpretation of that provision. The Court held that, in the light of the purpose of Directive 97/67, namely the liberalisation

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of postal services, Member States are not free to impose additional conditions on the provision of postal services by extending the range of services reserved for the universal service provider. (16)

47. Therefore, the list of reserved services must be regarded as exhaustive. The following can thus be considered to be reserved services: the clearance, sorting, transport and distribution of items of domestic correspondence, as well as direct mail and outgoing cross-border correspondence, to the extent necessary to ensure the maintenance of universal service for the latter.

48. However, as stated, the reserved services only affect items of correspondence weighing less than 350 grams, the price of which is less than five times the public tariff.

49. In the present case, according to the Audiencia Nacional, the Cooperation Agreement encompasses the provision of postal services that go beyond the services regarded as reserved.

50. The documents before the Court show that, pursuant to Article 58(2) of Law 14/2000, the company objects of Correos cover the management and operation of any postal service. Thus, no distinction is made between reserved and non-reserved services. Moreover, on the basis of that law, pursuant to Article 1 of the Cooperation Agreement, the provision of postal services reserved for Correos concerns all letters, and all packages and parcels, without any restrictions on weight or volume.

51. As previously stated, according to Article 7 of Directive 97/67, only the clearance, sorting, transport and distribution of items of domestic correspondence, within the price and weight conditions defined by the Directive, can be reserved for a single provider. Only the provision of those services can be directly entrusted to a single provider without a call for tenders. Other postal services, within the meaning of Article 2 of Directive 97/67, must be made subject to competition rules.

52. Therefore, Article 7(1) of Directive 97/67 must be interpreted as precluding national legislation which reserves the provision of postal services to a single provider without making a distinction between reserved and non-reserved services.

53. The question that arises at this point is whether entrusting the provision of non-reserved postal services, which Article 58 of Law 14/2000 aims to do, without a prior call for tenders and a call for competition infringes Directive 92/50.

2. Applicability of Directive 92/50

54. As regards Directive 92/50, it is common ground that it applies to public service contracts whose value, net of value added tax, is not less than 200 000 SDRs. (17)

55. According to the Audiencia Nacional, the value of the Cooperation Agreement exceeds EUR 12 020.42. During the oral hearing, neither party was in a position to specify the exact value of the contract. It will be a matter for the national court to establish that value in order to determine whether Directive 92/50 applies in the situation at issue in the main proceedings.

56. Suppose, first of all, that the value of the Cooperation Agreement is not less than 200 000 SDRs.

57. In that situation, it will be seen that Directive 92/50 has to be interpreted as precluding national legislation that allows Public Authorities to entrust the provision of non-reserved postal services to a company whose capital is wholly state-owned, for the following reasons.

58. Pursuant to Article 1(a) of Directive 92/50, public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'.

59. According to the case-law, the categorisation of a contract is not to be sought in the law of the Member States. (18) Therefore, the notion of public contracts has to be regarded as a Community

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concept. In order to determine whether one is dealing with a public contract, it has to be examined whether the criteria set out in Article 1(a) of Directive 92/50 are fulfilled.

60. For Directive 92/50 to apply, two conditions must be fulfilled. The contract must be for pecuniary interest and must have been concluded between two distinct entities, namely a contracting authority and a service provider.

61. As regards the first condition, it seems to me to be fulfilled, since, in the present case, Law 14/2000 provides that public authorities may conclude cooperation agreements with Correos for the provision of postal services. In addition, on the basis of that law, the Cooperation Agreement was concluded between the Ministry and Correos in return for a financial value whose amount depends on turnover. The contract in issue is thus clearly a contract for pecuniary interest.

62. As regards the second condition, namely the existence of a contracting authority and a service provider, Directive 92/50 provides a definition for both. Article 1(b) of Directive 92/50 states that contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'. Article 1(c) of Directive 92/50 defines the service provider as any natural or legal person, including a public body, which offers services'.

63. It would appear in the present case that the Ministry is indeed a contracting authority and Correos a service provider.

64. However, given that Correos' capital is wholly state-owned, the question arises here whether the derogation provided for under Article 6 of Directive 92/50 falls to be applied. Pursuant to that provision, Directive 92/50 shall not be applicable to public service contracts entrusted to an entity which is itself a contracting authority within the meaning of Article 1(b) of the Directive, on the basis of an exclusive right which it enjoys pursuant to a law, regulation or administrative provision.

65. In the present case, it is common ground that Correos enjoys exclusive rights conferred on it by Law 14/2000.

66. Therefore, in my view, it must be examined whether the two entities concerned - namely the contracting authority and the service provider - actually form one single entity. If the answer is in the affirmative, there cannot be a contract for pecuniary interest concluded with an entity that is legally distinct from the contracting authority, and the conditions set out in Article 1 of Directive 92/50 would not be fulfilled. Therefore the Community rules on public contracts would not apply.

67. It would seem to me that the answer may be found in the Court's case-law.

68. In its judgment in Stadt Halle and RPL Lochau , (19) the Court - within the context of Directive 92/50 - applied conditions formulated in its judgment in Teckal (20) in relation to Council Directive 93/36/EEC. (21) Given that Directive 93/36 does not contain any exception comparable to that provided for under Article 6 of Directive 92/50, the Court held that - as regards whether there is a contract - the national court must determine whether there has been an agreement between two separate persons.

69. According to the Court, this is not the case when the contracting authority exercises over the service provider a control which is similar to that which it exercises over its own departments' and that [service provider] carries out the essential part of its activities [with the controlling contracting authority or authorities]'. (22)

70. Those two conditions, which are found in a relationship referred to as in house', constitute cumulative conditions which, if fulfilled, mean that public authorities may award a public contract

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to a single provider without making the contract subject to competition rules. None the less, given that those conditions constitute derogations from the general rules of Community law, they must be interpreted strictly. (23)

71. As regards the condition relating to control which is similar to that which the contracting authority exercises over its own departments, the Court explained its meaning in its judgment in Parking Brixen. (24) In order to determine whether the contracting authority exercises such control over the service provider, it is necessary to establish whether it can be inferred from an examination of the legislative provisions and the relevant circumstances that the service provider in question is subject to control which allows the contracting authority to influence the service provider's decisions. The Court adds that it must be a case of a power of decisive influence over both strategic objectives and significant decisions. (25)

72. Moreover, according to the Court, the fact that the capital of the company providing the services is wholly owned by the contracting authority is not decisive. (26)

73. By contrast, the Court considers that the fact that a particular undertaking changes its status to a limited liability company tends to show that that company has become market-oriented, which renders the public authority's control tenuous. (27)

74. In addition, the Court also took into consideration the fact that the administrative board of the company providing the services had considerable powers, with the public authority exercising no control, and that the objects of the company could be broadened. (28) These two elements militate in the direction that the contracting authority does not exercise similar control' over the company providing the services.

75. Given that the condition of similar control' must be interpreted strictly, I consider that that condition implies that the company providing the services has no discretion whatsoever and that, in the end, the public authority is the only one to take decisions concerning that company. Moreover, use of the expression in house' indeed reveals the intention to make a distinction between activities which the authority carries out directly - by means of internal structures belonging to the house' - and those that it will entrust to a third-party operator.

76. In the present case, several elements combine to show that Correos, the capital of which is indeed state-owned, retains some discretion as regards decisions it has to take.

77. Whilst it is true that pursuant to Article 58(2)(g) of Law 14/2000, Correos, the universal service provider, is under an obligation to accept the Cooperation Agreement, it is apparent from the documents before the Court that Correos can put an end to the contract with the contracting authority, by giving one month's written notice.

78. In addition, pursuant to Law 14/2000, Correos, which used to be a public undertaking, changed its status to a limited liability company which offers services in exchange for remuneration. It is also common ground that Correos can be asked to carry out any other activities or services in addition to the above or necessary to the achievement of the objects of the company. (29) This also seems to be apparent from its 2005 annual report, which mentions that growing competition in that sector has made it inevitable to broaden the services on offer and to enter other markets. (30)

79. By changing its status to a limited liability company, and by having the possibility to broaden its company objects and to terminate the contract which binds it to the State administration, I consider that Correos became market-oriented, which renders the State administration's control tenuous.

80. In light of those elements, I consider that the contracting public authority does not exercise

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similar control' over Correos, within the meaning of the case-law mentioned above. However, it is for the national court to examine whether that condition is indeed fulfilled in the present case.

81. As far as the second condition is concerned, namely that the service provider must carry out the essential part of its activities with the controlling contracting authority or authorities, the Court had the opportunity to clarify its meaning in its judgment in Carbotermo and Consorzio Alisei , (31) concerning the interpretation of Directive 93/36.

82. According to the Court, that second condition will only be fulfilled if the activities carried out by the company providing the services are devoted principally to the controlling contracting authority and any other activities are only of marginal significance. (32) In other words, Correos' activities must be almost exclusively devoted to the controlling State administration.

83. In order to determine if that is so, the national court must take into account all the facts of the case, both qualitative and quantitative.

84. In the present case, pursuant to Law 14/2000, Correos can conclude cooperation agreements with any public authority. The Audiencia Nacional even states in its order for reference that Correos has in fact concluded several cooperation agreements with various public bodies.

85. Moreover, in its submissions to the Court, the Spanish Government acknowledges that Correos operates the universal postal service, whose main recipients are third parties, across the whole of Spain.

86. Therefore, public authorities are neither the main nor the only recipients of the services provided by Correos.

87. Therefore, subject to review by the national court, it appears that the second condition is not fulfilled either.

88. Consequently, on the assumption that the value of the contract at issue in the main proceedings is not less than 200 000 SDRs, I am of the opinion that Directive 92/50 applies in this case.

89. Accordingly, I consider that, under Article 8 of Directive 92/50, the public contract for postal services entrusted to Correos should have been awarded in accordance with the provisions of Titles III to VI of the Directive, and in particular the provisions of Article 11(1) of the Directive. Consequently, I consider that the contract should have been awarded by a call for tenders and made the subject of appropriate publicity.

90. In its submissions, the Spanish Government takes the view that making non-reserved services subject to competition rules would cause financial imbalance, with the result that Correos would no longer be able to ensure the provision of the minimum universal service with which it has been entrusted.

91. As a matter of fact, by arguing in that way, the Spanish Government invokes the derogation in Article 86(2) EC.

92. However, that argument cannot be upheld in the present case, for the following reasons.

93. According to Article 86(2) EC, undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, in particular to those relating to competition, in so far as the application of such rules does not obstruct the performance of the particular tasks entrusted to them.

94. In the present case, Correos' company objects consist of the provision of postal services that are not restricted to the universal service, but cover the management and operation of any postal service.

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95. I consider that the Community legislature's intention to liberalise the postal sector by making a distinction between reserved and non-reserved services shows that the performance of the particular tasks entrusted to providers like Correos is not defeated by putting non-reserved services up for competition.

96. Directive 97/67 has established a regulatory framework for the postal sector. In particular, the Directive makes provisions for securing a universal service in this sector by giving Member States the opportunity to reserve certain postal services. The provision of all other services which cannot be reserved must be open to competition.

97. If Member States were able to grant a public contract for non-reserved postal services to a single provider without a prior call for tenders, this would actually go against the purpose of Directive 97/67, which is to liberalise the postal sector.

98. Moreover, I should add that the Commission has made it clear that reserved services enjoy a presumption that they are justified by reason of Article 86(2) EC. (33)

99. It would seem to me that, by distinguishing between reserved and non-reserved services and by making it possible for Member States to entrust reserved services to a single universal service provider, Directive 97/67 applies Article 86(2) EC.

100. In light of all of these considerations, I am of the opinion that, in a situation in which the value of the public service contract is not less than the threshold of 200 000 SDRs, Directive 92/50 has to be interpreted as precluding national legislation that reserves the provision of non-reserved postal services to a limited liability company which is wholly state-owned, to the extent that the contracting authority does not exercise over the service provider a control which is similar to that which it exercises over its own departments and the service provider does not carry out the essential part of its activities with the controlling authority or authorities.

101. However, on the assumption that the threshold of 200 000 SDRs is not reached, the allocation of public contracts not falling within the scope of Community directives remains none the less subject to the fundamental principles of the Treaty. Therefore, the situation at issue in the main proceedings must also be considered in the light of those principles.

3. Interpretation of Articles 43 EC, 49 EC et 86 EC

102. As stated in paragraph 44 of this opinion, the Court has held that when the value of a public service contract does not reach the threshold set by Directive 92/50, the contracting authorities are nevertheless bound to comply with the fundamental principles of the Treaty.

103. Therefore, the Audiencia Nacional asks whether Article 86(1) EC, read in conjunction with Articles 43 and 49 EC, precludes national legislation that permits the provision of non-reserved postal services to be entrusted directly to a limited liability company whose capital is state-owned.

104. Pursuant to Article 86(1) EC, the Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty in the case of public undertakings to which they grant special or exclusive rights.

105. In the present case, Article 86(1) EC indeed applies to the situation at issue in the main proceedings, seeing that Correos - whose capital is state-owned - is a public undertaking within the meaning of that provision. Moreover, it is apparent from the documents before the Court that Correos has been allocated the exclusive right to ensure the provision of postal services that, as stated, go beyond the services regarded as reserved.

106. Since Article 86(1) EC has no independent effect and must be read in conjunction with the relevant rules of the Treaty, (34) I consider that in the present case, the relevant rules are

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Articles 43 and 49 EC.

107. To the extent that the public contract for postal services at issue could be of interest to undertakings established in another Member State, its direct allocation, without a call for tenders, deprives those undertakings of any possibility to tender. Further, undertakings offering services similar to those offered by Correos are discouraged from establishing themselves in the Member State concerned, since they will not be given the opportunity to tender.

108. The first paragraph of Article 43 EC states that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited. The first paragraph of Article 49 EC prohibits restrictions on freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

109. Article 43 and 49 EC are specific expressions of the principle of equal treatment, which in itself implies the principle of non-discrimination on grounds of nationality, as set out in Article 12 EC. (35)

110. In its case-law relating to public contracts, the Court has already held that the principle of equal treatment of tenderers is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality. (36)

111. Consequently, the Court has held that respect for the principles of equal treatment and non-discrimination require, with respect to public contracts, that the contracting authority observes the principle of transparency by making the public contract subject to some degree of advertising. In that way, all potential bidders can acquire knowledge of the existence of such a contract and can thus respond to the call for tenders. (37)

112. In other words, with respect to public contracts, the discrimination consists in not making the contract subject to the rules on advertising and therefore depriving undertakings established in another Member State of the possibility to tender.

113. As stated, the public contract entrusted to Correos concerns, on the one hand, the provision of reserved services, which can thus be directly entrusted to a single provider, and, on the other hand, the provision of non-reserved services, which have to be made subject to the competition rules.

114. The Audiencia Nacional has admitted that the public contract for postal services was neither covered by publicity nor by a call inviting other providers active on the national market or on foreign markets to participate, but was directly entrusted to Correos.

115. By acting in that manner, the contracting authority not only deprived undertakings established in another Member State of the right to tender and to offer their services in the Member State concerned, but also discouraged other undertakings with the same company objects as Correos from establishing themselves in that Member State, which constitutes an obstacle to the freedom of establishment and the freedom to provide services, contrary to Articles 43 and 49 EC.

116. None the less, two objections may be raised.

117. In the first place, while it is true that under Article 86(1) EC, public undertakings cannot receive more favourable treatment than private undertakings, the situation is different if the contracting authority entrusts the public service contract to an undertaking which it controls. (38)

118. However, in the present case, as stated in paragraphs 69 to 88 of this opinion, the relationship between the contracting authority and Correos cannot be described as in house'. Therefore, this objection has to be rejected.

119. In the second place, pursuant to Article 86(2) EC, there is a derogation from the prohibition

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in paragraph (1) of that Article.

120. However, as stated above, the Spanish Government cannot invoke Article 86(2) within the context of Directive 97/67.

121. Therefore, that second objection must also be rejected.

122. Consequently, I am of the opinion that Article 86(1) EC, read in conjunction with Articles 43 and 49 EC, has to be interpreted as precluding national legislation that allows public authorities to allocate the provision of nonreserved postal services to a company whose capital is wholly state-owned, without making that allocation subject to the fundamental principles governing the award of public service contracts.

V - Conclusion

123. In view of the foregoing, I propose that the Court answer the question referred to it for a preliminary ruling by the Audiencia Nacional as follows:

In so far as the value of the public service contract is not less than 200 000 SDRs, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as precluding national legislation that allows public authorities to allocate the provision of non-reserved postal services to a company whose capital is wholly state-owned, without making that allocation subject to the rules governing the award of public service contracts, to the extent that the contracting authority does not exercise over the service provider a control which is similar to that which it exercises over its own departments and the service provider does not carry out the essential part of its activities with the contracting authority or authorities.

In a situation in which the value of the service contract is less than 200 000 SDRs, Article 86(1) EC, read in conjunction with Articles 43 and 49 EC, must be interpreted as precluding national legislation that allows public authorities to allocate the provision of non-reserved postal services to a company whose capital is wholly state-owned, without making that allocation subject to the fundamental principles governing the award of public service contracts, to the extent that the contracting authority does not exercise over the service provider a control which is similar to that which it exercises over its own departments and the service provider does not carry out the essential part of its activities with the contracting authority or authorities.'

(1) .

(2) - See first and second recital of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14).

(3) - On 11 July 2007, the Members of the European Parliament at first reading adopted a report which supports the European Commission's proposal relating to the Directive of the European Parliament and of the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services [COM(2006) 594 final] (see report of the European Parliament A60246/2007). However, a compromise must be found concerning the date on which the market for postal services is to be fully liberalised. The European Parliament proposes that the sector be fully liberalised from 31 December 2010, while the Commission proposes to keep the date of 31 December 2008.

(4) - Article 7(1).

(5) - Idem.

(6) - For the definition of direct mail, see Article 2(8) of Directive 97/67.

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(7) - Directive of the European Parliament and the Council of 10 June 2002 (OJ L 176, p. 21).

(8) - OJ L 209, p. 1. Directive as amended by Directive 97/52/EEC of the European Parliament and the Council, of 13 October 1997 (OJ L 328, p. 1, Directive 92/50').

(9) - According to the definition provided by the International Monetary Fund (IMF'), the SDR is an international reserve asset, created to supplement the existing official reserves of member countries. Its value, expressed in US Dollars, is determined by the IMF each day on the basis of a basket of currencies including the euro, the US dollar, the Japanese yen and UK sterling.

(10) - BOE No 167, of 14 July 1998, p. 23473, the Postal Law'.

(11) - BOE No 148, of 21 June 2000, p. 21775.

(12) - BOE No 313, of 30 December 2000, p. 46631, Law 14/2000'.

(13) - Case C295/05 Asociacion Nacional de Empresas Forestales [2007] not yet published in the ECR, paragraph 29, and the case-law cited there).

(14) - Judgment in Case C231/03 Coname [2005] ECR I7287, paragraph 16, and Case C264/03 Commission v France [2005] ECR I8831, paragraph 32, and the case-law cited there.

(15) - Case C-240/02 Asempre and Others [2004] ECR I2461.

(16) - paragraphs 21 to 26.

(17) - See second indent of subparagraph (ii) of Article 7(1)(a) of Directive 92/50. In a communication dated 30 August 2000 concerning the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM(2000) 275 final/2, p. 14), the Commission stated that the value of 200 000 DTS amounted to EUR 214 326.

(18) - Commission v France (cited above, paragraph 36).

(19) - Case C26/03 Stadt Halle and RPL Lochau [2005] ECR I1, paragraphs 49 to 52.

(20) - Case C107/98 Teckal [1999] ECR I8121, paragraphs 49 to 51.

(21) - Directive of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199, p. 1).

(22) - Judgment in Teckal , cited above (paragraph 50).

(23) - See judgment in Case C410/04 ANAV [2006] ECR I3303, paragraph 26.

(24) - Case C458/03 Parking Brixen [2005] ECR I8585.

(25) - Paragraph 65.

(26) - See judgments in Teckal and Parking Brixen , cited above.

(27) - Judgment in Parking Brixen , cited above (paragraph 67).

(28) - Idem.

(29) - See order for reference (p. 11).

(30) - Report available on the Internet site www.correos.es.

(31) - Case C340/04 Carbotermo and Consorzio Alisei [2006] ECR I4137.

(32) - Ibidem (paragraphs 61 to 63).

(33) - Notice from the Commission on the application of the competition rules to the postal sector

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and on the assessment of certain State measures relating to postal services (OJ 1998 C 39, p. 2).

(34) - Judgment in Asociacion Nacional de Empresas Forestales , cited above (paragraph 40).

(35) - See judgment in Case 810/79 Überschär [1980] ECR 2747, paragraph 16, and Case C3/88 Commission v Italie [1989] ECR 4035, paragraph 8.

(36) - Judgment in Parking Brixen , cited above (paragraph 48).

(37) - Ibidem (paragraph 49).

(38) - See judgment in Stadt Halle and RPL Lochau , cited above (paragraph 48).

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62005J0295-N29 : N 38
62005J0295-N40 : N 106

SUB Freedom of establishment and services ; Free movement of services ; Competition ; Rules applying to undertakings

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DATES	of document: 20/09/2007 of application: 15/05/2006

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Reference for a preliminary ruling from the Audiencia Nacional, Sala de lo Contencioso-Administrativo (España) of 15 May 2006 - Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia. v Administración del Estado (Ministerio de Educación y Ciencia)

(Case C-220/06)

Language of the case: Spanish.

Referring court

Audiencia Nacional, Sala de lo Contencioso-Administrativo (National High Court, Chamber for Contentious Administrative Proceedings)

Parties to the main proceedings

Applicant: Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia

Defendant: Ministerio de Educación y Ciencia

Question(s) referred

Are Articles 43 and 49 of the EC Treaty in conjunction with Article 86 thereof, as applied within the framework of the liberalisation of the postal services established by Directives 1997/67/EC [1] and 2002/39/EC [2] and within the framework of the rules governing public procurement introduced by the ad hoc Directives, to be interpreted as precluding an agreement whose subject-matter includes the provision of postal services, both reserved and unreserved and, therefore, liberalised, concluded between a department of the State Administration and a state company whose capital is wholly state-owned and which is furthermore, the universal postal service provider?'

_____

[1] - Directive 97/67/EC of the European Parliament and the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service. (OJ 1998 L 15, p. 14)

[2] - Directive 2002/39/EC of the European Parliament and the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services. (OJ 2002 L 176, p. 21)

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ARRÊT DE LA COUR (deuxième chambre)

4 octobre 2007 (*)

«Manquement d'État – Marchés publics de travaux – Directive 71/305/CEE – Notion et délimitation d'un marché public de travaux – Manquement ayant produit tous ses effets»

Dans l'affaire C–217/06,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 12 mai 2006,

Commission des Communautés européennes, représentée par M. X. Lewis, en qualité d'agent, assisté de M^e^ M. R. Mollica, avocat, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par M. I. M. Braguglia, en qualité d'agent, assisté de M. S. Fiorentino, avvocato dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (deuxième chambre),

composée de M. C. W. A.Timmermans, président de chambre, MM. P. Kūris, K. Schiemann, L. Bay Larsen et J.-C. Bonichot, (rapporteur), juges,

avocat général: M. M. Poiares Maduro,

greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, la commune de Stintino ayant attribué directement à Maresar Soc. Cons. arl (ci-après «Maresar»), par la convention n° 7/91, du 2 octobre 1991 (ci-après la «convention»), et par les actes additionnels liés à cette convention, le marché public de travaux ayant pour objet la réalisation des ouvrages mentionnés dans la décision n° 48 du conseil communal de Stintino, du 14 décembre 1989, notamment «l'élaboration du projet et la construction des ouvrages pour l'adaptation technologique et structurelle, le réaménagement et l'achèvement des réseaux de distribution d'eau et d'égouttage, du réseau routier, des structures et de l'équipement dans le secteur du logement, des pôles touristiques situés à l'extérieur et sur le territoire de la commune de Stintino, y compris l'assainissement et la dépollution de la côte et de ses centres touristiques», sans avoir recours à la procédure d'adjudication prévue par la directive 71/305/CEE du Conseil, du 26 juillet 1971, portant coordination des procédures de passation des marchés publics de travaux (JO L 185, p. 5), et, en particulier, sans publier aucun avis au *Journal officiel des Communautés européennes,* la République italienne a manqué aux obligations qui lui incombent en vertu de cette directive, et en particulier des articles 3 et 12 de celle-ci.

Le cadre juridique

2 La législation applicable à l'adjudication en cause est la directive 71/305 dans sa version antérieure aux modifications apportées par la directive 89/440/CEE du Conseil, du 18 juillet 1989 (JO L 210, p. 1).

3 Aux termes de l'article 1er, sous a), de la directive 71/305:

«les 'marchés publics de travaux' sont des contrats à titre onéreux, conclus par écrit entre un entrepreneur – personne physique ou morale – d'une part et, d'autre part, un pouvoir adjudicateur défini sous b) et qui ont pour objet une des activités visées à l'article 2 de la directive du Conseil du 26 juillet 1971, concernant la suppression des restrictions à la libre prestation de services dans le domaine des marchés publics de travaux et à l'attribution de marchés publics de travaux par l'intermédiaire d'agences ou de succursales».

4 L'article 3, paragraphe 1, de cette directive définit le contrat de concession comme «un contrat présentant les mêmes caractères que ceux visés à l'article 1er sous a), à l'exception du fait que la contrepartie des travaux à effectuer consiste, soit uniquement dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix».

5 Ce même article 3, paragraphe 1, précise, en outre, que les dispositions de la directive 71/305 ne sont pas applicables aux contrats de concession.

6 Aux termes de l'article 12 de la directive 71/305:

«Les pouvoirs adjudicateurs, désireux de passer un marché public de travaux [...] font connaître leur intention au moyen d'un avis.

Cet avis est envoyé à l'Office des publications officielles des Communautés européennes et il est publié in extenso au *Journal officiel des Communautés européennes* [...]»

7 L'article 7, paragraphe 1, de cette directive énonce:

«Les dispositions des titres II, III et IV ainsi que celles de l'article 9 sont appliquées, dans les conditions prévues à l'article 5, aux marchés publics de travaux dont le montant estimé égale ou dépasse 1 000 000 d'unités de compte.»

La procédure précontentieuse

8 La convention, conclue entre la commune de Stintino et Maresar sans publicité ni mise en concurrence, a été suivie, durant la période 1992–2001, de la passation, entre les mêmes parties, de onze actes additionnels qui confient à Maresar la réalisation d'ouvrages déterminés relevant de la convention, ainsi que celle de toutes les activités technico–administratives nécessaires jusqu'à la réception des travaux. Le prix de chacune de ces interventions est fixé dans ces actes.

9 Après avoir reçu une plainte, la Commission, estimant que la convention constituait un marché public de travaux dont l'attribution directe en dehors de toute procédure de mise en concurrence enfreint la réglementation communautaire relative aux marchés publics, a transmis à la République italienne une lettre de mise en demeure le 30 mars 2004 à laquelle celle-ci a répondu par lettre du 30 juin 2004.

10 Les explications fournies dans cette réponse n'ayant pas été considérées comme satisfaisantes par la Commission, celle–ci a, le 13 octobre 2004, adressé à la République italienne un avis motivé invitant cet État membre à prendre les mesures requises pour se conformer à cet avis dans un délai de deux mois à compter de la notification de celui-ci. La République italienne a répondu à cet avis motivé par lettre du 3 janvier 2005.

11 Considérant que les mesures nécessaires n'avaient pas été prises par les autorités italiennes, la Commission a introduit le présent recours.

Sur le recours

12 La Commission constate que, dans leur réponse à l'avis motivé, les autorités italiennes ne contestent plus le fait que la convention doit être considérée comme un marché public.

13 Elle considère que les autorités italiennes ont reconnu l'infraction commise en ce qui concerne les ouvrages déjà pratiquement achevés et un bassin de régulation hydraulique qui, à la date à laquelle elles ont envoyé leur réponse, était réalisé à 30 %.

14 La Commission fait toutefois valoir que le bassin de régulation hydraulique fait l'objet d'un seul des onze actes additionnels et considère que les autorités italiennes ne fournissent aucune information au sujet de l'état d'avancement des travaux faisant l'objet des autres actes additionnels portant sur des travaux qui, au total, représentent, pour la période 1992–2001, environ 16 millions d'euros. Elle estime, en outre, que ces travaux ne concernent qu'une partie des interventions susceptibles de s'inscrire dans le cadre de la convention qui semble avoir été conclue pour une durée indéterminée.

15 La Commission en déduit que, même si il a été mis un terme aux relations avec Maresar «en ce qui concerne la réalisation des infrastructures qui s'inscrivent dans le cadre de la convention, principal objet de contestation, et que les autorités italiennes ont procédé à la publication d'appels d'offres pour la sélection d'adjudicataires», aucun élément ne lui a été transmis et, notamment, aucune décision officielle de la commune de Stintino de nature à confirmer que la convention a cessé de produire des effets juridiques.

16 À cet égard, la convention n° 7/91, décrite au point 1, conclue le 2 octobre 1991 entre la commune de Stintino et Maresar, ensemble les onze actes additionnels qui confient à Maresar la réalisation d'ouvrages déterminés relevant de la convention, ainsi que celle de toutes les activités technico–administratives nécessaires jusqu'à la réception des travaux, a été passée par un pouvoir adjudicateur, la commune de Stintino, contre le paiement d'un prix supporté par celui-ci. Elle doit, par suite, conformément à l'article 1er, sous a), de la directive 71/305, être analysée comme un marché de travaux. Le gouvernement italien ne le conteste d'ailleurs plus.

17 Ainsi, c'est à bon droit que la Commission a estimé que ledit marché qui dépassait le seuil fixé par la directive 71/305 aurait dû faire l'objet de la publication d'un avis au *Journal officiel des Communautés européennes* prescrit par l'article 12 de cette directive et a, en conséquence, émis un avis motivé à l'encontre de la République italienne à l'effet de faire cesser le manquement constitué par l'attribution dudit marché à Maresar, par la commune de Stintino, sans procédure de mise en concurrence.

18 Il revient donc à la Cour de déterminer si, à la date pertinente pour apprécier le manquement, c'est–à–dire à l'issue du délai fixé dans l'avis motivé (voir en ce sens, arrêts du 14 septembre 2004, Commission/Espagne, C-168/03, Rec. p. I–8227, point 24, et du 27 octobre 2005, Commission/Luxembourg, C-23/05, Rec. p. I–9535, point 9), les mesures nécessaires pour faire cesser ce manquement avaient été prises par le gouvernement italien.

19 En l'espèce, compte tenu des éléments apportés par le gouvernement italien, au moment de l'expiration du délai fixé dans l'avis motivé, l'exécution de la convention irrégulière ne se poursuivait plus que pour la réalisation finale d'un ouvrage, le bassin de régulation hydraulique, prévu par l'acte additionnel n° 10. D'autres ouvrages étaient terminés. Par ailleurs, la Commission ne démontre pas que les affirmations du gouvernement italien selon lesquelles la commune de Stintino avait retiré à Maresar les autres prestations qui avaient été confiées à cette société par la convention seraient erronées.

20 Le gouvernement italien ne conteste plus que la commune de Stintino a manqué à ses obligations en passant la convention sans mise en concurrence. Il soutient toutefois, en premier lieu, que le recours est dépourvu d'objet dans la mesure où le marché litigieux avait, à la date d'expiration du délai fixé dans l'avis motivé, épuisé presque tous ses effets. À cette date, en tenant compte de la fin de la réalisation du bassin de régulation hydraulique, les travaux en cause auraient été achevés à hauteur de 82 %. Ainsi, il n'aurait plus été possible, matériellement, de se conformer à l'avis motivé.

21 Toutefois, s'il est vrai que, en matière de passation des marchés publics, la Cour a jugé qu'un recours en manquement est irrecevable si, à la date d'expiration du délai fixé dans l'avis motivé, le

contrat en question avait déjà épuisé tous ses effets (voir, en ce sens, arrêts du 31 mars 1992, Commission/Italie, C–362/90, Rec. p. I–2353, points 11 et 13, et du 2 juin 2005, Commission/Grèce, C–394/02, Rec. p. I–4713, point 18), en l'espèce, la Cour ne peut que constater que la convention était, à cette date, en cours d'exécution, les travaux n'étant pas complètement achevés. Le marché n'avait donc pas épuisé tous ses effets.

22 En second lieu, pour démontrer qu'il n'avait pas été possible légalement de se conformer à l'avis motivé, les autorités italiennes soutiennent qu'elles ne pouvaient pas résilier l'acte additionnel concernant la réalisation du bassin de régulation compte tenu de la confiance légitime qui avait pu naître dans le chef de Maresar, en raison de la durée du rapport contractuel qui s'était déroulé sur une période de plus de dix ans avant l'introduction de la procédure précontentieuse.

23 Toutefois, le comportement d'une autorité nationale chargée d'appliquer le droit communautaire, qui est en contradiction avec ce dernier, ne saurait fonder, dans le chef d'un opérateur économique, une confiance légitime à bénéficier d'un traitement contraire au droit communautaire (voir arrêts du 26 avril 1988, Krücken, C–316/86, Rec. p. 2213, point 24, et du 1er avril 1993, Lageder e.a., C–31/91 à C–44/91, Rec. p. I–1761, point 38).

24 La circonstance que la convention litigieuse a été signée il y a plus de dix ans est sans incidence sur son caractère irrégulier au regard du droit communautaire et, par suite, sur l'impossibilité pour elle de faire naître une confiance légitime dans le chef de Maresar (voir en ce sens arrêt du 24 septembre 1998, Commission/France, C–35/97, Rec. p. I–5325, point 45).

25 Il résulte de ce qui précède que, en ayant laissé se poursuivre l'exécution d'au moins une des opérations confiées par la commune de Stintino à Maresar aux termes de la convention et des actes additionnels conclus postérieurement par ces mêmes parties, la République italienne a manqué aux obligations qui lui incombent en vertu de la directive 71/305, et en particulier des articles 3 et 12 de celle-ci.

Sur les dépens

26 En vertu de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République italienne et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (deuxième chambre) déclare et arrête:

1) En ayant laissé se poursuivre l'exécution d'au moins une des opérations confiées par la commune de Stintino à la société Maresar Soc. Cons. arl aux termes de la convention n° 7/91 signée le 2 octobre 1991 et des actes additionnels conclus postérieurement par ces mêmes parties, la République italienne a manqué aux obligations qui lui incombent en vertu de la directive 71/305/CEE du Conseil, du 26 juillet 1971, portant coordination des procédures de passation des marchés publics de travaux, et en particulier des articles 3 et 12 de celle-ci.

2) La République italienne est condamnée aux dépens.

Signatures

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* Langue de procédure: l''italien.

Judgment of the Court (Second Chamber) of 4 October 2007

Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil its obligations - Directive 71/305/EEC. Case C-217/06.

DOCNUM	62006J0217
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page I-00132*
DOC	2007/10/04
LODGED	2006/05/12
JURCIT	31971L0305-A03 : 31971L0305-A12 :
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Action for failure to fulfil obligations
ADVGEN	Poiares Maduro
JUDGRAP	Bonichot
DATES	of document: 04/10/2007 of application: 12/05/2006

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Documents relating to the same case

Judgment of the Court (Second Chamber) of 4 October 2007 – Commission v Italy

(Case C–217/06)

Failure of Member State to fulfil obligations – Public works contracts – Directive 71/305/EEC – Meaning and definition of a public works contract – Failure which has produced all its effects

1. *Actions for failure to fulfil obligations – Infringement terminated before the expiry of the period laid down in the reasoned opinion – Inadmissible (Art. 226 EC) (see para. 21)*

2. *Community law – Principles – Protection of legitimate expectations – Scope (Council Directive 71/305) (see para. 23)*

Failure of Member State to fulfil obligations – Infringement of Articles 3 and 12 of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5) – Award, after private negotiation and without publication of a notice of invitation to tender, of a works contract for the performance of works specified in resolution No 48 of the Municipal Council of Stintino of 14 December 1989, in particular: 'the design and execution of works relating to the technical and structural modernisation, maintenance and completion of the water supply and drainage networks, the road network, and structures and facilities serving the centre of population, the external villages and the tourist zones of the territory of the commune of Stintino, and including the cleaning and decontamination of the coast and tourist centres of that commune'.

e part

The Court:

1. Declares that by allowing execution of at least one of the operations entrusted by the commune of Stintino to the company Maresar Soc. Cons arl under the Agreement No 7/91 signed on 2 October 1991 and additional measures subsequently agreed by the same parties, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, and in particular Articles 3 and 12 thereof;

2. Orders the Italian Republic to pay the costs.

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Judgment of the Court (Second Chamber) of 4 October 2007 - Commission of the European Communities v Italian Republic

(Case C-217/06) [1]

(Failure of Member State to fulfil obligations - Public works contracts - Directive 71/305/EEC - Meaning and definition of a public works contract - Failure which has produced all its effects)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis, agent and M. Mollica, avocat,)

Defendant: Italian Republic (represented by: I. Braguglia and S. Fiorentino, agents.)

Re:

Failure of Member State to fulfil obligations - Infringement of Articles 3 and 12 of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5) - Award, after private negotiation and without publication of a notice of invitation to tender, of a works contract for the performance of works specified in resolution No 48 of the Municipal Council of Stintino of 14 December 1989, in particular: 'the design and execution of works relating to the technical and structural modernisation, maintenance and completion of the water supply and drainage networks, the road network, and structures and facilities serving the centre of population, the external villages and the tourist zones of the territory of the commune of Stintino, and including the cleaning and decontamination of the coast and tourist centres of that commune'

Operative part of the judgment

The Court:

1. declares that by allowing execution of at least one of the operations entrusted by the commune of Stintino to the company Maresar Soc. Cons arl under the Agreement No 7/91 signed on 2 October 1991 and additional measures subsequently agreed by the same parties, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, and in particular Articles 3 and 12 thereof;

2. orders the Italian Republic to pay the costs.

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[1] - OJ C 178 of 29.07.2006.

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Action brought on 12 May 2006 - Commission of the European Communities v Italian Republic

(Case C-217/06)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis, agent, M. Mollica, lawyer)

Defendant: Italian Republic

Form of order sought

Declare that, as the commune of Stintino awarded directly to Maresar, through Agreement No 7/91 of 2 October 1991 and connected measures, a public works contract concerning the execution of the works mentioned in Resolution No 48 of the municipal council of Stintino of 14 December 1989, particularly the 'detailed design and construction of the works for the technological and structural adaptation, rehauling and completion of the water supply and drainage networks, the road network, the buildings and service facilities in the town centre, the tourist areas in and outside the territory of the commune of Stintino, including the clean-up and depollution of the coast and the tourist centres situated in that commune', without following the procedures laid down by Council Directive 71/305/EEC[1] and, in particular, without publishing a notice of invitation to tender in the Official Journal of the European Communities, the Commission of the European Communities considers that the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC, which co-ordinates the procedures for the award of public works contracts, in particular under Articles 3 and 12 thereof.

Order the Italian Republic to pay the costs of the proceedings.

Pleas in law and main arguments

The Commission considers that the Agreement of 2 October 1991 between the commune of Stintino and Maresar is a public works contract under Community law. The said contract, the subject of which is works with a value (around EUR 16 million) clearly greater than the threshold for the application of the Directive, which was in force at that time, should have been awarded in accordance with the rules laid down by that Directive.

As regards the Italian authority's arguments put forward to justify their non-fulfilment, the Commission recalls that, in accordance with settled case-law, a Member State cannot rely on internal difficulties to justify failure to fulfil obligations derived from Community law.

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[1] - OJ L 185, p. 5.

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ORDONNANCE DU PRÉSIDENT DE LA COUR

5 septembre 2008(*)

«Radiation»

Dans l'affaire C-214/06,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Tribunale amministrativo regionale per la Lombardia (Italie), par décision du 19 avril 2006, parvenue à la Cour le 11 mai 2006, dans la procédure

Colasfalti srl

contre

Provincia di Milano e.a.,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. D. Ruiz-Jarabo Colomer, entendu,

rend la présente

Ordonnance

1 Par lettre du 19 mai 2008, le greffe de la Cour a transmis à la juridiction de renvoi l'arrêt rendu le 15 mai 2008 dans les affaires jointes C–147/06 et C–148/06, SECAP e.a. (non encore publié au Recueil), en l'invitant à bien vouloir lui indiquer si, à la lumière de cet arrêt, elle souhaitait maintenir son renvoi préjudiciel.

2 Par lettre du 16 juin 2008, parvenue au greffe de la Cour le 28 juillet 2008, le Tribunale amministrativo regionale per la Lombardia a informé la Cour qu'il n'entendait pas maintenir son renvoi préjudiciel.

3 Dans ces conditions, il y a lieu d'ordonner la radiation de la présente affaire du registre de la Cour.

4 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, le président de la Cour ordonne:

L'affaire C-214/06 est radiée du registre de la Cour.

Fait à Luxembourg, le 5 septembre 2008.

Le greffier
R. Grass

Le président de la Cour
V. Skouris

* Langue de procédure: l'italien.

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Order of the President of the Court of 5 September 2008 (reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia - Italy) - Colasfalti S.r.l. v Provincia di Milano, ATI Legrenzi Srl, Impresa Costruzioni Edili e Stradali dei F. 11i Paccani Snc

(Case C-214/06) [1]

Language of the case: Italian

The President of the Court has ordered that the case be removed from the register.

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1 -

2 - OJ C 178, 29.07.2006.

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Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia lodged on 11 May 2006 - Colasfalti srl v Provincia di Milano, ATI Legrenzi Srl,Impresa Costruzioni Edili e Stradali dei F. 11i Paccani Snc

(Case C-214/06)

Language of the case: Italian

Referring court

Tribunale Amministrativo Regionale per la Lombardia

Parties to the main proceedings

Applicant(s): Colasfalti srl

Defendant(s): Provincia di Milano, ATI Legrenzi Srl,Impresa Costruzioni Edili e Stradali dei F. 11i Paccani Snc

Question(s) referred

Does the rule laid down in Article 30(4) of Directive 93/37/EEC [1] or the similar rule contained in Article 55 (1) and (2) of Directive 2004/18/EC [2] (where that is regarded as the relevant provision), that, where tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, constitute a fundamental principle of Community law, such as to transcend the formal bounds set by the value of the contracts mentioned in Article 6 of Directive 93/37/EC and is it, therefore, capable of applying also to contracts when their value does not cross that threshold?

Is the rule established by Article 30(4) of Directive 93/37/EEC or the similar rule contained in Article 55(1) and (2) of Directive 2004/18/EC (where that is regarded as the relevant provision), according to which, if tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, while not presenting the characteristics of a fundamental principle of Community law, nevertheless an implied consequence of or a "principle deriving from" the principle of competition, considered in conjunction with the principles of administrative transparency and non-discrimination on grounds of nationality and is it therefore, as such, directly binding, taking precedence over possibly incompatible national provisions adopted by the Member States to regulate public works contracts to which Community law is not directly applicable?

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[1] - OJ 199, p.54

[2] - OJ 134, p.114

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ORDONNANCE DE LA COUR (septième chambre)

20 avril 2007 (*)

«Pourvoi – Marchés publics de services – Appel d'offres relatif à un contrat-cadre multiple pour le recrutement d'experts à court terme chargés de fournir une assistance technique en faveur de pays tiers – Rejet de l'offre des requérantes – Pourvoi manifestement non fondé»

Dans l'affaire C-189/06 P,

ayant pour objet un pourvoi au titre de l'article 56 du statut de la Cour de justice, introduit le 11 avril 2006,

TEA-CEGOS SA, établie à Madrid (Espagne),

Services techniques globaux (STG) SA, établie à Bruxelles (Belgique),

représentées par M^es^ G. Vandersanden et L. Levi, avocats,

parties requérantes,

les autres parties à la procédure étant:

GHK Consulting Ltd, établie à Londres (Royaume-Uni),

partie demanderesse en première instance,

Commission des Communautés européennes, représentée par M. M. Wilderspin et M^me^ G. Boudot, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse en première instance,

LA COUR (septième chambre),

composée de M. J. Klučka, président de chambre, MM. J. N. Cunha Rodrigues (rapporteur) et U. Lõhmus, juges,

avocat général: M. J. Mazák,

greffier: M. R. Grass,

l'avocat général entendu,

rend la présente

Ordonnance

1 Par leur pourvoi, TEA-CEGOS SA (ci-après «TEA-CEGOS») et Services techniques globaux (STG) SA (ci-après «STG») demandent l'annulation de l'arrêt du Tribunal de première instance des Communautés européennes du 14 février 2006, TEA-CEGOS e.a./Commission (T-376/05 et T-383/05, Rec. p. II-205, ci-après l'«arrêt attaqué»), par lequel celui-ci a rejeté leur recours tendant à l'annulation, d'une part, des décisions de la Commission des Communautés européennes du 12 octobre 2005, rejetant les offres qu'elles avaient soumises dans le cadre de l'appel d'offres, portant la référence «EuropeAid/119860/C/SV/multi-Lot 7», relatif à un contrat-cadre multiple pour le recrutement d'experts à court terme chargés de fournir une assistance technique en faveur de pays

tiers bénéficiaires de l'aide extérieure (ci-après l'«appel d'offres») et, d'autre part, de toute autre décision prise par la Commission dans le cadre de ce même appel d'offres à la suite des décisions du 12 octobre 2005.

Le cadre juridique

2 La passation des marchés de services de la Commission dans le cadre des actions extérieures de cette dernière est assujettie aux dispositions de la deuxième partie, titre IV, du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1, ci-après le «règlement financier»), ainsi qu'aux dispositions de la deuxième partie, titre III, du règlement (CE, Euratom) n° 2342/2002 de la Commission, du 23 décembre 2002, établissant les modalités d'exécution du règlement n° 1605/2002 (JO L 357, p. 1, ci-après les «modalités d'exécution»).

3 Selon l'article 94 du règlement financier, repris au point 2.3.3 du guide pratique des procédures contractuelles financées par le budget général des Communautés européennes dans le cadre des actions extérieures (ci–après le «guide pratique»):

«Sont exclus de l'attribution d'un marché les candidats ou les soumissionnaires qui, à l'occasion de la procédure de marché:

a) se trouvent en situation de conflit d'intérêts,

b) se sont rendus coupables de fausses déclarations en fournissant les renseignements exigés par le pouvoir adjudicateur pour leur participation au marché ou n'ont pas fourni ces renseignements.»

4 Aux termes de l'article 146, paragraphe 3, des modalités d'exécution:

«Les demandes de participation et les offres qui ne contiennent pas tous les éléments essentiels exigés dans les documents d'appels d'offres ou qui ne correspondent pas aux exigences spécifiques qui y sont fixées sont éliminées.

Toutefois, le comité d'évaluation peut inviter le candidat ou le soumissionnaire à compléter ou à expliciter les pièces justificatives présentées relatives aux critères d'exclusion et de sélection, dans le délai qu'il fixe.»

5 Le point 13 de l'avis de marché, du 9 juillet 2004, publié dans le cadre de la procédure relative à l'appel d'offres (JO S 132, ci-après l'«avis de marché») énonçait que les personnes physiques ou morales (y compris les personnes morales participant au même groupement juridique) ne pourront présenter qu'une seule candidature, quelle que soit leur forme de participation (en tant qu'entité juridique individuelle ou chef de file ou partenaire d'un groupement candidat). Dans l'hypothèse où une personne physique ou morale (y compris les personnes morales participant au même groupement juridique) présenterait plus d'une candidature, toutes les candidatures auxquelles cette personne (et les personnes morales participant au même groupement juridique) aura participé seront exclues.

6 Dans le formulaire de déclaration que devaient remplir les candidats et soumissionnaires était notamment mentionnée l'obligation pour ceux-ci d'indiquer s'ils appartenaient ou non à un «groupe ou à un réseau».

7 Le point 14 des instructions aux soumissionnaires précisait que chaque attributaire serait informé par écrit que son offre avait été retenue. Il prévoyait en outre que, avant que l'autorité contractante ne signe le contrat-cadre avec le soumissionnaire retenu, ce dernier devait produire des documents supplémentaires aux fins de prouver la véracité de ses déclarations. Si un soumissionnaire n'était pas en mesure de produire les documents requis dans un délai de quinze jours calendaires suivant la notification de l'attribution ou s'il s'avérait qu'il avait fourni de fausses informations, il était prévu que l'attribution serait considérée comme nulle et non avenue. Dans une telle hypothèse, l'autorité contractante pouvait accorder le contrat-cadre à un autre soumissionnaire ou annuler la procédure d'appel d'offres.

8 Le point 16 desdites instructions prévoyait que les soumissionnaires qui s'estimeraient lésés par une erreur ou une irrégularité commise dans le cadre de la procédure d'appel d'offres pouvaient

introduire une réclamation, l'autorité compétente devant répondre à cette dernière dans les 90 jours.

Les antécédents du litige

9 Les faits à l'origine du litige ont été exposés par le Tribunal aux points 8 à 26 de l'arrêt attaqué de la manière suivante:

«8 Par [l']avis de marché [...], la Commission a lancé l'appel d'offres.

9 Le consortium TEA-CEGOS (ci-après 'TEA-CEGOS Consortium') a manifesté son souhait de participer à l'appel d'offres. TEA-CEGOS [...] a été choisie pour être le chef de file dudit consortium aux fins de la participation de ce dernier à la procédure d'appel d'offres. [STG] est également membre de TEA-CEGOS Consortium et lui fournit des services en matière de gestion technique et financière.

10 Au cours de la phase de proposition des candidatures et conformément aux exigences de l'avis de marché, les différents membres de TEA-CEGOS Consortium ont effectué une déclaration selon laquelle ils ne se trouvaient dans aucune des situations correspondant aux causes d'exclusion mentionnées au point 2.3.3 du guide pratique. Le 18 août 2004, le Danish Institute for Human Rights (ci-après le 'DIHR'), membre de TEA-CEGOS Consortium, a adressé à la Commission un document dans lequel était indiqué que le DIHR avait son propre conseil d'administration mais faisait partie d'une structure plus large, le Danish Centre for International Studies and Human Rights (ci–après le 'Centre') et avait pour partenaire le Danish Institute for International Studies (ci-après le 'DIIS'), un institut créé par une loi danoise du 6 juin 2002 qui a également créé le Centre et le DIHR.

11 GHK Consulting Ltd [(ci-après 'GHK Consulting')], société de droit anglais, fait partie d'un consortium qui regroupe diverses entités (ci-après 'GHK Consortium'), dont le DIIS. GHK Consulting, au travers de sa division GHK International Ltd [(ci-après 'GHK International')], a été choisie pour être le chef de file de GHK Consortium aux fins de la procédure d'appel d'offres. Le 29 septembre 2004, lors de la proposition de candidatures, le DIIS a déclaré qu'il n'appartenait pas à un groupement ou à un réseau.

12 Par courriel du 17 décembre 2004 et par lettre du 31 décembre 2004, TEA CEGOS Consortium a été invité à participer à l'appel d'offres pour le lot n° 7. Le DIHR, durant cette étape de la procédure d'appel d'offres, a de nouveau indiqué qu'il faisait partie d'une structure plus large, le Centre, comportant un autre institut, le DIIS. GHK Consortium a également été admis à soumissionner une offre pour le lot n° 7.

13 Par courriers du 20 mai 2005, TEA-CEGOS et GHK International ont appris que les offres des consortiums auxquels elles appartenaient respectivement avaient été retenues pour le lot n° 7. Lesdits courriers précisaient que les contrats seraient envoyés aux consortiums pour signature sous réserve de la preuve qu'ils ne se trouvaient pas dans l'une des situations correspondant aux causes d'exclusion prévues au point 2.3.3 du guide pratique. Les requérantes ont communiqué à la Commission les documents qu'elles jugeaient pertinents à cet égard.

14 Par télécopie du 22 juin 2005, la Commission a demandé à TEA-CEGOS d'expliquer le lien qui unissait le DIHR au Centre ainsi que son éventuelle autonomie vis-à-vis de ce dernier et a également prié GHK International de lui fournir des éclaircissements quant au statut juridique du DIIS.

15 Le 23 juin 2005, TEA-CEGOS Consortium a adressé à la Commission une lettre du DIHR expliquant son fonctionnement. Le 24 juin 2005, GHK International a transmis par télécopie à la Commission des éclaircissements relatifs au DIIS.

16 Répondant à une nouvelle demande de la Commission formulée par voie téléphonique le 27 juin 2005 et visant à recueillir des précisions supplémentaires, TEA-CEGOS Consortium a fait parvenir à celle-ci le même jour une copie de la loi danoise du 6 juin 2002 créant le Centre, accompagnée d'un mémorandum indiquant les éléments pertinents de ladite loi et le lien entre le Centre et le DIHR, ainsi qu'une lettre du chef d'administration du Centre.

17 Le 14 juillet 2005, TEA-CEGOS Consortium a également adressé à la Commission une déclaration du ministère des Affaires étrangères danois, dans laquelle ce dernier affirmait que

le DIHR et le DIIS étaient des entités autonomes au sein du Centre.

18 Par courriers du 18 juillet 2005 (ci-après les 'décisions du 18 juillet 2005'), la Commission a informé TEA-CEGOS Consortium et GHK Consortium que ses décisions de retenir leurs offres étaient fondées sur des informations incorrectes qui lui avaient été données durant la procédure d'appel d'offres et que, à la lumière d'éléments nouveaux, leur candidature et leur offre devaient être rejetées.

19 Les 22 et 25 juillet 2005, TEA-CEGOS Consortium a fait valoir auprès de la Commission que le DIHR et le DIIS ne pouvaient pas être considérés comme faisant partie d'un même groupement juridique au sens [du point] 13 de l'avis de marché, rappelant qu'il avait indiqué, dès le début de la procédure d'appel d'offres, l'appartenance du DIHR au Centre. Le 27 juillet 2005, la Commission a accusé réception du courrier du 22 juillet, en précisant que son contenu serait examiné de manière approfondie.

20 Le 25 juillet 2005, la liste des soumissionnaires retenus pour le lot n° 7, publiée sur le site d'EuropeAid, a été modifiée de manière à ne plus y faire figurer les deux consortiums.

21 Le 8 septembre 2005, TEA-CEGOS et STG se sont adressées à la Commission pour dénoncer les illégalités qui, selon elles, entachaient les décisions du 18 juillet 2005, l'invitant par conséquent à revenir sur celles-ci dans les plus brefs délais. Par courrier du 13 septembre 2005, la Commission leur a indiqué qu'un réexamen était en cours et qu'elle avait adressé au Centre une série de questions et lui avait demandé de produire des documents susceptibles d'étayer les réponses qu'il apporterait.

22 Le 14 septembre 2005, TEA-CEGOS et STG ont réitéré leur souhait d'obtenir une réponse rapide quant à la position finale que la Commission adopterait. Le 21 septembre 2005, la Commission leur a indiqué qu'elle attendait du Centre certains renseignements nécessaires pour se prononcer sur l'issue à donner à la procédure, s'engageant à leur faire part dans les plus brefs délais de la décision qu'elle adopterait.

23 Par courriel du 23 septembre 2005 et par télécopie du 26 septembre 2005, le Centre a répondu aux questions de la Commission, lui adressant également une série de documents visant à étayer ses réponses. Le 26 septembre 2005, GHK International a fait parvenir à la Commission un courrier venant au soutien des réponses apportées par le Centre.

24 Le 27 septembre 2005 et le 5 octobre 2005, TEA-CEGOS et STG ont adressé à la Commission deux courriers dans lesquels était, notamment, mis en exergue le caractère indépendant des deux instituts. Elles y soulignaient le fait que les seuls motifs pour lesquels les décisions d'attribution pouvaient être retirées étaient ceux visés par [le point] 14 des instructions aux soumissionnaires, qui renvoyaient au point 2.3.3 du guide pratique. Elles ajoutaient que TEA-CEGOS Consortium n'était responsable d'aucune omission d'information et n'avait fourni aucune information erronée.

25 Le 11 octobre 2005, TEA-CEGOS et STG ont sollicité la Commission afin de savoir si cette dernière avait adopté une position définitive quant à la procédure d'appel d'offres, tout en l'invitant à ne pas conclure de contrats concomitamment aux décisions d'attribution qu'elle adopterait. La Commission leur a indiqué qu'elle était sur le point d'adopter une décision.

26 Par deux décisions adressées le 12 octobre 2005, d'une part, à TEA-CEGOS Consortium et, d'autre part, à GHK Consortium, la Commission a confirmé les décisions du 18 juillet 2005 et a rejeté les offres desdits Consortiums (ci-après les 'décisions attaquées').»

La procédure devant le Tribunal

10 Par requête déposée au greffe du Tribunal le 13 octobre 2005, TEA–CEGOS et STG ont introduit le recours dans l'affaire T-376/05.

11 Par requête déposée au greffe du Tribunal le 20 octobre 2005, GHK Consulting a introduit le recours dans l'affaire T-383/05.

12 Par ordonnance du président de la deuxième chambre du Tribunal du 10 novembre 2005, les affaires T-376/05 et T-383/05 ont été jointes aux fins de la procédure écrite, de la procédure orale

et de l'arrêt.

13 Les requérantes dans l'affaire T-376/05 ont invoqué quatre moyens à l'appui de leur recours. Par le premier, elles ont fait valoir que la Commission avait violé, d'une part, le point 13 de l'avis de marché et, d'autre part, le point 14 des instructions aux soumissionnaires. Par leur deuxième moyen, les requérantes ont soutenu que la Commission avait manqué à son obligation de motivation ainsi qu'au principe de sécurité juridique, celle-ci ayant par ailleurs commis, selon elles, une erreur manifeste d'appréciation dans l'application du point 13 de l'avis de marché. Par leur troisième moyen, les requérantes ont fait grief à la Commission d'avoir violé le principe de bonne administration et d'avoir manqué à son devoir de diligence. Enfin, par leur quatrième moyen, elles ont fait valoir que la Commission avait violé le principe de confiance légitime.

L'arrêt attaqué

14 Dans le cadre de son appréciation du deuxième moyen invoqué dans l'affaire T-376/05, le Tribunal a notamment précisé ce qui suit:

«50 En ce qui concerne, en deuxième lieu, le grief tiré de l'erreur manifeste d'appréciation dont seraient entachées les décisions attaquées, il convient de rappeler que la Commission dispose d'un large pouvoir d'appréciation quant aux éléments à prendre en considération en vue de la prise d'une décision de passer un marché sur appel d'offres et que le contrôle du Tribunal doit se limiter à la vérification du respect des règles de procédure et de motivation, ainsi que de l'exactitude matérielle des faits, de l'absence d'erreur manifeste d'appréciation et de détournement de pouvoir (arrêts du Tribunal du 24 février 2000, ADT Projekt/Commission, T-145/98, Rec. p. II-387, point 147, et du 26 février 2002, Esedra/Commission, T-169/00, Rec. p. II-609, point 95).

51 Le Tribunal relève que [le point] 13 de l'avis de marché prohibait que des entités d'un même groupement juridique participent aux mêmes appels d'offres, par exemple en tant que membres de consortiums, afin d'éviter un risque de conflit d'intérêts ou de concurrence faussée entre les soumissionnaires. De cette interdiction, il résulte que le respect [du point] 13 de l'avis de marché conditionnait la validité d'une offre, étant entendu que la Commission jouit d'un large pouvoir d'appréciation pour déterminer tant le contenu que la mise en œuvre des règles applicables à la passation d'un marché sur appel d'offres. Ainsi, même dans l'hypothèse où une violation dudit [point] n'est décelée qu'à un stade avancé de la procédure d'appel d'offres, [ce point] trouve à s'appliquer.

52 Compte tenu de ces considérations, il importe, en l'espèce, de déterminer si la Commission a commis une erreur manifeste d'appréciation en considérant que le DIIS et le DIHR appartenaient au même groupement juridique. À cette fin, il convient de rappeler que, en l'absence d'une définition textuelle ou jurisprudentielle de la notion de groupement juridique qui fixerait les critères d'un tel groupement, la Commission était obligée, aux fins de se prononcer quant à la réunion des conditions d'application [du point] 13 de l'avis de marché, de procéder à un examen au cas par cas en tenant compte de tous les éléments pertinents.

53 Dès lors, aux fins de reconnaître dans le présent litige l'existence d'un groupement juridique, la Commission a eu à déterminer si les entités en cause étaient structurellement liées au Centre, cet élément étant susceptible de créer un risque de conflit d'intérêts ou de concurrence faussée entre les soumissionnaires, étant entendu néanmoins que d'autres facteurs pouvaient venir au soutien de l'analyse des liens structurels, tels que ceux ayant trait au degré d'indépendance des entités concernées et qualifiés par les parties de 'critère fonctionnel'.

54 En l'espèce, il ressort des décisions attaquées que la Commission a constaté que le DIIS et le DIHR faisaient juridiquement partie du Centre et appartenaient ainsi à une même structure. Elle a déduit de la loi danoise du 6 juin 2002 ainsi que des statuts du Centre et de ceux des instituts que le DIIS et le DIHR ne constituaient pas des entités juridiques distinctes du Centre et a relevé que ce dernier assurait notamment l'administration commune des deux instituts, qui étaient par ailleurs représentés au conseil d'administration du Centre.

55 S'agissant, premièrement, de l'appartenance structurelle des instituts au Centre, il ressort effectivement du dossier, et plus spécifiquement de la section 1, sous-section 2, des statuts du Centre, que ce dernier se compose de deux entités autonomes: le DIIS et le DIHR, les deux instituts et le Centre partageant les mêmes locaux.

56 Concernant l'administration des deux instituts, comme l'a relevé la Commission dans les décisions attaquées, l'article 2 des statuts du Centre énonce que ce dernier 'assure une administration conjointe pour les finances, les ressources humaines, l'administration, les services communs ainsi que la bibliothèque commune aux deux instituts'. Ainsi, les services administratifs, tels que le paiement des salaires et la gestion des facturations, sont assurés par le Centre, qui reçoit des deux instituts une rémunération spécifique en contrepartie des prestations offertes, ce dernier étant également chargé de la réception des paiements versés au profit des instituts.

57 Par ailleurs, ainsi que la Commission l'a également relevé dans les décisions attaquées, il existe un lien entre les instituts et le conseil d'administration du Centre, étant donné que certains membres de ce dernier sont désignés par le DIIS et le DIHR (section 5, sous–section 3, de la loi danoise du 6 juin 2002). Un échange de vues concernant les stratégies commerciales à mener par les deux instituts peut donc avoir lieu à ce niveau élevé de la structure. Ce lien est renforcé par le fait, qui ressort également du dossier, que le conseil d'administration du Centre discute des prévisions opérationnelles des deux instituts.

58 Il résulte de ce qui précède que les deux instituts doivent être considérés comme faisant structurellement partie du même groupement juridique. Dès lors, la Commission n'a pas commis d'erreur manifeste d'appréciation en faisant application [du point] 13 de l'avis de marché, cette appartenance structurelle constituant un indice suffisant d'un risque de concurrence faussée entre les soumissionnaires, voire de conflit d'intérêts. En outre, force est de constater que la prise en compte d'éléments relevant du critère fonctionnel ne remet pas en cause l'appréciation de la Commission à cet égard.

59 S'agissant en effet, deuxièmement, du critère fonctionnel, à savoir de l'indépendance des instituts à l'égard du Centre, le Tribunal relève que l'autonomie financière des instituts est relativement limitée par l'influence du Centre. En effet, comme cela ressort du dossier, le DIIS et le DIHR sont financés en partie par des fonds publics octroyés au Centre qui doit les répartir à hauteur de 80 % pour le DIIS et à hauteur de 20 % pour le DIHR. De plus, les articles 4 et 15 des statuts du DIIS énoncent que ce dernier est 'placé sous les auspices du [Centre]' et que "[l]es comptes de l'institut son contrôlés en tant qu'entité du [Centre] par le 'Rigsrevisor'". De même, les comptes du DIHR doivent être approuvés par le conseil d'administration du Centre.

60 En ce qui concerne l'autonomie décisionnelle des instituts, les requérantes mettent en exergue le fait que les conseils d'administration des instituts sont autonomes à l'égard du Centre. Cette allégation ne suffit cependant pas à infirmer la constatation selon laquelle le DIIS et le DIHR appartiennent à un même groupement juridique, puisque cette appartenance n'exclut pas nécessairement une autonomie décisionnelle des différentes entités juridiques qui coexistent au sein d'un même groupement.

61 Quant à l'argument des requérantes, selon lequel la Commission aurait omis de prendre en considération le fait que les instituts possédaient des patrimoines distincts, le Tribunal constate que les requérantes n'ont pas été en mesure d'apporter des éléments probants susceptibles de démontrer que la Commission aurait, à tort, relevé dans les décisions attaquées que les actifs des instituts appartenaient au Centre. Par ailleurs, le fait que la Commission ait estimé que les instituts étaient dépourvus de personnalité juridique n'est pas constitutif d'une erreur manifeste d'appréciation conduisant à une application erronée [du point] 13 de l'avis de marché. En effet, d'une part, il convient de relever que les décisions attaquées ne sont nullement fondées sur l'absence de personnalité juridique, cet élément n'étant à aucun moment mentionné dans ces dernières. D'autre part, et comme le démontre à suffisance de droit la Commission dans ses écritures, à supposer que les instituts aient une personnalité juridique propre, l'appartenance du DIIS et du DIHR au Centre justifiait l'application [du point] 13 de l'avis de marché.

62 Partant, la Commission n'a pas commis d'erreur manifeste d'appréciation en se fondant principalement sur un critère structurel. Le fait qu'elle ait pu demander, dans un premier temps, des informations se rattachant au critère fonctionnel pour ensuite retenir le critère structurel ne saurait modifier ce constat, la Commission ayant effectué une analyse approfondie des circonstances du cas d'espèce avant de faire application [du point] 13 de l'avis de marché.

63 Dès lors, le grief selon lequel la Commission a violé le principe de sécurité juridique en décidant d'opter pour un critère structurel est non fondé. […]

64 Quant au caractère prétendument disproportionné et inadéquat [du point] 13 de l'avis de marché, les requérantes ont indiqué, lors de l'audience, que le champ d'application [du point] 13 de l'avis de marché était trop étendu, pouvant couvrir des situations dans lesquelles aucun conflit d'intérêts ne saurait résulter d'une appartenance structurelle. À cet égard, il convient de considérer que, compte tenu du large pouvoir d'appréciation dont jouit la Commission et de la nécessité de fixer à l'avance des règles claires et compréhensibles dans l'avis de marché, la Commission n'a pas manifestement excédé son pouvoir en décidant du contenu [du point] 13 de l'avis de marché et en l'appliquant aux offres des requérantes. En particulier, elle n'a pas dépassé les limites de ce pouvoir en stipulant audit [point] 13 que l'appartenance de personnes morales à un même groupement juridique entraînerait leur exclusion de l'adjudication.

[…]

67 Il résulte de ce qui précède que, eu égard à l'appartenance structurelle du DIIS et du DIHR au Centre, la Commission n'a pas commis d'erreur manifeste d'appréciation et n'a pas violé le principe de sécurité juridique en considérant que les deux instituts faisaient partie du même groupement juridique et en appliquant [le point] 13 de l'avis de marché. Partant, le deuxième moyen doit être rejeté.»

15 Dans le cadre de son examen du troisième moyen invoqué dans l'affaire T-376/05, le Tribunal a notamment jugé ce qui suit:

«77 En l'espèce, la Commission a indiqué aux requérantes, le 20 mai 2005, que leurs offres avaient été retenues pour le lot n° 7 à condition que ces dernières fournissent les documents prouvant qu'elles ne se trouvaient dans aucune des situations correspondant aux causes d'exclusion prévues au point 2.3.3 du guide pratique.

78 Il convient de constater que le DIHR a indiqué son appartenance au Centre dès la proposition de candidature de TEA-CEGOS Consortium, en mentionnant également que l'un de ses partenaires était le DIIS. Le DIIS a déclaré quant à lui n'appartenir à aucun groupement ou réseau. Or, si le DIIS considérait réellement ne pas appartenir à un groupement juridique, il aurait dû à tout le moins signaler à la Commission, au vu des informations requises dans le formulaire de déclaration, qu'il entretenait des liens avec le Centre et faisait ainsi partie d'un réseau, les statuts du Centre stipulant expressément que le DIIS constitue l'une de ses entités.

79 Bien que la déclaration du DIIS soit erronée, il convient de relever que l'offre technique soumise par GHK Consortium indiquait le nom des différents membres du Consortium et que le DIIS y était mentionné en troisième position. Par conséquent, la Commission aurait pu s'apercevoir que la déclaration du DIIS n'était pas exacte. Toutefois, le fait que la Commission ne se soit rendu compte de l'appartenance des instituts au Centre qu'à un stade avancé de la procédure est sans incidence sur la solution du présent litige, dès lors que, même à ce stade, l'offre de GHK Consortium devait être exclue conformément [au point] 13 de l'avis de marché.

80 En tout état de cause, la complexité inhérente à la diversité des informations soumises lors des procédures d'appel d'offres peut expliquer que la Commission ne se soit rendu compte de l'existence de l'appartenance au Centre qu'une fois les deux offres retenues sous conditions. En effet, ce n'est qu'à ce stade de la procédure que les requérantes se trouvaient dans l'obligation de fournir les documents qui justifiaient la véracité de leurs déclarations initiales. Il s'ensuit que la Commission n'a pas violé le principe de bonne administration en ne soulevant la question de l'appartenance des instituts au Centre qu'après l'acceptation conditionnelle de l'offre de GHK Consortium.

81 S'agissant de la conduite de la procédure d'appel d'offres par la Commission, force est de relever que, dès le 22 juin 2005, cette dernière a demandé à TEA-CEGOS d'expliquer le lien qui unissait le DIHR au Centre et a prié GHK International de lui apporter des éclaircissements quant au statut juridique du DIIS. Faisant suite aux informations apportées par TEA-CEGOS, la Commission lui a demandé le 27 juin 2005, avant d'adopter la décision du 18 juillet 2005, de fournir des renseignements supplémentaires. De plus, il ressort des faits que, entre le 18 juillet et le 12 octobre 2005, la Commission a été en contact constant avec les requérantes et leur a notamment indiqué qu'elle procédait à un réexamen des éléments soumis et leur ferait connaître dans les meilleurs délais la position finale qu'elle adopterait. En outre, la Commission s'est attachée à répondre promptement aux sollicitations des requérantes, notamment en informant les avocats de TEA-CEGOS de l'état de la procédure dès le 13 septembre 2005, ces derniers ayant manifesté leur souhait de le connaître le 8 septembre

2005.

82 En ce qui concerne les informations contradictoires qui auraient été diffusées sur le site Internet d'EuropeAid, il convient de constater que les noms des soumissionnaires retenus et mentionnés sur ledit site étaient ceux qui avaient été retenus sous conditions par la Commission. Il était donc logique que les noms des requérantes y aient figuré, puisque ce n'est qu'au moment où ces dernières ont eu à prouver la véracité de leurs déclarations, en l'espèce à la suite des décisions du 20 mai 2005, que l'appartenance du DIIS et du DIHR au Centre est apparue de manière claire et non équivoque. Une fois les décisions du 18 juillet 2005 adoptées, les noms des requérantes ont été retirés dudit site, et ce dès le 25 juillet 2005.

83 Il résulte de ce qui précède que les requérantes n'ont pas démontré que la Commission avait violé le principe de bonne administration et avait manqué à son devoir de diligence de sorte que leurs griefs sont, en tout état de cause, non fondés. Partant, le troisième moyen doit être rejeté.»

16 Sur la base notamment de ces considérations, le Tribunal a décidé de rejeter les recours.

Les conclusions des parties devant la Cour

17 Le présent pourvoi n'a été formé que par TEA-CEGOS et STG, GHK Consulting s'étant abstenue d'engager une action devant la Cour.

18 En substance, TEA-CEGOS et STG concluent à ce que la Cour:

– annule l'arrêt attaqué,

– tranche le litige en faisant droit aux demandes introduites devant le Tribunal, et

– condamne la Commission aux dépens.

19 La Commission conclut au rejet du pourvoi et à la condamnation des requérantes aux dépens.

20 GHK Consulting n'a pas soumis d'observations à la Cour dans le cadre du présent pourvoi.

Sur le pourvoi

21 En vertu de l'article 119 du règlement de procédure, lorsque le pourvoi est manifestement irrecevable ou manifestement non fondé, la Cour peut, à tout moment, sur rapport du juge rapporteur, l'avocat général entendu, le rejeter par voie d'ordonnance motivée.

22 À l'appui de leurs conclusions, les requérantes invoquent trois moyens. Outre que, dans le cadre de chacun de ces moyens les requérantes invoquent la méconnaissance, par le Tribunal, de l'obligation de motivation, elles fondent le premier de ceux-ci sur une violation du principe de sécurité juridique, le deuxième et le troisième sur une dénaturation des éléments de preuve, ce dernier moyen étant également tiré d'une violation du principe de bonne administration.

Sur le premier moyen

23 Par la première branche du premier moyen, les requérantes critiquent l'interprétation que le Tribunal a retenue de la notion de groupement juridique et, par la seconde branche de ce moyen, elles reprochent à celui-ci d'avoir adopté une motivation incohérente sur ce point.

Sur la première branche du premier moyen

24 Par la première branche de ce moyen, les requérantes font valoir que l'avis de marché et les instructions aux soumissionnaires ne contiennent aucune définition de la notion de groupement juridique figurant au point 13 de l'avis de marché. La Commission aurait d'abord retenu un critère fonctionnel pour ensuite lui préférer un critère structurel. Le principe de sécurité juridique

s'opposerait à ce que la Commission agisse ainsi, au cas par cas, sans cadre préalablement défini. Les requérantes n'auraient donc pas pu connaître sans ambiguïté leurs droits et obligations au titre de la procédure d'appel d'offres en question et n'auraient pas pu prendre leurs dispositions en conséquence. En considérant, notamment au point 63 de l'arrêt attaqué, que la Commission n'avait pas violé le principe de sécurité juridique, le Tribunal aurait méconnu ce principe même.

25 La Commission fait valoir, à titre principal, que la première branche du présent moyen est irrecevable au motif que, étant tirée de l'absence de définition préalable de la notion de groupement juridique, elle constitue un moyen nouveau qui n'a pas été soulevé en première instance.

26 Cet argument ne saurait toutefois être retenu. En effet, il ressort notamment du point 42 de l'arrêt attaqué que l'argument tiré de l'absence de définition préalable de la notion de groupement juridique a bien été débattu devant le Tribunal, dans le cadre de la procédure de première instance. Par conséquent, les requérantes sont recevables à contester l'appréciation portée par le Tribunal sur cette question.

27 La Commission fait valoir, à titre subsidiaire, que la présente branche du moyen est non fondée.

28 Il convient de considérer que l'exclusion automatique des soumissionnaires appartenant au même groupement juridique, prévue au point 13 de l'avis de marché, visait à éviter que la concurrence soit faussée et à concrétiser la notion de situation de conflit d'intérêts au sens de l'article 94 du règlement financier.

29 Dans le cadre d'un appel d'offres, la simple mention des termes «groupement juridique» présente un degré de précision suffisante, sans que la Commission soit tenue d'apporter plus d'informations.

30 En effet, si un pouvoir adjudicateur est tenu de rédiger les conditions d'un appel d'offres avec précision et clarté, il n'est pas obligé de prévoir à l'avance tous les cas de figure, aussi rares qu'ils puissent être, susceptibles de se présenter dans la pratique.

31 Il est loisible audit pouvoir d'évaluer l'applicabilité d'une condition telle que celle posée au point 13 de l'avis de marché en procédant à un examen au cas par cas en tenant compte de tous les éléments pertinents, ainsi que le Tribunal l'a jugé au point 52 de l'arrêt attaqué.

32 Il s'ensuit que le Tribunal n'a pas méconnu le principe de sécurité juridique et que la première branche du moyen n'est pas fondée.

Sur la seconde branche du premier moyen

33 Par la seconde branche de ce moyen, les requérantes font valoir, premièrement, que le Tribunal s'est contredit en reconnaissant que, en omettant de définir la notion de groupement juridique, la Commission ne s'était pas dotée à l'avance de règles claires et compréhensibles, alors qu'il aurait, dans le même temps, souligné que de telles règles sont nécessaires lorsque la partie défenderesse jouit d'un large pouvoir d'appréciation. Deuxièmement, la considération, exposée au point 62 de l'arrêt attaqué, selon laquelle la Commission n'avait pas commis d'erreur manifeste d'appréciation ne suffirait pas pour que le Tribunal puisse conclure, au point 63 de cet arrêt, que celle-ci n'avait pas violé le principe de sécurité juridique. Troisièmement, le Tribunal n'aurait pas suffisamment motivé son appréciation selon laquelle la Commission avait effectué une analyse approfondie des circonstances de l'espèce.

34 S'agissant du premier de ces arguments, il convient de rappeler que, au point 52 de l'arrêt attaqué, le Tribunal a constaté «l'absence d'une définition textuelle ou jurisprudentielle de la notion de groupement juridique» pour en déduire que la Commission était obligée de procéder à un examen au cas par cas.

35 Au point 64 de cet arrêt, le Tribunal a constaté la nécessité pour le pouvoir adjudicateur de fixer à l'avance des règles claires et compréhensibles. En appliquant ce critère, le Tribunal a considéré que, en décidant du contenu du point 13 de l'avis de marché, la Commission n'avait pas dépassé les limites de son pouvoir d'appréciation.

36 Aucune incohérence ne peut être relevée entre ces deux éléments de la motivation de l'arrêt attaqué. En effet, il est cohérent de considérer que le point 13 de l'avis de marché suffisait à établir des règles claires et compréhensibles applicables à l'appel d'offres, sans qu'il soit nécessaire

d'accompagner ce point de définitions plus détaillées. Il ne découle pas nécessairement de l'absence d'une définition préalable de la notion de groupement juridique que la Commission ne s'était pas dotée de règles claires et compréhensibles. L'argument tiré d'une contradiction entachant le raisonnement du Tribunal n'est donc pas fondé.

37 En ce qui concerne le deuxième argument, il est vrai que le point 63 de l'arrêt attaqué commence par l'expression «Dès lors». Cependant il ressort à l'évidence d'une lecture d'ensemble de cet arrêt que cette expression renvoie non pas au seul point 62, mais à l'ensemble des développements figurant aux points 52 à 62 dudit arrêt. La conclusion relative au principe de sécurité juridique qui figure au point 63 du même arrêt découle de manière cohérente de ces développements. Par conséquent l'argument tiré de ce que cette conclusion n'est pas assortie d'une motivation suffisante n'est pas fondé.

38 Quant au troisième argument, il convient de considérer que l'arrêt attaqué, et notamment ses points 49 ainsi que 81, exposent de façon claire et suffisante les motifs ayant conduit le Tribunal à la conclusion que les décisions attaquées avaient été adoptées à la suite d'un réexamen approfondi mené par la Commission. L'argument soulevé à cet égard n'est pas fondé.

39 Il en résulte que la seconde branche du moyen n'est pas fondée.

40 Par conséquent, le premier moyen doit être rejeté dans son intégralité.

Sur le deuxième moyen

41 Par la première branche du deuxième moyen, les requérantes reprochent au Tribunal d'avoir adopté une motivation erronée ou insuffisante. Par les deux autres branches de ce moyen, il est allégué, respectivement, que le Tribunal aurait dénaturé la décision litigieuse ainsi que d'autres éléments de preuve.

Sur la première branche du deuxième moyen

42 Par la présente branche de ce moyen, les requérantes font valoir que, aux points 52 à 61 de l'arrêt attaqué, le Tribunal a violé l'obligation de motivation, d'abord en admettant que les instituts en cause pouvaient être en situation de conflit d'intérêts alors qu'ils étaient autonomes, ensuite, en privilégiant le critère structurel au détriment du critère fonctionnel et, enfin, en examinant les éléments relevant du critère fonctionnel alors qu'il aurait écarté la pertinence de ce dernier.

43 S'agissant du premier de ces arguments, il est vrai que, au point 55 de l'arrêt attaqué, le Tribunal a constaté que le Centre «se compose de deux entités autonomes: le DIIS et le DIHR, les deux instituts et le Centre partageant les mêmes locaux».

44 Si dans ce passage dudit point, le Tribunal admet que ces deux entités apparaissent, dans une certaine mesure, comme distinctes l'une de l'autre, dans les points suivants de l'arrêt attaqué il énumère de façon détaillée les éléments de connexité qui les unissent. Ainsi, au point 56 de cet arrêt, il précise que les finances, les ressources humaines, l'administration et la bibliothèque commune des deux instituts sont gérées en commun par le Centre. Au point 57 dudit arrêt, il rappelle que certains membres du conseil d'administration du Centre sont désignés par le DIIS et le DIHR. Au point 59 de ce même arrêt, il explique de quelle manière la relative autonomie financière de ces instituts est limitée par l'influence du Centre. Enfin, au point 60 de l'arrêt attaqué, le Tribunal considère que l'appartenance à un même groupement juridique n'exclut pas nécessairement une autonomie décisionnelle des différentes entités qui coexistent au sein de celui-ci.

45 Il convient d'estimer que, de cette manière, le Tribunal a motivé de façon complète et pertinente sa conclusion selon laquelle, malgré un certain degré d'autonomie, les deux instituts en question étaient suffisamment connexes pour pouvoir se trouver en situation de conflit d'intérêts.

46 En ce qui concerne le deuxième argument, il convient de relever que le Tribunal était appelé à trancher la question de savoir si les deux instituts en cause appartenaient au même groupement juridique au sens du point 13 de l'avis de marché. À cette fin, le Tribunal devait interpréter cette disposition en fonction de l'objet, du système et du libellé de celle-ci. À cet égard, il apparaît que cette disposition vise à éviter que la concurrence soit faussée ou que se présentent des conflits d'intérêts dans le cadre de l'appel d'offres. Il est conforme à cette interprétation de retenir le critère de l'appartenance structurelle à un groupe pour décider du point de savoir si certaines entités font partie d'un groupement juridique au sens de ladite disposition. Partant, il était loisible au Tribunal de

privilégier le critère structurel par rapport au critère fonctionnel.

47 Sur ce point, il ressort de l'arrêt attaqué, et notamment de son point 58, que la motivation retenue, à cet égard, par le Tribunal est cohérente et claire, et n'est pas erronée.

48 Quant au troisième argument invoqué, il convient de relever, d'une part, que, contrairement à ce qu'allèguent les requérantes, le Tribunal n'a pas écarté la pertinence des éléments relevant du critère fonctionnel. Au contraire, il ressort du point 53 de l'arrêt attaqué que, si le Tribunal attribue davantage d'importance au critère structurel, il n'exclut pas pour autant que le critère fonctionnel puisse revêtir une certaine importance. D'autre part, étant donné que les requérantes avaient fait état d'une prétendue autonomie fonctionnelle des instituts pour dénier l'existence d'un groupement juridique, il était légitime que le Tribunal réponde à cet argument.

49 Il s'ensuit que la motivation de l'arrêt attaqué n'est pas entachée d'une contradiction en raison du fait qu'elle comporte un examen des éléments relevant du critère fonctionnel.

50 Par conséquent, la première branche du deuxième moyen doit être écartée comme non fondée.

Sur la deuxième branche du deuxième moyen

51 Par la deuxième branche de ce moyen, les requérantes font valoir que le Tribunal a dénaturé la décision de la Commission du 12 octobre 2005 adressée à TEA-CEGOS Consortium. D'une part, elles reprochent au Tribunal d'avoir considéré, au point 58 de l'arrêt attaqué, que l'appartenance structurelle constituait un indice du «risque de concurrence faussée entre les soumissionnaires, voire de conflit d'intérêts» alors que le critère figurant dans le règlement financier est celui de «la situation de conflit d'intérêts» (par opposition au simple risque d'une telle situation). D'autre part, les requérantes font valoir que le Tribunal a dénaturé ladite décision en retenant que la Commission s'était fondée principalement sur un critère structurel alors que, en fait, cette institution s'était fondée exclusivement sur le critère structurel.

52 S'agissant du premier de ces arguments, il convient de considérer que, dans le présent contexte, les notions de situation de conflit d'intérêts et de risque de conflit d'intérêts, contrairement à ce que laissent entendre les requérantes, ne s'excluent pas mutuellement. En effet, les deux notions sont intimement liées à la prévention du risque que le pouvoir adjudicateur prenne des décisions faussées. Par conséquent, le Tribunal, en se fondant sur le critère du risque de conflit d'intérêts, n'a pas dénaturé la décision litigieuse.

53 Quant au second argument, il ressort du dossier que la Commission a demandé, dans un premier temps, des informations se rattachant au critère fonctionnel pour ensuite retenir le critère structurel comme base de sa décision du 12 octobre 2005. Lorsque le Tribunal a considéré, à la première phrase du point 62 de l'arrêt attaqué, que la Commission s'était fondée principalement sur un critère structurel, c'est manifestement en se référant à l'ensemble de ce processus décisionnel et non pas exclusivement aux termes de la décision du 12 octobre 2005. Lue en ce sens, la constatation du Tribunal selon laquelle la Commission s'était fondée principalement sur un critère structurel n'est pas inexacte. Il en résulte que le présent argument est fondé sur une lecture erronée de l'arrêt attaqué.

54 Par conséquent, il convient de considérer la deuxième branche du présent moyen comme non fondée.

Sur la troisième branche du deuxième moyen

55 Par la troisième branche de ce moyen, les requérantes font valoir que le DIIS et le DIHR sont des entités autonomes qui ne disposent l'une à l'égard de l'autre d'aucun moyen de contrôle et qui ne sont soumises à aucun contrôle de la part du Centre. En concluant qu'il n'en est pas ainsi, le Tribunal aurait dénaturé certains éléments de preuve. D'une part, elles font valoir que le Tribunal n'identifie pas les pièces du dossier sur lesquelles il se fonde pour conclure, au point 57 de l'arrêt attaqué, qu'un échange de vues concernant les stratégies commerciales à conduire peut avoir lieu au niveau du conseil d'administration du Centre et que les éléments du dossier ne permettent pas d'arriver à cette conclusion. D'autre part, les requérantes prétendent que le Tribunal a dénaturé les éléments de preuve en retenant, au point 59 de cet arrêt, que l'autonomie financière des instituts est relativement limitée par l'influence du Centre.

56 S'agissant de l'argument relatif à la possibilité d'un échange de vues au sein du conseil

d'administration du Centre, il convient de constater, d'une part, qu'il ressort clairement du point 57 de l'arrêt attaqué que le Tribunal se réfère pour l'essentiel à la loi danoise du 6 juin 2002. Il résulte, d'autre part, de ce point que le Tribunal n'a pas affirmé qu'un tel échange de vues avait effectivement eu lieu. Il a simplement considéré, et cela constitue une évidence, que la présence des membres des instituts au sein du conseil d'administration du Centre permettait un tel échange. Il s'ensuit que cet argument n'est pas fondé.

57 En ce qui concerne l'argument relatif à l'autonomie financière des instituts en cause, il convient de relever, d'une part, que le Tribunal a retenu de façon exacte que ces derniers sont financés par des fonds publics, lesquels leur sont attribués selon une formule sur laquelle le Centre n'a aucune emprise. D'autre part, s'agissant de la question du contrôle des comptes de ces instituts, le Tribunal s'est fondé sur des éléments contenus dans le dossier. Il en découle que le Tribunal n'a pas dénaturé les éléments de preuve relatifs à ce point.

58 Par conséquent, la troisième branche du moyen n'est pas fondée.

59 Il résulte de ce qui précède que le deuxième moyen doit être rejeté dans son ensemble.

Sur le troisième moyen

60 Par leur troisième moyen, les requérantes reprochent au Tribunal d'avoir considéré, aux points 79 à 81 de l'arrêt attaqué, en se référant à la complexité inhérente à la diversité des informations soumises lors des procédures d'appel d'offres, que la Commission n'a pas violé le principe de bonne administration en ne soulevant la question de l'appartenance des instituts au Centre qu'à un stade tardif de la procédure.

61 À cet égard, les requérantes invoquent quatre arguments. Premièrement, l'appartenance au Centre des instituts en cause aurait été révélée non pas par l'examen des documents fournis par les requérantes, mais par des informations fournies par un tiers.

62 Deuxièmement, les documents et déclarations fournis à la suite du courrier de la Commission du 20 mai 2005 ne viseraient pas à justifier la véracité des déclarations initiales, mais constitueraient une confirmation de la validité des premières déclarations.

63 Troisièmement, la Commission ne se serait pas donné les moyens informatiques nécessaires pour atteindre l'objectif à poursuivre, à savoir l'exclusion des candidats non qualifiés.

64 Quatrièmement, la Commission n'aurait pas fait preuve de diligence dans ses contacts avec les requérantes pendant la période de réexamen du dossier.

65 Force est de constater que ces quatre arguments sont inopérants. En effet, à supposer même que les affirmations contenues dans ces arguments soient exactes, aucune d'entre elles ne pourrait entraîner l'annulation de l'arrêt attaqué, car en aucun cas elles n'infirmeraient la conclusion, décisive pour l'arrêt attaqué, selon laquelle le DIIS et le DIHR faisaient partie du même groupement juridique, de sorte que le point 13 de l'avis de marché était applicable.

66 Par conséquent, il convient de rejeter le troisième moyen.

67 Il résulte de tout ce qui précède que le pourvoi doit, en application de l'article 119 du règlement de procédure, être rejeté dans son intégralité.

Sur les dépens

68 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, applicable à la procédure de pourvoi en vertu de l'article 118 du même règlement, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation des requérantes et ces dernières ayant succombé en leurs moyens, il y a lieu de les condamner aux dépens.

Par ces motifs, la Cour (septième chambre) ordonne:

1) Le pourvoi est rejeté.

2) TEA-CEGOS SA et Services techniques globaux (STG) SA sont condamnées aux dépens.

Signatures

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* Langue de procédure: le français.

Order of the Court (Seventh Chamber) of 20 April 2007

TEA-CEGOS SA and Services techniques globaux (STG) SA v Commission of the European Communities. Appeal - Public contracts for services - Call for tenders relating to a multiple framework contract for the short term recruitment of experts responsible for providing technical assistance to third countries - Rejection of the appellants' tender - Appeal manifestly unfounded. Case C-189/06 P.

European Communities' public procurement

-

Tendering procedure (see paras 29-31

)

Re:

Appeal brought against the judgment of the Court of First Instance (Second Chamber) of 14 February 2006 in Joined Cases T-376/05 and T-383/05 TEA-CEGOS and Others v Commission dismissing the application for annulment, first, of the Commission's decisions of 12 October 2005 rejecting the tenders submitted by the applicants in the context of the procedure for the call for tenders bearing the reference EuropeAid/119860/C/SV/multi-Lot 7' and, second, of any other decision taken by the Commission in the context of the same call for tenders following the decisions of 12 October 2005.

Operative part

The Court:

1. Dismisses the appeal;

2. Orders TEA-CEGOS SA and Services techniques globaux (STG) SA to pay the costs.

DOCNUM	62006O0189
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page I-00062*
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SUB	Public contracts of the European Communities
AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions ; Person
NATIONA	E B GB
PROCEDU	Action for annulment;Appeal
ADVGEN	Mazak
JUDGRAP	Cunha Rodrigues
DATES	of document: 20/04/2007 of application: 13/04/2006

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Documents relatifs à la même affaire

Ordonnance de la Cour (septième chambre) du 20 avril 2007 – TEA-CEGOS et STG / Commission(affaire C–189/06 P)

«Pourvoi – Marchés publics de services – Appel d'offres relatif à un contrat-cadre multiple pour le recrutement d'experts à court terme chargés de fournir une assistance technique en faveur de pays tiers – Rejet de l'offre des requérantes – Pourvoi manifestement non fondé»

Marchés publics des Communautés européennes - Procédure d'appel d'offres (cf. points 29-31)

Objet

Pourvoi formé contre l'arrêt du Tribunal de première instance (deuxième chambre) du 14 février 2006, TEA-CEGOS e.a. / Commission (affaires jointes T-376/05 et T-383/05), par lequel le Tribunal a rejeté le recours visant l'annulation, d'une part, des décisions de la Commission du 12 octobre 2005, rejetant les offres soumises par les requérantes dans le cadre de la procédure d'appel d'offres portant la référence «EuropeAid/119860/C/SV/multi-Lot7» et, d'autre part, de toute autre décision prise par la Commission dans le cadre de ce même appel d'offres à la suite des décisions du 12 octobre 2005.

Dispositif

1) Le pourvoi est rejeté.

2) TEA-CEGOS SA et Services techniques globaux (STG) SA sont condamnées aux dépens.

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Order of the Court of 20 April 2007 - TEA-CEGOS, SA, Services techniques globaux (STG) SA v GHK Consulting Ltd, Commission of the European Communities

(Case C-189/06 P) [1]

(Appeal - Public contracts for services - Call for tenders relating to a multiple framework contract for the short term recruitment of experts responsible for providing technical assistance to third countries - Rejection of the appellants' tender - Appeal manifestly unfounded)

Language of the case: French

Parties

Appellants: TEA-CEGOS, SA, Services techniques globaux (STG) SA (represented by: G. Vandersanden and L. Levi, avocats)

Other parties to the proceedings: GHK Consulting Ltd, Commission of the European Communities (represented by: M. Wilderspin and G. Boudot, Agents)

Re:

Appeal brought against the judgment of the Court of First Instance (Second Chamber) of 14 February 2006 in Joined Cases T-376/05 and T-383/05 *TEA-CEGOS and Others* v *Commission* dismissing the application for annulment, first, of the Commission's decisions of 12 October 2005 rejecting the tenders submitted by the applicants in the context of the procedure for the call for tenders bearing the reference 'EuropeAid/119860/C/SV/multi-Lot 7' and, second, of any other decision taken by the Commission in the context of the same call for tenders following the decisions of 12 October 2005

Operative part of the order

The Court:

Dismisses the appeal;

Orders TEA-CEGOS SA and Services techniques globaux (STG) SA to pay the costs.

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1 -

2 - OJ C 165, 15.07.2006.

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Appeal brought on 13 April 2006 by TEA-CEGOS, SA and Services techniques globaux (STG) SA against the judgment of the Court of First Instance (Second Chamber) delivered on 14 February 2006 in Joined Cases T-376/05 and T-383/05 TEA-CEGOS, SA, STG SA and GHK Consulting Ltd v Commission of the European Communities

(Case C-189/06 P)

Language of the case: French

Parties

Appellants: TEA-CEGOS, SA, Services techniques globaux (STG) SA (represented by: G. Vandersanden and L. Levi, lawyers)

Other parties to the proceedings: GHK Consulting Ltd, Commission of the European Communities

Form of order sought

The appellants claim that the Court should:

set aside the judgment of 14 February 2006 of the Court of First Instance in Joined Cases T-376/05 and T-383/05;

consequently, grant the appellants the relief they claimed at first instance and, therefore,

annul the decision of 12 October 2005 rejecting the candidature and bid of the TEA-CEGOS consortium and withdrawing the decision awarding the framework contract to the TEA-CEGOS consortium under the call for tenders EuropeAid - 2/119860/C-LOT No 7;

annul all the other decisions taken by the defendant under that call for tenders following the decision of 12 October 2005 and, in particular, the award decisions and the contracts concluded by the Commission implementing those decisions;

order the defendant to pay all the costs at first instance and on appeal.

Pleas in law and main arguments

The appellants base their appeal on breach of Community law by, and on procedural irregularities before, the Court of First Instance. The appellants submit that the Court of First Instance disregarded the principle of legal certainty, its obligation to state reasons and the principle of sound administration and distorted the evidence.

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JUDGMENT OF THE COURT (Second Chamber)

2 October 2008 (*)

(Failure of a Member State to fulfil obligations – Public supply contracts –Directive 93/36/EEC – Award of public contracts without prior publication of a notice – Light helicopters for the police and the national fire service)

In Case C–157/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 March 2006,

Commission of the European Communities, represented by X. Lewis and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, and by G. Fiengo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of L. Bay Larsen, President of the Sixth Chamber, acting for the President of the Second Chamber, K Schiemann, J. Makarczyk (Rapporteur), J.-C. Bonichot and C. Toader, Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2008,

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

gives the following

Judgment

1 By its action, the Commission of the European Communities seeks a declaration from the Court that by adopting Decree No 558/A/04/03/RR of the Minister for the Interior of 11 July 2003 ('the Ministerial Decree') authorising the derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and in particular under Articles 2(1)(b), 6 and 9 thereof.

Legal context

Community legislation

2 Article 2(1)(b) of Directive 93/36 reads as follows:

‘1. This Directive shall not apply to:

…

(b) supply contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member States concerned or when the protection of the basic interests of the Member State’s security so requires.’

3 Article 3 of Directive 93/36 provides:

‘Without prejudice to Articles 2, 4 and 5(1), this Directive shall apply to all products to which Article 1(a) relates, including those covered by contracts awarded by contracting authorities in the field of defence, except for the products to which Article [296](1)(b) [EC] applies.’

4 Article 6 of Directive 93/36 provides:

‘1. In awarding public supply contracts the contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), in the cases set out below.

2. The contracting authorities may award their supply contracts by negotiated procedure in the case of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions that are in accordance with provisions of Title IV, in so far as the original terms for the contract are not substantially altered. The contracting authorities shall in these cases publish a tender notice unless they include in such negotiated procedures all the enterprises satisfying the criteria of Articles 20 to 24 which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure.

3. The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

(a) in the absence of tenders or appropriate tenders in response to an open or restricted procedure insofar as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission;

(b) when the products involved are manufactured purely for the purpose of research, experiment, study or development, this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;

(c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

(e) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.

4. In all other cases, the contracting authorities shall award their supply contracts by the open procedure or by the restricted procedure.’

5 Article 9 of Directive 93/36 reads as follows:

‘1. The contracting authorities shall make known, as soon as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement by product area which they envisage awarding during the subsequent 12 months where the total estimated value, taking into account the provisions of Article 5, is equal to or greater than [EUR] 750 000.

The product area shall be established by the contracting authorities by means of reference to the nomenclature “Classification of Products According to Activities (CPA)”. The Commission shall determine the conditions of reference in the notice to particular positions of the nomenclature in accordance with the procedure laid down in Article 32(2).

2. Contracting authorities who wish to award a public supply contract by open, restricted or negotiated procedure in the cases referred to in Article 6(2), shall make known their intention by means of a notice.

3. Contracting authorities who have awarded a contract shall make known the result by means of a notice. However, certain information on the contract award may, in certain cases, not be published where release of such information would impede law enforcement or otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, public or private, or might prejudice fair competition between suppliers.

4. The notices shall be drawn up in accordance with the models given in Annex IV and shall specify the information requested in those models. The contracting authorities may not require any conditions other than those specified in Article 22 and 23 when requesting information concerning the economic and technical standards which they require of suppliers for their selection (Section 11 of Annex IV B, Section 9 of Annex IV C and Section 8 of Annex IV D).

5. The contracting authorities shall send the notices as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities. In the case of the accelerated procedure referred to in Article 12, the notice shall be sent by telex, telegram or telefax.

The notice referred to in paragraph 1 shall be sent as soon as possible after the beginning of each budgetary year.

The notice referred to in paragraph 3 shall be sent at the latest 48 days after the award of the contract in question.

6. The notices referred to in paragraphs 1 and 3 shall be published in full in the *Official Journal of the European Communities* and in the TED data bank in the official languages of the Communities, the text in the original language alone being authentic.

7. The notice referred to in paragraph 2 shall be published in full in the *Official Journal of the European Communities* and in the TED data bank in their original language. A summary of the important elements of each notice shall be published in the official languages of the Communities, the text in the original language alone being authentic.

8. The Office for Official Publications of the European Communities shall publish the notices not later than 12 days after their dispatch. In the case of the accelerated procedure referred to in Article 12, this period shall be reduced to five days.

9. The notices shall not be published in the Official Journals or in the press of the country of the contracting authority before the date of dispatch to the Office for Official Publications of the European Communities; they shall mention that date. They shall not contain information other than that published in the *Official Journal of the European Communities*.

10. The contracting authorities must be able to supply proof of the date of dispatch.

11. The cost of publication of the notices in the *Official Journal of the European Communities* shall be borne by the Communities. The length of the notice shall not be greater than one page of the Journal, or approximately 650 words. Each edition of the Journal containing one or more notices shall reproduce the model notice or notices on which the published notice or notices are based.’

National legislation

6 The Ministerial Decree provides:

'1. Supplies of light helicopters for the use of police forces and the national fire service must be accompanied by special security measures which also apply to documents of the technical evaluation group and the Interministerial Commission referred to in this decree.

2. With regard to the award of those supplies, derogation may be made from the provisions of Legislative Decree No 358 of [24 July 1992], as amended by Legislative Decree No 402 of [20 October 1998 ('Legislative Decree No 358/1992')], as the conditions referred to in Article 4 [point] (c) of that decree have been met in this instance.'

7 Legislative Decree No 358/1992, which is referred to by the Ministerial Decree, constitutes the legislation which transposes the Community legislation on public supply contracts.

8 Article 4 point (c) of Legislative Decree No 358/1992 repeats the provisions of Article 2(1)(b) of Directive 93/36.

The pre-litigation procedure

9 The Commission, having become aware of the existence of the Ministerial Decree and being of the opinion that it was not in compliance with Article 2(1)(b), 6 and 9 of Directive 93/36, sent a letter of formal notice to which the Italian Republic replied on 30 July 2004.

10 As the Commission was not satisfied with that answer, it sent the Italian Republic a reasoned opinion on 14 December 2004 calling on it to take the measures necessary to comply with that opinion within a period of two months from receipt thereof.

11 By letter of 22 March 2005, the Italian Republic informed the Commission that it had not yet replied in detail to that reasoned opinion but that it 'had initiated a process of in-depth reflection in that regard' the initial outcomes of which 'suggested that a reading of that decree could give rise to some perplexity as regards its correspondence with the legislative framework in force at Community level in respect of procedures for the award of public supply contracts'. That letter continued by expressing a wish to engage in technical dialogue with the Commission's staff which could 'accompany the process of reflection in question and lead to a re-examination of the abovementioned legislation which duly takes account of the various relevant requirements'.

12 Despite two letters from the Commission of 14 April and 26 May 2005 informing the Italian Republic that it was prepared to engage in dialogue with officials of the Ministry concerned, that technical dialogue never took place. In those circumstances, the Commission decided to bring the present action.

The action

Arguments of the parties

13 The Commission alleges that, by the Ministerial Decree, the Italian Republic improperly excluded supplies of light helicopters for the use of police forces and the national fire service from the scope of Directive 93/36, because none of the conditions laid down in Article 2(1)(b) had been complied with.

14 In that regard, the Commission points out that those helicopters are intended for police forces and the national fire service, that is to say for civilian departments, which should not normally take part in military operations. Furthermore, the fact that the installation of light arms is envisaged as a mere possibility confirms that the helicopters in question are intended for a use which is essentially civilian. Lastly, the fact that those helicopters have to have certain characteristics similar to those of military helicopters is not sufficient for them to be equated with military supplies. For the Commission, they are at the very most aircraft intended for a possible dual use.

15 In addition, the Commission takes the view that, even if military supplies were involved, Directive 93/36 should still be applied and the circumstances warranting the derogation provided for in Article 2(1)(b) of that directive should be established by the Member State which is relying on that derogation. The Commission considers that, in the present case, the Italian Republic has not established that it was legitimate to have recourse to the derogation set out in that provision.

16 The Italian Republic maintains that, in the current international context, the concepts of war and war material have departed significantly from their original meanings, as has the concept of protection of the essential interests of national security. The military nature of the helicopters constituting the subject-matter of the supplies provided for by the Ministerial Decree cannot be disputed as those helicopters may be used to carry out national security missions. In accordance with the requirements of an Interministerial Commission created for that purpose, those helicopters must possess certain technical characteristics making it possible for them to potentially be used as arms and defence systems, with the result that they require an approval from the Ministry of Defence.

17 The Italian Republic claims that the conditions set out in Article 2(1)(b) of Directive 93/36 have been satisfied. It bases its claim in particular on the argument that the greatest discretion must be maintained with regard to the supplies in question given their use as arms systems and their interoperability with other military material. That is why confidentiality cannot be guaranteed in an open invitation to tender procedure.

18 Furthermore, the Italian Republic takes the view that since the aircraft in question may be classified without restriction as military material, even if it were to be found that the conditions set out in Article 2(1)(b) of Directive 93/96 could not apply in the present case, the disputed supplies would nevertheless be covered by the derogation referred to in Article 296 EC and would therefore fall outside the scope of the Community rules on public procurement.

19 Lastly, the Italian Republic regards this action as inadmissible in so far as it is contrary to the principle of *ne bis in idem*. It submits that the issue forming the subject-matter of the proceedings has already been examined and assessed by the Court in Case C-337/05 *Commission* v *Italy* [2008] ECR I-0000.

Findings of the Court

Admissibility

20 In that regard, it is sufficient to point out an essential difference between this case and that which gave rise to the judgment in *Commission* v *Italy*. In this case, the Italian Republic acted pursuant to a decree of the Minister for the Interior while the case which gave rise to the judgment in *Commission* v *Italy* related to the lawfulness of a practice of the Italian authorities. That point is sufficient to establish that, in the present case, the principle of *ne bis in idem* cannot, on any basis, be effectively relied on.

21 Consequently, the plea of inadmissibility raised by the Italian Republic must be rejected.

Substance

22 It should be noted at the outset that it is common ground between the parties that the value of the contracts covered by the Ministerial Decree exceed the threshold, fixed in Article 5(1)(a) of Directive 93/36, capable of bringing them within the scope of that directive.

23 It must also be borne in mind that it is settled case-law that any derogations from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in connection with public procurement must be strictly interpreted (see, to that effect, Case C–71/92 *Commission* v *Spain* [1993] ECR I-5923, paragraph 36) and that the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (see, to that effect, Case C-328/92 *Commission* v *Spain* [1994] ECR I-1569, paragraphs 15 and 16, and *Commission* v *Italy*, paragraphs 57 and 58).

24 In the present case, the Italian Republic maintains that the Ministerial Decree fulfils the conditions set out in Article 296 EC and Article 2(1)(b) of Directive 93/36 on the ground, inter alia, that the helicopters covered by that decree are dual-use items, that is to say, they may serve both military and civilian purposes.

25 In that regard, it is important to point out that, under Article 296(1)(b) EC, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes (see

Commission v *Italy*, paragraph 46).

26 It is clear from the wording of that provision that the products in question must be intended for specifically military purposes. It follows that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts (see *Italy* v *Commission*, paragraph 47).

27 It is not disputed that the Ministerial Decree applies, as the Italian Republic admits, to helicopters which are clearly for civilian use whereas their military use is only potential.

28 Consequently, Article 296(1)(b) EC, to which Article 3 of Directive 93/36 refers, cannot properly be invoked by the Italian Republic to justify national legislation authorising recourse to the negotiated procedure for the purchase of those helicopters.

29 The Italian Republic relies, in addition, on Article 2(1)(b) of Directive 93/36.

30 At the outset, it must be pointed out that the requirement to impose an obligation of confidentiality in no way prevents the use of a competitive tendering procedure for the award of a contract (*Commission* v *Italy*, paragraph 52).

31 Therefore, resort to Article 2(1)(b) of Directive 93/36 to justify national legislation authorising the purchase of the helicopters in question by the negotiated procedure appears disproportionate as regards the objective of preventing the disclosure of sensitive information relating to their production. The Italian Republic has not shown that such an objective was unattainable within a competitive tendering procedure such as that specified by the same directive (see *Commission* v *Italy*, paragraph 53).

32 It follows that, in the present case, the mere fact of stating that the supplies at issue are declared secret, that they are accompanied by special security measures or that it is necessary to exclude them from the Community rules in order to protect the essential interests of State security cannot suffice to prove that the exceptional circumstances justifying the derogations provided for in Article 2(1)(b) of Directive 93/36 actually exist.

33 Consequently, Article 2(1)(b) of Directive 93/36 cannot properly be invoked by the Italian Republic to justify national legislation authorising recourse to the negotiated procedure for the purchase of those helicopters.

34 Having regard to all of the foregoing, it must be held that by adopting the Ministerial Decree authorising the derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied, the Italian Republic has failed to fulfil its obligations under Directive 93/36, and in particular under Articles 2(1)(b), 6 and 9 thereof.

Costs

35 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission applied for costs against the Italian Republic and as the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Declares that by adopting Decree No 558/A/04/03/RR of the Minister for the Interior of 11 July 2003, authorising the derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, and in particular under Articles 2(1)(b), 6 and 9 thereof;

2. Orders the Italian Republic to pay the costs.

[Signatures]

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* Language of the case: Italian.

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Affaire C-157/06

Commission des Communautés européennes

contre

République italienne

«Manquement d'État — Marchés publics de fournitures — Directive 93/36/CEE — Attribution de marchés publics sans publication d'un avis préalable — Hélicoptères légers pour la police et le corps national des pompiers»

Sommaire de l'arrêt

Rapprochement des législations — Procédures de passation des marchés publics de fournitures — Directive 93/36 — Dérogations aux règles communes — Interprétation stricte — Protection des intérêts essentiels de la sécurité d'un État membre
(Art. 296, § 1, b), CE; directive du Conseil 93/36, art. 2, § 1, b), 3, 6 et 9)

Manque aux obligations qui lui incombent en vertu de la directive 93/36, portant coordination des procédures de passation des marchés publics de fournitures, et notamment des articles 2, paragraphe 1, sous b), 6 et 9 de celle-ci, un État membre qui a adopté une réglementation nationale autorisant une dérogation à la réglementation communautaire en matière de marchés publics de fournitures pour l'achat d'hélicoptères légers destinés aux besoins des forces de police et du corps national des pompiers, sans qu'aucune des conditions susceptibles de justifier une telle dérogation soit remplie.

En effet, en ce qui concerne les exigences légitimes d'intérêt national prévues par l'article 296, paragraphe 1, sous b), CE, tout État membre peut prendre les mesures qu'il estime nécessaires à la protection des intérêts essentiels de sa sécurité et qui se rapportent à la production ou au commerce d'armes, de munitions et de matériel de guerre, à la condition toutefois que ces mesures n'altèrent pas les conditions de la concurrence dans le marché commun en ce qui concerne les produits non destinés à des fins spécifiquement militaires.

Il ressort du libellé de ladite disposition que les produits en cause doivent être destinés à des fins spécifiquement militaires. Il en résulte que l'achat d'équipements, dont l'utilisation à des fins militaires est peu certaine, doit nécessairement respecter les règles de passation des marchés publics. Or, lorsqu'il est constant que la réglementation nationale vise des hélicoptères dont la vocation civile est certaine alors que leur finalité militaire n'est qu'éventuelle, l'article 296, paragraphe 1, sous b), CE, auquel renvoie l'article 3 de la directive 93/36, ne saurait utilement être invoqué par l'État membre concerné pour justifier une réglementation nationale autorisant le recours à la procédure négociée pour l'achat desdits hélicoptères.

En outre, le recours à l'article 2, paragraphe 1, sous b), de la directive 93/36 pour l'achat des hélicoptères en question apparaît disproportionné au regard de l'objectif consistant à empêcher la divulgation d'informations sensibles relatives à la production de ceux-ci dans la mesure où l'État membre concerné n'a pas démontré qu'un tel objectif n'aurait pas pu être atteint dans le cadre d'une mise en concurrence telle que prévue par la même directive. Il s'ensuit que le simple fait d'affirmer que les fournitures en cause sont déclarées secrètes, qu'elles sont accompagnées de mesures spéciales de sécurité ou qu'il est nécessaire de les soustraire aux règles communautaires pour protéger les intérêts essentiels de sécurité de l'État ne saurait suffire à établir que les circonstances exceptionnelles justifiant les dérogations prévues à l'article 2, paragraphe 1, sous b), de la directive 93/36 existent effectivement.

(cf. points 25-28, 31-34, disp. 1)

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Judgment of the Court (Second Chamber) of 2 October 2008 - Commission of the European Communities v Italian Republic

(Case C-157/06) [1]

(Failure of a Member State to fulfil obligations - Public supply contracts -Directive 93/36/EEC - Award of public contracts without prior publication of a notice - Light helicopters for the police and the national fire service)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis and D. Recchia, acting as Agents)

Defendant: Italian Republic (represented by: I.M. Braguglia, acting as Agent, and by G. Fiengo, lawyer)

Re:

Failure of a Member State to fulfil obligations - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) - Failure to establish the existence of grounds capable of allowing a contracting authority to have recourse to the negotiated procedure without prior publication of a tender notice - Light helicopters acquired for the use of the police and fire service

Operative part of the judgment

The Court:

1. Declares that by adopting Decree No 558/A/04/03/RR of the Minister for the Interior of 11 July 2003, authorising the derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, and in particular under Articles 2(1)(b), 6 and 9 thereof;

2. Orders the Italian Republic to pay the costs.

_____

[1] - OJ C 131, 3.6.2006.

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Action brought on 23 March 2006 - Commission of the European Communities v Italian Republic

(Case C-157/06)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis and D. Recchia, Agents)

Defendant: Italian Republic

Form of order sought

Declaration that, by adopting Decree No 558/A/04/03/RR of the Minister for the Interior of 11 July 2003, authorising the derogation from Community rules on public supply contracts in respect of the procurement of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied, the Italian Republic has failed to fulfil its obligations under the combined provisions of Articles 2(1)(b), 6 and 9 of Directive 93/36/EEC; [1]

Order requiring the Italian Republic to pay the costs of the proceedings.

Pleas in law and main arguments

The Commission of the European Communities brought an action on 23 March 2006 in which it seeks a declaration that, by adopting the Decree of the Minister for the Interior of 11 July 2003 authorising the derogation from Community rules on public supply contracts in respect of the procurement of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying such a derogation having been satisfied, the Italian Republic has failed in its obligations under Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, and in particular under Article 2(1)(b), in conjunction with Articles 6 and 9, thereof.

The Commission became aware of the existence of the aforementioned decree of the Minister for the Interior while preparing other infringement proceedings. The Commission submits that this decree is at variance with the above directive on public supply contracts in so far as none of the conditions set out in Article 2(1)(b) of Directive 93/36/EEC which, if met, may allow that directive not to be applied - that is to say, in the case of contracts which are declared secret or the execution of which must be accompanied by special security measures, or where the protection of the basic interests of the State's security so requires - has been satisfied.

_____

[1] - OJ L 199 of 09.08.1993, p. 1.

Judgment of the Court (Fourth Chamber)
of 15 May 2008
SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino. Reference for a preliminary ruling: Consiglio di Stato - Italy. Public works contracts - Award of contracts - Abnormally low tenders - Exclusion rules - Works contracts not reaching the thresholds laid down in Directives 93/37/EEC and 2004/18/EC - Obligations upon the contracting authorities deriving from the fundamental principles of Community law. Joined cases C-147/06 and C-148/06.

In Joined Cases C147/06 and C148/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 25 October 2005, received at the Court on 20 March 2006, in the proceedings

SECAP SpA (C147/06) ,

v

Comune di Torino,

intervening parties:

Tecnoimprese Srl,

Gambarana Impianti Snc,

ICA Srl,

Cosmat Srl,

Consorzio Ravennate,

ARCAS SpA,

Regione Piemonte,

and

Santorso Soc. coop. arl (C148/06)

v

Comune di Torino,

intervening parties:

Bresciani Bruno Srl,

Azienda Agricola Tekno Green Srl,

Borio Giacomo Srl,

Costrade Srl,

THE COURT (Fourth Chamber),

composed of G. Arestis, President of the Eighth Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhasz (Rapporteur), J. Malenovsku and T. von Danwitz, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 October 2007,

after considering the observations submitted on behalf of:

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- SECAP SpA, by F. Videtta, avvocato,

- Santorso Soc. coop. arl, by B. Amadio, L. Fumarola and S. Bonatti, avvocati,

- the Comune di Torino, by M. Caldo, A. Arnone and M. Colarizi, avvocati,

- the Italian Government, by I.M. Braguglia, acting as Agent, and D. Del Gaizo and F. Arena, avvocati dello Stato,

- the German Government, by M. Lumma, acting as Agent,

- the French Government, by G. de Bergues and J.C. Gracia, acting as Agents,

- the Lithuanian Government, by D. Kriauinas, acting as Agent,

- the Netherlands Government, by H.G. Sevenster and P. van Ginneken, acting as Agents,

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

- the Slovak Government, by R. Prochazka, acting as Agent,

- the Commission of the European Communities, by X. Lewis and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 November 2007,

gives the following

Judgment

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

The fundamental rules of the EC Treaty on freedom of establishment and freedom to provide services and the general principle of non-discrimination preclude national legislation which, with regard to contracts with a value below the threshold set by Article 6(1)(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, which are of certain cross-border interest, imposes an absolute duty on the contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those elements. That would not be the case if national or local legislation or even the contracting authorities concerned were to set a reasonable threshold above which abnormally low tenders were automatically excluded on account of there being an unduly large number of tenders, which might oblige the contracting authorities to examine on an inter partes basis such a high number of bids that it would exceed their administrative capacity or might, due to the delay which such an examination would entail, jeopardise the implementation of the project.

1. These references for a preliminary ruling concern the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) (Directive 93/97'), and fundamental principles of Community law concerning the award of public contracts.

2. The references were made in proceedings between, first, SECAP SpA (SECAP') and, secondly, Santorso Soc. coop arl (Santorso') and the Comune di Torino concerning the compatibility with Community law of a requirement laid down in Italian legislation concerning public works contracts having a value lower than the threshold laid down in Directive 93/37 that tenders considered to

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be abnormally low are to be automatically excluded.

Legal context

Community legislation

3. Pursuant to Article 6(1)(a) thereof, Directive 93/37 applies to ... public works contracts whose estimated value net of value added tax (VAT) is not less than the equivalent in [euros] of 5 000 000 special drawing rights (SDRs)'.

4. Article 30 of Directive 93/37, which forms part of Title IV of the directive entitled Common Rules on Participation', Chapter 3 of which is concerned with the criteria for the award of contracts, provides as follows:

1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

...

4. If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

...'

5. The content of Article 30(4) of Directive 93/37 is reiterated and developed in Article 55, entitled Abnormally low tenders', of Directive 2004/18EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). The purpose of that directive, as set out in recital 1 of its preamble, was a recasting within a single measure of the directives which applied to the procedures for the award of public works contracts, public supply contracts and public service contracts and, under Article 80(1), the date for transposition of that directive into the legal systems of the Member States was to be no later than 31 January 2006.

6. The reason for which tenders which appear to be abnormally low in relation to the goods, works or services are not automatically excluded is apparent from the first paragraph of recital 46 in the preamble to Directive 2004/18, which states that [c]ontracts should be awarded on the basis of objective criteria... which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: the lowest price and the most economically advantageous tender. Those two award criteria are referred to in Article 30(1)(a) and (b) of Directive 93/37 and Article 53(1)(a) and (b) of Directive 2004/18.

National legislation

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7. Directive 93/37 was transposed into Italian law by Law No 109, Framework Law on public works (Legge Quadro in materia di lavori pubblici) of 11 February 1994 (GURI No 41 of 19 February 1994, ordinary supplement).

8. Article 21(1)(a) of that law, in the version applicable to the disputes in the main proceedings (Law No 109/94'), is worded as follows:

In cases of awards of contracts for works to a value equivalent in euros to 5 000 000 SDRs or above on the basis of the lowest-bid criterion mentioned in paragraph 1, the authority concerned must assess the irregular nature of the tenders referred to in Article 30 of ... Directive 93/37... in relation to all tenders undercutting the indicative price to an extent equal to or greater than the arithmetical mean of the percentage discounts of all the tenders admitted, excluding 10%, rounded up to the nearest digit, of those offering the highest and lowest discounts respectively, increased by the arithmetical mean of the difference in the percentage discounts which are in excess of the said mean.

Tenders must be accompanied, when submitted, by explanations concerning the most significant price components, indicated in the tender notices or the letters of invitation, which together add up to not less than 75% of the basic contract value. The tender notice or letter of invitation must specify the manner in which explanations are to be submitted but must also state which explanations may be necessary in order for tenders to be admitted. Explanations are not required for elements for which minimum values may be ascertained from official data. If, upon examination, the explanations requested and provided are insufficient for the possibility that the tender contains inconsistencies to be excluded, the tenderer shall be requested to supplement the supporting documentation and the decision whether to exclude the tender may be taken only after further verification, it being possible for arguments to be exchanged.

For public works contracts with a value below the Community threshold only, the authority concerned shall automatically exclude tenders having a percentage discount equal to or greater than the percentage referred to in the first subparagraph. The automatic exclusion procedure shall not apply if the number of valid tenders is lower than five.'

The actions in the main proceedings and the questions referred for a preliminary ruling

9. SECAP took part in a competitive tender procedure announced by the Comune di Torino in December 2002 for a public works contract with an estimated value of EUR 4 699 999. At the time of that call for tenders, the threshold for the application of Directive 93/37 was set, in accordance with Article 6(1)(a) thereof, at EUR 6 242 028. Santorso took part in a similar tender procedure, announced in September 2004, for a contract with an estimated value of EUR 5 172 579. At that time, the threshold for the application of Directive 93/37 was EUR 5 923 624. Consequently, in both cases the estimated value of the contracts in question was below the relevant thresholds for the application of Directive 93/37.

10. The notices by which the Comune di Torino announced those tendering procedures stated that the contract was to be awarded on the basis of the lowest price criterion and abnormally low tenders were to be verified and not automatically excluded. Those notices were based on a decision of the Giunta Comunale (the Municipal Council) that the criterion of awarding the contracts at the lowest price entailed verification of anomalous' tenders in accordance with Directive 93/37, even in the case of tenders for contracts with a value below the Community threshold, and Article 21(1)(a) of Law No 109/94 was not to apply in so far as it provided for the automatic exclusion of abnormally low tenders.

11. At the end of the evaluation process, the bids of SECAP and Santorso emerged as the first of the tenders that were not considered to be anomalous'. After verifying abnormally low tenders,

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the Comune di Torino finally rejected SECAP's and Santorso's bids in favour of tenders submitted by other companies.

12. SECAP and Santorso challenged that decision before the Tribunale Amministrativo Regionale di Piemonte (Regional Administrative Court, Piedmont), arguing that Law No 109/94 obliges the contracting authority automatically to exclude abnormally low tenders, allowing no discretion for the application of an inter partes verification procedure.

13. By decisions of 11 October 2004 and 30 April 2005, that court rejected the actions brought by SECAP and Santorso respectively on the ground that the contracting authorities are not under any obligation automatically to exclude abnormally low tenders but have the option to call for the verification of any anomalies arising from the fact that such tenders are low, which extends to contracts below the Community threshold.

14. SECAP and Santorso appealed against those judgments before the Consiglio di Stato (Council of State). The latter concurred with the view of those companies that the rule requiring the automatic exclusion of abnormally low tenders is mandatory but, nevertheless, did not totally dismiss the arguments put forward by the Comune di Torino, which, relying on statistical data, stated that, due to its extreme inflexibility, that rule encouraged undertakings to collude in agreeing on prices in order to influence the outcome of the tendering procedure, thus adversely affecting both the contracting authority and the other tenderers, the vast majority of whom are undertakings established in another Member State.

15. The Consiglio di Stato refers to the case-law of the Court according to which, with regard to contracts falling outside the scope of directives on public contracts on account of their subject-matter, the contracting authorities are bound to comply with the fundamental rules of the EC Treaty, in particular the principle of non-discrimination on the ground of nationality (see, in particular, Case C324/98 Telaustria and Telefonadress [2000] ECR I10745, paragraph 60), and to the case-law which prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts above the Community threshold of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in Community rules (see, in particular, Case 103/88 Costanzo [1989] ECR 1839, paragraph 19).

16. Having regard to those considerations and since it has doubts concerning the answer to be given to the question whether the rule on the verification of abnormally low tenders may be classified as a fundamental principle of Community law capable of setting aside any conflicting provisions of national law, the Consiglio di Stato decided to stay the proceedings and refer the following questions, which are worded in exactly the same manner in both Case C147/06 and Case C148/06, to the Court for a preliminary ruling:

(1) Does the rule laid down in Article 30(4) of Directive 93/37... or the similar rule contained in Article 55(1) and (2) of Directive 2004/18 ... (in cases where that is the relevant provision), that, where tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, constitute a fundamental principle of Community law?

(2) If the answer to the preceding question is in the negative: Is the rule established by Article 30(4) of Directive 93/37... or the similar rule contained in Article 55(1) and (2) of Directive 2004/18 ... (in cases where that is the relevant provision), according to which, if tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers

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relevant and shall verify those constituent elements taking account of the explanations received, while not presenting the characteristics of a fundamental principle of Community law, nevertheless an implied consequence of or a principle deriving from the principle of competition, considered in conjunction with the principles of administrative tra nsparency and non-discrimination on grounds of nationality and is it therefore, as such, directly binding, taking precedence over possibly incompatible national provisions adopted by the Member States to regulate public works contracts to which Community law is not directly applicable?'

17. By order of the President of the Court of 10 May 2006, Cases C-147/06 and C-148/06 were joined for the purposes of the written and oral procedure and of the judgment.

The questions

18. By its questions, which it is appropriate to consider together, the Consiglio di Stato asks, in essence, whether the fundamental principles of Community law governing the award of public contracts, to which Article 30(4) of Directive 93/37 gives specific expression, preclude national legislation which, with regard to contracts with a value below the threshold set in Article 6(1)(a) of that directive, obliges contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation, without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those elements.

19. The strict special procedures prescribed by the Community directives coordinating public procurement procedures apply only to contracts whose value exceeds a threshold expressly laid down in each of those directives (order in Case C59/00 Vestergaard [2001] ECR I9505, paragraph 19). Accordingly, the rules in those directives do not apply to contracts with a value below the threshold set by those directives (see, to that effect, Case C412/04 Commission v Italy [2008] ECR I0000, paragraph 65).

20. That does not mean, however, that contracts below the threshold are excluded from the scope of Community law (order in Vestergaard , paragraph 19). According to the established case-law of the Court concerning the award of contracts which, on account of their value, are not subject to the procedures laid down by Community rules, the contracting authorities are nonetheless bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on the ground of nationality in particular (Telaustria and Telefonadress , paragraph 60; the order in Vestergaard , paragraphs 20 and 21; Case C264/03 Commission v France [2005] ECR I8831, paragraph 32; and Case C6/05 Medipac-Kazantzidis [2007] ECR I4557, paragraph 33).

21. However, according to the case-law of the Court, the application of the fundamental rules and general principles of the Treaty to procedures for the award of contracts below the threshold for the application of Community directives is based on the premiss that the contracts in question are of certain cross-border interest (see, to that effect, Case C507/03 Commission v Ireland [2007] ECR I0000, paragraph 29, and Commission v Italy , paragraphs 66 and 67).

22. It is in the light of those considerations that national legislation such as that at issue in the main proceedings must be examined.

23. It is apparent from the documents submitted to the Court that that legislation obliges the contracting authority concerned, when awarding contracts with a value below the threshold laid down in Article 6(1)(a) of Directive 93/37, automatically to exclude tenders which, according to a mathematical criterion laid down by that legislation, are considered to be abnormally low in relation to the goods, works or services, the only exception to that rule of automatic exclusion being that it does not apply if the number of valid tenders is lower than five.

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24. Consequently, that rule, which is formulated in clear, imperative and absolute terms, deprives tenderers who have submitted abnormally low bids of the opportunity to demonstrate that those bids are viable and genuine. That aspect of the legislation at issue in the main proceedings could have consequences incompatible with Community law if, in view of its particular characteristics, a given contract is likely to be of certain cross-border interest and therefore attract operators from other Member States. A works contract could, for example, be of such cross-border interest because of its estimated value in conjunction with its technical complexity or the fact that the works are to be located in a place which is likely to attract the interest of foreign operators.

25. As the Advocate General pointed out at points 45 and 46 of his Opinion, although objective and not in itself discriminatory, such legislation could undermine the general principle of non-discrimination in procurement procedures which are of cross-border interest.

26. Indeed, the application of the rule requiring the automatic exclusion of tenders considered to be abnormally low to contracts of certain cross-border interest may constitute indirect discrimination since, in practice, it places at a disadvantage operators from other Member States which, as they have different cost structures, may benefit from significant economies of scale or, intending to cut their profit margins in order to enter the market in question more effectively, would be in a position to make a bid that was competitive and at the same time genuine and viable but which the contracting authority would not be able to consider as a result of that legislation.

27. In addition, as stated by the Comune di Torino and the Advocate General at points 43, 46 and 47 of his Opinion, such legislation could give rise to anti-competitive conduct and agreements, namely collusion between national or local undertakings intended to secure public works contracts for themselves.

28. Accordingly, the application of the rule requiring the automatic exclusion of abnormally low tenders to contracts of certain cross-border interest could deprive economic operators from other Member States of the opportunity of competing more effectively with operators located in the Member State in question and thereby affect their access to the market in that State, thus impeding the exercise of freedom of establishment and freedom to provide services, which constitutes a restriction on those freedoms (see, to that effect, Case C-79/01 Payroll and Others [2002] ECR I8923, paragraph 26; Case C442/02 CaixaBank France [2004] ECR I8961, paragraphs 12 and 13; and Case C452/04 Fidium Finanz [2006] ECR I9521, paragraph 46).

29. By applying such legislation to contracts of certain cross-border interest, the contracting authorities, lacking any power to assess the soundness and viability of abnormally low tenders, cannot comply with their obligation to observe the fundamental rules of the Treaty on freedom of movement or the general principle of non-discrimination, as required by the case-law of the Court cited at paragraph 20 above. It is also contrary to the contracting authorities' own interests for them to be deprived of such power, since they are not able to assess tenders which are submitted to them under conditions of effective competition and therefore to award the contract by applying the criteria, which are also laid down in the public interest, of the lowest price or the most economically advantageous tender.

30. It is in principle for the contracting authority concerned to assess whether there may be cross-border interest in a contract whose estimated value is below the threshold laid down by the Community rules, it being understood that that assessment may be subject to judicial review.

31. It is permissible, however, for legislation to lay down objective criteria, at national or local level, indicating that there is certain cross-border interest. Such criteria could be, inter alia, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out. The possibility of such an interest may also be excluded

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in a case, for example, where the economic interest at stake in the contract in question is very modest (see, to that effect, Case C231/03 Coname [2005] ECR I7287, paragraph 20). However, in certain cases, account must be taken of the fact that the borders straddle conurbations which are situated in the territory of different Member States and that, in those circumstances, even low-value contracts may be of certain cross-border interest.

32. Even where there is certain cross-border interest, it may be acceptable automatically to exclude some tenders on account of their being abnormally low if recourse to that rule is justified by the unduly large number of tenders, a fact which might oblige the contracting authority concerned to examine on an inter partes basis such a high number of bids that it would exceed the administrative capacity of those authorities or might, due to the delay which such an examination would entail, jeopardise the implementation of the project.

33. In such circumstances, national or local legislation or even the contracting authorities themselves would be entitled to set a reasonable threshold for the automatic exclusion of abnormally low tenders. However, the threshold of five valid tenders set by the third paragraph of Article 21(1)(a) of Law No 109/94 cannot be regarded as reasonable.

34. As regards the actions in the main proceedings, it is for the referring court to carry out a detailed assessment of all the relevant facts concerning both the contracts in question in order to determine whether, in each case, there is certain cross-border interest.

35. The answer to the questions referred must therefore be that the fundamental rules of the Treaty on freedom of establishment and freedom to provide services and the general principle of non-discrimination preclude national legislation which, with regard to contracts with a value below the threshold set by Article 6(1)(a) of Directive 93/97 which are of certain cross-border interest, imposes an absolute duty on the contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those elements. That would not be the case if national or local legislation or even the contracting authorities concerned were to set a reasonable threshold above which abnormally low tenders were automatically excluded on account of there being an unduly large number of tenders, which might oblige those contracting authorities to examine on an inter partes basis such a high number of bids that it would exceed their administrative capacity or might, due to the delay which such an examination would entail, jeopardise the implementation of the project.

Costs

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

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 27 November 2007. SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino. Reference for a preliminary ruling: Consiglio di Stato - Italy. Public works contracts - Award of contracts - Abnormally low tenders - Exclusion rules - Works contracts not reaching the thresholds laid down in Directives 93/37/EEC and 2004/18/EC - Obligations upon the contracting authorities deriving from the fundamental principles of Community law. Joined cases C-147/06 and C-148/06.

I - Introduction

1. The Consiglio di Stato (Council of State) of the Italian Republic seeks a ruling from the Court of Justice, pursuant to Article 234 EC, on whether Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (2) transcends that directive and also governs the award of contracts excluded from its scope.

2. The Court interpreted that provision in the judgment in Lombardini and Mantovani , (3) stating that it was essential' that each tenderer suspected of submitting an abnormally low tender should have the opportunity effectively to state his point of view and to supply all relevant explanations (paragraph 53).

3. The object of the present reference is to determine whether that positive right constitutes a general principle of the Community legal system which applies to the award of public contracts regardless of whether those contracts come under the sectoral directives. (4)

4. The Consiglio di Stato has raised that issue in a very specific context, namely that of a national measure which requires the automatic exclusion of abnormally low tenders in procedures for the award of contracts with a value lower than that stated in the directives. In addition to that measure is a practice whereby, in the case of such contracts, certain tenderers may influence the outcome of the tendering procedure by the ruse (5) of colluding to submit similar bids with the aim of creating a particular anomalous threshold and excluding other tenderers.

5. The present reference for a preliminary ruling is, therefore, highly significant since it concerns general principles of Community law while also recognising that the solution may be founded only on Community legal provisions. The Court must have regard to both spheres in order to provide the Italian court with an effective response to enable it to resolve the dispute.

II - The legal framework

A - Community law

6. The freedom of establishment and the freedom to provide services are enshrined in Articles 43 EC and 49 EC respectively. Council Directive 71/305/EEC of 26 July 1971, (6) which set in motion the coordination of the laws of the Member States on public procurement, had as its main purpose the simultaneous attainment of those two freedoms, as stated in the first recital. That directive, which applied only to contracts with a value of 1 000 000 units of account or above (eighth recital), provided that the criteria for the award of contracts should be the lowest price or the most economically advantageous tender (Article 29(1)) and, envisaging that there might be abnormally low tenders, provided for the exclusion of such tenders after hearing explanations from the tenderers concerned (Article 29(5)).

7. The Court, interpreting the latter provision, ruled that a tender may be rejected only after the tenderer has been given the opportunity to explain his bid, in other words after an inter-partes examination procedure; automatic rejections are therefore prohibited. (7)

8. Directive 71/305 was amended substantially on a number of occasions; (8) it was therefore appropriate

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to consolidate that directive and this was effected by Directive 93/37, which was also intended to safeguard freedom of establishment and freedom to provide services (second recital). Applicable to contracts with a value of not less than ECU 5 000 000 (Article 6(1)) and retaining the previous award criteria (Article 30(1)), Directive 93/37 reproduced, with minor amendments, the wording of the former Article 29(5) in Article 30(4):

If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

...'

9. Directive 2004/18, which the Member States were required to transpose by 31 January 2006 (Article 80(1)), repealed Directive 93/37 with effect from 31 March 2004 (Articles 82 and 83). When awarding works contracts whose value is at least EUR 5 278 000 (Article 7(c)), (9) a contracting authority has the right to exclude abnormally low tenders following an inter partes verification procedure (Article 55(1) and (2)).

B - The Italian legislation

10. Article 30(4) of Directive 97/37 was transposed into Italian law by Article 21(1)(a) of Law No 109/1994 of 11 February 1994, the framework law on public works, (10) appended to the original text by Article 7 of Law No 216/1995 of 2 June 1995. (11) In accordance with that provision:

In cases of awards of contracts for works to the value of ECU 5 000 000 or above on the basis of the lowest-bid criterion mentioned in paragraph 1, the authority concerned must assess the irregular nature of the tenders referred to in Article 30 of Council Directive 93/37/EEC of 14 June 1993 in relation to all tenders undercutting the indicative price to an extent equal to or greater than the arithmetical mean of the percentage discounts of all the tenders admitted, excluding 10%, rounded up to the nearest digit, of those offering the highest and lowest discounts respectively, increased by the arithmetical mean of the difference in the percentage discounts which are in excess of the said mean.

For that purpose, the public administration may take account, within 60 days from the submission of tenders, only of explanations based on the economy of the construction method, the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer in question, excluding, in any event, explanations relating to those elements for which minimum values have been set by laws, regulations or administrative provisions, or for which values may be ascertained from official data.

Tenders must be accompanied, when submitted, by explanations concerning the most significant price components, indicated in the tender notice or in the letter of invitation, the total amount of which must not be less than 75% of the basic value of the bid.

For public works contracts with a value below the Community threshold only, the authority concerned shall automatically exclude tenders with a percentage discount equal to or greater than the percentage

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referred to in the first subparagraph. The automatic exclusion procedure shall not apply if the number of valid tenders is lower than five.' (12)

11. Legislative Decree No 163 of 12 April 2006 (13) transposes Directive 2004/18 into national law. The final subparagraph of Article 21(1)(a) of Law No 109/94 has been removed from the provisions governing abnormally low tenders (Articles 86 to 88).

III - The main proceedings

12. By decision of 28 January 2003, Turin Municipal Council resolved to deprive of all effectiveness pro futuro Article 21(1)(a) of Law No 109/94 in order to prevent the automatic exclusion of abnormally low tenders so that, when awarding municipal contracts, including those below the Community threshold, such tenders would be verified in accordance with the inter partes procedure laid down in Directive 93/37.

13. The Italian undertakings SECAP SpA (Case C147/06) and Santorso Soc. Coop. arl. (Case C148/06) participated in two procurement procedures announced by the Council for the execution of certain works, (14) the value of which did not exceed the Community threshold. The tender notices stipulated the criterion of the lowest price, subject to the verification of anomalous tenders, and stated that there would be no automatic rejection of abnormally low tenders, in accordance with the decision of 28 January 2003. The tenders submitted by the two undertakings emerged as the first of the regular' tenders but, before making a decision, the municipal authorities declared that the tenders which appeared to be anomalous were in fact valid and awarded the contracts to other tenderers.

14. Both undertakings brought actions before the Tribunale amministrativo regionale del Piemonte (Regional Administrative Court, Piedmont), arguing that Article 21(1)(a) of Law No 109/94 requires the automatic exclusion of abnormally low tenders and prohibits public-sector entities from hearing explanations from the tenderers concerned and from examining such tenders before rejecting them. The Tribunale amministrativo regionale del Piemonte did not accept that reasoning and dismissed the actions on the grounds that, in its opinion, Article 21(1)(a) authorises the automatic exclusion of abnormally low tenders but does not make it mandatory, from which it follows that there is nothing to preclude a contracting authority from hearing explanations from tenderers and examining their tenders.

15. The Consiglio di Stato, which is seised of the appeals lodged by the appellants, accepts their arguments and rejects the interpretation of the regional court. However, the Consiglio di Stato is also mindful of the requirements of Community law, which have been invoked by Turin Municipal Council, and has therefore referred the following questions to the Court for a preliminary ruling under Article 234 EC:

1) Does the rule laid down in Article 30(4) of Directive 93/37/EEC or the similar rule contained in Article 55(1) and (2) of Directive 2004/18/EC (in cases where that is the relevant provision), that, where tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, constitute a fundamental principle of Community law?

2) If the answer to the preceding question is in the negative: Is the rule established by Article 30(4) of Directive 93/37/CEE or the similar rule contained in Article 55(1) and (2) of Directive 2004/18/EC (in cases where that is the relevant provision), according to which, if tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, while not presenting the characteristics of a fundamental principle of Community law, nevertheless

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an implied consequence of or a principle deriving from the principle of competition, considered in conjunction with the principles of administrative transparency and non-discrimination on grounds of nationality and is it therefore, as such, directly binding, taking precedence over possibly incompatible national provisions adopted by the Member States to regulate public works contracts to which Community law is not directly applicable?'

IV - The procedure before the Court of Justice

16. By order of 10 May 2006, the President of the Court joined the two proceedings, since they share the same subject-matter.

17. The appellant undertakings in the main proceedings, Turin Municipal Council, the Austrian, French, German, Italian, Lithuanian, Netherlands and Slovak Governments and the Commission have submitted written observations which are varied in approach but may be grouped into two categories. The first category supports the position of Turin Municipal Council and includes the observations of Lithuania, Slovakia (15) and the Commission, while the second category comprises the observations of all the other participants in these proceedings, who propose that the questions referred should be answered in the negative. At the hearing on 25 October 2007, oral argument was presented by the representatives of Santorso Soc. coop. arl, the Comune di Torino, the German, Italian and Lithuanian Governments and the Commission.

V - Analysis of the questions referred for a preliminary ruling

18. In point of fact, the two questions referred by the Consiglio di Stato may be reduced to a single question, aimed at establishing whether Article 30(4) of Directive 93/37, which requires abnormally low tenders to undergo an inter partes procedure before a decision whether to reject them is taken, applies to contracts falling outside the scope of the directive. In other words, the referring court asks whether, in the case of such contracts, Article 30(4) precludes Member States from providing for the automatic exclusion of that type of tender.

19. It is therefore appropriate to examine the nature of that rule in order to determine whether it is part of primary Community law and thus transcends Directive 93/37.

A - The starting point

20. The analysis may be based on solid foundations, firmly anchored in case-law which I have already examined. (16) Public procurement procedures which, for different reasons (quantitative or conceptual), fall outside the scope of the relevant directives still come within the sphere of the Community legal system, so that its fundamental principles, in particular, the fundamental freedoms of movement, become insurmountable barriers.

21. That view, which is encapsulated in recital 2 in the preamble to Directive 2004/18, (17) is well-established in the annals of the Court. (18) In the judgment in Telaustria and Telefonadress , (19) the Court held that contracting entities are bound to comply with the rules of the Treaty when awarding contracts which are excluded from the scope of the sectoral directives (paragraph 60). (20) That case-law was reiterated in the judgment in HI (paragraph 47) (21) and followed more recently, quite naturally and without reference to the previous cases, in the Coname judgment. (22)

22. Next, in the order in Vestergaard , (23) the Court pointed out that the mere fact that the strict special procedures laid down in those directives are not appropriate in the case of public contracts of small value does not mean that those contracts are not subject to Community law, since they must also comply with the Treaty (paragraphs 19 to 21) (24) if they are of interest to operators established in other Member States. (25) In Case C264/03 Commission v France , (26) the Court took the same view (paragraph 33).

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23. The setting of a financial threshold above which contracts are subject to public procurement directives is based on a single premiss, namely that contracts of small value do not attract operators established outside national borders; such contracts are thus devoid of Community implications. However, that rebuttable presumption is open to evidence to the contrary and therefore, as the Commission argues in its written observations, it must be borne in mind that a contract of small value may be of interest to operators in other Member States by reason, for example, of the fact that the place where the contract is to be performed may be close to their own country or because it would be beneficial to their commercial strategy.

24. Accordingly, that quantitative limit clearly serves only as a guideline and it therefore follows that there is nothing to prevent a contract of small value from being of interest in other Member States, giving rise to the factor which triggers the application of Community law and its objectives. Consequently, the procedures for the award of those contracts which, despite their limited interest, have a European dimension, must comply with the principles laid down in the Treaty, subject always to the fact that contracts for values higher than the amounts indicated in the directives must comply with stricter coordinating provisions. (27)

25. One such provision, Article 30(4) of Directive 93/37, which is applicable ratione temporis to the disputes in the main proceedings and is reproduced in Article 55(1) and (2) of Directive 2004/18, prohibits the automatic exclusion of abnormally low tenders. The Consiglio di Stato asks whether that prohibition constitutes a fundamental rule of Community law or whether it is, at the very least, a consequence of the principle of competition, considered in conjunction with the principles of administrative transparency and non-discrimination on grounds of nationality, which must also be complied with when awarding contracts which do not fall within the scope of those directives.

B - Less than a fundamental principle...

26. The concepts of fundamental principle' or fundamental rule', as used in the case-law I have cited, have a very specific meaning. They do not refer to the axiological elements latent in the Treaty, or to any kind of measure adopted to attain its objectives; instead, they fall between those two extremes, in the letter of the primary law where the constituent members' of the Community laid down the objectives they intended to achieve together with the essential means of attaining them. A cursory examination of Articles 2 EC and 3 EC reveals that they relate to the unrestricted movement of persons, goods, services and capital, guaranteed by the corresponding freedoms of movement (Articles 23 EC, 43 EC and 49 EC), as well as to the abolition of all discrimination on grounds of nationality (Article 12 EC), which is a horizontal principle integral to any project to integrate a number of countries.

27. That view, which is similar to the one contained in recital 2 in the preamble to Directive 2004/18, is also discernible in the judgments I have cited. In Telaustria and Telefonadress , the Court invoked the principle of non-discrimination on grounds of nationality (paragraph 60); in HI , the Court referred to the freedom of establishment and the freedom to provide services (paragraphs 42 and 47); in the order in Vestergaard , the Court relied on the free movement of goods as the ratio decidendi (paragraph 21); while, in Coname , the Court again invoked Articles 43 EC and 49 EC to prohibit indirect discrimination on grounds of nationality.

28. Clearly, the fundamental principles of the Treaty, which are capable of limiting the powers of the Member States in procedures for the award of contracts excluded from the coordinating provisions laid down in the sectoral directives, are the same as the principles referred to in the preambles of those directives, to which the Court has drawn particular attention.

29. Moreover, that should surprise no one since, as recital 2 in the preamble to Directive 2004/18 makes clear, the provisions of that directive are founded on those fundamental principles. Indeed,

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those directives pursue a limited direct aim, namely the coordination of procedures governed by the sectoral directives with a view to encouraging the development of effective competition in the field of public contracts (28) for the purposes of securing the fundamental freedoms of European integration. More particularly, the aim is to eliminate barriers to freedom of movement and to protect the interests of economic operators in one Member State who wish to sell their goods or services to contracting entities in other Member States. (29)

30. Reversing that perspective, it becomes clear that the aim is twofold: to avoid the risk of preference being given to national tenderers (buy national) and to ensure that the body responsible for awarding the contract is guided by considerations other than economic ones (30) (thus, the essential award criterion is always that of the lowest or most economically advantageous tender).

31. In those circumstances, the first question can only be answered in the negative, since, in a procedure for the award of a public works contract, the automatic exclusion of abnormally low tenders does not run counter to any fundamental principle of the Treaty. Neither the fundamental freedoms nor the prohibition of discrimination require that, in all circumstances and as an absolute rule, a tenderer who submits such a bid must have the opportunity to be heard before a decision is taken on whether to admit his tender.

32. In particular, that is because logic dictates that the principle of effectiveness, which also applies in the field of Community public-procurement law, must operate in this sphere. Finally, the management of public interests necessitates such effectiveness, which, on occasions, is in conflict with the pace of a selection procedure complete with guarantees. (31)

C - ...but more than a mere rule of positive law

1. The implied principles

33. Article 30(4) of Directive 93/37 is not a discretionary - perhaps even capricious - provision of the legislature, which has no connection to the real world and might just as well never have existed.

34. I have already pointed out that, in Lombardini and Mantovani , the Court described as essential' the examination procedure for which that measure makes provision. (32) Underlying the use of that adjective is the belief that the inter partes procedure for the verification of abnormally low tenders is vital in order to achieve effective competition in the field of public procurement and to safeguard freedom of movement, which, as I stated in my Opinion in those joined cases, presupposes that tenderers must be able to participate on an equal basis, without any discrimination whatsoever (paragraph 24).

35. The prohibition of discrimination, particularly where it is based on nationality, entails a duty of transparency to ensure that, for the benefit of any potential tenderer, there is a degree of advertising sufficient to enable the market to be opened up to competition and that the impartiality of procurement procedures can be monitored, as the Court declared in Unitron Scandinavia and 3S (paragraphs 31 and 32). (33)

36. In that context, it is reasonable to ask, as does the Consiglio di Stato, whether, since it does not state a fundamental principle of Community law, Article 30(4) of Directive 93/37 comprises one of logical consequences of Community law, which have a binding effect on public contracts, regardless of whether they fall within the scope of the directives, if they are of Community interest.

37. In other words, if the automatic exclusion of anomalous tenders is contrary to those consequences, is it appropriate to apply the contested rule to contracts which do not fall within the scope of Directive 93/37?

2. Tenderers and the concept of an abnormally low tender

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38. The concept of an abnormally low tender is not made up of abstract features; on the contrary, it is defined by reference to the contract to be awarded and to the work involved. (34) It therefore has the characteristics of an indeterminate concept, which at first sight is imprecise but which may clarified by reference to the specific nature of the contract.

39. That aspect is more marked in the Italian system, which defines the concept, having regard to the subject-matter of the contract and to the value of the different bids, by means of a mathematical formula for setting the anomaly threshold.

40. The tenderers who, as a result of advertising, are aware of the contract and its nature, draw up their bids in secret, so that each of them knows only the details of his own bid. In general, in view of the fact that the system gives preference to the lowest tender or the most economically advantageous one, very low bids are submitted with the aim of offering the lowest price, even at the risk of reducing the profits of the undertaking concerned.

41. Accordingly, all parties take the same risk that, once the sealed envelopes are opened, their tender will be treated as anomalous.

42. However, that balance is disrupted where one or more of the tenderers have at their disposal information which is capable of influencing the fixing of the anomaly threshold, thereby removing the essential equality.

3. Concerted practices in the submission of tenders

43. In the light of the facts alleged by Turin Municipal Council, the Consiglio di Stato outlines a scenario, which the Court must bear in mind, whereby the automatic exclusion of excessive discounts, required by Article 21(1)(a) of Law 109/1994, encourages collusive agreements between undertakings in order to influence ex ante the outcome of the selection process.

44. Community law does not remain on t he sidelines when faced with such a situation.

45. It is clear that the automatic exclusion of abnormally low tenders in accordance with the first subparagraph of Article 21(1)(a) is not in itself discriminatory, in view of the objective nature of that provision. In the Opinion in Lombardini and Mantovani , I stated that Italian law implements a mathematical, automatic system for setting the irregularity threshold, which is perfectly in line with the aims of Directive 93/37, allowing the market to establish the threshold, above which a tender may be considered irregular, for each contract. All applicants are on an equal footing and no party has any advantage in submitting its bid (points 33 and 35). Thus, the automatic rejection of anomalous tenders, without giving the parties concerned the opportunity to provide explanations, does not discriminate against anyone.

46. However, the situation is different if, as a result of collusive agreements, a group of undertakings, usually ones operating in the territorial market of the contract, collude with one another to draw up almost identical bids, with only minimal differences between them, so that the bids submitted by competitors who are not party to those agreements are classified as abnormally low and those tenderers have no opportunity to submit explanations or provide evidence of the viability of their bids.

47. Such practices therefore undermine the Community law principles of transparency and fair competition, which are applicable to public contracts, since, where the disadvantaged tenderers are established in other Member States, they must have the opportunity to explain their position if the discrimination prohibited by the Treaty is to be avoided. Turin Municipal Council stated at the hearing in these preliminary-ruling proceedings that, following the decision not to apply the national provision, there was a significant reduction in the number of tenders submitted with the aim of distorting free competition.

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48. In short, the principles referred to above require that, in public procurement procedures of Community interest, the contracting authority must take into account, as part of an exchange of views, the contentions of undertakings whose tenders have been classified as abnormally low. Those principles therefore preclude a national provision which, in the case of contracts whose value is below the threshold laid down in the sectoral directives, requires the automatic exclusion of such tenders without allowing the parties to be heard.

4. The right to good administration

49. To the foregoing objective, abstract view, which transcends the individual interests of the undertakings participating in a selection process, another, subjective, view must be added, according to which the rights of those undertakings, in particular, the right not to be deprived of the opportunity to be heard in administrative procedures, are highly important.

50. The right not to be deprived of the opportunity to be heard is expressly provided for in the legal systems of all the Member States and forms part of the right to good administration enshrined in Article 41, under Chapter V on Citizens' Rights, of the Charter of Fundamental Rights of the European Union. (35) Article 41(2) recognises the right of every person to be heard before any individual measure which would affect him or her adversely is taken.

51. The Charter, whose importance the Court has recently made clear, in particular in the judgments in Parliament v Council (36) and Advocaten voor de Wereld , (37) requires that, before a tenderer is excluded, he must have the opportunity to state his views in order to persuade the contracting authority that his bid is genuine.

52. I agree with the Commission that that right, interpreted in isolation, does not mean that an undertaking which appears to have submitted an irregular bid must always be able to submit explanations, since, in principle, such an undertaking is already protected by the impartial examination of tenders in accordance with predetermined, objective, non-discriminatory criteria. However, a tenderer at risk of being excluded as a result of a collusive agreement between other parties is at a disadvantage, and all the more so if, in addition, he is not permitted to provide explanations.

53. Thus, the right to be heard by the administrative authorities is the basis for arguing against the automatic exclusion of abnormally low tenders, since, as I have indicated, the notion of abnormality' is an indeterminate legal concept which must be substantiated in each case by reference to the particular circumstances of the candidates.

54. Accordingly, the right to good administration militates against the abolition of the inter partes procedure for the verification of tenders before a decision is taken on their merits and this extends to contracts excluded from the scope of the sectoral directives, because it would entail a weakening of the guarantees laid down in what are known as the Remedies Directives. (38)

5. The discretion of the Member States

55. It follows from the foregoing that Community law precludes national legislation under which contracting authorities are bound automatically to reject abnormally low tenders for public contracts excluded from the scope of the directives on the coordination of award procedures. On the contrary, under Community law, such authorities must have the opportunity to decide, depending on the circumstances in each case, whether it is appropriate to allow the candidates to be heard in order to verify, in an inter partes procedure, the composition of their tenders. (39)

56. However, the freedom of action accorded to the Member States means that they are not obliged to take the route provided for in Article 30(4) of Directive 93/37 and permits them to establish the manner in which the rights conferred by the Community legal system on individuals are to be protected, subject only to the limitations imposed by the principles of equivalence and effectiveness,

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namely that the procedures may not be less favourable than those designed for the protection of rights under national law and must be organised in such a way that, in practice, they do not make it difficult or virtually impossible to achieve the aim pursued. (40)

VI - Conclusion

57. In the light of the foregoing considerations, I propose that the Court replies to the Consiglio di Stato of the Italian Republic, in the following manner:

The principles of free competition, administrative transparency and non-discrimination on grounds of nationality, which govern Community public-procurement law, together with the right to good administration preclude national legislation which, with regard to the procedure for the award of public contracts excluded from the directives governing that field, obliges the contracting authority automatically to reject abnormally low tenders without providing for any inter partes verification procedure.'

(1) .

(2) - OJ 1993 L 199, p. 54.

(3) - Joined Cases C285/99 and C286/99 [2001] ECR I9233.

(4) - In addition to Directive 93/37 on the award of public works contracts, Council Directive 77/62/EEC of 21 December 1976 (OJ 1977 L 13, p. 1), as subsequently amended by Council Directive 93/36/EEC of 14 June 1993 (OJ 1993 L 199, p. 1), governed the award of public supply contracts. The coordination of the procedures for the award of public service contracts was provided for in Council Directive 92/50/CEE of 18 June 1992 (OJ 1992 L 209, p. 1). Those measures (amended by Directive 97/52/EC (OJ 1997 L 328, p. 1)) were consolidated and merged in a single provision: Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

(5) - This type of ruse has always existed and, in The Odyssey , translated by E.V. Rieu, revised translation by D.C.H. Rieu, Penguin, London, 1991, Homer recounts numerous examples of the legendary guile of Ulysses, such as the adventure in Book 9 where the hero gets Polyphemus, who is holding him prisoner, drunk and tells him that his name is Nobody. Taking advantage of the drowsiness caused by the wine, Ulysses plunges a red-hot stake made of olive wood into Polyphemus' one eye. Hearing the Cyclops' cries for help, his fellow Cyclopes ask what is happening to him, who is attacking him, to which Polyphemus replies ...it's Nobody's treachery, not violence, that is doing me to death, thus ensuring that they do not come to his aid (p. 120).

(6) - Directive concerning the co-ordination of procedures for the award of public works contracts (OJ English special edition: Series I Chapter 1971(II), p. 682).

(7) - That was the finding of the Court in the judgment in Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraphs 16, 18 and 19, which prohibited the automatic exclusion of tenders determined in accordance with mathematical criteria (point 1 of the operative part). That case-law was reiterated in the judgment in Case C295/89 Donà Alfonso [1991] ECR I2967. Prior to this was the judgment in Case 76/81 Transporoute [1982] ECR 417, paragraph 18.

(8) - One of those amendments affected Article 29(5), which was given new wording by Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).

(9) - According to the wording in Commission Regulation (EC) no 2083/2005 of 19 December 2005 (OJ 2005 L 333, p. 28).

(10) - Gazzeta Ufficiale della Repubblica Italiana (GURI') No 41 of 19 February 1994, p.

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5.

(11) - GURI No 127 of 2 June 1995, p. 3. The full text is the result of the adoption, with amendments, of Decree-law No 101/1995 of 3 April 1995 on urgent regulations concerning public works (GURI No 78 of 3 April 1995, p. 8).

(12) - Wording inserted by Article 7 of Law No 415/1998 of 18 November 1998 (GURI No 284 of 4 December 1998, ordinary supplement, p. 5).

(13) - GURI No 100 of 2 May 2006.

(14) - The conversion of a former palace into a youth hostel (EUR 4 699 999) and the environmental upgrading of Corso Francia, between Piazza Statuto and Piazza Bernini (EUR 5 172 579), respectively.

(15) - Albeit with certain nuances vis-à-vis the stance of Lithuania and Turin Municipal Council in that, when contending that the first question should receive a negative reply, the Slovak Government refuses to dissociate the rule in Article 30(4) of Directive 93/37 from the principles laid down in the Treaty, thereby concurring with the decision of the municipal council.

(16) - Opinion in Case C412/04 Commission v Italy (points 44 to 47).

(17) - The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency ...'

(18) - And in those of the Commission, specifically in the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C 179, p. 2, in particular pp. 5 and 6).

(19) - Case C324/98 [2000] ECR I10745.

(20) - In that case, Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which was replaced by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 134, p. 1).

(21) - Case C92/00 [2002] ECR I5553. In fact, rather than a contract excluded from one of the directives, that judgment concerned a procedure not provided for in the provision concerned. Under the Treaty, a decision to withdraw an invitation to tender must be subject to a review procedure but that requirement was not reflected in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50.

(22) - Case C231/03 [2005] ECR I7287. In paragraph 16 of that judgment, the Court recalled that the award of such a concession (for the management of a public gas-distribution service to a company in which there is a majority public holding) is not governed by any of the directives regulating the field of public contracts. In the absence of any such legislation, the consequences in Community law of the award of such concessions must be examined in the light of primary law and, in particular, of the fundamental freedoms provided for by the Treaty. The Court took the same view in its judgments in Case C458/03 Parkíng Brixen [2005] ECR I8585, paragraph 46, and Case C410/04 ANAV [2006] ECR I3303, paragraph 18.

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(23) - Case C59/00 [2001] ECR I9505.

(24) - In that order, the Court ruled that it was contrary to Article 28 EC to include in the contract documents for a public works contract of small value a clause requiring, without further explanation, the use of products of a certain make.

(25) - Paragraph 20 of the judgment in Coname , interpreted a contrario .

(26) - Case C264/03 [2005] ECR I8831.

(27) - See the second sentence of recital 2 in the preamble to Directive 2004/18.

(28) - Fratelli Costanzo , paragraph 18.

(29) - Case C360/96 BFI Holding [1998] ECR I6821, paragraph 41; Case C380/98 University of Cambridge [2000] ECR I8035, paragraph 16; and Case C237/99 Commission v France [2001] ECR I939, paragraph 41.

(30) - Case C44/96 Mannesmann Anlagenbau Austria and others [1998] ECR I73, paragraph 33; BFI Holding , paragraph 42; University of Cambridge , paragraph 17; and Commission v France (C237/99), paragraph 42.

(31) - Point 30 of my Opinion of 5 June 2001 in Lombardini and Mantovani .

(32) - The Court observed in that judgment that it is apparent from the very wording of that provision that the contracting authority is under a duty to identify suspect tenders, to allow the undertakings concerned to demonstrate their genuineness, to assess the merits of the explanations provided, and to take a decision as to whether to admit or reject those tenders (paragraph 55).

(33) - Case C275/98 [1999] ECR I8291. The Court put forward the same view in the judgments in Telaustria and Telefonadress (paragraphs 61 and 62) and Parking Brixen (paragraph 49).

(34) - Point 32 of the Opinion in Lombardini and Mantovani.

(35) - OJ 2000 C 364, p. 1.

(36) - Case C540/03 [2006] ECR I5769.

(37) - Case C303/05 [2007] ECR I-3633. As to the nature of the Charter, see points 76 to 79 of my Opinion in that case.

(38) - Directive 89/665, cited above, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

(39) - In Case C247/02 Sintesi [2004] ECR I9215, the Court declared void a national provision which restricted contracting authorities to taking account of a single criterion for the award of public works contracts, thereby depriving them of the possibility of taking into consideration the nature and specific characteristics of such contracts, and of choosing the criterion most likely to ensure free competition and thus the best tender (paragraph 40).

(40) - According to settled case-law and first expressed in Case 33/76 Rewe [1976] ECR 1989.

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ORDONNANCE DU PRÉSIDENT DE LA COUR

10 mai 2006 (*)

«Jonction»

Dans l'affaire C-147/06,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Consiglio di Stato (Italie), par ordonnance du 25 octobre 2005, parvenue à la Cour le 20 mars 2006, dans la procédure

SECAP SpA

contre

Comune di Torino,

et dans l'affaire C-148/06,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Consiglio di Stato (Italie), par ordonnance du 25 octobre 2005, parvenue à la Cour le 20 mars 2006, dans la procédure

Santorso Soc. coop. arl

contre

Comune di Torino,

LE PRÉSIDENT DE LA COUR,

le premier avocat général, M^me^ C. Stix-Hackl, entendu,

rend la présente

Ordonnance

1 Les demandes préjudicielles portent sur l'interprétation de l'article 30, paragraphe 4, de la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199, p. 54), et de l'article 55, paragraphes 1 et 2, de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114).

2 Les affaires susmentionnées étant connexes par leur objet, il convient, conformément à l'article 43 du règlement de procédure, de les joindre aux fins de la procédure écrite et orale et de l'arrêt.

Par ces motifs, le président de la Cour ordonne:

Les affaires C-147/06 et C-148/06 sont jointes aux fins de la procédure écrite et orale et de l'arrêt.

Fait à Luxembourg, le 10 mai 2006.

Le greffier	Le président
R. Grass	V. Skouris

* Langue de procédure: l'italien.

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Reference for a preliminary ruling from the Consiglio di Stato, Quinta Sezione lodged on 20 March 2006 - SECAP SpA v Comune di Torino

(Case C-147/06)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Applicant: SECAP SpA

Defendant: Comune di Torino and Others

Question(s) referred

Does the rule laid down in Article 30(4) of Directive 93/37/EEC [1] or the similar rule contained in Art. 55 (1) and (2) of Directive 2004/18/EC [2] (in cases where that is the relevant provision), that, where tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, constitute a fundamental principle of Community law?

If the answer to the preceding question is in the negative, is the rule established by Art. 30 (4) of Directive 93/37/EEC or the similar rule contained in Art. 55 (1) and (2) of Directive 2004/18/EC (in cases where that is the relevant provision), according to which, if tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, while not presenting the characteristics of a fundamental principle of Community law, nevertheless an implied consequence of or a principle deriving from the principle of competition, considered in conjunction with the principles of administrative transparency and non-discrimination on grounds of nationality and is it therefore, as such, directly binding, taking precedence over possibly incompatible national provisions adopted by the Member States to regulate public works contracts to which Community law is not directly applicable?

_____

[1] - OJ L 199, p. 54.

[2] - OJ L 134, p. 114.

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ARRÊT DE LA COUR (troisième chambre)

29 novembre 2007 (*)

«Manquement d'État – Violation de la directive 92/50/CEE portant coordination des procédures de passation des marchés publics de services – Attribution d'un marché sans appel d'offres – Attribution des services de transport sanitaire en Toscane»

Dans l'affaire C–119/06,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 28 février 2006,

Commission des Communautés européennes, représentée par M. X. Lewis et M^me^ D. Recchia, en qualité d'agents, assistés par M^e^ M. R. Mollica, avocat, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par M. I. M. Braguglia, en qualité d'agent, assisté de MM. G. Fiengo et S. Varone, avvocati dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (troisième chambre),

composée de M. A. Rosas, président de chambre, MM. J. N. Cunha Rodrigues (rapporteur), A. Ó Caoimh, M^me^ P. Lindh et M. A. Arabadjiev, juges,

avocat général: M. J. Mazák,

greffier: M^me^ M. Ferreira, administrateur principal,

vu la procédure écrite et à la suite de l'audience du 6 septembre 2007,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, la Région de Toscane et les agences sanitaires de cette même région:

– ayant tout d'abord conclu avec la Confederazione delle Misericordie d'Italia, l'Associazione Nazionale Pubbliche Assistenze (comité régional toscan) et la Croce Rossa Italiana (section toscane) l'accord-cadre régional pour la réalisation d'activités de transport sanitaire du 11 octobre 1999,

– ayant ensuite prorogé ledit accord-cadre par le protocole d'accord du 28 mars 2003 et, enfin,

– ayant conclu le 26 avril 2004, en vertu de la décision n° 379 de l'exécutif régional du 19 avril 2004, un nouvel accord-cadre régional qui, poursuivant les rapports avec les associations

susmentionnées, leur confie la gestion des services en cause pour la période allant du 1er janvier 2004 au 31 décembre 2008 (ci-après l'«accord-cadre de 2004»),

la République italienne a manqué aux obligations qui lui incombent en vertu de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), telle que modifiée par l'acte relatif aux conditions d'adhésion à l'Union européenne de la République tchèque, de la République d'Estonie, de la République de Chypre, de la République de Lettonie, de la République de Lituanie, de la République de Hongrie, de la République de Malte, de la République de Pologne, de la République de Slovénie et de la République slovaque, et aux adaptations des traités sur lesquels est fondée l'Union européenne (JO 2003, L 236, p. 33, ci-après la «directive 92/50»), notamment de ses articles 11, 15 et 17.

2 La Commission soutient également que, si la valeur des services attribués à travers les actes en question figurant à l'annexe I B de la directive 92/50 devait s'avérer supérieure à celle des services figurant à l'annexe I A de cette même directive, la conclusion de ces actes par les organismes susmentionnés serait tout de même contraire à l'article 3, paragraphe 2, de ladite directive et à l'article 49 CE relatif à la libre prestation des services.

Le cadre juridique

3 L'article 1er, sous a), de la directive 92/50 prévoit notamment que «les '*marchéspublicsdeservices*' sont des contrats à titre onéreux, conclus par écrit entre un prestataire de services et un pouvoir adjudicateur».

4 L'article 3, paragraphes 1 et 2, de cette directive établit:

«1. Pour passer leurs marchés publics de services […], les pouvoirs adjudicateurs appliquent des procédures adaptées aux dispositions de la présente directive.

2. Les pouvoirs adjudicateurs veillent à ce qu'il n'y ait pas de discrimination entre les différents prestataires de services.»

5 Aux termes de l'article 6 de ladite directive:

«La présente directive ne s'applique pas aux marchés publics de services attribués à une entité qui est elle-même un pouvoir adjudicateur au sens de l'article 1er [sous] b) sur la base d'un droit exclusif dont elle bénéfice en vertu de dispositions législatives, réglementaires ou administratives publiées, à condition que ces dispositions soient compatibles avec le traité.»

6 Selon l'article 7, paragraphes 1 et 2, de la directive 92/50:

«1. a) La présente directive s'applique:

– aux marchés publics des services visés à l'article 3 paragraphe 3, aux marchés publics de services ayant pour objet des services figurant à l'annexe I B, des services de la catégorie 8 de l'annexe I A et des services de télécommunications de la catégorie 5 de l'annexe I A, dont les numéros de référence CPC sont 7524, 7525 et 7526, passés par les pouvoirs adjudicateurs visés à l'article 1er [sous] b), lorsque la valeur estimée hors taxe sur la valeur ajoutée (TVA) égale ou dépasse 200 000 [euros],

– aux marchés publics de services ayant pour objet des services figurant à l'annexe I A, à l'exception des services de la catégorie 8 et des services de télécommunications de la catégorie 5, dont les numéros de référence CPC sont 7524, 7525 et 7526:

i) passés par les pouvoirs adjudicateurs désignés à l'annexe I de la directive 93/36/CEE [du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures (JO L 199, p.1)], lorsque la valeur estimée hors TVA égale ou dépasse l'équivalent en [euros] de 130 000 droits de tirage spéciaux (DTS);

ii) passés par les pouvoirs adjudicateurs désignés à l'article 1er [sous] b) autres que ceux mentionnés à l'annexe I de la directive 93/36[…] et dont la valeur estimée hors TVA égale ou dépasse l'équivalent en [euros] de 200 000 DTS.

[…]

2. Aux fins du calcul du montant estimé d'un marché, le pouvoir adjudicateur inclut la rémunération totale estimée du prestataire de services, compte tenu des dispositions des paragraphes 3 à 7.»

7 L'article 8 de la directive 92/50 dispose:

«Les marchés qui ont pour objet des services figurant à l'annexe I A sont passés conformément aux dispositions des titres III à VI.»

Lesdits titres III à VI comportent les articles 11 à 37 de cette directive.

8 L'article 9 de la directive 92/50 prévoit:

«Les marchés qui ont pour objet des services figurant à l'annexe I B sont passés conformément aux articles 14 et 16.»

9 L'article 10 de cette directive précise:

«Les marchés qui ont pour objet à la fois des services figurant à l'annexe I A et des services figurant à l'annexe I B sont passés conformément aux dispositions des titres III à VI lorsque la valeur des services figurant à l'annexe I A dépasse celle des services figurant à l'annexe I B. Dans les autres cas, le marché est passé conformément aux articles 14 et 16.»

10 L'article 11 de ladite directive énonce:

«1. Pour passer leurs marchés publics de services, les pouvoirs adjudicateurs appliquent les procédures définies à l'article 1er [sous] d), e) et f), [à savoir les procédures ouvertes, les procédures restreintes et les procédures négociées], adaptées aux fins de la présente directive.

2. Les pouvoirs adjudicateurs peuvent passer leurs marchés publics de services en recourant à une procédure négociée après avoir publié un avis de marché dans les cas suivants:

[…]

3. Les pouvoirs adjudicateurs peuvent passer leurs marchés publics de services en recourant à une procédure négociée sans publication préalable d'un avis de marché dans les cas suivants:

[…]

4. Dans tous les autres cas, les pouvoirs adjudicateurs passent leurs marchés de services en recourant à la procédure ouverte ou à la procédure restreinte.»

11 Aux termes de l'article 15, paragraphe 2, de la directive 92/50:

«Les pouvoirs adjudicateurs désireux de passer un marché public de services en recourant à une procédure ouverte, restreinte ou, dans les conditions prévues à l'article 11, à une procédure négociée font connaître leur intention au moyen d'un avis.»

12 L'article 17 de cette directive 92/50 précise:

«1. Les avis sont établis conformément aux modèles qui figurent aux annexes III et IV et précisent les renseignements qui y sont demandés. […]

2. Les avis sont envoyés par le pouvoir adjudicateur dans les meilleurs délais et par les voies les plus appropriées à l'Office des publications officielles des Communautés européennes. […]

[…]

4. Les avis visés à l'article 15 paragraphes 2 et 3 sont publiés *in extenso* au *Journal officiel des Communautés européennes* et à la banque de données TED, dans la langue originale. Un résumé des éléments importants de chaque avis est publié dans les autres langues officielles des Communautés, seul le texte de la langue originale faisant foi.

[…]»

13 L'annexe I A de la directive 92/50, intitulée «Services au sens de l'article 8», comporte la mention suivante:

«Catégorie	Désignation des services	Numéro de référence CPC
2	Services de transports terrestres […], y compris les services de véhicules blindés et les services de courrier, à l'exclusion des transports de courrier	712 (sauf 71235), 7512, 87304»

14 L'annexe I B de ladite directive, intitulée «Services au sens de l'article 9», comprend la mention suivante:

«Catégorie	Désignation des services	Numéro de référence CPC
25	Services sociaux et sanitaires	93»

15 L'article 1er, paragraphe 5, de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114), prévoit:

«Un 'accord-cadre' est un accord conclu entre un ou plusieurs pouvoirs adjudicateurs et un ou plusieurs opérateurs économiques ayant pour objet d'établir les termes régissant les marchés à passer au cours d'une période donnée, notamment en ce qui concerne les prix et, le cas échéant, les quantités envisagées.»

16 L'article 32, paragraphes 1 et 2, de cette directive établit:

«1. Les États membres peuvent prévoir la possibilité pour les pouvoirs adjudicateurs de conclure des accords-cadres.

2. Aux fins de la conclusion d'un accord-cadre, les pouvoirs adjudicateurs suivent les règles de procédure visées par la présente directive dans toutes les phases jusqu'à l'attribution des marchés fondés sur cet accord-cadre. Le choix des parties à l'accord-cadre se fait par application des critères d'attribution établis conformément à l'article 53.

Les marchés fondés sur un accord-cadre sont passés selon les procédures prévues aux paragraphes 3 et 4. […]

[…]»

17 Selon l'article 80, paragraphe 1, de la directive 2004/18:

«Les États membres mettent en vigueur les dispositions législatives, réglementaires et administratives nécessaires pour se conformer à la présente directive au plus tard le 31 janvier 2006. Ils en informent immédiatement la Commission.

[…]»

18 Aux termes de l'article 82 de ladite directive:

«La directive [92/50], à l'exception de son article 41, et les directives 93/36[…] et 93/37/CEE [du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de

travaux (JO L 199, p. 54),] sont abrogées, avec effet à partir de la date prévue à l'article 80, sans préjudice des obligations des États membres en ce qui concerne les délais de transposition et d'application figurant à l'annexe XI.

[…]»

Les faits et la procédure précontentieuse

19 La Région de Toscane ainsi que les unités sanitaires locales et les agences hospitalières de cette région (ci-après «les agences») ont conclu certains accords avec la Confederazione delle Misericordie d'Italia, l'Associazione Nazionale Pubbliche Assistenze (comité régional toscan) et la Croce Rossa Italiana (section toscane), prises en tant que représentantes de plusieurs associations bénévoles (ci–après «les associations concernées»), aux fins de l'attribution de services de transport sanitaire à ces associations.

20 Pendant la période du 1er juillet 1999 au 31 décembre 2002, l'attribution des services de transport sanitaire aux associations concernées a été régie par un accord-cadre régional conclu le 11 octobre 1999. Ce dernier a été prorogé jusqu'à la fin de l'année 2003 par un protocole d'accord daté du 28 mars 2003. Par la décision n° 379, le gouvernement régional de Toscane a approuvé l'accord-cadre de 2004.

21 À la suite d'une plainte, la Commission a adressé à la République italienne, le 9 juillet 2004, une lettre de mise en demeure au sujet de l'attribution des services de transport sanitaire aux associations concernées en vertu des accords susmentionnés. Les autorités italiennes n'ont pas répondu à cette lettre.

22 La Commission a adressé un avis motivé à la République italienne le 22 décembre 2004. Cet État membre a répondu à cet avis par une communication du 16 mars 2005. N'étant pas satisfaite de cette réponse, la Commission a introduit le présent recours.

Sur le recours

Argumentation des parties

23 La Commission estime que les services de transport sanitaire en question constituent des services relevant de la directive 92/50, que la Région de Toscane et les agences sont des pouvoirs adjudicateurs au sens de cette directive, que les accords en question ont été établis par écrit et que lesdits services de transport sanitaire sont rendus à titre onéreux, de sorte que les opérations en cause constituent des marchés publics de services au sens de l'article 1er, sous a), de la directive 92/50.

24 Selon la Commission, les activités de transport sanitaire en question relèveraient à la fois de l'annexe I A, catégorie 2 («Services de transports terrestres […], y compris les services de véhicules blindés et les services de courrier, à l'exclusion des transports de courrier»), et de l'annexe I B, catégorie 25 («Services sociaux et sanitaires»), de la directive 92/50. Conformément à l'article 10 de cette directive, si la valeur des services relevant de ladite annexe I A dépasse celle des services visés à ladite annexe I B, les accords en cause auraient dû être passés conformément aux dispositions des titres III à VI de la directive 92/50. Dans le cas inverse, ces accords auraient dû être conclus conformément aux articles 3, paragraphe 2, 14 et 16 de cette même directive.

25 À titre principal, la Commission estime que la valeur des services de transports terrestres, au sens de l'annexe I A de la directive 92/50, visés par les accords en question, dépasse la valeur des services sociaux et sanitaires, au sens de l'annexe I B de cette directive, visés par ces mêmes accords, et que, par conséquent, ces derniers auraient dû être passés conformément aux dispositions des titres III à VI de ladite directive. Ces dispositions imposeraient notamment la publication d'un avis de marché au *Journal officiel de l'Union européenne* et, en principe, la passation du marché par voie de procédure ouverte ou restreinte.

26 À titre subsidiaire, dans le cas où la valeur des services sociaux et sanitaires, au sens de l'annexe I B de la directive 92/50, visés par les accords en question, dépasserait la valeur des services de transports terrestres, au sens de l'annexe I A de cette directive, visés par ces accords, la

Commission estime que l'article 3, paragraphe 2, de la directive 92/50 ainsi que l'article 49 CE s'appliqueraient, afin que soit imposée au pouvoir adjudicateur l'obligation d'éviter toute discrimination, notamment fondée sur la nationalité, entre les prestataires susceptibles d'être intéressés par l'opération en cause. D'après la jurisprudence de la Cour, le principe de non-discrimination impliquerait une obligation de transparence en vertu de laquelle le pouvoir adjudicateur serait tenu de garantir un degré de publicité adéquat permettant l'ouverture du marché à la concurrence ainsi que le contrôle de l'impartialité des procédures de passation.

27 La République italienne souligne que les associations concernées, chargées des opérations de transport sanitaire, sont des organismes bénévoles qui jouent un rôle important en matière de solidarité et de cohésion dans la société italienne. Tant en raison de leur nature qu'en vertu de la législation nationale applicable, ces associations ne pourraient réaliser de bénéfices au titre des prestations qu'elles effectuent. Les éventuels paiements que lesdites associations recevraient pour les services qu'elles rendent seraient limités aux remboursements des dépenses effectivement engagées pour réaliser l'activité visée. Les accords en cause seraient destinés notamment à encadrer de tels remboursements, sans prévoir une rémunération des associations concernées. Ces dernières, qui ne seraient pas des opérateurs commerciaux, déploieraient leur activité en-dehors du marché et de la sphère de la concurrence. Les arrangements mis en cause par la Commission ne seraient pas réalisés à titre onéreux, au sens de l'article 1er, sous a), de la directive 92/50. Par conséquent, ils ne constitueraient pas des marchés publics de services relevant du champ d'application de cette directive.

28 En outre, les accords en cause ne prévoiraient pas eux-mêmes de prestations ni de remboursements, effets qui ne découleraient que des marchés spécifiques conclus dans le cadre de ces accords. Par conséquent, lesdits accords ne constitueraient pas des marchés publics de services relevant du champ d'application de la directive 92/50.

29 À titre subsidiaire, le gouvernement italien fait valoir que, à supposer même que les accords en question constituent de tels marchés, ils seraient néanmoins exclus du champ d'application de ladite directive en vertu de l'article 6 de celle-ci, en tant que marchés attribués sur la base d'un droit exclusif.

Appréciation de la Cour

30 Il résulte d'une jurisprudence constante que l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre, telle qu'elle se présentait au terme du délai fixé dans l'avis motivé (arrêt du 27 novembre 2003, Commission/France, C-429/01, Rec. p. I-14355, point 56).

31 En matière de passation des marchés publics, la Cour a jugé qu'un recours en manquement est irrecevable si, à la date d'expiration du délai fixé dans l'avis motivé, le contrat en question avait déjà épuisé tous ses effets (voir arrêt du 2 juin 2005, Commission/Grèce, C-394/02, Rec. p. I-4713, point 18).

32 En l'espèce, le délai fixé dans l'avis motivé est venu à expiration le 22 février 2005. L'accord-cadre régional du 11 octobre 1999 et le protocole d'accord du 28 mars 2003 ayant épuisé leurs effets avant cette date, le présent recours est irrecevable en tant qu'il les concerne. Par conséquent, il y a lieu de prendre en compte, aux fins du présent recours, le seul accord-cadre de 2004.

33 En vertu de ses articles 80 et 82, la directive 2004/18 a abrogé la directive 92/50 avec effet au 31 janvier 2006. La directive 92/50 était donc encore en vigueur au terme du délai fixé en l'espèce dans l'avis motivé. Par conséquent, c'est à la lumière de cette directive qu'il convient d'apprécier l'accord-cadre de 2004.

34 À titre liminaire, se pose la question de savoir si cet accord-cadre présente les caractéristiques d'un marché public au sens de l'article 1er, sous a), de la directive 92/50, à savoir être un contrat à titre onéreux, conclu par écrit entre un prestataire de services et un pouvoir adjudicateur.

35 Le caractère écrit de l'accord-cadre de 2004 n'est pas contesté, non plus que le fait que la Région de Toscane et les agences constituent des pouvoirs adjudicateurs.

36 Tout d'abord, la République italienne conteste que ledit accord-cadre constitue un marché public de services au sens de l'article 1er, sous a), de ladite directive, au motif que les associations concernées ne sont pas des opérateurs commerciaux et qu'elles déploient leur activité en-dehors du

marché et de la sphère de la concurrence. Cet argument est fondé sur le fait que ces associations ne poursuivent pas un but lucratif et qu'elles regroupent des personnes motivées par des considérations de solidarité sociale.

37 Sans dénier l'importance sociale des activités bénévoles, force est de constater que cet argument ne peut pas être retenu. En effet, l'absence de but lucratif n'exclut pas que de telles associations exercent une activité économique et constituent des entreprises au sens des dispositions du traité relatives à la concurrence (voir, en ce sens, arrêts du 16 novembre 1995, Fédération française des sociétés d'assurance e.a., C–244/94, Rec. p. I–4013, point 21; du 12 septembre 2000, Pavlov e.a., C–180/98 à C–184/98, Rec. p. I–6451, point 117, et du 16 mars 2004, AOK Bundesverband e.a., C-264/01, C-306/01, C–354/01 et C-355/01, Rec. p. I-2493, point 49).

38 Il convient de rappeler que, selon la jurisprudence de la Cour, des entités telles que des organisations sanitaires assurant la fourniture de services de transport d'urgence et de transport de malades doivent être qualifiées d'entreprises au sens des règles de concurrence prévues par le traité (arrêt du 25 octobre 2001, Ambulanz Glöckner, C–475/99, Rec. p. I–8089, points 21 et 22).

39 Il en résulte que les associations concernées peuvent exercer une activité économique en concurrence avec d'autres opérateurs.

40 La circonstance que, en raison du fait que leurs collaborateurs agissent à titre bénévole, de telles associations sont susceptibles de faire des offres à des prix sensiblement inférieurs à ceux d'autres soumissionnaires ne les empêche pas de participer aux procédures de passation de marchés publics visées par la directive 92/50 (voir, en ce sens, arrêt du 7 décembre 2000, ARGE, C–94/99, Rec. p. I–11037, points 32 et 38).

41 Il en résulte que l'accord-cadre de 2004 n'est pas exclu de la notion de «marchés publics de services» au sens de l'article 1er, sous a), de la directive 92/50, en raison du fait que les associations concernées ne poursuivent pas un but lucratif.

42 Ensuite, la République italienne fait valoir que l'accord-cadre de 2004 ne fournit que le cadre des prestations et des remboursements qui sont concrètement prévus par de nombreux marchés spécifiques. Selon cet État membre, aucune opération de transport sanitaire ni aucun remboursement ne serait effectué en vertu de l'accord-cadre de 2004 lui-même. Cette argumentation revient, en substance, à alléguer que cet accord-cadre ne constitue pas un contrat au sens dudit article 1er, sous a).

43 À cet égard, il convient de rappeler que, aux fins de définir le champ d'application des directives en matière de marchés publics, la Cour a consacré une interprétation extensive de la notion de marché public qui englobe les accords-cadres. Selon la Cour, un accord-cadre doit être considéré comme un «marché public» au sens de la directive concernée, dans la mesure où il confère une unité aux divers marchés spécifiques qu'il régit (voir, en ce sens, arrêt du 4 mai 1995, Commission/Grèce, C-79/94, Rec. p. I-1071, point 15).

44 Ainsi qu'il ressort de ce dernier arrêt, cette interprétation extensive de la notion de marché public, englobant les accords-cadres, s'impose pour éviter que les opérateurs contournent les obligations établies par les directives en matière de marchés publics. Elle est, d'ailleurs, confirmée, en ce qui concerne les marchés publics de travaux, de fournitures et de services, par les dispositions de la directive 2004/18. Les articles 1er, paragraphe 5, et 32 de cette directive comportent des dispositions spécifiques concernant les accords-cadres qui reposent sur le principe que ces derniers relèvent du champ d'application de la réglementation communautaire en matière de marchés publics.

45 Il en résulte que l'accord-cadre de 2004 doit être considéré comme un contrat au sens de l'article 1er, sous a), de la directive 92/50.

46 Le gouvernement italien conteste enfin que cet accord-cadre ait été conclu à titre onéreux, au motif que les opérations de transport sanitaire en question sont effectuées par des associations bénévoles qui ne perçoivent que les remboursements de leurs frais.

47 Cet argument ne peut non plus être retenu. Il convient de relever que le caractère onéreux d'un

contrat se réfère à la contre-prestation à laquelle procède l'autorité publique concernée en raison de l'exécution des prestations de services qui font l'objet du contrat et dont cette autorité aura le bénéfice (voir en ce sens, concernant la directive 93/37, arrêt du 12 juillet 2001, Ordine degli Architetti e.a., C–399/98, Rec. p. I–5409, point 77).

48 Dans le cas d'espèce, s'il est vrai que le travail des personnes qui effectuent les transports sanitaires en question n'est pas rémunéré, il ressort néanmoins des éléments soumis à la Cour que les paiements prévus par les autorités publiques concernées dépassent le simple remboursement des frais encourus pour fournir les services de transport sanitaire en cause. Ces montants sont établis au préalable et de manière forfaitaire, sur la base de tableaux annexés à l'accord-cadre de 2004. Le système décrit dans ces tableaux prévoit le paiement d'une somme fixe pour la mise à disposition (dite «stand-by») d'un véhicule destiné aux interventions, de sommes calculées en fonction des temps d'arrêt marqués au cours des activités de transport, d'une somme fixe pour les transports ne dépassant pas 25 km et de montants additionnels par kilomètre supplémentaire.

49 Le gouvernement italien a confirmé lors de l'audience que cette méthode de paiement et les sommes prévues à l'annexe de l'accord-cadre de 2004 permettent aux autorités nationales de subventionner les associations qui effectuent les prestations de services de transport sanitaire en question.

50 Dans les circonstances précises de l'espèce, la méthode de paiement prévue par l'accord-cadre de 2004 dépasse donc le simple remboursement des frais encourus. Dans cette mesure, il convient de considérer que cet accord-cadre prévoit une contrepartie des services de transport sanitaire qu'il vise.

51 Par conséquent, l'accord-cadre de 2004 doit être considéré comme ayant été conclu à titre onéreux au sens de l'article 1er, sous a), de la directive 92/50.

52 Il découle de ce qui précède que ledit accord-cadre constitue un marché public de services au sens de cette même disposition.

53 En vertu de son article 7, paragraphe 1, la directive 92/50 ne s'applique qu'aux marchés publics de services dont la valeur estimée hors TVA égale ou dépasse certains montants précisés à cette disposition.

54 Les termes de l'accord-cadre de 2004 ne permettent pas de connaître la valeur, même estimative, de celui-ci. Cet accord-cadre ne fournit qu'un barème de prix unitaires à partir duquel il n'est pas possible d'établir la valeur du marché en cause.

55 À la lumière de l'article 7, paragraphe 2, de la directive 92/50, il convient de considérer que la valeur de l'accord-cadre de 2004 est constituée par la valeur totale des marchés spécifiques qui sont ou seront passés en vertu de celui-ci (voir, en ce sens, arrêt du 4 mai 1995, Commission/Grèce, précité, point 15).

56 La Commission soutient que, compte tenu, d'une part, du fait que l'accord-cadre de 2004 couvre, sur le territoire de la Région de Toscane, tous les services de transport sanitaire qui ne sont pas effectués par les agences elles-mêmes et, d'autre part, de la durée pluriannuelle de cet accord-cadre, il est présumé que le seuil d'application de la directive 92/50 de 200 000 euros est atteint.

57 Cependant, il est de jurisprudence constante que, dans le cadre d'une procédure en manquement en vertu de l'article 226 CE, il incombe à la Commission d'établir l'existence du manquement allégué. C'est elle qui doit apporter à la Cour les éléments nécessaires à la vérification par celle-ci de l'existence de ce manquement, sans pouvoir se fonder sur une présomption quelconque (arrêt du 26 avril 2005, Commission/Irlande, C–494/01, Rec. p. I–3331, point 41).

58 La Commission n'a produit aucune preuve relative à la valeur des marchés spécifiques conclus en vertu de l'accord-cadre de 2004.

59 Dans ces conditions, il n'est pas établi que le seuil d'application de la directive 92/50 a été atteint en l'espèce.

60 Il en résulte que le recours n'est pas fondé en ce qu'il est tiré d'une violation de la directive 92/50.

61 À titre subsidiaire, la Commission demande à la Cour de constater que la conclusion de l'accord-cadre de 2004 serait contraire à l'article 49 CE si la valeur des services attribués à travers cet accord-cadre et figurant à l'annexe I B de la directive 92/50 devait s'avérer supérieure à celle des services figurant à l'annexe I A de cette directive.

62 Or, comme cela a été relevé au point 58 du présent arrêt, la Commission n'a fourni aucun élément de preuve quant à la valeur du marché en cause. Il est donc impossible de déterminer la valeur relative des services en cause qui relèvent de l'annexe I A ou de l'annexe I B de la directive 92/50.

63 À supposer que lesdits services relèvent, pour la partie prépondérante de leur valeur, de l'annexe I B de la directive 92/50, il conviendrait, toutefois, de rappeler que, dans la mesure où un marché relatif à un service relevant de cette annexe présente un intérêt transfrontalier certain, l'attribution, en l'absence de toute transparence, de ce marché à une entreprise située dans l'État membre du pouvoir adjudicateur de ce marché est constitutive d'une différence de traitement au détriment des entreprises susceptibles d'être intéressées par ce marché, qui sont situées dans un autre État membre (voir arrêt du 13 novembre 2007, Commission/Irlande, C–507/03, non encore publié au Recueil, point 30 et jurisprudence citée).

64 À moins qu'elle ne se justifie par des circonstances objectives, une telle différence de traitement, qui, en excluant toutes les entreprises situées dans un autre État membre, jouerait principalement au détriment de celles-ci, serait constitutive d'une discrimination indirecte selon la nationalité, interdite en application de l'article 49 CE (voir, en ce sens, arrêt du 13 novembre 2007, Commission/Irlande, précité, point 31 et jurisprudence citée).

65 Dans ces conditions, il appartiendrait à la Commission d'établir que, nonobstant le rattachement du marché en cause aux services relevant de l'annexe I B de la directive 92/50, ledit marché présentait, pour une entreprise située dans un État membre autre que celui dont relève le pouvoir adjudicateur concerné, un intérêt certain et que cette dernière, n'ayant pas eu accès aux informations adéquates avant que ce marché ne soit attribué, n'a pu être en mesure de manifester son intérêt pour celui–ci (voir arrêt du 13 novembre 2007, Commission/Irlande, précité, point 32).

66 En l'espèce, ces éléments n'ont pas été rapportés par la Commission. En effet, la simple indication, par celle-ci, de l'existence d'une plainte qui lui a été adressée en relation avec le marché en cause ne saurait suffire à démontrer que ledit marché présentait un intérêt transfrontalier certain et, par conséquent, à constater l'existence d'un manquement (voir, en ce sens, arrêt du 13 novembre 2007, Commission/Irlande, précité, point 34).

67 Dès lors, il convient de constater que le recours n'est pas fondé en ce qu'il est tiré d'une violation de l'article 49 CE.

68 En conséquence, le recours de la Commission doit être rejeté.

Sur les dépens

69 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La République italienne ayant conclu à la condamnation de la Commission et cette dernière ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (troisième chambre) déclare et arrête:

1) Le recours est rejeté.

2) La Commission des Communautés européennes est condamnée aux dépens.

Signatures

* Langue de procédure: l'italien.

Judgment of the Court (Third Chamber) of 29 November 2007 Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil its obligations. Case C-119/06.

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61999J0094 : N 40
61999J0475 : N 38
62001J0264 : N 37
62001J0429 : N 30
62001J0494 : N 57
62002J0394 : N 31
62003J0507 : N 63 - 66

SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
NOTES	Brown, Adrian: Application of the Directives to Contracts with Not-for-profit Organisations and Transparency under the EC Treaty: A Note on Case C-119/06 Commission v Italy, Public Procurement Law Review 2008 p.NA96-NA99
PROCEDU	Action for failure to fulfil obligations
ADVGEN	Mazak
JUDGRAP	Cunha Rodrigues
DATES	of document: 29/11/2007 of application: 28/02/2006

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Documents relating to the same case

Judgment of the Court (Third Chamber) of 29 November 2007 – Commission v Italy

(Case C–119/06)

Failure of a Member State to fulfil obligations – Infringement of Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts – Award of a contract without a call for tenders – Award of the contract for healthcare transport services in Tuscany

1. *Approximation of laws – Procedures for awarding public service contracts – Directive 92/50 – Scope (Council Directive 92/50) (see paras 34-52)*

2. *Actions for failure to fulfil obligations – Proof of failure – Burden of proof on the Commission (Art. 226 EC) (see paras 57, 65-66)*

3. *Approximation of laws – Procedures for awarding public service contracts – Directive 92/50 – Award of contracts (Arts 43 EC and 49 EC; Council Directive 92/50) (see paras 63-64)*

Failure of a Member State to fulfil obligations – Infringement of Articles 11, 15 and 17 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) – Award of a contract without publication of the appropriate notice – Award of the contract for healthcare transport services in Tuscany.

e part

1. Action dismissed;

2. The Commission of the European Communities is ordered to pay the costs.

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Judgment of the Court (Third Chamber) of 29 November 2007 - Commission of the European Communities v Italian Republic

(Case C-119/06) [1]

(Failure of a Member State to fulfil obligations - Infringement of Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts - Award of a contract without a call for tenders - Award of the contract for healthcare transport services in Tuscany)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis and D. Recchia, acting as Agents, and M. Mollina, avocat)

Defendant: Italian Republic (represented by: I. Braguglia, Agent, and G. Fiengo and S, Varone, avocats)

Re:

Failure of a Member State to fulfil obligations - Infringement of Articles 11, 15 and 17 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) - Award of a contract without publication of the appropriate notice - Award of the contract for healthcare transport services in Tuscany

Operative part of the judgment

The Court:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

_____

[1] - OJ C 131 of 3.6.2006.

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Action brought on 28 February 2006 - Commission of the European Communities v Italian Republic

(Case C-119/06)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis, acting as Agent, and M. Mollica, Avvocato)

Defendant: Italian Republic

Form of order sought

A Declaration that, as the region of Tuscany and the Tuscan Aziende Sanitarie (public health authorities) concluded the regional framework agreement for the supply of healthcare transport services on 11 October 1999 with the Confederazione delle Misericordie d'Italia, ANPAS - the Tuscan regional committee and the Croce Rossa Italiana - Tuscan division, and subsequently extended that framework agreement by means of a memorandum of understanding on 28 March 2003 and, finally, in April 2004, on the basis of Regional Decision No 379 of 19 April 2004, concluded a new regional framework agreement maintaining the relationship with the above-mentioned organisations and entrusting the administration of the services in question to them for the period from January 2004 to December 2008, the Italian Republic has failed to fulfil its obligations under Council Directive 92/50/EEC[1] of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and, in particular, Articles 11, 15 and 17 thereof.

An order that the Italian Republic should pay the costs.

Pleas in law and main arguments

The Commission maintains that the above-mentioned agreements delegating the supply of services in question constitute public service contracts which were awarded directly, without recourse to any form of tendering procedure, and thus in breach of Community law on public contracts.

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[1] - OJ L 209 of 24/07/1992, p. 1.

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Reference for a preliminary ruling from the Consiglio di Stato, Quinta Sezione lodged on 20 March 2006 - Santorso Soc. coop. arl v Comune di Torino

(Case C-148/06)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Applicant: Santorso Soc. coop. arl

Defendant: Comune di Torino and Others

Question(s) referred

Does the rule laid down in Article 30(4) of Directive 93/37/EEC [1] or the similar rule contained in Art. 55 (1) and (2) of Directive 2004/18/EC [2] (in cases where that is the relevant provision), that, where tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, constitute a fundamental principle of Community law?

If the answer to the preceding question is in the negative, is the rule established by Art. 30 (4) of Directive 93/37/EEC or the similar rule contained in Art. 55 (1) and (2) of Directive 2004/18/EC (in cases where that is the relevant provision), according to which, if tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, while not presenting the characteristics of a fundamental principle of Community law, nevertheless an implied consequence of or a principle deriving from the principle of competition, considered in conjunction with the principles of administrative transparency and non-discrimination on grounds of nationality and is it therefore, as such, directly binding, taking precedence over possibly incompatible national provisions adopted by the Member States to regulate public works contracts to which Community law is not directly applicable?

_____

[1] - OJ L 199, p. 54.

[2] - OJ L 134, p. 114.

Judgment of the Court (First Chamber)
of 10 January 2008
Commission of the European Communities v Portuguese Republic. Failure of a Member State to fulfil obligations - Judgment of the Court establishing the failure of a Member State to fulfil its obligations - Non-compliance - Financial penalty. Case C-70/06.

In Case C70/06,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 7 February 2006,

Commission of the European Communities, represented by X. Lewis, A. Caeiros and P. Andrade, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, P. Fragoso Martins and J. de Oliveira, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), R. Schintgen, A. Borg Barthet and E. Levits, Judges,

Advocate General: J. Mazak,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 July 2007,

after hearing the Opinion of the Advocate General at the sitting on 9 October 2007,

gives the following

Judgment

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

1. Declares that, by failing to repeal Decree-Law No 48 051 of 21 November 1967, making the award of damages to persons injured by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to adopt the measures necessary to comply with the judgment of 14 October 2004 in Case C275/03 Commission v Portugal and has thereby failed to fulfil its obligations under Article 228(1) EC;

2. Orders the Portuguese Republic to pay to the Commission of the European Communities, into the account European Community own resources', a penalty payment of EUR 19 392 for every day of delay in implementing the measures necessary to comply with the judgment in Case C275/03 Commission v Portugal , from the day on which the Court of Justice delivers judgment in the present case until the day on which the judgment in Case C275/03 Commission v Portugal is complied with;

3. Orders the Portuguese Republic to pay the costs.

1. By its application the Commission of the European Communities claims that the Court should:

- declare that, by having failed to take the measures necessary to comply with the judgment of 14 October 2004 in Case C-275/03 Commission v Portugal , not published in the ECR, the Portuguese Republic has failed to fulfil its obligations under Article 228(1) EC;

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- order the Portuguese Republic to pay to the Commission, into the account European Community own resources', a penalty payment of EUR 21 450 for every day of delay in complying with the judgment in Commission v Portugal , from the day on which the Court of Justice delivers judgment in the present case until the day on which the judgment in Commission v Portugal is complied with;

- order the Portuguese Republic to pay the costs.

Legal framework

2. The third, fourth and sixth recitals in the preamble to Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) state the following:

Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement.'

3. Article 1(1) of Directive 89/665 states:

The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible... on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4. Pursuant to Article 2(1) of Directive 89/665:

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

...

(c) award damages to persons harmed by an infringement'.

Background to the dispute

The judgment in Commission v Portugal

5. In point 1 of the operative part of the judgment in Commission v Portugal the Court declared that:

By failing to repeal... Decree-Law No 48 051 of 21 November 1967, making the award of damages to persons harmed by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of ... Directive 89/665...'

Prelitigation procedure

6. By letter of 4 November 2004 the Commission requested the Portuguese Republic to inform it of the measures which it had adopted or which it intended to adopt in order to amend its domestic

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law and, thus, to comply with the judgment in Commission v Portugal.

7. In its reply of 19 November 2004 the Portuguese Republic claimed, in essence, that a recent change of government had led to a delay in the adoption of the measures necessary to comply with the judgment in Commission v Portugal. That Member State also sent the Commission a draft law repealing DecreeLaw No 48 051 and laying down new legal rules governing the non-contractual liability of the Portuguese State and the other public bodies concerned, while requesting the Commission to indicate whether it considered that the draft law would ensure the correct and complete transposition of Directive 89/665.

8. On 21 March 2005, the Commission sent a formal letter of notice to the Portuguese authorities in which it informed them, first, that the changes in government which had taken place did not, in accordance with the case-law of the Court, justify the failure to comply with the obligations and the time-limits laid down in Directive 89/665. Second, the Commission stated in that letter that the draft law - which had not, moreover, yet been approved by the Assembleia da Republica (Parliament) - did not, in any event, comply with Directive 89/665.

9. Dissatisfied with the response provided on 25 May 2005 by the Portuguese Republic, the Commission sent the latter a reasoned opinion on 13 July 2005 in which it stated that, having still failed to take the measures necessary to comply with the judgment in Commission v Portugal , that Member State had failed to fulfil its obligations under Article 228(1) EC. The Commission requested the Portuguese Republic to comply with that reasoned opinion within a time-limit of two months from receipt thereof.

10. In its response of 12 December 2005 to the reasoned opinion, the Portuguese Republic explained that draft law No 56/X of 7 December 2005 on the non-contractual liability of the State and other public bodies (draft law No 56/X'), repealing Decree-Law No 48 051, had already been submitted to Parliament for final approval and that it had been requested that it be given priority and dealt with urgently on the agenda of that assembly.

11. Considering that the Portuguese Republic had still not complied with the judgment in Commission v Portugal , on 7 February 2006 the Commission brought the present action.

The alleged failure to fulfil obligations

Arguments of the parties

12. The Commission considers that, since it has not repealed Decree-Law No 48 051, the Portuguese Republic has not taken the measures necessary to ensure compliance with the judgment in Commission v Portugal. In order to comply with that judgment the Portuguese Government has merely adopted draft law No 56/X. However, the latter has not yet been approved by the parliament and its content does not, in any event, ensure the correct and complete transposition of Directive 89/665.

13. The Portuguese Republic submits, by contrast, that the action is unfounded in so far as the body of rules set out in draft law No 56/X, although not yet definitely approved by the parliament, constitutes adequate transposition of the provisions of Directive 89/665 and ensures full compliance with the obligations under the judgment in Commission v Portugal.

14. That Member State submits, in addition, that it has always fully intended' to introduce a body of rules governing the non-contractual liability of public law entities in accordance with the requirements of Directive 89/665, but that the constitutional difficulties involved, the nature and importance of which should, at the very least, mitigate its liability, prevented it from attaining that result.

15. Finally, the Portuguese Republic submits that, in any case, Articles 22 and 271 of its Constitution and the new code of procedure of administrative courts sufficiently ensure compliance with the judgment

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in Commission v Portugal in so far as they already provide for State liability as a result of damage caused by acts committed by its officials and agents.

Findings of the Court

16. In point 1 of the operative part of the judgment in Commission v Portugal , the Court held that, by failing to repeal Decree-Law No 48 051, the Portuguese Republic had failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of Directive 89/665.

17. In the context of the present proceedings for failure to comply with obligations, in order to check whether the Portuguese Republic has adopted the measures necessary to comply with the judgment at issue, it needs to be determined whether Decree-Law No 48 051 has been repealed.

18. In that regard, according to settled caselaw, the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see Case C304/02 Commission v France [2005] ECR I6263, paragraph 30; Case C119/04 Commission v Italy [2006] ECR I6885, paragraph 27; and Case C503/04 Commission v Germany [2007] ECR I0000, paragraph 19).

19. In the present case, it is common ground that, on the date of expiry of the period laid down in the reasoned opinion addressed to it on 13 July 2005, the Portuguese Republic had not yet repealed Decree-Law No 48 051.

20. In the light of the above, it must be found that, by failing to adopt the measures necessary to ensure compliance with the judgment in Commission v Portugal , the Portuguese Republic has failed to fulfil its obligations under Article 228(1) EC.

21. That finding cannot be called into question by the argument raised by the Portuguese Republic that constitutional difficulties have prevented it from passing a definitive text repealing Decree-Law No 48 051 and, thus, from complying with the judgment in Commission v Portugal .

22. According to settled caselaw, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law (see Commission v Germany , paragraph 38 and the caselaw cited).

23. Similarly, the argument of the Portuguese Republic that State liability for damage caused by acts committed by its officials and agents is already laid down in other provisions of national law cannot be accepted. As the Court held in paragraph 33 of its judgment in Commission v Portugal , that fact has no bearing on the failure to fulfil obligations constituted by maintaining Decree-Law No 48 051 in force in the national legal system. The existence of such provisions cannot, therefore, ensure compliance with that judgment.

24. Consequently, it must be found that, by failing to repeal Decree-Law No 48 051 making the award of damages to persons harmed by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to adopt the measures necessary to comply with the judgment in Commission v Portugal and has thereby failed to fulfil its obligations under Article 228(1) EC.

The financial penalty

Arguments of the parties

25. On the basis of the method of calculation set out in Communication 96/C 242/07 of 21 August 1996 on applying Article [228] of the EC Treaty (OJ 1996 C 242, p. 6; the Communication of 1996'), and Communication 97/C 63/02 of 28 February 1997 concerning the method of calculating the penalty payments provided for pursuant to Article [228] of the EC Treaty (OJ 1997 C 63, p. 2; the Communication of 1997'), the Commission proposes that the Court impose a penalty payment on the Portuguese Republic

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of EUR 21 450 per day of delay in complying with the judgment in Commission v Portugal , from the day on which the Court of Justice delivers judgment in the present case until the day on which the breach of obligations is brought to an end.

26. The Commission considers that the imposing of a penalty payment constitutes the most appropriate sanction for bringing the breach of obligations to an end as quickly as possible. The amount of that penalty payment is calculated by multiplying a uniform base of EUR 500 by a coefficient of 11 (on a scale of 1 to 20) for the seriousness of the infringement, a coefficient of 1 (on a scale of 1 to 3) for the duration of the infringement and a coefficient of 3.9 calculated on the basis of the Portuguese Republic's gross domestic product and the weighting of the votes which that Member State has in the Council of the European Union, which reflects that Member State's ability to pay.

27. The Portuguese Republic considers that the amount of the penalty payment suggested by the Commission is manifestly disproportionate in the light of the circumstances of the present case and is not consistent with the Court's wellestablished caselaw in the field.

28. The objections raised by that Member State concern two aspects of the methods of calculation of the penalty pay ment in particular. First, the coefficient of 11 for seriousness applied by the Commission is excessive to sanction an alleged partial failure of a Member State to fulfil obligations in the area of public procurement since, in respect of actions for failure to act concerning areas which are more sensitive than the present one, such as public health (Case C387/97 Commission v Greece [2000] ECR I5047) or the environment (Case C278/01 Commission v Spain [2003] ECR I14141), the Commission suggested coefficients for seriousness of 6 and 4 respectively. Consequently, the coefficient for seriousness fixed by the Court in the present case should not exceed 4. Second, in accordance with point 13.3 of the Commission's Communication implementing Article 228 of the EC Treaty (SEC(2005) 1658; the Communication of 2005'), the reference period to be used in these circumstances to assess whether the national legislation at issue is compatible with Directive 89/665 must be calculated on an annual basis and not, as proposed by the Commission, on a daily basis.

29. In addition, the Portuguese Republic submits that, irrespective of the reduction of the amount of that penalty payment and the setting of the frequency of that penalty on an annual basis, the Court should order the suspension of the application of that sanction until the entry into force of draft law No 56/X. That possibility is in fact provided for in point 13.4 of the Communication of 2005, in consideration of which the Court may, in exceptional cases, order the suspension of the penalty payment when a Member State has already adopted the measures necessary to comply with a judgment finding there to be a failure to comply with obligations, but a certain amount of time must inevitably pass before the desired result is achieved. The Portuguese Republic considers that to be the case here.

Findings of the Court

30. Having recognised that the Portuguese Republic has not complied with its judgment in Commission v Portugal , the Court may, pursuant to the third subparagraph of Article 228(2) EC, impose a lump sum or penalty payment on it.

31. In that regard, it should be pointed out that it is for the Court to assess in each case, in the light of the circumstances of the case, the financial penalties to be imposed (Case C304/02 Commission v France , paragraph 86, and Case C177/04 Commission v France [2006] ECR I2461, paragraph 58)

32. In the present case, as pointed out in paragraph 25 of this judgment, the Commission suggests that the Court should impose a penalty payment on the Portuguese Republic.

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33. That suggestion is based on the method of calculation which the Commission defined in its Communications of 1996 and 1997. It should also be made clear that those two communications were replaced by the Communication of 2005 which, pursuant to point 25 thereof, applies to decisions taken by the Commission from 1 January 2006 to refer a matter to the Court of Justice under Article 228 EC.

34. In that regard, it must, first, be pointed out that the Commission's suggestions cannot bind the Court and merely constitute a useful point of reference (see Commission v Greece , paragraph 80, and Commission v Spain , paragraph 41). Similarly, guidelines such as those contained in the communications of the Commission are not binding on the Court but contribute to ensuring that the action brought by that institution is transparent, foreseeable and consistent with legal certainty (see, to that effect, Case C304/02 Commission v France , paragraph 85, and Case C177/04 Commission v France , paragraph 70).

35. The Court has also stated that the order imposing a penalty payment and/or a lump sum is intended to place a defaulting Member State under economic pressure which induces it to put an end to the breach established. The financial penalties imposed must therefore be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct (see, to that effect, Case C304/02 Commission v France , paragraph 91, and Case C177/04 Commission v France , paragraphs 59 and 60).

36. It must be found, in the present case, that, during the hearing at the Court on 5 July 2007, the agent of the Portuguese Republic confirmed that DecreeLaw No 48 051 was still in force on that date.

37. Given that it must be considered that the failure to fulfil obligations at issue was still apparent when the Court examined the facts, it must be found that, as suggested by the Commission, the order imposing a penalty payment on the Portuguese Republic constitutes a means adapted in order to induce that Member State to take the measures necessary to ensure compliance with the judgment in Commission v Portugal (see, to that effect, Case C304/02 Commission v France , paragraph 31; Case C177/04 Commission v France , paragraph 21; and Commission v Italy , paragraph 33).

38. Next, as regards the method of calculation of the amount of such a penalty payment, it is for the Court, in exercising its discretion, to set the penalty payment so that it is appropriate to the circumstances and proportionate both to the breach that has been established and to the ability to pay of the Member State concerned (see, inter alia, Case C304/02 Commission v France , paragraph 103, and Case C177/04 Commission v France , paragraph 61).

39. In that light, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of inducing the Member State concerned to fulfil its obligations (see, inter alia, Case C304/02 Commission v France , paragraph 104, and Case C177/04 Commission v France , paragraph 62).

40. As regards, first, the seriousness of the infringement and, in particular, the consequences of the failure to comply with the judgment in Commission v Portugal on private and public interests, it should be pointed out that, pursuant to the third recital in the preamble to Directive 89/665, the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination. In order for that opening-up to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law.

41. To that end, Article 1(1) of that directive requires the Member States to ensure that unlawful

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decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible, whereas Article 2(1)(c) thereof emphasis the fact that it is important that national procedures be laid down for awarding damages to persons harmed by such an infringement.

42. The failure by the Portuguese Republic to repeal Decree-Law No 48 051, which makes the award of damages to individuals subject to the furnishing of proof of fault or fraud on the part of the Portuguese State or public entities concerned, must be regarded as serious since, although it does not render it impossible for individuals to bring judicial actions, it would appear, none the less, as also pointed out by the Advocate General in paragraph 51 of his Opinion, to render those actions more difficult and costly, so impairing the full effectiveness of the Community's public procurement policy.

43. It must none the less be found that the coefficient of 11 (on a scale of 1 to 20) suggested by the Commission appears, in the present case, to be too severe; a coefficient of 4 would be more suited, by contrast, to the seriousness of the infringement at issue.

44. As regards, second, the coefficient relating to the duration of the infringement, the Commission's suggestion that it be set at 1 cannot be upheld. It is apparent from the documents before the Court that that coefficient was calculated on the basis of the time which elapsed between the date of delivery of the judgment in Commission v Portugal and the date on which the present action was brought.

45. It should be recalled that the duration of the infringement must be assessed by reference to the time when the Court assesses the facts, not the time at which the case is brought before it by the Commission (see, to that effect, Case C177/04 Commission v France , paragraph 71).

46. In the present case, the failure of the Portuguese Republic to comply with the judgment in Commission v Portugal has persisted for more than three years in the light of the considerable period of time which has elapsed since the date of delivery of that judgment, namely 14 October 2004.

47. In those circumstances, a coefficient of 2 (on a scale of 1 to 3) would appear to be more appropriate to take account of the duration of the infringement.

48. As regards, third, the Commission's suggestion of multiplying a basic amount by a coefficient based on the gross domestic product of the Member State concerned and on the number of votes which it has in the Council, that suggestion is an appropriate way, in principle, of reflecting that Member State's ability to pay, while keeping the variation between Member States within a reasonable range (see, to that effect, Commission v Greece , paragraph 88; Commission v Spain , paragraph 59; and Case C304/02 Commission v France , paragraph 109).

49. However, in the present case, the coefficient of 3.9 suggested by the Commission does not adequately reflect the evolution of the factors which are at the basis of the evaluation of the Portuguese Republic's ability to pay, in particular, as regards the growth of its gross domestic product. Therefore, as is apparent from point 18.1 of the Communication of 2005, that coefficient must be raised from 3.9 to 4.04.

50. Similarly, the basic amount to which the multiplier coefficients are applied must be fixed at EUR 600, in accordance with the indexing of the amount of EUR 500 set by the Commission in point 15 of that communication, in order to take account of movements in inflation since the publication of the Communication of 1997.

51. In the light of all the above, the multiplication of the basic amount of EUR 600 by coefficients, set at 4 for the seriousness of the infringement, by 2 for the duration of that infringement, and at 4.04 for the ability to pay of the Member State concerned, amounts, in the present case, to

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a total of EUR 19 392 per day of delay. That amount must be regarded as adequate in the light of the purposes of the penalty payment as referred to in paragraph 35 above.

52. As regards the frequency of the penalty payment, in a case such as the present one concerning compliance with a judgment of the Court which involves the adoption of a legislative amendment, a penalty imposed on a daily basis should be chosen (see, to that effect, Case C177/04 Commission v France , paragraph 77).

53. Finally, the Portuguese Republic's arguments claiming that it is possible for the Court to order, in the present case, the suspension of the penalty payment within the meaning of point 13.4 of the Communication of 2005 cannot be upheld. Irrespective of the fact that, as was pointed out in paragraph 34 of the present judgment, that communication is not binding on the Court, it is sufficient to point out that, in any event, contrary to what is required in point 13.4 of that communication for such a suspension to be granted, the measures necessary to comply with the judgment in Commission v Portugal have not been adopted.

54. In the light of all of the foregoing, it is necessary to order the Portuguese Republic to pay to the Commission, into the account European Community own resources', a penalty payment of EUR 19 392 for every day of delay in implementing the measures necessary to comply with the judgment in Commission v Portugal , from the day of delivery of judgment in the present case until the day on which the judgment in Commission v Portugal is complied with.

Costs

55. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful in its submissions, the latter must be ordered to pay the costs.

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FORM	Judgment
TREATY	European Economic Community
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62001J0278 : N 34 48
62002J0304 : N 18 31 34 35 37
62004J0119 : N 18
62004J0177 : N 31 34 35 37 - 39 45 48 52
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SUB Provisions governing the Institutions

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APPLICA Commission ; Institutions

DEFENDA Portugal ; Member States

NATIONA Portugal

NOTES Boi, Nina: Denarne kazni drave zaradi javnih naroil na ravni ES, Pravna praksa 2008, T. 4, p.29-31 ; Rigaux, Anne: Sanctions pécuniaires en cas d'inexécution d'un précédent arrêt de manquement, Europe 2008 Mars Comm. no 77 p.12-14 ; Mok, M.R.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2008 no 238

PROCEDU Action for failure to fulfil obligations

ADVGEN Mazak

JUDGRAP Tizzano

DATES of document: 10/01/2008
of application: 07/02/2006

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Opinion of Mr Advocate General Mazak delivered on 9 October 2007. Commission of the European Communities v Portuguese Republic. Failure of a Member State to fulfil obligations - Judgment of the Court establishing the failure of a Member State to fulfil its obligations - Non-compliance - Financial penalty. Case C-70/06.

I - Introduction

1. The present proceedings were brought by the Commission pursuant to Article 228 EC on 7 February 2006. The Commission claims that the Portuguese Republic has failed to take the necessary measures to comply with the judgment of the Court of 14 October 2004 in Case C275/03 Commission v Portugal (2) and requests that a penalty payment be imposed on Portugal. In that judgment, the Court declared that, by failing to repeal Decree-Law No 48051 of 21 November 1967, making the award of damages to persons injured by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or wilful misconduct, the Portuguese Republic has failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. (3)

II - Legal framework

2. Article 1(1) of Directive 89/665, as amended, provides that [t]he Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible...'

3. Article 2(1) of Directive 89/665 provides that [t]he Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(c) award damages to persons harmed by an infringement.'

4. Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (4) was repealed by Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, (5) which was in turn repealed by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, with effect from 31 January 2006. (6)

5. Article 81 of Directive 2004/18 provides that [i]n conformity with ... Directive 89/665..., Member States shall ensure implementation of this Directive by effective, available and transparent mechanisms'.

6. The reference in Article 1(1) of Directive 89/665 to Directive 71/305 should be read as a reference to Directive 2004/18. (7)

III - Pre-litigation procedure and forms of order sought

7. By letter dated 4 November 2004, the Commission drew the Portuguese authorities' attention to the terms of the judgment in Case C275/03 and the fact that Article 228 EC requires Portugal to take the necessary measures to comply with that judgment. The Commission requested the Portuguese authorities to inform it of the measures taken by 15 January 2005.

8. On 19 November 2004, the Portuguese authorities forwarded to the Commission a copy of a proposed

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new law on the non-contractual civil liability of the State and other public entities. The Portuguese authorities requested the Commission to indicate whether it considered that the proposed law would ensure the correct and complete transposition of Directive 89/665. In addition, by letter dated 12 January 2005, the Portuguese authorities requested the Commission not to take any action pursuant to Article 228 EC until after the new legislator commences, following the elections of 20 February 2005, in order that the procedure for the adoption of the law on non-contractual liability of the State could be undertaken during the first semester of 2005.

9. On 21 March 2005, the Commission sent a formal letter of notice to the Portuguese authorities in which it informed them that the dissolution of the Portuguese Parliament (Assembleia da Republica Portuguesa) and the holding of elections did not justify the failure by Portugal to comply with its obligations pursuant to Directive 89/665 and the time-limits established by that directive. The Commission also indicated that the proposed law did not, in any event, comply with Directive 89/665. The Commission informed the Portuguese authorities, that given that it had not received any information on the measures taken to comply with the judgment of the Court in Case C275/03, it considered that Portugal had failed to fulfil its obligations pursuant to Article 228(1) EC. The Commission called on Portugal to submit its observations on the matter within two months. It also drew the Portuguese authorities' attention to the fact that the Court can impose monetary sanctions pursuant to Article 228(2) EC. The Commission indicated that it would specify to the Court the amount of the lump sum or penalty payment that the Commission considers should be paid by Portugal in the circumstances.

10. By letter dated 25 May 2005, the Portuguese authorities replied to the Commission's formal letter of notice. Dissatisfied with that response, the Commission issued a reasoned opinion on 13 July 2005 in which it stated that Portugal had failed to take the necessary measures to comply with the judgment of the Court in Case C275/03 and had failed to fulfil its obligations pursuant to Article 228(1) EC. It set a time-limit of two months for the Portuguese Republic to adopt the measures necessary to comply with the judgment in Case C275/03. The Commission also drew Portugal's attention to the fact that if the case were brought before the Court, that the Court could impose monetary sanctions and that the Commission itself would suggest that a lump sum or penalty payment be imposed.

11. In its response to the reasoned opinion dated 12 December 2005, the Portuguese authorities indicated that the proposed law on the non-contractual liability of the State, which inter alia repeals Decree-Law No 48051, had already been submitted to the Portuguese Parliament for final approval. Taking the view that Portuguese Republic had not complied with the judgment of the Court in Case C275/03, the Commission decided to bring the present action.

12. By its application, the Commission requests the Court to:

- declare that, by having failed to take the measures necessary to comply with the judgment of the Court... in Case C275/03..., the Portuguese Republic has failed to fulfil its obligations under Article 228(1) of the EC Treaty;

- order the Portuguese Republic to pay to the Commission, into the account European Community own resources, mentioned in Article 9 of Council Regulation (EC, Euratom) No 1150/2000, a penalty payment of EUR 21 450 for every day of delay in complying with the judgment in Case C275/03 from the day on which the Court... delivers judgment in the present case until the day on which the judgment in Case C275/03 is complied with;

- order the Portuguese Republic to pay the costs.'

13. The Portuguese Republic contends that the Court should:

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1. Dismiss as unfounded all the claims of the Commission, and:

a) consider that the Portuguese Republic has taken all the necessary measures to comply with the judgment of the Court... in Case C275/03, ... and thus, consider as unfounded the first claim of the Commission;

b) dispense the Portuguese Republic of the obligation to pay... a penalty payment of EUR 21 450 for every day of delay in complying with the judgment in Case C275/03 from the day on which the Court delivers judgment in the present case until the day on which the judgment in Case C275/03 is complied with, and thus consider as unfounded the second claim of the Commission.

2. In the alternative, in the event that our position is not accepted - [quod non] - reduce the amount of the penalty payment specified, as that amount is manifestly excessive, and fix the applicable coefficient for seriousness at a level not exceeding 4 (four), fix the payment of the penalty payment on an annual basis and suspend the payment of the penalty payment until the entry into force of the measures adopted in the meantime by the Portuguese State.'

IV - Compliance with the obligation imposed by Article 228(1) EC

A - Arguments of the parties

14. The Commission claims that Portugal has not adopted the necessary measures to comply with the judgment of the Court in Case C275/03 as that Member State has not repealed Decree-Law No 48051. The Commission submits that the proposed law on the non-contractual civil liability of the State and other public bodies, which was placed before the Portuguese Parliament by the Portuguese Government, does not comply with that judgment. Moreover, as no other measures have been communicated to the Commission, it considers that the Portuguese Republic has failed to fulfil its obligations under Article 228(1) EC.

15. Portugal considers that proposed Law No 56/X on the non-contractual civil liability of the State and other public entities, which was unanimously adopted by the Portuguese Parliament on 6 April 2006 and which will shortly enter into force correctly transposes Directive 89/665. Portugal also considers that the legal regime adopted by it in the meantime adequately transposes Directive 89/665 and that it thereby wholly complies with the judgment in Case C275/03. In that regard, Portugal submits that Articles 22 and 271 of the Constitution of the Portuguese Republic (CRP) and the new Procedural Code of the Administrative Courts (CPTA) ensure sufficient compliance with the judgment in Case C275/03. Moreover, it claims that the Portuguese courts, in their settled case-law, have recognised that there exists a presumption of fault in relation to the illegal acts of the Administration.

B - Assessment

16. It is for the Commission to provide the Court, in the course of Article 228 EC proceedings, with the information necessary to determine the extent to which a Member State has complied with a judgment declaring it to be in breach of its obligations. Moreover, where the Commission has adduced sufficient evidence to show that the breach of obligations has persisted, it is for the Member State concerned to challenge in substance and in detail the information produced and its consequences. (8)

17. In the operative part of the judgment in Case C275/03, the Court declared that, by failing to repeal Decree-Law No 48051, making the award of damages to persons injured by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or wilful misconduct, the Portuguese Republic has failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of Directive 89/665.

18. Given the terms of the operative part of the judgment in Case C275/03, it is necessary in

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my view to ascertain, in the context of the present case which concerns a failure to fulfil obligations pursuant to Article 228(1) EC, whether the Portuguese Republic has complied with that judgment and, in particular, whether it has repealed Decree-Law No 48051.

19. The reference date for assessing whether there has been a failure to fulfil obligations under Article 228(1) EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision. Moreover, since the Commission seeks the imposition of a penalty payment on the Portuguese Republic, it must also be ascertained whether the alleged failure to fulfil obligations continued up to the Court's hearing in the present case.

20. In the present case, it would appear from the written pleadings submitted by the Commission, and indeed Portugal, that while a proposed law for the repeal of Decree-Law No 48051 is currently before the Portuguese Parliament, that law has not been definitely adopted. The Portuguese Government itself admitted in its written pleadings that in order for proposed Law No 56/X to enter into force it would require, inter alia, the signature of the Presidente da Republica (President of the Republic) and publication in the Diario da Republica (Portuguese Official Journal). On the date of expiry of the period prescribed in the reasoned opinion of 13 July 2005, those necessary steps in the legislative procedure had not yet been taken by the Portuguese Republic.

21. Moreover, at the oral hearing, which took place on 5 July 2007, when it was directly put to the agent of the Portuguese Republic that Decree-Law No 48051 was still in force on the date of the hearing, the agent replied that it was the intention of the Portuguese Republic to alter the current regime by the adoption of proposed Law No 56/X. It is clear therefore that on 5 July 2007 the Portuguese Republic had failed to repeal Decree-Law No 48051. Moreover, on that date, the obligations owed by Portugal to transpose Articles 1(1) and 2(1)(c) of Directive 89/665 continued to exist. (9)

22. As regards, the submissions of the Portuguese Government based on Articles 22 and 271 of the CRP, the CPTA and the case-law of the Portuguese courts (10) on the presumption of fault, those submissions are, in my view, legally irrelevant and inappropriate in the context of the present proceedings. In my opinion, the submissions in question represent an attempt by Portugal to re-open the procedure in Case C275/03 and to seek a re-examination of matters which were already debated by the parties and thus considered by the Court in reaching its final judgment in that case.

23. In the light of all the foregoing, the conclusion must be that the Portuguese Republic has failed to take the necessary measures to comply with the judgment in Case C275/03 as regards the transposition of Articles 1(1) and 2(1)(c) of Directive 89/665, and has thereby failed to fulfil its obligations under Article 228(1) EC.

24. Since the failure to fulfil obligations on the part of the Portuguese Republic has thus been shown still to subsist on the date of the Court's hearing in the present case, the Commission's proposal of a penalty payment must now be examined.

V - The appropriate financial penalty

A - Arguments of the parties

25. On the basis of the calculation method defined in its Communication 96/C 242/07 of 21 August 1996 on applying Article [228] EC (11) and Communication 97/C 63/02 of 28 February 1997 on the method of calculating the penalty payments provided for pursuant to Article [228] EC, (12) the Commission proposes that the Court impose on the Portuguese Republic a penalty payment of EUR 21 450 for each day of delay as a sanction for non-compliance with the judgment in Case C275/03. The penalty should be imposed from the date of delivery of the judgment in the present case until the date the judgment in Case C275/03 is complied with.

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26. The Commission considers that a penalty payment is the most appropriate means of bringing to an end as soon as possible the established infringement. A penalty payment of EUR 21 450 for each day of delay is commensurate with the seriousness and length of the infringement, due regard being had to the need to ensure that the sanction is effective. According to the Commission, that sum should to be calculated by multiplying a uniform base of EUR 500 by a coefficient of 11 (on a scale of 1 to 20) for the seriousness of the infringement, a coefficient of 1 for the duration of the infringement and a coefficient of 3.9 (based on Portugal's Gross Domestic Product (GDP) and the weighting of its votes in the Council), which reflects Portugal's ability to pay.

27. In relation to the duration of the infringement, the Commission submits that on 12 October 2005, the date it decided to bring the present action, 11 months had elapsed since the judgment in Case C275/03 was handed down. In conformity with its orientations adopted in March 2001, the Commission starts counting the duration of an infringement pursuant to Article 228 EC from the seventh month following the date of the judgment finding an infringement of Community law. In the present case, the multiplication of the coefficient 0.1 by 5 months (November 2004 to May 2005) leads to the result 0.5'. The duration coefficient should therefore be 1, or the minimum coefficient.

28. As regards the seriousness of the infringement, the Commission considers that two factors should be taken into account when fixing the amount of the financial penalty, namely the importance of the Community rules breached and the impact of the infringement on general and particular interests. Pursuant to the third recital of Directive 89/665, the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination'. In order for that opening-up to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law'. The Commission considers that the rules which were infringed are of great importance and that the impact of that infringement on general and individual interests could be considerable. In that regard, in 2002 the public procurement sector represented 13.2% of Portugal's GDP. (13) Without prejudice to the above and in the light, firstly, of the fact that the Court, for the first time in Case C275/03, ruled on whether national rules which condition the grant of damages to persons injured by a breach of the Community rules on public procurement, or national rules transposing those rules, on the proof of fault or wilful misconduct are compatible with Articles 1(1) and 2(1)(c) of Directive 89/665 and secondly, the infringement which led to the judgment in Case C275/03 is, in the case of Portugal, an isolated case of incorrect transposition of a Community directive in the public procurement field, the Commission considers that the coefficient for seriousness to be applied in this case should be 11.

29. The Commission indicated in its reply that, contrary to Portugal's arguments, (14) paragraph 13.3 of the 2005 Communication from the Commission - Application of Article 228 of the EC Treaty (15) (hereinafter the 2005 Communication'), which provides for the possibility of adapting the reference time-frame for assessing continuing non-compliance by a Member State after the judgment pursuant to Article 228 EC has been handed down, should not be applied in the present case. The Commission also considers that the circumstances in Case C278/01 Commission v Spain , (16) where the Court held that the termination of the infringement in that case could only be ascertained annually, are materially different to those in the present case, which concerns the adoption of measures to transpose correctly into national law a provision of Directive 89/665.

30. Moreover, the Commission considers, again contrary to the submissions of Portugal, (17) that there is no need to suspend the imposition of a penalty in the present case in accordance with paragraph 13.4 of the 2005 Communication. Paragraph 13.4 of the 2005 Communication provides for the suspension of a penalty where, for example, a period of time is necessary in order to verify whether all the necessary measures have been taken to comply with a judgment. As the present case concerns the transposition of a directive, the Commission can immediately, upon notification of the national

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transposition measures, take note of such measures.

31. Portugal considers that the amount of the penalty payment proposed by the Commission, and in particular the coefficient of 11 for seriousness, is manifestly disproportionate and excessive in the light of the circumstances of the present case. According to the Portuguese Government, the imposition of civil liability on the Administration would appear, within the framework of Directive 89/665, to be an instrument of public procurement policy. However, that instrument should not be considered to be of over-riding importance with regard to that policy. The objective of public procurement policy is primarily to guarantee the legality of the procedures for the award of public tenders. The possibility to impose liability on the Administration should be considered as a secondary instrument to safeguard the interests of victims. Moreover, Portugal considers that it is doubtful whether the infringement has had any impact on general and individual interests as the Portuguese courts have recognised, in their settled case-law, that there is a presumption of fault in relation to the illegal acts of the Administration, thereby facilitating the grant of damages to injured individuals in perfect conformity with the requirements of Directive 89/665.

32. Portugal claims that the present case is not similar to other cases which were decided by the Court pursuant to Article 228 EC as the present case does not concern the incorrect application of Community law but rather the alleged incorrect transposition of a directive. Portugal claims that this should be considered as a mitigating circumstance. In addition, the present case, contrary to other cases decided by the Court where lower coefficients for seriousness were proposed by the Commission, does not concern fundamental interests such as public health or the bodily integrity of individuals. Furthermore, the present case does not concern a sensitive matter which is the exclusive competence of the Community and which has been extensively legislated and examined in Community case-law. Portugal considers that it is therefore surprising that the Commission proposes a coefficient of 11 for seriousness in a case relating to partial failure to transpose Directive 89/665. Portugal therefore considers that the coefficient for seriousness in this case should not exceed 4.

33. Moreover, Portugal considers, in accordance with paragraph 13.3 of the 2005 Communication which replaced Communications 96/C 242/07 and 97/C 63/02, that the appropriate reference time-frame in the present case for assessing compliance with Directive 89/665 should be annual and not daily as proposed by the Commission.

34. In addition, Portugal considers that in accordance with paragraph 13.4 of the 2005 Communication, the penalty in the present case should be suspended. By its adoption of proposed Law No 56/X, Portugal has ensured that all the necessary steps to comply with the judgment of the Court in Case C275/03 have been taken. It is merely necessary that a certain time period elapses for the text of the law to be adopted.

B - Assessment

35. In the event that the Court should find that the Portuguese Republic has not complied with its judgment in Case C275/03, the Court may, under the third subparagraph of Article 228(2) EC, impose on that Member State a lump sum and/or penalty payment. (18)

36. According to its settled case-law, it is for the Court to assess in each case, in the light of the circumstances of the case, the financial penalties to be imposed. (19) The fixing of a sanction pursuant to Article 228 EC thus lies within the exclusive remit of the Court. In exercising its discretion, it is for the Court to fix the lump sum and/or penalty payment that is appropriate to the circumstances and proportionate both to the breach that has been found and to the ability to pay of the Member State concerned. In that regard, the Commission's proposals with regard to financial penalties do not bind the Court and merely constitute a useful point of reference. (20)

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Moreover, the Commission's communications in relation to Article 228 EC are not binding on the Court but serve to ensure the transparency, predictability and legal certainty of that institution's actions. (21)

37. In the present case, the Commission in its application based its proposal on the financial penalties to be imposed on Portugal, inter alia, on its Communications 96/C 242/07 and 97/C 63/02. It should be noted that on 7 February 2006, the date when the application in the current proceedings was lodged before the Court, those communications were no longer in force and had been replaced by the 2005 Communication with effect from 1 January 2006. (22)

38. I consider that in the context of the present proceedings it would be appropriate for the Court to use, inter alia, the more recent 2005 Communication, together with the submissions of the parties, as a useful point of reference for establishing whether a financial sanction should be imposed in the present case, and if so, the amount of that sanction. In reaching this finding, I consider that the reference by the Commission to its earlier communications did not hinder Portugal in defending its interests in the course of the current proceedings and that the principles of transparency, predictability and legal certainty have been observed. Portugal itself, in its written pleadings, highlighted the fact that the 2005 Communication had replaced the Commission's earlier communications and indeed, as can be seen from Portugal's pleadings, that Member State specifically relied on paragraphs 13.3 and 13.4 of the 2005 Communication. In my opinion, Portugal was fully aware of the contents of the 2005 Communication and that it could be used as a point of reference in relation to the imposition of financial sanctions by the Court.

39. In my view, in order to apply the enforcement procedure provided by Article 228 EC in a consequent manner, that procedure must be understood as a tool for fully realising the objective of Article 226 EC proceedings, which is to bring infringements of Community law to an end, and at the same time as a means of dissuading Member States from failing to comply with the judgments of the Court establishing a breach of Community law pursuant to Article 226 EC.

40. In concrete terms, the procedure laid down in Article 228(2) EC is aimed at inducing a defaulting Member State to comply with a judgment establishing a failure to fulfil obligations, thereby ensuring that Community law is in fact applied by that State. The sanctions provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective. The purpose of imposing a penalty payment and/or a lump sum is to place a Member State under economic pressure which induces it to put an end to the infringement that has been established. The financial penalties imposed must therefore be decided on according to the degree of persuasion needed for the Member State in question to alter its conduct. (23)

41. In Case C304/02 Commission v France , the Court stated that while the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it. (24)

42. I consider in the light of the circumstances of the case that the imposition of a penalty payment is a suitable means to induce or persuade Portugal to alter its conduct and to comply with its obligations pursuant to Articles 1(1) and 2(1)(c) of Directive 89/665. In my view, there is sufficient evidence in the present proceedings to suggest that there is a real danger that the infringement in question will persist unless a penalty payment is imposed on Portugal. In that regard, at the oral hearing on 5 July 2007 it was evident that the Portuguese Republic had not taken the necessary action to comply with the judgment in Case C275/03, despite its repeated earlier statements that such action was imminent.

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43. As regards the amount of the penalty payment, the basic criteria which must be taken into account in order to ensure that such payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations. (25)

44. The Commission submits that the coefficient for duration of the infringement should be fixed at 1 in the present proceedings. As can be seen from the Commission's pleadings, that coefficient was calculated by reference, inter alia, to the date when the Commission decided to initiate the present proceedings, that is 12 October 2005. In my view, the proposal of the Commission in relation to duration is flawed. Aside from the fact that the Commission did not actually bring the present proceedings until 7 February 2006, the Court in Case C177/04 Commission v France stated that the duration of an infringement pursuant to Article 228 EC must be assessed by reference to the time when the Court assesses the facts, not the time at which the case is brought before it by the Commission. (26)

45. In the present case, compliance with the judgment in Case C275/03 only required the adoption by Portugal of measures of transposition into national law of Articles 1(1) and 2(1)(c) of Directive 89/665 and, in particular, the repeal of Decree-Law No 48051. It is clear that the failure by Portugal to definitely adopt the necessary legislative measures to comply with the judgment in Case C275/03, which was handed down on 14 October 2004, has persisted for a substantial period of time. On the date of the oral hearing in the present case nearly three years had elapsed since the judgment in Case C275/03 was delivered. (27)

46. In those circumstances, I consider that a coefficient of 2 appears appropriate to take account of the duration of the infringement.

47. As regards the seriousness of the infringement, I do not consider that the Commission's proposal of a coefficient of 11, on a scale of 1 to 20, for seriousness is correct. In my view, that coefficient is clearly excessive in the light of the circumstances of the present case and the previous case-law of the Court.

48. With regard to that case-law, the Portuguese Government in my view correctly pointed out that a lower coefficient for seriousness in cases involving for example a threat to public health, damage to the environment and the depletion of fishing stocks was applied by the Court. (28) I consider that the coefficient of 4 suggested by the Portuguese Government is thus more appropriate in the present case.

49. While the infringement of Directive 89/665 would appear to be partial, in that the present proceedings and the proceedings in Case C275/03 relate to Articles 1(1) and 2(1)(c) of that directive rather than the directive in its entirety, the coefficient of 4 for seriousness is warranted given, in my view, the importance of the provisions in question which provide for the establishment of measures for the award of damages to persons injured by an infringement of the public procurement rules. (29)

50. In coming to this conclusion I would stress that I do not agree with the submissions of Portugal which would tend to suggest that the European Community's policy on public procurement is not of any great importance. Public procurement policy is, in my view, pivotal in ensuring that competition in the internal market is not distorted. (30) Moreover, contrary to Portugal's arguments, (31) I consider that the possibility for private actors to seek review of the decisions of contracting authorities and, where they have been injured by an infringement of the rules on public procurement, to obtain damages, is crucial to the proper functioning of those rules. The availability of such

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procedures not only safeguards the interests of the parties in question, but also guarantees the full effectiveness of the Community's public procurement policy.

51. The failure by Portugal to repeal Decree-Law No 48051 (32) would appear to render judicial actions in this field by private parties more difficult and indeed costly. This situation could, in my opinion, undermine the incentives of private parties to bring such actions and thus impair the full effectiveness of the Community's public procurement policy.

52. In the light of the foregoing, I consider that the penalty payment to be imposed in the present case should be derived by multiplication of the base amount of EUR 600 by the coefficients of 4.04 (ability to pay), (33) 4 (seriousness of the infringement) and 2 (duration of the infringement) which leads to an amount of EUR 19 392 for each day of delay.

53. As regards, the frequency of the penalty payment, in a case such as the present one concerning compliance with a judgment of the Court which involves the simple adoption of a legislative amendment in order to transpose a part of a directive, a penalty payment imposed on a daily basis should be chosen. (34) The arguments of the Portuguese Government based on paragraph 13.3 of the 2005 Communication should thus be rejected.

54. Moreover, I consider that there is no need to suspend the imposition of the penalty payment in the present case. The adoption of the necessary legislative amendment and thus compliance with the judgment in Case C275/03 can be assessed immediately by the Commission upon notification of that amendment. The arguments of the Portuguese Government based on paragraph 13.4 of the 2005 Communication should therefore also be rejected.

55. As regards the possibility for the Court to impose a lump sum, I do not consider that such a sanction is warranted in the present proceedings despite the fact that the failure to transpose Articles 1(1) and 2(1)(c) of Directive 89/665 has persisted for almost three years since the judgment in Case C275/03 was handed down and the public and private interests affected due to that failure are of some importance.

56. That reflexion is underpinned by the case-law of the Court, particularly by the judgment of the Court in Case C304/02 and the very specific circumstances of that case which led the Court to impose a lump sum in addition to a penalty payment. (35) Indeed, the wording of Article 228(2) EC itself contemplates the imposition of only one of the two potential sanctions mentioned. Moreover, the Court has considered that both sanctions have their own autonomous function. (36)

VI - Conclusion

57. In the light of the foregoing considerations, I suggest that the Court should:

- declare that, by failing to repeal Decree-Law No 48051 of 21 November 1967, making the award of damages to persons injured by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or wilful misconduct, the Portuguese Republic has failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and has accordingly failed to fulfil its obligations under Article 228 EC;

- order the Portuguese Republic to pay to the Commission of the European Communities, into the account EC own resources', a penalty payment of EUR 19 392 for each day of delay in implementing the measures necessary to comply with the judgment in Case C275/03 Commission v Portugal , from delivery of the present judgment until the judgment in Case C275/03 has been complied with in full;

- order the Portuguese Republic to pay the costs.

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(1) .

(2) - Judgment of 14 October 2004, not published in the ECR.

(3) - OJ 1989 L 395, p. 33.

(4) - OJ 1971 L 185, p. 5.

(5) - OJ 1993 L 199, p. 54.

(6) - OJ 2004 L 134, p. 114.

(7) - See Article 81 of Directive 2004/18.

(8) - Case C119/04 Commission v Italy [2006] ECR I6885, paragraph 41.

(9) - Those provisions have not been repealed in the meantime.

(10) - See point 15 above.

(11) - OJ 1996 C 242, p. 6.

(12) - OJ 1997 C 63, p. 2.

(13) - Which is slightly below the Community average of 16%.

(14) - See point 33 below.

(15) - SEC (2005) 1658.

(16) - [2003] ECR I14141, paragraph 51.

(17) - See point 34 below.

(18) - See Case C304/02 Commission v France [2005] ECR I6263, in particular paragraphs 80 to 82.

(19) - Commission v France , cited in footnote 18, paragraph 86.

(20) - See Case C387/97 Commission v Greece [2000] ECR I5047, paragraph 89.

(21) - See Commission v Greece , cited in footnote 20, paragraph 87.

(22) - See paragraph 25 of the 2005 Communication.

(23) - Case C177/04 Commission v France [2006] ECR I2461, paragraphs 59 and 60.

(24) - See paragraph 81.

(25) - Commission v Greece , cited in footnote 20, paragraph 92.

(26) - See paragraph 71. In my view, the date of the Court's assessment of the facts is an unidentifiable date which is not known by the parties. I consider therefore that for the purposes of imposing a penalty payment pursuant to Article 228 EC, the duration of the infringement must be assessed by reference to the date of the hearing in a case, or in the event that a hearing is not held, the date of the close of the written procedure.

(27) - See by analogy Case C177/04 Commission v France , cited in footnote 23, paragraphs 73 and 74. In that case the Court considered that a coefficient of 3 for duration should be applied where a failure to adopt measures of transposition into national law had persisted for nearly four years.

(28) - In that regard, Portugal noted that in Commission v Greece (cited in footnote 20), the Commission proposed a coefficient of 6 for seriousness concerning a failure to fulfil obligations

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which threatened public health and where no action had been taken to execute the previous judgment. While in Commission v Spain (cited in footnote 16), a coefficient of 4 for seriousness was proposed by the Commission in relation to a failure to transpose a directive on the quality of bathing waters and thus concerned the protection of the environment and public health. In addition, in Case C304/02 Commission v France (cited in footnote 18), which concerned the common fisheries policy, a coefficient of 10 for seriousness was proposed.

(29) - See by contrast Case C177/04 Commission v France (cited in footnote 23) where the Court considered that the infringement of Community law due to the partial non-transposition of a directive was not particularly serious and thus applied a coefficient for seriousness of 1. In that case, the Court found that France had failed to comply with the judgment in Case C52/00 Commission v France ([2002] ECR I3827) as regards the transposition of Article 3(3) of Council Directive 85/374/EEC of 25 July 1985 on the approx imation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29), and had thus failed to fulfil its obligations under Article 228 EC as it continued to regard the supplier of a defective product as liable on the same basis as the producer where the producer cannot be identified, even though the supplier had informed the injured person within a reasonable time of the identity of the person who supplied him with the product.

(30) - Indeed the sheer size of the public procurement sector, which would appear to represent 16% of the Community's GDP and 13.2% of Portugal's GDP, can not be overlooked.

(31) - See point 31 above.

(32) - Thereby making the award of damages to persons injured by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or wilful misconduct on the part of the State or public entities.

(33) - It should be noted that the base amount and the coefficient in relation to Portugal's ability to pay have been drawn from the 2005 Communication. See point 37 above.

(34) - See Case C177/04 Commission v France , cited in footnote 23, paragraph 77.

(35) - See paragraphs 114 and 115 of Case C304/02 Commission v France (cited in footnote 18).

(36) - See Case C304/02 Commission v France , cited in footnote 18, paragraph 84.

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SUB	Provisions governing the Institutions
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	Portugal ; Member States
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JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

8 October 2008 (*)

(Public works contracts – Tender procedure of the European Agency for Reconstruction – Decision to cancel tender procedure and to publish a new procedure – Action for annulment – Jurisdiction of the Court of First Instance – Necessity of a prior administrative complaint – Time-limit for bringing proceedings – Instructions to act as agent – Obligation to state the reasons on which the decision is based – Application for damages)

In Case T–411/06,

Sogelma – Società generale lavori manutenzioni appalti Srl, established in Scandicci (Italy), represented by E. Cappelli, P. De Caterini, A. Bandini and A. Gironi, lawyers,

applicant,

v

European Agency for Reconstruction (EAR), represented initially by O. Kalha, subsequently by M. Dischendorfer and then by R. Lundgren, acting as Agents, and by S. Bariatti and F. Scanzano, lawyers,

defendant,

supported by

Commission of the European Communities, represented by P. van Nuffel and L. Prete, acting as Agents,

intervener,

APPLICATION for annulment of decisions of the EAR relating to cancellation of the tender procedure for the public works contract reference EuropeAid/120694/D/W/YU and organisation of a new tender procedure, and an application for compensation for loss allegedly suffered,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Eighth Chamber),

composed of E. Martins Ribeiro, President, S. Papasavvas and A. Dittrich (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 June 2008,

gives the following

Judgment

Legal context

1 The European Agency for Reconstruction (EAR) was established by Council Regulation (EC) No 2454/1999 of 15 November 1999 amending Regulation (EC) No 1628/96 relating to aid for Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia, in particular by the setting up of a European Agency for Reconstruction (OJ 1999 L 299, p. 1).

2 Council Regulation (EC) No 1628/96 of 25 July 1996 (OJ 1996 L 204, p. 1), was repealed by Article 14(1) of Council Regulation (EC) No 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation (EC) No 1628/96 and amending Regulations (EEC) No 3906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC (OJ 2000 L 306, p. 1). The provisions of Regulation (EC) No 1628/96, as amended by Regulation No 2454/1999, governing the establishment and operation of the EAR were amended by and incorporated in Council Regulation (EC) No 2667/2000 of 5 December 2000 on the European Agency for Reconstruction (OJ 2000 L 306, p. 7).

3 Under Article 1 of Regulation No 2667/2000, the Commission may delegate to the EAR implementation of the Community assistance provided for in Article 1 of Regulation No 2666/2000 to Serbia and Montenegro. Under Article 2(1)(c) of Regulation No 2667/2000, the Commission may make the EAR responsible for all operations required to implement programmes for the reconstruction of Serbia and Montenegro, including preparing and evaluating invitations to tender and awarding contracts. In addition, under Article 3 of that regulation, the EAR is to have legal personality.

Background to the dispute

4 On 7 September 2005 the EAR published in the Supplement to the *OfficialJournal of the European Union* (OJ 2005 S 172) an open procedure procurement notice, reference EuropeAid/120694/D/W/YU, relating to the award of the public works contract 'Restoring of Unhindered Navigation (removal of unexploded ordnance) in the Inland Waterway Transport system, Republic of Serbia, Serbia and Montenegro' ('the Procurement Notice').

5 The Procurement Notice and point 2 of the instructions to tenderers to be found in the tender dossier [the 'Instructions to tenderers'] stated that the project concerned was to be financed by the EAR, and that the contracting authority for it was to be the Serbian Ministry of Capital Investments.

6 Point 16(x) of the Procurement Notice and point 4.2(x) of the Instructions to tenderers specified, among the 'minimum selection criteria' to be met by the successful candidate, that all the key personnel had to have at least 10 years appropriate professional experience.

7 Point 37 of the Instructions to tenderers reads as follows:

'Appeals

(1) Tenderers believing that they have been harmed by an error or irregularity during the award process may petition the [EAR] directly and inform the Commission. The [EAR] must reply within 90 days of receipt of the complaint.

(2) Where informed of such a complaint, the Commission must communicate its opinion to the [EAR] and do all it can to facilitate an amicable solution between the complainant (tenderer) and the [EAR].

(3) If the above procedure fails, the tenderer may have recourse to procedures established by the European Commission.'

8 Before the deadline for the submission of tenders, the EAR received three tenders, submitted respectively by a consortium formed by the applicant, Sogelma – Societá generale lavori manutenzioni appalti Srl, and the Croatian company DOK ING RAZMINIRANJE d.o.o. ('DOK ING'), and by two other consortia.

9 On 10 March 2006 the EAR publicly opened the tender envelopes. The price in the applicant's tender was lower than that proposed by its competitors.

10 On 14 and 22 March 2006 the EAR sent requests for clarification to the tenderers. The second request concerned in particular the CVs of the proposed key personnel. All the tenderers replied to the requests for clarification within the periods set by the EAR.

11 By letter dated 9 October 2006 the EAR informed the applicant that the tender procedure in

question had been cancelled due to the fact that none of the offers received was technically compliant. As regards the applicant's offer, the EAR stated that one of the key personnel proposed, the 'Superintendent Survey Team' did not satisfy the requirements laid down in point 16(x) of the Procurement Notice and in point 4.2(x) of the Instructions to tenderers.

12 By letter of 19 October 2006 (mistakenly dated 19 September 2006) the applicant asked for a copy of the decision to cancel the tender procedure and the respective minutes. In addition, it refers in that letter to the possibility of using the negotiated procedure under Article 30 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

13 By letter of 13 November 2006 the applicant repeated that request and asked the EAR to take a reasoned decision on whether or not to proceed with a negotiated procedure.

14 By letter of 1 December 2006 the applicant asked the EAR to provide it with copies of all the minutes of the evaluation committee which examined the tenders submitted in response to the Procurement Notice, of the minutes of the public opening of the tender envelopes, and of the decision to cancel the tender procedure and the related minutes, on the basis of Article 6 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

15 By letter of 14 December 2006 the EAR advised the applicant that it had exercised its right to cancel the tender procedure and to initiate a new invitation to tender due to the fact that the technical requirements 'ha[d] been considerably changed'. Furthermore, the EAR stated that, apart from the finding that no technically compliant tenders had been received, the evaluation committee made no other remarks. Annexed to that letter, the EAR sent the minutes relating to the public opening of tender envelopes.

Procedure and forms of order sought

16 By application lodged at the Registry of the Court of First Instance on 22 December 2006 the applicant brought this action and stated that it was bringing proceedings on its own behalf and as the agent of the company DOK ING.

17 By order of the President of the Second Chamber of 4 June 2007 the Commission was given leave to intervene in support of the forms of order sought by the EAR.

18 The Commission lodged a statement in intervention. The applicant submitted observations on that statement within the period allowed.

19 After a partial renewal of the membership of the Court of First Instance, the case was allocated to a new Judge Rapporteur. That judge was then assigned to the Eighth Chamber, and this case was consequently allocated to that chamber.

20 After hearing the report of the Judge Rapporteur the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Court's Rules of Procedure, asked the parties to reply in writing to a number of questions. The parties complied with that request within the period allowed.

21 The parties presented oral argument and replied to the questions put by the Court at the hearing of 18 June 2008.

22 The applicant claims that the Court should:

– annul the decisions of the EAR relating to:

– cancellation of the tender procedure;

– organisation of a fresh tender procedure;

– order the EAR to pay it compensation for the loss suffered, as stated in the application;

– order the EAR to pay the costs.

23 The EAR contends that the Court should:

– declare the action to be inadmissible, or, alternatively, dismiss the action as unfounded;

– order the applicant to pay the costs.

24 The Commission contends that the Court should:

– declare the action for annulment to be inadmissible, or, alternatively, dismiss the action as unfounded;

– dismiss the action for compensation for damage as unfounded;

– order the applicant to pay the costs.

25 Further, the applicant requests that, pursuant to Article 65(b) of the Rules of Procedure, the Court order the EAR to produce all the documents relating to the award procedure in question. The EAR and the Commission oppose that request.

26 In the application, the applicant also claimed that the Court should annul 'all other preliminary, connected or associated measures, including the decision to exclude the applicant'. At the hearing, the applicant stated that this claim should no longer be considered by Court of First Instance, which has been duly recorded.

Admissibility

27 The EAR relies on several pleas of inadmissibility. It is necessary to examine, first, the plea that the Court of First Instance has no jurisdiction to rule on an action for annulment brought on the basis of the fourth paragraph of Article 230 EC against an act of the EAR and, secondly, the plea that the applicant did not lodge an administrative complaint prior to bringing the present action. The Court must examine, thirdly, in relation to the application for annulment of the decision to cancel the tender procedure, whether the time-limit for bringing proceedings laid down in the fifth paragraph of Article 230 EC was respected. Fourthly, it is necessary to examine the admissibility of the action in so far as it seeks annulment of the EAR's decision to organise a new tender procedure. Lastly, it is necessary to examine the admissibility of the action in so far as the applicant asserts the rights of DOK ING.

A – The jurisdiction of the Court of First Instance to rule on an action for annulment brought on the basis of the fourth paragraph of Article 230 EC against an act of the EAR

1. Arguments of the parties

28 The EAR claims that the decision to cancel the tender procedure is not an act the legality of which can be reviewed by the Court under Article 230 EC. It submits that, in terms of that article, review by the Community judicature is limited to acts adopted jointly by the European Parliament and the Council, acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and to acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

29 Article 13a of Regulation No 2667/2000, as amended by Council Regulation (EC) No 1646/2003 of 18 June 2003 (OJ 2003 L 245, p. 16), is irrelevant in that regard, since it refers only to actions against decisions of the EAR taken pursuant to Article 8 of Regulation No 1049/2001.

30 Equally, Article 13(2) of Regulation No 2667/2000 does no more than provide that the Community judicature has jurisdiction to hear disputes relating to compensation in the case of the EAR's non-contractual liability.

31 Tenderers are not, according to the EAR, without any protection. Their rights are protected by the procedure laid down in point 37 of the Instructions to tenderers (quoted in paragraph 7 above). The EAR submits that, in terms of that point, a tenderer may, if the procedure provided for in that point fails, have recourse to procedures established by the Commission, whose acts are actionable under Article 230 EC. The EAR also raises the possibility of bringing an action before the domestic courts.

32 The applicant and the Commission do not accept that plea of inadmissibility.

2. Findings of the Court

33 First, it is clear that agencies such as the EAR established on the basis of secondary legislation are not among the Community institutions listed in the first paragraph of Article 230 EC.

34 Furthermore, Regulation No 2667/2000, as amended, which states only, in Articles 13 and 13a, that the Court has jurisdiction in disputes relating to compensation in the case of the EAR's non-contractual liability and to EAR decisions relating to access to documents taken pursuant to Article 8 of Regulation No 1049/2001, does not provide that the Court has jurisdiction to hear actions for annulment against other decisions taken by the EAR.

35 None the less, those considerations do not preclude review by the Court of First Instance, under Article 230 EC, of the legality of EAR acts which are not referred to in Articles 13 and 13a of Regulation No 2667/2000.

36 The Court of Justice has held, in paragraph 23 of the *Les Verts* case (Case 294/83 *'Les Verts'* v *Parliament* [1986] ECR 1339), that the European Community is a community based on the rule of law, and that the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. The general scheme of the Treaty is to make a direct action available against all measures adopted by the institutions which are intended to have legal effects (see *Les Verts*, paragraph 24, and case-law cited). The Court of Justice concluded in that case that an action for annulment could be brought against measures of the European Parliament intended to have legal effects vis-à-vis third parties, even though Article 173 of the EC Treaty (now, after amendment, Article 230 EC), in the version applicable at the material time, referred only to acts of the Council and the Commission. The Court stated that an interpretation of that article which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 of the EC Treaty (now Article 220 EC) and to its system (*Les Verts*, paragraph 25).

37 The general principle to be elicited from that judgment is that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review. It is true that *Les Verts*, paragraph 24, refers only to Community institutions and the EAR is not one of the institutions listed in Article 7 EC. None the less, the situation of Community bodies endowed with the power to take measures intended to produce legal effects vis-à-vis third parties is identical to the situation which led to the *Les Verts* judgment: it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review.

38 It must be noted that the cancellation of a tender procedure is an act which, as a general rule, may be the subject of an action under Article 230 EC (see, to that effect, order of the Court of 19 October 2007 in Case T–69/05 *Evropaïki Dinamiki* v *EFSA*, not published in the ECR, paragraph 53). It is an act which adversely affects the applicant and brings about a distinct change in his legal position, since the result is that the applicant can no longer expect to be awarded the contract for which he has submitted a tender.

39 It must also be borne in mind that, under Articles 1 and 2 of Regulation No 2667/2000, as amended, the Commission may delegate to the EAR implementation of the Community assistance provided for in Article 1 of Regulation No 2666/2000 to Serbia and Montenegro, and, in particular, make the EAR responsible for preparing and evaluating invitations to tender and awarding contracts. As is stated by the Commission, the EAR therefore takes decisions which the Commission itself would have taken if it had not delegated those powers to the EAR.

40 Decisions which the Commission would have taken cannot cease to be acts open to challenge solely because the Commission has delegated powers to the EAR, otherwise there would be a legal vacuum.

41 The Court must reject the EAR's argument that the rights of tenderers are protected by the procedure laid down in point 37 of the Instructions to tenderers on the ground that they could have recourse to procedures established by the Commission, whose acts are open to challenge under Article 230 EC. It is clear that point 37 of the Instructions to tenderers does not provide for the Commission to adopt, in the course of the procedure, a decision which is open to judicial review. It must further be observed that the Commission stated, in reply to a written question put by the Court, that it had not set up any specific procedure to deal with any complaints which did not reach an amicable settlement under point 37 of the Instructions to tenderers.

42 Lastly, the Court must reject the EAR's argument that an action against its acts could be brought before a domestic court. While it is true, in the present case, that, according to the Procurement Notice and point 2 of the Instructions to tenderers, the contracting authority is the Serbian Ministry of Capital Investments, it remains the case that it is the EAR, and not a domestic authority, which took the decision to cancel the tender procedure. It is clear that no domestic court has jurisdiction to assess the legality of that decision.

43 It follows that decisions taken by the EAR in the context of public procurement procedures and intended to produce legal effects vis-à-vis third parties are acts open to challenge before the Community judicature.

44 No doubt is cast on that conclusion by the case-law referred to by the EAR in support of its defence.

45 As regards Case C-160/03 *Spain* v *Eurojust* [2005] ECR I-2077, it is true that the Court of Justice there held that the acts contested were not included in the list of acts the legality of which the Court may review under Article 230 EC (paragraph 37). However, in the following paragraph of that judgment, the Court of Justice also held that Article 41 EU did not provide for the application of Article 230 EC to the provisions on police and judicial cooperation in criminal matters in Title VI of the Treaty on European Union, the jurisdiction of the Court in such matters being defined in Article 35 EU, to which Article 46(b) EU refers. The Court of Justice also held, in paragraphs 41 and 42 of that judgment, that the acts contested in that case were not exempt from judicial review.

46 Similarly, in the order in Case T-148/97 *Keeling* v *OHIM* [1998] ECR II-2217, the Court of First Instance did not confine itself to stating, in paragraph 32, that the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) was not one of the institutions of the Community listed in Article 4 of the EC Treaty (now Article 7 EC) and was not mentioned in the first paragraph of Article 173 of the EC Treaty, but also observed, in paragraph 33, that other remedies were potentially available against the contested decision of the President of OHIM, mentioning, inter alia, Article 179 of the EC Treaty (now Article 236 EC). That order therefore does not preclude an action lying under Article 230 EC against a decision of a Community body not mentioned in that article.

47 As regards the order of 1 March 2007 in Joined Cases T-311/06 R I, T-311/06 R II, T-312/06 R and T-313/06 R *FMC Chemical and Others* v *EFSA,* not published in the ECR, it must be pointed out that that order relates to an action brought against an opinion of the European Food Safety Authority which did not produce binding legal effects. It cannot be concluded from that order that an action brought against an act of a Community body not mentioned by Article 230 EC is inadmissible.

48 Consequently, the case-law relied on by the EAR does not affect the finding that an act emanating from a Community body intended to produce legal effects vis-à-vis third parties cannot escape judicial review by the Community judicature.

49 It must moreover be observed that, as a general rule, actions must be directed against the body which enacted the contested measure, in other words, the Community institution or body from which the decision emanated.

50 In that context, it must be pointed out that the EAR is a Community body endowed with legal personality and established by a regulation with the aim of implementing Community assistance inter alia to Serbia and Montenegro (see Articles 1 and 3 of Regulation No 2667/2000). For that purpose, Articles 1 and 2 of Regulation No 2667/2000 expressly permit the Commission to delegate to the EAR the implementation of that assistance, including preparing and evaluating invitations to tender and awarding contracts. The EAR therefore itself has the power, conferred on it by the Commission, to implement programmes of Community assistance.

51 In the present case, it is the EAR which took the decision to cancel the tender procedure, by virtue

of the powers delegated by the Commission in accordance with Regulation No 2667/2000. The Commission played no part in the decision-making process. Accordingly, it is clear that the EAR is the body which enacted the contested measure. Consequently, the applicant may institute proceedings before the Court of First Instance against the EAR in that capacity.

52 Furthermore, it must be pointed out that it is clear from Article 13(2) and from Article 13a(3) of Regulation No 2667/2000 that it is for the EAR to defend itself in a court of law in disputes relating to whether it has incurred non-contractual liability and in disputes relating to decisions which it has taken pursuant to Article 8 of Regulation No 1049/2001.

53 In those circumstances, it cannot be considered that other decisions taken by the EAR ought not also to be defended in a court of law by the EAR.

54 It is true that, in certain cases, the Community judicature has held that acts adopted pursuant to delegated powers were to be imputed to the delegating institution, which was obliged to defend in a court of law the act in question. However, in those cases, the circumstances were not comparable to those of the present case.

55 As regards the order of 5 December 2007 in Case T-133/03 *Schering-Plough* v *CommissionandEMEA* (not published in ECR), relating to an action for annulment directed against an act of the European Agency for the Evaluation of Medicinal Products (EMEA), the Court there stated that Council Regulation (EEC) No 2309/93 of 22 July 1993 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products (OJ 1993 L 214, p. 1) provided for only advisory powers for the EMEA. The Court thereby concluded that the refusal by the EMEA of an application for variation of a marketing authorisation had to be deemed to emanate from the Commission itself and therefore that any action had to be directed against the Commission (order in *Schering-Plough* v *Commission and EMEA*, paragraphs 22 and 23). In the present case, it is clear that the powers of the EAR are not advisory, since it has the responsibility, delegated to it by the Commission, of preparing and evaluating invitations to tender and awarding contracts.

56 As regards Joined Cases T-369/94 and T-85/95 *DIR International Film and Others* v *Commission* [1998] ECR II-357, relating to an action for annulment directed against acts of the European Film Distribution Office (EFDO), it must be noted that the Court stated that, under Article 7(1) of Decision 90/685/EEC concerning the implementation of an action programme to promote the development of the European audiovisual industry (MEDIA) (1991 to 1995) (OJ 1990 L 380, p. 37), the Commission was responsible for the implementation of the MEDIA programme. The Court then pointed out that the relevant agreement between the Commission and the EFDO on the financial implementation of the MEDIA programme made any decision in that area subject in practice to the prior agreement of the Commission's representatives, and that decisions taken by the EFDO on funding applications made under the MEDIA programme were accordingly imputable to the Commission, which was therefore responsible for their content and could be called upon to defend them in court (paragraphs 52 and 53 of that judgment). In the present case, it is clear that decisions taken by the EAR in relation to procurement are not subject to the prior approval of the Commission.

57 It follows from all of the foregoing that the Court of First Instance has jurisdiction to hear the present action and that the applicant has properly directed that action against the EAR.

B – The necessity of a prior administrative complaint

1. Arguments of the parties

58 The EAR contends that point 37 of the Instructions to tenderers (quoted in paragraph 7 above) establishes a system for preliminary monitoring of the legality of its acts. The action brought before the Court of First Instance is claimed to be inadmissible because the applicant did not comply with the procedure laid down in that article.

59 The applicant and the Commission do not accept that plea of inadmissibility.

2. Findings of the Court

60 It is clear, first, that the wording of point 37.1 of the Instructions to tenderers does not specify that an administrative complaint is obligatory. It must further be observed that the fact that point 37 of the Instructions to tenderers does not lay down any time-limit for bringing an administrative complaint militates against an interpretation of that point as being designed to introduce the requirement of a prior administrative complaint.

61 Moreover, point 37.2 of the Instructions to tenderers provides only that the Commission is to facilitate an amicable solution between the complainant (tenderer) and the EAR, not that it must in that context adopt a decision which may be open to judicial review.

62 It must further be pointed out that Article 37.3 also does not provide that completion of the procedure concerned is a prerequisite of bringing an action before the Community judicature. That point states that '[i]f the above procedure fails, the tenderer may have recourse to procedures established by the European Commission'. In that context, it must be borne in mind that the Commission has not established any specific procedure for dealing with any complaints which have not given rise to an amicable settlement under point 37 of the Instructions to tenderers (see paragraph 41 above). There is therefore no 'procedure established by the Commission' completion of which could be considered a prerequisite of bringing an action before the Community judicature.

63 The EAR claims that use of the word 'may' in point 37.1 of the Instructions to tenderers cannot be interpreted to mean that that procedure is optional. In that regard, it is true that that word is also used in regulations which provide that a prior administrative procedure is a prerequisite of bringing an action before the Community judicature. That applies, for example, to Article 68 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), to which the EAR refers, and which states '[a]ny natural or legal person may appeal' against relevant decisions of the Community Plant Variety Office. It must, however, be noted that that regulation expressly lays down, in Article 69, a time-limit for filing a notice of appeal against a decision of the Community Plant Variety Office. In addition, it expressly provides, in Article 73(1) that an appeal lies from decisions of the Board of Appeal of that Office to the Community judicature and lays down a time-limit for lodging such an appeal. Similarly, while Article 90(2) of the Staff Regulations of Officials of the European Economic Community provides that any person to whom those Regulations apply 'may' submit to the appointing authority a complaint against an act adversely affecting him, it also establishes a time-limit for doing so. Furthermore, Article 91(2) of those Regulations expressly provides that an appeal to the Community judicature is to lie only if the appointing authority has previously had a complaint submitted to it.

64 By contrast, point 37 of the Instructions to tenderers cannot subject the admissibility of an action to an obligatory prior administrative complaint, since the wording is not sufficiently clear.

65 For the sake of completeness, it must be stated that the EAR cannot, without any basis in law, introduce a condition governing admissibility which goes beyond those laid down in Article 230 EC.

66 In this context, the Court must reject the EAR's argument that point 2.4.16 of the 'Practical Guide to contract procedures for EC external actions' represents such a legal basis. It need merely be pointed out that such a Practical Guide is a working tool which explains the procedures applying in a particular area and which cannot, as such, constitute a basis in law for the introduction of an obligatory prior administrative complaint.

67 The Court must also reject the EAR's argument that such a legal basis is provided by Article 56(1)(b) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, the 'Financial Regulation'), under which decisions entrusting executive tasks to the agencies referred to in Article 54(2) of that regulation, must comprise an effective internal control system for management operations. On that point, it must be observed that that provision relates to budgetary matters and manifestly does not apply to the legal remedies available to tenderers. It cannot therefore constitute a basis in law for the introduction of a condition governing the admissibility of appeals by tenderers, namely an obligatory prior administrative complaint.

68 It follows from the foregoing that the plea of inadmissibility on the ground that no prior administrative complaint was submitted by the applicant must be rejected.

C – Compliance with the time-limit for bringing proceedings

1. Arguments of the parties

69 The EAR considers that the action is inadmissible in so far as it relates to the annulment of the decision to cancel the tender procedure, because the time-limit for bringing proceedings laid down by the fifth paragraph of Article 230 EC was not complied with.

70 In that regard, it contends that it sent the letter of 9 October 2006, informing the applicant of the cancellation of the tender procedure in question as an annex to an e-mail of the same day. Since it did not receive any 'not received' message from the electronic messaging system of the applicant, the EAR considers that it can reasonably take the view that the e-mail sent on 9 October 2006 actually reached the applicant on the same day. The period for bringing an action against that decision therefore expired on 19 December 2006.

71 In its rejoinder the EAR states that, following enquiry, it established that the original version of the letter in question was never sent to the applicant. Contrary to what was stated in its statement in defence, the letter was not sent to the applicant by e-mail and by post, but solely by e-mail. The applicant therefore obtained the information that the tender procedure had been cancelled from the document sent as an annex to the e-mail of 9 October 2006.

72 The applicant claims that it never received the e-mail of 9 October 2006. The letter of 9 October 2006 reached it by post on 12 October 2006.

2. Findings of the Court

73 First, it should be noted that the decision to cancel the tender procedure is not a decision which had to be formally notified to the applicant in accordance with Article 254(3) EC. The applicant is not an addressee of the decision to cancel the tender procedure (see, to that effect, order of 14 May 2008 in Case T-383/06 *Icuna.Com* v *Parliament* [2008] ECR II-0000, paragraph 43). The decision to cancel related to the entire tender procedure, and the fact that it was subsequently communicated to the applicant does not mean that it was addressed to the applicant.

74 The period for instituting proceedings laid down in the fifth paragraph of Article 230 EC therefore started to run from the time when the applicant had knowledge of the decision.

75 According to the Court's case-law, if the date of notification of a decision cannot be established with certainty, the applicant is accorded the benefit of the doubt which results and his application is regarded as having been lodged within the prescribed period if, in the light of the facts, it does not appear absolutely impossible that the letter notifying the decision arrived so late that the time-limit was complied with (Joined Cases 32/58 and 33/58 *SNUPAT.* v *High Authority* [1959] ECR, p. 127, at p. 136).

76 Similarly, the applicant is accorded the benefit of the doubt if it is not a matter of determining the date of notification, but the date on which the applicant became aware of the act. It is for the party pleading that the action is out of time to provide evidence of the date on which the event causing time to begin to run occurred (see Case T-347/03 *Branco* v *Commission* [2005] ECR II-2555, paragraph 54, and case-law cited).

77 It is clear that sending an e-mail does not guarantee that it is actually received by the person to whom it is addressed. An e-mail may not reach him for technical reasons. Even if, in the present case, the EAR did not receive a 'not received' message, that does not necessarily mean that the e-mail did actually reach the person to whom it was addressed. Furthermore, even where an e-mail actually reaches the person to whom it is addressed, it may not be received on the day on which it was sent.

78 In that context, it must be observed that the EAR could have chosen a means of communication which enabled it to establish accurately the date on which the letter reached the tenderer. It is true that the EAR asked the applicant, in its e-mail of 9 October 2006, to confirm by e-mail receipt of the message. However, it did not receive such confirmation. It is clear that, if the sender of an e-mail who does not receive any confirmation of receipt takes no further action, he is normally not able to prove that that e-mail was received and, when necessary, on which date.

79 As regards the EAR's argument, put forward in the rejoinder, that the letter in question was not sent to the applicant by e-mail and by post, but solely by e-mail, contrary to what was stated in the statement in defence, the EAR offers no evidence in that connection. The 'fiche détail' [record sheet]

produced as an annex to the rejoinder which refers to the sending of the letter in question on 9 October 2006 certainly cannot exclude the possibility that the letter was also sent by post. It should be noted that the EAR conceded, moreover, at the hearing, that that document did not demonstrate that the communication was not sent by post.

80 The EAR has therefore not demonstrated that the applicant had knowledge of the decision to cancel the tender procedure before 12 October 2006, the date on which the applicant acknowledges having received the letter of 9 October 2006. The period of two months laid down in the fifth paragraph of Article 230 EC, extended, under Article 102(2) of the Court's Rules of Procedure, by a period of 10 days on account of distance, therefore expired on 22 December 2006, the date on which the application was lodged at the Registry of the Court of First Instance.

81 It follows from the foregoing that the present action cannot be regarded as out of time in so far as it relates to annulment of the decision to cancel the tender procedure.

D – Admissibility of the action in so far as it relates to annulment of the decision to organise a new tender procedure

1. Arguments of the parties

82 The EAR and the Commission contend that the application for the annulment of the EAR's decision to organise a new tender procedure is inadmissible. As regards this head of claim the application does not comply with the essential procedural requirements laid down in Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, since the pleas put forward in the application relate only to the decision to cancel the tender procedure.

83 Furthermore, the decision to organise a tender procedure, whether it is a new invitation to tender or follows cancellation of another invitation to tender, is not of direct and individual concern to economic operators, even if they have submitted a tender in a previous procedure, which was then cancelled.

84 The applicant claims that the decision to publish a new invitation to tender resulted from the fact that – according to the EAR – the first tender procedure had no positive outcome. Were the decision to cancel the first tender procedure to be held unlawful, the subsequent decision to organise a new tender procedure would be the direct consequence of the EAR's unlawful conduct. The applicant claims that, should its action be upheld, that would reopen the first procedure and render the second devoid of purpose.

2. Findings of the Court

85 The Court has consistently held that only a measure whose legal effects are binding on the applicant and are capable of affecting his interests by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC (see order in Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, paragraph 18, and case-law cited).

86 As a general rule, a decision to organise a tender procedure has no adverse effects, since it does no more than give to interested parties the possibility of taking part in the procedure and submitting a tender. The applicant has not put forward any arguments capable of showing that, in the present case, the decision to organise a new invitation to tender could none the less be regarded as adversely affecting it.

87 Accordingly, the applicant's argument that, should its action be upheld, that would reopen the first procedure and render the second devoid of purpose, is not capable of establishing that the decision to organise a new tender procedure adversely affects it. Equally, its argument that, were the decision to cancel the first tender procedure to be held unlawful, the subsequent decision to organise a new tender procedure would be the direct consequence of the EAR's unlawful conduct, is not capable of demonstrating that the latter decision adversely affects it. The mere fact that there is a link between one decision which adversely affects the applicant, namely the cancellation of the first tender procedure, and a second decision, namely the decision to organise a new tender procedure, does not mean that the second decision also adversely affects it.

88 Furthermore, it is clear that the decision to organise a new tender procedure for the same work as that covered by a procurement procedure which has been previously cancelled does not in itself mean that, if the Court annuls the decision to cancel the first procurement procedure, the contracting authority is no longer in a position to continue the first procedure. The decision to organise a new tender procedure does not necessarily involve the award of a contract covering the same work to another tenderer.

89 In light of the foregoing, it must be held that the applicant has not brought forward evidence to establish that the decision to organise a new tender procedure has legal effects which are binding on it and are capable of affecting its interests by bringing about a distinct change in its legal position.

90 It follows that the action must be dismissed as inadmissible in so far as the applicant seeks annulment of the decision to organise a new tender procedure, and it is unnecessary to examine whether the application meets the requirements of Article 44(1)(c) of the Rules of Procedure.

E – Admissibility of the action to the extent that the applicant asserts the rights of DOK ING

1. Preliminary observations

91 It must be borne in mind that the applicant states, in the application, that it is bringing the action on its own behalf and as agent of the company DOK ING. That relates, first, to the requests for annulment. Secondly, the applicant quantifies, in the application, both the damage which it claims to have suffered and the damage allegedly suffered by DOK ING, and asks the Court to order the EAR to pay to it the full amount of the sum in question.

92 The Court asked the applicant, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, to supply details of the 'instructions' which it received from the company DOK ING, to lodge in the Court file any relevant documentation and to express a view on the admissibility of the manner in which it had chosen to proceed in order to defend the rights of the company DOK ING.

2. Arguments of the parties

93 The applicant claims, in reply to the question put by the Court, that it brought the present action in order to obtain suitable protection of its own rights and those of DOK ING, on the basis of existing agreements, as undertakings which had taken part in the tender procedure. It submits that the three documents which it has produced, at the request of the Court, show that it has authority to do so.

94 The EAR and the Commission consider that the present action is not admissible to the extent that the applicant asserts the rights of the company DOK ING.

3. Findings of the Court

95 It is, first of all, clear that Sogelma is the only applicant in the present case. In particular, neither DOK ING nor the consortium formed by the applicant and DOK ING are parties to these proceedings. Moreover, it must be noted that the applicant does not claim that DOK ING has assigned its rights to the applicant.

96 It is necessary therefore to examine whether the three documents which the applicant has produced, at the request of the Court, enable it to assert the rights of DOK ING in the context of the present proceedings.

97 As regards the document titled 'Joint Venture Agreement', dated 27 September 2005, Article 4 thereof provides that the applicant, as Group Leader, has authority in particular to assume obligations on behalf of DOK ING and that it may sign, on behalf of the joint venture, all documentation required for the performance of works covered by the contract. It must be pointed out that this agreement makes no reference to the possibility of the applicant bringing legal proceedings to assert the rights of DOK ING.

98 As regards the document titled 'Power of attorney', signed on 6 December 2005 by a representative of DOK ING, it must be observed that this also makes no reference to the possibility of the applicant bringing legal proceedings to assert the rights of DOK ING.

99 Only the third document submitted by the applicant, a letter from DOK ING dated 1 December 2006 and addressed to the applicant, relates to legal proceedings. That letter reads as follows:

'With reference to the above tender and the subsequent cancellation by the Contracting Authority, we her[e]by authorize you as the Joint Venture Leader, to instruct your lawyer to take legal action against the [EAR], for damages caused by the tender cancellation, also on our behalf.'

100 Accordingly, that document serves only to authorise the applicant to instruct its lawyer to take legal proceedings on behalf of DOK ING also. The document does not however deal with the form and content of the legal proceedings referred to and, consequently, provides no detail of those matters. In particular it does not provide that the applicant is entitled to bring legal proceedings in its name alone and to thereby assert the rights of DOK ING. It is clear that the fact that a company instructs a lawyer for the purpose of bringing legal proceedings also on behalf of a second company normally means that the lawyer will bring the action in the name of two applicants, or by means of two separate actions.

101 It is not acceptable for a company to assert in legal proceedings the rights of another company if it has not been unequivocally instructed to do so. There is an interest in having the status of applicant in order to be able to determine the scope of the case and, if necessary, to bring an appeal against the judgment to which an action gives rise. Moreover, a company which wishes to obtain payment of a certain sum as compensation for alleged damage normally wants the court to order the defendant to pay that sum to it and not to another company.

102 It follows from the foregoing that the documents provided by the applicant are not such as to establish that it was instructed by DOK ING to assert, as the sole applicant, the rights of the DOK ING before the Community judicature.

103 It follows that the action is inadmissible to the extent that the applicant asserts the rights of DOK ING.

F – Conclusion on the admissibility of the action

104 It follows from all of the foregoing that the action is admissible to the extent that the applicant seeks, on its own behalf, annulment of the decision to cancel the tender procedure and to the extent that it seeks damages in respect of the loss which it itself has suffered.

105 On the other hand, the action must be dismissed as inadmissible to the extent that the applicant seeks annulment of the EAR's decision to organise a new tender procedure and to the extent that it asserts the rights of DOK ING.

Substance

A – The claim for annulment of the decision to cancel the tender procedure

106 In support of its claim for annulment of the decision to cancel the tender procedure, the applicant relies on a single plea in law alleging infringement of essential procedural requirements. That plea has two parts, the first relating to an inadequate statement of reasons and the second to the claim that the statement of reasons is illogical and contradictory.

1. Arguments of the parties

(a) The first part of the single plea in law, alleging that the statement of reasons was inadequate

107 The applicant claims that the EAR did not, in relation to the decision to cancel the tender procedure, comply with the obligation to state reasons laid down in Article 41 of Directive 2004/18 which, in its opinion, is applicable to the EAR. The EAR was obliged to inform the tenderers, in good time and comprehensively, of all the grounds for the cancellation of the tender procedure, given the public interest and the urgency which should, in the applicant's opinion, have ensured that the contract was awarded quickly and satisfactorily, in light of the fact that the contract covered services in an area as sensitive as that in this case.

108 Taking account of the process which led to the taking of the contested decisions, there cannot,

according to the applicant, be any doubt but that the cancellation of the procedure is the result of an ill-considered judgment, made without a thorough assessment of the public interest to be protected.

109 The EAR's conduct is even more serious in that almost seven months were needed in order to adopt and give notice of the decision to cancel the tender procedure.

110 The EAR and the Commission do not accept those arguments.

(b) The second part of the single plea in law, alleging that the statement of reasons was illogical and contradictory

111 The applicant considers that comparison of the EAR's letters of 9 October 2006 and 14 December 2006 could lead to the conclusion that the real reason for the decision to cancel the old procedure in order to initiate a new procedure is not to be found in the technical inadequacy of the tenders submitted but rather in a significant alteration of the technical requirements. The applicant considers that reference should be made to the later communication, namely the letter of 14 December 2006, in order to assess the EAR's conduct.

112 Furthermore, the statement of reasons provided in the letter of 9 October 2006, referring to the fact that the professional experience of one of the key experts proposed by the applicant was less than that specified in the Procurement Notice, is contradicted by the conduct of those in charge of evaluation of the tenders, who authorised calling on the applicant for underwater mine-clearing operations identical to those covered by the Procurement Notice, precisely because of the technical qualities of the applicant's experts and the technology used by the applicant.

113 The EAR and the Commission do not accept those arguments.

2. Findings of the Court

(a) Preliminary observations

114 It must first be decided which provisions and principles govern the obligation to state the reasons for the decision to cancel the tender procedure.

115 In that context, the Court must reject the applicant's argument that Directive 2004/18 applies to the procurement procedure at issue. The purpose of that directive which, according to Article 84 thereof, is addressed to Member States, is to coordinate national laws, regulations and administrative provisions applicable to the procedures for the award of public works contracts, public supply contracts and public service contracts. However, public contracts awarded by the EAR are not subject to the legislation of Member States.

116 It must be noted that public procurement by the Community institutions is subject to the provisions of the Financial Regulation and Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002, laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1, 'the Implementing Rules'). Under Article 162(1) of the Financial Regulation, external actions financed from the general budget of the European Communities are governed by Parts One (Common Provisions) and Three (Transitional and Final Provisions) of that regulation save as otherwise provided in Title IV (External Actions) of Part Two (Special Provisions). Article 7 of Regulation No 2666/2000 moreover expressly provides that the Commission is to implement the Community assistance covered by that regulation in accordance with the Financial Regulation.

117 The provisions which the Commission must respect as regards public procurement also apply to the EAR. Under Article 185(1) of the Financial Regulation, the Commission is to adopt a framework financial regulation for the bodies set up by the Communities and having legal personality which actually receive grants charged to the budget. Under Article 74 of Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Regulation No 1605/2002 (OJ 2002 L 357, p. 72), the relevant provisions of the Financial Regulation and the Implementing Rules are to apply as regards procurement by those bodies.

118 Under Article 101 of the Financial Regulation, the decision to cancel a procurement procedure must be substantiated and brought to the attention of the candidates or tenderers.

119 Furthermore, it is settled case-law that the statement of reasons for a decision must show clearly and unequivocally the reasoning of the institution which enacted the measure so as to inform the persons concerned of the justification for the contested measure and to enable the Community judicature to exercise its powers of review (see Case C–22/94 *Irish Farmers Association and Others* [1997] ECR I–1809, paragraph 39, and case-law cited).

120 However it is not necessary for the decision to give all the relevant factual and legal details. The adequacy of the statement of the reasons on which a decision is based may be assessed with regard not only to its wording but also to the context in which it was adopted and to all the legal rules governing the matter in question (Case T–471/93 *Tiercé Ladbroke* v *Commission* [1995] ECR II–2537, paragraph 33). It is sufficient for the decision to set out, in a concise but clear and relevant manner, the principal issues of law and of fact (Case 24/62 *Germany* v *Commission* [1963] ECR, p. 63, at p. 69).

121 It is in regard to those considerations that the Court must examine whether the EAR has given a sufficient statement of the reasons for the decision to cancel the tender procedure.

(b) The first part of the single plea in law, alleging that the statement of reasons was insufficient

122 It must be recalled that the EAR stated, in the letter of 9 October 2006, that the contract award procedure had been cancelled due to the fact that none of the tenders received was technically compliant, and that the EAR added, in relation to the applicant's tender, that it had been decided that the 'Superintendent Survey Team' did not satisfy the requirements in point 16(x) of the Procurement Notice and point 4.2(x) of the Instructions to tenderers.

123 The statement of reasons provided for the cancellation of the tender procedure, namely the fact that none of the tenders received was technically compliant, although succinct, is clear and unambiguous. The statement of reasons given to explain, more particularly, why the applicant's offer did not comply, is also succinct, but again clear and unambiguous. The EAR referred to the points in the Procurement Notice and in the Instructions to tenderers which specify that the key personnel must have at least 10 years appropriate professional experience, and stated which member of the team proposed by the applicant did not satisfy that requirement.

124 In that regard, it must be noted that the applicant itself had stated, in the curriculum vitae of the person proposed for the post of 'Superintendent Survey Team' that that person had only five years professional experience. Consequently, it was unnecessary for the EAR to give further reasons for the conclusion that the applicant's tender did not satisfy the technical requirements of the tender procedure.

125 As regards the applicant's argument that cancellation of the procedure is the result of an ill–considered judgment, made without a thorough assessment of the public interest to be protected, it is clear that this does not in fact relate to an infringement of essential procedural requirements, but concerns the substance, since it amounts to an allegation of an error of assessment on the part of the EAR.

126 In any event, the facts put forward by the applicant are not such as to establish that the EAR committed a manifest error of assessment. True, there was a public interest in ensuring that unexploded ordnance in the inland waterway transport system of Serbia and Montenegro was removed as soon as possible in order to permit the re–opening of those waters to navigation. None the less, the mere fact that there is a public interest in a contract being awarded quickly does not allow the contracting authority to dispense with the obligatory technical requirements set out in the call for tenders. Under Article 100(1) of the Financial Regulation, the selection of the tenderer to whom the contract is to be awarded must be made in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders. As is stated by the Commission, if a contracting authority could set aside the conditions of the contract, as originally prescribed, that would give an advantage to those who submitted tenders over those undertakings which had decided not to take part in the tender procedure owing to the fact that they – just like the tenderers – could not satisfy the requirements laid down in advance.

127 As regards the argument that the EAR was slow to take and give notice of the decision to cancel the procedure, it must be observed that the applicant does not explain what effect that fact could have on the legality of that decision.

(c) The second part of the single plea, that the statement of reasons was illogical and contradictory

128 The applicant claims, in essence, that there is a contradiction between the statement of reasons for the decision to cancel the tender procedure provided in the letter of 9 October 2006 and that given in the letter of 14 December 2006, in so far as in the former the explanation for that decision was that no tender was technically compliant, whereas the explanation in the latter was that the technical requirements had been changed.

129 First, the Court must reject the applicant's argument that reference should be made to the communication which is later in date, namely the letter of 14 December 2006, in order to assess the EAR's conduct. The letter informing the applicant of the cancellation of the tender procedure is that of 9 October 2006, and accordingly that is the letter which should be referred to in order to assess whether the statement of reasons for the decision to cancel the tender procedure is illogical and contradictory.

130 The letter of 9 October 2006 is not, in itself, contradictory. Even though the EAR provided another explanation in the letter of 14 December 2006, that cannot alter the statement of reasons for the decision which was sent two months earlier. Any difference between those two letters cannot therefore entail a contradiction in the statement of reasons provided for the decision to cancel the tender procedure.

131 In any event, there is no contradiction between the reasons given for the decision to cancel the tender procedure in the letter of 9 October 2006 and those given in the letter of 14 December 2006.

132 It must be noted that the letter of 14 December 2006 refers expressly to the fact that the EAR evaluation committee found that none of the tenders received was technically compliant and states that that committee made no other remarks. That letter therefore confirms that the sole reason for the decision to cancel the tender procedure was that no tender was technically adequate.

133 While that letter also states that the EAR was exercising its right to cancel the tender procedure and to initiate a new procedure due to the fact that the technical conditions had been considerably changed, that sentence must be understood in context. It is in fact expressly stated in the heading to the letter of 14 December 2006 that it is a reply to the applicant's letter of 13 November 2006. In that letter, the applicant had asked EAR to send to it a copy of the decision to cancel the tender procedure and the relevant minutes and also to take a reasoned decision on whether or not it would commence a negotiated procedure.

134 In that context, the sentence to the effect that the EAR was exercising its right to cancel the tender procedure and to initiate a new procedure due to the fact that the technical conditions had been considerably changed must be understood to mean that the EAR was explaining why it had decided to initiate a new procedure instead of commencing a negotiated procedure.

135 Furthermore, the applicant itself states, in its reply, that the new justification appears to have been put forward solely in order to respond to its request for recourse to a negotiated procedure. In that regard, it must be observed that a decision to cancel a tender procedure is distinct from a decision relating to the subsequent action to be taken, namely a decision not to award the contract, to have recourse to a negotiated procedure, or to organise a new tender procedure. It cannot be inferred from the fact that the EAR mentioned, in response to the request for recourse to a negotiated procedure, reasons other than those given to explain the cancellation of the tender procedure, that there is any contradiction in the statement of reasons.

136 Moreover, it must be noted that, once a tender procedure is cancelled, that procedure is at an end and the contracting authority is entirely at liberty to decide on what subsequent action to take. There is no provision which confers on an economic operator the right to have a negotiated procedure set in motion. The EAR was therefore not obliged to take a formal decision in relation to the applicant's proposal that such a procedure should commence. The letter of 14 December 2006 is quite simply a reply to the applicant's letter of 13 November 2006, in which it asked the EAR, inter alia, to take a reasoned decision on whether or not to initiate a negotiated procedure, which led the EAR to inform the applicant, in the interests of sound administration, why the EAR had decided to initiate a new tender procedure instead of a negotiated procedure.

137 The Court must also reject the applicant's argument that the statement of reasons provided in the letter of 9 October 2006 is at variance with the fact that the applicant was subsequently awarded a public contract similar to that at issue in the present case. The statement of reasons provided in the

letter of 9 October 2006 relates to the fact that the technical requirements of the tender procedure had not been complied with, a fact which the applicant moreover does not dispute, since it acknowledges that the 'Superintendent Survey Team' included in its tender did not possess the requisite professional experience. That reasoning does not imply that the applicant is incapable of carrying out such work.

138 As regards the applicant's argument that the letter of 14 December 2006 shows that the real reason for the cancellation of the tender procedure was not the technical inadequacy of the tenders received but the alteration of the technical requirements, it is clear that this, in fact, does not relate to an error in the statement of reasons for the decision to cancel the tender procedure but rather challenges the truthfulness of that statement of reasons, which amounts in essence to contesting that decision as to its substance, alleging misuse of powers.

139 According to settled case-law, misuse of powers is defined as the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see Case C–84/94 *United Kingdom* v *Council* [1996] ECR I–5755, paragraph 69, and case–law cited).

140 In the present case, it has already been determined that there is no contradiction between the statement of reasons provided in the letter of 9 October 2006 and that provided in the letter of 14 December 2006.

141 In addition, the Commission correctly states that notice of the cancellation decision was given to the public in the Official Journal with the same statement of reasons as that provided in the letter of 9 October 2006 (OJ 2006, S 198). That statement of reasons reads as follows: 'The tender process has been cancelled since none of the offers received was technically compliant'.

142 In those circumstances, it is impossible to infer from the subsequent conduct of the EAR that the real reason for the cancellation of the procedure was other than that set out in the letter of 9 October 2006.

143 It follows from the foregoing that the applicant's claim for annulment of the decision to cancel the tender procedure must be dismissed as unfounded.

B – The request for compensation for damage allegedly suffered

1. Arguments of the parties

144 The applicant considers that the fact that the contract at issue was not awarded is due to the unlawful conduct of the EAR and that has caused it to suffer damage. That damage comprises the expenses needlessly incurred in the framing of the tender and the making available of some of the equipment required over a period of 60 days, and amounts to a total of EUR 118 604.58.

145 The EAR does not accept the applicant's arguments.

2. Findings of the Court

146 It is settled case-law that, for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC, a series of conditions must be met, namely the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question (Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675, paragraph 7, and Case T–19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II–315, paragraph 76).

147 In so far as those three conditions governing liability must be satisfied cumulatively, the fact that one of them has not been satisfied is a sufficient basis on which to dismiss an action for damages (Case C–257/98 P *Lucaccioni* v *Commission* [1999] ECR I–5251, paragraph 14).

148 In the present case, all the arguments which the applicant has presented in order to establish that the decision to cancel the tender procedure was unlawful have been examined and rejected (see

paragraphs 122 to 143 above). The applicant therefore cannot claim damages on the basis of the alleged unlawfulness of the decision.

149 As regards the applicant's argument that the EAR took an unreasonably long time to take the decision to cancel the tender procedure and to inform the applicant, it is clear that the mere fact that more than six months elapsed between the sending of the last request for clarification to the tenderers and the notification of the decision to cancel the tender procedure cannot be characterised as unlawful conduct on the part of the EAR.

150 It is moreover clear that there can be no causal link between the time taken by the EAR to take and give notice of the decision to cancel the tender procedure and the expenses incurred by the applicant in order to frame its tender.

151 It follows from the foregoing that the application for compensation for damage allegedly suffered must be rejected.

C – The request for production of documents

152 As regards the applicant's request that the Court order the EAR to produce all the documents relating to the award procedure at issue, it must be noted that, according to the case-law, to enable the Court to determine whether it is conducive to the proper conduct of the procedure to order the production of certain documents, the party requesting production must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings (Case C–185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I–8417, paragraph 93).

153 In support of that request, the applicant claims that the EAR has provided explanations that are general and succinct in support of its decisions and that it had asked the EAR to produce those documents, but had no response. Furthermore, the applicant argues that it has the right to know the reasons which led to cancellation of the tender procedure so as to be assured that the contracting authority's acts are lawful.

154 As regards, first, the fact that the applicant requested from the EAR production of documents relating to the award procedure and that that request met with no response, it must be observed that that fact is not in itself capable of demonstrating the utility of those documents for the purposes of the proceedings.

155 In relation, secondly, to the applicant's argument that the EAR provided explanations which were general and succinct in support of its decisions, it has been determined, in paragraphs 123 and 124 above, that the EAR communicated to the applicant an adequate statement of reasons for its decision to cancel the tender procedure. In that regard, the Court has sufficient information in the documents on the court file and it does not, moreover, appear that the documents relating to the award procedure could serve any purpose in the assessment of the adequacy of the statement of reasons provided.

156 As regards, third and last, the applicant's argument that it has the right to know the reasons which led to cancellation of the tender procedure so as to be assured of the legality of the contracting authority's acts, it must be held that the applicant has presented no objective evidence to suggest that the real reason for the cancellation of the procedure differs from that set out in the letter of 9 October 2006 (see paragraphs 140 to 142 above).

157 In that context, it must be observed that an application for the production of all the documents relating to the award procedure at issue, as sought by the applicant, is equivalent to a request for the production of the EAR's internal file. It is clear that examination by the Community judicature of the internal file of a Community body with a view to verifying whether that body's decision was influenced by factors other than those indicated in the statement of the reasons is an exceptional measure of inquiry. Such a measure presupposes that the circumstances surrounding the decision in question give rise to serious doubts as to the real reasons and in particular, to suspicions that those reasons were extraneous to the objectives of Community law and hence amounted to a misuse of powers (see, to that effect, as regards decisions of the Commission, order in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 11). However, it is clear that in the present case there are no such circumstances.

158 It follows from the foregoing that the applicant has not presented evidence to demonstrate the utility of all the documents relating to the award procedure being produced for the purposes of these proceedings. The request for production of those documents must therefore be rejected.

Costs

159 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

160 Since the applicant has been unsuccessful, the applicant must be ordered to pay the costs, as applied for by the EAR.

161 Furthermore, the first paragraph of Article 87(4) of the Rules of Procedure states that institutions which intervened in the proceedings are to bear their costs. It follows that the Commission must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Sogelma – Societá generale lavori manutenzioni appalti Srl to bear its own costs and to pay those incurred by the European Agency for Reconstruction;

3. Orders the Commission to bear its own costs.

Martins Ribeiro Papasavvas Dittrich

Delivered in open court in Luxembourg on 8 October 2008.

E. Coulon M.E. Martins Ribeiro

Registrar President

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* Language of the case: Italian.

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: D. Botis, Agent)

Re:

ACTIONS brought against four decisions of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 26 September 2006 (R 353/2006-1, R 354/2006-1, R 355/2006-1 and R 356/2006-1) concerning applications for the registration of four figurative trade marks consisting of graphic representations of a pallet.

Operative part of the judgment

The Court:

1. *Annuls the decisions of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 26 September 2006 (R 353/2006-1, R 354/2006-1, R 355/2006-1 and R 356/2006-1) in so far as registration of the marks applied was refused in respect of goods and services in Classes 6, 7, 16, 20, 35, 39 and 42 of the Nice Agreement concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks of 15 June 1957, as revised and amended but not in so far as that refusal was in respect of 'loading pallets of metal', 'loading carriers and loading pallets of metal for packaging and transportation purposes' and 'metal transport pallets', in Class 6; 'goods pallets not of metal', 'loading pallets and loading carriers not of metal for packaging and transportation purposes' and 'transport pallets not of metal', in Class 20; and the 'rental of loading pallets' services, in Class 39;*

2. *Dismisses the actions as to the remainder;*

3. *Orders each party to bear its own costs.*

([1]) OJ C 20, 27.1.2007.

Judgment of the Court of First Instance of 8 October 2008 — Sogelma v EAR

(Case T-411/06) ([1])

(Public works contracts — Tender procedure of the European Agency for Reconstruction — Decision to cancel tender procedure and to publish a new procedure — Action for annulment — Jurisdiction of the Court of First Instance — Necessity of a prior administrative complaint — Time-limit for bringing proceedings — Instructions to act as agent — Obligation to state the reasons on which the decision is based — Application for damages)

(2008/C 301/51)

Language of the case: Italian

Parties

Applicant: Sogelma — Societá generale lavori manutenzioni appalti Srl (Scandicci, Italy) (represented by: E. Cappelli, P. De Caterini, A. Bandini and A. Gironi, lawyers)

Defendant: European Agency for Reconstruction (EAR) (represented by: initially by O. Kalha, subsequently by M. Dischendorfer and then by R. Lundgren, Agent and by S. Bariatti and F. Scanzano, lawyers)

Intervener in support of the defendant: Commission of the European Communities (represented by: P. van Nuffel and L. Prete, Agents)

Re:

APPLICATION for annulment of decisions of the EAR relating to cancellation of the tender procedure for the public works contract reference EuropeAid/120694/D/W/YU and organisation of a new tender procedure, and an application for compensation for loss allegedly suffered.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders Sogelma — Societá generale lavori manutenzioni appalti Srl to bear its own costs and to pay those incurred by the European Agency for Reconstruction;*

3. *Orders the Commission to bear its own costs.*

([1]) OJ C 42, 24.2.2007.

Judgment of the Court of First Instance of 13 October 2008 — Neophytou v Commission

(Case T-43/07 P) ([1])

(Appeals — Staff cases — Open competition — Rejection of the appellant's candidature — Composition of the selection board for the oral tests — Principle of equal treatment — New pleas in law — Error of law — Appeal in part unfounded and in part founded — Referral back to the Civil Service Tribunal)

(2008/C 301/52)

Language of the case: English

Parties

Applicant: Neophytos Neophytou (Itzig, Luxembourg) (represented by: S. Pappas, lawyer)

Other party to the proceedings: Commission of the European Communities (represented by: J. Currall and H. Krämer, acting as Agents)

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Action brought on 22 December 2006 - SO.GE.L.M.A. v EAR

(Case T-411/06)

Language of the case: Italian

Parties

Applicant: SO.GE.L.M.A. (Scandicci, Italy) (represented by: E. Cappelli, P. De Caterini, A. Bandini and A. Gironi, avvocati)

Defendant: European Agency for Reconstruction

Form of order sought

The applicant claims that the Court should:

annul the decisions of the EAR cancelling the works tender procedure "Restoring of Unhindered Navigation (removal of unexploded ordnance) in the Inland Waterway Transport System, Republic of Serbia, Serbia and Montenegro" (Publication Reference No: EuropeAid/120694/D/W/YU, Project No 05SER01 04 01) and launching a new tender procedure, communicated by AER letter of 9 October 2006, Prot. D (06)DG/MIL/EP 2715 and AER letter of 14 December 2006, Prot. DG/mie/3313, together with all other prior or connected acts, including the decision excluding the applicant, and, in any case, order the European Agency for Reconstruction to pay damages to the applicant in the amount specified in the application;

order the European Agency for Reconstruction to pay the costs.

Pleas in law and main arguments

The object of the tender procedure at issue in the present case was the award of a public works contract for works consisting in the identification and clearance of unexploded military ordnance left over from the aerial bombardment carried out by NATO in 1999, with a view to re-opening the waterways of the Danube and the Sava for inland navigation.

After its tender had been found to be the most suitable, the applicant received a first request for clarifications, which were provided without delay. In particular, precise reasons were given for the presence, as leader of the aquatic survey team, of a person who had high qualifications but whose work experience fell short of that specified in the call for tenders.

Following professional contacts with a consultancy which had provided the European Agency for Reconstruction with advice in respect of the tender procedure in question, on the basis of which the applicant was led to expect a positive outcome, the applicant was informed that the tender procedure had been cancelled for lack of tenders which were technically suitable, and it became clear that there was an intention to issue a new call for tenders.

In support of its claims, the applicant alleges infringement of Article 41 of Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[1] and, more generally, breach of the principles that govern Community legislation on public procurement procedures, in so far as the annulment of the tendering procedure in question was the result of a choice made without careful reflection and without an in-depth assessment of the public interest to be safeguarded. Secondly, the applicant alleges failure to comply with the obligation to state reasons.

———————

[1] - OJ 2004 L 134, 30.4.2004, p. 114.

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JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

12 November 2008 (*)

(Public service contracts – Invitation to tender concerning support services for the system of registries established under Directive 2003/87/EC – Rejection of a tender – Decision to award the contract to another tenderer – Manifest error of assessment – Obligation to state the reasons on which the decision is based – Claim for damages)

In Case T–406/06,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis and N. Keramidas, lawyers,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and E. Manhaeve, acting as Agents,

defendant,

APPLICATION for, first, annulment of the Commission's decision of 19 October 2006 to reject the applicant's offer in a call for tenders for support services for the system of registries established under Directive 2003/87/CE of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), the Community independent transaction log (CITL), with technical maintenance and user support (OJ 2006 S 102), and an application for annulment of the decision to award the contract to another tenderer and, secondly, a claim for damages,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of V. Tiili, President, F. Dehousse (Rapporteur) and I. Wiszniewska-Białecka, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 30 January 2008,

gives the following

Judgment

Legal context

1 The Commission's procedure for the award of contracts for services is governed by the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; 'the Financial Regulation') and the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1; 'the Implementing Regulation'), in the version applicable to the facts of the present case.

2 According to Article 89(1) of the Financial Regulation:

‘All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.’

3 Article 92 of the Financial Regulation provides that ‘a full, clear and precise description of the subject of the contract must be given in the documents relating to the call for tenders’.

4 Article 93(1) of the Financial Regulation specifies the cases in which candidates or tenderers are to be excluded from participation in a procurement procedure and Article 94 of the Financial Regulation specifies the cases in which contracts may not be awarded to candidates or tenderers.

5 Article 97 of the Financial Regulation provides:

‘1. The selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders shall be defined in advance and set out in the call for tender.

2. Contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure.’

6 Article 100 of the Financial Regulation provides as follows:

‘1. The authorising officer shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

2. The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.’

7 Article 135(1) of the Implementing Regulation provides:

‘The contracting authorities shall draw up clear and non-discriminatory selection criteria.’

8 Finally, Article 149 of the Implementing Regulation provides as follows:

‘1. The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract or framework contract or admission to a dynamic purchasing system, including the grounds for any decision not to award a contract or framework contract, or set up a dynamic purchasing system, for which there has been competitive tendering or to recommence the procedure.

2. The contracting authority shall, within not more than 15 calendar days from the date on which a written request is received, communicate the information provided for in Article 100(2) of the Financial Regulation.

3. In the case of contracts awarded by the Community institutions on their own account, under Article 105 of the Financial Regulation, the contracting authority shall inform all unsuccessful tenderers or candidates, simultaneously and individually, as soon as possible after the award decision and within the following week at the latest, by mail and fax or email, that their application or tender has not been accepted; specifying in each case the reasons why the tender or application has not been accepted.

The contracting authority shall, at the same time as the unsuccessful candidates or tenderers are informed that their tenders or applications have not been accepted, inform the successful tenderer of the award decision, specifying that the decision notified does not constitute a commitment on the part of the contracting authority.

Unsuccessful tenderers or candidates may request additional information about the reasons for their rejection in writing by mail, fax or email, and all tenderers who have put in an admissible tender

may obtain information about the characteristics and relative merits of the tender accepted and the name of the successful tenderer, without prejudice to the second subparagraph of Article 100(2) of the Financial Regulation. The contracting authority shall reply within no more than 15 calendar days from receipt of the request.

The contracting authority may not sign the contract or framework contract with the successful tenderer until two calendar weeks have elapsed from the day after the simultaneous dispatch of the rejection and award decisions. If necessary it may suspend signing of the contract for additional examination if justified by the requests or comments made by unsuccessful tenderers or candidates during the two calendar weeks following the rejection or award decisions or any other relevant information received during that period. In that event all the candidates or tenderers shall be informed within three working days following the suspension decision.'

9 Article 149(3) of the Implementing Regulation stems from Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005, amending Regulation No 2342/2002 which laid down the Implementing Regulation (OJ 2005 L 201, p. 3), recital 5 in the preamble to which states:

'It is also appropriate to lay down a procedure for informing unsuccessful candidates and tenderers in procurement procedures conducted by the institutions on their own account. Such information should be provided before the contract is signed and should give the unsuccessful candidates and tenderers the reasons why their application or tender has been rejected. The introduction of such an information procedure is designed to make the institutions subject to an obligation imposed on the Member States by the Court of Justice of the European Communities.'

The factual background to the proceedings

10 The applicant, Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, is a company incorporated under Greek law operating in the sector of information and communications technology.

11 By a contract notice of 31 May 2006, published in the Supplement to the *Official Journal of the European Union* (OJ 2006 S 102), the Commission issued an invitation to tender for services to support the system of registries established under Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), the Community independent transaction log ('CITL'), together with technical maintenance and user support.

12 Under Directive 2003/87 and Commission Regulation (EC) No 2216/2004 of 21 December 2004 for a standardised and secured system of registries pursuant to Directive 2003/87 and Decision No 280/2004/EC of the European Parliament and of the Council (OJ 2004 L 386, p. 1), adopted in order to implement it, the Commission is required to establish, operate and maintain the CITL, which records the greenhouse gas emission allowances issued, transferred and cancelled. As this scheme necessitates the services of professional information technology specialists, who were previously provided by the CITL's developer, the Commission launched the invitation to tender in issue in the present case.

13 The invitation to tender comprised a section headed 'technical description' a section relating to administrative details and a section setting out the selection and award criteria.

14 The section of the invitation to tender headed 'technical description' recorded the general background to the contract and described its objectives. It stated that the tasks can be divided into two main groups, called respectively 'user support profile' and 'technical profile'. The nature of the tasks was explained for each of the two groups in eight points. With regard to the second group, 'technical profile', it is also stated that:

'the CITL is a webservices based system … The system will not need major improvements. We only anticipate that it will need minor updates and enhancements to follow the developments of the market. Global corrective maintenance is to be expected.'

15 The 'technical description' part of the invitation to tender included a point 4 entitled 'Experience required of the Contractor', which stated in particular as follows:

'In carrying out the assignment the Contractor should preferably possess the following specific skills and expertise:

(a) Deep understanding of the business area

...

(d) For the staff undertaking the technical services: deep understanding of the architecture of the registries system and of the technologies employed in programming the Community Registry and CITL applications and deployed in the hosting environment, and of the functional and technical specifications of the Community Registry and the CITL.'

16 The administrative part of the invitation to tender showed the budget allocated to the contract (a maximum of EUR 265 000), specified the requirements relating to the technical proposal and indicated the maximum number of pages of the tender, namely 20 in the present case, excluding the annexes.

17 Finally, the third part of the invitation to tender set out the three stages in the examination of tenders. It stated as follows:

'The procedure of the award of the contract, which will concern only admissible bids, will be carried out in three successive stages. Only bids meeting the requirements of stage one will be examined in the following stages.

The aim of each of these stages is:

Stage 1: to check, in the first stage (exclusion criteria) whether tenderers can take part in the tendering procedure and, where applicable, be awarded the contract (see annex 3).

Stage 2: to check, in the second stage (selection criteria), the technical and professional capacity as well as the economic and financial capacity of each tenderer who has passed the exclusion stage (see Part 3, point 2 – selection criteria).

Stage 3: to assess on the basis of the award criteria each bid which has passed the exclusion and selection stages (see Part 3, point 3 – Award criteria).'

18 After giving details of the criteria for exclusion and selection, the invitation to tender listed the three criteria for award of the contract as follows:

'Award criteria 1 – Understanding (max points 40)

This criterion is used to assess the degree to which the tender shows a clear understanding of the objectives and tasks of the study/service to be provided.

Award criteria 2 – Project management and availability (max points 35)

This criterion relates to the quality of project planning, the organisation of the team with a view to managing a project of this nature and the availability of the resources for the completion of the contractual tasks.

Award criteria 3 – Methodology (max points 25)

This criterion assesses the suitability and strength of the proposal as measured against the requirements of the specification in terms of the technical content, completeness, originality of ideas (where appropriate) and proposed effort.'

19 A points system was laid down for assessment of the tenders by reference to each of the three award criteria. First, a minimum points threshold was specified for each criterion. The threshold was 24 points for the 'Understanding' criterion, 22 points for 'Project management and availability' and 16 points for 'Methodology'. Secondly, an overall minimum of 65 points was required. Tenders obtaining the minimum points required were deemed to be technically sufficient for the purposes of the criteria and were then examined to determine the best-value-for-money tender by dividing the price by the total number of points.

20 Annex 2 to the invitation to tender consisted of a model table relating to the financial part of the tender, entitled:

'Annex 2 – Financial offer template

(For Guidance Purposes only)

Price and estimated Budget breakdown'.

21 By two faxes of 6 July 2006, the applicant asked the Commission for clarification concerning the invitation to tender (15 questions in all) relating in particular to the meaning of a 'deep understanding' of the business area, which the invitation to tender required from bidders, and how that could be demonstrated in the tender. The applicant also asked the Commission for an estimate of the effort required per year and per task and for details of the description of tasks, in particular the operational hours of the user support service.

22 The Commission replied to the 15 questions from the applicant by fax of 10 July 2006. With regard to a 'deep understanding', it referred to the passage in the invitation to tender concerning the experience which the contractor was required to have and explained what was envisaged by the term. With regard to the estimate of the effort required, the Commission replied that it could not be estimated with reasonable certainty. The Commission stated that the user support service operated from 08.00 to 18.00 on weekdays.

23 Also on 10 July 2006, the applicant sent a further request for clarification to the Commission in which it stressed that the term 'deep understanding' was subjective and not quantifiable and asked how it could demonstrate that it was able to meet that requirement.

24 The Commission replied by fax of 11 July 2006, referring to its previous reply.

25 On 12 July 2006, the applicant submitted its tender to the Commission, which states that it received a total of four tenders.

26 By letter and fax of 19 October 2006 the Commission informed the applicant that its tender had been rejected at the award stage in the following terms:

'Your organisation failed to represent the best case of value for money in accordance with the award criteria set out in the call for tender. Even though your offer passed the selection and exclusion criteria, we regret to inform you that it had not been retained after detailed examination by the evaluation committee of all the offers submitted to [the Directorate General] Environment. Specifically, the evaluation committee concluded:

1. Understanding: The authors have a good understanding of the project. They do however provide sufficient material to show their understanding of the technical aspect of this contract. There is, nevertheless, a concern that there is much repetition in their offer.

2. Methodology: European Dynamics has underestimated the amount of man-days necessary to cover the user support and only offers 30 man-days for this task. This is unfortunate as they could have offered the necessary days and still be under the Commission's estimated budget. The offer is not balanced between the two parts of the contract but is concentrated on the technical part. The committee does not feel that the proposed team and the distribution of the workload would be sufficient to cover the needs for this contract.

3. Project management and availability: The presentation of the methodology is very detailed and long but this has [the] effect that it is not focused. Nevertheless European Dynamics presents a methodology that could do the job. There are no interesting new ideas on how to approach the tasks.'

27 The Commission also stated that the contract would not be signed for two calendar weeks from the day following the date on which its letter was sent. The Commission added that any request from the applicant for information and any reply from the Commission could not be regarded as suspending the two-month deadline for lodging an appeal against the contract award decision.

28 By letter and fax of the same date, namely 19 October 2006, the applicant asked the Commission to inform it of the name of the successful tenderer and the scores awarded to its own technical offer

and to that of the successful tenderer, and to send the applicant a copy of the evaluation committee's report and a comparison of its own financial offer with that of the successful tenderer. The applicant added that it would like a reply by fax or email, and set out its contact details.

29 By letter of 26 October 2006, which the applicant states that it received only on 14 November 2006, the Commission informed the applicant that it had been eliminated because the minimum points required for the 'Project management and availability' criterion had not been obtained. The Commission referred to the evaluation committee's findings, giving the number of points obtained by the applicant for each award criterion, together with the name of the successful tenderer and the number of points it obtained.

30 By letter and fax of 13 November 2006, the applicant sent the Commission a letter reminding it of the applicant's request of 19 October 2006 and adding a request for clarification concerning the evaluation committee's assessment with regard to the fact that the applicant's offer had underestimated the number of man-days necessary in offering only 30 man-days.

31 The Commission signed the contract with the successful tenderer on 14 November 2006. It is apparent from the arguments put forward before the Court at the hearing of 30 January 2008 that that signature renders formal the decision to award the tender, which therefore dates from 14 November 2006.

32 By fax of 16 November 2006, the applicant drew attention to the delay in the delivery of the Commission's response dated 26 October 2006, which it stated it received only on 14 November 2006, and repeated its request for a full copy of the evaluation committee's report, adding that the Commission could keep confidential those parts of the report which did not concern the applicant or the successful tenderer.

33 The applicant also disputed the evaluation of its tender in relation to the three award criteria. With regard to the 'Understanding' criterion, it submitted that its tender was clear and concise. With regard to 'Project management and availability', it described the Commission's letters of 19 and 26 October 2006 as 'confusing' in that the evaluation under the heading 'Methodology' in the letter of 19 October 2006 was the same as that under the heading 'Project management and availability' in the letter of 26 October 2006 and vice versa. The applicant also provided a table showing the profiles of the proposed experts and the number of man-days allocated to each of them, as well as the total man-days (410 man-days a year). The applicant stated that the number of 30 man-days mentioned for covering the user support part was mistaken. It added that it was obvious from the curriculum vitae of the persons proposed that they were capable of covering more than one function if necessary. The applicant also denied that its offer was unbalanced, as the technical part consisted of six pages and the user support part of four pages.

34 In addition, the applicant asked for detailed information on the successful tenderer's offer. Regarding the proposed budget, the applicant stated that its offer was lower than that chosen. Finally, the applicant disputed the decision to award it a number of points which disqualified it on the second criterion and, having regard to its observations, invited the Commission to suspend the procedure for signature of the contract with the successful tenderer.

35 On 24 November 2006, the Commission replied to the applicant that the contract had been signed with the successful tenderer on 14 November 2006 and that the applicant's comments and request for re-examination, received by fax on 16 November 2006, were too late in view of the period laid down by Article 149(3) of the Implementing Regulation, which had expired on 3 November 2006.

36 On 28 November 2006, the applicant sent its comments to the Commission.

37 By fax of 30 November 2006, the Commission sent the applicant an extract from the evaluation report in a non-confidential version pursuant to Article 100 of the Financial Regulation. The Commission stated that it could not disclose details concerning the other tenderers which would harm their business interests. The document in question, dated 29 August 2006, contained, first, a note of the exclusion, selection and award criteria and, secondly, a table showing the number of points awarded for each award criterion to the applicant, its total points and the price it had proposed. The name of the successful tenderer appeared in the table, together with its total points and the price it offered. With regard to the other two unsuccessful tenderers, only their names were given. Finally, the report contained, for each tenderer, the evaluation committee's analysis of their respective offers and the committee's conclusions, which proposed that the contract be awarded to the successful tenderer finally chosen by the Commission. Only the part of the analysis relating to

the applicant was shown. It was worded as follows:

'1. The authors have a good understanding of the project. They do however provide sufficient material to show their understanding of the technical aspect of this contract. There is, nevertheless, a concern that there is much repetition in their offer.

2. European Dynamics has underestimated the amount of man-days necessary to cover the user support and only offers 30 man-days for this task. This is unfortunate as they could have offered the necessary days and still be under the Commission's estimated budget. The offer is not balanced between the two parts of the contract but is concentrated on the technical part. The committee does not feel that the proposed team and the distribution of the workload would be sufficient to cover the needs for this contract.

3. The presentation of the methodology is very detailed and long but this has the effect that it is not focused. Nevertheless European Dynamics presents a methodology that could do the job. There are no interesting new ideas on how to approach the tasks.

Evaluation committee's comment on sub-contracting: there is no sub-contracting.

This offer failed to obtain technical sufficiency for award criteria 2. It is therefore not selected.'

Procedure and forms of order sought

38 By application lodged at the Registry of the Court of First Instance on 28 December 2006, the applicant brought the present action.

39 On hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure. The parties presented oral argument and answered the questions put to them by the Court at the hearing on 30 January 2008.

40 The applicant claims that the Court should:

– annul the decisions to reject its tender and to award the contract to the successful tenderer;

– order the Commission to compensate it for the loss suffered as a result of the procurement procedure in question, which it assesses at EUR 86 300;

– order the Commission to pay the costs, even if the present action is dismissed.

41 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

1. The application for annulment

42 The Court observes, as a preliminary point, that the applicant is seeking the annulment of the decision of 19 October 2006 to reject its tender and of the decision of 14 November 2006 to award the contract to another tenderer.

43 Having regard to the close connection between those two decisions and inasmuch as the applicant's arguments concern the decision to reject its tender, the Court is of the opinion that it is appropriate to examine first the lawfulness of the second of those decisions ('the contested decision').

44 The applicant raises two pleas in law. The first alleges multiple and manifest errors of assessment which the evaluation committee is alleged to have made in assessing the applicant's offer and the infringement of the principles of equal treatment and transparency. In the second plea, the

applicant alleges that the merits of the successful tenderer were not disclosed and that the contested decision lacks a proper statement of reasons.

45 The Court will consider, first of all, the second complaint set out in the second plea, relating to the lack of a proper statement of reasons, then the first plea, alleging manifest errors of assessment, and, lastly, the first complaint set out in the second plea, concerning the failure to disclose the merits of the successful tenderer.

Lack of a proper statement of reasons

46 The applicant claims, on several occasions, that the contested decision must be regarded as failing to state adequate reasons. It claims, in the plea alleging that the relative merits of the successful tender were not disclosed, that the Commission informed it on 26 October 2006 merely of the successful tenderer's identity and of the number of points it had received (88 out of 100), without stating the relative merits of the successful tender compared with the applicant's tender, contrary to Article 100(2) of the Financial Regulation. In addition, in the course of its arguments alleging manifest errors of assessment, it claims that the Commission is attempting to justify the contested decision retrospectively, which leads to discrepancies, demonstrating, in the applicant's view, the lack of reasoning behind the contested decision.

47 It must be borne in mind, first of all, that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35).

48 In addition, pursuant to Article 100(2) of the Financial Regulation and Article 149(2) of the Implementing Regulation, the Commission was under a duty to notify the applicant of the grounds on which its offer was rejected and, the applicant having submitted an admissible tender, of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract was awarded, within not more than 15 calendar days from the date on which a written request was received.

49 Such a course of action is consistent with the duty to state reasons laid down in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its power of review (Case T–19/95 *Adia interim* v *Commission* [1996] ECR II-321, paragraph 32, and judgment of 12 July 2007 in Case T-250/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraphs 68 and 69).

50 Moreover, the observance of the duty to state reasons must be assessed in the light of the information available to the applicant at the time the application was brought (see Case T-183/00 *Strabag Benelux* v *Council* [2003] ECR II-135, paragraph 58, and Case T–4/01 *Renco* v *Council* [2003] ECR II–171, paragraph 96).

51 In the present case, it is accepted that the contested decision sets out the grounds on which the offer was rejected. Accordingly, by letter and fax of 19 October 2006, the Commission informed the applicant that its tender had been rejected at the award stage and reproduced the evaluation committee's findings on each of the award criteria.

52 In addition, in response to a written request from the applicant, also dated 19 October 2006, the Commission, by letter of 26 October 2006, informed the applicant that it had been eliminated because the minimum points required for the 'Project management and availability' criterion had not been obtained. The Commission referred to the evaluation committee's findings, giving the number of points obtained by the applicant for each award criterion. It also stated the name of the successful tenderer, the price that tenderer had offered for the contract and the number of points it had obtained.

53 Although it appears that the letter of 19 October 2006 notifying the applicant of the rejection of its tender reversed the titles of two of the award criteria, that reversal cannot, however, be regarded as a failure in the contested decision to give adequate reasons. In the light of the content of each of the assessments, the wording of the invitation to tender, the content of the letter of 26 October 2006 and the extract from the minutes of the evaluation committee sent to the applicant on 30

November 2006, the applicant was able to identify the specific reasons for the decision to reject its offer, so that that reversal is of no relevance in the present case.

54 Consequently, the argument alleging a failure to give a proper statement of reasons must be rejected.

The first plea, alleging manifest errors of assessment and infringement of the principles of equal treatment and transparency

55 The Court will consider first the arguments raised in respect of the manifest errors of assessment allegedly committed by the evaluation committee, and then the arguments raised in respect of infringement of the principles of equal treatment and transparency.

The existence of manifest errors of assessment

– Arguments of the parties

56 First, the applicant disputes the evaluation committee's assessment concerning the 'Project management and availability' criterion, for which it obtained only 20 out of 35 points, whereas the minimum required was 22 points. Specifically, it denies that there was a 'lack of balance' in its offer. It submits, on the contrary, that the part concerning technical services, dealt with in pages 23 to 29 of its offer, and that relating to user support services, analysed in pages 20 to 23 of its offer, addressed the needs of the contracting authority precisely as they were described in the invitation to tender and complied with the limitations imposed on tender volume.

57 It adds that, if the user support element were so important, the specifications should have mentioned that fact. The Commission itself was unable to provide an estimate of the effort required in this respect when the applicant requested one from it on 10 July 2006.

58 The applicant also challenges the evaluation committee's finding that it underestimated the resources necessary for user support. That committee wrongly assumed that the 30 days allocated for the quality manager was the total number of man–days provided for user support. The applicant claims that, on the contrary, it is evident from its technical offer that the senior analyst, the software and database architect and the senior software engineer were to be involved with user support, that activity also calling for information technology skills. The man-days estimate for the user support activity would therefore amount to approximately 190 man-days, the allocation being 40 man-days for the senior analyst, 40 man-days for the software and database architect and 40 man-days for senior software engineer. It adds that, in the light of the skills, experience and seniority of the proposed personnel and the distribution of the workload, the proposed team was more than adequate to carry out the services envisaged in the contract. It states that it followed the template in the tendering documents and that the breakdown of the number of man-days could not be presented in more detail having regard to the standard reply form in the tender specification.

59 The applicant submits, moreover, that user support is not very different to the technical profile, that the nature of the work to be carried out requires essentially the same type of expertise and that the persons carrying out those functions have to be primarily information technology experts. It claims that it provided a balanced team of multi-disciplinary experts able to carry out all aspects of the work required.

60 In addition, in the reply it disputes the low technical marks awarded to the two proposed experts and states that their rate of pay was found to be entirely satisfactory by the Commission in other contracts.

61 Secondly, as regards the 'Understanding' criterion, the applicant disputes the evaluation committee's assessment that its offer was repetitive. It claims that the evaluation committee, which awarded it 30 points out of 40, failed to give sufficient justification for its decision. It adds, in its reply, that its offer merely addressed all the aspects of the project in order to explain how it would tackle them, following the requested structure and without any superfluous repetition, in particular as regards the software at issue in the present case and its various uses.

62 Thirdly, as regards the 'Methodology' criterion, in respect of which the applicant obtained 18 points out of 25, the minimum required being 16 points, it observes that the evaluation committee claimed that its offer was not focused enough and did not contain any interesting new ideas. The applicant

submits that this evaluation is arbitrary and unjustified.

63 The Commission disputes the applicant's arguments.

– Findings of the Court

64 As a preliminary point, it must be noted that it is settled case-law that the Commission has broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (Case 56/77 *Agence européenne d'intérims* v *Commission* [1978] ECR 2215, paragraph 20; see *Evropïki Dynamiki* v *Commission*, cited in paragraph 49 above, paragraph 89 and the case-law cited).

65 In the present case, the applicant claims the Commission committed several manifest errors of assessment in the evaluation of its offer.

66 As regards the 'Project management and availability' criterion, the applicant disputes the evaluation committee's finding that its offer lacked balance and gave undue weight to the technical part of the contract. It submits that the evaluation committee was wrong to consider that the applicant was offering only 30 man-days for the support services and that it had, in doing so, underestimated the number of days and resources necessary for user support.

67 The Court notes in this connection that the invitation to tender, in the description of the tasks, specified, as regards the technical profile:

'The system will not need major improvements. We only anticipate that it will need minor updates and enhancements to follow the developments of the market.'

68 Consequently, the wording of the invitation to tender indicates that the technical part was ancillary and the part dealing with user support therefore indeed seems to be the more important.

69 It must be stated that, as regards the evaluation of the number of man-days, the table in the financial proposal in the applicant's tender provides for four posts, each of which is assessed in man-days and the total of which amounts to 410 man-days. Thus, 30 man-days are allocated to the post of contract/quality manager, 80 man-days are allocated to the post of senior analyst, 80 man-days are allocated to the post of software and database architect and 220 days are allocated to the post of senior software engineer.

70 It is apparent from the description of those four posts by the applicant in its tender that the contract/quality Manager is described as being responsible for the coordination and planning of the activities linked to the project and responsible 'for the overall contract implementation management, quality assurance, European Commission Security Convention terms follow up and interfacing with the Commission'. His duties can therefore be regarded as covering, at least in part, user support services.

71 By contrast, the duties of the senior analyst, the software and database architect and the senior software engineer are all described as relating to the technical support services of the CITL. They must thus be regarded as meeting the requirements of the technical profile in the invitation to tender.

72 Therefore, it must be stated that the applicant's tender could be interpreted as meaning that only the post of contract/quality manager clearly fell within the 'user support' part. Furthermore, it might also be regarded as only partially falling within that part, since that post was allocated other duties.

73 In addition, the figure of 190 man-days put forward by the applicant is not, in its tender, specifically allocated to the user support service. The evaluation committee is not required to take into account evidence and information not communicated with the tender submitted. Moreover, in contrast to what the applicant asserts, the template adopted in its financial proposal was not obligatory, since the invitation to tender specified that the financial tender template was provided only for purposes of information. The presentation of the applicant's tender could therefore have been adapted so as to show clearly the figure of 190 man-days, allegedly allocated to the user support service but which does not appear as such in its offer.

74 Therefore the evaluation committee was entitled, without committing any manifest error of assessment, to consider that only 30 man-days, corresponding to the post of contract/quality manager, were allocated to user support and that, as a result, the tender lacked balance having regard to the importance of that task in the invitation to tender.

75 Furthermore, in the light of the division of the posts and methodology proposed by the applicant on the one hand and, on the other, the number of pages devoted to the user support services (three pages) in comparison to the number of pages devoted to the technical services (seven pages), the applicant's offer could, without a manifest error of assessment, be regarded as weighted towards the technical profile and not towards user support.

76 Lastly, nothing turns on the fact that the Commission had found the rate of the proposed experts' pay satisfactory in other contracts, since the assessment here concerns only the presentation of the applicant's team in the contract at issue.

77 In conclusion, the Commission did not commit any manifest error of assessment as regards the 'Project management and availability' award criterion.

78 Otherwise, as regards the applicant's arguments seeking to dispute the evaluation committee's assessment in respect of the 'Understanding' and 'Methodolody' criteria, the committee's assessment on those criteria is not the reason for the Commission's rejection of the applicant's tender. Those arguments are therefore irrelevant.

79 It follows from all of the foregoing that the applicant has not proved any manifest error of assessment by the Commission in the present case.

The argument alleging infringement of the principles of equal treatment and transparency

– Arguments of the parties

80 The applicant asserts that, by failing to properly examine its tender and rejecting it on the basis of misinterpretations, the Commission infringed the principles of equal treatment and transparency. In this respect, it points out that the selection criteria must be stated clearly and unambiguously in the specifications. However, the invitation to tender requested that tenderers show a 'deep understanding' of the relevant field of activity which, it submits, cannot be quantified by persons other than the Commission's incumbent contractor, and rendered that invitation to tender unduly subjective.

81 The Commission disputes the applicant's arguments.

– Findings of the Court

82 Under Article 89(1) of the Financial Regulation, all public contracts financed in whole or in part by the budget are to comply with the principles of transparency, proportionality, equal treatment and non-discrimination.

83 Thus, according to settled case-law, the Commission is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 108; see *Evropaïki Dynamiki*, cited in paragraph 49 above, paragraph 45, and the case-law cited).

84 A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 51; see *Evropaïki Dynamiki*, cited in paragraph 49 above, paragraph 46 and the case-law cited).

85 Furthermore, the principle of equal treatment entails an obligation of transparency for the purpose of ensuring it is complied with (see, by way of analogy, Case C-532/06 *Lianakis and Others* [2008] ECR I-0000, paragraph 34 and the case-law cited). Thus, in order to guarantee that the principles of equal treatment and transparency are observed, potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the offer providing best value for money, and of their relative importance, when they prepare their tenders (see, to that

effect, Case C-87/94 *Commission* v *Belgium* [1996] ECR I–2043, paragraph 88; and *Lianakis and Others*, paragraph 36 and the case-law cited).

86 This obligation of transparency also means that the contracting authority must interpret the award criteria in the same way throughout the entire procedure (see, to that effect, *Commission* v *Belgium*, cited in paragraph 85 above, paragraphs 88 and 89, and Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 43).

87 The applicant claims that the requirement for a 'deep understanding' of the relevant field was too subjective a criterion.

88 In the present case, the requirement of a 'deep understanding' of the relevant field is set out in point 4 of the 'technical description' part of the invitation to tender (see paragraph 15 above) and is therefore not included in the part relating to the criteria for the exclusion, selection and the award of the tender.

89 In addition, even if that requirement of a 'deep understanding' of the relevant field could have been regarded as a selection criterion in the present case, the Court notes that the applicant's offer successfully passed the second stage relating to the examination of the selection criteria. 'Deep understanding' was therefore, in any event, an evaluation criterion which was not a ground for the rejection of the applicant's tender by the Commission, the rejection being on the basis of the fact that the applicant had not attained the minimum number of points required in respect of the 'Project management and availability' award criterion.

90 It must be stated in this connection that the contested decision does not refer at all to the requirement of a 'deep understanding', nor, *a fortiori*, to the fact that the applicant's tender failed to satisfy it.

91 Therefore, that argument must be rejected as irrelevant.

92 It follows from the foregoing that the applicant has failed to establish that the principle of transparency was infringed in the present case. Moreover, the applicant does not claim any discrimination with respect to it.

93 As a result, the argument alleging infringement of the principles of equal treatment and transparency must be rejected.

94 It follows from the foregoing that the first plea must be rejected.

The second plea, alleging that the merits of the successful tenderer were not disclosed

Arguments of the parties

95 The applicant states that the Commission merely informed it, on 26 October 2006, of the identity of the successful tenderer and of the number of points it had obtained (88 out of 100), without specifying the relative advantages of the successful tender in relation to its own, in breach of Article 100(2) of the Financial Regulation. It refers to the judgment in Case T-169/00 *Esedra* v *Commission* [2002] ECR II-609, in which the statement of reasons communicated to the rejected tenderer was more detailed.

96 It adds, in the reply, that the statement of reasons must be appropriate to the act at issue, which in the present case relates to a tendering procedure for a complex information technology contract which cannot be compared to a procedure for the mere provision of agency staff, which was at issue in the case which gave rise to the judgment in *Adia interim* v *Commission*, cited in paragraph 49 above, to which the Commission refers in the defence. The requirement of transparency implies, according to the applicant, that the Commission must be able to justify its decision and explain the evaluation procedure that led to the decision, unless that decision is to be held to be arbitrary.

97 The applicant also claims that the Commission's letter of 26 October 2006 was the only letter sent to it by post, notwithstanding the fact that it had requested the Commission to reply to it by fax or email. It considers that, in so far as it did not receive that letter until 14 November 2006, the

Commission should have refrained from signing the contract with the successful tenderer until the legal deadline for opposition had expired.

98 The Commission disputes the applicant's arguments.

Findings of the Court

99 Pursuant to Article 100(2) of the Financial Regulation and Article 149(3) of the Implementing Regulation, the Commission had to notify the applicant of the grounds on which its offer was rejected and, the applicant having submitted an admissible tender, of the characteristics and relative advantages of the successful tender and the name of the successful tenderer within not more than 15 calendar days from the date on which a written request was received.

100 In this connection, the contracting authority fulfils its obligation to state reasons if it first informs eliminated tenderers immediately of the fact that their tender has been rejected by a simple unreasoned communication and then subsequently, if expressly requested to do so, informs tenderers of the relative characteristics and advantages of the successful tender and the name of the successful tenderer within 15 days of receipt of a written request (*Strabag Benelux* v *Council*, cited in paragraph 50 above, paragraph 54 et seq.).

101 In the present case, three award criteria were set out in the third part of the invitation to tender, entitled 'Understanding', 'Project management and availability' and 'Methodology', in addition to the exclusion and selection criteria. A points system was established for the evaluation of tenders in the light of each of those three award criteria. First, a minimum threshold was laid down for each criterion. Secondly, an overall minimum of 65 points was required. The tenders having obtained the minimum points required, considered to be technically satisfactory in the light of those criteria, were then examined in order to ascertain which tender provided the best value for money, by dividing the price by the total number of points.

102 By letter and fax of 19 October 2006, the Commission notified the applicant that its tender had been rejected at the award stage and informed the applicant of the evaluation committee's findings for each of the award criteria.

103 In response to a written request from the applicant, also dated 19 October 2006, the Commission – by letter of 26 October 2006 received, according to the applicant, on 14 November 2006 – informed the applicant that it had been eliminated on the ground that it had not attained the minimum number of points required for the 'Project management and availability' criterion. The Commission reiterated the evaluation committee's findings, stating the number of points obtained by the applicant in respect of each award criterion. It also stated the name of the successful tenderer, the price of its tender and the number of points it had obtained.

104 The applicant was therefore able not only to pinpoint the specific reasons for the rejection of its offer, namely that it had not attained the quality score required for the second award criterion ('Project management and availability'), but also to compare its result (68 points out of 100) with that of the successful tenderer (88 points out of 100). Likewise, it was able to compare the price of the tender it had submitted with that offered by the successful tenderer. Furthermore, the general comments gave details on the aspects of its offer which were considered to be unsatisfactory by the Commission (see, to that effect, *Evropaïki Dynamiki* v *Commission*, cited in paragraph 49 above, paragraph 75).

105 The applicant objects that it was not able to compare its results with those of the other tenders and, in particular, with those of the successful tenderer, since it was not notified of the evaluation committee's findings in its regard and of the details of the points obtained by the successful tenderer for each award criterion.

106 In the present case, the Court observes that the contested decision was not based on a comparison of the services of the various tenderers, but on the fact that the applicant's tender did not obtain the minimum number of points required with regard to the second award criterion.

107 As provided in the invitation to tender, only the tenders which had obtained the minimum threshold of points were considered to be technically satisfactory in the light of those criteria, those tenders then being examined in order to ascertain which provided the best value for money.

108 As a result, the information communicated by the Commission was, in the present case, sufficient in the light of the relevant requirements.

109 The argument alleging that the statement of reasons communicated to the unsuccessful tenderer was more detailed in *Esedra* v *Commission*, cited in paragraph 95 above, does not affect that finding, since the circumstances were different to those at issue in this case. In that case, the tender specifications did not set out, as regards the evaluation of the award criteria, either a minimum threshold or an elimination criterion (paragraphs 128 and 154) and the applicant's excluded tender had therefore been compared to that of the successful tenderer (paragraph 191).

110 That is not the case in this instance, since the applicant's tender was not eliminated following a comparison with the other tenders, in particular with that of the successful tenderer, but on the ground that it had not attained the threshold required in respect of one of the criteria.

111 Consequently, the Court takes the view that, in these particular circumstances, the obligation to communicate the characteristics and relative advantages of the successful offer, laid down in Article 100(2) of the Financial Regulation, was satisfied in this case.

112 Furthermore, as regards the applicant's arguments alleging that it did not receive the Commission's letter of 26 October 2006 until 14 November 2006 and that the Commission should have delayed signing the contract, it must be stated that that argument also cannot be accepted.

113 The fourth subparagraph of Article 149(3) of the Implementing Rules provides:

'The contracting authority may not sign the contract or framework contract with the successful tenderer until two calendar weeks have elapsed from the day after the simultaneous dispatch of the rejection and award decisions. If necessary it may suspend signing of the contract for additional examination if justified by the requests or comments made by unsuccessful tenderers or candidates during the two calendar weeks following the rejection or award decisions or any other relevant information received during that period. In that event all the candidates or tenderers shall be informed within three working days following the suspension decision.'

114 It is common ground that in the present case the applicant received notification of the rejection of its offer on 19 October 2006. That notification states that the contract would not be signed during the two calendar weeks following the day after the date on which that letter was posted.

115 The period of two calendar weeks, laid down by the fourth subparagraph of Article 149(3) of the Implementing Rules and which was drawn to the applicant's attention by the Commission in its notification letter of 19 October 2006, therefore expired on 3 November 2006.

116 In this instance, since the contract was signed on 14 November 2006, that is, after the expiry of the period laid down by Article 149, the Commission complied with the applicable provisions.

117 In addition, it also follows from the fourth subparagraph of Article 149(3) of the Implementing Rules, that the option to suspend signing of the contract for additional examination is provided for only if the requests or comments of the rejected tenderers or candidates are made 'during the two calendar weeks following the rejection or award decisions' or if justified by any other relevant information received 'during that period'.

118 That was not the case here, since the applicant did not make any requests or comments during that period, even though the time-limit of two calendar weeks was drawn to its attention by the Commission in its notification letter of 19 October 2006. The fact that the letter of 26 October 2006 was not sent to it by fax, but by post, and did not reach it until 14 November 2006 is irrelevant in this respect.

119 It follows from the foregoing that the second plea must be rejected.

120 As regards the application for annulment of the decision awarding the contract to a third party, it must be rejected as a consequence of the rejection of the application for annulment of the preceding decision with which it is closely connected (Case T-195/05 *Deloitte Business Advisory* v *Commission* [2007] ECR II-0000, paragraph 113).

2. The application for disclosure of a full copy of the evaluation report

Arguments of the parties

121 Under its plea alleging infringement of the obligation to provide a statement of reasons and the lack of transparency, put forward in its reply, the applicant requests a full copy of the evaluation committee's report. It states that Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) constitutes the general rule and the rule in Article 100(2) of the Financial Regulation and Article 149 of the Implementing Rules is the particular rule. It submits that the exception to that rule, on grounds of confidentiality, is to be interpreted strictly and restricted to the protection of business secrets and that, in the present case, the Commission has not proved that there are business interests whose protection prohibits disclosing the evaluation report to rejected tenderers who have requested its disclosure.

122 The Commission disputes these arguments.

Findings of the Court

123 It must be pointed out, first, that the Commission was not required to disclose the evaluation committee's report to the applicant, as part of the statement of reasons for the contested decision. Article 100(2) of the Financial Regulation provides only that, following a request in writing, the contracting authority is to notify those concerned of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded (*Evropaïki Dynamiki* v *Commission*, cited in paragraph 49 above, paragraph 113).

124 Next, even if the applicant's request were to be understood as a request for access to documents, it must be held that the applicant did not comply with the procedure, laid down in Article 6 et seq. of Regulation No 1049/2001, for applying for access to the evaluation committee report before bringing an action before the Court to challenge the refusal to produce it, which renders such a request inadmissible (*Evropaïki Dynamiki* v *Commission*, cited in paragraph 49 above, paragraph 114).

125 Lastly, the Commission sent the applicant, by fax of 30 November 2006, a non-confidential version of an extract from the evaluation report. The Commission stated that it could not disclose the details concerning the other tenderers, which would harm their commercial interests.

126 Accordingly, having regard to the fact that the information in the file does not show any manifest error of assessment or infringement of the duty to provide a proper statement of reasons, the Court considers that, regardless of the legal basis relied upon by the applicant, it is not appropriate to order the Commission to produce the evaluation committee's report in its entirety.

127 In the light of the foregoing, the application for annulment must be dismissed in its entirety.

3. The application for damages

Arguments of the parties

128 The applicant states, in the part of its application dealing with the costs, that the Court is likely to rule after the completion of the contract. It requests, in the alternative, that the Court order the Commission to pay it damages of EUR 86 300, corresponding to the net profit which, it estimates, it would have gained from the contract, and relies in this connection on Articles 235 EC and 288 EC.

129 It states in its reply that the contested decision is unlawful and has caused it actual damage, which it assesses at approximately EUR 86 300, calculated on the basis of a gross profit margin of 50% and also taking into account all extensions of the contract. At the hearing, the applicant stated that, of the total price chargeable in respect of a contract, one half will consist of production costs, 40% of general costs and 10% will represent its net profit.

130 The Commission contends that this application for damages is wholly unsubstantiated, that it does not comply with Article 44(1)(c) of the Rules of Procedure of the Court of First Instance and, consequently, that it is inadmissible. It requests in the alternative that the application should be rejected as manifestly lacking any legal basis.

Findings of the Court

131 Article 44(1)(c) of the Rules of Procedure provides that the application must state the subject–matter of the proceedings and a summary of the pleas in law on which it is based. It is settled case-law that the information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to give a ruling, if necessary without other supporting information. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, at the very least summarily, provided that the statement is coherent and comprehensible (Case T-387/94 *Asia Motor Finance and Others* v *Commission* [1996] ECR II-961, paragraph 106).

132 The Court considers however that, in the circumstances in the present case, there is no need to rule on the Commission's argument founded on the inadmissibility of the application for damages, since the forms of order sought by the applicant must, in any event, be rejected on their merits (see, to that effect, Case C–23/00 P *Council* v *Boehringer* [2002] ECR I–1873, paragraph 52; Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26; and Case T-415/03 *Cofradía de pescadores 'San Pedro' de Bermeo and Others* v *Council* [2005] ECR II-4355, paragraph 32, confirmed on appeal by judgment of 22 November 2007 in Case C–6/06 P *Cofradía de pescadores 'San Pedro' de Bermeo and Others* v *Council*, not published in the ECR, paragraph 21).

133 In accordance with settled case-law, for the Community to incur liability, the applicant must prove the unlawfulness of the conduct alleged against the institution concerned, the fact of damage and the existence of a causal link between that conduct and the damage complained of (Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; see also to that effect Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II–1239, paragraph 20). Where one of those conditions is not fulfilled, the action must therefore be dismissed in its entirety and it is not necessary to examine the other conditions for that liability (Case C–146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19, and *Strabag Benelux* v *Commission*, cited in paragraph 50 above, paragraph 83).

134 It is apparent from the Court's findings on the application for annulment that the applicant has not proved unlawful conduct on the part of the Commission.

135 Accordingly, the application for damages must be dismissed.

Costs

136 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

137 Since the applicant has been unsuccessful in all the forms of order it sought, and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action;

2. Orders Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to pay its own costs and those incurred by the Commission.

Tiili Dehousse Wiszniewska-Białecka

Delivered in open court in Luxembourg on 12 November 2008.

[Signatures]

* Language of the case: English.

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Judgment of the Court of First Instance of 12 November 2008 - Evropaïki Dynamiki v Commission

(Case T-406/06) [1]

(Public service contracts - Invitation to tender concerning support services for the system of registries established under Directive 2003/87/EC - Rejection of a tender - Decision to award the contract to another tenderer - Manifest error of assessment - Obligation to state the reasons on which the decision is based - Claim for damages)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and N. Keramidas, lawyers)

Defendant: Commission of the European Communities (represented by: M. Wilderspin and E. Manhaeve, acting as Agents)

Re:

Application for, first, annulment of the Commission's decision of 19 October 2006 to reject the applicant's offer in a call for tenders for support services for the system of registries established under Directive 2003/87/CE of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), the Community independent transaction log (CITL), with technical maintenance and user support (OJ 2006 S 102), and an application for annulment of the decision to award the contract to another tenderer and, secondly, a claim for damages.

Operative part of the judgment

The Court:

Dismisses the action;

Orders Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to pay its own costs and those incurred by the Commission.

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[1] - OJ C 42, 24.2.2007.

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Action brought on 28 December 2006 - Evropaïki Dynamiki v Commission

(Case T-406/06)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and N. Keramidas, lawyers)

Defendant: Commission of the European Communities

Form of order sought

Annul the Commission's decision (DG ENV) to reject the applicant's bid and to award the contract to the successful contractor;

order the Commission (DG ENV) to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected;

order the Commission (DG ENV) to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 86 300.

Pleas in law and main arguments

The applicant submitted a bid in response to the defendant's call for an open tender for the provision of services to support Registries Systems established under Directive 2003/87[1] with technical maintenance and user support (OJ 2006/S 102-108793). The applicant contests the decision to reject its bid and to award the contract to another bidder.

In support of its application, the applicant submits that the defendant committed several errors of assessment and violated the principles of equal treatment and transparency. Furthermore, the applicant claims that the defendant did not state reasons for its decision by not informing the applicant of the merits of the successful tender compared to the applicant's tender.

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[1] - Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

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Action brought on 24 November 2006 - Evropaïki Dynamiki v EEA

(Case T-331/06)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and N. Keramidas, lawyers)

Defendant: European Environment Agency

Form of order sought

- Annul the decision of the EEA to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

order the EEA to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

In support of its claims the applicant argues that in the decision taken in the framework of the tendering procedure EEA/IDS/06/002 for the 'Provision of IT consultancy services' (OJ 2006 S 118-125101) communicated to the applicant by letter dated 14 September 2006 the European Environmental Agency ('EEA') failed to comply with its obligations foreseen in the Implementing rules and Directive 2004/18/EC as well as the principle of transparency by not disclosing to the participants in advance the weighting of the sub-criteria which were subsequently applied during the selection procedure.

Furthermore, the applicant claims that the EEA committed several manifest errors of assessment which resulted in the rejection of its bid.

The applicant requests that the decision of the EEA to reject its bid and award the contract to three other participants be annulled and that the defendant is ordered by the Court to pay all legal expenses related to the present proceedings even if the application is rejected.

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ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

2 July 2009 (*)

(Public service contracts – Community public procurement procedure – Supply of consultancy and IT development services for the ECB – Rejection of a tender and decision to award the contract to other tenderers – Action for annulment – Interest in bringing proceedings – Ground for exclusion – Permit to be issued by a national authority – Action in part manifestly unfounded in law and in part manifestly inadmissible)

In Case T–279/06,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis and N. Keramidas, lawyers,

applicant,

v

European Central Bank (ECB), represented by F. von Lindeiner and G. Gruber, acting as Agents,

defendant,

ACTION for annulment of the decision of the European Central Bank (ECB) of 31 July 2006 rejecting the tender submitted by the applicant in the negotiated procedure for the provision of IT consultancy and IT development services to the ECB, and of the decision to award the contract to other tenderers,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and K. O'Higgins, Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

1 The applicant, Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, is a company incorporated under Greek law, active in the field of information technology and communications.

2 On 19 July 2005, the ECB published a contract award notice in the Supplement to the *Official Journal of the European Union* (OJ 2005 S 137) concerning a negotiated procedure for the provision of IT consultancy and IT development services with pre-selection of appropriate candidates ('the negotiated procedure'). The purpose of the negotiated procedure was to select two contractors with a view to supplying services to the ECB in the performance of framework contracts.

3 The entire negotiated procedure was carried out under the responsibility of an ECB procurement committee ('the PRC') established for the purposes of the negotiated procedure.

4 On 29 August 2005 the Applicant submitted a tender on behalf of and as leader of the E2Bank

consortium.

5 The ECB received in total 23 applications, of which 3 were from consortia. The PRC evaluated the applications on the basis of the selection criteria published in the contract notice and selected 7 candidates, including E2Bank.

6 On 22 December 2005, the ECB notified the specifications to the candidates selected and invited them to submit their tenders. The specifications included the call for tenders and five annexes, including the draft framework contract.

7 Point 2.4 of Annex 3 to the invitation to tender laid down an obligation to obtain authorisation under the Arbeitnehmerüberlassungsgesetz (German law governing the supply of temporary staff; 'the AÜG'). Under that point, tenderers were required to give a firm commitment that the Arbeitnehmerüberlassungsgenehmigung [permit to supply temporary staff] would be available when the contract was signed.

8 Under point 2.10 of Annex 3 to the invitation to tender, tenderers must provide the Arbeitnehmerüberlassungsgenehmigung ('the permit') within the meaning of the AÜG. That point states:

'This document proves that the tenderer is allowed to supply staff for the time and material activities. The tenderer will supply evidence that this document is available or will be available at company level'.

9 In addition, under point 4.1.4 of the draft framework contract (Annex 1 to the invitation to tender):

> 'The Contractor shall be obliged to hold a permit to supply employees as temporary staff as part of its business in accordance with Article 1(1) of the [AÜG]. The permit has been issued by the locally competent office … The Contractor shall be obliged to inform in writing on any changes mentioned in Article 12(2) [of the] AÜG, in particular discontinuation, non-extension, withdrawal/redemption or revocation of the permit.'

10 The ECB received five tenders within the time-limit which it had fixed. An evaluation panel, designated by the PRC, verified that the tenders were complete. E2Bank's tender was found to be complete. In particular, it included the firm commitment of two members of the consortium to obtain the permit before the contract was signed. As evidence of the commitment of members of the E2Bank consortium, the applicant supplied copies of two permit applications made on 3 and 6 February 2006 to the competent German authorities.

11 Subsequently, the evaluation panel reviewed the five tenders and assessed them against the criteria laid down in the evaluation grid. The assessment of the written tenders and the tenderers' presentations were summarised in a preliminary evaluation report.

12 On 3 April 2006, the PRC considered and approved the preliminary evaluation report. According to that report, the E2Bank consortium was ranked in fourth position.

13 On the basis of the preliminary evaluation report, the PRC decided to invite the three best-ranked tenderers for further negotiations. The applicant and the fifth-ranked tenderer were not invited for negotiations.

14 In the course of April 2006 the ECB conducted negotiations with the three best-ranked tenderers. Subsequently, the PRC decided to continue negotiations only with two tenderers, since the third tenderer, established in India, was not able to resolve the ECB's concerns with regard to the permit. The contract negotiations with those two tenderers were finalised in the course of June 2006.

15 In its letter of 11 July 2006, the applicant stated that it was concerned about the legality of the public procurement procedure. Inter alia, it claimed that the obligation to hold the permit constituted discrimination against tenderers established outside Germany.

16 By letter of 31 July 2006, the PRC informed the applicant of its decision to award the two framework contracts to the two tenderers with which it had carried on negotiations.

17 By letter of 1 August 2006, the applicant requested additional information regarding the evaluation,

asked the ECB to reconsider its decision and stated its intention to bring the matter before the Court of First Instance if its appeal were dismissed.

18 The PRC took the view that that letter lodged a formal appeal and submitted that appeal to the appeal body of the ECB. By letter dated 18 August 2006, the appeal body informed the applicant that it had dismissed the appeal.

Procedure and forms of order sought by the parties

19 By application lodged at the Court Registry on 9 October 2006, the applicant brought the present action.

20 The applicant claims that the Court should:

– annul the decision of the ECB not to accept its tender and to award the contract to the successful tenderers;

– order the ECB to pay the costs, including in the case of dismissal of the action.

21 The ECB contends that the Court should:

– declare the action inadmissible;

– in the alternative, dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

22 It should be borne in mind that, in accordance with Article 113 of the Rules of Procedure of the Court of First Instance, the Court may at any time, of its own motion, decide whether there exists any absolute bar to proceeding with an action.

23 Furthermore, pursuant to Article 111 of the Rules of Procedure, where it is clear that the Court of First Instance has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the Court may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.

24 In the present case, the Court considers that it has sufficient information at its disposal in the file before it to rule on the present proceedings without opening the oral procedure.

Admissibility

Arguments of the parties

25 The ECB submits that, in accordance with case-law, an action based on the fourth paragraph of Article 230 EC is admissible only if the applicant can show a legal interest in bringing proceedings. The applicant has no legal interest in bringing proceedings against the decisions to reject its tender and to award the contract to the successful tenderers. The applicant does not meet the mandatory requirement to hold the permit and, as the applicant has accepted in its written submissions, cannot obtain such a permit in the future. Accordingly, even if the applicant's tender had been the most economically advantageous, the ECB could not award it one of the contracts.

26 The ECB also states that the applicant had declared in its tender of 10 February 2006 that both partners of the consortium would hold the required permit when the contract was signed and that the applicant subsequently declared that it expected the permits to be issued by the end of March 2006. The ECB learned only when analysing the application that the Greek and German authorities had rejected the applicant's application for the permit. The ECB adds that, if the PRC had known that the applicant was not eligible for the permit, it would have been obliged to exclude the applicant's tender right from the start.

27 With regard to Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), which provides that review procedures must be available 'to any person ... who has been or risks being harmed by an alleged infringement', the ECB takes the view that a tenderer which cannot be awarded the contract because it does not meet a mandatory requirement cannot be harmed by a possible infringement.

28 The ECB submits that the factual and legal context of the present case differs appreciably from that of Case C-249/01 *Hackermüller* [2003] ECR I-6319 and of Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, so that the present action cannot be declared admissible on the basis of that case-law.

29 It points out that the legal question at issue in *AICS* v *Parliament*, paragraph 28 above, was whether a requirement laid down by the contracting authority was compatible with national law. However, in the present case, the obligation to hold the permit is not set up by the ECB but results from mandatory German law. Furthermore, contrary to the situation in *AICS* v *Parliament*, paragraph 28 above, in the present case it is possible for tenderers to meet this mandatory requirement without breaching the applicable law.

30 With regard to *Hackermüller*, paragraph 28 above, the ECB points out that, in the case giving rise to that judgment, it was due to an error on the part of the contracting authority that the ground for exclusion had not been found during the selection procedure. However, in the present case, the ECB learned only in the course of the proceedings before the Court that the applicant did not fulfil the mandatory statutory requirement to hold the permit. The ECB was in no way negligent in that regard. On the contrary, it was the applicant who failed to inform the ECB that its application for the required permit had been rejected although it was obliged to keep the ECB informed of all circumstances affecting its tender. The applicant may not now invoke its own failure and argue that the action must be declared admissible because it had no opportunity to challenge the ECB's decision to exclude it from the negotiated procedure.

31 In any event, the ECB submits that, even if the Court of First Instance were to consider that the applicant's plea concerning the requirement to hold the permit is admissible, the other pleas raised by the applicant remain inadmissible. It points out that in paragraph 29 of the judgment in *AICS* v *Parliament*, paragraph 28 above, the Court of Justice clearly stated that '[i]n the review procedure thus open to the tenderer, he must be allowed to challenge the ground of exclusion'. The right to challenge the specific ground for exclusion does not include the right to challenge the award decision in its entirety.

32 Referring, inter alia, to paragraph 29 of the judgment in Case *AICS* v *Parliament*, paragraph 28 above, the applicant takes the view that it follows from that case-law that, even if its tender had been found unacceptable on account of the lack of the permit, this could not deprive the applicant of its right to seek annulment of the decision to award the contract.

Findings of the Court

33 Without formally raising an objection of inadmissibility, the ECB submits that the action is inadmissible because the applicant lacks an interest in bringing proceedings, given that it does not meet the mandatory criterion of holding the permit, which means that, even if the contested decision were to be annulled, it could not be accepted as a contractor to the ECB after a fresh examination of the tenders.

34 In accordance with settled case-law, a claim for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 59; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 40; and Case T-141/03 *Sniace* v *Commission* [2005] ECR II-1197, paragraph 25). That interest must be vested and present (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 33) and is evaluated as at the date on which the action is brought (Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 357 and *Sniace* v *Commission*, paragraph 25).

35 In the present case, it is established that the applicant did not hold the permit either during the negotiated procedure or when the present action was brought. Moreover, the applicant has expressly admitted that 'it could not obtain [the permit] under any circumstances in Germany'. It is

also clear from the documents relating to the negotiated procedure that the contracting authority had, before the procedure, laid down the requirement to hold the permit as a mandatory criterion to be met by the time when the framework contracts were signed at the latest, so that neither of the framework contracts could have been awarded to a tenderer which did not hold the permit.

36 The applicant takes the view nevertheless that, on the basis of the decisions in *Hackermüller*, paragraph 28 above, and *AICS* v *Parliament*, paragraph 28 above, it can bring an action seeking annulment of the decision to reject its tender and that to award the framework contracts to other tenderers.

37 In its judgment in *AICS* v *Parliament*, paragraph 28 above, paragraphs 32 and 33, the Court held that the applicant, excluded during the tender procedure on the ground that it had not fulfilled a mandatory criterion set out in the tender documents, had an interest in bringing proceedings since the finding that that criterion was unlawful entailed the reopening of the tender procedure, so that the applicant could submit a fresh tender. Thus, the Court declared that the two pleas raised by the applicant, regarding whether the ground for exclusion was well founded, were admissible.

38 The case which gave rise to the judgment in *Hackermüller*, paragraph 28 above, concerned a reference for a preliminary ruling on the interpretation of Article 1(3) of Directive 89/665, in accordance with which '[t]he Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement'.

39 In the case which gave rise to the judgment in *Hackermüller*, paragraph 28 above, paragraph 11, the applicant had brought an action against the decision to accept the tender of another tenderer as being the best tender. The authority competent to hear the action dismissed it on the grounds that the applicant did not have *locus standi* because his bid should have been eliminated at the first stage of the procedure, pursuant to a provision of national law.

40 It was in that context that the Court held that the refusal of access to legal review referred to in Directive 89/665 (see paragraph 38 above) to a tenderer which is in a situation like that of the applicant has the effect of depriving it not only of its right to bring an action against a decision which it alleges is unlawful, but also of the right to dispute whether there is foundation for the ground for exclusion raised by that authority to deny it the quality of a person which has been or is likely to be harmed by the alleged infringement.

41 In the light of those considerations, the Court held that, in the context of the review procedures laid down in Article 1(3) of Directive 89/665, the applicant had to be allowed to challenge the justification for its exclusion on the basis of which the authority responsible for review procedures proposed to find that the applicant had not been or was not likely to be harmed by the decision which it alleged was unlawful.

42 Firstly, it should be observed that it is apparent from the judgments in *AICS* v *Parliament*, paragraph 28 above, and *Hackermüller*, paragraph 28 above, that, in principle, the tenderer has an interest in bringing proceedings to contest the justification for its exclusion, irrespective of the fact that that should have been raised during the procedure before the contracting authority or at the appeal stage.

43 Secondly, with regard to the factual differences referred to by the ECB between the present case and *Hackermüller*, paragraph 28 above, it must be observed that, in its reasoning, the Court did not attach any importance to the fact that the ground for exclusion had not been noted during the procedure before the contracting authority because of an error by that body. The Court based its judgment on the need to ensure the excluded tenderer had a review procedure so that it could contest the justification for that ground for exclusion.

44 Thirdly, irrespective of whether Directive 89/665 applies to the ECB, it should be pointed out that Article 1(3) of that directive enshrines the principle of access to justice in the specific field of procedures for the award of public contracts.

45 It should be borne in mind that access to justice is one of the constitutive elements of a Community based on the rule of law and is guaranteed in the legal order based on the EC Treaty in that the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions (Case 294/83 *Les*

Verts v *Parliament* [1986] ECR 1339, paragraph 23, and Joined Cases T–377/00, T–379/00, T–380/00, T–260/01 and T–272/01 *Philip Morris International* v *Commission* [2003] ECR II–1, paragraph 121). The fact that the ECB is not an institution does not prevent application of that case-law by analogy, since it is the Court of Justice which has jurisdiction, by virtue of Article 230(1) EC, to rule on the legality of the acts of the ECB and, by virtue of Article 288 EC, to rule on actions concerning the non-contractual liability of the ECB.

46 In the same way, in accordance with well-established case-law, the Court of Justice takes the constitutional traditions common to the Member States and Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, as a basis for the right to obtain an effective remedy before a competent court (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and *Philip Morris International* v *Commission*, paragraph 121).

47 In the present case, the Court of First Instance is the only Court before which the applicant may contest the legality of the ground for exclusion, since German courts are not competent to rule either on a decision of the ECB rejecting the applicant's tender, or on an action for compensation on the basis of the non-contractual liability of the ECB.

48 Accordingly, it must be concluded that the principle laid down by the Court of Justice in *Hackermüller*, paragraph 28 above, that the applicant must be allowed to contest the justification of the ground for exclusion found for the first time during an appeal procedure is applicable to the present case.

49 That conclusion cannot be called into question by the ECB's argument that the applicant, in breach of its obligations laid down in the negotiated procedure documents, failed to inform the ECB of the fact that it was impossible for the applicant to obtain the permit, so that the applicant relies on its own negligence in order to obtain a legal advantage. Even if such an obligation to provide that information existed, it must be noted that, if the applicant had actually informed the ECB of that fact and had then been excluded for that reason, it would still have been able to dispute the ground for exclusion and the ECB's decision in that regard would also have been subject to appeal before the Court. Accordingly, the view must be taken that the applicant's conduct complained of by the ECB gave the applicant no advantage with regard to its contesting the ground for exclusion.

50 Having regard to the fact that the eighth plea in law raised by the applicant relates to the justification for that ground for exclusion, the action is accordingly admissible.

The application for annulment

51 The Court considers it appropriate to begin its examination with an analysis of the eighth plea.

The eighth plea, alleging that the requirement to hold the permit is unlawful

– Arguments of the parties

52 In the first place, the applicant takes the view that the ECB does not fall within the material scope of the AÜG, given its nature as a European institution. That requirement was introduced by the ECB only in order to favour participating companies established in Germany, by excluding foreign companies.

53 According to Greek and German law, the applicant can offer the services requested by the ECB and does not need the permit. In that regard, it adds that it signed a contract with the ECB in May 2006 for the provision of an expert who offered his services at the premises of the ECB, without the ECB having asked for the permit.

54 In the second place, the applicant states that, in accordance with the AÜG, the permit is provided to foreign companies only if they hold a permit in their country of establishment relating to the supply of temporary staff. Pursuant, in particular, to Article 20(4) of Greek Law No 2956/2001, the provisions of which are consistent with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), such a permit can be issued only to undertakings which exclusively carry out that activity, namely the 'loan' of staff or temporary staff. However, those undertakings are not allowed to exercise any other activities. The applicant is not a supplier of interim staff but an

IT company, so that it is impossible for it to obtain the permit under Greek law and, consequently, the German authorities will not issue it with the permit.

55 Thirdly, the applicant takes the view that, pursuant to Article 1(1) and (3)(a) of Directive 96/71, no permit to supply temporary staff can be required of undertakings which provide support personnel to a customer in the framework of the performance of a contract. That is clearly the case of the ECB project which is the object of the contract notice at issue.

56 Next, it follows from Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) that the AÜG does not apply to the framework contract referred to in the negotiated procedure, since posting of employees is governed by Directive 96/71. In that regard, the applicant relies on paragraph 46 of Case C–290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I–9461. The requirement imposed by the ECB to hold the permit is, consequently, contrary to the Community rules on public contracts and accordingly constitutes a breach of the freedom to provide services, provided for by Article 49 EC, since that requirement makes the supply of services 'less attractive'. The applicant also refers to paragraph 30 of Case 31/87 *Beentjes* [1988] ECR 4635.

57 The applicant also submits that the ECB's arguments regarding the judicial penalties laid down by German law in the event of non-compliance with the requirement to hold the permit are irrelevant. It follows from the principle of primacy of EC law over national law that national authorities and, *a fortiori*, European institutions are obliged not to apply national law when it contravenes Community law.

58 Fourthly, the eligibility of candidates or tenderers to take part in a procedure must be carried out on the basis of clear and non-discriminatory selection criteria. The ECB arbitrarily or erroneously introduced a 'mandatory' requirement in the tender documents which led to discrimination against all non-German companies participating in the negotiated procedure.

59 The requirement in question also runs counter to the settled case-law of the Court on 'exclusion criteria' deriving directly from the principles of transparency and non-discrimination of participants. In that regard, the applicant refers to Case C–470/99 *Universale-Bau and Others* [2002] ECR I–11617, paragraphs 91 and 92, and Case C–421/01 *Traunfellner* [2003] ECR I–11941, paragraph 29, and Joined Cases C–226/04 and C–228/04 *La Cascina and Others* [2006] ECR I–1347, paragraph 22.

60 The ECB disputes the applicant's arguments.

61 The ECB emphasises that the mandatory requirements laid down in the AÜG cannot be waived by the parties. It is also impossible to avoid application of the AÜG by choosing another national law as the basis for the contractual relationship, since, under German private international law, labour law regulations adopted in the public interest (such as the AÜG) apply to all contracts performed on German territory even if the contract is governed by a different law. The legal consequences of non-compliance with the relevant provisions of the AÜG are, by virtue of Articles 9 and 16 thereof, the nullity of the framework contract and the fact that the ECB would commit an administrative offence.

62 The ECB maintains that the scope of the AÜG is not limited to interim agencies, the exclusive purpose of which is the provision of staff to other companies. The AÜG applies to all companies, including those active in the IT sector who post their professional employees to other companies to provide services.

63 According to the ECB, the fact that the applicant concluded, in May 2006, another contract with the ECB without holding the permit is not relevant. The contract in question is not a contract for the supply of staff but a service contract (Dienstvertrag), which does not necessitate authorisation under the AÜG. There are differences between the two types of contract. First, while the supplier of staff is responsible for the proper selection of appropriate staff, and not for services provided by its staff, the service provider is fully responsible for the performance of the services in the prescribed manner by its staff. Second, unlike the framework contracts, the contract for the provision of services does not provide for the transfer of the right to supervise the staff concerned and the right to give instructions to them. The staff that the service provider deploys to perform the services remain subject to its instructions and supervision.

– Findings of the Court

64 As a preliminary point, it should be noted that the ECB, like the institutions, has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (see, by analogy with the public procurement procedures before the Community institutions, Case 56/77 *Agence Européenne d'Intérims* v *Commission* [1978] ECR 2215, paragraph 20; Case T–203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II–4239, paragraph 56; and *AICS* v *Parliament*, paragraph 28 above, paragraph 39).

65 By its first complaint, the applicant submits that the ground for exclusion is not justified since, under German and Greek law, it is not necessary for it to hold the permit in order to offer services to the ECB. The ECB erroneously and arbitrarily introduced that criterion in order to exclude all non-German tenderers.

66 In that regard, it should be borne in mind, firstly, that the place of the supply of services concerned in the negotiated procedure is Frankfurt-am-Main (Germany), secondly, that, in accordance with point 3.16.1 of the draft framework contract, that contract is governed by German law and must be interpreted in the light thereof and, thirdly, that the ECB gave the provisions of the AÜG as the reason for the requirement to hold the permit. Accordingly, Greek law is irrelevant from the point of view of assessment of whether, in order to conclude a framework contract with the ECB, the applicant was subject to the obligation, under national law, to hold the permit.

67 It remains, therefore, to be determined whether the ECB erroneously interpreted and applied German law when it took the view that that law required the successful tenderer to hold the permit.

68 Firstly, in that regard, it must be pointed out that the applicant does not contest the lawfulness of point 3.16.1 of the framework contract, which provides that that contract is governed by German law and must be interpreted in the light thereof. Nor does it contest the arbitration clause in point 3.16.2 of the framework contract which provides that any dispute arising out of the ECB's contractual relationship with the successful tenderer is to be subject to the exclusive jurisdiction of the Amtsgericht/Landesgericht Frankfurt am Main (Local Court/Regional Court, Frankfurt-am-Main).

69 Secondly, it should be borne in mind that, under Article 1 of the AÜG, 'employers wishing to provide workers (temporary staff) to third parties (users) on a professional basis must hold a permit'. Clearly, the supply of services in performance of a framework contract requires the provision to a third party, in this case the ECB, of staff, which is, moreover, not disputed by the applicant.

70 With regard to the criterion that the supply must be on a professional basis, it is apparent from the case-law of the Bundesarbeitsgericht (Federal Labour Court) (judgment of 9 November 1994, AZR 217/94) that the scope of the requirement under the AÜG is not limited to interim agencies whose only purpose is the supply of staff to other companies, but also applies to companies in the IT sector which post their employees to other companies. In the same way, in that judgment, the view was taken that the requirement at issue applied to a contract for remunerated services the scope of which had been limited to 85 man-days and to a period of four months. Accordingly, it is manifest that the contract in question in the present case, which concerns a period of three years and is intended to provide the ECB with 10 000 man-hours per year, implies that that provision is on a professional basis.

71 Thirdly, the applicant cannot validly rely on the fact that, at the time the contract for supply of an expert to the ECB in May 2006 was concluded, no permit was required. Having regard to the findings in paragraphs 68 to 70 above, even if the arguments of the ECB distinguishing between the two types of contract from the point of view of application of the AÜG (see paragraph 63 above) were without foundation, that would mean at the very most that the ECB had infringed the provisions of the AÜG in respect of the May 2006 contract. Such an infringement of the AÜG in the past does not exempt the ECB from correctly applying the AÜG during the negotiated procedure and, subsequently, on conclusion of the framework contracts.

72 Accordingly, the conclusion must be reached that the ECB did not err in either its interpretation or its application of the AÜG when it took the view that the supply of services in question was subject to the obligation laid down in Article 1 of the AÜG. It also follows that the imposition of the requirement to hold the permit cannot be classified as arbitrary or a method of intentionally favouring tenderers established in Germany.

73 It follows that the applicant's first complaint is manifestly devoid of any foundation in law.

74 By its second complaint, the applicant submits that it is impossible for it to obtain the permit from the competent German authorities because of specific features of Greek law, which permits the grant of a similar permit only to undertakings the sole activity of which is the supply of temporary staff, and of German law, which provides that, in the case of an undertaking established in another Member State, the permit can be issued only if that undertaking holds a corresponding permit in the Member State where it is established.

75 In that regard, it should be noted that the Court, in the context of an action for annulment brought pursuant to Article 230 EC, is not competent to assess whether the interaction between two national laws effectively constitutes an obstacle to the freedom to provide services, which is prohibited by Article 49 EC. In order to contest the compatibility with Community law of a decision to grant the permit, the applicant must bring an action for annulment before the national court against the decisions of the national authorities.

76 It follows that the applicant's second complaint is manifestly inadmissible.

77 By its third complaint, the applicant submits that it follows from the principle of the primacy of Community law that the ECB should have excluded the application of German law in so far as it imposes the obligation to hold the permit, since the application of that requirement by the ECB limits access to the public procurement procedure by undertakings established outside Germany and is contrary to Article 49 EC and to Directives 96/71 and 2004/18. In that regard, the applicant relies on paragraph 30 of the judgment in *Beentjes,* paragraph 56 above, and paragraph 46 of the judgment in *FKP Scorpio Konzertproduktionen*.

78 Firstly, it is clear that the applicant does not rely on any rule of law which, having regard to the particular status of the ECB, would permit the ECB to avoid the territorial scope of German law with regard to services supplied by a successful tenderer in Germany. It should also be borne in mind that the applicant does not contest the lawfulness of the choice of German law as the law applicable to the framework contract or that of the arbitration clause (see paragraph 68 above).

79 Furthermore, it has previously been held that, in accordance with the principles of sound administration and cooperation in good faith as between the Community institutions and the Member States, the institutions are required to ensure that the conditions laid down in an invitation to tender do not induce potential tenderers to infringe the national legislation applicable to their business (*AICS* v *Parliament*, paragraph 28 above, paragraph 41).

80 It follows that the applicant cannot validly complain of the fact that the ECB applied the provisions of German law.

81 Secondly, as is apparent from paragraphs 69, 70 and 72 above, the ECB rigorously complied with the provisions of the AÜG, which gave it no discretion as to imposition of the requirement to hold the permit. Consequently, the applicant's argument that the ECB's imposition of that requirement is contrary to Article 49 EC and to the abovementioned directives in truth seeks to dispute the compatibility of the AÜG with those provisions of Community law.

82 As stated in paragraph 75 above, when considering an action brought under Article 230 EC, the Court is not competent to review the lawfulness of national legislation in the light of Community law. In order to do so, the applicant should have brought an action against the Federal Republic of Germany before the national court, which would have been able to refer a question to the Court of Justice for a preliminary ruling.

83 Nor, thirdly, can the applicant validly base its arguments on the case-law on which it relies.

84 With regard to the judgment in *Beentjes*, paragraph 56 above, in the case which gave rise to that judgment, the contracting authority took an additional criterion into account, namely, the requirement to employ the long-term unemployed, which was not imposed by national legislation. However, in the present case, the criterion of holding the permit is derived directly from German law, without the ECB having any discretion at all as to its application. Accordingly, unlike the judgment in *Beentjes*, paragraph 56 above, in the present case examination of whether the ground for exclusion is compatible with the principle of non-discrimination does not concern a decision of the contracting authority to add a criterion to those laid down by national law, but whether the AÜG infringes the principle of non-discrimination by requiring all undertakings supplying staff to third

parties in Germany to hold the permit.

85 The judgment in *FKP Scorpio Konzertproduktionen*, paragraph 56 above, concerns questions referred for a preliminary ruling relating to the compatibility of provisions of national law with Community law.

86 As has already been noted in paragraph 82 above, when considering an action brought under Article 230 EC, the Court is not competent to review the lawfulness of national legislation in the light of Community law, with the result that the applicant cannot successfully rely on the case-law created by the judgments in *Beentjes* and *FKP Scorpio Konzertproduktionen*, paragraph 56 above, in support of its position.

87 It follows that the applicant's third complaint must be rejected in part as manifestly unfounded and in part as manifestly inadmissible.

88 In its fourth complaint, the applicant submits that the imposition by the ECB of the requirement to hold the permit is discriminatory and infringes the principle of transparency. In that regard it relies on paragraphs 91 and 92 of the judgment in *Universale-Bau and Others*, paragraph 59 above, paragraph 29 of the judgment in *Traunfellner*, paragraph 59 above, and paragraph 22 of the judgment in *La Cascina and Others*, paragraph 59 above.

89 In the judgment in *Traunfellner*, paragraph 59 above, the Court of Justice was asked to give a preliminary ruling concerning the interpretation of Article 19 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), pursuant to which, where the awarding authority has not excluded the submission of variants (alternative tenders), it is required to state the minimum specifications to be respected by those variants. The Court held that, having regard to the principle of transparency, reference in the contract documents to a provision of national legislation cannot satisfy the obligation laid down in Article 19 of Directive 93/37 and that only a statement in the contract documents enables tenderers to be kept informed in the same way of the minimum specifications which their variants must respect.

90 In that regard, it suffices to note that, in the present case, the requirement to hold the permit was clearly set out in a number of places in the negotiated procedure documents and that the applicant had no difficulty in interpreting the disputed requirement, which, moreover, enabled it to apply to the competent national authorities for the permit in good time. It follows that the judgment in *Traunfellner*, paragraph 59 above, is entirely irrelevant to the resolution of the present dispute.

91 The judgment in *La Cascina and Others*, paragraph 59 above, concerns questions referred for a preliminary ruling relating to the compatibility of provisions of national law with Community law in the light, in particular, of the principles of non-discrimination and transparency. According to paragraph 93 of the judgment in *Universale-Bau and Others*, paragraph 59 above, the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in a restricted procedure, both with the principle of the equal treatment of the potential tenderers and the principle of transparency, so as to afford to all equality of opportunity in formulating the terms of their applications to take part and their tenders.

92 As has been noted in paragraph 90 above, the applicant cannot validly allege that it was not sufficiently informed of the disputed requirement and so cannot successfully rely on the principle of transparency. With regard to breach of the principle of non-discrimination, it must be pointed out that the disputed requirement applied to all tenderers. As regards the applicant's allegation that only tenderers established in Germany could meet that requirement, even if the applicant's assertion were correct, that situation would be the direct result of the provisions of the AÜG and other national laws, the compatibility of which with the principle of non-discrimination cannot be examined in the context of the present dispute (see paragraph 82 above).

93 Accordingly the applicant's fourth complaint must also be rejected in part as manifested unfounded and in part as manifestly inadmissible.

94 Having regard to all the foregoing considerations, the eighth plea, alleging that the ground for exclusion is unlawful, must be rejected in part as manifestly inadmissible and in part as manifestly unfounded.

The applicant's first seven pleas

95 The first plea alleges that the lack of separation between the selection criteria and award criteria is unlawful. The second plea alleges breach of the implementing rules, of Directive 2004/18 and the lack of transparent and objective assessment of the applicant's technical and professional capabilities. The third plea alleges discrimination arising from the lack of experience of the applicant and E2Bank as a consortium. The fourth plea alleges a failure to indicate the weighting given to the criteria in the negotiated procedure documents. The fifth plea alleges breach of the principles of transparency and sound administration and of the duty to state reasons. The sixth plea alleges errors in assessment when examining the applicant's tender. The seventh plea alleges breach of confidentiality as evidenced by an anonymous letter received by the applicant.

96 On the one hand, the applicant has not succeeded in demonstrating that the mandatory criterion, laid down in the negotiated procedure documents, requiring the permit to be held was unlawful and, on the other, the applicant has expressly accepted in its pleadings that it 'could not obtain [the permit] under any circumstances in Germany'.

97 It follows that, even if one or more of the first seven pleas were well founded, that cannot profit the applicant. Even if the decisions rejecting its tender and awarding the contract to other tenderers were annulled on the basis of those pleas, the fact remains that the applicant has not succeeded in demonstrating the unlawfulness of the ground for exclusion, with the result that the ECB could replace the contested decisions in respect of the applicant only with a fresh decision rejecting its tender on the basis of the ground for exclusion.

98 In accordance with settled case-law, an applicant cannot have a legitimate interest in the annulment of a decision where it is already certain that that decision which concerns it cannot be other than reconfirmed (see, to that effect, Case 432/85 *Souna* v *Commission* [1987] ECR 2229, paragraph 20; Joined Cases T–357/00, T–361/00, T–363/00 and T–364/00 *Martínez Alarcón and Others* v *Commission* [2002] ECR-SC I–A–37 and II–161, paragraph 93; and Case T–16/02 *Audi* v *OHIM* (*TDI*) [2003] ECR II–5167, paragraph 97). Accordingly, it must be held that the applicant, following the rejection of its plea alleging that the ground for exclusion is unlawful, no longer has a legitimate interest in putting forward other pleas in order to obtain the annulment of the decisions rejecting its tender and awarding the contract to other tenderers (see, to that effect, *Martínez Alarcón and Others* v *Commission*, cited above, paragraph 93).

99 In the same way, in accordance with case-law, a plea for annulment is inadmissible on the ground of lack of interest in bringing proceedings where, even if it were well founded, annulment of the contested act on the basis of that plea would not give the applicant satisfaction (see, to that effect, Case 37/72 *Marcato* v *Commission* [1973] ECR 361, paragraphs 2 to 8, and the Opinion of Advocate General Mayras in the same case, ECR 371, 374).

100 Consequently, the applicant's first seven pleas must be rejected as manifestly inadmissible.

101 It follows from all the foregoing considerations that the action must be dismissed in part as manifestly inadmissible and in part as manifestly unfounded.

Costs

102 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the form of order sought by the ECB, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. The action is dismissed.

2. Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE is ordered to pay the costs.

Luxembourg, 2 July 2009.

E. Coulon	O. Czúcz
Registrar	President

* Language of the case: English.

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Documents relatifs à la même affaire

Ordonnance du Tribunal (quatrième chambre) du 2 juillet 2009 – Evropaïki Dynamiki/BCE (affaire T-279/06)

« Marchés publics de services – Procédure d'appel d'offres communautaire – Prestation de services de conseil et de développement informatiques en faveur de la BCE – Rejet d'une offre et décision d'attribuer le marché à d'autres soumissionnaires – Recours en annulation – Intérêt à agir – Motif d'exclusion – Autorisation devant être accordée par une autorité nationale – Recours en partie manifestement dépourvu de tout fondement en droit et en partie manifestement irrecevable »

1. *Droit communautaire - Principes - Droit à un recours juridictionnel (Art. 230, al. 1, CE et 288 CE) (cf. points 45-49)*

2. *Recours en annulation - Compétence du Tribunal (Art. 230 CE) (cf. points 75, 85)*

3. *Recours en annulation - Personnes physiques ou morales - Intérêt à agir (Art. 230, al. 4, CE) (cf. points 98-99)*

Objet

Demande d'annulation de la décision de la Banque centrale européenne (BCE) du 31 juillet 2006 rejetant l'offre soumise par la requérante dans le cadre de la procédure négociée pour la prestation des services de conseil et de développement informatiques en faveur de la BCE, ainsi que de la décision d'attribuer le marché à d'autres soumissionnaires.

Dispositif

1) Le recours est rejeté.

2) Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE est condamnée aux dépens.

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Order of the Court of First Instance of 2 July 2009 - Evropaïki Dynamiki v European Central Bank (ECB)

(Case T-279/06) [1]

(Public service contracts - Community public procurement procedure - Supply of consultancy and IT development services for the ECB - Rejection of a tender and decision to award the contract to other tenderers - Action for annulment - Interest in bringing proceedings - Ground for exclusion - Permit to be issued by a national authority - Action in part manifestly unfounded in law and in part manifestly inadmissible)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and N. Keramidas, lawyers)

Defendant: European Central Bank (represented by: F. von Lindeiner and G. Gruber, agents)

Re:

Application for annulment of the ECB's decision of 31 July 2006 rejecting the offer made by the applicant in the negotiated procedure for the supply of consultancy and IT development services for the ECB and the decision to award the contract to other tenderers.

Operative part of the order

The Court:

1) Dismisses the action.

2) Orders Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to pay the costs.

_____

[1] - OJ C 294 of 2.12.2006

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Action brought on 9 October 2006 - Evropaïki Dynamiki v ECB

(Case T-279/06)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and N. Keramidas, lawyers)

Defendant: European Central Bank

Form of order sought

Annul the decision of the ECB to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

order ECB to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

The applicant submitted a bid in response to a call by the defendant for a negotiated tender for the provision of IT consultancy and IT development services to the European Central Bank (ECB) (OJ 2005/S 137-135354). The applicant contests the decision to reject its bid and to commence contractual negotiations with other bidders.

In support of its application, the applicant submits that the ECB unlawfully did not disclose the weighting of criteria and sub-criteria in the tender notice and that the ECB used vague terms to evaluate negatively the applicant's bid and thereby violated the principles of transparency and sound administration and failed to state reasons. Furthermore, the applicant claims that the ECB made several errors of appreciation under the evaluation of the applicant's offer. Finally the applicant alleges that the ECB introduced a specific term in the call for tender, which favoured German established companies, and thereby violated among others Articles 12 EC and 49 EC.

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JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

10 September 2008 (*)

(Public service contracts – Community tendering procedure – Rejection of bid – Selection and award criteria – Obligation to state reasons)

In Case T–272/06,

Evropaïki Dinamiki – Proigmena Sistimata Tilepikinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis and N. Keramidas, lawyers,

applicant,

v

Court of Justice of the European Communities, represented initially by M. Schauss and then by D. Guild, acting as Agents,

defendant,

APPLICATION for the annulment of the decision of the Court of Justice of 20 July 2006 not to accept the tender submitted by the applicant in response to the call for tenders of 5 July 2005 for services to maintain, develop and support computer applications, and to award the contract to the successful tenderer,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of O. Czúcz (Judge Rapporteur), President, J.D. Cooke and I. Labucka, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 19 February 2008,

gives the following

Judgment

Background to the litigation

1 The award of service contracts by the Court of Justice is subject to the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation') and to the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) ('the implementing rules'). Those provisions are based on the relevant Community directives and, in particular, as regards service contracts, on Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1) and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The applicant is a company governed by Greek law, active in the area of information technology and communications.

3 By a contract notice of 5 July 2005, published in the Supplement to the *Official Journal of the European Union* (OJ 2005 S 127) under reference 2005/S 127–125162, the Court of Justice issued a call for tenders for the provision of services to maintain, develop and support current or future computer applications.

4 Section III.2.1.3 of the contract notice reads as follows:

'Technical capacity – means of proof required:

Brief description of the professional activities undertaken by the company which are relevant to this invitation to tender.

Summaries containing [three] references for work carried out by the company, or by the partner companies in a consortium, during the past [three] years, involving research, development, maintenance or support of IT applications in both of the following functional fields: computerisation of judicial and/or administrative procedures in the civil service; documentation and collaborative work in document preparation.

Summaries containing [three] references for work carried out by the company or by the partner companies in a consortium, during the past [three] years, involving quality assurance plans in both of the following functional fields: computerisation of judicial and/or administrative procedures in the civil service; documentation and collaborative work in document preparation.

Description of how the technical division(s) is/are structured within the company or consortium.

...

Description of IT skills centres within the company, citing in each case the particular field covered, the number of IT staff working there, and the centre's geographic location.'

5 The tender specifications define the assessment criteria as follows:

'5.1 Assessment of tenders

Tenders will be assessed in three stages:

– checking of the exclusion criteria;

– shortlisting of no more than five tenderers;

– comparison of tenders on the basis of the award criteria … and award of the contract to two firms.

...

5.3 Selection criteria

...

Tendering firms will be assessed on the basis of the profile that emerges from analysis of the following factors:

– the experience and references of the firm and associated firms in equivalent projects in the following functional domains (35 points):

(1) computerisation of judicial and/or administrative procedures in the public service;

(2) documentation and collaboration in the preparation of documents;

in each of these two domains 15 man/years' experience in each of the last three years is required.

...

– capacity for intervention in situ and speed of intervention, expressed as a number of hours worked (15 points);

…

– availability of computer skill centres (10 points) …

Tendering firms scoring a minimum of 70 points will go forward to the award procedure.

5.4 Award criteria

…

Tenders will be classified in order to identify the most economically advantageous tender, i.e. the bid with the best quality/price ratio [with the quality and price criteria counting for 60 and 40 points respectively].'

6 On 9 January 2006, the applicant submitted a bid in response to the call for tenders.

7 By letter of 20 July 2006, the Court of Justice informed the applicant that its tender had not been selected as the applicant did not fulfil the criteria to go forward to the award stage and that it had the possibility to obtain additional information on the grounds for rejection of its bid.

8 By letter of 24 July 2006, the applicant requested the Court of Justice to provide it with the following information: the name of the successful tenderers; the reasons for the decision and the criteria which the applicant's tender had not satisfied; the scores obtained in respect of each award criterion for the applicant's technical offer and that of the successful tenderers; a comparison of the applicant's financial offer and that of the successful tenderers. The applicant also requested a copy of the evaluation committee's report.

9 By letter of 3 August 2006, the Court of Justice gave details of the names of the successful tenderers and provided a table comparing the results obtained by them and by the applicant. It also informed the applicant that since its tender had not satisfied the selection criteria no financial evaluation had been carried out.

10 By letter of 7 August 2006, the applicant stated that the information provided by the Court of Justice did not allow it to understand how the applicant's tender had been compared with those of the successful tenderers, particularly as regards its experience and references, its capacity for intervention in situ and its capacity to assume the responsibilities of the contract. It also asked the Court of Justice to disclose the financial offers of the successful tenderers.

11 By letter of 23 August 2006, the Court of Justice informed the applicant that at the end of the selection procedure it had received a score of more than 70 points, but that it had finished in sixth place. Consequently, its tender was not considered in the award phase, as the number of candidates which could participate in that procedure had been limited to five.

12 The Court of Justice went on to provide the following additional explanations:

– for the criterion concerning experience and references, the applicant had obtained a score of 17.25 points out of 35, because some of the applicant's references concerned activities which had been carried out more than three years previously, other references did not contain the relevant certificates or reference letters for 'work carried out' and no reference was dedicated to a quality assurance project;

– for the criterion concerning the capacity of intervention in situ and speed of intervention, expressed as a number of hours worked, since the time given in the applicant's tender (48 hours) was longer than that given in other tenders, the applicant had obtained 10.5 points out of 15;

– as regards the criterion relating to the availability of computer skill centres, the applicant's tender did not indicate either the specialisations of each of those centres or the number of persons employed there and had obtained 6.67 points out of 10.

13 In the same letter, in reply to the applicant's request that the financial offers of the successful tenderers be disclosed, the Court of Justice pointed out that the choice of tenderers was based not only on a price ratio, but also on a quality ratio. Even if the applicant had been among the five successful candidates in the selection phase, it would not have succeeded in the award phase, since its total score, taking into account its hypothetical result in respect of the pricing criteria, would have been 77.91 points, whereas those of the successful tenderers were 81.62 points and 83.71 points respectively.

Procedure and forms of order sought

14 By application lodged at the Registry of the Court of First Instance on 29 September 2006, the applicant brought the present action.

15 Upon hearing the report of the Judge Rapporteur the Court (Fourth Chamber) decided to open the oral procedure. By way of measure of organisation of procedure it put certain written questions to the parties and invited the Court of Justice to furnish certain documents including, in particular, a copy of the report of the evaluation committee. The parties complied with these requests within the time fixed.

16 At the hearing on 19 February 2008 the Court, by way of measure of organisation of procedure pursuant to Article 64(3) of its Rules of Procedure and without prejudice to the possible application of Article 67(3) of those Rules, ordered the production by the Court of Justice within 10 days of a full version of the evaluation committee report, including its annexes, and for this purpose did not close the oral procedure at the end of the hearing.

17 The Court of Justice complied with this request by the Court within the time fixed.

18 By decision of 9 July 2008 the Court decided to close the oral procedure, having decided that it was not necessary to include the document thus produced in the case-file.

19 The applicant claims that the Court should:

– annul the decision of the Court of Justice not to accept its bid and the decision to award the contract to the successful tenderers;

– order the Court of Justice to pay the costs, even if the application is unsuccessful.

20 The Court of Justice contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Substance

21 In support of its application for annulment, the applicant relies on two pleas in law. The first plea alleges infringement of the Financial Regulation, of the implementing rules and of Directive 2004/18/EC, together with infringement of the principles of equal treatment and transparency. The second plea alleges manifest errors of assessment.

Arguments of the parties

22 In its first plea, the applicant argues that the evaluation committee incorrectly interpreted the provisions of the contract notice regarding the references to be provided by candidates for the purposes of assessing their technical capacity.

23 It claims that all project references submitted in its tender concerned projects carried out during the previous three years, as section III.2.1.3 of the contract notice required. However, the evaluation committee took into account only the references relating to projects which were initiated and completed during the previous three years, including that in which the contract notice was

published (2003, 2004 and 2005) ('the relevant period').

24 In its second plea, the applicant submits, firstly, that the contracting authority committed a manifest error of assessment by not taking into account the applicant's references relating to the projects which were partially completed during the relevant period, including those concerning the 'EUR-Lex', 'ESP5', 'Circa', 'SEI-JOS', 'IDA Tools', 'Stadium' and 'Chopin' projects.

25 Secondly, it submits that the contracting authority committed a manifest error of assessment by disregarding certain of the applicant's references because they did not contain certificates or reference letters.

26 The Court of Justice rejects the arguments put forward by the applicant. It denies that the evaluation committee had mistakenly interpreted the conditions of the contract notice relating to references furnished by tenderers and also denies the alleged errors of assessment concerning the references which the applicant furnished.

Findings of the Court

27 It must be recalled at the outset that, in accordance with settled case-law, the statement of the reasons on which a decision adversely affecting a person is based must allow the Community Court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded (Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22, and Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 23).

28 Accordingly, the fact that a statement of reasons is lacking or inadequate, hindering that review of legality, constitutes a matter of public interest which may, and even must, be raised by the Community Court of its own motion (Case 18/57 *Nold* v *High Authority* [1959] ECR 41, at p. 52, and Case C-166/95 P *Commission* v *Daffix*, cited above, paragraph 24).

29 Although the applicant has not in the present case raised a failure to state reasons, the Court considers that, in the circumstances set out below, it must examine the question as to whether the Court of Justice has discharged the obligation upon it to state reasons.

30 It follows from the above summary of the pleas in law and arguments put forward by the applicant that the present action was formulated on the basis of information furnished by the Court of Justice in its letters of 3 and 23 August 2006, in response to the applicant's request for the reasons upon which the decision was based in accordance with Article 100(2) of the Financial Regulation.

31 Thus, the pleas in law advanced against the contested decision are confined to putting in issue the way in which the references supplied by the applicant in accordance with the contract conditions were evaluated, these references being relevant only at the selection stage of the procedure. In other words, the present case has been brought upon a basis induced by the reasons given by the Court of Justice, to the effect that the applicant's bid had been excluded at the end of the selection stage upon the ground that the bid had been placed in sixth position in accordance with the evaluation criteria for that phase of the procedure and that only five tenderers had been retained for consideration at the award phase.

32 However, the documents produced by the Court of Justice on foot of the measure of organisation of the procedure (see paragraph 15 above) show that the information given to the applicant in the letters of 20 July, 3 and 23 August 2006 was wrong and did not reflect the true basis upon which the decision to award the contract to the two successful tenderers had in fact been taken by the Court of Justice.

33 On the basis of the proofs which have been furnished to it, the Court finds that what happened during the course of the evaluation procedure was as follows:

– on 21 June the Informatics and New Technologies Division of the Court of Justice ('the Informatics Division') presented to the evaluation committee its report No 16/2006 on the call for tenders Ref. CJ AM 13/2004, containing an evaluation by reference to both the selection and the award criteria;

– the Informatics Division informed the evaluation committee that on the basis of this evaluation six tenderers including the applicant had received the minimum 70 points in the evaluation of the selection criteria stage. However, the applicant, with 70.1 points, was placed in sixth position. Accordingly, only the bids of the other five tenderers had been evaluated at the phase of the award criteria;

– in the evaluation of the bids by reference to the award criteria, the Informatics Division had placed the two tenderers who were subsequently successful in first and second position and recommended that the committee should award them the contract;

– at its meeting on 12 July 2006 the evaluation committee had considered the Informatics Division report but decided to postpone its decision on the award of the contract and to await additional information which it requested from the Informatics Division;

– on 18 July 2006, the Informatics Division furnished a supplementary report entitled 'Addendum to Report No 16/2006'; this report, together with its annexes, clearly shows that the Informatics Division had carried out a new evaluation of the award criteria in order to take into account the applicant's bid as well as the five bids which had previously been assessed;

– for the two categories of award criteria, the Informatics Division had placed the applicant's bid in fourth position for quality (38.13 points out of 60) and in second place on price (39.18 points out of 40). On the combined quality/price criteria the applicant's bid had been placed in fourth position with a total of 77.91 points out of 100;

– on 20 July 2006, the Court of Justice informed the two successful tenderers of the award of the contract and informed the applicant that its bid had been rejected.

34 The description of the conduct of the evaluation procedure as set out in the preceding paragraph does not establish that, on the one hand, the applicant's bid had been rejected on the grounds that it had been placed in sixth position at the end of the selection stage or, on the other hand, that no technical and financial evaluation of the bid had been made.

35 The formal decision to award the contract to the two successful tenderers was in reality taken on the basis of the supplementary report of 18 July 2006, which includes an evaluation of all six bids which had attained 70 points at the selection stage, including that of the applicant. The applicant's bid was not therefore rejected at the end of the selection stage but upon the basis that it had been placed in fourth position at the end of the award stage. Moreover, this fact was known to the Court of Justice when it sent its letter of 20 July 2006 to the applicant.

36 At the hearing the Court of Justice argued that the evaluation of the applicant's bid by reference to the award criteria was merely an informal exercise designed to confirm the earlier decision to reject the bid at the selection phase. That argument cannot be accepted. The supplementary report of 18 July 2006 clearly shows that the bid had been fully evaluated at the award stage and had even been placed in second position on price. It was on the basis of that evaluation, which took into account the applicant's bid, that the Court of Justice adopted its formal and definitive decision to award the contract to the two successful tenderers.

37 It is also apparent that, in formulating its present case, the applicant was induced into error by the description given of the evaluation of the references in the letters of 20 July and 3 and 23 August 2006. In particular this last letter suggests that the mark of 17.5 out of 35 points was attributable to the three factors cited at paragraph 10 above, including the fact that some of its references concerned activities which were carried out more than three years previously. The applicant, as is shown clearly in the application, interpreted this explanation to the effect that the references in question had not been taken into account in the evaluation of the selection criteria upon the ground that they covered work which had been commenced or finished on dates outside the relevant period, running from 1 January 2003 to 31 December 2005, even though the work was being performed during those years.

38 That interpretation was, in effect, further confirmed by the defence which, at paragraph 29, reads as follows:

'First the applicant's contention is misconceived in fact. Even though all the aforementioned references cover work carried out by the applicant or by the partner companies in a consortium during the past three years, it would have been contrary to the principles of transparency and equal

treatment to take into account the work and activities which were carried out more than three years ago by the applicant. The [Court of Justice] indeed took into account the work carried out by the applicant or by the partner companies in a consortium during the past three years, excluding however the activities [relating to the projects “EUR-Lex”, “ESP5”, “Circa”, “SEI-JOS”, “IDA Tools”, “Stadium” and “Chopin”] which were anterior to this period.’

39 Although paragraph 29 of the defence is open to an interpretation to the effect that the references in question had been excluded from consideration only to the extent that they covered work performed outside the relevant period, the defence pleading did not correct the impression created by the letter of 23 August 2006. It was not until the Court of Justice, in its rejoinder, declared unequivocally that all of the references had been taken into account in respect of work performed during the relevant period that the applicant and the Court were able to understand that the meaning first given to the letter of 23 August 2006 was mistaken.

40 Moreover, it follows from the foregoing that the debate between the parties in the present case as to the validity of the evaluation of the references is in effect redundant in these circumstances, because the evaluation of the selection criteria is no longer relevant once the bid is admitted to the award stage. If the Court of Justice had informed the applicant of the fact that the limit of five tenderers at the outcome of the selection phase had not been applied and that its bid had been placed in fourth position at the end of the award stage, the present case might not have been brought, or, at the very least, would have been founded on a totally different basis.

41 As the applicant points out, Article 89(1) of the Financial Regulation requires that ‘all public contracts … comply with the principles of transparency, proportionality, equal treatment and non-discrimination’. Moreover Article 100(2) of the regulation provides that ‘[t]he contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken.’

42 It is undeniable that this last provision requires every contracting authority to give a tenderer the true reasons for the rejection of its bid. Moreover, the reasons given must reflect the actual conduct of the evaluation procedure. In that connection it must be recalled that the reasons given for a decision which has adverse effect must be logically compatible with the decision as adopted (see, to that effect, Case 2/56 *Geitling* v *High Authority* [1957] ECR 3, at p. 16).

43 A statement of reasons which does not identify the true basis upon which a decision rejecting a bid has been taken and does not reflect faithfully the manner in which the rejected bid has been evaluated is not transparent and does not fulfil the obligation to state reasons in Article 100(2) of the Financial Regulation.

44 It follows from the above findings that the decision rejecting the applicant’s bid disregarded the obligation to state reasons and that in consequence it is necessary to annul that decision, as communicated to the applicant by the letter of 20 July 2006.

45 As regards the applicant’s claim for annulment of the decision awarding the contract to the two successful tenderers, the Court finds it impossible to judge whether it is well founded because, as the obligation to state reasons was disregarded, no examination of the evaluation of the award criteria could take place in the present action.

Costs

46 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Court of Justice has been unsuccessful, it must be ordered to pay costs as applied for by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Annuls the decision of the Court of Justice to reject the tender submitted by Evropaïki Dinamiki – Proigmena Sistimata Tilepikinonion Pliroforikis kai Tilematikis AE, as communicated to the latter by letter of 20 July 2006;**

2. Orders the Court of Justice to pay the costs.

Czúcz Cooke Labucka

Delivered in open court in Luxembourg on 10 September 2008.

E. Coulon O. Czúcz

Registrar President

* Language of the case: English.

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Judgment of the Court of First Instance of 10 September 2008 - Evropaïki Dinamiki v Court of Justice

(Case T-272/06) [1]

(Public service contracts - Community tendering procedure - Rejection of bid - Selection and award criteria - Obligation to state reasons)

Language of the case: English

Parties

Applicant: Evropaïki Dinamiki - Proigmena Sistimata Tilepikinonion Pliroforikis kai Tilematikis AE (Athens (Greece) (represented by: N. Korogiannakis and N. Keramidas, lawyers)

Defendant: Court of Justice of the European Communities (represented: initially by M. Schauss and then by D. Guild, acting as Agents)

Re:

Application for the annulment of the decision of the Court of Justice of 20 July 2006 not to accept the tender submitted by the applicant in response to the call for tenders of 5 July 2005 for services to maintain, develop and support computer applications, and to award the contract to the successful tenderer.

Operative part of the judgment

The Court:

Annuls the decision of the Court of Justice to reject the tender submitted by Evropaïki Dinamiki - Proigmena Sistimata Tilepikinonion Pliroforikis kai Tilematikis AE, as communicated to the latter by letter of 20 July 2006.

Orders the Court of Justice to pay the costs.

_____

[1] - OJ C 294, 2.12.2006.

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Action brought on 29 September 2006 - Evropaïki Dynamiki v Court of Justice

(Case T-272/06)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and N. Keramidas, lawyers)

Defendant: Court of Justice of the European Communities

Form of order sought

Annulment of the decision of the Court of Justice to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

order the Court of Justice to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

By means of its application, the applicant seeks annulment of the decision of the Court of Justice of 20 July 2006, rejecting its bid filed in response to the open Call for Tenders AM CJ 13/04 for the maintenance, development and support of computer applications (OJ 2005/S 127-125162 & 2005/S 171-169521) and awarding the same Call for Tender to another bidder.

The applicant claims that the contested decision was taken in violation of the Financial Regulation (EC) No 1605/2002 (OJ L 248, 16/09/02, p. 1), its Implementing Rules and Directive 2004/18/EC, through an alleged misinterpretation of the selection criteria, violation of the principles of transparency and equal treatment of the participants.

Moreover, the applicant submits that the contracting authority's decision contains evident errors of assessment in the framework of the evaluation of its offer, exceeding, thus, the discretion that European Institutions dispose in procurement procedures.

_____

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ARRÊT DU TRIBUNAL (septième chambre)

24 septembre 2008 (*)

« Marchés publics de fournitures – Programme TACIS – Décision d'annuler l'appel d'offres – Recours en annulation – Obligation de motivation »

Dans l'affaire T–264/06,

DC-Hadler Networks SA, établie à Bruxelles (Belgique), représentée par M^e^ L. Muller, avocat,

partie requérante,

contre

Commission des Communautés européennes, représentée initialement par M^me^ E. Cujo et M. P. Kuijper, puis par M. M. Wilderspin et M^me^ Cujo, en qualité d'agents,

partie défenderesse,

ayant pour objet une demande d'annulation de la décision de la Commission du 14 juillet 2006, portant annulation de la procédure d'appel d'offres EuropeAid/122742/C/SUP/RU relatif à la fourniture d'équipement informatique et de bureau pour le réseau d'information ainsi que d'équipement d'intégration sociale et de rééducation pour les personnes handicapées dans le district fédéral de la Volga (Fédération de Russie),

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (septième chambre),

composé de MM. N. J. Forwood, président, D. Šváby et L. Truchot (rapporteur), juges,

greffier : M^me^ K. Pocheć, administrateur,

vu la procédure écrite et à la suite de l'audience du 22 mai 2008,

rend le présent

Arrêt

Faits à l'origine du litige

1 Le 1^er^ avril 2006, la Commission, agissant par l'intermédiaire de sa délégation à Moscou (Fédération de Russie), a publié au Supplément au *Journal officiel de l'Union européenne* (JO S 70) un appel d'offres ouvert international pour un marché de fournitures intitulé « Social Integration of the Disabled in Privolzhsky Federal Okrug, Russian Federation – supply of social integration and rehabilitation-related equipment for the disabled and IT and office equipment for the information network » (EuropeAid/122742/C/SUP/RU). Cette procédure faisait l'objet d'une gestion centralisée déconcentrée et, à ce titre, la Commission avait la qualité de pouvoir adjudicateur agissant au nom et pour le compte de la Fédération de Russie, pays bénéficiaire. Le service déconcentré, la délégation de la Commission à Moscou (ci-après « la délégation »), était le service en charge de la gestion des contrats.

2 La requérante, DC-Hadler Networks SA, est la seule entreprise ayant présenté une offre à la suite de cet appel. À l'issue de l'évaluation technique et financière réalisée par la délégation les 13, 14 et

15 juin 2006, son offre a été déclarée recevable.

3 Le 19 juin 2006, la section « Finances et contrats » de la délégation a présenté au chef de délégation une demande de dérogation à la règle d'origine, selon laquelle les fournitures et les matériaux acquis dans le cadre d'un marché financé au titre d'un instrument communautaire doivent tous être originaires d'un pays communautaire ou d'un pays éligible, au motif que l'offre de la requérante spécifiait que certaines des fournitures n'étaient pas produites dans la zone éligible. Le même jour, le chef de délégation faisant fonction a accordé cette dérogation.

4 Le 20 juin 2006, la délégation a informé la requérante que le marché lui était attribué.

5 Par lettre du 14 juillet 2006, la Commission a notifié à la requérante sa décision d'annuler la procédure de passation du marché (ci-après la « décision attaquée »).

6 Le 17 juillet 2006, la requérante a demandé à la Commission de lui indiquer la base juridique de la décision attaquée.

7 Le 27 juillet 2006, la Commission lui a répondu que la décision attaquée était fondée sur l'article 101 du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1, rectificatif publié au JO L 25, du 30 janvier 2003, p. 43, ci-après le « règlement financier »).

8 Le 5 septembre 2006, la Commission a signé avec l'Unicef (Fonds des Nations unies pour l'enfance) une convention de contribution dont l'objet était identique à celui de l'appel d'offres du 1er avril 2006.

Procédure et conclusions des parties

9 Par requête déposée au greffe du Tribunal le 22 septembre 2006, la requérante a introduit le présent recours.

10 À la suite de l'empêchement du juge rapporteur initialement désigné, le président du Tribunal a, par décision du 18 décembre 2007, nommé un nouveau juge rapporteur.

11 Sur rapport du juge rapporteur, le Tribunal (septième chambre) a décidé d'ouvrir la procédure orale.

12 Dans le cadre des mesures d'organisation de la procédure prévues à l'article 64 du règlement de procédure du Tribunal, celui-ci a, par lettre du 7 avril 2008, invité la Commission à communiquer la décision d'attribution de l'appel d'offres à la requérante dans la mesure où elle diffère de la décision du 20 juin 2006. La Commission a confirmé, dans le délai imparti, que cette dernière décision constituait le seul document pertinent.

13 Les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions du Tribunal à l'audience du 22 mai 2008.

14 La requérante conclut à ce qu'il plaise au Tribunal d'annuler la décision attaquée.

15 La Commission conclut à ce qu'il plaise au Tribunal :

– à titre principal, prononcer le non-lieu à statuer ;

– à titre subsidiaire, rejeter le recours comme non fondé ;

– condamner la requérante aux dépens.

Sur l'intérêt à agir

Arguments des parties

16 La Commission allègue que le recours est sans objet, dans la mesure où l'exécution des lots faisant

l'objet de l'appel d'offres a déjà été confiée à une organisation internationale.

17 La requérante répond que, à défaut de lui donner la possibilité de soumissionner une nouvelle fois pour le marché en question, l'annulation de la décision attaquée lui permettrait de réclamer la réparation du préjudice subi en se fondant sur la responsabilité extracontractuelle de la Commission.

Appréciation du Tribunal

18 Aux termes d'une jurisprudence constante, un recours en annulation contre un acte devenu sans objet est recevable s'il permet de redresser les éventuelles conséquences préjudiciables résultant de cet acte ou d'éviter que l'illégalité alléguée ne se reproduise à l'avenir (arrêt de la Cour du 26 avril 1988, Apesco/Commission, 207/86, Rec. p. 2151, point 16 ; arrêt du Tribunal du 25 mars 1999, Gencor/Commission, T–102/96, Rec. p. II–753, point 41 ; ordonnance du Tribunal du 5 décembre 2007, Schering-Plough/Commission et EMEA, T–133/03, non publiée au Recueil, point 31).

19 Il résulte également de la jurisprudence que, même dans une situation où la décision attaquée a déjà été pleinement exécutée en faveur d'autres concurrents dans le cadre d'une même adjudication, le requérant conserve un intérêt à voir annuler cette décision soit pour obtenir, de la part de la Commission, une remise en état adéquate de sa situation, soit pour amener la Commission à apporter, à l'avenir, les modifications appropriées au régime des adjudications, au cas où celui-ci serait reconnu contraire à certaines exigences juridiques (arrêt de la Cour du 6 mars 1979, Simmenthal/Commission, 92/78, Rec. p. 777, point 32).

20 La requérante conserve par conséquent un intérêt à agir même si l'achat et la livraison des fournitures visées dans l'appel d'offres EuropeAid/122742/C/SUP/RU, qui fait l'objet de la décision attaquée, ont été confiés à un tiers.

21 Dès lors, l'objection de la Commission relative à la disparition de l'objet du litige doit être écartée.

Sur le fond

Arguments des parties

22 La requérante soulève deux moyens à l'appui de son recours. Selon le premier moyen, tiré de la violation des formes substantielles, le manque de précision de la décision attaquée ou, à tout le moins, sa motivation incomplète aurait pour effet de priver la requérante de la possibilité d'en contrôler la légalité. Selon le second moyen, la motivation de la décision attaquée serait inexacte, car cette décision trouverait son origine dans les premières conclusions d'une procédure de vérification financière visant la requérante, qui a révélé l'existence d'anomalies affectant les certificats d'origine de fournitures informatiques livrées par elle dans le cadre d'autres contrats.

23 La Commission affirme que les deux moyens invoqués par la requérante se confondent et concernent le défaut de motivation de la décision attaquée.

24 Elle considère que, même si la motivation de la décision attaquée n'est pas longue, elle est, selon la jurisprudence, suffisante.

25 La Commission estime que le caractère suffisant de la motivation doit être apprécié en fonction du contexte de l'acte et de l'ensemble des règles juridiques régissant la matière concernée. Elle affirme que la décision attaquée ne fait que prendre acte et tirer les conséquences de l'existence de règles communautaires qui interdisent qu'une dérogation à la règle d'origine soit accordée ex post et que la signification de l'indication d'une concurrence insuffisante était, dans ce contexte, claire et évidente. Elle considère que, en tout état de cause, on peut attendre des personnes concernées par une décision un certain effort d'interprétation pour résoudre les ambiguïtés que contient la motivation.

26 La Commission soutient, en outre, qu'une motivation dont le début se trouve exprimé dans l'acte attaqué peut être développée et précisée en cours d'instance.

27 S'agissant du caractère inexact ou tout au moins incomplet de la motivation, elle affirme que la décision d'annuler la procédure est fondée sur l'article 101 du règlement financier, qui permet au pouvoir adjudicateur d'annuler, jusqu'à la signature du contrat, la procédure de passation du

marché si les conditions d'octroi du marché ne sont pas respectées, et trouve sa justification dans l'insuffisance de concurrence.

28 La Commission fait également valoir que l'appel d'offres en cause est un appel d'offres ouvert international qui doit permettre d'assurer une concurrence maximale, sans qu'aucune dérogation à la règle d'origine soit envisagée, sauf dans des circonstances exceptionnelles prévues à l'article 7, paragraphes 2 et 3, du règlement (CE) n° 2112/2005 du Conseil, du 21 novembre 2005, relatif à l'accès à l'aide extérieure de la Communauté (JO L 344, p. 23). Or, eu égard au caractère strict de la règle d'origine inscrite dans l'appel d'offres en question, la dérogation à cette règle octroyée à la seule requérante aurait pu être critiquée par des soumissionnaires potentiels en mesure de satisfaire aux conditions finalement retenues dans l'appel d'offres, mais s'étant abstenus de présenter une offre à défaut de pouvoir respecter la règle de l'origine.

Appréciation du Tribunal

29 Conformément à une jurisprudence constante, la portée de l'obligation de motivation exigée par l'article 253 CE dépend de la nature de l'acte en cause et du contexte dans lequel il a été adopté. La motivation doit faire apparaître de manière claire et non équivoque le raisonnement de l'institution auteur de l'acte, de manière à permettre au juge communautaire d'exercer son contrôle et aux intéressés de connaître les justifications de la décision attaquée (voir arrêts de la Cour du 15 avril 1997, Irish Farmers Association e.a., C–22/94, Rec. p. I–1809, point 39, et du 10 mars 2005, Espagne/Conseil, C–342/03, Rec. p. I–1975, point 54, et la jurisprudence citée).

30 En l'espèce, la décision attaquée se fonde sur l'insuffisance de concurrence pour justifier l'annulation de la procédure de passation du marché. Dans sa lettre du 27 juillet 2006, la Commission a ensuite répondu à la requérante que la décision attaquée était fondée sur l'article 101 du règlement financier.

31 Dans sa défense, la Commission invoque comme motif de l'annulation de la procédure de passation du marché la dérogation à la règle d'origine accordée par ses propres services à la requérante. En outre, dans sa duplique, la Commission se réfère au contexte de l'adoption de la décision attaquée et allègue que la requérante aurait dû en déduire que le grief relatif à l'insuffisance de concurrence était fondé sur la dérogation qui lui avait été accordée dans l'application de la règle d'origine.

32 Si l'on peut attendre des personnes concernées par une décision un certain effort d'interprétation lorsque le sens du texte n'apparaît pas à la première lecture (arrêt du Tribunal du 12 décembre 1996, Rendo e.a./Commission, T–16/91, Rec. p. II–1827, point 46), il convient toutefois de constater que, en l'espèce, la requérante ne pouvait déduire de la notion de « concurrence insuffisante » que la raison pour laquelle la Commission avait décidé d'annuler la procédure de passation du marché était liée à la dérogation à la règle d'origine dont elle avait bénéficié.

33 Les services de la Commission ont accordé d'office cette dérogation à la requérante, avant de lui attribuer le marché. Dans la mesure où la décision attaquée était défavorable à la requérante, contrairement aux décisions antérieures sur la recevabilité de son offre et l'attribution du marché, alors même que le contexte de l'offre de la requérante était identique, il appartenait à la Commission de développer son raisonnement de manière explicite dans la décision attaquée ou dans sa lettre du 27 juillet 2006 (voir, par analogie, arrêt de la Cour du 26 novembre 1975, Groupement des fabricants de papiers peints de Belgique e.a./Commission, 73/74, Rec. p. 1491, point 31). La décision attaquée est donc entachée d'une insuffisance de motivation.

34 Le fait que la Commission ait fourni les raisons de cette décision en cours d'instance ne compense pas l'insuffisance de la motivation initiale de la décision attaquée. En effet, il est de jurisprudence constante que la motivation doit figurer dans le corps même de la décision et qu'elle ne peut être explicitée pour la première fois et a posteriori devant le juge, sauf circonstances exceptionnelles qui, en l'absence de toute urgence, ne sont pas réunies en l'espèce (voir, en ce sens, arrêts du Tribunal du 2 juillet 1992, Dansk Pelsdyravlerforening/Commission, T–61/89, Rec. p. II–1931, point 131, et du 15 septembre 1998, European Night Services e.a./Commission, T–374/94, T–375/94, T–384/94 et T–388/94, Rec. p. II–3141, point 95, et la jurisprudence citée).

35 La seule référence à l'insuffisance de concurrence ne peut donc pas constituer une motivation suffisante de la décision attaquée, dans la mesure où elle ne permet ni à la requérante de connaître ni au Tribunal de contrôler les raisons pour lesquelles la Commission a décidé de revenir sur sa décision d'attribuer le marché à la requérante.

36 Il résulte de l'ensemble des considérations qui précèdent que la décision attaquée doit être annulée pour violation des exigences de motivation requises par l'article 253 CE, sans qu'il y ait lieu d'examiner le second moyen d'annulation soulevé par la requérante.

Sur les dépens

37 En vertu de l'article 87, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La requérante n'ayant pas conclu à la condamnation de la Commission, il y a lieu de décider que chaque partie supportera ses propres dépens.

Par ces motifs,

LE TRIBUNAL (septième chambre)

déclare et arrête :

1) La décision de la Commission du 14 juillet 2006, portant annulation de la procédure d'appel d'offres EuropeAid/122742/C/SUP/RU, est annulée.

2) La Commission et DC-Hadler Networks SA supporteront leurs propres dépens.

Forwood Šváby Truchot

Ainsi prononcé en audience publique à Luxembourg, le 24 septembre 2008.

Le greffier Le président

E. Coulon N. J. Forwood

* Langue de procédure : le français.

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Judgment of the Court of First Instance of 24 September 2008 - DC-Hadler Networks v Commission

(Case T-264/06) [1]

(Public supply contracts - TACIS programme - Decision to annul the call for tenders - Application for annulment - Duty to state reasons)

Language of the case: French

Parties

Applicant: DC-Hadler Networks SA (Brussels, Belgium) (represented by: L. Muller, lawyer)

Defendant: Commission of the European Communities (represented by: initially by E. Cujo and P. Kuijper, and subsequently by M. Wilderspin and E. Cujo, acting as Agents)

Re:

Application to annul the Commission decision of 14 July 2006 to annul the tender procedure in respect of Europe Aid/122742/C/SUP/RU relating to the supply of IT and office equipment for the information network and of social integration and rehabilitation-related equipment for the disabled in the federal district of the Volga (Russian Federation).

Operative part of the judgment

The Court:

Annuls the Commission decision of 14 July 2006 annulling the tender procedure in respect of Europe Aid/122742/C/SUP/RU;

Orders the Commission and DC-Hadler Networks to pay their own costs.

_____

1 - OJ C 294, 2.12.2006.

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Action brought on 22 September 2006 - DC-HADLER NETWORKS v Commission

(Case T-264/06)

Language of the case: French

Parties

Applicant: DC-HADLER NETWORKS (Brussels, Belgium) (represented by: L. Muller, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Declare the application admissible and well founded;

annul the contested measure.

Pleas in law and main arguments

The applicant in the present action took part in the invitation to tender procedure in respect of the project Europe Aid/122742/C/SUP/RE entitled 'Social Integration of the Disabled in Privolzhsky Federal Okrug - Supply of social integration and rehabilitation-related equipment for the disabled and IT and office equipment for the information network', which is part of the Tacis national action Programme 2003. [1] By letter of 20 June 2006, the Commission notified the applicant that its tender had been successful for Lots 1, 2 and 4. However, on 14 July the Commission sent the applicant a letter informing it that the contracting authority had decided to annul the tender procedure and not to sign the contract with it on the basis that there was insufficient competition. In the present action, the applicant seeks the annulment of the decision contained in that letter.

The applicant puts forward two pleas in law in support of its application.

The first plea alleges infringement of an essential procedural requirement in that, according to the applicant, the reasons put forward by the Commission in support of its decision ultimately not to award it the contract cannot be regarded as satisfactory. It maintains that it was only when it requested the Commission to do so, in a letter dated 17 July 2006, that the latter clarified, by letter of 27 July 2006, that its decision was based on Article 101 of Council Regulation No 1605/2002. [2] In the applicant's opinion, it is not possible to ascertain from the reasons put forward by the Commission in support of the contested decision what prompted it to go back on its earlier decision to award the applicant the contract. It submits that that lack of precision in the Commission's reasoning is all the more significant as the Commission resiled from its earlier official position.

The second plea alleges infringement of Article 253 EC. The applicant considers that, by withdrawing the invitation to tender on the ground of insufficient competition, the Commission committed a manifest and serious error by putting forward an imprecise and incomplete set of reasons since, on previous occasions, the applicant has obtained a number of contracts in cases where it was the only tenderer.

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[1] - Programme based on Council Regulation (EC, Euratom) No 99/2000 of 29 December 1999 concerning the provision of assistance to the partner States in Eastern Europe and Central Asia (OJ 2000 L 12, p. 1).

[2] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

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Action brought on 12 September 2006 - Germany v Commission

(Case T-258/06)

Language of the case: German

Parties

Applicant: Federal Republic of Germany (represented by: M. Lumma and C. Schulze-Bahr)

Defendant: Commission of the European Communities

Form of order sought

declare null and void the Commission's interpretative communication of 23 June 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives; and

order the defendant to pay the costs.

Pleas in law and main arguments

The applicant takes issue with the Commission's interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives, which was placed on the Commission's internet website on 24 July 2006 and published in the *Official Journal* on 1 August 2006 (OJ 2006 C 179, p. 2).

As grounds for its action, the applicant submits that the Commission was not competent to issue the contested communication. It argues in this connection that the contested communication contains new rules on tendering which go beyond the obligations arising under existing Community law. These new rules will have legally binding effects for the Member States. The EC Treaty, however, contains no authorisation which would enable the defendant to adopt such rules. The present case therefore, in the applicant's view, essentially involves an instance of *de facto* legislation.

The applicant goes on to contend that, by establishing mandatory rules, the defendant has upset the institutional balance existing between the Council, the European Parliament and the Commission.

In conclusion the applicant submits that, even if the Commission were competent to issue the contested communication, the latter would still have to be declared null and void as the principle of legal certainty has been infringed. The defendant ought to have invoked the appropriate legal basis and made express reference to this in the legal measure in question. The Commission thus also breached the duty to state reasons laid down in Article 253 EC.

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Action brought on 28 August 2006 - Eyropaïki Dynamiki v Commission

(Case T-232/06)

Language of the case: English

Parties

Applicant: Eyropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and N. Keramidas, lawyers)

Defendant: Commission of the European Communities

Form of order sought

- Annulment of the decision of DG TAXUD to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

order DG TAXUD to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected;

order DG TAXUD to pay applicant's damages suffered on account of the tendering procedure in question.

Pleas in law and main arguments

By means of its application, the applicant seeks annulment of DG TAXUD's decision of 19 June 2006, rejecting its bid filed in response to the open Call for Tenders TAXUD/2005/AO-001 for specification, development, maintenance and support of customs IT services relating to projects of the DG-TAXUD "CUST-DEV" (OJ 2005/S 117-115222) and awarding the same Call for Tender to another bidder.

In support of its claims the applicant puts forward that, in the framework of the said tendering procedure, DG TAXUD failed to respect the procedural requirements set out in the Financial Regulation and its Implementing Rules, thus resulting in unequal treatment of tenderers and violation of principles of transparency and sound administration. Moreover, DG TAXUD's decision allegedly contained manifest errors of assessment and according to the applicant, by far exceeded the discretion that European Institutions dispose of when evaluating tenders.

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CVRIA
LUXEMBOURG

ПЪРВОИНСТАНЦИОНЕН СЪД НА ЕВРОПЕЙСКИТЕ ОБЩНОСТИ
TRIBUNAL DE PRIMERA INSTANCIA DE LAS COMUNIDADES EUROPEAS
SOUD PRVNÍHO STUPNĚ EVROPSKÝCH SPOLEČENSTVÍ
DE EUROPÆISKE FÆLLESSKABERS RET I FØRSTE INSTANS
GERICHT ERSTER INSTANZ DER EUROPÄISCHEN GEMEINSCHAFTEN
EUROOPA ÜHENDUSTE ESIMESE ASTME KOHUS
ΠΡΩΤΟΔΙΚΕΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
TRIBUNAL DE PREMIÈRE INSTANCE DES COMMUNAUTÉS EUROPÉENNES
CÚIRT CHÉADCHÉIME NA GCÓMHPHOBAL EORPACH
TRIBUNALE DI PRIMO GRADO DELLE COMUNITÀ EUROPEE
EIROPAS KOPIENU PIRMĀS INSTANCES TIESA
EUROPOS BENDRIJŲ PIRMOSIOS INSTANCIJOS TEISMAS
AZ EURÓPAI KÖZÖSSÉGEK ELSŐFOKÚ BÍRÓSÁGA
IL-QORTI TAL-PRIMISTANZA TAL-KOMUNITAJIET EWROPEJ
GERECHT VAN EERSTE AANLEG VAN DE EUROPESE GEMEENSCHAPPEN
SĄD PIERWSZEJ INSTANCJI WSPÓLNOT EUROPEJSKICH
TRIBUNAL DE PRIMEIRA INSTÂNCIA DAS COMUNIDADES EUROPEIAS
TRIBUNALUL DE PRIMĂ INSTANȚĂ AL COMUNITĂȚILOR EUROPENE
SÚD PRVÉHO STUPŇA EURÓPSKYCH SPOLOČENSTIEV
SODIŠČE PRVE STOPNJE EVROPSKIH SKUPNOSTI
EUROOPAN YHTEISÖJEN ENSIMMÄISEN OIKEUSASTEEN TUOMIOISTUIN
EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÄTT

BESCHLUSS DES GERICHTS (Vierte Kammer)

17. Januar 2007 *

„Nichtigkeitsklage – Wesentliche Formerfordernisse – Zwingend vorgeschriebene Vertretung der natürlichen oder juristischen Personen durch einen Anwalt, der berechtigt ist, vor dem Gericht eines Mitgliedstaats aufzutreten – Verspätete Einreichung der nunmehr ordnungsgemäßen Klageschrift – Unzulässigkeit der Klage“

- II-3949 -

In der Rechtssache T-129/06

Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi,

Musa Akar,

mit Sitz in Ankara (Türkei), Prozessbevollmächtigter: Rechtsanwalt Ç. Şahin,

Kläger,

gegen

Kommission der Europäischen Gemeinschaften, vertreten durch P. van Nuffel und F. Hoffmeister als Bevollmächtigte,

Beklagte,

wegen Nichtigerklärung der Entscheidung MK/KS/DELTUR/(2005)/SecE/D/1614 vom 23. Dezember 2005 in Bezug auf die Vergabe des Auftrags betreffend Baumaßnahmen der Ausbildungsstätten in den Provinzen Siirt und Diyarbakir (EuropeAid/121601/C/W/TR) und Aussetzung des betreffenden Vergabeverfahrens

erlässt

DAS GERICHT ERSTER INSTANZ
DER EUROPÄISCHEN GEMEINSCHAFTEN (Vierte Kammer)

* Verfahrenssprache: Deutsch.

DE

unter Mitwirkung des Präsidenten H. Legal sowie der Richterin I. Wiszniewska-Białecka und des Richters E. Moavero Milanesi,

Kanzler: E. Coulon,

folgenden

Beschluss

Vorgeschichte des Rechtsstreits

1 Auf die Ausschreibung eines öffentlichen Bauauftrags für ein Projekt betreffend Baumaßnahmen der Ausbildungsstätten in den türkischen Provinzen Siirt und Diyarbakir (EuropeAid/121601/C/W/TR) reichten zwei in der Türkei ansässige Unternehmen, Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi und Musa Akar (im Folgenden: Kläger), am 21. Oktober 2005 ihre Bewerbungsunterlagen bei der Delegation der Kommission in der Türkei ein.

2 Nach Abschluss des Vergabeverfahrens erteilte die Kommission der ILCI Ins. San. Ve Tic, AS, mit Entscheidung vom 29. November 2005 den Zuschlag.

3 Mit Schreiben vom 2. Dezember 2005 beantragten die Kläger bei der Kommission die Rücknahme dieser Entscheidung.

4 Die Kommission wies diesen Antrag mit der Entscheidung MK/KS/DELTUR (2005)/SecE/D/1614 (im Folgenden: Entscheidung) ab, die in einem Schreiben vom 23. Dezember 2005 enthalten war, das den Klägern per Telefax vom selben Tag bekannt gegeben wurde.

5 Diese Entscheidung enthielt eine Rechtsbehelfsbelehrung, in der die Kläger darauf hingewiesen wurden, dass sie nach Art. 230 EG innerhalb von zwei Monaten ab dem Datum des Schreibens vor dem Gemeinschaftsgericht Nichtigkeitsklage gegen die Entscheidung über die Zuschlagserteilung erheben könnten.

6 Durch zwei in der Türkei praktizierende Rechtsanwälte haben die Kläger am 21. bzw. 23. Februar 2006 bei der Kanzlei des Gerichts eine englische und eine türkische Fassung einer Klage auf Nichtigerklärung der Entscheidung eingereicht.

7 Mit Schreiben vom 21. März 2006 hat die Kanzlei des Gerichts den Klägern mitgeteilt, dass sie sich für diesen Rechtsstreit von einem Anwalt vertreten lassen müssten, der berechtigt sei, vor einem Gericht eines Mitgliedstaats der Europäischen Union oder eines anderen Vertragsstaats des Abkommens über den Europäischen Wirtschaftsraum (im Folgenden: EWR-Abkommen) aufzutreten, und dass über ihre Klage, so wie sie eingereicht worden sei, nicht verhandelt werden könne.

8 Mit Schreiben vom 23. März 2006, dem eine Vollmacht beigefügt war, hat der in Düsseldorf (Deutschland) zugelassene Rechtsanwalt Ç. Şahin der Kanzlei des Gerichts mitgeteilt, dass die Kläger ihn zu ihrem Vertreter im vorliegenden Verfahren bestimmt hätten.

9 Am 6. April 2006 hat Rechtsanwalt Şahin bei der Kanzlei des Gerichts eine deutsche Übersetzung der am 21. Februar 2006 vorgelegten englischen Fassung der Klage eingereicht.

10 Nachdem die Kanzlei des Gerichts Rechtsanwalt Şahin darauf hingewiesen hatte, dass er die deutsche Fassung der Klage nicht unterschrieben habe, hat er am 26. April 2006 ein neues Exemplar dieser Fassung eingereicht, das mit seiner Unterschrift versehen war.

11 Die vorliegende Klage ist am selben Tag unter der Rechtssachennummer T-129/06 eingetragen worden.

12 Am 16. August 2006 hat die Kommission auf der Grundlage von Art. 114 der Verfahrensordnung des Gerichts eine Einrede der Unzulässigkeit dieser Klage erhoben.

13 Mit am 19. Oktober 2006 eingereichtem Schriftsatz haben die Kläger zu dieser Einrede Stellung genommen.

Anträge der Parteien

14 Die Kläger beantragen,

- die Einrede der Unzulässigkeit zurückzuweisen;
- den Vollzug der Entscheidung auszusetzen;
- die Entscheidung vom 23. Dezember 2005 mit der Nummer MK/KS/DELTUR/(2005)/SecE/D/1614 für nichtig zu erklären;
- ihnen ihre Rechte auf Geltendmachung von Schadensersatzansprüchen vorzubehalten;
- der Kommission die Kosten aufzuerlegen.

15 Die Kommission beantragt,

- die Klage als unzulässig abzuweisen;
- den Klägern die Kosten aufzuerlegen.

Zur Zulässigkeit des Antrags auf Nichtigerklärung

16 Will eine Partei vorab eine Entscheidung des Gerichts über die Zulässigkeit einer Klage herbeiführen, so wird nach Art. 114 der Verfahrensordnung über diesen Antrag mündlich verhandelt, sofern das Gericht nichts anderes bestimmt.

17 Im vorliegenden Fall ist das Gericht in der Lage, aufgrund des Akteninhalts ohne mündliche Verhandlung zu entscheiden.

Vorbringen der Parteien

18 Die Kommission weist darauf hin, dass die Klage einer natürlichen oder juristischen Person auf Nichtigerklärung einer sie unmittelbar und individuell betreffenden Entscheidung gemäß Art. 230 Abs. 5 EG binnen zwei Monaten ab Bekanntgabe dieser Entscheidung an den Kläger erhoben werden müsse.

19 Hier sei die Klagefrist, die zu laufen begonnen habe, als den Klägern am 23. Dezember 2005 die Gründe für die Versagung des Zuschlags mitgeteilt worden seien, am 22. Februar 2006 abgelaufen.

20 Daher sei die Klage verspätet und folglich unzulässig.

21 Die Kläger erwidern, dass die nicht fristgerechte Einreichung der vorliegenden Klageschrift und die dabei begangenen Fehler allein durch die Lücken der in der Entscheidung enthaltenen Rechtsbehelfsbelehrung verursacht worden seien.

22 Indem die Kommission nicht darauf hingewiesen habe, dass Anwälte, die nur in der Türkei auftreten dürften, eine natürliche oder juristische Person nicht vor dem Gemeinschaftsgericht vertreten könnten, habe sie bei den Klägern den Eindruck erweckt, dass sie ihre Klage rechtswirksam persönlich oder durch diese Anwälte erheben könnten.

23 Als Gemeinschaftsorgan sei die Kommission verpflichtet gewesen, die Kläger über Form und Frist der Rechtsbehelfe zu belehren, die ihnen gegen die Entscheidung zur Verfügung standen. Insoweit sei ein bloßer Verweis auf Art. 230 EG nicht ausreichend, da man den Klägern nicht zumuten könne, sich selbst nach den Formerfordernissen für ihre Klage zu erkundigen. Sogar die beiden türkischen Rechtsanwälte, denen die Kläger Prozessvollmacht erteilt hätten, seien nicht in der Lage gewesen, der in der Entscheidung enthaltenen Rechtsbehelfsbelehrung zu entnehmen, dass die vorliegende Klage nur von einem Anwalt eingereicht werden könne, der berechtigt sei, vor den Gerichten eines Mitgliedstaats aufzutreten.

24 Aufgrund der fehlerhaften Rechtsbehelfsbelehrung sei somit die Rechtsmittelfrist nicht in Lauf gesetzt worden, so dass ihnen nicht entgegengehalten werden könne, dass die beim Gericht am 26. April 2006 eingetragene Klage verspätet erhoben worden sei.

Würdigung durch das Gericht

25 Nach Art. 19 Abs. 3 und 4 der Satzung des Gerichtshofs, der gemäß deren Art. 53 Abs. 1 auf das Verfahren vor dem Gericht anwendbar ist, kann nur ein Anwalt, der berechtigt ist, vor einem Gericht eines Mitgliedstaats oder eines anderen Vertragsstaats des EWR-Abkommens aufzutreten, Prozesshandlungen vor dem Gericht für andere Parteien als die in Art. 19 Abs. 1 und 2 der Satzung genannten Staaten und die Organe vornehmen.

26 Gemäß Art. 21 Abs. 1 der Satzung des Gerichtshofs, der gemäß deren Art. 53 Abs. 1 auf das Verfahren vor dem Gericht anwendbar ist, muss die Klageschrift u. a. die Stellung des Unterzeichnenden enthalten.

27 Die Klageschrift muss somit von einer Person unterzeichnet sein, die berechtigt ist, den Kläger gemäß Art. 19 der Satzung des Gerichtshofs zu vertreten, wie Art. 43 § 1 Abs. 1 der Verfahrensordnung des Gerichts bestätigt, der verlangt, dass die Urschrift jedes Schriftsatzes vom Bevollmächtigten oder vom Anwalt der Partei unterzeichnet ist.

28 Um die Einhaltung von Art. 19 Abs. 3 und 4 der Satzung des Gerichtshofs zu gewährleisten, muss nach Art. 44 § 3 der Verfahrensordnung des Gerichts der Anwalt, der als Beistand oder Vertreter einer Partei auftritt, bei der Kanzlei eine Bescheinigung hinterlegen, aus der hervorgeht, dass er berechtigt ist, vor einem Gericht eines Mitgliedstaats oder eines anderen Vertragsstaats des EWR-Abkommens aufzutreten.

29 Diese Vorschriften sollen sicherstellen, dass die Verantwortung für die Vornahme und den Inhalt von Prozesshandlungen von einer Person übernommen wird, die berechtigt ist, derartige Handlungen vor den Gemeinschaftsgerichten vorzunehmen, also bei Vertretung der Organe, der Mitgliedstaaten und der anderen Vertragsstaaten des EWR-Abkommens von einem Bevollmächtigten und bei Vertretung der anderen Parteien von einem Anwalt, der berechtigt ist, vor einem Gericht eines Mitgliedstaats oder eines anderen Vertragsstaats des EWR-Abkommens aufzutreten, und der den Rechtsvorschriften und den Standesregeln unterliegt, die für die Ausübung des Anwaltsberufs in diesen Staaten gelten (Beschluss des Gerichts vom 24. Februar 2000, FTA u. a./Rat, T-37/98, Slg. 2000, II-373, Randnrn. 20 bis 25).

30 Somit wäre die Klage nur zulässig gewesen, wenn die Urschrift der Klageschrift die handschriftlich vollzogene Unterschrift eines Rechtsanwalts getragen hätte, der von den Klägern beauftragt und nach den oben genannten Verfahrensvorschriften zu ihrer Vertretung vor dem Gericht berechtigt war.

31 Die Unterzeichnung der Klageschrift durch einen Rechtsanwalt, der berechtigt ist, Prozesshandlungen vor dem Gericht vorzunehmen, ist zudem ein wesentliches Formerfordernis, dessen Nichteinhaltung zur Unzulässigkeit der Klage führt; das Fehlen dieser Unterzeichnung gehört auch nicht zu den Formfehlern, die gemäß

Art. 21 Abs. 2 der Satzung des Gerichtshofs und Artikel 44 § 6 der Verfahrensordnung des Gerichts noch nach Ablauf der für die Klageerhebung vorgeschriebenen Frist behoben werden können (Beschluss FTA u. a./Rat, Randnr. 28).

32 Aus den vorstehenden Erwägungen folgt, dass nur die von Rechtsanwalt Şahin unterzeichnete und am 24. April 2006 bei der Kanzlei des Gerichts eingereichte Fassung der Klageschrift als der Form nach zulässig angesehen werden kann, da nur sie die Erfordernisse gemäß Art. 19 Abs. 3 und 4 und Art. 21 Abs. 1 der Satzung des Gerichtshofs sowie nach Art. 43 § 1 der Verfahrensordnung des Gerichts erfüllt.

33 Daher ist zu prüfen, ob diese Fassung der Klageschrift innerhalb der Klagefrist eingereicht worden ist.

34 Nach Art. 230 Abs. 5 EG war die vorliegende Klage binnen zwei Monaten ab Bekanntgabe der Entscheidung an die Kläger zu erheben.

35 Anlage 5 der Klageschrift ist zu entnehmen, wie im Übrigen auch nicht bestritten wird, dass das Formerfordernis der Bekanntgabe mit der Übersendung der Entscheidung an die Kläger per Telefax vom 23. Dezember 2005 erfüllt wurde.

36 Bei einer Maßnahme, die auf diese Art und Weise bekannt zu geben ist, endet die Klagefrist, wenn sie in Kalendermonaten ausgedrückt ist, mit Ablauf des Tages, der in dem durch die Frist bezeichneten Monat dieselbe Zahl trägt wie der Tag, an dem die Frist in Lauf gesetzt worden ist, also der Tag der Bekanntgabe (Beschluss des Gerichtshofs vom 17. Mai 2002, Deutschland/Parlament und Rat, C-406/01, Slg. 2002, I-4561, Randnr. 14).

37 Gerechnet ab Bekanntgabe der Entscheidung am 23. Dezember 2005, ist die in Anwendung von Art. 102 § 2 der Verfahrensordnung um die pauschale Frist von zehn Tagen verlängerte Klagefrist von zwei Monaten, über die die Kläger nach Art. 230 Abs. 5 EG verfügten, am Montag, den 6. März 2006, abgelaufen.

38 Da die Klageschrift erst am 24. April 2006 rechtswirksam eingereicht worden ist, ist die vorliegende Klage als verspätet anzusehen.

39 Soweit die Kläger geltend machen, die ordnungsgemäße Erhebung ihrer Klage habe sich nur deswegen verzögert, weil die Kommission in der der Entscheidung beigefügten Rechtbehelfsbelehrung nicht erwähnt habe, dass eine Klage weder von den Betroffenen selbst noch durch Anwälte erhoben werden könne, die nur vor türkischen Gerichten auftreten dürften, und wegen dieses Versäumnisses, durch das sie irregeführt worden seien, könne ihnen die Klagefrist nicht entgegengehalten werden, bleibt ihrem Vorbringen der Erfolg versagt.

40 Der entschuldbare Irrtum, auf den sich die Kläger berufen und der es erlauben würde, aus Gründen der Rechtssicherheit und des Vertrauensschutzes zu ihren

Gunsten von den Gemeinschaftsbestimmungen über die Klagefristen, bei denen es sich um zwingendes Recht handelt, abzuweichen, ist ein eng auszulegender Begriff.

41 Die Vorschriften über die Verfahrensfristen unterliegen einer restriktiven Anwendung, die dem Erfordernis der Rechtssicherheit und der Notwendigkeit entspricht, jede Diskriminierung oder willkürliche Behandlung bei der Rechtspflege zu vermeiden (Urteil des Gerichtshofs vom 12. Juli 1984, Ferriera Valsabbia/Kommission, 209/83, Slg. 1984, 3089, Randnr. 14, und Beschluss des Gerichtshofs vom 18. Januar 2005, Zuazaga Meabe/HABM, C-325/03 P, Slg. 2005, I-403, Randnr. 16; Beschluss des Präsidenten des Gerichts vom 28. April 2005, Microsoft/Kommission, T-201/04, Slg. 2005, II-1491, Randnr. 47).

42 Der entschuldbare Irrtum kann sich daher nur auf Ausnahmefälle beziehen, insbesondere auf solche, in denen das betroffene Organ den Irrtum durch ein Verhalten verursacht hat, das für sich genommen oder aber in ausschlaggebendem Maß geeignet war, bei einem gutgläubigen Rechtsbürger, der alle Sorgfalt aufwendet, die von einem Einzelnen mit normalem Kenntnisstand zu verlangen ist, eine verständliche Verwirrung hervorzurufen (Urteil des Gerichts vom 29. Mai 1991, Bayer/Kommission, T-12/90, Slg. 1991, II-219, Randnr. 29, bestätigt im Rechtsmittelverfahren durch Urteil des Gerichtshofs vom 15. Dezember 1994, Bayer/Kommission, C-195/91 P, Slg. 1994, I-5619, Randnrn. 26 bis 28).

43 Das wesentliche Formerfordernis, dass die Klageschrift von einem Anwalt unterschrieben ist, der berechtigt ist, vor einem Gericht eines Mitgliedstaats aufzutreten, ist im Protokoll über die Satzung des Gerichtshofs vorgesehen, das u. a. in der Sammlung der Verträge über die Europäische Union sowie im *Amtsblatt der Europäischen Union* veröffentlicht ist. Die Kläger und ihre türkischen Anwälte waren aufgrund dieser Veröffentlichung in der Lage, die Erfordernisse in Bezug auf die Vertretung der juristischen und natürlichen Personen vor dem Gemeinschaftsgericht zu kennen.

44 Da ihnen diese Erfordernisse somit entgegengehalten werden können, ohne dass es dazu eines Hinweises in der Entscheidung bedurft hätte, haben weder die Kläger noch ihre türkischen Anwälte alle Sorgfalt aufgewandt, die von einem verständigen Kläger zu verlangen ist; daher können sie nicht mit Erfolg geltend machen, dass die Kommission, indem sie nur die Klagefrist genannt habe, ihnen gegenüber ein Verhalten an den Tag gelegt habe, das für sich genommen oder aber in ausschlaggebendem Maß geeignet gewesen wäre, bei ihnen eine verständliche Verwirrung im Hinblick auf die Modalitäten ihrer gerichtlichen Vertretung vor dem Gemeinschaftsgericht hervorzurufen.

45 Infolgedessen ist die Klage wegen Verspätung als unzulässig abzuweisen, ohne dass über die Anträge zu entscheiden ist, die die Kläger neben dem Antrag auf Nichtigerklärung der Entscheidung gestellt haben.

Kosten

46 Nach Art. 87 § 2 der Verfahrensordnung des Gerichts ist die unterliegende Partei auf Antrag zur Tragung der Kosten zu verurteilen. Da die Kläger unterlegen sind, haben sie ihre eigenen Kosten sowie gesamtschuldnerisch gemäß dem Antrag der Kommission deren Kosten zu tragen.

Aus diesen Gründen hat

DAS GERICHT (Vierte Kammer)

beschlossen:

1. **Die Klage wird als unzulässig abgewiesen.**

2. **Die Kläger, Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi und Musa Akar, tragen ihre eigenen Kosten und gesamtschuldnerisch die Kosten der Kommission.**

Luxemburg, den 17. Januar 2007

Der Kanzler | Der Präsident

i.A. E. Coulon | H. Legal

Order of the Court of First Instance (Fourth Chamber)
First Instance (Fourth Chamber)First Instance (Fourth Chamber)2007. Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar v Commission of the European Communities. Action for annulment. Case T-129/06.

Procedure - Application initiating proceedings - Formal requirements (Statute of the Court of Justice, Arts 19, third and fourth paras, 21, second para., and 53, first para.; Rules of Procedure of the Court of First Instance, Arts 43(1) and 44(3)) (see paras 25-30)

2. Procedure - Time-limit for instituting proceedings - Time barred - Excusable error - Definition (Statute of the Court of Justice, Art. 21, second para.; Rules of Procedure of the Court of First Instance, Art. 44(6)) (see paras 31-44)

Re:

APPLICATION for, first, annulment of Decision MK/KS/DELTUR/(2005)/SecE/D/1614 of 23 December 2005 concerning the award of a public works contract for the construction of educational establishments in the Provinces of Siirt and Diyarbakir (EuropeAid/121601/C/W/TR) and, second, suspension of the award procedure in question.

Operative part

The Court:

1. Dismisses the action as inadmissible;

2. Orders the applicants, Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar, to bear their own costs and, jointly and severally, pay the Commission's costs.

DOCNUM	62006B0129
AUTHOR	Court of First Instance of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
DOC	2007/01/17
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SUB	Public contracts of the European Communities
AUTLANG	German
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APPLICA	Person

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DEFENDA	Commission ; Institutions
NATIONA	X TR
PROCEDU	Action for annulment - inadmissible
DATES	of document: 17/01/2007 of application: 26/04/2006

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Documents relating to the same case

Order of the Court of First Instance (Fourth Chamber) of 17 January 2007 – Diy-Mar Insaat Sanayi ve Ticaret and Akar v Commission

(Case T-129/06)

Action for annulment – Essential procedural requirements – Natural and legal persons required to be represented by a lawyer entitled to practise before a court of a Member State – Application in proper form lodged out-of-time – Inadmissibility of the action

1. *Procedure – Application initiating proceedings – Formal requirements (Statute of the Court of Justice, Arts 19, third and fourth paras, 21, second para., and 53, first para.; Rules of Procedure of the Court of First Instance, Arts 43(1) and 44(3)) (see paras 25-30)*

2. *Procedure – Time-limit for instituting proceedings – Time barred – Excusable error – Definition (Statute of the Court of Justice, Art. 21, second para.; Rules of Procedure of the Court of First Instance, Art. 44(6)) (see paras 31-44)*

APPLICATION for, first, annulment of Decision MK/KS/DELTUR/(2005)/SecE/D/1614 of 23 December 2005 concerning the award of a public works contract for the construction of educational establishments in the Provinces of Siirt and Diyarbakir (EuropeAid/121601/C/W/TR) and, second, suspension of the award procedure in question.

e part

The Court:

1. Dismisses the action as inadmissible;

2. Orders the applicants, Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar, to bear their own costs and, jointly and severally, pay the Commission's costs.

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Order of the Court of First Instance of 17 January 2007 - Diy-Mar Insaat Sanayi ve Ticaret and Akar v Commission

(Case T-129/06) [1]

(Action for annulment - Essential procedural requirements - Natural and legal persons required to be represented by a lawyer entitled to practise before a court of a Member State - Application in proper form lodged out-of-time - Inadmissibility of the action)

Language of the case: German

Parties

Applicants: Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar (Ankara, Turkey) (represented by: Ç. Şahin, lawyer)

Defendant: Commission of the European Communities (represented by: P. van Nuffel and F. Hoffmeister, Agents)

Re:

Application for, first, annulment of Decision MK/KS/DELTUR/(2005)/SecE/D/1614 of 23 December 2005 concerning the award of a public works contract for the construction of educational establishments in the Provinces of Siirt and Diyarbakir (EuropeAid/121601/C/W/TR) and, second, suspension of the procedure in question.

Operative part of the order

1. *The action is dismissed as inadmissible.*

2. *The applicants, Diy-Mar Insaat Sanayi ve Ticaret Ltd Sirketi and Musa Akar, shall bear their own costs and, jointly and severally, pay the Commission's costs.*

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[1] - OJ C 212 of 2.9.2006.

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Action brought on 26 April 2006 - Diy-Mar Insaat Sanayi ve Ticaret and Akar v Commission

(Case T-129/06)

Language of the case: German

Parties

Applicants: Diy-Mar Insaat Sanayi ve Ticaret Limited Sirketi (Cankaya/Ankara, Turkey) and M. Akar (Cankaya/Ankara, Turkey) (represented by: C. Sahin, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Reservation of rights to bring a claim for damages;

Suspension, as a matter of priority, of implementation of the procedure with regard to the subject-matter of the present proceedings;

Annulment of the procedure of 23 December 2005 with the number MK/KS/DELTUR/(2005)/SecE/D/1614 which is the subject-matter of the present proceedings;

Order the defendant to pay the costs.

Pleas in law and main arguments

The applicants are contesting the decision of the European Commission Delegation in Turkey of 23 December 2005 which was addressed to the applicants with regard to the call for tenders in respect of the construction of educational establishments in the provinces of Diyarbakir and Siirt.

The applicants submit, *inter alia*, that their tender was the lowest and that the file in respect thereof was complete and therefore the contract should have been awarded to them. Furthermore, they submit that the contested decision infringes European Union law.

_____

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JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

28 January 2009 (*)

(Public service contracts – Tendering procedure for full crèche management – Decision to use the services of the Office for Infrastructure and Logistics (OIB) and to abandon a tendering procedure)

In Case T–125/06,

Centro Studi Antonio Manieri Srl, established in Rome (Italy), represented by C. Forte, M. Forte and G. Forte, lawyers,

applicant,

v

Council of the European Union, represented by A. Vitro, P. Mahnic and M. Balta, acting as Agents,

defendant,

APPLICATION, first, for annulment of the decision of the Council, made public by letter of its General Secretariat of 16 January 2006, abandoning the tendering procedure 2003/S 209–187862 for the full management of a crèche; second, for annulment of the decision to accept the proposal of the Office for Infrastructure and Logistics (OIB) for the management of those services; and, third, for damages,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 June 2008,

gives the following

Judgment

Background to the dispute

1 The applicant, Centro Studi Antonio Manieri Srl, is a company which specialises in the management of training activities and organisations.

2 On 2 October 2003, the Council issued a restricted tendering procedure for a service contract entitled ‘B–Brussels: full crèche management 2003/S 209–187862’ (‘the tendering procedure’).

3 The Council notified the applicant, by letter of its General Secretariat of 7 January 2004, that its candidature had been accepted by the evaluation committee and confirmed that the company satisfied the conditions to qualify for the restricted procedure.

4 Initially planned for July 2004, the forwarding of the tendering specifications was twice deferred. It was finally sent to the applicant by letter of 8 December 2004, together with a draft contract. The closing date for submitting tenders was 28 February 2005.

5 At the beginning of 2005, the applicant submitted its tender to the Council. By letter of its General Secretariat of 21 April 2005, the Council acknowledged receipt of the tender.

6 The Council notified the applicant by letter of 20 December 2005 that the date upon which a decision would be taken had been deferred to 16 January 2006.

7 By letter of the General Secretariat of the Council of 16 January 2006, which was faxed to the applicant, the latter was informed of the Council's decisions, first, to abandon the tendering procedure and, second, to entrust the management of the crèche to the Office for Infrastructure and Logistics (OIB) in Brussels. That letter stated as follows:

'[t]he General Secretariat has decided to abandon the invitation to tender in question in accordance with paragraph 4 of the specifications, formulated pursuant to Article 101 of Council Regulation No 1605/2002.

The General Secretariat has given a favourable evaluation of the proposal submitted to it during the second half of 2005 by the OIB …, for the direct educational and administrative management of the crèche, which is intended primarily for the children of officials of the General Secretariat.

In analysing that option, the many advantages it entails have become apparent, particularly as regards the contractual conditions offered to the staff, the economies of scale and the optimisation of the available resources in the context of appropriate interinstitutional cooperation.

…'

8 By letter of 15 February 2006, the applicant asked the Council to provide explanations concerning its letter of 16 January and set out a number of arguments challenging its content.

9 The Council responded to the applicant's questions and arguments by letter of 3 March 2006.

Procedure

10 The applicant brought the present action by fax on 20 March 2006. The original application was sent by post on 17 March 2006 and arrived at the Registry of the Court of First Instance on 3 May 2006. A corrigendum to the request for measures of inquiry was lodged on 20 May 2006.

11 By decision of 12 June 2006, the President of the Court of First Instance allocated the case to the Fourth Chamber.

12 The Council lodged its defence on 18 July 2006.

13 The time-limit for lodging the reply was set for 10 October 2006. The reply was sent by post on 6 October 2006 and arrived at the Court Registry on 12 October 2006.

14 On 10 October 2006, the applicant lodged an additional request for the production of documents by way of measures of inquiry.

15 The Council submitted its observations on that request on 23 October 2006.

16 The written procedure concluded with the lodging of the rejoinder on 30 November 2006.

17 By decision of 18 January 2007, the President of the Court of First Instance reallocated the case to the Third Chamber.

18 As the Judge-Rapporteur was unable to sit in the present case, the President of the Court of First Instance reallocated the case to the Second Chamber.

Forms of order sought by the parties

19 The applicant claims that the Court should:

– annul the decision of the General Secretariat of the Council of 16 January 2006 to abandon the tendering procedure;

– annul the favourable evaluation of the OIB's proposal;

– adopt all measures necessary to protect its rights and privileges, including the suspension of the operation of the contract with the OIB;

– assess the damage suffered by the applicant on an equitable basis;

– order the Commission to pay the costs.

20 The Council contends that the Court should:

– declare the action inadmissible on the ground that the application was lodged after the expiry of the maximum period laid down in Article 230 EC;

– in the alternative, declare that the applications for annulment and the claim for damages are unfounded;

– order the applicant to pay the costs.

Admissibility

21 The Council contends that the application and the reply are inadmissible since they were both lodged out of time.

1. Compliance with the time-limit for bringing an action

22 The fifth paragraph of Article 230 EC provides that proceedings for annulment must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. In accordance with Article 102(2) of the Rules of Procedure of the Court of First Instance, that period must also be extended by 10 days on account of distance.

23 In the present case, the decision of the Council was sent by letter of its General Secretariat dated 16 January 2006, and addressed to the applicant by fax the following day. At the hearing, the applicant expressly acknowledged that it received that letter on 17 January 2006.

24 Since the letter was received by the applicant on 17 January 2006, the time-limit for instituting proceedings for the annulment of the decision in question, extended by 10 days on account of distance, expired at midnight on 27 March 2006 (*dies ad quem*).

25 It is clear that a copy of the application was received at the Registry by fax on 20 March 2006 and the original application was subsequently lodged on 3 May 2006.

26 Under Article 43(6) of the Rules of Procedure, 20 March 2006 is deemed to be the date of lodgment for the purpose of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading was lodged at the Registry no later than 10 days thereafter, that is, no later than midnight on 30 March 2006. Given that, in the present case, the signed original application was lodged only on 3 May 2006, 20 March 2006 cannot be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings. The only date that can be taken into account for the purpose of determining whether the application was lodged out of time is therefore 3 May 2006. Since that date is after the *dies ad quem*, the action is out of time and must, in principle, be declared inadmissible.

27 However, it is necessary to examine whether, in the present case, there exist unforeseeable circumstances or force majeure which would permit the Court to derogate from the time-limit in question on the basis of the second paragraph of Article 45 of the Statute of the Court of Justice, applicable to proceedings before the Court of First Instance pursuant to Article 53 of that statute.

28 The concepts of 'force majeure' and 'unforeseeable circumstances' within the meaning of Article 45 of the Statute of the Court of Justice contain both an objective element relating to abnormal circumstances unconnected with the person in question and a subjective element involving the obligation, on that person's part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices. In particular, the person concerned must pay close attention to the course of the procedure set in motion and, in particular, demonstrate diligence in order to comply with the prescribed time-limits (Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 32). Thus, the concept of force majeure does not apply to a situation in which, objectively, a diligent and prudent person would have been able to take the necessary steps before the expiry of the period prescribed for instituting proceedings (Case 209/83 *Ferriera Valsabbia* v *Commission* [1984] ECR 3089, paragraph 22, and order of the Court of Justice in Case C-325/03 P *Zuazaga Meabe* v *OHIM* [2005] ECR I-403, paragraph 25). It is therefore necessary to examine whether the circumstances relied on by the applicant may be regarded as exceptional circumstances which constitute a case of force majeure.

29 In the present case, the package containing the original signed application was sent by the applicant on 17 March 2006. By sending the original document on that date, the applicant could reasonably expect it to arrive at the Court before the expiry of the limitation period, especially since, in view of the fact that a copy of that document had been sent by fax, that period had been extended to 30 March 2006. The package in question had already reached the offices of the Luxembourg postal service on 21 March 2006, as demonstrated by the postmark on the package. The fact that the postal service kept the package for a period of 42 days (from 21 March to 3 May 2006) clearly constitutes abnormal circumstances unconnected with the applicant, which, for its part, demonstrated diligence in order to comply with the prescribed time-limits by sending the original application well before the expiry of the limitation period and by taking the steps necessary to extend that period in accordance with Article 43(6) of the Rules of Procedure by sending a copy of the application to the Court Registry by fax. Consequently, the fact that the original application was lodged out of time is attributable to a case of force majeure (see, to that effect, Joined Cases 25/65 and 26/65 *Simet and Feram* v *High Authority* [1967] ECR 33, p. 43).

30 It follows that, as the expiry of the time-limit is not enforceable against the applicant, pursuant to the second paragraph of Article 45 of the Statute of the Court of Justice, the Council's plea alleging inadmissibility must be rejected.

2. Compliance with the time-limit for lodging the reply

31 The time-limit for lodging the reply was 10 October 2006. Since the reply was received at the Court Registry on 12 October 2006, it was lodged out of time.

32 The original reply was sent from Brussels by post on 6 October 2006. Although the original was sent only four days before the expiry of the time-limit by which it was to be lodged, the applicant failed to avail itself of the possibility provided for in Article 43(6) of the Rules of Procedure to send a copy of the signed original to the Registry by fax or by any other technical means of communication available to the Court of First Instance, which could have extended the time-limit for lodging the reply by an additional period of up to 10 days.

33 In the light of those circumstances, the applicant failed to demonstrate the diligence to be expected of a reasonably prudent applicant in order to comply with the time-limits. On the contrary, it increased the risk that the reply would be delivered to the Court out of time, first, by failing to draw the appropriate conclusions from the problems encountered in lodging the application and, second, by omitting to send a copy of the signed original to the Registry by fax or by any other technical means of communication available to the Court.

34 Such a lack of diligence rules out the existence of a case of force majeure and it is therefore necessary to reject the reply as inadmissible.

The applications for annulment

1. Preliminary observations

35 First of all, it should be pointed out that the applicant asks the Court to annul not only the Council's

decision to abandon the tendering procedure but also the Council's favourable evaluation of the OIB's proposal. The Court will examine the application for annulment of the favourable evaluation of the OIB's proposal after examining the application for annulment of the decision to abandon the tendering procedure.

36 Next, it should be observed that, in support of its claims for annulment, the applicant relies on four pleas in law, alleging, first, infringement of Articles 43 EC, 49 EC and 86 EC; second, misapplication of paragraph 4 of the tendering specifications and infringement of Articles 43 EC and 49 EC and of Articles 89, 97, 98, 100 and 101 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation') and Articles 135 and 147 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) ('the Implementing Regulation'); third, infringement of the obligation to state reasons; and, fourth, misapplication of Article 116 of the Implementing Regulation.

37 Lastly, in each of the four pleas, the applicant has alleged infringement of the principle of transparency and the principle of equal treatment. Consequently, the Court will examine all the applicant's arguments alleging infringement of both those principles after examining the four pleas in law.

2. The application for annulment of the Council's decision to abandon the tendering procedure

The fourth plea in law, alleging misapplication of Article 116 of the Implementing Regulation

Arguments of the parties

38 As regards the ground put forward by the Council in its letter of 3 March 2006 (see paragraph 9 above) that the rules of the Treaty and the Financial Regulation and the general principles of Community law do not apply in the present case since the Council did not act as a contracting authority within the meaning of Article 116(7) of the Implementing Regulation, the applicant does not accept that that provision may be taken into consideration for the purpose of examining the legality of the 'decision of 16 January 2006', given that the provision is not referred to in that decision.

39 In any event, the applicant does not accept that the exception provided for in Article 116(7) of the Implementing Regulation is applicable to the present case.

40 First of all, the applicant takes the view that that exception must be interpreted strictly, in that it is applicable solely to arrangements between departments of the Community institutions. The applicant considers that the OIB does not constitute such a department but, as is apparent from recital 7 in the preamble to Commission Decision 2003/523/EC of 6 November 2002 establishing the OIB in Brussels (OJ 2003 L 183, p. 35), is a European office within the meaning of Article 171 of the Financial Regulation. Moreover, unlike other European offices such as the European Anti-Fraud Office (OLAF) or the European Personnel Selection Office (EPSO), the OIB cannot be attached to the Council. It is not, in fact, an interinstitutional European office within the meaning of Article 174 of the Financial Regulation, since, under Article 6 of Decision 2003/523, it is managed exclusively by members appointed by the Commission.

41 Secondly, it is necessary to apply, by analogy, the case-law according to which provisions governing public procurement are applicable where a contracting authority, such as a regional or local authority, intends to conclude, in writing and for consideration, with an entity which is formally distinct from it and independent of it with regard to decision-making, a contract for the supply of goods. In the present case, given that the OIB is not a department of the Council, which does not have any control over it, it is not possible to plead the inapplicability of the Financial Regulation or Articles 43 EC and 49 EC.

42 Thirdly, it is apparent from recitals 2 and 3 in the preamble to Decision 2005/523 that the OIB was established as an office whose purpose is to manage the externalisation of the non-core activities of the Community administration. Consequently, the internalisation of a department which is already subject to a tendering procedure is inconsistent with its purpose.

43 The Council disputes the applicant's arguments.

Findings of the Court

44 According to Article 88 of the Financial Regulation, '[p]ublic contracts are contracts for pecuniary interest concluded in writing by a contracting authority within the meaning of Articles 104 and 167 [of that regulation], in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services'.

45 In order to be classified as a public contract, a contract must be concluded by a 'contracting authority'. Article 116(7) of the Implementing Regulation provides that '[d]epartments of the Community institutions shall be considered to be contracting authorities, save where they conclude between themselves administrative arrangements for the provision of services, the supply of products or the execution of works'.

46 It follows from the two provisions referred to above that the provision of services is outside the ambit of the rules governing public contracts where it forms part of an administrative arrangement concluded between the departments of Community institutions.

47 Contrary to the applicant's submission, the OIB is a department of the Community institutions within the meaning of Article 116(7) of the Implementing Regulation. In accordance with recital 4 in the preamble to Decision 2003/523, '[t]he type of office selected [for the OIB] consists of administrative entities aimed at providing support for the activities of other Commission departments and/or potentially of other Community institutions'. By referring to 'other Commission departments' as being among the recipients of support from the OIB, the Commission has indicated in that recital, impliedly but necessarily, that the OIB is also one of its departments.

48 It follows that the Council was not required to comply with the rules governing public procurement when it decided to have recourse to the services of the OIB. That conclusion cannot be affected by the other arguments put forward by the applicant.

49 First of all, the applicant's arguments that the OIB is, first, attached to the Commission and not to the Council and, second, managed exclusively by the members appointed by the Commission are invalid. The first point to be made is that the exception provided for in Article 116(7) of the Implementing Regulation concerns administrative arrangements between departments of the Community institutions, irrespective of whether such departments belong to the same institution. Secondly, the fact that the OIB is attached to the Directorate-General (DG) for Personnel and Administration of the Commission does not preclude it from being an interinstitutional body, as is clear from recitals 4 and 6 in the preamble to and Article 2(4) of Decision 2003/523. Thirdly, as regards Article 6(1)(g) of Decision 2003/523, that provision expressly states that the Management Committee of the OIB is to include a representative of the other Community institutions. That fact not only contradicts the applicant's claim that the OIB is managed exclusively by members appointed by the Commission but also makes clear the interinstitutional character of the OIB.

50 On the same grounds, it is necessary to reject as invalid the applicant's arguments based on the fact that the OIB is an entity which is formally distinct from the Council and independent of it with regard to decision-making. In any event, the OIB is precluded from being distinct from and independent of the Council by virtue of Article 281 EC. In view of the fact that, under that provision, only the European Community as such has legal personality under the Community institutional system, both the Council and the OIB are part of the same legal person and, consequently, the OIB cannot be regarded as an entity that is distinct from or independent of the Council

51 With regard to the applicant's argument that Article 116(7) of the Implementing Regulation should not be taken into account for the purpose of examining the legality of the 'decision of 16 January 2006', since no reference was made to that provision in the decision, it must be noted that the Council informed the applicant in the letter of 16 January 2006 of its decision to abandon the tendering procedure in view of the decision it had taken to have recourse to the services of the OIB. As regards the decision to abandon the tendering procedure, it is clear that the two provisions on which that decision is based, namely Article 101 of the Financial Regulation and paragraph 4 of the tendering specifications, were duly referred to by the Council in that letter. On the other hand, it is apparent from paragraphs 44 to 48 above that the decision to have recourse to the services of the OIB is an act that is unconnected with the tendering procedure and is of no concern to the applicant. It follows that the fact that no reference was made to Article 116(7) of the Implementing Regulation

is irrelevant for the purpose of examining the legality of the decision to abandon the tendering procedure and, accordingly, the argument in question must be rejected as invalid.

52 Finally, with regard to the applicant's argument that the internalisation of the full management of the crèche by the OIB is inconsistent with its purpose, which is to manage the externalisation of the non-core activities of the Community administration, it must be noted that the OIB is not obliged under Decision 2003/523 systematically to use tendering procedures in the performance of its tasks. While, under Article 16 of that decision, it is in fact entitled to use such a procedure, the fact remains that there is no provision which prohibits it from carrying out its task by its own means. In the absence of any formal prohibition, the OIB may therefore decide on a case-by-case basis whether it is necessary to use a tendering procedure.

53 It follows from the foregoing that the conclusion between the Council and the OIB of an arrangement for full crèche management constitutes the conclusion of an administrative arrangement between two departments of the Community institutions for the provision of services to which the rules on public procurement are not applicable.

54 The fourth plea in law must therefore be rejected in its entirety as unfounded.

The third plea, alleging infringement of the 'obligation to state reasons'

Arguments of the parties

55 The applicant disputes that the many advantages put forward by the Council in its letter of 16 January 2006 could justify its decision to have recourse to the services of the OIB, even taking into account the explanations which it provided in its letter of 3 March 2006. Thus, the applicant argues, by the explanations given as regards the advantages represented by the contractual conditions guaranteed to staff, the economies of scale and the optimisation of the available resources, the Council infringed the 'obligation to state reasons'.

56 The Council disputes the applicant's arguments.

Findings of the Court

57 As a preliminary point, in connection with the plea in question, the applicant is confusing infringement of the obligation to state reasons and manifest error of assessment. Although the heading of this plea refers to an infringement of the obligation to state reasons, the arguments put forward in that connection relate, instead, to the errors allegedly made by the Council in assessing the advantages entailed by a decision to have recourse to the services of the OIB.

58 It should be recalled that these are two distinct pleas in law that may be invoked in an application for annulment, The first, which relates to the fact that a statement of reasons is lacking or inadequate, constitutes an infringement of essential procedural requirements for the purposes of Article 253 EC and is a matter of public interest which must be raised by the Community judicature of its own motion (see Case C-166/99 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24, and the case-law cited). On the other hand, the second, which concerns the substantive legality of the decision in question, can be examined by the Community judicature only if it is raised by the applicant.

59 Consequently, it is necessary to rule on the arguments put forward in connection with the third plea by examining first of all those alleging infringement of the obligation to state reasons and, subsequently, those alleging manifest errors of assessment.

60 As regards any infringement of the duty to state reasons, according to established case-law, that duty depends on the type of document at issue and the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way, first, as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to verify whether or not the decision is well founded and, secondly, as to permit the Community judicature to exercise its power of review (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; Case T-217/01 *Forum des migrants* v *Commission* [2003] ECR II-1563, paragraph 68; and Case T-195/05 *Deloitte Business Advisory* v *Commission* [2007] ECR II-871, paragraph 45).

61 In the circumstances, the letter of 16 January 2006 expressly states that the tendering procedure had been abandoned as a result of the favourable evaluation of the proposal which the OIB had made to the Council. In that letter, the General Secretariat of the Council therefore informed the applicant that, as a result of the decision to entrust the management of the services in question to the OIB on the basis of the latter's proposal, there was no longer any reason to continue with the tendering procedure. It follows that the letter of 16 January 2006 discloses in a clear and unequivocal fashion the reasoning followed by the Council in such a way, first, as to make the applicant aware of the reasons for the measure and thus enable it to defend its rights and to verify whether or not the decision was well founded and, secondly, to enable the Court to exercise its power of review. It follows that, in its decision to abandon the tendering procedure, the Council did not infringe the obligation to state reasons.

62 As regards the existence of any manifest errors of assessment, it must be borne in mind that an institution using the tendering procedure has broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract and that review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment (see judgment of 12 July 2007 in Case T–250/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 89, and the case–law cited). The applicant has not put forward any facts capable of establishing that the decision to abandon the tendering procedure was vitiated by a manifest error of assessment. With regard to the decision to have recourse to the services of the OIB and, in particular, the supposed advantages to be gained from such a decision, while the Council is of course required to justify its choice to the political authority and internal auditors, it is not required to demonstrate to a participant in a tendering procedure the advantages of the decision to perform the services in question by its own means. Such a decision is a matter of policy and thus within the Council's discretion. It follows that the Court is not required in these proceedings to examine whether the decision to have recourse to the services of the OIB is justified economically and at institutional level.

63 The third plea must therefore be rejected as unfounded.

The second plea, alleging infringement of the Treaty, the Financial Regulation, the Implementing Regulation and the tendering specifications

Arguments of the parties

64 First of all, the applicant submits that paragraph 4 of the tendering specifications can serve as the legal basis for the abandonment of a tendering procedure only if the purpose of such a decision is to instigate a new tendering procedure. As a consequence, the reference to paragraph 4 of the tendering specifications in the Council's decision to abandon the tendering procedure is inconsistent and contradictory and constitutes an error of law.

65 Secondly, the reference to Article 101 of the Financial Regulation in the Council's decision to abandon the tendering procedure is also irrelevant, since that provision requires reasons to be given for such abandonment. In that regard, the reasons are to be found in the decision to entrust the services in question to the OIB. In view of the fact that the OIB did not, unlike the others, participate in the tendering procedure and submitted its offer out of time, that decision does not constitute an abandonment of the tendering procedure. As a consequence, Article 101 of the Financial Regulation was misapplied and Articles 89, 97, 98 and 100 of the Financial Regulation and Articles 135 and 147 of the Implementing Regulation disregarded.

66 Thirdly, although the Council carried out a kind of comparative analysis between the OIB's proposal on the one hand and the proposals submitted by the applicant and other companies which participated in the tendering procedure on the other, it did not request that the OIB participate in the tendering procedure. Accordingly, the procedure chosen by the Council is also vitiated by a breach of the principles of equal treatment and transparency and of Articles 43 EC and 49 EC.

67 The Council disputes the applicant's arguments.

– Findings of the Court

68 First of all, paragraph 4 of the tendering specification states as follows:

'The Secretariat may decide at its sole discretion and without being required to state reasons for its

decision:

(a) not to award the contract in respect of which the tendering procedure was launched and to recommence the procedure;

...

In none of the above cases shall a tenderer, regardless of whether his bid has been accepted or rejected, be entitled to claim any compensation.'

69 While it might be possible on the basis of a textual interpretation of paragraph 4(a) of the tendering specifications to conclude that there was a connection between the Council's decision not to award a contract and the decision to recommence the tendering procedure, the fact remains that such a provision must be interpreted in the light of Article 101 of the Financial Regulation. While paragraph 4(a) of the tendering specifications simply allows the Council the option of instigating a new tendering procedure after deciding not to award the contract in the first procedure, express provision is made in Article 101 of the Financial Regulation for the alternative option of not awarding the contract at all. In fact, that provision states that '[t]he contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure ...'. The Court cannot therefore conclude from the wording of paragraph 4(a) of the tendering specifications that the Council did not have the option of abandoning the tendering procedure.

70 It is true that Article 101 of the Financial Regulation, unlike paragraph 4(a) of the tendering specifications, expressly requires the contracting authority to give reasons for its decision to abandon the procurement. However, it has been demonstrated in the examination of the third plea that, in the present case, the Council properly gave reasons for its decision to abandon the tendering procedure. It follows that its decision to abandon the tendering procedure satisfies the requirements laid down in Article 101 of the Financial Regulation.

71 Secondly, with regard to the argument alleging infringement of Articles 43 EC and 49 EC, Articles 89, 97, 98 and 100 of the Financial Regulation and Articles 135 and 147 of the Implementing Regulation, under the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure, all applications are to contain the subject-matter of the dispute and a brief statement of the pleas in law on which the application is based. According to case-law, that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information (Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 106, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29). In the present case, the applicant has merely referred to infringement of the provisions in question without putting forward any arguments whatsoever in support of its claim. Consequently, in the light of the principles outlined above, the argument must be rejected as inadmissible.

72 In any event, it has already been demonstrated in the examination of the fourth plea that the decision to entrust the services in question to the OIB independently of the tendering procedure was perfectly proper, since the provision of services by the OIB for the Council is not covered by the rules governing public procurement and the issue of infringement of the provisions in question does not therefore arise.

73 It follows that the second plea must be rejected as inadmissible in part and, as for the remainder, unfounded.

The first plea, alleging infringement of Articles 43 EC, 49 EC and 86 EC

Arguments of the parties

74 The applicant takes the view that, by opting to use a tendering procedure, the Council made the decision to entrust the provision of the services in question within a clearly defined framework and is thus responsible for ensuring that the Treaty, the Financial Regulation and Articles 43 EC and 49 EC are complied with. In those circumstances, the decision to entrust the services at issue to the OIB independently of a tendering procedure is contrary to Articles 43 EC and 49 EC.

75 The applicant also relies on Article 86 EC, which does not permit any derogation from the Treaty

provisions as regards the public undertakings of the Member States, and submits that that rule applies a fortiori to the Community institutions.

76 As a consequence, the decision to entrust the provision of the services in question to the OIB without publishing any advertisement or putting it out to competitive tender is contrary to the rules and principles of Community law that have been referred to, which justifies its annulment.

77 The Council does not accept the applicant's arguments.

Findings of the Court

78 With regard, first of all, to the argument alleging infringement of Article 86 EC, it is apparent from Articles 2 and 3 of Decision 2003/523 that the OIB is an office which is responsible for managing the purely internal requirements of the Community and is not at all commercially orientated, so that it cannot be classified as a public undertaking within the meaning of Article 86 EC. Consequently, there can be no question of any kind of infringement of Article 86 EC and the applicant's argument in that regard must therefore be rejected as unfounded.

79 As regards the other arguments put forward by the applicant in connection with the plea under examination, in particular those alleging infringement of Articles 43 EC and 49 EC, the applicant once again merely refers to infringement of those provisions without putting forward any substantive reasoning in that regard. In the light of the principles referred to at paragraph 71 above, those arguments must therefore be disregarded as inadmissible.

80 The first plea must therefore be rejected in its entirety on the basis that it is unfounded in part and, as to the remainder, inadmissible.

– The arguments alleging infringement of the principle of equal treatment

81 According to the applicant, the fact that the Council evaluated the proposal submitted by the OIB independently of the tendering procedure constitutes infringement of the principle of equal treatment.

82 The general principle of equality is one of the fundamental principles of Community law. That principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C–304/01 *Spain* v *Commission* [2004] ECR I–7655, paragraph 31).

83 Given that, as was established in the examination of the fourth plea, the OIB is a department of the Community institutions, its situation cannot in any way be compared to that of the participants in a tendering procedure. Accordingly, the fact that the Council evaluated the proposal submitted by the OIB independently of the tendering procedure cannot constitute infringement of the principle of equal treatment.

84 The applicant's arguments alleging infringement of the principle of equal treatment must therefore be rejected as unfounded.

– The arguments alleging infringement of the principle of transparency

85 According to the applicant, the Council infringed the principle of transparency by entrusting the services in question to the OIB independently of the tendering procedure.

86 As regard the infringement of that principle, it should be noted that, according to the case–law on public contracts, the contracting institution must comply, at each stage of a tendering procedure, not only with the principle of the equal treatment of tenderers, but also with the principle of transparency (Case C–87/94 *Commission* v *Belgium* [1996] ECR I–2043, paragraph 54, and Case T–203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II–4239, paragraph 85).

87 The principle of transparency implies an obligation upon the contracting authority to publish all precise information concerning the conduct of the entire procedure (see, to that effect, *Embassy Limousines & Services* v *Parliament*, paragraph 85).

88 In the circumstances, it is apparent that the applicant was not kept informed, before the letter of 16 January 2006, of the discussions that had begun between the Council and the OIB which concluded in the Council's decision to entrust the management of the crèche to the OIB. According to the information set out in the letter of 16 January 2006, those discussions commenced in the second half of 2005 when the OIB submitted its proposal.

89 However, according to case-law, the objectives of publicity with which the contracting authority must comply under the obligation of transparency are, first, to ensure that all tenderers are afforded equality of opportunity (see, to that effect, *Commission* v *Belgium*, paragraphs 54 and 55) and, secondly, to protect the legitimate expectations of the tenderers, who have been encouraged to make irreversible investments in advance (see, to that effect, *Embassy Limousines & Services* v *Parliament*, paragraphs 85 and 86).

90 In the present case, the applicant has failed to demonstrate that either of those objectives was compromised. First, since all the tenderers met with the same lack of publicity with regard to the correspondence between the Council and the OIB, it could not have rendered the chances of the applicant and of the other tenderers unequal. Secondly, the applicant has failed to demonstrate – and has not even claimed – that it was encouraged to make investments going beyond the risks inherent in participating in a tendering procedure.

91 Consequently, the applicant's arguments alleging infringement of the principle of transparency must be rejected as unfounded.

3. The application for annulment of the favourable evaluation of the OIB's proposal

92 The application for annulment of the Council's favourable evaluation of the OIB's proposal cannot be declared admissible.

93 The favourable evaluation of the OIB's proposal which preceded the decision to entrust the services in question to that office is an internal act that is unconnected with the tendering procedure, given that, as was established at paragraphs 44 to 48 above, the Council is not required to comply with the rules governing public procurement when it decides to use the services of the OIB.

94 As an internal act that is unconnected with the tendering procedure, the favourable evaluation of the OIB's proposal cannot produce binding legal effects such as to affect the interests of the applicant by bringing about a distinct change in its legal position. It cannot therefore constitute an act against which an action for annulment can be brought under Article 230 EC (see Joined Cases T-10/92 to T-12/92 and T-15/*92 Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28 and the case-law cited) and this application for annulment must therefore be declared inadmissible.

The claim for compensation

Arguments of the parties

95 The applicant seeks compensation for the damage which it allegedly suffered as a result of the Council's conduct, to be assessed by the Court on an equitable basis.

96 The Council contends that that claim is unfounded.

Findings of the Court

97 According to established case-law, in order for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC on account of the unlawful conduct of its institutions, a number of requirements must be satisfied, namely that the alleged conduct of the institutions is unlawful, that the damage is real and that there is a causal link between the conduct alleged and the damage in question (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; and order of the Court of First Instance of 8 September 2006 in Case T-92/06 *Lademporiki and Parousis & Sia* v *Commission*, not published in the ECR, paragraph 10).

98 Moreover, as pointed out at paragraph 71 above, the application must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application.

99 In that regard, according to case-law, in an action for compensation, a claim for any unspecified form of damages is insufficiently concrete and must therefore be regarded as inadmissible (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 9, and Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, paragraph 181).

100 However, the Court has accepted that, in special circumstances, it was not essential to specify the exact extent of the damage in the application and to state the amount of compensation sought (see, to that effect, Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 76, and order of the Court of First Instance in Case T-91/05 *Sinara Handel* v *Council and Commission* [2007] ECR II-245, paragraph 110). It has also been held that that the applicant had to establish, or at least indicate, the existence of any such circumstances in the application (order of the Court of First Instance in Case T-262/97 *Goldstein* v *Commission* [1998] ECR II-2175, paragraph 25).

101 In the present case, the applicant requests that the Court 'assess the damage suffered on an equitable basis'. It is also clear that, in addition to failing to put a figure in its application on the amount of damage it claims to have suffered, the applicant has also failed to furnish the Court with a shred of factual evidence to enable the extent of the damage to be ascertained. It has merely claimed, in abstract and general terms, that it has suffered damage, without giving the least detail of that damage. Moreover, the applicant fails to explain the special circumstances which might justify its inability to carry out even an approximate assessment of the damage it allegedly suffered.

102 The obligation to specify the exact extent of the damage in the application applies all the more so in the present case since it is apparent from Article 101 of the Financial Regulation and the end of paragraph 4(a) of the tendering specifications (see paragraph 68 above) that the contracting authority is not under any obligation to compensate tenderers who have participated in a tendering procedure which has been cancelled. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages (Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 71, and *Embassy Limousines & Services* v *Parliament*, paragraph 97).

103 Therefore, in the light of the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and Article 44(1)(c) of the Rules of Procedure, the claim for damages must be rejected as inadmissible.

The application for suspension of the operation of the contract concluded between the Council and the OIB

104 Among the forms of order sought by the applicant is an application for the 'suspension of the operation of the contract concluded with the OIB'.

105 From the procedural point of view, the application has not been made by a separate document in accordance with the requirement laid down in Article 104(3) of the Rules of Procedure. It is simply one of the forms of order sought in the same document as the main application and must therefore be rejected as inadmissible (see Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 38 and the case-law cited).

106 The application in question must therefore be rejected as inadmissible.

The application for measures of inquiry

Arguments of the parties

107 The applicant has requested that the Court, by way of measures of inquiry, call upon the Council to provide the following documents:

– the contract concluded between the Council and the OIB;

– all the documents relating to the Council's decision to entrust the services in question to the OIB, in particular the communication prior to 1 August 2005 in which the Council asked the OIB to submit an offer for the management of those services.

108 The Council contends that those documents have no useful purpose in the context of the present case.

Findings of the Court

109 As a preliminary point, according to settled case-law, it is for the Court to appraise the usefulness of measures of inquiry for the purpose of resolving the dispute (Case T-68/99 *Toditec* v *Commission* [2001] ECR II–1443, paragraph 40, and Case T–23/03 *CAS* v *Commission* [2007] ECR II–289, paragraph 323).

110 Clearly, the production of the documents requested could be justified only if it were accepted that the rules governing public procurement were applicable in the circumstances of the case. In view of the fact that the examination of the claims for annulment has led to the opposite conclusion, the production of the documents in question would no longer serve any useful purpose in the resolution of the present case.

111 In the light of those considerations, the application for measures of inquiry must be rejected.

Costs

112 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Council.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders Centro Studi Antonio Manieri Srl to pay its own costs as well as the costs incurred by the Council.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 28 January 2009.

[Signatures]

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* Language of the case: Italian.

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Case T-125/06

Centro Studi Antonio Manieri Srl

v

Council of the European Union

(Public service contracts – Tendering procedure for full crèche management – Decision to use the services of the Office for Infrastructure and Logistics (OIB) and to abandon a tendering procedure)

Summary of the Judgment

1. *Procedure – Time-limits for commencing proceedings – Limitation periods*

   (Statute of the Court of Justice, Art. 45)

2. *Budget of the European Communities – Financial regulation – Provisions applicable to procedures for the award of public contracts – Scope*

   (Council Regulation No 1605/2002, Art. 88; Commission Regulation No 2342/2002, Art. 116(7))

3. *European Communities' public procurement – Tendering procedure – Duty to comply with the principles of equal treatment of tenderers and transparency*

4. *European Communities' public procurement – Tendering procedure – Expenses incurred by a tenderer – Right to compensation – None*

   (Council Regulation No 1605/2002, Art. 101)

1. The concepts of 'force majeure' and 'unforeseeable circumstances' within the meaning of Article 45 of the Statute of the Court of Justice contain both an objective element relating to abnormal circumstances unconnected with the person in question and a subjective element involving the obligation, on that person's part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices. In particular, the person concerned must pay close attention to the course of the procedure set in motion and, in particular, demonstrate diligence in order to comply with the prescribed time-limits. Thus, the concept of force majeure does not apply to a situation in which, objectively, a diligent and prudent person would have been able to take the necessary steps before the expiry of the period prescribed for instituting proceedings.

   (see para. 28)

2. It follows from Article 88 of Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities and Article 116(7) of Regulation No 2342/2002 laying down detailed rules for the implementation of the Financial Regulation that the provision of services is outside the ambit of the rules governing public contracts where it forms part of an administrative arrangement concluded between the departments of Community institutions. The Office for Infrastructure and Logistics (OIB) is a department of the Community institutions within the meaning of Article 116(7) of Regulation No 2342/2002. It follows that the Council was not required to comply with the rules governing public procurement when it decided to have recourse to the services of the OIB.

   (see paras 46-48)

3. The contracting institution must comply, at each stage of a tendering procedure, not only with the

principle of the equal treatment of tenderers, but also with the principle of transparency. The principle of transparency implies an obligation upon the contracting authority to publish all precise information concerning the conduct of the entire procedure. However, the objectives of publicity with which the contracting authority must comply under the obligation of transparency are, first, to ensure that all tenderers are afforded equality of opportunity and, secondly, to protect the legitimate expectations of the tenderers, who have been encouraged to make irreversible investments in advance.

(see paras 86-87, 89)

4. It is apparent from Article 101 Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities that the contracting authority is not under any obligation to compensate tenderers who have participated in a tendering procedure which has been cancelled. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages.

(see para. 102)

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Judgment of the Court of First Instance of 28 January 2009 - Centro Studi Manieri v Council

(Case T-125/06) [1]

(Public service contracts - Tendering procedure for full crèche management - Decision to have recourse to the services of the Office for Infrastructure and Logistics (OIB) and to abandon a tendering procedure)

Language of the case: Italian

Parties

Applicant: Centro Studi Antonio Manieri Srl (Rome, Italy) (represented by: C. Forte, M. Forte and G. Forte, lawyers)

Defendant: Council of the European Union (represented by: A. Vitro, P. Mahnič and M. Balta, acting as Agents)

Re:

Application, first, for annulment of the decision of the Council, made public by letter of its General Secretariat of 16 January 2006, abandoning the tendering procedure 2003/S 209-187862 for the full management of a crèche; second, for annulment of the decision to accept the proposal of the Office for Infrastructure and Logistics (OIB) for the management of those services; and, third, for damages.

Operative part of the judgment

The Court:

Dismisses the action;

Orders Centro Studi Antonio Manieri Srl to pay its own costs as well as the costs incurred by the Council.

_____

[1] - OJ C 131, 3.6.2006.

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Action brought on 3 May 2006 - Centro Studi A. Manieri v Council of the European Union

(Case T-125/06)

Language of the case: Italian

Parties

Applicant(s): Centro Studi A. Manieri (Rome, Italy) (represented by: Carlo Forte, Mario Forte and Giannicola Forte, lawyers)

Defendant(s): Council of the European Union

Form of order sought

Annul the decision of the General Secretariat of the Council of the European Union of 16 January 2006 to withdraw the restricted invitation to tender UCA-459/03 for full crèche management and, at the same time to accept the proposal of the Office for infrastructure and logistics (OIB) of the European Commission for the supply of the same services;

Assess the damage suffered by the applicant on an equitable basis:

Order the Council to pay the costs.

Pleas in law and main arguments

This action has been brought against the decision of the Secretary-General of the defendant to withdraw the invitation to tender launched in the autumn of 2003 by contract notice 2003/S 209-187862 by restricted procedure for the full management of a crèche. The reason for the decision is alleged to be the acceptance of a proposal by the Office for infrastructure and logistics (OIB) of the Commission regarding the management of the crèche in question. That proposal was judged to be much more advantageous than the applicant's tender, particularly as regards the contractual conditions offered to the staff, the economies of scale and the optimisation of the available resources.

In support of its claims the applicant relies on pleas of:

Breach of the principles of transparency and equal treatment, in so far as the contested measure, a decision to bring the service which was the subject of the procedure under internal management, was adopted without being advertised or opened up to competition.

Breach of Article 86(1) EC in that it is inconceivable that there should be a system which requires Member States not to maintain in force a national system which allows the award of contracts for public services without competition while the Community institutions are allowed to conduct themselves in such a manner.

Misapplication of the provisions cited as the legal basis of the contested decision: section 4 of the specification and Article 101 of the Financial Regulation, in so far as the withdrawal of the invitation cited by the Council was not intended to recommence the procedure.

Breach of the obligation to state reasons and error of assessment of the facts, as regards the correctness of the criteria supporting the choice of the proposal of the OIB.

Breach of Articles 43 and 49 EC. It is argued on this point that the OIB is not a department of the Council and it does not have any control over it. It follows that it is not possible in the circumstances of this case to rely on the case-law according to which the application of the public procurement procedures is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity

carries out the essential part of its activities with the controlling authority.

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ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

20 July 2006 (*)

(Public procurement – Community tendering procedure – Interim proceedings – Prima facie case – Urgency)

In Case T–114/06 R,

Globe SA, established in Zandhoven (Belgium), represented by A. Abate, lawyer,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and G. Boudot, acting as Agents,

defendant,

APPLICATION for suspension of the operation of the Commission's decision to reject the applicant's bid in the tendering procedure for supplies to various countries in Central Asia (EuropeAid/122078/C/S/Multi),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts of the dispute and procedure

1 Globe SA provides specialised services to network operators (gas and electricity) and to the petrochemical industry. Its core activity, surveying, has been extended to include the taking of measurements in three dimensions (by means of a laser scanning process), data conversion (Globe DD) and computer-aided-design (CAD).

2 In the field of gas pipelines, the applicant developed in 2004, from a software programme called 'SIG' ('système d'information géographique', geographical information system), a new version of that software called 'Pipe Guardian' designed to assist managers of such installations in all aspects of their work.

3 On 20 October 2005, the Commission published an invitation to tender for the EuropeAid/122078/C/S/Multi project calling for the supply of a gas pipeline information system to gas companies in Central Asia (Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan). Those contracts are part of the TACIS 2002 programme.

4 The subject of the contract was the integration, configuration, delivery, installation, commissioning and after-sales service, in a single lot, of three pipeline network information systems, as well as the corresponding application programs and the related ancillary services, that is to say training and after-sales service, as defined in the technical specifications set out in the tender.

5 According to Article 1.1 of the Instructions to tenderers, published only in English, a pipeline information system is a data base system intended for the management of all construction and

inspection data of a pipeline network and its geographical environment.

6 The Commission points out that although it initiated the invitation to tender itself, it entrusted the drafting of the substantive details of the tender to an outside consulting firm.

7 Section 2 of the Instructions to tenderers laid down the following timetable:

– deadline for requests for any clarifications from the contracting authority: 18 November 2005;

– last date on which clarifications are issued by the contracting authority: 29 November 2005;

– deadline for submission of tenders: 5 December 2005;

– tender opening session: 8 December 2005;

– notification of award to the successful tenderer:16 December 2005;

– signature of the contract 30 December 2005.

8 By letter of 10 November 2005 to the Commission, the applicant asked several questions on various subjects connected with the invitation to tender, of which one concerned the number of toner cartridges required by the specification in the contract documents (75 black toner cartridges and 25 colour toner cartridges). The applicant wished to know, in particular, whether those quantities were specified for each individual printer or for the whole contract.

9 On 14 November 2005, the Commission published Corrigendum No 1, it which it stated that the last date on which clarifications would be issued by the contracting authority was 24 November 2005.

10 On 22 November 2005, the Commission published a series of clarifications, one of which, No 23, concerned the number of toner cartridges involved in the invitation to tender and indicated that the figures of 75 and 25 toner cartridges referred to the number of cartridges required for each printer. The Commission also stated that the number of printers to be supplied under the contract was 16.

11 On 24 November 2005, the Commission published Corrigendum No 2, it which it stated that the precise number of toner cartridges was five black and two colour cartridges per printer.

12 IGN France International (‘IGN’) submitted its tender on 2 December 2005, that is to say, eight days after the publication of Corrigendum No 2. That tender made mention of a total of 1 600 toner cartridges, namely 1 200 black toner cartridges (that is to say, 75 cartridges for each of the 16 printers) and 400 colour toner cartridges (that is to say, 25 cartridges for each of the 16 printers).

13 The applicant’s bid was submitted on 5 December 2005 and took account of Corrigendum No 2.

14 The two other tenderers, Asia Soft and Geomagic, also submitted bids taking account of the information provided by the Commission in Corrigendum No 2.

15 In accordance with Article 20.6 of the Instructions to tenderers, the sole award criterion was to be the price and the contract would be awarded to the lowest compliant tender.

16 The tender opening session was held by the committee for the evaluation of tenders, as planned, on 8 December 2005. It was determined at that time that the bids of the four tenderers were as follows:

– Globe: EUR 545 215;

– IGN: EUR 592 400;

– Asia Soft: EUR 865 143;

– Geomagic: EUR 934 964.

17 The Commission awarded the contract to IGN. The contract was signed by the Commission on 19 December 2005 and by IGN on 30 December 2005 without the applicant being informed.

18 By letters of 6 January 2006 and 3 February 2006, the applicant and its lawyer wrote to the Commission to enquire as to what further steps had been taken in the tendering procedure.

19 By letter of 1 March 2006, the Commission informed the applicant's lawyer:

'... although it is true that at the tender opening session, it was found that Globe's bid was the lowest, it was discovered subsequently that another tenderer's bid was based on the quantities set out in the original publication in the Official Journal rather than on those contained in the corrigendum published on the EuropeAid web site. Since the corrigendum was published at a late stage, leaving very little time for potential tenderers to take note of its contents and because, in an invitation to tender for the supply of equipment, it is not possible to identify the potential tenderers in advance, the evaluation committee decided to take that bid into consideration and make the adjustments necessary to take account of the quantities indicated in the corrigendum published on the internet. As a result of those adjustments (reduction of the quantities and, consequently, reduction in the price), it appeared that Globe's bid was not the lowest. The contract was therefore awarded to [IGN]'.

20 By letter of 2 March 2006 ('the contested decision'), the Commission informed the applicant that its tender was not the least expensive of those tenders which were technically compliant and that the contract had been awarded to IGN for an amount of EUR 531 600.

21 In response to a letter to the Commission of 6 March 2006 from the applicant's lawyer, the Commission forwarded, on 17 March 2006, a copy of the report drawn up by the evaluation committee. In that report, under the heading of technical compliance, the evaluation committee states, in essence, that, at the request of the contracting authority IGN's bid had to be re-calculated to take into account the changed number of toner cartridges, as modified by Corrigendum No 2, and that the bid had been amended to that effect. Under the same heading, the evaluation committee confirmed that the revised bid and the confirmation had been received within 24 hours by e-mail and fax.

22 By an application lodged at the registry of the Court of First Instance on 14 April 2006 the applicant brought an action for the annulment of the contested decision.

23 On the same day, the applicant lodged an application for interim measures in which it seeks, essentially, suspension of the operation of the contested decision by the President of the Court of First Instance and an order for costs against the Commission.

24 On 27 April 2006, the Commission submitted its observations on the application for interim measures. In those observations, it asked the Court to dismiss that application and order the applicant to pay the costs.

25 The parties presented oral argument at the hearing on 16 May 2006.

Law

26 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures must specify the subject matter of the dispute, the circumstances giving rise to urgency as well as the pleas of fact and law prima facie justifying the grant of the provisional measure sought (*fumus boni juris*). Those conditions are cumulative so that an application for interim measures must be rejected if one of them is absent (order of the President of the Court in Case C–268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I–4971, paragraph 30). In an appropriate case the President has also to weigh up the interests at stake (order of the President of the Court in Case C–445/00 R *Austria* v *Council* [2001] ECR I–1461, paragraph 73 and the case-law cited therein).

27 Moreover, in the context of that overall examination, the President enjoys a wide margin of discretion and remains free to determine, in light of the particular features of the case, the way in

which those different conditions have to be verified and the order of priority of that examination since there is no rule of Community law imposing on him a predetermined analytical model for assessing the need for an interim decision (order of the President in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 23).

28 The present application for interim measures must be considered in the light of the principles set out above.

29 Before ruling on the application for interim measures, the subject matter of the application should be made clear. The applicant, in its application, is seeking suspension of the operation of the contested decision.

30 It should be pointed out that a decision relating to the award of a contract to a single tenderer inevitably and inseparably entails a corresponding decision not to award the contract to the other tenderers. It must therefore be held that the formal communication of the result of the tendering procedure to the rejected tenderers does not mean that a decision other than the decision awarding the contract will be adopted for the express purpose of stating a rejection (judgment of the Court of First Instance in Case T-183/00 *Strabag Benelux* v *Council* [2003] ECR II-135, paragraph 28).

31 It must therefore be considered that the applicant is seeking suspension of the operation both of the decision not to award it the contract and of the decision to award the contract to IGN.

32 Moreover, it was confirmed at the hearing that the contract was concluded by the Commission on 19 December and by IGN on 30 December, that performance has begun but is not yet completed. The contract is thus the immediate extension of the Commission's decision to award the contract to IGN.

33 However, as was made clear at the hearing, the applicant puts forward claims for damages arising from performance of the contract and is therefore seeking to prevent serious and irreparable damage which would result, in its view, from such performance.

34 It must be considered therefore that the applicant is also seeking suspension of performance of the contract.

1. Prima facie case

Arguments of the parties

The applicant's arguments

35 The applicant puts forward, essentially, four pleas in law in support of its application in the main proceedings which concern the compliance of the bids, infringement of the right to be heard, breach of the Commission's duty to give reasons and of the principle of sound administration.

– The first plea in law

36 In its first plea in law, the applicant claims that the Commission committed three errors of assessment which vitiate the procedure under which the contract was awarded to IGN.

37 In the first place, the applicant argues, on the one hand, that its bid was the lowest and that, consequently, in accordance with Article 20.6 of the Instructions to tenderers, which provided that the sole award criterion was to be the price and that the contract would be awarded to the lowest compliant tender, the Commission should have awarded it the contract and had no discretion in that regard. It considers that in not awarding it the contract, the Commission disregarded its legitimate expectations.

38 On the other hand, the applicant argues that IGN's bid did not comply with the technical specifications contained in the contract documents.

39 Firstly, according to the applicant, the contract documents provided that the printers were to be of type 'A3 max' so as to be able to print on paper of size 297 x 420mm. In its view, the indication 'A3

max' means that the printers should be able to print in that format and that larger sizes (A2, A1, A0) were not required. It adds that in the field concerned, larger formats are sometimes used and that, therefore, 'A3 max' expresses a requirement that it should be possible to print on A3 size paper. The printers offered by IGN are A4 size (210 x 297mm). The applicant claims, therefore, that those printers do not comply with the format called for in the contract documents.

40 Secondly, the applicant claims that the contract documents provide that the print speed of the first page in colour should be 26 seconds whereas, in the case of the printers offered by IGN, it is only 29 seconds.

41 In the applicant's view, those technical differences result in significant price differences between the printers it offered and those offered by IGN, the latter costing EUR 379, whereas the printers offered by the applicant cost EUR 3 719.10. The decision to accept IGN's bid therefore infringed the principle of non-discrimination.

42 Thirdly, the applicant argues, in essence, that the Commission should have rejected IGN's bid since it did not fulfil the requirements of the invitation to tender inasmuch as it was based on the supply of 1 600 cartridges, the number initially set out in the contract documents, and not 112 cartridges, the number finally established by Corrigendum No 2.

43 In the second place, the applicant claims essentially that the Commission granted IGN an extension of the deadline for submission of tenders inasmuch as it permitted IGN to amend and correct its bid after the deadline fixed by the invitation to tender, even though IGN was aware of the prices offered by the other tenderers, having been present, along with them, at the tender opening session.

44 In the third place, the applicant argues, in substance, the Commission permitted IGN to amend its tender contrary to the applicable rules and, in particular, to the provisions of Articles 15, 19.5, 20.3, and 20.4 of the Instructions to tenderers.

– The second plea in law

45 The applicant argues, essentially, that the Commission should have informed it of the reasons why it proposed to invert the order of precedence of the tenders so as to permit it to submit it views in accordance with its right to be heard.

– The third plea in law

46 The applicant claims, in essence, that the statement of the reasons on which the Commission's decision is based is insufficient and contradictory, all the more so as application of the Instructions to tenderers should have led to its being awarded the contract. The decision also does not mention the matters of fact or of law which led the Commission to change the order of tenders fixed by the evaluation committee on 8 December 2005.

– The fourth plea in law

47 The applicant claims that the Commission demonstrated negligence in the context of the procedure for the award of the contract. It considers, essentially, that the time which it took for the Commission to reply to it infringes the Code of good administrative behaviour, which requires the Commission to reply within 15 days from the date of receipt of the request for information.

The Commission's arguments

– The first plea in law

48 On the one hand, the Commission argues that IGN's bid was already the lowest at the time at which it submitted its tender on 2 December 2005. It justifies that claim by pointing out that if the correction of the number of toner cartridges required by the invitation to tender, as set out in Corrigendum No 2, had been carried out by the evaluation committee itself, IGN's bid would have been lower than that of Globe.

49 Consequently, the Commission considers that the applicant has no basis for alleging an infringement of its legitimate expectations having regard to the fact that the evaluation committee

had only commenced its consideration of the tenders and had not yet adopted any decision, notwithstanding the fact the committee considered, from the very start, that Globe's bid fulfilled the requirements of the invitation to tender.

50 On the other hand, with regard to the compliance of IGN's tender, the Commission relies on the fact that the expression 'A3 max' was interpreted by the evaluation committee as including the A4 format, the A3 format being an upper threshold beyond which the printers which were required did not need to go.

51 Secondly, the Commission emphasises that the evaluation committee considered that the print time of 26 seconds for the first page in colour laid down in the contract documents was a threshold and that the committee considered that a difference of 3 seconds was not a major technical weakness justifying automatic rejection of IGN's tender.

52 Thirdly, the Commission points out, essentially, that the reason for its invitation to IGN to submit a corrected version of its tender was the late appearance of Corrigendum No 2. The Commission adds that it was not just reasons of equity which led the evaluation committee to adopt that decision, but the fear that if it excluded IGN, that firm might bring an action for annulment or for damages.

– The second plea in law

53 The Commission considers that it has already replied to that plea in its argument concerning the lowest tender and refers back to that argument and it also claims that a period of two months was needed to permit its departments to draw up a reasoned decision in a matter which it considered complex and which, in its view, had encountered technical difficulties during the tendering procedure.

– The third plea in law

54 The Commission argues, in essence, that the contested decision is perfectly clear and it fulfils the requirements of the settled case-law of the Court of Justice and the Court of First Instance to the effect that the extent of the obligation to state reasons, as required by Article 253 EC, depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning of the institution which adopted the decision, in such a way as to permit the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights, and to enable the Community judicature to carry out its review of the measure (judgment of the Court of First Instance in Case T–282/02 *Cementbouw Handel & Industrie* v *Commission* [2006] ECR II–319, paragraph 85). It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to the wording of the measure at issue but also to its context (judgments of the Court of Justice in Case 203/85 *Nicolet Instrument* [1986] ECR 2049, paragraph 10; Case 240/84 *NTN Tokyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 31; Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 39; and Case C–76/00 *Petrotub and Republica* v *Council* [2003] ECR I–79, paragraph 81).

55 The Commission also points out that it took care, in the first two paragraphs of its letter of 1 March 2006, to explain the reasons which led it to suggest to IGN that it reformulate its tender in accordance with Corrigendum No 2.

– The fourth plea in law

56 The Commission merely states that this plea is unfounded.

Assessment of the President of the Court

57 As a preliminary matter it should be pointed out, first of all, that under Article 89(1) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, 'the Financial Regulation') all public contracts financed in whole or in part by the budget have to comply with the principles of transparency, proportionality, equal treatment and non–discrimination. Next, under Article 97(1) of the Financial Regulation the selection criteria for evaluating the capability of candidates or tenderers

and the award criteria for evaluating the content of the tenders are to be defined in advance and set out in the call for tender. Finally, it is settled case-law that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way (Order of the President of the Court of First Instance in Case T–447/04 R *Capgemini Nederland* v *Commission* [2005] ECR II–257, paragraph 68).

58 It should further be observed, also as a preliminary matter, that, in accordance with settled case-law, the Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (judgment of the Court in Case 56/77 *Agence Européenne d'Interims* v *Commission* [1978] ECR 2215, paragraph 20, and judgment of the Court of First Instance in Case T–19/95 *Adia Interim* v *Commission* [1996] ECR II–321, paragraph 49).

59 Having formulated those preliminary observations, the President considers that, having regard to the documents in the case concerning this application for interim measures, the applicant's first plea in law is of a serious nature.

60 It is not disputed that at the tender opening session on 8 December 2005, the evaluation committee determined that the bids of the four tenderers were as follows:

– Globe: EUR 545 215;

– IGN: EUR 592 400;

– Asia Soft: EUR 865 143;

– Geomagic: EUR 934 964.

The applicant's bid was thus the lowest at the time that the tenders were opened.

61 However, the Commission claims that IGN's bid was the lowest even at the time that the tenders were opened. In its view, if the evaluation committee had itself corrected the number of toner cartridges required by the invitation to tender, as provided for in Corrigendum No 2, IGN's bid would have been lower than that of the applicant.

62 Clearly, the Commission thereby admits that in the absence of any correction by IGN of its tender, it had not submitted the lowest bid at the time that the tenders were opened.

63 It must therefore be determined whether, prima facie, the Commission was entitled to permit IGN to correct its tender.

64 Article 15 of the Instructions to tenderers provides that no tender was to be altered after 5 December 2005.

65 In addition, Article 19.5 of the Instructions to tenderers provides that in the interests of transparency and equal treatment and without being able to modify their tenders, tenderers may be required, at the written request of the evaluation committee, to provide clarifications within 48 hours. Any such request for clarification must not seek the correction of formal errors or of major 'restrictions' affecting performance of the contract or distorting competition.

66 Article 20.3 of the Instructions to tenderers provides that to facilitate the examination, evaluation and comparison of tenders, the evaluation committee may ask each tenderer for clarification of his tender, including breakdowns of prices. The request for clarification and the response must be in writing only, but no change in the price or substance of the tender may be sought, offered or permitted except as required to confirm the correction of arithmetical errors discovered during the evaluation of tenders.

67 In addition, Article 20.4 of the Instructions to tenderers provides that tenders found to be technically compliant are to be checked for any arithmetical errors in computation and summation. According to that provision, errors will be corrected by the evaluation committee as follows: on the

one hand, where there is a discrepancy between amounts in figures and in words, the amount in words will be the amount taken into account. On the other, except for lump-sum contracts, where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will be the price taken into account.

68 Although the correction of arithmetical errors is clearly possible under those provisions, that possibility is strictly limited; the provisions in question do not, prima facie, permit a correction that amounts to a modification of the tender.

69 In this case, IGN, at the Commission's request, did not correct arithmetical errors but rectified certain erroneous parameters of its bid, something the Commission does not deny, inasmuch as it admits that the number of toner cartridges mentioned in IGN's original tender was not the number required by Corrigendum No 2.

70 It should also be made clear that the other three tenderers, namely the applicant, Asia Soft and Geomatic, submitted tenders in accordance with the requirement laid down in Corrigendum No 2.

71 The Commission argues that the reason for its invitation to IGN to submit a corrected version of its tender was the late appearance of Corrigendum No 2. The Commission adds that it was not just reasons of equity which led the evaluation committee to adopt that decision, but the fear that if it excluded IGN, that firm might bring an action for annulment or for damages.

72 None the less, the last date initially fixed on which clarifications were to be issued by the contracting authority was 29 November 2005. On 14 November 2005, the Commission published Corrigendum No 1, indicating that the last date on which clarifications would be issued by the contracting authority was 24 November 2005. It should be pointed out that that correction to the time-limit for the publication of clarifications seems to have been made necessary in order to comply with the period of 11 days between the last date on which clarifications were to be issued by the Commission and the deadline for submission of tenders, required by Article 2 and the third paragraph of Article 13 of the Instructions to tenderers. Those articles provide that the last date on which clarifications might be issued constituted the beginning of a period of 11 days during which tenderers could draw up and transmit their bid, knowing that the contract documents would not undergo any further modification.

73 Clarifications were issued on 22 November 2005 and a corrigendum to those clarifications was issued on 24 November 2005. Consequently, the Commission cannot, prima facie, argue that Corrigendum No 2 was issued late, since it was issued within the time-limit fixed by the Commission itself.

74 With regard to whether IGN's tender was compliant, which, according to Article 20.4 of the Instructions to tenderers, was an essential pre-condition if arithmetical errors were to be corrected, the applicant argues that the contract documents specified that the print speed of the first page in colour should be 26 seconds, whereas the printers offered by IGN had a speed of 29 seconds.

75 The Commission claims that the evaluation committee regarded the print time of 26 seconds for the first page in colour, fixed in the contract documents as a threshold. Moreover, it argues that the committee considered that the difference of three seconds did not constitute a major technical weakness justifying an automatic rejection of IGN's tender.

76 Leaving aside the fact that, at first glance, the Commission's line of reasoning concerning the print speed is unconvincing since if the speed was in fact a threshold, the slower a printer was, the more it would fulfil the conditions laid down in the specification in the contract documents, the fact is that those documents specified that the print speed was to be 26 seconds. Furthermore, the latitude to which the Commission refers is not set out expressly in the contract documents and the evaluation committee does not, prima facie, seem to have any legal basis for considering that it was entitled to depart from the technical specifications contained in those documents. Consequently, the compliance of IGN's tender in that regard must be regarded with circumspection since the broad discretion which the Commission enjoys as to the factors to be taken into account when awarding a contract following an invitation to tender does not, prima facie, permit it to depart from the criteria which it has itself strictly defined, as it will otherwise have failed to maintain the equal treatment to which the tenderers are entitled.

77 Moreover, the applicant's arguments concerning the print format required for the printers to be delivered by the successful tenderer can also not be dismissed without further consideration.

78 It is not contested that the printers are to be used, in particular, to print plans of the route followed by gas pipelines and of the areas around them.

79 The applicant argues, essentially, that the reference to 'A3 max' format is a technical specification which requires printers meeting it to be able to print, in the A3 format, geographical plans and maps of areas ranging from 2 to 40 000 kilometres, in accordance with the requirements of Annex TS4.2 of the Instructions to tenderers, whereas printers capable of producing larger formats, such as A2, A1 or even A0, frequently used in cartography, were not required.

80 The Commission argues that the evaluation committee decided unanimously to interpret the expression 'A3 max' as an 'upper threshold' and to consider printers which printed only in A4 format to fulfil the requirements of the contract documents.

81 First of all, it must be determined, on the one hand, whether the expression 'A3 max' was open to interpretation by the evaluation committee if, as the applicant claims, it was a technical specification and, on the other, whether the Commission was entitled to interpret that expression, particularly since the tenderers were not informed of that interpretation.

82 Secondly even supposing that the evaluation committee was entitled to interpret the expression 'A3 max' and that it was not a technical specification which was not subject to interpretation, it should be pointed out that the Commission's interpretation seems, prima facie, unconvincing. According to the Commission's argument to the effect that the A3 format was an upper limit, print formats equal to or smaller than A4 (such as A5 or even smaller formats) would have fulfilled the conditions of the contract documents, even though such formats seem ill adapted to printing geographical plans and maps covering areas from 2 to 40 000 kilometres. If, on the other hand, the evaluation committee's interpretation merely regarded the A4 format as acceptable, to the exclusion of smaller formats, that would imply that the format laid down in the Instructions to tenderers contained not merely an 'upper threshold' ('A3 max') but a lower limit (A4) which was not mentioned therein and which, it would appear, was not made known to the tenderers.

83 In addition, it should be pointed out that the applicant argued in its written pleadings, without being contradicted by the Commission, that the computer programme in question requires the A3 print format.

84 It is not contested that the differences in print format give rise to particularly significant differences in the price of the printers – those offered by IGN cost EUR 379 each whereas those offered by the applicant cost EUR 3 719.10 each – which, if the Commission was right, ought logically to have led the tenderers not to offer printers with the A3 format and to limit themselves to smaller print formats in order to reduce the amount of their tenders.

85 Moreover, it should be pointed out that the total cost of the 16 printers offered by IGN was EUR 6 064, whereas the total cost of the printers offered by the applicant was EUR 59 504, which is a difference of EUR 53 440. If IGN had complied with the A3 print format requirement for the printers it offered, there is every reason to believe that its price would have been increased by approximately the same amount and would then have been considerably above that of the applicant, even after correction of the number of toner cartridges, provided that such correction was possible.

86 Consequently, the question whether the printers chosen by IGN corresponded or not to the technical specifications in the contract documents concerning the print format required require a detailed consideration which it is not for the President to enter into, his role being merely to determine, in the course of considering whether a prima facie case has been made out, that the applicant's arguments are not, prima facie, without any foundation.

87 In the light of the foregoing and having regard to the information at the disposal of the President, the arguments of fact and law put forward by the applicant in the context of its first plea in law give rise to serious doubts as to the lawfulness of the award of the contract to IGN. Under those circumstances, this application cannot be rejected for want of having made a prima facie case, and it must be considered whether the application satisfies the condition relating to urgency (see, to that effect, the order in *Austria* v *Council*, cited above at paragraph 26, paragraphs 100 and 101).

2. Urgency

Arguments of the parties

The applicant's arguments

88 Although it accepts that failure to obtain the contract will not jeopardise its existence, the applicant contends that the damage resulting from the loss of the contract cannot be fully compensated for by a money payment and its application is therefore aimed at obtaining compensation in kind.

89 The applicant argues that its core activity, surveying, has gradually been extended to include the taking of measurements in three dimensions (by means of a laser scanning process), data conversion (Globe DD) and computer-aided-design (CAD) and that in the field of gas pipelines, that expertise permitted it to develop a software programme called 'SIG' ('système d'information géographique', geographical information system), designed to assist managers of such installations in all aspects of their work. In 2004, Globe developed a new version of that software called 'Pipe Guardian'.

90 The applicant points out that that software represents a considerable investment and is part of a strategy to internationalise the company, which at the moment, does business essentially in Belgium and the Netherlands. It emphasises that internationalisation is necessary in a highly specialised technology market on which a limited number of traders are present. It points out that there are five traders present worldwide on this market, including the four tenderers.

91 The applicant contends that the commercial progress of its Pipe Guardian software is closely linked to its participation in international invitations to tender and that most potential customers select their new software programmes by way of pre–selections and invitations to tender. One of the most important factors in that process is the submission of a list of representative references. It points out that the Commission itself requires such references before giving consideration to a bid submitted in the context of one of its invitations to tender, in particular in the case of the contract which is the subject of the contested decision, in regard to which the applicant was able to produce references from Shell and the North Atlantic Treaty Organisation (NATO).

92 Furthermore, the applicant observes, in substance, that, having been set up 16 years ago, it is an operator on the market for whom a contract such as that offered by the Commission would permit it to make itself better known, to compete with other traders in the context of international invitations to tender and to carve out a place on the international market.

93 At the hearing, the applicant also pointed out, in essence, that it considered that, in this case, it had not lost an opportunity to obtain a contract but that it had failed to obtain a contract that it should have been awarded if the rules for making such awards had been complied with by the Commission and consequently, it had also lost the opportunity to obtain references on which it could have relied if the Commission had awarded it the contract. That, in its view, constitutes irreparable damage.

94 According to the applicant, there is also urgency because, before the judgement on the substance of the case is delivered, the contract at issue will have been largely, if not entirely, performed. The judgment in the main proceedings would therefore be ineffective. It relies in that regard on the order of the President of the Court of Justice of 22 April 1994 in *Commission* v *Belgium* (Case C–87/94 R [1994] ECR I–1395, paragraph 31), made in the course of an action for failure to fulfil obligations.

The Commission's arguments

95 The Commission argues that Globe has produced no evidence showing that performance of the contract by IGN would cause it damage. The Commission also contends that the damage is not irreparable since the applicant itself estimated its loss at EUR 492 000 in its application in the main proceedings, although it acknowledges that the applicant argued that such compensation would only be an imperfect remedy.

96 It adds that that is all the more true inasmuch as the applicant claims not to have lost an opportunity but the contract itself.

97 It also stated, in essence, at the hearing that although it is true that the applicant lost an opportunity to obtain references, it is accepted that tendering procedures are highly competitive and

the fact of not having been awarded the contract is not in any way a negative reflection on the capacities of the disappointed tenderer.

98 Finally, the Commission contends that the applicant's argument to the effect that the contract concluded between the Commission and IGN would be largely performed before the judgment in the main proceedings was delivered is irrelevant in this case. The applicant has based its argument on case-law referring to applications for failure to fulfil obligations. That is a special category of actions which cannot give rise to proceedings for damages before the Community courts. Moreover, the facts at issue in the case which gave rise to the order in *Commission* v *Belgium*, mentioned in paragraph 93, above, are not comparable to those in the present case.

Assessment of the President of the Court

99 As regards the condition of urgency, it must be remembered that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court (orders in Case 27/68 R *Renckens* v *Commission* [1969] ECR 255; Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46; Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 36; and *Commission* v *NALOO*, paragraph 52). For the purpose of attaining that objective, urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief (orders in Case C-65/99 P(R) *Willeme* v *Commission* [1999] ECR I-1857, paragraph 62, *Commission* v *NALOO*, cited above, paragraph 52 and Case C-156/03 P(R) *Commission* v *Laboratoires Servier* [2003] ECR I-6575, paragraph 35).

100 The applicant contends that if the contested decisions are annulled and if interim relief is not granted, the contract at issue in the invitation to tender could not be awarded to it or performed by it and it would therefore be deprived of certain benefits in terms of references and access to the international market for the services concerned.

101 It should be pointed out that if the contested decisions were annulled by the Court, the Commission would be required, under the first paragraph of Article 233 EC, to take the necessary measures to comply with the judgment, without prejudice to any obligations resulting from the application of the second paragraph of Article 288 EC (order of the President of the Court of First Instance in Case T-195/05 R *Deloitte Business Advisory* v *Commission* [2005] ECR II-0000, paragraph 128).

102 It addition, it should be borne in mind that under Article 233 EC, it is the institution whose act has been declared void which is required to take the necessary measures to comply with the judgment of the Court. It follows that the court which declares the measure void has no jurisdiction to issue directions to the institution whose act has been declared void as to the manner in which it is to comply with the Court's judgment (order of the Court of Justice in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24) and that the President of the Court of First Instance cannot pre-judge measures which might be adopted as a result of the annulment. The measures necessary in order to comply with a judgment annulling a measure depend not merely on the measure which has been annulled and the scope of the judgment, which is to be assessed on the basis of the grounds which led to it (judgments of the Court of justice in Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27, and Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya)* v *Commission* [2006] ECR I-4845, paragraph 44) but also on the circumstances of each case, such as the time frame in which the annulment of the contested measure takes place or the interests of third parties.

103 In this case, if the contested decisions were annulled, it would be for the Commission, in the light of the circumstances of the case, to take the measures necessary to provide appropriate protection for the applicant's interests (see, to that effect, the orders in *Capgemini Nederland* v *Commission*, cited above at paragraph 57, paragraph 96, and *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 130).

104 The President may not therefore pre-judge the measures that the Commission might take to comply with a judgment annulling the contested decisions.

105 None the less, the general principle of the right to full and effective judicial protection means that parties before the courts must be granted interim protection if this is necessary to ensure the full effectiveness of the subsequent definitive judgment, in order to prevent a lacuna in the legal protection afforded by the Community courts (see, to that effect, the order in *Renckens* v *Commission*, cited above at paragraph 99; the judgments of the Court of Justice in Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 21, and Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-1415, paragraphs 16 to 18; and the orders in *Germany* v *Commission,* cited above at paragraph 99, paragraph 46, and *Austria* v *Council*, cited above at paragraph 26, paragraph 111).

106 It must therefore be considered whether it has been shown with a sufficient degree of probability that the applicant is likely to suffer serious and irreparable damage if the interim relief applied for is not granted (see, to that effect, the order in *Commission* v *NALOO*, cited above at paragraph 99, paragraph 53).

107 It must first therefore be considered whether, following a judgment annulling the contested decisions, the fact that the Commission could organise a new tendering procedure would repair the damage caused to the applicant and if the answer to that question is in the negative, to assess whether the applicant could be compensated.

108 With regard to the possibility of the Commission organising a new tendering procedure, it must be pointed out that the Commission awarded the contract to IGN and it was signed in December 2005, without the applicant being informed previously that it had not been awarded the contract. The Commission ultimately informed it of that fact, after several requests, only by letter of 1 March 2006.

109 In addition, in reply to a question at the hearing, the Commission initially indicated that although it could confirm that performance of the contract commenced after it was signed by the parties and that some of the equipment provided for under the contract, such as the printers and toner cartridges, were to be delivered at the end of April 2006, it was unaware of the stage which performance of the contract had reached, then, without any further explanation, it indicated that the equipment provided for under the contract had already been delivered.

110 For its part, the applicant indicated, without being contradicted by the Commission, that the final date fixed by the Commission for provision of the other services under the contract, in particular, the placing in service of the software, was 15 March 2007.

111 Thus, the inevitable conclusion is that the judgment which will close the main proceedings will probably not be delivered until after the contract, or at least, a large part of the contract, has been performed.

112 It is therefore highly unlikely that, following a judgment in which the contested decisions are annulled, which would probably be delivered after performance of the contract has been completed, a new tendering procedure would be organised by the Commission. The damage suffered by the applicant could not therefore be repaired by that means.

113 It must therefore be considered whether, and how, the damage suffered by the applicant could be repaired by an action under Article 235 EC.

114 It should be pointed out the applicant contends that compensation in the form of money damages would make good the loss it has suffered only in a very imperfect way whereas suspension of the contract until the judgment in the main proceedings has been delivered would preserve the possibility of its obtaining compensation in kind, that is to say, in this case, performance of the contract and consequently, the competitive advantages it believes would flow from being awarded such a contract.

115 As the principle that the damage actually suffered must be made good in its entirety is a principle of law upheld by the Community judicature (judgment of the Court of Justice in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2002] ECR I-203, paragraph 227), it must be considered whether the damage which the applicant alleges it has suffered can be made good in its entirety by an equivalent means.

116 The first paragraph of article 101 of Regulation No 1605/2002 provides that '[t]he contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation'. Thus, contrary to the applicant's claim, it did not lose a contract but rather an opportunity, and, in this case, a particularly favourable one, to obtain the contract which was the subject of the Community tendering procedure.

117 Although the chances of obtaining the contract were good, it is none the less very difficult, if not impossible, to quantify them and consequently to determine with sufficient accuracy the damage resulting from failure to obtain it. It is settled case-law that damage which, once it has occurred, cannot be quantified with sufficient accuracy is to be regarded as difficult to repair (see, to that effect, the order of the President of the Court of Justice in Joined Cases C–51/90 R and C–55/90 R *Comos-Tank and Others* v *Commission* [1990] ECR I–2167, paragraph 31; and the orders of the President of the Court of First Instance in Case T–41/97 R *Antillian Rice Mills* v *Council* [1997] ECR II–447, paragraph 47, and in Case T–65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II–2641, paragraph 65; see also the order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 147 and the case-law cited therein).

118 That loss of opportunity may therefore be regarded as difficult to repair in an equivalent form (see, to that effect, the order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 148).

119 In addition, the applicant contends, in essence, that the loss, properly so called, resulting from the failure to obtain the contract at issue is in addition to the loss of the competitive advantage attached to the award of the contract and that that advantage would have permitted it to enter the international market by allowing it to refer to the contract awarded by the Commission in the context of other invitations to tender.

120 It should be pointed out that, according to the applicant, there are only five traders present worldwide on this market, something which the Commission does not contest. It also does not contest the applicant's claim that references likely to advance the position of tenderers on the market in question constitute an important factor for potential customers of such tenderers.

121 In accordance with paragraph 11.8 of the Instructions to tenderers, references are one of the factors to be taken into account in assessing whether tenders are compliant in the procedure for awarding the contract laid down by the Commission.

122 It should be pointed out that such references represent, however, only one of many criteria taken into account by the Commission in the qualitative selection of service providers (Article 137 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1); see also, to that effect, the orders of the President of the Court of First Instance in Case T–169/00 R *Esedra* v *Commission* [2000] ECR II–2951, paragraph 49, and in Case T–148/04 R *TQ3 Travel Solutions Belgium* v *Commission* [2004] ECR II–3027, paragraph 51).

123 However, in this case, having regard to the extremely limited number of traders on the world market, it cannot be excluded out of hand and without any further consideration that such references could represent a real competitive advantage, something which the Commission does not deny. Moreover, the references are being sought not with a view to obtaining contracts from the Commission – for which they represent only one of many criteria taken into account – , but to obtain contracts from other customers for whom such references could be the determining factor, something which the Commission does not contest either.

124 In this case, having regard to the special circumstances of the contract at issue, which concerns very specific software programmes for which the number of potential customers is relatively limited, and to the extremely limited number of suppliers, the alleged damage appears to be certain or, at least, established with a sufficient degree of probability (order of the President of the Court of First Instance in Case T–241/00 R *Le Canne* v *Commission* [2001] ECR II–37, paragraph 34) and does not appear to be hypothetical and based exclusively on the unpredictable probability of future and uncertain events (see, to that effect, the order of the President of the Court of First Instance in Joined Cases T–195/01 R and T–207/01 R *Government of Gibraltar* v *Commission* [2001] ECR

II–3915, paragraph 101 and the case-law cited therein).

125 The fact that the applicant would be able to point to a contract awarded by the Commission of the European Communities in a such a specialised market with such a limited number of suppliers, after being selected by Shell and NATO, could well represent a competitive advantage which could have been of benefit to the applicant if it had been awarded the contract.

126 It should also be noted that by failing to be selected, the applicant was placed at a competitive disadvantage in regard to IGN, which obtained the contract, and could use that fact for competitive purposes, although there are serious grounds for thinking that the contract should not have been awarded to it.

127 It would also be very difficult to quantify the value of that competitive advantage and, consequently, to determine with sufficient accuracy the damage resulting from failure to obtain it or to compensate for it fully and completely by an award of damages (see, to that effect, the order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraphs 147 and 148).

128 Clearly, the applicant is therefore fully entitled to argue that damages would constitute only an imperfect remedy for the loss it has suffered.

129 The damage relied on by the applicant could thus be regarded as difficult to repair unless operation of the contested decision was suspended.

130 However, in order to justify interim relief, the damage relied on by the applicant must be serious (order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 149).

131 The loss of an opportunity to be awarded, or to perform, a public contract is inherent in the exclusion from the tendering procedure at issue and cannot be regarded as constituting, in itself, serious damage independently of a concrete assessment of the specific damage alleged in each case (order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 150).

132 Consequently, the applicant's loss of the opportunity to obtain and perform the contract at issue will constitute serious damage only if the applicant can prove to the requisite legal standard that it would have obtained a sufficiently significant advantage from the award and performance of the contract concluded on the basis of the invitation to tender (order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 151).

133 A concrete assessment must therefore be made of the various advantages which would accrue to the applicant from the award and performance of the contract concluded on the basis of the invitation to tender.

134 When the applicant is an undertaking, the seriousness of material damage must be assessed in the light, in particular, of the size of the undertaking (see, to that effect, the order in *Comos-Tank and Others* v *Commission*, cited above at paragraph 117, paragraphs 26 and 31; and the order of the President of the Court of First Instance in Case T–201/04 R *Microsoft* v *Commission* [2004] ECR II–4463, paragraph 257). The President considers in this case that documents in the case do not permit him to assess the seriousness of the damage having regard to the size of the undertaking.

135 However, it is possible that the seriousness of the damage should also be assessed on the basis of other criteria, such as the seriousness of the effect on market shares or of the change in the competitive position of the undertaking (see, by analogy, the orders of the President of the Court of First Instance in Case T–13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II–1961, paragraph 138; Case T–392/02 R *Solvay Pharmaceuticals* v *Council* [2003] ECR II–1825, paragraph 107; and Case T–369/03 R *Arizona Chemical and Others* v *Commission* [2004] ECR II–205, paragraph 76).

136 As regards, first, financial advantages flowing from performance of the contract, it is clear that failure to perform the contract would deprive the applicant of the income it would have received if the contract had been awarded to it and loss of the opportunity to obtain the income that would have accrued to it under the contract would, having regard to the amounts at stake, seem likely to cause fairly serious damage to the applicant.

137 Secondly, the possibility that the applicant would be able to point to a contract awarded by the Commission of the European Communities in such a specialised market with such a limited number of suppliers could well represent a competitive advantage which could have been of benefit to the applicant if it had been awarded the contract.

138 Even if its precise value is difficult to estimate, the loss of such a competitive advantage is, in the light of the circumstances of the case, likely to cause serious damage to a company such as the applicant which develops very specific software intended for customers who, prima facie, are limited in number, in a highly competitive market in which there is a limited number of suppliers. That is all the more true inasmuch as IGN, one of its direct competitors, could rely, for competitive purposes, on the fact that it had obtained the contract, even though there are good reasons for thinking that it should not have been awarded to it.

139 It must therefore be concluded, in the light of the particular circumstances of the case and the characteristics of the market on which the applicant and IGN do business, that the damage suffered by the applicant may be regarded as serious.

140 Lastly, the urgency which the applicant may consequently invoke must be taken into consideration a fortiori by the President of the Court because, as is apparent from paragraphs 54 to 84 of this order, the arguments of fact and law put forward by the applicant in the context of its first plea in law appear to be of a particularly serious nature (see, to that effect, the order in *Austria* v *Council*, cited above at paragraph 26, paragraph 110).

141 Having regard to all those factors, in order to guarantee the full effectiveness of the definitive future decision and, in particular, to preserve the possibility of obtaining compensation in kind, as the applicant has requested and which may well be the only means of making good, at least partially, the damage suffered, the application for suspension of the operation of the contested decision and of performance of the contract must be granted in so far as the balance of interests is in its favour. That is the matter which must now be considered.

3. The balance of interests

Arguments of the parties

The applicant's arguments

142 The applicant contends, essentially, that the balance of interests is in its favour inasmuch as it has been deprived of the income from a contract which should have been awarded to it and IGN cannot claim protection for interests which arise from a measure which must be regarded as unlawful. The applicant also considers that IGN should not enjoy greater protection than is accorded to it, all the more so as proper application of the rules for awarding contracts should have led the Commission to exclude IGN's tender as not fulfilling the conditions laid down in the Instructions to tenderers.

143 It also argues that relief is required by the public interest in ensuring that the procedures followed by the Community institutions in awarding public contracts comply with the principles of legality, transparency, equal treatment, legitimate expectations and sound administration.

The Commission's arguments

144 The Commission contests that line of argument and contends, in substance, that even if it committed a fault for which it is liable towards the applicant, the contract with IGN remains valid since the hopes and legitimate expectations of that company must be protected, in so far as it was entitled to rely on the apparent lawfulness of the decision awarding the contract to it.

145 The Commission also argues that the contract is particularly important for the development of gas pipeline networks in Central Asia and that suspension of performance of the contract for a lengthy period would have a negative effect in the region, in particular, on the Commission's relations with the Kazakh authorities. It considers that the public interest in the timely performance of the contract should take precedence over the applicant's purely private interests, which can be protected by the judgment in the main proceedings. It stated at the hearing that that factor also played a role in the Commission's decision not to terminate the invitation to tender in order to initiate it again later so that there would be no delay in the performance of the contract and, from a budgetary perspective, so that the credits allocated to the contract would not be lost. In its view, that factor should also be

taken into account in assessing the applicant's interest in obtaining suspension, at this time, of the performance of the contract.

146 At the hearing, the Commission also pointed out, in essence, that it wished to avoid legal proceedings being brought against it by IGN, which could occur if the contract which it had entered into with that company was suspended.

Assessment of the President of the Court

147 Where, on an application for interim measures, the judge before whom the applicant claims that it will sustain serious and irreparable harm weighs up the various interests involved, he must consider whether the annulment of the contested decision by the court dealing with the main application would make it possible to reverse the situation that would have been brought about in the absence of interim measures and, conversely, whether suspension of the operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed (see, to that effect, the order of the President of the Court of Justice in Joined Cases C–182/03 R and C–217/03 R *Belgium and Forum 187* v *Commission* [2003] ECR I–6887, paragraph 142, and the order of the President of the Court of First Instance in *Pfizer Animal Health* v *Council*, cited above at paragraph 135, paragraph 167 and the case-law cited therein).

148 Account must be taken, first of all, of the applicant's interest in suspension of the operation of the decision awarding the contract to IGN, secondly, of IGN's interest in performing the contract and thirdly of the public interest, and the Commission's interest, in the performance of the contract.

149 Firstly, the President considers that continued performance of the contract awarded to IGN would cause the applicant to sustain serious and irreparable harm (see paragraphs 104 to 140, above).

150 Secondly, there are serious grounds for believing that IGN's tender did not comply with the specifications laid down in the Instructions to tenderers and should have been rejected by the Commission. Contrary to the latter's contention at the hearing, the lawfulness of the contested decision and the lawfulness of the contract entered into on the basis of it are not separate from each other; if the contested decision is annulled by the Court in the main proceedings and performance of the contract is suspended, the annulment decision could lead the Commission to terminate its contract with IGN.

151 Accordingly, IGN, as the Commission has pointed out, would probably be entitled to sue the Commission for damages arising out of the fault it had committed, bringing their action in the Belgian courts, which, according to the Commission, have jurisdiction under a choice–of–jurisdiction clause in the contract. It must therefore be concluded that IGN's interests could be protected by legal proceedings.

152 Consequently, the balance of interests cannot be in IGN's favour and to the applicant's disadvantage. There are serious grounds for believing that IGN's tender did not comply with the specifications laid down in the invitation to tender, whereas the Commission does not deny that the applicant's tender did comply with those specifications. Under those circumstances, IGN's interest in carrying on with the contract cannot take precedence over the applicant's interest in being awarded that contract, which would be possible, at least in part, if the contract was suspended until judgment has been delivered in the main proceedings.

153 Thirdly, the Commission has not substantiated its claim that further performance of the contract cannot be delayed if good relations are to be maintained with the Kazakh authorities as the Commission has submitted no evidence on that subject to the President.

154 Moreover, the arguments put forward by the Commission at the hearing seem to indicate that it was aware that the award of the contract to IGN could, or would, cause difficulties but that, for budgetary reasons, it preferred not to act on that possibility but to take the risk of being sued subsequently by tenderers whose bids had been improperly rejected.

155 Even supposing that budgetary considerations could justify such a course of action, the Commission has not shown that such considerations which, by its own account, lead it to conclude the contract with IGN before 31 December 2005 so as not to lose the credits available to it for that purpose, are such as to make it impossible to suspend performance of the contract at this point in time.

156 The Commission also cannot rely on its interest in the continued performance of the contract in order to avoid legal action by IGN in support of a claim that the President should refuse to accord judicial protection to the applicant.

157 Accordingly, in the particular circumstances of the present case, the grant of interim measures is justified and adequately meets the need to guarantee effective provisional legal protection to the applicant.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The operation of the Commission's decision to award the contract to IGN France international in the tendering procedure for supplies to various countries in Central Asia (EuropeAid/122078/C/S/Multi) and the performance of the contract concluded by the Commission with IGN France international are suspended until the Court of First Instance has ruled on the application in the main proceedings.

2. Costs are reserved.

Luxembourg, 20 July 2006.

E. Coulon	B. Vesterdorf
Registrar	President

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* Language of the case: French.

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Order of the Court of First Instance of 12 July 2007 - Globe v Commission

(Case T-114/06) [1]

Language of the case: French

The President of the Court of First Instance (First Chamber) has ordered that the case be removed from the register.

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[1] - OJ C 131, 3.6.2006.

Order of the President of the Court of First Instance of 20 July 2006
Globe SA v Commission of the European Communities. Application for interim measures - Fumus boni juris. Case T-114/06 R.

1. Applications for interim measures - Interim measures - Conditions for granting - Urgency - Prima facie case - Cumulative conditions - Balancing of all the interests involved

(Art. 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

2. Applications for interim measures - Suspension of operation of a measure - Suspension of operation of a decision on public procurement

(Art. 242 EC)

3. Applications for interim measures - Suspension of operation of a measure - Suspension of operation of a decision on public procurement

(Art. 242 EC)

4. Interim proceedings - Suspension of operation of a measure - Suspension of operation of a decision on public procurement

(Art. 242 EC)

1. Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures must specify the subject-matter of the dispute, the circumstances giving rise to urgency as well as the pleas of fact and law prima facie justifying the grant of the provisional measure sought (fumus boni juris). Those conditions are cumulative so that an application for interim measures must be rejected if one of them is absent. In an appropriate case the President has also to weigh up the interests at stake. Moreover, in the context of that overall examination, the President enjoys a wide margin of discretion and remains free to determine, in light of the particular features of the case, the way in which those different conditions have to be verified and the order of priority of that examination since there is no rule of Community law imposing on him a predetermined analytical model for assessing the need for an interim decision.

(see paras 26-27)

2. Although the President may not pre-judge the measures that the Commission might take to comply with a judgment annulling a decision, the general principle of the right to full and effective judicial protection means that parties before the courts must be granted interim protection if this is necessary to ensure the full effectiveness of the subsequent definitive judgment, in order to prevent a lacuna in the legal protection afforded by the Community courts.

In interim proceedings on the award of a public contract, it must therefore be considered whether, following a judgment annulling a decision, the fact that the Commission could organise a new tendering procedure would repair the damage caused to the applicant and if the answer to that question is in the negative, to assess whether the applicant could be compensated.

(see paras 104-105, 107)

3. Where an applicant has lost an opportunity to be awarded a contract which is the subject of a public procurement procedure and it is very difficult or even impossible to quantify and therefore assess with the required accuracy the damage resulting from that loss, that loss may be considered to constitute damage which is very difficult to repair in an equivalent form. That is also the case where it is very difficult, given the circumstances of the case, to quantify the value of a competitive advantage and, consequently, to determine with sufficient accuracy the damage resulting

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from failure to obtain it.

(see paras 118, 127)

4. The loss of an opportunity to be awarded, or to perform, a public contract is inherent in the exclusion from the tendering procedure at issue and cannot be regarded as constituting, in itself, serious damage independently of a concrete assessment of the specific damage alleged in each case. Consequently, in the case of a procedure for the award of a public contract, the applicant's loss of the opportunity to obtain and perform the contract at issue will constitute serious damage only if the applicant can prove to the requisite legal standard that it would have obtained a sufficiently significant advantage from the award and performance of the contract concluded on the basis of the invitation to tender.

Although, where the applicant is an undertaking, the seriousness of material damage must be assessed in the light, in particular, of the size of the undertaking, it is possible that the seriousness of the damage should also be assessed on the basis of other criteria, such as the seriousness of the effect on market shares or of the change in the competitive position of the undertaking.

(see paras 131-132, 134-135)

In Case T114/06 R,

Globe SA, established in Zandhoven (Belgium), represented by A. Abate, lawyer,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and G. Boudot, acting as Agents,

defendant,

APPLICATION for suspension of the operation of the Commission's decision to reject the applicant's bid in the tendering procedure for supplies to various countries in Central Asia (EuropeAid/122078/C/S/Multi),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The operation of the Commission's decision to award the contract to IGN France international in the tendering procedure for supplies to various countries in Central Asia (EuropeAid/122078/C/S/Multi) and the performance of the contract concluded by the Commission with IGN France international are suspended until the Court of First Instance has ruled on the application in the main proceedings.

2. Costs are reserved.

Luxembourg, 20 July 2006.

Facts of the dispute and procedure

1. Globe SA provides specialised services to network operators (gas and electricity) and to the

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petrochemical industry. Its core activity, surveying, has been extended to include the taking of measurements in three dimensions (by means of a laser scanning process), data conversion (Globe DD) and computer-aided-design (CAD).

2. In the field of gas pipelines, the applicant developed in 2004, from a software programme called SIG' (système d'information géographique', geographical information system), a new version of that software called Pipe Guardian' designed to assist managers of such installations in all aspects of their work.

3. On 20 October 2005, the Commission published an invitation to tender for the EuropeAid/122078/C/S/Multi project calling for the supply of a gas pipeline information system to gas companies in Central Asia (Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan). Those contracts are part of the TACIS 2002 programme.

4. The subject of the contract was the integration, configuration, delivery, installation, commissioning and after-sales service, in a single lot, of three pipeline network information systems, as well as the corresponding application programs and the related ancillary services, that is to say training and after-sales service, as defined in the technical specifications set out in the tender.

5. According to Article 1.1 of the Instructions to tenderers, published only in English, a pipeline information system is a data base system intended for the management of all construction and inspection data of a pipeline network and its geographical environment.

6. The Commission points out that although it initiated the invitation to tender itself, it entrusted the drafting of the substantive details of the tender to an outside consulting firm.

7. Section 2 of the Instructions to tenderers laid down the following timetable:

- deadline for requests for any clarifications from the contracting authority: 18 November 2005;

- last date on which clarifications are issued by the contracting authority: 29 November 2005;

- deadline for submission of tenders: 5 December 2005;

- tender opening session: 8 December 2005;

- notification of award to the successful tenderer:16 December 2005;

- signature of the contract 30 December 2005.

8. By letter of 10 November 2005 to the Commission, the applicant asked several questions on various subjects connected with the invitation to tender, of which one concerned the number of toner cartridges required by the specification in the contract documents (75 black toner cartridges and 25 colour toner cartridges). The applicant wished to know, in particular, whether those quantities were specified for each individual printer or for the whole contract.

9. On 14 November 2005, the Commission published Corrigendum No 1, it which it stated that the last date on which clarifications would be issued by the contracting authority was 24 November 2005.

10. On 22 November 2005, the Commission published a series of clarifications, one of which, No 23, concerned the number of toner cartridges involved in the invitation to tender and indicated that the figures of 75 and 25 toner cartridges referred to the number of cartridges required for each printer. The Commission also stated that the number of printers to be supplied under the contract was 16.

11. On 24 November 2005, the Commission published Corrigendum No 2, it which it stated that the precise number of toner cartridges was five black and two colour cartridges per printer.

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12. IGN France International (IGN') submitted its tender on 2 December 2005, that is to say, eight days after the publication of Corrigendum No 2. That tender made mention of a total of 1 600 toner cartridges, namely 1 200 black toner cartridges (that is to say, 75 cartridges for each of the 16 printers) and 400 colour toner cartridges (that is to say, 25 cartridges for each of the 16 printers).

13. The applicant's bid was submitted on 5 December 2005 and took account of Corrigendum No 2.

14. The two other tenderers, Asia Soft and Geomagic, also submitted bids taking account of the information provided by the Commission in Corrigendum No 2.

15. In accordance with Article 20.6 of the Instructions to tenderers, the sole award criterion was to be the price and the contract would be awarded to the lowest compliant tender.

16. The tender opening session was held by the committee for the evaluation of tenders, as planned, on 8 December 2005. It was determined at that time that the bids of the four tenderers were as follows:

- Globe: EUR 545 215;

- IGN: EUR 592 400;

- Asia Soft: EUR 865 143;

- Geomagic: EUR 934 964.

17. The Commission awarded the contract to IGN. The contract was signed by the Commission on 19 December 2005 and by IGN on 30 December 2005 without the applicant being informed.

18. By letters of 6 January 2006 and 3 February 2006, the applicant and its lawyer wrote to the Commission to enquire as to what further steps had been taken in the tendering procedure.

19. By letter of 1 March 2006, the Commission informed the applicant's lawyer:

... although it is true that at the tender opening session, it was found that Globe's bid was the lowest, it was discovered subsequently that another tenderer's bid was based on the quantities set out in the original publication in the Official Journal rather than on those contained in the corrigendum published on the EuropeAid web site. Since the corrigendum was published at a late stage, leaving very little time for potential tenderers to take note of its contents and because, in an invitation to tender for the supply of equipment, it is not possible to identify the potential tenderers in advance, the evaluation committee decided to take that bid into consideration and make the adjustments necessary to take account of the quantities indicated in the corrigendum published on the internet. As a result of those adjustments (reduction of the quantities and, consequently, reduction in the price), it appeared that Globe's bid was not the lowest. The contract was therefore awarded to [IGN]'.

20. By letter of 2 March 2006 (the contested decision'), the Commission informed the applicant that its tender was not the least expensive of those tenders which were technically compliant and that the contract had been awarded to IGN for an amount of EUR 531 600.

21. In response to a letter to the Commission of 6 March 2006 from the applicant's lawyer, the Commission forwarded, on 17 March 2006, a copy of the report drawn up by the evaluation committee. In that report, under the heading of technical compliance, the evaluation committee states, in essence, that, at the request of the contracting authority IGN's bid had to be re-calculated to take into account the changed number of toner cartridges, as modified by Corrigendum No 2, and that the bid had been amended to that effect. Under the same heading, the evaluation committee confirmed that the revised bid and the confirmation had been received within 24 hours by e-mail and fax.

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22. By an application lodged at the registry of the Court of First Instance on 14 April 2006 the applicant brought an action for the annulment of the contested decision.

23. On the same day, the applicant lodged an application for interim measures in which it seeks, essentially, suspension of the operation of the contested decision by the President of the Court of First Instance and an order for costs against the Commission.

24. On 27 April 2006, the Commission submitted its observations on the application for interim measures. In those observations, it asked the Court to dismiss that application and order the applicant to pay the costs.

25. The parties presented oral argument at the hearing on 16 May 2006.

Law

26. Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures must specify the subject matter of the dispute, the circumstances giving rise to urgency as well as the pleas of fact and law prima facie justifying the grant of the provisional measure sought (fumus boni juris). Those conditions are cumulative so that an application for interim measures must be rejected if one of them is absent (order of the President of the Court in Case C268/96 P(R) SCK and FNK v Commission [1996] ECR I4971, paragraph 30). In an appropriate case the President has also to weigh up the interests at stake (order of the President of the Court in Case C445/00 R Austria v Council [2001] ECR I1461, paragraph 73 and the case-law cited therein).

27. Moreover, in the context of that overall examination, the President enjoys a wide margin of discretion and remains free to determine, in light of the particular features of the case, the way in which those different conditions have to be verified and the order of priority of that examination since there is no rule of Community law imposing on him a predetermined analytical model for assessing the need for an interim decision (order of the President in Case C149/95 P(R) Commission v Atlantic Container Line and Others [1995] ECR I2165, paragraph 23).

28. The present application for interim measures must be considered in the light of the principles set out above.

29. Before ruling on the application for interim measures, the subject matter of the application should be made clear. The applicant, in its application, is seeking suspension of the operation of the contested decision.

30. It should be pointed out that a decision relating to the award of a contract to a single tenderer inevitably and inseparably entails a corresponding decision not to award the contract to the other tenderers. It must therefore be held that the formal communication of the result of the tendering procedure to the rejected tenderers does not mean that a decision other than the decision awarding the contract will be adopted for the express purpose of stating a rejection (judgment of the Court of First Instance in Case T183/00 Strabag Benelux v Council [2003] ECR II135, paragraph 28).

31. It must therefore be considered that the applicant is seeking suspension of the operation both of the decision not to award it the contract and of the decision to award the contract to IGN.

32. Moreover, it was confirmed at the hearing that the contract was concluded by the Commission on 19 December and by IGN on 30 December, that performance has begun but is not yet completed. The contract is thus the immediate extension of the Commission's decision to award the contract to IGN.

33. However, as was made clear at the hearing, the applicant puts forward claims for damages arising

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from performance of the contract and is therefore seeking to prevent serious and irreparable damage which would result, in its view, from such performance.

34. It must be considered therefore that the applicant is also seeking suspension of performance of the contract.

1. Prima facie case

Arguments of the parties

The applicant's arguments

35. The applicant puts forward, essentially, four pleas in law in support of its application in the main proceedings which concern the compliance of the bids, infringement of the right to be heard, breach of the Commission's duty to give reasons and of the principle of sound administration.

- The first plea in law

36. In its first plea in law, the applicant claims that the Commission committed three errors of assessment which vitiate the procedure under which the contract was awarded to IGN.

37. In the first place, the applicant argues, on the one hand, that its bid was the lowest and that, consequently, in accordance with Article 20.6 of the Instructions to tenderers, which provided that the sole award criterion was to be the price and that the contract would be awarded to the lowest compliant tender, the Commission should have awarded it the contract and had no discretion in that regard. It considers that in not awarding it the contract, the Commission disregarded its legitimate expectations.

38. On the other hand, the applicant argues that IGN's bid did not comply with the technical specifications contained in the contract documents.

39. Firstly, according to the applicant, the contract documents provided that the printers were to be of type A3 max' so as to be able to print on paper of size 297 x 420mm. In its view, the indication A3 max' means that the printers should be able to print in that format and that larger sizes (A2, A1, A0) were not required. It adds that in the field concerned, larger formats are sometimes used and that, therefore, A3 max' expresses a requirement that it should be possible to print on A3 size paper. The printers offered by IGN are A4 size (210 x 297mm). The applicant claims, therefore, that those printers do not comply with the format called for in the contract documents.

40. Secondly, the applicant claims that the contract documents provide that the print speed of the first page in colour should be 26 seconds whereas, in the case of the printers offered by IGN, it is only 29 seconds.

41. In the applicant's view, those technical differences result in significant price differences between the printers it offered and those offered by IGN, the latter costing EUR 379, whereas the printers offered by the applicant cost EUR 3 719.10. The decision to accept IGN's bid therefore infringed the principle of non-discrimination.

42. Thirdly, the applicant argues, in essence, that the Commission should have rejected IGN's bid since it did not fulfil the requirements of the invitation to tender inasmuch as it was based on the supply of 1 600 cartridges, the number initially set out in the contract documents, and not 112 cartridges, the number finally established by Corrigendum No 2.

43. In the second place, the applicant claims essentially that the Commission granted IGN an extension of the deadline for submission of tenders inasmuch as it permitted IGN to amend and correct its bid after the deadline fixed by the invitation to tender, even though IGN was aware

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of the prices offered by the other tenderers, having been present, along with them, at the tender opening session.

44. In the third place, the applicant argues, in substance, the Commission permitted IGN to amend its tender contrary to the applicable rules and, in particular, to the provisions of Articles 15, 19.5, 20.3, and 20.4 of the Instructions to tenderers.

- The second plea in law

45. The applicant argues, essentially, that the Commission should have informed it of the reasons why it proposed to invert the order of precedence of the tenders so as to permit it to submit it views in accordance with its right to be heard.

- The third plea in law

46. The applicant claims, in essence, that the statement of the reasons on which the Commission's decision is based is insufficient and contradictory, all the more so as application of the Instructions to tenderers should have led to its being awarded the contract. The decision also does not mention the matters of fact or of law which led the Commission to change the order of tenders fixed by the evaluation committee on 8 December 2005.

- The fourth plea in law

47. The applicant claims that the Commission demonstrated negligence in the context of the procedure for the award of the contract. It considers, essentially, that the time which it took for the Commission to reply to it infringes the Code of good administrative behaviour, which requires the Commission to reply within 15 days from the date of receipt of the request for information.

The Commission's arguments

- The first plea in law

48. On the one hand, the Commission argues that IGN's bid was already the lowest at the time at which it submitted its tender on 2 December 2005. It justifies that claim by pointing out that if the correction of the number of toner cartridges required by the invitation to tender, as set out in Corrigendum No 2, had been carried out by the evaluation committee itself, IGN's bid would have been lower than that of Globe.

49. Consequently, the Commission considers that the applicant has no basis for alleging an infringement of its legitimate expectations having regard to the fact that the evaluation committee had only commenced its consideration of the tenders and had not yet adopted any decision, notwithstanding the fact the committee considered, from the very start, that Globe's bid fulfilled the requirements of the invitation to tender.

50. On the other hand, with regard to the compliance of IGN's tender, the Commission relies on the fact that the expression A3 max' was interpreted by the evaluation committee as including the A4 format, the A3 format being an upper threshold beyond which the printers which were required did not need to go.

51. Secondly, the Commission emphasises that the evaluation committee considered that the print time of 26 seconds for the first page in colour laid down in the contract documents was a threshold and that the committee considered that a difference of 3 seconds was not a major technical weakness justifying automatic rejection of IGN's tender.

52. Thirdly, the Commission points out, essentially, that the reason for its invitation to IGN to submit a corrected version of its tender was the late appearance of Corrigendum No 2. The Commission adds that it was not just reasons of equity which led the evaluation committee to adopt that decision,

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but the fear that if it excluded IGN, that firm might bring an action for annulment or for damages.

- The second plea in law

53. The Commission considers that it has already replied to that plea in its argument concerning the lowest tender and refers back to that argument and it also claims that a period of two months was needed to permit its departments to draw up a reasoned decision in a matter which it considered complex and which, in its view, had encountered technical difficulties during the tendering procedure.

- The third plea in law

54. The Commission argues, in essence, that the contested decision is perfectly clear and it fulfils the requirements of the settled case-law of the Court of Justice and the Court of First Instance to the effect that the extent of the obligation to state reasons, as required by Article 253 EC, depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning of the institution which adopted the decision, in such a way as to permit the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights, and to enable the Community judicature to carry out its review of the measure (judgment of the Court of First Instance in Case T282/02 Cementbouw Handel & Industrie v Commission [2006] ECR II319, paragraph 85). It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to the wording of the measure at issue but also to its context (judgments of the Court of Justice in Case 203/85 Nicolet Instrument [1986] ECR 2049, paragraph 10; Case 240/84 NTN Tokyo Bearing and Others v Council [1987] ECR 1809, paragraph 31; Case 255/84 Nachi Fujikoshi v Council [1987] ECR 1861, paragraph 39; and Case C76/00 Petrotub and Republica v Council [2003] ECR I79, paragraph 81).

55. The Commission also points out that it took care, in the first two paragraphs of its letter of 1 March 2006, to explain the reasons which led it to suggest to IGN that it reformulate its tender in accordance with Corrigendum No 2.

- The fourth plea in law

56. The Commission merely states that this plea is unfounded.

Assessment of the President of the Court

57. As a preliminary matter it should be pointed out, first of all, that under Article 89(1) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, the Financial Regulation') all public contracts financed in whole or in part by the budget have to comply with the principles of transparency, proportionality, equal treatment and nondiscrimination. Next, under Article 97(1) of the Financial Regulation the selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders are to be defined in advance and set out in the call for tender. Finally, it is settled case-law that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way (Order of the President of the Court of First Instance in Case T447/04 R Capgemini Nederland v Commission [2005] ECR II257, paragraph 68).

58. It should further be observed, also as a preliminary matter, that, in accordance with settled case-law, the Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (judgment

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of the Court in Case 56/77 Agence Européenne d'Interims v Commission [1978] ECR 2215, paragraph 20, and judgment of the Court of First Instance in Case T19/95 Adia Interim v Commission [1996] ECR II321, paragraph 49).

59. Having formulated those preliminary observations, the President considers that, having regard to the documents in the case concerning this application for interim measures, the applicant's first plea in law is of a serious nature.

60. It is not disputed that at the tender opening session on 8 December 2005, the evaluation committee determined that the bids of the four tenderers were as follows:

- Globe: EUR 545 215;

- IGN: EUR 592 400;

- Asia Soft: EUR 865 143;

- Geomagic: EUR 934 964.

The applicant's bid was thus the lowest at the time that the tenders were opened.

61. However, the Commission claims that IGN's bid was the lowest even at the time that the tenders were opened. In its view, if the evaluation committee had itself corrected the number of toner cartridges required by the invitation to tender, as provided for in Corrigendum No 2, IGN's bid would have been lower than that of the applicant.

62. Clearly, the Commission thereby admits that in the absence of any correction by IGN of its tender, it had not submitted the lowest bid at the time that the tenders were opened.

63. It must therefore be determined whether, prima facie, the Commission was entitled to permit IGN to correct its tender.

64. Article 15 of the Instructions to tenderers provides that no tender was to be altered after 5 December 2005.

65. In addition, Article 19.5 of the Instructions to tenderers provides that in the interests of transparency and equal treatment and without being able to modify their tenders, tenderers may be required, at the written request of the evaluation committee, to provide clarifications within 48 hours. Any such request for clarification must not seek the correction of formal errors or of major restrictions' affecting performance of the contract or distorting competition.

66. Article 20.3 of the Instructions to tenderers provides that to facilitate the examination, evaluation and comparison of tenders, the evaluation committee may ask each tenderer for clarification of his tender, including breakdowns of prices. The request for clarification and the response must be in writing only, but no change in the price or substance of the tender may be sought, offered or permitted except as required to confirm the correction of arithmetical errors discovered during the evaluation of tenders.

67. In addition, Article 20.4 of the Instructions to tenderers provides that tenders found to be technically compliant are to be checked for any arithmetical errors in computation and summation. According to that provision, errors will be corrected by the evaluation committee as follows: on the one hand, where there is a discrepancy between amounts in figures and in words, the amount in words will be the amount taken into account. On the other, except for lump-sum contracts, where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will be the price taken into account.

68. Although the correction of arithmetical errors is clearly possible under those provisions, that possibility is strictly limited; the provisions in question do not, prima facie, permit a correction

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that amounts to a modification of the tender.

69. In this case, IGN, at the Commission's request, did not correct arithmetical errors but rectified certain erroneous parameters of its bid, something the Commission does not deny, inasmuch as it admits that the number of toner cartridges mentioned in IGN's original tender was not the number required by Corrigendum No 2.

70. It should also be made clear that the other three tenderers, namely the applicant, Asia Soft and Geomatic, submitted tenders in accordance with the requirement laid down in Corrigendum No 2.

71. The Commission argues that the reason for its invitation to IGN to submit a corrected version of its tender was the late appearance of Corrigendum No 2. The Commission adds that it was not just reasons of equity which led the evaluation committee to adopt that decision, but the fear that if it excluded IGN, that firm might bring an action for annulment or for damages.

72. None the less, the last date initially fixed on which clarifications were to be issued by the contracting authority was 29 November 2005. On 14 November 2005, the Commission published Corrigendum No 1, indicating that the last date on which clarifications would be issued by the contracting authority was 24 November 2005. It should be pointed out that that correction to the time-limit for the publication of clarifications seems to have been made necessary in order to comply with the period of 11 days between the last date on which clarifications were to be issued by the Commission and the deadline for submission of tenders, required by Article 2 and the third paragraph of Article 13 of the Instructions to tenderers. Those articles provide that the last date on which clarifications might be issued constituted the beginning of a period of 11 days during which tenderers could draw up and transmit their bid, knowing th at the contract documents would not undergo any further modification.

73. Clarifications were issued on 22 November 2005 and a corrigendum to those clarifications was issued on 24 November 2005. Consequently, the Commission cannot, prima facie, argue that Corrigendum No 2 was issued late, since it was issued within the time-limit fixed by the Commission itself.

74. With regard to whether IGN's tender was compliant, which, according to Article 20.4 of the Instructions to tenderers, was an essential pre-condition if arithmetical errors were to be corrected, the applicant argues that the contract documents specified that the print speed of the first page in colour should be 26 seconds, whereas the printers offered by IGN had a speed of 29 seconds.

75. The Commission claims that the evaluation committee regarded the print time of 26 seconds for the first page in colour, fixed in the contract documents as a threshold. Moreover, it argues that the committee considered that the difference of three seconds did not constitute a major technical weakness justifying an automatic rejection of IGN's tender.

76. Leaving aside the fact that, at first glance, the Commission's line of reasoning concerning the print speed is unconvincing since if the speed was in fact a threshold, the slower a printer was, the more it would fulfil the conditions laid down in the specification in the contract documents, the fact is that those documents specified that the print speed was to be 26 seconds. Furthermore, the latitude to which the Commission refers is not set out expressly in the contract documents and the evaluation committee does not, prima facie, seem to have any legal basis for considering that it was entitled to depart from the technical specifications contained in those documents. Consequently, the compliance of IGN's tender in that regard must be regarded with circumspection since the broad discretion which the Commission enjoys as to the factors to be taken into account when awarding a contract following an invitation to tender does not, prima facie, permit it to depart from the criteria which it has itself strictly defined, as it will otherwise have failed to maintain the equal treatment to which the tenderers are entitled.

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77. Moreover, the applicant's arguments concerning the print format required for the printers to be delivered by the successful tenderer can also not be dismissed without further consideration.

78. It is not contested that the printers are to be used, in particular, to print plans of the route followed by gas pipelines and of the areas around them.

79. The applicant argues, essentially, that the reference to A3 max' format is a technical specification which requires printers meeting it to be able to print, in the A3 format, geographical plans and maps of areas ranging from 2 to 40 000 kilometres, in accordance with the requirements of Annex TS4.2 of the Instructions to tenderers, whereas printers capable of producing larger formats, such as A2, A1 or even A0, frequently used in cartography, were not required.

80. The Commission argues that the evaluation committee decided unanimously to interpret the expression A3 max' as an upper threshold' and to consider printers which printed only in A4 format to fulfil the requirements of the contract documents.

81. First of all, it must be determined, on the one hand, whether the expression A3 max' was open to interpretation by the evaluation committee if, as the applicant claims, it was a technical specification and, on the other, whether the Commission was entitled to interpret that expression, particularly since the tenderers were not informed of that interpretation.

82. Secondly even supposing that the evaluation committee was entitled to interpret the expression A3 max' and that it was not a technical specification which was not subject to interpretation, it should be pointed out that the Commission's interpretation seems, prima facie, unconvincing. According to the Commission's argument to the effect that the A3 format was an upper limit, print formats equal to or smaller than A4 (such as A5 or even smaller formats) would have fulfilled the conditions of the contract documents, even though such formats seem ill adapted to printing geographical plans and maps covering areas from 2 to 40 000 kilometres. If, on the other hand, the evaluation committee's interpretation merely regarded the A4 format as acceptable, to the exclusion of smaller formats, that would imply that the format laid down in the Instructions to tenderers contained not merely an upper threshold' (A3 max') but a lower limit (A4) which was not mentioned therein and which, it would appear, was not made known to the tenderers.

83. In addition, it should be pointed out that the applicant argued in its written pleadings, without being contradicted by the Commission, that the computer programme in question requires the A3 print format.

84. It is not contested that the differences in print format give rise to particularly significant differences in the price of the printers - those offered by IGN cost EUR 379 each whereas those offered by the applicant cost EUR 3 719.10 each - which, if the Commission was right, ought logically to have led the tenderers not to offer printers with the A3 format and to limit themselves to smaller print formats in order to reduce the amount of their tenders.

85. Moreover, it should be pointed out that the total cost of the 16 printers offered by IGN was EUR 6 064, whereas the total cost of the printers offered by the applicant was EUR 59 504, which is a difference of EUR 53 440. If IGN had complied with the A3 print format requirement for the printers it offered, there is every reason to believe that its price would have been increased by approximately the same amount and would then have been considerably above that of the applicant, even after correction of the number of toner cartridges, provided that such correction was possible.

86. Consequently, the question whether the printers chosen by IGN corresponded or not to the technical specifications in the contract documents concerning the print format required require a detailed consideration which it is not for the President to enter into, his role being merely to determine, in the course of considering whether a prima facie case has been made out, that the applicant's

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arguments are not, prima facie, without any foundation.

87. In the light of the foregoing and having regard to the information at the disposal of the President, the arguments of fact and law put forward by the applicant in the context of its first plea in law give rise to serious doubts as to the lawfulness of the award of the contract to IGN. Under those circumstances, this application cannot be rejected for want of having made a prima facie case, and it must be considered whether the application satisfies the condition relating to urgency (see, to that effect, the order in Austria v Council , cited above at paragraph 26, paragraphs 100 and 101).

2. Urgency

Arguments of the parties

The applicant's arguments

88. Although it accepts that failure to obtain the contract will not jeopardise its existence, the applicant contends that the damage resulting from the loss of the contract cannot be fully compensated for by a money payment and its application is therefore aimed at obtaining compensation in kind.

89. The applicant argues that its core activity, surveying, has gradually been extended to include the taking of measurements in three dimensions (by means of a laser scanning process), data conversion (Globe DD) and computer-aided-design (CAD) and that in the field of gas pipelines, that expertise permitted it to develop a software programme called SIG' (système d'information géographique', geographical information system), designed to assist managers of such installations in all aspects of their work. In 2004, Globe developed a new version of that software called Pipe Guardian'.

90. The applicant points out that that software represents a considerable investment and is part of a strategy to internationalise the company, which at the moment, does business essentially in Belgium and the Netherlands. It emphasises that internationalisation is necessary in a highly specialised technology market on which a limited number of traders are present. It points out that there are five traders present worldwide on this market, including the four tenderers.

91. The applicant contends that the commercial progress of its Pipe Guardian software is closely linked to its participation in international invitations to tender and that most potential customers select their new software programmes by way of preselections and invitations to tender. One of the most important factors in that process is the submission of a list of representative references. It points out that the Commission itself requires such references before giving consideration to a bid submitted in the context of one of its invitations to tender, in particular in the case of the contract which is the subject of the contested decision, in regard to which the applicant was able to produce references from Shell and the North Atlantic Treaty Organisation (NATO).

92. Furthermore, the applicant observes, in substance, that, having been set up 16 years ago, it is an operator on the market for whom a contract such as that offered by the Commission would permit it to make itself better known, to compete with other traders in the context of international invitations to tender and to carve out a place on the international market.

93. At the hearing, the applicant also pointed out, in essence, that it considered that, in this case, it had not lost an opportunity to obtain a contract but that it had failed to obtain a contract that it should have been awarded if the rules for making such awards had been complied with by the Commission and consequently, it had also lost the opportunity to obtain references on which it could have relied if the Commission had awarded it the contract. That, in its view, constitutes irreparable damage.

94. According to the applicant, there is also urgency because, before the judgement on the substance of the case is delivered, the contract at issue will have been largely, if not entirely, performed.

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The judgment in the main proceedings would therefore be ineffective. It relies in that regard on the order of the President of the Court of Justice of 22 April 1994 in Commission v Belgium (Case C87/94 R [1994] ECR I1395, paragraph 31), made in the course of an action for failure to fulfil obligations.

The Commission's arguments

95. The Commission argues that Globe has produced no evidence showing that performance of the contract by IGN would cause it damage. The Commission also contends that the damage is not irreparable since the applicant itself estimated its loss at EUR 492 000 in its application in the main proceedings, although it acknowledges that the applicant argued that such compensation would only be an imperfect remedy.

96. It adds that that is all the more true inasmuch as the applicant claims not to have lost an opportunity but the contract itself.

97. It also stated, in essence, at the hearing that although it is true that the applicant lost an opportunity to obtain references, it is accepted that tendering procedures are highly competitive and the fact of not having been awarded the contract is not in any way a negative reflection on the capacities of the disappointed tenderer.

98. Finally, the Commission contends that the applicant's argument to the effect that the contract concluded between the Commission and IGN would be largely performed before the judgment in the main proceedings was delivered is irrelevant in this case. The applicant has based its argument on case-law referring to applications for failure to fulfil obligations. That is a special category of actions which cannot give rise to proceedings for damages before the Community courts. Moreover, the facts at issue in the case which gave rise to the order in Commission v Belgium , mentioned in paragraph 93, above, are not comparable to those in the present case.

Assessment of the President of the Court

99. As regards the condition of urgency, it must be remembered that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court (orders in Case 27/68 R Renckens v Commission [1969] ECR 255; Case C399/95 R Germany v Commission [1996] ECR I2441, paragraph 46; Case C393/96 P(R) Antonissen v Council and Commission [1997] ECR I441, paragraph 36; and Commission v NALOO , paragraph 52). For the purpose of attaining that objective, urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief (orders in Case C65/99 P(R) Willeme v Commission [1999] ECR I1857, paragraph 62, Commission v NALOO , cited above, paragraph 52 and Case C156/03 P(R) Commission v Laboratoires Servier [2003] ECR I6575, paragraph 35).

100. The applicant contends that if the contested decisions are annulled and if interim relief is not granted, the contract at issue in the invitation to tender could not be awarded to it or performed by it and it would therefore be deprived of certain benefits in terms of references and access to the international market for the services concerned.

101. It should be pointed out that if the contested decisions were annulled by the Court, the Commission would be required, under the first paragraph of Article 233 EC, to take the necessary measures to comply with the judgment, without prejudice to any obligations resulting from the application of the second paragraph of Article 288 EC (order of the President of the Court of First Instance in Case T195/05 R Deloitte Business Advisory v Commission [2005] ECR II0000, paragraph 128).

102. It addition, it should be borne in mind that under Article 233 EC, it is the institution

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whose act has been declared void which is required to take the necessary measures to comply with the judgment of the Court. It follows that the court which declares the measure void has no jurisdiction to issue directions to the institution whose act has been declared void as to the manner in which it is to comply with the Court's judgment (order of the Court of Justice in Joined Cases C199/94 P and C200/94 P Pevasa and Inpesca v Commission [1995] ECR I3709, paragraph 24) and that the President of the Court of First Instance cannot pre-judge measures which might be adopted as a result of the annulment. The measures necessary in order to comply with a judgment annulling a measure depend not merely on the measure which has been annulled and the scope of the judgment, which is to be assessed on the basis of the grounds which led to it (judgments of the Court of justice in Joined Cases 97/86, 99/86, 193/86 and 215/86 Asteris and Others v Commission [1988] ECR 2181, paragraph 27, and Joined Cases C442/03 P and C471/03 P P & O European Ferries (Vizcaya) v Commission [2006] ECR I4845, paragraph 44) but also on the circumstances of each case, such as the time frame in which the annulment of the contested measure takes place or the interests of third parties.

103. In this case, if the contested decisions were annulled, it would be for the Commission, in the light of the circumstances of the case, to take the measures necessary to provide appropriate protection for the applicant's interests (see, to that effect, the orders in Capgemini Nederland v Commission , cited above at paragraph 57, paragraph 96, and Deloitte Business Advisory v Commission , cited above at paragraph 101, paragraph 130).

104. The President may not therefore pre-judge the measures that the Commission might take to comply with a judgment annulling the contested decisions.

105. None the less, the general principle of the right to full and effective judicial protection means that parties before the courts must be granted interim protection if this is necessary to ensure the full effectiveness of the subsequent definitive judgment, in order to prevent a lacuna in the legal protection afforded by the Community courts (see, to that effect, the order in Renckens v Commission , cited above at paragraph 99; the judgments of the Court of Justice in Case C213/89 Factortame and Others [1990] ECR I2433, paragraph 21, and Joined Cases C143/88 and C92/89 Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest [1991] ECR I1415, paragraphs 16 to 18; and the orders in Germany v Commission, cited above at paragraph 99, paragraph 46, and Austria v Council , cited above at paragraph 26, paragraph 111).

106. It must therefore be considered whether it has been shown with a sufficient degree of probability that the applicant is likely to suffer serious and irreparable damage if the interim relief applied for is not granted (see, to that effect, the order in Commission v NALOO , cited above at paragraph 99, paragraph 53).

107. It must first therefore be considered whether, following a judgment annulling the contested decisions, the fact that the Commission could organise a new tendering procedure would repair the damage caused to the applicant and if the answer to that question is in the negative, to assess whether the applicant could be compensated.

108. With regard to the possibility of the Commission organising a new tendering procedure, it must be pointed out that the Commission awarded the contract to IGN and it was signed in December 2005, without the applicant being informed previously that it had not been awarded the contract. The Commission ultimately informed it of that fact, after several requests, only by letter of 1 March 2006.

109. In addition, in reply to a question at the hearing, the Commission initially indicated that although it could confirm that performance of the contract commenced after it was signed by the parties and that some of the equipment provided for under the contract, such as the printers and

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toner cartridges, were to be delivered at the end of April 2006, it was unaware of the stage which performance of the contract had reached, then, without any further explanation, it indicated that the equipment provided for under the contract had already been delivered.

110. For its part, the applicant indicated, without being contradicted by the Commission, that the final date fixed by the Commission for provision of the other services under the contract, in particular, the placing in service of the software, was 15 March 2007.

111. Thus, the inevitable conclusion is that the judgment which will close the main proceedings will probably not be delivered until after the contract, or at least, a large part of the contract, has been performed.

112. It is therefore highly unlikely that, following a judgment in which the contested decisions are annulled, which would probably be delivered after performance of the contract has been completed, a new tendering procedure would be organised by the Commission. The damage suffered by the applicant could not therefore be repaired by that means.

113. It must therefore be considered whether, and how, the damage suffered by the applicant could be repaired by an action under Article 235 EC.

114. It should be pointed out the applicant contends that compensation in the form of money damages would make good the loss it has suffered only in a very imperfect way whereas suspension of the contract until the judgment in the main proceedings has been delivered would preserve the possibility of its obtaining compensation in kind, that is to say, in this case, performance of the contract and consequently, the competitive advantages it believes would flow from being awarded such a contract.

115. As the principle that the damage actually suffered must be made good in its entirety is a principle of law upheld by the Community judicature (judgment of the Court of Justice in Joined Cases C104/89 and C37/90 Mulder and Others v Council and Commission [2002] ECR I203, paragraph 227), it must be considered whether the damage which the applicant alleges it has suffered can be made good in its entirety by an equivalent means.

116. The first paragraph of article 101 of Regulation No 1605/2002 provides that [t]he contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation'. Thus, contrary to the applicant's claim, it did not lose a contract but rather an opportunity, and, in this case, a particularly favourable one, to obtain the contract which was the subject of the Community tendering procedure.

117. Although the chances of obtaining the contract were good, it is none the less very difficult, if not impossible, to quantify them and consequently to determine with sufficient accuracy the damage resulting from failure to obtain it. It is settled case-law that damage which, once it has occurred, cannot be quantified with sufficient accuracy is to be regarded as difficult to repair (see, to that effect, the order of the President of the Court of Justice in Joined Cases C51/90 R and C55/90 R Comos-Tank and Others v Commission [1990] ECR I2167, paragraph 31; and the orders of the President of the Court of First Instance in Case T41/97 R Antillian Rice Mills v Council [1997] ECR II447, paragraph 47, and in Case T65/98 R Van den Bergh Foods v Commission [1998] ECR II2641, paragraph 65; see also the order in Deloitte Business Advisory v Commission , cited above at paragraph 101, paragraph 147 and the case-law cited therein).

118. That loss of opportunity may therefore be regarded as difficult to repair in an equivalent form (see, to that effect, the order in Deloitte Business Advisory v Commission , cited above at paragraph 101, paragraph 148).

119. In addition, the applicant contends, in essence, that the loss, properly so called, resulting

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from the failure to obtain the contract at issue is in addition to the loss of the competitive advantage attached to the award of the contract and that that advantage would have permitted it to enter the international market by allowing it to refer to the contract awarded by the Commission in the context of other invitations to tender.

120. It should be pointed out that, according to the applicant, there are only five traders present worldwide on this market, something which the Commission does not contest. It also does not contest the applicant's claim that references likely to advance the position of tenderers on the market in question constitute an important factor for potential customers of such tenderers.

121. In accordance with paragraph 11.8 of the Instructions to tenderers, references are one of the factors to be taken into account in assessing whether tenders are compliant in the procedure for awarding the contract laid down by the Commission.

122. It should be pointed out that such references represent, however, only one of many criteria taken into account by the Commission in the qualitative selection of service providers (Article 137 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1); see also, to that effect, the orders of the President of the Court of First Instance in Case T169/00 R Esedra v Commission [2000] ECR II2951, paragraph 49, and in Case T148/04 R TQ3 Travel Solutions Belgium v Commission [2004] ECR II3027, paragraph 51).

123. However, in this case, having regard to the extremely limited number of traders on the world market, it cannot be excluded out of hand and without any further consideration that such references could represent a real competitive advantage, something which the Commission does not deny. Moreover, the references are being sought not with a view to obtaining contracts from the Commission - for which they represent only one of many criteria taken into account - , but to obtain contracts from other customers for whom such references could be the determining factor, something which the Commission does not contest either.

124. In this case, having regard to the special circumstances of the contract at issue, which concerns very specific software programmes for which the number of potential customers is relatively limited, and to the extremely limited number of suppliers, the alleged damage appears to be certain or, at least, established with a sufficient degree of probability (order of the President of the Court of First Instance in Case T241/00 R Le Canne v Commission [2001] ECR II37, paragraph 34) and does not appear to be hypothetical and based exclusively on the unpredictable probability of future and uncertain events (see, to that effect, the order of the President of the Court of First Instance in Joined Cases T195/01 R and T207/01 R Government of Gibraltar v Commission [2001] ECR II3915, paragraph 101 and the case-law cited therein).

125. The fact that the applicant would be able to point to a contract awarded by the Commission of the European Communities in a such a specialised market with such a limited number of suppliers, after being selected by Shell and NATO, could well represent a competitive advantage which could have been of benefit to the applicant if it had been awarded the contract.

126. It should also be noted that by failing to be selected, the applicant was placed at a competitive disadvantage in regard to IGN, which obtained the contract, and could use that fact for competitive purposes, although there are serious grounds for thinking that the contract should not have been awarded to it.

127. It would also be very difficult to quantify the value of that competitive advantage and, consequently, to determine with sufficient accuracy the damage resulting from failure to obtain it or to compensate for it fully and completely by an award of damages (see, to that effect, the order in Deloitte

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Business Advisory v Commission , cited above at paragraph 101, paragraphs 147 and 148).

128. Clearly, the applicant is therefore fully entitled to argue that damages would constitute only an imperfect remedy for the loss it has suffered.

129. The damage relied on by the applicant could thus be regarded as difficult to repair unless operation of the contested decision was suspended.

130. However, in order to justify interim relief, the damage relied on by the applicant must be serious (order in Deloitte Business Advisory v Commission , cited above at paragraph 101, paragraph 149).

131. The loss of an opportunity to be awarded, or to perform, a public contract is inherent in the exclusion from the tendering procedure at issue and cannot be regarded as constituting, in itself, serious damage independently of a concrete assessment of the specific damage alleged in each case (order in Deloitte Business Advisory v Commission , cited above at paragraph 101, paragraph 150).

132. Consequently, the applicant's loss of the opportunity to obtain and perform the contract at issue will constitute serious damage only if the applicant can prove to the requisite legal standard that it would have obtained a sufficiently significant advantage from the award and performance of the contract concluded on the basis of the invitation to tender (order in Deloitte Business Advisory v Commission , cited above at paragraph 101, paragraph 151).

133. A concrete assessment must therefore be made of the various advantages which would accrue to the applicant from the award and performance of the contract concluded on the basis of the invitation to tender.

134. When the applicant is an undertaking, the seriousness of material damage must be assessed in the light, in particular, of the size of the undertaking (see, to that effect, the order in Comos-Tank and Others v Commission , cited above at paragraph 117, paragraphs 26 and 31; and the order of the President of the Court of First Instance in Case T201/04 R Microsoft v Commission [2004] ECR II4463, paragraph 257). The President considers in this case that documents in the case do not permit him to assess the seriousness of the damage having regard to the size of the undertaking.

135. However, it is possible that the seriousness of the damage should also be assessed on the basis of other criteria, such as the seriousness of the effect on market shares or of the change in the competitive position of the undertaking (see, by analogy, the orders of the President of the Court of First Instance in Case T13/99 R Pfizer Animal Health v Council [1999] ECR II1961, paragraph 138; Case T392/02 R Solvay Pharmaceuticals v Council [2003] ECR II1825, paragraph 107; and Case T369/03 R Arizona Chemical and Others v Commission [2004] ECR II205, paragraph 76).

136. As regards, first, financial advantages flowing from performance of the contract, it is clear that failure to perform the contract would deprive the applicant of the income it would have received if the contract had been awarded to it and loss of the opportunity to obtain the income that would have accrued to it under the contract would, having regard to the amounts at stake, seem likely to cause fairly serious damage to the applicant.

137. Secondly, the possibility that the applicant would be able to point to a contract awarded by the Commission of the European Communities in such a specialised market with such a limited number of suppliers could well represent a competitive advantage which could have been of benefit to the applicant if it had been awarded the contract.

138. Even if its precise value is difficult to estimate, the loss of such a competitive advantage is, in the light of the circumstances of the case, likely to cause serious damage to a company such as the applicant which develops very specific software intended for customers who, prima facie,

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are limited in number, in a highly competitive market in which there is a limited number of suppliers. That is all the more true inasmuch as IGN, one of its direct competitors, could rely, for competitive purposes, on the fact that it had obtained the contract, even though there are good reasons for thinking that it should not have been awarded to it.

139. It must therefore be concluded, in the light of the particular circumstances of the case and the characteristics of the market on which the applicant and IGN do business, that the damage suffered by the applicant may be regarded as serious.

140. Lastly, the urgency which the applicant may consequently invoke must be taken into consideration a fortiori by the President of the Court because, as is apparent from paragraphs 54 to 84 of this order, the arguments of fact and law put forward by the applicant in the context of its first plea in law appear to be of a particularly serious nature (see, to that effect, the order in Austria v Council , cited above at paragraph 26, paragraph 110).

141. Having regard to all those factors, in order to guarantee the full effectiveness of the definitive future decision and, in particular, to preserve the possibility of obtaining compensation in kind, as the applicant has requested and which may well be the only means of making good, at least partially, the damage suffered, the application for suspension of the operation of the contested decision and of performance of the contract must be granted in so far as the balance of interests is in its favour. That is the matter which must now be considered.

3. The balance of interests

Arguments of the parties

The applicant's arguments

142. The applicant contends, essentially, that the balance of interests is in its favour inasmuch as it has been deprived of the income from a contract which should have been awarded to it and IGN cannot claim protection for interests which arise from a measure which must be regarded as unlawful. The applicant also considers that IGN should not enjoy greater protection than is accorded to it, all the more so as proper application of the rules for awarding contracts should have led the Commission to exclude IGN's tender as not fulfilling the conditions laid down in the Instructions to tenderers.

143. It also argues that relief is required by the public interest in ensuring that the procedures followed by the Community institutions in awarding public contracts comply with the principles of legality, transparency, equal treatment, legitimate expectations and sound administration.

The Commission's arguments

144. The Commission contests that line of argument and contends, in substance, that even if it committed a fault for which it is liable towards the applicant, the contract with IGN remains valid since the hopes and legitimate expectations of that company must be protected, in so far as it was entitled to rely on the apparent lawfulness of the decision awarding the contract to it.

145. The Commission also argues that the contract is particularly important for the development of gas pipeline networks in Central Asia and that suspension of performance of the contract for a lengthy period would have a negative effect in the region, in particular, on the Commission's relations with the Kazakh authorities. It considers that the public interest in the timely performance of the contract should take precedence over the applicant's purely private interests, which can be protected by the judgment in the main proceedings. It stated at the hearing that that factor also played a role in the Commission's decision not to terminate the invitation to tender in order to initiate it again later so that there would be no delay in the performance of the contract and, from a budgetary perspective, so that the credits allocated to the contract would not be lost. In

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its view, that factor should also be taken into account in assessing the applicant's interest in obtaining suspension, at this time, of the performance of the contract.

146. At the hearing, the Commission also pointed out, in essence, that it wished to avoid legal proceedings being brought against it by IGN, which could occur if the contract which it had entered into with that company was suspended.

Assessment of the President of the Court

147. Where, on an application for interim measures, the judge before whom the applicant claims that it will sustain serious and irreparable harm weighs up the various interests involved, he must consider whether the annulment of the contested decision by the court dealing with the main application would make it possible to reverse the situation that would have been brought about in the absence of interim measures and, conversely, whether suspension of the operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed (see, to that effect, the order of the President of the Court of Justice in Joined Cases C182/03 R and C 217/03 R Belgium and Forum 187 v Commission [2003] ECR I6887, paragraph 142, and the order of the President of the Court of First Instance in Pfizer Animal Health v Council , cited above at paragraph 135, paragraph 167 and the case-law cited therein).

148. Account must be taken, first of all, of the applicant's interest in suspension of the operation of the decision awarding the contract to IGN, secondly, of IGN's interest in performing the contract and thirdly of the public interest, and the Commission's interest, in the performance of the contract.

149. Firstly, the President considers that continued performance of the contract awarded to IGN would cause the applicant to sustain serious and irreparable harm (see paragraphs 104 to 140, above).

150. Secondly, there are serious grounds for believing that IGN's tender did not comply with the specifications laid down in the Instructions to tenderers and should have been rejected by the Commission. Contrary to the latter's contention at the hearing, the lawfulness of the contested decision and the lawfulness of the contract entered into on the basis of it are not separate from each other; if the contested decision is annulled by the Court in the main proceedings and performance of the contract is suspended, the annulment decision could lead the Commission to terminate its contract with IGN.

151. Accordingly, IGN, as the Commission has pointed out, would probably be entitled to sue the Commission for damages arising out of the fault it had committed, bringing their action in the Belgian courts, which, according to the Commission, have jurisdiction under a choiceofjurisdiction clause in the contract. It must therefore be concluded that IGN's interests could be protected by legal proceedings.

152. Consequently, the balance of interests cannot be in IGN's favour and to the applicant's disadvantage. There are serious grounds for believing that IGN's tender did not comply with the specifications laid down in the invitation to tender, whereas the Commission does not deny that the applicant's tender did comply with those specifications. Under those circumstances, IGN's interest in carrying on with the contract cannot take precedence over the applicant's interest in being awarded that contract, which would be possible, at least in part, if the contract was suspended until judgment has been delivered in the main proceedings.

153. Thirdly, the Commission has not substantiated its claim that further performance of the contract cannot be delayed if good relations are to be maintained with the Kazakh authorities as the Commission has submitted no evidence on that subject to the President.

154. Moreover, the arguments put forward by the Commission at the hearing seem to indicate that it was aware that the award of the contract to IGN could, or would, cause difficulties but that,

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for budgetary reasons, it preferred not to act on that possibility but to take the risk of being sued subsequently by tenderers whose bids had been improperly rejected.

155. Even supposing that budgetary considerations could justify such a course of action, the Commission has not shown that such considerations which, by its own account, lead it to conclude the contract with IGN before 31 December 2005 so as not to lose the credits available to it for that purpose, are such as to make it impossible to suspend performance of the contract at this point in time.

156. The Commission also cannot rely on its interest in the continued performance of the contract in order to avoid legal action by IGN in support of a claim that the President should refuse to accord judicial protection to the applicant.

157. Accordingly, in the particular circumstances of the present case, the grant of interim measures is justified and adequately meets the need to guarantee effective provisional legal protection to the applicant.

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SUB	Public contracts of the European Communities
AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions

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NATIONA	Belgium
NOTES	Meisse, Eric: Sursis à exécution d'une décision de la Commission, Europe 2006 Octobre no 268 p.11-12
PROCEDU	Action for annulment;Action for damages;Application for interim measures - successful
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Order of the President of the Court of First Instance of 20 July 2006 - GLOBE v Commission of the European Communities

(Case T-114/06 R)

(Public procurement - Community tendering procedure - Procedure for interim relief - Prima facie case - Urgency)

Language of the case: French

Parties

Applicant: GLOBE NV (Zandhoven, Belgium) (represented by: A. Abate, lawyer)

Defendant: Commission of the European Communities (represented by: M. Wilderspin and G. Boudot, agents)

Re:

Suspension of the operation of the Commission's decision to reject the applicant's tender in connection with the tendering procedure for supplies to various countries in Central Asia (EuropeAid/122078/C/S/Multi).

Operative part of the order

1. *The operation of the Commission's decision to award the tender to IGN France international in connection with the tendering procedure for supplies to various countries in Central Asia (EuropeAid/122078/C/S/Multi) and the performance of the contract concluded by the Commission with IGN France international are suspended until the Court of First Instance has ruled on the application in the main proceedings.*

2. Costs are reserved.

———————

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Action brought on 14 April 2006 - GLOBE v Commission

(Case T-114/06)

Language of the case: French

Parties

Applicant: GLOBE NV (Zandhoven, Belgium) (represented by: A. Abate, lawyer)

Defendant: Commission of the European Communities

Form of order sought

Annul the European Commission decision contained in the letter of 2 March 2006 from the Procurement Co-ordinator, Directorate D/3 of the EuropeAid Co-operation Office, concerning the project EuropeAid/122078/C/S/Multi, entitled 'Supply of a Pipeline Network Information System to the Central Asia Gas companies (Kazakhstan, Kyrgystan, Turkmenistan, Uzbekistan)';

Determine the Commission's non-contractual liability with regard to the adoption of the decision referred to above;

Order the Commission to pay compensation for the loss caused to the applicant assessed at EUR 492 024.00 plus interest for late payment from the date of the judgment's publication;

Order the Commission to pay the costs.

Pleas in law and main arguments

The applicant took part in the tendering procedure in respect of the project EuropeAid/122078/C/S/Multi, entitled 'Innovation to tender for Supply of a Pipeline Network Information System to the Central Asia Gas companies (Kazakhstan, Kyrgystan, Turkmenistan, Uzbekistan)', which is part of the TACIS Programme 2002[1]. By letter of 2 March 2006, the Commission notified the applicant that its tender had been unsuccessful because it was not the lowest and that the contract had been awarded to a competing undertaking. In this action, the applicant seeks annulment of the decision contained in that letter and compensation for the loss which it claims to have sustained as a result of the adoption of the contested decision.

The applicant relies on a number of pleas to dispute that decision.

First of all, it submits that in adopting the contested decision the Commission made major errors of assessment and that it contravened the Instructions to tenderers, rendering null and void the award of the contract to the successful tenderer. Under that plea, the applicant contends that the proposal accepted by the Commission does not comply with the technical specifications in the contract documents. It also criticises the Commission for extending the period for the submission of tenders and for having asked the applicant's competitor to change its tender in the light of the Corrigendum to the tender dossier, after the opening of tenders, which allowed the ultimately successful tenderer to amend its tender so as to make it the best o

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ORDER OF THE PRESIDENT OF THE FIFTH CHAMBER
OF THE COURT OF FIRST INSTANCE

6 June 2006(*)

(Removal from the Register)

In Case T-9/06,

Equant Belgium SA, established in Brussels (Belgium), represented by T. Müller-Ibold and T. Graf, lawyers,

applicant,

v

Commission of the European Communities, represented by M. Šimerdová and E. Manhaeve, acting as agents, assisted by J. Stuyck, lawyer,

defendant,

APPLICATION for annulment of decisions of the Commission of 6 and 27 December 2005 rejecting the tender submitted by the applicant in the framework of the restricted invitation to tender procedure aimed at concluding a framework contract for the delivery, exploitation and maintenance of a secured Trans European communication infrastructure included in the contract 'Secured Trans European Services for Telematics between administrations (s-TESTA)' (lot 1) (2004/S 137-116821) as well as the decision to award the contract to another tenderer,

THE PRESIDENT OF THE FIFTH CHAMBER
OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By letter lodged at the Court Registry on 24 April 2006, the applicant informed the Court of First Instance, in accordance with Article 99 of the Rules of Procedure of the Court of First Instance, that it wishes to discontinue the proceedings and that the parties have come to an agreement in relation to costs, according to which the defendant is to pay the applicant's costs.

2 By letter lodged at the Court Registry on 8 May 2006, the defendant indicated to the Court of First Instance that it has no objection to the request to discontinue the proceedings. As to the matter of costs, the defendant confirmed its acceptance of the fact that the withdrawal of the application for annulment is justified by its conduct and, thus, that the costs of the proceedings will be adjudicated in accordance with the last sentence of the first subparagraph of Article 87(5) of the Rules of Procedure.

3 By order of 2 June 2006, the President of the Court of First Instance ordered the removal of the interim measures proceedings from the register and reserved the decision as to costs for the decision in the main action.

4 Article 87(5), second subparagraph, of the Rules of Procedure provides that where discontinuance has been applied for and the parties have come to an agreement on costs, the decision as to costs shall be in accordance with that agreement.

On those grounds,

THE PRESIDENT OF THE FIFTH CHAMBER

hereby orders:

1. Case T-9/06 is removed from the register of the Court of First Instance.

2. The defendant shall bear its own costs and the costs incurred by the applicant, including those incurred in relation to the request for interim measures.

Luxembourg, 6 June 2006.

E. Coulon — M. Vilaras

Registrar — President

* Language of the case: English.

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Action brought on 17 January 2006 - Equant Belgium v Commission

(Case T-9/06)

Language of the case: English

Parties

Applicant: Equant Belgium SA (Brussels, Belgium) [represented by: T. Müller-Ibold, T. Graf, lawyers]

Defendant: Commission of the European Communities

Form of order sought

Annul

(i) the decision of the European Commission dated December 6, 2005 to suspend the signing of the contract identified in the Commission's earlier decision of November 3, 2005 relating to the award of the contract pursuant to the following procurement procedure: "Restricted invitation to tender No ENTR/04/011 - Lot 1 Secured Trans European Services for Telematics between administrations (s-TESTA)";

(ii) the decision of the European Commission dated December 27, 2005 to reject the Offer submitted by Equant/HP in the framework of the Restricted invitation to tender No ENTR/04/011 - Lot 1 "Secured Trans European Services for Telematics between administrations (s-TESTA)" and to tacitly withdraw its decision in favour of Equant/HP dated November 3, 2005; and

(iii) the decision of the European Commission communicated to the Applicant by the same letter of December 27, 2005 to select another tenderer for the award of the contract in the framework of the Restricted invitation to tender No. ENTR/04/011 - Lot 1 "Secured Trans European Services for Telematics between administrations (s-TESTA)";

grant any other relief that the Court considers appropriate in the circumstances; and, in any event;

order the Commission to pay Equant's legal costs and other fees and expenses incurred in connection with this application.

Pleas in law and main arguments

The applicant, in conjunction with another company, submitted an offer to the Commission in the context of a procurement procedure relevant to the Commission's contract notice No. 2004/S 137-116821 "Lot 1 - Secured Trans European Services for Telematics between administrations (s-TESTA)". By letter dated 3 November 2005 the Commission informed the applicant that its joint offer had been selected for the award of the contract. However, by letter dated 6 December 2005 the Commission informed the applicant that it had decided to suspend the signing of the contract, awaiting further examination of the offers. By a further letter, dated 27 December 2005, the Commission informed the applicant that it had decided to reject the applicant's joint offer on the grounds that it did not conform to the tendering specifications and to award the contract to another tenderer.

In support of its application to annul the above decisions, the applicant first of all disputes in detail the Commission's findings that certain components of its offer, more particularly its waiver of one-off installation charges for an initial two-year period, the inclusion of a five-year discount period in preparing prices and its volume discount on the monthly charges for turnkey access points, were contrary to the specifications. The applicant's position is that in identifying an alleged incompatibility the Commission committed a manifest error of assessment and that the contested decisions are unlawful.

The applicant further submits that the Commission breached the principle of transparency by relying on an

unsupported interpretation of its tendering specifications and that it breached Regulation 2342/2002 as well as the principles of equality, proportionality and good administration by failing to ask for clarifications or apply less restrictive remedies. The applicant finally alleges that the Commission also violated the principle of legitimate expectations as well as the rights of defence and the duty to state reasons for its decisions.

_____

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ARRÊT DE LA COUR (troisième chambre)

18 juillet 2007 (*)

«Manquement d'État – Directive 93/38/CEE – Marchés publics dans les secteurs de l'eau, de l'énergie, du transport et des télécommunications – Construction et mise en service d'une centrale thermoélectrique – Conditions d'admission à concourir»

Dans l'affaire C-399/05,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 15 novembre 2005,

Commission des Communautés européennes, représentée par M^me^ M. Patakia et M. X. Lewis, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République hellénique, représentée par M^me^ D. Tsagkaraki, et M. V. Christianos, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (troisième chambre),

composée de M. A. Rosas, président de chambre, MM. J. N. Cunha Rodrigues (rapporteur), U. Lõhmus, A. Ó Caoimh et M^me^ P. Lindh, juges,

avocat général: M^me^ E. Sharpston,

greffier: M^me^ L. Hewlett, administrateur principal,

vu la procédure écrite et à la suite de l'audience du 25 avril 2007,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, en raison de la sélection par Dimosia Epicheirisi Ilektrismou AE (Compagnie publique d'électricité, ci-après «DEI»), lors de la phase finale de la procédure d'appel d'offres pour la construction et la mise en service d'une centrale thermoélectrique à Lavrio, de deux entreprises qui ne satisfaisaient pas aux conditions spécifiées dans l'avis de marché et les cahiers des charges, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 4, paragraphe 2, de la directive 93/38/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO L 199, p. 84), ainsi qu'aux principes de transparence et d'égalité de traitement.

Le cadre juridique

2 L'article 2 de la directive 93/38, telle que modifiée par la directive 2001/78/CE de la Commission, du 13 septembre 2001 (JO L 285, p. 1, ci-après la «directive»), prévoit:

«1. La présente directive s'applique aux entités adjudicatrices:

a) qui sont des pouvoirs publics ou des entreprises publiques et qui exercent une des activités visées au paragraphe 2;

[…]

2. Les activités relevant du champ d'application de la présente directive sont les suivantes:

a) la mise à disposition ou l'exploitation de réseaux fixes destinés à fournir un service au public dans le domaine de la production, du transport ou de la distribution:

[…]

ii) d'électricité

[…]

6. Les entités adjudicatrices énumérées aux annexes I à X répondent aux critères énoncés ci-dessus. […]»

3 Aux termes de l'article 4 de cette directive:

«[…]

2. Les entités adjudicatrices veillent à ce qu'il n'y ait pas de discrimination entre fournisseurs, entrepreneurs ou prestataires de services.

[…]»

4 L'article 14 de la même directive prévoit:

«1. La présente directive s'applique:

[…]

b) aux marchés passés par des entités adjudicatrices qui exercent des activités auxquelles se réfèrent les annexes I, II, VII, VIII et IX, lorsque la valeur estimée hors TVA de ces marchés égale ou dépasse:

[…]

iii) l'équivalent en écus de 5 000 000 DTS en ce qui concerne les marchés de travaux;

[…]»

5 L'annexe II de la directive vise la production, le transport ou la distribution d'électricité et mentionne DEI en tant qu'entité adjudicatrice.

Les antécédents et la procédure précontentieuse

6 Le 3 février 2003, DEI a lancé un appel d'offres pour la construction et la mise en service, à Lavrio, d'une centrale thermoélectrique d'une puissance nette de 360 à 400 MW utilisant comme combustible le gaz naturel.

7 Ce projet avait pour objet la conception, l'étude, l'industrialisation, la construction et la mise à l'essai de la centrale (composée d'une turbine à gaz et de ses appareils auxiliaires, d'une chaudière de récupération de chaleur, d'une turbine à vapeur et de ses appareils auxiliaires ainsi que de l'indispensable générateur) dans les usines de construction, le transport et l'entreposage des équipements sur le site du projet, le montage, l'installation et les essais de la centrale sur place, la mise en service de l'équipement et la fourniture de pièces de rechange (en dehors de la turbine à gaz qui devait faire l'objet d'un contrat de maintenance à long terme). Le budget du projet soumis à adjudication était de 190 000 000 euros.

8 L'article 2, paragraphe 4, de l'invitation à soumissionner imposait notamment la condition suivante aux soumissionnaires:

«L'offre portant sur le contrat de maintenance à long terme doit provenir exclusivement du constructeur de

la turbine à gaz, ce dernier pouvant, en sa qualité de constructeur, soit participer au groupement ou au consortium qui soumet l'offre relative au projet, soit être le constructeur désigné dans la même offre.»

9 L'article 3, paragraphe 1, point 1, de l'invitation à soumissionner prévoyait:

«Le candidat doit posséder une expérience dans la conception et la gestion de l'exécution de projets (project management), selon la méthode 'clé en main', de centrales thermiques de production électrique».

10 L'article 3, paragraphe 2, in fine, de l'invitation à soumissionner disposait:

«Toute offre qui ne satisfait pas pleinement à tous les critères précités établis aux paragraphes 1 et 2 sera rejetée.»

11 L'invitation à soumissionner était accompagnée d'un cahier intitulé «Lignes directrices pour le contrat de maintenance à long terme (contrat de maintenance) pour la turbine à gaz et ses annexes» (ci-après les «lignes directrices pour le contrat de maintenance à long terme»), lequel prévoyait notamment:

«Bidder must include in his Offer a proposal coming from the Gas Turbine Manufacturer, for a long term maintenance agreement of the Gas Turbine and the relevant auxiliary equipment (as specific in the List Material and Prices) for twelve years of operation. […]

The Gas Turbine Manufacturer (or his Authorized Agent) shall be here after called 'Maintenance Contractor'.

1. General Terms

1.1. The Maintenance Contract shall be signed by [DEI] and the GT's manufacturer or his Authorized Agent within six months as from the date of signing of the Contract.

[…]»

[«Le soumissionnaire doit inclure dans son offre une proposition provenant du constructeur de la turbine à gaz pour un contrat de maintenance à long terme de la turbine à gaz et du matériel annexe pertinent (tel que spécifié dans la liste matériels et prix) d'une durée d'opération de douze ans. […]

Le constructeur de la turbine à gaz (ou son agent autorisé) est dénommé ci-après le 'contractant de maintenance'.

1. Conditions générales

1.1. Le contrat de maintenance sera signé par [DEI] et le constructeur de la turbine à gaz ou son agent autorisé dans un délai de six mois à compter de la date de signature du contrat.

[…]»]

12 Quatre candidats ont participé à la procédure: la société METKA, le consortium AEGEK-AKTOR, la société ALSTOM et la société VA TECH HYDRO. Lors de la phase finale de l'appel d'offres, à savoir à l'ouverture des offres financières, seuls restaient en lice METKA et le consortium AEGEK-AKTOR. Le projet a finalement été attribué à METKA.

13 À la suite d'une plainte émanant d'une entreprise qui, après avoir envisagé de participer à cet appel d'offres, a finalement renoncé à le faire, la Commission a, le 9 juillet 2004, adressé une lettre de mise en demeure concernant ledit appel d'offres à la République hellénique, qui a répondu à cette dernière par lettre du 17 septembre 2004.

14 N'ayant pas été convaincue par cette réponse, la Commission a adressé, le 22 décembre 2004, un avis motivé à cet État membre, dans lequel elle faisait valoir que, par l'admission de deux entreprises qui ne satisfaisaient pas aux conditions spécifiées dans l'invitation à soumissionner, ledit État membre avait manqué à ses obligations découlant de l'article 4, paragraphe 2, de la directive ainsi que des principes d'égalité de traitement et de transparence. La Commission invitait la République hellénique à se conformer à cet avis motivé dans un délai de deux mois à compter de sa réception.

15 La République hellénique ne s'étant pas conformée à cet avis motivé, la Commission a introduit le présent recours.

Sur le recours

Sur le premier grief

Argumentation des parties

16 Le consortium AEGEK-AKTOR est composé des sociétés AEGEK et AKTOR. La Commission soutient qu'AKTOR, n'ayant jamais participé à la construction d'une centrale thermoélectrique, ne possédait pas l'expérience en matière de conception et de gestion de l'exécution de marchés relatifs à des centrales thermoélectriques selon la méthode «clé en main» exigée par l'invitation à soumissionner.

17 Le gouvernement hellénique ne conteste pas cette allégation.

18 Quant à la question de savoir si AEGEK possédait l'expérience stipulée dans l'invitation à soumissionner, la Commission fait valoir que, pour être considéré comme remplissant effectivement cette condition, un candidat au marché devait posséder l'expérience requise, soit en ayant lui-même construit une centrale thermoélectrique «clé en main», soit en ayant participé, en tant que membre d'un consortium, à l'exécution d'un marché en vue de la construction d'une telle centrale, à condition d'avoir été responsable de la conception et de la gestion du projet, à savoir de la coordination de tous les autres membres du consortium. La circonstance qu'AEGEK a participé à un projet similaire en tant que simple membre d'un consortium ne suffirait pas à conférer à celle-ci l'expérience nécessaire.

19 La Commission soumet à la Cour un extrait du contrat de consortium conclu en vue de l'exécution du marché relatif à la centrale électrique de Komotini, lequel définirait les compétences respectives des différents membres du consortium concerné. Ce contrat aurait été conclu entre trois entreprises: ABB Power Generation Ltd (ci-après «ABB»), Ansaldo Energia SpA et AEGEK. Il désignerait ABB en tant que dirigeant du consortium («consortium leader» en anglais, langue dans laquelle ledit contrat a été rédigé), chargé de gérer les affaires de ce dernier, y compris la coordination technique, commerciale et organisationnelle de l'exécution du contrat.

20 Le gouvernement hellénique rétorque qu'aucune des conditions imposées par l'invitation à soumissionner, telle qu'elle est formulée, ne permet d'inférer l'existence d'une exigence selon laquelle le membre du consortium concerné devrait être le chef de projet, c'est-à-dire le responsable de toute la coordination des autres membres ainsi que de la conception et de l'application du calendrier d'exécution. La Commission imposerait ainsi une condition qui ne figure pas dans l'invitation à soumissionner. Ce gouvernement affirme que l'examen des justificatifs de l'expérience d'AEGEK révèle que cette société a participé à deux autres projets de grande envergure de DEI, comportant des exigences importantes quant à l'administration et à la gestion de marchés. Des représentants de cette société auraient participé sur un pied d'égalité avec les autres participants à l'équipe d'administration qui coordonnait les opérations techniques des membres dudit consortium, préparait et suivait le calendrier d'exécution, et décidait des rectifications nécessaires qu'il convenait d'y apporter. Le gouvernement hellénique en déduit que l'offre d'AEGEK était pleinement étayée du point de vue du critère de l'expérience.

21 Par ailleurs, ledit gouvernement fait valoir que le contrat de consortium relatif à la centrale de Komotini doit être considéré comme confidentiel et que la Commission n'est pas recevable à en faire état dans la présente procédure.

Appréciation de la Cour

22 Il convient de rappeler qu'il n'est pas nécessaire qu'un critère de sélection, tel que, en l'espèce, celui relatif à l'expérience, soit rempli par chacun des membres d'un consortium soumissionnaire et qu'il suffit que l'un des membres du consortium y satisfasse (voir, en ce sens, arrêt du 14 avril 1994, Ballast Nedam Groep, C-389/92, Rec. p. I-1289, point 13, repris, postérieurement à la date des faits en cause dans le présent litige, à l'article 54, paragraphe 6, de la directive 2004/17/CE du Parlement européen et du Conseil, du 31 mars 2004, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des services postaux (JO L 134, p. 1).

23 Puisqu'il est constant qu'AKTOR ne satisfaisait pas à ce critère, le présent grief revient à poser la question de savoir s'il était possible de considérer qu'AEGEK y satisfaisait.

24 L'article 3, paragraphe 1, point 1, de l'invitation à soumissionner n'admet pas une simple participation à l'exécution des projets du type visé, mais précise que l'expérience acquise doit porter sur la conception et la gestion de l'exécution de tels projets. Il était donc exigé des candidats qu'ils aient planifié et géré les activités des entreprises participant à l'exécution de projets de ce type.

25 Cette interprétation est confirmée par l'ajout de la précision «project management», en langue anglaise. Il ressort de cet ajout que l'expérience demandée est bien celle acquise dans la gestion de projets en tant que telle.

26 En revanche, l'article 3, paragraphe 1, point 1, de l'invitation à soumissionner ne stipulait pas qu'une telle expérience devait nécessairement avoir été acquise en tant que chef de projet.

27 Conformément à ce texte, il était loisible à l'entité adjudicatrice de prendre en compte l'expérience acquise

dans la gestion de projets relatifs à la construction de centrales thermoélectriques selon la méthode «clé en main», que cette expérience ait été acquise ou non en tant que chef de projet.

28 Il convient de reconnaître à l'entité adjudicatrice un certain pouvoir d'appréciation dans l'évaluation des qualifications des soumissionnaires. En l'espèce, la question de savoir quelle est l'expérience que chaque type d'opération a pu procurer à chacun des soumissionnaires ne saurait faire l'objet d'une analyse générique, mais doit être vérifiée eu égard aux caractéristiques de chaque cas particulier.

29 Il ressort du dossier que l'expérience dont se prévalait AEGEK était la suivante: elle aurait participé à la construction, pour DEI, de centrales électriques à Agios Dimitrios et à Komotini, sa participation dans la construction de la dernière de ces centrales se serait élevée à 22 %, ou à 23,61 % abstraction faite des pièces de rechange fournies. En outre, des représentants d'AEGEK auraient fait partie, sur un pied d'égalité, de l'équipe gestionnaire du projet de Komotini qui coordonnait les tâches techniques des différents membres du consortium, préparait le calendrier de mise en œuvre, en assurait le suivi et décidait des corrections nécessaires qui devaient y être apportées.

30 La proportion dans laquelle une entreprise a participé à un ouvrage n'indique pas en soi l'existence d'un rôle de gestionnaire du projet.

31 En revanche, la circonstance, si elle est avérée, que des responsables d'une entreprise membre d'un consortium aient participé aux activités de planification et de gestion de l'exécution du marché serait pertinente pour établir que l'entreprise à laquelle ils appartiennent a pu de ce fait acquérir une expérience telle que celle requise par l'invitation à soumissionner en cause.

32 Il convient d'examiner si, en l'espèce, une telle circonstance est établie par les éléments de preuve fournis.

33 L'argument avancé par le gouvernement hellénique et tiré de l'irrecevabilité, dans le cadre de la présente procédure, de l'extrait du contrat de consortium relatif à la centrale de Komotini qui a été produit par la Commission ne saurait être retenu. Le gouvernement hellénique n'ayant pas précisé en quoi ce contrat aurait un caractère de confidentialité, aucune considération juridique n'impose à la Cour de l'écarter. Elle peut donc le prendre en compte aux fins de la présente procédure.

34 Selon ledit contrat, le dirigeant du consortium, à savoir ABB, était chargé de la coordination technique, commerciale et organisationnelle du projet, en particulier de la coordination des activités techniques exercées par les membres du consortium, de la coordination des activités de ces derniers portant sur la construction, la mise en service et la livraison du projet, la coordination générale de la formation du personnel du client, la publication d'instructions et de procédures adéquates, la préparation et la coordination du calendrier global ainsi que le suivi du calendrier, le cas échéant, de toutes les mesures correctrices nécessaires.

35 ABB, en tant que dirigeant du consortium, était chargée notamment de la coordination de l'exécution du marché relatif à la centrale thermoélectrique de Komotini. Les tâches de coordination de l'exécution du marché, attribuées par le contrat à ABB, n'excluaient toutefois pas que les représentants d'AEGEK participent aux réunions de coordination du projet. Il s'ensuit que l'extrait de contrat produit par la Commission ne contredit pas les indications figurant dans le dossier et selon lesquelles des représentants d'AEGEK avaient fait partie, sur un pied d'égalité, de l'équipe gestionnaire du projet de Komotini qui coordonnait les tâches techniques des différents membres du consortium, préparait le calendrier de mise en œuvre, en assurait le suivi et décidait des corrections nécessaires qui devaient y être apportées. Or, cette participation active dans la conception et la gestion de l'exécution de ce projet pouvait être considérée par le pouvoir adjudicateur comme une expérience pertinente au sens de l'invitation à soumissionner.

36 En tout état de cause, la Commission n'a pas apporté la preuve de ce que l'entité adjudicatrice, dans l'exercice du pouvoir d'appréciation qu'il convient de lui reconnaître, ait, en l'espèce, commis une erreur dans l'évaluation des éléments relatifs à l'expérience invoqués par AEGEK.

37 La Commission n'ayant pas apporté d'éléments de preuve suffisants à l'appui de son premier grief, il convient de rejeter celui-ci comme non fondé.

Sur le second grief

Argumentation des parties

38 La Commission fait valoir que l'offre de METKA, prévoyant l'installation d'une turbine fabriquée par l'entreprise General Electric, ne comportait pas d'offre relative au contrat de maintenance à long terme provenant directement de cette entreprise. La Commission estime que, dans la mesure où General Electric n'a pas soumis elle-même d'offre de maintenance à long terme, l'offre de METKA aurait dû être rejetée comme non conforme à l'une des conditions obligatoires figurant dans l'invitation à soumissionner.

39 Le gouvernement hellénique souligne que l'article 2, paragraphe 4, de l'invitation à soumissionner exige

seulement que l'offre portant sur le contrat de maintenance à long terme «provienne» du constructeur de la turbine, et permet que cette offre soit présentée par une autre entreprise habilitée à cet effet, en l'espèce METKA. L'article 2, paragraphe 4, de l'invitation à soumissionner aurait été respecté. En effet, l'offre de maintenance proviendrait du constructeur désigné dans l'offre relative au projet, cette conclusion n'étant pas susceptible d'être modifiée par la circonstance que l'offre a été présentée par METKA. En effet, l'offre de METKA qui contenait également l'offre relative à la maintenance de la turbine à gaz aurait été soumise à DEI accompagnée d'une lettre d'habilitation de General Electric International Inc., datée du 11 juillet 2003 et rédigée dans les termes suivants:

«Dear Sirs,

With reference to METKA SA participation to the above mentioned tender, we wish to confirm that

a. We in conjunction with GE Energy Parts Inc., have made an offer to METKA to provide parts and services for the maintenance of the General Electric GT and its auxiliaries which are provided by METKA for the Project, and

b. In case METKA is awarded by [DEI] as Contractor for the execution of the said Project, METKA SA is authorized to accept and utilize our offer to sign and execute a Long Term Agreement (Maintenance Agreement) for the GT and its auxiliaries, according to the requirements of the article 2 […] 'Invitation' and […] 'Guide Lines for the Long term Maintenance Agreement (Maintenance Agreement) for the GT and its auxiliaries'.»

[«Messieurs,

Nous référant à la participation de METKA à l'offre mentionnée ci-dessus, nous souhaitons confirmer que:

a. conjointement avec GE Energy Parts Inc., nous avons fait une offre à METKA concernant la fourniture de pièces et de services pour la maintenance de la turbine à gaz General Electric et de ses annexes, qui sont fournis par METKA pour le projet et

b. si METKA est admise par [DEI] comme partie contractante pour l'exécution du projet susmentionné, METKA SA est autorisée à accepter et à utiliser notre offre pour signer et exécuter un contrat à long terme (contrat de maintenance) pour la turbine à gaz et ses annexes, conformément aux prescriptions de l'article 2 […] 'Invitation' et […] 'Lignes directrices pour le contrat de maintenance à long terme (contrat de maintenance) de la turbine à gaz et ses annexes'.»]

Appréciation de la Cour

40 Il apparaît que l'objet de l'article 2, paragraphe 4, de l'invitation à soumissionner consiste à garantir la maintenance de la turbine à gaz par son constructeur postérieurement à l'achèvement de la construction de la centrale, que ce constructeur soit ou non membre du consortium qui a introduit l'offre retenue.

41 Conformément à cet objet, ladite disposition vise à obtenir du constructeur de la turbine à gaz qu'il s'engage à assurer la maintenance de celle-ci durant la période postérieure à l'achèvement de la construction de la centrale.

42 Dans ce contexte, le mot «exclusivement» qui figure dans la disposition en question doit être compris comme indiquant que la responsabilité de la maintenance de la turbine doit reposer sur le seul constructeur et non pas sur des tiers. En revanche, ce mot ne doit pas être interprété comme imposant que la garantie provienne «directement» du constructeur de la turbine. Au vu de l'objet de cette disposition telle qu'elle vient d'être dégagée dans les points précédents du présent arrêt, il est indifférent que l'offre de maintenance provienne directement du constructeur ou qu'elle soit présentée par l'intermédiaire du consortium qui a introduit l'offre relative au projet.

43 Cette interprétation est confirmée par les termes des lignes directrices pour le contrat de maintenance à long terme qui accompagnaient, en l'espèce, l'invitation à soumissionner. Il ressort de ce document que le contrat de maintenance pouvait être signé par l'agent autorisé du constructeur de la turbine à gaz. Il s'ensuit que, a fortiori, l'offre de maintenance dudit constructeur pouvait être présentée par un soumissionnaire agissant en tant qu'agent autorisé de ce dernier.

44 Il en découle que, en l'espèce, il était loisible à l'entité adjudicatrice d'accepter qu'une offre de maintenance émanant du constructeur d'une turbine soit déposée par l'intermédiaire du consortium qui avait désigné ce constructeur dans son offre.

45 En ce qui concerne la lettre de General Electric International Inc. du 11 juillet 2003 transmise par METKA, celle-ci comporte notamment l'affirmation selon laquelle METKA est autorisée à accepter et à utiliser l'offre conjointe de General Electric International Inc. et de GE Energy Parts Inc. pour signer et exécuter un contrat de maintenance à long terme conformément aux prescriptions de l'article 2 de l'invitation à

soumissionner et des lignes directrices pour le contrat de maintenance à long terme. Cet engagement paraît suffisamment clair pour permettre à l'entité adjudicatrice, dans l'exercice du pouvoir d'appréciation qu'il convient de lui reconnaître, de considérer les documents soumis par METKA comme constituant une offre de maintenance conforme à l'article 2, paragraphe 4, de l'invitation à soumissionner.

46 Par conséquent, il convient de rejeter le second grief comme non fondé.

Sur les principes de transparence et d'égalité de traitement

Argumentation des parties

47 Le gouvernement hellénique rappelle qu'il ressort d'une jurisprudence constante de la Cour que, lorsque des dispositions générales ou des principes généraux, tels que les principes d'égalité de traitement et de transparence, sont mis en œuvre par la voie de dispositions particulières du droit communautaire (telles que, en l'espèce, l'article 4, paragraphe 2, de la directive 93/38), toute réglementation nationale qui est incompatible avec ces dispositions générales ou principes généraux est également incompatible avec ces dispositions particulières. Il en résulterait que ces dispositions générales ou principes généraux ne peuvent s'appliquer de façon autonome que dans des situations pour lesquelles le droit communautaire ne prévoit pas d'interdiction spécifique.

48 Dès lors, le recours de la Commission visant à faire constater, outre la violation de la directive, celle des principes généraux d'égalité de traitement et de transparence devrait être rejeté comme non fondé en tant qu'il concerne ces deux principes.

49 La Commission rétorque que les principes d'égalité de traitement des candidats et de transparence sont consacrés par la jurisprudence constante de la Cour en tant que principes fondamentaux applicables au domaine des marchés publics, de manière autonome et en dépit de l'existence d'un article spécifique sur l'égalité de traitement dans les directives sur les marchés publics.

Appréciation de la Cour

50 S'agissant du principe de transparence, il convient de constater que la Commission n'indique pas en quoi les faits reprochés à la République hellénique dans le cadre du présent recours peuvent constituer une violation de ce principe. En effet, la prise en considération d'une offre non conforme à l'invitation à soumissionner est un acte qui peut être considéré sous l'angle de l'égalité de traitement des soumissionnaires, mais qui en soi n'est pas de nature à contrevenir au principe de transparence. À cet égard, la présente affaire doit être distinguée de celle qui est à l'origine de l'arrêt du 25 avril 1996, Commission/Belgique (C-87/94, Rec. p. I-2043, notamment points 54 à 60 et 74), dans la mesure où l'atteinte aux principes de transparence constatée résultait en substance de la prise en compte par le pouvoir adjudicateur d'une modification apportée aux offres initiales de l'un des soumissionnaires. Dans la présente affaire, en revanche, est en cause une condition formelle d'admission d'une offre qui n'est pas susceptible d'altérer la transparence de la procédure de passation du marché.

51 En ce qui concerne le principe d'égalité de traitement, il ressort des points 22 à 37 et 40 à 46 du présent arrêt que les deux griefs reprochés à la République hellénique n'ont pas été établis par la Commission, que ce soit en tant qu'ils sont tirés de la violation de l'article 4, paragraphe 2, de la directive ou de celle du principe général d'égalité de traitement. En tout état de cause, à supposer même que la Cour ait constaté une violation de l'article 4, paragraphe 2, de la directive, il n'y aurait pas lieu de se référer au principe général d'égalité dont cette disposition constitue une expression spécifique (voir, dans ce sens, arrêt du 31 janvier 1991, Commission/France, C-244/89, Rec. p. I-163, point 34).

52 Au vu des considérations qui précèdent, il y a lieu de rejeter le recours de la Commission.

Sur les dépens

53 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu dans ce sens. La République hellénique ayant conclu à la condamnation de la Commission et cette dernière ayant succombé en ses moyens, il convient de la condamner aux dépens.

Par ces motifs, la Cour (troisième chambre) déclare et arrête:

1) Le recours est rejeté.

2) La Commission des Communautés européennes est condamnée aux dépens.

Signatures

* Langue de procédure: le grec.

Judgment of the Court (Third Chamber) of 18 July 2007

Commission of the European Communities v Hellenic Republic. Failure of a Member State to fulfil obligations - Directive 93/38/EC - Procurement in the water, energy, transport and telecommunications sectors - Construction and bringing into operation of a thermal power station - Conditions of admission to the tendering procedure. Case C-399/05.

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Judgment of the Court (Third Chamber) of 18 July 2007 - Commission of the European Communities v Hellenic Republic

(Case C-399/05) [1]

(Failure of a Member State to fulfil obligations - Directive 93/38/EC - Procurement in the water, energy, transport and telecommunications sectors - Construction and bringing into operation of a thermal power station - Conditions of admission to the tendering procedure)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and X. Lewis, acting as Agents)

Defendant: Hellenic Republic (represented by: D. Tsagkaraki and V. Christianos, Agents)

Re:

Failure of a Member State to fulfil obligations - Infringement of Article 4(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) - Admission of the tenders of two companies not meeting the conditions of the notice to tender or of the specification - Construction and bringing into operation of a thermal power station at Lavrio

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders the Commission of the European Communities to pay the costs.*

_____

[1] - OJ C 28.1.2006.

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Documents relatifs à la même affaire

Arrêt de la Cour (troisième chambre) du 18 juillet 2007 – Commission / Grèce(affaire C–399/05)

«Manquement d'État – Directive 93/38/CEE – Marchés publics dans les secteurs de l'eau, de l'énergie, du transport et des télécommunications – Construction et mise en service d'une centrale thermoélectrique – Conditions d'admission à concourir»

1. *Rapprochement des législations - Procédures de passation des marchés publics dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications - Directive 93/38 (Directive du Conseil 93/38) (cf. point 22)*

2. *Rapprochement des législations - Procédures de passation des marchés publics dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications - Directive 93/38 (Directive du Conseil 93/38) (cf. points 28, 35, 45)*

Objet

Manquement d'État - Violation de l'art. 4, p. 2, de la directive 93/38/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO L 199, p. 84) - Admission à concourir de deux sociétés ne remplissant ni les conditions de l'avis ni celles du cahier des charges - Construction et mise en fonctionnement d'une centrale thermique à Lavrio.

Dispositif

1) Le recours est rejeté.

2) La Commission des Communautés européennes est condamnée aux dépens.

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Action brought on 15 November 2005 by the Commission of the European Communities against the Hellenic Republic

(Case C-399/05)

(Language of the case: Greek)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 15 November 2005 by the Commission of the European Communities, represented by M. Patakia, Commission Legal Adviser, and A.X.P. Lewis, of the Commission's Legal Service, with an address for service in Luxembourg.

The Commission claims that the Court should:

- declare that, because the Dimosia Epikhirisi Ilektrismou (Public Power Corporation; 'DEI') admitted to the final stage of the tender procedure which it had opened for the construction and bringing into operation of a thermal power station in Lavrio two companies which did not meet the relevant conditions in the invitation to tender and the tender documents, the Hellenic Republic has failed to fulfil its obligations under Article 4(2) of Directive 93/38/EC [1] and under the principles of transparency and of equal treatment of tenderers;

- order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

- The Commission received a complaint relating to the carrying out of, and in particular to the failure to observe tender conditions in, a DEI tendering procedure for the construction and bringing into operation of a thermal power station in Lavrio.

- In light of the Court of Justice's case-law, the Commission submits that, for reasons of equality and transparency, DEI was obliged to reject the tenders of companies which did not meet conditions that DEI itself laid down in the invitation to tender and in the specification, that is to say possession of experience in the planning and management of turn-key contracts and the offer of maintenance of the gas turbine exclusively by its manufacturer.

- The Commission considers that the content of those conditions is clear and that they should have been observed by DEI however strict they may be, so as to ensure equal treatment not only of the tenderers but also of interested parties who could have taken part in the tender procedure in question had they known that the contracting authority would adhere to conditions other than those which it itself had laid down by means of the invitation to tender.

- Also, in the Commission's submission, the need for swift award of the contracts in question, which is invoked by the Greek authorities, does not justify the failure to observe during the tender procedure conditions which the contracting authority itself laid down.

- The Commission considers that the Hellenic Republic has failed to fulfil its obligations under Article 4(2) of Directive 93/38/EC and under the principles of transparency and of equal treatment of tenderers.

_____

[1] - OJ No L 199, 9.8.1993, p. 84.

Judgment of the Court (Second Chamber)
of 18 July 2007
Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil obligations - Public service contracts - Directive 92/50/EEC - Agreements concerning the treatment of municipal waste - Classification - Public contract - Service concession - Advertising measures. Case C-382/05.

In Case C382/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 October 2005,

Commission of the European Communities, represented by A. Aresu and X. Lewis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent and G. Fiengo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kris, K. Schiemann (Rapporteur), L. Bay Larsen and C. Toader, Judges,

Advocate General: J. Mazak,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2007,

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

gives the following

Judgment

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

1. Declares that, owing to the fact that the Presidenza del Consiglio dei Ministri - Dipartimento per la protezione civile - Ufficio del Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia (i) initiated the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of the Region of Sicily and remaining after the collection of selected material and (ii) concluded those agreements, without following the procedures laid down by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, and, in particular, without publishing the appropriate contract notice in the Official Journal of the European Communities , the Italian Republic failed to fulfil its obligations under that directive, in particular under Articles 11, 15 and 17 thereof;

2. Orders the Italian Republic to pay the costs.

1. By its application, the Commission of the European Communities asks the Court of Justice to declare that, owing to the fact that the Presidenza del Consiglio dei Ministri - Dipartimento per la protezione civile - Ufficio del Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia (Office of the Prime Minister, Civil Defence Department, Office of the Commissioner for Waste Emergencies and Water Protection in Sicily) (i) initiated the procedure

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for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of the Region of Sicily and remaining after the collection of selected material and (ii) concluded those agreements, without following the procedures laid down by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1) (Directive 92/50'), and, in particular, without publishing the appropriate contract notice in the Official Journal of the European Communities , the Italian Republic failed to fulfil its obligations under that directive, in particular under Articles 11, 15 and 17 thereof.

Legal context

Community legislation

2. Article 1(a) of Directive 92/50 states:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority...'

3. Article 8 of Directive 92/50 provides:

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

4. In Title V of Directive 92/50, Article 15(2) provides:

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

5. Under Article 17 of Directive 92/50:

1. The notices shall be drawn up in accordance with the models set out in Annexes III and IV and shall specify the information requested in those models...

4. The notices referred to in Article 15(2) and (3) shall be published in full in the Official Journal of the European Communities and in the TED data bank in their original language. A summary of the important elements of each notice shall be published in the official languages of the Communities, the text in the original language alone being authentic.

...'

6. Annex I A to Directive 92/50, entitled Services within the meaning of Article 8', includes inter alia Category No 16 Sewage and refuse disposal services; sanitation and similar services' with the CPC reference number 94.

7. Annex III to Directive 92/50 contains inter alia models of prior information notices' and contract notices'.

National legislation

8. Article 4 of Order No 2983 of the Prime Minister of 31 May 1999 (GURI No 132 of 8 June 1999), as amended by Order No 3190 of 22 March 2002 (Order No 2983/99'), provides:

The Commissioner, the President of the Region of Sicily, after hearing the Ministry of the Environment and the Protection of Natural Resources, shall conclude agreements with a duration of up to 20 years concerning the use of that part of municipal waste produced in the municipalities in the Region of Sicily and remaining after the collection of selected material... For that purpose, the Commissioner, the President of the Region of Sicily, shall designate the industrial operators on the basis of transparent public procedures, in derogation from the Community tendering procedures...'

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9. The words in derogation from the Community tendering procedures' which appeared in that provision were repealed by Order No 3334 of the Prime Minister of 23 January 2004 (GURI No 26 of 2 February 2004).

The facts of the case and the prelitigation procedure

10. By Order No 670 of 5 August 2002, the President of the Region of Sicily, acting in his capacity as the Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia (the Commissioner for Waste Emergencies and Water Protection in Sicily, the Commissioner') and pursuant to Article 4 of Order No 2983/99, approved a document entitled Public notice on the conclusion of agreements for the use of that part of municipal waste produced in the Region of Sicily and remaining after the collection of selected material' (the notice at issue'). The notice at issue contains three annexes. Annex A lays down guidelines concerning the use of that part of municipal waste produced in municipalities in the Region of Sicily and remaining after the collection of selected material'. Annex B is entitled Financial plan summary' and Annex C comprises a model agreement for use with the appointed operators (the model agreement').

11. On 7 August 2002, a notice concerning the abovementioned agreements, based on the model notice entitled prior information notice' in Annex III to Directive 92/50, was sent to the Publications Office. Publication in the Official Journal of the European Communities (OJ 2002 S 158, electronic version) subsequently occurred on 16 August 2002.

12. The notice at issue itself was published in the Gazzetta ufficiale della Regione Siciliana (Official Journal of the Region of Sicily) on 9 August 2002.

13. The Commission, having received a complaint regarding that procedure, sent a letter to the Italian authorities on 15 November 2002 requesting information, to which those authorities replied by letter on 2 May 2003.

14. On 17 June 2003, four agreements, which were based in essence on the model agreement, were concluded between the Commissioner and Tifeo Energia Ambiente Soc. coop. arl, Palermo Energia Ambiente Soc. coop. arl, Sicil Power SpA and Platani Energia Ambiente Soc. coop. arl respectively (the agreements at issue').

15. On 17 October 2003, the Commission, in accordance with Article 226 EC, sent a formal notice to the Italian Republic alleging that it had infringed Directive 92/50, in particular Articles 11, 15 and 17 thereof. On 9 July 2004, dissatisfied with the reply of 1 April 2004 which it received to that formal notice, the Commission sent a reasoned opinion to the Italian Republic calling on it to bring an end to the alleged failure to fulfil obligations within a twomonth timelimit.

16. In their reply of 24 September 2004 to that reasoned opinion, the Italian authorities denied the infringement.

17. Not satisfied with this reply, the Commission decided to bring the present action.

The action

Arguments of the parties

18. The Commission maintains that the agreements at issue are public service contracts within the meaning of Article 1 of Directive 92/50 but they were not concluded in compliance with the publicity requirements of that directive. It claims, in particular, that instead of using the contract notice form required by Annex III to that directive for the award of public contracts, the notice published in the Official Journal of the European Communities was based on the prior information' form, which appears in the same annex. Nonnational service providers were moreover discriminated against when compared to national operators who had the benefit of a detailed contract notice published

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in the Gazetta ufficiale della Regione Siciliana.

19. According to the Commission, the agreements at issue cannot be classified, as the Italian Republic maintains, as service concessions falling outside the scope of Directive 92/50. The operators' remuneration does not lie in their right to exploit for payment their own service by receiving revenue from users, whilst assuming all the risks linked to that exploitation.

20. First, in the present case, the operator's remuneration consists in a royalty directly paid to it by the Commissioner the amount of which is fixed by the agreements at issue in euros per tonne of waste transferred to the operator by the municipalities. The income which the operator is able to derive additionally from the sale of electrical energy produced during the thermal treatment of waste does not constitute a part of its remuneration.

21. Secondly, the operator does not assume the risk connected with the exploitation, in particular since the agreements at issue guarantee it the transfer of a minimum annual quantity of waste whilst providing for the annual adjustment of the amount of the royalty in order to take account of trends in the costs for which it is responsible. Moreover, those agreements provide for an adjustment of the royalty if the annual quantity of waste actually transferred falls below 95% or exceeds 115% of the guaranteed minimum quantity, in order to ensure the economic and financial equilibrium of the operator.

22. The Italian Government maintains, on the contrary, that the agreements at issue constitute, as is clear particularly from the national caselaw, service concessions which are outside the scope of Directive 92/50.

23. First, such contracts are intended to delegate authority for the performance of a service of general interest, the continuity of which the operator is obliged to ensure.

24. Secondly, the services at issue are provided directly to users, namely the body of residents of the municipalities producing the waste, who, having to pay a charge to the municipalities covering both the removal and processing of the waste, ultimately bear the cost of the royalty paid to the operator and thus remunerate it for the services it provides. The Commissioner plays only the role of intermediary in that respect.

25. Thirdly, the requirement to produce energy when processing the waste and, accordingly, the sale of that energy certainly fall within the object and purpose of the agreements at issue. It is, moreover, classically the case that the remuneration of a concession derives not only from the price paid by the user but also from other activities connected with the service provided.

26. Fourthly, having regard to the financial significance of the operator's investment, which is in the region of a billion euros, and to the length of the agreements at issue, namely 20 years, the profits to be made by the operator are uncertain, particularly as a part of them is derived from the sale of energy produced.

27. Fifthly, responsibility for the organisation and management of services thus delegated is exclusively the operator's, the authorities limiting themselves to a simple monitoring role.

28. In the case of service concessions, the necessary transparency may be ensured by all appropriate means, including, as in the present case, publication of a notice in the national daily specialist press.

Findings of the Court

29. It is clear from settled caselaw that service concessions are excluded from the scope of Directive 92/50 (see, inter alia, Case C231/03 Coname [2005] ECR I7287, paragraph 9, and Case C458/03 Parking Brixen [2005] ECR I8585, paragraph 42).

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30. The Italian Government having, on various occasions, stressed that it is clear from national caselaw that agreements such as the agreements at issue must be classified as service concessions, it must be noted as a preliminary point that the definition of a public service contract is a matter of Community law, with the result that the classification of the agreements at issue under Italian law is irrelevant for the purpose of determining whether they fall within the scope of Directive 92/50 (see, to that effect, Case C264/03 Commission v France [2005] ECR I8831, paragraph 36, and Case C220/05 Auroux and Others [2007] ECR I0000, paragraph 40).

31. The question whether the agreements at issue should or should not be classed as service concessions must therefore be considered exclusively in the light of Community law.

32. In that respect, it is necessary, first, to point out that the agreements at issue provide for the payment by the Commissioner to the operator of a royalty the amount of which is fixed in euros per tonne of waste transferred by the municipalities concerned to that operator.

33. As the Court has previously held, it follows from the definition in Article 1(a) of Directive 92/50 that a public service contract within the meaning of that directive involves consideration which is paid directly by the contracting authority to the service provider (Parking Brixen , paragraph 39). Accordingly, a royalty of the type for which the agreements at issue provide is capable of characterising a contract as one for pecuniary interest within the meaning of Article 1(a), and accordingly as a public contract (see, as to the payment of a fixed sum per dustbin or container by a town to an enterprise with exclusive responsibility for the collection and treatment of waste, Case C29/04 Commission v Austria [2005] ECR I9705, paragraphs 8 and 32).

34. Secondly, it is clear from the caselaw of the Court of Justice that a service concession exists where the agreed method of remuneration consists in the right of the service provider to exploit for payment his own service and means that he assumes the risk connected with operating the services in question (see Case C324/98 Telaustria and Telefonadress [2000] ECR I10745, paragraph 58; the order in Case C358/00 BuchhändlerVereinigung [2002] ECR I4685, paragraphs 27 and 28; and Parking Brixen , paragraph 40).

35. It must be stated that the method of remuneration for which the agreements at issue provide does not consist in the right to exploit for payment the services in question, nor does it involve the assumption by the operator of the risk connected with operating them.

36. Not only is the operator essentially remunerated by the Commissioner by means of a fixed royalty per tonne of waste transferred to it, as pointed out at paragraph 32 of the present judgment, but it is not in dispute that, under the agreements at issue, the Commissioner undertakes, first, that all the municipalities concerned will transfer all of the remaining part of their waste to the operator and, secondly, that a minimum annual quantity of waste will be transferred to it. The agreements at issue provide, moreover, for the adjustment of the amount of the royalty if the annual quantity of waste actually transferred falls below 95% or exceeds 115% of the guaranteed minimum quantity, in order to ensure the economic and financial equilibrium of the operator. They also provide for the annual adjustment of the royalty in the light of trends in the costs of staff, raw materials and maintenance work, and of an economic index. The agreements provide moreover for a renegotiation of the royalty if, owing to a change to the legislative framework, the operator is faced with investment above a certain level in order to comply with the new legislation.

37. Having regard to the foregoing, the agreements at issue must be considered to be public service contracts subject to Directive 92/50 and not service concessions outside the scope of that directive.

38. In addition, none of the arguments put forward by the Italian Government for the purpose of contesting that classification prevails.

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39. Concerning, first, the fact that the operators are in a position, over and above the receipt of the agreed royalty, to benefit from the financial returns connected with the sale of electricity produced during the processing of waste, it is necessary to point out that Article 1(a) of Directive 92/50, which defines what is a public contract, refers to contracts for pecuniary interest' and that the pecuniary interest in a contract refers to the consideration paid to the contractor on account of the provision of services designated by the contracting authority (see, to that effect, Auroux and Others , paragraph 45).

40. In the present case, it is evident that the consideration received by the operator in return for the provision of services designated by the Commissioner, namely the processing of transferred waste with energy recovery, consists essentially in the payment of the amount of the royalty by the Commissioner.

41. Even assuming that the income from the sale of electricity could also be regarded as consideration for the services designated by the Commissioner - owing, in particular, to the fact that in the agreements at issue the Commissioner undertakes to facilitate its sale to third parties - the mere fact that the operator would accordingly be able, over and above the remuneration received by way of consideration from the Commissioner, to obtain income incidentally from third parties in consideration for its provision of services is insufficient to prevent the agreements at issue from being classified as public contracts (see, by analogy, Auroux and Others , paragraph 45).

42. Furthermore, the length of the agreements at issue and the significant initial investment which the operator must make in performing them are not conclusive either for the purpose of classifying those agreements, as such characteristics may be present both in public contracts and in service concessions.

43. The same is also true of the fact that the treatment of waste comes within the general interest. In that respect, it should moreover be pointed out that, as is clear from Annex I A to Directive 92/50, [s]ervices within the meaning of Article 8', to which the directive is capable of applying, include the category of [s]ewage and refuse disposal services; sanitation and similar services', which the Court has previously held to cover inter alia services for the collection and treatment of waste (see, to that effect, Commission v Austria , paragraph 32).

44. Nor, finally, is it conclusive, for the purpose of classifying an agreement as a public contract or a service concession, that the services offered by the operator require, where appropriate, a large degree of independence of performance on his part.

45. Since the agreements at issue constitute public service contracts within the meaning of Article 1(a) of Directive 92/50, they could only be concluded in accordance with the provisions of the directive, in particular Articles 11, 15 and 17 thereof. Under those provisions, the contracting authority concerned was inter alia obliged to publish a contract notice which conformed to the model laid down in Annex III to the directive, which it did not do.

46. It follows that the Commission's action must be upheld and that it is necessary to hold that, owing to the fact that the Presidenza del Consiglio dei Ministri - Dipartimento per la protezione civile - Ufficio del Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia (i) initiated the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of the Region of Sicily and remaining after the collection of selected material and (ii) concluded those agreements, without following the procedures laid down by Council Directive 92/50 and, in particular, without publishing the appropriate contract notice in the Official Journal of the European Communities , the Italian Republic failed to fulfil its obligations under that directive, in particular under Articles 11, 15 and 17 thereof.

Costs

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47. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

DOCNUM	62005J0382
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page I-06657
DOC	2007/07/18
LODGED	2005/10/20
JURCIT	31992L0050 : N 29 30 37 47 31992L0050-A01LA : N 2 33 39 45 31992L0050-A08 : N 3 31992L0050-A11 : N 1 45 - 47 31992L0050-A15 : N 1 45 - 47 31992L0050-A15P2 : N 4 5 31992L0050-A15P3 : N 5 31992L0050-A17 : N 1 5 45 - 47 31992L0050-N1A : N 6 43 31992L0050-N3 : N 7 45 61998J0324 : N 34 62000J0358 : N 34 62003J0231 : N 29 62003J0264 : N 30 62003J0458 : N 29 33 34 62004J0029 : N 33 43 62005J0220 : N 30 39 41
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy

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NOTES	Di Martino, Mario: La Corte censura la qualificazione di una procedura di affidamento di servizi secondo l'ordinamento nazionale, Diritto pubblico comparato ed europeo 2007 p.1907-1911
PROCEDU	Action for failure to fulfil obligations
ADVGEN	Mazak
JUDGRAP	Schiemann
DATES	of document: 18/07/2007 of application: 20/10/2005

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Case C-382/05

Commission of the European Communities

v

Italian Republic

(Failure of a Member State to fulfil obligations – Public service contracts – Directive 92/50/EEC – Agreements concerning the treatment of municipal waste – Classification – Public contract – Service concession – Advertising measures)

Summary of the Judgment

Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Scope

Where an awarding authority of a Member State initiates the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of a region of that Member State remaining after the collection of selected material, and concludes those agreements without following the procedures laid down by Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Directive 2001/78, and, in particular, without publishing the appropriate contract notice in the *Official Journal of the European Communities*, that Member State fails to fulfil its obligations under that directive, and in particular under Articles 11, 15 and 17 thereof.

The abovementioned agreements, which provide, in particular, for the payment by the awarding authority to the operator of a royalty the amount of which is fixed in euros per tonne of waste transferred by the municipalities concerned to that operator do not establish a method of remuneration consisting in the right to exploit the services in question for payment and involving the assumption by the operator of the risk connected with operating them. Such agreements must therefore be considered to be public service contracts subject to Directive 92/50 and not service concessions outside the scope of that directive, their conclusion being possible only in accordance with the provisions of that directive.

(see paras 32, 34, 37, 45-46, operative part)

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Judgment of the Court (Second Chamber) of 18 July 2007 - Commission of the European Communities v Italian Republic

(Case C-382/05) [1]

(Failure of a Member State to fulfil obligations - Public service contracts - Directive 92/50/EEC - Agreements concerning the treatment of municipal waste - Classification - Public contract - Service concession - Advertising measures)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: A. Aresu and X. Lewis, Agents)

Defendant: Italian Republic (represented by: I.M. Braguglia and G. Fiengo, Agents)

Re:

Failure of a Member State to fulfil its obligations - Infringement of Articles 11, 15 and 17 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) - Award of a contract without publication of the appropriate notice - Agreements concluded for the use of the remaining part of municipal waste produced in the municipalities of the Region of Sicily

Operative part of the judgment

The Court:

1. Declares that, owing to the fact that the Presidenza del Consiglio dei Ministri - Dipartimento per la protezione civile - Ufficio del Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia (i) initiated the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of the Region of Sicily and remaining after the collection of selected material and (ii) concluded those agreements, without following the procedures laid down by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, and, in particular, without publishing the appropriate contract notice in the *Official Journal of the European Communities*, the Italian Republic failed to fulfil its obligations under that directive, in particular under Articles 11, 15 and 17 thereof;

Orders the Italian Republic to pay the costs.

_____

[1] - OJ C 22, 28.01.2006.

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Action brought on 20 October 2005 by the Commission of the European Communities against the Italian Republic

(Case C-382/05)

(Language of the case: Italian)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 20 October 2005 by the Commission of the European Communities, represented by A. Aresu and X. Lewis, acting as Agents, with an address for service in Luxembourg.

The Commission claims that the Court should:

declare that, by reason of the fact that the Presidenza del Consiglio dei Ministri (Prime Minister's Office) - Dipartimento per la protezione civile (Department of Civil Defence) - Ufficio del Commissario delegato (Office of the Deputy Government official) responsible for waste emergency and water protection in Sicily initiated the procedure for the award of contracts for the use of residual municipal waste, remaining after separately collected waste, produced in the municipal areas of the Region of Sicily, and concluded such contracts but failed to apply the procedures laid down by Council Directive 92/50/EEC [1] of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and, in particular, failed to publish the appropriate contract notice in the Official Journal of the European Union, the Italian Republic failed to fulfil its obligations under that directive and, in particular, under Articles 11, 15 and 17 of that directive;

order the Italian Republic to pay the costs.

Pleas in law and main arguments

According to the Commission, an examination of the documents relating to the award of the contracts at issue leads to the conclusion that they are to be classified as public service contracts governed by Directive 92/50/EEC.

It follows that those contracts should have been awarded in compliance with the rules on advertising and participation laid down in Titles III and IV of that directive and, in particular, following publication in the O.J.E.U of the contract notice required by Articles 15 and 17 of the directive and in accordance with the procedures set out in Article 11.

In the present case, the notice published on behalf of the Commissario delegato cannot be regarded as adequately fulfilling the advertising requirements laid down by the above-mentioned provisions. Not only does the model contract notice used for the advertisement refer to what is called the 'prior information' procedure and not to the award of contracts, but, more importantly, the information set out in the notice is clearly inadequate when compared with the information that must be included in accordance with the model contract notice set out in the Annexes to Directive 92/50/EEC, as most recently amended by Directive 2001/78/EC.

_____

[1] - O J 1992 L 209 p. 1

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ARRÊT DE LA COUR (deuxième chambre)

17 juillet 2008 (*)

«Manquement d'État – Directive 92/50/CEE – Articles 11 et 15, paragraphe 2 – Marchés publics de services – Attribution des services informatiques de la commune de Mantoue (Italie) – Attribution directe sans publication préalable d'un avis de marché»

Dans l'affaire C–371/05,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 5 octobre 2005,

Commission des Communautés européennes, représentée par MM. X. Lewis, C. Zadra, L. Visaggio et M^me^ C. Cattabriga, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par M. I. M. Braguglia, en qualité d'agent, assisté de M. G. Fiengo, avvocato dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (deuxième chambre),

composée de M. C. W. A. Timmermans, président de chambre, MM. K. Schiemann, J. Makarczyk (rapporteur), J.–C. Bonichot et M^me^ C. Toader, juges,

avocat général: M. M. Poiares Maduro,

greffier: M. H. von Holstein, greffier adjoint,

vu la procédure écrite et à la suite de l'audience du 24 avril 2008,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, la commune de Mantoue (Italie) ayant attribué, directement et sans publication d'un avis de marché spécifique au *Journal officiel des Communautés européennes*, la gestion, la maintenance et le développement de ses services informatiques à ASI Spa (ci-après «ASI»), la République italienne a manqué aux obligations qui lui incombent en vertu de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), telle que modifiée par la directive 93/36/CEE du Conseil, du 14 juin 1993 (JO L 199, p. 1, ci-après la «directive 92/50»), notamment des articles 11 et 15, paragraphe 2, de la directive 92/50.

Le cadre juridique

2 Aux termes de l'article 1er, sous a) à f), de la directive 92/50:

«Aux fins de la présente directive:

a) les *'marchés publics de services'* sont des contrats à titre onéreux, conclus par écrit entre un prestataire de services et un pouvoir adjudicateur, […];

b) sont considérés comme *'pouvoirs adjudicateurs'*, l'État, les collectivités territoriales, les organismes de droit public, les associations formées par une ou plusieurs de ces collectivités ou de ces organismes de droit public.

Par *'organisme de droit public'*, on entend tout organisme:

– créé pour satisfaire spécifiquement des besoins d'intérêt général ayant un caractère autre qu'industriel ou commercial

et

– ayant la personnalité juridique

et

– dont, soit l'activité est financée majoritairement par l'État, les collectivités territoriales ou d'autres organismes de droit public, soit la gestion est soumise à un contrôle par ces derniers, soit l'organe d'administration, de direction ou de surveillance est composé de membres dont plus de la moitié est désignée par l'État, les collectivités territoriales ou d'autres organismes de droit public.

[…]

c) le *'prestataire de services'* est toute personne physique ou morale, y inclus un organisme public, qui offre des services. Le prestataire de services qui a présenté une offre est désigné par le mot 'soumissionnaire'; celui qui a sollicité une invitation à participer à une procédure restreinte ou négociée est désigné par le mot 'candidat';

d) les *'procédures ouvertes'* sont les procédures nationales dans lesquelles tout prestataire de services intéressé peut présenter une offre;

e) les *'procédures restreintes'* sont les procédures nationales dans lesquelles seuls les prestataires de services invités par le pouvoir adjudicateur peuvent présenter une offre;

f) les *'procédures négociées'* sont les procédures nationales dans lesquelles les pouvoirs adjudicateurs consultent les prestataires de services de leur choix et négocient les conditions du marché avec un ou plusieurs d'entre eux».

3 Selon l'article 7, paragraphe 1, de cette directive, celle-ci s'applique aux marchés publics de services dont le montant estimé hors taxe sur la valeur ajoutée égale ou dépasse 200 000 euros.

4 L'article 8 de ladite directive prévoit:

«Les marchés qui ont pour objet des services figurant à l'annexe I A sont passés conformément aux dispositions des titres III à VI.»

5 L'article 11, paragraphe 1, de la directive 92/50, qui figure sous le titre III de celle-ci intitulé «Choix des procédures de passation et règles applicables aux concours», dispose que, pour passer leurs marchés publics de services, les pouvoirs adjudicateurs appliquent les procédures définies à l'article 1er, sous d) à f), de ladite directive. Les paragraphes 2 et 3 de cet article 11 détaillent les cas dans lesquels les pouvoirs adjudicateurs recourent à la procédure négociée respectivement après avoir publié un avis de marché et sans publication préalable d'un tel avis. Le paragraphe 4 dudit article 11 précise que, dans tous les autres cas, les pouvoirs adjudicateurs passent leurs marchés de services en recourant à la procédure ouverte ou à la procédure restreinte.

6 Aux termes de l'article 15, paragraphe 2, de la directive 92/50, qui figure sous le titre V de cette

directive relatif aux règles communes de publicité:

> «Les pouvoirs adjudicateurs désireux de passer un marché public de services en recourant à une procédure ouverte, restreinte ou, dans les conditions prévues à l'article 11, à une procédure négociée font connaître leur intention au moyen d'un avis.»

7 L'annexe I A de cette directive vise, sous la catégorie 7, les «[s]ervices informatiques et services connexes».

La procédure précontentieuse

8 Par une convention conclue le 2 décembre 1997, la commune de Mantoue a confié à ASI la gestion, la maintenance et le développement des services informatiques municipaux jusqu'au 31 décembre 2012 (ci-après la «convention»), sans que cette attribution fasse l'objet d'un appel à la concurrence.

9 À la suite d'une plainte, la Commission a adressé, le 20 juin 2001, une lettre demandant à la République italienne des éclaircissements concernant la convention et rappelant les conditions pour qu'un marché public puisse être soustrait à l'application des directives communautaires relatives à la passation de tels marchés. Par une lettre du 26 juin 2001, cet État membre a répondu que les dispositions de la directive 92/50 étaient, en l'espèce, inapplicables.

10 Le 24 octobre 2001, la Commission a adressé une lettre de mise en demeure à la République italienne, à laquelle cette dernière a répondu le 11 février 2002.

11 Après examen des observations présentées par la République italienne, la Commission a, le 27 juin 2002, émis un avis motivé invitant cet État membre à prendre les mesures nécessaires pour se conformer à cet avis dans un délai de deux mois à compter de la réception de celui-ci.

12 La République italienne n'ayant pas répondu audit avis motivé, la Commission a décidé d'introduire le présent recours.

Sur le recours

13 Par ordonnance du président de la Cour du 4 mai 2006, la République de Finlande a été admise à intervenir au soutien des conclusions de la République italienne. Par lettre déposée au greffe de la Cour le 5 septembre 2006, la République de Finlande a informé la Cour qu'elle se désistait de son intervention dans la présente affaire. Par ordonnance du président de la Cour du 2 octobre 2006, la République de Finlande a été radiée comme partie intervenant au litige.

Argumentation des parties

14 À l'appui de son recours, la Commission invoque un seul grief tiré du fait que la convention n'a pas été conclue conformément aux articles 11 et 15, paragraphe 2, de la directive 92/50.

15 À cet égard, la Commission fait valoir que la convention entre dans le champ d'application de la directive 92/50 et que, partant, elle aurait dû être passée conformément, notamment, auxdits articles.

16 Rappelant l'arrêt de la Cour du 18 novembre 1999, Teckal (C–107/98, Rec. p. I–8121), elle exclut que la relation entre la commune de Mantoue et ASI puisse recevoir la qualification de gestion «interne» au sens de cet arrêt. En effet, le contrôle exercé par cette commune sur ASI, en application des articles 8 et 11 de la convention, s'apparenterait à celui d'un simple actionnaire majoritaire d'une société par actions et serait limité par la nécessité de prendre en considération les intérêts des autres actionnaires de cette société. Par ailleurs, la Commission fait remarquer que la commune de Mantoue est sortie du capital d'ASI sans qu'il soit, pour autant, mis fin à la convention.

17 Au contraire, la République italienne fait valoir que, au moment de la conclusion de la convention et conformément à la réglementation nationale applicable, le capital d'ASI était entièrement détenu par la commune de Mantoue et d'autres communes limitrophes. Dès lors, la commune de Mantoue aurait eu sur cette société un contrôle structurel et fonctionnel analogue à celui qu'elle exerce sur ses propres services.

18 La République italienne souligne que la commune de Mantoue nommait les membres des organes de direction de ladite société. En outre, il ne saurait être contesté que le seul intérêt protégé par la convention est celui de cette commune. Au surplus, les frais d'ASI seraient fixés à intervalles périodiques par des délibérations communales. La commune de Mantoue se serait encore réservé la possibilité de procéder à certaines vérifications des objectifs prévus par la convention. À cet égard, la désignation d'un fonctionnaire, en vertu de l'article 8 de la convention, serait l'expression du pouvoir de supervision que ladite commune doit maintenir afin de satisfaire à la condition du contrôle analogue à celui exercé sur ses propres services fixée par l'arrêt Teckal, précité.

19 En tout état de cause, la République italienne précise que, conformément aux décisions prises lors de l'assemblée générale des actionnaires d'ASI qui s'est tenue le 23 décembre 2004, la commune de Mantoue est définitivement sortie du capital d'ASI et que cette dernière a cessé d'accomplir les activités couvertes par la convention au 31 décembre 2006.

Appréciation de la Cour

20 D'emblée, il convient de relever qu'il est constant entre les parties que la convention concerne la fourniture de services visés à l'annexe I A de la directive 92/50 et que le montant de ces services dépasse le seuil, fixé à l'article 7, paragraphe 1, de cette directive, susceptible de faire entrer la convention dans le champ d'application de celle-ci.

21 Cependant, la République italienne fait valoir que la convention n'avait pas à être soumise aux règles régissant les marchés publics étant donné que les critères de gestion «interne» étaient remplis.

22 À cet égard, il y a lieu de rappeler que, selon la jurisprudence constante de la Cour, l'appel à la concurrence, conformément aux directives relatives à la passation des marchés publics, n'est pas obligatoire, même si le cocontractant est une entité juridiquement distincte du pouvoir adjudicateur, lorsque deux conditions sont remplies. D'une part, l'autorité publique, qui est un pouvoir adjudicateur, doit exercer sur l'entité distincte en question un contrôle analogue à celui qu'elle exerce sur ses propres services et, d'autre part, cette entité doit réaliser l'essentiel de son activité avec la ou les collectivités publiques qui la détiennent (voir, notamment, arrêts Teckal, précité, point 50, ainsi que du 8 avril 2008, Commission/Italie, C–337/05, non encore publié au Recueil, point 36 et jurisprudence citée).

23 Dès lors, il convient d'examiner si les deux conditions exigées par la jurisprudence mentionnée au point précédent sont remplies à l'égard d'ASI.

24 S'agissant de la première condition, relative au contrôle de l'autorité publique, il ressort de la jurisprudence de la Cour qu'il convient de tenir compte non seulement de l'ensemble des dispositions législatives, mais également des circonstances pertinentes du cas d'espèce. Il doit résulter de cet examen que la société adjudicataire est soumise à un contrôle permettant au pouvoir adjudicateur d'influencer les décisions de cette société. Il doit s'agir d'une possibilité d'influence déterminante tant sur les objectifs stratégiques que sur les décisions importantes de ladite société (voir arrêts du 13 octobre 2005, Parking Brixen, C–458/03, Rec. p. I–8585, point 65, ainsi que du 11 mai 2006, Carbotermo et Consorzio Alisei, C–340/04, Rec. p. I–4137, point 36).

25 La République italienne a fait valoir, sans être contredite sur ce point par la Commission, que la commune de Mantoue avait la faculté, en raison de son statut d'actionnaire majoritaire d'ASI, de nommer les membres des organes de direction et d'orienter l'activité de cette société. Elle a également indiqué que, en application de la convention, le conseil municipal de ladite commune fixait, par des délibérations, les frais de fonctionnement de ladite société et que la commune de Mantoue s'était réservée la possibilité de procéder à certaines vérifications, d'une part, par la désignation d'un fonctionnaire communal chargé de collaborer à l'action d'ASI, de stimuler et de contrôler cette action et, d'autre part, par le contrôle de la comptabilité de ladite société afin de s'assurer de l'application des règles d'exactitude comptable et des normes de garantie prévues par ladite convention.

26 Il en résulte que ladite commune avait la faculté d'influencer de manière déterminante tant les objectifs stratégiques que les décisions importantes d'ASI par la désignation des membres des organes de direction de cette société et d'un fonctionnaire communal chargé d'orienter et de contrôler l'action de celle-ci. Ladite faculté suffit à caractériser l'existence d'un pouvoir de contrôle structurel et fonctionnel de la commune de Mantoue sur ladite société analogue à celui qu'elle

exerce sur ses propres services, de sorte que la première condition posée par la Cour au point 50 de l'arrêt Teckal, précité, est remplie.

27 La Commission fait cependant valoir que ladite condition ne pouvait être remplie dès lors que, premièrement, au moment de la conclusion de la convention, deux organismes de droit privé, à savoir TEA Spa et APAM Spa, détenaient des participations dans le capital d'ASI et que, deuxièmement, à supposer même que cette dernière soit une société à capital entièrement public, la participation d'associés privés était explicitement prévue dès sa constitution.

28 Or, s'agissant du premier argument soulevé par la Commission, il suffit de constater que celle-ci n'a pas contesté les informations fournies par la République italienne dans le mémoire en duplique, selon lesquelles les deux sociétés en question étaient elles aussi des entreprises communales.

29 En ce qui concerne le second argument soulevé par la Commission, il y a lieu de relever que la possibilité pour des personnes privées de participer au capital de la société adjudicataire, eu égard notamment à la forme sociale de ladite société, ne suffit pas, en l'absence d'une participation effective de leur part au moment de la conclusion d'une convention telle que celle en cause dans la présente affaire, pour conclure que la première condition, relative au contrôle de l'autorité publique, n'est pas remplie. En effet, pour des raisons de sécurité juridique, l'éventuelle obligation pour le pouvoir adjudicateur de procéder à un appel d'offres public doit être examinée, en principe, au vu des conditions prévalant à la date de l'attribution du marché public en cause (voir, en ce sens, arrêt du 10 novembre 2005, Commission/Autriche, C–29/04, Rec. p. I–9705, point 38).

30 Certes, des circonstances particulières, notamment lorsqu'il apparaît que l'ouverture du capital de l'entité concernée à des associés privés était envisagée dès l'attribution dudit marché public, peuvent requérir la prise en compte d'une participation effective desdits associés intervenue ultérieurement à ladite attribution (voir, en ce sens, arrêt Commission/Autriche, précité, points 38). Toutefois, en l'espèce, force est de constater que la Commission n'est pas parvenue à rapporter la preuve de l'existence de telles circonstances particulières.

31 S'agissant de la seconde condition, relative à l'activité de l'entité concernée, il convient de rappeler qu'une entreprise réalise l'essentiel de son activité avec la collectivité qui la détient, au sens de l'arrêt Teckal, précité, si l'activité de cette entreprise est consacrée principalement à cette collectivité, toute autre activité ne revêtant qu'un caractère marginal (voir arrêt Carbotermo et Consorzio Alisei, précité, point 63).

32 En outre, dans le cas où plusieurs collectivités détiennent une entreprise, la condition relative à l'activité peut être satisfaite si cette entreprise effectue l'essentiel de son activité non nécessairement avec telle ou telle de ces collectivités, mais avec ces collectivités prises dans leur ensemble. Par conséquent, l'activité à prendre en compte dans le cas d'une entreprise détenue par plusieurs collectivités est celle que cette entreprise réalise avec l'ensemble de ces collectivités (voir arrêt Carbotermo et Consorzio Alisei, précité, points 70 et 71).

33 À cet égard, il ressort des pièces présentées par la République italienne que, s'il est tenu compte des activités réalisées par ASI non pas uniquement en faveur de la commune de Mantoue mais pour toutes les collectivités qui la détiennent, ces activités peuvent être considérées comme étant consacrées essentiellement auxdites collectivités.

34 Partant, la seconde condition posée par la Cour au point 50 de l'arrêt Teckal, précité, est remplie.

35 Dans ces conditions, il convient de considérer que la République italienne a démontré à suffisance de droit que les conditions exigées par la jurisprudence mentionnée au point 22 du présent arrêt sont réunies et que, dès lors, la commune de Mantoue n'était pas tenue de faire appel à la concurrence avant de conclure la convention.

36 En conséquence, le recours de la Commission doit être rejeté comme non fondé.

Sur les dépens

37 En vertu de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La République italienne ayant conclu à la condamnation de la Commission et cette dernière ayant succombé en ses moyens, il y a lieu de la

condamner aux dépens.

Par ces motifs, la Cour (deuxième chambre) déclare et arrête:

1) Le recours est rejeté.

2) La Commission des Communautés européennes est condamnée aux dépens.

Signatures

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* Langue de procédure: l'italien.

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Documents relating to the same case

Judgment of the Court (Second Chamber) of 17 July 2008 – Commission v Italy

(Case C–371/05)

Failure of a Member State to fulfil obligations – Directive 92/50/EEC – Articles 11 and 15(2) – Public service contracts – Award of IT services for the commune of Mantova (Italy) – Direct award without prior publication of a notice to tender

Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Scope – Contracting authority holding shares in a company which is legally separate from it with one or more bodies constituted under private law (Council Directive 92/50) (see paras 22, 24, 26, 29-33)

Failure of a Member State to fulfil obligations – Infringement of Articles 11 and 15(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) – Award of IT services for the Commune di Mantova – Direct award without prior publication of a contract notice.

e part:

The Court:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

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Judgment of the Court (Second Chamber) of 17 July 2008 - Commission of the European Communities v Italian Republic

(Case C-371/05) [1]

(Failure of a Member State to fulfil obligations - Directive 92/50/EEC - Articles 11 and 15(2) - Public service contracts - Award of IT services of the municipality of Mantova (Italy) - Direct award without prior publication of a notice to tender)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis, C. Zadra, L. Visaggio and C. Cattabriga, acting as Agents)

Defendant: Italian Republic (represented by: I.M. Braguglia, Agent and G. Fiengo, avvocato dello Stato)

Re:

Failure of a Member State to fulfil obligations - Infringement of Article 11 and Article 15(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, 24/07/1992, p. 1) - Award of IT services for the Commune di Mantova - Direct award without prior publication of a contract notice

Operative part of the judgment

The Court:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

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[1] - OJ C 10, 14.01.2006.

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ORDONNANCE DU PRÉSIDENT DE LA COUR

2 octobre 2006 (*)

«Retrait d'une intervention»

Dans l'affaire C-371/05,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 7 octobre 2005,

Commission des Communautés européennes, représentée par MM. X. Lewis, L. Visaggio et M^me^ C. Cattabriga, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par MM. I. M. Braguglia, en qualité d'agent, et G. Fiengo, avvocato dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

soutenue par :

République de Finlande, représentée par M^me^ E. Bygglin, en qualité d'agent, ayant élu domicile à Luxembourg,

partie intervenante,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. M. Poiares Maduro, entendu,

rend la présente

Ordonnance

1 Par lettre déposée au greffe de la Cour le 5 septembre 2006, la République de Finlande a informé la Cour qu'elle se désistait de son intervention dans la présente affaire.

2 Par lettre déposée au greffe de la Cour le 11 septembre 2006, la Commission a pris acte du retrait de l'intervention de la République de Finlande.

3 La République italienne n'a pas présenté d'observations sur ce retrait dans les délais impartis.

4 En vertu de l'article 69, paragraphe 4, du règlement de procédure, les États membres qui sont intervenus au litige supportent leurs propres dépens.

Par ces motifs, le président de la Cour ordonne:

1) La République de Finlande est radiée comme partie intervenante au litige.

2) La République de Finlande supportera ses propres dépens.

Fait à Luxembourg, le 2 octobre 2006.

Le greffier	Le président
R. Grass	V. Skouris

* Langue de procédure: l'italien.

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ORDONNANCE DU PRÉSIDENT DE LA COUR

4 mai 2006 (*)

«Intervention»

Dans l'affaire C-371/05,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 7 octobre 2005,

Commission des Communautés européennes, représentée par MM. X. Lewis, L. Visaggio et M^me^ C. Cattabriga, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par M. I. M. Braguglia, en qualité d'agent, et M. G. Fiengo, avvocato dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. M. Poiares Maduro, entendu,

rend la présente

Ordonnance

1 Par requête déposée au greffe de la Cour le 23 février 2006, la République de Finlande, représentée par M^me^ E. Bygglin, en qualité d'agent, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-371/05 à l'appui des conclusions de la partie défenderesse.

2 La requête en intervention a été introduite conformément à l'article 93, paragraphe 1, du règlement de procédure, et est présentée en application de l'article 40, premier alinéa, du statut de la Cour.

Par ces motifs, le président de la Cour ordonne:

1) La République de Finlande est admise à intervenir dans l'affaire C-371/05 à l'appui des conclusions de la partie défenderesse.

2) Un délai sera fixé à la partie intervenante pour exposer, par écrit, les moyens à l'appui de ses conclusions.

3) Une copie de tous les actes de procédure sera signifiée à la partie intervenante par les soins du greffier.

4) Les dépens sont réservés.

Fait à Luxembourg, le 4 mai 2006

Le greffier

R. Grass

Le président

V. Skouris

* Langue de procédure: l'italien.

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Action brought on 7 October 2005 by the Commission of the European Communities against the Italian Republic

(Case C-371/05)

(Language of the case: Italian)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 7 October 2005 by the Commission of the European Communities, represented by X. Lewis and L. Visaggio, acting as Agents.

The applicant claims that the Court should:

Declare that by virtue of the fact that the Comune di Mantova awarded, directly and without prior publication of the appropriate contract notice in the Official Journal of the European Communities, the contract for the management, maintenance and development of the in-house IT services to the company A.S.I. S.p.A., the Italian Republic has failed to fulfil its obligations under Directive 92/50/EEC, in particular Articles 11 and 15(2) thereof;

Order the Italian Republic to pay the costs.

Pleas in law and main arguments

SEQ SJNumPar * MERGEFORMAT 1. Following a complaint, the Commission became aware of the contract concluded on 2 December 1997, by which the Comune di Mantova (municipality of Mantova) awarded, directly and without prior publication of the appropriate contract notice, the contract for the management, maintenance and development of its in-house IT services to a company in which it holds an interest, Azienda Servizi Informativi ('A.S.I.') S.p.A. The award was for a period of 15 years, ending on 31 December 2012.

SEQ SJNumPar * MERGEFORMAT 2. The Commission takes the view that the award to the company A.S.I. S.p.A. of the contract for the Comune di Mantova's IT services constitutes a public service contract subject to the application of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.[1] For that reason in was necessary in this case to follow the competition procedure in accordance with the provisions of that directive, in particular the publication of the appropriate contract notice in the Official Journal of the European Communities within the meaning of Article 11 and Article 15(2) of that directive.

SEQ SJNumPar * MERGEFORMAT 3. Moreover, according to the applicant, the Italian authorities did not provide sufficient information to allow it to be considered that, given the overall arrangement of the legal relationships existing between the Comune and the company which received the contract, as well as the activities of that company, the awarding of the contract in question here relates solely to in-house providing and is therefore outside the scope of application of the Community directives governing the award of public contracts.

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[1] - OJ L 209, p. 1.

**Judgment of the Court (Grand Chamber)
of 8 April 2008
Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil obligations - Public supply contracts - Directives 77/62/EEC and 93/36/EEC - Award of public contracts without prior publication of a notice - Absence of competitive tendering - Agusta and Agusta Bell helicopters. Case C-337/05.**

In Case C337/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 15 September 2005,

Commission of the European Communities, represented by D. Recchia and X. Lewis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, K. Lenaerts and G. Arestis, Presidents of Chambers, K. Schiemann, J. Makarczyk (Rapporteur), P. Kris, E. Juhasz, E. Levits and A. O Caoimh, Judges,

Advocate General: J. Mazak,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 April 2007,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2007,

gives the following

Judgment

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

1. Declares that, by adopting a procedure, which has been in existence for a long time and is still followed, of directly awarding to Agusta SpA contracts for the purchase of Agusta and Agusta Bell helicopters to meet the requirements of several military and civilian corps, without any competitive tendering procedure, and, in particular, without complying with the procedures provided for by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and previously, by Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended and supplemented by Council Directives 80/767/EEC of 22 July 1980 and 88/295/EEC of 22 March 1988, the Italian Republic has failed to fulfil its obligations under those directives;

2. Orders the Italian Republic to pay the costs.

1. By its application, the Commission of the European Communities is asking the Court to declare that by adopting a procedure, which has been in existence for a long time and is still followed, of directly awarding to Agusta SpA (Agusta') contracts for the purchase of Agusta and Agusta Bell helicopters to meet the requirements of several military and civilian corps of the Italian

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State, without any competitive tendering procedure and, in particular, without complying with the procedures provided for by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1; Directive 93/36'), and previously, by Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1997 L 13, p. 1), as amended and supplemented by Council Directives 80/767/EEC of 22 July 1980 (OJ 1980 L 215, p. 1) and 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1; Directive 77/62'), the Italian Republic has failed to fulfil its obligations under those directives.

Legal framework

2. By its action, the Commission claims a declaration of failure to fulfil obligations under Directive 93/36 and, as regards the period prior to the date on which that directive entered into force, under Directive 77/62. In view of the similarity of the provisions of those directives and in the interests of clarity, reference will be made here to Directive 93/36 alone.

3. The 12th recital in the preamble to Directive 93/36 is in the following terms:

... the negotiated procedure should be considered to be exceptional and therefore applicable only in limited cases'.

4. Article 1 of Directive 93/36 states that, for the purposes of that directive:

(a) public supply contracts are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

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

...

(d) open procedures are those national procedures whereby all interested suppliers may submit tenders;

(e) restricted procedures are those national procedures whereby only those suppliers invited by the contracting authorities may submit tenders;

(f) negotiated procedures are those national procedures whereby contracting authorities consult suppliers of their choice and negotiate the terms of the contract with one or more of them.'

5. Under Article 2(1)(b), that directive is not to apply to:

supply contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member States concerned or when the protection of the basic interests of the Member State's security so requires.'

6. Article 3 of the same directive provides:

Without prejudice to Articles 2, 4 and 5(1), this Directive shall apply to all products to which Article 1(a) relates, including those covered by contracts awarded by contracting authorities in the field of defence, except for the products to which Article [296](1)(b) [EC] applies.'

7. Article 5(1)(a) of Directive 93/36 is worded as follows:

(a) Titles II, III and IV and Articles 6 and 7 shall apply to public supply contracts awarded

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by:

(i) the contracting authorities referred to in Article 1(b), including contracts awarded by the contracting authorities listed in Annex I in the field of defence in so far as products not covered by Annex II are concerned, where the estimated value net of value-added tax (VAT) is not less than the equivalent in [euros] of 200 000 special drawing rights (SDRs);

(ii) the contracting authorities listed in Annex I whose estimated value net of VAT is not less than the equivalent in [euros] of 130 000 SDRs; in the case of contracting authorities in the field of defence, this shall apply only to contracts involving products covered by Annex II.'

8. Article 6(1) to (3) of the same directive provides:

1. In awarding public supply contracts the contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), in the cases set out below.

2. The contracting authorities may award their supply contracts by negotiated procedure in the case of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions that are in accordance with provisions of Title IV, in so far as the original terms for the contract are not substantially altered. The contracting authorities shall in these cases publish a tender notice unless they include in such negotiated procedures all the enterprises satisfying the criteria of Articles 20 to 24 which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure.

3. The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

...

(c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier;

...

(e) for additional deliver[ies] by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.'

9. Article 33 of Directive 93/36 is worded as follows:

Directive 77/62/EEC... is hereby repealed, without prejudice to the obligation of the Member States concerning the deadlines for transposition into national law and for application indicated in Annex V.

References to the repealed Directives shall be construed as reference to this Directive and should be read in accordance with the correlation table set out in Annex VI.'

Pre-litigation procedure

10. Since the Commission was unaware of any information pertaining to the organisation of a tendering procedure at Community level for the supply of helicopters to meet the requirements of various corps of the Italian State, it considered that such Agusta and Agusta Bell helicopters had been purchased directly, without any competitive tendering procedure at Community level, in breach of the provisions of Directives 77/62 and 93/36. Accordingly, on 17 October 2003, it sent the Italian

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Republic a letter of formal notice, inviting it to present its observations within a period of 21 days from the receipt of that letter.

11. The Italian authorities replied to that letter by fax of 9 December 2003.

12. Since it considered that the Italian authorities had not provided sufficient arguments to refute the observations formulated in the letter of formal notice, and in the absence of further communication from them, the Commission, on 5 February 2004, sent the Italian Republic a reasoned opinion, inviting it to comply therewith within a period of two months from its notification.

13. The Italian authorities replied to that reasoned opinion by three letters of 5 April, 13 May and 27 May 2004.

14. Since it considered that the Italian Republic's arguments in reply to the reasoned opinion were insufficient and finding that it had adopted no measure intended to terminate the impugned practice in awarding public supply contracts, the Commission decided to bring the present action.

The action

Admissibility

Arguments of the parties

15. The Italian Republic pleads that the action is inadmissible on the ground that the Commission made no complaint, in the pre-litigation procedure, about contracts for military supplies. Only civilian supplies were in question. Consequently, there are divergences between, on the one hand, the complaints made in the course of the pre-litigation procedure and, on the other, those formulated in the present action.

16. The Italian Republic submits also that the part of the action covering the supply contracts concluded for the requirements of the Corpo forestale dello Stato (State Forestry Corps) is inadmissible. It is contrary to the principle of no double jeopardy, since the failure to fulfil obligations relating to that category of contracts has already been examined and determined by the Court in Case C525/03 Commission v Italy [2005] ECR I9405.

17. In addition, in its rejoinder, the Italian Republic contends that, having regard to the vague and imprecise character of the facts reported by the Commission both in the letter of formal notice and in the reasoned opinion, the action does not satisfy the requirements of coherence and detail under the case-law, which has gravely affected its rights of defence.

18. The Commission counters that the pre-litigation procedure never concerned military supplies, but concerned civilian supplies for, in particular, the requirements of certain military corps of the Italian State. It points out also that the subject-matter of the proceedings which gave rise to the judgment in Commission v Italy , cited above, differed from that of the present action.

Findings of the Court

19. It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission (see, among others, Case C-152/98 Commission v Netherlands [2001] ECR I-3463, paragraph 23; Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 10; and Case C185/00 Commission v Finland [2003] ECR I14189, paragraph 79).

20. The proper conduct of that procedure thus constitutes an essential guarantee required by the EC Treaty in order to protect the rights of the Member State concerned. It is only when that guarantee is observed that the contentious procedure before the Court can enable it to judge whether

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that State has in fact failed to fulfil the obligations which the Commission alleges it has breached (see, in particular, Case C-145/01 Commission v Italy [2003] ECR I-5581, paragraph 17).

21. It is in the light of that case-law that it is necessary to examine whether the Commission has respected the rights of the defence with regard to the Italian Republic in the pre-litigation procedure.

22. First, as regards the alleged divergences between the complaints made during the pre-litigation procedure and those formulated before the Court, it suffices to state that the reasoned opinion and the application commencing the proceedings, which are in almost identical terms, are based on the same complaints. Therefore, the Italian Republic's argument to show that the complaints raised in the course of the pre-litigation procedure do not correspond to those developed in that application cannot be accepted.

23. Secondly, as regards the alleged lack of clarity and precision in the definition of the complaints made against the Italian Republic in the pre-litigation procedure, it must be observed that, while the reasoned opinion referred to in Article 226 EC must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints (see, in particular, Case 274/83 Commission v Italy [1985] ECR 1077, paragraph 21; Case C279/94 Commission v Italy [1997] ECR I4743, paragraph 15; and Case C221/04 Commission v Spain [2006] ECR I4515, paragraph 36).

24. In this case, the Commission's allegations in the pre-litigation procedure were sufficiently clear to enable the Italian Republic to deploy its defence, as is shown by the course which that part of the procedure took.

25. Thirdly, as regards the alleged breach of the principle of no double jeopardy, Case C525/03 Commission v Italy , cited above, was a case with a completely different subject-matter since, in that instance, the Commission's action concerned an ordinance of the President of the Italian Council of Ministers authorising recourse to negotiated procedures by derogation from Community directives on public supply contracts, and the action was declared inadmissible since that ordinance had ceased to have any effect before the expiry of the period fixed in the reasoned opinion. The subject-matter of the present action is not a re-examination of the legality of the abovementioned ordinance, but concerns a long-standing practice of the Italian State of directly awarding contracts for the purchase of Agusta and Agusta Bell helicopters without any competitive tendering procedure at Community level.

26. Accordingly, the Italian Republic's plea of inadmissibility must be rejected.

Substance

Arguments of the parties

27. In support of its action, the Commission alleges that it has established the existence of a general practice of directly awarding contracts for the purchase of Agusta and Agusta Bell helicopters to cover the requirements of various military and civilian corps of the Italian State.

28. It refers to several contracts concluded in the period 2000 to 2003 with the Corpo dei Vigili del Fuoco (Corps of Fire Brigades), the Carabinieri, the Corpo Forestale dello Stato, the Guardia Costiera (Coastguard), the Guardia di Finanza (Revenue Guard Corps), the Polizia di Stato (State Police) and the Department of Civil Protection in the Presidency of the Council of Ministers. As regards the period prior to the year 2000, the Italian authorities admitted having purchased Agusta and Agusta Bell helicopters without any competitive tendering procedure. The Commission

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observes finally that the fleets of the State corps concerned are formed exclusively of such helicopters none of which was purchased following a competitive tendering procedure at Community level.

29. Since those contracts satisfy the conditions specified by Directive 93/36, the Commission submits that they should have been the subject of an open or a restricted procedure, in compliance with Article 6 of that directive, but not of a negotiated procedure.

30. The Italian Republic contends, first of all, that the supplies intended for the military corps of the Italian State are covered by Articles 296 EC and 2(1)(b) of Directive 93/36. It submits that those provisions are applicable because the helicopters in question are dual-use items', that is to say, they may serve both military and civilian purposes.

31. That Member State argues next that, because of the technical specificity of the helicopters and of the additional nature of the supplies in question, it could, pursuant to Article 6(3)(c) and (e) of Directive 93/36, use the negotiated procedure.

32. Generally, it points out that its practice does not differ from that implemented in the majority of the Member States which produce helicopters.

33. The Italian Republic argues, finally, that, until the end of the 1990s, the relations of the Italian State with Agusta could be analysed as in-house' relations as referred to in Case C107/98 Teckal [1999] ECR I8121.

Findings of the Court

34. At the outset, it is important to note that it is common ground between the parties that the value of the contracts in question exceeded the threshold fixed in Article 5(1)(a) of Directive 93/36, capable of bringing them within the scope of that directive.

35. It must also be stated that the documents concerning the helicopter purchase contracts annexed to the Italian Republic's defence confirm the Commission's view that the purchase of those helicopters using the negotiated procedure was a consistent practice of long standing.

- The in-house' relationship between the Italian State and Agusta

36. According to the Court's settled case-law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority, which is a contracting authority, must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities which control it (see Teckal , cited above, paragraph 50; Case C26/03 Stadt Halle and RPL Lochau [2005] ECR I1, paragraph 49; Case C84/03 Commission v Spain [2005] ECR I139, paragraph 38; Case C29/04 Commission v Austria [2005] ECR I9705, paragraph 34; Case C340/04 Carbotermo and Consorzio Alisei [2006] ECR I4137, paragraph 33; and Case C295/05 Asemfo [2007] ECR I2999, paragraph 55).

37. Therefore, it must be examined whether the two conditions required by the case-law mentioned in the preceding paragraph are met with regard to Agusta.

38. As regards the first condition, relating to the public authority's control, it is important to note that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments (see Stadt Halle and RPL Lochau , cited above, paragraph 49).

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39. In that regard, as is shown by the study annexed to the defence on the Italian State's shareholdings in EFIM (Ente Partecipazioni e Finanziamento Industrie Manifatturiere), Finmeccanica and Agusta, the latter, which has, since its formation, been a company governed by private law, has, since 1974, always been a private company with government participation, that is to say a company whose capital is held in part by that State and in part by private shareholders.

40. Thus, since Agusta is a company in part open to private capital and therefore meets the criterion stated in paragraph 38 of the present judgment, the Italian State cannot exercise over that company a control similar to that which it exercises over its own departments.

41. In such circumstances, and without the necessity of examining whether Agusta carries out the essential part of its activities with the concession-granting public authority, the Italian Republic's argument that there is an in-house' relationship between that company and the Italian State must be rejected.

- The legitimate requirements of national interest

42. It should be noted at the outset that measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of Community law solely because they are taken in the interests of public security or national defence (see, to that effect, Case C186/01 Dory [2003] ECR I2479, paragraph 30).

43. As the Court has already held, the Treaty provides for derogations applicable in situations which may involve public safety, in particular, in Articles 30 EC, 39 EC, 46 EC, 58 EC, 64 EC, 296 EC and 297 EC, which deal with exceptional and clearly defined cases. It cannot be inferred from those articles that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, would be liable to impair the binding nature of Community law and its uniform application (see, to that effect, Case 222/84 Johnston [1986] ECR 1651, paragraph 26; Case C273/97 Sirdar [1999] ECR I7403, paragraph 16; Case C285/98 Kreil [2000] ECR I69, paragraph 16; and Dory , cited above, paragraph 31).

44. In that regard, it is for the Member State which seeks to rely on those exceptions to furnish evidence that the exemptions in question do not go beyond the limits of such exceptional cases (see, to that effect, Case C414/97 Commission v Spain [1999] ECR I5585, paragraph 22).

45. In this case, the Italian Republic contends that the purchases of Agusta and Agusta Bell helicopters meet the legitimate requirements of national interest foreseen in Articles 296 EC and 2(1)(b) of Directive 93/36, on the ground that those helicopters are dual-use items, that is to say, they may serve as well for civilian as for military purposes.

46. First, it is important to point out that, under Article 296(1)(b) EC, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

47. It is clear from the wording of that provision that the products in question must be intended for specifically military purposes. It follows that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules.

48. It is established that the helicopters in question, as the Italian Republic admits, are certainly

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for civilian use and possibly for military use.

49. Consequently, Article 296(1)(b) EC, to which Article 3 of Directive 93/36 refers, cannot properly be invoked by the Italian Republic to justify recourse to the negotiated procedure for the purchase of those helicopters.

50. Secondly, that Member State relies on the confidential nature of the information which is obtained to put the helicopters manufactured by Agusta into production to justify the award of the contracts to that company following the negotiated procedure. In that regard, the Italian Republic cites Article 2(1)(b) of Directive 93/36.

51. However, the Italian Republic has not stated the reasons for which it submits that the confidentiality of the information communicated for the production of the helicopters manufactured by Agusta would be less well guaranteed were such production entrusted to other companies, be they established in Italy or in other Member States.

52. In that regard, the requirement to impose an obligation of confidentiality in no way prevents the use of a competitive tendering procedure for the award of a contract.

53. Therefore, resort to Article 2(1)(b) of Directive 93/36 to justify the purchase of the helicopters in question by the negotiated procedure seems to be disproportionate as regards the objective of preventing the disclosure of sensitive information relating to their production. The Italian Republic has not shown that such an objective was unattainable within a competitive tendering procedure such as that specified by the same directive.

54. Consequently, Article 2(1)(b) of Directive 93/36 cannot properly be invoked by the Italian Republic to justify the use of the negotiated procedure for the purchase of those helicopters.

- The requirement for homogeneity of the fleet of helicopters

55. To justify the use of the negotiated procedure, the Italian Republic also invokes Article 6(3)(c) and (e) of Directive 93/36. It maintains, first, that, having regard to their technical specificity, the manufacture of the helicopters in question could be entrusted only to Agusta and, second, that it was necessary to ensure the interoperability of its fleet of helicopters, in order, particularly, to reduce the logistic, operational and pilot-training costs.

56. As is clear, in particular, from the 12th recital in the preamble to Directive 93/36, the negotiated procedure is exceptional in nature and may be applied only in cases which are set out in an exhaustive list. To that end, Article 6(2) and (3) of Directive 93/36 exhaustively and expressly lists the only exceptions for which recourse to the negotiated procedure is allowed (see, to that effect, as regards Directive 77/62, Case C71/92 Commission v Spain [1993] ECR I5923, paragraph 10; as regards Directive 93/36, see Teckal , paragraph 43, and Case C84/03 Commission v Spain , cited above, paragraph 47).

57. According to settled case-law, the derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public contracts must be interpreted strictly (see Case C57/94 Commission v Italy [1995] ECR I1249, paragraph 23; Case C318/94 Commission v Germany [1996] ECR I1949, paragraph 13; and Case C394/02 Commission v Greece [2005] ECR I4713, paragraph 33). To prevent Directive 93/36 being deprived of its effectiveness, the Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for by that directive, or add new conditions to the cases expressly provided for by the directive in question which make that procedure easier to use (see, to that effect, Case C84/03 Commission v Spain , paragraph 48).

58. In addition, it must be recalled that the burden of proving the existence of exceptional circumstances justifying the derogation from those rules lies on the person seeking to rely on those circumstances

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(see Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 14, and Commission v Greece , cited above, paragraph 33).

59. In this case, the Italian Republic has not discharged the burden of proof as regards the reason for which only helicopters produced by Agusta would be endowed with the requisite technical specificities. In addition, that Member State has confined itself to pointing out the advantages of the interoperability of the helicopters used by its various corps. It has not however demonstrated in what respect a change of supplier would have constrained it to acquire material manufactured according to a different technique likely to result in incompatibility or disproportionate technical difficulties in operation and maintenance.

60. Having regard to all the foregoing, it must be declared that, by adopting a procedure, which has been in existence for a long time and is still followed, of directly awarding to Agusta contracts for the purchase of Agusta and Agusta Bell helicopters to meet the requirements of several military and civilian corps of the Italian State, without any competitive tendering procedure, and, in particular, without complying with the procedures provided for by Directive 93/36 and, previously, by Directive 77/62, the Italian Republic has failed to fulfil its obligations under those directives.

Costs

61. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful in its submissions, the latter must be ordered to pay the costs.

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31993L0036-A33 : N 9
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61997J0414 : N 44
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61999J0439 : N 19
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62001J0145 : N 20
62001J0186 : N 42
62002J0394 : N 57 - 58
62003J0026 : N 36 38
62003J0084 : N 36 56 - 57
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NOTES Mirti, Cristina: La questione degli elicotteri Agusta, Rassegna dell'avvocatura dello Stato 2006 p.75-78

PROCEDU Action for failure to fulfil obligations

ADVGEN Mazak

JUDGRAP Makarczyk

DATES of document: 08/04/2008
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Judgment of the Court (Grand Chamber) of 8 April 2008 - Commission of the European Communities v Italian Republic

(Case C-337/05) [1]

(Failure of a Member State to fulfil obligations - Public supply contracts - Directives 77/62/EEC and 93/36/EEC - Award of public contracts without prior publication of a notice - Absence of competitive tendering - Agusta and Agusta Bell helicopters)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: D. Recchia and X. Lewis, avocat)

Defendant: Italian Republic (represented by: I.M. Braguglia, Agent, assisted by G. Fiengo, lawyer)

Re:

Failure of a Member State to fulfil obligations - Council Directives 93/36/EEC of 14 June 1993 (OJ 1993 L 199, p. 1) and 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts - Failure to show existence of grounds which may justify recourse by the contracting authority to the negotiated procedure without prior publication of a contract notice - Agusta and Agusta Bell helicopters purchased for the requirements of the State Forestry Corps, the Coastguard, the Carabinieri, etc.

Operative part of the judgment

The Court:

Declares that, by adopting a procedure, which has been in existence for a long time and is still followed, of directly awarding to Agusta SpA contracts for the purchase of Agusta and Agusta Bell helicopters to meet the requirements of several military and civilian corps, without any competitive tendering procedure, and, in particular, without complying with the procedures provided for by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and previously, by Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended and supplemented by Council Directives 80/767/EEC of 22 July 1980 and 88/295/EEC of 22 March 1988, the Italian Republic has failed to fulfil its obligations under those directives;

Orders the Italian Republic to pay the costs.

_____

[1] - OJ C 281, 12.11.2005.

Opinion of Mr Advocate General Mazak delivered on 10 July 2007. Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil obligations - Public supply contracts - Directives 77/62/EEC and 93/36/EEC - Award of public contracts without prior publication of a notice - Absence of competitive tendering - Agusta and Agusta Bell helicopters. Case C-337/05.

1. In the present action, brought pursuant to Article 226 EC, the Commission seeks a declaration from the Court that, by adopting a procedure, in existence over a long period and still followed now, of directly awarding to the firm Agusta' contracts for the purchase of helicopters to meet the requirements of several ministries and departments without any tendering procedure, Italy has failed to fulfil its obligations under the directives on coordinating procedures for the award of public supply contracts, namely Council Directive 93/36/EEC (2) and, earlier, Council Directive 77/62/EEC, (3) Council Directive 80/767/EEC (4) and Council Directive 88/295/EEC. (5)

2. Italy contests the alleged infringement and in its defence relies, inter alia, on Article 296(1)(b) EC.

I - Legal framework

A - Community law

3. Directive 93/36 (Directive 93/36' or the Directive') coordinates procedures for the award of public supply contracts and lays down requirements for the award of such contracts.

4. Article 1 of Directive 93/36 provides:

(a) public supply contracts are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

...

(d) open procedures are those national procedures whereby all interested suppliers may submit tenders;

(e) restricted procedures are those national procedures whereby only those suppliers invited by the contracting authorities may submit tenders;

[f] negotiated procedures are those national procedures whereby contracting authorities consult suppliers of their choice and negotiate the terms of the contract with one or more of them.'

5. Under Article 2(1)(b), the Directive is not to apply to: supply contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member States concerned or when the protection of the basic interests of the Member State's security so requires'.

6. Article 3 of the Directive provides that: [w]ithout prejudice to Articles 2, 4 and 5(1), this Directive shall apply to all products to which Article 1(a) relates, including those covered by contracts awarded by contracting authorities in the field of defence, except for the products to which [Article 296(1)(b) EC] applies.'

7. According to Article 6 of the Directive:

1. In awarding public supply contracts the contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), in the cases set out below....

3. The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

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...

(c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier;

...

(e) for additional [deliveries] by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.

4. In all other cases, the contracting authorities shall award their supply contracts by the open procedure or by the restricted procedure.'

8. As regards other specific provisions, they will be referred to when I analyse the grounds of the alleged failure to fulfil obligations.

II - Facts, pre-litigation procedure and forms of order sought

A - Facts

9. Following receipt of a complaint, the Commission opened an infringement procedure (No 2002/4194) in relation to Ordinance No 3231 of the President of the Council of Ministers of the Italian Republic of 24 July 2002 concerning aerial forest fire-fighting, which authorised recourse to negotiated procedures by way of derogation from the directives on public supply and service contracts. On the basis of this ordinance, the Corpo Forestale dello Stato (State Forestry Corps) purchased on 28 October 2002 two Agusta Bell AB 412 EP helicopters for approximately EUR 18 millions, by private negotiated contract, by derogation from the statutory provisions listed in Article 4 [of that ordinance]', that is to say in particular from the national legislation transposing Community directives on coordinating procedures for the award of public supply contracts. The Commission brought an action before the Court pursuant to Article 226 EC which resulted in a judgment in Case C525/03 of 27 October 2005. (6)

10. On the basis of the information received within the framework of the above procedure, the Commission noted that the specific infringement, forming the subject-matter of that procedure was not an isolated incident but was symptomatic of a general practice of directly awarding contracts for the purchase of helicopters manufactured by Agusta' and Agusta Bell' to meet the requirements of various corps of the Italian State, without any tendering procedure. The Commission therefore opened another infringement procedure (No 2003/2158).

11. As regards the Corpo Nazionale dei Vigili del Fuoco (the fire brigade, Ministry of Interior), the Commission noted in particular that the latter directly awarded the following contracts to the company Agusta', without any tendering procedure: (i) on 10 June 2002, a contract to purchase four Agusta Bell AB 412 helicopters for approximately EUR 30.5 millions; (ii) on 23 December 2002, a contract to purchase four Agusta A 109 Power helicopters for approximately EUR 33.6 million; and (iii) on 19 March 2003, a contract for a lease-purchase of four A 109 Power helicopters for approximately EUR 12.8 million. The Commission noted that the Corpo Nazionale dei Vigili del Fuoco's helicopter fleet is essentially composed of Agusta' or Agusta Bell' helicopters.

12. With regard to the Corpo Carabinieri (Ministry of Defence), the information communicated to the Commission indicates that, in the period 2000 to 2002, the Corpo Carabinieri awarded two contracts to Agusta to purchase four helicopters, without any tendering procedure. The Commission noted that the Corpo Carabinieri's helicopter fleet is also essentially composed of Agusta' or

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Agusta Bell' helicopters.

13. As to the Corpo Forestale dello Stato (Ministry for Agricultural and Forestry Policy), apart from the purchases which formed the subject-matter of Case C525/03, that body is said to have purchased one other Agusta helicopter. Likewise, the Commission noted that the Corpo Forestale's helicopter fleet is essentially composed of Agusta' or Agusta Bell' helicopters.

14. Concerning the Department of Civil Protection, the Commission was informed that it concluded a contract to lease-purchase Agusta' helicopters.

15. As regards the other state corps, the Commission considered - in spite of the fact that it did not have any information as to the specific contracts - that the air fleets of the Guardia Costiera (Coastguard), an emanation of the Corpo delle Capitanerie di Porto (Ministry of Infrastructure and Transport), of the Guardia di Finanza (Revenue Guard Corps, Ministry of Economy and Finance) and of the Polizia di Stato (State Police, Ministry of Interior) were also composed exclusively or predominantly of Agusta' or Agusta Bell' helicopters.

B - Pre-litigation procedure

16. The Commission - not having found any information pertaining to the organisation of a tender at Community level for the purchase of helicopters to meet the requirements of the above-mentioned Italian ministries and departments - considered that the above helicopters manufactured by Agusta' were directly purchased in breach of the procedures laid down in Directive 93/36 and, earlier, in Directive 77/62, Directive 80/767 and Directive 88/295. On 17 October 2003, the Commission sent the Italian Government a letter of formal notice, inviting it to present its observations.

17. The Italian authorities replied by way of a fax from its Permanent Representation to the European Union of 9 December 2003. Considering the Italian authorities' reply unsatisfactory, the Commission sent the Italian Republic a reasoned opinion on 5 February 2004, inviting it to comply with that reasoned opinion within two months of notification thereof.

18. The Italian authorities responded to the reasoned opinion in three letters from the Italian Permanent Representation to the European Union. (7)

19. The Commission considered that the Italian authorities did not provide sufficient arguments to refute the observations formulated in the reasoned opinion and noted that the Italian Republic did not take any measures intended to bring the incriminated practice to an end, and accordingly brought the present action before the Court on 15 September 2005. (8)

20. The Commission claims that the Court should:

1. declare that, since the Italian Government and, in particular, the Ministries of Home Affairs, Defence, Economics and Finance, for Agricultural and Forestry Policy, and for Infrastructure and Transport, and the Department of Civil Protection of the Presidency of the Council of Ministers, have adopted a procedure, which has been in existence for a long time and is still followed, of directly awarding to the firm Agusta contracts for the purchase of helicopters manufactured by Agusta and Agusta Bell to meet the requirements of the military corps of the fire brigade, the Carabinieri, the State Forestry Corps, the Coastguard, the Revenue Guard Corps, the State Police and the Department of Civil Protection, without any tendering procedure, in particular without complying with the procedures provided for by Directive 93/36 and, earlier, by Directive 77/62, Directive 80/767 and Directive 88/295, the Italian Republic has failed to fulfil its obligations under the abovementioned directives;

2. order the Italian Republic to pay the costs.'

21. The Italian Republic contends that the action should be dismissed as inadmissible and, in

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any event, dismissed as unfounded.

22. Both parties submitted oral argument at the hearing which took place on 17 April 2007.

III - Assessment

A - Preliminary remarks

23. It is important to note that the Italian Government does not contest having used the negotiated procedure for the purchase of helicopters for its corps and having directly awarded contracts to Agusta without prior publication of a tender notice at Community level. The discussion in this case therefore focuses on whether Italy could lawfully depart from the Community provisions on public supply contracts. (9) The form of order sought by the Commission refers not only to Directive 93/36 but also to earlier directives, namely Directives 77/62, 80/767 and 88/295. None the less, in view of the similarity of the relevant provisions in these directives, as suggested by the Commission, I consider that for reasons of clarity and simplicity it is sufficient for me to refer henceforth in my analysis solely to Directive 93/36.

B - Admissibility

24. In its defence, the Italian Government disputes the admissibility of the present action.

1. Main arguments of the parties

25. Italy submits that during the course of the pre-litigation procedure the Commission did not refer to military supplies; the only supplies mentioned during that procedure being civil supplies. Moreover, in the framework of the pre-litigation procedure the Commission merely cited a number of contracts concluded in recent years, that is to say in 2002 and 2003, by Corpo dei Vigili del Fuoco, Corpo Forestale and the Carabinieri with Agusta. Therefore, the complaint raised during the pre-litigation procedure does not correspond to the form of order sought in the present application to the Court. In addition, in its rejoinder, Italy contends that having regard to the vague and imprecise character of the facts alleged by the Commission, the action does not satisfy the requirements laid down by the case-law. The Italian Republic submits that this has gravely affected its rights of defence.

26. Finally, the Italian Government contends that the part of the present action relating to the supplies for the Corpo Forestale dello Stato is inadmissible, since these supplies were based on Ordinance No 3231. The principle ne bis in idem would be breached, as that ordinance was already considered by the Court in Case C525/03. (10)

27. The Commission disputes the views of the Italian Republic. It considers that the pre-litigation procedure never concerned military supplies. Rather, it related to civil supplies intended to meet inter alia the needs of certain military corps of the Italian Republic. With regard to the alleged imprecision, the Commission contends that it had always been clear since the letter of formal notice that the subject-matter of the procedure was the practice of directly awarding contracts to Agusta over a long period of time, which was never suspended. The purpose of the procedure was clear to Italy, which could and has defended itself, by producing inter alia a number of annexed documents. In addition, the Commission submits that the procedure which gave rise to Case C525/03 had a different subject-matter from that of the present case.

2. Appraisal

28. According to the Court's settled case-law, the Commission must indicate, in any application made under Article 226 EC, the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based. (11)

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29. In this regard, although it is true that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for in that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same objections, that requirement cannot go so far as to mean that in every case exactly the same wording must be used in both, where the subject-matter of the proceedings has not been extended or altered but simply narrowed. Accordingly, in its application the Commission may clarify its initial grounds of objection provided, however, that it does not alter the subject-matter of the dispute. (12)

30. First of all, I find persuasive the Commission's explanation that the adjective military' refers quite unambiguously to certain corps' of the State, rather than to supplies', as contended by the Italian Government. (13) It is clear from the file before the Court that the Commission's case is only about civil supplies purchased in order to meet the requirements of certain corps of the Italian State, some of which are of a military character and some of a civil character. In fact, a comparison of the reasoned opinion and the application, which are framed in almost identical terms, reveals that they are based on the same objections. In those circumstances, Italy's plea that the complaint raised during the pre-litigation procedure does not correspond to the form of order sought in the present action cannot be upheld.

31. Secondly, as regards the Italian Government's contention that the facts alleged by the Commission were vague and imprecise, in my opinion in the pre-litigation procedure in the present case it was set out clearly why the Commission considered that the Italian Republic had failed to comply with the directives on public supplies. Indeed, in point 14 of the reasoned opinion and point 25 of the letter of formal notice, the Commission stated in unambiguous terms that it had been unable to obtain any information that would confirm that the Italian Government had followed public procurement procedures at Community level in its purchases of helicopters, in conformity with Directive 93/36 but also, previously, Directives 77/62, 80/767 and 88/295. The allegations were thus sufficiently clear for the Italian Government to defend itself.

32. Finally, I consider that the principle ne bis in idem has not been breached in the present proceedings. In my view the subject-matter of Case C525/03 concerned a specific national order (namely Ordinance No 3231) which authorised recourse to negotiated procedures by way of derogation from directives on public supply and service contracts. Indeed that action was held inadmissible on account of the ordinance's temporary validity. A re-examination of the legality of Ordinance No 3231 has not been sought in the present proceedings. Rather the subject-matter of the present case is the alleged practice of directly awarding contracts for the purchase of helicopters to Agusta without any tendering procedure at Community level.

33. It follows from the foregoing that the Italian Government's objection of inadmissibility must be dismissed.

C - Substance

1. The in-house relations with Agusta

34. In order to establish whether Italy actually breached the directives on public supply contracts, I shall first deal with the Italian Government's contention that until the end of the 1990s its relations with Agusta qualified as in-house' relations.

a) Main arguments of the parties

35. Italy submits that the relations with Agusta were in-house' relations and in its defence it traces the development of public participation in Agusta. Although Italy acknowledges that the direct award of contracts by the State to companies in whose capital it participated at the time was difficult to reconcile with the case-law on in-house' transactions, it contends that Agusta's

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relations with the Italian State had rather the character of what it refers to as auto-production of goods and services' - used by the State and which constituted a fundamental part of the production portfolio of companies with a State participation.

36. The Commission submits that the Italian authorities did not prove that the criteria established by the Court in Teckal were fulfilled in the present case, (14) as Italy confined itself to submitting only vague and imprecise information.

b) Appraisal

37. As the Commission rightly argues, it is important to recall that, according to the Court's settled case-law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two cumulative conditions are met. First, the public authority which is a contracting authority must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities which control it. (15)

38. It was Italy's duty not only to claim the existence of such a relationship between the contracting authorities and Agusta, but also to furnish such evidence as would enable the Court to conclude unequivocally that the above two conditions were met. However, it is apparent from the file before the Court that Italy's claims in this respect are rather inconclusive and are not supported by any relevant documents. Therefore, in the present case, the Italian Government has failed to demonstrate that the two conditions have been met.

39. Moreover, the Court recently clarified that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments. (16)

40. Therefore, in view of the fact pointed out by the Commission that between the 1970s and the 1990s Agusta was never wholly owned by the Italian State, that in itself suffices to exclude the existence of an in-house relationship with Agusta. (17) Moreover, as regards the period since 2000, when a joint-venture Agusta Westland' was created with the British company Westland, the in-house relationship with the Italian State has to be excluded as well.

41. Hence, I shall now consider whether the directives on public supply contracts were indeed breached.

2. The existence of the practice

a) Main arguments of the parties

42. In view of the fact that the public supplies at issue fulfil the conditions laid down by Directive 93/36, in that due to helicopters' high prices the contracts have always largely exceeded the threshold of 130 000 Special Drawing Rights (SDRs), (18) the Commission maintains they should have been subject to an open procedure or to a restricted one, in conformity with Article 6 of the Directive, but not to a negotiated procedure. Therefore, the Commission submits that the infringement of Community law is demonstrated. Since the Italian authorities have explicitly admitted purchasing Agusta helicopters without any tendering procedure on the Community level before 2000, the Commission submits that the practice of directly awarding contracts to Agusta has been pursued after 2000, which is confirmed by the contracts annexed to its application.

43. In essence, as regards the pre-2000 purchases, Italy argues that they qualified as in-house', while with regard to the recent purchases, Italy submits that the direct awarding of contracts is a result of the international security climate following 11 September 2001. Civil helicopters, therefore, must be assimilated to military ones. The purchases were thus exempted from Community

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law under Article 296 EC.

b) Appraisal

44. The Commission claims that the practice in question was general' and systematic' and alleges infringement of Directive 93/36 and of Directive 77/62 and of the other directives applicable in the meantime. It follows that the practice of systematically awarding contracts directly to Agusta for the purchase of helicopters may well have lasted for some 30 years.

45. The Italian Government does not dispute the above practice. Moreover, in the annexes to its defence Italy actually confirms the Commission's contention in this respect. It follows that Italy has indeed used the negotiated procedure without proceeding to any tendering procedure at Community level. Therefore, it is necessary to analyse whether or not Italy could lawfully derogate from the directive.

46. The twelfth recital in the preamble to Directive 93/36 clearly notes that the negotiated procedure should be considered as exceptional and therefore applicable only in limited cases. To that end, Article 6(2) and (3) of the Directive exhaustively and expressly lists the cases in which the negotiated procedure may be used without prior publication of a tender notice. (19)

47. It should also be borne in mind that derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public supply contracts must be interpreted strictly. (20) In order not to deprive Directive 93/36 of its effectiveness, Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for in that directive, or add new conditions to the cases expressly provided for by that directive which make that procedure easier to use. (21) In addition, the burden of proving the actual existence of exceptional circumstances justifying derogation lies on the person seeking to rely on those circumstances. (22)

48. It is therefore necessary to examine whether or not Italy meets the requirements expressly covered by the derogations provided for in the Treaty and/or in the directive on which it relies.

3. The legitimate requirements of national interest

a) Main arguments of the parties

49. Italy contends that the purchases of helicopters at issue meet the legitimate requirements of national interest foreseen by Article 296 EC as well as Article 2(1)(b) of the Directive. Italy submits that these provisions are applicable, because the helicopters in question are dual-use goods', that is to say, goods capable of being used for both civil and military purposes.

50. First, the Italian Government takes the view that Article 296 EC covers all the supplies to the military corps of the Italian State. As regards the other corps, it emphasises that since 2001 the supplies for those corps have been progressively included in a specific domain pertaining to State security (or homeland security') and subject to a regime which tends to assimilate them to military supplies. (23) Italy considers that in Leifer , (24) which concerned a derogation from Article 28 EC in relation to dual-use goods, the Court expressly recognised that the Member States have a discretionary power when adopting measures deemed necessary to guarantee their public security, both internal and external.

51. In that regard, Italy refers to the judgment of the Court of First Instance in Fiocchi munizioni v Commission , (25) which states that the regime established by Article 296(1)(b) EC is intended to preserve the freedom of action of the Member States in certain matters affecting national defence and security. Article 296(1)(b) EC confers on the Member States a particularly wide discretion in assessing the needs receiving such protection.

52. Second, Italy maintains that in view of the fact that the helicopters in question can be involved

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in the fight against terrorism as well as missions protecting public order the derogation under Article 2(1)(b) of the Directive is applicable. It also invokes confidentiality requirements with regard to the purchases of the helicopters.

53. The Commission submits that Italy has not proven in the present case that requirements existed which justified the application of Article 30 EC and the dual-use goods' argument. In addition, with regard to Article 2(1)(b) of the Directive and the argument that the divulgation of elements concerning the purchases at issue would be contrary to Italy's essential interests, the Commission contends that Italy has not specified which elements' they may be. With regard to Article 296 EC, what is in question here is not trade in arms, munitions and war material' but rather purchases of helicopters intended for essentially civil use. Italy has not demonstrated that the situation in the present case constituted a measure necessary to protect its essential interests, such as security, which is an indispensable condition laid down by Article 296 EC. The Commission submits that the helicopters' only certain use is for civil purposes and that their military use remains only potential and uncertain. Therefore Article 296 EC is not applicable. Even on the hypothesis that the supplies in question were of a military character, Article 296 EC would not allow an automatic derogation such as that applied by Italy in the circumstances of the present case. To remove an entire industrial sector from competition procedures in order to protect national security appears neither proportionate nor necessary.

b) Appraisal

54. The Court has held that the only articles in which the Treaty provides for derogations applicable in situations which may affect public security are Articles 30 EC, 39 EC, 46 EC, 58 EC, 64 EC, 296 EC, and 297 EC, which deal with exceptional and clearly defined cases. It cannot be inferred from those articles that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application. (26) Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends. (27)

55. The Court has also held that it is for the Member State which seeks to rely on those exceptions to furnish evidence that the exemptions in question do not go beyond the limits of such cases and that they are necessary for the protection of the essential interests of its security. (28)

56. In its defence, Italy relies in particular on Article 296 EC. The purpose of Article 296 EC is to coordinate as well as balance relations and tensions between the protection of competition in the common market and the protection of Member States' essential interests of security which are connected with the production of or trade in arms, munitions and war material of the Member States, so that the latter are permitted to derogate from Community law, but only under the strict conditions prescribed.

57. As a derogation, this Article must be interpreted strictly.

58. It follows that that derogation, as for example the derogation in Article 30 EC, cannot be considered an automatic and/or blanket exemption which Member States may invoke regardless of the particular circumstances of a given situation. Article 296 EC should be applied by Member States on a case-by-case basis and in a case such as this one each individual procurement contract must be assessed. Under Article 296 EC the measures, which are applied by a Member State and which are connected with the production of or trade in arms, munitions and war material, must be necessary for the protection of the essential interests of its security. In addition, Article 296 EC is

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subject to the condition that such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes' (emphasis added). Moreover, Article 296 EC is applicable only to products that are enumerated on the list included in a Council Decision of 15 April 1958. (29)

59. In my view, where the application of Article 296 EC by a Member State adversely affects competition in the common market, the Member State in question must prove that the products are intended for specifically military purposes. (30) To my mind, that in itself already precludes dual-use products. (31)

60. The nature of the products on the 1958 list and the explicit reference in Article 296 EC to specifically military purposes' confirms that only the trade in equipment which is designed, developed and produced for specifically military purposes can be exempted from Community rules on competition on the basis of Article 296(1)(b) EC. (32) The requirement that products be destined for specifically military purposes means for example that the supply of a helicopter to the military corps which is intended for civil purposes must comply with the public procurement rules. A fortiori , helicopters supplied to certain civil departments of a Member State which could only hypothetically be used, as Italy claims, for military purposes too, inevitably have to comply with those rules.

61. In the present case, Italy has never contended that all the helicopters in question were purchased for specifically military purposes. Rather, the Italian Government essentially submits that the helicopters in question can also hypothetically be used for military purposes but are, however, used at the same time for civil purposes. It is thus clear from the file before the Court that the helicopters in question were not intended to be used for specifically military purposes. As a result, Italy cannot rely in its defence on Article 296(1)(b) EC.

62. Italy has not attempted to demonstrate that its concerns with regard to confidentiality could not have been adequately resolved pursuant to the procedures laid down in the directive, in particular the restricted procedure mentioned in Article 1(e) thereof. Rather, Italy removed a substantial part of supplies of helicopters to the central administration of the Italian State from the scope of application of the rules on public procurement by systematically awarding contracts directly to Agusta. This practice is clearly disproportionate by reference to the expressed concern of protecting confidentiality. (33)

63. Furthermore, as regards Article 2(1)(b) of the Directive, the fact that the helicopters in question serve for exclusively or primarily civil purposes renders invalid Italy's argument on the necessity to protect the confidentiality of purchases of the helicopters in the case at hand and thus the derogation under that provision is not applicable to the purchases of helicopters which are subject to these proceedings.

4. On homogeneity/interoperability of the fleet

a) Main arguments of the parties

64. Italy submits that owing to the technical specificity of helicopters and to fact that the supplies in question constituted additional deliveries, the Government was entitled to award the contracts by a negotiated procedure, in application of Article 6(3)(c) and (e) of Directive 93/36.

65. The Commission contends that the two exceptions mentioned above are not pertinent in the present case. As regards additional deliveries, the Commission submits that, in addition, the general three-year rule provided for in Article 6(3)(e) of the Directive applied and, in any event, since the previous deliveries were unlawful the additional deliveries were by definition also unlawful.

b) Appraisal

66. It suffices to state that Italy failed to explain and to prove to a sufficient extent what

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led it to consider that only Agusta helicopters had the required characteristics to justify the purchases under Article 6(3)(c) and (e) of the Directive. Moreover, I agree with the Commission and find that the fact alleged by Italy that other Member States producing helicopters follow the same procedure is not pertinent for the purposes of the present proceedings.

67. It follows that in the light of the foregoing considerations, I propose that the Court declare that the Italian Republic has failed to fulfil its obligations under Directive 93/36 and, earlier, under Directives 77/62, 80/767, and 88/295.

IV - Costs

68. Under Article 69(2) of the Rules of Procedure of the Court of Justice the Italian Government as the unsuccessful party should be ordered to bear the costs.

V - Conclusion

69. In the light of the foregoing considerations, I propose that the Court:

(1) declare that, since the Italian Government and, in particular, the Ministries of Home Affairs, Defence, Economics and Finance, for Agricultural and Forestry Policy, and for Infrastructure and Transport, and the Department of Civil Protection of the Presidency of the Council of Ministers, have adopted a procedure, which has been in existence for a long time and is still followed, of directly awarding to the firm Agusta' contracts for the purchase of helicopters manufactured by Agusta' and Agusta Bell' to meet the requirements of the military corps of the fire brigade, the Carabinieri, the State Forestry Corps, the Coastguard, the Revenue Guard Corps, the State Police and the Department of Civil Protection, without any tendering procedure, in particular without complying with the procedures provided for by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, and, earlier, by Council Directive 77/62/EEC, Council Directive 80/767/EEC and Council Directive 88/295/EEC, the Italian Republic has failed to fulfil its obligations under the abovementioned directives;

(2) order the Italian Republic to pay the costs.

(1) .

(2) - Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199, p. 1.

(3) - Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ 1977 L 13, p. 1.

(4) - Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts, OJ 1980 L 215, p. 1.

(5) - Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC, OJ 1988 L 127, p. 1.

(6) - Commission v Italy [2005] ECR I9405.

(7) - (i) The first dated 5 April 2004 communicating a note from the head of the legislative service of the Ministry for Community policy of 2 April 2004; (ii) the second dated 13 May 2004 transmitting a note from the President of the Council of Ministers (department of Community policy) of 11 May 2004; and (iii) the third dated 27 May 2004 forwarding a note from the Presidency of the Council of Ministers (department of civil protection) of 12 May 2004.

(8) - The Commission also points out that, according to its information, the Italian Government

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by way of a negotiated procedure directly purchased in December 2003 further Agusta helicopters to meet the requirements of Guardia di Finanza , Polizia di Stato , Carabinieri and Corpo Forestale and, as follows from the date of their registration at the Italian Court of Auditors, Italy did not annul these contracts after it had received the reasoned opinion.

(9) - Namely Directive 93/36 and, previously, Directive 77/62, Directive 80/767 and Directive 88/295.

(10) - Cited in footnote 6.

(11) - See, inter alia, Case C375/95 Commission v Greece [1997] ECR I5981, paragraph 35 and the case-law cited therein.

(12) - See, most recently, Case C195/04 Commission v Finland [2007] ECR I0000, paragraph 18 and the case-law cited therein. See also Case C29/04 Commission v Austria [2005] ECR I9705, paragraphs 25 to 27 and the case-law cited therein.

(13) - The Commission is right to point out in its reply that Italy itself states in its defence that the Carabinieri , Guardia di Finanza and Guardia Costiera are State corps of a military character. The other corps are, however, civil.

(14) - See Case C107/98 [1999] ECR I8121.

(15) - See Teckal , cited in footnote 14, paragraph 50, and, most recently, Case C295/05 Asociacion Nacional de Empresas Forestales (Asemfo) v Transformacion Agraria SA (Tragsa) and Administracion del Estado [2007] ECR I0000, paragraph 55 and the case-law cited therein.

(16) - See Case C26/03 Stadt Halle [2005] ECR I1, paragraphs 49 and 50.

(17) - Italy's argument that Stadt Halle is not applicable as it postdates the facts of the present case is to my mind not pertinent, as the latter judgment merely interpreted the law as it should have been interpreted ab initio.

(18) - As provided in Article 5(1)(a)(ii) of Directive 93/36. That amount in SDRs is equal to approximately EUR 162 000 for 2002 and 2003.

(19) - See Teckal , cited in footnote 14, paragraph 43, which states that: the only permitted exceptions to the application of Directive 93/36 are those which are exhaustively and expressly mentioned therein (see, with reference to Directive 77/62, Case C71/92 Commission v Spain [1993] ECR I5923, paragraph 10).' With reference to inter alia Council Directive 93/37/EEC of 14 June 1993 (OJ 1993 L 199, p. 54), see Case C323/96 Commission v Belgium [1998] ECR I5063, paragraph 34.

(20) - See Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 14.

(21) - See Case C84/03 Commission v Spain [2005] I139, paragraphs 48, 58 and the operative part, and the case-law cited therein.

(22) - Case 199/85 Commission v Italy , cited in footnote 20, paragraph 14. Most recently, with reference to Council Directive 93/38/EECof 14 June 1993 (OJ 1993 L 199, p. 84), see Case C394/02 Commission v Greece [2005] ECR I4713, paragraph 33.

(23) - Italy maintains that the fact that the military or paramilitary use of the helicopters in question is only an eventuality does not call in question their non-civil' character, since the need to ensure that the helicopters are suitable for military purposes imposes requirements from the order and procurement stage, especially as regards principles of secrecy.

(24) - Case C83/94 [1995] ECR I3231, paragraph 35.

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(25) - Case T26/01 [2003] ECR II3951, paragraph 58.

(26) - Case C186/01 Dory v Bundesrepublik Deutschland [2003] ECR I2479, paragraph 31; Case 222/84 Johnston [1986] ECR 1651, paragraph 26; Case C273/97 Sirdar [1999] ECR I7403, paragraph 16; and Case C285/98 Kreil [2000] ECR I69, paragraph 16.

(27) - Case C54/99 Eglise de scientologie de Paris [2000] ECR I1335, paragraph 17 and the case-law cited therein.

(28) - Case C414/97 Commission v Spain [1999] ECR I5585, paragraph 22. See also Case C367/89 Richardt and Les Accessoires Scientifiques' [1991] ECR I4621, paragraphs 20 and 21 and the case-law cited therein.

(29) - The Council adopted the list of products to which this Article applies on 15 April 1958. The list itself has never been officially published or amended, but is in the public domain. See Written Question E1324/01 by Bart Staes (Verts/ALE) to the Council: Article 296(1)(b) of the EC Treaty, OJ C 364 E of 20. 12. 2001, p. 85.

(30) - In Case C414/97 Commission v Spain , cited in footnote 28, at paragraph 22 the Court stated that it is for the Member State which seeks to rely on those exceptions [that is to say inter alia Articles 30 EC and 296 EC] to furnish evidence that the exemptions in question do not go beyond the limits of such cases'.

(31) - A contrario sensu , however, I should note that products which appear on the list and are not intended for specifically military purposes do fall under the procurement rules.

(32) - See Fiocchi munizioni , cited in footnote 25, paragraphs 59 and 61.

(33) - I agree with the Commission that it is appropriate to recall in this respect the Opinion of Advocate General Léger in Case C349/97 Spain v Commission [2003] ECR I3851, points 249 to 257, where he concluded that requirements of confidentiality could not be invoked in order to exempt a public contract from competition. In that case the applicable provision was Directive 77/62, which was repealed by Directive 93/36.

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31993L0036-A01 : N 4
31993L0036-A01LE : N 62
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31993L0036-A03 : N 6
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31993L0036-A06P2 : N 46
31993L0036-A06P3 : N 46
31993L0036-A06P3LC : N 66
31993L0036-A06P3LE : N 66
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62003J0026 : N 39
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62003J0525 : N 32
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SUB Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws

AUTLANG English

APPLICA Commission ; Institutions

DEFENDA Italy ; Member States

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NATIONA	Italy
PROCEDU	Action for failure to fulfil obligations
ADVGEN	Mazak
JUDGRAP	Makarczyk
DATES	of document: 10/07/2007 of application: 15/09/2005

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Notice for the OJ

Action brought on 15 September 2005 by the Commission of the European Communities against the Italian Republic

(Case C-337/05)

(Language of the case: Italian)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 15 September 2005 by the Commission of the European Communities, represented by D. Recchia and X. Lewis, acting as Agents.

The Commission claims that the Court should:

Declare that, since the Italian Government and, in particular, the Ministries of Home Affairs, Defence, Economics and Finance, for Agricultural and Forestry Policy, and for Infrastructure and Transport, and the Department of Civil Protection of the Presidency of the Council of Ministers, have adopted a procedure, which has been in existence for a long time and is still followed, of directly awarding to the firm 'Agusta' contracts for the purchase of helicopters manufactured by 'Agusta' and 'Agusta Bell' to meet the requirements of the military corps of the fire brigade, the Carabinieri, the State Forestry Corps, the Coastguard, the Revenue Guard Corps, the State Police and the Department of Civil Protection, without any tendering procedure, in particular without complying with the procedures provided for by Directive 93/36/EEC [1] and, earlier, by Directive 77/62/EEC, [2] Directive 80/767/EEC [3] and 88/295/EEC, [4] the Italian Republic has failed to fulfil its obligations under the abovementioned directives;

Order the Italian Republic to pay the costs.

Pleas in law and main arguments

The Government of the Italian Republic and, in particular, the Ministries of Home Affairs, Defence, Economics and Finance, for Agricultural and Forestry Policy, and for Infrastructure and Transport, and the Department of Civil Protection of the Presidency of the Council of Ministers, have adopted a procedure, which has been in existence for a long time and is still followed, of directly awarding to the firm 'Agusta' contracts for the purchase of helicopters manufactured by 'Agusta' and 'Agusta Bell' to meet the requirements of the military corps of the fire brigade, the Carabinieri, the State Forestry Corps, the Coastguard, the Revenue Guard Corps, the State Police and the Department of Civil Protection, without any tendering procedure, in particular without complying with the procedures provided for by Directive 93/36/EEC and, earlier, by Directive 77/62/EEC, Directive 80/767/EEC and 88/295/EEC, and has thereby failed to fulfil its obligations under the abovementioned directives.

Following receipt of a complaint, the Commission acquired information from which it appears that the Italian Government has operated that procedure for a long time.

The Commission takes the view that that practice is incompatible with the directives on public supply contracts referred to above in so far as none of the conditions to which recourse to the negotiated procedure without publication of a contract notice is subject appears to have been satisfied.

The Commission considers, moreover, that Italy has not shown that the practice in question is justified on the basis of Article 2 of Directive 93/36/EEC, according to which the directive is not to apply to supply contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member States concerned or when the protection of the basic interests of the Member State's security so requires.

_____

[1] - OJ L 199 of 09.08.1993, p. 1.

[2] - OJ L 13 of 15.01.1977, p. 1.

[3] - OJ L 215 of 18.08.1980, p. 1.

[4] - OJ l 127 of 20.05.1988, p. 1.

**Judgment of the Court (Second Chamber)
of 19 April 2007**

Asociacion Nacional de Empresas Forestales (Asemfo) v Transformacion Agraria SA (Tragsa) and Administracion del Estado. Reference for a preliminary ruling: Tribunal Supremo - Spain. Reference for a preliminary ruling - Admissibility - Article 86(1) EC - No independent effect - Factors permitting material which enables the Court to give a useful answer to the questions referred - Directives 92/50/EEC, 93/36/EEC and 93/37/EEC - National legislation enabling a public undertaking to perform operations on the direct instructions of the public authorities without being subject to the general rules for the award of public procurement contracts - Internal management structure - Conditions - The public authority must exercise over a distinct entity a control similar to that which it exercises over its own departments - The distinct entity must carry out the essential part of its activities with the public authority or authorities which control it. Case C-295/05.

1. Competition - Public undertakings and undertakings to which the Member States grant special or exclusive rights - Article 86 EC - Scope

(Art. 86(1) EC)

2. Approximation of laws - Procedures for the award of public works, supply and service contracts - Directives 92/50, 93/36 and 93/37 - Scope

(Council Directives 92/50, 93/36 and 93/37)

1. Article 86(1) EC, according to which, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States are not to enact or maintain in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Articles 12 EC and 81 EC to 89 EC inclusive, has no independent effect in the sense that it must be read in conjunction with the relevant rules of the Treaty.

(see paras 39-40)

2. Directives 92/50 relating to the coordination of procedures for the award of public service contracts, 93/36 coordinating procedures for the award of public supply contracts and 93/37 concerning the coordination of procedures for the award of public works contracts do not preclude a body of rules which enables a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, since, first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

(see paras 54-55, 60, 62-65, operative part)

In Case C-295/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 1 April 2005, received at the Court on 21 July 2005, in the proceedings

Asociacion Nacional de Empresas Forestales (Asemfo)

v

Transformacion Agraria SA (Tragsa) ,

Administracion del Estado,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, R. Silva de Lapuerta,

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G. Arestis (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: L.A. Geelhoed,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 15 June 2006,

after considering the observations submitted on behalf of:

- the Asociacion Nacional de Empresas Forestales (Asemfo), by D.P. Thomas de Carranza y Méndez de Vigo, procuradora, and R. Vazquez del Rey Villanueva, abogado,

- Transformacion Agraria SA (Tragsa), by S. Ortiz Vaamonde and I. Pereña Pinedo, abogados,

- the Spanish Government, by F. Díez Moreno, acting as Agent,

- the Lithuanian Government, by D. Kriauinas, acting as Agent,

- the Commission of the European Communities, by X. Lewis and F. Castillo de la Torre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2006,

gives the following

Judgment

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

Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts do not preclude a body of rules such as that governing Tragsa, which enable it, as a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, since, first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

1. The reference for a preliminary ruling concerns the question whether, having regard to Article 86(1) EC, a Member State may confer on a public undertaking a legal regime enabling it to carry out operations without being subject to Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and whether those directives preclude such a regime.

2. That reference was made in the course of proceedings between the Asociacion Nacional de Empresas Forestales (National Association of Forestry Undertakings, Asemfo') and the Administracion del Estado (State Administration) over a complaint about the legal regime of Transformacion Agraria SA (Tragsa').

Legal background

Relevant provisions of Community law

3. Article 1 of Directive 92/50 stated:

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For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority...

...

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

... '

4. Article 1 of Directive 93/36 provided:

For the purposes of this Directive:

(a) public supply contracts are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

(b) contracting authorities shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...'

5. Article 1 of Directive 93/37 was worded as follows:

For the purpose of this Directive:

(a) public works contracts are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) contracting authorities shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...'

The relevant provisions of national law

Legislation on public procurement

6. Article 152 of Ley 13/1995 de Contratos de las Administraciones Publicas of 18 May 1995 (Law 13/1995 on Public Procurement) (BOE No 119 of 19 May 1995, p. 14601), in its version codified by Real Decreto Legislativo 2/2000 of 16 June 2000 (BOE No 148 of 21 June 2000, p. 21775), (hereinafter Law 13/1995'), states:

1. The Administation may carry out works using its own services and its own human or material resources, or in co-operation with private contractors, provided, in the latter case, that the value of the works in question is lower than..., where one of the following situations obtains:

(a) Where the Administration has at its disposal factories, stocks, workshops or technical or industrial services suitable for the execution of the projected works, use should usually be made of that method of execution.

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...'

7. Article 194 of Law 13/1995 provides:

1. The Administration may manufacture movable property using its own services and its own human or material resources or in cooperation with private contractors, provided, in the latter case, that the value of the works in question is lower than the maximum amounts laid down in Article 177(2) where one of the following situations obtains:

(a) Where the Administration has at its disposal factories, stocks, workshops or technical or industrial services suitable for the execution of the projected works, use should usually be made of that method of execution.

...'

The body of rules governing Tragsa

8. Tragsa's constitution was authorised by Article 1 of Decreto Real (Royal Decree) 379/1977 of 21 January 1977 (BOE No 65 of 17 March 1977, p. 6202).

9. The body of rules governing Tragsa and established by that royal decree was successively amended until the adoption of Ley 66/1997 de Medidis Fiscales Adminstrativas y del Orden Social (Law 66/1997 concerning Fiscal, Administrative and Social Measures) of 30 December 1997 (BOE No 313 of 31 December 1997, p. 38589), as amended by Ley 53/2002 of 30 December 2002 (BOE No 313 of 31 December 2002, p. 46086), and Ley 62/2003 of 30 December 2003 (BOE No 313 of 31 December 2003, p. 46874), (hereinafter Law 66/1997').

10. Under Article 88 of Law 66/1997, entitled Legal status':

1. [Tragsa] is a state company... which provides essential services in the field of rural development and environmental protection, in accordance with the provisions of the present law.

2. The Autonomous Communities may participate in the share capital of Tragsa by means of acquisitions of shares, the disposal of which requires authorisation by the Ministerio de Economía y Hacienda (Ministry of the Treasury), on the proposal of the Ministerio de Agricultura, Pesca y Alimentacion (Ministry of Agriculture, Fisheries and Food) and of the Ministerio de Medio Ambiente (Ministry of the Environment).

3. Tragsa's objects are:

(a) The carrying out of all types of actions, works and supplies of services in respect of agriculture, stock-rearing, forestry, rural development, conservation and protection of nature and the environment, of aquaculture and fisheries, as well as the actions necessary for the improvement of the use and of the management of natural resources, in particular, the carrying out of works of conservation and enrichment of the historic Spanish patrimony in the countryside ... ;

(b) the preparation of studies plans and projects and of all types of advice and technical assistance and training in respect of agriculture, forestry, rural development, environmental protection and improvement, aquaculture and fisheries, nature conservation, as well as in respect of the use and management of natural resources;

(c) agricultural activities, stock-rearing, forestry and aquaculture and the marketing of the products thereof, administration and management of farms, mountains, agricultural, forestry environmental and nature protection centres and the management of open spaces and natural resources;

(d) the promotion, development and adaptation of new techniques, of new agricultural, forestry, environmental, aquacultural or fishery equipment and nature protection systems, and systems for the logical use of natural resources;

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(e) the manufacture and marketing of moveable goods of the same character;

(f) the prevention of and campaign against plant and animal disasters and diseases and against forest fires and the performance of works and tasks of emergency technical support;

(g) the financing of the construction or exploitation of agricultural and environmental infrastructures and of equipment for rural populations as well as the formation of companies and participation in companies already formed with purposes corresponding to the social objects of the undertaking;

(h) the execution, at the request of third parties, of actions, works, technical assistance, advice and supplies of rural, agricultural, forestry and environmental services within and outside the national territory, directly or through its subsidiaries.

4. As an instrument and technical service of the Administration, Tragsa shall be required to execute exclusively, by itself or through its subsidiaries, the works entrusted to it by the Administracion General del Estado (General Administration of the State), the Autonomous Communities or the public bodies subject to them in matters which come within the company's objects and, in particular, those which are urgent or which are ordered because of declared emergencies.

...

5. Neither Tragsa nor its subsidiaries may participate in public procurement procedures put in place by the public authorities whose instrument they are. However, in the absence of any tenderer, Tragsa may be entrusted with the execution of the activity which is the subject of the public call for tenders.

6. The value of the major works, projects, studies and supplies undertaken by Tragsa shall be determined by applying to the stages carried out the corresponding tariffs, which must be determined by the competent authority. Those tariffs shall be calculated so as to reflect the actual costs of carrying out the works and their application to the stages carried out shall be sufficient evidence of the investment made or services rendered.

7. Contracts for works, supplies, advice and assistance and services which Tragsa and its subsidiaries conclude with third parties shall remain subject to the provisions of [Law 13/1995], as regards publicity, procurement procedures and the forms thereof, provided that the value of the contracts is equal or superior to those laid down in Articles 135(1), 177(2) and 203(2) of [that law].'

11. Decreto Real 371/1999 of 5 March 1999 laying down the rules governing Tragsa (BOE No 64 of 16 March 1999, p. 10605, Royal Decree 371/1999') specifies the legal, financial and administrative rules governing that company and subsidiaries in their relations with the public authorities in respect of administrative action in or outside national territory, in their capacity as an instrument and technical service of those administrations.

12. Under Article 2 of Royal Decree 371/1999, Tragsa's entire share capital is to be held by persons governed by public law.

13. Article 3 of Royal Decree 371/1999, entitled Legal status', provides:

1. Tragsa and its subsidiaries are an instrument and a technical service of the General Administration of the State and of those of each of the Autonomous Communities concerned.

The various departments or ministries of the Autonomous Communities of the aforementioned public administrations, as well as the bodies subject to them and the entities of any nature which are connected to them for the purposes of carrying out of their plans of action, may entrust Tragsa or its subsidiaries with works and activities necessary to the exercise of their powers and duties, and with complementary or ancillary works and activities in accordance with the regime established by this royal decree.

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2. Tragsa and its subsidiaries shall be required to carry out the works and activities with which they are entrusted by the administration. That obligation covers, exclusively, the demands with which they are entrusted as an instrument and technical service in matters which come within its objects.

3. Emergency action decided upon in connection with catastrophes or disasters of any nature which is entrusted to them by the competent authority shall, for Tragsa and its subsidiaries, in addition to being obligatory, be a priority.

In emergencies, in which the public authorities must take immediate action, they shall be able to call directly on Tragsa and its subsidiaries and instruct them to take the action necessary to provide the most effective possible protection for persons and goods and the maintenance of services.

To that end, Tragsa and its subsidiaries shall be integrated into the present arrangements for the prevention of dangers and into action plans and shall be subject to implementing protocols. In that type of situation, they shall mobilise, on demand, all the means at their disposal.

4. In connection with their relationships of collaboration or cooperation with other authorities or bodies governed by public law, the public authorities may suggest the services of Tragsa and its subsidiaries, regarded as their instrument, in order that those other authorities or bodies governed by public law shall use them as their instrument ...

5. ... the functions of organisation, supervision and control concerning Tragsa and its subsidiaries shall be exercised by the Ministerio de Agricultura, Pesca y Alimentacion (Ministry of Agriculture, Fisheries and Food) as well as by the Ministerio de Medio Ambiente (Ministry of the Environment).

6. Tragsa's and its subsidiaries' relations with other authorities as an instrument and technical service are instrumental and not contractual in nature. Consequently, they are, in every respect, internal, dependent, and subordinate.'

14. Article 4 of Royal Decree 371/1999, entitled Financial structure', is worded as follows:

1. In accordance with Article 3 of the present royal decree, Tragsa and its subsidiaries shall receive, in return for the works, technical assistance and advice, and for the supplies of goods and services with which they are entrusted, an amount corresponding to the expenses which they have incurred by applying the system of tariffs established by this article...

2. The tariffs shall be calculated and applied by stages of execution and in such a way as to reflect the total actual costs, be they direct or indirect, of executing them.

...

7. New tariffs, modification of existing tariffs and the procedures, mechanisms and formulae for revising them shall be adopted by each public authority of which Tragsa and its subsidiaries are an instrument and technical service.

...'

15. Finally, Article 5 of Royal Decree 371/1999, entitled Administrative rules for action', provides:

1. Mandatory action which is entrusted to Tragsa or its subsidiaries, shall form the subject, as appropriate, of drafts, memoranda or other technical documents...

2. Before finalising the demand, the competent organs shall approve those documents and follow the mandatory procedures and the technical, legal, budgetary, supervisory and approval formalities in respect of the expense.

3. The demand for each mandatory action shall be formally communicated by the authorities to Tragsa

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or its subsidiaries, by means of an instruction containing, in addition to the appropriate information, the name of the authority, the period within which the instruction is to be carried out, its value, the budgetary heading corresponding to it and, if appropriate, the annual amounts on which the financing is based and the respective amount relating to it, as well as the director designated for the action to be executed....

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

16. The facts, as set forth in the order for reference, may be summarised as follows.

17. On 23 February 1996, Asemfo lodged a complaint against Tragsa for a declaration that Tragsa was abusing its dominant position in the Spanish forestry works, services and projects market because of non-compliance with the award procedures laid down in Law 13/1995. According to Asemfo, Tragsa's special status enabled it to carry out a large number of works at the direct demand of the Administration, in breach of the principles relating to public procurement and to free competition, which eliminates any competition on the Spanish market. Being a public undertaking for the purposes of Community law, Tragsa could not be entitled, under the pretext of being a technical service of the Administration, to privileged treatment as regards the rules governing public procurement.

18. By decision of the competent authority of 16 October 1997, that complaint was rejected on the ground that Tragsa was a service of the Administration, without any independent decision-making powers and was required to carry out the works demanded of it. Tragsa operating outside the market, its activities do not, therefore, come under the law of competition.

19. Asemfo appealed against that decision before the Tribunal de Defensa de la Competencia (Competition Court). By judgment of 30 March 1998, that court dismissed the appeal, holding that the operations carried out by Tragsa were executed by the Administration itself and that, therefore, there could be no breach of competition law unless that company was acting independently.

20. Asemfo appealed to the Audiencia Nacional (National High Court) which, in its turn, by a judgment of 26 September 2001, upheld the judgment at first instance.

21. Asemfo appealed on a point of law against that judgment to the Tribunal Supremo (Supreme Court) arguing that Tragsa, as a public undertaking, could not be treated as a service of the Administration, which would enable it to derogate from the rules of public procurement, and that the company's legal status, as defined in Article 88 of Ley 66/1997, could not be compatible with Community law.

22. Having held that Tragsa is an instrument' of the Administration and that it confines itself to carrying out the instructions of the public authorities, without being able to refuse them or fix the price of its activities, the Tribunal Supremo has harboured doubts as regards the compatibility of Tragsa's legal status with Community law in the light of the Court's case-law on the application to public undertakings of the provisions of Community law relating to public procurement and free competition.

23. In addition, while recalling that, in Case C-349/97 Spain v Commission [2003] ECR I-3851, the Court held, in respect of Tragsa, that it must be regarded as a means by which the Administration acts directly, the referring court states that, in the case which is now before it, there are factual circumstances which were not considered in that judgment, such as the strong public participation on the agricultural works market, which causes it significant disruption, even if Tragsa's activities are, in law, unconnected to the market, inasmuch as from a legal point of view it is the Administration which acts.

24. Those were the circumstances in which the Tribunal Supremo decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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(1) Does Article 86(1) EC permit a Member State of the European Union to grant ex lege to a public undertaking a legal status which allows it to execute public works without being subject to the general rules on the award of public contracts by tender, where there are no special circumstances of urgency or public interest, both below and above the financial threshold laid down by the European Directives in this regard?

(2) Is such a legal regime compatible with the provisions of Council Directives 93/36/EEC and 93/37/EEC and European Parliament and Council Directive 97/52/EC of 13 October 1997 [(OJ 1997 L 328, p. 1)] and Commission Directive 2001/78 [EC of 13 September 2001 (OJ 2001 L 285, p. 1)] amending the three previous directives - legislation recently recast by European Parliament and Council Directive 2004/18/EC of 31 March 2004 [on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)]?

(3) Are the statements contained in the judgment... in Spain v Commission applicable in any event to Tragsa and its subsidiaries, in the light of the rest of the case-law of the Court regarding public procurement and in view of the fact that the Administration entrusts to Tragsa a large number of works which are not subject to the rules governing free competition, and that this situation might cause considerable distortion of the relevant market?'

The questions referred for a preliminary ruling

Admissibility

25. Tragsa, the Spanish Government and the Commission of the European Communities challenge the Court's jurisdiction to give a preliminary ruling on the reference and, relying on several arguments, cast doubt on the admissibility of the questions referred by the national court.

26. First of all, those questions relate only to the evaluation of national measures and, therefore, they do not come within the jurisdiction of the Court,

27. Next, those questions are hypothetical inasmuch as they seek an answer to problems which are not relevant or germane to the outcome of the main proceedings. If the only relevant plea in law invoked by Asemfo were a breach of the rules concerning public procurement, such a breach cannot, by itself, found an allegation that Tragsa abuses a dominant position on the market. In addition, it does not seem that the Court could be persuaded to interpret the directives relating to public procurement for the purposes of national proceedings intended to establish whether that company has abused an allegedly dominant position.

28. Finally, the order of reference contains no information relating to the relevant market or to Tragsa's allegedly dominant position upon it. Nor does it contain any detailed argument on the applicability of Article 86 EC and offers no comment on its application in conjunction with Article 82 EC.

29. It is appropriate in the first place to recall that, according to settled case-law, even though it is true that it is not for the Court to rule on the compatibility of national rules with the provisions of Community law in proceedings brought under Article 234 EC since the interpretation of such rules is a matter for the national courts, the Court does have jurisdiction to supply the latter with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law (Case C-506/04 Wilson [2006] ECR I-0000, paragraphs 34 and 35, and the case-law there cited).

30. Secondly, under equally settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent

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judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court of Justice is bound, in principle, to give a ruling (see, in particular, Case C286/02 Bellio F.lli [2004] ECR I3465, paragraph 27, and Case C217/05 Confederacion Española de Empresarios de Estaciones de Servicio [2006] ECR I0000, paragraphs 16 and 17, and the case-law there cited).

31. Thirdly, it is settled case-law that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-238/05 Asnef-Equifax and Administracion del Estado [2006] ECR I-0000, paragraph 17, and the case-law there cited).

32. Furthermore, the Court has also held that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Case C205/05 Nemec [2006] ECR I0000, paragraph 25, and Confederacion Española de Empresarios de Estaciones de Servicio , paragraph 26, and the case-law there cited).

33. In that regard, according to the case-law of the Court, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute (Nemec , paragraph 26, and Joined Cases C-94/04 and C-202/04 Cipolla and Others [2006] ECR I-0000, paragraph 38).

34. In the case in the main proceedings, while it is admittedly true that the Court cannot itself rule on the compatibility of Tragsa's legal status with Community law, there is nothing to prevent it from providing the canons of construction of Community law which will enable the referring court itself to rule on the compatibility of Tragsa's legal status with Community law.

35. In those circumstances, it is necessary to examine whether, in the light of the case-law referred to in paragraphs 31 to 33 of the present judgment, the Court has before it the factual and legal material necessary to give a useful answer to the questions submitted to it.

36. As regards the second and third questions, it is important to point out that the order of reference sets out, briefly but precisely, the facts which gave rise to the main proceedings and the relevant provisions of the applicable national law.

37. Indeed, it is clear from that decision that those proceedings arose following a complaint lodged by Asemfo concerning Tragsa's legal status, since the latter can, according to Asemfo, carry out a large number of operations at the direct demand of the Administration, without compliance with the rules in respect of publicity set out in the directives relating to public procurement. In those proceedings, Asemfo maintains also that Tragsa, being a public undertaking, cannot be entitled, under the pretext of being a technical service of the Administration, to privileged treatment as regards the rules governing public procurement.

38. In addition, in connection with the second and third questions, the order of reference sets out, referring to the Court's case-law, first, the reasons for which the national court requests the interpretation of the directives relating to public procurement and, second, the link between the relevant Community legislation and the national legislation applicable to the matter.

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39. As regards the first question, which concerns the point whether the body of rules governing Tragsa is contrary to Article 86(1) EC, it is appropriate to point out that, according to that article, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States are not to enact or maintain in force any measure contrary to the rules contained in the EC Treaty, in particular to those rules provided for in Articles 12 EC and 81 EC to 89 EC inclusive.

40. It follows from the clear terms of Article 86(1) EC that it has no independent effect in the sense that it must be read in conjunction with the relevant rules of the Treaty.

41. It follows from the order of reference that the relevant provision referred to by the national court is Article 86(1) EC in conjunction with Article 82 EC.

42. In that regard, there is no precise information in the order for reference concerning the existence of a dominant position, its unlawful exploitation by Tragsa or the effect of such a position on trade between the Member States.

43. In addition, it seems that, by the first question, the national court refers, in essence, to operations capable of being regarded as public contracts, a premise on which the Court is, in any event, requested to rule in the second question.

44. It follows therefore from the foregoing that, in contrast to the second and third questions, the Court does not have before it the factual and legal material necessary to give a useful answer to the first question.

45. It follows that, whilst the first question must be declared to be inadmissible, the reference for a preliminary ruling is admissible as regards the two other questions.

Substance

The second question

46. By its second question, the referring court asks the Court whether a body of rules such as that governing Tragsa, which enables it to execute operations without being subject to the regime laid down by those directives, is contrary to Directives 93/36 and 93/37.

47. At the outset, it must be stated that, notwithstanding the references made by the national court to Directives 97/52, 2001/78 and 2004/18, in view both of the context and of the date of the facts of the dispute in main proceedings and the nature of Tragsa's activities, as described in Article 88(3) of Ley 66/1997, it is appropriate to examine that second question having regard to the rules set forth in the directives relating to public procurement, namely, Directives 92/50, 93/36 and 93/37, which are relevant in this case.

48. In that regard, it must be observed that, according to the definitions given in Article 1(a) of each of the Directives mentioned in the preceding paragraph, a public service, supply or works contract assumes the existence of a contract for pecuniary interest in writing between, first, a service provider, a supplier or a contractor and, second, a contracting authority within the meaning of Article 1(b) of those directives.

49. In this case it is appropriate to hold , first of all, that, under Article 88(1) and (2) of Ley 66/1997 Tragsa is a State company the share capital of which may also be held by the Autonomous Communities. Article 88(4) and the first subparagraph of Article 3(1) of Royal Decree 371/1999 state that Tragsa is an instrument and a technical service of the General State Administration and of the administration of each of the Autonomous Communities concerned.

50. Next, as is clear from Articles 3(2) to (5), and 4(1), (2) and (7) of Royal Decree 371/1999, Tragsa is required to carry out the orders given it by the General State Administration, the Autonomous

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Communities and the public bodies subject t o them, in the areas covered by its company objects, and it is not entitled to fix freely the tariff for its actions.

51. Finally, under Article 3(6) of Royal Decree 371/1999, Tragsa's relations with those public bodies, inasmuch as that company is an instrument and a technical service of those bodies, are not contractual, but in every respect internal, dependent and subordinate.

52. Asemfo submits that the legal relationship which flows from the orders which Tragsa receives, even though it is formally unilateral, reveals in fact, as is clear from the Court's case-law, an indisputable contractual link with the limited partner. Asemfo refers, in that regard, to Case C399/98 Ordine degli Architetti and Others [2001] ECR I-5409. In those circumstances even if Tragsa seems to act on the instructions of the public authorities, it is, in fact, a party contracting with the Administration, so that the rules for public procurement ought to be applied.

53. In that regard, it is appropriate to observe that, in paragraph 205 of the judgment in Spain v Commission , the Court held, in a different context from that of the main proceedings, that being an instrument and technical service of the Spanish Administration, Tragsa is required to implement, itself or using its subsidiaries, only work entrusted to it by General Administration of the State, the Autonomous Communities or the public bodies subject to them.

54. It must be observed that, if, which it is for the referring court to establish, Tragsa has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services, the requirement for the application of the directives concerned relating to the existence of a contract is not met.

55. In any event, it is important to recall that, according to the Court's settled case-law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority which is a contracting authority must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities which control it (see Case C107/98 Teckal [1999] ECR I8121, paragraph 50; Case C26/03 Stadt Halle and RPL Loclau [2005] ECR I-1 paragraph 49; Case C-84/03 Commission v Spain [2005] ECR I-139, paragraph 38; Case C-29/04 Commission v Austria [2005] ECR I-9705, paragraph 34; and Case C-340/04 Carbotermo and Consorzio Alisei [2006] ECR I-4137, paragraph 33).

56. Accordingly, it is appropriate to examine whether the two conditions required by the case-law cited in the preceding paragraph are met in Tragsa's case.

57. As regards the first condition, relating to the public authority's control, it follows from the Court's case-law that the fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, generally, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments (Carbotermo and Consorzio Alisei , paragraph 37).

58. In the case in the main proceedings, it is clear from the case file, but subject to confirmation by the referring court, that 99% of Tragsa's share capital is held by the Spanish State itself and through a holding company and a guarantee fund, and that four Autonomous Communities, each with one share, hold 1% of such capital.

59. In that regard, the argument cannot be accepted that that condition is met only for contracts performed at the demand of the Spanish State, excluding those which are the subject of a demand from the Autonomous Communities as regards which Tragsa must be regarded as a third party.

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60. It appears to follow from Article 88(4) of Ley 66/1997 and Articles 3(2) to (6) and 4(1) and (7) of Royal Decree 371/1999 that Tragsa is required to carry out the orders given it by the public authorities, including the Autonomous Communities. It also seems to follow from that national legislation that, as with the Spanish State, in the context of its activities with those Communities, as an instrument and technical service, Tragsa is not free to fix the tariff for its actions and that its relationships with them are not contractual.

61. It seems therefore that Tragsa cannot be regarded as a third party in relation to the Autonomous Communities which hold a part of its capital.

62. As regards the second condition, relating to the fact that the essential part of Tragsa's activities must be carried out with the authority or authorities which own it, it follows from the case-law that, where several authorities control an undertaking, that condition may be met if that undertaking carries out the essential part of its activities, not necessarily with any one of those authorities, but with all of those authorities together (Carbotermo and Consorzio Alisei , paragraph 70).

63. In the case in the main proceedings, as is clear from the case-file, Tragsa carries out more than 55% of its activities with the Autonomous Communities and nearly 35% with the State. It thus appears that the essential part of its activities is carried out with the public authorities and bodies which control it.

64. In those circumstances, but subject to confirmation by the referring court, it must be held that the two conditions required by the case-law cited in paragraph 55 of the present judgment are met in this case.

65. It follows from the entirety of the foregoing considerations that the reply to the second question must be that a body of rules such as that governing Tragsa which enables it, as a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, is not contrary to Directives 92/50, 93/36 and 93/37, since first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

The third question

66. Having regard to the reply given to the second question referred by the national court, there is no need to reply to the third question.

Costs

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

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CONCERNS

Interprets 31992L0050 -
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Interprets 31993L0037 -

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SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	Spanish
OBSERV	Spain ; Lithuania ; Member States ; Commission ; Institutions
NATIONA	Spain
NATCOUR	*A9* Tribunal Supremo, Sala de lo contencioso-administrativo, Seccion 3¬, auto de 01/04/2005 (548/2002)
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2008 p.73-80

PROCEDU	Reference for a preliminary ruling;Reference for a preliminary ruling - inadmissible
ADVGEN	Geelhoed
JUDGRAP	Arestis
DATES	of document: 19/04/2007 of application: 21/07/2005

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Opinion of Mr Advocate General Geelhoed delivered on 28 September 2006. Asociacion Nacional de Empresas Forestales (Asemfo) v Transformacion Agraria SA (Tragsa) and Administracion del Estado. Reference for a preliminary ruling: Tribunal Supremo - Spain. Reference for a preliminary ruling - Admissibility - Article 86(1) EC - No independent effect - Factors permitting material which enables the Court to give a useful answer to the questions referred - Directives 92/50/EEC, 93/36/EEC and 93/37/EEC - National legislation enabling a public undertaking to perform operations on the direct instructions of the public authorities without being subject to the general rules for the award of public procurement contracts - Internal management structure - Conditions - The public authority must exercise over a distinct entity a control similar to that which it exercises over its own departments - The distinct entity must carry out the essential part of its activities with the public authority or authorities which control it. Case C-295/05.

I - Introduction

1. This case concerns the compatibility with Community law, and in particular with the Community directives governing the award of public contracts (2) and with Articles 12 EC, 43 EC, 46 EC and 86(1) EC, of a national statutory regime for a public undertaking constituted under private law which, under that statutory regime, is an instrument' or executive service of the public authorities, but which may also carry out work for public bodies other than those to which it is subject as an executive service, as well as for private undertakings and organisations. In addition, this legal person may be asked by the competent public authorities to provide services other than those included in its statutory remit.

2. The questions have arisen in connection with a complaint by the Asociacion Nacional de Empresas Forestales (Asemfo') against Empresa de Transformacion Agraria SA (Tragsa'), in which Asemfo accused Tragsa of infringing Spanish competition law by failing to comply with the public procurement procedures laid down in Spanish legislation, which constituted an abuse of its dominant position in the market for forestry works, services and projects. In considering Asemfo's appeal against the decision of the Sala de lo Contencioso-Administrativo (Chamber for Contentious Administrative Proceedings) of the Audiencia Nacional (National High Court), the Spanish Tribunal Supremo (Supreme Court) eventually decided that it needed to refer questions to the Court of Justice for a preliminary ruling.

II - Legal framework

A - National legislation

3. In order to have a clear understanding of the practical and legal implications of the questions referred to the Court, a more than usually detailed summary is needed of the extensive and complicated national legislation applicable to Tragsa.

4. Tragsa was set up on 24 May 1977 (3) under Royal Decree 379/1977 of 21 January 1977, which authorised its constitution as a public undertaking. Its legal personality is regulated partly by the general rules that apply to companies governed by private law, and partly by the general rules of law that apply for public undertakings. Its company objects were originally laid down in Article 2 of Royal Decree 379/1977, but were subsequently extended by Royal Decrees 424/1984 of 8 February 1984 and 1422/1985 of 17 July 1985. Today, its principal activities involve the execution of various types of works, installations and studies, the provision of services and the preparation of plans and projects in the field of agriculture and forestry, the protection and improvement of the physical environment, fish farming, fishing and nature conservation.

5. It is to be inferred from Article 88 of Spanish Law 66/1997 of 30 December 1997 concerning fiscal, administrative and social measures that Tragsa is a public company, as defined in Article

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6(1)(a) of the General Budget Law, providing essential services in the field of rural development and environmental protection. It is an instrument and technical service of the Administration' which is required to carry out, either itself or using its subsidiaries, any work entrusted to it by the General Administration of the State, the Autonomous Communities or the public bodies subject to them.

6. Ultimately, the legal regime for Tragsa is set out in Royal Decree 371/1999 of 5 May 1999 laying down the regime governing the Land Transformation Company PLC' (Tragsa).

7. Tragsa is required to carry out the works and activities entrusted to it by the Administration. That requirement specifically includes the work it is given as an executive organisation and technical service of the Administration in the areas covered by its company objects (Article 3(2) of Royal Decree 371/1999). In addition, Tragsa is required to give priority to urgent and exceptional work arising from natural disasters and similar events (Article 3(3) of the decree). It cannot refuse the work entrusted to it or negotiate the deadline for completion, and must execute the works assigned in accordance with the instructions it is given (Article 5(3) of the decree).

8. The royal decree classifies Tragsa's relations with the central and decentralised public administrations as instrumental rather than contractual, and they are therefore, for all purposes, internal, dependent and (for Tragsa) subordinate (Article 3(6) of the decree).

9. Under the financial system to which Tragsa is subject, its work is paid according to a system of tariffs laid down in Article 4 of Royal Decree 371/1999. The tariffs are decided by a joint ministerial committee partly on the basis of information supplied by Tragsa on its costs.

10. Tragsa can call on the help of private undertakings in its activities (Article 6 of Royal Decree 371/1999). There are a number of restrictions on such cooperation with private contractors: the work may involve only the processing or manufacturing of movable property, the amounts for which such contracts may be concluded are limited, and the principles of prior public tender (publication and competition) must be observed in the selection of private partners.

11. It should also be pointed out here that Tragsa can also operate as an undertaking company, even vis-à-vis the Administration, without having to retain its capacity as an executive organisation and technical service of the Administration'. In such cases, its activities are governed, pursuant to Article 1 of Royal Decree 371/1999, by the rules which generally apply to commercial undertakings.

12. The administrative context in which Tragsa operates changed significantly in the 1980s as a result of the entry into force of the Spanish Constitution of 1978, when responsibility for agriculture and environmental protection was transferred from the General State Administration to the Autonomous Communities or regions (the Autonomous Communities'). The transfer of administrative powers also necessarily involved the transfer of the resources and instruments needed to enable those powers to be fully exercised. For that reason Tragsa was placed at the disposal of the Autonomous Communities to enable them to exercise their powers even before the EC Treaty came into force for Spain.

13. The transfer of public powers with respect to Tragsa from the General State Administration to the Autonomous Communities took the form of public law agreements which each of the Communities concluded with Tragsa, laying down the rules governing the use of Tragsa as an instrument' of the Autonomous Community concerned. Most of the Autonomous Communities concluded such agreements with Tragsa, although only four became shareholders in it as a company.

14. Under the Spanish laws and regulations in force, however, an Autonomous Community does not need to become a shareholder in Tragsa in order to use its services: Tragsa operates as an instrument' of the Autonomous Communities, so that as a rule it makes no difference whether or not they are shareholders. That is borne out by Law 66/1997, which provides that the regions may, but need not,

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be shareholders in Tragsa.

15. In order to assess the questions referred to the Court, it is also useful to reproduce a number of other sections of the Spanish legislation on public procurement, which determine the legal framework in which Tragsa operated, and still operates, on the basis of its legal status as a public undertaking.

Article 60 of the Law on Public Procurement, as confirmed by Royal Decree 923/1965 of 8 April 1965, provides as follows:

Only those works which are carried out in the following circumstances may be executed directly by the Administration:

1. Where the Administration has available plant, stocks, facilities or technical or industrial services suitable for the execution of the planned works, in which case use should usually be made of those resources.'

Article 153 of Law 13/1995 of 18 May 1995 on Public Procurement provides as follows:

1. The Administration may carry out works using its own services and its own human or material resources, or in cooperation with private undertakings, in the latter case on condition that the financial interest of the works in question is less than ESP 681 655 208, excluding VAT, where one of the following circumstances occurs:

(a) where the Administration has available plant, stocks, facilities or technical or industrial services suitable for the execution of the planned works, in which case use should usually be made of those resources.'

Article 152 of the revised text of the Law on Public Procurement, confirmed by Royal Decree 2/2000 of 16 June 2000, reads:

1. The Administration may carry out works using its own services and its own staff or material resources, or in cooperation with private undertakings, provided, in the latter case, that the amount of the works in question is lower than EUR 5 923 624, the equivalent of 5 000 000 special drawing rights, where one of the following situations obtains:

(a) where the Administration has at its disposal factories, stocks, workshops or technical or industrial services suitable for the execution of the project works, use should usually be made of that method of execution.'

Article 194 of the Law on Public Procurement provides that:

1. The Administration may manufacture movable property using its own services and its own human or material resources, or in cooperation with private contractors, provided, in the latter case, that the amount of the works in question is lower than the maximum amounts laid down in Article 177(2), where one of the following situations obtains:

(a) where the Administration has available factories, stocks, workshops or technical or industrial services suitable for the execution of the planned works, use should usually be made of that method of execution.'

16. As the referring court explains, the legislation cited in the previous point summarises the various conditions on which the Administration itself is allowed to execute works directly, including the condition that it must have its own resources, as is the case with Tragsa in its activities. That condition is not linked to any other more detailed requirement or circumstance, such as reasons of urgency or public interest, for instance. Those are covered by a separate provision: in the case of the execution of works considered urgent according to the provisions of this Law'. (4) Therefore, the Administration need only have its own services, like Tragsa and its subsidiaries,

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to be able to entrust to them all types of work or works without any other requirement, the only restriction being the quantitative limit that applies if Tragsa involves private parties in the execution of the services. It would then be a possibility, but not an obligation, for the Administration concerned.

17. Finally, I would point out that Tragsa is itself a contracting authority. That is clear from Article 88(7) of Law 66/1997, as amended by Law 53/2002.

B - Further details of Tragsa's structure and activities

18. In its written observations, the Commission provided a number of details about Tragsa's structure and activities which shed light on the legal and administrative framework described above, and which may be relevant in assessing and answering the questions referred to the Court.

19. At present, the vast majority of the shares in Tragsa - more than 99% - are held directly or indirectly by the Spanish State. Four Autonomous Communities have an almost symbolic share, which combined accounts for less than 1% of Tragsa's share capital.

20. Tragsa's activities have become considerably diversified over time. Apart from the more conventional activities such as designing and constructing infrastructure and other works needed to modernise agricultural production and livestock farming, technologies promoting efficient water use and activities protecting the physical and natural environment as well as the historical and cultural heritage of the countryside have become increasingly important. There are also activities promoting forestry, the protection of fish stocks and fish farming.

21. Tragsa is financed by the payments it receives for its work. In the 2004 financial year, its turnover was EUR 674 million, and its profits after deduction of corporation tax were EUR 22.24 million.

22. More than half the turnover of Tragsa and its subsidiaries (5) comes from work for the Autonomous Communities. That is logical, because the Autonomous Communities exercise most of the public powers in the areas in which this undertaking operates. Around 30% of turnover comes from the Spanish State Administration, around 5% from other public bodies, including local authorities, and 2 to 3.5% from private undertakings.

23. The Commission asserts that it cannot tell from the figures available what proportion of the total turnover comes from Tragsa's activities in its capacity as an instrument and technical service' of the Administration.

24. In order to analyse the questions raised by the Tribunal Supremo more closely, I feel it useful at this stage to make the following points on the basis of the above observations:

In its capacity as an executive organisation for - primarily - the Autonomous Communities, Tragsa, as a legal entity, is almost entirely owned by the Spanish State, which holds more than 99% of its share capital;

As a constitutionally independent executive organisation, Tragsa is entirely subject, when providing services for the General State Administration and the Autonomous Communities, to the orders and instructions given by those administrations in the exercise of their public powers: it is required to accept the work entrusted to it and to carry it out in accordance with the specifications and time periods given and at the tariffs laid down by regulation;

Under the Spanish legislation on public procurement, it is entirely possible for Tragsa to receive contracts from the General State Administration and the Autonomous Communities which have no connection with the exercise of public powers, duties and responsibilities, but which are entrusted to it solely because it is available as a technical service, and which are also carried out by private operators under normal market conditions; (6)

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The system of statutory and administrative rules under which Tragsa operates expressly and tacitly allows scope for activities other than those which it carries out as an executive organisation of the General State Administration and the Autonomous Communities. However, the extent of that scope cannot be accurately deduced from the information available, since Tragsa carries out some of its activities through its subsidiaries.

III - Facts, procedure and the questions referred

25. On 23 February 1996 Asemfo lodged a complaint with the Spanish Competition Authority, accusing Tragsa of abusing its dominant position in the Spanish forestry (works, services and projects) market because its public clients did not comply with the award procedures laid down in Ley 13/1995 de Contratos de las Administraciones Publicas (Law 13/1995 on Public Procurement) of 18 May 1995, cited in point 15 above.

According to Asemfo, the constitution governing Tragsa's operations meant that it could carry out a wide range of works at the direct request of the central or decentralised authorities, without a prior invitation to tender. As a result, competition on the market for services and works in the areas of agriculture and forestry in Spain was eliminated.

26. In a decision of 16 October 1997, the Competition Authority dismissed the complaint. It ruled that in that particular case Tragsa operated as an instrument' or executive service of the Administration, without any independent decisionmaking powers, and was required to carry out the works entrusted to it itself. It was therefore a question of relations between contracting authority and contractor within the State Administration itself, and Tragsa's operations had nothing to do with the market or the competition law applicable to private and public undertakings.

27. Asemfo lodged an appeal against that decision before the Tribunal de Defensa de Competencia (Competition Court). By judgment of 30 March 1998, that court dismissed the appeal on the same grounds as the Competition Authority. It emphasised that the activities which Tragsa carried out for the relevant authorities were to be seen as works carried out by those authorities themselves. Only when Tragsa acted independently as a public undertaking could there be any question of a breach of competition law.

28. Asemfo then appealed to the Sala de lo Contencioso-Administrativo of the Audiencia Nacional, which confirmed the Competition Court's decision in a judgment of 26 September 2001.

29. Asemfo finally appealed to the Tribunal Supremo, arguing that Tragsa, in its capacity as a public undertaking, could not be regarded as an instrument' or executive service of the Administration, to which the Community rules on public procurement did not apply, and that the legal regime applicable to Tragsa, as laid down in Article 88 of Law 66/1997 in particular, was not compatible with Community law.

30. The Tribunal Supremo had a number of doubts about the compatibility of Tragsa's legal regime with Community law.

31. It therefore felt it desirable to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does Article 86(1) EC permit a Member State of the European Union to grant ex lege to a public undertaking a legal status which allows it to execute public works without being subject to the general rules on the award of public contracts by tender, where there are no special circumstances of urgency or public interest, both below and above the financial threshold laid down by the European Directives in this regard?

(2) Is such a legal regime compatible with the provisions of Council Directives 93/36/EEC and 93/37/EEC of 14 June 1993, European Parliament and Council Directive 97/52/EC of 13 October

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1997 and Commission Directive 2001/78[/EC] amending the three previous directives - legislation recently recast by European Parliament and Council Directive 2004/18/EC of 31 March 2004?

(3) Are the statements contained in the judgment of the Court of Justice of the European [Communities] of 8 May 2003 in Case C349/97 Spain v Commission applicable in any event to Tragsa and its subsidiaries, in the light of the rest of the case-law of the Court regarding public procurement and in view of the fact that the Administration entrusts to Tragsa a large number of works which are not subject to the rules governing free competition, and that this situation might cause considerable distortion of the relevant market?'

A - Procedure before the Court

32. Asemfo, Tragsa, the Spanish Government, the Lithuanian Government and the Commission have submitted written observations. At the hearing on 15 June 2006, Tragsa, the Spanish Government and the Commission provided further information in support of their positions.

IV - Assessment

A - Preliminary remarks

33. Tragsa, the Spanish Government and the Commission have all to some extent challenged the admissibility of the questions referred to the Court for a preliminary ruling.

34. In my view, given the complexity of the factual and legal situation in Spain, it is not possible to examine the doubts raised concerning the relevance of the questions referred and whether they are necessary to the resolution of the dispute in the main proceedings until the substance of the questions has been addressed in the light of the Court's existing case-law.

35. For that reason, I shall not examine the admissibility of the questions referred until the end of this Opinion.

36. In all the written observations and also at the hearing, detailed consideration was given to the Court's judgments concerning the applicability of Community law to the award of public contracts for supplies and for the execution of works, (7) and in the award of concessions by administrations, (8) in cases where the public authority which is a contracting authority exercises over the contracting entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities. (9)

37. As the Commission rightly pointed out at the hearing, those judgments were delivered in cases where the contracting authorities awarded contracts for pecuniary interest for the supply of goods and/or services to entities over which they exercised more or less extensive control and which carried out most or a significant part of their activities with those authorities.

38. However, the factual and legal situation underlying the questions referred in this case differs in two respects from that of the judgment cited in footnote 7 above:

The Spanish State Administration and the Autonomous Communities are Tragsa's contracting authorities in a strictly hierarchical sense, in that Tragsa cannot refuse the work entrusted to it by the relevant authorities, is wholly bound by the instructions and specifications of those authorities and receives payment for its work which is calculated and determined by regulation. In short, even though its legal personality is governed partly by private and partly by public law, Tragsa has to be characterised as an executive service of the Spanish State Administration and the Autonomous Communities. The contractual element between the contracting authority and the contractor, which always existed in the cases in which the Court delivered the judgments cited above, is entirely absent here; (10)

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Although Tragsa currently carries out the essential part of its activities with the Autonomous Communities, the assumption that it is controlled by these territorial entities is problematic, to say the least. Its status under public law is, as is clear from the above summary,(11) entirely or almost entirely determined by Spain's State legislature, while only 4 of the 17 Autonomous Communities have shares in Tragsa on a symbolic scale, together accounting for less than 1% of the total share capital. It may be inferred from this that, as an executive organisation, Tragsa is indeed at the service of the Autonomous Communities, but not necessarily that it is controlled by them.

39. These differences suggest that the questions referred cannot automatically be answered on the basis of the Court judgments cited, although they may, of course, provide significant guidance for interpreting the relevant rules of law by analogy.

40. Below I shall look first in broad terms at the possible questions of Community law that might arise in a legal and organisational context such as that in the main proceedings.

41. I shall then examine, as far as possible using the Court's judgments cited above in footnotes 7 and 8, how the questions referred might be answered.

42. I will consider separately the relevance of Article 86(1) EC in the context of those questions.

43. Finally, I will briefly examine the question of admissibility.

B - The legal and organisational context

44. As I said earlier in point 38 above, Tragsa must be characterised as an instrument' or executive service of Spain's State Administration and, perhaps, of the Autonomous Communities, and must, both as a result of its legal status and because of its ownership - with over 99% of Tragsa's shares owned directly or indirectly by the Spanish State Administration - be regarded as an entity entirely under the control of the Spanish State Administration.

45. The vast majority of its activities, as is clear from its statutory remit, concern work associated with structural improvements in Spanish agriculture and forestry, as well as fishing and fish farming. Over time, these activities have come to include environmental protection and work on maintaining the natural and cultural heritage of the countryside.

46. In addition to these regular' activities, Tragsa is also on standby to be called into action in exceptional circumstances, such as in the event of floods or other similar natural disasters. Tragsa is also sometimes involved in implementing certain sections of the common agricultural policy, as is clear from the Court's judgment in Spain v Commission . (12)

47. The vast majority of those activities must be regarded as practical work carried out as part of the exercise of public responsibility for agricultural structural development in the broad sense, and for the quality of the rural environment.

48. The nature of those activities and the public objectives pursued mean that they can be carried out both by the Administration's own services, by entities that are to some extent independent but under public control, and by private entities contracted by the authorities responsible.

49. In principle, the Member States are free to decide how they organise the performance of activities for which they are publicly responsible, although the Court in the judgments cited earlier ruled that authorities may award public contracts and concessions to their own instruments' without a prior competitive tendering procedure only on strict conditions.

50. As is clear from paragraph 48 of the judgment in Stadt Halle and RPL Lochau , the Court considers that in cases where a public authority which is a contracting authority has the possibility of performing the tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments, the Community

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rules in the field of public procurement do not apply. In such cases, there can be no question of a contract for pecuniary interest concluded with an entity which is legally distinct from the contracting authority.

51. Such a situation appears also to occur in the relationship between the Spanish State Administration and Tragsa. Whether that is also the case in the relationship between the Autonomous Communities and Tragsa, which the Spanish Government and Tragsa appear to take for granted, is one of the questions requiring further analysis at the very least. Can Tragsa automatically be regarded as the Autonomous Communities' own' technical or administrative resource, given that they cannot exercise any powers of control over that resource' under national legislation, nor can they derive such powers from their ownership of shares in it? (13)

52. Whatever the answer to that question may be, the issue of compatibility with primary Community law, and in particular Articles 12 EC, 43 EC and 49 EC, must be assessed. That is, in my opinion, the implication of the recent judgments in Coname and Parking Brixen. (14)

53. However, before I deal with the question whether the Spanish Autonomous Communities, as Tragsa's principals, exercise actual control over that entity, I must first examine what relevance the answer to that question might have in the light of Articles 12 EC, 43 EC, 49 EC and, if appropriate, 86 EC.

54. It is apparent from what I said in point 47 above that the vast majority of the actual activities which Tragsa carries out for the Spanish State Administration do not include activities for the exercise of the Spanish State's official authority. The fact that those activities serve objectives of public policy and public responsibility does not in principle distinguish them from activities carried out by private undertakings contracted by the Administration, such as infrastructure construction works.

55. It follows from this that the first sentence of Article 45 EC in conjunction with Article 55 EC is not applicable. (15) In so far as secondary Community law on public contracts does not apply to them, therefore, the compatibility of Tragsa's operations with Articles 43 EC, 49 EC and, if appropriate, 86 EC must be assessed. (16)

56. Now, does the fact that the Spanish Autonomous Communities can in the broad sense entrust' a considerable proportion of their agricultural structural improvement works to an executive organisation of the Spanish State Administration have actual or potential consequences for freedom of establishment and the free movement of services within the Community? (17)

57. The answer to that question clearly appears to be affirmative, since the result of this arrangement is that a large proportion of the activities in question, which might also be allocated to private operators, are thereby reserved for Tragsa as the State Administration's executive organisation. The market for possible private candidates from elsewhere in the Community is then correspondingly restricted.

58. The fact that the services at issue here are entrusted by one authority (the Autonomous Community) to an executive service (Tragsa) of another authority (the Spanish State Administration), and that not a single element of a contract for pecuniary interest is involved, does not alter the fact that this administrative arrangement has the same effect in economic terms as an arrangement in which one authority entrusts services under contracts for pecuniary interest to an entity which is under the control of another authority.

59. In both arrangements, contracts for the supply of goods, services and public works are removed from competition, with real and potential consequences for the free movement of goods and services and freedom of establishment in the Community market. They should therefore be judged as far as

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possible by the same measure.

60. The same applies in respect of the requirement that the contracting authority must control the entity or service to which it entrusts works, whether or not by means of a contract for pecuniary interest.

61. In their written and oral statements, Tragsa and the Spanish Government have emphasised above all that Tragsa is an instrument' serving the Spanish State Administration and the Autonomous Communities. That does not alter the fact that Tragsa is more than just an executive service for the Spanish State and the Autonomous Communities. It also acts as a contractor for local authorities, other public bodies and private parties. In that capacity, it competes with other economic operators in order to win contracts.

62. The proportion of its total turnover accounted for by those contracts varies. Paragraph 34 of the Commission's written observations suggests that it fluctuates between 7 and 8.5%. Paragraph 96 of Tragsa's written observations quotes slightly different figures from the Commission's in that the data for two subsidiaries are given separately. In any event, the figures given by the Commission and Tragsa are roughly of the same order of magnitude.

63. Whether it can automatically be concluded from these figures that Tragsa carries out the essential part of its activities with the public authority that controls it - which is the view taken by the Spanish Government and Tragsa itself - is doubtful.

64. First of all, it cannot be concluded from quantitative data for a small number of years that the proportion of the work carried out on a competitive basis for other public bodies and private parties rather than for the Spanish State Administration and the Autonomous Communities will remain less than 10% of the total turnover. In the legal and administrative regime by which Tragsa is governed, there is, at any rate, no provision limiting the extent of such work.

65. Secondly, there is of course still the question of which authority controls Tragsa. If it were solely the Spanish State Administration, from contracts with which Tragsa generates around 30% of its turnover, it would be difficult to argue that it carries out the essential part of its activities with its controlling authority.

66. However, there is a further complication that is legally relevant, to do with the hybrid nature of Tragsa's legal personality.

67. If a legal entity carries out the essential part of its activities as the own' executive service of one or more public authorities and a smaller proportion of its activities on a competitive basis for other public authorities and private clients, the question arises in what capacity it supplies the latter services.

68. Must Tragsa be regarded for the smaller proportion as a legal entity which may be governed by a special constitution, but which competes on the same footing as other private candidates to win contracts from other' public authorities and private parties?

69. Or does Tragsa not rather remain an executive service of the public authorities with which it carries out the essential part of its activities, making its remaining capacity available on the market and thereby absorbing more of the remaining work on the market in the field of agricultural infrastructure and nature conservation?

70. This question is particularly important in that Tragsa's statutory constitution does not appear to require a clear distinction to be drawn for legal and accounting purposes between the two capacities in which it can operate, or at least it does not contain any unambiguous safeguards against possible distortions of competition that could arise on the remaining market as a result of Tragsa's hybrid nature.

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71. Thus a situation could arise where private candidates for the type of contracts that Tragsa carries out, which are already excluded from the arrangement in which Tragsa works for the Spanish State Administration and the Autonomous Communities, also miss out on the remaining sub-markets (carrying out work for other public authorities and private parties) because Tragsa starts from an advantageous competitive position as a result of being, if not the only, then at least a privileged candidate on the sizeable closed market for contracts from the State Administration and the Autonomous Communities.

72. The second Teckal criterion, that the entity, concession-holder or independent executive service concerned must carry out the essential part of its activities with its controlling public authority, is therefore not in itself sufficient to prevent real or potential obstacles to the free movement of goods and services and freedom of establishment, or to avoid possible distortion of competition. I shall come back to this later.

73. Finally, a further question arises concerning the provisions of Articles 152 and 194 of the revised text of the Law on Public Procurement. (18)

74. Under those provisions, the Administration may carry out works or produce goods using its own services and its own staff or material resources. If the Administration has appropriate staff and material resources for the purpose, it is as a rule required to do so. If this method of execution is chosen, private undertakings may also be involved without a prior award procedure if the cost of the works in question is lower than a maximum of EUR 5 923 624.

75. Those provisions do not make it a condition that the works in question must be executed or the goods in question produced within the framework of the statutory remit of the executing organisations and services involved.

76. It is naturally for the competent national court to interpret and apply this national legislation. That does not alter the fact, however, that the texts in question appear to create powers and obligations for the administrative authorities in Spain which may conflict with Community law. (19)

77. The provisions of the Spanish legislation in question appear to mean that the various administrative authorities in Spain are freely able, or even in principle required, (20) to use the capacity of their executive services to carry out works or to provide services for purposes other than the statutory duties of those executive services.

78. Where the execution, provision or production of the works, services or goods in question entails costs lower than the statutory maximum, the relevant services may also have recourse to private companies.

79. Without there being any need to interpret the relevant national legislation more closely, it may be concluded that it allows scope for national sub-markets for public contracts to be extensively protected or even shut off. The extent to which this may occur depends on the capacity which the relevant executive services have available. By increasing their capacity and improving their equipment and staffing, it is very easy to bring sizeable sub-markets for public contracts into the exclusive domain of the executive services of the authorities concerned.

80. The fact that private companies can also be involved in the execution of such contracts without a prior award procedure, provided that the costs associated with those contracts do not exceed a certain maximum, increases that risk still further.

81. The fact that Tragsa is prohibited under Article 88(5) of Law 66/1997 from tendering for public contracts from the Spanish State Administration and the Autonomous Communities does not alter the risks presented by the application of Articles 152 and 194 of the Law on Public Procurement, since the purpose of those provisions is precisely to ensure that public contracts are generally

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not awarded publicly if they can be executed by departments of the Administration.

82. To summarise, the Spanish legislation in question here, in encouraging the Administration not to place public contracts through public award procedures even when that is not justified by the public interest, raises serious doubts as to its compatibility with the Community directives on public procurement. In addition, it accords a privileged position to the Administration's own executive services, which may be considered for public contracts that have no connection whatsoever with any legal or statutory duties. Even though they are de jure instruments of the Administration, they are placed de facto in the position of privileged market operators. The question is very much whether such an arrangement is consistent with the principle laid down in Article 86(1) EC, which prohibits such forms of unequal treatment. (21)

83. Finally, with more direct reference to the legal and factual situation underlying the questions referred, the issue also arises whether the very possibility that Tragsa may, under Article 152 of the Spanish Law on Public Procurement, be entrusted to carry out works and supply services outside its own remit has implications for whether this public undertaking is still able to satisfy the second Teckal criterion, which is that it should carry out the essential part of its activities with the public authority that controls it.

C - Answers to the questions

Questions 1 and 2

84. As I observed earlier in points 38 and 44 of this Opinion, the legal and factual situation in the main proceedings is not one in which a contracting public authority awards a contract for pecuniary interest to an independent entity over which the contracting authority exercises a control which is similar to that which it exercises over its own departments'. In the present case, Tragsa, even though it has a separate legal personality, must be regarded as a service' of the contracting authority. That follows unequivocally from the relevant Spanish legislation.

85. In Stadt Halle and RPL Lochau , (22) the Court specifically ruled that a public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement.

86. In my view, it is apparent from the statutory regime that applies for Tragsa that it must be regarded as an instrument' or executive service of the Spanish State Administration, in any event. In so far as Tragsa carries out, as part of its statutory remit, contracts awarded to it by the Spanish State Administration, the Community rules in the field of public procurement do not apply to it.

87. I infer from the Court's judgments in Coname (23) and Parking Brixen (24) that where the relationship between a contracting public authority and an executive service or entity is not governed by the Community rules on public procurement the general provisions of the Treaty, and in particular the provisions on fundamental freedom of movement and competition, remain applicable.

88. Although the Community rules on public procurement do not apply where a public entity performs the tasks conferred on it in the public interest by using its own administrative, technical and other services, without calling on outside entities, if the entity in question exercises a control over those services which is similar to that which it exercises over its other internal departments, and if the services in question also carry out the essential part of their activities with the public

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entity that controls them. But those two criteria - known as the Teckal criteria - constitute, however, an exception. They must therefore be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying the derogation lies on the person seeking to rely on those circumstances. (25)

89. It is apparent from these somewhat paraphrased considerations in Parking Brixen that it must also be examined whether the Teckal criteria can be invoked in respect of Tragsa. That is a matter for the national court, which will have to investigate the legal and factual situation in which Tragsa operates. The Court can provide it with the necessary information which might help it to resolve the dispute in the main proceedings.

90. On second viewing, there is no doubt that the relationship between the Spanish State Administration and the Autonomous Communities on the one hand and Tragsa on the other satisfies the first Teckal criterion:

All of the shares in Tragsa are owned directly or indirectly by the Spanish State and the Autonomous Communities, albeit that only four regions hold shares on a symbolic scale;

Furthermore, the legal framework within which Tragsa operates as an executive service of the Spanish State Administration and the Autonomous Communities for the purpose of agricultural structural policy in the broad sense appears to indicate conclusively that it is operating in that capacity as an instrument' of the public authorities concerned. I refer here in particular to my description of the legal framework in points 4 to 9 of this Opinion.

91. In its more recent judgments, the Court has defined the first Teckal criterion in greater detail, so that in exercising a control similar to that which it exercises over its own departments' it must be a case of a power of decisive influence over both strategic objectives and significant decisions of that company'. (26)

92. This more detailed criterion applies not just to the relationship between one public authority and its own' executive service, but also where different public authorities, whether or not acting together, have a joint executive service. (27)

93. It is not unusual for a number of public authorities to establish, for the execution of certain public tasks such as sewage treatment, a partnership which is responsible for managing a joint executive service. Where that joint executive service is constituted in the form of a separate company, the authorities concerned can exercise their decisive influence over both strategic objectives and significant decisions of that company' as shareholders and through representation on the company's board of directors. (28)

94. Where the executive organisation is constituted as an instrument' of the public authorities in the partnership, then by analogy with the requirements applied to control over a shared' independent entity for the execution of public tasks, the control they exercise must be such as to ensure that all the public authorities involved have influence over both strategic objectives and significant decisions' of that entity.

95. In fact, while they cannot influence the strategy and management of their own joint service, nor can the public authorities involved be called to account for their responsibility for that service's actions either. The same also applies to their responsibility for proper compliance with Community law.

96. The Commission is also right when it argues that arrangements in which a number of public authorities use an executive service that is constituted, in terms of power of influence over it, as the instrument' of just one of them are open to abuse. They can mean that public authorities call on - or are invited to call on - an existing executive service of another public authority to execute works and supply

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services for which they would otherwise have held a public award procedure. As I described in points 57 to 59 above, this can result in substantial sub-markets being removed from the operation of primary and secondary Community law on public procurement.

97. That leads me to conclude, provisionally, that in cases where an executive service acts as an instrument' for various public authorities, the statutory regime that applies to it must ensure that all the contracting public authorities have effective influence over its strategic objectives and significant decisions. It must also specify for the exercise of precisely which public responsibilities the public authorities in question can award contracts to the joint executive service as an instrument'.

This is in order to restrict as far as possible the risk of abuse described in the previous point. (29)

98. From the description of Tragsa's statutory regime in points 4 to 9 above, it appears to be governed entirely or almost entirely by the laws and regulations of the Spanish State Administration. The tariffs for the work which Tragsa carries out for the State Administration and the Autonomous Communities are also laid down by and come under the responsibility of the State Administration. The Autonomous Communities do not appear to have any direct influence. It is true, as Tragsa and the Spanish Government have stressed, that the Autonomous Communities can bring their influence to bear through their contracts, but such control over the design and execution of individual works and projects - which is inherent in any contract which a public authority awards to one of its own services or to an external entity - is not the control intended by the Court when it refers to decisive influence over both the strategic objectives and significant decisions' of, in this case, the Autonomous Communities' own' executive service.

99. I would also point out, for the sake of completeness, that the lack of influence which the Autonomous Communities have on and under Tragsa's statutory regime is by no means compensated for by the influence that they might bring to bear as shareholders in the company, given that only a small minority of the Autonomous Communities have a merely symbolic shareholding in Tragsa.

100. The fact that the statutory regime which governs Tragsa's operations does not give a clear, restrictive definition of the areas in which the Autonomous Communities can give Tragsa work - the general legislation on award procedures in Spain discussed in points 73 to 83 above is relevant here - is a further indication that Tragsa cannot be regarded as a joint executive service for the execution of restrictively defined works and services in the public interest. I have already described earlier the risks of abuse which such an open arrangement entails.

101. I therefore reach the conclusion that, operating under a statutory regime such as that in force, Tragsa cannot be regarded as an instrument' of the Autonomous Communities because they cannot exercise any control over Tragsa's strategic and other significant decisions.

102. Since Tragsa cannot be regarded as an instrument of the Autonomous Communities, the obvious implication is that it is wrong that the contracts given to Tragsa by the Autonomous Communities should not be subject to a public award procedure.

103. The situation is, in principle, different for the tasks entrusted to Tragsa by the Spanish State Administration, of which it can indeed be regarded as an instrument.

104. It is apparent from the analysis of the legal framework within which Tragsa operates in points 61 to 65 of this Opinion that that legal framework does not fulfil the requirements of the second Teckal criterion either.

105. The Court ruled in Carbotermo and Consorzio Alisei (30) that the requirement that the local authority must exercise over the person in question a control similar to that which it exercises over its own departments and that person must carry out the essential part of its activities with

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the controlling authority or authorities is aimed precisely at preventing distortions of competition.

106. Only where the person controlled carries out the essential part of its activities with the controlling authority or authorities alone can it be justified that that undertaking is not subject to the restrictions of the directives on public procurement, since they are in place to preserve a state of competition which, in that case, no longer has any raison d'être.

107. That implies that the person concerned can be viewed as carrying out the essential part of its activities with the controlling authority within the meaning of Teckal only if that undertaking's activities are devoted principally to that authority and any other activities are only of marginal significance.

108. I have established in points 61 to 65 above that Tragsa's activities with public authorities other than the Spanish State Administration and the Autonomous Communities and with private companies have accounted for between 7 and 8.5% of its total turnover in the last three years, and that the legal regime governing it does not place any restrictions on the scale of those activities.

109. Furthermore, if my argument that the Autonomous Communities cannot be regarded as controlling authorities in respect of Tragsa is followed, it must then be concluded that the requirement that the essential part of the activities must be carried out with the controlling authority is not satisfied, given that the activities with the Autonomous Communities account for more than 50% of Tragsa's total turnover.

110. The condition that the essential part of the activities must be carried out with the controlling authority is a necessary requirement in order to prevent distortion of competition on the Community market, as the Court recently emphasised in Carbotermo and Consorzio Alisei. (31) However, that condition is not sufficient.

111. Even if Tragsa did carry out the vast majority of its activities with the authority or authorities which control it, it would still be possible for it seriously to distort competition on sub-markets with its remaining activities. As I have already pointed out in points 66 to 72 above, as long as those activities are not kept completely separate in the organisation of this executive service, both for financial and accounting purposes and in terms of personnel and material resources, from the activities which it carries out as an executive service of one or more public authorities, it is in a position to use the advantages that it derives from its public status in competition with other operators in other sub-markets that are still open.

112. It is Tragsa's hybrid nature as part internal executive service working for its controlling authority or the public authorities, and part entity competing for work from other public bodies such as local authorities and from private parties and companies, that makes a more detailed assessment of compatibility with Article 86(1) EC necessary.

113. In accordance with that provision, in the case of public undertakings Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 12 EC and Articles 81 EC to 89 EC.

114. Now, if an internal executive service of a public authority seeks work on open sub-markets without adequate and transparent measures being taken to prevent any financial material advantages which that service derives from the fact that it carries out the essential part of its activities as an executive organisation of a public authority from being exploited in the competition on those open sub-markets, then the specific requirements of Article 86(1) EC are not satisfied.

115. That failure to take measures is contrary to Articles 43 EC and 49 EC in particular, since executive services of public authorities which also operate on open national markets can make it more difficult for potential candidates from other Member States to access those markets. (32)

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116. The risks which arise, in the light of the prohibition of State aid, from the absence of transparent financial or accounting relations between the State or other public authorities, on the one hand, and public undertakings and companies, on the other, have in the past led the Commission to introduce rules on the basis of Article 86(3) EC. (33)

In the legal and factual situation that lies at the heart of the main proceedings, those risks are at least just as great. The absence of any specific safeguards in the legal regime that applies to Tragsa against open or covert forms of cross-financing between its activities as an executive service of the Administration and as an operator on open sub-markets therefore conflicts with Article 86(1) EC in conjunction with Articles 87 EC and 88 EC.

117. In points 78 to 83 above, I have examined in detail the risks which the application of provisions such as Articles 152 and 194 of the Spanish Law on Public Procurement may present for the sound operation of Community law on public procurement and for the fundamental freedoms of movement and the state of competition on the Community market.

118. Those risks lie in the fact that, if executive services as instruments' or independent entities which are fully controlled by the contracting authorities can also obtain, outside the scope of the competences or field of work laid down in their legal, administrative or private law constitutional regime, contracts from the administrations responsible for them for the provision of services, execution of works or production of goods, simply because they are available, the useful effect of the Community directives on public procurement may be seriously undermined or, where those directives are not applicable, serious obstacles may arise to the movement of goods and services between States and to freedom of establishment, and competition between those executive services or publicly controlled entities and private undertakings on the relevant markets may be seriously distorted. There is only one exception: where compelling public interest requirements provide justification for awarding work directly to an own executive organisation even if that work lies outside its legal or constitutional remit. Examples here would include natural disasters and similar exceptional circumstances, which may require the immediate involvement of all the resources which an administration has available.

119. It is precisely those consequences which the Court sought to prevent with the second Teckal criterion. If that criterion is to be effective, it must be interpreted in such a way that it also prohibits the award to own' executive services or publicly controlled entities of public contracts which lie outside their legal, administrative or constitutional remit.

120. Furthermore, the referring court has, in my view rightly, questioned the compatibility of provisions such as those of Articles 152 and 194 of the current Spanish Law on Public Procurement with Community competition law.

121. Such provisions clearly create a privileged position for own executive services or publicly controlled entities - acting as market operators outside their legal, administrative or constitutional remit - in the award of public contracts, and thus conflict with the provisions of Article 86(1) EC.

Question 3

122. The purpose of the Tribunal Supremo's third question is obviously to determine whether the Court's judgment in Spain v Commission (34) has implications for the assessment of Tragsa's legal position in the award of public contracts.

123. In that judgment, the Court concluded that an organisation such as Tragsa, which, despite its financial and accounting autonomy, is entirely subject to Spanish State control, must be regarded as one of the national administration's own official departments within the meaning of the first subparagraph of Article 3(5) of Council Regulation (EEC) No 154/75 of 21 January 1975 on the

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establishment of a register of olive cultivation in the Member States producing olive oil (OJ 1975 L 19, p. 1).

124. As the Commission has rightly observed, that judgment of the Court concerns Tragsa's activities on behalf of the Spanish State in establishing a register of olive cultivation.

125. In answer to the Spanish Government's assertion that for the establishment of that register Tragsa, as an independent entity, had been given a private contract because of the requirements of confidentiality which such an activity had to satisfy, the Court ruled that Tragsa had to be regarded as an own executive organisation forming part of the Administration, to which the case-law developed in Teckal (35) and ARGE (36) applied in principle. The Court took the view that this was confirmed by Article 88(4) of Law 66/1997, (37) in which it is established that Tragsa is required, as an instrument and technical service of the Administration, to carry out, either itself or using its subsidiaries, to the exclusion of third parties, any work entrusted to it by the General Administration of the State, the Autonomous Communities and the public bodies subject to them. (38)

126. I would point out here that the judgment in Spain v Commission primarily concerned whether the Kingdom of Spain was allowed to entrust to Tragsa the establishment of the olive cultivation register without a public award procedure.

127. The Court was not required on that occasion to consider questions such as those referred in the present case. For that reason, that judgment cannot be interpreted as meaning that Tragsa, as an executive service in the field of agricultural structural policy in the broad sense, must be regarded as an instrument of the General Spanish State Administration. That is consistent with my finding in point 103 of this Opinion.

D - Admissibility

128. In the analysis of the Tribunal Supremo's first two questions, it emerged that both the legal regime under which Tragsa operates as an instrument' for, among others, the Autonomous Communities, the authority which that entity has to carry out work for public authorities other than the State Administration and the Autonomous Communities and for private parties and companies, and the rules contained in Articles 152 and 194 of the current Spanish Law may be criticised as being incompatible with the criteria which the Court formulated in paragraph 50 of the judgment in Teckal.

129. That incompatibility has legal implications concerning the applicability of Community directives on public procurement, the supply of services and the execution of works. It may also lead to conflict with Articles 43 EC, 49 EC and 86 EC.

130. The criticism spelled out above is also implied in the form of doubts in the order for reference.

131. The Tribunal Supremo makes its doubts particularly clear in paragraph Four' of the order for reference.

132. I am sure that the Court's answers to the questions referred will, in the light of the doubts expressed, provide the referring court with useful guidance for its decision in the main proceedings.

133. The arguments put forward by Tragsa and the Spanish Government that the legal questions raised by the referring court in its order for reference are new', not relevant in an appeals procedure and therefore hypothetical and inadmissible are not at all convincing, in my view.

134. Firstly, the Court is usually extremely cautious in assessing the purpose and usefulness of the questions referred to it by the national courts in order to reach a decision in the main proceedings. Only where the questions are manifestly hypothetical in nature does the Court deem them inadmissible. (39)

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135. From the description of the proceedings before various administrative and judicial authorities in Spain, it appears that the legal regime under which Tragsa operates has always been held to be compatible with the principles of national competition law. The fact that the Tribunal Supremo has also chosen to take account of the principles of Community law on public procurement and competition law is a step which does not in itself in any way render the resulting questions hypothetical.

136. Whether the Tribunal Supremo was authorised under Spanish law to take that step in the proceedings before it is a question which the Tribunal itself, as the highest national court in the present case, must and can answer. (40)

137. Nor can I agree with the Commission's view that the factual and legal information provided in the order for reference is too concise. As has been made clear earlier, it provides sufficient information for a detailed analysis of the questions referred.

138. I have therefore come to the conclusion that the Tribunal Supremo's questions are admissible.

V - Conclusion

139. On the basis of the foregoing findings, I propose that the Court give the following answers to the questions referred by the Tribunal Supremo:

- The Community directives on public contracts for the provision of goods and services and the execution of works do not, in principle, apply to a legal person governed by private law, such as Empresa de Transformacion Agraria SA (Tragsa), which under its legal regime must be regarded as an instrument' of the administration which is required to carry out the work it is given by the relevant public authorities without contracts for pecuniary interest.

- The national rules of law on the subject must ensure that the relevant national authorities control the entity concerned, in the sense that they have a decisive influence over both its strategic objectives and its significant decisions, and ensure that the entity at the same time carries out the essential part of its activities with the public authorities which control it, so that any other activity is marginal.

- The requirement that the relevant public authorities must be able to have a decisive influence over both the entity's strategic objectives and its significant decisions is not satisfied where the public authorities which use the entity as an executive service do not have a direct influence on the content of the legal regime that applies to it, or on the tariffs it may charge for its activities, and further as shareholders in the entity cannot exercise any decisive influence on its decisions.

- The requirement that the entity must carry out the essential part of its activities with the authorities that control it is not satisfied where the legal regime does not restrict the scale of the other activities so that they remain marginal.

- It follows from Article 86(1) EC that an entity which, for the essential part of its activities, acts as an executive service of the relevant public authorities must separate the activities which it carries out for other public authorities and for private persons in a transparent manner, both in terms of organisation and for financial and accounting purposes, from its activities as an instrument of the relevant public authorities.

- It follows from the same provision of the EC Treaty that national administrations may not entrust to a legal person operating as their own executive service contracts for the supply of goods and services or the execution of works, where those contracts have no connection with their public responsibilities or where the performance of those contracts falls outside the statutory remit of the legal person in question. The only exception is where there is objective justification for such work, such as in the case of natural disasters or similar exceptional circumstances.

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- The national court must examine whether those conditions are satisfied in the legal and factual situation in the main proceedings.

(1) .

(2) - In Question 2 the referring court merely refers to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as subsequently amended and now incorporated in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). However, the description of Tragsa's activities in the relevant Spanish legislation and regulations suggests that those activities may also include the provision of services and the supply of water. The possibility therefore remains that Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), now replaced by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), may apply to the facts in the main proceedings. For the sake of brevity, I shall always refer in this Opinion to the public procurement directives' in general.

(3) - In its written observations the Commission points out in footnote 3 that an earlier law of 1973 on land reform and development specifically provided for the setting-up of a land-reform undertaking as an instrument for State action in the field of land development. The setting-up of Tragsa stems from the desire to give the Instituto Nacional de Reforma y Desarrollo Agrario (National Institute for Agricultural Reform and Development, IRYDA) legal personality, as is clear from the preamble to Royal Decree 379/1977, which explains that the aim is to carry out... through an undertaking vested with legal personality in the field of private law the works currently entrusted to the Parque de Maquinaria of the Institute, works which cannot be given to private undertakings because they require specialisation, because of the space and time entailed, because it is necessary to complete work schedules which cannot be delayed or because the works are almost or wholly unprofitable in cases in which the Government, because of hurricanes or similar disasters, orders the Institute to take urgent action to help the victims ...'.

(4) - Article 152(1)(d) of the revised text of 2000, which is currently in force.

(5) - The Commission also states that Tragsa has a small number of foreign subsidiaries. At the hearing, however, Tragsa said that those undertakings had already either been wound up, or else had entirely or largely ceased operating.

(6) - Tragsa and the Spanish Government have pointed out that Tragsa is not permitted by law to take part in public tenders for the General State Administration and the Autonomous Communities. Tragsa may only tender in public tendering procedures organised by public authorities other than the General State Administration and the Autonomous Communities.

(7) - In particular, Case C-107/98 Teckal [1999] ECR I-8121; Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1; Case C-29/04 Commission v Austria [2005] ECR I-9705; and Case C340/04 Carbotermo and Consorzio Alisei [2006] ECR I-4137.

(8) - Relevant judgments here include Case C-231/03 Coname [2005] ECR I-7287; Case C-458/03 Parking Brixen [2005] ECR I-8612; and Case C-410/04 ANAV [2006] ECR I-3303.

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(9) - In paragraph 48 of the judgment in Stadt Halle and RPL Lochau (cited in footnote 7), the Court expressly confirms that there is no need to apply the Community rules in the field of public procurement to works entrusted by a public authority to its own administrative, technical and other resources.

(10) - See previous footnote.

(11) - See, in particular, points 4 to 9 and 13 of this Opinion.

(12) - Case C-349/97 [2003] ECR I-3851.

(13) - At the hearing, the Commission discussed this point in great detail, including in the light of the Court's recent judgments in Parking Brixen (cited in footnote 8) and Carbotermo and Consorzio Alisei (cited in footnote 7).

(14) - Although those cases concerned the award of concessions by public authorities, which is not regulated in secondary Community law, the principle established in those judgments that if a legal relationship is not governed by secondary Community law its compatibility with primary Community law can always be assessed is also applicable in the present case.

(15) - The Court has always strictly interpreted this derogation as being restricted to activities and interests connected with the exercise of official authority. See Case 2/74 Reyners [1974] ECR 631, confirmed on several occasions since then, including in Case C-283/99 Commission v Italy [2001] ECR I-4363, paragraph 20.

(16) - See on this point the judgments in Coname , Parking Brixen and ANAV (all cited in footnote 8).

(17) - From the earlier overview of the relevant Spanish legislation, particularly in point 13, it might be inferred that the use of Tragsa by the Autonomous Communities as their own' executive organisation is optional. If that were true, then the classification of Tragsa as an instrument' of the Autonomous Communities becomes even more problematic, since the freedom of choice to use an executive organisation of another public entity rather than holding a public award procedure conflicts with the provisions of Community law on public procurement. It is for the national court to determine whether they have that freedom of choice.

(18) - Cited in point 15 of this Opinion.

(19) - On pages 12 and 13 of its order for reference, the Tribunal Supremo is clear about its own doubts here: Problems of compatibility with the general principles of Community law also seem to be raised by the eventuality that the Administration, by participating directly and by making use of the legal authorisation provided in the abovementioned provisions of the successive laws governing public procurement, may take on, through a public company which is given the legal status of an instrument of the Administration itself, so many contracts as to alter the relevant market significantly.'

(20) - It appears from the wording of Articles 152 and 194 of the Spanish Law on Public Procurement that the national legislature at least assumes that contracting authorities will make use of the remaining capacity of their executive services:... in which case use should usually be made of that method of execution'. A more detailed interpretation of this is naturally a matter for the referring court.

(21) - See points 117 to 121 below for a more detailed discussion of this.

(22) - Cited in footnote 7, paragraph 48.

(23) - Cited in footnote 8, paragraph 16.

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(24) - Cited in footnote 8, paragraphs 61 and 62.

(25) - See, among others, Stadt Halle and RPL Lochau (cited in footnote 7), paragraph 46, and Parking Brixen (cited in footnote 8), paragraphs 63 and 65.

(26) - See Parking Brixen (cited in footnote 8), paragraph 65, and Carbotermo and Consorzio Alisei (cited in footnote 7), paragraph 36.

(27) - In the judgment in Coname (cited in footnote 8), there was such a joint entity shared by public authorities (Padania), as there was also in the judgment in Carbotermo and Consorzio Alisei (cited in footnote 7). The fact that both quantitative and qualitative requirements must be applied is clear both from Coname (ibid.), where a shareholding of 0.97% was not deemed sufficient to provide objective justification, and from Carbotermo and Consorzio Alisei , where the control which the controlling public authorities exercised over the board of directors of a company was not deemed sufficient to have decisive influence over both strategic objectives and significant decisions of that company'.

(28) - The existence of a decisive influence over Tragsa cannot be inferred from the public law agreements which the Autonomous Communities have concluded with Tragsa, referred to in point 13 of this Opinion, the text of which was attached by the Commission as an annex to its written observations. However, it is ultimately for the national court to decide on an interpretation here.

(29) - The need for a precise and restrictive description of the tasks and powers of a joint executive organisation is also relevant for the second Teckal criterion. See points 112 to 116 and 117 to 121 below.

(30) - Cited in footnote 7, paragraphs 58 to 63.

(31) - Cited in footnote 7.

(32) - In Coname (cited in footnote 8), the Court stated, albeit in a slightly different context, that the absence of the necessary transparency can constitute an obstacle to the free movement of services and freedom of establishment.

(33) - See Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35), subsequently supplemented and amended on several occasions.

(34) - Cited in footnote 12.

(35) - Cited in footnote 7.

(36) - Case C-94/99 [2000] ECR I-11037, paragraph 40.

(37) - The content of this is summarised in point 5 above.

(38) - Spain v Commission (cited in footnote 12), paragraphs 204 to 206.

(39) - See, among others, Case 244/80 Foglia [1981] ECR 3045, paragraph 18; Case C-314/96 Djabali [1998] ECR I-1149, paragraph 18; and Case C-167/01 Inspire Art [2003] ECR I-10155, paragraphs 44 and 45.

(40) - Only where, in examining the facts on which the main proceedings are based and the relevant national law, the Court's ruling on the questions referred manifestly cannot help to resolve the dispute can the questions referred be held to be inadmissible. See, among others, Case C-132/81 Vlaeminck [1982] ECR 2953, paragraphs 13 and 14, and, more recently, Case C-314/01 Siemens and ARGE Telecom [2004] ECR I-2549, paragraph 37.

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DOCNUM	62005C0295
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page I-02999
DOC	2006/09/28
LODGED	2005/07/21
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	Dutch
NATIONA	Spain
PROCEDU	Reference for a preliminary ruling;Reference for a preliminary ruling - inadmissible
ADVGEN	Geelhoed
JUDGRAP	Arestis
DATES	of document: 28/09/2006 of application: 21/07/2005

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**Judgment of the Court (Second Chamber)
of 11 October 2007
Commission of the European Communities v Hellenic Republic. Failure of a Member State to fulfil obligations - Directive 92/50/EEC - Public service contracts - Provision of assistance services to farmers for the year 2001 - Regulation (EEC) No 3508/92 - Implementation in Greek of the integrated administration and control system (IACS) - Absence of call for tenders - Application inadmissible. Case C-237/05.**

In Case C237/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 30 May 2005,

Commission of the European Communities, represented by M. Patakia and X. Lewis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by G. Kanellopoulos and S. Charitaki, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, G. Arestis, L. Bay Larsen, R. Schintgen and P. Kris, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 September 2006,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

Judgment

1. By its application, the Commission of the European Communities asks the Court of Justice to declare that, by reason of the practice of the competent authority with regard to the completion and collation of applications and declarations by cereal producers and others under the integrated administration and control system for the year 2001, the Hellenic Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1, Directive 92/50'), particularly Articles 3(2), 7, 11(1) and 15(2) thereof, and the general principle of transparency.

Legal context

Directive 92/50

2. Under Article 1(a) of Directive 92/50, public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority', to the exclusion of the contracts listed in that same provision under (i) to (ix).

3. Article 3(1) and (2) of that directive provides:

1. In awarding public service contracts or in organising design contests, contracting authorities

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shall apply procedures adapted to the provisions of this Directive.

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

4. Under Article 7(1)(a) of Directive 92/50:

1. (a) This Directive shall apply to:

- ... public service contracts concerning the services referred to in Annex I B,... awarded by the contracting authorities referred to in Article 1(b), where the estimated net value of value added tax (VAT) is not less than ECU 200 000,

- public service contracts concerning the services referred to in Annex I A ...:

(i) awarded by the contracting authorities listed in Annex I to Directive 93/36/EEC where the estimated value net of VAT is not less than the equivalent in ecus of 130 000 special drawing rights (SDRs);

(ii) awarded by the contracting authorities listed in Article 1(b) other than those referred to in Annex I to Directive 93/36/EEC and where the estimated value net of VAT is not less than the equivalent in ecus of 200 000 SDRs.'

5. Under Article 8 of Directive 92/50, [c]ontracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI'.

6. Article 9 of the directive states:

Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

7. Article 11(1) of the same directive provides that, in awarding public service contracts, contracting authorities are to apply the open, restricted and negotiated procedures defined in Article 1(d), (e) and (f), of that directive.

8. Under Article 15(2) of Directive 92/50:

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

Regulation (EEC) No 3508/92

9. It is clear from the third and fourth recitals of the preamble to Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355, p. 1), as amended by Council Regulation (EC) No 1593/2000 of 17 July 2000 (OJ 2000 L 182, p. 4, Regulation No 3508/92'), that, as part of the reform of the common agricultural policy and in order to adapt the administration and control mechanisms to the new situation and improve their effectiveness and usefulness, it is necessary to set up a new integrated administration and control system covering the aid schemes for arable crops, beef and veal, sheepmeat and goatmeat (IACS').

10. Article 2 of Regulation No 3508/92 provides:

The [IACS] shall comprise the following elements:

(a) a computerised database;

(b) an identification system for agricultural parcels;

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(c) a system for the identification and registration of animals;

(d) aid applications;

(e) an integrated control system.'

11. Under Article 3(1) of the regulation:

The computerised database shall record, for each agricultural holding, the data obtained from the aid applications. This database shall in particular allow direct and immediate consultation, through the competent authority of the Member State, of the data relating at least to the previous three consecutive calendar and/or marketing years.'

12. Article 4 of the same regulation provides:

An identification system for agricultural parcels shall be established on the basis of maps or land registry documents or other cartographic references. Use shall be made of computerised geographical information system techniques including preferably aerial or spatial orthoimagery, with an homogenous standard guaranteeing accuracy at least equivalent to cartography at a scale of 1:10 000.'

13. Under Article 6(1) of Regulation No 3508/92:

In order to be eligible under one or more Community schemes governed by this Regulation, each farmer shall submit, for each year, an area aid application indicating:

- agricultural parcels, including areas under forage crops, and agricultural parcels covered by a set-aside measure for arable land and those laid fallow,

- where applicable, any other necessary information provided for either by the Regulations relating to the Community schemes, or by the Member State concerned.'

14. Article 7 of the regulation is worded as follows:

The [IACS] shall cover all aid applications submitted, in particular as regards administrative checks, on-the-spot checks and, if appropriate, verification by aerial or satellite remote sensing.'

The facts giving rise to the dispute and the prelitigation procedure

15. A complaint was made to the Commission concerning the alleged unlawfulness, in the light of Directive 92/50, of a framework agreement and the implementing agreements thereof concerning the provision of certain services in the context of the implementation of the IACS in Greece for the year 2001.

16. The framework agreement was concluded on 20 February 2001 between the Greek Ministry of the Interior, the Civil Service and Decentralisation, the Greek Ministry of Agriculture, the Greek Union of Prefectoral Authorities and the PanHellenic Association of Unions of Agricultural Cooperatives (the framework agreement').

17. The framework agreement concerned coordination by that association of the following services supplied by its members, namely the unions of agricultural cooperatives (the UACs'):

- informing farmers about the adoption of new forms for applications and for declarations relating to agricultural holdings and crops, which will supply data to be added to the new IACS database;

- providing assistance with a view to ensuring that data provided by farmers are entered correctly and in good time using the relevant forms. That service includes, in particular, technical assistance for the identification of cultivated areas on orthophotographs, aerial photographs or topographical maps;

- collecting the forms and sending them in hard copy or electronic format to the competent prefectoral

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authority.

18. To that effect, the framework agreement provides for the conclusion of implementing agreements between the prefectoral authorities and the UACs at the level of each prefecture. Subsequently, such contracts were actually awarded (the contracts at issue').

19. By letter of 18 December 2002, the Commission gave the Hellenic Republic formal notice to submit its observations on the plea in law alleging that, by awarding the service contracts to the UACs directly and without prior advertising, it had failed to comply with the provisions of Directive 92/50, in particular Article 3(2) thereof, and the principle of nondiscrimination.

20. On 19 December 2003, the Commission, taking the view that the observations submitted in response to its letter by the Hellenic Republic were inadequate, issued a reasoned opinion inviting that Member State to take the measures necessary to comply with the opinion within a period of two months from the date of its notification.

21. The Commission was not convinced by the Hellenic Republic's responses to the reasoned opinion and decided to bring the present proceedings.

Admissibility

22. The Hellenic Republic raises a plea of inadmissibility against the Commission's action, alleging that it does not have a legal interest in bringing the proceedings and that the action is devoid of purpose.

23. In that connection, the Member State claims, first, that it took the necessary measures to bring the alleged failure to fulfil obligations to an end and that it was no longer in existence by the expiry of the period prescribed by the reasoned opinion for compliance, since:

- over the course of 2003, there were no direct awards of contracts for the services at issue and the right to tender was extended to entities other than the UACs;

- by Official Declaration No 5767 of the SecretaryGeneral of the Ministry of Agriculture of 6 November 2003, the Greek authorities undertook to use, if necessary, competitive tendering procedures for the award of the service contracts at issue, provided always that those services fall, wholly or in part, under Annex I A of Directive 92/50'.

24. Secondly, the Hellenic Republic submits that, by the expiry of the period prescribed for it to comply with the reasoned opinion, the alleged failure to fulfil obligations, which concerned the year 2001 only, was no longer in existence and had ceased to have any effects.

25. The Commission contends that a finding of failure to fulfil obligations is necessary because there is no guarantee that Directive 92/50 will be applied effectively and correctly, either in the present dispute concerning the year 2001, or in the future.

26. First, not only is Declaration No 5767 inadequate because it is not legally binding but it is also vague owing to the use of the expression if necessary'.

27. Secondly, the continuing disagreement between the Hellenic Republic and the Commission regarding the unique nature of the contracts at issue, and also as to whether the services concerned are included in Annex I A of Directive 92/50, is far from being theoretical and entails a risk that the Member State will reoffend.

28. Finally, there is no guarantee that Directive 92/50 will be correctly applied in the future since, during the years following 2001, the service contracts in question have also been awarded directly to the UAC.

29. In that regard, it is important to note that, as regards the award of public procurement contracts,

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the Court has held that an action for failure to fulfil obligations is inadmissible if, when the period prescribed in the reasoned opinion expired, the contract in question had already been completely performed (see Case C-362/90 Commission v Italy [1992] ECR I2353, paragraphs 11 and 13, and Case C394/02 Commission v Greece [2005] ECR I4713, paragraph 18).

30. Accordingly, it is necessary to verify whether, when the period prescribed by the reasoned opinion expired, that is to say, on 19 February 2004, the contracts at issue were, at least partly, still being performed or whether, on the contrary, the assistance work for which they were concluded was at that date already fully completed, so that they had been completely performed.

31. In the present case, the failure to fulfil obligations alleged by the Commission, described expressly in the claims in the application initiating proceedings, concerns the assistance provided by the UACs in the context of the implementation of the IACS solely for the year 2001, as those services are detailed in the contracts at issue concluded, in respect of that same year, for the performance of the framework agreement. At the hearing, the Commission confirmed that its action was limited to the year 2001 alone.

32. The assistance work provided for by the contracts at issue concerns the preparation of aid applications submitted by farmers for the purpose of recording the data they contain on the IACS database in accordance with Article 3(1) of Regulation No 3508/92. Those applications must be submitted annually to enable payments for the year in question to be paid. Therefore, these are, in essence, services related to an annual exercise concluded by the payment of the aid granted.

33. In that connection, it is necessary to state that Article 5(1) of the framework agreement - a provision which also appears in the contracts at issue - provides that they are to enter into force on the day they are signed and expire when all the financial aid has been paid to the farmers who applied for it.

34. The Commission was not able to refute the Hellenic Republic's argument, put forward by its representative at the hearing, that the payment of aid for the year 2001 was made in full in the course of the following year, in other words well before the expiry of the period prescribed by the reasoned opinion.

35. In the absence of indications from the Commission to the contrary, it must accordingly be found that, by the date that the period prescribed by the reasoned opinion expired, the framework agreement and the contracts at issue concerning the performance of that agreement for the year 2001 had already exhausted all their effects.

36. At the hearing, the Commission maintained that, unlike the infringement at issue in Commission v Italy , the failure to fulfil obligations which is the subject of the present action, namely awarding the services of assistance to the UAC directly and without advertising, was repeated in the years following 2001, in other words before the present case was brought.

37. In that connection, it must be observed that the Commission has not succeeded in refuting the Hellenic Republic's submissions that, in those years, those services of assistance were provided under a procedure which was radically different from that followed for the year 2001.

38. In particular, the Commission has not succeeded in calling into question the statement made by the representative of the Hellenic Republic at the hearing on the basis of supporting documents submitted by the Greek Government, in response to a question asked in that regard by the Court, to the effect that, for the years following 2001, the Greek State budget made no provision for payment in consideration of the services of assistance provided by the UACs, since from that point onwards the UACs received a payment from each farmer for the services they provided to him.

39. It follows that, having regard to the evidence presented to the Court, the Commission has

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not succeeded in demonstrating to the requisite legal standard that the failure to fulfil obligations alleged by the Commission against the Hellenic Republic in respect of the year 2001 recurred in subsequent years.

40. Finally, concerning the Commission's argument to the effect that its action is admissible by virtue of the continuing dispute between it and the Hellenic Republic concerning the interpretation of Directive 92/50 in the light of the specific characteristics of the public contracts at issue, it is sufficient to note that that circumstance alone is not enough to make the action admissible.

41. It follows from all the foregoing that the Commission's application must be dismissed as inadmissible.

Costs

42. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Hellenic Republic has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

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

1. Dismisses the action as inadmissible;

2. Orders the Commission of the European Communities to pay the costs.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page I-08203
DOC	2007/10/11
LODGED	2005/05/30
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Greek
APPLICA	Commission ; Institutions
DEFENDA	Greece ; Member States
NATIONA	Greece
NOTES	Meisse, Eric: Manquement et procédure de passation, Europe 2007 Décembre

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Comm. no 341 p.27

PROCEDU Action for failure to fulfil obligations

ADVGEN Mengozzi

JUDGRAP Timmermans

DATES of document: 11/10/2007
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Judgment of the Court (Second Chamber) of 11 October 2007 - Commission of the European Communities v Hellenic Republic

(Case C-237/05) [1]

(Failure of a Member State to fulfil obligations - Directive 92/50/EEC - Public service contracts - Provision of assistance services to farmers for the year 2001 - Regulation (EEC) No 3508/92 - Implementation in Greek of the integrated administration and control system (IACS) - Absence of call for tenders - Application inadmissible)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Patakia and X. Lewis, Agents)

Defendant: Hellenic Republic (represented by: G. Kanellopoulos and S. Charitaki, Agents)

Re:

Failure of a Member State to fulfil its obligations - Infringement of Articles 3(2), 7, 11(1) and 15(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1)

Operative part of the judgment

The Court:

Dismisses the action as inadmissible;

Orders the Commission of the European Communities to pay the costs.

_____

[1] - OJ C 193, 6.8.2005.

Opinion of Mr Advocate General Mengozzi delivered on 15 February 2007. Commission of the European Communities v Hellenic Republic. Failure of a Member State to fulfil obligations - Directive 92/50/EEC - Public service contracts - Provision of assistance services to farmers for the year 2001 - Regulation (EEC) No 3508/92 - Implementation in Greek of the integrated administration and control system (IACS) - Absence of call for tenders - Application inadmissible. Case C-237/05.

I - Introduction

1. In this case, the European Commission has brought an action before the Court of Justice, pursuant to Article 226 EC, seeking a declaration that, by reason of the practice followed by the competent authorities in regard to the works involved in the completion and collation of applications and declarations by cereal producers and others in the context of the Integrated Administration and Control System (IACS), introduced by Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes, (2) for the year 2001, the Hellenic Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (3) and, in particular, Articles 3(2), 7, 11(1) and 15(2) thereof, as well as the general principle of transparency.

II - Legislative framework

A - Directive 92/50

2. In order to analyse the issues raised in this case, it is necessary briefly to cite a number of the provisions in Titles I to V of Directive 92/50, in the version which was in force at the material time. As we know, Directive 92/50 has been amended several times over the years, and was finally repealed, except for Article 41 thereof, as of 31 January 2006, by Article 82 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (4)

3. Article 1(a) of Directive 92/50 defines public service contracts' as contracts for pecuniary interest concluded in writing between a service provider and a contracting authority', to the exclusion of contracts falling within the scope of Directive 77/62/EEC, (5) Directive 71/305/EEC (6) and Directive 90/531/EEC, (7) contracts relating to services in the sectors listed in Article 1(a)(iii) to (vii) and (ix), as well as employment contracts.

4. According to Article 3(1) of Directive 92/50, [i]n awarding public service contracts (...) contracting authorities shall apply procedures adapted to the provisions of this Directive.' And, according to Article 3(2), [c]ontracting authorities shall ensure that there is no discrimination between different service providers.'

5. According to Article 7(1)(a):

1. (a) This Directive shall apply to:

- ... public service contracts concerning the services referred to in Annex I B, (...) awarded by the contracting authorities referred to in Article 1(b), where the estimated net value of value-added tax (VAT) is not less than ECU 200 000;

- public service contracts concerning the services referred to in Annex I A ...:

(i) awarded by the contracting authorities listed in Annex I to Directive 93/36/EEC where the estimated value net of VAT is not less than the equivalent in ecus of 130 000 special drawing rights (SDRs);

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(ii) awarded by the contracting authorities listed in Article 1 (b) other than those referred to in Annex I to Directive 93/36/EEC(8) and where the estimated value net of VAT is not less than the equivalent in ecus of 200 000 SDRs.'

6. Under Article 7(2) of Directive 92/50, for the purposes of calculating the estimated value of the contract, the contracting authority is to include the estimated total remuneration of the service provider, taking account of the provisions of paragraphs 3 to 7, which lay down a number of criteria for determining that figure. More particularly, according to Article 7(3), the selection of the valuation method shall not be used with the intention of avoiding the application of this Directive, nor shall any procurement requirement for a given amount of services be split up with the intention of avoiding the application of this Article.' The first sentence of Article 7(4) indicates which factors must, where appropriate, be taken into account for the purposes of calculating the estimated contract value for certain types of services, including, in particular, insurance services, banking services and other financial services and contracts which involve design. The first and second subparagraphs of Article 7(4) stipulate that [w]here the services are subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amount referred to above' and that [w]here the value of the lots is not less than this amount, the provisions of this Directive shall apply to all lots. Contracting authorities may waive application of paragraph 1 for any lot which has an estimated value net of VAT of less than ECU 80 000, provided that the total value of such lots does not exceed 20% of the total value of all the lots.'

7. For the purposes of applying the rules establishing the award procedures, the directive divides the services forming the subject matter of the contracts into two categories - used also in Annexes I A and I B to the directive - based on a classification system which, in the absence of a Community nomenclature, refers to the CPC (common product classification) nomenclature of the United Nations.

8. According to Articles 8 and 9 of Directive 92/50, contracts which have as their object services listed in Annex I A are to be awarded in accordance with the provisions of Titles III to VI, whereas contracts which have as their object services listed in Annex I B are to be awarded in accordance with Articles 14 and 16. Pursuant to Article 10, [c]ontracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

9. Title III of the directive lays down the rules which the contracting authorities must apply in selecting the procedures for the award of public service contracts, defined in Article 1(d), (e) and (f), to which Article 11(1) refers, that is to say the open, restricted and negotiated procedures. In accordance with Article 11(4), the award of public service contracts is usually made by the open procedure or by the restricted procedure. Article 11(2) lists those cases in which the contracting authorities may use the negotiated procedure, with prior publication of a contract notice, and Article 11(3) lists the cases in which the contracting authority may use the negotiated procedure without prior publication of a contract notice. Among those cases, of particular interest for the purposes of this case, is the situation envisaged in Article 11(3)(b) which refers to contracts where for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider.'

10. Title IV of Directive 92/50, which consists only of Article 14, lays down common rules in the technical field, while Title V contains rules on advertising. In particular, Article 15(2) requires contracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11, negotiated procedure, to make known their intention

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by means of a notice. Under Article 16(1), contracting authorities who have awarded a public service contract are to send a notice of the results of the award procedure to the Office for Official Publications of the European Communities. Those notices are to be published in the conditions laid down in Article 16(2). With reference solely to the public service contracts listed in Annex I B, Article 16(3) provides that the contracting authorities shall indicate in the notice whether they agree on its publication.'

B - Regulation 3508/92

11. Adopted for the purpose of harmonising the administration and control mechanisms which the Member States apply in the crop and livestock sectors, to adapt them to the requirements of the reform of the common agricultural policy and improve their effectiveness and usefulness, Regulation 3508/92 provides for the creation, by each Member State, of an integrated administration and control system (IACS) covering the aid schemes for arable crops, beef and veal, sheepmeat and goatmeat, as well as specific measures for farming in mountain, hill and certain less-favoured areas.

12. Since the services at issue relate to the implementation of the activities involved in putting the IACS into effect in Greece for the year 2001, it may be helpful to cite briefly the provisions of Regulation 3508/92 which define the aims and operation of the system, in the version which was in force at the material time.

13. Under Article 2 of Regulation 3508/92, the IACS comprises the following elements: (a) a computerised data base; (b) an identification system for agricultural parcels; (c) a system for the identification and registration of animals; (d) aid applications; and (e) an integrated control system. According to Article 3(1), the computerised data base is to record, for each agricultural holding, the data obtained from the aid applications.' This data base must, in particular, allow direct and immediate consultation, through the competent authority of the Member State, of the data relating at least to the previous three consecutive calendar and/or marketing years. As regards the system for identifying agricultural parcels, Article 4 stipulates that this is to be established on the basis of maps or land registry documents or other cartographic references. Use shall be made of computerised geographical information system techniques including preferably aerial or spatial orthoimagery, with an homogenous standard guaranteeing accuracy at least equivalent to cartography at a scale of 1:10 000.'

14. Article 6(1) of the regulation provides:

In order to be eligible under one or more Community schemes governed by this Regulation, each farmer shall submit, for each year, an area aid application indicating:

- agricultural parcels, including areas under forage crops, and agricultural parcels covered by a set-aside measure for arable land and those laid fallow;

- where applicable, any other necessary information provided for either by the Regulations relating to the Community schemes, or by the Member State concerned.'

15. A Member State may, however, decide that an area' aid application need contain only changes with respect to the area' aid application submitted for the previous year. According to Article 6(6), [f]or each of the agricultural parcels declared, farmers shall indicate the area and its location which information must enable the parcel to be identified in the alphanumeric identification system for agricultural parcels.'

16. According to Article 7 of the regulation, the integrated control system is to cover all aid applications submitted, in particular as regards administrative checks, on-the-spot checks and, if appropriate, verification by aerial or satellite remote sensing. In particular, the Member State must carry out administrative checks on aid applications (Article 8(1)), and administrative checks

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are to be supplemented by on-the-spot checks covering a sample of agricultural holdings. For all these checks, the Member State is to draw up a sampling plan (Article 8(2)). Finally, Article 8(5) provides that where the competent authorities of the Member State delegate some aspects of the work to be carried out pursuant to the regulation to specialised agencies or firms, they must retain control over and responsibility for that work.

III - Facts and pre-litigation procedure

17. On 20 February 2001, the Greek Ministry of the Interior, the Greek Ministry of Agriculture, the Union of Prefectoral Authorities (ENAE) and the Pan-Hellenic Association of Unions of Agricultural Cooperatives (PASEGES) entered into a framework agreement concerning the activities involved in implementing the IACS in Greece for the year 2001.

18. On the basis of that framework agreement, PASEGES acted as coordinator between its members, the local unions of agricultural cooperatives (hereinafter: the UACs'), for the purpose of providing assistance to producers of agricultural products in connection with the IACS. In particular, the UACs were supposed to:

- inform farmers about the adoption of the new aid application forms and the declarations relating to the agricultural holdings and crops, which were intended to be entered into the IACS database;

- assist farmers in entering the data in the relevant forms, including by providing technical assistance for the identification of parcels and crops on orthophotographs, aerial photographs or topographical maps;

- collect the forms and send them in hard copy or electronic format to the competent prefectoral authority.

19. The individual prefectoral authorities entered into contracts with the local UACs on the basis of the abovementioned framework agreement.

20. In response to a complaint questioning the compatibility of the abovementioned framework agreement and the related implementing agreements with the provisions of Directive 92/50, the Commission sent the Hellenic Republic, by letter of 10 December 2001, a request for information on both the selection procedure in relation to PASEGES as the authority's co-contractor and on how it had been ensured that the procedure for the award of the implementing agreements was properly publicised.

21. The Hellenic Republic responded on 19 February 2002, explaining that, in the context of the framework agreement, PASEGES merely acted as coordinator between the various UACs, in return for which it received no remuneration, and that the direct allocation to the UACs, on the basis of the implementing agreements, of the activities linked to the implementation of the IACS was compatible with the applicable provisions of Community law.

22. The Commission was not satisfied with this response and, on 18 December 2002, it sent the Greek authorities a letter of formal notice claiming, with reference to the implementing agreements for the framework agreement, that there had been a breach of the provisions of Directive 92/50 and of Article 3(2) thereof, in particular, as well as of the principle of non-discrimination.

23. The Commission basically took the view that, on the basis of the agreements at issue, the local authorities had directly awarded, without prior publication, public service contracts falling within the scope of Directive 92/50.

24. It pointed out that the conclusion of the framework agreement and the related implementing agreements marked a departure from the practice followed for the years preceding 2001, when there had been provision for the conclusion, in respect of each region, of technical assistance agreements with specialist companies, based on competitive tendering procedures.

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25. For the purpose of applying the thresholds laid down by Article 7 of Directive 92/50, the Commission took the view that, given the uniform nature of the agreements at issue, they constituted a single contract and that it was, therefore, necessary, in calculating the estimated value of the latter, to take account of the cumulative value of each of the agreements.

26. As regards the nature of the services, the Commission pointed out that, in its letter of 10 December 2001, it had stated that the contract in question concerned two types of service: on the one hand, public administration services, which were covered by Annex I B to Directive 92/50 and, on the other, data processing services, which were included in Annex I A to the directive, and that the value of the services falling into the first category seemed to be higher than that of those falling into the second category, with the result that the contract was gover ned by the provisions of Articles 14 and 16 of the directive. However, as a result of information obtained from the complainant, the Commission cast doubt on that conclusion, speculating that some of the services previously categorised as public administration services ought really to be regarded as topographical services, falling under Annex I A to Directive 92/50. If that supposition were confirmed by further information, which the Greek Government was asked to supply, the total value of the services falling under Annex I A would have been higher than that of the services falling under Annex I B, so that the provisions of Titles III to VI of the directive would apply.

27. The Hellenic Republic responded by letter of 30 January 2003, rejecting all of the complaints.

28. Consequently, on 19 December 2003, the Commission adopted a reasoned opinion in which it concluded that, by reason of the practice followed by the competent authorities in regard to the works involved in the completion and collation of applications and declarations by cereal producers and others in the context of the IACS in respect of 2001, the Hellenic Republic had failed to fulfil its obligations under Directive 92/50, and in particular Articles 3(2), 7, 11(1) and 15(2) thereof, as well as the general principle of transparency, and asked the Hellenic Republic to comply with the abovementioned obligations within a period of two months.

IV - Procedure before the Court and arguments of the parties

29. By an application lodged at the registry of the Court on 30 May 2005, the Commission brought the present action.

30. The Commission claims that the Court should:

- declare that, by reason of the practice followed by the competent authorities in regard to the works involved in the completion and collation of applications and declarations by cereal producers and others in the context of the IACS in respect of 2001, the Hellenic Republic has failed to fulfil its obligations under Directive 92/50, and in particular Articles 3(2), 7, 11(1) and 15(2) thereof, and under the general principle of transparency;

- order the Hellenic Republic to pay the costs.

31. The Hellenic Republic claims that the Court should:

- dismiss the application;

- order the Commission to pay the costs.

32. By way of measures of organisation of the procedure, the Greek Government was asked to answer in writing a number of questions put by the Court. It complied with that request within the prescribed time limit.

33. The parties presented oral argument at the hearing of 14 September 2006.

V - Legal analysis

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A - Admissibility

1. Arguments of the parties

34. The Greek Government submits, firstly, that it adopted the measures necessary to bring to an end the breach with which it is charged before the deadline which the Commission set in its reasoned opinion had expired. The application is, therefore, inadmissible since it is devoid of purpose. In that connection, the Greek Government claims, on the one hand, that the service contracts at issue were not directly awarded in 2003 and, on the other, that the Greek authorities had undertaken, by official declaration of the Secretary-General of the Ministry of Agriculture of 2003, to use, if necessary, competitive tendering procedures for the award of the service contracts at issue, provided that those services fell, wholly or in part, under Annex I A to Directive 92/50.

35. Secondly, the Greek Government contends that, since the services to be provided under the contracts at issue consist in activities which have to be undertaken on an annual basis, the effects of the infringement at issue were confined to 2001. Consequently, the Commission has no legal interest in bringing proceedings in this case. An interest of that nature cannot be based solely on a difference of opinion between the Commission and the Greek authorities regarding the nature of the services at issue, which has not resulted in specific actions. In addition, the facts relating to the years subsequent to 2001, which the Commission cites in its observations, fall outside the scope of the application and cannot constitute an independent subject of complaint, since the Commission failed to raise them in the pre-litigation procedure. Furthermore, the Commission's account of those facts does not reflect reality. In fact, contrary to the Commission's claims, the services at issue were not awarded to PASEGES for the years subsequent to 2001, but were directly provided by the local authorities, leaving each producer free to apply to the authorities themselves or to private bodies to complete the applications for financial assistance.

36. In response to a written question put by the Court, in which it asked for clarification of the procedures followed by the Greek authorities for the award of service contracts linked to the implementation of the IACS in Greece for the years from 2002 to 2005, the Greek Government confirmed that the Greek authorities had not awarded service contracts for those years. In the context of their activities involving the provision of assistance to farmers, the local authorities had worked with the owners of parcels of land and their trade union bodies. The farmers were free to choose whether to seek the assistance of their UAC or of third parties. Whenever necessary, the authorities had also provided the computerised or cartographic materials needed to complete the application forms to PASEGES or to the UACs considered competent to administer that material. Any natural or legal person requesting it could have had access to that same material, subject to a prior assessment of their capacity to administer it. The Greek Government rejects any claim that a procedure of that kind could be equated with the direct or indirect award of the services linked to the implementation of the IACS. To substantiate its claims, the Greek Government attached to its response to the Court's question a memorandum, of 28 April 2004, concluded with PASEGES and concerning the implementation of the IACS for 2004.

37. Finally, the Greek Government points out that the regulatory background of the IACS was amended subsequent to the material facts and remains in constant evolution. Therefore, according to the Greek Government, the action which the Greek authorities have already taken to adjust their own practices in this area to meet the requirements of Directive 92/50 will, of necessity, have to be re-evaluated once the IACS has assumed its final form.

38. The Commission's response is that the interpretation by the Greek authorities, an interpretation which it believes to be mistaken, of the provisions of Directive 92/50 concerning the nature of the services at issue and the related obligations regarding advertising, as well as the nature of the agreements at issue, has resulted in an application of the national rules which is incompatible

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with Community law. Far from being merely theoretical, the difference of opinion in that regard between the Commission and the Greek Government involves a real risk of further breaches. Without seeking to extend the subject matter of the application to conduct subsequent to 2001, but merely in order to demonstrate the actual effects of the position adopted by the Greek authorities, the Commission refers to a number of documents annexed to the application, which indicate that PASEGES was directly awarded the contracts at issue for the years subsequent to 2001 also.

2. Assessment

39. The plea of inadmissibility submitted by the Greek Government does not appear to be unfounded.

40. In point of fact, there are a number of precedents in case-law, relating, in particular, to infringement proceedings in the public contracts sector, which support the Greek Government's argument.

41. The judgment of 31 March 1992, in Case C-362/90 Commission v Italy , (9) concerned an action against Italy under Article 226 EC, seeking a declaration of the incompatibility with the provisions of Directive 77/62/EEC of the condition, required for participation in an annual supply contract held by a local health authority, stipulating that 50% of the minimum amount of supplies required to have been made by the tenderers over the preceding three years should have been supplied to public administrative authorities. The contract notices containing that condition had been published in October 1988 and the supply contract consequent on the contract notice had fully exhausted its effects by 31 December 1989, that is to say at a date prior to the expiry of the period the Commission had accorded the respondent Government to comply with the reasoned opinion, which was issued on 27 March 1990. The Italian Government contended that, for this reason, the action was devoid of purpose and should be declared to be inadmissible.

42. In its judgment, the Court held (10) that, in that case, the effects of the contract notice at issue had been exhausted on 31 December 1989, that is to say, before the issue of the reasoned opinion, and that the contract notices for 1990 and 1991, published, respectively, on 4 November 1989, that is to say before the reasoned opinion was issued, and on 3 November 1990, that is to say before the action was brought, no longer contained the condition at issue. The Court further held that the Commission had not acted in good time in order to prevent, by means of procedures available to it, the infringement complained of from producing effects and had not even invoked the existence of circumstances preventing it from concluding the pre-litigation procedure laid down in Article 226 EC before the infringement ceased to exist. The Court concluded, on the basis of those considerations, that the infringement complained of had ceased to exist on expiry of the deadline laid down in the reasoned opinion and that the Commission's application should therefore be dismissed as inadmissible. (11)

43. In subsequent judgments, while rejecting the pleas of inadmissibility raised by the respondent governments, the Court implicitly upheld the solution adopted in the abovementioned judgment in Commission v Italy.

44. In its judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 Commission v Germany , (12) the Commission complained that the Federal Republic of Germany had infringed the provisions of Directive 92/50 on the occasion of the award by two German municipalities of service contracts concerning the collection of waste water and waste disposal, the minimum period of which was set, in both cases, at 30 years. The German Government submitted that, in this instance, the failure to fulfil obligations consisted of breaches of procedural rules, whose effects were entirely exhausted before the end of the periods laid down in the reasoned opinions, and that the Federal Republic of Germany had acknowledged, before that date, that it had failed to fulfil its obligations. The action ought, therefore, to be dismissed on the ground that the Commission had no legal interest in bringing proceedings.

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45. The Court first of all drew attention to the case-law according to which, when the Commission exercises its powers under Article 226 EC, it does not have to show that it has a specific interest in bringing an action, and the Commission alone is competent to determine the act or omission on which such proceedings should be based. The Court confirmed that, on the basis of those powers, the Commission may, therefore, ask the Court for a declaration that there has been a failure to fulfil an obligation, consisting in not having achieved, in a specific case, the result intended by the directive.

46. The Court further pointed out that although Directive 92/50 contains essentially procedural rules, it was nevertheless adopted with a view to eliminating barriers to the freedom to provide services and therefore is intended to protect the interests of traders established in a Member State who wish to offer services to contracting authorities established in another Member State' (13) and that, therefore, the adverse effect on the freedom to provide services arising from the infringement of Directive 92/50 must be found to subsist throughout the entire performance of the contracts concluded in breach thereof'. (14)

47. Consequently, the Court concluded that, since in that particular case, the contracts at issue would have continued to produce effects for decades, it could not be maintained that the alleged breaches of obligations had come to an end before the periods laid down in the reasoned opinions expired. (15) The plea of inadmissibility was, therefore, rejected. (16)

48. In Case C-394/02 Commission v Greece , (17) the Commission sought a declaration by the Court that, by reason of the award by the public electricity company DEI of a contract for the construction of a conveyor-belt system for the thermal electricity generation plant at Megalopolis by means of a negotiated procedure without prior publication of a contract notice, the Hellenic Republic had failed to fulfil its obligations under Council Directive 93/38/EEC. In the context of its pleas of inadmissibility, the Greek Government alleged both that the Commission lacked any interest in bringing an action, since the alleged infringement of Community law had, when the period for compliance with the reasoned opinion expired, been fully or at least in large measure completed, and that the action was devoid of purpose, since the contract for works, awarded by DEI as part of the contract notice at issue, had, when the period fixed by the reasoned opinion expired, been almost fully performed, and in actual fact, it was therefore no longer possible to comply with the reasoned opinion.

49. In rejecting the first of the above pleas, the Court basically confined itself to drawing attention to the case-law, according to which, when exercising its powers under Article 226 EC, the Commission does not have to show that there is a specific interest in bringing an action. (18)

50. As regards the second plea, after citing the abovementioned judgment in Commission v Italy , the Court noted that, in that case, the contract concluded between DEI... for the purposes of the contract at issue, was, when the period prescribed by the reasoned opinion expired, in course of performance , since only 85% of the works had been completed. That contract had therefore not been fully performed .' (19) Consequently, the plea was rejected. (20)

51. It should, finally, be pointed out that, recently, (21) relying on grounds largely identical to those which it adopted in the abovementioned judgment in Commission v Italy , cited in point 41 above, the Court declared to be inadmissible an action by which the Commission complained that Italy had authorised, in connection with an ordinance introducing urgent measures for aerial forest fire-fighting on national territory, the award of supply and service contracts which were incompatible with Directives 92/50 and 93/36 and with Article 43 EC and 49 EC. (22) The Court found that the contested ordinance had ceased to produce any legal effect at the expiry date of the state of emergency declared on Italian territory and had been exhausted before the period laid down in the reasoned opinion expired. (23)

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52. That judgment also stands out in that, in contrast to the abovementioned judgments in Commission v Germany and Commission v Greece , the Court did not consider the fact that the procedures set under way in accordance with the authorisation contained in the ordinance at issue were still effective to be relevant. (24)

53. The abovementioned case-law provides a number of elements which are useful in assessing the validity of the plea of inadmissibility submitted by the respondent Government in this case.

54. Firstly, it is necessary to point out that there are two earlier cases in which the Court declared the action to be inadmissible on the basis of the finding that the alleged failure to fulfil an obligation had exhausted its effects before the period allowed in the reasoned opinion had expired. In those judgments, moreover, the Court expressed itself in terms which do not permit a distinction to be made between the various types of contract governed by the Community directives.

55. Secondly, it is clear from the abovementioned judgments in Commission v Germany and Commission v Greece that the action cannot be declared to be inadmissible if the alleged breach of the rules on public contracts continues to produce its effects after the period allowed in the reasoned opinion has expired. More particularly, those effects continue to exist so long as the contracts concluded on the basis of the procedures at issue have not been performed in full.

56. In this case, it is clear from the documents before the Court that the contracts at issue were of one year's duration (they related to the implementation of activities connected with the IACS for 2001 only) and that the services which constituted the subject matter of those contracts had been performed in full at the time when the reasoned opinion was adopted on 19 December 2003. (25)

57. As regards the implementation of the IACS for the years subsequent to 2001, the competent authorities followed procedures different from the procedure at issue. In particular, according to information provided by the Greek Government, those procedures no longer provided for any payment to be made, from the authorities' budget, to persons, including the UACs, which assisted farmers in compiling and submitting application forms.

58. Although the Commission has voiced doubts concerning the compatibility of those procedures with the provisions of Directive 92/50, I do not consider it necessary to assess the validity of those allegations for the purpose of determining whether the present action is admissible. In point of fact, as clearly emerges from the forms of order sought in the application itself, and as the Commission specifically acknowledged in its written observations and at the hearing, the current dispute relates solely to the procedure adopted by the Greek authorities to implement the IACS in 2001.

59. Moreover, since the procedures adopted by the Greek authorities for the years subsequent to 2001 clearly differ from the procedure at issue in this case - to such an extent that, on the basis of the information which the Greek Government has supplied, it is hard to imagine that any public works contracts were awarded after 2001 (26) - it does not seem to me to be permissible to rely on those procedures to claim, as the Commission appears to claim, that the failure to fulfil an obligation with which the Greek Government is charged for 2001 was followed, in subsequent years, by conduct which can be defined as a continuing breach.

60. In those circumstances, in accordance with the abovementioned case-law, the action must, in my view, be declared to be inadmissible.

61. As Advocate General Lenz rightly pointed out in his Opinion in the case of Commission v Italy , which I have mentioned several times and which is cited at point 41 above, it is a condition for bringing an action under Article 226 EC that, at the time when the period allowed to the Member

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State to comply with the reasoned opinion expires, conduct or a failure should exist, which is attributable to that Member State and which the Commission considers to be incompatible with Community law.

62. That is perfectly clear from the second paragraph of Article 226 EC, according to which, if the Member State concerned does not comply with the reasoned opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice. Interpreted a contrario , that provision implies that the Commission is not authorised to bring an action to establish that there has been a breach of Community law, if that breach came to an end before the period laid down in the reasoned opinion expired, at least where the breach was brought to an end because the Member State took measures to comply with the reasoned opinion.

63. No other solution appears to me to be justified, as a rule, if the alleged breach had in any case come to an end when the period laid down in the reasoned opinion expired because it had exhausted all its effects before that date, even though the fact that it was brought to an end was not actually the result of the Member State concerned taking the action the Commission had required. That conclusion is consistent with the objectives of the pre-litigation stage of the procedure under Article 226 EC - which seems to be designed to bring the breach to an end before the matter is referred to the Court -and, more generally, it is consistent with the aims of Treaty infringement proceedings. (27)

64. It is also worth pointing out that, as the Court has stated on many occasions, the purpose of infringement proceedings is objectively to establish whether there has been a breach of Community law. Any recognition by a Member State of a failure to fulfil an obligation, if not followed by measures capable of bringing it to an end within the period laid down in the reasoned opinion, does not preclude a finding of that nature, just as a continuing difference of opinion between the Commission and the Member State concerning the existence of an infringement does not authorise the Commission to bring the matter before the Court if the latter has nonetheless complied with the reasoned opinion. In other words, use of the mechanism provided for under Article 226 EC is not, in my view, justified solely in order to prevent the risk of future infringements or resolve differences of opinion between the Commission and a Member State concerning the compatibility of the latter's conduct with Community law.

65. Nor does it seem to me to be possible to base justification for action by the Commission in relation to an infringement, which has been brought to an end, on the need to obtain a declaration that there has been a failure to fulfil an obligation which may provide the basis for actions which are designed to establish the Member State's liability for harm caused to individuals by that failure. While there is no doubt that a judgment of the Court of Justice declaring the existence of a breach of Community law may make it easier to bring actions for damages against the defaulting State before the national courts, actions under Article 226 EC are not designed to determine the liability of the Member State in question, which will have to be established through the legal channels provided for that purpose in the individual national legal systems; such actions are designed solely to establish objectively whether there has been a failure to fulfil an obligation in the general interest. Furthermore, it should be pointed out that the interest of persons who have suffered harm as a result of a breach of Community law by a Member State in obtaining a declaration that there has been a failure to fulfil an obligation continues to exist even where the State concerned complied with the reasoned opinion within the period laid down by the Commission, without that interest of itself conferring on the Commission the right to bring the matter before the Court to seek a declaration confirming the infringement in question.

66. It should, however, be made clear that while, in principle, the Commission is not authorised to bring proceedings in relation to infringements which have been brought to an end, that does not rule out the possibility of taking action in respect of failures of brief duration, in relation

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to which, although it has acted swiftly, the Commission did not actually have the time to conclude the pre-litigation procedure before those failures were remedied (28) or in respect of continuing and systematic breaches of Community law. (29)

67. On the basis of all of the above considerations, I therefore consider that the abovementioned case-law should be applied in this case in which, as we have seen, the infringement at issue, which lasted for more than a year, was probably brought to an end before the pre-litigation procedure began and, in any event, before the period accorded to the Hellenic Republic in the reasoned opinion had expired.

68. In the alternative, should the Court reject any argument and hold the action to be admissible, I shall consider below whether the action is well founded as to the merits.

B - Merits

1. The alleged breach of the provisions of Directive 92/50

69. An examination of the first plea submitted by the Commission in support of its action, which is founded on the breach of the provisions of Directive 92/50, necessitates an analysis of both the nature of the agreements at issue and the nature of the services forming the subject matter of those agreements.

a) The nature of the agreements at issue

i) Arguments of the parties

70. According to the Commission, the implementing agreements for the framework agreement, which it considers to be public service contracts within the meaning of Directive 92/50, must, for the purposes of applying the provisions of that directive, be viewed as a whole and not, as the Greek Government submits, separately.

71. The Commission infers that those agreements are unitary in nature from a number of different factors, and, in particular: from the fact that they share the same object, that is to say to carry out activities linked to the implementation of the IACS; from the existence of a framework agreement which uniformly defines the basic components of the individual agreements and globally determines the remuneration to be paid for the services forming the subject matter of those agreements; and from the fact that, by its very nature, the IACS requires uniform and centralised implementing procedures. It follows, according to the Commission, that, in order to determine the estimated cost of the contract in accordance with Article 7 of Directive 92/50, it is necessary to take into account the cumulative value of all of the implementing agreements. Since the figure arrived at on the basis of that calculation will be far in excess of the thresholds laid down in Article 7, the directive will apply to each contract.

72. The respondent Member State submits, in its defence, that the implementing agreements are not uniform in nature. The fact that the contracting parties are not the same, the diversity of the services provided - which vary in nature and scope according to the characteristics of the territory concerned - the different places of implementation and the different value, in economic terms, of each category of services offered, are all elements which differentiate the agreements in question, with the result that they cannot be considered to be unitary agreements.

73. The Hellenic Republic also claims that the figure laid down in the framework agreement, which the Commission used as the basis for calculating the thresholds laid down in Article 7 of Directive 92/50, actually represents the financial cover provided by the Greek authorities for the implementation of the IACS throughout the whole of Greek territory and includes, not only remuneration for the services provided by the UACs, but also sums earmarked to cover the costs of the prefectoral authorities.

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74. According to the Greek Government, the value of the contracts at issue must, in fact, be calculated by reference to each agreement in isolation, taking account of the figure corresponding to the remuneration paid for the services provided and excluding the credits allocated to the individual contracting authorities.

ii) Analysis

75. It is first necessary to make clear that it is only in the event that the agreements at issue have to be assessed as a single unit, as the Commission suggests, that the provisions of Directive 92/50 will apply. It appears, in fact, to be common ground among the parties that, if viewed individually, as the Greek Government claims they should be, those agreements do not fall within the thresholds laid down by the directive.

76. According to Article 7(3) of Directive 92/50, [t]he selection of the valuation method [of the estimated cost of the contract] shall not be used with the intention of avoiding the application of this Directive, nor shall any procurement requirement for a given amount of services be split up with the intention of avoiding the application of this Article.'

77. Although there are, in this case, both elements which support the view that the agreements at issue are unitary in nature, as the Commission claims, and elements which suggest the contrary, as the Greek Government contends, I consider that the former should take precedence.

78. The framework agreement which the Greek authorities entered into with PASEGES places all of the agreements at issue in a single legal context and acts as a unifying factor for those agreements. (30) Not only does it define the nature of the services, identify the contracting authorities and the successful tenderers, (31) designate a person responsible for coordinating all of the activities involved in implementing the individual agreements and determine the overall financial cover for the operation, it also furnishes the legislative framework within which the individual agreements are concluded. That agreement is automatically annexed to the agreements entered into at local level (32) and its provisions supplement the content of those agreements on matters for which the latter do not make specific provision. Moreover, it seems to me that the conclusion of the framework agreement of itself demonstrates that the Greek authorities themselves took a unitary view of the various contracts entered into on the basis of that framework agreement.

79. As regards the implementing agreements, it must be pointed out that the Greek State appears as a contracting party in each of those agreements, even though, as the Greek Government points out, the agreements were in fact concluded by the individual prefectoral authorities with the territorially competent UAC and, therefore, actually differ in terms of the particular contracting authorities and successful tenderers. They are largely the same in content as regards the nature of the services forming the subject matter of the contracts, the nature of the obligations entered into by each of the contracting parties and the duration of the agreement. They also relate to the provision of services which are essential for the attainment of a common objective, that is to say the implementation of the IACS throughout the whole of Greek territory for 2001. (33)

80. The fact that, as the Greek Government points out, the economic value of the services provided differs, depending on the requirements linked to the territory of each prefectoral authority, just as the place at which the services are provided differs, does not, however, seem to me to be of critical importance, since it does not change the fact that the agreements at issue have basically the same rationale and object, are of the same duration and have the same purpose.

81. If, then, the implementing agreements have to viewed overall, their value must be considered cumulatively in order to assess the estimated cost of the contract. Since the documents before the Court indicate that some of the implementing agreements, viewed in isolation, have a value close to the thresholds provided for by Directive 92/50, the conclusion must be that if the value

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of all of the agreements at issue is added together, those thresholds are substantially exceeded.

82. The Greek Government's allegation that the Commission incorrectly used as the basis for calculating the overall value of the contracts the sum laid down in the framework agreement, which includes not only the payment for the services provided by the UACs, but also sums earmarked to cover the costs of the prefectoral authorities, seems to me to be unfounded in fact.

83. There is no evidence to substantiate that allegation, and it is, moreover, contradicted on a reading of the documents in the pre-litigation procedure, which clearly indicate that in calculating the estimated value of those contracts, the Commission did not rely on the abovementioned figure but, in fact, added up the value of each agreement. Moreover, at the hearing, the Commission confirmed that this was the method it had adopted.

84. On the basis of the above considerations, it must be concluded, in agreement with the Commission, that the contracts at issue fall within the scope of Directive 92/50.

b) The nature of the services provided

i) Arguments of the parties

85. The Commission considers that many of the services forming the subject matter of the contracts at issue must be regarded as topographical services' falling within category 12 of Annex I A to Directive 92/50. According to the Commission, that category includes operations involving the use of orthophotographic maps and the identification of agricultural holdings on those maps. Those services can be provided only by professional topographers.

86. Again, according to the Commission, the remaining portion of the services at issue relates, on the one hand, to processing the data which has been collected and entering it in a data base, operations which - the Commission contends - come under category 7, data processing services', of Annex I A to Directive 92/50, and, on the other, the entering of the data collected in the declaration forms, which activity, being a public administration activity, should, in fact, be classified in Annex I B, other services', to the directive.

87. The Commission considers that the value of the services which fall under Annex I A to Directive 92/50 is higher than the value of the services which fall under Annex I B thereto.

88. The Greek Government maintains that the services forming the subject matter of the implementing agreements entirely - or, at least, overwhelmingly - constitute public administration activities, which fall under Annex I B to Directive 92/50.

89. As regards, in particular, the services involved in providing assistance to producers with a view to submitting the applications and declarations, the Greek Government first explains that these involve not only assistance in filling in the forms, but also identifying both the areas under cultivation and those used for stabling. Consequently, the Commission's argument that those services must be classified as topographical services is valid only in relation to the identification of the agricultural parcels.

90. Secondly, the Greek Government contends that the cartographical support equipment needed to make that identification is provided by the ministry of agriculture, and that the prefectoral authorities, the staff of the topographical service and the directorate for agricultural development provide producers with the technical assistance they need for the identification process. The UACs provide their activities of assisting the producers under the supervision of the topographical service and the directorate for agricultural development.

91. Thirdly, the Greek Government points out that since the UACs had access to the data entered in the declarations submitted for 2000, as well as maps indicating the parcels declared for that

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year, their work in locating the parcels was made easier and basically confined to identifying any differences as compared with the previous year. The respondent Government estimates that, in general, approximately 70% of the parcels declared in a given year remain unchanged in the following year.

92. Fourthly, the Greek Government claims that the activities involved in identifying the agricultural parcels do not require the services of topographers, since they can be carried out by other specialist staff.

93. Finally, in response to a question put by the Court, the Greek Government objects to the classification of the services at issue as topographical services, a classification which, it alleges, the Commission arrived at without undertaking a detailed analysis of the United Nations CPC nomenclature.

ii) Analysis

94. An analysis designed to identify the nature of the services forming the subject matter of the agreements at issue is important for the purpose of determining the rules applicable to the related contracts. If the services fall under Annex I A to Directive 92/50, then, in accordance with Article 8 thereof, the provisions of that directive apply in full; if they do not fall under Annex I A, only Articles 14 and 16 are applicable, in accordance with Article 9 of the directive. If the services in question are regarded as in part covered by Annex I A and in part covered by Annex I B, as suggested - though their views differ - by both the Commission and, in the alternative, by the Greek Government, it is further necessary to assess, for the purposes of applying the rule under Article 10 of Directive 92/50, whether the value of the services included in Annex I A is higher than that of the services which fall under Annex I B or vice versa.

95. That said, it seems to me that the analysis must include an assessment of the content of the agreements at issue. Since they have been concluded in implementation of the framework agreement, the different contracts are largely similar in content, particularly as regards the subject matter of the services the different contracting parties undertake to provide, consequently, that assessment will be made below with reference, by way of illustration, solely to the provisions of the agreement entered into by the Greek State, the prefectoral authority of Corinth and the Corinth UAC.

96. It should first be pointed out that, in defining the subject matter and aims of the agreement, Article 1 thereof sets out that the need to issue an invitation to tender for the services of providing assistance to producers in the context of implementing the IACS is based on a finding that it is impossible for producers independently to identify the areas under cultivation on orthophotographic materials and to collect information on the livestock being raised, and on the lack of adequate assistance from the services of the prefectoral authorities, of specialist staff and the appropriate data processing support and, consequently, the difficulty, in those circumstances, of complying with the time limits laid down for implementing the IACS.

97. Article 2 of the agreement defines the obligations entered into by the different contracting parties and is made up of two parts: part A refers to the activities of identifying the declared areas under cultivation and the livestock and their entry in the special application forms.' Part B concerns activities involving inputting data from the application forms into the ministry's computer to create a computerised data base.'

98. As regards the activities covered in Part A, the UAC undertakes to provide the necessary technical assistance to the producers concerned within the confines of the territorial jurisdiction of the contracting prefectoral authority. For that purpose, it is required to set up two teams, providing five individuals responsible for identifying on orthophotographic maps the areas and stabling facilities which are to be declared for the purpose of filling in the application forms, under the supervision of the topographical service, the veterinary service and the prefectoral authority's directorate for agricultural development, as well as to submit the declarations to the prefectoral

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authority and make the necessary corrections should mistakes have been made.

99. The Greek State undertakes to make available the cartographical materials for identifying the holdings and the manuscript archives concerning the branded livestock in order to identify them and establish a computerised register. It also undertakes to pay to the UAC, through the offices of the prefectoral authority, a sum in drachma corresponding to the overall amount of the applications drawn up by the UAC, augmented by a sum representing a flat-rate payment for each application.

100. The prefectoral authority undertakes to supply, using the staff of the topographical service, technical assistance to producers covering, in all, 500 of an estimated total of 1 192 claim declarations, with the assistance for the remaining declarations to be provided by the UAC.

101. The activities falling under part B of Article 2 of the agreement consist in entering the data taken from the declarations into a computer program provided by the ministry of agriculture, under the supervision of the prefectoral authority's directorate for agricultural development, in order to establish a definitive data base. Therefore, the Greek State undertakes to provide the software with the instructions for entering the data concerning the holdings and the livestock; to make available the requisite computer connections, to make available to the directorate for agricultural development and the UAC the computer expertise of its own services; and to pay the UAC, through the offices of the prefectoral authority, a sum in drachma corresponding to the overall amount of the applications draw up by the UAC, augmented by a sum of 500 drachma for each application by way of remuneration for entering the data in the relevant computerised data base and a sum of 1 750 drachma for each application by way of remuneration for entering data in the cattle register.

102. Article 3 of the agreement defines the financing procedures. Article 3(b) lays down a sum of 6 554 025 drachma to cover spending on remuneration, in the form of a flat-rate payment per form, for carrying out the activities of identification and preparing the applications and declarations. Article 3(c) lays down a sum of 1 920 500 drachma to cover spending on remuneration, in the form of a flat-rate payment per form, for carrying out the activities involved in processing the data from the applications and declarations.

103. One element of the services which the UACs are asked to provide, which the Commission describes as topographical services', consists, therefore, in identifying, on the basis of cartographic or orthophotograhic materials or aerial photographs provided by the prefectoral authorities, the agricultural holdings under cultivation. Furthermore, it is clear from the wording of Articles 1 and 2 of the agreement concluded between the Greek State, the prefectoral authority of Corinth and the Corinth UAC that those activities are able to be carried out only by specialist staff. It should, finally, be pointed out that those activities are carried out under the supervision of the staff of the prefectoral authority's topographical service.

104. The above elements should now be used to assess the accuracy of the Commission's classification.

105. The Greek Government challenges that classification essentially in relation to the services involved in identifying the agricultural parcels. Furthermore, the breach of the provisions of Directive 92/50, which is cited in the context of the plea under consideration, could arise only if those services can be included under Annex I A to the directive. In point of fact, were that not the case, then, given the marginal economic nature of the services involved in entering data in the authority's data bases, as compared with the other services, it would have to be concluded that, in value terms, the services falling under Annex I B to Directive 92/50 are more significant than those falling under Annex I A, with the result that the rules on publication laid down in the directive would apply in part only.

106. For those reasons, the analysis which follows relates solely to the proper definition of the services involved in identifying the agricultural parcels.

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107. It should first be pointed out that the seventh recital in the preamble to Directive 92/50 states that the field of services is best described, for the purpose of application of procedural rules and for monitoring purposes, by subdividing it into categories corresponding to particular positions of a common classification; whereas Annexes I A and I B of this Directive refer to the CPC nomenclature (common product classification) of the United Nations; whereas that nomenclature is likely to be replaced in the future by a Community nomenclature; whereas provision should be made for adapting the CPC nomenclature in Annexes I A and B in consequence.'

108. In its judgment in Tögel , the Court held that it is clear from the seventh recital in the preamble to Directive 92/50 that the reference in Annexes I A and I B to the CPC nomenclature is binding. (34) It follows that in defining the services forming the subject matter of a contract, the Commission must refer to the nomenclature - and the explanatory notes which accompany it - in order to determine whether they fall under Annex I A or Annex I B to the directive.

109. It is not clear from the procedural documents, which the Commission has submitted, on the basis of what information and with reference to exactly which class in the CPC nomenclature the Commission has defined the activities at issue as topographical services.'

110. In response to a written question put by the Court, the Commission has, however, cited reference numbers CPC 86753 and CPC 86721, which constitute subdivisions of CPC 867, listed in category 12 of Annex I A to Directive 92/50.

111. Category 12 of Annex I A to Directive 92/50 covers the following descriptions: [a]rchitectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services.'

112. Number 867 in the provisional CPC nomenclature, to which category 12 of Annex I A to Directive 92/50 refers, concerns architectural services, engineering and other technical services.' Class 8672 covers engineering services' and includes subclass 86721 advisory and consultative engineering services', to which the Commission refers. According to the explanatory note relating to that subclass, it includes preparatory technical feasibility studies and project impact studies.' Cited, by way of example are study of the impact of topography and geology on the design, construction and cost of a ... infrastructure.' The explanatory note further makes clear that the provision of those services is not necessarily linked to a construction project, but may, for example, consist in the appraisal of the structural, mechanical and electrical installations of buildings, of expert testimony in litigation cases, of assistance to government bodies in drafting laws etc.'

113. As regards subclass CPC 86753 [s]urface surveying services' to which the Commission also refers, this belongs to class 8675, services related to scientific and technical consultancy.' According to the explanatory note referring to that subclass, such services consist in [g]athering services of information on the shape, position and/or boundaries of a portion of the earth's surface by different methods including (...) photogrammetric and hydrographic surveying for the purpose of preparing maps. (35)

114. The Greek Government takes the view that services involving the provision of assistance by the UACs, including those relating to the identification of the agricultural parcels on cartographic or other materials, must be classified as pubic administration' services falling within the category of other services' (category 27) of Annex I B to Directive 92/50.

115. The Commission does not appear to me to have adequately clarified whether, and to what extent, the services at issue fall under category 12 of Annex I A to Directive 92/50.

116. While it is true that it is clear from the implementing agreements that the services provided

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by the UACs in connection with their work in providing assistance in filling in the forms for applications and declarations largely consist in identifying agricultural parcels on the basis of the cartographic materials provided by the competent authorities, the Commission's argument to the effect that, because they involve using specialist staff and are carried out under the supervision of the topographical services, these services must be categorised as topographical services, does not seem to me to be entirely persuasive.

117. In point of fact, it is clear from the explanatory note cited in point 113 above, that the surface surveying' surfaces which fall under CPC subclass 86753, to which the Commission refers, consist in identification activities for the purpose of drawing up maps, whereas, in this case, the parties do not dispute that the services at issue are confined to identifying data on existing cartographic materials. Furthermore, subclass CPC 86721, advisory and consultative engineering services', which the Commission also cites, refers, according to the relevant explanatory note - which is cited in point 112 above - to project feasibility studies or studies relating to a project's topographical impact, or other consultancy activities, which may also not be linked to a construction project, and whose description does not clearly extend to cover technical assistance activities, such as those at issue in this case.

118. It is settled case-law that in an action based on Article 226 EC, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose. (36)

119. In this case, on the basis of the above considerations, it is my view that the Commission has failed to provide sufficient evidence to demonstrate that the services involved in identifying the agricultural parcels at issue may be categorised as falling under category 12 of Annex I A to Directive 92/50 and that, consequently, it has failed to prove one of the conditions establishing the existence of the Treaty infringement with which the Greek Government is charged under the first form of order sought. (37)

120. For the reasons set out above, and without prejudice to the conclusion I have reached concerning the admissibility of the action forming the subject matter of these proceedings, I consider that this plea, which is based on a breach of the provisions of Directive 92/50, must be rejected.

2. The alleged breach of the principle of transparency and the principle of non-discrimination

121. In the alternative, and should the Court consider that the services at issue fall - largely or entirely - under Annex I B to Directive 92/50, the Commission contends that the Greek authorities were, none the less, required to ensure an adequate level of publicity, in the procedure for awarding the contracts at issue, in compliance with the principle of nondiscrimination laid down in Article 3(2) of Directive 92/50. That article is included in the general provisions of Title I of the directive, which also apply to public service contracts falling under Annex I B thereto.

122. The Commission also refers to the Court's more general finding in its judgment in Teleaustria and Telefonadress (38) concerning the application of the principles of non-discrimination and transparency to public service contracts which are not governed by Community directives.

123. In that judgment, as in the abovementioned Coname (39) and Parking Brixen (40) judgments, the Court held that notwithstanding the fact that public service concession contracts are, as Community law stands at present, excluded from the scope of Directive 92/50, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular. (41) According to the Court, the principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency to ensure... for the benefit of any potential tenderer,

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a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed.' (42)

124. However, the question raised in this case differs in part from those which formed the subject matter of the earlier cases cited above. Whereas the cases which resulted in the Teleaustria , Coname and Parking Brixen judgments related to the award of public services which were not governed by Community directives, the agreements at issue fall within the scope of Directive 92/50, which provides for an advertising regime which differs depending on whether the public service contracts to which it applies have, as their object, services falling under Annex I A or Annex I B to the directive.

125. That issue is the subject of Case C-507/03 Commission v Ireland , which is currently pending before the Grand Chamber of the Court. Advocate General Stix-Hackl delivered her Opinion in that case on 14 September 2006, and has taken the view that the general principles of non-discrimination and transparency also apply in relation to public service contracts falling under Annex I B to Directive 92/50, in relation to those aspects of that contract regime which the directive does not specifically regulate.

126. I endorse the solution which Advocate General Stix-Hackl recommends in her Opinion, and which, basically, reflects the argument advanced by the applicant in this case. I do not, therefore, consider it necessary - bearing in mind also the considerations set out in relation to the admissibility of the action - to analyse this plea further and will, therefore, simply refer to the considerations set out in the abovementioned Opinion.

127. It remains to be considered whether the Greek Government has cited grounds which, in any event, justify excluding the requirements of prior publication in relation to the public service contracts at issue.

128. In challenging the validity of the plea in question, the Greek Government's response has simply been that it has provided an appropriate and sufficient level of advertising of the activities linked to the IACS for 2001, with the result that interested persons had the opportunity to offer their services to farmers, with the latter, in any event, remaining free to choose to whom they would apply in order to obtain assistance in drawing up and submitting the applications and declarations.

129. In response to the first complaint submitted by the Commission, the respondent Government did, however, cite the applicability to the public service contracts at issue of Article 11(3)(b) of Directive 92/50, according to which the award of public service contracts by negotiated procedure without prior publication of a contract notice is permitted where for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider.' The Greek Government cited, in particular, the existence in this case of technical reasons requiring that the contracts at issue be awarded to the UACs.

130. Even supposing that the exception which that provision permits to the rule, according to which contracts to which the provisions of Title III of the directive applies are awarded after prior publication of a contract notice, may be relied upon in connection with this plea - concerning the infringement of the general principles of transparency and non-discrimination and not a breach of the rules on prior publication provided for by directive 92/50 (43) - it does not seem to me that the respondent Member State has adequately proved that, in the case in point, the conditions for that exception to apply were met. Indeed, in that connection, the Greek Government merely refers generally to the existence of technical reasons relating to the subject matter and award of the public service contracts at issue - reasons which, that Government contends, necessitate awarding those contracts to the representatives of farmers in the place where the services are to be provided - without, however, providing further information.

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131. In the light of the above considerations, and should the Court not share the Opinion at which I have arrived concerning the admissibility of the action forming the object of these proceedings, I propose to accept this plea concerning the breach of the principles of non-discrimination and transparency and to declare that the conduct with which the Commission has charged the Hellenic Republic in the context of this plea constitutes a failure to fulfil the obligations incumbent upon the Hellenic Republic under the Treaty.

VI - Costs

132. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

133. Since I am proposing that the Court should dismiss the action, and since the Hellenic Republic has applied for costs against the Commission, the Commission must be ordered to pay the costs.

VII - Conclusion

134. For all of the reasons set out above, I propose that the Court should declare that:

- the action is inadmissible;

- the Commission is ordered to pay the costs.

(1) .

(2) - OJ 1992 L 355, p.1.

(3) - OJ 1992 L 209, p. 1.

(4) - OJ 2004 L 134, p. 114.

(5) - Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1976 L 13, p.1).

(6) - Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

(7) - Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

(8) - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

(9) - [1992] ECR I-2353.

(10) - Before reaching that finding, the Court first noted that it follows from the very terms of [the second paragraph of Article 226 EC] that the Commission may bring an action for failure to fulfil obligations before the Court only if the Member State concerned does not comply with the opinion within the period laid down by the Commission for that purpose', and pointed out that the Court has consistently held that the action brought under the second paragraph of Article 226 EC is for a declaration that the State concerned has failed to fulfil an obligation under the Treaty and that it has not put an end to that infringement within the time laid down to that effect by the Commission in its reasoned opinion.' The Court further pointed out that it is settled case-law that the question whether there has been a failure to fulfil obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion.

(11) - In that case, the Court largely followed the Opinion of Advocate General Lenz, according to which pursuant to the [second paragraph of Article 226 EC], it is a condition for bringing

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an action that an infringement of the Treaty should exist after the period laid down in the reasoned opinion.' According to the Advocate General, there is no legal interest in a declaration by the Court of an infringement of the Treaty if the infringement has been terminated before the expiry of that period', that approach being consistent with the ratio of the pre-litigation procedure, which is aimed at bringing about the termination of the Treaty infringement before the proceedings before the Court. Advocate General Lenz acknowledges that exceptions to that rule may arise in cases of seasonal infringements (Case C-240/86) where, because of its purpose and legal nature, the infringement of the Treaty is confined to a limited period (as, for example, in the case of the import and export restrictions introduced on a seasonal basis for the protection of national traders) and where, because of this, the conduct of the procedure prior to the actions for failure to fulfil obligations is made, purely in terms of time, more difficult, if not altogether impossible.' However, since, in that case, it was objectively possible, without any difficulty, to conduct the procedure prior to the bringing of an action for failure to fulfil obligations during the almost 15 months in which the invitation to tender was valid, the Advocate General concluded that the action was inadmissible.

(12) - [2003] ECR I-3609.

(13) - Paragraphs 35 and 36 of the judgment. The Court cited in that connection Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 32.

(14) - Emphasis added.

(15) - The Court reached a similar conclusion in its judgment in Case C-328/96 Commission v Austria [1999] ECR I-7479, paragraphs 43 to 45, in which the plea of inadmissibility raised by the respondent government was rejected, on the ground that, although Austria had amended - in the way indicated by the Commission and before the reasoned opinion was adopted - all the procedures already under way, any effects contrary to Community law produced by the procedures at issue still subsisted on the date on which the period set in the reasoned opinion expired. Advocate General Alber took the same approach in his Opinion.

(16) - In his opinion, without citing the above judgment in Commission v Italy , Advocate General Geelhoed expresses views which essentially contradict the solution upheld in that judgment (see, in particular, points 47 to 50 and 53 to 57). According to the Advocate General, proceedings for failure to fulfil obligations are intended, not only to put an end to the specific breach but also to bring about a change in the conduct of the defendant State and prevent further breaches. However, the continuing effects of the breach after the deadline imposed by the reasoned opinion represents, for the Advocate General too, the key factor in the solution of that case (see point 57).

(17) - [2005] ECR I-4713

(18) - Case C-394/02, cited in footnote 17 above, paragraph 14.

(19) - Ibidem , paragraph 19. Emphasis added.

(20) - Advocate General Jacobs had expressed the same view, although he did not adopt quite the same line of argument. According to the Advocate General, in fact, the Commission had an interest in securing a declaration of the alleged failure to fulfil an obligation by the Hellenic Government in that case, since the contract concluded on completion of the tendering procedure at issue was still under way and, therefore, the default continued to produce legal effects. As regards the plea based on the action being devoid of purpose, the Advocate General cited the Court's case-law according to which even where the default has been remedied after the time-limit given in the reasoned opinion has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, towards other Member

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States, the Community or private parties.' The Advocate General added that the same applies whenever the default may no longer be remedied.

(21) - Case C-525/03 Commission v Italy [2005] ECR I-9405. It is interesting, moreover, to note that the judgment was handed down by the Court's second chamber, albeit in a formation different from that which is hearing this case.

(22) - It should be noted that the Court considered the admissibility of the action of its own motion, and declared it to be inadmissible despite the fact that, at the hearing the respondent government stated that it was in favour of admissibility. The Italian Republic did not, moreover, acknowledge the failure to fulfil an obligation with which it was charged.

(23) - Advocate General Jacobs considered that the action was admissible.

(24) - Paragraph 11 of the judgment in Case C-525/03, cited in footnote 21 above. It is true that the forms of order sought in the application related solely to the provisions of the ordinance at issue, however, as Advocate General Jacobs pointed out, the fact that tendering procedures were under way or that the related contracts were in the course of being performed could constitute a factor to be taken into account in assessing whether the effects of the ordinance could be regarded as being completely exhausted at the time when the period laid down in the reasoned opinion expired.

(25) - According to Article 5(1) of the framework agreement, that agreement is to enter into force on the day of its signature and cease to be in force when all of the financial aid has been paid to the farmers who have applied for it. The same provision appears in each of the agreements concluded on the basis of the framework agreement. In the absence of information to the contrary from the Commission, it must be assumed that, as the Greek Government stated at the hearing, the aid had been paid out in full before the period laid down in the reasoned opinion expired.

(26) - According to Article 1(a) of Directive 92/50, public service contracts' means contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.' It follows from the definition that a public service contract within the meaning of that directive involves consideration which is paid directly by the contracting authority to the service provider (see Case C-458/03 Parking Brixen [2005] ECR I-8612, paragraph 39).

(27) - It is settled case-law that when exercising its powers under Article 226 EC, the Commission's function is to ensure, in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (Case C-333/99 Commission v France [2001] ECR I-1025, paragraph 23 and Case C-394/02 , cited in footnote 17 above, paragraphs 14 and 15, as well as the case-law cited therein).

(28) - See, to that effect, Case C-362/90, cited in footnote 9 above.

(29) - See, for example, Case C-236/05 Commission v United Kingdom , [2006] ECR I10819.

(30) - See, to that effect, Case C-79/94 Commission v Greece [1995] ECR I-1071, paragraph 15.

(31) - Although, as the Greek Government points out, in regions in which there are several UACs, the UAC which will be party to the agreement with the local authority will be selected at the time when the implementing agreement is concluded.

(32) - See, for example, the preamble to the implementing agreement concluded between the Greek State, the prefectoral authority of Corinth and the Corinth UAC. The first paragraph in the preamble provides that the framework agreement is an integral part of the agreement.

(33) - Although in a different regulatory context (the question related to a breach of the provisions

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of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors), the Court has already demonstrated, in the past, that it gives precedence to the criterion of the uniformity of the economic and technical function of public contracts rather than to factors such as the existence of a number of contracting authorities or a number of companies submitting successful tenders (see Case C-16/98 Commission v France [2000] ECR I-8315).

(34) - Case C-76/97 [1998] ECR I-5357, paragraph 37.

(35) - The Commission also points out that, although it has only indicative value, - the table in of equivalence Annex II A to Directive 2004/18/EC, between the headings in the Common Procurement Vocabulary (CPV) and the CPC nomenclature, includes topographical services in category 12 engineering services.'

(36) - See Case C-287/03 Commission v Belgium [2005] ECR I-3761, paragraph 27, and the case-law cited therein.

(37) - See the considerations set out at point 105 above.

(38) - Case C-324/98 [2000] ECR I-10745.

(39) - Case C-231/03 [2005] ECR I-7287, concerning the award of a public gas distribution service to a company with predominantly public capital.

(40) - Cited in footnote 26 above.

(41) - Case C-324/98, cited in footnote 38 above, paragraph 60; Case 23/03, cited in footnote 39 above, paragraph 16; and Case C-458/03, cited in footnote 26 above, paragraph 46.

(42) - See Case C-324/98, cited in footnote 38 above, paragraphs 61 and 62, and Case C458/03, cited in footnote 26 above, paragraph 49.

(43) - The possibility of relying on that is supported by Advocate General Stix-Hackl in her abovementioned Opinion in Case C-507/03, and in the Opinion delivered on the same day in the related case C-532/03 Commission v Ireland , which is also pending before the Grand Chamber of the Court.

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AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Greece ; Member States
NATIONA	Greece
PROCEDU	Action for failure to fulfil obligations
ADVGEN	Mengozzi
JUDGRAP	Timmermans
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Notice for the OJ

Action brought on 30 May 2005 by the Commission of the European Communities against the Hellenic Republic

(Case C-237/05)

(Language of the case: Greek)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 30 May 2005 by the Commission of the European Communities, represented by M. Patakia and X. Lewis, with an address for service in Luxembourg.

The applicant claims that the Court should:

Declare that, owing to the practice followed by the competent authorities in regard to the works involved in the completion and collation of claim declarations by cereal producers and others in the context of the Integrated Administration and Control System (IACS) in respect of 2001, the Hellenic Republic has failed to fulfil its obligations under Directive 92/50/EEC, [1] and in particular Articles 3(2), 7, 11(1), and 15(2) thereof, as well as the general principle of transparency.

order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The Commission received a complaint in relation to the direct award to PASEGES [2] of the programme contract, and its implementing agreements, in relation to the provision of multiple services in connection with the application of the Integrated Administration and Control System (IACS) in respect of 2001.

In light of the Court's case-law, the Commission considers that the Greek authorities ought to have applied the rules of procedural openness laid down by Directive 92/50 in Titles III, IV, V, and VI.

The Commission further considers that the Hellenic Republic, on the one hand, has not substantiated the existence of grounds for derogation under Article 11(3)(b) of Directive 92/50 and, on the other, has wrongly categorised the services in question as coming under Annex 1B to the directive.

In the alternative, the Commission maintains that the Member States are not relieved of the obligation to maintain a certain degree of openness even in regard to services coming under Annex 1B to the directive.

Finally, the Commission considers that, apart from the continuing variance in regard to the interpretation of the relevant provisions of the directive at issue as between the Greek authorities and the Commission, application of the directive in practice has not been secured, contrary to the assertions of the Greek authorities.

Accordingly, the Commission considers that the Hellenic Republic infringed its obligations under Articles 3 (2), 7, 11(1) and 15(2) of Directive 92/50/EEC, as well as the general principle of transparency.

———————————

[1] - OJ 1992 L 209, p. 1.

[2] - Panellinia Sinomospondia Enoseon Georgikon Sinetairismon (Pan-Hellenic association of unions of agricultural cooperatives).

**Judgment of the Court (First Chamber)
of 18 January 2007
Jean Auroux and Others v Commune de Roanne. Reference for a preliminary ruling: Tribunal administratif de Lyon - France. Public procurement - Directive 93/37/EEC - Award without call for tenders - Contract for the implementation of a development project concluded between two contracting authorities - Definition of "public works contract' and "work' - Method of calculation of the value of the contract. Case C-220/05.**

In Case C-220/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal administratif de Lyon (France), made by decision of 7 April 2005, received at the Court on 19 May 2005, in the proceedings

Jean Auroux and Others

v

Commune de Roanne,

intervening party:

Société d'équipement du département de la Loire (SEDL),

THE COURT (First Chamber),

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

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 April 2006,

after considering the observations submitted on behalf of:

- Mr Auroux and Others, by J. Antoine, avocat,

- the Commune de Roanne, by P. Petit and C. Xavier, avocats,

- the French Government, by G. de Bergues and J.-C. Niollet, acting as Agents,

- the Lithuanian Government, by D. Kriauinas, acting as Agent,

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

- the Polish Government, by T. Nowakowski, acting as Agent,

- the Commission of the European Communities, by X. Lewis, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2006,

gives the following

Judgment

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

1. An agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work constitutes a public works contract within the meaning of Article 1(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive

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97/52/EC of 13 October 1997, regardless of whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work.

2. In order to determine the value of a contract for the purpose of Article 6 of Directive 93/37, as amended by Directive 97/52, account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties.

3. A contracting authority is not exempt from using the procedures for the award of public works contracts laid down in Directive 93/37, as amended by Directive 97/52, on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts.

1. This reference for a preliminary ruling concerns the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) (the Directive').

2. The reference was made in the course of an action for annulment brought by Mr Auroux and eight other applicants (the applicants in the main proceedings') against the resolution of the Municipal Council of the Commune de Roanne (municipality of Roanne), of 28 October 2002, authorising its mayor to sign a contract with the Société d'équipement du département de la Loire (SEDL') for the construction of a leisure centre in Roanne.

Legal background

Community law

3. According to the second recital in the preamble to the Directive, the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

4. It is clear from the sixth recital in the preamble to the Directive that works contracts of less than EUR 5 000 000 may be exempted from competition as provided for under the Directive, and should be exempted from coordination measures.

5. According to the 10th recital in the preamble to the Directive, to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community'. It goes on to state that the information contained in these notices must enable contractors established in the Community to determine whether the proposed contracts are of interest to them'.

6. Article 1(a) to (d) of the Directive provides:

For the purpose of this Directive:

(a) public works contracts are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) contracting authorities shall be the State, regional or local authorities, bodies governed

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by public law, associations formed by one or several of such authorities or bodies governed by public law;

...

(c) a work means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function;

(d) public works concession is a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment'.

7. The activities referred to in Annex II' mentioned in Article 1(a) of the Directive are the building and civil engineering works in Class 50 of the general industrial classification of economic activities within the European Communities. The construction of buildings is expressly listed among those activities.

8. Article 6 of the Directive provides:

1. This Directive shall apply to:

(a) public works contracts whose estimated value net of value added tax (VAT) is not less than the equivalent in [euros] of 5 000 000 special drawing rights (SDRs);

(b) public works contracts referred to in Article 2(1) whose estimated value net of VAT is not less than [EUR] 5 000 000.

...

3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to in paragraph 1. Where the aggregate value of the lots is not less than the amount referred to in paragraph 1, the provisions of that paragraph shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than [EUR] 1 000 000, provided that the total estimated value of all the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.

4. No work or contract may be split up with the intention of avoiding the application of this Directive.

5. When calculating the amounts referred to in paragraph 1 and in Article 7, account shall be taken not only of the amount of the public works contracts but also of the estimated value of the supplies needed to carry out the works [and] made available to the contractor by the contracting authorities.

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

National law

9. At the material time, Article L.300-4 of the Code de l'urbanisme (Town Planning Code), as amended by Article 8 of Law No 2000-1208 of 13 December 2000 (JORF of 14 December 2000, p. 19777), provides:

The State, the local authorities or public bodies established by them may entrust the planning and implementation of development projects provided for in this Title to any suitably qualified public or private person.

Where the contract is concluded with a public body, a local semi-public company defined by Law No 83-597 of 7 July 1983, or a semi-public company more than half of whose capital is held by one or more of the following public persons: State, regions, départements , municipalities or groupings thereof, it may take the form of a public development agreement. In that case, the contracting

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partner may be entrusted with acquisitions by way of expropriation or pre-emption and carrying out any operation or measure relating to development and installation which contributes to the overall project forming the subject of the public development agreement.

The bodies referred to in the preceding paragraph may be entrusted with conducting preliminary studies necessary for the definition of the characteristics of the project under an agency contract requiring them to conclude study contracts for and on behalf of the authority or grouping of authorities.

The provisions of Chapter IV of Title II of Law No 93-122 of 29 January 1993 relating to the prevention of corruption and transparency in economic life and public procedures are not applicable to public development agreements drawn up in accordance with this article.

A public development agreement may lay down the conditions under which the contracting partner is involved with the studies concerning the operation and, in particular, the revision or amendment of a local development plan.'

10. Following the initiation of proceedings by the Commission of the European Communities against the French Republic for failure to fulfil obligations, Article L.300-4 of the Town Planning Code was amended by Law No 2005-809 of 20 July 2005 on development concessions (JORF of 21 July 2005, p. 11833) as follows:

The State and local authorities and public bodies established by them may grant concessions for carrying out the development projects provided for in this Title to any suitably qualified person.

The grant of development concessions shall be made subject by the awarding body to a notice procedure enabling a number of competing tenders to be submitted, in accordance with conditions laid down by decree in the Conseil d'Etat.

The concession holder shall oversee the works and installations forming part of the project which are provided for in the concession and carry out the relevant studies and any tasks necessary for their execution. It may be entrusted by the awarding body with acquiring the assets necessary for implementation of the project, including, where appropriate, by way of expropriation or pre-emption. It shall sell, lease or assign by concession the immovable property located within the area covered by the concession.'

11. Article 11 of Law No 2005-809 provides:

Subject to judicial decisions which have acquired the force of res judicata , the following are declared valid, in so far as their lawfulness is contested on the ground that the appointment of the developer was not preceded by a notice procedure enabling a number of competitive tenders to be submitted:

1. Development concessions, public development agreements and development agreements signed before the publication of this Law'.

The main proceedings and the questions referred for a preliminary ruling

12. By resolution of 28 October 2002, the Municipal Council of the municipality of Roanne authorised its mayor to sign an agreement with SEDL for the construction of a leisure centre (the agreement').

13. The agreement, concluded on 25 November 2002, provides for the development of a leisure centre in successive phases. The first phase consists of the construction of a multiplex cinema and commercial premises intended to be transferred to third parties and works intended to be transferred to the contracting authority, that is to say a car park as well as access roads and public spaces. The later phases, which require the signature of an addendum to the agreement, principally concern the construction of other commercial or service premises and a hotel.

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14. According to the preamble to the agreement, the municipality of Roanne seeks, by means of that project, to regenerate a run-down urban area and promote the development of leisure and tourism.

15. Pursuant to Article 2 of the agreement, SEDL is entrusted, inter alia, with acquiring land, organising an architecture and/or engineering competition, having studies carried out, undertaking construction works, drawing up and keeping up to date certain accounting and management documents, procuring funding, putting in place effective measures for the sale of the works, and the overall management and coordination of the project and keeping the municipality of Roanne informed.

16. It is clear from the second paragraph of Article 10 of the agreement that the award of any contracts by SEDL to third parties is subject to the principles of advertising and calling for competition laid down by the Code des marchés publics (Public Procurement Code), pursuant to Article 48.1 of Law No 93-122 of 29 January 1993 (JORF of 30 January 1993).

17. According to the forecast balance sheet annexed to the agreement, the total amount of receipts is estimated at EUR 10 227 103 for the first phase of the project, and at EUR 14 268 341 for the execution of the project in its entirety. Of that total, the sum of EUR 2 925 000 will come from the municipality as consideration for the transfer of the car park. Furthermore, it is estimated that SEDL will receive EUR 8 099 000 as consideration for the transfer of works intended for third parties. Finally, it is stipulated that the municipality of Roanne is to contribute to the financing of all the works to be executed in an amount of EUR 2 443 103 for the first phase and of EUR 3 034 341 for the works as a whole.

18. It is clear from Articles 22 to 25 of the agreement that, on its expiry, SEDL is to draw up a closing balance sheet which is to be approved by the municipality of Roanne. Any excess on that balance sheet is to be paid to the municipality. Furthermore, the municipality automatically becomes owner of all the land and works to be transferred to third parties not yet sold. The municipality of Roanne is also to guarantee the execution of contracts still ongoing, except employment contracts, and will take over the debts contracted by SEDL.

19. By application lodged at the Tribunal administratif de Lyon (Administrative Court, Lyon) on 11 December 2002, the applicants in the main proceedings brought an action for annulment against the resolution of the Municipal Council of 28 October 2002. In that action, they contest the validity of that resolution with respect to both national and Community law. As regards the latter, they argue that the conclusion of the agreement should have been preceded by advertising and a call for competition in accordance with the obligations arising from the Directive.

20. In those circumstances, the Tribunal administratif de Lyon decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Does an agreement under which one contracting authority engages a second contracting authority to carry out a development project for a purpose of general interest, pursuant to which agreement that second contracting authority is to deliver works to the first which are intended to meet its needs, and at the end of which such of the other land and works as have not been disposed of to third parties vest automatically in the first contracting authority, constitute a public works contract within the meaning of Article 1 of [the Directive]?

(2) If the answer to Question 1 is in the affirmative, is it necessary, in assessing the threshold of 5 000 000 [SDRs] imposed by Article 6 of the same directive, to take into account only the price paid in return for the delivery of the works to the contracting authority, or the sum of that price and the contributions paid, even if the latter are only partly allocated to the execution of those works, or the total value of the works, with assets not disposed of at the end of the agreement vesting automatically in the first contracting authority and the latter then pursuing the execution of ongoing contracts and assuming the debts incurred by the second contracting authority?

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(3) If the answer to both Questions 1 and 2 is in the affirmative, is the first contracting authority, when entering into such an agreement, not required to follow the procurement procedures laid down in that directive, on the grounds that that agreement can be concluded only with certain legal persons and that those procedures will be applied by the second contracting authority when awarding its public works contracts?'

The admissibility of the questions

21. The municipality of Roanne and the French Government submit, as a preliminary point, that the reference for a preliminary ruling is inadmissible.

22. The municipality of Roanne submits that, by enacting Law No 2005-809, the French legislature retroactively validated public development agreements which were concluded without having been preceded by an advertising procedure and a call for competition. As the national court is obliged to apply French law, and to find that the agreement has been validated by that law, the interpretation of Community law requested is no longer necessary in order to resolve the dispute in the main proceedings.

23. The French Government asserts that the reference for a preliminary ruling wrongly treats the agreement at issue as a development agreement within the meaning of Article L.300-4 of the Town Planning Code, in the version in force at the material time. It submits that it concerns, in reality, merely the construction of buildings. It follows that the question whether an agreement for the implementation of a development project constitutes a public works contract within the meaning of the Directive is inadmissible, since it bears no relation to the purpose and the actual facts of the dispute.

24. It is common ground that both the municipality of Roanne and the French Government plead that the reference for a preliminary ruling is inadmissible based on considerations relating to the interpretation of French law and the classification of the facts forming the basis of the dispute in the main proceedings in the light of that law.

25. The Court has consistently held that the procedure laid down in Article 234 EC is based on a clear separation of functions between national courts and tribunals and the Court of Justice, and the latter is empowered to rule only on the interpretation or the validity of the Community acts referred to in that article. In that context, it is not for the Court to rule on the interpretation of national laws or regulations or to decide whether the referring court's interpretation of them is correct (see, to that effect, Case 27/74 Demag [1974] ECR 1037, paragraph 8; Case C-347/89 Eurim-Pharm [1991] ECR I-1747, paragraph 16; and Case C-246/04 Turn- und Sportunion Waldburg [2006] ECR I-589, paragraph 20).

26. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case C-448/01 EVN and Wienstrom [2003] ECR I-14527, paragraph 74, and Case C-145/03 Keller [2005] ECR I-2529, paragraph 33). Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling.

27. It follows that the pleas of inadmissibility raised by the municipality of Roanne and the French Government must be rejected and the reference for a preliminary ruling be declared admissible.

The first question

28. By its first question, the national court asks essentially whether the agreement constitutes a public works contract within the meaning of Article 1(a) of the Directive.

29. The definition in Article 1(a) of the Directive provides that public works contracts are contracts

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for pecuniary interest concluded in writing between a contractor and a contracting authority within the meaning of Article 1(b), which have as their object either the execution, or both the execution and design, of works or work defined by the Directive, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

30. In their written submissions, the municipality of Roanne and the French and Polish Governments argue that the agreement does not correspond to that definition and, therefore, does not constitute a public works contract within the meaning of the Directive.

31. The municipality of Roanne submits that, in the light of its purpose, the agreement does not constitute a public works contract, since, as a public development agreement, its purpose goes beyond that of the execution of works. In accordance with French law, public development agreements concern the overall implementation of all aspects of a town planning project or of certain town planning policies, in particular, the planning of the project, management of the legal and administrative aspects, the acquisition of land by way of expropriation and putting in place procedures for the award of contracts.

32. Similarly, the Polish Government observes that, according to the agreement, SEDL undertakes to implement an investment project which consists of various tasks. It submits, in that regard, that SEDL is not the contractor which will execute the works provided for in the contract, but merely undertakes to prepare and manage a public works contract. Taking the view that the most important aspect of the contract consists in commissioning works and supervising their execution, the Polish Government argues that the agreement should be classified as a public service contract' within the meaning of Article 1 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

33. The French Government submits that the part of the leisure centre which concerns the execution of works which are intended to be sold to third parties does not constitute a public works contract within the meaning of the Directive. It takes the view that precisely because that part is intended for third parties it cannot be regarded as corresponding to the municipality's requirements. It adds that only the construction of the car park on behalf of the municipality of Roanne could, in principle, constitute a public works contract. However, the car park does not fall within the scope of the Directive either, as it will be transferred to the municipality only after it has been constructed in accordance with a special procedure laid down by French law called vente en l'état future d'achèvement', so that it is essentially a simple purchase of real property, the subject-matter of which is not so much the works as the sale of works to be constructed.

34. The Lithuanian and Austrian Governments and the Commission take the view that the agreement is a public works contract within the meaning of Article 1 of the Directive. In particular, the Commission submits that, even if the agreement contains a number of tasks which are supplies of services, its main purpose is the execution of a work which corresponds to the requirements specified by the contracting authority within the meaning of Article 1(a) and (c) of the Directive.

35. The arguments put forward by the municipality of Roanne and the French and Polish Governments cannot be accepted.

36. It is true that, in addition to the execution of works, the agreement entrusts SEDL with further tasks which have, as several parties have observed, the character of a supply of services. However, contrary to the municipality of Roanne's submissions, it does not follow from the mere fact the agreement contains elements which go beyond the execution of works that it falls outside the scope of the Directive.

37. It is clear from the case-law of the Court that, where a contract contains elements relating both to a public works contract and another type of public contract, it is the main purpose of the

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contract which determines which Community directive on public contracts is to be applied in principle (see Case C-331/92 Gestin Hotelera Internacional [1994] ECR I-1329, paragraph 29).

38. As regards the application of that case-law to these proceedings, it should be stated, contrary to the Polish Government's arguments in its written observations, that under the agreement SEDL's commitment is not limited to the administration and organisation of works, but also extends to the execution of the works set out therein. Furthermore, according to settled case-law, in order to be classed as a contractor under a public works contract within the meaning of Article 1(a) of the Directive, it is not necessary that a person who enters into a contract with a contracting authority is capable of direct performance using his own resources (see, to that effect, Case C-389/92 Ballast Nedam Groep [1994] ECR I-1289, paragraph 13, and Case C-176/98 Holst Italia [1999] ECR I-8607, paragraph 26). It follows that in order to ascertain whether the main purpose of the agreement is the execution of works it is irrelevant that SEDL does not execute the works itself and that it has them carried out by subcontractors.

39. The argument of the French Government that, by reason of the considerations set out in paragraph 33, the purpose of the agreement cannot be regarded as the execution of a work corresponding to the requirements specified by the contracting authority within the meaning of Article 1(a) of the Directive must be dismissed.

40. As regards the legal classification by the French Government of the car park, it must be observed that the definition of a public works contract is a matter of Community law. Since Article 1(a) of the Directive makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, the legal classification of the contract in French law is irrelevant for the purpose of determining whether the contract falls within the scope of the Directive (see, by analogy, Case C-264/03 Commission v France [2005] ECR I-8831, paragraph 36).

41. It is clear from Article 1(c) of the Directive that the existence of a work must be determined in relation to the economic or technical function of the result of the works undertaken (see Joined Cases C-187/04 and C-188/04 Commission v Italy , not published in the ECR, paragraph 26). As is apparent from a number of clauses in the agreement, the construction of the leisure centre is intended to accommodate commercial and service activities, so that the agreement must be regarded as fulfilling an economic function.

42. Furthermore, the construction of the leisure centre must be regarded as corresponding to the requirements specified by the municipality of Roanne in the agreement. It must be observed, in that regard, that the work referred to by the agreement is the leisure centre as a whole, including the construction of a multiplex cinema, service premises for leisure activities, a car park and, possibly, a hotel. It is clear from a number of clauses in the agreement that, by the construction of the leisure centre as a whole, the municipality of Roanne seeks to reposition and regenerate the area around the railway station.

43. As regards the other elements covered by the definition of public works contract' laid down in Article 1(a) of the Directive, it must be observed, first, that it is not disputed that the municipality of Roanne, being a local authority, has the capacity of contracting authority' within the meaning of Article 1(b) of the Directive and that a written contract exists.

44. Second, it is common ground that SEDL, as an economic operator active on the market which undertakes to execute works provided for in the agreement, is to be regarded as a contractor within the meaning of the Directive. As was stated in paragraph 38 of this judgment, it is irrelevant in that respect that SEDL uses subcontractors for the design and execution of the works (see, to that effect, Case C-399/98 Ordine degli Architetti and Others [2001] ECR I-5409, paragraph 90).

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45. Finally, it is clear that the agreement was concluded for pecuniary interest. The pecuniary interest in a contract refers to the consideration paid to the contractor on account of the execution of works intended for the contracting authority (see, to that effect, Ordine degli Architetti and Others , paragraph 77). Under the terms of the agreement, SEDL is to receive a sum from the municipality of Roanne as consideration for the transfer of the car park. The municipality also undertakes to contribute to the costs of all the works to be executed. Finally, under the agreement, SEDL is entitled to obtain income from third parties as consideration for the sale of the works executed.

46. It is apparent from the examination of the agreement that its main purpose, as the Commission submitted, is the performance of works which, taken as a whole, lead to the execution of a work within the meaning of Article 1(c) of the Directive, that is to say a leisure centre. The service elements provided for in the agreement, such as the acquisition of property, obtaining finances, organising an architecture and/or engineering competition and marketing the buildings, are part of the completion of that work.

47. Having regard to the foregoing, the answer to the first question must be that an agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work constitutes a public works contract within the meaning of Article 1(a) of the Directive, regardless of whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work.

The second question

48. By its second question, the national court asks the Court about the methods for determining the value of the contract at issue, in order to establish whether the threshold laid down in Article 6 of the Directive has been reached.

49. The national court puts forward three possible bases for calculation of that threshold. First, the value of the contract is determined only on the basis of the amounts paid by the contracting authority as consideration for the works which are transferred to it. Second, the value of the contract is constituted by all the sums paid by the contracting authority, that is to say the consideration for the works transferred to it as well as the financial contribution paid in respect of all the works to be executed. Third, the determination of the value of the contract takes account of the total value of the works, including the amounts paid by the contracting authority and those received from third parties as consideration for the works executed on their behalf.

50. It must be observed first of all that, according to the wording of Article 6 of the Directive, its provisions apply to public works contracts whose value reaches the threshold laid down therein. Article 6 does not lay down any rule limiting the amounts to be taken into account in order to determine the value of the contract to the amounts received from the contracting authority.

51. Furthermore, to infer such a rule from Article 6 would be contrary to the spirit and the purpose of the Directive.

52. As is apparent from the 2nd and 10th recitals, the Directive aims to abolish restrictions on freedom of establishment and the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition (Ordine degli Architetti and Others , paragraph 52). As the 10th recital states, the development of such competition entails the publication at Community level of contract notices containing sufficient information to enable contractors established in the Community to determine whether the proposed contracts are of interest to them. In that regard, the threshold laid down in Article 6 of the Directive serves to ensure that public contracts with a sufficiently high value to justify intra-Community participation are notified to potential tenderers.

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53. Since the aim of the procedures for the award of public works contracts laid down in the Directive is precisely to guarantee to potential tenderers established in the European Community access to public contracts of interest to them, it follows that whether the value of a contract reaches the threshold laid down in Article 6 of the Directive should be calculated from the tenderers' perspective.

54. It is clear, in that regard, that, if the value of a contract is constituted by revenue from both the contracting authority and from third parties, the interest of a potential tenderer in such a contract resides in its overall value.

55. Conversely, the argument that only the amounts paid by the contracting authority should be taken into account in the calculation of the value of a contract within the meaning of Article 6 of the Directive would undermine its purpose. The result would be that the contracting authority could award a contract with an overall value exceeding the threshold laid down in Article 6 which might interest other contractors active on the market, without applying the procedures for the award of public works contracts provided for in the Directive.

56. Finally, it must be recalled that, under Article 3 of the Directive, public works concession contracts are subject to the advertising rules laid down by the Directive where the threshold referred to in that provision is reached. Since an essential characteristic of concessions is that the consideration for the works comes either wholly or partly from third parties, it would be contrary to the purpose and scheme which underpin the Directive that, in the context of public works contracts, the amounts coming from third parties were excluded from the calculation of the value of the contract for the purposes of Article 6 of the Directive.

57. Having regard to the foregoing, the answer to the second question must be that, in order to determine the value of a contract for the purpose of Article 6 of the Directive, account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties.

The third question

58. By its third question, the national court asks, essentially, whether, in order to conclude an agreement such as that in the main proceedings, a contracting authority is exempt from using the procedures for the award of public works contracts laid down by the Directive on the ground that, in accordance with national law, that agreement may be concluded only with certain legal persons which themselves have the capacity of contracting authority and which will be obliged in turn to apply those procedures in order to award any subsequent contracts.

59. It must be observed, as a preliminary point, that the only permitted exceptions to the application of the Directive are those which are expressly mentioned in it (see, by analogy, Case C-107/98 Teckal [1999] ECR I-8121, paragraph 43, and Case C340/04 Carbotermo and Consorzio Alisei [2006] ECR I-4137, paragraph 45).

60. The Directive does not contain any provision comparable to that in Article 6 of Directive 92/50, which excludes from its scope public contracts awarded, under certain conditions, to contracting authorities (see, by analogy, Teckal , paragraph 44, and Carbotermo and Consorzio Alisei , paragraph 46).

61. It must be observed that Article 11 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) provides an exception as regards contracting authorities which purchase, inter alia, works from a central purchasing body, as defined in Article 1(10) of that directive. However, that provision is not

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applicable ratione temporis to the facts in the main proceedings.

62. It follows that a contracting authority is not exempt from using the procedures for the award of public works contracts provided for by the Directive, on the ground that it plans to conclude the contract concerned with a second contracting authority (see, by analogy, Teckal , paragraph 51; Case C-94/99 ARGE [2000] ECR I-11037, paragraph 40; and Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, paragraph 47). Furthermore, that finding does not affect the obligation on the latter contracting authority to apply in its turn the tendering procedures laid down in the Directive (see, by analogy, Teckal , paragraph 45).

63. It is true that, according to the Court's case-law, a call for competition is not compulsory for contracts concluded between a local authority and a person legally distinct from it, where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities (see, Teckal , paragraph 50, and Case C-84/03 Commission v Spain [2005] ECR I-139, paragraphs 38 and 39).

64. However, the fact that SEDL is a semi-public company, whose capital includes private funds, prevents the municipality of Roanne from being regarded as exercising a control over it similar to that which it exercises over its own departments. The Court has held that any private capital investment in an undertaking follows considerations proper to private interests and pursues objectives of a different kind from those pursued by a public authority (see Stadt Halle and RPL Lochau , paragraphs 49 and 50). The reasoning adopted by the Court in Stadt Halle and RPL Lochau with respect to public service contracts also applies with respect to public works contracts.

65. According to the submissions of the municipality of Roanne and those of the French and Polish Governments, the effectiveness of the Directive is preserved where, as in the present case, a second contracting authority is obliged to use the procedures for the award of public works contracts laid down by the Directive for any subsequent contract. For the purposes of ensuring effective competition, it is irrelevant whether such a procedure is organised by the first or the second contracting authority.

66. It must be recalled, first of all, that the Directive does not contain any provisions which enable its application to be avoided where a public works contract is concluded between two contracting authorities, even if the second contracting authority is obliged to subcontract the total value of the contract to successive contractors and, for that purpose, to use the procedures for the award of public contracts laid down by the Directive.

67. Furthermore, in this case, it is not stipulated in the agreement that SEDL is obliged to subcontract the whole of the initial contract to successive contractors. Furthermore, as the Advocate General rightly observed in point 72 of her Opinion, where a second contracting authority has recourse to subcontractors, the subject-matter of any successive contract may often represent only part of the overall contract. It may follow that the value of any subsequent contracts awarded by a second contracting authority will be lower than that set out in Article 6(1)(a) of the Directive. Therefore, by setting up a series of successive contracts, the application of the Directive could be avoided.

68. Having regard to the foregoing, the answer to the third question must be that a contracting authority is not exempt from using the procedures for the award of public works contracts laid down in the Directive on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts.

Costs

69. Since these proceedings are, for the parties to the main proceedings, a step in the action

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

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AUTHOR	Court of Justice of the European Communities
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JURCIT	11997E234 : N 25 31992L0050-A01 : N 32 31992L0050-A06 : N 60 31993L0037 : N 1 31993L0037-A01 : N 20 31993L0037-A01LA : N 6 7 39 40 43 47 31993L0037-A01LB : N 6 29 43 31993L0037-A01LC : N 6 41 31993L0037-A01LD : N 6 31993L0037-A03 : N 56 31993L0037-A06 : N 8 50 - 53 55 - 57 31993L0037-A06P1LA : N 67 31993L0037-C6 : N 4 31993L0037-C10 : N 5 31997L0052 : N 1 32004L0018-A01P10 : N 61 32004L0018-A11 : N 61 61974J0027 : N 25 61989J0347 : N 25 61992J0331 : N 37 61992J0389 : N 38 61998J0107 : N 59 60 62 63 61998J0176 : N 38 61998J0399 : N 44 45 61999J0094 : N 62 62001J0448 : N 26 62003J0026 : N 62 64 62003J0084 : N 63 62003J0145 : N 26

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CONCERNS Interprets 31993L0037 -
Interprets 31993L0037 -A01LA
Interprets 31993L0037 -A06

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

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NATCOUR *P1* Tribunal administratif de Lyon, jugement du 22/03/2007 (0205404) ; - Simon, Denys: La loi n'est pas supérieure au droit: à propos de quelques décisions récentes de la juridiction administrative, Europe 2007 Juillet no 38 p.3

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PROCEDU Reference for a preliminary ruling

ADVGEN Kokott

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Affaire C-220/05

Jean Auroux e.a.

contre

Commune de Roanne

(demande de décision préjudicielle, introduite par
le tribunal administratif de Lyon)

«Marchés publics — Directive 93/37/CE — Attribution sans appel d'offres — Convention pour la réalisation d'une opération d'aménagement conclue entre deux pouvoirs adjudicateurs — Notions de 'marchés publics de travaux' et d''ouvrage' — Modalités de calcul de la valeur du marché»

Sommaire de l'arrêt

1. *Rapprochement des législations — Procédures de passation des marchés publics de travaux — Directive 93/37 — Marchés publics de travaux — Notion*

   (Directive du Conseil 93/37, art. 1er, a))

2. *Rapprochement des législations — Procédures de passation des marchés publics de travaux — Directive 93/37 — Champ d'application*

   (Directive du Conseil 93/37, art. 6)

3. *Rapprochement des législations — Procédures de passation des marchés publics de travaux — Directive 93/37 — Champ d'application*

   (Directive du Conseil 93/37, art. 1er, a))

1. Une convention par laquelle un premier pouvoir adjudicateur confie à un second pouvoir adjudicateur la réalisation d'un ouvrage constitue un marché public de travaux au sens de l'article 1er, sous a), de la directive 93/37, portant coordination des procédures de passation des marchés publics de travaux, indépendamment du fait qu'il est prévu ou non que le premier pouvoir adjudicateur soit ou devienne propriétaire de tout ou partie de cet ouvrage.

   (cf. point 47, disp. 1)

2. Pour déterminer la valeur d'un marché aux fins de l'article 6 de la directive 93/37, portant coordination des procédures de passation des marchés publics de travaux, il convient de prendre en compte la valeur totale du marché de travaux du point de vue d'un soumissionnaire potentiel, ce qui comprend non seulement l'ensemble des montants que le pouvoir adjudicateur aura à payer, mais aussi toutes les recettes qui proviendront de tiers.

   (cf. point 57, disp. 2)

3. Un pouvoir adjudicateur n'est pas dispensé de recourir aux procédures de passation de marchés publics de travaux prévues par la directive 93/37, portant coordination des procédures de passation des marchés publics de travaux, au motif que, conformément au droit national, la convention portant sur l'ouvrage à réaliser ne peut être conclue qu'avec certaines personnes morales, qui ont elles-mêmes la qualité de pouvoir adjudicateur et qui seront tenues, à leur tour, d'appliquer lesdites procédures pour passer d'éventuels marchés subséquents.

(cf. point 68, disp. 3)

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OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 June 2006 (1)

Case C-220/05

Jean Auroux and Others
v
Commune de Roanne

(Reference for a preliminary ruling from the Tribunal administratif de Lyon (France))

(Public procurement – Directive 93/37/EEC – Definition of a public works contract – Design and execution of a leisure centre – Public development agreement between a town and a semi-public undertaking without a prior procurement procedure – Calculation of the value of the contract)

I – Introduction

1. In this case, a French court, the Tribunal administratif de Lyon, (2) has referred to the Court a number of questions concerning the interpretation of European procurement law. These questions have arisen in a dispute relating to a leisure centre in the French town of Roanne, the design and execution of which was entrusted to a semi-public urban development company without the prior issue of a call for tenders. The project is characterised in particular by the fact that only certain parts of the proposed leisure centre, once constructed, were intended for the town itself, while other parts were to be disposed of by the urban development company directly to third parties, although the town was to contribute towards their financing, take over those parts not disposed of at the end of the project, and bear the full risk of any losses incurred.

2. Against that background, the referring court first of all wishes to ascertain which provisions of European procurement law may apply at all to such a project, and, in particular, how the term 'public works contract' is to be interpreted. The question has also been raised whether, in the determination of the value of the contract, account is to be taken of the overall volume of the project or whether, in that calculation, regard is to be had only to the price which the contracting authority will pay for those parts of the work which are intended for it, plus any overall financial contribution which it has committed. Finally, it must be clarified whether a procurement procedure can be dispensed with where, under national law, the agreement in question can only be concluded with certain legal persons in the first place, and those persons would themselves have to carry out procurement procedures if they were to award any follow-up contracts.

II – Legal framework

A – *Community law*

3. Article 1 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (3) ('Directive 93/37') reads, in extract, as follows:

'For the purposes of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the

execution, or both the execution and design, of works related to to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

– established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

– having legal personality, and

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

...

(c) a "work" means the outcome of building or civil engineering works, taken as a whole, that is sufficient of itself to fulfil an economic and technical function;

...'

4. Article 6 of Directive 93/37, as amended by Directive 97/52, (4) provides as follows:

'1. This Directive shall apply to:

(a) public works contracts whose estimated value net of value-added tax (VAT) is not less than the equivalent in ecus of 5 000 000 special drawing rights (SDRs);

...

3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to in paragraph 1. Where the aggregate value of the lots is not less than the amount referred to in paragraph 1, the provisions of that paragraph shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than ECU 1 000 000, provided that the total estimated value of the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.

4. No work or contract may be split up with the intention of avoiding the application of this Directive.

5. When calculating the amounts referred to in paragraph 1 and in Article 7, account shall be taken not only of the amount of the public works contracts but also of the estimated value of the supplies needed to carry out the works [and] made available to the contractor by the contracting authorities.

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

5. At the time material to this case, the threshold of 5 000 000 SDRs corresponded to a value of EUR 6 242 028. (5)

B – *National law*

6. In the version of it which was applicable at the time of the facts of the main proceedings, (6) Article L. 300-4 of the French Code de l'urbanisme (7) ('the old Article L. 300-4 of the Code de l'urbanisme') provided:

‘The State, local authorities or public bodies established by them may entrust the planning and implementation of development projects provided for in this Title to any suitably qualified public or private person.

Where the contract is concluded with a public body, a local semi-public company defined by Law No 83-597 of 7 July 1983 or a semi-public company more than half of whose capital is held by one or more of the following public persons: State, regions, *départements*, municipalities or groupings thereof, it may take the form of a public development agreement. In that case, the contracting partner may be entrusted with making acquisitions by way of expropriation or preemption and carrying out any operation or measure relating to development and installation which contributes towards the overall project forming the subject of the public development agreement.

The bodies referred to in the preceding paragraph may be entrusted with conducting preliminary studies necessary for the definition of the characteristics of the project under an agency contract requiring them to conclude study contracts for and on behalf of the authority or grouping of authorities.

...’

7. After the Commission had brought proceedings against France for failure to fulfil obligations, Article L. 300-4 of the Code de l’urbanisme was amended as follows by Law No 2005-809: (8)

‘The State and local authorities and the public bodies established by them may grant concessions for carrying out the development projects provided for in this Title to any suitably qualified person.

The grant of development concessions shall be subject by the awarding body to a notice procedure enabling a number of competing tenders to be submitted, in accordance with conditions laid down by decree in the Conseil d’Etat.

The concession holder shall oversee the works and installations forming part of the project which are provided for in the concession and carry out the relevant studies and any tasks necessary for their completion. It may be entrusted by the awarding body with acquiring the assets necessary for implementation of the project, including, where appropriate, by way of expropriation or preemption. It shall sell, lease or assign by concession the immovable property located within the area covered by the concession.’

8. Furthermore, Article 11 of Law No 2005-809 provides:

‘Subject to judicial decisions which have acquired the force of *res judicata*, the following are declared valid, in so far as their lawfulness is contested on the ground that the appointment of the developer was not preceded by a notice procedure enabling a number of competitive tenders to be submitted:

1. Development concessions, public development agreements and development agreements signed before the publication of this Law;

...’

III – Facts and main proceedings

9. In 2002, the French town of Roanne drew up plans to build a leisure centre as an urban development measure. The first phase of the project was to include, inter alia, a multiplex cinema. Provision was also made for the construction of commercial premises, a public car park with some 320 spaces, access roads and public spaces. The construction of further commercial premises and a hotel was envisaged as part of a later phase.

10. Execution of the project was entrusted to Société d’équipement du département de la Loire (SEDL), a semi-public urban development company. To that end, on 25 November 2002, the town of Roanne concluded with SEDL a public development agreement, (9) which the Municipal Council of Roanne had previously authorised the mayor to sign by resolution of 28 October 2002.

11. Under that agreement, SEDL was entrusted, inter alia, with purchasing land, procuring funding, submitting certain accounts, having studies conducted, organising an engineering competition and having the construction works carried out, as well as with coordinating the work

and reporting to the town.

12. The agreement concluded also provided that the public car park to be built for the leisure centre, the access roads and the public spaces were to become the property of the town of Roanne. The other works planned, however, were to be disposed of to third parties, the potential income for SEDL, as contractor, from the sale of those assets being estimated at EUR 8 099 000 in total.

13. Under the agreement, the town was to pay EUR 2 925 000 to SEDL as consideration for the public car park. In addition, the town was to make a capital contribution to finance all the facilities to be constructed which was estimated at EUR 2 443 103 for the first phase of the works and at EUR 3 034 341 for the works as a whole. (10) Moreover, the land and buildings which SEDL had not disposed of to third parties at the end of the project were at that point automatically to become the property of the town of Roanne, the town from then on ensuring the performance of contracts still ongoing and taking over the obligations previously entered into by SEDL. The town of Roanne also expressly assumed the full risk of any losses incurred in connection with the project. (11)

14. Before the public development agreement was concluded with SEDL, no public notice or invitation to tender was issued in relation to the project.

15. The claimants in the main proceedings are members of the opposition in the Municipal Council of Roanne. Before the Tribunal administratif de Lyon, they claim that the Municipal Council Resolution of 28 October 2002 should be annulled. They contend inter alia that there has been an infringement of the provisions of European procurement law. They submit that a procurement procedure under Directive 93/37 should have been carried out.

IV – Reference for a preliminary ruling and procedure before the Court

16. By judgment of 7 April 2005, the Tribunal administratif de Lyon stayed the proceedings before it and referred the following questions to the Court of Justice for a preliminary ruling:

(1) Does an agreement under which one contracting authority engages a second contracting authority to carry out a development project for a purpose of general interest, pursuant to which contract that second contracting authority is to deliver works to the first which are intended to meet its needs, and at the end of which such of the other land and works as have not been disposed of to third parties vest automatically in the first contracting authority, constitute a public works contract within the meaning of Article 1 of Directive 93/37/EEC of 14 June 1993, as amended?

(2) If the answer to question 1 is in the affirmative, is it necessary, in assessing the threshold of

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Notice for the OJ

Reference for a preliminary ruling from the Tribunal Administratif de Lyon (France) by judgment of that court of 7 April 2005 in the case Jean Auroux and Others v Commune de Roanne - Intervener: Société d'équipement du département de la Loire

(Case C-220/05)

(Language of the case: French)

Reference has been made to the Court of Justice of the European Communities by judgment of the Tribunal Administratif de Lyon of 7 April 2005, received at the Court Registry on 19 May 2005, for a preliminary ruling in the proceedings between Jean Auroux and Others and Commune de Roanne - Intervener: Société d'équipement du département de la Loire, on the following questions:

Does a contract under which one contracting authority engages a second contracting authority to carry out a development project for a purpose of general interest, pursuant to which contract that second contracting authority is to deliver works to the first which are intended to meet its needs, and at the end of which such of the other land and works as have not been disposed of to third parties vest automatically in the first contracting authority, constitute a public works contract within the meaning of Article 1 of Directive 93/37/EEC of 14 June 1993, [1] as amended?

If the answer to question 1 is in the affirmative, is it necessary, in assessing the threshold of 500 000 000 special drawing rights imposed by Article 6 of the same directive, to take into account only the price paid in return for the delivery of the works to the contracting authority, or the sum of that price and the contributions paid, even if the latter are only partly allocated to the execution of those works, or the total value of the works, with assets not disposed of at the end of the contract vesting automatically in the first contracting authority and the latter then pursuing the execution of ongoing contracts and assuming the debts incurred by the second contracting authority?

3. If the answer to both questions 1 and 2 is in the affirmative, can the first contracting authority, when entering into such a contract, dispense with the procedures for awarding public works contracts laid down in that directive, on the grounds that that contract can be awarded only to certain legal persons and that those same procedures will be applied by the second contracting authority when awarding its public works contracts?

_____

[1] - Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

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ORDONNANCE DU PRÉSIDENT DE LA COUR

6 septembre 2005 (*)

«Radiation»

Dans l'affaire C-123/05,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 15 mars 2005,

Commission des Communautés européennes, représentée par MM. X. Lewis et A. Aresu, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par M. I. M. Braguglia, en qualité d'agent, assisté de M. M. Fiorilli, avvocato dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. M. Poiares Maduro, entendu,

rend la présente

Ordonnance

1 Par lettre déposée au greffe de la Cour le 7 juillet 2005, la Commission européenne a informé la Cour, conformément à l'article 78 du règlement de procédure, qu'elle se désistait de son recours et a demandé, en application de l'article 69, paragraphe 5, du règlement de procédure, que la République italienne soit condamnée aux dépens.

2 La partie défenderesse n'a pas présenté d'observations dans le délai imparti.

3 Aux termes de l'article 69, paragraphe 5, premier alinéa, du règlement de procédure, la partie qui se désiste est condamnée aux dépens, s'il est conclu en ce sens par l'autre partie dans ses observations sur le désistement. Toutefois, à la demande de la partie qui se désiste, les dépens sont supportés par l'autre partie, si cela apparaît justifié par l'attitude de cette dernière.

4 En l'espèce, le recours et le désistement consécutif de la Commission ont été le résultat de l'attitude de la République italienne, celle-ci n'ayant adopté qu'après l'introduction du recours de la Commission les mesures pour se conformer à ses obligations.

5 Il y a donc lieu de condamner la République italienne aux dépens.

Par ces motifs, le président de la Cour ordonne:

1) L'affaire C-123/05 est radiée du registre de la Cour.

2) La République italienne est condamnée aux dépens.

Fait à Luxembourg, le 6 septembre 2005

Le greffier — Le président

R. Grass — V. Skouris

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* Langue de procédure: l'italien.

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Notice for the OJ

Removal from the register of Case C-123/05 [1]

Language of the case: Italian

By order of 6 September 2005, the President of the Court of Justice of the European Communities has ordered the removal from the register of Case C-123/05 Commission of the European Communities v Italian Republic.

_____

[1] - OJ C 115, 14.5.2005.

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Notice for the OJ

Action brought on 15 March 2005 by the Commission of the European Communities against the Italian Republic

(Case C-123/05)

(Language of the case: Italian)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 15 March 2005 by the Commission of the European Communities, represented by X. Lewis and A. Aresu, members of the Commission's legal service.

The applicant claims that the Court should:

declare that by adopting Article 44 of Law No 724 of 23 December 1994, amending Article 6(2) of Law No 573 of 24 December 1993 so as to permit the renewal of public service contracts to previous contract-holders, the Italian Republic has failed to fulfil its obligations under Articles 11, 15 and 17 of Council Directive 92/50/EEC[1] of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and Articles 6 and 9 of Council Directive 93/36/EEC[2] of 14 June 1993 coordinating procedures for the award of public supply contracts, and Articles 43 EC and 49 EC;

order the Italian Republic to pay the costs.

Pleas in law and main arguments

The Commission has challenged Article 6(2) of Law No 537 of 1993 as amended by Article 44 of Law No 724 of 1994. In particular that provision prohibits the tacit renewal of public contracts for the supply of goods and services but also provides that "within three months of the expiry of the contracts the administration shall ascertain whether it is convenient and in the public interest for those contracts to be renewed and, if so, shall notify the contracting party of its willingness to renew the contract."

The Commission submits that those provisions allow public bodies to award, directly and without any tendering procedure, new service and supply contracts which are thus awarded under procedures which do not comply with Community law. There is an infringement of the principles laid down by Directive 92/50/EEC and 93/36/EEC respectively on public service and supply contracts. Furthermore, those provisions infringe the principles of equality and transparency intended to ensure the freedoms of establishment and the supply of services under Articles 43 EC and 49 EC.

_____

[1] - OJ 1992 L 209 of 24.07.1992, p. 1.

[2] - OJ 1993 L 199 of 09.08.1993, p. 1.

**Judgment of the Court (First Chamber)
of 14 June 2007
Medipac-Kazantzidis AE v Venizeleio-Pananeio (PE.S.Y. KRITIS). Reference for a preliminary ruling: Symvoulio tis Epikrateias - Greece. Free movement of goods - Directive 93/42/EEC - Hospital purchase of medical devices bearing the CE marking - Protective measures - Public supply contract - Contract falling below the threshold of application of Directive 93/36/EEC - Principle of equal treatment and obligation of transparency. Case C-6/05.**

In Case C-6/05,

REFERENCE for a preliminary ruling under Article 234 EC, by the Simvoulio tis Epikratias (Greece), made by decision of 17 November 2004, received at the Court on 5 January 2005, in the proceedings

Medipac-Kazantzidis AE

v

Venizelio-Pananio (PE.S.Y. KRITIS),

THE COURT (First Chamber),

composed of P. Jann, President of Chamber, K. Lenaerts, E. Juhasz (Rapporteur), K. Schiemann and M. Ilei, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2006,

after considering the observations submitted on behalf of:

- Medipac-Kazantzidis AE, by K. Giannakopoulos, dikigoros,

- Venizelio-Pananio (PE.S.Y. KRITIS), by V. ChasourakiDamanaki, dikigoros, and M. Ntourountakis, director,

- the Greek Government, by S. Spyropoulos and by Z. Chatzipavlou and D. Tsagkaraki, acting as Agents,

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

- the Commission of the European Communities, by M. Patakia and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 November 2006,

gives the following

Judgment

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

1. The principle of equal treatment and the obligation of transparency preclude a contracting authority, which has issued an invitation to tender for the supply of medical devices and specified that those devices must comply with the European Pharmacopoeia and bear the CE marking, from rejecting, directly and without following the safeguard procedure provided for in Articles 8 and 18 of Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, on grounds of protection of public health, the materials proposed, if they comply with the stated technical requirement. If the contracting authority considers that those materials may jeopardise public health, it is required

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to inform the competent national authority with a view to setting that safeguard procedure in motion.

2. A contracting authority, which has referred a matter to the competent national authority with a view to setting in motion the safeguard procedure provided for by Articles 8 and 18 of Directive 93/42, as amended by Regulation No 1882/2003, concerning medical devices bearing the CE marking, is required to suspend the tendering procedure until the end of that safeguard procedure, the outcome of that procedure being binding on the contracting authority. If the implementation of such a safeguard procedure gives rise to delays liable to jeopardise the operation of a public hospital and thereby public health, the contracting authority is entitled to take all interim measures required to enable it to procure the materials necessary for the smooth running of that hospital, subject to compliance with the principle of proportionality.

1. This reference for a preliminary ruling concerns the interpretation of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) (Directive 93/36'), and Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ 1993 L 169, p. 1), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) (Directive 93/42').

2. The reference was made by the Simvoulio tis Epikratias (Greek Council of State) in the context of proceedings between the company Medipac-Kazantzidis AE (Medipac') and VenizelioPananio (PE.S.Y. KRITIS) (VenizelioPananio'), which is the general hospital of Heraklion, concerning an invitation to tender issued by that hospital and to which that company responded.

Legal context

Community legislation

3. Article 5(1) of Directive 93/36 provides:

(a) Titles II, III and IV and Articles 6 and 7 shall apply to public supply contracts awarded by:

(i) the contracting authorities referred to in Article 1 (b),... where the estimated value net of value-added tax (VAT) is not less than the equivalent in [euros] of 200 000 special drawing rights (SDRs);

...

(b) This Directive shall apply to public supply contracts for which the estimated value equals or exceeds the threshold concerned at the time of publication of the notice in accordance with Article 9(2);

...

(d) The thresholds laid down in subparagraph (a) and the values of the thresholds expressed in [euros] and in national currencies shall be published in the Official Journal of the European Communities at the beginning of the month of November which follows the revision laid down in the first paragraph of subparagraph (c).'

4. The values of the thresholds provided for by the directives governing public contracts applicable as from 1 January 2002 were published in the Official Journal of the European Communities of 27 November 2001 (OJ 2001 C 332, p. 21). A table in point 1 of that notice shows that 200 000 SDR is equivalent to EUR 249 681.

5. The 3 rd , 5 th , 8 th , 13 th , 17 th and 21 st recitals in the preamble to Directive 93/42 state:

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Whereas the national provisions for the safety and health protection of patients, users and, where appropriate, other persons, with regard to the use of medical devices should be harmonised in order to guarantee the free movement of such devices within the internal market;

...

Whereas medical devices should provide patients, users and third parties with a high level of protection and attain the performance levels attributed to them by the manufacturer; whereas, therefore, the maintenance or improvement of the level of protection attained in the Member States is one of the essential objectives of this Directive;

...

Whereas, in accordance with the principles set out in the Council resolution of 7 May 1985 concerning a new approach to technical harmonisation and standardisation..., rules regarding the design and manufacture of medical devices must be confined to the provisions required to meet the essential requirements; whereas, because they are essential, such requirements should replace the corresponding national provisions; whereas the essential requirements should be applied with discretion to take account of the technological level existing at the time of design and of technical and economic considerations compatible with a high level of protection of health and safety;

...

Whereas, for the purpose of this Directive, a harmonised standard is a technical specification (European standard or harmonisation document) adopted, on a mandate from the Commission, by either [the European Committee for standardisation (CEN) or by the European Committee for Electrotechnical Standardisation (Cenelec)] or both of these bodies in accordance with Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations..., and pursuant to the ... [general guidelines on cooperation between the Commission and these two bodies signed on 13 November 1984];... whereas, for specific fields, what already exists in the form of European Pharmacopoeia monographs should be incorporated within the framework of this Directive; whereas, therefore, several European Pharmacopoeia monographs may be considered equal to the abovementioned harmonised standards;

...

Whereas medical devices should, as a general rule, bear the CE mark to indicate their conformity with the provisions of this Directive to enable them to move freely within the Community and to be put into service in accordance with their intended purpose;

...

Whereas the protection of health and the associated controls may be made more effective by means of medical device vigilance systems which are integrated at Community level'.

6. Article 1(1) of Directive 93/42 provides that it is to apply to medical devices and their accessories. For the purposes thereof, accessories are to be treated as medical devices in their own right.

7. Under Article 2 of Directive 93/42, Member States are to take all necessary steps to ensure that medical devices may be placed on the market and/or put into service only if they comply with the requirements laid down in that directive when duly supplied and properly installed, maintained and used in accordance with their intended purpose.

8. Under Article 3 of that directive, medical devices must meet the essential requirements set out in Annex I thereto which apply to them, taking account of their intended purpose.

9. Article 4(1) of Directive 93/42 prohibits Member States from creating any obstacle to the placing

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on the market or the putting into service within their territory of medical devices bearing the CE marking provided for in Article 17 of that same directive which indicates that they have been the subject of an assessment of their conformity in accordance with the provisions of Article 11 thereof.

10. Under Article 5(1) of Directive 93/42, Member States are to presume compliance with the essential requirements referred to in Article 3 in respect of medical devices which are in conformity with the relevant national standards adopted pursuant to the harmonised standards, the references of which have been published in the Official Journal of the European Communities.

11. Article 5(2) provides that, for the purposes of Directive 93/42, reference to harmonised standards also includes the monographs of the European Pharmacopoeia notably on surgical sutures, the references of which have been published in the Official Journal of the European Communities .

12. Article 5(3) of Directive 93/42 refers to Article 6(2) thereof with respect to the procedure to be followed by the Member States where they consider that the harmonised standards do not entirely meet the essential requirements referred to in Article 3 of that directive.

13. Article 8 of that directive, entitled Safeguard clause', reads as follows:

1. Where a Member State ascertains that the devices referred to in Article 4(1) and (2) second indent, when correctly installed, maintained and used for their intended purpose, may jeopardise the health and/or safety of patients, users or, where applicable, other persons, it shall take all appropriate interim measures to withdraw such devices from the market or prohibit or restrict their being placed on the market or put into service. The Member State shall immediately inform the Commission of any such measures, indicating the reasons for its decision and, in particular, whether non-compliance with this Directive is due to:

(a) failure to meet the essential requirements referred to in Article 3;

(b) incorrect application of the standards referred to in Article 5, in so far as it is claimed that the standards have been applied;

(c) shortcomings in the standards themselves.

2. The Commission shall enter into consultation with the parties concerned as soon as possible. Where, after such consultation, the Commission finds that:

- the measures are justified, it shall immediately so inform the Member State which took the initiative and the other Member States; where the decision referred to in paragraph 1 is attributed to shortcomings in the standards, the Commission shall, after consulting the parties concerned, bring the matter before the Committee referred to in Article 6(1) within two months if the Member State which has taken the decision intends to maintain it and shall initiate the procedures referred to in Article 6,

- the measures are unjustified, it shall immediately so inform the Member State which took the initiative and the manufacturer or his authorised representative established within the Community.

3. Where a non-complying device bears the CE marking, the competent Member State shall take appropriate action against whomsoever has affixed the mark and shall inform the Commission and the other Member States thereof.

4. The Commission shall ensure that the Member States are kept informed of the progress and outcome of this procedure.'

14. Article 10 of Directive 93/42 provides:

1. Member States shall take the necessary steps to ensure that any information brought to their knowledge, in accordance with the provisions of this Directive, regarding the incidents mentioned

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below involving a Class I, IIa, IIb or III device is recorded and evaluated centrally:

(a) any malfunction or deterioration in the characteristics and/or performance of a device, as well as any inadequacy in the labelling or the instructions for use which might lead to or might have led to the death of a patient or user or to a serious deterioration in his state of health;

(b) any technical or medical reason in relation to the characteristics or performance of a device for the reasons referred to in subparagraph (a), leading to systematic recall of devices of the same type by the manufacturer.

2. Where a Member State requires medical practitioners or the medical institutions to inform the competent authorities of any incidents referred to in paragraph 1, it shall take the necessary steps to ensure that the manufacturer of the device concerned, or his authorised representative established in the Community, is also informed of the incident.

3. After carrying out an assessment, if possible together with the manufacturer, Member States shall, without prejudice to Article 8, immediately inform the Commission and the other Member States of the incidents referred to in paragraph 1 for which relevant measures have been taken or are contemplated.'

15. Article 11 of Directive 93/42 governs the procedure for assessing the conformity of medical devices with the requirements of that directive. To that end, as set out in the 15 th recital in the preamble to the directive, medical devices are grouped into four product classes and the tests to which they are subjected are made progressively more stringent based on the vulnerability of the human body and taking account of the potential risks associated with the technical design and manufacture of the devices.

16. Article 14b of that directive provides:

Where a Member State considers, in relation to a given product or group of products, that, in order to ensure protection of health and safety and/or to ensure that public health requirements are observed pursuant to Article 36 of the Treaty, the availability of such products should be prohibited, restricted or subjected to particular requirements, it may take any necessary and justified transitional measures. It shall then inform the Commission and all the other Member States giving the reasons for its decision. The Commission shall, whenever possible, consult the interested parties and the Member States and, where the national measures are justified, adopt necessary Community measures in accordance with the procedure referred to in Article 7(2).'

17. Under Article 17(1) of Directive 93/42, medical devices, other than devices which are custom-made or intended for clinical investigations, considered to meet the essential requirements referred to in Article 3 must bear the CE marking of conformity when they are placed on the market.

18. Under Article 18 of that directive:

Without prejudice to Article 8:

(a) where a Member State establishes that the CE marking has been affixed unduly, the manufacturer or his authorised representative established within the Community shall be obliged to end the infringement under conditions imposed by the Member State;

(b) where non-compliance continues, the Member State must take all appropriate m easures to restrict or prohibit the placing on the market of the product in question or to ensure that it is withdrawn from the market, in accordance with the procedure in Article 8.

...'.

19. Annex I to Directive 93/42, entitled Essential requirements', sets out the following in Part

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I, entitled General requirements':

1. The devices must be designed and manufactured in such a way that, when used under the conditions and for the purposes intended, they will not jeopardise the clinical condition or the safety of patients, or the safety and health of users or, where applicable, other persons, provided that any risks which may be associated with their use constitute acceptable risks when weighed against the benefits to the patient and are compatible with a high level of protection of health and safety.

2. The solutions adopted by the manufacturer for the design and construction of the devices must conform to safety principles, taking account of the generally acknowledged state of the art.

In selecting the most appropriate solutions, the manufacturer must apply the following principles in the following order:

- eliminate or reduce risks as far as possible (inherently safe design and construction),

- where appropriate take adequate protection measures including alarms if necessary, in relation to risks that cannot be eliminated,

- inform users of the residual risks due to any shortcomings of the protection measures adopted.

3. The devices must achieve the performances intended by the manufacturer and be designed, manufactured and packaged in such a way that they are suitable for one or more of the functions referred to in Article 1(2)(a), as specified by the manufacturer.

...'.

National rules

20. Joint Ministerial Decree No DI7/ik.2480, making Greek legislation consistent with Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, of 19 August 1994 (FEK B' (Greek Official Journal) 679), transposed that directive into Greek law.

The main proceedings and the questions referred for a preliminary ruling

21. By notice No 146/2003 of 8 December 2003, Venizelio-Pananio issued a public invitation to tender, on the basis of lowest price as the award criterion, for the supply of various surgical sutures with a value of EUR 131 500 (including VAT). The notice specified that the sutures had to be certified in accordance with the European Pharmacopoeia and bear the CE marking.

22. Medipac was one of the nine companies which submitted a tender. The materials proposed by Medipac bore the required marking.

23. On 17 March 2004, the committee conducting the tendering procedure issued a recommendation to VenizelioPananio's Administrative Board, reiterating a suggestion from the surgeons of that hospital that the PGA type sutures proposed by Medipac be excluded. According to that recommendation, it had been found that knots done with PGA type materials slipped easily and closed prematurely, that needles frequently twisted or broke and that sutures did not hold sufficiently.

24. By Decision No 108 of 24 March 2004, Venizelio-Pananio's Administrative Board stated that the PGA type sutures proposed by Medipac did not meet the technical specifications for the contract and accordingly rejected its tender.

25. On 5 April 2004, Medipac submitted an appeal against that rejection decision to Venizelio-Pananio's administration. In its appeal, it stated, inter alia, that the technical specifications on which the rejection of its tender was based had not been set out in the invitation to tender, were imprecise to the point of being incomprehensible, did not permit a proper assessment of the requirements relating to the materials to be supplied, and diverged from the technical characteristics for such materials

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referred to in Directive 93/42. Medipac also maintained that the materials it proposed, which comply with the requirements of the European Pharmacopoeia, did not and could not have the technical imperfections referred to by the hospital. The hospital rejected the appeal by an initial decision of 7 April 2004, which was subsequently repealed and replaced by a second decision adopted on 28 April 2004.

26. An action against that rejection decision has been brought before the Simvoulio tis Epikratias. In its action, Medipac puts forward the same reasons that it had raised in its appeal.

27. In those circumstances, the Simvoulio tis Epikratias decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Whenever tender procedures governed by... Directive 93/36/EEC for the supply of medical devices under Directive 93/42/EEC are conducted under the lowest-price system, is the contracting authority as the purchaser of the relevant goods able, in accordance with Directive 93/42/EEC, interpreted in conjunction with Directive 93/36/EEC, to reject a tender for medical devices which bear the CE marking and have been the subject of a quality check by the competent certification body, as technically unacceptable at the stage of the technical assessment, in reliance upon sound objections relating to their adequacy in terms of quality which are connected with the protection of public health and the specific form of use for which those devices are intended and in view of which objections the devices are considered inappropriate and unfit for that use (with the self-evident precondition that those objections are subject to review of their validity by the court having jurisdiction if there is a dispute as to whether they pertain)?

(2) If the preceding question is answered in the affirmative, is the contracting authority as the purchaser of the relevant goods able, for the foregoing reason, directly to consider medical devices which bear the CE marking unsuitable for the form of use for which they are intended, or must the safeguard clauses first be applied which are contained in Directive 93/42/EEC and the... Joint Ministerial Decree DI7/ik.2480/1994 and which enable the relevant competent authority - which in Greece is the Ministry of Health, Welfare and Social Security acting through the Directorate for Biomedical Technology - to take measures either in accordance with the procedure in Article 8 of the directive, if correctly installed and maintained medical devices may jeopardise the life or safety of patients or users, or under Article 18 of the directive, if it is established that the CE marking has been affixed unduly?

(3) In the light of the answer to the second question, and in the event that the abovementioned safeguard clauses must first be applied, is the contracting authority obliged to await the outcome of the procedure initiated either under Article 8 or under Article 18 of Directive 93/42/EEC and, further, is it bound by that outcome in the sense that it is obliged to procure the article in question even though its use demonstrably gives rise to risks for public health and generally it is unsuitable for the use for which the contracting authority intends it?'

Admissibility of the reference for a preliminary ruling

Arguments of the Austrian Government

28. The Austrian Government considers that the answer to the questions referred by the national court is not liable to help that court adjudicate on the main proceedings and that the reference for a preliminary ruling is accordingly inadmissible. First, those questions relate expressly to the interpretation of Directive 93/36, but the tendering procedure at issue in the main proceedings does not fall within the scope of application of that directive, since the amount of the contract under the invitation to tender is lower than the threshold laid down in Article 5 of that directive.

29. Second, the reference for a preliminary ruling does not contain the information necessary for the Court to be able to answer the questions referred in a manner that will be helpful to the continuation

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of the main proceedings. The Austrian Government observes that the reference does not state whether the surgical sutures in question really are considered to be dangerous for human health or whether they simply do not meet the qualitative expectations of the surgeons concerned, which is a crucial factor in the assessment of the rights and obligations of the contracting authority.

Findings of the Court

30. Regarding, in the first place, the applicability of Directive 93/36, it is common ground that it applies only to contracts the value of which is equal to or greater than the threshold laid down in Article 5(1) of that directive (see, to that effect, order in Case C59/00 Vestergaard [2001] ECR I-9505, paragraph 19). The file shows that the value of the contract at issue in the main proceedings is EUR 131 500 (including VAT), which is lower than the threshold of application laid down in that directive.

31. In those circumstances, the Court, pursuant to Article 104(5) of its Rules of Procedure, made a written request for clarifications from the national court as to the reasons why it considered that Directive 93/36 was applicable to the contract. That court replied that, for procedural reasons, it was not able to answer such a request. Consequently, the Court decided to hold a hearing, during which the Greek Government confirmed that the value of the contract was lower than the threshold for application of that directive and maintained that the directive did not apply to the main proceedings. The Court accordingly finds that the Austrian Government is correct in arguing that, in those circumstances, an interpretation of Directive 93/36 has no bearing on the outcome of those proceedings.

32. However, a useful reply to the questions referred by the national court calls for the consideration of certain general principles applicable to public procurement.

33. The Court notes that the national court has categorised Venizelio-Pananio as a contracting authority'. That classification is also accepted by the Greek Government, which stated at the hearing that that hospital is a body governed by public law equated with the State. According to settled case-law, even if the value of a contract which is the subject-matter of an invitation to tender does not attain the threshold of application of the directives by which the Community legislature has regulated the field of public procurement, and the contract in question therefore does not fall within the scope of application of those directives, contracting authorities awarding contracts are nevertheless bound to abide by the general principles of Community law, such as the principle of equal treatment and the resulting obligation of transparency (see, to that effect, Case C324/98 Telaustria and Telefonadress [2000] ECR I10745, paragraphs 60 and 61; order in Vestergaard , paragraphs 20 and 21; Case C231/03 Coname [2005] ECR I7287, paragraphs 16 and 17, and Case C458/03 Parking Brixen [2005] ECR I8585, paragraphs 46 to 48).

34. Admittedly, the national court does not refer directly in its reference for a preliminary ruling to the general principles of Community law. It is settled case-law, however, that in order to provide a satisfactory answer to a national court which has referred a question to it, the Court may deem it necessary to consider rules of Community law to which the national court has not referred in its reference (Case 35/85 Tissier [1986] ECR 1207, paragraph 9; Case C-315/88 Bagli Pennacchiotti [1990] ECR I-1323, paragraph 10; Case C-107/98 Teckal [1999] ECR I8121, paragraph 39, and Telaustria and Telefonadress , paragraph 59).

35. Second, regarding the Austrian Government's line of argument relating to insufficient information on the facts of the main proceedings, the Court notes that the information contained in the reference for a preliminary ruling has been supplemented by the written observations submitted to the Court. Moreover, an audience has been held, which has enabled the Greek and Austrian Governments and the Commission to submit additional observations. The Court is thus sufficiently enlightened to be able to respond to the questions referred.

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36. In the light of the foregoing, the Court finds that the reference for a preliminary ruling is admissible and that it is appropriate to reply to the questions referred by the national court.

The questions referred for a preliminary ruling

The first and second questions

37. By its first and second questions, which are closely linked and must be examined together, the national court asks, essentially, whether under the general principles of Community law applicable to tendering procedures, a contracting authority which has initiated such a procedure with a view to purchasing medical devices may directly exclude a tender for products for reasons relating to the protection of public health although those products bear the CE marking as required by the specifications of the invitation to tender, or whether that authority is required first to apply the safeguard clauses provided for in Articles 8 and 18 of Directive 93/42.

Observations submitted to the Court

38. With regard to Directive 93/42, Medipac states that Member States may not prohibit, restrict or impede the placing on the market of medical devices which satisfy the provisions of that directive and which bear the CE marking. It maintains, as does the Commission, that a combined reading of Articles 3 and 17 of Directive 93/42 indicates that medical devices bearing that marking satisfy all compliance and safety requirements as laid down in Annex I to that directive. It follows that that directive introduces a presumption of compliance for products bearing the CE marking which may be rebutted only in the context of the safeguard procedure referred to in Articles 8 and 18.

39. Venizelio-Pananio and the Greek and Austrian Governments state that Directive 93/42 is intended to ensure that medical devices offer a high level of protection to patients, users and third parties. They infer therefrom that if a tender for medical devices certified in accordance with that directive is however inadequate from a technical standpoint, a contracting authority is entitled to exclude those devices directly from the tendering procedure. The Austrian Government adds, however, that the contracting authority is bound to inform the competent national authority of that exclusion so that the latter may take appropriate interim measures and commence the procedure provided for in Article 8 of that directive.

40. The Greek Government adds that Directive 93/42 in principle lays down only minimum requirements to be satisfied by a medical device in order to be able to bear the CE marking within the Community. The Austrian Government states that a contracting authority is free to impose qualitative requirements which go beyond the minimum required at Community level.

Findings of the Court

41. The Court finds as a preliminary point that the file does not show that, in the main proceedings, the contracting authority imposed particular requirements going beyond the minimum required by Community law.

42. It follows from the provisions referred to in paragraphs 5 to 19 of this judgment that Directive 93/42 harmonises the essential requirements to be met by medical devices falling within its scope of application. Once those devices comply with the harmonised standards and are certified in accordance with the procedures provided for by that directive, they must be presumed to comply with those essential requirements and therefore be deemed to be appropriate for the use for which they are intended. Those medical devices must also be allowed to circulate freely throughout the Community.

43. It follows from the Court's settled case-law that the obligations arising from Community directives are binding, inter alia, on bodies or entities which are subject to the authority or control of a public authority or the State (see, to that effect, Case 152/84 Marshall [1986] ECR 723, paragraph 49; Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraphs 30 and 31; Case C188/89 Foster

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and Others [1990] ECR I-3313, paragraph 18; order in Case C297/03 Sozialhilfeverband Rohrbach [2005] ECR I4305, paragraph 27). Consequently, the obligation to presume that medical devices which meet the harmonised standards and bear the CE marking comply with the requirements of Directive 93/42 extends to VenizelioPananio in its capacity as a body governed by public law.

44. The Court notes, however, as pointed out by the Advocate General in point 92 of her Opinion, that the presumption of compliance of medical devices may be rebutted. In that respect, Directive 93/42 provides for the implementation of safeguard measures where a finding is made that certain medical devices bearing the CE marking may nevertheless pose risks for patients or users.

45. Article 10 of that directive provides that Member States are to take the necessary steps to ensure that information relating to incidents occurring after the placing on the market of medical devices which may pose a risk for the health of a patient or a user are recorded and evaluated centrally. If, following such an evaluation, Member States take or contemplate taking measures, they must inform the Commission immediately.

46. Article 8(1) of Directive 93/42 requires Member States which have found there to be risks linked to medical devices which have been certified as being in compliance with that directive to take all appropriate interim measures to withdraw those medical devices from the market or prohibit or restrict their being placed on the market or put into service. In those circumstances, the Member State concerned is required by that same provision to notify the Commission immediately of the measures taken, indicating in particular the reasons for the measures. Under Article 8(2) of Directive 93/42, the Commission must in turn examine whether those interim measures are justified and, if so, inform immediately the Member State which initiated such measures and the other Member States.

47. Under Article 8(3) of Directive 93/42, where a medica l device bearing the CE marking nevertheless does not comply with the essential requirements provided for by that directive, the Member State concerned is to take appropriate action and to inform the Commission and the other Member States. Moreover, Article 18 of that same directive provides that where a Member State establishes that the CE marking has been affixed unduly, the manufacturer or his authorised representative established within the Community is to be obliged to end the infringement under conditions imposed by the Member State.

48. It is clear from the wording of Article 8(1) of that directive that the obligations provided for therein are imposed on a body on which the Member State has conferred competence to ascertain the risks which devices which comply with that directive may nevertheless pose for public health and/or safety and to take, where necessary, measures of general application provided for by that article in order to deal with the situation.

49. Since Venizelio-Pananio clearly was not given such competence by the Greek State, it is not entitled to implement on its own the safeguard measures referred to in Article 8 of Directive 93/42. It follows that, once that hospital had doubts as to the technical reliability of the surgical sutures proposed by Medipac, it was required, by virtue of the obligation imposed on it as an entity governed by public law, to assist in the correct application of Directive 93/42, to inform the competent national authority so that the latter could conduct its own checks and, where necessary, implement such safeguard measures. The file shows that in the main proceedings Venizelio-Pananio did refer the question of the appropriateness of the sutures for their intended use to the Greek national body overseeing medicinal products and that the latter confirmed that they complied with the standards in force. That reference was made only on 5 May 2004, however, that is, after the hospital had rejected Medipac's tender. Venizelio-Pananio thus rebutted the presumption of compliance of its own motion, without following the safeguard procedure introduced by the abovementioned directive.

50. However, not only the wording of Article 8 of Directive 93/42 but also the purpose of the

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harmonisation system established by it preclude a contracting authority from being entitled to reject, outside that safeguard procedure and on grounds of technical inadequacy, medical devices which are certified as being in compliance with the essential requirements provided for by that directive.

51. Directive 93/42, in so far as it amounts to a harmonisation measure adopted pursuant to Article 100a of the EEC Treaty (which became Article 100a of the EC Treaty, itself now, after amendment, Article 95 EC), is intended to promote the free movement of medical devices which have been certified as being in compliance with that directive, precisely by replacing the various measures taken in this field in the Member States, which may amount to an obstacle to that free movement.

52. In that context, the need to reconcile the free movement of those devices with the protection of patients' health implies that, in the event of the emergence of a risk linked to devices which have been certified as being in compliance with Directive 93/42, the Member State concerned must implement the safeguard procedure provided for in Article 8 of that directive; bodies which are not empowered to do so may not themselves decide unilaterally on the action to be taken in such circumstances.

53. Moreover, where proposed products, although bearing the CE marking, give rise to concern on the part of the contracting authority as to patients' health or safety, the principle of equal treatment of tenderers and the obligation of transparency, which apply irrespective of whether Directive 93/36 is applicable, preclude, in order to avoid arbitrariness, the contracting authority from being able itself to reject the tender in question directly and requires it to follow a procedure, such as the safeguard procedure provided for in Article 8 of Directive 93/42, which is such as to ensure objective and independent assessment and checking of the alleged risks.

54. Moreover, that principle and that obligation prohibit the contracting authority from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications and which are relied on subsequent to the submission of the tender.

55. In the light of the foregoing, the answer to the first and second questions must be that the principle of equal treatment and the obligation of transparency preclude a contracting authority, which has issued an invitation to tender for the supply of medical devices and specified that those devices must comply with the European Pharmacopoeia and bear the CE marking, from rejecting, directly and without following the safeguard procedure provided for in Articles 8 and 18 of Directive 93/42, on grounds of protection of public health, the materials proposed, if they comply with the stated technical requirement. If the contracting authority considers that those materials may jeopardise public health, it is required to inform the competent national authority with a view to setting that safeguard procedure in motion.

The third question

56. By its third question, the national court asks the Court how the safeguard measures provided for by Directive 93/42 must be implemented by a contracting authority in the context of an ongoing tendering procedure. It asks in particular whether the contracting authority must await the end of the safeguard procedure and whether it is bound by the outcome of that procedure.

57. As evidenced by the answer given to the first and second questions, a contracting authority is entitled to reject a tender for medical devices bearing the CE marking, on grounds of technical inadequacy, only in the context of the safeguard procedure provided for by Directive 93/42.

58. More specifically, a contracting authority's power to reject the tender for medical devices bearing the CE marking on grounds of technical inadequacy is subject to the outcome of the safeguard procedure, namely the Commission's decision establishing, in accordance with Article 8(2) of that directive, that the adoption of measures prohibiting the placing on the market or putting into service

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of the devices is justified.

59. It follows that a contracting authority, once it has decided to refer the matter to the competent national authority, is required to suspend the award procedure so as to set in motion the safeguard procedure provided for by Directive 93/42 and to await the end of the latter procedure. The Commission's decision is binding on the contracting authority. If the safeguard procedure were to lead to a finding that those materials do not comply with the requirements of that directive, the measures of general application taken by the Member State would entail the exclusion of those products from the award procedure which was suspended.

60. The suspension of a tendering procedure for the supply of medical devices may, of course, lead to delays liable to give rise to problems in running a hospital such as Venizelio-Pananio. However, as pointed out by the Advocate General in point 118 of her Opinion and pursuant to Article 14b of Directive 93/42, the objective of the protection of public health constitutes an overriding public-interest requirement entitling Member States to derogate from the principle of the free movement of goods provided that the measures taken comply with the principle of proportionality (see Case 120/78 ReweZentral [1979] ECR 649 (Cassis de Dijon '), paragraph 8; Case C270/02 Commission v Italy [2004] ECR I-1559, paragraphs 21 and 22; and Joined Cases C158/04 and C159/04 Alfa Vita Vassilopoulos and Carrefour-Marinopoulos [2006] ECR I-8135, paragraphs 20 to 23).

61. Consequently, in a situation of urgency, a hospital such as Venizelio-Pananio is entitled to take all interim measures required to enable it to procure the medical devices necessary for its operation. In such cases, however, it must be able to show that there is a situation of urgency justifying such a derogation from the principle of free movement of goods and demonstrate that the measures taken are proportionate.

62. In the light of the foregoing, the answer to the third question must be that a contracting authority, which has referred a matter to the competent national authority with a view to setting in motion the safeguard procedure provided for by Articles 8 and 18 of Directive 93/42 concerning medical devices bearing the CE marking, is required to suspend the tendering procedure until the end of that safeguard procedure, the outcome of that procedure being binding on the contracting authority. If the implementation of such a safeguard procedure gives rise to delays liable to jeopardise the operation of a public hospital and thereby public health, the contracting authority is entitled to take all interim measures required to enable it to procure the materials necessary for the smooth running of that hospital, subject to compliance with the principle of proportionality.

Costs

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

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

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SUB	Approximation of laws
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PROCEDU	Reference for a preliminary ruling
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Affaire C-6/05

Medipac-Kazantzidis AE

contre

Venizeleio-Pananeio (PE.S.Y. KRITIS)

(demande de décision préjudicielle, introduite par le Symvoulio tis Epikrateias)

«Libre circulation des marchandises — Directive 93/42/CEE — Acquisition par un hôpital de dispositifs médicaux munis du marquage CE — Mesures de sauvegarde — Marché public de fournitures — Marché n'atteignant pas le seuil d'application de la directive 93/36/CEE — Principe d'égalité de traitement et obligation de transparence»

Sommaire de l'arrêt

1. *Rapprochement des législations — Dispositifs médicaux — Directive 93/42*

   (Directive du Conseil 93/42, telle que modifiée par le règlement du Parlement européen et du Conseil nº 1882/2003)

2. *Rapprochement des législations — Dispositifs médicaux — Directive 93/42*

   (Directive du Conseil 93/42, telle que modifiée par le règlement du Parlement européen et du Conseil nº 1882/2003)

1. Le principe d'égalité de traitement et l'obligation de transparence s'opposent à ce qu'un pouvoir adjudicateur ayant lancé une procédure d'appel d'offres pour la fourniture à un hôpital public de dispositifs médicaux et précisé que ces derniers doivent être conformes à la pharmacopée européenne et munis du marquage CE rejette, directement et en dehors du cadre de la procédure de sauvegarde prévue aux articles 8 et 18 de la directive 93/42, relative aux dispositifs médicaux, telle que modifiée par le règlement nº 1882/2003, pour des raisons relatives à la protection de la santé publique, les matériels proposés dès lors qu'ils respectent cette condition technique exigée. Si le pouvoir adjudicateur considère que ceux-ci sont susceptibles de compromettre la santé publique, il est tenu d'en informer l'organisme national compétent en vue de la mise en oeuvre de ladite procédure de sauvegarde.

   (cf. point 55, disp. 1)

2. Un pouvoir adjudicateur, qui a saisi l'organisme national compétent en vue de la mise en oeuvre de la procédure de sauvegarde prévue aux articles 8 et 18 de la directive 93/42, relative aux dispositifs médicaux, telle que modifiée par le règlement nº 1882/2003, au sujet de dispositifs médicaux munis du marquage CE, est tenu de suspendre la procédure d'appel d'offres jusqu'à l'issue de cette procédure de sauvegarde, le résultat de celle-ci étant contraignant à l'égard de ce pouvoir. Si la mise en oeuvre d'une telle procédure de sauvegarde engendre un retard susceptible de compromettre le fonctionnement d'un hôpital public et, ce faisant, la santé publique, le pouvoir adjudicateur est en droit de prendre toutes les mesures provisoires nécessaires, dans le respect du principe de proportionnalité, pour lui permettre de se procurer les matériels nécessaires au bon fonctionnement de cet hôpital.

   (cf. point 62, disp. 2)

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Judgment of the Court (First Chamber) of 14 June 2007 (reference for a preliminary ruling from the Simvoulio tis Epikratias, Greece) - Medipac-Kazantzidis AE v Venizelio-Pananio (PE.S.Y. KRITIS)

(Case C-6/05) [1]

(Free movement of goods - Directive 93/42/EEC - Hospital purchase of medical devices bearing the CE marking - Protective measures - Public supply contract - Contract falling below the threshold of application of Directive 93/36/EEC - Principle of equal treatment and obligation of transparency)

Language of the case: Greek

Referring court

Simvoulio tis Epikratias

Parties to the main proceedings

Applicant: Medipac-Kazantzidis AE

Defendant: Venizelio-Pananio (PE.S.Y. KRITIS)

Re:

Reference for a preliminary ruling - Symvoulio tis Epikrateias - Interpretation of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ 1993 L 169, p. 1) - Rejection of a tender concerning products bearing the CE marking - Insufficiency of the products in terms of their quality, having regard to the protection of public health and the particular use for which they are intended - Procedure for the supply of medical devices to a hospital

Operative part of the judgment

The principle of equal treatment and the obligation of transparency preclude a contracting authority, which has issued an invitation to tender for the supply of medical devices and specified that those devices must comply with the European Pharmacopoeia and bear the CE marking, from rejecting, directly and without following the safeguard procedure provided for in Articles 8 and 18 of Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, on grounds of protection of public health, the materials proposed, if they comply with the stated technical requirement. If the contracting authority considers that those materials may jeopardise public health, it is required to inform the competent national authority with a view to setting that safeguard procedure in motion.

A contracting authority, which has referred a matter to the competent national authority with a view to setting in motion the safeguard procedure provided for by Articles 8 and 18 of Directive 93/42, as amended by Regulation No 1882/2003, concerning medical devices bearing the CE marking, is required to suspend the tendering procedure until the end of that safeguard procedure, the outcome of that procedure being binding on the contracting authority. If the implementation of such a safeguard procedure gives rise to delays liable to jeopardise the operation of a public hospital and thereby public health, the contracting authority is entitled to take all interim measures required to enable it to procure the materials necessary for the smooth running of that hospital, subject to compliance with the principle of proportionality.

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[1] - OJ C 69, 19.03.2005.

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ARRÊT DU TRIBUNAL (sixième chambre)

9 septembre 2009 (*)

« Marchés publics de services – Procédure d'appel d'offres communautaire – Sécurité et surveillance d'immeubles de la Commission au Luxembourg – Rejet de l'offre d'un soumissionnaire – Égalité de traitement – Accès aux documents – Protection juridictionnelle effective – Obligation de motivation – Transfert d'entreprise – Recours en indemnité »

Dans l'affaire T–437/05,

Brink's Security Luxembourg SA, établie à Luxembourg (Luxembourg), représentée par M^es^ C. Point et G. Dauphin, avocats,

partie requérante,

contre

Commission des Communautés européennes, représentée par M. E. Manhaeve, M^mes^ M. Šimerdová et K. Mojzesowicz, en qualité d'agents, assistés de M^e^ J. Stuyck, avocat,

partie défenderesse,

soutenue par

G4S Security Services SA, anciennement Group 4 Falck – Société de surveillance et de sécurité SA, établie à Luxembourg, représentée par M^es^ M. Molitor, P. Lopes Da Silva, N. Cambonie et N. Bogelmann, avocats,

partie intervenante,

ayant pour objet, d'une part, une demande d'annulation de la décision de la Commission du 30 novembre 2005 rejetant l'offre soumise par la requérante dans le cadre de la procédure d'appel d'offres 16/2005/OIL (sécurité et surveillance des immeubles), de la décision de la Commission du 30 novembre 2005 d'attribuer le marché à un autre soumissionnaire, d'une prétendue décision implicite de refus de la Commission de retirer ses deux décisions précitées ainsi que des deux lettres de la Commission, datées des 7 et 14 décembre 2005, répondant aux demandes d'information de la requérante et, d'autre part, un recours en indemnité visant à obtenir réparation du préjudice prétendument subi par la requérante,

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (sixième chambre),

composé de MM. A. W. H. Meij, président, V. Vadapalas et L. Truchot (rapporteur), juges,

greffier : M^me^ K. Pocheć, administrateur,

vu la procédure écrite et à la suite de l'audience du 20 novembre 2008,

rend le présent

Arrêt

Cadre juridique

A – Réglementation applicable aux marchés publics des Communautés européennes

1 L'article 100, paragraphe 2, du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1, ci-après le « règlement financier »), dispose ce qui suit :

« Le pouvoir adjudicateur communique à tout candidat ou soumissionnaire écarté les motifs du rejet de sa candidature ou de son offre et, à tout soumissionnaire ayant fait une offre recevable et qui en fait la demande par écrit, les caractéristiques et les avantages relatifs de l'offre retenue ainsi que le nom de l'attributaire.

Toutefois la communication de certains éléments peut être omise dans les cas où elle ferait obstacle à l'application des lois, serait contraire à l'intérêt public, porterait préjudice aux intérêts commerciaux légitimes d'entreprises publiques ou privées ou pourrait nuire à une concurrence loyale entre celles-ci. »

2 L'article 149, paragraphe 1, du règlement (CE, Euratom) n° 2342/2002 de la Commission, du 23 décembre 2002, établissant les modalités d'exécution du règlement financier (JO L 357 p. 1), tel que modifié par le règlement (CE, Euratom) n° 1261/2005 de la Commission, du 20 juillet 2005 (JO L 201, p. 3, ci–après les « modalités d'exécution »), prévoit :

« Les pouvoirs adjudicateurs informent dans les meilleurs délais les candidats et les soumissionnaires des décisions prises concernant l'attribution du marché ou d'un contrat-cadre ou l'admission dans un système d'acquisition dynamique, y inclus les motifs pour lesquels ils ont décidé de renoncer à passer un marché ou un contrat-cadre ou à mettre en place un système d'acquisition dynamique pour lequel il y a eu mise en concurrence ou de recommencer la procédure. »

3 L'article 149, paragraphe 3, des modalités d'exécution, dispose :

« Pour les marchés passés par les institutions communautaires pour leur propre compte, au titre de l'article 105 du règlement financier, les pouvoirs adjudicateurs notifient le plus tôt possible après la décision d'attribution et au plus tard dans la semaine qui suit, simultanément et individuellement à chaque soumissionnaire ou candidat évincé, par lettre et par télécopie ou courrier électronique, que leur offre ou candidature n'a pas été retenue, en précisant dans chaque cas les motifs du rejet de l'offre ou de la candidature.

Les pouvoirs adjudicateurs notifient, en même temps qu'ils informent les candidats ou soumissionnaires évincés du rejet de leur offre, la décision d'attribution à l'attributaire en précisant que la décision notifiée ne constitue pas un engagement de la part du pouvoir adjudicateur concerné.

Les soumissionnaires ou candidats évincés peuvent obtenir des informations complémentaires sur les motifs du rejet, sur demande écrite, par lettre, par télécopie ou par courrier électronique et, pour tout soumissionnaire ayant fait une offre recevable, sur les caractéristiques et avantages relatifs de l'offre retenue ainsi que le nom de l'attributaire, sans préjudice des dispositions de l'article 100, paragraphe 2, deuxième alinéa, du règlement financier. Les pouvoirs adjudicateurs répondent dans un délai maximal de quinze jours de calendrier à compter de la réception de la demande.

Les pouvoirs adjudicateurs ne peuvent procéder à la signature du contrat avec l'attributaire du marché ou du contrat-cadre qu'au terme d'une période de deux semaines de calendrier, à compter du lendemain de la date de notification simultanée des décisions de rejet et d'attribution. Le cas échéant, ils peuvent suspendre la signature du contrat pour examen complémentaire si les demandes ou commentaires formulés par des soumissionnaires ou candidats écartés pendant la période de deux semaines de calendrier suivant la notification des décisions de rejet ou d'attribution, ou toute autre information pertinente reçue pendant cette période, le justifient. Dans ce cas, tous les candidats ou soumissionnaires sont informés dans les trois jours ouvrables suivant la décision de suspension. »

B – Réglementation relative au droit d'accès aux documents des institutions

4 Selon l'article 4 du règlement (CE) n° 1049/2001 du Parlement européen et du Conseil, du 30 mai 2001, relatif à l'accès du public aux documents du Parlement européen, du Conseil et de la Commission (JO L 145, p. 43) :

« 1. Les institutions refusent l'accès à un document dans le cas où la divulgation porterait atteinte à la protection :

[…]

b) de la vie privée et de l'intégrité de l'individu, notamment en conformité avec la législation communautaire relative à la protection des données à caractère personnel.

[…]

6. Si une partie seulement du document demandé est concernée par une ou plusieurs des exceptions susvisées, les autres parties du document sont divulguées.

[…] »

5 L'article 6 du règlement n° 1049/2001 prévoit :

« 1. Les demandes d'accès aux documents sont formulées sous forme écrite, y compris par des moyens électroniques, dans l'une des langues énumérées à l'article 314 [CE] et de façon suffisamment précise pour permettre à l'institution d'identifier le document. Le demandeur n'est pas obligé de justifier sa demande.

2. Si une demande n'est pas suffisamment précise, l'institution invite le demandeur à la clarifier et assiste celui-ci à cette fin, par exemple en lui donnant des informations sur l'utilisation des registres publics de documents.

3. En cas de demande portant sur un document très long ou sur un très grand nombre de documents, l'institution concernée peut se concerter avec le demandeur de manière informelle afin de trouver un arrangement équitable.

4. Les institutions assistent et informent les citoyens quant aux modalités de dépôt des demandes d'accès aux documents. »

6 L'article 7 du règlement n° 1049/2001, qui établit les modalités du traitement des demandes initiales, énonce ce qui suit :

« 1. Les demandes d'accès aux documents sont traitées avec promptitude. Un accusé de réception est envoyé au demandeur. Dans un délai de quinze jours ouvrables à partir de l'enregistrement de la demande, l'institution soit octroie l'accès au document demandé et le fournit dans le même délai conformément à l'article 10, soit communique au demandeur, dans une réponse écrite, les motifs de son refus total ou partiel et l'informe de son droit de présenter une demande confirmative conformément au paragraphe 2 du présent article.

2. En cas de refus total ou partiel, le demandeur peut adresser, dans un délai de quinze jours ouvrables suivant la réception de la réponse de l'institution, une demande confirmative tendant à ce que celle-ci révise sa position.

3. À titre exceptionnel, par exemple lorsque la demande porte sur un document très long ou sur un très grand nombre de documents, le délai prévu au paragraphe 1 peut, moyennant information préalable du demandeur et motivation circonstanciée, être prolongé de quinze jours ouvrables.

4. L'absence de réponse de l'institution dans le délai requis habilite le demandeur à présenter une demande confirmative. »

7 L'article 8 du règlement n° 1049/2001, relatif au traitement des demandes confirmatives, dispose :

« 1. Les demandes confirmatives sont traitées avec promptitude. Dans un délai de quinze jours ouvrables à partir de l'enregistrement de la demande, l'institution soit octroie l'accès au document demandé et le fournit dans le même délai conformément à l'article 10, soit communique, dans une réponse écrite, les motifs de son refus total ou partiel. Si elle refuse totalement ou partiellement l'accès, l'institution informe le demandeur des voies de recours dont il dispose, à savoir former un recours juridictionnel contre l'institution et/ou présenter une plainte au médiateur, selon les conditions prévues respectivement aux articles 230 [CE] et 195 [CE].

2. À titre exceptionnel, par exemple lorsque la demande porte sur un document très long ou sur un très grand nombre de documents, le délai prévu au paragraphe 1 peut, moyennant information préalable du demandeur et motivation circonstanciée, être prolongé de quinze jours ouvrables.

3. L'absence de réponse de l'institution dans le délai requis est considérée comme une réponse négative et habilite le demandeur à former un recours juridictionnel contre l'institution et/ou à présenter une plainte au médiateur, selon les dispositions pertinentes du traité CE. »

C – Réglementation applicable au maintien des droits des travailleurs en cas de transfert d'entreprises

8 La directive 2001/23/CE du Conseil, du 12 mars 2001, concernant le rapprochement des législations des États membres relatives au maintien des droits des travailleurs en cas de transfert d'entreprises, d'établissements ou de parties d'entreprises ou d'établissements (JO L 82, p. 16), codifie la directive 77/187/CEE du Conseil, du 14 février 1977, concernant le rapprochement des législations des États membres relatives au maintien des droits des travailleurs en cas de transfert d'entreprises, d'établissements ou de parties d'entreprises ou d'établissements (JO L 61, p. 26), telle que modifiée par la directive 98/50/CE du Conseil, du 29 juin 1998 (JO L 201, p. 88).

9 Le champ d'application de la directive 2001/23 est déterminé à l'article 1er de celle-ci, qui prévoit :

« 1. a) La présente directive est applicable à tout transfert d'entreprise, d'établissement ou de partie d'entreprise ou d'établissement à un autre employeur résultant d'une cession conventionnelle ou d'une fusion.

b) Sous réserve du point a) et des dispositions suivantes du présent article, est considéré comme transfert, au sens de la présente directive, celui d'une entité économique maintenant son identité, entendue comme un ensemble organisé de moyens, en vue de la poursuite d'une activité économique, que celle-ci soit essentielle ou accessoire.

[...] »

10 L'article 1er, paragraphe 1, sous a) et b), de la loi luxembourgeoise du 19 décembre 2003 portant réglementation du maintien des droits des travailleurs en cas de transfert d'entreprises, d'établissements ou de parties d'entreprises ou d'établissements et transposition de la directive 2001/23 (Mém. A 2003, p. 3678, ci-après la « loi du 19 décembre 2003 »), dispose :

« a) La présente loi s'applique à tout transfert d'entreprise, d'établissement ou de partie d'entreprise ou d'établissement résultant notamment d'une cession conventionnelle, d'une fusion, d'une succession, d'une scission, d'une transformation de fonds, ou d'une mise en société.

b) Est considéré comme transfert au sens de la présente loi celui d'une entité économique qui maintient son identité et qui constitue un ensemble organisé de moyens, notamment personnels et matériels, permettant la poursuite d'une activité économique essentielle ou accessoire. »

11 Selon l'article 3, paragraphe 1, premier alinéa, de ladite loi :

« Les droits et obligations qui résultent pour le cédant d'un contrat de travail ou d'une relation de travail existant à la date du transfert sont, du fait de ce transfert, transférés au cessionnaire. »

Antécédents du litige

12 Brink's Security Luxembourg SA (ci-après « Brink's » ou la « requérante »), société dont le siège social est situé au Luxembourg (Luxembourg), était chargée de la surveillance et du gardiennage des immeubles de la Commission des Communautés européennes depuis le milieu des années 70.

13 En 2000, la requérante a conclu avec la Commission un contrat de surveillance et de gardiennage d'immeubles de celle-ci, situés au Luxembourg et relevant de la responsabilité de l'Office pour les infrastructures et la logistique à Luxembourg (OIL), de l'Office des publications de l'Union européenne et du Centre de traduction des organes de l'Union européenne. Ce contrat, qui ne prévoyait pas de reconduction au-delà de la cinquième année, a expiré le 31 décembre 2005.

14 Par un avis de préinformation publié au Supplément au *Journal officiel de l'Union européenne* du 19 mars 2005 (JO S 56), la Commission a annoncé que la date prévue pour le lancement d'une procédure de passation de marché concernant un contrat de sécurité et de surveillance des immeubles visés au point 13 ci-dessus était le 15 mai 2005.

15 Par un avis de marché publié au Supplément au *Journal officiel de l'Union européenne* du 1er septembre 2005 (JO S 168), la Commission a lancé l'appel d'offres 16/2005/OIL pour le contrat de sécurité et de surveillance litigieux (ci-après l'« appel d'offres »).

16 La date limite de présentation des offres a été fixée au 13 octobre 2005. L'ouverture des offres a eu lieu le 18 octobre 2005 et leur évaluation a été effectuée le 11 novembre 2005.

17 Le 30 novembre 2005, la Commission a informé la requérante que le contrat ne lui avait pas été attribué, son offre n'ayant pas obtenu la meilleure note finale lors de l'évaluation qualitative et financière des offres. Dans le même courrier (ci–après la « décision de rejet »), la Commission a informé la requérante qu'elle était en droit d'obtenir des informations complémentaires sur les motifs du rejet de son offre.

18 Par lettre du 1er décembre 2005, la requérante a demandé à la Commission de lui communiquer les motifs du rejet de son offre, les caractéristiques et les avantages relatifs de l'offre retenue ainsi que le nom de l'attributaire du marché.

19 Par lettre du 5 décembre 2005, la Commission a informé la requérante que l'attributaire était Group 4 Falck – Société de surveillance et de sécurité SA, devenue G4S Security Services SA (ci-après « Group 4 Falck » ou l'« intervenante »), et lui a communiqué des éléments de comparaison de l'évaluation de son offre par rapport à l'offre de Group 4 Falck.

20 Par trois courriers du 5 décembre 2005, la requérante a demandé à la Commission de réexaminer sa décision d'attribution du 30 novembre 2005 (ci-après la « décision d'attribution ») et de lui attribuer le marché, en lui indiquant les raisons qui, selon elle, auraient dû l'empêcher de retenir l'offre de Group 4 Falck.

21 Par lettre du 7 décembre 2005, la Commission a répondu aux courriers de la requérante du 5 décembre 2005.

22 Par lettre du 8 décembre 2005, la requérante a demandé à la Commission les nom, prénom, grade, ancienneté et affectation des membres du comité d'évaluation des offres ainsi qu'un complément de motivation, estimant que les raisons indiquées par la Commission n'étaient pas suffisantes.

23 Par lettre du 14 décembre 2005, la Commission, invoquant des raisons de confidentialité, de protection de la vie privée et de l'intégrité des personnes, a refusé de fournir les informations demandées par la requérante à propos des membres du comité d'évaluation des offres. La Commission a cependant fourni à la requérante des informations complémentaires concernant les raisons du rejet de son offre.

24 Par lettre du 14 décembre 2005, Group 4 Falck a fait part à la requérante de son intention de recruter une partie de son personnel.

Procédure et conclusions des parties

25 Par requête déposée au greffe du Tribunal le 15 décembre 2005, la requérante a introduit le présent recours.

26 Par acte séparé, déposé au greffe du Tribunal le même jour, la requérante a introduit une demande en référé ainsi qu'une demande de mesures provisoires sur le fondement de l'article 105, paragraphe 2, du règlement de procédure du Tribunal.

27 Par ordonnance du 16 décembre 2005, le président du Tribunal a ordonné qu'il soit sursis à la signature du contrat en cause dans le cadre de l'appel d'offres jusqu'au prononcé d'une ordonnance statuant sur la demande de mesures provisoires.

28 En conséquence de l'adoption de l'ordonnance mentionnée au point 27 ci-dessus, le contrat en cours entre Brink's et la Commission a été reconduit jusqu'à la date du 31 janvier 2006, afin de garantir la continuité de la surveillance et du gardiennage des bâtiments en cause.

29 Par acte déposé au greffe du Tribunal le 22 décembre 2005, Group 4 Falck a demandé à intervenir dans la présente procédure au soutien des conclusions de la Commission. Le 4 janvier 2006, les parties principales ont déposé leurs observations sur la demande en intervention de Group 4 Falck.

30 Par acte déposé au greffe du Tribunal le 4 janvier 2006, la requérante a introduit une demande de traitement confidentiel de la demande en référé vis-à-vis de Group 4 Falck, à laquelle il a été fait droit. Le 5 janvier 2006, la requérante a déposé au greffe du Tribunal une version non confidentielle de la demande en référé.

31 Par ordonnance du 9 janvier 2006, Group 4 Falck a été admis à intervenir dans la présente affaire.

32 Le 11 janvier 2006, la Commission a déposé ses observations sur la demande en référé et, sur demande du Tribunal au titre de l'article 64, paragraphe 3, du règlement de procédure, a produit une version non confidentielle des documents communiqués à la Commission par Group 4 Falck pour se conformer au point 28 du cahier des charges relatif au marché en cause.

33 Par ordonnance du 7 février 2006, le président du Tribunal a rejeté la demande de mesures provisoires de la requérante aux motifs qu'elle n'avait pas démontré qu'elle risquait de subir un préjudice grave et irréparable en l'absence des mesures provisoires demandées (T–437/05 R, Rec. p. II–21).

34 Le 12 mai 2006, la requérante a déposé une demande de traitement confidentiel de certaines annexes de la requête. Group 4 Falck n'a pas présenté d'observations sur cette demande.

35 Sur rapport du juge rapporteur, le Tribunal (sixième chambre) a décidé d'ouvrir la procédure orale et, dans le cadre des mesures d'organisation de la procédure prévues à l'article 64 du règlement de procédure, a posé par écrit des questions aux parties, auxquelles celles-ci ont répondu dans le délai imparti.

36 Les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions du Tribunal lors de l'audience du 20 novembre 2008.

37 Lors de l'audience, Group 4 Falck a demandé au Tribunal de pouvoir produire des courriers qu'elle a échangés avec la Société nationale de certification et d'homologation (ci-après la « SNCH »). La requérante et la Commission ont présenté leurs observations sur cette demande de production de documents.

38 Dans le cadre du présent recours, la requérante conclut à ce qu'il plaise au Tribunal :

– annuler la décision de rejet ;

– annuler la décision d'attribution ;

– annuler la prétendue décision implicite de la Commission par laquelle elle a refusé de retirer la décision de rejet et la décision d'attribution ;

– annuler les deux lettres de réponse de la Commission des 7 et 14 décembre 2005 ;

– octroyer des dommages et intérêts en réparation du préjudice moral et matériel qu'elle a prétendument subi ;

– condamner la Commission aux dépens.

39 La requérante a également demandé au Tribunal, au titre des mesures d'organisation de la procédure, d'enjoindre à la Commission de communiquer les éléments suivants :

– la composition (nom, grade, ancienneté et affectation des membres) du comité d'évaluation

des offres ;

– les raisons ayant motivé le décalage entre la date de l'appel d'offres et la date annoncée dans l'avis de préinformation paru au *Journal officiel de l'Union européenne ;*

– les informations permettant de vérifier que Group 4 Falck exécute le contrat passé avec la Commission dans les conditions prévues par le cahier des charges en ses points 22 et 28.

40 La Commission, soutenue par l'intervenante, conclut à ce qu'il plaise au Tribunal :

– déclarer le recours en annulation non fondé ;

– déclarer le recours en indemnité irrecevable ;

– subsidiairement, déclarer le recours en indemnité non fondé ;

– condamner la requérante aux dépens.

En droit

A – Sur les mesures d'organisation de la procédure

41 En ce qui concerne la demande relative au calendrier de l'appel d'offres, la Commission a indiqué, dans le mémoire en duplique, les raisons ayant motivé le report de la publication de l'avis de marché par rapport à la date annoncée dans l'avis de préinformation. Il n'y a donc plus lieu de statuer sur cette demande devenue sans objet.

42 En ce qui concerne la demande visant à contrôler le respect par Group 4 Falck du critère figurant au point 28 du cahier des charges en tant que condition d'exécution du contrat, il résulte d'une jurisprudence constante que, dans le cadre d'un recours en annulation introduit sur le fondement de l'article 230 CE, la légalité de l'acte attaqué s'apprécie en fonction des éléments de droit et de fait existant à la date où l'acte a été pris (arrêt de la Cour du 7 février 1979, France/Commission, 15/76 et 16/76, Rec. p. 321, point 7 ; arrêt du Tribunal du 22 janvier 1997, Opel Austria/Conseil, T–115/94, Rec. p. II–39, points 87 et 88).

43 Ainsi, des considérations relatives à l'exécution du contrat passé entre Group 4 Falck et la Commission, dans la mesure où elles constituent des circonstances de fait postérieures à l'adoption des actes attaqués, ne peuvent être invoquées au soutien d'un moyen visant à remettre en cause la validité desdits actes.

44 Il résulte de ce qui précède que les demandes de mesures d'organisation de la procédure relatives au calendrier de l'appel d'offres et à l'exécution du contrat par Group 4 Falck doivent être rejetées.

45 Il sera statué sur la demande de communication de la composition du comité d'évaluation lors de l'examen du septième moyen du présent recours en annulation, tiré de la violation du principe de transparence et du droit d'accès aux documents des institutions.

B – Sur la recevabilité du grief tiré du report de la publication de l'avis de marché par rapport à la date annoncée dans l'avis de préinformation

1. Arguments des parties

46 La requérante a présenté, dans son mémoire en réplique, un nouvel argument, tiré du report de la publication de l'avis de marché relatif à l'appel d'offres par rapport à la date annoncée dans l'avis de préinformation. Ce changement de calendrier l'aurait placée dans une situation délicate au regard de la législation sociale luxembourgeoise, compte tenu des délais de préavis prévus par celle-ci en cas de licenciement. Le respect du calendrier initial lui aurait permis d'anticiper les licenciements ou réaffectations consécutifs à l'éventuelle perte du marché.

47 De plus, si le calendrier prévu dans l'avis de préinformation avait été respecté, Group 4 Falck

n'aurait pas pu participer à la procédure d'appel d'offres, sous peine de violer l'engagement de ne pas solliciter activement les clients des sociétés cédées pendant une période de six mois à compter de la cession figurant dans la décision de la Commission du 28 mai 2004 (Affaire COMP/M.3396 – GROUP 4 FALCK/SECURICOR) ayant autorisé la fusion entre Group 4 Falck A/S et Securicor plc (ci-après la « décision de la Commission du 28 mai 2004 »).

48 La Commission conteste la recevabilité de cet argument, qu'elle considère comme un moyen nouveau, au regard de l'article 48, paragraphe 2, du règlement de procédure.

2. Appréciation du Tribunal

49 En vertu de l'article 48, paragraphe 2, premier alinéa, du règlement de procédure, la production de moyens nouveaux en cours d'instance est interdite à moins que ces moyens ne se fondent sur des éléments de droit et de fait qui se sont révélés pendant la procédure.

50 Toutefois, un moyen qui constitue l'ampliation d'un moyen énoncé antérieurement, directement ou implicitement, dans la requête introductive d'instance et qui présente un lien étroit avec celui-ci doit être déclaré recevable (arrêt de la Cour du 14 octobre 1999, Atlanta/Communauté européenne, C–104/97 P, Rec. p. I–6983, point 29 ; arrêt du Tribunal du 8 mars 2007, France Télécom/Commission, T–340/04, Rec. p. II–573, point 164). Par ailleurs, les arguments dont la substance présente un lien étroit avec un moyen énoncé dans la requête introductive d'instance ne peuvent être considérés comme des moyens nouveaux et leur présentation est admise au stade de la réplique ou de l'audience (voir, en ce sens, arrêt de la Cour du 12 juin 1958, Compagnie des hauts fourneaux de Chasse/Haute Autorité, 2/57, Rec. p. 129, 146).

51 En l'espèce, l'argument de la requérante, qui repose sur le report de la publication de l'avis de marché par rapport à la date annoncée dans l'avis de préinformation, n'est fondé sur aucun élément de droit ou de fait qui se serait révélé pendant la procédure.

52 Le grief tiré de la situation délicate dans laquelle ce report aurait placé la requérante au regard de la législation sociale luxembourgeoise applicable aux licenciements est dès lors irrecevable, car il ne constitue pas l'ampliation d'un moyen énoncé antérieurement dans la requête et ne présente pas un lien étroit avec un tel moyen.

53 En revanche, le grief selon lequel le respect du calendrier annoncé dans l'avis de préinformation aurait empêché Group 4 Falck de participer à l'appel d'offres présente un lien étroit avec le quatrième moyen de la requête, tiré de la violation de la décision de la Commission du 28 mai 2004. L'argument tiré du report de publication de l'avis de marché par rapport à la date annoncée dans l'avis de préinformation est donc partiellement recevable, en ce qu'il vient au soutien du quatrième moyen de la requérante, avec lequel il sera en conséquence examiné.

C – Sur le recours en annulation

1. Sur la recevabilité

54 Les conditions de recevabilité d'un recours relevant des fins de non-recevoir d'ordre public (voir ordonnance de la Cour du 7 octobre 1987, D.M./Conseil et CES, 108/86, Rec. p. 3933, point 10, et arrêt du Tribunal du 22 octobre 2008, TV 2/Danmark/Commission, T–309/04, non encore publié au Recueil, point 62, et la jurisprudence citée), il appartient au Tribunal de vérifier d'office si ces conditions sont satisfaites.

a) Sur l'existence d'une décision implicite de refus de la Commission

55 Il résulte de la jurisprudence que, en principe, en l'absence de dispositions expresses fixant un délai à l'expiration duquel une décision implicite est réputée intervenir de la part d'une institution invitée à prendre position et définissant le contenu de cette décision, le seul silence d'une institution ne saurait être assimilé à une décision, sauf à mettre en cause le système des voies de recours institué par le traité (arrêt de la Cour du 9 décembre 2004, Commission/Greencore, C–123/03 P, Rec. p. I–11647, point 45 ; arrêts du Tribunal du 13 décembre 1999, SGA/Commission, T–189/95, T–39/96, T–123/96, Rec. p. II–3587, point 27, et Sodima/Commission, T–190/95, T–45/96, Rec. p. II–3617, point 32).

56 Dans certaines circonstances spécifiques, ce principe peut ne pas trouver application, de sorte que le silence ou l'inaction d'une institution peuvent être exceptionnellement considérés comme ayant valeur de décision implicite de refus (arrêt Commission/Greencore, point 55 supra, point 45).

57 En l'espèce, la requérante demande l'annulation de la décision implicite de la Commission refusant de retirer les décisions d'attribution et de rejet. Cependant, aucune disposition du règlement financier ou des modalités d'exécution ne fixe un délai à l'expiration duquel une décision implicite est réputée être intervenue de la part du pouvoir adjudicateur invité à réexaminer sa décision d'attribution ou de rejet.

58 De plus, la requérante n'invoque aucune circonstance spécifique permettant d'assimiler, à titre exceptionnel, le silence de la Commission à une décision implicite de refus.

59 Il résulte de ce qui précède que les conclusions de la requérante sont irrecevables, en ce qu'elles visent à l'annulation de la prétendue décision implicite de refus de la Commission.

b) Sur l'existence d'actes produisant des effets juridiques obligatoires

60 Selon une jurisprudence constante, constituent des actes ou des décisions susceptibles de faire l'objet d'un recours en annulation, au sens de l'article 230 CE, les mesures produisant des effets juridiques obligatoires de nature à affecter les intérêts du requérant, en modifiant de façon caractérisée la situation juridique de celui-ci (arrêts de la Cour du 11 novembre 1981, IBM/Commission, 60/81, Rec. p. 2639, point 9, et du 14 février 1989, Bossi/Commission, 346/87, Rec. p. 303, 332).

61 Tel est le cas de la décision d'attribution.

62 Quant aux lettres de la Commission du 30 novembre 2005, du 7 décembre 2005 et du 14 décembre 2005, adressées à la requérante, il convient de s'assurer qu'elles contiennent bien une décision au sens de l'article 230 CE.

63 Selon la jurisprudence, il ne suffit pas qu'une lettre ait été envoyée par une institution communautaire à son destinataire, en réponse à une demande formulée par ce dernier, pour qu'elle puisse être qualifiée de décision au sens de l'article 230 CE, ouvrant ainsi la voie du recours en annulation (ordonnance de la Cour du 27 janvier 1993, Miethke/Parlement, C-25/92, Rec. p. I-473, point 10 ; arrêt du Tribunal du 22 mai 1996, AITEC/Commission, T-277/94, Rec. p. II-351, point 50, et ordonnance du Tribunal du 11 décembre 1998, Scottish Soft Fruit Growers/Commission, T-22/98, Rec. p. II-4219, point 34). La lettre concernée doit en effet comporter des mesures répondant à la définition rappelée au point 60 ci-dessus.

64 En l'espèce, la lettre du 30 novembre 2005, par laquelle la Commission informe la requérante, de manière précise et non équivoque, du rejet de sa candidature, modifie de façon caractérisée la situation juridique de celle-ci et constitue par conséquent une décision attaquable.

65 En revanche, la lettre de la Commission du 7 décembre 2005 indique à la requérante que son service juridique a été saisi de l'une des questions qu'elle a posées dans son précédent courrier, concernant la prétendue violation du principe d'égalité de traitement des soumissionnaires. Elle rejette par ailleurs certains des arguments avancés par la requérante dans ses courriers du 5 décembre 2005 à l'appui d'une demande de réexamen des décisions d'attribution et de rejet, relatifs à la violation de la loi du 19 décembre 2003 transposant la directive 2001/23, ainsi que l'allégation de la requérante selon laquelle la Commission aurait donné instruction à un salarié de Brink's de recueillir les curriculums vitae et les lettres de motivation du personnel de Brink's, en vue d'une transmission de ces documents à Group 4 Falck.

66 Cette lettre n'a qu'un caractère informatif. Elle ne fait en effet qu'informer la requérante que le service juridique de la Commission a été saisi et que celle-ci estime qu'il ne saurait y avoir eu violation de la loi du 19 décembre 2003, et réfuter l'existence d'une quelconque instruction adressée au personnel de Brink's. Elle est dès lors dépourvue d'effets juridiques obligatoires de nature à affecter les intérêts de la requérante, dont elle n'a en rien modifié de façon caractérisée la situation juridique.

67 S'agissant de la lettre de la Commission du 14 décembre 2005, il convient de relever qu'elle

comporte deux aspects distincts. Par cette lettre, la Commission, d'une part, informe la requérante de son refus de lui communiquer la composition exacte du comité d'évaluation et, d'autre part, précise la motivation de la décision de rejet.

68 En ce qui concerne le refus de communication de la composition du comité d'évaluation, il convient de rappeler, d'une part, que le règlement n° 1049/2001 s'applique à toute demande d'accès aux documents des institutions formulée par écrit et, d'autre part, que l'article 3, sous a), de ce règlement définit le document comme « tout contenu quel que soit son support (écrit sur support papier ou stocké sous forme électronique, enregistrement sonore, visuel ou audiovisuel) concernant une matière relative aux politiques, activités et décisions relevant de la compétence de l'institution ». La demande de renseignements complémentaires concernant la composition du comité d'évaluation formulée par la requérante dans son courrier du 8 décembre 2005 constitue donc une demande d'accès à un document au titre de l'article 3, sous a), du règlement n° 1049/2001.

69 La procédure d'accès aux documents de la Commission, régie par les articles 6 à 8 du règlement n° 1049/2001 ainsi que par les articles 2 à 4 de l'annexe de la décision 2001/937/CE, CECA, Euratom de la Commission, du 5 décembre 2001, modifiant son règlement intérieur (JO L 345, p. 94), se déroule en deux étapes. Dans un premier temps, le demandeur doit adresser à la Commission une demande initiale d'accès aux documents. En principe, la Commission doit répondre à la demande initiale dans un délai de quinze jours ouvrables à compter de l'enregistrement de ladite demande. Dans un second temps, en cas de refus total ou partiel, le demandeur peut présenter, dans un délai de quinze jours ouvrables suivant la réception de la réponse initiale de la Commission, une demande confirmative auprès du secrétaire général de la Commission, demande à laquelle ce dernier doit, en principe, répondre dans un délai de quinze jours ouvrables à compter de l'enregistrement de ladite demande. En cas de refus total ou partiel, le demandeur peut former un recours juridictionnel contre la Commission ou présenter une plainte au Médiateur européen, selon les conditions prévues respectivement aux articles 230 CE et 195 CE.

70 Selon la jurisprudence, il ressort de l'application combinée des articles 3 et 4 de l'annexe de la décision 2001/937 ainsi que de l'article 8 du règlement n° 1049/2001 que la réponse à la demande initiale ne constitue qu'une première prise de position, conférant au demandeur la possibilité d'inviter le secrétaire général de la Commission à réexaminer la position en cause (voir, en ce sens, arrêts du Tribunal du 6 juillet 2006, Franchet et Byk/Commission, T–391/03 et T–70/04, Rec. p. II–2023, point 47, et du 5 juin 2008, Internationaler Hilfsfonds/Commission, T–141/05, non publié au Recueil, points 56 et 109).

71 Par conséquent, seule la mesure adoptée par le secrétaire général de la Commission, ayant la nature d'une décision et remplaçant intégralement la prise de position précédente, est susceptible de produire des effets juridiques de nature à affecter les intérêts du demandeur et, partant, de faire l'objet d'un recours en annulation en vertu de l'article 230 CE (voir, en ce sens, arrêts Franchet et Byk/Commission, point 70 supra, point 48, et Internationaler Hilfsfonds/Commission, point 70 supra, points 57 et 109).

72 En l'espèce, la réponse contenue dans la lettre du 14 décembre 2005 adressée à la requérante constitue une réponse initiale de la Commission, au sens de l'article 7, paragraphe 1, du règlement n° 1049/2001, dans laquelle elle manifestait son intention de rejeter sa demande. Cette réponse initiale conférait à la requérante la possibilité, dans le respect des délais impartis, d'inviter le secrétaire général de la Commission à réviser cette première prise de position, en adoptant une décision définitive.

73 Or, la requérante n'a pas adressé à la Commission de demande confirmative à la suite de cette réponse initiale. Seule la décision du secrétaire général étant susceptible de recours, un tel recours n'est pas, en principe, recevable à l'égard de la lettre du 14 décembre 2005.

74 La lettre de la Commission du 14 décembre 2005 est cependant entachée d'un vice de forme. La Commission a en effet omis d'informer la requérante, comme le lui impose l'article 7, paragraphe 1, du règlement n° 1049/2001, de son droit de présenter une demande confirmative.

75 Cette irrégularité a pour conséquence de rendre recevable, à titre exceptionnel, un recours en annulation contre la demande initiale. S'il en était autrement, la Commission pourrait se soustraire au contrôle du juge communautaire en raison d'un vice de forme qui lui est imputable. Or, il ressort de la jurisprudence que, la Communauté européenne étant une communauté de droit dans laquelle les institutions sont soumises au contrôle de la conformité de leurs actes avec le traité, les modalités

procédurales applicables aux recours dont le juge communautaire est saisi doivent être interprétées, dans toute la mesure du possible, d'une manière telle que ces modalités puissent recevoir une application qui contribue à la mise en œuvre de l'objectif de garantir une protection juridictionnelle effective des droits que tirent les justiciables du droit communautaire (voir arrêt de la Cour du 17 juillet 2008, Athinaïki Techniki/Commission, C–521/06 P, non encore publié au Recueil, point 45, et la jurisprudence citée). L'exigence d'un contrôle juridictionnel constitue en effet un principe général de droit communautaire, qui découle des traditions constitutionnelles communes aux États membres et qui a trouvé sa consécration dans les articles 6 et 13 de la convention de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH), signée à Rome le 4 novembre 1950 (arrêts de la Cour du 15 mai 1986, Johnston, 222/84, Rec. p. 1651, point 18 ; du 27 novembre 2001, Commission/Autriche, C–424/99, Rec. p. I–9285, point 45, et du 25 juillet 2002, Unión de Pequeños Agricultores/Conseil, C–50/00 P, Rec. p. I–6677, point 39). Le droit à un recours effectif a, en outre, été réaffirmé par l'article 47 de la charte des droits fondamentaux de l'Union européenne proclamée le 7 décembre 2000 à Nice (JO 2000, C 364, p. 1).

76 Pour le surplus, la lettre du 14 décembre 2005 ne fait que préciser la motivation de la décision de rejet, en fournissant des éléments d'informations complémentaires concernant l'évaluation qualitative des offres. Sur ce point, elle est dépourvue de tout caractère décisionnel et ne constitue pas un acte attaquable au sens de l'article 230 CE.

77 Il résulte de ce qui précède que les conclusions dirigées contre les lettres de la Commission des 7 et 14 décembre 2005 sont irrecevables, hormis en ce qui concerne le refus de communication de la composition du comité d'évaluation.

78 Il y a donc lieu de circonscrire l'objet du présent recours à l'annulation des décisions d'attribution et de rejet ainsi que de la décision de refus de la Commission de communiquer la composition du comité d'évaluation figurant dans la lettre du 14 décembre 2005 et de déclarer irrecevables les conclusions dirigées contre la prétendue décision implicite par laquelle la Commission aurait refusé de retirer les décisions d'attribution et de rejet et contre les deux lettres de réponse de la Commission des 7 et 14 décembre 2005, hormis en ce qui concerne le refus de communication de la composition du comité d'évaluation.

2. Sur le fond

79 La requérante invoque sept moyens à l'appui de son recours en annulation, à savoir la violation du principe d'égalité de traitement du fait que la Commission n'a pas prévu dans le cahier des charges la reprise des contrats de travail des agents affectés par la requérante à l'exécution du contrat de surveillance, la violation des dispositions de la loi du 19 décembre 2003 et de la directive 2001/23 qu'elle transpose, la violation du principe d'égalité de traitement du fait de la détention par l'intervenante d'informations privilégiées, la violation de la décision de la Commission du 28 mai 2004 et des règles de concurrence, la violation de l'obligation de motivation, du principe de transparence et du droit d'accès aux documents des institutions, la violation des règles du marché, du cahier des charges en ce qui concerne l'évaluation du critère relatif à la formation de base de secouriste ou de pompier volontaire et l'existence d'une erreur manifeste d'appréciation, et la violation du principe de transparence et du droit d'accès aux documents des institutions.

80 Il y a lieu de relever, à titre liminaire, que tous les moyens de la requérante à l'exception du septième visent, s'agissant des chefs de conclusions recevables de la requérante, à obtenir l'annulation des décisions d'attribution et de rejet. Le septième moyen est formulé au soutien de la demande d'annulation de la lettre de la Commission du 14 décembre 2005.

81 S'agissant des six premiers moyens visant à l'annulation des décisions d'attribution et de rejet, le Tribunal estime opportun d'examiner d'abord la légalité de la décision d'attribution.

82 Le premier moyen suppose que, à défaut d'applicabilité de la loi du 19 décembre 2003, la Commission aurait dû imposer au nouvel attributaire la reprise de la totalité des contrats de travail des salariés de la requérante en application du principe d'égalité de traitement. Ce moyen présente donc un caractère subsidiaire par rapport au deuxième moyen, de sorte qu'il y a lieu d'examiner en premier lieu le deuxième moyen.

a) Sur le deuxième moyen, tiré de la violation des dispositions de la loi du 19 décembre 2003, transposant la directive 2001/23

83 Le présent moyen se décompose en deux branches tirées, d'une part, de l'irrégularité de l'offre de Group 4 Falck et, d'autre part, de l'illégalité du cahier des charges de la Commission.

Sur la première branche, tirée de l'irrégularité de l'offre de Group 4 Falck

– Arguments des parties

84 La requérante prétend que, si la loi du 19 décembre 2003 et la directive 2001/23 qu'elle transpose s'appliquent à la présente affaire, il en résulte que l'offre de Group 4 Falck est irrégulière pour ne pas avoir comporté l'obligation de reprendre les contrats de travail des agents de Brink's affectés à l'exécution du contrat de surveillance passé avec la Commission.

85 Elle fait valoir que Group 4 Falck a affirmé, dans un courrier du 14 décembre 2005 adressé à la requérante, son intention de ne pas respecter la loi du 19 décembre 2003, puisque Group 4 Falck y explique qu'elle ne serait disposée à engager qu'environ 40 personnes en priorité parmi les anciens salariés de Brink's. Elle souligne que, à la date du 31 mars 2006, Group 4 Falck avait repris 56 des 173 salariés que Brink's avait affectés à la réalisation du marché.

86 Dès lors, la requérante estime que Group 4 Falck a violé la législation luxembourgeoise et la directive 2001/23 qu'elle transpose, en ne reprenant qu'une partie de ses anciens salariés sans maintenir leurs droits. Le refus de la Commission de retirer sa décision d'attribution, en dépit des éléments portés à sa connaissance par la requérante, serait donc illégal.

87 La Commission conteste l'applicabilité de la loi invoquée par la requérante au motif qu'aucun transfert d'entreprise ne serait intervenu en l'espèce. Elle fait valoir à titre subsidiaire que, même si un transfert d'entreprise avait eu lieu, elle ne pouvait pas en avoir connaissance au moment où elle a préparé l'appel d'offres.

88 Group 4 Falck se rallie à la position de la Commission sur la non-applicabilité de la loi du 19 décembre 2003. Elle fait également valoir que, étant donné que la reprise d'une partie essentielle du personnel est une condition déterminante dans la réalisation d'un transfert d'entreprise et que le cahier des charges ne l'imposait pas, la directive 2001/23 ne pouvait pas s'appliquer a priori.

– Appréciation du Tribunal

89 Aux termes de l'article 1er, paragraphe 1, sous a), de la directive 2001/23, transposée en droit luxembourgeois par l'article 1er de la loi du 19 décembre 2003 invoquée par la requérante, ladite directive « est applicable à tout transfert d'entreprise, d'établissement ou de partie d'entreprise ou d'établissement à un autre employeur résultant d'une cession conventionnelle ou d'une fusion ».

90 Aux termes du paragraphe 1, sous b), de ce même article, « est considéré comme transfert, au sens de la présente directive, celui d'une entité économique maintenant son identité, entendue comme un ensemble organisé de moyens, en vue de la poursuite d'une activité économique, que celle-ci soit essentielle ou accessoire ».

91 Selon la jurisprudence de la Cour, le critère décisif pour établir l'existence d'un transfert au sens de la directive 2001/23 est de savoir si l'entité en question garde son identité, ce qui résulte notamment de la poursuite effective de l'exploitation ou de sa reprise (voir, par analogie, arrêts de la Cour du 18 mars 1986, Spijkers, 24/85, Rec. p. 1119, points 11 et 12, et du 11 mars 1997, Süzen, C–13/95, Rec. p. I–1259, point 10).

92 La seule circonstance que le service fourni par l'ancien et le nouveau titulaire du marché soit similaire ne permet pas de conclure au transfert d'une entité économique entre les entreprises successives. En effet, une telle entité ne saurait être réduite à l'activité dont elle est chargée. Son identité ressort également d'autres éléments tels que le personnel qui la compose, son encadrement, l'organisation de son travail, ses méthodes d'exploitation ou encore, le cas échéant, les moyens d'exploitation à sa disposition (arrêt de la Cour du 10 décembre 1998, Hidalgo e.a., C–173/96 et C–247/96, Rec. p. I–8237, point 30).

93 Ainsi, dans la mesure où, dans un secteur tel que le gardiennage, dans lequel l'activité repose essentiellement sur la main-d'œuvre, une collectivité de travailleurs que réunit durablement une activité commune peut correspondre à une entité économique, une telle entité est susceptible de

maintenir son identité par-delà son transfert quand le nouvel attributaire du marché ne se contente pas de poursuivre l'activité en cause, mais reprend également une partie essentielle, en termes de nombre et de compétence, des effectifs que son prédécesseur affectait préalablement à cette tâche (arrêt Hidalgo e.a., point 92 supra, point 32).

94 Il résulte de ce qui précède que, en l'espèce, l'existence d'un transfert d'entreprise entre l'ancien et le nouveau titulaire du marché dépendait de la reprise éventuelle, par le nouvel attributaire, d'une partie essentielle, en termes de nombre et de compétence, des effectifs que la requérante affectait à l'exécution du contrat. Par conséquent, la Commission ne pouvait, ni lorsqu'elle a publié l'appel d'offres, ni à la date de la décision d'attribution, savoir si les conditions de fait requises pour qu'il y ait un transfert d'entreprise entraînant l'application de la loi du 19 décembre 2003 transposant la directive 2001/23 étaient réunies.

95 Par ailleurs, le courrier du 14 décembre 2005 invoqué par la requérante, dans lequel Group 4 Falck a manifesté sa volonté de recruter 40 personnes supplémentaires en priorité parmi les salariés de Brink's affectés à l'exécution du marché dont elle était titulaire, n'exprime qu'une intention. Celle-ci ne saurait être assimilée à la reprise d'une partie essentielle, en termes de nombre et de compétence, des effectifs (au nombre de 173) que Brink's affectait au marché litigieux, c'est-à-dire à la condition exigée par la jurisprudence pour qu'il y ait transfert d'entreprise (voir, en ce sens, arrêt Hidalgo e.a., point 92 supra, point 32).

96 De plus, cette intention a été exprimée postérieurement à la soumission de l'offre par Group 4 Falck et à la décision d'attribution. Or, dans le cadre d'un recours en annulation fondé sur l'article 230 CE, la légalité de l'acte communautaire concerné doit être appréciée en fonction des éléments de fait et de droit existant à la date où cet acte a été adopté (arrêt France/Commission, point 42 supra, point 7 ; arrêts du Tribunal du 25 juin 1998, British Airways e.a./Commission, T–371/94 et T–394/94, Rec. p. II–2405, point 81, et du 14 janvier 2004, Fleuren Compost/Commission, T–109/01, Rec. p. II–127, point 50) et des éléments d'information dont l'institution auteur de l'acte pouvait disposer au moment où elle l'a arrêté (voir, en ce sens, arrêt de la Cour du 24 septembre 2002, Falck et Acciaierie di Bolzano/Commission, C–74/00 P et C–75/00 P, Rec. p. I–7869, point 168). La requérante ne peut ainsi se prévaloir devant le juge communautaire d'éléments de fait postérieurs à la décision d'attribution ou dont la Commission ne pouvait avoir connaissance lors de l'adoption de celle-ci. Il en va de même de l'allégation de la requérante selon laquelle Group 4 Falck aurait repris, au 31 mars 2006, 56 des 173 salariés qu'elle avait affectés à l'exécution du marché litigieux.

97 Partant, il convient de conclure que les circonstances de fait nécessaires à l'existence d'un transfert d'entreprise n'étaient pas réunies au moment de la soumission de l'offre de Group 4 Falck le 12 octobre 2005, pas plus qu'au moment de la décision d'attribution.

98 Par ailleurs, il n'y a pas lieu de répondre au grief de la requérante portant sur l'illégalité du refus de la Commission de retirer sa décision d'attribution, compte tenu de l'absence de décision implicite de refus et de l'irrecevabilité des conclusions de la requérante tendant à l'annulation des lettres de la Commission des 7 et 14 décembre 2005, sauf en ce qui concerne le refus de communication de la composition du comité d'évaluation.

99 Par conséquent, il y a lieu de considérer que l'argument de la requérante ne saurait prospérer.

100 Il résulte de ce qui précède que la présente branche doit être rejetée.

Sur la deuxième branche, tirée de l'illégalité du cahier des charges de la Commission

– Arguments des parties

101 La requérante reproche à la Commission de ne pas avoir fait figurer dans le cahier des charges remis aux soumissionnaires l'inventaire de ses salariés et les conditions de leur contrat. En l'absence d'un tel inventaire, il aurait été impossible que l'une des offres soumises par les autres soumissionnaires puisse comporter la reprise desdits salariés.

102 La Commission estime que, à supposer même que l'existence d'un transfert d'entreprise soit avérée, il ne pourrait en être déduit une obligation pour le pouvoir adjudicateur d'imposer la reprise des contrats de travail dans le cahier des charges.

– Appréciation du Tribunal

103 En vertu des principes de bonne administration et de coopération loyale entre les institutions communautaires et les États membres, les institutions sont tenues de s'assurer que les conditions prévues dans un appel d'offres n'incitent pas les soumissionnaires potentiels à violer la législation nationale applicable à leur activité (voir, en ce sens, arrêt du Tribunal du 6 juillet 2000, AICS/Parlement, T–139/99, Rec. p. II–2849, point 41).

104 En l'espèce, l'absence d'inventaire des salariés de Brink's dans le cahier des charges ne saurait être considérée comme incitant les soumissionnaires ou l'adjudicataire à violer la législation nationale relative au maintien des droits des travailleurs en cas de transfert d'entreprise. La Commission n'a pas imposé dans son cahier des charges de condition qui entraînerait nécessairement la violation de la loi du 19 décembre 2003, en rendant impossible toute reprise des contrats de travail dans l'hypothèse d'un transfert d'entreprise. Les seules conditions du cahier des charges relatives au personnel, à savoir l'exigence d'une expérience professionnelle minimale d'un an, de trois ans ou de cinq ans en fonction de l'emploi occupé et l'exigence selon laquelle au moins 10 % des agents de sécurité doivent posséder une formation de base de secouriste et/ou de pompier volontaire, ne faisaient pas obstacle au respect d'une éventuelle obligation résultant de la loi du 19 décembre 2003 de reprendre les contrats de travail des agents que Brink's affectait à l'exécution du contrat de surveillance.

105 Par ailleurs, le cahier des charges prévoyait expressément que l'attributaire du marché devait être en conformité, à la signature du contrat, avec la réglementation en vigueur au Luxembourg, invitant ainsi les soumissionnaires à s'assurer qu'ils respectaient la législation nationale en vigueur.

106 Il résulte de ce qui précède que le grief formulé par la requérante relatif à l'absence d'inventaire de ses salariés dans le cahier des charges doit être rejeté.

b) Sur le premier moyen, tiré de la violation du principe d'égalité de traitement appliqué aux marchés publics

Arguments des parties

107 Selon la requérante, la Commission, en imposant une ancienneté minimale d'un an, l'aurait placée dans une position défavorable dans la mesure où, étant en charge du marché depuis les années 70, elle emploie un grand nombre de salariés dont l'ancienneté est supérieure à un an, ce qui représente une charge salariale certaine que les autres soumissionnaires n'avaient pas à intégrer dans leurs offres. Si la reprise de la totalité des contrats de travail, avec maintien de leurs droits, des salariés de Brink's affectés au marché litigieux ne s'imposait pas au nouvel attributaire, la Commission aurait donc dû la rendre obligatoire pour éviter une telle rupture du principe d'égalité de traitement.

108 La requérante estime qu'imposer la reprise des contrats de travail n'aurait pas empêché les autres soumissionnaires de proposer des prix inférieurs, en optimisant d'autres aspects de leurs offres.

109 La Commission fait valoir que la condition d'une expérience professionnelle minimale d'un an pour les agents est une exigence réaliste et adaptée à la spécificité de la mission de surveillance de ses locaux, qui a par ailleurs contribué à ouvrir le plus largement possible le marché à la concurrence.

110 Elle ajoute qu'exiger une expérience professionnelle minimale plus élevée, afin de prendre en compte les contraintes salariales qui pèsent sur Brink's, aurait été discriminatoire à l'égard des autres soumissionnaires.

111 La Commission estime par ailleurs qu'elle n'était pas habilitée par le droit luxembourgeois à imposer la reprise des contrats de travail.

Appréciation du Tribunal

112 Aux termes de l'article 89, paragraphe 1, du règlement financier, tous les marchés publics financés totalement ou partiellement par le budget respectent les principes de transparence, de proportionnalité, d'égalité de traitement et de non-discrimination.

113 Ainsi, selon une jurisprudence constante, le pouvoir adjudicateur est tenu, à chaque phase d'une procédure d'appel d'offres, au respect du principe d'égalité de traitement des soumissionnaires et, par voie de conséquence, au respect de l'égalité des chances de tous les soumissionnaires (arrêt de la Cour du 29 avril 2004, Commission/CAS Succhi di Frutta, C-496/99 P, Rec. p. I-3801, point 108 ; arrêts du Tribunal du 17 décembre 1998, Embassy Limousines & Services/Parlement, T-203/96, Rec. p. II-4239, point 85, et du 12 juillet 2007, Evropaïki Dynamiki/Commission, T-250/05, non publié au Recueil, point 45).

114 Le principe d'égalité de traitement entre les soumissionnaires, qui a pour objectif de favoriser le développement d'une concurrence saine et effective entre les entreprises participant à un marché public, impose que tous les soumissionnaires disposent des mêmes chances dans la formulation des termes de leurs offres et implique donc que celles-ci soient soumises aux mêmes conditions pour tous les compétiteurs (voir arrêt du Tribunal du 12 mars 2008, European Network/Commission, T-332/03, non publié au Recueil, point 125, et la jurisprudence citée).

115 Quant au principe de transparence, qui en constitue le corollaire, il a essentiellement pour but de garantir l'absence de risque de favoritisme et d'arbitraire de la part du pouvoir adjudicateur. Il implique que toutes les conditions et modalités de la procédure d'attribution soient formulées de manière claire, précise et univoque, dans l'avis de marché ou dans le cahier des charges (arrêt Commission/CAS Succhi di Frutta, point 113 supra, point 111).

116 Dans le même sens, l'article 131, paragraphe 1, premier alinéa, des modalités d'exécution prévoit que « [l]es spécificités techniques doivent permettre l'égalité d'accès des candidats et soumissionnaires et ne pas avoir pour effet de créer des obstacles injustifiés à l'ouverture des marchés à la concurrence ».

117 En l'espèce, la requérante prétend que, en imposant dans le cahier des charges une expérience professionnelle minimale d'un an, l'appel d'offres ne permettrait pas d'assurer l'égalité de traitement des soumissionnaires.

118 Il y a lieu de constater que la condition d'une expérience professionnelle dans le domaine du gardiennage d'un an au minimum pour les agents, prévue au point 21 du cahier des charges, s'applique indistinctement à tous les soumissionnaires.

119 Par ailleurs, cette condition a été énoncée de manière claire, précise et univoque.

120 En outre, l'exigence d'une expérience professionnelle minimale d'un an n'apparaît pas inappropriée au regard des missions de surveillance à accomplir dans le cadre de l'exécution du contrat. Il convient d'observer que, pour les emplois de responsable de site et de chef d'équipe, le cahier des charges exigeait une expérience professionnelle minimale de cinq ans dans le domaine du gardiennage, dont deux ans au minimum dans la responsabilité d'équipes de gardiennage, et une expérience professionnelle minimale de trois ans pour les opérateurs du dispatching de sécurité. Les dispositions du cahier des charges relatives à l'expérience professionnelle des agents dénotent donc l'intention du pouvoir adjudicateur d'adapter les exigences relatives à l'expérience professionnelle aux spécificités de l'emploi à occuper.

121 Au demeurant, la requérante ne conteste pas l'adéquation de l'exigence d'une expérience professionnelle minimale d'un an aux spécificités de la tâche à accomplir.

122 En tout état de cause, la Commission, ainsi qu'elle le souligne, aurait contribué à réduire le nombre de soumissionnaires potentiels en imposant une expérience professionnelle supérieure à un an et aurait par là même restreint le développement d'une concurrence effective sans que cela apparaisse justifié par les nécessités de la mission. Une telle condition aurait constitué un obstacle injustifié à l'ouverture des marchés au sens de l'article 131 des modalités d'exécution.

123 Il y a également lieu de relever que la directive 2001/23, transposée en droit luxembourgeois par la loi du 19 décembre 2003, a un champ d'application déterminé. Il n'appartenait pas à la Commission, dès lors que les conditions d'un transfert d'entreprise n'étaient pas réunies (voir points 89 à 97 ci-dessus), d'imposer la reprise des contrats de travail. En effet, la Commission n'a pas le pouvoir d'obliger une société à transférer ses contrats de travail, ni même à engager des personnes qu'elle n'a pas choisies.

124 Partant, il y lieu de conclure qu'il n'appartenait pas à la Commission, en vertu du principe d'égalité de traitement des soumissionnaires, d'imposer une expérience professionnelle minimale supérieure à un an, ni d'imposer la reprise des agents affectés par Brink's à l'exécution du marché. Le présent moyen doit donc être rejeté.

c) Sur le troisième moyen, tiré de la violation du principe d'égalité de traitement appliqué aux marchés publics, résultant de la détention par Group 4 Falck d'informations privilégiées au moment de la remise de son offre

Arguments des parties

125 La requérante estime que Group 4 Falck disposait d'informations privilégiées la concernant, qui ont pu l'aider et l'avantager dans la préparation de son offre. Il en résulterait une violation du principe d'égalité de traitement, plus particulièrement de l'égalité de traitement des soumissionnaires.

126 Ces informations essentielles auraient été transmises par Securicor Luxembourg – devenue Brink's – à son ancienne maison mère lors de la fusion entre Group 4 Falck A/S et Securicor, afin de répondre aux demandes d'informations additionnelles formulées par la Commission à la suite de la notification de la concentration. Il s'agirait notamment des chiffres d'affaires par clients et par activités, de données sur les contrats, de listes de clientèle, d'informations sur les personnes de contact ainsi que d'analyses des prix, des coûts, des marges et des bénéfices. À supposer même que la Commission ait pu légitimement ignorer ce fait lors de l'adjudication, elle aurait dû retirer sa décision d'attribution dès lors qu'il avait été porté à sa connaissance par la requérante dans un courrier du 5 décembre 2005.

127 La requérante souligne que le dispositif d'isolement (« ring fencing ») prévu par la décision de la Commission du 28 mai 2004 afin de s'assurer que Group 4 Falck ne puisse obtenir et utiliser des secrets d'affaires, des savoir-faire, des informations commerciales ou toute autre information confidentielle concernant les actifs cédés n'a été mis en place qu'à compter de la date de cette décision.

128 La Commission considère que le principe d'égalité de traitement des soumissionnaires n'est pas méconnu du seul fait qu'un des soumissionnaires dispose de certaines informations, fussent-elles privilégiées, dont ne disposent pas les autres soumissionnaires. Elle estime ne pas être tenue de vérifier systématiquement si les informations dont disposent les soumissionnaires sont de nature confidentielles.

129 La Commission précise qu'elle n'avait aucune raison de croire, au moment de l'attribution du marché, que l'attributaire disposait de telles informations, un dispositif d'isolement ayant été mis en place à la suite de la décision de la Commission du 28 mai 2004. La requérante n'a pas démontré, selon elle, que Group 4 Falck aurait bénéficié d'informations privilégiées.

130 L'intervenante indique n'avoir jamais obtenu d'informations sur la requérante ou sur le marché litigieux de la part de sa maison mère, Group 4 Falck A/S, ou de la société née de la fusion des deux groupes, la société Group 4 Securicor plc, ni avant ni après la fusion. Elle relève que, en tout état de cause, les informations qui auraient été transmises, selon la requérante, étaient trop générales pour pouvoir présenter une utilité dans le cadre de cette soumission, dans la mesure où n'y figuraient pas des données essentielles telles que le détail des frais (salaires, taux d'absentéisme, frais d'encadrement et de formation) et la marge bénéficiaire concernant le marché en cause. Ces informations seraient en outre anciennes et obsolètes, compte tenu des changements intervenus à la suite de l'intégration de la requérante dans le groupe Brink's Inc. et des différences importantes entre l'appel d'offres et le précédent (redéfinition des catégories d'agents et des missions qui leur sont assignées, obligations nouvelles de formation et contraintes renforcées en ce qui concerne le matériel).

Appréciation du Tribunal

131 Il convient de déterminer si Group 4 Falck détenait des informations confidentielles qui ont pu l'avantager de manière déterminante dans la préparation de son offre. Cela exige qu'il soit établi, d'une part, que des informations essentielles de cette nature ont été transmises par la requérante lors de la notification de la concentration et, d'autre part, que ces informations ont ensuite été communiquées à Group 4 Falck par sa société mère et utilisées par Group 4 Falck lors de la préparation de son offre.

132 La requérante prétend avoir transmis des informations essentielles à son ancienne maison mère, Securicor, dont aurait bénéficié Group 4 Falck. Elle a produit, en annexe à la requête, une série de messages électroniques adressés entre le 5 mars 2004 et le 26 avril 2004 à Securicor, qui comportent notamment des informations relatives au marché du gardiennage au Luxembourg, aux chiffres d'affaires produits par les dix contrats les plus importants de la requérante (au premier rang desquels figure le gardiennage des locaux de la Commission) et à la structure des coûts, directs et indirects, de son activité de gardiennage. Des données sociales, telles que le taux moyen d'arrêts maladie constaté ou l'importance des heures supplémentaires ainsi que le taux de marge relatif à l'activité de gardiennage de la requérante, figurent également parmi les informations transmises.

133 Ces informations, relatives à l'ensemble de l'activité de gardiennage de la requérante et non au marché litigieux, ne sont pas de nature à avoir avantagé le soumissionnaire retenu de manière déterminante, car elles ne permettent pas de calculer avec précision le prix de l'offre de la requérante.

134 La requérante n'apporte par ailleurs aucun élément de preuve au soutien de son affirmation selon laquelle ces informations auraient été transmises à Group 4 Falck par sa société mère et utilisées par Group 4 Falck lors de la préparation de son offre, en violation des déclarations de confidentialité signées par les salariés de Group 4 Falck, en application de la décision de la Commission du 28 mai 2004.

135 Il convient également de relever que la requérante et l'intervenante n'étaient pas les seules entreprises ayant soumissionné. À supposer même que lesdites informations aient été en possession du soumissionnaire retenu, il eût été risqué pour celui-ci de formuler son offre exclusivement par rapport à celle de la requérante, qui n'était que l'une des six soumissionnaires, en se fondant sur des données datant de 2004 et antérieures à la reprise de Securicor Luxembourg – devenue Brink's – par le groupe Brink's, qui pouvait avoir, entre-temps, introduit des changements importants dans la gestion de l'entreprise.

136 Il résulte de ce qui précède que la requérante n'a démontré ni avoir transmis lors de la notification de l'opération de concentration des informations confidentielles de nature à avantager Group 4 Falck dans la préparation de son offre, ni que de telles informations auraient été transmises à Group 4 Falck par sa société mère et utilisées par le soumissionnaire retenu dans le cadre de l'appel d'offres.

137 Le présent moyen doit donc être rejeté.

d) Sur le quatrième moyen, tiré de la violation de la décision de la Commission du 28 mai 2004

Arguments des parties

138 Par le présent moyen, la requérante fait valoir que la décision d'attribution est illégale au motif qu'elle méconnaîtrait la décision de la Commission du 28 mai 2004.

139 La décision de la Commission du 28 mai 2004 aurait autorisé la fusion entre Group 4 Falck A/S et Securicor sous réserve de la cession d'un certain nombre d'actifs, parmi lesquels figurait Securicor Luxembourg, cédée au groupe Brink's. Selon la requérante, l'attribution à Group 4 Falck du marché litigieux antérieurement détenu par Brink's aurait pour effet de permettre à Securicor de récupérer les parts de marchés et les actifs cédés dans le cadre de la fusion. Cette récupération aurait en outre été permise par la détention d'informations confidentielles obtenues par le groupe Group 4 Securicor lors de la notification de la concentration.

140 La Commission conteste toute violation de sa décision du 28 mai 2004, en particulier des engagements pris par Group 4 Falck A/S et Securicor pour obtenir une décision de compatibilité de la concentration avec le marché commun.

141 La Commission souligne que l'engagement 10 figurant dans la décision, selon lequel Group 4 Falck Securicor ne devait pas solliciter activement les clients des sociétés cédées pendant une période de six mois à compter de la cession, n'a pas été violé. La soumission de l'offre de Group 4 Falck aurait en effet eu lieu le 12 octobre 2005, soit postérieurement au délai de six mois suivant la cession, intervenue le 4 mars 2005.

142 Selon l'engagement 9 figurant dans la décision de la Commission du 28 mai 2004, Group 4 Falck aurait été également tenue de ne pas obtenir ou utiliser des informations confidentielles concernant

la requérante. Or, selon la Commission, Group 4 Falck n'a pas pu violer cet engagement compte tenu du dispositif d'isolement mis en place lors de l'opération de concentration, comme l'atteste le rapport du mandataire chargé de contrôler le respect des engagements pris. La Commission estime que la requérante n'apporte aucune preuve tendant à démontrer que les engagements pris auraient été violés.

143 La requérante précise, dans le mémoire en réplique, que le dispositif d'isolement n'a été mis en place qu'après l'adoption de la décision de la Commission du 28 mai 2004 et ne vise que les informations transmises à compter de celle-ci, alors que les informations confidentielles concernant le marché litigieux ont été transmises avant cette date.

144 Elle ajoute également que, si le calendrier prévu par l'avis de préinformation avait été respecté, Group 4 Falck n'aurait pas été autorisée à participer à la procédure d'appel d'offres, compte tenu du délai de six mois prévu par l'engagement 10.

145 La Commission souligne que la date de publication de l'avis de marché annoncée dans l'avis de préinformation n'est qu'une estimation, à caractère indicatif. Elle explique que l'élaboration de l'appel d'offres a pris plus de temps qu'initialement prévu, car il concernait différents organes de la Communauté.

Appréciation du Tribunal

146 L'argument de la requérante selon lequel l'attribution du marché litigieux à Group 4 Falck conduirait le groupe issu de la fusion à récupérer les parts de marchés, donc les actifs cédés, doit être écarté. L'objectif de la cession des actifs détenus par Securicor sur le marché du gardiennage au Luxembourg imposée par la décision de la Commission du 28 mai 2004 est d'empêcher que la concentration ne conduise à créer une position dominante sur ce marché. Cette cession n'a pas pour objet d'interdire au groupe issu de la fusion de reconstituer ses parts de marché sur le marché concerné, dès lors que cette reconstitution de ses parts de marché résulte du libre jeu de la concurrence, ce qui est le cas en l'espèce. L'interprétation que la requérante fait de la cession d'actifs imposée par la décision de la Commission du 28 mai 2004 conduirait à fausser le libre jeu de la concurrence, en figeant de manière définitive la part de marché détenue par la filiale du groupe issu de la fusion sur le marché concerné.

147 En ce qui concerne la violation de l'engagement 9 relatif à l'interdiction d'obtenir et d'utiliser des informations confidentielles, il convient de relever que la requérante n'apporte aucun élément de fait ou de preuve au soutien de son affirmation selon laquelle cet engagement aurait été violé.

148 L'engagement 10 de la décision de la Commission du 28 mai 2004 interdisant toute sollicitation active de ses anciens clients (dont la Commission fait partie) par Group 4 Falck durant une période de six mois à compter de la cession, soit jusqu'au 4 septembre 2005, n'a pas davantage été violé. Seule la soumission formelle d'une offre est en effet susceptible d'être considérée comme une sollicitation active, en ce qui concerne un marché faisant l'objet d'un appel d'offres. Or, l'offre de Group 4 Falck a été soumise le 12 octobre 2005, après l'expiration du délai. Ni la demande de Group 4 Falck formulée le 25 mars 2005, visant à être informée de la date à laquelle le cahier des charges serait disponible, ni celle visant à obtenir les spécifications de l'appel d'offres, déposée le 1er septembre 2005, ne peuvent être considérées comme une sollicitation active dans ce contexte.

149 Par ailleurs, l'argument de la requérante fondé sur le décalage entre la publication de l'appel d'offres et la date annoncée dans l'avis de préinformation doit être rejeté. La date annoncée dans cet avis ne constitue en effet qu'une estimation, dépourvue de caractère contraignant pour le pouvoir adjudicateur.

150 Il résulte de ce qui précède que le présent moyen doit être écarté.

e) Sur le cinquième moyen, tiré de la violation de l'obligation de motivation, du principe de transparence et du droit d'accès aux documents des institutions

Arguments des parties

151 Selon la requérante, la Commission a violé l'obligation de motivation prévue par l'article 253 CE, l'article 12, paragraphe 1, de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), l'article

100, paragraphe 2, du règlement financier et l'article 149, paragraphe 3, des modalités d'exécution.

152 Elle estime que la seule communication des notes respectivement attribuées à Group 4 Falck et à elle-même au titre de chaque critère d'attribution, sans préciser la méthode d'évaluation retenue ni son application pratique, constitue une motivation insuffisante. La requérante rappelle qu'elle a clairement indiqué à la Commission, dans sa lettre du 8 décembre 2005, qu'elle jugeait insuffisante la motivation qu'elle avait fournie.

153 La requérante estime que la réponse fournie par la Commission dans son courrier du 14 décembre 2005, se bornant à lui indiquer que Group 4 Falck avait fourni suffisamment de documents probants, est inacceptable pour une institution astreinte à une obligation de transparence.

154 En outre, la requérante prétend que, en ne lui communiquant pas les documents fournis par Group 4 Falck afin de prouver les informations requises par le cahier des charges, la Commission a violé le droit d'accès aux documents des institutions. De plus, ce refus ne reposerait sur aucun motif légitime. Elle estime que la Commission aurait pu lui communiquer une version anonymisée des documents.

155 La Commission fait valoir qu'elle a suffisamment motivé ses décisions d'attribution et de rejet au regard de la jurisprudence relative à l'étendue de l'obligation de motivation des actes en matière de marchés publics.

156 Elle ajoute que sa motivation étant suffisante, elle n'avait pas à communiquer les documents probants fournis par Group 4 Falck dans le cadre de la soumission de son offre.

Appréciation du Tribunal

157 À titre liminaire, il convient de relever que la requérante a confirmé, en réponse à une question écrite du Tribunal, que, par le présent moyen, en dépit de l'intitulé de celui-ci, elle se limite à invoquer la violation de l'obligation de motivation.

158 Il est de jurisprudence constante que la motivation exigée par l'article 253 CE doit être adaptée à la nature de l'acte en cause et doit faire apparaître de façon claire et non équivoque le raisonnement de l'institution auteur de l'acte, de manière à permettre aux intéressés de connaître les justifications de la mesure prise et à la juridiction compétente d'exercer son contrôle (arrêt de la Cour du 2 avril 1998, Commission/Sytraval et Brink's France, C–367/95 P, Rec. p. I–1719, point 63 ; arrêts du Tribunal du 14 juillet 1995, Koyo Seiko/Conseil, T–166/94, Rec. p. II–2129, point 103, et du 8 mai 1996, Adia Interim/Commission, T–19/95, Rec. p. II–321, point 32).

159 Contrairement à ce que fait valoir la requérante, l'obligation de motivation du rejet de son offre qui incombe à la Commission ne relève pas, en l'espèce, de la directive 92/50. Ainsi qu'il a été rappelé aux points 1 à 3 ci-dessus, le règlement financier et les modalités d'exécution sont les dispositions pertinentes applicables en l'espèce et, plus précisément, l'article 100, paragraphe 2, du règlement financier et l'article 149 des modalités d'exécution, qui régissent l'obligation de motivation qui incombe à l'institution compétente dans le cadre d'une procédure de passation des marchés publics.

160 Or, il résulte de ces dispositions ainsi que d'une jurisprudence constante que le pouvoir adjudicateur satisfait à son obligation de motivation s'il se contente, tout d'abord, d'informer immédiatement les soumissionnaires écartés des motifs du rejet de leur offre et s'il fournit, ensuite, aux soumissionnaires ayant fait une offre recevable et qui en font la demande expresse, les caractéristiques et avantages relatifs de l'offre retenue ainsi que le nom de l'attributaire dans un délai de quinze jours à compter de la réception d'une demande écrite (arrêt du Tribunal du 10 septembre 2008, Evropaïki Dynamiki/Commission, T–465/04, non encore publié au Recueil, point 47, et la jurisprudence citée).

161 Cette façon de procéder est conforme à la finalité de l'obligation de motivation inscrite à l'article 253 CE.

162 Par conséquent, pour déterminer si, en l'espèce, la Commission a respecté son obligation de motivation, il y a lieu d'examiner les décisions d'attribution et de rejet ainsi que les lettres de la Commission des 5, 7 et 14 décembre 2005, envoyées à la requérante en réponse à ses demandes expresses des 1er, 5 et 8 décembre 2005 visant à obtenir des informations supplémentaires sur les

décisions d'attribution et de rejet.

163 Dans la décision de rejet, la Commission, conformément à l'article 100, paragraphe 2, du règlement financier, a exposé les motifs pour lesquels l'offre de la requérante avait été rejetée, à savoir que ladite offre n'avait pas obtenu la meilleure note attribuée à l'issue de l'évaluation finale. Elle informait aussi la requérante de la possibilité de demander des renseignements additionnels sur les motifs du rejet de son offre et, cette dernière ayant été recevable, d'obtenir les caractéristiques et avantages relatifs de l'offre retenue ainsi que le nom de l'attributaire du marché.

164 S'agissant des lettres des 5, 7 et 14 décembre 2005, il importe de relever, d'emblée, que la Commission a répondu aux demandes écrites de la requérante des 1er, 5 et 8 décembre 2005 dans le respect du délai maximal de quinze jours de calendrier, à compter de la réception desdites demandes, tel que prévu à l'article 149, paragraphe 3, des modalités d'exécution.

165 La lettre du 5 décembre 2005 était rédigée dans les termes suivants :

« […]

Le cahier des charges prévoyait d'attribuer le marché à l'offre économiquement la plus avantageuse, suivant la méthodologie qui y est détaillée.

L'attributaire du marché relatif à l'appel d'offres […] est la société :

[Group 4 Falck]

[…]

La comparaison de l'évaluation de votre offre par rapport à celle de l'attributaire est détaillée dans le tableau repris ci-dessous :

	Group Falck 4	[Brink's]
Évaluation qualitative	30/30	30/30
Évaluation financière	70/70	68,67/70
Évaluation finale	100/100	98,67/100
RANG	1	2

[…] »

166 La lettre du 14 décembre 2005, qui contenait plusieurs informations en réponse aux précisions sollicitées par la requérante, indiquait notamment :

« […]

En complément à notre courrier précédent, veuillez trouver ci–après les informations complémentaires à l'évaluation qualitative des offres :

Évaluation qualitative	Group 4 Falck	[Brink's]
Critère 26 : Organisation mise en place pour assurer les prestations objet du contrat	10/10	10/10
Critère 27 : Organisation mise en place – délais de mise en place d'un dispositif efficace lors de diverses manifestations ou événements imprévus ou de toute modification apportée au dispositif de gardiennage	10/10	10/10
Critère 28 : Formation de base de secouriste et/ou de pompier volontaire	10/10	10/10
TOTAL	30/30	30/30

En ce qui concerne les critères 26 et 27, les descriptions fournies, tant par Brink's que par Group 4 Falck, ont été jugées très complètes et très satisfaisantes. Elles méritent dès lors le maximum de points, conformément à la méthodologie détaillée au cahier des charges.

En ce qui concerne le critère 28, Group 4 Falck a fourni suffisamment de documents probants permettant de justifier les 10 points obtenus pour ce critère.

Pour des raisons de confidentialité de l'offre de votre concurrent, il ne nous est pas autorisé de vous en détailler davantage le contenu.

[...] »

167 Il y a lieu de constater que, en précisant, dans ces lettres, le nom de l'attributaire ainsi que les caractéristiques et les avantages relatifs de l'offre retenue par rapport à celle de la requérante au regard des critères d'attribution déterminés dans le cahier des charges, la Commission a motivé à suffisance de droit le rejet de l'offre de la requérante.

168 Premièrement, les tableaux fournis permettaient à la requérante de comparer directement, pour chaque critère, les points qui lui avaient été attribués avec ceux obtenus par le soumissionnaire retenu, la Commission ne s'étant pas bornée à communiquer à la requérante les totaux des notes obtenues par les deux offres concernées. En particulier, le premier tableau permettait à la requérante d'identifier immédiatement les raisons précises pour lesquelles son offre n'avait pas été choisie, à savoir l'obtention d'une note inférieure à celle de Group 4 Falck en ce qui concerne l'évaluation financière (voir, en ce sens, arrêts du Tribunal du 26 février 2002, Esedra/Commission, T–169/00, Rec. p. II–609, points 191 à 193 ; du 25 février 2003, Strabag Benelux/Conseil, T–183/00, Rec. p. II–135, point 57, et du 25 février 2003, Renco/Conseil, T–4/01, Rec. p. II–171, point 95).

169 Deuxièmement, la lettre du 14 décembre 2005 faisait également ressortir que l'offre de la requérante n'avait pas été classée, pour aucun des trois critères de qualité précisés par le cahier des charges, en meilleure position que l'offre retenue. Par ailleurs, les commentaires généraux figurant dans cette lettre en complément des notes donnaient des précisions sur les raisons ayant conduit la Commission à attribuer le maximum de points aux deux offres concernées.

170 Enfin, la requérante ne peut valablement soutenir qu'elle n'a pas été informée par la Commission de la méthode d'évaluation retenue pour chaque critère ainsi que de son application pratique.

171 En effet, destinataire du cahier des charges de l'appel d'offres, Brink's était précisément informée de la méthode d'évaluation retenue par la Commission avant même que celle-ci n'attribue le marché litigieux à l'intervenante. La lettre de la Commission du 14 décembre 2005 lui a ensuite apporté les précisions requises concernant l'application qui en a été opérée.

172 S'agissant des critères figurant aux points 26 et 27 du cahier des charges, ce dernier décrivait la méthode d'évaluation suivie en rappelant notamment qu'une description très satisfaisante de l'organisation mise en place afin, d'une part, d'assurer de manière optimale les prestations sur les différents sites et, d'autre part, de minimiser les délais de mise en œuvre d'un dispositif efficace lors de diverses manifestations ou événements imprévus ou de toute modification apportée au dispositif de gardiennage conduirait à l'obtention de la note maximale, soit 10 points, pour chacun de ces deux critères. Dans sa lettre du 14 décembre 2005, la Commission a explicité l'application qu'elle a opérée de cette méthode en indiquant à la requérante que les descriptions fournies par Brink's et Group 4 Falck au titre de ces deux critères ont été jugées très satisfaisantes et que le maximum de points leur a donc été attribué, conformément à la méthodologie détaillée dans le cahier des charges.

173 S'agissant du critère figurant au point 28 du cahier des charges, ce dernier précise la méthode d'évaluation retenue, en indiquant que l'offre présentant le pourcentage le plus grand d'agents ayant suivi une formation de base de secouriste ou de pompier volontaire se verrait attribuer le maximum de points, les autres offres se voyant attribuer une note inférieure en proportion de leur écart avec le pourcentage le plus élevé. L'attribution de la note maximale à l'offre de la requérante et à celle du soumissionnaire retenu, portée à la connaissance de la requérante par la lettre du 14 décembre 2005, signifiait dès lors que ces deux entreprises avaient indiqué un pourcentage identique. En conséquence, l'application de la méthode prévue par le cahier des charges n'appelait pas, au titre de l'obligation de motivation, d'explication particulière de la part de la Commission, en sus des précisions données à la requérante en réponse à sa demande d'éclaircissement relative aux documents probants fournis par l'intervenante.

174 S'agissant de l'évaluation financière des offres, le point 29 du cahier des charges précisait que l'offre présentant le prix le plus bas se verrait attribuer le maximum de points, les autres offres

obtenant une note inversement proportionnelle. Les notes attribuées à l'offre de la requérante et à celle du soumissionnaire retenu reposent donc sur un raisonnement mathématique dont l'application n'appelait pas d'explication complémentaire de la part de la Commission.

175 Au vu de ces informations, il y a lieu de conclure que la Commission s'est acquittée de son obligation de motivation, telle qu'interprétée par la jurisprudence.

176 Il y a lieu de relever également que la Commission n'était pas tenue de communiquer à la requérante, au titre de la motivation des décisions d'attribution et de rejet, les documents fournis par Group 4 Falck. En effet, l'article 100, paragraphe 2, du règlement financier prévoit uniquement que le pouvoir adjudicateur communique, à la suite d'une demande écrite, les caractéristiques et les avantages relatifs de l'offre retenue ainsi que le nom de l'attributaire.

177 Partant, le présent moyen doit être rejeté, la Commission n'ayant pas violé l'obligation de motivation.

f) Sur le sixième moyen, tiré de la violation des règles du marché, de la méconnaissance du cahier des charges en ce qui concerne l'évaluation du critère qualitatif relatif à la formation de base de secouriste et/ou de pompier volontaire des agents et d'une erreur manifeste d'appréciation

Arguments des parties

178 La requérante affirme que Group 4 Falk ne disposait pas, lors de la soumission de son offre, ni même au jour du dépôt de la requête, des agents de sécurité nécessaires à l'exécution du marché litigieux. Elle avance que l'intervenante n'a donc pas pu remettre les documents probants exigés par le point 28 du cahier des charges, à savoir les copies des certificats de formation des agents, afin de prouver que 100 % des agents de sécurité concernés disposaient d'une formation de secouriste et/ou de pompier volontaire comme elle l'annonçait dans son offre. Or, selon la requérante, l'indication d'un pourcentage non prouvé entraîne l'irrégularité de l'offre et de la décision lui attribuant le marché. À ce titre, l'offre de Group Falck aurait dû être rejetée.

179 La requérante estime que le pourcentage indiqué par l'intervenante dans son offre aurait dû, pour le moins, être réduit à hauteur du rapport entre le nombre de certificats fournis par Group 4 Falck et ceux produits par la requérante, soit à environ 45 % au lieu de 100 %.

180 La requérante insiste sur le fait que le critère figurant au point 28 du cahier des charges est un critère d'attribution, et non un engagement contractuel, et que le pourcentage annoncé devait être vérifié et vérifiable au jour de la soumission de l'offre.

181 La requérante conteste également, dans le mémoire en réplique et dans ses observations sur le mémoire en intervention, la valeur probante du courrier de la SNCH du 11 octobre 2005. Ce document ne saurait établir, selon elle, que 100 % des agents de sécurité de Group 4 Falck ont bénéficié de la formation requise, car il ne constitue qu'une certification d'un système de gestion de la qualité conforme au référentiel ISO 9001:2000 (ci-après « ISO 9001 ») fondée sur des sondages et donc soumise au risque de l'échantillonnage.

182 La requérante conteste par ailleurs la valeur probante de ce document au motif qu'il ne comporte pas de destinataire et qu'il ne mentionne pas le but exact pour lequel il aurait été établi. Elle estime également que son signataire n'était pas habilité pour engager la SNCH, dont il n'est ni gérant, ni administrateur. Elle affirme que des pressions auraient été exercées par Group 4 Falck sur les auditeurs de la SNCH afin d'obtenir la rédaction de la lettre du 11 octobre 2005.

183 La requérante a annexé à ses observations sur le mémoire en intervention plusieurs pièces, parmi lesquelles figure un courrier électronique du 18 décembre 2006 de l'auditeur de la SNCH ayant signé la lettre du 11 octobre 2005. La requérante a également annexé à ses observations cinq attestations émanant de ses salariés, visant à confirmer que les représentants de la SNCH auraient affirmé, lors d'une réunion qui s'est tenue dans les locaux de Brink's le 6 décembre 2006, avoir rédigé la lettre du 11 octobre 2005 en raison de l'insistance de Group 4 Falck. La requérante a également proposé au Tribunal de procéder à l'audition de plusieurs de ses salariés ayant participé à cette réunion ainsi qu'à celle de deux salariés de la SNCH.

184 La Commission considère que la notation ne s'effectue pas en fonction du nombre de certificats fournis, mais uniquement au regard du pourcentage indiqué, étant donné notamment que

l'adjudicateur ne peut pas déterminer a priori le nombre d'agents nécessaires à l'exécution du contrat.

185 Selon la Commission, les 78 certificats produits par Group 4 Falck prouvent que 100 % des employés que ce soumissionnaire entendait d'ores et déjà affecter au contrat étaient titulaires des formations exigées au moment de l'évaluation de l'offre. L'attestation de la SNCH prouverait quant à elle que 100 % des agents de Group 4 Falck devaient avoir suivi une formation de secouriste et/ou de pompier volontaire au moment de l'exécution du contrat, car elle attesterait qu'une formation est dispensée à chaque nouvel agent engagé.

186 La Commission fait valoir que l'interprétation du critère relatif à la formation des agents défendue par Brink's conduirait à exiger de la part des soumissionnaires qu'ils disposent déjà dans leurs effectifs de la totalité des agents nécessaires pour l'exécution du contrat. Il en résulterait une inégalité de traitement des soumissionnaires, qui destinerait immanquablement le contrat litigieux au contractant sortant.

187 L'intervenante fait valoir que, en fournissant 78 certificats de formation, elle a produit autant de certificats que d'agents visés au point 22 du cahier des charges. Concernant les autres agents susceptibles d'être affectés au marché, et non visés au point 22 du cahier des charges, Group 4 Falck aurait fourni l'attestation de la SNCH prouvant de manière globale leur formation en matière de premiers secours et de lutte contre l'incendie.

188 Selon l'intervenante, l'attestation de la SNCH qu'elle a fournie permet de prouver que le personnel opérationnel se voit dispenser une formation initiale dans les domaines des premiers secours et de la lutte contre l'incendie, conformément à la norme ISO 9001, dont le respect est attesté par un premier certificat, lui-même délivré par la SNCH à la suite de plusieurs procédures d'audit menées auprès de Group 4 Falck.

189 L'intervenante a contesté la recevabilité des nouvelles pièces produites par la requérante dans ses observations sur le mémoire en intervention au regard de l'article 48 du règlement de procédure. À titre subsidiaire, elle a déposé, lors de l'audience, de nouvelles pièces en réponse à celles déposées par la requérante.

Appréciation du Tribunal

– Sur la recevabilité des offres de preuve nouvelles présentées par la requérante et l'intervenante

190 Aux termes de l'article 48, paragraphe 1, du règlement de procédure, les parties peuvent faire des offres de preuve à l'appui de leur argumentation dans la réplique et la duplique, mais doivent alors motiver le retard apporté à la présentation de celles-ci. Cependant, selon la jurisprudence, la preuve contraire et l'ampliation des offres de preuve fournies à la suite d'une preuve contraire de la partie adverse dans son mémoire en défense ne sont pas visées par la règle de forclusion prévue à l'article 48, paragraphe 1, du règlement de procédure. En effet, cette disposition concerne les offres de preuve nouvelles et doit être lue à la lumière de l'article 66, paragraphe 2, dudit règlement, qui prévoit expressément que la preuve contraire et l'ampliation des offres de preuve restent réservées (arrêts de la Cour du 17 décembre 1998, Baustahlgewebe/Commission, C–185/95 P, Rec. p. I–8417, points 71 et 72, et du Tribunal du 12 septembre 2007, Commission/Trends, T–448/04, non publié au Recueil, point 52).

191 En l'espèce, la production par la requérante du courrier électronique de la SNCH du 18 décembre 2006, du courrier électronique du directeur juridique de Brink's du même jour, des attestations testimoniales de ses salariés ayant assisté à la réunion du 6 décembre 2006 ainsi que des pièces K1 à K4, relatives à la norme ISO 9001 et à la SNCH, constitue une offre de preuve contraire visant à répondre aux pièces produites dans le mémoire en intervention par l'intervenante en vue de démontrer la force probante du document du 11 octobre 2005 établi par la SNCH, à savoir les statuts de la SNCH et de la Société nationale de contrôle technique, le règlement grand-ducal du 28 décembre 2001 portant détermination d'un système d'accréditation des organismes de certification et d'inspection ainsi que des laboratoires d'essais et portant création de l'Office luxembourgeois d'accréditation et de surveillance, d'un comité d'accréditation et d'un recueil national des auditeurs qualité et techniques (Mém. A 2002, p. 94), et le certificat ISO 9001 du 14 février 2005 de Group 4 Falck. Elle n'est donc pas visée par la règle de forclusion prévue à l'article 48, paragraphe 1, du règlement de procédure et doit être déclarée recevable.

192 Les pièces produites par l'intervenante lors de l'audience consistent en une correspondance entre l'intervenante et la SNCH au sujet de la valeur probante du courrier du 11 octobre 2005 et des allégations de la requérante selon lesquelles ce document aurait été établi à la suite de pressions de Group 4 Falck sur les auditeurs de la SNCH. Elles constituent également une offre de preuve contraire, visant à répondre aux observations et aux pièces déposées par la requérante dans ses observations sur le mémoire en intervention. Elles doivent donc être déclarées recevables.

– Sur le fond

193 À titre liminaire, il convient de rappeler que la Commission dispose d'un large pouvoir d'appréciation quant aux éléments à prendre en considération en vue de la prise d'une décision de passer un marché sur appel d'offres et que le contrôle du Tribunal doit se limiter à la vérification du respect des règles de procédure et de motivation ainsi que de l'exactitude matérielle des faits, de l'absence d'erreur manifeste d'appréciation et de détournement de pouvoir (voir, en ce sens, arrêt de la Cour du 23 novembre 1978, Agence européenne d'intérims/Commission, 56/77, Rec. p. 2215, point 20 ; arrêts du Tribunal du 24 février 2000, ADT Projekt/Commission, T–145/98, Rec. p. II–387, point 147, et du 6 juillet 2005, TQ3 Travel Solutions Belgium/Commission, T–148/04, Rec. p. II–2627, point 47).

194 Les parties donnent des interprétations divergentes du critère figurant au point 28 du cahier des charges. Il convient donc de rappeler le contenu du point 28, avant de préciser le sens de ce critère et, enfin, d'examiner la valeur probante du courrier de la SNCH du 11 octobre 2005.

195 Le point 28 du cahier des charges était ainsi libellé :

« Formation de base de secouriste et/ou de pompier volontaire

Les conditions spécifiques d'exécution des prestations stipulent qu'au minimum 10 % des agents de sécurité doivent être titulaires d'une formation de base de secouriste et/ou de pompier volontaire.

– Veuillez indiquer ici le pourcentage d'agents concernés par ces formations : … %

– Veuillez transmettre des documents probants permettant au pouvoir adjudicateur de vérifier le pourcentage annoncé (copie des certificats).

L'offre présentant le pourcentage maximum se verra attribuer le maximum de points. Les autres offres se verront attribuer une note inversement proportionnelle. »

196 La requérante et l'intervenante ont affirmé que 100 % de leurs agents de sécurité disposaient d'une telle formation et ont obtenu 10 points chacune. La requérante a produit 173 certificats de formation à l'appui de ce pourcentage, tandis que l'intervenante a fourni 78 carnets de formation, correspondant aux salariés qu'elle entendait d'ores et déjà affecter au contrat litigieux et dont les curriculum vitae avaient été transmis en application du point 22 du cahier des charges, ainsi qu'un courrier de la SNCH du 11 octobre 2005 attestant que, dans le cadre de la certification ISO 9001 de Group 4 Falck, une formation initiale dans le domaine des premiers secours et de la lutte incendie est dispensée à tout le personnel, que des plans de formation et de maintien à niveau des connaissances sont disponibles et que des audits réalisés en 2004 et en 2005 font ressortir que les procédures mises en place sont effectivement appliquées.

197 Selon la requérante, seuls les soumissionnaires en mesure de démontrer, comme elle l'a fait elle-même, qu'ils disposent, au jour de l'offre, de tous les agents de sécurité nécessaires à l'exécution du contrat et que la totalité de ces agents bénéficient d'une formation de secouriste et/ou de pompier volontaire étaient en droit d'indiquer un pourcentage de 100 %.

198 Cette interprétation ne saurait être admise. Elle conduirait en effet, comme le souligne la Commission, à une violation du principe d'égalité de traitement entre soumissionnaires, car elle avantagerait le titulaire actuel du marché, seul à disposer de l'ensemble des agents nécessaires. Or, il résulte de la jurisprudence qu'exiger que le soumissionnaire dispose au moment du dépôt de son offre du nombre de préposés requis reviendrait à privilégier le soumissionnaire en place (arrêt TQ3 Travel Solutions Belgium/Commission, point 193 supra, point 90). Au surplus, il est impossible pour le pouvoir adjudicateur de déterminer à l'avance le nombre d'agents nécessaires, qui est susceptible de varier d'un soumissionnaire à l'autre en fonction des modalités d'organisation qu'il aura retenues.

199 Le pourcentage figurant au point 28 du cahier des charges doit donc être entendu comme relatif aux agents de sécurité qui seront affectés à l'exécution du contrat. Ce pourcentage devant être prouvé au stade de la soumission de l'offre, il est légitime d'accepter des documents prouvant, d'une part, que le pourcentage annoncé correspond au pourcentage d'agents disposant de la formation requise parmi les agents que le soumissionnaire était déjà tenu d'identifier en vertu du point 22 du cahier des charges et, d'autre part, qu'une politique de formation a été mise en place afin de garantir que chaque nouvel agent recruté disposera de la formation exigée.

200 S'agissant de la valeur probante du courrier de la SNCH du 11 octobre 2005, il y a lieu de relever que la requérante a annexé à ses observations sur le mémoire en intervention un courrier électronique du 18 décembre 2006 de l'auditeur de la SNCH ayant signé la lettre du 11 octobre 2005. Le signataire de ce courrier y précise que la lettre du 11 octobre 2005 ne doit être considérée ni comme un certificat, ni comme une attestation, et qu'elle ne saurait prouver que 100 % du personnel concerné a reçu une formation de secouriste et/ou de pompier volontaire. La portée de la lettre du 11 octobre 2005 se limite par conséquent, selon son signataire, à rappeler que l'existence d'une politique de formation et sa mise en œuvre effective ont été vérifiées et certifiées conformément à la norme ISO 9001.

201 Il convient de constater que la lettre de la SNCH du 11 octobre 2005 n'a pas été interprétée par la Commission, lors de l'évaluation de l'offre du soumissionnaire retenu, comme signifiant que 100 % des agents de Group 4 Falck avaient suivi, au jour de la soumission de l'offre, la formation exigée. Elle a simplement servi à démontrer qu'une politique de formation existait et était effectivement appliquée. Combiné aux 78 certificats de formation attestant que tous les agents que Group 4 Falck entendait d'ores et déjà affecter à l'exécution du marché litigieux disposaient d'une telle formation, cet élément a pu être considéré, à bon droit, comme de nature à prouver que 100 % des agents de sécurité employés par Group 4 Falck disposeront de la formation exigée lors de l'exécution du contrat.

202 En ce qui concerne l'absence de destinataire et de mention de l'objet de la lettre du 11 octobre 2005, il convient de relever que le cahier des charges exigeait que le pourcentage avancé par les soumissionnaires soit démontré par des documents probants et faisait référence à des copies de certificats, sans cependant imposer un quelconque formalisme. Ces arguments doivent donc être écartés.

203 Quant à la qualité du signataire, il convient de constater que la Commission n'a pas commis d'erreur manifeste d'appréciation en estimant qu'un auditeur de la SNCH était habilité à délivrer ce type de certificat. Le mandataire de la SNCH, dans un courrier du 27 février 2007 produit par l'intervenante lors de l'audience, a d'ailleurs confirmé que l'auditeur concerné était habilité à signer ce type de document en vertu des délégations de signature accordées aux experts de la SNCH.

204 L'argument de la requérante relatif aux pressions exercées par Group 4 Falck doit également être écarté, car la délivrance d'un courrier attestant que la certification ISO 9001 dont Group 4 Falck fait l'objet inclut l'existence d'une politique de formation, comme le prévoit cette norme, fait partie des services usuels qu'un organisme de certification offre à toute société certifiée par lui, sur simple demande, ainsi que l'a confirmé le mandataire de la SNCH dans le courrier précité du 27 février 2007.

205 À cet égard, il apparaît que le Tribunal a pu utilement se prononcer sur ce grief sur la base des arguments développés au cours de la procédure tant écrite qu'orale et au vu des documents produits. Dans ces conditions, il y a lieu de rejeter la demande d'audition de témoins présentée par la requérante.

206 Il résulte de ce qui précède que le présent moyen doit être écarté.

g) Sur le septième moyen, tiré de la violation du principe de transparence et du droit d'accès aux documents des institutions

207 Le présent moyen se décompose en deux branches, tirées, d'une part, de la violation du droit d'accès aux documents des institutions et, d'autre part, de l'existence d'un conflit d'intérêts s'agissant de l'un des membres du comité d'évaluation.

Sur la première branche, tirée de la violation du droit d'accès aux documents des institutions

– Arguments des parties

208 La requérante estime que, en refusant de lui communiquer la composition exacte du comité d'évaluation, la Commission vide de sa substance le droit d'accès des citoyens aux actes des institutions. Elle ajoute que ce refus ne saurait être justifié par le motif tiré de la protection de la vie privée et de l'intégrité des personnes.

209 Invoquant l'article 4 du règlement n° 1049/2001, la Commission estime que les informations demandées ne peuvent pas être divulguées. Elle prétend que la communication de la composition du comité d'évaluation porterait atteinte à la protection de la vie privée et à l'intégrité des individus.

– Appréciation du Tribunal

210 Comme il a été indiqué aux points 72 à 75 ci-dessus, la lettre de la Commission du 14 décembre 2005 visée par le présent moyen, bien que constituant une réponse à une demande initiale, doit être considérée comme un acte susceptible de faire l'objet d'un recours en annulation, compte tenu du vice de forme résultant du défaut d'information relative au droit de présenter une demande confirmative.

211 Il convient donc de déterminer si la Commission a pu fonder sa réponse sur l'exception figurant à l'article 4, paragraphe 1, sous b), du règlement n° 1049/2001, relative à la protection de la vie privée et de l'intégrité de l'individu.

212 Conformément à une jurisprudence constante, les exceptions au principe du droit d'accès aux documents des institutions doivent être interprétées de manière stricte (arrêt de la Cour du 11 janvier 2000, Pays-Bas et van der Wal/Commission, C–174/98 P et C–189/98 P, Rec. p. I–1, point 27 ; arrêts du Tribunal du 7 février 2002, Kuijer/Conseil, T–211/00, Rec. p. II–485, point 55, et Franchet et Byk/Commission, point 70 supra, point 84).

213 Selon une jurisprudence constante, l'examen requis pour le traitement d'une demande d'accès à des documents doit revêtir un caractère concret. En effet, la seule circonstance qu'un document concerne un intérêt protégé par une exception ne saurait suffire à justifier l'application de cette dernière (arrêt du Tribunal du 13 avril 2005, Verein für Konsumenteninformation/Commission, T–2/03, Rec. p. II–1121, point 69 ; voir également, en ce sens, arrêt du Tribunal du 26 avril 2005, Sison/Conseil, T–110/03, T–150/03 et T–405/03, Rec. p. II–1429, point 75). Une telle application ne saurait, en principe, être justifiée que dans l'hypothèse où l'institution a préalablement apprécié si l'accès au document était susceptible de porter concrètement et effectivement atteinte à l'intérêt protégé. En outre, le risque d'atteinte à un intérêt protégé doit, pour pouvoir être invoqué, être raisonnablement prévisible et non purement hypothétique (voir, en ce sens, arrêt de la Cour du 1er juillet 2008, Suède et Turco/Conseil, C–39/05 P et C–52/05 P, non encore publié au Recueil, point 43).

214 Afin de déterminer si l'exception prévue à l'article 4, paragraphe 1, sous b), du règlement n° 1049/2001 s'applique, il y a donc lieu d'examiner si l'accès de la requérante à la composition (nom, grade, ancienneté et affectation des membres) du comité d'évaluation est susceptible de porter concrètement et effectivement atteinte à la protection de la vie privée et de l'intégrité des membres dudit comité.

215 Il convient de constater que les membres du comité d'évaluation ont été nommés en qualité de représentants des services intéressés et non à titre personnel. Dans ces circonstances, la divulgation de la composition du comité d'évaluation ne met pas en jeu la vie privée des personnes concernées.

216 En tout état de cause, la divulgation de cette composition n'est pas susceptible de porter concrètement et effectivement atteinte à la protection de la vie privée et de l'intégrité des personnes concernées. La seule appartenance audit comité, au titre de l'entité que les personnes concernées représentaient, ne constitue pas une telle atteinte et la protection de la vie privée et de l'intégrité des personnes concernées n'est pas compromise.

217 Il n'est donc pas démontré que la communication de la composition du comité d'évaluation aurait été de nature à porter atteinte à la vie privée et à l'intégrité des personnes concernées au sens de l'article 4 du règlement n° 1049/2001.

218 Il y a donc lieu d'annuler la décision de la Commission du 14 décembre 2005 par laquelle elle refuse de communiquer à la requérante la composition du comité d'évaluation.

Sur la deuxième branche, tirée de l'existence d'un conflit d'intérêts concernant l'un des membres du comité d'évaluation

– Arguments des parties

219 La requérante prétend qu'un membre du comité d'évaluation a un lien d'alliance avec un employé de Group 4 Falck et qu'il existe donc un conflit d'intérêts s'agissant de ce membre du comité d'évaluation.

220 La Commission précise que le comité d'évaluation a été composé conformément aux prescriptions de l'article 146 des modalités d'exécution et que ses membres ont signé une déclaration d'absence de conflit d'intérêts et confirmé, en réponse à une question qu'elle leur a posée à la suite de l'allégation de la requérante, n'avoir aucun lien d'alliance avec une personne exerçant une activité professionnelle au sein de Group 4 Falck.

221 Elle ajoute que la requérante n'apporte pas la preuve que l'exercice impartial de ses fonctions par un membre du comité d'évaluation a été compromis par des intérêts économiques ou par tout autre intérêt partagé avec le bénéficiaire.

– Appréciation du Tribunal

222 La requérante affirme que « l'attitude de refus de la Commission ne fait que renforcer [ses] doutes […] quant à un traitement égalitaire de son offre et un examen de celle-ci conforme aux critères du cahier des charges selon les exigences de celui-ci » et que « [c]es doutes ont été renforcés tout dernièrement par la connaissance fortuite d'une information troublante puisqu'il semblerait qu'un des membres de ces comités ait un lien d'alliance avec une personne exerçant son activité professionnelle au sein de l'heureux attributaire du marché ».

223 La requérante, qui recourt à de simples allégations de fait formulées sur un mode purement dubitatif, n'apporte aucun commencement de preuve de nature à mettre en doute l'impartialité des membres du comité d'évaluation. Il y a donc lieu de rejeter ce grief.

224 S'agissant de la demande de mesure d'organisation de la procédure relative à la communication de la composition du comité d'évaluation, il y a lieu de relever que, à supposer même que la mesure demandée ait été prononcée, cette composition ne pourrait être communiquée qu'au Tribunal et non à la requérante, en vertu des dispositions de l'article 67, paragraphe 3, troisième alinéa, du règlement de procédure, aux termes duquel « [l]orsqu'un document dont l'accès a été refusé par une institution communautaire a été produit devant le Tribunal dans le cadre d'un recours portant sur la légalité de ce refus, ce document n'est pas communiqué aux autres parties ». La mesure demandée n'est donc pas de nature à permettre à la requérante d'apporter la démonstration que son allégation relative à l'existence d'un conflit d'intérêts concernant l'un des membres du comité d'évaluation est fondée. Elle n'est pas davantage susceptible d'éclairer le Tribunal, qui ne serait pas en mesure de vérifier l'existence du conflit d'intérêts allégué à partir de la liste des membres du comité d'évaluation, compte tenu de l'imprécision de cette allégation.

225 Dans ces conditions, il convient de constater que la requérante n'a pas démontré en quoi la mesure demandée contribuerait à la mise en l'état de l'affaire, au déroulement de la procédure ou au règlement du litige, comme l'exige l'article 64, paragraphe 1, du règlement de procédure. La demande de mesure d'organisation de la procédure de la requérante doit donc être rejetée.

226 Il résulte de l'ensemble de ce qui précède que la lettre de la Commission du 14 décembre 2005 doit être annulée en ce qu'elle a refusé la communication de la composition du comité d'évaluation de l'appel d'offres et que les conclusions tendant à l'annulation de la décision d'attribution doivent être rejetées.

227 S'agissant de la demande d'annulation de la décision de rejet, elle ne peut qu'être rejetée par voie de conséquence du rejet de la demande d'annulation de la décision d'attribution, à laquelle elle est étroitement liée (voir, en ce sens, arrêts du Tribunal du 18 avril 2007, Deloitte Business Advisory/Commission, T–195/05, Rec. p. II–871, point 113, et du 12 novembre 2008, Evropaïki Dynamiki/Commission, T–406/06, non publié au Recueil, point 120).

228 Il s'ensuit que le recours en annulation doit être rejeté, sauf en ce qui concerne la demande d'annulation de la lettre de la Commission du 14 décembre 2005 en ce qu'elle a refusé la

communication de la composition du comité d'évaluation de l'appel d'offres.

D – Sur le recours en indemnité

1. Sur la recevabilité

a) Arguments des parties

229 La Commission estime que le recours en responsabilité de la requérante est irrecevable dès lors que le recours en annulation est non fondé. Selon elle, une demande en dommages et intérêts fondée sur l'illégalité de l'attribution d'un marché public suppose nécessairement la constatation de l'illégalité de la décision d'attribution.

230 La requérante prétend que le recours en responsabilité est recevable indépendamment du bien-fondé du recours en annulation. Elle estime en effet que des griefs tels que le décalage du calendrier ou le refus de donner accès à certains documents permettent, de manière autonome, d'engager la responsabilité de la Commission.

b) Appréciation du Tribunal

231 Selon une jurisprudence constante, l'action en indemnité fondée sur l'article 288, deuxième alinéa, CE est une voie de recours autonome, ayant sa fonction particulière dans le cadre du système des voies de recours et subordonnée à des conditions d'exercice conçues en vue de son objet spécifique (arrêts de la Cour du 2 décembre 1971, Zuckerfabrik Schöppenstedt/Conseil, 5/71, Rec. p. 975, point 3 ; du 26 février 1986, Krohn/Commission, 175/84, Rec. p. 753, point 26, et du 17 mai 1990, Sonito e.a./Commission, C–87/89, Rec. p. I–1981, point 14). Elle se différencie du recours en annulation en ce qu'elle tend non à la suppression d'une mesure déterminée, mais à la réparation du préjudice causé par une institution (arrêts Zuckerfabrik Schöppenstedt/Conseil, précité, point 3 ; Krohn/Commission, précité, point 32, et Sonito e.a./Commission, précité, point 14). Le principe de l'autonomie du recours en indemnité trouve ainsi sa justification dans le fait qu'un tel recours se singularise par son objet du recours en annulation (arrêts du Tribunal du 24 octobre 2000, Fresh Marine/Commission, T–178/98, Rec. p. II–3331, point 45, et du 21 juin 2006, Danzer/Conseil, T–47/02, Rec. p. II–1779, point 27).

232 Le recours est ouvert à toute personne physique ou morale qui estime avoir subi un dommage du fait de la Communauté. L'action se prescrit par cinq ans à compter de la survenance du dommage.

233 Au vu de ce qui précède, le rejet de la demande d'annulation des décisions d'attribution et de rejet n'entraîne pas, par lui-même, l'irrecevabilité du recours en indemnité (voir, en ce sens et par analogie, ordonnance de la Cour du 21 juin 1993, Van Parijs e.a./Conseil et Commission, C–257/93, Rec. p. I–3335, point 14 ; arrêt du Tribunal du 15 décembre 1994, Unifruit Hellas/Commission, T–489/93, Rec. p. II–1201, point 31). Il convient donc de déclarer le recours en indemnité recevable.

2. Sur le fond

a) Arguments des parties

234 Selon la requérante, le comportement illégal de la Commission, de nature à engager sa responsabilité non contractuelle, résulte de l'annulation nécessaire des décisions de la Commission visées par le recours en annulation. Elle allègue que la Commission, allant au-delà des limites de son pouvoir d'appréciation, a commis une erreur grave et manifeste et un manquement à certaines règles du droit communautaire ainsi qu'aux règles qu'elle s'était fixées elle-même dans la préparation de son cahier des charges.

235 La requérante fait valoir que le préjudice subi consiste en un préjudice commercial substantiel lié à la perte d'un marché important, sans préjudice d'autres dommages, tels que l'éventuelle obligation de procéder à un lourd et coûteux licenciement collectif de ses salariés. Le lien de causalité est, selon elle, manifeste.

236 Dans la requête, la requérante a demandé la réparation de son préjudice à concurrence d'un million

d'euros à titre provisionnel. Elle a porté ce montant à 3 191 702,58 euros dans le mémoire en réplique. Ce montant comprend la marge nette de la branche d'activité sur cinq années, soit 3 084 702,58 euros, et une partie des frais de formation engagés pour les 106 agents restés auprès d'elle, destinés à assurer leur reconversion, soit 107 000 euros que la requérante se réserve le droit de moduler en fonction des frais réels engagés. Elle précise qu'elle n'invoque pas, au titre de son préjudice, la perte d'une chance de remporter le marché, mais la réalisation d'un dommage certain. En effet, elle prétend que, sans le comportement illégal de la Commission, elle aurait dû remporter le marché. Le lien de causalité serait donc établi.

237 S'agissant du comportement illégal, la Commission soutient qu'il ressort du caractère non fondé de la requête en annulation qu'elle n'a violé aucune règle de droit communautaire. De plus, à supposer même que la Commission ait eu un comportement illégal, la requérante n'aurait pas démontré l'existence d'une violation suffisamment caractérisée des dispositions invoquées.

238 S'agissant du préjudice, la Commission rappelle que la charge de la preuve pèse sur la requérante. Elle souligne que la Cour refuse d'indemniser le préjudice lié à la perte d'une chance. De plus, et selon les termes mêmes de la requête, le caractère certain du préjudice lié à l'obligation de licencier le personnel de la requérante ferait défaut.

239 La Commission fait valoir que la requérante ne prouve pas l'existence d'un lien de causalité et se contente d'affirmer que ce lien est « manifeste ». Elle soutient que le recours en annulation et le recours en responsabilité extracontractuelle sont deux recours distincts, et que la requérante ne précise pas le fondement sur lequel elle entend engager la responsabilité de la Commission, qui semble se confondre avec sa demande en annulation.

b) Appréciation du Tribunal

240 Il convient de rappeler que, selon une jurisprudence constante, l'engagement de la responsabilité non contractuelle de la Communauté au sens de l'article 288, deuxième alinéa, CE pour comportement illicite de ses organes est subordonné à la réunion d'un ensemble de conditions, à savoir l'illégalité du comportement reproché aux institutions, la réalité du dommage et l'existence d'un lien de causalité entre le comportement allégué et le préjudice invoqué (voir arrêt du Tribunal du 14 décembre 2005, FIAMM et FIAMM Technologies/Conseil et Commission, T–69/00, Rec. p. II–5393, point 85, et la jurisprudence citée).

241 Dans la mesure où ces trois conditions d'engagement de la responsabilité sont cumulatives, l'absence de l'une d'entre elles suffit pour rejeter un recours indemnitaire, sans qu'il soit dès lors nécessaire d'examiner les autres conditions (voir arrêt du Tribunal du 13 septembre 2006, CAS Succhi di Frutta/Commission, T–226/01, Rec. p. II–2763, point 27, et la jurisprudence citée).

242 S'agissant du comportement illégal, la jurisprudence exige que soit établie une violation suffisamment caractérisée d'une règle de droit ayant pour objet de conférer des droits aux particuliers (arrêt de la Cour du 4 juillet 2000, Bergaderm et Goupil/Commission, C–352/98 P, Rec. p. I–5291, point 42). Le critère décisif pour considérer qu'une violation du droit communautaire est suffisamment caractérisée est celui de la méconnaissance manifeste et grave, par l'institution communautaire concernée, des limites qui s'imposent à son pouvoir d'appréciation. Lorsque cette institution ne dispose que d'une marge d'appréciation considérablement réduite, voire inexistante, la simple infraction au droit communautaire peut suffire à établir l'existence d'une violation suffisamment caractérisée (arrêt de la Cour du 10 décembre 2002, Commission/Camar et Tico, C–312/00 P, Rec. p. I–11355, point 54 ; arrêt du Tribunal du 12 juillet 2001, Comafrica et Dole Fresh Fruit Europe/Commission, T–198/95, T–171/96, T–230/97, T–174/98 et T–225/99, Rec. p. II–1975, point 134).

243 En l'espèce, tous les arguments que la requérante a fait valoir afin de démontrer l'illégalité des décisions d'attribution et de rejet ont été examinés et rejetés (voir points 84 à 228 ci-dessus). La responsabilité de la Communauté ne saurait donc être engagée sur le fondement d'une prétendue illégalité de ces décisions.

244 S'agissant de l'illégalité de la décision de la Commission du 14 décembre 2005 portant rejet de la demande de communication de la composition du comité d'évaluation, il y a lieu de constater que la requérante n'a pas établi l'existence d'un lien de causalité direct entre le refus de communication contesté et le préjudice invoqué, qui résulterait de la perte du marché litigieux.

245 Il s'ensuit que la demande en indemnité doit être rejetée.

Sur les dépens

246 Aux termes de l'article 87, paragraphe 3, premier alinéa, du règlement de procédure, le Tribunal peut répartir les dépens ou décider que chaque partie supporte ses propres dépens si les parties succombent respectivement sur un ou plusieurs chefs.

247 Dans les circonstances de l'espèce, compte tenu du fait que la requérante a succombé en la plupart de ses demandes, il sera fait une juste appréciation de la cause en condamnant la requérante à supporter ses propres dépens ainsi que la moitié de ceux exposés par la Commission et Group 4 Falck, y compris ceux afférents à la procédure de référé.

Par ces motifs,

LE TRIBUNAL (sixième chambre)

déclare et arrête :

1) La décision de la Commission du 14 décembre 2005, portant rejet d'une demande de communication de la composition du comité d'évaluation de l'appel d'offres 16/2005/OIL, est annulée.

2) Le recours en annulation est rejeté pour le surplus.

3) Le recours en indemnité est rejeté.

4) Brink's Security Luxembourg SA supportera, outre ses propres dépens, la moitié des dépens exposés par la Commission des Communautés européennes et par G4S Security Services SA, y compris ceux afférents à la procédure de référé.

5) La Commission supportera la moitié de ses propres dépens.

6) G4S Security Services supportera la moitié de ses propres dépens.

Meij Vadapalas Truchot

Ainsi prononcé en audience publique à Luxembourg, le 9 septembre 2009.

signatures

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* Langue de procédure : le français.

Re:

Annulment of Commission Decision 2006/598/EC of 16 March 2005 concerning State aid that Italy (Regione Lazio) intends to grant for the reduction of greenhouse gas emissions (OJ 2006 L 244, p. 8)

Operative part of the judgment

The Court:

1. *dismisses the action;*

2. *orders AceaElectrabel to pay the costs, except those referred to in point 3 below;*

3. *orders Electrabel to bear its own costs and to pay the costs incurred by the Commission as a result of its intervention.*

([1]) OJ C 257 of 15.10.2005.

Judgment of the Court of First Instance of 4 September 2009 — Austria v Commission

(Case T-368/05) ([1])

(EAGGF — Guarantee Section — Expenditure excluded from Community financing — Cattle premium — Suckler cow premium — Payment for extensification — Key controls — Duty to use a computerised geographical information system — Control of Alpine forage areas — Duty to cooperate — Duty to state reasons — Type of financial correction applied — Extrapolation of the findings of default)

(2009/C 256/38)

Language of the case: German

Parties

Applicant: Republic of Austria (represented by: H. Dossi, initially, H. Dossi and C. Pesendorfer, subsequently, and C. Pesendorfer and A. Hable, finally, Agents)

Defendant: Commission of the European Communities (represented by: F. Erlbacher, Agent)

Re:

Annulment of Commission Decision 2005/555/EC of 15 July 2005 excluding from Community financing certain expenditure incurred by the Member States under the 'Guarantee' Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2005 L 188, p. 36), inasmuch as it excluded certain expenditure by the Republic of Austria.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

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

([1]) OJ C 296, 26.11.2005.

Judgment of the Court of First Instance of 9 September 2009 — Brink's Security Luxembourg v Commission

(Case T-437/05) ([1])

(Public services contracts — Community tender procedure — Security and surveillance of the Commission's buildings in Luxembourg — Rejection of a tenderer's bid — Equal treatment — Access to documents — Effective judicial protection — Duty to give reasons — Transfer of undertaking — Action for damages)

(2009/C 256/39)

Language of the case: French

Parties

Applicant: Brink's Security Luxembourg SA (Luxembourg, Luxembourg) (represented by: C. Point and G. Dauphin, lawyers)

Defendant: Commission of the European Communities (represented by: E. Manhaeve, M. Šimerdová and K. Mojzesowicz, Agents, and by J. Stuyck, lawyer)

Intervener in support of the defendant: G4S Security Services SA, formerly Group 4 Falck — Surveillance and Security Company SA (Luxembourg, Luxembourg) (represented by: M. Molitor, P. Lopes Da Silva, N. Cambonie and N. Bogelmann, lawyers)

Re:

First, an action for annulment of the Commission Decision of 30 November 2005 rejecting the tender submitted by the applicant in call for tenders No 16/2005/OIL (provision of building surveillance and security services); the Commission Decision of 30 November 2005 to award the contract to another tenderer; an alleged implied Commission Decision refusing to withdraw its two previous decisions and two of its letters, dated 7 and 14 December 2005, responding to the applicant's requests for information. Second, an action for damages seeking compensation for the loss allegedly suffered by the applicant.

Operative part of the judgment

The Court:

1. *Annuls the Commission Decision of 14 December 2005, rejecting the request that the composition of the evaluation committee in call for tenders No 16/2005/OIL be communicated to the applicant;*

2. *Dismisses the action for annulment as to the remainder;*

3. *Dismisses the action for damages;*

4. *Orders Brink's Security Luxembourg SA to pay, apart from its own costs, half of the costs incurred by the Commission of the European Communities and by G4S Security Services SA, including those relating to the interlocutory proceedings;*

5. *Orders the Commission to bear half of its own costs;*

6. *Orders G4S Security Services to bear half of its own costs.*

([1]) OJ C 48, 25.2.2006.

Judgment of the Court of First Instance of 9 September 2009 — Holland Malt v Commission

(Case T-369/06) ([1])

(State aid — Malt production — Investment aid — Decision declaring the aid incompatible with the common market — Adverse effect on competition — Effect on trade between Member States — Obligation to state the reasons on which the decision is based — Guidelines for State aid in the agriculture sector)

(2009/C 256/40)

Language of the case: English

Parties

Applicant: Holland Malt BV (Lieshout, Netherlands) (represented initially by: O. Brouwer and D. Mes, and subsequently by O. Brouwer, A. Stoffer and P. Schepens, lawyers)

Defendant: Commission of the European Communities (represented by: T. Scharf and A. Stobiecka-Kuik, acting as Agents)

Intervener in support of the applicant: Kingdom of the Netherlands (represented by: C. Wissels, M. de Grave, C. ten Dam and Y. de Vries, acting as Agents)

Re:

Application for annulment of Commission Decision 2007/59/EC of 26 September 2006 concerning the State aid granted by the Netherlands to Holland Malt BV (OJ 2007 L 32, p. 76).

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders Holland Malt BV to bear its own costs and to pay those incurred by the Commission;*

3. *Orders the Kingdom of the Netherlands to bear its own costs.*

([1]) OJ C 42, 24.2.2007.

Judgment of the Court of First Instance of 8 September 2009 — ETF v Landgren

(Case T-404/06) ([1])

(Appeals — Staff cases — Members of the temporary staff — Contract for an indefinite period — Decision to dismiss — Article 47(c)(i) of the Conditions of Employment of other servants — Obligation to state the reasons on which the decision is based — Manifest error of assessment — Unlimited jurisdiction — Monetary compensation)

(2009/C 256/41)

Language of the case: French

Parties

Appellant: European Training Foundation (ETF) (represented by: G. Vandersanden and L. Levi, lawyers)

Other party to the proceedings: Pia Landgren (Revigliasco, Italy) (represented by: M.-A. Lucas, lawyer)

Re:

Appeal against the judgment of the European Union Civil Service Tribunal (Full Court) of 26 October 2006 in Case F 1/05 *Landgren* v *ETF* [2006] EC- SC-I-A-123 and II-A-I 459 seeking to have that judgment set aside

Operative part of the judgment

The Court:

1. *dismisses the appeal;*

2. *orders the European Training Foundation (ETF) to bear its own costs and to pay the costs incurred by Ms Landgren in the present instance;*

3. *orders the Commission of the European Communities to bear its own costs.*

([1]) OJ C 42 of 24.2.2007.

Judgment of the Court of First Instance of 2 September 2009 — El Morabit v Council

(Joined Cases T-37/07 and T-323/07) ([1])

(Common Foreign and Security Policy — Restrictive measures with a view to combating terrorism — Freezing of funds — List of persons, groups and entities — Action for annulment)

(2009/C 256/42)

Language of the case: Dutch

Parties

Applicant: Mohamed El Morabit (Amsterdam, Netherlands) (represented by: U. Sarikaya, lawyer)

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ORDONNANCE DU PRÉSIDENT DU TRIBUNAL

7 février 2006 (*)

« Référé – Urgence – Absence »

Dans l'affaire T-437/05 R,

Brink's Security Luxembourg SA, établie à Luxembourg (Luxembourg), représentée par M^es^ C. Point et G. Dauphin, avocats, ayant élu domicile à Luxembourg,

partie requérante,

contre

Commission des Communautés européennes, représentée par M. E. Manhaeve, M^mes^ M. Šimerdová et K. Mojzesowicz, en qualité d'agents, assistés de M^e^ J. Stuyck, avocat, ayant élu domicile à Luxembourg,

partie défenderesse,

soutenue par

Group 4 Falck SA, établie à Luxembourg, représentée par M^es^ M. Molitor, P. Lopes Da Silva, N. Cambonie et N. Bogelmann, avocats, ayant élu domicile à Luxembourg,

partie intervenante,

ayant pour objet une demande de mesures provisoires visant en substance, premièrement, à ce qu'il soit enjoint à la Commission de ne pas procéder à la signature du contrat relatif à l'appel d'offres n° 16/2005/OIL (sécurité et surveillance des immeubles), deuxièmement, pour autant que la Commission ait déjà conclu ce contrat, à suspendre son exécution jusqu'à ce que le Tribunal statue sur le fond du recours et, troisièmement, à ce que d'autres mesures soient ordonnées,

LE PRÉSIDENT DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

Faits et procédure

1 Brink's Security Luxembourg SA (ci-après « Brink's » ou « la requérante ») est une société établie au Luxembourg, active dans le secteur de la surveillance et du gardiennage. Cette société était chargée de la surveillance et du gardiennage des immeubles de la Commission depuis le milieu des années 70.

2 En 2000, la requérante a conclu avec la Commission un contrat de surveillance et de gardiennage d'immeubles de la Commission, situés au Luxembourg, et relevant de l'Office des publications officielles des Communautés européennes et du Centre de traduction des organes de l'Union européenne. Ce contrat a expiré, sans possibilité de reconduction ultérieure, le 31 décembre 2005.

3 Par un avis de marché publié au *Journal officiel de l'Union européenne* du 1^er^ septembre 2005 (JO

S 168, n° 166735), la Commission (Office infrastructures et logistique Luxembourg) a lancé l'appel d'offres n° 16/2005/OIL pour un contrat de surveillance et de gardiennage des mêmes immeubles que ceux en cause dans le contrat visé au point précédent.

4 La date limite de présentation des offres a été fixée au 13 octobre 2005. L'ouverture des offres a eu lieu le 18 octobre 2005 et leur évaluation a été effectuée le 11 novembre 2005.

5 Le 30 novembre 2005, la Commission a fait savoir à la requérante que le contrat ne lui avait pas été attribué en raison du fait que son offre n'avait pas obtenu la meilleure note finale lors de l'évaluation qualitative et financière des offres. Dans le même courrier, la Commission a informé la requérante qu'elle était en droit d'obtenir des informations complémentaires sur les motifs du rejet de son offre.

6 Par lettre du 1er décembre 2005, la requérante a cherché à exercer ce droit en demandant à la Commission de lui communiquer les motifs du rejet de son offre, les caractéristiques et les avantages relatifs de l'offre retenue ainsi que le nom de l'attributaire.

7 Par lettre du 5 décembre 2005, la Commission a informé la requérante que l'attributaire retenu était Group 4 Falck SA, intervenante dans la présente procédure (ci-après « Group 4 Falck » ou l'« intervenante »), et a exposé les éléments de comparaison pertinents de l'évaluation de l'offre de la requérante par rapport à l'offre de l'attributaire.

8 Par trois courriers du 5 décembre 2005, la requérante a demandé à la Commission de réexaminer sa décision et de lui attribuer le marché, en lui indiquant les raisons qui, selon elle, auraient dû l'empêcher de retenir l'offre de Group 4 Falck.

9 Par lettre du 7 décembre 2005, la Commission a répondu aux courriers de la requérante du 5 décembre 2005, en confirmant sa position.

10 Par lettre du 8 décembre 2005, la requérante a demandé à la Commission des informations concernant les membres composant les comités de sélection et d'adjudication chargés de l'évaluation des offres des soumissionnaires de l'appel d'offres ainsi qu'un complément de motivation, estimant que les raisons indiquées jusqu'alors par la Commission n'étaient pas suffisantes.

11 Par lettre du 14 décembre 2005, la Commission s'est refusée, pour des raisons de confidentialité, à fournir les informations demandées par la requérante à propos des membres des comités de sélection et d'adjudication. La Commission a cependant fourni à la requérante des informations complémentaires concernant les raisons du rejet de l'offre de la requérante.

12 Par lettre du 14 décembre 2005, Group 4 Falck a fait part à la requérante de son intention de recruter une partie de son personnel.

13 Par requête déposée au greffe du Tribunal le 15 décembre 2005, Brink's a introduit un recours au titre de l'article 230, quatrième alinéa, CE visant à l'annulation de la décision adoptée dans le cadre de l'appel d'offres n° 16/2005/OIL et par laquelle la Commission attribuait le marché à Group 4 Falck (ci-après la « décision attaquée au principal »).

14 Par acte séparé déposé au greffe du Tribunal le même jour, Brink's a introduit la présente demande en référé, ainsi qu'une demande de mesures provisoires sur le fondement de l'article 105, paragraphe 2, du règlement de procédure du Tribunal.

15 Par ordonnance du 16 décembre 2005, le président du Tribunal a ordonné à la Commission de surseoir à la signature du contrat en cause dans l'appel d'offres n° 16/2005/OIL jusqu'au prononcé d'une ordonnance statuant sur la demande de mesures provisoires.

16 En conséquence de l'adoption de l'ordonnance mentionnée au point précédent, le contrat en cours entre Brink's et la Commission a été reconduit jusqu'à la date du 31 janvier 2006, afin de garantir la continuité de la surveillance et du gardiennage des bâtiments en cause.

17 Par acte déposé au greffe du Tribunal le 22 décembre 2005, Group 4 Falck a demandé à intervenir dans la présente procédure au soutien de la Commission. Le 4 janvier 2006, les parties principales ont déposé leurs observations sur la demande en intervention de Group 4 Falck.

18 Par acte déposé au greffe du Tribunal le 4 janvier 2006, la requérante a introduit une demande de traitement confidentiel de la demande en référé vis-à-vis du demandeur en intervention, à laquelle il a été fait droit. Le 5 janvier 2005, la requérante a déposé au greffe du Tribunal une version non confidentielle de la demande en référé.

19 Par ordonnance du 9 janvier 2006, Group 4 Falck a été admise à intervenir dans la présente affaire.

20 Le 11 janvier 2006, la Commission a déposé ses observations sur la demande en référé et, sur demande du Tribunal adoptée en application de l'article 64, paragraphe 3, du règlement de procédure, a produit une version non confidentielle des certificats communiqués à la Commission par Group 4 Falck pour se conformer au n° 28 du cahier des charges relatif à ce même marché.

21 Le 24 janvier 2006, les parties ont été entendues lors d'une audition.

Conclusions

22 La requérante demande au juge des référés, sur le fondement de l'article 104 et de l'article 105, paragraphe 2, du règlement de procédure :

– en premier lieu, et dans l'attente d'une ordonnance se prononçant sur la demande de mesures provisoires :

  – de suspendre l'exécution de la décision attaquée au principal ;

  – d'enjoindre à la Commission de communiquer les certificats joints à l'offre de Group 4 Falck (y compris sous une forme anonyme) ;

  – d'enjoindre à la Commission de ne pas conclure le contrat avec le tiers retenu avant l'expiration d'un délai de cinq jours ouvrables suivant la communication des documents demandés ;

– en deuxième lieu, sans préjudice des mesures énumérées ci-dessus :

  – d'enjoindre à la Commission de ne pas conclure le contrat jusqu'à l'intervention de la décision mettant fin à l'instance au principal ;

  – pour autant que la Commission ait déjà conclu ledit contrat, de suspendre son exécution jusqu'à l'intervention de la décision mettant fin à l'instance au principal ;

– en troisième lieu, de condamner la Commission à payer l'intégralité des dépens liés à la présente demande.

23 La Commission, soutenue par Group 4 Falck, conclut à ce que le président du Tribunal déclare la demande en référé non fondée et condamne la requérante aux dépens.

En droit

24 L'article 104, paragraphe 2, du règlement de procédure dispose que les demandes de mesures provisoires doivent spécifier l'objet du litige, les circonstances établissant l'urgence ainsi que les moyens de fait et de droit justifiant à première vue (fumus boni juris) l'octroi de la mesure provisoire à laquelle elles concluent. Ces conditions sont cumulatives, de sorte que les mesures provisoires doivent être rejetées dès lors que l'une d'elles fait défaut [ordonnance du président de la Cour du 14 octobre 1996, SCK et FNK/Commission, C–268/96 P(R), Rec. p. I–4971, point 30]. Le juge des référés procède également, le cas échéant, à la mise en balance des intérêts en présence (ordonnance du président de la Cour du 23 février 2001, Autriche/Conseil, C–445/00 R, Rec. p. I–1461, point 73).

25 En outre, dans le cadre de cet examen, le juge des référés dispose d'un large pouvoir d'appréciation et reste libre de déterminer, au regard des particularités de l'espèce, la manière dont ces différentes

conditions doivent être vérifiées ainsi que l'ordre de cet examen, dès lors qu'aucune règle de droit communautaire ne lui impose un schéma d'analyse préétabli pour apprécier la nécessité de statuer provisoirement [ordonnance du président de la Cour du 19 juillet 1995, Commission/Atlantic Container Line e.a., C-149/95 P(R), Rec. p. I-2165, point 23].

26 Au regard des circonstances de la présente affaire, il convient de commencer par examiner si la condition relative à l'urgence est remplie.

Arguments des parties

27 Selon la requérante, l'attribution irrégulière du marché à un prestataire autre qu'elle-même aurait pour effet de lui causer plusieurs préjudices graves et irréparables. La requérante allègue, en premier lieu, une violation de son droit d'accès au dossier ; en deuxième lieu, la perte d'une chance de se voir attribuer et d'exécuter le marché en cause dans la procédure d'appel d'offres ; en troisième lieu, une atteinte irrémédiable de son droit de participer à une procédure régulière d'appel d'offres ; en quatrième lieu, une perte de capital humain et, enfin, en cinquième lieu, une atteinte à sa réputation.

28 En premier lieu, en ce qui concerne la violation de son droit d'accès aux documents, la requérante fait valoir que le refus de la Commission de lui communiquer les pièces justifiant certains éléments de la notation de Group 4 Falck, d'une part, viole son droit à une information complète et transparente sur le déroulement de l'appel d'offres et l'issue de celui-ci et, d'autre part, la prive de la possibilité d'éviter un éventuel recours contentieux inutile.

29 La Commission soutient, en revanche, qu'elle a respecté toutes les obligations légales découlant du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1, ci-après le « règlement financier »), et qu'elle n'avait pas d'autres obligations à cet égard.

30 En deuxième lieu, la requérante soutient que l'irrégularité de la procédure aurait entraîné la violation de son droit à participer à une procédure d'appel d'offres non faussée. Le préjudice qui en résulterait pour elle consisterait en la perte d'une chance de se voir attribuer et d'exécuter le marché, ce qui devrait être considéré comme un préjudice grave et irréparable, compte tenu, notamment, de sa taille au Luxembourg et de l'importance du marché par rapport à l'activité de l'entreprise.

31 Selon la Commission, la requérante n'aurait pas démontré le caractère grave du préjudice découlant de la perte de chance invoquée par elle.

32 En troisième lieu, la requérante allègue un préjudice lié au fait qu'elle aurait été privée de manière irrémédiable de son droit à participer à une procédure d'appel d'offres non faussée. Laisser se conclure le contrat sans permettre au préalable à la requérante d'obtenir une information complète sur le déroulement de la procédure en cause la priverait de son droit de réclamer une éventuelle régularisation, ce qui aurait permis d'éviter le présent litige.

33 En réponse, la Commission soutient que, compte tenu de la production de documents ultérieurs sur demande du Tribunal, la requérante a obtenu toutes les informations sur le déroulement de la procédure d'attribution qu'elle était en droit de recevoir.

34 En quatrième lieu, la requérante allègue un préjudice lié à la perte d'un capital humain expérimenté constitué, notamment, des 173 personnes qui étaient spécifiquement affectées à la surveillance des locaux de la Commission.

35 Selon la Commission, le préjudice allégué par Brink's est inhérent à l'exécution du contrat entre la Commission et Brink's, lequel avait été conclu pour une durée limitée et sans possibilité de reconduction. En outre, il s'agirait d'un préjudice financier, qui serait donc susceptible de faire l'objet d'une compensation. En conséquence, il ne saurait être considéré comme irréparable.

36 Enfin, la requérante allègue une atteinte grave et irréparable à sa réputation tenant au fait que, à la suite de la perte du marché, elle serait contrainte de mettre en place le second plan de licenciement collectif au Luxembourg par ordre d'importance. En outre, Brink's allègue que sa réputation serait atteinte par l'éviction même du marché en cause, qui représenterait pour elle un atout indéniable en terme de prestige.

37 Selon la Commission, l'élimination d'un soumissionnaire, en vertu des règles de la soumission, n'a, en soi, rien de préjudiciable.

38 Pour sa part, la partie intervenante, dans ses observations orales, a soutenu les arguments de la Commission invoquant en l'espèce une absence d'urgence.

Appréciation du juge des référés

39 Le caractère urgent d'une demande en référé doit s'apprécier par rapport à la nécessité qu'il y a de statuer provisoirement afin d'éviter qu'un préjudice grave et irréparable ne soit occasionné à la partie qui sollicite la mesure provisoire (ordonnance du président de la Cour du 6 février 1986, Deufil/Commission, 310/85 R, Rec. p. 537, point 15, et ordonnance du président du Tribunal du 30 juin 1999, Pfizer Animal Health/Conseil, T–13/99 R, Rec. p. II–1961, point 134). C'est à cette dernière qu'il appartient d'apporter la preuve qu'elle ne saurait attendre l'issue de la procédure au principal sans avoir à subir un préjudice de cette nature (ordonnance du président de la Cour du 8 mai 1991, Belgique/Commission, C–356/90 R, Rec. p. I–2423, point 23, et ordonnance du président du Tribunal du 15 novembre 2001, Duales System Deutschland/Commission, T–151/01 R, Rec. p. II–3295, point 187).

40 L'imminence du préjudice ne doit pas être établie avec une certitude absolue, mais il suffit, particulièrement lorsque la réalisation du préjudice dépend de la survenance d'un ensemble de facteurs, qu'elle soit prévisible avec un degré de probabilité suffisant. Le requérant demeure cependant tenu de prouver les faits qui sont censés fonder la perspective d'un tel dommage grave et irréparable [ordonnance du président de la Cour du 14 décembre 1999, HFB e.a./Commission, C–335/99 P(R), Rec. p. I–8705, point 67].

41 En l'espèce, Brink's invoque en substance cinq types de préjudices, qui doivent faire l'objet d'un examen séparé.

Sur le préjudice prétendument lié au droit d'accès au dossier

42 En ce qui concerne le préjudice tenant à la prétendue indisponibilité d'une information complète et transparente sur le déroulement de l'appel d'offres et l'issue de celui-ci, ainsi qu'à la possibilité d'éviter un recours contentieux inutile, premièrement, il y a lieu de noter que, dans sa demande, la requérante allègue l'existence d'un préjudice tenant à un manque de clarification, d'une part, des modalités d'attribution du marché à Group 4 Falck et, d'autre part, des moyens à soulever dans le cadre de la présente procédure.

43 Or, quant à la clarification des modalités d'attribution du marché, la requérante n'a pas démontré en quoi consiste le dommage qui lui est prétendument causé, en l'absence de ladite clarification, dans l'attente de l'arrêt au principal. De même, s'agissant de la possibilité d'éviter un recours contentieux inutile, la requérante n'a pas fourni la preuve que le litige, en tant que tel, lui cause un dommage grave et irréparable.

44 Deuxièmement, force est de constater que la Commission, en cours d'instance et sur demande du Tribunal, a produit une version non confidentielle des certificats communiqués par l'intervenante pour se conformer au n° 28 du cahier des charges relatif au marché en cause. Or, lors de la procédure orale, la requérante n'a pas démontré que ces informations n'étaient pas suffisantes pour éclaircir de façon complète et transparente le déroulement de la procédure.

45 En conséquence, la requérante n'a pas établi qu'il était urgent de prononcer des mesures provisoires pour lui éviter un dommage grave et irréparable lié à un prétendu manque d'information sur le déroulement de l'appel d'offres.

Sur le préjudice prétendument lié à la perte d'une chance de se voir attribuer et d'exécuter le marché en cause

46 La requérante allègue également avoir subi un préjudice grave et irréparable lié au fait que, en raison de l'irrégularité de la procédure et de l'illégalité de la décision attaquée, elle aurait perdu une chance de se voir attribuer le marché en cause et, par voie de conséquence, de tirer les divers bénéfices qui pourraient résulter, le cas échéant, de l'exécution du contrat.

47 Il y a préliminairement lieu de constater que Brink's avait, effectivement, une chance de se voir attribuer le marché en cause. En effet, tout d'abord, l'offre de Brink's a reçu des notations d'évaluation de peu inférieures à celles attribuées à Group 4 Falck, dont la régularité est contestée au principal. Ensuite, Brink's était en principe à même de proposer une offre intéressante, compte tenu de l'expérience acquise durant les années au cours desquelles elle a exécuté le marché. Enfin, aucun élément du dossier, à l'exception de ceux dont la légalité est contestée au principal, ne permet d'exclure que Brink's disposait d'une chance de se voir attribuer et d'exécuter le marché en cause.

48 Il convient donc de vérifier si la perte de cette chance constitue, pour Brink's, un préjudice à la fois grave et irréparable, de nature à justifier l'octroi des mesures provisoires demandées.

49 En effet, même à supposer que la requérante parvienne à démontrer que le préjudice subi en raison de la perte d'une chance de se voir attribuer le marché en cause était irréparable, il convient de constater que, pour justifier l'octroi de mesures provisoires, le préjudice invoqué par le demandeur doit aussi être grave (voir, en ce sens, ordonnances du président du Tribunal du 20 juillet 2000, Esedra/Commission, T-169/00 R, Rec. p. II-2951, point 43 ; du 27 juillet 2004, TQ3 Travel Solutions Belgium/Commission, T-148/04 R, non encore publiée au Recueil, point 41, et du 20 septembre 2005, Deloitte Business Advisory/Commission, T-195/05 R, non encore publiée au Recueil, point 149).

50 Or, la perte d'une chance de se voir attribuer et d'exécuter un marché public est inhérente au risque d'exclusion qu'encourt tout soumissionnaire participant à une procédure d'appel d'offres et ne saurait être regardée comme constitutive, en soi, d'un préjudice grave, indépendamment d'une appréciation concrète de la gravité de l'atteinte spécifique alléguée dans chaque cas d'espèce (ordonnance Deloitte Business Advisory/Commission, point 49 supra, point 150).

51 En conséquence, c'est, en l'espèce, à la condition que la requérante parvienne à démontrer à suffisance de droit qu'elle aurait pu retirer des bénéfices suffisamment significatifs de l'attribution et de l'exécution du marché en cause que le fait, pour elle, d'avoir perdu une chance de se voir attribuer et d'exécuter ledit marché constituerait un préjudice grave (voir, en ce sens, ordonnance Deloitte Business Advisory/Commission, point 49 supra, point 151).

52 Il convient donc d'apprécier concrètement les bénéfices qui, selon la requérante, découleraient pour elle de l'attribution et de l'exécution du marché en cause dans le cadre de la procédure d'appel d'offres (voir, en ce sens, ordonnance Deloitte Business Advisory/Commission, point 49 supra, point 152).

53 À cet égard, la requérante s'est bornée à alléguer que l'inexécution du contrat la priverait d'une part conséquente de son activité, ce qui serait de nature à porter atteinte à la poursuite efficace de ses activités.

54 En l'espèce, s'il est évident que l'inexécution de ce contrat priverait la requérante des revenus qu'elle aurait perçus si le marché lui avait été attribué, il convient de rappeler que, lorsque le demandeur est une entreprise, la gravité d'un préjudice d'ordre matériel doit être évaluée au regard, notamment, de la taille de cette entreprise (ordonnance Deloitte Business Advisory/Commission, point 49 supra, point 156 ; voir également, en ce sens, ordonnance du président du Tribunal du 22 décembre 2004, Microsoft/Commission, T-201/04 R, non encore publiée au Recueil, point 257).

55 Or, en l'espèce, la requérante, dans sa demande en référé, a soutenu que le marché en cause représentait un cinquième de son activité au Luxembourg. Dans ses observations orales, la requérante a, en revanche, soutenu que le même marché correspondait au quart de son activité au Luxembourg.

56 D'une part, il y a toutefois lieu de constater que la requérante, indépendamment de ses contradictions quant à la valeur exacte de la perte qu'elle risque de subir, n'a fourni à cet égard qu'une seule évaluation sans en expliquer la réelle portée, par exemple en ce qui concerne la valeur de la perte de bénéfice financier. De plus, même à supposer que la requérante se réfère au rapport existant entre la valeur du contrat passé avec la Commission et son propre chiffre d'affaires en 2005, elle n'a fourni aucun élément de preuve permettant de conclure que l'évaluation avancée par elle reflète bien le dommage qu'elle subirait si le juge des référés ne faisait pas droit à sa demande de mesures provisoires. En particulier, elle n'a pas démontré qu'elle allait perdre toutes les

ressources antérieurement affectées à l'exécution du contrat avec la Commission, sans possibilité de les investir, au moins en partie, dans d'autres marchés.

57 D'autre part, même à supposer que le préjudice lié à la perte du marché en cause corresponde à une réduction de 25 % de l'activité commerciale de la requérante, force est de constater que, ainsi que celle-ci l'a confirmé lors de ses observations orales, elle appartient à un groupe de dimension internationale. Or, il ressort du dossier que la valeur de 25 % ne se réfère qu'aux activités de Brink's Security Luxembourg SA au Luxembourg. La requérante n'a pas démontré que, compte tenu du groupe auquel elle appartient, la perte invoquée présente un caractère de gravité suffisant.

58 Dès lors, au regard des éléments présents dans la demande en référé et de ceux exposés lors de l'audition, le juge des référés ne saurait considérer que, pour la requérante, la perte d'une chance de se voir attribuer et d'exécuter le marché en cause constitue un préjudice suffisamment grave pour justifier l'octroi de mesures provisoires.

Sur le préjudice prétendument lié à une atteinte irrémédiable au droit de la requérante à participer à une procédure régulière d'appel d'offres

59 En ce qui concerne l'argument de la requérante selon lequel celle-ci risque de subir un préjudice du fait qu'elle se voit privée de manière irrémédiable de son droit à participer à une procédure d'appel d'offres non faussée, force est de constater que les seules conséquences concrètes, qui, selon la requérante, résultent de l'atteinte à ce droit tiennent dans le fait que « [l]aisser se conclure le contrat sans permettre au préalable à la requérante d'obtenir une information complète sur le déroulement de la procédure en cause la priverait de son droit de réclamer une éventuelle régularisation, permettant ainsi d'éviter l'engagement de recours contentieux ».

60 Or, d'une part, pour autant que la requérante invoque l'impossibilité de procéder à la « régularisation » du contrat, son argumentation ne se distingue pas de celle visant à démontrer l'existence d'un préjudice lié à la perte d'une chance de se voir attribuer le marché, laquelle a déjà été écartée comme ne démontrant pas l'existence d'un préjudice grave et irréparable (voir points 46 à 58 supra).

61 D'autre part, pour autant que la requérante invoque la nécessité d'éviter un recours contentieux, il a déjà été jugé qu'une telle circonstance n'était pas susceptible de démontrer l'existence d'un préjudice grave et irréparable (voir points 42 à 45).

62 En conséquence, la requérante n'a pas établi qu'il était urgent de prononcer des mesures provisoires pour éviter un dommage grave et irréparable lié à une atteinte irrémédiable à son droit à participer à une procédure d'appel d'offres non faussée.

Sur le préjudice prétendument lié à une perte de capital humain

63 En ce qui concerne le préjudice allégué par la requérante et lié à une perte de capital humain expérimenté, force est de constater, ainsi que le fait valoir, à juste titre, la Commission, que Brink's connaissait les conditions du contrat conclu avec la Commission et savait que celui-ci devait expirer le 31 décembre 2005, sans possibilité de reconduction. Le risque pour Brink's de ne pas se voir attribuer le marché lors de la conclusion d'un nouveau contrat est par conséquent inhérent au système de passation des marchés publics.

64 En outre, la requérante ne fournit aucune preuve permettant de démontrer que le préjudice allégué est irréparable et que, dans le cas où elle obtiendrait gain de cause au principal, elle ne pourrait pas reconstituer une équipe de la même qualité, par le biais du recrutement soit du même personnel, soit d'autres personnes aussi qualifiées.

65 En conséquence, la requérante n'a pas établi qu'il était urgent de prononcer des mesures provisoires pour éviter un dommage grave et irréparable lié à une prétendue perte de capital humain.

Sur le préjudice prétendument lié à une atteinte à la réputation de la requérante

66 Enfin, la requérante allègue un préjudice quant à sa réputation, lié, d'une part, au fait qu'elle se verra obligée de procéder à un important plan de licenciement collectif et, d'autre part, au fait même de son éviction du marché.

67 Néanmoins, force est de constater que, ainsi que le rappelle à juste titre la Commission, la participation à une soumission publique, par nature hautement compétitive, implique des risques pour tous les participants et que l'élimination d'un soumissionnaire, en vertu des règles de la soumission, n'a, en elle-même, rien de préjudiciable (ordonnance du président de la Cour du 5 août 1983, CMC/Commission, 118/83 R, Rec. p. 2583, point 51, et ordonnance du président du Tribunal du 10 novembre 2004, European Dynamics/Commission, T-303/04 R, non encore publiée au Recueil, point 82).

68 En outre, lorsqu'une entreprise a été illégalement écartée d'une procédure d'appel d'offres, il existe d'autant moins de raisons de penser qu'elle risque de subir une atteinte grave et irréparable à sa réputation que, d'une part, son exclusion est sans lien avec ses compétences et, d'autre part, l'arrêt d'annulation qui s'ensuivra permettra en principe de rétablir une éventuelle atteinte à sa réputation (ordonnance Deloitte Business Advisory/Commission, point 49 supra, point 126).

69 Enfin, en l'espèce, à supposer qu'elle soit effectivement obligée de procéder à un plan de licenciement collectif, il n'est pas démontré que l'éventuel arrêt d'annulation qui s'ensuivra ne permettra pas d'exclure toute responsabilité de la requérante dans le licenciement.

70 En conséquence, la requérante n'a pas établi qu'il était urgent de prononcer des mesures provisoires pour éviter un dommage grave et irréparable à sa réputation.

71 Il découle de tout ce qui précède que la requérante n'a pas démontré qu'elle risquait de subir un préjudice grave et irréparable en l'absence de mesures provisoires. En conséquence, sans qu'il soit nécessaire d'examiner la condition relative au fumus boni juris et de mettre en balance les intérêts en présence, la demande en référé doit être rejetée.

Par ces motifs,

LE PRÉSIDENT DU TRIBUNAL

ordonne :

1) La demande de mesures provisoires est rejetée.

2) Les dépens sont réservés.

Fait à Luxembourg, le 7 février 2006.

Le greffier	Le président
E. Coulon	B. Vesterdorf

* Langue de procédure : le français.

**Order of the President of the Court of First Instance
First InstanceFirst Instance2006. Brink's Security Luxembourg SA v Commission of the European Communities. Application for interim measures. Case T-437/05 R.**

Applications for interim measures - Suspension of operation of a measure - Interim relief - Conditions for granting - Prima facie case - Serious and irreparable damage - Cumulative requirements (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 24-25)

2. Applications for interim measures - Suspension of operation of a measure - Interim relief - Conditions for granting - Serious and irreparable damage - Burden of proof (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 39-40)

3. Applications for interim measures - Suspension of operation of a measure - Interim relief - Conditions for granting - Serious and irreparable damage (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 49-52, 54)

4. Applications for interim measures - Suspension of operation of a measure - Interim relief - Conditions for granting - Serious and irreparable damage (Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2)) (see paras 67-68)

Re:

APPLICATION for interim measures essentially asking, first, that the Commission be ordered not to sign the contract relating to Call for tenders No 16/2005/OIL (security and surveillance of buildings), secondly, should the Commission have already concluded that contract, that its performance be suspended until the Court has ruled on the substance of the action and, thirdly, for the adoption of other interim measures

Operative part

The Court:

1. Dismisses the application for interim measures;

2. Reserves the costs.

DOCNUM	62005B0437(01)
AUTHOR	Court of First Instance of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2006 Page II-00021*
DOC	2006/02/07
LODGED	2005/12/15
JURCIT	31991Q0530-A104P2 :

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62005B0437 :

SUB	Public contracts of the European Communities
AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Luxembourg
PROCEDU	Action for annulment;Action for damages;Application for interim measures - unfounded
DATES	of document: 07/02/2006 of application: 15/12/2005

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Order of the President of the Court of First Instance of 7 February 2006 - Brink's Security Luxembourg v Commission

(Case T-437/05 R)

(Application for interim measures - Urgency - Absence)

Language of the case: French

Parties:

Applicant: Brink's Security Luxembourg (Luxembourg, Luxembourg) (represented by: C. Point and G. Dauphin, lawyers)

Defendan): Commission of the European Communities (represented by: E. Manhaeve, M. Šimerdová and K. Mojzesowicz, Agents, and by J. Stuyck, lawyer)

Intervener in support of the defendant: Group 4 Falck SA (Luxembourg) (represented by: M. Molitor, P. Lopes da Silva, N. Cambonie and N. Bogelmann, lawyers)

Application for

interim measures essentially asking, firstly, that the Commission enjoined from signing the contract relating to Call for tenders No 16/2005/OIL (buildings security and surveillance), secondly, should the Commission have already concluded that contract, that its performance be suspended until the Court has ruled on the substance of the action and, thirdly, that the adoption of other measures be ordered

Operative part of the order

1. The application for interim measures is dismissed.

2. Costs are reserved.

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Action brought on 15 December 2005 - Brink's Security Luxembourg v Commission

(Case T-437/05)

Language of the case: French

Parties

Applicant(s): Brink's Security Luxembourg SA (Luxembourg) (represented by: Christian Point, Lawyer)

Defendant(s): Commission of the European Communities

Form of order sought

The applicant(s) claim(s) that the Court should:

declare the present action admissible and well-founded;

annul the decision not to award the contract, that is, the Commission's unilateral decision not to award the contract to Brink's Security Luxembourg;

annul the decision to award the contract, that is, the Commission's unilateral decision to award the contract to Group 4 Falck Luxembourg;

annul the implicit decision of the Commission to refuse to withdraw its two aforementioned decisions;

annul the Commission's two letters dated respectively 7 and 14 December 2005 replying to the applicant's requests for information pursuant to Article 149(3) of the regulation implementing the Financial Regulation;

order the Commission to pay to the applicant the sum of EUR 1 000 000 by way of damages for the material and non-material harm suffered by reason of the illegality of the decision challenged, that sum being determined *ex aequo et bono* and on a provisional basis;

order the Commission to pay the entire costs.

Pleas in law and main arguments

The present application seeks, firstly, the annulment of the Commission's decision rejecting the tender submitted by the applicant in call for tenders No 16/2005/OIL (provision of building surveillance and security services) and, secondly, the annulment of the decision awarding the contract to a competitor.

The arguments relied on by the applicant in support of the orders for annulment sought can be categorised, in substance, into seven pleas.

By the first plea the applicant relies on the alleged infringement of the principle of equal treatment and non-discrimination in so far as the Commission imposed a requirement for length of service of one year for the employees of each tenderer to be assigned to the contract which, according to the applicant - the current holder of the contract with long-serving employees - placed it at a disadvantage vis-à-vis the other tenderers, who could recruit people with the minimum experience and have lower wage costs than those of the applicant.

By the second plea, the applicant claims that the Commission infringed the provisions of Directive 2001/23/EC[1]. That plea has two parts: alleged irregularity in the tender accepted by the Commission in that that tender did not guarantee the retention of the applicant's employees nor, moreover, did it ensure that all of their rights would be respected. The applicant alleges that the decision to award taken by the

Commission was illegal from the time it was taken since the accepted tender involved the infringement of employment law.

The third plea is based on an alleged infringement of the principle of equal treatment in so far as the successful party, at the time of submission of its tender, had privileged information in relation to the applicant, in particular in relation to turnover by client and activity, contracts and their expiry dates, and analysis of their prices and costs, which had been obtained by reason of the merger with the applicant's former parent company. In the applicant's opinion, this would have allowed its competitor to prepare a more favourable tender compared with that submitted by the applicant itself.

By the fourth plea, the applicant relies on the alleged infringement of the decision of Directorate General IV of the Commission of 28 May 2004[2] and the rules aimed at ensuring undistorted competition in that, by the decision challenged in the present application, the Commission permitted the group to which the successful tenderer selected belonged to recover assets which it was obliged to relinquish at the time of the merger authorised by the decision of 28 May 2004.

The fifth plea is based on the alleged infringement of the obligation to give reasons for the decision, the alleged infringement of the transparency principle and the right of access to documents of the Community institutions. The applicant alleges that the Commission, despite several written requests, send it only a brief explanation, which was limited to comparative tables of the tenders, of the reasons for its decision.

The applicant also relies on the infringement of the rules applying to the award of the contract, a failure to take account of the contract documents and a manifest error of assessment in relation to the analysis and evaluation of the third qualitative award criterion in relation to the basic first-aid and fire fighting training of the security agents. It alleges that it has proof that the tenderer selected by the Commission does not have all of the operatives whom it proposed to assign to the performance of the contract at issue.

By its last plea, the applicant alleges infringement of the principle of transparency and of the right of citizens to access documents of the institutions in so far as the Commission refused it information on the composition of the selection and award committees.

The applicant also seeks, by relying on the principle of extra-contractual liability, compensation for the harm which it claims to have suffered by reason of the illegality of the Commission's conduct in the tender award procedure for the contract at issue.

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[1] - Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[2] - Commission Decision of 28/05/2004 declaring a concentration to be compatible with the common market (Case N IV / M. 3396 - Group 4 Falck / Securicor (4064) pursuant to Council Regulation (EEC) No 4064/89).

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ORDONNANCE DU PRÉSIDENT DU TRIBUNAL

11 janvier 2006 (*)

« Procédure de référé – Radiation »

Dans l'affaire T-383/05 R,

GHK Consulting Limited (GHK), établie à Londres (Royaume-Uni), représentée par M^es^ J.–E. Svensson et M. A. Dittmer, avocats,

partie requérante,

contre

Commission des Communautés européennes, représentée par M. M. Wilderspin et M^me^ G. Boudot, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse,

ayant pour objet une demande de mesures provisoires visant notamment, en substance, à ce que soit ordonné le sursis à l'exécution, premièrement, de la décision de la Commission du 12 octobre 2005 rejetant l'offre présentée conjointement par la requérante et d'autres opérateurs dans le cadre de la procédure d'appel d'offres portant la référence « EuropeAid/119860/C/SV/multi – Lot 7 » et retirant la décision d'octroi du contrat-cadre en cause à ce même consortium et, deuxièmement, de toute autre décision prise par la Commission dans le cadre de l'appel d'offres « EuropeAid/119860/C/SV/multi – Lot 7 », à la suite de la décision de la Commission du 12 octobre 2005,

LE PRÉSIDENT DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

1 Par lettre déposée au greffe du Tribunal le 16 décembre 2005, la partie requérante a informé le Tribunal, conformément à l'article 99 du règlement de procédure du Tribunal, qu'elle se désistait de sa demande en référé. Elle n'a pas formulé de conclusions quant aux dépens.

2 Par lettre déposée au greffe du Tribunal le 19 décembre 2005, la partie défenderesse a fait savoir au Tribunal qu'elle n'avait aucune objection ou remarque à formuler sur ce désistement.

3 Il y a donc lieu de rayer la présente demande en référé du registre. S'agissant des dépens, il y a lieu, dans le cadre de la procédure en référé, de les réserver en attendant la décision sur le recours au principal.

Par ces motifs,

LE PRÉSIDENT DU TRIBUNAL

ordonne :

1) L'affaire T-383/05 R est rayée du registre du Tribunal.

2) Les dépens sont réservés.

Fait à Luxembourg, le 11 janvier 2006.

Le greffier	Le président
E. Coulon	B. Vesterdorf

* Langue de procédure : français.

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Order of the Court of First Instance of 11 January 2006 - GHK Consulting v Commission

(Case T -383/05 R)

Language of the case: French

The President of the Court of First Justice has ordered that the case be removed from the register.

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Notice for the OJ

Action brought on 20 October 2005 S GHK Consulting / Commission

(Case T-383/05)

Language of the case: English

Parties

Applicant(s): GHK Consulting Limited (London, United Kingdom) [represented by: J-E. Svensson, M. Dittmer, lawyers]

Defendant(s): Commission of the European Communities

Form of order sought

Annul the European Commission's Decision of 12 October 2005 excluding the candidacy and the offer of the consortium headed by the applicant, whereby the Commission revoked its decision on allocating the framework contract to the consortium, in relation to Tender EuropeAid//119860/C/ - Lot No. 7;

annul any decision by the Commission following the Commission's Decision of 12 October 2005 and, in particular, any decision by the Commission to enter into contract with other tenderers;

order the Commission to pay all costs related to the case.

Pleas in law and main arguments

The Commission issued, under reference EuropeAid//119860/C - Lot No. 7, an invitation to tender for a multiple framework contract to recruit technical assistance for short-term expertise for the exclusive benefit of third countries benefiting from European Commission external aid. The applicant, acting as leader of a consortium, submitted a bid.

By the contested Decision the Commission excluded the applicant's consort

Judgment of the Court of First Instance (Second Chamber)
First Instance (Second Chamber)First Instance (Second Chamber)February 2006. TEA-CEGOS, SA, Services techniques globaux (STG) SA (T-376/05) and GHK Consulting Ltd (T-383/05) v Commission of the European Communities. Joined cases T-376/05 and T-383/05.

In Joined Cases T376/05 and T383/05,

TEA-CEGOS, SA, established in Madrid (Spain),

Services techniques globaux (STG) SA , established in Brussels (Belgium),

represented by G. Vandersanden and L. Levi, lawyers,

applicants in Case T376/05,

GHK Consulting Ltd, established in London (United Kingdom), represented by M. Dittmer and J.-E. Svensson, lawyers,

applicant in Case T383/05,

v

Commission of the European Communities, represented by M. Wilderspin and G. Boudot, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment, first, of the Commission's decisions of 12 October 2005 rejecting the tenders submitted by the applicants in the tendering procedure bearing reference EuropeAid/119860/C/SV/multi-Lot 7' and, second, of all other decisions taken by the Commission in the same call for tenders following the decisions of 12 October 2005,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N. J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2006,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the applications;

2. Orders the applicants to pay the costs, including those relating to the applications for interim measures.

Legal context

1. The award of Commission service contracts in connection with its external actions is governed by the provisions of the second part of Title IV of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, the Financial Regulation') and the provisions of the second part of Title III of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed

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rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1, the Implementing Rules').

2. Under Article 94 of the Financial Regulation, reproduced in point 2.3.3 of the Practical Guide to contract procedures for EC external actions (the Practical Guide'):

Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest,

(b) are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information.'

3. Under Article 146(3) of the Implementing Rules:

Requests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated.

However, the evaluation committee may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within a specified time-limit.'

4. Article 13 of the procurement notice issued in the tendering procedure bearing reference EuropeAid/119860/C/SV/multi-Lot 7' relating to a multiple framework contract to recruit technical assistance for short-term expertise for exclusive benefit of third countries benefiting from European Commission external aid (the call for tenders') stated that no more than one application could be submitted by a natural or legal person (including legal persons within the same legal group), whatever the form of participation (as an individual legal entity or as leader or partner of a consortium submitting an application). In the event that a natural or legal person (including legal persons within the same legal group) submitted more than one application, all applications in which that person (and legal persons within the same legal group) had participated would be excluded.

5. The declaration form to be completed by candidates and tenderers mentioned their obligation to indicate whether or not they belonged to a group or network'.

6. Article 14 of the instructions to tenderers stated that each successful tenderer would be notified in writing. It also provided that, before the contracting authority signed the framework contract with the successful tenderer, the tenderer had to produce additional documents to prove the veracity of his statements. If a tenderer was not able to produce the required documents within a period of 15 calendar days from notification of the award of the contract or if he was found to have supplied false information, it was provided that the award of the contract would be regarded as null and void. In such a case, the contracting authority could award the framework contract to another tenderer or cancel the tendering procedure.

7. Article 16 of the instructions to tenderers provided that tenderers who believed themselves to have been harmed by an error or an irregularity in the course of the tendering procedure could submit a complaint, to which the competent authority had to respond within a period of 90 days.

Background to the dispute

8. By a procurement notice of 9 July 2004 published in the Official Journal of the European Union (OJ 2004, S 132), the Commission launched the call for tenders.

9. The TEA-CEGOS consortium expressed its interest in participating in the call for tenders. TEA-CEGOS, SA was chosen to be the leader of the consortium with a view to the consortium's participation in the tendering procedure. Services techniques globaux (STG) SA is also a member

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of the TEA-CEGOS Consortium and provides it with technical and financial management services.

10. In the course of the application to participate phase and in accordance with the requirements set out in the procurement notice, the various members of the TEACEGOS Consortium made statements to the effect that they were not in any of the situations corresponding to the grounds for exclusion listed in point 2.3.3 of the Practical Guide. On 18 August 2004 the Danish Institute for Human Rights (DIHR), a member of the TEA-CEGOS Consortium, sent the Commission a document in which it was stated that the DIHR had its own board of management but was part of a larger structure, the Danish Centre for International Studies and Human Rights (the Centre'), and had as a partner the Danish Institute for International Studies (DIIS), an institute set up by a Danish law of 6 June 2002 which also established the Centre and the DIHR.

11. GHK Consulting Ltd, a company governed by English law, is part of a consortium (the GHK Consortium') bringing together various entities including the DIIS. GHK Consulting, through its GHK International Ltd division, was chosen to be the leader of the GHK Consortium for the tendering procedure. On 29 September 2004, when the applications to participate were submitted, the DIIS stated that it did not belong to a group or network.

12. By email of 17 December 2004 and by letter of 31 December 2004, the TEACEGOS Consortium was invited to participate in the call for tenders for lot 7. During this stage of the tendering procedure the DIHR indicated once again that it was part of a larger structure, the Centre, which included another institute, the DIIS. The GHK Consortium was also invited to tender for lot 7.

13. By letters of 20 May 2005, TEA-CEGOS and GHK International learnt that the tenders submitted by the consortia to which they each belonged had been accepted for lot 7. Those letters stated that the contracts would be sent to the consortia for signature subject to proof that they were not in any of the situations corresponding to the grounds for exclusion listed in point 2.3.3 of the Practical Guide. The applicants sent the Commission the documents that they considered to be relevant in this respect.

14. By a fax of 22 June 2005, the Commission asked TEA-CEGOS to explain the link between the DIHR and the Centre and its possible autonomy vis-à-vis the Centre, and also requested GHK International to provide it with clarification as to the legal status of the DIIS.

15. On 23 June 2005 the TEA-CEGOS Consortium sent the Commission a letter from the DIHR explaining the way it operated. On 24 June 2005 GHK International sent the Commission a fax providing clarification with regard to the DIIS.

16. In response to a further request by the Commission for additional clarification, made by telephone on 27 June 2005, on the same date the TEA-CEGOS Consortium sent the Commission a copy of the Danish law of 6 June 2002 setting up the Centre, together with a memorandum pointing out the relevant parts of the law and the link between the Centre and the DIHR, and a letter from the Centre's head of administration

17. On 14 July 2005 the TEA-CEGOS Consortium also sent the Commission a statement by the Danish Minister for Foreign Affairs in which the Minister affirmed that the DIHR and the DIIS were autonomous entities within the Centre.

18. By letters of 18 July 2005 (the decisions of 18 July 2005'), the Commission informed the TEA-CEGOS Consortium and the GHK Consortium that its decisions to accept their tenders were based on inaccurate information which it had been given during the tendering procedure and that, in the light of new evidence, their applications and their tenders were to be rejected.

19. On 22 and 25 July 2005 the TEA-CEGOS Consortium claimed to the Commission that the DIHR

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and the DIIS could not be regarded as part of the same legal group within the meaning of Article 13 of the procurement notice, pointing out that from the very beginning of the tendering procedure it had stated that DIHR belonged to the Centre. On 27 July 2005 the Commission acknowledged receipt of the letter of 22 July and stated that its content would be examined in detail.

20. On 25 July 2005 the shortlist of tenderers for lot 7, published on the EuropeAid website, was altered so that it no longer included the two consortia.

21. On 8 September 2005 TEA-CEGOS and STG contacted the Commission, alleging that the decisions of 18 July 2005 were unlawful and therefore calling on it to reverse those decisions as soon as possible. By letter of 13 September 2005, the Commission informed them that a review was in progress and that it had sent the Centre a series of questions and asked it to produce documents to substantiate the answers that it provided.

22. On 14 September 2005 TEA-CEGOS and STG reiterated that they wanted a quick reply regarding the final position adopted by the Commission. On 21 September 2005 the Commission informed them that it was waiting for the Centre to provide certain information that was needed in order to take a decision on the result of the procedure, and undertook to notify them of its decision as soon as possible.

23. By email of 23 September 2005 and by fax of 26 September 2005, the Centre answered the Commission's questions, also sending it a number of documents to substantiate its answers. On 26 September 2005 GHK International sent the Commission a letter in support of the answers provided by the Centre.

24. On 27 September 2005 and 5 October 2005 TEA-CEGOS and STG sent the Commission two letters which, among other things, highlighted the independence of the two institutes. They noted that the only grounds on which award decisions could be withdrawn were those set out in Article 14 of the instructions to tenderers, which referred to point 2.3.3 of the Practical Guide. They added that the TEA-CEGOS Consortium had not failed to provide information or supplied inaccurate information.

25. On 11 October 2005 TEA-CEGOS and STG made an enquiry to the Commission in order to ascertain whether it had adopted a final position on the tendering procedure, asking it not to conclude any contracts at the same time as the award decisions that it would be adopting. The Commission informed them that it was about to adopt a decision.

26. By two decisions sent on 12 October 2005 to the TEA-CEGOS Consortium on the one hand and to the GHK Consortium on the other, the Commission confirmed the decisions of 18 July 2005 and rejected the tenders submitted by those consortia (the contested decisions').

Procedure and forms of order sought

27. By an application lodged with the Registry of the Court of First Instance on 13 October 2005, TEA-CEGOS and STG brought the action in Case T376/05.

28. By separate document registered at the Registry of the Court of First Instance on 14 October 2005, TEA-CEGOS and STG submitted an application for interim measures, requesting suspension of the operation of the contested decision in that case and of all the other decisions taken by the Commission in the same call for tenders following that decision. By order of the President of the Court of First Instance of 14 October 2005, the Commission was ordered to suspend the tendering procedure bearing reference EuropeAid/119860/C/SV/multi-Lot 7' pending a final order on the application for interim measures. On account of an agreement reached between the parties on 26 October 2005, in the light of the settlement proposed by the President of the Court of First Instance, acting in his capacity as the judge hearing the application for interim relief, the order of 14 October 2005 was revoked by an order of the President of 13 December 2005. By an order of

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the President of the Court of First Instance of 11 January 2006, the application for interim measures submitted by TEA-CEGOS and STG was removed from the register of the Court of First Instance, costs being reserved.

29. By an application lodged with the Registry of the Court of First Instance on 20 October 2005, GHK Consulting brought the action in Case T383/05, requesting that the case be decided under an expedited procedure pursuant to Article 76a of the Rules of Procedure of the Court of First Instance. On 7 November 2005 the Commission stated that it agreed to that request.

30. By separate document registered at the Registry of the Court of First Instance on 20 October 2005, GHK Consulting submitted an application for interim measures, requesting suspension of operation of the decision in that case and of all subsequent decisions with respect to other tenderers and an order of interim measures to suspend the effects of those decisions. By letter lodged with the Registry of the Court of First Instance on 16 December 2005, GHK Consulting informed the Court pursuant to Article 99 of the Rules of Procedure that it was withdrawing its application for interim measures. By order of the President of the Court of First Instance of 11 January 2006, the application for interim measures submitted by GHK Consulting was removed from the register of the Court of First Instance, costs being reserved.

31. By letter lodged with the Registry of the Court of First Instance on 20 October 2005, GHK Consulting submitted a request for Cases T376/05 and T383/05 to be joined. The Commission and TEA-CEGOS and STG stated on 28 October 2005 and 8 November 2005 respectively that they had no objection to the cases being joined.

32. By letter lodged with the Registry of the Court of First Instance on 31 October 2005, GHK Consulting made a request for the language of the case to be changed to French, whilst reserving the right to use English where necessary in the written and oral procedure. On 7 November 2005 the Commission stated that it had no objection to the proposed change of language.

33. By letter lodged with the Registry of the Court of First Instance on 3 November 2005, TEA-CEGOS, STG and GHK Consulting requested that they be given the opportunity to put before the Court, in the main proceedings, the documents requested by the Present of the Court of First Instance at the interim measures hearing. On 4 November 2005 the President of the Second Chamber of the Court of First Instance granted that request, on condition that the documents were sent to the Registry of the Court of First Instance in English by 1 December 2005 at the latest.

34. On 8 November 2005 the Second Chamber of the Court of First Instance decided to grant the application for an expedited procedure in Case T383/05 and to change the language of the case, as requested by GHK Consulting.

35. By order of the President of the Second Chamber of the Court of First Instance of 10 November 2005, Cases T376/05 and T383/05 were joined for the purposes of the written procedure, the oral procedure and the judgment.

36. By letter lodged wi th the Registry of the Court of First Instance on 30 November 2005, the Commission requested that Case T-376/05 be decided under an expedited procedure pursuant to Article 76a of the Rules of Procedure. On 1 December 2005 TEA-CEGOS and STG agreed to that request. On 6 December 2005 the Second Chamber of the Court of First Instance decided to grant the application for an expedited procedure in Case T-376/05.

37. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. The parties presented oral argument and answered the questions put to them by the Court at the hearing on 12 January 2006.

38. The applicants claim that the Court of First Instance should:

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- annul the contested decisions;

- annul all the other decisions taken by the Commission in the call for tenders following the contested decisions;

- order the Commission to pay the costs.

39. The Commission contends that the Court of First Instance should:

- dismiss the applications;

- order the applicants to pay the costs.

Law

40. The applicants in Case T-376/05 rely on four pleas in law in support of their action. By the first plea, the applicants claim that the Commission infringed Article 13 of the procurement notice and Article 14 of the instructions to tenderers. By the second plea, they assert that the Commission failed to comply with its obligation to state reasons and breached the principle of legal certainty, while moreover committing a manifest error of assessment with regard to the application of Article 13 of the procurement notice. By the third plea, they allege that the Commission breached the principle of good administration and failed to exercise due care. Lastly, by the fourth plea, they claim that the Commission breached the principle of protection of legitimate expectations. Since the second plea to a large extent determines the resolution of the other pleas, it should be examined first.

41. The applicant in Case T-383/05 relies on a single plea in law, alleging misapplication of Article 13 of the procurement notice, and this plea will therefore be examined in connection with the second plea mentioned above.

The second plea, alleging breach of the obligation to state reasons, manifest error of assessment and breach of the principle of legal certainty

Arguments of the parties

42. TEA-CEGOS and STG point out that Article 13 of the procurement notice excludes applications from a natural or legal person' who submits more than one tender for the same lot, including legal persons within the same legal group'. However, no definition of legal group' is given in Community law or in the documents supplied in connection with the call for tenders. In the absence of such a definition, GHK Consulting considers that tenders should be excluded under Article 13 of the procurement notice only where the entities belong to the same group, that is to say where they are controlled by a common parent company or control each other. GHK Consulting claims that in the present case the DIHR and the DIIS are independent, that they have their own statutes and that they each pursue their own specific objectives, and that the Centre was set up to facilitate the administration of the two institutes. Only the management of their administrative services is shared in so far as they are managed by the Centre, which receives remuneration for the services provided. In addition, TEA-CEGOS and STG claim that the Commission committed a manifest error of assessment in failing to take account of the fact that each of the institutes had its own assets.

43. TEA-CEGOS and STG consider that the Commission changed its interpretation of the concept of legal group' since, in the decisions of 18 July 2005, it stated, for the first time, that the criterion of independence was no longer relevant and that it was sufficient for the DIHR to form part of the Centre structurally, an approach confirmed in the contested decisions, thus breaching the principle of legal certainty.

44. TEA-CEGOS and STG state that the objective of Article 13 of the procurement notice is to prevent conflicts of interest between persons who, directly or indirectly, might compete several

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times for a single contract and therefore find themselves in competition for the framework contract or, later, for specific contracts. Thus, if the DIHR and the DIIS were not independent from the Centre and had to be given the Centre's prior approval to conclude a contract, a conflict of interest could exist between them. In the present case, TEA-CEGOS and STG consider that the conduct of each entity may be imputed only to that entity and not to third parties, with the result that the Centre and the two institutes cannot constitute a single economic entity (Case T325/01 DaimlerChrysler v Commission [2005] ECR II0000, paragraphs 218 and 219). The Commission cannot therefore take the view, as it did in the present case, that because the two institutes belong to the Centre effective competition between them in the implementation of the framework contract is precluded. In the event that an examination of a conflict of interest is not required by the provisions of Article 13 of the procurement notice, TEA-CEGOS and STG consider that that article must be manifestly disproportionate and inappropriate in relation to the objective being pursued, namely to prevent conflicts of interest between tenderers.

45. The Commission acknowledges that there is no definition of legal group' in Article 13 of the procurement notice. However, that concept is general and can cover a variety of situations, with the Commission making an assessment in the specific case in order to decide on the existence of a legal group. It states that Article 13 of the procurement notice reproduces a more general provision of the Financial Regulation, namely Article 94, which expressly provides for the exclusion of candidates who are subject to a conflict of interest. In the present case, according to the Commission, the fact that the two institutes belong to the Centre makes effective competition between them difficult, since they have similar areas of expertise and their fields of competence may overlap. Moreover, Article 13 is sufficiently clear in that it prohibits membership of the same legal group, thereby introducing a structural criterion.

46. The Commission considers that the applicants' claims alleging breach of the principle of legal certainty and breach of the obligation to state reasons are not well founded.

Findings of the Court

47. First, as regards the complaint alleging a failure to state reasons, it should be stated that the reasons for which the Commission rejected the applicants' tenders can be clearly seen from the grounds of the contested decisions.

48. According to consistent case-law, the scope of the obligation to state reasons depends on the nature of the measure at issue and the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution, so as to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded, and so as to enable the Community judicature to exercise its power of review (Case C350/88 Delacre and Others v Commission [1990] ECR I395, paragraphs 15 and 16, and Case T217/01 Forum des migrants v Commission [2003] ECR II1563, paragraph 68).

49. In the present case, the contested decisions expressly mention that the tenders submitted by the two consortia infringed Article 13 of the procurement notice because the DIIS and the DIHR belonged to the same legal group, the evidence which enabled the Commission to make this finding also being set out in those decisions. In addition, it should be stressed that the contested decisions were adopted following a thorough review by the Commission, after the decisions of 18 July 2005 and after hearing the views of the applicants. The applicants were therefore aware of the Commission's questions as to the nature of the link between the two institutes and the Centre. In these circumstances, this complaint cannot be upheld.

50. Second, as regards the complaint alleging the manifest error of assessment affecting the contested

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decisions, it should be noted that the Commission has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (Case T145/98 ADT Projekt v Commission [2000] ECR II387, paragraph 147, and Case T169 Esedra v Commission [2002] ECR II609, paragraph 95).

51. The Court observes that Article 13 of the procurement notice prohibited entities within the same legal group from participating in the same call for tenders, for example as members of consortia, in order to prevent the risk of a conflict of interest or of distorted competition between the tenderers. As a result of that prohibition, the validity of a tender was dependent on compliance with Article 13 of the procurement notice, since the Commission has a broad discretion in determining both the content and the application of the rules applicable to the award of a contract following a call for tenders. Therefore, the article applies even where an infringement of the article is detected only at an advanced stage of the tendering procedure.

52. In the light of the foregoing, it must be determined in the present case whether the Commission committed a manifest error of assessment in taking the view that the DIIS and the DIHR belonged to the same legal group. To that end, it should be noted that in the absence of a definition of the concept of legal group in legislation or in case-law, laying down the criteria applying to such a group, the Commission was required to conduct an examination of each individual case, taking into account all the relevant factors, in order to decide whether the conditions for the application of Article 13 of the procurement notice had been met.

53. Consequently, in order to recognise the existence of a legal group in the present case, the Commission had to determine whether the entities in question were structurally linked to the Centre, since this factor was liable to give rise to a risk of a conflict of interest or of distorted competition between the tenderers, although other factors could support the examination of structural links, such as those relating to the degree of independence of the entities in question which are described by the parties as functional criteria'.

54. In the present case, it can be seen from the contested decisions that the Commission found that the DIIS and the DIHR legally formed part of the Centre and therefore belonged to the same structure. It inferred from the Danish law of 6 June 2002 and from the statutes of the Centre and those of the institutes that the DIIS and the DIHR did not constitute legal entities distinct from the Centre and noted that the Centre was among other things responsible for the common administration of the two institutes, which were, moreover, represented on the Centre's board of management.

55. First, as regards the question whether institutes belong to the Centre structurally, it is apparent from the documents before the Court, and more specifically Paragraph 1(2) of the Danish Law of 6 June 2002, that the Centre is composed of two autonomous entities, the DIIS and the DIHR, and that the two institutes and the Centre share the same premises.

56. As regards the administration of the two institutes, as the Commission observed in the contested decisions, Article 2 of the Centre's statutes provides that the Centre shall provide joint administration concerning finance, staff administration, management, joint services and the joint library'. Thus, administrative services, such as payment of salaries and management of invoices, are provided by the Centre, which receives specific remuneration from the two institutes for the services provided, and the Centre is also responsible for receiving payments made to the institutes.

57. Furthermore, as the Commission also pointed out in the contested decisions, there is a link between the institutes and the Centre's board of management, since certain board members are appointed by the DIIS and the DIHR (Paragraph 5(3) of the Danish Law of 6 June 2002). An exchange of

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views on the commercial strategies to be pursued by the two institutes may therefore take place at this high level of the structure. This link is reinforced by the fact, also apparent from the papers before the Court, that the Centre's board of management discusses operational forecasts for the two institutes.

58. In the light of the foregoing, the two institutes must be regarded as structurally forming part of the same legal group. Consequently, the Commission did not commit a manifest error of assessment in applying Article 13 of the procurement notice, since the fact that the institutes belonged to the Centre structurally was sufficient evidence of a risk of distorted competition between the tenderers, or even a conflict of interest. It must also be stated that consideration of factors relating to the functional criterion does not call into question the Commission's assessment in this regard.

59. Second, as regards the functional criterion, namely the institutes' independence from the Centre, the Court notes that the institutes' financial autonomy is relatively limited by the influence of the Centre. As is apparent from the papers before the Court, the DIIS and the DIHR are financed in part by public funds granted to the Centre, which must divide them on the basis of an 80% share for the DIIS and 20% for the DIHR. In addition, Articles 4 and 15 of the DIIS's statutes provide that the DIIS is under the auspices of the [Centre]' and that the accounts of the institute, as an entity of the [Centre], shall be audited by the Rigsrevisor'. Similarly, the DIHR's accounts must be approved by the Centre's board of management.

60. As regards the institutes' decision-making autonomy, the applicants highlight the fact that the institutes' boards of management are autonomous from the Centre. However, this claim is not sufficient to rebut the finding that the DIIS and the DIHR belong to the same legal group, since such a situation does not necessarily preclude decision-making autonomy for different legal entities coexisting within the same group.

61. As regards the applicants' argument that the Commission failed to take into consideration the fact that the institutes had distinct assets, the Court notes that the applicants have not been able to provide conclusive evidence to show that in the contested decisions the Commission wrongly took the view that the institutes' assets belonged to the Centre. Furthermore, the fact that the Commission did not consider the institutes to have legal personality does not constitute a manifest error of assessment resulting in a misapplication of Article 13 of the procurement notice. First, it should be noted that the contested decisions are not in any way based on the absence of legal personality, since no mention is made of that factor in the decisions. Second, as the Commission proves satisfactorily in its written submissions, even if the institutes had their own legal personality, the fact that the DIIS and the DIHR belonged to the Centre justified the application of Article 13 of the procurement notice.

62. Consequently, the Commission did not commit a manifest error of assessment in basing its position principally on a structural criterion. The fact that it was able initially to request information relating to the functional criterion and then used the structural criterion cannot affect this finding, since the Commission undertook a thorough examination of the facts of the case before applying Article 13 of the procurement notice.

63. The complaint that the Commission breached the principle of legal certainty by deciding to opt for a structural criterion is therefore unfounded. In addition, the removal of Article 13 of the procurement notice from subsequent tender notices is irrelevant to the outcome of the present case, since the lawfulness of the individual measure contested must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 France v Commission [1979] ECR 321, paragraph 7; Case C449/98 P IECC v Commission [2001] ECR I3875, paragraph 87; and Joined Cases T177/94 and T377/94 Altmann and

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Others v Commission [1996] ECR II2041, paragraph 119).

64. As regards the allegedly disproportionate and inappropriate nature of Article 13 of the procurement notice, the applicants stated at the hearing that the scope of Article 13 of the procurement notice was too broad and was capable of covering situations where no conflict of interest could result from an entity belonging structurally to another. It should be considered in this regard that, in view of the broad discretion enjoyed by the Commission and the need to lay down clear, understandable rules in the procurement notice in advance, the Commission did not manifestly misuse its power in deciding on the content of Article 13 of the procurement notice and in applying it to the applicants' tenders. In particular, it did not exceed the limits of that power in stipulating in Article 13 that if legal persons belonged to the same legal group, they would be excluded from the tendering procedure.

65. The Court notes, for the sake of completeness, that in Joined Cases C21/03 and C34/03 Fabricom [2005] ECR I1559, paragraph 36, the Court of Justice held that a candidate or tenderer cannot automatically be excluded from a tendering procedure without having the opportunity to comment on the reasons justifying such exclusion.

66. In the present case, in exercising its broad discretion the Commission gave the applicants several opportunities to offer a detailed explanation of the link between the two institutes and the Centre before concluding that the two institutes belonged structurally to the same legal group and applying Article 13 of the procurement notice. Thus, it was finally decided to exclude the applicants from the tendering procedure only after they had the opportunity to express their point of view regarding the links between the DIIS and the DIHR. Consequently, the Commission did not automatically apply the provisions laid down in Article 13 of the procurement notice. The facts of the present case are therefore different from those of the Fabricom case. As a result, the applicants' argument regarding the disproportionate or inappropriate nature of Article 13 of the procurement notice must be rejected.

67. In the light of the foregoing, since the DIIS and the DIHR belong to the Centre structurally, the Commission did not commit a manifest error of assessment and did not breach the principle of legal certainty in taking the view that the two institutes were part of the same legal group and in applying Article 13 of the procurement notice. The second plea must therefore be rejected.

The first plea, alleging infringement of Article 13 of the procurement notice and Article 14 of the instructions to tenderers

Arguments of the parties

68. TEA-CEGOS and STG state that under Article 14 of the instructions to tenderers the signing of the framework contract with the successful tenderer was subject to the production of additional documents to prove the correctness of the statements made by the tenderer during the tendering procedure. Consequently, the decision to award the contract should have been declared null and void only if the successful tenderer had not been able to produce those documents or had communicated inaccurate information during the tendering procedure.

69. They stress that in the present case, in accordance with the request made in the letter of 20 May 2005 (see paragraph 13 above), the TEA-CEGOS Consortium communicated the required documents within the period of 15 calendar days and did not provide any wrong information, since the fact that the DIHR belonged to the Centre was mentioned from the initial application to participate. Consequently, TEA-CEGOS and STG claim that the required evidence was duly provided in accordance with Article 14 of the instructions to tenderers. In addition, TEACEGOS and STG consider that Article 13 of the procurement notice could not be applicable once an award decision had been taken. The only grounds on which the award decision could have been withdrawn were those set out in Article

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14 of the instructions to tenderers, which refer to point 2.3.3 of the Practical Guide.

70. The Commission contests the arguments put forward by the applicants. In its view, the letters of 20 May 2005 cannot be treated as decisions definitively awarding the contract to the applicants, since the award was dependent on the submission of documents showing that the applicants were not in a situation corresponding to the grounds for exclusion. The Commission considers that the documents supplied disclosed that the applicants failed to comply with Article 13 of the procurement notice.

Findings of the Court

71. It should be noted that the decisions of 20 May 2005 expressly stated that the signing of the framework contract was subject to evidence being provided by the applicants that they were not in any of the situations corresponding to the grounds for exclusion set out in point 2.3.3 of the Practical Guide. In addition, it is apparent from the actual wording of Article 14 of the instructions to tenderers that it was for the successful candidates to prove the truth of their statements. Consequently, the award of the contract was dependent on the submission of evidence capable of proving the veracity of the information supplied by the applicants when they submitted their tenders and on the Commission verifying that Article 13 of the procurement notice had been complied with.

72. As has already been pointed out (paragraph 51 above), the validity of any tender was dependent on compliance with Article 13 and the Commission could apply that article at an advanced stage of the procedure, at the very least until the evidence mentioned in the preceding paragraph had been examined. Consequently, the applicants' argument that Article 13 of the procurement notice could not apply once an award decision had been taken is unfounded.

73. The first plea must therefore be rejected.

The third plea, alleging breach of the principle of good administration and failure to exercise due care

Arguments of the parties

74. TEA-CEGOS and STG state that the Commission had been aware from the initial application to participate that the DIHR belonged to the Centre. If the Commission had questions as to the extent to which the DIHR belonged to the Centre, it should have asked the TEA-CEGOS Consortium during the tendering procedure and not after it had decided to award it the contract. By failing to do so, the Commission breached the principle of good administration. It should also have answered the letters sent by the TEA-CEGOS Consortium on 22 and 25 July 2005, which it did only after being requested to do so by TEA-CEGOS. In their view, the carelessness with which the Commission acted, an attitude reflected in the contradictory information on its website relating to the successful tenderers for lot 7, should therefore be condemned.

75. The Commission notes that, while it is true that the DIHR had pointed out the link with the DIIS, the DIIS had not made any such statement. Consequently, the computer system set up for the administrative procedure was not able to detect a possible infringement of Article 13 of the procurement notice. Having been alerted by a third party to the existence of a link between the DIHR and the DIIS, the Commission reacted by asking the applicants about this point. The Commission cannot therefore be accused of any failure to exercise due care. The Commission also claims that it responded quickly to the requests made by the applicants on 22 and 25 July 2005, as early as 27 July 2005, when it informed them, among other things, that it would take their comments into consideration and would notify them as soon as possible of the action it intended to take.

Findings of the Court

76. According to settled case-law, the guarantees conferred by the Community legal order in administrative proceedings include, in particular, the principle of good administration, involving the duty of

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the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C269/90 Technische Universität München [1991] ECR I5469, paragraph 14; Case T44/90 La Cinq v Commission [1992] ECR II1, paragraph 86; and Case T70/99 Alpharma v Council [2002] ECR II3495, paragraph 182). Furthermore, the Commission is bound to ensure, at each stage of a tendering procedure, compliance with the principle of equal treatment and, thereby, equality of opportunity for all the tenderers (see, to that effect, Case C496/99 P Commission v CAS Succhi di Frutta [2004] ECR I3801, paragraph 108, and ADT Projekt v Commission , paragraph 164).

77. In the present case, on 20 May 2005 the Commission informed the applicants that their tenders had been accepted for lot 7 on the condition that the applicants produced documents to prove that they were not in any of the situations corresponding to the grounds for exclusion set out in point 2.3.3 of the Practical Guide.

78. The DIHR indicated that it belonged to the Centre when the TEA-CEGOS Consortium applied to participate, and also mentioned that one of its partners was the DIIS. The DIIS stated that it did not belong to any group or network. However, if the DIIS really considered that it did not belong to any legal group, in view of the information required in the declaration form, it should at the very least have notified the Commission that it had links with the Centre and was therefore part of a network, since the Centre's statutes expressly provide that the DIIS is one of its entities.

79. Although the DIIS's statement was inaccurate, it should be noted that the technical tender submitted by the GHK Consortium indicated the names of the various members of the Consortium and that the DIIS was the third name mentioned there. Consequently, the Commission could have realised that the DIIS's statement was not accurate. However, the fact that the Commission realised that the institutes belonged to the Centre only at an advanced stage of the procedure has no bearing on the outcome of the present case, since, even at that stage, the tender submitted by the GHK Consortium had to be excluded in accordance with Article 13 of the procurement notice.

80. Whatever the case, the inherent complexity of the range of information submitted in tendering procedures can explain why the Commission realised that the institutes belonged to the Centre only once the two tenders had been conditionally accepted. It was only at this stage of the procedure that the applicants were required to produce documents to prove the veracity of their initial statements. It follows that the Commission did not breach the principle of good administration by failing to raise the question whether the institutes belonged to the Centre until after the tender submitted by the GHK Consortium had been conditionally accepted.

81. With regard to the way the Commission conducted the tendering procedure, it is clear that as early as 22 June 2005 the Commission asked TEA-CEGOS to explain the link between the DIHR and the Centre and asked GHK International to provide it with clarification as to the legal status of the DIIS. Further to the information supplied by TEA-CEGOS, on 27 June 2005, before adopting the decision of 18 July 2005, the Commission asked it to provide supplementary information. In addition, it is apparent from the facts that between 18 July and 12 October 2005 the Commission was in constant contact with the applicants and, among other things, informed them that it was reviewing the evidence submitted and would notify them as soon as possible of the final position it adopted. Furthermore, the Commission endeavoured to answer the applicants' questions promptly, in particular by informing TEA-CEGOS' lawyers of the state of the procedure as early as 13 September 2005, after those lawyers expressed a desire to find out about this on 8 September 2005.

82. As regards the contradictory information allegedly circulated on the EuropeAid website, it should be stated that the names of the successful tenderers mentioned on that website were those that had been conditionally accepted by the Commission. It was therefore logical for the applicants' names to appear there, since it became clear and unequivocal that the DIIS and the DIHR belonged

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to the Centre only when the applicants were required to prove the veracity of their statements, in this case following the decisions of 20 May 2005. Once the decisions of 18 July 2005 had been adopted, the applicants' names were removed from the website, with effect from 25 July 2005.

83. In the light of the foregoing, the applicants have not shown that the Commission breached the principle of good administration and failed to exercise due care, with the result that their complaints are in any event unfounded. The third plea must therefore be rejected.

The fourth plea, alleging the retroactive withdrawal of the contested decisions and breach of the principle of protection of legitimate expectations

Arguments of the parties

84. TEA-CEGOS and STG take the view that the decision contested by them annuls the decision of 20 May 2005 awarding the contract to the TEA-CEGOS Consortium, which in fact constitutes retroactive withdrawal of an administrative act. It follows from settled case-law that the retroactive withdrawal of a favourable decision is subject to very strict conditions (Case 54/77 Herpels v Commission [1978] ECR 585, paragraph 38). They also state that, according to settled case-law, while it must be acknowledged that any Community institution which finds that a measure which it has just adopted is tainted by illegality has the right to withdraw it within a reasonable period, with retroactive effect, that right may be restricted by the need to fulfil the legitimate expectations of a beneficiary of the measure, who has been led to rely on its lawfulness (Case C90/95 P de Compte v Parliament [1997] ECR I1999, paragraph 35).

85. TEA-CEGOS and STG claim that in the present case the initial decision is not unlawful and should not therefore have been withdrawn. Even if that decision were unlawful, which is not the case in their view, its withdrawal could have been decided only if the conditions laid down for that purpose by the abovementioned case-law were satisfied. However, the Commission's request for explanation as to the links between the DIHR and the Centre was not made until 22 June 2005, even though it had had the DIHR's statement since October 2004. It was not until almost two months after the favourable decision of 20 May 2005 that the decision was withdrawn. The TEA-CEGOS Consortium also took care to answer the Commission's questions as set out in its fax of 22 June 2005. However, the decision contested by it was based on grounds which did not correspond with those questions. Consequently, TEA-CEGOS and STG consider that they could legitimately take the view that the evidence communicated to the Commission was not called into question and could not form the basis for a decision altering the award of the contract. They therefore take the view that they could rely on the lawfulness of the decision of 20 May 2005 and claim that the decision should be upheld. In these circumstances, regard was not had to their legitimate expectations or to the conditions under which an administrative act may be withdrawn.

86. The Commission points out that the letters of 20 May 2005 stated that the applicants' application would be accepted on the condition that they produced the documents required under Article 14 of the instructions to tenderers. It therefore considers that those letters did not contain a decision, but simply information regarding the Commission's conditional intention to accept the applicants' tenders. It adds that, since the applicants were not able to produce evidence that the two institutes satisfied the requirements laid down in Article 13 of the procurement notice, they could not be awarded the contract in any case.

Findings of the Court

87. First, it should be noted that the retroactive withdrawal of a favourable decision is generally subject to very strict conditions (Herpels v Commission , paragraph 38). According to settled case-law, while it must be acknowledged that any Community institution which finds that a measure which it has just adopted is tainted by illegality has the right to withdraw it within a reasonable

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period, with retroactive effect, that right may be restricted by the need to fulfil the legitimate expectations of a beneficiary of the measure, who has been led to rely on its lawfulness (Case 14/81 Alpha Steel v Commission [1992] ECR 749, paragraphs 10 to 12; Case 15/85 Consorzio Cooperative d'Abruzzo v Commission [1987] ECR 1005, paragraphs 12 to 17; Case C248/89 Cargill v Commission [1991] ECR I2987, paragraph 20; Case C365/89 Cargill [1991] ECR I3045, paragraph 18; and de Compte v Parliament , paragraph 35).

88. Second, it must be recalled that, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual in a situation where the Community authorities, by giving him precise assurances, have caused him to entertain legitimate expectations. Such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources (Joined Cases T66/96 and T221/97 Mellett v Court of Justice [1998] ECRSC IIA449 and II1305, paragraphs 104 and 107). However, a person may not plead breach of the principle unless he has been given precise assurances by the administration (Case T290/97 Mehibas Dordtselaan v Commission [2000] ECR II15, paragraph 59, and Case T273/01 Innova Privat-Akademie v Commission [2003] ECR II1093, paragraph 26).

89. In the present case, first, as regards the applicants' argument relating to the withdrawal of an administrative act, it should be noted that the decisions of 20 May 2005 were conditional acts. The signing of the framework contract for lot 7, provided for by the contested decisions, was subject to the condition that the applicants produced evidence that they were not in any of the situations corresponding to the grounds for exclusion provided for in point 2.3.3 of the Practical Guide. In these circumstances, it is apparent that the applicants were not awarded the contract, not as a result of the withdrawal of a decision awarding them that contract, but because they did not meet the conditions to which such a decision was subject. Consequently, the applicants' argument on this point is irrelevant.

90. Second, as regards the breach of the principle of protection of legitimate expectations claimed by TEACEGOS and STG, the decisions of 20 May 2005 did not contain precise assurances as to the fact that the framework contract would be signed under any circumstances, and could not therefore cause the applicants to entertain legitimate expectations to that effect, since they expressly stated that the signing of the framework contract was subject to the applicants producing evidence that they were not in any of the situations corresponding to the grounds for exclusion provided for in point 2.3.3 of the Practical Guide. It follows that the arguments put forward by the applicants relating to the breach of the principle of protection of legitimate expectations are unfounded.

91. The fourth plea must therefore be rejected as unfounded. It follows that the present applications must be dismissed.

Costs

92. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, including those relating to the applications for interim measures.

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AUTHOR Court of First Instance of the European Communities

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FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2006 Page II-00205
DOC	2006/02/14
LODGED	2005/10/13
JURCIT	32002Q1605 : N 1 32002Q1605-A94 : N 2 32002R2342 : N 1 32002R2342-A146P3 : N 3 61976J0015 : N 63 61977J0054 : N 87 61981J0014 : N 87 61985J0015 : N 87 61988J0350 : N 48 61989J0248 : N 87 61989J0365 : N 87 61990A0044 : N 76 61990J0269 : N 76 61994A0177 : N 63 61995J0090 : N 87 61996A0066 : N 88 61997A0290 : N 88 61998A0145 : N 50 76 61998J0449 : N 63 61999A0070 : N 76 61999J0496 : N 76 62000A0169 : N 50 62001A0217 : N 48 62001A0273 : N 88 62003J0021 : N 65 66
SUB	Public contracts of the European Communities
AUTLANG	French
MISCINF	AFFAIRE : 62005A0383POURVOI : C-189/06
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	E B GB
NOTES	Meisse, Eric: Principes de motivation, de sécurité juridique, du respect des droits de la défense, de bonne administration et de protection de la confiance légitime, Europe 2006 Avril Comm. no 102 p.8 ; Prevedourou, E.: Epitheorisis Dimosiou Dikaiou kai Dioikitikou Dikaiou 2006 p.456-459 ; Killmann, Bernd-Roland: Aktuelles zum europäischen Eigenvergaberecht,

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Osterreichisches Recht der Wirtschaft 2007 p.6-9

PROCEDU Action for annulment - unfounded

DATES of document: 14/02/2006
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Joined Cases T-376/05 and T-383/05

TEA-CEGOS and Others

v

Commission of the European Communities

(Public contracts – Community tendering procedure – Recruitment of technical assistance for short-term expertise for exclusive benefit of third countries benefiting from external aid – Rejection of tenders)

Summary of the Judgment

1. *European Communities' public procurement – Conclusion of a contract following a call for tenders*

2. *European Communities' public procurement – Tendering procedure*

3. *Community law – Principles – Protection of legitimate expectations – Conditions*

1. The Commission has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and review by the Court of First Instance must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers.

(see para. 50)

2. Where the procurement notice issued in a tendering procedure contains a provision prohibiting entities within the same legal group from participating in the same calls for tenders, in the absence of a definition of the concept of legal group in legislation or in case-law, laying down the criteria applying to such a group, the Commission is required to conduct an examination of each individual case, taking into account all the relevant factors, in order to decide whether the conditions governing the application of that provision have been met. Consequently, in order to recognise the existence of a legal group, the Commission has to determine whether the entities in question are structurally linked, since this factor is liable to give rise to a risk of a conflict of interest or of distorted competition between the tenderers, although other factors can support the examination of structural links, such as those relating to the degree of independence of the entities in question.

(see paras 51-53)

3. The right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual in a situation where the Community authorities, by giving him precise assurances, have caused him to entertain legitimate expectations. Such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources. However, a person may not plead breach of the principle unless he has been given precise assurances by the administration.

Decisions of the Commission on successful tenders, taken in connection with the tendering procedure and expressly stating that the signing of the framework contract is subject to the persons concerned producing evidence that they are not in any of the situations corresponding to the grounds for exclusion from the tendering procedure, cannot be regarded as thereby containing precise assurances as to the fact that the framework contract will be signed under any circumstances, and cannot therefore cause the entities in question to entertain legitimate expectations to that effect.

(see paras 88, 90)

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Judgment of the Court of First Instance of 14 February 2006 - TEA-CEGOS and Others v Commission

(Joined Cases T-376/05 and T-383/05) [1]

(Public contracts - Community procedure for call for tenders - Recruitment of short-term experts responsible for providing technical assistance for the benefit of third countries benefiting from external aid - Rejection of tenders)

Language of the case: French

Parties

Applicants: TEA-CEGOS, SA (Madrid, Spain) and Services techniques globaux (STG) SA (Brussels, Belgium), in Case T-376/05 (represented by: G. Vandersanden and L. Levi, lawyers), and GHK Consulting Ltd (London, United Kingdom), in Case T-383/05 (represented by: M. Dittmer and J.-E. Svensson, lawyers)

Defendant: Commission of the European Communities (represented by: M. Wilderspin and G. Boudot, Agents)

Application for

Annulment, first, of the Commission's decisions of 12 October 2005 rejecting the tenders submitted by the applicants in the context of the procedure for the call for tenders bearing the reference "EuropeAid/119860/C/SV/multi-Lot 7" and, second, of any other decision taken by the Commission in the context of the same call for tenders following the decisions of 12 October 2005

Operative part of the judgment

The Court:

Dismisses the actions.

Orders the applicants to pay the costs, including those relating to the interlocutory procedures.

_____

[1] - OJ C 315 of 10.12.2005

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ORDONNANCE DU PRÉSIDENT DU TRIBUNAL

11 janvier 2006 (*)

« Procédure de référé – Radiation »

Dans l'affaire T-376/05 R,

TEA-CEGOS SA, établie à Madrid (Espagne),

Services Techniques Globaux (STG) SA, établie à Bruxelles (Belgique),

représentées par M^es^ G. Vandersanden et L. Levi, avocats,

parties requérantes,

contre

Commission des Communautés européennes, représentée par M. M. Wilderspin et M^me^ G. Boudot, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse,

ayant pour objet une demande de mesures provisoires visant notamment, en substance, à ce que soit ordonné le sursis à l'exécution, premièrement, de la décision de la Commission du 12 octobre 2005 rejetant l'offre présentée conjointement par les requérantes et d'autres opérateurs dans le cadre de la procédure d'appel d'offres portant la référence « EuropeAid/119860/C/SV/multi – Lot 7 » et retirant la décision d'octroi du contrat-cadre en cause à ce même consortium et, deuxièmement, de toute autre décision prise par la Commission dans le cadre de l'appel d'offres « EuropeAid/119860/C/SV/multi – Lot 7 », à la suite de la décision de la Commission du 12 octobre 2005,

LE PRÉSIDENT DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

1 Par lettre déposée au greffe du Tribunal le 14 décembre 2005, les parties requérantes ont informé le Tribunal, conformément à l'article 99 du règlement de procédure du Tribunal, qu'elles se désistaient de leur demande en référé et ont demandé que les dépens soient réservés.

2 Par lettre déposée au greffe du Tribunal le 19 décembre 2005, la partie défenderesse a fait savoir au Tribunal qu'elle n'avait aucune objection ou remarque à formuler sur ce désistement.

3 Il y a donc lieu de rayer la présente demande en référé du registre. S'agissant des dépens, il y a lieu, dans le cadre de la procédure en référé, de les réserver en attendant la décision sur le recours au principal.

Par ces motifs,

LE PRÉSIDENT DU TRIBUNAL

ordonne :

1) L’affaire T-376/05 R est rayée du registre du Tribunal.

2) Les dépens sont réservés.

Fait à Luxembourg, le 11 janvier 2006.

Le greffier	Le président
E. Coulon	B. Vesterdorf

* Langue de procédure : français.

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Notice for the OJ

Action brought on 13 October 2005 - Tea-Cegos and STG v Commission

(Case T-376/05)

Language of the case: French

Parties:

Applicant(s): TEA-CEGOS (Madrid, Spain) and Services Techniques Globaux (STG) (Brussels, Belgium) (represented by: G.Vandersanden and L. Levi, lawyers)

Defendant(s): Commission of the European Communities

Form of order sought

The applicant(s) claim(s) that the Court should:

- annul the decision of 12 October 2005 rejecting the candidature and bid of the TEA-CEGOS consortium and withdrawing the decision awarding the framework contract to the TEA-CEGOS consortium under the call for tenders EuropeAid -2/119860/C-LOT No 7;

- annul all the other decisions taken by the defendant under that call for tenders following the decision of 12 October 2005 and, in particular, the award decisions and the contracts concluded by the Commission implementing those decisions;

- order the Commission to pay all the costs.

Pleas in law and main arguments

The applicants in these proceedings are members of the consortium constituted for the purposes of the call for tenders 'EuropeAid/119860/C/SV/MULTI' launched by the defendant. It tendered for lot No 7 'Culture, Governance and Home Affairs'.

On 20 May 2004, the consortium was informed by post that its candidature had been accepted. By letter of 18 July 2005, the defendant informed it that it considered it necessary to review its decision awarding it the framework contract, and justified that change by the fact that the decision in question had been taken on the basis of inaccurate information communicated during the procedure. On 12 October 2005, the Commission took a decision confirming rejection of the applicant's candidature and bid on the basis of the exclusion clause provided for in Article 13 of the contract notice.[1] To justify its decision, it relied on the fact that one of the members of the consortium was part of another group, one of the members of which was taking part in another candidature for the same contract. That is the contested decision.

In support of their action for annulment, the applicants rely on several pleas in law.

By the first, they claim that the defendant was in breach of the contractual documents inasmuch as it misapplied Article 13 of the contract notice and Article 14 of the instructions to tenderers. The applicants claim that Article 13 of the contract notice was not applicable when an award decision had already been taken. They also submit that they did not fail to communicate the documents requested by the defendant or supply false information, so the conditions for applying Article 14 of the instructions to tenderers, which would alone justify the decision awarding the contract being challenged at that stage of the procedure, had not been fulfilled.

Secondly, the applicants claim that the defendant made a manifest error of assessment of the concept of 'legal group' in Article 13 of the contract notice, by taking into account only the structural criterion and excluding application of the test of conflict of interest between candidates in the same call for tenders. In

the applicants' opinion, the defendant's assessment is such as to undermine the principles of legal certainty. The applicants also rely on a plea alleging breach of the duty to state reasons.

The third plea raised by the applicants relates to the alleged breach of the principle of good administration and a failure to take steps. The applicants claim that, where there is uncertainty, the defendant ought to have informed the consortium within a reasonable time, and questioned them during the tendering procedure and not after its decision awarding the contract, which would have made it possible to save the costs associated with their participation in the later stages of the procedure.

By the final plea, the applicants submit that regard was not had to their legitimate expectations and also rely on the theory of *retrait des actes adminstratifs* (cancellation of administrative acts). They claim that, in this case, the decision awarding the contract was not unlawful and, accordingly, could not be withdrawn by the defendant.

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[1] - Contract notice for a multiple framework contract 'Multiple framework contract to recruit technical assistance for short-term expertise for the exclusive benefit of third countries benefiting from the European Commission's external aid' 2004/S 132-111932, OJ S 132.

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ORDER OF THE PRESIDENT OF THE FIRST CHAMBER
OF THE COURT OF FIRST INSTANCE

11 November 2005(*)

(Removal from the Register)

In Case T-310/05,

ASTEC Global Consultancy Ltd., established in Dublin (Ireland), represented by B. O'Connor, Solicitor and I. Carreño, lawyer,

applicant,

v

Commission of the European Communities, represented by J. Forman and M. Wilderspin, acting as agents, with an address for service in Luxembourg

defendant,

APPLICATION for annulment of the Commission's Decision of 25 July 2005 (Reference no. AIDCO/F3/ACH D (2005) 19574), rejecting the applicant's application to participate in Lot 3 of the Commission procurement procedure EuropeAid//19860/C/SV multi for a multiple framework contract to recruit technical assistance for short-term expertise for exclusive benefit of third countries benefiting from European Commission external aid,

THE PRESIDENT OF THE FIRST CHAMBER
OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By letter lodged at the Court Registry on 29 September 2005, the applicant informed the Court of First Instance, in accordance with Article 99 of the Rules of Procedure of the Court of First Instance, that it wishes to discontinue the proceedings and that the parties have come to an agreement in relation to costs, according to which each party is to bear its own costs. In the same letter, the applicant also withdrew its application for interim measures.

2 By letter lodged at the Court Registry on 14 October 2005, the defendant indicated to the Court of First Instance that it had no observations on the application for discontinuance.

3 By Order of 9 November 2005, the President of the Court of First Instance ordered the removal of the interim measures proceedings from the register and reserved the decision as to costs for the decision in the main action.

4 Article 87(5), second subparagraph, of the Rules of Procedure provides that where discontinuance has been applied for and the parties have come to an agreement on costs, the decision as to costs shall be in accordance with that agreement.

On those grounds,

THE PRESIDENT OF THE FIRST CHAMBER

hereby orders:

1. **Case T-310/05 is removed from the register of the Court of First Instance.**

2. **Each party will bear its own costs, including those incurred in relation to the request for interim measures.**

Luxembourg, 11 November 2005.

E. Coulon — R. García-Valdecasas

Registrar — President

* Language of the case : English.

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ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

9 November 2005(*)

(Removal from the Register)

In Case T-310/05 R,

ASTEC Global Consultancy Ltd., established in Dublin (Irlande), represented by B. O'Connor, Solicitor and I. Carreño, lawyer,

applicant,

v

Commission of the European Communities, represented by J. Forman and M. Wilderspin, acting as agents, with an address for service in Luxembourg

defendant,

APPLICATION for suspension of the Commission's Decision of 25 July 2005 (Reference no. AIDCO/F3/ACH D (2005) 19574), rejecting the applicant's application to participate in Lot 3 of the Commission procurement procedure EuropeAid//119860/C/SV/multi for a multiple framework contract to recruit technical assistance for short-term expertise for exclusive benefit of third countries benefiting from European Commission external aid, until the date of the final judgment in the main proceedings,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By letter lodged at the Court Registry on 29 September 2005, the applicant informed the Court of First Instance, in accordance with Article 99 of the Rules of Procedure of the Court of First Instance, that it wishes to discontinue the proceedings and that the parties have come to an agreement in relation to costs, according to which each party is to bear its own costs. In the same letter, the applicant also withdrew its main application.

2 By letter lodged at the Court Registry on 14 October 2005, the defendant indicated to the Court of First Instance that it had no observations on the application for discontinuance.

3 Article 99 of the Rules of Procedure provides that upon an application to discontinue the proceedings, the President shall order the case to be removed from the Register and shall give a decision as to costs in accordance with Article 87(5). In that regard, it is appropriate in interim measures proceedings to reserve the decision as to costs for the decision in the main action, in accordance with Article 87(1).

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Case T-310/05 R is removed from the register of the Court of First Instance.

2. The decision as to costs is reserved.

Luxembourg, 9 November 2005.

E. Coulon	B. Vesterdorf
Registrar	President

* Language of the case : English.

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Notice for the OJ

Action brought on 12 August 2005 S ASTEC Global Consultancy / Commission

(Case T-310/05)

Language of the case: English

Parties

Applicant(s): ASTEC Global Consultancy Limited (Dublin, Ireland) [represented by: B. O'Connor, solicitor and I. Carreño, lawyer]

Defendant(s): Commission of the European Communities

Form of order sought

Annul the European Commission's Decision of 25 July 2005 (Reference no. AIDCO/F3/ACH D (2005) 19574), rejecting the applicant's application to participate in Lot 3 of the Commission procurement procedure EuropeAid//119860/C/SV multi;

order the Commission to pay the costs.

Pleas in law and main arguments

The applicant, acting as consortium leader, applied on 15 April 2005 for Lot 3 of the Framework contract in the context of a re-launch of the Commission procurement procedure EuropeAid//119860/C/SV/multi. One of the other members of the applicant's consortium was Austroconsult Ges.m.b.H. That company was also a partner in another consortium applying for the same lot. On 31 May 2005 Austroconsult formally withdrew from that other consortium.

By the contested Decision the Commission refused to short-list the applicant's application on the grounds that it did not comply with the Procurement Notice since Austroconsult was also present in another application.

In support of its request to annul the contested Decision the applicant contends that the Commission infringed essential procedural requirements in procurement procedures, since any conflict of interest due to Austroconsult's participation in two consortiums had been resolved by its withdrawal from the other consortium. In the same context, the applicant alleges in the alternative that Austroconsult could not have been considered a valid member of the other consortium, since its formal letter in the application package was not dated.

The applicant further alleges that the Commission infringed the principles of equal treatment, sound administration and due diligence, as it failed to investigate Austroconsult's withdrawal from the other consortium, if it had doubts about it, and failed to inform the applicant of its concerns. The applicant considers that its exclusion without any further clarification was disproportionate and in violation of good administration.

Finally, the applicant alleges that by establishing a short-list of only six candidates and continuing the tender procedure, the Commission has infringed the rules set down in the tender notice requiring a minimum of eight candidates. It also considers that it has been discriminated against, in that in the original launch and in the first re-launch of the tender procedure, in both of which the applicant had been successful, the rule requiring a short list of at least eight candidates had been observed, contrary to what has been the case at the second re-launch, from which the applicant was excluded.

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JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

12 July 2007 (*)

(Public service contracts – Community tendering procedure – Provision of services for the collection, production and dissemination of electronic publications, in particular the Supplement to the Official Journal of the European Union – Rejection of a tender – Equal treatment – Obligation to state reasons – No manifest error of assessment)

In Case T–250/05,

Evropaiki Dynamiki – Proigmena Systimata Tilepikinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis, lawyer,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and M. Šimerdová, acting as Agents,

defendant,

APPLICATION for annulment of the decision of the Office for Official Publications of the European Communities of 15 April 2005 to reject the applicant's tender in connection with the call for tenders issued on 19 November 2004 (OJ 2004 S 226) for the provision of services in relation to the collection, production and dissemination of electronic publications, in particular the Supplement to the *Official Journal of the European Union*, and to award the contract to the successful tenderer,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, V. Vadapalas and N. Wahl, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2007,

gives the following

Judgment

Law

1 The award of service contracts by the Commission is subject to the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; 'the Financial Regulation') and to the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1; 'the implementing rules'). Those provisions are based on the relevant Community directives and, in particular, as regards service contracts, on Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1), and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004

L 134, p. 114).

2 According to Article 89(1) of the Financial Regulation:

'All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.'

3 As Article 97(2) of the Financial Regulation states, a contract may be awarded by the best-value-for-money procedure.

4 Article 100(2) of the Financial Regulation provides that:

'The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

5 Under Article 135(1) of the implementing rules:

'The contracting authorities shall draw up clear and non-discriminatory selection criteria.'

6 Finally, Article 149(2) of the implementing rules, in the version which applies to the facts of this case, provides as follows:

'The contracting authority shall, within not more than fifteen calendar days from the date on which a written request is received, communicate the information provided for in Article 100(2) of the Financial Regulation.'

Facts giving rise to the dispute

7 The applicant is a company governed by Greek law, active in the area of information technology and communications.

8 By a contract notice of 19 November 2004, published in the Supplement to the *Official Journal of the European Union* (OJ 2004 S 226) under reference 2004/S 226 194443, the Office for Official Publications of the European Communities launched a call for tenders for the provision of services in relation to the collection, production and dissemination of electronic publications, in particular the Supplement to the Official Journal ('the call for tenders').

9 The call for tenders concerned the provision of a number of services, including online access to the European public procurement database TED (Tenders Electronic Daily) for public procurement notices published on a daily basis in the Supplement to the Official Journal and offline access to that supplement on CD–ROM or DVD–ROM for subscribers wishing to have a hard copy.

10 Annex I to the draft contract, annexed to the call for tenders, specified the days and times by which the CD-ROM had to be delivered to the Publications Office in Luxembourg (Luxembourg). Thus, for a layout available at 15.00 on Mondays and Thursdays, the contractor had to deliver the CD–ROM on Tuesdays and Fridays respectively by 17.00 at the latest. Annex I to the draft contract also provided that tenderers had to submit an offer including, as an alternative to delivery of the CD–ROM to the Publications Office, its direct dispatch by post to subscribers on Tuesdays and Fridays respectively by 22.00 at the latest. According to the draft contract, meeting those delivery times was the prime objective.

11 By fax of 24 December 2004, the applicant indicated to the Publications Office that, according to its own research, only one company, Technicolor Srl, established in Luxembourg, could comply with the deadlines referred to in the call for tenders for delivery of the CD–ROM and that that company had an exclusivity agreement with the incumbent contractor, Euroscript Srl. The applicant requested the

Publications Office to ensure equal conditions of competition for all the tenderers.

12 By letter of 4 January 2005, the Publications Office replied that several companies were able to meet the terms and conditions of the call for tenders and that those terms and conditions did not create any obstacles to competition.

13 By fax of the same date, the applicant reiterated its assertions and requested the Publications Office to indicate to it the companies capable of producing the CD-ROM and complying with the delivery deadlines set out in the call for tenders.

14 By letter of 6 January 2005, the Publications Office informed the applicant that it was not in a position to provide any further information regarding the economic operators capable of fulfilling the requirements of the call for tenders.

15 On 11 January 2005, the applicant, in a consortium with Sofware AG, submitted a tender in response to the call for tenders. The Publications Office also received three other tenders, two of which were rejected at the selection stage.

16 On 10 February 2005, the applicant sent the Publications Office samples of the CD-ROM holders.

17 By letter and fax of 17 February 2005, the Publications Office requested the applicant, in the context of the evaluation of its tender, to provide it inter alia with a schedule complying with the deadlines referred to in the call for tenders and a detailed action plan to ensure production, delivery and/or dispatch of the CD-ROM within the deadlines.

18 On 21 February 2005, the applicant sent a fax to the Publications Office in which it replied to those requests.

19 By letter and fax of 15 April 2005, the Publications Office informed the applicant that its tender had been rejected at the award stage, since it had not achieved the necessary quality score, and that the contract would be awarded to the Eutis consortium, comprising the Euroscript and Intrasoft companies, whose tender had been considered to be the most economically advantageous ('the contested decision'). The Publications Office added that the applicant could request in writing additional information on the grounds for the rejection of its tender.

20 On the same day, the applicant sent a letter and a fax to the Publications Office requesting it to communicate to the applicant the names of any of the successful tenderer's partners and subcontractors, the scores awarded in respect of each criterion for its technical offer and that of the successful tenderer, a copy of the Evaluation Committee report, and a comparison of the financial offers of the applicant and the successful tenderer.

21 By letter of 19 April 2005, the Publications Office replied, indicating the name of the successful tenderer and that of its subcontractor, DocData, and the scores awarded in respect of each criterion for the applicant's technical offer and that of the successful tenderer, in the form of tables. According to those tables, the applicant obtained, at the award stage, a total of 60.6 points out of 120 whilst Eutis obtained a total of 100.4 points. The table relating to the applicant also contained six 'general comments taking into account the awarding criteria and price' which stated inter alia that the tender contained 'no information with regard to the CD-ROM' and that the 'daily production d[id] not seem realisable according to provided information on the procedures'. The letter from the Publications Office also stated that Eutis' financial offer was EUR 5 784 684.54 and the applicant's was EUR 4 973 140.

22 By fax of 27 April 2005, the applicant set out a number of objections to the contested decision, in particular in so far as concerned the results of the technical evaluation.

23 By letter of 13 May 2005, the Publications Office advised the applicant that it was taking account of certain complaints raised by it and that, consequently, it was suspending the signing of the contract in order to conduct a supplementary examination.

24 By letter of 3 June 2005, the Publications Office informed the applicant that the supplementary examination had confirmed the outcome presented in its letter of 15 April 2005 and that it had decided to proceed with the signing of the contract. The conclusions of that examination were

summarised in a note internal to the Publications Office, but were not recorded formally.

25 Also on 3 June 2005, the applicant requested the Publications Office to communicate to it the results of the supplementary examination and the answers to the questions raised in its letter of 27 April 2005. It also asked the Publications Office not to proceed with the signing of the contract before those requests had been satisfied.

26 The applicant had not received any response to those requests by the date on which this action was brought.

Procedure and forms of order sought

27 By application lodged at the Court Registry on 24 June 2005, the applicant brought the present action.

28 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, requested the Commission to produce Annex II to the draft contract annexed to the call for tenders. The Court also requested the parties to reply to written questions. The parties complied with those requests within the prescribed period.

29 The parties presented oral argument and answered the questions put by the Court at the hearing on 1 March 2007. At that hearing, the applicant submitted written comments concerning the extract of the Evaluation Committee report and the Publications Office's internal note drawn up in the context of the supplementary examination of its tender, as annexed to the Commission's rejoinder. In those written comments it claims, principally, that the Publications Office's internal note should be removed from the file.

30 The Commission made written submissions in response to the applicant's comments and the oral procedure was closed on 21 March 2007.

31 The applicant claims that the Court should:

– annul the contested decision;

– order the Publications Office to pay all the costs, even if the action is dismissed.

32 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

The application for annulment

33 The applicant relies on three pleas in support of its application for annulment: (i) impairment of free competition and breach of the principle of equal treatment, (ii) manifest errors of assessment by the Publications Office in the evaluation of the applicant's tender, (iii) infringement of the obligation to state reasons and lack of transparency.

34 The Court considers it appropriate to start by considering the first plea, then the third plea and, finally, the second plea.

The first plea: impairment of free competition and breach of the principle of equal treatment

– Arguments of the parties

35 The applicant claims that it informed the Publications Office of problems connected with the call for

tenders, relating in particular to the fact that only CD-ROM producers located within a range of approximately two hours from Luxembourg by road were in a position to supply the quantity requested within the time-limit imposed and, consequently, that the tenderers were obliged to produce the CD-ROM at the premises of those few companies having a production site in that area. The Publications Office failed to take any action to investigate that situation, remedy it, and subsequently inform the tenderers concerned.

36 Thus, the Publications Office could have, first, annulled or modified the call for tenders in relation to the deadlines for delivering the CD-ROM to Luxembourg or, second, allowed contractors to propose production in more distant areas and subsequently send the CD-ROM directly to end customers. The Publications Office therefore failed to ensure that free competition would be observed throughout the tendering procedure, which led it to the view that only one tender fulfilled the technical evaluation criteria, that of the incumbent contractor, although the project is of average technical complexity – the only noteworthy features being the large quantity of CD-ROMs (about 8 000) to be manufactured and the very strict deadlines for delivery to the premises of the Publications Office.

37 Referring to the case-law, the applicant also states that the Publications Office did not ensure equal treatment between tenderers at every stage of the contract award procedure.

38 In addition, the financial offer of the selected tenderer is extremely high. The procedure implemented therefore failed to offer the best value for money.

39 In its reply, the applicant adds that it understands the need for strict deadlines as regards the project in question. In this respect, the option consisting of direct dispatch of the CD-ROM from the production site to the final recipients could have resulted in fair competition between the tenderers. However, the Publications Office imposed delivery of the CD-ROM to its premises in Luxembourg.

40 The Commission states, as a preliminary point, that it has broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error.

41 It then states that the Publications Office was under an obligation to publish public procurement notices sent by the contracting authorities within the time-limits laid down in Article 36(3) of, and Annex VIII to, Directive 2004/18. Since the CD-ROM is the only hard copy version of the Supplement to the Official Journal, it was necessary to fix the same deadlines for delivery of the CD-ROM and for publication of notices on the internet in order not to discriminate against readers of the Supplement to the Official Journal without access to the internet.

42 Moreover, the applicant admits in its application that a number of manufacturers could be chosen as partners. Consequently, the conditions laid down in the call for tenders could have been complied with in any event. The applicant also admits that the call for tenders gave tenderers the option to submit alternative offers providing for direct dispatch to end users.

43 Lastly, other tenderers chose companies in different Member States (France, Belgium, the Netherlands) for the production of the CD-ROM. This shows that the claims of discrimination are not well founded.

– Findings of the Court

44 Under Article 89(1) of the Financial Regulation, all public contracts financed in whole or in part by the budget are to comply with the principles of transparency, proportionality, equal treatment and non-discrimination.

45 Thus, according to settled case-law, the Commission is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 108; Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 85; and Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981,

paragraph 75).

46 Furthermore, a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 51, and Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 83).

47 In the present case, it is apparent from the oral argument at the hearing that the process for distributing the CD-ROM to subscribers consists of three stages. The first consists of preparing the call for tenders following the dispatch by the contracting authorities of the Member States and the Community institutions or bodies of documents which must be published; the second of the validation and editing of the call for tenders and the third of the production proper and delivery of the CD-ROM to the Publications Office in Luxembourg or its dispatch by post to end users. This dispute concerns only the third stage, which was the subject of the disputed call for tenders. For that third stage, the tenderer entrusts the technical part of the production of the CD-ROM to a manufacturer.

48 The applicant claims, first, that the call for tenders did not ensure free competition and equal treatment between tenderers in that the deadlines for delivery of the CD-ROM to the Publications Office in Luxembourg were too short.

49 In that respect, it must be pointed out that the call for tenders did provide for very strict deadlines for delivery of the CD-ROM. Thus, for a layout available at 15.00 on Mondays and Thursdays, the contractor had to deliver the CD-ROM to the Publications Office on Tuesdays and Fridays respectively by 17.00 at the latest. The contractor therefore had 26 hours in total, whilst production alone of the CD-ROM requires 12 to 20 hours according to the applicant, which was not contradicted on that point by the Commission at the hearing.

50 The applicant does not however adduce evidence that those deadlines were set with the aim of benefiting the incumbent contractor to the detriment of all the other tenderers.

51 First of all, the applicant does not dispute the need for short deadlines, as provided for in Article 36 (3) of Directive 2004/18, in order that subscribers have access to the CD-ROM at the same time as contract notices are published on the internet.

52 Next, the Court notes that applicant's argument relating to the number of specialised manufacturers capable of complying with the deadlines provided for in the call for tenders is imprecise. In its letter of 24 December 2004, reproduced in its application, the applicant claims that only one company, namely Technicolor, established in Luxembourg and having an exclusivity agreement with Euroscript Srl, could manufacture the CD-ROM within the deadlines provided for in the call for tenders. Next, the applicant refers, in its application, to CD-ROM manufacturers located within 2 hours of Luxembourg by road, which meant, according to the applicant, that tenderers were obliged to produce the CD-ROM at the 'premises of those few companies having a production site in that area'. Lastly, in its reply, the applicant submits that, apart from Technicolor, one other manufacturer was capable of complying with the deadlines provided for, namely DocData, whose production site is in Langres (France).

53 It is apparent from the replies to the written questions put by the Court, by way of measures of organisation of procedure, that Euroscript had chosen, for the call for tenders, two of DocData's production sites, in Langres and in Tillburg (Netherlands). Since Euroscript was the successful tenderer, those sites must be regarded as satisfying the conditions as to deadlines laid down by the call for tenders, which the applicant did not dispute at the hearing. Furthermore, the two other tenderers opted for sites which were also different: Wellen (Belgium) and Uden (Netherlands).

54 It is apparent from those findings that several manufacturers other than Technicolor were capable of satisfying the conditions as to deadlines laid down by the call for tenders.

55 Moreover, the applicant does not adduce any facts or evidence in support of its claim that Technicolor had an exclusivity agreement with Euroscript.

56 The applicant asserts, secondly, that the Publications Office required delivery of the CD-ROM to Luxembourg although the call for tenders also provided for another option, the direct dispatch of the CD-ROM by post to subscribers.

57 In that respect, it is sufficient to observe that this is merely an assertion on the part of the applicant and it is not able to establish or, at the very least, submit evidence substantiating its claims.

58 In addition, the applicant does not explain how the Publications Office could, at the stage of the examination of the tenders, refuse the option of direct dispatch by post even though that was expressly provided for in the call for tenders.

59 Lastly, the fact that only one tenderer managed to offer a service achieving the quality score required by the call for tenders does not mean, in itself, that the call for tenders was discriminatory.

60 It is apparent from the foregoing that the applicant has failed to demonstrate that the Publications Office impaired free competition and infringed the principle of equal treatment between tenderers.

61 The first plea must therefore be rejected.

The third plea: infringement of the obligation to state reasons and lack of transparency

– Arguments of the parties

62 The applicant claims that the contested decision is vitiated by failure to provide an adequate statement of reasons. By failing to reply to the applicant's questions raised within the time-limits or to provide clarifications repeatedly requested in writing, the Publications Office did not make it possible to assess the legality of its acts. Thus, the Evaluation Committee fails to explain why a tender that was EUR 1 600 000 higher than the applicant's could be considered more advantageous. In addition, the Publications Office did not reply to the questions put by the applicant in its letter of 27 April 2005.

63 Moreover, according in particular to Article 253 EC, Article 100 of the Financial Regulation and Article 148(3) of Regulation No 2342/2002, the contracting authority is required to give reasons for its decision to reject the tender of a participant when requested, within a period of 15 days. In that respect, the Publications Office did not sufficiently elaborate on the characteristics and relative advantages of the tender of the successful tenderer. The insufficient reasoning given in the contested decision therefore makes review by the Court difficult.

64 The applicant also observes, in its reply, that Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005 amending Regulation No 2342/2002 (OJ 2005 L 201, p. 3) supplemented Article 149 of Regulation No 2342/2002 with a view to limiting the discretionary power of the Community institutions in relation to notification of the grounds for rejecting a tender. The Publications Office has thus misinterpreted its obligation to state reasons for its decisions.

65 The Commission submits that the Publications Office more than fulfilled its duty to state reasons. By its letter of 15 April 2005 the Publications Office first of all informed the applicant that its tender had not been selected on the ground that it had not achieved the necessary quality score and that, if it made a written request, the tenderer would be informed in more detail of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract had been awarded.

66 The applicant requested additional information on the same day and the Publications Office then sent the tables concerning the technical evaluation in which details of the applicant's own tender and those of the successful tender, were shown, as well as the name of the successful tenderer and its subcontractor. Thus, the applicant was clearly in a position to know the reasons why its tender had been rejected.

67 Moreover, the statement of reasons is not intended to present the unsuccessful tenderer with an opportunity to demand that the evaluation procedure be recommenced, nor is it intended to impose a burden on the Commission to prove the legality of its decision. The Commission's obligation is simply to give reasons for its decisions and it is then for the applicant to show that those reasons

reveal a manifest error.

– Findings of the Court

68 In accordance with Article 100(2) of the Financial Regulation and Article 149(2) of the implementing rules, the Publications Office was required to notify the applicant of the grounds for rejecting its tender and, since its tender was admissible, the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract was awarded, within not more than fifteen calendar days from the date on which a written request was received.

69 Such a manner of proceeding satisfies the purpose of the duty to state reasons laid down in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its power of review (see, to that effect, Case T–166/94 *Koyo Seiko* v *Council* [1995] ECR II–2129, paragraph 103, and Case T–19/95 *Adia Interim* v *Commission* [1996] ECR II–321, paragraph 32).

70 It must be stated at the outset that Annex II to the draft contract, relating to the 'special terms and conditions' provided, in paragraph 5.3 thereof, that the contract would be awarded to the tenderer submitting the most economically advantageous bid, on the basis of two award criteria: first, the quality of the production process, assessed according to six specific criteria under which it was possible to obtain 120 points and, second, the assessment of the financial terms. Once the quality of the tenders had been assessed, companies which obtained the minimum score of 80 points in total and half of the possible points for each of the criteria would be classified according to the price proposed and the contract would be awarded to the lowest tender.

71 In the present case, the Publications Office first of all informed the applicant, by letter of 15 April 2005, that its tender had been unsuccessful in the call for tenders. That letter contained two standard phrases concerning the evaluation stage: 'the tender did not achieve the necessary quality score' and 'the tender is not the most economically advantageous'. The Publications Office put a cross in the box opposite the first phrase. In that letter, the Publications Office added that the contract would be concluded with the Eutis consortium, whose tender had been considered to be the most economically advantageous, and that the applicant could obtain additional information on the grounds for the rejection of its tender.

72 In response to a written request by the applicant, also dated 15 April 2005, the Publications Office notified it, by letter of 19 April 2005, of the name of the successful tenderer and that of its subcontractor and the scores awarded in respect of each criterion for its technical offer and that of the successful tenderer, in the form of tables. The table relating to the applicant's tender indicates that it obtained scores lower than the average possible score in respect of two of the evaluation criteria: 10.9 out of 25 as regards the fourth criterion 'Quality of the proposed procedures and organisation to carry out the project (development and operation)' and 13 out of 30 in respect of the sixth criterion 'Quality of the outline of the proposed technical components (hardware, software and netware) for the TED website and its related services'. Furthermore, the table shows that the applicant obtained a total of 60.6 points out of 120.

73 That table was accompanied by six general comments: 'methodology not well adapted'; 'certain technical specifications are not taken into account'; 'no information with regard to the CD–ROM'; 'daily production does not seem realisable according to provided information on the procedures'; 'the resources proposed for production are not appropriate'; 'the offer does not meet the characteristics required in the specifications'.

74 At the same time, the table concerning the Eutis consortium indicated that it had obtained the average in respect of each of the award criteria, in particular 21.4 points for the fourth criterion and 25.1 points for the sixth criterion. Furthermore, the Eutis consortium obtained a total of 100.4 points.

75 Consequently, the Publications Office gave a sufficiently detailed statement of the reasons for which it had rejected the applicant's tender and explained the characteristics and relative advantages of that of the successful tenderer (see, to that effect and by analogy, Case T–169/00 *Esedra* v *Commission* [2002] ECR II–609, paragraphs 187 to 193; Case T–183/00 *Strabag Benelux* v *Council*

[2003] ECR II–135, paragraphs 54 to 59; and Case T–4/01 *Renco* v *Council* [2003] ECR II–171, paragraphs 89 to 97). The applicant could immediately identify the precise reasons for the rejection of its tender, namely that it did not achieve the necessary quality score for two of the award criteria and for the overall quality of its tender. It could also compare, for each of the award criteria, its results with those of the successful tenderer. Moreover, the general comments gave details on the aspects of its tender which were considered to be unsatisfactory by the Publications Office.

76 Such reasoning therefore enables the applicant to defend its rights and the Court to exercise its power of review.

77 As regards the argument based on the entry into force of Commission Regulation No 1261/2005, which supplemented Article 149 of the implementing rules by adding a paragraph 3, it is sufficient to note that that regulation was not applicable at the material time. In any event, the applicant merely cites the text of Article 149(3), without stating how the Publications Office failed to comply with those new provisions.

78 Lastly, as regards the correspondence exchanged during the tendering procedure, it must be stated that the Publications Office did not reply in detail to all of the applicant's letters, in particular that of 27 April 2005. However, the Publications Office cannot be criticised for that, since, having provided reasons for the contested decision in accordance with Article 100(2) of the Financial Regulation, it was not required to reply. Moreover, that fact cannot call in question, of itself, the legality of the contested decision (see, to that effect and by analogy, Case T–30/04 *Sena* v *EASA* [2005] ECR-SC I–A–113 and II–519, paragraph 95).

79 It follows from the foregoing that the third plea must be rejected.

The second plea: manifest errors of assessment by the Publications Office in the evaluation of the applicant's tender

– Arguments of the parties

80 The applicant claims that the Evaluation Committee made several manifest errors of assessment.

81 First of all, as regards the price proposed by the applicant, the Evaluation Committee referred to a total amount of EUR 4 973 140, which is lower than that of the tender of the selected tenderer, which amounted to EUR 5 784 684.54. In the applicant's submission, the price mentioned in its tender was, in actual fact, only EUR 4 177 748.

82 The applicant states, next, that the Evaluation Committee report refers to 'general comments taking into account the awarding criteria and price', which indicates that price was indeed taken into consideration, even if the Publications Office states, in the contested decision, that the applicant's tender was rejected on the ground that it had not achieved the necessary quality score. In its reply, the applicant adds that since the envelope containing the financial offer is opened at the beginning of the evaluation procedure, the Publications Office knew from the start the price proposed by each tenderer. The applicant is therefore convinced that the tenderers' price offers were taken into account by the Publications Office.

83 The applicant also asserts that the arguments put forward by the Evaluation Committee in order to reject its tender are vague and inaccurate. The Evaluation Committee thus made another manifest error of assessment by taking the view that the 'daily production d[id] not seem realisable'. The applicant used the quotations of professional CD–ROM manufacturers, one of which has worked with the incumbent contractor for a number of years, including at the time of the call for tenders. The Publications Office cannot argue that that manufacturer is in a position to deliver the daily production in association with the incumbent contractor, but is incapable of doing the same when working with the applicant.

84 Nor can the Evaluation Committee claim that the tender contained 'no information with regard to the CD–ROM'. The applicant's tender includes the same manufacturer as that chosen until then by the incumbent contractor. In addition, in its technical offer, its letter of 10 February 2005 and its fax of 21 February 2005, the applicant provided all the necessary information with regard to the CD–ROM.

85 The Commission states that, under the special terms and conditions provided for by the call for tenders, the contract is to be awarded to the most economically advantageous tender on the basis of two criteria: the quality of the production process and the assessment of the financial terms. Only the tenders which have been awarded the minimum score of 80 points in total and at least half of the possible points for each evaluation criterion in respect of the quality of the production process will be the subject of a financial evaluation. Since the applicant did not succeed in overcoming the quality hurdle, its arguments relating to price are irrelevant.

86 The Commission concedes that the formulation 'general comments taking into account the awarding criteria and price', used in its letter of 19 April 2005, is imprecise and may have led to confusion. Nevertheless, that formulation gives no support to the applicant's allegation, since its tender was not the subject of a financial evaluation. The aim of the general comments made in its letter of 19 April 2005 was simply to provide the applicant with further details as regards the reasons for which its tender did not meet all the requirements of the Technical Specifications. Those comments should be read in conjunction with the table concerning the evaluation of the quality criteria.

87 In its rejoinder, the Commission recognises that its letter of 19 April 2005 mentions by error the price of EUR 4 973 140 in relation to the applicant's tender, but that error did not have any impact on the evaluation process. The price proposed in the applicant's tender does not moreover appear in the Evaluation Committee report. Further, the supplementary examination of its tender confirms the Evaluation Committee's conclusion that it did not meet all the quality criteria.

88 Finally, the Commission states that the tenders were opened in compliance with Article 145 of Regulation No 2342/2002 by the Opening Committee, the composition of which is not the same as the Evaluation Committee's.

– Findings of the Court

89 As a preliminary point, it should be recalled that the Commission has broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (Case 56/77 *Agence européenne d'intérims* v *Commission* [1978] ECR 2215, paragraph 20; Case T–145/98 *ADT Projekt* v *Commission* [2000] ECR II–387, paragraph 147, and Case T–148/04 *TQ3Travel Solutions Belgium* v *Commission* [2005] ECR II–2627, paragraph 47).

90 It should also be noted that, according to Article 97(2) of the Financial Regulation, a contract may be awarded by the best-value-for-money procedure.

91 In the present case, the applicant, who does not challenge the two award criteria or the criteria relating to the quality of the production process selected for the call for tenders, claims that the Publications Office made several manifest errors of assessment in the evaluation of its tender.

92 First, the Evaluation Committee proceeded on the basis of a total price of EUR 4 973 140, although the price which appears in the applicant's tender documents is in actual fact EUR 4 177 748. In addition, according to the applicant, the table concerning the evaluation of its tender, annexed to the letter of 19 April 2005, contains the heading 'General comments taking into account the awarding criteria and price', which indicates that its price was indeed taken into account in the evaluation of its tender.

93 In that respect, it must be stated, first of all, that the Publications Office's letter of 19 April 2005 mistakenly mentions the price of EUR 4 973 140 as regards the applicant's tender, which the Commission concedes in its rejoinder.

94 However, whether it is a clerical error or an incorrect evaluation of the price proposed by the applicant, such an error is, in the present case, of no consequence.

95 It must be recalled that the applicant's tender obtained a total of 60.6 points and less than half of the points for two of the criteria relating to the quality of the production process. Consequently, pursuant to the rules laid down by Annex II to the draft contract, the applicant's tender was rejected at the stage of the examination of the quality of the production process. There is therefore no need

to examine the price of the tender, as the extract of the Evaluation Committee report produced by the Commission confirms.

96 The fact that the table relating to the applicant contains the heading 'General comments taking into account the awarding criteria and price' cannot call in question such a finding, since the Publications Office followed the evaluation procedure laid down by the call for tenders.

97 Consequently, the price of the applicant's tender, although stated incorrectly by the Publications Office, had no influence on the decision to award the contract to another tenderer.

98 Moreover, the applicant claims that the Publications Office was aware, right from the start of the tendering procedure, of the price proposed by each tenderer.

99 In that regard, it is sufficient to observe that that is a mere assertion on the part of the applicant, who does not adduce any facts or evidence in support of its claim.

100 Consequently, the applicant has not demonstrated that the Publications Office made a manifest error of assessment as regards the price of its tender.

101 Second, the applicant refers to the general comment, which appears in the table concerning the evaluation of the applicant's offer, that 'daily production does not seem realisable according to provided information on the procedures'. In its submission, the Publications Office cannot argue that one of the manufacturers is in a position to deliver the daily production in association with the incumbent contractor, but is incapable of doing the same when working with it.

102 However, there again, the applicant does not put forward any specific facts or evidence to warrant the conclusion that the Publications Office made a manifest error of assessment in relation to its tender as regards daily production.

103 Third, the Publications Office is alleged to have made another error of assessment by also stating, among the general comments annexed to the table concerning the evaluation of its tender, that that tender contained 'no information with regard to the CD-ROM'. In support of its argument, the applicant relies on various aspects of its tender and its letters of 10 and 21 February 2005. The applicant claims that it is clear from those documents that it provided the Publications Office with various information relating to the CD-ROM.

104 At the hearing, the Commission stated that that general comment concerned the fourth criterion, relating to the 'quality of the proposed procedures and organisation to carry out the project'.

105 Consequently, it must be stated that the comment at issue is, at the very least, imprecise and that it gave rise to confusion regarding the Evaluation Committee's assessment of the applicant's tender.

106 However, such imprecision does not suffice to warrant the conclusion that the Publications Office made a manifest error of assessment. The table contains other general comments which are not disputed on a reasoned basis by the applicant. Furthermore, the applicant has not put forward any argument showing that the scores awarded in respect of each of the award criteria for its tender were erroneous.

107 The second plea must therefore be rejected as unfounded.

The request relating to the Publications Office's internal note drawn up in the context of the supplementary examination of its tender

108 The Commission produces, in Annex II to its rejoinder, the Publications Office's internal note, drawn up in the context of the supplementary examination carried out in response to the applicant's letter of 27 April 2005.

109 In its written comments presented at the hearing, the applicant requests, principally, that that note not be taken into account by the Court for the purposes of the examination of the legality of the contested decision.

110 In that respect, it must observed that that document, which is neither dated nor signed, postdates,

according to the Commission, the contested decision and does not replace the Evaluation Committee's earlier assessment.

111 Consequently, the Court considers that the applicant's request should be allowed.

The request for production of the Evaluation Committee report

112 The applicant requests, in its plea alleging infringement of the obligation to state reasons and lack of transparency, that the Publications Office produce a full copy of the Evaluation Committee report. It states, in its reply, that, in the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

113 It must be pointed out, first of all, that the Publications Office was not required to communicate to the applicant, as part of the statement of reasons for the contested decision, the Evaluation Committee report. Article 100(2) of the Financial Regulation provides only that, following a request in writing, the contracting authority is to notify those concerned of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

114 Next, assuming that the applicant's request must be understood as a request for access to documents, it must be held that the applicant did not comply with the procedure, provided for in Article 6 et seq. of Regulation No 1049/2001, for applying for access to the Evaluation Committee report before bringing an action before the Court in the event of a refusal, which renders such a request inadmissible.

115 Lastly, the Commission has produced, in an annex to its rejoinder, an extract from the Evaluation Committee report concerning the applicant, in a non-confidential version.

116 In the circumstances, the Court considers that there is no need to order the Commission to produce the Evaluation Committee Report in its entirety.

117 In light of all the foregoing the application must be dismissed in its entirety.

Costs

Arguments of the parties

118 The applicant asks that the Publications Office be ordered to pay all the costs, even if the application is dismissed. It claims that the insufficient grounds given for the contested decision did not allow it fully to evaluate its chances of challenging that decision and therefore forced it to bring the present action in order to preserve its rights.

119 The Commission submits that the applicant's purported reasons are non-existent.

Findings of the Court

120 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

121 In the present case, it has been held that the third plea, alleging infringement of the obligation to state reasons and lack of transparency, was unfounded. The applicant's claim must therefore be dismissed.

122 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby

1. Dismisses the action;

2. Orders Evropaiki Dynamiki – Proigmena Systimata Tilepikinonion Pliroforikis kai Tilematikis AE to pay the costs.

Legal Vadapalas Wahl

Delivered in open court in Luxembourg on 12 July 2007.

E. Coulon H. Legal

Registrar President

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* Language of the case: English.

Judgment of the Court of First Instance (Fourth Chamber)
First Instance (Fourth Chamber)First Instance (Fourth Chamber)2007. Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities. Public service contracts - Community tendering procedure - Provision of services for the collection, production and dissemination of electronic publications, in particular the Supplement to the Official Journal of the European Union - Rejection of a tender - Equal treatment - Obligation to state reasons - No manifest error of assessment. Case T-250/05.

DOCNUM	62005A0250
AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
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DOC	2007/07/12
LODGED	2005/06/24
JURCIT	32001R1049-A06 : N 114 32002R1605-A97P2 : N 90 32002R1605-A89P1 : N 44 32002R1605-A100P2 : N 68 113 32002R2342-A149P2 : N 68 32002R2342-A149P3 : N 77 32004L0018-A36P3 : N 51 32005R1261 : N 77 61977J0056 : N 89 61988J0202 : N 46 61994A0166 : N 69 61995A0019 : N 69 61996A0203 : N 45 61998A0145 : N 89 61999J0462 : N 46 61999J0496 : N 45 62000A0169 : N 75 62000A0183 : N 75 62001A0004 : N 75 62003A0160 : N 45 62004A0030 : N 78 62004A0148 : N 89
SUB	Public contracts of the European Communities ; Financial provisions

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AUTLANG	English
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Greece
PROCEDU	Action for annulment
DATES	of document: 12/07/2007 of application: 24/06/2005

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**Order of the President of the Court of First Instance
First InstanceFirst Instance2005. Deloitte Business Advisory NV v Commission of the European Communities. Application for interim measures. Case T-195/05 R.**

1. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Decision to exclude a tenderer from a tender procedure - Damage to its reputation - Non-financial damage which cannot be regarded as irreparable

(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

2. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Financial loss - Damage which may subsequently be made good by compensation or by means of an action for damages - Damage which cannot be regarded as irreparable

(Arts 242 EC and 288 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

3. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Financial loss - Assessment - Consideration of the size of the undertaking

(Arts 242 EC and 288 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

In Case T195/05 R,

Deloitte Business Advisory NV, established in Brussels (Belgium), represented by D. Van Heuven, S. Ronse and S. Logie, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by L. Pignataro-Nolin and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for interim measures seeking, first, an order suspending the operation of (1) the Commission decision rejecting the tender submitted inter alia by the applicant under the tendering procedure bearing reference SANCO/2004/01/041 and (2) the decision to award the contract in question to a third party and, secondly, an order prohibiting the Commission (1) from informing the successful tenderer of the decision awarding the contract in question and (2) from proceeding with signature of the relevant contract, on pain of a periodic penalty payment,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 20 September 2005.

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Legal context

1. The award of Commission service contracts must comply with the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1: the Financial Regulation') and the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1; the detailed implementing rules').

2. Under Article 94 of the Financial Regulation:

Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest...'

3. Article 138 of the detailed implementing rules provides:

1. Contracts shall be awarded in one of the following two ways:

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.'

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

...'

4. Under Article 146(3) of the detailed implementing rules:

Requests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated.

However, the evaluation committee may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within a specified time-limit.

...'

5. Article 147(3) of the detailed implementing rules provides:

The contracting authority shall... take its decision giving at least the following:

(a) the name and address of the contracting authority, and the subject and value of the contract or of the framework contract;

(b) the names of the candidates or tenderers rejected and the reasons for their rejection;

(c) the names of the candidates or tenderers to be examined and the reasons for their selection;

(d) the reasons for the rejection of tenders found to be abnormally low;

(e) the names of the candidates or contractor selected and the reasons for that choice by reference to the selection and award criteria announced in advance and, if known, the proportion of the contract or the framework contract which the contractor intends to subcontract to third parties;

(f) in the case of negotiated procedures, the circumstances referred to in Articles 126, 127, 242, 244, 246 and 247 which justify their use;

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(g) where appropriate, the reasons why the contracting authority has decided not to award a contract.'

Facts and procedure

6. On 14 December 2004, the Commission published in the Supplement to the Official Journal of the European Union (OJ 2004 S 243) a contract notice for the award of a framework contract entitled evaluation framework contract covering the policy areas of DG Health and Consumer Protection, Lot 1 (public health) - call for tenders SANCO/2004/01/141' (that framework contract and the award procedure for the framework contract are hereinafter referred to, respectively, as the framework contract' and the tendering procedure').

7. According to Sections 7.1.3 and 7.1.4 of the specifications relating to the tendering procedure, the framework contract relates in particular to the evaluation of the programme of Community action in the field of public health established by Decision No 1786/2002/EC of the European Parliament and of the Council of 23 September 2002 adopting a programme of Community action in the field of public health (2003-08) (OJ 2002 L 271, p. 1).

8. The specifications divide the tasks to be carried out under the framework contract into two main tasks. The first task (Main Task 1') is to conduct studies and to provide services intended to assist in the design and preparation of Community programmes or policies, their ex ante assessment and the organisation of evaluation activities'. The second task (Main Task 2') is to carry out mid-term, final and ex post evaluations of programmes, policies and other activities.

9. The framework contract must allow specific contracts to be concluded in accordance with the Commission's needs. In addition, it must be concluded in principle for a period of 24 months and may be renewed for two further periods of 12 months.

10. The specifications also set out several grounds for the exclusion of tenderers. One of those grounds reproduces Article 94 of the Financial Regulation:

Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest...'

11. With a view to tendering for the contract in question, Deloitte Business Advisory NV (the applicant') joined forces with the London School of Hygiene and Tropical Medicine, the Nederlandse Organisatie voor toegepast-natuurwetenschappelijk onderzoek (Netherlands Organisation for Applied Scientific Research, TNO) and the Istituto superiore di sanità (Italian National Health Institute). Those four entities formed the European Public Health Evaluation Task Force (Euphet). Euphet proposed using certain experts from other institutions where necessary.

12. On 10 February 2005, Euphet submitted a tender to the Commission under the tendering procedure. Euphet's tender includes a paragraph with the heading Independence', which reads as follows:

Euphet understands and accepts that none of the evaluation organisations or their staff should have the slightest existing or potential conflict of interest in the performance of their task under the framework contract. We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present. Furthermore, we undertake to conduct a detailed prior check in connection with each specific contract in order to ensure that the teams we propose are composed of members who are able to work in complete independence and to provide an objective and independent external assessment. If, in the course of execution of the projects, the slightest problem should arise which could have a bearing on this key principle, we would notify the Commission immediately and work with it to seek to rectify the situation.'

13. By a letter of 22 April 2005 (the decision rejecting the tender'), the Commission informed the applicant that the evaluation committee for the contract had found there to be risks of conflicts

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of interest within Euphet. In the decision rejecting the tender, the Commission notes that certain of Euphet's members and partners hold grant contracts in SANCO's area of activities' (health and consumer protection) and thus have a significant involvement in the implementation of the programme of Community action in the field of public health. The Commission therefore considers that in view of the considerable risk of [a conflict of interest], a detailed specific explanation would have been needed to give an adequate understanding of the way in which the matter of [conflicts of interest] could be resolved and the associated risks eliminated'. In those circumstances, in the view of the Commission, the proposed approach is not adequate and the tenderer has not provided a satisfactory guarantee that the [conflicts of interest] will be eliminated'.

14. In the decision rejecting the tender, the Commission nevertheless adds that it will not sign the framework contract with the successful tenderer until a period of two weeks has passed.

15. By a letter dated 3 May 2005, Euphet contested the Commission's position and inter alia requested it to respond by 4 May 2005, failing which it would refer the matter to the Court of First Instance.

16. By a fax of 4 May 2005, the Commission acknowledged receipt of the letter from Euphet and stated:

Because we need more time to examine the questions raised in your letter, we will not proceed with the signing of the contract for a further period of 15 days from the date on which this letter was sent.'

17. By a fax of 19 May 2005, the Commission responded to the arguments put forward by the applicant in its letter of 3 May 2005.

18. By a fax of the same date, the applicant lodged an action for annulment before the Court of First Instance by which it contests the legality of the decision rejecting the tender and of the decision to award the contract to another tenderer (the award decision').

19. On the same date, the applicant submitted an application for interim measures in which it claims essentially that the President of the Court of First Instance, acting in his capacity as the judge hearing the application for interim relief, should:

- order the suspension of the operation of the decision rejecting the tender and of the award decision;

- prohibit the Commission from informing the successful tenderer of the award decision and from signing the relevant contract, on pain of a periodic penalty payment of EUR 2.5 million;

- order the Commission to pay the costs.

20. In its application for interim measures, the applicant also asks the President of the Court of First Instance to prohibit the defendant, as a precautionary measure and if possible before ruling on the application for suspension of operation, from informing the successful tenderer of the award decision and from signing the framework contract until the Court of First Instance has ruled on the main action, on pain of a periodic penalty payment of EUR 2.5 million for each infringement.

21. By letter of 23 May 2005, the Commission informed the Court that the contract covered by the procedure bearing reference SANCO/2004/01/041 had not yet been signed. In the same letter, the Commission stated that the framework contract had been sent to the selected tenderer to be signed with a reply deadline of 1 June 2005 and, in accordance with the applicable procedures, that contract would be signed by the Commission's authorised representative after it had been returned by the other party, without a deadline having been set for that purpose.

22. On 26 May 2005, on the basis of Article 105(2) of the Rules of Procedure of the Court of First Instance, the President of the Court of First Instance ordered the Commission not to sign the framework contract until an order had been made on the application for interim measures.

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23. On 30 May 2005, the Commission submitted observations on the application for interim measures in which it contended that the application should be dismissed and that the applicant should be ordered to pay the costs.

24. At the invitation of the President of the Court of First Instance, the applicant responded to those observations on 13 June 2005. The Commission in turn responded to these new observations on 23 June 2005.

Law

25. Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative so that an application for interim measures must be rejected if one of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) SCK and FNK v Commission [1996] ECR I-4971, paragraph 30). In an appropriate case, the President has also to weigh up the interests at stake (order of the President of the Court of Justice in Case C-445/00 R Austria v Council [2001] ECR I-1461, paragraph 73).

26. Moreover, in the context of that overall examination the judge hearing the application enjoys a wide margin of discretion and remains free to determine, in the light of the particular features of the case, the way in which those different conditions have to be verified and the order of priority of that examination since there is no rule of Community law imposing on him a predetermined analytical model for assessing the need for an interim decision (order of the President of the Court of Justice in Case C-149/95 P(R) Commission v Atlantic Container Line and Others [1995] ECR I-2165, paragraph 23).

27. It is in the light of those considerations that the present application for interim measures falls to be examined.

1. Arguments of the parties

Admissibility of the application for interim measures

28. In its observations of 30 May 2005, the Commission states that it informed the successful tenderer in the tendering procedure that its tender had been selected by a letter of 22 April 2005. The Commission therefore takes the view that the applicant's request for an order prohibiting the Commission from informing the successful tenderer of the award decision is devoid of purpose.

Prima facie case

Arguments of the applicant

29. The applicant relies on two pleas in support of its main application.

- The first plea

30. In its first plea, the applicant claims essentially that Euphet's exclusion from the tendering procedure by the Commission infringes Article 94 of the Financial Regulation, the provisions of the tender documents, the principle of protection of legitimate expectations, the general obligation to state reasons and Articles 147(3) and 138 of the detailed implementing rules.

31. First of all, the applicant takes the view that it is unlawful to exclude it from the tendering procedure solely because its proposal for resolving any conflicts of interest does not provide a satisfactory guarantee.

32. In the applicant's view, the notion of conflict of interest is not defined either in the call for tenders or in Article 94 of the Financial Regulation. On the other hand, in the decision rejecting

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the tender, the Commission defined the notion of conflict of interest by reference to the draft framework contract. However, according to that draft, a conflict of interest and, a fortiori, a simple risk of a conflict do not in themselves constitute a ground for exclusion.

33. In addition, none of the tender documents provide for a specific ground for exclusion in respect of a tenderer one or more of whose members have an involvement in current projects in the areas of health and consumer protection. Moreover, neither Article 94 of the Financial Regulation nor the case-law of the Court of Justice justifies such a ground for exclusion.

34. Furthermore, as far as risks of conflicts of interest are concerned, it is sufficient for the tenderer to undertake to notify the Commission and, if appropriate, to take the necessary measures. The proposal made by Euphet in this regard (paragraph 12 above) was adequate, since the applicant went as far as proposing a prior check with reference to the nature and the subject of the specific contracts to be concluded. No more can be expected of Euphet, since the content of the specific contracts to be concluded is not yet known.

35. In the applicant's view, any conflict of interest can arise only when specific contracts are concluded. Furthermore, Community case-law has confirmed that it is unlawful to exclude a tenderer in an abstract manner without any specific check on the resolution of a conflict of interest (judgments in Joined Cases C-21/03 and C-34/03 Fabricom [2005] ECR I-1559, and in Case T-160/03 AFCon Management Consultants and Others v Commission [2005] ECR II-981, paragraphs 75 to 78).

36. In its observations of 13 June 2005, the applicant adds that the acceptance by the Commission that a tenderer subject to a conflict of interest during the performance of the framework contract may continue to perform the contract provided it takes adequate measures, whilst such an option is not open to a tenderer subject to a conflict of interest prior to the award of the contract, which can take identical measures, constitutes a breach of the principle of equality as set out in Articles 89(1) and 99 of the Financial Regulation.

37. Lastly, in the alternative, the applicant states that the tender notice requires only a minimum of seven experts, whereas its tender contains 65 curricula vitae, including 45 from persons who do not have links with the institutions which, according to the Commission, are subject to a conflict of interest. Furthermore, the 20 people who do have links with those organisations could still be assigned to evaluation cases without any risk of conflicts. As regards the Commission's claim that the experts in question are those who hold the highest qualifications, even if all these people were subject to a conflict of interest for a certain task, there would be a sufficient number of other high-level experts to carry out the task.

38. Secondly, in the applicant's view, where the evaluation committee intends to eliminate a tenderer, it must at the very least allow it to submit its observations, which did not occur in the present case.

39. Thirdly, by rejecting a way to resolve conflicts of interest that had already been accepted by other Commission directorates-general, the Commission departed from its earlier practice and breached the principle of protection of legitimate expectations.

40. Fourthly, the decision rejecting the tender does not contain an adequate statement of reasons, in particular in so far as it fails to explain the reasons why Euphet's proposal is inadequate. The statement of reasons for the decision is also incorrect in so far as Euphet did not remain silent about the specific experience of some of its members and did take account of the resolution of conflicts of interest provided for in the draft framework contract. Because of this failure to state reasons, the decision rejecting the tender infringes Article 147(3) of the detailed implementing rules.

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41. Fifthly, the Commission may not award the contract to a third party without infringing Article 138 of the detailed implementing rules when it has wrongly rejected Euphet's tender. The applicant does not contest the fact that, if its tender had been deemed admissible, the contract would not necessarily have been awarded to it. However, it considers that, in view of the experience and the competence of the team it proposed, Euphet's tender could only be awarded a high score.

- The second plea

42. In its second plea, the applicant claims that by failing to ask Euphet to submit additional information, the Commission infringed Article 146(3) of the detailed implementing rules, the Court's case-law on public procurement (judgment in Fabricom , cited in paragraph 35 above) and the principle of protection of legitimate expectations.

43. Furthermore, in so far as the Commission gave other tenderers the opportunity to submit additional information in connection with the contract in question, it acted in contravention of the principles of equal treatment and non-discrimination set out in Articles 89(1) and 99 of the Financial Regulation.

44. The applicant acknowledges that the Commission is not required under Article 94 of the Financial Regulation and Article 146(3) of the detailed implementing rules to request additional information from tenderers. Nevertheless it states that the Commission gave that opportunity to some tenderers in other procedures, and also in the tendering procedure at issue. The applicant asks the Commission to produce the correspondence exchanged on this subject and the minutes of the tendering opening session.

45. It also follows from the judgment in Fabricom , cited in paragraph 35 above, that, in the event of a potential conflict of interest, the contracting authority may not automatically exclude the tenderer in question, but must always examine the matter on the basis of the specific circumstances of the case, which means that the tenderer must be able to show that a conflict of interest is impossible. In the applicant's view, the Commission could not conduct the required specific assessment without requesting additional information from Euphet. On the one hand, the Commission did not carry out any checks on the basis of the specific circumstances of the case, since such an assessment would have had to have been made for each specific contract. On the other hand, the Commission could not claim either that its specific assessment related to the framework contract since, according to the Commission itself, the applicant's proposal for a posteriori corrective measures was formulated in very general terms.

Arguments of the Commission

46. The Commission contests the arguments put forward by the applicant in support of the existence of a prima facie case.

- The first plea

47. The Commission considers, first of all, that in accordance with the wording of Section 9.1.3 of the specifications, which reproduces Article 94 of the detailed implementing rules word for word, the existence of a conflict of interest prior to the award of the contract is a ground for exclusion. In the view of the Commission, even though the curricula vitae of several of Euphet's partners reveal their involvement in the implementation of the programme of Community action in the field of public health, the applicant did not see reason to notify the Commission of a risk of a conflict of interest.

48. As regards the a priori' corrective mechanism proposed by the applicant to reduce the risk of a conflict of interest, the Commission takes the view that the passage in question in the applicant's tender is formulated too generally.

49. Moreover, contrary to the applicant's assertions, the evaluation committee did in fact specifically

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verify the existence of a conflict of interest with reference to the applicant's tender and the nature of the contract to be awarded, since a conflict can arise in respect of mid-term and ex post evaluations and in respect of ex ante evaluations.

50. With regard to the applicant's argument that Euphet's offer contained 45 curricula vitae of people who have no links with the Commission, the latter points out that the experts put forward do not all have the same specific weight and that the applicant's tender presented all the partners and experts as a coherent team.

51. Secondly, as regards the Commission's alleged obligation to consult the applicant, the Commission considers that it must comply with that obligation only where it intends to impose administrative or financial penalties pursuant to Article 96 of the Financial Regulation.

52. Thirdly, with regard to the alleged breach of the principle of protection of legitimate expectations by the Commission, the applicant does not substantiate its claims that in identical circumstances in the past other Commission departments had reached opposite conclusions to those reached in the present case.

53. Fourthly, in the decision rejecting the tender, the Commission clearly explained the reasons why it considered that the applicant was subject to a conflict of interest.

54. Fifthly, the Commission did not infringe Article 138 of the Financial Regulation because acceptance of Euphet's tender for the selection and award stages did not necessarily mean that it should be awarded the contract.

- The second plea

55. The Commission considers that the second plea should also be rejected.

56. First of all, the Commission points out that it does not have any obligation to consult a tenderer before eliminating it from an award procedure.

57. Secondly, the applicant does not make clear in what way the failure to request additional information constitutes a departure from the Commission's alleged practice in identical cases. As regards the applicant's claims that the Commission breached the principle of equal treatment by allowing certain tenderers to submit evidence that their documents had been sent within the prescribed period, the Commission states that in fact it merely conducted a substantive verification of a mandatory deadline, which is not comparable to the applicant's situation.

58. Thirdly, the applicant's reference to the judgment in Fabricom , cited in paragraph 35 above, is irrelevant because in the present case the Commission specifically verified whether a conflict of interest existed on the basis of the information in the tender and in the light of the nature of the contract to be awarded.

59. Fourthly, the Commission points out that, after the tenders were opened, none of the tenderers was sent a request for additional information or a request for clarification concerning a supposed conflict of interest.

Urgency

Arguments of the applicant

60. In support of its view that it is a matter of urgency that the interim measures applied for be ordered, the applicant claims that, once the contested contract is concluded between the defendant and the successful tenderer, Euphet will no longer have any opportunity to carry out the task effectively. In practice, it will be impossible for it to obtain the annulment of the framework contract after it has been concluded. In addition, in the applicant's view, given the final date for the performance

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of the contract, which is set for the end of 2006, if interim measures are not adopted, the contract will already have been performed, at least to a large extent, when the Court's judgment is delivered.

61. On account of the considerable value of the contract, the honour and prestige attached to it, and the experience that the applicant could gain if it performed the contract, effective performance of the contract would offer it much more satisfactory reparation than compensation.

62. In its observations of 13 June 2005, the applicant states in this respect that the fact that it was not awarded the contract and, further, that its tender was deemed inadmissible will be seen by its clients as a sign of incompetence. In so far as the Commission claims that award procedures involve risks for tenderers with the result that the loss of a contract cannot therefore be regarded as damage, the applicant considers that such an argument is valid only if a tenderer is rightly eliminated. In the present case, the applicant considers that it had a prospect of being selected.

63. In addition, the harm to the applicant's reputation and the failure to gain experience as a result of the non-performance of the contract cannot be quantified financially.

64. In its observations of 13 June 2005, the applicant states lastly that its application cannot be regarded as insufficiently urgent merely on the ground that it may subsequently be awarded damages. Such a position is incompatible with the ratio legis of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

65. In the applicant's view, the ratio legis of Directive 89/665 is to make it possible for tenderers eliminated from a tendering procedure to perform the contract in question themselves. The applicant's position is confirmed by the Court's case-law (judgment in Case C-81/98 Alcatel Austria and Others [1999] ECR I7671). The applicant concedes that the provisions of Directive 89/665 apply only to Member States. However, in its view, it is clearly contrary to the principle of protection of legitimate expectations, the principle of equality and Article 2 EC for the Community institutions to fail to comply with the substance of those provisions.

Arguments of the Commission

66. The Commission considers that the applicant has not shown that it is a matter of urgency to order interim measures.

67. First of all, in the Commission's view, if the Court were to find the action for annulment to be well founded, it would have to take the necessary measures to ensure that the applicant's interests are protected, which could consist in the cancellation of the already partially performed contract and the launch of a new procedure, whilst such measures may be combined, if necessary, with the payment of compensation (orders of the President of the Court of First Instance in Case T169/00 R Esedra v Commission [2000] ECR II2951, paragraph 51, in Case T-148/04 R TQ3 Travel Solutions Belgium v Commission [2004] ECR II3027, paragraph 55, and in Case T-303/04 R European Dynamics v Commission [2004] ECR II-3889, paragraph 83).

68. The applicant has not referred to any circumstance which could prevent its interests being safeguarded in this way.

69. Secondly, in its observations of 23 June 2005, the Commission refutes the applicant's arguments according to which a judgment annulling an act can be given only once the contract is being performed. In the view of the Commission, the applicant is confusing the performance of the framework contract with the carrying-out of the specific mid-term assessment provided for in Article 12 of Decision No 1786/2002.

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70. Thirdly, in so far as the applicant alleges pecuniary damage, the Commission points out that it cannot be regarded as irreparable or even difficult to repair, because compensation can subsequently be awarded (order in Esedra v Commission , cited in paragraph 67 above, paragraph 43). The applicant does not show either how it might suffer damage liable to jeopardise its existence or to change its position on the market irreversibly.

71. Fourthly, as regards the non-pecuniary damage alleged by the applicant, the Commission points out that participation in a public tender procedure, by nature highly competitive, involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial (order of the President of the Court of Justice in Case 118/83 R CMC v Commission [1983] ECR 2583, paragraph 51; orders in Esedra v Commission , cited in paragraph 67 above, paragraph 48, and in European Dynamics v Commission , cited in paragraph 67 above, paragraph 82). Furthermore, the applicant has not established how the dismissal of its application would harm its reputation and deprive it of experience, less still the effect that such damage would have on it.

72. Fifthly, with regard to the ratio legis of Directive 89/665, the Commission points out that, if its application for interim measures is to be granted, the applicant must show that all the relevant conditions under Article 104(2) of the Rules of Procedure and case-law are satisfied. The Commission adds that it is not subject to Directive 89/665 and that the fourth paragraph of Article 230 EC and Articles 242 EC and 243 EC guarantee effective protection against acts by Community institutions. Lastly, as regards the reference made by the applicant to the judgment in Alcatel Austria and Others , cited in paragraph 65 above, it fails to understand that the application for interim measures may be granted only if it satisfies the relevant conditions.

Balance of interests

Arguments of the applicant

73. In its observations of 13 June 2005, the applicant claims that the Commission does not make clear the nature of the damage that it would suffer if an interim measure were ordered.

74. The applicant adds that Decision No 1786/2002 does not provide for any penalty in the event of late performance of the evaluation provided for in Article 12 thereof. In any case, the Commission could revoke the contested decisions and take the applicant's tender into consideration, as it is authorised to do under Article 101 of the Financial Regulation. Moreover, the Commission commonly fails to respect the prescribed deadlines for the performance of evaluation contracts like those at issue.

75. Lastly, account should be taken of the Commission's responsibility for any delay in the performance of the contract.

Arguments of the Commission

76. The Commission considers that the balance of the interests at stake is in favour of the dismissal of the application. The Commission is required under Article 12 of Decision No 1786/2002 to have a mid-term external assessment of the implementation of the programme of Community action in the field of public health conducted by the end of 2006.

77. In addition, the Commission considers that a suspension would prejudice the main action since the successful tenderer's tender would no longer be valid on the date when the judgment in the main action is delivered and the team proposed by it would no longer be available.

2. Findings of the President

78. Since the written observations of the parties contain all the information necessary to adjudicate

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on the application for interim measures, it is not necessary to hear oral argument from them.

Admissibility of some heads of claims in the application for interim measures

79. In its application, the applicant claims inter alia that the President should prohibit the Commission from informing the successful tenderer of the award decision.

80. In its observations of 2 June 2005, the Commission stated, without being contradicted by the applicant or by any of the documents in the file, that it had already informed the successful tenderer that its tender had been selected by letter of 22 April 2005.

81. Consequently, the applicant's request for an order prohibiting the Commission from giving such information was devoid of purpose from the moment it was lodged. It must therefore be rejected as inadmissible (see, to that effect, the order of the President of the Court of First Instance in Case T-125/05 R Umwelt- und Ingenieurtechnik Dresden v Commission [2005] ECR II-1901, paragraph 36).

The other heads of claim in the application for interim measures

82. In the present case, it is necessary first to examine whether the condition relating to the existence of a prima facie case is satisfied.

Prima facie case

- The first plea

83. In its first plea, the applicant claims essentially that Euphet's exclusion from the tendering procedure by the Commission infringes Article 94 of the Financial Regulation, the provisions of the tender documents, the principle of protection of legitimate expectations, the general obligation to state reasons and Articles 147(3) and 138 of the detailed implementing rules.

84. First of all, it is appropriate to examine the applicant's arguments according to which the Commission infringed Article 94 of the Financial Regulation and the provisions of the tender documents.

85. In this respect, it should be noted that the Commission justified the decision rejecting the tender by the existence of a major risk' of a conflict of interest which, in its view, could not be resolved satisfactorily by the guarantees offered by Euphet.

86. As the applicant stresses, Article II.3.1 of the draft framework contract, which was annexed to the specifications, provides for a mechanism for resolving conflicts of interest to which the successful tenderer might be subject. However, on the one hand, it cannot be ruled out, prima facie, that that provision might govern conflicts of interest arising during the performance of the framework contract and not from the stage of the tendering procedure. On the other hand, prima facie, that provision cannot in any event preclude the application of Article 94 of the Financial Regulation.

87. Article 94 of the Financial Regulation provides for the exclusion of tenderers who during the procurement procedure' are subject to a conflict of interest'. In this regard, the President considers that it cannot be ruled out, prima facie, that the expression subject to a conflict of interest' includes the risks of conflicts of interest present from the stage of the procurement procedure which may affect the performance of the contract.

88. In such a situation, the question nevertheless arises as to the degree of certainty needed to justify exclusion from the tendering procedure and the discretion enjoyed by the Commission in establishing a risk of a conflict of interest. The President considers that it is for the Court of First Instance to answer these questions and that the applicant's arguments cannot therefore, at this stage, be rejected as unfounded.

89. Nevertheless, at this stage, and in the light of the arguments put forward in the interlocutory

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proceedings, doubts must be raised as to whether the Commission committed an error in establishing a risk of a conflict of interest in respect of an institution which receives Community grants in the field of public health and is subsequently required to participate in the evaluation of Community policy in that field. It is clear, prima facie, that such an institution is placed in a position that is at least capable of affecting its objectivity.

90. In the present case, it can be seen from Sections 7.1.3 and 7.1.4 of the tender specifications that the framework contract relates inter alia to certain evaluations of the programme of Community action in the field of public health. In addition, the decision rejecting the tender states that, in the opinion of the Commission, the grants received by certain of Euphet's members give rise to a major risk of a conflict of interest.

91. In the light of the foregoing, and at this stage, doubts must therefore be raised as to whether the Commission committed an error of assessment in considering that, for certain members of Euphet, receipt of grants in the field of public health gave rise to a major risk of a conflict of interest justifying exclusion from the tendering procedure.

92. Furthermore, in the light of the arguments made in the interlocutory proceedings, it is not apparent that the Commission refrained from conducting a specific examination of the risk of a conflict of interest established vis-à-vis Euphet, in particular because it did not know the precise nature of the specific contracts to be concluded. First of all, the decision rejecting the tender makes reference to the programme of Community action in the field of public health, the evaluation of which is precisely one of the subjects of the framework contract. However, it is not apparent at this stage that the Commission failed to conduct a specific examination of the risk of a conflict of interest identified by it having regard to the subject of the contract. Secondly, because of the grants received by certain members of Euphet, serious doubts could be cast, prima facie, on their objectivity. Consequently, at this stage, doubts must be raised as to the need to know the detailed content of the specific contracts to be concluded in order to establish the existence of a major risk of a conflict of interest.

93. The President nevertheless considers that this question must be examined in detail in the main proceedings.

94. Similarly, there are, prima facie, reasons to doubt whether the applicant may rely effectively on the judgments in Fabricom , cited in paragraph 35 above, and AFCon Management Consultants and Others v Commission , cited in paragraph 35 above.

95. First of all, in Fabricom , cited in paragraph 35 above, the Court held essentially that the Community directives relating to the coordination of procedures for the award of public contracts preclude a rule which states that any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services is not permitted to apply to participate in or to submit a tender for a public contract for those works, supplies or services where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.

96. However, at this stage, it has not been clearly shown that the applicant has not been able to prove, in connection with its tender, that the grants received by some of the experts which Euphet intends to use were irrelevant.

97. Secondly, with regard to the applicant's reference to the judgment in AFCon Management Consultants and Others v Commission , cited in paragraph 35 above, it should be noted that, in that judgment, the Court of First Instance held essentially that after the discovery of a conflict of interest between a tenderer and a member of the evaluation committee, the Commission must act with due diligence and on the basis of all the relevant information when adopting its decision on the outcome of the

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procedure and that the Commission has some discretion to determine the measures which must be taken (paragraphs 75 and 77). In the light of the circumstances of that case, the Court found that the Commission had made an error of assessment in failing to investigate the relations between a tenderer and a member of the evaluation committee.

98. However, at this stage, doubts must be raised as to whether it is possible usefully to compare the facts of the present case with those that gave rise to the judgment in AFCon Management Consultants and Others v Commission , cited in paragraph 35 above. In the present case, unlike the facts which gave rise to that judgment, there is no reason to think, prima facie, that Euphet's exclusion caused unequal treatment. All the tenderers were, prima facie, in the same position as regards providing proof in their respective tenders that there was no conflict of interest.

99. The President nevertheless considers that this question must be examined in detail in the main proceedings.

100. Lastly, also in the light of the arguments made in the application for interim measures, doubts must be raised as to whether the tender submitted by Euphet allowed any risk of a conflict of interest to be eliminated.

101. First of all, it does not appear at this stage that the Commission manifestly committed an error in considering that the guarantees offered by Euphet were inadequate. As the Commission points out, the proposal for a corrective measure was formulated in general terms and made no specific reference to the risk of a conflict of interest identified by the Commission. Furthermore, in the interlocutory proceedings, the applicant does not cite any passages of its tender where it states that it was aware and took into consideration the specific risk identified by the Commission in the decision rejecting the tender. Quite the opposite, Euphet states in its tender that all the participants in Euphet are entirely independent of the Commission' and that it does not foresee any risk in this regard at present'.

102. Second, it is true, as the applicant notes, that not all the experts proposed in its tender come from institutions subject to the risk of a conflict of interest identified by the Commission. At this stage, however, it is not apparent that the Commission was required to regard that element as sufficient grounds to rule out any risk of a conflict of interest, in particular in the light of the links and respective roles of the members of Euphet. In this respect, as the Commission points out, it can be seen inter alia from Euphet's tender that each of its members is represented on a contract committee' which is responsible for managing and supervising Euphet's evaluation services.

103. For similar substantive reasons, doubts must also be raised as to whether the Commission must consider that the members of an institution subject to a conflict of interest are not themselves personally subject to that conflict. There is every reason to assume that there is a community of professional interests between an expert and the institution employing him. However, at this stage, the applicant does not provide evidence or arguments to reverse this presumption.

104. Third, doubts must also be raised as to whether the rejection of the applicant's tender constitutes a breach of the principle of equality as set out in Articles 89(1) and 99 of the Financial Regulation, because a tenderer subject to a conflict of interest during the performance of the framework contract would be allowed to perform the contract provided it takes adequate measures. As has already been observed (paragraphs 100 to 103), it is not apparent, at this stage, that the Commission committed an error in considering that Euphet's tender was not adequate, from the stage of the tendering procedure, for preventing a risk of a conflict of interest. Prima facie, the applicant cannot therefore claim that it is in a comparable situation to a tenderer subject to a conflict of interest arising only during the performance of the framework contract.

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105. Consequently, whilst the applicant's arguments require several assessments to be made in the main proceedings and cannot therefore be regarded, at this stage, as unfounded, doubts must nevertheless be raised as to whether the Commission infringed Article 94 of the Financial Regulation or the provisions of the tender documents.

106. Second, as regards the alleged obligation on the part of the evaluation committee to consult a tenderer before eliminating its tender, in this plea the applicant does not rely on any legal basis imposing such a duty on the Commission. In so far as the applicant relies implicitly on the principle of the rights of the defence, it should be noted that respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting tha t person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views (Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I5373, paragraph 21). However, in the present case, the applicant does not, prima facie, put forward any arguments to show that the tendering procedure is initiated against it.

107. Thirdly, as regards the Commission's alleged breach of the principle of protection of legitimate expectations on account of its rejection of a way of resolving conflicts of interest, it has already accepted, prima facie, that the applicant does not, at this stage, describe an earlier practice that can satisfactorily justify such expectations.

108. Fourthly, doubts must be raised at this stage as to the existence of the failure to state reasons for the decision rejecting the tender claimed by the applicant. According to settled case-law, the scope of the obligation to state reasons must be appropriate to the act at issue and the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way as to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded and to enable the competent Community Court to exercise its power of review (Case C-367/95 P Commission v Sytraval and Brink's France [1998] ECR I1719, paragraph 63; Joined Cases T-228/99 and T-233/99 Westdeutsche Landesbank Girozentrale v Commission [2003] ECR II435, paragraph 278; and Case T-109/01 Fleuren Compost v Commission [2004] ECR II-127, paragraph 119).

109. The reason stated for the decision rejecting the tender is the existence of a risk of a conflict of interest connected, first, with the grants received by certain members of Euphet and certain experts which it might use to perform the framework contract and, secondly, the inadequate guarantees provided by Euphet in this regard.

110. As regards the allegedly erroneous nature of the reason stating that Euphet failed to acknowledge the involvement of certain experts in the implementation of the programme of Community action in the field of public health, the applicant does not mention any passage in its tender where it specifically acknowledged, or even merely suggested, that certain experts whom it intended to use received Community grants in that field.

111. Fifthly, as regards the Commission's alleged infringement of Article 138 of the detailed implementing rules, by that plea the applicant seems to claim essentially that its unlawful exclusion results in the contract being awarded to a tenderer whose tender does not offer the best value for money. However, at this stage, assuming that Euphet's tender was accepted in the tendering procedure, it appears that it would not necessarily have been selected by the Commission.

- The second plea

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112. In its second plea, the applicant claims essentially that by failing to ask Euphet to submit additional information, the Commission infringed Article 146(3) of the detailed implementing rules, the Court's case-law on public procurement (judgment in Fabricom , cited in paragraph 35 above), the principle of protection of legitimate expectations, the principle of equal treatment and Articles 89(1) and 99 of the Financial Regulation.

113. First of all, at this stage, serious doubts must be raised as to whether the Commission infringed Article 146(3) of the detailed implementing rules. As the applicant itself recognises, that provision simply offers the Commission a discretionary option.

114. Secondly, at this stage, doubts must also be raised as to whether the applicant may rely effectively on the judgment in Fabricom , cited in paragraph 35 above, in order to show that the Commission could not conduct a specific assessment of the potential conflict of interest without requesting additional information from it.

115. First of all, the applicant does not clearly show, at this stage, that the Commission could not conduct a specific examination of the risk of a conflict of interest established vis-à-vis Euphet without knowing the precise nature of the specific contracts to be concluded. As has already been observed in the examination of the first plea (paragraph 92 above), it is not apparent at this stage that the Commission failed to conduct a specific examination of a risk of a conflict of interest having regard to the subject of the framework contract. It is not apparent either, at this stage, that that examination was insufficient to establish the existence of a major risk of a conflict of interest and that it was also necessary to know the precise nature of the specific contracts to be concluded.

116. Second, prima facie, the fact that, in the Commission's view, the terms of the corrective measure proposed by Euphet were too general does not mean that it could not conduct a specific examination of Euphet's situation with regard to conflicts of interest. The general nature of the terms of the tender submitted by Euphet is precisely one of the criteria assessed by the Commission in the decision rejecting the tender in order to reach the conclusion that the Euphet's proposed corrective measure, as set out in its tender, is not adequate for resolving the risk of a conflict of interest identified by the Commission.

117. The President nevertheless considers that this question must be examined in detail in the main proceedings.

118. Third, in so far as the applicant claims a breach of the principle of protection of legitimate expectations, the e-mails annexed to its observations of 13 June 2005 concern only one tendering procedure and do not, at this stage, give proof of the existence of a consistent practice on the part of the Commission whereby it asks tenderers for additional information.

119. Fourth, the applicant does not clearly demonstrate, at this stage, that the Commission's request for additional information from other tenderers constitutes a breach of the principle of equal treatment or an infringement of Articles 89(1) and 99 of the Financial Regulation.

120. According to the Commission's observations, those tenderers were invited to prove the date of submission of their respective tenders because the postmarks on the envelopes containing those tenders were illegible. However, doubts must be raised at this stage as to whether the applicant is in a similar position to those tenderers. Unlike the tenderers in those cases, the defects noted by the Commission in Euphet's tender could not, prima facie, be attributed to circumstances outside its control, but to intrinsic shortcomings in its tender.

121. The President nevertheless considers that this question must be examined in detail in the main proceedings.

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122. In the light of the arguments put forward in the interlocutory proceedings, doubts must be raised on several points of the applicant's arguments. Its arguments must nevertheless be examined in detail in the main proceedings.

123. Without prejudice to the Court's position in the main proceedings, the applicant's arguments cannot therefore, at this stage, be rejected as entirely without foundation. The condition relating to a prima facie case is therefore satisfied.

Urgency

124. According to settled case-law, the urgency of an application for interim measures must be assessed on the basis of the need for an interlocutory order in order to prevent serious and irreparable damage being caused to the party requesting the interim measure. That party must prove that it cannot wait for the outcome of the main proceedings without having to suffer damage of this kind (orders in Esedra v Commission , cited in paragraph 67 above, paragraph 43, and in TQ3 Travel Solutions Belgium v Commission , cited in paragraph 67 above, paragraph 41).

125. In the present case, the applicant's argument consists essentially of two parts where, on the one hand, the applicant's exclusion from the tendering procedure harms its reputation and, on the other, the absence of interim measures will, if the contested decisions are annulled, prevent it from being awarded and then performing the contract covered by the tendering procedure and, as a result, from deriving certain benefits in terms of prestige, experience and revenue. Those two parts should be considered in turn.

126. First of all, the applicant claims that its exclusion from the tendering procedure harms its reputation. In that regard, the Commission rightly points out that participation in a public tender procedure, by nature highly competitive, involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial (orders in CMC v Commission , cited in paragraph 71 above, paragraph 51, and in European Dynamics v Commission , cited in paragraph 67 above, paragraph 82). Furthermore, the applicant's argument that this case-law does not apply where the tenderer has been unlawfully eliminated cannot be accepted. The case-law in question concerns cases where, like the applicant in the present case, the applicants were contesting the lawfulness of the act(s) contested in the main proceedings. In addition, where an undertaking has been unlawfully eliminated from a tendering procedure, there is even less reason to believe that it is liable to suffer serious and irreparable harm to its reputation, since its exclusion is unconnected with its competences and the subsequent annulling judgment will in principle allow any harm to its reputation to be made good.

127. Second, the applicant claims that, if the contested decisions are annulled and interim measures are not adopted, it will no longer be possible for it to be awarded the contract covered by the tendering procedure and then to perform the contract and, as a result, to derive certain benefits in terms of prestige, experience and revenue.

128. It should be noted in that regard that if the contested decisions were annulled by the Court, it would be for the Commission, under the first paragraph of Article 233 EC, to take the necessary measures to comply with the judgment, without prejudice to the obligations stemming from the application of the second paragraph of Article 288 EC.

129. It should also be noted that, under Article 233 EC, it is the institution whose act has been declared void that is required to take the necessary measures to comply with the Court's judgment. It follows that the Court hearing annulment proceedings is not competent to indicate to the institution whose act has been declared void the manner in which its ruling is to be complied with (order of the Court of Justice in Joined Cases C-199/94 P and C-200/94 P Pevasa and Inpesca v Commission [1995] ECR I3709, paragraph 24) and that the judge hearing the application for interim measures

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may not prejudice the measures that might be taken following any annulling judgment. The manner in which an annulling judgment is complied with depends not only on the annulled provision and the scope of the judgment, which is to be assessed with reference to its grounds (Joined Cases 97/86, 99/86, 193/86 and 215/86 Asteris and Others v Commission [1988] ECR 2181, paragraph 27, and Joined Cases T305/94 to T307/94, T313/94 to T316/94, T318/94, T325/94, T328/94, T329/94 and T335/94 Limburgse Vinyl Maatschappij and Others v Commission [1999] ECR II931, paragraph 184), but also on the specific circumstances of each case, such as the time within which the contested act is annulled or third-party interests.

130. In the present case, if the contested decisions were annulled, the Commission would therefore have to adopt the necessary measures for ensuring appropriate protection of the applicant's interests, having regard to the specific circumstances of this case (see, to that effect, the orders of the President of the Court of First Instance in Case T108/94 R Candiotte v Council [1994] ECR II249, paragraph 27, and in Case T447/04 R Capgemini Nederland v Commission [2005] ECR II-257, paragraph 96).

131. It is not therefore for the President to prejudice measures which might be taken by the Commission in order to comply with any annulment judgment.

132. Nevertheless, the general principle of the right to full and effective judicial protection requires that interim protection be available to individuals, if it is necessary for the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection afforded by the Community Courts (see, to that effect, the order of the President of the First Chamber of the Court of Justice in Case 27/68 R Renckens v Commission [1969] ECR 274, 276; judgments in Case C-213/89 Factortame and Others [1990] ECR I2433, paragraph 21, and in Joined Cases C-143/88 and C-92/89 Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest [1991] ECR I415, paragraphs 16 to 18; orders of the President of the Court of Justice in Case C-399/95 R Germany v Commission [1996] ECR I2441, paragraph 46, and in Austria v Council , cited in paragraph 25 above, paragraph 111).

133. It is therefore necessary to examine whether it is proven, with a sufficient degree of probability, that the applicant is likely to suffer serious and irreparable damage if the interim measures applied for are not adopted (see, to that effect, the order of the President of the Court of Justice in Case C-180/01 P(R) Commission v NALOO [2001] ECR I5737, paragraph 53).

134. In the present case, ignoring the issue of the conflict of interest identified by the Commission, which is contested by the applicant and is the subject of the main proceedings, it must be held that Euphet had an opportunity to be awarded the contract covered by the tendering procedure. First of all, it is clear from the documents before the Court that Euphet was excluded from the tendering procedure irrespective of the value for money of its tender and solely because the tender showed that there was a risk of a conflict of interest. Second, nothing in the file suggests that Euphet did not have an opportunity to be awarded and to perform the contract in question, irrespective of the risk of a conflict of interest identified by the Commission.

135. However, because of its exclusion from the tendering procedure, Euphet lost its opportunity to be awarded the contract and, consequently, to derive the various financial and non-financial benefits that might result from the performance of the framework contract. It should therefore be examined whether, following an annulment judgment, the possibility of the Commission organising a new tendering procedure would allow such damage to be repaired and, if that is not the case, it should be assessed whether the applicant could be compensated accordingly.

136. As regards the possibility of the Commission organising a new tendering procedure, it should be stated that, even if Euphet could be restored under competitive conditions comparable to those

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that applied in the tendering procedure in question, it is highly likely that the subject of the new procedure organised by the Commission will be different from the subject of the first procedure.

137. Under Sections 7.1.3 and 7.1.4 of the specifications, the framework contract relates inter alia to an evaluation of the programme of Community action in the field of public health established by Decision No 1786/2002. Article 12(3) of that decision provides that an external assessment must be conducted by the end of the fourth year of the programme', that is 31 December 2006.

138. Consequently, even though the Commission rightly stresses that the framework contract does not necessarily concern just that evaluation, it is highly likely that, if interim measures are not adopted, at least some of the services to be provided under the framework contract will have been completed when the Court delivers its decision in the main proceedings.

139. Therefore, even if the Commission decides to or is required to organise a new call for tenders in order to comply with an annulment judgment, if Euphet can be restored under competitive conditions similar to those that applied in the tendering procedure in question, and if Euphet's tender is accepted by the Commission, it is unlikely that Euphet will in practice still have an opportunity to carry out all the services that it would have performed if it had been declared the successful tenderer at the outset.

140. In the circumstances of this case, it is therefore unlikely that the possibility of the Commission organising a new tendering procedure would in itself make it possible to preserve the opportunity that the applicant had to be awarded and to perform the contract covered by the tendering procedure and, as a result, to derive the various benefits that might have resulted.

141. However, as was held above (paragraph 135), account should also be taken of the possibility that, if the contested decisions are annulled in the main proceedings, the Commission could compensate the applicant for any damage suffered and that, if the Commission chose not to award such compensation, the applicant could bring an action for damages on the basis of Article 288 EC. If any damage suffered by the applicant can subsequently be compensated, it cannot be regarded as irreparable (see, to that effect, the orders in Esedra v Commission , cited in paragraph 67 above, paragraph 44, and in TQ3 Travel Solutions Belgium v Commission , cited in paragraph 67 above, paragraph 43).

142. In the present case, the Commission claims in its observations that, if the contested decisions are annulled, the applicant's interests could be adequately protected inter alia through the payment of compensation. However, the file does not contain anything to guarantee, with a sufficient degree of certainty, that, if the contested decisions were annulled, the Commission would compensate the applicant without an action for damages being brought.

143. Account must therefore be taken of the possibility of the applicant bringing an action under Article 288 EC.

144. According to settled case-law, the damage for which compensation is sought in an action under Article 288 EC must be real and certain (see, to that effect, Case T-54/96 Oleifici Italiani and Fratelli Rubino v Commission [1998] ECR II3377, paragraph 66, and Case T-231/97 New Europe Consulting and Brown v Commission [1999] ECR II2403, paragraph 29).

145. In the present case, as has already been held (paragraph 134 above), it must be regarded as established that Euphet had an opportunity to be awarded and to perform the contract covered by the tendering procedure. Therefore, the damage suffered by the applicant, consisting in the loss of that opportunity, must, at this stage and in the light of the evidence and arguments submitted in the interlocutory proceedings, be regarded as real and certain within the meaning of the case-law mentioned in the preceding paragraph.

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146. However, it must be stated that that opportunity is very difficult to quantify. On the one hand, Euphet's tender was excluded at a very early stage in the procedure and the evaluation committee did not deliver an opinion regarding its economic value. On the other hand, even if that tender had been evaluated by the evaluation committee, the contracting authority would not be bound by its proposal and would have a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract (see, to that effect, Case T-13/96 TEAM v Commission [1998] ECR II4073, paragraph 76, and AFCon Management Consultants and Others v Commission , cited in paragraph 35 above, paragraph 113).

147. It is therefore very difficult, or even impossible, to quantify that opportunity and therefore to evaluate the damage resulting from its loss. According to settled case-law, damage, which once it has been suffered cannot be quantified, may be regarded as irreparable (see, to that effect, the order of the President of the Court of Justice in Joined Cases C51/90 R and C59/90 R Comos Tank and Others v Commission [1990] ECR I2167, paragraph 31; orders of the President of the Court of First Instance in Case T41/97 R Antillean Rice Mills v Council [1997] ECR II447, paragraph 47, and in Case T-65/98 R Van den Bergh Foods v Commission [1998] ECR II2641, paragraph 65).

148. The loss of that opportunity may therefore be regarded as constituting irreparable damage.

149. However, in order to justify the grant of interim measures, the damage claimed by the applicant must be serious (see, to that effect, the orders in Esedra v Commission , cited in paragraph 67 above, paragraph 43, and in TQ3 Travel Solutions Belgium v Commission , cited in paragraph 67 above, paragraph 41).

150. The loss of an opportunity to be awarded and to perform a public contract forms an integral part of exclusion from the tendering procedure in question and cannot be regarded as constituting in itself serious damage, whether or not a specific assessment is made of the seriousness and irreparability of the precise prejudice alleged in each case considered (see, by analogy, the order of the President of the Court of First Instance in Case T-237/99 R BP Nederland and Others v Commission [2000] ECR II3849, paragraph 52).

151. Therefore, in the present case, the applicant's loss of an opportunity to be awarded and to perform the contract in the tendering procedure would constitute serious damage if it has shown satisfactorily that it would have been able to derive sufficiently sizeable benefits from the award and performance of that contract.

152. It is therefore necessary to make a specific assessment of the various benefits that, according to the applicant, it would derive from the award and performance of the contract covered by the tendering procedure.

153. First of all, the applicant claims that the performance of the framework contract would have brought it major benefits in terms of experience and prestige. However, in this respect, its claims are too general, too vague and too unsubstantiated to establish satisfactorily the likelihood and, a fortiori, the significance of those benefits. As regards the honour and prestige attached to the performance of the tasks to be carried out, the applicant pleads the value of the framework contract, the subject, the duration, the international and large-scale nature of the task' and the fact that it assembled a team of 65 people to perform the contract. Nevertheless, in the absence of more specific evidence allowing an assessment of the effects of performance of the framework contract, in particular on its customers, its prestige and its experience, these claims alone are too vague to prove satisfactorily the likelihood and, a fortiori, the significance of those benefits.

154. Second, as regards the financial benefits attached to the performance of the framework contract, their existence is clearly established. It is obvious therefore that non-performance of the contract

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would deprive the applicant of revenue that it would have received if it had been awarded the contract. The applicant is therefore liable to suffer irreparable damage linked to the loss of an opportunity to receive that revenue.

155. With regard to the seriousness of that loss, it should be noted that, having regard to its subject-matter, the framework contract concerns tasks with a considerable value. It can be seen from the specifications that the successful tenderer will be assigned three to five tasks each year and that, for the first year, the value of the remunerable services is EUR 1 million.

156. However, where the applicant is an undertaking, the seriousness of material damage must be assessed inter alia in the light of the size of that undertaking (see, to that effect, the order in Comos Tank and Others v Commission , cited in paragraph 147 above, paragraphs 26 and 31, and the order of the President of the Court of First Instance in Case T-201/04 R Microsoft v Commission [2004] ECR II-4463, paragraph 257).

157. In the present case, it must be stated that the applicant does not produce evidence or arguments to show that, in the light of its size in particular, the loss that it is liable to suffer would be sufficiently serious to justify the grant of interim measures.

158. For example, it can be seen from an annex to the tender submitted by Euphet that the applicant realised a turnover of more than EUR 27 million in 2004. Furthermore, the information provided in Euphet's tender seeks to highlight the size of the group to which the applicant is linked. In that tender, it is stated that the group in question employs the services of almost 130 000 people throughout the world, approximately 20 000 of whom work within the European Union.

159. Consequently, in the light of the evidence and arguments contained in the application for interim measures, the President cannot take the view that the applicant's loss of an opportunity to receive revenue from the performance of the framework contract would be sufficiently serious to justify the grant of interim measures.

160. The condition relating to urgency cannot therefore be regarded as satisfied.

161. Lastly, it should be noted that the balance of interests is in any case in favour of not ordering interim measures.

162. As has already been noted, if interim measures are not adopted, the applicant is liable to suffer damage linked to the loss of an opportunity to receive revenue from the performance of the framework contract.

163. However, if the interim measures applied for were ordered, the Commission would be unable to conclude the framework contract. It is clear from recital 44 in the preamble to Decision No 1786/2002 that the evaluations of the programme of Community action in the field of public health are intended, where appropriate, to adjust or modify that programme. The performance of these evaluations therefore fulfils an important general interest.

164. Account must also be taken of the interest of the tenderer which was successful at the end of the tendering procedure and which, in the event of suspension, would be unable to perform the contract which it has been awarded.

165. Lastly, as can be seen from the examination of the prima facie case (paragraphs 83 to 123 above), it is not particularly strong, in the light of the evidence and arguments presented in the interlocutory proceedings, and is not capable of tipping the balance of interests in favour of the grant of interim measures.

166. Therefore, in the light of the foregoing, the balance of the interests at stake is in favour of not granting the interim measures applied for.

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167. Consequently, without it being necessary to give a ruling on the applicant's request for the correspondence exchanged between the Commission and the other tenderers to be lodged with the Registry, the application for interim measures must be dismissed.

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AUTHOR	Court of First Instance of the European Communities
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APPLICA	Person
DEFENDA	Commission ; Institutions
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Judgment of the Court of First Instance (Fourth Chamber)
First Instance (Fourth Chamber)First Instance (Fourth Chamber)2007. Deloitte Business Advisory NV v Commission of the European Communities. Public service contracts - Call for tenders for programme evaluation activities and other activities in the public health sector - Rejection of a tender - Conflict of interest. Case T-195/05.

1. Budget of the European Communities - Financial Regulation - Provisions applicable to tendering procedures

(Council Regulation No 1605/2002, Art. 94)

2. Budget of the European Communities - Financial Regulation - Provisions applicable to tendering procedures

(Commission Regulation No 2342/2002, Art. 146(3), second subpara.)

1. Article 94 of Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities applies - according to the provisions of that regulation - to all public contracts financed in whole or in part by the Community budget. Thus no distinction is made according to whether the procurement procedure in question relates to a framework contract or another type of contract.

However, that provision permits exclusion of a tenderer from a procurement procedure only if the situation of conflict of interest to which it refers is real and not hypothetical. That does not mean that a risk of conflict of interest is not sufficient to exclude a tender. In principle, it is only when the contract is performed that a conflict of interest can become real. Before conclusion of the contract, a conflict of interest can be only potential and Article 94 of the Financial Regulation therefore implies an assessment in terms of risk. That risk must actually be found to exist, following a specific assessment of the tender and the tenderer's situation, for that tenderer to be excluded from the procedure. The mere possibility of a conflict of interest cannot suffice for that purpose.

It follows that, in the procedure for the award of a framework contract, account must be taken of the fact that specific contracts, award of which will give rise to a check that there is no risk of conflict of interest, must come into being before the successful tenderer for the framework contract is entrusted with the performance of specific tasks. Thus, in such a case, the risk that a conflict of interest will in fact arise can be considered only where there are material circumstances placing the tenderer in a position where it is unable to avoid the risk of bias in the performance of the majority of the tasks under the framework contract.

(see paras 66-68)

2. The second subparagraph of Article 146(3) of Regulation No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation gives the evaluation committee the option of requesting from tenderers additional information concerning the supporting documents submitted in relation to the exclusion and selection criteria. It follows that that provision cannot be interpreted as imposing a duty on the evaluation committee to request such information from tenderers.

(see para. 102)

In Case T195/05,

Deloitte Business Advisory NV, established in Brussels (Belgium), represented by D. Van Heuven, S. Ronse and S. Logie, lawyers,

applicant,

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v

Commission of the European Communities, represented by L. Pignataro-Nolin and E. Manhaeve, acting as Agents,

defendant,

ACTION for annulment, firstly, of the Commission's decision rejecting the tender from Euphet for the public procurement contract Evaluation Framework Contract covering the policy areas of [the Directorate-General for] Health and Consumer Protection, Lot 1 (Public Health) - call for tenders SANCO/2004/01/041' and, secondly, of the Commission's decision awarding that contract to a third party,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, I. Wiszniewska-Biaecka and E. Moavero Milanesi, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 11 October 2006,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action.

2. Orders the applicant, Deloitte Business Advisory NV, to pay the costs, including those of the application for interim measures.

Legal framework

1. The award of service contracts by the Commission is governed by Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; the Financial Regulation') and Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1; the Implementing Rules').

2. Pursuant to Article 89(1) of the Financial Regulation:

All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.'

3. Under Article 94 of the Financial Regulation:

Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest;

...'

4. Under Article 99 of the Financial Regulation:

While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers must satisfy conditions ensuring transparency and equal treatment. They

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may not lead to amendment of the conditions of the contract or the terms of the original tender.'

5. Article 138 of the Implementing Rules provides:

1. Contracts shall be awarded in one of the following two ways:

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability completion or delivery times, after-sales service and technical assistance.

...'

6. Pursuant to Article 146(3) of the Implementing Rules:

Requests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated.

However, the evaluation committee may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within a specified time-limit...'

7. Article 147(3) of the Implementing Rules states:

The contracting authority shall then take its decision giving at least the following:

(a) the name and address of the contracting authority, and the subject and value of the contract or of the framework contract;

(b) the names of the candidates or tenderers rejected and the reasons for their rejection;

(c) the names of the candidates or tenderers to be examined and the reasons for their selection;

(d) the reasons for the rejection of tenders found to be abnormally low;

(e) the names of the candidates or contractor selected and the reasons for that choice by reference to the selection and award criteria announced in advance and, if known, the proportion of the contract or the framework contract which the contractor intends to subcontract to third parties;

(f) in the case of negotiated procedures, the circumstances referred to in Articles 126, 127, 242, 244, 246 and 247 which justify their use;

(g) where appropriate, the reasons why the contracting authority has decided not to award a contract.'

8. Article 148(3) of the Implementing Rules provides:

If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.'

Background to the dispute

9. On 14 December 2004, the Commission published in the Supplement to the Official Journal of the European Union (OJ 2004 S 243) a contract notice for the award of a framework contract entitled Evaluation framework contract covering the policy areas of [the Directorate-General for] Health and Consumer Protection, Lot 1 (public health) - invitation to tender Sanco/2004/01/141' (the

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framework contract').

10. It is clear from sections 7.1.3 and 7.1.4 of the specifications relating to the tendering procedure (the specifications') that the framework contract is to relate in particular to the evaluation of the programme of Community action in the field of public health established by Decision No 1786/2002/EC of the European Parliament and of the Council of 23 September 2002 adopting a programme of Community action in the field of public health (2003-2008) (OJ 2002 L 271, p. 1).

11. The specifications divide the tasks to be carried out under the framework contract into two main tasks. The first task (main task 1') is to conduct studies and to provide services intended to assist in the design and preparation of Community programmes or policies, their ex-ante assessment and the organisation of evaluation activities'. The second task (main task 2') is to carry out mid-term, final and ex-post evaluations of programmes, policies and other activities. According to the specifications, the framework contract must allow specific contracts to be concluded in accordance with the Commission's needs. It must be concluded in principle for a period of 24 months with the possibility of renewal for two further periods of 12 months each.

12. The specifications also set out several grounds for the exclusion of tenderers.

13. One of those grounds, set out in section 9.1.3 of the specifications, which reproduces Article 94 of the Financial Regulation, is formulated as follows:

Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest...'

14. With a view to tendering for the contract in question, Deloitte Business Advisory NV formed a consortium with the London School of Hygiene and Tropical Medicine, the Nederlandse Organisatie voor toegepast-natuurwetenschappelijk onderzoek (Netherlands Organisation for Applied Scientific Research, TNO) and the Istituto superiore di sanità (National Health Institute, Italy) for the evaluation of European public health (European Public Health Evaluation Task Force; Euphet'), assisted by other bodies such as the Karolinska Institutet (a Swedish medical research and education centre). The applicant acts as the legal representative of that group.

15. On 10 February 2005 Euphet submitted a tender to the Commission under the tendering procedure. Euphet's tender includes a paragraph with the heading Independence', which reads as follows:

Euphet understands and accepts that none of the evaluation organisations or their staff should have the slightest existing or potential conflict of interest in the performance of their task under the framework contract. We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present. Furthermore, we undertake to conduct a detailed prior check in connection with each specific contract in order to ensure that the teams we propose are composed of members who are able to work in complete independence and to provide an objective and independent external assessment. If, in the course of execution of the projects, the slightest problem should arise which could have a bearing on this key principle, we would notify the Commission immediately and work with it to seek to rectify the situation.'

16. By a letter of 22 April 2005, the Commission informed Euphet that its tender had been rejected since the evaluation committee for the contract had found there to be risks of conflicts of interest within Euphet. In the decision rejecting the tender, the Commission noted as follows:

The evaluation committee examined the offers concerning possible Conflict of Interest... The definition of [conflict of interest] is provided in the draft contract that was included in the tender documentation. This definition reads:

The Contractor shall take all necessary measures to prevent any situation that could compromise

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the impartial and objective performance of the Contract. Such conflict of interests could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest.

In the context of an evaluation contract, a case of [conflict of interest] could take place if the tenderer is being, or has been, involved in the implementation of the subject to be evaluated. This situation could involve the evaluator assessing his/her own work, and there is a great risk that the conflict of interest affects the objectivity - which is a crucial factor for an evaluation - of the evaluator. It is also being stressed in the Specifications of the Tender that objectivity has to be ensured in evaluations.

The following information was found concerning the Euphet main and supporting partners' involvement in... activities [of the Directorate-General for health and consumer protection (SANCO)].

- London School of Hygiene and Tropical Medicine (LSHTM) has a large number of grant contracts (14 listed) with SANCO.

- TNO has a large number of grant contracts with SANCO/Public Health.

- Istituto Superiore di Sanita (ISS) has one grant contract with SANCO/Public Health and another one is planned to be signed in the coming months.

- Karolinska Institutet (KI) has a large number of grant contracts with SANCO/Public Health.

The evaluation committee concluded that Euphet does not acknowledge the fact that a number of the consortium partners have a large involvement in the implementation of the Public Health programme. Considering the great risk of [conflict of interest], a detailed and concrete explanation would have been required to provide a sufficient level of understanding of how the [conflict of interest] issue should be addressed and the risks should be eliminated. However, the approach proposed is not sufficient, and no satisfactory assurance is provided by the tenderer that [conflict of interest] could be avoided.'

17. In the decision rejecting the tender, however, the Commission adds that it would not be signing the framework contract with the successful tenderer until a period of two weeks had passed.

18. By a letter dated 3 May 2005, Euphet contested the Commission's position and, inter alia, asked it to respond by 4 May 2005, failing which it would bring the matter before the Court of First Instance.

19. By a fax of 4 May 2005, the Commission acknowledged receipt of the letter from Euphet and stated:

Because we need more time to examine the questions raised in your letter, we will not proceed with the signing of the contract for a further period of 15 days from the date on which this letter was sent.'

20. By a fax of 19 May 2005, the Commission replied that it was maintaining its position and rejecting the tender submitted by Euphet.

Procedure and forms of order sought

21. By application lodged at the Registry of the Court of First Instance on 19 May 2005, the applicant brought the present action.

22. By a separate document lodged at the Registry of the Court of First Instance on the same day, the applicant made an application for interim measures, seeking, on the one hand, suspension of execution of the decision rejecting the tender and the decision awarding the contract to another tenderer (the award decision') and, on the other, an order preventing the Commission, firstly,

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from notifying the award decision to the successful tenderer and, secondly, from signing the relevant contract, on pain of a fine of EUR 2.5 million.

23. By order of 26 May 2005, the President of the Court of First Instance ordered the Commission not to sign the framework contract until a final order had been made on the application for interim measures.

24. By order of 20 September 2005, the President of the Court of First Instance dismissed the application for interim measures.

25. Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.

26. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 11 October 2006.

27. The applicant claims that the Court should:

- declare the action well founded;

- annul the decision rejecting the tender;

- annul the award decision;

- order the Commission to pay the costs.

28. The Commission contends that the Court should:

- declare the applicant's application unfounded and dismiss the action;

- order the applicant to pay the costs.

Law

29. In support of its action, the applicant raises, in essence, two pleas in law, alleging, respectively, that Euphet was unlawfully excluded from the tender procedure on grounds of a risk of conflict of interest and that it was unlawfully deprived of the possibility of supplying additional information with regard to the conflict of interest.

The first plea in law, alleging the unlawful exclusion of Euphet from the tender procedure on grounds of a risk of conflict of interest

30. The applicant's arguments seek to show, in essence, firstly, the lack of reasoning in the decision rejecting the tender with regard to the existence of a conflict of interest, secondly, the lack of a conflict of interest and, thirdly, infringement of the principle of protection of legitimate expectations and of Article 138 of the Implementing Rules.

Breach of the duty to give reasons concerning the existence of a conflict of interest

- Arguments of the parties

31. In the context of the first part of its first plea, alleging breach of the general duty to give reasons and of Article 147(3) of the Implementing Rules, the applicant submits that the decision rejecting the tender is based on incorrect and insufficient reasons with regard to the existence of a conflict of interest.

32. The reasons given by the Commission for its decision rejecting the tender are incorrect since the evaluation committee - certain extracts of whose report are set out in the present judgment - concluded wrongly that Euphet did not acknowledge the fact that a number of the consortium partners are greatly involved in the implementation of the Public Health programme. Euphet's tender clearly

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stated that certain Euphet partners were involved in ongoing activities for the DG Health and Consumer Protection'.

33. The Commission's reasons for its decision rejecting the tender are also incorrect, since at no time did it state why the course of action suggested by Euphet was inadequate and why it offered no satisfactory assurance that all conflicts of interest could be avoided. Moreover, according to the applicant, although the invitation to tender required a minimum of seven experts, Euphet's tender included 65 curricula vitae, 45 of which were of persons who had nothing to do with the organisations named by the Commission, and therefore Euphet would always have been capable of carrying out the different tasks without there being a conflict of interest. The 20 persons connected to organisations named by the Commission would be faced with a conflict of interest only if they carried out activities of type D for main task 2, which has many aspects, thus enabling them to work on a number of evaluation files without any risk of conflict of interest. Since the conditions for selection were particularly stringent, Euphet had tried to gather a large number of experts who were likely to have experience in the activities of the DG Health and Consumer Protection'. Accordingly, a necessary and sufficient condition would have been to propose a way of resolving conflicts of interest, which is a condition that Euphet would have met in the present case.

34. As subsidiary points, the applicant observes that the fact that one or more Euphet partners had received grants from the Commission is not such as to cast doubt on their objectivity in all circumstances. The applicant also notes that the Commission raises that point, and the fact that several of the experts engaged have received grants from the DG Health and Consumer Protection', for the first time in its defence.

35. It is for the Commission to show concrete proof that a particular tenderer has a conflict of interest, and if such a risk could justify the exclusion of a tenderer - which is not the case here - the Commission ought to state that clearly in the invitation to tender, so that tenderers so forewarned can take that risk into account when forming their teams.

36. The Commission disputes, firstly, the allegation that the decision rejecting the tender is based on incorrect reasons, maintaining that it was fully entitled to hold that Euphet did not acknowledge the fact that a number of Euphet partners were greatly involved in the implementation of the Public Health programme in question in the present case. Although the curricula vitae of some of the partners in Euphet disclosed their involvement in the implementation of the programme of Community action in the public health sector, Euphet did not see the need to notify the Commission of a potential risk of conflicts of interest, and stated as follows:

We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present.'

37. Furthermore, that ground for exclusion - exclusion for conflict of interest - which is set out in Article 94 of the Financial Regulation and reproduced in section 9.1.3 of the specifications, was - by choice - drafted in wide terms by the Commission, since the assessment as to whether there is a conflict of interest requires a concrete examination by the adjudicating authority on the basis of the documents in the file.

38. The Commission further takes the view that it gave sufficient explanation of the reasons for its finding that there was a conflict of interest with regard to Euphet. It adds that its letter of 19 May 2005 was not a statement of reasons a posteriori but a response to the arguments raised in the detailed letter from Euphet's lawyers of 3 May 2005. Accordingly, Euphet has sufficient knowledge of the reasons for the decision rejecting the tender.

39. Finally, the Commission rejects the applicant's assertion that it would still have been possible to carry out certain evaluation tasks without risk of conflict of interest, since the tender included

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65 curricula vitae, 45 of which were of persons who have no connection with the Euphet partners in respect of which the Commission had found a conflict of interest. The experts proposed by Euphet did not all carry the same specific weight and, in its tender, Euphet classified its experts according to their experience in the areas of Evaluation' and Public Health'. On that basis a points system was established on a scale from A to D. Analysis of the qualifications of the experts proposed by Euphet shows that most of those given the highest points - and, it may be supposed, those who play the most important role in the actual performance of the evaluation tasks - are connected with organisations which received large subsidies from the Commission for carrying out work relating to the Community public health programme. Each partner in the consortium is also a member of the contract committee which oversees performance of the contract. Furthermore, the applicant has tried to create a homogeneous team and it is rather implausible that those organisations or experts would be excluded from carrying out certain tasks, irrespective of the consequences that that would have for the quality of the work to be done.

40. Moreover, the Commission refutes the argument that it should have made express mention of the risk of a conflict of interest' as a specific ground for exclusion in the specifications, thus depriving Euphet of the opportunity to take that risk into consideration.

41. Firstly, the grounds for exclusion are exhaustively laid down in Articles 93 and 94 of the Financial Regulation; the possibility of conflict of interest is mentioned in Article 94 and repeated word for word in the specifications.

42. Secondly, Euphet was perfectly aware of the problem of conflicts of interest when it drafted its tender since it stated therein: Euphet understands and accepts that none of the evaluation organisations or their staff should have the slightest existing or potential conflict of interest in the performance of their task under the framework contract'. Aware of the fact that the risk of conflict of interest - not merely actual but also potential - was incompatible with performance of the evaluation tasks under the framework contract, Euphet nevertheless asserted in its tender:

We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present.'

43. Thirdly, the applicant accepted, in its reply, that there was a problem of conflict of interest where organisations participate in the evaluation of a Community policy in the context of which they have received subsidies, stating that it is clear that a partner or an expert employed by that partner cannot participate in the evaluation of a file in the context of which that partner has itself received a subsidy'. In that regard, the Commission points out that all the partners in the consortium in question, as well as a number of the experts called upon, received subsidies from the DG for Health and Consumer Protection' for carrying out certain actions in implementation of the Community public health programme.

- Findings of the Court

44. As a preliminary point, it should be noted that the arguments alleging incorrect and insufficient reasons for the decision rejecting the tender amount essentially to a single argument alleging an error of assessment by the Commission and the unfounded nature of the decision rejecting the tender. Accordingly, those questions require not an analysis of the Commission's duty to give reasons, but an in-depth analysis of the substance of the decision rejecting the tender, and will therefore be dealt with in the analysis of the second part of this plea. The arguments set out above will be analysed in the context of the first part of the plea only to the extent that they can truly be understood as alleging infringement of the duty to give reasons.

45. In that regard, it should be noted that, according to established case-law, the duty to give reasons depends on the type of document at issue and on the context in which it was adopted. The

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statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way, firstly, as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to verify whether or not the decision is well founded and, secondly, to permit the Community Court to exercise its supervisory jurisdiction (Case C350/88 Delacre and Others v Commission [1990] ECR I395, paragraphs 15 and 16, and Case T217/01 Forum des migrants v Commission [2003] ECR II1563, paragraph 68).

46. In the present case, the decision rejecting the tender expressly states that Euphet's tender was rejected because of the existence of a conflict of interest connected, on the one hand, to the subsidies received by the main members of Euphet and, on the other, to the inadequacy of the safeguards offered by Euphet in that regard.

47. The decision rejecting the tender therefore states clearly and unequivocally the Commission's reasoning, thus, firstly, making the persons concerned aware of the reasons for the measure so that they are able to defend their rights and verify whether or not the decision is well founded and, secondly, permitting the Court to exercise its supervisory jurisdiction.

48. It follows that the applicant's argument alleging lack of reasoning for the decision rejecting the tender cannot be accepted. Accordingly, the first part of the first plea must be rejected.

The absence of conflict of interest

- Arguments of the parties

49. In the context of the second part of the first plea, the applicant alleges that the Commission infringed Article 94 of the Financial Regulation and the provisions of the tendering procedure.

50. Firstly, Euphet could not be excluded from the procurement procedure merely because of the existence of a risk of a conflict of interest. Section 9.1.3 of the specifications does indeed provide that the contract cannot be awarded to candidates or tenderers likely to find themselves in a situation of conflict of interest during the procedure for award of the contract, but the concept of conflict of interest is not defined either in the invitation to tender or in Article 94 of the Financial Regulation.

51. Under Article II.3.1 of the framework contract, a simple conflict of interest and, a fortiori, a risk of a conflict of interest do not in themselves constitute a ground for exclusion. It is sufficient for the party involved to take the measures necessary to avoid any conflict of interest or its consequences. Furthermore, that article lays down a procedure for resolving conflicts of interest likely to arise during the performance of contracts. The Commission therefore foresaw the risk of conflicts of interest in the context of the contract; it follows that the existence of such a risk cannot justify exclusion.

52. The applicant adds that Euphet's suggested approach greatly exceeded the requirements of the draft framework contract in that it proposed not only an ex-post solution - that is to say during performance of each specific contract - but also an ex-ante check, that is to say with effect from the stage at which the application file is drawn up, depending on the nature and the subject of the specific contracts. Such an approach enables the maximum reduction of the risk of a conflict of interest arising in the performance of a specific task. The independence of Euphet's staff was thus guaranteed in the letter of 10 February 2005 accompanying the tender, sent by Euphet to the Commission.

53. The applicant claims that the Commission could not require more of Euphet, all the more so because, at the date of lodging of the application, the exact content of the specific contracts was not known. Accordingly, the Commission could not exclude Euphet without acquiring detailed knowledge of the contents of the specific contracts to be concluded. If the Commission wished

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to have the option of excluding a tenderer on grounds of a risk of conflict of interest, it should have stated that in the specifications.

54. Furthermore, none of the invitation to tender documents provides - by way of a specific ground for exclusion - for the exclusion of a tenderer of which one or more members are involved in ongoing projects for the DG Health and Consumer Protection', and such a ground for exclusion could not be applied since it was neither mentioned in Article 94 of the Financial Regulation nor laid down in case-law.

55. In addition, the applicant submits that it is necessary to distinguish - as did the President of the Court of First Instance in his order of 20 September 2005 -between a case where the tenderers are subject to a conflict of interest during the procurement procedure', which justifies their exclusion pursuant to Article 94 of the Financial Regulation, and a case where there is potential risk of a conflict of interest, as relied upon by the Commission in the present case to justify exclusion. Basing its argument on paragraph 88 of that order, the applicant takes the view that it is for the Court to ascertain the degree of certainty needed to justify exclusion from the tendering procedure and to determine the discretion enjoyed by the Commission for the purposes of establishing a risk of a conflict of interest. The Commission cannot and must not exclude a tenderer before an actual conflict of interest is found.

56. Secondly, the applicant claims that the Commission did not carry out a specific check of Euphet's tender.

57. In that regard, it refers to case-law, according to which it is unlawful to exclude a tenderer in an abstract manner without any specific check on the resolution of a conflict of interest (Joined Cases C21/03 and C34/03 Fabricom [2005] ECR I1559 and Case T160/03 AFCon Management Consultants and Others v Commission [2005] ECR II981, paragraphs 75 to 78).

58. The Commission disputes the argument that Euphet was excluded from the tendering procedure on the sole ground that there was a risk of conflict of interest.

59. Firstly, it submits that the provisions of Article 94 of the Financial Regulation, reproduced in section 9.1.3 of the specifications, provide for the exclusion of tenderers who during the procurement procedure' are subject to a conflict of interest'. Those provisions relate inter alia to risks of conflicts of interest which exist at the stage of the procurement procedure and may affect its implementation. The existence of a conflict of interest even before the award of the contract accordingly constitutes a ground for rejection of the tender. That is not the case where a conflict of interest which did not exist when the contract was awarded arises during performance of the contract. In the latter situation, a contractual provision is laid down to remove any conflict of interest. An actual risk of conflict of interest already present at the stage of award of the contract is a legitimate ground for exclusion from the contract pursuant to Article 94 of the Financial Regulation. A finding that there is a serious risk of a conflict of interest in the future' (when the contract is performed) is an actual' conflict of interest in the context of award of the contract.

60. Next, although the invitation to tender does not require tenderers to include proposals for measures to correct conflicts of interest in their tender from the outset, that omission is explained by the very fact that a finding of conflict of interest even before award of the contract entails exclusion of the tender concerned, pursuant to section 9.1.3 of the specifications and Article 94 of the Financial Regulation.

61. Finally, a risk of conflict of interest, so far as Euphet is concerned, requires no prior knowledge of the precise content of the specific contracts following the framework contract. It is sufficient to note that, having regard to the subject-matter of the framework contract itself, Euphet's objectivity and impartiality in the performance of the tasks to be entrusted to it may seriously be doubted.

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62. With regard to the argument alleging lack of a specific check of Euphet's tender, the Commission responds that, in the present case, the evaluation committee specifically checked whether there was a conflict of interest. On making that check, it found that all the partners in the consortium, as well as a number of experts called upon, received subsidies from DG Health and Consumer Protection' for carrying out certain actions in implementation of the Community public health programme. The participation of those organisations in the carrying out of the evaluation could require them, in the context of an intermediary or ex-post evaluation, to assess their own work, which would compromise their objectivity and impartiality. Moreover, in the context of an ex-ante evaluation, there is also a risk of conflict of interest since organisations regularly receiving subsidies under certain programmes are in a position to affect the development and later direction of those programmes.

63. The Commission rejects the theory that there can be conflict of interest only at the stage of intermediary and ex-post evaluations of individual programmes. Since the ex-ante evaluations are intended to support and guide the future policy of the Commission on public health matters, organisations regularly receiving subsidies would be inclined to put their own interests first when setting out the basic outlines of a future action programme.

- Findings of the Court

64. The reasons for the decision rejecting Euphet's tender were the risk of conflict of interest on the part of the tenderer, the tenderer's failure to acknowledge the existence of such a risk and the absence, in the tender, of concrete proposals for the removal of that risk. Thus, firstly, it must be determined, on the one hand, whether the Commission was correct to base its refusal of the tender submitted by Euphet on the existence of a risk of conflict of interest and, on the other, whether it was indeed the existence of that risk which led the Commission to adopt the decision rejecting the tender. Subsequently, it must be considered whether the Commission was justified in taking the view that the risk of conflict of interest alleged actually existed in the present case.

65. The legal basis for the decision rejecting the tender is to be found in Article 94 of the Financial Regulation, reproduced in section 9.1.3 of the specifications, which provides for the exclusion - from the award of contracts - of tenderers who during the award procedure' are subject to a conflict of interest'. Moreover, the decision rejecting the tender suggests as a definition of conflict of interest the terms of Article II.3.1 of the framework contract, which provides: The Contractor shall take all necessary measures to prevent any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interest could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest'. Article II.3.1 also provides that the Contractor shall ensure that his staff, board and directors are not placed in a situation which could give rise to conflict of interests'.

66. Article 94 of the Financial Regulation applies - according to the provisions of that regulation - to all public contracts financed in whole or in part by the Community budget. Thus no distinction is made according to whether the procurement procedure in question relates to a framework contract or another type of contract.

67. However, Article 94 of the Financial Regulation permits exclusion of a tenderer from a procurement procedure only if the situation of conflict of interest to which it refers is real and not hypothetical. That does not mean that a risk of conflict of interest is not sufficient to exclude a tender. In principle, it is only when the contract is performed that a conflict of interest can become real. Before conclusion of the contract, a conflict of interest can be only potential and Article 94 of the Financial Regulation therefore implies an assessment in terms of risk. That risk must actually be found to exist, following a specific assessment of the tender and the tenderer's situation,

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for that tenderer to be excluded from the procedure. The mere possibility of a conflict of interest cannot suffice for that purpose.

68. It follows that, in the procedure for the award of a framework contract, account must be taken of the fact that specific contracts, award of which will give rise to a check that there is no risk of conflict of interest, must come into being before the successful tenderer for the framework contract is entrusted with the performance of specific tasks. Thus, in such a case, the risk that a conflict of interest will in fact arise can be considered only where there are material circumstances placing the tenderer in a position where it is unable to avoid the risk of bias in the performance of the majority of the tasks under the framework contract.

69. In the present case, the decision rejecting the tender could rightly be related to a situation of conflict of interest that was real and not hypothetical and it is that situation which led the Commission to adopt that decision.

70. As stated in paragraph 16 above, the decision rejecting the tender shows that the main partners in Euphet are involved in activities of the DG Health and Consumer Protection', particularly since they hold a large number of subsidy contracts in that area and that of public health, whereas Euphet does not acknowledge that its members are involved in the implementation of the public health programme.

71. The Commission has also stated, without being contradicted on the point, that the majority of the most experienced experts proposed by Euphet are connected with organisations which have received large subsidies from the Commission for carrying out work relating to the Community public health programme.

72. By concluding, on that basis, in the decision rejecting the tender and in the confirmatory letter of 19 May 2005, that there was a risk of conflict of interest, classified as great', the Commission thus took the view that a situation of conflict of interest already existed in principle at the stage of the procedure for the award of the contract, even if that conflict had not yet materialised in terms of its consequences.

73. It follows that the Commission correctly assessed Euphet's tender on the basis of the provisions of Article 94 of the Financial Regulation and of section 9.1.3 of the specifications. Accordingly, the applicant's argument that criteria extraneous to those provisions were taken into account in rejecting its tender cannot be accepted.

74. The applicant's arguments to the contrary are not such as to cast doubt on that conclusion.

75. The argument that Article II.3.1 of the framework contract applies only to conflicts of interest arising during performance of the framework contract and not to those at the stage of the procurement procedure is irrelevant, since the conflict of interest in the present case existed at the stage of award of the contract, thus justifying the exclusion of the tender pursuant to Article 94 of the Financial Regulation and section 9.1.3 of the specifications. For the same reason, the applicant submits in vain that the proposed course of action for resolving conflicts of interest exceeded the requirements of the framework contract in so far as it entailed an ex-ante check, that is to say, with effect from the stage of drawing up of the application file, with reference to the nature and the subject of the specific contracts.

76. In the same way, contrary to the applicant's assertion, since the subject-matter of the framework contract was expressly defined, the Commission was entitled to find that, because of the subsidies received, serious doubts could be cast on the objectivity of the main partners in Euphet as early as the time when the tender was lodged, the reason being, as stated in the decision rejecting the tender, that that situation could require the evaluator to assess his own work, thus creating a

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conflict of interest.

77. Next, with regard to whether the Commission was in fact justified in finding that there was a situation of conflict of interest in the present case involving Euphet and in taking the view that Euphet did not recognise such a risk, it must be noted that, as stated in paragraph 70 above, the Commission states in the decision rejecting the tender - without being contradicted by the applicant on that point - that the evaluation committee found that the main partners in Euphet have a number, indeed a large number, of subsidy contracts with DG Health and Consumer Protection', particularly in the area of public health. Having regard to the subject-matter of the framework contract, namely evaluation... covering the policy areas of DG Health and Consumer Protection... (public health)', the Commission was correct to take the view, at the stage of the procedure to award the contract, that there was a conflict of interest which could compromise the impartial and objective performance of the framework contract by Euphet. Furthermore, the Commission points out in the decision rejecting the tender that Euphet's tender specified that Euphet understands and accepts that none of the evaluation organisations or their staff should have the slightest existing or potential conflict of interest in the performance of their task under the framework contract. We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present'. Accordingly, it must be held that the Commission was also correct to infer from that in the decision rejecting the tender that Euphet [did] not acknowledge the fact that a number of the consortium partners [had] a large involvement in the implementation of the Public Health programme' and that, considering the great risk of [conflict of interest], a detailed and concrete explanation would have been required to provide a sufficient level of understanding of how the [conflict of interest] issue should be addressed and the risks should be eliminated'.

78. It follows from the foregoing that the Commission was right to take the view that, pursuant to Article 94 of the Financial Regulation and section 9.1.3 of the specifications, it was necessary to exclude Euphet's tender from the award of the contract.

79. The applicant's argument that it is unlawful to exclude a tenderer in an abstract manner without any specific check of its tender, and in particular of its proposal for resolving conflicts of interest, is unfounded.

80. It follows from the foregoing findings that in the present case the Commission did carry out a specific check on the tender submitted by Euphet before deciding to exclude it from the contract. Moreover, the alleged lack of examination of the proposal for resolving conflicts of interest is irrelevant, since the Commission was required to reject Euphet's tender, because of the conflict of interest, pursuant to Article 94 of the Financial Regulation and section 9.1.3 of the specifications.

81. In the light of the foregoing, the applicant's argument relating to the lack of conflict of interest cannot be accepted and the second part of the first plea must be rejected.

Breach of the principle of protection of legitimate expectations and of Article 138 of the Implementing Rules

- Arguments of the parties

82. In the context of the third part of its first plea, the applicant submits that the proposal made by Euphet for resolving conflicts of interest had previously been accepted by the Commission, even if by other Directorates-General. Since the Commission has departed from its earlier practice, it has breached the principle of protection of legitimate expectations.

83. The applicant adds that, if the Commission awards the contract to a third party after wrongfully rejecting Euphet's tender, it will infringe Article 138 of the Implementing Rules.

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84. The Commission contends that the applicant does not provide sufficient evidence in support of its allegation of breach of the principle of protection of legitimate expectations.

85. The Commission also disputes that the award of the contract to a third party constitutes infringement of Article 138 of the Implementing Rules. That provision merely distinguishes between the two possible ways of awarding the contract, that is to say by adjudication or by award to the most economically advantageous tender. Acceptance of Euphet's tender for the selection and award stages did not necessarily mean that it would be awarded the contract.

- Findings of the Court

86. In accordance with established case-law, the right to rely on the principle of protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual who is in a situation in which it is clear that the Community administration has, by giving him precise assurances, led him to entertain reasonable expectations. Such assurances include, irrespective of the form in which they are given, precise, unconditional and consistent information coming from authorised and reliable sources (Joined Cases T66/96 and T221/97 Mellett v Court of Justice [1998] ECRSC IA449 and II1305, paragraphs 104 and 107).

87. In the present case, without otherwise substantiating its assertions in that regard, the applicant merely refers to the position adopted by the Commission in other procurement procedures. Such facts, even if proven, do not constitute precise assurances given by the institution and, accordingly, cannot form the basis of legitimate expectations as to the Commission's acceptance of the procedure proposed by Euphet in the context of the contract in question.

88. The applicant's allegation that the unlawful exclusion of Euphet led to the award of the contract to a tenderer whose tender was not the most economically advantageous is ineffective since, having regard to the existence of the conflict of interest found in Euphet's case (see paragraphs 77 and 78 above), the Commission was required to reject its tender.

89. The applicant's argument cannot therefore be accepted. Accordingly, the third part of the first plea must be rejected.

90. In the light of the foregoing considerations, the first plea in law must be rejected in its entirety.

The second plea in law, alleging that Euphet was unlawfully deprived of the opportunity of supplying additional information with regard to the conflict of interest

91. In the context of its second plea, the applicant essentially alleges breach by the Commission of its duty to request additional information before rejecting the tender, which follows from Article 146(3) of the Implementing Rules, of the principle of protection of legitimate expectations and the principle of equal treatment.

Arguments of the parties

92. According to the applicant, the Commission could not reject Euphet's tender without giving it the opportunity of defending its position and the evaluation committee should at least have allowed it to submit its observations on that question.

93. Firstly, the applicant complains that the Commission did not ask Euphet to supply additional information in relation to the problem of conflict of interest, contrary to Article 146(3) of the Implementing Rules.

94. Secondly, the applicant claims breach of the principle of protection of legitimate expectations and asserts - referring in that regard to an exchange of e-mails between the Commission and a tenderer - that it is the Commission's practice to ask candidates or tenderers for additional information

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where that is necessary. That practice is, furthermore, confirmed by the case-law of the Court of Justice on public procurement matters, inter alia by the judgment in Fabricom , paragraph 57 supra. By failing to ask for additional information, the Commission departed from an established practice confirmed by case-law and breached the principle of protection of legitimate expectations. Moreover, in other circumstances, the Commission gave a tenderer at risk of exclusion the opportunity of defending itself. Furthermore, the applicant does not know of any other case where a tenderer was excluded on the basis of a risk of conflict of interest. If the Commission could not show that such cases exist, it would be impossible for it to provide for such exclusion without infringing the principle of protection of legitimate expectations.

95. Thirdly, alleging in that regard breach of the principles of equal treatment and non-discrimination laid down in Articles 89(1) and 99 of the Financial Regulation, the applicant raises the question whether the Commission, in the context of the invitation to tender in question, offered other tenderers the possibility of supplying additional information. The applicant submits that the Commission's argument is contradictory in that, on the one hand, it asserts, in its defence, that after the opening of the tenders, no request for additional information was made to any tenderer', but, on the other, states in its rejoinder lodged on 24 June 2005 in the proceedings for interim relief brought before the President of the Court of First Instance, that it had asked certain tenderers to show that their tenders were sent within the time-limit prescribed, a request made after the Commission had opened the tenders or, at least, after the closing date for their receipt. The applicant takes the view that, if information was requested from those tenderers whilst the opportunity was not given to Euphet to defend its position or to give its point of view on the risk of conflict of interest, the Commission was in breach of the principle of equal treatment between the tenderers.

96. The Commission argues that it is obliged to consult the tenderer only where it intends to impose administrative or financial penalties, such as exclusion from future contracts or subsidies, pursuant to Article 96 of the Financial Regulation and not when it excludes that tenderer from the award of a particular contract pursuant to Article 94 of the Financial Regulation.

97. In that regard, firstly, the Commission points out that Article 146(3) of the Implementing Rules does not impose any duty on it to ask a tenderer for more details regarding the supporting documents submitted. In any event, pursuant to Article 99 of the Financial Regulation and Article 148(3) of the Implementing Rules, contact between the Commission and tenderers cannot lead to amendment of the terms of a tender.

98. Secondly, the Commission disputes that there is a general practice of systematically requesting additional information from a tenderer before excluding it on the ground of conflict of interest. Furthermore, the exchange of e-mails with the Commission produced by the applicant, concerning a different award procedure, related to a request for additional information regarding certain elements of the tender, and in no way shows that the Commission has the standard practice of obtaining additional information from tenderers before rejecting their tenders on the basis of one of the criteria for exclusion set out in the Financial Regulation.

99. In that regard, the applicant's reference to Fabricom , paragraph 57 supra, is irrelevant, since in that judgment the Court of Justice censured Belgian legislation which automatically precludes from participation in a public procurement contract a person who has been instructed to carry out preparatory work in connection with that contract or an undertaking connected to such a person, whereas in the present case Euphet was not prevented by the Commission from taking part in the award procedure. Initially, Euphet submitted a tender in respect of which the Commission subsequently carried out checks for the existence of a conflict of interest on the basis of information included in that tender and in the light of the type of contract to be awarded. The tender was therefore rejected because there was such a conflict of interest. The applicant's argument, consisting in

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the assertion that Euphet was the victim of automatic exclusion since a concrete assessment of the existence of a conflict of interest was possible only after award of the contract - and, more particularly, at the time when a specific contract is concluded in performance of the framework contract - is incompatible with Article 94 of the Financial Regulation. That article permits exclusion from the award of a contract of candidates or tenderers who, even before award of the contract, are involved in a conflict of interest.

100. Thirdly, the Commission points out that, after the opening of the tenders, no tenderer was asked to supply information regarding a potential conflict of interest. With regard to the alleged contradiction in its argument, the Commission contends that it did indeed invite some tenderers to prove that their tenders were sent within the time-limit because the postmarks on the envelopes containing those tenders were illegible. However, the applicant's position is not comparable to the position of those tenderers. As the President of the Court of First Instance held in his order in Case T195/05 R Deloitte Business Advisory v Commission [2005] ECR II3485, paragraph 120, the illegible postmarks on the envelopes containing those tenders cannot be assimilated to intrinsic shortcomings in the tender itself.

Findings of the Court

101. Firstly, regarding whether the Commission ought to have invited Euphet to supply additional information on the conflict of interest problem, it should be recalled that the first subparagraph of Article 146(3) of the Implementing Rules provides that requests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein are to be eliminated. However, in accordance with the second subparagraph of Article 146(3), the evaluation committee may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within the time-limit specified by it.

102. It is clear from its very wording that the second subparagraph of Article 146(3) of the Implementing Rules gives the evaluation committee the option of requesting from tenderers additional information concerning the supporting documents submitted in relation to the exclusion and selection criteria. It follows that that provision cannot be interpreted as imposing a duty on the evaluation committee to request such information from tenderers (see, to that effect and by analogy, Case T19/95 Adia Interim v Commission [1996] ECR II321, paragraph 44).

103. Accordingly, in the present case, the Commission was right to decide to exclude Euphet's tender from the procedure for award of the contract by reason of a conflict of interest within the meaning of Article 94 of the Financial Regulation and section 9.1.3 of the specifications, without being required to request additional information pursuant to the second subparagraph of Article 146(3) of the Implementing Rules.

104. Secondly, with regard to the alleged infringement of the principle of protection of legitimate expectations, it is appropriate to recall that, in accordance with established case-law cited in paragraph 86 above, no party may allege infringement of the principle of protection of legitimate expectations without having been given precise assurances by the administration.

105. In the present case, the applicant bases its argument on a standard practice of the Commission - confirmed, moreover, by case-law - which consists in systematically requesting additional information from a tenderer before excluding it.

106. As it is, the documents submitted by the applicant concern a single invitation to tender to which it responded, that is to say, invitation to tender PO/200462/B3 relating to Ex-ante evaluation of the activities of the TV, radio services and studios Unit'. What is more, the request for additional information made in that case by the evaluation committee related, on the one hand, to

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the question whether Deloitte's presence in the whole of the European continent in 300 cities [confirmed] its ability to cover the operations under the contract in all the Member States of the EU' and, on the other, to the fact that the Commission had not received attestations of good performance', and not to a risk of conflict of interest.

107. Furthermore, the applicant does not submit any concrete proof showing that the Commission gave Euphet a precise assurance that it would receive from the evaluation committee a request for additional information on the question of a risk of conflict of interest and on the satisfactory nature of the response given by Euphet to that question.

108. In those circumstances, the applicant cannot claim infringement of the principle of protection of legitimate expectations.

109. That finding is not affected by the applicant's reference to the judgment in Fabricom , paragraph 57 supra, which deals with a legal question and a factual situation which are not analogous to the dispute before the Court of First Instance in the present case.

110. Thirdly, the applicant's argument alleging infringement of the principles of equal treatment and non-discrimination in that the Commission requested information from other tenderers whilst Euphet did not have the opportunity of defending its position or even of putting forward its point of view on the risk of a conflict of interest must be dismissed. The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Fabricom , paragraph 27). The tenderer whose tender is contained in an envelope with an illegible postmark is not in a situation comparable to that of a tenderer whose tender is incomplete since, in the first case, the defect noted by the Commission is attributable to factors outside the tenderer's control, whereas, in the second, the defect noted is intrinsic to the tender. The rejection of Euphet's tender does not, therefore, infringe the principle of equal treatment.

111. Accordingly, it has not been established that the Commission infringed the principles of equal treatment and non-discrimination set out in Articles 89 and 99 of the Financial Regulation.

112. The second plea in law must therefore be rejected and, consequently, the arguments seeking annulment of the decision rejecting the tender must be dismissed.

113. The application for annulment of the decision awarding the contract to a third party must be dismissed as a consequence of the dismissal of the application for annulment of the preceding decision with which it is closely connected.

114. It follows that the action must be dismissed in its entirety.

Costs

115. Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

116. In the present case, since the applicant has been unsuccessful, it must be ordered to pay the costs, including those of the application for interim measures.

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AUTHOR Court of First Instance of the European Communities

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FORM	Judgment
TREATY	European Economic Community
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PROCEDU	Action for annulment - unfounded
DATES	of document: 18/04/2007 of application: 19/05/2005

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Judgment of the Court of First Instance of 18 April 2007 - Deloitte Business Advisory v Commission

(Case T-195/05) [1]

(Public service contracts - Call for tenders for programme evaluation activities and other activities in the public health sector - Rejection of a tender - Conflict of interest)

Language of the case: Dutch

Parties

Applicant: Deloitte Business Advisory NV (Brussels, Belgium) (represented by: D. Van Heuven, S. Ronse and S. Logie, lawyers)

Defendant: Commission of the European Communities (represented by: L. Pignataro-Nolin and E. Manhaeve, acting as Agents)

Re:

Application for annulment, firstly, of the Commission's decision rejecting the tender from Euphet for the public procurement contract 'Evaluation Framework Contract covering the policy areas of [the Directorate-General for Health and Consumer Protection], Lot 1 (Public Health) - call for tenders SANCO/2004/01/041' and, secondly, of the Commission's decision awarding that contract to a third party

Operative part of the judgment

The Court:

Dismisses the action.

Orders the applicant, Deloitte Business Advisory NV, to pay the costs, including those of the application for interim measures.

_____

[1] - OJ C 193, 6.8.2005.

**Order of the President of the Court of First Instance
First InstanceFirst Instance2005. Deloitte Business Advisory NV v Commission of the European Communities. Application for interim measures. Case T-195/05 R.**

1. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Decision to exclude a tenderer from a tender procedure - Damage to its reputation - Non-financial damage which cannot be regarded as irreparable

(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

2. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Financial loss - Damage which may subsequently be made good by compensation or by means of an action for damages - Damage which cannot be regarded as irreparable

(Arts 242 EC and 288 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

3. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Financial loss - Assessment - Consideration of the size of the undertaking

(Arts 242 EC and 288 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

In Case T195/05 R,

Deloitte Business Advisory NV, established in Brussels (Belgium), represented by D. Van Heuven, S. Ronse and S. Logie, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by L. Pignataro-Nolin and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for interim measures seeking, first, an order suspending the operation of (1) the Commission decision rejecting the tender submitted inter alia by the applicant under the tendering procedure bearing reference SANCO/2004/01/041 and (2) the decision to award the contract in question to a third party and, secondly, an order prohibiting the Commission (1) from informing the successful tenderer of the decision awarding the contract in question and (2) from proceeding with signature of the relevant contract, on pain of a periodic penalty payment,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 20 September 2005.

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Legal context

1. The award of Commission service contracts must comply with the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1: the Financial Regulation') and the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1; the detailed implementing rules').

2. Under Article 94 of the Financial Regulation:

Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest...'

3. Article 138 of the detailed implementing rules provides:

1. Contracts shall be awarded in one of the following two ways:

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.'

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

...'

4. Under Article 146(3) of the detailed implementing rules:

Requests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated.

However, the evaluation committee may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within a specified time-limit.

...'

5. Article 147(3) of the detailed implementing rules provides:

The contracting authority shall... take its decision giving at least the following:

(a) the name and address of the contracting authority, and the subject and value of the contract or of the framework contract;

(b) the names of the candidates or tenderers rejected and the reasons for their rejection;

(c) the names of the candidates or tenderers to be examined and the reasons for their selection;

(d) the reasons for the rejection of tenders found to be abnormally low;

(e) the names of the candidates or contractor selected and the reasons for that choice by reference to the selection and award criteria announced in advance and, if known, the proportion of the contract or the framework contract which the contractor intends to subcontract to third parties;

(f) in the case of negotiated procedures, the circumstances referred to in Articles 126, 127, 242, 244, 246 and 247 which justify their use;

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(g) where appropriate, the reasons why the contracting authority has decided not to award a contract.'

Facts and procedure

6. On 14 December 2004, the Commission published in the Supplement to the Official Journal of the European Union (OJ 2004 S 243) a contract notice for the award of a framework contract entitled evaluation framework contract covering the policy areas of DG Health and Consumer Protection, Lot 1 (public health) - call for tenders SANCO/2004/01/141' (that framework contract and the award procedure for the framework contract are hereinafter referred to, respectively, as the framework contract' and the tendering procedure').

7. According to Sections 7.1.3 and 7.1.4 of the specifications relating to the tendering procedure, the framework contract relates in particular to the evaluation of the programme of Community action in the field of public health established by Decision No 1786/2002/EC of the European Parliament and of the Council of 23 September 2002 adopting a programme of Community action in the field of public health (2003-08) (OJ 2002 L 271, p. 1).

8. The specifications divide the tasks to be carried out under the framework contract into two main tasks. The first task (Main Task 1') is to conduct studies and to provide services intended to assist in the design and preparation of Community programmes or policies, their ex ante assessment and the organisation of evaluation activities'. The second task (Main Task 2') is to carry out mid-term, final and ex post evaluations of programmes, policies and other activities.

9. The framework contract must allow specific contracts to be concluded in accordance with the Commission's needs. In addition, it must be concluded in principle for a period of 24 months and may be renewed for two further periods of 12 months.

10. The specifications also set out several grounds for the exclusion of tenderers. One of those grounds reproduces Article 94 of the Financial Regulation:

Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest...'

11. With a view to tendering for the contract in question, Deloitte Business Advisory NV (the applicant') joined forces with the London School of Hygiene and Tropical Medicine, the Nederlandse Organisatie voor toegepast-natuurwetenschappelijk onderzoek (Netherlands Organisation for Applied Scientific Research, TNO) and the Istituto superiore di sanità (Italian National Health Institute). Those four entities formed the European Public Health Evaluation Task Force (Euphet). Euphet proposed using certain experts from other institutions where necessary.

12. On 10 February 2005, Euphet submitted a tender to the Commission under the tendering procedure. Euphet's tender includes a paragraph with the heading Independence', which reads as follows:

Euphet understands and accepts that none of the evaluation organisations or their staff should have the slightest existing or potential conflict of interest in the performance of their task under the framework contract. We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present. Furthermore, we undertake to conduct a detailed prior check in connection with each specific contract in order to ensure that the teams we propose are composed of members who are able to work in complete independence and to provide an objective and independent external assessment. If, in the course of execution of the projects, the slightest problem should arise which could have a bearing on this key principle, we would notify the Commission immediately and work with it to seek to rectify the situation.'

13. By a letter of 22 April 2005 (the decision rejecting the tender'), the Commission informed the applicant that the evaluation committee for the contract had found there to be risks of conflicts

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of interest within Euphet. In the decision rejecting the tender, the Commission notes that certain of Euphet's members and partners hold grant contracts in SANCO's area of activities' (health and consumer protection) and thus have a significant involvement in the implementation of the programme of Community action in the field of public health. The Commission therefore considers that in view of the considerable risk of [a conflict of interest], a detailed specific explanation would have been needed to give an adequate understanding of the way in which the matter of [conflicts of interest] could be resolved and the associated risks eliminated'. In those circumstances, in the view of the Commission, the proposed approach is not adequate and the tenderer has not provided a satisfactory guarantee that the [conflicts of interest] will be eliminated'.

14. In the decision rejecting the tender, the Commission nevertheless adds that it will not sign the framework contract with the successful tenderer until a period of two weeks has passed.

15. By a letter dated 3 May 2005, Euphet contested the Commission's position and inter alia requested it to respond by 4 May 2005, failing which it would refer the matter to the Court of First Instance.

16. By a fax of 4 May 2005, the Commission acknowledged receipt of the letter from Euphet and stated:

Because we need more time to examine the questions raised in your letter, we will not proceed with the signing of the contract for a further period of 15 days from the date on which this letter was sent.'

17. By a fax of 19 May 2005, the Commission responded to the arguments put forward by the applicant in its letter of 3 May 2005.

18. By a fax of the same date, the applicant lodged an action for annulment before the Court of First Instance by which it contests the legality of the decision rejecting the tender and of the decision to award the contract to another tenderer (the award decision').

19. On the same date, the applicant submitted an application for interim measures in which it claims essentially that the President of the Court of First Instance, acting in his capacity as the judge hearing the application for interim relief, should:

- order the suspension of the operation of the decision rejecting the tender and of the award decision;

- prohibit the Commission from informing the successful tenderer of the award decision and from signing the relevant contract, on pain of a periodic penalty payment of EUR 2.5 million;

- order the Commission to pay the costs.

20. In its application for interim measures, the applicant also asks the President of the Court of First Instance to prohibit the defendant, as a precautionary measure and if possible before ruling on the application for suspension of operation, from informing the successful tenderer of the award decision and from signing the framework contract until the Court of First Instance has ruled on the main action, on pain of a periodic penalty payment of EUR 2.5 million for each infringement.

21. By letter of 23 May 2005, the Commission informed the Court that the contract covered by the procedure bearing reference SANCO/2004/01/041 had not yet been signed. In the same letter, the Commission stated that the framework contract had been sent to the selected tenderer to be signed with a reply deadline of 1 June 2005 and, in accordance with the applicable procedures, that contract would be signed by the Commission's authorised representative after it had been returned by the other party, without a deadline having been set for that purpose.

22. On 26 May 2005, on the basis of Article 105(2) of the Rules of Procedure of the Court of First Instance, the President of the Court of First Instance ordered the Commission not to sign the framework contract until an order had been made on the application for interim measures.

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23. On 30 May 2005, the Commission submitted observations on the application for interim measures in which it contended that the application should be dismissed and that the applicant should be ordered to pay the costs.

24. At the invitation of the President of the Court of First Instance, the applicant responded to those observations on 13 June 2005. The Commission in turn responded to these new observations on 23 June 2005.

Law

25. Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative so that an application for interim measures must be rejected if one of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) SCK and FNK v Commission [1996] ECR I-4971, paragraph 30). In an appropriate case, the President has also to weigh up the interests at stake (order of the President of the Court of Justice in Case C-445/00 R Austria v Council [2001] ECR I-1461, paragraph 73).

26. Moreover, in the context of that overall examination the judge hearing the application enjoys a wide margin of discretion and remains free to determine, in the light of the particular features of the case, the way in which those different conditions have to be verified and the order of priority of that examination since there is no rule of Community law imposing on him a predetermined analytical model for assessing the need for an interim decision (order of the President of the Court of Justice in Case C-149/95 P(R) Commission v Atlantic Container Line and Others [1995] ECR I-2165, paragraph 23).

27. It is in the light of those considerations that the present application for interim measures falls to be examined.

1. Arguments of the parties

Admissibility of the application for interim measures

28. In its observations of 30 May 2005, the Commission states that it informed the successful tenderer in the tendering procedure that its tender had been selected by a letter of 22 April 2005. The Commission therefore takes the view that the applicant's request for an order prohibiting the Commission from informing the successful tenderer of the award decision is devoid of purpose.

Prima facie case

Arguments of the applicant

29. The applicant relies on two pleas in support of its main application.

- The first plea

30. In its first plea, the applicant claims essentially that Euphet's exclusion from the tendering procedure by the Commission infringes Article 94 of the Financial Regulation, the provisions of the tender documents, the principle of protection of legitimate expectations, the general obligation to state reasons and Articles 147(3) and 138 of the detailed implementing rules.

31. First of all, the applicant takes the view that it is unlawful to exclude it from the tendering procedure solely because its proposal for resolving any conflicts of interest does not provide a satisfactory guarantee.

32. In the applicant's view, the notion of conflict of interest is not defined either in the call for tenders or in Article 94 of the Financial Regulation. On the other hand, in the decision rejecting

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the tender, the Commission defined the notion of conflict of interest by reference to the draft framework contract. However, according to that draft, a conflict of interest and, a fortiori, a simple risk of a conflict do not in themselves constitute a ground for exclusion.

33. In addition, none of the tender documents provide for a specific ground for exclusion in respect of a tenderer one or more of whose members have an involvement in current projects in the areas of health and consumer protection. Moreover, neither Article 94 of the Financial Regulation nor the case-law of the Court of Justice justifies such a ground for exclusion.

34. Furthermore, as far as risks of conflicts of interest are concerned, it is sufficient for the tenderer to undertake to notify the Commission and, if appropriate, to take the necessary measures. The proposal made by Euphet in this regard (paragraph 12 above) was adequate, since the applicant went as far as proposing a prior check with reference to the nature and the subject of the specific contracts to be concluded. No more can be expected of Euphet, since the content of the specific contracts to be concluded is not yet known.

35. In the applicant's view, any conflict of interest can arise only when specific contracts are concluded. Furthermore, Community case-law has confirmed that it is unlawful to exclude a tenderer in an abstract manner without any specific check on the resolution of a conflict of interest (judgments in Joined Cases C-21/03 and C-34/03 Fabricom [2005] ECR I-1559, and in Case T-160/03 AFCon Management Consultants and Others v Commission [2005] ECR II-981, paragraphs 75 to 78).

36. In its observations of 13 June 2005, the applicant adds that the acceptance by the Commission that a tenderer subject to a conflict of interest during the performance of the framework contract may continue to perform the contract provided it takes adequate measures, whilst such an option is not open to a tenderer subject to a conflict of interest prior to the award of the contract, which can take identical measures, constitutes a breach of the principle of equality as set out in Articles 89(1) and 99 of the Financial Regulation.

37. Lastly, in the alternative, the applicant states that the tender notice requires only a minimum of seven experts, whereas its tender contains 65 curricula vitae, including 45 from persons who do not have links with the institutions which, according to the Commission, are subject to a conflict of interest. Furthermore, the 20 people who do have links with those organisations could still be assigned to evaluation cases without any risk of conflicts. As regards the Commission's claim that the experts in question are those who hold the highest qualifications, even if all these people were subject to a conflict of interest for a certain task, there would be a sufficient number of other high-level experts to carry out the task.

38. Secondly, in the applicant's view, where the evaluation committee intends to eliminate a tenderer, it must at the very least allow it to submit its observations, which did not occur in the present case.

39. Thirdly, by rejecting a way to resolve conflicts of interest that had already been accepted by other Commission directorates-general, the Commission departed from its earlier practice and breached the principle of protection of legitimate expectations.

40. Fourthly, the decision rejecting the tender does not contain an adequate statement of reasons, in particular in so far as it fails to explain the reasons why Euphet's proposal is inadequate. The statement of reasons for the decision is also incorrect in so far as Euphet did not remain silent about the specific experience of some of its members and did take account of the resolution of conflicts of interest provided for in the draft framework contract. Because of this failure to state reasons, the decision rejecting the tender infringes Article 147(3) of the detailed implementing rules.

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41. Fifthly, the Commission may not award the contract to a third party without infringing Article 138 of the detailed implementing rules when it has wrongly rejected Euphet's tender. The applicant does not contest the fact that, if its tender had been deemed admissible, the contract would not necessarily have been awarded to it. However, it considers that, in view of the experience and the competence of the team it proposed, Euphet's tender could only be awarded a high score.

- The second plea

42. In its second plea, the applicant claims that by failing to ask Euphet to submit additional information, the Commission infringed Article 146(3) of the detailed implementing rules, the Court's case-law on public procurement (judgment in Fabricom , cited in paragraph 35 above) and the principle of protection of legitimate expectations.

43. Furthermore, in so far as the Commission gave other tenderers the opportunity to submit additional information in connection with the contract in question, it acted in contravention of the principles of equal treatment and non-discrimination set out in Articles 89(1) and 99 of the Financial Regulation.

44. The applicant acknowledges that the Commission is not required under Article 94 of the Financial Regulation and Article 146(3) of the detailed implementing rules to request additional information from tenderers. Nevertheless it states that the Commission gave that opportunity to some tenderers in other procedures, and also in the tendering procedure at issue. The applicant asks the Commission to produce the correspondence exchanged on this subject and the minutes of the tendering opening session.

45. It also follows from the judgment in Fabricom , cited in paragraph 35 above, that, in the event of a potential conflict of interest, the contracting authority may not automatically exclude the tenderer in question, but must always examine the matter on the basis of the specific circumstances of the case, which means that the tenderer must be able to show that a conflict of interest is impossible. In the applicant's view, the Commission could not conduct the required specific assessment without requesting additional information from Euphet. On the one hand, the Commission did not carry out any checks on the basis of the specific circumstances of the case, since such an assessment would have had to have been made for each specific contract. On the other hand, the Commission could not claim either that its specific assessment related to the framework contract since, according to the Commission itself, the applicant's proposal for a posteriori corrective measures was formulated in very general terms.

Arguments of the Commission

46. The Commission contests the arguments put forward by the applicant in support of the existence of a prima facie case.

- The first plea

47. The Commission considers, first of all, that in accordance with the wording of Section 9.1.3 of the specifications, which reproduces Article 94 of the detailed implementing rules word for word, the existence of a conflict of interest prior to the award of the contract is a ground for exclusion. In the view of the Commission, even though the curricula vitae of several of Euphet's partners reveal their involvement in the implementation of the programme of Community action in the field of public health, the applicant did not see reason to notify the Commission of a risk of a conflict of interest.

48. As regards the a priori' corrective mechanism proposed by the applicant to reduce the risk of a conflict of interest, the Commission takes the view that the passage in question in the applicant's tender is formulated too generally.

49. Moreover, contrary to the applicant's assertions, the evaluation committee did in fact specifically

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verify the existence of a conflict of interest with reference to the applicant's tender and the nature of the contract to be awarded, since a conflict can arise in respect of mid-term and ex post evaluations and in respect of ex ante evaluations.

50. With regard to the applicant's argument that Euphet's offer contained 45 curricula vitae of people who have no links with the Commission, the latter points out that the experts put forward do not all have the same specific weight and that the applicant's tender presented all the partners and experts as a coherent team.

51. Secondly, as regards the Commission's alleged obligation to consult the applicant, the Commission considers that it must comply with that obligation only where it intends to impose administrative or financial penalties pursuant to Article 96 of the Financial Regulation.

52. Thirdly, with regard to the alleged breach of the principle of protection of legitimate expectations by the Commission, the applicant does not substantiate its claims that in identical circumstances in the past other Commission departments had reached opposite conclusions to those reached in the present case.

53. Fourthly, in the decision rejecting the tender, the Commission clearly explained the reasons why it considered that the applicant was subject to a conflict of interest.

54. Fifthly, the Commission did not infringe Article 138 of the Financial Regulation because acceptance of Euphet's tender for the selection and award stages did not necessarily mean that it should be awarded the contract.

- The second plea

55. The Commission considers that the second plea should also be rejected.

56. First of all, the Commission points out that it does not have any obligation to consult a tenderer before eliminating it from an award procedure.

57. Secondly, the applicant does not make clear in what way the failure to request additional information constitutes a departure from the Commission's alleged practice in identical cases. As regards the applicant's claims that the Commission breached the principle of equal treatment by allowing certain tenderers to submit evidence that their documents had been sent within the prescribed period, the Commission states that in fact it merely conducted a substantive verification of a mandatory deadline, which is not comparable to the applicant's situation.

58. Thirdly, the applicant's reference to the judgment in Fabricom , cited in paragraph 35 above, is irrelevant because in the present case the Commission specifically verified whether a conflict of interest existed on the basis of the information in the tender and in the light of the nature of the contract to be awarded.

59. Fourthly, the Commission points out that, after the tenders were opened, none of the tenderers was sent a request for additional information or a request for clarification concerning a supposed conflict of interest.

Urgency

Arguments of the applicant

60. In support of its view that it is a matter of urgency that the interim measures applied for be ordered, the applicant claims that, once the contested contract is concluded between the defendant and the successful tenderer, Euphet will no longer have any opportunity to carry out the task effectively. In practice, it will be impossible for it to obtain the annulment of the framework contract after it has been concluded. In addition, in the applicant's view, given the final date for the performance

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of the contract, which is set for the end of 2006, if interim measures are not adopted, the contract will already have been performed, at least to a large extent, when the Court's judgment is delivered.

61. On account of the considerable value of the contract, the honour and prestige attached to it, and the experience that the applicant could gain if it performed the contract, effective performance of the contract would offer it much more satisfactory reparation than compensation.

62. In its observations of 13 June 2005, the applicant states in this respect that the fact that it was not awarded the contract and, further, that its tender was deemed inadmissible will be seen by its clients as a sign of incompetence. In so far as the Commission claims that award procedures involve risks for tenderers with the result that the loss of a contract cannot therefore be regarded as damage, the applicant considers that such an argument is valid only if a tenderer is rightly eliminated. In the present case, the applicant considers that it had a prospect of being selected.

63. In addition, the harm to the applicant's reputation and the failure to gain experience as a result of the non-performance of the contract cannot be quantified financially.

64. In its observations of 13 June 2005, the applicant states lastly that its application cannot be regarded as insufficiently urgent merely on the ground that it may subsequently be awarded damages. Such a position is incompatible with the ratio legis of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

65. In the applicant's view, the ratio legis of Directive 89/665 is to make it possible for tenderers eliminated from a tendering procedure to perform the contract in question themselves. The applicant's position is confirmed by the Court's case-law (judgment in Case C-81/98 Alcatel Austria and Others [1999] ECR I7671). The applicant concedes that the provisions of Directive 89/665 apply only to Member States. However, in its view, it is clearly contrary to the principle of protection of legitimate expectations, the principle of equality and Article 2 EC for the Community institutions to fail to comply with the substance of those provisions.

Arguments of the Commission

66. The Commission considers that the applicant has not shown that it is a matter of urgency to order interim measures.

67. First of all, in the Commission's view, if the Court were to find the action for annulment to be well founded, it would have to take the necessary measures to ensure that the applicant's interests are protected, which could consist in the cancellation of the already partially performed contract and the launch of a new procedure, whilst such measures may be combined, if necessary, with the payment of compensation (orders of the President of the Court of First Instance in Case T169/00 R Esedra v Commission [2000] ECR II2951, paragraph 51, in Case T-148/04 R TQ3 Travel Solutions Belgium v Commission [2004] ECR II3027, paragraph 55, and in Case T-303/04 R European Dynamics v Commission [2004] ECR II-3889, paragraph 83).

68. The applicant has not referred to any circumstance which could prevent its interests being safeguarded in this way.

69. Secondly, in its observations of 23 June 2005, the Commission refutes the applicant's arguments according to which a judgment annulling an act can be given only once the contract is being performed. In the view of the Commission, the applicant is confusing the performance of the framework contract with the carrying-out of the specific mid-term assessment provided for in Article 12 of Decision No 1786/2002.

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70. Thirdly, in so far as the applicant alleges pecuniary damage, the Commission points out that it cannot be regarded as irreparable or even difficult to repair, because compensation can subsequently be awarded (order in Esedra v Commission , cited in paragraph 67 above, paragraph 43). The applicant does not show either how it might suffer damage liable to jeopardise its existence or to change its position on the market irreversibly.

71. Fourthly, as regards the non-pecuniary damage alleged by the applicant, the Commission points out that participation in a public tender procedure, by nature highly competitive, involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial (order of the President of the Court of Justice in Case 118/83 R CMC v Commission [1983] ECR 2583, paragraph 51; orders in Esedra v Commission , cited in paragraph 67 above, paragraph 48, and in European Dynamics v Commission , cited in paragraph 67 above, paragraph 82). Furthermore, the applicant has not established how the dismissal of its application would harm its reputation and deprive it of experience, less still the effect that such damage would have on it.

72. Fifthly, with regard to the ratio legis of Directive 89/665, the Commission points out that, if its application for interim measures is to be granted, the applicant must show that all the relevant conditions under Article 104(2) of the Rules of Procedure and case-law are satisfied. The Commission adds that it is not subject to Directive 89/665 and that the fourth paragraph of Article 230 EC and Articles 242 EC and 243 EC guarantee effective protection against acts by Community institutions. Lastly, as regards the reference made by the applicant to the judgment in Alcatel Austria and Others , cited in paragraph 65 above, it fails to understand that the application for interim measures may be granted only if it satisfies the relevant conditions.

Balance of interests

Arguments of the applicant

73. In its observations of 13 June 2005, the applicant claims that the Commission does not make clear the nature of the damage that it would suffer if an interim measure were ordered.

74. The applicant adds that Decision No 1786/2002 does not provide for any penalty in the event of late performance of the evaluation provided for in Article 12 thereof. In any case, the Commission could revoke the contested decisions and take the applicant's tender into consideration, as it is authorised to do under Article 101 of the Financial Regulation. Moreover, the Commission commonly fails to respect the prescribed deadlines for the performance of evaluation contracts like those at issue.

75. Lastly, account should be taken of the Commission's responsibility for any delay in the performance of the contract.

Arguments of the Commission

76. The Commission considers that the balance of the interests at stake is in favour of the dismissal of the application. The Commission is required under Article 12 of Decision No 1786/2002 to have a mid-term external assessment of the implementation of the programme of Community action in the field of public health conducted by the end of 2006.

77. In addition, the Commission considers that a suspension would prejudice the main action since the successful tenderer's tender would no longer be valid on the date when the judgment in the main action is delivered and the team proposed by it would no longer be available.

2. Findings of the President

78. Since the written observations of the parties contain all the information necessary to adjudicate

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on the application for interim measures, it is not necessary to hear oral argument from them.

Admissibility of some heads of claims in the application for interim measures

79. In its application, the applicant claims inter alia that the President should prohibit the Commission from informing the successful tenderer of the award decision.

80. In its observations of 2 June 2005, the Commission stated, without being contradicted by the applicant or by any of the documents in the file, that it had already informed the successful tenderer that its tender had been selected by letter of 22 April 2005.

81. Consequently, the applicant's request for an order prohibiting the Commission from giving such information was devoid of purpose from the moment it was lodged. It must therefore be rejected as inadmissible (see, to that effect, the order of the President of the Court of First Instance in Case T-125/05 R Umwelt- und Ingenieurtechnik Dresden v Commission [2005] ECR II-1901, paragraph 36).

The other heads of claim in the application for interim measures

82. In the present case, it is necessary first to examine whether the condition relating to the existence of a prima facie case is satisfied.

Prima facie case

- The first plea

83. In its first plea, the applicant claims essentially that Euphet's exclusion from the tendering procedure by the Commission infringes Article 94 of the Financial Regulation, the provisions of the tender documents, the principle of protection of legitimate expectations, the general obligation to state reasons and Articles 147(3) and 138 of the detailed implementing rules.

84. First of all, it is appropriate to examine the applicant's arguments according to which the Commission infringed Article 94 of the Financial Regulation and the provisions of the tender documents.

85. In this respect, it should be noted that the Commission justified the decision rejecting the tender by the existence of a major risk' of a conflict of interest which, in its view, could not be resolved satisfactorily by the guarantees offered by Euphet.

86. As the applicant stresses, Article II.3.1 of the draft framework contract, which was annexed to the specifications, provides for a mechanism for resolving conflicts of interest to which the successful tenderer might be subject. However, on the one hand, it cannot be ruled out, prima facie, that that provision might govern conflicts of interest arising during the performance of the framework contract and not from the stage of the tendering procedure. On the other hand, prima facie, that provision cannot in any event preclude the application of Article 94 of the Financial Regulation.

87. Article 94 of the Financial Regulation provides for the exclusion of tenderers who during the procurement procedure' are subject to a conflict of interest'. In this regard, the President considers that it cannot be ruled out, prima facie, that the expression subject to a conflict of interest' includes the risks of conflicts of interest present from the stage of the procurement procedure which may affect the performance of the contract.

88. In such a situation, the question nevertheless arises as to the degree of certainty needed to justify exclusion from the tendering procedure and the discretion enjoyed by the Commission in establishing a risk of a conflict of interest. The President considers that it is for the Court of First Instance to answer these questions and that the applicant's arguments cannot therefore, at this stage, be rejected as unfounded.

89. Nevertheless, at this stage, and in the light of the arguments put forward in the interlocutory

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proceedings, doubts must be raised as to whether the Commission committed an error in establishing a risk of a conflict of interest in respect of an institution which receives Community grants in the field of public health and is subsequently required to participate in the evaluation of Community policy in that field. It is clear, prima facie, that such an institution is placed in a position that is at least capable of affecting its objectivity.

90. In the present case, it can be seen from Sections 7.1.3 and 7.1.4 of the tender specifications that the framework contract relates inter alia to certain evaluations of the programme of Community action in the field of public health. In addition, the decision rejecting the tender states that, in the opinion of the Commission, the grants received by certain of Euphet's members give rise to a major risk of a conflict of interest.

91. In the light of the foregoing, and at this stage, doubts must therefore be raised as to whether the Commission committed an error of assessment in considering that, for certain members of Euphet, receipt of grants in the field of public health gave rise to a major risk of a conflict of interest justifying exclusion from the tendering procedure.

92. Furthermore, in the light of the arguments made in the interlocutory proceedings, it is not apparent that the Commission refrained from conducting a specific examination of the risk of a conflict of interest established vis-à-vis Euphet, in particular because it did not know the precise nature of the specific contracts to be concluded. First of all, the decision rejecting the tender makes reference to the programme of Community action in the field of public health, the evaluation of which is precisely one of the subjects of the framework contract. However, it is not apparent at this stage that the Commission failed to conduct a specific examination of the risk of a conflict of interest identified by it having regard to the subject of the contract. Secondly, because of the grants received by certain members of Euphet, serious doubts could be cast, prima facie, on their objectivity. Consequently, at this stage, doubts must be raised as to the need to know the detailed content of the specific contracts to be concluded in order to establish the existence of a major risk of a conflict of interest.

93. The President nevertheless considers that this question must be examined in detail in the main proceedings.

94. Similarly, there are, prima facie, reasons to doubt whether the applicant may rely effectively on the judgments in Fabricom , cited in paragraph 35 above, and AFCon Management Consultants and Others v Commission , cited in paragraph 35 above.

95. First of all, in Fabricom , cited in paragraph 35 above, the Court held essentially that the Community directives relating to the coordination of procedures for the award of public contracts preclude a rule which states that any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services is not permitted to apply to participate in or to submit a tender for a public contract for those works, supplies or services where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.

96. However, at this stage, it has not been clearly shown that the applicant has not been able to prove, in connection with its tender, that the grants received by some of the experts which Euphet intends to use were irrelevant.

97. Secondly, with regard to the applicant's reference to the judgment in AFCon Management Consultants and Others v Commission , cited in paragraph 35 above, it should be noted that, in that judgment, the Court of First Instance held essentially that after the discovery of a conflict of interest between a tenderer and a member of the evaluation committee, the Commission must act with due diligence and on the basis of all the relevant information when adopting its decision on the outcome of the

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procedure and that the Commission has some discretion to determine the measures which must be taken (paragraphs 75 and 77). In the light of the circumstances of that case, the Court found that the Commission had made an error of assessment in failing to investigate the relations between a tenderer and a member of the evaluation committee.

98. However, at this stage, doubts must be raised as to whether it is possible usefully to compare the facts of the present case with those that gave rise to the judgment in AFCon Management Consultants and Others v Commission , cited in paragraph 35 above. In the present case, unlike the facts which gave rise to that judgment, there is no reason to think, prima facie, that Euphet's exclusion caused unequal treatment. All the tenderers were, prima facie, in the same position as regards providing proof in their respective tenders that there was no conflict of interest.

99. The President nevertheless considers that this question must be examined in detail in the main proceedings.

100. Lastly, also in the light of the arguments made in the application for interim measures, doubts must be raised as to whether the tender submitted by Euphet allowed any risk of a conflict of interest to be eliminated.

101. First of all, it does not appear at this stage that the Commission manifestly committed an error in considering that the guarantees offered by Euphet were inadequate. As the Commission points out, the proposal for a corrective measure was formulated in general terms and made no specific reference to the risk of a conflict of interest identified by the Commission. Furthermore, in the interlocutory proceedings, the applicant does not cite any passages of its tender where it states that it was aware and took into consideration the specific risk identified by the Commission in the decision rejecting the tender. Quite the opposite, Euphet states in its tender that all the participants in Euphet are entirely independent of the Commission' and that it does not foresee any risk in this regard at present'.

102. Second, it is true, as the applicant notes, that not all the experts proposed in its tender come from institutions subject to the risk of a conflict of interest identified by the Commission. At this stage, however, it is not apparent that the Commission was required to regard that element as sufficient grounds to rule out any risk of a conflict of interest, in particular in the light of the links and respective roles of the members of Euphet. In this respect, as the Commission points out, it can be seen inter alia from Euphet's tender that each of its members is represented on a contract committee' which is responsible for managing and supervising Euphet's evaluation services.

103. For similar substantive reasons, doubts must also be raised as to whether the Commission must consider that the members of an institution subject to a conflict of interest are not themselves personally subject to that conflict. There is every reason to assume that there is a community of professional interests between an expert and the institution employing him. However, at this stage, the applicant does not provide evidence or arguments to reverse this presumption.

104. Third, doubts must also be raised as to whether the rejection of the applicant's tender constitutes a breach of the principle of equality as set out in Articles 89(1) and 99 of the Financial Regulation, because a tenderer subject to a conflict of interest during the performance of the framework contract would be allowed to perform the contract provided it takes adequate measures. As has already been observed (paragraphs 100 to 103), it is not apparent, at this stage, that the Commission committed an error in considering that Euphet's tender was not adequate, from the stage of the tendering procedure, for preventing a risk of a conflict of interest. Prima facie, the applicant cannot therefore claim that it is in a comparable situation to a tenderer subject to a conflict of interest arising only during the performance of the framework contract.

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105. Consequently, whilst the applicant's arguments require several assessments to be made in the main proceedings and cannot therefore be regarded, at this stage, as unfounded, doubts must nevertheless be raised as to whether the Commission infringed Article 94 of the Financial Regulation or the provisions of the tender documents.

106. Second, as regards the alleged obligation on the part of the evaluation committee to consult a tenderer before eliminating its tender, in this plea the applicant does not rely on any legal basis imposing such a duty on the Commission. In so far as the applicant relies implicitly on the principle of the rights of the defence, it should be noted that respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting tha t person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views (Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I5373, paragraph 21). However, in the present case, the applicant does not, prima facie, put forward any arguments to show that the tendering procedure is initiated against it.

107. Thirdly, as regards the Commission's alleged breach of the principle of protection of legitimate expectations on account of its rejection of a way of resolving conflicts of interest, it has already accepted, prima facie, that the applicant does not, at this stage, describe an earlier practice that can satisfactorily justify such expectations.

108. Fourthly, doubts must be raised at this stage as to the existence of the failure to state reasons for the decision rejecting the tender claimed by the applicant. According to settled case-law, the scope of the obligation to state reasons must be appropriate to the act at issue and the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way as to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded and to enable the competent Community Court to exercise its power of review (Case C-367/95 P Commission v Sytraval and Brink's France [1998] ECR I1719, paragraph 63; Joined Cases T-228/99 and T-233/99 Westdeutsche Landesbank Girozentrale v Commission [2003] ECR II435, paragraph 278; and Case T-109/01 Fleuren Compost v Commission [2004] ECR II-127, paragraph 119).

109. The reason stated for the decision rejecting the tender is the existence of a risk of a conflict of interest connected, first, with the grants received by certain members of Euphet and certain experts which it might use to perform the framework contract and, secondly, the inadequate guarantees provided by Euphet in this regard.

110. As regards the allegedly erroneous nature of the reason stating that Euphet failed to acknowledge the involvement of certain experts in the implementation of the programme of Community action in the field of public health, the applicant does not mention any passage in its tender where it specifically acknowledged, or even merely suggested, that certain experts whom it intended to use received Community grants in that field.

111. Fifthly, as regards the Commission's alleged infringement of Article 138 of the detailed implementing rules, by that plea the applicant seems to claim essentially that its unlawful exclusion results in the contract being awarded to a tenderer whose tender does not offer the best value for money. However, at this stage, assuming that Euphet's tender was accepted in the tendering procedure, it appears that it would not necessarily have been selected by the Commission.

- The second plea

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112. In its second plea, the applicant claims essentially that by failing to ask Euphet to submit additional information, the Commission infringed Article 146(3) of the detailed implementing rules, the Court's case-law on public procurement (judgment in Fabricom , cited in paragraph 35 above), the principle of protection of legitimate expectations, the principle of equal treatment and Articles 89(1) and 99 of the Financial Regulation.

113. First of all, at this stage, serious doubts must be raised as to whether the Commission infringed Article 146(3) of the detailed implementing rules. As the applicant itself recognises, that provision simply offers the Commission a discretionary option.

114. Secondly, at this stage, doubts must also be raised as to whether the applicant may rely effectively on the judgment in Fabricom , cited in paragraph 35 above, in order to show that the Commission could not conduct a specific assessment of the potential conflict of interest without requesting additional information from it.

115. First of all, the applicant does not clearly show, at this stage, that the Commission could not conduct a specific examination of the risk of a conflict of interest established vis-à-vis Euphet without knowing the precise nature of the specific contracts to be concluded. As has already been observed in the examination of the first plea (paragraph 92 above), it is not apparent at this stage that the Commission failed to conduct a specific examination of a risk of a conflict of interest having regard to the subject of the framework contract. It is not apparent either, at this stage, that that examination was insufficient to establish the existence of a major risk of a conflict of interest and that it was also necessary to know the precise nature of the specific contracts to be concluded.

116. Second, prima facie, the fact that, in the Commission's view, the terms of the corrective measure proposed by Euphet were too general does not mean that it could not conduct a specific examination of Euphet's situation with regard to conflicts of interest. The general nature of the terms of the tender submitted by Euphet is precisely one of the criteria assessed by the Commission in the decision rejecting the tender in order to reach the conclusion that the Euphet's proposed corrective measure, as set out in its tender, is not adequate for resolving the risk of a conflict of interest identified by the Commission.

117. The President nevertheless considers that this question must be examined in detail in the main proceedings.

118. Third, in so far as the applicant claims a breach of the principle of protection of legitimate expectations, the e-mails annexed to its observations of 13 June 2005 concern only one tendering procedure and do not, at this stage, give proof of the existence of a consistent practice on the part of the Commission whereby it asks tenderers for additional information.

119. Fourth, the applicant does not clearly demonstrate, at this stage, that the Commission's request for additional information from other tenderers constitutes a breach of the principle of equal treatment or an infringement of Articles 89(1) and 99 of the Financial Regulation.

120. According to the Commission's observations, those tenderers were invited to prove the date of submission of their respective tenders because the postmarks on the envelopes containing those tenders were illegible. However, doubts must be raised at this stage as to whether the applicant is in a similar position to those tenderers. Unlike the tenderers in those cases, the defects noted by the Commission in Euphet's tender could not, prima facie, be attributed to circumstances outside its control, but to intrinsic shortcomings in its tender.

121. The President nevertheless considers that this question must be examined in detail in the main proceedings.

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122. In the light of the arguments put forward in the interlocutory proceedings, doubts must be raised on several points of the applicant's arguments. Its arguments must nevertheless be examined in detail in the main proceedings.

123. Without prejudice to the Court's position in the main proceedings, the applicant's arguments cannot therefore, at this stage, be rejected as entirely without foundation. The condition relating to a prima facie case is therefore satisfied.

Urgency

124. According to settled case-law, the urgency of an application for interim measures must be assessed on the basis of the need for an interlocutory order in order to prevent serious and irreparable damage being caused to the party requesting the interim measure. That party must prove that it cannot wait for the outcome of the main proceedings without having to suffer damage of this kind (orders in Esedra v Commission , cited in paragraph 67 above, paragraph 43, and in TQ3 Travel Solutions Belgium v Commission , cited in paragraph 67 above, paragraph 41).

125. In the present case, the applicant's argument consists essentially of two parts where, on the one hand, the applicant's exclusion from the tendering procedure harms its reputation and, on the other, the absence of interim measures will, if the contested decisions are annulled, prevent it from being awarded and then performing the contract covered by the tendering procedure and, as a result, from deriving certain benefits in terms of prestige, experience and revenue. Those two parts should be considered in turn.

126. First of all, the applicant claims that its exclusion from the tendering procedure harms its reputation. In that regard, the Commission rightly points out that participation in a public tender procedure, by nature highly competitive, involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial (orders in CMC v Commission , cited in paragraph 71 above, paragraph 51, and in European Dynamics v Commission , cited in paragraph 67 above, paragraph 82). Furthermore, the applicant's argument that this case-law does not apply where the tenderer has been unlawfully eliminated cannot be accepted. The case-law in question concerns cases where, like the applicant in the present case, the applicants were contesting the lawfulness of the act(s) contested in the main proceedings. In addition, where an undertaking has been unlawfully eliminated from a tendering procedure, there is even less reason to believe that it is liable to suffer serious and irreparable harm to its reputation, since its exclusion is unconnected with its competences and the subsequent annulling judgment will in principle allow any harm to its reputation to be made good.

127. Second, the applicant claims that, if the contested decisions are annulled and interim measures are not adopted, it will no longer be possible for it to be awarded the contract covered by the tendering procedure and then to perform the contract and, as a result, to derive certain benefits in terms of prestige, experience and revenue.

128. It should be noted in that regard that if the contested decisions were annulled by the Court, it would be for the Commission, under the first paragraph of Article 233 EC, to take the necessary measures to comply with the judgment, without prejudice to the obligations stemming from the application of the second paragraph of Article 288 EC.

129. It should also be noted that, under Article 233 EC, it is the institution whose act has been declared void that is required to take the necessary measures to comply with the Court's judgment. It follows that the Court hearing annulment proceedings is not competent to indicate to the institution whose act has been declared void the manner in which its ruling is to be complied with (order of the Court of Justice in Joined Cases C-199/94 P and C-200/94 P Pevasa and Inpesca v Commission [1995] ECR I3709, paragraph 24) and that the judge hearing the application for interim measures

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may not prejudice the measures that might be taken following any annulling judgment. The manner in which an annulling judgment is complied with depends not only on the annulled provision and the scope of the judgment, which is to be assessed with reference to its grounds (Joined Cases 97/86, 99/86, 193/86 and 215/86 Asteris and Others v Commission [1988] ECR 2181, paragraph 27, and Joined Cases T305/94 to T307/94, T313/94 to T316/94, T318/94, T325/94, T328/94, T329/94 and T335/94 Limburgse Vinyl Maatschappij and Others v Commission [1999] ECR II931, paragraph 184), but also on the specific circumstances of each case, such as the time within which the contested act is annulled or third-party interests.

130. In the present case, if the contested decisions were annulled, the Commission would therefore have to adopt the necessary measures for ensuring appropriate protection of the applicant's interests, having regard to the specific circumstances of this case (see, to that effect, the orders of the President of the Court of First Instance in Case T108/94 R Candiotte v Council [1994] ECR II249, paragraph 27, and in Case T447/04 R Capgemini Nederland v Commission [2005] ECR II-257, paragraph 96).

131. It is not therefore for the President to prejudice measures which might be taken by the Commission in order to comply with any annulment judgment.

132. Nevertheless, the general principle of the right to full and effective judicial protection requires that interim protection be available to individuals, if it is necessary for the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection afforded by the Community Courts (see, to that effect, the order of the President of the First Chamber of the Court of Justice in Case 27/68 R Renckens v Commission [1969] ECR 274, 276; judgments in Case C-213/89 Factortame and Others [1990] ECR I2433, paragraph 21, and in Joined Cases C-143/88 and C-92/89 Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest [1991] ECR I415, paragraphs 16 to 18; orders of the President of the Court of Justice in Case C-399/95 R Germany v Commission [1996] ECR I2441, paragraph 46, and in Austria v Council , cited in paragraph 25 above, paragraph 111).

133. It is therefore necessary to examine whether it is proven, with a sufficient degree of probability, that the applicant is likely to suffer serious and irreparable damage if the interim measures applied for are not adopted (see, to that effect, the order of the President of the Court of Justice in Case C-180/01 P(R) Commission v NALOO [2001] ECR I5737, paragraph 53).

134. In the present case, ignoring the issue of the conflict of interest identified by the Commission, which is contested by the applicant and is the subject of the main proceedings, it must be held that Euphet had an opportunity to be awarded the contract covered by the tendering procedure. First of all, it is clear from the documents before the Court that Euphet was excluded from the tendering procedure irrespective of the value for money of its tender and solely because the tender showed that there was a risk of a conflict of interest. Second, nothing in the file suggests that Euphet did not have an opportunity to be awarded and to perform the contract in question, irrespective of the risk of a conflict of interest identified by the Commission.

135. However, because of its exclusion from the tendering procedure, Euphet lost its opportunity to be awarded the contract and, consequently, to derive the various financial and non-financial benefits that might result from the performance of the framework contract. It should therefore be examined whether, following an annulment judgment, the possibility of the Commission organising a new tendering procedure would allow such damage to be repaired and, if that is not the case, it should be assessed whether the applicant could be compensated accordingly.

136. As regards the possibility of the Commission organising a new tendering procedure, it should be stated that, even if Euphet could be restored under competitive conditions comparable to those

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that applied in the tendering procedure in question, it is highly likely that the subject of the new procedure organised by the Commission will be different from the subject of the first procedure.

137. Under Sections 7.1.3 and 7.1.4 of the specifications, the framework contract relates inter alia to an evaluation of the programme of Community action in the field of public health established by Decision No 1786/2002. Article 12(3) of that decision provides that an external assessment must be conducted by the end of the fourth year of the programme', that is 31 December 2006.

138. Consequently, even though the Commission rightly stresses that the framework contract does not necessarily concern just that evaluation, it is highly likely that, if interim measures are not adopted, at least some of the services to be provided under the framework contract will have been completed when the Court delivers its decision in the main proceedings.

139. Therefore, even if the Commission decides to or is required to organise a new call for tenders in order to comply with an annulment judgment, if Euphet can be restored under competitive conditions similar to those that applied in the tendering procedure in question, and if Euphet's tender is accepted by the Commission, it is unlikely that Euphet will in practice still have an opportunity to carry out all the services that it would have performed if it had been declared the successful tenderer at the outset.

140. In the circumstances of this case, it is therefore unlikely that the possibility of the Commission organising a new tendering procedure would in itself make it possible to preserve the opportunity that the applicant had to be awarded and to perform the contract covered by the tendering procedure and, as a result, to derive the various benefits that might have resulted.

141. However, as was held above (paragraph 135), account should also be taken of the possibility that, if the contested decisions are annulled in the main proceedings, the Commission could compensate the applicant for any damage suffered and that, if the Commission chose not to award such compensation, the applicant could bring an action for damages on the basis of Article 288 EC. If any damage suffered by the applicant can subsequently be compensated, it cannot be regarded as irreparable (see, to that effect, the orders in Esedra v Commission , cited in paragraph 67 above, paragraph 44, and in TQ3 Travel Solutions Belgium v Commission , cited in paragraph 67 above, paragraph 43).

142. In the present case, the Commission claims in its observations that, if the contested decisions are annulled, the applicant's interests could be adequately protected inter alia through the payment of compensation. However, the file does not contain anything to guarantee, with a sufficient degree of certainty, that, if the contested decisions were annulled, the Commission would compensate the applicant without an action for damages being brought.

143. Account must therefore be taken of the possibility of the applicant bringing an action under Article 288 EC.

144. According to settled case-law, the damage for which compensation is sought in an action under Article 288 EC must be real and certain (see, to that effect, Case T-54/96 Oleifici Italiani and Fratelli Rubino v Commission [1998] ECR II3377, paragraph 66, and Case T-231/97 New Europe Consulting and Brown v Commission [1999] ECR II2403, paragraph 29).

145. In the present case, as has already been held (paragraph 134 above), it must be regarded as established that Euphet had an opportunity to be awarded and to perform the contract covered by the tendering procedure. Therefore, the damage suffered by the applicant, consisting in the loss of that opportunity, must, at this stage and in the light of the evidence and arguments submitted in the interlocutory proceedings, be regarded as real and certain within the meaning of the case-law mentioned in the preceding paragraph.

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146. However, it must be stated that that opportunity is very difficult to quantify. On the one hand, Euphet's tender was excluded at a very early stage in the procedure and the evaluation committee did not deliver an opinion regarding its economic value. On the other hand, even if that tender had been evaluated by the evaluation committee, the contracting authority would not be bound by its proposal and would have a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract (see, to that effect, Case T-13/96 TEAM v Commission [1998] ECR II4073, paragraph 76, and AFCon Management Consultants and Others v Commission , cited in paragraph 35 above, paragraph 113).

147. It is therefore very difficult, or even impossible, to quantify that opportunity and therefore to evaluate the damage resulting from its loss. According to settled case-law, damage, which once it has been suffered cannot be quantified, may be regarded as irreparable (see, to that effect, the order of the President of the Court of Justice in Joined Cases C51/90 R and C59/90 R Comos Tank and Others v Commission [1990] ECR I2167, paragraph 31; orders of the President of the Court of First Instance in Case T41/97 R Antillean Rice Mills v Council [1997] ECR II447, paragraph 47, and in Case T-65/98 R Van den Bergh Foods v Commission [1998] ECR II2641, paragraph 65).

148. The loss of that opportunity may therefore be regarded as constituting irreparable damage.

149. However, in order to justify the grant of interim measures, the damage claimed by the applicant must be serious (see, to that effect, the orders in Esedra v Commission , cited in paragraph 67 above, paragraph 43, and in TQ3 Travel Solutions Belgium v Commission , cited in paragraph 67 above, paragraph 41).

150. The loss of an opportunity to be awarded and to perform a public contract forms an integral part of exclusion from the tendering procedure in question and cannot be regarded as constituting in itself serious damage, whether or not a specific assessment is made of the seriousness and irreparability of the precise prejudice alleged in each case considered (see, by analogy, the order of the President of the Court of First Instance in Case T-237/99 R BP Nederland and Others v Commission [2000] ECR II3849, paragraph 52).

151. Therefore, in the present case, the applicant's loss of an opportunity to be awarded and to perform the contract in the tendering procedure would constitute serious damage if it has shown satisfactorily that it would have been able to derive sufficiently sizeable benefits from the award and performance of that contract.

152. It is therefore necessary to make a specific assessment of the various benefits that, according to the applicant, it would derive from the award and performance of the contract covered by the tendering procedure.

153. First of all, the applicant claims that the performance of the framework contract would have brought it major benefits in terms of experience and prestige. However, in this respect, its claims are too general, too vague and too unsubstantiated to establish satisfactorily the likelihood and, a fortiori, the significance of those benefits. As regards the honour and prestige attached to the performance of the tasks to be carried out, the applicant pleads the value of the framework contract, the subject, the duration, the international and large-scale nature of the task' and the fact that it assembled a team of 65 people to perform the contract. Nevertheless, in the absence of more specific evidence allowing an assessment of the effects of performance of the framework contract, in particular on its customers, its prestige and its experience, these claims alone are too vague to prove satisfactorily the likelihood and, a fortiori, the significance of those benefits.

154. Second, as regards the financial benefits attached to the performance of the framework contract, their existence is clearly established. It is obvious therefore that non-performance of the contract

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would deprive the applicant of revenue that it would have received if it had been awarded the contract. The applicant is therefore liable to suffer irreparable damage linked to the loss of an opportunity to receive that revenue.

155. With regard to the seriousness of that loss, it should be noted that, having regard to its subject-matter, the framework contract concerns tasks with a considerable value. It can be seen from the specifications that the successful tenderer will be assigned three to five tasks each year and that, for the first year, the value of the remunerable services is EUR 1 million.

156. However, where the applicant is an undertaking, the seriousness of material damage must be assessed inter alia in the light of the size of that undertaking (see, to that effect, the order in Comos Tank and Others v Commission , cited in paragraph 147 above, paragraphs 26 and 31, and the order of the President of the Court of First Instance in Case T-201/04 R Microsoft v Commission [2004] ECR II-4463, paragraph 257).

157. In the present case, it must be stated that the applicant does not produce evidence or arguments to show that, in the light of its size in particular, the loss that it is liable to suffer would be sufficiently serious to justify the grant of interim measures.

158. For example, it can be seen from an annex to the tender submitted by Euphet that the applicant realised a turnover of more than EUR 27 million in 2004. Furthermore, the information provided in Euphet's tender seeks to highlight the size of the group to which the applicant is linked. In that tender, it is stated that the group in question employs the services of almost 130 000 people throughout the world, approximately 20 000 of whom work within the European Union.

159. Consequently, in the light of the evidence and arguments contained in the application for interim measures, the President cannot take the view that the applicant's loss of an opportunity to receive revenue from the performance of the framework contract would be sufficiently serious to justify the grant of interim measures.

160. The condition relating to urgency cannot therefore be regarded as satisfied.

161. Lastly, it should be noted that the balance of interests is in any case in favour of not ordering interim measures.

162. As has already been noted, if interim measures are not adopted, the applicant is liable to suffer damage linked to the loss of an opportunity to receive revenue from the performance of the framework contract.

163. However, if the interim measures applied for were ordered, the Commission would be unable to conclude the framework contract. It is clear from recital 44 in the preamble to Decision No 1786/2002 that the evaluations of the programme of Community action in the field of public health are intended, where appropriate, to adjust or modify that programme. The performance of these evaluations therefore fulfils an important general interest.

164. Account must also be taken of the interest of the tenderer which was successful at the end of the tendering procedure and which, in the event of suspension, would be unable to perform the contract which it has been awarded.

165. Lastly, as can be seen from the examination of the prima facie case (paragraphs 83 to 123 above), it is not particularly strong, in the light of the evidence and arguments presented in the interlocutory proceedings, and is not capable of tipping the balance of interests in favour of the grant of interim measures.

166. Therefore, in the light of the foregoing, the balance of the interests at stake is in favour of not granting the interim measures applied for.

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167. Consequently, without it being necessary to give a ruling on the applicant's request for the correspondence exchanged between the Commission and the other tenderers to be lodged with the Registry, the application for interim measures must be dismissed.

DOCNUM	62005B0195(01)
AUTHOR	Court of First Instance of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page II-03485
DOC	2005/09/20
LODGED	2005/05/19
JURCIT	31991Q0530-A104P2 : 32002Q1605 : 32002Q1605-A94 : 32002R2342 : 32002R2342-A146P3 : 32002R2342-A147P3 :
SUB	Public contracts of the European Communities
AUTLANG	Dutch
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Belgium
NOTES	Meisse, Eric: Sursis à exécution, Europe 2005 Novembre no 371 p.13-14
PROCEDU	Action for annulment;Application for interim measures - inadmissible;Application for interim measures - unfounded
DATES	of document: 20/09/2005 of application: 19/05/2005

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Notice for the OJ

Order of the President of the Court of First Instance of 20 September 2005 - Deloitte Business Advisory v Commission

(Case T-195/05 R)

(Interim measures - Community tendering procedure - Loss of an opportunity - Urgency - Balance of interests)

Language of the case: Dutch

Parties:

Applicant(s): Deloitte Business Advisory (Brussels, Belgium) (represented by: D. Van Heuven, S. Ronse and S. Logie, lawyers)

Defendant(s): Commission of the European Communities (represented by: L. Pignataro-Nolin and E. Manhaeve, Agents)

Application for

interim measures seeking, first, an order suspending the operation of (1) the Commission decision rejecting the tender submitted, inter alia, by the applicant under a call for tenders bearing reference SANCO/2004/01/041 and (2) the decision to award the contract in question to a third party and, secondly, an order prohibiting the Commission (1) from informing the successful tenderer of the decision awarding the contract in question and (2) from proceeding with signature of the relevant contract, on pain of a periodic penalty payment.

Operative part of the Order

1. The application for interim measures is dismissed;

2. Costs are reserved.

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[1] -

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Notice for the OJ

Action brought on 19 May 2005 by N.V. Deloitte Business Advisory against the Commission of the European Communities

(Case T-195/05)

(Language of the case: Dutch)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 19 May 2005 by N.V. Deloitte Business Advisory, Brussels, represented by Dirk Van Heuven, Steve Ronse and Sofie Logie, with an address for service in Luxembourg.

The applicant claims that the Court should:

annul the contested decisions;

order the defendant to pay all the costs.

Pleas in law and main arguments

The applicant, which was in a consortium with other undertakings, submitted a tender, under the name EUPHET, in response to the invitation to tender for the 'Sanco Evaluation Framework Contract, Lot 1 (Public Health) - tender No SANCO/2004/01/041', issued by the European Commission. In the application, the applicant seeks annulment of the European Commission's decision not to select EUPHET for the contract, as well as annulment of the award decision, not served on and unknown to the applicant, by which the contract was awarded to a third party.

In support of its application, the applicant pleads infringement of Article 94 of Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [1] and infringement of Articles 138 and 147(3) of Regulation No 2342/2002 laying down detailed rules for the implementation of Regulation No 1605/2002. [2] The applicant also pleads breach of the tender documents, of the general duty to state reasons and of the principle of the protection of legitimate expectations.

According to the applicant, the reason stated for exclusion, namely that the proposal for measures to prevent a conflict of interest was inadequate and did not provide a sufficient guarantee, is completely unlawful and in breach of the contract documents. The applicant maintains that it is sufficient that the contractor undertake, by signing the draft contract, to inform the Commission immediately of any conflict of interest and to take the necessary steps to resolve such conflict as soon as possible. The applicant also states that it proposed measures which went further than what was required.

The applicant further claims that it was not at any time invited to supply additional information. According to the applicant, that constitutes an infringement of Article 146(3) of Regulation No 2342/2002, a breach of the principle of the protection of legitimate expectations, of the principle of the right to be treated fairly and of the principle of non-discrimination, as well as an infringement of Articles 89(1) and 99 of Regulation No 1605/2002.

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[1] - Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

[2] - Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1).

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DOCUMENT DE TRAVAIL

ORDONNANCE DU PRÉSIDENT
DE LA CINQUIÈME CHAMBRE DU TRIBUNAL

7 octobre 2005 (*)

« Radiation »

Dans l'affaire T-125/05,

Umwelt- und Ingenieurtechnik GmbH Dresden, établie à Dresden (Allemagne), représentée par M^e^ H. Robl, avocat,

partie requérante,

contre

Commission des Communautés européennes, représentée par M^me^ S. Fries et M. M. Wilderspin, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse,

ayant pour objet l'annulation de la décision de la Commission (AIDCO/A6/FP/co/2004/D/45370) du 23 décembre 2004 de ne pas attribuer à la requérante le lot n°2 du marché EuropeAid/119151/D/S/UA intitulé « Projet d'amélioration des centrales nucléaires dans le sud de l'Ukraine », et de l'attribuer à une autre entreprise,

LE PRÉSIDENT DE LA CINQUIÈME CHAMBRE
DU TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES

rend la présente

Ordonnance

1 Par lettre déposée au greffe du Tribunal le 29 août 2005, la partie requérante a informé le Tribunal, conformément à l'article 99 du règlement de procédure du Tribunal, qu'elle se désistait de son recours. Elle n'a pas conclu sur les dépens.

2 Par lettre déposée au greffe du Tribunal le 20 septembre 2005, la partie défenderesse a fait savoir au Tribunal qu'elle prend acte du désistement et demande que la partie requérante soit condamnée aux dépens.

3 Par ordonnance du président du Tribunal du 2 juin 2005, Umwelt- und Ingenieurtechnik GmbH Dresden/Commission (T-125/05 R, non encore publiée au Recueil), la demande en référé dans la présente affaire a été rejetée et les dépens ont été réservés.

4 Selon l'article 87, paragraphe 5, premier alinéa, du règlement de procédure, la partie qui se désiste est condamnée aux dépens, s'il est conclu en ce sens par l'autre partie dans ses observations sur le désistement. En l'espèce, la partie défenderesse demande que la partie requérante soit condamnée aux dépens.

5 Il y a donc lieu de condamner la partie requérante aux dépens, y compris ceux afférents à la

procédure en référé.

Par ces motifs,

LE PRÉSIDENT DE LA CINQUIÈME CHAMBRE DU TRIBUNAL

ordonne :

1) L'affaire T-125/05 est radiée du registre du Tribunal.

2) La partie requérante supportera les dépens, y compris ceux afférents à la procédure en référé.

Fait à Luxembourg, le 7 octobre 2005.

Le greffier	Le président
E. Coulon	M. Vilaras

* Langue de procédure : l'allemand.

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Notice for the OJ

Order of the Court of First Instance of 7 October 2005 - Umwelt-und Ingenieurtechnik v Commission

(Case T -125/05) [1]

Language of the case: German

The President of the Fifth Chamber has ordered that the case be removed from the register.

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1 -

2 - OJ C 115, 14.5.2005.

Order of the President of the Court of First Instance of 2 June 2005 Umwelt- und Ingenieurtechnik GmbH Dresden v Commission of the European Communities. Application for interim measures. Case T-125/05 R.

Applications for interim measures - Suspension of operation of a measure - Interim measures - Conditions for granting - Urgency - Serious and irreparable damage - Burden of proof - Financial loss

(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

The urgency of an application for the adoption of interim measures must be assessed in the light of the extent to which an interlocutory order is necessary to avoid serious and irreparable damage to the party seeking the adoption of the interim measure. It is for that party to prove that he cannot await the conclusion of the main action without suffering damage of that kind.

In that regard, financial loss, such as that which might arise in the event of exclusion from a tendering procedure, cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation.

(see paras 38-39, 42)

In Case T-125/05 R,

Umwelt- und Ingenieurtechnik GmbH Dresden, established in Dresden (Germany), represented by H. Robl, lawyer,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and S. Fries, acting as Agents, with an address for service in Luxembourg,

defendant,

ACTION for suspension of implementation of the decisions of the Commission not to award the applicant Lot No 2 of the EuropeAid/119151/D/S/UA contract called Plan Improvement Project for South Ukraine NPP' and to award the lot to another company and, alternatively, for an order for other interim measures,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Background to the dispute

1. Council Regulation (EC, Euratom) No 99/2000 of 29 December 1999 concerning the provision of assistance to the partner States in Eastern Europe and Central Asia (OJ 2000 L 12, p. 1) provides in particular for the financing of nuclear safety programmes in those States.

2. An annual action programme in the field of nuclear safety was established for the year 2001 in the context of Regulation No 99/2000. In that context a tendering procedure was launched for a public procurement contract entitled Plan Improvement Project for South Ukraine NPP'. Lot No 2 of that contract related to the supply of an expert system for collection and processing of data concerning the control of water quality in a nuclear power station in South Ukraine.

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3. In response to that tendering procedure, published in the Official Journal of the European Union on 19 June 2004 (OJ 2004 S 119), three tenders, including that of the applicant, were submitted within the time-limit.

4. On 4 October 2004, the tenders submitted were made public in the presence of the tenderers.

5. The committee in charge of the technical evaluation of the tenders (the evaluation committee') proceeded to the examination of the different tenders received and checked that they complied with the administrative and technical specifications.

6. The evaluation committee requested the applicant to clarify several elements of its tender by letters of 6, 8 and 12 October 2004 respectively, to which the applicant replied by letters of 7, 12 and 14 October 2004 respectively.

7. Taking the view that the explanations provided by the applicant on two technical aspects (Clarification No 9' and Clarification No 13') were insufficient, the committee did not accept the applicant's tender. The prices proposed by the applicant were therefore not compared with those of the other tenderers.

8. The contract was awarded to the company All Trade, whose tender was the most advantageous of those submitted.

9. The award was notified to All Trade and the required steps were taken for the signature of the contract. The contract was concluded directly between Energoatom, the beneficiary of the project, and the successful tenderer. It was signed on 20 December 2004.

10. By letter of 23 December 2004, received by the applicant on 10 January 2004, the Commission informed the applicant that it had not been awarded the contract having regard to the fact that its offer did not comply with the technical requirements (the first decision'). In addition, that letter informed the applicant that the contract had been awarded to All Trade (the second decision').

11. By letter of 14 January 2005 to the Commission, the applicant disputed the reasons given for those two decisions.

12. By letter of 31 January 2005, the Commission replied to the complaints made by the applicant.

Procedure and forms of orders sought by the parties

13. By application lodged at the Registry of the Court of First Instance on 18 March 2005, the applicant brought an action for annulment under the fourth paragraph of Article 230 EC of the first and second decisions (together the contested decisions').

14. By a separate document, lodged at the Registry of the Court on 21 March 2005 pursuant to Article 104 of the Rules of Procedure of the Court of First Instance and Articles 242 EC and 243 EC, the applicant brought the present application for interim relief in which it claims

- suspension of the execution of the contested decisions until the Court rules on the main action;

- in the alternative, an order for the necessary interim measures to prevent implementation of the challenged decisions from becoming a fait accompli to the detriment of the applicant and, in particular, to prevent the defendant:

- firstly, awarding the contested contract to All Trade;

- secondly, drawing up the contract stipulated in paragraph 21 of the call for tenders and submitting it to All Trade for signature, or taking any other measure for awarding or implementing the contract.

15. In its written observations lodged at the Registry of the Court on 11 April 2005, the Commission contended that the application should be dismissed as unfounded.

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Law

16. Under, first, the combined provisions of Articles 242 EC and 243 EC and, secondly, Article 225(1) EC, the Court of First Instance can, if it considers that the circumstances require, order the suspension of a measure challenged before it or order necessary provisional measures.

17. Article 104(2) of the Rules of Procedure provides that requests for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case (fumus boni juris) for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (Order of the President of the Court of Justice in Case C268/96 P(R) SCK and FNK v Commission [1996] ECR I-4971, paragraph 30).

18. Having regard to the contents of the file, the President considers that it contains all the information necessary in order to rule on the current request for provisional measures without the need for an oral hearing.

Arguments of the parties

Prima facie case

19. In relation to the first decision the applicant maintains that the Commission infringed the principle of non-discrimination. That principle is of fundamental importance in the context of public contracts and Article 89(1) of the Financial Regulation is a particular expression of it.

20. First, contrary to what is stated in the Commission's letters of 23 December 2004 and 31 January 2005, the applicant's tender was in conformity with the technical specifications stated in the call for tenders, namely, those mentioned, firstly, in section 2.2.6 of the specifications and, secondly, in sections 2.3.1 and 2.3.4 of those technical specifications. Moreover, contrary to what is claimed by the Commission, the detailed explanations and the additional information provided to the Commission were not inadequate.

21. The applicant adds that the technical reservations set out in the letters of 23 December 2004 and 31 January 2005 have nothing to do with the Commission's previous requests for clarification.

22. In relation to the second decision the applicant maintains that the Commission's finding in relation to the financial assessment is manifestly in error.

23. In the award notice for the supply contract, All Trade is mentioned as holding a contract to the value of EUR 3 423 658, which corresponded to the price of the offer, including all extras and services. According to the applicant, the statements in relation to the prices of offers mentioned in the Commission's letter of 31 January 2005 are not correct.

24. According to the applicant, the Commission's reference to paragraph 1.3 of the instructions to tenderers is incorrect. Paragraph 1.3 in substance provides that, in the context of the evaluation of offers, only the base price of tenders was to be taken into consideration to the exclusion of the unit price and the overall price of spare parts, except if those latter two prices differed substantially from one offer to another. According to the applicant, that was precisely the case in this instance.

25. The applicant considers that All Trade in all likelihood proposed a higher number of spare parts, with the consequence that the overall price of the tender had to be higher by more than 300 000 euros. According to the applicant, the Commission failed in its obligation under paragraph 1.3 of the instructions to tenderers to take that circumstance into consideration.

26. The applicant also maintains that All Trade possesses neither the qualifications nor the references required. According to the applicant, All Trade clearly proposed a product with a high risk of

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failure. The award of Lot No 2 to All Trade therefore raised serious doubts from a technical, commercial, personnel and financial viewpoint as to the guarantee that the envisaged service, the subject of the contract, could be carried out with the required competence and in the required time frame.

27. In that regard, the applicant adds, firstly, that All Trade's company capital is not in line with the value of the contract, secondly, that All Trade clearly wants to carry out the contract by itself, with the help of three collaborators and, thirdly, that All Trade's references relate only to a project in Armenia in a contract the value of which is less that one million euros and which was carried out nearly two years ago.

28. In reply, the Commission maintains that the application for annulment in the main proceedings is manifestly unfounded.

29. The Commission recalls that it is established case-law that it enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Review by the Community Courts is therefore limited to checking compliance with the applicable procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-211/02 Tideland Signal v Commission [2002] ECR II3781, paragraph 33).

30. In this case the invitation to tender procedure was carried out in conformity with the applicable provisions. The decision to reject the applicant's offer was, moreover, reasoned. The reasons given in that regard were of a technical nature. When assessing those arguments the Commission relied on the opinion of experts, in this case, the evaluation committee. The Commission concludes from this that no manifest error of assessment or abuse of power has been demonstrated by the applicant and that there is nothing to suggest that they exist.

Urgency and the balance of interests

31. The applicant maintains that, if the orders sought are not made, the decisions at issue will take effect. This fait accompli' will definitively affect the applicant's legal position and will do irreversible harm to its rights.

32. For its part the Commission maintains that the applicant has not proven that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage.

33. The Commission further argues that it is settled case-law that pecuniary damage cannot, in principle, except in exceptional circumstances, be regarded as irreparable, or even reparable only with difficulty, if it may be the subject of subsequent compensation (Orders of the President of the Court of First Instance in Case T-169/00 R Esedra v Commission [2000] ECR II2951, paragraph 45; Case T-181/02 R Neue Erba Lautex v Commission [2002] ECR II5081, paragraph 84, and Case T-148/04 R TQ3 Travel Solutions Belgium v Commission [2004] II3027, paragraph 46).

34. In any event, the applicant's interests should not prevail, firstly, over those of the tenderer with which the contract was signed and, secondly, over the interest of the safety of nuclear installations.

Findings of the President of the Court of First Instance

35. In its application, the applicant in essence requests the President of the Court of First Instance to prohibit the defendant, firstly, from awarding the contract at issue to All Trade and, secondly, from drawing up the contract envisaged at paragraph 21 of the invitation to tender file and offering it for signature by All Trade. It also requests the suspension of the decision not to award it Lot No 2 of the contract at issue and to suspend the execution of any contract signed with All Trade.

36. The Commission has stated, without being contradicted by the applicant, or by any of the documents

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on the file, that the contract between All Trade and Energoatom was signed on 23 December 2004. For that reason, the application for interim relief, in so far as it aims to avoid the award of the contract to All Trade and the signature of the contract, has been devoid of purpose since it was lodged. This head of claim is therefore inadmissible.

37. In relation to the head of claim seeking to obtain suspension of the execution of the decision not to award the contract to the applicant and the execution of the contract made with All Trade, the President of the Court of First Instance considers that, without there being any need to rule on the conformity of the application with the requirements of Article 104(2) of the Rules of Proc edure, as interpreted by the Community judicature (Orders of the President of the Court of First Instance in Case T-306/01 R Aden and Others v Council and Commission [2002] ECR II2387, paragraph 52, and Case T-303/04 R European Dynamics v Commission [2004] ECR II-3889, paragraphs 63 and 64), it is appropriate to examine whether the condition for urgency is fulfilled.

38. In that regard, according to well-established case-law, the urgency of an application for the adoption of interim measures must be assessed in the light of the extent to which an interlocutory order is necessary to avoid serious and irreparable damage to the party seeking the adoption of the interim measure (Order of the President of the Court of Justice in Case 310/85 R Deufil v Commission [1986] ECR 537, paragraph 15, and Order of the President of the Court of First Instance in Case T-13/99 R Pfizer Animal Health v Council [1999] ECR II1961, paragraph 134).

39. The party seeking the suspension of the operation of the contested decision must provide proof that he cannot await the conclusion of the main action without suffering prejudice of that nature (Order of the President of the Court of Justice in Case C-356/90 R Belgium v Commission [1991] ECR I2423, paragraph 23, and Order of the President of the Court of First Instance in Case T-151/01 R Duales System Deutschland v Commission [2001] ECR II3295, paragraph 187).

40. In this case, the applicant limits itself to stating, without more, that the appeal does not have suspensive effect and therefore it must be feared that, in the context of the decision process at issue, the decision in favour of All Trade challenged... would take effect' and that this would create a fait accompli and would definitively affect the applicant's legal position'.

41. The applicant does not give any reasons as to why it cannot wait for the request for annulment to be decided and adduces no proof of such serious and irreparable damage.

42. In so far as the applicant can be understood as arguing that the damage alleged concerns the fact that its non-selection has caused financial loss, it suffices to recall that damage of such a kind cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation (Orders in Esedra v Commission , cited above, paragraph 45, Neue Erba Lautex v Commission , cited above, paragraph 84, and TQ3 Travel Solutions Belgium v Commission , cited above, paragraph 46).

43. In these circumstances it must be concluded that, since the condition regarding urgency is not satisfied, the present application must be dismissed without the need to consider whether the other conditions for the grant of interim measures are satisfied.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

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Luxembourg, 2 June 2005.

DOCNUM	62005B0125
AUTHOR	Court of First Instance of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page II-01901
DOC	2005/06/02
LODGED	2005/03/21
JURCIT	11997E225-P1 : N 16 11997E242 : N 16 11997E243 : N 16 31991Q0530-A104P2 : N 17 37 61985O0310 : N 38 61990O0356 : N 39 61996O0268 : N 1 61999B0013 : N 38 62000B0169 : N 42 62001B0151 : N 39 62001B0306 : N 37 62002B0181 : N 42 62004B0148 : N 42 62004B0303 : N 37
SUB	Public contracts of the European Communities
AUTLANG	German
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Federal Republic of Germany
PROCEDU	Action for annulment;Application for interim measures - inadmissible;Application for interim measures - unfounded
DATES	of document: 02/06/2005 of application: 21/03/2005

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Notice for the OJ

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

of 2 June 2005

in Case T-125/05 R Umwelt-und Ingenieurtechnik GmbH Dresden v Commission of the European Communities

(Tendering procedure - Interim proceedings - Urgency - Absence)

(Language of the case: German)

In Case T-125/05 R: Umwelt-und Ingenieurtechnik GmbH Dresden, established in Dresden (Germany), represented by H. Robl, lawyer, against Commission of the European Communities (Agents: M. Wilderspin and S. Fries, with an address for service in Luxembourg): action for suspension of implementation of the decisions of the Commission not to award the applicant Lot No 2 of the EuropeAid/119151/D/S/UA contract called 'Plan Improvement Project for South Ukraine NPP' and to award the lot to another company and, alternatively, for an order for other interim measures – the President of the Court of First Instance made an order on 2 June 2005, the operative part of which is as follows:

The application for interim measures is dismissed.

Costs are reserved.

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Notice for the OJ

Action brought on 18 March 2005 by Umwelt- und Ingenieurtechnik GmbH Dresden against the Commission of the European Communities

(Case T-125/05)

Language of the case: German

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 18 March 2005 by Umwelt- und Ingenieurtechnik GmbH Dresden, Dresden (Germany), represented by H. Robl, lawyer.

The applicant claims that the Court should:

- annul the decision of 23 December 2004 refusing to award a contract to the applicant;

- annul the decision of 23 December 2004 awarding a contract to All Trade S.r.l;

- order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant challenges the decision of the Commission of 23 December 2004 not to award the applicant Public Contract No AIDCO/A6/FP/co/2004/D/45370, Contract No 90-127 in the tender procedure 'Plan Improvement Project for South Ukraine NPP,' concerning a measure to introduce an intelligent control system for water quality in the nuclear power station in South Ukraine. The applicant also challenges the simultaneous decision to award this contract to the competitor All Trade S.r.l.

The applicant argues that the Commission:

- erroneously assessed that the applicant's tender did not comply with point 2.2.6 of the technical specification, although all of the services offered by the applicant fully satisfied the specification and this was confirmed by references,

- erroneously stated that the applicant did not comply with points 2.3.1 and 2.3.4 of the technical specification due to insufficient explanations and information, although the applicant's explanations were both extensive and exhaustive, and

- breached the duty to provide clarification and exceeded its discretion.

The applicant contends further that in assessing the price, the Commission incorrectly, and in breach of the requirements of paragraph 1.3 of the instructions to tenders based its decision solely on the basic tender price and thus, in spite of their relevance, the pricing of spare parts and maintenance costs were not taken into consideration.

Finally, the applicant submits that the competitor All Trade S.r.l. does not provide any guarantee, either by its expertise or financial standing or by its technical experience, that it will successfully carry out the project in question.

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ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)

10 October 2006(*)

(Public service contracts – Call for tenders concerning technical assistance to improve the information and communication technology system in the State Institute of Statistics of the Republic of Turkey – Application rejected – Period for bringing proceedings – Confirmatory act – Inadmissibility)

In Case T–106/05,

Evropaiki Dinamiki – Proigmena Sistimata Tilepikinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis, lawyer,

applicant,

v

Commission of the European Communities, represented by C. Tufvesson and K. Kańska, acting as Agents,

defendant,

APPLICATION for: (1) annulment of the Commission decision not to short-list the applicant in the tendering procedure concerning the provision of technical assistance to improve the information and communication technology system (ICT) in the State Institute of Statistics of the Republic of Turkey, and (2) annulment of the decisions rejecting the applicant's request for review of the decision not to short-list it,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, J. Azizi and E. Cremona, Judges,

Registrar: E. Coulon,

makes the following

Order

Legal background

1 The award of contracts by the Commission in the course of its external actions is subject to the provisions of Part II, Title IV, Chapter 3, of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation') and the provisions of Part II, Title III, Chapter 3, of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) ('the implementing rules').

2 According to Article 100(2) of the Financial Regulation:

'The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected on the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the

successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

3 Article 149 of the implementing rules, in the version applicable to the facts in this case, provides as follows:

'1. The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract, including the grounds for any decision not to award a contract for which there has been competitive tendering or to recommence the procedure.

2. The contracting authority shall, within not more than fifteen calendar days from the date on which a written request is received, communicate the information provided for in Article 100(2) of the Financial Regulation.'

Facts at the origin of the dispute

4 By contract notice of 24 September 2004 published in the *Supplement to the Official Journal of the European Communities* (OJ 2004 S 187), the Commission, acting through its delegation in Turkey, issued an international restricted call for tenders under the reference EuropeAid/117579/C/SV/TR for a contract entitled 'Technical Assistance to improve the Information and Communication Technology (ICT) System in the State Institute of Statistics (SIS) of [the Republic of] Turkey – Upgrading the Statistical System of [the Republic of] Turkey (USST)'.

5 On 27 October 2004, Evropaiki Dinamiki, in consortium with the German company CCGIS Christl & Stamm GbR and the Department of Statistics of the Middle Eastern Technical University of Turkey, applied to be short-listed in respect of that call for tenders.

6 By fax of 2 December 2004, the Commission Delegation in Turkey ('the Delegation') informed the applicant that it had not been included on the short-list of candidates invited to submit a detailed tender, on the ground that it did not satisfy the criterion of technical capacity.

7 By letter of 8 December 2004, complaining that it had not been short-listed, the applicant informed the Delegation that it was clear from the documents supplied that, with its partners, it had the experience required by the contract notice concerned. It therefore asked the Delegation to reconsider its decision and include the consortium in the list of selected companies, so that it could participate in the final stage.

8 By letter dated 13 December 2004, faxed to the applicant on 22 December 2004 ('the letter of 13 December 2004'), the Head of Section, Financial Management and Procurement, at the Delegation replied in the following terms:

'With reference to your fax dated 8 December 2004 … , I would like to inform you that I have taken due note of your complaint regarding the short-listing of the above tender.

While the proceedings of the short-listing committee are confidential, I would like to inform you that all committee members read your references very carefully and in detail. The selection was done taking into consideration only the selection criteria mentioned at point 7 of the Procurement Notice. All the applications received were then compared to each other in order to finalise a final ranking and 8 applicants were short-listed.

Even though the references you presented were impressive the committee unanimously believed that in your application was not evident the fulfilment of the criterion related to the minimum number of areas (six out of ten listed) requested in the Procurement Notice while in the references of the firms short-listed the criterion was clearly fulfilled.'

9 By letter of 23 December 2004, sent by fax and registered post, to the Delegation and to the Commission's Directorate-General (DG) for Enlargement, the applicant insisted that the projects conducted by the consortium to which it belonged, and described in its application to participate in the call for tenders, satisfied all the required criteria and called on the Commission to comply with

the provisions of Council Regulation (EC) No 1488/96 of 23 July 1996 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership (OJ 1996 L 189, p. 1), and apply the provisions of the Financial Regulation concerning the applicant's right of appeal.

10 By fax of 24 December 2004, the Head of Section, Financial Management and Procurement, informed the applicant that it would receive a reply to its letter of 23 December 2004 within three weeks. In particular, it stated as follows:

'I have taken due note of your explanations on the issue and I would like to assure you that I would do all I can to clarify it. Since we shall be looking into the matter more closely, you will receive our reply within three weeks.'

11 On 10 January 2005, the applicant sent a letter, transmitted first by fax, to the Delegation and to DG Enlargement, in which it repeated in essence that its consortium was in a better position and had more references which suited the subject-matter of the call for tenders than other short-listed consortia. It also repeated the assertion that among the subject areas referred to in the 'terms of reference of the call for tenders' was the need to link the Turkish authorities with the 'Stadium' and 'Statel' applications of Eurostat (Statistical Office of the European Communities), both previously developed by the applicant.

12 On 14 and 20 January 2005, the applicant sent to the Delegation, with copies to DG Enlargement, two letters in which it expressed its wish to obtain a response within the time–limits given. In particular, in the fax of 20 January 2005, the applicant, complaining that it had not yet received a reply to its letter of 23 December 2004, informed the Delegation of its intention, despite the rejection of its application, to submit a tender before the expiry date stipulated by the contracting authority, namely 7 February 2005.

13 By letter of 24 January 2005, the Head of the Delegation informed the applicant that since the short-listing procedures had been duly applied, there was no justification for re-examining the decision concerning the short-list. In particular, having briefly set out the working methods of the short-list panel, it stated that all the members of that panel had taken the view that, in spite of the very technical descriptions provided by the applicant about its experience, the number of references to the areas required by the contract notice was not sufficient.

14 On 7 February 2005, after repeating its criticisms in respect of the decision to reject its application, the applicant informed the Commission of its intention to participate in one of the pre-selected consortia and announced that it would bring legal proceedings.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court of First Instance on 22 February 2005, the applicant brought these proceedings.

16 The applicant claims that the Court of First Instance should:

– annul the Commission's decision, contained in the letter of 2 December 2004, not to shortlist the applicant, and to short-list other candidates;

– annul the Commission's decision contained in the letter of 13 December 2004 refusing its request for review of the decision of 2 December 2004, as well as that contained in the letter of 24 January 2005;

– order the Commission to pay the costs, even if the present application is dismissed.

17 By separate document, registered at the Court of First Instance on 26 May 2005, the Commission raised a plea of inadmissibility in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance.

18 The Commission contends that the Court of First Instance should:

– dismiss the application as inadmissible;

– order the applicant to pay the costs.

19 The applicant submitted its observations on that plea of inadmissibility on 11 July 2005.

20 The applicant claims there that the Court of First Instance should:

– dismiss the plea of inadmissibility;

– proceed with the examination of the case.

Law

21 Under Article 114(1) of the Rules of Procedure, if a party so requests, the Court may give a ruling on admissibility without going into the substance of the case. In accordance with Article 114(3), the remainder of the proceedings is to be oral, unless the Court decides that the information in the file is sufficient to enable it to rule on the application made by the defendant and that there is no need to open the oral procedure.

Arguments of the parties

22 The Commission takes the view that the action is inadmissible. For that purpose it relies in the first place on the argument that the action for annulment brought by the applicant against the decision contained in the letter of 2 December 2004 is out of time. The date on which the application was lodged at the Court Registry, 22 February 2005, is after the expiry of the period of two months and ten days available to the applicant for bringing such proceedings. Since that decision was sent by fax on 2 December 2004, and received by the applicant on the same day, the period for bringing an action against that decision expired on 14 February 2005.

23 The Commission recalls, first of all, that, according to settled case-law, in order for a letter to constitute a notification for the purpose of Article 230 EC, it must be precise, unequivocal and contain a reasoned decision of the Commission (order in Case C-12/90 *Infortec* v *Commission* [1990] ECR I-4265, paragraph 9). In this case the letter satisfies those criteria, since it clearly informed the applicant that its application had been rejected and provided a reason for that. The letter concerned is, therefore, sufficiently detailed to constitute a decision enabling the applicant to ascertain its precise content in order to exercise its right to bring proceedings.

24 Second, as regards the application for annulment of the reiteration of its position, which is the subject of the letter of 13 December 2004, the Commission submits that that letter merely confirmed the contents of the initial decision of 2 December 2004. Therefore, the second letter cannot be regarded as a new decision, since neither the information on the file nor the letter itself indicates that the case was reconsidered before the letter was sent to the applicant. It cannot constitute a decision as it simply informs the applicant that the Commission did not intend to reconsider its decision concerning the short-list.

25 In that regard, the defendant recalls that, according to settled case-law, a measure constitutes a decision which may be the subject of an action for annulment under Article 230 EC if it produces legal effects which are binding on, and capable of affecting the interests of, the applicant, by bringing about a distinct change in his legal position (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62). The letter of 13 December 2004 merely confirmed the Commission's decision and thus did not bring about a distinct change in the applicant's legal position. Therefore, in accordance with the case-law of the Court of Justice, that letter cannot be the subject of an action for annulment (Case C-199/91 *Foyer culturel du Sart-Tilman* v *Commission* [1993] ECR I-2667, paragraph 23).

26 The Commission adds that, even if the Court of First Instance considered that the letter concerned constituted a decision, as a confirmatory decision it does not have the effect of laying down a fresh time-limit (Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16; order in *Infortec* v *Commission*, paragraph 10; and Case C-480/93 P *Zunis Holding and Others* v *Commission* [1996] ECR I-1, paragraph 14). In that regard, the defendant refers to

the case-law according to which, where an applicant allows the time-limit for bringing an action against a decision unequivocally laying down a measure with legal effects affecting his interests and binding on him to expire, he cannot start time running again by asking the institution to reconsider its decision and by bringing an action against the refusal confirming the decision previously taken (Case T–514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 44).

27 In its observations on the plea of inadmissibility, the applicant challenges the Commission's arguments.

28 It states, by way of a preliminary, that the contested decisions are those contained in the three letters from the Commission, that is, the letters of 2 and 13 December 2004 and 24 January 2005.

29 The applicant submits that in its plea of inadmissibility the Commission failed to refer to the letter of 24 December 2004 and the letter of 24 January 2005. The latter one contradicts, in particular, the Commission's argument that the letters sent after that of 2 December 2004 were not based on any new factors and did not lead to a re-examination of the decision contained in it.

30 According to the applicant, several factors lead to that conclusion. In particular, the fact that, in the letter of 24 December 2004, the Head of Section, Financial Management and Procurement, stated expressly that it was necessary to take a closer look at the problem, and indicated that the applicant would receive a reply within an exceptional period of three weeks, is evidence that the case was, in fact, reconsidered by the Delegation. Furthermore, that corresponds to what the applicant understood from the telephone conversations it had with the officials handling the case. In the same way, the statement 'I have taken due note of your explanations …' contained in that letter shows clearly that new information had been submitted to the Delegation by the applicant.

31 In any event, the letters of 24 December 2004 and 24 January 2005 constitute the Commission's response to the applicant's request for re-examination of its bid set out in the letter of 23 December 2004. Consequently, the decision contained in the letter of 24 January 2005, signed by the Head of the Delegation, must be regarded as a new decision, producing legal effects and capable of being challenged in accordance with Article 230 EC. It follows that the application was lodged within the time-limits, since the period in which to bring an action against the decision of 24 January 2005 expired only on 3 April 2005.

32 Moreover, the fact that the letter concerned was signed by the Head of the Delegation, and not by the official responsible for the tender procedure, implies that he had re-examined the file, since he had not been involved previously in the tender evaluation procedure, and that therefore he must necessarily have requested explanations, a copy of the file and the reports of the Evaluation Committee.

33 According to the applicant, the letter of 24 January 2005 must therefore be regarded as the act whereby the Commission notified its definitive decision, and not as confirmation of a prior act (Case 44/81 *Germany* v *Commission* [1982] ECR 1855, paragraph 12).

34 Furthermore, the applicant takes the view that, when a Community institution enters into discussions with a third party regarding the legality of its acts, as in this case, by declaring directly that it will re-examine its position, and requests an additional period within which to examine the arguments of that third party, it would be contrary to the principle of good faith for the institution to rely on the time-limit for bringing an action, as against the third party, immediately or shortly after giving him a definitive answer.

35 In that regard, the applicant recalls that it had to wait a month (from 24 December 2004 until 24 January 2005), at the Commission's specific request, before receiving the definitive decision rejecting its request for re-examination. Therefore, if the objection of inadmissibility were to be accepted, that would mean that the applicant had only 20 days within which to bring an action, instead of the two months provided for by Article 230 EC.

Findings of the Court

36 The plea alleging an absolute bar to proceeding raised by the Commission is divided into two parts, alleging, first, that the action is out of time as regards the first decision challenged, namely the letter of 2 December 2004, and, second, that the decision allegedly contained in the letter of 13 December 2004 does not constitute a challengeable act because it does not produce legal effects

capable of affecting the applicant's interests by bringing about a distinct change in its position. In any event, that letter should be regarded as being merely a confirmation of the decision contained in the letter of 2 December 2004 to reject the applicant's application. However, the defendant does not explicitly define its position with respect to the letter sent by the Head of the Delegation on 24 January 2005.

37 Therefore, it is appropriate to determine whether, as the defendant claims, the letter of 2 December 2004 must be regarded as a 'notification within the meaning of Article 230 EC'.

38 In that regard, it must be recalled, first of all, that, according to Article 100(2) of the Financial Regulation, the contracting authority is to notify all candidates whose applications are rejected of the grounds on which the decision was taken, and, under Article 149 of the implementing rules, it must as soon as possible inform candidates of decisions reached concerning the award of the contract.

39 In this case, it must be observed that the Delegation informed the applicant that its application had been rejected by a standard letter, the model for which is in Annex B8 of the Finance Guide for the external actions financed from the General Budget of the EC, sent by fax on 2 December 2004. The Delegation had ticked the box indicating that the application did not satisfy the criterion of technical capacity and that it was inferior to that of the applications which were accepted and stated, furthermore, that, out of 19 applications received following the publication of the contract notice, it had short-listed eight of them. As was stated in Article 21(3) of the contract notice, concerning the candidate's technical capacity, the latter had to demonstrate 'at least one project/reference of the execution of 6 of the 10 assignments listed under point 7 [of the contract notice] within the last three years', relating to the description of the contract.

40 By that letter, the Commission did, therefore, notify the applicant in a sufficiently precise and unequivocal manner of its definitive decision to reject the application at issue and stated the reasons for that, in accordance with the provisions of the Financial Regulation and the implementing rules mentioned above. Furthermore, it is clear from the words used by the applicant in its letter of 8 December 2004, and the correspondence subsequently exchanged between it and the Delegation, that it had indeed identified the reasons for the decision to reject its application. There is no other possible explanation for the arguments set out in that letter as regards the fact that the decision to reject the application did not take account of all the projects and references set out in sections 5 and 6 of the application form with reference to the list of areas of technical assistance set out in point 7 of the contract notice.

41 Contrary to the applicant's submissions, there is no doubt, therefore, that the letter at issue constitutes an act which brought about a distinct and immediate change in its legal position and which should, if necessary, have been challenged within the period provided for that purpose. Under the fifth paragraph of Article 230 EC, the period within which to institute an action for annulment is two months from the notification of the decision to the applicant, which in this case was 2 December 2004, and an additional 10 days on account of distance as provided for in Article 102(2) of the Rules of Procedure. The period for instituting an action for annulment against that decision therefore expired on 14 February 2005. Since the application was lodged on 22 February 2005, the action was brought out of time.

42 The applicant's argument that that letter did not contain a definitive decision, as evidenced, it argues, by the fact that after it was sent discussions with the Delegation continued and the latter sent the applicant a further three letters, does not alter that assessment. The fact that the applicant and the Delegation were in contact after the letter of 2 December 2004 was sent and that the Delegation sent other letters in response to issues raised by the applicant does nothing to alter the manifestly binding and definitive nature of that letter.

43 Furthermore, the applicant's reasoning is contradicted by its letter of 23 December 2004, in which it explicitly requested the Delegation to provide it with assurances as regards its right of appeal, which shows that it was perfectly aware of the fact that the decision of 2 December 2004 was an act adversely affecting it. The only uncertainty on the part of the applicant related to remedies, as is clear from the passage in the letter where it states the following:

'In case our legitimate appeal is rejected we do not feel that we will enjoy sufficient protection if we bring this issue before the Turkish courts. As an EU taxpayer we respectfully ask the European Commission to protect our rights arising from the EU public procurement legislation. In particular, we would like to ask that in case we are not immediately included in the short list, we have the

appeal rights as specified by the EU public procurement legislation and the Financial Regulation.'

44 Furthermore, it must be held, in that regard, that it was for the applicant alone to decide whether to bring an action for annulment and not to allow the mandatory time-limit of two months provided for for that purpose to expire. Therefore, no importance can be attached to the correspondence exchanged between the applicant and the Delegation after the decision to reject its application.

45 As regards the decisions supposedly contained in the letters from the Delegation of 13 December 2004 and 24 January 2005, it is appropriate to determine whether the latter merely confirmed therein the decision to reject the applicant's application without taking into consideration any new factor capable of producing binding legal effects capable of affecting the applicant's interests.

46 It should be remembered, in that regard, that according to settled case-law, actions for annulment brought against decisions which merely confirm earlier decisions which have not been contested within the time-limits are inadmissible (see, to that effect, the order of 7 December 2004 in Case C-521/03 P *Internationaler Hilfsfonds* v *Commission*, not published in the ECR, paragraph 41; Case T-275/94 *CB* v *Commission* [1995] ECR II-2169, paragraph 27; order in Case T-235/95 *Goldstein* v *Commission* [1998] ECR II-523, paragraph 41; order in Case T–84/97 *BEUC* v *Commission* [1998] ECR II-795, paragraph 52; and order in Case T–127/01 *Ripa di Meana* v *Parliament* [2002] ECR II-3005, paragraph 25). A decision is regarded as merely confirmatory of a previous decision if it contains no new factor as compared with a previous measure and was not preceded by a re–examination of the circumstances of the person to whom that measure was addressed (Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 14; order in *BEUC* v *Commission*, paragraph 52; Case T-186/98 *Inpesca* v *Commission* [2001] ECR II–557, paragraph 44; and order in *Internationaler Hilfsfonds* v *Commission*, paragraph 47).

47 The applicant submits in its observations on the plea of inadmissibility that the third decision contested, that is, the decision supposedly contained in the letter of 24 January 2005, constitutes the response of the Delegation to its letter of 23 December 2004, in which it had challenged the Evaluation Committee's decision not to include the applicant in the short-list and requested a re-examination of its application. That decision was adopted after a re-examination of the file and should therefore be regarded as a new decision producing legal effects and thus capable of being challenged, in accordance with Article 230 EC. The applicant argues essentially that the letter at issue must be regarded as the act by which the Commission notified its definitive decision, and not as the confirmation of a previous act.

48 In that regard, it is clear, as the case-law indicates, that whether a measure is confirmatory cannot be determined solely with reference to its content as compared with that of the previous decision which it confirms, but must also be appraised in the light of the nature of the request to which it constitutes a reply (see, to that effect, *Inpesca* v *Commission*, paragraph 45 and the case-law cited, and the order in Case T-308/02 *SGL Carbon* v *Commission* [2004] ECR II-1363, paragraph 52).

49 In particular, it is clear from that case-law that, if the measure constitutes the reply to a request in which substantial new facts are relied on, and whereby the administration is asked to reconsider its previous decision, that measure cannot be regarded as merely confirmatory, since it constitutes a decision taken on the basis of those facts and thus contains a new factor as compared with the previous decision. The existence of substantial new facts may justify the submission of a request for reconsideration of a previous decision which has become definitive. Conversely, if the request for reconsideration is not based on substantial new facts, an action against the decision refusing to reconsider it must be declared inadmissible (see, to that effect, *Inpesca* v *Commission*, paragraph 49, and the order in *SGL Carbon* v *Commission*, paragraph 54).

50 It must be observed that, in this case, the evidence relied on by the applicant in support of its request for re-examination of the decision to reject its application in no way constitutes substantial new facts. In the letter of 23 December 2004, the applicant merely challenges the letter of 13 December 2004 which it had just received in which the Delegation repeated the grounds which were the basis of the decision to reject its application. It simply inserted a table in which it matched the areas of technical assistance set out in point 7 of the contract notice with the references mentioned in its application form, numbered in the same way as the latter.

51 Likewise, it cannot be held that the letter of 13 December 2004, sent by the Delegation in response to the applicant's letter of 8 December 2004, in which the applicant had already set out its objections as to the reasons which were the basis of the rejection of its application, is based on new

factors and was preceded by a re-examination of the applicant's situation.

52 In that letter, the Delegation essentially merely restated its position, as already set out in its decision of 2 December 2004. It states, in particular, that the selection was made solely on the basis of the criteria mentioned in point 7 of the contract notice and that all the applications received were then compared in order to determine the eight applicants to be short-listed. In the final paragraph, the Delegation states, finally, that the applicant's application did not satisfy the criterion relating to the minimum number of references (six out of the ten listed) to projects in the contract notice, whereas that criterion was fulfilled by the candidates selected.

53 The same is true as regards the note of 24 January 2005, in which the Head of Delegation merely repeated what the Head of Section, Financial Management and Procurement had stated in the letter of 13 December 2004.

54 It must be held, therefore, that none of the information contained in those two letters constitutes a new factor of such a kind as to confer on them the character of new decisions adversely affecting the applicant. Furthermore, there is nothing either in the file submitted to the Court of First Instance or in the final contested letter to indicate that the sending of that letter was preceded by a re-examination of the applicant's application (see, to that effect, the order in Case T-372/02 *Internationaler Hilfsfonds* v *Commission* [2003] ECR II-4389, paragraph 44). Moreover, the statement of reasons contained in those two letters is substantially the same as that contained in the first contested letter.

55 It must also be observed that according to settled case-law, where an applicant allows the time-limit for bringing an action against a decision unequivocally laying down a measure with legal effects affecting his interests and binding on him to expire, he cannot start time running again by asking the institution to reconsider its decision and by bringing an action against the refusal confirming the decision previously taken (*Cobrecaf and Others* v *Commission*, paragraph 44; see also, to that effect, the order in Case C-250/90 *Control Union* v *Commission* [1991] ECR I-3585, paragraph 14).

56 Finally, as regards the applicant's claim that it is clear from the letter sent to it by the Delegation that the latter had assured the applicant that its application would be re-examined and that it would reply within three weeks to the applicant's request for re-examination, the applicant's allegation that the conduct of the Commission was such as to give rise to pardonable confusion on its part as to the definitive nature of the letter of 2 December 2004 is unfounded, since the terms of that letter clearly disclose both the Delegation's decision to reject its application and the reasons for the decision.

57 In any event, even if the conduct of the Commission, assuming it were established, caused the application to be lodged out of time that would not have made the action admissible by derogation from the rules governing the time-limits for initiating proceedings. Such conduct could not have led the applicant to make an excusable error, that is to say, one which the Community judicature accepts as permitting a derogation from the rules governing time-limits for initiating proceedings. The concept of excusable error, the direct source of which is a concern for observance of the principles of legal certainty and the protection of legitimate expectations, can, according to settled case-law, concern only exceptional circumstances in which, in particular, the conduct of the institution concerned was, either alone or to a decisive extent, such as to give rise to pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally prudent person (Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraphs 28 and 29, confirmed on appeal in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 26).

58 Although such may be the case where the commencement of an action out of time is caused by the provision, by the institution concerned, of wrong information creating pardonable confusion in the mind of a party acting in the manner mentioned above, it cannot be the case where, as here, the party cannot harbour any doubt that the measure notified to it is in the nature of a decision (see, to that effect, the order in Case T-218/01 *Laboratoire Monique Rémy* v *Commission* [2002] ECR II–2139, paragraph 30, and the Opinion of Advocate General Tizzano in Case C–193/01 P *Pitsiorlas* v *Counciland ECB* [2003] ECR I-4837, I-4839, paragraph 20).

59 In any event, it must be observed that, in this case, the applicant has not established or even alleged the existence of excusable error.

60 In the light of all of the foregoing considerations, it must be held that, as the letters of 13 December 2004 and 24 January 2005 do not contain any new factor as regards the decision

contained in the letter of 2 December 2004 and there was no re-examination of the applicant's position, those letters are merely decisions confirming the decision of 2 December 2004. Consequently, since the latter was not challenged within a period of two months from the date of its notification to the applicant and an additional 10 days on account of distance as referred to in Article 102(2) of the Rules of Procedure, the action must be dismissed as inadmissible.

Costs

61 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The action is dismissed as inadmissible.

2. The applicant shall pay the costs.

Luxembourg, 10 October 2006.

E. Coulon	M. Jaeger
Registrar	President

*Language of the case: English.

Order of the Court of First Instance (Third Chamber)
First Instance (Third Chamber)First Instance (Third Chamber)2006. Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities. Public service contracts - Call for tenders concerning technical assistance to improve the information and communication technology system in the State Institute of Statistics of the Republic of Turkey - Application rejected - Period for bringing proceedings - Confirmatory act - Inadmissibility. Case T-106/05.

DOCNUM	62005B0106
AUTHOR	Court of First Instance of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2006 Page II-00082*
DOC	2006/10/10
LODGED	2005/02/22
JURCIT	11997E230 : N 37 47 11997E230-L5 : N 41 31991Q0530-A102P2 : N 41 60 31991Q0530-A114P1 : N 21 31996R1488 : N 9 32002R1605 : N 1 32002R1605-A100P2 : N 2 38 32002R2342 : N 1 32002R2342-A149 : N 3 38 61977J0054 : N 46 61990A0012 : N 57 61990O0250 : N 55 61991J0195 : N 57 61993A0514 : N 55 61994A0275 : N 46 61995B0235 : N 46 61997B0084 : N 46 61998A0186 : N 46 49 62001B0127 : N 46 62001J0193 : N 58 62001B0218 : N 58 62002B0308 : N 48 49 62002B0372 : N 54 62003O0521 : N 46

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SUB	Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	English
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Greece
NOTES	Meisse, Eric: Conditions de recevabilité du recours, Europe 2006 Décembre Comm. no 351 p.12-13 ; Braun, Peter: Time-limit to Bring Proceedings Against Decisions of the European Commission: Case T-106/05, Public Procurement Law Review 2007 p.NA25-NA28
PROCEDU	Action for annulment
DATES	of document: 10/10/2006 of application: 22/02/2005

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Documents relatifs à la même affaire

Ordonnance du Tribunal (troisième chambre) du 10 octobre 2006 – Evropaïki Dynamiki/Commission(affaire T-106/05)

« Marchés publics de services – Appel d'offres relatif à une assistance technique en vue de l'amélioration du système de technologie de l'information et de la communication de l'Institut national des statistiques de la République de Turquie – Rejet de la candidature – Délai – Acte confirmatif – Irrecevabilité »

1. *Recours en annulation - Recours dirigé contre une décision confirmative d'une décision non attaquée dans les délais (Art. 230 CE) (cf. points 46, 48-49, 54-55, 60)*

2. *Procédure - Délais de recours – Forclusion (cf. points 57-58, 60)*

Objet

D'une part, une demande d'annulation de la décision de la Commission de ne pas retenir sur la liste restreinte la candidature de la requérante, dans le cadre de la procédure d'appel d'offres concernant la fourniture d'une assistance technique en vue de l'amélioration du système de technologies de l'information et de la communication (TIC) de l'Institut national des statistiques de la République de Turquie et, d'autre part, une demande d'annulation des décisions rejetant la demande de la requérante de revenir sur la décision de ne pas retenir sa candidature.

Dispositif

1) Le recours est rejeté comme irrecevable.

2) La requérante est condamnée aux dépens.

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Order of the Court of First Instance of 10 October 2006 - Evropaiki Dinamiki v Commission of the European Communities

(Case T-106/05) [1]

(Public service contracts - Call for tenders concerning technical assistance to improve the information and communication technology system in the State Institute of Statistics of the Republic of Turkey - Application rejected - Period for bringing proceedings - Confirmatory act - Inadmissibility)

Language of the case: English

Parties

Applicant: Evropaiki Dinamiki - Proigmena Sistimata Tilepikinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, lawyer,)

Defendant: Commission of the European Communities (represented by: C. Tufvesson and K. Kańska, acting as Agents)

Re:

Annulment of the Commission's decisions not to select the tender submitted by the applicant in the context of a call for tenders for the provision of technical assistance for the improvement of the system of Information and Communication Technologies (ICT) of the Turkish National Institute for Statistics and of the decisions rejecting the applicant's request to renew the decision not to short-list it.

Operative part of the order

The action is dismissed as inadmissible.

The applicant shall pay the costs.

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[1] - OJ C 115, 14. 5. 2005.

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Notice for the OJ

Action brought on 22 February 2005 by European Dynamics S.A. against the Commission of the European Communities

(Case T-106/05)

Language of the case: English

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 22 February 2005 by European Dynamics S.A., established in Athens (Greece), represented by N. Kostakopoulos, lawyer.

The applicant claims that the Court should:

- annul the Commission's decision not to short-list the applicant's application, filed in response to the International Restricted Tender EuropeAid/117579/C/SV/TR for the "Technical Assistance to improve the Information and Communication Technology System in the State Institute of Statistics of Turkey - Upgrading the Statistical System of Turkey"1 and to short-list other candidates;

- annul the decision to reject the applicant's request to review its decision communicated to the applicant by the Commission's letter dated 13 December 2004;

- order the Commission to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

The applicant company filed an application in response to the Commission's International Restricted Tender EuropeAid/117579/C/SV/TR for the "Technical Assistance to improve the Information and Communication Technology System in the State Institute of Statistics of Turkey - Upgrading the Statistical System of Turkey". By the contested decision the applicant's application was not short-listed.

In support of its application to annul the contested decision the applicant contends that the defendant violated Regulation 1488/1996, the Financial Regulation2 and the regulation applying it, as well as Directive 92/503 by using evaluation criteria, that were not well specified in the call for tenders. According to the applicant, if the Commission intended to proceed to a comparative analysis of the candidates' capacities, as it appears to have done, then it should have noted so in the call for tenders.

The applicant also claims that the defendant committed manifest errors of appreciation in the evaluation of the bid it had submitted. The applicant contests the Commission's assessment of its technical capacity.

The applicant finally submits that the Commission failed to provide adequate reasons for its decision, in violation of Article 253 EC.

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[1] - OJ 2004/S 187-158886

[2] - Coucil Regulatio (EC, Euratom) No 1605/2002 of 25 Jue 2002 o the Fiacial Regulatio applicable to the geeral budget of the Europea Commuities, OJ L 248, 16/09/2002 p.1

[3] - Council Directive 92/5/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 29, 24/7/1992 p. 1

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Notice for the OJ

Action brought on 28 February 2005 by CEGELEC SA against European Parliament

(Case T-104/05)

Language of the case : French

An action against the European Parliament was brought before the Court of First Instance of the European Communities on 28 February 2005 by CEGELEC SA, whose registered office is in Brussels, represented by André Delvaux and Véronique Bertrand, lawyers.

The applicant claims that the Court of First Instance should:

- declare the action for annulment admissible;

- annul the decision of 15 December 2004, by which the European Parliament rejected the tender submitted by CEGELEC SA and awarded to GROUP 4 Technology SA the three components making up the contract for the supply and commissioning of video surveillance systems for the three main workplaces of the European Parliament, which was the subject of a contract notice published in *Official Journal of the European Union* S 61 of 26 March 2004, and for which the reasons were notified to CEGELEC SA by letter of 16 December 2004;

- order the European Parliament to pay the costs.

Please in law and main arguments

The applicant seeks annulment of the Parliament's decision to reject the applicant's tender in the call-for-tenders procedure concerning the provision of video surveillance systems at the European Parliament's three main workplaces and to award the contract to another tenderer.

In support of its application, the applicant describes a number of alleged infringements of the tendering conditions and of Regulations Nos 1605/2002 1 and 2432/2002 2 and of Directives 92/50 3, 93/36 4 and 2004/18 5, which consist more particularly of:

- inadequate statement of the reasons for the contested decision notified to the applicant;

- failure to apply the rules for awards of contract and the weighting system provided for in the tendering specifications;

- the fact that, in the light of its size, the tender accepted was not in conformity with the obligation to submit a tender in writing in one of the official languages of the Union;

- the fact that the Parliament, in breach of the principle of equal treatment for tenderers, awarded the contract on the basis of cameras which had not been demonstrated at the 'photos-tests' session;

- the alleged belatedness of the tender that was accepted.

_____

[1] - OJ L 48, p. 1.

[2] - OJ L 357, p. 1.

[3] - OJ L 29, p. 1.

[4] - OJ L 199, p. 1.

[5] - OJ L 134, p. 114.

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JUDGMENT OF THE GENERAL COURT (Third Chamber)

2 March 2010 (*)

(Public service contracts – EMSA tendering procedures – Provision of information technology services – Rejection of the tender – Action for annulment – Jurisdiction of the Court – Non–compliance of a tender – Equal treatment – Compliance with the award criteria set out in the tender specifications or the contract notice – Establishment of sub-criteria for the award criteria – Manifest error of assessment – Obligation to state the reasons on which a decision is based)

In Case T–70/05,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis, lawyer,

applicant,

v

European Maritime Safety Agency (EMSA), represented by W. de Ruiter and J. Menze, acting as Agents, and J. Stuyck, lawyer,

defendant,

ACTION for annulment of the decisions of EMSA not to accept the tenders submitted by the applicant in tendering procedures EMSA C–1/01/04, relating to the contract entitled 'SafeSeaNet Validation and further development', and EMSA C–2/06/04, relating to the contract entitled 'Specification and development of a marine casualty database, network and management system', and to award those contracts to other tenderers,

THE GENERAL COURT (Third Chamber),

composed of J. Azizi, President, E. Cremona (Rapporteur) and S. Frimodt Nielsen, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 20 January 2009,

gives the following

Judgment

Legal context

1 The European Maritime Safety Agency (EMSA) was established by Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 (OJ 2002 L 208, p. 1). Its task is to ensure a high, uniform and efficient level of maritime safety and of prevention of pollution caused by ships in the European Union.

2 Pursuant to Article 5(1) of that regulation, EMSA is a body of the Community and has legal personality.

3 Article 8 of Regulation No 1406/2002 provides:

‘1. The contractual liability of [EMSA] shall be governed by the law applicable to the contract in question.

2. The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by [EMSA].

3. In the case of non-contractual liability, [EMSA] shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties.

4. The Court of Justice shall have jurisdiction in disputes relating to the compensation for damage referred to in paragraph 3.

5. The personal liability of its servants towards [EMSA] shall be governed by the provisions laid down in the Staff Regulations or Conditions of employment applicable to them.’

4 Article 185(1) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) (‘the Financial Regulation’) provides:

‘The Commission shall adopt a framework financial regulation for the bodies set up by the Communities and having legal personality which actually receive grants charged to the budget. The financial rules of these bodies may not depart from the framework regulation except where their specific operating needs so require and with the Commission’s prior consent.’

5 Article 74 of Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework financial regulation for the bodies referred to in Article 185 of the Financial Regulation (OJ 2002 L 357, p. 72), in the version applicable at the material time, states:

‘As regards procurement, the relevant provisions of the general Financial Regulation and the detailed rules for implementing that Regulation shall apply.’

6 That provision is repeated in Article 74 of the EMSA financial regulation adopted by its Administrative Board on 3 July 2003.

7 The award of service contracts by the bodies referred to in Article 185 of the Financial Regulation is, accordingly, subject to the provisions of Title V of Part One of the Financial Regulation and to the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) (‘the implementing rules’). Those provisions are based on the relevant directives, in particular, with regard to service contracts, on Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended.

8 Under Article 89(1) of the Financial Regulation:

‘All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.’

9 Article 97 of the Financial Regulation, in the version applicable at the material time, states:

‘1. The selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders shall be defined in advance and set out in the call for tender.

2. Contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure.’

10 In that regard, Article 138 of the implementing rules, in the version applicable at the material time, states:

‘...

2. The tender offering the best value for money shall be the one with the best price-quality ratio,

taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

3. The contracting authority shall specify, in the contract notice or in the [tender] specifications, the weighting it will apply to each of the criteria for determining best value for money.

The weighting applied to price in relation to the other criteria must not result in the neutralisation of price in the choice of contractor.

If, in exceptional cases, weighting is technically impossible, particularly on account of the subject of the contract, the contracting authority shall merely specify the decreasing order of importance in which the criteria are to be applied.'

11 Article 98 of the Financial Regulation provides:

'1. The arrangements for submitting tenders shall ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously.

...

3. With the exception of the contracts involving small amounts ..., applications and tenders shall be opened by an opening board appointed for this purpose. Any tender or application declared by the board not to satisfy the conditions laid down shall be rejected.

4. All applications or tenders declared by the opening board to satisfy the conditions laid down shall be evaluated, on the basis of the selection and award criteria laid down in the documents relating to the call for tenders, by a committee appointed for this purpose with a view to proposing to whom the contract should be awarded.'

12 In the version applicable at the material time, Article 143(2) of the implementing rules provided:

'Tenderers may submit tenders:

(a) by post, for which purposes the invitation to tender documents shall specify that the relevant date is to be the date of despatch by registered post, as evidenced by the postmark; or

(b) by hand-delivery to the premises of the institution by the tenderer in person or by an agent, including courier service; for which purposes the invitation to tender documents shall specify, in addition to the information referred to in point (a) of Article 130(2), the department to which tenders are to be delivered against a signed and dated receipt.'

13 Article 100(2) of the Financial Regulation provides:

'The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

14 In that regard, Article 149 of the implementing rules, in the version applicable at the material time, states:

'1. The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract, including the grounds for any decision not to award a contract for which there has been competitive tendering or to recommence the procedure.

2. The contracting authority shall, within not more than fifteen calendar days from the date on which a written request is received, communicate the information provided for in Article 100(2) of the Financial Regulation.'

Background to the dispute

15 The applicant, Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, is a company established under Greek law, active in the field of information technology and communications.

16 The present case concerns two calls for tender, relating to 'SafeSeaNet validation and further development', under reference EMSA C–1/01/04–2004 ('call for tenders C–1/01/04'), and to 'specification and development of a marine casualty database, network and management system (marine casualty information platform)', under reference EMSA C–2/06/04 ('call for tenders C–2/06/04').

1. Tendering procedure EMSA C-1/01/04

17 By a contract notice of 1 July 2004 published in the Supplement to the *Official Journal of the European Union* (OJ 2004 S 126), EMSA launched call for tenders C-1/01/04. The time-limit for submitting tenders was 9 August 2004.

18 Point 13 of the tender specifications, entitled 'Criteria for the award of the contract', is worded as follows:

'… The contract will be awarded to the tenderer who submits the most economically advantageous bid, as assessed on the basis of the following factors:

(a) Technical evaluation criteria in their order of importance as weighted by percentage:

1. Proposed methodology for the project – this includes the detailed proposals of how the project would be carried out including milestones and deliverables (as defined in [point] 3 [of the tender specifications]). (40%)

2. Understanding of the specifications in terms of reference and the succinct presentation of that understanding. (20%)

3. Quality of the operational services (Helpdesk). (10%)

(b) Total price. (30%)

Only bids that have reached a total score of a minimum of 70% and a minimum score of 60% for each criteri[on] will be taken into consideration for awarding the contract.

…'

19 With regard to the first of those three award criteria, point 3 of the tender specifications, entitled 'Reports and documents to be submitted', provided that tenders were to include detailed information regarding the project implementation structure, each work package was to be clearly defined, and the project implementation structure was to include (as a minimum) the following: horizontal activities (point 3.1); a description of the project management team and responsibilities (point 3.2); quality control (point 3.3); deliverables on project management level (point 3.4); work package description and relations (point 3.5); and other relevant information concerning the submission of reports (point 3.6).

20 On 1 July 2004, the invitation to tender and the tender specifications were sent to the applicant.

21 The applicant claims that it sent to EMSA, by fax of 31 July 2004, a request for additional information. It claims to have repeated that request by fax of 1 August 2004.

22 By email of 2 August 2004, EMSA informed the applicant that the fax of 1 August 2004, containing that request for information, had been received incomplete and asked it to resend its questions by email, which the applicant did that same day. In that email, the applicant stated that it had tried to send the fax on 31 July 2004 and again on 1 August 2004, but that there seemed to have been a

problem in transmitting the fax. It therefore asked that its request be dealt with, since the last day for submitting such requests, namely Saturday, 31 July 2004, was not a working day.

23 By email of 3 August 2004, EMSA informed the applicant that its questions would not be answered on account of their late submission, in accordance with point 8 of the invitation to tender. By email of the same day, the applicant pointed out once more that it had tried in vain to send that request for information on the days indicated and that, in any event, since the deadline for submitting questions was Saturday, 31 July 2004, it should have been extended to the next working day, namely, Monday 2 August 2004.

24 On 9 August 2004, the applicant submitted its tender.

25 By letter of 6 December 2004, EMSA informed the applicant that its tender had not been selected because its price/quality ratio was worse than that of the successful tender.

26 By fax of 7 December 2004, the applicant asked EMSA for the name of the successful tenderer, the characteristics and relative advantages and the scores given under each award criterion to both the applicant's tender and that of the successful tenderer, a copy of the evaluation committee report and a comparison between its financial offer and that of the successful tenderer.

27 By letter dated 16 December 2004, which the applicant states it did not receive until 7 January 2005, EMSA informed the applicant of the scores achieved by its tender under each award criterion, as well as the total score of the successful tender. With regard to the latter's characteristics, EMSA stated as follows:

'clear approach in terms of methodology to be used for managing the whole project. The description of the tasks is realistic (well completed with tables indicating the effort and resources affected, Gantt diagram and breakdown of tasks); the number of man days offered is sufficient; deliverables have been assigned per type of task; good understanding of the project and good approach in the management plan; the proposed Service Level Agreement complies with the requirements of the project.'

28 On 5 January 2005, the applicant sent a fax to EMSA stating that it had not been informed about the outcome of the contract award process in respect of the two calls for tender within the time-limits imposed by the Financial Regulation. It also complained that EMSA had proceeded to the signature of contracts with the selected tenderers and published this information in the *Official Journal*.

29 EMSA replied, by letter and fax of 7 January 2005, attaching a copy of its letter of 16 December 2004.

30 By fax of 18 January 2005, the applicant pointed out that it had received the letter from EMSA dated 16 December 2004 late. It also complained that EMSA had infringed the Financial Regulation in that it had failed to answer the applicant's request for information within the time-limit, had not informed the applicant of the name of the successful tenderer, the amount of its financial offer, or the technical evaluation of its tender in comparison to the applicant's own, and had decided to proceed to signature of the contract. Furthermore, it asserted that the reference made by EMSA, in its letter of 16 December 2004, to the score given to the applicant's tender by the evaluation committee for each award criterion was not detailed and did not include reasons for its decision. Finally, the applicant requested a number of clarifications with regard to the evaluation committee's assessment.

31 By fax of 9 February 2005, EMSA replied to the applicant, informing it of the name of the successful tenderer and stating that the applicant had already received the result of the tender evaluation and that more detailed information, such as financial and commercial details of the successful tenderer, would harm that party's legitimate interests and could therefore not be disclosed.

2. Tendering procedure EMSA C-2/06/04

32 By a contract notice of 3 July 2004, published in the Supplement to the *Official Journal of the European Union* (OJ 2004 S 128), EMSA launched call for tenders C–2/06/04. The time-limit for submitting tenders was 9 August 2004.

33 Point 13 of the tender specifications, entitled 'Criteria for the award of the contract', reads as follows:

'... The contract will be awarded to the tenderer who submits the most economically advantageous bid, as assessed on the basis of the following factors as weighted by percentage:

(a) Technical evaluation criteria: 70% in total

Technical criteria in their order of importance

– proposed methodology – this must include detailed proposals of how the work as a whole would be carried out and by whom (named individuals) including key milestones and deliverables (40%)

– understanding of the specification in the terms of reference and a succinct presentation of that understanding, and previous experience with comparable work (20%)

– quality of proposed tools, programs and modules (10%)

(b) Total price: (30%)

Only bids that have reached a total score of a minimum of 70% and a minimum score of 60% for each criteri[on] will be taken into consideration for awarding the contract.'

34 On 9 July 2004, the invitation to tender and the tender specifications were sent to the applicant.

35 By email of 26 July 2004, sent to all undertakings which had shown an interest in the call for tenders, the EMSA project officer responsible supplied a certain amount of additional information concerning the call for tenders in question.

36 As stated in paragraph 21 above, the applicant claims that it sent, by fax of 31 July 2004, a request for additional information also in respect of this call for tenders. It claims to have repeated that request on 1 August 2004.

37 On 2 August 2004, EMSA received that request for information by email. In that email, the applicant claims that it had tried to send the attached documents on 31 July 2004 and again on 1 August 2004 but that there had been a transmission problem with the fax. The applicant thus asked that the attached requests be considered, since the last day for their submission, namely Saturday, 31 July 2004, was not a working day.

38 By email of 3 August 2004 in response to requests for clarification of certain points in the tender specifications, EMSA sent to the applicant and to the other interested companies additional information concerning call for tenders C–2/06/04.

39 On 5 August 2004, EMSA informed the applicant that it would not reply to its questions because of their late submission, in accordance with point 8 of the invitation to tender.

40 On 9 August 2004, the applicant submitted a tender in respect of call for tenders C–2/06/04.

41 On 25 August 2004, the tender opening board – composed of four persons and appointed by EMSA on 16 July 2004 – opened the tenders, noting, in particular, that the tender submitted by SSPA Sweden AB ('SSPA'), received on 10 August 2004, namely one day after the deadline for the submission of tenders, required written confirmation of when it was despatched, since the envelope containing it did not bear any postmark.

42 On 26 August 2004, the president of the opening board sent a letter to SSPA, asking it to supply proof that the tender had been submitted within the deadline and by the method specified in the invitation to tender.

43 On examination of the documents produced by SSPA, the opening board decided, on 21 September 2004, to accept the tender submitted by that company.

44 By letter of 30 November 2004, which the applicant states it did not receive until 13 December

2004, EMSA informed it that its tender had not been selected because the price/quality ratio was worse than that of the successful tender.

45 On 7 December 2004, the applicant sent a fax to EMSA, which stated as its subject and referred to call for tenders C-1/01/04, requesting EMSA, inter alia, to inform it of whether its tender in respect of call for tenders C–2/06/04 had been accepted or rejected and to send it the same information as that requested for the first call for tenders.

46 By fax of 5 January 2005, the applicant indicated to EMSA that it had not received any information about the outcome of the two calls for tender within the time-limit imposed by the Financial Regulation. The applicant also complained about the fact that EMSA had proceeded to the signature of contracts with the successful tenderers and published this information in the *Official Journal*.

47 EMSA replied by letter of 6 January 2005, also sent by fax on 7 January 2005, giving the scores achieved by the applicant's tender, as well as the total score of the successful tender and a copy of the contract award notice published in the *Official Journal* containing the name of the successful tenderer. With regard to the characteristics of the successful tender, EMSA stated as follows:

'[t]he offer of the successful bidder reflected relevant expertise and was presented as a well-prepared proposal. The tasks and the role of the project leader were reasonably described. The team leader would supervise a team with a high degree of relevant expertise from prior projects which perfectly match the tendered project. A very good understanding of the project has been proven. The proposed tools have already been successfully applied and are compatible with the IT frame of EMSA.'

48 In response to that letter, the applicant sent a fax to EMSA on 18 January 2005 in which it complained that EMSA had infringed the Financial Regulation, because it had failed to answer the applicant's request for information within the time-limit imposed, had failed to communicate to the applicant the name of the successful tenderer, the amount of its financial offer, or the technical evaluation of its tender in comparison to the applicant's own, and had decided to proceed to signature of the contract. Finally, it requested a number of clarifications concerning the evaluation committee's assessment.

49 EMSA replied to the applicant by letter of 9 February 2005, stating that the applicant had already received the relevant information and that more detailed information, such as certain financial and commercial details of the successful tenderer, would harm that party's legitimate interests and could therefore not be disclosed.

Procedure and forms of order sought by the parties

50 By application lodged at the Court Registry on 14 February 2005, the applicant brought the present action.

51 Acting upon a report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, requested the parties to produce certain documents and EMSA to reply in writing to a question. The parties complied with those requests within the time-limit set.

52 The parties presented oral argument and their answers to the Court's questions at the hearing on 20 January 2009.

53 The applicant claims that the Court should:

– annul EMSA's decisions not to accept its tenders and to award the contracts to the successful tenderers;

– annul all of EMSA's subsequent decisions relating to the calls for tender at issue;

– order EMSA to pay the costs, even if the application is dismissed.

54 EMSA contends that the Court should:

– declare the action inadmissible or, in the alternative, dismiss it as unfounded;

– order the applicant to pay the costs.

Admissibility

55 Without formally raising an objection of inadmissibility, EMSA has put forward two pleas of inadmissibility, alleging that the Court does not have jurisdiction to hear an action brought on the basis of Article 230 EC against an act of EMSA and alleging the formal irregularity of the application. First of all, the Court will examine the first plea of inadmissibility.

1. The jurisdiction of the Court to hear an action brought on the basis of Article 230 EC against an act of EMSA

Arguments of the parties

56 EMSA submits that its acts, because of its status, are not subject to review pursuant to Article 230 EC. Since that article does not contain any explicit or implicit reference to acts of European Union agencies or bodies other than the institutions mentioned therein, the Court cannot review the legality of those acts. In its submission, Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, '*Les Verts*', is not applicable in this case, since it concerned review by the Courts of a decision of an institution and not of an agency.

57 Article 8 of Regulation No 1406/2002, by providing only for the jurisdiction of the Court of Justice in disputes relating to the contractual and non-contractual liability of EMSA, confirms, *a contrario*, that neither the General Court nor the Court of Justice has jurisdiction to review the legality of its acts. In addition, given that that provision refers only to the Court of Justice, it must be inferred that if any court has jurisdiction to give a ruling, it ought to be the Court of Justice and not the General Court.

58 The inadmissibility of an application for annulment of a decision taken by an agency is, moreover, confirmed by Case C–160/03 *Spain* v *Eurojust* [2005] ECR I–2077, paragraphs 35 to 37 and 40, and by the order in Case T–148/97 *Keeling* v *OHIM* [1998] ECR II–2217.

59 Since that judgment and that order introduce a double test in order to determine whether Article 230 EC applies – namely a reference to the body in that article and the lack of effective review by the Courts –, that would mean that both conditions must be satisfied and, in the present case, EMSA does not satisfy the first, since it is not referred to in Article 230 EC. In addition, even if each of those conditions were sufficient in itself, the second would not be satisfied, since Article 8 of Regulation No 1406/2002 provides for review by the Courts but limits its scope to disputes relating to the contractual and non-contractual liability of EMSA.

60 The applicant contests that plea of inadmissibility.

Findings of the Court

61 At the outset, it must be noted that agencies established on the basis of secondary legislation, such as EMSA, are not included in the list of institutions in the first paragraph of Article 230 EC.

62 It should also be noted that Article 8 of Regulation No 1406/2002 provides that the Court of Justice is to have jurisdiction in disputes relating to compensation for damage in the case of EMSA's non-contractual liability, and to give judgment pursuant to any arbitration clause contained in a contract concluded by EMSA. However, that regulation does not provide that the Court of Justice has jurisdiction to give judgment on actions for annulment against other decisions adopted by EMSA.

63 Nevertheless, those considerations do not preclude the Court from reviewing the legality of those acts of EMSA which are not referred to in Article 8 of Regulation No 1406/2002.

64 As the Court observed in Case T–411/06 *Sogelma* v *EAR* [2008] ECR II–2771, paragraph 36, referring to *Les Verts*, paragraph 56 above, the European Community is a community based on the rule of law and the Treaty has established a complete system of legal remedies and procedures

designed to permit the Court of Justice to review the legality of measures adopted by the institutions. The general scheme of the Treaty is to make a direct action available against all measures adopted by the institutions which are intended to have legal effects. On that basis, the Court of Justice accordingly concluded, in *Les Verts*, paragraph 56 above, that an action for annulment could be brought against measures of the European Parliament intended to have legal effects vis-à-vis third parties, even though the provision of the Treaty on actions for annulment, in the version then in force, referred only to acts of the Council and the Commission. The Court of Justice held that an interpretation of that provision which excluded measures adopted by the European Parliament from those which can be contested would have led to a result contrary both to the spirit of the Treaty as expressed in Article 164 of the EC Treaty (now Article 220 EC) and to its general scheme (see, to that effect, *Les Verts*, paragraph 56 above, paragraphs 23 to 25).

65 The general principle to be elicited from that judgment is that any act adopted by a body such as EMSA, which is intended to have legal effects vis-à-vis third parties, must be amenable to review by the Courts.

66 It is true that *Les Verts*, paragraph 56 above, refers only to the institutions, while EMSA, as noted in paragraph 61 above, is not one of the institutions referred to in Article 230 EC. Nevertheless, the situation of such bodies, endowed with the power to adopt acts intended to have legal effects vis-à-vis third parties – which is without any doubt the case where, in public procurement procedures, those bodies adopt decisions rejecting the tender of one tenderer and awarding the contract to another tenderer – is identical to the situation which gave rise to the judgment in *Les Verts*, paragraph 56 above. It cannot therefore be acceptable, in a community based on the rule of law, that such acts escape all review by the Courts (see, to that effect, *Sogelma* v *EAR*, paragraph 64 above, paragraph 37).

67 It follows that decisions which are adopted by EMSA in public procurement procedures and are intended to have legal effects vis-à-vis third parties are acts open to challenge.

68 That conclusion is not called into question by the case-law cited by EMSA in support of its argument concerning the inadmissibility of the action.

69 With regard to *Spain* v *Eurojust*, paragraph 58 above, it is true that the Court of Justice held in that case that the acts contested were not included in the list of acts the legality of which it may review under Article 230 EC (paragraph 37 of that judgment). However, in the following paragraph of that judgment, the Court observed that Article 41 EU, applicable to that case, did not provide that Article 230 EC is to apply to the provisions on police and judicial cooperation in criminal matters in Title VI of the Treaty on European Union, the jurisdiction of the Court of Justice in such matters being defined in Article 35 EU, to which Article 46(b) EU refers. Furthermore, as regards the right to effective judicial protection, the Court of Justice also held, in paragraphs 41 and 42 of that judgment, that the acts contested in that case were not exempt from all review by the Courts (see, to that effect, *Sogelma* v *EAR*, paragraph 64 above, paragraph 45).

70 In the order in *Keeling* v *OHIM*, paragraph 58 above, the General Court similarly did not confine itself to stating, in paragraph 32, that the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) was not one of the institutions of the Community listed in Article 4 of the EC Treaty (now Article 7 EC) and was not mentioned in the first paragraph of Article 173 of the EC Treaty (now Article 230 EC), but also found, in paragraph 33, that other remedies were potentially available against the contested decision of the President of OHIM, mentioning, inter alia, Article 179 of the EC Treaty (now Article 236 EC). That order therefore does not preclude an action lying under Article 230 EC against a decision of a body not mentioned in that article (see, to that effect, *Sogelma* v *EAR*, paragraph 64 above, paragraph 46).

71 The case-law relied on by EMSA does not therefore call into question the finding that an act of such a body which is intended to have legal effects vis-à-vis third parties is not exempt from review by the Courts.

72 Moreover, that solution cannot be called into question by the interpretation of *Sogelma* v *EAR*, paragraph 64 above, relied on by EMSA at the hearing, to the effect that its situation is different from that of the European Agency for Reconstruction (EAR), since that agency was made responsible by the Commission, in connection with the implementation of Community assistance to Serbia and Montenegro, for preparing and evaluating invitations to tender and awarding contracts. It follows, EMSA argued, that decisions which the Commission would have taken itself, if it had not delegated its powers, could not cease to be subject to review by the Courts solely because the

Commission had delegated its powers to the EAR, if a legal vacuum was not to be created.

73 EMSA's interpretation disregards the terms of paragraphs 39 and 40 of *Sogelma* v *EAR*, paragraph 64 above, from which it is apparent that the argument based on the nature of the power on the basis of which the EAR acts is referred to by the Court for the sake of completeness and is intended only to reinforce the conclusion reached in paragraph 37 of that judgment, in which the Court states the general principle that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to review by the Courts. Moreover, contrary to EMSA's submissions, the identical risk of creating a legal vacuum would exist in the present case, if it were necessary to consider that the acts in question are exempt from review by the Courts.

74 Finally, with regard to EMSA's argument that it is possible to deduce from Article 8 of Regulation No 1406/2002 – which refers only to the Court of Justice – that if any court has jurisdiction to hear the present case, it ought to be the Court of Justice, not the General Court, it is sufficient to note that the words 'Court of Justice' are used here generically to designate the institution which now includes the Court of Justice, the General Court and a specialised court, the European Union Civil Service Tribunal. Consequently, the reference in Article 8 of Regulation No 1406/2002 to the 'Court of Justice' must be taken to be a reference to that institution and not to one of the courts of which it is composed (see, to that effect and by analogy, Case C–294/02 *Commission* v *AMI Semiconductor Belgium and Others* [2005] ECR I–2175, paragraph 49).

75 Thus the effect of the first paragraph of Article 230 EC, as interpreted in the light of *Les Verts*, paragraph 56 above (paragraphs 23 to 25), and of *Sogelma* v *EAR*, paragraph 64 above (paragraphs 36 and 37), is that the present action is admissible. Moreover, that solution is confirmed by the first paragraph of Article 263 TFEU, pursuant to which the Court of Justice of the European Union has jurisdiction to review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. Consequently, the first plea of inadmissibility raised by EMSA must be rejected.

2. The exceptio obscuri libelli

Arguments of the parties

76 By its plea alleging that the application is unclear, EMSA submits, in essence, that the applicant fails to specify which plea is applicable to which call for tenders and, accordingly, that the application, which confuses the two calls for tender, does not contain a sufficiently clear and precise summary of the pleas relied on, in breach of the Statute of the Court of Justice, the Rules of Procedure of the General Court and the relevant case-law.

77 The applicant disputes that assertion.

Findings of the Court

78 Under the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to proceedings before the General Court by virtue of the first paragraph of Article 53 thereof, and under Article 44(1)(c) of the Rules of Procedure of the General Court, an application must set out the subject-matter of the proceedings and a summary of the pleas in law on which it is based. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to exercise its review, if necessary without other supporting information. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible the essential facts and law on which it is based must be apparent from the text of the application itself, at the very least summarily, provided that the statement is coherent and intelligible (see, to that effect, Case T–387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II–961, paragraphs 106 and 107; Case T–210/00 *Biret et Cie* v *Council* [2002] ECR II–47, paragraph 34; and Case T–209/01 *Honeywell* v *Commission* [2005] ECR II–5527, paragraphs 55 and 56, and the case-law cited).

79 In the present case, the application satisfies the requirements laid down in the Rules of Procedure, since it enables both the defendant and the Court to identify the EMSA conduct complained of and the facts and circumstances which gave rise to the dispute. Furthermore, it is apparent from the documents before the Court that EMSA was able to organise its defence as necessary and to develop detailed arguments in response to each complaint raised by the applicant.

80 The plea alleging the formal irregularity of the application must, therefore, be rejected.

Substance

81 The applicant raises four pleas in law in support of its claims for annulment. The first alleges breach of the principles of good faith, good administration and diligence. The second alleges infringement of the Financial Regulation, the implementing rules and Directive 92/50. The third alleges manifest errors of assessment by EMSA. The fourth alleges lack of relevant information and failure to state reasons. In addition, following the lodging by EMSA, as annexes to its defence, of the administrative files relating to the two tendering procedures at issue, the applicant put forward, at the stage of the reply, an ad hoc series of complaints, in support of the pleas set out in its application, concerning a number of alleged breaches which are claimed to be apparent from those administrative files and, with regard to tendering procedure C-2/06/04, a separate plea in law alleging non-compliance of the tender submitted by the successful tenderer with the arrangements for submitting tenders set out in point 2 of the invitation to tender. The Court will first examine the claim for annulment of the decisions taken by EMSA in connection with tendering procedure C-2/06/04.

1. The claim for annulment of the decisions taken by EMSA in connection with tendering procedure C-2/06/04

The plea alleging non-compliance of the tender submitted by the successful tenderer

Arguments of the parties

82 In its reply, the applicant puts forward a new plea in law, alleging that the tender of the successful tenderer should not have been considered to have satisfied point 2(a) of the invitation to tender C–2/06/04. It is apparent from the file that the successful tenderer, not having any proof of the despatch of its tender, merely supplied *ex post facto* a certification letter from an official of the Swedish post office stating that the item had indeed been despatched on time. In the applicant's submission, a letter from a postal employee cannot replace 'the stamp of the post office' and 'act as proof'; accordingly it cannot constitute sufficient proof. Acceptance of such an irregularity can, according to the applicant, create a dangerous precedent and create uncertainty with regard to compliance with deadlines in public procurement.

83 EMSA counters that the purpose of point 2(a) of the invitation to tender at issue was to have a means of checking that all tenderers had delivered their tenders before the deadline. The decision of the evaluation committee to accept an alternative means of proof was, accordingly, reasonable, since in this case the post office, contrary to its normal practice, had not postmarked the item.

Findings of the Court

84 As a preliminary point, it must be noted that the plea alleging that the tender submitted by the successful tenderer in respect of call for tenders C–2/06/04 did not comply with the arrangements for lodging tenders set out in point 2 of the invitation to tender, raised by the applicant in its reply, constitutes a new plea. Nevertheless, it can be admitted on the basis of Article 48(2) of the Rules of Procedure since it is based on matters of law or of fact which came to light in the course of the procedure, namely the written record of the tender opening board in relation to that call for tenders, which EMSA put before the Court as an annex to its defence.

85 According to settled case-law, the contracting authority is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (see, to that effect, Case C–496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I–3801, paragraph 108; see also, to that effect, judgments of 12 July 2007 in Case T–250/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 45, and the case-law cited, and of 12 March 2008 in Case T–332/03 *European Service Network* v *Commission*, not published in the ECR, paragraph 122). A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (*Evropaïki Dynamiki* v *Commission*, paragraph 46).

86 It should also be borne in mind that, under Article 98(1) of the Financial Regulation, '[t]he arrangements for submitting tenders shall ensure that there is genuine competition and that the

contents of tenders remain confidential until they are all opened simultaneously'.

87 In the present case, the contract notice had fixed 9 August 2004 as the closing date for lodging tenders. Furthermore, the invitation to tender – which, pursuant to Article 130(2)(a) of the implementing rules, must at least specify 'the rules governing the lodging and presentation of tenders, including in particular the closing date and time for submission' – stated, in point 2, that tenders could be submitted either by registered mail to the address given and posted not later than 9 August 2004 (the stamp of the post office acting as proof), or by hand-delivery to the address given, made not later than 16:00 on 9 August 2004, submission of the tender being attested, in that case, by a signed and dated receipt issued by an official of EMSA. The invitation to tender also stated that any type of delivery other than registered mail, including delivery by 'private courier services', would be considered 'hand delivery'.

88 Those arrangements for communication comply with Article 143(2) of the implementing rules, cited in paragraph 12 above, under which 'tenderers may submit tenders … by post, for which purposes the invitation to tender documents shall specify that the relevant date is to be the date of despatch by registered post, as evidenced by the postmark, or … by hand-delivery to the premises of the institution by the tenderer in person or by an agent, including courier service, for which purposes the invitation to tender documents shall specify … the department to which tenders are to be delivered against a signed and dated receipt'. In that regard, it should be noted that, under Article 2 (9) of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), a 'registered item' means a service providing a flat-rate guarantee against risks of loss, theft or damage and supplying the sender, where appropriate upon request, with proof of the handing in of the postal item and/or of its delivery to the addressee.

89 Moreover, also under point 2 of the invitation to tender, non-compliance with those formal conditions was to entail rejection of the tenders at the opening session.

90 According to a first written record drafted by the tender opening board on 25 August 2004, SSPA's tender – namely that which was subsequently accepted – was not submitted with proof of despatch and, if it was to be declared to have satisfied the conditions laid down, it was therefore necessary for the tenderer to produce written confirmation of despatch. It is apparent from a second written record, dated 21 September 2004, that, in response to a letter from the tender opening board requesting it to produce that written confirmation, SSPA sent EMSA a certification letter from an employee of the Swedish post office confirming that the tender had been despatched in time. The tender opening board therefore considered SSPA's tender to have satisfied the conditions laid down.

91 The documents annexed to the second written record were produced for the file by EMSA in response to a measure of organisation of procedure ordered by the Court. They include copies of the envelopes containing the tender sent by SSPA, as received by EMSA, copies of the correspondence between them and copies of the receipt of the post office in Gothenburg dated 6 August 2004 and of the declaration signed by an employee of that post office dated 2 September 2004 confirming, in essence, that the envelope deemed to contain the tender in question had indeed been despatched by that post office on 6 August 2004.

92 In the first place, it is apparent from those documents that SSPA's tender reached EMSA on 10 August 2004, that is to say a day after the deadline for submission of tenders, and that there was no post office stamp, either of despatch or receipt, on the envelopes containing that tender.

93 In the second place, although EMSA stated, in the letter sent to SSPA on 26 August 2004, that 'the envelope did neither carry any indication that it was submitted in the form of post office registered mail, nor did it carry any date of submission to the post office', and asked SSPA to provide it with 'any further proof that [the tender had been submitted to EMSA] within the deadline and in the form asked for in [the] invitation to tender', SSPA sent it a mere receipt from a post office in Gothenburg.

94 In that regard, the argument put forward by EMSA at the hearing, that that receipt proves that the letter was logged – which can be equated, more or less, to its being registered – cannot succeed. Firstly, such a receipt cannot in any way be equated to a formal receipt for handing in a registered item, which, irrespective of whether the envelope is postmarked, is, as a general rule, issued to the sender as proof that the postal item has been handed in, as set out in paragraph 88 above. The receipt from Gothenburg does not bear the name of the sender, the name of the addressee, or even the destination of the item or anything else to show that it related to the despatch of a registered

item. Furthermore, it is apparent from the file that EMSA considered another tenderer's bid to have satisfied the requirements laid down solely upon production by that tenderer, of its own initiative, of a formal receipt indicating the date on which the registered item was sent and a digital code linking it to the envelope containing that tender, although the tender had initially been excluded on the ground that the envelope containing it was stamped only with the date of receipt. Secondly, contrary to the suggestion made by EMSA at the hearing, it is clear from the file that it was not the receipt from Gothenburg which, finally, induced it to consider SSPA's tender to have satisfied the requirements laid down, but the declaration of the employee of the Swedish post office, whereas, in the case of the abovementioned tenderer, EMSA considered the formal receipt which that tenderer submitted after learning that its tender had been rejected to be sufficient proof.

95 In the third place, the declaration by the employee of the post office in Gothenburg states: 'I hereby certify …, after having examined the attached copy of the receipt … along with the photocopy of the delivered envelope, that this envelope was mailed from the above named post office on Friday, 6th August, 2004'. The employee of the Swedish post office thus declared that he had despatched the envelope deemed to contain SSPA's tender on 6 August 2004, firstly, without however explaining why there was no post office stamp on that envelope and, secondly, omitting to indicate whether the item had been sent by registered mail. When asked at the hearing about that point, EMSA was unable to show that the item had been sent by registered mail.

96 There is, therefore, nothing in the file to show that SSPA's tender was submitted by registered mail.

97 Accordingly, the question arises whether SSPA's tender ought to have been, first, opened by the tender opening board and, subsequently, examined by the evaluation committee, even though it was received at EMSA on the day after the closing date for the submission of tenders.

98 In that regard, it should be borne in mind that the closing date and time for receipt of tenders were fixed, in the contract notice, on 9 August 2004 at 16:00. It is clear from point 2 of the invitation to tender that, as a general rule, tenders were to reach EMSA no later than the date and time stated above, whether they were tenders submitted by hand delivery or tenders delivered by private courier services, the only exception to that rule being tenders sent by post office registered mail, which had to be posted no later than 9 August 2004 – although receipt could be later – the stamp of the post office acting as proof of the date of posting. It follows that, as an exception, the possibility of having tenders arrive after the closing date and time fixed, as a rule, for their receipt must be interpreted strictly.

99 It should next be observed that point 2(a) of the invitation to tender sets out two distinct formal conditions to be met by a tenderer intending to submit its tender by post, which are the closing date for posting the tender and the fact that it must be sent by registered mail. Those conditions, although complementary, are of independent significance in the assessment of whether a tender has been submitted in compliance with the provisions in the invitation to tender documents and Article 143 of the implementing rules.

100 Compliance with those two conditions – the importance of which had been expressly pointed out by EMSA in the letter sent to SSPA on 26 August 2004 – must, accordingly, be checked by the contracting authority, more specifically by the tender opening board, before it goes on to open the tenders and, subsequently, to examine them. In that regard, the tender opening board does not have any discretion: once it has been found that a tender received after the closing date was not sent in accordance with the requirements under the invitation to tender and the implementing rules, the board can only reject that tender, as pointed out in paragraph 86 above.

101 Moreover, the stage of opening the tenders – the rules for conduct of which are set out in Article 145 of the implementing rules – is characterised precisely by its formal nature and is intended to enable a board, made up of at least three persons, to assess and ensure compliance with the rules concerning, in particular, the arrangements for submission of the tenders, having regard to the importance of those rules in public procurement procedures. The members of the board are to initial, in particular, the documents proving the date and time of despatch of each tender and sign the written record of the opening of the tenders received, which is to identify those tenders which satisfy the requirements and those which do not, and which is to give the grounds on which tenders were rejected for non-compliance, by reference to the methods of submitting tenders referred to in Article 143 of the implementing rules. These are, therefore, formalities compliance with which is essential for the purposes of public procurement procedures.

102 In the light of the foregoing considerations and of the principle of equal treatment of tenderers,

compliance with which must, as set out in paragraph 85 above, be ensured at each stage of a tendering procedure, the tender submitted by SSPA in the present case should not have been opened or accepted by the tender opening board since, in the absence of a post office stamp as evidence and of proof that it was sent by registered mail, it should have been deemed to have reached EMSA on the date of its receipt, namely 10 August 2004, that is to say, out of time. It follows that the opening board was wrong to open SSPA's tender and, subsequently, that the evaluation committee was wrong to evaluate it and rank it in first place.

103 According to settled case-law, a procedural defect leads to the annulment in whole or in part of a decision only if it is shown that, but for that defect, the administrative procedure could have had a different outcome and, consequently, the contested decision might have been different (see, to that effect, Case T-345/03 *Evropaïki Dynamiki* v *Commission* [2008] ECR II-341, paragraph 147, and *European Service Network* v *Commission*, paragraph 85 above, paragraph 130, and the case-law cited).

104 In the present case, if SSPA's tender had not been taken into consideration by EMSA because of its non-compliance by reference to the methods for submission referred to in point 2 of the invitation to tender and in Article 143 of the implementing rules, the administrative procedure would clearly have had a different outcome, since SSPA's tender would not have been evaluated by the evaluation committee and the award decision, which is based inter alia on a comparative examination of the tenders, would clearly have been different.

105 Furthermore, in the light of the fact that, in the present case, only two undertakings exceeded the minimum threshold indicated in point 13.1(b) of the tender specifications, if SSPA's tender had been rejected when the tenders were opened, only one tender would have remained on conclusion of the procurement procedure for the contract in question. In those circumstances, the contracting authority – since it was no longer in a position to compare the prices or the other characteristics of various tenders in order to award the contract to the most economically advantageous – would not have been required to award the contract to the only tenderer judged to be suitable (see, to that effect and by analogy, Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraphs 31 to 33). Moreover, that consideration does not allow the possibility to be ruled out that EMSA, as it accepted at the hearing in reply to a question put to that effect by the Court, could have cancelled the contract in question and launched a fresh call for tenders. As a consequence, it is sufficiently demonstrated that, but for that defect, the administrative procedure could have had a different outcome.

106 Accordingly, EMSA's decision to award the contract to the successful tenderer must be annulled in that it infringed Article 143 of the implementing rules and point 2 of the invitation to tender, without its being necessary to rule on the other pleas in law relied on by the applicant in connection with call for tenders C-2/06/04.

107 Thus, the Court will pursue its examination of the pleas and arguments raised by the applicant only in as much as they are relied on against EMSA's decisions to reject the applicant's tender and to award the contract to another tenderer on conclusion of the procedure in respect of call for tenders C-1/01/04.

2. The claim for annulment of the decisions taken by EMSA in connection with tendering procedure C-1/01/04

108 As set out in paragraph 81 above, the applicant raises four pleas in law in support of its claim for annulment, alleging, firstly, breach of the principles of good faith, good administration and diligence, secondly, infringement of the Financial Regulation, the implementing rules and Directive 92/50, thirdly, manifest errors of assessment and, fourthly, lack of relevant information and failure to state reasons. The Court considers it appropriate to examine first the first plea, then the second, then the fourth and finally the third.

The first plea in law, alleging breach of the principles of good faith, good administration and diligence

Arguments of the parties

109 According to the applicant, by acting with significant delay, and by failing to provide adequate

answers to the questions raised by the tenderers before the submission of their tenders, EMSA has infringed the principles of good faith, good administration and diligence, which, in accordance with case-law, can constitute a ground for annulment of the decision if that decision would have been different had the breach not occurred.

110 The applicant points out that it sent questions which EMSA refused to answer, arguing that they had not been submitted in time, that is to say, before 31 July 2004. In that regard, it insists that it tried unsuccessfully to send those questions by fax on 31 July 2004 and that they were not received by EMSA, probably because its fax machine was not functioning correctly, a fact allegedly acknowledged by EMSA in its email of 2 August 2004. In addition, the applicant points out that the questions were finally received by EMSA on Sunday, 1 August 2004. In any event, given that the period for submission of a request for additional information expired on a Saturday, EMSA should have extended the deadline until the first working day thereafter, namely Monday, 2 August 2004. By refusing to answer the applicant's questions, EMSA not only infringed the principles of good faith, good administration and diligence, but also prevented the applicant from submitting a more competitive tender.

111 Finally, the applicant states that, contrary to what EMSA implies, it never tried to obtain information that the other tenderers would not have had, given, it claims, that all replies to requests for additional information are communicated to all tenderers. In that regard, it points out that the contracting authority is required to reply to requests for additional information where the tender specifications are unclear.

112 At the hearing, the applicant claimed, in addition, for the first time, that EMSA had infringed Article 141 of the implementing rules since, in the invitation to tender, it fixed a deadline for making requests for additional information which was shorter than that laid down in Article 141.

113 EMSA disputes the applicant's arguments.

Findings of the Court

114 The applicant complains that EMSA, firstly, acted with significant delay and, secondly, failed to give adequate replies to the requests for additional information from the tenderers. It then adds that, on 31 July 2004, it put questions seeking clarification on points of the calls for tender which were allegedly unclear, which EMSA refused to answer.

115 First of all, the Court finds not only that the applicant has failed in any way to substantiate its assertion that EMSA acted tardily and failed to give adequate replies to the tenderers' requests, but also that it has failed to state either to which replies it refers or the reasons for which they should be considered inadequate. It follows that, despite its rather vague wording, this plea must be understood, in essence, as a complaint by the applicant that EMSA failed to answer its questions although they were submitted in time and that, for that reason, it was prevented from submitting a tender which was more competitive both technically and financially.

116 In that regard, in the first place, it should be noted that the applicant has not substantiated its assertions. Although it refers to its numerous attempts to send the requests for information both on Saturday, 31 July and on Sunday, 1 August 2004, it has not produced any transmission reports which could prove either transmission (complete or incomplete) of those documents to EMSA, or an error in their transmission. Nor has the applicant stated how that alleged irregularity could have affected the decision to award the contract.

117 In the second place, under point 8 of the invitation to tender, additional information could be requested in writing at the latest 10 days before the deadline for submission of tenders. Contrary to the applicant's claim, that point of the invitation to tender can only be interpreted as meaning that the day for submission of tenders must not be taken into account in calculating that period. Since that deadline was fixed, under point 2 of the invitation to tender, as 9 August 2004, the period for submission of requests for additional information must therefore have expired on Friday, 30 July 2004 and not, as the applicant claims, on Saturday, 31 July 2004.

118 As EMSA rightly points out, the applicant – as it acknowledges in its pleadings – tried to send its request for additional information from Saturday, 31 July 2004, thus after expiry of the period set for its submission. Since that request was submitted out of time, EMSA was right in not replying to it, if indeed it received it.

119 Finally, with regard to the alleged breach of Article 141(2) of the implementing rules, the Court notes that that plea was raised for the first time during the oral procedure. Under the first subparagraph of Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith does not constitute a new plea in law within the meaning of Article 48 (2) of the Rules of Procedure (see, to that effect, Case T–40/01 *Scan Office Design* v *Commission* [2002] ECR II–5043, paragraph 96, and Case T–495/04 *Belfass* v *Council* [2008] ECR II–781, paragraph 87).

120 In the present case, the submission alleging breach of Article 141(2) of the implementing rules, made by the applicant at the hearing, cannot be regarded either, on the one hand, as a complaint based on matters of law or of fact which have come to light in the course of the written procedure, since it is based on an alleged illegality which was capable of being known and pleaded when the action was commenced, or, on the other, as amplifying a plea made previously, since it was only during the oral procedure that the applicant mentioned the legal rule allegedly infringed and the ground for annulment thus invoked had not been referred to, either directly or by implication, in the application initiating proceedings, since the present submission alleges breach of the principles of good faith, good administration and diligence (see, to that effect, Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 25). Moreover, the applicant puts forward no matters of law or of fact which came to light in the course of the procedure and on which that complaint could be based. It follows that the complaint is inadmissible as out of time under the first subparagraph of Article 48 (2) of the Rules of Procedure.

121 In the light of the foregoing considerations, the first plea in law, so far as tendering procedure C–1/01/04 is concerned, must be rejected as unfounded.

The second plea in law, alleging breach of the Financial Regulation, the implementing rules and Directive 92/50

Arguments of the parties

122 By this plea, the applicant submits, in essence, that EMSA infringed the Financial Regulation, the implementing rules and Directive 92/50 by using vague criteria that were not correctly specified in the call for tenders. Furthermore, it asserts, at the stage of the reply, that, by deciding to subdivide the award criteria into sub-criteria, the evaluation committee not only openly accepted that those criteria were not well defined and needed to be clarified and/or replaced, which was also acknowledged by EMSA in its defence, but also infringed the Financial Regulation.

123 In addition, the applicant argues that certain elements of the call for tenders, such as the real duration of the contract, the number of Member States that had already implemented the applications, the role of specific technicians (help desk), the content and the duration of their services, and so on, which were necessary in order to submit a competitive tender, were also given in vague terms, in breach of Article 97(1) of the Financial Regulation and of Article 17(1) of Directive 92/50. In support of its argument, it refers to institutional calls for tender in which the documentation was more complete and clearer.

124 Finally, the applicant complains that, in its letter of 16 December 2004, EMSA refused to provide it with the name of the successful tenderer, because of the provisions on public procurement, although some weeks later the same official who had signed the letter called the applicant and proposed a meeting in person in order to explain the result of the tendering procedure, which the applicant refused.

125 EMSA disputes the applicant's arguments.

Findings of the Court

126 As a preliminary point, the applicant is incorrect to plead breach of Article 17 of Directive 92/50. Under Article 105 of the Financial Regulation, from 1 January 2003 – the date on which that regulation entered into force – the directives on the coordination of procedures for the award of public supply, service and works contracts are applicable to contracts awarded by the institutions, offices and agencies on their own account only in respect of questions relating to the thresholds

which determine the publication arrangements, the choice of procedures and the corresponding time-limits. It follows that, in the present case, which concerns a public service contract awarded by an agency, in this case EMSA, the applicant's complaint concerning the award criteria for the contract at issue must be examined, as under the rules applicable to the institutions, solely in the light of the provisions of the Financial Regulation and the implementing rules.

127 In that regard, it should be noted that Article 97(1) of the Financial Regulation imposes on the contracting authority the obligation of defining the award criteria in advance and setting them out in the call for tenders. That obligation, which is to ensure an appropriate level of advertising for the criteria and the conditions governing each contract, is set out in more detail in Article 138 of the implementing rules.

– The complaint that the award criteria are vague

128 With regard to the applicant's complaint that EMSA infringed the Financial Regulation and the implementing rules, in that it used criteria which were not correctly defined in the call for tenders, it must be recalled, first of all, that the method used to award the contract at issue was the best-value-for-money procedure, in accordance with Article 97(2) of the Financial Regulation and Article 138(1) of the implementing rules (see point 13 of the tender specifications, cited in paragraph 18 above).

129 When a contract is awarded by the best-value-for-money procedure, the contracting authority must define in the tender specifications the award criteria enabling evaluation of the content of tenders. In addition, those criteria must, in accordance with Article 138(2) of the implementing rules, be justified by the subject of the contract. In accordance with Article 138(3) thereof, the contracting authority must also specify, in the contract notice or in the tender specifications, the weighting it will apply to each of the criteria for determining best value for money. Those provisions seek to ensure compliance with the principles of equal treatment and of transparency at the stage of evaluation of the tenders with a view to award of the contract (see, to that effect and by analogy, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 21 and 22; Case C–470/99 *Universale-Bau and Others* [2002] ECR I–11617, paragraphs 90 to 92; see also, to that effect, judgment of 12 November 2008 in Case T–406/06 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 85, and the case-law cited).

130 The aim of those provisions is, accordingly, to allow all reasonably well-informed and normally diligent tenderers to interpret the award criteria in the same way (see, to that effect and by analogy, Case C–19/00 *SIAC Construction* [2001] ECR I–7725, paragraph 42) and, consequently, to have equal opportunity in formulating the terms of their tenders (see, to that effect and by analogy, *Universale-Bau and Others*, paragraph 129 above, paragraph 93).

131 Although it is true that the criteria which contracting authorities may apply are not listed exhaustively in Article 138(2) of the implementing rules and that that provision therefore leaves it open to contracting authorities to select the criteria on which they propose to base their award of the contract, their choice is nevertheless limited to criteria aimed at identifying the tender which is economically the most advantageous (see, to that effect and by analogy, Case C–532/06 *Lianakis and Others* [2008] ECR I–251, paragraph 29, and the case-law cited; see also, to that effect, Case T–4/01 *Renco* v *Council* [2003] ECR II–171, paragraph 66, and Case T–183/00 *Strabag Benelux* v *Council* [2003] ECR II–135, paragraphs 73 and 74).

132 In addition, the criteria used by the contracting authority to identify the most economically advantageous tender must not necessarily be either quantitative or related solely to prices. Even if award criteria which are not expressed in quantitative terms are included in the tendering documents, they can be applied objectively and uniformly in order to compare the tenders and are clearly relevant for identifying the most economically advantageous tender (see, to that effect, *Renco* v *Council*, paragraph 131 above, paragraphs 67 and 68).

133 In the present case, EMSA indicated, in point IV.2 of the contract notice and in point 13 of the tender specifications, the award criteria which it intended to apply with a view to awarding the contract to the most economically advantageous tender, namely, on the one hand, three qualitative criteria with the weighting which it intended to give to each of those criteria and, on the other, one quantitative criterion, that is to say, the total price of the tender with its weighting on the tender as a whole.

134 The three quality criteria, and their respective weighting, are set out as follows:

'1. Proposed methodology for the project – this includes the detailed proposals of how the project would be carried out including milestones and deliverables (as defined in [point] 3 [of the tender specifications]). (40%)

2. Understanding of the specifications in terms of reference and the succinct presentation of that understanding. (20%)

3. Quality of the operational services (Helpdesk). (10%)'.

135 The applicant confines itself to pleading that those criteria are vague, raising the question of how EMSA could evaluate objectively the quality of the tenders in respect of each of them. It does not put forward any evidence in support of its assertions to support the view that, in defining those criteria, EMSA disregarded the principles of transparency, equal treatment and non-discrimination.

136 In that regard, it should be noted that the quality criteria at issue, such as the proposed organisation and methodology for the supply of the services, a good understanding of the specifications in the terms of reference and the quality of the services requested, read in context, namely in the light of the details set out in point 3 of the tender specifications (see paragraph 19 above), can be conditions for the proper supply of the services to be provided and therefore the value of the tenders in themselves. Accordingly, they are relevant criteria for the identification of the economically most advantageous tender. Furthermore, as recalled in paragraph 132 above, the mere fact that those criteria are not quantitative is not sufficient to permit a deduction that the contracting authority has not applied them objectively and uniformly (see, to that effect, *Renco* v *Council*, paragraph 131 above, paragraphs 67 and 68). Finally, EMSA indicated, in accordance with the applicable provisions, the relative weighting given to each of those quality criteria by means of percentages, thus informing tenderers of the importance which it intended to give to each criterion in the comparative evaluation of the tenders.

137 There is nothing in the file, contrary to the applicant's claim, to indicate that EMSA exceeded the limits which stem from the abovementioned legislation in the choice and definition of the award criteria used to identify the economically most advantageous tender.

138 In the light of the foregoing considerations, the conclusion must be that the applicant has failed sufficiently to show that EMSA failed to meet its obligation to define in the call for tenders the award criteria in accordance with the principles of transparency, equal treatment and non-discrimination.

139 That conclusion cannot be called into question by the applicant's assertion relating to the terms in which other institutions have drafted call for tender documents in connection with other public procurement procedures.

140 In that regard, by granting to contracting authorities the power freely to choose the contract award criteria which they intend to apply, the legislature sought to enable them to take into consideration the nature, subject and specific features particular to each contract in choosing and formulating the award criteria. The formulation of the award criteria chosen by certain institutions in the context of other public procurement procedures cannot, accordingly, be usefully relied on by the applicant to demonstrate the vagueness of the award criteria applied in the present case. Reference to the tender documents of other public procurement procedures does not constitute either relevant or sufficient evidence for that purpose.

141 Finally, with regard to the argument that the evaluation committee, by deciding to subdivide them into sub-criteria, openly accepted that the award criteria chosen were not well defined and needed to be clarified and/or replaced, it must be observed that, irrespective of whether, in the present case, there was such a subdivision of the criteria, the existence of sub-criteria for a principal criterion in no way shows that the principal criteria are vague.

142 Accordingly, the complaint that the award criteria are vague must be rejected as unfounded.

– The complaint that certain elements of the call for tenders are vague

143 With regard to the argument that certain elements of the call for tenders are vague, it must be borne in mind that, as set out in paragraph 78 above, the application must contain the subject-

matter of the proceedings and a summary of the pleas in law on which it is based. This information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without other supporting information. However, in the present case, the applicant merely refers to an alleged breach of the Financial Regulation resulting from the vagueness of certain elements of the call for tenders without putting forward any argument in support of its claim and, above all, without stating to which call for tenders it is referring. Consequently, in the light of the abovementioned principles, the argument must be rejected as inadmissible.

– The complaint that subdivision of one of the award criteria into sub-criteria was unlawful

144 As a preliminary comment, it must be noted that, although this complaint was raised by the applicant at the stage of the reply, it can nevertheless be admitted on the basis of Article 48(2) of the Rules of Procedure, since it is based on matters of law or of fact which came to light in the course of the procedure, namely the report to the authorising officer of 19 November 2004 and the technical evaluation sheets, which EMSA put before the Court as annexes to its defence.

145 As set out in paragraph 129 above, under Article 97 of the Financial Regulation and Article 138(3) of the implementing rules, when a contract is awarded by the best-value-for-money procedure, the contracting authority must indicate, in the tender specifications or in the contract notice, the award criteria applicable and their weighting.

146 Those provisions, read in the light of the principles of equal treatment of economic operators and of transparency, referred to in Article 89(1) of the Financial Regulation, require that potential tenderers be aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous tender and their relative importance when they prepare their tenders (see, to that effect and by analogy, Case C–331/04 *ATI EAC e Viaggi di Maio and Others* [2005] ECR I–10109, paragraph 24, and *Lianakis and Others*, paragraph 131 above, paragraph 36).

147 It follows that a contracting authority cannot apply sub-criteria for award criteria which it has not previously brought to the tenderers' attention (see, to that effect and by analogy, *Lianakis and Others*, paragraph 131 above, paragraph 38).

148 In accordance with settled case-law, it is, none the less, possible for a contracting authority, after expiry of the period for submission of tenders, to determine weighting coefficients for sub-criteria of award criteria previously established, on three conditions, namely that that ex post determination, firstly, does not alter the criteria for the award of the contract set out in the contract documents or the contract notice; secondly, does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and, thirdly, was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (see, to that effect and by analogy, *ATI EAC e Viaggi di Maio and Others*, paragraph 146 above, paragraph 32, and *Lianakis and Others*, paragraph 131 above, paragraphs 42 and 43).

149 In the present case, it should be borne in mind that point 13.1 of the tender specifications stated, as the first award criterion, the 'proposed methodology for the project', and that that was to include 'detailed proposals of how the project would be carried out', including milestones and deliverables as defined in point 3 of the tender specifications. The tender specifications allotted to this criterion 40 points out of 100.

150 In accordance with point 3 of the tender specifications, tenderers were to include in their tenders detailed information regarding the project implementation structure, each work package was to be clearly defined, and the project implementation structure was to include as a minimum certain information (see paragraph 19 above). This was to include, in particular, horizontal activities (point 3.1), a description of the project management team and responsibilities (point 3.2), deliverables on project management (point 3.4), and work package description and relations (point 3.5). In particular, point 3.2, concerning the description of the project management team, states that tenderers were to 'clearly define in the offer the exact services and … provide detailed information in respect of response time [and] provide with their offer detailed curriculum vitae of each staff member responsible for carrying out the work, including his or her educational background, degrees and diplomas, professional experience, research work, publications and linguistic skills'. In point 3.4, concerning deliverables on project management, it is stated in addition that tenderers were to provide in their tenders a detailed description regarding the requirements set out in that point, and the Gantt planning diagram for the project. Finally, point 3.5 states that a total overview was to be given of the 'man days' and 'man days cost' for each work package.

151 It is apparent from the report to the authorising office of 19 November 2004 that the evaluation committee had agreed to break down the first criterion concerning the proposed methodology for the project (which was to include detailed proposals of how the project would be carried out, and milestones and deliverables, as defined in point 3 of the tender specifications), into two sub-criteria: 'repartition of tasks, manpower offered of quality and man-days (roadmap) – 20%; deliverables – 20%'.

152 Contrary to what the applicant claims, the evaluation committee did not subdivide that award criterion into sub-criteria which had not previously been brought to the tenderers' attention. Those sub-criteria correspond, essentially, to the description of the first criterion, concerning methodology, as specified in point 13.1 of the tender specifications, read in the light of point 3 thereof (see paragraphs 149 and 150 above). Accordingly, the evaluation committee merely weighted the 40 points available for the first award criterion by dividing them fairly between those sub-criteria.

153 In the light of those considerations, it must be determined whether, in providing for such weighting, the evaluation committee infringed the Financial Regulation and its implementing rules.

154 It is apparent from the case-law cited in paragraph 148 above that a contracting authority cannot infringe the Financial Regulation or the implementing rules when it divides among the subheadings of an award criterion which are defined in advance the number of points allotted to that criterion when the tender specifications were prepared, provided that that division does not alter the award criteria defined in the tender specifications or the contract notice, does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation, and was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

155 In the present case, the applicant, by merely referring generically to the fact that the contracting authority subdivided a criterion into two sub-criteria, has not shown that the decision of the contracting authority to make such a division led to an alteration of the contract award criteria previously defined in the tender documents, or that it contained elements which could have affected the preparation of the tenders, or that it gave rise to discrimination against the applicant or one of the tenderers.

156 In the light of those considerations, that complaint must be rejected as unfounded.

157 With regard, finally, to the complaint that, in substance, the name of the successful tenderer was communicated late – since, instead of being communicated by EMSA, in accordance with Article 100 (2) of the Financial Regulation, within 15 days of the applicant's request, it was revealed only some weeks later, by means of the contract award notice published in the *Official Journal*, annexed to EMSA's letter of 6 January 2005 –, it must be held that that delay, although it is to be deplored and cannot be justified, has not, however, restricted the applicant's opportunity to assert its rights before the Court and thus cannot, by itself, lead to the annulment of the contested decision (see, to that effect and by analogy, judgment of 10 September 2008 in Case T–465/04 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 52). Moreover, the applicant does not state what effect that fact could have on the legality of the award decision or the concrete effect which it may have had on its rights of defence.

158 In the light of all the foregoing, the conclusion must be that the second plea in law, as regards tendering procedure C–1/01/04, must be rejected in its entirety.

The fourth plea in law, alleging breach of the duty to give reasons and lack of relevant information

Arguments of the parties

159 The applicant submits that EMSA's decision to reject its tender and award the contract to another tenderer is vitiated by a lack of sufficient reasoning.

160 Firstly, it complains that, by failing to reply to the applicant's timely questions and provide clarifications repeatedly requested in writing, EMSA denied the applicant the possibility of assessing the legality of its acts.

161 Secondly, it submits that EMSA did not provide it with all the information requested regarding the grounds on which its tender was rejected. In that regard, it recalls that, in accordance with Article

253 EC and Article 8 of Directive 92/50, the contracting authority has the duty to give sufficient reasons for its decision to reject a tender when the tenderer asks the reasons for the rejection, within 15 days of that request.

162 In the present case, EMSA failed clearly to explain the reasons for which it rejected the applicant's tender, and merely provided it – after a significant delay and only further to a reminder – with a small amount of information which did not comply with the provisions of the Financial Regulation or the case-law on public procurement. It also failed to make any reference to the characteristics and comparative advantages of the successful tender, thus denying the applicant the possibility of effectively commenting upon the choice made and countering it, and of seeking legal redress.

163 In support of its argument, the applicant produces, as an example, a copy of an evaluation committee report, concerning a different public procurement procedure, which was sent to it by a Directorate General of the Commission. A simple comparison between that document and EMSA's letter of 16 December 2004 is sufficient to show that the latter does not satisfy the duty to state reasons imposed by the legislation and case-law on public procurement.

164 Next, the applicant refutes EMSA's argument that only the decision not to state reasons can be annulled by the Court and not the contested decisions themselves. Following such an argument would mean that the contracting authorities can take arbitrary decisions, without giving reasons, and proceed to sign contracts.

165 EMSA disputes the applicant's arguments.

Findings of the Court

166 First of all, by its first complaint, the applicant seeks to criticise EMSA's refusal to debate with it the merits of its tender by comparison with those of the successful tender. In that regard, it is sufficient to recall that no contracting authority is obliged, on the basis of its duty to state reasons for a decision rejecting a tender, to enter into such a debate (see, to that effect, judgment of 1 July 2008 in Case T–211/07 *AWWW* v *EFILWC*, not published in the ECR, paragraph 43). Moreover, that fact cannot call in question, of itself, the legality of the decision (*Evropaïki Dynamiki* v *Commission*, paragraph 85 above, paragraph 78). Accordingly, the applicant cannot criticise EMSA for failing in its duty to state reasons because it refused to answer the questions and requests for clarification which the applicant had put to it after having received the letter of 16 December 2004.

167 With regard to the second complaint, concerning breach of the obligation to state reasons, in the narrow sense, alleged by the applicant, in that EMSA declined to send it the information requested on the grounds for the rejection of its tender, it must be stated that, in the context of a public procurement procedure such as that at issue, the legislative provisions which determine the content of the contracting authority's obligation to state reasons to tenderers whose tenders have not been successful are Article 100(2) of the Financial Regulation and Article 149 of the implementing rules, and not the provisions of Directive 92/50, as the applicant claims (see paragraph 126 above).

168 It is clear from the abovementioned articles that, in public procurement matters, the contracting authority fulfils its duty to state reasons if it confines itself, first of all, to notifying immediately all tenderers whose tenders are rejected of the grounds on which the decision was taken and subsequently informs tenderers whose tenders were admissible and who make an express request of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract was awarded, within 15 calendar days of the date on which a written request is received (see *Evropaïki Dynamiki* v *Commission*, paragraph 85 above, paragraph 68, and *Evropaïki Dynamiki* v *Commission*, paragraph 157 above, paragraph 47, and the case-law cited).

169 That manner of proceeding satisfies the purpose of the duty to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to assert their rights; and, on the other, to enable the Court to exercise its supervisory jurisdiction (see *Evropaïki Dynamiki* v *Commission*, paragraph 157 above, paragraph 48, and the case-law cited).

170 It should be added that compliance with the duty to state reasons must be assessed in the light of the information available to the applicant at the time the application was brought (*Strabag Benelux* v *Council*, paragraph 131 above, paragraph 58; *Renco* v *Council*, paragraph 131 above, paragraph 96, and *Evropaïki Dynamiki* v *Commission*, paragraph 129 above, paragraph 50).

171 In addition, it is necessary to note that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and the case-law cited).

172 In the present case, it should finally be borne in mind that the tender specifications set out, in point 13.1, three award criteria, entitled, respectively, 'Proposed methodology for the project' – which refers expressly to point 3 of the tender specifications, indicating a certain amount of detailed information to be provided by tenderers (see paragraph 19 above) –, 'Understanding of the specifications in terms of reference' and 'Quality of the operational services'. A system of points was established for evaluation of the tenders in respect of each of those three award criteria. A minimum threshold of points (60%) was also laid down for each criterion and an overall minimum of 70% was required. Only those tenders which attained the minimum thresholds of points were to be taken into account for awarding the contract.

173 Accordingly, in order to determine whether EMSA satisfied the requirement for a statement of reasons laid down in the Financial Regulation and the implementing rules, its letter of 6 December 2004 and that of 16 December 2004, sent in reply to the applicant's express request of 7 December 2004 for additional information on the award of the contract at issue and the rejection of its tender, must be examined.

174 In that regard, the Court finds that the letter of 6 December 2004 informed the applicant that its tender had not been successful at the award stage on the ground that its price/quality ratio was worse than that of the successful tender. In that letter, EMSA also informed the applicant that it could request additional information on the grounds for rejection of its tender, the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract had been awarded, which the applicant did by fax of 7 December 2004.

175 With regard to EMSA's letter of 16 December 2004, it should be observed, at the outset, that the applicant states that it received it only on 7 January 2005, as an annex to the fax sent by EMSA on that date, further to a fax from the applicant of 5 January 2005 in which it complained that it had not received any communication regarding the award of the contract at issue. In that regard, the Court has no reason to doubt that EMSA did in fact send that letter on 16 December 2004 – a fact that, moreover, the applicant does not expressly dispute – and considers that EMSA was not required by any provision governing the procurement procedure at issue to comply with formalities for sending that type of communication which allowed it to check whether it was actually received by tenderers, although it is regrettable that it did not consider it to be appropriate to choose means of communication which might have enabled it to make such a check (see, to that effect, order of 19 October 2007 in Case T-69/05 *Evropaïki Dynamiki* v *EFSA*, not published in the ECR, paragraph 56). In any event, that delay did not limit the applicant's opportunity to assert its rights before the Court and cannot, by itself, lead to the annulment of the contested decision. It is apparent from the file that the applicant made use of all the information contained in that letter in bringing the present action.

176 Next, it must be noted that, in that letter, EMSA indicated the number of points awarded to the applicant's tender for each award criterion and the final result concerning the price/quality ratio of its tender, which was 68.89 points out of 100, while that of the successful tender was 79.33 points out of 100. As regards the successful tender, the letter, the contents of which are cited in paragraph 27 above, includes a detailed analysis of that tender.

177 It is apparent from the file that the information on the methodology to be used for managing the project, the description of the tasks, the number of man-days proposed and the deliverables is related to the evaluation of the successful tender on the basis of the first criterion, while the information on the understanding of the project and the proposed service level agreement is related to the second and third award criteria respectively.

178 Furthermore, that information must be read in the light of point 3 of the tender specifications, which lists a number of items to be detailed in the tender, including, inter alia, the resources allocated, the Gantt diagram, the breakdown of tasks, the number of man-days proposed and the deliverables, defined by type of task (see paragraph 150 above). Since the applicant has an in-depth knowledge of the tender specifications, as the drafting of its tender shows, it was, accordingly, in a position to deduce the relative advantages of the successful tender.

179 In the light of all that information and of the statements on the number of points awarded to its tender for each criterion, the applicant was in a position not only to identify the weak points in its tender and, thereby, the reasons for its rejection, namely that it did not attain the level of quality necessary in respect of two of the award criteria, but also to compare the overall result of the assessment of its tender (68.69 points out of 100) with that of the successful tenderer (79.33 points out of 100) (see, to that effect, *Evropaïki Dynamiki* v *Commission*, paragraph 85 above, paragraph 75, and the case-law cited).

180 In addition, it is clear from all the information provided in that letter that the applicant's tender not only had failed to obtain the minimum number of points required for the first ('proposed methodology for the project') and third ('quality of the operational services') award criteria, but had not even attained the overall minimum required of 70 points out of 100, when, under the tender specifications, only those tenders which attained the minimum threshold of points required were to be taken into account for awarding the contract at issue.

181 In the light of all the foregoing, it must be concluded that that statement of reasons enabled the applicant to assert its rights before the Court and the Court to exercise its review of legality with regard to the decision to reject the tender. Accordingly, the present plea, so far as tendering procedure C–1/01/04 is concerned, must be rejected as unfounded.

The third plea in law, alleging manifest errors of assessment by EMSA

Arguments of the parties

182 In its application, the applicant submits that EMSA made a manifest error of assessment in that it did not correctly and objectively evaluate the quality of the applicant's tender and found that it was inferior to that of the successful tenderer.

183 In addition, it argues that, since EMSA did not follow a predetermined and objective methodology, known to the tenderers, it is obvious that the decision of the evaluation committee was based on incorrect assumptions.

184 At the stage of the reply, the applicant challenges, firstly, EMSA's assertion that defining the methodology of evaluation could have favoured certain tenderers. According to the applicant, a clear methodology does not affect the rights of tenderers but, on the contrary, allows them to produce the best-value-for-money tender and enables the Court to exercise its review. Moreover, the very fact that the evaluation committee subdivided the award criteria into sub-criteria confirms that the criteria were not sufficiently defined.

185 In addition, the applicant raises complaints concerning the evaluation committee documents produced to the Court by EMSA as annexes to its defence.

186 In that regard, it claims, the subdivision of the first award criterion into two sub-criteria by the evaluation committee led that committee to focus on two particular aspects of the call for tenders which were not known to the tenderers before submission of their tenders.

187 With regard to the evaluation report, firstly, the applicant submits that although it is apparent from that report that the successful tender contained 'minor errors', the applicant cannot comment on the importance of those errors since the report did not specify their nature. Secondly, the evaluation of the weak points of the applicant's tender was formulated in vague terms and the comments were too generic.

188 The applicant also criticises certain specific comments in the evaluation sheets completed by each evaluator. With regard to the successful tender, it points out the contradiction between the statement of one of the evaluators that the successful tender contained 'minor errors' in the field of 'the flow of information to be handled by the SafeSeaNet system and … the type of information supported' and the statement that those errors did not have 'a direct impact on their understanding of the specifications'. It also highlights the fact that, according to one of the evaluators, the successful tenderer had good experience in dealing with maritime projects although experience was not amongst the evaluation criteria.

189 It also challenges certain of the evaluators' comments with regard to the evaluation of its own tender. This relates, more particularly, with regard to award criterion 1(a), to the first evaluator's

comment that the figure of 833.5 man-days of work is, excluding the Help Desk, over-estimated, and to the comments of the second and third evaluators relating, respectively, to the lack of clarity of the Gantt diagram, the lack of distinction between phase A and phase B of that diagram and the excessive duration of the analysis and design phase. According to the applicant, its tender stated clearly that, apart from the dedicated resources for the Help Desk, the project team would rely on the services of specialised engineers, included in the 833.5 man-days. Moreover, its tender clearly detailed the operation of the Help Desk, its clear methodology, the IT platform used, the management of cases, and use of the required Service Level Agreement. By failing to take account of that information, the evaluators therefore made a manifest error of assessment.

190 A second manifest error of assessment was made by the evaluators in taking the view that the 'analysis and design' phase described in the applicant's tender was too long. The applicant points out in that regard that, since the tender specifications required a web-orientated application, it was necessary to develop an SSN application based on an iterative model, on the basis of the principles of UML (Unified Modelling Language), in accordance with the methodology followed by all the institutions and the entire market. It therefore devoted 105 pages of its tender to an explanation of the 'software development methodology', of which a large part explained in detail the principles of UML. Accordingly, the evaluators made a further manifest error of assessment, since they did not correctly evaluate the applicant's tender or take into account the fact that the applicable methodology was UML.

191 Furthermore, with regard to the lack of clarity of the Gantt diagram, the applicant points out that the use of UML and an iterative approach for the process explains its Gantt diagram. In particular, as explained in detail in the section of its tender dealing with the 'take-over methodology', the takeover phase was to last one month and the validation task would have started at the same time as the take-over task. Accordingly, three months were more than enough for the validation. During that period, the applicant would also be involved in 'analysis and design' work, taking advantage of the feedback from the validation phase. According to the applicant, the implementation phase would also commence at the same time. During the first two months the applicant's team would have focussed on preparatory work, to organise the implementation environment. That is a standard approach which could not be regarded as abnormal by the evaluators, who therefore made a further manifest error of assessment.

192 Finally, with regard, in the applicant's tender, to the lack of distinction between phases A and B in the Gantt diagram, again noted by the evaluators, the applicant points out that it was the tender specifications which stated that the two phases were connected and were to be regarded as a single project. In that regard also a manifest error of assessment was made by the evaluators.

193 With regard to award criterion 1(b), the applicant challenges the comments of the first, second and third evaluators relating, respectively, to the lack of any concrete methodology, the lack of precision about technical meetings and the lack of clarity on the deliverables. In that regard, it submits that its tender indicated all the meetings which were to take place, gave a clear list of the deliverables and detailed the methodology which it proposed to use for each of the aspects of the call for tenders and the methodology and approach used for each of the projects to be carried out. Accordingly, it is clear that the evaluators made another manifest error of assessment.

194 Finally, with regard to the third award criterion, the applicant points out that, according to the first evaluator, the Help Desk activity was not defined in terms of functionality and there was no concrete proposal on the organisation and management of the Help Desk, while the second evaluator took the view that the number of man-days for the Help Desk and Member State support was not sufficient and there was no clear methodology for the management of incoming calls or for the procedures to minimise intervention time. In that regard, the applicant argues that it was clear from its tender that the Help Desk service relied on the services of some of the 833.5 man-days – which figure was considered overestimated by the evaluation committee – and that, moreover, the tender contained a clear description of the methodology, based on state-of-the-art procedures and advanced IT tools to handle the process.

195 EMSA disputes the applicant's arguments.

Findings of the Court

196 It is settled case-law that the contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following a call for tenders, and that the Court's review must be limited to verifying that there has been no serious and manifest

error (Case 56/77 *Agence européenne d'intérims* v *Commission* [1978] ECR 2215, paragraph 20; Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II-2627, paragraph 47; and *Belfass* v *Council*, paragraph 119 above, paragraph 63).

197 In the present case, the arguments put forward by the applicant in its written submissions, in order to show the existence of manifest errors of assessment, are based, essentially, on three main factors.

198 Firstly, it refers to the lack of predetermined and objective methodology, known to the tenderers, in order to arrive at the final ranking. It also refers to the fact that the tenderers were not aware of the subdivision of the criteria into sub-criteria and the alleged generic and abstract nature of the award criteria, and concludes that the evaluation of the tenders must have been subjective and based on incorrect assumptions.

199 However, the fact remains that the applicant has merely made general assertions, neither supported nor corroborated by any evidence at all. By that line of argument, the applicant is trying, in essence, to reintroduce in the context of the present plea the arguments already put forward in respect of the second plea, which has been rejected by the Court. Furthermore, the applicant in no way demonstrates how all the alleged failures on the part of the contracting authority to which it refers led that authority to make incorrect assumptions and a subjective evaluation of the tenders. In any event, the methodology used by the evaluation committee for the final ranking of the tenders was predetermined and specified in point IV.2 of the contract notice and point 13 of the tender specifications, in which EMSA indicated the criteria on the basis of which tenders were to be selected, and the weighting to be given to each of those criteria.

200 Accordingly, the conclusion must be that that first category of arguments cannot support the present plea.

201 Secondly, the applicant challenges the assessment of the successful tender made by the evaluation committee in its final report, in that, despite the existence of minor errors found in that tender, the committee did not state the nature of those errors.

202 In that regard, the Court notes that the abovementioned comment of the evaluation committee relates to the second award criterion and is worded as follows: '[p]roposers show a good understanding of the project, despite minor errors in their SafeSeaNet diagram'. Such a comment is not capable, of itself, of revealing an error or even an inherent contradiction. The contracting authority is fully entitled to take the view that a tender, although containing errors regarded as minor, shows a good understanding of the project. In any event, the applicant has not shown that the comment is incorrect or, even less, that that allegedly incorrect comment led to a manifest error of assessment in the evaluation of the successful tender.

203 Thirdly, the arguments put forward by the applicant to challenge the specific comments on its tender, set out in the technical evaluation sheets completed by each evaluator in respect of award criteria 1(a), 1(b) and 3 of the call for tenders at issue (see paragraphs 188 to 194 above), are ineffective.

204 The evaluation committee, composed of at least three persons, is appointed by the authorising officer and responsible for giving an advisory opinion, in accordance with the second subparagraph of Article 146(1) of the implementing rules. It is the committee which draws up the written record of the evaluation, signed by all its members, which contains, inter alia, the names of the tenderers rejected and the reasons for the rejection of their tenders, and the name of the contractor proposed and the reasons for that choice. The definitive decision on award of the contract is taken subsequently by the contracting authority in accordance with Article 147(3) of the implementing rules.

205 It follows that the technical evaluation sheets, intended to collect evaluations made by various evaluators, whose points of view can, clearly, diverge, do not have any independent legal effect. Consequently, in the present case, those evaluation sheets taken individually cannot be used by the applicant to base arguments on any contradictions between the evaluation contained in one or other of them, since all of those evaluations were consolidated by the tender evaluation committee, which thus adopted its final position, which remains, moreover, an advisory opinion vis-à-vis the contracting authority.

206 The decision of that committee as to the proposal of the future contractor and the reasons for that

choice can only be collective, since each committee member's evaluation is absorbed into the final report. Accordingly, it is clear that any argument seeking to prove that there was a manifest error of assessment can, where appropriate, be directed only against the evaluation report adopted by the evaluation committee and only in the event that the final decision of the contracting authority is in fact based on that report.

207 In any event, in the present case, the applicant has not shown whether and in what way those comments made individually by the evaluators in the technical evaluation sheets are reflected in the final report of the evaluation committee and brought about a manifest error of assessment of its tender on the part of the contracting authority. In that regard, it should, at the very least, have explained in what way the allegedly incorrect comments affected the score obtained by its tender in respect of the first and third award criteria, which are those for which its tender did not obtain the minimum number of points required by the tender specifications and the only ones in respect of which it has complained. It is sufficient to note that the applicant has not given such an explanation.

208 In the light of those considerations, that complaint must also be rejected.

209 The conclusion must therefore be that the applicant has failed to show the existence of manifest errors of assessment, supposedly made by the contracting authority, either in the evaluation of the successful tender or in the evaluation of its own tender.

210 The third plea in law, so far as tendering procedure C–1/01/04 is concerned, must therefore be rejected in its entirety as unfounded.

3. The claim for annulment of EMSA's subsequent decisions

211 In its second head of claim, the applicant requests that the Court annul all EMSA's subsequent decisions relating to the calls for tender at issue.

212 In that regard, as has already been stated in paragraph 78 above, an application must set out the subject-matter of the proceedings and a summary of the pleas in law on which it is based. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to exercise its review. In order to ensure legal certainty and the sound administration of justice, the essential facts and law on which it is based must be apparent from the text of the application itself, at the very least summarily, provided that the statement is coherent and intelligible.

213 In the present case, the applicant does not state which measures are concerned by its second head of claim and does not put forward any arguments in support of its claim.

214 Consequently, the second head of claim must be dismissed as inadmissible.

The request for measures of inquiry

215 The applicant requests the Court, in essence, to ask EMSA to supply a copy of the report of the evaluation committee and the relevant related documentation.

216 Since EMSA has put before the Court, as annexes to its defence, the documents requested by the applicant and since the applicant has made no other observations in that regard, there is no longer any need to adjudicate on this request.

Costs

217 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In the circumstances of the present case, the Court considers, on a fair assessment of the matter, that each party should bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Annuls the decision of the European Maritime Safety Agency (EMSA) to award the contract to the successful tenderer in tendering procedure 'EMSA C–2/06/04';

2. Dismisses the action as to the remainder;

3. Orders each party to bear its own costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 2 March 2010.

[Signatures]

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* Language of the case: English.

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Notice for the OJ

Action brought on 14 February 2005 by European Dynamics S.A. against the European Maritime Safety Agency

(Case T-70/05)

Language of the case: English

An action against the European Maritime Safety Agency was brought before the Court of First Instance of the European Communities on 14 February 2005 by European Dynamics S.A., established in Athens (Greece), represented by N. Korogiannakis, lawyer.

The applicant claims that the Court should:

- annul the decision of EMSA, to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

- annul all subsequent decisions of EMSA related to the Tenders under examination in the current application;

- order EMSA to pay the applicant's legal costs and other costs and expenses incurred in connection with the application, even if the application is rejected.

Pleas in law and main arguments

The applicant company filed bids in response to EMSA's calls for tenders EMSA C-1/0104-20041 and EMSA C.2/06/042 for the SafeSeaNet Validation and further development and for the marine casualty database, network and management system. By the contested decisions the applicant's bids were rejected and the contracts awarded to another bidder.

In support of its application to annul the contested decisions the applicant claims first of all that the defendant agency violated the principles of good faith and good administration by acting with significant delay and failing to offer adequate answers to the tenderers' requests before the submission of the bids. The defendant refused to answer the applicant's questions, on the grounds that they had not been submitted in time, even though it had accepted indirectly that technical problems under its own control prevented the questions from being received. The applicant considers that had the defendant answered its questions timely and with diligence, it would have been able to submit a more competitive offer.

The applicant further contends that the defendant violated the Financial Regulation3 as well as Article 17 (1) of Directive 92/504 by using evaluation criteria, especially the tenderers' prior experience, that were neither specified nor included in the call for tenders.

The applicant also claims that the defendant committed a manifest error of appreciation in considering that the successful bidder's offer was superior to that of the applicant. In this respect, the applicant contends that no predetermined objective methodology was used to evaluate its offer, that on the contrary the criteria used left room for subjective evaluation and that, finally, there were no clear and objective metrics.

The applicant finally submits that the defendant failed to provide pertinent information and state adequate reasons for its acts by not replying to the applicant's legitimate and timely questions.

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[1] - OJ 200/S 126-10625

[2] - OJ 200/S 128-108027

[3] - Coucil Regulatio (EC, Euratom) No 1605/2002 of 25 Jue 2002 o the Fiacial Regulatio applicable to the geeral budget of the Europea Commuities, OJ L 248, 16/09/2002 p.1

[4] - Council Directive 92/5/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 29, 24/7/1992 p. 1

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ORDONNANCE DU PRÉSIDENT
DE LA CINQUIÈME CHAMBRE DU TRIBUNAL

5 juin 2008 (*)

« Radiation »

Dans l'affaire T-104/05,

Cegelec SA, établie à Bruxelles (Belgique), représentée par M^es^ A. Delvaux et V. Bertrand, avocats,

partie requérante,

contre

Parlement européen, représenté par M. D. Petersheim et M^me^ M. Ecker, en qualité d'agents,

partie défenderesse,

ayant pour objet une demande d'annulation de la décision par laquelle le Parlement a écarté l'offre de la requérante et a attribué à Group 4 Technology SA/NV les trois lots constitutifs du marché public sous la référence EP/DG1/SER/2004/0001.

1 Par lettre déposée au greffe du Tribunal le 26 mars 2008, la partie requérante a informé le Tribunal, conformément à l'article 99 du règlement de procédure du Tribunal, qu'elle se désistait de son recours et a demandé, en application de l'article 87, paragraphe 5, dudit règlement, que la partie défenderesse soit condamnée aux dépens.

2 Par lettre déposée au greffe du Tribunal le 1^er^ avril 2008, la partie défenderesse a fait savoir au Tribunal qu'elle ne pouvait donner son accord quant à la prise en charge des dépens.

3 La partie requérante fait valoir qu'elle n'aurait pas poursuivi le recours, si, à un stade antérieur, la partie défenderesse lui avait donné les informations nécessaires à la vérification de son classement dans le cadre de l'appel d'offres.

4 La partie défenderesse indique qu'elle a, conformément à l'article 100, paragraphe 2, du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1, rectification JO 2003, L 25, p. 43), communiqué le nom, les prix, les caractéristiques et les avantages relatifs à l'offre de l'attributaire du marché. Elle fait valoir qu'elle n'est pas tenue d'informer la partie requérante de son classement à l'issue de la procédure d'évaluation. Elle fait, en outre, valoir que la partie requérante pouvait comprendre les raisons du rejet de son offre et comparer les caractéristiques de son offre à celles de l'attributaire sur la base des informations fournies.

5 Selon l'article 87, paragraphe 5, premier alinéa, du règlement de procédure, la partie qui se désiste est condamnée aux dépens, s'il est conclu en ce sens par l'autre partie dans ses observations sur le désistement. Toutefois, à la demande de la partie qui se désiste, les dépens sont supportés par l'autre partie, si cela apparaît justifié en vertu de l'attitude de cette dernière. En l'espèce, les pièces du dossier ne démontrent pas un tel comportement de la part de la partie défenderesse.

6 Il y a donc lieu de rayer l'affaire du registre et de condamner la partie requérante aux dépens.

Par ces motifs,

LE PRÉSIDENT DE LA CINQUIÈME CHAMBRE DU TRIBUNAL

ordonne :

1) L'affaire T-104/05 est rayée du registre du Tribunal.

2) La partie requérante supportera ses propres dépens et ceux de la partie défenderesse.

Fait à Luxembourg, le 5 juin 2008.

Le greffier	Le président
E. Coulon	M. Vilaras

* Langue de procédure : le français.

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JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

10 September 2008 (*)

(Public service contracts – Community tendering procedure – Provision of development, maintenance and support services for the financial information systems of the Directorate-General for Agriculture – Selection and award criteria – Rejection of a submitted tender – Obligation to state the reasons on which the decision is based – No manifest error of assessment – Principles of diligence and good administration)

In Case T–59/05,

Evropaïki Dinamiki – Proigmena Sistimata Tilepikinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis, lawyer,

applicant,

v

Commission of the European Communities, represented initially by K. Banks and E. Manhaeve, and subsequently by E. Manhaeve and M. Wilderspin, acting as Agents,

defendant,

APPLICATION for annulment of the Commission's decision of 23 November 2004 rejecting the tender submitted by the applicant in the tendering procedure relating to the provision of development, maintenance and related support services for the financial information systems of the Directorate-General for Agriculture and awarding the contract to the successful tenderer,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 16 May 2007,

gives the following

Judgment

Legal context

1 The award of Commission service contracts is governed by the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, 'the Financial Regulation') and by the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1, 'the Implementing Rules'). Those provisions are based on the Community directives on the subject, in particular, in the case of public service contracts, Council Directive 92/50/EEC of 18 June 1992 relating

to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended.

2 Article 89(1) of the Financial Regulation provides:

'All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non–discrimination.'

3 Article 97 of the Financial Regulation, in the version applicable at the material time, states:

'1. The selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders shall be defined in advance and set out in the call for tender.

2. Contracts may be awarded by the automatic award procedure or by the best–value-for-money procedure.'

4 Article 100 of the Financial Regulation provides:

'1. The authorising officer shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

2. The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

5 Article 130(3) of the Implementing Rules, in the version applicable at the material time, states:

'The specifications shall at least:

(a) specify the exclusion and selection criteria applying to the contract …;

(b) specify the award criteria and their relative weighting, if this is not specified in the contract notice;

…'.

6 Article 135(1) of the Implementing Rules provides:

'The contracting authorities shall draw up clear and non-discriminatory selection criteria.'

7 Article 138 of the Implementing Rules, in the version applicable at the material time, provides:

'1. Contracts shall be awarded in one of the following two ways:

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability completion or delivery times, after-sales service and technical assistance.

3. The contracting authority shall specify, in the contract notice or in the specifications, the weighting it will apply to each of the criteria for determining best value for money.

…'.

8 Article 148 of the Implementing Rules provides:

'1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

2. Before the closing date for the submission of tenders, in respect of the additional documents and information referred to in Article 141, the contracting authority may:

(a) at the instance of tenderers, communicate additional information solely for the purpose of clarifying the nature of the contract, such information to be communicated on the same date to all tenderers who have asked for the specifications;

…'.

9 Article 149(2) of the Implementing Rules provides:

'The contracting authority shall, within not more than 15 calendar days from the date on which a written request is received, communicate the information provided for in Article 100(2) of the Financial Regulation.'

Background to the dispute

10 The applicant, Evropaïki Dinamiki – Proigmena Sistimata Tilepikinonion Pliroforikis kai Tilematikis AE, is a company incorporated under Greek law, active in the area of information technology and communications.

11 By a contract notice of 24 March 2004, published in the Supplement to the *Official Journal of the European Union* (OJ 2004, S 59) under reference 2004/S 59–050031, the Commission issued a call for tenders relating to development maintenance and support services for financial information systems of the Directorate-General for Agriculture (DG AGRI). The outcome of that tender process was to be the signing of a framework contract for a period of 36 months, renewable for a period of 12 months.

12 Section 7.4 of the tender specifications of the call for tenders at issue, relating to subcontracting, is worded as follows:

'The contractor … shall none the less remain bound by his obligations to the Commission under the contract. …

In the case of a tender offer incorporating subcontracting, the information required below under sections 8.2.1 "administrative information", 8.2.2 "information for assessment of exclusion criteria" and 8.2.3 "information for assessment of selection criteria" must be provided for all proposed subcontractors.'

13 Section 8 of the tender specifications defines the information which the tenderers' bids must contain:

'8.1. Presentation of the offer

…

8.2. Technical dossier

8.2.1. Administrative information

…

This information requirement applies to all members of a Consortium, and to any possible subcontractors named in the offer or who might be proposed to be used during the time period of the expected contract.

8.2.2. Information for assessment of exclusion criteria

…

This information requirement applies to all members of a Consortium and to any possible subcontractors named in the offer or who might be proposed to be used during the time period of the expected contract.

8.2.3. Information for assessment of selection criteria

…

This information requirement applies to all members of a Consortium and to any possible subcontractors named in the offer or who might be proposed to be used during the time period of the expected contract.

8.2.3.1. Economic and financial Situation

…

8.2.3.2. Technical Capacities

…

8.2.4. Information for assessment of award criteria

…

8.3. Financial proposal – price schedule

…'.

14 Section 9 of the tender specifications, relating to the evaluation of tenders and award of the contract, is worded as follows:

'9. Evaluation of tenders and award of the contract

9.1. Exclusion of tendering parties

Tendering parties shall be excluded from participation if:

…

Tendering parties shall be excluded from the award of the contract if:

…

In the case of joint tenders (consortium) or subcontractors, these exclusion criteria will be applied to all the individual organisations proposed by the tenderer.

The exclusion decision will be assessed on the basis of the information supplied by the tenderer. All Tenderers (either a single entity, all members of a joint offer or all subcontractors) must therefore supply the information requested in accordance with the requirements of 8.2.2. above, on which the

exclusion decision will be assessed.

9.2. Selection of tendering parties – selection criteria

Tendering parties' capacity will be assessed in the light of the criteria below.

9.2.1. Economic and financial standing

[Selection criterion] Tendering parties must demonstrate that they have been financially sound during the last three years.

The selection decision will be assessed on the basis of the information supplied by the tenderer in accordance with the requirements of 8.2.3.1 above and, where applicable, of other information that the Commission may judge relevant.

9.2.2. Professional and technical capacities

[Selection criterion 1] Tendering parties must possess at least three years' experience of direct relevance to the activities concerned or to the provision of the services and products covered by this invitation to tender.

[Selection criterion 2] Tendering parties must demonstrate that they have the skills and human resources and the technical and organisational ability needed to provide the services and products required.

[Selection criterion 3] Tendering parties must demonstrate that they have the level of infrastructure adequacy required for the successful provision of the required services.

[Selection criterion 4] If relying on the capacities of other entities, tendering parties must demonstrate that they have at their disposal the resources necessary for the performance of the contract by providing a written undertaking from such entities to place such resources at [their] disposal.

The selection decision will be assessed on the basis of the information supplied by the tenderer in accordance with the requirements of 8.2.3.2 above and, where applicable, of other information that the Commission may judge relevant.

9.3. Evaluation of tenders – award criteria

The Commission will award the contract after comparing the tenders in the light of the following criteria:

9.3.1. Award criteria

– Quality of the tenderer's proposal in terms of completeness, clarity and concision, relevance of information and documentation provided, lack of ambiguity (20%);

– The proposed methodology and the organisation of the services to cover the needs of the Commission/DG AGRI; in particular, the measures proposed to ensure the timely availability of adequate resources for the proposed skills, and an effective and efficient project management and communication with the DG AGRI (40%);

– The quality control of the delivered services and the guarantees offered to respect the proposal (40%).

The assessment of each individual quality criterion should be at least 50% of the maximum scoring set for that criterion. Those offers which will not receive these minimum scorings shall be rejected.

The overall assessment (sum of points for all criteria) should be at least 65 points out of 100. Those offers which will not receive this minimum overall scoring shall be rejected, even if they received the minimum scoring for each individual criterion.

…

9.3.2. Price criteria

…

9.4. Award of the contract

The contract will be awarded to the tender with the highest Performance/Price ratio (best value-for-money procedure) …'.

15 Moreover, it is clear from section 9.1.2 of the draft framework contract that, in the case of subcontractors, the contractor remains bound by its obligations to the Commission under the contract and has exclusive responsibility for the due performance of the contract.

16 On 25 March 2004 the applicant expressed its interest in taking part in the call for tenders in question and asked to be sent the contract tender documents. Those documents were sent to the applicant on 30 March 2004.

17 By registered post of 14 April 2004 the applicant sent to the Commission an initial request for clarification in respect of some of the specifications in the tender documents.

18 On 16 April 2004 the applicant sent to the Commission a second and third request for additional clarification relating to the selection and award criteria set out in the tender specifications.

19 The Commission replied to those requests by letter of 20 April 2004.

20 On the same day, in the light of the Commission's response, the applicant requested additional clarification.

21 The Commission replied to that request by letter of 21 April 2004.

22 On the same day, the applicant sent to the Commission a fresh request for clarification.

23 The Commission replied to the applicant's final request by e-mail on 22 April 2004, stating that it could not answer the questions put to it because they had arrived after the date fixed for that purpose in section 7.6 of the tender specifications, namely six days before the closing date for submission of tenders.

24 On 26 April 2004, the deadline for receipt of tenders, the applicant, in consortium with Software AG Belgium SA ('Software'), submitted a proposal in the tendering procedure at issue.

25 The 12 tenders received by DG AGRI were examined by an evaluation committee set up for that purpose and comprising 6 officials from four Directorates General of the Commission. The contract was awarded on the criterion of which offer was the best value for money. The evaluation committee checked that the tenders submitted satisfied the exclusion and selection criteria and then declared the 12 tenders to be eligible for the award phase. Of the 12 tenders, only 2, which did not obtain the minimal total score of 65 points required by the tender specifications, were eliminated. The results of the evaluation as regards the applicant's tender and that of the successful tenderer, showing the points awarded on each quality criterion, and the weighted prices of each of those tenders, can be presented as follows:

Tenderer	Weighted price (EUR)	Points out of 100	Points/price (rounded to four decimal places)	Rank

European Dynamics	381.40	74.33	0.1949	4
IBM	393.03	90.70	0.2308	1

26 By letter of 23 November 2004, sent on 30 November 2004, the Commission informed the applicant of the result of the evaluation of its tender and of the fact that it had not been successful in so far as it 'did not achieve the highest quality/price ratio according to which the [contract] was awarded'.

27 By fax and registered letter of 2 December 2004 the applicant asked the Commission to provide it, within 15 calendar days from receipt of its request, with the following information:

– the identity of the successful tenderer, and of any partners or subcontractors and, where appropriate, the percentage of the market to be allocated to it or them;

– the score awarded on each award criterion concerning the applicant's technical offer and that of the successful tenderer;

– the content of the evaluation committee report;

– information as to how the applicant's offer compared with that of the successful tenderer and, in particular, the scores awarded to the applicant's financial offer and that of the successful tenderer.

28 By letter in response of 10 December 2004, sent on 13 December 2004, the Commission informed the applicant that the successful tenderer was IBM Belgium SA ('IBM'), and that ARHS Developments SA was the subcontractor. The Commission annexed an extract from the evaluation committee report relating to the applicant's offer and that of the successful tenderer, while stating that, in order to protect the legitimate business interests of other tenderers, it was not possible to send to it a complete copy of that report, which contained information relating to other tenders which had been submitted but had been unsuccessful. The annexed extract from the evaluation committee report indicated the points obtained by the applicant and the successful tenderer on each of the quality criteria in the light of which the tenders had been assessed. The annexed extract also contained the general observations of the evaluation committee arising from comparison of the applicant's tender with that of the successful tenderer, in the following terms :

'[The applicant's offer is a] good but rather general offer, more a collection of best practices than tailored to the specific aspects of DG AGRI addressed by the tendering specifications (notably, the guarantees offered to cope with the business aspects of financial systems)'.

29 As regards the successful tender, the evaluation committee considered that it was a 'very good offer, concise and clear' and that it covered well 'both technical and business aspects'. The committee added:

'The offer conveys the assurance of the ability of the tenderer to cope successfully with the challenges in the field of financial [IT systems] at DG AGRI'.

30 By fax and registered letter of 29 December 2004 the applicant requested from the Commission more precise information as to why its tender had been rejected and the contract awarded to another tenderer. The applicant also set out certain comments and objections on the process of evaluation of its tender and of that of the successful tenderer, in the light of the quality criteria, and taking account of the information given by the Commission in its letter of 10 December 2004.

31 By fax and registered letter of 30 December 2004 the applicant sent to the Commission certain information on the financial standing of ARHS Developments which it had obtained through market research conducted in the interim. The applicant asked the Commission to open an investigation to check and confirm that information and, if appropriate, to take it into consideration in the tendering procedure at issue.

32 By letter of 13 January 2005 the Commission informed the applicant that it acknowledged receipt of its

letters of 29 and 30 December 2004, while adding that the questions raised needed to be examined carefully and that a reply would be provided within the following six weeks.

33 By letter dated 26 January 2005, sent on 7 February 2005, the Commission replied to those letters. The applicant acknowledged receipt on 9 February 2005.

Procedure and forms of order sought by the parties

34 The applicant brought this action by application lodged at the Registry of the Court of First Instance on 2 February 2005.

35 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, as measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, asked the Commission to provide it with certain information and to produce certain documents, including, in particular, the evaluation Committee report and the bid of the successful tenderer. The Commission acceded to this request in part, stating that it was not able to produce a non-confidential version of the bid of the successful tenderer within the period stipulated.

36 The parties set out their arguments and replied to questions put by the Court at the hearing on 16 May 2007. The Court asked the Commission to produce the non-confidential version of the bid of the successful tenderer and set a new time-limit of 28 May 2007.

37 By letter of 25 May 2007, the Commission requested an extension of that period. The Court upheld that request and granted a further extension until 12 June 2007. A non-confidential version of the bid of the successful tenderer was placed on the case-file by the Commission on 12 June 2007. The applicant submitted its written observations on that document on 2 July 2007. After the Commission had set out in writing its views on the applicant's observations, the oral procedure was closed on 19 July 2007.

38 The applicant claims that the Court should:

– annul the Commission's decision to reject its tender and to award the contract to the successful contractor ('the contested decision');

– order the Commission to pay the costs, even if the application is rejected.

39 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

40 The applicant relies on four pleas in law in support of its action. The first plea in law alleges an infringement of Article 97(1) of the Financial Regulation and of Article 17(1) of Directive 92/50. The basis of the second plea in law is manifest error of assessment. The third plea in law alleges failure to provide pertinent information and infringement of the obligation to state reasons. The fourth plea in law is based on infringement of the principles of diligence and good administration.

The first plea in law: infringement of Article 97(1) of the Financial Regulation and Article 17(1) of Directive 92/50

Arguments of the parties

41 The applicant complains that the Commission infringed Article 97(1) of the Financial Regulation and Article 17(1) of Directive 92/50 by using selection criteria which were not well specified and not clearly

stated in the call for tenders at issue.

42 The applicant also takes issue with the vagueness of the three qualitative award criteria set out in section 9.3.1 of the specifications (see paragraph 14 above). The fact that those criteria were unspecific and lacked clarity misled the tenderers and obliged the evaluation committee to take a subjective decision when evaluating the submitted tenders.

43 According to the applicant, several examples of tendering documents sent to tenderers in the course of other tendering procedures initiated by the Commission, in which the technical specifications were set out clearly and comprehensively and the work requested was detailed effectively, demonstrate that the tender specifications in this case are among the least complete and the most vague that the applicant has ever seen.

44 The Commission rejects the applicant's arguments and contends, first, that the applicant has no interest in challenging the alleged vagueness of the selection criteria, since the applicant was selected for the tender procedure because it satisfied those criteria.

45 Secondly, as regards the award criteria, the Commission first states that the contracting authority is free to choose those criteria. It then contends that the award criteria, in this case, were defined in advance and set out in a sufficiently clear and objective manner in the tender specifications.

Findings of the Court

46 First, the applicant alleges infringement of Article 17(1) of Directive 92/50. However, under Article 105 of the Financial Regulation, as from 1 January 2003 that directive, relating to the coordination of procedures for the award of public service contracts, applies to public contracts awarded by the institutions of the Communities on their own account only as regards questions relating to the thresholds determining publication arrangements, choice of procedures and corresponding time-limits.

47 It follows that in the present case, which concerns a public services contract awarded by the Commission, the question whether the contracting authority has complied with its obligation to define and set out in advance in the call for tenders the selection criteria for evaluating the capability of tenderers, and the award criteria for evaluating the content of their tenders, must be examined in the light of the provisions of the Financial Regulation and the Implementing Rules.

48 Article 97(1) of the Financial Regulation imposes on the contracting authority the obligation to define and set out in advance in the call for tenders both the selection criteria and the award criteria. Furthermore, that obligation, which involves ensuring that the criteria and conditions governing each contract are sufficiently advertised, is defined further in Articles 135 to 137 of the Implementing Rules, in respect of selection criteria, and in Article 138 of the Implementing Rules, in respect of award criteria.

49 Those provisions are intended to ensure respect for the principles of equal treatment and transparency, enshrined in Article 89 of the Financial Regulation, at all stages of the procedure for the award of public contracts, in particular the stage of selection of the tenderers and that of selection of tenders for the award of the contract (see, to that effect and by analogy, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 21 and 22, and Case C-470/99 *Universale-Bau and Others*[2002] ECR I-11617, paragraphs 90 to 92).

50 The purpose of those provisions is none other than to allow all reasonably well informed and normally diligent tenderers to interpret both the selection criteria and the award criteria in the same way (see, to that effect and by analogy, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 42) and consequently, to have equality of opportunity in formulating the terms of their applications to participate or of their tenders (see, to that effect, as regards the stage of selecting candidates, *Universale-Bau and Others*, cited in paragraph 49 above, paragraph 93, and, as regards the stage of comparing tenders, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 54).

51 Moreover, while it cannot be excluded that the operation of checking the suitability of contractors to provide the services which are the subject of the public contract to be awarded (selection of tenderers)

and that of awarding the contract (selection of tenders) may take place simultaneously, it remains the case that those two operations are governed by different rules (see, by analogy, *Beentjes*, cited in paragraph 49 above, paragraphs 15 and 16, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraphs 59 and 60).

52 The complaint concerning (i) the alleged vagueness of the specifications on the selection of tenderers, and (ii) the alleged vagueness and subjectivity of the award criteria, must be examined in the light of the foregoing considerations.

– The vagueness of the specifications contained in the tender documents on the selection of tenderers

53 First, as is clear from the documents before the Court and as has been pointed out by the Commission, without objection from the applicant, the applicant passed the stage of selection of tenderers, since it was permitted to lodge a tender.

54 In those circumstances, even if the complaint as to the vagueness of the specifications relating to the phase of selection of tenderers were well founded, the applicant has not demonstrated any interest in challenging those specifications, as the Commission correctly points out, inasmuch as the applicant passed that stage.

55 Consequently, this complaint must be rejected as inoperative.

– The vagueness and subjectivity of the award criteria

56 It must be pointed out that, in accordance with Article 97(2) of the Financial Regulation and Article 138 (1) of the Implementing Rules, the contract was awarded, in this case, to the tender offering the best value for money (section 9.4 of the tender specifications, see paragraph 14 above).

57 It must further be borne in mind that, in order to ensure observance of the principles of transparency, equal treatment and non-discrimination at the stage of selection of tenders for the award of a contract, Article 97(1) of the Financial Regulation imposes on the contracting authority, when the contract is to be awarded by the best-value-for-money procedure, the obligation to define and set out in the tender specifications the award criteria for evaluating the content of the tenders. Those criteria must, in accordance with Article 138(2) of the Implementing Rules, be justified by the subject of the contract. Under Article 138(3), the contracting authority must also specify, in the contract notice or in the tender specifications, the weighting which it will apply to each of the chosen criteria for determining which tender offers the best value for money.

58 None the less, those provisions leave to the contracting authority the choice of the award criteria on which tenders will be evaluated. However, the aim of the award criteria which the contracting authority intends to adopt must, in all cases, be to identify the tender which offers the best value for money (see, to that effect, Case T-4/01 *Renco* v *Council* [2003] ECR II-171, paragraph 65, and Case T-183/00 *StrabagBenelux* v *Council* [2003] ECR II-135, paragraphs 73 and 74).

59 Furthermore, the criteria adopted by the contracting authority in order to identify the tender which offers the best value for money need not necessarily be quantitative or related solely to prices. Even if award criteria which are not expressed in quantitative terms are included in the tender specifications, they may be applied objectively and uniformly in order to compare the tenders and are clearly relevant for identifying the most economically advantageous tender (see, to that effect, *Renco* v *Council*, cited in paragraph 58 above, paragraphs 67 and 68).

60 In this case, it is clear that the Commission referred in section 9.3 of the tender specifications to the award criteria which it intended to adopt for awarding the contract to the tender which offered the best value for money, namely, on the one hand, three qualitative criteria (section 9.3.1 of the tender specifications, see paragraph 14 above) and the relative weighting which it intended to apply to each of those criteria and, on the other hand, one quantitative criterion which, in essence, involved determining the total cost of the tender by adding together the weightings of several unit prices (section 9.3.2 of the tender specifications, see paragraph 14 above).

61 It is useful to recall, at this point, that the three qualitative criteria challenged by the applicant, and their weighting, were worded as follows:

– ‘quality of the tenderer’s proposal in terms of completeness, clarity and concision, relevance of information and documentation provided, lack of ambiguity (20%);

– the proposed methodology and the organisation of the services to cover the needs of the Commission/DG AGRI; in particular, the measures proposed to ensure the timely availability of adequate resources for the proposed skills, and an effective and efficient project management and communication with the DG AGRI (40%);

– the quality control of the delivered services and the guarantees offered to respect the proposal (40%)’.

62 The applicant does no more than claim that those criteria are vague, questioning how the Commission could objectively evaluate the quality of tenders with regard to each of those criteria. The applicant offers no evidence in support of its allegation from which it can be determined that, when defining those criteria, the Commission disregarded its obligation to observe the principles of transparency, equal treatment and non-discrimination.

63 The Court considers that there is nothing in the documents before it to justify any criticism that the Commission exceeded the limits stemming from the abovementioned legislative provisions, as they have been interpreted in the case–law cited (see paragraphs 58 and 59 above), when it chose and defined the award criteria intended to identify the tender offering the best value for money.

64 It must be pointed out that the qualitative criteria at issue are criteria which are relevant to identifying the tender which offers the best value for money, given that the various factors taken into consideration by the Commission when defining them, such as the organisation and methodology intended for provision of the services, and the timely availability of skills and material and personal resources, may, unquestionably, affect the proper provision of the services covered by the contract to be awarded and, therefore, the value of the tender itself.

65 Furthermore, it is obvious that the principal function of the three qualitative award criteria challenged by the applicant is to check that the tender of each candidate is capable of ensuring, first, a provision of services of the quality required and suited to the needs and organisation of DG AGRI in terms of the timely availability of human and material resources and, secondly, the existence of appropriate mechanisms to monitor the effective provision of those services, including a project management team capable of ensuring communication with the recipient of the service. The Court finds that those award criteria, although they are not quantitative, unlike the criterion relating to the total cost of the tender in section 9.3.2 of the tender specifications, are not vague and subjective inasmuch as they may be applied in an objective, concrete and uniform manner by the contracting authority.

66 In addition, the Commission indicated, in accordance with the applicable provisions, the relative weighting attributed to each of the quality criteria by means of percentages, thereby informing the tenderers of the importance that the Commission intended to attach to each criterion when making the comparative evaluation of the tenders.

67 In the light of the foregoing, it must be concluded that the applicant has not established to the requisite legal standard that the Commission failed to fulfil its obligation to define and set out the award criteria in the tender specifications in accordance with the principles of transparency, equal treatment and non-discrimination.

68 Consequently, the complaint that the award criteria were vague and subjective must be rejected as being unfounded.

69 That conclusion cannot be invalidated by the applicant’s claims relating to the terms in which the Commission has drafted the tendering documents in other public procurement procedures.

70 It must, in that regard, be borne in mind that the Community legislature has conferred on the Commission the discretion to choose freely the criteria for awarding a contract which it intends to adopt, but that that discretion is not absolute. In accordance with the provisions of the Financial Regulation and the Implementing Rules, the award criteria chosen by the Commission must be defined and set out in advance in the tendering documents, have the aim of identifying the tender offering the best value for money, and be justified by the subject-matter of the contract. In addition, when exercising that discretion, the Commission must respect the principles of transparency, equal treatment and non-discrimination.

71 In conferring that discretion to choose freely the criteria for awarding the contract, the aim of the Community legislature was to enable the Commission to take into consideration the nature, subject-matter and specific features of each contract when choosing and formulating the award criteria. Consequently, the terms of the award criteria chosen by the Commission in other procurement procedures cannot be relied on by the applicant for the purpose of demonstrating that the award criteria in this case are vague and subjective. Reference to the tender documents in other procurement procedures is not evidence which is either relevant or sufficient for that purpose.

72 In the light of all of the foregoing, the plea in law which alleges an infringement of Article 97(1) of the Financial Regulation must be rejected in its entirety.

The second plea in law: manifest error of assessment

Arguments of the parties

73 The applicant claims that the Commission, by accepting the tender submitted jointly by IBM and ARHS Developments, committed a manifest error of assessment. The applicant challenges the general remarks made by the evaluation committee in its report and considers that its own tender was neither correctly nor objectively evaluated when compared with that of the successful tenderer.

74 First, the applicant makes the observation that the consortium formed by IBM and ARHS Developments, whose tender was successful, did not satisfy the selection criterion linked to economic and financial capacity, because the overall financial position of the latter company, which suffered losses in the tax years 2003 and 2004, was negative. The criterion in section 9.2.1 of the tender specifications requiring financial soundness for the previous three years, which had to be complied with by all members of a consortium and by all possible subcontractors, was, accordingly, not fulfilled.

75 The applicant also criticises the Commission for not, in those circumstances, requesting that IBM provide a guarantee on behalf of ARHS Developments, as the Commission had done in a procurement procedure launched by the Taxation and Customs Union Directorate-General (DG TAXUD) to which ARHS Developments had also submitted a tender in a consortium with IBM. The applicant states in that regard that, unlike the present case, it was not a requirement of the tender specifications in the procedure launched by DG TAXUD that the exclusion criteria and the selection criteria should be satisfied by all of the members of a consortium or by subcontractors.

76 Secondly, the applicant cannot understand the Commission's choice in accepting the tender of the consortium formed by ARHS Developments and IBM. While the latter has the advantage of international recognition, it has only limited experience in the provision of services to the Commission. The same is true of its partner, ARHS Developments, which has almost no experience in this field, quite apart from the fact that it has a limited number of employees. By contrast, the applicant and Software, with which it submitted a tender as a consortium, are both regular suppliers of IT services to the European institutions. Furthermore, Software has a staff of 3 000 employees.

77 The applicant also claims that the working relations maintained in the past by the founder of ARHS Developments with DG AGRI in the provision of IT services was not a criterion which could have been taken into account by the evaluation committee.

78 Thirdly, the applicant complains that the Commission did not, when evaluating the tenders, follow a methodology which was precise and known to the tenderers. Fourthly, the applicant criticises the Commission for not taking into account the fact that its tender was financially more advantageous than

that of the successful tenderer.

79 The Commission rejects the applicant's arguments, and refers to its broad discretion as to the factors to be taken into consideration when a decision to award a contract following a call for tenders is made.

80 It observes that, contrary to the applicant's assertion, ARHS Developments is a subcontractor and not a member of a consortium. In the case of subcontracting, it is clear from sections 7.4 and 9.1.2 of the tender specifications that the contractor remains solely and entirely responsible for performance of the contract awarded. For that reason, contrary to what was decided in the DG TAXUD procurement procedure, in which IBM and ARHS Developments were both members of a consortium and, therefore, jointly responsible if the contract was awarded to them, the Commission did not deem it necessary, in the tendering procedure at issue in the present case, that the tendering company, IBM, should provide a guarantee on behalf of the company which was a subcontractor, ARHS Developments.

81 The Commission refers to the wording of section 9.2 of the tender specifications in support of its point that satisfaction of the criterion of financial soundness did not have to be established by each of the members of a consortium or by each of the subcontractors proposed by the tenderer. According to the Commission, it is enough to demonstrate that the members of a consortium or the tenderer and its subcontractor(s) jointly offer an adequate financial capacity. Accordingly, a tender can be rejected because of the financial position of one single member of the consortium or one of the subcontractors only when that position is such as to affect the financial capacity of the other members of the consortium or of the principal partner (in the case of subcontractors) to perform the contract.

Findings of the Court

82 It is clear from settled case-law that the Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Community Courts is limited to checking compliance with the applicable procedural rules and with the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case 56/77 *Agence européenne d'intérims* v *Commission* [1978] ECR 2215, paragraph 20; Case T–145/98 *ADT Projekt* v *Commission* [2000] ECR II–387, paragraph 147, and Case T–148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II–2627, paragraph 47).

83 What must be determined therefore is whether, in this case, the Commission committed a manifest error of assessment in the award of the contract by selecting a tender other than that of the consortium of which the applicant was a member, regard being had to the broad discretion enjoyed by the Commission when awarding a contract following an invitation to tender.

– The selection criterion relating to the economic and financial capacity of the successful tenderer

84 It is appropriate to examine the applicant's argument that the Commission, in taking the view that the consortium formed by IBM and ARHS Developments satisfied the selection criterion relating to economic and financial capacity, even though the overall financial position of ARHS Developments was negative, committed a manifest error of assessment.

85 In essence the question is whether, as is claimed by the applicant, the tender specifications in this case required compliance with the selection criterion relating to economic and financial capacity by all of the parties which submitted a joint tender as members of a consortium or as subcontractors. It must also be determined whether the reply to that question is dependent on the legal nature of the links between the parties which decided to jointly submit their tender, whether those are links characteristic of those between members of a consortium or links characteristic of subcontracting.

86 First of all, it is useful to recall the content of the provisions of the tender specifications relating to the information which must, when a tender is submitted, be supplied to the contracting authority to allow examination of compliance with the exclusion and selection criteria, namely sections 8.2.2 and 8.2.3 of the specifications (see paragraph 13 above). That information must be provided by each of the members of a consortium, where the tender is submitted by a consortium, or by each of the

subcontractors proposed at the time of submission of the tender or in the future, in the case where the tenderer envisages making use of subcontractors.

87 In addition, as regards information for the selection criterion relating to economic and financial capacity, section 8.2.3.1 of the specifications states that, where a company has been operating for less than three years, proof must be furnished that its financial standing is adequate.

88 Next, as regards the provisions concerning the assessment of compliance with the exclusion criteria, it is clear that section 9.1 of the specifications states that '[i]n the case of joint tenders (consortium) or subcontractors, these exclusion criteria will be applied to all the individual organisations proposed by the tenderer', and that the decision to exclude a tenderer will be taken on the basis of the information which all the tenderers, either a single entity or all members of a joint offer as members of consortium or as subcontractors, have to supply in accordance with the requirements of section 8.2.2 of the specifications.

89 Lastly, as regards the provisions of the specifications concerning the assessment of compliance with the selection criteria, namely section 9.2.1 on examination of economic and financial standing, and section 9.2.2 corresponding to professional and technical capacity, it is clear that those provisions merely state that the decision relating to selection of tenderers will be taken on the basis of the information supplied by the tenderers in accordance with the requirements of sections 8.2.3.1 and 8.2.3.2 of the specifications and, where applicable, on the basis of other information which the Commission may judge to be relevant. However, it is noteworthy that those provisions do not, unlike the provisions on exclusion criteria, state that, in the case of joint tenders (consortium) or subcontractors, those selection criteria will be applied to all the organisations in the tenderer's proposal.

90 The applicant's reliance on the provisions referred to above does not therefore support its claim that, in this case, both IBM and ARHS Developments, which jointly submitted the successful tender, were required individually to demonstrate a sound economic and financial capacity for the previous three years, irrespective, furthermore, of the legal nature of the links between them.

91 That conclusion cannot be invalidated by the fact that, under section 8.2.3 of the specifications, the information relating to economic and financial capacity there referred to must be supplied by all parties submitting the joint tender. There is no provision in the tender specifications which specifies how that information must be used by the contracting authority when assessing compliance with the selection criteria, in particular the criterion concerning the economic and financial capacity of the tenderer.

92 It follows that, in this case, the Commission was at liberty, by reason of its broad discretion as regards the factors to be taken into consideration when a public contract is awarded, to make an overall assessment of the information provided by each of the two companies which jointly submitted the successful tender and to conclude that, taken together and regard being had to the fact that they were in some respects interdependent, those companies jointly possessed the economic and financial capacity necessary to satisfy the relevant selection criterion. Contrary to what is claimed by the applicant, there is no provision of the specifications in this case from which it can be inferred that the Commission was obliged to examine separately the economic and financial capacity of each of the two companies which jointly submitted their tender and to conclude that those two companies individually satisfied the relevant selection criterion.

93 In any event, having regard to the legal nature of the links between IBM and ARHS Developments, the Commission was entitled to refrain from establishing that ARHS Developments had complied with the selection criterion relating to economic and financial capacity. In fact, as is clear from the non-confidential version of the successful candidate's tender placed on the case-file by the Commission (pages 18, 29 and 35), the legal status of that company is, in the context of the call for tenders at issue, that of a subcontractor, and not that of a member of a consortium as is claimed by the applicant.

94 As is correctly observed by the Commission, the legal links characteristic of a subcontracting relationship differ from those which characterise the relationship of members of a consortium inasmuch as, in the case of subcontracting, the sole party responsible for the proper performance of the contract is the tenderer to which the contract has been awarded, not the subcontractor. In the present case, it was laid down in sections 7.3 and 7.4 of the specifications, and in Article 9.1.2 of the draft framework contract, that, in the case of subcontracting, the contractor was to remain solely responsible for the due

performance of the contract. IBM remained, therefore, ultimately solely responsible for the due performance of the contract.

95 Moreover, since ARHS Developments had been operating in the market for less than three years, it was obliged, in accordance with section 8.2.3.1 of the specifications, only to demonstrate that it possessed, at the time of lodging its tender and for the purposes of performance of the contract, adequate financial standing. It is clear from the non-confidential version of the tender of the successful tenderer (pages 57 and 58) that ARHS Developments, operating in the market since 2003, submitted the information required for assessment of the selection criterion relating to economic and financial capacity in a detailed and objective manner, and that information, moreover, has not been directly disputed by the applicant.

96 In those circumstances, the Commission could reasonably form the view, without exceeding the limits set on the exercise of its broad discretion in awarding a contract, that examination of the economic and financial capacity of the two companies which jointly submitted the successful tender justified the conclusion that the selection criterion relating to economic and financial capacity had been satisfied. In addition, taking account of the role in the tender reserved to IBM and its financial soundness, which is moreover undisputed by the applicant, the Commission was also justified in forming the view that the fact that the overall financial situation of ARHS Developments was negative was not such as to place in question the economic and financial capacity required by the tender specifications.

97 In addition, and to the extent to which it is evident that ARHS Developments was a subcontractor of IBM, it is not possible to accept the applicant's argument which seeks to demonstrate that the Commission treated differently two similar situations and, consequently, infringed the principle of equal treatment and non-discrimination in the exercise of its broad discretion, inasmuch as, in this case, by contrast to what the Commission had done in the DG TAXUD procurement procedure, it did not require the provision of a guarantee covering ARHS Developments.

98 As the applicant rightly acknowledges, in the last-mentioned procurement procedure, IBM and ARHS Developments submitted their tender jointly in the form of a consortium. That is not the position here. In the instant case, it has been established that ARHS Developments was the subcontractor of the tendering company, IBM, which, under the provisions of the specifications and of the draft framework contract, was solely responsible for performance of the contract. In the case of a consortium, as a general rule all its members are bound to the contract and jointly and severally responsible for its due performance, which explains why DG TAXUD requested a guarantee from IBM, given that the overall financial situation of the other tendering member of the consortium, ARHS Developments, was negative. It follows that, contrary to what is claimed by the applicant, since the situations are not similar, the Commission was entitled to treat them differently, and, consequently, the Court cannot hold that there was any infringement of the principle of equal treatment.

99 In the light of all of the foregoing, it must be concluded that the applicant has not established that, in taking the view that the successful tenderer satisfied the selection criterion relating to economic and financial capacity, notwithstanding the fact that the overall financial situation of the company operating as subcontractor, ARHS Developments, was negative, the Commission committed a manifest error of assessment.

– The evaluation of the applicant's tender and its comparison with that of the successful tenderer

100 It is also clear that the applicant cannot rely on its greater experience in the field of providing IT services for the European institutions, nor on a larger number of employees, in order to establish that the Commission did not correctly assess its tender when comparing it with the successful tender, and that it thereby committed a manifest error of assessment.

101 In accordance with settled case-law, the quality of tenders must be assessed on the basis of the tenders themselves and not either on the basis of the experience acquired by the tenderers with the contracting authority in connection with previous contracts or on the basis of selection criteria (such as the technical and professional capacity of tenderers) which were already checked at the selection phase and which cannot be taken into account again for the purpose of comparing the tenders (Case T-169/00 *Esedra* v *Commission* [2002] ECR II-609, paragraph 158, and *TQ3 Travel Solutions Belgium* v

Commission, cited in paragraph 82 above, paragraph 86; see also, to that effect, *Beentjes*, cited in paragraph 49 above, paragraph 15).

102 In this case, it is clear from section 9.3.1 of the specifications that the award criteria are three in number (see paragraph 14 above), and that the past experience of tenderers in the field of providing IT services to the Commission is not among them. The applicant's experience therefore cannot preclude the successful candidate's tender from being treated as a tender capable of ensuring a quality of service superior to that of the applicant and adequately satisfying the award criteria concerned.

103 The same is true of the applicant's assertion concerning the number of its employees. There is nothing to prevent the Commission from judging a lesser number of employees to be sufficient, not to say justified, without impairing the expected quality of the services (see, to that effect, *TQ3 Travel Solutions Belgium* v *Commission*, cited in paragraph 82 above, paragraph 89). Moreover, the applicant has in no way demonstrated that the lower number of employees made available by the successful tenderer might affect the quality of the service here being provided.

104 Furthermore, as stated by the Commission, the past acquisition of significant experience in the field of providing IT services to the European institutions and, more specifically, to the Commission, cannot under any circumstances be taken into account by the contracting authority when selecting tenders if the principles of equal treatment and non-discrimination are to be respected.

105 It follows that the conduct of the contracting authority, when in this case it did not take into account the experience acquired by the applicant in the past in providing IT services to the Commission, far from constituting a manifest error of assessment, was consistent with the limits imposed by those general principles of law on the exercise of its broad discretion and was in accordance with the relevant provisions of the specifications.

106 As regards the applicant's assertion that the Commission took into account the experience acquired in the past by the founder of ARHS Developments with DG AGRI, the Court considers that this argument must be dismissed. First, the applicant offers no evidence in support of its assertion. Secondly, it is clear from the evaluation committee report that the committee relied on the three objective award criteria in relation to quality stated in section 9.3.1 of the specifications, and within the general observations no reference is made to the alleged earlier experience of the founder of ARHS Developments with DG AGRI.

107 Consequently, the Court finds that the Commission conducted the public procurement procedure at issue with the required impartiality and objectivity, that being ensured, moreover, by the fact that the evaluation committee was composed of members of four different services of the Commission. The applicant's claim intended to establish that the Commission did not assess its tender either correctly or objectively must therefore, in the absence of sufficient evidence, be rejected.

– The financial evaluation of the applicant's tender and the methodology used in evaluating the tenders

108 As regards the applicant's claim that its tender was in financial terms a lower bid than that of the successful candidate, that fact is of no relevance, because in this case the contract had to be awarded, in accordance with the tender specifications, on the basis of the criterion of the best quality/price ratio, and not only on the basis of the criterion of price.

109 In addition, while it is true that the financial tender of the consortium to which the applicant belonged was lower than that of the successful tenderer, it remains the case that, as is clear from the results of the evaluation of tenders to be found in the evaluation committee report (section 5.5), the applicant's tender was not, in financial terms at any rate, the lowest bid among the tenders submitted, since it was ranked merely in fourth position in relation to price.

110 It follows that the applicant is not entitled to argue that there was a manifest error of assessment by relying on the fact that its tender was, in financial terms, a lower bid than that of the successful tenderer.

111 The same is true of the applicant's claim concerning the methodology used by the Commission when evaluating the tenders. On this point, leaving aside the fact that that claim is unsupported, the Court observes that, contrary to what is maintained by the applicant, the methodology employed by the Commission when making a final ranking of the tenders was defined in advance and set out in section 9.3 of the specifications (see paragraph 14 above), where, in an adequately detailed manner, the contracting authority set out the criteria in the light of which selection of tenders was to be carried out, as well as the weighting to be attributed to each of those criteria.

– The discrepancy in award criteria referred to in the evaluation committee report

112 Lastly, as regards the discrepancy, referred to by the applicant at the hearing, between the award criteria set out in section 5.2 of the non-confidential version of the evaluation committee report and those mentioned in section 5.4 of that report, it is clear that that typographical error, acknowledged as such by the Commission, although regrettable, is of no relevance, since, as is clear from the results of the evaluation of the tenders, the evaluation committee applied the three qualitative award criteria which had been defined in advance and set out in the tender specifications in accordance with the requirements of the legislation.

113 Consequently, in the light of all the foregoing, it must be concluded that, since the applicant has not succeeded in establishing to the requisite legal standard that the Commission committed a manifest error of assessment, this plea in law must be rejected as being unfounded.

The third plea in law: infringement of the obligation to state reasons and failure to provide pertinent information

Arguments of the parties

114 The applicant claims that the contested decision is vitiated by the failure to provide an adequate statement of reasons.

115 First, the applicant complains that the Commission deprived it of the possibility of assessing the legality of the Commission's acts by failing both to reply in time to the applicant's questions and to provide the clarification repeatedly requested in writing.

116 Secondly, the applicant claims that the Commission did not provide it with all the information requested on the grounds for rejection of its tender. In this context the applicant states that, in accordance with Article 253 EC and Article 8 of Directive 92/50, the contracting authority is obliged to give sufficient reasons for its decision to reject the tender of a participant when the latter request the reasons for that rejection, and must do so within 15 days following that request.

117 In this case, the applicant contends, the Commission did not explain clearly the reasons why it rejected the applicant's tender and failed to make any reference to the characteristics and comparative advantages of the successful tenderer, thereby depriving the applicant of the possibility of commenting meaningfully on the choice made and of challenging it, and also of the possibility of obtaining legal redress.

118 The Commission considers that it has complied in full with the requirements to state reasons which stem from Article 100(2) of the Financial Regulation. The Commission therefore rejects the applicant's arguments seeking to establish the contrary.

Findings of the Court

119 As a preliminary point, the complaint put forward by the applicant, criticising the fact that the Commission omitted both to reply within the time-limits to the requests submitted to it by the applicant and to provide the clarification which was sought several times in writing by the applicant, does not fall within the scope of an analysis of the Commission's obligation to state reasons, but within an analysis of the infringement of the principles of diligence and good administration as alleged by the applicant under its fourth and final plea in law. Consequently, this complaint will be examined only in the context of that plea in law (see paragraphs 142 to 150 below).

120 As regards the infringement, claimed by the applicant, of the obligation to state reasons as such, in that the Commission failed to communicate to it all the information requested on the reasons for rejection of its tender, it must be pointed out that, contrary to what is maintained by the applicant, the obligation on a contracting authority to state reasons for the rejection of a candidate's tender does not, in this case, come within the scope of Directive 92/50. As stated in paragraphs 47 and 48 above, the relevant provisions which are applicable in this case are the Financial Regulation and the Implementing Rules and, more specifically, Article 100(2) of the Financial Regulation and Article 149 of the Implementing Rules, which govern the obligation to state reasons incumbent on the competent institution in the context of a public procurement procedure.

121 It is clear from those provisions, and from settled case-law, that the Commission fulfils its obligation to state reasons if it confines itself, first, to informing unsuccessful tenderers immediately of the reasons for the rejection of their tenders and then subsequently, if expressly requested to do so, provides to all tenderers who have made an admissible tender the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer, within a period of 15 days from the date on which a written request is received (see, to that effect, Case T–19/95 *Adia Interim* v *Commission* [1996] ECR II–321, paragraph 31, and *Strabag Benelux* v *Council* cited in paragraph 58 above, paragraph 54).

122 That manner of proceeding satisfies the purpose of the duty to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure taken and thereby enable them to assert their rights, and, on the other, to enable the Court to exercise its supervisory jurisdiction (see *Adia Interim* v *Commission*, cited in paragraph 121 above, paragraph 32 and case–law cited; *Strabag Benelux* v *Council*, cited in paragraph 58 above, paragraph 55; and *Renco* v *Council*, cited in paragraph 58 above, paragraph 93).

123 Consequently, in order to determine whether, in this case, the Commission fulfilled its obligation to state reasons, the Court considers it necessary to examine the contested decision and also the letter of 10 December 2004, sent to the applicant in reply to its express request of 2 December 2004 seeking to obtain additional information on the decision to award the contract in question and on the rejection of its tender.

– The statement of reasons contained in the contested decision and in the letter of 10 December 2004

124 In the contested decision, the Commission confined itself, in accordance with Article 100(2) of the Financial Regulation, to disclosing the reasons why the applicant's tender had been rejected, namely the fact that that tender did not offer the best value for money, the criterion on which the contract had been awarded. The Commission also informed the applicant of the possibility of requesting additional information on the reasons for the rejection of its tender.

125 As regards the letter of 10 December 2004 (see paragraph 28 above), it is necessary to observe, at the outset, that the Commission's reply to the applicant's written request of 2 December 2004 complied with the maximum period of 15 calendar days, from the date of receipt of that request, as laid down in Article 149(2) of the Implementing Rules.

126 The letter of 10 December 2004, which provided information on several points in reply to the applicant's request for detailed explanations, was worded as follows:

'(1) The successful tenderer is IBM … with subcontractor Aris Developments …

The tender specifications did not require the percentage of the contract to be allocated to subcontractors.

(2) [Points allocated on each of the three quality criteria to the successful tender and to that of the applicant:]

Tendering Party	QC 1 out of 20	QC 2 out of 40	QC 3 out of 40	Total out of 100
European Dynamics	14,51	30,08	29,75	74,33
IBM	18,20	36,33	36,17	90,70

(3) For the reasons mentioned in the introductory letter [protection of the legitimate business interests of the tendering parties], it is not possible to provide a copy of the evaluation report to you. I can, however, give you an extract from the minutes of the Evaluation Committee comparing your offer [the applicant's tender] to the winning offer:

European Dynamics	Good but rather general offer, more a collection of best practices than tailored to the specific aspects of DG AGRI addressed by the tendering specifications (notably, the guarantees offered to cope with the business aspects of financial systems)
IBM	Very good offer, concise and clear. Covers both technical and business aspects well. The offer conveys the assurance of the ability of the tenderer to cope successfully with the challenges in the field of financial IS [IT systems] at DG AGRI

(4) As explained in the tender specifications, there is no score awarded to the financial offers. The award has been done using the best quality/price ratio.

Tendering party	Weighted Price (EUR)	Points out of 100	Points/price (rounded to 4 decimals)	Rank
European Dynamics	381,40	74,33	0,1949	4
IBM	393,03	90,70	0,2308	1

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127 It is clear that, in that letter, the Commission stated to the requisite legal standard the reasons for the rejection of the applicant's tender, by specifying the name of the candidate to which the contract had been awarded and that of its subcontractor, and also the advantages of the successful tender by comparison with that of the applicant in the light of the three qualitative award criteria established by the tender specifications. Indeed, the second table enabled the applicant to compare directly, on each qualitative criterion, the points which had been awarded to it with those obtained by the successful tenderer. In addition, the last table showed the result of the quality/price ratio calculation, for both the applicant's tender and the successful tender, thereby enabling the applicant to identify immediately the reasons why its tender had not been chosen, namely the fact that it offered less value for money than that of the successful tenderer, because the latter offered a better quality/price ratio (see, to that effect, *Esedra* v *Commission*, cited in paragraph 101 above, paragraph 192; *Strabag Benelux* v *Council*, cited in paragraph 58 above, paragraph 57; cited in and *Renco* v *Council*, cited in paragraph 58 above, paragraph 95).

128 Furthermore, the letter of 10 December 2004 also revealed that the applicant's tender had not been ranked, on any of the three qualitative criteria set out in the tender specifications, ahead of the successful tender. In addition, in the last table, it was indicated that, in the final ranking, the applicant's tender was placed in fourth position.

129 Moreover, the general observations concerning the comparison of the applicant's tender with that of the successful tenderer gave details of the factors in its tender which the Commission considered to be unsatisfactory.

130 Having regard to all of that information, it must be concluded that the Commission properly fulfilled its obligation to state reasons, as interpreted by the case-law, inasmuch as its letter of 10 December 2004 satisfied the requirements laid down by Article 100(2) of the Financial Regulation and Article 149(2) of the Implementing Rules.

– The brevity of the evaluation committee report

131 Furthermore, the applicant's claim that the evaluation committee report is relatively brief cannot invalidate the finding that the statement of reasons was sufficient.

132 While it is true that the evaluation committee report appears succinct, it remains the case that the information which it contains was sufficient to satisfy the obligation to state reasons in the terms laid down by the Community legislature and the case-law, since that information enabled both the applicant to assert its rights before the Court and the Court to exercise its supervisory jurisdiction. Indeed, the applicant, in its written pleadings, relied on information drawn from the extracts from the evaluation committee report which had been sent to it in the letter of 10 December 2004.

133 It follows that, while regrettable, the fact that the evaluation committee report was succinct, none the less cannot invalidate the conclusion that the Commission satisfactorily fulfilled, to the requisite legal standard, its obligation to state reasons.

134 Nevertheless, it is appropriate to point out that the principle of transparency which informs every public procurement procedure requires that particular care is taken, when a candidate's tender is rejected, with the statement of reasons, and that is a consequence of the broad discretion enjoyed by the institutions in public procurement. It would be desirable, accordingly, that the contracting authority should ensure that any evaluation committee report issued in a tendering procedure be as substantial as possible, setting out in detail the reasoning which led to the proposal to award the contract to one specific tender and to reject, consequently, the tenders of other candidates. The fact that, as the Commission stated at the hearing, 'a lot of work is done behind the scenes' cannot release the contracting authority from the obligation, in conformity with the principle of transparency and the safeguards which limit its broad discretion, to take pains to ensure that all the factors on which it has based its decision are revealed.

135 For the same reasons, the Court considers that that it would be equally desirable that the institution concerned systematically should send to tenderers which have made a written request, within the meaning of Article 100(2) of the Financial Regulation and Article 149(2) of the Implementing Rules, a copy of the evaluation committee report from which, if necessary, confidential information has been removed.

– The Commission's letter of 26 January 2005, sent on 7 February 2005

136 Lastly, the sufficiency of the statement of reasons is not brought into question by the fact that in the letter dated 26 January 2005, and posted on 7 February 2005, the Commission provided, at the applicant's express request, an even more detailed explanation concerning the evaluation of the applicant's tender and the grounds for its rejection (see, to that effect, *Strabag Benelux* v *Council*, cited in paragraph 58 above, paragraph 57). After all, since the Commission had, to the requisite legal standard and in accordance with Article 100(2) of Financial Regulation and Article 149(2) of the Implementing Rules, stated the reasons for its decision to reject the applicant's tender and to award the contract to the successful tenderer, the Commission was not under any obligation to reply to the applicant's requests of 29 and 30 December 2004. Since that letter was sent to the applicant after the date on which the present action was brought by the applicant, it cannot be taken into consideration for the examination of this plea in law relating to the infringement of the obligation to state reasons. On the other hand, the Court considers that the letter must be examined under the fourth plea in law, which alleges infringement of the principles of diligence and good administration (see paragraphs 151 to 159 below).

137 Having regard to all of the foregoing, the third plea in law alleging an infringement of the obligation to state reasons must be rejected as being unfounded, since the applicant, on the basis of the information concerning the grounds for the rejection of its tender which were sent to it by the Commission, was in a position to assert its rights before the Court and the Court has been able to exercise its supervisory jurisdiction in respect of the legality of the contested decision.

The fourth plea in law: infringement of the principles of diligence and good administration

Arguments of the parties

138 First, the applicant claims that the Commission infringed the principles of good administration and diligence, by acting with significant delay and by failing to provide adequate answers to the applicant's requests to it for clarification of certain specifications in the tender documents prior to the submission of its tender. The Commission, it argues, thereby prevented it from submitting a more specific tender, on the assumption, which is not accepted, that the tender which the applicant did submit was not specific.

139 Secondly, the applicant repeats its criticism that the Commission failed both to reply to the questions sent to it within the time-limits and to provide the clarification which the applicant had requested several times in writing. It submits that the Commission, although acknowledging receipt on 13 January 2005 of its letter of 30 December 2004, did not reply to it until 7 February 2005, that is to say, after expiry of the period for bringing this action, on 2 February 2005.

140 The Commission rejects the applicant's arguments and contends that it replied promptly and comprehensively to each of the applicant's requests for information.

141 As regards the letter sent on 7 February 2005, the Commission considers that that letter was not essential in order for the applicant to be aware of the grounds for the rejection of its tender. The Commission also disputes that that letter was sent after the expiry of the period for bringing this action. On the contrary, the contested decision, dated 23 November 2004, was, it claims, sent by recorded delivery on 1 December 2004. Accordingly, the two-month period for bringing proceedings, extended on account of distance by a period of 10 days, expired on 11 February 2005. The letter posted on 7 February 2005 was received by the applicant before that date, namely 9 February 2005.

Findings of the Court

142 This plea in law can be divided into two parts. In the first part, the applicant claims that the Commission failed to send to it the information relating to certain specifications contained in the tender documents which it had requested from the Commission before submitting its tender. In the second part, the applicant claims that the Commission replied to its requests of 29 and 30 December 2004, following rejection of its tender, only by letter dated 26 January 2005 and posted on 7 February 2005, and thus after the expiry of the period for bringing this action, thereby depriving the applicant of the possibility of assessing the legality of the Commission's acts.

– The first part of the fourth plea in law

143 So far as concerns the requests for information sent by the applicant to the Commission before it submitted its tender, it must be borne in mind that, in accordance with Article 148(1) and (2)(a) of the Implementing Rules, contacts between contracting authorities and tenderers are permitted by way of exception during the contract award procedure. Accordingly, before the closing date for the submission of tenders, the contracting authority may, at the instance of tenderers, provide additional information solely for the purpose of clarifying the nature of the contract, such information to be communicated on the same date to all tenderers which have asked for the tender specifications.

144 It is clear from the actual terms of Article 148(1) and (2)(a) of the Implementing Rules that contacts between the contracting authority and tenderers before the lodging of tenders may take place only by way of exception.

145 Furthermore, it is clear that that provision confers on the contracting authority the option of replying to requests for additional information sent to it by tenderers. Accordingly, contrary to what the applicant appears to maintain, that provision cannot be interpreted as imposing on the contracting authority an obligation to reply to such requests.

146 Consequently, it must be held that the Commission was not obliged to reply to requests for additional information sent by the applicant prior to the lodging of its tender.

147 However, it is clear from the documents before the Court that the Commission provided the information which was requested on several occasions by the applicant and, on each occasion, did so within a

reasonable period of time.

148 In that regard it must be observed, first, that the applicant sent to the Commission four successive requests for additional information on 14, 16, 20 and 21 April 2004. All of those requests related to the content of the tender specifications and sought clarification on many different specifications within them. More specifically, those four requests contained a total of 46 questions.

149 Next, it must be noted that the Commission replied promptly to each of those requests. Thus, as regards the applicant's requests of 14 and 16 April 2004, the Commission replied to some questions in those requests within four working days, namely on 20 April 2004. On 21 April 2004, the Commission replied equally promptly to the applicant's request of 20 April 2004. The same is true of the request for information dated 21 April 2004, to which the Commission replied by letter on 22 April 2004, while correctly informing the applicant that it was not possible to reply as regards the additional information sought because of the lateness of the applicant's request. In fact, the applicant's request of 21 April 2004 was outwith the date laid down for questions in the tender specifications, namely at least six days before the closing date for submission of tenders, which had been set for 26 April 2004.

150 In the light of the foregoing, it must be concluded that the applicant's claim that the Commission did not reply either promptly or adequately to its requests for additional information has no basis in fact or in law. The Court considers that the Commission, by endeavouring to respond quickly to the applicant's requests, demonstrated a level of diligence characteristic of good administration, the more so when, as noted above, the Community legislature has placed no obligation on the Commission to reply. Consequently, the infringement of the principles of diligence and good administration claimed by the applicant has not been established.

– The second part of the fourth plea in law

151 The infringement of the principles of diligence and good administration claimed by the applicant is in actual fact bound up with the claim that the Commission, because it did not reply to the applicant's requests of 29 and 30 December 2004 within a reasonable time, is partly responsible for the present dispute and has thereby forced the applicant to bring this action.

152 It must be recalled that the need to act within a reasonable time in conducting administrative proceedings is a component of the general Community law principle of good administration which is incumbent on all Community institutions throughout such proceedings (Case T–394/03 *Angeletti* v *Commission* [2006] ECR II–000, paragraph 162).

153 The reasonableness of a period must be assessed, furthermore, in relation to the particular circumstances of each case and, in particular, the background of each case, the various procedural stages which the Commission must follow and the complexity of the case (Case T–347/03 *Branco* v *Commission* [2005] ECR II–2555, paragraph 114; see also, as regards examination of a complaint relating to State aid, Case T–395/04 *Air One* v *Commission* [2006] ECR II–1343, paragraph 61 and the case-law cited).

154 That is the context in which it is appropriate to assess the reasonableness of the period of approximately five weeks which elapsed between the applicant's requests of 29 and 30 December 2004 and the posting of the Commission's reply on 7 February 2005.

155 It is to be noted in this regard that the information sought by the applicant in those requests related, essentially, to the general observations in the evaluation committee report, and to the results of the comparison of its tender with that of the successful tenderer. However, at the time of the applicant's requests of 29 and 30 December 2004, the phase of evaluation of tenders had already been completed, and the decision to award the contract to a tenderer other than the applicant had also been taken. In those circumstances, it is clear that the Commission was in possession of the information requested by the applicant, relating to the tender evaluation phase, at the moment when those requests were sent to it, if not before, namely on the date on which the Commission notified the applicant, by letter of 10 December 2004, of the reasons for rejecting its tender.

156 That being the case, there was nothing to prevent the Commission conveying that information when it sent its letter on 10 December 2004, or at the very least doing so in a period shorter than five weeks, since no particular steps had to be taken in order to reply to the applicant's requests. It must, furthermore, be noted that the letter in question, although it bears the date of 26 January 2005, was not posted until 7 February 2005. The Commission therefore allowed another 12 days to elapse before posting it to the applicant, while fully aware that the period for bringing proceedings was very close to expiry. Consequently, it must be concluded that, since the period of almost five weeks which elapsed between those requests and the reply of the Commission by the letter posted on 7 February 2005 was not justified by the circumstances of this case, the Commission failed in its duty of diligence and good administration.

157 However, it does not, in this case, necessarily follow from the establishment of such an infringement either that the contested decision was unlawful or that the decision should be annulled, since the delay in the Commission's replying to the applicant's requests did not, contrary to what the applicant claims, affect its rights of defence in relation to the contested decision.

158 As has been established in paragraphs 127 to 130 above, the letter of 10 December 2004 contained all the information required to enable the applicant duly to assert its rights before the Court and to enable the Court to exercise its supervisory jurisdiction on legality. The more detailed explanations provided to the applicant by the letter sent on 7 February 2005 are not such as to affect that assessment.

159 Having regard to all of the foregoing, the Court finds that the fact, regrettable as it may be, that the Commission replied to the applicant's requests of 29 and 30 December 2004 with a significant delay, but in any event before expiry of the period for bringing proceedings laid down in Article 230 EC, did not restrict the applicant's ability to assert its rights before the Court in the form of this action and is, consequently, not such as to entail annulment of the contested decision.

Costs

160 The applicant requests that the Commission should be ordered to pay the whole costs, even if the application is rejected.

161 The applicant claims that the Commission, by failing to provide a timely and sufficient statement of reasons, did not allow it to assess its chances of contesting the decision and therefore forced it to bring this action in order to preserve its rights. The applicant is critical of the fact that the information contained in the letter posted on 7 February 2005, which was extremely important as to the exact reasons why its tender was rejected, reached it only after the expiry of the deadline for the bringing of this action.

162 The Commission takes the view that there is no basis for the applicant's claims. The letter posted on 7 February 2005 reached the applicant before the final date for the bringing of this action. The Commission does not accept that the information contained in that letter was indispensable to knowledge of the reasons which led to rejection of the applicant's tender, given that those reasons had been set out previously in the contested decision and in the letter of 10 December 2004.

163 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first subparagraph of Article 87(3) of those Rules further provides that the Court may order that the costs be shared or that each party should bear its own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

164 In this case, the applicant has failed on its claim for annulment. However, the Court's examination has established that the Commission failed to comply with its duty of diligence and with the principle of good administration by replying with a significant delay to the applicant's requests of 29 and 30 December 2004 and, consequently, that the Commission may have contributed to the present dispute.

165 In those circumstances, the Court considers that an equitable assessment of the matter is to decide that the Commission, in addition to its own costs, should pay one fifth of the costs of the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The action is dismissed as being unfounded.

2. The Commission shall bear its own costs and shall pay one fifth of the costs incurred by Evropaïki Dinamiki – Proigmena Sistimata Tilepikinonion Pliroforikis kai Tilematikis AE.

3. Evropaïki Dinamiki shall bear four fifths of its costs.

Jaeger Azizi Cremona

Delivered in open court in Luxembourg on 10 September 2008.

E. Coulon M. Jaeger

Registrar President

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** Language of the case: English.

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Notice for the OJ

Action brought on 2 February 2005 by European Dynamics S.A. against the Commission of the European Communities

(Case T-59/05)

Language of the case: English

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 2 February 2005 by European Dynamics S.A., established in Athens (Greece), represented by N. Korogiannakis, lawyer.

The applicant claims that the Court should:

- annul the decision of the Commission (DG Agriculture), to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

- order the Commission to pay the applicant's legal costs and other costs and expenses incurred in connection with the application, even if the application is rejected.

Pleas in law and main arguments

The applicant company filed a bid in response to the Commission's call for tenders AGRI-2004-S4FA-I3-01 for the provision of information system development, maintenance and support services for the DG Agriculture Financial Information Systems1. By the contested decision this bid was rejected and the contract awarded to another bidder.

In support of its application for annulment of that decision the applicant claims first of all the Commission violated the Financial Regulation2 as well as Article 17 (1) of Directive 92/503 by using evaluation criteria that were extremely vague. The applicant further contends that the Commission failed, in response to the applicant's questions, to explain in a clear and objective manner what precisely was requested of the tenderers.

The applicant further considers that the Commission committed manifest errors of appreciation in its evaluation of the applicant's tender. In this respect the applicant contends that the Evaluation Committee did not correctly evaluate the offers, failing to take into account that contrary to the applicant both members of the successful consortium had extremely limited experience. The applicant also maintains that its own bid was more advantageous.

The applicant also invokes a violation, by the Commission, of its obligation, under Article 253 EC, to state reasons and a failure to provide pertinent information requested by the applicant on the grounds for the rejection of its bid. The applicant also submits that the Commission violated the principle of good administration and diligence by acting with significant delay and by not offering adequate answers to the applicant's requests for information prior to the submission of the bids.

_____

[1] - OJ 2004 S 59-050031

[2] - Coucil Regulatio (EC, Euratom) No 1605/2002 of 25 Jue 2002 o the Fiacial Regulatio applicable to the geeral budget of the Europea Commuities, OJ L 248 , 16/09/2002 p.1

[3] - Council Directive 92/5/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 29 , 24/7/1992 p. 1

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JUDGMENT OF THE GENERAL COURT (Third Chamber)

19 March 2010 (*)

(Public service contracts – Community tendering procedure – Provision of computer services relating to telematic systems to control the movement of products subject to excise duty – Rejection of a tenderer's bid – Action for annulment – Consortium of tenderers – Admissibility – Principles of equal treatment of tenderers and transparency – Award criteria – Principles of sound administration and diligence – Obligation to state the reasons on which the decision is based – Manifest error of assessment)

In Case T–50/05,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis, lawyer,

applicant,

v

European Commission, represented initially by L. Parpala and K. Kańska, subsequently by L. Parpala and E. Manhaeve, and lastly by L. Parpala, E. Manhaeve and M. Wilderspin, acting as Agents,

defendant,

ACTION for the annulment of the Decision of the Commission of the European Communities of 18 November 2004 rejecting the tender submitted by the consortium formed by the applicant and another undertaking in a tendering procedure relating to the provision of computer services concerning the specification, development, maintenance and support of telematic systems to control the movement of products subject to excise duty within the European Community under the excise-duty suspension arrangements and awarding the contract to another tenderer,

THE GENERAL COURT (Third Chamber),

composed of J. Azizi, President, E. Cremona (Rapporteur) and S. Frimodt Nielsen, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 17 March 2009,

gives the following

Judgment

Legal context

1 The award of service contracts of the Commission of the European Communities is subject to the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the financial regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, 'the financial regulation') and the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the financial regulation (OJ 2002 L 357, p. 1; 'the implementing rules'), in the versions applicable to the facts of the case.

Background to the dispute

I – Computerising the movement and surveillance of excisable products (EMCS)

2 On 16 June 2003, the European Parliament and the Council of the European Union adopted Decision No 1152/2003/EC on computerising the movement and surveillance of excisable products (OJ 2003 L 162, p. 5), in which they stated that it was necessary to have a computerised system for monitoring the movement of excisable goods (EMCS), such as would allow Member States to obtain real-time information on those movements and to carry out the requisite checks (recital 3 of Decision No 1152/2003).

3 Article 1 of Decision No 1152/2003 thus provides for the establishment of the EMCS.

4 Furthermore, Article 3(2) of Decision No 1152/2003 provides:

'The Commission shall ensure that in work on the Community components of the computerised system every attention is paid to re-using as much of the NCTS [new computerised transit system] as possible and ensuring that the computerised system is compatible with, and, if technically possible, integrated into, the NCTS with the objective of creating an integrated computer system for the surveillance both of intra-Community movements of excisable goods and of movements of excisable goods and goods subject to other duties and charges coming from or going to third countries.'

5 The file shows that the EMCS was to be introduced in four stages between 2002 and 2009 (stage 0 in parallel to stages 1, 2 and 3).

6 Stage 0 was to be an intermediary phase prior to the actual setting up of the EMCS. During that stage, the existing computer systems used in the excise duty sector were to be kept in place and supported up until the moment of their integration into the EMCS at a time when the latter had become operational. Stage 0 was to take place in parallel to the other stages of the EMCS and to end once the EMCS started working. The tasks during stage 0 were to be carried out by the contractor for the public contract Fiscalis Information Technology Systems, specification, development, maintenance and support (FITS–DEV).

7 Stage 1 was to comprise the setting up of the EMCS and the definition of its specifications. Those specifications were to be produced by the contractor for public contract EMCS System Specifications (ESS) ('the ESS contract'). The work of that contractor was to be finished by the middle of 2005.

8 Finally, stages 2 and 3 were to be development and implementation stages and were to be linked to the activities of the contractor for the public contract called 'Specification, development, maintenance and support of telematic systems to control the movement of products subject to excise duty within the European Community under the excise-duty suspension arrangements (EMCS–DEV)-(TAXUD/2004/AO-004)' ('the contract at issue').

II – Award of the contract at issue

9 By a contract notice of 20 July 2004, published in the Supplement to the *Official Journal of the European Union* (OJ 2004, S 139), the Commission's Directorate-General for Taxation and Customs Union ('Taxation and Customs Union DG' or 'the contracting authority') issued an open call for tenders for the contract at issue. The contract was to be awarded to the most economically advantageous tender, that is to say the one presenting the best price-quality ratio. The time-limit for receipt of tenders was 31 August 2004.

10 Point 10 of the specifications annexed to the invitation to tender defines the criteria for the award of the contract as follows:

'10. Award criteria

The contract will be awarded based on the economically most advantageous tender. The following criteria will be taken into account when assessing tenders:

(1) Quality of the proposed solution:

1. – Fitness of the proposed strategy to perform the tasks of the contract (40/100)

2. – Fitness of the proposed methods, tools, quality environment and quality procedures to perform the tasks (30/100)

3. Fitness of the proposed team organisation to perform the tasks (20/100)

4. – Structure, clarity and level of completeness of the proposal (10/100)

The price component will be further evaluated for the tenders which have reached a global quality score of 60% across all the quality criteria and minimal scores (50%) for each of the quality criteria.

(2) Price

The offer presenting the best value for money will be identified in the following way:

– The offer with the best technical score will receive a quality indicator of 100 points. The remaining offers will receive lower quality indicators in proportion to their technical scores;

– the offer found to be the cheapest will receive a price indicator of 100 points. The remaining offers will receive higher price indicators in proportion to their prices.

A quality/price ratio will be calculated for each offer by dividing the quality indicator by the price indicator. The highest result will go to the offer presenting the best value for money.'

11 By fax of 27 August 2004, the applicant, Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, a company incorporated under Greek law active in the area of information and communications technology, expressed reservations regarding the procedure for the award of the contract at issue, based on a potential lack of objectivity of the call for tenders to the advantage of tenderers which had already been suppliers to the Taxation and Customs Union DG, a lack of clear specifications in the call for tenders and a lack of precise and objective criteria for the evaluation of tenderers. By the same fax, it also asked the contracting authority to extend the deadline for the submission of tenders until it had remedied the abovementioned problems.

12 On 31 August 2004, the applicant in consortium with the French company Steria SA submitted its tender ('the Evropaïki Dynamiki-Steria consortium's tender').

13 By letter of 3 September 2004, the contracting authority expressed the opinion that the reservations in the applicant's fax of 27 August 2004 were unfounded and refused to grant its request for extension of the deadline for the submission of tenders.

14 In response to the abovementioned letter of 3 September 2004, the applicant, by fax of 6 September 2004, submitted reservations regarding the compliance of the tendering procedure with Article 92 of the financial regulation and Article 131(1) and (2) of the implementing rules.

15 By letter of 5 October 2004, the contracting authority replied that the conditions of Article 92 of the financial regulation and Article 131(1) and (2) of the implementing rules had been complied with.

16 The opening of the tenders took place on 8 September 2004. Five tenders were received and all of them were declared admissible. One of the tenders was eliminated at the exclusion stage. Another was eliminated at the quality evaluation stage. Only three tenders, including that of the Evropaïki Dynamiki-Steria consortium, were compared in terms of the price-quality ratio.

17 The evaluation committee proposed awarding the contract to Intrasoft International SA ('Intrasoft'), whose tender presented the best price-quality ratio. It decided to rank the Evropaïki Dynamiki-Steria consortium's tender third.

18 The evaluation committee's proposal was endorsed by the contracting authority which, by decision of 18 November 2004, awarded the contract at issue.

19 The result of the tendering procedure was communicated to the applicant by letter of 18 November

2004. The letter stated that '[the applicant's] tender has not been selected for award, because following the assessment of the tenders selected and in the light of the award criteria specified in the terms of reference, it does not represent the best offer in terms of quality and price'.

20 By registered letter and fax of 22 November 2004, the applicant requested the following information and documents from the contracting authority: the name of the successful tenderer and, in case the successful tenderer had a partner (or partners), or a subcontractor (or subcontractors), their names and the percentage of the contract to be allocated to the partner(s)/subcontractor(s); the scores awarded to the applicant's technical offer and to that of the successful tenderer for each award criterion; a copy of the evaluation committee report; how the applicant's financial offer compared with that of the successful tenderer and, more particularly, the scores attributed to each of those two tenders. By fax of 8 December 2004, the applicant repeated its request.

21 In reply, the contracting authority, by letter of 10 December 2004, provided the applicant with an extract from the report of the evaluation committee. That extract contains, among other things, comments by the committee on the tenders of Intrasoft and the Evropaïki Dynamiki-Steria consortium concerning each of the award criteria for the contract at issue. Those comments are as follows:

'A. Intrasoft …

Overall comment
An excellent offer, demonstrating a profound understanding of the issues involved with an extremely well thought out and detailed project management approach. The level of detail, the careful approach to analysing potential problems and the attention paid to quality management issues contributes to the overall quality of this offer. The only weakness is a lack of architectural analysis, which nevertheless does not detract greatly from the overall quality of the offer. The offer is based on a solid comprehension of the excise domain and its political and organisational environment in the Commission and the Member States. Methods and team organisation are of a very high quality and show that they will be able to cope with the scope of the task, including [by displaying] the necessary flexibility. As a result, this proposal appears perfectly adequate to assume the responsibility for the project.
Criteria "Fitness of the proposed strategy to perform the tasks of the contract"
This company has an outstanding comprehension of the EMCS business problems to be solved, a clear understanding of how the project components fit together. The offer presents a comprehensive and in depth description of their strategy, implementation approach, and very detailed work packages description. Their vision and strategy is supported by a very detailed and sound project plan. There is a good analysis of the possibility of re-use of NCTS components. The offer presents an exhaustive requirements tracking matrix that shows their deep understanding of the project purposes and their adherence to the "high level" requirements defined in the terms of reference of the call for tender. The offer proposes a nice set of quality indicators covering all activities, to complement the ones proposed in the terms of reference. A small weakness of the offer is the lack of deep analysis of architectural issues (robustness, scalability and performance).
Criteria "Fitness of the proposed methods, tools, quality environment and quality procedures to perform the tasks"
Extremely detailed description of the methods and tools proposed. General approach combining RUP [Rational Unified Process] for the specification phase followed by TEMPO for the development phase shows a good understanding of the differences between the two stages in Commission-Member State collaborative developments.

The quality assurance approach is extremely well thought out, proposing quality indicators for both process and product, derived from “key evaluation topics”. The tenderer has a good understanding of the principles of COSMIC FFP [footnote omitted], although the description is a bit theoretical, as their offer lacks pragmatic implementation (e.g. does not specify the tools to be used). Although the development infrastructure is very well defined, the security provisions in the tender’s premises are overlooked.
Criteria “Fitness of the proposed team organisation to perform the tasks”
The team structure and the organisation are extremely well defined, along with lines of reporting, extensive profiles identification (23 in total) and description, full matrix of skills per profile. The team composition is well balanced between manager profiles, business experts, business analysts, developers, designers, helpdesk operators etc. The roles and responsibilities within the team are very well described. The sizing of the team (around 60 people) is sound and consistent with the volume of activities to be performed. Their offer guarantees low turnover by maintaining it to around 80% of team personnel, avoiding them being removed to work on other projects.
Criteria “Structure, clarity and level of completeness of the proposal”
The proposal is complete and comprehensive in its treatment of all project activities. The overall presentation is well structured, rich in explanatory diagrams. Information is easy to find and to read as it is written in a comprehensive language. The offer only lacks a table of acronyms.

B. [Evropaïki Dynamiki-Steria]

Overall comment
Whilst this offer contains some interesting proposals concerning architecture, the proposal is too generic: the description of the specification and development process does not show much emphasis on the specificity of the [implementation of the] EMCS project. The offer’s proposed methodology is a good collection of best practices and literature about computerisation system development. However, again, the specific issues of the EMCS development are dealt with in a very generic fashion and the proposed analysis is not very complete. The description of the team organisation is good, but does not indicate that there is an understanding of the necessity of strong end user support during the specification activities of the [implementation of the] EMCS project. The offer contains some inconsistencies, and this casts some doubt on the reliability of the proposal.
Criteria “Fitness of the proposed strategy to perform the tasks of the contract”
The tenderer has included a review of the EMCS technical architecture, made an interesting proposal concerning the architecture (e.g. the use of Web services), made initial attempts to propose technical solutions, and a proposal for setting up the infrastructure. The offer presents a detailed list of work packages with relevant order, request, planning, delivery/acceptance mechanism, and quality indicators. However, the overall approach is extremely generic with few close examinations of EMCS specific issues. The proposed strategy is a bit simplistic with many excerpts from external sources (e.g. large excerpts from IBM Rational RUP documentation) without showing how that documentation fits in the project.

The offer shows some lack of understanding of the terms of reference as the proposal makes reference to activities that have already been completed, or will be completed by the time the contract will come into force, or are proposing architecture elements that would not fit the EMCS environment in terms of performance or scalability. The offer presents some inconsistencies, and in particular in the planning: for instance, some development activities are starting even before the start of the specifications.
Criteria “Fitness of the proposed methods, tools, quality environment and quality procedures to perform the tasks”
The methods proposed are generally well presented. The offer presents an accurate description of the IT development infrastructure and a good description of its relevant security aspects. There are lots of textbook-like references to architecture, standards, IT tools and infrastructure components (e.g. XML, X509, J2EE), accompanied by a few hundred pages of manuals and brochures from HP, Oracle, CISCO, etc., but often without any justification or connection made to EMCS objectives. The offer presents a detailed description of Cosmic FFP, but the tools proposed for estimates (Calico and Costar) are only suitable for estimates based on the Cocomo II methodology, which is incoherent (see section 4.1.3.5.1). RUP is considered throughout their offer as “the” project management methodology but their software proposal for the development environment does not list any IBM-Rational licence.
Criteria “Fitness of the proposed team organisation to perform the tasks”
Good description of team organisation, showing understanding of the evolution of the team composition as the project proceeds from specification to development to production, to handover, including security, testing, and helpdesk. Interactions in the team organisation are well described. The sizing of the team, with a pool of 67 team members, is adequate. Although customs and excise experience is identified in their offer as a must in terms of skills, in practice, their proposal does not show such competences.
Criteria “Structure, Clarity and level of completeness of the proposal”
The presentation of the offer is clear. Its structure and overview is good. However, the overwhelmingly generic material and the low level of details lower the readability of the offer.’

22 The extract from the evaluation committee's report sent to the applicant also contains a comparative evaluation table concerning the quality of the tenders from the Evropaïki Dynamiki-Steria consortium and Intrasoft and a comparative evaluation table for the price-quality ratio of the two tenders. The two tables are as follows:

Comparative evaluation table

ITT TAXUD/2004/AO-004 EMCS-DEV

Criteria	...	Intrasoft	Evropaïki Dynamiki-Steria	...	...	
Quality						
Fitness of the proposed strategy to perform the tasks of the contract (/40)		35.1	23.2			
Fitness of the proposed						

methods, tools, quality environment and quality procedures to perform the task (/30)		24.5	16.7		
Fitness of the proposed team organisation to perform the tasks (/20)		17.6	14.5		
Structure, clarity and level of completeness of the proposal (/10)		8.5	5.8		
Total quality		85.7	60.2		
Quality indicator (maximum reference is 100)		100	70		

Comparative evaluation table ITT TAXUD/2004/AO-004 EMCS-DEV					
Criteria	...	Intrasoft	Evropaïki Dynamiki-Steria	...	...
Total quality		85.7	60.2		
Quality indicator (maximum reference is 100)		100	70		
Quoted price TBP/(IS+EI) (in euros) (IT services and provision for the evolution of the infrastructure)		11 634 533	15 078 693		
Normalised price indicator (minimum reference is 100)		100	130		
Quality indicator / Price indicator		1	0.54		

23 By registered letter and fax of 30 December 2004, the applicant submitted its observations on the extract from the evaluation committee's report communicated to it and repeated its view that the procedure for the award of the contract at issue was contrary to the financial regulation and to the applicable legislation.

24 By letter of 14 January 2005, the contracting authority indicated that it was closely examining the points raised by the applicant in its letter of 30 December 2004 and that the applicant would receive a detailed reply as soon as possible.

25 By letter of 17 February 2005, the contracting authority replied to the applicant's observations set out in its letter of 30 December 2004.

26 The award notice for the contract at issue was published on 2 March 2005 in the Supplement to the *Official Journal of the European Union* (OJ 2005, S 43).

Procedure and forms of order sought by the parties

27 By application lodged at the Registry of the Court on 28 January 2005, the applicant brought the present action.

28 By letter of 30 October 2006, the Court, by way of measures of organisation of procedure, asked the applicant to reply in writing to questions concerning the admissibility of the action. The applicant complied with that request within the time allowed.

29 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure.

30 By letter of 3 February 2009, the Court, by way of measures of organisation of procedure, asked the parties to reply in writing to certain questions. By the same letter, the Court also asked the Commission to submit certain documents. The parties complied with those requests within the time allowed.

31 By letter of 2 March 2009, the Court, by way of measures of organisation of procedure, asked each party to submit its written observations on the replies given by the other party to the written questions put by the Court in the letter of 3 February 2009. The parties complied with those requests within the time allowed.

32 The parties presented oral argument and replied to the questions put by the Court at the hearing which took place on 17 March 2009.

33 The applicant claims that the Court should:

– annul the decision of the Commission not to choose its tender and to award the contract to the successful tenderer;

– order the Commission to pay the costs, even if the application is dismissed.

34 The Commission contends that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

I – Admissibility

A – Arguments of the parties

35 Without formally raising an objection of inadmissibility, the Commission draws the Court's attention to the fact that Steria, the other member of the Evropaïki Dynamiki-Steria consortium, has not challenged the decision of the contracting authority not to choose the tender submitted by that consortium and to award the contract at issue to another tenderer and that, furthermore, it was not clear from the application that that decision was being challenged by the applicant on behalf of

Steria. The Commission therefore observes that the applicant is challenging that decision only on its own behalf.

36 In its reply, the applicant responds that, as leader of the Evropaïki Dynamiki-Steria consortium and the member fully responsible for preparing and drafting the tender, it has standing to act and that no Community legislation or case-law requires all members of a consortium of tenderers to challenge a contested decision to award a contract. Furthermore, the applicant set out those arguments in its written responses to the Court's questions (see paragraph 28 above).

37 The Commission did not challenge the position of the applicant as set out above.

B – Findings of the Court

38 The Court considers it appropriate in the present case to examine whether the applicant has standing to bring an action against the contracting authority's decision, communicated to it by letter of 8 November 2004, not to choose the tender submitted by the Evropaïki Dynamiki-Steria consortium and, consequently, to award the contract at issue to another tenderer ('the contested decision').

39 Under the fourth paragraph of Article 230 EC, '[a]ny natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

40 In the present case, even though the contested decision is formally addressed to the tenderer, that is to say the Evropaïki Dynamiki-Steria consortium, the fact remains that, as the applicant stated in its written replies to the Court's questions (see paragraph 28 above), which were not contested by the Commission and which the Court has no reason to doubt, the Evropaïki Dynamiki-Steria consortium has never had legal personality. Consequently, from the point of view of Article 230 EC, given that its members remained visible in that ad hoc structure, the two undertakings at issue must both be considered to be addressees of the contested decision. Therefore, the applicant was entitled, as addressee of the contested decision, to challenge that decision in accordance with the conditions laid down by Article 230 EC.

41 It follows that the applicant's action is admissible.

II – Substance

42 In support of its action for annulment, the applicant puts forward five pleas in law. The first plea alleges breach of the principles of non-discrimination and freedom of competition. The second plea alleges infringement of the provisions of the financial regulation, the implementing rules, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). The third plea alleges that there is a manifest error of assessment in the contracting authority's evaluation of the Evropaïki Dynamiki-Steria consortium's tender. The fourth plea alleges a lack of relevant information and reasoning. The fifth plea alleges breach of the principle of sound administration and diligence.

43 The Court considers it appropriate to start by examining the first plea, then the second, then the fifth, then the fourth and finally the third. That order is dictated by the fact that the first, second and fifth pleas concern the award procedure for the contract at issue, whereas the fourth and third pleas concern the contested decision itself.

A – The first plea: breach of the principles of non-discrimination and freedom of competition

1. Arguments of the parties

44 The applicant submits that the Commission infringed the principles of non-discrimination and freedom of competition among tenderers by not making available to the applicant – despite a request to that effect from the applicant before the deadline for the submission of tenders – two types of technical information that were necessary for the formulation of tenders for the contract at

issue, namely, first, the exact specifications for the EMCS and, second, technical information relating to existing computer applications linked to the EMCS and, more specifically, the source-code for the NCTS. That alleged omission on the part of the Commission benefited tenderers which were previous or current contractors for the Taxation and Customs Union DG, or which had links to such contractors, and which therefore had exclusive access to the abovementioned information. Those tenderers, including the successful tenderer, were thus able to submit tenders that were more competitive than that of the applicant, both technically and financially.

45 As regards, first, the specifications for the EMCS, the applicant emphasises that they were not yet available at the time of the procurement procedure for the contract at issue, but that they were being prepared by another contractor under a separate contract. The applicant submits that the Commission fails to explain how a tenderer could adequately fulfil the objectives and the requirements of a computer system for which it had not received detailed specifications and wonders how its tender could have been 'better' than that of the incumbent contractor, which was the only one to have access to such specifications.

46 As regards, second, the NCTS source-code, the applicant emphasises that the Commission refused to grant it access for no valid reason and despite its request to that effect. By contrast, the successful tenderer had access to that source-code, since it was the Commission's contractor for the NCTS and was, for that reason, able to submit a tender that was more competitive than the applicant's tender.

47 In order to show the importance of the NCTS source-code for the formulation of tenders for the contract at issue, the applicant points to the following aspects.

48 First, the applicant refers to Article 3(2) of Decision No 1152/2003, which suggests that the contractor for the contract at issue re-use as much as possible the NCTS, the aim being to create an integrated computer system for intra-Community movement of excisable goods. The applicant interprets the content of that article to mean that the decision requires the re-use, by the contractor for the contract at issue, of the NCTS source-code and its architecture.

49 Second, the applicant refers to the description of work package No 7.1 in the technical annex to the tender specifications, where the NCTS source-code was mentioned.

50 Third, the applicant refers to the comments made by the evaluation committee in respect of the tender submitted by the successful tenderer, according to which that tender contained a good analysis of the possibility of re-using the components of the NCTS. The applicant submits that the term 'components' in that instance 'clearly' refers 'to various blocks of source-code'.

51 Fourth, regarding the financial offer, the applicant, in order to show that it was necessary to know the NCTS source-code for the pricing of its tender, claims that the Commission asked tenderers to mention in their offers not only unit prices, as the Commission claims, but also and more importantly a budget and a total price for the supply of the EMCS and all associated services. That requirement on the part of the Commission required tenderers to evaluate with precision the scope and the complexity of the project, which in turn required knowledge of the source-code. The fact that the applicant did not know the source-code forced it to raise the price of its offer in order to incorporate the risks resulting from that lack of knowledge. By contrast, the successful tenderer, which knew that code, was able to submit an offer that was more competitive, requiring only 50% of the budget made available for the contract at issue.

52 Finally, the applicant submits that, in the context of the call for tenders for another contract (a contract for the specification, development, maintenance and support of customs IT systems for the Taxation and Customs Union DG's IT systems (CUST–DEV) (TAXUD/2005/AO–001)), launched not long after the call for tenders for the contract at issue and for which the Taxation and Customs Union DG was also the contracting authority, the NCTS source-code was made available to tenderers. The applicant is therefore asking the Commission to explain that difference in treatment. Furthermore, at the hearing, the applicant submitted that the present case was similar to Case T–345/03 *Evropaïki Dynamiki* v *Commission* [2008] ECR II–341, in which the Court accepted the applicant's plea alleging that there had been a breach of the principle of equal treatment of tenderers and thus annulled the contract award decision adopted by the Commission.

53 The Commission contests the applicant's arguments.

2. Findings of the Court

54 According to Article 89(1) of the financial regulation, all public contracts financed in whole or in part by the budget are to comply with the principles of transparency, proportionality, equal treatment and non-discrimination.

55 Therefore, according to consistent case-law, the contracting authority is required to ensure at each stage of a tendering procedure that the principle of equal treatment and, thereby, equality of opportunity for all the tenderers is observed (Case C-496/99 P *Commission* v *CASSucchi di Frutta* [2004] ECR I-3801, paragraph 108; Case T-203/96 *Embassy Limousines& Services* v *Parliament* [1998] ECR II-4239, paragraph 85; and Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981, paragraph 75).

56 Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions (see, to that effect, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 34, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 93).

57 The case-law also shows that the principle of equal treatment implies an obligation of transparency so that it is possible to verify that that principle has been complied with (Case C-92/00 *HI* [2002] ECR I-5553, paragraph 45, and *Universale-Bau and Others*, paragraph 56 above, paragraph 91).

58 That principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tendering specifications (*Commission* v *CAS Succhi di Frutta*, paragraph 55 above, paragraph 111).

59 The principle of transparency therefore implies that all technical information relevant for the purpose of a sound understanding of the contract notice or the tendering specifications must be made available as soon as possible to all the undertakings taking part in a public procurement procedure in order, first, to enable all reasonably well-informed and normally diligent tenderers to understand their precise scope and to interpret them in the same manner and, secondly, to enable the contracting authority actually to verify whether the tenderers' bids meet the criteria of the contract in question (*Evropaïki Dynamiki* v *Commission*, paragraph 52 above, paragraph 145).

60 In the present case, the applicant criticises the Commission for not providing it with two types of technical information, which, according to the applicant, were necessary for the formulation of tenders and which were, moreover, available to other tenderers. In the light of the case-law cited in paragraphs 55 to 58 above, that alleged omission on the part of the Commission, if it were proven, would prejudice the equality of opportunity between tenderers as well as the principle of transparency as a corollary to the principle of equal treatment.

61 As the Court held in *Evropaïki Dynamiki* v *Commission*, paragraph 52 above (paragraph 147), such an undermining of equality of opportunity and the principle of transparency, assuming that it were proved, would constitute a defect in the pre-litigation procedure adversely affecting the right of the parties concerned to information. That procedural defect could lead to the annulment of the decision in question only if it were shown that, but for that defect, the administrative procedure could have had a different outcome if the applicant had had access to the information in question and if there was even a small chance that the applicant could have brought about a different outcome to the administrative procedure (see *Evropaïki Dynamiki* v *Commission*, paragraph 52 above, paragraph 147 and the case-law cited).

62 Therefore, it is appropriate to examine, first, whether there was a disparity in respect of information in the present case, in the sense that, in the context of the call for tenders, information which the applicant claims not to have had was available to some tenderers, including the successful tenderer. If such a disparity was found to have existed, it would then be appropriate to examine, second, whether the relevant information was useful for the purpose of the formulation of the tenders. Only if that had been the case would the tenderer with access to that information have had an advantage to the detriment of the other tenderers. It would be appropriate to examine, third,

whether the alleged disparity in respect of useful information was the result of a procedural defect brought about by the Commission. If there was such a defect, it would be appropriate to examine, fourth, whether, but for that defect, the tendering procedure could have had a different outcome. From that point of view, such a defect can constitute an infringement of the equality of opportunity of tenderers only in so far as the explanations provided by the applicant demonstrate, in a plausible and sufficiently detailed manner, that the procedure could have had a different outcome as far as it was concerned (see, to that effect, *Evropaïki Dynamiki* v *Commission*, paragraph 52 above, paragraphs 148 and 149).

63 That reasoning applies to each of the two types of technical information that the applicant claims were not made available to it, namely the specifications for the EMCS (first part of the plea) and the NCTS source-code (second part of the plea).

a) The first part of the plea, concerning the non-availability of the specifications for the EMCS

64 The applicant submits, essentially, that the non-availability of the exact specifications for the EMCS, at the time of the procurement procedure, created an advantage for tenderers that were already providing services to the Taxation and Customs Union DG – including the successful tenderer – and which, for that reason, were already aware of the said specifications. Therefore, those tenderers were in a position to submit tenders that were more precise and, accordingly, more competitive than the applicant's tender.

65 As was pointed out in paragraph 62 above, it is appropriate to examine first whether, in the present case, there was a disparity in respect of information in that the specifications for the EMCS were available to some tenderers, including the successful tenderer, but not to the applicant.

66 The tender specifications for the contract at issue (see paragraph 7 above) show that the project for the setting up of the EMCS, of which the contract at issue was to be a part, provided for a stage 1 during which the contractor for the ESS contract was to define the specifications for the EMCS. The Commission explained that they were 'high level' specifications for the EMCS. The abovementioned tender specifications also state that the contractor for the ESS contract was to draw up those specifications before and, in part, in parallel to the drawing up of specifications by the contractor for the contract at issue. The Commission explained that the specifications prepared under the contract at issue relate to the application of the EMCS ('application-related specifications'), as opposed to the 'high level' specifications for that system, prepared under the ESS contract. Finally, the abovementioned tender specifications make it clear that the contractor for the ESS contract was to finalise its work by the middle of 2005.

67 The applicant's arguments show that its complaint concerns the alleged failure to communicate to tenderers the 'high level' specifications for the EMCS.

68 In addition, the Commission has contended, without being contradicted by the applicant, that the contractor for the ESS contract, namely Siemens, had begun to work on the specifications for the EMCS in June 2004 (and that it had finished in April 2005), whereas the call for tenders for the contract at issue was published in July 2004 and the deadline for the submission of tenders was 31 August 2004. Therefore, in the light of the Commission's argument, which was not contested by the applicant, it must be found that only three months elapsed between the start of Siemens' work on the specifications for the EMCS and the deadline for the submission of tenders for the contract at issue, which means that, while the call for tenders remained open, there were no specifications for the EMCS that were actually usable and of which knowledge could have been to the advantage of a tenderer with access to those specifications.

69 Finally, both the applicant and the Commission stated that Siemens, contractor for the ESS contract, had also submitted a tender for the contract at issue.

70 The following conclusions are to be drawn from the abovementioned information.

71 First, it appears that no tenderer – including the successful tenderer – could have had more information regarding the specifications for the EMCS than the applicant, since those specifications did not exist, or were at an embryonic stage. Therefore, it has not been shown that there was a disparity of information which would have led to an infringement of the principle of equal treatment of tenderers.

72 Second, the fact that the specifications for the EMCS did not exist when the tendering procedure for

the contract at issue was launched was not the result of a procedural defect on the part of the Commission, but resulted from the actual planning for the setting up of the EMCS, which envisaged that those specifications would be drawn up under an ESS contract that was separate from the contract at issue and preceded it.

73 Third, even if Siemens managed, under the ESS contract for which it was the contractor, to draw up specifications capable of being used for the formulation of tenders for the contract at issue, it is apparent that that was not decisive since Siemens' tender, submitted for the contract at issue, was not successful. Furthermore, the fact that Siemens submitted a tender for the contract at issue and, therefore, entered into direct competition with the successful tenderer for the award of the contract at issue suggests that Siemens did not share with that tenderer its alleged knowledge of the specifications for the EMCS. Hence, there is no basis for claiming that any tenderer benefited from any sort of privileged access to the said specifications.

74 Given that the applicant has not shown that some tenderers, including the successful tenderer, had more information regarding the specifications for the EMCS than the applicant itself, it should be concluded that, as regards that type of technical information, there was no unequal treatment of tenderers. Accordingly, the first part of this plea in law must be rejected.

b) The second part of the plea, concerning the failure to communicate the NCTS source-code

75 The applicant submits, essentially, that the refusal by the contracting authority to communicate to it the NCTS source-code created an advantage for the successful tenderer, which was also the contractor for the Commission when the NCTS was set up and did, for that reason, inevitably have access to the source code. Since it had that information, the successful tenderer was able to submit a tender that was more competitive than that of the applicant, both technically and financially.

Disparity in information to the benefit of the successful tenderer

76 The Commission does not contest the fact that the NCTS source-code was available to the contracting authority before the date on which the tendering procedure for the contract at issue was launched and that it did not communicate it to tenderers. It contends that it considered it to be of no use for the formulation of the tenders.

77 It is also not disputed that the successful tenderer knew the NCTS source-code when it prepared its tender, given that it was the contractor for the Taxation and Customs Union DG for the NCTS.

78 It follows that, when the tendering procedure for the contract at issue was launched and until the deadline for the submission of tenders, technical information that had been denied to the applicant was available to the successful tenderer, because it was the contractor for the Taxation and Customs Union DG for the NCTS.

The usefulness of the NCTS source-code for the formulation of the tenders

79 In order for the disparity in information established to represent an advantage to the benefit of the successful tenderer in the preparation of its tender, it is further necessary to show that the relevant information was useful for the development of tenders for the contract at issue, in the sense that not having that information could be to the detriment of the tender in terms of quality and the financial offer.

80 In the present case, and in the light of the arguments submitted by the parties, the usefulness of the NCTS source-code for the formulation of tenders for the contract at issue must be assessed. Two preliminary observations are called for.

81 First of all, as the arguments of the parties show, the source-code is a set of instructions written in a computer programming language that permits creation of a computer programme. The arguments also show that the source-code is one of the first pieces of material to be produced in the entire software life-cycle.

82 Further, the Commission explained at the hearing, without being contradicted by the applicant, that there are clear differences between the NCTS and the EMCS, in so far as the NCTS concerned the customs sector whereas the EMCS related to the excise duty sector. In the context of the NCTS, the main users are customs officials, while in the context of the EMCS, the main users are economic

operators. It follows that the 'targets' of the two systems are different and, therefore, that the two systems do not have the same function.

83 In the first place, the applicant, in support of its claim concerning the usefulness of access to the NCTS source-code, refers to Article 3(2) of Decision No 1152/2003, quoted in paragraph 4 above.

84 In this respect, it is appropriate to point out that Decision No 1152/2003 constitutes the legal basis for the setting up of the EMCS and that Article 3(2) of that decision defines the relationship between the EMCS and the NCTS. The Commission's task was to ensure the integration, if technically possible, of the EMCS into the NCTS, with the objective of creating an integrated computer system to monitor the intra-Community movements of excisable goods. It was in order to accomplish that mission that it had been entrusted with by the Community legislature that the Commission launched the tendering procedure for the contract at issue. In the context of that procedure, the Commission, as contracting authority, took the view that the expression 're-using as much of the NCTS as possible' in Article 3(2) of the decision did not mean that tenderers had to be given the NCTS source-code for the purposes of formulating their tenders. The Commission communicated that 'message' to tenderers in the documentation relating to the tendering procedure at issue.

85 In this respect, the Commission refers, in particular, to paragraph 4.2.1 of the management plan for the setting up of the EMCS – entitled 'The EMCS development based on NCTS experience' –, which was distributed to tenderers and thus also to the applicant; the description in that plan of the 'NCTS experience' to be taken into account for the development of the EMCS does not refer to the NCTS source-code or, *a fortiori*, to the need to have access to it in order to formulate a tender. Furthermore, in clarification No 46, provided as part of the award procedure for the contract at issue, the contracting authority explained that, once the contract had been awarded, '[the duty of] the Contractor [for the contract at issue will be] to propose and [the Taxation and Customs Union DG's] to decide how much of the NCTS applications' architecture and source-code will be reused' and that that 'information [namely the NCTS source-code] will only be available to the successful Tenderer'.

86 Consequently, the applicant cannot in the present case invoke Article 3(2) of Decision No 1152/2003 in support of its claim concerning the usefulness of access to the NCTS source-code, since the contracting authority incorporated that article's requirement to 're-us[e] as much of the NCTS as possible' in the call for tenders at issue in concrete terms and in a transparent manner in such a way that it was not necessary for tenderers to have access to that source-code in order to be able to formulate their tenders.

87 In the second place, the applicant invokes, in support of its claim, the description of work package No 7.1 in the technical annex to the tender specifications. That description is worded as follows:

'Work package 7.1.: Application development

This work package covers development and maintenance of the Centrally Developed Applications (CDA), Test Applications and Central Service applications (e.g. the MCC, ETA, SETA, CS/RD and CS/MIS).

The applications developed will take as much inspiration as possible from the architecture and even the source code of the NCTS applications:

...'

88 The description of that work package does indeed mention the NCTS source-code. However, that description does not show that the said source-code is useful for the preparation of tenders, as the applicant claims, but shows that the source-code will be useful for the work that will have to be carried out at a stage following the award of the contract at issue, namely during the performance of that contract by the successful tenderer.

89 Furthermore, that information emerges clearly from the abovementioned clarification No 46 (see paragraph 85 above).

90 It follows that both the description of work package No 7.1 and, above all, clarification No 46, far from showing the usefulness of the NCTS source-code for the formulation of tenders for the contract at issue, show that the 'message' that the contracting authority wanted to communicate to tenderers was, first, that that code was not relevant to the formulation of tenders, but that it would

become so only at the later stage of the performance of the contract at issue by the successful tenderer and, second, that it would be for the contracting authority to decide how much of the NCTS source-code would be reused. Furthermore, at the hearing, the Commission revealed that, in the end, the contracting authority had decided not to use a single line of the NCTS source-code for the development of the project to set up the EMCS.

91 Consequently, the applicant's argument relating to the reference in the description of work package No 7.1 to the NCTS source-code cannot be accepted.

92 In the third place, the same is true for the applicant's argument concerning a specific comment made by the evaluation committee about the tender submitted by the successful tenderer (see paragraph 50 above). The applicant provides no evidence to show that the expression 'components of the NCTS', which the evaluation committee used, is a reference to the components of the NCTS source-code. In this respect, the tender documents for the contract at issue show that the contracting authority provided tenderers with a certain number of reference documents regarding the NCTS which, as the Commission rightly claimed, cover a vast range of subjects, from methodology to quality assurance procedures, from system specifications to test procedures, and from the functional description of NCTS applications to the specifications of central operations. It must therefore be considered that the evaluation committee, when it referred to the possibility of re-using 'components of the NCTS', was alluding to the possibility of re-using the elements of the NCTS that are mentioned in the documents made available to tenderers. In any event, the applicant does not provide any demonstration or evidence that could undermine this analysis.

93 In the fourth place, the applicant also does not demonstrate the usefulness of access to the NCTS source-code for the pricing of tenders. It is recalled that the applicant submits, in essence, that that pricing required tenderers to make precise estimates as to the size and the complexity of the project, which required knowledge of the source-code. Lack of access to the source-code made it impossible for the applicant to estimate precisely the size and the complexity of the project, forcing it, essentially, to raise the price of its tender.

94 That argument from the applicant cannot be upheld.

95 First, the NCTS source-code was not necessary in order to estimate the size and the complexity of the project for the setting up of the EMCS. In fact, as previously stated, the NCTS and the EMCS are different from each other (see paragraph 82 above) and the contracting authority clearly communicated to tenderers – and thus to the applicant – that the NCTS source-code was not relevant for the formulation of tenders (see paragraph 90 above).

96 Further, as the Commission contended and as the applicant conceded at the hearing, as regards the activities whose pricing allegedly depended on an estimate of the size and the complexity of the project, the contracting authority, having itself determined the number of days which were to be devoted to carrying out those activities, merely asked tenderers to quote unit prices expressed in daily rates for each staff profile required (namely developer, programmer and analyst). In order to arrive at the price of the tender, those unit prices were to be multiplied by the number of days determined by the contracting authority. By determining the number of days required for carrying out the abovementioned activities, the contracting authority itself estimated the scale of the work to be done, thus liberating tenderers from the need to undertake that task and focusing competition among tenderers on the daily rates proposed for each necessary staff profile. The applicant has not shown that lack of knowledge of the NCTS source-code had any sort of impact on the daily rate quoted for its staff.

97 It follows that it has not been shown that access to the NCTS source-code would have been useful for the purposes of pricing the applicant's offer.

98 Finally, the applicant's argument relating to the usefulness of access to the NCTS source-code is not supported by *Evropaïki Dynamiki* v *Commission*, paragraph 52 above. Unlike the present case, in which the computer system under the contract at issue – the EMCS – is different from the system whose source-code was not provided – the NCTS – (see paragraph 82 above), the case cited by the applicant related to a computer system – the Cordis system – which was merely a new version of the same Cordis system for which the source-code had not been provided (*Evropaïki Dynamiki* v *Commission*, paragraph 52 above, paragraph 7). Since the present case concerns the usefulness of the NCTS source-code, no analogy may be drawn between the present case and *Evropaïki Dynamiki* v *Commission*, paragraph 52 above.

99 The same is true for the applicant's argument concerning the CUST–DEV contract (see paragraph 52 above). In this respect, the Commission stated in the observations it submitted in response to the Court's letter of 2 March 2009 (see paragraph 31 above) that the CUST–DEV contract concerned computer applications in the customs sector, which is also the relevant sector for the NCTS, and that it was therefore right to provide tenderers with the source-code of that system. By contrast, that was not the case for the contract at issue, which concerns computer applications in the excise duty sector, in other words, a sector other than customs. The applicant did not contest the Commission's claim at the hearing and the Court has no reason to doubt it.

100 In the light of the above reasoning, the conclusion must be that the usefulness of the NCTS source-code for the formulation of tenders in connection with the award of the contract at issue has not been demonstrated. Consequently, the second part of the applicant's plea in law must be rejected.

101 It follows that the present plea in law must be rejected in its entirety.

B – The second plea: infringement of the financial regulation, the implementing rules, and Directives 92/50 and 2004/18

1. Arguments of the parties

102 The applicant claims that the award criteria for the contract at issue are not sufficiently specific and quantifiable and, consequently, were not capable of being examined objectively by the evaluation committee. That failure on the part of the contracting authority constitutes an infringement of Article 97(1) of the financial regulation, Article 138 of the implementing rules, Article 17(1) of Directive 92/50 and the provisions of Directive 2004/18.

103 The Commission contests the applicant's arguments.

2. Findings of the Court

104 By way of a preliminary point, it must be noted that, pursuant to Article 105 of the financial regulation, from 1 January 2003 onwards – the date of entry into force of the regulation – the directives relating to the coordination of procedures for the award of public supply, service and works contracts do not apply to public contracts awarded by the Community institutions on their own behalf except as regards questions concerning the thresholds which determine publication arrangements, the choice of procedures and corresponding time-limits. It follows that the applicant's complaint against the award criteria for the contract at issue must be examined solely in the light of the provisions of the financial regulation and the implementing rules.

105 In addition, it must be recalled that, in accordance with Article 97(2) of the financial regulation and Article 138(1)(b) of the implementing rules, the contract at issue had to be awarded to the most economically advantageous tender.

106 It must, next, be recalled that, in order to ensure that the principles of transparency, equal treatment and non-discrimination are observed at the stage at which tenders are selected with a view to awarding a contract, Article 97(1) of the financial regulation imposes on the contracting authority, where the contract is awarded to the most economically advantageous tender, the obligation to define and set out in the call for tenders the award criteria for evaluating the content of tenders. Those criteria must, in accordance with Article 138(2) of the implementing rules, be justified by the subject of the contract. According to Article 138(3), the contracting authority must also specify, in the contract notice or in the tender specifications, the weighting it will apply to each of the criteria for determining the best value for money.

107 Nevertheless, those provisions leave it to the contracting authority to choose the award criteria in the light of which tenders will be assessed. However, the award criteria which the contracting authority proposes to use must, in any event, be aimed at identifying the offer which is economically the most advantageous (see, to that effect, Case T–4/01 *Renco* v *Council* [2003] ECR II–171, paragraph 66, and Case T–183/00 *Strabag Benelux* v *Council* [2003] ECR II–135, paragraph 74).

108 In addition, the criteria used by the contracting authority to identify the most economically advantageous tender do not necessarily have to be quantitative or related solely to the price. Even if award criteria that are not expressed in quantitative terms are included in the tender specifications,

they can be applied objectively and uniformly in order to compare tenders and are clearly relevant for identifying the most economically advantageous tender (see, to that effect, *Renco* v *Council*, paragraph 107 above, paragraphs 67 and 68).

109 In the present case, it must be recalled first that the award criteria for the contract at issue appear both in the contract notice (paragraph IV 2) and in the specifications annexed to the invitation to tender. Therefore, the condition of publicity laid down in Article 97(1) of the financial regulation has been fulfilled.

110 Further, it should be recalled that the award criteria, described as vague and subjective by the applicant, read as follows:

'1. Quality of the proposed solution:

– Fitness of the proposed strategy to perform the tasks of the contract (40/100);

– fitness of the proposed methods, tools, quality environment and quality procedures to perform the tasks (30/100);

– fitness of the proposed team organisation to perform the tasks (20/100);

– structure, clarity and level of completeness of the proposal (10/100).'

111 It must therefore be held that the applicant, far from substantiating its argument that those criteria are vague and subjective, finds itself contradicted by the clear terms of those criteria. In particular, the applicant puts forward no evidence to support its claims which would allow for a finding that, when the contracting authority defined those criteria, it failed to have regard to its obligation to observe the principles of transparency and equal treatment of tenderers. On the contrary, the applicant in effect repeats the argument it put forward in the context of the first plea, concerning the alleged lack of an exact description of the services required and of the specific requirements of the work to be done.

112 A review of the abovementioned criteria shows that they focus on the following elements: the strategy proposed by the tenderers (first criterion), the methods, tools, quality environment and quality procedures proposed by the tenderers (second criterion), the proposed team organisation (third criterion), and the structure, clarity and level of completeness of the tender (fourth criterion). The applicant does not explain, or show, why those criteria are not justified by the subject of the contract at issue. Furthermore, there is no reason to doubt that those criteria are relevant to identifying the most economically advantageous tender, since those criteria are guaranteed to affect the quality of the services provided under the contract at issue and, therefore, the value of the tender itself.

113 Although those criteria are not quantitative, that fact alone cannot be taken to mean that the contracting authority did not apply them objectively and uniformly (see, to that effect, *Renco* v *Council*, paragraph 107 above, paragraphs 67 and 68). It should be noted that, in the present case, the applicant has submitted no evidence to that effect.

114 Finally, for the sake of completeness, it should be observed that the contracting authority specified, in accordance with the applicable provisions, the relative weighting it would apply to each of the award criteria, thus informing tenderers of the importance it intended to attach to each criterion when it came to the comparative evaluation of the tenders.

115 It follows from the foregoing that the applicant has not shown that the contracting authority failed to fulfil its obligation to define, in the call for tenders, the award criteria in compliance with the regulatory framework and the principles laid down in the case-law as set out in paragraphs 104 to 108 above.

116 It follows from all the foregoing that the second plea in law must be rejected.

C – The fifth plea: breach of the principles of sound administration and diligence

1. Arguments of the parties

117 The applicant claims, in essence, that the Commission infringed the principles of sound administration and diligence by failing to respond promptly and adequately to the applicant's fax of 27 August 2004, in which the applicant expressed its reservations regarding the call for tenders, in particular with regard to the principle of non-discrimination.

118 The Commission contests the applicant's arguments.

2. Findings of the Court

119 In accordance with the general principle of sound administration, which also encompasses the duty of care, a Community institution must observe reasonable time-limits in conducting administrative proceedings and behave diligently in its relations with the public (Case C-47/07 P *Masdar (UK)* v *Commission* [2008] ECR I-9761, paragraph 92, and Case T-394/03 *Angeletti* v *Commission* [2006] ECR-SC I-A-2-95 and II-A-2-441, paragraph 162).

120 In addition, as regards the award of Community public contracts, contact between the contracting authority, on the one hand, and potential tenderers or tenderers, on the other hand, is regulated by Articles 141 and 148 of the implementing rules.

121 Article 141 of the implementing rules provides:

'1. Provided that the request was made in good time before the deadline for submission of tenders, the specifications and additional documents shall be sent, within six calendar days of the receipt of the request, to all economic operators who have requested the specifications or expressed interest in submitting a tender.

2. Provided it has been requested in good time, additional information relating to the specifications shall be supplied simultaneously to all economic operators who have requested the specifications or expressed interest in submitting a tender no later than six days before the deadline for the receipt of tenders or, in the case of requests for information received less than eight calendar days before the deadline for receipt of tenders, as soon as possible after receipt of the request.

...'

122 Furthermore, Article 148 of the implementing rules provides:

'1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

2. Before the closing date for the submission of tenders, in respect of the additional documents and information referred to in Article 141, the contracting authority may:

(a) at the instance of tenderers, communicate additional information solely for the purpose of clarifying the nature of the contract, such information to be communicated on the same date to all tenderers who have asked for the specifications;

...'

123 Therefore, the provisions cited above show that contact between the contracting authority, on the one hand, and potential tenderers or tenderers, on the other hand, before the deadline for submission of tenders, is permitted in so far as it is for the purpose of obtaining 'additional information' relating to the specifications (Article 141(2) of the implementing rules) and 'additional information' in respect of the additional documents and information referred to in Article 141 and 'solely for the purpose of clarifying the nature of the contract' (Article 148(2)(a) of the implementing rules).

124 As regards the 'additional information' referred to in Article 141(2) of the implementing rules, the contracting authority is required to provide it to the potential tenderers within the time-limits laid down in that article. As regards the 'additional information' referred to in Article 148(2)(a) of the implementing rules, the contracting authority has the right to communicate it to the tenderers, but is not under an obligation to do so.

125 In the present case, it must be held that the fax of 27 August 2004 to which the applicant refers

does not contain a request for the information referred to by the abovementioned provisions of the implementing rules. As previously stated (see paragraph 11 above), in that fax, the applicant expressed reservations regarding the procedure for the award of the contract at issue, based on a potential lack of objectivity of the call for tenders to the advantage of tenderers which had already been suppliers to the Taxation and Customs Union DG, a lack of clear specifications in the call for tenders and a lack of precise and objective criteria for the evaluation of tenderers. By way of the same fax, the applicant also asked the Taxation and Customs Union DG to extend the deadline for the submission of tenders until it had remedied the abovementioned problems. It follows that the Commission was not required to reply to that letter. It did reply none the less, in a manner that was both prompt and adequate, by letter of 3 September 2004, expressing the view that the applicant's reservations were unfounded and refusing to grant its request to extend the deadline for the submission of tenders (see paragraph 13 above). Therefore, there is no doubt that the defendant acted diligently, in the spirit of sound administration, all the more so because, as stated above, the legislature had not imposed any obligation on it to provide a response in the present case. It follows that the Commission's follow-up to the applicant's fax of 27 August 2004 does not in any way infringe the principles of sound administration and diligence.

126 For the sake of completeness, it should be noted that the applicant did not contest the Commission's claim that the contracting authority had replied quickly to all the questions put by tenderers about the tender specifications, most of which had been asked by the applicant.

127 In the light of the foregoing, this plea must be rejected as unfounded.

D – The fourth plea: lack of relevant information and failure to state reasons

1. Arguments of the parties

128 The applicant argues that the contested decision is vitiated by the fact that the Taxation and Customs Union DG did not give a sufficient statement of reasons for its acts. The plea is based on two complaints.

129 First, the Taxation and Customs Union DG did not provide the applicant with all the information requested concerning the grounds for the rejection of its tender, contrary to Article 253 EC and Article 8 of Directive 92/50. That DG did not set out clearly the reasons why it rejected the applicant's tender and made no reference to the characteristics and comparative advantages of the successful tender, thereby denying the applicant the possibility of effectively commenting on the choice made, and any possibility of seeking legal redress. The applicant adds that the Taxation and Customs Union DG did not invoke any reason of public policy or commercial secret to justify its refusal to provide the evaluation report which the Commission normally sends to all tenderers in such cases, in accordance with Article 12(2) of Directive 92/50. According to the applicant, an insufficient statement of reasons, such as that in the present case, makes the Court's review of the contested decision extremely difficult, if not impossible.

130 Secondly, in the reply, the applicant points to the non-compliance with the 15-day time-limit for providing tenderers with extracts from the evaluation committee's report, contrary to the financial regulation and the legislation on public contracts. That non-compliance and the complete lack of reasons concerning certain aspects of the contested decision caused the applicant difficulties in bringing its action before the Court.

131 The Commission contends that this plea should be rejected.

2. Findings of the Court

132 It must be noted, as a preliminary point, that the legislative provisions which determine the content of the obligation to state reasons which a contracting authority has towards unsuccessful tenderers in a public procurement procedure are Article 100(2) of the financial regulation and Article 149 of the implementing rules, and not the provisions of Directive 92/50, as alleged by the applicant (see paragraph 104 above).

133 It follows from those articles that, in the field of public procurement, a contracting authority fulfils its obligation to state reasons if it confines itself first to informing unsuccessful tenderers immediately of the reasons for the rejection of their respective tenders and then subsequently, if expressly requested to do so, provides to all tenderers who have submitted an admissible tender the characteristics and relative advantages of the tender selected as well as the name of the successful

tenderer, within a period of 15 calendar days from the date on which a written request is received (see judgment of 12 July 2007 in Case T–250/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 68, and judgment of 10 September 2008 in Case T–465/04 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 47 and case-law cited).

134 Such a manner of proceeding satisfies the purpose of the duty to state reasons laid down in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion so as to enable, on the one hand, the persons concerned to be aware of the reasons for the measure in order to assert their rights, and, on the other, the Court to exercise its review (see, to that effect, Case T–19/95 *Adia interim* v *Commission* [1996] ECR II–321, paragraph 32; Case T–169/00 *Esedra* v *Commission* [2002] ECR II–609, paragraph 190; *Strabag Benelux* v *Council*, paragraph 107 above, paragraph 55; and Case T–250/05 *Evropaïki Dynamiki* v *Commission*, paragraph 133 above, paragraph 69).

135 Moreover, compliance with the duty to state reasons must be assessed in the light of the information available to the applicant at the time when the action is brought (*Strabag Benelux* v *Council*, paragraph 107 above, paragraph 58, and *Renco* v *Council*, paragraph 107 above, paragraph 96).

136 It follows that, in order to determine whether the Commission fulfilled its duty to state reasons in the present case, it is necessary to examine the letters of 18 November 2004 and 10 December 2004 sent by it to the applicant before the present action was brought.

137 The letter of 18 November 2004 informs the applicant that its tender (submitted with Steria as part of the Evropaïki Dynamiki-Steria consortium's tender) was unsuccessful. It states that that tender was not chosen because, in the light of the award criteria, it did not represent the best tender in terms of quality and price. That letter adds that the applicant could obtain further information on the grounds for the rejection of its tender and that, if it made a request in writing, it could be informed of the characteristics and relative advantages of the successful tender and the name of the successful tenderer. Lastly, the letter states that certain details of the successful tender would not be disclosed if that disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings. It follows that that letter, although somewhat formulaic in nature, is drafted in accordance with Article 100(2) of the financial regulation.

138 The letter of 10 December 2004, from the Commission to the applicant, provides the latter with an extract from the evaluation committee's report. That letter was sent in response to a written request from the applicant dated 22 November 2004, repeated on 8 December 2004.

139 The extract from the evaluation committee's report refers to the name of the successful tenderer. It also contains the evaluation committee's detailed comments on the successful tender and the Evropaïki Dynamiki-Steria consortium's tender in respect of each of the award criteria (see paragraph 21 above). That extract also contains a table with the points awarded to each of the two tenders in respect of each of the award criteria, and a table showing the respective prices of the two tenders and the comparative evaluation of the price-quality ratio (see paragraph 22 above).

140 Accordingly, the Court finds that, by communicating to the applicant, first, the essential grounds for the rejection of the Evropaïki Dynamiki-Steria consortium's tender, and then the aforementioned extract from the evaluation committee's report, the Commission stated to the requisite legal standard the reasons why the applicant's tender was rejected, in accordance with Article 100(2) of the financial regulation and Article 149(2) of the implementing rules. It should be noted that that extract refers to the name of the successful tenderer and, through the comments of the evaluation committee and the two abovementioned tables, the 'characteristics and relative advantages of the successful tender'. The letter of 18 November 2004 and that extract, provided with the letter of 10 December 2004, thus enabled the applicant to identify immediately the reasons why its tender had not been selected, that is, because it was less advantageous economically than that of the successful tenderer, which offered a better price-quality ratio.

141 As regards, finally, the applicant's complaint regarding non-compliance with the 15-day time-limit for providing it with extracts from the evaluation committee's report, it must, in fact, be noted that that extract was sent to it by letter of 10 December 2004 and thus reached it at least 18 calendar days after its written request, sent to the Commission by fax and by registered letter on 22 November 2004. Although it is to be regretted, that slight delay has not, however, in any way

restricted the possibility for the applicant to assert its rights before the Court and cannot therefore, by itself, lead to the annulment of the contested decision. It is clear from the documents before the Court that the applicant has used all the information contained in that extract in order to bring the present action (see, to that effect, Case T-465/04 *Evropaïki Dynamiki* v *Commission*, paragraph 133 above, paragraph 52).

142 Having regard to the foregoing, it must be concluded that the statement of reasons provided in the contested decision enabled the applicant to assert its rights and the Court to exercise its review. Accordingly, the present plea must be rejected.

E – The third plea: manifest errors of assessment in the contracting authority's evaluation of the applicant's tender

1. Arguments of the parties

143 The applicant submits that the Taxation and Customs Union DG made a manifest error of assessment by failing to evaluate correctly and objectively the quality of the applicant's tender and by deciding that that tender was inferior to that submitted by the successful tenderer.

144 In the context of this plea, the applicant argues first that, since the Taxation and Customs Union DG did not follow an objective and predetermined methodology known to the tenderers in order to arrive at the final ranking, it is obvious that the decision of the evaluation committee was based on incorrect assumptions.

145 Second, the applicant argues that the general nature of the criteria used and the tenderers' lack of knowledge of the exact nature of the contractual task to be performed led to a subjective evaluation of the value of the tenders.

146 Finally, the applicant criticises specific comments made by the evaluation committee, which show that its evaluation of the applicant's tender contained manifest errors of assessment.

147 The Commission contests the applicant's arguments.

2. Findings of the Court

148 According to consistent case-law, the contracting authority enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and review by the Court must be limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 33, and Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II-2627, paragraph 47; see also, to that effect, Case 56/77 *Agence européenne d'intérims* v *Commission* [1978] ECR 2215, paragraph 20).

149 In the present case, it should be noted that the applicant bases its argument, in essence, on two factors in order to show that the contracting authority made a manifest error of assessment.

150 In the first place, the applicant claims that the Taxation and Customs Union DG did not follow an objective and predetermined methodology known to the tenderers in order to arrive at the final ranking. It also refers to the alleged lack of knowledge on the part of the tenderers of the nature of the contractual tasks to be performed and the allegedly general nature of the award criteria and concludes from this that the evaluation of the tenders must have been subjective and based on incorrect assumptions.

151 It must be held that the applicant confines itself to general assertions that are unsubstantiated and not supported by any evidence. Its argument is a repetition of the argument put forward in the context of the first and second pleas, which have been rejected by the Court. Furthermore, the applicant does not show in any way how all these alleged shortcomings on the part of the contracting authority led it to make incorrect assumptions and evaluate the tenders subjectively. Therefore, it must be concluded that that argument cannot support the present plea in law.

152 In the second place, the applicant contests specific comments made by the evaluation committee

on the Evropaïki Dynamiki-Steria consortium's tender.

153 First, the applicant contests the evaluation committee's comment that '[t]he offer shows some lack of understanding of the Terms of Reference as the proposal makes reference to activities that have already been completed, or will be completed by the time the contract will come into force'. The applicant contests the merits of that comment, which it describes as subjective and unfair, and submits, in essence, that, if there was a misunderstanding, that misunderstanding was due to the fact that the applicant had been invited to submit a tender for a project for which the specifications were unknown. The applicant claims, furthermore, that in any event the comment is vague and that it is impossible to argue against it.

154 The abovementioned comment of the evaluation committee relates to the first award criterion for the contract at issue, namely that of 'fitness of the proposed strategy to perform the tasks of the contract'. As regards that award criterion, the Evropaïki Dynamiki-Steria consortium's tender was given a score of 23.2/40 whereas the successful tender received a score of 35.1/40.

155 It must be held that, once more, in the context of its criticism of the abovementioned comment, the applicant reiterates the arguments it put forward in the context of its first plea, which has been rejected by the Court. Furthermore, by simply making statements, the applicant does not show in any way the merits of its claim that the comment quoted above is subjective, unfair and vague. It follows that the applicant's criticism in respect of the abovementioned comment of the evaluation committee does not show that that comment was wrong and, even less, that there was a manifest error of assessment in respect of its tender.

156 Second, the applicant contests the evaluation committee's comment that '[t]he offer presents some inconsistencies, and in particular in the planning: for instance, some development activities are starting even before the start of the specifications'. The applicant, in its response to a written question from the Court, stated that a careful review of the Gantt diagrams included in its tender showed that, contrary to the evaluation committee's comment, it had envisaged that, save for some justified exceptions, development activities would start after the activities related to the specifications.

157 The abovementioned comment of the evaluation committee, which is contested by the applicant, also concerns the first award criterion for the contract at issue.

158 The Court, having examined the Gantt diagrams submitted by the applicant and taking into account the answers provided by the parties to the questions put by the Court at the hearing, finds that the diagrams do in fact give the impression that the applicant envisaged, in its planning of the project for the contract at issue, that at least some development activities would commence before the corresponding specification activities, thus showing that the evaluation committee's comment was well founded. Admittedly, the applicant, in essence, claimed at the hearing that any misunderstanding which might arise from reading the Gantt diagrams was due to the fact that those diagrams, as lodged before the Court and also included as part of the tender, were presented in A4 format, which meant that some information – which was necessary to understand the planning of the project in the Evropaïki Dynamiki-Steria consortium's tender – was not visible. The applicant has claimed that it had also included as part of its tender the same Gantt diagrams, but in A3 format, which made the relevant information concerning the planning of the project visible and show that the evaluation committee's comment was unfounded. However, irrespective of their alleged importance, the Gantt diagrams in A3 format were not available to the Court.

159 In any event, even assuming that this argument presented by the applicant is well founded, it must be noted that it relates to the first award criterion for the contract at issue. As the tables set out in paragraph 22 above show, even if, in respect of that award criterion, the applicant's tender had been given maximum points, namely 40/40, the applicant could not have been awarded the contract, taking into account the number of points its tender received in respect of the other three award criteria.

160 In those circumstances, it must be concluded that the applicant has not shown that the comment in question made by the evaluation committee was incorrect and that, in any event, it has not shown at all that that allegedly incorrect comment reflects a manifest error of assessment in the evaluation of its tender.

161 Third, the applicant contests the following comment by the evaluation committee:

'The offer presents a detailed description of Cosmic FFP, but the tools proposed for estimates (Calico and Costar) are only suitable for estimates based on the Cocomo II methodology, which is incoherent (see section 4.1.3.5.1 [of the tender]).'

162 That comment relates to the second award criterion for the contract at issue, namely 'fitness of the proposed methods, tools, quality environment and quality procedures to perform the tasks'. As regards that award criterion, the applicant's tender received a score of 16.7/30 whereas the successful tender received a score of 24.5/30.

163 The Commission explained in its written pleadings and at the hearing that the inconsistency noted by the evaluation committee consisted in the fact that, while the applicant in its tender described the tools it intended to use to support the Cocomo method, which the call for tenders did not ask for, it did not provide any information regarding the infrastructure to support the Cosmic FFP method, which was the method required by the tender specifications. Furthermore, the applicant did not explain the link between the two methods, Cocomo and Cosmic FFP, mentioned in its tender or the link between the Cocomo method, which it mentioned in its tender for no apparent reason, and the system that is the subject of the contract at issue.

164 In its reply to a written question put by the Court, the applicant submitted that the reference in its tender to the Cocomo method should not be considered to be an inconsistency and that the reason why it had not proposed specific tools for the Cosmic FFP methodology lay in the fact that such specific tools were not necessary. The successful tenderer, for its part, also did not propose such tools in its tender.

165 It should be noted, first, that the tender specifications for the contract at issue do in fact require use of the Cosmic FFP system to provide estimates relating, in essence, to the effort required to carry out certain computer activities related to the contract at issue. A review of section 4.1.3.5.1 of the Evropaïki Dynamiki-Steria consortium's tender also shows that it refers very briefly and in general terms to the Cocomo method and the Calico and Costar tools. Finally, it should be noted that the evaluation committee criticised not only the Evropaïki Dynamiki-Steria consortium, but also the successful tenderer for not specifying the tools that would be used within the framework of the Cosmic FFP system.

166 The Court finds that the applicant does not put forward a single argument to establish that those factual elements, which are not contested, mean that the evaluation committee's comment set out in paragraph 161 above was incorrect or, *a fortiori*, support the finding that that comment led the contracting authority, in that regard, to make a manifestly incorrect assessment of the Evropaïki Dynamiki-Steria consortium's tender, especially since the score given to that tender in respect of the second award criterion for the contract at issue, far from being based on that analysis alone, was also based on the evaluation committee's other, corresponding comments (see, to that effect, Case T-250/05 *Evropaïki Dynamiki* v *Commission*, paragraph 133 above, paragraph 106).

167 Fourth, the applicant contests the evaluation committee's comment that 'RUP [was] considered throughout [the Evropaïki Dynamiki-Steria consortium's] offer as "the" project management methodology, [even though its] software proposal for the development environment does not list any IBM-Rational licence'. That comment also relates to the second award criterion for the contract at issue.

168 The Commission explained in its written pleadings and at the hearing that, by that comment, the evaluation committee had pointed to an inconsistency in the Evropaïki Dynamiki-Steria consortium's tender that consisted in the tender referring to RUP on several occasions as 'the' methodology to follow, but failing to state whether the consortium had a licence for the IBM-Rational software, which was required for that method, thus leaving open the question of who would pay for using that software, the applicant or the contracting authority.

169 According to the applicant, the abovementioned comment was liable to mislead the contracting authority and is also irrelevant. The necessary licences had to be paid for by the applicant and there was thus no reason to refer to that matter at all in the tender, since the call for tenders did not require it. According to the applicant, it was obvious that it would use products covered by a licence to carry out its work.

170 It suffices, in this respect, to state that the applicant's argument is of a general nature and not supported by any evidence. It is therefore not capable of showing that the abovementioned comment by the evaluation committee was incorrect or, even less, that the contracting authority

made a manifest error of assessment.

171 Fifth, the applicant contests the relevance of the evaluation committee's comment that '[a]lthough customs and excise experience is identified in [the Evropaïki Dynamiki-Steria consortium's tender] as a must in terms of skills, in practice, their proposal does not show such competences'. That comment relates to the third award criterion for the contract at issue, namely 'fitness of the proposed team organisation to perform the tasks'. The score given to the Evropaïki Dynamiki-Steria consortium's tender in respect of that award criterion was 14.5/20 whereas the successful tender received a score of 17.6/20.

172 In the first place, the applicant submits that the abovementioned comment is not well founded, since the Evropaïki Dynamiki-Steria consortium had experience in the area of customs and excise and that experience was described in the tender. In the second place, the applicant states that there was no reason to include detailed information on that area in the tender, since the call for tenders did not ask for it and the tender specifications did not require that such 'competence' be offered. Finally, the applicant claims that the fact that the alleged lack of experience of the Evropaïki Dynamiki-Steria consortium in the area of customs and excise was being used to justify a mediocre evaluation of its tender constitutes an infringement of the call for tenders, since the call for tenders does not list that experience as an evaluation criterion.

173 The applicant's criticism relates both to the relevance of the evaluation committee's comment and to its merits.

174 As regards the relevance of the comment, the Court notes that, even though the tender specifications did not require tenderers to have customs and excise experience, the evaluation committee simply wanted to emphasise, with that comment, that there was an inconsistency in the Evropaïki Dynamiki-Steria consortium's tender. That inconsistency consisted in the fact that, while the consortium stated that the tenderer, in order to be successful, had to have customs and excise experience, its tender did not however show that it had such experience. Contrary to the applicant's claim, such a comment from the evaluation committee helped to clarify matters for the contracting authority.

175 As regards the merits of the comment, the Commission explained that that comment was made in relation to section 6.3.1 of the Evropaïki Dynamiki-Steria consortium's tender, which stated that the business analysts in the proposed team had 'proven experience in the area of excise/tax/customs in the EU'. According to the Commission, the evaluation committee took the view that the curricula vitae submitted by the applicant for the business analysts did not show that experience. The applicant was not able to refute those explanations given by the Commission. In those circumstances, the Court finds that it has not been shown that the comment in question made by the evaluation committee was incorrect.

176 Finally, it should be noted that the applicant contests the evaluation committee's comment relating to the second award criterion, which criticises the Evropaïki Dynamiki-Steria consortium's tender for including textbook-like references to, in particular, the architecture and IT tools used, without any justification or connection made to the objectives of the EMCS. The applicant also refutes the evaluation committee's comment relating to the fourth award criterion, concerning the allegedly general nature of the Evropaïki Dynamiki-Steria consortium's tender. However, the Court finds that, again, the applicant puts forward mere assertions, argues in a general manner and does not adduce any supporting evidence. Consequently, those complaints must be rejected.

177 For the sake of completeness, the Court considers it important to emphasise that the applicant's approach, which is to criticise certain specific comments made by the evaluation committee, is ineffective, since the applicant does not show in any way how those allegedly incorrect comments were likely to bring about a manifest error of assessment of the Evropaïki Dynamiki-Steria consortium's tender. In this respect, the applicant should explain, above all, how the allegedly incorrect comment affects the score given to its tender. The applicant did not provide such an explanation.

178 Having regard to the foregoing, the conclusion must be that the applicant has not shown that the contracting authority made manifest errors of assessment in the evaluation of Evropaïki Dynamiki-Steria consortium's tender. Consequently, the present plea in law must be rejected.

179 It follows that the action must therefore be dismissed.

Costs

180 The applicant has asked the Court to order the Commission to pay all costs, even if the application is dismissed. The applicant claims that as a result of the Taxation and Customs Union DG's failure to provide it in good time with sufficient reasons, it was not able fully to evaluate its chances of challenging the contested decision and was thus forced to bring the present action to preserve its rights.

181 The Commission submits that that request has no basis in Community law.

182 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

183 Furthermore, Article 87(3) of those rules provides:

'Where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

The Court … may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.'

184 In the present case, it has been found, *inter alia*, that the fourth plea, alleging a lack of relevant information and failure to state reasons, was unfounded. Furthermore, there is no other reason for the Court to deviate from the rule in Article 87(2) of the Rules of Procedure. Consequently, the applicant's request must be rejected.

185 Since the applicant has been entirely unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to bear its own costs and to pay those incurred by the European Commission.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 19 March 2010.

[Signatures]

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* Language of the case: English.

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Notice for the OJ

Action brought on 28 January 2005 by European Dynamics SA against the Commission of the European Communities

(Case T-50/05)

Language of the case: English

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 28 January 2005 by European Dynamics SA, established in Athens (Greece), represented by N. Korogiannakis, lawyer.

The applicant claims that the Court should:

- annul the decision of the Commission (DG TAXUD), to evaluate the applicant's bid as not successful and award the contract to the successful contractor;

- order the Commission to pay the applicant's legal costs and other costs and expenses incurred in connection with the application, even if the application is rejected.

Pleas in law and main arguments

The applicant company filed a bid in response to the Commission's call for tenders TAXUD/2004/AO-004 for the specification, development, maintenance and support of telematic systems to control the movements of products subject to excise duty within the European Community. By the contested decision this bid was rejected and the contract awarded to another bidder.

In support of its application for annulment of that decision the applicant claims first of all that the Commission violated the principle of non-discrimination and of free competition. The unavailability of exact specifications for the EMCS system prevented tenderers from presenting their expertise in a targeted manner in the specific areas that were important for the project. The access to privileged information by the previous and current contractors constituted a major and exclusive advantage for them. The applicant claims that its timely request for equal access rights to such applications and documentation should have been accepted. According to the applicant, even though the Commission had the opportunity to remedy this situation it did not take appropriate measures to do so.

The applicant further submits that the Commission violated Article 97 (1) of the Financial Regulation1 as well as Article 17 (1) of Directive 92/502 by using evaluation criteria that were extremely vague and were not accompanied by clear quantifiable parameters.

The applicant further considers that the Commission committed manifest errors of appreciation in its evaluation of the applicant's tender. In this respect the applicant contends that any deficiencies of its bid were due to the Commission's failure to communicate critical elements required by the applicant in order to prepare its bid. The applicant further contests each of the statements contained in the report of the Evaluation Committee.

The applicant also invokes a violation, by the Commission, of its obligation, under Article 253 EC, to state reasons and a failure to provide pertinent information requested by the applicant on the grounds for the rejection of its bid. The applicant also submits that the Commission violated the principle of good administration and diligence by acting with significant delay and by not offering adequate answers to the applicant's requests for information prior to the submission of the bids.

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[1] - Coucil Regulatio (EC, Euratom) No 1605/2002 of 25 Jue 2002 o the Fiacial Regulatio applicable to the geeral budget of the Europea Commuities, OJ L 248, 16/09/2002 p.1

[2] - Council Directive 92/5/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 29, 24/7/1992 p.1

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ORDONNANCE DU PRÉSIDENT DE LA COUR

6 juin 2005(*)

«Interventions»

- 728.293 -

Dans l'affaire C-503/04,

ayant pour objet un recours en manquement au titre de l'article 228 CE, introduit le 7 décembre 2004,

Commission des Communautés européennes, représentée par M. B. Schima, en qualité d'agent, ayant élu domicile à Luxembourg,

partie requérante,

contre

République fédérale d'Allemagne, représentée par M. W.-D. Plessing, Mme C. Schulze-Bahr, en qualité d'agents, et M. H.-J. Prieß, Rechtsanwalt,

partie défenderesse,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. L.A. Geelhoed, entendu,

rend la présente

Ordonnance

1 Par requête déposée au greffe de la Cour le 21 mars 2005, le Royaume des Pays-Bas, représenté par Mme C. Wissels, en qualité d'agent, a demandé à intervenir dans l'affaire C-503/04 à l'appui des conclusions de la partie défenderesse.

2 Par requête déposée au greffe de la Cour le 30 mars 2005, la République française, représentée par M. G. de Bergues, en qualité d'agent, a demandé à intervenir dans l'affaire C-503/04 à l'appui des conclusions de la partie défenderesse.

3 Par requête déposée au greffe de la Cour le 11 avril 2005, la République de Finlande, représentée par Mme T. Pynnä, en qualité d'agent, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-503/04 à l'appui des conclusions de la partie défenderesse.

4 Les requêtes en intervention ont été introduites conformément à l'article 93, paragraphe 1, du règlement de procédure, et sont présentées en application de l'article 40, premier alinéa, du Statut de la Cour.

Par ces motifs, le président de la Cour ordonne:

1) Le Royaume des Pays-Bas, la République française et la République de Finlande sont admis à intervenir dans l'affaire C-503/04 à l'appui des conclusions de la partie défenderesse.

2) Un délai sera fixé aux parties intervenantes pour exposer, par écrit, les moyens à l'appui de leurs conclusions.

3) Une copie de toutes les pièces de procédure sera signifiée aux parties intervenantes par les soins du greffier.

4) Les dépens sont réservés.

Fait à Luxembourg, le 6 juin 2005

Le greffier — Le président

R. Grass — V. Skouris

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* Langue de procédure: l'allemand.

Reference for a preliminary ruling by the Hoge Raad der Nederlanden by decision of that court of 26 November 2004 in the case of Heintz van Landewyck SARL against Staatssecretaris van Financiën)

(Case C-494/04)

(2005/C 45/28)

(Language of the case: Dutch)

Reference has been made to the Court of Justice of the European Communities by order of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 26 November 2004 received at the Court Registry on1 December 2004, for a preliminary ruling in the case of Heintz van Landewyck SARL against Staatssecretaris van Financiën on the following questions:

1. Must the Excise Duty Directive ([1]) be interpreted as requiring the Member States to enact a statutory provision under which they must reimburse or offset amounts by way of excise duty due or paid at the time excise labels are requested in a case in which the requesting party (the holder of an authorisation to operate a tax warehouse) has not used, nor will be able to use, labels which disappeared before they were affixed to products subject to excise duty, and third parties cannot have made and will not be able to make lawful use of the labels even though it cannot be ruled out that they have used, or will use, the labels by affixing them to tobacco products which have been put on the market in an irregular manner?

2 (a) Must the Sixth Directive, ([2]) and in particular Article 27(1) and (5) thereof, be interpreted as meaning that the fact that the Netherlands Government notified the Commission at a date later than that laid down in Article 27(5) of the Sixth Directive, as amended by the Ninth Directive, that it wished to maintain the special procedure for charging tax on tobacco products means that if an individual invokes the failure to observe the time-limit, after the date when notification was in fact made, this special procedure for charging tax must be disapplied also after the making of the notification?

(b) If the answer to Question 2(a) is in the negative, must the Sixth Directive, and in particular Article 27(1) and (5) thereof, be interpreted as meaning that the special procedure for charging tax on tobacco products laid down in Article 28 of the Wet op de Omzetbelasting must be disapplied on the grounds that it is incompatible with the conditions laid down by the abovementioned provisions of the directive?

(c) If the answer to Question 2(b) is in the negative, must the Sixth Directive, and in particular Article 27(1) and (5) thereof, be interpreted as meaning that failure to reimburse turnover tax in circumstances such as those referred to in Question 1 is contrary thereto?

([1]) Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ 1992 L 76, p. 1.

([2]) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, OJ 1977 L 145, p. 1.

Action brought on 7 December 2004 by the Commission of the European Communities against the Federal Republic of Germany

(Case C-503/04)

(2005/C 45/29)

(Language of the case: German)

An action against the Federal Republic of Germany was brought before the Court of Justice of the European Communities on 7 December 2004 by the Commission of the European Communities, represented by Bernhard Schima, acting as Agent, with an address for service in Luxembourg.

The Commission of the European Communities claims that the Court should:

1. Declare that the Federal Republic of Germany has failed to fulfil its obligations under Article 228(1) of the Treaty establishing the European Community inasmuch as it has not taken the necessary measures to comply with the judgment of the European Court of Justice of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* ([1]) regarding the award of a contract for the collection of waste water by the Municipality of Bockhorn and of a contract for waste disposal by the City of Braunschweig;

2. Order the Federal Republic of Germany to pay to the Commission's own resources account of the European Community a daily penalty payment

of EUR 31 680 for each day of delay in implementing the measures necessary to comply with the abovementioned judgment in respect of the award of a contract for the collection of waste water by the Muncipality of Bockhorn and

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ORDONNANCE DU PRÉSIDENT DE LA COUR

17 mai 2005(*)

«Radiation»

- 726.935 -

Dans l'affaire C-424/04,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 4 octobre 2004

Commission des Communautés européennes, représentée par MM. K. Wiedner et B. Stromsky, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République française, représentée par MM. G. de Bergues et D. Petrausch, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. A. Tizzano, entendu,

rend la présente

Ordonnance

1 Par lettre déposée au greffe de la Cour le 17 mars 2005, la Commission des Communautés européennes a informé la Cour, conformément à l'article 78 du règlement de procédure, qu'elle se désistait de son recours et a demandé, en application de l'article 69, paragraphe 5, du règlement de procédure, que la République française soit condamnée aux dépens.

2 Par lettre déposée au greffe de la Cour le 20 avril 2005, la partie défenderesse considère que ce n'est pas son attitude qui justifie le désistement de la Commission et demande que celle-ci soit condamnée aux dépens.

3 Aux termes de l'article 69, paragraphe 5, premier alinéa, du règlement de procédure, la partie qui se désiste est condamnée aux dépens, s'il est conclu en ce sens par l'autre partie dans ses observations sur le désistement. Toutefois, à la demande de la partie qui se désiste, les dépens sont supportés par l'autre partie, si cela apparaît justifié par l'attitude de cette dernière.

4 Eu égard aux circonstances particulières en l'espèce, la Cour estime qu'il convient de compenser les dépens.

Par ces motifs, le président de la Cour ordonne:

1) L'affaire C-424/04 est radiée du registre de la Cour.

2) La Commission des Communautés européennes et la République française supporteront chacune leurs propres dépens de l'instance au principal.

Fait à Luxembourg, le 17 mai 2005.

Le greffier	Le président
R. Grass	V. Skouris

* Langue de procédure: le français.

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Notice for the OJ

Removal from the register of Case C-424/04 [1]

(Language of the case: French)

By order of 17 May 2005 the President of the Court of Justice of the European Communities has ordered the removal from the register of Case C-424/04: Commission of the European Communities v French Republic.

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[1] - OJ C 300 of 4.12.2004.

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Notice for the OJ

Action brought on 4 October 2004 by the Commission of the European Communities against the French Republic

(Case C-424/04)

An action against the French Republic was brought before the Court of Justice of the European Communities on 4 October 2004 by the Commission of the European Communities, represented by K. Wiedner and B. Stromsky, acting as Agents, with an address for service in Luxembourg.

The Commission claims that the Court should:

1. declare that, by failing to provide for an obligation on contracting authorities to ensure genuine competition by the presence of a minimum of five tenderers in restricted procedures, even where no range is prescribed, the French Republic has failed to fulfil its obligations under Article 19(2) of Council Directive 93/36/EEC of 14 June 1993, [1] Article 27(2) of Council Directive 92/50/EEC of 18 June 1992 [2] and Article 22(2) of Council Directive 93/37/EEC of 14 June 1993; [3]

2. declare that, by excluding from the scope of the French Code of Public Procurement contracts concerning loans or financial undertakings, whether intended to cover financing or liquidity requirements, not connected with real property transactions, the French Republic has failed to fulfil its obligations under Article 1(a)(vii) of Council Directive 92/50/EEC of 18 June 1992 and Article 1(4)(c)(iv) of Council Directive 93/38/EEC of 14 June 1993; [4]

3. declare that, by providing that public contracts concerning

- legal services,

- social and health services,

- recreational, cultural and sports services,

- educational services and occupational qualification and integration services

are to be subject, as regards their award, only to the obligations relating to the definition of services by reference to standards where they exist, and to the sending of an award notice, without expressly specifying that the rules and principles of the Treaty are to be complied with, the French Republic has failed to fulfil its obligations flowing from compliance with the principles and rules of the Treaty (Article 49), and in particular the principle of equal treatment and the principle of transparency of which adequate publicity is the corollary;

4. order the French Republic to pay the costs.

Pleas in law and main arguments

The French Code of Public Procurement is incompatible in certain respects with the rules and principles of the EC Treaty and the Community directives relating to public procurement.

First, by failing to provide for an obligation on the contracting authority to ensure the presence of a minimum of five tenderers where no range is prescribed, the French Republic is in breach of the obligation in the Community directives to ensure genuine competition in certain restricted procedures for the award of public contracts.

The French Republic is also in breach of its obligations by excluding from the scope of the French Code of Public Procurement contracts concerning loans or financial undertakings, whether intended to cover financing or liquidity requirements, not connected with real property transactions. Those contracts relate to the provision of services and thus fall within the scope of the directives. Nor may they be regarded as covered by the exception concerning securities and other financial instruments.

Finally, the exclusion of certain service contracts from the scope of the obligation to ensure an adequate degree of publicity constitutes a breach of the principle of non-discrimination as laid down in Article 49 EC and of the principle of transparency.

_____

[1] - Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts (OJ L 199 of 9.8.1993, p. 1).

[2] - Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts (OJ L 209 of 24.7.1992, p. 1).

[3] - Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts (OJ L 199 of 9.8.1993, p. 54).

[4] - Council Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199 of 9.8.1993, p. 84).

Judgment of the Court (Second Chamber)
of 21 February 2008
Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil its obligations - Public works, supply and service contracts - Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC - Transparency - Equal treatment - Contracts excluded from the scope of those directives on account of their value. Case C-412/04.

In Case C412/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 24 September 2004,

Commission of the European Communities, represented by X. Lewis and K. Wiedner, acting as Agents, and G. Bambara, avvocato, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, and M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

supported by:

French Republic, represented by G. de Bergues, acting as Agent,

Kingdom of the Netherlands, represented by H.G. Sevenster and M. de Grave, acting as Agents,

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk (Rapporteur), and J.-C. Bonichot, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2006,

gives the following

Judgment

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

1. Declares that, by adopting:

- Article 2(1) of Law No 109 of 11 February 1994 - Framework Law on public works (legge quadro in materia di lavori pubblici), as amended by Law No 166 of 1 August 2002, the Italian Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts as amended by European Parliament and Council Directive 97/52/EC

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of 13 October 1997;

- Article 2(5) of Law No 109/1994 as amended, the Italian Republic has failed to fulfil its obligations under Directive 93/37 as amended; and

- Articles 27(2) and 28(4) of Law No 109/1994 as amended, the Italian Republic has failed to fulfil its obligations under Directive 92/50 and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

2. Dismisses the action as to the remainder;

3. Orders the Commission of the European Communities and the Italian Republic to bear their own costs;

4. Orders the French Republic, the Kingdom of the Netherlands and the Republic of Finland to bear their own costs.

1. By its action, the Commission of the European Communities seeks a declaration from the Court that, by adopting the provisions contained in:

- Articles 2(1) and (5), 17(12), 27(2), 30(6a), 37b and 37c(1) of Law No 109 of 11 February 1994 - Framework Law on public works (legge quadro in materia di lavori pubblici) (Ordinary Supplement to the GURI No 41 of 19 February 1994), as amended by Law No 166 of 1 August 2002 (Ordinary Supplement to the GURI No 181 of 3 August 2002) (Law No 109/1994'),

- Article 28(4) of Law No 109/1994, read in conjunction with Article 188 of Presidential Decree No 554 of 21 December 1999 implementing the Framework Law on public works of 11 February 1994 (No 109) and its successive amendments (regolamento di attuazione della legge quadro in materia di lavori pubblici 11 febbraio 1994, n. 109, e successive modificazioni) (Ordinary Supplement to the GURI No 98 of 28 April 2000) (DPR No 554/1999'), and Article 3(3) of Legislative Decree No 157 of 17 March 1995 implementing Directive 92/50/EEC on public service contracts (attuazione della direttiva 92/50/CEE in materia di appalti pubblici di servizi) (Ordinary Supplement to the GURI No 104 of 6 May 1995) (Legislative Decree No 157/1995'),

the Italian Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) (Directive 93/37'), Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), and Articles 43 EC and 49 EC and the principles of transparency and equal treatment which are the corollary to them.

Legal background

Community law

2. Directives 92/50, 93/36, 93/37 and 93/38 were adopted in pursuance of the establishment of the internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. The directives sought to eliminate practices that restrict competition in general and participation in public contracts by other Member States' nationals, in order to implement inter alia the freedom of establishment and freedom to provide services enshrined in Articles 43 EC and 49 EC respectively.

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3. The 16th recital in the preamble to Directive 92/50 states that public service contracts may from time to time include some works, and that it results from Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) that, for a contract to be a public works contract, its object must be the achievement of a work. In so far as those works are ancillary rather than the object of the contract, they do not justify treating the contract as a public works contract.

4. It is clear from Article 8 of Directive 92/50 that public contracts which have as their object services listed in Annex I A to that directive are to be awarded in accordance with the provisions of Titles III to VI thereof. Title III concerns the choice of award procedures and rules governing design contests.

5. Category No 12 of Annex I A to Directive 92/50 mentions, inter alia, architectural services; engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; and technical testing and analysis services.

6. According to Article 15 of Directive 93/38, contracts which have as their object services listed in Annex XVI A thereto are to be awarded in accordance with the provisions of Titles III, IV and V. Title IV concerns procedures for the award of contracts.

7. Category No 12 of Annex XVI A is identical to Category No 12 in Annex I A to Directive 92/50.

8. Under Article 1(a) of Directive 93/37, public works contracts are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in [Article 1(b)], which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in [Article 1(c)], or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority'.

9. Article 6(1) of Directive 93/37 sets out its scope with regard to the estimated value of the various public works contracts covered. It is clear from Article 6(3) that where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amount referred to in Article 6(1) and, where the aggregate value of the lots is not less than that amount, the provisions of Article 6(1) are to apply in principle to all lots.

National law

10. Public works contracts are regulated by Law No 109/1994, implemented by DPR No 554/1999.

11. According to Article 2(1) of Law No 109/1994, public works, if they are awarded by the persons referred to in Article 2(2), are defined as construction, demolition, restoration, restructuring, refurbishment and maintenance of works and installations. Article 2(1) extends the scope of Law No 109/1994 to mixed works, supply and service contracts and to supply or service contracts which include ancillary works the estimated value of which exceeds 50% of the total value of the relevant contract.

12. Article 3(3) of Legislative Decree No 157/1995 provides that, in the case of mixed works and of service contracts and of service contracts which include ancillary works, the provisions of Law No 109/1994 are applicable if the works represent more than 50% of the total value of the relevant contract.

13. Article 2(5) of Law No 109/1994 excludes from the Law's scope works carried out directly by private persons which are set off against contributions payable in respect of building permits and works arising from the obligations set out Article 28(5) of Law No 1150 of 17 August 1942 on town planning (legge urbanistica) (GURI No 244 of 16 October 1942), as amended (Law No 1150/1942').

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Article 2(5) also excludes from the Law's scope works which are analogous to those mentioned above. Article 2(5) states that if the value of the works, assessed individually, exceeds the Community threshold the contract must be awarded by the private person in accordance with the procedures prescribed by Directive 93/37.

14. In that regard, it is apparent from Articles 1 and 31 of Law No 1150/1942, and from Articles 3 and 11 of Law No 10 of 28 January 1977 laying down rules on the suitability of land for development (norme in materia di edificabilità dei suoli) (GURI No 27 of 29 January 1977) as amended (Law No 10/1977'), that the holder of a permit may execute infrastructure works himself and offset the whole or part of the cost against the charges due.

15. In addition to public works contracts, Law No 109/1994 regulates certain public service contracts.

16. Thus, Article 17(12) of Law No 109/1994 authorises the awarding entities to award public service contracts for the design and supervision of works the estimated value of which is less than EUR 100 000, through the person responsible for the procedure, to persons referred to in Article 17(1)(d) to (g) who are trusted by the awarding entities, after verifying the professional experience and professional capacity of the persons selected and stating reasons for that choice.

17. Under Article 27(2) of Law No 109/1994, if the contracting authorities cannot assume responsibility for the supervision of the works, they must entrust the supervision, in the following order, to other public authorities, to the project designer for the purposes of Article 17(4) of the Law, or to other persons selected pursuant to the procedures prescribed by national legislation transposing the relevant Community provisions.

18. Under Article 28(4) of Law No 109/1994, testing is to be entrusted to one, two or three highly qualified technicians expert in the particular field concerned, by reference to the type, complexity and value of the works. The technicians are to be selected by the contracting authorities from their own organisations unless a lack of staff is established and certified by the person responsible for the procedure.

19. Article 30(6a) of Law No 109/1994 offers the same possibility as regards inspection which is generally entrusted to the technical departments of the awarding entities or to the supervisory bodies referred to in Article 30(6a)(a).

20. Furthermore, it is apparent from Article 188(1), (3), (8), (9), (11), (12) and (13) of DPR No 554/1999 that within 30 days from the completion of the works, or from the date of handing over of the works where testing is on-going, the awarding entity is to entrust the inspection of the works to its staff, by reference to the type, category, complexity and value of the works and on the basis of pre-established criteria.

21. If the staff do not meet the requirements stipulated, external specialists included in lists drawn up by the Ministry of Public Works and by the regions and autonomous provinces are to be called upon.

22. In the absence of such lists, the awarding entities may, in their discretion, award the inspection of works to persons who possess, in any event, the requisite qualifications and satisfy the requisite conditions.

23. Articles 37a to 37c of Law No 109/1994 govern the award of contracts for public works financed wholly or partly by private persons.

24. Article 37a permits private persons to submit proposals for public works or works in the public interest to the awarding entities and to conclude the corresponding contracts providing for the financing and management of those works.

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25. Article 37b sets out the procedure for selecting the promoter. It provides that the contracting authorities are to evaluate the feasibility of the proposals submitted having regard to various aspects: construction, town planning, environment, quality of the design, functionality, the use to which the works will be put, public access, the return, management and maintenance costs, the duration of the concession, time-limits for carrying out the works, the applicable charges and the method for updating them, the economic value of the plans, and the content of the draft agreement. The contracting authorities must establish that no factors exist which would preclude the proposals from being carried out and, after examining and comparing the latter and hearing representations from any promoters who so request, they are to indicate whether a proposal is in the public interest.

26. In that case, under Article 37c of Law No 109/1994, a restricted procedure is opened in order to obtain two further offers. The concession is then awarded under a negotiated procedure in which the proposal of the promoter initially selected and the other offers are examined. During the course of the procedure, the promoter may adapt his proposal to the offer considered by the contracting authority to be the most suitable. If he does so he will be awarded the concession.

Pre-litigation procedure

27. Having received complaints about the effects of Law No 109/1994 in its original version, the Commission monitored the procedure for the adoption of the draft law intended to amend it.

28. Following the adoption of Law No 166 of 1 August 2002 amending Law No 109/1994, the Commission sent a letter of formal notice to the Italian Republic on 19 December 2002 stating that, in its view, a number of provisions of Law No 109/1994 were still incompatible with Community law.

29. By letter of 26 June 2003, the Italian Republic agreed with most of the objections put forward by the Commission and informed it of its consequent intention to amend the legislation in force.

30. However, as the Italian Republic failed to make the amendments indicated, on 15 October 2003 the Commission sent the Italian Republic a reasoned opinion calling on it to take the measures necessary to comply with that opinion within two months of its notification.

31. Taking the view that the position adopted by the Italian Republic in a letter of 22 April 2004 was unsatisfactory, the Commission brought the present proceedings pursuant to the second paragraph of Article 226 EC.

32. By order of the President of the Court of 6 April 2005, the French Republic, the Kingdom of the Netherlands and the Republic of Finland were granted leave to intervene in support of the form of order sought by the Italian Republic. Only the Kingdom of the Netherlands and the Republic of Finland submitted statements in intervention.

The action

33. This action is based on six complaints.

The first complaint

34. The first complaint concerns the rules on mixed contracts as set out in Law No 109/1994.

35. It is clear from Article 2(1) of Law No 109/1994, which is intended to define the notion of public works, that the Law covers the construction, demolition, restoration, restructuring, refurbishment and maintenance of works and installations where they are awarded by the persons referred to in Article 2(2). Article 2(1) states that mixed works, supply and services contracts and supply or service contracts which include ancillary works, are subject to the provisions of Law No 109/1994 if the works represent more than 50% of the total value of the relevant contract.

36. Likewise, Article 3(3) of Legislative Decree No 157/1995 provides that, in the case of mixed

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works and service contracts and service contracts which include ancillary works, the provisions of Law No 109/1994 are applicable if the works represent more than 50% of the total value of the relevant contract.

Arguments of the parties

37. The Commission submits that the legal rules applicable to mixed contracts must depend on the main purpose of the contract as determined inter alia, but not exclusively, by the value of the various matters covered by the contract.

38. In that connection, the Commission claims that, by making those contracts in which the works are the most important element from an economic point of view but are nevertheless incidental to the other matters covered by the contract subject to the rules on public works contracts, the Italian legislation has the effect of removing many service and supply contracts the estimated value of which exceeds the thresholds for the application of Directives 92/50 and 93/36 but which is less than that for Directive 93/37 from the application of the relevant Community legislation.

39. The Italian Republic replies that pending the amendment of the national legislation concerned, undertaken in response to the Commission's objections, the Ministry of Infrastructure and Transport adopted Circular No 2316 of 18 December 2003 laying down rules for mixed public works, supply and service contracts (disciplina dei contratti misti negli appalti pubblici di lavori, forniture e servizi) (GURI No 79 of 3 April 2004, p. 26), by which the contracting authorities were called on to comply with the principle that, when dealing with a mixed contract, its main purpose must be taken into account in determining the applicable legislation, so that the economic aspect would no longer be predominant in that respect.

40. Law No 62 of 18 April 2005 laying down measures for the implementation of obligations arising from Italy's membership of the European Communities - Community Law 2004 (dispozioni per l'adempimento di obblighi derivanti dall'apparteneza dell'Italia alle Comunità europee, Legge comunitaria 2004) (Ordinary Supplement to the GURI No 96 of 27 April 2005) (Community Law 2004') ratified that approach.

41. The Republic of Finland takes the view that the economic value is a decisive factor in determining the main purpose of the contract, and such an approach should be excluded only in exceptional circumstances, namely where use of the criterion of economic value is intended to prevent the application of Community law.

Findings of the Court

42. According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-114/02 Commission v France [2003] ECR I-3783, paragraph 9, and Case C-433/03 Commission v Germany [2005] ECR I-6985, paragraph 32).

43. The adoption of laws, regulations or administrative provisions after the date on which that period expired cannot be taken into account.

44. Accordingly it is with regard to the legislation in force on 15 December 2003, the date on which the two month period prescribed in the reasoned opinion of 15 October 2003 expired, that it must be decided whether the Italian Republic committed the infringement alleged in this complaint, given that at that date neither the circular referred to in paragraph 39 of this judgment nor the national legislation cited in paragraph 40 had been adopted.

45. Public works contracts' as defined in Article 1(a) of Directive 93/37 means contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined

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in Article 1(b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II to Directive 93/37 or a work defined in Article 1(c), or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

46. Furthermore, it follows from the 16th recital in the preamble to Directive 92/50, read in conjunction with Article 1(a) of Directive 93/37, that a contract may be regarded as a public works contract only if its object corresponds to the definition given in the preceding paragraph and that works that are ancillary rather than the object of the contract do not justify treating the contract as a public works contract.

47. It is, moreover, clear from the case-law of the Court that, where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is the main purpose of the contract that determines which Community directive on public procurement is to be applied in principle (see Case C-220/05 Auroux and Others [2007] ECR I-385, paragraph 37).

48. In particular, therefore, the scope of Directive 93/37 is linked to the main purpose of the contract, which must be determined in an objective examination of the entire transaction to which the contract relates.

49. The assessment must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very purpose of the contract; the value of the various matters covered by the contract is, in that regard, just one criterion among others to be taken into account for the purposes of the assessment.

50. It may be inferred from the foregoing that, as the Advocate General has indicated in points 38 and 74 of his Opinion, the value of the works cannot, without infringing the requirements of Directive 93/37, constitute the sole criterion capable of resulting in the application of Law No 109/1994 to a mixed contract, where those works are only ancillary.

51. The rule laid down in Article 2(1) of Law No 109/1994 also fails to comply with the requirements in Directives 92/50 and 93/36, in so far as its application may result in certain mixed contracts falling outside the procedures provided for in those directives, namely those contracts where the works, although ancillary, represent more than 50% of the total value and the total value is below the threshold set by Directive 93/37 even though it reaches the thresholds adopted in Directives 92/50 and 93/36.

52. Therefore, it must be held that, by adopting Article 2(1) of Law No 109/1994, the Italian Republic has failed to fulfil its obligations under Directives 92/50, 93/36 and 93/37.

The second complaint

53. The second complaint relates to the direct award of works or a work to the holder of a building permit or an approved estate plan if their value is below the threshold for the application of Directive 93/37.

54. Under Article 2(5) of Law No 109/1994, works carried out directly by private persons which are set off against contributions payable in respect of building permits, works arising from the obligations set out in Article 28(5) of Law No 1150/1942 and works which are analogous to the two preceding categories are not covered by Law No 109/1994. Article 2(5) states, however, that if the value of the works, assessed individually, exceeds the thresholds laid down by the applicable Community rules, the contract must be awarded in accordance with the procedures prescribed by Directive 93/37.

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55. It is also clear from Articles 1 and 31 of Law No 1150/1942 and Articles 3 and 11 of Law No 10/1977 that the holder of a permit may carry out infrastructure works himself and offset the whole or part of the cost against the charges due.

Arguments of the parties

56. The Commission claims, first, that the provisions of Law No 109/1994, read together with the relevant provisions of Law No 1150/1942 and Law No 10/1977, enable works or a work which constitute public works contracts within the meaning of Article 1(a) of Directive 93/37 to be awarded directly to the holder of a building permit or approved site plan without any guarantee, by way of express provisions, that the principles of transparency and equal treatment that are enshrined in the EC Treaty and must be observed even if the estimated value of the contract is below the threshold for application of the directive will be applied.

57. Second, the Commission submits that, in order to determine whether that threshold has been reached, the total value of the works and/or work covered by the agreement concluded between the private person and the authority must be calculated, as they must be regarded as separate lots in one single contract. The fact that, under national law, the tender procedures are applicable only if the agreement concerns works whose estimated value, taken individually, exceeds the threshold for the application of the relevant Community rules therefore amounts to a failure to comply with the requirements of Directive 93/37, through the exclusion from the scope of the national provisions transposing those requirements contracts the total value of which is higher than the threshold because the amounts corresponding to each of the matters involved in those contracts are insufficient.

58. According to the Italian Republic, as regards infrastructure works with a value less than the threshold for application of the Community rules and which are executed by the holder of a building permit or approved estate plan, it is unnecessary at the transposition stage to refer specifically to the rules of the Treaty on advertising and competition and the relevant case-law of the Court interpreting them.

59. Second, the Italian Republic draws attention to the specific features of the town planning sector in which estate owners take the place of local authorities and to the characteristics of the development agreements concluded between local authorities and estate owners.

60. Such agreements simply require the local authority concerned to issue building permits, the estate owner being responsible for undertaking the infrastructure works in the area concerned on the basis of proposals that the local authority reserves the right to approve.

61. The fact that the same estate owner has been entrusted with the execution of various works which by their very nature differ from each other does not mean that there is an obligation to aggregate the works for the purpose of applying Directive 93/37 simply because he is the owner of the land concerned. The Italian Republic submits, in that connection, that in Case C-399/98 Ordine degli Architetti and Others [2001] ECR I5409 the Court gave a ruling on a situation different from the one in the present case, in so far as it concerned the achievement of works which were clearly a single unit.

62. According to the Kingdom of the Netherlands, public contracts with a value below the threshold laid down by the relevant directives are not covered by the principle of transparency. It adds that the directives themselves expressly provide for a number of derogations, as the Community legislature chose in those situations to give priority to interests other than transparency.

63. The Republic of Finland submits that while contracts the value of which is lower than the thresholds set by those directives are thereby excluded from the scope of the directives, they are subject as a matter of law to the provisions of the Treaty relating to the free movement of goods

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and services and freedom of establishment.

64. Accordingly, national law should not impose specific requirements relating to advertising or inviting competing bids with respect to those contracts.

Findings of the Court

65. First of all, the Community legislature expressly made a policy choice to exclude contracts under a certain threshold from the advertising regime which it introduced and therefore did not impose any specific obligation with respect to them.

66. Furthermore, where it is established that such a contract is of certain cross-border interest, the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in the contract but which are located in other Member States. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC (see, to that effect, as regards Directive 92/50, Case C507/03 Commission v Ireland [2007] ECR I0000, paragraphs 30 and 31 and the case-law cited).

67. Since, as the Advocate General has observed, in point 56 of his Opinion, under Article 249 EC directives are binding as to the result to be achieved upon each Member State to which they are addressed and since the Community legislature excluded certain contracts from the scope of Directive 93/37, in particular by laying down thresholds, the Member States are not required to adopt, in the legislation transposing that directive, provisions recalling the obligation to comply with Articles 43 EC and 49 EC, which is applicable only in the circumstances set out in paragraph 66 of this judgment.

68. The fact that the Italian legislature did not adopt such provisions with respect to public contracts for infrastructure works executed by the holder of a building permit or an approved estate plan the value of which is below the threshold for application of Directive 93/37, for cases where the existence of a certain cross-border interest is established, does not call into question the applicability of Articles 43 EC and 49 EC to those contracts.

69. Therefore, the second complaint, in so far as it is based on the infringement of fundamental rules of the Treaty, must be dismissed.

70. Second, as regards the scope of Article 2(5) of Law No 109/1994 in the light of the requirements of Directive 93/37, according to settled caselaw the fact that a provision of national law allowing direct execution by the holder of a building permit or an approved estate plan of infrastructure works which offset the whole or part of the contribution payable in respect of the permit forms part of a set of urban development regulations which are of a special nature and pursue a specific aim that is separate from Directive 93/37 is not sufficient to exclude the direct execution of works from the scope of the directive when the elements needed to bring it within the scope of the directive are present (see Ordine degli Architetti and Others , paragraph 66).

71. Such execution must therefore be subject to the procedures provided for in Directive 93/37 where it satisfies the conditions contained therein for classification of a public works contract and, in particular, where the contractual element required in Article 1(a) thereof is present and the value of the work is equal to or higher than the threshold laid down in Article 6(1).

72. Furthermore, it is clear from Article 6(3) of Directive 93/37 that, where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amount referred to in Article 6(1) which determine whether

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or not the directive is applicable to all the lots. In addition, under Article 6(4), no work or contract may be split up with the intention of avoiding the application of the directive.

73. Therefore, as the Advocate General has stated in point 88 of his Opinion, if the agreement concluded between a private person who is the owner of development land and the municipal authority satisfies the criteria for the definition of a public works contract' within the meaning of Article 1(a) of Directive 93/37, which are set out in paragraph 45 of this judgment, the estimated value which must in principle be taken into account in order to ascertain whether the threshold set by the directive is attained and whether, therefore, the award of the contract must comply with the rules on advertising laid down therein, may be calculated solely by reference to the total value of the various works, by adding together the value of the various lots.

74. By providing for an award procedure which complies with the requirements of Directive 93/37 only where the estimated value of each of those lots, taken individually, exceeds the threshold for application of the directive, Italian law infringes the directive.

75. It is clear from the foregoing that Article 2(5) of Law No 109/1994 fails to comply with the requirements of Directive 93/37 by improperly limiting use of the procedures established by the directive.

The third complaint

76. The third complaint concerns the award of the design, supervision and inspection of works in the context of public service contracts the value of which is below the threshold for the application of the relevant Community provisions.

77. According to Articles 17(12) and 30(6a) of Law No 109/1994, public service contracts for the design and supervision of works and inspection of the works, the estimated value of which is below the threshold for the application of Directive 92/50, may be awarded to persons trusted by the awarding entity.

Arguments of the parties

78. The Commission criticises those provisions, which allow the use of a method of awarding the public service contracts concerned that excludes any form of advertising, on the ground that, although those contracts do not fall within the scope of Directive 92/50, they remain subject to the rules of the Treaty on the freedom to provide services and freedom of establishment as well as to the principles of non-discrimination, equal treatment, proportionality and transparency.

79. The Italian Republic submits that any rule of secondary legislation must be interpreted on the basis of the general principles of the Treaty and that any interpretation which deviates from them would be unlawful. In any event, any unlawfulness can only arise from an incorrect application of the rule to a particular case. Therefore, when transposing Community law, there cannot be a requirement to refer specifically to the provisions of the Treaty.

80. It adds that a ministerial circular drew the attention of contracting authorities to the requirement to comply with the general principles of non-discrimination, equal treatment and transparency and that, in any event, direct award of the contracts concerned to trusted persons may take place only after their professional experience and professional capacity have been checked.

Findings of the Court

81. It is settled caselaw, as stated in paragraph 66 of this judgment, that public service contracts falling outside the scope of Directive 92/50 which have been shown to be of certain cross-border interest remain subject to the fundamental freedoms laid down by the Treaty in the circumstances specified in the case-law set out in that paragraph.

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82. Since the obligations arising from primary law that relate to equal treatment and transparency are therefore automatically applicable to those contracts - which are nevertheless excluded from the scope of Directive 92/50 on account of their value - in so far as the conditions laid down by that case-law are satisfied, there is no requirement for the national legislation transposing the directive to recall them expressly.

83. Therefore, the third complaint must be dismissed.

The fourth and fifth complaints

84. The fourth complaint concerns the provisions of Article 27(2) of Law No 109/1994, according to which, if the contracting authorities are unable to carry out the supervision of works which is as a rule the responsibility of their technical departments, those activities are entrusted to the project designer within the meaning of Article 17(4) thereof.

85. The fifth complaint relates to the award of testing and of inspection tasks in respect of public works, as governed by Article 28(4) of Law No 109/1994 and Article 188 of DPR No 554/1999. It is clear from a combined reading of those provisions that although those tasks are, as a rule, the responsibility of the technical departments of the contracting authorities, where a lack of staff has been established and certified by the person responsible for the procedure the authority may award the tasks to third parties featured on lists drawn up for that purpose by the Ministry of Public Works, without using the procedures relating to the opening of contracts up to competition.

Arguments of the parties

86. In the Commission's view, since Articles 27(2) and 28(4) of Law No 109/1994 allow the public service contracts concerned to be directly awarded without competition, they infringe, depending on the value of those contracts, either Directives 92/50 and 93/38 or Articles 43 EC and 49 EC.

87. The Italian Republic replies that it took formal notice of the criticisms made by the Commission and, as a result, it has amended its legislation by adopting Community Law 2004.

Findings of the Court

88. It must be noted as a preliminary point that, in accordance with the case-law set out in paragraph 42 of this judgment, only the national legislation in force on 15 December 2003 may be taken into account in assessing the complaints made by the Commission.

89. It must be observed, in the first place, that the only permitted exceptions to the application of Directives 92/50 and 93/38 are those which are exhaustively and expressly mentioned therein (see, by way of analogy, Case C-107/98 Teckal [1999] I8121, paragraph 43, and Case C-340/04 Carbotermo and Consorzio Alisei [2006] ECR I-4137, paragraph 45).

90. As the Advocate General has noted, in point 101 of his Opinion, supervision and the inspection of works are included in Category No 12 of both Annex I A to Directive 92/50 and Annex XVI A to Directive 93/38.

91. It is clear, first, from Article 8 of Directive 92/50 that contracts which have as their object services listed in Annex I A are to be awarded in particular in accordance with the provisions of Title III of that directive which concerns the choice of award procedures and, second, from Article 15 of Directive 93/38 that supply and works contracts and contracts which have as their object services listed in Annex XVI A are to be awarded in accordance with, inter alia, the provisions of Title IV of Directive 93/38, relating to award procedures.

92. Therefore, in so far as contracts for the supervision of works must be awarded in accordance with the rules laid down by Directives 92/50 and 93/38, the direct award to the project designer, as resulting from Article 27(2) of Law No 109/1994, infringes those directives as regards contracts

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which, having regard to their value, fall within the scope of the directives.

93. Likewise, in so far as contracts for inspection works must be awarded in accordance with the rules laid down by Directives 92/50 and 93/38, the award to third parties in the circumstances set out in Article 28(4) of Law No 109/1994 and Article 188 of DPR No 554/1999 infringes those directives as far as concerns the contracts included in their scope.

94. In the second place, in the case of contracts in respect of which the value of the services concerned is below the threshold for application of Directives 92/50 and 93/38, as stated in paragraphs 68 and 82 of this judgment the absence from the applicable national provisions of any express reference to the application of the obligations arising from the Treaty does not mean that there is no need to comply with the principle of equal treatment and the obligation of transparency when awarding those contracts in so far as the conditions laid down by the case-law recalled in paragraph 66 of this judgment are satisfied.

95. Therefore, the fourth and fifth pleas must be dismissed in so far as they refer to the infringement of Articles 43 EC and 49 EC but are well founded as to the remainder.

The sixth complaint

96. The sixth complaint concerns Articles 37a to 37c of Law No 109/1994, pursuant to which the authorities may allow the execution by third parties of public works which can be exploited commercially, in accordance with a specific award procedure. During the first stage, third parties are invited to submit, as promoters, proposals for the award of concessions, in respect of which the costs are assumed wholly or in part by the promoters. Once the proposals submitted have been evaluated, those considered to be in the public interest are selected in a second stage, in the course of which, with respect to each proposal selected, a restricted tender procedure is opened with a view to selecting two further offers.

97. A negotiated procedure is then opened by the contracting authority with the promoter and the other third parties who have submitted the two best offers in the tender procedure, the promoter having the opportunity to adapt his proposal to the offer considered most suitable by the contracting authority.

Arguments of the parties

98. The Commission submits that those rules are liable to constitute an infringement of the principle of equal treatment.

99. It takes the view that the rules for opening the concession up to competition favour the promoter as compared with all the other potential tenderers for two reasons.

100. First, the promoter is automatically invited to take part in the negotiated procedure for the award of the concession, irrespective of any comparison between his proposal and the offers submitted by the participants in the previous tendering procedure.

101. Second, the promoter has the opportunity to amend his proposal during the negotiated procedure in order to adapt it to the tender considered by the contracting authority to be the most suitable. In reality, that advantage amounts to the recognition of a right of priority for the promoter in the award of the concession.

102. The Italian Republic states that Community Law 2004, mentioned in paragraph 40 of this judgment, took account of the Commission's objections.

Findings of the Court

103. It is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and

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from the case-law relating to that provision, that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of claim to be set out unambiguously so that the Court does not rule ultra petita or indeed fail to rule on an objection (Case C-195/04 Commission v Finland [2007] ECR I3351, paragraph 22).

104. In this case, the Commission's application does not satisfy those requirements so far as the present complaint is concerned.

105. By its application, the Commission seeks a declaration that the Italian Republic has failed to fulfil obligations under Directives 92/50, 93/36, 93/37 and 93/38 and Articles 43 EC and 49 EC. In the sixth complaint, it fails to state precisely which of those directives and/or provisions of the Treaty the Italian Republic is supposed to have infringed by allegedly infringing the principle of equal treatment.

106. Moreover, as far as concerns Articles 43 EC and 49 EC, those articles do not lay down a general obligation of equal treatment but contain, as is clear from the case-law cited in paragraph 66 of this judgment, a prohibition on discrimination on the basis of nationality. The Commission does not give any particulars regarding the existence of such discrimination in this complaint.

107. Therefore, the sixth complaint must be declared inadmissible.

108. Having regard to all the foregoing considerations, it must be held that, by adopting:

- Article 2(1) of Law No 109/1994, the Italian Republic has failed to fulfil its obligations under Directives 92/50, 93/36 and 93/37;

- Article 2(5) of Law No 109/1994, the Italian Republic has failed to fulfil its obligations under Directive 93/37; and

- Articles 27(2) and 28(4) of Law No 109/1994, the Italian Republic has failed to fulfil its obligations under Directives 92/50 and 93/38.

Costs

109. Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or decide that each party is to bear its own costs where each party succeeds on some and fails on other heads. Since the Commission has been partly unsuccessful with respect to the second, fourth and fifth complaints, unsuccessful with respect to the third complaint and the sixth complaint has been declared inadmissible, and the Italian Republic has been unsuccessful on the first complaint and partly unsuccessful with respect to the second, fourth and fifth complaints, each party is to bear its own costs.

110. Under Article 69(4) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs.

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FORM	Judgment
TREATY	European Economic Community
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PROCEDU	Action for failure to fulfil obligations
ADVGEN	Ruiz-Jarabo Colomer
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Case C-412/04

Commission of the European Communities

v

Italian Republic

(Failure of a Member State to fulfil its obligations – Public works, supply and service contracts – Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC – Transparency – Equal treatment – Contracts excluded from the scope of those directives on account of their value)

Summary of the Judgment

1. *Actions for failure to fulfil obligations – Examination of merits by the Court – Situation to be taken into consideration – Situation on expiry of the period laid down in the reasoned opinion*

   (Art. 226 EC)

2. *Approximation of laws – Procedures for the award of public services, supply and works contracts – Directives 92/50, 93/36 and 93/37 – Determination according to the main purpose of the contract – Mixed works, supply and service contracts – Supply or service contracts including ancillary works*

   (Council Directives 92/50, 93/36 and 93/37)

3. *Approximation of laws – Procedures for the award of public works contracts – Directive 93/37 – Award of contracts*

   (Arts 43 EC and 49 EC; Council Directive 93/37)

4. *Approximation of laws – Procedures for the award of public works contracts – Directive 93/37 – Scope*

   (Council Directive 93/37, Art. 6(1) and (3))

5. *Approximation of laws – Procedures for the award of public service contracts and contracts in the water, energy, transport and telecommunications sectors – Directives 92/50 and 93/38 – Award of contracts*

   (Council Directives 92/50 and 93/38)

6. *Procedure – Application initiating proceedings – Formal requirements*

   (Rules of Procedure of the Court of Justice, Art. 38(1)(c))

1. The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion. In that connection, the adoption of laws, regulations or administrative provisions after the date on which that period expired cannot be taken into account.

(see paras 42-43)

2. A Member State which makes mixed works, supply and service contracts and supply or service contracts which include ancillary works if the works represent more than 50% of the total value of the relevant contract subject to the national rules on public works contracts fails to fulfil its obligations under Directive 92/50 coordinating procedures for the award of public service contracts, Directive 93/36 coordinating the procedures for the award of public supply contracts and Directive 93/37 coordinating the procedures for the award of public works contracts, as amended by Directive 97/52.

Where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is the main purpose of the contract that determines which Community directive on public procurement is to be applied in principle. In particular, therefore, the scope of Directive 93/37 is linked to the main purpose of the contract, which must be determined in an objective examination of the entire transaction to which the contract relates. The assessment must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very purpose of the contract; the value of the various matters covered by the contract is, in that regard, just one criterion among others to be taken into account for the purposes of the assessment. Therefore, the value of the works cannot constitute the sole criterion capable of resulting in the application of the rules on public works contracts to a mixed contract, where those works are only ancillary, without infringing the requirements of Directive 93/97.

Furthermore, such national rules also fail to comply with the requirements of Directives 92/50 and 93/36, in so far as its application may result in certain mixed contracts falling outside the procedures provided for in those directives, namely those contracts where the works, although ancillary, represent more than 50% of the total value and the total value is below the threshold set by Directive 93/37 even though it reaches the thresholds adopted in Directives 92/50 and 93/36.

(see paras 47-49, 50-51, operative part 1)

3. The Community legislature expressly made a policy choice to exclude contracts under a certain threshold from the advertising regime which it introduced and therefore did not impose any specific obligation with respect to them. Where it is established that such a contract is of certain cross-border interest, the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in the contract but which are located in other Member States. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC.

Since, under Article 249 EC, directives are binding as to the result to be achieved upon each Member State to which they are addressed and since the Community legislature excluded certain contracts from the scope of Directive 93/37, in particular by laying down thresholds, the Member States are not required to adopt, in the legislation transposing that directive, provisions recalling the obligation to comply with Articles 43 EC and 49 EC, which is applicable only in the circumstances cited above. The fact that the national legislature did not adopt such provisions with respect to public contracts for infrastructure works executed by the holder of a building permit or an approved estate plan the value of which is below the threshold for application of Directive 93/37, for cases where the existence of a certain cross-border interest is established, does not call into question the applicability of Articles 43 EC and 49 EC to those contracts.

(see paras 65-68)

4. A Member State which authorises the direct award of works or a work to the holder of a building permit or an approved estate plan by providing for an award procedure which complies with the requirements of Directive 93/37 only, where the works are divided into several lots, if the estimated value of each of those lots, taken individually, exceeds the threshold for the

application of the directive fails to fulfil its obligations under Directive 93/37 concerning the coordination of procedures for the award of public words contracts, as amended by Directive 97/52.

The fact that a provision of national law allowing direct execution by the holder of a building permit or an approved estate plan of infrastructure works which offset the whole or part of the contribution payable in respect of the permit forms part of a set of urban development regulations which are of a special nature and pursue a specific aim that is separate from Directive 93/37 is not sufficient to exclude the direct execution of works from the scope of the directive when the elements needed to bring it within the scope of the directive are present. Such execution must therefore be subject to the procedures provided for in Directive 93/37 where it satisfies the conditions contained therein for classification of a public works contract and, in particular, where the contractual element required in Article 1(a) thereof is present and the value of the work is equal to or higher than the threshold laid down in Article 6(1).

Furthermore, it is clear from Article 6(3) of Directive 93/37 that, where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amount referred to in Article 6(1), which determines whether or not the directive is applicable to all the lots. In addition, under Article 6(4), no work or contract may be split up with the intention of avoiding the application of the directive. Therefore, if the agreement concluded between a private person who is the owner of development land and the municipal authority satisfies the criteria for the definition of a 'public works contract' within the meaning of Article 1(a) of Directive 93/37, the estimated value which must in principle be taken into account in order to ascertain whether the threshold set by the directive is attained and whether, therefore, the award of the contract must comply with the rules on advertising laid down therein, may be calculated solely by reference to the total value of the various works, by adding together the value of the various lots.

(see paras 70-74, operative part 1)

5. A Member State which allows, first, the supervision of works which is as a rule the responsibility of the technical departments of the contracting authorities, to the project designer and, second, the award of testing and of inspection tasks in respect of public works, to third parties featured on lists drawn up for that purpose by the Ministry of Public Works, without using the procedures relating to the opening of contracts up to competition fails to fulfil its obligations under Directive 92/50 on public service contracts and Directive 93/38 coordinating the procurement procedures for entities operating in the water, energy, transport and telecommunications sectors.

The only permitted exceptions to the application of Directives 92/50 and 93/38 are those which are exhaustively and expressly mentioned therein. Supervision and the inspection of works are included in Category No 12 of both Annex I A to Directive 92/50 and Annex XVI A to Directive 93/38. It is clear, first, from Article 8 of Directive 92/50 that contracts which have as their object services listed in Annex I A are to be awarded in particular in accordance with the provisions of Title III of that directive which concerns the choice of award procedures and, second, from Article 15 of Directive 93/38 that supply and works contracts and contracts which have as their object services listed in Annex XVI A are to be awarded in accordance with, inter alia, the provisions of Title IV of Directive 93/38, relating to award procedures. Therefore, in so far as contracts for the supervision of works must be awarded in accordance with the rules laid down by Directives 92/50 and 93/38, the direct award to the project designer infringes those directives as regards contracts which, having regard to their value, fall within the scope of the directives. Likewise, in so far as contracts for inspection works must be awarded in accordance with the rules laid down by Directives 92/50 and 93/38, the award to third parties infringes those directives as regards the contracts included in their scope.

(see paras 84-85, 89-93, operative part 1)

6. It is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision, that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application

itself and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on an objection.

(see para. 103)

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Judgment of the Court (Second Chamber) of 21 February 2008 - Commission of the European Communities v Italian Republic.

(Case C-412/04) [1]

(Failure of a Member State to fulfil its obligations - Public works, supply and service contracts - Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC - Transparency - Equal treatment - Contracts excluded from the scope of those directives on account of their value)

Language of the case: Italian.

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis, K. Wiedner, Agent and G. Bambara, lawyer)

Defendant: Italian Republic (represented by: I. Braguglia and M. Fiorilli, agents)

Intervening parties support the defendant: French Republic, (represented by G. de Bergues, agent), Kingdom of Holland (represented by: H.G. Sevenster and M. de Grave, agents), Finnish Republic (represented by: A. Guimaraes-Purokoski, agent)

Re:

Failure of a Member State to fulfil obligations - Infringement of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, (OJ 1993 L 199, p. l) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, (OJ 1993 L 199, p. 54) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) - Infringement of Articles 43 and 49 EC - Infringement of the principles of transparency and equal treatment

Operative part of the judgment

The Court:

Declares that, by adopting:

Article 2(1) of Law No 109 of 11 February 1994 - Framework Law on public works (legge quadro in materia di lavori pubblici), as amended by Law No 166 of 1 August 2002, the Italian Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997;

Article 2(5) of Law No **109/1994** as amended, the Italian Republic has failed to fulfil its obligations under Directive 93/37 as amended; and

Articles 27(2) and 28(4) of Law No **109/1994** as amended, the Italian Republic has failed to fulfil its obligations under Directive 92/50 and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

Dismisses the action as to the remainder;

Orders the Commission of the European Communities and the Italian Republic to bear their own costs;

Orders the French Republic, the Kingdom of the Netherlands and the Republic of Finland to bear their own costs.

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[1] - OJ C 300, 04.12.2004.

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OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 8 November 2006 [1](1)

Case C-412/04

Commission of the European Communities
v
Italian Republic

(Public procurement – Criteria for the application of Community rules to mixed contracts – Application of the principles of transparency and equal treatment to contracts excluded on grounds of value – Award of contracts for urban development works; of contracts for the design, supervision and inspection of works the value of which is below the Community thresholds; of contracts for the supervision and inspection of works; and of public works contracts to private promoters)

I – Introduction

1. The Commission has brought an action under Article 226 EC, seeking a declaration from the Court of Justice that Italy has failed to fulfil its obligations under Articles 43 EC and 49 EC and under the Council Directives concerning the coordination of procedures for the award of public service contracts (92/50/EEC of 18 June 1992), (2) public supply contracts (93/36/EEC of 14 June 1993), (3) and public works contracts (93/37/EEC, also of 14 June 1993), (4) and coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (93/38/EEC, also of 14 June 1993) ('the Directives'). (5)

2. The Commission claims that the infringement is entailed by Articles 2(1) and (5), 17(12), 27 (2), 28(4), 30(6a), 37b, and 37c(1) of Law No 109 of 11 February 1994, Legge quadro in materia di lavori pubblici (Framework Law on public contracts). (6) It alleges that it consists specifically in: (1) the exclusion of mixed contracts from Law No 109/94 if the ancillary works represent more than 50 % of the price; (2) the award of contracts directly to the holder of a building permit or development plan in cases where the works do not exceed the financial thresholds provided for in Directive 93/37; (3) the procedure for awarding contracts for the design, supervision and inspection of works the value of which is below the Community thresholds; (4) the award of contracts for the supervision of works to the project designer when neither the contracting authority nor any other public authority is able to perform that role; (5) the method of awarding inspection contracts to third parties; and (6) the system of awarding contracts for privately financed works.

3. Those complaints raise two issues of general interest which need to be discussed in more detail; first, the criteria for determining whether the Community provisions on procurement must apply to mixed contracts, and, second, the application of the principles of transparency and equal treatment to the award of contracts whose value is lower than the thresholds set in the Directives.

II – The legal framework

A – *The Community legislation*

1. The EC Treaty

4. The first paragraph of Article 43 EC provides: 'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State'.

5. The first paragraph of Article 49 EC provides: 'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'.

2. The Directives on public contracts

6. Directives 92/50, 93/36, 93/37 and 93/38 were adopted in order to provide simultaneously for the application to the field of public contracts of the principles of freedom of establishment and freedom to provide services enshrined in Articles 43 EC and 49 EC. Of all the provisions included in those Directives, the most notable are the ones which define the scope of each Directive by setting different thresholds for the exclusion of works with values below the amounts set (Article 7 of Directive 92/50, Article 5 of Directive 93/36, Article 6 of Directive 93/37 and Article 14 of Directive 93/38).

7. I will refer to other specific provisions as I analyse the grounds of failure to fulfil obligations.

B – *The Italian legislation*

8. The Directives were transposed into Italian law by Law No 109/94, which was amended by Article 7 of Law No 166 of 1 August 2002. (7)

1. Mixed contracts

9. Article 2(1) of Law No 109/94, which delimits the scope of the Law, defines public works as construction, demolition, restoration, restructuring, refurbishment and maintenance, and provides that the Law applies to mixed works, supply and service contracts and to supply and service contracts which include ancillary works the value of which exceeds 50% of the total value of the contract.

10. Article 3(3) of Legislative Decree No 157 of 17 March 1995 (8) lays down the same provision for mixed works and service contracts and for service contracts which include ancillary works.

2. Urban development works

11. Article 2(5) of Law No 109/94 excludes from the scope of the Law: a) works carried out directly by private persons which are set off against fees payable in respect of building permits; b) works arising from the obligations laid down in Article 28(5) of Law No 1150 of 17 August 1942; (9) and c) works which are analogous to the foregoing. If the value, which is assessed individually where there are a number of works, exceeds the Community thresholds, the contract must be awarded in accordance with Directive 93/37.

12. In that regard, it is apparent from Articles 1 and 31 of Law No 1150/42, and from Articles 3 and 11 of Law No 10 of 28 January 1977, (10) that the holder of a building permit may carry out urban development works himself and offset the whole or part of the cost against the urban development fees due.

3. Contracts for the design, supervision and inspection of works the value of which is below the Community thresholds

13. Under Article 17(12) of Law No 109/94, the competent authorities may award contracts for the design and supervision of works with a value of less than EUR 100 000 to the persons referred

to in subparagraph (1)(d), (e), (f) and (g), after verifying the experience and professional capacity of the person selected and stating reasons for the choice.

14. In addition, under Article 30(6a) of Law No 109/94, responsibility for the inspection of works falls to the technical departments of the tendering entities or to the supervisory bodies referred to in Article 30(6a)(a) or, where the value is below the Community thresholds, to persons trusted by the awarding authority.

4. The supervision of works

15. Under Article 27(2) of Law No 109/94, provided that the contracting authority does not, in the cases referred to in Article 17(4), assume responsibility for the supervision of works, that authority must award the contract for supervision services, in the following order, to (1) other public authorities; (2) the project designer, in accordance with Article 17(4); or (3) other persons who have been pre-selected pursuant to national rules.

5. Inspection services

16. Under Article 28(4) of Law No 109/94, contracts for inspection services are awarded to one, two or three highly qualified experts in the particular field concerned, by reference to the type, complexity and value of the works, who are selected from the contracting authority's own experts unless it is established and certified that none of those experts satisfy the aforesaid requirements.

17. Those provisions must be read in conjunction with Article 188 of Presidential Decree No 554 of 21 December 1999, (11) which adds to Law No 109/94. It appears from paragraphs 1, 3, 8, 9, 11, 12 and 13 of Article 188 that, within 30 days of the conclusion of the works, the contracting authority must award the contract for inspection of the works to its staff, by reference to the type, category, complexity and value of the works and certain other pre-established criteria. If no one meets the requirements stipulated, the authority must use the services of external experts included in lists held by the Ministero dei Lavori Pubblici (Ministry of Public Works) and by the regional and provincial governments, from which the authority must select a person who meets the conditions stated and who has been qualified for at least 10 years – in the case of structural works or works with a value equal to or in excess of five million euros – or for at least five years – in the case of works with a the value of below one million euros. In addition, the contracting authority must make that person subject to a number of restrictions. In the absence of such lists, the contracting authority is entitled to award the contract on a discretionary basis to whoever satisfies the requirements laid down.

6. Privately financed works

18. Articles 37a, 37b and 37c of Law No 109/94 govern the award of contracts for public works financed wholly or partly by private persons.

19. Article 37a permits such persons to submit proposals for public works and works in the public interest, and to conclude the relevant contracts, under which they assume the financing and management of those works. To that end, the contracting authority is required to publish an indicative notice sufficiently in advance.

20. Article 37b sets out the procedure for selection of the promoter. First, the proposals are evaluated, having regard to the construction, the planning, the environment, the quality of the design, its functional nature, its objective, its accessibility to users, the return, the management and maintenance costs, the duration of the concession, the time-limits for carrying out the works, the charges, the system for inspecting the works, and the economic value of the plans. Having established that no factors exist which would preclude the execution of the works and after hearing representations from any promoters who so request, it is decided whether any of the proposals is in the public interest, in which case Article 37c(1) provides for a restricted procedure to obtain two further offers. The concession is awarded under a negotiated procedure in which the promoter's proposal competes with the other two proposals, subject to the special rule, laid down at the end of Article 37c, that the award may be made to the promoter who, during the course of the procedure, adapts his proposal to the amendments suggested by the contracting authority .

III – The pre-litigation procedure

21. After receiving a number of complaints regarding the effects of Law No 109/94 and obtaining details of the proposed amendments to that Law, on 12 April 2002 the Commission wrote to the Italian authorities stating that a number of provisions were incompatible with Community law.

22. In a letter dated 17 June 2002 and at a meeting held in Rome on 23 July 2002, Italy indicated its willingness to amend Law No 109/94 in the manner requested.

23. Following the adoption of the amendments under Law No 166/2002, the Commission took the view that certain provisions of that Law conflicted with Community law and, on 19 December 2002, the Commission sent a letter of formal notice. Unconvinced by the reply to that letter, the Commission sent a reasoned opinion on 15 October 2003 and then brought an action before the Court under Article 226 EC seeking a declaration that Italy has failed to fulfil its obligations.

IV – The procedure before the Court

24. In the application, which was received at the Court registry on 24 September 2004, the Commission seeks a declaration that, 'by adopting Articles 2(1), 17(12), 27(2), 30(6a), 37b and 37c (1) of Law No 109 of 11 February 1994, as most recently amended by Article 7 of Law No 166 of 1 August 2002; Article 2(5) of Law No 109/94, as most recently amended by Law No 166/2002, to be read in conjunction with Law No 1150 of 1942 and Law No 10 of 1977, as amended and supplemented; Article 28(4) of Law No 109/94, to be read in conjunction with Article 188 of Presidential Decree No 554 of 21 December 1999 and Article 7 of Law No 166/2002, and Article 3(3) of Legislative Decree No 157 of 17 March 1995, the Italian Republic has failed to fulfil its obligations under Directives 93/37/EEC, 93/36/EEC, 92/50/EEC and 93/38/EEC, Articles 43 and 49 EC and the principles of transparency and equal treatment to which they give expression'. The Commission also claims that the defendant must be ordered to pay the costs.

25. In the defence, lodged on 16 December 2004, Italy seeks the dismissal of the Commission's action and, in the alternative, the approval of the amendments made to the Italian legislation criticised in the reasoned opinion, together with the dismissal of the complaint relating to Article 2 (5) of Law No 109/94.

26. The reply was lodged on 26 January 2005 and the rejoinder was lodged on 16 March 2005.

27. By order of 6 April 2004, the President of the Court granted leave for the Netherlands (which submitted a statement in intervention on 14 July 2005) and Finland (which submitted a statement in intervention on 18 July 2005) to intervene in support of Italy, (12) which lodged a response to the statements in intervention on 14 September 2005.

28. On conclusion of the written stage of the proceedings, since none of the parties requested a hearing, the case became ready for the preparation of this Opinion on 11 July 2006.

V – Mixed contracts

29. Freedom of contract allows new contractual forms to emerge, which combine elements from different standard contracts (13) and which aim to attain more effectively the objectives proposed by the parties.

30. There are numerous possible combinations, depending on the extent of the contractual obligation concerned, (14) because a single legal transaction may encompass several different transactions, a contract may have more than one object and, in that connection, each object may relate to a different activity.

31. The main difficulty lies in selecting the relevant provisions, which give rise to certain effects such as the application of more rigorous procedures or the exclusion of certain tenderers.

32. The selection may be based on the combination criterion, by using provisions from different sources in different parts of the same contract, on the absorption criterion, complying with the contractual rules to which the predominant element belongs. (15)

33. The first criterion emphasises the specific nature of each type but the extensive practical difficulties it entails mean that it is not normally used, except, for example, in contracts which,

behind a unitary structural appearance, combine a number of different contractual types.

34. The second criterion is generally used in more complex situations, such as the ones which are specifically referred to in the Directives and are based on the object of the contract:

– A contract which covers products and services where the value of the services exceeds that of the products is governed by Directive 92/50. (16)

– A contract which covers products, where the supply of those products entails, as an incidental matter, siting and installation operations, is governed by Directive 93/36. (17)

– A contract which covers services and includes ancillary works is governed by Directive 92/50. (18)

– A contract which covers a public works concession must comply with the advertising rules specifically laid down in Directive 93/37. (19)

35. In addition, Directive 92/50 provides that, where contracts cover services listed in both Annex I A and Annex I B, the value of those services determines which provisions must be applied to the award of the contracts (20) (Article 10). (21) Directive 93/38 contains a similar provision (Article 17).

36. However, the alternatives referred to do not exhaust all the possibilities so that, in the light of the lacunae in the Directives, which, moreover, do not set out a common framework for all contracts, (22) the legislatures of the Member States must adopt provisions applicable to the other types of mixed contracts, for which purpose they have a wide margin of discretion, subject to the Directives and the Treaty.

37. It is important to point out that the Directives are founded on the concept of the main object of the contract, and, where there is more than one object or a number of activities are combined, on the object or activity with the highest financial value. It is possible to determine the material scope of the Directives by taking both those factors into account.

38. The main object of the contract is framed as the essential element around which the contract is centred. (23) Thus, in *Gestión Hotelera Internacional*, (24) in relation to a contract for the assignment of property and also the performance of works, (25) the Court held that it was inappropriate to treat those works as the main object of the contract when they were incidental in nature, although that was a factor which must be determined by the national court (paragraphs 26 to 29). That judgment must be qualified, however, because the classification of operations or works as ancillary (sixteenth recital in the preamble to Directive 92/50 and Article 1(a), *in fine,* of Directive 93/36) does not convert that quality into the one that defines the system. Accordingly, the judgment must be construed as meaning that ancillary contractual obligations may not be used to identify the applicable provisions, which must be determined in accordance with the prevalence criterion. (26)

39. The value of the contract is framed as an impartial criterion which is useful when it comes to selecting the predominant object or activity, having regard to its primary function which is to determine whether or not contracts are covered by the Directives. In that connection, the Court held in *Teckal*, (27) on the basis of an *a contrario* interpretation of Article 2 of Directive 92/50, that a contract for products and services is governed by the provisions on products if the value of those items exceeds that of the services (paragraph 38), a finding upheld in *Carbotermo and Consorzio Alisei* (28) (paragraphs 31 and 47).

VI – The Community principles in relation to excluded contracts

A – *The action for failure to fulfil obligations on the grounds of infringement of the Community principles*

40. It is clear from Article 10 EC that membership of the Community entails two obligations for the Member States. One of those obligations is positive and requires the Member States to take 'all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising' out of the Treaty or 'resulting from action taken by the institutions', while the other is negative and requires Member States 'to abstain from any measure which could jeopardise the attainment of the

objectives' pursued. Under Articles 226 EC and 227 EC, the Commission and the Member States may bring the matter before the Court where they consider that another Member State has failed to fulfil its obligations.

41. Accordingly, the action for an infringement of Community law has a wide material scope because it does not apply only to secondary law where directives provide a rich source of such proceedings.

42. Those considerations explain why the application does not contain any submissions concerning the infringement by the Italian legislation of specific provisions of the Directives on public contracts and focuses instead on the claim that the Italian legislation breaches the Community principles enshrined in Articles 43 EC and 49 EC.

43. In other words, since the legal provisions governing public contracts vary depending on whether the national implementing measures define those contracts in such a way that they fall within the scope of the Directives, the Commission bases its complaint on the absence of an express provision requiring compliance with the principles of transparency and equal treatment when awarding contracts which are excluded on the grounds of their value.

B – *The principles of transparency and equal treatment in relation to excluded contracts*

44. In previous Opinions I have argued that the development of open competition in the field of public contracts will be achieved if those who wish to be awarded public contracts participate on an equal footing without any unjustified discrimination whatsoever, and that it is not sufficient for the procedure to be governed by objective criteria because the principle of transparency must also apply. (29)

45. The Court has already considered the effect of the principles of transparency and equal treatment on the award of contracts which, on account of their value, are excluded from the scope of the Directives and, consequently, from that of national implementing provisions.

46. In *Teleaustria and Telefonadress*, (30) the Court held that, where contracts are excluded from the scope of Directive 93/38, 'the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular' (paragraph 60). In accordance with the judgment in *Unitron Scandinavia and 3–S*, (31) the principle of transparency 'implies … an obligation of transparency' in order to ensure that it is observed (paragraph 31) and, in accordance with *Teleaustria and Telefonadress*, that obligation of transparency ensures, 'for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed' (paragraph 62). Therefore, as the Court declared in *Parking Brixen*, (32) a complete lack of any call for competition 'does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency' (paragraph 50), although, in *Coname*, (33) the Court pointed out that transparency does not imply an obligation to 'hold an invitation to tender' (paragraph 21).

47. Those findings, which have since been upheld, (34) are therefore based on the distinction between contracts which fall within the scope of the Directives and must be governed by the procedures laid down therein, and contracts which do not fall within the scope of those Directives and are subject only to the fundamental principles. (35)

C – *The scope of the obligation to comply with the principles of transparency and equal treatment*

48. Having established that contracts which are excluded from the specific provisions must be awarded in accordance with the principles of transparency and equal treatment, it is necessary to define that obligation and establish whether it must be enshrined in legislation.

49. The Court did not dispel that uncertainty in *Coname*, despite the detailed analysis undertaken by Advocate General Stix-Hackl in the Opinion in that case. However, there are a number of cases pending in which the debate may be rekindled. (36)

50. Unlike those cases, which concern specific contracts, the present case is broader in scope and requires an examination of the Directives and of the Treaty.

1. Reference to the Directives

51. The Court made clear in *Stadt Halle and RPL Lochau* (37) that the principal objective of the Community rules in the field of public procurement is, in addition to the free movement of goods and services, the opening-up to undistorted competition in all the Member States (paragraph 44). (38)

52. However, an analysis of the Directives reveals the absence of a complete body of law at Community level, (39) because, first, the Directives essentially govern procurement, although they also have an effect on other stages, such as performance of the contract; second, the Directives exclude certain contracts; and, finally, the Directives do not contain any general provisions with which the excluded contracts are required to comply.

53. The restriction of the scope of the Directives to the preparatory stages, the procedure and the methods of awarding contracts, as indicated by their titles, is justified by the fact that those are the stages which affect the free movement of goods, freedom of establishment, freedom to provide services, and the principles derived from those freedoms.

54. It is also possible to explain the exclusion of certain contracts on the grounds that they have a sensitive object, such as contracts which are secret or are subject to stringent security measures; that they fall within the scope of other directives, such as telecommunications contracts; or that they have a modest value.

55. However, it is more difficult to understand why none of the Community legislation on public procurement contains stipulations concerning equal opportunities, the prohibition of discrimination, transparency and advertising, subject to the necessary exclusions, (40) because such stipulations would benefit the aims of the Community without creating insuperable difficulties.

56. The legislatures of the Member States have the power to fill that gap but they are not required to introduce rules which have not even been adopted in secondary legislation. It is therefore important to recall that Article 249 EC provides that '[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods', from which it follows that, while transposition must extend to the whole of a directive, it nevertheless extends to the directive alone.

57. Accordingly, as Community law currently stands, neither the objective, the subject-matter, nor the effectiveness of the Directives require that legislation adopted by the Member States in relation to contracts excluded from the scope of the Directives must refer expressly to the principles on which the latter are founded.

2. Reference to the Treaty

58. In *Commission* v *Italy*, (41) the Court found that Articles 43 EC and 49 EC embody specific instances of the principle of equal treatment (paragraph 8), which, as the Court held in *Commission* v *Belgium*, (42) means that all tenderers must have equality of opportunity when they formulate their tenders, irrespective of their nationality (paragraphs 33 and 54).

59. The publication of a call for tenders is the key element from the point of view of the principles laid down in the Treaty, which, however, does not contain any guidance which might indicate the manner in which notices must be published. The Court has not intervened in this matter, except to offer minimal guidance. Thus, as concerns the case-law already cited, the Court held in *Parking Brixen* that '[i]t is for the concession-granting public authority to evaluate, subject to review by the competent courts, the appropriateness of the detailed arrangements of the call for competition to the particularities of the public service concession in question' but a complete lack of any call for tenders is incompatible with the principles of the Treaty (paragraph 50, which cites paragraphs 61 and 62 of the judgment in *Teleaustria and Telefonadress*), (43) an approach which may be applied to any type of contract.

60. In *Coname*, the Court analysed the direct award by an Italian local authority of the service covering the maintenance, operation and monitoring of the methane gas network, and held that regard must be had to the principles referred to. Since the contract concerned did not fall within the scope of any of the Directives, the Court applied primary law (paragraph 16), and pointed out that infringement of the principle of transparency amounted to indirect discrimination contrary to Articles

43 EC and 49 EC (paragraphs 17 to 19), which was justified by 'special circumstances, such as a very modest economic interest at stake', so that 'it could reasonably be maintained that an undertaking located' in another Member State 'would have no interest in the concession at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed' (paragraph 20).

61. In a wider context, in the Opinion in *Coname*, Advocate General Stix-Hackl expressed uncertainty as to whether the fundamental freedoms require uniform rules for all awards (point 70), and proposed a simplified set of rules which assesses the different categories on the basis of their relevance to the internal market (point 75 et seq).

62. From the foregoing I conclude, first of all, that regard must always be had to the principles of equal treatment and transparency as laid down in the Treaty, without the need for provisions of secondary law or national law calling for observance those principles; (44) and, second, that the degree of publication of a call for tenders is currently a matter for each Member State, subject to certain restrictions.

D – *Corollary*

63. In the light of the analysis carried out, it is my view that neither the Directives nor the Treaty require the Member States expressly to lay down general provisions for excluded contracts, concerning the application of the principles of equal treatment and transparency or publicity which are essential to free competition. Any action by the Member States in that regard would be voluntary rather than the result of an obligation arising from membership of the Union.

64. To conclude otherwise would give rise to the significant practical difficulties set out in the *Coname* Opinion, such as the choice of the means of publication and the minimum content of the notice (points 96 and 97), because the Directives make a distinction based on the financial value of the activities concerned. Such an approach would also be contrary to case-law which, in the *Coname* judgment, allows direct awards in certain situations without the need to hold an invitation to tender (point 21).

65. In any event, it remains possible to monitor observance of those principles by individual acts as was the case in, for example, in the *Parking Brixen* and *Coname* judgments. (45)

VII – Examination of the grounds of failure to fulfil obligations

A – *Preliminary point*

66. At the beginning of this Opinion, I stated that the Commission complains that Italy has failed to fulfil its obligations in the field of public contracts by excluding certain procurement procedures from the rules and provisions of Community law, essentially in two ways; first, by providing that the value of ancillary works is the sole criterion for determining whether mixed contracts fall within the scope of the Community legislation; and, second, by failing to provide that the principles of transparency and equal treatment enshrined in Articles 43 EC and 49 EC must be observed in the award of contracts whose value is below the thresholds laid down in the Directives.

67. Although the defendant Government specifically contests the claim that the provisions of Italian law governing works carried out by private persons which are deductible from urban development fees are incompatible with Community law, it submits that the other infringements detailed by the plaintiff were rectified as a result of the amendments introduced by Law No 62/2005 of 18 April, Legge comunitaria 2004. (46)

68. Suffice it to recall the case-law of the Court to the effect that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes. (47)

69. Accordingly, in the case before the Court, regard must be had to the legislation in force at the end of the two-month period allowed in the reasoned opinion of 15 October 2003, but not to any legislation adopted subsequently.

B – *Definition of mixed contracts*

70. Mixed works, supply and service contracts and mixed supply and service contracts which include ancillary works must comply with the Italian implementing legislation if those works constitute more than 50% of the price (Article 2(1) of Law No 109/94 and, similarly, Article 3(3) of Legislative Decree No 157/95). The financial evaluation of a component of that type of contract is, therefore, the exclusive criterion for application of the Law.

71. The Commission cites the *Gestión Hotelera Internacional* judgment in support of its contention that application of the Community provisions must be determined by reference to the principal object of the contract as defined, *inter alia* and not exclusively, by the financial value of the activities concerned because to do otherwise would lead to the exclusion of mixed contracts with a value in excess of the thresholds laid down in Directives 92/50 and 93/36 but, simply because the works, although ancillary, constitute the predominant component of the price, below the thresholds fixed in Directive 93/37.

72. The defendant cites a circular from the Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport) (48) and the amendment of Law No 109/94 as evidence that, in mixed contracts, the value of ancillary works is not taken into account, with the result that the financial aspect is also the predominant, albeit not the only, criterion for the purpose of selecting the applicable legislation.

73. In my opinion, for the reasons set out, the amendments cited cannot be taken into account. Furthermore, as the Commission states in the reply, a circular lacks the authority to override a legal provision and is not sufficient evidence to deny the existence of an infringement, because, as the Court has held, '[m]ere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations flowing from Community law'. (49)

74. It is clear from those considerations that the Directives preclude the value of the works from being, in all cases, the criterion which determines the legal provisions applicable to mixed contracts because, otherwise, contracts whose primary purpose is services or supply might be excluded from the scope of the Community legislation merely by reason of the lower value of their primary obligations.

75. The Directives refer to the object of the contract but do not confuse it with either the aim or the activities entailed, (50) even though the latter define the object. In addition, where there is more than one object, the Directives classify them by reference to the value of the activities concerned, because the Directives define their scope in terms of easily ascertainable financial amounts.

76. It is not appropriate to carry out an *a contrario* interpretation or, as the Italian provisions do, to have regard to the value of ancillary works, and, for the reasons stated, I consider that the claim of infringement is well-founded.

C – *Urban development works*

77. Works carried out by private persons (a) which are deductible from charges arising from building permits, (b) which require the assumption of certain legal obligations, and (c) which are analogous to the works in the first two categories, are not required to comply with Law No 109/94. However, if the value of the activities, assessed on an individual basis, exceeds the Community thresholds, such contracts are awarded in accordance with Directive 93/37 (Article 2(5) of the Law No 109/94).

78. The Commission claims, first, that those provisions, in conjunction with Law No 1150/42 and Law No 10/77, allow for a contract to be awarded directly to the holder of a building permit or development plan but fail to uphold the principles of transparency and equal treatment enshrined in the EC Treaty, principles which must be observed even if the value of the contract is below the Community thresholds. Second, the Commission submits that the determination of whether the threshold has been attained must take account of all the activities covered by the contract, rather than just one of them.

79. The Italian Government strenuously denies that the Italian legislation gives rise to the infringement complained of. First, it has lodged a circular from the Ministero delle Infrastrutture e dei Trasporti (51) and a circular from the Dipartimento per le Politiche Comunitarie (Department of Community Policy attached to the aforementioned ministry), (52) which give details of the

provisions adopted to ensure compliance with the Community legislation. Second, the Italian Government describes as excessive the requirement that there must be a reference to the relevant provisions of the Treaty and to the case-law of the Court in the implementing provisions. Third, the Italian Government points to the special nature of urban development works where the builder acts in place of the local authority. Finally, the Italian Government disputes the interpretation of the judgment in *Ordine degli Architetti and Others* (53) cited by the Commission, because, in the opinion of the Italian Government, it did not analyse the different types of works executed by the private person concerned as the agent of the contracting authority.

1. The principles of transparency and equal treatment

80. For the reasons stated, the complaint to the effect that national provisions do not contain a general reference to the obligation to comply with the principles of transparency and equality cannot be upheld. The flexible nature of those principles means that the assessment as to whether they have been infringed must be based on the circumstances of each award of a contract.

81. Accordingly, Italy has not committed the alleged infringement.

2. The scope of the Italian legislation

82. The other complaint in the application concerning the award of works contracts to the holder of a building permit or development plan relates to the fact that the procurement procedures concerned must be followed in all cases where an agreement between a contracting authority and a private person covers works whose value, assessed individually, is in excess of the Community thresholds.

83. The Commission claims that that rule is contrary to Directive 93/37, because it leads to the exclusion of contracts whose total value exceeds the thresholds, on the grounds that the individual cost of each component operation is below that threshold.

84. As I have pointed out, the Italian Government draws attention to the special nature of urban development works and the characteristics of the contested procurement procedure but fails to take account of the fact that the procedure at issue in the present proceedings must be assessed pursuant to the Directives on public contracts. Placing the emphasis on one legal sphere – the national one – while ignoring the other sphere – the Community one – causes the situation to become distorted. Moreover, as I have already observed, in *Ordine degli Architetti and Others*, the Court held that the special nature of urban development works is not sufficient to exclude the application of the Directives (paragraph 66).

85. Article 1 of Directive 93/37 provides definitions of 'public works contracts' (paragraph (a)) (54) and 'a work' (paragraph (c)); (55) Article 6(3) of that Directive provides for the case where a work is subdivided into several lots, each one the subject of a contract; while Article 6(4) prohibits a work or a contract from being split up in order to avoid the application of the Directive. (56)

86. Thus, those provisions supply definitions and rules which must be interpreted in accordance with Community law, (57) and that is appropriate context in which to view the judgment in *Ordine degli Architetti and Others*, pursuant to which Directive 93/37 must be applied to cases where 'the holder of a building permit or approved development plan' executes 'infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit … where the value of that work is the same as or exceeds the ceiling fixed by the Directive'.

87. However, that judgment must be qualified because public works which entail urban development works may be executed directly by the contracting authority or by a third party in accordance with the law or an agreement, in which case there is a contract governed by Community law (58) and the holder of a building permit or development plan, acting as the *alter ego* of the contracting authority, (59) is bound by the same requirements of publicity and competition. (60)

88. In addition, Directive 93/37 defines the term 'a work', the existence of which, pursuant to the judgment in *Commission* v *France*, (61) must be assessed in the light of the economic and technical function of the result of the works concerned (paragraph 36). The total value obtained, where appropriate, by adding together lots, determines whether the Community provisions apply and, as I have already indicated, the particular features of urban development works cannot serve

as objective grounds to justify splitting up a contract.

89. It is clear from the foregoing considerations that urban development works which are subject to Directive 93/37 must also comply with the rules laid down in that directive governing the calculation of the value of contracts. Provisions such as Article 2(5) of Law No 109/94, which alter those rules by stipulating a single general criterion which has the detrimental effect of circumventing the Community provisions and precluding, on objective grounds relating to the value of the works, the undertakings of other Member States from submitting tenders in public procurement procedures in which they wish to participate, cannot therefore be upheld. (62)

90. Article 2(5) of Italian Law No 109/94 accordingly infringes Directive 93/37.

D – *The award of contracts for the design, supervision and inspection of works the value of which is below the Community thresholds*

91. Under Law No 109/94, contracts for the design, supervision and inspection of works the value of which is below the thresholds set in the Directives may be awarded to persons trusted by the contracting authority (Articles 17(12) and 30(6a)).

92. The Commission claims that the principles of non-discrimination, equal treatment, proportionality and transparency must also be applied to contracts which do not fall within the scope of the Directives and that those principles are infringed where the procurement procedure is not advertised at all, an infringement which is not remedied by the requirement to confirm the experience and professional capacity of the person selected and to state reasons for the selection.

93. The defendant cites the amendment of Law No 109/94, which inserts a specific reference to the Community principles, and repeats its previous assertion that the references to the Treaty and the case-law of the Court required by the plaintiff are unreasonable.

94. Since the arguments raised in connection with this complaint are similar to the ones put forward concerning Article 2(5) of Law No 109/94, it is advisable to settle the matter in the same way, that is, by holding that Community law does not currently require that the obligation to observe the Community principles in the case of excluded contracts must be explicitly enshrined in legislation governing the award of those contracts, subject always to the right to scrutinise each procedure and to bring an action for infringement of the principles before national courts or the Court of Justice.

95. Therefore, it is appropriate to find that Articles 17(12) and 30(6a) of Law No 109/94 do not constitute the infringement of Community law complained of in the present proceedings.

E – *The award of contracts for the supervision of works*

96. The contracting authority is responsible for the supervision of works but where neither that authority nor other public authorities are able to carry out that task, it is awarded to the project designer (Article 27(2) of Law No 109/94).

97. The Commission complains that the general nature of that provision infringes Directives 92/50 and 93/38, the aim of which is to ensure publicity and competition in procurement procedures for supervision services both where the Community thresholds are exceeded, because the Directives so provide, and where those thresholds are not reached, in accordance with the principles of the Treaty.

98. The Italian Government draws attention to the difficulties which its system avoids but adds that, with a view to addressing the complaints put forward, it has amended Law No 109/94 by introducing a number of safeguards which provide that the contracting authority may only award the contract to the project designer if it indicates as much in the tender notice, and that the value of the supervision services must have been calculated in the budget.

99. Identical considerations to the ones already set out with regard to the previous complaints are relevant to the application of the principles of transparency and equal treatment to contracts for the supervision of works whose value does not exceed the Community thresholds, because the same factors are involved. In that connection, the infringement complained of by the Commission cannot be upheld.

100. A different solution must apply to contracts which, by reason of their value, are subject to procurement procedures because the Community provisions are precise in that regard. In those cases, there must be strict compliance with all the provisions, however convenient it may be not to hold a call for competition, because Article 11(1) of Directive 92/50 and Article 4(1) of Directive 93/38 make it absolutely clear that contracts must be awarded in accordance with the procedures defined therein (open, restricted and negotiated), (63) with the result that, as the case-law has made clear, only the exceptions provided for are permitted. (64)

101. Contracts for the supervision of works are included in category 12 of Annex I A to Directive 92/50 and of Annex XVI A to Directive 93/38, from which it follows that those contracts must be awarded in accordance with the procedures laid down in those Directives.

102. For all the reasons stated, it is clear that Article 27(2) of Law No 109/94 infringes Directives 92/50 and 93/38.

F – *The award of contracts for inspection services*

103. Inspection services are carried out by the departments of the contracting authority but, where it is established and certified that there are no qualified staff (Article 28(4) of Law No 109/94), the contract is awarded to third parties included in the lists held by the public authorities (Article 188 of Presidential Decree No 554/99).

104. The complaint put forward by the Commission in that connection repeats the claim, set out in section VII E of this Opinion, that the procedures laid down in Directives 92/50 and 93/38 must be applied where the value of the contract exceeds the relevant thresholds and that the principles laid down in the Treaty must be respected in all other cases.

105. The Italian Government cites the future repeal of the regulatory provisions (specifically, of Article 188(8) to (11) of Presidential Decree No 554/99). (65)

106. That expression by the Italian Government of its good intentions in the fullness of time notwithstanding, this complaint must be resolved in the same way as the preceding one. Accordingly, the claim concerning Article 43 EC and Article 49 EC cannot be upheld, while, on the other hand, contracts for inspection services, which are included in category 12 of Annex I A to Directive 92/50 and of Annex XVI A to Directive 93/38, must be awarded in accordance with the Directives.

107. For all the reasons stated, Article 28(4) of Law No 109/94, in conjunction with Article 188 of Presidential Decree No 554/99, is incompatible with Directives 92/50 and 93/38.

G – *Privately financed works*

108. Contracting authorities allow third parties to execute public works which may be exploited commercially. In the first stage of the procedure, the authorities publish a notice inviting private persons, who then acquire the status of promoters, to submit proposals for the award of concessions under which those persons assume all or part of the costs and, by way of consideration, undertake to operate the concession. Once the proposals submitted have been evaluated, those which are in the public interest are chosen in the second stage when, in the case of each proposal chosen, a restricted procedure is commenced with a view to selecting two further offers. Those offers are used as points of reference in the negotiated procedure which leads to the award of the concession and favours the promoter who is able to adapt his proposal to the specifications of the contracting authority (Articles 37a, 37b and 37c of Law No 109/94).

109. The Commission complains, first, that the procedure described constitutes an infringement by Italy of the principle of equal treatment, since the promoter obtains two advantages in the procedure vis-à-vis the other competitors, even where his original proposal is not as suitable, because he participates automatically in the procedure and has priority in the selection process. It would be possible to excuse the infringement if all the participants were aware of those advantages and of the selection criteria, but it is not obligatory to state those matters in the initial notice. Second, the Commission complains that, since the notice has only been compulsory with effect from 18 August 2002, the date on which Law No 166/2002 entered into force, procedures which have already been held lead to outcomes which are incompatible with the general Community provisions.

110. The defendant contends that both complaints have been addressed in the amendment of Law No 109/94, which provides that the notice must state the advantages of the promoter, and refers to a regulatory provision governing procedures which were already underway on 31 January 2004 and in which the notices did not contain that statement.

111. Although the Italian Government does not dispute the claims advanced in the application, the burden of proving the alleged infringement falls on the Commission and it must do so without relying on any presumption, (66) although, once sufficient evidence has been adduced, the Member State concerned must challenge that evidence in substance and in detail. (67)

112. The two claims appear to be well-founded in principle. In the case of the first claim, because, as the Commission states, the national legislation accords to the promoter of the works certain advantages which the other candidates do not receive and are unable to do anything about. In that connection, the Court held in *Commission* v *Belgium* that, when a contracting entity takes into account an amendment to the initial tenders of only one tenderer, that tenderer enjoys an advantage over his competitors, which breaches the principle of the equal treatment of tenderers and impairs the transparency of the procedure (paragraph 56). Furthermore, the Commission cites a number of specific cases where the notice failed to state the advantages or stipulate the objective selection criteria. (68)

113. The second claim appears to be founded on the grounds that the subsequent correction of defects in the situation giving rise to the infringement is insufficient from a temporal point of view.

114. Further to the considerations set out in the foregoing points, it is appropriate to uphold the claim that Articles 37b and 37c(1) of Law No 109/94 infringe the principle of equal treatment enshrined in Articles 43 EC and 49 EC.

H – *Conlusion*

115. It may be concluded from the foregoing that:

– Article 2(1) of Law No 109/94 is incompatible with Directives 92/50, 93/36, 93/37 and 93/38;

– Article 2(5) of Law No 109/94, in conjunction with Laws No 1150/1942 and No 10/1977, infringes Directive 93/37;

– Article 27(2) of Law No 109/94 infringes Directives 92/50 and 93/38;

– Article 28(4) of Law No 109/94, in conjunction with Article 188 of Presidential Decree No 554/99, infringes Directives 92/50 and 93/38; and

– Articles 37b and 37c(1) of Law No 109/94 are incompatible with Articles 43 EC and 49 EC.

116. However, Article 2(5), Article 17(12), Article 27(2), and Article 30(6a) of Law No 109/94 do not infringe Articles 43 EC and 49 EC.

VIII – Costs

117. Article 69(2) of the Rules of Procedure of the Court of Justice provides that the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. In accordance with Article 69(3) of the Rules of Procedure, where the claims are upheld in part, the Court may order that the costs be shared or that each party bear his own costs.

118. In view of the fact that the Commission and the Italian Republic have each applied for costs to be awarded against the other, and since I propose that the action be allowed in part, Italy should bear half the costs of the Commission which should, in turn, bear half the costs of that Member State.

119. Pursuant to the first paragraph of Article 69(4) of the Rules of Procedure, the Member States which have intervened in these proceedings must bear their own costs.

IX – Conclusion

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

(1) declare that, by adopting Articles 37b and 37c(1) of Law No 109/1994 of 11 February 1994, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC; that, by adopting Article 2(1) of Law No 109 of 11 February 1994, the Italian Republic has failed to fulfil its obligations under Council Directives 92/50/EEC of 18 June 1992, and 93/36/EEC, 93/37/EEC and 93/38/EEC of 14 June 1993, relating, respectively, to the coordination of procedures for the award of public service contracts, public supply contracts, public works contracts, and the procurement procedures in the water, energy, transport and telecommunications sectors; that, by adopting Article 2(5) of Law No 109/94, the Italian Republic has failed to fulfil its obligations under Directive 93/37; and that, by adopting Articles 27(2) and 28(4) of Law No 109/94, the Italian Republic has failed to fulfil its obligations under Directives 92/50 and 93/38;

(2) dismiss the remainder of action;

(3) order the Italian Republic to pay half the Commission's costs;

(4) order the Commission to pay half the Italian Republic's costs;

(5) order the Republic of Finland and the Kingdom of the Netherlands to bear their own costs.

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1 – Original language: Spanish.

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2 – OJ 1992 L 209, p. 1; amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1), and by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1); repealed, except for Article 41, with effect from 31 January 2006, by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

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3 – OJ 1993 L 199, p. 1; likewise amended and repealed by the directives referred to in the previous footnote.

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4 – OJ 1993 L 199, p. 54; also amended and appealed by the directives cited in footnote 2.

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5 – OJ 1993 L 199, p. 84; amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1), and by Commission Directive 2001/78; repealed by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

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6 – GURI No 41 of 19 February 1994; amended on a number of occasions.

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7 – Disposizioni in materia di infrastrutture e trasporti, GURI No 181 of 3 August 2002.

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8 – Attuazione della directiva 92/50/CEE in materia di appalti pubblici di servizi, GURI No 104 of 6 May 1995.

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9 – Legge urbanistica, GURI No 244 of 16 October 1942.

10 – Norme per la edificabilità dei suoli, GURI No 27 of 29 January 1977.

11 – Regolamento d'attuazione della Legge quadro in materia di Lavori Pubblici 11 Febbraio 1994 nº 109, e successive modificazioni, GURI No 98 of 28 April 2000.

12 – France was also given leave to intervene but did not submit observations.

13 – In the view of Larenz, K., *Metodología de la ciencia del derecho*, Ariel, Barcelona, 1994, p. 456, the standard contract, as an expression of intention, is used 'for a more specific description of certain kinds of legal relationship, in particular those concerning individual rights and compulsory contractual relationships'.

14 – Moreno Molina, J.A. and Pleite Guadamillas, F., *El nuevo reglamento de contratación de las administraciones públicas (Repercusión práctica, novedades, concordancias y formularios adaptados),* La Ley, Madrid, 2002, p. 36, state that such contracts provide examples of rich and complex casuistry.

15 – García Macho, R., *Comentarios a la Ley de contratos de las administraciones públicas y a la Ley sobre procedimientos de contratación en los sectores especiales,* Tirant lo Blanch, Valencia, 2003, p. 91.

16 – Second subparagraph of Article 1(2)(d) of Directive 2004/18.

17 – Second subparagraph of Article 1(2)(c) of Directive 2004/18.

18 – Third subparagraph of Article 1(2)(d) of Directive 2004/18.

19 – Article 1(3) and Title III (Articles 56 to 65) of Directive 2004/18.

20 – In points 31 to 36 of the Opinion in Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, Advocate General Mischo outlines the differences between that approach, where provisions within the Directive itself are selected, and the previous approaches, which involved stating the applicable Directive. In the judgment in that case, the Court pointed out that Directive 92/50 supplies an unequivocal test for the determination of the regime applicable to a contract composed of several services, based on their value (paragraph 52), and dismissed the view that regard should be had to the main object of the contract (paragraph 49).

21 – Article 22 of Directive 2004/18.

22 – Irrespective of the civil laws of the Member States. Messineo, F., *Doctrina general del contrato,* volume I, Rubinzal-Culzoni, Buenos Aires, 1985, p. 382, considers the problem inherent in that legal sphere by reference to Article 1323 of the Italian Civil Code which provides: 'all contracts, even where they do not fall into the categories which are governed by specific provisions, are subject to the general provisions contained in this title' (the second title of the section on obligations).

23 – Article 1(a) of Directives 93/36 and 93/37; Article 1(4) of Directive 93/38; Recital 10 and Article 1(2) of Directive 2004/18.

24 – Case C-331/92 [1994] ECR I-1329.

25 – In point 19 of the Opinion in the case, Advocate General Lenz stated that the question referred for a preliminary ruling concerned the award of a concession to open and operate a casino, and a concession to operate a hotel, which required an obligation to be entered into for carrying out conversion work.

26 – Greco, G., 'Contratti "misti" e appalti comunitari', *Rivista italiana di diritto pubblico comunitario,* 1994, p. 1265, argues that the prevalence criterion is more suited to identifying the provisions applicable to the majority of mixed contracts because the criterion of ancillary obligations is often inadequate.

27 – C-107/98 [1999] ECR I-8121.

28 – C-340/04 [2006] ECR I-00000.

29 – Points 24 to 29 and 21 to 26, respectively, of my Opinions in Joined Cases C–285/99 and C–286/99 *Lombardini and Mantovani* [2001] ECR I–9233 and in Case C–331/04 ATI *EAC and Others* [2005] ECR I-10109.

30 – Case C-324/98 [2000] ECR I-10745. The judgment principally addressed the question whether, in the light of its specific object, namely 'the production and publication of printed and electronically accessible lists of telephone subscribers (telephone directories)' (paragraph 19), the contract at issue in the proceedings fell within the scope of Directive 93/38 rather than that of Directive 92/50 (paragraphs 31 to 40).

31 – Case C-275/98 [1999] ECR I-8291.

32 – Case C-458/03 [2005] ECR I-8612.

33 – Case C-231/03 [2005] ECR I-7287.

34 – *Inter alia*, in the judgment in Case C-410/04 *ANAV* [2006] ECR I-0000, paragraph18.

35 – See in that regard, the Order of the Court in Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraphs 19 to 21.

36 – Case C-507/03 *Commission* v *Ireland* and Case C-532/03 *Commission* v *Ireland*, which concern the complaint that service contracts were awarded without publication of a prior notice. Advocate General Stix-Hackl delivered the Opinions in both cases on 14 September 2006. Also, Case C–195/04 *Commission* v *Finland*, in which the hearing was held on 8 June and the infringement relates to the award of a contract for institutional kitchen equipment.

37 – Case C-26/03 [2005] ECR I-1.

38 – Although those rules also fulfil other objectives, such as protecting the financial interests of the contracting authority by enabling price screening. See García-Trevijano Garnica, J.A., 'Disposiciones comunes a los contratos administrativos. En especial, el precio y su revisión', *Derecho de los contratos públicos. Estudio sistemático de la Ley 13/1995, de 18 de mayo, de contratos de las Administraciones Públicas,* coordinated by Pendás, B., Praxis, Barcelona, 1995, p. 258.

39 – Millett, T., 'Les marchés publics en droit communautaire', *Revue du Marché commun et de l'Union européenne,* no 452, October-November 2001, p. 630. Piñar Mañas, J.L. notes, in the collective work *Comentario a la Ley de contratos de las administraciones públicas,* 2nd ed., Civitas, Madrid, 2004, p. 79, that, nevertheless, the Directives are creating 'a move towards a common system of procurement'.

40 – Article 2 of Directive 2004/18 requires contracting authorities to 'treat economic operators equally and non-discriminatorily' and to act 'in a transparent way', while Articles 4 to 6 set out rules governing all public contracts and relating to 'economic operators', 'conditions relating to agreements concluded within the World Trade Organisation', and 'confidentiality'. However, Article 7 provides that those articles, like the other provisions of the Directive, apply only to public contracts 'which are not excluded'.

41 – Case C-3/88 [1989] ECR 4035.

42 – Case C-87/94 [1996] ECR I-2043.

43 – In point 43 of the Opinion in that case, Advocate General Fennelly states that 'substantive compliance with the principle of non-discrimination on grounds of nationality requires that the award of concessions respect a minimum degree of publicity and transparency' but does not require 'the awarding entity to apply by analogy the provisions of the most relevant … directives'.

44 – However, the Italian legislature included a reference to those principles in the 2005 amendment, which I will discuss below.

45 – Cases C-507/03, C-532/03 and C-195/04, cited in footnote 36, in which judgment is pending.

46 – Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee, supplemento ordinario to GURI No 96 of 27 April 2005.

47 – Judgments in Case C-200/88 *Commission* v *Greece* [1990] ECR I–4299, paragraph 13; Case C–133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraph 17; Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraph 23; and Case C-333/01 *Commission* v *Spain* [2003] ECR I–2623, paragraph 8.

48 – Circular No B1/2316 of 18 December 2003, GURI No 79 of 3 April 2004.

49 – Judgments in Case C-80/92 *Commission* v *Belgium* [1994] ECR I-1019, paragraph 20; Case C–151/94 *Commission* v *Luxembourg* [1995] ECR I-3685, paragraph 18; Case C-159/99 *Commission* v *Italy* [2001] ECR I–4007, paragraph 32; Case C-

394/00 *Commission* v *Ireland* [2002] ECR I-581, paragraph 11; Case C-415/01 *Commission* v *Belgium* [2003] ECR I-2081, paragraph 21; and Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 54.

50 – In point 37 of the Opinion in *Gestión Hotelera Internacional*, Advocate General Lenz states that the fact that a primary obligation is non-assignable converts it into the main object of the contract.

51 – Circular No 462 of 18 December 2001, *Sentenza della Corte di giustizia europea (Sesta Sezione) 12 luglio 2001 (c-n. 399/98) sulla realizzazione diretta da parte di un privato di opere di urbanizzazione a scomputo del contributo di concessione dovuto. Appalto di lavori pubblici, ai sensi della direttiva 93/37. Indirizzi e chiarimenti operativi*, GURI No 300 of 28 December 2001.

52 – Circular No 8756 of 6 June 2002, *Normativa applicabile agli appalti pubblici 'sottosoglia'*, GURI No 178 of 31 July 2002.

53 – Case C-399/98 [2001] ECR I-5409.

54 – '[C]ontracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority'.

55 – '[T]he outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function'.

56 – Similar provisions are contained in Article 7 of the Directive, Article 5 of Directive 93/36, Article 14 of Directive 93/38 and Article 9 of Directive 2004/18, concerning the Methods for calculating the estimated value of public contracts, framework agreements and dynamic purchasing systems.

57 – Huelin Martínez de Velasco, J., 'Las obras de urbanización y los contratos públicos de obras. A propósito de la sentencia Scala 2001', *Cuadernos de Derecho local,* no 4, 2004, p. 19 et seq.

58 – In the Opinion in *Ordine degli Architetti and Others*, Advocate General Léger correctly states that an essential element of the contractual relationship is missing where 'a party called on to carry out development works is simply identified by law' (point 68).

59 – Fernández Rodríguez, T.R., 'La sentencia del TJCE de 12 de julio de 2001 (asunto "proyecto Scala 2001") y su impacto en el ordenamiento urbanístico español', *Documentación Administrativa,* nos 261-262, September 2001-April 2002, p. 23.

60 – Huelin Martínez de Velasco, J., op. cit., p. 28.

61 – Case C-16/98 [2000] ECR I-8315. Although in that case the Court analysed Directive

93/38, the findings concerning analogous provisions may be applied to Directive 93/37.

62 – See the judgment in *Commission* v *France*, cited in footnote 61, in particular points 38 to 47. In the Opinion in that case, Advocate General Jacobs put forward the view that a series of operations to be carried out within a specified period on a group of networks having a shared economic and technical function must itself be regarded as intended to fulfil a shared economic and technical function (point 72). That view may be applied to urban development works, as may the finding of the Court in the judgment in Case C-385/02 *Commission* v *Italy* [2004] ECR I-8121 to the effect that 'merely to state that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor' (paragraph 21).

63 – Also, Article 6(1) of Directive 93/36 and Article 7(1) of Directive 93/37.

64 – Judgments in Case C-71/92 *Commission* v *Spain* [1993] ECR I–5923, paragraph 10; *Teckal*, paragraph 43; and *Carbotermo and Consorzio Alisei*, point 45.

65 – In the rejoinder the defendant contends that, in judgment No 302/03 (paragraph 5.1), the Corte Constituzionale (Constitutional Court) held that Article 188(8) to (10) of the Decree is unconstitutional.

66 – Judgments in Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C–408/97 *Commission* v *Netherlands* [2000] ECR I-6417, point 15; and Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 41.

67 – Judgment in Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraphs 84 and 86.

68 – Point 87 of the application and footnote 12 which illustrates it.

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ORDONNANCE DU PRESIDENT DE LA COUR

(*) 6 avril 2005

«Interventions»

Dans l'affaire C-412/04,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 24 septembre 2004

Commission des Communautés européennes, représentée par M. X. Lewis, M. K. Wiedner et M. G. Bambara, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par M. I.M. Braguglia, en qualité d'agent, et M. M. Fiorilli, avvocato dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

LE PRESIDENT DE LA COUR,

l'avocat général, M. D. Ruiz-Jarabo Colomer, entendu,

rend la présente

Ordonnance

1 Par requête déposée au greffe de la Cour le 5 janvier 2005, la République de Finlande, représentée par Mme T. Pynnä, en qualité d'agent, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-412/04 à l'appui des conclusions de la partie défenderesse.

2 Par requête déposée au greffe de la Cour le 5 janvier 2005, la République française, représentée par M. G. de Bergues, en qualité d'agent, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-412/04 à l'appui des conclusions de la partie défenderesse.

3 Par requête déposée au greffe de la Cour le 18 janvier 2005, le Royaume des Pays-Bas, représenté par Mme H. Sevenster, en qualité d'agent, a demandé à intervenir dans l'affaire C-412/04 à l'appui des conclusions de la partie défenderesse.

4 Les requêtes en intervention ont été introduites conformément à l'article 93, paragraphe 1, du règlement de procédure, et sont présentées en application de l'article 40, premier alinéa, du Statut de la Cour.

Par ces motifs, le président de la Cour ordonne:

1) La République de Finlande, la République française et le Royaume des Pays-Bas sont admis à intervenir dans l'affaire C-412/04 à l'appui des conclusions de la partie

défenderesse.

2) Un délai sera fixé aux parties intervenantes pour exposer, par écrit, les moyens à l'appui de leurs conclusions.

3) Une copie de toutes les pièces de procédure sera signifiée aux parties intervenantes par les soins du greffier.

4) Les dépens sont réservés.

Fait à Luxembourg, le 6 avril 2005

Le greffier — Le président

R. Grass — V. Skouris

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* Langue de procédure: l'italien.

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Notice for the OJ

Action brought on 24 September 2004 by the Commission of the European Communities against the Italian Republic

(Case C-412/04)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 24 September 2004 by the Commission of the European Communities, represented by Klaus Wiedner and Giuseppe Bambara, acting as Agents.

The applicant claims that the Court should:

- declare that, by adopting Articles 2(1), 17(12), 27(2), 30(6a), 37b and 37c(1) of Law No 109 of 11 February 1994, as most recently amended by Article 7 of Law No 166 of 1 August 2002; Article 2(5) of Law No 109/94, as most recently amended by Law No 166/2002, to be read in conjunction with Law No 1150 of 1942 and Law No 10 of 1977, as amended and supplemented; Article 28(4) of Law No 109/94, to be read in conjunction with Article 188 of Presidential Decree No 554 of 21 December 1999 and Article 7 of Law No 166/2002, and Article 3(3) of Legislative Decree No 157 of 17 March 1995, the Italian Republic has failed to fulfil its obligations under Directives 93/37/EEC[1], 93/36/EEC[2], 92/50/EEC[3] and 93/38/EEC[4], Articles 43 and 49 EC and the principles of transparency and equal treatment to which they give expression;

- Order the Italian Republic to pay the costs.

Pleas in law and main arguments:

The Commission notes that, by making those contracts in which the works component is prevalent from the economic point of view but is clearly ancillary to other services subject to the rules on public works contracts, Article 2(1) of Law No 109/94 and Article 3(3) of Legislative Decree No 157 of 17 March 1995 have the effect of removing numerous public service and supply contracts from the purview of the relevant Community legislation, specifically Directives 92/50/EEC and 93/36/EEC.

Since the thresholds for the application of those directives are appreciably lower than those for the application of Directive 93/37/EEC, the effect of the provisions in question is to enable mixed service and works contracts, supply and works contracts or supply, works and service contracts to be awarded in breach of the procedures laid down by Directives 92/50/EEC and 93/36/EEC where the value exceeds the threshold for application of those directives but does not exceed that for public works contracts under Directive 93/37/EEC on the sole ground that, although ancillary, the works component is prevalent from the economic point of view. From that perspective, the provisions in question constitute an infringement of Directives 92/50/EEC and 93/36/EEC.

Rules governing works carried out by private persons which are deductible from urbanisation taxes

The Commission considers that, in so far as it excludes the duty to comply with the procedures laid down by Directive 93/37/EEC in cases of contracts between private persons and the State relating to a number of works, each of which falls below the threshold for the application of that directive, but whose aggregate value exceeds that threshold, Article 2(5) of Law No 109/94 infringes Directive 93/37/EEC, read in conjunction with Laws No 1150 of 1942 and No 10 of 1977, as subsequently amended and supplemented, which allows contracts for urbanisation works to be awarded directly to the holder of a building permission or development plan.

Rules governing the award of contracts for the design and supervision of works the value of which is below the Community thresholds

The Commission notes that Articles 17 and 30 of Law No 109/94, which permit the awarding authorities to award such contracts on the basis of trust without complying with any requirement concerning advertising, must be regarded as infringing the principle of transparency set out in Article 49 EC. Furthermore, reliance upon a procedure to ascertain the experience and capacity of suppliers is, in the absence of minimum advertising requirements intended to ensure a level playing field of competition between all persons potentially interested in supplying the services, insufficient in itself to ensure compliance with the principle of transparency.

Rules governing the award of contracts for the supervision of works

The Commission submits that, in so far as it allows the direct award, without any form of competition, of contracts for services for the supervision of works to the professional practitioner responsible for their design, Article 27(2) of Law No 109/94, having regard to the value of the services awarded and the rules applicable, infringes Directives 92/50/EEC and 93/38/EEC and Articles 43 and 49 EC.

Rules governing the award of contracts for inspection services

The Commission considers that the mechanism laid down by Article 28 of Law No 109/94, which permits the direct selection of inspectors by the awarding authorities otherwise than in accordance with their own rules, without provision either for the publication of a tender notice or other forms of direct advertising such as to enable all potential interested suppliers to compete for the award of contracts for inspection services, infringes Directives 92/50/EEC and 93/38/EEC and the principle of transparency as set out in Articles 43 and 49 EC, having regard to the value of those services and the rules applicable.

Rules governing project finance

Article 37a et seq. of Law No 109/94 govern so called "project finance", which is intended to enable public works to be carried out on the basis of proposals submitted by persons independent of the State, referred to as "promoters", by the award of a works concession.

The Commission notes that those rules governing the competitive procedure for the award of the concession give the promoter two advantages over all other potential competitors. First, from the procedural point of view, the promoter is automatically invited to participate in the negotiated procedure for the award of the concession, without any comparison being made between his offer and that of other participants in the earlier tendering procedure. Therefore, even if in that tendering procedure there were more than two offers better than that submitted by the original promoter, the negotiated procedure will nevertheless proceed only as between the two best offers and the promoter. Second, from the substantive point of view, the provision enabling the promoter to amend his offer in the course of the negotiated procedure so as to match that found to be the most suitable by the awarding authority amounts in substance to the promoter being accorded a right of pre-emption for the award of the concession.

The Commission submits that the grant of those advantages to the promoter and not to other potential concessionaires infringes the principle of equal treatment.

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[1] - OJ L 199 of 9. 8.1993, p. 54.

[2] - OJ L 199 of 9. 8.1993, p. 1.

[3] - OJ L 209 of 24. 7.1992, p. 1.

[4] - OJ L 199 of 9. 8.1993, p. 84.

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ORDONNANCE DU PRÉSIDENT DE LA COUR

21 juin 2005(*)

«Radiation»

-729708-

Dans les affaires jointes C-362/04, C-363/04, C-364/04 et C-365/04,

ayant pour objet des demandes de décision préjudicielle au titre de l'article 234 CE, introduites par le Symvoulio tis Epikrateias (Grèce), par décisions respectivement du 2 juillet 2004 et du 29 juillet 2004, parvenues à la Cour le 20 août 2004, dans les procédures

Michaniki A.E.,

Tholos A.E.

contre

Ypourgos Politismou,

Ypourgos Perivallontos, Chorotaxias et Dimosion Ergon,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. D. Ruiz-Jarabo Colomer, entendu,

rend la présente

Ordonnance

1 Par lettre du 3 juin 2005, parvenue au greffe de la Cour le 8 juin 2005, le Symvoulio tis Epikrateías (Conseil d'Etat) a informé la Cour qu'il retirait ses demandes de décision à titre préjudiciel.

2 Dans ces conditions, il y a lieu d'ordonner la radiation des présentes affaires.

3 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, le président de la Cour ordonne:

Les affaires jointes C-362/04, C-363/04, C-364/04 et C-365/04 sont radiées du registre de la Cour.

Fait à Luxembourg, le 21 juin 2005.

[Signatures]

* Langue de procédure: le grec.

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Notice for the OJ

Removal from the register of Joined Cases C-362/04, C-363/04, C-364/04 and C-365/04 [1]

(Language of the case: Greek)

By order of 21 June 2005 the President of the Court of Justice of the European Communities has ordered the removal from the register of Joined Cases C-362/04, C-363/04, C-364/04 and C-365/04 (Reference for a preliminary ruling Symvoulio tis Epikrateias): Michaniki A.E., Tholos A.E. v Ypourgos Politismou, Ypourgos Perivallontos, Chorotaxias and Dimosion Ergon.

_____

[1] - OJ C 273 of 06.11.2004. OJ C 284 of 20.11.2004.

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ORDONNANCE DU PRÉSIDENT DE LA COUR
17 novembre 2004 (1)

«Procédure accélérée»

Dans les affaires C-363/04, C-364/04 et C-365/04,

ayant pour objet des demandes de décision préjudicielle au titre de l'article 234 CE, introduites par le Symvoulio tis Epikrateias (Grèce), par décisions du 2 juillet 2004, parvenues à la Cour le 20 août 2004, dans les procédures

et

Michaniki AE

Michaniki AE

Tholos AE

Ypourgos Dimosion Ergon,

contre

Syndesmos Technikon Etaireion Anoteron Taxeon,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. D. Ruiz-Jarabo Colomer, entendu,

rend la présente

Ordonnance

1
Les demandes de décision préjudicielle portent sur l'interprétation de l'article 30, paragraphe 4, de la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199, p. 54).

2
Ces demandes ont été présentées dans le cadre de trois procédures en référé introduites par les sociétés de droit hellénique Michaniki AE (C-363/04 et C-364/04) et Tholos AE (C-365/04) contre l'Ypourgos Dimosion Ergon (le ministre des Travaux publics), par lesquelles les sociétés demanderesses sollicitent plus particulièrement le sursis à l'application, dans le contexte de différentes procédures de passation de marchés publics, de certaines clauses des avis d'adjudication, au motif que ces dernières seraient contraires aux exigences du droit communautaire en ce qui concerne la détermination et la vérification des offres anormalement basses.

3
Dans ses trois décisions de renvoi le Symvoulio tis Epikrateias (Epitropi anastolon) [Conseil d'État (commission des suspensions)] a demandé à la Cour de soumettre les renvois préjudiciels à une procédure accélérée, en application de l'article 104 bis, premier alinéa, de son règlement de procédure.

4
Il résulte de cette dernière disposition que, à la demande de la juridiction nationale, le président de la Cour peut exceptionnellement, sur proposition du juge rapporteur, l'avocat général entendu, décider de soumettre un renvoi préjudiciel à une procédure accélérée dérogeant aux dispositions du règlement de procédure, lorsque les circonstances invoquées établissent l'urgence extraordinaire de statuer sur la question posée à titre préjudiciel.

5

La juridiction de renvoi souligne à cet égard qu'il importe de mener rapidement à leur terme les procédures en référé dont elle est saisie.

6
Elle ajoute que l'application de la procédure accélérée dans les présentes affaires est également justifiée par la circonstance que, par ordonnance de référé du 22 mars 2004, le président de la quatrième chambre du Symvoulio tis Epikrateias a ordonné au pouvoir adjudicateur de ne pas attribuer les marchés en cause avant que la commission des suspensions n'ait statué sur les demandes en référé.

7
Toutefois, force est de constater que le fait que les demandes de décision préjudicielle sont formulées dans le cadre d'une procédure en référé n'est pas, à lui seul, de nature à établir l'existence d'une urgence extraordinaire au sens de l'article 104 bis, premier alinéa, du règlement de procédure.

8
De manière analogue, la circonstance que, en l'occurrence, l'attribution des marchés publics en cause soit suspendue jusqu'à ce qu'il ait été statué sur les demandes en référé n'est pas non plus, à elle seule, susceptible de justifier l'application de ladite disposition. En tout état de cause, il ressort des décisions de renvoi que la commission des suspensions du Symvoulio tis Epikrateias a elle-même jugé insuffisante l'affirmation de l'État hellénique selon laquelle les avis d'adjudication litigieux se rapporteraient à des «travaux extrêmement importants pour l'infrastructure du pays», au motif qu'aucune précision n'avait été fournie à l'appui de cette allégation.

9
Dans ces conditions, il y a lieu de conclure que les circonstances invoquées par la juridiction de renvoi ne sont pas susceptibles d'établir l'existence d'une urgence extraordinaire dans les affaires au principal.

10
Partant, la demande de la juridiction de renvoi de soumettre les présentes affaires à une procédure accélérée ne saurait être accueillie.

Par ces motifs, le Président de la Cour ordonne:

La demande visant à soumettre les affaires C-363/04, C-364/04 et C-365/04 à la procédure accélérée prévue à l'article 104 bis, premier alinéa, du règlement de procédure est rejetée.

Signatures.

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1 – Langue de procédure: le grec.

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Notice for the OJ

Reference for a preliminary ruling by the Simvoulio tis Epikratias - by order of that court of 29 July 2004 in the case of **Mikaniki AE** against the **Ministry of Culture** and against the intervening joint venture entitled '**J& P - AVAX AE - ARXITEX ATE - YETEM AE**'

(Case C-362/04)

Reference has been made to the Court of Justice of the European Communities by order of the Simvoulio tis Epikratias (Council of State, 4th Section, Greece) of 29 July 2004, received at the Court Registry on 20 August 2004, for a preliminary ruling in the case of **Mikaniki AE** against the **Ministry of Culture** and against the intervening joint venture entitled '**J & P - AVAX AE - ARXITEX ATE - YETEM AE**' on the following questions:

(1) Must Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) be interpreted as meaning that, in the case of a tendering procedure such as that described in the grounds hereof (offers not accompanied by a justificatory report, indicating the specific discount percentages applied to each group of prices and verification as to whether discounts are at a normal level), the contracting authority is required to give a specific content to the document in which it requests a bidder to provide explanations concerning an offer which has been adjudged abnormally low in regard to a threshold determined by application of a mathematical method having characteristics analogous to those of the mathematical method described in the grounds of this order?

(2) If the reply to the first question is affirmative, is it sufficient, in order to satisfy the requirements of the abovementioned provision of Directive 93/37/EEC, for the document to mention the specific discount offered by the tenderer for one or more groups of prices adjudged by the contracting authority to be problematic or must the latter also indicate the reasons why it regards such discount as problematic by providing a reasoned appraisal concerning the maximum cost for carrying out the relevant works?

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Notice for the OJ

Reference for a preliminary ruling by the Simvoulio tis Epikratias - by order of that court of 30 July 2004 in the case of **Mikaniki AE** against the **Ministry of the Environment, Planning and Public Works** supported by the interveners (1) '**Sindesmos Teknikon Etaireion Anoteron Taxeon' (STEAT)** and (2) **'Enklidis ATE'**

(Case C-363/04)

Reference has been made to the Court of Justice of the European Communities by order of the Simvoulio tis Epikratias (Council of State, 4th Section, Greece) of 30 July 2004, received at the Court Registry on 20 August 2004, for a preliminary ruling in the case of **Mikaniki AE** against the **Ministry of Culture** and against the **Ministry of the Environment, Planning and Public Works** and against the interveners (1) **'Sindesmos Teknikon Etaireion Anoteron Taxeon' (STEAT)** and (2) **'Enklidis ATE'** on the following questions:

(1) Must Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) be interpreted as meaning that, in the case of a tendering procedure such as that described in the grounds hereof (offers not accompanied by a justificatory report, indicating the specific discount percentages applied to each group of prices and verification as to whether discounts are at a normal level), the contracting authority is required to give a specific content to the document in which it requests a bidder to provide explanations concerning an offer which has been adjudged abnormally low in regard to a threshold determined by application of a mathematical method having characteristics analogous to those of the mathematical method described in the grounds of this order?

(2) If the reply to the first question is affirmative, is it sufficient, in order to satisfy the requirements of the abovementioned provision of Directive 93/37/EEC, for the document to mention the specific discount offered by the tenderer for one or more groups of prices adjudged by the contracting authority to be problematic or must the latter also indicate the reasons why it regards such discount as problematic by providing a reasoned appraisal concerning the maximum cost for carrying out the relevant works?

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Notice for the OJ

Reference for a preliminary ruling by the Simvoulio tis Epikratias - by order of that court of 30 July 2004 in the case of **Mikaniki AE** against the **Ministry of the Environment, Planning and Public Works** supported by the intervener '**Sindesmos Teknikon Etaireion Anoteron Taxeon' (STEAT)**

(Case C-364/04)

Reference has been made to the Court of Justice of the European Communities by order of the Simvoulio tis Epikratias (Council of State, 4th Section, Greece) of 30 July 2004, received at the Court Registry on 20 August 2004, for a preliminary ruling in the case of **Mikaniki AE** against the **Ministry of the Environment, Planning and Public Works** and against the intervener '**Sindesmos Teknikon Etaireion Anoteron Taxeon' (STEAT)** on the following questions:

(1) Must Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) be interpreted as meaning that, in the case of a tendering procedure such as that described in the grounds hereof (offers not accompanied by a justificatory report, indicating the specific discount percentages applied to each group of prices and verification as to whether discounts are at a normal level), the contracting authority is required to give a specific content to the document in which it requests a bidder to provide explanations concerning an offer which has been adjudged abnormally low in regard to a threshold determined by application of a mathematical method having characteristics analogous to those of the mathematical method described in the grounds of this order?

(2) If the reply to the first question is affirmative, is it sufficient, in order to satisfy the requirements of the abovementioned provision of Directive 93/37/EEC, for the document to mention the specific discount offered by the tenderer for one or more groups of prices adjudged by the contracting authority to be problematic or must the latter also indicate the reasons why it regards such discount as problematic by providing a reasoned appraisal concerning the maximum cost for carrying out the relevant works?

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Notice for the OJ

Reference for a preliminary ruling by the Simvoulio tis Epikratias - by order of that court of 30 July 2004 in the case of **Tholos Anonimi Tekniki Touristiki Emboriki Pliroforiki Biomekaniki Eteria (Tholos AE)** against the **Ministry of the Environment, Planning and Public Works** supported by the interveners (1) **Sindesmos Teknikon Etaireion Anoteron Taxeon** and (2) **Thessaliki Anonimi Tekniki Etairia, 'Thessaliki ATE'**

(Case C-365/04)

Reference has been made to the Court of Justice of the European Communities by order of the Simvoulio tis Epikratias (Council of State, 4th Section, Greece) of 30 July 2004, received at the Court Registry on 20 August 2004, for a preliminary ruling in the case of **Tholos Anonimi Tekniki Touristiki Emboriki Pliroforiki Biomekaniki Eteria (Tholos AE)** against the **Ministry of the Environment, Planning and Public Works** and against the interveners (1) **Sindesmos Teknikon Etaireion Anoteron Taxeon** and (2) **Thessaliki Anonimi Tekniki Etairia, 'Thessaliki ATE',** on the following questions:

(1) Must Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) be interpreted as meaning that, in the case of a tendering procedure such as that described in the grounds hereof (offers not accompanied by a justificatory report, indicating the specific discount percentages applied to each group of prices and verification as to whether discounts are at a normal level), the contracting authority is required to give a specific content to the document in which it requests a bidder to provide explanations concerning an offer which has been adjudged abnormally low in regard to a threshold determined by application of a mathematical method having characteristics analogous to those of the mathematical method described in the grounds of this order?

(2) If the reply to the first question is affirmative, is it sufficient, in order to satisfy the requirements of the abovementioned provision of Directive 93/37/EEC, for the document to mention the specific discount offered by the tenderer for one or more groups of prices adjudged by the contracting authority to be problematic or must the latter also indicate the reasons why it regards such discount as problematic by providing a reasoned appraisal concerning the maximum cost for carrying out the relevant works?

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Judgment of the Court (First Chamber)
of 11 May 2006
Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA. Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy. Directive 93/36/EEC - Public supply contracts - Award of contract without a call for tenders - Award of the contract to an undertaking in which the contracting authority has a shareholding. Case C-340/04.

In Case C-340/04

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REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale della Lombardia (Italy), made by decision of 27 May 2004, received at the Court on 9 August 2004, in the proceedings

Carbotermo SpA,

Consorzio Alisei

v

Comune di Busto Arsizio,

AGESP SpA,

intervening party:

Associazione Nazionale Imprese Gestione servizi tecnici integrati (AGESI),

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, J.N. Cunha Rodrigues (Rapporteur) and E. Levits, Judges,

Advocate General: C. Stix-Hackl,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2005,

after considering the observations submitted on behalf of:

- Carbotermo SpA, by A. Sansone and P. Sansone, avvocati,
- Consorzio Alisei, together with AGESI, by B. Becchi and L. Grillo, avvocati,
- the Comune di Busto Arsizio, by C. Caputo, avvocatessa,
- AGESP SpA, by A. Sciumè and D. Tassan Mazzocco, avvocati,
- the Italian Government, by I.M. Braguglia, acting as Agent, and by G. Fiengo, avvocato dello Stato,
- the German Government, by W.D. Plessing, acting as Agent,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the Polish Government, by T. Nowakowski, acting as Agent,
- the United Kingdom Government, by M. Hoskins, acting as Agent,
- the Commission of the European Communities, by X. Lewis and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2006,

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gives the following

Judgment

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

1. Council Directive 93/36

/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts precludes the direct award of a public supply and service contract, the main value of which lies in supply, to a joint stock company whose Board of Directors has ample managerial powers which it may exercise independently and whose share capital is, at present, held entirely by another joint stock company whose majority shareholder is, in turn, the contracting authority.

2. Article 13 of Council Directive 93/38/EEC

of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors must not be applied in the assessment of the requirement relating to the inapplicability of Directive 93/36

, according to which the undertaking to which a supply contract was awarded directly must carry out the essential part of its activities with the controlling authority.

3. In order to determine whether an undertaking carries out the essential part of its activities with the controlling authority, for the purpose of deciding on the applicability of Directive 93/36

, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities, whether it be the contracting authority itself or the user of the services provided; the territory where the activities are carried out is irrelevant.

1. This reference for a preliminary ruling concerns the interpretation of Council Directive 93/36

/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2. The reference was made in the context of proceedings between the companies Carbotermo SpA (Carbotermo') and Consorzio Alisei, on the one hand, and the Comune di Busto Arsizio (municipality of Busto Arsizio) and the company AGESP SpA (AGESP'), on the other, concerning the award to that company of a contract for the supply of fuel and for the maintenance, modification and upgrading of the heating installations in that municipality's buildings to comply with the relevant regulations.

Legal framework

Community legislation

3. Article 1(a) and (b) of Directive 93/36

provides inter alia:

For the purposes of this Directive:

(a) public supply contracts are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

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

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law.

A body governed by public law means any body:

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

and

- having legal personality,

and

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

...'

4. Article 6 of that same directive provides:

1. In awarding public supply contracts the contracting authorities shall apply the [open procedures, restricted procedures and negotiated procedures] in the cases set out below.

2. The contracting authorities may award their supply contracts by negotiated procedure in the case of...

3. The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

...

4. In all other cases, the contracting authorities shall award their supply contracts by the open procedure or by the restricted procedure.'

5. Article 1(3) of Council Directive 93/38

/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) provides inter alia:

For the purpose of this Directive:

...

(3) affiliated undertaking shall mean any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the seventh Council Directive 83/349/EEC

of 13 June 1983, based on Article 54(3)(g) of the EEC Treaty on consolidated accounts [OJ 1983 L 193, p. 1] or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of paragraph 2, or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.'

6. Article 13 of the same directive provides:

1. This Directive shall not apply to service contracts which:

(a) a contracting entity awards to an affiliated undertaking;

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(b) are awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Article 2(2) to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities,

provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

Where more than one undertaking affiliated with the contracting entity provides the same service or similar services, the total turnover deriving from the provision of services by those undertakings shall be taken into account.

2. The contracting entities shall notify to the Commission, at its request, the following information regarding the application of the provisions of paragraph 1:

- the names of the undertakings concerned,

- the nature and value of the service contracts involved,

- such proof as may be deemed necessary by the Commission that the relationship between the undertaking to which the contracts are awarded and the contracting entity is in conformity with the requirements of this Article.'

Italian law

7. By judgment No 5316 of 18 September 2003, the Consiglio di Stato held that a local authority was entitled to award a supply contract to a supplier without issuing a call for tenders in cases where the local authority exercised over the supplier a control similar to that which it exercised over its own departments and the supplier carried out the essential part of its activities with the controlling authority.

The main proceedings and the questions referred for a preliminary ruling

8. Carbotermo in an undertaking which specialises in energy supply and heating management for public and private sector customers.

9. Consorzio Alisei is an undertaking which supplies energy products and air-conditioning and heating services for use in buildings.

10. AGESP Holding SpA (AGESP Holding') is a joint stock company which was created following the restructuring, decided upon on 24 September 1997, of the Azienda per la Gestione dei Servizi Pubblici, a special undertaking of the Comune di Busto Arsizio. Some 99.98% of AGESP Holding's share capital is currently held by the Comune di Busto Arsizio. The other shareholders are the municipalities of Castellanza, Dairago, Fagnano Olona, Gorla Minore, Marnate and Olgiate Olona, each of which hold one share.

11. According to Article 2 of its statutes, AGESP Holding's mission includes the management of public utility services in the gas, water, environmental services, transport, parking areas, public pools, pharmacies, electricity and heating, funeral services and road signage sectors.

12. Article 6 of those statutes provides that:

... the majority of the shares is reserved for the Comune di Busto Arsizio.

...

Other than the Comune di Busto Arsizio, the following may take up shareholdings in the joint stock company: other local authorities (provinces, municipalities and their associations), economic and financial establishments, territorial and category associations, and private citizens who also wish

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to pursue the mission as laid down in the statutes....'

13. Article 7 of the same statutes provides:

No private shareholder may hold more than 10% of the total share capital of the company.'

14. According to Article 18 of AGESP Holding's statutes, it is to be managed by a Board of Directors.

15. According to Article 26 of those statutes:

The Board of Directors shall be vested with the broadest possible scope of powers for the ordinary and extraordinary management of the company, and shall have the power to take any action it deems necessary to implement and achieve the mission of the company, with the sole exception being acts which are formally reserved to the Assembly by law or by these statutes....'

16. AGESP is a joint stock company which was established on 12 July 2000 by AGESP Holding, which currently holds 100% of the share capital.

17. According to Article 3 of its statutes, in the amended version, which expanded the mission of the company and was produced before the national court, AGESP's mission covers public utility services in the gas, water, environmental services, transport, parking areas, electricity, heating, air-conditioning, IT, telecommunications, subsoil management and lighting sectors, and also the provision of various services for related companies.

18. Article 7 of AGESP's statutes provides:

No shareholder, except for the majority shareholder AGESP Holding, may hold more than one tenth of the total share capital of the company ... .'

19. According to Article 17 of those statutes, AGESP is to be managed by a Board.

20. In that connection, Article 19 of the same statutes provides:

The Board shall be vested with the broadest possible scope of powers, without limitation, for the ordinary and extraordinary management of the company.'

21. On 22 September 2003, the Comune di Busto Arsizio published a call for tenders for the supply of fuel and for the maintenance, modification and upgrading of the heating installations in that municipality's buildings to comply with the relevant regulations. The contract, worth an estimated EUR 8 450 000 plus value added tax (VAT), covered the supply of fuel (four fifths diesel oil and one fifth methane) for EUR 5 700 000, maintenance of the heating installations for EUR 1 000 000, and upgrading and modification of those installations to comply with the relevant regulations for EUR 1 750 000.

22. Carbotermo submitted a tender on 22 November 2003. Consorzio Alisei drew up a tender but did not submit it within the prescribed time-limit.

23. On 21 November 2003, the Comune di Busto Arsizio decided, in the light of judgment No 5316 of the Consiglio di Stato referred to in paragraph 7 of this judgment, to suspend the call for tenders procedure until 10 December 2003.

24. By decision of 10 December 2003, the Comune di Busto Arsizio withdrew the call for tenders, reserving the right to award the contract directly to AGESP at a later time.

25. By decision of 18 December 2003, the Comune di Busto Arsizio awarded the contract in question directly to AGESP. The reasons given for the decision were that AGESP met the conditions laid down in the Community and national courts' case-law regarding the award of public procurement contracts without calls for tenders, namely that the local authority exercises over the entity which received

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the contract a control similar to that which it exercises over its own departments and that that entity carries out the essential part of its activities with the controlling authority. The preamble in the introduction to that decision states, first, that a relationship of dependency between AGESP and the Comune di Busto Arsizio results from the fact that the latter holds 99.98% of the share capital of AGESP Holding, which holds 100% of the share capital of AGESP. It states, second, that most of AGESP's turnover is derived from activities entrusted to it pursuant to contracts obtained directly from the Comune di Busto Arsizio.

26. By a notice of 23 January 2004, AGESP issued a call for tenders as part of an expedited procedure for the supply of the diesel oil in question and awarded that contract to the undertaking Pezzoli Petroli Srl on 27 February 2004. On 28 April, 18 May, 30 June and 2 September 2004, AGESP awarded contracts to other undertakings for methane processing, technical upgrading, compliance upgrading and the installation of a remote-control monitoring and management system for the heating installations in various municipal buildings. Carbotermo and Consorzio Alisei were not among the successful tenderers for those contracts.

27. Carbotermo and Consorzio Alisei brought actions against the decisions to suspend the call for tenders and to award the contract in question to AGESP before the Tribunale amministrativo regionale della Lombardia.

28. Before that court, the two undertakings stated that the conditions for non-applicability of Directive 93/36

were not met in the present case. First, AGESP is not controlled by the Comune di Busto Arsizio because the latter holds its shares in AGESP only through a holding company in which it is a 99.98% shareholder and AGESP retains the full autonomy of a joint stock company under private law. Second, AGESP does not carry out the essential part of its activities for the Comune di Busto Arsizio because it achieves much less than 80% of its turnover with that municipality, a criterion which must be retained by analogy with Article 13 of Directive 93/38

.

29. The Comune di Busto Arsizio and AGESP replied that the direct award of the contract was permitted in the present case because AGESP was controlled by the Comune di Busto Arsizio by virtue of the latter's shareholding in the former and because AGESP carried out the essential part of its activities with that municipality. In that connection, AGESP stated that more than 28% of its turnover within the territory of the Comune di Busto Arsizio could be attributed to services provided directly to the municipality and that its turnover in the territory of the municipality accounted for 65.59% of its total turnover.

30. In those circumstances, the Tribunale amministrativo regionale della Lombardia decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Is the direct award of a contract for the supply of fuel for heating appliances in buildings owned by or within the competence of the Municipality, and relating to operation, supervision and maintenance (the main value of which lies in supply), to a joint stock company whose capital is, at present, held entirely by another joint stock company, of which the awarding Municipality is, for its part, the major shareholder (with 99.98% of the shares), or to a company (AGESP) in which a direct holding is owned not by the public authority but by another company (AGESP Holding), 99.98% of whose capital is presently owned by the public administration, compatible with Directive 93/36

...?

(2) Must the requirement that the undertaking to which the supply contract is awarded directly

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carry out the essential part of its activities with the controlling authority be ascertained by applying Article 13 of Directive 93/38... and can it be concluded that it has been satisfied where that undertaking derives the majority of its turnover from the controlling public authority or, alternatively, in the territory of that authority?'

The questions referred for a preliminary ruling

The first question

31. The Court has held previously that, if a public procurement contract relates both to products within the meaning of Directive 93/36

and to services within the meaning of Council Directive 92/50

/EEC of 18 June 1992 relating to the coordination of procedures for the award of public supply contracts (OJ 1992 L 209, p. 1), it will fall within the scope of Directive 93/36

if the value of the products covered by the contract exceeds that of the services (Case C-107/98

Teckal [1999] ECR I8121, paragraph 38). A contract such as that at issue in the main proceedings, where the value of the products covered by the contract exceeds that of the services, therefore falls within the scope of Directive 93/36

, as the national court, moreover, has already found.

32. For there to be a contract within the meaning of Article 1(a) of Directive 93/36

, there must have been an agreement between two separate persons (Teckal , paragraph 49).

33. In accordance with Article 1(a) of that directive, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities (Teckal , paragraph 50).

34. It is apparent from the order for reference and the evidence in the case-file that, at present, the contracting authority holds 99.98% of the share capital in AGESP Holding, with the remaining 0.02% being held by other local authorities. According to AGESP Holding's statutes, private shareholders may acquire holdings in that company, on two conditions: first, the majority of the shares are reserved for the Comune di Busto Arsizio; second, no private shareholder may hold more than one tenth of the share capital of that company.

35. At present, AGESP Holding holds 100% of the share capital in AGESP. According to the latter's statutes, private shareholders may acquire holdings in it subject to only one condition, namely that, with the exception of AGESP Holding, no shareholder may hold more than one tenth of the share capital of that company.

36. In order to determine whether the contracting authority exercises a control similar to that which it exercises over its own departments, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the successful tenderer is subject to a control enabling the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that company (see Case C-458/03

Parking Brixen [2005] ECR I0000, paragraph 65).

37. The fact that the contracting authority holds, alone or together with other public authorities,

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all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments, as contemplated in paragraph 50 of Teckal.

38. It is apparent from the case-file that the statutes of AGESP Holding and AGESP confer on the Board of Directors of each of those companies the broadest possible powers for the ordinary and extraordinary management of the company. Those statutes do not reserve for the Comune di Busto Arsizio any control or specific voting powers for restricting the freedom of action conferred on those Boards of Directors. The control exercised by the Comune di Busto Arsizio over those two companies can be described as consisting essentially of the latitude conferred by company law on the majority of the shareholders, which places considerable limits on its power to influence the decisions of those companies.

39. Moreover, any influence which the Comune di Busto Arsizio might have on AGESP's decisions is through a holding company. The intervention of such an intermediary may, depending on the circumstances of the case, weaken any control possibly exercised by the contracting authority over a joint stock company merely because it holds shares in that company.

40. It follows that, in such circumstances, subject to their being verified by a court adjudicating on the substance in the main proceedings, the contracting authority does not exercise over the successful tenderer for the public procurement contract at issue here a control similar to that which it exercises over its own departments.

41. Article 6 of Directive 93/36

requires contracting authorities who conclude public procurement contracts to use the open procedure or the restricted procedure unless the contract falls within one of the exceptions listed exhaustively in Article 6(2) and (3). The order for reference does not indicate that the public supply contract at issue in the main proceedings falls within one of those exceptions.

42. It follows that Directive 93/36

does not allow for the direct award of a public procurement contract in circumstances such as those in the main proceedings.

43. In response to that finding, the Italian Government states that the fact that AGESP must use a public tendering procedure to purchase the diesel oil in question shows that the Comune di Busto Arsizio, AGESP Holding and AGESP must be regarded as constituting together a body governed by public law' within the meaning of Article 1(b) of Directive 93/36

and required to conclude public supply contracts in accordance with the relevant Community and national legislation.

44. That argument cannot be accepted. First, the Comune di Busto Arsizio qualifies as a local authority and not a body governed by public law within the meaning of that provision. Second, the Comune di Busto Arsizio, AGESP Holding and AGESP each have distinct legal personalities.

45. Moreover, as the Court stated in paragraph 43 of Teckal , the only permitted exceptions to the application of Directive 93/36

are those which are exhaustively and expressly mentioned therein.

46. Directive 93/36

does not contain any provision comparable to Article 6 of Directive 92/50

, which excludes from its scope of application public contracts awarded, under certain conditions, to contracting authorities (Teckal , paragraph 44).

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47. Accordingly, the answer to the first question must be that Directive 93/36

precludes the direct award of a public supply and service contract, the main value of which lies in supply, to a joint stock company whose Board of Directors has ample managerial powers which it may exercise independently and whose share capital is, at present, held entirely by another joint stock company whose majority shareholder is, in turn, the contracting authority.

The second question

48. The second question comprises two parts.

49. First, the national court asks whether it is necessary to apply Article 13 of Directive 93/38

to assess the requirement that the undertaking to which a supply contract was directly awarded must carry out the essential part of its activities with the controlling authority. Second, it asks whether that requirement may be regarded as being fulfilled when such an undertaking carries out the essential part of its activities with the controlling authority or when it carries out the essential part of its activities in the territory of that authority.

First part of the second question

50. The order for reference indicates that the contract at issue in the main proceedings falls within the scope of Directive 93/36

.

51. The issue is thus whether the exception provided for in Article 13 of Directive 93/38

should be applied by analogy in the scope of application of Directive 93/36

.

52. The exception provided for in Article 13 relates only to service contracts and does not include supply contracts.

53. Article 13 of Directive 93/38

covers entities, particularly joint ventures and undertakings whose annual accounts are consolidated and whose methods of operating are different from those of the contracting authorities covered by Directive 93/36

.

54. That article, moreover, contains a mechanism for notifying the Commission, which cannot be transposed to Directive 93/36

because there is no legal basis for doing so.

55. As exceptions must be interpreted restrictively, the Court does not find it appropriate to extend the application of Article 13 of Directive 93/38

to the scope of application of Directive 93/36

.

56. This finding is supported by the fact that, during the reform of the public procurement directives in 2004, the Community legislature, whilst maintaining that exception in Article 23 of Directive 2004/17

/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), chose not to incorporate an analogous exception in Directive 2004/18/EC of

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the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), which replaced Directive 93/36

.

57. In the light of all of the foregoing, the answer to the first part of the second question must be that Article 13 of Directive 93/38

must not be applied in the assessment of the requirement relating to the inapplicability of Directive 93/36

, according to which the undertaking to which a supply contract was awarded directly must carry out the essential part of its activities with the controlling authority.

Second part of the second question

58. It should be borne in mind that the principal objective of the Community rules in the field of public procurement is the free movement of services and the opening-up to undistorted competition in all the Member States (see, to that effect, Case C26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, paragraph 44).

59. The conditions laid down in Teckal for a finding that Directive 93/36

is inapplicable to the contracts concluded between a local authority and a person legally distinct from it, according to which the local authority must exercise over the person in question a control similar to that which it exercises over its own departments and that person must carry out the essential part of its activities with the controlling authority or authorities, are aimed precisely at preventing distortions of competition.

60. The requirement that the person in question must carry out the essential part of its activities with the controlling authority or authorities is aimed precisely at ensuring that Directive 93/36

remains applicable in the event that an undertaking controlled by one or more authorities is active in the market and therefore likely to be in competition with other undertakings.

61. An undertaking is not necessarily deprived of freedom of action merely because the decisions concerning it are controlled by the controlling authority, if it can still carry out a large part of its economic activities with other operators.

62. It is still necessary that that undertaking's services be intended mostly for that authority alone. Within such limits, it appears justified that that undertaking is not subject to the restrictions of Directive 93/36

, since they are in place to preserve a state of competition which, in that case, no longer has any raison d'être.

63. In applying those principles, the undertaking in question can be viewed as carrying out the essential part of its activities with the controlling authority within the meaning of Teckal only if that undertaking's activities are devoted principally to that authority and any other activities are only of marginal significance.

64. In order to determine if that is the case, the competent court must take into account all the facts of the case, both qualitative and quantitative.

65. As to the issue of whether it is necessary to take into account in that context only the turnover achieved with the supervisory authority or that achieved within its territory, it should be held that the decisive turnover is that which the undertaking in question achieves pursuant to decisions

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to award contracts taken by the supervisory authority, including the turnover achieved with users in the implementation of such decisions.

66. The activities of a successful undertaking which must be taken into account are all those activities which that undertaking carries out as part of a contract awarded by the contracting authority, regardless of who the beneficiary is: the contracting authority itself or the user of the services.

67. It is also irrelevant who pays the undertaking in question, whether it be the controlling authority or third-party users of the services provided under concessions or other legal relationships established by that authority. The issue of in which territory those services are provided is also irrelevant.

68. If, in the main proceedings, the share capital of the successful undertaking is held indirectly by several authorities, it may be relevant to consider whether the activities to be taken into account are those which the successful undertaking carries out with all of the controlling authorities or only the activities carried out with the authority which in the present case acts as the contracting authority.

69. It should be borne in mind in this connection that the Court has stated that the legally distinct person in question must carry out the essential part of its activities with the controlling local authority or authorities' (Teckal , paragraph 50). It thus envisaged the possibility that the exception provided for could apply not only in cases where a single authority controls such a legal person, but also where several authorities do so.

70. Where several authorities control an undertaking, the condition relating to the essential part of its activities may be met if that undertaking carries out the essential part of its activities, not necessarily with one of those authorities, but with all of those authorities together.

71. Accordingly, the activities to be taken into account in the case of an undertaking controlled by one or more authorities are those which that undertaking carries out with all of those authorities together.

72. It follows from the foregoing that the answer to the second part of the second question must be that, in order to determine whether an undertaking carries out the essential part of its activities with the controlling authority, for the purpose of deciding on the applicability of Directive 93/36

, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities, whether it be the contracting authority itself or the user of the services provided; the territory where the activities are carried out is irrelevant.

Costs

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

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Affaire C-340/04

Carbotermo SpA et Consorzio Alisei

contre

Comune di Busto Arsizio et AGESP SpA

(demande de décision préjudicielle, introduite par
Tribunale amministrativo regionale per la Lombardia)

«Directive 93/36/CEE — Marchés publics de fournitures — Attribution sans appel d'offres — Attribution du marché à une entreprise dans laquelle le pouvoir adjudicateur détient une participation»

Sommaire de l'arrêt

1. *Rapprochement des législations — Procédures de passation des marchés publics de fournitures — Directive 93/36 — Champ d'application*

   (Directive du Conseil 93/36)

2. *Rapprochement des législations — Procédures de passation des marchés publics de fournitures — Directive 93/36 — Champ d'application*

   (Directives du Conseil 93/36 et 93/38, art. 13)

3. *Rapprochement des législations — Procédures de passation des marchés publics de fournitures — Directive 93/36 — Champ d'application*

   (Directive du Conseil 93/36)

1. La directive 93/36, portant coordination des procédures de passation des marchés publics de fournitures, s'oppose à l'attribution directe d'un marché de fournitures et de services, dans lequel la valeur des fournitures est prépondérante, à une société par actions dont le conseil d'administration possède d'amples pouvoirs de gestion qu'il peut exercer de manière autonome et dont le capital est, dans l'état actuel des choses, intégralement détenu par une autre société par actions dont l'actionnaire majoritaire est, à son tour, le pouvoir adjudicateur.

   N'est en effet pas remplie dans de telles circonstances la condition relative à l'inapplicabilité de la directive 93/36, selon laquelle le pouvoir adjudicateur exerce sur la société adjudicataire du marché public en cause un contrôle analogue à celui qu'il exerce sur ses propres services.

   Pour apprécier cette condition, il convient de tenir compte de l'ensemble des dispositions législatives et des circonstances pertinentes. Il doit résulter de cet examen que la société adjudicataire est soumise à un contrôle permettant au pouvoir adjudicateur d'influencer les décisions de ladite société. Il doit s'agir d'une possibilité d'influence déterminante tant sur les objectifs stratégiques que sur les décisions.

   Tel n'est pas le cas lorsque le contrôle exercé par le pouvoir adjudicateur se résume pour l'essentiel à la latitude que le droit des sociétés reconnaît à la majorité des associés, ce qui limite de manière considérable son pouvoir d'influencer les décisions de ces sociétés. En outre, lorsque l'influence éventuelle du pouvoir adjudicateur s'exerce par l'intermédiaire d'une société holding, l'intervention d'un tel intermédiaire peut affaiblir le contrôle

éventuellement exercé par le pouvoir adjudicateur sur une société par actions du simple fait de participer à son capital.

(cf. points 36, 38-40, 47, disp. 1)

2. Pour apprécier la condition relative à l'inapplicabilité de la directive 93/36, portant coordination des procédures de passation des marchés publics de fournitures, selon laquelle l'entreprise à laquelle un marché de fournitures a été directement attribué doit réaliser l'essentiel de son activité avec la collectivité qui la détient, il ne faut pas appliquer l'article 13 de la directive 93/38, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications, qui prévoit que ladite directive ne s'applique pas aux marchés de services passés auprès d'une entreprise liée lorsque 80 % au moins du chiffre d'affaires moyen que cette entreprise a réalisé dans la Communauté au cours des trois dernières années en matière de services provient de la fourniture de ces services aux entreprises auxquelles elle est liée. Cette condition n'est remplie que si l'activité de cette entreprise est consacrée principalement à la collectivité qui la détient ou aux collectivités qui la détiennent, toute autre activité ne revêtant qu'un caractère marginal.

(cf. points 57, 63, 70, disp. 2)

3. Pour apprécier si une entreprise réalise l'essentiel de son activité avec la collectivité qui la détient, aux fins de décider de l'applicabilité de la directive 93/36, portant coordination des procédures de passation des marchés publics de fournitures, il convient de tenir compte de toutes les activités que cette entreprise réalise sur la base d'une attribution faite par le pouvoir adjudicateur et ce, indépendamment de savoir qui rémunère cette activité, qu'il s'agisse du pouvoir adjudicateur lui-même ou de l'usager des prestations fournies, le territoire où l'activité est exercée étant sans pertinence.

(cf. point 72, disp. 3)

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Judgment of the Court (First Chamber) of 11 May 2006 (Reference for a preliminary ruling from the Tribunale amministrativo regionale della Lombardia (Italy)) - Carbotermo SpA, Consorzio Alisei v Comune di Busto Arsizio, AGESP SpA

(Case C-340/04)[1]

(Directive 93/36/EEC - Public supply contracts - Award of contract without a call for tenders - Award of the contract to an undertaking in which the contracting authority has a shareholding)

Language of the case: Italian

Referring court

Tribunale amministrativo regionale della Lombardia

Parties to the main proceedings

Applicants: Carbotermo SpA, Consorzio Alisei

Defendants: Comune di Busto Arsizio, AGESP SpA

Intervener: Associazione Nazionale Imprese Gestione servizi tecnici integrati (AGESI)

Re:

Reference for a preliminary ruling - Tribunale Amministrativo Regionale della Lombardia (Italy) - Interpretation of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of Article 13 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) - Direct award of a contract for the supply and management of fuel and heating for heating appliances in buildings belonging to a municipality - Award to a company the shares of which are held by another company in which the municipality is a majority shareholder

Operative part of the judgment

The Court rules:

1. Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts precludes the direct award of a public supply and service contract, the main value of which lies in supply, to a joint stock company whose Board of Directors has ample managerial powers which it may exercise independently and whose share capital is, at present, held entirely by another joint stock company whose majority shareholder is, in turn, the contracting authority.

2. Article 13 of Council HYPERLINK "javascript:OpenURL(('DocNumber|lg=en|type_doc=Directive|an_doc=1993|nu_doc=38'),'CELEX');" Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors must not be applied in the assessment of the requirement relating to the inapplicability of Directive 93/36, according to which the undertaking to which a supply contract was awarded directly must carry out the essential part of its activities with the controlling authority.

3. In order to determine whether an undertaking carries out the essential part of its activities with the controlling authority, for the purpose of deciding on the applicability of Directive 93/36, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities, whether it be the contracting authority itself or the user of the services provided; the territory where the activities are carried out is irrelevant.

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[1] - OJ C 251, 09.10.2004.

Opinion of Advocate General Stix-Hackl delivered on 12 January 2006. Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA. Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy. Directive 93/36/EEC - Public supply contracts - Award of contract without a call for tenders - Award of the contract to an undertaking in which the contracting authority has a shareholding. Case C-340/04.

I - Introduction

1. This reference for a preliminary ruling concerns the circumstances under which the award of a public contract is to be regarded as a quasi-in-house' procurement procedure which, as such, does not fall within the scope of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public service contracts (2) (Directive 93/36'). It is therefore another case concerning the interpretation and application of the criteria developed in the judgment in Teckal (3) and - at least to some extent - clarified in Stadt Halle. (4)

2. It is also another in a list of cases - some of which have already been decided (5) - concerning energy supply or waste disposal contracts awarded by Italian municipalities.

II - Legal framework: Community law

3. Article 1 of Directive 93/36 lays down basic rules concerning the scope of the directive.

4. Article 1, opening phrase and paragraph (a), reads:

For the purposes of this Directive:

(a) public supply contracts are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations'.

5. In paragraphs 49 and 50 of the judgment in Teckal , the Court of Justice laid down principles for excluding certain procedures from the scope of the directives:

49 As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons.

50 In that regard, in accordance with Article 1(a) of Directive 93/36, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.'

6. The Court clarified the first of those two conditions in its judgments in Stadt Halle (6) and Parking Brixen. (7)

7. Council Directive 93/38/EEC of 14 June 1993 concerning the coordination of the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (8) (Directive 93/38') contains a provision, since amended by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, (9) concerning the award of contracts to undertakings with some form of close connection with the contracting entity.

8. Article 13(1) of Directive 93/38 provides:

1. This Directive shall not apply to service contracts which:

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(a) a contracting entity awards to an affiliated undertaking;

(b) are awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Article 2(2) to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities,

provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

Where more than one undertaking affiliated with the contracting entity provides the same service or similar services, the total turnover deriving from the provision of services by those undertakings shall be taken into account'.

III - Facts and main proceedings

9. On 22 September 2003, the Municipality of Busto Arsizio issued a call for tenders to supply energy for, and to maintain, modify and technically upgrade, the heating appliances in the municipal buildings (the value of the contract, EUR 8 450 000 + VAT, was broken down into EUR 5 700 000 for the supply of fuel - 4/5 diesel oil and 1/5 methane -, EUR 1 000 000 for maintenance, and EUR 1 175 000 for upgrading and modification to comply with the relevant rules).

10. By municipal council resolution No 804 of 21 November 2003, the Municipality of Busto Arsizio (the Municipality') ordered that the tender procedure be suspended until 10 December 2003, pending a decision, if any, to award the contract directly. The claimant Carbotermo SpA (Carbotermo') submitted its tender on 22 November 2003. Consorzio Alisei (Alisei') did prepare a technical tender but did not submit it within the original deadline of 24 November 2003, having been informed by the Municipality, on 21 November 2003, that the tender procedure had been suspended until 10 December 2003, and, subsequently, that the call for tenders had been withdrawn.

11. By resolution No 857 of 10 December 2003, the Municipality withdrew the call for tenders and reserved the right subsequently to award the contract directly to AGESP SpA (AGESP').

12. AGESP is wholly controlled by AGESP Holding SpA, (10) it too a public company limited by shares, 99.98% of whose capital is owned by the Municipality. (11) The remaining shares are held by a number of adjoining municipalities in the same province.

13. On 18 December 2003, the contract in question was awarded directly to AGESP.

14. Carbotermo and Alisei brought actions against those resolutions before the Tribunale Amministrativo Regionale (Regional Administrative Court) della Lombardia (Italy), which joined the two cases and, by order of 27 May 2004, received on 9 August 2004, referred the following question to the Court of Justice for a preliminary ruling:

(1) Is the direct award of a contract for the supply of fuel for heating appliances in buildings owned by or within the competence of the Municipality, and relating to operation, supervision and maintenance (the main value of which lies in supply), to a joint stock company whose capital is, at present, held entirely by another joint stock company, of which the awarding Municipality is, for its part, the major shareholder (with 99.98% of the shares), or to a company (AGESP) in which a direct holding is owned not by the public authority but by another company (AGESP Holding), 99.98% of whose capital is presently owned by the public administration, compatible with Directive 93/36/EEC?

(2) Must the requirement that the undertaking to which the supply contract is awarded directly carry out the essential part of its activities with the controlling authority be ascertained by applying Article 13 of Directive 93/38/EEC and can it be concluded that it has been satisfied

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where that undertaking derives the majority of its turnover from the controlling public authority or, alternatively, in the territory of that authority?'

IV - The questions referred

15. In essence, the two questions concern the two cumulative conditions under which certain quasi-in-house procurement procedures do not fall within the scope of Directive 93/36 (the Teckal exception' or Teckal criteria'): control similar to that which the contracting entity exercises over one of its own departments; and activities carried out essentially for the controlling contracting entity. If those conditions are met, the provisions of the directive, such as compliance with certain rules of procurement procedure, will not be applicable.

16. For the sake of clarity, it should be stressed that it is the old legislation, that is to say not the new legislative package', which is relevant to these proceedings.

V - Preliminary remark

17. This case, like those before it, shows that the Teckal criteria comprise a number of imprecise concepts which have raised a raft of legal questions and caused numerous problems of differentiation. In the light of that experience, the question arises as to how the Court of Justice can best clarify the law and thus secure legal certainty for the persons concerned. One possibility would be for the Court not only to refine its case-law in relation to specific circumstances but also to clarify it in a more general way than it has done previously. Another solution would be to eliminate the uncertainties created by the Teckal exception by conducting a comprehensive revision of the case-law. Through its judgment in Teckal in November 1999, the Court opened the way for exceptions to the directive. How wide that opening is, however, is still unclear.

18. This case in particular shows that the situation described above also has an impact on national supreme courts, such as the Consiglio di Stato (Council of State) (Italy). Thus, according to the order for reference, the principles relating to quasi-in-house procurement established by the Consiglio di Stato are based on a decision of the Court of Justice. (12) However, according to the national court, the question whether that case-law is consistent with the Court's own case-law does not need to be resolved in this case. In any event, the main proceedings here, like other cases in other Member States, show that the case-law of the Court manifestly does not contain any clear guidance for the relevant economic sectors and courts of the Member States.

19. In order to give the Court a choice of more than one alternative, I shall, despite the misgivings I have expressed, clarify the Teckal exception in a more general fashion. That way, the Court can always choose the other option.

VI - First criterion: control similar to that which the contracting entity exercises over one of its own departments

20. This case exhibits a number of specific characteristics which, taken together, set it apart from other cases concerning public-private partnerships' (PPPs') which are pending before, or have already been decided by, the Court.

21. The documents before the Court show that, in this instance, in contrast to the procurement at issue in Stadt Halle , there is no shareholding by private undertakings. Furthermore, the legal structure in question here, that is to say a public company limited by shares, is different from that in Stadt Halle. For its part, the contract in this case, unlike in Parking Brixen (13) or Teckal , was not awarded to a subsidiary but to a sub-subsidiary of the local authority.

A - Legal assessment of indirect shareholdings

22. As in Stadt Halle , the first characteristic of the procedure at issue in this case has to

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do with the fact that the contract was not awarded directly to the entity in which the local authority has a direct shareholding.

23. In this connection, the question is whether the Teckal criteria are also applicable in principle to situations in which there is an indirect shareholding, that is to say whether the procurement directives also exclude procedures in which the public authority for which the service is provided has an interest in the entity concerned only through another company.

24. Both the Commission and the Polish Government reject such an interpretation outright on grounds of principle.

25. The case-law of the Court of Justice does not provide any clear guidance in this regard. This remains the case following the judgment in Parking Brixen.

26. In support of the argument that the Teckal criteria are also applicable in principle to cases of indirect shareholdings is the fact that, in Stadt Halle , the Court of Justice actually carried out an examination of those shareholdings to determine whether the conditions for the two Teckal criteria had been fulfilled. This could be interpreted as tacit recognition of that principle.

27. On the other hand, the wording of the judgment in Stadt Halle appears to point more in the other direction. Thus, paragraph 49 reads: ... where that entity carries out the essential part of its activities with the controlling public authority or authorities'. It could be inferred from this that the services have to be exchanged directly between the public contracting authority as shareholder and the entity whose shares are owned by the public contracting authority.

28. However, since that wording refers expressly to the second criterion, that is to say that concerning the essential part of the supplier's activities, it could of course be concluded that the judgment in Teckal does not contain any express finding on whether it is possible for indirect shareholdings too to be capable of satisfying the first criterion.

29. On the other hand, the fact that Teckal concerned a situation involving a number of public entities and that the Court implicitly recognised such situations by introducing the Teckal criteria' indicates that indirect shareholdings are also capable in principle of falling within the scope of those criteria. The condition for this, however, is that the control criterion must be fulfilled at all levels of participation.

30. According to the judgment in Parking Brixen , the important point in relation to the control criterion is that there should be a power of decisive influence over both strategic objectives and significant decisions'. All the legal provisions and relevant circumstances must be taken into account in this regard. (14) That such influence should also be exercised in fact, does not, however, seem to be necessary, according to that judgment.

B - Legal assessment of public-public undertakings

1. Principle

31. The facts of the main proceedings exhibit a further characteristic that distinguishes them from the situation at issue in Stadt Halle . This case does not concern a semi-public entity, but an entity, or more precisely its parent company, in which no private undertakings hold shares. This is not apparent from the order for reference itself, but from the other documents before the Court. Furthermore, the shares owned by other parties amount to only 0.02% of the capital. Since those residual shares are held by other municipalities, i.e. public bodies, the entity in question is a public-public undertaking or a public-public partnership'.

32. If the circumstances of this case are compared with the Court's previous case-law, the following picture emerges. On the one hand, there is a fundamental difference between this case and Stadt

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Halle , which concerned a semi-public entity; on the other hand, there is a clear parallel with Teckal , which concerned a public-public entity. In the latter case, the entity which was to perform the procurement contract, namely AGAC, did have its own legal personality but had been set up by a number of municipalities.

33. Further support for the application of the Teckal exception to public-public entities, in addition to the judgment in Teckal , as already explained, is the fact that, in the judgment in Stadt Halle , (15) the deciding factor for the Court was that private undertakings pursue different interests from local authorities.

34. However, this case is concerned only with the participation of municipalities and not with the interests of private parties. Since municipalities pursue objectives in the public interest, it could be assumed, at least on first sight, that the control criterion, even on a strict reading of it, is satisfied. That is certainly the case if the condition in respect of identity of interests (16) is understood as meaning that such identity obtains automatically in the absence of private interests. Of course, the possibility cannot be discounted, and is confirmed by their activities as economic operators, that local authorities may represent a variety of interests. In such cases there is no longer identity of interests.

35. Also, finally, it should not be overlooked in this regard that Teckal concerned an azienda municipalizzata' (municipal undertaking) and not, as in this case, a public company limited by shares. The significance of the legal structure will be discussed later.

36. On the other hand, the question of how public-public entities are to be treated must also be answered in the light of the principle of interpretation expressly confirmed in the judgment in Stadt Halle , which states that any exception to the obligation to apply the Community rules must be interpreted strictly. (17)

37. However, even in Stadt Halle , which did not concern the participation of more than one shareholder, the Court confirmed that the Teckal exception is applicable in principle to entities with more than one shareholder. This is evident from the fact that the Court (18) not only reiterated the Teckal exception word for word, but also pointed out that, in Teckal , the entity was owned by public authorities'. The Court therefore used the plural in that judgment not only in relation to the second criterion of the Teckal exception.

38. It therefore follows that even entities which have more than one shareholder are in principle capable of falling within the scope of the exception.

39. However, for it to be possible to apply the Teckal exception in this case, it would be necessary to go one step further, because these proceedings also involve an indirect shareholding. In my opinion, the applicability of the Teckal exception to a situation such as this as well cannot be ruled out a priori in a general, abstract manner.

40. Here too, it must be examined in concreto whether the control criterion is satisfied. Regard is to be had in this respect to the criterion established by the Court in Parking Brixen. This requires that the controlled entity should enjoy only a certain degree of independence, (19) that is to say vis-à-vis its shareholders. (20)

41. Since, in this case, the possibility of private participation is provided for in the statutes, it must be examined, with regard to the control criterion, whether a future opening-up of the share capital to private investors has any legal significance.

42. As far as opening up the share capital to private investors is concerned, a distinction could be drawn according to whether private participation is merely possible in law or is mandatory in law. In the first case, a further distinction could be drawn according to whether or not that possibility

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was in fact subsequently taken up - cases in which the share capital has already been opened up, as in Stadt Halle , are automatically excluded in this regard.

43. In this connection, the Commission has taken the view that even the potential participation of private parties, as provided for, for example, in the statutes of a capital company, indicates that the control criterion is not satisfied.

44. There are, in the first place, a number of fundamental considerations which argue against that extreme view taken by the Commission. If that were the case, the legal classification of PPP projects would depend purely on potential future developments. Whether these then actually materialised would, however, be irrelevant. In terms of the regime operated by the public procurement directives, this is a new approach. Moreover, under the law of the Member State concerned, it might even be illegal for the statutes to prohibit the transfer of shares to private parties.

45. On the other hand, however, the principle of protection against circumvention which underpins the public procurement directives requires that certain events occurring after the transfer of tasks, that is to say after the contract has been awarded, must none the less be taken into account. This applies in particular to cases in which the share capital had not been opened up at the time when the contract was awarded, but specific plans for this to proceed were already in place.

46. The question is whether the judgment in Parking Brixen alters that assessment at all. The fact that, in that case, in contrast to this one, the opening-up of the company to other capital was obligatory and represented only one of five essential characteristics taken into account in the assessment would indicate not. (21) It is none the less true that this still does not rule out the possibility that even the potential opening-up of the share capital may mean - albeit only when considered in conjunction with other specific characteristics of the situation in the main proceedings - that the minimum degree of control is not satisfied in that situation. It is therefore necessary to examine those other specific characteristics and their significance from the point of view of control.

47. Regard must also be had in this connection to the situation which gave rise to an action for failure to fulfil obligations brought against the Republic of Austria (22) and the recent legal assessment made by the Court of Justice in that matter.

48. Commission v Austria concerned the transfer of responsibility for waste disposal by the town of Mödling to a Gesellschaft mit beschränkter Haftung (private company limited by shares), that is to say by a municipality to a wholly-owned subsidiary. Some two weeks after the transfer of that task, the municipality decided to transfer 49% of the shares to a private undertaking. The sale took place a further two weeks or so later. The company began to carry out the activity which had been transferred a further few weeks after that.

49. In its judgment in that case, the Court held that all the stages in the course of events had to be taken into account as a whole and in the light of their objectives, and could not be assessed in isolation. (23) This indicates that developments which occur after the transfer of tasks must likewise be taken into account, as the Court also expressly held in that judgment. (24) That case, however, unlike this one, concerned developments which had actually occurred, the act of opening up the company to private participation having already been carried out. At the time when the overall course of events was assessed, the opening-up was a fait accompli.

50. In contrast, the documents in this case do not make it clear whether, and, if so, when, any shares were transferred to private parties or whether any plans to that effect were in place. From that point of view, neither the judgment in Parking Brixen nor the judgment in Commission v Austria provides a clear indication that the mere possibility that a company may be opened up to private persons is sufficient.

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51. It can thus be assumed that the existing case-law does not in principle exclude the award of contracts to public-public entities from the Teckal exception. It is therefore necessary now to set out the conditions which such procedures must satisfy.

2. The individual conditions

52. The conditions under which the award of contracts to public-public entities is capable of falling within the scope of the Teckal exception concern the relationship between the entity concerned and the public authorities which directly or indirectly own the shareholding.

53. First of all, the argument put forward during the proceedings that the Teckal exception covers only inter-organic or inter-organisational delegations' or divisions of the organisational apparatus of a local authority must be rejected. There is nothing in the case-law of the Court to indicate that the Teckal exception is restricted to such categories of entity.

54. In general, and in particular in the judgment in Parking Brixen , the Court of Justice adopts a material rather than a formal approach to such matters. The decisive factor, therefore, as I shall demonstrate in more detail at length, is the embodiment of the relationship between the parties concerned. In particular, regard is had in this respect to general, abstract provisions, such as national company law, and the material embodiment of the relationship, such as, for example, the statutes of the entity concerned. (25)

55. In this case, unlike in Stadt Halle , the entity which is to provide the service is not a private company limited by shares under German law but a public company limited by shares under Italian law (SpA).

56. In this instance, the relevant provisions of the Codice civile (Italian Civil Code) (C.C.') are applicable.

57. There is also a difference in regard to the entity at issue in Teckal . While that case related to an undertaking in the form of an azienda municipalizzata', this case actually concerns an entity, AGESP, which, although originally operating as a municipal undertaking, was converted to a public company limited by shares by Resolution No 148 of 24 September 1997.

58. Under Italian law, as under other legal systems, public companies limited by shares in principle have greater autonomy than private companies limited by shares.

59. In my view, an abstract examination of the possibilities open to shareholders under the C.C. for exerting influence over public companies limited by shares and the possibilities open to the latter for influencing their subsidiaries is not sufficient. As I have already said, what matters is more the material embodiment of the relationship between grandparent' and parent company, and that between parent company and subsidiary. (26)

60. Consequently, the fact that the undertaking concerned is in the form of a public company limited by shares, under Italian law for example, does not matter per se. Moreover, this is also clear from the judgment in Parking Brixen , which likewise concerned a public company limited by shares under Italian law. The mere fact that the Court of Justice did not consider that circumstance to be sufficient to support the conclusion that the company was independent, and that there was therefore no control, indicates that the organisation of that undertaking as an Italian public company limited by shares does not in itself preclude adequate control.

61. However, the conversion of a dedicated [municipal] undertaking into a public company limited by shares is at least one of several factors which must be taken into account in the assessment of independence. (27)

62. As regards the examination of the material embodiment of the relationship, it is the specific

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powers of the respective shareholders that count, rather then whether those powers are exercised in practice. (28) The Court of Justice has since confirmed that view in Parking Brixen , in which it examined the statutes of the public company limited by shares in that case. (29)

63. Furthermore, the rights of control enjoyed by the shareholder(s) must extend not only to procurement decisions in general or the specific procurement decision in particular, (30) but also to the running of the business as a whole.

64. With respect to the means of control, regard is usually had to rights to give instructions, supervisory powers and rights to make appointments. The guiding principle in this regard must be that what is conclusive is the power of influence and not, therefore, legislative provisions alone. (31)

65. Finally, we must also consider the argument put forward during the proceedings to the effect that the assessment of a procurement procedure and the application of the Teckal exception depend on the conduct of the parties concerned, that is to say the controlling entity and the controlled entity, during the procurement procedure itself.

66. It could thus be concluded from the conduct of the parties involved in the procurement procedure, in particular that of the public-public entity, that the latter is independent of the contracting body.

67. In these proceedings, the focus in this regard has essentially been centred on the content of the contract. In particular, it has been said that the penalty laid down in the contract for failure to achieve certain objectives is to be regarded as an indication of AGESP's autonomy.

68. Since the control criterion relates to influence over the running of the business as a whole, the conduct of the entity at issue within a particular procurement procedure cannot be decisive. If that were the case, the same entity could fall within the scope of the Teckal exception in one procurement procedure but not in another. However, there is nothing in the case-law of the Court to support a view which would have such an outcome. On the contrary, the Court classifies the relationship, and thus determines compliance with the control criterion, by reference to the circumstances of the persons concerned.

69. The examination as to whether the general, abstract provisions of national law and the material embodiment of the relationship in the statutes of the company concerned, in this case Article 19 in particular, do in fact ensure an adequate degree of control involves an assessment of a specific situation. However, in accordance with the provisions on jurisdiction in Article 234 EC, such an assessment and the interpretation of national law are matters not for the Court of Justice but for the national court.

C - Interim conclusion

70. The criterion of control similar to that which the contracting authority exercises over one of its own departments is also capable in principle of being satisfied in the case of public-public undertakings. It is for the national court to assess the facts of the main proceedings. In this case, it has to take the following factors into account:

- the interests of the shareholders;

- the conversion of the azienda municipalizzata' into a public company limited by shares;

- the fact that there is non-mandatory provision for the company to be opened up to other capital, but this has not been put into effect;

- the possibility for AGESP to set up establishments even abroad;

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- the extent of the power of influence over the appointment of members of the board of directors and the running of the business;

- the powers of the board of directors of AGESP; and

- the fact that the Municipality has an indirect shareholding in AGESP through AGESP Holding.

71. The Court could of course, in this case - as in Stadt Halle and Parking Brixen -, itself make a definitive assessment of a situation such as that in the main proceedings. Since the factors for consideration set out above are largely the same as those in Parking Brixen , (32) with the addition of the indirect shareholding, it may be concluded, on the basis of the existing case-law - which many consider to be too strict -, that the first criterion, that is to say adequate control similar to that which the contracting authority exercises over one of its own departments, is not satisfied in the circumstances of the main proceedings.

72. If, on the other hand, the Court were to take the opportunity to clarify its existing case-law to the effect that at least some public-public partnerships are capable of satisfying the control criterion, and came to the conclusion that this is also the case in the main proceedings, the Court would afford itself the further opportunity to clarify - for the first time - the second Teckal criterion, in other words that concerning the essential part of the supplier's activities.

VII - Second criterion: the supplier must carry out the essential part of its activities for the controlling contracting entity

73. In contrast to the first Teckal criterion, the Court has not, since that judgment, delivered a decision which clarifies the second Teckal criterion. These proceedings now offer the Court the opportunity to do so.

74. Moreover, the main proceedings concern a situation involving an almost 100% shareholding at the first level, i.e. between the Municipality and AGESP Holding, and a 100% shareholding at the second level, i.e. between AGESP Holding and AGESP.

75. Like Stadt Halle , this case too concerns an indirect shareholding. It is therefore necessary to examine whether the activities of a sub-subsidiary' for its grandparent' are in principle also capable in certain circumstances of satisfying the second Teckal criterion.

A - The working hypothesis

76. Since, in its judgment in Stadt Halle , the Court did not need to give further consideration to the interpretation of the second criterion, in view of its chosen interpretation of the first criterion, it is only logical that I should repeat at this point the view on this issue which I expressed in my Opinion in Stadt Halle.

77. The second criterion established in Teckal , concerning the essential part of the supplier's activities, concerns a certain minimum proportion of the overall activities carried out by the controlled entity. It is therefore necessary to determine the volume of activities carried out overall and the volume of those carried out for the shareholder in the broad sense.

78. It must be pointed out in this connection, however, that the fact that the term shareholder' is not to be interpreted too strictly does not for that matter support the conclusion that activities carried out for the shareholder also include those performed for third parties which the shareholder would otherwise have to carry out itself. In practice, this exception applies primarily to services in the general economic interest and, as far as this case is concerned, to municipalities (local authorities) with an obligation to provide certain services for certain persons.

79. It must also be made clear that the activities to be taken into account are those actually carried out and not those which may be carried out under the law or under an undertaking's statutes,

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or those which the controlled entity has an obligation to carry out. (33)

80. The central question is what proportion marks the threshold for satisfying the second Teckal criterion. There are various views on this. They extend from over 50%, through significantly', predominantly' and almost exclusively', to exclusively'.

81. The approach to establishing the threshold is not only positive, in the sense that it involves determining the volume of services provided for the shareholder, but also negative. The negative approach would be based on a calculation of the proportion of services provided for persons other than the shareholder. The latter view can be found in the Opinion of Advocate General Léger in ARGE. He considered that the Directive is applicable if that entity carries out the essential part of its activity with operators or local authorities other than those of which the contracting authority is made up'. (34) However, in view of the positive approach adopted with respect to the second criterion in Teckal , the negative approach will not be pursued any further here.

82. The passage cited from the Opinion of Advocate General Léger none the less raises another important issue, which must be taken into account in determining the proportion of services provided for the shareholder.

83. That issue is whether the second Teckal criterion can be assessed in quantitative terms alone or whether qualitative factors must also be taken into consideration. The wording and spirit of the exception, which, moreover, contains no indication as to how the activities are to be assessed, indicate that the latter is the case. The authentic language version of the relevant passage in the judgment in Teckal , that is to say the Italian, likewise does not preclude an additional or alternative qualitative assessment (la parte piu importante dell propria attività').

84. Furthermore, the judgment in Teckal likewise does not contain any indication of how the proportion of services provided for the shareholder is to be calculated. It is not therefore axiomatic that turnover alone is decisive.

85. In my view, the national court must therefore determine the essential part of the supplier's activities' by reference to quantitative and qualitative factors.

86. It should be recalled at this point that Opinions are authentic in the original language chosen by the Advocate General. In this regard, the Opinion of Advocate General Léger presents the following picture. On the one hand, he talks about the quasi-exclusivité' (almost all') of the services provided, whereas the German text reads sämtliche Dienstleistungen' (all services'). (35) On the other hand, he relies on the version of the second Teckal criterion contained in the language of the case, Italian, and refers to en grande partie' (largely'), which, in German, is rendered as im Wesentlichen' (essentially'), (36) or to la plus grande partie de leur activité' (den größten Teil ihrer Tätigkeit') (the biggest part of their activities'). (37)

87. For the sake of greater clarity, however, legal commentators apply the 80% criterion laid down in Article 13 of Directive 93/38, even in the context of proceedings before the Court. The reason they give for doing so is that that criterion is objective' or appropriate'.

88. It must be pointed out in this respect that a different fixed percentage might be equally objective or appropriate. As some of the interested parties in these preliminary ruling proceedings have pointed out, I made it clear in my Opinion in Stadt Halle that the rigidity of a fixed percentage may also be an obstacle to an appropriate solution. Moreover, a fixed percentage permits only quantitative factors to be taken into account.

89. The arguments against the transposability of the 80% criterion laid down in Article 13 of Directive 93/38 are, first, that this is a provision creating an exception in a directive applicable only to certain sectors. The Community legislature intended that percentage to be confined to Directive

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93/38. While the basic principle may also be applicable in practice outside those sectors, the decisive fact remains that such a provision was not included in the directive applicable in this case.

90. Secondly, to find in favour of the transposability of the 80% threshold is to disregard the fact that Article 13 of Directive 93/38 applies only to services. As an exception, its application to the supply of goods within the sectors concerned is by definition prohibited. Such an extension to the supply of goods came about only with the amendments introduced as part of the legislative package in this field. (38)

91. Thirdly, even when the directives were amended in the legislative package, the legislature retained the 80% threshold only for the sectors concerned, and refrained from transposing it to the so-called classic' directive. At the time of those amendments, however, the second Teckal criterion was already well-known and, furthermore, was the subject of discussions during the legislative procedure.

92. Fourthly, there is yet a further reason why Article 13 of Directive 93/38 should not be relied on. Paragraph 2 of that article requires the contracting entity to provide the Commission, at its request, with certain information. That provision acts as the procedural counterbalance to the exception provided for in Article 13. In the case of the Teckal exception, however, the Court followed a different route.

93. Fifthly, the mere fact that the Court of Justice did not define the second Teckal criterion by reference to Directive 93/38, of which it was certainly aware, would in itself be sufficient to preclude transposability. Instead, the Court, in derogation from Article 13, confined itself to two material conditions, the abovementioned two Teckal criteria. Those conditions, however, precisely because of the lack of a procedural rule comparable with that in Article 13, must be interpreted strictly.

94. All in all, therefore, it is appropriate to adhere to the view that the 80% threshold deriving from Directive 93/38 is not a suitable criterion for assessing whether the supplier carries out the essential part of its activities for the controlling contracting authority. (39)

B - Further development of the above proposition in the light of recent case-law

95. As a condition for applying an exception, the criterion concerning the essential part of a supplier's activities must be interpreted strictly. The Court has confirmed this, in so far as it held, in paragraph 63 of the judgment in Parking Brixen :

[s]ince it is a matter of a derogation from the general rules of Community law, the two conditions stated in the preceding paragraph must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying the derogation to those rules lies on the person seeking to rely on those circumstances.'

96. Those requirements must be satisfied in this case too.

97. I continue to take the view - as previously expressed in my Opinion in Stadt Halle - that the essential part of a supplier's activities' must be determined by reference not only to quantitative criteria but also to qualitative factors. (40)(41)

98. With respect to the qualitative factors, it would have to be ascertained how and for whom the controlled entity in question carries out its activities. It makes a difference in this regard whether a market for the activities carried on by the entity actually exists in the first place, and whether the entity offers on the market some of the services which it provides for persons other than the controlling authority. (42)

99. However, this must not be taken to mean that the services provided by the entity in question

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must also be in demand from persons other than public institutions. For, even if a product or service is in demand from only public consumers , this does not in itself mean that there is no market. There may be other suppliers. Consequently, the qualitative assessment would depend not only on the relationship between the supplier and the controlling entity, but also, and fully in keeping with the competitive objectives of the procurement legislation, on the supplier's economic position on the market. The situation would thus be similar to that in cases where the directives permit a negotiated procedure without competitive tender, that is to say where only one economic operator is capable of performing the contract. (43)

100. It is also necessary, in principle, to clarify whether the activity actually carried out is alone relevant, or whether account must also be taken of the purpose of the entity, such as the objects provided for in its statutes, that is to say every activity the entity could ever pursue. However, although reliance on the purpose of an entity is not unknown in procurement law, such an approach would make it even more difficult to assess whether a supplier carries out the essential part of its activities for the contracting authority, because it is impossible to supply reliable, up-to-date information on potential - indefinite, future - activities.

101. A further question is whether account should be taken of only some of the entity's activities or of all of them. Thus, the criterion concerning the essential part of a supplier's activities could also be understood as meaning that regard is to be had only to that type of activity which is carried out for both the controlling entity and other contracting bodies, such as energy supplies, for example, other activities carried out by the entity, such as waste disposal, being left out of account and the relative proportion of the sector-specific activities being alone decisive.

102. However, in my view, the mere fact that we are dealing with an exception to the rules of the directive argues against such an interpretation of the second Teckal criterion. For this could lead to an increase in the number of procedures covered by the exception in cases where the criterion concerning the essential part of a supplier's activities is satisfied in relation to a particular type of activity but not in relation to all the activities carried out by the entity.

103. As the wording of the judgment in Teckal and the facts of the proceedings suggest, the criterion concerning the essential part of a supplier's activities can be satisfied not only where the activities carried out for one shareholder exceed the essential part' threshold, but also by adding together all the services provided for all the shareholders and comparing that figure with the totality of the activities carried out.

104. In paragraph 50 of the judgment in Teckal , the Court also used the plural in relation to the second criterion, holding that:

... [t]he position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.' (44)

105. If that wording is taken literally, it is not only the services provided for the controlling entity, that is to say the Municipality of Busto Arsizio, which are relevant. Services provided for the other shareholders could also be taken into account.

106. As regards the quantitative factors, turnover cannot be the only consideration. Other business indicators surely have to be taken into account as well. Thus, as the second question states, the proportion of total income derived from activities carried out for shareholders can, in principle, also be taken into account. However, determination of the proportion of total income derived from activities for shareholders is subject to the same principle that applies when determining the proportion of total turnover derived from such activities, that is to say that it is not sufficient for the

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income from those activities simply to exceed other income. It should be noted that these are both only quantitative indicators.

107. Finally, the Court has not made it clear, in connection with the criterion concerning the essential part of a supplier's activities, at what point in time that condition must be satisfied or what period of time is relevant for making the assessment.

108. Under the scheme of the procurement directives, this would be the point at which the awarding authority acts, that is to say, in this case, the point at which it transfers the relevant task. This, however, gives only a snapshot of the situation, unless, as we have already seen - in Article 13 of Directive 93/38 -, account is taken of a longer period.

109. Since AGESP provides services not only directly for the Municipality, but also in many cases directly for third parties within the Municipality, and, more specifically, for business and residential consumers, the further question arises whether, and, if so, under what conditions, services which are not provided directly for the Municipality must also be regarded as services for the Municipality, that is to say for the controlling entity within the meaning of the second Teckal criterion.

110. At this point, the vagueness of the second Teckal criterion and the corresponding lack of legal clarity for the entities concerned become apparent once again. For the sake of legal certainty, some clarification should therefore be provided.

111. For the question has been raised in this regard whether the deciding factor is the area in which the services are provided. On that proposition, only services in the area of the Municipality of Busto Arsizio would be relevant in the main proceedings. A satisfactory territorial reference is at least a suitable criterion for classification. This has to do with the fact that such a point of reference also plays an essential role in the determination of the jurisdiction of public bodies, and in particular municipalities. The view that only services for persons resident in the Municipality are to be included would certainly be too restrictive. It would , however, be possible also to include services which, although provided outside the Municipality, none the less benefit persons from within the Municipality, perhaps because the service is not offered by the authority itself - for reasons of cost, for example - but is provided by an entity in which several municipalities and/or one or more regions have shareholdings.

112. It must also be emphasised that, for the purposes of classification as an activity for the Municipality, it does not matter who is charged for the service or who pays for it. In fact, in the case of services of general economic interest provided in the form of concessions, at least part of the payment typically comes from the users of the service. I am thinking in particular in this regard of the concessions, included in the directives, concerning the construction of motorways for which a toll is charged. More significant in the everyday life of the Municipality are, above all, transport services, energy supplies, waste disposal and the construction and, where appropriate, operation of educational and leisure facilities or car parks. In cases such as these, however, consideration would have to be given first of all to whether these are service concessions, to which the rules laid down in the directives are for that very reason not applicable.

113. The Court should clarify the second Teckal criterion by laying down the conditions under which services for third parties are also included. Regard must be had first and foremost to the nature of the relationship between the third parties and the controlling entity, that is to say, in this case, the Municipality. Classification as an activity carried out for the Municipality is appropriate in particular in cases where the Municipality has an obligation to provide a service for third parties. This does not necessarily have to be an obligation to provide a service arising under public law, such as the relevant regional laws, for example. Obligations under private law,

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such as those arising under a contract between private persons and the Municipality, could also, conceivably, count as such. It should further be made clear whether contractual relations between third parties and the entity providing the service are likewise relevant. Here too, the determinative factor should be that, in addition to the actual provision of the service, there must also be a legal relationship between the Municipality and the entity providing the service.

114. In any event, the view that any service for the population of the local authority in question, that is to say, in this case, the Municipality of Busto Arsizio, is to be included must be rejected. For then, all other services to private persons, notwithstanding that they do not involve a relationship with the Municipality, would also be included, because the nature of the commercial activity would in that event be irrelevant. For example, if an entity not only supplied energy or provided waste disposal services, but also sold certain goods, such as heating equipment or refuse containers, the latter activities would also be included, even though they relate to goods which any consumer can also obtain from other sources. The effect of an interpretation based solely on the status of the third party consumer would be to include any service to consumers merely because the consumers are resident in the Municipality.

115. Taking everything into consideration, it must therefore be concluded that regard is to be had not only to the status of the third party consumer but also to the substance of the commercial activity.

C - Interim conclusion

116. The criterion to the effect that the controlled entity must carry out the essential part of its activities for the local authority or authorities which hold(s) its shares is also capable of being satisfied in the case of public-public undertakings and in the case of an indirect shareholding. In this connection, certain services provided for third parties should also be classified as being performed for the controlling entity.

117. In this case, the national court must take into account a number of factors in this regard, which include the income derived from activities carried out for the shareholders, but not the 80% criterion laid down in Article 13 of Directive 93/38.

VIII - Conclusion

118. In the light of the foregoing, I propose that the Court answer the questions referred as follows:

Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public service contracts is to be interpreted as precluding the direct award of a contract in a procedure such as that in the main proceedings, unless the following conditions are fulfilled:

First, the local authority must exercise over the other entity a control similar to that which it exercises over its own departments. The national court should examine the following factors in this regard:

- the interests of the shareholders;

- the conversion of the azienda municipalizzata' into a public company limited by shares;

- the fact that there is non-mandatory provision for the company to be opened up to other capital, but this has not been put into effect;

- the possibility for AGESP to set up establishments even abroad;

- the extent of the power of influence over the appointment of members of the board of directors and running of the business;

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- the powers of the board of directors of AGESP; and

- the fact that the Municipality has an indirect shareholding in AGESP through AGESP Holding.

Secondly, that entity must also have carried out the essential part of its activities for the local authority or authorities which hold(s) its shares. In this regard, the national court must take into account the factors referred to in points 76 to 115, which include the income derived from activities carried out for the shareholders, but not the 80% criterion laid down in Article 13 of Directive 93/38/EEC.

(1) .

(2) - OJ 1993 L 199, p. 1.

(3) - Judgment in Case C107/98 Teckal [1999] ECR I-8121.

(4) - Judgment in Case C26/03 Stadt Halle [2005] ECR I-1.

(5) - See, for example, the order in Case C310/01 Comune di Udine (OJ 2003 C 55, p. 20); judgment in Case C108/98 RI. SAN. [1999] ECR I-5219.

(6) - Judgment in Case C26/03, cited in footnote 4.

(7) - Judgment in Case C458/03 Parking Brixen [2005] ECR I-8612.

(8) - OJ 1993 L 199, p. 84.

(9) - OJ 2004 L 134, p. 1.

(10) - Under Article 7 of the statutes of AGESP, no shareholder, with the exception of the controlling company AGESP Holding SpA, may hold a share greater than one tenth of the total capital of the company'.

(11) - Under Article 6 of the statutes of AGESP Holding SpA, the majority of the shares are reserved for the Municipality.

Under Article 7 of the statutes of AGESP Holding SpA, no private shareholder may hold a share greater than 10% of the total capital of the company'.

(12) - Decision in Case C310/01, cited in footnote 5.

(13) - Judgment in Case C458/03, cited in footnote 7.

(14) - Judgment in Case C458/03, cited in footnote 7, paragraph 65.

(15) - Judgment in Case C26/03, cited in footnote 4, paragraph 50.

(16) - See the approach adopted by Advocate General Kokott in her Opinion in Case C458/03, judgment cited in footnote 7, point 74 et seq.

(17) - Judgment in Case C26/03, cited in footnote 4, paragraph 46.

(18) - Judgment in Case C26/03, cited in footnote 4, paragraph 49.

(19) - Judgment in Case C458/03, cited in footnote 7, paragraph 70.

(20) - Judgment in Case C458/03, cited in footnote 7, paragraph 68.

(21) - Judgment in Case C458/03, cited in footnote 7, paragraph 67.

(22) - Judgment in Case C29/04 Commission v Austria [2005] ECR I-9705.

(23) - Judgment in Case C29/04, cited in footnote 22, paragraph 41.

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(24) - Judgment in Case C29/04, cited in footnote 22, paragraph 38.

(25) - See the judgment in Case C458/03, cited in footnote 7, paragraph 66 et seq.

(26) - See my Opinion in Case C26/03, judgment cited in footnote 4, point 65.

(27) - Judgment in Case C458/03, cited in footnote 7, paragraph 67.

(28) - See my Opinion in Case C26/03, judgment cited in footnote 4, point 76.

(29) - Judgment in Case C458/03, cited in footnote 7, paragraph 66 et seq.

(30) - See my Opinion in Case C26/03, judgment cited in footnote 4, point 77.

(31) - Judgment in Case C458/03, cited in footnote 7, paragraph 65.

(32) - Judgment in Case C458/03, cited in footnote 7, paragraph 67.

(33) - See, following my Opinion, that of Advocate General Kokott in Case C-458/03, judgment cited in footnote 7, point 81.

(34) - Opinion of Advocate General Léger in Case C94/99 ARGE Gewässerschutz (judgment of 7 December 2000) [2000] ECR I-11037, point 93 (my emphasis).

(35) - Opinion of Advocate General Léger in Case C94/99 (cited in footnote 34), point 74.

(36) - Opinion of Advocate General Léger in Case C94/99 (cited in footnote 34), point 81.

(37) - Opinion of Advocate General Léger in Case C94/99 (cited in footnote 34), point 83.

(38) - Article 23 of Directive 2004/17/EC (directive cited in footnote 9).

(39) - As regards the academic commentary on this issue, which has since become the prevailing legal opinion, see: Meinrad Dreher, Public Private Partnerships und Kartellvergaberecht-Gemischtwirtschaftliche Gesellschaften, In-house-Vergabe, Betreibermodell und Beleihung Privater', NZBau 2002, p. 245 (253); Wolfram Krohn, Aus für In-house-Vergaben an gemischtwirtschaftliche Unternehmen', NZBau 2005, p. 92 (95); Opitz, Zeitschrift für Vergaberecht 2000, p. 97 (105); Ulf-Dieter Pape/Henning Holz, Die Voraussetzungen vergabefreier In-house-Geschäfte', NJW 2005, p. 2264 (2265 et seq.); Wolfgang Jaeger, Verträge kommunaler Körperschaften sowie ihrer eigenen und gemischtwirtschaftlicher Gesellschaften über Energiebezug und Kartellvergaberecht', in: Büdenbender/Kühne/Baur (Ed.), Das neue Energierecht in der Bewährung; Bestandsaufnahme und Perspektiven, Baur-FS , 2002, p. 455 (464); Christoph Riese/Andreas van den Eikel, Neues zum In-House-Geschäft - Das Ende für gemischt-wirtschaftliche Unternehmen?', Vergaberecht 2005, p. 590 (601); Kurt Weltzien, Avoiding the Procurement Rules by Awarding Contracts to an In-House Entity: The Scope of Procurement Directives in the Classical Sector', Public Procurement Law Review 2005, p. 237 (249), who rightly points out that Directive 93/38 also applies to private undertakings; Jan Ziekow/Thorsten Siegel, Die Vergaberechtspflichtigkeit von Partnerschaften der öffentlichen Hand', Vergaberecht 2005, p. 145 (148), who cast doubt on whether the 80% formula is in conformity with Community law.

(40) - See, following my Opinion, that of Advocate General Kokott in Case C458/03, judgment cited in footnote 7, point 83.

(41) - See to the same effect: Marc Gabriel/Bernd Joachimsmeier, Vergaberecht 2005, p. 103 et seq.; Holger Schröder, In-House-Vergaben zwischen Beteiligungsunternehmen der öffentlichen Hand?', NZBau 2005, p. 127 et seq.; Kurt Weltzien, Avoiding the Procurement Rules by Awarding Contracts to an In-House Entity: The Scope of Procurement Directives in the Classical Sector', Public Procurement Law Review 2005, p. 237 (248).

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(42) - See in this connection the legal definition contained in the first subparagraph of Article 1(8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), and the first subparagraph of Article 1(7) of Directive 2004/17, cited in footnote 9.

The directive applicable here does not contain such a definition making express reference to the market.

(43) - See the new Article 31(1)(b) of Directive 2004/18 and Article 40(3)(c) of Directive 2004/17.

(44) - My emphasis.

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FORM Conclusions

TREATY European Economic Community

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SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	German
NATIONA	Italy
PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl
JUDGRAP	Cunha Rodrigues
DATES	of document: 12/01/2006 of application: 09/08/2004

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Notice for the OJ

SEQ CHAPTER \h \r 1Reference for a preliminary ruling by the Tribunale Amministrativo Regionale della Lombardia (Sezione Terza) by order of 27 May 2004 in the case Carbotermo SpA against Comune di Busto Arsizio

(third party: AGESP s.p.a.)

(**Case C-340/04**)

Reference has been made to the Court of Justice of the European Communities by order of 27 May 2004 of the Tribunale Amministrativo Regionale della Lombardia, which was received at the Court Registry on 9 August 2004, for a preliminary ruling in the case of Carbotermo SpA against Comune di Busto Arsizio (third party: AGESP s.p.a.) on the following questions:

(1) Is the direct award of a contract for the supply of fuel for heating appliances in buildings owned by or within the competence of the Municipality, and relating to operation, supervision and maintenance (the main value of which lies in supply), to a joint stock company whose capital is, at present, held entirely by another joint stock company, of which the awarding Municipality is, for its part, the major shareholder (with 99.98% of the shares), or to a company (AGESP) in which a direct holding is owned not by the public authority but by another company (AGESP Holding), 99.98% of whose capital is presently owned by the public administration, compatible with Directive 93/36/EEC [1]?

(2) Must the requirement that the undertaking to which the supply contract is awarded directly carry out the essential part of its activities with the controlling authority be ascertained by applying Article 13 of Directive 93/38/EC and can it be concluded that it has been satisfied where that undertaking derives the majority of its turnover from the controlling public authority or, alternatively, in the territory of that authority?

_____

[1] - - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts OJ 1993 L 1999 of 9.8.1993, p. 1.

Judgment of the Court (Second Chamber)
of 24 November 2005
ATI EAC Srl e Viaggi di Maio Snc, EAC Srl and Viaggi di Maio Snc v ACTV Venezia SpA, Provincia di Venezia and Comune di Venezia. Reference for a preliminary ruling: Consiglio di Stato - Italy. Public service contracts - Directives 92/50/EEC and 93/38/EEC - Award criteria - The economically most advantageous tender - Observance of award criteria set out in the contract documents or the contract notice - Establishment of subheadings for one of the award criteria in the contract documents or the contract notice - Decision to apply weighting - Principles of equal treatment of tenderers and transparency. Case C-331/04.

Approximation of laws - Procedures for the award of public service contracts and procurement contracts in the water, energy, transport and telecommunications sectors - Directives 92/50 and 93/98 - Award of contracts - The most economically advantageous tender - Jury attaching specific weight to the subheadings of an award criterion set out in the contract documents - Lawfulness - Conditions

(Council Directives 92/50, Art. 36 and 93/38, Art. 34)

Article 36 of Directive 92/50 relating to the coordination of procedures for the award of public service contracts and Article 34 of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents were prepared, provided that that decision :

- does not alter the criteria for the award of the contract set out in the contract documents;

- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;

- was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

(see para. 32, operative part)

In Case C-331/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 6 April 2004, received at the Court on 29 July 2004, in the proceedings

ATI EAC Srl e Viaggi di Maio Snc,

EAC Srl,

Viaggi di Maio Snc

v

ACTV Venezia SpA,

Provincia di Venezia,

Comune di Venezia,

intervening parties:

ATI La Linea SpA-CSSA,

THE COURT (Second Chamber),

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composed of C.W.A. Timmermans, President of Chamber, C. Gulmann (Rapporteur), R. Schintgen, G. Arestis and J. Kluka, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 July 2005,

after considering the observations submitted on behalf of:

- ATI EAC Srl e Viaggi di Maio Snc, EAC Srl and Viaggi di Maio Snc, by L. Visone, avvocato,

- ACTV Venezia SpA, by A. Bianchini and E. Romanelli, avvocati,

- ATI La Linea SpA-CSSA, by P. Zanardi and G. Fiore, avvocati,

- the Netherlands Government, by H.G. Sevenster and C.M. Wissels, and D.J.M. de Grave, acting as Agents,

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

- the Commission of the European Communities, by D. Recchia and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

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

Article 36 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and Article 34 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision:

- does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;

- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;

- was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

1. The reference for a preliminary ruling concerns the interpretation of Article 36 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and Article 34 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

2. The reference was made in the course of proceedings brought by ATI EAC Srl e Viaggi di Maio Snc and those two companies individually against ACTV Venezia SpA (ACTV'), the Province di Venezia and the Commune di Venezia over the award of a contract for public passenger transport services.

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Legal context

3. Article 36 of Directive 92/50, headed Criteria for the award of contracts', reads as follows:

1. ... the criteria on which the contracting authority shall base the award of contracts may be:

(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) ...

2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.'

4. Under Article 34 of Directive 93/38:

1. ... the criteria on which the contracting entities shall base the award of contracts shall be:

(a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

(b) ...

2. In the case referred to in paragraph 1(a), contracting entities shall state in the contract documents or in the tender notice all the criteria which they intend to apply to the award, where possible in descending order of importance.'

The main proceedings and the questions referred for a preliminary ruling

5. On 6 April 2002 ACTV published in the Official Journal of the European Communities a notice concerning a public contract for passenger transport in three lots. The dispute in the main proceedings concerns Lot No 1 relating to the urban transport service for the town of Mestre for the period from 16 June 2002 to 31 December 2003.

6. In that tender notice it was stated, under the heading Award Criteria', that ACTV had decided to award the contract to the bidder submitting the economically most advantageous tender.

7. The applicants in the main proceedings applied to participate in the award procedure. By letter of 7 May 2002, ACTV invited them to submit a bid for Lot No 1. The conditions of participation (disciplinare di gara', hereinafter the contract documents') attached to that letter laid down the following four award criteria on the basis of which the economically most advantageous tender was to be determined:

1. cost per kilometre for the services mentioned in Annexes A, B and C to the contract documents:

- max. 60 points allocated on the basis of the ratio:...

2. cost per kilometre for services in addition to those mentioned in Annexes A, B and C to the contract documents:

- max. 10 points allocated on the basis of the ratio:...

3. organisational procedures and support structures used in carrying out the service, as they appear in the document referred to in paragraph 3(10)(6) of the terms and conditions:

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- max. 25 points allocated by ACTV at its absolute discretion.

4. possession of a certificate of conformity...: 5 points.'

8. As regards the third and fourth criteria for the award of the contract, the contract documents provided in paragraph 3(10)(6) that the tender papers must contain a descriptive account of the organisation and of the logistical and support structures to be used in the management of the services which are the subject-matter of the contract, if it is awarded; that account had to include at least the following information:

- depots and/or areas where buses can be parked, owned by or available to the undertaking, within the territory of the Provincia di Venezia ...;

- procedures for supervising the service supplied and number of employees supervising the service itself;

- number of drivers on the route and kind of licence held;

- number of places of business owned by or available to the undertaking (other than depots) within the territory of the Provincia di Venezia ...;

- number of employees engaged in organising drivers' shifts'.

9. Subsequently, on 29 May 2002, that is to say, after expiry of the period prescribed for the submission of tenders and before the envelopes were opened, when it already had a list of the names of the undertakings which had put in a tender for the lot at issue in the main proceedings, the jury, in its report No 1, weighted the 25 points available to be awarded for the third criterion by dividing them into five subheadings corresponding to each of the indications to be given in the report included in the tender submitted by the bidders. The number of points to be awarded for each of the subheadings was broken down as follows: eight, seven and six points for the first, second and third subheadings respectively and two points for each of the fourth and fifth subheadings.

10. On 30 May 2002, having rejected one of the tenders submitted, the jury proceeded to examine those from the applicants in the main proceedings and from ATI La Linea SpA-CSSA (La Linea'). The latter, with 86.53 points, was awarded the contract, the applicants in the main proceedings having obtained 83.5 points.

11. Taking the view that La Linea was awarded the contract solely as a result of the weighting ex post facto of the number of points liable to be awarded for the third criterion, the applicants in the main proceedings contested the measures and decisions taken by the jury before the Tribunale amministrativo regionale on the basis, inter alia, of a plea of breach of Article 36(2) of Directive 92/50.

12. The Tribunale amministrative regionale dismissed the action, finding, inter alia, that the award criteria and the matters to be taken into account for the purposes of awarding the contract at issue in the main proceedings were indicated in the contract documents.

13. The applicants in the main proceedings appealed against that judgment to the Consiglio di Stato, which decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

1. Is it lawful to interpret [Article 36 of Directive 92/50 and Article 34 of Directive 93/38] as a flexible rule allowing the contracting authority, where the award is to be made on the basis of the economically most advantageous tender, to fix the criteria in a general way in the tender notice or the contract documents, leaving it to the jury to specify or supplement those criteria, if need be, provided always that such specifying or supplementing is carried out before the packets containing the tenders have been opened and that such action introduces nothing new in relation

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to the criteria fixed in the tender notice or, on the contrary, must that provision be interpreted as a rigid rule requiring the contracting authority to determine, analytically, the criteria for the award of the contract in the tender notice or the contract documents, before the prequalification stage or the invitation to tender, and as meaning that the jury may not subsequently in any way do anything to specify or supplement those criteria or to create subheadings or sub-marking, since for reasons of transparency every piece of information concerning the criteria for the award must appear in the notice or contract documents?

In consequence is the traditional line of interpretation followed in the past in the Consiglio di Stato's case-law, which permits the jury to take action to supplement those criteria before the packets containing the tenders are opened, lawful in the light of Community law?

2. Is it lawful, in the light of that provision loosely interpreted having regard to the adverbial phrase where possible, for the contracting authority to adopt terms and conditions for the tender that provide, with regard to one of the criteria for the award (in this instance, the organisational and support procedures), with reference to a complex series of criteria for which the tender notice did not allocate individual points, so that they were in that sense in part indeterminate, that the points should be allocated at the absolute discretion of the contracting authority, or does not that provision in any case require that the criteria should as a general rule be formulated absolutely definitively, which is not compatible with the fact that those criteria were not allocated separate points in the notice; if it is lawful, because the provision is considered to be flexible and because it is not essential to give points to every item, is it permissible, where the tender notice does not give express power to the jury, for the latter to specify or supplement the criteria (simply by allocating individual importance and relative weight to every single item that the notice intended to be assessed by the overall allocation of a maximum of 25 points), or is it not on the contrary necessary to apply the conditions of the tender literally, allocating the points on an overall assessment of the various and complex matters taken into consideration by the lex specialis?

3. In any case, is it lawful, in the light of that provision, to give the jury which is to assess the tenders, regardless of the manner in which criteria have been formulated in the tender notice, in a procedure for an award on the basis of the economically most advantageous tender, the power, but only in respect of the complexity of the matters to be assessed, to restrict its own actions in a general way, by specifying the parameters for the application of the criteria previously determined in the tender notice, and may such power held by the jury be exercised by creating subheadings, sub-points, or simply by setting more specific criteria for the application of the criteria laid down generally in the notice or the contract documents, before of course the envelopes have been opened?'

The application for reopening of the oral procedure

14. By a document lodged at the Registry of the Court of Justice on 19 September 2005, ACTV requested the Court of Justice to order the reopening of the oral procedure under Article 61 of the Rules of Procedure.

15. In support of its application, ACTV essentially argued that, in his Opinion, the Advocate General did not answer the main questions asked by the referring court. For that reason and to aid understanding of the questions referred in the light of the specific nature of the dispute in the main proceedings, it wished to submit further observations.

16. In that regard, it should be recalled that the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, order that the oral procedure be reopened, in accordance with Article 61 of the Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been

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debated between the parties (see order of 4 February 2000 in Case C-17/98 Emesa Sugar [2000] ECR I-665, paragraph 18, and Case C-147/02 Alabaster [2004] ECR I-3101, paragraph 35).

17. In the present case, the Court, having heard the Advocate General, takes the view that it had all the information necessary to answer the questions referred and that that information had been debated before it. Consequently, the application to reopen the oral procedure must be rejected.

The questions

18. As a preliminary point, it must be observed, as the referring court pointed out, that, by the decision at issue in the main proceedings, the jury simply decided how the 25 points allocated for the third award criterion had to be distributed among the five subheadings in the contract documents.

19. Accordingly, the questions referred should be understood to relate essentially to the question whether Article 36 of Directive 92/50 and Article 34 of Directive 93/38 must be interpreted as meaning that Community law precludes a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those subheadings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared.

20. First, as the Austrian Government rightly observed, the provisions of Article 36 of Directive 92/50 and Article 34 of Directive 93/38 cannot be applied simultaneously to the same set of facts. However, the provisions cited in the questions referred for a preliminary ruling have substantially the same wording (see Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, paragraph 91). Therefore, the Court can give a proper answer to the question as reformulated without there being any need for it to rule as to which of the two directives is applicable in the case in the main proceedings.

21. Next, it must be observed that the award criteria defined by a contracting authority must be linked to the subject-matter of the contract, may not confer an unrestricted freedom of choice on the authority, must be expressly mentioned in the contract documents or the tender notice, and must comply with the fundamental principles of equal treatment, non-discrimination and transparency (see Concordia Bus , cited above, paragraph 64).

22. In the present case, it must be observed, in particular, that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives (see Concordia Bus Finland , paragraph 81) and that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed (see Case C-19/00 SIAC Construction [2001] ECR I7725, paragraph 34).

23. It must also be observed that, in accordance with Article 36 of Directive 92/50 and Article 34 of Directive 93/38, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope (see Concordia Bus Finland , paragraph 62).

24. Similarly, in order to ensure respect for the principles of equal treatment and transparency, it is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders (see, to that effect, Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 88, and Case C470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 98).

25. Finally, it is for the national court to assess, in the light of these rules and principles, whether, in the case in the main proceedings, the jury infringed Community law by applying a weighting to the various subheadings of the third criterion for the award of the contract.

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26. In that regard, it must be determined first whether, in the light of all the relevant facts of the case in the main proceedings, the decision applying such weighting altered the criteria for the award of the contract set out in the contract documents or the contract notice.

27. If it did the decision would be contrary to Community law.

28. Second, it must be determined whether the decision contains elements which, if they had been known at the time the tenders were prepared, could have affected that preparation.

29. If it did the decision would be contrary to Community law.

30. Third, it must be determined whether the jury adopted the decision to apply weighting on the basis of matters likely to give rise to discrimination against one of the tenderers.

31. If it did the decision would be contrary to Community law

32. Accordingly, the answer to the questions referred must be that Article 36 of Directive 92/50 and Article 34 of Directive 93/38 must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision:

- does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;

- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;

- was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

Costs

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

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Gulmann

DATES of document: 24/11/2005
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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 8 September 2005. ATI EAC Srl e Viaggi di Maio Snc, EAC Srl and Viaggi di Maio Snc v ACTV Venezia SpA, Provincia di Venezia and Comune di Venezia. Reference for a preliminary ruling: Consiglio di Stato - Italy. Public service contracts - Directives 92/50/EEC and 93/38/EEC - Award criteria - The economically most advantageous tender - Observance of award criteria set out in the contract documents or the contract notice - Establishment of subheadings for one of the award criteria in the contract documents or the contract notice - Decision to apply weighting - Principles of equal treatment of tenderers and transparency. Case C-331/04.

1. This reference for a preliminary ruling concerns the interpretation of Article 36(2) of Council Directive 92/50/EEC and Article 34(2) of Council Directive 93/38/EEC, which harmonise the methods of awarding public service contracts (2) and those concluded in certain sectors. (3)

2. The reference from the Consiglio di Stato relates to the award of a contract to the economically most advantageous offer and the guidelines for making the decision, and raises the question of the powers of the contracting authority and of the jury, so as to establish whether the former may simply set out the parameters in the tender notice or the contract documents and leave it to the latter to specify and supplement them.

3. In order to give a reply to that court, it is necessary to observe mandatory principles governing public procurement, which seek to introduce objective rules of participation and allocation, with transparent procedures in which discriminatory measures and clauses are prohibited.

I - The provisions requiring interpretation

4. Both directives, which focus on the equal treatment of bidders (Article 3(2) of Directive 92/50 and Article 4(2) of Directive 93/38), provide neutral methods of granting contracts, either based on the lowest price or on the most advantageous tender from an economic point of view (Articles 36(1) and 34(1) respectively).

5. As regards the latter, Article 36(2) of Directive 92/50 provides that the contracting authority shall state in the contract documents or in the tender notice the award criteria... in descending order of importance'. Article 34(2) of Directive 93/38 is expressed in almost identical terms.

II - The facts in the main proceedings and the questions referred for a preliminary ruling

6. The temporary association of undertakings constituted by EAC Srl and Viaggi di Maio' Snc (EAC') took part in a negotiated procedure arranged by the Azienda del Consorcio Trasporti Veneciano (ACTV'), using the second of the methods stated, pursuant to Article 24(1)(b) of Legislative Decree No 158/1995, (4) for the subcontracting of public passenger transport services. (5)

7. The contract documents contained the instructions for identifying the best tender: the third instruction related to the organisational procedures and support structures for implementing the service, which the jury could assess with a maximum of 25 points. (6) It was necessary to state: (a) the depots and/or areas where buses could be parked, (b) the procedures for supervising the service and the number of employees supervising the service, (c) the number of regular drivers and the type of licence which authorises them to drive coaches, (d) the company's premises in the province of Venice and (e) the staff engaged in organising drivers' shifts.

8. After the envelopes had been submitted and before they had been opened but, in any event, knowing who the candidates were, the jury allocated the points between the five aforementioned headings, giving 8 to the first, 7 to the second, 6 to the third and 2 to each of the other two.

9. The service was awarded to the temporary association of undertakings La Línea', which received 86.53 points; EAC received only 83.50 points and therefore challenged the result before the Tribunale

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Amministrativo Regionale del Veneto (Regional Administrative Court, Veneto) alleging that its opponent won as a result of the distribution ex post facto of points relating to the organisational procedures and support structures, and relying on Article 36 of Directive 92/50 and Article 24(1)(b) of Legislative Decree 158/1995.

10. The Tribunale dismissed the action by judgment of 15 April 2003, against which the EAC brought an appeal before the Consiglio di Stato, whose case-law approves the practice of giving award juries some freedom of action to introduce factors, to add specific detail to the general guidelines set out in the tender notice and to provide for subheadings in the main categories already defined.

11. In order to establish whether Article 36 of Directive 92/50 and Article 34 of Directive 93/38 permit that interpretation, the Consiglio di Stato refers the following questions to the Court of Justice:

(1) Is it lawful to interpret those provisions as flexible rules allowing the contracting authority, where the award is to be made on the basis of the economically most advantageous tender, to fix the criteria in a general way in the tender notice or the contract documents, leaving it to the jury to specify or supplement those criteria, if need be, provided always that such specifying or supplementing is carried out before the packets containing the tenders have been opened, and does not alter those criteria or, on the contrary, must those provisions be interpreted as a rigid rule requiring the contracting authority to determine, analytically, the criteria for the award of the contract in the tender notice or the contract documents, and in any case before the prequalification stage or the invitation to tender, and as meaning that the jury may not subsequently do anything to specify or supplement those criteria or to create subheadings or sub-marking since for reasons of transparency every piece of information concerning the criteria for the award must appear in the notice or contract documents?

In short, is the traditional line of interpretation followed in the past in the Consiglio di Stato's case-law, which permits the jury to supplement the award criteria before the envelopes are opened, lawful in the light of Community law?

(2) Is it lawful, in the light of those provisions loosely interpreted having regard to the adverbial phrase where possible, for the contracting authority to adopt conditions for participation that provide, with regard to one of the criteria for the award (in this instance, the organisational and support procedures), with reference to a complex series of parameters for which the tender notice does not allocate individual points, so that they were in that sense in part indeterminate, that the points should be allocated at the absolute discretion of the contracting authority, or do not those provisions in any case require that the criteria should as a general rule be formulated absolutely definitively, which is not compatible with the fact that those criteria were not allocated separate points in the notice; if it is lawful, because the provisions are considered to be flexible and because it is not essential to give points to every item, is it permissible, where the tender notice does not give express power to the jury, for the latter to specify or supplement the criteria (simply by allocating individual importance and relative weight to every single item that the notice intended to be assessed by the overall allocation of a maximum of 25 points), or is it not on the contrary necessary to apply the conditions of the tender literally, allocating the points on an overall assessment of the various and complex matters taken into consideration by the lex specialis ?

(3) Is it lawful, in the light of [those provisions] to give the jury which is to assess the tenders, regardless of the manner in which criteria have been formulated in the tender notice, in a procedure for an award on the basis of the economically most advantageous tender, the power, in respect of the complexity of the matters to be assessed, to restrict its own actions, by specifying the parameters for the application of the criteria previously determined in the tender notice, and may such power be exercised by creating subheadings, sub-points, or simply by setting more specific criteria than

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those laid down in the tender notice or the contract documents, before the envelopes have been opened?'

III - Procedure before the Court of Justice

12. Written observations were submitted, within the time-limit laid down in Article 20 of the EC Statute of the Court of Justice, by the Commission, the Austrian and Netherlands Governments, EAC and ACTV, who presented oral argument at the hearing held on 7 July 2005.

IV - Admissibility of the questions referred for a preliminary ruling

13. The Austrian Government and ACTV contend that the reference for a preliminary ruling is inadmissible, for different reasons and to different extents.

14. The former complains that the order for reference is vague as to the provisions of which it requires an interpretation, and infers from page 10 of the order that Article 34 of Directive 93/38 is unconnected with the main action. Neither of these criticisms is persuasive, since the Consiglio di Stato raises its doubts with regard to the rule laid down in Article 34 of Directive 93/38 and, in particular, to the similar rule in Article 36 of Directive 92/50', indicating that the appeal refers to the wording of Article 36 of Directive 92/50, which is similar to that of Article 34 of Directive 93/38, applicable to the present case, even if it is not expressly quoted by the appellant'.

15. In a way, the Austrian Government is not seeking the rejection in limine of the proceedings, but wants the analysis to be limited to the second of the provisions cited, which has the same meaning as Article 34 of Directive 93/38. In the circumstances, that claim of admissibility may only be described as superfluous because whatever interpretation is suggested will suit both provisions, and it will be up to the national court to choose between them; the Court of Justice must not intervene in that task, unless the facts are incompatible with Community law or the doubt raised with regard to interpretation is based on mere hypothesis, unconnected with the true circumstances of the case.

16. ACTV's claim of inadmissibility falls within the latter category, as it only gives the appearance of having more weight. ACTV claims that the Italian court's interest in knowing whether the jury may supplement' or specify' the award criteria laid down in the tender notice or the contract documents is irrelevant because, in this case, the jury did not carry out such operations; according to the order for reference, it merely created subcriteria of calculation which define the terms of that document but do not add to it (final paragraph in Point 5).

17. Irrespective of the problem of deciding whether the question referred for a preliminary ruling is hypothetical, (7) this argument is contradictory because it accepts that the approved guidelines were defined more closely and then, immediately afterwards, explains that the Consiglio di Stato does not need to establish whether Article 36 of Directive 92/50 and Article 34 of Directive 93/38 authorise that subsequent operation. Moreover, the questions are formulated in such a way as to highlight the legality of the Italian legislation applicable to the case, which accords the jury powers to make additions before the envelopes are opened. The reference for a preliminary ruling is therefore appropriate.

V - The rules governing public procurement

18. The Consiglio di Stato wishes to know whether, in a procedure for an award on the basis of the economically most advantageous tender, the provisions to which it refers allow the contracting authority to fix the criteria for assessing the tenders in a general way in the tender notice or contract documents, leaving it to the jury to specify or supplement them (question 1).

19. It also seeks to clarify whether, in the light of that broad interpretation and having regard to the words where possible' used in the two articles at issue, the Authority may allocate points to one of the criteria for assessment, to be divided between complex parameters, which are stated

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but without indication of their relative weight, so that their order of priority is determined later by the jury, which may restrict its own actions by specifying the rules previously determined in the tender notice, in particular by creating subheadings or subpoints (questions 2 and 3).

20. To dispel those doubts, it is necessary to follow the advice given in the opinion in Lombardini and Mantovani (8) to recall the principles underlying selection of a contractor, in order better to understand Article 36 of Directive 92/50 and Article 34 of Directive 93/38.

21. The Directives on public contracts, each one concerned with a specific field, aim to promote the development of open competition by realising the four fundamental freedoms of European integration (free movement of goods, persons, services and capital). (9) Those directives aim to give effect to the requirements set out by the Community legislature in Articles 9, 52, 59 and 73B of the EC Treaty (now, after amendment, Articles 23 EC, 43 EC, 49 EC and 56 EC).

22. Giving effect to those requirements and the pursuit of that objective can only be achieved if those who wish to be awarded public contracts can apply on an equal basis, without any hint of unjustified bias. To this end, a system based on objectivity, in terms of both substance and form, is indispensable. Such a system must be established, as regards substance, by setting objective criteria for participation in the tender and award of contracts, (10) and as regards form, by making provision for transparent procedures in which publication is the norm.

23. The criteria for selection of candidates refer to the professional, economic and technical suitability of applicants. To rule out any discriminatory effect, it is necessary in each case to predetermine the rules governing the selection procedure, as well as the levels of skill and experience required. (11)

24. Once the tenderers qualifying for award of the contract have been selected, that award is subject to objective parameters of assessment, whether the lowest bid or the economically most advantageous tender. If the second criterion is applied, the contracting authority sets out the award criteria in the contract documents or tender notice, (12) stating their respective importance, in accordance with the provisions with which this reference for a preliminary ruling is concerned.

25. Consequently, the system leaves nothing to chance or subject to any arbitrary decision on the part of the body which makes the final decision. Equality of treatment for tenderers requires that any person who wishes to be awarded a contract must know beforehand what he must do to be awarded it, so that the awarding body is confined, given the discretion involved in the technical evaluation, to applying parameters set out in the lex contractus , both those rules governing public contracts in a general sense, and those which involve in particular a specific contract.

26. To ensure that such a system is effective and that there is no discrimination, it is not sufficient to set objective criteria for the procedures, but application of the criteria must be based on transparency. This must apply from the time of the tender notice, in the contract documents and, finally, in the selection stage itself, (13) both in the open procedures and the restricted procedures.

VI - The reply to the questions referred for a preliminary ruling

27. Some of the claims made at the hearing have taken the Court of Justice far from Luxembourg, to an Italian court where the main action is to be decided, but it must be made clear that it is not for this European Court, but for the Consiglio di Stato, to determine whether the transport services contract in question was awarded in accordance with the law.

28. This Court has a different, more complex and more important task: to determine whether the articles for which an interpretation is sought permit, in the light of the aforementioned principles, situations in which the jury does not merely assess - although, inevitably, with some latitude - the tenders received in accordance with the rules set out in the tender notice or the contract documents,

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because it has been given the additional role of specifying, adding to and supplementing them. In short, it is necessary to ascertain whether that body, whose function is to implement, can acquire quasi-legislative' responsibilities, by defining the content of the lex contractus in some way.

A - The first question referred for a preliminary ruling

29. Article 36 of Directive 92/50 and Article 34 of Directive 93/38 are rules for awarding contracts, which lay down for that purpose two basic criteria which have already been mentioned: the lowest price and the economically most advantageous tender. The former, because it is fixed, leaves no room for assessment by the awarding body. The latter, however, constitutes an undefined legal concept, which the contracting authority must specify in each case, to which end Articles 36(1)(a) and 34(1)(a) provide a non-exhaustive list of various points which must be included in the contract documents or the tender notice in descending order of importance, as required under Articles 36(2) and 34(2).

30. It may therefore be inferred that the criteria which the jury must take into consideration when selecting the most advantageous tender must be laid down by the contracting authority in the tender notice or the contract documents, and they cannot be fixed by reference, nor can that task be deferred until a later time.

31. This, for Community case-law, is an inescapable corollary of the principles of transparency, publicity and non-discrimination. The assessment criteria must be appropriate for identifying the economically most advantageous tender, so they must necessarily be linked to the subject-matter of the contract (14) and be included in the aforementioned documents, (15) in such a way as to allow all reasonably wellinformed and normally diligent tenderers to interpret them in the same way; (16) their order of importance should also be stated. (17)

32. Thus, the contracting authority does not have complete freedom of action: it does not have a discretionary power to establish formulae for assessing the tenders; nor does it have the capacity to choose when to publicise them, or to change them during the selection procedure, which also prevents it from altering their meaning. (18)

33. In the light of all those considerations, the jury must not be permitted to initiate any changes and its participation must be limited to applying the criteria prepared beforehand by the contracting authority, of which all the tenderers are duly aware, because they have been subject to transparency and have been publicised. Consequently, the specification and supplementation activities to which the Consiglio di Stato refers in its first question, to the extent that they involve creating new schemes, not merely implementing those already established, infringe the spirit of Directives 92/50 and 93/38, because they fail to have regard to the grounds on which they are based.

34. It is irrelevant that that task is carried out before the envelopes are opened, because equal treatment is required not only in the decision but also in the participation, so that the lack of complete information regarding the conditions of the selection procedure means less publicity, which is likely to leave out of the running possible competitors who, if they had had access to all the requirements, might have decided to compete. (19) Furthermore, as the Commission and the Austrian Government suggest, that possibility would give the body responsible for identifying the most acceptable offer the ability to influence the end result, thus jeopardising impartiality, because, when it comes to calculating the final totals, although it may not know the content of the envelopes, it does know who the candidates are, and might tip the scales in favour of one of them.

35. In short, under Article 36(2) of Directive 92/50 and Article 34(2) of Directive 93/38, the contracting authority must state the award criteria, in detail, in the tender notice or contract documents; the jury is not authorised to do anything other than to apply them and is precluded from making any alterations, even if this is done before the envelopes are opened.

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B - The second and third questions

36. All the weighting factors must therefore be announced in advance, in decreasing order of importance.

37. Consequently, the criteria for awarding the contract must always appear in the tender notice or the contract documents, and the jury may not eliminate any of them, add others or subdivide those initially laid down. As I have already pointed out, it does not have competence to introduce new criteria or to alter or supplement those already existing.

38. If it is impossible to weight the various award criteria in the tender notice or contract documents, it might be thought that this was a task for the jury, but the wording of Article 36(2) of Directive 92/50 and Article 34(2) of Directive 93/38 does not permit it. This accords with the general principles of public procurement, because it might change the parameters and influence the outcome of the selection procedure. In that event, it is more in keeping with the spirit of directives to entrust that task to an expert, who is not involved in the final decision. (20)

39. Directives 2004/18 and 2004/17/EC, (21) both currently in force, confirm these views, requiring the contracting authorities, in Articles 53 and 55 respectively, to state each of the criteria selected for identifying the most advantageous offer, using a range of points with an appropriate maximum spread. Where this is not possible for demonstrable reasons, the contracting authority is required to indicate the criteria in descending order of importance. Thus, no competence is conferred on the jury to intervene in this matter.

40. There is all the more reason for rejecting a modus operandi such as the one adopted in the main proceedings, in which the contracting authority has laid down a criterion to be assessed on the basis of various factors to which it allocates an overall number of points but no order of priority, leaving it to the jury not only to distribute those points but also to grade them.

41. I therefore consider that, where it is impossible to state the award criteria in order of importance in the tender notice or contract documents, Article 36(2) of Directive 92/50 and Article 34(2) of Directive 93/38 do not allow the jury to do so subsequently, even if it does so before the envelopes are opened; accordingly, the jury may not assume rules to govern that intervention, nor may it distribute the points initially set out in those documents between the various parameters, by arranging these in order of importance.

VII - Conclusion

42. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the questions referred by the Consiglio di Stato:

(1) Article 36(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and Article 34(2) of Council Directive 93/38/EC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors require the contracting authority to set out the award criteria, in detail, in the tender notice or contract documents; the jury is not authorised to do anything other than to apply them and is precluded from making any alterations, even if this is done before the envelopes containing the offers are opened.

(2) Where it is impossible to state the award criteria in order of importance in the tender notice or contract documents, those provisions do not allow the jury to do so subsequently, even if it does so before the envelopes are opened; accordingly, the jury may not assume rules to govern that intervention, nor may it distribute the points initially allocated between the various parameters, by arranging these according to their relative importance.

(1) .

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(2) - Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(3) - Directive of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

(4) - Gazzeta Ufficiale della Repubblica No 104, of 6 May 1995. That article provides that in the case of the most economically advantageous tender, decided on the basis of various criteria, which vary according to the market..., the contracting authorities shall state, in the contract documents or in the tender notice, all the award criteria... in descending order of importance'.

(5) - The Mestre urban transport service, lot No 1, from 16 June 2002 to 31 December 2003.

(6) - Paragraph 3.10, No 6 of the contract documents.

(7) - The only case-law which has prohibited hypothetical questions - established in Case 104/79 Foglia v Novello [1980] ECR 745 and Case 244/80 Foglia v Novello [1981] ECR 3045 - has not been upheld subsequently and has drawn criticism from the most authoritative academic lawyers (Barav. A., Preliminary Censorship? The Judgment of the European Court in Foglia v Novello ', in European Law Review 1980, pp. 443 to 468).

(8) - Joined Cases C285/99 and C286/99 [2001] ECR I9233.

(9) - In particular, the second recital in the preamble to Directive 92/50 and the first of the preamble to Directive 93/38. The same notion is found in the second recital in the preamble to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) which will replace inter alia Directive 92/50 when the time-limit for its transposition expires in 2006.

(10) - The distinction between the two kinds of criteria, which was drawn by Advocate General Darmon in his Opinion in Case 31/87 Beentjes [1988] ECR 4635, is also contained in Directive 2004/18 (recitals 39 and 46).

(11) - Articles 29 to 35 of Directive 92/50 and Articles 30 to 33 of Directive 93/38 refer to this aspect.

(12) - The contractor is to be selected according to circumstances connected with the subject-matter of the contract, which may relate to quality, technical merit, aesthetic and functional characteristics, technical assistance and service, delivery date, delivery period or period of completion, cost-effectiveness, price or running costs (Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38).

(13) - Article 15 and corroborating articles of Directive 92/50, and also Article 21 et seq. of Directive 93/38.

(14) - See to this effect Case C513/99 Concordia Bus Finland [2002] ECR I7215, paragraph 59, applying Article 36(1)(a) of Directive 92/50.

(15) - The judgment in Beentjes stated that a general reference to a provision of national legislation cannot satisfy the publicity requirement (paragraph 35).

(16) - Case C19/00 SIAC Construction [2001] ECR I7725, paragraph 42. The judgment in Case C448/01 EVN and Wienstrom [2003] ECR I14527, paragraph 57, confirms this approach.

(17) - Case C470/99 Universale-Bau [2002] ECR I11617, paragraph 97.

(18) - This last consequence is reflected in the aforementioned judgments in SIAC Construction

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, paragraph 43, and EVN and Wienstrom , paragraph 92.

(19) - The judgments in Case C87/94 Commission v Belgium [1996] ECR I2043, paragraph 88, and in Universale-Bau , paragraph 98, give as grounds for the obligation imposed on the contracting authorities the expediency of enabling potential tenderers to be aware, before preparing their tenders, of the criteria to be taken into account in selecting the best offer and the relative importance of those criteria. Moreover, that requirement ensures the observance of the principles of equal treatment and of transparency.

(20) - This was implicitly acknowledged by the judgment in SIAC Construction , to which I have already referred, which stated that the opinion of an expert on a factual matter that will be known precisely only in the future guarantees that the criteria are applied objectively and uniformly to all tenderers (paragraph 44).

(21) - Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) which, when the time-limit for its transposition expires, will replace Directive 93/38.

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31992L0050-A36P1LA : N 24
31992L0050-A36P2 : N 1 5 35 38 41
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31993L0038 : N 33
31993L0038-A04P2 : N 4
31993L0038-A21 : N 26
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Notice for the OJ

Reference for a preliminary ruling by the Consiglio di Stato, in sede giurisdizionale (Sesta Sezione), by order of that court of 6 April 2004 in the case of A.T.I. E.A.C. srl and VIAGGI DI MAIO SNC against A.C.T.V. Venezia spa

(Case C-331/04)

Reference has been made to the Court of Justice of the European Communities by order of the Consiglio di Stato, in sede giurisdizionale, Sesta Sezione (Council of State, Judicial Division, Sixth Chamber), of 6 April 2004, received at the Court Registry on 29 August 2004, for a preliminary ruling in the case of A.T.I. E.A.C. srl and VIAGGI DI MAIO SNC against A.C.T.V. Venezia spa on the following questions:

'1. Is it lawful to interpret those provisions as flexible rules allowing the contracting authority, where the award is to be made on the basis of the economically most advantageous tender, to fix the criteria in a general way in the tender notice or the contract documents, leaving it to the jury to specify or supplement those criteria, if need be, provided always that such specifying or supplementing is carried out before the packets containing the tenders have been opened and that such action introduces nothing new in relation to the criteria fixed in the tender notice or, on the contrary, must that provision be interpreted as a rigid rule requiring the contracting authority to determine, analytically, the criteria for the award of the contract in the tender notice or the contract documents, and in any case before the prequalification stage or the invitation to tender, and as meaning that the jury may not subsequently in any way do anything to specify or supplement those criteria or to creating subheadings or sub-marking, since for reasons of transparency every piece of information concerning the criteria for the award must appear in the notice or contract documents.

In short, is the traditional line of interpretation followed in the past in the Consiglio di Stato's case-law, which permits the jury to take action to supplement the criteria, lawful in the light of Community law?

2. Is it lawful, in the light of that provision loosely interpreted having regard to the adverbial phrase "where possible", for the contracting authority to adopt conditions for participation that provide, with regard to one of the criteria for the award (in this instance, the organisational and support procedures), with reference to a complex series of criteria for which the tender notice did not allocate individual points, so that they were in that sense in part indeterminate, that the points should be allocated at the absolute discretion of the contracting authority, or does not that provision in any case require that the criteria should as a general rule be formulated absolutely definitively, which is not compatible with the fact that those criteria were not allocated separate points in the notice; if it is lawful, because the provision is considered to be flexible and because it is not essential to give points to every item, is it permissible, where the tender notice does not give express power to the jury, for the latter to specify or supplement the criteria (simply by allocating individual importance and relative weight to every single item that the notice intended to be assessed by the overall allocation of a maximum of 25 points), or is it not on the contrary necessary to apply the conditions of the tender literally, allocating the points on an overall assessment of the various and complex matters taken into consideration by the lex specialis?

3. In any case, is it lawful, in the light of that provision, to give the jury which is to assess the tenders, regardless of the manner in which criteria have been formulated in the tender notice, in a procedure for an award on the basis of the economically most advantageous tender, the power, but only in respect of the complexity of the matters to be assessed, to restrict its own actions in a general way, by specifying the parameters for the application of the criteria previously determined in the tender notice, and may such power held by the jury be exercised by creating subheadings, sub-points, or simply by setting more specific criteria for the application of the criteria laid down generally in the notice or the contract documents, before of course the envelopes have been opened?'

_____

Judgment of the Court (Fourth Chamber)
of 13 September 2007
Commission of the European Communities v Italian Republic. Failure to fulfil obligations - Freedom of establishment and freedom to provide services - Public service concessions - Renewal of 329 horse-race betting licences without inviting competing bids - Requirements of publication and transparency. Case C-260/04.

In Case C260/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 June 2004,

Commission of the European Communities, represented by K. Wiedner, C. Cattabriga and L. Visaggio, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I. M. Braguglia, acting as Agent, and G. De Bellis, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

supported by:

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, E. Juhasz, R. Silva de Lapuerta, G. Arestis (Rapporteur) and J. Malenovsku, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 29 March 2007

gives the following

Judgment

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

1. Declares that, by renewing 329 licences for horse-race betting operations without inviting any competing bids, the Italian Republic failed to fulfil its obligations under Articles 43 and 49 EC and, in particular, infringed the general principle of transparency and the obligation to ensure a sufficient degree of advertising.

2. Orders the Italian Republic to pay the costs.

1. By its application, the Commission of the European Communities seeks a declaration by the Court that, by renewing 329 licences for horse-race betting operations without inviting any competing bids, the Italian Republic has failed to fulfil its obligations under the EC Treaty and has,

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in particular, infringed the general principle of transparency and the publication requirement resulting from Articles 43 and 49 EC.

Legal context

National legislation

2. In Italy, horse-race betting and gaming operations were originally run exclusively by the Unione Nazionale per l'Incremento delle Razze Equine (National Union for the Improvement of Horse Breeding, 'UNIRE'), which had the option of operating the services of collecting and taking bets directly or delegating them to third parties. The UNIRE entrusted the operation of those services to bookmakers.

3. Law No 662 of 23 December 1996 (ordinary supplement to the GURI No 303, of 28 December 1996) subsequently assigned responsibility for the organisation and management of horse-race betting and gaming to the Ministry of Finance and the Ministry of Agriculture, Food and Forestry Resources, which were authorised either to operate the activity directly or through public bodies, companies or bookmakers appointed by them. Paragraph 78 of Article 3 of Law No 662 states that there is to be a reorganisation, by way of regulation, of the organisational, functional, fiscal and penal aspects of horse-race betting and gaming, as well as the sharing out of revenue from such betting.

4. In implementation of Article 3 of Law No 662, the Italian Government adopted Presidential Decree No 169 of 8 April 1998 (GURI No 125 of 1 June 1998, 'Decree No 169/1998'), which provided in Article 2 that the Ministry of Finance, in agreement with the Ministry of Agricultural and Forestry Policy, was to award licences for horse-race betting operations to natural persons or companies fulfilling the relevant conditions by means of calls for tender organised in accordance with Community rules. As a transitional measure, Article 25 of Decree No 169/1998 provided for an extension of the period of validity of the licences granted by UNIRE until 31 December 1998, or, if it proved impossible to organise calls for tender by that date, the end of 1999.

5. A Ministerial Decree of 7 April 1999 (GURI No 86 of 14 April 1999) subsequently approved the plan to reinforce the network of outlets collecting and taking bets on horse-races with a view to increasing the number of betting shops across the whole of Italy from 329 to 1 000. Whereas 671 new licences were put out to tender, the directive of the Ministry of Finance of 9 December 1999 provided for the renewal of UNIRE's 329 'old licences'. In implementation of that directive, the decision of the Ministry of Finance of 21 December 1999 (GURI No 300 of 23 December 1999, 'the contested decision') renewed the said licences for a period of six years starting 1 January 2000.

6. Decree-Law No 452 of 28 December 2001 (GURI No 301 of 29 December 2001), converted after amendment into Law No 16 of 27 February 2002 (GURI No 49 of 27 February 2002), subsequently provided that the 'old licences' were to be reallocated in accordance with Decree No 169/1998, that is, by way of a Community call for tenders, and that they would remain valid until that reallocation had been finalised.

7. Finally, Decree-Law No 147 of 24 June 2003 extending time-limits and emergency provisions in budgetary matters (GURI No 145 of 25 June 2003), now Law No 200 of 1 August 2003 (GURI No 178 of 2 August 2003, 'Law No 200/2003'), provides in Article 8(1) that the financial status of each licence holder has to be assessed in order to resolve the problem of the guaranteed minimum', a levy which every licence holder had to pay to UNIRE irrespective of the actual amount of revenue generated during the year, which had proven to be excessive and had led to an economic crisis in the horse-race betting sector. In implementation of that law, the special commissioner appointed by UNIRE adopted decision No 107/2003 of 14 October 2003, which extended the period of validity of the licences that had already been granted until the deadline for the last payment, set for 30 October 2011, and, in any event, until the date on which the new licences are allocated by means

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of a call for tenders, in order to take the necessary steps to calculate the amounts to be paid by the licence holders.

Facts and the pre-litigation procedure

8. Following a complaint lodged by a private operator in the horse-race betting sector, on 24 July 2001 the Commission sent the Italian authorities a letter of formal notice pursuant to Article 226 EC, drawing their attention to the incompatibility of the Italian system of granting licences for horse-race betting operations, and, in particular, the renewal by the contested decision of the 329 old licences granted by UNIRE without a competitive tendering procedure, with the general principle of transparency and the requirement of publication resulting from Articles 43 and 49 EC. In response, the Italian Government announced, by letters dated 30 November 2001 and 15 January 2002, respectively, the bill for and the adoption of Law No 16 of 27 February 2002

9. Since the Commission was not satisfied with the implementation of the provisions of that law, it issued a reasoned opinion on 16 October 2002 in which it asked the Italian Republic to adopt the necessary measures to comply with the reasoned opinion within two months of its receipt. By letter of 10 December 2002, the Italian Government responded that it had to conduct a detailed assessment of the financial status of existing licence holders before issuing calls for tenders.

10. Since it received no further information concerning the completion of that assessment and the launching of a call for tenders for the purposes of reallocating the licences at issue, the Commission decided to bring the present action.

11. The Kingdom of Denmark and the Kingdom of Spain intervened in support of the Italian Republic.

The action

12. The Commission puts forward a single ground in support of its action. It submits that, by renewing UNIRE's 329 old licences for horse-race betting operations without inviting any competing bids, the Italian Republic has failed to fulfil its obligations under the Treaty and has, in particular, infringed the general principle of transparency and the publication requirement resulting from Articles 43 and 49 EC.

13. The Commission states in its application that, under Community law, the award of licences for horse-race betting operations in Italy must be considered to be a public service concession. As such, it does not fall within the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). However, it is clear from the case-law of the Court, and particularly the judgment in Telaustria and Telefonadress (Case C324/98 [2000] ECR I10745), that national authorities which award such licences must observe the principles of non-discrimination and transparency in order to ensure a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

14. The Commission points out in this respect that the Italian Government failed to comply with those principles when it renewed UNIRE's 329 existing licences without inviting competing bids. In the Commission's opinion, only the circumstances and reasons provided for in Articles 45 and 46 EC permit derogations from these principles. The justifications cited by the Italian Government are not among those expressly covered by Articles 45 and 46 EC and, in any event, the Italian Government has not shown the need for, and the proportionality of, the derogations in the light of the objectives pleaded.

15. In its defence, the Italian Government submits that Law No 200/2003 and Decision No 107/2003 are in conformity with the requirements of Community law concerning public service concessions. According to the Italian Government, the extension of UNIRE's old licences was justified by

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the need to ensure continuity, financial stability and a proper return on past investments for licence holders as well as the need to discourage recourse to clandestine activities, until the existing licences could be reallocated on the basis of tendering procedures. Such justifications constitute overriding requirements relating to the public interest which may justify derogations from the principles of the Treaty, including the obligation to open up the services market to competition.

16. The Danish Government takes issue with the Commission's interpretation of the Court's judgment in Teleaustria and Telefonadress , cited above, as regards the scope of the requirement of transparency in circumstances such as those of the present case. The Spanish Government puts forward considerations relating to the specific features of the authorisation and organisation of gambling activities which, it asserts, the Commission has failed to take into account.

17. It should be noted at the outset that the Italian Government does not deny that Law No 200/2003 and Decision No 107/2003 took effect after expiry of the time-limit laid down in the reasoned opinion.

18. In that regard it must be remembered that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-282/02 Commission v Ireland [2005] ECR I4653, paragraph 40, and Case C-514/03 Commission v Spain [2006] ECR I963, paragraph 44).

19. Therefore, the provisions of Law No 200/2003 and Decision No 107/2003 cannot be of relevance for the purposes of determining whether the Italian Republic has failed to fulfil its obligations. It follows that the present action is concerned solely with a review of the contested decision.

20. As the Commission rightly observed, the Italian Government has not denied, either during the pre-litigation procedure or in the course of these proceedings, that the award of licences for horse-race betting operations in Italy constitutes a public service concession. That classification was accepted by the Court in Placanica and Others (C338/04, C359/04 and C360/04 [2007] ECR I-0000), in which it interprets Articles 43 and 49 EC in relation to the same national legislation.

21. It is common ground that public service concessions are excluded from the scope of Directive 92/50 (see Case C-458/03 Parking Brixen [2005] ECR I-8585, paragraph 42).

22. The Court has held that, notwithstanding the fact that public service concession contracts are, as Community law stands at present, excluded from the scope of Directive 92/50, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the grounds of nationality, in particular (see, to that effect, Telaustria and Telefonadress , cited above, paragraph 60; Case C231/03 Coname [2005] ECR I-7287, paragraph 16; and Parking Brixen , cited above, paragraph 46).

23. The Court then stated that the provisions of the Treaty applying to public service concessions, in particular Articles 43 and 49 EC, and the prohibition of discrimination on grounds of nationality are specific expressions of the principle of equal treatment (see, to that effect, Parking Brixen , cited above, paragraph 48).

24. In that regard, the principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed (see, to that effect, Telaustria and Telefonadress

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, paragraphs 61 and 62, as well as Parking Brixen , paragraph 49, both cited above).

25. In the present case, it must be observed that the complete failure to invite competing bids for the purposes of granting licences for horse-race betting operations does not accord with Articles 43 and 49 EC, and, in particular, infringes the general principle of transparency and the obligation to ensure a sufficient degree of advertising. The renewal of the 329 old licences without a call for tenders precludes the opening up to competition of the licences and review of the impartiality of the procurement procedures.

26. In those circumstances, it is necessary to consider whether the renewal may be recognised as an exceptional measure, as expressly provided for in Articles 45 EC and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest (see, to that effect, Case C-243/01 Gambelli and Others [2003] ECR I-13031, paragraph 60, and Placanica and Others , cited above, paragraph 45).

27. On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (Placanica and Others , cited above, paragraph 46).

28. Although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality (Placanica and Others , cited above, paragraph 48).

29. It should therefore be examined whether the renewal of the licences without inviting any competing bids is suitable for achieving the objective pursued by the Italian Republic and does not go beyond what is necessary in order to achieve that objective. In any case, the renewal must be applied without discrimination (see, to that effect, Gambelli and Others , paragraphs 64 and 65, and Placanica and Others , paragraphs 49).

30. It is common ground that the Italian Government approved the plan to reinforce the network of outlets collecting and taking bets on horse-races with a view to increasing the number of betting shops across the whole of Italy from 329 to 1 000. To carry out that plan, 671 new licences were awarded on completion of a tendering procedure, but the 329 existing old licences were renewed without competing bids having being invited.

31. In that connection, the Italian Government has not relied on any derogation, such as the ones expressly provided in Article 45 and 46 EC. By contrast, the Italian Government justifies its renewal of the licences without a tendering procedure by the need, in particular, to discourage the development of clandestine activities for collecting and allocating bets.

32. However, the Italian Government has not explained in its defence the basis on which it was necessary not to invite competing bids and has not submitted arguments to dispute the infringement alleged by the Commission. In particular, the Italian Government has not explained how the renewal of the existing licences without inviting any competing bids could prevent the development of clandestine activities in the horse-race betting sector, and has simply submitted that Law No 200/2003 and Decision No 107/2003 are in conformity with the requirements of Community law concerning public service concessions.

33. In that regard it is for the competent national authorities to show, first, that their legislation addresses an essential interest within the meaning of Articles 45 and 46 EC or an overriding requirement relating to the general interest as laid down in the case-law and, second, that that legislation conforms to the principle of proportionality (see, to that effect, Case C41/02 Commission v Netherlands

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[2004] ECR I11375, paragraph 47; Case C38/03 Commission v Belgium [2005], not published in the ECR, paragraph 20, and Case C255/04 Commission v France [2006] ECR I5251, paragraph 29).

34. Accordingly, it must be stated that the renewal of UNIRE's old licences without putting them out to tender was not an appropriate means of attaining the objective pursued by the Italian Republic, going beyond what was necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities.

35. In addition, as regards the grounds of an economic nature put forward by the Italian Government, such as the need to ensure continuity, financial stability and a proper return on past investments for licence holders, suffice it to point out that those cannot be accepted as overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (see, to that effect, Case C35/98 Verkooijen [2000] ECR I4071, paragraph 48, and Case C388/01 Commission v Italie [2003] ECR I721, paragraph 22).

36. It follows that none of the overriding reasons in the general interest pleaded by the Italian Government to justify the renewal of the 329 old licences without any competing bids being invited can be accepted.

37. Therefore, the Commission's application is well founded.

38. It follows from the above that, by renewing 329 licences for horse-race betting operations without inviting any competing bids, the Italian Republic failed to fulfil its obligations under Articles 43 and 49 EC and, in particular, infringed the general principle of transparency and the obligation to ensure a sufficient degree of advertising.

Costs

39. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

DOCNUM	62004J0260
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
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LODGED	2004/06/17
JURCIT	11997E043 : N 1 20 23 - 39 11997E045 : N 26 31 33 11997E046 : N 26 31 33 11997E049 : N 1 20 23 - 39

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31992L0050 : N 21 22
61998J0035 : N 35
61998J0324 : N 22 24
62001J0243 : N 26
62001J0388 : N 35
62002J0041 : N 33
62002J0282 : N 18
62003J0038 : N 33
62003J0458 : N 21 - 24
62003J0514 : N 18
62004J0255 : N 33
62004J0338 : N 20 26 - 28

SUB	Freedom of establishment and services
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Action for failure to fulfil obligations
ADVGEN	Sharpston
JUDGRAP	Arestis
DATES	of document: 13/09/2007 of application: 17/06/2004

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Opinion of Advocate General Sharpston delivered on 29 March 2007. Commission of the European Communities v Italian Republic. Failure to fulfil obligations - Freedom of establishment and freedom to provide services - Public service concessions - Renewal services - Public service concessions - Renewalservices - Public service concessions - Renewalbetting licences without inviting competing bids - Requirements of publication and transparency. Case C-260/04.

1. In 1999, the Italian authorities renewed 329 horse-race betting licences without a prior tendering procedure. The Commission seeks a declaration that Italy thereby infringed the requirements of transparency and publicity which flow from the Treaty provisions on freedom of establishment and freedom to provide services. Italy denies the infringement, and is supported by Denmark and Spain, although Italy and the interveners each put forward different arguments for dismissing the Commission's action.

Community law

2. Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State.

3. Article 49 EC prohibits restrictions on freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

4. Pursuant to Articles 45 and 46 EC (read, in so far as Article 49 is concerned, in conjunction with Article 55 EC), those prohibitions do not apply to activities which in a Member State are connected, even occasionally, with the exercise of official authority, and do not prejudice the applicability of national provisions entailing special treatment for foreign nationals on grounds of public policy, public security or public health.

5. In addition, the Court has repeatedly held that restrictions on freedom of establishment and freedom to provide services may be justified by overriding reasons in the public interest which do not go beyond what is necessary to achieve their aim and which are applied irrespective of nationality. (2)

6. At the material time, the award of public service contracts in general was regulated at Community level by Council Directive 92/50/EEC. (3) For contracts over a certain value, specific obligations are laid down, including in particular an obligation to advertise the procedure at Community level other than in certain strictly defined circumstances. However, the eighth recital in the preamble to the directive states that it covers the provision of services only in so far as it is based on contracts, and that the provision of services on other bases is not covered. The Commission had proposed that public service concessions be included in the scope of the directive but the Council decided to exclude them, in particular because of differences between Member States' systems. (4)

7. The Court has however held that, although public service concessions are excluded from the scope of the public procurement directives, public authorities awarding them must comply with the fundamental rules of the EC Treaty, in particular the principle of non-discrimination on the ground of nationality. (5) Articles 43 and 49 EC are specifically applicable to public service concessions, (6) and the principle of equal treatment of tenderers applies even in the absence of discrimination on grounds of nationality. (7) Those principles impose a duty of transparency on the public authority, which must ensure a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed. (8)

8. In 2000, the Commission published an interpretative communication on concessions under Community law, (9) in which it sets out its understanding of the ways in which Community law impinges on the award of concessions. (10)

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Facts

9. Until 1996, the organisation of horse-race betting in Italy was the responsibility of UNIRE, the national union for the improvement of horse breeding, which awarded a number of concessions for that purpose. Since that year, (11) betting has been under the aegis of the Finance and Agriculture Ministries. According to a 1998 presidential decree, (12) those ministries are to award concessions on the basis of tendering procedures conducted in accordance with Community law. As a transitional measure, concessions awarded under the previous regime (which did not involve public tendering) were extended until the end of 1998 or, if tendering procedures could not be organised by then, the end of 1999.

10. In 1999, it was decided by ministerial decree (13) to increase the number of betting centres in Italy from 329 to 1 000. 671 new concessions were put out to tender and awarded. The 329 existing concessions were simply renewed for six years from 1 January 2000. (14) A law was subsequently enacted providing that the 329 concessions were to be reawarded in accordance with the 1998 presidential decree, but would remain valid until that time. (15)

Procedure

11. On 24 July 2001 the Commission sent the Italian Republic a formal letter pursuant to Article 226 EC, concerning a number of matters related to betting, including the renewal of the 329 concessions in issue. It considered the circumstances of the renewal to be incompatible with the requirements of transparency and publicity flowing from Articles 43 and 49 EC.

12. In reply, the Italian authorities referred to the adoption of the abovementioned law. (16)

13. Considering that law to have remained a dead letter in practice, the Commission sent a reasoned opinion to Italy on 18 October 2002, inviting it to comply within two months.

14. On 10 December 2002, the Italian authorities invoked the need to certify the financial status of the holders of the concessions still in force, pending organisation of the tendering procedures.

15. On 17 June 2004, having received no information as to the completion of the certification process and the opening of the new tendering procedures, the Commission brought the present action, asking the Court to:

- declare that, the Ministry of Finance having renewed 329 licences for the taking of bets on horse races without a prior competitive tendering procedure, the Italian Republic has infringed the general principle of transparency and the obligation to advertise which follow from the provisions of the EC Treaty on the freedom of establishment in Article 43 et seq. and the freedom to provide services in Article 49 et seq., and

- order the Italian Republic to pay the costs.

16. Italy asks the Court to dismiss the action and order the Commission to pay the costs.

17. Denmark and Spain have been granted leave to intervene in support of Italy, and have submitted statements in intervention. Finland and the Netherlands were also granted leave to intervene, but Finland later withdrew from the proceedings and the Netherlands has made no submission.

18. No hearing has been requested, and none has been held.

Assessment

19. The Commission's argument may be summarised as follows. Betting concessions of the kind in issue are public service concessions for the purposes of Community law. As such, they do not fall within the scope of Directive 92/50 but are subject to the general requirements of non-discrimination, transparency and publicity which flow from Articles 43 and 49 EC. The simple renewal of 329 existing

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concessions without any tendering procedure is not compatible with those requirements. Only the grounds set out in Articles 45 and 46 EC can justify a derogation, and none of those grounds is present. As regards those 329 concessions, the Italian authorities had not brought their practice into compliance with Community law within the two-month period laid down in the reasoned opinion sent on 18 October 2002, or indeed by the time the application was lodged some 18 months later.

20. In the light of the facts as set out in points 9 and 10 above, which do not appear to be in dispute, and of the case-law summarised in point 7, it seems to me that the Commission has established a prima facie case for the declaration which it seeks.

21. Italy relies in its defence on a number of measures adopted in 2003 and the public-interest requirements underlying them.

22. Spain puts forward considerations relating to the specific features of the authorisation and organisation of gambling activities which, it asserts, the Commission has failed to take into account.

23. Denmark takes issue with the Commission's interpretation of the Court's judgment in Telaustria as to what the requirement of transparency means in circumstances such as those of the present case.

24. Having regard to the differences between the three sets of arguments put forward by the three Member States, I shall deal with them separately.

Italy

25. Italy submits that the measures which it has taken are legitimate. It refers in particular to a decree-law of 2003 and a decision adopted thereunder. (17) The decree-law provided for verification of the financial status of all concession-holders, following difficulties which had arisen as to their ability to pay what turned out to be excessively high levies required of them. Further measures sought to alleviate those difficulties by various means, and the decision maintained existing concessions in force until that aim was attained, but not beyond 31 December 2011. All those measures were justified by the need to ensure continuity, financial stability and a proper return on investment for concession-holders, thereby discouraging recourse to clandestine betting activities, until the current concessions could be reawarded on the basis of tender procedures.

26. The Commission points out that measures taken in 2003 can have no bearing on the infringement. The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion. (18)

27. I agree.

28. The Commission none the less goes on to consider whether the reasons given for adopting the 2003 measures could have justified the situation in 2002, and concludes that they could not.

29. I find nothing to support the Commission's statement that only justifications set out expressly in Articles 45 or 46 EC could be available, to the exclusion of other overriding reasons in the public interest. The Court has repeatedly accepted that such reasons may justify limitations on freedom of establishment or freedom to provide services. (19)

30. However, as the Commission rightly points out, to benefit from any justification - whether on the basis of a Treaty provision or on that of an overriding reason in the public interest - the measures in question must be suitable for achieving the objective sought and must not go beyond what is necessary to attain it. (20)

31. In addition, considerations of a purely economic or administrative nature cannot justify restricting the freedoms laid down by the Treaty. (21)

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32. Of the objectives put forward by Italy, none seems to fall within the categories provided for in Articles 45 or 46 EC. As regards other (non-economic) overriding reasons, only that of preventing clandestine betting may be said, at least in principle, to be in the public interest.

33. However, according to the undisputed facts of the case, it was decided in 1999 to increase the number of betting concessions in Italy from 329 to 1 000. That target was duly achieved by awarding 671 new concessions after a tendering procedure and simply renewing the 329 old concessions. In those circumstances it is difficult to imagine - and Italy's defence does not explain - how the renewal or maintenance of the 329 old concessions without a tendering procedure could serve to prevent clandestine betting, or how the absence of transparency could be necessary for that purpose.

34. I therefore find that Italy has put forward no argument capable of rebutting the Commission's case.

Spain

35. Spain submits that the Commission's application is inadequately grounded because it fails to take account of a number of essential considerations. First, as recognised by the Court, (22) moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, may imply a margin of appreciation for national authorities in regulating those activities in the interests of consumer protection and public order. Second, a transitional period is required when replacing one concession regime by another and can justify extending certain aspects of the previous regime. In both those regards, the Italian authorities show a clear intention to achieve full compliance with Community requirements. Third, complex social interests are involved, in particular the use of betting revenue as the sole source of financing the improvement of horse breeding. Fourth, there are current serious financial difficulties in the Italian horse-race betting sector, whose origins date from earlier than the 2003 measures cited by Italy in its defence.

36. However, none of those considerations seems capable of justifying the situation of which the Commission complains, namely the renewal and subsequent maintenance, without transparency or publicity, of 329 old concessions concurrently with the award of 671 new concessions by means of a tendering procedure.

37. The particular nature of betting and gambling has indeed been recognised by the Court, but not as being capable of justifying restrictions on Treaty freedoms which do not meet imperative requirements in the general interest, which are not suitable for achieving the objective which they pursue or which go beyond what is necessary in order to attain it. (23) Social and financial considerations of the kinds cited by Spain in its third and fourth considerations, or practical difficulties involved in changing from one regime to another, do not constitute such requirements. And the expressed intention of the Italian authorities is not relevant to an assessment of the factual situation at the end of the period specified in the Commission's reasoned opinion.

Denmark

38. Denmark raises a number of related issues concerned essentially with the extent of the obligations which flow from the Treaty with regard to public contracts or concessions not subject to the procurement directives. In particular it contends that a tendering procedure is not necessarily obligatory, and that the use of the word advertising' in the English version of the Telaustria judgment wrongly suggests a more demanding requirement than the equivalent of publicity' in other language versions. It asks the Court to specify whether the requirement implies a need for the awarding authority to seek future contractors or concession-holders openly, for potential tenderers to have access to tender documents, or for the awarding authority simply to publicise the fact that it intends to award a contract or concession.

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39. Denmark's submissions in that regard are very similar to those which it made in another case currently pending before the Court, Commission v Finland. (24) The questions which it raises are important, and I would agree that some clarification of the law may be desirable. (25) However, the general clarification which Denmark seeks seems aimed primarily at answering certain questions of general interest to the Member States, rather than at determining the outcome of the present infringement action.

40. In the present case, it is not contested that the 329 concessions in question were quite simply and automatically renewed. Even if it might be argued that the Italian authorities publicised to some extent the fact that the procedure was to take place, it is quite obvious that the degree of publicity vis-à-vis those concessions (as opposed to the 671 new concessions awarded after a tendering procedure) was not, on any view, sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed'. (26)

41. I do not consider, therefore, that Denmark's submissions can affect the outcome of the present case.

Concluding remarks

42. I thus take the view that, regard being had to the Court's case-law and to the undisputed facts of the case, the Commission has sufficiently established the infringement which it seeks to have declared, and that none of the submissions by the Member States adequately rebuts the Commission's arguments in the circumstances.

43. I should make it clear that, in so doing, I express no opinion as to other circumstances in which renewal of horse-race betting concessions without a tendering procedure might be justified by public-interest requirements. Nor do I consider it necessary to specify the precise kind or degree of publicity required where a tendering procedure is conducted. Suffice it to recall that, in the present case, 671 concessions were awarded after a tendering procedure which, in the Commission's view, complied with Community law, while 329 were at the same time renewed without the slightest degree of transparency or publicity which could have afforded interested parties access to the award procedure.

Costs

44. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings and, under Article 69(4), Member States which intervene in the proceedings are to bear their own costs. The Commission has applied for costs against Italy.

Conclusion

45. I am therefore of the opinion that the Court should

- declare that, the Ministry of Finance having renewed 329 licences for the taking of bets on horse races without a prior competitive tendering procedure, the Italian Republic has infringed the general principle of transparency and the obligation to advertise which follow from the provisions of the EC Treaty on the freedom of establishment in Article 43 et seq. and the freedom to provide services in Article 49 et seq., and

- order the Italian Republic to pay the costs, except for those of the intervening Member States, which should bear their own costs.

(1) .

(2) - See, for example, Case C-76/90 Säger [1991] ECR I-4221, paragraph 15, and Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32.

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(3) - Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1); now repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). In the water, energy, transport and telecommunications sectors awards were regulated by Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84); now repealed and replaced by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

(4) - See further paragraph 46 et seq. of the judgment in Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745.

(5) - See Telaustria , cited in footnote 4, paragraph 60; Case C-231/03 Coname [2005] ECR I-7287, paragraph 16; Case C-458/03 Parking Brixen [2005] ECR I-8612, paragraph 46; and Case C-410/04 ANAV [2006] ECR I-3303, paragraph 18.

(6) - See Parking Brixen , paragraph 47; ANAV , paragraph 19.

(7) - See Parking Brixen , paragraph 48; ANAV, paragraph 20.

(8) - See Telaustria , paragraphs 61 and 62, Parking Brixen , paragraph 49, and ANAV , paragraph 21.

(9) - OJ 2000 C 121, p. 2.

(10) - A more recent interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives (OJ 2006 C 179, p. 2) expressly does not deal with concessions, although some of the guidance which it contains might be thought to be of a sufficiently general nature to do so.

(11) - Under Law N° 662/1996 (GURI, 28 December 1996, n° 303).

(12) - Presidential Decree N° 169/1998 (GURI, 1 June 1998, n° 125).

(13) - Ministerial decree of 7 April 1999 (GURI, 14 April 1999, n° 86).

(14) - Ministerial directive of 9 December 1999, and ministerial decision of 21 December 1999 (GURI, 23 December 1999, n° 300).

(15) - Decree-Law N° 452/2001 (GURI, 29 December 2001, n° 301), converted after amendment into Law N° 16/2002 (GURI, 27 February 2002, n° 49).

(16) - See point 10 and footnote 15.

(17) - Decree-law 147/2003 of 24 June 2003 (GURI, 25 June 2003, N° 145), converted into Law 200/2003; Decision 107/2003 of 14 October 2003 of UNIRE (which originally awarded the 329 concessions in question).

(18) - The Commission cites Case C-299/01 Commission v Luxembourg [2002] ECR I-5899, paragraph 11. See, more recently, Case C-183/05 Commission v Ireland [2007] ECR I-0000, paragraph 17.

(19) - See, for example, in the particular context of betting, Case C-243/01 Gambelli and Others [2003] ECR I-13031, paragraphs 59 and 60; Joined Cases C-338/04, C359/04 and C-360/04 Placanica and Others [2007] ECR I-0000, paragraph 45.

(20) - See Gambelli , paragraph 65; Case C-150/04 Commission v Denmark [2007] ECR I-0000,

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paragraph 46.

(21) - See, for example, Case C-388/01 Commission v Italy [2003] ECR I-721, paragraph 22, or Case C-463/00 Commission v Spain [2003] ECR I-4581, paragraph 35.

(22) - Gambelli , cited in footnote 19, paragraph 63, and the case-law cited there: Case C-275/92 Schindler [1994] ECR I-1039, Case C-124/97 Läärä and Others [1999] ECR I-6067 and Case C-67/98 Zenatti [1999] ECR I-7289.

(23) - Gambelli , paragraphs 65 and 67.

(24) - Case C-195/04; see in particular point 79 et seq. of my Opinion delivered on 18 January 2007.

(25) - See further Seeing through transparency: the requirement to advertise public contracts and concessions under the EC Treaty', Adrian Brown, Public Procurement Law Review 2007, p. 1. It may also be noted that the Commission's 2006 interpretative communication (cited in footnote 10) is currently the subject of annulment proceedings brought by Germany before the Court of First Instance in Case T-258/06, in which several Member States and the European Parliament have applied to intervene.

(26) - See point 7 and footnote 8 above.

DOCNUM	62004C0260
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
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LODGED	2004/06/17
JURCIT	11997E043 : N 2 19 - 43 45 11997E045 : N 4 19 - 43 45 29 32 11997E046 : N 4 19 29 32 11997E049 : N 3 4 11997E055 : N 4 31992L0050 : N 6 19 31993L0038 : N 6 32000Y0929(01) : N 8 39 32004L0017 : N 6 32004L0018 : N 6 61990J0076 : N 5 61992J0019 : N 5 61998J0324 : N 6 7

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62000J0463 : N 31
62001J0243 : N 29
62001J0299 : N 26
62001J0388 : N 31
62003J0231 : N 7
62003J0458 : N 7
62004J0150 : N 30
62004J0195 : N 39
62004J0338 : N 29
62004J0410 : N 7
62005J0183 : N 26

SUB	Freedom of establishment and services
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Action for failure to fulfil obligations
ADVGEN	Sharpston
JUDGRAP	Arestis
DATES	of document: 29/03/2007 of application: 17/06/2004

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Judgment of the Court (Second Chamber)
of 18 July 2007
Commission of the European Communities v Federal Republic of Germany. Failure of a Member State to fulfil obligations - Judgment of the Court establishing the failure to fulfil obligations - Non-implementation - Article 228 EC - Measures necessary to comply with the judgment of the Court - Rescission of a contract. Case C-503/04.

In Case C503/04,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 7 December 2004,

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

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and C. Schulze-Bahr, acting as Agents, and H.-J. Prieß, Rechtsanwalt,

defendant,

supported by

French Republic, represented by G. de Bergues and J.-C. Gracia, acting as Agents, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by H.G. Sevenster and D.J.M. de Grave, acting as Agents,

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, P. Kris, K. Schiemann, J. Makarczyk and J.C. Bonichot, Judges,

Advocate General: V. Trstenjak,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 7 December 2006,

after hearing the Opinion of the Advocate General at the sitting on 28 March 2007,

gives the following

Judgment

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

1. Declares that, by having failed, at the date on which the period laid down in the reasoned opinion issued by the Commission of the European Communities pursuant to Article 228 EC, to adopt all the necessary measures to comply with the judgment of 10 April 2003 in Joined Cases C20/01 and C28/01 Commission v Germany regarding the conclusion of a contract for waste disposal by the City of Brunswick (Germany), the Federal Republic of Germany has failed to fulfil its obligations under that article;

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

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3. Orders the French Republic, the Kingdom of the Netherlands and the Republic of Finland to bear their own costs.

1. By its application, the Commission of the European Communities requests the Court to declare that, by failing to adopt all the necessary measures to comply with the judgment in Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609 regarding the conclusion of a contract for the collection of waste water by the municipality of Bockhorn (Germany) and of a contract for waste disposal by the City of Brunswick (Germany), the Federal Republic of Germany has failed to fulfil its obligations under Article 228(1) EC, and to order that Member State to pay to the Commission's own resources account of the European Community a penalty payment of EUR 31 680 for each day of delay in implementing the measures necessary to comply with that judgment in respect of the contract relating to the municipality of Bockhorn and of EUR 126 720 for each day of delay in implementing the measures necessary to comply with the abovementioned judgment in respect of the contract relating to the City of Brunswick, in each case from the date of delivery of that judgment until the measures are implemented.

2. By order of the President of the Court of 6 June 2005, the French Republic, the Kingdom of the Netherlands and the Republic of Finland were granted leave to intervene in support of the forms of order sought by the Federal Republic of Germany.

Legal context

3. Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) provides:

The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

4. Article 3(1) of Directive 89/665 states:

The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.'

The judgment in Commission v Germany

5. In paragraphs 1 and 2 of the operative part of the judgment in Commission v Germany , the Court:

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

2. Declare[d] that since the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid

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down in Article 11(3) of Directive 92/50 for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 and Article 11(3)(b) of that directive.'

Pre-litigation procedure

6. By letter of 27 June 2003, the Commission requested the German Government to notify it of the measures taken to comply with the judgment in Commission v Germany.

7. Since it was not satisfied by the German Government's response of 7 August 2003, on 17 October 2003 the Commission requested the German authorities to submit their observations within two months.

8. In its letter of 23 December 2003, the German Government referred to a letter sent in early December 2003 to the government of the Land of Lower Saxony asking it to ensure compliance with the public procurement legislation in force and to notify it of the measures intended to prevent similar infringements in future. In addition, the German Government referred to Paragraph 13 of the German Vergabeverordnung (Public Procurement Regulation) which entered into force on 1 February 2001 and which provides that a contract concluded by a contracting authority is invalid if unsuccessful tenderers have not been informed of the conclusion of that contract at least 14 days before its award. That government also submitted that Community law did not require the rescission of the two contracts at issue in the case which gave rise to the judgment in Commission v Germany.

9. On 1 April 2004, the Commission sent a reasoned opinion to the Federal Republic of Germany, to which the latter responded on 7 June 2004.

10. Since the Commission considered that the Federal Republic of Germany had failed to comply with the judgment in Commission v Germany , it decided to bring the present action.

The action

The subject-matter of the action

11. Since the Federal Republic of Germany stated in its defence that on 28 February 2005 the contract for the collection of waste water concluded by the municipality of Bockhorn was to be annulled, the Commission stated in its reply that it was not pursuing either its action or its claim for imposition of a periodic penalty payment in so far as they related to that contract.

12. As the Commission has partly discontinued its action, it is necessary to examine it only in so far as it relates to the contract concluded by the City of Brunswick for waste disposal.

Admissibility

13. The Federal Republic of Germany alleges, firstly, that the Commission has no interest in bringing proceedings because of its failure to submit an application for interpretation within the meaning of Article 102 of the Rules of Procedure. According to that Member State, the dispute relating to the consequences which follow from the judgment in Commission v Germany could and should have been resolved by way of an application for interpretation of that judgement and not by way of an action based on Article 228 EC.

14. However, that argument cannot be accepted.

15. In proceedings for failure to fulfil obligations under Article 226 EC, the Court is required to find only that a provision of Community law has been infringed. Pursuant to Article 228(1) EC, the Member State concerned is required to take the measures necessary to comply with the judgment of the Court (see, to that effect, Case C-126/03 Commission v Germany [2004] ECR I-11197, paragraph 26). Since a question concerning the measures required for the implementation of a judgment

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establishing a failure to fulfil obligations under Article 226 EC does not form part of the subject-matter of such a judgment, such a question cannot form the subject-matter of an application for interpretation of a judgment (see also, to that effect, order in Joined Cases 146/85 INT and 431/85 INT Maindiaux and Others v ESC and Others [1988] ECR 2003, paragraph 6).

16. Furthermore, it is precisely at the stage of an action under Article 228(2) EC that it is for the Member State, whose responsibility it is to draw the conclusions to which the judgment establishing the failure to fulfil obligations appears to it to give rise, to justify the validity of those conclusions, should they be criticised by the Commission.

17. Secondly, in its rejoinder, the Federal Republic of Germany, supported by the Kingdom of the Netherlands, requests the Court to close the procedure by application of Article 92(2) of the Rules of Procedure, as the action has become devoid of purpose since, with effect from 10 July 2005, the contract concluded by the City of Brunswick concerning waste disposal has also been rescinded.

18. The Commission responds, in its observations relating to the statements in intervention of the French Republic, the Kingdom of the Netherlands and of the Republic of Finland, that it retains an interest in obtaining from the Court a ruling on whether, on expiry of the period laid down in the reasoned opinion issued under Article 228 EC, the Federal Republic of Germany had already complied with the judgment of 10 April 2003 in Joined Cases C20/01 and C28/01 Commission v Germany . The Commission states, however, that an order for payment of a periodic penalty payment is no longer necessary.

19. In that regard, it should be recalled that, according to settled case-law, the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see Case C119/04 Commission v Italy [2006] ECR I6885, paragraph 27, and case-law cited).

20. In the present case, the period referred to in the reasoned opinion which, as is apparent from the receipt stamp, was received by the German authorities on 1 April 2004, was one of two months. The reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is therefore 1 June 2004. At that date, the contract concluded by the City of Brunswick for waste disposal had not yet been terminated.

21. Nor, moreover, is the action inadmissible contrary to the Federal Republic of Germany's submissions at the hearing, on the ground that the Commission is no longer requesting the imposition of a periodic penalty payment.

22. Since the Court has jurisdiction to impose a financial penalty not suggested by the Commission (see, to that effect, Case C-304/02 Commission v France [2005] ECR I-6263, paragraph 90), the action is not inadmissible simply because the Commission takes the view, at a certain stage of the procedure before the Court, that a penalty is no longer necessary.

23. With regard, thirdly, to the plea of inadmissibility based on Article 3 of Directive 89/665, to which the Advocate General refers in point 44 of her Opinion, it is appropriate to note that the particular procedure laid down in that provision constitutes a preventive measure which can neither derogate from nor replace the powers of the Commission under Articles 226 EC and 228 EC (see, to that effect, Case C-394/02 Commission v Greece [2005] ECR I4713, paragraph 27, and case-law cited).

24. It follows from all the foregoing that the action is admissible.

Substance

25. The Commission takes the view that the Federal Republic of Germany has not adopted measures sufficient to comply with the judgment in Joined Cases C20/01 and C28/01 Commission v Germany

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, since that Member State did not, before the date of expiry of the period laid down in the reasoned opinion, rescind the contract concluded by the City of Brunswick for waste disposal.

26. The Federal Republic of Germany reiterates the position expressed in the letter from the German Government of 23 December 2003 that rescission of the contracts affected by that judgment was not required and submits that the steps set out in that communication constituted measures sufficient to comply with that judgment.

27. In that regard, it should be recalled that, as is apparent from paragraph 12 of the judgment in Joined Cases C20/01 and C28/01 Commission v Germany , the City of Brunswick and Braunschweigsche Kohlebergwerke (BKB') concluded a contract under which BKB was made responsible for residual waste disposal by thermal processing for a period of 30 years from June/July 1999.

28. As the Advocate General observes in point 72 of her Opinion, the measures mentioned by the German Government in its letter of 23 December 2003 were intended exclusively to prevent the conclusion of new contracts which would constitute failures to fulfil obligations similar to those found in that judgment. However, they did not prevent the contract concluded by the City of Brunswick from continuing to have full effect on 1 June 2004.

29. Accordingly, since that contract had not been terminated on 1 June 2004, the failure to fulfil obligations continued on that date. The adverse effect on the freedom to provide services arising from the disregard of the provisions of Directive 92/50 subsists throughout the entire performance of the contracts concluded in breach thereof (Joined Cases C20/01 and C28/01 Commission v Germany , paragraph 36). Furthermore, at that date, the failure to fulfil obligations was to continue for decades, given the long period for which the contract in question had been concluded.

30. Having regard to all those facts, the view cannot be taken, in a situation such as that of the present case, that, with regard to the contract concluded by the City of Brunswick, the Federal Republic of Germany had adopted, as at 1 June 2004, measures implementing the judgment in Joined Cases C20/01 and C28/01 Commission v Germany.

31. However, the Federal Republic of Germany, supported by the French Republic, the Kingdom of the Netherlands and the Republic of Finland, submits that the second subparagraph of Article 2(6) of Directive 89/665, which allows Member States to provide in their legislation that, after the conclusion of a contract following the award of a public contract, the bringing of an action can give rise only to an award of damages and, thus, to exclude any possibility of rescission of that contract, precludes a finding of failure to fulfil obligations within the meaning of Article 226 EC with regard to such a contract entailing the obligation to rescind it. According to those Member States, the principles of legal certainty and of the protection of legitimate expectations, the principle pacta sunt servanda , the fundamental right to property, Article 295 EC and the case-law of the Court regarding the limitation in time of the effects of a judgment also preclude such a result.

32. However, such arguments cannot be upheld.

33. With regard, firstly, to the second subparagraph of Article 2(6) of Directive 89/665, the Court has already held that, although that provision permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate expectations of the parties thereto, its effect cannot be, unless the scope of the EC Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis third parties is to be regarded as in conformity with Community law following the conclusion of such contracts (Joined Cases C20/01 and C28/01 Commission v Germany , paragraph 39).

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34. If the second subparagraph of Article 2(6) of Directive 89/665 does not affect the application of Article 226 EC, nor can it affect the application of Article 228 EC, without, in a situation such as that in the present case, reducing the scope of the Treaty provisions establishing the internal market.

35. Furthermore, the second subparagraph of Article 2(6) of Directive 89/665, which has the objective of guaranteeing the existence, in all Member States, of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures (Case C470/99 Universale-Bau and Others [2002] ECR I11617, paragraph 71), relates, as is apparent from its wording, to the compensation which a person harmed by an infringement committed by a contracting authority may obtain from it. That provision, because of its specific nature, cannot be regarded also as regulating the relations between a Member State and the Community in the context of Articles 226 EC and 228 EC.

36. With regard, secondly, even if it were to be accepted that the principles of legal certainty and of the protection of legitimate expectations, the principle pacta sunt servanda and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission, Member States cannot rely thereon to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade their own liability under Community law (see, by analogy, Case C470/03 AGM.-COS.MET [2007] ECR I-0000, paragraph 72).

37. With regard, thirdly, to Article 295 EC, according to which this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership', it should be recalled that that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (see Case C463/00 Commission v Spain [2003] ECR I4581, paragraph 67, and case-law cited). The particular features of the system of property ownership in a Member State cannot therefore justify the continuation of a failure to fulfil obligations which consists of an obstacle to the freedom to provide services in disregard of the provisions of Directive 92/50.

38. Moreover, it should be recalled that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law (see Commission v Italy , paragraph 25, and case-law cited).

39. Fourthly, with regard to the Court's case-law on the limitation in time of the effects of a judgment, it is sufficient to state that, in any event, that case-law does not justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC.

40. Although, with regard to the contract concluded by the City of Brunswick, it must therefore be held that the Federal Republic of Germany had not, as at 1 June 2004, adopted the measures to implement the judgment in Joined Cases C20/01 and C28/01 Commission v Germany , the same is not, however, true at the date of examination of the facts by the Court. It follows that the imposition of the periodic penalty payment, which the Commission is in fact no longer requesting, is not justified.

41. In the same way, the facts of the present case are such that it does not appear necessary to order payment of a lump sum.

42. Accordingly, it must be held that, by having failed, at the date on which the period laid down in the reasoned opinion issued by the Commission pursuant to Article 228 EC, to adopt all the necessary measures to comply with the judgment in Joined Cases C20/01 and C28/01 Commission v Germany regarding the conclusion of a contract for waste disposal by the City of Brunswick,

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the Federal Republic of Germany has failed to fulfil its obligations under that article.

Costs

43. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has asked that costs be awarded against the Federal Republic of Germany and the latter has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs. The intervening Member States, the French Republic, the Kingdom of the Netherlands and the Republic of Finland, must be ordered to bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

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Case C-503/04

Commission of the European Communities

v

Federal Republic of Germany

(Failure of a Member State to fulfil obligations – Judgment of the Court establishing the failure to fulfil obligations – Non-implementation – Article 228 EC – Measures necessary to comply with the judgment of the Court – Rescission of a contract)

Summary of the Judgment

1. *Actions for failure to fulfil obligations – Judgment of the Court finding a failure to fulfil obligations – Breach of the obligation to comply with the judgment – Financial penalties*

   (Art. 228(2) EC)

2. *Approximation of laws – Review procedures in respect of the award of public supply and public works contracts – Directive 89/665*

   (Arts 226 EC and 228 EC; Council Directive 89/665, Art. 3)

3. *Approximation of laws – Review procedures in respect of the award of public supply and public works contracts – Directive 89/665*

   (Arts 226 EC and 228 EC; Council Directive 89/665, Art. 2(6), second subpara.)

4. *Approximation of laws – Review procedures concerning the award of public service contracts – Directive 92/50*

   (Art. 226 EC; Council Directive 92/50)

5. *Member States – Obligations – Failure to fulfil obligations – National system pleaded as justification – Not permissible*

   (Art. 226 EC)

1. In proceedings under Article 228(2) EC, an action does not become inadmissible on the ground that the Commission is no longer requesting the imposition of a periodic penalty payment. Since the Court has jurisdiction to impose a financial penalty not suggested by the Commission, the action is not inadmissible simply because the Commission takes the view, at a certain stage of the procedure before the Court, that a periodic penalty is no longer necessary.

   (see paras 21-22)

2. The special procedure under Article 3 of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, whereby the Commission may intervene with a Member State if it considers that a clear and manifest infringement of Community provisions in

the field of public procurement has been committed, constitutes a preventive measure which can neither derogate from nor replace the powers of the Commission under Articles 226 EC and 228 EC.

(see para. 23)

3. Although the second subparagraph of Article 2(6) of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate expectations of the parties thereto, its effect cannot be, unless the scope of the EC Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis third parties is to be regarded as in conformity with Community law following the conclusion of such contracts.

If the second subparagraph of Article 2(6) of Directive 89/665 does not affect the application of Article 226 EC, nor can it affect the application of Article 228 EC, without reducing the scope of the Treaty provisions establishing the internal market. Furthermore, that provision relates, as is apparent from its wording, to the compensation which a person harmed by an infringement committed by a contracting authority may obtain from it. That provision, because of its specific nature, cannot be regarded also as regulating the relations between a Member State and the Community in the context of Articles 226 EC and 228 EC.

(see paras 33-35)

4. Even if it the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda* and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission of a contract concluded in breach of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, a Member State cannot in any event rely on those principles or that right in order to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade its own liability under Community law.

(see para. 36)

5. A Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law.

(see para. 38)

Opinion of Advocate General Trstenjak delivered on 28 March 2007. Commission of the European Communities v Federal Republic of Germany. Failure of a Member State to fulfil obligations - Judgment of the Court establishing the failure to fulfil obligations - Non-implementation - Article 228 EC - Measures necessary to comply with the judgment of the Court - Rescission of a contract. Case C-503/04.

I - Introduction

1. The basis for the present case is an action brought by the Commission pursuant to the second paragraph of Article 228(2) EC against the Federal Republic of Germany for its failure to fulfil obligations. By its action the Commission is seeking a declaration from the Court of Justice of the European Communities that the Federal Republic of Germany has failed to fulfil its obligations under Article 228(1) EC, inasmuch as it has not taken the necessary measures to comply with the judgment of the Court of 10 April 2003 in Joined Cases C-20/01 and C-28/01 Commission v Germany regarding the award of a contract for the collection of waste water by the municipality of Bockhorn and of a contract for waste disposal by the City of Brunswick. (2)

2. In that judgment, the Court of Justice declared that the Federal Republic of Germany had disregarded the Community provisions concerning the award of public contracts. It considered it to be established, first, that the municipality of Bockhorn had failed to invite tenders for the award of the contract for the collection of its waste water and had failed to publish notice of the results of the procedure for the award of the contract in the Supplement to the Official Journal of the European Communities , as prescribed by Article 8 in conjunction with Articles 15(2) and 16(1) of Directive 92/50/EEC. (3) The Court further declared that the City of Brunswick had awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) of that directive for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met.

3. The dispute currently pending before the Court focuses on the conclusions that the Federal Republic of Germany should have drawn from the judgment of 10 April 2003 in order to fulfil its obligation to ensure that compliance with Community law was restored. While the Commission takes the view that the contracts under private law initially concluded for a minimum term of 30 years should have been rescinded, the Federal Republic denies that it is under such a legal obligation, essentially citing Article 2(6) of Directive 89/665/EEC, (4) under which Member States are entitled to limit the powers of the body responsible for review procedures to the award of damages.

II - Legal background

4. Article 228 EC provides:

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment

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it may impose a lump sum or penalty payment on it.

...'

5. Article 2(6) of Directive 89/665/EEC provides:

The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

III - Background

A - The judgment in Joined Cases C-20/01 and C-28/01

6. At points 1 and 2 of the operative part of its judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 Commission v Germany the Court:

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

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

7. For a detailed presentation of the facts and procedure, I refer to the judgment mentioned above. (5)

B - The pre-litigation procedure in Case C-503/04

8. By letter of 27 June 2003, the Commission requested the German Government to notify to it the measures taken to comply with the judgment in Commission v Germany. In its letter of 7 August 2003, the German Government replied that the Federal Republic of Germany had always acknowledged the infringements and had taken all measures necessary to prevent the reoccurrence of such infringements in future. It maintained, however, that the Federal Republic of Germany was not obliged to terminate the two contracts at issue in the case.

9. By letter of 17 October 2003, the Commission called on the German authorities to submit their observations within two months.

10. In its letter of 23 December 2003, the German Government reiterated that the Federal Republic of Germany had always acknowledged and regretted the infringements and had taken all measures necessary to prevent a re-occurrence of such infringements in future. In early December 2003, it had also urgently requested the Land Government of Lower Saxony by letter to comply with the public procurement legislation in force and had called on it to give an account of the measures intended to help prevent similar infringements in future. The German Government referred in addition to Paragraph 13 of

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the Vergabeverordnung (Public Procurement Regulations), which had entered into force on 1 February 2001, under which a contract concluded by a contracting authority is invalid if the unsuccessful tenderers have not been informed of the conclusion of that contract 14 days at the latest prior to its award. It also reiterated its view that Community law did not require the two contracts to be terminated, as had been stated in Commission v Germany.

11. By letter of 1 April 2004, the Commission sent a reasoned opinion to the Federal Republic of Germany. In it, the Commission expressed its conviction that it was not sufficient to prevent infringements of that kind in future procurement procedures as the contracts complained of would continue to produce effects for decades. It was essential to introduce measures to end the Treaty infringement in the cases involving procurement law dealt with in the judgment of 10 April 2003 in order to comply with that judgment. It laid down a period for compliance of two months from receipt of that letter. The Federal Republic of Germany replied by letter of 7 June 2004, reaffirming the view it had previously expressed.

12. Since it took the view that the Federal Republic of Germany had failed to take the necessary measures to comply with the judgment in Commission v Germany , the Commission brought the present action on 7 December 2004.

IV - Proceedings before the Court of Justice

13. According to its original wording, the Commission's application was aimed, first, at obtaining a declaration that the Federal Republic of Germany had failed to fulfil its obligations under Article 228(1) EC, inasmuch as it had not taken the necessary measures to comply with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 Commission v Germany regarding the award of a contract for the collection of waste water by the municipality of Bockhorn and of a contract for waste disposal by the City of Brunswick. The application was aimed, secondly, at obtaining an order that the Federal Republic of Germany pay into the Commission's own resources account of the European Community' a penalty of EUR 31 680 for each day of delay in implementing the measures necessary to comply with the judgment in respect of the award of a contract for the collection of waste water by the municipality of Bockhorn, and of EUR 126 720 for each day of delay in implementing the measures necessary to comply with the judgment in respect of the award of a contract for waste disposal by the City of Brunswick. The Commission further claimed that the Federal Republic of Germany should be ordered to pay the costs of the proceedings.

14. In the course of the written procedure in the case, the disputed contracts were rescinded. In its defence of 14 February 2005, registered at the Court on 15 February 2005, the Federal Republic of Germany stated that a contract rescinding the contract for the collection of waste water had been concluded on 3 January 2005 between the municipality of Bockhorn and the relevant undertaking. In its defence it also claimed that the action should be dismissed, or, in the alternative, that the effect of a judgment upholding the application should be limited to the future and that the Commission should be ordered to pay the costs of the proceedings.

15. In its reply of 26 April 2005, the Commission stated that it no longer sought to pursue the action as a whole or the specific claim for the imposition of a penalty payment in respect of that part of the action.

16. In its rejoinder of 28 July 2005, the Federal Republic of Germany advised that a contract cancelling the previous contract had also been concluded in the meantime (on 4 and 5 July 2005) by the City of Brunswick, and claimed that the proceedings should be discontinued in their entirety in accordance with Article 92(2), in conjunction with Article 91(3) and (4), of the Rules of Procedure of the Court and that an order should be issued for the case to be removed from the register, or, in the alternative, that the action as a whole should be dismissed as inadmissible. The Federal

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Republic of Germany argued, for the sake of completeness, that an order to pay a lump sum was no longer possible on procedural and substantive grounds.

17. As a result of that information supplied by the Federal Republic of Germany, the Commission declared in its observations of 6 December 2005 that it would henceforth pursue its original action only for the purposes of obtaining a declaration that the Federal Republic of Germany had failed to comply by the relevant date with the judgment of the Court regarding the contract concluded by the City of Brunswick. Furthermore, in the light of the subsequent rescission of that second contract, it no longer considered it necessary to seek the imposition of a periodic penalty payment. In those observations, the Commission pointed out that although it was still possible to impose a lump sum penalty, it did not consider a claim to that end to be appropriate in the circumstances.

18. By order of the President of the Court of Justice of 6 June 2005, the Kingdom of the Netherlands, the French Republic and the Republic of Finland were granted leave to intervene under Article 93(1) of the Rules of Procedure in support of the form of order sought by the Federal Republic of Germany.

19. The Commission, the Federal Republic of Germany and the French Republic took part in the hearing held on 7 December 2006.

V - Pleas in law and main arguments

20. The Federal Republic of Germany raises a number of pleas of inadmissibility and considers the action also to be unfounded on substantive grounds.

A - Whether the action is admissible

1. Whether the procedure is lawful

21. The German Government first claims that the Commission does not have an interest in bringing the proceedings as it failed to apply for interpretation of the judgment pursuant to Article 102 of the Rules of Procedure of the Court of Justice. The dispute over the consequences ensuing from the judgment in Commission v Germany should have been resolved by making such an application rather than by bringing an action under Article 228 EC. It also claims, that by bringing an action immediately for the imposition of a periodic penalty payment without first making an application for interpretation, the Commission is offending against the principle of proportionality.

22. In support of its action, the Commission maintains that the Federal Republic of Germany did not take the necessary measures to comply with the judgment of 10 April 2003, although it was obliged to do so under Article 228(1) EC. In that judgment, the Court had acknowledged the Commission's authority to obtain declarations, by means of infringement proceedings, that Member States have failed to fulfil their obligations under Community law - for instance, by concluding long-term service contracts in disregard of public procurement law - for the purpose of bringing such infringements to an end.

23. The Commission objects to the view that the dispute could have been resolved by an application for interpretation of the judgment under Article 102 of the Rules of Procedure. In the proceedings under Article 226 EC which led to the judgment of 10 April 2003, the Court had established a failure to fulfil obligations. A judgment upholding the application could have done no more than that, given that it does not fall to the Court to rule in such judgments on the measures which a Member State has to take to comply with that judgment.

2. Disappearance of the subject-matter of the proceedings

24. The Germa n Government proposes that the proceedings should be discontinued pursuant to Article 92(2) of the Rules of Procedure, since it considers the conditions of that provision to be met.

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The contract awarded by the municipality of Bockhorn for the collection of waste water and the contract awarded by the City of Brunswick for waste disposal, the continued existence of which had prompted the Commission to bring the proceedings, have both been rescinded. As a result, the action has now become devoid of purpose and there is no need to adjudicate on it.

25. The German Government contends in the alternative that the action must be dismissed as inadmissible on the ground that there is no interest in bringing the proceedings because, the contracts at issue having been rescinded, there is no longer any cause to implement the Court's judgment in Joined Cases C-20/01 and C-28/01. In assessing whether there continues to be an interest in bringing proceedings, the crucial factor to be borne in mind in the context of an action under Article 228(2) EC is the date of the last hearing and not, for instance, the expiry of the period prescribed in the reasoned opinion.

26. The Netherlands Government concurs with the observations made by the German Government and proposes that the Court should dismiss the action as inadmissible on the ground that there is no interest in bringing proceedings, because they have become devoid of purpose on account of the fact that the waste disposal contract concluded by the City of Brunswick has in the meantime been cancelled.

27. The Commission takes the view that, in proceedings under Article 228(2) EC, just as in proceedings under Article 226 EC, a failure to fulfil obligations must have occurred by the date of expiry of the period imposed on the Member State in the reasoned opinion for the action to be admissible. If the Member State has not taken the necessary measures to comply with the judgment of the Court within that period, the Commission may bring an action before the Court. Once an action is admissible, it argues, it cannot become inadmissible as a result of subsequent events.

28. The Commission maintains that it has an interest in clarifying whether the Federal Republic of Germany had already complied with the judgment in Joined Cases C-20/01 and C-28/01 by the relevant date, when the contract concluded by the City of Brunswick still existed. It had not done so, in its view, because an obligation to rescind that contract arose out of that judgment. Thus, the action must be upheld.

B - The merits

29. In its reasoning on the merits of the action the Commission refers essentially to its observations on admissibility. It takes the view that the Federal Republic of Germany did not take sufficient measures to comply with the judgment mentioned above, since it did not cancel the waste disposal contract concluded by the City of Brunswick before expiry of the period prescribed in the reasoned opinion. A Member State's obligation to bring an end to the infringement established by the Court and the Commission's powers to ensure that that obligation is performed are laid down in Article 228 EC, that is to say, in primary Community law. As a provision of secondary Community legislation, Article 2(6) of Directive 89/665 cannot in any way alter the implications of that obligation. Moreover, the review procedure provided for in Directive 89/665 pursues a more specific purpose than infringement proceedings.

30. The German Government, on the other hand, considers the action to be unfounded, as it regards the measures mentioned in its letter of 23 December 2003 as sufficient to comply with the judgment in question. The necessary and, in its view, sufficient measures had consisted in express instructions at national and Land level to comply strictly with the provisions of public procurement law.

31. It further takes the view, supported by the Netherlands, French and Finnish Governments, that a declaration of a failure to fulfil obligations under Article 226 EC cannot give rise to an obligation to rescind a contract resulting from an award procedure. Such an interpretation is, above all, contrary to Article 2(6) of Directive 89/665, which permits the Member States, after the conclusion of a contract, to limit the powers of the body responsible for the review procedures

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to awarding damages to any person harmed by the improper conduct of the contracting authorities. Under that provision, the contracts concluded by the contracting authorities can thus continue to be effective. Since the Federal Republic of Germany has availed itself of that possibility, Community law does not mean that the contractual obligations undertaken are unlawful. Furthermore, an obligation to rescind the contracts would be contrary to the principles of legal certainty and of the protection of legitimate expectations, the principle pacta sunt servanda , Article 295 EC, the fundamental right to property and the case-law of the Court on the temporal limitation of the effects of a judgment in damages.

32. The German Government further points out that, under German law and on the basis of the relevant provisions of the contracts at issue in this case, the contracts could not be rescinded or could be rescinded but only at the expense of incurring a disproportionately high risk of being found liable in damages.

VI - Legal assessment

33. As mentioned at the start of this Opinion, the central issue in the present dispute is the conclusions that the Federal Republic of Germany should have drawn from the judgment of 10 April 2003 in order to fulfil its obligation to ensure that compliance with Community law was restored.

34. However, that unduly straightforward presentation of the subject-matter of the dispute belies its complexity from a legal point of view, especially as it raises points of law directly concerning both the admissibility and the merits of the action.

A - Whether the action is admissible

1. Whether the procedure is lawful

35. The first point concerns the complaint made by the German Government regarding the admissibility of infringement proceedings brought by the Commission pursuant to the second subparagraph of Article 228(2) EC. In its view, the Commission should have first made an application for interpretation of the judgment in Joined Cases C20/01 and C-28/01 in accordance with Article 102 of the Rules of Procedure of the Court. In addition, the fact that the action for the imposition of a periodic penalty payment was brought immediately without a prior application for interpretation offends against the principle of proportionality.

36. In my view, no legal basis for that view of the law can be found in the Treaties, nor is it compatible with Community procedural law. On the contrary, that view seems to be based on a false understanding of the nature of infringement proceedings under the second subparagraph of Article 228(2) EC, and it is consequently essential that the matter be clarified.

37. It must first be noted in this regard that the procedural law of the Community does not accord any precedence to the application for interpretation of a judgment over proceedings brought under the second subparagraph of Article 228(2) EC. By the same token, procedural law does not require the Commission to make such an application before it may bring an action. The separate procedures before the Court differ in their criteria and objectives; thus they must be regarded in principle as independent of one another and can take priority over other types of procedure only where regard is had to their specific purpose in a particular case.

38. In accordance with Article 102 of the Rules of Procedure, for an application for interpretation of a judgment to be admissible, it must concern the operative part of the judgment in question, and the essential grounds thereof, and seek to resolve an obscurity or ambiguity that may affect the meaning or scope of that judgment, in so far as that judgment was intended to resolve the particular case before the Court. According to the case-law of the Court, an application for interpretation of a judgment is therefore inadmissible where it relates to matters not decided upon by the judgment

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concerned or seeks to obtain from the Court in question an opinion on the application, implementation or consequences of its judgment. (6)

39. In these proceedings the Commission and the German Government are in dispute as to whether a legal obligation on the part of the Federal Republic of Germany to terminate the contracts for the provision of services can be inferred from the judgment of 10 April 2003. In such a case, the Commission's application can be construed only as a claim seeking a declaration from the Court, binding on both parties, regarding the application and implementation or, as the case may be, the consequences of the judgment delivered. The subject-matter of the proceedings is, after all, the practical implementation of a judicial decision by the Federal Republic of Germany and not, for instance, an obscurity or ambiguity involving that decision. On the basis of the criteria developed by the case-law, any application under Article 102 of the Rules of Procedure would therefore have to be regarded as inadmissible in the absence of any decision which might properly be the subject of interpretation.

40. I should like in addition to refer to Advocate General Geelhoed's remarks in Commission v France , that any obligation to comply with a ruling of the Court may involve questions as to the precise content of that ruling. Where necessary, they must be resolved by having recourse to the procedure laid down under Article 228 EC. (7) That comment by the Advocate General can be adopted without any difficulty in my view, especially as the infringement procedure is a procedure the exclusive aim of which, restricted by its declaratory nature, is to secure a declaration from the Court of a failure to fulfil obligations. (8)

41. Because the Court is restricted to declaring a failure to fulfil obligations, it can be difficult in some cases for the Member States concerned to determine which particular measures they must take in order to put an end to the infringement complained of. In such cases, the Court endeavours to lay down a framework in the grounds of the judgment within which the contested measure may continue to be regarded as consistent with the Treaty. (9) The Court can also provide assistance as to interpretation in the operative part of the judgment by defining the failure to fulfil obligations which has been established either broadly or narrowly. (10) Thus, while the powers of the Court in infringement proceedings are limited, that does not mean in any way is that it is prevented in general from referring in the judgment itself to the manner and extent of the possibilities available for rectifying the infringement in the circumstances of the case. The wording of Article 228 EC, which expressly refers to the Member State concerned being required to take the necessary measures to comply with the judgment, confirms that of such a course of action is permissible. (11)

42. Accordingly, the scope of the obligation on the Member State concerned to take steps to apply the judgment can be determined by the parties to the proceedings in an individual case simply by interpreting the judgment establishing the failure to fulfil obligations, without there being any need for an application for interpretation pursuant to Article 102 of the Rules of Procedure.

43. It is apparent from all the foregoing that infringement proceedings under Article 228 EC are indeed the correct procedure for clarifying any issues concerning the obligation of a Member State to implement a judgment of the Court. (12) Their specific nature means that those proceedings override all other types of procedure, including applications for interpretation of a judgment, and consequently a discussion on the proportionality of such an action is superfluous.

2. The relationship of the proceedings under Article 228(2) EC to the correction procedure laid down under Article 3 of Directive 89/665

44. In so far as the German Government objects to the Commission taking action against the presumed continuation of an infringement of Community law in the form of an action under Article 228(2) EC, and relies on its national review measures and penalties and on the correction procedure available

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to the Commission under Article 3 of Directive 89/665/EEC, that submission is to be interpreted primarily as a plea of inadmissibility as regards the action.

45. The answer to that plea must be that measures taken by the Commission pursuant to Article 226 EC remain unaffected by the approximation of the respective laws of the Member States to the provisions of Directive 89/665. (13) Where it believes that a contracting authority has infringed Community law, the Commission may, of its own motion, bring infringement proceedings under Article 226 EC against the Member State concerned, irrespective of the national measures taken to transpose Directive 89/665. (14) Not only the precedence of primary law over the provisions of secondary legislation contained in Directive 89/665/EEC, but also the differing function of the review mechanisms laid down therein mean that infringement proceedings cannot be excluded as a relevant cause of action. (15)

46. It is true that Article 2(6) of Directive 89/665/EEC empowers the Member States to limit national legal protection, after the conclusion of a contract, to the awarding of damages to the persons harmed by such an infringement. However, that does not mean that the conduct of a contracting authority is to be regarded in every case as being in compliance with Community law. (16) On the contrary, it is for the Court alone to establish in infringement proceedings whether the alleged infringement has arisen. (17)

47. In addition, the Court held in its judgment in Commission v Ireland that the procedure set out in Article 3 of Directive 89/665/EEC, under which the Commission can take action against a Member State if it considers that a clear and manifest infringement of Community provisions on the award of public contracts has been committed, is a preventive measure, which can neither derogate from nor replace the powers of the Commission under Article 226 EC. (18)

48. The correction procedure under Article 3 of Directive 89/665/EEC serves to afford the Member States an opportunity to prevent foreseeable infringements of public procurement law and in so doing to clarify in advance situations that are straightforward from a legal viewpoint, also saving the Commission work. As a result, lengthy and burdensome infringement proceedings are avoided in unambiguous cases. (19)

49. In view of the special function they have in the system for reviewing the legality of procurement procedures, the two sets of proceedings again differ in the criteria essential for their institution: unlike the correction procedure, infringement proceedings do not presuppose the existence of a clear and manifest infringement; (20) they merely require that there be a failure to fulfil an obligation under Community law. (21) For that reason, the individual stages of the procedures are also not interchangeable, although they have a parallel structure: the reasoned opinion under Article 226 EC and the Member State's observations on it cannot be replaced by measures under Article 3 of Directive 89/665; instead they must be effected separately as a preliminary stage to bringing proceedings before the Court of Justice. Conversely, a correction procedure under Article 3 of the directive does not detract from the Commission's powers under Article 226. (22)

50. It should also be borne in mind that the correction procedure is not an instrument which enables proceedings to be brought before the Court of Justice. Since, however, the safeguarding of Community law requires in every case that review procedures before the Court of Justice be available, it cannot have been the aim of the Community legislature to exclude such review by eliminating recourse to infringement proceedings.

51. As regards the powers of the Commission, it should be recalled that, by virtue of its role as guardian of the Treaty, the Commission is not obliged to have recourse primarily to the correction procedure. On the contrary, it is free to bring proceedings before the Court if it considers that a Member State has failed to fulfil an obligation under the Treaty and has not complied with its

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reasoned opinion. (23)

52. The same conclusions can be drawn, in my view, in relation to the procedure under Article 228(2) EC. That procedure, absorbed into the primary law of the Community by virtue of the Maastricht Treaty, is, from a procedural viewpoint, modelled on the procedure under Article 226 EC. It now affords the Court the option of no longer only making a finding of failure to comply with the first judgment, but also of imposing on the Member State concerned payment of a lump sum or periodic penalty payment. The procedure under Article 228(2) EC is therefore a procedure the purpose of which is to encourage the recalcitrant Member State, by means of financial penalties, to comply with a judgment establishing a breach of obligations. (24) By contrast, the review measures which the Commission may take pursuant to Directive 89/665 have the function of preventing infringements of Community law at the earliest possible stage. The mechanisms of primary and secondary law therefore are not mutually exclusive; instead they complement each other with a view to everything that the Member States conduct themselves in a manner which is lawful. (25)

53. Thus, the German Government cannot raise a plea of inadmissibility on the basis of the review and penalty mechanisms set out in Directive 89/665.

3. Absence of an interest in bringing proceedings and disappearance of the subject-matter of the proceedings

54. In its rejoinder the German Government claims that, there is no longer an interest in bringing proceedings as regards the part of the subject-matter of the dispute that is left outstanding by the Commission's reply of 26 April 2005, because the Federal Republic of Germany, as the Member State concerned, no longer needs to be prompted through the imposition of a periodic penalty payment or a lump sum to alter its conduct, since the waste disposal contract between the City of Brunswick and the Braunschweigische Kohlebergwerke (BKB') has in the meantime been rescinded. It contends that the proceedings should be discontinued, or, in the alternative, the action dismissed as inadmissible, since now that the contracts at issue have been rescinded, no further encouragement to enforce the Court's ruling in Joined Cases C-20/01 and C-28/01 is necessary. In support of the form of order sought, it maintains that, in assessing whether there is still an interest in bringing proceedings, the crucial factor in an action under Article 228(2) EC is the date of the last hearing.

55. Those arguments cannot be accepted. It is settled case-law that, when exercising its powers under Article 226 EC, the Commission does not have to show that there is a specific interest in bringing an action. The Commission's function is to ensure, of its own motion and in the general interest, that the Member States give effect to Community law and to obtain a declaration as regards any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end. (26)

56. Furthermore, it is for the Commission to determine whether it is expedient to take action against a Member State, what provisions the Member State has infringed, and to choose the time at which it will bring an infringement proceedings; the considerations which determine that choice cannot affect the admissibility of the action. (27)

57. Lastly, while the bringing and continuation of infringement proceedings is a matter for the Commission in its entire discretion, it is for the Court to consider whether there has been a failure to fulfil obligations as alleged, without its being part of its role to take a view on the Commission's exercise of its discretion. (28)

58. In the light of all the foregoing, the plea of inadmissibility based on the Commission's lack of interest in bringing proceedings must be dismissed.

59. Under Article 92(2) of the Rules of Procedure, the Court may of its own motion declare that the substance of the action has become devoid of purpose if it comes to the conclusion that there

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is no longer any need to adjudicate on the action. It may also be invited to do so by the parties. (29) However, an invitation of that kind is not essential: the Court may bring an end to the proceedings even without an application to that effect, by way of a judgment discontinuing the action. I shall consider below whether an event justifying a decision not to give a ruling has occurred.

60. First, it should be noted that, inasmuch as the contract between the City of Brunswick and the BKB rescinding the previous contract was concluded on 7 July 2005, the Federal Republic of Germany has met the requirement to withdraw the contract for services complained of, as originally imposed by the Commission in its reasoned opinion of 30 March 2004. (30) The infringement complained of was therefore corrected after the twomonth period prescribed in the reasoned opinion had expired, but at a time at which the written procedure before the Court was not yet completed.

61. Seen from a procedural point of view, the fact that, under the settled case-law of the Court, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion means that it cannot be held that there is no need to adjudicate. Consequently, the Court will not take account of any subsequent correction of the infringement and such a correction has no impact on the question whether the action is admissible. (31)

62. This is apparent not only indirectly from the wording of Article 226 EC but also from the purpose of that stage in the pre-litigation procedure, which is to afford the infringing Member State a final opportunity to rectify the infringement before any action is brought. However, it is uncertain whether those principles also apply to the procedure under Article 228(2) EC. The German Government's position that the date of the last hearing should be the basis for assessing whether or not there is a need to adjudicate on the action seems in essence to correspond with the view adopted by Advocate General Ruiz-Jarabo Colomer in Commission v Greece. In his Opinion, the Advocate General stated that the purpose of the procedure under Article 228(2) EC was not to obtain a further declaration of failure to fulfil obligations but to encourage the recalcitrant Member State to comply with a judgment establishing a breach of obligations. Since the hearing or, failing that, the end of the written procedure is the last opportunity for the defendant State to submit observations as to the level of compliance it has achieved, and for the Commission to make submissions regarding the amount and form of the financial penalty which it is appropriate to impose, it is that date which should to be taken as the basis for assessment. (32)

63. I concur with that view of the law, but only inasmuch as it concerns the assessment of the need to impose a penalty payment on an infringing Member State in the case in point. However, as regards the application for a declaration of non-compliance with a judgment establishing an infringement, the essential reference point should still be the date of expiry of the period prescribed in the reasoned opinion. It is clear that the Court proceeded on the same assumption in its recent judgment in Case C-119/04 Commission v Italy , when it assessed the two claims independently of one another and in so doing took as the basis of assessment the date relevant in each separate case. (33)

64. Accordingly, the rescission of the waste disposal contract at issue subsequent to its conclusion cannot be regarded as an event rendering the action devoid of purpose for the purposes of Article 92(2) of the Rules of Procedure. On that basis, this plea of inadmissibility must also be dismissed.

B - The merits of the action

1. The continuing effects of the infringement of public procurement law

65. An action under Article 228(2) EC is well founded if the Member State found by a judgment of the Court to be in breach of an obligation under the Treaty has failed to take the necessary measures to comply with that judgment. Under Article 228(1) EC, it is required to bring the infringement of Community law to an end. That obligation to act also applies to the organs of all local and

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regional authorities of the State against which the judgment was given. (34)

66. As regards the procedural allocation of the duty to adduce evidence and the burden of proof, it must first be pointed out that, according to settled case-law, it is for the Commission to provide the Court, in the course of the proceedings, with the information necessary to determine the extent to which a Member State has complied with a judgment declaring it to be in breach of its obligations. (35) Moreover, where the Commission has adduced sufficient evidence to show that the breach of obligations has persisted, it is for the Member State concerned to challenge in substance and in detail the information produced and its consequences. (36)

67. The Commission takes the view that the Federal Republic of Germany has not complied with its obligation to end the Treaty infringements established in the judgment of 10 April 2003. It considers the express instructions of the German Government, at federal and Land level alike, that public procurement law should be strictly complied with to be insufficient. It adopts the position that the breach of obligations has persisted by means of the continued existence of the waste disposal contract between the City of Brunswick and the BKB. It bases its reasoning essentially on the Court's observations at paragraphs 36 and 37 of its judgment. It therefore considers the rescission of that contract to be the only measure capable of eliminating the consequences of the infringement of public procurement law.

68. As far as the interpretation of those two paragraphs of that judgment is concerned, I must concur with the Commission. In its observations the Court, in my view, admits of no doubt that the effects of an infringement of Community law persist as long as a contract concluded in breach of public procurement law is being performed. (37)

69. That interpretation is also consistent with the prevailing case-law of the Court according to which, in the award of public contracts, the infringement of a directive ceases to exist only if, on the date of expiry of the period laid down by the Commission in its reasoned opinion, all effects of the contract notice at issue are exhausted. (38) Those effects cannot be considered to be exhausted while the contracts concluded in breach of Community law continue to produce effects, in other words, while those contracts continue to be performed. (39)

70. Since the waste disposal contract concluded for a term of 30 years was still valid until the date relevant for legal assessment in these proceedings, it can be concluded that the infringements held to exist in the original judgment continued to produce effects. (40) The German Government does not, in the final analysis, actually dispute that the privatelaw contract at issue has continued to produce legal effects after the judgment given on 10 April 2003. However, it rejects any obligation to rescind the contract, referring to the authority provided for in Article 2(6) of Directive 89/665 to limit the powers of the body responsible for the review procedures, once a contract has been concluded, to awarding damages to any person harmed by an infringement. (41)

2. The maintenance of rights acquired under the contract in breach of public procurement law

71. It is necessary to examine below whether the Federal Republic of Germany was obliged by law to terminate the contract concerned or whether it should instead have resorted to other measures in order to fulfil its obligations under Article 228(1) EC.

72. It should be made clear first of all that the measures cited by the German Government, namely the express instructions, at federal and Land level alike, that the provisions of public procurement law should be strictly complied with and the request to notify the measures introduced and implemented by its authorities, have the sole aim of preventing future infringements and are therefore incapable of putting an end to a continuing infringement of Community law that has already begun and continues, as in this case. Since the German Government has not informed the Court of any further measures, it now remains only to determine whether an obligation to terminate exists.

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73. In my view, it is necessary to note at the outset that a Member State is required to take all necessary measures to remedy its default and may not impose any obstacle of any kind this being achieved. According to the well-established case-law of the Court, a Member State may not, in particular, plead national problems in the exercise or transposition of a Community rule. Nor may it do so in respect of any provisions, practices or circumstances existing in its legal system. (42) The Federal Republic of Germany may not therefore plead that public procurement in its legal system, unlike in other Member States, has civil-law features and, therefore, that the contracting authority is bound, as a party having a status equivalent to that of the contractor, by a contract under private law. (43) Recognising certain Member States' special status on account of special features of national law would be contrary to the need for a uniform application of Community law across the Member States of the European Union.

74. Inasmuch as the German Government argues that terminating the contract would be unreasonable because of the legitimate expectations of the parties to the contract, it must be countered that it relies on legal rights of third parties which were created unlawfully by the contracting authority. As explained by Advocate General Alber in his Opinion in Case C-328/96 Commission v Austria , as far as a Member State's fundamental obligations towards the Community are concerned, that State may not successfully rely on the consequences of its illegal conduct in order to call into question the legal obligation as such. (44) The pacta sunt servanda principle can therefore be replied on only if Community law expressly accepts that rights acquired under contracts concluded in breach of public procurement law are to be protected.

75. Thus far the Court has not expressly addressed the question whether there is an obligation to bring such contracts to an end. However, if the judgment of 10 April 2003 is considered in the light of the Court's case-law mentioned above, under which all effects of contract awards contrary to Community law must be exhausted, everything suggests that the Court would uphold the principle of the existence of an obligation to bring the contract to an end. (45)

76. No other conclusion can be drawn from the notion of effet utile in the sense of the broadest possible effectiveness of the procurement directives. Effectiveness is a central principle of Community law, the special relevance of which in public procurement law becomes clear only on closer consideration of the legislative purpose of the procurement directives. (46) The Court of Justice does not merely recognise in the procurement directives formal arrangements laying down the basis on which contracts are to be awarded; it also highlights their purpose of putting into effect the free movement of services and goods. (47) Therefore, an infringement of the directives is not exhausted upon conclusion of the contract; on the contrary, it persists until the contract has been performed completely or ends in some other way. If this case-law is not to deprived of all practical effect, an infringement established in an action for failure to fulfil obligations must consequently be corrected by bringing the contract to an end. (48)

77. An obligation to bring to an end contracts that are contrary to public procurement law is also necessary from the point of view of deterrence, in order to guarantee careful compliance with the procurement directives with a view to ensuring the effective implementation of Community law. Member States which circumvent the provisions of public procurement law might be inclined in certain circumstances, in the absence of an appropriate penalty, to adopt a policy of fait accompli. (49) That would, as a result, perpetuate the infringement of Community law.

78. That measure is also proportionate in the case in point if account is taken of the 30-year term originally envisaged for the waste disposal contract. Because of the length of that period, such a contractual relationship was capable of creating a fait accompli. Thus, only by rescinding the contract was it possible to counter a situation where the breach of Community law would be perpetuated.

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79. Article 2(6) of Directive 89/665/EEC does not preclude such an obligation to bring the contract to an end. First, as an item of secondary legislation, that directive cannot restrict the fundamental freedoms. Secondly, on no account can it be inferred from the protection of other tenderers afforded by Article 2(6) of the directive to contracts which infringe Community law that Community law does not in general exclude any obligation to put an end to contracts that are contrary to public procurement law. Rather, that provision means that a tenderer who brings proceedings before the review body cannot rely on Article 228(1) EC to support a claim that the tenderer a Member State is under an obligation to bring to an end contracts in breach of public procurement law. (50) Thus, that provision is only relevant as regards the arrangements for individual legal protection against unlawful procurement decisions in the Member States. (51) It makes no reference to protection of the Community interest, which must be clearly distinguished from the individual interest of unsuccessful tenderers. (52) The position could not be otherwise, as primary law, which ranks ahead of it, already lays down exhaustive rules in that regard. That Community system of legal protection against unlawful procurement decisions by national authorities has been carefully thought through and differentiated in order to take account of the various interests involved. On the one side, there is the review procedure, which seeks to protect individual interests, and on the other, the procedure, for failure to fulfil obligations and the objection procedure, which are designed to serve the Community interest in creating or restoring a lawful situation. As already stated at the outset, because of their specific purpose, infringement proceedings override the correction procedure. Since, by bringing an action under Article 226 EC, the Commission is defending the public interest exclusively, the provisions on the review procedure, including Article 2(6) of Directive 89/665, must be regarded as irrelevant to this case.

80. Irrespective of that point, rescinding a contract and subsequently launching a new invitation to tender with a view to implementing procurement law as effectively as possible should generally prove to be the best solution for taking account of the individual interests of unsuccessful tenderers. First, it is often more advantageous for a tenderer to have a contract concluded and the primary claim under civil law satisfied than to file a claim for damages against the contracting authority. (53) Secondly, in bringing an action before the national courts for enforcement of a claim for damages a tenderer will find itself facing difficulties, because it will have to prove not only that it has suffered harm but also that it had submitted the best tender. To that falls to be added the fact that it is frequently difficult to assess the damage caused. (54)

81. Furthermore, it is not apparent why a contract concluded in breach of public procurement law, which of its nature will give rise to a continuing infringement of the fundamental freedoms, should be exempted a priori from the measures necessary to comply with a judgment establishing a failure to fulfil obligations. (55)

82. Consequently, that submission by the German Government must also be rejected. It must therefore be concluded that the possibilities available under national law for ending the contract must be utilised and exhausted in compliance with the principle of the effectiveness and equivalence of the remedies available to enforce Community law. (56) The fact that both the City of Brunswick and the municipality of Bockhorn managed during the proceedings before the Court of Justice to free themselves from their contractual obligations belies, moreover, the view adopted by the German Government that the contractual obligations cannot be terminated, or can be terminated but only at the risk of incurring a disproportionately high exposure to damages.

83. Since the Federal Republic of Germany did not terminate the criticised contract by the relevant date, it has not taken the necessary measures to comply with the judgment of the Court of Justice of 10 April 2003 in Joined Cases C-20/01 and C-28/01 Commission v Germany concerning the award of a contract for waste disposal by the City of Brunswick.

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C - The lack of any need for penalties

84. Following the view of the law expressed here, it must be assumed that the Federal Republic of Germany has failed to fulfil its obligations under Article 228(1) EC, thus affording the Court of Justice the possibility of imposing coercive measures.

85. Even though the Commission withdrew in its entirety its original claim for a periodic penalty payment to be imposed and made no claim for the imposition of a lump sum, the Court still retains the right to adopt a final decision in that regard, since it is not bound by the Commission's proposals as regards the financial consequences of the finding that a Member State has failed to comply with an earlier judgment of the Court. Those proposals merely constitute a useful point of reference for the Court in exercising its discretion under Article 228(2) EC. (57) In other words, the application of that provision falls within the full jurisdiction of the Court. (58)

86. The procedure under Article 228(2) EC is intended to induce a defaulting Member State to comply with a judgment establishing an infringement and thus to ensure that Community law is applied effectively. The measures provided for by that provision, namely the periodic penalty payment and the lump sum, both serve that purpose.

87. As the Court made clear in Case C-304/02 Commission v France , whether one or the other of those two measures should be applied depends on whether it is capable of meeting the objective pursued according to the circumstances of the specific case. Whilst the imposition of a periodic penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations that, in the absence of such a measure, would otherwise tend to persist, the imposition of a lump sum is based more on assessment of the effects on private and public interests of the relevant Member State's failure to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it. (59)

88. In view of the persuasive function, described above, of the periodic penalty payment, it is appropriate, in assessing whether the Member State against which the judgment has been given still has not complied with its obligations and whether, therefore, the criteria for imposing such a penalty continue to be met, to take the date of the hearing, as discussed earlier, as the relevant point of reference. In this case those criteria ceased to apply upon cancellation of the waste disposal contract while the written procedure was still ongoing, and thus the imposition of a periodic penalty payment no longer appears to be appropriate.

89. By contrast, as a one-off financial penalty of a punitive nature, the lump sum is suited to penalising unlawful conduct which, although belonging to the past, meaning that elimination of the established infringement retains only minor interest for the Community, none the less makes the imposition of a penalty imperative as a deterrent. (60) Recourse should be had to the threat of a lump sum in particular if the Member State concerned has complied with the judgment only because it fears that a second set of proceedings may be brought against it (61) the breach is particularly serious (62) or there is a tangible risk of its reoccurrence. (63)

90. In the present case, there are no indications to suggest a risk of reoccurrence, nor can the breach be defined as particularly serious. In view of the purely local relevance of the waste disposal contract concluded by the City of Brunswick in breach of public procurement law, the resulting damage to the efficient operation of the internal market can still be regarded as minor.

91. It is true that, any disregard of a judgment of the Court of Justice must be regarded as serious, and thus the infringement at issue could be penalised in principle by way of a lump sum as a symbolic penalty (64) in respect of the period from the date of the judgment, that is to say, 10 April 2003, in Joined Cases C-20/01 and C-28/01 Commission v Germany until the conclusion of the contract cancelling the previous contract; however, it should be borne in mind, allowing for extenuating

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circumstances, that the Federal Republic of Germany fulfilled its obligation under that first judgment while the written procedure was still ongoing.

92. In the circumstances of the present case, I consider it appropriate to refrain from imposing a financial penalty.

VII - Costs

93. Pursuant to Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission made an application to that effect and the Federal Republic of Germany has been unsuccessful in its submissions, it should be ordered to pay the costs.

94. Under Article 69(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. Accordingly, the French Republic, the Kingdom of the Netherlands and the Republic of Finland must bear their own costs.

VIII - Conclusion

95. In the light of the foregoing considerations and the fact that the Commission has not maintained the action in respect of the municipality of Bockhorn, I suggest that the Court should

- declare that, by failing to take the necessary measures to comply with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 Commission v Germany regarding the award of a contract for waste disposal by the City of Brunswick the Federal Republic of Germany has failed to comply with the obligations under Article 228(1)EC;

- order the Federal Republic of Germany to pay the costs;

- declare that the French Republic, the Kingdom of the Netherlands and the Republic of Finland must bear their own costs.

(1) .

(2) - Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609.

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

(4) - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures for the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

(5) - Judgment in Commission v Germany , cited in footnote 2, at paragraphs 6 to 20.

(6) - Judgments in Case 5/55 Assider v High Authority [1955] ECR 135; Case 70/63 A High Authority v Collotti and Court of Justice [1965] ECR 275; and Case 110/63 A Willame v Commission of the EAEC [1966] ECR 287; Orders in Case 9/81 INT Court of Auditors v Williams [1983] ECR 2859; Case 206/81 A Alvarez v Parliament [1983] ECR 2865; Case 25/86 Suss v Commission [1986] ECR 3929; Joined Cases 146/85 and 431/85 INT Maindiaux and Others v Economic and Social Committee and Others [1988] ECR 2003; and Case T-22/91 INT Raiola-Denti and Others v Council [1993] ECR II-817, paragraph 6.

(7) - Opinion of Advocate General Geelhoed in Case C-177/04 Commission v France [2006] ECR I-2461, point 43.

(8) - Case C-126/03 Commission v Germany [2004] ECR I-11197, paragraphs 25 and 26; Opinion of Advocate General Reischl in Case 141/78 France v United Kingdom [1979] ECR 2923. Schütz, H.-J./Bruha, T./König, D., Casebook Europarecht , Beck, Munich, 2004, p. 333; Cremer, W.,

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in Calliess/Ruffert (Ed.), Kommentar zu EU-Vertrag und EG-Vertrag , on Article 228(1) EC, and Karpenstein, P./Karpenstein, U., in Grabitz/Hilf (Ed.), Das Recht der Europäischen Union , Vol. III, Art. 228 EC, paragraph 6, each point out that, as a declaratory judgment, the ruling is neither an instrument for enforcement nor does it modify the legal position. As a result of the finding that a Member State has failed to fulfil its obligations, that State is obliged under Article 228(1) EC to bring an end to that infringement. However, the Court may not itself set aside the measure which gave rise to the infringement or order the defaulting Member State to correct the infringement.

(9) - Case 70/72 Commission v Germany [1973] ECR 813, paragraph 13.

(10) - Burgi, M., in Handbuch des Rechtsschutzes der Europäischen Union (Ed. Rengeling/Middeke/Gellermann), Second edition, Beck, Munich, 2003, Section 6, paragraph 49.

(11) - Karpenstein, P./Karpenstein, U., in Grabitz/Hilf (Ed.), Das Recht der Europäischen Union , Vol. III, Art. 228 EC, paragraph 6.

(12) - See Fernandez Martín, J. M., The EC Public Procurement Rules: A Critical Analysis , Clarendon Press, Oxford, 1996, p. 220.

(13) - Frenz, W., Handbuch Europarecht, Vol. 3, Beihilfe- und Vergaberecht , Springer-Verlag, Berlin/Heidelberg, 2007, paragraph 3399, p. 1016.

(14) - Seidel, I., in Dauses (Ed.), Handbuch des EU-Wirtschaftsrechts , Issue IV, paragraph 173.

(15) - Bitterich, K., Kein Bestandsschutz für vergaberechtswidrige Verträge gegenüber Aufsichtsmaßnahmen nach Artikel 226 EG', Europäisches Wirtschafts- und Steuerrecht , Vol. 16, 2005, Book 4, p. 164.

(16) - Case C-125/03 Commission v Germany [2004] ECR I-4771, paragraph 15.

(17) - Case C125/03 Commission v Germany , cited in footnote 16, at paragraph 15.

(18) - See Case C-353/96 Commission v Ireland [1998] ECR I-8565, paragraph 22, and Opinion of Advocate General Alber in that case, at point 18; Case C-328/96 Commission v Austria [1999] ECR I-7479, paragraph 57; Case C-359/93 Commission v Netherlands [1995] ECR I-157, paragraph 13; and Case C-79/94 Commission v Greece [1995] ECR I-1071, paragraph 11.

(19) - Seidel, I., in Dauses (Ed.), Handbuch des EU-Wirtschaftsrechts , Issue IV, paragraph 164, and Frenz, W., Handbuch Europarecht, Vol. 3, Beihilfe- und Vergaberecht , Springer-Verlag, Berlin/Heidelberg, 2007, paragraph 3407, p. 1019. That is apparent from the eighth recital in the preamble to Directive 89/665, according to which the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention of the competent authorities of the Member State and of the contracting authority concerned so that appropriate steps are taken for the rapid correction of any alleged infringement.

(20) - Under Article 3(1) of Directive 89/665 the Commission may invoke the procedure for which that article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305 and 77/62.

(21) - Commission v Netherlands , cited in footnote 18, at paragraph 14.

(22) - Opinion of Advocate General Tesauro in Commission v Netherlands , cited in footnote 18, point 4 et seq.

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(23) - In connection with failures to fulfil the obligation to transpose directives, see Case C-433/93 Commission v Germany [1995] ECR I-2303, paragraph 22; Case C471/98 Commission v Belgium [2002] ECR I-9681, paragraph 39; and Joined Cases C-20/01 and C-28/01 Commission v Germany , cited in footnote 2, paragraph 30.

(24) - Opinion of Advocate General Colomer in Case C-387/97 Commission v Greece [2000] ECR I-5047, point 58.

(25) - Kalbe, P., Kommentar zum Urteil des Gerichtshofs vom 10. April 2003 in den verbundenen Rechtssachen C-20/01 und C-28/01', Europäisches Wirtschafts- und Steuerrecht, 2003, p. 566, refers to the twin-track nature of the system of legal protection in respect of infringements of the EC procurement directives.

(26) - Case C-33/04 Commission v Luxembourg [2005] ECR I-10629, paragraph 65; Case C-333/99 Commission v France [2001] ECR I-1025, paragraph 23; Case C-394/02 Commission v Greece [2005] ECR I-4713, paragraphs 14 and 15; Case 167/73 Commission v France [1974] ECR 359, paragraph 15; and Joined Cases C-20/01 and C-28/01 Commission v Germany, cited in footnote 2, paragraph 29.

(27) - Commission v Luxembourg , cited in footnote 26, paragraph 66; Case C-317/92 Commission v Germany [1994] ECR I-2039, paragraph 4; Case C-35/96 Commission v Italy [1998] ECR I-3851, paragraph 27; and Commission v France, cited in footnote 26, paragraph 24.

(28) - Commission v Luxembourg, cited in footnote 26, paragraph 67, which incorporate a reference to Case C-474/99 Commission v Spain [2002] ECR I-5293, paragraph 25.

(29) - Case C-400/99 Italy v Commission [2001] ECR I-7303, paragraphs 49 to 65.

(30) - See p. 4 of the Commission's reasoned opinion of 30 March 2004, issued in accordance with Article 228 EC, addressed to the Federal Republic of Germany for failing to take measures to comply with the judgment of the Court of Justice of the European Communities of 10 April 2003 in Joined Cases C-20/01 and C-28/01 concerning the award of a contract for the collection of waste water by the municipality of Bockhorn and of a contract for waste disposal by the City of Brunswick.

(31) - Case C-119/04 Commission v Italy [2006] ECR I-6885, paragraphs 27 and 28; Case C-29/01 Commission v Spain [2002] ECR I-2503, paragraph 11; Case C-147/00 Commission v France [2001] ECR I-2387, paragraph 26; Case C-119/00 Commission v Luxembourg [2001] ECR I-4795, paragraph 14; Case C-384/99 Commission v Belgium [2000] ECR I-10633, paragraph 16; Case C-60/96 Commission v France [1997] ECR I-3827, paragraph 15; Case C-289/94 Commission v Italy [1996] ECR I-4405, paragraph 20; and Case C-302/95 Commission v Italy [1996] ECR I-6765, paragraph 13.

(32) - Opinion of Advocate General Ruiz-Jarabo Colomer in Commission v Greece , cited in footnote 24, points 57 to 59.

(33) - Case C-119/04 Commission v Italy , cited in footnote 31. The Court first declared that, on the date of expiry of the period prescribed in the reasoned opinion, the Italian Republic still had not taken all the measures necessary to comply with the judgment of 26 June 2001 in Case C-212/99 Commission v Italy [2001] ECR I-4923 (paragraphs 27 to 32). The Court subsequently assessed whether the criteria had been met for imposing a periodic penalty payment, and in particular whether the alleged breach of obligations had continued until its examination of the facts (paragraphs 33 to 46). See also Case C-304/02 Commission v France [2005] ECR I-6263, paragraphs 30 and 31, and Case C177/04 Commission v France, cited in footnote 7, paragraphs 20 and 21.

(34) - Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 16.

(35) - Case C-119/04 Commission v Italy , cited in footnote 31, paragraph 41, and Commission

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v Greece , cited in footnote 24, paragraph 73.

(36) - Case C-119/04 Commission v Italy , cited in footnote 31, paragraph 41, together with the Opinion of Advocate General Poiares Maduro in that case (point 24), and Commission v France, cited in footnote 33, paragraph 56. According to Advocate General RuizJarabo Colomer in his Opinion in Commission v Greece , cited in footnote 24, at point 77, in proceedings under Article 228 EC it is for the Member State to prove that it has duly complied with the judgment establishing an infringement of the Treaty.

(37) - See also Heuvels, K., Fortwirkender Richtlinienverstoß nach De-facto-Vergaben', Neue Zeitschrift für Baurecht und Vergaberecht , Vol. 2, 2005, Book 1, p. 32; Bitterich, K., Kein Bestandsschutz' für vergaberechtswidrige Verträge gegenüber Aufsichtsmaßnahmen nach Artikel 226 EG', Europäisches Wirtschafts- und Steuerrecht , Vol. 16 (2005), Book 4, p. 164; Bitterich, K., Kündigung vergaberechtswidrig zu Stande gekommener Verträge durch öffentliche Auftraggeber', Neue Juristische Wochenschrift 26/2006, p. 1845; Prieß, G., Beendigung des Dogmas durch Kündigung: Keine Bestandsgarantie für vergaberechtswidrige Verträge', Neue Zeitschrift für Baurecht und V ergaberecht , 2006, p. 220; Kalbe, P., Kommentar zum Urteil des Gerichtshofs vom 10. April 2003 in den verbundenen Rechtssachen C20/01 und C28/01', Europäisches Wirtschafts- und Steuerrecht, 2003, p. 567; Griller, S., Qualifizierte Verstöße gegen das Vergaberecht - Der Fall St. Pölten', ecolex , 2000, p. 8; Hintersteininger, M., Fehlerhafte Anwendung des EG-Vergaberechts am Beispiel St. Pölten - Zum Urteil des EuGH vom 28.10.1999', Osterreichische Juristen-Zeitung, 2000, p. 634.

(38) - See Case C-125/03 Commission v Germany , cited in footnote 16, paragraph 12, which incorporates a reference to Joined Cases C-20/01 and C28/01 Commission v Germany , cited in footnote 2, paragraphs 34 to 37, and to Commission v Austria , cited in footnote 18, paragraph 57; and Case C-362/90 Commission v Italy [1993] ECR I-2353, paragraphs 11 and 13.

(39) - Case C-125/03 Commission v Germany , cited in footnote 16, paragraph 12 et seq., and, for previous caselaw on the matter, in Commission v Austria , cited in footnote 18, paragraph 44.

(40) - See the Opinion of Advocate General Geelhoed in Joined Cases C-20/01 and C28/01 Commission v Germany , cited in footnote 2, point 57.

(41) - The Federal Republic of Germany availed itself of that authority by adopting the first sentence of Paragraph 114(2) of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition), in the version published on 15 July 2005 (BGBl. I, p. 2114), as most recently amended by Paragraph 132 of the Regulation of 31 October 2006 (BGBl. I p. 2407). Under that provision, a contract which has already been awarded may not be cancelled. An undertaking harmed by an infringement of a provision of public procurement law that affords protection is entitled under Paragraph 126 of that Law to compensation for the damage caused by the infringement of the principle of the protection of legitimate expectations.

(42) - Case 239/85 Commission v Belgium [1986] ECR 3645, paragraph 13, Case 42/80 Commission v Italy [1980] ECR 3635, paragraph 4, and Case C-383/00 Commission v Germany [2002] ECR I4219, paragraph 18.

(43) - In Member States with a Romanlaw tradition, procurement in its entirety is subject to public law. Thus, in France, Spain and Portugal award procedures and contracts between contracting authorities and contractors are subject to public law. Only the administrative courts or the Council of State of the relevant country can, on that basis, settle disputes arising out of award procedures and contracts. The award is therefore an administrative act. Conversely, the award under German procurement law is the civil-law acceptance of an offer. The award is made mostly in the form of

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a notice of award or confirmation letter (Seidel, I., in, Dauses (Ed.), Handbuch des EUWirtschaftsrechts , Book IV, paragraphs 8 and 9).

(44) - Opinion in Commission v Austria, cited in footnote 18, point 83.

(45) - In his comments on the judgment of the Court of 10 April 2003 in Joined Cases C20/01 and C28/01 Kalbe, P., Kommentar zum Urteil des Gerichtshofs vom 10. April 2003 in den verbundenen Rechtssachen C20/01 und C28/01', Europäisches Wirtschafts- und Steuerrecht , 2003, p. 567, takes the view that, in the infringement proceedings under Article 226 EC, the fate of the contested contracts was not the decisive factor in declaring and describing the Treaty infringement. Accordingly, no express position was adopted in the judgment as regards the fate of the contracts. The judgment nevertheless clearly explains that the infringement at issue can be rectified only by rescinding the contracts and issuing a new invitation to tender; see also Gjørtler, P., Varemærker og udbud', Lov & ret , June 2003, p. 33, which infers a corresponding obligation to terminate from the principle of Community loyalty laid down in Article 10 EC.

(46) - Leffler, H., Damages liability for breach of EC procurement law: governing principles and practical solutions', Public Procurement Law Review , No 4, 2003, pp. 152 and 153; Pachnou, D., Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness', Public Procurement Law Review , No 2, 2000, p. 69.

(47) - According to the second recital in the preamble to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), the aim of the secondary legislation on public procurement is to ensure effective implementation of the fundamental freedoms of undertakings. The same can be inferred from the recitals in the preamble to Directives 92/50 and 89/665 applicable in this case. The procurement directives are therefore to be construed as giving expression to the fundamental freedoms. They were adopted to guarantee the effectiveness of the fundamental freedoms and the opening-up of public procurement to competition across the Community. The Court of Justice also made it clear at an early stage that the aim of the procurement directives - and therefore of procurement law per se - is to ensure actual implementation of the fundamental freedoms. See Case 199/85 Commission v Italy , cited in footnote 34, at paragraph 12; Case 76/81 Commission v Luxembourg [1982] ECR 417, paragraph 7; Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16; and Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 32.

(48) - Bitterich, K., Kein Bestandsschutz für vergaberechtswidrige Verträge gegenüber Aufsichtsmaßnahmen nach Artikel 226 EG', Europäisches Wirtschafts- und Steuerrecht , Vol. 16 (2005), p. 165; Frenz, W., Handbuch Europarecht, Vol. 3, Beihilfe- und Vergaberecht , Springer-Verlag, Berlin/Heidelberg, 2007, paragraph 3394 et seq., p. 1015. Griller, S., Qualifizierte Verstöße gegen das Vergaberecht - Der Fall St. Pölten', ecolex , 2000, p. 8, takes the view that a corresponding obligation to rescind contracts that are contrary to public procurement law can arise in certain circumstances, but only where the contractual relations with the successful tenderer allow such termination in that way.

(49) - Fernandez Martín, J. M., The EC Public Procurement Rules: A Critical Analysis , Clarendon Press, Oxford, 1996, p. 157, on the risks of an irreversible infringement of Community law where a Member State creates a fait accompli through its own action; Arrowsmith, S., Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts', Remedies for enforcing the public procurement rules , 1993, p. 16, takes the view that the absence of such a possibility to bring the contract concerned to an end might render the authorities less willing to comply with procurement law. There is a risk that contracts may be concluded in breach

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of the obligation to notify, in order to discourage tenderers and to restrict their legal remedies.

(50) - Bitterich, K., Kündigung vergaberechtswidrig zu Stande gekommener Verträge durch öffentliche Auftraggeber', Neue Juristische Wochenschrift , 26/2006, p. 1846.

(51) - Pachnou, D., Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness', Public Procurement Law Review , No 2, 2000, pp. 57 and 58.

(52) - Hintersteininger, M., Fehlerhafte Anwendung des EG-Vergaberechts am Beispiel St. Pölten - Zum Urteil des EuGH vom 28.10.1999', Osterreichische Juristen-Zeitung , 2000, Vol. 55, Book 17, pp. 633 and 634, construes Article 2(6) of Directive 89/665 as presenting an option for limiting State liability, which is relevant only to the relationship between Member State and unsuccessful tenderer. That provision must therefore be regarded as an exception. Moreover, as a mere instrument of secondary legislation, the directive is not capable of restricting the fundamental obligation of Member States to create a situation which complies with Community law.

(53) - Fernandez Martín, J. M., The EC Public Procurement Rules: A Critical Analysis , Clarendon Press, Oxford, 1996, p. 213, and Pachnou, D., Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness', Public Procurement Law Review , No 2, 2000, p. 65, refer to the award of damages as the secondbest alternative to specific performance; Hintersteininger, M., Fehlerhafte Anwendung des EG-Vergaberechts am Beispiel St. Pölten - Zum Urteil des EuGH vom 28.10.1999', Osterreichische Juristen-Zeitung , 2000, Vol. 55, Book 17, p. 634, describes the straightforward payment of monetary damages as a deficient form of redress. In their view, the principle whereby restitutio in integrum takes precedence over the award of pecuniary damages can be applied as a general principle of law.

(54) - Leffler, H., Damages liability for breach of EC procurement law: governing principles and practical solutions', Public Procurement Law Review , No 4, 2003, p. 160, refers to the slim chance a tenderer has of winning in an action for damages for the loss of a public contract; Fernandez Martín, J. M., The EC Public Procurement Rules: A Critical Analysis , Clarendon Press, Oxford, 1996, p. 214, refers to the fact that in most Member States evidence must be adduced to show that the applicant would have been awarded the contract or that it at least had a serious chance of being awarded it. Where that evidence is not furnished, the courts refuse to award damages. In the author's view, it is unlikely that an applicant will be able to overcome that obstacle.

(55) - Arrowsmith, S., Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts', Remedies for enforcing the public procurement rules , 1993, p. 8, considers it possible for a Member State to be required by the Court in infringement proceedings to rescind a contract that is contrary to public procurement law.

(56) - In its judgment of 20 December 2005 (Ref. 33 O 16465/05) the Landgericht München I (Regional Court Munich I) regarded as permissible the extraordinary termination by the City of Munich of a transport contract not put out to tender, citing Paragraph 313(3) of the Bürgerliches Gesetzbuch (German Civil Code, hereinafter:BGB') and a contractual loyalty clause', since under a previous judgment of the Court of Justice of the European Com munities in the infringement proceedings relating to that case (judgment in Case C126/03 Commission v Germany , cited in footnote 8), the City could no longer reasonably be expected to maintain the contract. Prieß, G. concurred in Beendigung des Dogmas durch Kündigung: Keine Bestandsgarantie für vergaberechtswidrige Verträge', Neue Zeitschrift für Baurecht und Vergaberecht , 2006, Book 4, p. 221. For continuous contractual obligations, termination on just and proper grounds is possible under Paragraph 314 of the BGB.

(57) - Commission v Greece , cited in footnote 24, paragraph 89, and Case C-278/01 Commission v Spain [2003] ECR I-14141, paragraph 41.

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(58) - Opinion of Advocate General Geelhoed of 29 April 2004 in Case C-304/02 Commission v France , cited in footnote 33, point 84.

(59) - Case C304/02 Commission v France , cited in footnote 33, at paragraphs 80 and 81.

(60) - Karpenstein, P./Karpenstein, U., in Grabitz/Hilf, Das Recht der Europäischen Union , Vol. III, Art. 228 EC, paragraph 28; Bonnie, A., Commission Discretion under Article 171(2) EC', European law review , Book 6 (1998), p. 547. Burgi, M., in Handbuch des Rechtsschutzes der Europäischen Union (Ed. Rengeling/Middeke/Gellermann), Second edition, C. H. Beck, Munich, 2003, Section 6, paragraph 49.

(61) - Karpenstein, P./Karpenstein, U., in: Grabitz/Hilf, Das Recht der Europäischen Union , Band III, Art. 228 EC, paragraph 28; Gaitanides, C., Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Union , von der Groeben/Schwarz (Hrsg.), Art. 228 EC, considers that such circumstances arise where the Member State concerned has only belatedly complied with the judgment but the new action is not yet pending at the Court or the judicial proceedings are not yet finished.

(62) - Candela Castillo, J., La loi européenne, désormais mieux protégée - Quelques réflexions sur la première décision de la Commission demandant à la Cour de Justice de prononcer une sanction pécuniaire au sens de l'article 171 du Traité à l`encontre de certains Etats membres pour violation du droit communautaire', Revue du Marché Unique Européen , Book 1 (1997), pp. 20 and 21.

(63) - Karpenstein, P./Karpenstein, U., in Grabitz/Hilf, Das Recht der Europäischen Union , Vol. III, Art. 228 EC, paragraph 28; Díez Hochleitner, J., Le traité de Maastricht et l`inexécution des arrêts de la Cour de Justice par les Etats membres', Revue du Marché Unique Européen , Book 2, 1994, p. 140; Bonnie, A., Commission Discretion under Article 171(2) EC', European Law Review , Book 6, 1998, p. 547; Burgi, M., in Handbuch des Rechtsschutzes der Europäischen Union (Ed. Rengeling/Middeke/Gellermann), Second edition, C. H. Beck, Munich, 2003, Section 6, paragraph 51.

(64) - Karpenstein, P./Karpenstein, U., in Grabitz/Hilf, Das Recht der Europäischen Union , Vol. III, Art. 228 EC, paragraph 28, take the view that a lump sum must take precedence over the periodic penalty payment, where the principle of proportionality demands that a symbolic' penalty be imposed on the defaulting Member State, for instance because it is foreseeable that the Member State will rectify its infringement before the judgment is given.

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

AUTLANG SL

APPLICA Commission ; Institutions

DEFENDA Federal Republic of Germany ; Member States

NATIONA Federal Republic of Germany

PROCEDU Action for failure to fulfil obligations

ADVGEN Trstenjak

JUDGRAP Timmermans

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**Judgment of the Court (First Chamber)
of 6 April 2006
Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA. Reference for a preliminary ruling: Tribunale amministrativo regionale per la Puglia - Italy. Freedom to provide services - Local public transport service - Award with no call for tenders - Award by a public authority to an undertaking of which it owns the share capital. Case C-410/04.**

In Case C-410/04,

REFERENCE for a preliminary ruling under Article 234 EC, by the Tribunale amministrativo regionale per la Puglia (Italy), made by decision of 22 July 2004, received at the Court on 27 September 2004, in the proceedings

Associazione Nazionale Autotrasporto Viaggiatori (ANAV)

v

Comune di Bari,

AMTAB Servizio SpA,

THE COURT (First Chamber),

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

Advocate General: L.A. Geelhoed,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 October 2005,

after considering the observations submitted on behalf of:

- the Associazione Nazionale Autotrasporto Viaggiatori (ANAV), by C. Colapinto, avvocato,

- the Comune di Bari, by R. Verna, B. Capruzzi and R. Cioffi, avvocati,

- AMTAB Servizio SpA, by G. Notarnicola and V. Caputi Jambrenghi, avvocati,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato,

- the German Government, by C. Schulze-Bahr, acting as Agent,

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

- the Polish Government, by T. Nowakowski, acting as Agent,

- the Commission of the European Communities, by X. Lewis and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2006,

gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Articles 43 EC, 49 EC and 86 EC.

2. The request was made in the course of proceedings between, on the one hand, the Associazione Nazionale Autotrasporto Viaggiatori (ANAV') and, on the other hand, the Comune di Bari (Municipality of Bari) and AMTAB Servizio SpA (AMTAB Servizio') concerning the award to that latter company

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of the public transport service within the municipality in question.

Legal context

Community legislation

3. Article 43 EC provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited....

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

4. Article 46 EC specifies:

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

2. The Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the abovementioned provisions.'

5. The first paragraph of Article 49 EC provides:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

6. Article 86(1) EC is worded as follows:

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.'

National legislation

7. As regards the Italian legislation, Article 14 of Decree Law No 269 laying down urgent measures to promote development and correct the operation of public finances of 30 September 2003 (Ordinary Supplement to GURI No 229 of 2 October 2003; Decree Law No 269/2003') amended Article 113 of Legislative Decree No 267 laying down the consolidated text of the laws on the organisation of local bodies of 18 August 2000 (Ordinary Supplement to GURI No 227 of 28 September 2000; Legislative Decree No 267/2000'). The new version of paragraph 5 of Article 113 of the latter decree provides:

The service contract is awarded in accordance with the rules of the sector and the legislation of the European Union, with entitlement to provide the service being granted to:

(a) joint stock companies selected by means of public and open tendering procedures;

(b) companies with mixed public and private ownership in which the private partner is selected by means of public and open tendering procedures that have ensured compliance with domestic and Community legislation on competition in accordance with guidelines issued by the competent authorities in specific regulations or circulars;

(c) companies belonging entirely to the public sector on condition that the public authority or

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authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities'.

The main proceedings and the question referred for a preliminary ruling

8. According to the order for reference, AMTAB Servizio is a joint stock company, the share capital of which is wholly owned by the Municipality of Bari and the sole activity of which is the provision of public transport services in that municipality. That company is wholly controlled by the Municipality of Bari.

9. The same decision shows that, under its statutes, ANAV represents undertakings providing national and international passenger transport services and services associated with transport activities and in that capacity safeguards, inter alia, the efficient running of the urban and out-of-town public transport service in the interest of the companies entrusted with operating such a service.

10. By decision of 17 July 2003, the Municipality of Bari initiated a public call for tenders for the award of the service contract for public transport in that municipality.

11. Following the amendment of paragraph 5 of Article 113 of Legislative Decree No 267/2000 by Article 14 of Decree Law No 269/2003, the Municipality of Bari abandoned that tendering procedure by decision of 9 October 2003.

12. By decision of 18 December 2003, that municipality awarded the service contract in question directly to AMTAB Servizio for the period from 1 January 2004 to 31 December 2012.

13. By application notified on 1 March 2004 and lodged on 9 March 2004 before the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court for Apulia), ANAV applied to that court for annulment of that decision and any connected or consequential acts on the ground that they constituted an infringement of Community law and, in particular, of Articles 3 EC, 16 EC, 43 EC, 49 EC, 50 EC, 51 EC, 70 EC to 72 EC, 81 EC, 82 EC, 86 EC and 87 EC.

14. In the light of those arguments, the Tribunale amministrativo regionale per la Puglia decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

Is the part of paragraph 5 of Article 113 of Legislative Decree No 267/2000, as amended by Article 14 of Decree Law No 269/2003, that sets no limit on the freedom of a public authority to choose between the different methods of awarding a contract for the provision of a public service and, in particular, between an award as a result of a public and open tendering procedure and direct award to a company wholly controlled by the authority, compatible with Community law and, in particular, with the obligations to ensure transparency and freedom of competition pursuant to Articles [43 EC], 49 EC and 86 EC?'

On the question referred for a preliminary ruling

15. By its question, the national court is essentially asking whether Community law, in particular the obligations to ensure transparency and freedom of competition referred to in Articles 43 EC, 49 EC and 86 EC, precludes national legislation such as that at issue in the main proceedings which sets no limit on the freedom of a public authority to choose between the various methods of awarding a contract for the provision of a public service, in particular between an award as a result of a public tendering procedure and direct award to a company of which that authority wholly owns the share capital.

16. It is apparent from the documents relating to the case in the main proceedings that the public transport service in the Municipality of Bari is remunerated, at least in part, through the purchase

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of tickets by those using it. That method of remuneration characterises a public service concession (Case C458/03 Parking Brixen [2005] ECR I-0000, paragraph 40).

17. It is common ground that public service concessions are excluded from the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (Parking Brixen , paragraph 42). That directive was replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), Article 17 of which expressly provides that it is inapplicable to service concessions.

18. Notwithstanding the fact that public service concession contracts are excluded from the scope of Directive 92/50, replaced by Directive 2004/18, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular (see, to that effect, Case C324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 60; Case C231/03 Coname [2005] ECR I-0000, paragraph 16, and Parking Brixen , paragraph 46).

19. The provisions of the Treaty which are specifically applicable to public service concessions include, in particular, Article 43 EC and Article 49 EC (Parking Brixen , paragraph 47).

20. Besides the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers is also to be applied to public service concessions even in the absence of discrimination on grounds of nationality (Parking Brixen , paragraph 48).

21. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed (see, to that effect, Telaustria and Telefonadress , paragraphs 61 and 62, and Parking Brixen , paragraph 49).

22. Theoretically, a complete lack of any call for competition in the case of the award of a public service concession such as that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency (Parking Brixen , paragraph 50).

23. Furthermore, it follows from Article 86(1) EC that the Member States must not maintain in force national legislation which permits the award of public service concessions without their being put out to competition since such an award infringes Article 43 EC or 49 EC or the principles of equal treatment, non-discrimination and transparency (Parking Brixen , paragraph 52).

24. However, in the field of public service concessions, the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority (Parking Brixen , paragraph 62).

25. National legislation which reproduces literally the wording of the conditions specified in the preceding paragraph, as does Article 113(5) of Legislative Decree No 267/2000 as amended by Article 14 of Decree Law No 269/2003, theoretically complies with Community law, with the proviso that the interpretation of that legislation must also comply with the requirements of Community

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law.

26. It should be made clear that, since it is a matter of a derogation from the general rules of Community law, the two conditions stated in paragraph 24 of this judgment must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying the derogation to those rules lies on the person seeking to rely on those circumstances (see Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, paragraph 46, and Parking Brixen , paragraph 63).

27. According to the written observations submitted to the Court by AMTAB Servizio, the Municipality of Bari decided, on 27 December 2002, to transfer 80% of the shares it owned in the capital of that company and, on 21 May 2004, it decided to initiate for that purpose the call for tenders in order to select the majority private partner. That information was confirmed by ANAV at the hearing before the Court.

28. However, at the same hearing, the Municipality of Bari stated that it had altered its intention to transfer part of its shareholding in the capital of AMTAB Servizio. On 13 January 2005, it decided not to act on its previous decision and not to privatise that company. That decision was not put in evidence in the file before the national court since it was taken after the decision to refer.

29. It is a matter for that court, and not for the Court of Justice, to determine whether the Municipality of Bari intends to open the capital of AMTAB Servizio to private shareholders. However, in order to provide that court with the guidance it needs for the purpose of ruling on the proceedings before it, it is useful to provide the following clarification.

30. If, for the duration of the contract at issue in the main proceedings, the capital of AMTAB Servizio is open to private shareholders, the effect of such a situation would be the award of a public services concession to a semi-public company without any call for competition, which would interfere with the objectives pursued by Community law (see, to that effect, Case C29/04 Commission v Austria [2005] ECR I-0000, paragraph 48).

31. In fact, the participation, even as a minority, of a private undertaking in the capital of a company in which the concession-granting public authority is also a participant excludes in any event the possibility of that public authority exercising over such a company a control similar to that which it exercises over its own departments (see, to that effect, Stadt Halle and RPL Lochau , paragraph 49).

32. Therefore, in so far as the concessionaire is a company which is open, even in part, to private capital, that fact precludes it from being regarded as a structure for the in-house' management of a public service on behalf of the controlling local authority (see, to that effect, Coname , paragraph 26).

33. In the light of the foregoing considerations, the answer to the question referred must be that Articles 43 EC, 49 EC and 86 EC, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency do not preclude national legislation which allows a public authority to award a contract for the provision of a public service directly to a company of which it wholly owns the share capital, provided that the public authority exercises over that company control comparable to that exercised over its own departments and that that company carries out the essential part of its activities with the controlling authority.

Costs

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

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

Articles 43 EC, 49 EC and 86 EC, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency do not preclude national legislation which allows a public authority to award a contract for the provision of a public service directly to a company of which it wholly owns the share capital, provided that the public authority exercises over that company control comparable to that exercised over its own departments and that that company carries out the essential part of its activities with the controlling authority.

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OBSERV Italy ; Federal Republic of Germany ; Austria ; Poland ; Member States ; Commission ; Institutions

NATIONA Italy

NATCOUR *A9* Tribunale Amministrativo Regionale per la Puglia, ordinanza del 27/07/2004 (885/2004) ; - Il Foro amministrativo 2004 p.2649-2654 ; - Il Foro amministrativo 2004 p.3110-3111 (résumé) ; - Bercelli, Iacopo: I modelli delle società con partecipazione degli enti locali per la gestione dei servizi pubblici, Il Foro amministrativo 2004 p.2654-2664 ; - Gaverini, Fabrizio: Alle "radici" dell'in house providing: la giustizia amministrativa italiana si rimette alla Corte di Giustizia CE, Il Foro amministrativo 2004 p.3111-3124 ; - Isoni, Alessandro: La delegazione interorganica nella gestione dei servizi pubblici locali. Tutela della concorrenza o prevalenza delle esigenze del servizio?, Il Foro amministrativo 2004 p.3124-3139

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PROCEDU Reference for a preliminary ruling

ADVGEN Geelhoed

JUDGRAP Cunha Rodrigues

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Opinion of Mr Advocate General Geelhoed delivered on 12 January 2006. Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA. Reference for a preliminary ruling: Tribunale amministrativo regionale per la Puglia - Italy. Freedom to provide services - Local public transport service - Award with no call for tenders - Award by a public authority to an undertaking of which it owns the share capital. Case C-410/04.

I - Introduction

1. In this reference for a preliminary ruling, the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court for Apulia) (Italy) seeks a ruling from the Court on whether national legislation permitting a contract for the provision of a local public transport service to be awarded directly to an undertaking owned and controlled by the public award body is compatible with Community law. This is another case in which the Court is requested to clarify the scope of its judgment in Teckal. (2)

2. The Court held, at paragraph 49 of that judgment, that the existence of a public supply contract within the meaning of Council Directive 93/36/EEC (3) requires inter alia an agreement between two distinct persons.

3. In this connection, the Court noted in paragraph 50 of the judgment that:

... it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.'

II - Law

4. In Italian law, Article 113 of Legislative Decree No 267/00 was amended by Article 14 of Decree Law No 269/03. The resulting new version of paragraph V of Article 113 provides:

The service contract is awarded in accordance with the rules of the sector and the legislation of the European Union, with entitlement to provide the service being granted to:

a) joint stock companies selected by means of public and open tendering procedures;

b) companies with mixed public and private ownership in which the private partner is selected by means of public and open tendering procedures that have ensured compliance with domestic and Community legislation on competition in accordance with guidelines issued by the competent authorities in specific regulations or circulars;

c) companies belonging entirely to the public sector on condition that the public authority or authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities.'

III - The dispute in the main proceedings and the question referred for a preliminary ruling

5. By decision of 17 July 2003, the Municipality of Bari launched the procedure for a public tender for the award of the contract for local transport services in the territory of the Municipality of Bari. By decision of 18 December 2003, it then decided not to go through with the tendering procedure and awarded the contract in question to AMTAB Servizio SpA by direct agreement.

6. It is apparent from the referring decision that the Municipality of Bari adopted its new decision following the entry into force of Article 14 of Decree Law No 269/03, amending paragraph V of

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Article 113 of Legislative Decree No 267/00.

7. In particular, the new paragraph V(c) of Article 113 - describing the internal' management of a public service in accordance with the definition provided by the Court at paragraph 50 of its judgment in Teckal , and from which it follows that the internal' management of a public service does not fall within the scope of Community law on calls for tender - is what led the municipal authority of Bari not to go through with the procedure for a public tender.

8. According to the order for reference, the concessionaire AMTAB Servizio SpA is a company the share capital of which is wholly owned by the Municipality of Bari and whose sole activity is the provision of a local transport service in the city of Bari. This company is wholly controlled by the municipal authority of Bari under the service contract binding these two entities.

9. The applicant in the main proceedings, the Associazione nazionale autotrasporto viaggiatori, lodged an appeal before the national court seeking annulment of the decision of the Municipality of Bari of 18 December 2003 to award the service contract in question to AMTAB Servizio SpA on the ground that the Municipality was in breach of Community law, and in particular Articles 3 EC, 16 EC, 43 EC, 49 EC, 50 EC, 51 EC, 70 EC, 71 EC, 81 EC, 82 EC, 86 EC and 87 EC.

10. In the light of these arguments, the Tribunale amministrativo regionale di Puglia stayed proceedings and referred the following question to the Court for a preliminary ruling:

Is the part of paragraph V of Article 113 of Legislative Decree No 267/00, as amended by Article 14 of Decree Law No 269/03, that sets no limit on the freedom of a public authority to choose between the different methods of awarding a contract for the provision of a public service, and, in particular, between an award as a result of a public and open tendering procedure and direct award to a company wholly controlled by the authority, compatible with Community law, and, in particular, with the obligations to ensure transparency and freedom of competition pursuant to Articles [43] EC, 49 EC and 86 EC?'

IV - Assessment

11. Do Articles 43 EC, 49 EC and 86 EC preclude national legislation, such as that set out in the question for a preliminary ruling, from giving local authorities the freedom to choose either to entrust with the management of a service, such as public transport, a company attached to the local authority in question or to initiate a procedure for a public tender to award the contract for this service to a private party?

12. That is the tenor of the question raised by the national court, the resolution of which, in the light of recent and indeed very recent case-law of the Court, does not pose particular difficulties. (4)

13. According to the documents relating to the case in the main proceedings, lodged with the Court Registry, the service in question is remunerated, at least in part, through the purchase of tickets by users, so that the relevant service concession falls not within the ambit of the Community directives on public contracts, but directly within the provisions of primary law, more particularly the fundamental freedoms laid down in the Treaty. (5) The national court appears to have made the same finding, since its question for a preliminary ruling refers only to Articles 43, (6) 49 and 86 EC, and not to Directive 92/50/EEC. (7)

14. The most important elements of the reply are to be found in paragraph 50 of Teckal and paragraph 49 of Stadt Halle and RPL Lochau . According to those judgments, a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority, where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments

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and that entity carries out the essential part of its activities with the controlling public authority or authorities. (8)

15. It is evident from a comparison of the wording of the new version of paragraph V(c) of Article 113 of Legislative Decree No 267/00 (companies belonging entirely to the public sector on condition that the public authority or authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities') with the passages of the Court's case-law cited in the paragraph above that the Italian legislature has clearly followed this case-law.

16. This has been confirmed by the Commission of the European Communities, which points out, in its written observations, that the current drafting of paragraph V(c) of Article 113 is the result of infringement proceedings brought by the Commission against the Italian Republic.

17. Given that the national legislation is consistent with the Court's case-law, any decision taken by a local authority which in turn is in line with that legislation must also be considered to be consistent with Community law.

18. In that connection, it should however be noted that the criteria for defining a situation as internal' are to be strictly applied. It follows inter alia from the judgments cited above in Parking Brixen and Commission v Austria that, first, the control exercised by the contracting authority should not be diluted by the participation, even as a minority', of a private undertaking in the capital of the company to which management of the relevant service has been entrusted, and secondly, that company must carry out the essential part of its activities with the controlling public authority or authorities.

19. The facts underlying the main proceedings seem to me to satisfy these two criteria so that I would be in a position to conclude my analysis with this finding were it not for a third criterion deriving from the judgment in Commission v Austria , (9) namely the requirement that the first two criteria be met on a continuous basis.

20. Where, having met the first two criteria at the time of awarding the management of the relevant service, the competent authority transfers even a minority share of the company concerned to a private company, this would result - by means of an artificial construction comprising several distinct phases, namely the establishment of the company, the award to that company of the management of the public transport service and the transfer of part of its shares to a private company - in a public service concession being awarded to a semi-public company without a prior call for competition.

21. The same reasoning applies to a situation in which the original concessionaire is awarded contracts for other public services, without a prior call for competition, by public authorities other than that which controls it.

22. In the two situations described above, the principles of equal treatment, non-discrimination and transparency, as recalled by the Court in its judgments in Coname and Parking Brixen , would not be observed.

V - Conclusion

23. In the light of the observations above, I propose that the Court answers the question referred by the Tribunale amministativo regionale per la Puglia as follows:

Articles 43 EC, 49 EC and 86 EC are to be interpreted as not precluding the application of a provision such as paragraph V of Article 113 of the Italian Legislative Decree No 267/00 in its current wording, provided that the two criteria it lays down, namely that the concessionaire must be subject to a control similar to that which the authority exercises over its own departments and

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that it must carry out the essential part of its activities with the controlling public authority, continue to be fulfilled on a lasting basis after the concessionaire has been awarded the contract for the management of a public service.

(1) .

(2) - Case C-107/98 [1999] ECR I8121.

(3) - Directive of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

(4) - Teckal ; Case 26/03 Stadt Halle and RPL Lochau [2005] ECR I-1; Case C-231/03 Coname [2005] ECR I-0000; Case C-458/03 Parking Brixen [2005] ECR I-0000; Case C-29/04 Commission v Austria [2005] ECR I-0000.

(5) - Coname , at paragraph 16.

(6) - In the question for a preliminary ruling the national court cites Article 46 EC, and not Article 43 EC. It may be concluded, from reading the referring decision as a whole, that this is a material error.

(7) - Council Directive of 18 June 1992, relating to the coordination of procedures on the award of public service contracts (OJ 1992 L 209, p. 1).

(8) - See also Commission v Austria , at paragraph 34.

(9) - See paragraphs 38 to 42.

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JURCIT	11997E043 : N 11 13 23 11997E049 : N 11 13 23 11997E086 : N 11 13 23 31992L0050 : N 13 31993L0036 : N 2 61998J0107 : N 1 - 3 12 14 62003J0026 : N 12 14 62003J0231 : N 12 13 22 62003J0458 : N 12 18 22 62004J0029 : N 12 14 18 19

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SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Competition
AUTLANG	French
NATIONA	Italy
PROCEDU	Reference for a preliminary ruling
ADVGEN	Geelhoed
JUDGRAP	Cunha Rodrigues
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ORDONNANCE DU PRÉSIDENT DE LA COUR

11 janvier 2006 (*)

«Radiation»

Dans les affaires jointes C-241/04 et C-242/04,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Tribunale Amministrativo Regionale della Liguria (Italie), par décision du 22 avril 2004, parvenue à la Cour le 8 juin 2004, dans la procédure

Acquedotto De Ferrari Galliera SpA

contre

Provincia di Genova

Autorità dell'Ambito Territoriale Ottimale Genovese

Regione Liguria

Comune di Genova

Comune di Chiavari

Comune di Davagna

Comune di Carasco

Comune di Cogorno

Comune di Arenzano

Comune di Avegno

Comune di Bogliasco

Comune di Busalla

Comune di Camogli

Comune di Campo Ligure

Comune di Campomorone

Comune di Casella

Comune di Ceranesi

Comune di Cogoleto

Comune di Crocefieschi

Comune di Fascia

Comune di Fontanigorda

Comune di Gorreto

Comune di Isola del Cantone

Comune di Masone

Comune di Mele

Comune di Montebruno

Comune di Montoggio

Comune di Pieve Ligure

Comune di Propata

Comune di Recco

Comune di Ronco Scrivia

Comune di Rondanina

Comune di Rossiglione

Comune di Rovegno

Comune di Sant´Olcese

Comune di Savignone

Comune di Serra Riccò

Comune di Sori

Comune di Tiglieto

Comune di Torriglia

Comune di Uscio

Comune di Valbrevenna

Comune di Vobbia

Comune di Borzonasca

Comune di Casarza Ligure

Comune di Castiglione Chiavarese

Comune di Cicagna

Comune di Coreglia Ligure

Comune di Favale di Malvaro

Comune di Lavagna

Comune di Leivi

Comune di Lorsica

Comune di Lumarzo

Comune di Mezzanego

Comune di Moconesi

Comune di Moneglia

Comune di Né

Comune di Neirone

Comune di Orero

Comune di Portofino

Comune di Rapallo

Comune di Rezzoaglio

Comune di San Colombano Certenoli

Comune di S. Margherita Ligure

Comune di S. Stefano d'Aveto

Comune di Sestri Levante

Comune di Zoagli

Comune di Mignanego

Comune di Bargagli

et une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Tribunale Amministrativo Regionale della Liguria (Italie), par décision du 22 avril 2004, parvenue à la Cour le 8 juin 2004, dans la procédure

Acquedotto Nicolay SpA

contre

Provincia di Genova

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LE PRÉSIDENT DE LA COUR,

l'avocat général, Mme C. Stix-Hackl, entendu,

rend la présente

Ordonnance

1 Par lettre du 18 octobre 2005, parvenue au greffe de la Cour le 24 octobre 2005, le Tribunale

Amministrativo Regionale della Liguria a informé la Cour qu'il retirait ses demandes de décision à titre préjudiciel.

2 Dans ces conditions, il y a lieu d'ordonner la radiation des présentes affaires.

3 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, le président de la Cour ordonne:

Les affaires jointes C-241/04 et C-242/04 sont radiées du registre de la Cour.

Fait à Luxembourg, le 11 janvier 2006

Le greffier	Le président
R. Grass	V. Skouris

* Langue de procédure: l'italien.

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Order of the President of the Court of 11 January 2006 (references for a preliminary ruling from the Tribunale Amministrativo Regionale della Liguria) - Acquedotto De Ferrari Galliera SpA v Provincia di Genova and Others (C-241/04) and Acquedotto Nicolay SpA v Provincia di Genova and Others (C-242/04)

(Joined Case C-241/04 and C-242/04) [1]

Language of the case: Italian.

The President of the Court has ordered that the case be removed from the register.

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1 -

2 - OJ C 217, 28.08.2004.

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Notice for the OJ

Reference for a preliminary ruling by the Il Tribunale Amminstrativo Regionale della Liguria (Second Chamber) by order of that court of 22 April 2004, in case of Acquedotto De Ferrari Galliera s.p.a. against Province of Genoa

(Case C-241/04)

Reference has been made to the Court of Justice of the European Communities by order of the Il Tribunale Amminstrativo Regionale della Liguria, (Second Chamber) Italy of 22 April 2004 received at the Court Registry on 8 June 2004, for a preliminary ruling in the case of Acquedotto De Ferrari Galliera s.p.a against Province of Genoa and Others on the following questions:

Is the interpretation of Articles 12 EC, 28 EC, 43 EC, 49 EC and 86 EC adopted by the Court of Justice in Case C-324/98 *Teleaustria* to be regarded as valid and binding on the national court even where there is no actual or potential risk of discrimination on the ground of nationality?

May Community law and in particular Articles 12 EC, 28 EC, 43 EC, 49 EC and 86 EC be interpreted in such a way as to permit Member States, when prescribing rules governing the award of concession contracts in accordance with the aforesaid provisions (as interpreted by the Court of Justice in Case C-324/98 *Teleaustria*), to introduce transitional rules preserving concessions already awarded without competitive tendering and, if so, for what duration?

May Article 86(2) be interpreted as permitting a derogation from Articles 12 EC, 28 EC, 43 EC and 49 EC (as interpreted by the Court of Justice in Case C-324/98 in relation to the requirement of competitive tendering for public service concessions), in the limited circumstances of a service concession being awarded for a transitional period of specified duration which is within reasonable limits, where the specific nature of the situation before the national court is such that the holding of a competitive tendering process for the concession of a public service of general economic interest, such as the integrated water service, could be detrimental to the timely implementation, activation and operation of the service in question?

_____

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Notice for the OJ

Reference for a preliminary ruling by the Il Tribunale Amminstrativo Regionale della Liguria (Second Chamber) by order of that court of 22 April 2004, in case of Acquedotto Nicolay against Province of Genoa

(Case C-242/04)

Reference has been made to the Court of Justice of the European Communities by order of the Il Tribunale Amminstrativo Regionale della Liguria, (Second Chamber) Italy of 22 April 2004 received at the Court Registry on 8 June 2004, for a preliminary ruling in the case of Acquedotto Nicolay SpA against Province of Genoa and Others on the following questions:

Is whether the interpretation of Articles 12, 28, 43, 49 and 86 of the EC Treaty adopted by the Court of Justice in Case C-324/98 Teleaustria to be regarded as valid and binding on the national court even where there is no actual or potential risk of discrimination on the ground of nationality?

May Community law and in particular Articles 12, 28, 43, 49 and 86 of the EC Treaty be interpreted in such a way as to permit Member States, when prescribing rules governing the award of concession contracts in accordance with the aforesaid provisions (as interpreted by the Court of Justice in Case C-324/98 Teleaustria), to introduce transitional rules preserving concessions already awarded without competitive tendering and, if so, for what duration?

May Article 86(2) be interpreted as permitting a derogation from Articles 12 EC, 28 EC, 43 EC and 49 EC (as interpreted by the Court of Justice in Case C-324/98 in relation to the requirement of competitive tendering for public service concessions), in the limited circumstances of a service concession being awarded for a transitional period of specified duration which is within reasonable limits, where the specific nature of the situation before the national court is such that the holding of a competitive tendering process for the concession of a public service of general economic interest, such as the integrated water service, could be detrimental to the timely implementation, activation and operation of the service in question?

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Judgment of the Court (First Chamber)
of 9 February 2006
La Cascina Soc. coop. arl and Zilch Srl v Ministero della Difesa and Others (C-226/04) and Consorzio G. f. M. v Ministero della Difesa and La Cascina Soc. coop. arl (C-228/04). Reference for a preliminary ruling: Tribunale amministrativo regionale del Lazio - Italy. Public service contracts - Directive 92/50/EEC - Article 29, first paragraph, subparagraphs (e) and (f) - Obligations of service providers - Payment of social security contributions and taxes. Joined cases C-226/04 and C-228/04.

In Joined Cases C-226/04 and C-228/04,

REFERENCES for a preliminary ruling under Article 234 EC, made by the Tribunale amministrativo regionale del Lazio (Italy), by decisions of 22 April 2004, received at the Court on 2 June 2004, in the proceedings

La Cascina Soc. coop. arl,

Zilch Srl (C226/04)

v

Ministero della Difesa,

Ministero dell'Economia e delle Finanze,

Pedus Service,

Cooperativa Italiana di Ristorazione soc. coop. arl (CIR),

Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL),

and

Consorzio G.f.M. (C228/04)

v

Ministero della Difesa,

La Cascina Soc. coop. arl,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, K. Lenaerts and E. Juhasz (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 June 2005,

after considering the observations submitted on behalf of:

- La Cascina Soc. coop. arl and Zilch Srl, by D. Grossi, G. RomanoCesareo and D. Cusmano, avvocati,
- the Italian Government, by I.M. Braguglia, acting as Agent, and D. Del Gaizo, avvocato dello Stato,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the Commission of the European Communities, by A. Aresu and K. Wiedner, acting as Agents,

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after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

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

Subparagraphs (e) and (f) of the first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts do not preclude a national law or administrative practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having paid in full when the period prescribed for submitting the request to participate in the contract expires, may subsequently regularise his position

- pursuant to a tax amnesty or leniency measures adopted by the State, or
- pursuant to an administrative arrangement of payment in instalments or debt relief, or
- by bringing administrative or legal proceedings,

provided that, within the period prescribed by national law or administrative practice, he provides evidence that he has benefited from such measures or arrangement or that he has brought such proceedings within that period.

1. These references for a preliminary ruling concern the interpretation of subparagraphs (e) and (f) of the first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (the Directive').

2. The references were made in proceedings between La Cascina Soc. coop. arl (La Cascina') and Zilch Srl (Zilch'), and the Consorzio G.f.M. (G.f.M.'), on the one hand, and the Italian Ministry of Defence and Ministry of Economy and Finance, on the other, in their capacity as contracting authorities, as regards (i) the exclusion of those undertakings from participation in a procurement procedure for public service contracts and (ii) the compatibility with Article 29 of the Directive of the corresponding provision of Italian legislation which transposes that directive into national law.

Legal background

Community law

3. It is clear from the second and third recitals in the preamble to the Directive that it was adopted in the context of measures aimed at progressively establishing the internal market' and that for that purpose it aims to achieve the coordination of the procurement procedures for the award of public service contracts'.

4. The 20th recital in the preamble to the Directive states that ... to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts'.

5. In order to open public contracts to the widest possible competition, Article 13(5) of the Directive provides, in relation to the organisation of design contests, that, [i]n any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition'. Similarly, in respect of restricted procedures, Article 27(2), second subparagraph, of that directive states that [i]n any event, the number of candidates invited to tender shall be sufficient to ensure

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genuine competition'.

6. As part of Chapter 2 of Title VI of the Directive, entitled Criteria for qualitative selection', Article 29 provides:

Any service provider may be excluded from participation in a contract who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding-up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under this Chapter.

Where the contracting authority requires of the service provider proof that none of the cases quoted in (a), (b), (c), (e), or (f) applies to him, it shall accept as sufficient evidence:

- ...

- for (e) or (f), a certificate issued by the competent authority in the Member State concerned.

...

Member States shall, within the time limit referred to in Article 44, designate the authorities and bodies competent to issue such documents or certificates and shall forthwith inform the other Member States and the Commission thereof.'

National law

7. The Directive was transposed into Italian law by Legislative Decree No 157 of 17 March 1995 (GURI No 104 of 6 May 1995) (Decree No 157/1995').

8. Article 12(d) and (e) of that decree, as replaced by Article 10 of Legislative Decree No 65 of 25 February 2000 (GURI No 70 of 24 March 2000) (Article 12 of Decree No 157/1995'), which transposes Article 29 of the Directive into national law, provides:

candidates shall be excluded from participation in contracts who:

are not in compliance in respect of obligations relating to the payment of social security contributions for employees, in accordance with Italian legislation or the legislation of the State in which they are established;

are not in compliance in respect of obligations relating to the payment of taxes, in accordance

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with Italian legislation or the legislation of the State in which they are established.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

9. In December 2002 the Italian Ministry of Defence, together with the Ministry of Economy and Finance, published in the Gazzetta ufficiale della Repubblica italiana and the Official Journal of the European Communities a restricted and accelerated call for tenders for the award of the contract to supply catering services to Ministry of Defence bodies and departments stationed in national territory. The final date for receipt of requests to participate was set at 15 January 2003 and the final date for receipt of tenders at 3 March 2003.

10. That call for tenders was divided into 16 lots. For each lot there was provision for a different annual value, a specific area to be covered and a range of specific services to be provided.

11. La Cascina and Zilch, as part of a temporary joint venture, were among those who responded to that call for tenders, in respect of the majority of the 16 lots, and G.f.M. responded in respect of Lot No 7.

12. On 4 December 2003 the contracting authority decided to exclude La Cascina and G.f.M. from the procedure on the ground that they were not in compliance with their obligations relating to the payment of social security contributions for employees, and Zilch on the ground that it was not in compliance with its obligations relating to the payment of taxes.

13. The three bodies in question requested the annulment of that decision before the referring court. In particular, La Cascina and G.f.M. argued that the failure to pay social security contributions had subsequently been regularised. For its part, Zilch stated that one part of the taxes claimed had been the subject of tax relief and that the other part had benefited from a tax amnesty' under a regularisation measure adopted by the national legislature in 2002, on the basis of which it had been authorised to make payment in instalments.

14. The contracting authority argued, on the other hand, that the subsequent regularisation did not mean that the applicant undertakings were in compliance with their obligations at the time the period prescribed for submitting requests to participate in the tendering procedure expired on 15 January 2003.

15. The referring court notes a difference in the wording of Article 29 of the Directive and Article 12 of Decree No 157/1995. Whereas the Community provision provides for the power to exclude from participation in a contract a service provider who has not fulfilled' obligations, the national provision excludes a person who is not in compliance' with his obligations.

16. The national court wishes to know therefore whether the national provision at issue in the main proceedings is more permissive and allows more freedom to the national authorities and it refers, in that regard, to the various interpretations in decisions given on that subject by the Italian courts. Some of those courts accept subsequent regularisation, that is after expiry of the period prescribed for submitting requests to participate in the contract, in two types of situation:

- where the parties concerned have contested the validity of their obligations before the competent national administrative authorities or courts,

- where the parties concerned, who have in fact failed to fulfil their obligations, have however benefited either from leniency measures on the part of the State which has given them the opportunity subsequently to regularise their position relating to tax and social security, or from a tax amnesty.

17. Taking the view that such an interpretation might lead to unequal treatment of service providers and obstruct the procedure for the award of a contract, the Tribunale amministrativo regionale del Lazio decided to stay its proceedings and to refer the following questions to the Court for

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a preliminary ruling:

(1) Must the Directive in question, as regards only the abovementioned provisions, be interpreted as meaning that, where the Community legislature employs the expression has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority or has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority, the legislature intended to refer - solely and exclusively - to a situation in which the person concerned has - when the period prescribed for submitting requests to participate in a public tendering procedure expires (or in any event before the award of the contract) - fulfilled those obligations by paying in full and in time?

2) Consequently, must the Italian national implementing measure [Article 12(d) and (e) of Legislative Decree No 157 of 17 March 1995] - in so far as, unlike the Community provision cited above, it allows the exclusion from tendering procedures of persons who are not in compliance in respect of obligations relating to the payment of social security contributions for employees, in accordance with Italian legislation or the legislation of the State in which they are established or who are not in compliance in respect of obligations relating to the payment of taxes, in accordance with Italian legislation or the legislation of the State in which they are established - be interpreted with reference solely to the failure - verifiable at the date mentioned above (the expiry of the period prescribed for submitting requests to participate or immediately before the award, even provisional, of the contract) - to fulfil those obligations, without any importance being attached to subsequent regularisation of their position?

3) Or, conversely (if, in the light of the indications set out in question 2 above, the national measure is held not to be in harmony with the rationale and function of the Community provision), may the national legislature be regarded, in the light of the limitations to which it is subject for the purpose of giving effect to the Community rules contained in the Directive at issue, as being entitled to introduce the option of allowing the admission to a tendering procedure of persons who, although not in compliance when the period prescribed for participation in the procedure expires, nevertheless show that they can regularise their position (and have taken positive steps to do so) before the award of the contract?

4) And, if the interpretation referred to in question 3 above is held to be workable - thus permitting the introduction of more flexible rules than would be allowed on a stricter interpretation of the fulfilment of obligations referred to by the Community legislature - do such rules conflict with fundamental Community principles, such as the principle of equal treatment for all citizens of the Union, or - with regard only to public tendering procedures - that of equal conditions for all persons who have applied for admission to such procedures?'

On the questions

18. It must be observed as a preliminary point that, in accordance with the provisions of Title II of the Directive, the application of its provisions varies according to the categorisation of the services in question. However, since that categorisation requires an assessment of the facts, it falls within the jurisdiction of the national court, and the Court will therefore interpret the provisions of the Directive to which the reference for a preliminary ruling refers. Furthermore, it is clear from that reference that it concerns a restricted procedure within the meaning of the Directive.

19. By its questions, the national court wishes in substance to know, firstly, whether subparagraphs (e) and (f) of the first paragraph of Article 29 must be interpreted as precluding a national provision which refers to the position of service providers who are not in compliance' with social security

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or tax obligations. Secondly, it wishes to know the time at which the service provider must provide evidence that he has complied with those obligations. Thirdly, it is unsure whether a service provider who is late with payment of its social security contributions or taxes, has been authorised by the competent authorities to make payment of those contributions or taxes in instalments, or has brought administrative or judicial proceedings to contest the existence or amount of its social security or tax obligations must be regarded as not having fulfilled his social security or tax obligations for the purposes of subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive.

20. In order to provide a useful reply to those questions, it must be observed as a preliminary point that the Community directives on public contracts aim to coordinate national procedures in that field. As regards, more particularly, public service contracts, the third recital in the preamble to the Directive states that the objectives set out in the first and second recitals... require the coordination of the procurement procedures for the award of public service contracts'.

21. As regards that coordination, Article 29 of the Directive lays down seven grounds for excluding candidates from participation in a contract, which relate to their professional honesty, solvency and reliability. That provision leaves the application of all those cases of exclusion to the assessment of the Member States, as evidenced by the phrase may be excluded from participation in a contract', which appears at the beginning of that provision and makes express reference, in subparagraphs (e) and (f), to the provisions of national law.

22. Thus, as the Commission of the European Communities rightly pointed out, Article 29 itself lays down the only limits to the power of the Member States in the sense that they cannot provide for grounds of exclusion other than those mentioned therein. That power of the Member States is also limited by the general principles of transparency and equal treatment (see, inter alia, Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraphs 91 and 92, and Case C-421/01 Traunfellner [2003] ECR I-11941, paragraph 29).

23. Accordingly, Article 29 of the Directive does not provide in this field for uniform application of the grounds of exclusion mentioned therein at Community level, since the Member States may choose not to apply those grounds of exclusion at all and opt for the widest possible participation in procedures for the award of public contracts or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context the Member States have the power to make the criteria laid down in Article 29 of the Directive less onerous or more flexible.

24. As regards, first, the question whether subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive must be interpreted as precluding a provision of national law which refers to the position of service providers who are not in compliance' with social security or tax obligations, that provision enables Member States to exclude any candidate who has not fulfilled obligations' relating to the payment of social security contributions and taxes in accordance with [national] legal provisions'.

25. That provision does not contain a definition of has not fulfilled obligations'. In the light of the considerations set out in paragraph 23 of this judgment, the authors of the Directive did not intend to give that concept an autonomous Community definition, but referred to national rules for that purpose. It is therefore for national rules to specify the content and scope of the obligations at issue and the conditions for their fulfilment.

26. The Italian legislature has made use of the power given to it under subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive, by inserting the two grounds of exclusion in question into Article 12(d) and (e) of Legislative Decree No 157/1995. However, the national court asks, first of all, whether, by using the terms who are not in compliance in respect of obligations...',

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that provision is more permissive and whether it gives more latitude to the national authorities compared with the wording in subparagraphs (e) and (f) of Article 29 of the Directive.

27. As the parties concerned who submitted observations to the Court have rightly observed, the words non abbia adempiuto' its obligations or non sia in regola con' its obligations (both expressions being rendered as has not fulfilled obligations' in English) are both used indiscriminately in the various Community directives on public procurement. For example, Article 24(e) and (f) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), Article 20(1)(e) and (f) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and, finally, Article 45(2)(e) and (f) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), which entered into force on 31 January 2006. There is not, therefore, any difference in content between the two expressions at issue.

28. On the basis of those considerations it is appropriate to consider the various situations to which the national court refers.

29. The national court asks, secondly, whether, in order to have fulfilled his obligations relating to social security contributions and taxes, the service provider must, when the period prescribed for submitting requests to participate in a public tendering procedure expires or in any event before the award of the contract', have made the relevant payment in full and in time'.

30. In order to establish the time at which to determine whether the candidate has fulfilled his obligations it should be observed that subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive refer to the legal provisions of the Member States in order to determine the meaning of the expression fulfilled obligations', and that the Community legislature did not wish to make the application of that article uniform at Community level; it is logical to find that in order to establish the relevant time reference should also be made to national provisions.

31. It is, therefore, for national rules to determine the date by which or the period within which the persons concerned must have made the payments corresponding to their obligations or, as regards the other situations contemplated by the national court which are dealt with in paragraphs 34 to 39 of this judgment, must have proved that the conditions for subsequent regularisation have been fulfilled. That period may be, inter alia, the final date for lodging the request to participate in the contract, the date on which the invitation to tender was sent, the final date on which the candidates' tenders are to be lodged, the date on which tenders are considered by the contracting authority or even immediately prior to the award of the contract.

32. It should be stated, however, that the principles of transparency and equal treatment which govern all procedures for the award of public contracts, according to which the substantive and procedural conditions concerning participation in a contract must be clearly defined in advance, require that the period be determined with absolute certainty and made public in order that the persons concerned may know exactly the procedural requirements and be sure that the same requirements apply to all candidates. That period may be fixed by national legislation or the latter may confer that responsibility on the contracting authorities.

33. Therefore, a candidate is regarded as having fulfilled its obligations if, within the period referred to in paragraph 31 above, he has made all the payments relating to his social security or tax debts, subject to the cases of subsequent regularisation or bringing of administrative or legal proceedings, which are dealt with in paragraphs 34 to 39 of this judgment. Merely commencing payment at the relevant time, proof of intention to pay or proof of financial capacity to regularise

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the position after that time are not sufficient, in order to avoid infringing the principle of equal treatment of candidates.

34. Thirdly, the national court's reference is essentially concerned with whether it is compatible with subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive for a national rule or administrative practice which enables service providers, for the purpose of being admitted to a procedure for the award of a public contract, subsequently to regularise their position as regards tax and social security pursuant to leniency measures or a tax amnesty adopted by the Member State at issue or pursuant to an administrative arrangement of payment by instalment or debt relief.

35. It must be observed in that regard that, as the Advocate General rightly stated in point 29 of his Opinion, the amount and the date on which tax and social security obligations are due are defined by national law. Similarly, it was stated in paragraph 25 above that it is also for national law to determine the content and scope of has fulfilled obligations'. Moreover, the relevant period in that regard is that fixed by national law, as stated in paragraph 31 of this judgment.

36. Accordingly, a national law or administrative practice according to which, in the event of leniency measures or a tax amnesty or as a result of an administrative arrangement, the candidates concerned are regarded as being in compliance with their obligations for the purpose of being admitted to a procedure for the award of a contract is not incompatible with subparagraphs (e) and (f) of the first paragraph of Article 29, provided that in the period referred to in paragraph 31 of this judgment they can provide evidence that they have benefited from leniency measures, a tax amnesty or an administrative arrangement in respect of their debts.

37. The national court's reference concerns lastly the effects to be attributed to a candidate's bringing administrative or legal proceedings against the findings of the competent tax or social security authorities in order to establish whether the candidate is in compliance with his obligations with a view to his admission to a procedure for the award of a public contract.

38. It must be held that the reference to national law under subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive is also applicable in respect of that question. Nevertheless, the effects of bringing administrative or legal proceedings are closely linked to the exercise and safeguard of fundamental rights in relation to judicial protection, respect for which is also guaranteed by the Community legal order. National legislation which paid no heed to the effects of bringing administrative or legal proceedings on the opportunity to participate in a procedure for the award of a contract would risk infringing the fundamental rights of the parties concerned.

39. Taking account of that limitation, it is therefore for national law to determine whether bringing administrative or legal proceedings has effects which require the contracting authority to take the view that the candidate concerned is in compliance with his obligations, pending a final decision, for the purpose of his admission to the procedure for the award of a contract, provided that such proceedings are brought within the period referred to in paragraph 31 of this judgment.

40. Therefore, the answer to the questions referred for a preliminary ruling must be that subparagraphs (e) and (f) of the first paragraph of Article 29 of the Directive do not preclude a national law or administrative practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having paid in full when the period prescribed for submitting the request to participate in the contract expires, may subsequently regularise his position

- pursuant to a tax amnesty or leniency measures adopted by the State, or
- pursuant to an administrative arrangement of payment in instalments or debt relief, or

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- by bringing administrative or legal proceedings,

provided that, within the period prescribed by national law or administrative practice, he provides evidence that he has benefited from such measures or arrangement or that he has brought such proceedings within that period.

Costs

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

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NOTES	Dreyfus, Jean-David: Causes d'exclusion de la participation des candidats à un marché public: quelle liberté pour les Etats membres en droit communautaire?, L'actualité juridique ; droit administratif 2006 p.704-706 ; Meisse, Eric: Cas d'exclusion des candidats à un marché, Europe 2006 Avril Comm. no 116 p.20-21 ; Dischendorfer, Martin: Fulfilling Obligations in Relation to Taxes and Social Security Contributions Under the EC Public Procurement Directives: the La Cascina case, Public Procurement Law Review 2006 p.NA91-NA97 ; Adobati, Enrica: E escluso da una gara d'appalto pubblico il prestatore di servizi che non è in regola con il pagamento dei contributi previdenziali e delle imposte, Diritto comunitario e degli scambi internazionali 2006 p.79-80 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Concurrence et marchés publics, L'actualité juridique ; droit administratif 2006 p.1160-1161 ; Nicolella, Mario: Régularisation du paiement des cotisations sociales et des taxes postérieurement à la date d'échéance pour le dépot de la demande de participation au marché public, Gazette du Palais 2007 no 52-53 I Jur. p.33
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Joined Cases C-226/04 and C-228/04

La Cascina Soc. coop. arl and Others

v

Ministero della Difesa and Others

(Reference for a preliminary ruling from the Tribunale amministrativo regionale del Lazio)

(Public service contracts – Directive 92/50/EEC – Article 29, first paragraph, subparagraphs (e) and (f) – Obligations of service providers – Payment of social security contributions and taxes)

Summary of the Judgment

Approximation of laws – Procedures for the award of public service contracts – Directive 92/50 – Award of contracts
(Council Directive 92/50, Art. 29, first para., subparas (e) and (f))

Article 29 of subparagraphs (e) and (f) of the first paragraph of Directive 92/50 relating to the coordination of procedures for the award of public service contracts enables Member States to exclude any candidate who 'has not fulfilled obligations' relating to the payment of social security contributions and taxes in accordance with national legal provisions.

That provision does not preclude a national law or administrative practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having paid in full when the period prescribed for submitting the request to participate in the contract expires, may subsequently regularise his position

– pursuant to a tax amnesty or leniency measures adopted by the State, or

– pursuant to an administrative arrangement of payment in instalments or debt relief, or

– by bringing administrative or legal proceedings,

provided that, within the period prescribed by national law or administrative practice, he provides evidence that he has benefited from such measures or arrangement or that he has brought such proceedings within that period.

Article 29 of the Directive does not provide in this field for uniform application of the grounds of exclusion mentioned therein at Community level, since the Member States may choose not to apply those grounds of exclusion at all or to incorporate them into national law with varying degrees of rigour. In that context the Member States have the power to make the criteria laid down in Article 29 of the Directive less onerous or more flexible.

It is therefore for national rules to specify the content and scope of the obligations at issue and the conditions for their fulfilment. It is also for national rules to determine the date by which or the period within which the persons concerned must have made the payments corresponding to their obligations or must have proved that the conditions for subsequent regularisation have been fulfilled. However, the principles of transparency and equal treatment require that the period be determined with absolute certainty and made public, in order that the persons concerned may know exactly the procedural requirements and be sure that the same requirements apply to all candidates. Furthermore, merely commencing payment at the relevant time, proof of intention to pay or proof of financial capacity to regularise the position after that time are not sufficient.

(see paras 23-24, 31-33, 40, operative part)

JUDGMENT OF THE COURT

(First Chamber)

of 9 February 2006

in Joined Cases C-226/04 and C-228/04: Reference for a preliminary ruling from the Tribunale amministrativo regionale del Lazio in La Cascina Soc. coop. arl. and Others v Ministero della Difesa and Others and Consorzio G.f.M. v Ministero della Difesa and Others [1]

(Public service contracts — Directive 92/50/EEC — Article 29, first paragraph, subparagraphs (e) and (f) — Obligations of service providers — Payment of social security contributions and taxes)

(2006/C 86/11)

(Language of the case: Italian)

In Joined Cases C-226/04 and C-228/04: references for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale del Lazio (Italy), made by decisions of 22 April 2004, received at the Court on 2 June 2004, in the proceedings between **La Cascina Soc. coop. arl, Zilch Srl** (C-226/04) and **Ministero della Difesa, Ministero dell'Economia e delle finanze, Pedus Service, Cooperativa Italiana di Ristorazione soc. coop. arl (CIR), Istituto nazionale per l'assicurazione contro gli infortuni (INAIL),** and between **Consorzio G.f.M.** (C-228/04) and **Ministero della Difesa, La Cascina Soc. coop arl,** the Court (First Chamber), composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, K. Lenaerts and E. Juhász (Rapporteur), Judges; M. Poiares Maduro, Advocate General; L. Hewlett, Principal Administrator, for the Registrar, gave a judgment on 9 February 2006, in which it ruled:

Subparagraphs (e) and (f) of the first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts do not preclude a national law or administrative practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having paid in full when the period prescribed for submitting the request to participate in the contract expires, may subsequently regularise his position

— *pursuant to a tax amnesty or leniency measures adopted by the State, or*

— *pursuant to an administrative arrangement of payment in instalments or debt relief, or*

— *by bringing administrative or legal proceedings,*

provided that, within the period prescribed by national law or administrative practice, he provides evidence that he has benefited from such measures or arrangement or that he has brought such proceedings within that period.

[1] OJ C 190, of 24.7.2004.

JUDGMENT OF THE COURT

(Second Chamber)

of 25 October 2005

in Case C-229/04: Reference for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen: Crailsheimer Volksbank eG v Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke [1]

(Consumer protection — Contracts negotiated away from business premises — Loan agreement linked to property purchase concluded in a doorstep-selling situation — Right of cancellation)

(2006/C 86/12)

(Language of the case: German)

In Case C-229/04: reference for a preliminary ruling under Article 234 EC from the Hanseatisches Oberlandesgericht in Bremen (Germany), made by decision of 27 May 2004, received at the Court on 2 June 2004, in the proceedings between **Crailsheimer Volksbank eG** and **Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke,** the Court (Second Chamber), composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, C. Gulmann (Rapporteur), R. Silva de Lapuerta and P. Kuris, Judges; P. Léger, Advocate General; M. Ferreira, Principal Administrator, gave a judgment on 25 October 2005, in which it ruled:

1. *Articles 1 and 2 of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises must be interpreted as meaning that when a third party intervenes in the name of or on behalf of a trader in the negotiation or conclusion of a contract, the application of the Directive cannot be made subject to the condition that the trader was or should have been aware that the contract was concluded in a doorstep-selling situation as referred to in Article 1 of the Directive.*

Opinion of Mr Advocate General Poiares Maduro delivered on 8 September 2005. La Cascina Soc. coop. arl and Zilch Srl v Ministero della Difesa and Others (C-226/04) and Consorzio G. f. M. v Ministero della Difesa and La Cascina Soc. coop. arl (C-228/04). Reference for a preliminary ruling: Tribunale amministrativo regionale del Lazio - Italy. Public service contracts - Directive 92/50/EEC - Article 29, first paragraph, subparagraphs (e) and (f) - Obligations of service providers - Payment of social security contributions and taxes. Joined cases C-226/04 and C-228/04.

1. By two orders of 22 April 2004, the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio) (Italy) referred to the Court of Justice two questions concerning the interpretation of subparagraphs (e) and (f) of the first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), under which service providers which have failed to fulfil their obligations in relation to the payment of social security contributions and taxes may be excluded from an invitation to tender. Since the questions submitted in the two orders for reference were identical, they were joined by order of the President of the Court of 30 June 2004.

I - Facts, legislative framework and the questions referred

2. La Cascina Soc. Coop. arl. (hereinafter La Cascina') and Zilch Srl (hereinafter Zilch'), which had set up a temporary joint venture, and Consorzio G.f.M. (hereinafter G.f.M.'), all of them companies established in Italy, took part in an accelerated restricted tendering procedure for contracts to supply restaurant services to bodies and departments of the Italian Ministry of Defence stationed in the national territory, organised by that Ministry in conjunction with the Ministry of Economy and Finance. The invitation to tender was divided into 16 lots and published in December 2002. The deadline for the receipt of requests to participate was 15 January 2003, and the deadline for the receipt of tenders 3 March 2003.

3. By a decision of 4 December 2003, the contracting authority excluded La Cascina, Zilch and G.f.M. from taking part in the tendering procedure. In Case C226/04, La Cascina, the principal in the temporary joint venture, was not in compliance with its obligations to pay social security contributions for its employees for the period 1 January 2001 to 31 December 2002. Another company in the joint venture, Zilch, was excluded by the same decision, since it had failed to pay its taxes for different periods between 1997 and 2001. In Case C-228/04, there were alleged to have been irregularities on the part of G.f.M. regarding its obligations towards the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (National Institute for insurance against accidents at work - hereinafter INAIL').

4. The decision to exclude the companies was taken in accordance with Article 12(d) and (e) of Legislative Decree No 157 of 17 March 1995, as replaced by Legislative Decree No 65 of 25 February 2000, (2) which provides that: competitors who are not in compliance in respect of obligations relating to the payment of social security contributions for employees, in accordance with Italian legislation or the legislation of the State in which they are established, shall be excluded from participating in competitions'.

5. Both La Cascina and Zilch and G.f.M. applied to the Tribunale amministrativo regionale del Lazio, seeking to have the decision of 4 December 2003 excluding them annulled. La Cascina and G.f.M. claimed, among other things, that there had simply been a delay in making the payments at issue, which had been settled subsequently. Zilch challenged the communication sent to the contract-awarding authority by the Ufficio centrale fiscale (Central Tax Authority) and produced a certificate issued by the Ufficio periferico di Messina (Messina branch office) showing that, on 1 January 2003, Zilch had paid the taxes it owed. Zilch also pointed out that it had requested the application of a law providing for the regularisation of tax debts and had been allowed to pay in instalments.

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6. Before the national court, the contracting authority pointed out, however, that the fact that the applicant companies had met their obligations a posteriori did not mean that they had settled those obligations by the time the deadline for submitting their requests to participate in the invitation to tender had expired, that is to say 15 January 2003.

7. The national court seised of the dispute noted that Article 12(d) and (e) of Legislative Decree No 157/1995 transposes into Italian law subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50. According to the latter provision: Any service provider may be excluded from participation in a contract who:... (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority; (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;... Where the contracting authority requires of the service provider proof that none of the cases quoted in (a), (b), (c), (e) or (f) applies to him, it shall accept as sufficient evidence:... for (e) or (f), a certificate issued by the competent authority in the Member State concerned.'

8. Taking the view that such an interpretation might lead to unequal treatment of service providers and obstruct the procedure for the award of a contract, the Tribunale amministrativo regionale del Lazio decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Must the Directive in question, as regards only the abovementioned provisions, be interpreted as meaning that, where the Community legislature employs the expression has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority or has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority, the legislature intended to refer - solely and exclusively - to a situation in which the person concerned has - when the period prescribed for submitting requests to participate in a public tendering procedure expires (or in any event before the award of the contract) - fulfilled those obligations by paying in full and in time?

2) Consequently, must the Italian national implementing measure [Article 12(d) and (e) of Legislative Decree No 157 of 17 March 1995] - in so far as, unlike the Community provision cited above, it allows the exclusion from tendering procedures of persons who are not in compliance in respect of obligations relating to the payment of social security contributions for employees, in accordance with Italian legislation or the legislation of the State in which they are established or who are not in compliance in respect of obligations relating to the payment of taxes, in accordance with Italian legislation or the legislation of the State in which they are established - be interpreted with reference solely to the failure - verifiable at the date mentioned above (the expiry of the period prescribed for submitting requests to participate or immediately before the award, even provisional, of the contract) - to fulfil those obligations, without any importance being attached to subsequent regularisation of their position?

3) Or, conversely (if, in the light of the indications set out in question 2 above, the national measure is held not to be in harmony with the rationale and function of the Community provision), may the national legislature be regarded, in the light of the limitations to which it is subject for the purpose of giving effect to the Community rules contained in the Directive at issue, as being entitled to introduce the option of allowing the admission to a tendering procedure of persons who, although not in compliance when the period prescribed for participation in the procedure expires, nevertheless show that they can regularise their position (and have taken positive steps to do so) before the award of the contract?

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4) And, if the interpretation referred to in question 3 above is held to be workable - thus permitting the introduction of more flexible rules than would be allowed on a stricter interpretation of the fulfilment of obligations referred to by the Community legislature - do such rules conflict with fundamental Community principles, such as the principle of equal treatment for all citizens of the Union, or - with regard only to public tendering procedures - that of equal conditions for all persons who have applied for admission to such procedures?'

9. La Cascina and Zilch, the Austrian and Italian Governments and the Commission of the European Communities submitted written statements in intervention to the Court. A hearing took place on 30 June 2005 during which La Cascina and Zilch, G.f.M., Pedus Service, the Italian Government and the Commission set out their positions.

10. It should first be pointed out that in the context of Article 234 EC, the Court has no jurisdiction to rule on the interpretation of provisions of national laws or regulations or their conformity with Community law. (3) The questions referred by the national court must, therefore, be reformulated. The answers given will enable the national court to interpret the national transposing provision in a manner compatible with subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50. In point of fact, [t]he requirement for national law to be interpreted in conformity with Community law is inherent in the system of the [EC] Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it'. (4) That means that, in this case, although the specific procedures for excluding potential candidates have to be determined by the national law, (5) as the Commission points out in its written observations, it is nonetheless appropriate to provide the national court with an interpretation of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50.

11. It would appear that the first and fourth questions concern the margin of discretion available to the national legislature when transposing Directive 92/50. More specifically, the first question raises two separate points of interpretation. The national court questions the effect of the difference in wording it has identified between the text of the directive and the way in which it has been transposed into the national law. It also raises the question whether the directive requires that the obligations cited in subparagraphs (e) and (f) of the first paragraph of Article 29 must be paid in full and in time. The principles of Community law the national court cites in its fourth question will be helpful in answering those two points. By its second and third questions, the referring court is seeking to establish the deadline by which a company taking part in an invitation to tender must prove that it has met its obligations in relation to tax and the payment of social security contributions. I shall begin by considering the significance of the difference in wording the national court has identified; then consider the interpretation to be given to the concept of having fulfilled obligations'; and, finally, consider the timelimit a company should be allowed in which to prove that it has met those obligations.

II - Analysis

A - The significance of the difference in wording between subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 and the Italian implementing legislation

12. The national court has identified a difference in wording between the text of Directive 92/50, which refers to any company which has not fulfilled obligations' in relation to taxation and the payment of social security contributions, and the expression used in the national legislation, which refers to companies which are not in compliance with' those same obligations. The national court takes the view that the obligation to be in compliance is broader than the obligation to fulfil obligations. In particular, the national court cites the possibility that a company may benefit from regularisation on the part of the tax authorities, which could have retroactive effect.

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13. I should first point out that Article 29 of Directive 92/50 gives Member States the option of providing for the grounds of exclusion listed therein. But the Member States are not bound to adopt those qualitative selection criteria. (6) The Italian Republic availed itself of that possibility by providing in its national legislation that companies which are not in compliance' with their obligations in relation to tax and the payment of social security contributions should be excluded.

14. Secondly, although the national court centres its argument on the difference in wording it has identified between the national provision and the Community directive, that difference does not seem to be significant. In point of fact, a directive, by its very definition, determines the result to be achieved, whilst leaving it to the Member States to choose the method best suited to achieving that objective, as provided for by Article 249 EC. Furthermore, there is no difference in meaning between the expressions to be in compliance with' and to have fulfilled' statutory requirements, which, as the Italian Government correctly points out in its written observations, are used without distinction in the Community directives on public contracts, be it in the Italian or other language versions. (7)

15. Consequently, the answer to the first question, as reformulated, must be that the expression to have fulfilled obligations' which appears in the text of Directive 92/50 may be construed as meaning to be in compliance with its obligations', as stated in the Italian transposing legislation, since both expressions mean the same.

B - The concept of having fulfilled obligations' within the meaning of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50

16. The national court raises three questions of interpretation which are linked: firstly, the effect of a delay in payment; secondly, the consequences of the authorities permitting payment in instalments; and, thirdly, the effect of lodging an administrative or judicial appeal challenging the existence of an obligation to make a payment or the amount of that payment.

1. The effect of a delay in making payment

17. The national court first raises the question whether subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 must be interpreted as requiring the payment of the obligations to which it refers in full and in time'.

18. In that connection, La Cascina claims that a mere delay in payment cannot result in exclusion. It advances two arguments on that point. On the one hand, it considers that the obligation to make payment referred to in Article 29 of Directive 92/50 is not directed towards the payment itself but towards all the activities preparatory to fulfilling the obligation to pay. An interpretation which is so clearly incompatible with the letter and spirit of the provision to be interpreted must be dismissed.

19. La Cascina's second argument merits more serious scrutiny. It contends that, in terms of the system, that is to say comparing the different grounds for exclusion listed in Directive 92/50, it is absurd to permit a company that is heavily indebted to take part in a tender, provided that it is not bankrupt, being wound up, having its affairs administered by the court or has not entered into an arrangement with creditors (Article 29(a) and (b) of the directive), while banning a company which is slightly indebted from taking part in that same tender, on the pretext that it has failed promptly to fulfil its obligations in relation to tax and social security contributions. La Cascina infers from this that a delay in making payment, which is not the same as non-payment, cannot result in exclusion under subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50.

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20. First of all, while it is true that a systematic interpretation frequently enables the Court to clarify the meaning of a provision, I would point out that the interpretation La Cascina proposes is incompatible with the wording of the article in question.

21. Secondly, La Cascina's view that debts to the State or other public bodies by way of taxes or social security contributions and debts to other creditors have to be taken into account globally in determining whether a tenderer is solvent is incorrect, since it assumes that these two categories of debt are the same, and that is not the case.

22. Finally, La Cascina's argument cannot be endorsed since it is founded on an incorrect assessment of the objectives pursued by the qualitative selection criteria within the system of Directive 92/50. In that connection, the Court has already ruled in its judgment in Holst Italia (8) that the criteria for qualitative selection laid down in Chapter 2 of Title VI of Directive 92/50 are designed solely to define the rules governing objective assessment of the standing of tenderers'. The fact is that the standing of tenderers does not depend exclusively on whether they are solvent. Indeed, the criteria applicable in relation to qualitative selection include criteria concerning the tenderer's personal situation, its financial and economic standing and even its skills, its efficiency, its experience and its reliability. As the Italian Government rightly points out, the objective pursued by Article 29 of Directive 92/50 is precisely to guarantee the reliability of tenderers. (9)

23. More specifically, subparagraphs (e) and (f) of the first paragraph of Article 29 encourage companies to pay their taxes and social security contributions. At the same time, that provision enables the contracting authority to award lucrative public contracts only to companies that have already paid these various taxes in order to protect the State's interest as the collector of taxes.

24. It is quite clear that the grounds for exclusion listed in Article 29 of Directive 92/50 are not solely designed to guarantee that the service provider in question is solvent, which is the aim of Article 31 of that directive, but actually to prevent that person from benefiting from an unfair advantage in relation to his competitors for a contract by failing to pay taxes or social security contributions. The exclusion of companies which have not fulfilled their obligations in relation to the payment of social security contributions or taxes is therefore justified because of the risk that competitors would cease to have an equal opportunity were companies that were not in compliance with those statutory obligations able to participate in an invitation to tender.

25. The principle that competitors must enjoy equal treatment underpins the law on public contracts, (10) making it possible to ensure that all potential competitors in a tender have the same opportunity when drawing up their applications to take part or their actual tenders. (11) The principle is specifically enshrined in Article 3(2) of Directive 92/50 which provides that [c]ontracting authorities shall ensure that there is no discrimination between different service providers'.

26. Consequently, Article 29 of Directive 92/50 must be interpreted as setting out a list of grounds resulting in the exclusion of competitors from taking part in a tender to safeguard the principle of equal treatment. That exclusion necessarily implies that a limit is placed on the parallel objective Directive 92/50 pursues, namely that of encouraging competition. (12) That limit is, however, inherent in the system of the directive which seeks to encourage competition between service providers only provided that competition takes place in compliance with the principle of equal treatment for candidates. (13)

27. Since a competitor which has failed to fulfil its obligations in relation to tax or the payment of social security contributions is excluded to ensure that all tenderers are treated equally, there is no reason to make a distinction between non-payment and a delay in paying. In fact, if a company were able to rely on a delay in payment to avoid being excluded from taking part in a tender under

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subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50, the application of that provision would be substantially curtailed. The evidence required under that provision is not that the company concerned intends to meet its statutory obligations at some later date - which would, moreover, be extremely difficult to prove - but that the obligations which have become due have actually been paid. (14) The non-discriminatory nature of the process of selecting service providers can be assured only by means of an objectively defined criterion. Consequently, the application of subparagraphs (e) and (f) of the first paragraph of Article 29 makes it necessary objectively to ascertain that the obligations to which it refers have actually been paid by the company in question.

2. The consequences of debt payment by instalment

28. Secondly, where it is established that a company has failed to fulfil its obligations within the meaning of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50, the national court questions what the effect will be if the authorities permit that company to pay by instalments. In that connection, the national court refers to judgment No 1114 of the Tribunale amministrativo regionale per la Puglia of 12 February 2004 which interpreted Article 12 of Legislative Decree No 157/1995 as applicable not only to companies which had evaded payment but also to companies which had simply not paid their contributions. However, companies benefiting from regularisation procedures allowing them extra time to pay or to pay by instalments and companies which had lodged administrative or judicial appeals and have yet to receive a final judgment could not be excluded under that article.

29. It should first be pointed out that it is, in any event, the national law which determines the amount and deadline for payment of obligations relating to the payment of tax as well as social security contributions. However, and subject to the interpretation of its national law by the referring court, it would appear that once the tax authority or competent authority has agreed that the social security contributions a company owes can be paid in instalments, that company can no longer be deemed to be late in making payment.

30. Furthermore, in the context of the application of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50, the burden of proof lies, as the Commission reminds us in its written observations, with the company wishing to take part in the tender. A company that has obtained permission from the authorities to pay the tax it owes in instalments, or - to use the expression the national court employs - which has regularised its situation vis-à-vis the tax authority, will receive a certificate from that authority stating that it has fulfilled its obligations within the meaning of Article 29 of Directive 92/50. (15)

3. The effects of lodging an administrative or judicial appeal

31. The last point raised by the referring court on the interpretation of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 concerns circumstances in which a company has lodged an administrative or judicial appeal against a decision of the authority, contesting the amount of the social security contributions or the taxes which it owes. In this case, the file shows that La Cascina lodged administrative appeals by two letters dated 6 February 2002 and addressed to INAIL. The referring court cites on that point judgment No 890 of the Tribunale amministrativo regionale per l'Umbria of 30 November 2002 which found that since the company concerned had lodged an appeal against its tax assessment before the tax courts, it could not be excluded from taking part in the tender on the ground that it was not in compliance with its obligations relating to the payment of taxes. According to the referring court, the Consiglio di Stato has adopted that same stance. (16)

32. In its written observations, the Italian Government was of the view that not even the lodging of a judicial appeal disputing the amount of the taxes or social security contributions due should

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preclude a finding that the company in question has not fulfilled its obligations within the meaning of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50. However, at the hearing, that government conceded that if the appeal had been lodged before the application to take part in the tender was made, the effect could be to prevent the company from being excluded, provided that the contracting authority was informed of the existence of that appeal.

33. The Commission also adopted a qualified position at the hearing, suggesting that a distinction be made between cases in which the applicant cites an administrative error on its part and those in which the taxpayer is simply asking the authority to exercise leniency. Permission to take part in the tender would be accorded in the first case only.

34. La Cascina and Zilch, however, claim that respect for the right of defence, protected by Article 24 of the Italian Constitution, means that a company which has lodged a judicial or administrative appeal cannot be held not to be in compliance with its fiscal or social obligations.

35. Community law, in this instance subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50, merely provides for the exclusion of a company which has not fulfilled the obligations to which that article refers. It is, however, for the national legislation to determine the amount a company owes by way of taxes or social security contributions as well as the consequences, so far as its position vis-à-vis the authorities is concerned, of lodging an administrative or judicial appeal.

36. It is undeniable that an appeal against a decision of the tax authority may have different effects in law depending on the national law in question. Whether or not the appeal has suspensory effect, for example, and the conditions determining whether the court allows it, vary from one legal system to another. (17) Consequently, the effect of the diversity of national legislations could be that some companies which have lodged an appeal will be allowed to take part in a tender, whereas others, taxed in a different Member State, will be excluded from that same tender because they are not considered to be in compliance with their fiscal and social obligations.

37. However, since the lodging of an appeal corresponds to the exercise of a right, the automatic consequence should not be to exclude the applicant from all tenders, particularly since that action is not, in itself, likely to affect a company's reliability, that being what subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 are seeking to ascertain. To exclude a company because it has lodged an appeal would be all the more inconvenient because if, on completion of the appeal proceedings, its appeal was allowed, its exclusion could be contested and result in the need for compensation. In some circumstances, annulling the decision to exclude could result in annulment of the award of the contract.

38. But, if the automatic effect of simply lodging an appeal were that the appellant would have to be allowed to take part in the tender, the risk would be that companies would be encouraged to lodge appeals inappropriately or in order to delay matters. Furthermore, if, after it had won the contract, a company failed in its appeal, its competitors would have been disadvantaged but could not challenge the award procedure.

39. Community law does not prescribe either one of those alternatives. In point of fact, Directive 92/50 accords the States a margin of discretion to assess whether or not companies which have lodged an appeal are in compliance with their tax obligations. That matter of fact is determined by the national legal system of origin of the companies wishing to tender, whereas the consequences for admission to the tender are established in accordance with the law of the contracting authority, provided that the right of defence and the principle of equal treatment between companies are observed. In that way, all of the potential participants in a tender are subject to uniform rules.

40. The guarantees required for the exercise of the right of defence, as regards the lodging of

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an appeal, are a matter for the national law and the procedures it lays down, as applied by the national courts (as, for example, in this case, by the Consiglio di Stato), subject to the observance of Community law and in particular its fundamental principles. (18)

41. The obligation to afford candidates equal treatment requires that the tax position of companies, determined by their national law of origin, must be recognised in exactly the same way in terms of the consequences for their admission to the tender. Consequently, the Italian legal system, which stipulates, in accordance with constitutional principles in particular, that companies which have lodged an appeal against a tax debt may not, on that ground, be prevented from taking part in a public tender, is compatible with the requirements of Community law, provided that the same rule applies to all participants in the tender that have lodged a similar appeal in another Member State.

42. Consequently, subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 do not preclude a national rule or an interpretation of the national rules, according to which a company which has lodged an administrative or judicial appeal is deemed to have fulfi lled its obligations until final judgment is handed down.

43. In the light of the above considerations, the answer to the second question, as reformulated, should be that the concept of having fulfilled obligations' within the meaning of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 must be interpreted as requiring actual payment of the obligations at issue, in the amount of and by the deadline as determined by the national law, and does not preclude a national rule or an interpretation of the national rules according to which a company which has lodged an administrative or judicial appeal is deemed to have fulfilled its obligations until final judgment is handed down.

C - The timelimit for furnishing evidence that the qualitative selection criteria have been respected

44. The third question submitted to the Court concerns the timelimit within which companies must furnish evidence that they meet the qualitative selection criteria set out in subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50. Let me make the preliminary point here that, as the Austrian Government states in its written observations, that assessment must take place on a single date. Three possible dates could, therefore, a priori be selected: the expiry of the timelimit for the request to participate; the expiry of the deadline to submit tenders or the point at which the contract is awarded.

45. The Commission contends that the material date must be the timelimit for applying to take part in the tender. As far as the Austrian Government is concerned, the service provider may furnish evidence that he has fulfilled his obligations in regard to tax and the payment of social security contributions until the deadline for the submission of tenders expires. However, La Cascina and Zilch claim that a company should be free to prove that it meets the qualitative selection criteria so long as the contract has yet to be provisionally awarded.

46. It is settled case-law that the system for awarding public service contracts set in place by Directive 92/50 is structured around two phases: the first involves selecting the candidates who will be allowed to take part on the basis of their technical and financial standing and other qualitative criteria, and the second, evaluating the tenders submitted in accordance with the award criteria. (19) All of the directives relating to public contracts separate the award procedure into two phases in this way. (20)

47. More often than not, the conceptual division of the procedure into two separate phases coincides with a time lapse between them. Initially, for example, the contracting authority will invite economic operators to register their interest in a tender within a specific timelimit and to furnish the evidence that they meet the qualitative selection criteria that apply to the particular contract.

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When that initial phase is completed, those selected to tender will be set another deadline within which to submit a full tender. Finally, the contract will be definitively awarded in accordance with the previously established criteria for its award.

48. Dividing the award procedure into two separate phases benefits both the contracting authority, which will consider only tenders from companies of proven standing, and the tenderers who will make the necessary effort to put together a tender only if their standing meets the requirements of the contracting authority.

49. If the tender is organised in this way, companies can be allowed to furnish evidence that they meet the qualitative selection criteria only until the deadline for applying to take part in the tender expires. Indeed, extending the deadline beyond that date would have the practical effect of preventing the contracting authority from evaluating the capacity of companies to take part in the tender before it embarked on detailed examination of the tenders. (21)

50. However, the award procedure may consist in just one phase without being in breach of Directive 92/50. In fact, the distinction between the selection criteria for economic operators and the contract award criteria does not require that those criteria should always be assessed at separate junctures. On the contrary, it is established in the abovementioned Beentjes and GAT judgments that [e]ven though the directive does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules'. (22) It is clear from that case-law, which can be transposed to the interpretation of Directive 92/50, that the contracting authority is free to examine simultaneously whether candidates meet the qualitative selection criteria, giving them the right to tender, and the tenders themselves in the light of the contract award criteria.

51. In that context, the evidence that the qualitative selection criteria are met could be furnished until the deadline for the submission of tenders expires. Indeed, if the contracting authority is to assess compliance with the selection criteria and the tenders submitted at one and the same time, there is no point in setting two different timelimits for the submission of information concerning compliance with the selection criteria, on the one hand, and details of the tender submitted, on the other. However, evidence that the qualitative selection criteria are met will not be able to be furnished subsequently, since any further amendment to a company's file after that deadline had expired would mean that candidates were no longer being treated equally. (23)

52. Furthermore, were a company able to be permitted to prove that it met the qualitative selection criteria after the contract had been awarded, the two phases in the award procedure would cease to be distinct. As the Italian Government points out in that connection, there is also the risk that companies would not fulfil their tax obligations until they had learnt that the outcome of an award procedure was in their favour. But it would not be acceptable for companies to include their tax obligations in a cost-benefit analysis in that way and unduly delay settling their debts to the State.

53. It follows from the foregoing that the answer to the third question, as reformulated, must be that a company may be allowed to furnish evidence that it has fulfilled the qualitative selection criteria applicable to a contract until the deadline for applying to take part in the tender expires, unless the contracting authority is examining compliance with the selection criteria and the candidates' tenders simultaneously, in which case the material deadline will be the timelimit set for the submission of tenders.

III - Conclusion

54. In the light of these considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Tribunale amministrativo regionale del Lazio as follows:

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1) The expression to have fulfilled obligations' which appears in the text of Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts may be construed as meaning to be in compliance with its obligations', as stated in the Italian transposing legislation, since both expressions mean the same.

2) The concept of having fulfilled obligations' within the meaning of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 must be interpreted as requiring actual payment of the obligations at issue, the amount of and deadline for which is determined by the national law, and does not preclude a national rule or an interpretation of the national rules according to which a company which has lodged an administrative or judicial appeal is deemed to have fulfilled its obligations until final judgment is handed down.

3) A company may be allowed to furnish evidence that it has fulfilled the qualitative selection criteria applicable to a contract, in accordance with subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 until the deadline for applying to take part in the tender expires, unless the contracting authority is examining compliance with the selection criteria and the candidates' tenders simultaneously, in which case the material deadline will be the timelimit set for the submission of tenders.

(1) .

(2) - Decrees published in GURI No 104 of 6 May 1995 and GURI No 70 of 24 March 2000 respectively (hereinafter Decree No 157/1995').

(3) - See, for example, Case C-57/01 Makedoniko Metro and Mikhaniki [2003] ECR I1091, paragraph 55 and the case-law cited therein.

(4) - Case C-397/01 Pfeiffer [2004] ECR I0000, paragraph 114. The need for a compatible interpretation was originally based in part on Article 10 EC: Case 14/83 Von Colson and Kamann [1984] ECR 1891, paragraph 26: However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article [10] of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of a Member State including, for matters within their jurisdiction, the courts'; Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8. See, on this subject, S. Prechal, Directives in EC Law , 2 nd edition, Oxford, 2005.

(5) - As regards Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1, hereinafter Directive 93/37'), see Case C-470/99 Universale-Bau [2002] ECR I-11617, paragraph 88: '[t]he title of Directive 93/37 and the second recital in its preamble show that its aim is simply to coordinate national procedures for the award of public works contracts, although it does not lay down a complete system of Community rules on the matter (Joined Cases C-285/99 and C286/99 Lombardini and Mantovani [2001] ECR I-9233, paragraph 33)'.

(6) - Article 29 of Directive 92/50 in fact provides that:... may be excluded ...' (my italics).

(7) - As far as public works contracts are concerned, the equivalent of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 is Article 24(e) and (f) of Directive 93/37 The Italian version of the latter employs the expression che non sia in regola'; the French qui n'est pas en règle'; the Spanish que no esté al corriente'; the Portuguese nao tenham cumprido'; the English has not fulfilled' and the German nicht erfüllt haben'. Article 20(1)(e) and (f) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), last amended by Directive 2001/78 also employs the expression

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qui n'est pas en règle' in the French version, while the Italian opts for the expression non abbia adempiuto' and the Portuguese nao tenham cumprido'. Article 45(2)(e) and (f) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) is significant, since its purpose is to consolidate the provisions in force in the raft of directives, including Directives 92/50 and 93/37. The French version employs the expression qui n'est pas en règle', the Italian che non sia in regola', the Spanish que no esté al corriente', the Portuguese nao tenham cumprido', the English has not fulfilled' and the German version nicht erfüllt haben'.

(8) - Case C-176/98 [1999] ECR I-8607, paragraph 25.

(9) - In that connection, see point 26 of the Opinion of Advocate General Léger in Holst Italia , cited in footnote 8 above, according to which the aim of the qualitative selection criteria is also to protect the interests of the contracting authority.

(10) - Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR, paragraph 31; Case C-94/99 ARGE [2000] ECR I-11037, paragraph 24; Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 61; Case C-92/00 HI [2002] ECR I-5553, paragraph 45, and Case C-315/01 GAT [2003] ECR I-6351, paragraph 73. For a résumé of earlier and settled case-law on this issue, see points 20 and 21 of the Opinion of Advocate General Tizzano in the abovementioned HI. See also recital (2) of the preamble to Directive 2004/18, according to which [t]he award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency'.

(11) - Concerning Directive 93/37, Universale-Bau , cited in footnote 5 above, paragraph 93.

(12) - That aim is laid down in the 20th recital of the preamble of Directive 92/50, according to which to eliminate practices that restrict competition in general and participation by other Member States' nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts'. That aim is also set out in Article 13(5) of that directive, according to which [i]n any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition', and in the second subparagraph of Article 27(2), according to which [i]n any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition'. As regards Directive 93/37, see also Case C-247/02 Sintesi [2004] ECR I0000, paragraph 35.

(13) - P. Cassia, Contrats publics et principe communautaire d'égalité de traitement', RTDE, 2002, p. 413 (p. 420), according to which: le principe communautaire d'égalité contribue à assurer le développement d'une concurrence effective dans l'attribution et l'exécution des contrats publics' (The Community principle of equal treatment helps to ensure that effective competition is fostered in the award and implementation of public contracts'.)

(14) - Moreover, because the payment of social security obligations and taxes is periodic in nature, approved service providers on official lists cannot benefit from a presumption that they meet the qualitative selection criteria listed in subparagraphs (e) and (f) of the first paragraph of Article 29, as is clear from the first and second subparagraphs of Article 35(3).

(15) - If the request to pay the tax or social security contributions owed in instalments has yet to be approved by the authority at the material time when the company is required to prove that

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it has fulfilled those obligations, it will not logically be able to be considered to be in compliance with Article 29 of Directive 92/50.

(16) - Decision No 7836 of the Vth Chamber of 1 December 2003. Attached at annex 3 of La Cascina's written observations to the Court.

(17) - If the national law confers suspensory effect on the lodging of an appeal, the company which has lodged that appeal will have to be deemed to have fulfilled its obligations, within the meaning of subparagraphs (e) and (f) of the first paragraph of Article 29 of Directive 92/50 until a judgment with the force of res judicata has been delivered in regard to its claim. However, if the obligation to make payment is not suspended under the national law, the applicant will still be required to meet its obligations to make payment to comply with subparagraphs (e) and (f) of the first paragraph of Article 29, subject to the possibility of a subsequent refund. There are, of course, other possibilities - the obligation to make payment may, for example, be suspended, provided the company provides a guarantee.

(18) - Case C-60/92 Otto [1993] ECR I-5683, paragraph 14.

(19) - Case 31/87 Beentjes [1988] ECR 4635, paragraph 15, according to which the examination of the suitability of contractors to carry out the contracts to be awarded and the awarding of the contract are two different operations in the procedure for the award of a public works contract'. See also the Opinion of Advocate General Darmon in that same case, at point 36, in which he states that [t]he directive thus draws a clear distinction between the criteria for checking the suitability of a contractor, which concern the qualities of the contractor as such, and those for awarding the contract, which relate to the qualities of the service which he offers, of the work which he proposes to carry out'. See also GAT cited in footnote 10 above, paragraph 59.

(20) - System common to all the directives on public contracts and retained in Directive 2004/18. Aricle 45 of that directive lists again the qualitative criteria to which economic operators tendering for a contract may be subject.

(21) - However, it is open to the contracting authority to establish that a company fails to meet the qualitative selection criteria until the point at which the contract is awarded.

(22) - Beentjes , cited in footnote 19 above, paragraph 16, and GAT , cited in footnote 10 above, paragraph 60.

(23) - See, by analogy, Makedoniko Metro and Mikhaniki , cited above, in which Directive 93/37 is interpreted as not precluding the prohibition, under the national legislation, of changes to the composition of a joint venture participating in a tender for a public contract after the tenders have been submitted.

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Notice for the OJ

Reference for a preliminary ruling by the Tribunale Amministrativo Regionale del Lazio, Division Ia, by order of that court of 22 April 2004 in the case of 'La Cascina' s.c.r.l. and Zilch s.r.l. v Ministry of Defence, Ministry of Economy and Finance, and Pedus Service P. Dussmann s.r.l. and Others

(Case C-226/04)

Reference has been made to the Court of Justice of the European Communities by order of Division Ia of the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio) of 22 April 2004, received at the Court Registry on 2 June 2004, for a preliminary ruling in the case of 'La Cascina' s.c.r.l. and Zilch s.r.l. v Ministry of Defence, Ministry of Economy and Finance and Pedus Service P. Dussmann s.r.l. and Others, on the following questions:

1) Must subparagraphs (e) and (f) of Council Directive 92/50/EEC1 of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as regards only the abovementioned provisions, be interpreted as meaning that, where the Community legislature employs the expression '*has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority*' or '*has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority*', the legislature intended to refer - solely and exclusively - to a situation in which the person concerned has - when the period prescribed for submitting applications to participate in a public tendering procedure expires (or in any event before the award of the contract, as indicated under point III.4 above) - fulfilled those obligations by paying in full and in time?

2) Consequently, must the Italian national implementing measure (Article 12 (d) and (e) of Legislative Decree No 157 of 17 March 1995) - in so far as, unlike the Community provision cited above, it allows the exclusion from tendering procedures of persons who 'are not in compliance in respect of obligations relating to the payment of social security contributions for employees, in accordance with Italian legislation or the legislation of the State in which they are established' or who 'are not in compliance in respect of obligations relating to the payment of taxes, in accordance with Italian legislation or the legislation of the State in which they are established' - be interpreted with reference solely to the failure - verifiable at the date mentioned above (the expiry of the period prescribed for submitting applications to participate or immediately before the award, even provisional, of the contract) - to fulfil those obligations, without any importance being attached to subsequent 'regularisation' of their position?

3) Or, conversely (if, in the light of the indications set out in question 2 above, the national measure is held not to be in harmony with the rationale and function of the Community provision), may the national legislature be regarded, in the light of the limitations to which it is subject for the purpose of giving effect to the Community rules contained in the Directive at issue, as being entitled to introduce the option of allowing the admission to a tendering procedure of persons who, although not 'in compliance' when the period prescribed for participation in the procedure expires, nevertheless show that they can regularise their position (and have taken positive steps to do so) before the award of the contract?

4) And, if the interpretation referred to in question 3 above is held to be workable - thus permitting the introduction of more flexible rules than would be allowed on a stricter interpretation of the 'fulfilment' of obligations referred to by the Community legislature - do such rules conflict with fundamental Community principles, such as the principle of equal treatment for all citizens of the Union, or - with regard only to public tendering procedures - that of equal conditions for all persons who have applied for admission to such procedures?

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Reference for a preliminary ruling by the Tribunale Amministrativo Regionale del Lazio, Division Ia, by order of that court of 22 April 2004 in the case of Consorzio G.f.M. v Ministry of Defence and 'La Cascina' s.c.r.l. and Zilch s.r.l

(Case C-228/04)

Reference has been made to the Court of Justice of the European Communities by order of Division Ia of the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio) of 22 April 2004, received at the Court Registry on 2 June 2004, for a preliminary ruling in the case of Consorzio G.f.M. v Ministry of Defence and 'La Cascina' s.c.r.l. and Zilch s.r.l, on the following questions:

1) Must subparagraphs (e) and (f) of Council Directive 92/50/EEC [1] of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as regards only the abovementioned provisions, be interpreted as meaning that, where the Community legislature employs the expression '*has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority*' or '*has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority*', the legislature intended to refer - solely and exclusively - to a situation in which the person concerned has - when the period prescribed for submitting applications to participate in a public tendering procedure expires (or in any event before the award of the contract, as indicated under point III.4 above) - fulfilled those obligations by paying in full and in time?

2) Consequently, must the Italian national implementing measure (Article 12 (d) and (e) of Legislative Decree No 157 of 17 March 1995) - in so far as, unlike the Community provision cited above, it allows the exclusion from tendering procedures of persons who 'are not in compliance in respect of obligations relating to the payment of social security contributions for employees, in accordance with Italian legislation or the legislation of the State in which they are established' or who 'are not in compliance in respect of obligations relating to the payment of taxes, in accordance with Italian legislation or the legislation of the State in which they are established' - be interpreted with reference solely to the failure - verifiable at the date mentioned above (the expiry of the period prescribed for submitting applications to participate or immediately before the award, even provisional, of the contract) - to fulfil those obligations, without any importance being attached to subsequent 'regularisation' of their position?

3) Or, conversely (if, in the light of the indications set out in question 2 above, the national measure is held not to be in harmony with the rationale and function of the Community provision), may the national legislature be regarded, in the light of the limitations to which it is subject for the purpose of giving effect to the Community rules contained in the Directive at issue, as being entitled to introduce the option of allowing the admission to a tendering procedure of persons who, although not 'in compliance' when the period prescribed for participation in the procedure expires, nevertheless show that they can regularise their position (and have taken positive steps to do so) before the award of the contract?

4) And, if the interpretation referred to in question 3 above is held to be workable - thus permitting the introduction of more flexible rules than would be allowed on a stricter interpretation of the 'fulfilment' of obligations referred to by the Community legislature - do such rules conflict with fundamental Community principles, such as the principle of equal treatment for all citizens of the Union, or - with regard only to public tendering procedures - that of equal conditions for all persons who have applied for admission to such procedures?

_____

[1] - OJ L 209 of 24.7.1992, p.1.

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ORDONNANCE DU PRÉSIDENT DE LA QUATRIÈME CHAMBRE DE LA COUR

5 avril 2006 (*)

«Radiation»

Dans l'affaire C-216/04,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Consiglio di Stato (Italie), par ordonnance du 27 janvier 2004, parvenue à la Cour le 24 mai 2004, dans la procédure

SABA Italia SpA,

contre

Comune di Bolzano,

SEAB SpA,

LE PRÉSIDENT DE LA QUATRIÈME CHAMBRE DE LA COUR,

l'avocat général, Mme J. Kokott, entendu,

rend la présente

Ordonnance

1 Par lettre du 10 mars 2006, parvenue au greffe de la Cour le 20 mars 2006, le Consiglio di Stato a informé la Cour qu'il retirait sa demande de décision à titre préjudiciel.

2 Dans ces conditions, il y a lieu d'ordonner la radiation de la présente affaire.

3 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, le président de la quatrième chambre de la Cour ordonne:

L'affaire C-216/04 est radiée du registre de la Cour.

Fait à Luxembourg, le 5 avril 2006

Le greffier

R. Grass

Le président de la quatrième chambre

K. Schiemann

* Langue de procédure: l'italien.

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Order of the President of the Fourth Chamber of the Court of 5 April 2006 (reference for a preliminary ruling from the Consiglio di Stato (Italy)) - SABA Italia SpA v Comune di Bolzano and SEAB SpA

(Case C-216/04) [1]

Language of the case: Italian

The President of the Fourth Chamber of the Court has ordered that the case be removed from the register.

_____

1 -

2 - OJ C 190, 24.07.2004.

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Notice for the OJ

Reference for a preliminary ruling by the Consiglio di Stato in sede guirisdizionale, Sezione Quinta, by order of that court of 27 January 2004 in the case of SABA Italia SpA against the Comune di Bolzano and SEAB SpA

(Case C-216/04)

Reference has been made to the Court of Justice of the European Communities by order of the Consiglio di Stato in sede guirisdizionale (Council of State sitting as a court) of 27 January 2004, received at the Court Registry on 24 May 2004, for a preliminary ruling in the case of SABA Italia SpA against the Comune di Bolzano and SEAB SpA on the following question:

'Is the direct award, that is to say, in derogation from the procedures for the selection of contractors laid down in Directive 92/50/EEC [1], of the management of public pay car parks to a public limited company the entire capital of which is publicly owned within the meaning of paragraph 6(b) of Article 44 of Law No 1 of the Region of Trentino-Alto Adige of 4 January 1993, as amended by Article 10 of Regional Law No 10 of 23 January 1998, compatible with Community law, in particular with the freedom to provide services, the prohibition of discrimination and the obligation to guarantee equal treatment, transparency and free competition referred to in Articles 12, 45, 46, 49 and 86 of the EC Treaty?'

_____

[1] - OJ L 209 of 24.07.1992, p. 1

Judgment of the Court (Second Chamber)
of 26 April 2007
Commission of the European Communities v Republic of Finland. Failure of a Member State to fulfil obligations - Public supply contract for catering equipment - Article 28 EC - Quantitative restrictions on imports - Measures having equivalent effect - Principle of non-discrimination - Obligation of transparency. Case C-195/04.

In Case C195/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 April 2004,

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

applicant,

v

Republic of Finland, represented by T. Pynnä and E. Bygglin, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

Federal Republic of Germany, represented by A. Tiemann and M. Lumma, acting as Agents,

Kingdom of the Netherlands, represented by H. G. Sevenster and C.M. Wissels and by P. van Ginneken, acting as Agents,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, P. Kris, R. Silva de Lapuerta (Rapporteur) and G. Arestis, Judges,

Advocate General: E. Sharpston,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2006,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2007,

gives the following

Judgment

1. By its application, the Commission of the European Communities seeks a declaration from the Court that the Republic of Finland has failed to comply with its obligations under Article 28 EC by allowing Senaatti-kiinteistöt (formerly Valtion kiinteistölaitos), the authority responsible for the management of Finnish government buildings, in the context of a contract for catering equipment, to infringe fundamental rules of the EC Treaty, and in particular the principle of non-discrimination, which implies an obligation of transparency.

Facts of the dispute and the pre-litigation procedure

2. In March 1998, as part of a restricted procedure, Senaatti-kiinteistöt published in the Official

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Journal of the European Communities and in the Suomen säädöskokoelma (Official Journal of the Republic of Finland) a call for tenders concerning a public works contract for the renovation and alteration of the premises of the regional administration of Turku (the initial call for tenders').

3. That contract was divided into lots, the individual value of which ranged from FIM 1 000 000 to FIM 22 000 000. Tenders could be made for one, several or all of the lots. One of those lots concerned the supply and installation of catering equipment for the kitchen of the administration's restaurant.

4. The parties are at odds over the question whether, at that stage of the tendering procedure, a tender was submitted to the contracting authority in respect of that lot. According to the Republic of Finland, just one tender was submitted - by the company Kopal Markkinointi Oy - whereas, according to the Commission, this was not the case.

5. In early 2000, the contracting authority wrote directly to four undertakings, inviting them to tender for the supply and installation of catering equipment.

6. By letter of 14 February 2000, the contracting authority informed the addressees of the earlier letter that it had decided to reject all tenders received because they were too expensive. The Republic of Finland and the Commission disagree as to whether that letter was sent to all those undertakings which, in response to the initial call for tenders, had submitted a bid for the supply and installation of catering equipment.

7. In the letter of 14 February 2000, the contracting authority also states that it has entrusted the company Amica Ravintolat Oy - to which the restaurant of the Turku regional administration was leased - with the purchase of the catering equipment on its behalf up to a maximum amount of FIM 1 050 000 and invites the addressees of the letter to submit their tenders directly to that company.

8. Amica Ravintolat Oy finally bought the equipment in question from Hackman-Metos Oy.

9. Having received a complaint querying the regularity of the procedure followed by Senaatti-kiinteistöt, the Commission gave the Republic of Finland formal notice by letter of 17 July 2002 to submit its observations within two months of receipt of that letter.

10. The Finnish authorities replied to the letter of formal notice by letter of 3 September 2002.

11. On the view that the Republic of Finland had failed to fulfil its obligations under Article 28 EC, the Commission issued a reasoned opinion on 19 December 2002 calling on the Republic of Finland to take the measures necessary to comply with that opinion within two months of its notification.

12. By letter of 12 February 2003, the Finnish authorities disputed the infringement alleged by the Commission, arguing that, in the present case, Article 28 EC had been complied with, as had the principle of non-discrimination and the obligation of transparency, which derive from that provision.

13. Since it was not convinced by the explanations provided by the Finnish Authorities, the Commission decided to bring the present action.

14. By order of the President of the Court of 14 October 2004, the Kingdom of Denmark, the Federal Republic of Germany and the Kingdom of the Netherlands were granted leave to intervene in support of the form of order sought by the Republic of Finland.

Admissibility

15. The Republic of Finland contends that the Commission's application is inadmissible.

16. According to that Member State, the reasoned opinion does not refer to the same objections as those contained in the application. Thus, in the reasoned opinion, the Commission stated that

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the contracting authority ought to have ensured a sufficient degree of advertising and that the infringement complained of arose from the fact that it was the tenant of the Turku regional administration's restaurant who had concluded the contract for the supply of catering equipment, acting as the authority's agent; in its application, on the other hand, the Commission states that the contracting authority ought to have organised an invitation to tender and that the infringement arises from the fact that the invitation to tender was not successful and that, therefore, the contract in question had not been the subject of a published call for tenders.

17. In that way, the Commission has widened the subject-matter of the action as delimited in the pre-litigation procedure.

18. In this regard, although it is true that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for in that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same objections, that requirement cannot go so far as to mean that in every case exactly the same wording must be used in both, where the subject-matter of the proceedings has not been extended or altered but simply narrowed (see, in particular, Case C229/00 Commission v Finland [2003] ECR I-5727, paragraphs 44 and 46, Case C-433/03 Commission v Germany [2005] ECR I-6985, paragraph 28, and Case C-150/04 Commission v Denmark [2007] ECR I-0000, paragraph 67). Accordingly, in its application the Commission may clarify its initial grounds of objection provided, however, that it does not alter the subject-matter of the dispute (Case C-67/99 Commission v Ireland [2001] ECR I-5757, paragraph 23, judgment of 12 October 2004 in Case C-328/02 Commission v Greece , not published in the ECR, paragraph 32, and Case C-494/01 Commission v Ireland [2005] ECR I-3331, paragraph 38).

19. It should be pointed out, however, that in the present case the Commission has neither extended nor altered nor even narrowed the subject-matter of the action, as delimited in the reasoned opinion of 19 December 2002.

20. In fact, not only is it clear from the wording of the heads of claim of the reasoned opinion and of the Commission's application, which are framed in almost exactly the same terms, that those documents are based on the same objections, but it is also apparent that, by asserting in its application that the contracting authority should have organised an invitation for tender, the Commission merely clarified the objection alleged initially in its reasoned opinion, that is to say, that the contract for the supply of catering equipment for the regional administration of Turku should have been sufficiently advertised.

21. However, the Court may of its own motion examine whether the conditions laid down in Article 226 EC for bringing an action for failure to fulfil obligations are satisfied (Case C-362/90 Commission v Italy [1992] ECR I-2353, paragraph 8, Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 8, and Case C98/04 Commission v United Kingdom [2006] ECR I-4003, paragraph 16).

22. It is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice, and from the case-law relating to that provision, that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself (Case C178/00 Italy v Commission [2003] ECR I-303, paragraph 6, judgment of 14 October 2004 in Case C55/03 Commission v Spain , not published in the ECR, paragraph 23, and Case C199/03 Ireland v Commission [2005] ECR I8027, paragraph 50) and for the heads of claim to be set out unambiguously so that the Court does not rule ultra petita or indeed fail to rule on an objection (Case C296/01 Commission v France [2003] ECR I13909, paragraph 121, and Case C255/04 Commission v France [2006] ECR I5251, paragraph 24).

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23. In the present case, however, the Commission's application does not fulfil those requirements.

24. By its action, the Commission seeks a declaration that the Republic of Finland failed to comply with its obligations under Article 28 EC on the ground that, in the context of a contract for catering equipment, Senaatti-kiinteistöt infringed fundamental Treaty rules and in particular the principle of non-discrimination, which implies an obligation of transparency.

25. As the Advocate General points out in point 45 of her Opinion, the heads of claim as formulated in the application are ambiguous and do not enable the Court to identify clearly and precisely the misconduct which the Commission imputes to the Republic of Finland, since it brackets together Article 28 EC, fundamental Treaty provisions, the principle of non-discrimination and the obligation of transparency.

26. In addition, even if the Commission's action were intended to obtain a declaration of infringement of Article 28 EC, neither the heads of claim of the application nor the submissions made in the body of the application identify with clarity and precision which measure is alleged in the present case to constitute a quantitative restriction on imports or a measure having equivalent effect within the meaning of that article.

27. In fact, the Commission merely calls into question the contracting authority's conduct in the context of a contract for catering equipment'.

28. Furthermore, at no point in the proceedings was the Commission able to state coherently and precisely the facts which provide the basis for the objections on which it relies in support of its application.

29. Thus, in its application the Commission does not furnish any precise evidence in relation to the first call for tenders, but merely states that it was unsuccessful in relation to the acquisition of catering equipment'.

30. In that respect, neither the submissions made in the body of the application nor the Commission's replies to the Court's questions at the hearing enable the Court to establish with certainty whether a tender for the supply and installation of catering equipment was submitted to the contracting authority in the context of the call for tenders.

31. By the same token, in its reply the Commission asserts - without, however, demonstrating the truth of that assertion - that at least one of the undertakings which submitted such a tender was not one of the four undertakings contacted by the contracting authority in 2000, and that the lot relating to the supply and installation of catering equipment which was part of the contract announced in the initial call for tenders did not have the same subject-matter as the contract which gave rise to the contacts made during the same year.

32. In those circumstances, the Court does not have sufficient evidence to enable it to appreciate exactly the scope of the infringement of Community law imputed to the Republic of Finland and thus to determine whether there is a breach of obligations as alleged by the Commission (see, to that effect, Commission v United Kingdom , cited above, paragraph 18).

33. Consequently, the action must be dismissed as inadmissible.

Costs

34. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Republic of Finland has applied for costs and the Commission's action is inadmissible, the Commission must be ordered to pay the costs.

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

1. Dismisses the action as inadmissible;

2. Orders the Commission of the European Communities to pay the costs.

DOCNUM	62004J0195
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
DOC	2007/04/26
LODGED	2004/04/29
JURCIT	11997E028 : N 1 11997E226 : N 18 21 31991Q0704(02)-A38P1LC : N 22 61990J0362 : N 21 61999J0067 : N 18 61999J0439 : N 21 62000J0178 : N 22 62000J0229 : N 18 62001J0296 : N 22 62001J0494 : N 18 62002J0328 : N 18 62003J0055 : N 22 62003J0199 : N 22 62003J0433 : N 18 62004J0098 : N 21 32 62004J0150 : N 18 62004J0255 : N 22
CONCERNS	Failure concerning 11997E028 -
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect
AUTLANG	Finnish
APPLICA	Commission ; Institutions
DEFENDA	Finland ; Member States

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NATIONA	Finland
NOTES	Kotsonis, Totis: The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls Below the Relevant Value Threshold: Case C-195/04, Commission v. Finland, Opinion of Advocate General Sharpston, January 18, 2007, Public Procurement Law Review 2007 p.NA71-NA83
PROCEDU	Action for failure to fulfil obligations - inadmissible
ADVGEN	Sharpston
JUDGRAP	Silva de Lapuerta
DATES	of document: 26/04/2007 of application: 29/04/2004

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Opinion of Advocate General Sharpston delivered on 18 January 2007 Commission of the European Communities v Republic of Finland. Failure of a Member State to fulfil obligations - Public supply contract for catering equipment - Article 28 EC - Quantitative restrictions on imports - Measures having equivalent effect - Principle of non-discrimination - Obligation of transparency. Case C-195/04.

1. This action raises before the Court the question of the extent of the transparency obligation imposed on a contracting authority awarding a contract whose value falls below the threshold specified in the relevant Community public procurement directive. Although a contract whose value is below the relevant threshold may still be significant in economic terms, I shall for convenience refer to such a contract in this Opinion as a low value contract'.

2. The Commission seeks a declaration under Article 226 EC that Finland has failed to comply with its obligations under Article 28 EC, since [the authority responsible in Finland for the management of government buildings] in procuring catering equipment infringed fundamental rules of the EC Treaty and, in particular, the principle of non-discrimination which implies an obligation of transparency'.

Relevant Community law

3. Council Directive 93/36/EEC (2) coordinating procedures for the award of public supply contracts lays down requirements for the award of such contracts.

4. In so far as relevant the preamble provides:

[10] ... supply contracts of less than [EUR 214 326 (3)] may be exempted from competition as provided under this Directive and it is appropriate to provide for their exemption from coordination measures;

[14] ... to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community; ... the information contained in these notices must enable suppliers established in the Community to determine whether the proposed contracts are of interest to them; ... for this purpose, it is appropriate to give them adequate information about the goods to be supplied and the conditions attached to their supply; ... more particularly, in restricted procedures advertisement is intended to enable suppliers of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions'.

5. Under Article 1(a), public supply contracts include contracts for the purchase of products between a supplier and a contracting authority. Contracting authorities are defined in Article 1(b) as the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law.

6. In accordance with Article 5(1)(a)(i), the substantive harmonising provisions of the directive (Articles 6 to 27) - which include the common advertising rules set out in Articles 9 to 14 - are applicable only to public supply contracts awarded by contracting authorities referred to in Article 1(b) where the estimated value net of value added tax (VAT) is not less than [EUR 214 326 (4)]'. Thus, low value contracts are not caught by the common advertising rules; and Member States are under no obligation to apply the rules in the directive to those contracts, although they may of course choose to do so as a matter of national law.

7. Contracts falling within the scope of the public procurement directives must be awarded using an open, a restricted or a negotiated procedure. Under a restricted procedure a contract notice is advertised inviting undertakings to express an interest in tendering for the contract and the contracting authority subsequently invites tenders from a limited number of undertakings. Under

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a negotiated procedure the contracting authority may select undertakings with whom to negotiate the contract without advertising the contract and without holding a competition. (5)

8. According to Article 6(3)(a), contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice in the absence of tenders or appropriate tenders in response to an open or restricted procedure insofar as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission'.

Background to the infringement proceedings

9. The Commission and Finland rely on partially differing accounts of the facts giving rise to the present action, which have been hotly contested throughout the proceedings. I will therefore set out the relevant background in some detail, noting and evaluating the points of disagreement.

The first stage: March 1998

10. In March 1998, under a restricted procedure, the contracting authority (6) published in the Official Journals of both the Community and of Finland (7) a notice inviting expressions of interest in a public works contract for renovation of, and alteration works to, the premises of the regional administration of Turku. Finland refers to this as the first stage'. (8)

11. The contract was subdivided into lots. These included, inter alia, the installation of catering equipment. In accordance with Annex IV to Council Directive 93/37/EEC (9) it was specified that tenders could be made for one, several or all of the lots. Individual lots varied in value between FIM 1 million and 22 million (between EUR 168 000 and EUR 3.7 million approximately), and the aggregate value of the lots was above the threshold from which the Works Directive applied. (10) The works were to be carried out in two tranches.

12. The kitchen in which the equipment was to be installed is part of the restaurant located within the Turku regional administration's premises.

13. The parties are at odds over whether any tender to supply catering equipment was received in the first stage.

14. In reply to a question from the Court at the hearing, Finland stated that just one tender to supply the catering equipment was received in the first stage, from Kopal Markkinointi Oy (Kopal'). Finland was unable to provide further details of that tender. It stated that, since no other tenders had been received, there was no means of comparing tenders. Therefore, Kopal's tender had been rejected.

15. The Commission said that, so far as it was aware, Kopal did not submit a tender in 1998.

16. No further evidence relating to the first stage has been placed before the Court. In any event, the parties agree that no tender was accepted at this point for the supply of catering equipment.

The second stage: early 2000

17. In early 2000 (11) the contracting authority wrote directly to four undertakings, inviting them to tender for the supply and installation of catering equipment. On the basis of the follow-up letter of 9 April 2001 (12) it may be deduced that those four undertakings were Dieta Oy (Dieta'), Electrolux Professional Oy (Electrolux'), Kopal, and the eventual supplier Hackman-Metos Oy (Hackman-Metos'). Thus it was the contracting authority who first approached Hackman-Metos. Finland claims that, those undertakings included a representative in Finland of a catering equipment supplier located in another Member State (presumably Electrolux). The Commission has not challenged that statement.

18. By this point, the restaurant in which the catering equipment was to be installed had been

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leased by the contracting authority to Amica Ravintolat Oy (Amica' or the tenant'). The contracting authority agreed with Amica that that company would purchase the catering equipment on the contracting authority's behalf. The contracting authority agreed to pay FIM 1 050 000 (about EUR 177 000) towards the purchase of the catering equipment. That amount is less than the threshold above which Directive 93/36 applied. (13)

The third stage: later in 2000

19. In February 2000 the contracting authority issued a notice which informed its addressees that all tenders received had been rejected because of their high cost. Addressees were however invited to approach the tenant, whose contact details were provided, with new offers. Finland refers to this invitation and what followed as the third stage'.

20. The parties disagree as to whether that notice was addressed to all undertakings who had tendered in 2000 to supply catering equipment.

21. Finland claims that the notice was sent to all four undertakings. In its reply, the Commission alleges that not all undertakings which previously tendered were informed of the rejection of all tenders and subsequently invited to tender under the third stage'. According to the Commission, at least one undertaking, Rakentajamestarit Oy (Rakentajamestarit'), which had previously tendered to supply the catering equipment was not informed of the rejection of tenders and was not invited to tender under the third stage. It refers to a tender (annexed to the reply) which was submitted by Rakentajamestarit.

22. Finland correctly objects that in submitting evidence of Rakentajamestarit's tender only in its reply without explanation the Commission has not complied with Article 42(1) of the Rules of Procedure, which requires that a party offering further evidence in reply or rejoinder must give reasons for the delay in offering it. (14) Finland also points out that Rakentajamestarit's tender related to the main works (which included installing kitchen furniture), not to the supply of catering equipment.

23. I therefore consider that the evidence of Rakentajamestarit's tender is inadmissible; and that, in any event, it also appears to be irrelevant. (15)

24. The tenant concluded the contract with Hackman-Metos. (16) The parties have not been able to inform the Court when that happened. At the hearing the Commission indicated that two years had elapsed between the notice in the Official Journal and the purchase of the catering equipment. I therefore assume that the contract was probably concluded during the first part of 2000. (17)

25. By letter of 9 April 2001, the contracting authority provided the addressees of the notice issued in February 2000 with a form for appealing against the decision to reject the tenders made under the second stage.

26. Pausing here to recapitulate: in the first stage, under a restricted procedure, a contract notice was published in the Official Journals of the EU and of Finland inviting applications to tender for a contract of which the installation of catering equipment was a separate lot. It seems that one undertaking, Kopal, may have offered to supply catering equipment in the first stage (that is, in the course of the restricted procedure) but that even if it did so its tender was rejected. In the second stage, the contracting authority approached Kopal and three other potential suppliers - Dieta, Electrolux and Hackman-Metos - and invited them to tender, but then rejected all four tenders on the ground that they were too expensive. In the third stage, the contracting authority gave the incoming tenant, Amica, power to negotiate as its agent with such of those four undertakings (Kopal, Dieta, Electrolux and Hackman-Metos) as chose to approach it, having been invited to do so by the contracting authority. Amica concluded the contract for catering equipment with Hackman-Metos.

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27. A complaint regarding the contested award was lodged with the Commission, which sent Finland a letter of formal notice on 18 July 2002. The Commission took the view that the contracting authority had not ensured that the contract had been awarded with a sufficient degree of advertising and that Finland was therefore in breach of its obligations under Article 28 EC (sic). The Commission added that, according to the information it had received, Amica (acting as agent for the contracting authority) had concluded the contract with an undertaking with which it shared close links and employees, but the Commission does not appear to have pursued this allegation beyond the pre-litigation procedure.

28. Finland replied by letter dated 3 September 2002. It accepted that public procurement procedures were subject to advertising and transparency requirements, but denied that it had infringed Article 28 EC or any other rule of Community law.

29. Not satisfied by Finland's reply, the Commission sent Finland a reasoned opinion on 19 December 2002. It relied expressly on the Court's judgment in Telaustria and Telefonadress (Telaustria ') (18) and repeated that, in its view, the contracting authority had failed to guarantee a sufficient degree of advertising (19) for the procurement contract.

30. Not satisfied by Finland's reply of 12 February 2003 (which merely reiterated its position), the Commission lodged the present infringement action. (20)

31. Following initiation of the present infringement proceedings by the Commission, Finland informed the Commission on 1 December 2003 that it intended to reinforce the obligation of transparency in Finland. (21)

32. Denmark, Germany and the Netherlands have made submissions as intervening parties. At the hearing on 8 June 2006 the Commission, Finland, Germany and the Netherlands made oral submissions.

Admissibility

Finland's objection of inadmissibility

33. Finland argues that the action is inadmissible. According to the case-law of the Court, the subject-matter of the action is delimited by the pre-litigation procedure and the application cannot be founded on any objections other than those raised in the pre-litigation procedure. Finland considers that the Commission has expanded the subject-matter of the action beyond the scope outlined in the reasoned opinion in two respects.

34. First, the Commission states for the first time in the application that the contracting authority ought to have organised an invitation to tender'. The reasoned opinion merely mentioned the obligation to ensure a sufficient degree of advertising. (22)

35. Second, the application states that the initial invitation to tender was unsuccessful and that the contract for catering equipment was not advertised subsequently in the form of an invitation to tender. In the reasoned opinion, however, the infringement was said to arise from the fact that the tenant, acting as the contracting authority's procurement agent, concluded the contract.

36. The Commission replies that the subject-matter of the action is set out in a precise manner on the cover page and at paragraph 23 of the application (the declaration sought). Both there and in the reasoned opinion, the essential allegation is that Finland infringed its obligations under Article 28 EC because the contracting authority breached fundamental rules of the Treaty in procuring catering equipment.

Assessment

37. Despite the loose way in which the declaration sought is framed, which I deal with below, I do not think that Finland's objection of inadmissibility is founded. The reasoned opinion concludes

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by alleging that in procuring catering equipment, the contracting authority was in breach of fundamental Treaty rules, and in particular the principle of non-discrimination, which implies an obligation of transparency; in consequence (it is said) Finland infringed its obligations under Article 28 EC. The application asks for a declaration that Finland has infringed its obligations under Article 28 EC because, in procuring catering equipment, the contracting authority infringed fundamental rules of the Treaty and, in particular, the principle of non-discrimination which implies an obligation of transparency. I cannot see how the way in which the Commission puts its case in those two statements can be distinguished in any meaningful way.

38. It is true that the Commission argued expressly for the first time in its application that an invitation to tender' should have been issued; and that the initial invitation to tender was unsuccessful and subsequently the contract for catering equipment was not advertised in the form of an invitation to tender. (23) However, an action is not inadmissible where the application merely expands on a charge made in the reasoned opinion and does not formulate a new charge. (24) It seems to me that the two detailed arguments set out in the application merely expand on the charge advanced in the reasoned opinion that the contract concerned was not sufficiently advertised (25) and that the obligation of transparency was therefore breached. They do not alter the subject-matter of the Commission's complaint.

39. Finland seeks to rely on Commission v Netherlands (26) and Commission v Italy. (27) In the former, the Court declared inadmissible part of the Commission's action, which concerned water pollution, that varied in geographical scope from that identified by the Commission in the pre-litigation procedure. (28) In the latter, the Commission's action was inadmissible in so far as it was based on (a) national provisions which had been referred to in the pre-litigation procedure erroneously and (b) national provisions which differed from those referred to in the pre-litigation procedure. (29) The geographical scope and the basis in national law of an infringement action clearly go to the core of the subject-matter of that action. The precise detail of the arguments advanced in the application in support of the Commission's main objection does not. Those cases may therefore be distinguished.

40. It follows that Finland's objection cannot be upheld.

The declaration sought

41. However I have serious doubts about the admissibility and merits of the Commission's action on other grounds.

42. The Court has stated that the Commission must, in the heads of claim in an application made under Article 226 EC, indicate the specific complaints on which the Court is asked to rule and that those heads of claim must be set out unambiguously so that the Court does not rule ultra petita or indeed fail to rule on a complaint. (30)

43. The Commission asks the Court to declare that Finland has failed to comply with its obligations under Article 28 EC, since [the authority responsible in Finland for the management of government buildings] in procuring catering equipment infringed fundamental rules of the EC Treaty and, in particular, the principle of non-discrimination which implies an obligation of transparency'.

44. Those terms are far from precise.

45. First, it is not clear from the text as formulated whether the Commission is asking for a declaration that (i) Article 28 EC, (ii) the non-discrimination principle which it contains, (iii) other fundamental rules of the Treaty, or (probably) (iv) a combination of the above have been infringed.

46. Second, the Commission does not explicitly state why Article 28 EC is relevant to its action.

47. Article 28 EC states that quantitative restrictions on imports and all measures having equivalent

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effect shall be prohibited between Member States. That prohibition covers all national measures. (31)

48. However, the Commission's application fails to identify with precision which act constitutes the measure, act or procedure which is alleged to have breached Article 28 EC. The Commission merely complains, in a general way, of the contracting authority's conduct in procuring' catering equipment.

49. I therefore consider that the heads of claim fail to indicate the specific complaints on which the Court is asked to rule and that the action should be declared inadmissible.

50. In the event that the Court does not share that view, I turn to the substance of the case.

Substance

Preliminary points

51. The Commission has failed to explain how, by not advertising the contested contract or initiating a new contract award procedure, both of which imply positive obligations, the contracting authority has infringed the negative obligation contained in Article 28 EC.

52. I should make it clear that I am not denying that Article 28 EC may create an obligation of transparency. My point is that, if so, the Commission has failed to explain that that is its case. In my view the action is therefore unfounded in so far as it fails to set out clearly how the alleged breach of the transparency obligation infringes Article 28 EC.

53. Again, in the event that the Court does not share my view, I turn to examine the Commission's complaint in detail.

54. It is common ground that the contested contract was a low value contract, and that it therefore falls outside the scope of the Directive 93/36.

55. It is moreover settled case-law that, although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities concluding such contracts are nevertheless bound to comply with the fundamental rules of the Treaty. (32) In particular, contracting authorities are bound by the principle of non-discrimination on grounds of nationality, which in turn implies an obligation of transparency in order to enable the contracting authorities to satisfy themselves that the principle of non-discrimination has been complied with. (33)

56. The outcome of the Commission's application thus depends on whether the measures adopted by the contracting authority in the course of procuring the catering equipment were sufficient to comply with the transparency obligation as established by the case-law. The answer to that depends on answering two further questions.

57. Did the contract notice which the contracting authority published in March 1998 under the restricted procedure in accordance with the Works Directive publicise substantially the same supply contract as was finally awarded in early 2000 and therefore ensure the necessary degree of transparency?

58. Alternatively, if it did not, did the contracting authority comply with the transparency obligation in 2000 (at stages two and three) when it twice issued invitations to tender directly to four potential tenderers?

59. In approaching these questions, I emphasise that the steps taken in 1998 (the first stage) and 2000 (the second and third stages) represent very different degrees of publicity. There can be no doubt that the transparency obligation is satisfied by publishing a contract notice in the Official Journal of the EU for a contract to be awarded under a restricted procedure (irrespective

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of the fact that that initial publication took place in accordance with the requirements of the Works Directive rather than Directive 93/36). It is more open to debate whether the transparency obligation is likewise fulfilled by contacting four undertakings directly.

Did the 1998 contract notice cover the supply contract awarded in early 2000 and thereby satisfy the transparency obligation?

60. Finland maintains that there was only one award procedure' for the purposes of assessing compliance with Article 28 EC. The contract for supplying catering equipment was first publicised as an independent lot within the overall public works contract for the Turku premises. That contract was advertised to all potential suppliers in the contract notice published in the Official Journal of the EU in 1998. The three stages represent three parts of the same procedure.

61. Finland considers that, in respect of a low value contract, the transparency oblig ation does not necessarily require a particular form of publication or the issue of a formal invitation to tender. The application of the transparency obligation depends on the circumstances and is primarily governed by national law. Finland is supported in this view by Denmark, Germany and the Netherlands.

62. The Commission seeks to draw a procedural distinction between each of the three stages identified above. The contracting authority failed to publish a fresh invitation to tender (34) before purchasing the catering equipment. That complaint relates to the second and third stages. Therefore, according to the Commission, there was an insufficient degree of advertising in procuring the catering equipment and the contracting authority thereby failed to comply with the transparency obligation.

63. I disagree with Finland that, formally speaking, the three stages formed a single award procedure. The first stage consisted of a restricted procedure which was unsuccessful as regards the lot concerning the supply of catering equipment. Under the second stage, the contracting authority contacted four undertakings directly, at least three of which had submitted no tender under the restricted procedure. Thus the second stage launched a separate, negotiated procedure. After the tenders received under that procedure were rejected, a further negotiated procedure was launched in the third stage.

64. That being said, it is necessary to examine whether, on the facts, the second and third stages can be regarded as a direct consequence of the unsuccessful first stage so that transparency requirements with respect to the second and third stages were already satisfied by the contract notice published in the Official Journal of the EU in 1998.

65. In order to answer that question, one has to establish, first, whether the 1998 notice published under the restricted procedure should properly be read as inviting applications to tender for the supply of the catering equipment as a separate lot and, second, whether the terms of the supply contract advertised under the restricted procedure were substantially the same as those of the contract at issue in the second and third stages.

66. First, the public works contract advertised in the Official Journal in 1998 bears the heading Building works (rebuilding, extensions, alteration and repair works)' (my translation). The detailed description of the work (35) reads: Municipal building, extensive renovation and modification work, building, plumbing and ventilation work, work on monitoring, cooling, safety and electrical equipment and installation of catering equipment' (my translation). The contract notice also made it clear (36) that candidates could apply to tender for one, several or all of the lots and invited potential tenderers to contact the contracting authority (37) (in Finnish) for supplementary information on technical and administrative aspects of the contract. (38)

67. The Commission does not seek to argue that the contract notice was insufficiently clear. It seems to acknowledge that the contract notice did in fact call for applications to tender for catering

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equipment. (39) Its case appears to be limited to saying that what took place in 2000 cannot be said to be merely the continuation of what happened in 1998.

68. In my view the 1998 contract notice, whilst not perhaps a model of clarity, could prima facie have been read as inviting expressions of interest in tendering for the installation of catering equipment; and the Commission has not contested that. Therefore I agree with Finland that would-be tenderers reading the contract notice published in March 1998 in the Official Journal would have understood that they could enquire about, and apply to tender for, the supply of catering equipment as an independent lot. (40)

69. Second, the Commission argues that the contractual terms altered between the various stages. It points out that the contract notice published in 1998 makes no mention of the tenancy agreement with Amica and its involvement in the awarding of the contract. (41) At the hearing the Commission, relying on a letter (annexed to its reply) from the contracting authority to Finland's Ministry of Commerce and Industry, also alluded to a modification of the plan for the restaurant, a change in the amount attributed to the contract and a change to the financing of the purchase (now to be shared between the contracting authority and Amica).

70. Finland replies that the essential clauses of the contract were not changed in the course of the procedure. The contracting authority was responsible for the award throughout. The only changes were that under the third stage Amica concluded the contract in its capacity as agent and that the contracting authority fixed in advance the sum that it would pay towards the purchase.

71. I do not think that the Commission has succeeded in demonstrating that the terms of the contract changed sufficiently over the course of the three stages described to break the link of continuity between those stages. Although in the third stage the contracting authority used Amica as agent to make the purchase and shared the cost with it, the invitations to tender in the third stage were issued in its, not Amica's, name. Moreover the sum which the contracting authority fixed as its contribution towards the purchase lies within the range of values specified for the separate lots published under the works contract in 1998. Nor do I read the invitations to tender issued in the third stage as supporting the Commission's contention that the tenancy agreement between the contracting authority and Amica altered the terms of the contract. They merely make clear Amica's role as procurement agent.

72. Contrary to Article 42(1) of the Court's Rules of Procedure, the Commission has not explained why the letter from the contracting authority to Finland's Ministry of Commerce and Industry was submitted as evidence only as an annex to its reply. Consequently that letter constitutes fresh evidence submitted out of time within the meaning of Article 42(1) of the Rules of Procedure and may not be taken into consideration. (42) The Commission has not submitted any further evidence establishing that there was substantial change in the nature or quantity of the catering equipment to be supplied as publicised in the three different stages.

73. For those reasons, I take the view that substantially the same contract for supply of catering equipment was publicised in 1998 under a restricted procedure as was awarded in 2000 under a negotiated procedure.

74. If that is so, and the restricted procedure failed because no acceptable tender was received, the next question is whether the contracting authority infringed the transparency obligation by subsequently resorting to the negotiated procedure to buy the catering equipment, without further advertising.

75. Under Article 6(3)(a) of Directive 93/36, a contracting authority is entitled to award a supply contract falling within the scope of the directive by negotiated procedure without prior publication of a tender notice where no appropriate tender was received under a restricted procedure, provided

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that the terms of the contract are not substantially altered and provided that a report is communicated to the Commission.

76. It has recently been emphasised (43) that where a derogation from the public procurement directives is expressly allowed, a negotiated procedure without prior publication of an invitation to tender is justified and there can be no requirement for advertising. The principles which flow from the Treaty cannot impose a requirement of publicity which has to be satisfied even when the directives expressly provide for a derogation. If they did, the derogation would be nugatory.

77. In my view the same reasoning applies to a contract not falling within the scope of Directive 93/36 by virtue of its low value. (44) Article 6(3)(a) expressly allows for recourse to a negotiated procedure without prior publication of a contract notice in respect of contracts falling within the directive. It follows that that procedure may similarly be used in respect of a low value contract.

78. I therefore conclude that where, after carrying out a restricted procedure with publication of a notice which fails due to the absence of any appropriate tenders, the contracting authority resorts to a negotiated procedure without advertising the supply contract, and where the terms of the contract under both procedures are substantially the same, the contracting authority does not infringe the transparency obligation under Community law.

Were the invitations to tender issued in 2000 in themselves sufficient to comply with the transparency obligation?

79. In case the Court reaches the conclusion that, contrary to my view, the second and third stages were unrelated to the first stage and cannot be considered to be covered by the 1998 contract notice, I must consider whether the invitations to tender issued directly to the four undertakings in 2000 complied with the transparency obligation.

80. The thrust of the Commission's allegation is that the contested contract should have been awarded in accordance with the condition laid down in Telaustria (45) for ensuring compliance with the transparency obligation. There, the Court stated that the transparency obligation imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the [market concerned] to be opened up to competition and the impartiality of procurement procedures to be reviewed'.

81. Finland, Germany and the Netherlands all submit that, whilst a contracting authority awarding a contract which falls outside the scope of the directives must respect the obligation of transparency, the issue remains as to what constitutes sufficient' advertising in the context of a particular award procedure to satisfy that obligation. (46) In principle, it is for the contracting authority to evaluate whether the detailed arrangements of the call for tenders are appropriate for the contract in question, subject to review by the competent courts. (47)

82. As Denmark and the Netherlands have pointed out, the use of the word advertising' in the English version of the judgment is problematic. On the one hand, advertising implies an obligation to publish. On the other hand, the words used in other language versions (Offentlichkeit' in the official language of the case, German; publicité' in the French; pubblicità' in the Italian; publicidad' in the Spanish) are more akin to publicity' in English. In my view, publicity' does not necessarily imply an obligation to publish. It does, however, imply an obligation to do more than simply contacting a single potential tenderer and awarding the contract to that undertaking. In his Opinion in Telaustria , (48) Advocate General Fennelly noted that the Commission had argued in that case that the transparency obligation did not require publication, and he shared the Commission's view. (49)

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83. It seems to me that, where a contract falls outside the scope of the directives, the appropriate degree of publicity is to be determined by reference to the potential market for that contract. The contracting authority must ensure a degree of publicity sufficient to open up that market to competition and to permit the impartiality of the procurement procedure to be reviewed. (50) Therefore, there must in principle be some degree of publicity for the procurement contract. Absent such publicity, it is difficult to see how there can be said to be either equal treatment or transparency.

84. Are the publicity requirements for such contracts to be set by Community law, or left to national law?

85. It seems to me that there is a fundamental difference between the potential market for a contract whose value is above the threshold but which, for whatever reason, is excluded from the scope of the relevant directive; and the potential market for a low value contract. The former may nevertheless be of very significant economic importance. One can readily see why the non-discrimination obligation, with its concomitant transparency obligation, should lead to a requirement under Community law to ensure adequate trans-national publicity for such a contract. The latter by definition falls below the threshold from which the relevant directive applies. That threshold marks the point at which the legislator deliberately chose not to apply detailed publicity requirements. It seems to me that, in so doing, he also implicitly defined which public contracts merit, because of their economic importance, being subject to detailed publicity requirements imposed by Community law. (51) I consider that Community law requires that, in principle, there must still be some degree of publicity for such a contract; but leaves it to national law to determine in detail what that publicity should be.

86. That logic is confirmed by the Court's statement in Coname (52) that special circumstances, such as the fact that the economic interest at stake was very modest, might mean that an undertaking located in a different Member State would have no appreciable interest in the contract in question. In such cases, the effects on the fundamental freedoms should be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed by differences in treatment arising from the absence of any transparency. (53) The special circumstances' there described represent the exception to the general rule that there should be some publicity. However, I do not read that statement as transposing the full panoply of the public procurement directives' publicity requirements to a context (low value contracts) from which the Community legislator deliberately excluded them.

87. In consequence, I do not accept the Commission's argument that, as a matter of Community law, contracting authorities are required to apply detailed Community law requirements for publicising low value contracts. Two principal arguments support that conclusion.

88. First, the principle of subsidiarity enshrined in Article 5 EC dictates that Community law should only impinge on national law to the extent justified by an assessment of costs and benefits. (54) Imposing a detailed duty under Community law to publicise low value contracts throughout the Community means disregarding part of the legislative intention behind Directive 93/36. The thresholds in the various public procurement directives mark the boundary between what the Member States have agreed should be harmonised at Community level and what remains within the competence of Member States. It follows, in my view, that setting detailed publicity requirements at Community level for low value contracts is incompatible with the principle of subsidiarity.

89. Second, imposing under Community law a detailed obligation to publicise in relation to the potential market - an obligation whose actual details are nevertheless not to be found in any legislative text promulgated at Community level - would create significant legal uncertainty for contracting authorities and potential tenderers wanting to conclude low value contracts. When, where and in

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what form such contracts should be publicised cannot readily be deduced from the case-law; and, as I have indicated, those matters are not covered by secondary legislation.

90. The legal uncertainty that would be created by imposing such an obligation is illustrated by the Commission's own doubts. In response to direct questioning from the Court it could only suggest in vague terms what form of publicity would have been required to satisfy the transparency obligation in the present case. The Commission has recently argued, in the context of awarding contracts for emergency ambulance services which were not covered by the public procurement directives, that a national or international call to tender was not required to achieve sufficient' publicity - correspondence addressed to particular undertakings could suffice. (55) That submission directly contradicts the position that the Commission has adopted in the present case.

91. Shortly after the hearing in the present case, the Commission published a communication setting out in considerable detail its views as to when, where and in what form contracts which are not subject to the public procurement directives should be advertised'. (56) In the course of arguing the present case the Commission has not explained how the breach of Treaty obligations that it alleges against Finland relates to the requirements which it proposes in that communication. Furthermore, the introduction to the communication itself states that the communication does not create any new rules and that, in any event, interpretation of Community law is ultimately a matter for the Court. (57)

92. I do not consider that the conclusion I have reached contradicts the Telaustria case-law, in which the Court has required contracting authorities to ensure a degree of advertising' sufficient to enable a contract falling outside the scope of the public procurement directives to be opened up to competition throughout the Community and the impartiality of the procurement procedure to be reviewed. (58) On closer inspection, it becomes clear that those cases concerned public service concessions which are excluded, irrespective of their economic value, from the scope of public procurement directives. The values of the concessions at issue in those cases were on a par with contracts covered by the publicity requirements laid down in the public procurement directives. (59)

93. There is therefore no contradiction between the fact that the Court has decided that the award of such contracts ought to be subject to a degree of advertising' sufficient to ensure they are opened up to competition throughout the Community and the approach that I suggest should be taken in respect of low value contracts. The interest from tenderers throughout the Community which such high-value concessions generate may reasonably be regarded as equivalent to the interest which the public procurement directives aim to protect in respect of contracts falling within their scope. (60) It is therefore reasonable to apply a Treaty-based obligation of transparency in respect of such concession contracts and to state that publicity for such contracts falls to be assessed by reference to Community law.

94. It may be objected that, economically, a contract whose value falls marginally below the threshold in the relevant public procurement directive might be valuable enough to be of interest to undertakings located in neighbouring Member States. In the present case, the value of the contract awarded (approximately EUR 177 000) was some EUR 47 000 below the threshold from which Directive 93/36 applied. (61) It was thus significantly lower than the value of contracts which the legislator considered to be of interest to suppliers located throughout the Community. (62) The potential profit to a supplier located in, for example, Spain from winning a contract worth EUR 177 000 would, it seems to me, be reduced significantly by transportation costs and other possible costs, such as modifying equipment and providing operating instructions in a form comprehensible to Finnish speakers. (63) Perhaps it might be otherwise for a potential supplier located in (say) Sweden or Denmark. However, the Commission has not suggested that price differences between catering equipment in different Member States are very pronounced. Still less has it submitted any evidence

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to that effect. It therefore seems to me that the Court would find it difficult, on the material before it, to be able to state with confidence that it would be beneficial to the contracting authority and to potentially interested suppliers in other (neighbouring) Member States to impose a requirement, derived from Community law, to publicise the contract in certain other Member States.

95. More generally, are contracting authorities required by the transparency obligation to assess market interest in individual neighbouring Member States and then to determine, using that assessment, in which States and in what form the contract ought to have been publicised? (64) Put another way: might there be compelling reasons for holding that a contracting authority should carry out a detailed market assessment, and in consequence sometimes ensure a higher degree of publicity than that required under national law?

96. I do not think that the transparency obligation under Community law should be construed as imposing such a requirement for contracts below the threshold. Contracting authorities would be required, for each low value contract of potential' significance (however that is to be defined) to assess market interest in an unspecified (and unspecifiable) selection of Member States at the risk of being penalised (65) if they fail to do so correctly. Such a situation is the antithesis of legal certainty. It seems to me that such a requirement is, moreover, likely to hit small contracting authorities (such as local authorities), who would tend to have lower value contracts to place, more often than large contracting authorities. If I am right, it would impose on them a disproportionate and unrealistic burden.

97. In my view, the benefit of avoiding legal uncertainty which follows from the approach I have suggested outweighs the marginal benefit to the integration of public procurement markets which detailed Community law requirements for publicising low value contracts could perhaps bring.

98. I therefore consider that what constitutes a sufficient degree of publicity for low value contracts is a matter for national law. (66) If, upon analysis, the Commission takes the view that applicable national rules on public procurement in a particular Member State fail to provide for sufficient transparency and thus jeopardise the application of the principle of equal treatment, it will no doubt bring infringement proceedings against the Member State in question. In that way, the Commission's and the Court's resources might also perhaps be more effectively employed than by scrutinising infringements allegedly committed in awarding individual low value contracts.

99. I therefore conclude that the Commission's application should be dismissed.

Costs

100. In its pleadings, Finland has asked for costs. Although the way in which the proceedings have been defended by Finland has not been entirely informative, I see no reason for the Court to depart from the normal practice. Therefore pursuant to Article 69(2) of the Rules of Procedure the Commission as the unsuccessful party should be ordered to bear the costs. The intervening Member States must be ordered to bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

Conclusion

101. I therefore propose that the Court should:

- declare the action inadmissible;

- in the alternative, dismiss the application;

- order the Commission to bear its own and Finland's costs;

- order the intervening Member States to bear their own costs.

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(1) .

(2) - Of 14 June 1993 (OJ 1993 L 199, p. 1), as amended in particular by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1). After the material time, further amendments were made by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1). With effect from 31 January 2006, Directive 93/36 was repealed and replaced by European Parliament and Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

(3) - See the values of thresholds set pursuant to Directive 93/36 in OJ 1999 C 379, p. 20, which came into force on 1 January 2000. Neither party has informed the Court of the precise date on which the contested contract was concluded. For reasons which I set out below at point 24, I assume that that occurred in the first part of 2000. At the material time the threshold from which Directive 93/36 applied was subject to change on a biennial basis. With effect from 1 January 2002, that threshold was increased to EUR 249 681 (see the values of thresholds set pursuant to Directive 93/36 in OJ 2001 C 332, p. 21).

(4) - See footnote 3 above.

(5) - Under a second type of negotiated procedure, the contracting authority advertises the contract and invites tenders from a limited number of undertakings but may also negotiate the terms of the contract to some extent.

(6) - Valtion kiinteistölaitos is the former name of the authority responsible for management of governmental buildings in Finland. It was renamed Senaatti-kiinteistöt in 2001.

(7) - Supplement to the Official Journal S48 of 10 March 1998 and the Official Journal of Finland, public procurement series, No 11, of 12 March 1998.

(8) - In following Finland's nomenclature for the three stages, I am using those terms for identification purposes. The question of whether the three stages form part of the same procedure, or should be considered to be separate procedures, is discussed below at points 60 to 63.

(9) - Of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) (the Works Directive'). The Works Directive (rather than Directive 93/36) governed the contract notice (and subsequent procedure) for the renovation and alteration works, which constituted the majority of the lots.

(10) - See Article 6(3) of Directive 93/37. The value of thresholds set pursuant to the Works Directive in OJ 1998 C 22, p. 2 (which was applicable during the period 1 January 1998 to 31 December 1999) was SDR 5 000 000, equivalent to FIM 29 908 547. The contract notice indicated that the estimated total value of the contract was FIM 38 million.

(11) - The Commission says these invitations to tender were issued in 2000, but neither the Commission nor Finland has identified the exact date. Given that the ensuing tenders were rejected in February 2000, it appears that the invitations must have been issued in either January or February 2000.

(12) - See point 25 below.

(13) - See points 4 and 6 above.

(14) - See Case C-308/87 Grifoni v EAEC [1994] ECR I-341, paragraph 7.

(15) - The text of the tender does in fact make clear that it was made in the context of the second tranche of renovation and alteration works referred to in the contract notice published in March 1998. It seems that Rakentajamestarit had also offered to supply certain kitchen furniture (storage

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cupboards and the like); but Finland stressed that Rakentajamestarit was not a manufacturer or supplier of catering equipment (in the sense of kitchen appliances) and that it had never offered to supply such equipment.

(16) - This information emerged only at the hearing.

(17) - Since the third stage began in February 2000, the contract was obviously concluded after that point. Whilst the date at which the contract was concluded is material to determining whether the threshold from which the Directive became applicable was EUR 214 326 or EUR 249 681 (see footnote 3 above), self-evidently the value of the contract (approximately EUR 177 000) is below either threshold.

(18) - Case C-324/98 [2000] ECR I-10745.

(19) - See paragraph 62 of the judgment.

(20) - Finland notes that the award was contested at national level by Finland's Ministry of Finance and the Ministry of Commerce and Industry but was not challenged before its national consumer protection tribunal.

(21) - In October 2004, a working group was due to make a legislative proposal for introducing an obligation to publicise on an electronic database contracts whose value exceeded prescribed national thresholds.

(22) - Thus the English version of the reasoned opinion. The French translation has un degré de publicité adéquat'. See point 82 below for an analysis of the difference in meaning.

(23) - Presumably, the Commission's real point is that, after the failure of the restricted procedure, a new procurement procedure - which could have been a negotiated procedure - should have been organised.

(24) - Case C-340/02 Commission v France [2004] ECR I-9845, paragraph 29.

(25) - See point 34 above.

(26) - Case C-152/98 [2001] ECR I-3463, paragraph 23.

(27) - Case C-439/99 [2002] ECR I-305, paragraph 11.

(28) - Paragraphs 24 and 25.

(29) - See paragraphs 13 and 14.

(30) - Case C-255/04 Commission v France [2006] ECR I-0000, paragraph 24.

(31) - See, for example, Case C-366/04 Schwarz [2005] ECR I-10139, paragraph 28.

(32) - See Cases C-59/00 Vestergaard [2001] ECR I-9505, paragraph 20, and C-264/03 Commission v France [2005] ECR I-8831, paragraph 32.

(33) - Telaustria , cited in footnote 18, paragraphs 60 and 61. The tenor of that case-law has since been affirmed in the second recital of the preamble to Directive 2004/18, cited in footnote 2, which states that [t]he award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency'.

(34) - I deduce that the real complaint is that the contracting authority failed to initiate

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a new procurement procedure: see footnote 23 above.

(35) - Point 3.b) in the original Finnish version of the contract notice. Although it does not alter the fact that the contracting authority itself took the measures necessary to seek interest throughout the Community in installing catering equipment, it may be noted that other language versions of the contract notice (which in fact summarise the original version) failed to mention that particular lot.

(36) - Point 3.c).

(37) - Point 6.b).

(38) - Point 13.

(39) - Paragraph 21 of the application.

(40) - In support of that view, Finland points out that one potential supplier (Kopal) does appear to have read the announcement in that way and to have applied to tender specifically for catering equipment.

(41) - As a matter of chronology, it could scarcely have done so.

(42) - See Grifon i v EAEC , cited in footnote 14 above, paragraph 7.

(43) - By Advocate General Jacobs in his Opinion in Case C-525/03 Commission v Italy [2005] ECR I-9405, at point 47. The Court did not deal with this point, having found the action inadmissible. See also the Opinion of Advocate General Stix-Hackl in Case C-532/03 Commission v Ireland , delivered on 14 September 2006, point 111.

(44) - Advocate General Jacobs went on to express the same view at point 48 of his Opinion in Commission v Italy.

(45) - Cited in footnote 18, paragraph 62.

(46) - See further point 75 of the Opinion of Advocate General Stix-Hackl in Case C-507/03 Commission v Ireland , delivered on 14 September 2006, and points 75 to 77 of the Opinion of Advocate General Jacobs in Case C-174/03 Impresa Portuale di Cagliari , delivered on 21 April 2005.

(47) - Case C-458/03 Parking Brixen [2005] ECR I-8612, paragraph 50.

(48) - Cited in footnote 18 above.

(49) - See points 42 and 43 of the Opinion.

(50) - This is the approach suggested by Advocate General Six-Hackl in Case C-507/03 Commission v Ireland , cited in footnote 46, at point 80.

(51) - Similarly, Advocate General Stix-Hackl observed in her Opinion in Case C-507/03 Commission v Ireland , at point 62, that the Community legislature consciously chose to fix limited transparency obligations for the award of contracts for non-priority services - obligations which are not as extensive as those imposed more generally by Council Directive 92/50/EEC of 18 June 1992 coordinating procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(52) - Case C-231/03 [2005] ECR I-7287.

(53) - Paragraphs 18 to 20.

(54) - See Braun, P., A Matter of Principle(s) - the Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives' (2000) 9 Public Procurement Law Review (1), p. 47.

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(55) - See paragraph 29 of the Opinion of Advocate General Stix-Hackl in Case C-532/03 Commission v Ireland , cited in footnote 43.

(56) - Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C 179, p. 2): see in particular section 2.1. The linguistic variations identified at point 82 above persist. Thus, for exemple, the English version of the Communication uses advertising'. The German version oscillates between Bekanntmachung' and Offentlichkeit'. The French, Italian and Spanish versions all use variants on publicity (publicité', pubblicità' and publicidad' respectively). All the illustrations given are, however, types of publication. The communication suggests that contracting authorities are responsible for deciding the most appropriate medium for advertising but that their choice should be guided by an assessment of the relevance of the contract to the internal market. The greater the potential interest in other Member States, the wider the coverage should be. The communication then lists a number of means of publication that may, in particular circumstances, be deemed adequate', such as the internet, including the contracting authority's website and portal websites, the Official Journals of the EU and of Member States, national journals specialising in public procurement announcements, national or regional newspapers, specialist publications, local means of publication such as newspapers, municipal journals and notice boards. I cannot see how that communication deals with the problem of legal certainty which I identify above.

(57) - In Case C-146/91 KYDEP v Council and Commission [1994] ECR I-4199, the Court emphasised the non-binding nature of an interpretation given by the Commission of a Community law measure.

(58) - The Court has also imposed that requirement in relation to the need to advertise criteria for selecting candidates who will be invited to tender under a restricted procedure for a contract falling within the scope of Council Directive 93/37 (cited in footnote 9) where that directive contains no specific provision on requirements for such advertising (see Case C-470/99 Universale-Bau [2002] ECR I-11617, paragraphs 87, 92 and 93 and the analysis which follows).

(59) - In Telaustria , the value of the advertising space related to the directories which were the subject of the concession was Ecu 35 million, according to Telaustria's submissions. In Parking Brixen , cited in footnote 47, the value of the concession is not apparent from the report in the ECR. However, the fact that the provider who was awarded the concession paid to the contracting authority an annual fee of EUR 151 700 which was indexed to the parking charges (see paragraph 26 of the judgment) suggests that the revenue from those charges must have been substantial. The Court found that it was possible that undertakings established in other Member States might have been interested in the contract (paragraph 55). Accordingly, the transparency of the award was assessed in the light of the Telaustria requirement to ensure a sufficient degree of advertising' (see paragraph 49 and the following analysis). In ANAV (Case C-410/04 [2006] ECR I-3303) the service concession was for the provision of transport services in the municipality of Bari for which the provider was remunerated, at least in part, by ticket sales to transport users. Again, the exact value of the concession is not stated in the report in the ECR. However, given that the sole and exclusive activity of the undertaking which had won the concession was providing the service of local urban public transport in the town of Bari (submissions of Comune di Bari, paragraph 5) it seems very probable that the value of the concession exceeded the threshold specified for non-concession contracts in the directive concerned.

(60) - See, for example, recital 14 of Directive 93/36, cited in point 4 above.

(61) - See point 6 above.

(62) - As is clear from reading Article 5(1)(a) in conjunction with recital 14. In any event, setting a numerical threshold for the application of a rule necessarily implies that there will

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(sooner or later) be individual cases that fall just below the threshold and which, accordingly, are not covered by the rule in question.

(63) - I acknowledge that the contracting authority invited a representative of a supplier located in another Member State to make an offer in 2000. However, there is nothing to suggest that the representative itself was not located in Finland. If that was the case, the supplier and its representative were in a different position from catering equipment suppliers in the Community without representatives in Finland.

(64) - This is the position expressly adopted by the Commission in its communication: see points 1.3 and 2.1.2.

(65) - The Commission offers reassurance in its communication (at point 1.3) that [w]hen [it] becomes aware of a potential violation... it will assess the Internal Market relevance of the contract in question ... Infringement proceedings... will be opened only in cases where this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market'. Leaving to one side the question of whether the present infringement proceedings objectively satisfy that test, it is clear that a disappointed competitor would be at perfect liberty to bring proceedings before the national courts and seek a reference under Article 234 EC.

(66) - It is to be noted that Advocate General Ruiz-Jarabo Colomer in point 62 of his Opinion in Case C-412/04 Commission v Italy , delivered on 8 November 2006, has similarly taken the view that the setting of precise rules regarding disclosure of tenders in order to satisfy the transparency obligation is a matter for each Member State, subject to certain limits.

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ARRÊT DE LA COUR (deuxième chambre)

27 octobre 2005 (*)

«Manquement d'État – Directive 93/37/CEE – Marchés publics de travaux – Concessions de travaux publics – Règles de publicité»

Dans les affaires jointes C-187/04 et C-188/04,

ayant pour objet deux recours en manquement au titre de l'article 226 CE, introduits le 22 avril 2004,

Commission des Communautés européennes, représentée par M. K. Wiedner, en qualité d'agent, assisté de M^e^ G. Bambara, avvocato, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par M. I. M. Braguglia, en qualité d'agent, assisté de M. M. Fiorilli, avvocato dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (deuxième chambre),

composée de M. C. W. A. Timmermans, président de chambre, M. J. Makarczyk (rapporteur), M^me^ R. Silva de Lapuerta, P. Kūris, et J. Klučka, juges,

avocat général: M. D. Ruiz-Jarabo Colomer,

greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger les affaires sans conclusions,

rend le présent

Arrêt

1 Par ses requêtes, la Commission des Communautés européennes demande à la Cour de constater que, dans la mesure où l'établissement public ANAS SpA (ci-après l'«ANAS») a confié la construction et la gestion des autoroutes de la Valtrompia, d'une part, et de la Pedemontana Veneta Ovest, d'autre part, à la Società per l'autostrada Brescia-Verona-Vincenza-Padova pA (ci-après la «société concessionnaire») dans le cadre de concessions directes mises en œuvre par le biais d'une convention conclue le 7 décembre 1999 sans publication préalable d'un avis de marché, alors même que les conditions nécessaires à cet égard n'étaient pas réunies, la République italienne a manqué aux obligations qui lui incombent en vertu de la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199, p. 54), et notamment des articles 3, paragraphe 1, et 11, paragraphes 3, 6 et 7 de celle-ci.

Le cadre juridique

2 L'article 1er de la directive 93/37 prévoit:

«Aux fins de la présente directive:

a) les 'marchés publics de travaux' sont des contrats à titre onéreux, conclus par écrit entre, d'une part, un entrepreneur et, d'autre part, un pouvoir adjudicateur défini au point b) et ayant pour objet soit l'exécution, soit conjointement l'exécution et la conception des travaux relatifs à une des activités visées à l'annexe II ou d'un ouvrage défini au point c), soit la réalisation, par quelque moyen que ce soit, d'un ouvrage répondant aux besoins précisés par le pouvoir adjudicateur;

[...]

c) on entend par 'ouvrage' le résultat d'un ensemble de travaux de bâtiment ou de génie civil destiné à remplir par lui-même une fonction économique ou technique;

d) la 'concession de travaux publics' est un contrat présentant les mêmes caractères que ceux visés au point a), à l'exception du fait que la contrepartie des travaux consiste soit uniquement dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix;

[...]»

3 L'article 3, paragraphe 1, de cette directive est libellé comme suit:

«Dans le cas où les pouvoirs adjudicateurs concluent un contrat de concession de travaux publics, les règles de publicité définies à l'article 11 paragraphes 3, 6, 7 et 9 à 13 et à l'article 15 sont applicables à ce contrat lorsque sa valeur égale ou dépasse 5 000 000 d'écus.»

4 L'article 7, paragraphe 3, de la même directive est ainsi rédigé:

«Les pouvoirs adjudicateurs peuvent passer leurs marchés de travaux en recourant à la procédure négociée, sans publication préalable d'un avis de marché, dans les cas suivants:

a) lorsqu'aucune offre ou aucune offre appropriée n'a été déposée en réponse à une procédure ouverte ou restreinte, pour autant que les conditions initiales du marché ne soient pas substantiellement modifiées. Un rapport doit être communiqué à la Commission à sa demande;

b) pour les travaux dont l'exécution, pour des raisons techniques, artistiques ou tenant à la protection des droits d'exclusivité, ne peut être confiée qu'à un entrepreneur déterminé;

c) dans la mesure strictement nécessaire, lorsque l'urgence impérieuse, résultant d'événements imprévisibles pour les pouvoirs adjudicateurs en question, n'est pas compatible avec les délais exigés par les procédures ouvertes, restreintes ou négociées visées au paragraphe 2. Les circonstances invoquées pour justifier l'urgence impérieuse ne doivent en aucun cas être imputables aux pouvoirs adjudicateurs;

d) pour les travaux complémentaires qui ne figurent pas dans le projet initialement adjugé ni dans le premier contrat conclu et qui sont devenus nécessaires, à la suite d'une circonstance imprévue, à l'exécution de l'ouvrage tel qu'il y est décrit, à condition que l'attribution soit faite à l'entrepreneur qui exécute cet ouvrage:

– lorsque ces travaux ne peuvent être techniquement ou économiquement séparés du marché principal sans inconvénient majeur pour les pouvoirs adjudicateurs

ou

– lorsque ces travaux, quoiqu'ils soient séparables de l'exécution du marché initial, sont strictement nécessaires à son perfectionnement.

Toutefois, le montant cumulé des marchés passés pour les travaux complémentaires ne doit pas dépasser 50 % du montant du marché principal.

[...]»

5 L'article 11 de la directive 93/37 dispose:

«[...]

3. Les pouvoirs adjudicateurs désireux d'avoir recours à la concession de travaux publics font connaître leur intention au moyen d'un avis.

[...]

6. Les avis prévus aux paragraphes 1 à 5 sont établis conformément aux modèles qui figurent aux annexes IV, V et VI et donnent les renseignements qui y sont demandés.

Les pouvoirs adjudicateurs ne peuvent exiger des conditions autres que celles prévues aux articles 26 et 27 lorsqu'ils demandent des renseignements concernant les conditions de caractère économique et technique qu'ils exigent des entrepreneurs pour leur sélection (annexe IV partie B point 11, annexe IV partie C point 10 et annexe IV partie D point 9).

7. Les avis prévus aux paragraphes 1 à 5 sont envoyés par les pouvoirs adjudicateurs dans les meilleurs délais et par les voies les plus appropriées à l'Office des publications officielles des Communautés européennes. Dans le cas de la procédure accélérée prévue à l'article 14, les avis sont envoyés par télex, télégramme ou télécopieur.

L'avis prévu au paragraphe 1 est envoyé le plus rapidement possible après la prise de décision autorisant le programme dans lequel s'inscrivent les marchés de travaux que les pouvoirs adjudicateurs entendent passer.

L'avis prévu au paragraphe 5 est envoyé au plus tard quarante-huit jours après la passation du marché en question.»

Les faits à l'origine des litiges et la procédure précontentieuse

6 La construction et la gestion des autoroutes de la Valtrompia et de la Pedemontana Veneta Ovest ont été confiées par l'ANAS à la société concessionnaire dans le cadre de deux concessions, attribuées sur la base d'une convention conclue le 7 décembre 1999 – portant révision d'une convention précédente conclue le 21 décembre 1972 et d'actes additionnels ultérieurs – et approuvée par décret interministériel du 21 décembre 1999, enregistré par la Cour des comptes italienne le 11 avril 2000.

7 Les concessions en cause, attribuées sans publication préalable d'un avis de marché au sens de la directive 93/37, prévoyaient une série de travaux visant à compléter et développer le réseau autoroutier, à savoir la construction de deux raccordements: le premier, entre l'autoroute A/4 Brescia-Padova et la Valtrompia, constitué de deux branches subséquentes, le second, entre l'autoroute A/4 (comune di Montebello-Vicentino) et l'autoroute A/31 (comune di Thiene).

8 Considérant que la République italienne avait manqué aux obligations qui lui incombent en vertu de la directive 93/37, la Commission a engagé à l'encontre de cet État membre la procédure en manquement prévue à l'article 226 CE.

9 Après lui avoir adressé, le 18 octobre 2002, une lettre de mise en demeure à laquelle les autorités italiennes n'ont pas répondu, la Commission a, le 11 juillet 2003, émis un avis motivé, invitant cet État membre à prendre les mesures nécessaires pour s'y conformer dans un délai de deux mois à compter de sa notification. Les autorités italiennes n'ayant pas donné suite à cet avis, la Commission a décidé d'introduire les présents recours.

10 Par ordonnance du président de la Cour du 19 octobre 2004, les affaires C-187/04 et C-188/04 ont été jointes aux fins d'une éventuelle procédure orale et de l'arrêt.

Sur les recours

Argumentation des parties

11 À l'appui de ses recours, la Commission fait valoir que les concessions visant la construction et la gestion des autoroutes de la Valtrompia et de la Pedemontana Veneta Ovest confiées à la société concessionnaire relèvent de l'article 1er, sous d), de la directive 93/37. Elle soutient, également, que les autoroutes faisant l'objet des travaux en cause constituent des ouvrages au sens de l'article 1er, sous c), de ladite directive.

12 Ayant rappelé que le coût des contrats de construction et d'exploitation des autoroutes de la Valtrompia et de la Pedemontana Veneta Ovest dépasse largement le seuil établi par la directive 93/37, la Commission fait valoir que lesdits contrats auraient dû faire l'objet d'une publication au *Journal officiel des Communautés européennes,* conformément aux articles 3, paragraphe 1, et 11, paragraphe 3, 6 et 7, de la directive 93/37.

13 Le gouvernement italien rappelle, en premier lieu, que, selon l'interprétation des dispositions nationales pertinentes, les travaux consistant à moderniser, élargir ou compléter des autoroutes en service, tels que, entre autres, les bretelles autoroutières et les connexions entre les différentes autoroutes, constituent des ouvrages relevant des interventions comprises dans la mission normale de la concession initiale. Ainsi, la directive 93/37 ne s'appliquerait pas.

14 En deuxième lieu, il fait valoir que ce n'est qu'en rationalisant et en absorbant une partie des coûts par la société concessionnaire, dont l'actionnariat est constitué majoritairement de collectivités locales, qu'il a été possible de procéder à l'investissement nécessaire à la réalisation des bretelles autoroutières en cause.

15 À cet égard, le gouvernement italien soutient que, si les raccordements en cause faisaient l'objet d'une concession autonome, celle-ci ne permettrait pas la récupération des coûts d'investissement, quelle que soit la durée de la concession envisagée. En conséquence, un éventuel appel d'offres pour l'attribution de la concession autonome dans le cas d'espèce se traduirait par l'absence de concurrents ou conduirait à la faillite de l'adjudicataire concessionnaire.

16 En troisième lieu, ce gouvernement conteste la qualification des travaux relatifs aux raccordements autoroutiers en cause en tant qu'ouvrage au sens de l'article 1er, sous c), de la directive 93/37, dans la mesure où l'infrastructure autoroutière en question serait dépourvue d'une fonction technique et économique autonome.

17 S'agissant de l'argument du gouvernement italien selon lequel la réalisation des raccords autoroutiers relèverait de la mission des concessions initiales, la Commission fait valoir que, dans la mesure où, en l'espèce, le pouvoir adjudicateur a renégocié la concession initiale en approuvant également un nouveau plan financier, on ne peut qualifier les travaux en cause de simples interventions relevant des concessions initiales, car ces dernières ont été remplacées par de nouvelles concessions.

18 En ce qui concerne la notion d'«ouvrage» au sens de l'article 1er, sous c), de la directive 93/37, et plus particulièrement la fonction technique ou économique autonome que cet ouvrage est censé remplir par lui-même, la Commission précise, d'une part, que la fonction technique autonome n'implique pas nécessairement que l'ouvrage soit dépourvu de liens avec d'autres ouvrages et, d'autre part, que la fonction économique doive se référer à l'ouvrage lui-même et non à sa gestion. Dès lors, le caractère non rémunérateur de la concession, résultant de la décision du pouvoir adjudicateur d'imposer des tarifs qui permettent seulement de supporter le coût de l'entretien dudit ouvrage, ne pourrait pas justifier le non-respect des règles de publicité.

Appréciation de la Cour

19 Il ressort de l'article 3, paragraphe 1, de la directive 93/37 que les règles de publicité relatives aux marchés de travaux s'appliquent également dans le cas où les pouvoirs adjudicateurs concluent un contrat de concession de travaux publics.

20 À titre liminaire, il convient de relever que, aux termes de l'article 1er, sous a) et d), de la directive 93/37, une concession de travaux publics est un contrat à titre onéreux, conclu par écrit, entre, d'une part, un entrepreneur et, d'autre part, un pouvoir adjudicateur défini au même article, sous b), et ayant pour objet l'exécution d'un certain type de travaux, dont la contrepartie consiste soit uniquement dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix.

21 Or, il y a lieu de constater, en premier lieu, que, en l'espèce, la société concessionnaire s'est vu accorder, en contrepartie de la construction de bretelles autoroutières, le droit d'exploiter l'ouvrage et de percevoir un droit de péage auprès des utilisateurs. Par conséquent, les contrats en cause constituent des «concessions de travaux publics» au sens de l'article 1er, sous d), de la directive 93/37.

22 En deuxième lieu, eu égard à leur valeur, il est constant que les contrats portant sur la construction et la gestion des autoroutes de la Valtrompia et de la Pedemontana Veneta Ovest relèvent du champ d'application de la directive 93/37.

23 En troisième lieu, s'agissant des arguments du gouvernement italien selon lesquels, d'une part, en vertu des dispositions nationales pertinentes, les travaux en cause seraient des ouvrages relevant des interventions comprises dans la mission normale de la concession initiale, auxquels la directive 93/37 ne s'appliquerait pas, et, d'autre part, un éventuel appel d'offres pour l'attribution de la concession autonome se serait traduit par une absence de concurrents, il convient de rappeler qu'il ne peut être recouru à la procédure négociée sans publication préalable d'un avis de marché que dans les cas limitativement énumérés à l'article 7, paragraphe 3, de cette directive.

24 À cet égard, il y a lieu de relever que, selon une jurisprudence constante, les dispositions d'une directive qui autorisent des dérogations aux règles visant à garantir l'effectivité des droits reconnus par le traité CE dans le secteur des marchés publics de travaux doivent faire l'objet d'une interprétation stricte et que c'est à celui qui entend s'en prévaloir qu'incombe la charge de la preuve que les circonstances exceptionnelles justifiant la dérogation existent effectivement (arrêts du 18 mai 1995, Commission/Italie, C-57/94, Rec. p. I-1249, point 23; du 28 mars 1996, Commission/Allemagne, C-318/94, Rec. p. I-1949, point 13, et du 13 janvier 2005, Commission/Espagne, C-84/03, Rec. p. I-139, point 48).

25 Or, le gouvernement italien n'a pas démontré l'existence d'une situation justifiant l'application de l'une des exceptions prévues par la directive 93/37 en particulier, celles figurant à l'article 7, paragraphe 3, sous a) et d), de celle-ci.

26 En quatrième lieu, il résulte de l'article 1er, sous c), de la directive 93/37 que l'existence d'un ouvrage doit être appréciée par rapport à la fonction économique ou technique du résultat des travaux effectués.

27 Or, comme le relève le gouvernement italien, la construction et la gestion de deux nouveaux raccordements autoroutiers sont, d'un point de vue technique, destinées à relier les zones choisies afin de résoudre les graves problèmes de voirie que connaissent les communes concernées. Le résultat de l'ensemble des travaux de génie civil en cause remplit donc par lui-même la fonction technique.

28 Quant à la fonction économique visée par la directive 93/37, il convient de constater qu'un concessionnaire d'autoroute, en tant qu'il met à la disposition des usagers contre rémunération une infrastructure autoroutière, accomplit une activité économique (voir en ce sens, arrêt du 12 septembre 2000, Commission/France, C-276/97, Rec. p. I-6251, point 32). L'absence d'une rentabilité autonome des concessions en cause n'est pas de nature à enlever à l'ensemble des travaux concernés son caractère d'ouvrage au sens de la directive 93/37.

29 En tout état de cause, pour que le résultat des travaux puisse être qualifié d'ouvrage au sens de l'article 1er, sous c), de la directive 93/37, il suffit que soit remplie l'une de deux fonctions susmentionnées.

30 Il résulte de ce qui précède que les griefs de la Commission sont fondés.

31 Dans ces conditions, il convient de constater que, dans la mesure où l'ANAS a confié la construction et la gestion des autoroutes de la Valtrompia et de la Pedemontana Veneta Ovest à la société concessionnaire dans le cadre de concessions directes sans publication préalable d'un avis de marché, alors même que les conditions nécessaires à cet égard n'étaient pas réunies, la République italienne a manqué aux obligations qui lui incombent en vertu de la directive 93/37, et plus particulièrement des articles 3, paragraphe 1, et 11, paragraphes 3, 6 et 7 de celle-ci.

Sur les dépens

32 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République italienne et cette dernière ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (deuxième chambre) déclare et arrête:

1) Dans la mesure où l'établissement public ANAS SpA a confié la construction et la gestion des autoroutes de la Valtrompia et de la Pedemontana Veneta Ovest à la Società per l'autostrada Brescia-Verona-Vincenza-Padova pA dans le cadre de concessions directes sans publication préalable d'un avis de marché, alors même que les conditions nécessaires à cet égard n'étaient pas réunies, la République italienne a manqué aux obligations qui lui incombent en vertu de la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux, et plus particulièrement des articles 3, paragraphe 1, et 11, paragraphes 3, 6 et 7 de celle-ci.

2) La République italienne est condamnée aux dépens.

Signatures

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* Langue de procédure: l'italien.

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JUDGMENT OF THE COURT

(Second Chamber)

of 27 October 2005

in Joined Cases C-187/04 and C-188/04: Commission of the European Communities v Italian Republic[1]

(Failure of a Member State to fulfil obligations - Directive 93/37/EEC - Public works contracts - Public works concessions - Rules on advertising)

(*Language of the case: Italian*)

In Joined Cases C-187/04 and C-188/04 **Commission of the European Communities** (Agent: K. Wiedner, Lawyer: G. Bambara) v **Italian Republic** (Agent: I.M. Braguglia, Lawyer: M. Fiorilli) - two actions under Article 226 EC for failure to fulfil obligations, brought on 22 April 2004 - the Court (Second Chamber), composed of C.W.A Timmermans, President of the Chamber, J. Makarczyk (Rapporteur), R. Silva de Lapuerta, P. Kūris and J. Klučka, Judges; D. Ruiz-Jarabo Colomer, Advocate General; R. Grass, Registrar, gave a judgment on 27 October 2005, in which it:

1. Declares that, since the public invitation ANAS S.p.A. awarded the contract for the construction and management of the Valtrompia and Pedemontana Veneta Ovest motorways to the Società per l'autostrada Brescia-Verona-Vicenza-Padova p.a. by direct concession without prior publication of a contract notice, where the requirements for such a concession were not met, the Italian Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 coordinating the procedures for the award of public works contracts and in particular Articles 3(1) and 11(3), (6) and (7) thereof;

2. Orders the Italian Republic to pay the costs.

_____

[1] - OJ C 179 of 10.7.2004 OJ C 168 of 26.6.2004.

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Notice for the OJ

Action brought on 22 April 2004 by the Commission of the European Communities against the Italian Republic

(Case C-187/04)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 22 April 2004 by the Commission of the European Communities, represented by K. Wiedner and G. Bambara, acting as Agents.

The applicant claims that the Court should:

- Declare that, since ANAS S.p.A. awarded the concession for the construction and management of the Valtrompia motorway to the Società per l'autostrada Brescia-Verona-Vicenza-Padova p.a., by direct concession by means of a contract signed on 7 December 1999 without prior publication of a contract notice, and where the requirements for such a concession were not met, the Italian Republic has failed to fulfil its obligations under Council Directive 93/37/EEC[1] of 14 June 1993 coordinating the procedures for the award of public works contracts and in particular Articles 3(1) and 11(3), (6) and (7) thereof;

- Order the Italian Republic to pay to the costs.

Pleas in law and main arguments:

According to the Commission, ANAS's concession relating to the construction and management of the Valtrompia motorway without prior publication of a contract notice does not comply with Directive 93/37/EEC and in particular with Articles 3(1) and 11(3), (6) and (7) thereof.

Article 3 of the Directive provides for the application of certain advertising rules at Community level where the contracting authorities conclude a public works concession contract if the value of that contract exceeds EUR 5 million. In particular, under Article 11(3) of the directive, contracting authorities wishing to award a works concession contract must make known that intention by means of a contract notice to be sent, pursuant to Article 11(7) of the directive, to the Office for Official Publications of the European Communities.

Since the contract for the construction and management of the Valtrompia motorway is worth approximately EUR 640 million, it clearly should have been the subject of publication in the Official Journal of the European Communities.

_____

[1] - OJ L 199 of 9.8.1993, p. 54.

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Notice for the OJ

Action brought on 22 April 2004 by the Commission of the European Communities against the Italian Republic

(Case C-188/04)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 22 April 2004 by the Commission of the European Communities, represented by K. Wiedner and G. Bambara, acting as Agents.

The applicant claims that the Court should:

- Declare that, since ANAS S.p.A. awarded the concession for the construction and management of the "Pedemontana Veneta Ovest" motorway to the Società per l'autostrada Brescia-Verona-Vicenza-Padova p.a., by direct concession by means of a contract signed on 7 December 1999 without prior publication of a notice, and where the requirements for such a concession were not met, the Italian Republic has failed to fulfil its obligations under Council Directive 93/37/EEC[1] of 14 June 1993 coordinating the procedures for the award of public works contracts and in particular Articles 3(1) and 11(3), (6) and (7) thereof;

- Order the Italian Republic to pay to the costs.

Pleas in law and main arguments:

According to the Commission, ANAS's concession relating to the construction and management of the "Pedemontana Veneta Ovest" motorway without prior publication of a notice does not comply with Directive 93/37/EEC and in particular with Articles 3(1) and 11(3), (6) and (7) thereof.

Article 3 of the Directive provides for the application of certain advertising rules at Community level where the contracting authorities conclude a public works concession contract if the value of that contract exceeds EUR 5 million. In particular, under Article 11(3) of the directive, contracting authorities wishing to award a works concession contract must make known that intention by means of a notice to be sent, pursuant to Article 11(7) of the directive, to the Office for Official Publications of the European Communities.

Since the contract for the construction and management of the "Pedemontana Veneta Ovest" motorway is worth approximately EUR 350 million, it clearly should have been the subject of publication in the Official Journal of the European Communities.

_____

[1] - OJ L 199 of 9.8.1993, p. 54.

Judgment of the Court (Second Chamber)
of 8 September 2005
Espace Trianon SA and Société wallonne de location-financement SA (Sofibail) v Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM). Reference for a preliminary ruling: Conseil d'Etat - Belgium. Public procurement - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Persons to whom review procedures must be available - Tender by a consortium - Prohibition against members of a consortium bringing an action individually - Meaning of "interest in obtaining a public contract". Case C-129/04.

Approximation of laws - Review procedures concerning the award of public supply and public works contracts - Directive 89/665 - Obligation of the Member States to provide for a review procedure - Availability of review procedures - National legislation prohibiting members of a tendering consortium which has no legal personality from bringing an action individually - Whether permissible

(Council Directive 89/665, Art. 1)

Article 1 of Council Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50 relating to the coordination of procedures for the award of public service contracts, is to be interpreted as not precluding national law from providing that only the members of a consortium without legal personality which has participated, as such, in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract and not just one of its members individually.

The same is true if all the members of such a consortium act together but the application of one of its members is held inadmissible.

In both cases, the national rules require only that applicants comply with the conditions relating to representation in legal proceedings in accordance with the legal form which the members have themselves chosen. Such requirements are general in application and do not limit the efficacy and availability of review procedures to tenderers in a manner contrary to Directive 89/665.

(see paras 28-29, operative part)

In Case C-129/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'Etat (Belgium), made by decision of 25 February 2004, received at the Court on 9 March 2004, in the proceedings

Espace Trianon SA,

Société wallonne de location-financement SA (Sofibail)

v

Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM),

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Schintgen, G. Arestis and J. Kluka Judges,

Advocate General: C. Stix-Hackl,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 16 December 2004,

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after considering the observations submitted on behalf of:

- Espace Trianon SA and Société wallonne de location-financement SA (Sofibail), by P. Coenraets and C. Lépinois, avocats,

- the Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM), by M. Uyttendaele, M. Mareschal and D. Gerard, avocats,

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

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

after hearing the Opinion of the Advocate General at the sitting on 15 March 2005,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), (hereinafter Directive 89/665').

2. The reference has been made in the course of proceedings between Espace Trianon SA (hereinafter Espace Trianon') and Société wallonne de location-financement SA (hereinafter Sofibail'), which are members of the consortium Espace Trianon-Sofibail', and the Office communautaire et régional de la formation professionnelle et de l'emploi (hereinafter FOREM') regarding a procedure for the award of a public contract.

Law

Community legislation

3. Article 1 of Directive 89/665 provides:

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC..., decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement....'

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

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

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal

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of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

...'

5. Article 21 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) provides:

Tenders may be submitted by groups of contractors. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.'

National legislation

6. Under Article 14(1) of the Consolidated Laws of 12 January 1973 on the Conseil d'Etat (Council of State) (Moniteur belge of 21 March 1973, p. 3461), the Conseil d'Etat has jurisdiction over actions for annulment of decisions awarding public contracts.

7. The first paragraph of Article 19 of those Consolidated Laws, which regulates, inter alia, standing to bring actions for annulment, provides:

... actions for annulment... may be brought before the Administrative Section by any party who establishes harm or an interest and are to be submitted in writing to the section in accordance with the formal requirements and time-limits specified by the King.'

8. As regards the decision to bring an action, Article 522(2) of the Companies Code provides that for public limited companies:

The Board of Directors shall represent the company as regards third parties and in legal proceedings, whether the company is bringing or defending an action. However, the articles of association may confer standing to represent the company, either solely or jointly, on one or more administrative officers. This clause shall be valid vis-à-vis third parties...'

9. That Code governs the status of consortia (sociétés momentanées'), formerly called associations momentanées'. A consortium is defined in Article 47 of this Code as being a company without legal personality and without a business name formed for specific commercial operations'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

10. On 30 September 1997, FOREM, as contracting authority, had a contract notice published in the Official Journal of the European Communities concerning the design, construction and financing of a building of approximately 6 500 m2' for the use of its Liège district headquarters.

11. On 20 February 1998 the opening of tenders took place. Five tenders had been submitted, one of which came from the consortium Espace Trianon-Sofibail.

12. On 22 December 1998 the contract was awarded by the Management Committee of FOREM to another consortium, CIDP-BPC. On 8 January 1999, that Management Committee confirmed its decision of 22 December 1998. On 25 January 1999, the award decision was notified to Espace Trianon and Sofibail.

13. On 19 February and 8 March 1999 respectively, those two companies lodged applications seeking the annulment of the decisions of FOREM's Management Committee of 22 December 1998 and 8 January 1999.

14. The Conseil d'Etat observes, in its decision to make a reference to the Court, that Espace Trianon's decisions to bring legal proceedings were taken by two of its administrative officers and not by its Board of Directors in accordance with its articles of association. Therefore, those decisions are irregular. The Conseil d'Etat observes that, by contrast, Sofibail's decisions to

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bring legal proceedings are not open to challenge.

15. Given that those companies submitted their tender in the name of the consortium Espace Trianon-Sofibail and that Espace Trianon's decisions to bring legal proceedings are irregular, the Conseil d'Etat decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling, with the aim of ascertaining whether the applications brought by Sofibail are admissible, since it is now alone in disputing the decisions of FOREM's Management Committee of 22 December 1998 and 8 January 1999:

(1) Does Article 1 of Directive 89/665... preclude a provision of national law, such as the first paragraph of Article 19 of the Laws on the Conseil d'Etat, consolidated on 12 January 1973, which is interpreted as requiring the members of a consortium without legal personality, which, as such, has participated in a procedure for the award of a public contract and has not been awarded that contract, to act together, in their capacity as associates or in their own names, in order to bring an action against the decision awarding the contract?

(2) Would the answer to Question 1 be different where the members of the consortium brought an action together, but the application of one of its members is inadmissible?

(3) Does Article 1 of Directive 89/665... preclude a provision of national law, such as the first paragraph of Article 19 of the Laws on the Conseil d'Etat, consolidated on 12 January 1973, which is interpreted as prohibiting a member of such a consortium from bringing an action individually, either in its capacity as an associate or in its own name, against the decision awarding the contract?'

The questions referred for a preliminary ruling

16. The first and third questions, which it is appropriate to consider together, seek to ascertain whether Article 1 of Directive 89/665 precludes a national rule under which, when a consortium without legal personality has participated as such in a procedure for the award of a public contract and has not been awarded that contract, an action may be brought against the decision awarding the contract only by all the members of that consortium acting together. With the second question, the referring court is essentially asking whether the answer to the first and third questions would be different if the members of the consortium acted together but the application of one of them is held inadmissible.

17. It must be borne in mind that, according to Article 1(1) of Directive 89/665, decisions taken by the contracting authorities must be capable of being reviewed effectively and that, in accordance with paragraph 3 of that article, the review procedures must be available at least to all persons having an interest in obtaining a public contract.

18. Espace Trianon, Sofibail and the Commission of the European Communities submit that, in circumstances such as those of the main proceedings, a national procedural rule which requires members of a consortium to bring legal proceedings together, and therefore that they unanimously agree to bring an action against a decision awarding a public contract, does not comply with the requirement regarding the availability of review procedures referred to in Article 1(3) of Directive 89/665. In their view, effective judicial protection must allow the members of such an association to have an individual right of action available to them.

19. In this respect it must be noted that Article 1(3), in referring to any person having an interest in obtaining a public contract, alludes, in a situation such as that in the main proceedings, to a person who, in tendering for the public contract at issue, has demonstrated his interest in obtaining it.

20. In this situation, it is the consortium as such which tendered and not its individual members. In the same way, all the members of the consortium, had the contract at issue been awarded to them,

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would have been obliged to sign the contract and carry out the work.

21. In contrast to other cases submitted to the Court (see, in particular, Case C-230/02 Grossmann Air Service [2004] ECR I-1829, paragraph 28, and Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-0000, paragraph 41), nothing in the case in the main proceedings prevented the members of the consortium from together bringing, in their capacity as associates or in their own names, an action for annulment of the decisions of 22 December 1998 and 8 January 1999.

22. Therefore, a national procedural rule which requires an action for annulment of a contracting authority's decision awarding a public contract to be brought by all the members of a tendering consortium does not limit the availability of such an action in a way contrary to Article 1(3) of Directive 89/665.

23. That is particularly so in this case because, as is apparent from the documents before the Court, under Belgian law the members of such a consortium may at any time, before bringing an action, settle the issue of the consortium's capacity to bring legal proceedings by internal agreement, without any other formality.

24. Furthermore, the Commission's argument that a rule such as that at issue in the main proceedings, which implies that groups of contractors are required to assume a specific legal form in order to submit a tender, is contrary to Article 21 of Directive 93/37 cannot be accepted. The national rule at issue in the main proceedings only requires a consortium to ensure, for the purpose of bringing legal proceedings, that it is represented in accordance with the rules applying to the legal form which its members have themselves assumed in order to be able to tender.

25. Moreover, it must be pointed out that the procedural rule referred to in this case applies in the same way to all actions brought by members of consortia in relation to the operations they carry out in the course of their activities, there being no need to know whether the claims are founded on a breach of Community law or of national law or whether they relate to public works contracts or to other operations.

26. Having regard to the above, it cannot be considered either that a rule such as that at issue in the main proceedings could undermine the requirement for effective review laid down in Article 1(1) of Directive 89/665. That principle does not require that an action be held admissible when the provisions relating to representation in legal proceedings, which stem from the legal form assumed, have not been adhered to as far as concerns the person who brings the proceedings.

27. Finally, as regards the second question, there is nothing to indicate that a case in which the action has, from the outset, been brought by only some of the members of the consortium and a case in which the action was initially brought by all those members, but where the application of one of them has, subsequently, been considered inadmissible, must be treated differently.

28. In both cases, the action is inadmissible pursuant to national rules which require only that applicants comply with the conditions relating to representation in legal proceedings in accordance with the legal form which the members have themselves chosen. Such requirements are general in application and do not limit the efficacy and availability of review procedures to tenderers in a manner contrary to Directive 89/665. Furthermore, the inadmissibility of the application of one of the members of a consortium may be justified by circumstances which show that no intention on the part of the member at issue to bring legal proceedings has been validly established.

29. In the light of the abovementioned the answers to the questions referred to the Court must be that:

- Article 1 of Directive 89/665 is to be interpreted as not precluding national law from providing that only the members of a consortium without legal personality which has participated, as such,

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in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract and not just one of its members individually;

- the same is true if all the members of such a consortium bring an action together but the application of one of its members is held inadmissible.

Costs

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

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

Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts is to be interpreted as not precluding national law from providing that only the members of a consortium without legal personality which has participated, as such, in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract and not just one of its members individually.

The same is true if all the members of such a consortium act together but the application of one of its members is held inadmissible.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
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JURCIT	31989L0665 : N 28 31989L0665-A01 : N 1 3 15 16 29 31989L0665-A01P1 : N 17 26 31989L0665-A01P3 : N 19 22 31989L0665-A02P1 : N 4 31992L0050 : N 1 31993L0037-A21 : N 5 62002J0230 : N 21 62003J0026 : N 21

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CONCERNS	Interprets 31989L0665 -A01
SUB	Approximation of laws
AUTLANG	French
OBSERV	Austria ; Member States ; Commission ; Institutions
NATIONA	Belgium
NATCOUR	*A9* Conseil d'Etat (Belgique), section d'administration, VIe chambre, arrêt no 128.507 du 25/02/2004 (A.82.593/VI-14.974 ; A.82.829/VI-14.992) ; - Administration publique 2004 p.55 (résumé)
NOTES	Pachner, Franz: Zur Aktivlegitimation einzelner Mitglieder von Bieter- oder Arbeitsgemeinschaften im Nachprüfungsverfahren, Zeitschrift für Vergaberecht und Beschaffungspraxis 2005 p.160 ; Antonucci, Marco: L'associazione temporanea di imprese e il principio comunitario dell'unanimità per la proposizione del ricorso, Il Consiglio di Stato 2005 II p.1593-1598 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Voies de recours, L'actualité juridique ; droit administratif 2006 p.257 ; Henty, Paul: Can Member States Bar Court Action by Individual Members of a Consortium? The ECJ decision in Espace Trianon Case C-129/04, Espace Trianon SA and Société wallone de location-financement SA (Sofibail) v Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM), Public Procurement Law Review 2006 p.NA1-NA8
PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl
JUDGRAP	Gulmann
DATES	of document: 08/09/2005 of application: 09/03/2004

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Notice for the OJ

JUDGMENT OF THE COURT

(Second Chamber)

of 8 September 2005

in Case C-129/04 Reference for a preliminary ruling from the Conseil d'État: Espace Trianon SA, Société wallonne de location-financement SA (Sofibail) v Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM) [1]

(Public procurement - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Persons to whom review procedures must be available - Tender by a consortium - Prohibition against members of a consortium bringing an action individually - Meaning of 'interest in obtaining a public contract')

(Language of the case: French)

In Case C-129/04: reference for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decision of 25 February 2004, received at the Court on 9 March 2004, in the proceedings between Espace Trianon SA, Société wallonne de location-financement SA (Sofibail) and Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM) - the Court (Second Chamber), composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Schintgen, G. Arestis and J. Klučka, Judges; C. Stix-Hackl, Advocate General; K. Sztranc, Administrator, for the Registrar, gave a judgment on 8 September 2005, the operative part of which is as follows:

Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts is to be interpreted as not precluding national law from providing that only the members of a consortium without legal personality which has participated, as such, in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract and not just one of its members individually.

The same is true if all the members of such a consortium act together but the application of one of its members is held inadmissible.

_____

[1] - OJ C 106 of 30. 04. 2005.

Opinion of Advocate General Stix-Hackl delivered on 15 March 2005. Espace Trianon SA and Société wallonne de location-financement SA (Sofibail) v Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM). Reference for a preliminary ruling: Conseil d'Etat - Belgium. Public procurement - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Persons to whom review procedures must be available - Tender by a consortium - Prohibition against members of a consortium bringing an action individually - Meaning of "interest in obtaining a public contract". Case C-129/04.

I - Introductory remarks

1. This reference for a preliminary ruling concerns the review of decisions taken by contracting authorities in the award of contracts and in particular it relates to the capacity to bring legal proceedings enjoyed by individual members of a consortium entered into under Belgian law which, for the purposes of Community public procurement law, must be regarded as a group of contractors (or in the terminology of the new public procurement directives (2) as a group of economic operators').

II - Legal framework

A - Community law

2. Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (3) (hereinafter: the Directive') inter alia provides:

(1) The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

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

3. Article 2(1) of Directive 89/665 inter alia provides:

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

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

...'

4. Article 21 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (4) provides:

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Tenders may be submitted by groups of contractors. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.'

B - National law

5. The relevant provisions are those of Article 19(1) of the Laws on the Conseil d'Etat (Council of State), consolidated on 12 January 1973, which govern inter alia legal capacity to bring review proceedings.

6. Article 53 of the Code des sociétés (Company Law Code) governs fundamental aspects of the relations of a consortium (association momentanée') with third parties.

7. Article 522(2) of the Code des sociétés provides that a société anonyme' is to be represented by its Board of Directors inter alia before a court. The same provision permits the company's articles of association to provide for such representation by one or more administrative officers.

III - Facts, preliminary procedure and questions referred

8. On 30 September 1997, a contract notice was published in the Official Journal of the European Communities for the Office communautaire et régional de la formation professionnelle et de l'emploi (hereinafter: FOREM), setting out the subjectmatter as follows: the design, construction and financing of a building of approximately 6 500 m2 (clear) above ground level, for the use of the administrative staff of the Office regional de l'emploi (Liège District Headquarters)', and stating that alternative plans were authorised. Four amendment notices were subsequently published.

9. On 20 February 1998, the tenders were opened. Five tenders had been submitted, including those submitted by the groups of contractors (associations momentanées; consortia) Espace TrianonSofibail and CIDP-BPC. The Espace Trianon-Sofibail consortium consists of Espace Trianon SA (hereinafter: Espace') and the Société Wallone de Location-Financement SA (Sofibail).

10. On 22 December 1998, the management committee of FOREM awarded a contract for the design, construction and financing of a building of approximately 6 500 m2 (clear) above ground level, for the use of the FOREM administrative staff, Liège District Headquarters, to the CIDP-BPC consortium.

11. On 8 January 1999, the management committee of FOREM approved the reasoned decision as adopted at its meeting of 22 December 1998'.

12. On 25 January 1999, the decision awarding the contract was notified to Espace and Sofibail.

13. On 19 February 1999, Espace and Sofibail applied to the Conseil d'Etat to have the decision to award the contract set aside.

14. On 8 March 1999, Espace and Sofibail applied to the Conseil d'Etat to have the approval decision of 8 January 1999 set aside.

15. When it examined the admissibility of the applications, the Conseil d'Etat concluded that the decisions taken in the name of Espace to institute legal proceedings were irregular since, contrary to the company's Articles of Association, the decisions were not taken by the management committee. In contrast, the decisions of Sofibail were correctly taken.

16. Since the tender had been made in the name of the Espace-Sofibail consortium but the decision of one of its members was irregular, the Conseil d'Etat considered the consequences for the admissibility of the proceedings.

17. By way of judgment dated 25 February 2004, the Conseil d'Etat decided to refer to the Court of Justice for a preliminary ruling the following questions:

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(1) Does Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts preclude a provision of national law, such as the first paragraph of Article 19 of the Laws on the Conseil d'Etat, consolidated on 12 January 1973, which is interpreted as requiring the members of a consortium without legal personality, which, as such, has participated in a procedure for the award of a public contract and has not been awarded that contract, to act together, in their capacity as associates or in their own names, in order to bring an action against the decision awarding that contract?

(2) Would the answer to Question 1 be different where the members of the consortium brought an action together, but the application of one of its members is inadmissible?

(3) Does Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts preclude a provision of national law, such as the first paragraph of Article 19 of the Laws on the Conseil d'Etat, consolidated on 12 January 1973, which is interpreted as prohibiting a member of such a consortium from bringing an action individually, either in its capacity as an associate, or in its own name, against the decision awarding the contract?'

IV - Appraisal

A - General remarks

18. All three questions essentially concern the Community law requirements regarding the admissibility of review proceedings brought by members of a group of contractors, and in particular in this case by members of a consortium under Belgian law.

19. In the light of the wording of the questions referred it must be recalled that the compatibility of national law with Community law cannot be the subject-matter of a reference for a preliminary ruling under Article 234 EC. Therefore the questions posed in this case must also be understood as concerning the interpretation of Community law.

20. Whilst the first and third questions concern the very principle of the capacity of individual members of a consortium to bring proceedings, the second question relates only to a specific factual situation, namely that in which, whilst all the members of a consortium have acted together in bringing proceedings, the application of one of its members is inadmissible.

21. The legal issues which are thereby raised must be distinguished, however, from the question - not at issue in the present case - whether and under which conditions a consortium must as a matter of Community law be allowed to invoke the review procedure provided for by the Directive.

22. From another additional point of view, however, the following appraisal must be restricted for procedural reasons to the specific facts of the case referred.

23. The main proceedings, that is to say the review procedure before the national court, are in fact concerned with the review of a decision taken by the contracting authority to award the contract, and therefore the successful tender. The answers given in respect of this reference for a preliminary ruling cannot without qualification be applied, however, to review procedures concerning other decisions of the contracting authority, such as for example the non-selection of operators to be tenderers, that is to say the failure to invite them to submit a tender, or the exclusion of tenders. It must also be recalled that the main proceedings concern the setting aside of a decision.

24. The answers proposed to the questions referred therefore have to be restricted to a set of circumstances such as those in the main proceedings. This means that it is perfectly conceivable that as regards a simple declaration of illegality and the availability of damages there might be

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other obligations under Community law.

25. In addition, the consortium which is at issue in the main proceedings is a creation of contract and - at least according to the case-file - does not possess as a matter of national law legal personality.

26. In that respect it may be noted, however, that the directives concerning the substantive rules on public procurement, old and new, explicitly provide for tenders to be submitted by groups of contractors' or groups of economic operators'. Thus Community law grants such candidates and tenderers certain rights, in particular the right to participate in a tendering procedure. From those Community law provisions it thus follows that consortia enjoy partial legal capacity.

27. Furthermore, within the scope of this preliminary reference the only question which must be examined is that concerning the unanimity rule, or in the alternative the denial to individual members of a consortium of capacity to bring proceedings. It is not necessary, however, to examine the question of compatibility of other existing or conceivable national provisions governing the use of review procedures by members of a consortium.

28. Finally, it must be observed that, should Community law require the Member States to allow a consortium to bring proceedings in its own right, then for the purposes of ensuring effective judicial protection it is no longer necessary for its members to have standing to bring proceedings. In those circumstances the legal issue raised by the present case is reduced to the question of who can act on behalf of a consortium which has standing to bring proceedings.

B - The first and third questions

29. Both the first and the third question take as their starting point the provision of national law applicable in the main proceedings according to which only all the members of a consortium may apply to have a decision of the contracting authority to award the contract reviewed, that is to say may bring legal proceedings contesting the decision, but no member of the consortium may act individually. It is appropriate, therefore, to consider the first and third questions together.

1. Starting point: interest' within the meaning of the Directive

30. The conditions set out in Article 1(3) of the Directive governing access to review procedures constitute a starting point. Under that provision, the Member States are to ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement'.

31. The Court, in its case-law on capacity to bring proceedings, has repeatedly emphasised the importance, as a matter of Community law, of satisfying those conditions. (5)

32. The judgment in Makedoniko furnishes valuable assistance as regards this reference for a preliminary ruling concerning a consortium. In that case the Court held that it was in the light of the conditions laid down in Article 1(3) of the Directive that it [was] necessary to consider whether,... the review procedures provided for by Directive 89/665 must be available to a consortium'. (6)

33. According to the Court, the decisive point is therefore whether the consortium can be regarded as having or having had an interest in obtaining the contract at issue in the main proceedings and as having been or at risk of being harmed by the contracting authority's decision for the purposes of Article 1(3) of Directive 89/665. (7)

34. This can be applied to the question at issue in the present proceedings, which do not concern the capacity to bring proceedings of the consortium as such but that of its members.

35. Under the Directive, standing must be afforded, therefore, to a person who has an interest in obtaining the contract which is to constitute the subject-matter of a review procedure. As regards

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standing and the interest which is necessary in that connection, it must be added that not every interest is sufficient to render an application for review admissible.

36. This point must also be emphasised with regard to consortia. It is necessary to make this clarification since there can be a difference between the interests of the consortium and those of its members and between the interests of the individual members themselves, as moreover the Commission also emphasises.

37. It is true that the members of a consortium have an interest in the economic success of the consortium to which they belong. Nevertheless a member of a consortium is merely interested in the consortium being awarded the contract, not however in obtaining the contract itself.

38. The question of whether an interest within the meaning of Article 1(3) of the Directive exists must be evaluated according to those activities of the consortium which are relevant for the purposes of public procurement law.

39. Contrary to the Commission's argument, Member States are obliged as a matter of principle to grant standing to challenge a contract award procedure only to undertakings that have actually participated in that procedure. (8)

40. It is true that there are exceptions to this rule, however those only apply in particular cases: thus participation in a contract award procedure cannot be imposed as a requirement if the contracting authority has not even conducted a formal contract award procedure. (9) Equally, an undertaking has access to the remedies provided for by the Directive where the only reason for its non-participation was that the terms of the invitation to tender appeared to render its participation pointless. (10)

41. According to the Court's case-law, the requirement of participation in the contract award procedure should be departed from therefore only in those cases in which participation was impossible or at the very least pointless. The decisive element is therefore that the cause of the impossibility of successful participation in a contract award procedure lies in the conduct of the contracting authority. Cases of impossibility must be distinguished, however, from those in which an undertaking does not even desire to participate in a contract award procedure. This also applies to the individual members of a consortium which do not desire to participate individually in a contract award procedure.

42. As regards those undertakings which combine to form a consortium since they cannot participate successfully on an individual basis it must be observed that the reason why they cannot do so does not lie in the conduct of the contracting authority.

43. The set of circumstances which forms the basis for the main proceedings can be distinguished, therefore, from cases of impossibility in which participation cannot be required in thus one further respect: there was participation and a bid was even tendered. It does not matter that this was the act of the consortium and not that of its members, since in the review procedure the members are not acting as undertakings unconnected to the bidder, that is to say unconnected to the consortium, but as its members. Therefore, since the individual undertakings rely upon the fact of their consortium membership, it must also be possible to attribute to them or to hold against them the consortium's conduct.

2. Substantive law considerations regarding capacity to bring proceedings

44. The procedural right to apply for review is derived, thus, from substantive participation in a contract award procedure, for example as a candidate, or as in the main proceedings as a tenderer.

45. Such parallelism is also apparent in Makedoniko , according to which in so far as a decision of a contracting authority adversely affects the rights conferred on a consortium by Community law in the context of a procedure for the award of a public contract, the consortium must be able to avail itself of the review procedures provided for by Directive 89/665'. (11)

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46. According to Community law, standing to bring proceedings must be accorded therefore to a person who also enjoys substantive rights. In the case of consortia, however, the rights conferred by the directives concerning the substantive law of public procurement are to be enjoyed by the consortia themselves. It is precisely the consortium which participates in the contract award procedure and appears as such in relation to third parties. Similarly, only it can constitute the addressee of a possible decision to award the contract.

47. Equally, the fact that national law also imposes upon the members of a consortium certain duties - possibly even towards third parties - may, as a matter of national procedural law, be decisive. Thus the principle that substantive rights and duties run parallel to remedies may acquire significance also under national law.

48. From the Community law perspective, the questions referred must be answered therefore in such a manner as to ensure that the Directive's aim of enforcing the rights which can be derived from the directives concerning the substantive law of public procurement is taken into account.

49. If that principle is applied to the main proceedings it leads then to the conclusion that the Directive provides remedies only for tenderers , in this case, therefore, the consortium. The main proceedings illustrate the typical situation concerning consortia, that is to say, that on account of their specialisation their members would be wholly unable to carry out the complete contract. It must be emphasised that they furthermore did not intend to do so.

50. The principle according to which rights run parallel to remedies would therefore tend to preclude the conclusion that under the Directive individual members as well should also be accorded standing.

51. It is possible to deduce from the Directive therefore only that the consortium as such has standing. From this it in turn follows that, as a matter of Community law, individual members of a consortium acting on their own behalf do not enjoy the right to seek review of the decision to award a contract.

52. It therefore remains to be clarified whether individual members of a consortium are at least permitted to seek review in the name of the consortium.

53. In that respect, as is true with regard to all national procedural rules, it is necessary to recall the principles of equivalence and effectiveness.

54. In respect of remedies provided for in the field of public procurement, those principles of Community law have even been expressly established in Article 1 of the Directive. As regards the principle of effectiveness, the Member States are required by Article 1(1) of the Directive to ensure that decisions taken by contracting authorities may be reviewed effectively and, in particular, as rapidly as possible. The standard resulting from the principle of effectiveness applicable here is, however, not an absolute one.

55. Thus the Court emphasised in a case concerning remedies in the field of public procurement that:... for the purpose of applying the principle of effectiveness, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference, in particular, to the role of that provision in the procedure, its progress and its special features, viewed as a whole'. (12)

56. A further principle was emphasised by the Court in Fritsch :

It should be added that the fact that Article 1(3) of Directive 89/665 expressly allows Member States to determine the detailed rules according to which they must make the review procedures available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement none the less does not authorise them to give the term interest in obtaining a public contract an interpretation which may limit

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the effectiveness of that directive.' (13)

57. In Grossmann the Court even acknowledged the lawfulness in principle of national rules which define more narrowly the concept of interest' thus restricting the ability to bring proceedings:

In those circumstances, a refusal to acknowledge the interest in obtaining the contract in question and, therefore, the right of access to the review procedures provided for by Directive 89/665 of a person who has not participated in the contract award procedure, or sought review of the decision of the contracting authority laying down the specifications of the invitation to tender, does not impair the effectiveness of that directive.' (14)

58. From that case-law it can therefore be deduced that only the consortium enjoys the necessary standing to bring proceedings but not an individual member.

3. Assessment of the effects of the unanimity rule

59. The effects of the unanimity rule must also be assessed in the light of those principles of equivalence and effectiveness.

60. That applies first of all to the effect advanced by the Commission according to which the unanimity rule reduces the possibilities of applying for a review procedure, that restriction being all the more serious since remedies in the field of public procurement need to be granted rapidly.

61. Tenderers other than consortia are also required to fulfil comparable procedural conditions and, in particular, to ensure that they are represented in a manner which is appropriate to their legal form. On closer examination, therefore, at issue is only the question of the internal decision-making process in respect of consortia, as is also required of other tenderers.

62. Moreover, the mere fact that the unanimity rule can result in the ability of the consortium to defend its interests being dependent on an individual member does not of itself constitute an infringement of the abovementioned principles. The fact that the individual members of a consortium must act together does not constitute a special feature of procedural law; that is a requirement even before they participate in a contract award procedure and particularly so well before they submit a tender, especially when, for example, they form a consortium.

63. The fact that the interests of the individual members may diverge can, when the unanimity rule is applied, it is true, make the lodging of a review application more difficult. It should not be overlooked however that the majority of the members may have different interests to those of individual members, including as far as the question of review is concerned.

64. In the Commission's view, the unanimity rule forces groups of contractors to adopt a particular legal form. On that point it must be observed that such rule is more likely to result in the avoidance of a particular legal form.

65. Moreover, every group of contractors has to conclude a framework for their cooperation, usually in the form of an association agreement. Contrary to the Commission's view, that cannot be regarded as constituting an infringement of Article 21 of Directive 93/37. It does not in fact require the adoption of any particular legal form. The decision to form a consortium is deliberate and is also taken in the knowledge of the resulting advantages and disadvantages.

66. Such an agreement may also govern the exercise of the right to seek review. The advantages which result to the individual members of the consortium from such an agreement cannot, however, be regarded as a requirement to adopt a particular legal form.

67. The Commission's final argument, that the unanimity rule already has a dissuasive effect even at the stage of forming a consortium overlooks, however, the fact that, given such knowledge of possible difficulties in obtaining remedies, precautionary measures may be adopted in the association

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agreement. Such measures may provide, for example, for representation by an individual member or for the adoption of a particular majority rule.

68. Likewise the unanimity rule cannot be regarded as discriminating against other legal forms of undertaking. Even tenderers who do not assume the form of a consortium must observe the rules of law relating to undertakings and procedure which are applicable to their case. For example, that includes observing the rules according to which companies may only be represented by those bodies authorised to do so. The features of a consortium merely demonstrate the fact that every form of legal organisation is characterised by particular attributes.

69. The disabling effect of the unanimity rule to which the Commission has referred in several respects can be avoided by the national legislature, as I have already explained, by rendering the unanimity rule as merely a default provision. In such cases alternative solutions could be reached by inserting appropriate provisions into the association agreement or, where appropriate, by a resolution of the members taken directly on the basis of the relevant provisions of national company law.

70. In the present case it has been pointed out on several occasions that it is possible to agree to a majority rule or to provide for representation by one member, for example, according to the national law applicable in the main proceedings in the form of a mandat'.

71. It would nevertheless constitute an impairment of the easier access to effective legal protection which the Community legislature sought to achieve if, for example, national law contained provisions on representation as a result of which consortia from other Member States were disadvantaged or which are in practice impossible to fulfil.

72. The fact that in certain Member States individual members of a consortium are also permitted to seek review does not alter the fact that this is not required by the Directive. Admittedly, Member States are permitted as a matter of principle to go beyond the minimum requirements of the Directive. (15) However the question would then arise whether such a rule of national law which, on first impression, appears generous, since it is favourable to tenderers, was compatible with Community law. That question is not however the subject-matter of the present reference for a preliminary ruling.

73. Finally, the fact that the other members of a consortium must also be protected tends, as a matter of Community law, to preclude an obligation on Member States to accord individual members standing to bring proceedings.

74. To accord individual members standing to bring proceedings could, for example, result in a situation in which even a majority of the members are, contrary to their wishes, compelled to enter into a review procedure and on being successful are forced into a new or continued contract award procedure in which they are possibly no longer interested since, for example, they have in the intervening period already concluded other contracts.

75. The point does not have to be examined here whether, on the other hand, Community law prevents an individual member from being accorded standing to bring proceedings. In the present case it was merely necessary to examine whether Community law precludes a specific national prohibition or, putting it another way, whether it permits standing to be restricted to the members of consortium acting together.

76. Community law does not therefore in principle require Member States to accord individual members of a consortium standing to bring review proceedings in their own names. Nor does Community law require individual members to be permitted to bring review proceedings in the name of the consortium. In any event there is no such requirement in respect of those Member States whose national law

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on this point is not mandatory, to the extent that it permits consortia, that is to say through their members, to derogate from the rule, for example, already by virtue of the association agreement or - later - by resolution.

77. The reply to the first and third questions must therefore be that Article 1 of Directive 89/665 is to be interpreted as not precluding a provision of national law according to which the members of a consortium without legal personality, which, as such has participated in a procedure for the award of a public contract and has not been awarded the contract, may only acting together - in their capacity as associates or in their own names - bring proceedings against the decision awarding that contract, and according to which an individual member of such a consortium may not, in its capacity as associate or its own name, seek review of the decision to award the contract. This is subject to the condition that the provision of national law does not render the application of Community law impossible or excessively difficult. That is the case if national law permits the members of the consortium to reach alternative solutions.

C - The second question

78. The second question concerns standing to bring proceedings in a particular set of circumstances, that is to say where, although the members of a consortium have acted together in bringing proceedings, the application of one of its members is, however, inadmissible.

79. The legal question is thereby raised whether in respect of the national unanimity rule it is necessary as a matter of Community law to differentiate according to the reason for the lack of unanimity.

80. According to the Commission and to FOREM, albeit for different reasons, the answer should be in the negative.

81. As Austria correctly emphasises, the second question must be answered in the light of the principles of equivalence and effectiveness or, as set out above, according to the principle of rapid and effective remedies expressly laid down in Article 1 of the Directive.

82. Those principles could be infringed in the context of particular factual situations or in respect of particular national provisions. This reference for a preliminary ruling concerns the limits imposed by both those principles on the effects of the application of the unanimity rule in a set of circumstances such as that in the case in the main proceedings.

83. When assessing the lawfulness of a national procedural rule in the light of both principles, as the judgment in Santex (16) clearly demonstrates and in contrast to Universale Bau , (17) the factual circumstances of the specific case must also be taken into consideration. Thus, as a matter of Community law, the unlawfulness of a provision which on first inspection appears to comply with Community law may only emerge in particular sets of circumstances.

84. In a reference for a preliminary ruling under Article 234 EC the Court must restrict itself, however, to answering the questions referred rather than delivering a general legal opinion. It is therefore unnecessary to examine and assess in the light of Community law such situations which differ from those of the main proceedings.

85. The national rule at issue, which requires compliance with the provisions concerning internal decision-making processes in circumstances such as those prevailing in the main proceedings, does not in any event infringe the requirement for rapid and effective remedies.

86. The reply to the second question must therefore be that the answer to the first question does not differ where, although the members of the consortium acted together in bringing proceedings, the application of one of its members is, however, inadmissible.

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V - Conclusion

87. In the light of the foregoing I propose that the Court should answer the questions as follows:

(1) Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts is to be interpreted as not precluding a rule of national law according to which:

- the members of a consortium without legal personality, which, as such has participated in a procedure for the award of a public contract and has not been awarded the contract may only acting together - in their capacity as associates or in their own names - bring proceedings against the decision awarding that contract;

- an individual member of such a consortium may not, in its capacity as associate or in its own name, seek review of the decision to award the contract.

This is subject to the condition that the provision of national law does not render the application of Community law impossible or excessively difficult. Those principles are in any event complied with if national law permits the members of the consortium to reach alternative solutions.

(2) The answer to the question does not differ where, although the members of the consortium acted together in bringing proceedings, the application of one of its members is, however, inadmissible under national law.

(1) .

(2) - Article 4(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134, p. 114, and Article 11(2) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134, p. 1.

(3) - OJ 1989 L 395, p. 33, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209, p. 1.

(4) - OJ 1993 L 199, p. 54, subsequently amended.

(5) - Case C-57/01 Makedoniko Metro [2003] ECR I-1091, at paragraph 65, and Case C230/02 Grossmann Air Service [2004] ECR I-0000, paragraph 25.

(6) - Makedoniko Metro, cited in footnote 5, paragraph 66.

(7) - Makedoniko Metro , cited in footnote 5, paragraph 72.

(8) - Grossmann Air Service , cited in footnote 5, paragraph 27.

(9) - Case C-26/03 Stadt Halle [2005] ECR I-0000, paragraphs 34 and 41 et seq.

(10) - Grossmann Air Service , cited in footnote 5, paragraph 28 et seq.

(11) - Case C-57/01, cited in footnote 5, at paragraph 73.

(12) - Case C-327/00 Santex [2003] ECR I-1877, paragraph 56; see also Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 14.

(13) - Case C-410/01 [2003] ECR I-6413, paragraph 34.

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(14) - Case C-230/02, cited in footnote 5, paragraph 39.

(15) - Case C-315/01 GAT [2003] ECR I-6351, paragraph 45.

(16) - Case C-327/00, cited in footnote 12.

(17) - Case C-470/99 [2002] ECR I-11617.

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Notice for the OJ

SEQ CHAPTER \h \r 1Reference for a preliminary ruling by the Conseil d'Etat (Belgium) Administrative Division, by judgment of that court of 25 February 2004 in the case Espace Trianon SA and Société wallonne de location-financement SA (SOFIBAIL) against the Office communautaire et régional de la formation professionelle et de l'emploi (FOREM)

(**Case C-129/04**)

Reference has been made to the Court of Justice of the European Communities by the Conseil d'Etat (Belgium), Administrative Division, of the 25 February 2004, which was received at the Court Registry on 9 March 2004, for a preliminary ruling in the case of Espace Trianon SA and Société wallonne de location-financement SA (SOFIBAIL) against the Office communautaire et régional de la formation professionelle et de l'emploi (FOREM).

The Conseil d'Etat (Belgium), Administrative Division, asks the Court of Justice to give a preliminary ruling on the following questions:

Does Article 1 of Council Directive 89/665/EEC on the Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts preclude a provision of national law, such as the first paragraph of Article 19 of the Laws of the Conseil d'Etat, consolidated on 12 January 1973, which is interpreted as requiring the members of a consortium without legal personality, which, as such, has participated in a procedure for the award of a public contract and has not been awarded that contract, to act together, in their capacity as associates or in their own names, in order to bring an action against the decision awarding the contract?

Would the answer to Question 1 be different if the members of the consortium acted all together, but the action of one of its members is inadmissible?

Does Article 1 of Council Directive 89/665/EEC on the Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts preclude a provision of national law, such as the first paragraph of Article 19 of the Laws of the Conseil d'Etat, consolidated on 12 January 1973, which is interpreted as prohibiting a member of such a consortium from bringing an action individually, either in its capacity as an associate, or in its own name, against the decision awarding the contract?

_____

Judgment of the Court (First Chamber) of 10 November 2005

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

Approximation of laws - Procedure for the award of public service contracts - Directive 92/50 - Scope - Contracting authority with a holding, together with one or more private undertakings, in the capital of a company legally distinct from it - Contract concluded by the contracting authority with the company - Included - Specific circumstances - Failure to fulfil obligations

(Council Directive 92/50, Arts 8, 11(1), and 15(2))

A Member State which permits the award by a municipality of a public service contract for waste disposal to a company which is legally distinct from that municipality and 49% owned by a private undertaking without complying with the procedural and advertising rules laid down by Article 8, in conjunction with Articles 11(1) and 15(2), of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, has failed to fulfil its obligations under that directive.

Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50 with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied.

(see paras 31, 46, 49-50, operative part)

In Case C-29/04,

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

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

applicant,

v

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

defendant,

THE COURT (First Chamber),

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

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

having regard to the written procedure,

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

gives the following

Judgment

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

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

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

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

Legal background

2. Article 1 of Directive 92/50 states:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority,...

...

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

...

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

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

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

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

...'

3. Article 8 of that directive provides:

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

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

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

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

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

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by means of a notice.'

Facts and pre-litigation procedure

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

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

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

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

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

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

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

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

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

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

The action

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Arguments of the parties

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

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

18. The Commission submits that even though that judgment was given in relation to Article 1(a) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), the Court's finding can be applied to all the Community directives on public contracts. The Commission relies on Teckal in order to substantiate its argument that it is only where the contracting authority exercises unlimited control over the contractor that the directives on public contracts do not apply. If a private undertaking holds shares in the contracting company it must, according to the Commission, be assumed that the contracting authority is not able to exercise over that company a control which is similar to that which it exercises over its own departments' within the meaning of that judgment. A minority holding by a private undertaking is thus sufficient to preclude the existence of an in-house' transaction.

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

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

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

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

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

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

Findings of the Court

- Admissibility

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

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

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

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

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

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

- Substance

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

32. It must be stated at the outset that the conditions for application of that directive were fulfilled in the present case. The town of Mödling is regarded, qua local authority, as a contracting authority', within the meaning of Article 1(b) of Directive 92/50, which entered into a contract for pecuniary interest with AbfallgmbH, which is a service provider' within the meaning of Article 1(c) of that directive. Services for the collection and treatment of waste constitute services

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within the meaning of Article 8 of that directive and Annex I A thereto. Furthermore, according to the findings of the Commission, which have not been disputed by the Austrian Government, the threshold laid down in Article 7(1) of Directive 92/50, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) was exceeded in the present case.

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

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

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

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

37. That argument cannot be upheld.

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

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

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

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

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by the Austrian Government.

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

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

44. In this respect, it must be noted that, in the present case, the contract at issue, relating to services within the material scope of Directive 92/50, was concluded for pecuniary interest between a contracting authority and a company governed by private law, which is legally distinct from the authority and in the capital of which that contracting authority has a majority holding.

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

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

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

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

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

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

Costs

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51. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Austria has been unsuccessful, the Republic of Austria must be ordered to pay the costs.

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FORM	Judgment
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CONCERNS	Failure concerning 31992L0050 -A08 Failure concerning 31992L0050 -A11P1 Failure concerning 31992L0050 -A15P2
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APPLICA	Commission ; Institutions
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NATIONA	Austria
NOTES	Ardelean, Veronica: O nou noiune de drept comunitar: parteneriatul public-privat instituionalizat (PPPI)., Revista româna de drept comunitar 2005 Nr.4 p.105-112 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Qualification de marché public, L'actualité juridique ; droit administratif 2006 p.253-255 ; Hoffer, Raoul ; Innerhofer, Isabelle: Umgehung des Vergaberechts bei PPPs?, Ecolex 2006 p.80-82 ; Dreifuss, Muriel: Le ciel s'obscurcit pour les contrats intégrés dérogeant aux règles communautaires de mise en concurrence, Recueil Le Dalloz 2006 Jur. 423-425
PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Geelhoed
JUDGRAP	Schiemann
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JUDGMENT OF THE COURT

(First Chamber)

of 10 November 2005

in Case C-29/04: Commission of the European Communities v Republic of Austria [1]

(Failure of a Member State to fulfil obligations - Articles 8, 11(1) and 15(2) of Directive 92/50/EEC - Procedure for the award of public service contracts - Contract relating to waste disposal - Absence of call for tenders)

(Language of the case: German)

In Case C-29/04: Commission of the European Communities (Agent: K. Wiedner) v Republic of Austria (Agent: M. Fruhmann) - action under Article 226 EC for failure to fulfil obligations, brought on 28 January 2004 - the Court (First Chamber), composed of P. Jann, President of the Chamber, K. Schiemann (Rapporteur), J.N. Cunha Rodrigues, K. Lenaerts and M. Ilešič, Judges; L.A. Geelhoed, Advocate General; R. Grass, Registrar, gave a judgment on 10 November 2005, in which it:

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

Orders the Republic of Austria to pay the costs.

_____

[1] - OJ C 71 of 20.3.2004.

Opinion of Mr Advocate General Geelhoed delivered on 21 April 2005. Commission of the European Communities v Republic of Austria. Failure of a Member State to fulfil obligations - Articles 8, 11(1) and 15(2) of Directive 92/50/EEC - Procedure for the award of public service contracts - Contract relating to waste disposal - Absence of call for tenders. Case C-29/04.

I - Introduction

1. In this case the Commission claims that the Court should declare that the Republic of Austria has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, (2) in that the award of a waste disposal contract entered into by the town of Mödling failed to comply with the procedural and advertising rules laid down in Article 8, in conjunction with Article 11(1) and Article 15(2), of that directive.

II - Legal background

A - Relevant provisions of the directive

2. The Commission alleges failure to fulfil obligations under Article 8, in conjunction with Article 11(1) and Article 15(2) of the directive. The definitions contained in Article 1(a), (b) and (c) are also relevant here.

3. Under Article 1(a) of Directive 92/50, public service contracts' are to mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority....' Under Article 1(b) of that directive, contracting authorities' are to mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law...'. Finally, Article 1(c) defines service provider' as any natural or legal person, including a public body, which offers services....'

4. Article 8 of Directive 92/50 provides: Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.' These provisions essentially contain the rules on calls for competition and advertising. Under Article 11(1) of Directive 92/50, [i]n awarding public service contracts, contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), adapted for the purposes of this directive.' The procedures referred to in these provisions are open procedures', restricted procedures' and negotiated procedures'. Article 15(2) of Directive 92/50 provides that [c]ontracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11, negotiated procedure, shall make known their intention by means of a notice.'

5. Category 16 of Annex I A to the directive covers [s]ewage and waste disposal services; sanitation and similar services.'

B - National provisions

6. Paragraph 9(3) of the Law on Waste Management of Lower Austria (the regional law on waste') provides that the municipalities of Lower Austria must ensure that waste is collected and treated and must set up or make available facilities, having regard to the provisions of this law. Under Paragraph 11 of this law, each municipality must ensure that a waste service is provided and functions properly.

III - Facts

7. On 21 May 1999 the municipality of Mödling decided to use an independent body to carry out its statutory duties relating to waste management. A company, AbfallwirtschaftsGmbH (AbfallGmbH'), was incorporated for this purpose. The minutes of the municipal council meeting state that all the shares in the undertaking are in principle to be held by the municipality of Mödling. The object

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of AbfallGmbH is to supply services relating to ecological waste management and to engage in related commercial transactions, primarily relating to waste disposal, which include the drafting and development of a waste management plan, primarily for the municipality of Mödling.

8. On 16 June 1999 the instrument of incorporation was drawn up. The whole of the company's share capital was held by one member, namely the municipality of Mödling.

9. On 25 June 1999, the municipality of Mödling decided to transfer to AbfallGmbH responsibility for waste management in the municipality in accordance with the regional law on waste, the federal law on waste management, and the municipal regulations on waste management. The municipality of Mödling also gave it an option to take over contracts relating to waste treatment which had not yet expired at that time. A lease concluded between the municipality of Mödling and AbfallGmbH provided for the equipment and personnel necessary for the treatment of waste.

10. The waste disposal contract, under which the municipality of Mödling transferred exclusive responsibility for the collection and treatment of waste to AbfallGmbH, was entered into on 15 September 1999. The contract was entered into for an unlimited period and came into force with retrospective effect from 1 July 1999. The contract stipulates that the municipality of Mödling is to pay to AbfallGmbH remuneration which consists of a fixed amount per dustbin or container by way of payment for collecting and treating waste, large objects, refuse, biologically degradable waste and hazardous substances. Furthermore, AbfallGmbH entered into no contracts with other municipalities or associations of municipalities. However, the waste transfer centre of the municipality of Mödling does carry out work for other private-law waste disposal companies relating to the transportation and compacting of household waste.

11. On 15 September 1999 the lease relating to the equipment and personnel necessary for the treatment of waste also entered into force for an unlimited period and with retrospective effect from 1 July 1999. AbfallGmbH is required to employ the personnel appointed by the municipality in accordance with the conditions applicable to seconded personnel. The contract states that the municipality of Mödling has transferred to AbfallGmbH the right to issue instructions to the personnel.

12. On 1 October 1999 the municipal council of Mödling decided that the municipality, as sole member of AbfallGmbH, should transfer 49% of its shares in the company to a private undertaking, namely Saubermacher Dienstleistungs Aktiengesellschaft (Saubermacher AG'). The minutes of the meeting of 1 October 1999 stated that following the decision of the municipal council on 25 June 1999 a series of talks were held with undertakings, primarily Saubermacher AG, which were interested in acquiring a holding. The companies' proposals were finally submitted to KPMG which identified the Saubermacher AG proposal as the one which guaranteed best operation.

13. On 6 October 1999 the instrument of incorporation was amended so that the vast majority of decisions could be adopted by a simple majority. In addition, the quorum for the general assembly was set at 51% of the share capital. The undertaking is represented in respect of internal and external relations by at least two managing directors who are jointly authorised to sign.

14. On 13 October 1999 the municipality of Mödling transferred 49% of its shares to Saubermacher AG by means of a transfer agreement.

15. AbfallGmbH became operational as from 1 December 1999, that is to say after Saubermacher AG had acquired its shares in this undertaking.

16. From 1 December 1999 to 31 March 2000 AbfallGmbH worked exclusively for the municipality of Mödling. After the waste transfer centre had been commissioned, it also worked for third parties. In the first financial year beginning 1 April 2000 AbfallGmbH's work for the municipality of Mödling accounted for 70 to 80% of its turnover.

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IV - Pre-litigation procedure

17. On 20 March 2002 the Commission sent a letter of formal notice to the Republic of Austria contending that the municipality of Mödling had not arranged a call for tenders for the waste collection and treatment contract despite the fact that it was a public service contract which came within the scope of Directive 92/50. By letter of 23 June 2002 the Republic of Austria disputed this contention. It takes the view that the award of the waste collection and treatment contract to AbfallGmbH does not come under the directives on public contracts because in legal terms it involves a so-called in-house' transaction.

18. Since it deemed this reply unsatisfactory, the Commission sent the Republic of Austria a reasoned opinion on 3 April 2003. Since in its reply to the reasoned opinion the Republic of Austria merely reiterated the arguments which it put forward in its reply to the letter of formal notice, the Commission brought the present action on 28 January 2004.

19. The Commission claims that the Court should:

- declare that the Republic of Austria has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, in that award of the waste disposal contract entered into by the town of Mödling failed to comply with the procedural and advertising rules laid down in Article 8, in conjunction with Article 11(1) and Article 15(2), of that directive;

- order the Republic of Austria to pay the costs.

20. The Republic of Austria contends that the action should be dismissed as inadmissible and, in the alternative, as unfounded.

V - Arguments of the parties and appraisal

A - Admissibility

1. Views of the parties

21. In its defence the Republic of Austria disputes the admissibility of the action. It claims that the Commission firstly failed to set out clearly why it regards the conclusion of the waste disposal contract as an infringement of Directive 92/50. Consequently, it failed to observe the principle that the subject-matter of an action must be set out clearly. Thus, the Commission failed to appreciate the purpose of the pre-litigation procedure, namely to give the Member State concerned an opportunity to defend itself. Secondly, the Commission infringed the basic rule that evidence of failure to fulfil obligations must be furnished. Thirdly, the action brought by the Commission rested on an incorrect legal basis.

22. In the view of the Austrian Government, the events which led to the award of the contract to AbfallGmbH must be assessed independently of one another. If such an assessment is made, it leads to the conclusion that Directive 92/50 is not applicable. The first stage - the incorporation of AbfallGmbH, which is 100%owned by the municipality of Mödling - is not an act which comes within the scope of the provisions on the award of public contracts. The second stage too - the conclusion of the waste disposal contract between the municipality of Mödling and AbfallGmbH - does not constitute an infringement of Directive 92/50 since it involves a so-called in-house' transaction. The third stage - the sale of 49% of the shares in AbfallGmbH by the municipality of Mödling to a private company - likewise does not come within the scope of provisions on the award of public contracts. Therefore, in the present case there is no infringement of Directive 92/50 and the award of the contract to AbfallGmbH should have been examined directly in the light of the provisions of the EC Treaty (the provisions on aid).

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23. The Commission could have demonstrated an infringement of Directive 92/50 only if it had taken as a basis one of the following two premisses, namely either that the various stages which led to the incorporation of AbfallGmbH and subsequently to the acquisition by a private party of a holding in AbfallGmbH had de facto been chosen so as to circumvent application of Directive 92/50, or that the share sale conceals the award to a private party of a contract which should be classified as a public contract. However, the Commission has at no point made any statement regarding these premisses.

24. Furthermore, at no point in the pre-litigation procedure did the Commission state that it considered that the award of the waste disposal contract, on the one hand, and the transfer of 49% of the shares and the amendment to the statutes, on the other, constituted the same act. Moreover, the Commission furnished no evidence in support of its pleas and in particular did not demonstrate that the municipality of Mödling sought to circumvent the law. Finally, it raised this complaint for the first time in its reply.

25. The Commission disputes the view of the Austrian Government. It considers that the award of the waste disposal contract to AbfallGmbH with the acquisition of a holding by Saubermacher AG cannot be divided artificially into three stages. In this respect it recalls that in its letter of formal notice (point 13) it stated that the award of the contract to AbfallGmbH, which was initially 100%owned by the municipality of Mödling, was merely a transitional stage in creating a semi-public undertaking following the transfer of 49% of the shares to a private undertaking. This is clear from the fact that following the municipal council meeting on 25 June 1999 talks were held with undertakings interested in acquiring a holding. The brief period between the conclusion of the contract with AbfallGmbH and the decision to transfer the shares - two weeks - showed that the intention of the municipality of Mödling was from the outset to entrust the service to an undertaking in which a private undertaking held a large number of shares. Therefore, the Austrian Government cannot claim that it was unaware of the subject-matter of the action.

2. Appraisal

26. According to the Court's settled case-law, the Commission must indicate, in any application made under Article 226 EC, the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based.

27. Like the formal notice addressed by the Commission to the Member State, and like the reasoned opinion issued by the Commission, which defines the subject-matter of the dispute, the application must enable the Member State concerned to put forward its defence and to contest all of the complaints raised against it by the Commission.

28. That case-law precludes infringement proceedings from being initiated by an application that prejudices the rights of the defence, because the complaints raised are insufficiently precise, or for lack of legal or factual reasons. (3)

29. In this case the Commission set out clearly in the pre-litigation procedure why it considers that the Austrian Government failed to comply with the procedural rules laid down in Directive 92/50 in concluding the waste disposal contract. It examined in great depth the factual circumstances which led to the award of the waste disposal contract and the legal grounds on which it based the infringement.

30. In particular the Commission deduced from the facts relating to the conclusion of the contract and the circumstances under which Saubermacher AG acquired a holding in AbfallGmbH that in this case there was a contract to which Directive 92/50 applied. Therefore, the subject-matter of the action was adequately defined.

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31. Consequently, the Austrian Government's complaint that the Commission failed to define the subject-matter of the action is unfounded.

32. The Austrian Government's other complaints regarding admissibility are of a substantive nature. I will examine them in my appraisal of the substance of the action below.

33. It follows from the foregoing that the Austrian Government's objection of inadmissibility must be dismissed.

B - Substance

1. Views of the parties

34. In its application the Commission observes that the municipality of Mödling must, in its capacity as a local authority, be regarded as a contracting authority within the meaning of Article 1(b) of Directive 92/50. Waste disposal is a service which comes within Category 16 of Annex I A to the directive. Therefore, the contract to supply this service must be awarded in accordance with the provisions of Titles III to VI. In addition, the waste disposal contract exceeds the threshold of 200 000 special drawing rights (SDRs), as provided in Article 7(1)(a)(ii) of Directive 92/50, as amended by Article 1(1) of European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively. (4) Consequently, the rules on procedure laid down in Article 11(1) and the rules on advertising laid down in Article 15(2) of Directive 92/50 are applicable in their entirety.

35. In the present case the Commission takes the view that there is no internal relationship between the municipality of Mödling and AbfallGmbH. In support of this view it refers to the judgment in Teckal . (5) In that judgment the Court held that the directives on the award of public contracts do not apply in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments.' Where a contracting authority did not intend to entrust the tasks assigned to it to a third party but merely to redistribute those tasks internally, the directives on the award of public service are not applicable. However, as soon as a private undertaking holds shares in the contractor, the contracting authority is no longer able to exercise a control which is similar to that which it exercises over its own departments. A minority holding of a private undertaking is sufficient to rule out the existence of an internal relationship.

36. The Commission contends, furthermore, that Saubermacher AG's minority holding means that this undertaking has acquired considerable rights of veto and the power to appoint one of the two managing directors having identical rights:

- Saubermacher AG enjoys a right of veto over important decisions concerning AbfallGmbH, such as increasing or reducing the share capital, amending its object as defined in its statutes, merging or selling shares, or splitting shares in the company;

- by appointing one of the two managing directors, Saubermacher AG exercises influence over AbfallGmbH since the two managing directors jointly manage and represent the undertaking in its internal and external relations and are jointly authorised to sign. Furthermore, the operational activities of the managing directors do not require prior decisions of the general assembly.

37. The Austrian Government takes the view that the conclusion of the waste disposal contract with AbfallGmbH does not fall within the scope of Directive 92/50/EEC because it involves a so-called in-house' transaction. In its view, the holding of a private person in an undertaking does not mean that there can be no internal relationship. The decisive element is the degree of autonomy' of the contractual partner, that is to say AbfallGmbH, and not the possible influence

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of a private partner within that undertaking. In the present case AbfallGmbH did not and does not have autonomous decision-making powers, either at the time the contract was entered into or at present.

38. In the view of the Austrian Government, the contract concluded between the contracting authority and the service provider is not really a contract at all for the purposes of Article 1(a) of Directive 92/50 since the contracting authority is able to influence the way in which the service provider operates and the latter consequently lacks autonomy. (6)

39. Moreover, the requirement laid down in Teckal , (7) namely exercising a control which is similar to that which a local authority exercises over its own departments', requires comparable and not identical control. A global assessment of the legal and factual circumstances is necessary to ascertain whether or not there is comparable control. When all the relevant factors are taken into account, it is clear that the municipality of Mödling is able to exercise such comparable' control even after the transfer of 49% of the shares. In this respect the following factors are relevant:

- because it has the majority of votes in the general assembly the municipality of Mödling is able at any time to rescind the waste disposal contract with AbfallGmbH or to dissolve AbfallGmbH itself;

- the operations of AbfallGmbH can be determined in any respect by the municipality of Mödling alone since the two managing directors are subject to the limits laid down by the general assembly;

- under the agreement determining the legal relationship between the parties, all decisions on the operations of AbfallGmbH can be taken by a simple majority (that is to say by the municipality of Mödling alone);

- by virtue of the simple majority of shares and voting rights which it possesses the municipality of Mödling can at any time and without giving reasons remove the managing director of AbfallGmbH from his post and also remove the managing director proposed by the private undertaking from his post. In addition, it can also decide at the general assembly to reduce the remuneration of the managing directors.

40. In the reply the Commission dismisses the Austrian Government's view that it is necessary to ascertain whether or not there is an internal control relationship on a case-by-case basis and having regard to all the circumstances. Such an examination would lead to legal uncertainty as regards the applicability of Community directives relating to public contracts. On the other hand, the scope of Directive 92/50 can be defined simply and predictably by the criterion applied by the Commission, that is to say the influence of a third party on the contractor.

2. Appraisal

41. In order to determine whether the present action brought by the Commission is well founded, the following two questions must be examined:

(a) must AbfallGmbH, in which Saubermacher holds 49% of the shares, be regarded as a legal entity which, although it has, in legal terms, been hived off as a separate legal person, remains an integral part of the organisation which the municipality of Mödling has to perform its public duties, including the disposal of waste? If the answer to this question is in the affirmative, the waste disposal contract given to AbfallGmbH by the municipality of Mödling must be regarded as a contract awarded within the organisation of the municipality. In that case there is no contract to which the rules on the award of contracts laid down in Directive 92/50 would apply;

(b) and, if it is assumed that AbfallGmbH in its present legal form, that is to say with the acquisition of a holding by Saubermacher AG and the provisions of the statutes and the law applicable thereto, must be regarded as an entity outside the organisation of the municipality of Mödling, is there proper compliance with the relevant provisions of Directive 92/50?

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42. As I have explained above, the action brought by the Commission raises the question of what is to be understood by a contract which is not awarded within a local authority's power structure. According to settled case-law, Directive 92/50 is applicable where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest. (8) It therefore follows that a contractor is not regarded as coming under the same power structure as the contracting authority where it is legally distinct from it. However, even where the contractor is an entity legally distinct from the contracting authority, there may be other circumstances in which a call for tenders is not mandatory. (9) In this respect Teckal provides two cumulative criteria which are used to ascertain whether or not there is an internal power structure. This is the case where the criterion is satisfied that the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities'. (10)

43. In the abovementioned Teckal judgment the distinct body was fully owned by a public corporation. The judgment in Stadt Halle , (11) which was given after the written procedure in the present case had ended, related to whether a contracting authority could exercise over a so-called semi-public company', that is to say a company in which private companies also have a holding, a control which is similar to that which it exercises over its own departments. The Court ruled that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments.'

44. In that case one of the factors on the basis of which the Court reached its judgment was the fact that the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors. (12)

45. In brief, a legal entity which has been hived off, in legal terms, as a separate legal person cannot be regarded as forming part of a contracting authority where a private undertaking also has a capital presence in that undertaking.

46. The following is clear from the facts set out in points 7 to 16 above and the information taken from the statutes which was cited by the Commission and has gone unchallenged, as reproduced in point 36 above:

- Saubermacher AG has a share holding of 49% in AbfallGmbH;

- attached to this holding is the right to appoint one of the managing directors;

- these directors are responsible for the business operations of AbfallGmbH;

- a qualified majority of the general assembly of shareholders is necessary for important decisions concerning the structure and organisation of the undertaking.

47. On the basis of these facts it is justified to conclude that the relationship between the municipality of Mödling and AbfallGmbH is not an internal relationship in which the municipality of Mödling can exercise control which is similar to that which it exercises over its own departments. This finding is not altered by the fact that the municipality can decide to end its cooperative link with Saubermacher AG. However, in this respect it is bound by the general and specific rules of

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national law on natural and legal persons which govern relations between parties working together in a company, which means that it must in any event take account of the legitimate interests of Saubermacher AG. It seems unlikely that Saubermacher AG would have been prepared, by taking a - considerable - interest in AbfallGmbH, to establish a cooperative link with the municipality of Mödling, as another major shareholder, if the continuity of that cooperative link were entirely at the discretion of the municipality.

48. In the present case the conversion of an internal department of the municipality of Mödling into a private undertaking cannot be regarded as an in-house' transaction in view of the hiving-off process and the activity of AbfallGmbH itself.

49. Immediately after AbfallGmbH had been incorporated by the municipality of Mödling on 16 June 1999, it started, following the decision of the municipal council of 25 June, to look for a private partner for the undertaking that had been set up. With Saubermacher AG's involvement the municipality of Mödling acquired the expertise necessary for the commercial operation of AbfallGmbH.

50. This interpretation of the facts is further confirmed by the following facts:

- a start was made on implementing the waste disposal contract between the municipality of Mödling and AbfallGmbH only after Saubermacher AG had acquired a holding in AbfallGmbH;

- third parties account for 20 to 30% of AbfallGmbH's operations (see point 16 above).

51. Since AbfallGmbH, in its present legal form, that is to say with the acquisition of a holding by Saubermacher AG and the provisions of the statutes and the law applicable thereto, must be regarded as an entity outside the organisation of the municipality of Mödling, it is necessary to examine whether the waste disposal contract, by which the municipality of Mödling transferred responsibility for the collection and treatment of waste exclusively to AbfallGmbH, comes within the scope of Directive 92/50 and whether there has been proper compliance with the relevant provisions.

52. I would observe first of all that the municipality of Mödling is a local authority. Moreover, this fact is not contested by the Austrian Government. Article 1(b) of Directive 92/50 provides that contracting authorities are to mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law. As a local authority, the municipality of Mödling is, therefore, a contracting authority and comes within the scope ratione personae of the directive.

53. Secondly, the services which form the subject-matter of the relationship at issue come within the scope of the directive. Annex I A to the directive lists among the categories of services referred to therein Category 16 relating to [s]ewage and waste disposal services; sanitation and similar services'. As regards the specific content of the services, Annex I A refers to the CPC reference number (Central Product Classification of the United Nations) which is indicated alongside the category in question. The core operations of AbfallGmbH comprise the collection and treatment of waste, large objects, refuse, biologically degradable waste and hazardous substances. Therefore, it follows that AbfallGmbH's core operations are among the services listed in Annex I A to the directive and that the provisions of the directive are applicable thereto.

54. The next aspect which must be examined is the nature of the relationship between the municipality of Mödling and AbfallGmbH. The eighth recital in the preamble states the provision of services is covered by this directive only in so far as it is based on contracts; ... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered.' Article 1(a) provides a definition of the term public services contract' for the purposes of the directive, namely contracts for pecuniary interest co ncluded in writing between a service provider and a contracting authority.'

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55. In order to be able to describe the relationship as a public contract, it is necessary to examine whether the contract was concluded in the form of a contract and whether a monetary consideration was agreed. This is so in the present case. It is an undisputed fact that the waste disposal contract, by which the municipality of Mödling transferred responsibility for waste collection and treatment exclusively to AbfallGmbH, provides that the municipality of Mödling is to pay remuneration to AbfallGmbH which consists of a fixed amount per dustbin or container by way of payment for collecting and treating waste.

56. In addition, the two legal persons which have entered into the contract must be legally distinct from one another, otherwise there is an in-house' service. I stated earlier in points 46 to 50, that AbfallGmbH must not be regarded as an internal department of the municipality of Mödling either in law or in fact.

57. The fact that the decision to enter into a contract between the municipality of Mödling and AbfallGmbH was adopted while AbfallGmbH was still fully owned by the municipality of Mödling does not alter the finding that the public contract concerned should, under Article 8, in conjunction with Article 11(1) and Article 15(2) of the directive, have been awarded in accordance with the provisions of Titles III to VI thereof. The certainty that AbfallGmbH would gain the contract from the municipality of Mödling made the acquisition of a holding in that undertaking attractive to a private tenderer. However, such forms of external hiving-off in which the hived-off entity is made appealing to private tenderers by means of a contract for an unlimited period acquired in advance by way of a dowry' may not undermine the effectiveness of Directive 92/50. The directive is also applicable to such arrangements.

58. In the light of the foregoing I conclude that the Commission has demonstrated an infringement of Article 8 of the directive, in conjunction with Article 11(1) and Article 15(2) thereof.

VI - Conclusion

59. On the basis of the foregoing I propose that the Court should:

- declare that, by virtue of the fact that the award of the waste disposal contract entered into by the town of Mödling failed to comply with the procedural and advertising rules laid down in Article 8, in conjunction with Article 11(1) and Article 15(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the Republic of Austria has failed to fulfil its obligations under that directive;

- order the Republic of Austria to pay the costs.

(1) .

(2) - OJ 1992 L 209, p. 1.

(3) - See, inter alia, Case C-191/95 Commission v Germany [1998] ECR I-5449, paragraph 55; and Case C-340/96 Commission v United Kingdom [1999] ECR I-2023, paragraph 36.

(4) - OJ 1997 L 328, p. 1.

(5) - See Case C-107/98 Teckal [1999] ECR I-8121, paragraph 50.

(6) - See also the Opinion of Advocate General Léger in Case C-94/99 ARGE [2000] ECR I-11037, point 59.

(7) - Cited in footnote 5 above.

(8) - See ARGE , cited in footnote 6 above, paragraph 40, and Teckal , cited in footnote 5 above.

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(9) - See Case C-26/03 Stadt Halle [2005] ECR I-1, paragraph 49.

(10) - See Teckal , cited in footnote 5 above.

(11) - See Stadt Halle , cited in footnote 9 above.

(12) - Stadt Halle , cited in footnote 9 above.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
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DOC	2005/04/21
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JURCIT	11997E226 : N 26 31992L0050 : N 29 30 42 31992L0050-A01LA : N 2 3 54 31992L0050-A01LB : N 2 3 52 31992L0050-A01LC : N 2 3 31992L0050-A08 : N 1 2 4 19 57 58 31992L0050-A11P1 : N 1 2 4 19 57 58 31992L0050-A15P2 : N 1 2 4 19 57 58 31992L0050-N1LA : N 5 53 61995J0191 : N 28 61996J0340 : N 28 61998J0107 : N 42 43 61999J0094 : N 42 62003J0026 : N 42 - 44
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AUTLANG	Dutch
APPLICA	Commission ; Institutions
DEFENDA	Austria ; Member States
NATIONA	Austria

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PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Geelhoed
JUDGRAP	Schiemann
DATES	of document: 21/04/2005 of application: 28/01/2004

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Notice for the OJ

Action brought on 28 January 2004 by the Commission of the European Communities against the Republic of Austria

(Case C-29/04)

An action against the Republic of Austria was brought before the Court of Justice of the European Communities on 28 January 2004 by the Commission of the European Communities, represented by Klaus Wiedner, acting as Agent, with an address for service in Luxembourg.

The applicant claims that the Court should:

declare that the Republic of Austria has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts,[1] in that award of the refuse disposal contract entered into by the town of Mödling failed to comply with the procedures and advertising rules laid down in Article 8, in conjunction with Article 11(1) and Article 15(2), of that directive;

order the Republic of Austria to pay the costs.

Pleas in law and main arguments:

On 21 May 1999, the municipality of Mödling decided to use its own vehicle to carry out its statutory duties relating to refuse disposal. A company, AbfallGmbH, was incorporated for this purpose. The whole of the company's share capital was held by one member, namely the municipality of Mödling. The contract for disposal, under which the municipality of Mödling transferred exclusive responsibility for the collection and treatment of waste to AbfallGmbH, was entered into on 15 September 1999. The contract was entered into for an unlimited period and came into force with retrospective effect on 1 July 1999. Two weeks after the conclusion of the contract for refuse disposal, the town council of the municipality of Mödling decided that the municipality of Mödling, as sole member of AbfallGmbH, should transfer 49% of its shares to a private undertaking.

The Republic of Austria is of the opinion that the provisions of Directive 92/50/EEC do not apply to the award of the waste disposal contract to AbfallGmbH, as it involved a so-called "in-house" transaction.

The Commission claims that the agreement of 15 September 1999 to transfer the responsibility for the collection and treatment of waste from the municipality of Mödling to AbfallGmbH does not fall to be classified as an "internal transfer" within the administration of the municipality of Mödling, as the municipality of Mödling ceased to exercise the control over AbfallGmbH that it would have over its own departments. The transfer of responsibility for the carrying out of public services accordingly involves a public service contract which was subject to the compulsory tender procedure.

_____

[1] - OJ 1992 L 209, p. 1.

Judgment of the Court (Second Chamber) of 2 June 2005

Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH. Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public procurement - Directive 89/665/EEC - Review procedures concerning the award of public procurement contracts - Decision to withdraw an invitation to tender after the opening of tenders - Judicial review -Scope - Principle of effectiveness. Case C-15/04.

Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directive 89/665 - Withdrawal of an invitation to tender - Member States under an obligation to provide for review procedures - Absence of such a procedure in national law - Not permissible - Direct effect of Articles 1(1) and 2(1)(b) of the directive - Obligations of the national courts

(Council Directive 89/665, Arts 1(1) and 2(1)(b))

Articles 1(1) and 2(1)(b) of Directive 89/665 relating to the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts require the decision of the contracting authority to withdraw the invitation to tender for a public procurement contract to be open to a review procedure, and to be capable of being set aside where appropriate on the ground that it has infringed Community law on public procurement or national rules implementing that law.

Consequently, where national law, even when it is interpreted in accordance with the requirements of Community law, does not make it possible for a tenderer to challenge a decision to withdraw an invitation to tender inasmuch as that decision infringes Community law and on that ground to apply for it to be set aside, that national law does not fulfil the requirements of Articles 1(1) and 2(1)(b) of Directive 89/665.

In those circumstances, the court or tribunal having jurisdiction is required to disapply national rules which prevent compliance with the obligation arising from those provisions.

Those provisions are unconditional and sufficiently clear to create rights for individuals on which they may rely, where necessary, against contracting authorities.

(see paras 30-31, 38-39, operative part)

In Case C-15/04,

REFERENCE under Article 234 EC for a preliminary ruling from the Bundesvergabeamt (Austria), made by decision of 12 January 2004, received at the Court on 19 January 2004, in the proceedings

Koppensteiner GmbH

v

Bundesimmobiliengesellschaft mbH,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, C. Gulmann (Rapporteur), P. Kris and G. Arestis, Judges,

Advocate General: C. Stix-Hackl,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

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- Koppensteiner GmbH, by D. Benko and T. Anker, Rechtsanwälte,

- Bundesimmobiliengesellschaft mbH, by O. Sturm, Rechtsanwalt,

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

- the Commission of the European Communities, by K. Wiedner, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2004,

gives the following

Judgment

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

The court or tribunal having jurisdiction is required to disapply national rules which prevent compliance with the obligation arising from Articles 1(1) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

1. The reference for a preliminary ruling concerns the interpretation of Articles 1 and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (Directive 89/665').

2. That reference was made in proceedings between Koppensteiner GmbH (Koppensteiner') and Bundesimmobiliengesellschaft mbH (BIG') regarding the decision taken by the latter to withdraw an invitation to tender for a public service contract after the expiry of the time-limit for the submission of tenders.

Relevant provisions

Community legislation

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

The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4. Under Article 2(1) and (6) of Directive 89/665:

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

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

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(c) award damages to persons harmed by an infringement.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

National legislation

5. The Federal Law of 2002 concerning the award of public procurement contracts (Bundesvergabegesetz 2002, BGBl. I, 99/2002) (the BVergG') provides inter alia for a distinction between decisions which may be challenged separately and those which may not.

6. Under Paragraph 20(13)(a)(aa) of the BVergG, the decisions which may be challenged separately in an open contract award procedure are the invitation to tender, various determinations made during the period for the submission of tenders and the award decision.

7. Paragraph 20(13)(b) of the BVergG provides:

The decisions which may not be challenged separately are all the other decisions which precede the decisions which may be challenged separately. The decisions which may not be challenged separately may be challenged only in conjunction with later decisions which may be challenged separately.'

8. Under Paragraph 166(2)(1) of the BVergG, an application for review is inadmissible where it is not directed against a decision which may be challenged separately.

9. According to Paragraph 162(5) of the BVergG, after the withdrawal of an invitation to tender the Bundesvergabeamt has jurisdiction solely to determine whether that withdrawal was lawful.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10. BIG, a company responsible for the management of the buildings and property of the Austrian Federal Government, which owns 100% of its shares, is the contracting authority in the case in the main proceedings. On 26 September 2003 it initiated an open contract award procedure for the demolition work' lot in connection with the construction of a primary school and three sports halls. The value of the entire project was estimated at EUR 8 600 000. The demolition work at issue in the main proceedings was estimated at EUR 95 000.

11. Koppensteiner tendered for that lot in that contract award procedure.

12. By letter of 29 October 2003, BIG informed Koppensteiner that pursuant to Paragraph 105 of the BVergG the invitation to tender had been withdrawn on serious grounds after the expiry of the time-limit for the submission of tenders.

13. On 6 November 2003 BIG invited Koppensteiner to participate in a negotiated procedure, without prior publication of a contract notice, for the demolition work which essentially covered the same services as under the first procedure. In the second procedure, the estimated contract value of that lot was now EUR 90 000.

14. Koppensteiner also tendered in that second procedure.

15. On 13 November 2003 Koppensteiner applied to the Bundesvergabeamt for the withdrawal of the invitation to tender in respect of the first contract award procedure to be set aside and for the issue of an invitation to tender in another contract award procedure to be prohibited and, in the

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alternative, for a declaration that the withdrawal was unlawful. At the same time it applied for the second contract award procedure to be terminated.

16. By decision of the Bundesvergabeamt of 20 November 2003, BIG was ordered to refrain from calling for tenders in the second contract award procedure for the duration of the review procedure or until 13 January 2004 at the latest.

17. On 28 January 2004 BIG awarded the contract in the second contract award procedure to another undertaking, and the demolition works have since been carried out by that undertaking.

18. BIG submitted before the Bundesvergabeamt that the reason for the withdrawal was the fact that all the tenders were much higher than the estimated contract value. Thus the estimated contract value of the demolition work' lot was EUR 95 000 in the first contract award procedure, but the lowest tender was EUR 304 150, which seemed much too high.

19. Koppensteiner argued inter alia that, in accordance with the judgment in Case C92/00 HI [2002] ECR I-5553, a decision of the contracting authority to withdraw an invitation to tender must also be open to a review procedure, and be capable of being set aside where appropriate on the ground that it has infringed Community law on public procurement.

20. In the decision making the reference, the Bundesvergabeamt notes that the system laid down by the BVergG does not permit the examination and, where appropriate, the setting aside in review proceedings of the withdrawal of an invitation to tender after the opening of tenders in an open contract award procedure. After the withdrawal of an invitation to tender, that body has jurisdiction solely to determine whether that withdrawal was unlawful on the grounds of infringement of the BVergG, the declaration of unlawfulness providing a means for the unsuccessful tenderers to bring an action for damages against the contracting authority.

21. However, in the view of the Bundesvergabeamt, Articles 1(1) and 2(1)(b) of Directive 89/665 require, in accordance with the Court's interpretation in HI , cited above, that the domestic legal system provide for the possibility of setting aside a withdrawal occurring after the opening of tenders in a contract award procedure. The power of the review body to declare a withdrawal unlawful, with then the possibility of seeking damages, is therefore not sufficient.

22. In those circumstances, the Bundesvergabeamt decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Are the combined provisions of Article 1 and Article 2(1)(b) of Council Directive 89/665... so unconditional and sufficiently precise that, in the event of withdrawal of the invitation to tender after the opening of tenders, an individual is entitled to rely on those provisions directly before the national courts and to seek a review of the withdrawal?

(2) If Question 1 must be answered in the negative, is Article 1 in conjunction with Article 2(1)(b) of Council Directive 89/665... to be interpreted as meaning that Member States are obliged to make a contracting authority's decision, prior to withdrawal of the invitation to tender, that it will withdraw the invitation to tender (withdrawal decision analogous to the award decision) amenable to review in any case, whereby the applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once withdrawal has taken place, of obtaining an award of damages?'

The questions referred for a preliminary ruling

Admissibility

23. The Austrian Government submits inter alia that as the contract in the case in the main proceedings was awarded, after the second contract award procedure, to an undertaking other than Koppensteiner

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and the demolition works have already been completed, the answer to the questions is no longer of any interest since Koppensteiner can now only obtain damages, which are in any event provided for by the BVergG. Moreover, the national court does not have jurisdiction to set aside the withdrawal decision and the answer to the questions will not assist it in resolving the dispute in the main proceedings.

24. BIG takes the view that the second question is merely hypothetical and therefore inadmissible. Given that the contract has been awarded, the question has no relevance to the outcome of the main case since it is impossible for the contracting authority to take a decision to withdraw that invitation to tender after the event.

25. The Court observes that it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decisions, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, since the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling (see, inter alia, Case C-373/00 Adolf Truley [2003] ECR I-1931, paragraph 21).

26. Although the Austrian Government and BIG have rightly noted that the Court must decline to rule on a question referred for a preliminary ruling where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (see, inter alia, Adolf Truley , cited above, paragraph 22), it is not obvious that the questions asked in this case have such characteristics.

27. In this case, the national court stated in its decision that the questions are asked in order to enable it to decide whether the application to have the withdrawal of the first invitation to tender set aside is inadmissible and if so on what grounds.

28. It follows that the reference for a preliminary ruling is admissible.

Substance

29. Before examining the questions, which should be dealt with together, the Court refers to the judgment in HI , cited above, in which it stated that:

- the decision to withdraw an invitation to tender for a public procurement contract is one of those decisions in relation to which Member States are required under Directive 89/665 to establish review procedures for annulment, for the purposes of ensuring compliance with the rules of Community law on public procurement contracts and national rules implementing that law (paragraph 54);

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

30. Accordingly, in the same judgment the Court ruled that Articles 1(1) and 2(1)(b) of Directive 89/665 require the decision of the contracting authority to withdraw the invitation to tender for a public procurement contract to be open to a review procedure, and to be capable of being set aside where appropriate on the ground that it has infringed Community law on public procurement or national rules implementing that law.

31. It follows that, where national law, even when it is interpreted in accordance with the requirements of Community law, does not make it possible for a tenderer to challenge a decision to withdraw an invitation to tender inasmuch as that decision infringes Community law and on that ground to

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apply for it to be set aside, that national law does not fulfil the requirements of Articles 1(1) and 2(1)(b) of Directive 89/665.

32. A national court before which a tenderer applies for a decision to withdraw an invitation to tender to be set aside inasmuch as that decision infringes Community law, and which cannot rule on the application under national law, is therefore faced with the question whether, and if so, under what circumstances, it is required under Community law to declare that such an application for annulment is admissible.

33. The Member States' obligation under a directive to achieve the result prescribed by the directive and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts (see, inter alia, Case C-258/97 HI [1999] ECR I-1405, paragraph 25).

34. Although it is for the legal order of each Member State to designate the review bodies in relation to the award of public procurement contracts competent to decide disputes which affect rights of individuals derived from Community law (see, inter alia, Case C-76/97 Tögel [1998] ECR I-5357, paragraph 28, and Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraph 49), such a question of jurisdiction does not arise in the case in the main proceedings.

35. In this case it is not disputed that under the applicable national law the Bundesvergabeamt has jurisdiction to hear applications for review relating to decisions' within the meaning of Article 1(1) of Directive 89/665 taken by contracting authorities in procedures for the award of public service contracts.

36. In addition, the national court stated (see paragraph 20 of this judgment) that the applicable national legislation precludes the examination and, where appropriate, the setting aside in review proceedings before the Bundesvergabeamt of decisions which withdraw an invitation to tender after the opening of tenders in an open contract award procedure.

37. As stated in paragraph 30 of this judgment, the Court has already held that precluding that possibility is contrary to Articles 1(1) and 2(1)(b) of Directive 89/665.

38. Those provisions of Directive 89/665 are unconditional and sufficiently clear to create rights for individuals on which they may rely, where necessary, against contracting authorities such as BIG.

39. In those circumstances, the court or tribunal having jurisdiction is required to disapply national rules which prevent compliance with the obligation arising from Articles 1(1) and 2(1)(b) of Directive 89/665.

Costs

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

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Notice for the OJ

JUDGMENT OF THE COURT

(Second Chamber)

of 2 June 2005

in Case C-15/04:Reference for a preliminary ruling from the Bundesvergabeamt Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH [1]

(Public procurement - Directive 89/665/EEC - Review procedures concerning the award of public procurement contracts - Decision to withdraw an invitation to tender after the opening of tenders - Judicial review - Scope - Principle of effectiveness)

(Language of the case: German)

In Case C-15/04: reference for a preliminary ruling under Article 234 EC from the Bundesvergabeamt (Austria), made by decision of 12 January 2004, received at the Court on 19 January 2004, in the proceedings between Koppensteiner GmbH and Bundesimmobiliengesellschaft mbH - the Court (Second Chamber), composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, C. Gulmann (Rapporteur), P. Kūris and G. Arestis, Judges; C. Stix-Hackl, Advocate General; R. Grass, Registrar, gave a judgment on 2 June 2005, in which it ruled:

The court or tribunal having jurisdiction is required to disapply national rules which prevent compliance with the obligation arising from Articles 1(1) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

_____

[1] - OJ C 85 of 03.04.2004.

Opinion of Advocate General Stix-Hackl delivered on 16 December 2004. Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH. Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public procurement - Directive 89/665/EEC - Review procedures concerning the award of public procurement contracts - Decision to withdraw an invitation to tender after the opening of tenders - Judicial review -Scope - Principle of effectiveness. Case C-15/04.

I - Introduction

1. This reference for a preliminary ruling concerns the legal question of whether a withdrawal of a contract award procedure is amenable to review. In particular, the question arises as to whether Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (2) (hereinafter the Directive') obliges the Member States to make it possible to have set aside a withdrawal of an invitation to tender, or at least a contracting authority's decision to withdraw an invitation to tender.

II - Legal framework

A - Community law

2. Article 1(1) provides:

The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

3. Article 2(1), which sets out the means of review the Member States are to provide for, states inter alia:

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

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

...'

B - National law

4. The review procedure system under the Bundesvergabegesetz 2002 (3) (Federal Procurement Law, hereinafter BVergG') is based on a distinction between decisions which may be challenged separately and those which may not. A decision which is not separately open to challenge may be challenged only in conjunction with the next decision that follows which is separately open to challenge.

5. Under Paragraph 20(13)(a)(aa) of the BVergG, the following decisions may be challenged separately in an open award procedure: the invitation to tender, other determinations during the period for the submission of tenders and the award decision. Withdrawal of the invitation to tender after the opening of tenders is not therefore a decision separately open to challenge.

6. Paragraph 105 makes provision in respect of withdrawal after the expiry of the period for the submission of tenders. Subparagraph 2 thereof permits the contracting authority to withdraw the

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invitation to tender on serious grounds which objectively justify withdrawal. Withdrawal for the sole purpose of enabling a new invitation to tender to be issued in order to reduce the price of the tender is not objectively justified.

7. Under Paragraph 162(2)(2) of the BVergG, the Bundesvergabeamt has jurisdiction, until the contract is awarded, for the purpose of correcting infringements of the BVergG and the regulations adopted under it, to annul decisions taken unlawfully by the contracting authority within the limits of the points of complaint relied on by the applicant.

8. Under Paragraph 166(2)(1) of the BVergG, an application for review is inadmissible where it is not directed against a decision that may be challenged separately.

9. The national court is of the view that under the system of the BVergG, any unlawfulness vitiating the withdrawal of the invitation to tender cannot be pleaded in a review procedure in connection with a subsequent decision open to separate challenge since withdrawal terminates the contract award procedure and therefore no further decisions are taken by the contracting authority during that contract award procedure.

10. The national court is further of the view that under the system of the BVergG, it is therefore not possible, in an open award procedure, for any withdrawal of the invitation to tender after the opening of tenders to be re-examined in a review procedure and, where appropriate, set aside. Under the system of the BVergG, the Bundesvergabeamt has jurisdiction, after withdrawal of an invitation to tender, (merely) to establish whether the withdrawal was unlawful on account of an infringement of the BVergG. Such a declaratory decision by the Bundesvergabeamt constitutes the prerequisite for the claiming of damages by contractors against the contracting authority on account of unlawfulness of the withdrawal.

III - The facts, the main proceedings and the questions referred

11. By notice of 26 September 2003, the Bundesimmobiliengesellschaft mbH (BIG') published an invitation to tender for the demolition work lot in the contract award procedure 14 Angerzellgasse, 6020 Innsbruck, Academic Grammar School, new primary school building and three sports halls' by an open award procedure (the first contract award procedure').

12. BIG, 100% of the shares in which are owned by the Federal Government, was formed to bring the Federal Government's building and property management into line. The objects of the business include: the making or holding available of premises for purposes of the Federal Government exclusively or jointly with third parties and, to that end, having specific regard to the needs of the Federal Government, in particular the acquisition, use, management, letting and disposal of real property and premises, the construction and maintenance of buildings, the provision of central building management services and the performance of other ancillary and secondary transactions connected with the objects of the business, the latter transactions excluding, however, all those governed by the provisions of the Kreditwesengesetz (Law on banking and credit business).

13. The first contract award procedure related to a building contract with an estimated contract value of EUR 8 600 000. The estimated contract value of the demolition work lot covered by the procedure is EUR 95 000.

14. By letter from BIG of 29 October 2003, Koppensteiner GmbH (Koppensteiner') and others were informed that, pursuant to Paragraph 105 of the BVergG, the invitation to tender was being withdrawn on serious grounds after the expiry of the timelimit for the submission of tenders.

15. On 6 November 2003 Koppensteiner was invited by telephone by BIG to participate in a negotiated procedure without prior publication of a contract notice for the demolition work (sports hall, Angerzellgasse) as part of the building project for the construction of a primary school with an after-school facility

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and three underground sports halls (the second contract award procedure'). Koppensteiner also submitted a tender in the second contract award procedure. The same work was put out to tender in both contract award procedures, although in the second contract award procedure the invitation to tender contained the additional stipulation that rough separation of the various demolition waste will be possible on the site'. In the case of the second contract award procedure, the estimated contract value was now EUR 90 000.

16. On 13 November 2003 Koppensteiner applied for the withdrawal of the invitation to tender in the first contract award procedure to be set aside and for an injunction against the issue of an invitation to tender in further contract award procedure; in the alternative, it sought a declaration that the withdrawal was unlawful. With respect to the second contract award procedure, Koppensteiner applied inter alia for it to be set aside.

17. By decision of the Bundesvergabeamt of 20 November 2003, BIG was ordered to refrain from opening the tenders in the second contract award procedure for the duration of the review procedure or until 13 January 2004 at the latest.

18. It appears from the file that on 28 January 2004 BIG awarded the contract in the second contract award procedure to another undertaking. This undertaking has already carried out the demolition works.

19. Before the Bundesvergabeamt, BIG argued in essence that the reason for the withdrawal was the fact that, despite careful estimation of the contract value, all the prices of the tenders were considerably in excess of the estimated contract value. The estimated contract value of the demolition work lot was EUR 95 000 in the first contract award procedure and EUR 90 000 in the second contract award procedure. The lowest tender in the first contract award procedure was approximately EUR 304 150 and thus considerably too high.

20. On the basis of the Court's judgment in Hospital IngenieureKrankenhaustechnik , Koppensteiner argued inter alia that a decision of the contracting authority to withdraw the invitation to tender [must] be open to a review procedure, and... be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts...'. (4)

21. Koppensteiner further argued that by application mutatis mutandis of Paragraph 100(2) of the BVergG and of the standstill period laid down as a rule in that provision, the withdrawal decision must be open to challenge by the tenderers by application mutatis mutandis of the provisions governing the award decision'. The withdrawal decision was to be regarded as analogous to an award decision since it was a decision by the contracting authority not to award the contract to any tenderer.

22. On 12 January the Bundesvergabeamt referred the following questions to the Court for preliminary ruling:

(1) Are the provisions of Article 1 in conjunction with Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 so unconditional and sufficiently precise that, in the event of withdrawal of the invitation to tender after the opening of tenders, an individual is entitled to rely on those provisions directly before the national courts and to seek a review of the withdrawal?

(2) If Question 1 must be answered in the negative, is Article 1 in conjunction with Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 to be interpreted as meaning that Member States are obliged to make a contracting authority's decision, prior to withdrawal of the invitation to tender, that it will withdraw the invitation to tender (withdrawal decision analogous to the award decision) amenable to review in any case, and the applicant is entitled to have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once withdrawal has taken place, of obtaining an award of damages?'

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IV - Admissibility

23. BIG and the Austrian Government have raised doubts as to the admissibility of, respectively, the second question and both questions. The Austrian Government submitted that it was not possible to annul the withdrawal, since it was legally and factually impossible to make a further award in the contract award procedure in question. After the contract had been awarded, the Bundesvergabeamt had no jurisdiction to set aside the withdrawal, but only to declare the withdrawal unlawful. BIG submitted that the second question, relating to a decision to withdraw the invitation to tender, was inadmissible because such a decision was no longer possible in the main proceedings.

24. The Court has consistently held that it may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (5)

25. On the one hand, it is to be observed that the national court has furnished the Court with all the material necessary to enable it to give a useful answer to the questions submitted to it.

26. On the other hand it must be considered whether the questions referred by the national court has referred remain material to the decision to be reached in the main proceedings, given the termination of the second contract award procedure by the award of the contract.

27. The question arises as to whether this has changed the actual facts of the main action, and whether the questions referred, which relate to the withdrawal and not to the other applications in the main proceedings, have thus become inadmissible.

28. As follows from the judgment in Siemens , (6) which also concerned a reference by the Bundesvergabeamt, in assessing the admissibility of questions referred for preliminary ruling the Court takes into account developments after the order making the reference.

29. That case concerned the effects of a decision by the Bundesvergabeamt which the Verfassungsgerichtshof (Constitutional Court) set aside while the reference for a preliminary ruling was pending. The Court concluded that when the decision was set aside, the questions relating to its effects became purely hypothetical. However, the Court held the question concerning the possible invalidity of unlawful contract awards to be admissible.

30. Siemens was therefore a case in which the withdrawal challenged in the main proceedings had been set aside in the meantime. However, it is common ground that that is not the case here.

31. By contrast with Siemens , in the present proceedings the question as to the legal effect of the subsequent invitation to tender or of the contract concluded in the second contract award procedure has not been expressly raised.

32. The questions referred relate to whether the withdrawal is amenable to review, and thus to the first contract award procedure. For that reason, it cannot be assumed that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose or is hypothetical, since the decision as to the legality of the withdrawal challenged in the main proceedings concerns the first contract award procedure and not the second. To be precise, only the latter is affected by the award of the contract. This formal approach, that is to say, considering the two contract award procedures separately, is to be preferred, at least in the context of assessing admissibility.

33. In any event, it may be that the contract concluded at the end of the second contract award procedure is invalid on account of unlawful acts the contracting authority may have committed.

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34. Accordingly, the questions referred still relate to the actual facts of the main action despite the change in the underlying facts.

35. In addition, it may equally be that the answer to the questions referred is important in relation to the lawfulness of the second contract award procedure. Even if this were not so under national law, the necessary relevance might arise under Community law. Thus, should the Directive require the withdrawal to be set aside, that might have consequences beyond the mere declaration that the withdrawal was unlawful. However, this need not be considered further at this point.

36. For the sake of completeness it is to be observed that the question as to whether the withdrawal is amenable to review arises regardless of what the contracting authority may or must do after the withdrawal has been annulled (set aside etc.). The latter issue would arise, for example, if the question were whether in particular cases, possibly that of an ostensible setting-aside, there was none the less an obligation to terminate a contract award procedure by awarding the contract.

37. Finally, the questions would be inadmissible if they related to a part of a contract award procedure that was not the subject of the dispute before the national court, (7) or concerned another contract award procedure altogether. However, that is likewise not the case here.

38. The national court has explained the reasons that led it to conclude that an answer to the questions referred is necessary in order to enable it to decide the dispute pending before it.

39. Accordingly, there are sufficient grounds to indicate that an answer to the questions is necessary to enable a decision to be reached in the dispute in the main proceedings.

40. The questions referred should accordingly be regarded as admissible.

V - The substance of the questions referred

A - Preliminary remarks

41. Both questions concern the withdrawal of the invitation to tender by the contracting authority and related aspects of the legal protection afforded by national review bodies. In essence, the question raised is whether the Directive obliges the Member States to provide for the possibility of having a withdrawal annulled.

42. Whereas the first question relates to the direct applicability of Article 1 in conjunction with Article 2(1)(b) of the Directive, the subject of the second question is the interpretation of those provisions.

43. As the Commission rightly submitted, in principle a question as to how a provision should be interpreted in the light of a Directive so as to comply with Community law must be considered before the question as to the Directive's direct applicability. The second question relates to whether a decision to withdraw an invitation to tender can be set aside. The wording of the question pre-supposes that there is such a decision in national law, but it appears from the order of the national court that the question seeks to ascertain whether the Directive obliges the Member States at least to provide for such a decision and the possibility of having it set aside where national law does not permit the withdrawal itself to be set aside.

44. However, a closer analysis of the questions in the light of the explanation given in the order for reference shows that the first question concerns the possibility of setting aside the withdrawal itself, whereas the second question concerns - alternative - possible approaches of national law.

45. Against this background, the questions referred should be considered separately under the following headings: whether the withdrawal itself may be set aside; if the withdrawal cannot be set aside, the obligation to provide for a decision to withdraw the invitation to tender; and interpretation in conformity with Community law and the direct applicability of the relevant provisions of the

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Directive.

B - The content of Article 2(1) of the Directive

46. Accordingly, the first question is as to whether the Directive obliges the Member States to provide for the possibility of having withdrawal of an invitation to tender annulled, that is to say, that it can be set aside by national review bodies.

47. In answering this question, one must start from the general principle in the case-law that the Directive is aimed at reinforcing existing arrangements... for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified'. (8)

48. As regards whether withdrawal can be set aside, one must start in particular with the Court's judgment in Hospital Ingenieure. (9) This judgment has been interpreted in different ways. Although the Court expressly held a withdrawal decision to be a decision subject to the Directive, this has sometimes been understood as meaning that although provision must be made for such a decision to be amenable to review, a declaration of its unlawfulness is sufficient and it is unnecessary to provide also for its being set aside. The justification for this restrictive interpretation is given as being that the Court's decision has to be considered in the light of the national legal situation in that case. National law conferred on the review bodies neither power to make a declaration of unlawfulness nor power to annul a withdrawal.

49. However, as the relevant passages in the judgment show, in particular paragraphs 48 to 54, by contrast with other judgments the Court did not justify its conclusion by reference to the specific national legal situation. (10)

50. Instead, the Court formulated its judgment in Hospital Ingenieure in the abstract and generally. Thus, the statements it made there may be generalised in so far as generally applicable principles may be taken from them.

51. Therefore, this reference for a preliminary ruling it must now be clarified whether the Directive lays down not only an obligation to make a declaration of unlawfulness, which also exists in national law, but an obligation as well to allow for a withdrawal to be set aside, that is to say, that the Member States are required to provide for the possibility of the withdrawal being annulled.

52. The answer to this question depends on the provisions of the Directive to be interpreted and applied. Whereas Article 1(1) lays down its substantive scope of application as regards which of a contracting authority's decisions are covered by the Directive, Article 2(1) sets out the legal protection the Member States must provide for.

53. Both provisions assume there to be decisions'. Article 2 must be regarded as a specific example of the far more general provision in Article 1. Since Article 2 is linked to Article 1, both provisions must cover the same decisions' by a contracting authority. Accordingly, even if the Court had interpreted the word decisions' for the purposes of Article 1(1) only, this would have to be carried through to Article 2(1).

54. As appears clearly from paragraph 49 of Hospital Ingenieure , the Court also expressly considered Article 2(1)(b) of the Directive and held that Article 1(1) of that directive does not lay down any restriction with regard to the nature and content of the decisions referred to therein. Nor can such a restriction be inferred from the wording of Article 2(1)(b) of that directive'.

55. Moreover, in paragraph 55 of that judgment the Court expressly considered whether a withdrawal should be amenable to review. That the Court inserted the phrase where appropriate' in referring to the possibility of review merely corresponds to the Directive's requirements and is not to be misunderstood as a restriction. For it is not every time a contracting authority's decision is

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reviewed that it requires to be set aside, but only where the requirements for doing so are satisfied. However, provision must be made generally for the possibility of annulment.

56. Furthermore, it is apparent from the Court's judgment in GAT (11) that the procedures listed in Article 2(1) come within the category of the review procedures which the Directive requires the Member States to provide for.

57. Accordingly, one must proceed on the basis of a broad interpretation of decisions' in Article 1(1) and of decisions' in Article 2(1)(b) of the Directive.

58. Thus, a withdrawal is one of the decisions generally subject to the Directive and also one of the decisions in respect of which the Member States have to make provisions for annulment (setting aside).

59. At this point consideration should be given to the question whether the Directive permits Member States to exempt certain decisions from the possibility of being set aside (annulled). At first glance, a judgment of the Court in infringement proceedings against the Kingdom of Spain (12) supports this proposition, the Court in that case having declared lawful a specific form of restricting liability to review to certain decisions in the contract award procedure.

60. However, from that judgment a general principle can also be drawn that the review procedures referred to in Article 1 of the Directive must be conducted effectively and as rapidly as possible and must be available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement'. (13)

61. The principle inherent in the Directive of protecting undertakings which have a particular interest (14) also supports an interpretation favourable to legal protection. Indeed, the facts of the dispute underlying the present proceedings demonstrate this.

62. As regards the case concerning the Spanish system of legal protection, it is first to be observed that the Court dismissed the Commission's complaint principally because the Commission had not adduced the evidence required in direct actions. (15)

63. It should also be emphasised that what the Court regarded as decisive in that case was that the Spanish legislation enables interested parties to bring actions against not only definitive acts but also procedural acts, if they decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests.' (16)

64. This is precisely what the national law applicable in the main proceedings does not allow.

65. However, the Court's judgment in Hospital Ingenieure has sometimes been interpreted narrowly in another regard. The Court's point that the absence of the possibility of annulment deprives tenderers of the possibility of bringing actions for damages has been relied on for the conclusion that it is sufficient to permit the award of damages, without also providing for the possibility of annulment.

66. On that point reference should be made to the principle also enunciated in Hospital Ingenieure that the scope of judicial review cannot be interpreted restrictively. (17)

67. Against that background, to exclude the setting aside of withdrawals and to limit claimants to damages would have to be regarded as an exception from the general rule that all the possibilities envisaged in Article 2(1) of the Directive are to be available in respect of a contracting authority's decisions.

68. Such a restriction on the powers of review bodies is, however, provided for expressly only in Article 2(6) of the Directive. That provision states that after the conclusion of a contract

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, following its award such powers may be limited to an award of damages.

69. The Directive does not, though, provide for their powers to be limited to awarding damages in any other cases.

70. It follows that a limitation to damages expressly provided for only where the contract has been concluded subsequent to its award cannot be applied to a withdrawal. It is true that withdrawal terminates the contract award procedure, but the principle underlying the exclusion of annulment and the limitation to damages in the situation mentioned above is that once concluded, contracts ought not to be set aside. Since there is no contract in the present case, that reasoning cannot apply.

C - The transposition of the Directive's requirements

71. The second question concerns in substance the transposition of the Directive's provisions by the Member States, and in particular the necessary, or at least permissible, separation of a withdrawal into a decision to withdraw the invitation to tender and the actual act of withdrawal, which in that case need not be amenable to challenge.

72. The problem addressed corresponds - at least at a higher level of abstraction - to the Court's requirement in Alcatel that the decision awarding the contract be amenable to review. (18)

73. There is indeed a certain parallelism between a withdrawal and an award, in so far as both acts terminate a contract award procedure.

74. One might start by taking from the judgment in Alcatel the requirement to provide for a measure of which the persons concerned can acquire knowledge and which may be the subject of an application to have it set aside'. (19)

75. Indeed, whichever decisions by a contracting authority should be liable to challenge, effective legal protection pre-supposes an external act by a contracting authority.

76. As regards the separation of a decision preceding an act, indicating the intention to act, from the act and the act itself, it is to be observed that in principle it is possible to imagine such a separation in respect of every act by a contracting authority. Thus, before a tender was eliminated, there would be a decision of the contracting authority notifying its intention to eliminate the tender.

77. In the present proceedings, however, irrespective of the sense or permissibility in law of such duplication, the only question to be decided is whether such separation in respect of withdrawal is sufficient.

78. The Commission submitted that the decision to withdraw, that is to say the withdrawal itself, must be amenable to challenge and that separation did not fulfil the Directive's requirements. The Commission based this argument on the fact that Alcatel concerned the contract award and the related conclusion of the contract. By contrast, a withdrawal did not precede the conclusion of a contract.

79. However, there are limits to the extent to which the judgment in Alcatel may be generalised. Not all of what the Court said in Alcatel can be applied to other sets of facts. This does not, however, mean that solutions similar to those permissible in relation to a contract award are necessarily not permissible in other cases.

80. In infringement proceedings against the Republic of Austria, the Court held that a separation was sufficient at least as regards a contract award. According to that judgment, the announcement of the award decision was enough if followed by a waiting or standstill period. The latter is intended to allow tenderers the opportunity to bring an appeal. (20)

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81. However, it is not possible to conclude from the grounds of this judgment or the other case-law of the Court on the Directive that separating acts other than awards would infringe Community law. The decisive factor is achieving the essential objectives of the Directive: the effectiveness and rapidity of legal protection. It is precisely the latter objective that could in fact be better served by holding a decision preceding the actual withdrawal to be amenable to review.

82. Thus, by appropriate separation the national legislature can maintain the act of withdrawal as not being amenable to challenge. However, such a solution must satisfy the requirements of the Directive and the rest of Community law.

83. As regards decisions to withdraw an invitation to tender, the requirements include in particular the announcement of the decision to the tenderers, whose names are known where the withdrawal follows the opening of the tenders, and a reasonable waiting period.

84. For the sake of completeness, reference must be made to the amendments affecting withdrawal in the new legislative package. The new procurement directives provide that a decision not to award a contract is to be notified without the need for an application. (21)

85. Finally, it is to be observed that the effects of setting aside a withdrawal, namely the legal consequences for the withdrawn contract award procedure, or even for the contract award procedure following the withdrawal, are not within the scope of the questions, and therefore on procedural grounds cannot be considered by the Court.

D - Interpretation in conformity with Community law and direct applicability

86. As the Court has consistently emphasised in its case-law, provisions of national law are to be interpreted in conformity with Directives. That obviously applies for the interpretation of national procurement law in the light of the Directive. (22)

87. If it is not possible to interpret national law in conformity with the Directive, it must be considered whether the relevant provision of the Directive is directly applicable. That presupposes that the content of the provision is unconditional and sufficiently precise.

88. The present reference for a preliminary ruling concerns principally Article 2(1)(b) of the Directive and the requirement it lays down that is must be possible for decisions of a contracting authority to be set aside, withdrawal and the related decision being such decisions.

89. It might be objected to the proposition that a provision of the Directive was directly applicable that it is clear from the case-law of the Court that this Directive, including in particular Article 2(1), is not directly applicable.

90. For that reason, before considering whether the requirements for direct applicability are satisfied, this view has to be examined in the light of the relevant judgments of the Court.

91. The first judgment that can be cited against the direct applicability of Article 2(1) is Alcatel. In that case, the Court stated that Article 2(1)(a) and (b) of Directive 89/665 cannot be interpreted to the effect that, even where there is no award decision which may be the subject of an application to have it set aside, the bodies in the Member States having power to review public procurement procedures may hear applications under the conditions laid down in that provision'. (23) If one reads this passage in conjunction with the paragraph preceding it, in which the Court refers to the possibility of claiming damages where an interpretation in conformity with to Community law is impossible, one might conclude that Article 2(1) of the Directive was denied direct applicability.

92. A similar view might be taken of the Court's judgment in Tögel , which specifically raised the question as to the jurisdiction of national bodies in respect of a whole category of awards. In that case too, the Court was required to interpret Article 2(1) of the Directive and did not

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recognise it as being directly applicable. (24)

93. However, common to both judgments is the fact that they have to be considered against the background of national jurisdictional problems, and in my opinion they do not in terms generally exclude the direct applicability of the provisions of the Directive in question. The scope of both these judgments is thus limited in that no general statement can be drawn from them as regards direct applicability.

94. By contrast, the case-law relating to this Directive and in a judgment delivered after Alcatel and Tögel includes express recognition of the direct applicability of provisions of the Directive, namely their overriding effect.

95. Thus, in Santex the Court held that where application in accordance with the requirements of the Directive is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Community law.' (25)

96. Specifically, the Court ensured that tenderers should be able to raise objections to decisions of the contracting authorities by way of the national court disapplying certain national procedural rules. The fact that national law permitted such disapplication cannot be regarded as a general precondition.

97. Analysis of the case-law on the Directive accordingly permits the conclusion that Article 2(1)(b) of the Directive is directly applicable.

98. The general requirements for a provision of a Directive to be directly applicable are fulfilled. The wording of Article 2(1)(b) makes it clear that this provision is sufficiently precise. There can be no doubt that it is unconditional as regards its context.

99. The fact that the Member States have some discretion in regulating national review procedures does not preclude Article 2(1) of the Directive from being directly applicable, since the requirements it lays down are to be regarded as a minimum level of protection. According to the case-law of the Court, for the purposes of direct applicability it is enough that such minimum protection is sufficiently certain. (26)

100. The national court can comply with the requirements of Articles 1 and 2 of the Directive by either not applying the national provisions relating to decisions which may be challenged separately, including the provision as to the admissibility of a review, or by extending the category of such decisions so as to include withdrawals.

VI - Conclusion

101. For the foregoing reasons, it is submitted that the Court should answer the questions referred as follows:

Article 1 in conjunction with Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts is to be interpreted as meaning that the Member States are obliged to make a contracting authority's decision, prior to withdrawal of the invitation to tender, that it will withdraw the invitation to tender amenable to review, and the applicant is entitled to have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once withdrawal has taken place, of obtaining an award of damages.

Article 2(1)(b) of the Directive is so unconditional and sufficiently precise that, in the event of withdrawal of the invitation to tender after the opening of the tenders, an individual is entitled

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to rely on it directly before the national courts and to seek a review on the basis of it.

(1) .

(2) - OJ 1989 L 395, p. 33.

(3) - BGBl. I No 99/2002.

(4) - See the operative part of the judgment in Case C-92/00 Hospital Ingenieure [2002] ECR I5553.

(5) - See Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 39, Case C390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 19, and Case C373/00 Adolf Truley [2003] ECR I-1931, paragraph 22 et seq.

(6) - Case C-314/01 Siemens [2004] ECR I-2549, paragraph 38 et seq.

(7) - For such circumstances, see Case C-421/01 Traunfellner [2004] ECR I-11941, paragraph 38.

(8) - Judgment of 24 June 2004 in Case C-212/02 Commission v Austria , not published in the ECR, paragraph 20, and Case C-433/93 Commission v Germany [1995] ECR I-2303, paragraph 23.

(9) - Hospital Ingenieure (cited above, footnote 4).

(10) - See, for example, Case C-327/00 Santex [2003] ECR I-1877.

(11) - Case C-315/01 GAT [2003] ECR I-6351, paragraph 53, referring to the possibility of awarding damages to be granted.

(12) - Case C-214/00 Commission v Spain [2003] ECR I-4667.

(13) - Commission v Spain (cited above, footnote 12), paragraph 78.

(14) - Commission v Austria (cited above, footnote 8), paragraph 24.

(15) - Commission v Spain (cited above, footnote 12), paragraph 80.

(16) - Commission v Spain (cited above, footnote 12), paragraph 79.

(17) - Hospital Ingenieure (cited above, footnote 4), paragraph 61.

(18) - Case C-81/98 Alcatel Austria and Others [1999] ECR I7671.

(19) - Alcatel Austria and Others (cited above, footnote 18), paragraph 48.

(20) - Commission v Austria (cited above, footnote 8), paragraph 21 et seq.

(21) - Article 41(1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and Article 49(1) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

(22) - See Alcatel Austria and Others (cited above, footnote 18), paragraph 49; Case C76/97 Tögel [1998] ECR I5357, paragraph 25; and Santex (cited above, footnote 10), paragraph 63.

(23) - Alcatel Austria and Others (cited above, footnote 18), paragraph 50.

(24) - Tögel (cited above, footnote 22) paragraph 21 et seq.

(25) - Santex (cited above, footnote 10), paragraph 64.

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(26) - See most recently Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835, paragraph 105.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
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JURCIT	31989L0665 : N 1 45 46 48 51 58 59 69 31989L0665-A01 : N 22 42 100 31989L0665-A01P1 : N 2 52 - 54 57 31989L0665-A02 : N 100 31989L0665-A02P1 : N 52 - 54 56 67 89 91 92 99 31989L0665-A02P1LB : N 3 22 42 57 88 98 31989L0665-A02P6 : N 68 32004L0017-A49P1 : N 84 32004L0018-A41P1 : N 84 61993J0433 : N 47 61997J0076 : N 86 92 - 94 61998J0081 : N 72 74 79 86 91 93 94 61998J0379 : N 24 61999J0390 : N 24 62000J0092 : N 48 - 50 54 55 65 66 62000J0214 : N 59 60 62 63 62000J0327 : N 49 86 95 62000J0373 : N 24 62001J0314 : N 28 62001J0315 : N 56 62001J0397 : N 99 62001J0421 : N 37 62002J0212 : N 47 61 80
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PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl
JUDGRAP	Gulmann
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Notice for the OJ

Reference for a preliminary ruling by the Bundesvergabeamt (Austria) by order of that Court of 12 January 2004 in the case of Koppensteiner GmbH against Bundesimmobiliengesellschaft m.b.H.

(Case C-15/04)

Reference has been made to the Court of Justice of the European Communities by order of the Bundesvergabeamt (Austria) (Federal Procurement Office) of 12 January 2004, received at the Court Registry on 20 January 2004, for a preliminary ruling in the case of Koppensteiner GmbH against Bundesimmobiliengesellschaft m.b.H. on the following questions:

1. Are the provisions of Article 1 in conjunction with Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 so unconditional and sufficiently precise that, in the event of withdrawal of the invitation to tender after the opening of tenders, an individual is entitled rely on those provisions directly before the national courts and to seek a review of the withdrawal?

2. If Question 1 must be answered in the negative, are Article 1 in conjunction with Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989[1] to be interpreted as meaning that Member States are obliged to make a contracting authority's decision, prior to withdrawal of the invitation to tender, that it will withdraw the invitation to tender (withdrawal decision analogous to the award decision) amenable to review in any case, since the applicant is entitled to have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once withdrawal has taken place, of obtaining an award of damages?

_____

[1] - OJ L 395, p. 33.

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JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

21 May 2008 (*)

(Public procurement – Community tender procedure – Obvious clerical error – Award to the tender offering best value for money – Abnormally low tender – Article 139(1) of Regulation (EC, Euratom) No 2342/2002 – Plea of illegality – Specifications – Admissibility)

In Case T–495/04,

Belfass SPRL, established in Forest (Belgium), represented by L. Vogel, lawyer,

applicant,

v

Council of the European Union, represented by B. Driessen and A. Vitro, acting as Agents,

defendant,

APPLICATION, first, for annulment of the decision of the Council of the European Union of 13 October 2004 to reject both the tenders submitted by the applicant under tender procedure UCA–033/04 and, secondly, for compensation in respect of the damage allegedly suffered by the applicant by reason of the Council's conduct,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 21 June 2007,

gives the following

Judgment

Legal context

1 Procedures for the award of service contracts by the Council of the European Union are subject to Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation') and Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) ('the Implementing Rules'). Those provisions are based on the Community directives in the field, in particular on Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), on Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and on Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended.

2 Article 97 of the Financial Regulation states:

‘1. The selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders shall be defined in advance and set out in the call for tender.

2. Contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure.’

3 Article 99 of the Financial Regulation provides:

‘While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers must satisfy conditions ensuring transparency and equal treatment. They may not lead to amendment of the conditions of the contract or the terms of the original tender.’

4 Article 100(2) of the Financial Regulation states:

‘The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.’

5 The first paragraph of Article 101 of the Financial Regulation provides:

‘The contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation.’

6 The second subparagraph of Article 122(2) of the Implementing Rules, in the version in force at the relevant time, provided that contracts to be awarded by call for tender:

‘… are restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 135 and invited simultaneously and in writing by the contracting authorities may submit a tender.’

7 Article 128(1) and (3) of the Implementing Rules, which applies where the restricted procedure involving a call for expressions of interest is involved, states in particular:

‘1. A call for expressions of interest shall constitute a means of preselecting candidates who will be invited to submit tenders in response to future restricted invitations to tender …

…

3. Where a specific contract is to be awarded, the contracting authority shall invite either all candidates entered on the list or only some of them, on the basis of objective and non-discriminatory selection criteria specific to that contract, to submit a tender.’

8 Article 130(1) of the Implementing Rules, in the version in force at the relevant time, provided:

‘The documents relating to the invitation to tender shall include at least:

(a) the invitation to submit a tender or to negotiate;

(b) the attached specifications, to which shall be annexed the general terms and conditions applicable to contracts;

(c) the model contract.

...'

9 Article 130(3)(a)(b) and (c) of the Implementing Rules, in the version in force at the relevant time, stated:

'The specifications shall at least:

(a) specify the exclusion and selection criteria applying to the contract, save in the restricted procedure and in the negotiated procedures following publication of a notice referred to in Article 127; in such cases those criteria shall appear solely in the contract notice or the call for expressions of interest;

(b) specify the award criteria and their relative weighting, if this is not specified in the contract notice;

(c) set out the technical specifications referred to in Article 131;

...'

10 Article 138 of the Implementing Rules, in the version in force at the relevant time, provided:

'1. Contracts shall be awarded in one of the following two ways:

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

3. The contracting authority shall specify, in the contract notice or in the specifications, the weighting it will apply to each of the criteria for determining best value for money.

The weighting applied to price in relation to the other criteria must not result in the neutralisation of price in the choice of contractor.

If, in exceptional cases, weighting is technically impossible, particularly on account of the subject of the contract, the contracting authority shall merely specify the decreasing order of importance in which the criteria are to be applied.'

11 Article 139(1) of the Implementing Rules, in the version in force at the relevant time, stated:

'If, for a given contract, tenders appear to be abnormally low, the contracting authority shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received.

The contracting authority may, in particular, take into consideration explanations relating to:

(a) the economics of the manufacturing process, of the provision of services or of the construction method;

(b) the technical solutions chosen or the exceptionally favourable conditions available to the tenderer;

(c) the originality of the tender.'

12 Article 148(1) and (3) of the Implementing Rules provides:

'1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

...

3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.'

Facts

13 On 4 March 2004, acting pursuant to the Financial Regulation and the Implementing Rules, the Council published a call for tenders in the *Supplement to the Official Journal of the European Union* (OJ 2004 S 45) with reference UCA–033/04, under the restricted procedure. The call related to the provision of cleaning and maintenance services in two buildings occupied by the General Secretariat of the Council in Brussels. The procedure was divided into two lots, each of which related to services to be provided in a specific location, namely the 'Woluwé Heights' building (Lot No 1) and the 'Frère Orban' building (Lot No 2).

14 The specifications provided that the award criterion to be applied was that of the tender offering best value for money. The final evaluation of the tenders in respect of each lot was to be carried out by awarding to each tender a number of marks calculated as follows: 'Number of points in respect of "quality" x 100/price index'. The tender to be considered as being the best value for money was to be the tender which had, on conclusion of that final evaluation, obtained the highest number of marks but had, at the same time, been awarded the minimum number of marks under the heading 'Quality'.

15 The specifications also stated that the quality of each tender was to be assessed on the basis of a maximum of 100 marks and under reference to eight criteria. The eighth criterion, which carried a maximum of 50 marks, referred to 'Hours worked, calculated by applying the totals of A, B, C and D in the spreadsheet set out in Annex 3'.

16 The 50 marks available under the last-mentioned criterion were to be awarded on a basis which was proportional to the difference between, first, the total number of annual hours proposed in the tender subjected to evaluation (Ho) and, secondly, the average of the total number of hours proposed, for each accounting period, in each of the tenders found to be admissible (Hm). A tender which proposed the Hm average was to be assessed as satisfactory and to be awarded 40 marks (that is to say, 80% of the cap of 50 marks). The specifications provided that where the Hm threshold was exceeded by up to 12.5% the tender would benefit from the award of additional marks, subject always to the cap of 50 marks. Conversely, a failure to attain the Hm threshold by a factor of more than 12.5% would be penalised by the deduction of marks, subject to a minimum score of 30 marks, below which the tender fell to be eliminated.

17 In addition, the specifications provided that the average hourly rate in respect of each tender should not, if the tender was not to be eliminated, be lower than the average hourly rate fixed by the Union générale belge de nettoyage (Belgian General Cleaners' Union) ('the UGBN') for a category 1A cost price, on the basis of the rate in force on the date on which the tender was submitted. As at 1 July 2004, that average hourly rate was fixed at EUR 19.6962.

18 On 23 June 2004, the specifications relating to the call for tenders at issue were issued to the tenderers.

19 On 23 July 2004, the applicant, Belfass SPRL, submitted a tender in respect of each of the lots to be awarded under the UCA–033/04 call for tenders. The total annual price under the applicant's tender for Lot No 1 was EUR 234 059.67.

20 By letter of 13 October 2004, the Council informed the applicant that both its tenders had been

rejected on the following grounds: '... With respect to Lot [No] 1, calculation of the average hourly rate contained in your tender gives a result which is lower than the minimum rate fixed by the UGBN of EUR 19.6962 as at [1 July 2004]. As regards Lot [No] 2, your tender was not awarded the minimum number of marks as regards quality by the evaluation committee, in accordance with the criteria referred to in the specifications ...'

21 On 15 October 2004, the applicant asked the Council to provide it with further and detailed information as to the circumstances in which its tender in respect of Lot No 2 had been rejected.

22 On 22 October 2004, the Council replied to that request, stating, inter alia, as follows:

'... your tender, which specified a number of hours which was 20% lower than the average number of hours in all tenders, was accordingly eliminated at that stage, in accordance with the formula set out on page 2.'

Procedure and forms of order sought

23 By application lodged at the Registry of the Court of First Instance on 23 December 2004, the applicant brought the present action.

24 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure.

25 On 13 December 2006, in reply to a request for the production of documents by the Court of 28 November 2006, issued by way of measures of organisation of procedure, the Council lodged the contract notice and the specifications relating to the UCA–033/04 call for tenders with the Court, together with the original report of the evaluation committee (non-confidential version) in respect of that call for tenders.

26 At the hearing on 21 June 2007, the parties presented oral argument and answered the questions put to them by the Court.

27 The applicant claims that the Court should:

– declare the application to be admissible and well founded;

– annul the Council's decision of 13 October 2004 not to accept each of its tenders submitted in relation to the UCA–033/04 call for tenders;

– order the Council to pay damages in respect of its loss assessed at EUR 1 481 317.65, together with interest at the rate of 7% a year;

– order the Council to pay the whole of the costs.

28 The Council contends that the Court should:

– dismiss the action as inadmissible as regards Lot No 2;

– declare the action for annulment to be unfounded;

– declare the application for damages to be unfounded;

– order the applicant to pay the costs.

The admissibility of the action against the decision of 13 October 2004, in so far as it relates to Lot No 2

Arguments of the parties

29 The Council, without raising a formal plea of inadmissibility, submits that, to the extent that it relates to Lot No 2, the action against the decision of 13 October 2004 is inadmissible. The applicant does not challenge the decision to exclude it from the tender process, as such, but the lawfulness of the Council's decision to include the criterion which led to its exclusion, namely the average of the total number of hours proposed by tenderers, in the specifications.

30 At the hearing, the Council stated that it was clear from the case-law of the Court of Justice that a person who considers that the specifications in a call for tenders, as prescribed by decision of the contracting authority, discriminate against him cannot await notification of the decision awarding the contract in question and then challenge it, on the ground specifically that those specifications are discriminatory, without infringing the objectives of speed and effectiveness of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50 (Case C-230/02 *Grossmann Air Service* [2004] ECR I–1829, paragraph 37).

31 It takes the view that, since the specifications were sent to each of the candidates, and thus to the applicant, on 23 June 2004, the prescribed period of two months for challenging the lawfulness of the decision to include that criterion had expired on the date on which the present action was brought.

32 The applicant submits, as its principal argument, that specifications are not a challengeable act for the purposes of Article 230 EC. They constitute a preparatory act of general scope and, according to settled case-law, such an act, whatever the time at which it may take place, can never be the subject of an action for annulment.

33 It also argues that specifications are addressed to all undertakings which, belonging to a category defined generally and in the abstract, wished to tender for the award of a public procurement contract. In the present case, the specifications were neither a decision which was addressed to the applicant nor a decision which was of direct and individual concern to it. It infers from that that only an action against the decision to award the contract was capable of allowing it to challenge the lawfulness of the criterion included in the specifications which related to the total number of hours proposed by tenderers.

34 In the alternative, the applicant invokes a plea of illegality under Article 241 EC as regards the specifications.

Findings of the Court

35 As a preliminary point, the Court finds that the Council's position consists of challenging the admissibility of the present action inasmuch as, according to the Council, it is truly directed only against the specifications. The latter constitute a challengeable act, the lawfulness of which was not contested within the prescribed period.

36 It must, however, be held that the annulment sought in the present action is that of the Council's decision of 13 October 2004 not to accept the applicant's tenders submitted in response to the call for tenders and that it is for the purposes of the annulment, and thus incidentally, that the applicant challenges the lawfulness of the specifications.

37 Accordingly, the issue which arises is not that of the admissibility of the action for annulment in so far as that action is alleged to be directed against the specifications, but that of the admissibility of the plea relating to the unlawfulness of that document which is invoked in that action for annulment.

38 In order to rule on that issue, it is necessary to determine whether a document relating to a call for tenders, such as the specifications at issue, is an act which is capable, as the Council submits, of being the subject of a direct action brought under the fourth paragraph of Article 230 EC and, accordingly, whether the applicant should have brought proceedings to challenge the specifications, on the basis of that provision, within the period of two months laid down under the fifth paragraph of Article 230 EC.

39 The fourth paragraph of Article 230 EC provides that any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

40 According to settled case-law, natural or legal persons other than the person to whom a measure is addressed can claim to be individually concerned, for the purposes of the fourth paragraph of Article 230 EC, only if they are affected by the measure in question by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I–6677, paragraph 36; and Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I–3425, paragraph 45).

41 In the present case, the Court finds that it is not possible to take the view that the specifications in question are of individual concern to the applicant.

42 First, contrary to what the Council submits, the fact that the specifications were sent individually to preselected tenderers, and thus to the applicant, on 23 June 2004, under the restricted procedure, cannot distinguish the applicant individually for the purposes of the fourth paragraph of Article 230 EC. The specifications, like each of the other documents relating to the call for tenders issued by the Council in the present case and of which the specifications form part, apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged generally and in the abstract. They are therefore of a general nature and it cannot be held that their communication to each of a number of undertakings preselected by the contracting authority allows each of those undertakings to be distinguished individually from all other persons for the purposes of the fourth paragraph of Article 230 EC.

43 Secondly, the Council is wrong to rely on the judgment in *Grossmann Air Service*, cited in paragraph 30 above, in order to establish that it was open to the applicant to challenge the specifications in question. It must be pointed out that that judgment was delivered by the Court of Justice in response to a question referred for a preliminary ruling relating to the interpretation of Article 1(3) and Article 2(1)(b) of Directive 89/665. The Council did not deny that the provisions of Directive 89/665, as amended, are therefore binding only on the Member States and not on the Community institutions. Furthermore, as the Council acknowledged at the hearing, it is clear that the Community legislation relating to the award of public service contracts by the Community institutions which is applicable in the present case contains no provision similar to those which are set out in Directive 89/665. Lastly, contrary to the situation which gave rise to the judgment in *Grossmann Air Service*, cited in paragraph 30 above, the criterion which features in the specifications and is challenged by the applicant did not prevent it from participating effectively in the contract award procedure in question. On the contrary, the documents before the Court show that the applicant, like the other tenderers included in the list drawn up after the preselection stage, was able to submit a tender for Lot No 2. Consequently, the interpretation given by the Court of Justice in the judgment in *Grossmann Air Service*, cited in paragraph 30 above, of the provisions of Directive 89/665, as amended, cannot be applied, by way of analogy, for the purposes of determining the admissibility of the present action in so far as it relates to Lot No 2.

44 It follows from the above that, since the specifications in question were not of individual concern to the applicant, it had no right to bring an action for annulment against the specifications under the fourth paragraph of Article 230 EC. Accordingly, there is no basis on which the Council can plead that the applicant had the right to challenge those specifications as a basis for opposing the incidental challenge by the applicant in these proceedings to the lawfulness of that document.

Substance

The action against the decision of 13 October 2004, in so far as it relates to Lot No 1

Arguments of the parties

45 In support of its action for annulment of the decision of 13 October 2004, in so far as it relates to Lot No 1, the applicant puts forward a single plea in law, alleging a manifest error of assessment.

46 The applicant essentially submits that the Council committed a manifest error of assessment in failing to give the applicant's tender in respect of Lot No 1 careful scrutiny.

47 Contrary to what the Council inferred from its tender, it argues that the average hourly rate in its tender amounted to EUR 22.123 and was accordingly higher than the minimum average hourly rate of EUR 19.6962 fixed by the UGBN.

48 It is true that the applicant acknowledges that that error on the Council's part is linked to an arithmetical error appearing in its tender as regards the total of categories A, B, C and D (EUR 234 059.67 instead of EUR 271 811.67).

49 However, it takes the view that the principle of sound administration required the Council, when assessing the applicant's tender, to take steps to ensure that the tender submitted for assessment by it did not contain an obvious clerical error of that kind, which it could have corrected on its own initiative.

50 It states that the Council could, merely by verifying the calculation, have established that the correct minimum hourly rate under its tender stood at EUR 20.92, as is clearly and precisely set out at page 40 of the tender.

51 At the very least, the applicant considers that, since the error was obvious and since to correct it would not have altered either the conditions of the contract or the original tender, the Council could, in accordance with Article 99 of the Financial Regulation and as Article 10 of the specifications relating to the calls for tenders in question provided, have made use of its right to contact the applicant.

52 The applicant claims that, contrary to what the Council contends, the conclusions drawn by the Court in its judgment in Case T-19/95 *Adia interim* v *Commission* [1996] ECR II-321, paragraph 47, cannot be applied in the present case. That judgment involved a systematic calculation error which it was difficult for the contracting authority to detect. In the present case, the applicant takes the view that the error in question is merely an error in the addition of categories A, B, C and D, which the Council ought easily to have been able to detect and correct.

53 The applicant likewise claims that the Council cannot argue that it did not detect that error when the correct, and therefore corrected, total price is set out in the 'ordinary' and 'theoretical' comparative evaluations of the applicant's tender in the annex to its defence.

54 It goes on to submit that the general principle laid down by the Court of Justice in Case 90/71 *Bernardi* v *Parliament* [1972] ECR 603, paragraph 10, according to which a party cannot invoke before the Court irregularities which may have been the consequence of its own behaviour, also does not apply in its case. Its conduct was neither intentional nor was it the source of the error committed by the Council. It adds that it had no interest in its error, which was in this case nothing more than an unintentional arithmetical error, not being corrected.

55 The applicant adds, in reply to the Council's arguments, that, while the notification provided for in Article 100 of the Financial Regulation confers on tenderers whose tenders are rejected a right to draw the contracting authority's attention to any errors of assessment which might have undermined the evaluation of their tender, the principles of sound administration and transparency require the contracting authority expressly to inform the recipient, in that notification, of the existence of that right. In its letter of 13 October 2004, the Council at no point informed it of the existence of such a right. There was accordingly a breach of the principle of equal treatment.

56 It infers from that that the error committed by the Council as to the calculation of the average hourly

rate in its tender in respect of Lot No 1 is the result of the Council's failure to give that tender careful scrutiny and that, as a result, the final decision to reject that tender is vitiated by a manifest error of assessment of a particularly serious nature.

57 The Council argues in reply that, as is clear from the wording in the specifications relating to the call for tenders, the average hourly rate is equal to the total price of the tender under consideration divided by the total number of hours included in that tender. That is the reason for which it states that it was content to make the calculation on the basis of the total reference price of EUR 234 059.67 given by the applicant in its tender.

58 The Council is of the view that it was not under any duty to verify the addition of the total of categories A, B, C and D in the applicant's tender and, having done so, to establish that the correct total price was EUR 271 811.67 rather than EUR 234 059.67. Similarly, the Council considers that the information set out in the 'ordinary' and 'theoretical' comparative evaluations of the tender concerned included in the annex to its defence cannot be used to demonstrate that it had established the existence of that error when the tender was being assessed. It carried out those evaluations in the course of preparing its defence to the present action.

59 It adds that a contracting authority can contact tenderers only in order to correct obvious clerical errors. The error in the present case was not obvious at all, with the result that it could not have detected it.

60 The Council also relies on the general principle of law recognised by the Court of Justice in its judgment in *Bernardi* v *Council*, cited in paragraph 54 above, whereby a party cannot invoke before the Court irregularities which may have been the consequences of its own behaviour.

61 It likewise considers that, even if it should have detected the error in question, it would have been impossible for it, without risking infringing Article 99 of the Financial Regulation and Article 148(3) of the Implementing Rules, to make contact with the tenderer for the purposes of correcting the error concerned. In support of that argument, it relies in particular on *Adia interim* v *Commission*, cited in paragraph 52 above.

62 Lastly, the Council argues that one of the objectives of the notification provided for in Article 100 of the Financial Regulation, which follows the award of the contract and its signature, is to allow tenderers whose tenders are rejected to draw the contracting authority's attention to any errors of assessment which may have undermined the evaluation of the tender. There was no reaction whatever on the applicant's part once it had received the letter of 13 October 2004 informing it of the reasons for which its tender in respect of Lot No 1 had been rejected.

Findings of the Court

63 It is settled case-law that the Council has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and that the Court's review must be limited to verifying that there has been no serious and manifest error (Case 56/77 *Agence européenne d'interims* v *Commission* [1978] ECR 2215, paragraph 20; *Adia interim* v *Commission*, cited in paragraph 52 above, paragraph 49; and Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, paragraph 39).

64 In addition, Article 148 of the Implementing Rules provides that if, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may, by way of exception, contact the tenderer.

65 In the present case, it is necessary to verify whether the clerical error committed by the applicant, namely an arithmetical error in its tender relating to the total of categories A, B, C and D (EUR 234 059.67 instead of EUR 271 811.67), was an obvious clerical error which the Council should have detected.

66 In that regard, the Court finds, first, that the method of calculation of the hourly rate of tenderers' bids did not require the Council to make a fresh calculation of the total of categories A, B, C and D. It is

common ground that the average hourly rate was to be calculated on the basis of the total price included in the tender and the total number of working hours proposed, as set out by the applicant in its tender.

67 Secondly, it cannot be the case that, as the applicant argues, the correct hourly rate under its tender was set at a minimum figure of EUR 20.92, with that amount being clearly and precisely shown at page 40 of the tender, and that the Council should, for that reason, have considered whether it was likely that there had been an arithmetical error in the calculation of the average hourly rate in the applicant's tender. That amount was entered at page 40 of the applicant's tender under category E, which expressly related to the hourly rate for additional work undertaken, on request, by the cleaning staff 'on working days (Monday to Friday) between 16.00 hrs and 22.00 hrs'. Accordingly, the hourly rate of EUR 20.92 thus referred to concerned a particular type of services, namely additional work, which is, therefore, a different kind of work from the services referred to in categories A, B, C and D.

68 Thirdly, contrary to what the applicant maintains, it cannot be accepted that the 'ordinary' and 'theoretical' evaluation tables produced by the Council as an annex to its defence in these proceedings show that the latter was aware of the error committed by the applicant. It is clear from the Council's written pleadings that it drew up those tables for the purposes of these proceedings. The Court also notes that the applicant has not established that the contrary is the case.

69 Furthermore, contrary to what the applicant claims, the Court considers that the Council cannot be criticised for not having informed the applicant, at the time of the notification provided for under Article 100 of the Financial Regulation, of the latter's right to draw the attention of the contracting authority to any errors of assessment that might have undermined the evaluation of its tender. According to the case-law, in the absence of express provisions of Community law, the Community administration and judicature cannot be placed under a general obligation to inform individuals of the remedies available or of the conditions under which they may exercise them (order in Case C-153/98 P *Guérin automobiles* v *Commission* [1999] ECR I–1441, paragraph 15, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II–387, paragraph 210). In the present case, Article 100 of the Financial Regulation does not impose any such express obligation.

70 In any event, it is clear that when the applicant received the Council's letter of 13 October 2004, when it decided to seek clarification as to the reasons for which its tender in respect of Lot No 2 was rejected, it said nothing as regards the existence of an obvious clerical error in its tender in respect of Lot No 1.

71 It follows that the clerical error committed by the applicant was not obvious, within the meaning of Article 148(3) of the Implementing Rules. Accordingly, the Council cannot be criticised for not having detected that error, and thus for not correcting it or, at the very least, for not contacting the applicant in order to allow it to rectify that error.

72 Consequently, the single plea in law, alleging a manifest error of assessment committed by the Council in the decision of 13 October 2004, in so far as it relates to Lot No 1, is unfounded. The action for annulment brought against the decision of 13 October 2004, in so far as it relates to Lot No 1, must therefore be rejected.

The action against the decision of 13 October 2004, in so far as it relates to Lot No 2

Arguments of the parties

73 In support of its action against the decision of 13 October 2004, in so far as it relates to Lot No 2, the applicant raises three pleas in law alleging breach of the general principle of sound administration, a manifest error of assessment and breach of the principle of non-discrimination. In addition, the applicant has raised a fourth plea in its reply, alleging that, by failing to contact it before its tender was rejected, the Council infringed Article 139(1) of the Implementing Rules.

74 The applicant essentially submits that the first three pleas, alleging breach of the general principle of sound administration, breach of the principle of non-discrimination and a manifest error of assessment, are well founded inasmuch as its tender in respect of Lot No 2 was rejected automatically, without further consideration, on the sole ground that the total number of working hours included in that tender was more than 12.5% lower than the average of the total number of hours proposed in the tenders that

were found to be admissible.

75 In the first place, the applicant argues that, for similar reasons, the selection criterion in the specifications regarding the average of the total number of hours proposed, on which the Council based its rejection of the applicant's tender, without giving it further consideration, infringes the principle of sound administration and is vitiated by a manifest error of assessment. The result was that preference was given to tenders that provided for a greater number of hours to be worked than was truly necessary and which were therefore more expensive.

76 In that regard, the applicant first of all argues that the criterion adopted by the Council does not allow for an objective evaluation of what is needed in order to provide the services in question. It states that it has, entirely to the Council's satisfaction, been providing cleaning and maintenance services for the building covered by Lot No 2 since 1 January 1998 and has been doing so on the basis of a total number of hours equivalent to that included in its tender. While acknowledging that the Council could not take that experience into account, it takes the view that such experience simply provides objective evidence that the total number of hours needed to provide the services in question, in, at the very least, equivalent conditions, was lower than that included in the tender that was ultimately accepted and, accordingly, that the criterion applied by the Council encouraged the number of hours in question to be overestimated.

77 It also considers that the evaluation of the volume of the services in question cannot reasonably be dependent on the bids submitted by the tenderers themselves, since the latter could, in collusion with one another, have an interest in artificially inflating the volume of the services tendered for. Finally, the number of hours worked cannot be the main criterion for assessing the quality of the work to be undertaken. As regards the last-mentioned point, the applicant states that, were it to have artificially inflated the number of hours proposed in its tender, that tender would not have been automatically excluded.

78 Secondly, the applicant argues that the Council cannot rely on the fact that although the successful tenderer's bid was 3.7% more expensive than that of the applicant, that tenderer proposed a number of hours that was 25.2% greater than the number of hours proposed in the applicant's tender. It states once again that the total number of hours proposed by the successful tenderer was higher than the number of hours that was actually necessary to carry out the work referred to in the specifications in compliance with the requisite quality standards. Accordingly, the overestimation of the services to be provided by the successful tenderer led to damage being done to the Council and those who fund it. It adds that the true position is that the selected tenderer does not provide all of the hours referred to in its tender and that that point confirms that the number of hours proposed by it corresponds with what was necessary in respect of the cleaning of the premises covered by Lot No 2.

79 In the second place, the applicant submits that the selection criterion adopted is discriminatory in so far as it leads to tenders being automatically excluded, without being given further consideration, that are objectively advantageous to the Council in budgetary terms and perfectly satisfactory from a qualitative point of view.

80 In the third place, the applicant submits that the Council infringed the provisions of Article 139(1) of the Implementing Rules. It argues that before rejecting its tender on account of the total number of hours of services proposed being abnormally low, the Council should have verified that tender, after due hearing of the parties, in accordance with Article 139(1) of the Implementing Rules. Furthermore, it is clear from the case-law that the automatic elimination of abnormally low tenders on the basis of the application of a mathematical criterion is prohibited (Case 103/88 *Fratelli Costanzo* [1989] ECR 1839).

81 The Council states that, according to the case-law, the award of a contract to the tenderer who submitted the tender offering best value for money does not mean that the successful tender is necessarily the cheapest.

82 It adds that a particular objective of the regular use of the competitive tendering procedure is to show that it is possible to do better or to do more. In a competitive market, the average of the total number of hours proposed by all tenderers is likely to represent a robust and reliable estimate of the means required for the service to be properly provided from a qualitative point of view. The Council takes the view that, if a greater number of hours are allocated to cleaning, that will mean that a higher level of

quality will be achieved. In the present case, the Council notes that, while the successful tenderer had submitted a bid that was 3.7% more expensive than that of the applicant, by contrast, it was proposing 25.2% more hours of work than the applicant. In addition, it points out that although the price criterion was worth a maximum of 50% in the tender evaluation procedure, the disputed criterion relating to the total number of hours proposed counted for only 25% of the total number of marks to be awarded. The successful tenderer's bid was therefore better value for money and the applicant's services were, for their part, considerably more expensive. The Council also states that the time-cards of the successful tenderer's employees show that the services provided are those which that tenderer is obliged to provide in accordance with the terms of the contract.

83 As regards the applicant's claims that there is a risk of collusion between tenderers, who might agree among themselves that the volume of services should be artificially inflated, the Council invites the applicant, to the extent that it has any evidence in that respect, to contact the competition authorities.

84 In relation to the third plea, alleging infringement of the principle of non-discrimination, the Council replies that that principle prohibited it from taking into account the quality of the services previously provided by the applicant when awarding the contract.

85 Lastly, the Council submits that since the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules, was raised by the applicant in its reply, it is a new plea and is, accordingly, inadmissible. In any event, the Council states that the applicant's tender was not abnormally low. It essentially argues that, in the case of an abnormally low tender, it is necessary to comply with the requirement laid down in Article 139(1) of the Implementing Rules to verify the constituent elements of a tender, after due hearing of the parties, applies only in relation to the pricing of that tender. It states that while the applicant proposed a total number of hours in its tender that was 25.2% lower than the successful tenderer's bid its price was only 3.7% lower than that proposed by the latter. It accordingly takes the view that the applicant's services were considerably more expensive than those of the successful tenderer.

Findings of the Court

86 Before considering the substance of the action for annulment against the decision of 13 October 2004, in so far as it relates to Lot No 2, it is necessary first of all to rule on the admissibility of the fourth plea, alleging infringement of the provisions of Article 139(1) of the Implementing Rules.

– The admissibility of the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules

87 According to settled case-law, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure of the Court of First Instance that the original application must contain the subject-matter of the proceedings and a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 25; Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraph 9; and Case T-216/95 *Moles García Ortúzar* v *Commission* [1997] ECR-SC I–A–403 and II–1083, paragraph 87).

88 The case-law also provides that, under Article 139(1) of the Implementing Rules, the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low (Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II–2627, paragraph 49).

89 In the present case, the Court finds that, in paragraph 17 of its application, the applicant places particular reliance, in support of it action against the decision of 13 October 2004, in so far as it relates to Lot No 2, on the infringement of the general principle of sound administration, infringement of the principle of non-discrimination and a manifest error of assessment, in that its tender was rejected, without being given further consideration, on the sole ground that the total number of hours of work in

that tender was more than 12.5% lower than the average of the total number of hours proposed. Similarly, in paragraph 26 of its application, it submits that the implementation of that criterion is discriminatory in that it leads to the automatic exclusion, without further consideration, of objectively more advantageous tenders. It follows that the applicant, in its application, expressly criticised the Council for having rejected its tender without further consideration, by reason of its being abnormally low.

90 It follows that although the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules, was not expressly raised by the applicant until its reply, that plea represents an amplification of the three pleas put forward in the original application and is closely connected with them. That plea must accordingly be declared admissible.

– The substance of the action against the decision of 13 October 2004, in so far as it relates to Lot No 2

91 As was mentioned in paragraph 89 above, the three pleas raised in the application and alleging infringement of the principle of sound administration, a manifest error of assessment and infringement of the principle of non-discrimination essentially seek to show that the Council was wrong not to invite the applicant, prior to the automatic elimination of the latter's tender by reason of the abnormally low number of hours proposed by the applicant and in accordance with the principle that the constituent elements of that tender should be verified after due hearing of the parties laid down in Article 139(1) of the Implementing Rules, to provide it with evidence that the tender was a genuine one. Consequently, it is appropriate to start by examining the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules.

92 In that respect, it is necessary, in the first place, to determine whether the concept of abnormally low tender extends, as the Council submits, only to the price criterion in the tender assessed by the contracting authority or, as the applicant essentially claims, that concept also extends to other criteria which apply to the evaluation of tenders.

93 According to the case-law, since the requirements laid down by Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), by Article 37(1) of Directive 92/50 and by Article 30(4) of Directive 93/37 are in substance identical to those laid down by Article 139(1) of the Implementing Rules, the following considerations apply equally in relation to the interpretation of the last-mentioned provision (see, by way of analogy, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I–9233, paragraph 50).

94 It must also be pointed out that the Court of Justice held in paragraph 67 of the judgment in *Lombardini and Mantovani*, cited in paragraph 93 above, that it was undisputed that Article 30(4) of Directive 93/37 did not define the concept of an abnormally low tender and, a fortiori, did not determine the method of calculating an anomaly threshold. In the same case, the Advocate General was of the opinion that the concept of an abnormally low tender was not an abstract one, but was very precise and had to be determined for each contract according to the specific purpose it was intended to fulfil (Opinion of Advocate General Ruiz-Jarabo Colomer in *Lombardini and Mantovani*, cited in paragraph 93 above, points 32 and 35).

95 In the present case, the Court finds, first, that there is no definition of the anomaly threshold and of the concept of abnormally low tender, within the meaning of Article 139(1) of the Implementing Rules, in the Financial Regulation or the Implementing Rules. Secondly, there is no express provision in that article to the effect that the concept of abnormally low tender cannot be applied to criteria other than that of price.

96 Consequently, in order to define the material scope of the concept of abnormally low tender within the meaning of Article 139(1) of the Implementing Rules, it is necessary, first of all, to take as a basis the objective pursued by that provision.

97 As was mentioned in paragraph 88 above, where a contracting authority considers that a tender is abnormally low, Article 139(1) of the Implementing Rules obliges it to allow the tenderer to clarify or even to explain the nature of its tender before rejecting that tender. More precisely, it is clear from the

case-law that it is essential that each tenderer suspected of submitting an abnormally low tender should have the opportunity effectively to state its point of view in that respect, giving it the opportunity to supply all explanations as to the various elements of its tender at a time when it is aware not only of the anomaly threshold applicable to the contract in question and of the fact that its tender has appeared abnormally low, but also of the precise points which have raised questions on the part of the contracting authority (*Lombardini and Mantovani*, cited in paragraph 93 above, paragraph 53). At the same time, the Court of Justice stated that the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer constitutes a fundamental requirement, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings (*Lombardini and Mantovani*, cited in paragraph 93 above, paragraph 57).

98 It follows that Article 139(1) of the Implementing Rules enshrines a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it.

99 Next, the Court notes that Article 97(2) of the Financial Regulation provides that contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure and that, as regards the latter form of procedure, Article 138(2) of the Implementing Rules states that the tender to be accepted is the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

100 The Court is accordingly of the view that, where the contract is awarded to the tender offering best value for money, the fundamental requirement referred to in paragraph 98 above applies not only to the price criterion under the tender evaluated but also to the other criteria referred to in Article 138(2) of the Implementing Rules, since those criteria allow an anomaly threshold to be determined beneath which a tender submitted in the tender procedure in question is suspected to be abnormally low, within the meaning of Article 139(1) of the Implementing Rules.

101 In the second place, it is necessary to determine in the light of the above whether the Council was, as the applicant submits, obliged in the present case to comply with the procedure for verification after due hearing of the parties laid down in Article 139(1) of the Implementing Rules.

102 In that regard, the Court notes that the award procedure in question was that of the tender offering best value for money. In addition, it is not in dispute that, of the criteria which were relevant, the criterion regarding the average of the total number of hours proposed related to the qualitative aspect of the applicant's tender and constituted one of the various elements of its tender for the purposes of the case-law referred to in paragraph 97 above. Lastly, in accordance with the provisions of the specifications referred to in paragraph 16 above, that criterion allowed an anomaly threshold to be determined, beneath which the tender in question was to be automatically eliminated.

103 As is clear from the Council's letter of 22 October 2004 and as the Council expressly confirmed at the hearing in reply to a question from the Court, it is on the basis of the latter criterion that the applicant's tender was rejected, on the sole ground of the excessively low nature of the total number of hours included in that tender. Moreover, it is plain that the Council did not arrange any hearing of the parties, within the meaning of Article 139(1) of the Implementing Rules, in relation to the applicant's tender prior to its being eliminated automatically.

104 That being the case, the Council has infringed the provisions of Article 139(1) of the Implementing Rules.

105 That conclusion cannot be affected by the fact that, as the Council argues in its reply, while the applicant's total number of hours was 25.2% lower than that of the successful tenderer, its total price was, by contrast, 3.7% beneath that of that tenderer. It is sufficient to point out once again that, as is clear from the Council's letter of 22 October 2004, the applicant's tender was excluded on the sole ground that the total number of hours included in that tender was excessively low.

106 It follows from the foregoing that the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules, is well founded.

107 Consequently, without it being necessary to rule on the merits of the first three pleas raised in support of the action for annulment, the decision of 13 October 2004 should be annulled, in so far as it relates to Lot No 2.

The claims for damages

Arguments of the parties

108 The applicant considers that the wrongful rejection of each of its tenders by the Council has caused it damage and seeks compensation for that damage, which it assesses, by multiplying the annual price of its tender by the period of the contract (three years), at EUR 1 481 317.65, together with interest at the rate of 7% a year.

109 With respect to the existence of a wrongful act, it submits that the Council plainly committed a serious and manifest wrongful act, as regards Lot No 1, by failing to verify that its tender was correct and, as regards Lot No 2, by infringing the provisions of the Financial Regulation and the Implementing Rules.

110 With regard to the actual harm suffered, the applicant argues that the wrongful rejection of each of its tenders has led to a considerable loss of profits, which threatens its very survival.

111 First, and in the alternative, the applicant invites the Court, should the latter not be satisfied in the present case with its claims for compensation for the damage suffered by it as a result of the rejection of each of its tenders, to make an immediate award in its favour of EUR 500 000 by way of interim damages. Secondly, it proposes that prior to adjudicating definitively on the amount of the damages the Court should appoint an accountant to calculate the profits, both direct and indirect, that it would have earned from the award of each of the contracts.

112 As regards the existence of a causal link between the wrongful act and the damage suffered, the applicant is of the view that the principle of proximate causes requires that the Court examine whether it would have suffered the same damage in the absence of any wrongful act committed by the Council. It argues in that regard that since the Council excluded both of its tenders automatically it is not possible in the present case to assess the damage in this way.

113 According to the applicant, since the Council did not annex the original evaluation report to its defence, the Court cannot scrutinise the Council's reasoning and determine on what basis the applicant's tenders might, even without the Council acting wrongfully, have been excluded from the tender procedure at issue.

114 The Council considers, as regards Lot No 1, that it did not commit any manifest error of assessment. It adds that, even if it were to be accepted that it should be held liable for such an error, the applicant has not established that such an error was serious and manifest, that there was any actual harm suffered or the existence of a causal link between them.

115 As regards Lot No 2, the Council is of the view that it did not infringe the principles of sound administration and non-discrimination, and that it also did not commit a manifest error of assessment. It adds that, even if it were to be accepted that it should be held liable for such an infringement, the applicant has not established that such an error was serious and manifest, that there was any actual harm suffered or the existence of a causal link between them.

116 It submits that, contrary to what the applicant maintains, the criteria for awarding marks in respect of Lot No 2 clearly allowed it to evaluate the applicant's tender. The Council notes that 75% of those marks were allocated pursuant to calculations based on information provided by tenderers, while the remaining 25% were allocated pursuant to the evaluation that had been carried out.

117 Lastly, under reference to an 'ordinary' evaluation (described by the Council as being 'based on the documentation actually submitted by the applicant on the assumption that it was not excluded from the tender process') and a 'theoretical' evaluation (described by the Council as being 'based on the award to the applicant [of the maximum number of marks awarded] to the tenderer who was given the highest number of marks for each criterion, save where the criterion is based on mathematical information contained in the tender'), the Council claims that it can show that, as regards both Lot No 1 and Lot No 2, the applicant's tenders did not rank first and that, as a result, the requirement that actual harm must have been suffered is not satisfied in the present case.

118 In any event, both as regards Lot No 1 and Lot No 2, even if the Court were, contrary to all probability, to accept the applicant's claims for damages, the Council is of the view that the damages sought by the applicant should be recalculated and limited to the net annual profits which it can show it would have earned under the contract in question.

Findings of the Court

119 It is settled case–law that, in order for the Community to incur non–contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II–729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II–1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II–1239, paragraph 20).

120 Where one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to examine the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81, and Case T–170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II–515, paragraph 37).

121 Although the applicant invokes a right to damages on the basis of the loss it claims to have suffered by reason of the rejection of each of its tenders, taken together, it is necessary to consider its claims for damages by distinguishing between that part of the decision of 13 October 2004 which relates to Lot No 1 and that part of the decision which relates to Lot No 2.

The claims for damages with respect to Lot No 1

122 It is settled case-law that an application for compensation for damage must be dismissed where there is a close connection between it and an application for annulment which has itself been dismissed (see Case T-340/99 *Arne Mathisen* v *Council* [2002] ECR II–2905, paragraph 134 and the case-law cited).

123 Since the claims for damages in respect of Lot No 1 were rejected, on the basis that the applicant's allegations of unlawfulness were unfounded, and since the application for damages is closely connected with those claims, the latter must be rejected as regards Lot No 1.

The claim for damages with respect to Lot No 2

124 The applicant seeks damages in the amount which it would have invoiced to the Council had the contract, and thus inter alia Lot No 2, been awarded to it. That claim must therefore be understood as being based not on the loss of an opportunity to enter into the contract but on the loss of the contract itself.

125 However, the applicant puts forward no evidence to show that, had the unlawful conduct established in relation to Lot No 2 not taken place, it would have been certain that it would have been awarded that lot of the contract. Put at its highest, it submits that since the Council did not annex its original evaluation report to its pleadings it is impossible to verify on what basis the applicant's tenders could have been excluded from the disputed tender procedure, even if the Council had not acted wrongfully.

126 In that last regard, since the Council has, in reply to a written question put by the Court, produced the original evaluation report and that report has been notified to the applicant, the only finding the Court can make is that the latter would in any event not have been awarded the contract in respect of Lot No 2, even in the absence of the unlawful conduct established in paragraph 106 above. The applicant's tender is ranked in the original evaluation report produced by the Council in eighth and last place.

127 It follows that the damage alleged by the applicant with respect to Lot No 2, that is to say, the loss of the contract itself, is not actual and certain, but hypothetical, with the result that it cannot give rise to compensation. That, of itself, is sufficient to reject the claim for damages. In addition and for the avoidance of doubt, there is nothing to suggest, nor does the applicant put forward anything to show, that by reason of the unlawful conduct that has been established it lost even an opportunity to obtain the contract.

128 Consequently, the applicant's claim for damages in respect of Lot No 2 must be rejected.

129 It follows from all of the above that the claims for damages must be rejected in their entirety.

Costs

130 Pursuant to Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads. In the circumstances of the present case, each party must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Annuls the decision of the Council of the European Union of 13 October 2004 to reject the tenders of Belfass SPRL under tender procedure UCA–033/04, in so far as that decision rejected Belfass' tender with respect to Lot No 2;

2. Dismisses the action as to the remainder;

3. Orders each party to bear its own costs.

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 21 May 2008.

E. Coulon M. Vilaras

Registrar President

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* Language of the case: French.

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JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

21 May 2008 (*)

(Public procurement – Community tender procedure – Obvious clerical error – Award to the tender offering best value for money – Abnormally low tender – Article 139(1) of Regulation (EC, Euratom) No 2342/2002 – Plea of illegality – Specifications – Admissibility)

In Case T–495/04,

Belfass SPRL, established in Forest (Belgium), represented by L. Vogel, lawyer,

applicant,

v

Council of the European Union, represented by B. Driessen and A. Vitro, acting as Agents,

defendant,

APPLICATION, first, for annulment of the decision of the Council of the European Union of 13 October 2004 to reject both the tenders submitted by the applicant under tender procedure UCA–033/04 and, secondly, for compensation in respect of the damage allegedly suffered by the applicant by reason of the Council's conduct,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 21 June 2007,

gives the following

Judgment

Legal context

1 Procedures for the award of service contracts by the Council of the European Union are subject to Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation') and Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) ('the Implementing Rules'). Those provisions are based on the Community directives in the field, in particular on Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), on Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and on Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended.

2 Article 97 of the Financial Regulation states:

‘1. The selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders shall be defined in advance and set out in the call for tender.

2. Contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure.’

3 Article 99 of the Financial Regulation provides:

‘While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers must satisfy conditions ensuring transparency and equal treatment. They may not lead to amendment of the conditions of the contract or the terms of the original tender.’

4 Article 100(2) of the Financial Regulation states:

‘The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.’

5 The first paragraph of Article 101 of the Financial Regulation provides:

‘The contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation.’

6 The second subparagraph of Article 122(2) of the Implementing Rules, in the version in force at the relevant time, provided that contracts to be awarded by call for tender:

‘… are restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 135 and invited simultaneously and in writing by the contracting authorities may submit a tender.’

7 Article 128(1) and (3) of the Implementing Rules, which applies where the restricted procedure involving a call for expressions of interest is involved, states in particular:

‘1. A call for expressions of interest shall constitute a means of preselecting candidates who will be invited to submit tenders in response to future restricted invitations to tender …

…

3. Where a specific contract is to be awarded, the contracting authority shall invite either all candidates entered on the list or only some of them, on the basis of objective and non-discriminatory selection criteria specific to that contract, to submit a tender.’

8 Article 130(1) of the Implementing Rules, in the version in force at the relevant time, provided:

‘The documents relating to the invitation to tender shall include at least:

(a) the invitation to submit a tender or to negotiate;

(b) the attached specifications, to which shall be annexed the general terms and conditions applicable to contracts;

(c) the model contract.

...'

9 Article 130(3)(a)(b) and (c) of the Implementing Rules, in the version in force at the relevant time, stated:

'The specifications shall at least:

(a) specify the exclusion and selection criteria applying to the contract, save in the restricted procedure and in the negotiated procedures following publication of a notice referred to in Article 127; in such cases those criteria shall appear solely in the contract notice or the call for expressions of interest;

(b) specify the award criteria and their relative weighting, if this is not specified in the contract notice;

(c) set out the technical specifications referred to in Article 131;

...'

10 Article 138 of the Implementing Rules, in the version in force at the relevant time, provided:

'1. Contracts shall be awarded in one of the following two ways:

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

3. The contracting authority shall specify, in the contract notice or in the specifications, the weighting it will apply to each of the criteria for determining best value for money.

The weighting applied to price in relation to the other criteria must not result in the neutralisation of price in the choice of contractor.

If, in exceptional cases, weighting is technically impossible, particularly on account of the subject of the contract, the contracting authority shall merely specify the decreasing order of importance in which the criteria are to be applied.'

11 Article 139(1) of the Implementing Rules, in the version in force at the relevant time, stated:

'If, for a given contract, tenders appear to be abnormally low, the contracting authority shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received.

The contracting authority may, in particular, take into consideration explanations relating to:

(a) the economics of the manufacturing process, of the provision of services or of the construction method;

(b) the technical solutions chosen or the exceptionally favourable conditions available to the tenderer;

(c) the originality of the tender.'

12 Article 148(1) and (3) of the Implementing Rules provides:

'1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

...

3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.'

Facts

13 On 4 March 2004, acting pursuant to the Financial Regulation and the Implementing Rules, the Council published a call for tenders in the *Supplement to the Official Journal of the European Union* (OJ 2004 S 45) with reference UCA–033/04, under the restricted procedure. The call related to the provision of cleaning and maintenance services in two buildings occupied by the General Secretariat of the Council in Brussels. The procedure was divided into two lots, each of which related to services to be provided in a specific location, namely the 'Woluwé Heights' building (Lot No 1) and the 'Frère Orban' building (Lot No 2).

14 The specifications provided that the award criterion to be applied was that of the tender offering best value for money. The final evaluation of the tenders in respect of each lot was to be carried out by awarding to each tender a number of marks calculated as follows: 'Number of points in respect of "quality" x 100/price index'. The tender to be considered as being the best value for money was to be the tender which had, on conclusion of that final evaluation, obtained the highest number of marks but had, at the same time, been awarded the minimum number of marks under the heading 'Quality'.

15 The specifications also stated that the quality of each tender was to be assessed on the basis of a maximum of 100 marks and under reference to eight criteria. The eighth criterion, which carried a maximum of 50 marks, referred to 'Hours worked, calculated by applying the totals of A, B, C and D in the spreadsheet set out in Annex 3'.

16 The 50 marks available under the last-mentioned criterion were to be awarded on a basis which was proportional to the difference between, first, the total number of annual hours proposed in the tender subjected to evaluation (Ho) and, secondly, the average of the total number of hours proposed, for each accounting period, in each of the tenders found to be admissible (Hm). A tender which proposed the Hm average was to be assessed as satisfactory and to be awarded 40 marks (that is to say, 80% of the cap of 50 marks). The specifications provided that where the Hm threshold was exceeded by up to 12.5% the tender would benefit from the award of additional marks, subject always to the cap of 50 marks. Conversely, a failure to attain the Hm threshold by a factor of more than 12.5% would be penalised by the deduction of marks, subject to a minimum score of 30 marks, below which the tender fell to be eliminated.

17 In addition, the specifications provided that the average hourly rate in respect of each tender should not, if the tender was not to be eliminated, be lower than the average hourly rate fixed by the Union générale belge de nettoyage (Belgian General Cleaners' Union) ('the UGBN') for a category 1A cost price, on the basis of the rate in force on the date on which the tender was submitted. As at 1 July 2004, that average hourly rate was fixed at EUR 19.6962.

18 On 23 June 2004, the specifications relating to the call for tenders at issue were issued to the tenderers.

19 On 23 July 2004, the applicant, Belfass SPRL, submitted a tender in respect of each of the lots to be awarded under the UCA–033/04 call for tenders. The total annual price under the applicant's tender for Lot No 1 was EUR 234 059.67.

20 By letter of 13 October 2004, the Council informed the applicant that both its tenders had been

rejected on the following grounds: '... With respect to Lot [No] 1, calculation of the average hourly rate contained in your tender gives a result which is lower than the minimum rate fixed by the UGBN of EUR 19.6962 as at [1 July 2004]. As regards Lot [No] 2, your tender was not awarded the minimum number of marks as regards quality by the evaluation committee, in accordance with the criteria referred to in the specifications ...'

21 On 15 October 2004, the applicant asked the Council to provide it with further and detailed information as to the circumstances in which its tender in respect of Lot No 2 had been rejected.

22 On 22 October 2004, the Council replied to that request, stating, inter alia, as follows:

'... your tender, which specified a number of hours which was 20% lower than the average number of hours in all tenders, was accordingly eliminated at that stage, in accordance with the formula set out on page 2.'

Procedure and forms of order sought

23 By application lodged at the Registry of the Court of First Instance on 23 December 2004, the applicant brought the present action.

24 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure.

25 On 13 December 2006, in reply to a request for the production of documents by the Court of 28 November 2006, issued by way of measures of organisation of procedure, the Council lodged the contract notice and the specifications relating to the UCA–033/04 call for tenders with the Court, together with the original report of the evaluation committee (non-confidential version) in respect of that call for tenders.

26 At the hearing on 21 June 2007, the parties presented oral argument and answered the questions put to them by the Court.

27 The applicant claims that the Court should:

– declare the application to be admissible and well founded;

– annul the Council's decision of 13 October 2004 not to accept each of its tenders submitted in relation to the UCA–033/04 call for tenders;

– order the Council to pay damages in respect of its loss assessed at EUR 1 481 317.65, together with interest at the rate of 7% a year;

– order the Council to pay the whole of the costs.

28 The Council contends that the Court should:

– dismiss the action as inadmissible as regards Lot No 2;

– declare the action for annulment to be unfounded;

– declare the application for damages to be unfounded;

– order the applicant to pay the costs.

The admissibility of the action against the decision of 13 October 2004, in so far as it relates to Lot No 2

Arguments of the parties

29 The Council, without raising a formal plea of inadmissibility, submits that, to the extent that it relates to Lot No 2, the action against the decision of 13 October 2004 is inadmissible. The applicant does not challenge the decision to exclude it from the tender process, as such, but the lawfulness of the Council's decision to include the criterion which led to its exclusion, namely the average of the total number of hours proposed by tenderers, in the specifications.

30 At the hearing, the Council stated that it was clear from the case-law of the Court of Justice that a person who considers that the specifications in a call for tenders, as prescribed by decision of the contracting authority, discriminate against him cannot await notification of the decision awarding the contract in question and then challenge it, on the ground specifically that those specifications are discriminatory, without infringing the objectives of speed and effectiveness of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50 (Case C-230/02 *Grossmann Air Service* [2004] ECR I–1829, paragraph 37).

31 It takes the view that, since the specifications were sent to each of the candidates, and thus to the applicant, on 23 June 2004, the prescribed period of two months for challenging the lawfulness of the decision to include that criterion had expired on the date on which the present action was brought.

32 The applicant submits, as its principal argument, that specifications are not a challengeable act for the purposes of Article 230 EC. They constitute a preparatory act of general scope and, according to settled case-law, such an act, whatever the time at which it may take place, can never be the subject of an action for annulment.

33 It also argues that specifications are addressed to all undertakings which, belonging to a category defined generally and in the abstract, wished to tender for the award of a public procurement contract. In the present case, the specifications were neither a decision which was addressed to the applicant nor a decision which was of direct and individual concern to it. It infers from that that only an action against the decision to award the contract was capable of allowing it to challenge the lawfulness of the criterion included in the specifications which related to the total number of hours proposed by tenderers.

34 In the alternative, the applicant invokes a plea of illegality under Article 241 EC as regards the specifications.

Findings of the Court

35 As a preliminary point, the Court finds that the Council's position consists of challenging the admissibility of the present action inasmuch as, according to the Council, it is truly directed only against the specifications. The latter constitute a challengeable act, the lawfulness of which was not contested within the prescribed period.

36 It must, however, be held that the annulment sought in the present action is that of the Council's decision of 13 October 2004 not to accept the applicant's tenders submitted in response to the call for tenders and that it is for the purposes of the annulment, and thus incidentally, that the applicant challenges the lawfulness of the specifications.

37 Accordingly, the issue which arises is not that of the admissibility of the action for annulment in so far as that action is alleged to be directed against the specifications, but that of the admissibility of the plea relating to the unlawfulness of that document which is invoked in that action for annulment.

38 In order to rule on that issue, it is necessary to determine whether a document relating to a call for tenders, such as the specifications at issue, is an act which is capable, as the Council submits, of being the subject of a direct action brought under the fourth paragraph of Article 230 EC and, accordingly, whether the applicant should have brought proceedings to challenge the specifications, on the basis of that provision, within the period of two months laid down under the fifth paragraph of Article 230 EC.

39 The fourth paragraph of Article 230 EC provides that any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

40 According to settled case-law, natural or legal persons other than the person to whom a measure is addressed can claim to be individually concerned, for the purposes of the fourth paragraph of Article 230 EC, only if they are affected by the measure in question by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I–6677, paragraph 36; and Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I–3425, paragraph 45).

41 In the present case, the Court finds that it is not possible to take the view that the specifications in question are of individual concern to the applicant.

42 First, contrary to what the Council submits, the fact that the specifications were sent individually to preselected tenderers, and thus to the applicant, on 23 June 2004, under the restricted procedure, cannot distinguish the applicant individually for the purposes of the fourth paragraph of Article 230 EC. The specifications, like each of the other documents relating to the call for tenders issued by the Council in the present case and of which the specifications form part, apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged generally and in the abstract. They are therefore of a general nature and it cannot be held that their communication to each of a number of undertakings preselected by the contracting authority allows each of those undertakings to be distinguished individually from all other persons for the purposes of the fourth paragraph of Article 230 EC.

43 Secondly, the Council is wrong to rely on the judgment in *Grossmann Air Service*, cited in paragraph 30 above, in order to establish that it was open to the applicant to challenge the specifications in question. It must be pointed out that that judgment was delivered by the Court of Justice in response to a question referred for a preliminary ruling relating to the interpretation of Article 1(3) and Article 2(1)(b) of Directive 89/665. The Council did not deny that the provisions of Directive 89/665, as amended, are therefore binding only on the Member States and not on the Community institutions. Furthermore, as the Council acknowledged at the hearing, it is clear that the Community legislation relating to the award of public service contracts by the Community institutions which is applicable in the present case contains no provision similar to those which are set out in Directive 89/665. Lastly, contrary to the situation which gave rise to the judgment in *Grossmann Air Service*, cited in paragraph 30 above, the criterion which features in the specifications and is challenged by the applicant did not prevent it from participating effectively in the contract award procedure in question. On the contrary, the documents before the Court show that the applicant, like the other tenderers included in the list drawn up after the preselection stage, was able to submit a tender for Lot No 2. Consequently, the interpretation given by the Court of Justice in the judgment in *Grossmann Air Service*, cited in paragraph 30 above, of the provisions of Directive 89/665, as amended, cannot be applied, by way of analogy, for the purposes of determining the admissibility of the present action in so far as it relates to Lot No 2.

44 It follows from the above that, since the specifications in question were not of individual concern to the applicant, it had no right to bring an action for annulment against the specifications under the fourth paragraph of Article 230 EC. Accordingly, there is no basis on which the Council can plead that the applicant had the right to challenge those specifications as a basis for opposing the incidental challenge by the applicant in these proceedings to the lawfulness of that document.

Substance

The action against the decision of 13 October 2004, in so far as it relates to Lot No 1

Arguments of the parties

45 In support of its action for annulment of the decision of 13 October 2004, in so far as it relates to Lot No 1, the applicant puts forward a single plea in law, alleging a manifest error of assessment.

46 The applicant essentially submits that the Council committed a manifest error of assessment in failing to give the applicant's tender in respect of Lot No 1 careful scrutiny.

47 Contrary to what the Council inferred from its tender, it argues that the average hourly rate in its tender amounted to EUR 22.123 and was accordingly higher than the minimum average hourly rate of EUR 19.6962 fixed by the UGBN.

48 It is true that the applicant acknowledges that that error on the Council's part is linked to an arithmetical error appearing in its tender as regards the total of categories A, B, C and D (EUR 234 059.67 instead of EUR 271 811.67).

49 However, it takes the view that the principle of sound administration required the Council, when assessing the applicant's tender, to take steps to ensure that the tender submitted for assessment by it did not contain an obvious clerical error of that kind, which it could have corrected on its own initiative.

50 It states that the Council could, merely by verifying the calculation, have established that the correct minimum hourly rate under its tender stood at EUR 20.92, as is clearly and precisely set out at page 40 of the tender.

51 At the very least, the applicant considers that, since the error was obvious and since to correct it would not have altered either the conditions of the contract or the original tender, the Council could, in accordance with Article 99 of the Financial Regulation and as Article 10 of the specifications relating to the calls for tenders in question provided, have made use of its right to contact the applicant.

52 The applicant claims that, contrary to what the Council contends, the conclusions drawn by the Court in its judgment in Case T-19/95 *Adia interim* v *Commission* [1996] ECR II-321, paragraph 47, cannot be applied in the present case. That judgment involved a systematic calculation error which it was difficult for the contracting authority to detect. In the present case, the applicant takes the view that the error in question is merely an error in the addition of categories A, B, C and D, which the Council ought easily to have been able to detect and correct.

53 The applicant likewise claims that the Council cannot argue that it did not detect that error when the correct, and therefore corrected, total price is set out in the 'ordinary' and 'theoretical' comparative evaluations of the applicant's tender in the annex to its defence.

54 It goes on to submit that the general principle laid down by the Court of Justice in Case 90/71 *Bernardi* v *Parliament* [1972] ECR 603, paragraph 10, according to which a party cannot invoke before the Court irregularities which may have been the consequence of its own behaviour, also does not apply in its case. Its conduct was neither intentional nor was it the source of the error committed by the Council. It adds that it had no interest in its error, which was in this case nothing more than an unintentional arithmetical error, not being corrected.

55 The applicant adds, in reply to the Council's arguments, that, while the notification provided for in Article 100 of the Financial Regulation confers on tenderers whose tenders are rejected a right to draw the contracting authority's attention to any errors of assessment which might have undermined the evaluation of their tender, the principles of sound administration and transparency require the contracting authority expressly to inform the recipient, in that notification, of the existence of that right. In its letter of 13 October 2004, the Council at no point informed it of the existence of such a right. There was accordingly a breach of the principle of equal treatment.

56 It infers from that that the error committed by the Council as to the calculation of the average hourly

rate in its tender in respect of Lot No 1 is the result of the Council's failure to give that tender careful scrutiny and that, as a result, the final decision to reject that tender is vitiated by a manifest error of assessment of a particularly serious nature.

57 The Council argues in reply that, as is clear from the wording in the specifications relating to the call for tenders, the average hourly rate is equal to the total price of the tender under consideration divided by the total number of hours included in that tender. That is the reason for which it states that it was content to make the calculation on the basis of the total reference price of EUR 234 059.67 given by the applicant in its tender.

58 The Council is of the view that it was not under any duty to verify the addition of the total of categories A, B, C and D in the applicant's tender and, having done so, to establish that the correct total price was EUR 271 811.67 rather than EUR 234 059.67. Similarly, the Council considers that the information set out in the 'ordinary' and 'theoretical' comparative evaluations of the tender concerned included in the annex to its defence cannot be used to demonstrate that it had established the existence of that error when the tender was being assessed. It carried out those evaluations in the course of preparing its defence to the present action.

59 It adds that a contracting authority can contact tenderers only in order to correct obvious clerical errors. The error in the present case was not obvious at all, with the result that it could not have detected it.

60 The Council also relies on the general principle of law recognised by the Court of Justice in its judgment in *Bernardi* v *Council*, cited in paragraph 54 above, whereby a party cannot invoke before the Court irregularities which may have been the consequences of its own behaviour.

61 It likewise considers that, even if it should have detected the error in question, it would have been impossible for it, without risking infringing Article 99 of the Financial Regulation and Article 148(3) of the Implementing Rules, to make contact with the tenderer for the purposes of correcting the error concerned. In support of that argument, it relies in particular on *Adia interim* v *Commission*, cited in paragraph 52 above.

62 Lastly, the Council argues that one of the objectives of the notification provided for in Article 100 of the Financial Regulation, which follows the award of the contract and its signature, is to allow tenderers whose tenders are rejected to draw the contracting authority's attention to any errors of assessment which may have undermined the evaluation of the tender. There was no reaction whatever on the applicant's part once it had received the letter of 13 October 2004 informing it of the reasons for which its tender in respect of Lot No 1 had been rejected.

Findings of the Court

63 It is settled case-law that the Council has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and that the Court's review must be limited to verifying that there has been no serious and manifest error (Case 56/77 *Agence européenne d'interims* v *Commission* [1978] ECR 2215, paragraph 20; *Adia interim* v *Commission*, cited in paragraph 52 above, paragraph 49; and Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, paragraph 39).

64 In addition, Article 148 of the Implementing Rules provides that if, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may, by way of exception, contact the tenderer.

65 In the present case, it is necessary to verify whether the clerical error committed by the applicant, namely an arithmetical error in its tender relating to the total of categories A, B, C and D (EUR 234 059.67 instead of EUR 271 811.67), was an obvious clerical error which the Council should have detected.

66 In that regard, the Court finds, first, that the method of calculation of the hourly rate of tenderers' bids did not require the Council to make a fresh calculation of the total of categories A, B, C and D. It is

common ground that the average hourly rate was to be calculated on the basis of the total price included in the tender and the total number of working hours proposed, as set out by the applicant in its tender.

67 Secondly, it cannot be the case that, as the applicant argues, the correct hourly rate under its tender was set at a minimum figure of EUR 20.92, with that amount being clearly and precisely shown at page 40 of the tender, and that the Council should, for that reason, have considered whether it was likely that there had been an arithmetical error in the calculation of the average hourly rate in the applicant's tender. That amount was entered at page 40 of the applicant's tender under category E, which expressly related to the hourly rate for additional work undertaken, on request, by the cleaning staff 'on working days (Monday to Friday) between 16.00 hrs and 22.00 hrs'. Accordingly, the hourly rate of EUR 20.92 thus referred to concerned a particular type of services, namely additional work, which is, therefore, a different kind of work from the services referred to in categories A, B, C and D.

68 Thirdly, contrary to what the applicant maintains, it cannot be accepted that the 'ordinary' and 'theoretical' evaluation tables produced by the Council as an annex to its defence in these proceedings show that the latter was aware of the error committed by the applicant. It is clear from the Council's written pleadings that it drew up those tables for the purposes of these proceedings. The Court also notes that the applicant has not established that the contrary is the case.

69 Furthermore, contrary to what the applicant claims, the Court considers that the Council cannot be criticised for not having informed the applicant, at the time of the notification provided for under Article 100 of the Financial Regulation, of the latter's right to draw the attention of the contracting authority to any errors of assessment that might have undermined the evaluation of its tender. According to the case-law, in the absence of express provisions of Community law, the Community administration and judicature cannot be placed under a general obligation to inform individuals of the remedies available or of the conditions under which they may exercise them (order in Case C-153/98 P *Guérin automobiles* v *Commission* [1999] ECR I–1441, paragraph 15, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II–387, paragraph 210). In the present case, Article 100 of the Financial Regulation does not impose any such express obligation.

70 In any event, it is clear that when the applicant received the Council's letter of 13 October 2004, when it decided to seek clarification as to the reasons for which its tender in respect of Lot No 2 was rejected, it said nothing as regards the existence of an obvious clerical error in its tender in respect of Lot No 1.

71 It follows that the clerical error committed by the applicant was not obvious, within the meaning of Article 148(3) of the Implementing Rules. Accordingly, the Council cannot be criticised for not having detected that error, and thus for not correcting it or, at the very least, for not contacting the applicant in order to allow it to rectify that error.

72 Consequently, the single plea in law, alleging a manifest error of assessment committed by the Council in the decision of 13 October 2004, in so far as it relates to Lot No 1, is unfounded. The action for annulment brought against the decision of 13 October 2004, in so far as it relates to Lot No 1, must therefore be rejected.

The action against the decision of 13 October 2004, in so far as it relates to Lot No 2

Arguments of the parties

73 In support of its action against the decision of 13 October 2004, in so far as it relates to Lot No 2, the applicant raises three pleas in law alleging breach of the general principle of sound administration, a manifest error of assessment and breach of the principle of non-discrimination. In addition, the applicant has raised a fourth plea in its reply, alleging that, by failing to contact it before its tender was rejected, the Council infringed Article 139(1) of the Implementing Rules.

74 The applicant essentially submits that the first three pleas, alleging breach of the general principle of sound administration, breach of the principle of non-discrimination and a manifest error of assessment, are well founded inasmuch as its tender in respect of Lot No 2 was rejected automatically, without further consideration, on the sole ground that the total number of working hours included in that tender was more than 12.5% lower than the average of the total number of hours proposed in the tenders that

were found to be admissible.

75 In the first place, the applicant argues that, for similar reasons, the selection criterion in the specifications regarding the average of the total number of hours proposed, on which the Council based its rejection of the applicant's tender, without giving it further consideration, infringes the principle of sound administration and is vitiated by a manifest error of assessment. The result was that preference was given to tenders that provided for a greater number of hours to be worked than was truly necessary and which were therefore more expensive.

76 In that regard, the applicant first of all argues that the criterion adopted by the Council does not allow for an objective evaluation of what is needed in order to provide the services in question. It states that it has, entirely to the Council's satisfaction, been providing cleaning and maintenance services for the building covered by Lot No 2 since 1 January 1998 and has been doing so on the basis of a total number of hours equivalent to that included in its tender. While acknowledging that the Council could not take that experience into account, it takes the view that such experience simply provides objective evidence that the total number of hours needed to provide the services in question, in, at the very least, equivalent conditions, was lower than that included in the tender that was ultimately accepted and, accordingly, that the criterion applied by the Council encouraged the number of hours in question to be overestimated.

77 It also considers that the evaluation of the volume of the services in question cannot reasonably be dependent on the bids submitted by the tenderers themselves, since the latter could, in collusion with one another, have an interest in artificially inflating the volume of the services tendered for. Finally, the number of hours worked cannot be the main criterion for assessing the quality of the work to be undertaken. As regards the last-mentioned point, the applicant states that, were it to have artificially inflated the number of hours proposed in its tender, that tender would not have been automatically excluded.

78 Secondly, the applicant argues that the Council cannot rely on the fact that although the successful tenderer's bid was 3.7% more expensive than that of the applicant, that tenderer proposed a number of hours that was 25.2% greater than the number of hours proposed in the applicant's tender. It states once again that the total number of hours proposed by the successful tenderer was higher than the number of hours that was actually necessary to carry out the work referred to in the specifications in compliance with the requisite quality standards. Accordingly, the overestimation of the services to be provided by the successful tenderer led to damage being done to the Council and those who fund it. It adds that the true position is that the selected tenderer does not provide all of the hours referred to in its tender and that that point confirms that the number of hours proposed by it corresponds with what was necessary in respect of the cleaning of the premises covered by Lot No 2.

79 In the second place, the applicant submits that the selection criterion adopted is discriminatory in so far as it leads to tenders being automatically excluded, without being given further consideration, that are objectively advantageous to the Council in budgetary terms and perfectly satisfactory from a qualitative point of view.

80 In the third place, the applicant submits that the Council infringed the provisions of Article 139(1) of the Implementing Rules. It argues that before rejecting its tender on account of the total number of hours of services proposed being abnormally low, the Council should have verified that tender, after due hearing of the parties, in accordance with Article 139(1) of the Implementing Rules. Furthermore, it is clear from the case-law that the automatic elimination of abnormally low tenders on the basis of the application of a mathematical criterion is prohibited (Case 103/88 *Fratelli Costanzo* [1989] ECR 1839).

81 The Council states that, according to the case-law, the award of a contract to the tenderer who submitted the tender offering best value for money does not mean that the successful tender is necessarily the cheapest.

82 It adds that a particular objective of the regular use of the competitive tendering procedure is to show that it is possible to do better or to do more. In a competitive market, the average of the total number of hours proposed by all tenderers is likely to represent a robust and reliable estimate of the means required for the service to be properly provided from a qualitative point of view. The Council takes the view that, if a greater number of hours are allocated to cleaning, that will mean that a higher level of

quality will be achieved. In the present case, the Council notes that, while the successful tenderer had submitted a bid that was 3.7% more expensive than that of the applicant, by contrast, it was proposing 25.2% more hours of work than the applicant. In addition, it points out that although the price criterion was worth a maximum of 50% in the tender evaluation procedure, the disputed criterion relating to the total number of hours proposed counted for only 25% of the total number of marks to be awarded. The successful tenderer's bid was therefore better value for money and the applicant's services were, for their part, considerably more expensive. The Council also states that the time-cards of the successful tenderer's employees show that the services provided are those which that tenderer is obliged to provide in accordance with the terms of the contract.

83 As regards the applicant's claims that there is a risk of collusion between tenderers, who might agree among themselves that the volume of services should be artificially inflated, the Council invites the applicant, to the extent that it has any evidence in that respect, to contact the competition authorities.

84 In relation to the third plea, alleging infringement of the principle of non-discrimination, the Council replies that that principle prohibited it from taking into account the quality of the services previously provided by the applicant when awarding the contract.

85 Lastly, the Council submits that since the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules, was raised by the applicant in its reply, it is a new plea and is, accordingly, inadmissible. In any event, the Council states that the applicant's tender was not abnormally low. It essentially argues that, in the case of an abnormally low tender, it is necessary to comply with the requirement laid down in Article 139(1) of the Implementing Rules to verify the constituent elements of a tender, after due hearing of the parties, applies only in relation to the pricing of that tender. It states that while the applicant proposed a total number of hours in its tender that was 25.2% lower than the successful tenderer's bid its price was only 3.7% lower than that proposed by the latter. It accordingly takes the view that the applicant's services were considerably more expensive than those of the successful tenderer.

Findings of the Court

86 Before considering the substance of the action for annulment against the decision of 13 October 2004, in so far as it relates to Lot No 2, it is necessary first of all to rule on the admissibility of the fourth plea, alleging infringement of the provisions of Article 139(1) of the Implementing Rules.

– The admissibility of the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules

87 According to settled case-law, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure of the Court of First Instance that the original application must contain the subject-matter of the proceedings and a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 25; Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraph 9; and Case T-216/95 *Moles García Ortúzar* v *Commission* [1997] ECR-SC I–A–403 and II–1083, paragraph 87).

88 The case-law also provides that, under Article 139(1) of the Implementing Rules, the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low (Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II–2627, paragraph 49).

89 In the present case, the Court finds that, in paragraph 17 of its application, the applicant places particular reliance, in support of it action against the decision of 13 October 2004, in so far as it relates to Lot No 2, on the infringement of the general principle of sound administration, infringement of the principle of non-discrimination and a manifest error of assessment, in that its tender was rejected, without being given further consideration, on the sole ground that the total number of hours of work in

that tender was more than 12.5% lower than the average of the total number of hours proposed. Similarly, in paragraph 26 of its application, it submits that the implementation of that criterion is discriminatory in that it leads to the automatic exclusion, without further consideration, of objectively more advantageous tenders. It follows that the applicant, in its application, expressly criticised the Council for having rejected its tender without further consideration, by reason of its being abnormally low.

90 It follows that although the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules, was not expressly raised by the applicant until its reply, that plea represents an amplification of the three pleas put forward in the original application and is closely connected with them. That plea must accordingly be declared admissible.

– The substance of the action against the decision of 13 October 2004, in so far as it relates to Lot No 2

91 As was mentioned in paragraph 89 above, the three pleas raised in the application and alleging infringement of the principle of sound administration, a manifest error of assessment and infringement of the principle of non-discrimination essentially seek to show that the Council was wrong not to invite the applicant, prior to the automatic elimination of the latter's tender by reason of the abnormally low number of hours proposed by the applicant and in accordance with the principle that the constituent elements of that tender should be verified after due hearing of the parties laid down in Article 139(1) of the Implementing Rules, to provide it with evidence that the tender was a genuine one. Consequently, it is appropriate to start by examining the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules.

92 In that respect, it is necessary, in the first place, to determine whether the concept of abnormally low tender extends, as the Council submits, only to the price criterion in the tender assessed by the contracting authority or, as the applicant essentially claims, that concept also extends to other criteria which apply to the evaluation of tenders.

93 According to the case-law, since the requirements laid down by Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), by Article 37(1) of Directive 92/50 and by Article 30(4) of Directive 93/37 are in substance identical to those laid down by Article 139(1) of the Implementing Rules, the following considerations apply equally in relation to the interpretation of the last-mentioned provision (see, by way of analogy, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I–9233, paragraph 50).

94 It must also be pointed out that the Court of Justice held in paragraph 67 of the judgment in *Lombardini and Mantovani*, cited in paragraph 93 above, that it was undisputed that Article 30(4) of Directive 93/37 did not define the concept of an abnormally low tender and, a fortiori, did not determine the method of calculating an anomaly threshold. In the same case, the Advocate General was of the opinion that the concept of an abnormally low tender was not an abstract one, but was very precise and had to be determined for each contract according to the specific purpose it was intended to fulfil (Opinion of Advocate General Ruiz-Jarabo Colomer in *Lombardini and Mantovani*, cited in paragraph 93 above, points 32 and 35).

95 In the present case, the Court finds, first, that there is no definition of the anomaly threshold and of the concept of abnormally low tender, within the meaning of Article 139(1) of the Implementing Rules, in the Financial Regulation or the Implementing Rules. Secondly, there is no express provision in that article to the effect that the concept of abnormally low tender cannot be applied to criteria other than that of price.

96 Consequently, in order to define the material scope of the concept of abnormally low tender within the meaning of Article 139(1) of the Implementing Rules, it is necessary, first of all, to take as a basis the objective pursued by that provision.

97 As was mentioned in paragraph 88 above, where a contracting authority considers that a tender is abnormally low, Article 139(1) of the Implementing Rules obliges it to allow the tenderer to clarify or even to explain the nature of its tender before rejecting that tender. More precisely, it is clear from the

case-law that it is essential that each tenderer suspected of submitting an abnormally low tender should have the opportunity effectively to state its point of view in that respect, giving it the opportunity to supply all explanations as to the various elements of its tender at a time when it is aware not only of the anomaly threshold applicable to the contract in question and of the fact that its tender has appeared abnormally low, but also of the precise points which have raised questions on the part of the contracting authority (*Lombardini and Mantovani*, cited in paragraph 93 above, paragraph 53). At the same time, the Court of Justice stated that the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer constitutes a fundamental requirement, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings (*Lombardini and Mantovani*, cited in paragraph 93 above, paragraph 57).

98 It follows that Article 139(1) of the Implementing Rules enshrines a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it.

99 Next, the Court notes that Article 97(2) of the Financial Regulation provides that contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure and that, as regards the latter form of procedure, Article 138(2) of the Implementing Rules states that the tender to be accepted is the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

100 The Court is accordingly of the view that, where the contract is awarded to the tender offering best value for money, the fundamental requirement referred to in paragraph 98 above applies not only to the price criterion under the tender evaluated but also to the other criteria referred to in Article 138(2) of the Implementing Rules, since those criteria allow an anomaly threshold to be determined beneath which a tender submitted in the tender procedure in question is suspected to be abnormally low, within the meaning of Article 139(1) of the Implementing Rules.

101 In the second place, it is necessary to determine in the light of the above whether the Council was, as the applicant submits, obliged in the present case to comply with the procedure for verification after due hearing of the parties laid down in Article 139(1) of the Implementing Rules.

102 In that regard, the Court notes that the award procedure in question was that of the tender offering best value for money. In addition, it is not in dispute that, of the criteria which were relevant, the criterion regarding the average of the total number of hours proposed related to the qualitative aspect of the applicant's tender and constituted one of the various elements of its tender for the purposes of the case-law referred to in paragraph 97 above. Lastly, in accordance with the provisions of the specifications referred to in paragraph 16 above, that criterion allowed an anomaly threshold to be determined, beneath which the tender in question was to be automatically eliminated.

103 As is clear from the Council's letter of 22 October 2004 and as the Council expressly confirmed at the hearing in reply to a question from the Court, it is on the basis of the latter criterion that the applicant's tender was rejected, on the sole ground of the excessively low nature of the total number of hours included in that tender. Moreover, it is plain that the Council did not arrange any hearing of the parties, within the meaning of Article 139(1) of the Implementing Rules, in relation to the applicant's tender prior to its being eliminated automatically.

104 That being the case, the Council has infringed the provisions of Article 139(1) of the Implementing Rules.

105 That conclusion cannot be affected by the fact that, as the Council argues in its reply, while the applicant's total number of hours was 25.2% lower than that of the successful tenderer, its total price was, by contrast, 3.7% beneath that of that tenderer. It is sufficient to point out once again that, as is clear from the Council's letter of 22 October 2004, the applicant's tender was excluded on the sole ground that the total number of hours included in that tender was excessively low.

106 It follows from the foregoing that the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules, is well founded.

107 Consequently, without it being necessary to rule on the merits of the first three pleas raised in support of the action for annulment, the decision of 13 October 2004 should be annulled, in so far as it relates to Lot No 2.

The claims for damages

Arguments of the parties

108 The applicant considers that the wrongful rejection of each of its tenders by the Council has caused it damage and seeks compensation for that damage, which it assesses, by multiplying the annual price of its tender by the period of the contract (three years), at EUR 1 481 317.65, together with interest at the rate of 7% a year.

109 With respect to the existence of a wrongful act, it submits that the Council plainly committed a serious and manifest wrongful act, as regards Lot No 1, by failing to verify that its tender was correct and, as regards Lot No 2, by infringing the provisions of the Financial Regulation and the Implementing Rules.

110 With regard to the actual harm suffered, the applicant argues that the wrongful rejection of each of its tenders has led to a considerable loss of profits, which threatens its very survival.

111 First, and in the alternative, the applicant invites the Court, should the latter not be satisfied in the present case with its claims for compensation for the damage suffered by it as a result of the rejection of each of its tenders, to make an immediate award in its favour of EUR 500 000 by way of interim damages. Secondly, it proposes that prior to adjudicating definitively on the amount of the damages the Court should appoint an accountant to calculate the profits, both direct and indirect, that it would have earned from the award of each of the contracts.

112 As regards the existence of a causal link between the wrongful act and the damage suffered, the applicant is of the view that the principle of proximate causes requires that the Court examine whether it would have suffered the same damage in the absence of any wrongful act committed by the Council. It argues in that regard that since the Council excluded both of its tenders automatically it is not possible in the present case to assess the damage in this way.

113 According to the applicant, since the Council did not annex the original evaluation report to its defence, the Court cannot scrutinise the Council's reasoning and determine on what basis the applicant's tenders might, even without the Council acting wrongfully, have been excluded from the tender procedure at issue.

114 The Council considers, as regards Lot No 1, that it did not commit any manifest error of assessment. It adds that, even if it were to be accepted that it should be held liable for such an error, the applicant has not established that such an error was serious and manifest, that there was any actual harm suffered or the existence of a causal link between them.

115 As regards Lot No 2, the Council is of the view that it did not infringe the principles of sound administration and non-discrimination, and that it also did not commit a manifest error of assessment. It adds that, even if it were to be accepted that it should be held liable for such an infringement, the applicant has not established that such an error was serious and manifest, that there was any actual harm suffered or the existence of a causal link between them.

116 It submits that, contrary to what the applicant maintains, the criteria for awarding marks in respect of Lot No 2 clearly allowed it to evaluate the applicant's tender. The Council notes that 75% of those marks were allocated pursuant to calculations based on information provided by tenderers, while the remaining 25% were allocated pursuant to the evaluation that had been carried out.

117 Lastly, under reference to an 'ordinary' evaluation (described by the Council as being 'based on the documentation actually submitted by the applicant on the assumption that it was not excluded from the tender process') and a 'theoretical' evaluation (described by the Council as being 'based on the award to the applicant [of the maximum number of marks awarded] to the tenderer who was given the highest number of marks for each criterion, save where the criterion is based on mathematical information contained in the tender'), the Council claims that it can show that, as regards both Lot No 1 and Lot No 2, the applicant's tenders did not rank first and that, as a result, the requirement that actual harm must have been suffered is not satisfied in the present case.

118 In any event, both as regards Lot No 1 and Lot No 2, even if the Court were, contrary to all probability, to accept the applicant's claims for damages, the Council is of the view that the damages sought by the applicant should be recalculated and limited to the net annual profits which it can show it would have earned under the contract in question.

Findings of the Court

119 It is settled case–law that, in order for the Community to incur non–contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II–729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II–1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II–1239, paragraph 20).

120 Where one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to examine the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81, and Case T–170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II–515, paragraph 37).

121 Although the applicant invokes a right to damages on the basis of the loss it claims to have suffered by reason of the rejection of each of its tenders, taken together, it is necessary to consider its claims for damages by distinguishing between that part of the decision of 13 October 2004 which relates to Lot No 1 and that part of the decision which relates to Lot No 2.

The claims for damages with respect to Lot No 1

122 It is settled case-law that an application for compensation for damage must be dismissed where there is a close connection between it and an application for annulment which has itself been dismissed (see Case T-340/99 *Arne Mathisen* v *Council* [2002] ECR II–2905, paragraph 134 and the case-law cited).

123 Since the claims for damages in respect of Lot No 1 were rejected, on the basis that the applicant's allegations of unlawfulness were unfounded, and since the application for damages is closely connected with those claims, the latter must be rejected as regards Lot No 1.

The claim for damages with respect to Lot No 2

124 The applicant seeks damages in the amount which it would have invoiced to the Council had the contract, and thus inter alia Lot No 2, been awarded to it. That claim must therefore be understood as being based not on the loss of an opportunity to enter into the contract but on the loss of the contract itself.

125 However, the applicant puts forward no evidence to show that, had the unlawful conduct established in relation to Lot No 2 not taken place, it would have been certain that it would have been awarded that lot of the contract. Put at its highest, it submits that since the Council did not annex its original evaluation report to its pleadings it is impossible to verify on what basis the applicant's tenders could have been excluded from the disputed tender procedure, even if the Council had not acted wrongfully.

126 In that last regard, since the Council has, in reply to a written question put by the Court, produced the original evaluation report and that report has been notified to the applicant, the only finding the Court can make is that the latter would in any event not have been awarded the contract in respect of Lot No 2, even in the absence of the unlawful conduct established in paragraph 106 above. The applicant's tender is ranked in the original evaluation report produced by the Council in eighth and last place.

127 It follows that the damage alleged by the applicant with respect to Lot No 2, that is to say, the loss of the contract itself, is not actual and certain, but hypothetical, with the result that it cannot give rise to compensation. That, of itself, is sufficient to reject the claim for damages. In addition and for the avoidance of doubt, there is nothing to suggest, nor does the applicant put forward anything to show, that by reason of the unlawful conduct that has been established it lost even an opportunity to obtain the contract.

128 Consequently, the applicant's claim for damages in respect of Lot No 2 must be rejected.

129 It follows from all of the above that the claims for damages must be rejected in their entirety.

Costs

130 Pursuant to Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads. In the circumstances of the present case, each party must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Annuls the decision of the Council of the European Union of 13 October 2004 to reject the tenders of Belfass SPRL under tender procedure UCA–033/04, in so far as that decision rejected Belfass' tender with respect to Lot No 2;

2. Dismisses the action as to the remainder;

3. Orders each party to bear its own costs.

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 21 May 2008.

E. Coulon M. Vilaras

Registrar President

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* Language of the case: French.

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Case T-495/04

Belfass SPRL

v

Council of the European Union

(Public procurement – Community tender procedure – Obvious clerical error – Award to the tender offering best value for money – Abnormally low tender – Article 139(1) of Regulation (EC, Euratom) No 2342/2002 – Plea of illegality – Specifications – Admissibility)

Summary of the Judgment

1. *European Communities' public procurement – Tendering procedure*

   (Arts 230, fourth para., EC and 241 EC)

2. *Procedure – Introduction of new pleas during the proceedings*

   (Rules of Procedure of the Court of First Instance, Arts 44(1)(c) and 48(2); Commission Regulation No 2342/2002, Art. 139(1))

3. *European Communities' public procurement – Conclusion of a contract following a call for tenders*

   (Commission Regulation No 2342/2002, Arts 138(2) and 139(1))

4. *Non-contractual liability – Conditions – Unlawfulness – Damage – Causal link*

   (Art. 288, second para., EC)

1. Since, in a procedure for the award of public contracts, the specifications are not of individual concern to tenderers, who accordingly have no right to bring an action for annulment against them under the fourth paragraph of Article 230 EC, there is no basis on which the Council can plead that one of those tenderers had the right to challenge those specifications as a basis for opposing the incidental challenge by the latter to the lawfulness of that document in an application for the annulment of the decision to exclude it from the procedure at issue.

   (see para. 44)

2. It follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure of the Court of First Instance that the original application must contain the subject-matter of the proceedings and a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible.

   That applies to a plea alleging infringement of Article 139(1) of Regulation No 2342/2002 laying down detailed rules for the implementation of the Financial Regulation, which provides that, in procedures for the award of public contracts of the European Communities, the contracting authority is obliged to allow

the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low, when the plea is raised expressly by an applicant only at the stage of its reply but when that applicant, in its application, had expressly criticised the Council for having rejected its tender without further consideration, by reason of its being abnormally low.

(see paras 87-90)

3. Article 139(1) of Regulation No 2342/2002 laying down detailed rules for the implementation of the Financial Regulation enshrines a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it.

Where the contract is awarded to the tender offering best value for money, that requirement applies not only to the price criterion under the tender evaluated but also to the other criteria referred to in Article 138(2) of Regulation No 2342/2002, since those criteria allow an anomaly threshold to be determined beneath which a tender submitted in the tender procedure in question is suspected to be abnormally low, within the meaning of Article 139(1) of that regulation.

Accordingly, in rejecting a tender, in a procedure for the award of public contracts to the tenderer offering best value for money, on the sole ground of the excessively low nature of the total number of hours included in that tender without arranging any hearing of the parties, within the meaning of Article 139(1), in relation to that tender prior to its being eliminated automatically, the Council infringed that article.

(see paras 98, 100, 103-104)

4. In order for the Community to incur non–contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded. Where one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to examine the other conditions.

It follows that a claim for damages must be rejected where the damage alleged, that is to say, the loss of a Community contract, is not actual and certain, but hypothetical.

(see paras 119-120, 127-129)

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Notice for the OJ

Action brought on 23 December 2004 by Belfass against the Council of the European Union

(Case T-495/04)

Language of the case: French

An action against the Council of the European Union was brought before the Court of First Instance of the European Communities on 23 December 2004 by Belfass, established in Brussels (Belgium), represented by Lucas Vogel, lawyer.

The applicant claims that the Court should:

- annul the decision adopted by the General Secretariat of the Council of the European Union rejecting the two tenders entered by the applicant under call for tenders UCA 033/04 for the award of a contract for cleaning and maintenance services of two office buildings in Brussels;

- order the defendant to pay the sum of EUR 1 481 317.65 together with interest, calculated at the rate of 7% per annum, from the date on which the present action was brought, expressly subject to future increase, reduction or determination;

- order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments:

The applicant in the present case, a company specialising in the cleaning of offices which has been responsible since 1 January 1998 for the cleaning of certain offices of the General Secretariat of the Council, challenges the rejection by the defendant of two tenders submitted by the applicant in respect of a tender relating to the conclusion of a contract for cleaning and general services to be performed in the 'Woluwe Heights' (lot 1) and 'Frère Orban' (lot 2) buildings.

In support of its claims, the applicant alleges:

- the existence in the present case of a manifest error of assessment in that, in order to reject the tender relating to lot 1, the defendant claims that the average hourly rate under that tender is less than the minimum wage laid down by the Union générale belge du nettoyage (Belgian General Cleaning Union) for category 1A, on 1 July 2004, whereas a precise analysis of the figures in the applicant's tender shows that the average hourly rate thereunder is above the minimum figure set by the Union générale belge du nettoyage;

- infringement of the principles of sound administration and non-discrimination and the existence in the present case of a manifest error of assessment in that the tender relating to lot 2 was rejected, without further consideration, on the sole ground that the total number of hours of work under that tender was less by more than 12.5% than the average number of hours under the other tenders received for the contract in question, whereas by using that criterion the contested decision favours the most expensive tenders providing for invoicing of an elevated number of hours, without any objective purpose.

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Notice for the OJ

Action brought on 25 November 2004 by European Dynamics SA against the Commission of the European Communities

(Case T-465/04)

Language of the case: English

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 25 November 2004 by European Dynamics SA, Athens, Greece, represented by N. Korogiannakis, lawyer.

The applicant claims that the Court should:

- annul the Decision of the Commission (DG Fisheries), of 15 September 2004, evaluating the applicant's bid as not successful and awarding the contract to the incumbent contractor;

- order the Commission to re-evaluate the tender submitted by the applicant;

- order the Commission to pay the applicant's legal costs and other costs and expenses incurred in connection with the application, even if the application is rejected.

Pleas in law and main arguments

The applicant company filed a bid in response to the Commission's call for tenders FISH/2004/021 for the provision of computer and related services linked to the information systems of the Directorate - General for Fisheries. By the contested decision this bid was rejected and the contract awarded to another bidder, which was also the incumbent contractor.

In support of its application for annulment of that decision the applicant claims first of all that the Commission violated the principle of non-discrimination and of free competition. The applicant considers that the Commission's decision to impose a two month familiarisation period unfavourably discriminated in favour of the incumbent, for whom the familiarisation period was obviously not necessary. In the same context the applicant also contends that delivery of information to the tenderers regarding the software application subject to the call for tenders was insufficient whilst of course the incumbent had unlimited access to such information.

The applicant further submits that the Commission violated the Financial Regulation2 as well as Directive 92/503 by using evaluation criteria that were not included in the call for tenders, namely the size of the applicant's proposed team, which was considered excessive by the Commission, and the average number of years of experience of the applicant's team, which the Commission considered was lower than that of the team proposed by the successful tenderer.

The applicant further considers that the Commission committed manifest errors of appreciation in its evaluation of the applicant's tender and in particular in its assessments of the expertise of its proposed team and of the applicant's financial offer where, according to the applicant, the Commission mistakenly assumed that all sixteen persons proposed by the applicant would be working in parallel for the whole of the project.

The applicant also invokes a violation, by the Commission, of its obligation, under Article 253 EC, to state reasons and a failure to provide pertinent information requested by the applicant on the grounds for the rejection of its bid. The applicant also submits that the Commission violated the principle of good administration and diligence by acting with significant delay and by not offering adequate answers to the applicant's requests for information prior to the submission of the bids.

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[1] - OJ 004/S 73 - 061407

[2] - Coucil Regulatio (EC, Euratom) No 1605/2002 of 25 Jue 2002 o the Fiacial Regulatio applicable to the geeral budget of the Europea Commuities, OJ L 248 , 16/09/2002 p.1

[3] - Council Directive 92/5/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 29 , 24/7/1992 p. 1

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Notice for the OJ

Action brought on 2 December 2004 by Danish Management A/S against the Commission of the European Communities

(Case T-463/04)

Language of the case: English

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 2 December 2004 by Danish Management A/S, Viby J, Denmark, represented by C. Kennedy-Loest and C. Thomas, Solicitors.

The applicant claims that the Court should:

- annul the Commission's decisions of 18 November 2004 and 30 November 2004 rejecting the tender submitted by the applicant in tender procedure service contract for a monitoring system of the implementation of projects and programmes of external co-operation financed by the European Community - lot 2: ACP, South Africa and Cuba - EuropeAid 119453/C/SV/Multi;

- order the defendant to pay the applicant's costs.

Pleas in law and main arguments

The applicant submitted a tender for a service contract for a monitoring system of the implementation of projects and programmes of external co-operation financed by the European Community - lot no. 2 covering ACP, South Africa and Cuba, which was published the 26 May 2004 1.

The Commission rejected the tender by decision of 18 November 2004 on the grounds that there was a discrepancy between the applicants financial offer and technical offer as to the number of man/days required. The Commission upheld its decision by letter of 30 November 2004.

The applicant submits that the Commission's decision is based on an error of fact since, according to the applicant, there was no such discrepancy between the two parts of the companies tender.

The applicant further alleges that the Commission ought to have sought to clarify the alleged disrepancy and that in not having done so before rejecting the applicants tender the Commission has taken a disproportionate action and failed to exercise due diligence, whereby it infringed its duty of care.

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**Order of the President of the Court of First Instance
First InstanceFirst Instance2005. Capgemini Nederland BV v Commission of the European Communities. Public contracts for services - Community tendering procedure - Interim proceedings - Prima facie case - Urgency. Case T-447/04 R.**

1. Applications for interim measures - Suspension of operation of a measure - Interim measures - Conditions for granting - Prima facie case - Conclusion of a contract following a call for tenders - Financial evaluation system for tenders - Failure to comply with the administrative instructions of the tender documentation

(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

2. Applications for interim measures - Suspension of operation of a measure - Interim measures - Conditions for granting - Urgency - Serious and irreparable damage - Decision to reject a bid in a tendering procedure - Financial loss and loss of prestige - Damage not capable of being considered irreparable - Lack of urgency

(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

In Case T-447/04 R,

Capgemini Nederland BV, established in Utrecht (Netherlands), represented by M. Meulenbelt and H. Speyart, lawyers,

applicant,

v

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

defendant,

APPLICATION for suspension of operation, first, of the Commission's decision to reject the bid submitted by the applicant in response to a call for tenders (JAI-C3-2003-01) for the development and installation of a second-generation Schengen Information System (SIS II) and for the possible development and installation of a Visa Information System (VIS) in the field of justice and home affairs and of its decision to award the contract to another bidder and, secondly, of the Commission's decision to conclude a contract relating to the SIS II and VIS systems with another bidder,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Facts of the dispute

1. By a notice of tender published in the Supplement to the Official Journal of the European Union on 25 June 2003 (OJ 2003 S 119), the Commission invited bids in accordance with the restricted

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procedure under tendering procedure JAI-C3-2003-01 for the development and installation of a second-generation Schengen Information System (SIS II) and for the possible development and installation of a Visa Information System (VIS) in the field of justice and home affairs.

2. The bid submitted by the applicant was not selected at the end of the tendering procedure. The Commission decision rejecting its bid and selecting that of a third party was notified to it on 13 September 2004 (hereinafter the decision of 13 September 2004'). In that decision the Commission stated that it would observe a delay of two weeks before entering into the SIS II/VIS contract (hereinafter also the contract at issue') with the bidder who had submitted the best bid.

3. By facsimile dated 16 September 2004, the applicant requested the Commission to specify the grounds of the decision of 13 September 2004 in accordance with Article 100(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; hereinafter the Financial Regulation'). In it the applicant also challenged the Commission's expressed intention to award the contract within a two-week period and relied in that connection on the judgment in Case C-81/98 Alcatel Austria and Others [1999] ECR I7671.

4. By letter dated 30 September 2004 the Commission confirmed its intention to award the contract to a third party on the basis of a report drawn up in August 2004 by the evaluation committee (hereinafter the evaluation report'), which was appended to that letter. According to the evaluation report, two bidders including the applicant satisfied the technical evaluation stages and were admitted to the financial evaluation stage.

5. By letter dated 8 October 2004 the applicant informed the Commission that it appeared to it that, in light of the evaluation report, rejection of its bid was contrary to Community law. Accordingly, it requested the Commission not to pursue the procedure and to await an analysis which it undertook to forward to the Commission within a period of a week.

6. On 15 October 2004 the applicant communicated the results of its analysis to the Commission and sought explanations concerning the method of calculating the total value of its bid. Again the applicant requested the Commission not to pursue the award procedure.

7. On 22 October 2004 the Commission entered into the contract at issue with a group of undertakings led by the companies, STERIA-France and HP-Belgium (hereinafter the decision of 22 October 2004').

8. On 26 October 2004 the Commission published press release No IP/04/1300 announcing signature of the contract at issue with a group of undertakings led by the companies STERIA-France and HP-Belgium (hereinafter Steria/HP') with a global budget amounting to EUR 40 million.

9. On 5 November 2004 the applicant pointed out to the Commission that the amount of EUR 40 million announced in the press release exceeded the total amount of its bid. It also requested the Commission to reply to its letter of 15 October 2004 and not to enter into the contract at issue with Steria/HP.

10. By a letter dated 11 November 2004 the Commission dismissed the objections raised by the applicant in its letters of 8 and 15 October 2004.

Procedure

11. By an application lodged at the registry of the Court of First Instance on 15 November 2004 the applicant brought an action for the annulment, first, of the decision of 13 September 2004 and, secondly, of the decision of 22 October 2004.

12. By a separate document the applicant applied for its action for annulment to be decided under an expedited procedure pursuant to Article 76a of the Rules of Procedure.

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13. By a separate document lodged at the registry of the Court of First Instance on the same day the applicant brought the present application for interim relief in which it seeks:

- suspension of operation of the decision of 13 September 2004 and of the decision of 22 October 2004 pending a decision on the present claim;

- suspension of operation of those decisions pending a decision by the Court of First Instance on the main action;

- if it were to be the case that the contract at issue had already been entered into, suspension of operation of that contract pending a decision by the Court of First Instance on the main action;

- such other interim measure as may be deemed appropriate;

- an order for costs against the Commission.

14. In reply to a written question raised on 17 November 2004 by the President of the Court of First Instance, the Commission on the following day specified the date on which the contract at issue was entered into. It also indicated that it did not intend to suspend operation of it pending an order by the President.

15. By order of 18 November 2004 the President ordered the immediate suspension of operation of the contract at issue under the second subparagraph of Article 105(2) of the Rules of Procedure pending the final order in these interim proceedings.

16. The Commission submitted written observations on the interim application on 25 November 2004.

17. The parties presented oral argument at the hearing before the President on 2 December 2004.

18. On 8 December 2004 the Court of First Instance granted the applicant's request for adjudication under the expedited procedure.

Law

19. Under the provisions of Articles 242 EC and 243 EC read with Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe such interim measures as may be necessary.

20. Under Article 104(2) of the Rules of Procedure an application for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case (fumus boni juris) for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court in Case C-268/96 P(R) SCK and FNK v Commission [1996] ECR I4971, paragraph 30).

Arguments of the parties

Prima facie case

21. In regard to the decision of 13 September 2004 the applicant claims that the bid submitted by Steria/HP was in conformity neither with the financial conditions nor the technical conditions set out in the tender documentation.

22. In the first place, the financial conditions were not observed in several respects.

23. First, the method of financial evaluation selected by the Commission was unusual', inasmuch as it was not based on a fixed price for the project, or the sum of the prices submitted for the 15 separate items comprising the project. It was based on price ratios, that is to say the ratio between the price offered by a tenderer and the lowest price offered by the other tenderers selected,

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calculated at the level of each of the 15 items. An overall price ratio was subsequently determined by calculating the average of the price ratios of all 15 items. In that regard, the applicant stresses that, whilst it is for the Commission to decide upon a price evaluation system, it is also clear that this system will generate inequitable outcomes unless the Commission checks with particular diligence whether the prices allocated by the candidates for each individual item are credible, accurate, and not abnormally low. An incorrect analysis, in particular of the most minor items, will have a disproportionate effect on the overall price ratio.

24. The applicant points out that, given this method of evaluation, the tender requires tenderers to identify a price for each of the 15 items of the project. In that regard it refers to several provisions in the tender documentation including Clause 5.4 of the administrative instructions. The obligation to indicate a price was all the more necessary since the financial evaluation was based not on the overall sum of prices offered for the 15 items of the project but on price ratios calculated in respect of each item.

25. In the present case, it is clear from the evaluation report that Steria/HP deliberately chose not to indicate any price or left the price blank in respect of item 6 (simulators), item 7 (national interfaces) and item 11 (optional VIS functionalities). Instead of rejecting Steria/HP's offer as non-compliant, the Commission accepted it by entering a price of 0.01 under each of those items, which severely distorted the overall price ratio.

26. Secondly, the prices proposed by Steria/HP were abnormally low. In light of the method of financial evaluation selected by the Commission under which the 15 items had a significant impact on the overall price ratio, the rules relating to abnormally low offers ought to have been applied in respect of each of the 15 items. Indeed, apart from items 6, 7 and 11 of Steria/HP's offer, for which no price was indicated, the offer of that group of undertakings concerning items 1 (project management) and 2 (detailed design) ought to have given rise on the Commission's part to queries concerning the possibility of abnormally low prices. Yet it is plain from the Commission's letter of 11 November 2004 that it did not apply the rules relating to abnormally low offers in this case.

27. Thirdly, the Commission did not observe the principle that the economically most advantageous offer should be selected. This principle is laid down in Article 138(3) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1; hereinafter the implementing regulation'). In fact it is apparent from the Commission's press release dated 26 October 2004 that the overall amount of Steria/HP's offer was clearly higher than the applicant's offer. As regards the overall amount of its offer, the applicant claims that the Commission took into account an incorrect amount in its initial bid, which was higher than the actual amount, owing to the fact that it improperly ignored a corrigendum sent to it on 26 May 2004.

28. In the second place, the technical conditions of the call for tenders were said not to have been complied with. First of all, Steria/HP's offer did not include the development of national interfaces in accordance with the technical specifications contained in the call for tenders, even though the technical specifications provided for the installation of national interfaces at national level. The evidence available to the applicant in fact indicates that the solution proposed by Steria/HP did not include the installation of national interfaces on the sites of users, that is to say the Member States. That evidence also suggests that Steria/HP did not offer the development or delivery of national simulators which were none the less necessary for verifying the proper functioning of national interfaces.

29. Yet, according to settled case-law, an offer which does not comply with the key technical requirements set out in the tender documentation must be rejected. That rule was expressly reproduced in Article 1.3 of the technical specifications under which the entire text of the tender documentation was

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made binding on the Commission. If Steria/HP proposed an alternative technical solution (variant), the Commission ought to have rejected its offer immediately.

30. As regards the decision of 22 October 2004 the applicant maintains, first of all, that it should be set aside on the ground that the Commission infringed the principle of entitlement to effective judicial protection (Case 222/84 Johnston [1986] ECR 1651, paragraph 18, and Case C-50/00 P Union de Pequeños Agricultores v Council [2002] ECR I-6677, paragraph 39). As far as national public procurement cases are concerned, that principle has been developed in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), and has been upheld by the Court of Justice (judgment in Alcatel Austria and Others).

31. Under that principle, the awarding authority must allow for a reasonable period of time between the award of a contract and its conclusion, so that rejected tenderers can lodge an application, under national law, for interim measures against the award decision before the contract is concluded. Although neither the Financial Regulation nor its implementing regulation contain provisions on remedies before the Community courts, an obligation analogous to that flowing from Directive 89/665 applies in the present case under the general principle of the availability of an effective remedy.

32. In the present case the Commission decided to conclude the contract at issue without having set a realistic period in the 30 September 2004 letter which contained the first statement of reasons for the decision of 13 September 2004. That period would have enabled the applicant to prepare an effective remedy against that decision, through an application for interim measures following an application for annulment of the rejection decision. By setting a period of two weeks, the Commission de facto infringed the applicant's right to bring an action for annulment and an application for interim measures within the period of two months provided for in Article 230 EC and, consequently, infringed that provision.

33. Furthermore, in adopting the decision of 22 October 2004 the Commission infringed Article 103 of the Financial Regulat ion under which, where there is a possibility of an error or irregularity, there is an obligation on the institution concerned to suspend the procedure. Moreover, it is plain from Article 153(1) of the implementing regulation that the existence of a problem does not have to be established irrefutably in order for the first paragraph of Article 103 of the Financial Regulation to apply.

34. The Commission is of the view that the condition concerning a prima facie case is not satisfied.

35. As a preliminary point, the Commission points out that it has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Moreover, the applicant accepted the price evaluation method. In that connection section 3.1 of the administrative instructions clearly states that the submission of a tender offer entails irrevocable agreement of the tenderers to participate in all evaluation procedures foreseen in this call for tender'.

36. As to the alleged non-compliance with the financial conditions, the Commission contends, first, that the applicant is calling in question Steria/HP's offer for not fixing the price of certain items or pricing certain items at zero, even though the applicant itself did exactly the same thing in regard to several items including item 8 (user deliveries).

37. Moreover, according to the Commission, even though section 2.8 of the administrative instructions of the tender specifications in fact asked tenderers to indicate prices for all items, a price equal to zero is also a price that has to be accepted. In fact, it continues, the possibility of zero-pricing certain items could flow directly from the nature of the contract and be entirely justified.

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38. In that regard the Commission states that it was for the tenderers to propose the most apposite solutions for meeting the objectives and the strategic needs of the call for tenders. Accordingly, tenderers were expected to provide technical solutions. Thus, the zero-¡pricing of certain items does not constitute price manipulation.

39. In regard to the price alteration alleged to have been carried out by the Commission, the latter states that it entered the price of EUR 0.01 for the sole purpose of being able to carry out a mathematical calculation. That justificatory reason was also mentioned in the evaluation report and was applied to all items concerned and to all tenderers.

40. Secondly, the Commission considers that it in no way disregarded the rules concerning abnormally low offers. In fact, the overall contract value of SIS II and VIS was, according to the notice of tender, between EUR 28 and 38 million. The value of the contract signed being more than EUR 37 million, the tender could not be regarded as abnormally low within the meaning of Article 139 of the implementing regulation.

41. In regard, thirdly, to the alleged non-observance of the principle that the economically most advantageous offer must be selected, the Commission contends that the applicant did not submit an offer the overall value of which was lower that Steria/HP's offer. Whilst it was true that the applicant sent a corrigendum to the Commission on 26 May 2004, the Commission was under no obligation to take account of it. In fact, under Article 148(3) of the implementing regulation, the contracting authority may contact the tenderer, if obvious clerical errors in the tender must be corrected. In the present case the multiplication error by the applicant did not impose on the Commission any obligation to contact it.

42. As far as the alleged non-observance of technical criteria is concerned, the Commission contends that, in regard to national interfaces, it is important to distinguish between, on the one hand, a communication part and, on the other, a logical software part. Only the communication part which did not form part of the call for tenders, needs to be installed in Member States' premises, whereas the logical software part can be installed at central level. The definition of the national interface in the call for tenders does not specify whether it has to be installed, in all parts, at central level or national level but clearly states that the national interface remains under the responsibility of the central domain. The fact that it is possible to install the software part of a national interface centrally is confirmed by the study which the Commission commissioned from Deloitte & Touche and which was annexed to the call for tenders as a technical input document. That study deals exclusively with the question of whether the software part of the national interfaces should be better instal1ed at the central or the local level. Had it been decided that it would be mandatory to install all parts of the national interface in the Member States, it would obviously have made no sense to provide the study as a technical input document.

43. Moreover, in reply to an argument by the applicant, the Commission states that Steria/HP's offer clearly states that the pricing for the development of simulators (item 6) was located under item 5 (central domain).

44. As regards the arguments deployed in support of the alleged illegality of the decision of 22 October 2004, the Commission contends that it in no way infringed the principle of entitlement to an effective remedy, since Directive 89/665 and the judgment in Alcatel Austria and Others were not relevant to the case. Moreover, the decision of 13 September 2004 and the letter of 30 September 2004 addressed to the applicant fully complied with the Commission's obligations under the first sentence of Article 100(2) of the Financial Regulation to provide a statement of reasons. In fact the reasoning contained in the letter of 30 September 2004 manifestly enabled the applicant to take legal proceedings.

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45. As to Article 103 of the Financial Regulation invoked by the applicant, that provision is not applicable in the present case.

Urgency

46. The applicant claims that, if the interim measures sought are not granted, it is likely to suffer serious and irreparable damage.

47. The damage suffered would be serious because the only offers considered in the final round of the tendering procedure were its and Steria/HP's. Rejection of Steria/HP's bid would have resulted in the award to it of the contract.

48. Since, moreover, the SIS II/VIS project is an exceptionally high-profile project, the loss suffered by the applicant includes the loss of a major reference in the public sector as well as the loss of an opportunity to demonstrate its capacity to develop large-scale IT systems on an international scale.

49. In that connection the applicant adds that the companies involved in the implementation of the project will be in a very advantageous position to compete for future SIS II and VIS related contracts that will be awarded by the Commission, for example for the extension of the system to other Member States, and by the countries and the local authorities of the Schengen area, for example for updating their national information systems. The total value of these follow-up contracts is significantly higher than the value of the central system' put to tender by the Commission.

50. The damage suffered would also be irreparable. The award of the contract, and, a fortiori, the execution and performance of this contract, even for the duration of the interim measures proceedings, would make it impossible for the Commission to go back on the disputed decision. The only way to avoid a fait accompli would be an immediate suspension of the operation of those decisions. If no interim measures were adopted, an annulment judgment by the Court of First Instance would be devoid of effectiveness. As the Community judicature has held, a decision on the merits after performance of the contract cannot reverse the damage suffered by the Community legal order and by the rejected tenderers (order of the President of the Court in Case C-87/94 R Commission v Belgium [1994] ECR I1395, paragraph 31). Accordingly, an award of damages would not constitute appropriate reparation.

51. At the hearing the applicant maintained that the present case may be distinguished from the orders of the President of the Court of First Instance in Case T-148/04 R TQ3 Travel Solutions Belgium v Commission [2004] ECR II-0000 and Case T303/04 R European Dynamics v Commission [2004] ECR II-0000, inasmuch as unlike the contracts in those cases the contract at issue is very narrow owing to its unique character in Europe and perhaps in the whole world. Access to the market at issue may be secured only by the successful bidder in the tendering procedure at issue.

52. The Commission stresses that the applicant has no entitlement to the award of the contract even were the decision of 13 September 2004 and the decision of 22 October 2004 to be annulled. Moreover, it notes that, if the Court of First Instance were to establish that an error was committed in the course of the financial evaluation, the same error also affected the offer submitted by the applicant since it entered a zero price for certain items.

53. It is settled case-law that the loss of a reference or opportunity to demonstrate a certain capacity does not have the consequence of causing such damage as to justify the adoption of urgent interim measures. In particular, the loss of a reference does not prevent the applicant from successfully participating in future calls for tenders. Moreover, damage which is purely hypothetical in so far as it is based on the occurrence of future and uncertain events cannot justify the grant of the interim measures sought.

54. As to the allegedly irreparable nature of the damage, the Commission emphasises as a preliminary

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matter that the order in Commission v Belgium is in no way relevant to the present case inasmuch as Article 226 EC and the fourth paragraph of Article 230 EC pursue different objectives. More specifically, one of the reasons why the grant of interim measures could be envisaged in the case giving rise to the order in Commission v Belgium was the absence of any other measure protective of tenderers' interests.

55. Moreover, damage cannot be deemed irreparable, or even be deemed to be damage in respect of which reparation is difficult, if compensation may subsequently be obtained by means of an action for compensation under Article 288 EC.

56. Finally, the extent and reality of the damage suffered owing to rejection of the applicant's bid have not been demonstrated, nor has its seriousness and irreparable nature. Nor has the applicant shown that its very existence would be likely to be compromised or that its position in the market would be irremediably altered.

57. According to the settled case-law of the Court of First Instance, the fact that the contract at issue is in course of performance on the date of judgment in the main proceedings, is not a valid argument for proving urgency (TQ3 Travel Solutions Belgium , paragraph 55). Indeed, the rejection of the applicant's bid, were it not justified, could be repaired: the costs of participating in the tender procedure could be quantified and made good, a pecuniary compensation envisaged and the applicant would be free to take part in a fresh call for tenders. At the hearing the Commission stated in that regard that, where a decision is annulled, it is for the institution concerned under Article 233 EC to take such consequential action as may be necessary, whilst observing the operative part of the judgment. None the less, neither the applicable rules nor the case-law of the Community courts make provision in regard to such consequences where a contract has been signed and is in course of performance. The present case concerns a contract which is valid under Belgian civil law. Moreover, annulment of the contract at issue would entail lengthy delays in the accomplishment of the SIS II/VIS project, which would prejudice the development and maintenance of an area of freedom, security and justice (Article 2 EU).

Balance of interests

58. The applicant claims, first, that the infringement of Community procurement law and the damage that such infringement inflicts upon the Community legal order, and on the rights of other tenderers, in themselves, constitute a serious interest to be protected by the Community courts (order in Commission v Belgium).

59. Second, a limited delay in the implementation of the SIS II/VIS project would not disproportionately harm the interests of the Commission and the Member States. The current Schengen Information System does not need to be replaced by the future system before the end of 2007; nor does provisional acceptance of the SIS II system have to take place before 31 March 2007. There is no indication at all that a limited delay beyond this date would cause harm of great significance or, alternatively, that such harm could not be mitigated to an acceptable degree by slightly increasing the speed of implementation. Conversely, performance of the contract at issue would create or contribute to a fait accompli representing serious and irreparable harm both to the applicant and to the Community legal order.

60. Third, rejection of Steria/HP's offer, and award of the contract to the applicant could be implemented within a very short time. Alternative measures to redress the infringements of Community law are available, for example allowing the applicant to submit a bid on the criteria that were apparently accepted for award of the contract to Steria/HP, or re-tendering the contract.

61. Fourth, even on the assumption that the suspension of operation of the decision of 13 September 2004 and the decision of 22 October 2004 would cause damage to the Commission or the Member States,

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the potential damage to the Commission is self-inflicted. The applicant consistently acted with great speed, which is a relevant factor in determining the balance of interests (order in Commission v Belgium , paragraph 34).

62. Fifth, the applicant submitted at the hearing that the Commission's assertions concerning the timetable for accomplishment of the project carried little conviction. Those assertions were, moreover, contradicted by a document of the Council dated 23 November 2001 exchanged between the delegations of the Member States responsible for implementation of the SIS system from which it appeared that it would be possible to continue with the current SIS system, even with 30 Member States.

63. Sixth, the applicant also referred at the hearing to the fact that the Council had already in 2001 entrusted the Commission with the task of developing the SIS II system. Moreover, the applicant maintained that provision was initially made for commencement of the SIS II/VIS project in January 2004. It cannot be accepted that the Commission can belatedly organise a tendering procedure at the same time as alleging that there is such a degree of urgency as to preclude the grant of interim measures.

64. The Commission contends that the grant of interim measures would occasion damage to the Community, the Commission, the Member States, non-member States, and indeed to the incumbent contractor, and that such damage far outweighs any potential damage to the applicant if interim measures are not granted.

Findings of the President

Prima facie case

65. It must be observed that, in its application for interim measures, the applicant makes a distinction between, on the one hand, the grounds of annulment of the decision of 13 September 2004 (paragraphs 21 to 29 above) and, on the other, the grounds of annulment referring to the decision of 22 October 2004 (paragraphs 30 to 33 above).

66. On that point the President considers that, were the decision of 13 September 2004 rejecting the applicant's bid and accepting the bid of a third party to be annulled, the decision of 22 October 2004 would be deprived of its legal basis. The latter decision would consequentially be vitiated by illegality and would therefore also have to be annulled.

67. It is therefore sufficient at an initial stage to examine whether the grounds of annulment of the decision of 13 September 2004, as set out in the application for interim measures, appear prima facie to be well founded.

68. As a preliminary matter it should be pointed out, first of all, that under Article 89(1) of the Financial Regulation all public contracts financed in whole or in part by the budget have to comply with the principles of transparency, proportionality, equal treatment and non-discrimination. Next, under Article 97(1) of the Financial Regulation the selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders are to be defined in advance and set out in the call for tender. Finally, it is settled case-law that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way (see, by analogy, judgment in Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 42).

69. It should further be observed, also as a preliminary matter, that, in accordance with settled case-law, the Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (Case 56/77

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Agence européenne d'interims v Commission [1978] ECR 2215, paragraph 20, and Case T-19/95 Adia interim v Commission [1996] ECR II-321, paragraph 49).

70. Having formulated those preliminary observations, the President considers that two of the grounds raised by the applicant are of a serious nature.

71. The first ground alleges a manifest error in the assessment of the financial evaluation of the offer submitted by Steria/HP, stemming from the fact that it did not state a price for each of the 15 items of its bid.

72. The question arises as to whether the applicant has adduced evidence from which it may be concluded that prima facie it cannot be preclude d that the Commission manifestly erred in its assessment, inasmuch as it applied the financial evaluation system provided for in the call for tenders in such a way that the financial bids did not reflect their actual value in that connection.

73. In the context of these proceedings the Commission asserted, on the one hand, that section 2.8 of the administrative instructions of the tender documentation asked tenderers to indicate prices for all items and that a zero price was also a price that had to be accepted. In that regard Steria/HP's offer did not indicate a price or indicated a zero price for item 6 (simulators), item 7 (national interfaces) and item 11 (optional VIS functionalities) but the prices of each of these items were included in the valuation of the amount of other items with which they were inextricably linked from a technical point of view. Thus, the prices for items 6, 7 and 11 were respectively included in items 4 (central system), 3 (system environments) and 2 (detailed design).

74. The question therefore arises as to whether prima facie the Commission manifestly erred in its assessment by accepting as compliant with the tender specification the lack of indication of a price or the indication of a zero price for one or more items of the offer, where the solution proposed for that item or those items and the prices relating to them were included in one or several other items of that offer.

75. It should be noted on this point that section 2.8 of the administrative instructions of the tender specification provided that, for the purposes of the financial evaluation, tenderers had to indicate prices for all items and that, as regards the financial sheets, all prices had to be expressed in euros, be clearly stated and, where appropriate, indicate all pricing elements for all items and sub-items.

76. It is clear from this provision that the price had to be indicated for each item proposed in the bid and that it could not be included under another item.

77. That conclusion is corroborated by the very purpose of the financial evaluation system selected in the context of the procedure for the call for tenders at issue.

78. Thus, section 5.4 of the administrative instructions of the tender documentation entitled financial evaluation' opted for a system based on 15 separate items. For the purposes of financial evaluation offers were assessed not on the basis of the global sum of the prices offered for the fifteen separate items but in relation to the price ratios calculated in respect of each item. In fact, for each item the method of evaluation employed by the Commission was based on a score awarded to each tenderer on the basis of the ratio between, on the one hand, the price offered by the tenderer and, on the other, the lowest price offered by the other tenderers selected for the purposes of financial evaluation. As the applicant emphasises, without being contradicted by the Commission, the score in respect of each item was therefore accorded equal weight, whatever the scope and complexity of the various items.

79. Accordingly, to accept the Commission's argument that a zero price could be indicated for an item in respect of a technical solution would be to concede that a tenderer could artificially improve

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his overall price ratio and, thereby, obtain the best overall price ratio even though his overall bid value was not the lowest. In fact, as the applicant correctly observed, that system enabled a tenderer artificially to improve his overall price ratio, for example by taking EUR 500 000 from two items worth EUR 1 million each, and adding these amounts to an item worth EUR 10 million. A tenderer could also achieve an unbeatable overa11 ratio by offering an artificial price of less than half the price of its competitor for five or six smaller items. Thus the best overall price ratio could be obtained even though the overall bid value was manifestly higher than that of all the other bids. The President notes that the Commission has not explained how the detailed rules governing application of the financial evaluation system selected by it enabled such a risk to be avoided.

80. That finding is in no way affected by the Commission's argument to the effect that it did not wish to deprive tenderers of the opportunity of proposing their technical solutions in an unrestricted way. Apart from the fact that that argument relates to the technical evaluation and not the financial evaluation, it is not even argued that it would not have been possible to indicate an approximate price for each bid item, though the technical solution was included under another item.

81. The interpretation of the financial instructions of the tender specification proposed by the Commission in no way guarantees that the economically most advantageous offer has been selected, contrary to the principle, applicable in this case, that the most economically advantageous tender should be accepted (section IV.2 of the contract notice).

82. In those circumstances, it must be considered, prima facie, that the Commission disregarded the technical specification and committed a manifest error of assessment by accepting the absence of any indication of a price or the indication of a zero price for certain items of Steria/HP'S offer, even though it cannot be precluded that the latter's offer ought to have been rejected because it did not observe the conditions of the call for tenders.

83. The second ground considered serious by the President relates to non-observance of the technical condition of the bid relating to national interfaces (item 7). In fact, the applicant criticises the solution proposed by Steria/HP because it did not involve installation of national interfaces on the sites of users, that is to say the Member States, although that was a requirement under the contract notice.

84. In that connection it must be stated that the requirements of the tender documentation prima facie support the analysis that the national interfaces must be installed on user sites (section 2.2 of the SIS II module; sections 2.1.2, 4.1 and 4.3 of the common requirements; section 2.5.2 of the administrative instructions). In particular, under section 4.1 of the common requirements national interfaces must be installed on the User's own premises'. Under section 2.5.2 of the administrative instructions the places of delivery for deliverables destined for users (e.g. national interfaces) [would] be defined at signature of the contract'.

85. Moreover, both in its application and at the hearing the applicant explained in greater detail the reasons why the installation of national interfaces at national level is crucial.

86. At this stage the replies by the Commission to those arguments do not dispel the lack of precision concerning the technical specifications in regard to the location in which the national interfaces are to be installed.

87. Consequently, it cannot be precluded that the interpretation of the technical specifications put forward by the applicant is correct and that, accordingly, Steria/HP's bid contravened the technical specifications in the call for tenders.

88. In light of the foregoing it must be concluded that the condition relating to a prima facie

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case is satisfied.

Urgency

89. As was held in the order of the President of the Court in Case C65/99 P(R) Willeme v Commission [1999] ECR I-1857, the purpose of interim proceedings is not to secure reparation of damage but to guarantee the full effectiveness of the judgment on the substance. In order that the latter objective may be attained, the measures sought must be urgent in the sense that, in order to avoid serious and irreparable damage to the applicant's interests, they must be ordered and become effective even before the decision in the main proceedings (paragraph 62). It is for the party applying for interim measures to adduce proof that it cannot await the outcome of the main action without suffering serious and irreparable damage (order of the President of the Court of First Instance in Case T-169/00 R Esedra v Commission [2000] ECR II-2951, paragraph 43).

90. In the present case the applicant maintains that the damage suffered owing to the fact that the contract at issue was not awarded to it is of an irreparable nature, inasmuch as annulment of the decision of 13 September 2004 and the decision of 22 October 2004 would, in the absence of any interim measure, produce no useful effect.

91. That argument cannot be upheld.

92. First of all, on the supposition that the Court of First Instance annuls those decisions it is in no way established, contrary to the applicant's assertions, that the contract would be awarded to it. In that regard, just as the successful bidder, the applicant proposed a zero price for an item of the project, namely item 8. Accordingly, the applicant's bid is prima facie affected by a lacuna analogous to the lacunae affecting the successful tenderer's bid.

93. Next, there is no warrant for concluding that, as is maintained by the applicant, its interests would not be adequately protected in the event of annulment by the Court of First Instance of the decision of 13 September 2004 and the decision of 22 October 2004.

94. It must first be noted that it is not correct to assert that compensation constitutes the sole means of compliance with an annulment judgment.

95. Under Article 233 EC it is the institution whose act has been declared void which is required to take the measures necessary for compliance with the judgment of the Court of First Instance. It follows, first, that the court annulling an act has no jurisdiction to direct the institution whose act it has annulled as to the manner in which a judgment is to be complied with (order of the Court of Justice of 26 October 1995 in Joined Cases C-199/94 P and C-200/94 P Pevasa and Inpesca v Commission [1995] ECR I-3709, paragraph 24). Secondly, the judge hearing the interim application cannot prejudge the measures which might be adopted following a judgment annulling an act. The manner in which a judgment annulling an act may be complied with depends not only on the provision annulled and the scope of the judgment in question, which must be appraised by reference to the grounds thereof (Joined Cases 97/86, 193/86, 99/86 and 215/86 Asteris and Others v Commission [1988] ECR I-2181, paragraph 27, and Joined Cases T305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T328/94, T-329/94 and T-335/94 Limburgse Vinyl Maatschappij and Others v Commission [1999] ECR II-931, paragraph 184), but also on other factors specific to each case such as the period within which the annulment of the contested act comes into effect or the interests of third parties concerned.

96. In the present case in the event of annulment of the decision of 13 September 2004 and of the decision of 22 October 2004, it would be for the Commission, in light of the specific circumstances of this case, to adopt the necessary measures for ensuring appropriate protection of the applicant's interests (order of the President of the Court of First Instance in Case T-108/94 R Candiotte

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v Council [1994] ECR II-249, paragraph 27; and orders in Esedra v C ommission, paragraph 51, and TQ3 Travel Solutions Belgium v Commission, paragraph 55).

97. In that context it is important to emphasise the fact that the applicant brought its main application and its application for interim measures after the conclusion of the contract at issue and that therefore the application for interim measures did not enable the President of the Court of First Instance to prevent signature of the contract, whereas the applicant could have brought an action for annulment of the decision of 13 September 2004, at the same time as an application for interim measures, within the period of three weeks which elapsed between the date on which the Commission communicated to it the evaluation report (30 September 2004) and the date of signature of the contract (22 October 2004). It is none the less pointed out, first, that the stay ordered by way of a protective measure by the President (see paragraph 15 above) had the effect of suspending the operation of the contract at issue. Second, the Court of First Instance agreed to adjudication of the main action under the expedited procedure (see paragraph 18 above). Consequently, judgment will be given within a short period of time (see, in regard to an analogous situation, the judgment in Case T-211/02 Tideland Signal v Commission [2002] ECR II-3781). In those circumstances it can in no way be precluded that the Commission may be directed to bring the contract at issue to an end and to organise a fresh procedure for the award of the public contract at issue in which the applicant could take part.

98. It must be noted, second, that even if the Commission decided to make a payment of damages in reparation of the loss suffered by the applicant, such manner of compliance with any annulment judgment could, under settled case-law, be regarded as constituting adequate reparation. Consequently, the potential loss suffered by the applicant cannot be regarded as irreparable once it can be the subject of subsequent financial compensation (see order in Esedra v Commission , paragraph 44 and case-law cited; and order in TQ3 Travel Solutions Belgium v Commission , paragraph 43).

99. In any event, even in the absence of voluntary reparation on the part of the Commission, it cannot but be noted that the applicant could, in the absence of indications to the contrary, bring an action for damages before the Court of First Instance, given that loss of a contract is a loss in respect of which financial reparation may be afforded by way of an action under Article 288 EC (order in Esedra v C ommission, paragraph 47; order of the President of the Court of First Instance in Case T-132/01 R Euroalliages and Others v Commission [2002] ECR II-777, paragraphs 51 to 53; and order in TQ3 Travel Solutions Belgium v Commission, cited above, paragraph 45).

100. In light of those considerations it cannot but be noted that the situation giving rise to the present dispute is fundamentally different to that in Commission v Belgium on which the applicant places reliance. Contrary to the finding in that case, it cannot be concluded in this case that a decision on the substance, even if made during the course of performance of the contract, would be unable to afford reparation of the damage to both the Community legal order and the applicant.

101. In light of the foregoing the interim measures sought would therefore be justified only in exceptional circumstances, that is to say if it appeared that, in the absence of such measures, the applicant would be in a situation likely to jeopardise its very existence or irremediably alter its position in the market (see, to that effect, orders in Esedra v Commission, paragraph 45, and TQ3 Travel Solutions Belgium v Commission, paragraph 46).

102. In that regard it cannot but be noted that, whilst the applicant maintains that the award to it of the contract at issue would be beneficial, it is not maintaining that the decisions of 13 September 2004 and 22 October 2004 entail financial consequences such as to jeopardise its very existence. In fact, the applicant has in no way argued to that effect and has adduced no item of evidence concerning its financial situation which might lead the President to conclude that its existence was imperilled.

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103. The only actual effects which the applicant associates with execution of the decision of 13 September 2004 and with the decision of 22 October 2004 are the loss of a major reference and the alleged difficulty of usefully tendering in the future in the context of projects connected with the contract at issue. To the extent to which those effects may be regarded as seeking to establish the irreparable nature of the alleged damage, the evidence in the case-file none the less does not permit an appraisal of their actual impact on the applicant's situation. In particular, the applicant has not demonstrated that that reference was essential to it or that it would be prevented in the future from accomplishing other projects of the same scale. Nor, moreover, has it adduced evidence from which it might be concluded that serious and irreparable damage has been done to its reputation or, a fortiori, that such damage prevents it from taking part in future calls for tenders by the Commission in connection with the SIS II and VIS systems. In that context, it should be added that, in any event, participation in a public call for tender procedure, which is by its nature highly competitive, necessarily entails risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial and cannot therefore, as a matter of principle, be regarded as damaging its reputation (see, in that connection, order of the President of the Court in Case 118/83 R CMC v Commission [1983] ECR 2583, paragraph 51, and the order in Esedra v Commission, paragraph 48).

104. In those circumstances it must be concluded that the evidence adduced by the applicant does not enable it to be established to the requisite legal standard that, failing the grant of the interim measures sought, the applicant would suffer serious and irreparable damage.

105. In light of the foregoing, it must be concluded that the condition relating to urgency is not satisfied and that therefore the application for interim measures must be rejected.

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62000B0169 : N 89 96 98 99 101 103
62001B0132 : N 99
62002A0211 : N 97
62004B0148 : N 96 98 99 101

SUB	Public contracts of the European Communities
AUTLANG	English
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Netherlands
PROCEDU	Action for annulment;Application for interim measures - unfounded
DATES	of document: 31/01/2005 of application: 15/11/2004

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Notice for the OJ

31 JANUARY 2005447/04 RCAPGEMINI NEDERLAND BVCOMMISSION OF THE EUROPEAN COMMUNITIESENGLISHUTRECHT (NETHERLANDS)M. MEULENBELT AND H. SPEYART

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

of 31 January 2005

in Case T-447/04 R Capgemini Nederland BV v Commission of the European Communities

(Public contracts for services - Community tendering procedure - Interim proceedings - Prima facie case - Urgency)

(Language of the case: English)

In Case T-447/04 R: Capgemini Nederland BV, established in Utrecht (Netherlands), represented by M. Meulenbelt and H. Speyart, lawyers, against Commission of the European Communities (Agent: L. Parpala, with an address for service in Luxembourg) - application for suspension of operation, first, of the Commission's decision to reject the bid submitted by the applicant in response to a call for tenders (JAI-C3-2003-01) for the development and installation of a second-generation Schengen Information System (SIS II) and for the possible development and installation of a Visa Information System (VIS) in the field of justice and home affairs and of its decision to award the contract to another bidder and, secondly, of the Commission's decision to conclude a contract relating to the SIS II and VIS systems with another bidder – the President of the Court of First Instance has made an order on 31 January 2005, the operative part of which is as follows:

The application for interim measures is dismissed.

2. Costs are reserved.

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Notice for the OJ

Action brought on 15 November 2004 by Capgemini Nederland B.V. against the Commission of the European communities

(Case T-447/04)

Language of the case: English

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 15 November 2004 by Capgemini Nederland B.V.,Utrecht, The Netherlands, represented by M. Meulenbelt and H. Speyart, lawyers.

The applicant claims that the Court should:

- Annul the Commission's decision, notified to the applicant by letter dated 13 September 2004, not to retain the applicant's offer in the context of the call for tender JAI-C3-2003-01;

- Annul the Commission's decision to sign a contract with another tenderer;

- Order the Commission to pay its own costs and those of the applicant.

Pleas in law and main arguments

On 25 June 2003 the Commission published a Contract Notice for the development and installation of a large scale information system in the field of justice and home affairs, referred to as SIS II and VIS. The applicant submitted a bid. By letter dated 13 September 2004 the Commission notified the applicant of its decision not to retain its offer and to award the contract to another tenderer. In the same letter it informed the applicant that it would not be signing the contract with the successful tenderer before the expiry of a period of two weeks from the date of the letter. An exchange of correspondence between the applicant and the Commission followed, in the course of which the Commission confirmed its intention to award the contract to another tenderer. On 26 October 2004 the Commission published a press release stating that it had signed a contract with the successful tenderer.

By its application the applicant requests the annulment of both the Commission's decision to reject its offer as well as the decision to sign a contract with the successful tenderer. In support of the request to annul the decision rejecting the applicant's offer, the applicant invokes a number of alleged violations of Regulation 1605/20021 (the Financial Regulation) and of Regulation 2342/20022 laying down detailed rules for the implementation of the Financial Regulation. In this context the applicant submits that the method of price evaluation chosen by the Commission is unusual in that it is not based on a fixed price for the project but rather on price ratios between the price offered by each particular tenderer and the lowest price offered, calculated at the level of each of the 15 individual items included in the project, which all carry equal weight even though they are of greatly diverging sizes. Use of this method, according to the applicant, did not result in a fair and equitable outcome. The applicant further alleges that the Commission failed to react to abnormally low prices in the successful tenderer's offer, failed to take into account a corrigendum submitted by the applicant and failed to reject the successful tenderer's offer in spite of non-compliance with technical criteria. The applicant also claims that the commission violated the "best value for money" principle since the total contract value for the successful tenderer is higher than that for the applicant.

In support of its request to annul the decision to sign a contract with the successful tenderer the applicant submits that by concluding that contract the Commission willingly deprived the applicant of an effective remedy. The applicant also invokes, in this context, a violation of Article 230 EC arguing that, by informing the applicant that it would only wait for two weeks before signing the contract with the successful tenderer, the Commission effectively shortened the two-month time limit for the introduction of an application set out in that article. Finally, the applicant argues that the Commission violated Article 103 of Regulation 1605/2002 by failing to suspend the procedure leading to the decision to sign the contract even though the applicant, by its letters, had drawn its attention to possible irregularities in the award procedure.

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[1] - OJ 00, L48 p. 1

[2] - OJ 00, L357 p. 1

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ORDER OF THE PRESIDENT OF THE FIFTH CHAMBER
OF THE COURT OF FIRST INSTANCE

17 November 2006(*)

(Removal from the Register)

In Case T-303/04,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis and N. Keramidas, lawyers,

applicant,

v

Commission of the European Communities, represented by L. Parpala and E. Manhaeve, acting as agents, assisted by J. Stuyck, lawyer,

defendant,

APPLICATION for annulment of the tender procedure concerning the provision of services for data and information management applications and of the Commission's decisions relative to the evaluation of tenders,

THE PRESIDENT OF THE FIFTH CHAMBER
OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By letter lodged at the Court Registry on 11 October 2006, the applicant informed the Court of First Instance, in accordance with Article 99 of the Rules of Procedure of the Court of First Instance, that it wishes to discontinue the proceedings and requested that each party bears its own costs.

2 By letter lodged at the Court Registry on 20 October 2006, the defendant indicated to the Court of First Instance that it had no objection to the discontinuance and requested that, in accordance with Article 87(5) of the Rules of Procedure, the applicant be ordered to pay the costs. The defendant denies the existence of any amicable settlement between the parties as suggested in the application for discontinuance.

3 Article 87(5), first subparagraph, of the Rules of Procedure provides that the party who discontinues or withdraws from proceedings be ordered to bear the costs, if they have been applied for in the observations of the other party on the discontinuance. In the present case, the defendant applied for the applicant to bear the costs, both in relation to the main application as well as to the two applications for interim measures.

4 It is, therefore, appropriate to order that the applicant bears its own costs and the costs incurred by the defendant.

On those grounds,

THE PRESIDENT OF THE FIFTH CHAMBER

hereby orders:

1. **Case T-303/04 is removed from the register of the Court of First Instance.**

2. **The applicant shall bear its own costs and the costs incurred by the defendant in Case T-303/04 as well as in the interim measures CasesT-303/04 R-I and T-303/04 R-II.**

Luxembourg, 17 November 2006.

E. Coulon — M. Vilaras

Registrar — President

* Language of the case: English.

**Order of the President of the Court of First Instance
First InstanceFirst Instance2004. European Dynamics SA v Commission of the European Communities. Public service contracts - Community tender procedure - Interim measures - Application for suspension of operation - Urgency - New application - New facts - None. Case T-303/04 R II.**

1. Applications for interim measures - Suspension of operation of a measure - Interim measures - Conditions for granting - Prima facie case - Cumulative nature - Provisional nature of the measure - Weighing-up of the interests at stake - Discretion of the judge dealing with the application for interim relief

(Arts 225(1) EC, 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

2. Applications for interim measures - Suspension of operation of a measure - Interim measures - Variation or cancellation - Condition - Change in circumstances - Variation or cancellation when the application is dismissed - Not covered

(Rules of Procedure of the Court of First Instance, Art. 108)

3. Applications for interim measures - Suspension of operation of a measure - Rejection of the application - Possibility of lodging another application - Condition - New facts - Meaning

(Rules of Procedure of the Court of First Instance, Art. 109)

1. Applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that those applications must be dismissed if any one of them is absent. The measures sought must also be provisional, in that they must not prejudge the points of law or fact at issue or neutralise in advance the effects of the decision subsequently to be given in the main action.

In the context of that overall examination, the judge hearing the application must, where appropriate, balance the interests concerned. He enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed.

(see paras 29-31)

2. Article 108 of the Rules of Procedure of the Court of First Instance, which provides that, on application by a party, an order may at any time be varied or cancelled on account of a change in circumstances, is applicable in situations where an order prescribing interim measures is in place. It cannot be applied to situations where an application has been dismissed, such situations being governed by Article 109 of those rules.

(see para. 54)

3. According to Article 109 of the Rules of Procedure of the Court of First Instance, rejection of an application for an interim measure shall not bar the party who made it from making a further application on the basis of new facts. It is for the applicant to show that the conditions allowing the making of a further application, set out in Article 109 of the Rules of Procedure, are met. New facts' within the meaning of that provision should be taken to mean facts which appear after the order rejecting the first application was made or during the proceedings leading to the first order or which the applicant was not capable of invoking in the first application and which are relevant to the assessment of the case in question.

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(see paras 55, 57, 60)

In Case T303/04 R II,

European Dynamics SA, established in Athens (Greece), represented by S. Pappas, lawyer,

applicant,

v

Commission of the European Communities, represented by L. Parpala and E. Manhaeve, acting as Agents, and J. Stuyck, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for suspension of operation of, first, the Commission's decision of 4 June 2004 (DIGIT/R2/CTR/mas D(2004) 324) to rank only in second place the offer submitted by the consortium of which the applicant is a member following a call for tenders for the provision of informatics services and, second, the Commission's decision of 14 July 2004 (DG DIGIT/R2/CTR/mas D(2004) 811) rejecting the applicant's complaints of 21 June, 1, 5 and 8 July 2004 against the award of the contract to another consortium,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 22 December 2004.

Facts of the dispute

1. European Dynamics SA is active in the field of information and communications technology, inter alia for the European institutions.

2. Following call for tenders ADMIN/DI/0005 ESP (External Service Providers') of 16 March 2001, the Commission concluded a number of framework contracts, applying the award system laid down for awards of multiple contracts in Article 1.4 of the General Terms and Conditions for Informatics Contracts published by the Commission on 11 June 1998 (the cascade' system), for the provision of external services relating to information systems. The overall contract was divided into nine lots, among which were Lot 4, for the provision of external services relating to data management applications and information systems (Lot ESP 4'), and Lot 5, for the provision of external services relating to internet and intranet applications (Lot ESP 5').

3. The applicant is a member of a consortium consisting of European Dynamics, IRIS SA, Datacep SA, Primesphere SA and Reggiani SpA (the ESP 5 consortium'), which is the contractor selected as first in the cascade for Lot ESP 5 and with which the Commission signed, on 5 November 2001, framework contract DI-02432-00 for the provision of services for Lot ESP 5.

4. With respect to Lot ESP 4, the contractor selected as first in the cascade is a consortium

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consisting of Trasys SA and Cronos Luxembourg SA, which later became Sword Technologies SA (the ESP 4 consortium'), with which the Commission signed, on 16 October 2001, a framework contract under reference DI0243200 for the provision of services for Lot ESP 4.

5. On 27 December 2003 the Commission launched a call for tenders under reference ADMIN/DI2/PO/2003/192 ESP-DIMA for the provision of on- and off-site IT services for data/information management systems at the European Commission including development, maintenance and other related activities' (the ESPDIMA call for tenders').

6. Following that call for tenders, the Commission services and the applicant engaged in correspondence and discussions regarding the applicant's concerns as to the implementation of Lot ESP 5 and Lot ESP 4 (the applicant considering in substance that Lot ESP 5 had been under-used to the advantage of Lot ESP 4) and the applicant's calls for the cancellation of the ESP-DIMA tender procedure. According to the applicant, that procedure had no raison d'être since, instead of using ESP-DIMA to replace ESP 4, whose budgetary ceiling had been reached, the Commission should have had recourse to Lot ESP 5 instead.

7. For a more detailed exposition of the facts underlying the dispute between the Commission and the applicant as to the raison d'être of ESP-DIMA and the implementation of Lot ESP 4 and Lot ESP 5, reference is made to the facts set out in the Order of the President of the Court of First Instance of 10 November 2004 in Case T303/04 R European Dynamics v Commission (the Order of 10 November'), dismissing the first application for interim measures made in this case.

8. On 20 February 2004 European Dynamics, IRIS, Datacep and Reggiani (in other words the companies forming the ESP 5 consortium minus Primesphere, the ED consortium') submitted a joint tender in response to the ESP-DIMA call for tenders.

9. On 2 June 2004 the Commission awarded the ESP-DIMA contract. The tenderer selected to be first in the cascade was a consortium of Trasys and Sword Technologies with Intrasoft International SA and TXT SpA (in other words the ESP 4 consortium plus two additional partners, the ESP-DIMA consortium'). The ED consortium was selected as second contractor in the cascade, followed by other tenderers in third and fourth places in the cascade.

10. Those results were notified to all the tenderers, including the ED consortium, by letter of 4 June 2004 (the award decision').

11. By fax of 8 June 2004, European Dynamics requested further details of the award decision. The Commission replied by letter of 9 June 2004, giving fuller information on the results of the technical evaluation in respect of each of the relevant criteria.

12. By letter of 14 July 2004 (the letter giving reasons'), the Commission replied to the points raised by European Dynamics in the above letters and refused to send it a copy of the evaluation report, stating that that would involve communicating confidential commercial information on other tenderers. As regards the doubts raised concerning the need to launch the ESP-DIMA call for tenders and the suggestion that Lot ESP 5 should be used for the provision of services covered by Lot ESP 4, the Commission said that DG Informatics had stated in a letter of 30 January 2004 that as the two lots represented separate and distinctly different markets it was not possible to switch from one to the other simply because one lot had not yet reached its budgetary ceiling. Launching a call for tenders for the lot whose budgetary ceiling could no longer be increased was therefore the only appropriate means, and was in line with Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, the Financial Regulation').

13. On 15 July 2004 the Commission sent the contracts resulting from the award decision to the

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four selected consortia at the same time, including the ED consortium as second contractor (framework contract DIGIT0455100), stating that the contracts were to be returned signed by 30 July 2004.

14. By application registered at the Registry of the Court of First Instance on 29 July 2004, the applicant brought an action under the fourth paragraph of Article 230 EC seeking, first, annulment of the ESPDIMA tender procedure, that is, contract notice 2003/S249221337 ESPDIMA and the ESPDIMA call for tenders, and, second, annulment of the Commission's decisions relating to the order in which the tenders were ranked, that is, the award decision and the letter giving reasons.

15. By separate document registered at the Registry of the Court on the same date, the applicant made an application under Article 76a of the Rules of Procedure of the Court of First Instance for the Court to adjudicate under an expedited procedure.

16. By separate document registered at the Registry of the Court on the same date, the applicant made an application for interim measures, seeking suspension of operation of the award decision and the letter giving reasons, so as to prevent the contract being concluded by the ESPDIMA consortium, until the Court's decision in the main proceedings (the first application').

17. On 30 July 2004, the Commission received the ED consortium's contract signed. Some missing powers of attorney were sent to the Commission on 4 August 2004. On that date the Commission was in possession of all the originals of the contracts relating to ESPDIMA signed by all the contractors.

18. Since, however, the applicant had made an application for interim measures seeking suspension of operation of the award decision, the contracting authority decided on 4 August 2004 to postpone the signature of the four contracts relating to the ESPDIMA market.

19. Following the first application, the Commission submitted its observations on 26 August 2004. The applicant and the Commission were given the opportunity to present a second round of pleadings and submitted their observations, respectively, on 23 September 2004 and 15 October 2004.

20. It should be recalled that, in its observations of 23 September, the applicant asked for the Commission to be ordered to produce a number of documents, namely the requests for quotations and the statistics relating to the implementation of Lot ESP 4 (the documents at issue').

21. On 2 November 2004 the applicant sent a letter to the Registry of the Court of First Instance in which it made a number of additional observations on the Commission's observations of 15 October 2004 and requested the President of the Court of First Instance to take them into account in his assessment. The applicant stated in particular that two reports annexed to the Commission's observations of 15 October 2004, one from EuroDB dated 22 March 2004 and one from Dun & Bradstreet dated 26 July 2004, discussing the applicant's financial situation were wrong and obsolete'. That letter was accepted as part of the file and was notified to the Commission in accordance with Article 105(1) of the Rules of Procedure.

22. By letter of 9 November 2004 the Registrar of the Court of First Instance informed the applicant that the Court had decided not to grant the applicant's request for adjudication under the expedited procedure.

23. By the Order of 10 November the President of the Court of First Instance dismissed the first application on the grounds that the evidence adduced by the applicant had not established to the requisite legal standard that it would suffer serious and irreparable damage if the interim measures sought were not granted and that, therefore, the applicant had not succeeded in proving that the condition of urgency was satisfied and, consequently, the application for interim measures had to be dismissed, without it being necessary to rule on its admissibility or examine whether the other conditions for the grant of interim measures were satisfied.

24. In the Order of 10 November, the President likewise dismissed the applicant's request concerning

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the documents at issue considering that those documents were of no relevance for the examination of the application for interim measures, and there was, therefore, no need to adopt the measures sought by the applicant concerning those documents.

25. It appears that on 18 November 2004, the Commission signed the contract with the ESPDIMA consortium.

26. In those circumstances, by separate document registered at the Registry of the Court on 22 November 2004, the applicant made the present application for interim measures, pursuant to Article 242 EC and Articles 104, 108 and 109 of the Rules of Procedure, by which it seeks suspension of operation of the award decision and the letter giving reasons. The applicant reiterates its request that the President order the Commission to produce the documents at issue.

27. On 1 December 2004 the Commission submitted its observations on the present application. The Commission asks that the President dismiss the application as inadmissible or, in the alternative, as unfounded. As regards the application to produce the documents at issue, the Commission requests that it be dismissed on the basis that the applicant has not provided information indicating the relevance of those documents for the present proceedings.

Law

The application for interim measures

28. Pursuant to Articles 242 EC and 243 EC in conjunction with Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

29. Article 104(2) of the Rules of Procedure prescribes that applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court of Justice of 14 October 1996 in Case C268/96 P(R) SCK and FNK v Commission [1996] ECR I-4971, paragraph 30). The judge hearing an application for interim measures must also, where appropriate, balance the interests concerned (order of the President of the Court of Justice of 29 June 1999 in Case C107/99 R Italy v Commission [1999] ECR I4011, paragraph 59).

30. The measures sought must also be provisional, in that they must not prejudge the points of law or fact at issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order of the President of the Court of Justice of 19 July 1995 in Case C149/95 P(R) Commission v Atlantic Container Line and Others [1995] ECR I2165, paragraph 22).

31. Moreover, in the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (order in Atlantic Container Line , paragraph 23).

32. Under Article 109 of the Rules of Procedure, [r]ejection of an application for an interim measure shall not bar the party who made it from making a further application on the basis of new facts'.

33. Having regard to the documents in the case-file, the President considers that he has all the material needed to decide the present application for interim measures, without there being any need first to hear oral argument from the parties.

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Arguments of the parties

34. The applicant asks the President of the Court of First Instance to declare the application well founded on the basis that new facts support its arguments in the first application.

35. The applicant claims that the Order of 10 November is based on assumptions and facts which are wrong, in particular because of the two reports by EuroDB and Dun & Bradstreet, dated 22 March 2004 and 26 July 2004 respectively (the old reports'), which were produced as evidence by the Commission in the proceedings relating to the first application even though, according to the applicant, the Commission was in possession of new corrected versions of the reports and failed to inform the Court.

36. Regarding the conduct of the Commission, the applicant alleges, more generally, that the Commission is engaging in an undeclared war' which has taken the form of blacklisting' its company in Commission tenders. In this respect, the applicant alleges that figures pertaining to the amounts paid by the Commission for Lots 2, 4 and 7 of the ESP contracts reveal that all the lots controlled by consortia involving Trasys SA or Sword Technologies SA (both members of the ESP 4 consortium) present abnormally high levels of consumption. According to the applicant, these abnormally high levels of consumption can be revealed through the Requests for Quotation issued by the Commission in the context of ESP which the applicant demands be disclosed by the Commission.

37. The applicant finally alleges that the execution of ESPDIMA entails in reality the end of Lot ESP 5, given that ESP-DIMA is the continuation of Lot ESP 4 which has, according to the applicant, been used incorrectly by the Commission to the detriment of Lot ESP 5.

38. Given this reality and its current financial situation, the applicant claims that it will suffer irreparable damage if interim measures are not granted.

39. In particular, according to the applicant, the Order of 10 November is based, inter alia, on incorrect assumptions as regards the applicant's financial situation, that is, that the applicant has a large number of clients, including European institutions, national public bodies and international companies, and that its financial situation is classified as good, with positive marks for sales, profitability and total assets (paragraph 79 of the Order of 10 November).

40. The applicant claims that the new versions of the reports, a report by Dunn and Bradstreet dated 2 November 2004 and a report by EuroDB, which are annexed to the present application (the new reports'), reveal that, on the basis of data up to December 2003, its annual turnover had fallen from EUR 16 million in 2001 to EUR 14 million in 2002 to EUR 10 million in 2003. The new reports show, moreover, that several companies mentioned in the old reports are no longer suppliers or clients of the applicant. In this respect, the applicant stresses that its number of clients has dropped from 200 to 15, that it is not involved in large-scale projects', except in projects involving the Commission, such as the ESEM, Lot ESP 5 and the DG Budget framework contracts, and that it does not own any real estate.

41. The applicant further claims that the Commission's handling of Lot ESP 5 and other contracts it has signed with the Commission will lead the applicant to dismiss over 30% of its staff before the end of the year.

42. With regard to the fall in income and dismissal of its staff arising from the incorrect implementation of Lot ESP 5, the applicant claims that such a fall in income cannot be easily overcome unless the company's financial situation improves. In any event, the damage is not only financial but irreparable. This is due to the magnitude of the damage, the enormous expenditure the applicant has incurred in order to perform Lot ESP 5 services, the fact that Lot ESP 5 is the largest part of its projects and of its budget, and the fact that its budget has been declining.

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43. The Commission objects strongly to the applicant's allegations of biased conduct on the part of the Commission and suggestions that the Commission deliberately invoked false data as evidence in the context of the first application. According to the Commission those allegations, which are of an extremely serious nature and may constitute libel, are entirely unsubstantiated and untrue. In particular, the Commission denies in the strongest possible terms that it was in possession of the new reports when it submitted the old reports to the Court. In fact, the Commission only received the new reports when it received the present application on 24 November 2004. It is absurd for the applicant to make an allegation to the effect that the old reports contain data which are false or obsolete given that those reports were based on interviews with the applicant's representatives and were presented as evidence of the applicant's financial capacity in the ESPDIMA call for tenders.

44. According to the Commission, the present application is manifestly inadmissible.

45. First, the application is devoid of purpose given that the applicant is not seeking suspension of performance of the contract signed with the ESP-DIMA consortium.

46. Second, the present application amounts effectively to an appeal against the Order of 10 November and not a new application for interim measures.

47. Third, the application does not fulfil the conditions of Article 104 of the Rules of Procedure as it does not mention the conditions required for an application for interim measures, namely urgency, a prima facie case and a balance of interests in favour of the applicant.

48. Fourth, while the application is based on Articles 108 and 109 of the Rules of Procedure, there are no new facts or change in circumstances within the meaning of those provisions which could justify the admissibility of the present application. The Commission observes that the new reports do not constitute new facts' or a change in circumstances'. Given that those reports are made in real time', that is at the client's request, if they were considered to be new facts' or a change in circumstances' within the meaning of Articles 108 and 109 of the Rules of Procedure, litigants could reopen closed cases simply by requesting the creation of such new reports.

49. The Commission points out that, in any event, the reports cannot constitute new facts since they are not dated after the Order of 10 November (the Dunn and Bradstreet report is dated 2 November 2004 and the EuroDB report is undated), they are based on financial data up to the end of 2003 and, in any case, they do not contain new facts that could change the conclusion on urgency contained in the Order of 10 November. The Commission observes that, on the contrary, the new reports continue to show that the financial situation of the applicant is not such as to endanger its existence. The fact that the new reports show a diminution in its client base does not change the fact that the applicant continues to have a large client base as indicated on its website. Finally, the applicant's allegation regarding dismissal of its staff is contradicted directly by the fact that its website shows that it is actively seeking to recruit a large number of new staff, inter alia, to work on latest European Commission projects'.

50. In the alternative, the Commission claims that, were the Court to find the application admissible, the above facts clearly show that there continues to be no urgency, as the President of the Court of First Instance rightly held in the Order of 10 November.

51. Finally the Commission claims that the balance of interests leans clearly in its favour given that suspension would damage the interests of the other tenderers with whom contracts have been signed.

Findings of the President

52. It should be observed at the outset that, in the present application, which constitutes a new

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application in the context of the same main action as the first application, the applicant invokes Articles 108 and 109 of the Rules of Procedure and seeks interim measures which are identical to those sought in the first application, that is suspension of the operation of the award decision and the letter giving reasons.

53. However, the first application was dismissed by the Court of First Instance by the Order of 10 November.

54. To the extent that in the present application the applicant invokes, without explaining why, Article 108 of the Rules of Procedure, it should be noted that, according to that provision, on application by a party, an order may at any time be varied or cancelled on account of a change in circumstances. This provision is, however, applicable in situations where an order prescribing interim measures is in place. It cannot be applied to situations where an application has been dismissed, such situations being governed by Article 109 of the Rules of Procedure (see to that effect the order of the Court of Justice of 14 February 2002 in Case C440/01 P(R) Commission v Artegodan [2002] ECR I1489, paragraphs 62 to 64).

55. According to Article 109 of the Rules of Procedure, rejection of an application for an interim measure shall not bar the party who made it from making a further application on the basis of new facts'.

56. Since the first application was dismissed and the present application is based on the alleged existence of new facts, it follows that it can be declared admissible only if the conditions prescribed in Article 109 of the Rules of Procedure are met (see to that effect the order of the President of the Court of First Instance of 8 October 2001 in Case T236/00 R II Stauner and Others v Parliament and Commission [2001] ECR II2943, paragraph 46).

57. It is for the applicant to show that the conditions allowing the making of a further application, set out in Article 109 of the Rules of Procedure, are met.

58. The applicant has not, however, shown that those conditions are met in the present case.

59. It should be observed, as a preliminary point, that the applicant does not attempt to show clearly why the facts presented in the present application should be considered as new facts' within the meaning of Article 109 of the Rules of Procedure.

60. New facts' within the meaning of Article 109 of the Rules of Procedure should be taken to mean facts which appear after the order rejecting the first application for interim measures was made or which the applicant was not capable of invoking in the first application or during the proceedings leading to the first order and which are relevant to the appreciation of the case in question (see to that effect the order in Stauner and Others v Parliament and Commission ,cited above, paragraph 49; see also the order of the Court of Justice of 14 February 2002 in Case C440/01 P(R) Commission v Artegodan [2002] ECR I1489, paragraphs 63 and 64, the order of the President of the Court of First Instance of 4 April 2002 in Case T198/01 R Technische Glaswerke Ilmenau v Commission [2002] ECR II2153, paragraph 123, and the order of the President of the Court of First Instance of 21 January 2004 in Case T245/03 R FNSEA and Others v Commission [2004] ECR II-0000, paragraph 129, discussing the meaning of change in circumstances' in Article 108 of the Rules of Procedure of the Court of First Instance).

61. None of the data put forward by the applicant in the present application can be regarded as new facts within the meaning of Article 109 of the Rules of Procedure.

62. In essence, the applicant relies on the new reports and, in addition, reiterates certain arguments, already put forward in the first application, regarding the importance of Lot ESP 5 for its overall operations and budget and the effects that the allegedly incorrect implementation of Lot ESP 5

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could have on its operations, staff and budget.

63. The arguments in paragraph 3 of the present application regarding the fall in revenue of the applicant from EUR 16 million in 2001 to EUR 10 million in 2003, were already contained in the first application and were expressly rejected in the Order of 10 November as evidence supporting the allegation that the applicant's existence could be put in danger (paragraphs 51 and 75 to 76). Apart from the fact that, as in the first application, the applicant does not even attempt to show how such a fall in revenue could put its existence in danger, it is obvious that financial data dating from 2003 and already produced in the first application cannot constitute new facts within the meaning of Article 109 of the Rules of Procedure.

64. The same considerations apply as regards the arguments in paragraphs 3, 5 and 6 of the present application relating to the implementation of Lot ESP 5 and the consequences it could have on the applicant's operations, staff and budget, such as in particular the alleged forthcoming dismissal of a large number of the applicant's staff. These arguments do not present any new facts. They were already made in the first application and expressly rejected in the Order of 10 November (paragraphs 49 to 52 and 81).

65. The data presented in paragraph 4 of the present application are not relevant to an analysis of the condition of urgency and cannot therefore cast doubt on the conclusions reached in the Order of 10 November. In any event, those data relate to historical levels of consumption of various lots in the ESP markets. The applicant does not allege and it does not appear from the file that such data contain new facts which came into being after the Order of 10 November or which the applicant could not have invoked during the proceedings leading to that order. They cannot therefore constitute new facts within the meaning of Article 109 of the Rules of Procedure.

66. As regards the new reports annexed to the present application, the applicant claims that they show that its financial situation was worse than it was painted in the old reports, in particular that its revenue up to 2003 had declined, that the list of customers and suppliers presented in the old reports was wrong and that the applicant does not own any real estate.

67. However, as the Commission rightly points out in its observations, the new reports cannot be considered new facts' within the meaning of Article 109 of the Rules of Procedure nor even a change in circumstances.

68. It should first be observed that the reports are not new, since the applicant could have invoked the new reports during the proceedings leading to the Order of 10 November. The Dunn and Bradstreet report of 2 November 2004 pre-dates the Order of 10 November while the EuroDB report is of unspecified date, and both reports are based on data pre-dating the Order of 10 November, in particular interviews with the applicant's management which took place on 1 November 2004 (page 2 of the Dunn and Bradstreet report) and financial data presenting the situation of the company as of the end of the calendar year 2003 (page 4 of the Dunn and Bradstreet report and page 3 of the EuroDB report). The applicant was therefore capable of invoking the new reports when it wrote to the Court on 2 November 2004. It should be recalled that the applicant's letter of 2 November was taken into account by the Court at the applicant's request.

69. Second, the new reports do not contain data which the applicant could not have invoked during the proceedings leading to the Order of 10 November. Financial reports such as the reports in question merely discuss the financial situation of a company on the basis of data collected by the authors of the reports. They may constitute additional evidence relating to the financial situation of the applicant but they do not change the actual facts pertaining to that situation. As the Commission rightly points out in its observations, if the mere existence of those reports (as opposed to the actual financial situation which they discuss), which are made in real time' at the request of a

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client and based largely on data provided by that client, were regarded as new facts' within the meaning of Article 109 of the Rules of Procedure, a litigant would be given the possibility of creating endless new facts by simply ordering a new report without any real change in its financial situation.

70. In this respect, the applicant was perfectly capable of presenting data regarding the actual state of its own financial situation at the time of the first application or in response to the Commission's observations on the first application. It did not need external financial reports in order to prove that it has a certain number of clients or that it does not own real estate. In addition, given that the reports can be obtained in real time at the request of a client, it cannot be considered that the applicant was incapable of invoking updated reports in order to support its allegations with regard to urgency in the first application.

71. However, as the Order of 10 November makes clear, the applicant failed, in the first application, to provide data supporting its arguments that in the absence of the requested interim measures its financial situation was such that its existence would be put in danger. The mere existence of the new reports does not change the underlying financial situation of the applicant at the time of the first application or of the adoption of the Order of 10 November. In this respect, it is hard to imagine that the financial situation of the applicant changed sufficiently in the short period of two weeks between the date of the Order of 10 November and the date the present application for interim measures was made or even in the period following the first application. The applicant does not even claim that this is the case.

72. In the light of the above considerations, it can be concluded that the two reports cannot be regarded as new facts within the meaning of Article 109 of the Rules of Procedure.

73. It should be observed in addition that, in any event, an examination of the content of the new reports, which it should be recalled discuss the applicant's financial situation at a time pre-dating the Order of 10 November, reveals that the overall evaluation of its financial situation is not substantially different from that painted by the old reports. It cannot thus constitute evidence putting into question the conclusion reached in the Order of 10 November that the applicant had not shown that it would be in a situation which, in the absence of interim measures, could endanger its very existence or irretrievably alter its position in the market (paragraph 73 of the Order of 10 November).

74. As the Commission rightly points out in its observations, the Dunn and Bradstreet report of 26 July 2004 and the new Dunn and Bradstreet report of 2 November 2004 classify the overall financial situation of the applicant in identical terms as being fair' with a financial rating of 2A3. (The old EuroDB report characterised the financial situation of the applicant as good' whereas the new EuroDB report does not contain any such description.) The new Dunn and Bradstreet report of 2 November 2004 adds that the applicant can be characterised as self-financed [to] a satisfactory degree'. Nor does the content of these reports change the conclusion reached in the Order of 10 November that the applicant has a large number of clients and participates in a variety of projects. Despite referring to a smaller client base, the new reports continue to indicate that the applicant has a range of 27 clients (see page 3 of the new Dunn and Bradstreet report) including major clients such as the European Commission, EUROSTAT, OPOCE and Cedefop (see page 2 of the EuroDB report). The applicant itself acknowledges that it continues to participate in major projects for the European Commission. As the Commission points out in its observations, such facts are corroborated by the applicant's own website.

75. Finally, it should also be noted that, in any event, neither the existence nor the content of the new reports is such as to have any bearing on the conclusions reached in the Order of 10 November.

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76. The existence of the reports cannot cast doubt on the conclusion reached in the Order of 10 November, that the applicant had failed to prove to the requisite legal standard that the alleged damage would flow from the contested acts, or that any such damage could be regarded as serious and irreparable as defined in the Court's case-law (see, to that effect, in particular, the orders of the President of the Court of First Instance of 20 July 2000 in Case T169/00 R Esedra v Commission [2000] ECR II2951, paragraph 43, and of 27 July 2004 in Case T148/04 R TQ3 Travel Solutions Belgium v Commission [2004] ECR II-0000, paragraph 41, and the case-law cited). That order was not based primarily on the content of the old reports but, inter alia, first, on the failure of the applicant to show a link between the alleged damage and the acts suspension of whose operation was sought (paragraphs 66 to 70 of the Order of 10 November) and, second, on the failure of the applicant to produce evidence concerning its financial situation from which the President could conclude that its existence would be endangered pending the Court's judgment in the main action (paragraphs 75 to 76) or evidence that the applicant's position in the market would be irretrievably altered (paragraph 81).

77. In the light of the above, it cannot be considered that the present application provides new facts within the meaning of Article 109 of the Rules of Procedure or, in any event, facts which could cast doubt on the conclusions reached in the Order of 10 November.

78. It follows that in the absence of such new facts the present application should be dismissed as inadmissible.

The application for measures of inquiry seeking production of documents by the Commission

Arguments of the parties

79. In the present application, the applicant reiterates its request, made in its observations of 23 September 2004 in the context of the first application, that the President of the Court of First Instance order the Commission to produce the documents at issue, on the ground that they might show that the implementation of Lot ESP 4 and Lot ESP 5 was incorrect and biased in favour of the ESP 4 consortium and that it would therefore be essential for the applicant's rights of defence, would be of assistance to the Court, and would even be decisive for the Court's judgment, to obtain those documents.

80. The Commission contends that the application for measures of inquiry must be dismissed on the ground that the applicant has not shown that there would be any purpose in producing the documents at issue, contrary to the requirements of the case-law of the Court of Justice.

Findings of the President

81. As was already held in the Order of 10 November, the applicant's request for production of the documents at issue can be understood only as an application for measures of inquiry or measures of organisation of procedure.

82. Under the first subparagraph of Article 105(2) of the Rules of Procedure the President of the Court assesses whether a preparatory inquiry should be ordered. Article 65 of the Rules of Procedure specifies that measures of inquiry include inter alia the production of documents. Article 64 of the Rules of Procedure allows the Court to adopt measures of organisation of procedure, including inter alia the production of documents or any papers relating to the case.

83. Since the present application for interim measures must be dismissed for failure to meet the conditions of Article 109 of the Rules of Procedure, the President considers that the documents at issue are of no relevance for the examination of the present application for interim measures, and that the measures sought by the applicant concerning those documents should not therefore be adopted.

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SUB	Public contracts of the European Communities
AUTLANG	English
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Greece
PROCEDU	Action for annulment;Application for interim measures - inadmissible;Application for measures of inquiry - unfounded
DATES	of document: 22/12/2004 of application: 23/11/2004

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Order of the President of the Court of First Instance First InstanceFirst Instance2004. European Dynamics SA v Commission of the European Communities. Public service contracts - Community tender procedure - Interim measures - Application for suspension of operation - Urgency - None. Case T-303/04 R.

1. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Burden of proof - Causal link between the alleged damage and the contested act

(Art. 242 EC)

2. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Financial loss

(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

3. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Non-financial loss

(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

1. The urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party seeking the interim measure. It is for that party to adduce proof that it cannot await the outcome of the main action without suffering such damage. Therefore, if the applicant does not show a link between the alleged damage and the acts suspension of whose operation is sought, the interim measures cannot be regarded as relevant and necessary for avoiding the occurrence of the alleged damage.

(see paras 65-66, 70)

2. Pecuniary damage cannot in principle be regarded as irreparable, or even reparable only with difficulty, if it may be the subject of subsequent compensation by means, for example, of an action for compensation under Article 288 EC.

(see para. 72)

3. The decision not to award a public contract does not necessarily have the consequence of causing irreparable harm to the reputation and credibility of the tenderers which are not successful. Taking part in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial.

(see para. 82)

In Case T303/04 R,

European Dynamics SA, established in Athens (Greece), represented by S. Pappas, lawyer,

applicant,

v

Commission of the European Communities, represented by L. Parpala and E. Manhaeve, acting as Agents, and J. Stuyck, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for suspension of operation of, first, the Commission's decision of 4 June 2004 (DIGIT/R2/CTR/mas D(2004) 324) to rank only in second place the offer submitted by the consortium

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of which the applicant is a member following a call for tenders for the provision of informatics services and, second, the Commission's decision of 14 July 2004 (DG DIGIT/R2/CTR/mas D(2004) 811) rejecting the applicant's complaints of 21 June, 1, 5 and 8 July 2004 against the award of the contract to another consortium,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Facts of the dispute

1. European Dynamics SA is active in the field of information and communications technology, inter alia for the European institutions.

2. Following call for tenders ADMIN/DI/0005 ESP (External Service Providers') of 16 March 2001, the Commission concluded a number of framework contracts, applying the award system laid down for awards of multiple contracts in Article 1.4 of the General Terms and Conditions for Informatics Contracts published by the Commission on 11 June 1998 (the cascade' system), for the provision of external services relating to information systems. The overall contract was divided into nine lots, among which were Lot 4, for the provision of external services relating to data management applications and information systems (Lot ESP 4'), and Lot 5, for the provision of external services relating to internet and intranet applications (Lot ESP 5').

3. On 16 October 2001 a framework contract under reference DI-02432-00 was concluded with the contractor selected as first in the cascade for Lot ESP 4, a consortium consisting of Trasys SA and Cronos Luxembourg SA, which later became Sword Technologies SA (the ESP 4 consortium').

4. On 5 November 2001 framework contract DI-02432-00 was concluded with the contractor selected as first in the cascade for Lot ESP 5, a consortium consisting of European Dynamics, IRIS SA, Datacep SA, Primesphere SA and Reggiani SpA (the ESP 5 consortium').

5. On 23 November 2001 the Commission published the budgetary ceilings based on the volume estimates announced for Lots ESP 4 and ESP 5, fixed at totals of EUR 42 885 318 and EUR 34 656 804 respectively, for the duration of the contracts, namely until October 2006.

6. Since the actual use of the contracts covered by Lot 4 had proved substantially greater than expected - according to the case-file, by the end of March 2003, which was after less than one third of the maximum total duration of the contract covered by Lot ESP 4, more than three quarters of the credits provided for had already been spent - the Commission decided to raise the budgetary ceiling of Lot ESP 4 and to prepare a fresh call for tenders for services of the same kind as those under Lot ESP 4 for the period ending in October 2006.

7. By decision of 28 April 2003, the Commission raised the budgetary ceiling of Lot ESP 4 by EUR 20 million, and on 10 May 2003 an award notice was published in the Official Journal of the European Union under reference ADMIN/PN/2003/105.

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8. On 23 May 2003 the ESP 5 consortium wrote to the director of the Informatics Directorate (now Directorate-General (DG) Informatics) to inform him of its concerns about the increase in the budgetary ceiling for Lot ESP 4, claiming that the Commission should have made more intensive use of Lot ESP 5, use of which was said to have been lower than the initial forecasts.

9. It is apparent from the case-file that the letter of 23 May 2003 was followed by correspondence between the Commission and the ESP 5 consortium, in particular a letter from the Commission of 4 July 2003 explaining the implementation of Lots ESP 4 and ESP 5, meetings between the parties, and a workshop arranged by the Commission on 6 November 2003, at which the ESP 5 consortium was able to explain the potential of the services covered by Lot ESP 5 to the Commission's Directorates-General.

10. On 27 December 2003 the Commission launched a call for tenders under reference ADMIN/DI2/PO/2003/192 ESP-DIMA for the provision of on- and off-site IT services for data/information management systems at the European Commission including development, maintenance and other related activities' (the ESP-DIMA call for tenders').

11. By letter of 19 January 2004, the legal adviser of the ESP 5 consortium called on the Commission to cancel the ESP-DIMA call for tenders, claiming that instead of awarding a new service contract to replace Lot ESP 4 the Commission should use Lot ESP 5.

12. That request was rejected by letter of 30 January 2004, in which DG Informatics stated that the use of Lot ESP 5 instead of Lot ESP 4 or the ESP-DIMA contract was not possible, as Lot ESP 5 on the one hand and Lot ESP 4 and the ESP-DIMA contract on the other had different objects, the former concerning internet and intranet applications and the latter data management applications and information systems.

13. On 20 February 2004 European Dynamics, IRIS, Datacep and Reggiani (in other words the companies forming the ESP 5 consortium minus Primesphere, the ED consortium') submitted a joint tender in response to the ESP-DIMA call for tenders.

14. On 2 June 2004 the Commission awarded the ESP-DIMA contract. The tenderer selected to be first in the cascade was a consortium of Trasys and Sword Technologies with Intrasoft International SA and TXT SpA (in other words the ESP 4 consortium plus two additional partners, the ESP-DIMA consortium'). The ED consortium was selected as second contractor in the cascade, followed by other tenderers in third and fourth places in the cascade.

15. Those results were notified to all the tenderers, including the ED consortium, by letter of 4 June 2004 (the award decision').

16. By fax of 8 June 2004, European Dynamics requested further details of the award decision. The Commission replied by letter of 9 June 2004, giving fuller information on the results of the technical evaluation in respect of each of the relevant criteria.

17. By letter of 21 June 2004, European Dynamics asked DG Informatics to provide a copy of the evaluation report for all the tenders submitted following the ESP-DIMA call for tenders, in particular the sections relating to its consortium and to that of the successful tenderer, and the names of the persons responsible for the evaluation.

18. On 29 June 2004 a meeting took place between European Dynamics and DG Informatics, at which the parties discussed the evaluation of the tenders and the concerns of European Dynamics as to the comparative implementation of Lots ESP 4 and ESP 5. A minute of the meeting was sent to European Dynamics by the Commission on 6 July 2004. Also on that date, the Commission confirmed that no contract had yet been concluded following the award in respect of the ESP-DIMA market.

19. Following that meeting, European Dynamics sent several letters to the Commission, inter alia on 1, 5 and 8 July 2004, in which it contested the lawfulness of the ESP-DIMA call for tenders

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and the award decision. European Dynamics argued in particular that the ESP-DIMA tender procedure had no raison d'être, since Lot ESP 5 should have been used instead of Lot ESP 4. It said that there was a conflict of interests in the case of one member of the evaluation committee, the marking scale used for the technical evaluation was inadequate, and the successful tender was of lower quality and offered a very limited informatics system. In those letters European Dynamics asked for a copy of the evaluation report and to be told the names of the members of the evaluation committee. It also requested that signature of the contracts be postponed until all the points raised had been satisfactorily resolved.

20. By letter of 14 July 2004 (the letter giving reasons'), the Commission replied to the points raised by European Dynamics in the above letters and refused to send it a copy of the evaluation report, stating that that would involve communicating confidential commercial information on other tenderers. As regards the doubts raised concerning the need to launch the ESP-DIMA call for tenders and the suggestion that Lot ESP 5 should be used for the provision of services covered by Lot ESP 4, the Commission said that DG Informatics had stated in its letter of 30 January 2004, cited above, that as the two lots represented separate and distinctly different markets it was not possible to switch from one to the other simply because one lot had not yet reached its budgetary ceiling. Launching a call for tenders for the lot whose budgetary ceiling could no longer be increased was therefore the only appropriate means, and was in line with Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, the Financial Regulation').

21. On 15 July 2004 the Commission sent the contracts resulting from the award decision to the four selected consortia at the same time, including the ED consortium as second contractor (framework contract DIGIT-04551-00), stating that the contracts were to be returned signed by 30 July 2004.

22. On 27 July 2004 a meeting took place between the representatives of the ED consortium and those of DG Informatics, at which the latter restated the Commission's position that it would not agree to the suggestion of European Dynamics that it should be allowed to play an active role in monitoring the distribution of projects between Lot ESP 4 and Lot ESP 5.

23. On 28 July 2004 the ED consortium requested the Commission to defer for one month conclusion of the contracts resulting from the ESP-DIMA call for tenders, on the ground that the members of the consortium needed more time to take various administrative steps. The Commission immediately replied that those administrative steps could be taken after signature of the contract and that no postponement was necessary. The ED consortium's contract was returned signed on 30 July 2004. Some missing powers of attorney were sent to the Commission on 4 August 2004.

24. On 4 August 2004 the Commission was therefore in possession of all the originals of the contracts relating to ESP-DIMA signed by all the contractors.

Procedure and forms of order sought by the parties

25. By application registered at the Registry of the Court of First Instance on 29 July 2004, the applicant brought an action under the fourth paragraph of Article 230 EC seeking, first, annulment of the ESP-DIMA tender procedure, that is, contract notice 2003/S249-221337 ESP-DIMA and the ESP-DIMA call for tenders, and, second, annulment of the Commission's decisions relating to the order in which the tenders were ranked, that is, the award decision and the letter stating reasons.

26. By separate document registered at the Registry of the Court on the same date, the applicant made an application under Article 76a of the Rules of Procedure of the Court of First Instance for the Court to adjudicate under an expedited procedure.

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27. By separate document registered at the Registry of the Court on the same date, the applicant made the present application for interim measures, seeking suspension of operation of the award decision and the letter giving reasons, so as to prevent the contract being concluded by the ESP-DIMA consortium, until the Court's decision in the main proceedings. The applicant also asks for the Commission to be ordered to pay the costs.

28. On 4 August 2004 a copy of the application for interim measures was served on the Commission in accordance with Article 105(1) of the Rules of Procedure, and the Commission was given until 19 August 2004 to submit its observations.

29. Since the applicant had made an application for interim measures seeking suspension of operation of the award decision, the contracting authority decided on 4 August 2004 to postpone the signature of the four contracts relating to the ESP-DIMA market.

30. On 12 August 2004 the Commission requested an extension of the period for submitting observations until 26 August 2004. That request was granted by decision of 16 August 2004.

31. On 26 August 2004 the Commission submitted observations on the application for interim measures, in which it contended that the application should be dismissed as inadmissible and, in the alternative, as unfounded.

32. On 31 August 2004 the Registry of the Court transmitted the Commission's observations to the applicant.

33. On 8 September 2004 the applicant requested leave to submit observations on the Commission's observations.

34. By decision of 14 September 2004, the President of the Court granted that request and set a deadline of 24 September 2004 for the submission of the applicant's observations on the Commission's observations.

35. On 23 September 2004 the applicant submitted its observations on the Commission's observations, with a large number of additional documents annexed. In its observations the applicant also asked for the Commission to be ordered to produce a number of documents, namely the requests for quotations and the statistics relating to the implementation of Lot ESP 4 (the documents at issue').

36. On 29 September 2004 the President of the Court set a deadline of 8 October 2004 for the submission by the Commission of observations on the applicant's observations.

37. On 6 October 2004 the Commission requested an extension of the period for submitting observations until 15 October 2004, and that request was granted by decision of the President of the Court of the same date.

38. On 15 October 2004 the Commission submitted observations in reply to the applicant's observations.

39. On 2 November 2004 the applicant sent a letter to the Registry of the Court in which it made a number of additional observations on the Commission's observations of 15 October 2004 and requested the President of the Court to take them into account in his assessment. That letter was notified to the Commission in accordance with Article 105(1) of the Rules of Procedure.

Law

The application for interim measures

40. Pursuant to Articles 242 EC and 243 EC in conjunction with Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

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41. Article 104(2) of the Rules of Procedure prescribes that applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court of Justice in Case C268/96 P(R) SCK and FNK v Commission [1996] ECR I-4971, paragraph 30). The judge hearing an application for interim measures must also, where appropriate, balance the interests concerned (order of the President of the Court of Justice in Case C107/99 R Italy v Commission [1999] ECR I401 1, paragraph 59).

42. The measures sought must also be provisional, in that they must not prejudge the points of law or fact at issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order of the President of the Court of Justice in Case C149/95 P(R) Commission v Atlantic Container Line and Others [1995] ECR I2165, paragraph 22).

43. Moreover, in the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (order in Atlantic Container Line , paragraph 23).

44. Having regard to the documents in the case-file, the President considers that he has all the material needed to decide the present application for interim measures, without there being any need first to hear oral argument from the parties.

Arguments of the parties

- Admissibility

45. The applicant submits that it has an interest in bringing proceedings against the acts it seeks to have suspended, and that it made the application in due time, so that its application is admissible.

46. The Commission submits that the application serves no purpose, as the applicant has not sought suspension of the decision to launch the ESP-DIMA tender procedure but suspension of decisions awarding the contract. The interim measures sought cannot therefore have the effect of suspending the ESP-DIMA tender procedure, contrary to what the applicant really seeks to obtain. The Commission adds that the application is inadmissible because the main application is also inadmissible. In its view, the applicant has not shown that it is directly concerned by the contested acts, and in any event it has not demonstrated the existence of a personal interest in bringing proceedings, since the acts concern the ED consortium and not the applicant individually.

- Prima facie case

47. The applicant, referring to its main application, submits that the ESP-DIMA contract should be annulled, on the grounds of erroneous assessment of the facts, breach of essential procedural requirements and an insufficient statement of reasons. It is apparent from the account of the facts in the application that the applicant considers that the launching of the ESP-DIMA call for tenders was unnecessary, since the Commission could have recourse to Lot ESP 5 instead of replacing Lot ESP 4 by the ESP-DIMA contract. The applicant further considers that the award of the ESP-DIMA contract is unlawful because at least one member of the evaluation committee was in a situation of serious conflict of interests, the Commission did not use the same scale for assessing the various tenderers, the successful tender offered only an informatics system of very limited value and restricted scope, and, finally, the Commission did not provide it with a copy of the evaluation report, contrary to the requirements of the Financial Regulation.

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48. The Commission considers that the applicant has not put forward pleas of fact and law making a prima facie case for granting the interim measures, and that it is only incidentally that it mentions the grounds on which the main application is based. It asserts that the allegations are unfounded, as may clearly be seen from the letter giving reasons of 14 July 2004, that they are not substantiated, and that they should not even be examined in the context of the present application for interim measures.

- Urgency

49. The applicant submits that the condition of urgency is satisfied. It states that it cannot wait for the outcome of the procedure in the main action without suffering serious and irreparable harm, consisting in extremely heavy pecuniary damage such that the applicant will no longer be able to survive in the market, the loss of a substantial part of its business leading to the dismissal of half of its staff, and particularly serious damage to its reputation.

50. As regards pecuniary damage, the applicant alleges that the harm would flow from the distorted implementation of Lot ESP 4 instead of Lot ESP 5 and from the continuation of Lot ESP 4 by the ESP-DIMA contract, which has been awarded to another tenderer. The applicant considers that that situation will put an end to implementation of Lot ESP 5, since Lot ESP 4 will be extended by the ESPDIMA contract and it is to be expected that a large number of existing contracts will be extended immediately after signature of contracts relating to the ESP-DIMA market, for several years. Consequently, the decision to award the ESP-DIMA contract to another tenderer and the continuation of the incorrect implementation of that contract in place of Lot ESP 5 will deprive the applicant of the income normally linked to implementation of Lot ESP 5, which constitutes the largest part of its activity.

51. In this respect, the applicant states that it is a company of medium size employing about 200 workers, that it is developing a number of projects, among which those falling within Lot ESP 5 are by far the most substantial, and that Lot ESP 5 covers the major part of its budget and occupies about half of its employees, who were recruited precisely for the requirements of Lot ESP 5. The accompanying infrastructure has also grown, thus constituting a system which altogether owes its existence and its survival to Lot ESP 5 and is designed and put into practice to ensure implementation of a contract in the amount of EUR 35 million. The award of Lot ESP 5 obliges the applicant to maintain expensive infrastructure, assign employees to that project and set up for those employees a continuous training structure necessitated by the technological changes adopted by the Commission at intervals of a few months. The applicant's activities connected with Lot ESP 5 represent the sum of approximately EUR 4 million a year and constitute a substantial part of its entire activities in the field of informatics services. The applicant's income fell from EUR 16 million in 2001 to EUR 14 million in 2002 and EUR 10 million in 2003, and is likely to continue falling during 2004 and 2005 to EUR 5 million, precisely because of the inadequacy of the orders placed within the framework of Lot ESP 5. Many of its employees have already left the company for that reason. With such a loss of employees, the applicant asserts that it will not be possible to regain the lost share of the market.

52. The applicant alleges that the possible non-implementation or reduction of orders of Lot ESP 5 would thus be fatal for it. It says that an entire infrastructure provided specially for implementation of Lot ESP 5 will disappear, with irreparable consequences for the applicant, which will no longer be in a position to survive in the highly competitive market in which it operates.

53. As regards the harm to its reputation, the applicant states that this situation will be liable to damage its relations with other operators in the market and other customers who will interpret the situation as demonstrating its inability to meet the Commission's expectations.

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54. Finally, the applicant considers that the interim measures sought are necessary since, if the acts against which it has brought the present application for interim measures are implemented before being annulled, the Commission will sign the corresponding contracts and thus clear the way for the absorption by the ESP-DIMA contract of a large proportion of the remaining credits. According to the applicant, EUR 120 million will be allocated to the ESP-DIMA contract, which would make it the Commission's largest investment in this field and definitively tie the Commission to the ESP-DIMA consortium.

55. The Commission contends that the damage alleged by the applicant is neither serious nor irreparable within the meaning of the case-law of the Court of First Instance.

56. As regards the alleged pecuniary damage, the Commission begins by stating that the applicant's arguments show that there is no causal link between, on the one hand, the act suspension of whose operation is sought (the award of the ESP-DIMA contract to another tenderer) and, on the other, the loss the applicant is allegedly liable to suffer, namely a reduction in its turnover from the contract relating to Lot ESP 5.

57. In this respect, the Commission submits that the damage allegedly liable to be caused proceeds from the applicant's argument that the Commission should have had recourse more intensively to Lot ESP 5 instead of following the tender procedure for replacing the former Lot ESP 4 contracts by the ESP-DIMA contract. The Commission states that the applicant's approach is in fact based on the - completely incorrect - hypothesis that, if the Commission is unable to sign the contracts resulting from the ESP-DIMA call for tenders, it will have to have recourse to Lot ESP 5 to provide the kind of services previously covered by Lot ESP 4, which will increase the applicant's turnover. According to the Commission, that argument is simply wrong, since the contracting authority will continue in any event to apply the distinction between Lots ESP 4 and ESP 5 which it has applied since the conclusion of those contracts and which derives from the definitions of those contracts in the relevant contract notices.

58. In any event, the Commission also submits that the damage allegedly incurred if the interim measures were not granted would be neither serious nor irreparable. The financial damage is clearly reparable, according to settled case-law, since it could be the subject of subsequent financial compensation. The applicant has not shown that there are exceptional circumstances which would allow that damage to be classified as serious and irreparable. The Commission emphasises in that regard that the applicant confines itself to making general assertions and has not demonstrated either that the market loss in question would endanger its existence or that its position in the market would be irretrievably changed.

59. On the contrary, according to the Commission, it is clear that the applicant can continue to exist until the Court's decision in the main action. The Commission refers in this respect inter alia to two reports, one from EuroDB dated 22 March 2004 and one from Dun & Bradstreet dated 26 July 2004, annexed to the Commission's observations of 15 October 2004, which indicate that the applicant's financial situation is good. In its letter of 2 November 2004, the applicant asserts that those reports are out of date and incorrect.

60. As regards the non-pecuniary damage alleged by the applicant, namely an especially serious impairment of its reputation as a result of the market loss in question, the Commission observes that taking part in a call for tenders obviously carries a risk for tenderers that the contract may not be awarded to them. That situation does not therefore involve any damage to reputation, as the Court has already found in its case-law.

61. Finally, the Commission considers that the fact that the contact may be concluded with the successful tenderer and a large part of the budget allocated to it before the Court gives judgment

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in the main action is not a factor which shows that the condition of urgency is satisfied, in accordance with settled case-law. In the event of annulment the Commission would be able to restore the applicant's rights.

- Balance of interests

62. Although the applicant has not expressly addressed the balance of interests in its application, the Commission states that the balance tilts in its favour, given that the damage the applicant is liable to suffer if interim measures are not granted does not exceed the damage the Commission and the other tenderers concerned could suffer it they are granted. The other tenderers have a legitimate expectation that the Commission will continue with the awarding of the contacts. The interim measures would prevent those contracts from being concluded, so that the informatics activities of the Commission would be impeded. Moreover, the Commission considers that, since the validity of the tenders expires on 19 November 2004, suspension would put an end to those tenders, so that the measures could not be regarded as provisional. The applicant rejects those last two assertions on the ground that the Commission has other ways of replacing the contracts at issue, in particular by seeking an extension to the validity of the tenders or by using other contracts. In this respect, the Commission considers that such an extension, while possible, is uncertain, and that the other means of obtaining the services in question would be less satisfactory than conclusion of the ESP-DIMA contract.

Findings of the President

- Preliminary remarks

63. It is settled case-law that the conditions laid down in Article 104(2) of the Rules of Procedure require that the essential elements of fact and law on which an application is founded are set out in a coherent and comprehensible fashion in the application for interim measures itself (orders of the President of the Court in Case T175/03 R Schmitt v EAR [2003] ECRSC IA175 and II883, paragraph 18; Case T236/00 R Stauner and Others v Parliament and Commission [2001] ECR II-15, paragraph 34; and Case T-306/01 R Aden and Others v Council and Commission [2002] ECR II2387, paragraph 52).

64. Even though, as the Commission rightly points out, the application contains few elements to enable the judge hearing the application to examine whether there is a prima facie case for granting the measures sought, the Commission's observations and the second round of observations of the parties have shed light on the subject-matter of the application in such a way as to allow the judge to examine it. The condition relating to urgency should be examined first.

- The condition of urgency

65. It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party seeking the interim measure. It is for that party to adduce proof that it cannot await the outcome of the main action without suffering such damage (see orders of the President of the Court in Case T169/00 R Esedra v Commission [2000] ECR II2951, paragraph 43, and Case T148/04 R TQ3 Travel Solutions Belgium v Commission [2004] ECR II0000, paragraph 41 and the case-law cited).

66. It must be stated at once that, as the Commission rightly points out, the applicant has not shown a link between the alleged damage and the acts suspension of whose operation is sought.

67. The applicant essentially complains of the way in which the contract relating to Lot ESP 5 was implemented, a lot which in its view was underused in comparison with Lot ESP 4. The applicant contests that allegedly improper implementation and the Commission's decision to start the tender

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procedure for the ESP-DIMA market for the purpose of renewing Lot ESP 4. However, the applicant has not challenged the Commission for improper implementation of its contract relating to Lot ESP 5, and has not sought suspension of operation of the tender procedure for the ESP-DIMA market. It should be recalled here that the ESP-DIMA call for tenders was published on 27 December 2003 and that the applicant's complaints against the very principle of that call for tenders were rejected by the Commission's letter of 30 January 2004.

68. This approach of the applicant has a direct effect on the value of its arguments relating to the condition of urgency. The applicant alleges only indirectly that serious and irreparable harm would flow from the award of the ESP-DIMA contract to another tenderer or from the very existence of that contract. On the contrary, it clearly states that it considers that the damage would flow from the possible non-execution or decrease of [Lot] ESP 5', which would be fatal' for it. The applicant attempts to show the existence of a causal link between the incorrect implementation of Lot ESP 5 and the award of the ESP-DIMA contract by saying, in its application, that it is more than obvious that the distorted implementation of [Lot] ESP 4 if it is prolonged by ESP-DIMA will mean the end of [Lot] ESP 5', that if the suspension sought is not granted the Commission will sign the relevant contracts opening thus the way for ESP-DIMA', and that as from this moment [Lot] ESP 5 will have no more room for services'.

69. The applicant has not, however, challenged either the defective implementation of Lots ESP 4 and ESP 5 which is essentially the source of its concerns or the foreseeable conditions of implementation of the ESP-DIMA contract. It is therefore clear that the applicant cannot show that the grant of the interim measures would bring about increased recourse to the Lot ESP 5 contracts, given that the Commission has clearly stated that in no circumstance would it use the Lot ESP 5 contracts to obtain services falling within the original Lot ESP 4 field or the ESP-DIMA contract. The applicant has not therefore shown that there is a causal link between, on the one hand, the acts suspension of whose operation is sought (the decision to award the ESP-DIMA contract to another tenderer and the letter giving reasons) and, on the other, the damage it is allegedly liable to suffer, namely a reduction in its turnover from Lot ESP 5. It thus appears that the interim measures sought will have no effect on the implementation of Lot ESP 5.

70. It follows that the interim measures sought are neither relevant nor necessary for avoiding the occurrence of the alleged damage.

71. In any event, even supposing that the alleged damage would flow from the contested acts, it is clear that that damage cannot be regarded as serious and irreparable as defined in the Court's case-law.

72. As regards the pecuniary damage alleged by the applicant, it must be observed that, as the Commission has submitted, it is settled case-law that such damage cannot in principle be regarded as irreparable, or even reparable only with difficulty, if it may be the subject of subsequent compensation (see the order in Esedra , paragraph 44 and the case-law cited). The applicant has not shown or even alleged that it would be unable to obtain such compensation by means of an action for compensation under Article 288 EC (see, to that effect, the order in Esedra , paragraph 47, and the order of the President of the Court in Case T230/97 R Comafrica and Dole Fresh Fruit Europe v Commission [1997] ECR II1589, paragraph 38).

73. In the light of the foregoing, the interim measures sought could be justified in the circumstances of the present case only if it were apparent that in the absence of such measures the applicant would be in a situation which could endanger its very existence or irretrievably alter its position in the market (see, to that effect, the order in Esedra , paragraph 45).

74. The applicant has not, however, adduced proof that in the absence of the interim measures sought

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it is liable to be placed in such a situation.

75. It is clear in this respect that the applicant has not produced evidence concerning its financial situation from which the President could conclude that its existence would be endangered pending the Court's judgment in the main action.

76. In particular, it must be observed that the applicant's arguments concerning falling income are not supported by evidence and, in any event, that the applicant has not shown that such a fall in income will be such as to endanger its existence before the Court's decision in the main action.

77. It must be considered, on the contrary, that the elements in the case-file indicate that the applicant will continue to pursue sufficient activity to exist until the Court gives judgment in the main action.

78. As the applicant itself emphasises in its application, it regularly takes part successfully in calls for tenders by the Commission, and has developed a number of projects for the European institutions, not only the Commission.

79. That is also confirmed by the reports by EuroDB of 22 March 2004 and Dun & Bradstreet of 26 July 2004, annexed to the Commission's observations of 15 October 2004, which indicate that the applicant has a large number of clients, including European institutions, national public bodies and international companies. Moreover, those reports show that the applicant's financial situation is classified as good', with positive marks for sales, profitability and total assets. With respect to those reports, it must be stated that the applicant's assertion in its letter of 2 November 2004 that those reports are out of date and incorrect is in very general terms, and the applicant has not produced the slightest evidence to demonstrate the truth of that assertion.

80. It should be observed, finally, that the applicant will continue to take part in the ESP 5 consortium, as first contractor for Lot ESP 5, and will also take part in the ED consortium, as second contractor for the ESP-DIMA contract, precisely because it demonstrated to the Commission, in the context of taking part in the ESP-DIMA call for tenders, that it had the financial and technical capacity required for such a project.

81. As to the possibility that in the absence of the interim measures sought the applicant's position in the market would be irretrievably altered, while the applicant alleges in this respect that it will be forced to terminate half its activity and dismiss half its staff and that all the infrastructure intended for the implementation of Lot ESP 5 will have to disappear with fatal' consequences, the applicant has not supported those arguments and, moreover, has not shown or even attempted to show that structural or legal obstacles would prevent it from regaining a substantial proportion of the lost market (see, to that effect, the order of the President of the Court in Case T369/03 R Arizona Chemical and Others v Commission [2004] ECR II0000, paragraph 84). In particular, the applicant has not shown that it would be prevented from winning other contracts, including the contract at issue following a fresh call for tenders, or from taking on employees or recreating a technical infrastructure capable of supporting large projects such as those implemented in the framework of Lot ESP 5, if that proved to be necessary for regaining the lost market shares. In this respect, it should be noted that Lot ESP 5 will continue to exist, and also that the fact that the applicant takes part, and will be able to continue taking part, in other projects for European institutions and other clients ensures that its technical capacity will not disappear.

82. As to the non-pecuniary damage alleged by the applicant, with respect to its argument that the interim measures are urgent because of the irreparable harm which would be caused to its reputation and credibility, it must be observed that the award decision does not have the consequence of causing such damage. According to settled case-law, taking part in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants and the elimination of a

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tenderer under the tender rules is not in itself in any way prejudicial (order of the President of the Court of Justice in Case 118/83 R CMC v Commission [1983] ECR 2583, paragraph 51, and order in Esedra , paragraph 48).

83. Similarly, the applicant's arguments intended to show that urgency derives from the fact that the contract with the ESP-DIMA consortium will be concluded and the budget corresponding to the ESP-DIMA contract fixed, before delivery of the decision putting an end to the main action, at an amount liable to tie the Commission permanently to that consortium cannot be accepted. Such a situation does not constitute a circumstance establishing urgency, since if the Court were to consider the main action well founded, the Commission would have to take the measures necessary to ensure appropriate protection of the applicant's interests. In that event, the institution would be able, without encountering great difficulties, to organise a new call for tenders in which the applicant could take part. Such a measure might be combined with the payment of compensation. The applicant has not referred to any circumstance which could prevent its interests from being safeguarded in such a way (see, to that effect, the order in Esedra , paragraph 51, and the order of the President of the Court in Case T108/94 R Candiotte v Council [1994] ECR II249, paragraph 27).

84. In those circumstances, it must be concluded that the evidence adduced by the applicant has not established to the requisite legal standard that it would suffer serious and irreparable damage if the interim measures sought were not granted.

85. It follows that the applicant has not succeeded in proving that the condition of urgency is satisfied. Consequently, the application for interim measures must be dismissed, without it being necessary to rule on its admissibility or examine whether the other conditions for the grant of interim measures are satisfied (order of the President of the Court in Joined Cases T38/99 R to T42/99 R, T45/99 R and T48/99 R Sociedade Agrícola dos Arinhos and Others v Commission [1999] ECR II2567, paragraph 48).

The application for measures of inquiry seeking production of documents by the Commission

Arguments of the parties

86. In its observations of 23 September 2004, the applicant requests the President of the Court to order the Commission to produce the documents at issue, on the ground that they might show that the implementation of Lot ESP 4 was incorrect and that it would therefore be of assistance to the Court, and even decisive for the Court's judgment, to obtain them.

87. The Commission contends that the application for measures of inquiry must be dismissed on the ground that the applicant has not shown that there would be any purpose in producing the documents at issue, contrary to the requirements of the case-law of the Court of Justice. The Commission further states that those documents contain confidential information and cannot be disclosed, as production of them would run counter to the protection of the tenderers' legitimate business interests.

Findings of the President

88. The applicant's request for production of the documents at issue can be understood only as an application for measures of inquiry or measures of organisation of procedure.

89. It must be recalled that under the first subparagraph of Article 105(2) of the Rules of Procedure the President of the Court assesses whether a preparatory inquiry should be ordered. Article 65 of the Rules of Procedure specifies that measures of inquiry include inter alia the production of documents. Article 64 of the Rules of Procedure allows the Court to adopt measures of organisation of procedure, including inter alia the production of documents or any papers relating to the case.

90. Since the application for interim measures must be dismissed for want of urgency, without there being any need to examine whether the other conditions for granting interim measures are satisfied,

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in particular the condition relating to a prima facie case, the President considers that the documents at issue are of no relevance for the examination of the present application for interim measures, and that the measures sought by the applicant concerning those documents should not therefore be adopted.

DOCNUM	62004B0303
AUTHOR	Court of First Instance of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2004 Page II-03889
DOC	2004/11/10
LODGED	2004/07/29
JURCIT	11997E225-P1 : N 40 11997E242 : N 40 11997E243 : N 40 31991Q0530-A64 : N 89 31991Q0530-A65 : N 89 31991Q0530-A104P2 : N 41 63 31991Q0530-A105P2L1 : N 89 61983O0118 : N 82 61994B0108 : N 83 61995O0149 : N 42 43 61996O0268 : N 41 61997B0230 : N 72 61999B0038 : N 85 61999O0107 : N 41 62000B0169 : N 65 72 73 82 83 62000B0236 : N 63 62001B0306 : N 63 62003B0175 : N 63 62003B0369 : N 81 62004B0148 : N 65 72
SUB	Public contracts of the European Communities
AUTLANG	English
APPLICA	Person
DEFENDA	Commission ; Institutions

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NATIONA	Greece
NOTES	Braun, Peter: Interim Measures Against Community Institutions: Case T-303/04 R, European Dynamics SA v. Commission, Public Procurement Law Review 2005 p.NA27-NA28
PROCEDU	Action for annulment;Application for interim measures - unfounded;Application for measures of inquiry - unfounded
DATES	of document: 10/11/2004 of application: 29/07/2004

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Notice for the OJ

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

of 10 November 2004

in Case T-303/04 R, European Dynamics SA v Commission of the European Communities

(Public service contracts - Community tender procedure - Interim measures - Application for suspension of operation - Urgency -- None)

(Language of the case: English)

In Case T-303/04 R, **European Dynamics SA,** established in Athens (Greece), represented by S. Pappas, lawyer, against **Commission of the European Communities** (Agents: L. Parpala and E. Manhaeve, and J. Stuyck, lawyer, with an address for service in Luxembourg) – application for suspension of operation of, first, the Commission's decision of 4 June 2004 (DIGIT/R2/CTR/mas D(2004) 324) to rank only in second place the offer submitted by the consortium of which the applicant is a member following a call for tenders for the provision of informatics services and, second, the Commission's decision of 14 July 2004 (DG DIGIT/R2/CTR/mas D(2004) 811) rejecting the applicant's complaints of 21 June, 1, 5 and 8 July 2004 against the award of the contract to another consortium – the President of the Court of First Instance has made an order on 10 November 2004, the operative part of which is as follows:

The application for interim measures is dismissed.

Costs are reserved.

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Notice for the OJ

Action brought on 29 July 2004 by European Dynamics SA against the Commission of the European Communities

(Case T-303/04)

Language of the case: English

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 29 July 2004 by European Dynamics SA, Athens, Greece, represented by Mr S. Pappas, lawyer.

The applicant claims that the Court should:

- annul the Commission's Contract Notice 2003/S249-221337 ESP-DIMA;

- annul the Commission's call for tenderers PO/2003/192 (ESP-DIMA);

- annul the Commission's Decision of 4 June 2004 ranking the offer of European Dynamic's consortium only second after the first successful tenderer;

- annul the Commission's Decision of 14 July 2004 rejecting the applicant's appeals against the award of the tender;

- order the Commission to pay European Dynamic's legal and other fees and expenses incurred in connexion with this application.

Pleas in law and main arguments

The applicant is part of a consortium that was the successful tenderer as service provider for ESP Lot 5, web applications. ESP Lot 4, Data/Information management applications, was awarded to another consortium.

According to the applicant, the tender contested in the present application, ESP-DIMA, was based on the wrong assumption that the provision of services for data and information management constitutes a new market and that the use of ESP Lot 4 had exceeded all expectations. The applicant submits that the Commission has wrongly allocated work to ESP Lot 4 that, according to the applicant, actually fell within ESP Lot 5. The applicant states that, as a result, the Commission had to increase the budget forecast for ESP Lot 4 and issue a new tender ESP-DIMA while the budget used for ESP Lot 5 remained behind the provisions.

The applicant furthermore submits that the Commission infringed an essential procedural requirement in that at least one member of the evaluation committee of the contested tender had a conflict of interest with the applicant.

Finally, the applicant claims that its ranking as second successful tenderer for ESP-DIMA is not sufficiently justified. The applicant also submits that the Commission refused to disclose information regarding the evaluation report.

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Judgment of the Court of First Instance (Second Chamber)
First Instance (Second Chamber)First Instance (Second Chamber)2005. TQ3 Travel Solutions Belgium SA v Commission of the European Communities. Public service contracts - Community tendering procedure - Provision of travel agency services for travel undertaken by officials and other staff of the institutions. Case T-148/04.

1. European Communities' public procurement - Conclusion of a contract following a call for tenders - Discretion of the institutions - Judicial review - Limits

2. European Communities' public procurement - Conclusion of a contract following a call for tenders - Abnormally low offer - Obligation of the contracting authority to hear from the tenderer

(Commission Regulation No 2342/2002, Art. 139)

3. European Communities' public procurement - Conclusion of a contract following a call for tenders - Award of contracts - Award criteria - Choice of the contracting authorities - Limit - Use of criteria enabling identification of the economically most advantageous offer - Admissibility of criteria not purely economic in nature

4. European Communities' public procurement - Conclusion of a contract following a call for tenders - Award of contracts - Evaluation of the offers on the basis of the offers themselves

1. The Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers.

(see para. 47)

2. Regarding European Communities' procurement contracts, Article 139 of Regulation No 2342/2002 laying down detailed rules on the implementation of the Financial Regulation, provides that the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low. This should be interpreted in the sense that the obligation to check the seriousness of a tender arises where there are doubts beforehand as to its reliability. Thus, the main purpose of this article is to enable a tenderer not to be excluded from the procedure without having had an opportunity to explain the terms of its tender which appear abnormally low.

(see para. 49)

3. For the purposes of identifying the economically most advantageous tender, in the context of the procedure for awarding a contract following an invitation to tender, each of the award criteria used by the contracting authority does not necessarily have to be of a purely economic nature, since it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority.

(see para. 51)

4. In the context of the procedure for awarding a contract following an invitation to tender, the quality of tenders must be evaluated on the basis of the tenders themselves and not on that of the experience acquired by the tenderers with the contracting authority in connection with previous contracts or on the basis of the selection criteria (such as the technical standing of candidates) which were checked at the stage of selecting applications and which cannot be taken into account again for the purpose of comparing the tenders.

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(see para. 86)

In Case T-148/04,

TQ3 Travel Solutions Belgium SA, established in Mechelen (Belgium), represented initially by R. Ergec and K. Möric and subsequently by B. Lissoir, lawyers,

applicant,

v

Commission of the European Communities, represented by L. Parpala and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Wagon-Lits Travel SA, established in Brussels (Belgium), represented by F. Herbert, H. Van Peer, lawyers, and D. Harrison, Solicitor, with an address for service in Luxembourg,

intervener,

APPLICATION, first, for annulment of the Commission's decisions not to award the applicant lot 1 of the contract which was the subject of Notice 2003/S 143 129409 for the provision of travel agency services, but to award that lot to another undertaking and, secondly, for damages to compensate for the loss suffered by the applicant following the rejection of its tender,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: J. Palacio Gonzalez, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 March 2005,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs of the Commission and of the intervener, including those incurred in the proceedings for interim relief.

Law

1. The award of service contracts by the Commission is subject to the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; the Financial Regulation') and to the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1; the detailed implementing rules'). Those provisions are based on the relevant

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Community directives and, in particular, as regards service contracts, on Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1).

2. Article 100(1) of the Financial Regulation provides that [t]he authorising officer shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules'. Article 97(2) of the Financial Regulation and Article 138(1)(b) and (2) of the detailed implementing rules state that a contract may be awarded to the tender offering the best value for money, that is, the one with the best pricequality ratio.

3. Article 100(2) of the Financial Regulation states:

The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken... However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

4. Article 139(1) of the detailed implementing rules provides that, [i]f, for a given contract, tenders appear to be abnormally low, the contracting authority shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received'.

5. Article 146(4) of the detailed implementing rules provides that, [i]n the case of abnormally low tenders as referred to in Article 139 of this regulation, the evaluation committee shall request any relevant information concerning the composition of the tender'.

Facts

6. By framework contract 98/16/IX.D.1/1 dated 13 January 1999, the company Belgium International Travel was entrusted by the Commission with the management of the travel agency services for its Brussels staff. That contract was concluded for an initial two-year period, with the possibility of renewal for three oneyear periods, that is, for the period from 1 April 1999 to 31 March 2004. By addendum dated 27 February 2001, that contract was transferred to the applicant.

7. By a contract notice of 30 May 2003, published in the Supplement to the Official Journal of the European Union (OJ 2003 S 103), the Commission issued an invitation to tender, in accordance with the restricted procedure, under the reference ADMIN/D1/PR/2003/051, for the provision of travel agency services for travel undertaken by officials and other staff carrying out missions and by any other persons travelling on behalf of or at the request of the Community institutions, agencies and bodies.

8. The file shows that that invitation to tender was cancelled by the Commission following the withdrawal of certain Community institutions.

9. On 29 July 2003, acting pursuant to the Financial Regulation and the detailed implementing rules, the Commission published in the Supplement to the Official Journal of the European Union (OJ 2003 S 143), under the reference 2003/S 143-129409, a new invitation to tender, in accordance with the restricted procedure, for the provision of travel agency services for travel undertaken by officials and other staff carrying out missions and by any other persons travelling on behalf of or at the request of certain Community institutions, agencies and bodies (section II.1.6 of the contract notice). The contract consisted of a number of lots, each corresponding to a site

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where the services were to be provided, including Brussels (lot 1), Luxembourg (lot 2), Grange (lot 3), Ispra (lot 4), Geel (lot 5), Petten (lot 6) and Seville (lot 7).

10. By registered letter of 28 November 2003, the applicant submitted to the Commission a tender for lots 1, 2, 3, 5, 6 and 7 of that contract.

11. By letter of 24 February 2004, the Commission informed the applicant that its tender for lot 1 of the contract (lot 1' or the contract at issue') had not been accepted, since the price-quality ratio of its tender was lower than that of the selected tender. That letter of 24 February 2004 states:

After examining the tenders received in response to our invitation to tender, we regret to inform you that your tender could not be accepted in respect of lots 1, 2, 3 and 7 of the above contract. The grounds justifying the rejection of your tender are the following:

Lot 1 (Brussels)

It was established that the pricequality ratio of your tender (51.55) is lower than that of the firm proposed as the successful tenderer (87.62)...'

12. By letter of 8 March 2004, the applicant sought from the Commission disclosure of more detailed information regarding the choice of the tender selected for the contract at issue. The applicant also requested that the Commission suspend the procedure for the award of that contract and refrain from concluding a contract with the undertaking selected for that contract.

13. By letter of 16 March 2004, the Commission provided the applicant with information on the grounds of its decision of 24 February 2004 not to award it the contract at issue and of its decision to award it to another undertaking (the refusal decision' and the award decision' respectively). The Commission pointed out inter alia that the applicant's tender had obtained 51.55 points, whereas the selected tender, from the company WagonLits Travel (WT' or the intervener'), had received 87.62 points after a qualitative and financial analysis, and that, as a consequence, WT's tender offered the best value for money and justified the award of the contract at issue to that undertaking. The Commission also stated that WT's tender, although appreciably lower in terms of price than the applicant's (index 100 for WT and index 165.56 for the applicant), did not appear abnormally low and it was therefore unnecessary to apply the provisions of Article 139 [of the detailed implementing rules]'.

14. By fax of 17 March 2004, the Commission proposed to the applicant that framework contract 98/16/IX.D.1/1 on travel agency services, which was due to expire on 31 March 2004, be extended until 27 June 2004.

15. By letter of 19 March 2004, the Commission justified its request for an extension of the abovementioned framework contract, stating that the communication of instructions to the new contractor, namely WT, and the entry into force of the new contract could not take place by the expiry date provided for in that framework contract. That letter specified that, owing to time-limits which cannot be shortened and which are beyond the control of the Commission and the other contracting party, the passing of instructions to the new contractor and the entry into force of the new contract cannot take place by the natural expiry date [of the applicant's] contract'.

16. By fax of 22 March 2004, the applicant informed the Commission that it did not wish to extend the framework contract and that, consequently, that contract would expire on 1 April 2004.

17. By letters of 23 and 26 March 2004, the Commission asked the applicant to intermediate by forwarding to WT the files of traveller profiles' which it had drawn up, so as to ensure the continuity of the missions sector service'. By letters of 25 and 31 March 2004, the applicant informed the Commission that it refused to forward those profiles to WT.

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18. On 31 March 2004, the Commission concluded a contract with WT for the provision of travel agency services in Brussels. That contract entered into force on 1 April 2004 with an addendum allowing the new contractor to perform the service explant' (in its own offices) for a transitional period from 1 April to 19 May 2004.

Procedure and forms of order sought by the parties

19. By application lodged at the Registry of the Court of First Instance on 26 April 2004, the applicant brought the present action seeking, firstly, annulment of the refusal decision and the award decision and, secondly, compensation for the loss suffered by it as a result of both those decisions.

20. On 26 April 2004, the applicant lodged an application for the case to be decided under an expedited procedure in accordance with Article 76a of the Rules of Procedure of the Court of First Instance. That application was dismissed by decision of the Court of First Instance of 10 June 2004.

21. By separate document lodged at the Registry of the Court of First Instance on 26 April 2004, the applicant made an application for interim relief, seeking, firstly, suspension of operation of the refusal decision and the award decision and, secondly, an order that the Commission take the measures necessary to suspend the effects of the award decision or of the contract concluded following that decision. That application was dismissed by order of the President of the Court of First Instance of 27 July 2004, the costs relating to those proceedings having been reserved.

22. By document lodged at the Registry of the Court of First Instance on 9 June 2004, WT sought leave to intervene in the present proceedings in support of the forms of order sought by the Commission. By order of 14 July 2004, the President of the Second Chamber of the Court of First Instance granted that leave to intervene. WT lodged its statement in intervention and the other parties lodged their observations on that statement within the prescribed periods.

23. Upon hearing the report of the JudgeRapporteur, the Court of First Instance decided to open the oral procedure and, by way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, asked the Commission to reply to a number of questions and WT, firstly, to reply to a question and, secondly, to produce a nonconfidential copy of the financial and technical tender submitted in connection with the tendering procedure in question. By letter of 9 February 2005, the Commission submitted its replies to the Court's questions and, by letter of 14 February 2005, WT produced the requested document and submitted its reply to the Court's question.

24. The applicant claims that the Court of First Instance should:

- annul the refusal decision;

- annul the award decision;

- declare that the unlawful act committed by the Commission constitutes a fault capable of rendering it liable;

- order, pursuant to Article 64 of the Rules of Procedure, the production by the Commission of all the documents in its possession relating to the award of lot 1;

- refer the applicant back to the Commission for the loss suffered to be assessed;

- order the Commission to pay the costs.

25. The Commission contends that the Court should:

- dismiss the application in its entirety;

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- order the applicant to pay the costs.

26. The intervener contends that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

The claims for annulment

27. In support of its claims for annulment, the applicant puts forward, in essence, two pleas. The first alleges infringement of Article 146 of the detailed implementing rules and a manifest error of assessment of the financial tenders. The second alleges a manifest error of assessment of the quality of the tenders.

1. The first plea, alleging infringement of Article 146 of the detailed implementing rules and a manifest error of assessment of the financial tenders

Arguments of the parties

28. The applicant submits that, by considering that WT's tender was not abnormally low and, therefore, by failing to comply with its obligation to request from WT any relevant information concerning the composition of the tender, the Commission infringed Article 146 of the detailed implementing rules since, in the applicant's view, Article 139 of the detailed implementing rules is not applicable to the present case.

29. According to the applicant, the price of WT's tender was 42% lower than the mean value between the tender submitted by the applicant and the tender of a third bidder which had submitted a tender which was even higher in price, the applicant's tender being assigned an index for its price of 165.56 and the most expensive tender an index of 181.13. That major difference should have prompted the Commission to consider WT's tender abnormally low, particularly since, by letter of 8 March 2004, the applicant had informed the Commission of its doubts as to the reliability of the terms of WT's tender.

30. The applicant points out that, even though the Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, the Community judicature nevertheless checks compliance with the applicable procedural rules and the duty to state reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-211/02 Tideland Signal v Commission [2002] ECR II-3781, paragraph 33).

31. In that regard, the applicant recalls that the Court held in Case T4/01 Renco v Council [2003] ECR II171, paragraph 76, that the Council ... must examine the reliability and seriousness of the tenders which it considers to be generally suspect, which necessarily means that it must ask, if appropriate, for details of the individual prices which seem suspect to it, a fortiori when there are many of them' and that, in addition, the fact that the applicant's tender was considered to conform to the contract documents did not relieve the Council of its obligation, under the same article, to check the prices of a tender if doubts arose as to their reliability during the examination of the tenders and after the initial assessment of their conformity'.

32. In this case, the applicant points out that, for each of the lots, the price of the travel agency services is made up, on the one hand, of the management fee', which is the charge payable to the travel agency to cover the management costs relating to travel undertaken by staff of the Community institutions and agencies, and, on the other, the transaction fee', which is the charge payable to the travel agency to cover the administrative costs relating to travel undertaken by persons other than the staff of Community institutions and agencies but travelling at the request

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of Community institutions and agencies.

33. The applicant notes that the management fee' is made up of wage costs, operating expenses and general expenses. According to the applicant, wage costs make up the bulk of the management fee' and, therefore, of the price of the travel agency services relating to lot 1. The applicant thus estimated in its financial tender that wage costs represented 79.5% of the management fee'. Since the price of travel agency services consists mainly of wage costs, the Commission should, in its view, have considered the price tendered by WT to be abnormally low.

34. In those circumstances, the applicant submits that the only possible way to reduce wage costs and therefore the price tendered, would have been to reduce significantly the number of persons assigned to the performance of the contract or the amount of their pay compared with that proposed by the applicant. Such reductions would then have been bound to have an effect on the quality of the services provided.

35. First, as regards pay, the applicant points out that the contract document provided that the travel agency services were to be provided on the premises of the Community institutions and agencies. The employment contracts of the employees are therefore subject to Belgian law, which imposes a minimum level of remuneration for employment contracts.

36. Second, as regards the number of employees, the applicant submits that the employment of 39 persons is necessary in order to ensure the quality of the services provided. Since the staff costs are irreducible, the substantial difference in price between the tender submitted by WT and those of two other tenderers suggests an abnormally low tender. It points out that, although it is possible to submit a more competitive tender than its own, a difference of 42% is, on any view, difficult to justify.

37. The applicant further submits that the Commission was wrong to pay attention to the ratio between the volume of transactions and the management fee', since that criterion is not included in the contract document. In that regard, the applicant points out that no proportionality can exist between the volumes of transactions for lots 1 and 2 and the budgets estimated for those lots. The budget estimated for lot 2 represents only 12.58% of the budget estimated for lot 1. In addition, the volume estimated for lot 2 represents only 22.8% of that expected for lot 1.

38. Finally, the applicant notes that the Commission used criteria other than those set out in the contract document, firstly, in regard to the management fee' and, secondly, by taking into account both the profitsharing scheme proposed by WT and its technical and logistical resources.

39. In the Commission's view, the tender submitted by WT was not abnormally low and the application of Article 139 of the detailed implementing rules was therefore not necessary. The use of the verb appear' in Article 139(1) of the detailed implementing rules makes clear the intention of the Community legislature to confer on the contracting authority a wide discretion during tendering procedures. The Commission further points out that it is clear from the same article that an abnormally low tender is not unlawful per se, since explanations for the abnormally low tender in question may be taken into account.

40. The Commission points out that there was no significant difference between the average cost of the transaction fees' tendered by the applicant and that of the transaction fees' tendered by WT, whereas there was a significant variation between the levels of the management fees' quoted by the two tenderers.

41. With regard to wage costs, WT properly estimated the number of persons necessary, basing its estimate inter alia on an annual average volume of transactions per manager' ratio. The Commission further points out that another tender also proposed a lower number of advisers than that proposed

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by the applicant. In terms of the cost per person, the Commission points out that WT quoted the second lowest price, the applicant for its part having submitted the highest price.

42. As regards general expenses, those quoted in WT's tender were far lower than those of the applicant.

43. The evaluation committee also took into account various parameters in evaluating the consistency of the tenders in respect of the management fee'. Firstly, it analysed the average cost of a missions' transaction paid for by the management fee' as compared with the average cost of an other travel' transaction paid for by the transaction fee'. That average cost was EUR 32.94 as against EUR 14.37 in the case of the applicant, and EUR 16 as against EUR 15.66 in the case of WT. Secondly, it compared the cost of the management fee' relating to lot 1 (Brussels) with that relating to lot 2 (Luxembourg) on the basis of the proportional volume of each lot. It was apparent from that analysis that WT's management fee' for lot 1 was 3.64 times higher than that quoted for lot 2, for a volume of missions 3.56 times higher. As for the applicant's management fee', it appeared to be higher for lot 1, since it was 7.89 times higher than that quoted for lot 2, likewise for a volume 3.56 higher.

44. In the light of that analysis, the Commission considered that WT's tender was realistic, balanced and proportional. It points out that it based its view on parameters which were objective and comparable as between the tenders, thus making it possible to assess the consistency between the technical content and the price level of the tender.

45. The Commission also draws attention to the fact that it took into account WT's profitsharing scheme (sharing between the agency and the Commission of any discounts negotiated by the agency on the purchase price of tickets as compared with International Air Transport Association (IATA') prices). It submits that the profitsharing scheme is a relevant factor, firstly, for the purpose of assessing the potential income that a tenderer can expect in addition to payment for the service and, secondly, for the purpose of assessing the economic balance of a tender as regards the management fee'.

46. WT, for its part, submits that the Commission has demonstrated that it carried out a detailed and precise comparative examination, and that its tender cannot, therefore, appear abnormally low.

Findings of the Court

47. As a preliminary point, it should be recalled that the Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-145/98 ADT Projekt v Commission [2000] ECR II-387, paragraph 147, and Case T169/00 Esedra v Commission [2002] ECR II609, paragraph 95).

48. It should also be noted that, under Article 97 of the Financial Regulation, [c]ontracts may be awarded by the automatic award procedure or by the best-value-for-money procedure'. In addition, under Article 138 of the detailed implementing rules, [t]he tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract'.

49. Moreover, under Article 139 of the detailed implementing rules, the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low. The obligation to check the seriousness of a tender also arises where there are doubts beforehand as to its reliability, also bearing in

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mind that the main purpose of that article is to enable a tenderer not to be excluded from the procedure without having had an opportunity to explain the terms of its tender which appears abnormally low.

50. The application of Article 146 of the detailed implementing rules is therefore inherently connected with that of Article 139 of those rules, since only when a tender is considered abnormally low, within the meaning of the latter article, is the evaluation committee required to request details of the constituent elements of the tender which it considers relevant before, where appropriate, rejecting it. Moreover, contrary to what the applicant claims, where a tender does not appear to be abnormally low for the purposes of Article 139 of the detailed implementing rules, Article 146 of those rules is not relevant. Consequently, given that the evaluation committee had no intention, in this case, of rejecting WT's tender, since that tender did not appear to it to be abnormally low, Article 139 of the detailed implementing rules proves to be irrelevant.

51. So far as the award of the contract at issue is concerned, under Article 6 of the contract document, for each lot, the contract will be awarded to the economically most advantageous tender, taking account of the quality of the services proposed and the prices tendered'. According to settled case-law, for the purpose of identifying the economically most advantageous tender, each of the award criteria used by the contracting authority does not necessarily have to be of a purely economic nature, since it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority (Case C513/99 Concordia Bus Finland [2002] ECR I7213, paragraph 55, and Renco v Council , paragraph 67).

52. In this case, the price of the travel agency services is made up of two main elements: (I) the management fee', which represents the total monthly amount covering wage costs, operating expenses and general expenses and (II) the transaction fee', which represents the charge payable to the travel agency for administrative expenses relating to travel undertaken by persons travelling at the request of the Community institutions and agencies.

53. The Court notes that the applicant does not call in question the transaction fee' proposed by WT, but challenges only the amount of the management fee' tendered by the latter. Consequently, it must be determined whether the Commission made a manifest error of assessment in regard to the financial terms of the management fee' taken in its various elements, since the management fee' tendered by WT was the least expensive, that of the applicant the most expensive and two other tenders were between the two.

Wage costs

54. It must be observed that the wage costs are established on the basis, first, of the number of persons employed and, secondly, of the cost generated by each employee.

55. As regards, firstly, the number of employees, this may be a useful indicator from the point of view of a possible underestimate of the requirements essential for a satisfactory performance of the services covered by the invitation to tender. However, such statistical data cannot be considered a decisive guide, since the efficiency of a tenderer's structural organisation may justify a smaller number of employees.

56. In this case, the Court notes that, in estimating the number of employees necessary, WT took as its basis the annual average volume of transactions per manager', that calculation being based on an objective and realistic criterion. WT stated, in reply to a written question from the Court, that the number of employees which it considered necessary for lot 1 was 29, even though it knew that another tender was proposing a still lower number.

57. The applicant's estimate, according to which 39 persons are needed to perform the services, is not relevant, since the possibility remains that other tenderers may tender a lower number of

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employees by virtue, inter alia, of a more efficient modus operandi and greater technical competitiveness.

58. Consequently, the Court takes the view that the applicant has not proved to the requisite legal standard that WT's estimate, having regard to the number of employees, was inappropriate or that WT underestimated that number.

59. As regards, secondly, the cost per person, it is to be observed that WT proposed the second lowest price per employee, the applicant, for its part, having proposed the highest price.

60. In the light of that fact, it is apparent that WT was not the only economic operator to estimate the requirements for lot 1 at a cost below that estimated by the applicant. Moreover, the fact that another tenderer proposed a cost per person which was lower than that proposed by the selected tenderer may have confirmed the contracting authority's assessment that the prices proposed by WT were not abnormally low.

61. The Court notes that the applicant merely relies on the fact that WT proposed either an insufficient number of employees or an abnormally low level of pay allocated to them. However, the applicant has not adduced any evidence that the Commission made a manifest error of assessment. Consequently, the contracting authority was able to show that the number of employees proposed by WT was consistent and that the selected tender was not abnormally low.

Operating expenses

62. So far as the operating expenses are concerned, it is apparent from Annex 2 to the contract document that those expenses are made up, firstly, of the expenses relating to the allocation by the agency of the period between the date of payment by the agency of its suppliers' invoices and the date of payment by the Commission of the agency's invoices and, secondly, of the other all management expenses and changes relating to capital goods, consumable goods, maintenance and operation of the computer and communication equipment used for the purposes of performing the contract.

63. In that regard, the applicant has adduced no proof that the operating expenses estimated by WT were abnormally low, but merely, in its pleadings, defined the components of those expenses without clarifying in what respect WT's estimate of them was abnormally low.

General expenses

64. So far as general expenses are concerned, it must be observed that the Commission found that WT's tender showed a far lower proportion of general expenses than the applicant's tender. With regard to this item, it must be pointed out that tenderers make estimates on the basis of their practice and experience. The applicant's estimates cannot therefore be regarded as a standard, since the specific organisational structure of each tenderer may be a reason for lower expenses.

65. Furthermore, in the Commission's submission, WT was concerned to minimise costs whilst ensuring a high level of quality through reliance on highly efficient infrastructures and technologies, thanks to advanced productivity techniques'. It is apparent from a written reply to a question put by the Court that the Commission took into account inter alia the fact that WT was able to propose not only solutions deemed optimal for the provision of the services from the point of view of reducing costs, but also innovative information technology solutions. In addition, the exhaustive description of the technical and logistic resources in WT's tender enabled the Commission to satisfy itself that the infrastructures used and tools developed were geared to productivity and cost reduction whilst ensuring the effectiveness of the services. The technical tender also placed to the fore a concern to provide the best possible service at the lowest possible cost.

66. Consequently, in the light of that information, the Court considers that the Commission took pains to satisfy itself that the general expenses ensured correct performance of the expected services and that the selected tender was reliable and serious.

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67. It should also be noted that the evaluation committee checked the consistency of the management fee' by comparing, in the first pla ce, the average cost of a missions' transaction paid for by the management fee' with the average cost of an other travel' transaction paid for by the transaction fee'. That analysis showed that, in the case of the applicant's tender, that cost was nearly twice as high as the average cost of a transaction paid for by the transaction fee' (EUR 32.94 as compared with EUR 14.37), unlike WT's tender, which proposed very slightly differing costs (EUR 16 as compared with EUR 15.66).

68. In the second place, the evaluation committee compared the cost of the management fee' for lots 1 (Brussels) and 2 (Luxembourg) on the basis of the proportional volume of each lot. The tender submitted by WT appeared reliable to the contracting authority since the management fee' for lot 1 was 3.64 times higher than that tendered for lot 2, for a volume of missions 3.56 times higher, that is, a justified proportion which did not reveal any inconsistency in the prices tendered. Conversely, the applicant's management fee' appeared much higher for lot 1 since it was 7.89 times higher than that tendered for lot 2, likewise for a volume 3.56 times higher.

69. The Court notes that the applicant disputes the foregoing comparison based on ratios, but does not prove that it is incorrect, bearing in mind, moreover, contrary to what the applicant claims, that the Commission used that comparative method only in order to satisfy itself as to the consistency of the selected tender and not in any way for the purpose of allocating lot 1. Consequently, the Commission was reasonably entitled to consider that the management fee' in WT's tender was serious and reliable.

The profitsharing scheme

70. It must be held that, as is maintained by the Commission, the profitsharing scheme was taken into account in the qualitative assessment of the tender, in order to show that the Commission was fully entitled to consider that the tender was not abnormally low. That element was used in order to check the reliability and seriousness of the financial tender as a whole, and not as an award criterion. Since any discount received by the service provider gives rise to a proportional payment to the Commission and since, in this case, WT's tender envisaged a substantial proportion of additional income in the profitsharing part, the Commission was able to satisfy itself that the management fee' was economically in balance.

71. In the light of the foregoing, it does not appear that the Commission made a manifest error of assessment in considering that WT's financial tender offered best value for money, yet without being abnormally low. Accordingly, the first plea must be rejected.

2. The second plea, alleging manifest error in the assessment of the quality of the technical tenders

Arguments of the parties

72. The applicant submits that the Commission made a manifest error of assessment by awarding WT's tender the highest mark (87.62 out of 100) for the quality of the proposed services. In its view, in order to explain the award of a higher mark, WT's tender was required to include not only substantial guarantees of quality with regard to the travel agency services, but also guarantees of quality superior to those offered by the applicant. In its view, WT's tender could provide no assurance whatsoever of a sufficient level of quality for those services.

73. The applicant submits that WT, by recruiting 14 of its 35 former employees, did not have the necessary staff to guarantee good quality of service provision.

74. The applicant raises the point that it was not accused, in the course of providing the services during the performance of the framework contract, that is, in the period from 1 April 1999 to 31 March 2004, of any breach of its obligations. In that regard, it recalls that, in an internal note

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of 6 December 2001, the head of unit in charge of missions at the Commission acknowledged the good performance of the travel agency services provided by it, emphasising the generally positive' character of those services. Consequently, the applicant submits that its tender fully satisfied the requirements laid down by the contract document.

75. The applicant points out that the Commission knew, even before the start of performance of the contract, that WT would be unable to guarantee a correct performance of the services for a threemonth period, that is, a period corresponding to one eighth of the initial term of the contract. However, the applicant points out that Annex 1 to the contract document makes provision of the travel agency services at the premises of the institutions a mandatory condition of performance of the service, bearing in mind also that the contract may be terminated if performance of the contract has not actually started within three months following the date laid down for that purpose'. The applicant also expresses surprise that WT, even though it was expected, at the time of the evaluation of tenders, not to be able to perform the contract for three months, was awarded the highest qualitative mark.

76. The applicant submits that the award of lot 1 to WT was made in disregard of the requirements of the contract document, which lays down, in Annex 1, as a condition of the admissibility of tenders, that tenderers must lodge proof that they have the necessary authorisations to issue tickets and states that an IATA licence number will be required before the start of performance of the contract. However, performance of the contract concluded with WT on 31 March 2004 began as from 1 April 2004, even though WT was unable to produce the abovementioned licence number. Consequently, the applicant submits that it was the only tenderer in a position to comply with the contract document so far as obtaining the IATA licence was concerned.

77. The Commission, on the other hand, submits that it evaluated the quality of the technical tenders in accordance with the contract document and with the evaluation methodology established prior to the opening of the tenders, and that it did so without making any manifest errors of assessment.

78. With regard to the inability to perform the contract between 1 April and 27 June 2004, the Commission notes that none of the contracting parties, apart from the applicant, would have been in a position to comply with the administrative and technical formalities necessary for performance of the services at the Commission's offices within six weeks following the award decision and less than one month from the first appropriate date for signing the contract. That is why the Commission asked the applicant to continue providing that service, although in the end the applicant refused to respond favourably to that request.

79. The Commission therefore points out that, faced with a situation of extreme urgency brought about by unforeseeable events not attributable to the contracting authority and likely to jeopardise the Community's interests, it had to resort to Article 126(1)(c) of the detailed implementing rules. Accordingly, it signed the contract in question with an addendum allowing the new contractor to perform the service ex-plant', that is to say, on its own premises, for a transitional period from 1 April to 19 May 2004 and not for a threemonth period as the applicant claims.

80. In that regard, the Commission reiterates that it was faced with the unforeseen withdrawal of several institutions, including the European Parliament and the Court of Justice. In this case, the contract document did not lay down a precise date for the commencement of performance of the services, except that the contract had to be signed before 30 June 2004 and that tenders were valid for nine months from 2 December 2003. Moreover, WT would still have been in a position to perform the contract at issue, which was not due to start until 1 July 2004 at the latest.

81. In addition, it disputes the allegation that it was aware, at the time of the inter-institutional invitation to tender, of the exact nature of the difficulties which would arise as a result of the

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withdrawals of the institutions. It was only on 8 March 2004, at the meeting with WT, that the technical and administrative problems, which precluded performance of the contract inplant' from 1 April 2004, manifested themselves. The Commission therefore submits that the problems were known about only after the closure of the invitation to tender, obliging the Commission to find an appropriate solution.

82. The Commission points out that, according to the contract document, the IATA licence is required only before commencement of the services, that is, after the tendering procedure is closed. Moreover, that licence is not a qualitative evaluation criterion.

83. WT, on the other hand, disputes the fact that an existing contractor should automatically be awarded the highest mark.

84. Regarding IATA licences, WT points out that it did have a general licence covering its operations in Belgium and IATA licences for each of its agencies. WT submits that none of the tenderers except the applicant could be in possession of a licence covering premises located inside the Commission. WT also points out that it is clear from Annex 1 to the contract document (clause 2.2) that holding an IATA licence number specific to the performance of the contract did not in any way constitute a condition of admissibility of tenders.

85. Finally, so far as the number of employees is concerned, WT reiterates that it satisfied the condition set out in the contract notice. It had at least 70 employees in Belgium and submits that, for the most part, its employees held the professional qualifications referred to in Article 5.2 of Annex 1 to the contract document.

Findings of the Court

86. It must be recalled, as a preliminary point, that it is settled caselaw that the quality of tenders must be evaluated on the basis of the tenders themselves and not on that of the experience acquired by the tenderers with the contracting authority in connection with previous contracts or on the basis of the selection criteria (such as the technical standing of candidates) which were checked at the stage of selecting applications and which cannot be taken into account again for the purpose of comparing the tenders (Case 31/87 Beentjes [1988] ECR 4635, paragraph 15, and Esedra v Commission , paragraph 158).

87. In this case, under Article 6 of the contract document, the criteria for awarding the contract are two in number, namely, the quality of the services proposed and the prices tendered. As regards the quality of the tender, this must be evaluated on the basis of four criteria: (i) staff, (ii) technical and logistical resources, (iii) management and communication of information and (iv) capacity to negotiate the lowest possible fares.

88. Consequently, the applicant's past experience cannot preclude the existence of a tender from another tenderer capable of offering a higher quality of services than its own and complying appropriately with the four criteria establishing the expected quality.

89. Regarding the number of employees, WT proposed 29 employees for lot 1, whereas the applicant tendered 39. WT's estimate was found reliable by the Commission since WT's productivity and efficiency, as explained by it in one of its written replies to the Court mentioned in paragraph 65 above, may justify a smaller number of employees than that used by the applicant, without impairing the expected quality of the services.

90. Moreover, neither the Financial Regulation nor the detailed implementing rules requires a tenderer actually to have available to it, at the time it submits its tender, the staff to perform a future contract which might be awarded to it. Any selected tenderer must be able to start providing the services on the date set by the contract resulting from the tendering procedure, and not before

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the contract is finally awarded to it. To require the tenderer to have the requisite number of employees at the time it lodges its tender would be tantamount to favouring the tenderer holding the existing contract and thus nullify the very essence of the call for tenders. In this case, the contract document required only that the tenderer, at the time of lodging its tender, have at least 70 employees in Belgium, a condition met by WT.

91. It should be noted that the performance difficulties encountered by WT, which was unable to obtain the required IATA licence and therefore to provide the services in-house from 1 April 2004, were connected with the withdrawal of certain institutions, which necessitated the issue of a second invitation to tender, and emerged only after the contract had been awarded. It was not until 8 March 2004, at the meeting between the Commission and WT, that those difficulties emerged. Consequently, the applicant's argument, that WT's performance difficulties during the first three months of the contract could not justify the award of a high mark and should have prompted the Commission to terminate the contract eventually signed with WT, is irrelevant.

92. According to the draft contract annexed to the contract document, the possibility of termination is only an option available to the institution, contrary to what the applicant claims. However, in this case, the Commission considered that the services in question had not been provided excessively late, and that their performance had not given rise to an unacceptable delay, given also that WT started to provide its services as from 1 April 2004, and did so under the conditions laid down and adapted by the addendum.

93. Moreover, according to the contract document, the capacity to perform the services immediately did not constitute a qualitative evaluation criterion, since the contract document provided only for a deadline for the commencement of performance of the services, in this case 1 July 2004. Consequently, the fact that WT was unable to provide its services inhouse from 1 April 2004 cannot constitute an infringement of the contract document, since the latter mentioned only a time-limit for the start of the services. WT actually provided the services inplant' from 24 May 2004 onwards, that is, more than a month before the deadline set by the contract document.

94. So far as the licence specific to the performance of the contract is concerned, the contract document states that an IATA licence number specific to the performance of the contract and an attestation from the local authorities administering the travel agency sector ... will be required before the start of operations...' (Annex 1 to the contract document (Clause 2.2)). WT stated at the hearing that it had received, on 10 May 2004, licence A', which is required in order to be able to obtain an IATA licence subsequently. In this case, WT obtained that IATA licence on 18 May 2004. Accordingly, WT complied with the requirements of the contract document, since it was in possession of that licence before 1 July 2004.

95. With regard to use of the negotiated procedure, Article 126(1)(c) of the detailed implementing rules states that [c]ontracting authorities may use the negotiated procedure without prior publication of a contract notice... in so far as is strictly necessary where, for reasons of extreme urgency brought about by unforeseeable events not attributable to the contracting authorities and likely to jeopardise the Communities' interests, it is impossible to comply with the time-limits set for the other procedures'.

96. As regards the unforeseeable nature of the event and whether or not it was attributable to the contracting authority, it should be noted that it was following the withdrawal of other institutions that the Commission published the contract again on 29 July 2003, resulting in the timetable being put back. The Commission explained, in its reply to a written question put by the Court, that, after giving its agreement to the publication of the contract notice, the Parliament expressed reluctance, at a meeting held on 3 June 2003, to participate in the invitation to tender. It had reservations inter alia about awarding the contract on the basis of one lot per city. By note of

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11 June 2003, the Parliament's DirectorGeneral of Personnel stated that it would be impossible for the Parliament to finalise the contract document before 30 October 2003. Compliance with the timelimit proposed by the Parliament would have jeopardised the progress of the invitation to tender in relation to the maximum duration of the current contract, namely, expiring on 31 March 2004. On 8 July 2003, the Parliament announced its withdrawal, also resulting in that of other institutions. The Commission also explained that it had been unable to specify a date of commencement of the services in the invitation to tender, but merely a deadline, since each lot had specific characteristics of its own, inter alia different expiry dates, which made it impossible to set a single start date for provision of the services for all the lots. Furthermore, it was only at the meeting on 8 March 2004 that the Commission became aware of the fact that the procedure for obtaining the IATA licence, which was required in order to provide the services in-plant', was timeconsuming and could thus result in some delay in the performance of the services.

97. Consequently, in order to overcome that difficulty resulting from the original withdrawal of the institutions, the Commission asked the applicant to provide the service for a transitional period of six to eight weeks, which it refused to do.

98. The Court therefore takes the view that the timetable, disrupted by the unforeseeable withdrawal of certain institutions and the applicant's refusal to provide the services for a transitional period, did not enable the Commission to maintain the continuity of the travel agency services without resorting to the signing of an addendum allowing WT to provide the services ex-plant' from 1 April to 19 May 2004, in order to cope with the situation of extreme urgency with which it was faced.

99. Moreover, it is apparent that the Commission had no part in the withdrawals in question, given that they were not attributable to it and were unforeseeable, since the Parliament's reservations emerged only after the initial publication of the contract notice.

100. With regard to jeopardising the Community's interests, it must be held that the importance of the continuity of the services at issue in this case, involving nearly 57 000 missions per year, is such that the Commission was obliged to ensure their continuity, and to do so by using the negotiated procedure.

101. The Court notes that the negotiated procedure was not used at all in the invitation to tender. It was used only in order to sign an addendum to the main contract, which arises from the tendering procedure and was signed on 31 March 2004. Consequently, the sole purpose of that addendum was to allow the provision ex-plant' of the services in question during the period from 1 April to 19 May 2004, in the light of the applicant's refusal to provide the services for a transitional period.

102. The Court also considers, on the basis of the contract document, that the tenderer was required to be in a position to provide the services inhouse not on the date of submission of the tender, but on 1 July 2004. Because of the applicant's refusal to extend the contract beyond the expiry of the framework contract on 31 March 2004, the Commission was forced to come to a contractual arrangement with WT in order to ensure the continuity of the services. It seems legitimate that early performance of the services on 1 April 2004 should require a contractual adjustment, allowing inter alia temporary provision of the services explant'. In that regard, it must also be pointed out that WT was in a position to meet the requirements laid down by the contract document, since it was able to provide the services in-house from 24 May 2004, that is, more than a month before the deadline set by that document.

103. Accordingly, it must be held that the conditions set out in Article 126(1)(c) of the detailed implementing rules were met and use of the negotiated procedure was justified.

104. Finally, as regards the applicant's plea, put forward in its reply, alleging infringement

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of the principles of equal treatment and nondiscrimination given effect by Article 89(1) of the Financial Regulation, it must be pointed out that, under Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. Since that plea was not mentioned in the application and is not a matter which has come to light in the course of the procedure, it must be declared inadmissible.

105. In the light of the foregoing, the Commission does not appear to have made a manifest error in the qualitative assessment of the selected tender. Accordingly, the second plea must be rejected.

3. The request for production of documents relating to the award of lot 1

106. In the context of the measures of organisation of procedure, the Court inter alia asked the intervener to produce data relating to its tender. The Court therefore considers that it has obtained sufficient information from the documents in the file to dispose of the case without ordering the Commission to produce all the documents relating to the award of lot 1, as requested by the applicant under Article 64 of the Rules of Procedure.

The claims for compensation

107. It follows from the foregoing that the Commission did not make a manifest error of assessment in the choice of the selected tenderer and did not in any way infringe the Financial Regulation. Moreover, the applicant alleges no other matter, apart from its two pleas, which could constitute an unlawful act capable of rendering the Community liable. Consequently, the claim for compensation must be held to be unfounded without there being any need for the Court to rule on its admissibility.

108. Accordingly, in the light of the foregoing, the application must be dismissed in its entirety.

Costs

109. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs of the Commission and of the intervener, including those incurred in the proceedings for interim relief.

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SUB Public contracts of the European Communities ; Financial provisions

AUTLANG French

APPLICA Person

DEFENDA Commission ; Institutions

NATIONA Belgium

NOTES Palmer, Sarah ; Braun, Peter: Action for Annulment and Damages for Irregularities in the Award Process: Case T-148/04, TQ3 Travel Solutions v Commission, Public Procurement Law Review 2005 p.NA171-NA175

PROCEDU Action for annulment - unfounded;Action for annulment - inadmissible;Action for damages - unfounded

DATES of document: 06/07/2005
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Notice for the OJ

JUDGMENT OF THE COURT OF FIRST INSTANCE

of 6 July 2005

in Case T-148/04 TQ3 Travel Solutions Belgium SA v Commission of the European Communities [1]

(Public service contracts - Community tendering procedure - Provision of travel agency services for travel undertaken by officials and agents of the institutions)

(Language of the case: French)

In Case T-148/04: TQ3 Travel Solutions Belgium SA, established in Mechelen (Belgium), initially represented by R. Ergec and K. Möric, and then by B. Lissoir, lawyers, against Commission of the European Communities (Agents: L. Parpala and E. Manhaeve, with an address for service in Luxembourg), supported by Wagon-Lits Travel SA, established in Brussels (Belgium), represented by F. Herbert and H. Van Peer, lawyers, and D. Harrison, Solicitor, with an address for service in Luxembourg (application both for annulment of the Commission's decisions not to award to the applicant lot No 1 of the contract covered by Notice No 2003/S 143 129409 for the provision of travel agency services but to award that lot to another undertaking and also for damages to compensate for the loss suffered by the applicant following the rejection of its tender (the Court of First Instance (Second Chamber), composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges; J. Palacio González, Principal Administrator, for the Registrar, gave a judgment on 6 July 2005, in which it:

Dismisses the application;

Orders the applicant to pay the costs incurred by the Commission and the intervener, including those of the proceedings on the application for interim measures.

_____

[1] - OJ C 179, 10.7.2004

Order of the President of the Court of First Instance of 27 July 2004

TQ3 Travel Solutions Belgium SA v Commission of the European Communities. Public service contracts - Community tendering procedure - Interim proceedings - Application for suspension of operation and interim measures - Urgency - None. Case T-148/04 R.

1. Applications for interim measures - Suspension of operation of a measure - Interim measures - Conditions for granting - Serious and irreparable damage - Financial loss - Situation capable of jeopardising the existence of the applicant company or of irremediably altering its market position

(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

2. Applications for interim measures - Suspension of operation of a measure - Interim measures - Conditions for granting - Serious and irreparable damage - Non-financial damage - Damage to the reputation of an undertaking caused by the non-award of a public contract - Not included

(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

1. In the context of interim proceedings, financial loss cannot in principle be regarded as irreparable, or even as being hard to repair, where it can be the subject of future financial compensation and thus consitutes a loss which is economically capable of being compensated for through the means of redress laid down under the Treaty, in particular Article 288 EC. It would be otherwise if, were the interim measures sought not granted, the applicant would find itself in a situation which could jeopardise its very existence or irremediably alter its position in the market.

(see paras 43, 45-46)

2. A decision not to award a public contract does not necessarily result in irreparable damage to the reputation and credibility of unsuccessful tenderers. Participation in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants, and the elimination of a tenderer under the rules on tenders is not, in itself, in any way damaging. Similarly, the fact that an undertaking is unsuccessful in renewing a contract for a set period in a new tender procedure arises from the periodic nature of invitations to tender in the public procurement sector and does not harm its credibility and reputation.

(see paras 53-54)

In Case T-148/04 R,

TQ3 Travel Solutions Belgium SA, established in Mechelen (Belgium), represented by R. Ergec and K. Möric, lawyers,

applicant,

v

Commission of the European Communities, represented by L. Parpala and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Wagon-Lits Travel SA, established in Brussels (Belgium), represented by F. Herbert and H. Van Peer, lawyers, and D. Harrison, solicitor, with an address for service in Luxembourg,

intervener,

APPLICATION, first, for suspension of the operation of the Commission's decisions not to award

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to the applicant Lot No 1 of the contract which was the subject of notice No 2003/S 143-129409 for the provision of travel agency services and to award that lot to another undertaking and, secondly, for an order directing the Commission to take the measures necessary to suspend the effects of the decision to award that contract and of the contract entered into pursuant to that decision,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES,

makes the following

Order

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 27 July 2004.

Facts and procedure

1. By framework contract No 98/16/IX.D.1/1 of 13 January 1999, the Commission entrusted the management of the travel agency services for its staff in Brussels to Belgium International Travel. That contract was entered into for an initial period of two years, with the possibility of extension for three further periods of one year, that is to say for the period from 1 April 1999 to 31 March 2004. By supplementary agreement of 27 February 2001, the contract was assigned to TQ3 Travel Solutions Belgium (the applicant').

2. By contract notice published in the Supplement to the Official Journal of the European Union (OJ 2003 S 103), the Commission called for tenders under the restricted procedure for the provision of travel agency services for travel undertaken by officials and other staff carrying out missions and by any other persons travelling on behalf of or at the request of the Community institutions, agencies and bodies. The reference number was ADMIN/D1/PR/2003/051.

3. The documents in the case show that that tendering procedure was annulled by the Commission following the withdrawal of certain Community institutions.

4. On 29 July 2003, acting under Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1), the Commission published a new call for tenders under the restricted procedure for the provision of travel agency services for travel undertaken by officials and other staff carrying out missions and by any other persons travelling on behalf of or at the request of the Community institutions, agencies and bodies (section II.1.6 of the tender notice) in the Supplement to the Official Journal of the European Union (OJ 2003 S143) under reference number 2003/S 143-129409. The contract was divided into a number of lots, each corresponding to the place where the services were to be performed, including Brussels (Lot No 1), Luxembourg (Lot No 2), Grange (Lot No 3), Geel (Lot No 5), Petten (Lot No 6) and Seville (Lot No 7).

5. By registered letter of 28 November 2003, the applicant submitted to the Commission a tender for Lots Nos 1, 2, 3, 5, 6 and 7.

6. By letter of 24 February 2004, the Commission informed the applicant that its tender for Lot

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No 1 had not been accepted, since the price-quality ratio of its tender was lower than that of the selected tender.

7. By letter of 8 March 2004, the applicant requested more detailed information regarding the selection of the tender accepted for Lot No 1. It also requested the Commission to suspend the award procedure for that contract and not to enter into a contract with the undertaking selected under the tendering procedure.

8. By letter of 16 March 2004, the Commission provided information to the applicant as to the reasons for its decision of 24 February 2004 not to award Lot No 1 to it (the refusal decision') and to award the lot to another undertaking (the award decision'). In particular, the Commission noted that the applicant's tender had obtained 51.55 points, while the tender selected, which had been submitted by Wagon-Lits Travel (WT'), had obtained 87.62 points following a qualitative and financial analysis, and that WT's tender therefore offered the best value for money. The award of the contract for Lot No 1 to that undertaking was accordingly justified. The Commission also stated that, although the prices incorporated in WT's tender had been significantly lower than those in the applicant's tender (index 100 for WT and 165.56 for the applicant), the former tender did not appear abnormally low and it was therefore unnecessary to apply the provisions of Article 139 of Regulation... No 2342/2002'.

9. By fax of 17 March 2004, the Commission proposed to the applicant that framework contract No 98/16/IX.D.1/1 relating to travel agency services, which was due to expire on 31 March 2004, be extended until 27 June 2004.

10. By letter of 19 March 2004, the Commission explained that it had requested that the framework contract be extended because the issuing of instructions to the new contractor, namely WT, and the entry into force of the new contract could not take place by the date of expiry provided for under the framework contract.

11. By fax of 22 March 2004, the applicant informed the Commission that it did not wish to extend the framework contract and that that contract would accordingly expire on 1 April 2004.

12. On 31 March 2004, the Commission entered into a contract with WT for the provision of travel agency services in Brussels.

13. By application lodged at the Registry of the Court of First Instance on 26 April 2004, the applicant brought proceedings seeking, first, the annulment of the refusal decision and of the award decision and, secondly, compensation for the damage allegedly suffered by it by reason of those decisions.

14. By separate document lodged at the Court Registry on the same date, the applicant brought the present application for interim measures seeking:

- first, suspension of the operation of the refusal decision and the award decision;

- secondly, an order requiring the Commission to take the measures necessary to suspend the effects of the award decision or the contract entered into following that decision.

15. On 4 May 2004, the Commission submitted its observations on that application, in which it stated that none of the conditions applicable to an order for interim measures was satisfied and that the application should accordingly be dismissed.

16. On 5 May 2004, the Court Registry forwarded the Commission's observations to the applicant and, on 10 May 2004, it invited the applicant to submit its observations on them.

17. On 12 May 2004, the applicant lodged an application for measures of inquiry pursuant to Article 105(2) and Article 65(b) of the Rules of Procedure of the Court of First Instance together with

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Articles 24 and 26 of the Statute of the Court of Justice, requesting that the Commission be ordered to produce certain documents, namely the contract entered into between the Commission and WT on 31 March 2004, the tender submitted by WT in response to the invitation to tender and the report of the Tender Appraisal Committee (the documents at issue'), which the applicant claimed formed the basis of the Commission's contention in points 46 to 49 of its observations that no prima facie case existed. The applicant also requested that the President of the Court allow the parties to be heard in relation to those documents.

18. On 17 May 2004, the applicant submitted its observations on the Commission's observations of 4 May 2004. The applicant repeated its application for interim measures and also requested that the President of the Court exclude from consideration the Commission's arguments set out in points 46 to 49 of its observations of 4 May 2004.

19. On 18 May 2004, the Commission submitted its observations on the application for measures of inquiry, in which it stated that the application should be rejected.

20. On 24 May 2004, the Commission lodged its observations in reply to the applicant's observations of 17 May 2004. The Commission repeated its request that the President of the Court dismiss the application for interim measures and requested that the application to have points 46 to 49 of its observations of 4 May 2004 excluded from consideration be rejected as being manifestly inadmissible.

21. By document lodged at the Court Registry on 9 June 2004, WT applied for leave to intervene in these proceedings in support of the form of order sought by the Commission. That application for leave was served on the parties in accordance with Article 116(1) of the Rules of Procedure. The parties raised no objections to that application.

22. By order of the President of the Court of 28 June 2004, WT was granted leave to intervene in these proceedings in support of the form of order sought by the Commission. A copy of all procedural documents was served on WT.

23. On 5 July 2004, WT submitted its observations on the application for interim measures. The intervener concurred with the observations of the Commission. It asked the President of the Court to reject the application for interim measures and to reject the application for measures of inquiry as being manifestly inadmissible.

24. On 16 July 2004, the applicant submitted its observations on the observations of WT. It repeated its application for interim measures and, contesting WT's arguments regarding the production of the documents in question, also repeated its application for a declaration that the Commission be ordered to produce the abovementioned documents, and that the President of the Court allow the parties to be heard in relation to those documents, failing which, that it exclude points 46 to 49 of the observations of 4 May 2004 from consideration. For its part, the Commission stated that it had no observations to make on the statement in intervention.

Law

The application for interim measures

25. Under Article 242 EC in conjunction with, first, Article 243 EC and, secondly, Article 225(1) EC, the Court may, if it considers that circumstances so require, order that the operation of the contested measure be suspended or prescribe any necessary interim measures.

26. Article 104(2) of the Rules of Procedure provides that applications for interim measures are to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be rejected if any one of them is absent (order of the President of the Court of Justice in Case C268/96 P(R) SCK

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and FNK v Commission [1996] ECR I-4971, paragraph 30).

27. The measures applied for must also be provisional inasmuch as they must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main proceedings (order of the President of the Court of Justice in Case C-149/95 P(R) Commission v Atlantic Container Line and Others [1995] ECR I-2165, paragraph 22).

28. Furthermore, the judge hearing the application enjoys, in the context of that overall examination, a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order in Commission v Atlantic Container Lines and Others , paragraph 23).

29. Having regard to the documents before the Court, the Court considers that it is in possession of all information necessary to give a ruling on the application for interim measures before it, and that it is not necessary to hear oral argument from the parties before doing so.

30. It is appropriate in this case to consider the condition relating to urgency first of all.

Arguments of the parties

31. The applicant argues that the condition relating to urgency is satisfied. It states that it could not await the outcome of the main proceedings without suffering serious and irreparable damage involving the loss of a substantial market share, extremely significant pecuniary damage and particularly serious harm to its reputation.

32. The applicant claims that the decision to award the disputed contract to another tenderer deprives it of substantial income and market share. The annual turnover for the disputed contract amounts to EUR 44 900 000, which represents approximately 20 per cent of the applicant's annual turnover in Belgium. Depending on the method of calculation used, the disputed contract represents between 16.83 and 23.85 per cent of its annual turnover.

33. The loss of that market share and of an essential reference related to the supply and management of travel agency services within the Commission in Brussels' will have an irremediable effect on its position on the market, particularly in the light of the difficult economic circumstances prevailing. The market share in question is of considerable significance in the travel agency sector, which has been faced with a particularly difficult economic situation for a number of years. That situation will deteriorate further after 1 January 2005, when commissions previously paid by airlines will be terminated in Belgium. The result will be a substantial reduction in income for travel agencies.

34. Lastly, the applicant considers that the interim measures applied for are necessary, since the annulment of the disputed decisions by the Court in the main proceedings would not be sufficient to eliminate the damage suffered by the Community legal order and by the applicant, as the contract between the Commission and WT will have been fully performed, or substantially performed, by that time.

35. The Commission considers that the damage which the applicant alleges is neither serious nor irreparable within the meaning of the case-law of the Court of First Instance.

36. As regards the alleged pecuniary damage, the Commission argues that, as the applicant is in a position to quantify its direct loss, that loss is reparable by an award of damages.

37. The Commission adds that the applicant has failed to establish exceptional circumstances which would allow the pecuniary damage to be classified as serious and irreparable. It points out in that regard that the applicant has failed to show either that the loss of market share at issue

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jeopardises its existence or that its position on the market has been irremediably altered. The applicant is not prevented from recovering the lost market share and its activities elsewhere than on that market are quite adequate to ensure that its existence itself is not jeopardised.

38. As regards the non-pecuniary damage alleged by the applicant, namely the loss of an essential reference and particularly serious harm to its reputation, the Commission states that the loss of an essential reference has no role to play at the contract award stage and that the loss of a reference contract implies no harm to reputation, as the Court has already held in its case-law.

39. Lastly, the Commission argues that the fact that the contract entered into by it with WT may be fully performed by the time the Court gives judgment in the main proceedings does not go to show that the condition as to urgency is satisfied. Were there to be an annulment, the Commission would be in a position to restore the applicant's rights by issuing a new invitation to tender and making payment of compensation.

40. WT supports the Commission's arguments and states that the applicant has failed to establish the serious and irreparable nature of the alleged damage. The applicant has not shown in what way a reduction in its turnover of approximately 20 per cent could affect its survival. WT notes that the applicant is a member of an international group, the TUI Group, which is one of the leading European groups in the travel sector, with a turnover for 2003 of approximately EUR 19 215 million and net profits for the same year of EUR 315 million. As regards the loss of market share, it observes that the applicant could easily recover it if, on the expiry of the current contract or, as the case may be, on its annulment, the applicant were to be awarded the contract following a new tender procedure organised by the Commission. As regards harm to its reputation, WT supports the Commission's arguments and adds that the loss of a contract following a tender procedure is not, in practice, harmful.

Findings of the Court

41. It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party who requests the interim measure. It is for that party to demonstrate that it cannot await the outcome of the main proceedings without suffering such damage (see order of the President of the Court of First Instance in Case T-169/00 R Esedra v Commission [2000] ECR II2951, paragraph 43, and the case-law cited there).

42. In the present case, the applicant argues that the serious and irreparable nature of the alleged damage arises from the fact that, in losing the disputed contract not only has it suffered damage consisting in loss of income and significant market share (pecuniary damage), but it has also lost an essential reference and suffered particularly serious harm to its reputation (nonpecuniary damage).

43. As regards the pecuniary damage relied on by the applicant, it should be pointed out that, as the Commission has stated, settled case-law provides that such damage cannot in principle be regarded as irreparable, or even reparable with difficulty, where it can be the subject of future pecuniary compensation (see order in Esedra v Commission , paragraph 44, and the case-law cited there).

44. In the present case, as the Commission rightly points out, the applicant appears to be able to quantify the pecuniary loss complained of, as it has not only brought proceedings on the basis of Articles 230 EC and 288 EC before the Court of First Instance, but also assessed its loss at the sum of EUR 44 900 000.

45. It follows that the pecuniary damage invoked by the applicant cannot be considered to be irreparable. Such damage represents a loss which is economically capable of being compensated for through the

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means of redress laid down under the Treaty, in particular Article 288 EC (order in Esedra v Commission , paragraph 47, and order of the President of the Court of First Instance in Case T230/97 R Comafrica and Dole Fresh Fruit Europe v Commission [1997] ECR II1589, paragraph 38).

46. In the light of the above, the interim measures applied for would be justified in this case only if it appeared that, if the order were not granted, the applicant would find itself in a situation which could jeopardise its very existence or irremediably alter its position in the market (see, to that effect, order in Esedra v Commission , paragraph 45).

47. The applicant has not shown that if the interim measures applied for are not granted it is at risk of being placed in a situation which could jeopardise its very existence or irremediably alter its share of the market.

48. It must be held in that regard that the applicant has produced no evidence regarding its financial position which would allow the Court to conclude that its existence will be jeopardised. On the contrary, it must be held that the fact that the disputed contract accounts for only 15 to 25 per cent of the applicant's annual turnover in Belgium demonstrates the applicant's ability to remain in business until the Court delivers its judgment in the main proceedings. That conclusion is supported by the fact that the applicant also carries on business outside Belgium, that it was in fact successful in bidding for other lots in the tendering procedure at issue and that it is a member of a large and profitable international group. The applicant's arguments regarding the difficulties faced by travel agencies do not alter that conclusion in any way. Even if it is accepted that travel agencies are in a difficult economic situation and that that situation will continue, the applicant does not explain how the loss of the disputed contract jeopardises its existence. In any event, the damage alleged is not the result of the refusal decision but arises from factors unconnected with it.

49. With respect to the possibility that if the interim measures applied for were not to be granted the applicant's position on the market would be irremediably altered, it is clear that the applicant has produced no evidence to show that its position will be altered in that way.

50. The applicant has failed to show that obstacles of a structural or legal nature would prevent it from regaining a significant proportion of the market share lost (see, to that effect, order of the President of the Court of First Instance in Case T369/03 R Arizona Chemical and Others v Commission [2004] ECR II0000, paragraph 84).

51. In particular, the applicant has not demonstrated that it will be prevented from being successful in other tendering procedures, including one having as its subjectmatter the disputed contract on the occasion of a new invitation to tender. The applicant's arguments based on the general economic situation faced by travel agencies do not show that its position on the market in question will be irremediably altered. The purported economic situation has the same consequences for all operators in the travel agency sector. There is nothing to prevent the applicant from recovering the lost market share, as it is fully open to it to recover that market share following a new invitation to tender. The fact that the applicant has lost an essential reference' does not preclude it from participating and being successful in new tendering procedures. Those references represent only one of many criteria taken into account in the qualitative selection of service providers (see Article 137 of Regulation No 2432/2002; see also, to that effect, order in Esedra v Commission , paragraph 49).

52. It follows that the applicant has failed to provide sufficient evidence to allow the Court to reach the view that the pecuniary damage alleged is serious and irreparable.

53. As regards the non-pecuniary damage alleged by the applicant and its argument that interim measures are urgent because of the irreparable damage caused to its reputation and credibility,

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it must be pointed out that the refusal decision would not necessarily cause such damage. According to settled case-law, participation in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants, and the elimination of a tenderer under the rules on tenders is not, in itself, prejudicial (order of the President of the Court of Justice in Case 118/83 R CMC v Commission [1983] ECR 2583, paragraph 5, and order in Esedra v Commission, paragraph 48).

54. As the Commission and WT rightly point out, the fact that an undertaking is unsuccessful in renewing a contract for a set period in a new tender procedure arises from the periodic nature of invitations to tender in the public procurement sector and does not harm its credibility and reputation.

55. The applicant's arguments seeking to establish urgency by reason of the fact that the contract entered into with WT will have been fully performed, or substantially performed, before the delivery of the judgment in the main proceedings also cannot be accepted. That is not a matter establishing urgency, since, if the Court considered the main proceedings to be well founded, the Commission would have to adopt the measures necessary to ensure appropriate protection of the applicant's interests (see, to that effect, order in Esedra v Commission , paragraph 51, and order of the President of the Court of First Instance in Case T-108/94 R Candiotte v Council [1994] ECR II-249, paragraph 27). As the Commission points out, it would be in a position in such a situation to organise a new tendering procedure in which the applicant would be able to participate without undue difficulty. Such a step could be coupled with payment of compensation. The applicant has not referred to any matter which might prevent its interests from being protected in that way (see, to that effect, order in Esedra v Commission , paragraph 51).

56. In those circumstances, it must be held that the evidence adduced by the applicant does not establish to the requisite legal standard that it will suffer serious and irreparable damage if the interim measures applied for are not granted.

57. The application for interim measures must accordingly be dismissed, and it is not necessary to consider whether the other conditions relating to the grant of such measures are satisfied.

The application for measures of inquiry and the application to have points 46 to 49 of the Commission's observations of 4 May 2004 excluded from consideration

Arguments of the parties

58. The applicant points out in its application of 12 May 2004 and its observations of 17 May and 16 July 2004, that the documents at issue are of decisive importance in the Commission's observations relating to the existence of a prima facie case. The applicant states that it would be difficult for it to provide evidence in support of its application if it were not allowed to have access to all of those documents. The production of the documents at issue is accordingly essential by virtue, in particular, of Article 6 of the European Convention on Human Rights, which requires that civil and criminal proceedings be fairly conducted. Alternatively, the applicant seeks an order that points 46 to 49 of the Commission's observations of 4 May 2004 be excluded from consideration.

59. The Commission, supported by WT, argues that the application for measures of inquiry should be rejected, on the grounds that the applicant has not shown that the production of the documents at issue will be worthwhile, that, in the absence of exceptional circumstances, those Commission internal documents cannot be made available and that the production of those documents would undermine the protection of the legitimate commercial interests of tenderers. WT adds that the documents at issue contain confidential commercial information and that their disclosure to a competitor would infringe the competition rules.

Findings of the Court

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60. It is clear, first of all, that the applicant's request regarding the production of the documents at issue and its request to have points 46 to 49 of the Commission's observations of 4 May 2004 excluded from consideration do not constitute an application for interim measures relating to the disputed decisions and can be understood only as an application for measures of inquiry or organisation of procedure.

61. It should be noted that under the first subparagraph of Article 105(2) of the Rules of Procedure the President of the Court of First Instance is to decide whether a preparatory inquiry is necessary. Article 65 of the Rules of Procedure provides that measures of inquiry include the production of documents. Article 64 of the Rules of Procedure allows the Court to adopt measures of organisation of procedure, including the production of documents or any papers relating to the case.

62. It should next be noted that the documents at issue, as also points 46 to 49 of the Commission's observations of 4 May 2004, relate solely to the requirement that there be a prima facie case, as the applicant itself notes in its application for interim measures and in its observations of 16 July 2004.

63. As the application for interim measures falls to be dismissed by reason of lack of urgency, without it being necessary to consider whether the other conditions for the grant of such measures are satisfied, in particular the requirement that there be a prima facie case, the Court considers that the documents in question are not relevant to the current application for interim measures and that there is therefore no need to adopt the measures regarding the documents at issue which the applicant has applied for.

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SUB	Public contracts of the European Communities ; Financial provisions
AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Belgium
PROCEDU	Action for annulment;Action for damages;Application for interim measures - unfounded;Application for measures of inquiry - unfounded
DATES	of document: 27/07/2004 of application: 26/04/2004

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Notice for the OJ

Action brought on 26 April 2004 by TQ3 Travel Solutions against the Commission of the European Communities

Case T-148/04

Language of the case: French

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 26 April 2004 by TQ3 Travel Solutions, established in Mechelen (Belgium), represented by Rusen Ergec and Kim Möric, lawyers.

The applicant claims that the Court should:

-- Annul the Commission's decision of 24 February 2004, informing the applicant of the rejection of its tender for Lot 1 (Brussels) of Contract No ADMIN/D1/PR/2003/131;

-- Annul the Commission's decision awarding Lot 1 to Carlson Wagonlit Travel, notified to the applicant by a letter from the Commission of 16 March 2004;

-- Hold that the unlawful action by the Commission constitutes a fault capable of rendering it liable to the appliant;

-- Send the applicant back to the Commission for the loss suffered to be assessed;

-- Order the Commission to pay the costs.

Pleas in law and main arguments

Following a restricted invitation to tender for "travel agency services" issued on 20 October 2003 and the tendering procedure, the Commission took the decision not to award the contract to the applicant and to award it to Carlson Wagonlit Travel.

The applicant makes two identical pleas in law challenging those decisions, alleging obvious error by the Commission in assessing the tenders.

In its first plea, the applicant claims that the Commission made an obvious error of assessment by holding that the tender of Carlson Wagonlit Travel was not abnormally low; it also claims that the Commission acted unlawfully by failing to comply with the obligation under Article 146(4) of Commission Regulation (EC) No 2342/2002 of 23 December 2002, requiring it to ask for appropriate clarifications as to the composition of the tender.

The second plea alleges obvious error by the Commission in assessing the quality of the tenders, giving the tender by Carlson Wagonlit Travel the highest mark for the quality of the services offered, whereas that tender was unable to allow sufficient quality for the services concerned to be guaranteed.

_____

Order of the Court of First Instance (Third Chamber)
First Instance (Third Chamber)First Instance (Third Chamber)2005. Adviesbureau Ehcon BV v Commission of the European Communities. Inadmissibility. Case T-140/04.

1. Actions for damages - Limitation period - Starting point - Date to be taken into consideration

(Art. 288, second para., EC; Statute of the Court of Justice, Art. 46)

2. Non-contractual liability - Conditions - Unlawfulness - Damage - Causal link - One of the conditions not present - Dismissal of the action for damages in its entirety

(Art. 288, second para., EC)

3. Non-contractual liability - Damage - Damage for which compensation is available - Costs incurred for the proceedings - Not included

(Art. 288, second para., EC)

4. European ombudsman - Alternative to an action before the Community judicature - Not possible to pursue both remedies in parallel - Whether action before the Ombudsman appropriate is a matter for the citizen to decide

(Art. 195(1) EC; Statute of the European Ombudsman, Art. 2(6) and (7))

1. It is apparent from the second paragraph of Article 288 EC that the existence of Community noncontractual liability and the enforceability of a right to compensation for damage suffered depend on the satisfaction of a number of requirements: the conduct of the institution must be unlawful, there must be actual damage and there must be a causal relationship between the conduct of the institution and the damage alleged. The fiveyear limitation period which applies to proceedings alleging Community liability, provided for by Article 46 of the Statute of the Court of Justice, therefore cannot begin before all the requirements governing the obligation to provide compensation are satisfied and in particular before the damage to be made good has materialised.

Since, in the context of Directive 80/778 relating to the quality of water intended for human consumption, the tenderer was aware of the fundamental reason for the rejection of its tender by the Commission, namely, its lack of experience in the design of water treatment facilities, a reason which it has always disputed, the fact that it could only have known later that the criterion in question was allegedly applied in a discriminatory manner cannot postpone until that date the point from which the limitation period for the action for compensation started to run. The function of the limitation period is to reconcile protection of the rights of the aggrieved person and the principle of legal certainty. The length of the limitation period was thus determined by taking into account, in particular, the time that the party who has allegedly suffered harm needs to gather the appropriate information for the purpose of a possible action and to verify the facts likely to provide the basis of that action. Knowledge of the facts is not one of the conditions which must be met in order for the limitation period to run.

Similarly, the fact that the tenderer allegedly became aware of additional information in support of its action after the rejection by the Commission of its tender, even though it had since the beginning disputed the fundamental reason for that rejection, which also constitutes the event giving rise to the damage, within the meaning of Article 46 of the Statute, cannot place the point from which the limitation period started to run at the date on which the tenderer became aware of that information. This applies a fortiori because, on the day on which that tenderer claims to have received the tender documents of one of the tenderers accepted at the end of the selection stage, and even on the day on which it itself considers that it had enough evidence to bring proceedings for compensation, that is, when the Ombudsman adopted his decision critical of the Commission,

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the limitation period had not yet expired.

It follows that, unlike the situation in which an applicant is prevented from bringing proceedings within a reasonable time because he became aware of the event giving rise to the damage only belatedly, expiry of the limitation period cannot be fixed at a date later than the normal date of expiry of that period.

In addition, although the time bar applies only to the period preceding by more than five years the date of the act stopping time from running and does not affect rights which arose during subsequent periods, this is only in the exceptional situation in which it is established that the damage in question was repeated on a daily basis after the occurrence of the event which caused it. That is not the position where the loss concerned, if proved, even though its full extent may not have been appreciated until after the rejection of the tenderer's tender for the contract in question, was nevertheless caused instantly by that rejection.

(see paras 39, 55-61, 67)

2. In order for the Community to incur non-contractual liability, a number of conditions must be met: the conduct of the Community institutions in question must be unlawful; there must be real and certain damage; and a direct causal link must exist between the conduct of the institution concerned and the alleged damage. If any one of those conditions is not satisfied the application must be dismissed in its entirety without it being necessary to examine the other preconditions for such liability.

The loss of the chance of securing a subsequent contract can be regarded as real and certain damage only if, in the absence of the allegedly improper conduct by the Commission, there would be no doubt that the tenderer would have been awarded the first contract.

(see paras 75, 77)

3. As regards the loss suffered as a result of the costs allegedly incurred in gathering evidence, the costs incurred by the parties for the purpose of the judicial proceedings cannot as such be regarded as constituting damage distinct from the burden of costs. Furthermore, even though, as a rule, substantial legal work is carried out in the course of the proceedings prior to the judicial phase, by proceedings' Article 91 of the Rules of Procedure of the Court of First Instance refers only to proceedings before the Court of First Instance, to the exclusion of the prior stage. That follows in particular from Article 90 of the Rules of Procedure, which refers to proceedings before the Court of First Instance'. Therefore, to regard such costs as a loss for which compensation may be claimed in an action for damages would be inconsistent with the fact that costs incurred during the phase before the judicial proceedings are not recoverable.

(see para. 79)

4. In the institution of the Ombudsman, the Treaty has given citizens of the Union an alternative remedy to that of an action before the Community judicature in order to protect their interests. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings. Moreover, as is clear from Article 195(1) EC and Article 2(6) and (7) of Decision 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties, the two remedies cannot be pursued at the same time. Indeed, although complaints submitted to the Ombudsman do not affect time-limits for bringing actions before the Community judicature, the Ombudsman must none the less cease consideration of a complaint and declare it inadmissible if the citizen simultaneously brings an action before the Community judicature based on the same facts. It is therefore for the citizen to decide which of the two available remedies is likely to serve his interests best.

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(see paras 83-84)

In Case T140/04,

Adviesbureau Ehcon BV, established in Reeuwijk (Netherlands), represented by M. Goedkoop, lawyer,

applicant,

v

Commission of the European Communities, represented by L. Parpala and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for damages for the loss allegedly suffered by the applicant as a result of the rejection of its tender submitted in response to an invitation to tender, published on 10 August 1996 (OJ 1996 C 232, p. 35), for services in relation to Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili and O. Czucz, Judges,

Registrar: H. Jung,

makes the following

Order

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The application is dismissed as in part inadmissible and in part manifestly unfounded.

2. The applicant shall pay the costs.

Luxembourg, 14 September 2005.

Facts

1. On 10 August 1996, the Commission published in the Official Journal of the European Communities (OJ 1996 C 232, p. 35) an invitation to tender for services in relation to Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11) (the invitation to tender'). The procedure was to lead to the conclusion of an initial one-year contract with the possibility of an extension for another two years if the service provider gave full satisfaction. The subject of the contract was the supply of technical and scientific support to the Drinking water' team of the Water protection, soil conservation and agriculture' unit of the Directorate-General for the Environment, Nuclear Safety and Civil Protection, in connection with the proposal aimed at the revision of the aforementioned directive.

2. In accordance with the technical annex to the invitation to tender, the tender procedure was to be completed in two stages.

3. The first stage consisted in selecting the tenderers who fulfilled the following criteria. They were required:

- to be individuals or legal entities, and provide evidence of this by supplying official registration

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documents or registration numbers;

- to provide evidence of their financial and economic position by supplying bank statements and/or balance sheets or extracts therefrom;

- to provide evidence that they had the necessary experience in the field of water research, as attested by qualifications, references to previous work and the composition of the proposed team, including curricula vitae;

- to have the network necessary to cover all the Member States of the Union.

4. At the end of the second stage, the contract was then awarded, on the basis of the following criteria, to one of the tenderers previously selected:

- presentation, clarity and quality of the tender;

- awareness and understanding of the technical requirements of such work (evidence of the necessary experience in water science on the basis of qualifications, references to earlier work and the composition of the proposed team, including curricula vitae);

- the price.

5. The applicant submitted its tender in September 1996.

6. By letter of 7 January 1997, the Commission informed the applicant that its tender had not been selected.

7. By letters of 13 and 31 January 1997 and 15 February 1997, the applicant asked the Commission to inform it of the reasons for the rejection of its tender.

8. By letter of 13 March 1997, the Commission replied to that request, stating that the applicant's tender had been rejected on the ground that the applicant did not have the necessary experience in the field of water research, which was a condition laid down in the technical annex, and adding that the Commission was looking for tenderers with experience in the research, development and design of water treatment facilities. Furthermore, although that factor was not conclusive, the applicant had only slight knowledge and coverage of the Union as a whole.

9. By letter of 20 March 1997, the applicant informed the Commission that the documents submitted showed that it did indeed have extensive experience in the field of water research and drinking water purification systems, and that experience in the research, development and design of water treatment facilities was not one of the criteria mentioned in the technical annex.

10. By letter of 10 April 1997, the Commission informed the applicant that the expression necessary experience in the field of water research' was to be taken as meaning experience in the design of water treatment facilities. The Commission expected tenderers to put down the experience their staff already had in water management and control, in particular with respect to the technical and financial impacts of the standards proposed by the Commission for certain chemical substances and with regard to the design and operation of water treatment facilities. Furthermore, the Commission pointed out that the applicant's tender was very weak as regards the criterion relating to knowledge and coverage of the European Union.

11. During 1997, the applicant submitted a complaint to the European Ombudsman. That complaint was rejected by decision of 3 December 1997. By letters of 7 December 1997 and 20 February 1998, the applicant requested the Ombudsman to reconsider his view. That request was rejected on 24 March 1998. By letters of 30 March 1998 and 12 January 1999, the applicant again requested the Ombudsman to reconsider his view. That request was rejected on 6 May 1999.

12. By letter of 20 September 1999, the applicant contacted the President of the Commission seeking

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compensation for the loss it claimed to have suffered and requested access to the documents relating to the invitation to tender. Those requests were refused by letter of 11 January 2000.

13. Having managed to obtain, by its own efforts, the tender of one of the tenderers, the company EDC, selected at the end of the first stage, which did not show evidence of experience in the design of water treatment facilities, the applicant submitted a further complaint to the Ombudsman on 22 July 2000. By letter of 15 February 2001, the Ombudsman informed the applicant that he had requested the Commission to supply certain information by 31 March 2001. The Commission acceded to that request.

14. On 22 October 2001, the Ombudsman gave his decision on the applicant's complaint of 22 July 2000 (the Ombudsman's decision'). In that decision, the Ombudsman found that, in view of the fact that the Commission had acted on the basis of a criterion which was not included in the invitation to tender, the selection procedure had not been conducted with transparency, and that, by selecting at the end of the first stage the tenders of two tenderers (EDC and Eunice) which did not show their experience in the design of water treatment systems, the Commission had also not accorded the applicant equal treatment. The Ombudsman concluded that those two cases of improper administration were open to criticism.

15. By letter of 12 November 2001, the applicant submitted a further claim for compensation to the Commission. The Commission rejected that claim by letter of 31 January 2002.

16. By application lodged at the Court Registry on 25 March 2002, the applicant applied for legal aid under Article 94(2) of the Rules of Procedure of the Court of First Instance with a view to bringing an action for compensation against the Commission.

17. That application was rejected by order of the President of the Second Chamber of the Court of First Instance of 13 December 2002 in Case T-90/02 AJ Ehcon v Commission , not published in the ECR.

Procedure and forms of order sought by the parties

18. By application lodged at the Court Registry on 8 April 2004, the applicant brought the present action.

19. By separate document lodged at the Court Registry on 29 July 2004, the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure.

20. The applicant submitted its observations on that objection on 30 August 2004.

21. In its application, the applicant claims that the Court should:

- order the Commission to pay the sum of EUR 243 900, together with interest at the statutory rate;

- in the alternative, order the Commission to pay the sum of EUR 40 400, together with interest at the statutory rate;

- order the Commission to pay the costs.

22. In its objection of inadmissibility, the Commission contends that the Court should:

- dismiss the application as inadmissible;

- order the applicant to pay the costs.

23. In its observations on the objection of inadmissibility, the applicant claims that the Court should:

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- declare the objection of inadmissibility unfounded;

- in the alternative, dismiss it;

- order the Commission to pay the costs of the preliminary objection.

Law

24. Under Article 114(1) of the Rules of Procedure, the Court may, if one of the parties so requests, rule on admissibility without going to the substance of the case. Under Article 114(3), the remainder of the procedure is to be oral, unless the Court of First Instance otherwise decides.

25. Furthermore, under Article 111 of the Rules of Procedure, where it is clear that the Court of First Instance has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the Court of First Instance may, without taking any further steps in the proceedings, give a decision on the action by reasoned order.

26. In the present case, the Court considers that it has sufficient information from the documents before it and will therefore give its decision without taking any further steps in the proceedings.

Arguments of the parties

27. The Commission raises an objection of inadmissibility against the whole application on the ground that the action brought by the applicant is time-barred for the purposes of Article 46 of the Statute of the Court of Justice.

28. It points out that, according to the case-law, the event which gives rise to the action is the materialisation of the damage (order in Case C-136/01 P Autosalone Ispra dei Fratelli Rossi v Commission [2002] ECR I-6565, paragraph 30). Moreover, the period of limitation is interrupted only if proceedings are instituted before the Court or an application is made to the competent institution of the Community; however, in the latter case, interruption only occurs if the application is followed by proceedings within the time-limit determined by reference to Articles 230 EC or 232 EC (Case 11/72 Giordano v Commission [1973] ECR 417, paragraph 6; Case T-167/94 Nölle v Council and Commission [1995] ECR II2589, paragraph 30; and order in Case T-332/99 Jestädt v Council and Commission [2001] ECR II-2561, paragraph 47).

29. With the exception of the costs incurred in obtaining evidence of the alleged unlawfulness of the Commission's conduct, the damage for which the applicant claims compensation materialised at the moment the Commission notified it of the formal decision to reject its tender, that is, 7 January 1997. With regard to those costs, the Commission points out, however, that the applicant had already indicated, by fax of 25 March 1997, that it had sufficient evidence to support a finding that the Commission was liable. The Commission therefore considers that costs incurred after that date cannot be the subject of compensation.

30. Since this action was lodged on 8 April 2004, that is, more than two years after expiry of the five -year limitation period, the Commission considers that it should be dismissed as inadmissible. The Commission also points out that, although the applicant lodged a request for compensation with its services on 21 September 1999, the rejection of that request on 11 January 2000 was not followed by an action within the time-limits laid down in Articles 230 EC and 232 EC, so that request cannot have interrupted the limitation period. The same applies to the second request for compensation made by the applicant on 12 November 2001 and rejected by the Commission on 31 January 2002.

31. Finally, the Commission points out that the applicant was aware that it was subject to the limitation period, as is clear from the letters sent to the Ombudsman on 12 January and 10 May 1999.

32. The applicant considers that the action is admissible in its entirety.

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33. It maintains, first, that the limitation period starts to run only on the day on which the party concerned becomes aware of the events giving him entitlement to compensation. In response to the applicant's numerous requests to the Commission for clarification regarding its decision not to accept the applicant's tender at the end of the first selection stage, the Commission always maintained that the applicant did not have sufficient experience in the field of water research, a criterion which must also be regarded as including the design of water treatment facilities. It follows that the applicant was misled by the Commission and could not have been aware of the unequal treatment initiating the Commission's decision until the year 2000, when it finally managed, through its own efforts, to obtain the tender of a tenderer admitted to the second stage.

34. The Court of Justice has moreover stated that a person who supplies incorrect information to an opposing party may not invoke the limitation of the action against that party. Accordingly, the strict application of a limitation period cannot reasonably be justified on the basis of the principles of legal certainty and the sound administration of justice (Case C-326/96 Levez [1998] ECR I-7835).

35. According to the applicant, logic and fairness therefore support the conclusion, in accordance with the principle of non valentem agere non currit praescriptio , that the limitation period was suspended until 22 October 2001, the day on which the Ombudsman concluded, in his decision on the applicant's complaint, that the Commission appeared to have discriminated between the tenderers. Before that date, in the absence of evidence, an action against the Commission could not have succeeded, as is shown by the fact that the applicant's previous complaints were rejected by the Ombudsman.

36. Secondly, the applicant maintains that the loss for which it claims compensation had not yet materialised on the day on which its tender was rejected by the Commission. It was only during the subsequent years that it suffered continual loss because it was unable to exploit and extend its expertise. Similarly, the loss suffered because the second public services contract was awarded to another tenderer materialised only when that contract was awarded, on 30 November 2000. Finally, the costs incurred in gathering evidence against the Commission and in submitting the complaint to the Ombudsman were not incurred until 2000.

37. Thirdly and lastly, the applicant points out that, on 25 March 2002, it applied for legal aid in order to bring an action for compensation against the Commission. Since that application was refused by the Court, the applicant did not have the funds to bring an action before the date on which it brought the present one.

Findings of the Court

38. Article 46 of the Statute of the Court of Justice provides:

Proceedings against the Communities in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to the proceedings an application is made by the aggrieved party to the relevant institution of the Communities. In the latter event the proceedings must be instituted within the period of two months provided for in Article 230 of the EC Treaty and Article 146 of the EAEC Treaty; the provisions of the second paragraph of Article 232 of the EC Treaty and the second paragraph of Article 148 of the EAEC Treaty, respectively, shall apply where appropriate.'

39. According to the case-law, it is apparent from the second paragraph of Article 288 EC that the existence of the non-contractual liability of the Community and the enforceability of the right to compensation for damage suffered depend on the satisfaction of a number of requirements: the conduct of the institution must be unlawful, there must be actual damage and there must be a causal relationship between the conduct of the institution and the damage alleged (Joined Cases 256/80,

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257/80, 265/80, 267/80 and 5/81 Birra Wührer v Council and Commission [1982] ECR 85, paragraph 9, and order in Case T-106/98 Fratelli Murri v Commission [1999] ECR II-2553, paragraph 25), and that the five-year limitation period which applies to proceedings alleging Community liability therefore cannot begin before all the requirements governing the obligation to provide compensation are satisfied and in particular before the damage to be made good has materialised (see, to that effect, Birra Wührer v Council and Commission , paragraphs 9 and 10).

40. In the present case, it should be pointed out that the applicant seeks compensation for damage of a different kind.

41. In essence, it seeks compensation for:

- the loss suffered as a result of not being awarded the initial contract, equal to the net profit which that contract would have generated, estimated at EUR 158 400 (the loss suffered as a result of not being awarded the contract in question');

- the loss suffered as a result of the damage caused to its reputation as an expert in the field of water research, of the reduction in its workload, of its inability to extend its expertise in water-related research and of the need to develop its expertise in a new area, estimated at EUR 60 000 at least (the loss suffered as a result of the damage caused to its reputation, of the reduction in its workload, of its inability to extend its expertise in water-related research and the development of its expertise in a new area');

- the loss of the chance of securing a later contract, awarded on 30 November 2000 to Haskoning, estimated at 10% of the net profits received by that company on that occasion, that is EUR 25 500 (the damage suffered as a result of the loss of the chance of securing the next contract').

42. In the alternative, the applicant seeks compensation for:

- the loss of the chance of securing the contract in question, estimated, having regard to the fact that six companies were selected at the end of the first selection stage, at 1/6 of the net profits generated by the contract, that is EUR 26 400 (the loss suffered as a result of the loss of the chance of securing the contract in question');

- the costs incurred in participating in the initial tendering procedure, estimated at EUR 10 000 (the costs of the tendering procedure');

- the costs incurred in bringing the various complaints before the Ombudsman and in obtaining evidence against the Commission, estimated at EUR 4 000 (the costs incurred in bringing the matter before the Ombudsman and in obtaining evidence').

Concerning the loss which materialised on the day on which the applicant's tender was rejected

43. It must be held that the loss suffered as a result of not being awarded the contract in question, the damage suffered as a result of the loss of the chance of securing the contract in question, the costs of the tendering procedure and the loss suffered as a result of the damage to its reputation, of the reduction in its workload, of its inability to extend its expertise in water-related research and of the development of its expertise in a new area materialised on the day on which the Commission rejected the applicant's tender. That rejection also constitutes the event giving rise to these proceedings to establish liability, within the meaning of Article 46 of the Statute of the Court of Justice.

44. Furthermore, it is common ground that the rejection occurred on the date of the Commission's decision, 7 January 1997, and that, at the applicant's request, the Commission set out the reasons for its decision in a letter of 13 March 1997. It must also be stated that the applicant knew those reasons by, at the latest, 20 March 1997, the date on which it wrote to the Commission referring

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to the Commission's letter of 13 March 1997.

45. It follows that, in respect of those losses, all the conditions for the applicant to assert its right to compensation were satisfied on 20 March 1997 at the latest and that, therefore, the five-year limitation period expired on 20 March 2002 at the latest.

46. The fact that the applicant submitted two claims to the Commission, on 20 September 1999 and 12 November 2001, for compensation for the loss it claims to have suffered does not lead to a different result, since it is not disputed that those claims were not followed by proceedings under Article 230 EC or 232 EC.

47. In accordance with Article 46 of the Statute of the Court of Justice, the period of limitation is interrupted only if proceedings are instituted before the Court or if prior to the proceedings an application is made to the relevant institution of the Community; however, in the latter case, interruption only occurs if the application is followed by proceedings within the time-limit determined by reference to Article 230 EC or 232 EC (Giordano v Commission , paragraph 28 above, paragraph 6; Case T-222/97 Steffens v Council and Commission [1998] ECR II4175, paragraphs 35 and 42; and order in Jestädt v Council and Commission , paragraph 28 above, paragraph 47).

48. Consequently, since the application was lodged on 8 April 2004, that is, more than seven years after 20 March 1997, the point from which the five-year limitation period started to run, this action, in so far as it seeks compensation for those losses, must be declared time-barred and therefore inadmissible.

49. None of the applicant's arguments can affect that conclusion.

50. In the first place, the applicant claims that it could not have known of the alleged illegality committed by the Commission until 2000, that is to say, when it managed to obtain another tenderer's tender, which was accepted at the end of the selection stage and which shows that that tenderer did not have experience in the design of water treatment facilities. Without specifying the day on which it actually managed to obtain that document, the applicant considers that logic and fairness call for the point from which the limitation period started to run to be set at 22 October 2001, the day on which the Ombudsman gave his decision on the basis of that document and of the inquiries made at the Commission, because before that date the applicant had no evidence and its action would therefore have failed.

51. It should be pointed out that the unlawfulness of the conduct for which the applicant criticises the Commission and of which it became aware only belatedly, consists essentially in the alleged application of a selection criterion, namely experience in the design of water treatment facilities, which was not included among the criteria contained in the invitation to tender and which was applied to the applicant in a discriminatory manner.

52. As regards the unlawfulness resulting from the application of the criterion at issue, a study of the documents before the Court shows that the applicant knew that its tender had been rejected on the basis of that criterion since the Commission's letter of 13 March 1997. It must further be stated that, in its letter of 20 March 1997, the applicant challenged the Commission's arguments, saying that it had extensive experience in water-related research and that experience in the design of water treatment facilities was not one of the selection criteria. The applicant therefore concluded that it had been wrongly excluded from the award procedure, reported a case of improper administration and threatened to bring proceedings if it had not received a reply by 10 April 1997. The applicant repeated those arguments in its claim for compensation sent to the President of the Commission on 20 September 1999, in which it stated that, if that claim were rejected, it would bring the matter before the Court of First Instance.

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53. As regards the claim that the criterion in question was also applied in a discriminatory manner, the applicant submits that it was not aware of that fact until 2000, when it managed to obtain, through its own efforts, the tender of another tenderer, namely the company EDC, whose tender was selected at the end of the first stage even though that tenderer likewise did not satisfy that criterion.

54. Apart from the fact that the applicant does not adduce proof of that fact, it should first be pointed out again that, in its letter of 20 September 1999, it was already complaining that the criterion in question was not applied to the other tenderers, as is apparent from the report of the Advisory Committee on Procurement and Contracts (the ACPC'), and that the Commission had thus infringed the principle of non-discrimination laid down in Article 3(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). It should also be pointed out that, in its letter to the Ombudsman of 30 March 1998, to which it refers in its letter of 12 January 1999, the applicant already complained of fraud, favouritism and improper administration on the part of the Commission. Therefore, the applicant's assertion that it had not been aware until 2000 of the discriminatory application by the Commission of the criterion in question is incorrect.

55. In any event, it is apparent from paragraph 52 above that the applicant had known since 1997 the fundamental reason for the rejection of its tender, namely, its lack of experience in the design of water treatment facilities, a reason which it has always disputed, both before the Commission and the Ombudsman as well as in these proceedings, inasmuch as that criterion was not included in the invitation to tender.

56. Therefore, even if the applicant could not have known until 2000, or even 22 October 2001, that the criterion in question was allegedly applied in a discriminatory manner, that fact cannot postpone until that date the point from which the limitation period for the action for compensation started to run.

57. It should be pointed out that the function of the limitation period is to reconcile protection of the rights of the aggrieved person and the principle of legal certainty. The length of the limitation period was thus determined by taking into account, in particular, the time that the party who has allegedly suffered harm needs to gather the appropriate information for the purpose of a possible action and to verify the facts likely to provide the basis of that action (order in Autosalone Ispra dei Fratelli Rossi v Commission , paragraph 28 above, paragraph 28).

58. Thus, it has been held that the argument that the limitation period cannot begin until the victim has specific and detailed knowledge of the facts of the case is misconceived, since knowledge of the facts is not one of the conditions which must be met in order for the limitation period to run (order in Autosalone Ispra dei Fratelli Rossi v Commission , paragraph 28 above, paragraph 31).

59. Similarly, in the present case, the fact that the applicant allegedly became aware of additional information in support of its action after the rejection - for which the Commission stated its reasons on 13 March and 10 April 1997 - of its offer, even though it had since the beginning disputed the fundamental reason for that rejection, which also constitutes the event giving rise to the damage, cannot place the point from which the limitation period started to run at the date on which the applicant became aware of that information.

60. This applies a fortiori because in 2000, on the day on which the applicant claims to have received the tender documents of one of the tenderers accepted at the end of the selection stage, and even on the day on which the applicant itself considers that it had enough evidence to bring proceedings for compensation, that is, when the Ombudsman adopted his decision of 22 October 2001 which was

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critical of the Commission, the five-year limitation period had not yet expired.

61. It follows that, in this case, unlike the situation in which an applicant is prevented from bringing proceedings within a reasonable time because he only belatedly became aware of the event giving rise to the damage, expiry of the limitation period cannot be fixed at a date later than the normal date of expiry of that period (see, to that effect, Case 145/83 Adams v Commission [1985] ECR 3539, paragraphs 50 and 51, and the order in Autosalone Ispra dei Fratelli Rossi v Commission , paragraph 28 above, paragraph 32).

62. In the second place, the applicant's argument that the Commission is responsible for the limitation of the action inasmuch as it provided the applicant with incorrect information in order to conceal the alleged unlawfulness of the tendering procedure likewise cannot be accepted.

63. It is true that the Court of Justice has already held, in connection with the implementation of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19) that Community law precludes the application of a rule of national law which time-bars an action brought by an employee for arrears of remuneration or damages for breach of the principle of equal pay, there being no possibility of extending that period, where the delay in bringing a claim is attributable to the fact that the employer deliberately supplied the employee with incorrect information (Levez , paragraph 34 above, paragraph 34).

64. However, even assuming that the Court of Justice has thus laid down a general rule, the rule is not applicable in the present case.

65. Indeed, contrary to the situation in the above case, the fact that, in the present case, the Commission may have deliberately misled the applicant by informing it that the main reason that its tender had been rejected was that it did not have experience in the design of water treatment facilities, if proved, was not such as to prevent the applicant from bringing proceedings in good time.

66. First, it is clear from the foregoing that the applicant knew, from the time the Commission gave the reasons for its decision on 13 March 1997, that its tender had been rejected on the ground that it did not satisfy the criterion relating to experience in the design of water treatment facilities and that it has from the beginning disputed the lawfulness of the application of that criterion, a complaint which it maintains in these proceedings. Second, even if it were conceded that the Commission's conduct might have prevented the applicant from being fully aware that the Commission had allegedly treated it differently, it must be stated that the applicant was already making that complaint, on the basis of the ACPC report, in its letter to the Commission of 20 September1999, and itself acknowledges that it became aware of the fact in 2000 after obtaining EDC's tender. By that time at the latest, the applicant therefore had the evidence it claims it needed in order to bring its action. It therefore cannot be accepted that the delay in bringing this action is solely, or even largely, due to the Commission's attitude, because the applicant still had an opportunity to bring its action, within the time-limit, after the Ombudsman's decision.

67. In the third place, contrary to what the applicant claims, it cannot be considered that the loss allegedly suffered as a result of the damage caused to its reputation, of the reduction in its workload, of its inability to extend its expertise in water-related research and of the development of its expertise in a new area was suffered continuously. Although, according to settled case-law, the time bar applies only to the period preceding by more than five years the date of the act stopping time from running and does not affect rights which arose during subsequent periods (see, to that effect, Case T-20/94 Hartmann v Council and Commission [1997] ECR II-595, paragraph 132, and Case T-201/94 Kustermann v Council and Commission [2002] ECR II-415, paragraph 64), this

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is only in the exceptional situation in which it is established that the damage in question was repeated on a daily basis after the occurrence of the event which caused it. That is not the position in the present case, in which the loss described above, if proved, even though its full extent may not have been appreciated until after the rejection of the applicant's tender for the contract in question, was nevertheless caused instantly by that rejection.

68. Finally and in the fourth place, the applicant's argument that it was not in a financial position to bring an action against the Commission before it initiated these proceedings obviously does not support the conclusion that this action is admissible.

69. Indeed, it should be pointed out that, under Article 94(1) of the Rules of Procedure, a party who is wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid. The applicant's alleged poverty cannot therefore be a reason justifying the late submission of the application.

70. It should also be noted that the applicant was familiar with that procedure and that it has not established that it is entitled to legal aid, since, on 25 March 2002, it submitted an application for legal aid which the Court of First Instance dismissed by order of 13 December 2002.

71. It follows that, in accordance with paragraphs 43 and 48 above, the action is time-barred and therefore inadmissible, in so far as it seeks compensation for the loss suffered as a result of the applicant's not being awarded the contract in question, the damage suffered as a result of the loss of the chance of securing the contract in question, the costs of the tendering procedure and the loss suffered as a result of the damage to its reputation, of the reduction in its workload, of its inability to extend its expertise in water-related research and of the development of its expertise in a new area.

The other losses

72. As regards the damage suffered as a result of the loss of the chance of securing the next contract and the costs incurred in bringing the matter before the Ombudsman and in obtaining evidence, the Court considers that it is first necessary to examine the substance of the applicant's claim (see, to that effect, Case C-23/00 P Council v Boehringer [2002] ECR I-1873, paragraphs 51 and 52, and Case C-233/02 France v Commission [2004] ECR I-2759, paragraph 26).

73. In the first place, the applicant claims that the allegedly unlawful rejection of its tender for the contract in question caused it damage owing to the fact that it lost the chance, during the tendering procedure in which it participated, to secure a subsequent contract, which was awarded on 30 November 2000 to the company Haskoning (the renewal contract'). It maintains that that contract followed on from the contract which was the subject of the invitation to tender of 10 August 1996 (the first contract') and that it was therefore at an unfair disadvantage in relation to Haskoning, which had already been awarded the first contract.

74. In the second place, the applicant claims that it also suffered loss as a result of the costs incurred in obtaining evidence against the Commission, inter alia the tender submitted by EDC, and in presenting the complaints to the Ombudsman.

75. It is settled case-law that in order for the Community to incur non-contractual liability, a number of conditions must be met: the conduct of the Community institutions in question must be unlawful; there must be real and certain damage; and a direct causal link must exist between the conduct of the institution concerned and the alleged damage (see, inter alia, Case T-231/97 New Europe Consulting and Brown v Commission [1999] ECR II-2403, paragraph 29). If any one of those conditions is not satisfied, the application must be dismissed in its entirety without it being necessary to examine the other preconditions for such liability (Case C-146/91 KYDEP

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v Council and Commission [1994] ECR I-4199, paragraph 81, and Case C-104/97 P Atlanta v European Community [1999] ECR I-6983, paragraph 65).

76. With regard, first, to the loss allegedly suffered owing to the loss of the chance of securing the renewal contract, it should be pointed out that the applicant furnishes no information regarding the subject of the invitation to tender which it claims followed, in 2000, the invitation to tender of 10 August 1996, or regarding the connection between those two invitations to tender. It is therefore impossible to establish the existence of any causal link between the allegedly unlawful rejection of the applicant's tender during the first tendering procedure and the loss which the applicant suffered owing to the loss of the chance of securing the renewal contract.

77. In any event, the loss of the chance of securing the renewal contract can be regarded as real and certain damage only if, in the absence of the allegedly improper conduct by the Commission, there would be no doubt that the applicant would have been awarded the first contract. However, it should be pointed out that, in a public tendering system such as the one in this case, the awarding authority has a broad discretion in deciding to award a contract. Consequently, the applicant could not be sure of securing the first contract even if it had been selected to participate in the second stage of the tendering procedure (see, to that effect, New Europe Consulting and Brown v Commission , paragraph 75 above, paragraph 51), and that is so even without it being necessary to ascertain whether it satisfied the conditions laid down by the invitation to tender.

78. It follows that even if the applicant might have lost the chance of securing the first contract owing to the fact that it did not participate in the second stage of the first tendering procedure, damage which is in any event time-barred, that single loss of a chance could not be regarded as sufficient to cause the applicant real and certain damage as a result of the loss of the chance of securing the renewal contract, if it were accepted that there was a sufficient link between that contract and the first one.

79. As regards, next, the loss suffered as a result of the costs incurred in gathering evidence, inter alia the tender submitted by EDC, it should be noted that the costs incurred by the parties for the purpose of the judicial proceedings cannot as such be regarded as constituting damage distinct from the burden of costs (see, to that effect, Case C-334/97 Commission v Montorio [1999] ECR I-3387, paragraph 54). Furthermore, the Court of First Instance has held that, even though, as a rule, substantial legal work is carried out in the course of the proceedings prior to the judicial phase, it must be pointed out that by proceedings' Article 91 of the Rules of Procedure refers only to proceedings before the Court of First Instance, to the exclusion of the prior stage. That follows in particular from Article 90 of the Rules of Procedure, which refers to proceedings before the Court of First Instance' (see, to that effect, the order in Case T-38/95 DEP Groupe Origny v Commission [2002] ECR II-217, paragraph 29 and the case-law cited). Therefore, to regard such costs as a loss for which compensation may be claimed in an action for damages would be inconsistent with the fact that costs incurred during the phase before the judicial proceedings are not recoverable, as is evident from the case-law cited above.

80. It follows that the applicant is not entitled to claim, in an action for damages, compensation for loss suffered as a result of costs allegedly incurred in obtaining evidence prior to these proceedings.

81. Similarly, if it were to be understood that what the applicant is in fact claiming is that the costs incurred in obtaining sufficient evidence were caused by the Commission's alleged unlawful failure to send a notice concerning the outcome of the tendering procedure to the Office for Official Publications of the European Communities, under Articles 16, 17(2) et seq. of Directive 92/50, the fact remains that the applicant does not show in what respect sending the notice to the Publications Office would have saved it from incurring the costs in question.

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82. Furthermore, as has already been stated, the applicant was under no obligation to acquire the tender submitted by EDC in order properly to bring an action for compensation before the Court of First Instance.

83. Finally, with regard to the loss as a result of the costs allegedly incurred in bringing the matter before the Ombudsman, it should be pointed out that, in the institution of the Ombudsman, the Treaty has given citizens of the Union an alternative remedy to that of an action before the Community judicature in order to protect their interests. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings (Case T209/00 Lamberts v Ombudsman [2002] ECR II-2203, paragraph 65).

84. Moreover, as is clear from Article 195(1) EC and Article 2(6) and (7) of Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ 1994 L 113, p. 15), the two remedies cannot be pursued at the same time. Indeed, although complaints submitted to the Ombudsman do not affect time-limits for bringing actions before the Community judicature, the Ombudsman must none the less cease consideration of a complaint and declare it inadmissible if the citizen simultaneously brings an action before the Community judicature based on the same facts. It is therefore for the citizen to decide which of the two available remedies is likely to serve his interests best (Lamberts v Ombudsman , paragraph 83 above, paragraph 66).

85. It follows that the applicant's decision to bring the complaints in question before the Ombudsman was its own independent choice and that it was under no obligation to proceed in that way before properly bringing its action before the Court of First Instance.

86. Consequently, the applicant has not managed to establish the existence of a direct causal relationship between the alleged costs incurred before the Ombudsman and the alleged illegalities. A citizen's free choice to refer a matter to the Ombudsman cannot appear to be the direct and necessary consequence of cases of improper administration which may be attributable to Community institutions or bodies.

87. It is apparent from the above that the applicant's claim for compensation for damage suffered as a result of the loss of the chance to secure the renewal contract and of the costs incurred before the Ombudsman and in obtaining evidence must be dismissed as manifestly unfounded, without there being any need to give a ruling on its admissibility.

88. Accordingly, the application must be dismissed in its entirety, as in part inadmissible and in part manifestly unfounded.

89. It is therefore unnecessary to grant the applicant's request that Mr Trouwborst, Mr Brinkman and Mr Söderman be called as witnesses. In any event, it must be stated that that request does not state precisely about what facts or for what reasons those witnesses should be examined, and that it therefore does not fulfil the requirements laid down in the second subparagraph of Article 68(1) of the Rules of Procedure.

Costs

90. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the costs.

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SUB	Public contracts of the European Communities
AUTLANG	Dutch
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Netherlands
PROCEDU	Action for damages - inadmissible;Action for damages - unfounded
DATES	of document: 14/09/2005 of application: 08/04/2004

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**Judgment of the Court (Grand Chamber)
of 18 December 2007
Commission of the European Communities v Ireland. Failure of a Member State to fulfil obligations - Public procurement - Articles 43 EC and 49 EC - Emergency ambulance services. Case C-532/03.**

In Case C532/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 19 December 2003,

Commission of the European Communities , represented by K. Wiedner and X. Lewis, acting as Agents, assisted by J. Flynn QC, with an address for service in Luxembourg,

applicant,

v

Ireland , represented by D. O'Hagan, acting as Agent, assisted by A. Collins SC, E. Regan, Barrister at law, and C. O'Toole, Barrister, with an address for service in Luxembourg,

defendant,

supported by:

Kingdom of the Netherlands , represented by H.G. Sevenster, C. Wissels and P. van Ginneken, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis (Rapporteur) and U. Lohmus, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, J. Makarczyk, M. Ilei, J. Malenovsku and J. Kluka, Judges,

Advocate General: C. Stix-Hackl,

Registrar: K. Sztranc-Sawiczek, Administrator,

having regard to the written procedure and further to the hearing on 4 April 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

Judgment

1. By its application, the Commission of the European Communities asks the Court of Justice to declare that, in permitting Dublin City Council (DCC'), successor to the Dublin Corporation Fire Brigade, to provide emergency ambulance services without the Eastern Regional Health Authority (the Authority'), previously known as the Eastern Health Board, having undertaken any prior advertising, Ireland has failed to fulfil its obligations under Articles 43 EC and 49 EC and the general principles of Community law.

Legal context

Community legislation

2. The provisions governing the award of public service contracts are contained in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328; p. 1; Directive 92/50'). Article 1(a) of Directive 92/50 provides in particular that public service contracts are contracts for pecuniary interest concluded

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in writing between a service provider and a contracting authority.

National legislation

3. Section 65(1) of the Health Act 1953, as applicable in 1999, which applies to the present dispute (the Health Act'), provides:

(1) A health board may, subject to any general directions given by the Minister and on such terms and conditions as it sees fit to impose, give assistance in any one or more of the following ways to any body which provides or proposes to provide a service similar or ancillary to a service that the health board may provide:

(a) by contributing to the expenses incurred by the body'.

4. Section 57 of the Health Act 1970 provides:

A health board may make arrangements for providing ambulances or other means of transport for the conveyance of patients...'

5. Under section 25 of the Fire Services Act 1981:

A fire authority may carry out or assist in any operations of an emergency nature, whether or not a risk of fire is involved, and a fire authority may accordingly make such provision for the rescue or safeguarding of persons and protection of property as it considers necessary for the purposes of that function.'

6. Section 9(1)(a) of the 1981 Act provides that the council of a county' is the fire authority for the purposes of the Act.

Facts and pre-litigation procedure

7. DCC, which is responsible for the fire service in Dublin, provides emergency ambulance services in part of the area served by the Authority, inter alia in the city of Dublin. It provided that service as a health authority until 1960, then as a local authority through its permanent fire brigade service.

8. Pursuant to section 65 of the Health Act and in order to contribute financially to the provision of emergency ambulance services, the East Coast Area Health Board - a board responsible for health matters that is separate from the Authority and which performs its functions as delegated by the Authority - makes annual payments to DCC, the final amount of which is determined following negotiations between DCC and the East Coast Area Health Board and which represents part of DCC's expenditure on the provision of the services in question.

9. In June 1998, the Eastern Health Board and the Dublin Corporation Fire Brigade drew up a draft agreement on the provision of emergency ambulance services. At the beginning of 2003, that is, as at the end of the period laid down in the reasoned opinion, that draft agreement included the financing arrangements between those two bodies and constituted an overview of the management of the public expenditure relating to that draft agreement.

10. The draft agreement gave rise to a complaint to the Commission in which it was claimed that the draft agreement should have been the subject of prior advertising in accordance with the requirements of Directive 92/50. Correspondence was initiated between the Commission and the Irish authorities with a view to establishing whether there was a contract to which such an advertising requirement would have applied.

11. Having concluded that the provision of emergency ambulance services to the Authority on the basis of an agreement made without any prior advertising was inconsistent with Articles 43 EC and 49 EC, the Commission initiated the infringement procedure laid down in Article 226 EC.

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12. After giving Ireland formal notice to submit its observations, the Commission issued a reasoned opinion on 17 December 2002, requesting Ireland to take the necessary steps to comply with that opinion within a period of two months from its receipt.

13. Taking the view that Ireland's response to the reasoned opinion was unsatisfactory, the Commission decided to bring the present action.

The action

Arguments of the parties

14. The Commission claims that the arrangements under which emergency ambulance services are provided by DCC by agreement with the Authority without there having been any prior advertising constitutes a breach of Articles 43 EC and 49 EC and of the general principles of Community law.

15. According to the Commission, in the absence of a written contract, the provision of such services falls outside the scope of Directive 92/50. However, those arrangements should be considered in the light of the fundamental freedoms and the general principles of Community law, which include the principle of transparency.

16. Referring to the judgment in Joined Cases 27/86 to 29/86 CEI and Bellini [1987] ECR 3347, the Commission claims that Community law applies in full to situations which are not covered by the public procurement directives. It submits further that, according to paragraphs 60 to 62 of the judgment in Case C324/98 Telaustria and Telefonadress [2000] ECR I10745, compliance with the rules of the EC Treaty relating to the fundamental freedoms in general, and with the principle of non-discrimination on the ground of nationality in particular, implies, notably, an obligation of transparency which allows the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

17. The Commission takes the view in this regard that the foregoing considerations apply to the provision of emergency ambulance services. It claims that DCC provides such services for remuneration at the behest of the Authority. The Authority takes an active role in ensuring that the services provided meet its requirements and in controlling the amount to be paid in respect of those services. The Commission notes also that the Authority's financial contribution appears to cover almost all of DCC's expenditure on the provision of those services.

18. Ireland contests the alleged failure to fulfil its obligations.

19. At the hearing, Ireland explained that the present dispute relates to the mobile emergency medical service, which must be provided as a public service. It contends that the Commission has not established that DCC provides emergency ambulance services at the behest of the Authority, or demonstrated that the arrangement between the Authority and DCC constitutes an award of a public contract'.

20. As regards the funding of those services, Ireland contends that the Authority's participation is undertaken in the exercise of its functions, in accordance with the provisions of the Health Act, and that its financial contribution covers only part of DCC's expenditure. In the present case, there is no fixed price and the Authority endeavours to control or limit the amount which it is empowered by law to pay to DCC towards the cost of those services.

21. Ireland maintains that section 25 of the Fire Services Act 1981 specifically confers on DCC statutory powers to provide emergency ambulance services. DCC, it argues, has provided such services in its capacity as a local authority which, under national law, is also the fire authority.

22. Ireland submits that the fact that the emergency ambulance and fire brigade services are concentrated in one public body is an advantage in terms of health and public safety, since all members of the

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combined ambulance and fire brigade services receive emergency medical training.

23. Furthermore, Ireland notes that, according to the Court's judgment in Case 263/86 Humbel and Edel [1988] ECR 5365, those services, which fall within Annex 1 B to Directive 92/50, are not services normally provided for remuneration and, as such, are not covered by Articles 43 EC and 49 EC.

24. As regards possible discrimination on the ground of nationality, Ireland submits that its national law does not prohibit providers of emergency ambulance services from other Member States from establishing themselves or providing services in Ireland.

25. Ireland takes the view that the Commission has failed to identify any directly or indirectly discriminatory provision in the Fire Services Act 1981 or in the Health Acts. In the present case, Ireland relies on the judgment in Case C70/95 Sodemare and Others [1997] ECR I3395, in which the Court held that it was not contrary to the principle of equal treatment to reserve participation in the social welfare system of providing old people's homes to non-profit-making private operators.

26. Ireland submits further that Articles 43 EC and 49 EC are inapplicable as the services in question are services of general economic interest' and that the level of their public funding is strictly limited to that which is necessary to cover the actual cost of those services.

27. The Kingdom of the Netherlands, which was granted leave to intervene in support of the form of order sought by Ireland by order of the President of the Court of 15 June 2004, submits that the principle of transparency does not apply in a situation in which there is no connecting factor with the internal market, in the present case, the freedom to provide services. As a subsidiary point, the Netherlands claims that, even if the Court were to rule that the principle of transparency must be applied if Directive 92/50 is not applicable, it is for the Member States to define what constitutes a sufficient degree of advertising'.

Findings of the Court

28. As a preliminary point, it must be noted that, as is apparent from the form of order sought in the application initiating proceedings, the present action for failure to fulfil obligations does not concern the application of Directive 92/50, but relates to the issue as to whether the provision by DCC, without prior advertising, of emergency ambulance services is contrary to the fundamental rules of the Treaty and, in particular, to the freedom of establishment and the freedom to provide services enshrined in Articles 43 EC and 49 EC respectively.

29. It follows from the case-law of the Court that, without prejudice to the obligation of the Member States, under Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article 211 EC, in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied (Case C494/01 Commission v Ireland [2005] ECR I3331, paragraph 42), in an action for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (see, in particular, Case 96/81 Commission v Netherlands [1982] ECR 1791, paragraph 6; Case C404/00 Commission v Spain [2003] ECR I6695, paragraph 26; and Case C135/05 Commission v Italy [2007] ECR I0000, paragraph 26).

30. The Commission claims that the maintenance of an agreement between DCC and the Authority, without any prior advertising, constitutes a breach of the rules of the Treaty and thereby of the general principles of Community law, in particular the principle of transparency.

31. In support of its case, the Commission takes the view that, even in the absence of a written

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contract detailing the terms of the services to be provided by DCC, the correspondence attached to a letter of 19 September 2002 shows that the scope of those services and the basis on which they are to be remunerated were considered by the parties and formalised in a draft agreement drawn up in June 1998. In particular, in a letter of 15 January 1999 attached to the letter of 19 September 2002, DCC's Finance Officer stated that the negotiations on the funding of the emergency ambulance service had resulted, in June 1998, in an agreement determining future charges by DCC to the Authority.

32. The Commission submits that it seems that DCC and the Authority agreed to enter into a service-level agreement and that a contract was drafted to that end. Therefore, according to the Commission, DCC provides emergency ambulance services at the behest of the Authority and for remuneration.

33. In that respect, it is apparent from the documents before the Court that national legislation empowers both the Authority and DCC to carry out emergency ambulance services. Under section 25 of the Fire Services Act 1981, a fire authority may carry out or assist in any operations of an emergency nature, whether or not a risk of fire is involved, and may accordingly make such provision for the rescue or safeguarding of persons and protection of property as it considers necessary for the purposes of that function. Thus, under section 9 of that Act, a local authority such as DCC is the responsible fire authority.

34. Bet ween 1899 and 1960, DCC provided emergency ambulance services in its capacity as a health authority. It subsequently acted in its capacity as a local authority and, under section 25 of the Fire Services Act 1981, provided those services through its permanent fire brigade service.

35. Consequently, it is conceivable that DCC provides such services to the public in the exercise of its own powers derived directly from statute, and applying its own funds, although it is paid a contribution by the Authority for that purpose, covering part of the costs of those services.

36. In that regard, as follows from the case-law cited in paragraph 29 of this judgment, it is, in the present case, incumbent upon the Commission to place before the Court the information needed to enable the Court to establish that a public contract has been awarded, and in so doing the Commission may not rely on any presumption in that regard.

37. However, neither the Commission's arguments nor the documents produced demonstrate that there has been an award of a public contract, since it is conceivable that DCC provides emergency ambulance services in the exercise of its own powers derived directly from statute. Moreover, the mere fact that, as between two public bodies, funding arrangements exist in respect of such services does not imply that the provision of the services concerned constitutes an award of a public contract which would need to be assessed in the light of the fundamental rules of the Treaty.

38. Since the Commission has not proved that Ireland has failed to fulfil its obligations under the Treaty, the action must be dismissed.

Costs

39. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ireland has applied for the Commission to be ordered to pay the costs and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

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PROCEDU	Action for failure to fulfil obligations - unfounded
ADVGEN	Stix-Hackl

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JUDGRAP Arestis

DATES of document: 18/12/2007
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Opinion of Advocate General Stix-Hackl delivered on 14 September 2006. Commission of the European Communities v Ireland. Failure of a Member State to fulfil obligations - Public procurement - Articles 43 EC and 49 EC - Emergency ambulance services. Case C-532/03.

I - Introductory remarks

1. This action for failure to fulfil obligations, like another such action brought in parallel, (2) relates to the question of what requirements can be inferred from primary law as regards the transparency of award procedures. In particular, the present case concerns the obligations that can be derived from the fundamental freedoms and general principles of law for awards which are not covered by the public procurement directives. Finally, the case concerns the interpretation and further development of the Court's case-law in Telaustria (3) and Coname. (4)

2. While Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, (5) which has been replaced in the meantime by the legislative package', covers awards in respect of emergency services, which are the services at issue in the present case, it covers only contracts in writing.

II - Legal context

A - Community law

3. This case involves primarily the freedom to provide services, that is to say Article 49 EC.

4. Article 86 EC is also to be noted. Article 86(1) imposes obligations on Member States with regard to particular undertakings. Article 86(2), on the other hand, lays down obligations for particular undertakings, above all for undertakings entrusted with the operation of services of general economic interest.

B - National law

5. Section 65(1) of the Health Act 1953 provides:

A health board may, subject to any general directions given by the Minister and on such terms and conditions as it sees fit to impose, give assistance in any one or more of the following ways to any body which provides or proposes to provide a service similar or ancillary to a service that the health board may provide:

(a) by contributing to the expenses incurred by the body,

...'

6. Section 25 of the Fire Services Act 1981 provides:

A fire authority [section 9 of the Act provides that local authorities are fire authorities] may carry out or assist in any operations of an emergency nature, whether or not a risk of fire is involved, and a fire authority may accordingly make such provision for the rescue or safeguarding of persons and protection of property as it considers necessary for the purposes of that function.'

III - Facts, pre-litigation procedure and proceedings before the Court

7. The Commission learnt following a complaint of the manner in which emergency ambulance services were allocated in Ireland. Since the Commission was of the view that the award should have been advertised in accordance with Directive 92/50, it entered into an exchange of correspondence with Ireland. The correspondence concerned the question whether there was a contract to which certain advertising requirements should have applied.

8. On 28 November 2001 the Commission requested from the Irish authorities information on the

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relationship between Dublin City Council (DCC') and the Eastern Regional Health Authority (the Authority'). Since the Commission received no reply, it initiated the Treaty infringement procedure under Article 226 EC.

9. In their response of 18 June 2002, the Irish authorities stated that the services provided by DCC and paid for by the Authority under section 65(1)(a) of the Health Act 1953 were provided by DCC independently as principal' and not pursuant to any contract with, or under any control or supervision of, the Authority. Moreover, such services had been provided for decades.

10. In its letter of 9 August 2002, the Commission requested from the Irish authorities all relevant documents in order to determine the relationship between DCC and the Authority.

11. The Department of Health and Children replied on 19 September 2002, attaching a number of documents.

12. The Commission maintained its position that there was a breach of Community law and on 17 December 2002 sent Ireland a reasoned opinion under Article 226 EC. By letter of 14 February 2003, the Irish authorities sent a detailed reply to the Commission. The Commission was not satisfied by this reply.

13. In its application, the Commission claims that the Court should:

1. declare that, in permitting emergency ambulance services to be provided by Dublin City Council without the Eastern Regional Health Authority undertaking any prior advertising, Ireland has failed to fulfil its obligations under the Treaty;

2. order Ireland to pay the Commission's costs.

14. Ireland contends that the Court should:

1. dismiss the Commission's application;

2. order the Commission to pay Ireland's costs.

IV - Submissions of the principal parties and the intervener

A - The Commission

15. The Commission submits that although, in the absence of a contract in writing, the basis upon which the emergency ambulance services are performed does not fall within the scope of Directive 92/50, certain obligations do arise from the fundamental freedoms, in particular Articles 43 EC and 49 EC, and from general principles of law. Those general principles undoubtedly include the principle of transparency and the principle of equality or non-discrimination. The Commission refers in this connection to the decisions in Telaustria and Vestergaard.

16. While the Member States are free to opt for a particular procedure, they must in so doing comply with the requirements of Community law. An appropriate form of advertising must therefore be undertaken. The advertising to be undertaken depends on the nature of the service and on the class of undertakings for which the service is of interest.

17. The Commission considers that its interpretative communication on concessions under Community law (6) constitutes a guide in this regard.

18. It is apparent from a number of letters, in particular one written by DCC's Finance Officer and Treasurer dated 15 January 1999, that certain arrangements regarding the services to be performed were entered into in June 1998. This also led to a contract being drafted, whose categorisation under national law is immaterial for the purposes of Community law.

19. The Commission therefore rejects Ireland's argument that the services have not been performed

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for the Authority. The tasks discharged by the Authority indeed involve, amongst others, monitoring the performance of the services. While DCC may be under no obligation to provide the services, the Authority must ensure their provision. This is clear, for example, from the draft contract mentioned above.

20. If Ireland argues that performance - without prior advertising - of the services is founded on section 65(1)(a) of the Health Act, this merely means that that provision infringes Articles 43 EC and 49 EC. In the Commission's submission, however, that provision merely empowers the Authority to enter into an arrangement. It does not prevent the Authority from calling for tenders. The nature of the service and its lack of attraction for undertakings do not mean that all advertisement can be dispensed with.

21. Nor is the approach adopted rendered lawful by the fact that the Authority would not outsource the services at issue if DCC did not provide them.

22. It is also not correct that the exception in Article 6 of Directive 92/50 is applicable.

23. Finally, the argument according to which the provision of services of general economic interest within the meaning of Article 86(2) EC is involved must be rejected. Compliance with the obligations arising under the EC Treaty does not obstruct performance of the particular tasks assigned. Besides, it is unclear whether DCC or the Authority is to be regarded as the undertaking entrusted with operation of the services.

24. In arguing that emergency ambulance services are provided free of charge, Ireland confuses the services drawn on by individuals with those provided vis-à-vis the Authority.

25. The Commission observes with regard to Ireland's submission that DCC is not reimbursed all its costs that that is immaterial, and moreover disputes the truth of the submission.

26. The Commission submits with regard to the Netherlands Government's view that application of the fundamental freedoms requires a cross-border element that that is the case here.

27. The restriction referred to by the Netherlands Government relating to the precedence accorded to harmonising provisions rests on a false understanding of the case-law cited. Moreover, Directive 92/50 itself requires application of the principle of non-discrimination, in Article 3(2).

28. The view that the requirement of transparency applies only where a voluntary tendering procedure is conducted must be rejected, as must the view that in the present case grounds of justification exist or the requirements of Article 86(2) EC are met.

29. The Commission stresses with regard to the appropriate degree of publicity that advertisement nationally or internationally is not required in all cases, and that notification given to specific firms may suffice. The carrying out of an award procedure as under the directives is not required.

B - Ireland

30. Ireland disputes the need for advertising in respect of the services at issue.

31. Fundamentally the Commission is challenging the existence of an arrangement and not a new award. The provisions relied upon by the Commission are, however, inapplicable thereto. The alteration of existing arrangements cannot be required.

32. Nor is there a contract or contractual arrangement of any kind between DCC and the Authority. The arrangement' of June 1998 concerns an interinstitutional arrangement between two statutory bodies and negotiations on the contribution to DCC's costs.

33. DCC acts pursuant to statutory powers of its own, and in its own name. Nor is it subject to the Authority's control. The costs contribution made by the Authority does not constitute consideration

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and does not fully cover the costs.

34. Ireland points out that the services at issue fall under Annex I B to Directive 92/50. Even if a contract had been concluded in writing, under Article 9 of the directive only the less stringent regime would be applicable, that is to say Articles 14 and 16. In the contrary case the Commission would have had to propose an appropriate amendment to the directive.

35. It follows from the fact that emergency ambulance services are provided free of charge in Ireland that they are not services normally provided for remuneration. Articles 43 EC and 49 EC are therefore also not applicable. Nor is there any discrimination against foreign private undertakings.

36. Ireland further submits that the Court's case-law in Telaustria and Bellini (7) which is cited by the Commission is not relevant.

37. Article 295 EC leaves the Member States free to choose the rules governing the system of property ownership.

38. Finally, reference should be made to the special provisions for services of general economic interest under Articles 16 EC and 86(2) EC.

C - The intervener

39. The Kingdom of the Netherlands, which has intervened in the proceedings in support of Ireland, notes that the principle of transparency does not mean that there is an obligation to apply the requirements of Directive 92/50. Furthermore, a series of exceptions to that principle exists. First, here there is no connecting factor with the internal market. Freedom to provide services is not affected. There are no grounds for examining compliance with the principle of non-discrimination. If the threshold under the directives is not reached, the requirement of transparency is also inapplicable.

40. Second, the requirement of transparency also does not apply in so far as secondary Community legislation lays down corresponding provisions. Nor does it operate in cases in respect of which the public procurement directives lay down an exception, such as Articles 4 and 6 of Directive 92/50. Since the directives provide for minimum harmonisation with regard to transparency, the Member States are of course free to go further.

41. Third, a Member State is required to observe the principles of the EC Treaty only where a tendering procedure is initiated.

42. Fourth, it must be examined whether grounds of justification exist or the requirements of Article 86(2) EC are met.

43. With regard to the content of the requirement of transparency, the Netherlands Government submits that it must be determined what the appropriate degree of publicity is. That is to be left in every award procedure to the contracting authority. In October 2005 the Commission put forward a draft interpretative communication, which concerns the requirement of transparency. It is therefore high time that the Court determined more precisely the content of that requirement.

V - Appraisal

A - Preliminary remarks

44. It must be stated with regard to the form of order sought by the Commission that the latter has applied only for a declaration that the provision of certain services is contrary to Community law. That, by its nature, involves conduct of the defendant Member State in the past and, to be more precise, at a particular time, namely upon expiry of the period set in the reasoned opinion. In principle, therefore, the subsequent adherence to certain conduct, including toleration, can also be the subject-matter of a failure to fulfil obligations under Article 226 EC.

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45. The form of order sought by the Commission does not concern the equally interesting issue of whether and how a particular contract or concession awarder has the obligation to terminate a contract that has been concluded. For Ireland, however, this question arises in so far as it will be obliged under Article 228(1) EC, if the arrangement is declared unlawful, to take the measures necessary to comply with the judgment of the Court. (8)

46. The Commission's action is limited to an application for a declaration that the particular activity should have been advertised. By this, the Commission would appear to mean a form of contract notice.

47. This action for failure to fulfil obligations is therefore not intended to determine the form which the approach adopted in respect of the particular award would have taken, but only that it was in any event impermissible for there to be no contract notice at all.

48. According to the Court's case-law, Article 49 EC prohibits restrictions on freedom to provide services within the European Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. Furthermore, it is settled case-law that that provision requires the elimination of any restriction, even if it applies to national providers of services and to those of other Member States alike, when it is liable to prohibit or impede the activities of a provider of services established in another Member State where he lawfully provides similar services'. (9)

49. With regard to the legal bases whose infringement is to be examined in the present proceedings, the broad formulation of the form of order sought by the Commission, which complains of a failure to fulfil obligations under the Treaty', means that not only Articles 43 EC and 49 EC may require consideration, but also general principles of law and Article 10 EC. The latter provision may require consideration in the form of the requirement for equivalence and effectiveness. (10)

50. According to the Court's case-law, (11) provisions of primary law apply if the award is not governed by any of the directives. This precondition is met with regard to the award at issue here because, as the parties to the dispute correctly submit, in the absence of a contract in writing it is not covered by Directive 92/50.

51. The process which forms the basis for this action for failure to fulfil obligations relates to a specific mechanism concerning the use of public funds for specific services. Ireland itself acknowledges that a certain form of arrangement exists.

52. As the judgment in Commission v Spain demonstrates, the public procurement directives also cover cooperation agreements between the public authorities and other public bodies. (12) The fact that that case concerned agreements that were in writing is of no consequence for the present action since it concerns not compliance with a condition laid down in the directives but the application of primary law. Even less strict requirements than under the directives apply in the case of primary law, so far as the nature of the relations is concerned. It is in any event not in dispute that the present proceedings also involve two mutually distinguishable bodies.

53. Application of the freedom to provide services stands at the heart of the present proceedings. That presupposes that the subject-matter of the contested award constitutes services' within the meaning of Article 50 EC.

54. The view could be taken that normally ambulance services or emergency ambulance services are not paid for directly by the person who avails himself of the service, but that the costs are met by insurance or borne directly by the State budget. Since it suffices under the Court's case-law in the very area of health care (13) if the payment for a service is made by a third party, detailed examination of the accounting system for the services at issue is superfluous. It is in any event

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not in dispute that the East Coast Area Health Board pays a contribution'. There is accordingly no need for the purpose of the present proceedings to clarify how great its share of the actual costs is.

B - Principle: requirement of transparency

55. The present action for failure to fulfil obligations is concerned with the question whether the requirement of transparency was infringed in a specific process.

56. As already explained in my Opinion in Coname , transparency under just the directives encompasses a whole series of aspects. (14) The present proceedings concern only particular advertising obligations relating to the allocation of particular services.

57. According to the Court's case-law, it is necessary to ensure, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and... procedures to be reviewed'. (15) This requirement indeed applies not only to awards which fall outside Directive 92/50 because they take the form of a concession but also to awards which are not covered by this, or another, public procurement directive for other reasons. It may be added here purely for the sake of clarification that the same standard does not apply to all awards irrespective of their subject-matter and their value.

58. The criterion for assessing the legality of the defendant Member State's action is whether an appropriate degree of transparency was ensured.

59. It must therefore be examined whether in the specific case the lack of a call for tenders infringes that requirement. As the Court stated in Coname , it must be determined whether the award... complies with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to ensure that an undertaking located in the territory of [another] Member State... can have access to appropriate information regarding that concession before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession'. (16)

60. It can thus be inferred from the case-law that what is appropriate is to be determined having regard to the persons interested in the particular award. In this connection, account is to be taken not only of persons who are actually interested: those interested also include all potentially interested persons in other Member States.

61. Thus, the degree of transparency which satisfies this requirement must be chosen. The question is, however, whether that must necessarily be in the form of a call for tenders (tender notice).

1. Need for a call for tenders?

62. It must be determined first of all whether primary law requires a call for tenders in all cases.

63. That view might be supported by the judgments of the First Chamber in Parking Brixen and ANAV , (17) in which the Court held that the Member States must not maintain in force national legislation which permits the award of public service concessions without their being put out to competition [ohne eine Ausschreibung', that is to say without a call for tenders', in the German version] since such an award infringes Article 43 EC or 49 EC or the principles of equal treatment, non-discrimination and transparency'.

64. However, there would appear to be an inaccuracy in the German version of those judgments. The French version in both cases, and similarly the Italian version in ANAV , speak of mise en concurrence' and a procedura concorrenziale' respectively. Reference is therefore deliberately not being made to an appel d'offres' or a bando di gara', that is to say to a tender notice for the purposes of the public procurement directives.

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65. Besides, the Court expressly points out in the judgment delivered by the Grand Chamber in Coname that primary law does not in all cases require advertising in the form of a call for tenders (tender notice). (18)

66. That judgment of the Court is therefore to be regarded as the leading decision and thus forms the starting point for the assessment below. Apart from the fact that the judgment in Coname was delivered by the Grand Chamber and that the other judgments contain linguistic inaccuracies, this also follows from a consideration of principle.

67. The view that an award without a tender notice (call for tenders) and the direct contacting of specific undertakings are universally impermissible cannot be followed if only because even the public procurement directives provide for exceptions to such an obligation to advertise. The Commission itself expressly points out that, for it, it is not a question of transposing the obligations to advertise under Directive 92/50 into primary law. If a tender notice were always required under primary law, contracting authorities would be subject to stricter rules outside the public procurement directives than within their field of application.

68. In addition, certain exceptions to the requirement to comply with the obligations of primary law were recognised by the Court in Coname . Those exceptions are still to be addressed separately.

69. It therefore remains to be stated that there can be procurement for which no call for tenders (tender notice) is required to be issued.

70. In this context, it appears to me necessary to recall the view that I have already expressed in my Opinion in Coname (19) that there is no uniform set of procurement rules under primary law and that instead it is appropriate to draw distinctions according to the circumstances of the particular award. The present proceedings offer the Court an opportunity to provide the necessary clarification.

2. Differentiation according to the particular award

71. The starting point must therefore be the principle that the details of the requirement of transparency depend on the circumstances of each particular case.

72. The following observations concern, in accordance with the subject-matter of this action for failure to fulfil obligations, the conditions under which advertising may be dispensed with and whether they were met in this specific case.

73. Guidance is provided by the principle that review must be possible and the principles of proportionality and equal treatment. Also, regard is to be had to the objectives of all Community procurement law, such as safeguarding competition and the internal market, and to the effet utile' of the provisions of primary law.

74. The content of the obligation of transparency in each case depends on various factors, such as the subject-matter - that is to say whether services, the supply of goods, or works are involved - and the estimated value of the contract.

75. Since the present proceedings concern services falling within Annex I B to Directive 92/50, that is to say non-priority services, it must be examined whether the distinction drawn in the directive between priority and non-priority services is also relevant to primary law.

76. This categorisation found in the directives would appear to be based on the idea, applicable to procurement generally, that some awards are of greater relevance to the internal market than others, that is to say they are of interest to a wider group of economic operators - to be more precise, also to undertakings from other Member States. This could be a matter relevant particularly to application of the fundamental freedoms, given that they require a cross-border element. (20)

77. While it is true that the Community legislature made only certain categories of services, namely

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priority services, subject to the full regime under Directive 92/50, that cannot automatically be taken to mean that other services, namely non-priority services, are not relevant to the internal market, that is to say that they essentially could not be provided from another State. Even though the Community legislature retained this split when the rules were amended, that is to say in Directive 2004/18, and used the same reasoning, (21) that does not in itself preclude as a matter of principle the application of primary law.

78. If a presumption were to be applied that non-priority services are of no interest to tenderers from other Member States, the Commission would have to furnish proof in an action for failure to fulfil obligations that the award at issue nevertheless does potentially have transnational interest.

79. It is true that the Commission is in principle obliged in an action for failure to fulfil obligations to prove its submissions with regard to both the facts and the law. This might be taken to mean that the Commission must show, by way of a market analysis, which economic operators have an interest in the proposed award as potential competitors; in this connection the value and subject-matter of the contract play a decisive role.

80. Neither the written nor the oral submissions of the Commission satisfy those requirements. On the basis of this strict standard for allocation of the burden of proof, the Commission's claims would have to be rejected as unfounded.

81. However, it is not to be overlooked in this context that hitherto the Court has not applied such a strict standard in relation to procurement. (22) Rather, in the absence of evidence to the contrary, it would probably proceed on the basis that awards of a certain order of magnitude are, in the event of doubt, potentially of interest to undertakings from other Member States.

82. Thus, the principle remains in the present proceedings that as much information is to be given as potentially interested undertakings need to enable them to decide whether to participate in the award procedure or to submit a tender. Under no circumstances does primary law require the details which the models laid down in the public procurement directives prescribe for notices. (23)

83. It is not to be inferred from the documents in the case or the hearing that the specific features of the particular award are such as to warrant no advertising at all. Neither the annual value nor the subject-matter of the services supports the conclusion that such an omission is in conformity with Community law.

84. It must therefore now be examined whether it was possible for that omission to be founded on exceptions expressly provided for in primary law, or on the grounds of justification recognised by the case-law on the fundamental freedoms generally or relating to procurement.

85. Since in the case in point no advertising at all of the planned services took place, there is, however, no need to examine in detail what publication medium should have been chosen and what the minimum content of the advertising should have been.

C - Exceptions and grounds of justification

86. It is now to be investigated whether, because the effects of the restrictions are slight, the fundamental freedoms are not affected, whether the defendant Member State can rely on one of the Treaty rules providing for a general exemption of measures of the Member States from the application of primary law, whether one of the grounds of justification expressly provided for in the Treaty or a ground of justification recognised by case-law applies, and whether Article 86(2) EC is applicable. Finally it must be examined whether the exceptions in the directives, in particular Article 6 of Directive 92/50, are to be applied as such or by analogy.

1. Slight effects of the award

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87. In Coname , the Court took up again a line of case-law, developed in the context of the free movement of goods, in accordance with which, because of special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in [another] Member State... would have no interest in the concession at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed'. (24)

88. Apart from the fact that it is open to question where the limit lies as to what is modest', the award at issue, having a value of several million Irish punts per year, in any event does not satisfy those requirements. In 2001 the annual value of the services is supposed already to have amounted to more than IEP 7 000 000. This indeed exceeded by far the threshold value under Directive 92/50.

2. Grounds of justification expressly laid down in the Treaty

89. First, the Treaty rules are to be noted that provide, even if subject to certain conditions, for a general exemption of measures of the Member States from the application of primary law. In relation to procurement, it is above all the exemptions relating to security that are relevant, to be more precise Articles 296 EC and 297 EC. These exemptions cannot, however, apply in the case in point, in the absence of any basis therefor.

90. In addition, the Member States can rely on the grounds of justification expressly provided for in the Treaty under Article 46 EC in conjunction with Article 55 EC, such as public policy or public health. In the case in point it is, however, to be observed that the defendant Member State has not defended itself in such a way as to have proved the presence of a ground of justification of this kind. (25)

91. A justification relating to official authority, that is to say one based on Article 45 EC, required that certain conditions be met. It is settled case-law that, as derogations from the fundamental rule of freedom of establishment, Articles 45 EC and 55 EC must be interpreted in a manner which limits their scope to what is strictly necessary for safeguarding the interests which those provisions allow the Member States to protect'. (26)

92. According to settled case-law, derogation under those articles must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority. (27)

93. Here, however, the conditions specified in the case-law in order for these expressly prescribed grounds to apply are not met.

3. Grounds of justification not expressly laid down in the Treaty or requirements in the general interest

94. Under the Court's case-law, (28) which in principle can also be applied in relation to procurement, (29) restrictions on freedom of establishment and freedom to provide services can be justified if they satisfy certain conditions.

95. According to that case-law, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

96. However, the defendant Member State has been unable to demonstrate that grounds of justification, or requirements in the general interest, recognised by the Court, for example consumer protection, justify the approach chosen.

97. Finally, reference should be made to the ground of justification, developed by the Court, of

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objective circumstances'. (30) It is unnecessary to conduct a detailed analysis of this possibility, not explained more precisely by the Court, of justifying certain Member State rules, and in particular of the conditions for the ground's application, because Ireland has made no relevant submissions in this regard.

4. Article 86 EC

98. In the present proceedings Article 86 EC has also been discussed.

99. It must be pointed out with regard to the award in question that strictly speaking it involves the grant of exclusive rights, in the field of emergency services, to be more precise emergency ambulance services.

100. The question arises in this regard whether the very entrustment with such rights, and not just further State measures in relation to undertakings to which the Member States grant special or exclusive rights, is covered by Article 86(1) EC. The Court's case-law yields indications that the very grant of exclusive rights - to be more precise by way of creation of a dominant position - also falls within Article 86(1) EC in conjunction with Article 82 EC. That does not mean, however, that the grant of such rights is automatically prohibited. (31) The question whether their grant, for example grant of the right enabling emergency services to be provided by DCC, is consistent with Community law is to be determined by means of provisions other than Article 86(1) EC. The provisions of substantive law pertinent in this regard include Article 86(2) EC. This provision thus acquires a relevance that extends beyond measures of the undertakings covered by it to State measures.

101. However, the present proceedings are concerned not with the vesting of rights in the Authority but with the Authority's actions in the context of the provision of essential services, to be more precise the awards made by it, namely the assignment of emergency services to DCC. It is in relation to the conduct of the bodies in which specific rights have been vested that Article 86(2) EC is of legal significance.

102. So far as concerns the assignment of emergency services to DCC, it must be examined whether the Authority satisfies the conditions of Article 86(2) EC, that is to say whether it is an undertaking that is entrusted with the operation of services of general economic interest and whether the application of the provisions of primary law would have obstructed the performance, in law or in fact, of the tasks assigned to it.

103. It must in principle be acknowledged that, because of the lead time involved and the period to be specified for the submission of tenders, the carrying out of an award procedure entailing a call for tenders can in certain cases obstruct the performance of tasks. That would be true, for example, in the case of a utility company if interruptions or delayed commencement of the energy or water supply were to result.

104. In light of the Court's case-law, it must therefore be examined to what extent a restriction on competition or even the exclusion of all competition from other economic operators was necessary to enable the holder of the exclusive right to perform its task of general interest, and in particular to have the benefit of economically acceptable conditions. (32)

105. Even though it is not necessary that the survival of the undertaking itself would have been threatened had a call for tenders been issued, it should at least be proved that the performance, in law or in fact, of the special obligations incumbent upon that undertaking would have been obstructed. (33)

106. The defendant Member State has not been able to demonstrate that the approach adopted was necessary to enable DCC to perform its task in economically acceptable conditions.

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107. There is accordingly no need to examine whether DCC is in fact an undertaking to which tasks of general economic interest were assigned.

108. It should, moreover, be pointed out in this context that, being a provision permitting derogation from the Treaty rules, Article 86(2) EC must be interpreted strictly. (34) Nor, in the present proceedings, does Article 16 EC change anything.

5. Application of exceptions under the directives

109. Finally, consideration is to be given to the application of exceptions to the duty first to publish a (contract) notice which are laid down in the directives.

110. It is necessary to proceed on the basis of the principle that, within the field of application of primary law, precisely the same rules cannot apply in respect of the award procedure as under the directives. This admittedly does not prevent many requirements, for example the prohibition of discrimination, from also applying outside the directives - though pursuant to another legal basis, for example a general principle of law.

111. As has already been pointed out a number of times, (35) exceptions corresponding to those which the directives (36) lay down ought in any event to be recognised in the context of primary law. It thus cannot be ruled out that there may also be cases in which an award procedure may be conducted without a prior contract notice, that is to say without advertising.

112. It must, however, be stated here with regard to this kind of exception that the defendant Member State has not relied on any of the exceptions laid down in Directive 92/50 for conducting a negotiated procedure without a contract notice.

6. Article 6 of Directive 92/50

113. In the proceedings the applicability of Article 6 of Directive 92/50 was discussed a number of times. This provision removes public service contracts from the directive's field of application subject to certain conditions - inter alia the service provider must have an exclusive right.

114. It must be pointed out, as a matter of principle, with regard to the applicability of this exception that it can have effect only where the award actually falls within Directive 92/50. Since it is, however, not in dispute that other conditions required in order for Directive 92/50 to apply are already not met, there is no need to examine whether an exclusive right exists in the present case.

115. In an action for failure to fulfil obligations, it is for the defendant State to put forward possible reasons why the provisions of Community law do not apply. In the present proceedings, the discussion has, however, been limited to Article 6 of Directive 92/50 in the strict sense.

116. The parties have not discussed in any detail whether a comparable exception exists in primary law, possibly as a ground of justification or objective circumstance' within the meaning of Coname , with the effect that such processes are exempt even from the application of primary law.

D - Conclusion

117. Overall, examination of the process complained of by the Commission has shown that there were no circumstances which would have allowed the services at issue to be performed without any advertising being undertaken.

118. It is true that there can be procurement procedures for which advertising can be entirely dispensed with, but in the case in point such circumstances were simply not present or at least have not been proved.

VI - Costs

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119. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ireland is unsuccessful and the Commission has applied for Ireland to pay its costs, Ireland should accordingly be ordered to pay those costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of the Netherlands which has intervened in the proceedings should bear its own costs.

VII - Conclusion

120. In accordance with all of the foregoing, I propose that the Court should:

(1) declare that, in permitting emergency ambulance services to be provided by Dublin City Council without the Eastern Regional Health Authority undertaking any prior advertising, although there were no circumstances which would have permitted Ireland to proceed in such a way, Ireland has failed to fulfil its obligations under the Treaty;

(2) order Ireland to pay the Commission's costs;

(3) order the Kingdom of the Netherlands to bear its own costs.

(1) .

(2) - See my Opinion, also delivered today, in Case C507/03 Commission v Ireland.

(3) - Case C324/98 Telaustria and Telefonadress [2000] ECR I-10745.

(4) - Case C231/03 [2005] ECR I7287.

(5) - OJ 1992 L 209, p. 1.

(6) - OJ 2000 C 121, p. 2.

(7) - Joined Cases 27/86, 28/86 and 29/86 CEI and Bellini [1987] ECR 3347.

(8) - Case C126/03 Commission v Germany [2004] ECR I11197, paragraph 26, and judgment of 3 March 2005 in Case C-414/03 Commission v Germany , not published in the ECR, paragraph 11.

(9) - Case C264/03 Commission v France [2005] ECR I8831, paragraph 66.

(10) - My Opinion in Coname (cited in footnote 4), point 81, with further references to the case-law.

(11) - Coname (cited in footnote 4), paragraph 16, and Commission v France (cited in footnote 9), paragraph 32.

(12) - Case C84/03 Commission v Spain [2005] ECR I139, paragraph 38 et seq.

(13) - Case C-158/96 Kohll [1998] ECR I-1931; Case C-368/98 Vanbraekel and Others [2001] ECR I5363; Case C-157/99 Smits and Peerbooms [2001] ECR I-5473; and Case C385/99 Müller-Fauré and van Riet [2003] ECR I4509.

(14) - My Opinion in Coname (cited in footnote 4), point 88 et seq.

(15) - Case C410/04 ANAV [2006] ECR I-0000, paragraph 21, and Case C-458/03 Parking Brixen [2005] ECR I-8612, paragraph 49.

(16) - Coname (cited in footnote 4), paragraph 21.

(17) - ANAV (cited in footnote 15), paragraph 23, and Parking Brixen (cited in footnote 15), paragraph 52.

(18) - Coname (cited in footnote 4), paragraph 21. That is also shown by the French version

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of the judgment (un appel d'offres').

(19) - Opinion in Coname (cited in footnote 4), point 69 et seq.

(20) - See my Opinion in Coname (cited in footnote 4), point 78.

(21) - Nineteenth recital in the preamble.

(22) - See the judgment of 27 October 2005 in Case C158/03 Commission v Spain , not published in the ECR.

(23) - See my Opinion in Coname (cited in footnote 4), point 97.

(24) - Coname (cited in footnote 4), paragraph 20.

(25) - Commission v France (cited in footnote 9), paragraph 69.

(26) - Case 147/86 Commission v Greece [1988] ECR 1637, paragraph 7; Case C-114/97 Commission v Spain [1998] ECR I6717, paragraph 34; and Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-0000, paragraph 45.

(27) - Case 2/74 Reyners [1974] ECR 631, paragraph 45; Case C-42/92 Thijssen [1993] ECR I-4047, paragraph 8; Case C-114/97 Commission v Spain (cited in footnote 26), paragraph 35; Case C283/99 Commission v Italy [2001] ECR I-4363, paragraph 20; and Servizi Ausiliari Dottori Commercialisti (cited in footnote 26), paragraph 46.

(28) - See Case C19/92 Kraus [1993] ECR I1663, paragraph 32; Case C55/94 Gebhard [1995] ECR I4165, paragraph 37; and Case C-243/01 Gambelli and Others [2003] ECR I13031, paragraphs 64 and 65.

(29) - See Case C-158/03 Commission v Spain (cited in footnote 22), paragraph 35.

(30) - Coname (cited in footnote 4), paragraph 23: with regard to the objective circumstances that could justify such a difference in treatment, it must be pointed out that the fact that the Comune di Cingia de' Botti has a 0.97% holding in the share capital of Padania does not, by itself, constitute one of those objective circumstances'.

(31) - See, for example, Case C41/90 Höfner and Elser [1991] ECR I1979, paragraph 29; Case C179/90 Merci Convenzionali Porto di Genova [1991] ECR I5889, paragraph 16; and Joined Cases C271/90, C281/90 and C289/90 Spain and Others v Commission [1992] ECR I5833, paragraphs 35 and 36.

(32) - Case C320/91 Corbeau [1993] ECR I2533, paragraph 16, and Case C475/99 Ambulanz Glöckner [2001] ECR I8089, paragraph 57.

(33) - Case C-157/94 Commission v Netherlands [1997] ECR I5699, paragraph 43.

(34) - Commission v Netherlands (cited in footnote 33), paragraph 37.

(35) - See my Opinion in Coname (cited in footnote 4), point 93, and, following that, the Opinion of Advocate General Jacobs in Case C-525/03 Commission v Italy [2005] ECR I9405, paragraph 47.

(36) - Article 11(3) of Directive 92/50 and Article 31 of Directive 2004/18.

DOCNUM 62003C0532

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
DOC	2006/09/14
LODGED	2003/12/19
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Ireland ; Member States
NATIONA	Ireland
PROCEDU	Action for failure to fulfil obligations - unfounded
ADVGEN	Stix-Hackl
JUDGRAP	Arestis
DATES	of document: 14/09/2006 of application: 19/12/2003

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Judgment of the Court (Second Chamber) of 27 October 2005

Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil obligations - National rules ceasing to have any legal effect before the expiry of the period laid down in the reasoned opinion - Inadmissibility of the action. Case C-525/03.

Actions for failure to fulfil obligations - Infringement terminated before the expiry of the period laid down in the reasoned opinion - Inadmissibility

(Art. 226, second para., EC)

Under the second paragraph of Article 226 EC, the Commission may bring an action for failure to fulfil obligations before the Court only if the Member State concerned has failed to comply with the reasoned opinion within the period laid down by the Commission for that purpose.

Furthermore, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion.

An action for failure to fulfil obligations is therefore inadmissible where the national measure which is the sole object of the action has been exhausted before the period laid down in the reasoned opinion expired and even before the letter of formal notice was sent.

(see paras 13-14, 16-17)

In Case C-525/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 December 2003,

Commission of the European Communities, represented by X. Lewis, C. Loggi and K. Wiedner, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, J. Makarczyk (Rapporteur), C. Gulmann, R. Schintgen and J. Kluka, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 April 2005,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2005,

gives the following

Judgment

1. By its application the Commission of the European Communities requests the Court to declare that, by adopting Articles 1(2) and 2(1) to (3) of Ordinance No 3231 of the President of the Council of Ministers of 24 July 2002 introducing urgent measures for aerial forest firefighting on national

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territory (GURI No 177, 30 July 2002, p. 42; the contested order'), which authorise recourse to private negotiations by way of derogation from the Community directives on public supply and service contracts and, in particular, from the common rules on advertising and participation laid down by Titles III and IV of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1; Directive 93/36'), and by Titles III and V of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 2001/78 (Directive 92/50'), for the acquisition of aircraft to combat forest fires and for the acquisition of firefighting services and which similarly allow for recourse to the aforementioned procedure for the acquisition of technical and computer equipment and two-way radios, without any of the lawful conditions for derogation from those common rules being satisfied and, in any event, without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers, the Italian Republic has failed to fulfil its obligations under the said Directives and Articles 43 EC and 49 EC.

Facts

2. The contested ordinance was made in application of the decree of the President of the Council of Ministers of 28 June 2002 declaring a state of emergency until 31 October 2002 on the national territory for the purposes of aerial forest firefighting (GURI No 161, 11 July 2002, p. 4).

3. That ordinance authorised the Corpo forestale dello Stato (National Forest Rangers), firstly, to purchase aircraft to combat forest fires by private negotiated contract, by derogation from the statutory provisions listed in Article 4 [of that ordinance]', that is to say in particular from the national legislation transposing Directives 92/50 and 93/36 and, secondly, to obtain, also by privately negotiated contract, two-way radio equipment for communication with firefighting aircraft. It moreover permitted the Dipartimento della protezione civile (Department of Civil Protection) to have recourse to private negotiation for the acquisition of equipment to reinforce its technological and computing resources, and for the acquisition and implementation of aerial forest firefighting services.

4. Pursuant to the contested ordinance, the Ministero delle Politiche agricole e forestali (Italian Ministry of Agriculture and Forestry) adopted Decree No 1619/2002 on 28 October 2002, authorising and approving a contract concluded with the company Agusta SpA, by private negotiation within the meaning of the said ordinance, relating to the supply of two helicopters, accompanying equipment, technical assistance, spare parts and all items necessary for the functioning of those aircraft.

The pre-litigation procedure

5. The Commission considered that the provisions of the contested ordinance authorising the award of supply and service contracts by the negotiated procedure in cases not covered by Directives 92/50 and 93/36 were contrary to those directives and to Articles 43 EC and 49 EC and, on 19 December 2002, sent the Italian Republic a letter of formal notice calling upon it to submit within one month its observations on the failure of which it was accused.

6. Not satisfied with the observations submitted by the Italian Government in reply to that letter, the Commission sent the Italian Republic a reasoned opinion on 3 April 2003 requesting it to take the measures necessary to comply with the reasoned opinion within one month of notification thereof and, in particular, to repeal or amend certain provisions of the contested ordinance and to annul and render void the acts and measures taken for the purposes of the award of public contracts on the basis of those provisions and, where contracts had been concluded, to suspend their performance.

7. Since the Commission was not convinced by the Italian Republic's responses to the reasoned

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opinion, it decided to bring the present proceedings.

Admissibility of the action

8. It is appropriate at the outset to emphasise that the Court may of its own motion examine the question whether the conditions laid down in Article 226 EC for the bringing of an action for failure to fulfil obligations are satisfied (see, inter alia, Case C-362/90 Commission v Italy [1992] ECR I-2353, paragraph 8, and Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 8).

9. It is of no effect in that regard that, in reply to a question put at the hearing, the Italian Republic submitted that the action was admissible although in the defence it claimed that the action was devoid of purpose on the ground that the contested ordinance had ceased to produce any effect even before the Commission disputed its legitimacy or sought to have it set aside.

10. Nor is the fact that the Italian Republic did not acknowledge the failure of which it was accused, a fact also evoked by the Commission at the hearing in support of the admissibility of its action, of any relevance since the procedure for a declaration of a failure on the part of a Member State to fulfil an obligation is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation (see, inter alia, Case C-71/97 Commission v Spain [1998] ECR I-5991, paragraph 14, and Case C-83/99 Commission v Spain [2001] ECR I-445, paragraph 23).

11. It is appropriate, firstly, to state, as is clear from the form of order sought in the application initiating proceedings, that the present action for failure to fulfil obligations is limited to Articles 1(2) and 2(1) to (3) of the contested ordinance and does not seek to call into question the subsequent acts adopted pursuant to that ordinance, which were nevertheless explicitly mentioned in the reasoned opinion.

12. It is important, secondly, to recall that the Commission, in exercising its powers under the second paragraph of Article 226 EC, has the function, in the general interest of the Community, of ensuring that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and of obtaining a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (see, to that effect, Case C-431/92 Commission v Germany [1995] ECR I2189, paragraph 21, and Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609, paragraph 29).

13. In that regard, it follows from the very terms of the second paragraph of Article 226 EC that the Commission may bring an action for failure to fulfil obligations before the Court only if the Member State concerned has failed to comply with the reasoned opinion within the period laid down by the Commission for that purpose (see Case C-362/90 Commission v Italy , cited above, paragraph 9).

14. It is, furthermore, settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-362/90 Commission v Italy , cited above, paragraph 10, Case C-173/01 Commission v Greece [2002] ECR I-6129, paragraph 7, and Case C-114/02 Commission v France [2003] ECR I-3783, paragraph 9).

15. It must be stated that the contested ordinance had ceased to produce any legal effect at the expiry date of the state of emergency declared on Italian territory until 31 October 2002 by the decree of the President of the Council of Ministers of 28 June 2002, the duration for the application of that ordinance being limited to that fixed by the decree.

16. The effects intrinsic to the contested ordinance, which was no longer in force from 1 November

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2002, had, as a consequence, been exhausted before the period laid down in the reasoned opinion expired and even before the letter of formal notice was sent. Since it relates only to that single ordinance, the failure of which the Italian Republic is accused in the present action, even if established, could in any event no longer have existed at the time that period expired.

17. It follows from all the foregoing that the Commission's application must be dismissed as inadmissible.

Costs

18. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Italian Republic has not applied for costs against the Commission. Consequently, each party shall bear its own costs.

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

1. Dismisses the action as inadmissible.

2. Orders the Commission of the European Communities and the Italian Republic to bear their own costs.

DOCNUM	62003J0525
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-09405
DOC	2005/10/27
LODGED	2003/12/16
JURCIT	11997E043 : N 1 11997E049 : N 1 11997E226 : N 8 11997E226-L2 : N 13 31992L0050 : N 1 31993L0036 : N 1 61990J0362 : N 8 13 14 61997J0071 : N 10 61999J0083 : N 10 61999J0439 : N 8 62001J0173 : N 14 62002J0114 : N 14
CONCERNS	Failure concerning 31992L0050 - Failure concerning 31993L0036 - Failure concerning 11997E043 -

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	Failure concerning 11997E049 -
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Action for failure to fulfil obligations - inadmissible
ADVGEN	Jacobs
JUDGRAP	Makarczyk
DATES	of document: 27/10/2005 of application: 16/12/2003

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Notice for the OJ

JUDGMENT OF THE COURT

(Second Chamber)

of 27 October 2005

in Case C-525/03: Commission of the European Communities v Italian Republic [1]

(Failure of a Member State to fulfil obligations - National rules ceasing to have any legal effect before the expiry of the period laid down in the reasoned opinion - Inadmissibility of the action)

(Language of the case: Italian)

In Case C-525/03 **Commission of the European Communities** (Agents: X. Lewis, C. Loggi and K. Wiedner) v **Italian Republic** (Agent: I. M. Braguglia and G. Fiengo, lawyer) - action for failure to fulfil obligations under Article 226 EC, brought on 16 December 2003 - the Court (Second Chamber), composed of C. W. A. Timmermans, President of the Chamber, J. Makarczyk (Rapporteur), C. Gulmann, R. Schintgen and J. Klučka, Judges; F. G. Jacobs, Advocate General; L. Hewlett, Principal Administrator for the Registrar, gave a judgment on 27 October 2005, in which it:

Dismisses the action as inadmissible;

Orders the Commission of the European Communities and the Italian Republic to bear their own costs.

_____

[1] - OJ C 59 of 06.03.2004

Opinion of Mr Advocate General Jacobs delivered on 2 June 2005. Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil obligations - National rules ceasing to have any legal effect before the expiry of the period laid down in the reasoned opinion - Inadmissibility of the action. Case C-525/03.

1. In the present case, the Commission alleges that, by adopting certain provisions authorising recourse to a negotiated procedure without publication of a tender notice for the acquisition of forest firefighting equipment and services, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36/EEC (2) and Articles 43 and 49 EC.

Relevant legislation

Community legislation

2. Directive 93/36 coordinates procedures for the award of public supply contracts, and Directive 92/50 (3) coordinates procedures for the award of public service contracts, by State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law. (4)

3. The directives provide for three types of procedure:

- open procedures', in which all interested suppliers may submit tenders;

- restricted procedures', in which only those suppliers invited by the contracting authorities may submit tenders; and

- negotiated procedures', in which contracting authorities consult suppliers of their choice and negotiate the terms of the contract with one or more of them. (5)

4. As a general rule, contracting authorities are to award supply and service contracts by an open or a restricted procedure. (6)

5. However, in a number of exceptional cases, they may award contracts by negotiated procedure, without prior publication of a tender notice.

6. For supply contracts, those cases are set out in Article 6(3) of Directive 93/36 and include, in so far as is relevant:

...

(c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 [(7)] cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

(e) for additional deliver[ie]s by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.'

7. For service contracts, they are set out in Article 11(3) of Directive 92/50, in slightly different terms:

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

...

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time-limit for the open, restricted or negotiated procedures [(8)] referred to in Articles 17 to 20 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

...

(f) for new services consisting in the repetition of similar services entrusted to the service provider to which the same contracting authorities awarded an earlier contract, provided that such services conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4. As soon as the first project is put up for tender, notice must be given that the negotiated procedure might be adopted and the total estimated cost of subsequent services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7. This procedure may be applied solely during the three years following the conclusion of the original contract.'

8. However, even where such exceptions apply, or where the value of contracts falls below the threshold for the application of the directives, (9) the Court has held that the procedure used must comply with the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services, namely Articles 43 and 49 EC. (10) That principle implies an obligation of transparency which in turn requires a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. (11)

National legislation

9. Article 23 quinquies of Law No 61 of 30 March 1998 (12) allocated certain sums for the Corpo Forestale dello Stato (National Forest Rangers, hereinafter Corpo Forestale') to purchase helicopters to combat forest fires in the years 1998 to 2000.

10. Article 5(1) of Law No 225 of 24 February 1992 on national service and civil protection (13) authorises the President of the Council of Ministers to declare a state of emergency in a specified area for a specified period in the case of natural calamities, catastrophes or other events of such magnitude and extent as to require exceptional measures and powers. Article 5(2) allows ordinances to be adopted in such cases, derogating from provisions in force but in compliance with general principles of law, for the purpose of ensuring emergency intervention consequent upon such a declaration.

11. By decree of 28 June 2002, (14) taken on the basis of Article 5(1) of Law No 225 following the outbreak of numerous forest fires, the President of the Council of Ministers declared a state of emergency for the whole of Italy, for the purpose of aerial forest firefighting. The state of emergency was to last until 31 October 2002. By another decree of the same date, (15) a more limited state of emergency was declared in the province of Verbano-Cusio-Ossola, to last until 31 December 2002. The latter state of emergency, but apparently not the former, was subsequently extended until 30 December 2003 (16) and again until 31 July 2004. (17)

12. On 24 July 2002, the President of the Council of Ministers adopted Ordinance No 3231 (the contested ordinance'), (18) concerning aerial forest firefighting, on the basis of: Law No 225, in particular Article 5 thereof; Decree-Law No 343 of 7 September 2001, as converted into Law No 401 of 9 November 2001; (19) and the two abovementioned Decrees of 28 June 2002. (20)

13. Articles 1(2) and 2(1), (2) and (3) of the ordinance (the contested provisions') are the object

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of the present proceedings.

14. Article 1(2) reads as follows:

In order to improve the operational capacity of airborne units employed in forest firefighting, the Department of Civil Protection is authorised to draw up and implement a special emergency programme to reinforce its technological and computing resources, and may acquire necessary equipment by procedures including privately negotiated contracts.'

15. Article 2(1), (2) and (3) read as follows:

1. In order to respond adequately and with the necessary immediacy to the forest fires occurring throughout the national territory, in pursuance of the aims set out in Article 7(2) of Law No 353 of 21 November 2000, [(21)] in a context of substantial and stable reinforcement of the fleet of aircraft at the disposal of the Department of Civil Protection, having regard to the great variety of emergency situations, and at the same time in order to meet the essential needs of preventing the possible spread of such fires, likely to endanger seriously both persons and property, the Department of Civil Protection is authorised to specify with the utmost urgency such aircraft as are deemed most suitable for the accomplishment of its tasks, concluding, by private negotiation, by derogation from the statutory provisions listed in Article 4 below, [(22)] contracts for the acquisition or implementation of aerial forest firefighting services.

2. In pursuance of the aims set out in Article 7(2) of Law No 353 of 21 November 2000, for the reinforcement of the operational capacity of the airborne units of the Corpo Forestale dello Stato employed in forest firefighting, and in subsequent action dealing with possible civil protection emergencies, the Corpo Forestale is authorised to specify with the utmost urgency such aircraft as are deemed most suitable for the accomplishment of its tasks and of other duties flowing from Article 11 of Law No 225/1992, [(23)] to be acquired by privately negotiated contract, by derogation from the statutory provisions listed in Article 4 below. For that purpose, the Corpo Forestale may also acquire and evaluate the results of tests performed by, and civil protection experience of, other State, regional or local entities, and of any technical research that may have been carried out, in order to achieve the most profitable functional and operational integration possible and the most economical management of the entire State fleet of forest firefighting aircraft. For the acquisition of the aircraft referred to in this paragraph and by derogation from the general rules on government accounting, the Corpo Forestale may also enter into agreements for trading in aircraft in its possession which are intended to be but have not yet been sold.

3. In order to allow the chief fire officer to ensure coordination between ground teams and firefighting aircraft, the Corpo Forestale is authorised to acquire, also by privately negotiated contracts, such radio transceiving equipment and accessories as are necessary for ground-to-air communication with those aircraft when employed in firefighting operations.'

16. The preamble to the ordinance mentions as reasons for its adoption the climatic and meteorological conditions prevailing since the beginning of 2002, with exceptionally high temperatures in June, increasing the risk of forest fires, and the urgent need for aerial firefighting equipment.

Procedure

17. In December 2000, pursuant to Article 23 quinquies of Law No 61/98, the Italian Ministry of Agriculture and Forestry issued two invitations to tender for the supply of a total of 49 helicopters. Those procedures were subsequently suspended and then withdrawn, a matter which gave rise to a complaint to the Commission. Questioned by the Commission, the Italian authorities replied that the step had been taken following the attack on the World Trade Centre in September 2001, since there was a need to ensure that the helicopters could be used in anti-terrorist as well as forest

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firefighting operations. On 22 July 2002, the Italian authorities informed the Commission that they intended to purchase the helicopters in question, and considered that the con tracts were not subject to Community law, being matters of national security.

18. The contested ordinance was adopted on 24 July 2002, and it appears to be common ground that the only relevant acquisition made pursuant to it was of two AB 412 helicopters, supplied by the Italian company Agusta Bell SpA (Agusta') following a negotiated procedure culminating in a contract signed on 28 October and approved on 31 October 2002.

19. The Commission took the view however that the authorisations contained in the contested ordinance were contrary to Community law and, on 19 December 2002, sent the Italian Government a letter of formal notice, asking it to submit its observations in accordance with Article 226 EC. The Government replied stressing the seriousness of the forest fires in Italy in 2002.

20. The Commission then, on 3 April 2003, sent the Italian Government a reasoned opinion pursuant to Article 226 EC, in which it concluded that the adoption of Articles 1(2) and 2(1), (2) and (3) of the contested ordinance was contrary to Community law. It requested Italy to comply with the opinion within one month.

21. Although the Italian authorities made a number of replies after the expiry of that period, the Commission considers that it has not been informed of any measures taken to comply with the reasoned opinion.

22. It has therefore brought the present action, in which it asks the Court to:

- declare that, by adopting Articles 1(2) and 2(1), (2) and (3) of Ordinance No 3231 of the President of the Council of Ministers of 24 July 2002, which allow for private negotiations by way of derogation from the provisions of the Community directives on public supply and service contracts, and in particular, from the common rules on advertising and participation laid down by Titles III and IV of Directive 93/36 and III and V of Directive 92/50, for the acquisition of aircraft to combat forest fires and for the acquisition of firefighting services and which similarly allow for such negotiations for the acquisition of technical and computer equipment and two-way radios, without any of the lawful conditions for derogation from those common rules being satisfied and, in any event, without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36 of 18 June 1992 and Articles 43 and 49 EC;

- order the Italian Republic to pay the costs.

23. Italy contends that the Court should declare the proceedings devoid of purpose or should dismiss the action as unfounded.

Admissibility

24. Italy points out in its written pleadings that the contested ordinance related to a limited period, defined by the duration of the state of emergency which was declared until 31 October 2002.

25. That factor gave rise to some discussion at the hearing as to whether the Commission's action could be regarded as admissible, since the reasoned opinion was not sent until 3 April 2003, and it might be questioned whether the alleged infringement was still in existence at the end of the period of one month laid down for compliance in that opinion.

26. The Commission argued, first, that the contested ordinance did not contain any provision limiting its effects in time or expire by operation of any other legal rule; second, that one of the measures on which it was based, namely the decree declaring a state of emergency in the province of Verbano-Cusio-Ossola, was extended until 31 July 2004; third, that the contract for the supply of two helicopters, concluded

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on the basis of the contested ordinance, had not been completed by the end of that period, since technical verifications were still being carried out; and, fourth, that if the Court were to find the action inadmissible on the ground envisaged Member States could adopt temporary measures authorising unjustified derogations from the Community procurement rules but escape censure by ensuring that they lapsed or were repealed before the Commission could take legal action.

27. The agent for the Italian Republic agreed that the action was admissible. He expressly acknowledged that, if that were not so, there would be no way of obtaining the requisite judicial scrutiny in cases of this kind.

28. In those circumstances I do not propose to examine the question of the expiry of the contested ordinance as a factor affecting the admissibility of the action. I agree however with both parties that short-term infringements of Community law, of the kind alleged in the present case, should not be immune from the procedure laid down in Article 226 EC merely because of their limited duration.

29. In any event, whether the contested ordinance was still in force or not at the end of the period laid down for compliance in the reasoned opinion, and whatever the situation as regards the procedures commenced on the basis of the ordinance, it is clear that no step was taken by Italy to remedy the alleged infringement, the existence of which it continues to deny.

30. In those circumstances, Italy cannot be considered to have complied with the reasoned opinion and the action cannot be held inadmissible. (24)

The declaration sought

31. The Commission seeks a declaration that by adopting Articles 1(2) and 2(1), (2) and (3) of the contested ordinance, Italy has failed to fulfil its obligations under Directive 93/36 and Articles 43 and 49 EC.

32. That delimitation of the scope of the application gives rise to two preliminary remarks.

33. First, the Commission has referred to supply procedures commenced and withdrawn before the adoption of the contested ordinance. (25) Those circumstances may explain the Commission's specific interest in the ordinance, and they may be relevant to some of the Commission's arguments concerning the existence of urgency.

34. Second, the discussion in the pleadings has dwelt to some extent on the acquisition of two Agusta AB 412 helicopters on the basis of the contested ordinance. The circumstances of those purchases may throw some light on the circumstances of the adoption of the ordinance.

35. It must however be remembered in both regards that the declaration sought relates solely to the adoption of specific provisions of that ordinance, and not to any actual procurement procedures whenever initiated and on whatever basis.

36. The wording of the declaration sought also gives rise to some rather more substantial observations.

37. That declaration asserts that the contested provisions authorise negotiated procedures by way of derogation from the provisions of the Community directives on public supply and service contracts, and in particular, from the common rules on advertising and participation laid down by Titles III and IV of Directive 93/36/EEC and III and V of Directive 92/50/EEC... without any of the lawful conditions for derogation from those common rules being satisfied and, in any event, without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers'.

38. From that, it concludes that Italy has failed to fulfil its obligations under Directive 93/36 and Articles 43 and 49 EC - but not Directive 92/50.

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39. That approach, whilst perfectly coherent with regard to supply contracts governed by Directive 93/36, seems more puzzling where service contracts are concerned.

40. It is true that the Court has held that, even where there is no requirement to comply with the provisions of the services directive, public procurement procedures must comply with the fundamental principles which flow from Articles 43 and 49 EC, in particular the principle of non-discrimination, which implies an obligation of transparency and thus in turn a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. (26)

41. Consequently, it may be reasoned, recourse to a privately negotiated procedure where such recourse is not authorised by Directive 92/50 must also offend against those principles, since by definition there will be no advertising.

42. However, that seems an unduly circuitous route to take, particularly when a perfectly straightforward approach is available - and is taken in the strictly parallel context of supply contracts governed by Directive 93/36.

43. The Commission does not offer any direct explanation for the approach it has taken, but one might infer from a passage in the application (27) that it intended to cater for a defence - which the Italian Government has not in fact advanced - to the effect that the service contracts concerned fell below the value threshold for the application of Directive 92/50.

44. However, since the case is concerned with the authorising provisions and not with any procedures carried out under them, even that consideration would be relevant only if those provisions applied expressly and exclusively to contracts whose value was below the threshold, whereas in fact they make no reference to any value whatever.

45. Another point is that the form of order sought refers to the authorisation of recourse to negotiated procedures without any of the conditions for derogation being satisfied and, in any event [comunque], without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers'.

46. Yet it cannot be the case that the absence of publicity can infringe Community law in any event.

47. If the conditions for derogation are satisfied, and a negotiated procedure without prior publication of an invitation to tender is thus justified, there can be no requirement for advertising. The principles which flow from the Treaty cannot impose a requirement of publicity which has to be satisfied even when the directives expressly provide for a derogation, or that derogation would be nugatory.

48. That must in my view apply by analogy even if the value of a particular contract is below the threshold for application of the relevant directive. (28) Where circumstances would normally justify recourse to a negotiated procedure, it would be absurd for that justification to be lost where the value of the contract falls below the threshold laid down in the directive.

49. Consequently, the separate reference to a lack of publicity, in the context of Articles 43 and 49 EC, could be relevant only in cases where a particular contract fell outside the scope of the relevant directive and there were no circumstances which would have justified a derogation of the kind authorised by the directive.

50. In the present case, however, the authorisation contained in the contested provisions is in no way confined to such situations.

51. Overall, the formulation of the declaration sought does not appear particularly consistent or clear, a circumstance which does not assist the Court in its assessment.

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52. However, on analysis the issue is simply whether any of the lawful conditions for derogation from the common rules in Directive 93/36 or, as the case may be, Directive 92/50 are present.

Substance

53. The authorisation contained in the contested provisions can be legitimate only if justified by one of the derogations in Article 6(3) of Directive 93/36, or Article 11(3) of Directive 92/50.

54. Italy does not in fact specifically invoke Directive 92/50. That may be due to an excessive concern with the two contracts actually concluded under the authorisation, which were supply contracts governed by Directive 93/36. However, since the relevant derogations are substantially the same in the two directives, whatever view is reached with regard to one directive will be valid with regard to the other.

55. Italy relies principally on Article 6(3)(d) of Directive 93/36, (29) which allows recourse to a negotiated procedure in situations of extreme urgency brought about by events unforeseeable by the contracting authorities. The urgent need to combat forest fires during the state of emergency declared in July 2002 constitutes, it claims, such a situation.

56. It also invokes, secondarily, Article 6(3)(c) and (e) of the same directive, (30) which allow such a procedure, respectively, where for technical reasons the products must come from a particular supplier and where it is necessary to continue to deal with the same supplier in order to ensure homogeneity of supply. Those conditions, Italy argues, are fulfilled by the need for the Corpo Forestale to maintain a homogenous fleet of AB412 helicopters, which only Agusta could supply.

Technical requirements and homogeneity of supply

57. These criteria may be dealt with very simply.

58. Whatever reasons may or may not have given rise to the alleged need to acquire Agusta AB 412 helicopters, they are relevant only to the actual procedures carried out under the authorisations conferred by the contested ordinance.

59. The alleged infringement however concerns the contested provisions of that ordinance, and not the negotiated contracts themselves. Nothing in those provisions, or in the context of the contested ordinance, indicates any limitation to a particular supplier on whatever grounds.

60. The contested provisions therefore cannot be justified on the basis of Article 6(3)(c) or (e) of Directive 93/36, or of Article 11(3)(b) or (f) of Directive 92/50.

Urgency

61. As a general proposition, it seems incontrovertible that widespread outbreaks of forest fires may be reasons of extreme urgency giving rise to a need for the acquisition of firefighting services and equipment if they are not already sufficiently available.

62. The Commission does not argue against that proposition as such, but submits that not all the conditions for the application of the derogation are satisfied. On the one hand, outbreaks of forest fires in summer are a regularly recurring event throughout southern Europe; they are thus foreseeable, and any urgency in the need to acquire means to combat them is attributable to the Italian authorities. On the other hand, the contested ordinance remained valid after the end of the national state of emergency on 31 October 2002, and could thus be used to authorise recourse to negotiated procedures after any situation of urgency had disappeared.

63. I agree that regular seasonal occurrences cannot be considered unforeseeable events.

64. However, it cannot be denied that even such occurrences may in some years be of such exceptional intensity or extent as to be legitimately regarded as unforeseeable.

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65. Both the decree declaring the national state of emergency and the contested ordinance itself speak, in their preambles, of exceptional meteorological conditions giving rise to drought and an increased risk of forest fires. The latter mentions such conditions in the early part of the year, giving rise to exceptional intervention by forest firefighting units and a need to increase capacity, followed by a long period of unseasonably high temperatures in June with a consequent increase in the risk of the outbreak and spread of forest fires. In its pleadings, the Italian Republic asserts that in the summer of 2002 such fires exceeded the worst forecasts.

66. The Commission however has not addressed the question of the exceptional nature of the meteorological conditions or of the outbreaks of forest fires in the summer of 2002. Its arguments are directed solely to the foreseeability of summer forest fires in general and to the mechanisms whereby the Italian authorities could legitimately have acquired the necessary means to combat such fires in good time and without recourse to any urgent procedure. And even in the latter regard, it refers extensively to the actual acquisition of two AB 412 helicopters rather than to the authorisations which are at issue.

67. It may be accepted that forest fires in summer are foreseeable in Italy, so that the authorities cannot rely on their own failure to provide in advance for such fires in order to justify recourse to a negotiated procedure under Article 6(3)(d) of Directive 93/36.

68. Exceptional forest fires due to exceptional weather conditions are however by definition not foreseeable as such and may provide reasons of extreme urgency for the purposes of that provision.

69. The Commission has not sought to disprove or deny the exceptional nature of the circumstances on which the contested ordinance was based.

70. I therefore consider that Italy has made an adequate prima facie case for the existence of urgency as a ground for authorising recourse to negotiated procedures without prior publication of an invitation to tender, and that the Commission has not rebutted that case.

71. But the Commission further objects that the authorisation in that ordinance cannot be covered by the derogation for urgent situations because it was not limited to the specific period of emergency.

72. It puts forward two arguments: first, the contested ordinance did not contain any provision limiting its effects in time or expire by operation of any other legal rule; second, the Ministry of Agriculture and Forestry, in a letter of 21 May 2003, (31) undertook not to use the contested ordinance for any future acquisition of supplies - demonstrating that the ordinance had not lapsed with the national state of emergency on 31 October 2002.

73. Before dealing with those arguments, however, it may be useful to point out that the fact that the decree declaring a state of emergency in the province of Verbano-Cusio-Ossola was extended until 31 July 2004 (32) is not relevant to this issue. The application seeks a declaration that by adopting the contested provisions Italy failed to fulfil its obligations. There is no indication or allegation that at the time of that adoption any extension of the legal basis for it was contemplated, and the declaration sought does not refer to any such extension or to the maintenance in force of the contested ordinance beyond any specified date.

74. Nor is it relevant that performance of the contract for the purchase of two AB 412 helicopters was not completed until after the end of the national state of emergency. What matters is whether the authorisation to initiate a negotiated procedure could still be relied upon after that period.

75. Turning now to the Commission's first argument, the Italian Government responds that the contested ordinance logically lapsed with the expiry of the state of emergency on which it was based.

76. That seems a credible contention.

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77. Where an executive ordinance is adopted on the basis of a declaration of a state of emergency, it appears reasonable to suppose that its effects and validity will lapse when the state of emergency legally comes to an end. In the present case, the preamble to the contested ordinance does not merely mention the declaration of a national state of emergency but specifies that it is to come to an end on 31 October 2002. I note also that Article 5(2) of Law No 225 of 24 February 1992, which is one of the legal bases for the contested ordinance, specifies that measures derogating from rules in force may be adopted for the purpose of ensuring emergency intervention consequent upon' a declaration of a state of emergency, a detail which strongly suggests that no such measures can be valid if adopted outside that context.

78. It certainly seems likely that any negotiated procedure concluded on the basis of the authorisation contained in the contested ordinance after the end of the state of emergency could be challenged on that ground. However, and in any event, there is no indication or allegation that the relevant authorities have attempted to initiate any such procedure since that date. It is moreover consistent with Italy's contention, and possibly suggestive of an assumption that the authorisation must lapse with the national state of emergency, that the contract for the purchase of two AB 412 helicopters, the only contract apparently negotiated under the authorisation, was approved on 31 October 2002, the last day of that state of emergency.

79. However, the undertaking given on 21 May 2003, not to use the contested ordinance for any future acquisition of supplies, could well seem in contradiction with the view that the ordinance was no longer valid by that date.

80. The Italian Government accepts the difficulty, but contends that the ministry's undertaking merely expresses the fact that it was no longer possible legally to rely on the contested ordinance, and does not indicate that it had any choice in the matter.

81. A reading of the relevant passage of the letter - which deals also with other matters and seems intended to demonstrate that the Commission's allegations are unfounded over a range of issues - shows that the undertaking follows an assertion that the acquisition of the two AB412 helicopters was in any event in compliance with Community law and that the contested ordinance was relied upon simply as a reinforcing measure'.

82. In those circumstances, I do not consider that the letter is sufficient to establish that the contested ordinance was still in force on 21 May 2003.

83. I thus reach the view that the Commission has not established that the contested provisions could have been relied upon in order to acquire supplies or services after the end of the state of emergency for which they were adopted or, in general, that the reasons of extreme urgency on which the Italian Government credibly relies were absent or were attributable to the Italian authorities.

Costs

84. The Italian Republic has not asked for costs in its pleadings; consequently, pursuant to Article 69(2) of the Rules of Procedure, the parties should be ordered to bear their own costs.

Conclusion

85. In the light of all the foregoing considerations, I am of the opinion that the Court should:

- dismiss the application;

- order the parties to bear their own costs.

(1) .

(2) - Of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993

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L 199, p. 1).

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

(4) - See Article 1(b) of each directive.

(5) - Article 1(d), (e) and (f), respectively, of each directive.

(6) - Articles 6(4) of Directive 93/36 and 11(4) of Directive 92/50.

(7) - The negotiated procedures are those carried out following a difficulty with an open or restricted procedure and either preceded by a tender notice or open to all those who submitted tenders in the prior procedures.

(8) - The latter are certain negotiated procedures with prior publication of a tender notice except in cases analogous to those referred to in the previous footnote.

(9) - That is to say, pursuant to Article 5(1)(a) of Directive 93/36 and Article 7(1) of Directive 92/50, where the estimated value of the contract net of VAT is at least 200 000 special drawing rights (SDR) or, for central government authorities and in the context of Directive 93/36, 130 000 SDR- equivalent in 2002 to EUR 249 681 and EUR 162 293 respectively - see OJ 2001 C 332, p. 21.

(10) - See Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609, paragraph 62.

(11) - See Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 62.

(12) - GURI, 31 March 1998.

(13) - GURI, 17 March 1992.

(14) - GURI, 11 July 2002.

(15) - GURI, 10 July 2002.

(16) - Decree of the President of the Council of Ministers of 20 December 2002, GURI, 27 December 2002.

(17) - Decree of the President of the Council of Ministers of 24 October 2003, GURI, 4 November 2003.

(18) - GURI, 30 July 2002.

(19) - GURI, 10 November 2001; Law introducing urgent provisions to ensure operational coordination of civil protection agencies.

(20) - The reference to the second state of emergency, in the province of Verbano-Cusio-Ossola, seems puzzling, at least in the context of the contested provisions, which all deal with forest firefighting. That state of emergency in fact relates apparently not to the whole province named but to a small part of it, and concerns an increase in the volume of melted glacier water, a matter which may be linked to unusually hot weather but not obviously to forest fires. However, it appears as one of the legal bases for the contested ordinance, and is referred to by the Commission.

(21) - Framework law concerning forest firefighting, GURI, 30 November 2000; Article 7(2) requires the relevant authorities to ensure effective firefighting and to improve and modernise the national fleet of firefighting aircraft.

(22) - The list includes, in addition to legislation transposing Community procurement directives,

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Article 23 quinquies of Law No 61/98.

(23) - This article lays down the general duties of all the civil protection agencies, including the Corpo Forestale.

(24) - See Case 199/85 Commission v Italy [1987] ECR 1039, at paragraphs 7 to 9 of the judgment and points 19 and 20 of the Opinion of Advocate General Lenz. See also Advocate General Lenz's Opinions in Case C-110/89 Commission v Greece [1991] ECR I-2659, at point 10; in Case 103/84 Commission v Italy [1986] ECR 1759, at point 1(c); and in Case C-247/89 Commission v Portugal [1991] ECR I-3659, at point 36 (here, see also paragraph 25 of the judgment); in all those cases the application was accepted as admissible.

(25) - See point 17 above.

(26) - See point 8 above.

(27) - Paragraph 48.

(28) - In contrast to a situation such as that in, for example, Telaustria , cited above in footnote 11, where a contract falls below the threshold, but would not have qualified for a derogation if it had been covered by the directive.

(29) - Equivalent to Article 11(3)(d) of Directive 92/50.

(30) - Equivalent to Article 11(3)(b) and (broadly) (f) of Directive 92/50.

(31) - Annex 8 to the application.

(32) - See point 11 above.

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31992L0050-A11P3LD : N 55
31992L0050-A11P3LF : N 56 60
31992L0050-A11P4 : N 4
31993L0036 : N 1 22 31 38 39 42 52 54
31993L0036-A01LB : N 2
31993L0036-A01LD : N 3
31993L0036-A01LE : N 3
31993L0036-A01LF : N 3
31993L0036-A05P1LA : N 8
31993L0036-A06P3 : N 6 53
31993L0036-A06P3LC : N 56 60
31993L0036-A06P3LD : N 55 67
31993L0036-A06P3LE : N 56 60
31993L0036-A06P4 : N 4
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Notice for the OJ

Action brought on 16 December 2003 by the Commission of the European Communities against the Italian Republic

(Case C-525/03)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 16 December 2003 by the Commission of the European Communities, represented by Klaus Wiedner and Claudio Loggi, acting as Agents.

The applicant claims that the Court should:

- Declare that, by adopting Article 1, second subparagraph and first, second and third subparagraphs of Article 2 of Order No 3231 of the President of the Council of Ministers of 24 July 2002, which allow for private negotiations by way of derogation from the provisions of the Community directives on public supply and service contracts, and in particular, from the common rules on advertising and participation laid down by Titles III and IV of Directive 93/36/EEC[1] and III and V of Directive 92/50/EEC[2], for the acquisition of aircraft to combat forest fires and for the acquisition of firefighting services and which similarly allow for such negotiations for the acquisition of technical and computer equipment and two-way radios, without any of the lawful conditions for derogation from those common rules being satisfied and, in any event, without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36/EEC of 18 June 1992 and Articles 43 and 49 of the EC Treaty;

- Order the Italian Republic to pay the costs.

Pleas in law and main arguments:

Contracts for the supply of aircraft fall within the scope of Directive 93/36/EEC which governs the award procedure for public supply contracts.

Pursuant to Article 6 of the directive, the contracting authorities are to award supply contracts by the open or restricted procedures. Recourse to the negotiated procedure is permitted only in the cases expressly provided for in paragraphs 2 and 3 of that article. Article 6(3) includes, amongst the cases in which the negotiated procedure is permitted, that where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities, and for which those authorities are not responsible, the time limits laid down for the competitive procedures with prior publication cannot be observed.

The Commission points out that, in the present case, none of the conditions laid down by Article 6 of Directive 93/36/EEC for derogation from the provisions of that directive appears to apply and that, in particular, there do not appear to be reasons of urgency such as to permit the contracting authority to avail itself of the derogation under Article 6(3)(d) of the directive.

The Commission further points out that the contested order lays down numerous other possibilities for resorting to private negotiations, namely for the acquisition of the material necessary to equip the Department of Civil Protection with technical and computer systems, for the acquisition by the State Forest Department of two-way radio equipment for communication with firefighting aircraft and for the acquisition and/or implementation, again on behalf of that Department, of air services for fighting forest fires, in the last case providing, in terms similar to the provision in respect of the acquisition of firefighting aircraft, that the relevant contracts may also be entered into in derogation from the legislation transposing the Community directives on public contracts and, in particular, Directives 92/50/EEC and 93/36/EEC.

The Commission further considers that, in those cases, recourse cannot be had to private negotiations and that, in any case, no evidence of the existence of the conditions required for recourse to such negotiations was provided by the Italian authorities. In particular, none of the conditions under Article 6(2) and (3) of Directive 93/36/EEC and Article 11(2) and (3) of Directive 92/50/EEC is satisfied.

———————————

[1] - OJ 1993 L 1999 of 9.8.1993, p. 1.

[2] - OJ 1992 L 209 of 24.7.1992, p. 1.

**Judgment of the Court (Grand Chamber)
of 13 November 2007
Commission of the European Communities v Ireland. Public procurement - Articles 43 EC and 49 EC - Directive 92/50/EEC - Award of a public contract to the Irish postal service An Post without a prior contract notice - Certain cross-border interest - Transparency. Case C-507/03.**

In Case C507/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 1 December 2003,

Commission of the European Communities, represented by X. Lewis and K. Wiedner, acting as Agents, and J. Flynn QC, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, E. Regan and B. O'Moore SC and C. O'Toole, Barrister, with an address for service in Luxembourg,

defendant,

supported by:

Kingdom of Denmark, represented by J. Molde and A. Jacobsen, acting as Agents,

French Republic, represented by G. de Bergues, D. Petrausch and S. Ramet, acting as Agents,

Kingdom of the Netherlands, represented by H.G. Sevenster, C. Wissels and P. van Ginneken, acting as Agents,

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, G. Arestis and U. Lohmus, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, J. Makarczyk (Rapporteur), A. Borg Barthet, M. Ilei, J. Malenovsku and J. Kluka, Judges,

Advocate General: C. Stix-Hackl,

Registrar: K. Sztranc-Sawiczek, Administrator,

having regard to the written procedure and further to the hearing on 4 April 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

Judgment

1. By its application, the Commission of the European Communities seeks a declaration from the Court that, in deciding to entrust the provision of services relating to the payment of social welfare benefits to An Post, the Irish postal service, without undertaking any prior advertising, Ireland has failed to fulfil its obligations under Articles 43 EC and 49 EC and the general principles of Community law in connection with a contract for the supply of such services.

Legal framework

2. The 20th recital in the preamble to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p.

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1) states the following:

... to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts'.

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

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

4. Title II of Directive 92/50 defines a so-called two-tier' application. Under Article 8, contracts which have as their object services listed in Annex I A to the directive are to be awarded in accordance with the provisions of Titles III to VI thereof, that is, Articles 11 to 37. By contrast, under Article 9 of that directive, [c]ontracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16'.

5. Article 14 of Directive 92/50 lays down the detailed rules for the technical specifications which are to be included in the contractual documents.

6. Article 16 of that directive provides:

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

...

3. In the case of public contracts for services listed in Annex I B, the contracting authorities shall indicate in the notice whether they agree on its publication.

4. The Commission shall draw up the rules for establishing regular reports on the basis of the notices referred to in paragraph 3, and for the publication of such reports in accordance with the procedure laid down in Article 40(3).

...'

7. Article 43 of Directive 92/50 provides:

Not later than three years after the time-limit for compliance with this Directive, the Commission, acting in close cooperation with the Committees referred to in Article 40(1) and (2), shall review the [manner] in which this Directive has operated, including the effects of the application of the Directive to procurement of the services listed in Annex I A and the provisions concerning technical standards. It shall evaluate, in particular, the prospects for the full application of the Directive to procurement of the other services listed in Annex I B, and the effects of in-house performance of services on the effective opening-up of procurement in this area. It shall make the necessary proposals to adapt the Directive accordingly.'

8. Annex I B to Directive 92/50 lists a series of categories of services.

Facts and pre-litigation procedure

9. On 4 December 1992, without following any competitive tendering process, the Irish Minister for Social Welfare entered into a contract with An Post, pursuant to which those entitled under various social benefit schemes could collect their payments from post offices.

10. The original term of the agreement was from 1 January 1992 until 31 December 1996. In May 1997, it was extended to 31 December 1999. In May 1999, the Irish authorities approved a further extension of that contract for the period between 1 January 2000 and 31 December 2002.

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11. Following a complaint, the Commission entered into correspondence with Ireland in October 1999.

12. Following the Commission's intervention, Ireland did not formally extend the contract with An Post, pending resolution of the issues raised by the Commission. An Post has continued to provide the relevant services on an ad hoc basis so as to ensure continuity of social welfare payments.

13. In the context of the Article 226 EC procedure Ireland has not, according to the Commission, provided any solution to the problems raised. The Commission takes the view, having regard to the Member State's replies to its letter of formal notice of 26 June 2002 and its reasoned opinion of 17 December 2002, that the award of a new contract to An Post without any prior advertising is contrary to the EC Treaty, and it therefore brought the present action.

The action

Arguments of the parties

14. The Commission submits that Ireland has infringed Articles 43 EC and 49 EC as well as the general principles of transparency, equality and non-discrimination. In its application, the Commission submits that these provisions are binding on the Member States, in addition to the obligations laid down by Articles 14 and 16 of Directive 92/50.

15. It bases its analysis on several judgments of the Court which, in its view, demonstrate that primary law can be invoked in addition to the obligations laid down by a directive (judgment in Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745; order in Case C59/00 Vestergaard [2001] ECR I-9505; and judgment in Case C92/00 HI [2002] ECR I-5553).

16. Ireland contests the Commission's analysis and submits that, where the Community legislature adopts express provisions governing specific subject-matter, those provisions cannot be overlooked, disregarded or ignored through the application of general rules. Special rules, it submits, must take precedence over general rules. By its action, the Commission thus seeks to extend the obligations of the Member States in the field of public service contracts.

17. Ireland also submits that, although the Commission initiated several consultations on the reform of Directive 92/50 and several amendments have been made since it was adopted, it failed to take legislative action on this issue. The Commission's approach, it argues, is contrary to the general principles of legitimate expectation and legal certainty.

18. The Commission contests this line of argument by making reference to the principle that secondary legislation is ancillary to primary law, with the result that any amendment to Directive 92/50 would not have affected Ireland's obligations.

19. The Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands and the Republic of Finland have intervened in support of Ireland.

20. According to the Kingdom of the Netherlands, the contracting authorities are subject only to a limited obligation of transparency. For the Kingdom of Denmark and the Republic of Finland, there is a linguistic difference between the language versions of the judgments referred to by the Commission which allows their scope to be modified. According to the French Republic, the limitation on the Member States' obligations is confirmed by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), which maintains the distinction laid down by Directive 92/50.

Findings of the Court

21. The first point to be noted here is that none of the parties denies that, in the present case,

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the contract in question does indeed come within the scope of application of Directive 92/50 and that the services relating to social benefit payments in question belong to the non-priority category of services listed in Annex I B thereto.

22. According to the wording of Article 9 of Directive 92/50, [c]ontracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16'.

23. Those specific provisions, in Articles 14 and 16 of Directive 92/50 respectively, require contracting authorities to define the technical specifications by reference to national standards implementing European standards which must be given in the general or contractual documents relating to each contract and to send a notice of the results of the award procedure to the Publications Office.

24. It is thus clear from a combined reading of Articles 9, 14 and 16 of Directive 92/50 that when, as in the present case, contracts concern services which fall under Annex I B, the contracting authorities are bound only by the obligations to define the technical specifications by reference to national standards implementing European standards which must be given in the general or contractual documents relating to each contract and to send a notice of the results of the award procedure to the Publications Office. The other procedural rules provided for by that directive, including those relating to the obligations to invite competing bids by means of prior advertising, are, by contrast, not applicable to those contracts.

25. For the services coming within the ambit of Annex I B to Directive 92/50, and subject to a subsequent evaluation as referred to in Article 43 of that directive, the Community legislature based itself on the assumption that contracts for such services are not, in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender. For that reason, Directive 92/50 merely imposes a requirement of publicity after the fact for that category of services.

26. It is common ground, however, that the award of public contracts is to remain subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services (see, to that effect, HI , paragraph 42).

27. In this regard, according to settled case-law, the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, inter alia, Case C380/98 University of Cambridge [2000] ECR I8035, paragraph 16; Case C19/00 SIAC Construction [2001] ECR I-7725, paragraph 32; and HI , paragraph 43).

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

29. It follows that the advertising arrangement, introduced by the Community legislature for contracts relating to services coming within the ambit of Annex I B, cannot be interpreted as precluding application of the principles resulting from Articles 43 EC and 49 EC, in the event that such contracts nevertheless are of certain cross-border interest.

30. Also, in so far as a contract relating to services falling under Annex I B is of such interest, the award, in the absence of any transparency, of that contract to an undertaking located in the

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same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but which are located in other Member States (see, to that effect, Telaustria and Telefonadress , paragraphs 60 and 61, and Case C231/03 Coname [2005] ECR I-7287, paragraph 17).

31. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC (Coname , paragraph 19 and case-law cited).

32. In those circumstances, it is for the Commission to establish that, notwithstanding the fact that the contract in question relates to services coming within the scope of Annex I B to Directive 92/50, that contract was of certain interest to an undertaking located in a different Member State to that of the relevant contracting authority, and that that undertaking was unable to express its interest in that contract because it did not have access to adequate information before the contract was awarded.

33. According to settled case-law, it is the Commisssion's responsibility to provide the Court with the evidence necessary to enable it to establish that an obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption (see, to that effect, inter alia, Case C-434/01 Commission v United Kingdom [2003] ECR I13239, paragraph 21; Case C-117/02 C ommission v Portugal [2004] ECR I-5517, paragraph 80; and Case C-135/05 Commission v Italy [2007] ECR I-0000, paragraph 26), in this case a presumption that a contract relating to services coming within the scope of Annex I B to Directive 92/50 and subject to the rules described in paragraph 24 of this judgment necessarily is of certain cross-border interest.

34. In the present case, that evidence has not been provided by the Commission. A mere statement by it that a complaint was made to it in relation to the contract in question is not sufficient to establish that the contract was of certain cross-border interest and that there was therefore a failure to fulfil obligations.

35. The Court accordingly finds that, in entrusting the provision of social benefit payment services to An Post without undertaking any prior advertising, Ireland has not failed to fulfil its obligations under Articles 43 EC and 49 EC and the general principles of Community law in connection with a contract for the supply of such services.

36. The Commission's action must therefore be dismissed.

Costs

37. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ireland has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands and the Republic of Finland, which have intervened in the proceedings, are to bear their own costs.

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

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs;

3. Orders the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands and the Republic of Finland to bear their own costs.

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DOCNUM	62003J0507
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
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PUBREF	European Court reports 2007 Page 00000
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JURCIT	11997E043 : N 1 14 29 31 35 11997E049 : N 1 14 29 31 35 31992L0050 : N 2 17 18 20 21 25 28 31992L0050-A03P2 : N 3 31992L0050-A08 : N 4 31992L0050-A09 : N 4 22 24 31992L0050-A14 : N 5 14 23 24 31992L0050-A16 : N 6 14 23 24 31992L0050-A43 : N 7 25 31992L0050-NIB : N 8 25 29 32 33 61998J0324 : N 15 30 61998J0380 : N 27 62000J0019 : N 27 62000J0059 : N 15 62000J0092 : N 15 26 27 28 62001J0434 : N 33 62002J0117 : N 33 62003J0231 : N 30 31 62005J0135 : N 33
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
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APPLICA	Commission ; Institutions
DEFENDA	Ireland ; Member States
NATIONA	Ireland
NOTES	Gutknecht, Brigitte: Anwendung des Primärrechts auf nichtprioritäre Dienstleistungen, Zeitschrift für Vergaberecht und Beschaffungspraxis 2007 p.64 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Chronique de jurisprudence communautaire. Marchés publics, L'actualité juridique ; droit administratif 2007 p.2254-2256 ; Meisse, Eric: Procédure de passation des marchés publics, Europe 2008 Janvier Comm. no 14 p.21 ; Bitterich, Klaus: Das grenzüberschreitende Interesse am Auftrag im primären Gemeinschaftsvergaberecht, Europäische Zeitschrift für Wirtschaftsrecht 2008 p.14-18 ; Mok, M.R.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2008 no 102 ;

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Brown, Adrian: The European Commission Fails to Prove that an Irish Contract for Part B Services was of Cross-border Interest: a Note on European Commission v Ireland (C-507/03), Public Procurement Law Review 2008 p.NA35-NA40 ; McGowan, David: Commission v Ireland: Post Offices, Proof and Transparency, Public Procurement Law Review 2008 p.NA48-NA52

PROCEDU Action for failure to fulfil obligations

ADVGEN Stix-Hackl

JUDGRAP Makarczyk

DATES of document: 13/11/2007
of application: 01/12/2003

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Judgment of the Court (Grand Chamber) of 13 November 2007 - Commission of the European Communities v Ireland

(Case C-507/03) [1]

(Public procurement - Articles 43 EC and 49 EC - Directive 92/50/EEC - Award of a public contract to the Irish postal service An Post without a prior contract notice - Certain cross-border interest - Transparency)

Language of the case: English

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis and K. Wiedner, Agents, J. Flynn QC, acting as Agents)

Defendant: Ireland, represented by D. O'Hagan, Agent, E. Regan and B. O'Moore SC and C. O'Toole, Barrister

Interveners in support of the defendant: Kingdom of Denmark (represented by J. Molde and A. Jacobsen, Agents), French Republic (represented by G. de Bergues, D. Petrausch and S. Ramet, Agents), Kingdom of the Netherlands (represented by H.G. Sevenster, C. Wissels and P. van Ginneken, Agents), Republic of Finland (represented by A. Guimaraes-Purokoski, Agent)

Re:

Failure of a Member State to fulfil its obligations — Infringement of Articles 43 and 49 EC — Procedure for award of public contracts — Decision to award a public contract without publication of a prior contract notice — Contract awarded to the Irish postal service (An Post) under which recipients of social welfare benefits could collect their payments from post offices

Operative part of the judgment

The Court:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs;

3. Orders the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands and the Republic of Finland to bear their own costs.

_____

[1] - OJ C 35, 07.02.2004.

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OPINION OF ADVOCATE GENERAL
STIX-HACKL
of 14 September 2006 [1](1)

Case C-507/03

Commission of the European Communities
v
Ireland

(Public procurement – Articles 43 EC and 49 EC – Directive 92/50/EEC – Non-priority services – Award of a contract to An Post without a contract notice (advertising) – Transparency – Equality – Failure to fulfil obligations)

I – Introductory remarks

1. This action for failure to fulfil obligations, like another such action brought in parallel, (2) relates to the question of what requirements can be inferred from primary law as regards the transparency of award procedures. In particular, the present case concerns the obligations that can be derived from the fundamental freedoms and general principles of law for 'non-priority' services, that is to say for services in respect of which Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, (3) replaced in the meantime by the 'legislative package', prescribes a special set of less stringent rules.

2. In addition, the present case concerns the interpretation and further development of the Court's case-law in *Telaustria*(4) and *Coname*. (5)

II – Legal context

3. The 21st recital in the preamble to Directive 92/50 states:

'... full application of this Directive must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realised; ... contracts for other services need to be monitored for a certain period before a decision is taken on the full application of this Directive; ... the mechanism for such monitoring needs to be defined; ... this mechanism should at the same time enable those interested to share the relevant information'.

4. Under Article 3(2) of Directive 92/50, contracting authorities are to ensure that there is no discrimination between different service providers.

5. In Title II, Directive 92/50 provides for a 'two-tier application'. Pursuant to Article 8, contracts which have as their object services listed in Annex I A are to be awarded in accordance with the provisions of Titles III to VI, that is to say in accordance with Articles 11 to 37. On the other hand, Article 9 provides that only Articles 14 and 16 are to be complied with in the case of contracts which have as their object services known as 'non-priority services', that is to say services listed in Annex I B.

6. Annex I B lists a series of categories of services. Category No 27 is 'Other services'.

7. Article 14 contains provisions on technical specifications which are to be given in the general documents or the contractual documents relating to each contract.

8. Article 16 states:

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

...

3. In the case of public contracts for services listed in Annex I B, the contracting authorities shall indicate in the notice whether they agree on its publication.

4. The Commission shall draw up the rules for establishing regular reports on the basis of the notices referred to in paragraph 3, and for the publication of such reports, in accordance with the procedure laid down in Article 40(3).

...'

III – Facts, pre-litigation procedure and proceedings before the Court

9. On 4 December 1992, without prior advertising, the Irish Minister for Social Welfare concluded a contract with An Post, the Irish postal service, under which persons entitled to social welfare benefits could collect their payments from post offices.

10. The original term of the contract was from 1 January 1992 until 31 December 1996. In May 1997 the contract was extended to 31 December 1999. The competent Irish authorities had a prior information notice concerning the planned award of a contract published in the *Official Journal of the European Communities* of 16 February 1999. Nevertheless, it was decided in May 1999 to extend the contract with An Post to 31 December 2002. This decision was subsequently suspended.

11. Prompted by a complaint, the Commission began an exchange of correspondence with the Irish authorities in October 1999.

12. As a result of the Commission's intervention, Ireland has not formally extended the contract. An Post continues, however, to provide the services, albeit on an ad hoc basis, so as to ensure continuity of social welfare payments.

13. In the Treaty infringement procedure initiated by the Commission under Article 226 EC, Ireland failed, in the Commission's view, to propose any solution to the problems raised. In light of the replies given by Ireland to the letter of formal notice of 26 June 2002 and the reasoned opinion of 17 December 2002, the Commission took the view that Ireland's approach with regard to renewal of the contract was contrary to the EC Treaty and it therefore brought the present action.

14. In its action the Commission claims that the Court should:

1. declare that, in deciding to entrust the provision of services to An Post without undertaking any prior advertising, Ireland has failed to comply with its obligations under the Treaty;

2. order Ireland to pay the Commission's costs.

15. Ireland contends that the Court should:

1. dismiss the Commission's application;

2. order the Commission to pay Ireland's costs.

IV – Submissions of the principal parties and the interveners

A – *The Commission*

16. According to the Commission, the fact that the contract in question falls within the scope of Directive 92/50 does not preclude application of the obligations developed by the Court's case-law which are derived from the fundamental freedoms laid down in the Treaty and from the general principles which are given specific expression in those fundamental freedoms.

17. The obligation on Member States to comply with general principles is confirmed, within the directive itself, by Article 3(2), which contains a general obligation on contracting authorities to avoid all discrimination between service providers. This obligation is incumbent on the Irish authorities in respect of Annex I B services just as much as in respect of Annex I A services.

18. The Commission's analysis is the only one which is consistent with the 'internal market logic of the Treaty'. The Court's case-law clearly holds that the Treaty provisions on freedom of establishment and freedom to provide services impose obligations on the Member States in respect of the award of public contracts outside the scope of the directives. This applies both to types of contracts (such as service concessions) that are not specifically covered and also to contracts of types that are covered but whose value falls below the thresholds set in the various directives.

19. It would therefore run directly counter to the logic of the internal market if, although Community law requires an appropriate level of advertising in such situations even if the contract falls outside the scope of the directives because of its structure or value, it were nevertheless open to the Member States not to advertise in any way contracts (whose value is above the financial thresholds) solely on the ground that the services to which they relate fall within the scope of Annex I B to the directive.

20. National measures are to be assessed in the light of the provisions of a directive, and not also those of the EC Treaty, only where the directive brings about exhaustive harmonisation.

21. The Commission submits with regard to the argument that the objective which it pursues is attainable only by means of legislation that a directive cannot derogate from primary law. Obligations flowing from primary law overlie those deriving from directives. Secondary law is intended to supplement primary law and to facilitate achievement of the objectives laid down therein.

22. Finally, the Commission stresses that primary law imposes requirements far less strict than those of the directive. Contrary to the interveners' understanding, the Commission is not requiring a call for tenders in every case. Nor is the Commission demanding that Ireland must apply to non-priority services the rules applicable to priority services.

23. As regards legal certainty, the Commission points out that observance of limits imposed by primary law is nothing unusual in procurement matters.

B – *Ireland*

24. Ireland disputes that the Commission's submissions are correct. First, it argues that the Court's case-law cited by the Commission is not relevant, and supports that with a commentary on the individual cases and on the line of argument put forward by the Commission in relation to each of them. Second, given that Directive 92/50 is applicable, measures adopted by Ireland are to be assessed by reference to that directive and not the fundamental freedoms too.

25. In addition, the Commission's approach infringes the principles of transparency, the protection of legitimate expectations and legal certainty. Instead of putting forward a proposal for appropriate amendment of the directive, which it would have been obliged to do under Article 43 thereof, the Commission pursues 'nebulous concepts'. Moreover, the Commission did not include a corresponding amendment in its proposal which led in 2004 to the adoption of Directive 2004/18/EC.

26. The Commission is seeking to persuade the Court to act as legislature in the Council's stead. Its aim is to impose obligations on Ireland that are expressly ruled out by Directive 92/50. Thereby the Commission also harms the institutional balance. If the Commission can derive an obligation to advertise from the principle of equality, the question arises as to what purpose is served by the directive.

C – *The interveners*

27. The Kingdom of Denmark, the Republic of Finland, the French Republic and the Kingdom of the Netherlands have intervened in the proceedings in support of Ireland.

28. In the submission of the Danish, Finnish, French and Netherlands Governments, Articles 14 and 16 of the directive alone apply to the services at issue. Other provisions relating to notices therefore do not apply to non-priority services. Nor can an obligation to advertise in all cases be derived from the Court's case-law. Also, the requirements of the principle of legal certainty are to be noted; this principle would be infringed by the wide interpretation put forward by the Commission. In this context it was also pointed out that the breach of procedural provisions could result in an obligation for contracting authorities to pay damages.

29. According to the Danish Government, an obligation to conduct a specific award procedure cannot be derived from Article 3 of the directive or from Articles 12 EC, 43 EC and 49 EC. To make non-priority services subject to detailed procedural provisions would, moreover, infringe the principles of proportionality and subsidiarity.

30. National measures are to be assessed by reference only to harmonising provisions and not primary law too. Furthermore, on its view of the law, the Commission should consequently have called the directive's validity into question.

31. The interveners refer to the history of Directive 92/50 and its objective. They also point out – partly with reference to the obligation of review under Directive 92/50 – that, in its proposal for amendment of the procurement directives, which inter alia led to the adoption of Directive 2004/18, the Commission itself did not take up any modification of the system, under which a less stringent set of rules continues to apply to non-priority services.

V – Appraisal

A – *Subject-matter of the present action for failure to fulfil obligations*

32. As regards the subject-matter of the present action, a number of points are not in dispute between the parties. That is true, first, of the fact that the supply of services that is at issue falls within Class 913 of the CPC (Central Product Classification). It is covered by Category No 27 ('Other services') in Annex I B to Directive 92/50. The services are thus to be classified as 'non-priority services'. It is also an undisputed fact that in the case in point the relevant threshold value under Article 7(1)(a) of Directive 92/50 has been exceeded.

33. Thus, while the question whether the supply of services at issue falls within the scope of Directive 92/50 and whether it is, in this regard, subject to a special set of rules can be answered with relative ease, it remains to be settled what other provisions of Community law are to be used as criteria of assessment. In a direct action such as an action for failure to fulfil obligations, the criteria of assessment are determined in accordance with the claims of the applicant – here, therefore, the Commission.

34. As is apparent from the application, the Commission claims that the Court should find a dual infringement. First, it complains that fundamental freedoms, in particular Articles 43 EC and 49 EC, have been infringed. Second, it complains that general principles of Community law, in particular the principles of transparency and of equality (non-discrimination), have been infringed.

35. In addition, a further provision has been discussed in the proceedings before the Court, namely Article 3(2) of Directive 92/50, under which contracting authorities are to ensure that there is no discrimination between different service providers.

36. The Commission seeks to deduce from this provision a requirement that applies to services of all kinds and therefore also to those at issue here, that is to say non-priority services.

37. The Commission has failed though to include Article 3(2) of Directive 92/50 in the form of order sought by it. It is true that the Commission refers to this provision of the directive as well in its application, (6) but that is not sufficient. By that reference, the Commission seeks to prove only that the directive itself expressly lays down a prohibition of discrimination. The Commission would appear to regard that as confirmation that the Member States have to observe corresponding

general principles of law. Moreover, in the reasoned opinion too the Commission complained of infringement of Articles 43 EC and 49 EC only.

38. The alleged infringement of general principles of law, on the other hand, is dealt with by the Commission not only in its legal assessment of the situation but also in the passage in the application where it summarises, by way of conclusion, the provisions which it considers to have been breached (paragraph 56). That is also true of the complaint that Articles 43 EC and 49 EC have been infringed.

39. The question as to what effects Article 3(2) of Directive 92/50 has with regard to 'non-priority services' is therefore not to be examined in detail.

B – *Can the directives be supplemented by primary law?*

40. The present proceedings do not concern the applicability of primary law outside the procurement directives, an issue that has been settled at least in principle, as under the Court's case-law (7) the provisions of primary law apply if the award is not covered by any of the directives. The present case, on the other hand, concerns the question whether requirements of primary law apply also to situations which fall within the directives.

41. However, this legal problem is also not entirely novel. The Court's case-law should be recalled under which rules of primary law, in particular fundamental freedoms, also apply to procurement which is covered by the procurement directives.

42. The Court thus held in an action for failure to fulfil obligations, which also related to Ireland, that 'by allowing the inclusion in the contract specification for tender for a public works contract of a clause stipulating … , Ireland [had] failed to fulfil its obligations under Article 30 of the EEC Treaty'. (8) The Court made a similar declaration in another action for failure to fulfil obligations, finding, in the case concerning the Storebælt, that Articles 30, 48 and 59 of the EEC Treaty had been infringed. (9)

43. In addition, a recent judgment in an action for failure to fulfil obligations should be mentioned, where the Court declared that Article 49 EC had been infringed. This case, like the case concerning the Storebælt, concerned the content of tendering specifications, in particular sub-criteria for the award of contracts. (10)

44. The principle under which the directives are, in their interpretation, to be completed or supplemented by primary law has, however, been confirmed by the Court in other situations too.

45. Valuable guidance is provided by the judgment in *HI*, where the Court held that 'even though, apart from the duty to notify the reasons for the withdrawal of the invitation to tender, Directive 92/50 contains no specific provision concerning the substantive or formal conditions for that decision, the fact remains that the latter is still subject to fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services'. (11)

46. Paragraph 47 of that judgment is couched by the Court in more general terms: 'even though Directive 92/50 does not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, …'.

47. The principle under which primary law is to be taken into account supplementarily has been confirmed by the Court in a further decision. (12) The fact the Court chose to give that decision in the form of an order shows that it at least considers this legal question to be settled.

48. Similarly, the Court held in *Makedoniko Metro* that 'even if the Community directives on public procurement *do not contain specifically applicable provisions*, the general principles of Community law … govern procedures for the award of public contracts'. (13)

49. While the judgment in *Unitron*, (14) which has been discussed in the present proceedings, admittedly also concerns transparency, that case, however, concerned the prohibition of discrimination on grounds of nationality and not the requirement of equal treatment as a general principle of law, that is to say the principle of equality.

50. It can therefore be stated that the principle under which primary law also applies to awards which fall within the procurement directives has been confirmed by the Court. The scope of this principle must, however, be examined. Under the principle that informs the relationship between primary and secondary law, application of primary law is precluded in so far as the situation is governed by exhaustive provisions of secondary law. (15) Community law therefore imposes limits on the application of primary law to supplement the directives.

51. While it has also been made clear in the meantime by the Court's case-law that the procurement directives do not regulate exhaustively the content of award criteria and the procedure for withdrawal, it remains to be considered how the rules relating to the obligation of transparency in respect of non-priority services are to be assessed.

C – *Is the obligation of transparency in respect of non-priority services regulated exhaustively in Directive 92/50?*

52. An essential feature of the present proceedings is that they relate to the applicability of primary law in connection with an award that is subject to a special set of rules under a procurement directive.

53. The category constituted by non-priority services is, incidentally, not the only category of awards for which a special set of rules is laid down in the procurement directives. Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (16) lays down a less stringent regime for public works concessions. Similarly to Article 9 of Directive 92/50, Article 3(1) of that directive lays down which of the directive's provisions are to be applied. In contrast to the rules in Directive 92/50 concerning non-priority services, Directive 93/37 does, however, make public works concessions also subject to the obligation to have a notice published with a certain minimum content (Article 11).

54. It should be made clear that the present proceedings are not concerned with whether the obligations which Directive 92/50 lays down for priority services also have effect in the case of non-priority services, that is to say whether those obligations are to be applied directly or at least by analogy.

55. It must also be noted that the issue is not whether the entire directive is to be classified as an exhaustive harmonising measure but whether the relevant aspect is regulated exhaustively. In Community law it is in fact typical for directives to contain exhaustive rules for certain situations and not others. (17) The Court thus held with regard to one of the procurement directives that it did not lay down a uniform and exhaustive body of Community rules and that the Member States had to comply with all the relevant provisions of Community law. (18)

56. Requirements under primary law are applicable to the award of contracts for non-priority services in so far as there is, *in that connection*, no exhaustive harmonisation. It is not, on the other hand, a precondition that Directive 92/50 must not be an exhaustive harmonising measure in respect of non-priority services in their entirety. In these proceedings it is to be examined only whether the rules in Directive 92/50 on the obligation of transparency are exhaustive, as Ireland, France and the Netherlands submit. Should that not be the case, the Court's case-law set out above on award criteria and withdrawal could be applied.

57. Furthermore, in this context the judgment in *Contse* is to be mentioned, where the Court proceeded on the basis that fundamental freedoms are applicable to non-priority services. It may be noted here merely in passing that, pursuant to Article 9 of Directive 92/50, not even the rules in the directive requiring to be supplemented on award criteria apply to non-priority services.

58. However, the present proceedings concern neither the drawing up of award criteria nor withdrawal, but a quite specific aspect of transparency, namely prior advertising of a contract. The question whether Directive 92/50 exhaustively harmonises the aspect of the obligation of transparency relevant here is, according to the Court's case-law, to be determined in the light of the wording of the relevant provision, the context in which it occurs and the objectives of the rules of which it is part. (19)

59. As the Court has already held, the starting point for the interpretation is the 21st recital in the preamble to Directive 92/50 and Article 9 thereof. (20)

60. The 21st recital states that application of the directive in full must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-border trade to be realised, the contracts for other services during that period being subject only to monitoring.

61. The wording of the central provision, that is to say of Article 9 of Directive 92/50, makes it clear that contracts for non-priority services are to be awarded in accordance with provisions that are expressly referred to. Those provisions are Articles 14 and 16. While Article 14 lays down 'Common rules in the technical field', Article 16 regulates *certain* aspects of transparency. With regard to transparency in respect of non-priority services, the Community legislature thus referred not to the whole of Title V of the Directive, which is headed 'Common advertising rules', but only to a part of the title.

62. The Community legislature thus made a conscious decision to lay down only certain obligations of transparency as regards non-priority services. Article 16(1) for example requires the results of award procedures to be sent to the Office for Official Publications.

63. The decision of the Community legislature not to refer also to the important Article 11 is, however, central to the present action for failure to fulfil obligations. This provision lays down, inter alia, the conditions under which a contracting authority may opt for a negotiated procedure without publication of a contract notice. This allows an award by private treaty (a direct award), that is to say an award without advertising. Those requirements were thus not applied to non-priority services.

64. Article 16(2) states that Articles 17 to 20 apply only to priority services. Those provisions essentially lay down the models to be used for notices and the time-limits to be observed.

65. The Commission is therefore correct in its view that Articles 14 and 16 of the directive specifically do not regulate the aspect at issue in the present case. However, the Commission draws the premature conclusion that this is in itself sufficient to bring primary law into play. It must be examined first whether it is to be concluded from the fact that only certain aspects are expressly regulated that there is no exhaustive harmonisation.

66. That question is preliminary to the question whether, while the strict requirements of Directive 92/50 admittedly do not have to be observed as regards non-priority services, less strict requirements of primary law must be at least.

67. The answer to this preliminary question must be to the effect that Directive 92/50 does not contain exhaustive rules on transparency in relation to the award of contracts for non-priority services, and instead primary law is to be taken into account supplementarily.

68. The effect of the contrary view would be that awards that fall entirely outside Directive 92/50, for example service concessions, would be subject to stricter requirements, namely those under *Telaustria* and *Coname*, than non-priority services. An alternative solution would of course be to lower the standard, that is to say the degree of transparency, for awards falling outside the directive and to apply to non-priority services that lower standard or one slightly higher.

D – *Specific content of the provision alleged to have been infringed*

69. In order to be able to declare that Community law has been infringed, the Court must first ascertain the content of the provision whose infringement is alleged. If the criterion of assessment is not clearly defined, it is not possible to appraise the conduct of the Member State in question.

70. In a direct action such as the present Treaty infringement proceedings, the applicant – here, therefore, the Commission – must specify what the obligation owed by the defendant Member State involved.

71. In the written procedure, the Commission admittedly did not simply refer to the existence of the obligations resulting from Articles 43 EC and 49 EC and from certain principles, but submitted at least that according to the Court's case-law on those rules of primary law an appropriate degree of transparency must be ensured. However, the Commission essentially left it at that.

72. The Commission cites in this context a judgment (21) on two actions for failure to fulfil

obligations. It is to be observed in this regard that there was a clear obligation in those actions, namely an obligation under Directive 93/37. That directive contained an express obligation to publish a contract notice, whose minimum content was indeed prescribed in certain models.

73. In the present proceedings, such requirements of Community law are just lacking. The directive applicable in this case does not prescribe any prior notice. That is also true of the case-law on the fundamental freedoms and general principles of law which has frequently been referred to in the proceedings. The most recent leading decision of the Court on the problem in point, the judgment in *Coname*, also yields only generally adhered to principles, but no concrete obligations.

74. If the present action for failure to fulfil obligations concerned the compatibility of national public-procurement legislation with Community law, a more tolerant view could be taken with regard to the burden of proof on the applicant. However, the action is concerned with proceeding against specific conduct, that is to say against a specific supply. The Commission's submissions should be correspondingly specific.

75. While it is true that, as a matter of law, the present action relates to one particular instance, it is nevertheless concerned with a legal problem of general practical importance. How should the numerous individual contracting authorities that award contracts and concessions in the Member States structure their practices in relation to procurement if the legal framework is so ill-defined and not even the Commission, which the Member States face in actions for failure to fulfil obligations, including in the prior administrative procedure, is able or wishes to state in specific terms what particular requirements are to be observed? The fact that, in the absence of an interpretative communication on the matter, it has been unclear until the last few weeks precisely what attitude the Commission takes must not operate to the detriment of the affected Member States. This very fact should have prompted the Commission to indicate more specifically the content of the obligation which it alleges to have been infringed.

76. From this angle, the following statement of Advocate General Jacobs in another procurement case is also true of the Commission in the present case: 'It did not however specify in what concrete ways those requirements could be fulfilled.' (22)

77. The principle requiring an appropriate degree of transparency thus entails as a rule the publication of a (contract) notice (a call for tenders). This rule is, however, subject to a series of exceptions and grounds of justification, which I have already addressed in detail in my Opinion in *Coname*(23) and in my Opinion delivered today in the action before the Court (C-532/03) parallel to the present action for failure to fulfil obligations. (24) It must therefore be examined below whether one of those exceptions or grounds of justification is applicable in the present proceedings. Since the Court does not consider that of its own motion, the following remarks are limited to the relevant arguments put forward in the proceedings.

78. It must be stated at the outset that the defendant Member State has been unable to prove the presence of a ground of justification expressly provided for in the Treaty or one recognised by case-law. The same is true as regards the application by analogy of one of the exceptions laid down in the directives. (25)

79. It cannot be ruled out that in some cases an award procedure may be conducted without a prior contract notice, that is to say without advertising. However, such circumstances were not present in the case in point or at least have not been proved.

80. Even the fact that the degree of transparency depends on the specific circumstances of the award, such as its subject-matter and value, does not mean in the case in point that the obligation to conduct some advertising could be dispensed with.

81. It is also necessary to consider Ireland's submission that the Commission's actions infringe the principles of the protection of legitimate expectations and of legal certainty. In this regard, reference must be made to a circumstance not discussed in the proceedings. The defendant Member State adopted the measure which the Commission criticises in May 1999, whereas the judgment in *Telaustria*, where the principle of transparency under primary law was presented, was not, however, delivered until 2000.

82. However, it is to be remembered that judgments interpreting Community law which are delivered on orders for references under Article 234 EC in principle have retroactive effect. No exception to this principle is made in the judgments in *Telaustria* and *Coname*. In actions for failure

to fulfil obligations under Article 226 EC, such a possibility is not provided for.

83. Questions of law concerning the appraisal of Court judgments declaring the Member States to owe obligations which had not hitherto been anticipated might perhaps be settled in a second action for failure to fulfil obligations under Article 228 EC, but here only if the judgment in the present action is not complied with. That circumstance could then be taken be taken into account when determining the financial penalty.

84. Overall, examination of the process complained of by the Commission has thus shown that there were no circumstances which would have allowed the services at issue to be provided without any advertising being undertaken.

VI – Costs

85. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ireland is unsuccessful, and the Commission has applied for Ireland to pay its costs, Ireland should accordingly be ordered to pay the Commission's costs.

86. The Kingdom of Denmark, the Republic of Finland, the French Republic and the Kingdom of the Netherlands have intervened in the proceedings. Pursuant to the first subparagraph of Article 69 (4) of the Rules of Procedure, the interveners should bear their own costs.

VII – Conclusion

87. In accordance with all of the foregoing, I propose that the Court should:

(1) declare that, in deciding to entrust the provision of services to An Post without a prior notice, although there were no circumstances which would have allowed no advertising at all, Ireland has failed to comply with its obligations under the Treaty;

(2) order Ireland to pay the Commission's costs;

(3) order the Kingdom of Denmark, the Republic of Finland, the French Republic and the Kingdom of the Netherlands to bear their own costs.

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1 – Original language: German.

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2 – See my Opinion, also delivered today, in Case C–532/03 *Commission* v *Ireland*.

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3 – OJ 1992 L 209, p. 1.

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4 – Case C–324/98 *Telaustria and Telefonadress* [2000] ECR I-10745.

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5 – Case C–231/03 [2005] ECR I–7287.

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6 – Paragraph 43.

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7 – *Coname* (cited in footnote 5), paragraph 16, and Case C–264/03 *Commission* v *France* [2005] ECR I–8831, paragraph 32.

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8 – Case 45/87 *Commission* v *Ireland* [1988] ECR I–4929, paragraph 27.

9 – Case C-243/89 *Commission* v *Denmark* [1993] ECR I–3353.

10 – See the judgments of 27 October 2005 in Case C–158/03 *Commission* v *Spain*, not published in the ECR, and in the parallel preliminary reference proceedings, Case C–234/03 *Contse and Others* [2005] ECR I–9315.

11 – Case C-92/00 [2002] ECR I–5553, paragraph 42.

12 – Order in Case C-244/02 *Kauppatalo Hansel Oy* [2003] ECR I–12139, paragraphs 31 and 33.

13 – Case C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I–1091, paragraph 69 (emphasis added).

14 – Case C–275/98 *Unitron Scandinavia and 3–S* [1999] ECR I–8291, paragraph 30 et seq.

15 – Case C–37/92 *Vanacker and Lesage* [1993] ECR I–4947, paragraph 9; Case C–324/99 *DaimlerChrysler* [2001] ECR I–9897, paragraph 32; and Case C–322/01 *Deutscher Apothekerverband* [2003] ECR I–14887, paragraph 64.

16 – OJ 1993 L 199, p. 54.

17 – See, for example, Case C-1/96 *Compassion in World Farming* [1998] ECR I–1251, paragraphs 55 and 56, and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I–11763, paragraph 53 et seq.

18 – That was held, with regard to the directive adopted in 1971 on the coordination of procedures for the award of public works contracts, in Joined Cases 27/86, 28/86 and 29/86 *CEI and Others* [1987] ECR 3347, paragraph 15.

19 – *Compassion in World Farming* (cited in footnote 17), paragraph 49 et seq., and Case C-128/94 *Hönig* [1995] ECR I–3389, paragraph 9.

20 – Case C-411/00 *FelixSwoboda* [2002] ECR I–10567, paragraphs 46 and 47.

21 – Judgment of 27 October 2005 in Joined Cases C–187/04 and C–188/04 *Commission* v *Italy*, not published in the ECR.

22 – Opinion of Advocate General Jacobs of 21 April 2005 in Case C–174/03 *Impresa Portuale di Cagliari* (case removed from the register by order of 23 March 2006), not published in the ECR, paragraph 77.

23 – Opinion in *Coname*, cited in footnote 5, point 58 et seq.

24 – Point 86 et seq.

25 – For example, Article 11(3) of Directive 92/50 and Article 31 of Directive 2004/18.

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Notice for the OJ

Action brought on 1 December 2003 by the Commission of the European Communities against Ireland.

(Case C-507/03)

An action against Ireland was brought before the Court of Justice of the European Communities on 1 December 2003 by the Commission of the European Communities, represented by K. Wiedner, acting as agent, assisted by J. E. Flynn QC, Barrister, with an address for service in Luxembourg.

The Applicant claims that the Court should:

declare that, in deciding to entrust the provision of services to An Post without undertaking any prior advertising, Ireland has failed to comply with its obligations under the Treaty; and

order Ireland to pay the Commission's costs.

Pleas in law and main arguments:

The Commission considers that the fact that the contract at issue in this case falls within the scope of Council Directive 92/50/EEC[1] as amended by European Parliament and Council Directive 97/52/EC[2] does not preclude the application of the principle enunciated in *Telaustria*[3] deriving from the fundamental freedoms laid down in the Treaty and the application of general principles which are given specific expression in those fundamental freedoms. The obligation on Member States to comply with general principles is confirmed, within the Directive itself by Article 3(2) (see above), a general obligation on contracting authorities to avoid all discrimination between service providers. That obligation is incumbent on the Irish authorities in respect of Annex 1B services just as much as in respect of Annex 1A services.

It is submitted that the Commission's analysis is the only one which can be regarded as consistent with the internal market logic of the Treaty. The Court's case-law clearly holds that the Treaty provisions on the freedoms of establishment and service provision impose obligations on Member States in respect of the award of public contracts outside the scope of the directives. This applies to types of contracts (such as service concessions) that are not specifically covered and also to contracts of types which are covered but where the value falls below the thresholds set in the various directives.

That being so, the Commission submits that it would run directly counter to the logic of the internal market if, whereas Community law requires an appropriate level of advertising in such situations even if the contract falls outside the scope of the directives because of its structure or value, it were nevertheless open to Member States not to advertise in any way contracts (whose value is above the financial thresholds) solely on the grounds that the services to which they relate fall within the scope of Annex 1B of the Directive.

_____

[1] - of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.07.1992, p. 1).

[2] - of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ L 328, 28.11.1997, p. 1).

[3] - Case C-324/98, Telaustria Verlags GmbH v Telekom Austria AG, ECR[2000], p.I-10745.

Judgment of the Court (Second Chamber) of 16 June 2005

Strabag AG (C-462/03) and Kostmann GmbH (C-463/03) v Osterreichische Bundesbahnen. Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public procurement contracts - Directive 93/38/EEC - Water, energy, transport and telecommunications sectors - Concepts of "operation' and "provision' of networks providing a service to the public in the field of transport by railway - Railway infrastructure works. Joined cases C-462/03 and C-463/03.

Approximation of laws - Procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Scope - Contracting entities exercising one of the activities mentioned in the directive and awarding a contract or organising a design contest for the purposes of the pursuit of that activity

(Council Directive 93/38, Arts 2(2), 4(1) and 6(1))

The applicability of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors depends on the activity exercised by the contracting entity concerned and on the links between that activity and the contract planned by that entity. If the latter carries on one of the activities listed in Article 2(2) of that directive, and in so doing contemplates, which it is a matter for the national court to verify, the award of a supply, works or service contract or the organisation of a design contest, the provisions of this directive will apply to that contract or contest. If the contracting entity does not carry on one of those activities, the contract or contest will be governed by the rules laid down in the directives concerning the award of public supply, works or service contracts as the case may be.

In accordance with Article 6(1) of Directive 93/38, the directive is not to apply, in particular, to contracts or design contests which the contracting entities award or organise for purposes other than the pursuit of their activities as described in Article 2(2) of that directive. In addition, the latter is not to extend to activities of those entities which either fall outside the water, energy, transport or telecommunications sectors or which fall within those sectors but are nevertheless directly exposed to competitive forces on markets to which entry is unrestricted.

(see paras 37-39, operative part)

In Joined Cases C-462/03 and C-463/03,

REFERENCES under Article 234 EC for a preliminary ruling from the Bundesvergabeamt (Austria), made by decisions of 27 October 2003, received at the Court on 4 November 2003, in the proceedings

Strabag AG (C-462/03),

Kostmann GmbH (C-463/03)

v

Osterreichische Bundesbahnen ,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, R. Silva de Lapuerta, R. Schintgen, G. Arestis and J. Kluka,

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the written procedure,

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after considering the observations submitted on behalf of:

- Strabag AG, by W. Mecenovic, Rechtsanwalt,

- Kostmann GmbH, by R. Kurbos, Rechtsanwalt,

- Osterreichische Bundesbahnen, by J. Schramm, Rechtsanwalt,

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

- the French Government, by G. de Bergues and D. Petrausch, acting as Agents,

- the Netherlands Government, by S. Terstal and N.A.J. Bel, acting as Agents,

- the Commission of the European Communities, by K. Wiedner, acting as Agent,

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

gives the following

Judgment

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

Where a contracting entity exercising one of the activities particularly mentioned in Article 2(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors contemplates, in the exercise of that activity, the award of a supply, works or service contract or the organisation of a design contest, that contract or contest is governed by the provisions of this directive.

1. These references for a preliminary ruling concern the interpretation of Article 2(2)(c) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

2. The references were made in the course of proceedings between Strabag AG and Kostmann GmbH respectively and Osterreichische Bundesbahnen (Austrian Federal Railways, the OBB'), concerning the award to competitors of the former parties of procurement contracts for the construction and double-track extension of railway lines involving, in particular, the carrying out of work involving earthworks, levelling and concreting, and the construction of railway bridges and works.

Law

The relevant provisions of Community law

3. Article 1(1) of Directive 93/38 defines certain concepts used in that act. So, under Article 1(1), (2), (4) and (7), for the purpose of the directive:

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

A body is considered to be governed by public law where it:

- is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature,

- has legal personality, and

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

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or local authorities, or other bodies governed by public law;

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

- hold the majority of the undertaking's subscribed capital, or

- control the majority of the votes attaching to shares issued by the undertaking, or

- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body;

...

(4) ... works... contracts shall mean contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a... contractor..., having as their object ... either the execution, or both the execution and design or the realisation, by whatever means, of building or civil engineering activities referred to in Annex XI. These contracts may, in addition, cover supplies and services necessary for their execution...

...

(7) open, restricted and negotiated procedures shall mean the award procedures applied by contracting entities whereby:

(a) in the case of open procedures, all interested suppliers, contractors or service providers may submit tenders;

(b) in the case of the restricted procedures, only candidates invited by the contracting entity may submit tenders;

(c) in the case of negotiated procedures, the contracting entity consults suppliers, contractors or service providers of its choice and negotiates the terms of the contract with one or more of them.'

4. By virtue of Article 2(1) of Directive 93/38, the latter is to apply to contracting entities which:

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

...'

5. Described in Article 2(2) of the directive, the activities falling within the scope of that act - and referred to in Article 2(1) - are the following:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water; or

(ii) electricity; or

(iii) gas or heat;

or the supply of drinking water, electricity, gas or heat to such networks;

(b) the exploitation of a geographical area for the purpose of:

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(i) exploring for or extracting oil, gas, coal or other solid fuels, or

(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

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

6. Under Article 4(1) of Directive 93/38:

When awarding supply, works or service contracts, or organising design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.'

7. Article 6(1) of the directive states that it is not to apply to contracts or design contests which the contracting entities award or organise for purposes other than the pursuit of their activities as described in Article 2(2) or for the pursuit of such activities in a non-member country, in conditions not involving the physical use of a network or geographical area within the Community'.

8. Lastly, according to Article 20(1) of Directive 93/38, [c]ontracting entities may choose any of the procedures described in Article 1(7), provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21'. Article 20(2) sets out the precise circumstances in which contracting authorities may use a procedure without a prior call for competition.

The relevant provisions of domestic law

The federal law of 1997 on public procurement contracts

9. Directive 93/38 was transposed into Austrian law by the federal Law of 1997 on the award of public procurement contracts (Bundesgesetz über die Vergabe von Aufträgen [Bundesvergabegesetz] 1997, BGBl. I, 56/1997, the BVergG'). Under Paragraph 84(1), (2) and (4) of Chapter 5 of that Law, headed Specific provisions relating to awarding authorities in the water, energy, transport and telecommunications sectors':

(1) Public awarding authorities, to the extent that they carry out an activity within the meaning of subparagraph 2,... shall be governed exclusively by the provisions of this chapter.

(2) The activities covered by subparagraph 1 are the following:

1. the provision or operation of fixed networks...

2. the exploitation of a geographical area for the purpose of...

3. the operation of fixed networks providing a service to the public in the field of transport by railway, automated systems, tramway, bus, trolley bus, or cable;

4. the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

...

(4) As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of

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the service....'

10. Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt (federal procurement office). It provides:

(1) The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the provisions of the following chapter.

(2) For the purpose of eliminating infringements of this federal law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

1. to adopt interim measures and

2. to set aside unlawful decisions of the contracting authority.

(3) After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....'

The federal law of 2002 on the award of public procurement contracts

11. The BVergG 1997 was repealed and replaced, as from 1 September 2002, by a new federal law on the award of public procurement contracts (Bundesgesetz über die Vergabe von Aufträgen, BGBl. I, 99/2002, the BVergG 2002'). Paragraph 120 of that law very largely recapitulates the wording of Paragraph 84 of the BVergG 1997. Unlike Paragraph 84, however, Paragraph 120(2)(3) of the BVergG 2002 provides, in respect of the transport sector, that the ope ration as well as the provision of fixed networks providing a service to the public in the field of transport by railway, automated systems, tramway, bus, trolley bus, or cable, are among the activities referred to in subparagraph 1 and to which apply, therefore, the specific rules laid down in Directive 93/38.

12. So far as concerns the powers conferred on the Bundesvergabeamt, the BVergG 2002 is again largely based on the provisions of the BVergG 1997, Paragraph 162 of the BVergG 2002 reproducing, in particular, with certain amendments, the wording of Paragraph 113 of the BVergG 1997.

13. Paragraph 188 of the BVergG 2002, concerning the entry into force of that law and the repeal of the BVergG 1997, states in subparagraph 1 that the BVergG 2002 is not applicable to procedures for public procurement contracts begun before the date of its entry into force. As a result, Paragraph 188(3) of that law provides that if actions have been brought before the Bundesvergabeamt before 1 September 2002, that body is as a rule bound to carry out its consideration of those actions on the basis of the provisions of the BVergG 1997, in the version published in BGBl. I, 136/2001.

14. By virtue of the second sentence of that provision, however, that rule is not applicable where proceedings are stayed or a reference made for a preliminary ruling. In those two cases, the Bundesvergabeamt is as a matter of fact required, after ruling on the matter giving rise to the stay of proceedings or after receiving the reference for a preliminary ruling, to conduct the proceedings on the basis of the BVergG 2002.

The disputes in the main proceedings and the questions referred for a preliminary ruling

15. The disputes in the main proceedings are based on similar facts. They arise out of the decision by which the OBB - a company wholly owned by the Austrian State and responsible, under Paragraph 1(3) of the federal law on railways of 1992 (Bundesbahngesetz 1992, BGBl. 825/1992), for the carriage of persons and goods and for the construction and maintenance of the infrastructures necessary for that purpose - rejected the tenders made by the companies which are the applicants in the main proceedings and awarded to competitors of those companies the works contracts at issue in the two cases. Strabag and Kostmann in essence challenge the use by the OBB of the negotiated procedure for the award of contracts.

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Case C-462/03

16. By communication of 29 December 2000 the OBB published in the Official Journal of the European Communities a contract notice relating to reinforced concrete works and construction of railways and railway bridges.

17. Fourteen construction undertakings, including Strabag and Kostmann, submitted tenders for that contract. The tenders made by those two undertakings were, however, rejected. Having been informed by fax of 5 July 2002 of the name of the tenderer selected by the OBB, Strabag decided to bring an action before the Bundesvergabeamt against the decision awarding the contract, seeking, first, to have that decision annulled pursuant to Paragraph 113(2) of the BVergG 1997 and, second, to have provisional measures adopted consisting, in this case, of an injunction addressed to the contracting authority for the purpose of preventing the contract in question's being concluded before a ruling should have been given on the merits of the action.

18. By an initial decision of 22 July 2002, that is to say, the very day of the conclusion of the contract between the OBB and the successful tenderer, the Bundesvergabeamt gave a favourable decision on the application for provisional measures and made the injunction sought by Strabag.

19. By a further decision of 30 August 2002 that body, ruling on the merits of the case, nevertheless held that the award had been made in accordance with the domestic and Community rules on public procurement contracts, so that it was no longer possible to uphold the application to have that contract annulled. In the same decision, le Bundesvergabeamt none the less found that recourse to the negotiated procedure for the award of the contract was unlawful. In that respect, it based its decision on the fact that the infrastructure project at issue in the case in the main proceedings constituted provision' of a network of public transport and could therefore not be regarded as an activity covered by Paragraph 84(2)(3) of the BVergG 1997. According to the Bundesvergabeamt, such a finding of unlawfulness would not, however, require a question to be referred to the Court of Justice seeking interpretation of the Community legislation, since the provisions of domestic law concerned are plain and on this point faithfully reflect the terms of Directive 93/38, in particular, those of Article 2(2)(c) thereof.

20. Following the adoption of that last decision, Strabag first brought an action challenging it before the Verfassungsgerichtshof (Constitutional Court), claiming, inter alia, that the Bundesvergabeamt had been wrong to dismiss the reference for a preliminary ruling presented by the applicant. Second, Strabag asked the Bundesvergabeamt to find, pursuant to Paragraph 113(3) of the BVergG 1997, that as a result of infringement of that law, the contract had not been awarded to the best tenderer. On that point, the company argued on the basis of the finding made by that same body, that the OBB's choice of the negotiated procedure for the award of public procurement contracts had been incorrect. That latter request, made on 30 August 2002, was received at the Bundesvergabeamt on 2 September 2002, that is to say, the day after the entry into force of the BVergG 2002.

21. Taking the view that in those circumstances it was faced with a question demanding an interpretation of Community law in the light, particularly, of the new wording of the provision of the BVergG 2002 concerning the transport sector, viz., Paragraph 120(2)(3) of that law and having regard to the differences, both terminological and linguistic, between the situations referred to in Article 2(2)(a) and (d) of Directive 93/38 on the one hand and those mentioned in Article 2(2)(b) and (c) on the other, the Bundesvergabeamt has decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) On a proper construction of Article 2(2)(c) of Directive 93/38/EEC, so far as transport is concerned, and contrary to the other situations covered by Article 2(2) of the directive, is it merely the operation of networks that must be considered to be a sectoral activity?

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(2) What activities are covered by the expression operation of networks providing a service to the public in the field of transport by railway under Article 2(2)(c) of Directive 93/38/EEC? To what extent, in particular, are measures in the sphere of infrastructure to be included therein? And to what extent are such measures to be classed under the expression provision of networks?

(3) In so far as in the sphere of transport (by railway) it is exclusively the operation of networks that falls within the ambit of Directive 93/38/EEC (if the answer to the first question should be Yes): is a review authority bound to refrain from applying a provision of domestic law according to which, contrary to the wording of Directive 93/38/EEC, the provision of networks providing a service to the public in the field of transport by railway constitutes a sectoral activity also?'

Case C-463/03

22. As has been observed in paragraph 15 above, the facts occasioning this second case are similar to those which gave rise to Case C-462/03. Following the publication by the OBB of various contract notices for works involving excavation, earthworks, levelling and concreting and the construction of bridges, shafts, tunnels and underground passages linked to the construction or double-track extension of certain railways, Kostmann submitted tenders for the purpose of obtaining the award of those contracts.

23. On being informed by the OBB that its tender for the first contract had not been successful and that that contract had been awarded to a competitor undertaking, by letter of 13 December 2000 Kostmann requested the Bundesvergabeamt to find, pursuant to Paragraph 113(3) of the BVergG 1997, that the contract had not been awarded to the best tenderer because, in its view, of the unwarranted use, contrary to that law, of the negotiated procedure.

24. The lawfulness of recourse to that last procedure is also at issue in the dispute between Kostmann and the OBB with regard to the other contract notices published by the OBB, in connection with the actions for annulment brought by Kostmann before the Bundesvergabeamt by letters of 13 December 2000 and 13 January 2001, that is to say, just a few days after the publication of those calls in the Official Journal of the European Communities. In those cases also the contracts were awarded to undertakings in competition with the applicant in the main proceedings after, in some of them, the latter's request for provisional measures had been rejected.

25. The arguments advanced before the Bundesvergabeamt in those various proceedings are, essentially, the same as those giving rise to Case C-462/03. The OBB defend having resorted to the negotiated procedure by inferring from the fact that the infrastructure projects that occasioned the various contract notices fall within the sector referred to in Article 2(2)(c) of Directive 93/38, and in the corresponding provision of the BVergG 1997, that the contracting authority might freely have recourse to an open, restricted or negotiated procedure. In contrast, Kostmann maintains that the OBB were bound to use the ordinary rules of public procurement, in particular, those laid down by Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which states that the negotiated procedure is to be considered to be exceptional, for the infrastructure works at issue in the main proceedings are not among the activities within the sector referred to in Article 2(2)(c) of Directive 93/38.

26. Considering, in those circumstances, that the terms of that last directive call for interpretation, the Bundesvergabeamt has decided to stay proceedings and to refer to the Court for a preliminary ruling three questions, worded identically to those set out in paragraph 21 above.

27. By order of the President of the Court of 16 January 2004 Cases C-462/03 and C-463/03 were joined for the purposes of the written and oral procedure and of the judgment.

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On the admissibility of the questions referred

28. In the observations it has submitted to the Court, the Commission of the European Communities expresses, as a preliminary point, some doubts as to the admissibility of the questions referred. It argues here that those questions are purely hypothetical, for the OBB are a contracting entity exercising one of the activities specifically mentioned in Article 2(2)(c) of Directive 93/38 and the infrastructure projects at issue in the main proceedings are directly linked to that activity. The question whether the provision of railway networks falls in a general way within the ambit of Article 2(2)(c) is therefore quite irrelevant to the cases in the main proceedings.

29. It ought to be borne in mind that, in accordance with settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraphs 18 and 19; Case C-373/00 Adolf Truley [2003] ECR I-1931, paragraphs 21 and 22, and Case C-380/01 Schneider [2004] ECR I-1389, paragraphs 21 and 22).

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

31. First, it cannot be maintained that the interpretation sought of Community law bears no relation to the actual facts of the main actions or their purpose, or that the matter raised is hypothetical, for the Bundesvergabeamt's assessment of the lawfulness of resort to the negotiated procedure for procurement contracts depends, in particular, on the question whether or not the infrastructure projects at issue in the main proceedings fall within the material scope of Directive 93/38.

32. Second, the national court has provided the Court with all the information necessary to enable it to give a useful answer to the questions referred.

33. The questions must therefore be held to be admissible.

On the first and second questions

34. By its two first questions, which may appropriately be dealt with together, the Bundesvergabeamt in substance raises the issue of the material scope of Directive 93/38. It is clear, both from the explanations given in the orders for reference and from the observations submitted to the Court, that by its questions concerning the meaning of the expressions operation' and provision' of transport networks, that body seeks to ascertain whether the infrastructure projects at issue in the main proceedings are among the activities mentioned in Article 2(2)(c) of the directive and whether the contracting entity may, as a result, derogate from the ordinary rules governing the award of procurement contracts laid down in Directive 93/37 in favour of those contained in Directive 93/38, authorising more extensive use of the negotiated procedure.

35. On this point it is first to be noted, that, according to Article 2(2)(a) of Directive 93/38, the latter applies to contracting entities which are public authorities or public undertakings and which exercise one of the activities referred to in paragraph 2 of that article.

36. Second, Article 4(1) of that directive makes it apparent that when awarding supply, works or service contracts, or organising design contests, the contracting entities are to apply procedures

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which are adapted to the provisions of the directive.

37. As the Commission has correctly noted in its written observations, reading those two provisions together shows that the applicability of Directive 93/38 depends on the activity exercised by the contracting entity concerned and on the links between that activity and the contract planned by that entity. If the latter carries on one of the activities listed in Article 2(2) of Directive 93/38, and in so doing contemplates, which it is a matter for the national court to verify, the award of a supply, works or service contract or the organisation of a design contest, the provisions of this directive will apply to that contract or contest. If the contracting entity does not carry on one of those activities, the contract or contest will be governed by the rules laid down in the directives concerning the award of public supply, works or service contracts as the case may be.

38. Furthermore, that interpretation is expressly supported both by the very wording of Article 6(1) of Directive 93/38, which states that the directive is not to apply to contracts or design contests which the contracting entities award or organise for purposes other than the pursuit of their activities as described in Article 2(2) of that directive and by reading the 13th recital in the preamble thereto, which states that the directive is not to extend to activities of those entities which either fall outside the water, energy, transport or telecommunications sectors or which fall within those sectors but are nevertheless directly exposed to competitive forces on markets to which entry is unrestricted.

39. Having regard to the foregoing considerations, the answer to be given to the two first questions referred in each of the cases in the main proceedings is that where a contracting entity exercising one of the activities mentioned in Article 2(2) of Directive 93/38 contemplates, in the exercise of that activity, the award of a supply, works or service contract or the organisation of a design contest, that contract or contest is governed by the provisions of this directive.

On the third question

40. By its third question, which is worded identically in the two cases in the main proceedings, the national body seeks to ascertain, in substance, whether it is bound to refrain from applying a provision of domestic law that, contrary to the tenor of Article 2(2)(c) of Directive 93/38, provides that the provision of networks providing a service to the public in the field of transport by railway also constitutes an activity falling within a sector covered by that directive.

41. That question relies on the premiss that infrastructure works such as those at issue in the main proceedings do not fall within the material ambit of Directive 93/38, given that, according to the Bundesvergabeamt, such work must be treated as provision' of transport networks and that such activity does not appear among those expressly listed in Article 2(2)(c) of that directive.

42. Now that premiss is mistaken. As has been noted in paragraph 37 above, the applicability of Directive 93/38 depends on the activity exercised by the contracting entity concerned and on the links between that activity and the contract planned by that entity.

43. In the circumstances there is no need to answer the third question.

Costs

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

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-05397
DOC	2005/06/16
LODGED	2003/11/04
JURCIT	31993L0037 : N 34 31993L0038 : N 31 34 37 42 31993L0038-A01P1 : N 3 31993L0038-A01P2 : N 3 31993L0038-A01P4 : N 3 31993L0038-A01P7 : N 3 31993L0038-A02P1LA : N 4 35 31993L0038-A02P2 : N 37 38 31993L0038-A02P2LA : N5 31993L0038-A02P2LB : N 5 31993L0038-A02P2LC : N 1 5 21 34 40 41 31993L0038-A02P2LD : N 5 31993L0038-A04P1 : N 6 36 31993L0038-A06P1 : N 7 38 31993L0038-A20P1 : N 8 61999J0390 : N 29 62000J0373 : N 29 62001J0380 : N 29
CONCERNS	Interprets 31993L0038 -A02P2
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	German
MISCINF	AFFAIRE : 62003J0463
OBSERV	Austria ; France ; Netherlands ; Member States ; Commission ; Institutions
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NATCOUR	*P1* Bundesvergabeamt, Bescheid vom 19/09/2005
NOTES	Koller, Tanja: "Betreiben" und "Bereitstellen" von Netzen im Verkehrsbereich, Zeitschrift für Vergaberecht und Beschaffungspraxis 2005 p.335-339 ; Dischendorfer, Martin: The Classification of Public Contracts Concerning Railway Infrastructure under the EC Public Procurement Directives: A Note on Joint Cases C-462/03, Strabag AG v Oesterreichische Bundesbahnen and C-463/03, Kostmann GmbH v Oesterreichische Bundesbahnen, Public Procurement Law Review 2005 p.NA114-NA120
PROCEDU	Reference for a preliminary ruling

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ADVGEN Léger

JUDGRAP Timmermans

DATES of document: 16/06/2005
of application: 04/11/2003

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Notice for the OJ

JUDGMENT OF THE COURT

(Second Chamber)

of 16 June 2005

in Joined Cases C-462/03 and C-463/03: Reference for a preliminary ruling from the Bundesvergabeamt Strabag AG, Kostmann GmbH v Österreichische Bundesbahnen [1]

(Public procurement contracts - Directive 93/38/EEC - Water, energy, transport and telecommunications sectors - Concepts of 'operation' and 'provision' of networks providing a service to the public in the field of transport by railway - Railway infrastructure works)

(Language of the case: German)

In Joined Cases C-462/03 and C-463/03: reference for a preliminary ruling under Article 234 EC from the Bundesvergabeamt (Austria), made by decision of 27 October 2003, received at the Court on 4 November 2003, in the proceedings pending before that court between Strabag AG (C-462/03), Kostmann GmbH (C-463/03) and Österreichische Bundesbahnen - the Court (Second Chamber) composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, R. Silva de Lapuerta, R. Schintgen, G. Arestis and J. Klučka, Judges; P. Léger, Advocate General, R. Grass, Registrar, has given a judgment on 16 June 2005, the operative part of which is as follows:

Where a contracting entity exercising one of the activities particularly mentioned in Article 2(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors contemplates, in the exercise of that activity, the award of a supply, works or service contract or the organisation of a design contest, that contract or contest is governed by the provisions of this directive.

_____

[1] - JO C 000 du 00.00.0000.

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Notice for the OJ

Reference for a preliminary ruling by the Bundesvergabeamt (Wien) by order of that Court of 27 October 2003 in the case of STRABAG AG against Österreichische Bundesbahnen

(Case C-462/03)

Reference has been made to the Court of Justice of the European Communities by order of the Bundesvergabeamt (Wien) (Federal Procurement Office, Vienna) of 27 October 2003, received at the Court Registry on 4 November 2003, for a preliminary ruling in the case of STRABAG AG against Österreichische Bundesbahnen on the following questions:

1. Is Article 2(2)(c) of Directive 93/38/EEC[1] to be interpreted as meaning that, contrary to the other factual situations covered by Article 2(2) of the Directive, in the area of transport 'merely' the operation of networks is to be considered a sectoral activity?

2. Which activities fall within the scope of 'the operation of networks providing a service to the public in the field of transport by railway' under Article 2(2)(c) of Directive 93/38/EEC? To what extent are, in particular, measures in the field of infrastructure to be subsumed under this heading? To what extent are such measures in the field of infrastructure to be classified under the heading 'provision of networks'?

3. Inasmuch as in the (railway) transport sector it is exclusively the operation of networks that is governed by Directive 93/38/EEC (affirmation of Question 1): Does a review authority have to refrain from applying a national provision in which, contrary to the wording of Directive 93/38/EEC, also the 'provision of networks providing a service to the public in the field of transport by railway' is listed as a sectoral activity?

_____

[1] - OJ L 199, p. 84.

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Notice for the OJ

Reference for a preliminary ruling by the Bundesvergabeamt (Wien) by order of that Court of 27 October 2003 in the case of Kostmann GesmbH against Österreichische Bundesbahnen

(Case C-463/03)

Reference has been made to the Court of Justice of the European Communities by order of the Bundesvergabeamt (Wien) (Federal Procurement Office, Vienna) of 27 October 2003, received at the Court Registry on 4 November 2003, for a preliminary ruling in the case of Kostmann GesmbH against Österreichische Bundesbahnen on the following questions:

1. Is Article 2(2)(c) of Directive 93/38/EEC[1] to be interpreted as meaning that, contrary to the other factual situations covered by Article 2(2) of the Directive, in the area of transport 'merely' the operation of networks is to be considered a sectoral activity?

2. Which activities fall within the scope of 'the operation of networks providing a service to the public in the field of transport by railway' under Article 2(2)(c) of Directive 93/38/EEC? To what extent are, in particular, measures in the field of infrastructure to be subsumed under this heading? To what extent are such measures in the field of infrastructure to be classified under the heading 'provision of networks'?

3. Inasmuch as in the (railway) transport sector it is exclusively the operation of networks that is governed by Directive 93/38/EEC (affirmation of Question 1): Does a review authority have to refrain from applying a national provision in which, contrary to the wording of Directive 93/38/EEC, also the 'provision of networks providing a service to the public in the field of transport by railway' is listed as a sectoral activity?

_____

[1] - OJ L 199, p. 84.

Judgment of the Court (First Chamber)
of 13 October 2005
Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG. Reference for a preliminary ruling: Verwaltungsgericht, Autonome Sektion für die Provinz Bozen - Italy. Public procurement - Procedures for the award of public contracts -Service concession - Management of public pay car parks. Case C-458/03.

1. Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Scope - Public service concession covering the management of a public pay car park - Excluded

(Council Directive 92/50)

2. Community law - Principles - Equal treatment - Discrimination on the ground of nationality - Freedom of establishment - Freedom to provide services - Treaty provisions - Scope - Public service concession contracts - Included - Limits - Specific case

(Arts 12 EC, 43 EC and 49 EC)

1. The award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public service concession to which Directive 92/50 relating to the coordination of procedures for the award of public service contracts does not apply.

(see para. 43, operative part 1)

2. Public authorities concluding public service concession contracts are bound to comply with the fundamental rules of the EC Treaty, in general, particularly Articles 43 EC and 49 EC, and the principle of non-discrimination on the ground of nationality set out in Article 12 EC, which are specific expressions of the general principle of equal treatment. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed.

However, the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority.

The aforementioned provisions and principles preclude, in that regard, a public authority from awarding, without putting it out to competition, a public service concession to a company limited by shares resulting from the conversion of a special undertaking of that public authority, a company whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

(see paras 46-49, 62, 72, operative part 2)

In Case C-458/03,

REFERENCE under Article 234 EC for a preliminary ruling from the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Italy), made by decision of 23 July 2003, received at the Court on 30 October 2003, in the proceedings

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Parking Brixen GmbH

v

Gemeinde Brixen,

Stadtwerke Brixen AG,

THE COURT (First Chamber),

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

Advocate General: J. Kokott,

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

having regard to the written procedure and further to the hearing on 13 January 2005,

after considering the observations submitted on behalf of:

- Parking Brixen GmbH, by K. Zeller and S. Thurin, avvocati,

- the Gemeinde Brixen, by N. De Nigro, Rechtsanwalt,

- Stadtwerke Brixen AG, by A. Mulser, Rechtsanwalt,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato,

- the Netherlands Government, by C. Wissels, acting as Agent,

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

- the Commission of the European Communities, by K. Wiedner, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2005,

gives the following

Judgment

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

1. The award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public service concession to which Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts does not apply.

2. Articles 43 EC and 49 EC, and the principles of equal treatment, non-discrimination and transparency, are to be interpreted as precluding a public authority from awarding, without putting it out to competition, a public service concession to a company limited by shares resulting from the conversion of a special undertaking of that public authority, a company whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

1. The request for a preliminary ruling concerns the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) Articles 43 EC, 49 EC and 86 EC, and the principles of non-discrimination,

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transparency and equal treatment.

2. That request was made in the course of a dispute between, on the one hand, Parking Brixen GmbH (hereinafter Parking Brixen') and, on the other hand, the Gemeinde Brixen (Municipality of Brixen) and Stadtwerke Brixen AG concerning the award to that company of the management of two car parks within that municipality.

Law

Community law

3. Article 43 EC provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited....

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

4. The first paragraph of Article 49 EC provides:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

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

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

6. Article 1 of that Directive provides:

For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority...

...

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

...'

National law

7. Article 22(3) of Italian Law No 142 of 8 June 1990 on the government of autonomous areas (Ordinary Supplement to the GURI No 135 of 12 June 1990; hereinafter Law No 142/1990') provides that municipalities and provinces may use the following management structures for local public services for which they are responsible under the law:

(a) direct management, where, owing to the small size or the characteristics of the service, it would not be expedient to create an institution or an undertaking;

(b) concessions to third parties, where there are technical or economic reasons or reasons of social

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expediency;

(c) by special undertakings, also for the management of a number of services of economic and commercial importance;

(d) by institutions, for the provision of social services without commercial importance;

(e) by companies limited by shares with a majority local public shareholding, where participation by other public or private persons appears expedient owing to the nature of the service to be provided.'

8. Article 44 of Regional Law No 1 of 4 January 1993, in its original version, largely reproduced Article 22 of Law No 142/1990. Subsequently, Article 44 was amended by Regional Law No 10 of 23 October 1998.

9. Article 44 of Regional Law No 1, as amended by Regional Law No 10, provides:

...

6. Municipalities shall by regulations establish the procedures and selection criteria for the forms of organisation set forth hereunder for the management of public services of economic and commercial importance:

(a) formation of special undertakings;

(b) formation of, or participation in, public or private limited companies, under predominantly public local influence;

(c) entrusting the management of public services to third parties, in which case suitable procedures for their being put out to competition must be laid down for their selection. Without prejudice to other legal provisions, such relationships may not endure more than 20 years and may be renewed with the same subject-matter only in accordance with the rules referred to in this subparagraph. Cooperatives, associations representing, by virtue of the law, the sick or handicapped, as well as voluntary associations and non-profit-making organisations are to be accorded preference on equal conditions.

...

18. The associated local authorities may, at any time, entrust to companies formed as referred to in paragraph 6 and to companies referred to in paragraph 17 the performance of other public services compatible with the company's objects, by resolution of the board simultaneously approving the service contract relating thereto.'

10. The provisions of Article 44(6) and (18) of Regional Law No 1, as amended by Regional Law No 10, are reproduced word for word as Article 88(6) and (18) of the consolidated text of the provisions concerning local government in the Trentino-Südtirol Autonomous Region.

11. Article 115 of Decree-Law No 267 of 18 August 2000, the single text of the laws on the organisation of local authorities (Ordinary Supplement to the GURI No 227 of 28 September 2000, hereinafter Decree-Law No 267/2000'), authorises municipalities to convert their special undertakings into limited companies and to be their sole shareholder for a period not exceeding two years from the date of such conversion.

The main proceedings and the questions referred for a preliminary ruling

12. Under Article 22 of Law No 142/1990, the Gemeinde Brixen had had recourse, for the management of certain local public services for which it was responsible, to Stadtwerke Brixen, a special undertaking owned by that municipality.

13. Under Article 1 of its statutes, Stadtwerke Brixen was endowed, from 1 January 1999, with

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legal personality and corporate autonomy and it constituted a municipal body, the specific function of which is the uniform and integrated provision of local public services.

14. Under Article 2 of its statutes, Stadtwerke Brixen's objective was, in particular:

(f) the management of car parks and multi-storey car parks including the carrying out of any related activity'.

15. Under Article 115 of Decree-Law No 267/2000, the Gemeinde Brixen, by Decision No 97 of 25 October 2001, converted the special undertaking Stadtwerke Brixen into a limited company called Stadtwerke Brixen AG'.

16. Under Article 1(3) of that company's statutes, all existing rights and obligations of the special undertaking [Stadtwerke Brixen] shall continue after the conversion and the company [Stadtwerke Brixen AG] shall, as a result, succeed to all the rights and obligations of the [special] undertaking Stadtwerke Brixen'.

17. Under Article 4 of its statutes, Stadtwerke Brixen AG may carry on, among others, the following activities at local, national and international level:

(g) the management of car parks and garages and related activities'.

18. Article 18 of Stadtwerke Brixen AG's statutes provides that the following powers are conferred on its Administrative Board:

(1) The Administrative Board shall have the broadest possible powers relating to the company's routine administration with the authority to carry out all acts which it deems appropriate or necessary to attain the objective of the company.

(2) Unless authorised by the shareholders' meeting, the Administrative Board is prohibited from providing guarantees with a value of over EUR 5 (five) million and from signing promissory notes and accepting drafts which exceed this amount.

(3) The purchase and sale of holdings in other companies, the purchase, sale and leasing of businesses or branches of businesses, and the purchase and sale of vehicles up to a value of EUR 5 (five) million per transaction shall be regarded as acts of routine administration.

(4) Those decisions which relate to the fixing and/or amendment of remuneration for special tasks in accordance with Article 2389(2) of the Italian Civil Code shall fall within the exclusive competence of the Administrative Board.'

19. Under Article 5(2) of Stadtwerke Brixen AG's statutes, the Gemeinde Brixen's holding in the nominal capital shall, in no circumstances, be below the absolute majority of nominal shares'. In addition, the Gemeinde Brixen shall have the right to appoint a majority of the members of the company's Administrative Board. Since the supervisory board of the company is to be composed of three full members and two alternates, that municipality shall appoint at least two full members and one alternate of that board.

20. According to the referring court, the conversion of a special undertaking into a company limited by shares entails an obvious increase in its independence. Indeed, Stadtwerke Brixen AG's area of operation has been considerably extended compared with that of Stadtwerke Brixen since it can pursue activities at local, national and international level, whereas the activities of the special undertaking Stadtwerke Brixen were limited to the territory of the Gemeinde Brixen. In addition, the special undertaking Stadtwerke Brixen was subject to the direct control and influence of the municipal council, whereas, as regards Stadtwerke Brixen AG, the control exercised by the municipality is limited to those measures which company law assigns to the majority of shareholders.

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21. By Decision No 37 of 23 March 2000, the municipal council of Brixen entrusted the construction and management of a public swimming pool to Stadtwerke Brixen. When it was converted, on 25 October 2001, into a company limited by shares, Stadtwerke Brixen AG succeeded to the rights and obligations resulting from that decision.

22. By Decision No 118 of 18 December 2001, the municipal council of Brixen granted Stadtwerke Brixen AG building rights over the soil and sub-soil of the site intended for the swimming pool, among others over registered plot 491/11 in the Gemeinde Brixen, for the construction of underground parking spaces.

23. Until the planned underground car park was built, provision was made for a temporary car park on the surface. For that purpose, plot 491/11, which had until then been used as a football pitch, was given a temporary tarmac surfacing to become an above-ground car park with about 200 spaces. According to the referring court, no agreement was made for the operation of plot 491/11 as an above-ground car park.

24. In order to provide additional parking spaces, the above-ground car park on the adjacent plot, namely registered plot 491/6, also in the Gemeinde Brixen, which had about 200 spaces and had been directly managed by the Gemeinde for more than 10 years, was awarded, for the purposes of its management, to Stadtwerke Brixen AG, by Decision No 107 of 28 November 2002 of the municipal council of Brixen. That decision states that, for the activity of the baths, a temporary car park has already been built by Stadtwerke Brixen AG in close proximity to municipal land' and that it seems therefore necessary and expedient to entrust also to Stadtwerke Brixen AG the management of the adjacent land, consisting of plot 491/6... covering 5 137 m 2 , which is currently managed direct ly by the municipality'.

25. On 19 December 2002, the Gemeinde Brixen, in order to implement Decision No 107, concluded with Stadtwerke Brixen AG an agreement which entrusted to it, for a nine-year term, the management of the car park on plot 491/6.

26. In consideration of the management of that car park, Stadtwerke Brixen AG collects the parking charges. However, it pays to the Gemeinde Brixen an annual fee of EUR 151 700, which is indexed on the parking charges, so that an increase in those charges leads to an increase in the fee paid to the municipality. Apart from the management of the car park, Stadtwerke Brixen AG takes responsibility for the free bicycle hiring service and accepts that the weekly market continues to be held on the area in question. Stadtwerke Brixen AG also took over the staff who were previously employed there by the Gemeinde Brixen. Finally, the routine and non-routine maintenance of the area is the task of that company which takes full responsibility in that regard.

27. Under a concession contract made on 19 June 1992 with the Gemeinde Brixen, Parking Brixen had undertaken to build and manage a car park, which is distinct from those which are the subjectmatter of the main proceedings, but also situated within that municipality. Parking Brixen challenged, before the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Division for the Province of Bolzen), the award to Stadtwerke Brixen AG of the management of the car parks on plots 491/6 and 491/11. In its submission, the Gemeinde Brixen should have applied the provisions on public procurement.

28. The defendants in the main proceedings, namely Stadtwerke Brixen AG and the Gemeinde Brixen, denied that there was any obligation to proceed by way of a public call for tenders. The Gemeinde maintained in that regard that it completely controls Stadtwerke Brixen AG and that there was therefore no award of a contract to a third party.

29. In those circumstances, the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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1. Does the award of the management of the public pay car parks in question constitute a public service contract within the meaning of Directive 92/50/EEC or a public service concession to which the competition rules of the European Community, in particular the obligation to ensure equal treatment and transparency, must be applied?

2. If that award does constitute a service concession relating to the management of a local public service, is the award of the management of public pay car parks which, under Article 44(6)(b) of Regional Law No 1 of 4 January 1993, as amended by Article 10 of Regional Law No 10 of 23 January 1998 and under Article 88(6)(a) and (b) of the consolidated text of the provisions concerning local government, can be effected without a public call for tenders, compatible with Community law, in particular with the principles of freedom to provide services and freedom of competition, the prohibition of discrimination, and the resultant obligations to ensure equal treatment, transparency and proportionality, where a company limited by shares is involved which was set up pursuant to Article 115 of Legislative Decree No 267/2000 by the conversion of a special undertaking of a municipality, whose share capital at the time of the award was held 100% by the municipality itself but whose administrative board enjoys all extensive powers of routine administration up to a value of EUR 5 million per transaction?'

30. By order of the President of the Court of 25 May 2004, an application by Energy Service Srl for leave to intervene was rejected as inadmissible.

The first question

31. By its first question, the referring court is asking whether the award of the management of the public pay car parks in question in the main proceedings involves a public service contract within the meaning of Directive 92/50, or a public service concession.

32. It is appropriate to state at the outset that it is not for the Court to classify specifically the transactions at issue in the main proceedings. That is within the jurisdiction of the national court alone. The Court's role is confined to providing the national court with an interpretation of Community law which will be useful for the decision which it has to take in the dispute before it.

33. For that purpose the Court may deduce from the case-file of the main proceedings the matters which are relevant to the interpretation of Community law.

34. In that context it is appropriate to note that the main proceedings concern the award of the management of two distinct car parks: first, that on plot 491/11 and, second, that on plot 491/6.

35. As regards the above-ground car park on plot 491/11, the order for reference states only that no agreement was concluded for its operation. In particular, that decision contains no information about the conditions for remunerating the car park operator.

36. In those circumstances, the Court can state only that it does not have sufficient information to give a useful interpretation of Community law in reply to that part of the question.

37. As regards the car park on plot 491/6, it is clear from the order for reference, as noted in paragraphs 24 to 26 of this judgment, that the car park had been managed directly by the Gemeinde Brixen for more than 10 years when its management was entrusted, for a term of nine years, to Stadtwerke Brixen AG by a contract which it concluded with the municipality on 19 December 2002. In consideration for managing the car park, parking charges are collected from its users by Stadtwerke Brixen AG, which pays the Gemeinde Brixen an annual fee. In addition, Stadtwerke Brixen AG accepts that the weekly market will continue to be held on the area in question, provides the free bicycle hiring service and takes responsibility for the maintenance of that area.

38. In view of that information, it must be understood that, by its first question, the referring court is asking, in essence, whether the award, by a public authority to a service provider, of

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the management of a public pay car park, in consideration for which that provider is remunerated by amounts paid by third parties for the use of the car park, is a public service contract within the meaning of Directive 92/50, or a public service concession to which that directive does not apply.

39. As stated in the eighth recital in its preamble, Directive 92/50 applies to public service contracts', which are defined in Article 1(a) thereof as contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'. It follows from that definition that a public service contract within the meaning of that directive involves consideration which is paid directly by the contracting authority to the service provider.

40. In the situation referred to in the first question, on the other hand, the service provider's remuneration comes not from the public authority concerned, but from sums paid by third parties for the use of the car park in question. That method of remuneration means that the provider takes the risk of operating the services in question and is thus characteristic of a public service concession. Therefore, in a situation such as that in the main proceedings, it is not a case of a public service contract, but of a public service concession.

41. In that regard, it is relevant to point out that that interpretation is confirmed by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), even though it was not applicable at the date of the facts in the main proceedings. Under Article 1(4) of that directive, service concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment'.

42. It is common ground that public service concessions are excluded from the scope of Directive 92/50 (see order in Case C-358/00 BuchhändlerVereinigung [2002] ECR I-4685, paragraph 28).

43. The reply therefore to the first question must be that the award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public service concession to which Directive 92/50 does not apply.

The second question

44. By its second question, the referring court is asking, in essence, whether the award of a public service concession without it being put out to competition is compatible with Community law, if the concessionaire is a company limited by shares resulting from the conversion of a special undertaking of a public authority, a company whose share capital is at the time of the award 100% owned by the concession-granting public authority, but whose administrative board enjoys all extensive powers of routine administration and can effect independently, without the agreement of the shareholders' meeting, certain transactions up to a value of EUR 5 million.

45. That question refers, first, to the conduct of the concession-granting authority in relation to the award of a specific concession and, second, to the national legislation which permits the award of such a concession without a call for tenders.

46. Notwithstanding the fact that public service concession contracts are, as Community law stands at present, excluded from the scope of Directive 92/50, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular (see, to that effect, Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 60, and Case C-231/03 Coname [2005] ECR I-0000, paragraph 16).

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47. The prohibition on any discrimination on grounds of nationality is set out in Article 12 EC. The provisions of the Treaty which are more specifically applicable to public service concessions include, in particular, Article 43 EC, the first paragraph of which states that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are to be prohibited, and Article 49 EC, the first paragraph of which provides that restrictions on freedom to provide services within the Community are to be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

48. According to the Court's case-law, Articles 43 EC and 49 EC are specific expressions of the principle of equal treatment (see Case C-3/88 Commission v Italy [1989] ECR 4035, paragraph 8). The prohibition on discrimination on grounds of nationality is also a specific expression of the general principle of equal treatment (see Case 810/79 Überschär [1980] ECR 2747, paragraph 16). In its case-law relating to the Community directives on public procurement, the Court has stated that the principle of equal treatment of tenderers is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality (see, to that effect, Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraphs 33 and 54). As a result, the principle of equal treatment of tenderers is to be applied to public service concessions even in the absence of discrimination on grounds of nationality.

49. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed (see, to that effect, Telaustria and Telefonadress , cited above, paragraphs 61 and 62).

50. It is for the concession-granting public authority to evaluate, subject to review by the competent courts, the appropriateness of the detailed arrangements of the call for competition to the particularities of the public service concession in question. However, a complete lack of any call for competition in the case of the award of a public service concession such as that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency.

51. Furthermore, Article 86(1) EC provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular to those laid down in Articles 12 EC and 81 EC to 89 EC.

52. It follows therefrom that the Member States must not maintain in force national legislation which permits the award of public service concessions without their being put out to competition since such an award infringes Article 43 EC or 49 EC or the principles of equal treatment, non-discrimination and transparency.

53. Two arguments are deployed to maintain that the provisions of the Treaty and the general principles mentioned in paragraphs 46 to 52 of this judgment do not apply to a public service concession awarded in circumstances such as those of the main proceedings.

54. First, Stadtwerke Brixen AG argues that Articles 43 EC to 55 EC do not apply to a situation such as that in the main proceedings, because it is a situation purely internal to a single Member State, given that Parking Brixen, Stadtwerke Brixen AG and the Gemeinde Brixen all have their seats in Italy.

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55. That argument cannot be accepted. It is possible that, in the main proceedings, undertakings established in Member States other than the Italian Republic might have been interested in providing the services concerned (see, to that effect, Commission v Belgium , cited above, paragraph 33). In the absence of advertising and the opening to competition of the award of a public service concession such as that at issue in the main proceedings, there is discrimination, at least potentially, against undertakings of the other Member States which are prevented from making use of the freedom to provide services and of the freedom of establishment provided for by the Treaty (see, to that effect, Coname , cited above, paragraph 17).

56. Secondly, the Italian Republic, Stadtwerke Brixen AG and the Gemeinde Brixen contend that the application of the rules of the Treaty and of the general principles of Community law to a situation such as that in the main proceedings is precluded by the fact that Stadtwerke Brixen AG is not an entity independent of that municipality. In support of that argument, they rely on the judgment in Case C-107/98 Teckal [1999] ECR I-8121, paragraphs 49 to 51.

57. In that regard, it is important to recall that, in Teckal , cited above, the Court held that Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) is applicable where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of goods.

58. As regards the existence of such a contract, the Court stated, in paragraph 50 of the judgment in Teckal , that, in accordance with Article 1(a) of Directive 93/36, it is in principle sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

59. The Court has confirmed that the same considerations apply to Directive 92/50 on public service contracts and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) (see, respectively, Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, paragraphs 48, 49 and 52, and Case C-84/03 Commission v Spain [2005] ECR I-139, paragraph 39).

60. Those considerations are based on the premiss that the application of Directives 92/50, 93/36 and 93/37 depends on the existence of a contract concluded between two distinct persons (see Teckal , paragraphs 46 and 49). Yet the application of Articles 12 EC, 43 EC and 49 EC, as well as the principles of equal treatment, non-discrimination and transparency associated with them, does not depend on the existence of a contract. As a result, the considerations developed in the case-law cited in paragraphs 56 to 59 of this judgment do not apply automatically either to those provisions of the Treaty or to those principles.

61. Nevertheless, it must be held that those considerations may be transposed to the Treaty provisions and to the principles which relate to public service concessions excluded from the scope of the directives on public procurement. Indeed, in the field of public procurement and public service concessions, the principle of equal treatment and the specific expressions of that principle, namely the prohibition on discrimination on grounds of nationality and Articles 43 EC and 49 EC, are to be applied in cases where a public authority entrusts the supply of economic activities to a third party. By contrast, it is not appropriate to apply the Community rules on public procurement or public service concessions in cases where a public authority performs tasks in the public interest for which it is responsible by its own administrative, technical and other means, without calling upon external entities (see, to that effect, Stadt Halle and RPL Lochau , paragraph 48).

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62. Consequently, in the field of public service concessions, the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority.

63. Since it is a matter of a derogation from the general rules of Community law, the two conditions stated in the preceding paragraph must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying the derogation to those rules lies on the person seeking to rely on those circumstances (see Stadt Halle and RPL Lochau , paragraph 46).

64. It is appropriate to examine, first, whether the concession-granting public authority exercises a control over the concessionaire which is similar to that which it exercises over its own departments.

65. That assessment must take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the concessionaire in question is subject to a control enabling the concession-granting public authority to influence the c oncessionaire's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions.

66. It is clear from the order for reference that under Article 1 of the statutes of the special undertaking, Stadtwerke Brixen, it was a municipal body whose specific function was the uniform and integrated provision of local public services. The municipal council laid down the general guidelines, allocated the start-up capital, ensured that any social costs were covered, monitored the operating results and exercised strategic supervision, the undertaking being guaranteed the necessary independence.

67. By contrast, Stadtwerke Brixen AG became market-oriented, which renders the municipality's control tenuous. Militating in that direction are:

(a) the conversion of Stadtwerke Brixen - a special undertaking of the Gemeinde Brixen - into a company limited by shares (Stadtwerke Brixen AG) and the nature of that type of company;

(b) the broadening of its objects, the company having started to work in significant new fields, particularly those of the carriage of persons and goods, as well as information technology and telecommunications. It must be noted that the company retained the wide range of activities previously carried on by the special undertaking, particularly those of water supply and waste water treatment, the supply of heating and energy, waste disposal and road building;

(c) the obligatory opening of the company, in the short term, to other capital;

(d) the expansion of the geographical area of the company's activities, to the whole of Italy and abroad;

(e) the considerable powers conferred on its Administrative Board, with in practice no management control by the municipality.

68. In fact, as regards the powers conferred on the Administrative Board, it is clear from the decision of reference that the statutes of Stadtwerke Brixen AG, particularly Article 18 thereof, give the board very broad powers to manage the company, since it has the power to carry out all acts which it considers necessary for the attainment of the company's objective. In addition, the power, under the said Article 18, to provide guarantees up to EUR 5 million or to effect other transactions without the prior authority of the shareholders' meeting shows that the company has broad independence vis-à-vis its shareholders.

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69. The decision of reference also states that the Gemeinde Brixen has the right to appoint the majority of the members of Stadtwerke Brixen AG's Administrative Board. However, the referring court notes that the control exercised by the municipality over Stadtwerke Brixen AG is limited, essentially, to those measures which company law assigns to the majority of shareholders, which considerably attenuates the relationship of dependence which existed between the municipality and the special undertaking Stadtwerke Brixen, in the light, above all, of the broad powers possessed by Stadtwerke Brixen AG's Administrative Board.

70. Where a concessionaire enjoys a degree of independence characterised by elements such as those noted in paragraphs 67 to 69 of this judgment, it is not possible for the concession-granting public authority to exercise over the concessionaire control similar to that which it exercises over its own departments.

71. In those circumstances, and without it being necessary to consider the question whether the concessionaire carries out the essential part of its activities with the concession-granting public authority, the award of a public service concession by a public authority to such a body cannot be regarded as a transaction internal to that authority, to which the rules of Community law do not apply.

72. It follows that the reply to the second question referred for a preliminary ruling must be as follows:

Articles 43 EC and 49 EC, and the principles of equal treatment, non-discrimination and transparency, are to be interpreted as precluding a public authority from awarding, without putting it out to competition, a public service concession to a company limited by shares resulting from the conversion of a special undertaking of that public authority, a company whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

Costs

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

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CONCERNS

Interprets 31992L0050 -
Interprets 11997E043 -
Interprets 11997E049 -

SUB

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

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NATIONA

Italy

NATCOUR

P1 Verwaltungsgericht - Autonome Sektion für die Provinz Bozen, Urteil vom 25/01/2006

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ADVGEN	Kokott
JUDGRAP	Cunha Rodrigues
DATES	of document: 13/10/2005 of application: 30/10/2003

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Notice for the OJ

JUDGMENT OF THE COURT

(First Chamber)

of 13 October 2005

in Case C-458/03: Reference for a preliminary ruling from the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, Parking Brixen GmbH v Gemeinde Brixen, Stadtwerke Brixen AG [1]

(Public procurement - Procedures for the award of public contracts - Service concession - Management of public pay car parks)

(Language of the case: German)

In Case C-458/03: Reference for a preliminary ruling under Article 234 EC from the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Italy), made by decision of 23 July 2003, received at the Court on 30 October 2003, in the proceedings between Parking Brixen GmbH and Gemeinde Brixen and Stadtwerke Brixen AG - the Court (First Chamber), composed of P. Jann, President of the Chamber, K. Schiemann, K. Lenaerts, J.N. Cunha Rodrigues (Rapporteur) and E. Juhász, Judges; J. Kokott, Advocate General; M.-F. Contet, Principal Administrator, for the Registrar, gave a judgment on 13 October 2005, the operative part of which is as follows:

The award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public service concession to which Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts does not apply.

Articles 43 EC and 49 EC, and the principles of equal treatment, non-discrimination and transparency, are to be interpreted as precluding a public authority from awarding, without putting it out to tender, a public service concession to a company limited by shares which resulted from the conversion of a special undertaking of that public authority, whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

_____

[1] - OJ C 7 of 10.01.2004.

Opinion of Advocate General Kokott delivered on 1 March 2005. Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG. Reference for a preliminary ruling: Verwaltungsgericht, Autonome Sektion für die Provinz Bozen - Italy. Public procurement - Procedures for the award of public contracts -Service concession - Management of public pay car parks. Case C-458/03.

I - Introduction

1. One of the key questions in public procurement law is the distinction between award transactions which are subject to a compulsory call for tenders and those which are not. Particularly topical in this connection is the differentiation between the award of contracts to third parties and internal procurement operations, also referred to as in-house operations'.

2. In-house operations stricto sensu are transactions in which a body governed by public law awards a contract to one of its departments which does not have its own legal personality. Largo sensu , however, in-house operations may also include certain situations in which contracting authorities conclude contracts with companies controlled by them which do have their own legal personality. Whereas in-house operations stricto sensu are by definition irrelevant for the purposes of procurement law, since they involve transactions wholly internal to the administration, (2) in-house operations largo sensu (sometimes called quasi-in-house operations' (3)) frequently raise the difficult question whether or not there is a requirement to put them out to tender. That is the issue with which the Court is concerned once again (4) in this case.

3. The Municipality of Brixen awarded the management of two public pay car parks to its subsidiary Stadtwerke Brixen AG without first carrying out an award procedure. The private company Parking Brixen GmbH challenged that award. An Italian court, the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Division for the Province of Bolzano) (hereinafter also called the referring court'), has referred to the Court for a preliminary ruling two questions which relate essentially to the distinction between public service concessions and public service contracts, and the distinction between external awards subject to a compulsory call for tenders and in-house operations not subject to a compulsory call for tenders.

II - Relevant legislation

A - Community law

4. The Community legislation relevant to this case comprises Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (5) (hereinafter Directive 92/50') and Articles 43 EC, 49 EC and 86(1) EC.

5. Article 1(a) and (b) of Directive 92/50 reads as follows:

For the purposes of this Directive:

(a) public service contracts' shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority,...;

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

...'.

6. Article 43 EC establishes the freedom of establishment and Article 49 EC the freedom to provide services. Under the first paragraph of Article 48 EC and Article 55 EC, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are, for the purposes of those freedoms, to

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be treated in the same way as natural persons who are nationals of Member States.

7. Finally, Article 86(1) and (2) EC provides as follows:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

B - National law

8. In Italy, Article 115(1) of Decreto Legislativo (6) No 267 of the President of the Republic of 18 August 2000 (hereinafter, Decree-Law 267/2000') (7) allows municipalities and other local authorities to convert their dedicated undertakings (also known as special undertakings'), by means of a unilateral legal transaction, into public limited companies. In those circumstances, the companies in question retain the rights and obligations obtaining prior to the conversion and take over the assets and liabilities of the original special undertakings. Under that provision, the local authority concerned may continue to be the sole shareholder in such a company, albeit for no more than two years following the conversion.

9. Article 88(6) of the consolidated text of the provisions concerning local government of the Autonomous Region of Trentino-South Tyrol (hereinafter, the provisions concerning local government') provides:

Municipalities shall by regulations establish the procedures and selection criteria for the forms of organisation set forth hereunder for the management of public services of economic and commercial importance:

(a) Formation of special undertakings;

(b) Formation of, or participation in, public or private limited companies, under predominantly public local influence;

(c) Entrusting the management of public services to third parties, in which case suitable procedures for their being put out to competition must be laid down....'. (8)

10. Also, Article 88(18) of the provisions concerning local government provides that local authorities with holdings in companies formed under Article 6 may - subject to certain conditions defined in greater detail in paragraph 18 - entrust such companies with the management of other public services which are compatible with the objectives of the company.

III - Facts

Facts and main proceedings

11. In 2001 and 2002, the Municipality of Brixen, situated in the Italian Autonomous Region of Trentino-South Tyrol, transferred the management of two public car parks to Stadtwerke Brixen AG, in each case without a prior award procedure. Both car parks belong to the municipal public swimming baths, the construction and management of which had already been transferred to Stadtwerke Brixen in 2000. As became clear at the hearing, however, those car parks are not used exclusively by patrons of the swimming baths.

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12. According to the information supplied by the referring court, those car parks are situated on two different plots of land bearing numbers 491/6 and 491/11.

13. With respect to plot 491/11, in December 2001, the municipality granted (9) Stadtwerke Brixen AG an overground and underground building right for the construction of a car park. Pending completion of the planned underground car park, provision was made for a temporary overground car park. To that end, the land in question (which had previously been a football field) was temporarily surfaced and converted into a car park with approximately 200 spaces.

14. In order to provide additional parking, management of the neighbouring overground car park on plot 491/6 was also transferred to Stadtwerke Brixen AG in November 2002 for a period of nine months. (10) That car park, which likewise comprised some 200 spaces, had previously been administered directly by the Municipality of Brixen for 10 years.

15. Under an agreement concluded with the Municipality of Brixen on 19 December 2002, Stadtwerke Brixen AG is permitted to charge patrons a fee for using the latter car park, situated on plot 491/6. In return, it undertook to pay the municipality annual compensation in the amount of EUR 151 700, which is to increase proportionately if the parking fee is raised. (11) In addition, Stadtwerke Brixen AG continued to employ the car park operating staff formerly employed by the Municipality of Brixen, undertook to ensure the routine and non-routine upkeep of the site and assumed full liability in this regard. Stadtwerke Brixen AG also stated that it was willing to carry on the cycle hire service which the Municipality of Brixen had previously operated from the car park and to allow the weekly market to continue to be held there.

16. According to the information supplied by the referring court, no such agreement was concluded, however, with respect to use of the overground car park on plot 491/11.

17. The award of the car park management contract to Stadtwerke Brixen AG is challenged by Parking Brixen GmbH, which already operates a multi-storey car park at another location in Brixen and is itself interested in managing the two car parks at issue here. On 17 January 2003, it brought a Rekurs' (appeal) before the referring court and seeks the annulment of the legal transactions by which the award was effected.

Additional information on Stadtwerke Brixen AG and the former dedicated undertaking

18. Stadtwerke Brixen AG is the legal successor to Stadtwerke Brixen, formerly a dedicated undertaking (also called a special undertaking') of the Municipality of Brixen. As a dedicated undertaking, it had had legal personality and commercial independence since 1 January 1999 and was converted by the municipality into a public limited company, Stadtwerke Brixen AG, under Article 115 of Legislative Decree 267/2000 in October 2001. (12)

19. The tasks of Stadtwerke Brixen AG are set out in Article 4 of its statutes. Under that article, it is permitted to operate in numerous areas falling under the heading of services of general economic interest in the broadest sense of that term, in particular water supply and sewage disposal, heating and power supply, highway construction, refuse disposal, transport of passengers and goods, as well as information technology and telecommunications, in each case at local, national and international level. Its tasks also include the management of car parks and garages, together with the activities associated with them.

20. The only shareholder in Stadtwerke Brixen AG at the time of the transfer of the two car parks, and thereafter, was the Municipality of Brixen. Article 5(2) of the statutes of Stadtwerke Brixen AG provides that participation by the Municipality of Brixen in the company's authorised share capital must not under any circumstances be less than the absolute majority of the ordinary share capital.

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21. Under Article 17 of its statutes, Stadtwerke Brixen AG is to be administered by an Administrative Board consisting of between three and six members to be appointed by the shareholders' meeting, the Municipality of Brixen being able in any event to appoint the majority of the members of the Administrative Board. (13) Under Article 18 of the statutes, the Administrative Board has the power to ensure the routine administration of the company, although that power is subject to a number of limitations including, in some circumstances, the carrying out of legal transactions up to a value of no more than EUR 5 000 000 per transaction. Furthermore, Article 24 of the statutes provides for a Supervisory Board consisting of three ordinary members and two alternate members, of which the Municipality is to appoint at least two ordinary members and one alternate member.

22. The former special undertaking Stadtwerke Brixen had tasks materially similar to those of the present Stadtwerke Brixen AG, although confined to the municipality's area of responsibility and to cooperation with other undertakings in matters extending beyond the boundaries of the municipality. Its tasks already included the management of single- and multi-storey car parks but not, for example, information technology and telecommunications. Stadtwerke's Supervisory Board was appointed by the Municipal Council and was subject in relation to its activities to the directives laid down by the Municipal Council.

IV - Reference for a preliminary ruling and procedure before the Court

23. By order of 23 July 2003, the referring court stayed the proceedings before it and referred two questions to the Court for a preliminary ruling. By those questions, the introduction to which also refers to Articles 43 et seq. EC, 49 et seq. EC and 86 EC, it seeks to ascertain whether:

1) the award of the management of the public pay car parks in question constitutes a public service contract within the meaning of Directive 92/50/EEC or a public service concession to which the competition rules of the EC, in particular the obligation to ensure equal treatment and transparency, must be applied;

2) if that award does constitute a service concession relating to the management of a local public service, the award of the management of public pay car parks which, under Article 44(6)(b) of Regional Law No 1 of 4 January 1993, as amended by Article 10 of Regional Law No 10 of 23 January 1998, and under Article 88(6)(a) and (b) of the provisions concerning local government, can be effected without a public call for tenders, is compatible with Community law, in particular with the principles of freedom to provide services and freedom of competition, the prohibition of discrimination, and the resultant obligations to ensure equal treatment, transparency and proportionality, where a company limited by shares is involved which was set up pursuant to Article 115 of Legislative Decree No 267/2000 by the conversion of a special undertaking of a municipality, whose share capital at the time of the award was held 100% by the municipality itself but whose administrative board enjoys all extensive powers of routine administration up to a value of EUR 5 000 000 per transaction.

24. By letter of 16 December 2004, the Court Registry drew the attention of the interested parties to the judgment in Stadt Halle (14) due to be delivered on 11 January 2005 in order to give them an opportunity to make observations on that judgment at the hearing in this case on 13 January 2005.

25. In the proceedings before the Court, written and oral observations were submitted by Parking Brixen AG, Stadtwerke Brixen AG, the Municipality of Brixen, the Italian Government, the Austrian Government and the Commission. The Netherlands Government also presented oral argument at the hearing.

V - Legal assessment

26. This reference for a preliminary ruling is aimed essentially at ascertaining what, if any,

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rules Community law lays down in respect of transactions between contracting authorities and their subsidiaries. That is the subject-matter of the referring court's second question. Before looking at this, however, we must, in the context of the first question referred, consider where in Community law such rules, if they do exist, are to be found in the first place - in Directive 92/50 or in general legal principles contained in the EC Treaty. To that end, it is necessary to distinguish between public service contracts and service concessions.

A - The first question: distinction between a public service contract and a service concession

27. By its first question, the referring court essentially wishes to ascertain whether a situation where a contracting authority assigns the management of a public car park to a contractor which may charge a fee for the use of the car park and, in return, undertakes to pay annual compensation to the municipality constitutes a public service contract within the meaning of Directive 92/50 or a service concession.

28. The distinction I referred to at the outset between awards to third parties which are subject to a compulsory call for tenders and in-house operations (15) which are not subject to a compulsory call for tenders has no bearing at this stage on the answer to this question. It is sufficient for now to examine whether the mere subject-matter of a transaction such as that in this case between the Municipality of Brixen and Stadtwerke Brixen AG is capable of falling within the scope of Directive 92/50 in the first place. That question would have to be answered in the affirmative if the transaction constituted a public service contract but in the negative if it were a service concession since, according to the Court's case-law, which was initially developed in relation to the Utilities Directive' (93/38) (16) and then transposed to the sphere of Directive 92/50, service concessions are not contracts for pecuniary interest concluded in writing within the meaning of those two directives, (17) not even where they relate to the spheres of activity listed in the annexes to the relevant directive. Moreover, this is also confirmed by a converse interpretation of the prospectively applicable Directive 2004/18, in which express reference is made for the first time to service concessions. (18)

29. Unlike a public service contract , a service concession is characterised by the fact that, in consideration for the service in question, the service provider obtains from the contracting authority the right to exploit for payment its own service. (19)

30. As the Commission, the Austrian Government and the Italian Government rightly submit, in the case of a service concession , the contractor bears the risks associated with the service and receives his consideration - at least in part - from the user of the service, for example through the payment of a fee. (20) There is therefore a triangular relationship between the contracting authority, the service provider and the service user. A public service contract , on the other hand, leads only to a bilateral legal relationship in which payment for the service provided is made by the contracting authority itself, which, moreover, also bears the risk connected with the procurement.

31. In this case, according to the facts set out above, the consideration which the Municipality of Brixen grants to Stadtwerke Brixen AG for managing the car park on plot 491/6 consists exclusively in permitting Stadwerke Brixen AG to charge patrons of the car park a user fee. From an economic point of view, Stadtwerke Brixen AG is thus able to reap the benefits of the service which it provides, that is to say the management and maintenance of the car park. At the same time, however, it also bears the economic risk connected with managing the car park, since it must use the revenue from the user fees to finance not only the running costs but also the upkeep of the parking surfaces and the annual compensation payable to the municipality. All of this indicates that the transaction in question is not a service contract but a service concession.

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32. Whether the same is also true of the car park on plot 491/11 cannot be conclusively determined on the basis of the information available. However, application of the criteria laid down by Community law to the facts of the main proceedings is in any event a matter not for the Court of Justice but for the referring court. (21) That court will have to ascertain, in particular, whether the consideration which the Municipality of Brixen grants to Stadtwerke Brixen AG for managing the car park consists in the permission to charge patrons of the car park a user fee.

33. In conclusion, I in any event concur with Parking Brixen GmbH, the Austrian and Italian Governments and the Commission (22) that a situation where a contracting authority assigns the management of a public car park to an undertaking which may charge a fee for the use of the car park and, in return, undertakes to pay annual compensation to the contracting authority does not constitute a public service contract within the meaning of Directive 92/50 but a service concession not falling within the scope of that directive.

B - The second question: rules of Community law governing the award of service concessions to subsidiaries of contracting authorities

34. By its second question, the referring court essentially wishes to ascertain the conditions under which a contracting authority may award to one of its subsidiaries, without first conducting an award procedure, a service concession such as the authority to manage public pay car parks at issue in the main proceedings.

1. Prohibition of discrimination under Community law and the obligation of transparency even outside the scope of the procurement directives

35. Contrary to the view taken by the Netherlands Government, it is already settled case-law that contracting authorities are subject, even outside the prevailing scope of the procurement directives, (23) to the requirements of Community law arising from the fundamental rules of the EC Treaty, in particular the fundamental freedoms (24) and the prohibition of discrimination contained in them. (25)

36. The prohibition of discrimination carries with it an obligation of transparency. Only if the award of a contract or a concession is carried out transparently can it be established at all whether, in a particular case, the principle of non-discrimination was observed or whether the decision to accept or reject a particular applicant was arbitrary. (26)

37. All of this does not mean of course that the procedure applied must be the same in every detail as that provided for in the procurement directives. However, as the Court held in the judgment in Telaustria and Telefonadress , the obligation of transparency imposed on the contracting authority means that it must:

for the benefit of any potential tenderer, [ensure] a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.' (27)

38. I would mention merely in passing that, in this connection, Stadtwerke Brixen AG raises the objection that the provisions of Article 43 et seq. EC are not at all applicable to this case because the situation in the main proceedings has no cross-border connection. All the parties to the main proceedings are established in Italy.

39. It must be pointed out in this regard that it is true that the fundamental freedoms are not in fact applicable to purely internal situations. (28) However, as the Commission, Parking Brixen GmbH and the Austrian Government have rightly submitted, in public procurement law, any failure to fulfil the obligation of transparency has an impact not only on domestic undertakings such as Parking Brixen GmbH but on all potential candidates, including any tenderers from other Member

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States. (29) Consequently, any lack of publicity always simultaneously affects the fundamental freedoms of potential candidates from other Member States as well.

2. Possible exception for operations with a contracting authority's own subsidiaries: the rule in Teckal

40. It remains to be considered, however, whether a contracting authority may exceptionally be exempt from the rules of Community law described above in cases where it commissions services from entities which it itself controls.

41. If the intention of the contracting authority in so doing is to use an organisationally independent public undertaking, in particular one of its subsidiaries, the answer appears initially to be readily apparent. In accordance with the principle of the equal treatment of public and private undertakings, as defined in particular in Article 86(1) EC, public undertakings must not, subject to the exceptions contained in Article 86(2) EC, be treated any more favourably than private competitors. A contracting authority cannot therefore simply entrust the provision of services to an undertaking which it itself controls without first giving any consideration to other possible tenderers or conducting a transparent selection procedure in order to do so.

42. On the other hand, the public body is of course at liberty to perform the tasks conferred on it by using exclusively its own resources , that is to say by performing them in-house, without calling on legally independent - public or private - undertakings at all. In those circumstances, moreover, it is not subject to the requirements of procurement law (30) or of Article 86 EC.

43. As I said at the outset, the distinction between in-house operations and external procurement transactions not infrequently creates difficulties in individual cases. In its judgment in Teckal , (31) the Court - in connection with Directive 93/36 - established a precedent in this regard. It can be inferred from that judgment that procurement law becomes applicable, in principle, upon the conclusion of an agreement between two separate persons , (32) in other words upon the coming into being of a contract.

44. However, the question whether or not procurement law is applicable depends not only on purely formal criteria but also on a process of evaluation. For, even where both parties to a legal transaction, from a formal point of view, each have their own legal personality, the transaction carried out between them may none the less exceptionally be treated in the same way as an in-house operation, in so far as two cumulative criteria developed by the Court in its case-law are fulfilled: (33)

- the contracting authority (34) must exercise over the contractor (35) a control similar to that which it exercises over its own departments (first Teckal criterion);

- the other contractor must carry out the essential part of its activities for (36) the controlling contracting authority or authorities (second Teckal criterion).

45. The Court has since applied that rule not only to Directive 93/36 but also to Directives 92/50 and 93/37. (37)(38)

46. The Teckal criteria can also be transposed to circumstances such as those of this case, which do not fall within the scope of any of the public procurement directives. (39) If the procurement directives, which lay down detailed requirements relating to the procedure for awarding contracts, themselves permit exceptions for in-house operations, such exceptions must with all the more reason also be permissible in cases where the procedural requirements are less detailed to begin with, relating only to general conditions arising from the prohibition on discrimination and the obligation of transparency. The absurd consequence if that were not the case would be that, in circumstances falling outside the scope of the directives, contracting authorities would be subject to stricter requirements than in circumstances falling within the scope of the directives, that is to say that

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they would in that event have an obligation without exception to ensure transparency and publicity.

47. Moreover, it must be taken into account that the procurement directives are for their part intended only to implement the fundamental rules of the EC Treaty as they arise in particular from the fundamental freedoms. (40) Derogations from the directives are therefore ultimately derogations from those principles. This too supports the proposition that the rule in Teckal should be transposed to cases in which the prohibition on discrimination and the obligation of transparency derive directly from the fundamental freedoms without first having been given expression in the procurement directives.

48. Whether, however, the two Teckal criteria are capable of being fulfilled in a particular case such as this, with the result that the contracting authority may, as the Municipality of Brixen, Stadtwerke Brixen AG and the Italian Government claim, be exempt from the rules of Community law, depends on an assessment of all the circumstances of the case in question.

a) First Teckal criterion: control similar to that which it exercises over its own departments

49. In accordance with the first Teckal criterion, treatment as an in-house operation is subject to the condition that the contracting authority must exercise over its contractor a control similar to that which it exercises over its own departments.

50. The Commission doubts whether this can be said to be the case in relation to an undertaking such as Stadtwerke Brixen AG, for two reasons: first, Stadtwerke Brixen AG may in future be required by law to open up its capital to participation by third parties; and, secondly, its managerial bodies can for the most part run the company's day-to-day business independently. The second point was also made by Parking Brixen GmbH and the Austrian Government.

i) Possibility of a control similar to that which it exercises over its own departments excluded by private participation

51. The starting point for an examination of this issue should be the recent judgment in Stadt Halle. In that judgment, the Court clarified the first Teckal criterion as meaning that any participation by private undertakings, even as minority shareholders, excludes the possibility of a control similar to that which it exercises over its own departments.(41)

52. That clarification shows that, through the criterion of a control similar to that which it exercises over its own departments , the Court has established in its case-law a more stringent standard than is customary in competition law, for example. Thus, the fact that the contracting authority has a majority holding in the capital of its subsidiary, the fact that it exercises the majority of the voting rights and the fact that it appoints the majority of the members of the subsidiary's managerial bodies may - together with any agreements between the members - combine to support the conclusion as to the existence of control within the meaning of competition law (42) and make the subsidiary a public undertaking within the meaning of Article 86(1) EC; (43) such considerations are not sufficient, however, to support the assumption of a - more extensive - control similar to that which it exercises over its own departments.

53. The mere presence of a private third party, even if only in the form of a minority holding without rights of veto, makes it impossible for the contracting authority to exercise a control similar to that which it exercises over its own departments. The reason for this is that the presence of a private third party always presupposes a minimum degree of consideration on the part of the public body for the private party's economic interests - for only then will a private third party make its know-how or financial might available to the public body in the first place. Thus, where a private third party - following the completion of a public call for tenders, where there has been one - acquires a holding in an undertaking, the consideration for the private party's economic interests may prevent the public body from fully pursuing its public interests, however legitimate such consideration

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may be from a purely legal point of view. It is essentially this combination of public and private interests which distinguishes semi-public undertakings as they are known from mere departments of the administration. (44)

54. Since a public body cannot therefore control semi-public undertakings in the same way as it can its own departments, all legal transactions which contracting authorities enter into with their semi-public subsidiaries are subject to the rules of public procurement law, in particular the prohibition on discrimination and the obligation of transparency.

ii) Future opening-up of the company's capital to participation by third parties

55. At the time of the transfer of the two car parks, and thereafter, Stadtwerke Brixen AG was not a semi-public undertaking but a wholly-owned subsidiary of the Municipality of Brixen. However, the municipality was required, within a maximum of two years following the conversion of the former dedicated undertaking, to surrender its status as sole shareholder to that of mere majority shareholder. (45)

56. The principle of legal certainty requires that the obligation to conduct an award procedure must always be assessed ex ante , that is to say in the context of the time when the legal transaction was carried out. For, both from the point of view of the contracting authority and its contractor and from the point of view of competitors not taken into consideration, the question whether or not it was necessary to carry out an award procedure must be determinable at the time when the contract was actually concluded. Subsequent events can be taken into account, at most, if their occurrence was already foreseeable with certainty at the time of the award.

57. The loss of the municipality's 100% holding in its subsidiary would have been foreseeable with certainty in any event if the acquisition of a holding in the company by a specific third party had already been imminent.

58. Taking that argument further, however, the Commission submits that, in a case such as this, the loss of the municipality's 100% holding was sufficiently foreseeable by virtue of the law then in force alone, and should therefore have been taken into consideration at the time when the car parks were transferred.

59. However, a provision of law such as Article 115 of Legislative Decree 267/2000 supports the inference only - and at most (46) - of an obligation to sell shares within a specified period. Whether and when such shares will actually be sold and transferred to a third party depends on many other circumstances about the materialisation of which the mere existence of such a statutory obligation says nothing at that stage. More specifically, it is by no means inconceivable that no candidate will be prepared to acquire a holding in the undertaking concerned on the terms offered, as is elegantly illustrated by the circumstances of this case in particular. According to the information supplied by the Municipality of Brixen and Stadtwerke Brixen AG at the hearing, no third party has to date acquired a holding in Stadtwerke Brixen AG.

60. The interests of the parties concerned are likewise not the same at that stage as they would be in a semi-public undertaking. For, so long as there is only an obligation to open up the capital of the subsidiary subsequently , but no particular third party has yet emerged, the contracting authority still has no reason, when awarding contracts or concessions to its subsidiaries, to take into consideration the interests of such a private investor.

61. The Commission voices the concern that a third party may, during the (potentially long (47)) term of a concession which has been awarded, acquire a holding in the public limited company and then, by virtue of its holding, share in the revenue from the concession. However, the danger associated with this possibility, that the subsequent private investor will be treated more favourably than

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other private undertakings, (48) does not have to be addressed at the time when the concession itself is awarded to the municipal subsidiary; it is sufficient for suitable precautions to be taken at the time when the third party is selected , that is to say before the shareholding is transferred to it. For, in the context of the participation by a private third party in a public undertaking, the fundamental freedoms (49) require compliance with the prohibition against discrimination and the obligation of transparency, in particular the assurance of an appropriate degree of publicity. (50)

62. For the foregoing reasons, the statutory obligation to open up a company's capital to participation by third parties within a certain period, in itself, does not at that stage make it impossible for the contracting authority to exercise over that company a control similar to that which it exercises over its own departments.

iii) Power of the managerial bodies of a public limited company to run the day-to-day business independently

63. On the other hand, doubts as to the existence of a control similar to that which a contracting authority exercises over its own departments may, irrespective of the shareholdings, follow generally from the fact that an undertaking such as Stadtwerke Brixen AG is a public limited company the managerial bodies of which are to a large extent permitted to run the day-to-day business independently. (51) These doubts have been expressed not only by Parking Brixen GmbH, the Austrian Government and the Commission, but also by the referring court.

64. In this connection, a distinction should be drawn between the public undertaking's external relations with other market operators and its internal relations with the municipality.

65. The fact that the managerial bodies of a public undertaking have extensive powers in their external relations still does not by any means make it impossible for the municipality to exercise over that undertaking a control similar to that which it exercises over its own departments. In fact, such powers in external relations are usually necessary in order to guarantee the undertaking's ability to pursue its activities, to ensure the smooth running of the day-to-day business and, not least, to protect the interests of third parties. (52) Even in the public sector itself, it is by no means unusual for individual officials, such as the mayor of a municipality, the head (Landrat') of a district authority or the heads of national authorities, to have relatively far-reaching powers to represent the organisation in question externally.

66. Of greater significance for the question of control at issue here, therefore, are the internal relations between a municipality and an undertaking such as Stadtwerke Brixen AG. In this regard, the referring court expresses the view that Stadtwerke Brixen AG has appreciably greater autonomy than its legal predecessor, the dedicated undertaking Stadtwerke Brixen. For, while the dedicated undertaking was under the direct control and influence of the municipal council, the only means by which the municipality can influence the public limited company are those provided by company law. The Commission and Parking Brixen GmbH advance similar arguments.

67. The control which a public body exercises over its own departments is usually characterised in law by rights to give instructions and supervisory powers. Within a single authority, for example, the authority's management usually has the right to give instructions to the departments under its responsibility. In relation to subordinate authorities, it also has a right to give instructions, or at least the possibility, under its supervisory powers, of reviewing and correcting the decisions they take.

68. In relation to the managerial bodies of public undertakings, at least where these are organised in the form of a public or private limited company, such powers of instruction or supervision should be the exception. Accordingly, any requirement that the public shareholder should have the same

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possibilities in law in relation to its contractor as it has in relation to its own departments would make it almost impossible for the first Teckal criterion to be fulfilled in respect of capital companies incorporated under private law. In that event, contracting authorities would always, even as the sole shareholder , be required to comply with the procurement rules before concluding contracts with subsidiaries of theirs organised as public or private limited companies, and would have to assign the performance of their tasks to private third parties if these had submitted better tenders. In those circumstances, the mere transfer of tasks to such companies, including in such sensitive areas as water supply, would ultimately amount to the compulsory commencement of the privatisation of those tasks.

69. It may well be that, in certain cases, the conversion of dedicated undertakings into public or private limited companies is actually intended as the first step towards privatisation of the tasks in question. However, this is not necessarily so. It may equally conceivably be nothing more than an internal reorganisational measure aimed, for example, at securing a more efficient - because more cost-effective - provision of services and more flexible working arrangements for employees, there not necessarily being any desire on the part of the public body in question to outsource the performance of its tasks at the same time. Moreover, because of the accounting rules applicable to them, the choice of public or private limited company as the form of organisation for the undertaking may lead to a welcome increase in transparency. (53)

70. If, on the other hand, the procurement rules were also applied to transactions between contracting authorities and their wholly-owned subsidiaries, the private-law form of organisation of a public or private limited company could no longer be used purely for the purposes of internal reorganisation. In those circumstances, the public body in question would essentially be left with a choice between privatising its tasks (54) or having them performed in-house by departments of the administration or by dedicated undertakings which form part of the administrative hierarchy and have no real independence to speak of. In some cases, public bodies might even take the retrograde step of converting existing subsidiaries back into dedicated undertakings.

71. However, such extensive interference in the organisational sovereignty of Member States and, in particular, in the self-government of many municipalities (55) is - even from the point of view of the market-opening function of procurement law - entirely unnecessary. After all, the purpose of procurement law is to ensure that contractors are selected in a transparent and non-discriminatory manner in all cases where a public body has decided to use third parties to perform certain tasks. However, the spirit and purpose of procurement law is not also to bring about, through the back door ', the privatisation of those public tasks which the public body would like to continue to perform by using its own resources. (56) This would require specific liberalisation measures on the part of the legislature. (57)

72. In any event, through its use of the phrase control similar to that which', (58) the judgment in Teckal indicates that the possibilities open to an authority for exerting influence over its own departments and over public undertakings do not have to be identical. What matters in deciding whether an undertaking is akin to an administrative department or to other market operators is not whether, from a formal point of view , the public body has the same possibilities in law as it does in relation to its own departments, for example the right to give instructions in a particular case. What matters is rather whether, in practice , the contracting authority is able to attain its public-interest objectives in full at all times. It is only where an undertaking has been made independent (autonomous) (59) to such an extent that the contracting authority is no longer able to pursue its interests in full within the undertaking that the contracting authority can no longer be said to exercise a control similar to that which it exercises over its own departments.

73. This focus on the interests involved is particularly apparent in the judgment in Stadt Halle

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, (60) where regard is had exclusively to the pursuit of objectives in the public interest as the decisive criterion in interpreting the first Teckal criterion. According to the judgment in Stadt Halle , the need to pursue those public interests dictates what possibilities for exerting influence on its departments the public body actually requires. (61)

74. Now, as for what those possibilities for exerting influence actually are, my comments in point 53 of this Opinion apply mutatis mutandis : if a private third party has a holding, even a minority holding, in an undertaking, the consideration given to the economic interests of that undertaking may prevent the public body from fully pursuing its public-interest objectives, however legitimate such consideration may be from a purely legal point of view. If, on the other hand, the contracting authority is the only shareholder in its subsidiary, its interests and those of the subsidiary can normally be deemed to be essentially the same, even if the subsidiary is organised as a private or public limited company. More specifically, the sole shareholder has a 100% economic share in the profits made and is alone able to decide how they are to be used.

75. Where consideration for the economic interests of private third parties is unnecessary because the public body holds all the shares, the pursuit of public interests within the company is made sufficiently possible, even without a formal power of instruction, by the means available under company law, and in particular by the presence on the company's managerial boards of representatives nominated (appointed) exclusively by the public body. It seems highly unlikely that these boards, which, moreover, are usually characterised by having close personal links with the public body, will, in the day-to-day running of the business, deviate from the philosophy of the local authority which nominated them to such an extent as to be capable of frustrating the pursuit of objectives in the public interest. What is more, if they did, the representatives in question would be bound to fear that they might in future be removed from the board or at least not be re-appointed.

76. In any event, the mere fact that a company such as Stadtwerke Brixen AG is a public limited company the managerial bodies of which have extensive powers in the day-to-day running of the business is not capable of supporting the conclusion that that company is autonomous of its public shareholder and that the latter no longer exercises over it a control similar to that which it exercises over its own departments.

b) Second Teckal criterion: the contractor must carry out the essential part of its activities for its public shareholder or shareholders

77. In accordance with the second Teckal criterion, treatment as an in-house operation is also subject to the condition that the contractor used by the contracting authority must carry out the essential part of its activities for the controlling contracting authority.

78. In the order for reference, the referring court cites only the provisions of Stadtwerke Brixen's statutes, according to which the company's material field of business comprises an extensive list of activities which can essentially be classified as services of general economic interest, capable of being carried out at local, national and international level. (62)

79. However, such provisions have little indicative value. On the one hand, they are not infrequently framed in particularly broad terms which are intended to cover not necessarily only the activities in which the company is engaged at present but also any others which it may carry out in future. On the other hand, even restrictions on a public limited company's field of activity which are laid down in the statutes cannot be relied on as against third parties; (63) - by means of the statutes, the company's shareholders set out only for internal purposes the framework within which its activities may be carried on.

80. Thus, if account were taken only of the - usually relatively extensive - fields of activity in which a public or private limited company is permitted to operate from a purely legal point of

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view (that is by law or under the company's statutes), it would be practically impossible for such undertakings to fulfil the second Tickal criterion. In those circumstances, contracting authorities would always be required to comply with the procurement rules before concluding contracts with their subsidiaries, in so far as those subsidiaries are organised as public or private limited companies. This would make the choice of public or private limited company as a form of organisation appreciably less attractive. (64) Such extensive interference in the organisational sovereignty of the Member States and, in particular, the self-government of many municipalities is not necessary for the purposes of the market-opening function of public procurement law.

81. It is sufficient to be guided by the actual activities of the undertaking concerned. (65) For, whatever its form of organisation in law, the activities which an undertaking actually pursues are the best indicator of whether that undertaking operates in the same way as others on the market or is so closely connected to the public body that contracts between it and the contracting authority can be treated as in-house operations and therefore justify an exception to the procurement rules.

82. In this connection, it should be noted that an exception to the procurement rules is already possible under the second Teckal criterion where the undertaking concerned carries out the essential part of its activities for the controlling contracting authority or authorities. Any activity pursued for third parties is therefore innocuous provided that it is of only secondary importance.

83. In order to decide whether that is so, it is necessary, as I said at the outset, to carry out an assessment of all the circumstances of the case in question. If a transaction is to be regarded as an in-house operation, the contractor used by the contracting authority must carry out the essential part of its activities, both quantitatively and qualitatively , for the controlling contracting authority or authorities. (66) An initial indicator in this regard may be the share of turnover which that undertaking derives from the contracts with its public shareholder. If an undertaking - such as Stadtwerke Brixen, for example - is active in several fields, account must also be taken of how many of those areas of business are ones in which the undertaking carries out the essential part of its activities for public shareholders and how important each of those areas of business is to the undertaking. (67)

84. The geographical range of activity of undertakings such as Stadtwerke Brixen AG also requires close examination. The mere fact that a municipal public undertaking does or can perform activities beyond the boundaries of a municipality does not necessarily mean that it does not carry out the essential part of its activities for that municipality. The examination should concentrate rather on determining what value in quantitative and qualitative terms any such activity outside the municipal boundaries has in relation to the activities it performs for its public shareholder or shareholders.

85. The mere fact that the field of activity defined in the statutes of a public limited company such as Stadtwerke Brixen AG is extensive in material terms, and, in geographical terms, also allows activities to be pursued beyond the boundaries of the municipality, does not in any event mean that such a public limited company does not in fact carry out the essential part of its activities for the controlling municipality.

c) Interim conclusion

86. In summary, therefore, it is appropriate to find that:

The fact that a municipality awards the management of a public pay car park to a public limited company in which it is the sole shareholder without first carrying out an award procedure does not infringe Articles 43 EC, 49 EC and 86 EC, in so far as the municipality exercises over the public limited company a control similar to that which it exercises over its own departments and the public limited company carries out the essential part of its activities for the municipality.

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The exercise by a contracting authority of a control similar to that which it exercises over its own departments is not automatically precluded because the municipality has a statutory obligation to open up the capital of the public limited company to participation by third parties within a certain period in the future, or because the managerial bodies of the public limited company have extensive powers in the day-to-day running of the business.

The pursuit by a contractor of the essential part of its activities for the municipality is not automatically precluded because the field of activity in which the public limited company is permitted to operate under its statutes is extensive in material and geographical terms; it is the activities which the company actually carries on which are the decisive criterion.

VI - Conclusion

87. In the light of the foregoing, I propose that the Court should answer as follows the questions referred for a preliminary ruling by the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen:

(1) A situation where a contracting authority assigns the management of a public car park to an undertaking which may charge a fee for the use of the car park and, in return, undertakes to pay annual compensation to the contracting authority does not constitute a public service contract within the meaning of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, but a service concession not falling within the scope of that directive;

(2) The fact that a municipality awards the management of a public pay car park to a public limited company in which it is the sole shareholder without first carrying out an award procedure does not infringe Articles 43 EC, 49 EC and 86 EC, in so far as the municipality exercises over the public limited company a control similar to that which it exercises over its own departments and the public limited company carries out the essential part of its activities for the municipality.

The exercise by a contracting authority of a control similar to that which it exercises over its own departments is not automatically precluded because the municipality has a statutory obligation to open up the capital of the public limited company to participation by third parties within a certain period in the future, or because the managerial bodies of the public limited company have extensive powers in the day-to-day running of the business.

The pursuit by a contractor of the essential part of its activities for the municipality is not automatically precluded because the field of activity in which the public limited company is permitted to operate under its statutes is extensive in material and geographical terms; it is the activities which the company actually carries on which are the decisive criterion.

(1) .

(2) - Judgment in Case C-107/98 Teckal [1999] ECR I-8121, paragraphs 49 and 50, concerning Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1, hereinafter Directive 93/36').

(3) - See in this regard point 49 of the Opinion of Advocate General Stix-Hackl in Case C-26/03 Stadt Halle [2003] ECR I-0000.

(4) - See, by way of first precedent, the judgment in Teckal (cited in footnote 2). The judgment in Case C-26/03 Stadt Halle and Others [2003] ECR I-0000 was delivered only recently, on 11 January 2005. Other cases, Case C-231/03 Coname , Case C-29/04 Commission v Austria and Case C-216/04 Saba Italia , for example, are currently still pending.

(5) - Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures

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for the award of public service contracts (OJ 1992 L 209, p. 1). That directive was repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114; hereinafter Directive 2004/18'). In terms of time, however, Directive 92/50 remains applicable to this case.

(6) - Decree-Law.

(7) - Decree-Law 267/2000 bears the title Testo unico delle leggi sull'ordinamento degli enti locali' (Single text of the laws on the organisation of local authorities) and is published in GURI No 227 of 28 September 2000, Ordentliches Beiblatt No 162.

(8) - This provision comes from Article 44 of Regional Law No 1 of 4 January 1993 (Amtsblatt Autonome Region Trentino-Südtirol No 3 of 19 January 1993, Ordentliches Beiblatt No 1), amended by Article 10 of Regional Law No 10 of 23 October 1998 (Amtsblatt Autonome Region Trentino-Südtirol No 45 of 27 October 1998, Beiblatt No 2).

(9) - Municipal Council Decision No 118 of 18 December 2001.

(10) - Municipal Council Decision No 107 of 28 November 2002.

(11) - According to the order for reference, an increase in the parking fee leads to a rise in the annual compensation equal to 80% of the percentage increase in the corresponding fee.

(12) - Municipal Council Decision No 97 of 25 October 2001.

(13) - The power to make such appointments, as became clear at the hearing, lies with the Municipal Council.

(14) - Cited in footnote 14.

(15) - See in this regard points 1 and 2 of this Opinion.

(16) - Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), since repealed and replaced by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

(17) - On Article 1(a) of the Services Directive (92/50), see the order in Case C-358/00 Buchhändler-Vereinigung [2002] ECR I-4685, paragraphs 29 and 30; on Article 1(4) of the Utilities Directive (93/38), see the judgment in Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraphs 57 and 58.

(18) - Article 1(4) of Directive 2004/18.

(19) - Judgment in Telaustria and Telefonadress , paragraph 58, second sentence, and the order in Buchhändler-Vereinigung , paragraph 27, both cited in footnote 17. See also to that effect the prospectively applicable legal definition of service concession in Article 1(4) of Directive 2004/18.

(20) - The Commission also refers in this connection to its interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2); see in particular paragraph 2.2 of that communication.

(21) - See to this effect, inter alia, the judgment in Case C-235/95 Dumon and Froment [1998] ECR I4531, paragraph 25; similarly, the judgment in Telaustria and Telefonadress (cited in footnote 17, paragraph 63).

(22) - The other parties to the proceedings have not commented in any depth on the issue discussed

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here. The Municipality of Brixen and Stadtwerke Brixen AG submit that there is no service concession because Stadtwerke Brixen AG is not a third party in relation to the Municipality of Brixen.

(23) - On the inapplicability of Directive 92/50 in circumstances such as those of this case, see my comments on the first question (points 27 to 33 of this Opinion).

(24) - In circumstances such as those of this case, the freedom to provide services (Article 49 EC) and - in so far as a foreign tenderer proposes to become established in Italy in order to manage the car parks - the freedom of establishment (Article 43 EC) may be relevant.

(25) - See to this effect - in particular in the case of a service concession - the judgment in Telaustria and Telefonadress (cited in footnote 17, paragraph 60); see also the judgment in Case C57/01 Makedoniko Metro and Michaniki [2003] ECR I-1091, paragraph 69, and the order in Case C59/00 Vestergaard [2001] ECR I-9505, paragraphs 20 and 21; similarly, the judgment in Case C-92/00 HI [2002] ECR I-5553, paragraph 47.

(26) - Judgments in Telaustria and Telefonadress (cited in footnote 17, paragraph 61) and HI (cited in footnote 25, paragraph 45); judgment in Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31.

(27) - Judgment in Telaustria and Telefonadress (cited in footnote 17, paragraph 62).

(28) - Settled case-law, see most recently the judgment in Case C-293/03 My [2004] ECR I-0000, paragraph 40. With regard specifically to the freedom of establishment and the freedom to provide services, see the judgment in Case 115/78 Knoors [1979] ECR 399, paragraph 24, first clause).

(29) - See also the judgment in Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 33, according to which undertakings established in other Member States may be concerned directly or indirectly by the award of a contract. Accordingly, requirements relating to the award procedure must be observed irrespective of the nationality or place of establishment of the tenderers. This finding applies not only to the requirements laid down in the procurement directives but can also be transposed to circumstances such as those of this case which call for the application of general principles of Community law.

(30) - Judgment in Stadt Halle (cited in footnote 4, paragraph 48).

(31) - Judgment in Teckal (cited in footnote 2, paragraphs 46, 49 and 50).

(32) - As regards the scope ratione personae of procurement law, it is necessary - and, on the other hand, sufficient - that one of the parties to the contract should be a contracting authority (judgments in Teckal , cited in footnote 2, paragraph 42, second sentence, and Stadt Halle , cited in footnote 4, paragraph 47; see also the judgment in Case C-94/99 ARGE [2000] ECR I-11037, paragraph 40.)

(33) - The criteria, as originally defined, can be found in paragraph 50, second sentence, of the judgment in Teckal (cited in footnote 2) and are also referred to in the judgment in Case C-84/03 Commission v Spain [2005] ECR I-0139, paragraph 38). The same criteria, albeit defined in slightly different words, are applied in the judgment in Stadt Halle (cited in footnote 4, paragraph 49, second sentence). The comments that follow are based on the latter definition, unless otherwise indicated.

(34) - In terms of terminology, the judgment in Stadt Halle uses the clumsy formulation public authority which is a contracting authority'; the judgment in Teckal uses the term - based on the circumstances of that case - local authority'.

(35) - In terms of terminology, the contractor is referred to in the judgment in Teckal as the person concerned'; in the judgment in Stadt Halle as entity concerned'.

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(36) - The use of the word with' in the judgment in Stadt Halle and in most language versions of the judgment in Teckal is unusual from a linguistic point of view, given that such a transaction does not usually involve cooperation between two undertakings but a relationship in which a public undertaking performs certain tasks or provides certain services for the public body which controls it.

(37) - Council Directive 93/37EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L199, p. 54), since repealed and replaced by Directive 2004/18.

(38) - On Directive 92/50, see the judgment in Stadt Halle (cited in footnote 4, paragraphs 47 and 49); similar evidence was already to be found in the judgment in ARGE (cited in footnote 32, paragraph 40). On Directive 93/97, see the judgment in Commission v Spain (cited in footnote 33, paragraph 39).

(39) - On the inapplicability of Directive 92/50 in circumstances such as those of this case, see my comments on the first question (points 27 to 33 of this Opinion).

(40) - See in this regard, for example, the sixth recital in the preamble to Directive 92/50 and recital 2 in the preamble to Directive 2004/18, as well as the judgments in Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16, and Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 51. See also points 35 to 37 of this Opinion.

(41) - Judgment in Stadt Halle (cited in footnote 4, paragraphs 49 and 52).

(42) - See for example in this connection - on the definition of control in the context of concentrations - paragraphs 13, 14 and 18 et seq. of Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1998 C 66, p. 5).

(43) - See also Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35; last amended by Commission Directive 2000/52/EC of 26 July 2000, OJ 2000 L 193, p. 75).

(44) - This is also referred to in the judgment in Stadt Halle (cited in footnote 4, paragraph 50). On the definition of a semi-public undertaking, see, for example, point 58 of the Opinion of Advocate General Stix-Hackl in Stadt Halle (cited in footnote 3).

(45) - See Article 115 of Decree-Law 267/2000, on the one hand, and Article 88(6)(b) of the Provisions concerning local government together with Article 5(2) of the Statutes of Stadwerke Brixen AG, on the other.

(46) - As became clear at the hearing before the Court, the parties to these proceedings are in disagreement as to whether Article 115 of Decree-Law 267/2000 does impose a statutory obligation on the municipality to open up the share capital of Stadtwerke Brixen AG, or whether, alternatively, the municipality may continue be the sole shareholder in the long term. The Municipality of Brixen relies in this regard on Article 2362 of the Italian Civil Code (Codice Civile, as amended by Decree-Law No 6 of the President of the Republic of 17 January 2003, Ordentliches Beiblatt No 8), under which, in Italy, public limited companies may also consist of a single shareholder.

(47) - In this case, a term of nine years was agreed in relation to the car park on plot No 491/6; see point 14 of this Opinion.

(48) - Judgment in Stadt Halle (cited in footnote 4, paragraph 51).

(49) - Freedom of establishment (Article 43 EC) and the free movement of capital (Article 56(1) EC).

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(50) - See in this regard points 35 to 39 of this Opinion.

(51) - As the referring court points out in its second question, the Administrative Board of Stadtwerke Brixen AG enjoys all extensive powers of routine administration up to a value of EUR 5 000 000 per transaction'.

(52) - See Article 9 of, and the second recital in the preamble to, First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41).

(53) - See in particular Article 2 et seq. of Directive 68/151 and Articles 2 and 47 of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11).

(54) - A publicly-controlled undertaking in the form of a public or private limited company would in some circumstances have to bid as one of several potential tenderers for the contract or concession in question.

(55) - Evidence of which can be found in the European Charter of Local Self-Government of 15 October 1985 (ETS No 122), which was ratified by most Member States within the framework of the Council of Europe. Article 6(1) of the Charter provides that local authorities must be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management'. Moreover, the importance of local self-government is emphasised by the express reference to it in Article I-5(1) of the Treaty establishing a Constitution for Europe (signed in Rome on 29 October 2004, OJ 2004 C 310, p. 1).

(56) - See also in this regard point 42 of this Opinion.

(57) - In this connection, regard should be had, for example, to the liberalisation of the telecommunications sector. See in particular in this respect Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21). See also the Amended Proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (COM (2002) 107 final, OJ 2002 C 151 E, p. 146).

(58) - My emphasis. Unlike the other language versions of the judgment in Teckal , the German version omits the word similar'. This inconsistency was rectified in the judgment in Stadt Halle.

(59) - The judgment in Teckal (cited in footnote 2, paragraph 51) refers to the concept of independence from the contracting authority in regard to decision-making (the French language version uses the adjective autonome , the Italian, the language of the case, the adjective autonomo).

(60) - Judgment in Stadt Halle (cited in footnote 4, paragraph 50).

(61) - The judgment in Stadt Halle (cited in footnote 4, paragraph 50) is worded as follows: [t]he relationship between a public authority which is a contracting authority is governed by considerations and requirements proper to the pursuit of objectives in the public interest'.

(62) - See in this regard point 19 of this Opinion.

(63) - Article 9(1) and (2) of Directive 68/151.

(64) - See also in this regard points 68 to 71 of this Opinion.

(65) - Advocate General Stix-Hackl likewise emphasises in point 83 of her Opinion in Stadt Halle

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(cited in footnote 3) that it is the activities actually carried out which count, not those permitted by law or under the undertaking's statutes.

(66) - See also to this effect Advocate General Stix-Hackl in point 89 of her Opinion in Stadt Halle (cited in footnote 3).

(67) - In a case such as this, consideration should also be given, for example, to the value in relation to the undertaking's activities as a whole of the new areas of work assigned to Stadtwerke Brixen AG in its statutes in addition to those in which the former special undertaking was active (that is to say information technology and telecommunications), and who contracted the undertaking to carry out such activities.

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

AUTLANG German

NATIONA Italy

PROCEDU Reference for a preliminary ruling

ADVGEN Kokott

JUDGRAP Cunha Rodrigues

DATES of document: 01/03/2005
of application: 30/10/2003

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Notice for the OJ

Reference for a preliminary ruling by the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen by order of that Court of 27 September 2003 in the case of Parking Brixen G.m.b.H against Municipality of Brixen/Bressanone and Stadtwerke Brixen A.G.

(Case C-458/03)

Reference has been made to the Court of Justice of the European Communities by order of the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Division for the Province of Bolzano) of 27 September 2003, received at the Court Registry on 30 October 2003, for a preliminary ruling in the case of Parking Brixen G.m.b.H against Municipality of Brixen/Bressanone and Stadtwerke Brixen A.G. on the following questions:

1.Does the award of the management of the public pay car parks in question concern a public service contract within the meaning of Directive 92/50/EEC[1] or a public service concession contract to which the competition rules of the EC, in particular the obligation to ensure equal treatment and transparency, must be applied?

2.If that award does concern a service concession contract relating to the management of a local public service, is the award of the management of public pay car parks which, under Article 44(6)(b) of Regional Law No 1 of 4 January 1993, as amended by Article 10 of Regional Law No 10 of 23 January 1998 and under Article 88(6)(a) and (b) of the consolidated text of the provisions concerning local government, can be effected without a public invitation to tender, compatible with Community law, in particular with the principles of freedom to provide services and freedom of competition, the prohibition of discrimination, and the resultant obligations to ensure equal treatment, transparency and proportionality, where a public limited company is involved which was set up pursuant to Article 115 of Legislative Decree No 267/2000 by the conversion of a special undertaking of a municipality, whose share capital at the time of the award was held 100% by the municipality itself but whose administrative board enjoys all extensive powers of routine administration up to a value of EURO 5 000 000.00 per transaction?

_____

[1] - OJ L 209 [1992], p. 1.

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ARRÊT DE LA COUR (quatrième chambre)
3 mars 2005 (1)

«Manquement d'État – Article 8 de la directive 92/50/CEE – Procédure de passation des marchés publics de services – Enlèvement des ordures dans le Land de Basse-Saxe»

Dans l'affaire C-414/03,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 2 octobre 2003,

Commission des Communautés européennes, représentée par M. K. Wiedner, en qualité d'agent, ayant élu domicile à Luxembourg,

partie requérante,

République fédérale d'Allemagne, représentée par MM. W.-D. Plessing et M. Lumma, en qualité d'agents,

partie défenderesse,

LA COUR (quatrième chambre),

composée de M. K. Lenaerts, président de chambre, MM. K. Schiemann (rapporteur) et M. Ilešič, juges,

avocat général: M. L. A. Geelhoed,
greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1
Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, un contrat d'enlèvement d'ordures ayant été passé par le Landkreis Friesland, dans le Land de Basse-Saxe, sans respecter les règles de publicité et de procédure prévues à l'article 8 de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), lu en combinaison avec les titres III à VI de cette directive, la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de ladite directive.

2
L'annexe I A de la directive 92/50 vise, à son point 16, les «[s]ervices de voirie et d'enlèvement des ordures: services d'assainissement et services analogues».

3
Selon l'article 8 de cette directive, «[l]es marchés qui ont pour objet des services figurant à l'annexe I A sont passés conformément aux dispositions des titres III à VI».

4
En 1994, le Landkreis Friesland a conclu un contrat d'enlèvement d'ordures. D'une durée de dix ans, ce contrat courait jusqu'au 31 décembre 2004 et portait sur un montant de 29 millions de DEM, soit environ 14,83 millions d'euros.

5

Après avoir mis la République fédérale d'Allemagne en mesure de présenter ses observations, la Commission a, le 18 octobre 2002, émis un avis motivé relevant que le marché en cause aurait dû faire l'objet d'un appel d'offre publié au *Journal officiel des Communautés européennes* et être passé conformément aux exigences prévues aux titres III à VI de la directive 92/50, et que cet État membre aurait dû mettre un terme audit contrat. Elle a dès lors invité la République fédérale d'Allemagne à se conformer à ses obligations résultant du traité CE dans un délai de deux mois à compter de la notification de cet avis. Insatisfaite de la réponse apportée par les autorités allemandes par lettre du 16 décembre 2002, la Commission a décidé d'introduire le présent recours.

6
Le gouvernement allemand admet que le Landkreis Friesland aurait dû passer le marché en cause en conformité avec les dispositions de la directive 92/50. Il n'est par ailleurs pas contesté que ce pouvoir adjudicateur s'est abstenu de le faire.

7
Il est également constant que, à la date à laquelle le délai imparti dans l'avis motivé a expiré, le contrat en cause était en cours d'exécution si bien que le manquement persistait encore à cette date (voir, en ce sens, arrêt du 9 septembre 2004, Commission/Allemagne, C-125/03, non publié au Recueil, point 13).

8
Selon le gouvernement allemand, la République fédérale d'Allemagne ayant reconnu le manquement au cours de la phase précontentieuse, la Commission n'était pas obligée, en l'absence de litige entre les parties, de s'adresser à la Cour, si bien que le recours doit être rejeté.

9
À cet égard, il convient de rappeler que, dans le cadre d'un recours en manquement, il appartient à la Cour de constater si le manquement reproché existe ou non, même si l'État concerné ne conteste plus celui-ci. S'il en était autrement, les États membres, en reconnaissant le manquement et en admettant la responsabilité qui peut en découler, seraient libres, à tout moment lors d'une procédure en manquement pendante devant la Cour, de mettre fin à celle-ci sans que l'existence du manquement et le fondement de leur responsabilité aient jamais été établis (voir, notamment, arrêt Commission/Allemagne, précité, point 16).

10
Par ailleurs, les parties ont échangé divers arguments quant aux conséquences découlant de la constatation qu'une attribution de marché est intervenue en méconnaissance de la directive 92/50 et, notamment, quant à la question de savoir si une telle constatation avait pour conséquence de contraindre le pouvoir adjudicateur concerné à résilier le contrat en cours. Selon le gouvernement allemand, le débat ainsi introduit par la Commission est étranger à l'objet du litige soumis à la Cour et ne contribue ni à clarifier ni à fonder la demande formulée par la Commission, laquelle demande doit dès lors être rejetée.

11
À cet égard, il suffit de rappeler que, si, dans le cadre de la procédure en manquement au titre de l'article 226 CE, la Cour est uniquement tenue de constater qu'une disposition du droit communautaire a été violée, il ressort de l'article 228, paragraphe 1, CE que l'État membre concerné est tenu de prendre les mesures que comporte l'exécution de l'arrêt de la Cour (voir arrêt du 18 novembre 2004, Commission/Allemagne, C-126/03, non encore publié au Recueil, point 26).

12
Par ailleurs, ainsi qu'il ressort des points 6 à 9 du présent arrêt, le manquement dont la requête poursuit la constatation est clairement établi, si bien que le recours de la Commission doit être accueilli.

13
Eu égard à ce qui précède, il convient de constater que, un contrat d'enlèvement d'ordures ayant été passé par le Landkreis Friesland sans respecter les règles de publicité et de procédure prévues à l'article 8 de la directive 92/50, lu en combinaison avec les titres III à VI de cette directive, la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de ladite directive.

Sur les dépens

14
Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République fédérale d'Allemagne et cette dernière ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (quatrième chambre) déclare et arrête:

1)

Un contrat d'enlèvement d'ordures ayant été passé par le Landkreis Friesland, dans le Land de Basse-Saxe, sans respecter les règles de publicité et de procédure prévues à l'article 8 de la

directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services, lu en combinaison avec les titres III à VI de cette directive, la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de ladite directive.

2)

La République fédérale d'Allemagne est condamnée aux dépens.

Signatures

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1 –

Langue de procédure: l'allemand.

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Notice for the OJ

JUDGMENT OF THE COURT

(Fourth Chamber)

of 3 March 2005

in Case C-414/03: Commission of the European Communities v Federal Republic of Germany [1]

(Failure to fulfil obligations - Article 8 of Directive 92/50/EEC - Procedure for awarding contracts for public services - Waste disposal in the Land of Lower Saxony)

(Language of the case: German)

In Case C-414/03 Commission of the European Communities (Agent: K. Wiedner) v Federal Republic of Germany (Agent: W.-D. Plessing and M. Lumma) - action for failure to fulfil obligations under Article 226 EC - the Court (Fourth Chamber), composed of K. Lenaerts, President of the Chamber, K. Schiemann (Rapporteur) and M. Ilešič, Judges; L.A. Geelhoed, Advocate General; R. Grass, Registrar, gave a judgment on 3 March 2005, in which it:

Declares that by the Landkreis Friesland in the Land of Lower Saxony awarding a contract for the disposal of waste without complying with the rules on advertising and the procedure laid down by Article 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts together with Titles III and VI of that directive, the Federal Republic of Germany has failed to fulfil its obligations under that directive;

Orders the Federal Republic of Germany to pay the costs.

_____

[1] - OJ 2003 C 275 of 15.11.2003.

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ARRÊT DE LA COUR (troisième chambre)
14 octobre 2004 (1)

«Manquement d'État – Directive 89/665/CEE – Procédures de recours en matière de passation des marchés publics de fournitures et de travaux – Transposition incomplète»

Dans l'affaire C-275/03,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 25 juin 2003,

Commission des Communautés européennes, représentée par MM. A. Caeiros et K. Wiedner, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

République portugaise, représentée par M. L. Fernandes et M^me^ C. Gagliardi Graça, en qualité d'agents,

partie défenderesse,

LA COUR (troisième chambre),

composée de M. A. Rosas, président de chambre, MM. A. Borg Barthet, J.-P. Puissochet (rapporteur), S. von Bahr et U. Lõhmus, juges,

avocat général: M^me^ C. Stix-Hackl,
greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1
Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, en ne transposant pas de façon correcte et complète la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395, p. 33), la République portugaise a manqué aux obligations qui lui incombent en vertu du droit communautaire.

Réglementation communautaire

2
L'article 1^er^, paragraphe 1, de la directive 89/665 dispose:

«Les États membres prennent, en ce qui concerne les procédures de passation des marchés publics relevant du champ d'application des directives 71/305/CEE et 77/62/CEE, les mesures nécessaires pour assurer que les décisions prises par les pouvoirs adjudicateurs peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible [...]»

3

La directive 71/305/CEE du Conseil, du 26 juillet 1971, portant coordination des procédures de passation des marchés publics de travaux a été abrogée par la directive 93/37/CEE du Conseil, du 14 juin 1993. La référence faite par l'article 1er, paragraphe 1, de la directive 89/665 à la directive 71/305, ainsi abrogée, doit s'entendre comme faite à la directive 93/37.

4
Aux termes de l'article 2, paragraphe 1, de la directive 89/665:

«Les États membres veillent à ce que les mesures prises aux fins des recours visés à l'article 1er prévoient les pouvoirs permettant:

[…]

c)
d'accorder des dommages-intérêts aux personnes lésées par une violation».

Réglementation nationale

5
Sous le titre «Responsabilité des organismes publics», l'article 22 de la Constitution de la République portugaise énonce:

«L'État et les autres organismes publics sont civilement responsables, solidairement avec les membres de leurs organes, fonctionnaires ou agents, de toutes leurs actions ou omissions dans l'exercice de leurs fonctions et en raison de cet exercice, dont il résulte une violation des droits, des libertés et des garanties d'autrui ou un préjudice pour autrui».

6
Aux termes de l'article 1er du décret-loi n° 48 051, du 21 novembre 1967 (ci-après le «décret-loi n° 48 051»):

«Dans le domaine des actes de gestion publique, la responsabilité civile extracontractuelle de l'État et des autres personnes morales de droit public est régie par les dispositions du présent décret-loi pour tout ce qui n'est pas prévu par des lois spéciales».

7
L'article 2 dudit décret-loi n° 48 051 précise:

«L'État et les autres personnes morales de droit public sont civilement responsables envers les tiers pour les violations de leurs droits ou des dispositions légales destinés à protéger leurs intérêts, résultant d'actes illégaux commis avec faute par leurs organes ou agents administratifs, dans l'exercice de leurs fonctions et au motif de cet exercice».

8
Aux termes de l'article 3 de ce décret-loi:

«1. Les titulaires de l'organe et les agents administratifs de l'État et des autres personnes morales de droit public sont civilement responsables envers les tiers pour la pratique d'actes illégaux violant les droits de ces tiers ou les dispositions légales destinées à protéger leurs intérêts, s'ils ont outrepassé les limites de leurs fonctions ou s'ils ont agi dolosivement dans l'exercice de ces fonctions et au motif de cet exercice.

2. En cas d'acte dolosif, la personne morale est toujours solidairement responsable avec les titulaires de l'organe ou les agents».

9
Selon l'article 4 du décret-loi n° 48 051:

«La faute des titulaires de l'organe ou des agents est appréciée sur la base des dispositions de l'article 487 du code civil».

10
Aux termes de l'article 487 du code civil:

«Il incombe à la personne lésée de prouver la faute de l'auteur du dommage, à moins qu'il n'y ait présomption légale de faute».

11
Selon l'article 342 du même code:

«1. La personne qui invoque un droit doit apporter la preuve des faits constitutifs du droit allégué.

2. La charge de la preuve des faits empêchant, modifiant ou invalidant le droit invoqué incombe à la personne contre laquelle le droit est invoqué […]».

12
Le décret-loi n° 134/98, du 15 mai 1998, qui transpose également en droit portugais la directive 89/665, a établi une forme de procédure urgente pour attaquer les actes administratifs individuels affectant des droits ou des intérêts légalement protégés, au stade de la formation des contrats de fourniture et d'adjudication de contrats publics de services et a institué des mesures de protection.

Procédure précontentieuse

13
Après un échange d'informations, le gouvernement portugais a, par lettre du 26 juillet 1995, communiqué à la Commission les mesures nationales de transposition de la directive 89/665.

14
Le 8 septembre 1995, la Commission, insatisfaite par cette communication, a mis en demeure le gouvernement portugais de transposer de façon correcte et complète la directive 89/665.

15
Le 7 juillet 1997, la Commission a adressé au gouvernement portugais un avis motivé. Elle considère que les productions qui lui ont été adressées n'ont pas apporté de suite satisfaisante à ses demandes.

16
Le 9 février 2001, la Commission a adressé au gouvernement portugais un avis motivé complémentaire. Elle évoque la réunion du 29 septembre 2000 au cours de laquelle les autorités portugaises ont indiqué que la transposition de la directive 89/665 serait complétée dans le cadre de la réforme en cours du contentieux administratif.

17
Dans cet avis motivé complémentaire, la Commission a rappelé que la transposition de la directive en cause restait incomplète sur deux points. En ce qui concerne le champ d'application de la directive 89/665, tout d'abord, elle reproche à la réglementation portugaise de ne pas inclure les concessions de travaux publics. En ce qui concerne l'octroi d'indemnisations, la Commission fait remarquer que l'abrogation du décret-loi n° 48 051 qui limite les possibilités d'indemnisation n'est toujours pas intervenue.

18
La Commission estime qu'à l'issue du délai, prolongé, fixé dans l'avis motivé, le manquement se limite à l'absence d'abrogation du décret-loi n° 48 051.

Sur le recours

19
La Commission fait valoir que la directive 89/665, dans son article 2, paragraphe 1, point c), prévoit l'indemnisation des personnes lésées par toute violation du droit communautaire régissant la passation de marchés publics ou des règles nationales le transposant.

20
Elle reproche au droit administratif portugais en vigueur, résultant du décret-loi n° 48 051, de subordonner l'octroi de dommages-intérêts à la production de la preuve, par les personnes lésées, que les actes illégaux de l'État ou des personnes morales de droit public ont été commis fautivement ou dolosivement. Elle estime donc que la République portugaise aurait dû abroger ce texte pour se conformer à la directive 86/665.

21
La Commission souligne que la preuve exigée est extrêmement difficile, voire impossible, à apporter, dans la mesure où l'auteur de la faute ne peut, en général, être individualisé de sorte que, dans la plupart des cas, la personne lésée n'obtiendra pas les dommages-intérêts qu'elle avait demandés et auxquels elle pouvait prétendre.

22
En outre, la difficulté à rapporter une telle preuve mène immanquablement à ce que les recours intentés par les personnes lésées en vue de l'obtention de dommages-intérêts soient lents et, probablement, inefficaces. Une telle situation serait contraire à l'article 1er, paragraphe 1, de la directive 89/665, qui insiste sur la nécessité de disposer de recours rapides et efficaces.

23
Le gouvernement portugais soutient que la directive 89/665 n'impose pas une responsabilité de type objectif. Il souligne qu'elle évoque simplement la possibilité pour les citoyens d'obtenir des «indemnisations» quand ils s'estiment lésés par des décisions illégales, sans spécifier si l'octroi d'une indemnisation est, ou non, subordonné au respect de conditions particulières.

24
Ce gouvernement ajoute que le décret-loi n° 48 051, contrairement à l'interprétation donnée par la Commission, n'exige pas la preuve d'une faute grave ou d'un dol de la part de l'État ou de la personne morale pour obtenir des dommages-intérêts. La faute grave ou le dol ne seraient exigés que pour établir, respectivement, soit le droit à

l'action récursoire de l'entité jugée responsable contre le fonctionnaire ou l'agent qui a commis l'acte illégal, soit la recherche de la responsabilité solidaire de l'agent et du service.

25
Les autorités portugaises font valoir que, en tout état de cause, le juge national, pour respecter l'article 22 de la Constitution consacrant, en toutes circonstances, la responsabilité de l'État, n'applique pas les règles restrictives de cette responsabilité qui seraient contenues dans le décret-loi n° 48 051 critiqué par la Commission.

26
Le gouvernement portugais fait enfin état de l'adoption prochaine d'un projet de texte relatif à la responsabilité civile extracontractuelle de l'État, introduisant la notion de présomption de faute tirée de l'illégalité d'actes administratifs. Ce texte consacrerait en outre la notion de faute de service, permettant ainsi d'engager la responsabilité de l'État et des autres personnes morales de droit public en cas de fonctionnement anormal, alors même qu'il n'est pas possible d'imputer les dommages à un acteur déterminé. Les autorités portugaises regrettent que le précédent projet n'ait pu être adopté en raison de la démission du gouvernement portugais présentée le 17 décembre 2001.

Appréciation de la Cour

27
Contrairement à l'affirmation du gouvernement portugais, il ressort du décret-loi n° 48 051, en vigueur à l'expiration du délai imparti dans l'avis motivé, que l'octroi de dommages-intérêts aux personnes lésées par une violation du droit communautaire régissant la passation de marchés publics ou des règles nationales le transposant est subordonné à la preuve que les actes illégaux de l'État ou des personnes morales de droit public ont été commis fautivement ou d'une façon dolosive.

28
Ainsi qu'il résulte de ses premier et deuxième considérants, la directive 89/665 vise à renforcer les mécanismes existants, tant sur le plan national que sur le plan communautaire, pour assurer l'application effective des directives communautaires en matière de passation de marchés publics, dans la mesure où les mécanismes qui existaient en général dans ce domaine, tant sur le plan national que sur le plan communautaire ne permettaient pas toujours de veiller au respect des dispositions communautaires (arrêt du 4 février 1999, Köllensperger et Atzwanger, C-103/97, Rec. p. I-551, point 3).

29
À cet effet, l'article 1er, paragraphe 1, de ladite directive impose aux États membres l'obligation de garantir que les décisions illégales des pouvoirs adjudicateurs puissent faire l'objet de recours efficaces et aussi rapides que possible (voir, notamment, arrêt du 28 octobre 1999, Alcatel Austria e.a., C-81/98, Rec. p. I-7671, points 33 et 34).

30
Parmi les procédures de recours que la directive 89/665 impose aux États membres d'instaurer aux fins de garantir que les décisions illégales des pouvoirs adjudicateurs puissent faire l'objet de tels recours, figure expressément, à l'article 2, paragraphe 1, sous c) de cette directive, celle permettant d'accorder des dommages-intérêts aux personnes lésées par une violation.

31
Or, si la réglementation portugaise prévoit la possibilité d'obtenir des dommages-intérêts en cas de violation du droit communautaire régissant la passation de marchés publics ou des règles nationales le transposant, elle ne saurait néanmoins être considérée comme un système de protection juridictionnelle adéquat dans la mesure où elle exige la preuve d'une faute ou d'un dol commis par les agents d'une entité administrative déterminée. Ainsi, le soumissionnaire lésé par une décision illégale des pouvoirs adjudicateurs risque d'être privé du droit de demander des dommages-intérêts au titre du préjudice causé par cette décision, ou du moins de les obtenir tardivement, au motif qu'il ne peut établir la preuve d'un dol ou d'une faute.

32
Dès lors, en n'abrogeant pas le décret-loi n° 48 051, subordonnant l'octroi de dommages-intérêts aux personnes lésées par une violation du droit communautaire des marchés publics ou des règles nationales le transposant à la preuve d'une faute ou d'un dol, la République portugaise a manqué aux obligations qui lui incombent en vertu des articles 1er, paragraphe 1, et 2, paragraphe 1, sous c), de la directive 89/665.

33
La circonstance que le juge national n'applique pas les dispositions restrictives de ce texte pour engager la responsabilité de l'administration est sans incidence sur le manquement qui consiste à avoir laissé subsister ledit texte dans l'ordre juridique interne. Il est, en effet, important, afin que soit satisfaite l'exigence de sécurité juridique, que les particuliers bénéficient d'une situation juridique claire et précise, leur permettant de connaître la plénitude de leurs droits et de s'en prévaloir, le cas échéant, devant les juridictions nationales (voir arrêt du 19 septembre 1996, Commission/Grèce, C-236/95, Rec. p. I-4459, point 13).

34
Il est en outre établi que, à l'expiration des délais fixés par les avis motivés, le projet de loi relatif à la responsabilité civile extracontractuelle de l'État introduisant la notion de présomption de faute n'avait pu être

adopté. Or, d'une part, un État membre ne saurait exciper de situations de son ordre juridique interne pour justifier le non-respect des obligations et des délais prescrits par une directive (arrêt du 10 avril 2003, Commission/France, C-114/02, Rec. p. I-3783, point 11) et, d'autre part, des modifications introduites dans la législation nationale sont sans pertinence pour statuer sur l'objet d'un recours en manquement, dès lors qu'elles n'ont pas été mises en œuvre avant l'expiration du délai imparti dans l'avis motivé (voir arrêt du 24 mars 1994, Commission/Belgique, C-80/92, Rec. p. I-1019, point 19).

35
Au vu de l'ensemble des considérations qui précèdent, le grief de la Commission doit en conséquence être accueilli.

Sur les dépens

36
Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République portugaise et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (troisième chambre) déclare et arrête:

1)
En n'abrogeant pas le décret-loi n° 48 051, du 21 novembre 1967, subordonnant l'octroi de dommages-intérêts aux personnes lésées par une violation du droit communautaire des marchés publics ou des règles nationales le transposant à la preuve d'une faute ou d'un dol, la République portugaise a manqué aux obligations qui lui incombent en vertu des articles 1er, paragraphe 1, et 2, paragraphe 1, sous c), de la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux.

2)
La République portugaise est condamnée aux dépens.

Signatures.

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1 –
Langue de procédure: le portugais.

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Notice for the OJ

Judgment of the Court (Third Chamber) of 14 October 2004 in Case C-275/03: **Commission of the European Communities** v **Portuguese Republic** [1]

(Failure by a Member State to fulfil its obligations - Directive 89/665/EEC - Review procedures for the award of public supply and public works contracts - Incomplete transposition)

(Language of the case: Portuguese)

In Case C-275/03: **Commission of the European Communities** (Agents: A. Caeiros and K. Wiedner) v **Portuguese Republic** (Agents: L. Fernandes and C. Gagliardi Graça) - action under Article 226 EC for failure to fulfil obligations, brought on 25 June 2003 - the Court (Third Chamber), composed of: A. Rosas, President of the Chamber, A. Borg Barthet, J.-P. Puissochet (Rapporteur), S. von Bahr and U. Lõhmus, Judges; C. Stix-Hackl, Advocate General; R.Grass, Registrar, has given a judgment on 14 October 2004, in which it:

1. Declares that, by failing to repeal the Decree-Law No 48051 of 21 November 1967, making the award of damages to persons harmed by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts;

2. Orders the Portuguese Republic to pay the costs.

_____

[1] - OJ C 213 of 6.9.2003

Judgment of the Court (Third Chamber) of 20 October 2005

Commission of the European Communities v French Republic. Failure of a Member State to fulfil obligations - Public contracts - Directive 92/50/EEC - Procedures for the award of public service contracts - Freedom to provide services - Agency of delegated project contracting - Persons to whom the task of delegated project contracting may be entrusted - Exhaustive list of legal persons under French law. Case C-264/03.

1. Freedom to provide services - Procedures for the award of public service contracts - Contracts excluded from the scope of Directive 92/50 - Obligation to comply with the fundamental rules of the Treaty

(Art. 49 EC; Council Directive 92/50)

2. Freedom to provide services - Procedures for the award of public service contracts - Directive 92/50 - National legislation permitting the project manager to delegate certain of its responsibilities - Task of agent reserved to exhaustively listed legal persons under national law - Not permissible

(Art. 49 EC; Council Directive 92/50)

1. The provisions of the EC Treaty relating to freedom of movement are intended to apply to public contracts which are outside the scope of Directive 92/50 relating to the coordination of procedures for the award of public service contracts. Although certain contracts are excluded from the scope of Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on grounds of nationality in particular. That is particularly the case in relation to public service contracts the value of which does not reach the thresholds fixed by Directive 92/50. The mere fact that the Community legislature considered that the strict special procedures laid down in the directives on public procurement are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law.

(see paras 32-33)

2. A Member State which reserves the task of delegated project contracting to an exhaustive list of legal persons under national law, by which the contracting authority may, by an agreement in writing and for remuneration, appoint an agent to fulfil, in its name and on its behalf, all or any of certain of its responsibilities, fails to fulfil its obligations under Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Directive 97/52, and under Article 49 EC as regards public service contracts outside the scope of Directive 92/50.

(see paras 64, 71, operative part)

In Case C-264/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 June 2003,

Commission of the European Communities, represented by B. Stromsky, K. Wiedner and F. Simonetti, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and D. Petrausch, acting as Agents, with an address for service in Luxembourg,

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defendant,

THE COURT (Third Chamber),

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

Advocate General: M. Poiares Maduro,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 7 October 2004,

after hearing the Opinion of the Advocate General at the sitting on 24 November 2004,

gives the following

Judgment

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

Declares that, by reserving, in Article 4 of Law No 85704 of 12 July 1985 on public project contracting and its relationship to private project management, as amended by Law No 96987 of 14 November 1996 on the implementation of the urban revival pact, the task of delegated project contracting to an exhaustive list of legal persons under French law, the French Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and under Article 49 EC.

1. By its application, the Commission of the European Communities is seeking a declaration by the Court that, by reserving, in Article 4 of Law No 85704 of 12 July 1985 on public project contracting and its relationship to private project management (JORF of 13 July 1985, p. 7914), as amended by Law No 96987 of 14 November 1996 on the implementation of the urban revival pact (JORF of 15 November 1996, p. 16656) (hereinafter Law No 85-704'), the task of delegated project contracting to an exhaustive list of legal persons under French law, the French Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) (hereinafter Directive 92/50'), and, in particular, Articles 8 and 9 thereof, and under Article 49 EC.

Legal framework

Community legislation

2. Under Article 1(a) of Directive 92/50, public service contracts' means contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of the contracts listed in Article 1(a)(i) to (ix). Under Article 1(b) of that directive, contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'. Article 1(c) defines service provider' as any natural or legal person, including a public body, which offers services'.

3. Article 3(2) of Directive 92/50 provides that contracting authorities are to ensure that there is no discrimination between different service providers.

4. Under Article 6 of Directive 92/50, that directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative

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provision which is compatible with the Treaty'.

5. Article 7(1)(a) of Directive 92/50 provides that it applies to public service contracts where the estimated value net of valueadded tax is not less than [EUR] 200 000'.

6. Under Article 8 of Directive 92/50, contracts which have as their object services listed in Annex IA thereto must be awarded in accordance with the provisions of Titles III to VI thereto, that is by a call for tenders and by being made the subject of appropriate publicity.

7. Category 12 in Annex IA to Directive 92/50 covers [a]rchitectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services'.

8. Under Article 9 of Directive 92/50, contracts which have as their object services listed in Annex IB thereto are to be awarded in accordance with Articles 14 and 16 of that directive. Article 14 concerns common rules in the technical field and Article 16 notices of the results of award procedures.

9. Categories 21 and 27 in Annex IB to Directive 92/50 comprise legal services' and other services' respectively.

10. Article 10 of Directive 92/50 provides that [c]ontracts which have as their object services listed in both Annexes IA and IB shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex IA is greater than the value of the services listed in Annex IB. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16'.

National legislation

11. The provisions of Law No 85704 apply, under Article 1 thereof, to the execution of all construction or infrastructure projects, and to industrial plant intended for their exploitation where the contracting authorities are:

1. The State or its public undertakings;

2. Local authorities, their public undertakings, public undertakings for new town planning created under Article L. 3211 of the Code de l'urbanisme (Town Planning Code), groups thereof and associations of different types of public undertaking, referred to in Article L. 166-1 of the Code des communes (Municipal Code);

3. The private bodies mentioned in Article L. 64 of the Code de la sécurité sociale (Social Security Code), and consortia and federations thereof;

4. The private bodies for lowrent housing, mentioned in Article L. 4112 of the Code de la construction et de l'habitation (Building and Housing Code), and public/private partnership companies, for rented accommodation subsidised by the State and provided by such bodies and companies.'

12. Article 2 of that Law defines the contracting authority as:

... the legal person, mentioned in Article 1, for which the project is to be built. Since it is primarily responsible for the project, it performs in that role a task in the public interest from which it may not resile.

...

The contracting authority defines in the planning brief the operation's objectives and the needs which it must satisfy as well as the social, town planning, architectural, functional, technical and economic constraints and requirements, and those of its insertion into the landscape and environmental

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protection, relating to the execution and use of the project.

...'

13. Article 3 of that Law provides:

... the contracting authority may appoint an agent, on the terms set out in the agreement referred to in Article 5, to fulfil, in its name and on its behalf, all or any of the following responsibilities of the contracting authority:

1. Defining the administrative and technical terms according to which the project will be worked up and executed;

2. Preparing for the selection of the project manager, signature of the project management contract, after approval of the choice of the project manager by the contracting authority, and management of that contract;

3. Approving the preliminary designs and agreements on the project;

4. Preparing for the selection of the contractor, signature of the contract for the works, after approval of the choice of the contractor by the contracting authority, and management of that contract;

5. Paying the remuneration for the project management and the works;

6. Acceptance of the works, and carrying out any measures relating to the aforementioned responsibilities.

The agent shall be under no obligation to the contracting authority other than for the proper performance of the responsibilities for which that authority has made the agent personally responsible.

The agent shall represent the contracting authority as against third parties in the performance of the responsibilities entrusted to him until the contracting authority certifies completion of his task under the terms set out in the agreement referred to in Article 5. He may engage in legal proceedings.'

14. Under Article 4 of Law No 85-704:

The responsibilities specified in the preceding article may be entrusted, within the limits of their powers, only to:

(a) The legal persons referred to in Article 1(1) and (2) of this Law, excepting public undertakings engaged in health and social matters, which may act as agents only for other such undertakings;

(b) Legal persons of which at least half the capital is held, directly or through an intermediary, by the legal persons referred to in Article 1(1) and (2) and whose purpose is to render their assistance to the contracting authority, provided that they are not acting as project manager or contractor on behalf of a third party;

(c) The private bodies for lowrent housing mentioned in Article L. 4112 of the Code de la construction et de l'habitation, but only for other lowrent housing bodies and for projects linked to a subsidised housing operation;

(d) Local public/private partnership companies governed by Law No 83597 of 7 July 1983 on local public/private partnership companies;

(e) Public undertakings created under Article L. 3211 of the Code de l'urbanisme as well as urban land associations approved or formed automatically under Article L. 3221 et seq. of the Code de l'urbanisme;

(f) Companies formed under Article 9 of Law No 51592 of 24 May 1951 concerning the Treasury special accounts for 1951, as amended by Article 28 of Law No 62933 of 8 August 1962 supplementing the

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Law providing guidance concerning agriculture;

(g) Any public or private person to which is entrusted the creation of a concerted development area or a housing development...;

(h) Companies which enter into the contract prescribed in Article L. 2221 of the Code de la construction et de l'habitation for the execution of operations of urban restructuring of large estates and areas of rundown housing....

Those authorities, undertakings and bodies shall be subject to the provisions of this Law in the performance of the responsibilities which, under this article, are entrusted to them by the contracting authority.

The rules for the award of contracts signed by the agent shall be the rules applicable to the contracting authority, subject to any necessary adaptations made by decree to take account of the intervention of an agent.'

15. Article 5 of Law No 85-704 provides:

The relationship between the contracting authority and the legal persons referred to in Article 4 shall be governed by an agreement, which shall be void unless it provides for:

(a) The project which forms the subjectmatter of the agreement, the responsibilities entrusted to the agent, the terms under which the contracting authority shall certify completion of the agent's tasks, the detailed arrangements for the agent's remuneration, the penalties applicable to the agent in the event of breach of his obligations and the circumstances in which the agreement may be terminated;

...'

The pre-litigation procedure

16. Since it considered that certain provisions of Law No 85704, and particularly those relating to the circumstances in which a contracting authority may have recourse to an operations manager and entrust the performance of some of its responsibilities to a delegated project contractor, were contrary, first, to the provisions of Directive 92/50 and, second, to those of Article 49 EC, the Commission, by letter of 25 July 2001, gave the French Republic formal notice to submit its observations.

17. By letter of 8 March 2002, the French authorities rejected the Commission's complaints, save those relating to operations management governed by Article 6 of Law No 85704. They admitted, in that regard, that the task of operations management is a supply of services for the purposes of Community law and stated that it was thenceforth to be made subject to the new French Code des marchés publics (Code on Public Procurement).

18. Unsatisfied by that answer, the Commission, on 27 June 2002, sent the French Republic a reasoned opinion, requesting it to adopt the measures necessary to comply with the opinion within two months of its notification.

19. By letter of 14 October 2002, the French Republic informed the Commission that it adhered to the points of view set forth in its letter of 8 March 2002.

20. Since it considered that the failure to fulfil obligations was persisting in relation to delegated project contracting, the Commission decided to bring this action.

21. Since the lodgement of the application in this action, the French authorities have adopted Order No 2004566 of 17 June 2004 amending Law No 85704 (JORF of 19 June 2004, p. 11020), which amends that Law by allowing the agency of delegated project contracting to be henceforth entrusted to any public or private person, thus removing the requirement that the agent be a legal person

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under French law, subject however to compliance with certain rules on disqualification intended to prevent conflicts of interest. According to the French Government, that amendment is not the result of this action and makes no difference to the point of law which it is defending in this connection.

The action

Arguments of the parties

22. The Commission claims that, by reserving, in Article 4 of Law No 85704, the task of delegated project contracting to certain exhaustively listed categories of legal persons under French law, the French Republic has failed to fulfil its obligations under Directive 92/50 and, in particular, Articles 8 and 9 thereof, and under Article 49 EC.

23. According to the Commission, the agency of a delegated project contractor is a public service contract within the meaning of Article 1(a) of Directive 92/50. The tasks subject to the agency come within Category 12 in Annex IA to that directive, save for tasks of representation, with the result that the provisions of Law No 85704 do not comply with Article 8 of that directive. As regards agencies exclusively or principally covering tasks of representation, they fall under Annex IB to Directive 92/50, with the result that that law does not comply with Article 9 of the same directive either.

24. In addition, the Commission asserts that, in relation to agencies of project contracting of a value lower than the thresholds fixed by Directive 92/50, as well as agencies covering exclusively or principally the services mentioned in Annex IB thereto, Article 4 of Law No 85704 constitutes a restriction on the principle of the freedom to provide services enshrined in Article 49 EC. Such a restriction can be justified neither by Articles 45 EC and 55 EC, since the tasks concerned do not include participation, even on an occasional basis, in the exercise of public authority, nor by Articles 46 EC and 55 EC, since the grounds of public policy, public safety and pu blic health do not apply in the circumstances of this case.

25. The French Government contends that the agency agreement of delegated project contracting provided for by Law No 85-704 is not a commercial contract and does not come within the scope of Directive 92/50. The agent participates in a task in the public interest and cannot be regarded as being a service provider. The agent represents the contracting authority, which is, essentially, the function of the agency. In that context, responsibilities are transferred to the agent, accompanied by a power to take decisions. The function of representation is inseparable from all the actions carried out by the agent on behalf of the principal. In exercising his powers, which are in effect those of a contracting authority, the agent is subject to the Community directives relating to public procurement.

26. The French Government also relies on Case C-399/98 Ordine degli Architetti and Others [2001] ECR I5409 relating to the application of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54). It follows from the Court's reasoning in that judgment, which is applicable by analogy to the facts of this case, that a contract for pecuniary interest, if it constitutes a contract of agency, may fall outside the scope of the Community directives relating to public procurement. It is sufficient that the agent is himself subject to the obligations arising from those directives. Law No 85704 makes contracts concluded by the agent subject to the same obligations as they would be were they concluded by the contracting authority.

27. Since the agency agreement of delegated project contracting presents, according to the French Government, characteristics such that it cannot be treated in the same way as a contract for the supply of services, Article 4 of Law No 85704 is not contrary to Article 49 EC.

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Findings of the Court

Preliminary observations

28. Article 3 of Law No 85704 provides that the contracting authority may appoint an agent, on the terms set out in the agreement referred to in Article 5 of that law, to perform, in its name and on its behalf, all or any of certain of its responsibilities. Article 4 of that law reserves the task of delegated project contracting to certain exhaustively listed categories of persons. The French Government has not denied that those persons must, as the Commission claims, be legal persons under French law.

29. Admittedly, since the commencement of this action, the French authorities have amended Law No 85704 by allowing the agency of delegated project contracting henceforth to be entrusted to any public or private person, thus abolishing the requirement that the agent be a legal person under French law. It is appropriate none the less to point out that the question whether a Member State has failed to fulfil its obligations must be determined with reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, among others, Case C63/02 Commission v United Kingdom [2003] ECR I-821, paragraph 11, and Case C313/03 Commission v Italy , not published in the ECR, paragraph 9). The Court cannot take account of any subsequent changes (see, among others, Case C482/03 Commission v Ireland , not published in the ECR, paragraph 11, and Case C-341/02 Commission v Germany [2005] ECR I2733, paragraph 33).

30. In such circumstances, it is important to examine whether Article 4 of Law No 85704 complies, first, with the provisions of Directive 92/50 and, second, with the principle of freedom to provide services enshrined in Article 49 EC.

31. So far as concerns the alleged infringement of Directive 92/50, it must be ascertained, first, whether, and if so to what extent, the agency contract of delegated project contracting, as defined by Law No 85704, falls within the scope of that directive. In that regard, it is appropriate to observe that that directive does not apply to contracts of a value below the threshold fixed therein.

32. As regards the complaint alleging breach of Article 49 EC, it is appropriate to point out that the provisions of the EC Treaty relating to freedom of movement are intended to apply to public contracts which are outside the scope of Directive 92/50. Although certain contracts are excluded from the scope of Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on grounds of nationality in particular (see, to that effect, Case C324/98 Telaustria and Telefonadress [2000] ECR I10745, paragraph 60; Case C92/00 HI [2002] ECR I5553, paragraph 47, and the order of 3 December 2001 in Case C59/00 Vestergaard [2001] ECR I9505, paragraph 20).

33. That is particularly the case in relation to public service contracts the value of which does not reach the thresholds fixed by Directive 92/50. The mere fact that the Community legislature considered that the strict special procedures laid down in the directives on public procurement are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law (see the order in Vestergaard , paragraph 19). Likewise, contracts outside the scope of Directive 92/50, such as concession agreements, continue to be subject to the general rules of the Treaty (see, to that effect, Case C-231/03 Coname [2005] ECR I7287, paragraph 16).

34. Finally, it is appropriate to point out that, so far as any given Member State is concerned, activities which in that State are connected, even occasionally, with the exercise of official authority do not come within the scope of Article 49 EC, by virtue of the first paragraph of Article

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45 EC and Article 55 EC.

The complaint alleging infringement of Directive 92/50

35. The expression public service contracts' is defined in Article 1(a) of Directive 92/50. That provision states that such contracts are contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.

36. In order to establish whether the agency agreement of delegated project contracting within the meaning of Law No 85704 falls within the scope of Directive 92/50, it is necessary to examine whether the criteria established in Article 1(a) of that directive are met. Since that provision makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, there is no need to inquire as to how French law categorises such agreements.

37. In the present case, it appears that the said criteria are met.

38. First of all, Article 5 of Law No 85704 provides that the relationship between, on the one hand, the contracting authority and, on the other, the delegated project contractor is to be defined by an agreement, concluded between them in writing. Furthermore, it is clear from the same provision that the delegated project contractor receives remuneration. Therefore, that agreement may be regarded as a contract for pecuniary interest, concluded in writing.

39. Next, so far as concerns the expression contracting authorities', they are defined in Article 1(b) of Directive 92/50 as the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'.

40. Article 1 of Law No 85704 provides that the persons which can perform the functions of the contracting authority are the State and its public undertakings, local authorities, their public undertakings, public undertakings for new town planning, groups thereof and associations of different types of public undertaking. The private bodies mentioned in Article L. 64 of the Code de la sécurité sociale may also conclude agency agreements of delegated project contracting under that law, as may consortia and federations thereof, as well as private lowrent housing bodies and public/private partnership companies, for rented accommodation subsidised by the State and provided by such bodies and companies.

41. In this case, it is not disputed that those persons may be contracting authorities' within the meaning of Article 1(b) of Directive 92/50.

42. Finally, Article 1(c) of Directive 92/50 defines service provider' as any natural or legal person, including a public body, which offers services'. Article 50 EC treats services' as such where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'. The contracts which have as their object services listed in Annex IA to Directive 92/50 are to be awarded in accordance with the provisions of Titles III to VI and those listed in Annex IB in accordance with Articles 14 and 16 of that directive.

43. The persons which may be appointed to fulfil the responsibilities of the delegated project contractor are listed in Article 4 of Law No 85704. It is appropriate to observe that some of those persons may, themselves, be contracting authorities within the meaning of Article 1(b) of Directive 92/50. While Article 6 of that directive excludes from its scope public service contracts awarded to an entity which is itself a contracting authority on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision, the fact remains that those conditions are not satisfied in the circumstances of this case.

44. Persons eligible to be appointed to fulfil the responsibilities of the delegated project contractor may be regarded as service providers', since the responsibilities entrusted to them, by the agency

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agreement of delegated project contracting, under Article 3 of Law No 85704, correspond to the provision of services within the meaning of Community law.

45. In that regard, the argument developed by the French Government to establish that the agent does not provide services cannot be accepted.

46. It is clear from Article 3 of Law No 85704, which lists the responsibilities which the contracting authority may appoint an agent to fulfil, that the agency agreement of delegated project contracting is not only a contract by which the agent undertakes to represent the contracting authority. Those responsibilities include various tasks corresponding, first, to providing technical and administrative assistance and, second, to tasks the object of which is the representation of the contracting authority.

47. First of all, as regards the question whether the function of representation is, as the French Government contends, inseparable from all the actions performed by the agent on behalf of the principal, it must be observed that it is perfectly feasible to separate those different tasks. Indeed, the contracting authority may appoint an agent, under Article 3 of Law No 85704, to fulfil all or any of the responsibilities listed in that provision. It is important also to state, as the Advocate General correctly noted in point 37 of his Opinion, that there is nothing to prevent the possibility of those tasks being subject to different rules.

48. Next, as regards the nature of those responsibilities, it is appropriate to observe that the question whether the agent contributes to the performance of a task in the public interest is not decisive in determining whether or not he provides services. It is not unusual, in the field of public procurement, for the contracting authority to entrust to a third party an economic task intended to meet a public interest need. That statement is corroborated, in particular, by the fact that Directive 92/50 applies, with certain exceptions, to public service contracts awarded by contracting authorities in the field of defence.

49. Finally, it must be determined whether the agency agreement of delegated project contracting effects a transfer of official authority, as the French Government argues. The examination of that question presupposes that the fulfilment of the responsibilities in question involves, on the part of the contracting authority, direct participation in the exercise of official authority.

50. In that regard, the French Government has not asserted the existence of circumstances in which the contracting authority is responsible for a structure for the inhouse' management of a public service within the meaning of the Court's caselaw (see, to that effect, Case C107/98 Teckal [1999] ECR I8121, paragraph 50, and Coname , paragraph 26). Indeed, there is no suggestion that the principal exercises over the agent a control similar to that which it exercises over its own departments and that the agent carries out the essential part of its activities with the controlling public authority or authorities (see, to that effect, Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I1, paragraph 49).

51. As regards tasks of administrative and technical assistance, such as defining the administrative and technical terms according to which the project will be worked up and executed, they seem to be provisions of services within the meaning of Article 8 of, and Annex IA to, Directive 92/50 and the agent does not appear to participate in the exercise of official authority.

52. As for agency agreements of delegated project contracting the object of which is tasks involving a representation function, it is important to point out at the outset that the fact that a service is provided in the performance of such an agreement is not sufficient to exclude it from the scope of Directive 92/50. That statement is supported by the fact that, as the Commission points out by way of example, agency agreements between a contracting authority and its lawyer come within the scope of Articles 14 and 16 of Directive 92/50, under Article 9 thereof and point 21 of Annex IB thereto.

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53. Under Article 3 of Law No 85704, the agent may be entrusted with various tasks involving the function of representing the contracting authority. Thus it is, particularly, as regards the signature of the project contracting agreement and the works contract, as well as where the agent pays the service providers and chosen contractors their remuneration.

54. As the Advocate General correctly observes in point 41 of his Opinion, although the agent may be authorised to sign the project contracting agreement and works contract on behalf of the contracting authority, he does not have sufficient autonomy in the execution of its acts to enable it to be considered the beneficiary of a transfer of official authority. In fact, according to Article 2 of Law No 85704, the contracting authority, which is primarily responsible for the project, performs in that role a task in the public interest from which it may not resile. Furthermore, the agent may act only after the contracting authority has given its approval. As regards the payment of remuneration to the service providers and contractors, it is financed by the contracting authority, with the result that the agent has no room for manoeuvre in that field either. The agent confines himself to advancing funds, which are reimbursed to him by the contracting authority.

55. In those circumstances, agency agreements of delegated project contracting the object of which is tasks involving a function of representing the contracting authority fall within Article 9 of, and Annex IB to, Directive 92/50.

56. The reasoning followed by the Court in paragraph 100 of the judgment in Ordine degli Architetti and Others , relating to the application of Directive 93/37, is not such as to undermine that conclusion. The Court observed, as regards compliance with that directive in cases concerning the execution of infrastructure works in circumstances such as were presented to it, that it was not necessary for the municipal authorities themselves to apply the awardofcontractprocedures laid down by that provision. That directive was still given full effect as long as the national legislation allowed the municipal authorities to require the developer holding the building permit to carry out the work contracted for in accordance with those procedures.

57. That assessment was made in the context of specific legislation in respect of town planning according to which the grant of a building permit entailed the payment, by its holder, of a contribution to the infrastructure costs engendered by its project. However, that developer could, by way of total or partial setoff against the amount due, undertake to execute the infrastructure works directly. On the latter hypothesis, the Court concluded that it was a public works contract within the meaning of Directive 93/37. Since the municipality had no power to choose who was to be made responsible for executing the infrastructure works, since, by operation of law, that person is the owner of the land to be developed and the holder of the building permit, it was possible to find that the award procedures could be applied, in place of the municipality, by the holder of the permit, the only appropriate person, according to the law, to execute the works, as an alternative to the payment to the municipality of a contribution to the infrastructure costs. That situation is different from the situation governed by Law No 85704, which leaves to the contracting authority the choice of the agent and does not lay down prior obligations for which the latter's remuneration would be consideration.

58. In the light of the preceding considerations, it must be held that an agency agreement, as defined by Law No 85704, is a public service contract within the meaning of Article 1(a) of Directive 92/50 and comes within the scope of the directive.

59. Therefore, it is necessary to examine whether Article 4 of Law No 85704, which reserves the role of agent to exhaustively listed categories of legal persons under French law, complies with the provisions of Directive 92/50.

60. In that regard, it is important to recall that Directive 92/50 is intended to improve the access

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of service providers to procedures for the award of contracts in order to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular. Those principles are referred to in Article 3(2) of that directive which prohibits discrimination between different service providers.

61. It must be held that Article 4 of Law No 85704 does not comply with the principle of equal treatment between different service providers, in as much as that provision reserves the task of delegated project contracting to exhaustively listed categories of legal persons under French law.

62. Furthermore, without it being necessary even to determine which services come within Annex IA to Directive 92/50 and which come within Annex IB thereto, as well as, in that context, what effect the application of Article 10 thereof may have, it is established that Law No 85704 prescribes no procedure for putting the choice of agent out to competition.

63. In those circumstances, the complaint alleging infringement of Directive 92/50 is well founded.

The complaint alleging breach of Article 49 EC

64. For public service contracts outside the scope of Directive 92/50, it remains to decide whether Article 4 of Law No 85704 complies with the principle, enshrined in Article 49 EC, of freedom to provide services.

65. It must be observed at the outset that, as stated in paragraphs 49 to 55 of this judgment, an agency agreement of delegated project contracting, as defined by Law No 85704, does not confer on the agent tasks connected with the exercise of official authority, for the tasks either of administrative or technical assistance or of representation which are entrusted to it. As a result, the exception under Articles 45 EC and 55 EC does not apply in this case.

66. Article 49 EC prohibits restrictions on freedom to provide services within the European Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. Furthermore, it is settled caselaw that that provision requires the elimination of any restriction, even if it applies to national providers of services and to those of other Member States alike, when it is liable to prohibit or impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see, in particular, Case C262/02 Commission v France [2004] ECR I6569, paragraph 22, and Case C429/02 Bacardi France [2004] ECR I-6613, paragraph 31 and the caselaw cited therein).

67. In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment, thereby depriving of all practical effectiveness the provisions of the Treaty whose object is to guarantee the freedom to provide services (see Case C-180/89 Commission v Italy [1991] ECR I709, paragraph 15).

68. In this case, it must be held that Article 4 of Law No 85704 is an obstacle to the freedom to provide services for the purposes of Article 49 EC in that it leads to the reservation of the task of delegated project contracting to an exhaustive list of legal persons under French law.

69. However, Article 46 EC, read in conjunction with Article 55 EC, allows restrictions on the freedom to provide services justified by grounds of public policy, public security or public health. The examination of the casefile has not however enabled any such justification to be established.

70. In those circumstances, the complaint alleging breach of Article 49 EC is well founded.

71. Having regard to all the preceding considerations, it must be held that, by reserving, in Article 4 of Law No 85704, the task of delegated project contracting to an exhaustive list of legal persons under French law, the French Republic has failed to fulfil its obligations under Directive 92/50

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and Article 49 EC.

Costs

72. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for. Since the Commission has applied for an order for costs against the French Republic and since the latter has been unsuccessful, it must be ordered to pay the costs.

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61998J0399 : N 56
62000J0092 : N 32
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62003J0231 : N 33 50
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CONCERNS Failure concerning 31992L0050 -
Failure concerning 11997E049 -

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

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DEFENDA France ; Member States

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NOTES Meisse, Eric: Procédure de passation, Europe 2005 Décembre no 412 Comm. p.19 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Qualification de marché public, L'actualité juridique ; droit administratif 2006 p.253-255 ; De Falco, Vincenzo: Contratti di committenza, appalti pubblici di servizi in Francia e le divergenze con l'ordinamento comunitario, Diritto pubblico comparato ed europeo 2006 p.265-270

PROCEDU Action for failure to fulfil obligations - successful

ADVGEN Poiares Maduro

JUDGRAP Rosas

DATES of document: 20/10/2005
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Notice for the OJ

JUDGMENT OF THE COURT

(Third Chamber)

of 20 October 2005

in Case C-264/03: Commission of the European Communities v French Republic [1]

(Failure of a Member State to fulfil obligations - Public contracts - Directive 92/50/EEC - Procedures for the award of public service contracts - Freedom to provide services - Agency of delegated project contracting - Persons to whom the task of delegated project contracting may be entrusted - Exhaustive list of legal persons created under French law)

(Language of the case: French)

In Case C-264/03: ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 June 2003, Commission of the European Communities (Agents: B. Stromsky, K. Wiedner and F. Simonetti) v French Republic (Agents: G. de Bergues and D. Petrausch - the Court (Third Chamber), composed of A. Rosas (Rapporteur), President of the Chamber, J. Malenovský, J.-P. Puissochet, A. Borg Barthet and U. Lõhmus, Judges; Advocate General: M. Poiares Maduro, Registrar: K. Sztranc, Administrator, gave a judgment on 20 October 2005, in which it:

Declares that, by reserving, in Article 4 of Law No 85-704 of 12 July 1985 on public project contracting and its relationship to private project management, as amended by Law No 96-987 of 14 November 1996 on the implementation of the urban revival pact, the task of delegated project contracting to an exhaustive list of legal persons created under French law, the French Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and under Article 49 EC.

_____

[1] - OJ C 200 of 23.08.2003.

Opinion of Mr Advocate General Poiares Maduro delivered on 24 November 2004. Commission of the European Communities v French Republic. Failure of a Member State to fulfil obligations - Public contracts - Directive 92/50/EEC - Procedures for the award of public service contracts - Freedom to provide services - Agency of delegated project contracting - Persons to whom the task of delegated project contracting may be entrusted - Exhaustive list of legal persons under French law. Case C-264/03.

1. In this action for failure to fulfil obligations, the Commission seeks a declaration that, by reserving, in Article 4 of Law No 85704 of 12 July 1985 on public project contracting and its relationship to private project management, as amended by Law No 91662 of 13 July 1991, and by Law No 96-987 of 14 November 1996, (2) the task of delegated project contracting to an exhaustive list of legal persons under French law, the French Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (3) and, in particular, Articles 8 and 9 thereof, and under Article 49 EC.

2. This action enables the material scope of Directive 92/50 to be clarified, and, in particular, the definition of the term contract'. Moreover, it concerns both compliance with that directive and the principle of freedom to provide services laid down in Article 49 EC, which makes it necessary to define the relationship between these two pieces of legislation.

I - Factual and legislative background

3. It must be noted at the outset that Article 4 of Law No 85-704, which is the subject of the present action, is in the process of being amended. Order No 2004566 of 17 June 2004 amends that article, by permitting authority henceforth to be delegated both to public bodies and to private persons. (4) The order creates an incompatibility between the role of agent and any task of project management, execution of works or technical supervision relating to the work or works connected to the delegated authority' in order to avoid conflicts of interest. (5) The incompatibility extends to any undertakings connected with the agent. A draft law aiming to ratify that order was laid before the Assemblée Nationale on 15 September 2004. However, the Court has consistently held that the failure to fulfil obligations must be assessed as at the end of the period of two months from the reasoned opinion, dated 27 June 2002. That is why in the rest of this Opinion I shall be referring to the French law as it was in force at that time.

4. Before explaining the respective positions of the French Republic and the Commission on these two issues, let me briefly set out the relevant national and Community law provisions.

5. Directive 92/50 coordinates the procedure for the award of public service contracts. It aims to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer goods or services to contracting authorities in another Member State'. (6) To achieve that aim, the Directive seeks to ensure that undertakings from other Member States will be able to tender for contracts or bundles of contracts likely to be of interest to them for objective reasons relating to their value.' (7) Under Directive 92/50 two categories of services, set out in Annexes IA and IB, are subject to different regimes. In accordance with Article 9 of the Directive, the rules applicable to the services listed in Annex IB are concerned only with a requirement for a definition of the technical specifications and the sending of a notice of the result of the award procedure. On the other hand, the services listed in Annex IA of the Directive are, in accordance with Article 8 thereof, subject to more extensive obligations: they must, for example, be subject to prior advertising in accordance with detailed procedures and fixed timelimits.

6. The principle of freedom to provide services set out in Article 49 EC applies to all provisions

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of services, provided that they do not fall within the exceptions laid down in Articles 45 EC and 46 EC. Since Directive 92/50 applies only to the provision of services based on public contracts, (8) services carried out on other bases are only subject to the principle of freedom to provide services. Contracts not exceeding the financial thresholds defined in Article 13 of Directive 92/50 are also subject to Article 49 EC.

7. The Law which is the subject of these proceedings organises and regulates public project contracting. It applies to the execution of all construction or infrastructure projects, and to industrial plant intended for their operation where the contracting authorities are the State, public bodies or certain designated private bodies. (9) Within that framework, the contracting authority may enter into an agency contract in accordance with the provisions of that law.

8. The features of this type of contract are specified in Article 5 of Law No 85-704: the relationship between the contracting authority and [the agent] shall be governed by an agreement, which shall be void unless it provides for:... the project which forms the subjectmatter of the agreement, the responsibilities entrusted to the agent, the terms under which the contracting authority shall certify completion of the agent's tasks, the detailed arrangements for the agent's remuneration, the penalties applicable to the agent in the event of breach of his obligations and the circumstances in which the agreement may be terminated;...'

9. Article 3 of that law then lists the responsibilities which the contracting authority may entrust to an agent:

- Defining the administrative and technical terms according to which the project will be worked up and executed;

- Preparing for the selection of the project manager, signature of the project management contract, after approval of the choice of the project manager by the contracting authority, and management of that contract;

- Approving the preliminary designs and agreements on the project;

- Preparing for the selection of the contractor, signature of the contract for the works, after approval of the choice of the contractor by the contracting authority, and management of that contract;

- Paying the remuneration for the project management and the works;

- Acceptance of the works, and carrying out any measures relating to the aforementioned responsibilities.'

10. Under Article 2 of that law, certain tasks are not eligible for delegation by the contracting authority. They include the general design of the work and the way that it is carried out.

11. As is apparent from the abovecited provisions of the Law at issue in these proceedings, the responsibilities that the contracting authority may entrust to the agent are very broad. However, what constitutes the specific nature of the agency contract is the identity of the agent, which the contracting authority may select only from the exhaustively prescribed classes in Article 4 of the law in question:

(a) The legal persons referred to in Article 1(1) and (2) of this Law, excepting public undertakings engaged in health and social matters, which may act as agents only for other such undertakings;

(b) Legal persons of which at least half the capital is held, directly or through an intermediary, by the legal persons referred to in Article 1(1) and (2) and whose purpose is to render their assistance to the contracting authority, provided that they are not acting as project manager or contractor on behalf of a third party;

(c) The private bodies for lowrent housing mentioned in Article L. 4112 of the Code de la construction

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et de l'habitation, but only for other lowrent housing bodies and for projects linked to a subsidised housing operation;

(d) Local public/private partnership companies governed by Law No 83597 of 7 July 1983 on local public/private partnership companies;

(e) Public undertakings created under Article L. 3211 of the Code de l'urbanisme as well as urban land associations approved or formed automatically under Article L. 3221 et seq. of the Code de l'urbanisme;

(f) Companies formed under Article 9 of Law No 51592 of 24 May 1951 concerning the Treasury special accounts for 1951, as amended by Article 28 of Law No 62933 of 8 August 1962 supplementing the Law providing guidance concerning agriculture;

(g) Any public or private person to which is entrusted the creation of a concerted development area or a housing development...;

(h) Companies which enter into the contract prescribed in Article L. 2221 of the Code de la construction et de l'habitation for the execution of operations of urban restructuring of large estates and areas of rundown housing....'

12. Agency contracts made pursuant to Law No 85-704 are not subject to the French Code des marchés publics (Code on Public Procurement). (10) The contracting authority is not obliged to go through the process of preliminary competitive tendering regarding its choice of agent. On the other hand, the agent itself is subject to the Code des marchés publics (11) in respect of any contracts it enters into on behalf of the contracting authority. The question which arises is whether agency contracts made pursuant to Law No 85-704 must be subject to the principles of putting out to competitive tender and of prior advertising which stem from Directive 92/50 and the provisions of the Treaty which relate to the freedom to provide services.

13. After having sent a letter requesting information to the French Republic on 31 May 2000, the Commission, not satisfied with the replies it received, sent France a letter of formal notice on 25 July 2001. As the replies sent by the French authorities did not convince the Commission, it sent a reasoned opinion on 27 June 2002. Although the French Republic announced the imminent repeal of the provisions in issue, the Commission chose to bring an action before the Court.

14. I should point out that the Commission's complaints turn on two aspects. First, the agency contract as described by French legislation falls within the scope of Directive 92/50 and its conditions are incompatible with Articles 8 and 9 of that directive. Second, where Directive 92/50 is not applicable, Article 4 of the Law in question, in so far as it reserves agency contracts to certain legal persons, is not consistent with the provisions of the Treaty which relate to the freedom to provide services.

15. In so far as Directive 92/50 is applicable, I shall consider the question of compliance with that Directive. Subsequently, it will be necessary to establish whether Law No 85-704 is consistent with Article 49 EC, where the directive is not applicable.

II - Incompatibility of Law No 85-704 with Directive 92/50

16. In order to establish whether, as the Commission claims in its action, Article 4 of Law No 85-704 is incompatible with the provisions of Directive 92/50, we must first examine whether the situations covered by that law fall within the scope of the Directive.

A - The inclusion of agency contracts as defined by Law No 85704 within the scope of Directive 92/50

17. The parties disagree in essence on whether agency contracts as defined by Law No 85-704 fall

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within the material scope of Directive 92/50. The scope of that directive is defined in Article 1 thereof. Therefore, for the purpose of establishing whether there is any failure to fulfil obligations, I must first consider whether an agency contract as defined by Law No 85-704 fulfils the criteria of Article 1(a) of Directive 92/50.

18. According to the definition given under that provision, public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'. Those criteria appear to be satisfied in this case.

19. Firstly, contracting authorities, within the meaning of Article 1(b) of the Directive, are the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.' Bodies governed by public law are defined in the same article in a functional way as any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character' and controlled by the State, whether by a majority capital holding or by the power to appoint the management authorities of the body concerned. Under Article 1 of Law No 85-704, those who may perform the tasks of a contracting authority are the State and its public undertakings, local authorities, their public undertakings, public undertakings for new town planning, groups thereof and associations of different types of public undertaking. Agency contracts may also be made under Law No 85-704 by the private bodies mentioned in Article L. 64 of the Code de la sécurité sociale (Social Security Code) and consortia and federations thereof as well as private bodies for low-rent housing and public/private partnership companies, for rented accommodation subsidised by the State and provided by such bodies and companies. There is no doubt that these bodies are all contracting authorities within the meaning of Directive 92/50.

20. Secondly, it is apparent from Article 5 of Law No 85-704 that all agency contracts must be made in writing. The second condition set out in Article 1(a) of Directive 92/50 is therefore satisfied.

21. Thirdly, for the agency contract to be valid, Article 5 of the said Law provides for the agent to be remunerated. The agency contract for project contracting is therefore a contract for pecuniary interest.

22. Fourthly, the responsibilities entrusted to the agent, as described in Article 4 of the Law, seem to correspond to the provision of services.

23. In applying these criteria, it appears, on first analysis, that the agency contract within the meaning of French legislation is a public service contract for the purposes of Article 1(a) of Directive 92/50.

24. However, the French Republic puts forward two arguments against that classification. First of all, it submits that, in the light of its numerous specificities, the agency contract as defined under Law No 85-704 cannot be considered a public service contract. Moreover, it takes the view that the reasoning adopted by the Court in Ordine degli Architetti and Others , (12) which is applicable by analogy, means that the agency contract within the meaning of Law No 85-704 also falls outside the scope of Directive 92/50.

1. Does the agency contract for project contracting mean that there is a transfer of official authority?

25. The French Republic asserts that the agency contract for project contracting may be distinguished from a contract for the provision of services on several counts. The essence of the agency contract is the power it grants the agent to represent the contracting authority. An inseparable link binds this representative role to the other responsibilities devolved to the agent. Thus the agent is charged with a task of general interest and even has a power of co-decision making with the contracting

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authority. The terms of the relationship between the contracting authority and the agent are quite different from those under a contract of a commercial nature. These specificities considered together prevent an agency contract from being treated as a contract for the provision of services.

26. The Commission disputes each of the arguments put forward. It asserts that the fact that services are provided under an agency contract is not sufficient to make them fall outside the scope of Directive 92/50. Thus, agency contracts made between a lawyer and his client, for example, fall within the ambit of that directive, under point 21 of Annex IB thereto. Moreover, such an analysis is consistent with that put forward by the Conseil d'Etat in its judgment of 5 March 2003, (13) in which it held that a general and systematic exclusion of agency contracts from the French Code des marchés publics was not compatible with Directive 92/50. Finally, nor does the existence of considerations of general interest preclude classification as a public service contract within the meaning of the Directive, since such elements are very often present in contracts subject to the Directive. (14) Thus, none of the specificities put forward by the French Republic would appear to be capable of excluding the contract from the scope of Directive 92/50.

27. The first question to be resolved concerns the nature of the contract made between the contracting authority and its agent. Although in principle it is immaterial to ascertain which classification national law accords to a contract made between a contracting authority and a service provider for the purposes of classifying it under Community law, it is to be noted nevertheless that the Directive applies only to contracts' for services, excluding, inter alia, public service concessions.

28. Without claiming that the contractual relationship in issue is to be treated as a concession, (15) the French Republic maintains that there is nevertheless a transfer of the exercise of official authority, from the contracting authority to the agent. It thus attempts to establish a parallel between the caselaw on concessions and the line of reasoning which the Court might adopt concerning agency contracts for project contracting. Indeed, it is clear from an analysis of the caselaw that it is precisely such a transfer of official authority to the concession holder that makes it fall outside the scope of Directive 92/50. After setting out the Community caselaw on concessions, we shall see whether it is possible to transpose that caselaw to the agency contract in issue in this case.

29. Whereas concessions for public works are expressly subject to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, (16) service concessions are not governed by Directive 92/50. It has been established that they are excluded from its scope. (17) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (18) which replaces, inter alia, Directive 92/50, maintains this exclusion of service concessions from its scope.

30. The criterion for a concession, although not laid down by any legislative provisions, may be ascertained by comparison with the definition set out in Directive 93/37. (19) In its interpretative communication on concessions under Community law, (20) the Commission also seeks to work out a definition of this term and declares the existence of exploitation risk to be the determining factor. Directive 2004/18 eliminates all uncertainty in this regard, as it defines a service concession in Article 1(4) as a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.'

31. In BFI Holding , the Court held that a contract classified as a concession under national law, which concerned refuse collection, could fall within the scope of Directive 92/50. (21) Indeed, without concerning itself with the national law's classification, the Court referred solely to the conditions laid down in Article 1 of Directive 92/50.

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32. In his Opinion in Telaustria and Telefonadress , Advocate General Fennelly had suggested using first the fact that the concessionaire itself must bear the principal... economic risk.' (22) The fact that the concession contract is made for the benefit of thirdparty users is a subsidiary criterion and, according to him, the requirement that the service ceded must be in the public interest ought to be disregarded. In that case, the Court did not rule on the precise scope of the term, while holding that a concession existed where the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service'. (23)

33. When the Court was considering the Loto concession in Italy, (24) it held that, in the absence of any transfer of authority to the concessionaire, the concession had to be regarded as a contract subject to Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts. (25)

34. The criterion on remuneration of the concessionaire cannot be transposed to reasoning about agency contracts. Indeed, the right of exploitation cannot exist in connection with delegation of project contracting. On the other hand, let us check whether the agency contract effects a transfer of official authority from the contracting authority to the agent. This would be a sign that such a contract would in fact not be a contract for the purposes of Directive 92/50. On the contrary, in the absence of any such transfer, the argument submitted by the French Republic would have to be rejected.

35. The difficulty in this case rests in the specific nature of the agency contract, under which the agent represents the principal. However, and this is why the French Republic's argument based on this particularity cannot succeed, the agency contract for project contracting, as defined under Law No 85-704, is not only a contract under which the agent undertakes to represent the contracting authority. As may be seen from the list of the diverse responsibilities that may be entrusted to the agent, in accordance with Article 3 of the Law, the agent also provides assistance to the contracting authority. (26)

36. The French Republic submits that the two tasks performed by the agent are inseparable. However, the fact that Article 3 of Law No 85704 provides only an indicative list of the tasks that may be entrusted to an agent militates against the French Republic's interpretation. According to that provision of the Law in question, the contracting authority may quite easily use a service provider to perform certain services and entrust only representative duties to the agent. On the other hand, it may entrust all the tasks listed in Article 3 of the Law to one person. The contracting authority's freedom is curtailed only by Article 2 of the Law which forbids it from resiling from the task in its role as primarily responsible for the project'. The fact that the contracting authority may choose which tasks it does or does not wish to entrust to the agent illustrates that it is entirely conceivable that the agent's various tasks can be separated: on the one hand, those which relate to the provision of services and, on the other, those which include a role of representing the contracting authority.

37. Since it is possible to distinguish the two kinds of responsibilities entrusted to the agent, there is nothing to prevent those two categories of task from being subject to different rules. As regards the provision of services carried out under an agency contract for project contracting, they correspond to the concept of public service contracts within the meaning of Article 1(a) of Directive 92/50. Therefore, at least in so far as it involves a provision of services, an agency contract for project contracting concluded pursuant to Law No 85-704 will be subject to the rules of that directive.

38. Let me now analyse the second category of tasks entrusted to the agent, in order to determine whether they may fall outside the scope of the Directive in that they might correspond to a transfer

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of official authority. The agent represents the contracting authority in two situations: firstly, when the project management contract is signed and when the contract for works is signed and, secondly, when paying remuneration to the service providers and contractors engaged.

39. Although the agent is entitled to sign the project management contracts and the contracts for works on behalf of the contracting authority, it may do so only after having obtained its agreement. (27) In that situation there cannot be any genuine transfer of official authority, as the agent is not in a position to make autonomous decisions.

40. As regards paying their remuneration to the service providers and contractors, the finance is provided by the contracting authority, so that the agent does not have any freedom to act in that regard either. It merely advances funds, which are reimbursed to it by the contracting authority.

41. Thus, although the agent may carry out certain legal transactions on behalf of the contracting authority, it does not thereby have sufficient autonomy in the performance of its tasks to be able to be regarded as the beneficiary of a transfer of official authority. (28) Therefore, the argument put forward by the French Republic concerning the specific nature of the delegation of project contracting must be rejected and this contract must be subject, in its entirety, to the provisions of Directive 92/50.

2. The possible effect of the decision in Ordine degli Architetti and Others

42. The French Republic asserts that the reasoning in Ordine degli Architetti and Others is applicable by analogy and it has the effect of excluding all agency contracts from the scope of the directives relating to public contracts. In this case, an Italian court had referred a question to the Court for a preliminary ruling on the compatibility with Community law of national legislation which provided that an applicant for a building permit may be partly or wholly exempt from payment of a contribution due as a result of the grant of building permission, in return for direct execution of infrastructure works (such as residential streets, parking areas, or networks for the distribution of gas.)

43. After having analysed the execution of such works as falling within the ambit of Directive 93/37, the Court declared that national legislation such as that at issue was incompatible with that directive in cases where the value of the work in question exceeds the ceiling fixed by that directive. (29) In other words, the Court considers that the contract made between the municipality and the landowner seeking a building permit falls within the scope of the Directive. Before arriving at that conclusion, the Court gives a proviso at paragraph 100 of the judgment: That does not mean that, in cases concerning the execution of infrastructure works, the Directive is complied with only if the municipal authorities themselves apply the award-of-contract procedures laid down therein. The Directive would still be given full effect if the national legislation allowed the municipal authorities to require the developer holding the building permit, under the agreements concluded with them, to carry out the work contracted for in accordance with the procedures laid down in the Directive so as to discharge their own obligations under the Directive. In such a case, the developer must be regarded, by virtue of the agreements concluded with the municipality exempting him from the infrastructure contribution in return for the execution of public infrastructure works, as the holder of an express mandate granted by the municipality for the construction of that work. Article 3(4) of the Directive expressly allows for the possibility of the rules concerning publicity to be applied by persons other than the contracting authority in cases where public works are contracted out.'

44. The Commission and the French Republic interpret that passage in different ways.

45. The French Republic infers a general theory about agency from that paragraph. (30) According to its suggested interpretation of the paragraph, in order for the provisions of Directive 93/37

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or Directive 92/50 to be complied with, it is sufficient that the agent itself be subject to those directives. Law No 85-704 is therefore consistent with Community law, since it makes contracts made by the agent subject to the same obligations as if the contracting authority made them. (31)

46. The Commission attempts to identify the differences between the main proceedings and those which gave rise to the judgment in Ordine degli Architetti and Others. Firstly, it points out that different directives are in issue. Then, it notes that, in a situation such as that in Ordine degli Architetti and Others , the municipality may not choose its agent, which is necessarily the paying party with the building permit. Finally, the contract made between a municipality and the landowner applying for a building permit provides only for the deduction of a charge due in return for infrastructure works, and not some other provision of services carried out for the benefit of the municipality.

47. In the light of these considerations, it seems to me that the judgment in Ordine degli Architetti and Others cannot be interpreted in the way suggested by the French Republic. Indeed, as the Commission explains, provided that the works contracts entered into by the landowner are subject to the requirements of Directive 93/37, the effectiveness of that directive is maintained. (32) To put it another way, for compliance with the objectives of Directive 93/37, it is immater ial whether the contracting authority obliged to put out to competitive tender is the municipality or the landowner applying for the building permit.

48. If it were accepted, by analogy, that the contract for the provision of services made between the contracting authority and the agent was able to fall outside the ambit of Directive 92/50, this would go against the effectiveness of that directive. Indeed, in contrast to the situation considered by the Court in Ordine degli Architetti and Others , a distinction must be made between, on the one hand, the representative tasks such as the signing of contracts on behalf of the contracting authority and, on the other, services performed for pecuniary interest by the agent for the contracting authority. Any application of Ordine degli Architetti and Others could relate only to the first of those tasks. If there were a transfer of official authority from the contracting authority to the agent, then it might be considered that applying Directive 92/50 to the agent alone would be sufficient to ensure the effectiveness of the legislation. On the other hand, in respect of provisions of services carried out for the benefit of a contracting authority, the mere fact that they are carried out under an agency contract cannot prevent their being subject to that Directive.

49. As regards the representative activities of the agent, in the absence of any transfer of official authority, these activities must be treated as provisions of services. Moreover, in so far as a contracting authority may entrust to a service provider, under a public contract and not by way of agency, tasks of assistance identical to those which might be carried out by an agent, there can be no doubt that Directive 92/50 applies to the agency contract for project contracting. It is established that the classification of a contract under national law cannot have the effect of circumventing the applicability of Community law. It is thus apparent that Directive 92/50 is applicable to provisions of services performed by the agent for the contracting authority, and the classification of that contractual relationship under national law has no bearing whatsoever.

50. In any event, and as will be seen more clearly in the third section, even when an agency contract as defined by French legislation does not fall within the scope of the Directive, it remains subject to the requirements relating to the freedom to provide services.

B - The incompatibility of Article 4 of Law No 85-704 with Directive 92/50

51. Where the agency contract within the meaning of Law No 85704 falls within the scope of Directive 92/50, we must see whether the French legislation is compatible with that directive. Article 4 of Law No 85-704, which is the subject of these proceedings, reserves the role of agent to exhaustively

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listed categories of public persons under French law.

52. This appears to be clearly inconsistent with the aim of Directive 92/50 to grant equal access for all service providers to public procurement. (33) As the Court held, with regard to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, (34) although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive' (35) The same assertion applies to Directive 92/50. Article 4 of Law No 85704 is thus clearly inconsistent with the principle of equal treatment of tenderers by virtue of the fact that it reserves exclusively to certain classes of publiclaw legal persons the benefit of agency contracts for project contracting.

53. Moreover, Law No 85-704 does not require any prior competitive tendering for the conferment of an agency contract, so that the contracting authority is completely free in its choice, within the class of public persons referred to in Article 4 of that Law, even if the value of the services concerned exceeds the ceiling laid down by Article 13 of Directive 92/50.

54. As pointed out above, the requirements regarding competitive tendering and prior advertising differ, depending on whether the services rendered to the contracting authority are listed in Annex IA or IB to Directive 92/50. Whether a service belongs to category IA or IB therefore affects which rules apply to it. Contracts which relate to services listed in Annex IB are subject to lesser obligations than those which relate to services covered by Annex IA. Where the contract is a mixed one, Article 10 of Directive 92/50 provides: [c]ontracts which have as their object services listed in both Annexes IA and IB shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex IA is greater than the value of the services listed in Annex IB. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

55. In this case, and without needing to determine which procedure ought to apply to the agency contract for project contracting, it is sufficient to observe that the law under scrutiny does not lay down any procedure for competitive tendering by agents. Thus, whether the provision of services entrusted to him falls within Annex IA or Annex IB, Law No 85-704 is not compatible with Articles 8 and 9 of Directive 92/50.

56. Even if the classification of the services performed by the agent has little effect in the light of the incompatibility of the national legislation with Directive 92/50, clarification is required, as the parties hold opposing views. (36) The French Republic claims, in the alternative, that the services performed by the agent are in essence legal services, as referred to in point 21 of Annex IB to Directive 92/50, and, to a lesser extent, administrative tasks, such as preparing the competitive tendering and contract award procedures and accountancy matters, which come under category 27 (other services) of the same Annex. The Commission takes the view that the agent mainly provides architectural and engineering services, listed in point 12 of Annex IA. According to the Commission, the agent's purely representative tasks can fall within point 27 of Annex IB of Directive 92/50, entitled Other services'.

57. On reading Article 3 of Law No 85-704, cited in point 9 of this Opinion, which describes the tasks which may be conferred on the agent, it seems difficult to assert, as the Commission does, that the tasks entrusted to the agent consist only in architectural planning or engineering services listed in category 12 of Annex IA, even if defining the administrative and technical terms according to which the project will be worked up and executed' (37) as well as acceptance of the works' (38) appear to fall within this category. In that respect this must be considered on a case-by-case basis. Under Article 10 of Directive 92/50, the contracting authority will be in a position to establish which rules are applicable to the agency contract for project contracting

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in question, as it does not seem possible to subject them all to the same regime, given the variety in the subjectmatter of such contracts. (39)

58. In the light of these considerations, Article 4 of the Law in question is incompatible with Articles 8 and 9 of Directive 92/50. (40) In cases where the Directive does not apply, it remains to be determined whether Article 4 of Law No 85-704 is consistent with the principle of the freedom to provide services.

III - The incompatibility of Article 4 of Law No 85-704 with Article 49 EC

59. The question may well be asked what the point is of applying both the Treaty articles relating to freedom to provide services and freedom of establishment and the directives governing public contracts, in this case Directive 92/50. However, in respect of all the public contracts which fall outside the scope of the directives, the Treaty provisions on free movement may of course apply. (41) Likewise, contracts outside the scope of Directive 92/50, such as concession contracts, are still subject to the general rules of the Treaty. (42) Thus, in respect of the situation where the agency contract for project contracting fell short of the financial thresholds of Directive 92/50, (43) or if it were covered by an exception to that directive, it must be determined whether Article 4 of the Law in question is consistent with Article 49 EC.

60. According to the French Republic, Article 49 EC does not apply to this case, as the agent does not provide any services. Unlike a service provider, the agent takes part in a task of general interest, acts in a representative role on behalf of a public person and is the beneficiary of a transfer of responsibilities together with a power to make decisions.

61. As explained above, it does not appear that there is anything preventing the tasks carried out by the agent from being classified as provisions of services.

62. Moreover, the French Republic reiterates its line of argument based on Ordine degli Architetti and Others and considers that its legislation is consistent with Article 49 EC provided that the agent is subject to the rules governing public contracts in respect of the contracts he enters into on behalf of the contracting authority.

63. The French Republic's interpretation of that judgment is not convincing. Indeed, as explained above, the agent does not simply make contracts on behalf of the contracting authority, but also performs numerous remunerated services for him. The Commission's criticisms relate exclusively to the contractual relationship in which the agent is in fact a service provider. The judgment in Ordine degli Architetti and Others envisages only agency in the strict sense, that is, the situation where the agent acts merely on behalf of the person he represents. Moreover, at no point does that judgment exclude an agency contract from being classified as a provision of services. As soon as the agent also acts as a service provider it is, as such, subject to Article 49 EC.

64. Reserving the right to enter into agency contracts for project contracting to certain public-law legal persons under Article 4 of Law No 85-704 constitutes a restriction on freedom to provide services. Although the provision in question does not make express reference to the nationality of authorised service providers, it is, in fact, practically impossible for an undertaking from another Member State to obtain the legal status of a legal person governed by French public law. (44)

65. Furthermore, even if it were possible for a foreign undertaking to belong to one of the categories of legal persons cited in Article 4 of the Law in question, to require a foreign undertaking to change its legal status in order to be able to provide the services in question would be contrary to the principle of freedom to provide services. As Advocate General Lenz made clear in point 22 of his Opinion in Commission v Italy , (45) [e]ntrepreneurial freedom, which Article 59 is

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specifically intended to protect, implies that such a step should not be necessary.'

66. In short, Article 4 of Law No 85-704 constitutes a restriction on freedom to provide services in that it has the effect of reserving to service providers of French nationality the contracts relating to the services listed in Article 3 of that law.

67. Since the fact that Law No 85-704 is inconsistent with Article 49 EC is established, it is necessary to consider whether the first paragraph of Article 45 EC applies, which provides that [t]he provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.' The Commission considers the application of that exception, and then rejects it. Having pointed out that that exception must be interpreted strictly as applying to activities... which in themselves involve a direct and specific connection with the exercise of official authority,' (46) the Commission states that the tasks entrusted to the agent are essentially technical in nature, which does not correspond to that definition.

68. As regards the activities in which the agent represents the contracting authority, such as the signing of the project management and works contracts, and the remuneration of contractors and service providers, the Commission also considers that Article 45 EC is inapplicable. The signing of the contracts is subject to the contracting authority's agreement, so that, according to the Commission, it cannot be considered that there is actually any delegation of official authority to the agent. Nor does paying remuneration to the contractors and service providers constitute the exercise of official authority by the agent, since the finances are provided by the contracting authority.

69. As demonstrated above, the agent does not take part in any exercise of official authority, whether the tasks entrusted to him are those of assistance or representation. Therefore, the exception provided for in Article 45 EC does not apply to it. (47)

70. Nor does the exception laid down in Article 46 EC apply, since the French Republic has not put forward any justification relating to public policy, public security or public health.

IV - Conclusion

71. In the light of the foregoing, I propose that the Court declare that the French Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and in particular Articles 8 and 9 thereof, and under Article 49 EC, by reserving, in Article 4 of Law No 85-704 of 12 July 1985 on public project contracting and its relationship to private project management, as amended by Law No 91-662 of 13 July 1991 and Law No 96-987 of 14 July 1996, the task of delegated project contracting to an exhaustive list of legal persons under French law.

(1) .

(2) - Respectively JORF of 13 July 1985, p. 7914, of 19 July 1991, p. 9524, and of 15 November 1996, p. 16656, hereinafter referred to as Law No 85-704'.

(3) - OJ 1992 L 209, p. 1.

(4) - JORF No 141 of 19 June 2004.

(5) - Such an incompatibility was provided for only with regard to the agents listed in Article 4, second indent, of the Law in its earlier version.

(6) - Case C-360/96 BFI Holding [1998] ECR I6821, paragraph 41.

(7) - Case C-16/98 Commission v France [2000] ECR I8315, paragraph 44. The case concerned

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Council Directive 93/38/EEC of 14 June 1993 corordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

(8) - Eighth recital in the preamble to Directive 92/50.

(9) - Article 1 of Law No 85-704: the contracting authorities are (1) The State or its public undertakings; (2) Local authorities, their public undertakings, public undertakings for new town planning created under Article L. 3211 of the Code de l'urbanisme (Town Planning Code), groups thereof and associations of different types of public undertaking, referred to in Article L. 166-1 of the Code des communes (Municipal Code); (3) The private bodies mentioned in Article L. 64 of the Code de la sécurité sociale (Social Security Code), and consortia and federations thereof; (4) The private bodies for lowrent housing, mentioned in Article L. 4112 of the Code de la construction et de l'habitation (Building and Housing Code), and public/private partnership companies, for rented accommodation subsidised by the State and provided by such bodies and companies.'

(10) - This stemmed from Article 3(7) of the Code des marchés publics, enacted by Decree No 2001-210 of 7 March 2001 on the Code des marchés publics (JORF of 8 March 2001, p. 3700). On that subject, see Richer, L, Le contrat de mandat au risque du droit administratif, CJEG 1999, p. 127. It should be noted that this provision was annulled by a decision of the Conseil d'Etat (France) of 8 March 2003. The Code des marchés publics enacted by Decree No 2004-15 of 7 January 2004 (JORF of 8 January 2004, p. 703) takes into account that annulment: from then on, agency contracts are subject to the Code.

(11) - Article 4, last paragraph, of Law No 85-704.

(12) - Case C-399/98 Ordine degli Architetti and Others [2001] ECR I-5409.

(13) - Case No 233372, Union nationale des services publics et industriels et commerciaux and Others.

(14) - See, in that regard, Case 3/88 Commission v Italy [1989] ECR 4035.

(15) - Note that different types of contracts for the delegation of public service which exist under French law may be treated as concessions under Community law. The term concession is wider under Community law than in French law.

(16) - Article 3 of Directive 93/37 (OJ 1993 L 199, p. 54), most recently amended by Commission Directive 2001/78/EEC of 13 September 2001 amending Annex IV to Council Directive 93/36/EEC, Annexes IV, V and VI to Council Directive 93/37/EEC, Annexes III and IV to Council Directive 92/50/EEC, as amended by Directive 97/52/EC, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38/EEC, as amended by Directive 98/4/EC (Directive on the use of standard forms in the publication of public contract notices) (OJ 2001 L 285, p. 1).

(17) - Case C-324/98 Teleaustria and Telefonadress [2000] ECR I10745, paragraph 48, and Order in Case C-358/00 Buchhandler-Vereiningung [2002] ECR I-4685, paragraphs 27 and 28.

(18) - OJ 2004 L 134, p. 114. Indeed, Article 17 of this directive states that this Directive shall not apply to service concessions'.

(19) - Article 1(d) of Directive 93/37 defines a public works concession as a contract of the same type as that indicated in (a) [that is, public works contracts] except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment'.

(20) - OJ 2000 C 121, p. 2.

(21) - Case cited above. Advocate General La Pergola had analysed the situation differently:

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[t]o sum up, I consider that there is no third party element, that is to say no essential distinction between ARA and the two municipalities, in the present case. What is involved here is a form of inter-departmental delegation that remains within the administrative ambit of the municipalities. In assigning the activities in question to ARA, the municipalities had absolutely no intention of privatising the functions they themselves had previously performed in this sector. In short, I take the view that the relationship between the municipalities and ARA cannot be regarded as a contract within the meaning of the Directive' (point 38 of the Opinion).

(22) - Opinion delivered on 18 May 2000 in Teleaustria and Telefonadress , point 30.

(23) - Teleaustria and Telefonadress , paragraph 58.

(24) - Case C-272/91 Commission v Italy [1994] ECR I-1409, paragraph 24.

(25) - OJ 1977 L 13, p. 1, amended by Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62 and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 127, p. 1).

(26) - For example defining the administrative and technical terms according to which the the project will be worked up and executed, or the management of contracts for project management or works.

(27) - Note that the agent, on the other hand, cannot oppose a decision taken by the contracting authority.

(28) - On the lack of autonomy of an approved commissioner in relation to the Insurance Inspectorate, see Case C-42/92 Thijssen [1993] ECR I-4047, paragraphs 20 to 22. See, also, Cases 3/88 and C272/91 Commission v Italy.

(29) - Ordine degli Architetti and Others , paragraph 103.

(30) - At the hearing the French Republic added that Directive 2004/18 took up this theory about agency in Article 11 by applying it to central purchasing bodies.

(31) - Article 4, last subparagraph, Law No 85-704.

(32) - Of course, a different conclusion would be reached if the landowner applying for a building permit were not subject to the obligations of the Directive for contracts he makes with contractors, because then the Directive would not apply at all, even where the buildings to be constructed are public works' within the meaning of the Directive.

(33) - See, in particular, the 20th recital in the preamble to the Directive.

(34) - OJ, English Special Edition 1971(II), p. 682.

(35) - Case C-243/89 Commission v Denmark [1993] ECR I3353, paragraph 33. See also point 18 of the Opinion of Advocate General Tesauro in that case: [o]n that point, it is hardly necessary to point out that, where a public contract falls to be awarded, it is precisely because the procedure is a competition that it must be ensured that all those who take part have an equal chance: otherwise, it would no longer be a public tendering procedure but private bargaining. In sum, equal treatment underlies any set of rules governing procedures for the award of public contracts since it is the very essence of such procedures'.

(36) - Moreover, this question carries implications concerning the consistency with Directive 92/50 of Law No 85-704, as amended by Order No 2004-566.

(37) - Article 3, first indent, of Law No 85-704.

(38) - Article 3, sixth indent, of Law No 85-704.

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(39) - Case C-411/00 Felix Swoboda [2002] ECR I10567.

(40) - In this regard, it should be noted that, under Article 2(2) of the French Code des marchés publics, as adopted by Decree No 2004-15, contracts made under an agency agreement granted by one of the public entities referred to in 10 of this Article' are subject to the provisions of that code.

(41) - Joined Cases 27/86 to 29/86 CEI and Others [1987] ECR 3347, paragraph 15, and order in Case C59/00 Vestergaard [2001] ECR I9505, paragraphs 19 to 21.

(42) - Case C-108/98 RI.SAN [1999] ECR I-5219, paragraph 20, and Teleaustria and Telefonadress , paragraph 60. See also Cassia, P. Contrats publics et principe communautaire d'égalité de traitement , RTDEur. 2002, p. 413.

(43) - Article 7 of Directive 92/50.

(44) - Cases 3/88 and C-272/91, Commission v Italy , cited above. On the subject of free movement of goods, the Court follows the same reasoning: Case C21/88 Du Pont de Nemours Italiana [1990] ECR I-889. On that subject, see also the study by R. Noguellou La délégation de maitrise d'ouvrage publique face au droit communautaire: un conflit latent' in Problèmes actuels de droit communautaire LGDJ, 1998.

(45) - Case C-360/89 Commission v Italy [1992] ECR I-3401.

(46) - Case 3/88 Commission v Italy.

(47) - On this point, see the case-law cited in note 27.

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62000O0358 : N 29

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

AUTLANG Portuguese

APPLICA Commission ; Institutions

DEFENDA France ; Member States

NATIONA France

PROCEDU Action for failure to fulfil obligations - successful

ADVGEN Poiares Maduro

JUDGRAP Rosas

DATES of document: 24/11/2004
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Notice for the OJ

Action brought on 17 June 2003 by the Commission of the European Communities against the French Republic

Case C-264/03

An action against the French Republic was brought before the Court of Justice of the European Communities on 17 June 2003 by the Commission of the European Communities, represented by B. Stromsky, K. Wiedner and F. Simonetti, acting as Agents, with an address for service in Luxembourg.

The Commission of the European Communities claims that the Court should:

1.declare that, by reserving, in Article 4 of the Law of 12 July 1985, delegated management contracts to an exhaustive list of legal entities governed by French law, the French Republic has failed to fulfil its obligations under Directive 92/50/EEC,[1] and in particular Articles 8 and 9 thereof, and under Article 49 of the Treaty establishing the European Community;

2.order the French Republic to pay the costs.

Pleas in law and main arguments:

Reserving delegated management contracts to certain legal entities governed by French law constitutes a breach of Directive 92/50/EEC and a restriction on the principle of the freedom to provide services laid down in Article 49 of the Treaty which is not justified under the exception provided for in Article 45 of the Treaty.

The management contract is a public service contract within the meaning of Article 1(a) of Directive 92/50. Moreover, management contracts fall within Category No 12 of Annex IA, apart from contracts exclusively or principally concerning representative tasks, so that the French legislation fails to comply with Article 8 of the Directive. Management contracts which relate exclusively or principally to representative tasks come under Annex IB of the Directive, so that the French legislation fails to comply with Article 9 of the Directive as well.

Secondly, reserving delegated management contracts solely to the legal entities listed in Article 4 of the Law of 12 July 1985 on the supervision of public work and its relation with the supervision of private work, as amended, constitutes a restriction on the principle of the freedom to provide services. Such a restriction cannot be justified either by Article 45, inasmuch as the tasks entrusted are not connected, even occasionally, with the exercise of official authority, or by Article 46, since grounds of public policy, public security or public health are not applicable in the present case.

_____

[1] - (Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209 of 24.07.1992, p. 1).

Judgment of the Court (Third Chamber) of 27 October 2005

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

Freedom to provide services - Procedures for the award of public service contracts - Award of contracts - Criteria - Conditions of admissibility - Specific case

(Art. 49 EC)

Article 49 EC precludes a contracting authority from providing, in the tendering specifications for a public contract for health services of home respiratory treatments and other assisted breathing techniques, first, for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favours the undertaking which was previously providing the service concerned, in so far as those criteria are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine.

(see para. 79, operative part)

In Case C-234/03,

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

Contse SA,

Vivisol Srl,

Oxigen Salud SA

v

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

interested parties:

Air Liquide Medicinal SL,

Sociedad Española de Carburos Metalicos SA,

THE COURT (Third Chamber),

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

Advocate General: C. Stix-Hackl,

Registrar: M. Ferreira, Principal Administrator,

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

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after considering the observations submitted on behalf of:

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

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

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

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

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

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

gives the following

Judgment

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

Article 49 EC precludes a contracting authority from providing, in the tendering specifications for a public contract for health services of home respiratory treatments and other assisted breathing techniques, first, for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favours the undertaking which was previously providing the service concerned, in so far as those criteria are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine.

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

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

Legal background

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

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

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

The facts and the dispute in the main proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) admission conditions requiring undertakings which wish to submit a tender already to have offices open to the public in the province or the capital of the province in which the service is to be provided; and

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

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

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

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

The question referred for a preliminary ruling

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

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

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

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of the service concerned, and the fact that the service is paid for by the Spanish health administration, support that conclusion. It is, however, for the national court to determine whether in fact that is the case.

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

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

25. It must be recalled, as all the parties which lodged observations before the Court have done, that, disregarding Article 46 EC, the national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, according to settled case-law, fulfil four conditions in order to comply with Article 43 EC and Article 49 EC: they must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it (see Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32; Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37; and Case C-243/01 Gambelli and Others [2003] ECR I-13031, paragraphs 64 and 65).

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

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

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

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

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

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

32. It is clear from the file that the Spanish market in gas for medical use is 97% controlled

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by four multinational undertakings. Moreover, as Contse rightly observed without being contradicted on that point, there cannot be any major differences between the participants as regards the number of points awarded for the techn ical aspects because all the tenderers use similar technical equipment which is produced by only two or three undertakings.

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

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

The admission condition

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

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

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

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

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

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

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

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

43. Even assuming that the existence of such an office may be regarded as suitable for ensuring

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patients' health, it is evident that the requirement to have an office at the time the tender is submitted is clearly disproportionate.

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

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

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

The evaluation criteria

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

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

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

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

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

52. Furthermore, as was stated in paragraph 40 of this judgment, it is common ground that the disputed

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elements in the contested calls for tenders have all been included in order to provide better protection for the life and health of patients. Insalud goes on to explain that those elements are designed, more particularly, to resolve problems with the supply of oxygen and the functioning of equipment and to ensure an adequate supply of the service in question, without undue delay or harm to the patient.

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

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

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

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

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

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

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

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

61. In any event, although reliability of supplies may be included in the elements to be considered in order to ascertain the most economically advantageous tender in the case of a service such as

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that in question in the main proceedings, which aims to protect the life and health of persons by providing a suitable and diversified production close to the place of consumption (see, by analogy Case C-324/93 Evans Medical and Macfarlan Smith [1995] ECR I-563, paragraph 44), it must be held that those elements do not appear, in this case, to be adapted to the objective pursued in several respects.

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

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

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

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

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

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

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

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

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

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

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

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

74. However, the evaluation criteria under consideration go beyond what is necessary. 1.3 points are still awarded where total annual production exceeds a threshold of at least 1 200 000 m3 and 1 500 000 m3 respectively and 2 extra points if that production is at least 1 600 000 m3 and 2 000 000 m3 respectively.

75. It should be noted that those figures, which correspond to the third total annual production threshold, represent each time twice the figure for the first threshold, set out in paragraph 73 of this judgment.

76. It follows that, in so far as the maximum number of points is allocated to tenderers with a production capacity which largely exceeds the consumption expected in the context of the contested calls for tenders, while the first threshold already appears suitable for ensuring, as far as possible, a reliable supply of gas, the evaluation criteria used in the case, as regards the award of extra points where the second and third total annual production thresholds are exceeded, are not compatible with the requirements of the relevant Community law (see, by analogy, EVN and Wienstrom , paragraph 71).

77. Finally, as regards the manner of deciding between two tenderers with the same number of points, the award criterion used applies not only where there is an overall tie, but also where there is a tie in respect of technical aspects between two tenders with the same number of points, and favours the undertaking which was already supplying the service.

78. The conditions to be fulfilled, set out above, are also applicable to such a criterion. Deciding automatically and definitively in favour of the operator already present on the market concerned is discriminatory.

79. It follows from all the foregoing considerations that Article 49 EC precludes a contracting authority from providing in the tendering specifications for a public contract for health services of home respiratory treatment and other assisted breathing techniques, first, for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within

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1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favour the undertaking which was already providing the service concerned, in so far as those elements are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine.

Costs

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

DOCNUM	62003J0234
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-09315
DOC	2005/10/27
LODGED	2003/06/02
JURCIT	11997E012 : N 1 3 19 20 11997E043 : N 1 4 19 20 24 25 11997E046 : N 25 11997E049 : N 1 4 19 20 24 25 36 79 31992L0050 : N 23 47 48 31992L0050-A03P2 : N 1 5 19 20 47 31992L0050-A09 : N 47 31992L0050-A14 : N 47 31992L0050-A16 : N 47 31992L0050-N1LB : N 47 68 61980J0022 : N 36 61988J0003 : N 36 61992J0019 : N 25 61993J0324 : N 61 61994J0055 : N 25 62001J0079 : N 34 62001J0243 : N 25 37 60 62001J0448 : N 68 70 71 76 62003J0231 : N 23
CONCERNS	Interprets 11997E049 -

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SUB	Freedom of establishment and services ; Free movement of services
AUTLANG	Spanish
OBSERV	Spain ; Austria ; Member States ; Commission ; Institutions
NATIONA	Spain
NATCOUR	*A9* Audiencia Nacional, auto de 16/04/2003
NOTES	Meisse, Eric: Procédure de passation, Europe 2005 Décembre no 412 Comm. p.19 ; Brown, Adrian: Evaluation Criteria for the Supply of Home Respiratory Treatment Services in Spain: a Note on C-234/03, Contse SA, Vivisol and Oxigen Salud SA v Insalud, Public Procurement Law Review 2006 p.NA48-NA54 ; Burgi, Martin: Juristenzeitung 2006 p.305-307
PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl
JUDGRAP	Rosas
DATES	of document: 27/10/2005 of application: 02/06/2003

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Notice for the OJ

Reference for a preliminary ruling by the Audiencia Nacional by order of that Court of 16 April 2003 in the case of Contse S.A., Vivisol SRL and Oxigen Salud S.A. against INSALUD (now INGESA)

(Case C-234/03)

Reference has been made to the Court of Justice of the European Communities by order of the Audiencia Nacional (National High Court) of 16 April 2003, received at the Court Registry on 2 June 2003, for a preliminary ruling in the case of Contse S.A., Vivisol SRL and Oxigen Salud S.A. against INSALUD (now INGESA) on the following questions:

Is it contrary to Articles 12, 43 et seq. and 49 et seq. of the EC Treaty, and Article 3(2) of Council Directive 92/50/EEC[1] of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, to include in the general specifications and special administrative clauses and technical specifications governing public competitions relating to home respiratory treatments and other assisted breathing techniques: 1) the requirement that, in order to qualify to tender, undertakings must already have offices open to the public in the province or capital of the province in which the service is to be provided; 2) award criteria which favour: a) tenders from undertakings established within a 1 000 Km radius of the capital in which the service is to be provided; b) undertakings which already have offices open to the public in certain towns in that province; or c) undertakings which have been providing the service previously?

_____

[1] - OJ L 209 of 18.06.1992, p. 1.

**Judgment of the Court (Grand Chamber)
of 21 July 2005
Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti. Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy. Articles 43 EC, 49 EC and 81 EC - Concession for the management of a public gas-distribution service. Case C-231/03.**

1. Competition - Agreements, decisions and concerted practices - Agreements between undertakings - Concept - Grant by a public authority of a concession to operate a public service - Excluded

(Art. 81 EC)

2. Freedom of movement for persons - Freedom of establishment - Freedom to provide services - Direct award of a concession for the management of a public gasdistribution service - Not permissible in the absence of sufficient transparency

(Arts 43 EC and 49 EC)

1. Article 81 EC, which applies, according to its wording, to agreements between undertakings', does not, in principle, apply to contracts for concessions concluded between municipalities acting in their capacity as public authorities and concessionaires entrusted with responsibility for a public service.

(see para. 12)

2. Articles 43 EC and 49 EC preclude the direct award by a municipality of a concession for the management of the public gas-distribution service to a company in which there is a majority public holding and in the capital of which the municipality in question has a 0.97% holding, if that award does not comply with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

(see paras 21, 28, operative part)

In Case C-231/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), by decision of 14 February 2003, received at the Court on 28 May 2003, in the proceedings

Consorzio Aziende Metano (Coname)

v

Comune di Cingia de' Botti,

intervener:

Padania Acque SpA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), A. Rosas, R. Silva de Lapuerta and A. Borg Barthet, Presidents of Chambers, R. Schintgen, S. von Bahr, J.N. Cunha Rodrigues, G. Arestis, M. Ilei, J. Malenovsku and J. Kluka, Judges,

Advocate General: C. Stix-Hackl,

Registrar: L. Hewlett, Principal Administrator,

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having regard to the written procedure and further to the hearing on 1 March 2005,

after considering the observations submitted on behalf of:

- Consorzio Aziende Metano (Coname), by M. Zoppolato, avvocato,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato,

- the Netherlands Government, by D.J.M. de Grave, acting as Agent,

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

- the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

- the Commission of the European Communities, by X. Lewis, K. Wiedner and C. Loggi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 April 2005,

gives the following

Judgment

1. The reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 49 EC and 81 EC.

2. That reference has been made in proceedings between Consorzio Aziende Metano (Coname') and the Comune di Cingia de' Botti (municipality of Cingia de' Botti) concerning the award by the latter to Padania Acque SpA (Padania') of service covering the management, distribution and maintenance of methane gas distribution installations.

Law

3. Under Article 22(3) of Law No 142 of 8 June 1990 on the organisation of local selfgovernment (Legge no 142, recante ordinamento delle autonomie locali) (ordinary supplement to GURI No 135 of 12 June 1990, Law No 142/1990'), a service such as that covering the management, distribution and maintenance of methane gas distribution installations may be provided by the public authority itself, by concession to third parties through recourse to outside undertakings or, in accordance with Article 22(3)(e), by means of companies limited by shares or limitedliability companies with predominantly local public capital, established by, or with the participation of, the body responsible for the public service and, if it is found to be appropriate due to the nature or extent of the territory covered by the service, with the participation of a number of public or private operators'.

The main proceedings and the question referred for a preliminary ruling

4. Coname had concluded with the Comune di Cingia de' Botti a contract for the award of the service covering the maintenance, operation and monitoring of the methane gas network for the period from 1 January 1999 to 31 December 2000.

5. By letter of 30 December 1999, that municipality informed Coname that, by decision of 21 December 1999, the municipal council had entrusted the service covering the management, distribution and maintenance of the methane gas distribution installations for the period from 1 January 2000 to 31 December 2005 to Padania. The latter company's share capital is predominantly public, held by the province of Cremona and almost all the municipalities of that province. The Comune di Cingia de' Botti holds a 0.97% share in the capital of that company.

6. The service at issue in the main proceedings was entrusted to Padania by direct award pursuant to Article 22(3)(e) of Law No 142/1990.

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7. Coname, which claims that the referring court should, inter alia, annul the decision of 21 December 1999, submits that the award of that service should have been made following an invitation to tender.

8. As it took the view that the outcome of the proceedings before it hinges on the interpretation of certain provisions of the EC Treaty, the Tribunal amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court) decided to stay those proceedings and to refer the following question to the Court for a preliminary ruling:

Do Articles 43 [EC], 49 [EC] and 81 EC, in so far as they prohibit, respectively, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State and on freedom to provide services within the Community in respect of nationals of Member States, as well as commercial and corporate practices which are liable to prevent, restrict or distort competition within the European Union, preclude provision for the direct award, that is to say without an invitation to tender, of the management of the public gasdistribution service to a company in which a municipality has a holding, whenever that holding is such as to preclude any direct control over the management itself, and must it therefore be declared that, as is the case in these proceedings, where the holding amounts to 0.97%, the essential preconditions for in-house management are not met?'

The question referred for a preliminary ruling

9. It must be observed at the outset that the case in the main proceedings appears to relate, as follows from the reply given by the referring court to a request for clarification made by the Court under Article 104(5) of its Rules of Procedure, to a service described as a concession, which does not fall within the scope of either Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) or Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) (see, to that effect, Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 56, and the order in Case C358/00 Buchhändler-Vereinigung [2002] ECR I-4685, paragraph 28).

10. The present judgment is therefore based on the premiss that the main proceedings concern the award of a concession, a premiss which it is for the referring court to verify.

11. That having been made clear, the referring court seeks, by its question, an interpretation of Articles 43 EC, 49 EC and 81 EC.

Article 81 EC

12. It must be recalled that Article 81 EC, which applies, according to its wording, to agreements between undertakings', does not, in principle, apply to contracts for concessions concluded between municipalities acting in their capacity as public authorities and concessionaires entrusted with responsibility for a public service (see, to that effect, Case 30/87 Bodson [1988] ECR 2479, paragraph 18).

13. Consequently, as the Finnish Government and the Commission rightly point out, that provision does not apply to the case in the main proceedings, as it is described in the order for reference.

14. There is therefore no need to answer the question in that regard.

Articles 43 EC and 49 EC

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15. By its question, the referring court seeks, in essence, to ascertain whether Articles 43 EC and 49 EC preclude the direct award, that is to say without an invitation to tender, by a municipality of a concession for the management of the public gas-distribution service to a company with predominantly public capital in which that municipality holds a 0.97% share.

16. It must be remembered that the award of such a concession is not governed by any of the directives by which the Community legislature has regulated the field of public contracts. In the absence of any such legislation, the consequences in Community law of the award of such concessions must be examined in the light of primary law and, in particular, of the fundamental freedoms provided for by the Treaty.

17. In that regard, it must be pointed out that, in so far as the concession in question may also be of interest to an undertaking located in a Member State other than the Member State of the Comune di Cingia de' Botti, the award, in the absence of any transparency, of that concession to an undertaking located in the latter Member State amounts to a difference in treatment to the detriment of the undertaking located in the other Member State (see, to that effect, Telaustria and Telefonadress , paragraph 61).

18. In the absence of any transparency, the latter undertaking has no real opportunity of expressing its interest in obtaining that concession.

19. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC (see in particular, to that effect, Case C-111/91 Commission v Luxembourg [1993] ECR I-817, paragraph 17, Case C-337/97 Meeusen [1999] ECR I-3289, paragraph 27, and Case C294/97 Eurowings Luftverkehr [1999] ECR I-7447, paragraph 33 and the case-law cited).

20. With regard to the case in the main proceedings, it is not apparent from the file that, because of special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in a Member State other than that of the Comune di Cingia de' Botti would have no interest in the concession at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed (see, to that effect, Case C-69/88 Krantz [1990] ECR I-583, paragraph 11; Case C44/98 BASF [1999] ECR I-6269, paragraph 16; and the order in Case C431/01 Mertens [2002] ECR I7073, paragraph 34).

21. In those circumstances, it is for the referring court to satisfy itself that the award of the concession by the Comune di Cingia de' Botti to Padania complies with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to ensure that an undertaking located in the territory of a Member State other than that of the Italian Republic can have access to appropriate information regarding that concession before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

22. If that is not the case, it must be concluded that there was a difference in treatment to the detriment of that undertaking.

23. With regard to the objective circumstances that could justify such a difference in treatment, it must be pointed out that the fact that the Comune di Cingia de' Botti has a 0.97% holding in the share capital of Padania does not, by itself, constitute one of those objective circumstances.

24. Even if the need for a municipality to exercise control over a concessionaire managing a public

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service may constitute an objective circumstance capable of justifying a possible difference in treatment, it must be pointed out that the 0.97% holding is so small as to preclude any such control, as the referring court itself observes.

25. At the hearing, the Italian Government submitted, in essence, that, in contrast to some large Italian cities, most municipalities lack the resources to provide, through in-house structures, public services such as that of gas distribution within their territory, and are therefore obliged to resort to structures, such as that of Padania, in the share capital of which several municipalities have holdings.

26. In that regard, it must be held that a structure such as that of Padania may not be treated in the same way as a structure through which a municipality or a city manages, on an inhouse basis, a public service. As is apparent from the file, Padania is a company open, at least in part, to private capital, which precludes it from being regarded as a structure for the in-house' management of a public service on behalf of the municipalities which form part of it.

27. The Court has not been made aware of any other objective circumstance capable of justifying any difference in treatment.

28. In those circumstances, the answer to the question referred must be that Articles 43 EC and 49 EC preclude, in circumstances such as those at issue in the main proceedings, the direct award by a municipality of a concession for the management of the public gasdistribution service to a company in which there is a majority public holding and in which the municipality in question has a 0.97% holding, if that award does not comply with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

Costs

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

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

Articles 43 EC and 49 EC preclude, in circumstances such as those at issue in the main proceedings, the direct award by a municipality of a concession for the management of the public gasdistribution service to a company in which there is a majority public holding and in the capital of which the municipality in question has a 0.97% holding, if that award does not comply with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

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AUTHOR Court of Justice of the European Communities

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FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-07287
DOC	2005/07/21
LODGED	2003/05/28
JURCIT	11997E043 : N 1 11 15 19 28 11997E049 : N 1 11 15 19 28 11997E081 : N 1 11 12 31992L0050 : N 9 31993L0038 : N 9 61987J0030 : N 12 61988J0069 : N 20 61991J0111 : N 19 61997J0294 : N 19 61997J0337 : N 19 61998J0044 : N 20 61998J0324 : N 9 17 62000J0358 : N 9 62001O0431 : N 20
CONCERNS	Interprets 11997E043 - Interprets 11997E049 -
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Competition ; Rules applying to undertakings
AUTLANG	Italian
OBSERV	Italy ; Netherlands ; Austria ; Finland ; Member States ; Commission ; Institutions
NATIONA	Italy
NATCOUR	*A9* Tribunale amministrativo regionale di Brescia, ordinanza del 14/02/2003 13/05/2003 (681) ; - Il Foro amministrativo 2003 p.1515 (résumé) ; - Il Foro amministrativo 2003 p.2174-2175 (résumé) ; - Muselli, Lucia: Affidamento diretto di servizi a società a prevalente capitale pubblico locale e principi comunitari di concorrenza, Il Foro amministrativo 2003 p.2175-2187
NOTES	Van den Berge, I.J.: De reikwijdte van het transparantiebeginsel bij de verlening van dienstenconcessies, Jurisprudentie bestuursrecht 2005 p.241-245 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Délégations de services publics, L'actualité juridique ; droit administratif 2005 p.2340-2342 ; Kotschy, B.: Arrêts "Stadt Halle", "Coname" et "Parking Brixen", Revue du droit de l'Union européenne 2005 no 4 p.845-853 ; Brown, Adrian: Transparency Obligations Under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti, Public Procurement Law Review 2005 p.NA153-NA159 ; Gaverini,

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Fabrizio: Nuove precisazioni in tema di in house providing e di "controllo" sulla partecipazione, non meramente simbolica, degli enti al capitale delle società che gestiscono pubblici servizi, Il Foro amministrativo 2005 p.2004-2015 ; G., F.: Ulteriori sviluppi sull'in house providing, Rassegna dell'avvocatura dello Stato 2005 p.44-50 ; Idot, Laurence: Transparence et contrats de concession, Europe 2005 Octobre no 338 p.23-24 ; Soncini, A.: Trasparenza ed effettività in materia di concessioni di servizi, Diritto comunitario e degli scambi internazionali 2005 p.693-704 ; Baldinato, M.: Alcune interessanti affermazioni della Corte di giustizia sull'applicazione del principio di trasparenza negli appalti pubblici, Rivista italiana di diritto pubblico comunitario 2005 p.1426-1432 ; X: Il Foro italiano 2006 IV Col.76-79 ; Ursi, Riccardo: La Corte di giustizia stabilisce i requisiti del controllo sulle società "in house", Il Foro italiano 2006 IV Col.79-82 ; Mok, M.R.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2006 no 171 ; Braun, Christian ; Hauswaldt, Christian: Vergaberechtliche Wirkung der Grundfreiheiten und das Ende der Inländerdiskriminierung?, Europäische Zeitschrift für Wirtschaftsrecht 2006 p.176-178 ; Van Harten, H.J.: S.E.W. ; Sociaal-economische wetgeving 2006 p.166-170 ; Mento, Sandro: Servizi pubblici e affidamenti trasparenti, Giornale di diritto amministrativo 2006 p.407-413 ; Prevedourou, E.: Epitheorisis Dimosiou Dikaiou kai Dioikitikou Dikaiou 2006 p.229-231

PROCEDU Reference for a preliminary ruling

ADVGEN Stix-Hackl

JUDGRAP Timmermans

DATES of document: 21/07/2005
of application: 28/05/2003

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Opinion of Advocate General Stix-Hackl delivered on 12 April 2005. Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti. Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy. Articles 43 EC, 49 EC and 81 EC - Concession for the management of a public gas-distribution service. Case C-231/03.

I - Introductory remarks

1. This reference for a preliminary ruling concerns the significance of primary law in the area of public procurement. The matter is concerned, in particular, with determining the obligations that are imposed on contracting authorities in pursuance of the fundamental freedoms. These proceedings thus also provide an opportunity to define further the case-law of the Court of Justice, in particular the Telaustria judgment. (2)

II - Relevant legislation

A - Community law

2. In the context of secondary Community law applying to public procurement, the following legislation (hereinafter: the directives'), which has since been superseded by new directives (the legislative package'), must be mentioned:

- from among the classic' directives, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (3) (hereinafter: Services Directive'), and

- Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (4) (hereinafter: Utilities Directive').

B - National law

3. Article 22(3) of Law No 142 of 8 June 1990 on local self-government (5) permitted municipalities and provinces to perform the local public functions for which they are responsible by one of the methods listed in (a) to (e) of that provision, namely:

(a) by public management, where, owing to the small size or the special features of the relevant function, it is not expedient to set up an institution or an undertaking;

(b) by concessions (concessione') to third parties, where there are technical, economic or social expediency reasons;

(c) by recourse to special undertakings, inter alia for the performance of a number of functions of economic and commercial interest;

(d) by recourse to institutions, for the performance of social functions not having any commercial interest;

(e) by recourse to companies limited by shares or to limited-liability companies with a predominantly public shareholding, which have been set up by or involve the participation of the establishment responsible for providing the public service concerned.

III - Facts, main proceedings and question referred for a preliminary ruling

4. The Consorzio Aziende Metano (hereinafter: Co.Na.Me.') had entered into a contract with the Municipality of Cingia de' Botti for the maintenance, supply and supervision of the methane gas network' for the period from 1 January 1999 to 31 December 2000.

5. By letter of 30 December 1999 the Municipality of Cingia de' Botti notified Co.Na.Me. that,

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by decision of 21 December 1999, the municipal council had approved the agreement with Padania Acque SpA for the management of the distribution and maintenance of the gas installation'. By that decision, approval was also granted for the draft contract between Padania Acque SpA (hereinafter: Padania') and the Municipality of Cingia de' Botti.

6. Padania, a predominantly state-owned undertaking, was created through the transfer of the former Consorzio per l'acqua potabile (Consortium for drinking water) to the municipalities of the Province of Cremona. Almost all the municipalities of that province have a holding in Padania, including the Municipality of Cingia de' Botti, which holds 0.97% of the share capital, together with the Province of Cremona itself.

7. In view of its nature, that undertaking was entrusted directly with supplying the services in question pursuant to Article 22(3)(e) of Law No 142.

8. Co.Na.Me. brought an action before the Tribunale Amministrativo Regionale per la Lombardia - Sezione staccata di Brescia (Lombardy Regional Administrative Court - Separate Chamber for Brescia) seeking, in particular, annulment of the municipality's decision. The national court referred the following question to the Court of Justice for a preliminary ruling:

Do Articles 43 [EC], 49 [EC] and 81 EC, in so far as they prohibit, respectively, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State and on freedom to provide services within the Community in respect of nationals of Member States, as well as commercial and corporate practices which are liable to prevent, restrict or distort competition within the European Union, preclude provision for the direct award, that is to say, without an invitation to tender, of the management of the public gas distribution service to a company in which a municipality has a holding, whenever that holding is such as to preclude any direct control over the management itself, and must it therefore be declared that, as is the case in these proceedings where the holding amounts to 0.97%, the essential preconditions for in-house' management are not met?

IV - Admissibility

9. The reference for a preliminary ruling in this case raises various issues as regards admissibility.

A - Article 81 EC

10. There are doubts concerning the admissibility of the question referred as regards Article 81 EC.

11. As the Court has consistently held, the national court must state the precise reasons which caused it to question itself as to the interpretation of Community law and to consider it necessary to refer questions to the Court for a preliminary ruling. (6) The Court has accordingly held that it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions of which it requests an interpretation and of the link it establishes between those provisions and the national legislation applicable to the dispute.

12. The Court has further held that it has no jurisdiction to rule on questions referred for a preliminary ruling where it is obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose. (7)

13. In the light of the abovementioned requirements established in the Court's case-law with regard to the admissibility of questions referred for a preliminary ruling, it should be noted that, apart from reproducing the wording of Article 81 EC, the observations on that Treaty provision in the order for reference merely point to the fact that free competition constitutes a general principle of Community law and that any infringement of that principle constitutes a wholly exceptional situation which is permitted only under specific conditions.

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14. On that basis, the order for reference fails, however, to meet the requirements of the case-law cited above as regards the reasons underlying the request for the interpretation of a provision of Community law.

15. According to consistent case-law, moreover, questions referred for a preliminary ruling are admissible only if the order for reference contains sufficient information on the facts of the case in the main proceedings. (8)

16. It is essential in that regard to impose particularly stringent criteria in the context of competition law, which includes Article 81 EC on the prohibition of cartels. (9)

17. As far as Article 81 EC is concerned, the order for reference also fails to meet the requirements as regards the facts. Thus, the order for reference does not contain, in particular, information on the undertakings concerned or on the practices which, in the view of the referring court, fall within the scope of Article 81 EC.

18. As regards Article 81 EC, the order for reference therefore fails to meet the criteria governing the admissibility of the question referred for a preliminary ruling.

B - The fundamental freedoms

19. The question referred raises problems as to admissibility also in relation to the fundamental freedoms cited (Articles 43 EC and 49 EC).

20. The Court had declared a reference for a preliminary ruling from the same Member State, which likewise concerned public procurement, to be inadmissible because, in that case, the undertaking which challenged the legality of the choice made by a municipality had its seat in Italy and did not operate on the Italian market in reliance on freedom of establishment or freedom to provide services. The Court of Justice concluded that the situation did not therefore have any connecting link with one of the situations envisaged by Community law in the area of the free movement of persons and services. If, however, there is a situation in which all the facts are confined to within a single Member State and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of the freedom of movement for persons and freedom to provide services, the fundamental freedoms do not apply. The Court of Justice came to that conclusion in the RI.SAN. case. (10)

21. However, the Court has also held references for a preliminary ruling to be admissible and has responded to them with indications as to the interpretation and application of primary law, even though the matters at issue likewise concerned purely internal situations. (11) In the context of public procurement, reference in this regard must be made to the Telaustria case, (12) in the main proceedings in which the parties came from the same Member State. The Buchhändler-Vereinigung case, (13) in which the principles developed in Telaustria were applied, must also be cited. Likewise in Buchhändler-Vereinigung , all parties to the proceedings were from the same Member State. The same is true of the ARGE case, in which the Court of Justice none the less answered a question on the interpretation of a fundamental freedom. (14)

22. It must therefore be determined why the Court none the less still ruled on the substance of those three references for a preliminary ruling concerning public procurement, even though the facts of those cases were similar to those in RI.SAN. One possible reason could be that, in the cases of Telaustria and Buchhändler-Vereinigung , the questions themselves specifically addressed the interpretation of directives. In contrast, the question referred in the present proceedings is focused specifically on primary law, in particular on two fundamental freedoms.

23. Consequently it could be inferred that the admissibility of a question referred for a preliminary ruling depends on its specific focus, that is to say whether it concerns primary or secondary law.

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(15)

24. There are two reasons to suggest, in these proceedings also, that the question referred with regard to the relevant fundamental freedoms is admissible, the first of which deals with procedure and the second with substance.

25. As far as procedure is concerned, it should be borne in mind that in preliminary ruling proceedings the Court of Justice is concerned with providing the referring court with an answer that will be of use to it. In some cases, that even means the Court having to reword the questions referred. In these proceedings, however, the question cannot be reworded because it focuses expressly on the interpretation of primary law, not on that of the directives, as the national court confirmed in its written answer to a question to that effect raised by the Court.

26. The question whether the main proceedings involve a concession or a contract for the purposes of Community law can ultimately be left unanswered. After all, as far as the Court is concerned, questions referred for a preliminary ruling need only give it cause to consider other factors in making an interpretation which may assist the determination of the main proceedings.' (16) Whether or not they are actually applied to the specific facts of the case in the main proceedings should not therefore be relevant.

27. As regards substance, it is essential to caution against dogmatising the approach adopted in the RI.SAN. case. In the specific context of procurement law, which is aimed at opening up national markets, whether or not all the parties in a given award procedure and/or in the subsequent national review procedure come from the same Member State as the contracting authority must not be the decisive factor. (17) That approach could even be construed as an indication that the requisite announcement of the award procedure had not in fact taken place and, therefore, that no foreign undertaking could participate in it. That is the case not only for the procurement directives but also for the fundamental freedoms concerned. Thus, protection must be afforded not only to the undertakings actually participating in an award procedure but also to potential tenderers. Therefore, undertakings from other Member States need only be potentially concerned for there to be a cross-border situation and, thus, for a criterion for the application of the fundamental freedoms to be met.

28. In so far as they concern the fundamental freedoms in Articles 43 EC and 49 EC, those reasons support the admissibility of the question referred.

V - Substance

29. The question referred for a preliminary ruling, in so far as it is admissible, essentially concerns the scope of Articles 43 EC and 49 EC, and more specifically the requirements or prohibitions under those provisions in respect of award procedures.

30. It thus relates to an essential part of the principles which the Court has described as fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.' (18)

A - Preliminary observations on the legislation applicable

31. Even though the question referred for a preliminary ruling refers expressly to the interpretation of specific provisions of primary law, that in itself still does not mean that those provisions are in fact applicable.

32. Rather, their applicability depends on whether the actual award process at issue in the main proceedings meets the relevant requirements for the application of those provisions of primary law.

33. In that regard it is irrelevant that the national court has described the award as a concessione' because that description could be a specific reference to national law, where that term is familiar.

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Nevertheless, the national term does not necessarily have to be coterminous with the Community law term. However, even if the national court has in mind the Community concept of concession, that still does not mean that classification of the award as such is actually accurate in the main proceedings.

34. Moreover, even if the requirements essential for the application of secondary law are met, further clarification is necessary to determine the directive under which the facts of this case fall. It should be noted in this regard that the Court is not familiar with all the relevant details of the facts of this case.

35. Since municipalities, as local authorities, are contracting authorities within the meaning of the classic directives on public procurement and the Utilities Directive alike, the purpose of the award should therefore be established. After all, that purpose determines which of the directives applies. (19)

36. Even if it is established that the Utilities Directive - a special directive in relation to the other directives - does not apply, it would still be unclear under which of the classic procurement directives the award falls. The decisive factor in that regard is the object of the award, whether, for instance, it concerns the supply of products, such as the supply of energy, or the provision of services, such as maintenance. If the award is for a mixed contract, that is to say, if it covers both products and services, the directive applicable is determined, in accordance with Article 2 of the Services Directive, by a comparison of the values of each of the component parts of the contract.

37. Although it cannot be inferred from the documents before the Court whether the main action is concerned with a mixed contract of that kind, that does not appear to be inconceivable in the light of the practice pursued in the Member State concerned, as is indeed shown by preliminary ruling proceedings in which the Court has already delivered its ruling. (20)

38. As already shown in RI.SAN. , the Court is unable to verify the accuracy of the referring court's analysis that the award of a public service contract is not at issue in the main proceedings. (21)

39. However, even if a given contract in principle meets all the requirements essential for the application of one of the directives, the actual award process could still be excluded from the scope of the directive in question. Thus, in this case, besides one of the exceptions expressly provided for in the directives, such as in Article 13 of the Utilities Directive, one of the unwritten exceptions established by the Court could also apply, such as the exception established in Teckal (22) and interpreted in the Stadt Halle judgment (23) in respect of quasiinhouse' contracts. If that were the case, primary law would again apply.

40. That would also be a reason for the national court to confine the question referred to the interpretation of primary law.

41. After all, if none of the directives is actually applicable, the fundamental freedoms, which impose on the Member States inter alia obligations of equality of treatment and transparency in relation to operators from other Member States, could be material to a decision in the case at issue.

B - Fundamental freedoms and positive obligations

42. These proceedings, which are concerned with establishing the obligations for the contracting authorities that derive from the fundamental freedoms enshrined in Articles 43 EC and 49 EC, relate to the central issue of whether the fundamental freedoms not only impose prohibitions in the form of restrictions on the actions of Member States but also lay down positive obligations and, if so, of what those obligations are.

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43. Some of the prohibitions deriving from the fundamental freedoms can easily be defined as restrictions; those prohibitions, moreover, have been the subject of countless proceedings before the Court. In the context of public procurement, reference might be had - simply by way of example - to the prohibition deriving from the free movement of goods, under which a contracting authority [is precluded] from including in the contract documents for that contract a clause requiring the use in carrying out the contract of a product of a specified make, without adding the words or equivalent.' (24)

44. However, the circumstances of that case and their treatment by the Court show very clearly that a prohibition against refraining from carrying out a measure, namely against refraining from adding particular words, can also be construed as an obligation to carry out a measure, that is to say to add particular words.

45. Applying that reasoning to the circumstances of the main action forming the basis of these preliminary ruling proceedings, those circumstances can thus be construed from at least two angles. First, it could be examined whether the fundamental freedoms - understood as meaning restrictions - impose a prohibition on contracts awarded directly or by private agreement. Secondly, it could be examined whether some degree of advertising or a particular form of publication is required under the fundamental freedoms. Whether or not a positive obligation is considered to exist therefore depends on whether the reasoning is based on omissions or on measures actively carried out.

46. However, for the purposes of answering the question referred for a preliminary ruling, it proves absolutely vital, for a further reason, to address the issue of positive obligations in the circumstances of this case.

47. Indeed, the circumstances at issue can also be considered from the perspective of defensive rights'. The practices of the contracting authority or entity awarding the concession may also be regarded as an encroachment on a right of a third party, and more specifically as an encroachment on the right of undertakings to participate in an award procedure or to submit a tender. Member States, including the contracting authorities or entities awarding concessions, must ensure observance of that right conferred by Community law.

48. For the sake of completeness it should be observed finally that the circumstances of this case could be assessed on the basis of whether they give rise to an obligation of protection or of guarantee on the part of the local authority concerned. In any event, it is not in dispute that a Member State, of which the municipality concerned in these proceedings is also considered a part, is required to safeguard the fundamental freedoms, in this case, those enjoyed by the undertakings, that is to say, by the potential tenderers.

49. The Court's case-law on mutual recognition is an essential starting point with a view to determining whether the fundamental freedoms contain any positive obligations and, if so, what their content is.

50. The Member States' obligation to set up and apply a particular procedure can, in fact, be inferred from that case-law. The obligation actively to carry out measures is addressed to the legislature, the administrative authorities and the judiciary alike. The requirements deriving from the fundamental freedoms relate in particular to the content of the procedure, for example, the requirement to carry out a specific examination procedure. From a procedural perspective, such examination is defined even further in that its objective and method - proceeding by way of a comparison of certain documents - are specified. In addition, the decisions must be reasoned and capable of being subject to review in judicial proceedings. (25)

51. Those requirements can also be transposed to public procurement law, an area concerned - likewise in this case - with the observance of certain procedural principles. It can therefore be concluded from the existing case-law on mutual recognition that the fundamental freedoms certainly do impose

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specific procedural obligations on the Member States.

52. A further source of rights under primary law - in addition to the fundamental freedoms - from which procedural requirements can be inferred is Article 10 EC. The first paragraph of that provision contains a clear obligation to take action which is addressed to the Member States (Member States shall take all appropriate measures ...'). That general and entirely fundamental provision at the very least gives rise to the obligation to organise procedures, thus including tendering procedures, in such a way that the Member States meet their substantive obligations under Community law.

53. To the extent to which certain obligations are derived from Community law, and thus from the fundamental freedoms in this case, the Member States, including the municipalities, also have to take relevant measures with regard to contracts or concessions, for instance comply with certain time-limits or proceed with specific publications.

54. Also connected with and developed from Article 10 EC are the Community law principles of equivalence and effectiveness, which impose certain limits as regards the procedural law of the Member States, including the law governing procurement procedure. The rules in question do not simply concern legal protection but actually relate to the phase upstream, that is to say when tendering procedures are carried out. Admittedly, in that respect each case must be analysed by reference to the role of [the] provision [concerned] in the procedure, its progress and its special features'. (26)

55. Those requirements of primary law, which supplement the Member States' obligations deriving from the fundamental freedoms, acquire great significance specifically beyond the scope of the procurement directives.

56. It remains, finally, to mention the general principles of law, from which it is possible likewise to infer rules for national procedural law and which may likewise play a part in the award procedure. That is true in particular of the general principle of equality (principle of equal treatment), which goes beyond the principle of non-discrimination on grounds of nationality.

C - Obligations arising from the fundamental freedoms in the area of public procurement

1. Restricted scope of the fundamental freedoms

57. Even if it is accepted that the fundamental freedoms apply as a rule to contracting authorities and entities awarding concessions, that still certainly does not mean that every award procedure is, on that ground, subject to the fundamental freedoms.

58. Thus it is not inconceivable for a contracting authority or entity awarding a concession to cite, as is their right, one of the numerous grounds which justify the non-application of the fundamental freedoms. Included in that regard, in addition to the grounds expressly laid down in the Treaty, such as public security or public health, (27) are the general interests as defined in the Cassis de Dijon case-law.

59. In one of its communications (28) the Commission also acknowledged that the grounds of justification can in general be applied as regards the award of concessions. Of course, the criteria essential for allowing the justification - the details of which I will not go into here - such as the proportionality of a national measure, must also be met in the context of procurement.

60. In addition to such justification relating to the fundamental freedoms, the derogations expressly provided for in the Treaty also come into play. Those derogations can in themselves apply to the award of concessions, as a result of which the awarding entity is not bound by the requirements of the fundamental freedoms.

61. Of relevance here, in particular, are the provisions concerning various aspects of internal

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or external security, reference to which was in fact made at the hearing. Article 296(1)(b) EC accordingly permits the Member States to take certain measures considered necessary for the protection of the essential interests of their security. In the area of public procurement, that involves the procurement of specific supplies intended for defence purposes. Although that sector is not exactly suitable for concessions, their inclusion still would not be ruled out on the basis of Community law.

62. Article 297 EC, for its part, permits Member States to take certain measures in specific crisis situations. That provision is likewise applicable in principle to procurement.

63. As is apparent in particular from Article 298 EC, the Member States' powers in applying the two Treaty provisions cited above are not by any means unlimited and are in particular subject to scrutiny by the Commission and the Court of Justice.

64. It remains, finally, to refer to a further provision of primary law which, although not tailored specifically to the fundamental freedoms, can still function as a derogation from them. Article 86(2) EC provides that the rules contained in this Treaty,' thus including the fundamental freedoms, apply in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them [the undertakings].' The provision lays down the further condition that the development of trade must not be affected beyond the degree specified. However, the sole addressees of that provision - in contrast with Article 10 EC, which applies to the Member States - are undertakings, and specifically only those which are entrusted with the operation of particular services or are revenue-producing monopolies. It therefore applies only to those entities awarding concessions which can be designated as undertakings of that kind.

65. As regards these preliminary ruling proceedings, it should therefore be examined whether the entity awarding the concession falls within one of the categories of undertaking covered by that derogation and whether the manner in which the award was made was necessary to enable it to perform its task of general interest in economically acceptable conditions. (29) Indeed, even the Member State concerned may rely on Article 86 EC to justify the grant of rights to an undertaking. (30)

66. To conclude, it is essential to mention the case-law in Teckal (31) and Stadt Halle (32) cited in the course of these proceedings, and the derogation laid down in Article 13 of the Utilities Directive applying to particular contracts awarded to affiliated undertakings.

67. The above case-law and provision allow, subject to very specific conditions, the non-application of the classic directives on public procurement or the Utilities Directive. Awards which come under one of those derogations are not therefore subject to the procurement rules under secondary law. However, primary law, including the fundamental freedoms at issue in these proceedings, then automatically applies.

68. However, neither the case-law cited nor the express provisions of the Utilities Directive result in the non-application of primary law. In fact, neither primary law nor case-law provide a basis for such a broad derogation from Community law. If, therefore, primary law applies to the award at issue in the main proceedings, the issue as to the significance of the case-law cited or of the provisions of the Utilities Directive is no longer relevant because that involves derogations from the application of secondary law.

2. Grading within primary law or a uniform set of rules on procurement?

69. Even if it is established that primary law, such as the fundamental freedoms, is applicable to a specific award, a further step is necessary in order to determine the specific obligations falling to the contracting authority or entity awarding the concession. It is therefore a matter of establishing the procurement rules which may be derived from the fundamental freedoms.

70. It is first of all uncertain in this regard whether the fundamental freedoms establish any

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set of rules at all, let alone a uniform set of rules, in other words whether the same rules apply to all awards they envisage. That may well be the case at a very generalised level. Accordingly, the contracting authorities and entities awarding concessions, regarded as part of the Member States, are required for instance to observe the principle of non-discrimination and to comply with certain restrictions on freedom of establishment and the freedom to provide services.

71. The very fact that rules even approximately as specific as those defined in the directives cannot be inferred from the fundamental freedoms militates against the argument that the same procedural rules, such as those concerning the method of publication and its content, are to apply to all awards.

72. In the interest of legal clarity and legal certainty, it would be advantageous to the contracting authorities, entities awarding concessions and undertakings as potential tenderers if there was a set of rules on procurement under primary law or indeed a few such sets of rules: then, it would be possible, for example, to avoid the problems that occasionally arise in practice as a result of the fact that, in the course of a procedure for the award of a concession, it is not until the negotiation stage that the award in question becomes a public contract. (33)

73. On the other hand, it is favourable for the parties to enjoy a margin of discretion in award procedures. The directives themselves thus provide for a number of options. The same must also be true a fortiori within the scope of primary law.

74. The problem now lies in determining categories of awards to which a particular set of rules applies in each case. However, criteria for distinguishing between different groups (categories) of awards cannot be deduced either from the wording of the Treaty or from the case-law on the fundamental freedoms, in particular the case-law relating to public procurement. The principle of proportionality itself suggests, however, that grading is necessary.

75. Admittedly, it would be conceivable to have recourse, also in this context, to the derogations established in the case-law in Teckal and Stadt Halle and under Article 13 of the Utilities Directive so that awards which they envisage are subject to a less stringent set of rules. However, the fact that there are absolutely no uniform rules on procurement under primary law from which a derogation could be made precludes application mutatis mutandis of the above derogations as a classification criterion.

76. It would therefore be appropriate to have recourse to criteria established by the directives themselves for the purpose of defining categories of awards.

77. The estimated value of the contract awarded is an essential criterion in that regard. (34) A further element for consideration is the subject-matter of the contract, that is to say whether it is for services, supplies or construction works. A distinction could be made between services, again as the directives do between excluded, non-priority and priority services, on the basis of their more detailed subject-matter. Furthermore, assessment should be based on the degree of complexity of the contract in question, that is to say, whether it involves relatively standardised products or complex infrastructure-related projects the technical, legal or financial conditions governing which cannot by any means be specified at the start of the award procedure.

78. The categorisation in the directives is based on the idea, applicable to procurement generally, that some awards are of greater relevance to the internal market than others, that is to say they are of interest to a wider group of economic operators - to be more precise, also to undertakings from other Member States. This could be a matter relevant particularly to application of the fundamental freedoms, given that they require a cross-border element.

79. Furthermore, for the purpose of distinguishing between the various categories, that is to say, attributing a particular award to a particular category and, therefore, also to a particular set

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of rules, specific circumstances, such as the existence of exclusive rights or urgency, could be taken into account, just as they are in the directives. Some awards which fall within the scope of the fundamental freedoms could in that way be exempted in full from the obligation to publish a contract notice.

80. However, in the extreme, a system applying to all awards - and consisting of a number of categories, for each of which there is a specific set of rules - would ultimately give rise to a complex set of procurement rules under primary law modelled on the rules laid down in the directives, or, more specifically, to a number of sets of rules. However, the transparency mentioned in these preliminary ruling proceedings constitutes just one regulatory area among many.

81. Lastly, reference must be made to the principle of effectiveness which is also applicable to award procedures. Under that principle, the procedure actually adopted, viewed as a whole, its progress and its special features must be taken into consideration. (35)

3. Rules applicable under primary law

82. To begin with, it can be established that the rules on procurement that apply within the scope of the directives cannot in any event apply under primary law. Two reasons above all militate against such wholesale transposition.

83. First, the rules laid down solely in respect of the awards envisaged by the directives would in that case effectively apply, without any recourse to the legislative procedure provided for in primary law, even beyond the scope of those directives. In that way, the Community legislative procedure would be circumvented. Secondly, those directives, which lay down rules exclusively for specific awards, would be circumvented.

84. However, it should be borne in mind, first of all, that the rules deriving from the fundamental freedoms apply, in principle, to all aspects of awards, that is to say, on the one hand, to their substance, which includes the description of the object of the service to be provided (for instance, by means of technical specifications or duration of a concession) as well as criteria for qualitative selection (qualifications primarily) and for the award of the contract, in which respect the principle of mutual recognition in particular must be observed. On the other hand, those rules also apply to the procedural aspect, thus to the procedure in the strict sense, which includes the choice of type of procedure - which also covers the publication of a contract notice - and the time-limits involved (for example, for receipt of the request to participate or of the tender).

85. In addition to the obligation of transparency at issue in these proceedings, the associated obligation of equality of treatment, (36) the principle of competition and the principle of proportionality can also be cited as rules that would also be applicable within the scope of primary law.

86. It can be inferred from the obligation of equality of treatment, for example, that concessionaires must be selected objectively. That also means that the requirements stipulated at the outset of the award procedure must be met and must be applied in the same manner to all candidates.

87. Since, however, these proceedings for a preliminary ruling are concerned exclusively with the issue of the transparency requirement, the following observations will be confined to that consideration.

a) Transparency

88. First it should be made clear that transparency, for the purposes of the directives, covers more than simply the matters connected with advertising particular award procedures. Such advertising comprises inter alia the various types of notice, whether in the form of an invitation to participate in an award procedure or a call for tenders, that is to say, an invitation to submit tenders.

89. The directives, moreover, acknowledge other obligations to publish, such as the obligation

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to announce the award that has been made. Furthermore, the directives impose obligations to compile internal records, for instance, in the form of written reports or by keeping particular documentation. (37) Those obligations could also be transposed to primary law.

90. In fact, the principle of transparency is, moreover, a guiding principle for the award procedure as a whole. It also comprises, for example, the demonstrability of decisions taken by contracting authorities and, generally, an objective approach during an award procedure.

91. In these proceedings the Court is requested to define further its case-law on the obligation to publish. In Telaustria it held, as a matter of principle, that the contracting authority must ensure, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.' (38)

92. In order to determine the degree of advertising' required, recourse must in the first instance be had to the objective of the transparency requirement of which an interpretation is sought. Indeed, as in the case of the directives, transparency is designed - also within the scope of primary law - to guarantee undistorted competition and contribute to the opening up of national markets.

93. The degree of advertising' necessary for an award relates primarily to the question whether there has to be any publication at all. Thus, cases in which a contract may be awarded by private agreement, that is to say by way of an award made without prior publication of a contract notice, cannot be ruled out. After all, whatever the directives allow must be permissible a fortiori under primary law. To avoid any blurring of the distinction between directives and primary law, it would be excessive to permit award procedures to go ahead without the publication of a contract notice only if the conditions specified in the directives are met, that is to say on the grounds exhaustively listed therein. It would also be excessive to make the validity of such procedures dependent on the requirement that all potential tenderers should be contacted. If the contracting authority or entity awarding a concession nevertheless proceeded to do that, the transparency requirement would in any case be met. (39)

94. Of course, contracting authorities or entities awarding concessions must, conversely, be prevented from abusing the discretion conferred on them. It could therefore be assumed that primary law imposes a principle of mandatory publication, which comprises various options for applying derogations. The contracting authority or entity awarding the concession would, accordingly, have to state the reasons, in the specific case, for its derogation from the publication rule.

95. However, even if the principle of mandatory publication is accepted, a number of issues are still unresolved.

96. For example, there is still the issue of the means of publication. This, on the one hand, involves geographical coverage, that is to say whether publication takes place at local, regional, national or European level. On the other hand, it relates to the actual publishing medium. Thus, in addition to the traditional print media such as official journals, the daily press or publications from the relevant economic sector, electronic forums such as the internet are also envisaged. In some circumstances recourse may even be had to the antiquated method of posting appropriate notices. (40)

97. However, the method of publication is just one aspect. In addition, it is important for the contracting authority or entity awarding the concession to know what restrictions are imposed on it by the fundamental freedoms as regards the minimum content of the notice. Generally, the rule of thumb here is that it is essential to give as much information as the undertakings need to enable them to decide whether to participate in the award procedure or to submit a tender. However, it is by no means possible to deduce from the fundamental freedoms sufficient details, applying to all circumstances, which can then be used in their entirety to produce model contract notices, as

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provided for in the directives. The general rule, which applies also to the minimum content of a contract notice, is, therefore, that the fundamental freedoms do not in all circumstances require the entity concerned to provide the information which is mandatory in the model contract notices under secondary law.

98. However, both the method of publication and the content of the notice published are dependent on the abovementioned criteria for distinguishing - within primary law - between categories of awards and for the resulting grading.

99. In view of the fact that the documents in the case, in particular the order for reference, do not provide the information necessary to make it possible to determine the degree of advertising appropriate to the main proceedings, and in view of the principle that it is not for the Court of Justice, in the preliminary ruling procedure under Article 234 EC, to apply provisions of Community law to specific circumstances, it will fall to the national court to rule on the question whether the obligation of transparency was complied with in the case in the main proceedings. (41)

100. To that end the national court must, in the manner of a market analysis, identify the economic operators to whom the proposed contract is of interest, bearing in mind the potential competition, the value and object of the contract in that respect playing a decisive role.

b) The derogation for some quasi-in-house' contracts

101. As already stated, neither the derogation under secondary law in the case-law in Teckal and Stadt Halle nor the derogation under Article 13 of the Utilities Directive can result in the non-application of primary law, and hence of the fundamental freedoms relevant in this case.

102. If the award at issue in the main proceedings is in fact to be regarded as a services concession and therefore does not fall within the scope of the directives, the question whether the directives do not apply to the award in question because of another factor, for example because of the derogation established by the case-law or laid down by the Utilities Directive, is redundant. In that case, primary law indeed applies for a different reason.

103. Moreover, in the context of a reference for a preliminary ruling under Article 234 EC, it does not fall to the Court of Justice to apply the Community provisions to the specific facts of the case. The Court has emphasised that point on a number of occasions, specifically in cases involving public procurement. (42) Accordingly, it instead falls to the national court to examine whether the criteria developed by the Court of Justice or the requirements laid down in the Utilities Directive are met in the main action. However, it would first be necessary to establish whether any of the directives is actually applicable.

104. If the matter concerns a services concession and, consequently, the directives are not applicable, the application of the two derogations for quasi-in-house' operations will in any event not be an issue.

VI - Conclusion

105. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling as follows:

Articles 43 EC and 49 EC are to be interpreted as establishing in principle an obligation of transparency. However, Articles 43 EC and 49 EC do not in all circumstances preclude the direct award of contracts, that is to say, contracts awarded without publication of a contract notice or a call for competition. In assessing whether a direct award is permissible in an award procedure such as the one at issue in the main proceedings, the national court must, in the manner of a market analysis, identify the economic operators to whom the proposed contract is of interest, bearing in mind the potential competition, the value and object of the contract playing a decisive role

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in that respect.

(1) .

(2) - Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745.

(3) - OJ 1992 L 209, p. 1, as amended.

(4) - OJ 1993 L 199, p. 84, as amended.

(5) - GURI No 135, 12 June 1990. That law was recast in Article 113 of Legislative Decree No 267 of 18 August 2000. That provision was subsequently amended by Article 35(1) of Law No 448 of 28 December 2001 (Finance Law for 2002).

(6) - Orders in Case C-54/03 Austroplant-Arzneimittel [2004] ECR I-0000, paragraph 11, Case C101/96 Italia Testa [1996] ECR I-3081, paragraph 6, Joined Cases C128/97 and C-137/97 Testa and Modesti [1998] ECR I-2181, paragraph 15, and Case C-9/98 Agostini [1998] ECR I4261, paragraph 6.

(7) - Order in Case C-54/03 (cited in footnote 6), paragraph 12, and judgments in Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 39, and Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 19.

(8) - Judgment in Joined Cases C-320/90, C-321/90 and C-322/90 Telemarsicabruzzo and Others [1993] ECR I-393, paragraph 6, and orders in Case C-157/92 Banchero [1993] ECR I-1085, paragraph 4, Joined Cases C-128/97 and C-137/97 (cited in footnote 6), at paragraph 5, Case C9/98 (cited in footnote 6), paragraph 4, and Case C-54/03 (cited in footnote 6), paragraph 10.

(9) - Judgment in Case C-176/96 Lehtonen and Castors [2000] ECR I2681, paragraph 22, and orders in Case C-157/92 (cited in footnote 8), paragraph 5, Case C-116/00 Laguillaumie [2000] ECR I4979, paragraph 19, and Joined Cases C-438/03, C-439/03, C-509/03 and C2/04 Cannito and Others [2004] ECR I-1605, paragraph 6.

(10) - Case C-108/98 RI.SAN. [1999] ECR I5219, paragraph 21 et seq.

(11) - See also Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 Reisch and Others [2002] ECR I2157, paragraph 24 et seq., which did not, however, concern procurement law.

(12) - Case C-324/98 (cited in footnote 2).

(13) - Order in Case C-358/00 Buchhändler-Vereinigung [2002] ECR I4685.

(14) - Case C-94/99 ARGE Gewässerschutz [2000] ECR I11037, in particular as regards the third question referred.

(15) - See, by contrast, Case C-448/98 Guimont [2000] ECR I10663. In that case the question referred specifically addressed the interpretation of primary law.

(16) - Case C-324/98 (cited in footnote 2), paragraph 59; emphasis added.

(17) - See also, for example, the circumstances at issue in Case C-94/99 (cited in footnote 14).

(18) - Case C-324/98 (cited in footnote 2), paragraph 60; confirmed, in different terms, in the order in Case C-59/00 Vestergaard [2001] ECR I9505, paragraph 20.

(19) - See, to that effect, Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I3609, and Case C-126/03 Commission v Germany [2004] ECR I-0000.

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(20) - Order of 14 November 2002 in Case C-310/01 Comune di Udine

(21) - Case C-108/98 (cited in footnote 10), at paragraph 20.

(22) - Case C-107/98 Teckal [1999] ECR I-8121.

(23) - Case C-26/03 Stadt Halle [2005] ECR I-0000.

(24) - Order in Case C-59/00 (cited in footnote 18), paragraph 24.

(25) - Case C-340/89 Vlassopoulou [1991] ECR I2357, paragraph 16 et seq.

(26) - Case C-276/01 Steffensen [2003] ECR I3735, paragraph 66, and Case C-327/00 Santex [2003] ECR I1877, paragraph 56.

(27) - As regards freedom of establishment and the freedom to provide services, the provisions concerned are Articles 45 EC and 55 EC.

(28) - Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2, point 3.1).

(29) - Case C-475/99 Ambulanz Glöckner [2001] ECR I8089, paragraph 57, and Case C-320/91 Corbeau [1993] ECR I2533, paragraph 16.

(30) - Case C-157/94 Commission v Netherlands [1997] ECR I5699, paragraph 32.

(31) - Case C-107/98 (cited in footnote 22).

(32) - Case C-26/03 (cited in footnote 23).

(33) - Green paper on public-private partnerships and Community law on public contracts and concessions, COM(2004) 327 final, paragraph 34 et seq.

(34) - The Community legislature considered in that regard that procedures laid down in the directives are not appropriate in the case of contracts of small value (order in Case C-59/00 (cited in footnote 18), paragraph 19).

(35) - Case C-276/01 (cited in footnote 26), paragraph 66, and - specifically with regard to procurement law - Case C-327/00 (cited in footnote 26), paragraph 56.

(36) - Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I8291, paragraph 31, and Case C324/98 (cited in footnote 2), paragraph 61.

(37) - See, to that effect, Article 12 of the Services Directive and Article 41 of the Utilities Directive.

(38) - Case C-324/98 (cited in footnote 2), paragraph 62; emphasis added.

(39) - Advocate General Fennelly acknowledges this at point 43 of his Opinion, with regard to the main proceedings in the Telaustria case, where the tenderers are not all or nearly all undertakings established in the same State as the contracting entity.

(40) - In its communication (cited in footnote 28), the Commission considers this to be a valid publishing medium.

(41) - For an analysis to that effect, see Case C-324/98 (cited in footnote 2), paragraph 63.

(42) - To that effect, simply see the judgments in Cases C-324/98 (cited in footnote 2), paragraph 63, C-18/01 Korhonen and Others [2003] ECR I5321, and C-448/01 EVN and Wienstrom [2003] ECR I-14527, and the order in Case C-310/01 (cited in footnote 20).

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62000J0358 : N 21 22
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62001J0276 : N 54 81
62001J0448 : N 103
62001O0310 : N 37 103
62003J0026 : N 39 66 75 101
62003J0126 : N 35
62003O0054 : N 11 12 15
62003O0438 : N 16

SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Competition ; Rules applying to undertakings
AUTLANG	German
NATIONA	Italy
PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl
JUDGRAP	Timmermans
DATES	of document: 12/04/2005 of application: 28/05/2003

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Notice for the OJ

Removal from the register of Case C-186/03 P 1

By order of 23 September 2004 the President of the Court of Justice of the European Communities has ordered the removal from the register of Case C-186/03 P: **Strabag Benelux NV** v **Council of the European Union**.

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Notice for the OJ

Appeal brought on 6 May 2003 by **Strabag Benelux NV** against the judgment delivered on 25 February 2003 by the Court of First Instance (Fifth Chamber) in Case **T-183/00** *Strabag Benelux NV* v *Council of the European Union*.

(**Case C-186/03 P**)

An appeal has been brought before the Court of Justice of the European Communities on 6 May 2003 by Strabag Benelux NV, represented by A. Delvaux and V. Bertrand, with an address for service in Luxembourg, against the judgment delivered on 25 February 2003 by the Court of First Instance (Fifth Chamber) in Case **T-183/00** *Strabag Benelux NV* v *Council of the European Union*.

The appellant claims that the Court should:

(set aside the judgment of the Court of First Instance inasmuch as it dismissed the applications for annulment and compensation on the ground that they were unfounded;

(uphold the forms of order sought by STRABAG in respect of those applications and accordingly:

*annul the decision of 12 April 2000 by which the Council awarded to the DE WAELE company the refitting and general maintenance work contract which was the subject of invitation to tender No 107865 published in the *Official Journal of the European Communities* S 146 of 30 July 1999, and by which the Council implicitly rejected the tender submitted by STRABAG;

*order the Council of the European Union to pay to STRABAG, subject to any increase, the sum of BEF 153 421 286 or EUR 3 803 214 together with interest thereon at the rate of 6% as from 12 April 2000;

(order the Council of the European Union to pay the costs.

Pleas in law and main arguments:

In support of its application for annulment, the appellant puts forward four pleas in law.

The first plea is divided into two limbs. The appellant first criticises the Court of First Instance for failing properly to construe the concepts of 'contract' and 'decision' in so far as it took the view that the contract which the Council concluded with the successful tenderer constituted the decision to award the contract. Second, the appellant claims that the Court of First Instance breached Article 8(3) of Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts in so far as the Court took the view that the written report required under that provision could consist of three documents, that is to say, the report to the Advisory Committee on Procurement and Contracts (ACPC), the favourable opinion of the ACPC, and the notice of contract award published in the *Official Journal*.

By its second plea in law, the appellant submits that there is a contradiction in the grounds of the judgment under appeal inasmuch as the Court of First Instance formed the view that the contract concluded between the Council and the successful tenderer was the decision to award the contract (paragraph 44) but examined the Council's letter of 11 March 2000 to determine that the decision to award the contract was adequately reasoned (paragraphs 56, 57 and 58). By way of alternative submission, the appellant criticises the Court of First Instance for having failed to ensure compliance with the obligation to state reasons imposed by Article 253 EC in so far as it took the view that the Council's letter of 11 March 2000 was adequately reasoned, particularly having regard to Article 8(1) of Directive 93/37.

By its third plea in law, the appellant contends that the Court of First Instance breached Articles 18 and 30(1) and (2) of Directive 93/37 and the contract documents and infringed the principles of equality and transparency inasmuch as it formed the view that the qualitative criteria have as their main function to check that each tenderer has the competence and abilities required to carry out the works and that the award criteria, in particular the qualitative and quantitative criteria, carry a different weight even though that does not follow from the contract documents.

By its fourth plea in law, the appellant criticises the Court of First Instance on the ground that it distorted the appellant's argument in forming the view that, in regard to the three criteria in respect of which STRABAG's tender was superior to that of the successful tenderer, the appellant had placed in question the Council's assessment in its report to the ACPC, whereas it in fact criticised the Council for having submitted during the proceedings before the Court of First Instance assessments which differed from those contained in that report.

In support of its claim for compensation, the appellant argues that, at the time when the contract was being awarded, the Council acted unlawfully in such a way as to incur non-contractual liability. This unlawful conduct formed the basis of significant damage incurred by STRABAG, which forfeited the profit which it hoped to secure

from performing the contract and whose commercial image and reputation have suffered as a result. The appellant calculates its total damage to be EUR 3 803 214, that is to say, 10% of the turnover which it might have hoped to achieve.

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ORDONNANCE DU PRÉSIDENT DE LA DEUXIÈME CHAMBRE DE LA COUR

23 mars 2006 (*)

«Radiation»

Dans l'affaire C-174/03,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par le Tribunale Amministrativo Regionale per la Sardegna (Italie), par ordonnance du 12 février 2003, parvenue à la Cour le 14 avril 2003, dans la procédure

Impresa Portuale di Cagliari Srl

contre

Tirrenia di Navigazione SpA

LE PRÉSIDENT DE LA DEUXIÈME CHAMBRE DE LA COUR

l'avocat général, Mme E. Sharpston, entendu,

rend la présente

Ordonnance

1 Par lettre du 23 février 2006, parvenue au greffe de la Cour le 3 mars 2006, le Tribunale Amministrativo Regionale per la Sardegna a informé la Cour qu'il retirait sa demande de décision à titre préjudiciel.

2 Dans ces conditions, il y a lieu d'ordonner la radiation de la présente affaire.

3 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, le président de la deuxième chambre de la Cour ordonne:

L'affaire C-174/03 est radiée du registre de la Cour.

Fait à Luxembourg, le 23 mars 2006

Le greffier	Le président de la deuxième chambre
R. Grass	C.W.A. Timmermans

* Langue de procédure: l'italien.

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Order of the President of the Second Chamber of the Court of 23 March 2006 (reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Sardegna (Italy)) - Impresa Portuale di Cagliari Srl v Tirrenia di Navigazione SpA

(Case C-174/03) [1]

Language of the case: Italian

The President of the Fourth Chamber of the Court has ordered that the case be removed from the register.

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1 -

2 - OJ C 213, 06.09.2003.

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OPINION OF ADVOCATE GENERAL
JACOBS
delivered on 21 April 2005 (1)

Case C-174/03

Impresa Portuale di Cagliari Srl
v
Tirrenia di Navigazione SpA

1. In this case the Tribunale amministrativo per la Sardegna (the Administrative Court for Sardinia) has referred to the Court two questions concerning the interpretation of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. (2)

2. First, the national court seeks clarification on how to categorise, for the purposes of Directive 93/38, an entity whose activities are carried out partly subject to competition and partly under a de facto monopoly.

3. Then, depending on the answer to that question, it wishes to know whether the technical specifications mentioned in Article 18 of Directive 93/38 must be laid down before the selection of the successful bidder and whether they must be publicised.

The Directive

4. In so far as is relevant, the aims of Directive 93/38 are explained as follows in the preamble.

5. Recitals 11 and 12 state that the main reasons for which entities operating in the sectors concerned do not purchase on the basis of Community-wide competition are 'the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the national authorities' and the 'various ways in which national authorities can influence the behaviour of these entities, including participations in their capital and representation in the entities' administrative, managerial or supervisory bodies'.

6. As regards scope, recital 13 states that 'this Directive should not extend to activities of those entities which either fall outside the sectors [concerned], or which fall within those sectors but are nevertheless directly exposed to competitive forces in markets to which entry is unrestricted'.

7. With regard to the existence of competition in certain areas, recitals 18 and 19 state respectively that, in view of the various Community legal acts designed to introduce more competition between the entities offering air transport services to the public, it is 'not appropriate for the time being to include such entities in the scope of this Directive although the situation ought to be reviewed at a later stage in the light of progress made as regards competition', and that, 'in view of the competitive position of Community shipping, it would be inappropriate for the greater part of the contracts in this sector to be subject to detailed procedures; … the situation of shippers operating sea-going ferries should be kept under review; [and] certain inshore and river ferry services operated by public authorities should no longer be excluded from the scope of Directives 71/305/EEC and 77/62/EEC'. (3)

8. Article 1(1) states that for the purposes of Directive 93/38 '"public authorities" shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law. A body is considered to be governed by public law where it:

– is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature,

– has legal personality, and

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

9. Article 2 defines the scope of the Directive. Article 2(1)(a) states that it shall apply 'to contracting entities which are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2'; Article 2(1)(b) adds entities which 'have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State'.

10. Article 2(2) sets out the relevant activities for the purposes of the Directive. Shipping is not mentioned among those activities.

11. Article 2(2)(b)(ii) defines as one of the relevant activities the exploitation of a geographical area for the purpose of the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway.

12. Article 2(2)(c) defines as a relevant activity the operation of networks providing a public transport service by, inter alia, bus. However, Article 2(4) states that 'the provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same condition[s] as the contracting entities'.

13. Article 2(2)(d) defines as a relevant activity the provision or operation of public telecommunications networks or the provision of public telecommunications services. However, Article 8(1) states that 'this Directive shall not apply to contracts which contracting entities exercising an activity described in Article 2(2)(d) award for purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions'.

14. Article 16 provides that 'contracts which have as their object services listed in Annex XVI B shall be awarded in accordance with Articles 18 and 24'. That list includes, in category 20, 'supporting and auxiliary transport services'.

15. Article 18 governs the use of technical specifications in contract award procedures under the directive. Article 18(1) requires contracting entities to include the technical specifications in the general documents or the contract documents relating to each contract. No other publicity requirement prior to the award is imposed by that provision. Other paragraphs of Article 18 lay down requirements which are intended, in essence, to avoid the discriminatory use of technical specifications by contracting authorities.

16. Technical specifications are defined in Article 1(8) as 'the technical requirements contained in particular in the tender documents, defining the characteristics of a set of works, material, product, supply or service, and enabling a piece of work, a material, a product, a supply or a service to be objectively described in a manner such that it fulfils the use for which it is intended by the contracting entity'.

17. Pursuant to Article 19(1): 'Contracting entities shall make available on request to suppliers, contractors or service providers interested in obtaining a contract the technical specifications regularly referred to in their supply, works or service contracts or the technical specifications which they intend to apply to contracts covered by periodic information notices within the meaning of Article 22.' Article 19(2) provides that 'where such technical specifications are based on documents available to interested suppliers, contractors or service providers, a reference to those documents shall be sufficient'.

18. Article 24 requires contracting entities which have awarded a contract to communicate to the Commission the results of the awarding procedure by means of a notice drawn up in accordance with the relevant Annexes of the directive.

The national proceedings and the questions referred

19. Impresa Portuale di Cagliari Srl, the applicant in the main proceedings ('the applicant'), is a company carrying on business in the Port of Cagliari, Italy. Its activities include the loading, unloading, transhipment, storage and general movement of goods and equipment transported on ships.

20. Before the national court the applicant has challenged the validity of a two-year private agreement by which, without following the award procedures contained in Directive 93/38, Tirrenia di Navigazione SpA ('Tirrenia'), a shipping company, contracted Combined Terminals Operators ('CTO') to provide the abovementioned port services.

21. The applicant argues that Tirrenia qualified as a contracting authority under that directive and was obliged to follow the award procedures provided for therein.

22. In the alternative the applicant contends that, if Directive 93/38 were found not to be applicable, the contract would fall under the more general rules of Council Directive 92/50/EEC. (4)

23. In its order for reference the national court considers that the agreement in question constitutes a contract within the scope of Directive 93/38 and that *ratione personae* Tirrenia qualifies as a contracting authority thereunder. It does not however give the reasons for its view.

24. Tirrenia argues that the rationale of Directive 93/38 is to exclude from its scope contracts entered into by undertakings operating in sectors fully open to competition, and it considers itself to come within that category of undertaking.

25. Referring to the preamble of Directive 93/38, in particular recital 13, and to the case-law of the Court, in particular the judgment in *British Telecommunications*, (5) the national court agrees that where a market is substantially open to competition from a number of operators Directive 93/38 does not apply. Relying on the analysis carried out by the Commission in its decision of 21 June 2001 (6) under the State aid provisions of the Treaty, it notes that Tirrenia faces strong competition from private operators on some of its routes whereas on others it enjoys a de facto monopoly. The national court is therefore uncertain as to how the company's activities should be categorised for the purposes of deciding whether Directive 93/38 applies.

26. Accordingly the national court seeks a preliminary ruling on:

'(a) whether, in accordance with the recitals in the preamble to Directive 93/38, a company in the maritime transport sector which in some cases operates under a de facto monopoly and in others in circumstances of free competition and which benefits from State aid is to be regarded as *always* (7) subject to Directive 93/38

and, in the event that such a company is subject to the rules on public notice,

(b) whether the "technical specifications" mentioned in Article 18 of Directive 93/38 (transposed by Article 19 of Legislative Degree No 158/95) must be established prior to the procedure for selecting a contractor and whether they are subject to any publicity requirements'.

27. In addition to the parties in the main proceedings, Austria, the Netherlands and the Commission have submitted written observations. The parties in the main proceedings and the Commission also presented oral observations at the hearing.

Admissibility

28. Austria considers that both preliminary questions should be declared inadmissible. It claims that the order for reference fails to provide the necessary elements of fact and law to enable the Court to give an interpretation which could be useful for the purposes of the resolution of the main proceedings by the national court. Tirrenia objects to the admissibility of the second question, on the ground that it is irrelevant for the resolution of the case before the national court.

29. It is settled case-law that whenever questions referred to the Court in accordance with Article 234 EC involve the interpretation of Community law and the Court is sufficiently informed as to the context in which those questions have been raised, the Court is, in principle, obliged to give a ruling. (8) Moreover, 'the Court can refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it'. (9) Thus, a finding that a reference for a preliminary ruling is inadmissible is and, given the objective underlying

Article 234 EC, should remain exceptional and limited to the circumstances mentioned.

30. Some of the conclusions reached by the national court in the instant case are not supported by a detailed exposition of the relevant facts or legal reasoning. It is also true, as most of the parties who have submitted written observations have pointed out, that the order for reference may be based on a misinterpretation of the criteria for determining the application of Directive 93/38.

31. Those shortcomings however do not necessarily mean that the questions referred should be declared inadmissible. Those questions are straightforward and are expressed in simple and succinct terms. Moreover the questions of Community law which they raise are clearly related to a real dispute and are, in the context referred to by the national court, relevant to the resolution of the main proceedings. They are not hypothetical in nature.

32. The factual and legal background of the main proceedings is explained in succinct but, in my view, sufficient detail to enable the Court and the parties submitting observations to make a proper assessment of the questions referred. Reference is also made to the relevant legal provisions, even though they may not have been explained in detail, and the parties submitting observations have been able to address the points at issue.

33. I therefore conclude that the questions referred are admissible.

Substance

34. Before consideration of the two questions referred by the national court, two preliminary issues must be examined: first, whether on a correct interpretation Directive 93/38 is applicable in the instant case; second, if it is not, whether Directive 92/50 is applicable.

Is Directive 93/38 applicable?

35. In its order for reference the national court reasons on the premiss that the dispute before it falls to be assessed under Directive 93/38 since Tirrenia is a contracting authority thereunder. It does not however explain the grounds for its premiss. It does not describe the private or public nature of Tirrenia or its main business activities, but merely refers to the analysis carried out by the Commission in its abovementioned decision of 21 June 2001. (10)

36. The Netherlands Government, the Commission and Tirrenia contend that since Tirrenia's main activity is the shipping of goods and persons, Directive 93/38 is not applicable to it.

37. Even though in the context of Article 234 EC the Court must in principle confine its examination to the matters which the referring court has decided to submit to it for consideration and must therefore proceed on the basis of the situation which that court considers to be established, (11) the Court may extract from the information contained in the order for reference those aspects of Community law the interpretation of which will help the national court to resolve the issue before it. (12)

38. The scope of Directive 93/38 is defined in Article 2, which lays down a double criterion: it applies to contracting entities which meet the definition in Article 2(1)(a) and (b), read in conjunction with Article 1(1) and (2), and which exercise one of the activities referred to in Article 2(2). If either criterion is not satisfied, the body in question falls outside the scope of the directive.

39. As regards the activities covered, it follows from recital 19 in the preamble and from Article 2(2)(b)(ii) that, within the transport sector, shipping is excluded from the scope of Directive 93/38. Recital 19 justifies the exclusion by the competitive position of Community shipping, which makes it 'inappropriate for the greater part of the contracts in this sector to be subject to detailed procedures'. (13) Accordingly, Article 2(2)(b)(ii) does not mention shipping as a relevant activity and subjects to the directive only 'the provision of airport, maritime or inland port or other territorial facilities to carriers by air, sea or inland waterway'.

40. From the information contained in the case-file and the observations made at the hearing, in particular by Tirrenia, it appears that Tirrenia is a company whose main, if not sole, activity is the shipping of goods and persons, in which case it must fall outside the scope of Directive 93/38.

41. It is for the national court to determine, after reassessment of the facts in the light of the above considerations, whether that is indeed the case. If it finds that Directive 93/38 does not apply, the questions referred will not arise unless, as has been suggested, Directive 92/50 (14) can apply in the alternative. That directive, it will be recalled, lays down general rules for the award of public service contracts.

Can Directive 92/50 apply in the alternative?

42. In the main proceedings the applicant argued in the alternative that, if the national court were to conclude that Directive 93/38 was not applicable, Tirrenia would be subject to the provisions of Directive 92/50. The national court, convinced that Directive 93/38 was applicable to the facts before it, did not refer a question to the Court on this point. Since that assumption may prove erroneous for the reasons stated above, the Court should, in line with previous practice and on grounds of procedural economy and expediency, address this issue in order to assist the national court in the determination of the case pending before it.

43. I do not agree with the applicant, the Commission and Austria that Directive 92/50 should apply in the alternative to Tirrenia.

44. It is commonplace that the original 1970s public procurement directives applying to works and supply contracts excluded from their field of application any contract awarded in the so-called utilities sectors, namely water, energy, transport and, as regards public supply contracts, telecommunications. The transport sector as a whole was thus excluded from the secondary Community rules on procurement until the utilities sectors were first regulated by Directive 90/531. (15) That directive was subsequently replaced by Directive 93/38, which extended its scope to public services contracts. Their content is otherwise essentially the same. Directive 93/38 will in turn be finally superseded in January 2006 when the period allowed for implementing Directive 2004/17 (16) expires. The latter directive, in the interest of clarity, simplifies and updates the regulation of procurement in the utilities sectors in the light of the suggestions made by contracting entities and economic operators involved in those sectors (17) and the case-law of the Court.

45. As stated above, in view of its competitive position, Community shipping is explicitly excluded from the scope of Directive 93/38. That exclusion was already declared in the preamble to Directive 90/531 (18) and is maintained, in simpler terms, in the preamble to Directive 2004/17. (19)

46. As regards the relationship between Directive 93/38 and Directive 92/50, (20) the 17th recital in the preamble to Directive 92/50 states that 'the rules concerning service contracts as contained in [Directive 90/531] should remain unaffected by this Directive'. That recital was interpreted by the Court in *Telaustria* as meaning that the provisions of Directive 92/50 must not affect those of Directive 90/531 or those of its successor, Directive 93/38. (21) On that basis the Court concluded that 'where a contract is covered by Directive 93/38 governing a specific sector of services, the provisions of Directive 92/50, which are intended to apply to services in general, are not applicable'. (22)

47. Like its predecessor, Directive 90/351, and its successor, Directive 2004/17, Directive 93/38 seeks to fill in the regulatory void as regards the sectors previously excluded from the general public procurement directives and to cater for the specific features of procurement in those sectors. It must be regarded as a self-contained regime unless otherwise expressly stated. Shipping, a sub-sector of the transport sector, would in principle have fallen within the subject-matter of Directive 93/38, but has been explicitly excluded. In this way, the Community legislature has laid down in Directive 93/38 what may be regarded as a *lex specialis* with regard to shipping, namely its exclusion from the Community public procurement legal regime.

48. It is moreover important to note that by reason of the specific characteristics of the targeted sectors, Directive 93/38 is meant to allow for greater flexibility than the general procurement directives. (23) In contrast to the situation under those directives, the main obligation on contracting entities under Directive 93/38 is that of publishing a notice in the Official Journal, after which they remain largely free to choose the award procedure most suitable to their own needs. The view that Directive 92/50 should apply in the alternative would lead to the paradoxical result that a sub-sector excluded by reason of its competitive nature from the application of the more flexible Directive 93/38 would become subject to the more rigid rules of Directive 92/50. That would in my view defeat the aim of the exclusion intended by the Community legislature when adopting Directive 93/38.

49. In view of the foregoing I conclude that a body whose sole business activity is shipping is excluded from the scope of Directive 93/38 and is not subject in the alternative to Directive 92/50. In the light of those considerations it is for the national court to assess the facts before it in order to determine whether Tirrenia exercises its activities in the excluded shipping sector. If so, the questions referred to the Court by the national court do not arise.

50. I will however go on to examine the questions referred, which are relevant if the national court finds that Tirrenia, by reason of its other business activities, falls within the scope of Directive 93/38.

The first question

51. According to the national court's interpretation of Directive 93/38, in particular of recital 13 in the preamble, where free competition exists in a particular utilities sector, entities operating in that sector fall outside the scope of the directive. The national court has doubts however as to how a situation such as Tirrenia's, whose activities are carried out in some cases under competitive conditions and in other cases under a de facto monopoly, must be qualified for the purposes of Directive 93/38 and, by its first question, seeks clarification from the Court in this respect.

52. First, however, I must examine whether the existence of competition in the sector concerned is relevant for the application of the directive. If not, the questions raised by the national court need not be addressed.

53. Two opposing positions emerge on that issue.

54. On the one hand, the national court, the parties to the main proceedings, and the Netherlands and Austrian Governments contend that, whenever a sector is subject to open competition, the provisions of Directive 93/38 should not apply.

55. On the other hand, the Commission maintains that Directive 93/38 was never intended to provide for a general exemption for sectors where competition exists. Only when an express exemption is provided for by one of its provisions, such as Articles 2(4) and 8(1), are contracting authorities operating in those sectors exempted from the provisions of Directive 93/38.

56. It is clear in my view that the Commission's thesis cannot be accepted.

57. In the first place, the wording of recital 13 in the preamble is couched in unambiguous terms, covers all four sectors and leaves little scope for interpretation.

58. In addition, the purpose of the Community rules governing procurement in the utilities sectors is to address the circumstances which led entities operating in those sectors to award contracts on a national basis. According to the preambles to the past, present and future directives regulating procurement in the utilities sectors, there are two main interrelated causes for discriminatory procurement, namely, the closed nature of the markets in which the relevant entities operate and the various ways in which national authorities can influence the behaviour of those entities. (24) It is assumed that where entities operate under undistorted competitive conditions, market forces will by themselves ensure that the best value for money is sought in every contract, and that there is therefore no need to subject their procurement to detailed award procedures.

59. In this respect the Court has held in its case-law on the notion of 'body governed by public law' for the purposes of the procurement directives that 'if the body operates in normal market conditions, aims to make a profit, and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims to meet are not of an industrial or commercial nature. In such a case, the application of the Community directives relating to the coordination of procedures for the award of public contracts would not be necessary, moreover, because a body acting for profit and itself bearing the risks associated with its activity will not normally become involved in an award procedure on conditions which are not economically justified'. (25)

60. Furthermore, the interpretation proposed by the Commission might distort competition in two ways. On the one hand, it would place public entities or public undertakings operating in truly competitive markets at a disadvantage with respect to competing private firms. Whereas the latter would be able to procure freely, contracting public entities would be required to comply with award procedures and other procurement obligations, regardless of whether their procurement policies were carried out on strict commercial criteria. On the other hand, it would also distort competition between sub-sectors that are in a relationship of competition substitution, such as bus transport and railways or different forms of energy. Such distortions of competition are not regarded as minor by the economic actors involved. Indeed, one of the most common criticisms of Community public procurement regulation relates to its complexity, rigidity and the related compliance costs that entities subject to it must endure. (26)

61. In the same vein, the principle of proportionality requires in my view that where there is a choice between different interpretations, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. For the reasons above I question whether the Commission's proposed interpretation respects that principle.

62. Finally, as regards the judgment in *British Telecommunications* (27) referred to as authority by the national court and some of the parties, the Court's interpretation in that case is confined to the specific exemption contained in Article 8(1) of Directive 93/38. For that reason it does not in my view support the general conclusion that, as a matter of principle, the degree of competition should be taken as to be a relevant factor when deciding whether Directive 93/38 should apply.

63. The above considerations lead me to conclude that, where bodies which would qualify as contracting entities under Directive 93/38 carry out their business activities under direct exposure to competitive forces in a market where access is unrestricted, the directive should not apply. When assessing whether that is the case, the national court must verify whether the body in question operates without the protection of the public authorities, assumes the commercial and financial risks inherent in economic activity, does not have recourse to the public purse to offset potential losses and, ultimately, bears the risk of bankruptcy.

64. Having reached that conclusion, I turn now to the national court's first question, namely how to classify for the purposes of Directive 93/38 an entity which in some cases operates under a de facto monopoly and in others in circumstances of free competition and which benefits from State aid.

65. In order to answer that question it is again useful to refer to the Court's case-law on the notion of 'body governed by public law'. As the Austrian Government rightly observes, the Court appears to have endorsed in that case-law, starting with its judgment in *Mannesman*, (28) the 'infection theory' to the effect that if one of an entity's activities falls within the scope of the procurement directives, all its other activities are equally subject, regardless of whether they are of an industrial or commercial nature. The Court justified that approach on the basis of the need to respect the principle of legal certainty, which requires a Community rule to be clear and its application foreseeable by all those concerned. According to the Court's reasoning such a principle would be impaired if the application of the procurement directives could vary according to the relative proportion of the entity's activities pursued for the purpose of meeting needs not having an industrial or commercial character.

66. To subject the award of all contracts 'whatever their nature' to the discipline of the directive without further qualification is perhaps too radical a stance. Entities carrying out only a minor part of their activities under the directives would be placed at a competitive disadvantage with respect to the majority of their commercial activities. The Court appears to have weighed those drawbacks against the requirements of legal certainty, finally accepting the former as the price to be paid for the latter. (29) That interpretation has been confirmed in later judgments. (30)

67. In view of that case-law and in application of the 'infection theory', all contracts of a body performing activities both under competition and under a de facto or de jure monopoly would come within the scope of the directive since in the latter case the conditions for exclusion would be absent. That would moreover be so regardless of the relative proportion between activities carried out under pure market forces and under a monopoly.

68. I would suggest a qualification to such an approach for the same reasons that have led me to conclude that competition should be taken as a relevant factor when deciding whether the directive should apply. In my view, if the entity can show that the contracts in question relate exclusively to its activities directly exposed to competitive forces and that there is no cross-subsidisation between those activities and others exercised under non-competitive conditions, then the infection theory should give way. The national court must satisfy itself that those conditions are fulfilled.

69. As regards the State aid referred to by the national court, it seems clear that public financing is one of the elements which the national court should take into consideration in deciding whether the entity in question truly operates directly under competitive forces. (31)

The second question

70. By its second question the national court asks whether, if Directive 93/38 applies, the 'technical specifications' mentioned in Article 18 must be established prior to the procedure for selecting a contractor and whether they are subject to any publicity requirements.

71. As regards the first limb of the question, technical specifications are defined by Article 1(8) of Directive 93/38 as 'the technical requirements contained in particular in the tender documents, defining the characteristics of a set of works, material, product, supply or service, and enabling a piece of work, a material, a product, a supply or a service to be objectively described in a manner such that it fulfils the use for which it is intended by the contracting entity'.

72. Technical specifications define the object of the contract in precise terms, they enable interested undertakings to assess whether to present a bid and they provide contracting authorities with the technical parameters to assess in relation to their needs the various offers presented. It clearly follows from their very nature that they must be established prior to the selection of a contractor.

73. As regards the second limb of the question, relating to publicity requirements, Directive 93/38, reproducing the approach of Directive 92/50, distinguishes between 'priority' public service contracts, to which the directive applies in full, and 'non-priority' service contracts, to which, pursuant to Article 16 of the directive, only Articles 18 and 24 apply. Article 18 lays down the rules concerning the use of technical

specifications and standards in contract award procedures. Article 24 governs the post-award information that the contracting authority must communicate to the Commission for monitoring purposes. Non-priority service contracts, which are considered to have little impact on cross-border trade, are thus not subject to the detailed award procedures of the directive, including the requirement of publication. Non-priority services are listed in Annex XVI B to Directive 93/38.

74. The services which are the subject of the contract at issue in the national proceedings appear to fall within Annex XVI B of Directive 93/38, category 20, 'supporting and auxiliary transport services'. (32) Article 18(1) requires contracting authorities to include the technical specifications in the general documents or contract documents relating to each contract. No other publication obligation is imposed on contracting authorities by that provision. There is thus in principle no specific obligation to publish the technical specifications relating to services contracts falling under Annex XVI B.

75. The Court held in *Telaustria*, however, that, even when contracts are excluded from the scope of the procurement directives, the contracting entities concluding them are none the less bound to comply with the fundamental rules of the Treaty in general, and the principle of non-discrimination on the ground of nationality in particular. That principle implies an obligation of transparency, which includes ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. (33)

76. The same reasoning should, as the Commission points out in its observations, apply when a contract is subject only to certain provisions of the procurement directives. As the Court has held, the duty to treat tenderers equally lies at the heart of the procurement directives and, together with the principle of transparency, must be complied with in every stage of the award procedure so as to afford equality of opportunity to all tenderers when formulating their tenders. (34) Thus, those general principles cover not only the definition of technical specifications by contracting authorities but also the means by which those specifications are made known to potential bidders. Those means must therefore ensure a sufficient degree of transparency and place all potential bidders on an equal footing.

77. The question remains as to what means are to be considered sufficient in that regard. At the hearing, answering a question posed by the Court, the Commission acknowledged that transparency requirements for technical specifications in contracts relating to non-priority services could not go as far as those imposed for contracts concerning priority services. It did not however specify in what concrete ways those requirements could be fulfilled.

78. In the instant case, since technical specifications are usually contained in rather voluminous documents, it would in my view fulfil those criteria to make the general documents readily available to all interested undertakings in sufficient time and on equal conditions. Support for that view may be drawn from Article 19 of Directive 93/38, which requires contracting entities to make available on request to interested parties the technical specifications regularly referred to in their contracts. Even though that provision is not applicable to the instant case, it indicates that the Community legislature considers making the relevant technical specifications available on request to be a suitable solution.

79. It is for the national court to decide whether, on the facts of the case, the means adopted by the contracting authority to make potential bidders aware of the technical specifications have respected these conditions.

Conclusion

80. In view of the foregoing I consider that the Court should answer the national court's questions in the following terms:

– A body whose sole business activity is shipping is excluded from the scope of Directive 93/38 and is not subject in the alternative to Directive 92/50. It is for the national court to determine whether the body in question exclusively exercises its activities in the excluded shipping sector.

– Where bodies that would otherwise qualify as contracting entities under Directive 93/38 carry out their business activities directly under competitive forces in a market where access is unrestricted, Directive 93/38 does not apply. When assessing whether that is the case, the national court must verify that the market concerned is de jure and de facto competitive and that the body in question operates without the protection of the public authorities, assumes the commercial and financial risks inherent in economic activity, does not have recourse to the public purse to offset potential losses and, ultimately, bears the risk of bankruptcy.

– If where Directive 93/38 applies a contracting entity carries out its activities both directly under competitive forces in a market where access is unrestricted and under a de facto monopoly, it must respect the obligations arising from that directive, unless it can show that the contracts in question

relate exclusively to the activities directly exposed to competitive forces and that there is no cross-subsidisation between those activities and the ones exercised under non-competitive conditions.

– Technical specifications governed by Article 18 of Directive 93/38 must be established prior to the selection of a contractor and must be made known or available to potential bidders by means that ensure transparency and place all potential bidders on an equal footing. It is for the national court to decide whether, in each case, the means used by the contracting entity to make potential bidders aware of the technical specifications have respected those conditions. It will normally be sufficient to make the general documents containing the technical specifications readily available to all interested undertakings in sufficient time and on equal conditions.

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1 – Original language: English.

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2 – OJ 1993 L 199, p. 84.

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3 – Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682), and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1).

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4 – Of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

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5 – Case C-392/93 [1996] ECR I-1631.

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6 – Commission Decision 2001/851/EC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by (OJ 2001 L 318, p. 9).

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7 – Emphasis in the original.

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8 – Case C-18/01 *Korhonen* [2003] ECR I-5321, paragraph 19, and the case-law cited there.

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9 – Ibid., paragraph 20 and the case-law cited therein.

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10 – Cited in footnote 6.

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11 – C-466/00 *Kaba* [2003] ECR I-2219, paragraph 41.

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12 – See, for example, Joined Cases 110/78 and 111/78 *van Wesemael* [1979] ECR 35, paragraph 21; Case 22/80 *Boussac* v *Gerstenmeier* [1980] ECR 3427, paragraph 5; Case 16/83 *Prantl* [1984] ECR 1299, paragraph 10.

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13 – This exclusion is explained in greater detail by the Commission in its 'Communication on a Community regime for procurement in the excluded sectors: water, energy, transport and telecommunications', COM(88) 376 final of 11 October 1988, at paragraphs 221 to 247 and 418 to 421.

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14 – Cited in footnote 4.

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15 – Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297 p. 1).

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16 – Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ('Directive 2004/17') (OJ 2004 L 134 p. 1).

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17 – See the Commission's Green Paper on *Public Procurement in the European Union:*

Exploring the Way Forward, COM(96) 583 final, of 27 November 1996 and its Communication *Public Procurement in the European Union*,COM(98) 143 final of 11 March 1998.

18 – 19th recital.

19 – Recital 4 in the preamble to Directive 2004/17 simply states that in view of the competitive position of Community shipping, it would be inappropriate to make contacts awarded in this sector subject to its rules.

20 – Recital 47 in the preamble to Directive 93/38 explains the relationship between the scope of Directive 93/38 and those of the original public works (71/305/EEC) and public supply (77/62/EEC) directives, but does not contain any reference to Directive 92/50.

21 – Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 31 and 32.

22 – Ibid., paragraph 33.

23 – Recital 45 in the preamble to Directive 93/38.

24 – Recitals 11 and 12 in the preambles to Directive 90/351 and Directive 93/38 and recitals 2 and 3 in the preamble to Directive 2004/17.

25 – *Korhonen*, cited at footnote 8, paragraph 51. See also more recently Case C-283/00 *Commission* v *Spain*[2003] ECR I-11697, paragraphs 81, 82 and 92.

26 – See the Commission's Green Paper at page 5, point 2.10 and page 8, point 3.6 and the Commission's Communication, at page 3, both cited in footnote 17.

27 – Cited in footnote 5.

28 – Case C-44/96 *Mannesmann Anlagenbau Austria and Others* v *Strohal Rotationsdruck* [1998] ECR I-73, paragraphs 25 and 30 to 35.

29 – Advocate General Léger argued that accepting the opposite interpretation could entail abuses by Member States and that consequently a criterion based on the relative proportion of the entity's activities devoted to needs in the general interest should be rejected. Opinion in Case C-44/96 *Mannesmann*, cited above, point 77.

30 – Case C-360/96 *Gemeente Arnhern and Gemeente Rheden* v *BFI Holding* [1998] ECR I-6821, paragraphs 55 and 56; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 54 and 55; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 56.

31 – Case C-380/98 [2000] ECR I-8035, paragraphs 21 to 25.

32 – See the analysis of what falls within that category carried out by Advocate General Mischo in his Opinion in Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, at point 67 et seq.

33 – *Telaustria*, cited in footnote 21, paragraphs 60 to 63.

34 – Case C-87/94 *Commission* v [1996] ECR I-2043, paragraphs 51 and 54.

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Notice for the OJ

Reference for a preliminary ruling by the Tribunale Amministrativo per la Sardegna by order of that Court of 15 January 2003 and 12 February 2003 in the case of Impresa Portuale di Cagliari s.r.l. against Tirrenia di Navigazione SpA and C.T.O. Combined Terminals Operators s.r.l.

(Case C-174/03)

Reference has been made to the Court of Justice of the European Communities by order of the Tribunale Amministrativo per la Sardegna (The Administrative Court for Sardinia) of 15 January 2003 and 12 February 2003, received at the Court Registry on 14 April 2003, for a preliminary ruling in the case of Impresa Portuale di Cagliari s.r.l. against Tirrenia di Navigazione SpA and C.T.O. Combined Terminals Operators s.r.l. on the following questions:

(a)whether, in accordance with the recitals in the preamble to Directive 93/38[1], a company in the maritime transport sector, which in some cases operates under a *de facto* monopoly and in others in circumstances of free competition and which benefits from State aid is to be regarded as always subject to the Directive 93/98,

and, in the event that such a company is subject to the rules on public notice,

(b)whether the "technical specifications" mentioned in Article 18 of Directive 93/38 (transposed by Article 19 of Legislative Decree No 158/95) must be established prior to the procedure for selecting a contractor and whether they are subject to any publicity requirements.

_____

[1] - Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199 of 09.08.1993, p. 84).

Judgment of the Court (First Chamber)
of 18 November 2004
Commission of the European Communities v Federal Republic of Germany. Failure of a Member State to fulfil its obligations - Directive 92/50/EEC - Public contracts - Waste transport services - Procedure without prior publication of a contract notice - Contract concluded by a contracting authority in relation to an economic activity subject to competition - Contract concluded by a contracting authority in order to be able to submit an offer in a tender procedure - Proof of the service provider's capabilities - Possibility of relying on the capabilities of a third party - Subcontracting - Consequences of a judgment finding a failure to fulfil an obligation. Case C-126/03.

Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Scope - Contract unrelated to the activities in the general interest of the contracting authority - Included - Contract aiming to subcontract the activities of a local or regional authority operating as a service provider - Included

(Council Directive 92/50, Arts 1(a) and (b), 8 and 11)

Article 8 of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, read in conjunction with Article 1(a) and (b) and Article 11(1) of the directive, provides that, where contracts for pecuniary interest concluded in writing between a service provider and a regional or local authority have as their object the services listed in Annex I A to the directive, they must be the subject of an open, restricted or negotiated procedure within the meaning of that directive.

In that regard, the fact that the contract does not fall within the scope of activities in the general interest of that local or regional authority, but comprises an independent economic activity, which is clearly distinct and subject to competition, does not show that that contract is not a public contract for the purposes of Articles 8 and 11 of Directive 92/50. Article 1(a) of that directive makes no distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task.

It is likewise irrelevant that the contracting authority intends to operate as a provider of services itself and that the contract in question aims, in that context, to subcontract a part of the activities to a third party.

(see paras 13, 16, 18)

In Case C-126/03,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on

20 March 2003

,

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

applicant,

v

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

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defendant,

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, A. Rosas, R. Silva de Lapuerta, K. Lenaerts and K. Schiemann,

Advocate General: L.A. Geelhoed,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on

26 May 2004,

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

24 June 2004,

gives the following

Judgment

1. By its application, the Commission of the European Communities asks the Court to declare that, as the contract for the transport of waste from discharge points in the region of Donauwald (Germany) to the Munich-North thermal power station was awarded by the City of Munich (Germany) in breach of the procedural rules laid down in Article 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), read in conjunction with Article 11(1) of that directive, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

Legal framwork

2. Article 1(a) of Directive 92/50 provides that public service contracts' are contracts for pecuniary interest concluded in writing between a service provider and a contracting authority', to the exclusion of the contracts listed in points (i) to (ix) of that provision.

3. Article (1)(b) of that directive states that contracting authorities' are the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'.

4. Article 8 of Directive 92/50 provides that contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI'.

5. Article 11(1) of Directive 92/50 states that in awarding public service contracts, contracting authorities are to apply the open, restricted or negotiated procedures defined in Article 1(d), (e) and (f), respectively, of the directive.

Facts and pre-litigation procedure

6. In 1997, the city of Munich, which operated the Munich-North thermal power station, concluded a contact with a private sector undertaking, Rethmann Entsorgungswirtschaft GmbH & Co. KG (Rethmann'), under which it undertook to entrust to Rethmannn responsibility for the transport of waste from discharge points to that power station if the City of Munich was awarded the waste disposal contract for the region of Donauwald (Germany) which had been the subject of an invitation to tender issued by the Abfallwirtschaftsgesellschaft Donau-Wald mbH (AWG Donau-Wald'), to which the City of Munich had responded.

7. Having been awarded that contract, the City of Munich entrusted responsibility for the transport

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of waste to Rethmann pursuant to the agreement concluded with that company, without, however, the transfer of that activity being the subject of an invitation to tender under Directive 92/50.

8. Having given the Federal Republic of Germany an opportunity to submit observations in that regard, the Commission sent a reasoned opinion to that Member State on 25 July 2001, in which it stated that the contract for the transport of waste from the discharge points in the Donauwald region to the Munich-North thermal power station (the contract at issue') should have been the subject of an invitation to tender published in the Official Journal of the European Communities in accordance with Directive 92/50. It invited the Member State to comply with its obligations under Community law within two months of the reasoned opinion being notified. Following the reply by the German authorities of 30 October 2001, in which they denied the infringement, the Commission brought the present action.

The action

The infringement

9. In support of its application, the Commission relies on a single complaint, alleging a breach of Article 8 of Directive 92/50, read in conjunction with Article 11(1) of that directive, on the ground that the City of Munich failed to make the contract at issue the subject of an invitation to tender.

10. It should be noted in that regard that under Article 8 of Directive 92/50, read in conjunction with Article 11(1) of that directive, public contracts which have as their object services listed in Annex I A must be awarded in accordance with the provisions of Titles III to VI of the directive, applying the open, restricted or negotiated procedures within the meaning of the directive.

11. Public service contracts' are defined in Article 1(a) of Directive 92/50 as being contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.

12. Contracting authorities' are defined in Article 1(b) of Directive 92/50 as being the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'.

13. Accordingly, Article 8 of Directive 92/50, read in conjunction with Article 1(a) and (b) and Article 11(1) of the directive, provides that, where contracts for pecuniary interest concluded in writing between a service provider and a regional or local authority have as their object the services listed in Annex I A to the directive, they must be the subject of an open, restricted or negotiated procedure within the meaning of that directive.

14. In the present case, it must be held that the contract at issue is a public contract for the purposes of Articles 8 and 11 of Directive 92/50, and that that contract should have been awarded in accordance with Titles III to VI of that directive.

15. The contract concluded between the City of Munich and Rethmann, under which that company undertook to transport waste from the discharge points in the Donauwald region to the Munich-North thermal power station, relates to a service covered by Annex I A to the directive and provided by an undertaking to a regional or local authority. It is accordingly a contract for pecuniary interest concluded in writing between a service provider and a contracting authority.

16. In that regard, the arguments relied on by the German Government to show that the contract at issue is not a public contract for the purposes of Articles 8 and 11 of Directive 92/50 cannot be accepted.

17. First of all, the German Government maintains that the City of Munich is not, in relation to the contract at issue, a contracting authority' for the purposes of Article 1(b) of Directive

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92/50 and that the contract is not a public contract' for the purposes of Article 1(a) of the directive. According to that government, the contract does not fall within the scope of activities in the general interest of the City of Munich, but comprises an independent economic activity, which is clearly distinct and subject to competition, that is to say the operation of the MunichNorth thermal power station.

18. It must be answered in that regard that, under Article 1(b) of Directive 92/50, regional or local authorities are, by definition, contracting authorities. It is clear from case-law that Article 1(a) of the directive makes no distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task (see, by way of analogy, in relation to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the awarding of public works contracts (OJ 1993 L 199, p. 54), Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, paragraph 32). It is likewise irrelevant that the contracting authority intends to operate as a provider of services itself and that the contract in question aims, in that context, to subcontract a part of the activities to a third party. It is conceivable that the decision of the contracting authority as to the choice of that third party will be based on considerations that are not economic ones. It follows that, whatever the nature and context of the contract at issue may be, it constitutes a public contract' within the meaning of Article 1(a) of Directive 92/50.

19. As regards the argument that the activity of transporting waste carried on by Rethmann would, in the end result, be the subject of two invitations to tender, it is sufficient to observe that that activity is the subject of two separate public contracts, that is to say the one awarded by the City of Munich and the one, concerning more generally the disposal of waste in the Donauwald region, awarded by AWG Donau-Wald, each of which required to be the subject of an invitation to tender, and that the application of Directive 92/50 thus has the result that the service provided by Rethmann required to be the subject of two successive invitations to tender.

20. As regards the argument that there was no use of public resources of the City of Munich in the present case, it must be held that use of that kind is not a factor that determines whether or not there is a public contract for the purposes of Articles 8 and 11 of Directive 92/50.

21. The German Government also submits that, inasmuch as it was awarded for the purpose of resale to third parties, the contract at issue is excluded from the scope of Directive 92/50 by reason of Article 1(a)(ii) of that directive, read in conjunction with Article 7 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84). In that regard, as the Advocate General observes at point 34 of his Opinion, it must be held that Article 1(a)(ii) of Directive 92/50 excludes from its scope contracts awarded in the fields covered by Directive 93/38, because the Community legislature wished those contracts to be covered only by Directive 93/38. The exception laid down in Article 7 of Directive 93/38 would therefore apply only if the contract at issue fell within the scope of that directive. Inasmuch as that contract does not come within the activities referred to in Article 2(2) of Directive 93/38, the exception laid down in Article 7 of that directive cannot apply in the present case.

22. The German Government also argues that it would have been impossible in practice to award the contract at issue in accordance with Titles III to VI of Directive 92/50, inasmuch as, in order to demonstrate its technical capability for the purposes of Article 32(2)(c) and (h) of that directive when the invitation to tender was issued by AWG DonauWald, the City of Munich needed to communicate the name of its subcontractor at the time its offer was lodged. In that regard it is true that a service provider which, with a view to being admitted to participate in a tendering procedure, intends to rely on the resources of entities or undertakings with which it is directly

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or indirectly linked must establish that it actually has available to it the resources of those entities or undertakings which are necessary for the performance of the contract but which it does not itself own (see, to that effect, Case C-176/98 Holst Italia [1999] ECR I-8607, paragraph 29; Case C-399/98 Ordine degli Architetti and Others [2001] ECR I-5409, paragraph 92; and Case C-314/01 Siemens and ARGE Telekom & Partner [2004] ECR I0000, paragraph 44). However, in the present case, it would in any event have been possible for the City of Munich to undertake an accelerated restricted procedure under Article 20 of Directive 92/50 between the issuing of the invitation to tender and the lodging of its offer.

23. The German Government maintains that the contract at issue could, by reason of Article 11(3)(d) of Directive 92/50, have been awarded using a negotiated procedure without prior publication of a contract notice. It should be pointed out in that regard that, as a derogation from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in relation to public service contracts, Article 11(3)(d) of Directive 92/50 must be interpreted strictly and that the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (see Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609, paragraph 58). The application of Article 11(3) of the directive is thus subject to three cumulative conditions. It requires the existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible, and a causal link between the unforeseeable event and the extreme urgency resulting therefrom (see, in relation to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), Case C-107/92 Commission v Italy [1993] ECR I-4655, paragraph 12, and Case C-318/94 Commission v Germany [1996] ECR I-1949, paragraph 14). In the present case, as was held in paragraph 22 of this judgment, it would have been possible for the City of Munich to undertake an accelerated restricted procedure (see, in relation to Directive 71/305, Case C-24/91 Commission v Spain [1992] ECR I-1989, paragraph 14, and Commission v Italy, paragraph 13). It follows that the Federal Republic of Germany has not shown that a situation of extreme urgency existed.

24. In the light of the above, it must be held that, as the contract for the transport of waste from the discharge points in the Donauwald region to the Munich-North thermal power station was awarded by the City of Munich in breach of the procedural rules laid down in Article 8 of Directive 92/50, read in conjunction with Article 11(1) of that directive, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

The consequences of a judgment finding a failure to fulfil obligations

25. The German Government submits that, should there be a finding of failure to fulfil obligations, the Federal Republic of Germany would not be obliged to terminate the contract which has already been entered into.

26. In that regard, it is sufficient to reply that while, in proceedings for failure to fulfil obligations under Article 226 EC, the Court is only required to find that a provision of Community law has been infringed, it is clear from Article 228(1) EC that the Member State concerned is required to take the measures necessary to comply with the judgment of the Court.

Costs

27. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Declares that, as the contract for the transport of waste from the discharge points in the Donauwald region to the Munich-North thermal power station was awarded by the City of Munich in breach of the procedural rules laid down in Article 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, read in conjunction with Article 11(1) of that directive, the Federal Republic of Germany has failed to fulfil its obligations under that directive;

2. Orders the Federal Republic of Germany to pay the costs.

DOCNUM	62003J0126
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2004 Page I-11197
DOC	2004/11/18
LODGED	2003/03/20
JURCIT	11997E226 : N 26 11997E228-P1 : N 26 31992L0050 : N 19 31992L0050-A01LA : N 2 11 13 18 21 31992L0050-A01LB : N 3 12 13 18 31992L0050-A08 : N 4 9 13 14 16 20 24 31992L0050-A11 : N 14 16 20 31992L0050-A11P1 : N 5 10 13 24 31992L0050-A11P3 : N 23 31992L0050-A11P3LD : N 23 31992L0050-A20 : N 22 31992L0050-NIA : N 13 15 31993L0038 : N 21 31993L0038-A02P2 : N 21 31993L0038-A07 : N 21 61998J0176 : N 22 61992J0107 : N 23 61994J0318 : N 23 61991J0024 : N 23 61998J0399 : N 22 62001J0314 : N 22 61996J0044 : N 18

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	62001J0020 : N 23
CONCERNS	Failure concerning 31992L0050 -A08 Failure concerning 31992L0050 -A11P1
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Federal Republic of Germany ; Member States
NATIONA	Federal Republic of Germany
NOTES	Dischendorfer, Martin ; Fruhmann, Michael: Contracting Authorities as Service Providers under the EC Public Procurement Directives: A Note on Case C-126/03, Commission / Germany, Public Procurement Law Review 2005 p.NA80-NA85 ; Koutoupa-Regkakou, Ev.: Dimosies Symvaseis & Kratikes Enisxyseis 2005 p.98-99
PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Geelhoed
JUDGRAP	Jann
DATES	of document: 18/11/2004 of application: 20/03/2003

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Opinion of Mr Advocate General Geelhoed delivered on 24 June 2004. Commission of the European Communities v Federal Republic of Germany. Failure of a Member State to fulfil its obligations - Directive 92/50/EEC - Public contracts - Waste transport services - Procedure without prior publication of a contract notice - Contract concluded by a contracting authority in relation to an economic activity subject to competition - Contract concluded by a contracting authority in order to be able to submit an offer in a tender procedure - Proof of the service provider's capabilities - Possibility of relying on the capabilities of a third party - Subcontracting - Consequences of a judgment finding a failure to fulfil an obligation. Case C-126/03.

I - Introduction

1. In this case, the Commission asserts that the Federal Republic of Germany is in breach of Community law because the City of Munich concluded a contract with a private undertaking without observing the rules contained in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (Directive 92/50'). (2)

2. The central question is whether the City of Munich, a local authority, should be deemed to be a contracting authority if, when participating in an award procedure itself as a prospective supplier, it subcontracts certain services to a private undertaking without having conducted an award procedure for them.

II - Legal framework

3. In Directive 92/50, Article 1(a) provides that public service contracts' means contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of the contracts listed in points (i) to (ix) inclusive.

4. Article 1(a)(ii) excludes contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC or fulfilling the conditions in Article 6(2) of the same Directive.

5. Article 1(b) states that contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

6. Article 8 states that contracts which have as their object services listed in Annex IA shall be awarded in accordance with the provisions of Titles III to VI.

7. Article 11(1) provides that in awarding public service contracts, contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), adapted for the purposes of this Directive.

8. Pursuant to Article 11(3)(d), contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the timelimit for the open, restricted or negotiated procedures referred to in Articles 17 to 20 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities.

III - Facts and pre-litigation procedure

9. In November 1997, Donau-Wald mbH, being a waste-processing undertaking and a contracting authority serving the Donau-Wald region, opened a tendering procedure for the supply of services relating to the thermal processing of waste. Tenders were received from the City of Munich (the operator of the combined power-station and waste-incinerating plant Munich North), and a private waste-processing firm, Rethmann Entsorgungswirtschaft GmbH & Co. KG (Rethmann').

10. The two bidders had agreed in advance that if the City of Munich's bid was successful, the

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transport of the waste would be subcontracted to Rethmann, as the City of Munich did not possess the necessary transport capacity. Conversely, were Rethmann's bid to succeed, the City of Munich, which did have sufficient processing capacity, would have the residual waste processed at its Munich North waste-burning power-station.

11. The entire contract was awarded to the City of Munich on 27 February 1998. As agreed, the City of Munich duly subcontracted the transport of the waste to Rethmann; it did not observe the procedure laid down in Directive 92/50.

12. The Commission's view is that the City of Munich is a contracting authority; the waste-transport contract was not awarded according to the procedure laid down in Directive 92/50; consequently Germany is in breach of its obligations.

13. The Commission initially gave the German Government an opportunity to submit observations, and subsequently - on 25 July 2001 - dispatched a reasoned opinion. The German Government responded by letter on 30 October 2001. The Commission did not consider that response satisfactory, and accordingly brought the present action before the Court.

14. The Commission asks the Court to declare that, by reason of the fact that the contract for waste transport concluded by the City of Munich was awarded without the procedures laid down in Articles 8 and 11(1) of Directive 92/50 having been observed, the Federal Republic of Germany has failed to fulfil its obligations under that Directive; and to order the Federal Republic of Germany to pay the costs of the proceedings.

15. The Commission considers the City of Munich to be a contracting authority within the meaning of Article 1(b) of Directive 92/50, and the transport of waste to be a service within the meaning of Category 16 of Annex 1A to the Directive. It follows that the contract for the supply of that service should have been awarded according to the rule laid down in Titles III to VI inclusive.

16. The German Government disagrees: there is no question of any infringement, since the City of Munich - in the present case - cannot be deemed to be a contracting authority.

17. It concedes that, as a general rule, the City of Munich would rank as a contracting authority within the meaning of the Directive, and that the conclusion of a transport contract with a value above the limit meets the definition of a public service contract within the meaning of Article 1(a), in conjunction with Category 16 of Annex 1A to Directive 92/50. However, in view of the purpose and scope of the Directive, those provisions cannot be applied to the present case.

18. The German Government adduces the following principal arguments. First, it contends that, in the circumstances of the case, the City of Munich is not a prospective purchaser of waste-transport services. Furthermore, the award of the contract to supply the services did not occur in the context of the performance by the City of Munich of the public-service tasks incumbent on it, but concerned a separate economic activity - the operation of the combined power-station and waste-processing-plant. That economic activity is as such subject to competition.

19. Furthermore, the City of Munich would never have been in a position to offer its services to the Donau-Wald region had it not secured the transport services supplied by Rethmann. If it had been necessary for the transport services contract to go out to tender, Rethmann's transport services would have been subject to a public award procedure twice. The German Government maintains that to require tenders within tenders' is utterly pointless.

20. Furthermore, no public funds were involved in the award of the contract in question. Moreover, the contract is exempt from the requirement to conduct an award procedure, pursuant to Article 1(a)(ii) of Directive 92/50 in conjunction with Article 7 of Directive 93/38, (3) since the latter provision states that Directive 93/38 shall not apply to contracts awarded for purposes of resale

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or hire to third parties,

21. Finally, it was practically impossible to hold, prior to an award procedure in which the City of Munich was itself a bidder, a further award procedure for that part of the contract which would have to be subcontracted. First, the contract was at that time a hypothetical one. Secondly, the period between the date of the invitation to tender and the date of the submission of the bid was too short to conduct a full award procedure. For the same reason it was not possible to subcontract the transport of the waste on the basis of an award procedure conducted following the award of the main contract. There was a further practical obstacle: any tenderer must show that they are suitable, and appropriately qualified, and must therefore indicate the identity of any possible subcontractor when making their bid.

22. In view of the fact that the services at issue form part of the operation of the Munich North thermal power station, the German Government concludes that in the circumstances of the present case the City of Munich cannot be regarded as a contracting authority within the meaning of Article 1(b) of Directive 92/50.

23. Moreover, if the City of Munich were deemed to be a contracting authority, it would be possible to rely on the exception contained in Article 11(3)(d) of Directive 92/50. The requirement of urgency was met - with so little time between the invitation to tender and the deadline for submitting a bid, the contract in question had to be awarded swiftly - and that urgency was both unforeseen, and inherent in the circumstance of the City of Munich being itself a bidder in another procedure.

IV - Assessment

24. The central issue in these proceedings is whether the City of Munich should be deemed to be a contracting authority. Should it be required to put the waste-transport services out to tender - or is the German Government correct in its view that the City of Munich was itself acting as a prospective supplier of services, and hence did not need to put out to tender any related services which it subcontracted?

25. The German Government favours a functional approach to the concept of contracting authority'; it sees intimations of such an approach both in the purpose and scope of the Directive, and in the Court's case-law. (4) It concludes that the public tendering rules do not apply to a party which is a prospective supplier. Moreover, waste-disposal in the Donau-Wald region does not constitute part of the statutory duties of the City of Munich; the contract to provide those services was obtained under normal conditions of competition.

26. My first observation is that the City of Munich is a local authority. Indeed, the German Government does not dispute this. Article 1(b) of Directive 92/50 provides that the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law are to be considered to be contracting authorities. Hence, as the Commission, too, has correctly observed, a regional or local authority is by definition a contracting authority within the meaning of the Directive. As the Court has consistently held, (5) it is the fact that a given body is a contracting authority which makes Directive 92/50 applicable, whatever the subject-matter of the contract. Indeed, that subject-matter need have no connection with the performance by the authority of its public tasks, and may even relate to activities lacking any such public element. Likewise it is immaterial whether the contracting authority be a prospective buyer or seller, as the German Government has contended.

27. Moreover, the City of Munich may be considered to be a prospective purchaser, inasmuch as it lacks the requisite transport capacity and consequently needs services provided by a third party.

28. It should be borne in mind that if a contracting authority, while trading as a supplier, none

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the less subcontracts certain services to a third party, the selection of that subcontractor may well be based on non-economic considerations. It is also quite possible that, at some stage in the process, public funds will be used

29. As to the case-law relied on by the German Government, (6) this goes to the question of whether or not a given body is a public body. There are three conditions; all must be met. The body must have been established for the specific purpose of meeting needs in the general interest, not of an industrial or commercial character; it must have legal personality; and it must be closely dependent on the State, regional or local authorities or other bodies governed by public law. Unlike a regional or local authority, a body governed by public law' is thus not by definition a contracting authority. However, where a public body meets the cumulative criteria, then it too is by definition a contracting authority within the meaning of the Directive, and the procedural rules set out in that Directive must be fully observed, whether or not the contract awarded concerns tasks in the general interest, and whether or not these are carried out under normal market conditions

30. I think Mannesmann Anlagenbau Austria (7) may be helpful on that point - the Court explained there that Article 1(a) of the Directive makes no distinction between public works contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest, and those which are unrelated to that task - the reason for this being to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities.

31. In the present case, therefore, it is immaterial that the activity in question may be unrelated to the body's task in the general interest, or may not involve any public funds. Where, under the terms of the Directive, a body ranks as a contracting authority, the Directive requires it to conduct award procedures. Accordingly that rule applies even where the contracting authority itself is trading as a supplier on the market, and subcontracting certain parts of a contract to a third party. It is, after all, entirely possible that non-economic considerations might be involved in the selection of a subcontractor, just as it is possible that public funds might be used in the course of the operation.

32. Incidentally, I agree with the Commission's view that it was open to the City of Munich to set up a legally independent body if it wished to offer services to third parties under normal market conditions. If such an organisation aims to make a profit, bears the losses related to the exercise of its activities itself, and performs no public tasks, it is not a public body, and hence not a contracting authority within the meaning of the Directive; its activities will therefore not be subject to the provisions of the directives coordinating public procurement procedures. A body which aims to make a profit and bears the losses associated with the exercise of its activity will not normally become involved in an award procedure on conditions which are not economically justified. (8)

33. Germany has argued that European procurement law does not require tenders within tenders'. It cites Article 1(a)(ii) of Directive 92/50, which excludes certain tasks from the scope of the Directive, and refers in that connection to Article 7 of Directive 93/38, a directive dealing with a number of specific sectors; that provision, which excludes contracts awarded for purposes of resale or hire to third parties from the scope of the directive, is, it suggests, applicable to Directive 92/50 by virtue of the reference to it there, the reason for the exclusion being that the purchase of the goods occurs in principle in a context of free competition, and the ensuing commercial discipline prevents a contracting authority in the sector from favouring particular tenderers on non-economic grounds. It claims that is also the position in the present case.

34. I disagree. The purpose of Article 1(a)(ii) of Directive 92/50 is to exclude from the scope of that Directive any contracts relating to the specific areas covered by Directive 90/531 (since

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replaced by Directive 93/38), because they are covered by what is now Directive 93/38. The provision in question, as the Commission has observed, establishes a dividing-line between Directive 92/50 and Directive 93/38. Directives 93/36 (9) and 93/37 (10) both contain a similar dividing-line. It is only in areas where the sectoral directive applies that Article 7 of that directive has any part to play. However, it not Directive 93/38 which applies to the present case, but Directive 92/50. Article 7 of the former is therefore not applicable, nor may it be applied by analogy.

35. Similarly, there is no merit in the German Government's contention that it would not be possible to conduct an award procedure for services which had to be subcontracted within the context of an award procedure in which the City of Munich was itself a bidder, either prior to that procedure or after it. First, that is no reason to disregard European public procurement legislation. Moreover, it is apparent from documents in the case-file that neither in the notice nor the conditions of tender is there a requirement that the tenderer identify any subcontractor beforehand. The conditions expressly state that subcontracting was allowed. In such a case, any subcontracting had to occur under normal conditions of competition and the party awarded the contract was obliged, on request, to inform the principal subsequently of the identity of the subcontractor.

36. Finally, the German Government considers that if, in the circumstances of the present case, the City of Munich were deemed to be a contracting authority, it could rely on the exception contained in Article 11(3)(d) of Directive 92/50. It would not have been possible to conduct an award procedure for the subcontracted transport services prior to the award procedure for the main contract.

37. The first thing that must be said about that argument is that Article 11(3), which permits derogation from the rules designed to guarantee the proper exercise of the rights granted by the Treaty in the field of public service contracts, must be construed strictly; moreover, a party seeking to rely on that provision must prove that the exceptional circumstances invoked to justify the derogation do indeed obtain. (11)

38. Article 11(3)(d) of Directive 92/50 allows prior publication of a contract notice to be waived in certain specified circumstances, namely in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time-limit cannot be kept. For a claim based on that provision to succeed, therefore, there must be irrefutable proof of extreme urgency - and the urgency must be unforeseen.

39. However, it follows from the above that an award procedure for the (sub)contract could have been conducted following the main award. The German Government cannot therefore properly argue that in the circumstances it was not possible to conduct an award procedure for the relevant transport services; nor may it plead unforeseeability within the meaning of Article 11(3)(d). One hardly needs to add that it is illogical for a contracting authority which is itself bidding for a contract, aware from the start that a substantial part of the execution of that contract would have to be subcontracted should the bid succeed, to fail to take all necessary steps to ensure that it will be able to meet its own obligations under the Directive. Accordingly I consider that the argument predicated on the time-consuming nature of the (sub)contract award procedure is untenable.

40. It follows from the foregoing that I agree with the Commission that the German Government has failed to fulfil its obligations under Directive 92/50. Furthermore, the infringement is a continuing one, since the contract in question was concluded for a term of 25 years.

41. On that latter point, the German Government has claimed that it is, in any case, under no duty to terminate the contract prematurely. First, to do so would be both impossible (no mention being made of such a contingency in the contract itself), and contrary to the maxim pacta sunt servanda. Secondly, Article 2(6) of Directive 89/665 (12) empowers Member States to maintain in force the consequences of contracts awarded in contravention of the public procurement directives.

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42. That provision does indeed permit Member States to provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement, thus protecting the legitimate expectation of the parties to the contract. However, as I stated in my Opinion in Joined Cases C-20/01 and C-28/01 (the issue there was admissibility), that provision in no way renders Treaty infringement proceedings impossible or meaningless. In fact the reverse is true: a finding that an infringement has occurred may well be to the advantage of any parties adversely affected.

43. I should like to make one further - emphatic - point: there are limits to the extent to which Member States may shelter behind the principle of legitimate expectation and the maxim pacta sunt servanda in order to avoid the consequences attendant on repeated breaches of the procurement directives. Ultimately each Member State must take responsibility for ensuring compliance with those directives within its jurisdiction.

44. However, as the Commission has refrained from raising such issues in the present proceedings, they need not be addressed here.

V - Conclusion

45. On the basis of the foregoing I suggest that the Court:

(1) Declares that the Federal Republic of Germany has failed to fulfil its obligations under Article 8 in conjunction with Article 11(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;

(2) Orders the Federal Republic of Germany to pay the costs.

(1) .

(2) - OJ 1992 L 209, p.1.

(3) - Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

(4) - The German Government cites inter alia the first four recitals in the preamble to Directive 92/50; Case 31/87 Beentjes [1988] ECR 4635, paragraph 11; and Case C-360/96 BFI Holding [1998] ECR I-6821, paragraph 62.

(5) - See, for example, Cases C-107/98 Teckal [1999] ECR I-8121, and C-399/98 Ordine degli Architetti and Others [2001] ECR I-5409.

(6) - Inter alia Case C-360/96 BFI Holding , cited at footnote 4, and Joined Cases C-223/99 and C260/99 Agorà and Excelsior [2001] ECR I-3605.

(7) - Case C-44/96 [1998] ECR I-73, paragraph 32. Mannesmann concerns Directive 93/37, the public works directive. For the same interpretation in the context of public service contracts (Directive 92/50) and public supply contracts (Directive 93/36), see respectively BFI Holding , cited at footnote 4, and Case C-373/00 Adolf Truley [2003] ECR I-1931.

(8) - Case C-18/01 Korhonen and Others [2003] ECR I-5321, paragraph 51.

(9) - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

(10) - Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

(11) - Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609.

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(12) - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
PUBREF	European Court reports 2004 Page I-11197
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LODGED	2003/03/20
JURCIT	31992L0050 : N 1 34 40 31992L0050-A01LA : N 3 4 34 31992L0050-A01LB : N 5 31992L0050-A08 : N 6 31992L0050-A11P1 : N 7 31992L0050-A11P3 : N 37 31992L0050-A11P3LD : N 8 38 39 31990L0531 : N 34 31993L0038 : N 34 31993L0038-A07 : N 34 31993L0036 : N 34 31993L0037 : N 34 61998J0107 : N 26 61998J0399 : N 26 61996J0360 : N 29 30 61999J0223 : N 29 61996J0044 : N 30 62000J0373 : N 30 62001J0018 : N 32 62001J0020 : N 37 62001C0020 : N 42
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
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DEFENDA	Federal Republic of Germany ; Member States
NATIONA	Federal Republic of Germany
PROCEDU	Action for failure to fulfil obligations - successful
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ARRÊT DE LA COUR (première chambre)
9 septembre 2004 (1)

«Manquement d'État – Recevabilité – Intérêt à agir – Directive 92/50/CEE – Marchés publics – Services de transports des déchets – Procédure sans publication préalable d'un avis de marché»

Dans l'affaire C-125/03,

ayant pour objet un recours en manquement au titre de l'article 226 CE,

introduit le 20 mars 2003,

Commission des Communautés européennes, représentée par M. K. Wiedner, en qualité d'agent, ayant élu domicile à Luxembourg,

partie requérante,

contre

République fédérale d'Allemagne, représentée par M. W.-D. Plessing et M^{me} A. Tiemann, en qualité d'agents,

partie défenderesse,

LA COUR (première chambre),

composée de M. P. Jann (rapporteur), président de chambre, MM. A. Rosas, S. von Bahr, K. Lenaerts et K. Schiemann, juges,

avocat général: M. L. A. Geelhoed,
greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1
Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, du fait que les contrats d'enlèvement d'ordures conclus par les villes de Lüdinghausen et d'Olfen ainsi que par les communes de Nordkirchen, de Senden et de Ascheberg ont été passés au mépris des règles de publicité prévues par les dispositions combinées des articles 8, 15, paragraphe 2, et 16, paragraphe 1, de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de cette directive.

Le cadre juridique

2
En vertu de l'article 8 de la directive 92/50, «[l]es marchés qui ont pour objet des services figurant à l'annexe I A sont passés conformément aux dispositions des titres III à VI».

3
L'article 15, paragraphe 2, de cette directive dispose que «[l]es pouvoirs adjudicateurs désireux de passer un marché public de services en recourant à une procédure ouverte, restreinte ou, dans les conditions prévues à l'article 11, à une procédure négociée font connaître leur intention au moyen d'un avis».

4
Selon l'article 16, paragraphe 1, de ladite directive, «[l]es pouvoirs adjudicateurs qui ont passé un marché public ou organisé un concours envoient un avis concernant les résultats de la procédure d'attribution à l'Office des publications officielles des Communautés européennes».

Les faits et la procédure précontentieuse

5
En 1997, les villes de Lüdinghausen et d'Olfen ainsi que les communes de Nordkirchen, de Senden et de Ascheberg ont conclu des contrats d'enlèvement d'ordures sans appliquer la procédure prévue par la directive 92/50. Ces contrats couraient jusqu'au 31 décembre 2003.

6
Après avoir mis la République fédérale d'Allemagne en mesure de présenter ses observations, la Commission a, le 20 avril 2001, émis un avis motivé relevant que les marchés relatifs aux transports des déchets des villes de Lüdinghausen et d'Olfen ainsi que des communes de Nordkirchen, de Senden et de Ascheberg (ci-après les «marchés en question») auraient dû faire l'objet d'un appel d'offres dans le *Journal officiel des Communautés européennes,* conformément à la directive 92/50, et que la République fédérale d'Allemagne aurait dû mettre un terme à ces contrats. Elle a, dès lors, invité cet État membre à se conformer à ses obligations résultant du traité CE dans un délai de deux mois. Insatisfaite de la réponse apportée par les autorités allemandes par lettre du 22 juin 2001, la Commission a décidé d'introduire le présent recours.

Sur le recours

Sur la recevabilité du recours

Argumentation des parties

7
Le gouvernement allemand fait valoir que le recours est irrecevable puisqu'il ne subsiste pas de violation du droit communautaire au terme du délai fixé dans l'avis motivé.

8
En effet, à cette date, la République fédérale d'Allemagne aurait déjà reconnu que les marchés en question avaient été passés en violation du droit communautaire et aurait assuré que, à l'avenir, la pratique suivie par les pouvoirs adjudicateurs en question respecterait le droit communautaire. Ces derniers n'étant pas tenus de résilier les contrats, elle aurait, à ce moment, déjà pris les mesures nécessaires pour répondre aux objections de la Commission.

9
La Commission soutient que le recours est recevable.

10
Selon, elle, ce manquement subsiste pendant toute la durée d'exécution des contrats illicites (voir arrêt du 10 avril 2003, Commission/Allemagne, C-20/01 et C-28/01, Rec. p. I-3609, points 35 et 36). L'intention de passer, à l'avenir, les contrats d'enlèvement d'ordures conformément au droit communautaire relatif à la passation des marchés ne suffirait pas à mettre fin au manquement reproché (voir arrêt du 28 octobre 1999, Commission/Autriche, C-328/96, Rec. p. I-7479, points 42 à 44). Étant donné que, au terme du délai fixé dans l'avis motivé, les contrats en question étaient en cours d'exécution, la violation aurait encore persisté à cette date et n'aurait pris fin que le 31 décembre 2003 (arrêt Commission/Allemagne, précité, points 32, 38 et 39).

Appréciation de la Cour

11
Il y a lieu de rappeler qu'il résulte des termes mêmes de l'article 226, second alinéa, CE que la Commission ne peut saisir la Cour d'un recours en manquement que si l'État membre en cause ne s'est pas conformé à l'avis motivé dans le délai que celle-ci a imparti à cette fin (voir arrêt du 31 mars 1992, Commission/Italie, C-362/90, Rec. p. I-2353, point 9).

12
Si, en matière de passation des marchés publics, la Cour a dit pour droit qu'un manquement n'existe plus à la date d'expiration du délai fixé dans l'avis de la Commission lorsque l'avis de marché en question avait, à ce moment-là, déjà épuisé tous ses effets (voir, en ce sens, arrêt Commission/Italie, précité, points 11 et 13), il ressort également de la jurisprudence qu'un manquement subsiste à cette date lorsque des contrats prétendument conclus en violation des dispositions communautaires relatives aux marchés publics continuent à produire leurs effets (voir, en ce sens, arrêts précités, Commission/Autriche, point 44, et Commission/Allemagne,

points 34 à 37).

13
En l'espèce, il convient de constater que, au terme du délai fixé dans l'avis motivé, les contrats d'enlèvement d'ordures prétendument conclus en violation des dispositions de la directive 92/50 étaient en cours d'exécution. Par conséquent, le prétendu manquement persistait encore à cette date et n'a pris fin qu'à la date d'échéance de ces contrats.

14
Dans ce contexte, l'argumentation avancée par le gouvernement allemand pour écarter la recevabilité du recours en manquement ne peut pas être accueillie.

15
En effet, selon le gouvernement allemand, il ressort de l'article 2, paragraphe 6, de la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395, p. 33) que le principe pacta sunt servanda s'oppose à une obligation de résilier ces contrats et protège les droits acquis même en vertu de contrats conclus en violation des dispositions régissant la passation des marchés publics. À cet égard, il convient de répondre que, si cette disposition permet aux États membres de limiter, après la conclusion du contrat, la protection juridique nationale à des dommages-intérêts aux personnes lésées par une telle violation, elle ne saurait avoir pour conséquence que le comportement d'un pouvoir adjudicateur devrait, en toute éventualité, être considéré comme conforme au droit communautaire dans le cadre d'un recours en manquement (voir, en ce sens, arrêt Commission/Allemagne, précité, points 38 et 39).

16
S'agissant de l'argument selon lequel la République fédérale d'Allemagne a reconnu les défauts qui ont affecté les procédures de passation en question, il convient de relever que, dans le cadre d'un recours en manquement, il appartient à la Cour de constater si le manquement reproché existe ou non, même si l'État concerné ne conteste plus le manquement. S'il en était autrement, les États membres, en reconnaissant le manquement et en admettant la responsabilité qui peut en découler, seraient libres, à tout moment lors d'une procédure en manquement pendante devant la Cour, de mettre fin à celle-ci sans que l'existence du manquement et le fondement de leur responsabilité aient jamais été établis en justice (voir, en ce sens, arrêts du 22 juin 1993, Commission/Danemark, C-243/89, Rec. p. I-3353, point 30 et Commission/Allemagne, précité, points 40 et 41).

17
Au vu de ce qui précède, il convient de considérer que le recours introduit par la Commission est recevable.

Sur le fond

18
À l'appui de son recours, la Commission fait valoir, comme grief unique, que les marchés en question auraient dû faire l'objet d'un appel d'offres dans le *Journal officiel des Communautés européennes* conformément aux articles 8, 15, paragraphe 2, et 16, paragraphe 1, de la directive 92/50.

19
Le gouvernement allemand admet que les pouvoirs adjudicateurs en question auraient dû passer un appel d'offres pour leurs marchés de services dans le *Journal officiel des Communautés européennes* et qu'il n'a pas été procédé à cette publication.

20
Dès lors le recours introduit par la Commission est fondé.

21
Eu égard à ce qui précède, il convient de constater que, du fait que les contrats d'enlèvement d'ordures conclus par les villes de Lüdinghausen et d'Olfen ainsi que par les communes de Nordkirchen, de Senden et de Ascheberg ont été passés au mépris des règles de publicité prévues par les dispositions combinées des articles 8, 15, paragraphe 2, et 16, paragraphe 1, de la directive 92/50, la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de cette directive.

Sur les dépens

22
En vertu de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République fédérale d'Allemagne et celle-ci ayant succombé en ses moyens, il convient de la condamner aux dépens.

Par ces motifs, la Cour (première chambre) déclare et arrête:

1)

Du fait que les contrats d'enlèvement d'ordures conclus par les villes de Lüdinghausen et d'Olfen ainsi que par les communes de Nordkirchen, de Senden et de Ascheberg ont été passés au mépris des règles de publicité prévues par les dispositions combinées des articles 8, 15, paragraphe 2, et 16, paragraphe 1, de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services, la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de cette directive.

2)

La République fédérale d'Allemagne est condamnée aux dépens.

Signatures.

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Langue de procédure: l'allemand.

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Notice for the OJ

Judgment of the Court (First Chamber) of 9 September 2004 in Case C-125/03: **Commission of the European Communities** against **Federal Republic of Germany** [1]

(Failure by a Member State to fulfil its obligations - Admissibility - Legal interest in bringing proceedings - Directive 92/50/EEC - Public contracts - Services for transport of waste - Procedure without prior publication of a contract notice)

(Language of the case: German)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Case C-125/03: **Commission of the European Communities** (Agents: K. Wiedner) v **Federal Republic of Germany** (Agent: W.-D. Plessing and A. Tiemann) - action under Article 226 EC for failure to fulfil obligations - the Court (First Chamber), composed of: P. Jann (Rapporteur), President of Chamber, A. Rosas, S. von Bahr, K. Lenaerts and K. Schiemann, Judges; L. Geelhoed, Advocate General; R. Grass, Registrar, has given a judgment on 9 September 2004, in which it:

1. Declares that, by virtue of the fact that contracts for refuse removal concluded by the towns of Lüdinghausen, and Olfen, and the district councils of Nordkirchen, Senden and Ascheberg were awarded in disregard of the advertising rules laid down in Article 8, in conjunction with 15(2) and 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the Federal Republic of Germany has failed to fulfil its obligations under that directive;

2. Orders the Federal Republic of Germany to pay the costs.

_____

[1] - OJ C 112 of 10.5.2003

Judgment of the Court (Second Chamber) of 13 January 2005

Commission of the European Communities v Kingdom of Spain. Failure to fulfil obligations - Directives 93/36/EEC and 93/37/EEC - Public contracts - Award procedure for public supply and public works contracts - Scope - Definition of contracting authority - Inter-administrative cooperation agreements - Definition of contract - Use of the negotiated procedure in cases not provided for by the directive. Case C-84/03.

1. Approximation of laws - Award procedures for public supply and public works contracts - Directives 93/36 and 93/37 - Contracting authorities - Body governed by public law - Concept - National legislation excluding bodies governed by private law from fulfilling the conditions laid down in the directives - Not permissible

(Council Directives 93/36, Art. 1(b), and 93/37, Art. 1(b))

2. Approximation of laws - Award procedures for public supply and public works contracts - Directives 93/36 and 93/37 - Public contract - Concept - National legislation excluding cooperation agreements concluded between bodies governed by public law - Not permissible

(Council Directives 93/36, Art. 1(a), and 93/37, Art. 1(a))

3. Approximation of laws - Award procedures for public supply and public works contracts - Directives 93/36 and 93/37 - Derogation from common rules - Strict interpretation - Use of the negotiated procedure - Limits

(Council Directives 93/36 and 93/37)

1. National legislation on public contracts which excludes from its scope private law bodies, even though they fulfil the cumulative requirements in the light of which the concept of body governed by public law' is defined and which are laid down in the second subparagraph of Article 1(b) of Directives 93/36 coordinating procedures for the award of public supply contracts and 93/37 concerning the coordination of procedures for the award of public works contracts constitutes an incorrect transposition of the definition of body governed by public law' and, accordingly, of contracting authority' in the first subparagraph of Article 1(b).

In order to determine whether a private law body is to be classified as a body governed by public law it is only necessary to establish whether the body in question satisfies those conditions, since an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority for the purposes of those directives.

(see paras 27-28, 31, operative part)

2. National legislation on public contracts which excludes, a priori, from its scope cooperation agreements concluded between public authorities and other public undertakings, and therefore, also the agreements which constitute public contracts for the purpose of those directives constitutes an incorrect transposition of Directives 93/36 coordinating procedures for the award of public supply contracts and 93/37 concerning the coordination of procedures for the award of public works contracts.

In order for there to be a public supply contract or a public works contract within the meaning of Article 1(a) of the directive, it is sufficient, in principle, if the contract was concluded between a local authority and a person legally distinct from it. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

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(see paras 38, 40, operative part)

3. The derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public supply contracts and public works contracts must be interpreted strictly. In order not to deprive Directives 93/96 coordinating procedures for the award of public supply contracts and 93/37 concerning the coordination of procedures for the award of public works contracts of their effectiveness, Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for in those directives, or add new conditions to the cases expressly provided for by those directives which make that procedure easier to use.

(see paras 48, 58, operative part)

In Case C-84/03,

ACTION under Article 226 EC for failure to fulfil obligations brought on

26 February 2003

,

Commission of the European Communities, represented by K.Wiedner and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A.Timmermans, President of the Chamber, R. Schintgen, J. Makarczyk (Rapporteur), G. Arestis and J. Kluka, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

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

gives the following

Judgment

Costs

62. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds the Court (Second Chamber) hereby:

1. Declares that by failing to transpose correctly into its national legal system Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the

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award of public works contracts and, in particular,

- by excluding from the scope of the Ley de Contratos de las Administraciones Publicas (Law on contracts awarded by public authorities) of 16 June 2000, in the codified version approved by the Real Decreto Legislativo 2/2000 of 16 June 2000, more particularly in Article 1(3) thereof, the entities governed by private law fulfilling the requirements laid down in the first, second and third indents of the second subparagraph of Article 1(b) of each of those directives;

- by excluding absolutely from the scope of that law, in Article 3(1)(c) thereof, cooperation agreements concluded between public authorities and the other public undertakings and, therefore, also agreements which constitute public contracts for the purpose of those directives; and

- by permitting, in Article 141(a) and Article 182(a) and (g) of that law, the negotiated procedure to be used in two cases which are not provided for in those directives,

the Kingdom of Spain has failed to fulfil its obligations under those directives;

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

1. By its application the Commission of the European Communities has brought an action for a declaration that by failing correctly to transpose into its national legal system Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and, in particular,

- by excluding from the scope of the Ley de Contratos de las Administraciones Publicas (Law on contracts awarded by public authorities) of 16 June 2000, in the codified version approved by the Real Decreto Legislativo 2/2000 of 16 June 2000 (BOE No 148 of 21 June 2000; the codified law'), more particularly in Article 1(3) of the codified law, entities governed by private law which fulfil the requirements laid down in the first, second and third indents of the second subparagraph of Article 1(b), of each of those directives;

- by excluding absolutely from the scope of the codified law, in Article 3(1)(c) thereof, cooperation agreements concluded between public authorities and the other public undertakings and, therefore, also agreements which constitute public contracts for the purpose of those directives; and

- by permitting in Article 141(a) and Article 182(a) and (g) of the codified law, the negotiated procedure to be used in two cases which are not provided for in those directives,

the Kingdom of Spain has failed to fulfil its obligations under the provisions of the EC Treaty and of those directives.

Legal background

Community legislation

2. Article 1(b) of Directive 93/37 provides:

contracting authorities shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having a legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies

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

3. The provisions of Article 1(b) of Directive 93/36 are essentially the same.

4. Under Article 6(2) to (4) of Directive 93/36:

2. The contracting authorities may award their supply contracts by negotiated procedure in the case of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions that are in accordance with provisions of Title IV, in so far as the original terms for the contract are not substantially altered. The contracting authorities shall in these cases publish a tender notice unless they include in such negotiated procedures all the enterprises satisfying the criteria of Articles 20 to 24 which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure.

3. The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

(a) in the absence of tenders or appropriate tenders in response to an open or restricted procedure in so far as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission;

(b) when the products involved are manufactured purely for the purpose of research, experiment, study or development, this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;

(c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

(e) for additional deliverers by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.

4. In all other cases, the contracting authorities shall award their supply contracts by the open procedure or by the restricted procedure.'

5. Under Article 7(3) and (4) of Directive 93/37:

3. The contracting authorities may award their public works contracts by negotiated procedure without prior publication of a contract notice, in the following cases:

(a) in the absence of tenders or of appropriate tenders in response to an open or restricted procedure in so far as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission at its request;

(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;

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(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

(d) for additional works not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the carrying-out of the work described therein, on condition that the award is made to the contractor carrying out such work:

- when such works cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities, or

- when such works, although separable from the execution of the original contract, are strictly necessary to its later stages.

However, the aggregate amount of contracts awarded for additional works may not exceed 50% of the amount of the main contract;

(e) for new works consisting of the repetition of similar works entrusted to the undertaking to which the same contracting authorities awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4.

As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting authorities when they apply the provisions of Article 6. This procedure may only be adopted during the three years following the conclusion of the original contract.

4. In all other cases, the contracting authorities shall award their public works contracts by the open procedure or by the restricted procedure.'

National legislation

6. The scope ratione personae of the Spanish legislation on public procurement is defined in Article 1 of the codified law, which includes all public authorities, whether State authorities or authorities of the autonomous communities and regional or local authorities.

7. Article 1(3) of the codified law provides:

This law shall also apply to the awarding of contracts by autonomous bodies in every case and to other bodies governed by public law having legal personality and connected with or under the control of a public authority, which fulfil the following criteria:

(a) they were established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature;

(b) they are financed, for the most part, by public authorities or other bodies governed by public law, or are subject to management supervision by those bodies, or have an administrative, managerial or supervisory board, more than half of whose members are appointed by public authorities or by other bodies governed by public law.'

8. The sixth additional provision of the codified law, entitled Rules applicable to the award of contracts in the public sector', provides that commercial companies in which public authorities or their autonomous bodies, or bodies governed by public law, hold, directly or indirectly, a majority shareholding, shall, when awarding contracts, comply with the advertising and competition rules, unless the nature of the operation to be carried out is incompatible with those rules'.

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9. Article 3(1) of the codified law excludes from its scope cooperation agreements between the State authorities, on the one hand, and the Social Security, autonomous communities, local bodies, their autonomous bodies and any other public body, on the other hand, or between these bodies'.

10. Articles 141(a) (concerning works contracts) and 182(a) (concerning supply contracts) of the codified law provide that that negotiated procedure may be used without prior publication of a tender notice where the contract has not been awarded during an open or restricted procedure, or where the candidates have not been allowed to submit tenders, so long as there has been no alteration of the contract's original conditions, except the price, which may not be increased by more than 10%.

11. Article 182(g) of the codified law states that the negotiated procedure may be used without prior publication of a tender notice in the procedures which concern goods whose uniformity has been declared necessary for their joint use by the administration, in so far as the choice of the type of goods in question was made previously and independently, pursuant to an invitation to tender, in accordance with the provisions of this chapter.

Pre-litigation procedure

12. Taking the view that the successive laws transposing Directives 93/36 and 93/37 into Spanish law were partly incompatible with them, the Commission sent a letter of formal notice to the Kingdom of Spain on 17 September 1997 and a supplementary letter of formal notice on 24 July 2000.

13. Following notification of the codified law by the Spanish authorities, the Commission took the view that certain contentious aspects of the transposition had been resolved.

14. Nevertheless, since in its view Directives 93/36 and 93/37 continued to be transposed incorrectly into Spanish law, the Commission sent a reasoned opinion to the Kingdom of Spain on 24 January 2001 and a supplementary reasoned opinion on 31 January 2002, calling on the Kingdom of Spain to take the measures necessary to comply within two months from the notification of the last reasoned opinion.

15. Since the Kingdom of Spain's response to the supplementary reasoned opinion was deemed to be unsatisfactory, the Commission decided to bring the present proceedings.

The action

16. In support of its action the Commission relies on three grounds of complaint.

17. By its first ground of complaint the Commission alleg es that the Kingdom of Spain has excluded entities governed by private law, a priori, from the scope of the codified law, even though they may be bodies governed by public law for the purposes of the second subparagraph of Article 1(b) of Directives 93/36 and 93/37.

18. By its second ground of complaint the Commission alleges that the Kingdom of Spain has excluded from the codified law cooperation agreements concluded between bodies governed by public law, although those agreements may constitute public contracts for the purpose of Directives 93/36 and 93/37.

19. By its third ground of complaint the Commission alleges that the Kingdom of Spain has permitted the use of the negotiated procedure in two cases which are not provided for by Directives 93/36 and 93/37, that is the award of contracts following procedures which have been declared unsuccessful and the award of supply contracts for uniform goods.

First ground of complaint: exclusion of entities governed by private law fulfilling the conditions laid down in the first, second and third indents of the second subparagraph of Article 1(b) of Directives 93/36 and 93/37 from the scope of the codified law

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Arguments of the parties

20. The Commission argues that the scope ratione personae of the codified law does not coincide with that of Directives 93/36 and 93/37, in so far as the national law applies exclusively to bodies subject to a public law regime for the purposes of Spanish law, while the legal form of the body at issue falls outside the definition of body governed by public law' set out in those directives.

21. Relying on the judgment in Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, paragraphs 17 to 35, the Commission recalls that the Court has held that a body governed by public law' must be understood as a body which fulfils the three cumulative conditions set out in the second subparagraph of Article 1(b) of Directive 93/37.

22. Relying on the judgments of the Court (in particular, the judgments in Case 31/87 Beentjes [1988] ECR 4635 and Case C-360/96 BFI Holding [1998] ECR I-6821, the Commission submits that the definition of a contracting authority in Article 1 of Directives 93/36 and 93/37 must be interpreted in functional terms.

23. Furthermore, the Commission asserts that the interpretation given by the Spanish Government of a body governed by public law' means that a Community concept which must be given a uniform interpretation throughout the Community ceases to be autonomous.

24. The Spanish Government opts for a literal interpretation of the definition of body governed by public law'. It argues that Directives 93/36 and 93/37 do not include commercial companies under public control in that definition. In support of its arguments, it relies on Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which distinguishes between the notion of body governed by public law', which is the same in the public contracts directives, and public undertaking', whose definition corresponds to the definition of public commercial company.

25. Furthermore, the Spanish Government rejects any solution of a general nature. It submits that a genuine delimitation of the definition of body governed by public law' may be made only after defining needs in the general interest' and, in particular, needs not having an industrial or commercial character', by means of a detailed examination of each body.

26. The Commission replies that Directive 93/38 is a special regulation, and that its exceptional character precludes its use in interpreting general provisions, in this case Directives 93/36 and 93/37.

Findings of the Court

27. It must be observed that according to settled case-law the definition of body governed by public law', a concept of Community law which must be given an autonomous and uniform interpretation throughout the Community, is defined in functional terms exclusively under the three cumulative conditions in the second subparagraph of Article 1(b) of Directives 93/36 and 93/37 (see, to that effect, Mannesmann Anlagenbau Austria and Others , paragraphs 20 and 21; Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraphs 51 to 53; Case C-214/00 Commission v Spain [2003] ECR I-4667, paragraphs 52 and 53; and Case C-283/00 Commission v Spain [2003] ECR I-11697, paragraph 69).

28. It follows that in order to determine whether a private law body is to be classified as a body governed by public law it is only necessary to establish whether the body in question satisfies the three cumulative conditions laid down in the second subparagraph of Article 1(b) of Directives 93/36 and 93/37, since an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority for the purposes of those directives (Case C214/00 Commission v Spain , paragraphs 54, 55 and 60).

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29. The Court has also stated that that interpretation does not amount to a disregard for the industrial or commercial character of the general interest needs which the body concerned satisfies, since that factor is necessarily taken into consideration in order to determine whether or not it satisfies the condition laid down in the first indent of the second subparagraph of Article 1(b) of Directives 93/36 and 93/37 (see, to that effect, Case C-283/00 Commission v Spain , paragraph 75).

30. Furthermore, that conclusion is not invalidated by the want of an express reference in Directives 93/36 and 93/37 to the specific category of public undertakings' which is used in Directive 93/38 (see, to that effect, Case C-283 Commission v Spain , paragraph 76).

31. Thus it follows from the foregoing that the Spanish legislation constitutes an incorrect transposition of the definition of contracting authority' in Article 1(b) of Directives 93/36 and 93/37, in so far as it excludes the bodies of private law from its scope, even though they may satisfy the conditions laid down in the first, second and third indents of the second subparagraph of Article 1(b) of those directives.

32. In those circumstances the Commission's first ground of complaint must be upheld.

Second ground of complaint: exclusion of cooperation agreements concluded between bodies governed by public law from the scope of the codified law

Arguments of the parties

33. The Commission states that the codified law excludes from its scope cooperation agreements concluded either between the general State administration and the Social Security, autonomous communities, local bodies, their autonomous bodies and any other public body, or between public bodies themselves. It argues that that absolute exclusion constitutes an incorrect transposition of Directives 93/36 and 93/37, as some of those agreements may be of the same kind as the public contracts covered by them.

34. The Commission maintains that this exclusion is not found in Directives 93/36 and 93/37.

35. The Commission relies on the definition of a contract set out in Article 1(a) of Directives 93/36 and 93/37 and the case-law of the Court, according to which, in order to show the existence of a contract, it must be determined whether there has been an agreement between two separate persons (judgment in Case C-107/98 Teckal [1999] ECR I-8121, paragraph 49). It takes the view, therefore, that, in the light of the above, inter-administrative cooperation agreements may be contracts within the meaning of Directives 93/36 and 93/37.

36. The Spanish Government asserts that the agreements are the normal way for bodies governed by public law to establish relations between each other. It maintains that those relations are marginal to the contract. Furthermore, it questions whether the judgment in Teckal is well founded and submits that the principle in Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) is implicitly included in the other directives on public contracts.

Findings of the Court

37. According to the definitions given in Article 1(a) of Directives 93/36 and 93/37, public supply or public works contracts are contracts for pecuniary interest concluded in writing between a supplier or a contractor and a contracting authority within the meaning of Article 1(b) of the directives, for the purchase of products or the performance of a certain type of works.

38. In accordance with Article 1(a) of Directive 93/36, it is sufficient, in principle, if the contract was concluded between a local authority and a person legally distinct from it. The position can be otherwise only in the case where the local authority exercises over the person concerned

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a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities. (judgment in Teckal , paragraph 50).

39. Having regard to the fact that the elements constituting the definition of a contract in Directives 93/36 and 93/37 are identical, except for the purpose of the contract in question, the approached adopted in Teckal must be applied to inter-administrative agreements covered by Directive 93/37.

40. Consequently, in so far as it excludes, a priori, from the scope of the codified law relations between public authorities, their public bodies and, in a general manner, non-commercial bodies governed by public law, whatever the nature of those relations, the Spanish law at issue in this case constitutes an incorrect transposition of Directives 93/36 and 93/37.

41. In those circumstances the Commission's second complaint must be upheld.

Third ground of complaint: use of the negotiated procedure laid down in the codified law in two cases not provided for by Directives 93/36 and 93/37

42. The Commission takes the view that the codified law authorises use of the negotiated procedure in two cases which are not provided for by Directives 93/36 and 93/37: the award of contracts following procedures declared unsuccessful and the award of supply contracts for uniform goods.

First part of the third ground of complaint concerning the award of contracts following unsuccessful procedures

Arguments of the parties

43. In the Commission's view, by permitting an increase of the original tender price of up to 10% in relation to the earlier open or restricted procedures, Articles 141(a) and 182(a) of the codified law contravene Directives 93/36 and 93/37, since they allow a substantial alteration of one of the original conditions of the contract, namely the price.

44. The Commission maintains that the list of cases in respect of which the negotiated procedure may be used is limited. The interpretation of the concept of nonsubstantial alteration' must therefore be restrictive.

45. The Spanish Government complains that the Commission has not indicated which price modifications must be regarded as substantial and which do not merit such a classification. For the purposes of legal certainty, the Spanish legislature transformed the vague notion of substantial modifications to the original conditions of the contract' into a well-defined notion.

46. In response, the Commission asserts that, in the context of an action for failure to fulfil obligations, it is neither bound to define the limits of the infringement nor to indicate measures which would enable the failure to fulfil obligations to be eliminated. Furthermore, it states that the aim of the national legislature in seeking to define the concepts contained in the directives can only result in failure to apply them.

Findings of the Court

47. As is clear, in particular, from the twelfth recital in the preamble to Directive 93/36 and the eighth recital in the preamble to Directive 93/37, the negotiated procedure is exceptional in nature and, therefore, must be applied only in cases which are set out in an exhaustive list. To that end Articles 6(3)(a) of Directive 93/36 and Article 7(3)(a) of Directive 93/37 exhaustively list the cases in which the negotiated procedure may be used without prior publication of a tender notice.

48. According to settled case-law, the derogations from the rules intended to ensure the effectiveness

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of the rights conferred by the Treaty in connection with public works contracts must be interpreted strictly (judgments in Case C-57/94 Commission v Italy [1995] ECR I-1249, paragraph 23, and Case C-318/94 Commission v Germany [1996] ECR I-1949, paragraph 13). To prevent the directives at issue being deprived of their effectiveness, the Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for in Directives 93/36 and 93/37, or add new conditions to the cases expressly provided for by those directives which make that procedure easier to use.

49. In the present case it cannot be denied that, in so far as they authorise the use of the negotiated procedure where it has not been possible to award the contract during an open or restricted procedure or where the candidates were not allowed to tender, provided that there were no modifications of the original conditions of the contract apart from the price, which cannot be increased by more than 10%, Articles 141(a) and 182(a) of the codified law do indeed add a new condition to the provisions of Directives 93/36 and 93/37 which is capable of undermining both their scope and their exceptional character. Such a condition cannot be regarded as a nonsubstantial alteration of the original terms of the contracts as provided for in Article 6(3)(a) of Directive 93/36 and Article 7(3)(a) of Directive 93/37.

50. In those circumstances it must be held that Articles 141(a) and 182(a) of the codified law constitute an incorrect transposition of Article 6(3)(a) of Directive 93/36 and Article 7(3)(a) of Directive 93/37.

Second part of the third ground of complaint concerning the award of supply contracts for uniform goods

Arguments of the parties

51. The Commission submits that the procedure set out in Article 182(g) of the codified law disregards the provisions of Article 6(2) and (3) of Directive 93/36, which sets out the cases in which the negotiated procedure may be applied.

52. In this case, the Spanish law provides that the negotiated procedure may be used without prior publication of a tender notice in respect of goods whose uniformity has been held to be necessary for their common use by the administration. The use of that procedure is possible in so far as the type of goods has been chosen in advance and independently, pursuant to a call for tenders.

53. The Spanish Government contends that the calls for tenders seeking to determine the type of uniform goods are similar to framework contracts.

54. Furthermore, the Spanish Government contends that the calls for tenders at issue do not differ in any way from the tendering procedures following an agreement or framework agreement provided for by another article of the codified law, which is not subject to any comment by the Commission. It takes the view, therefore, that the codified law is in accordance with the directives on public contracts.

55. Having set out the definition of the framework agreements, the Commission asserts that those agreements are not covered by Directive 93/36.

Findings of the Court

56. As regards the award of supply contracts for uniform goods, referred to in Article 182(g) of the codified law, the negotiated procedure may be used only in the cases exhaustively listed in Art icle 6(2) and (3) of Directive 93/36. Article 6(4) states, moreover, that in all other cases, the contracting authorities shall award their supply contracts by the open procedure or by the restricted procedure'.

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57. The provision at issue, introduced by the Spanish legislature, does not correspond either to the case mentioned in Article 6(2) of Directive 93/36 or to one of the five situations listed in Article 6(3) in which the use of a negotiated procedure without prior publication of a tender notice is expressly permitted. It must be stated, moreover, that the concept of framework agreement' does not come within the scope of those exceptions.

58. Furthermore, the Court has consistently held that the provisions which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in the field of public supply contracts must be strictly interpreted (judgment in Case C71/92 Commission v Spain [1993] ECR I-5923, paragraph 36). It is, therefore, for the Member States to show that their legislation constitutes a faithful transposition of the cases expressly provided for by the directive. In the present case, such evidence has not been provided by the Spanish Government.

59. Accordingly, to the extent that it authorises use of the negotiated procedure without prior publication of a tender notice for the procedures involving goods whose uniformity has been held to be necessary for their common use by the public authorities, provided that the choice of the type of goods has been made in advance, pursuant to a call for tenders, the law at issue constitutes an incorrect transposition of Article 6(2) and (3) of Directive 93/36.

60. In those circumstances the Commission's third complaint must be upheld.

61. In the light of the foregoing considerations, it must be held that, by failing to transpose correctly into its national legal system Directive 93/36 and Directive 93/37 and, in particular,

- by excluding from the scope of the codified law, more particularly in Article 1(3) thereof, the entities governed by private law fulfilling the requirements laid down in the first, second and third indents of the second subparagraph of Article 1(b) of each of those directives;

- by excluding absolutely from the scope of that law, in Article 3(1)(c) thereof, cooperation agreements concluded between public authorities and the other public undertakings and, therefore, also agreements which constitute public contracts for the purpose of those directives; and

- by permitting, in Article 141(a) and Article 182(a) and (g) of that law, the negotiated procedure to be used in two cases which are not provided for in those directives,

the Kingdom of Spain has failed to fulfil its obligations under those directives.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
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JURCIT

31991L0036 : N 1 30 39 40 48 61
31991L0036-A01LA : N 37 38
31991L0036-A01LB : N 3 31 37
31991L0036-A01LBL2 : N 1 27 28 61
31991L0036-A01LBL2T1 : N 29
31991L0036-A06P2 : N 4 56 57 59
31991L0036-A06P3 : N 4 56 57 59
31991L0036-A06P3LA : N 47 49 50
31991L0036-A06P4 : N 4
31991L0036-C12 : N 47
31993L0037 : N 1 30 39 40 48 61
31993L0037-A01LA : N 37
31993L0037-A01LB : N 2 31 37
31993L0037-A01LBL2 : N 1 27 28 61
31993L0037-A01LBL2T1 : N 29
31993L0037-A07P3 : N 5
31993L0037-A07P3LA : N 47 49 50
31993L0037-A07P4 : N 5
31993L0038 : N 30
61996J0044 : N 27
61999J0470 : N 27
62000J0214 : N 27 28
62000J0283 : N 27 29
61998J0107 : N 38 39
61994J0057 : N 48
61994J0318 : N 48
61992J0071 : N 58

CONCERNS

Failure concerning 31993L0036 -A01LBL2
Failure concerning 31993L0037 -A01LBL2

SUB

Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services

AUTLANG

Spanish

APPLICA

Commission ; Institutions

DEFENDA

Spain ; Member States

NATIONA

Spain

NOTES

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PROCEDU Action for failure to fulfil obligations - successful

ADVGEN Kokott

JUDGRAP Makarczyk

DATES of document: 13/01/2005
of application: 26/02/2003

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Notice for the OJ

JUDGMENT OF THE COURT OF JUSTICE

(Second Chamber)

of 13 January 2005

in Case C-84/03 Commission of the European Communities v Kingdom of Spain[1]

(Failure to fulfil obligations - Directives 93/36/EEC and 93/37/EEC -- Public contracts - Award procedure for public supply and public works contracts - Scope - Definition of contracting authority - Inter-administrative cooperation agreements - Definition of contract - Use of the negotiated procedure in cases not provided for by the directive)

(Language of the Case: Spanish)

In Case C-84/03, concerning an action for failure to fulfil obligations under Article 226 EC, brought on 26 February 2003 by the **Commission of the European Communities** (Agents: K. Wiedner and G. Valero Jordana) against the **Kingdom of Spain** (Agent: S. Ortiz Vaamonde), the Court of Justice (Second Chamber), composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, J. Makarczyk (Rapporteur), G. Arestis and J. Klučka, Judges; Advocate General, J. Kokott; Registrar, R. Grass, gave a judgment on 13 January 2005, in which it:

Declares that by failing to transpose correctly into its national legal system Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts and, in particular,

by excluding from the scope of the Ley de Contratos de las Administraciones Públicas (Law on contracts awarded by public authorities) of 16 June 2000, in the codified version approved by the Real Decreto Legislativo 2/2000 of 16 June 2000, more particularly in Article 1(3) thereof, the private law undertakings fulfilling the requirements laid down in the first, second and third indents of the second subparagraph of Article 1(b) of each of those directives;

by excluding absolutely from the scope of that law, in Article 3(1)(c) thereof, cooperation agreements concluded between public authorities and the other public undertakings and, therefore, also agreements which constitute public contracts for the purpose of those directives; and

by permitting, in Article 141(a) and Article 182(a) and (g) of that law, the negotiated procedure to be used in two cases which are not provided for in those directives,

the Kingdom of Spain has failed to fulfil its obligations under those directives;

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

_____

[1] - OJ C 101 of 26.4.2003

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Notice for the OJ

Removal from the register of Case C-50/03 1

(Language of the case: German)

By order of 9 November 2004 the President of the Court of Justice of the European Communities has ordered the removal from the register of Case C-50/03 (reference for a preliminary ruling from the Oberlandesgericht Rostok): 1. Simrad GmbH & Co, KG, 2. Kongsberg Simrad AS v Ministerium für Bildung, Wissenschaft und Kultur Macklenburg-Vorpommern.

_____

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Notice for the OJ

Reference for a preliminary ruling by the Oberlandesgericht Rostock by order of that Court of 5 February 2003 in the procurement review procedure 1. Simrad GmbH & Co. KG, 2. Kongsberg Simrad AS against Ministry for Education, Science and Culture Mecklenburg-Vorpommern

(Case C-50/03)

Reference has been made to the Court of Justice of the European Communities by order of the Oberlandesgericht Rostock (Higher Regional Court, Rostock) of 5 February 2003, received at the Court Registry on 10 February 2003, for a preliminary ruling in the procurement review procedure 1. Simrad GmbH & Co. KG, 2. Kongsberg Simrad AS against Ministry for Education, Science and Culture Mecklenburg-Vorpommern on the following questions:

Does an agreement to amend an existing public supply contract, to the effect that different goods are to be supplied from those originally agreed, constitute a public supply contract for the purposes of Article 1(a) of Council Directive 93/36/EEC[1] of 14 June 1993 coordinating procedures for the award of public supply contracts ("Directive 93/36") in respect of which an invitation to tender must be issued where:

1. the value of the goods to which the amendment relates exceeds the *de minimis* amount referred to in Article 5(1)(a) of Directive 93/36 and

2. as regards the goods affected by the amendment, the amendment changes both the supplier and, in a material way, the specification of those goods?

_____

[1] - OJ L 199 of 09.08.1993, p. 1.

Judgment of the Court (First Chamber)
of 11 January 2005
Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna. Reference for a preliminary ruling: Oberlandesgericht Naumburg - Germany. Directive 92/50/EEC - Public service contracts - Award with no public call for tenders - Award of the contract to a semi-public undertaking - Judicial protection - Directive 89/665/EEC. Case C-26/03.

1. Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directive 89/665 - Obligation of the Member States to provide for review procedures - Reviewable decisions - Meaning - Decisions taken outside a formal award procedure and prior to a formal call for tenders - Included - Access to review procedures - Conditions - Requirement for procedure to have reached a particular stage - Not permissible

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

2. Approximation of laws - Award procedures for public service contracts - Directive 92/50 - Scope - Contracting authority having a holding in the capital of a company legally distinct from it together with one or more private undertakings - Contract concluded by the contracting authority with that company - Included

(Council Directive 92/50)

1. Article 1(1) of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 92/50 relating to the coordination of procedures for the award of public service contracts, itself amended by Directive 97/52, must be interpreted as meaning that the obligation of the Member States to ensure that effective and rapid remedies are available against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal and material scope of Directive 92/50, as amended. That possibility of review is available to any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects. The Member States are not therefore authorised to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

(see para. 41, operative part 1)

2. Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Directive 97/52, with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied, even if the holding is a majority one.

(see para. 52, operative part 2)

In Case C-26/03,

REFERENCE for a preliminary ruling under Article 234 EC

from the Oberlandesgericht Naumburg (Higher Regional Court, Naumburg, Germany), made by decision of

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8 January 2003

, received at the Court on

23 January 2003

, in the proceedings

Stadt Halle,

RPL Recyclingpark Lochau GmbH

v

Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues, E. Juhasz (Rapporteur), M. Ilei and E. Levits, Judges,

Advocate General: C. Stix-Hackl,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Stadt Halle, by U. Jasper, Rechtsanwältin,

- Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, by K. Heuvels, Rechtsanwalt,

- the French Government, by G. de Bergues and D. Petrausch, acting as Agents,

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

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

- the Commission of the European Communities, by K. Wiedner, acting as Agent,

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

23 September 2004,

gives the following

Judgment

Costs

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

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

1. Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, itself amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must

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be interpreted as meaning that the obligation of the Member States to ensure that effective and rapid remedies are available against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal and material scope of Directive 92/50, as amended. That possibility of review is available to any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects. The Member States are not therefore authorised to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

2. Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50, as amended by Directive 97/52, with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied.

1. This reference for a preliminary ruling concerns the interpretation of Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), itself amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) (Directive 89/665'). The reference for a preliminary ruling also concerns the interpretation of Articles 1(2) and 13(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1) (Directive 93/38').

2. The reference was made in the course of proceedings between Stadt Halle (City of Halle) (Germany) and RPL Recyclingpark Lochau GmbH (RPL Lochau') and Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna (TREA Leuna') concerning the lawfulness, from the point of view of the Community rules, of the award without a public tender procedure of a contract for services concerning the treatment of waste by the City of Halle to RPL Lochau, a majority of whose capital is held by the City of Halle and a minority by a private company.

Legal background

Community legislation

3. Under Article 1(a) of Directive 92/50, as amended by Directive 97/52 (Directive 92/50'), public service contracts' are contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'. Under Article 1(b) of that directive, contracting authorities' are the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'. Article 1(c) of that directive defines service provider' as any natural or legal person, including a public body, which offers services'.

4. Under Article 8 of Directive 92/50, [c]ontracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI'. Those provisions essentially contain rules on putting out to tender and on advertising. Article 11(1) of the directive provides that, in awarding public service contracts, contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), adapted for the purposes of this Directive'. The procedures referred to in that provision are open procedures', restricted procedures' and negotiated

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procedures' respectively.

5. Category 16 in Annex I A to that directive designates [s]ewage and refuse disposal services; sanitation and similar services'.

6. Article 7(1)(a) of Directive 92/50 provides that the directive is to apply to public service contracts whose estimated value net of value added tax is not less than ECU 200 000'.

7. The second and third recitals in the preamble to Directive 89/665 show that its purpose is to ensure the application of the Community rules on public procurement by means of effective and rapid remedies, particularly at a stage when infringements can be corrected, given that the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination.

8. To that end, Article 1(1) and (3) of Directive 89/665 provides:

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives ... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

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

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

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

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

(b) either set aside or ensure the setting-aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

...'

10. Under Article 1 of Directive 93/38:

For the purposes of this Directive:

...

2. public undertaking shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an

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undertaking:

- hold the majority of the undertaking's subscribed capital, or

- control the majority of the votes attaching to shares issued by the undertaking, or

- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body;

3. affiliated undertaking shall mean... any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of paragraph 2....

...'

11. Article 13 of Directive 93/38 provides:

1. This Directive shall not apply to service contracts which:

(a) a contracting entity awards to an affiliated undertaking;

...

provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

...'

National legislation

12. The order for reference states that reviews in the public procurement field are governed in German law by the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions of competition). Under Paragraph 102 of that law, awards of public contracts' may be the subject of review. A tenderer or candidate has a subjective right to compliance with the provisions governing the award procedure', which enables it to enforce against the contracting authority the rights conferred on it by Paragraph 97(7) of that law in relation to the performance or omission of an act in an award procedure'.

13. The order for reference states that, on the basis of those provisions, in accordance with the view taken in some of the case-law and by some legal writers in Germany, a review is available in the field of procurement only if the applicant is seeking to have the contracting authority ordered to act in a particular way in a current formal award procedure, which means that it is not possible to seek a review if the contracting authority has decided not to issue a public call for tenders and not formally to initiate an award procedure. That view is contested, however, in other decided cases and by other legal writers.

The main proceedings and the questions referred for a preliminary ruling

14. According to the order for reference, the City of Halle, by decision of the city council of 12 December 2001, awarded to RPL Lochau a contract to draw up a plan for the pretreatment, recovery and disposal of its waste, without having formally initiated an award procedure. At the same time, the City of Halle decided, again without calling for tenders, to enter into negotiations with RPL Lochau with a view to concluding a contract with that company concerning the management of the residual urban waste from 1 June 2005. RPL Lochau would be the investor in the construction of the thermal waste disposal and recovery plant.

15. RPL Lochau is a limited liability company set up in 1996. Of its capital, 75.1% is held by Stadtwerke Halle GmbH, whose sole shareholder Verwaltungsgesellschaft für Versorgungs- und Verkehrsbetriebe der Stadt Halle mbH is wholly owned by the City of Halle, and 24.9% by a private limited liability company. The national court describes RPL Lochau as a semi-public company' and notes that the

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allocation of the shareholdings in the company was not agreed in the company's statutes until the end of 2001, when the award of the contract for carrying out the project at issue was envisaged.

16. The national court also observes that RPL Lochau's objects are the operation of recycling and waste treatment plants. Resolutions of the general meeting of shareholders are adopted either by a simple majority or by a majority of 75% of the votes. The commercial and technical management of the company is currently contracted out to another undertaking, and the City of Halle is entitled inter alia to audit the accounts.

17. On learning of the award of the contract outside the procedure laid down by the Community rules in the field of public procurement, TREA Leuna, which was also interested in providing the services, opposed the decision of the City of Halle and made an application to the Procurement Board of the Regierungspräsidium Halle for the City of Halle to be ordered to issue a public call for tenders.

18. The City of Halle argued in its defence that, in accordance with the national legislation referred to in paragraphs 12 and 13 above, the application was inadmissible since it, as contracting authority, had not formally initiated an award procedure. Furthermore, RPL Lochau was really an emanation of the City of Halle, since it was controlled by it. There was therefore an in-house operation' to which the Community rules on public procurement did not apply.

19. The Procurement Board allowed TREA Leuna's application, on the ground that, even in the absence of an award procedure, decisions of the contracting authority ought to be subject to review. It also considered that in the present case there was no question of an in-house operation', since the private minority shareholding exceeded the threshold of 10% above which, in accordance with the German legislation on limited companies, there is a minority with certain specific rights. Moreover, it could be predicted with sufficient certainty that the activity performed for the City of Halle by RPL Lochau would make use of only 61.25% of its capacity, so that, in order to find outlets for the remainder of its capacity, the company would be obliged to look for orders in the market in which it operated.

20. The City of Halle appealed to the Oberlandesgericht Naumburg, which decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

1. (a) Does the first sentence of Article 1(1) of [Directive 89/665] require Member States to ensure that the decision of a contracting authority not to award a public contract in a procedure which complies with the directives relating to the award of public contracts may be reviewed effectively and as rapidly as possible?

(b) Does the first sentence of Article 1(1) of [Directive 89/665] require Member States to ensure that decisions of contracting authorities made prior to the issue of a formal invitation to tender, in particular the decision on the preliminary questions of whether a particular procurement process falls within the personal or material scope of the directives relating to the award of public contracts or exceptionally is outside the scope of procurement law, may be reviewed effectively and as rapidly as possible?

(c) If Question [1(a)] is answered in the affirmative and Question [1(b)] is answered in the negative:

Is the obligation of a Member State to ensure that the decision of a contracting authority not to award a public contract in a procedure which complies with the directives relating to the award of public contracts may be reviewed effectively and as rapidly as possible satisfied if the availability of review procedures depends on a specified, formal stage in the procurement procedure having been reached, for example the commencement of oral or written contractual negotiations with a third party?

2. (a) Where a contracting authority such as a regional or local authority intends to conclude in writing, with an entity which is formally distinct from it (the contracting partner), a service

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contract for pecuniary interest which would fall within [Directive 92/50], and that contract would exceptionally not be a public service contract within the meaning of Article 1(a) of [Directive 92/50] if the contracting partner were to be regarded as part of the public administration or, as the case may be, of the contracting authority's undertaking (a procurement-exempt self-supply), does the mere fact that a private undertaking is a shareholder in the contracting partner always preclude the classification of such a contract as a procurement-exempt self-supply?

(b) If Question [2(a)] is answered in the negative:

In what circumstances is a contracting partner whose shareholders include a private person (a semi-public company) to be regarded as part of the public administration or, as the case may be, of the contracting authority's undertaking? In particular:

- Does control by the contracting authority, for example within the meaning of Articles 1(2) and 13(1) of [Directive 93/38] as amended by the [Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1)] and by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1), suffice, from the point of view of structure and degree of control, for a semi-public company to be regarded as part of the contracting authority's undertaking?

- Does any influence the private co-shareholder in the semi-public company may legally have on the contracting partner's strategic objectives and/or individual decisions relating to the management of its undertaking preclude regarding the semi-public company as part of the contracting authority's undertaking?

- Does a comprehensive right of direction, in respect only of decisions on concluding the contract and providing the services concerning the specific procurement procedure, suffice, from the point of view of structure and degree of control, for a semi-public company to be regarded as part of the contracting authority's undertaking?

- Does the fact that at least 80% of the undertaking's average turnover in the services sector within the Community during the last three years derives from providing those services for the contracting authority or for undertakings affiliated to or to be regarded as part of the contracting authority, or, where the mixed undertaking has not yet carried on business for three years, that it is to be expected by way of forecast that that 80% rule will be fulfilled, suffice, from the point of view of carrying out the essential part of its activities for the contracting authority, for a semi-public company to be regarded as part of the contracting authority's undertaking?'

The questions referred for a preliminary ruling

21. To give the national court a useful and coherent answer, the questions referred should be distinguished and considered in two groups, according to their content and subject-matter.

Question 1(a), (b) and (c)

22. By this first series of questions, the national court essentially asks whether Article 1(1) of Directive 89/665 must be interpreted as meaning that the Member States' obligation to ensure that effective and rapid remedies are available against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal or material scope of Directive 92/50, and from what moment during a procurement procedure the Member States are obliged to make a remedy available to a tenderer, candidate or interested party.

23. It must be observed, first, that Directive 92/50 was adopted, as stated in the first and second recitals in its preamble, in the context of the measures necessary to implement the internal market,

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in other words an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. It is apparent from the fourth and fifth recitals in the preamble to that directive that, as the directive's aim is to bring about an opening-up of public procurement in the field of services in conditions of equal treatment and transparency, it must be applied by all contracting authorities.

24. It must be noted, next, that the provisions of Directive 92/50 set out clearly the conditions which make it obligatory for the rules in Titles III to VI of that directive to be applied by all contracting authorities, with the exceptions to the application of those rules being listed exhaustively in the directive itself.

25. Consequently, where those conditions are satisfied, in other words where an operation falls within the personal and material scope of Directive 92/50, the public contracts in question must, by virtue of Article 8 taken together with Article 11(1) of that directive, be awarded in accordance with the provisions of Titles III to VI of the directive, that is to say, they must be made the subject of a call for tenders and be adequately advertised.

26. That obligation is binding on contracting authorities with no distinction between public contracts awarded by them in order to fulfil their task of meeting needs in the public interest and those which are unrelated to that task (see, to that effect, Case C44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I73, paragraph 32).

27. To give an answer to the national court, the expression decisions taken by the contracting authorities' in Article 1(1) of Directive 89/665 must be examined. Since that concept is not expressly defined in the directive, its scope must be determined on the basis of the wording of the relevant provisions of the directive and the objective of effective and rapid judicial protection pursued by it.

28. The wording of Article 1(1) of Directive 89/665 assumes, by using the words as regards... procedures', that every decision of a contracting authority falling under the Community rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Article 2(1)(a) and (b) of that directive (see, to that effect, Case C92/00 HI [2002] ECR I5553, paragraph 37, and Case C57/01 Makedoniko Metro and Mikhaniki [2003] ECR I1091, paragraph 68). It thus refers generally to the decisions of a contracting authority without distinguishing between those decisions according to their content or time of adoption.

29. Article 2(1)(b) of Directive 89/665 provides, moreover, for the possibility of annulling unlawful decisions of the contracting authorities in relation to the technical and other specifications not only in the invitation to tender but also in any other document relating to the award procedure in question. That provision can therefore include documents containing decisions taken at a stage prior to the call for tenders.

30. That broad meaning of the concept of a decision taken by a contracting authority is confirmed by the Court's case-law. The Court has already held that Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature and content of the decisions it refers to (Case C81/98 Alcatel Austria and Others [1999] ECR I7671, paragraph 35). Nor may such a restriction be inferred from the wording of Article 2(1)(b) of that directive (see, to that effect, Alcatel Austria and Others , paragraph 32). Moreover, a restrictive interpretation of the concept of a decision amenable to review would be incompatible with the provision in Article 2(1)(a) of that directive which requires the Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities (HI , paragraph 49).

31. In line with this broad interpretation of the concept of a decision amenable to review, the Court has held that the contracting authority's decision prior to the conclusion of the contract

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as to the tenderer to whom the contract will be awarded must in all cases be open to review, regardless of the possibility of obtaining an award of damages once the contract has been concluded (Alcatel Austria and Others , paragraph 43).

32. The Court has also held, referring to the objective of abolishing obstacles to the free movement of services pursued by Directive 92/50 and to the objectives, wording and scheme of Directive 89/665, that the contracting authority's decision to withdraw the invitation to tender for a public service contract must be open to a review procedure, in accordance with Article 1(1) of Directive 89/665 (see, to that effect, HI , paragraph 55).

33. In this respect, as the Advocate General observes in point 23 of her Opinion, the contracting authority's decision not to initiate an award procedure may be regarded as the counterpart of its decision to terminate such a procedure. Where a contracting authority decides not to initiate an award procedure on the ground that the contract in question does not, in its opinion, fall within the scope of the relevant Community rules, such a decision constitutes the very first decision amenable to judicial review.

34. Having regard to that case-law and to the objectives, scheme and wording of Directive 89/665, and in order to preserve the effectiveness of that directive, it must be concluded that any act of a contracting authority adopted in relation to a public service contract within the material scope of Directive 92/50 and capable of producing legal effects constitutes a decision amenable to review within the meaning of Article 1(1) of Directive 89/665, regardless of whether that act is adopted outside a formal award procedure or as part of such a procedure.

35. Not amenable to review are acts which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure.

36. On the basis of those considerations, the approach of the City of Halle - according to which Directive 89/665 does not require judicial protection outside a formal award procedure, and the contracting authority's decision not to initiate such a procedure cannot be the subject of review, nor indeed can the decision as to whether a public contract falls within the scope of the relevant Community rules - should not be adopted.

37. The effect of that approach would be to make the application of the relevant Community rules optional, at the option of every contracting authority, even though that application is mandatory where the conditions of application are satisfied. Such an option could lead to the most serious breach of Community law in the field of public procurement on the part of a contracting authority. It would substantially reduce the effective and rapid judicial protection aimed at by Directive 89/665, and would interfere with the objectives pursued by Directive 92/50, namely the objectives of free movement of services and open and undistorted competition in this field in all the Member States.

38. As to the time from which such a possibility of review is open, it must be noted that no such time is formally laid down in Directive 89/665. However, having regard to that directive's objective of effective and rapid judicial protection, in particular by interlocutory measures, it must be concluded that Article 1(1) of the directive does not authorise Member States to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

39. On the basis of the consideration that, in accordance with the second recital in the preamble to that directive, compliance with the Community rules must be ensured in particular at a stage at which infringements can still be corrected, it must be concluded that an expression of the will of the contracting authority in connection with a contract, which comes in whatever way to the knowledge

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of the persons interested, is amenable to review where that expression has passed the stage referred to in paragraph 35 above and is capable of producing legal effects. Entering into specific contractual negotiations with an interested party constitutes such an expression of will. The obligation of transparency, to which the contracting authority is subject in order to make it possible to verify that the Community rules have been complied with (HI , paragraph 45), should be noted in this respect.

40. As to the persons to whom review procedures are available, it suffices to state that under Article 1(3) of Directive 89/665 the Member States must ensure that review procedures are available at least to any person having or having had an interest in obtaining a public contract who has been or risks being harmed by an alleged infringement (see, to that effect, Case C212/02 Commission v Austria [2004] ECR I0000, paragraph 24). The formal capacity of tenderer or candidate is not thus required.

41. In the light of the foregoing, the answer to Question 1(a), (b) and (c) must be that Article 1(1) of Directive 89/665 must be interpreted as meaning that the obligation of the Member States to ensure that effective and rapid remedies are available against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal and material scope of Directive 92/50. That possibility of review is available to any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects. The Member States are not therefore authorised to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

Question 2(a) and (b)

42. By this second series of questions, which should be considered together, the national court essentially asks whether, where a contracting authority intends to conclude with a company governed by private law, legally distinct from the authority and in which it has a majority capital holding and exercises a certain control, a contract for pecuniary interest relating to services within the material scope of Directive 92/50, it is always obliged to apply the public award procedures laid down by that directive, merely because a private company has a holding, even a minority one, in the capital of the company with which it concludes the contract. If that question is answered in the negative, the national court asks what the criteria are by reference to which it should be considered that the contracting authority is not subject to such an obligation.

43. This question concerns the particular situation of a semi-public' company, set up and functioning in accordance with the rules of private law, from the point of view of the obligation of a contracting authority to apply the Community rules in the field of public procurement where the conditions for such application are satisfied.

44. On this point, the principal objective of the Community rules in the field of public procurement, as stated in connection with the answer to Question 1, should be recalled, namely the free movement of services and the opening-up to undistorted competition in all the Member States. That involves an obligation on all contracting authorities to apply the relevant Community rules where the conditions for such application are satisfied.

45. The obligation to apply the Community rules in such a case is confirmed by the fact that in Article 1(c) of Directive 92/50 the term service provider', that is, a tenderer for the purposes of the application of that directive, also includes a public body, which offers services' (see Case C94/99 ARGE [2000] ECR I11037, paragraph 28).

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46. Any exception to the application of that obligation must consequently be interpreted strictly. Thus the Court has held, concerning recourse to a negotiated procedure without the prior publication of a contract notice, that Article 11(3) of Directive 92/50, which provides for such a procedure, must, as a derogation from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in relation to public service contracts, be interpreted strictly and that the burden of proving the existence of exceptional circumstances justifying the derogation lies on the person seeking to rely on those circumstances (Joined Cases C20/01 and C28/01 Commission v Germany [2003] ECR I3609, paragraph 58).

47. In the spirit of opening up public contracts to the widest possible competition, as the Community rules intend, the Court has held, with reference to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), that that directive is applicable in the case where a contracting authority plans to conclude a contract for pecuniary interest with an entity which is legally distinct from it, whether or not that entity is itself a contracting authority (Case C107/98 Teckal [1999] ECR I8121, paragraphs 50 and 51). It is relevant to note that the other contracting party in that case was a consortium consisting of several contracting authorities, of which the contracting authority in question was also a member.

48. A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement.

49. In accordance with the Court's case-law, it is not excluded that there may be other circumstances in which a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority. That is the case where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities (see, to that effect, Teckal , paragraph 50). It should be noted that, in the case cited, the distinct entity was wholly owned by public authorities. By contrast, the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments.

50. In this respect, it must be observed, first, that the relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind.

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

52. The answer to Question 2(a) and (b) must therefore be that, where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50 with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must

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always be applied.

53. In view of that answer, there is no need to answer the national court's other questions.

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62002J0212 : N 40
62001J0020 : N 46
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PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl
JUDGRAP	Juhasz
DATES	of document: 11/01/2005 of application: 23/01/2003

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Notice for the OJ

JUDGMENT OF THE COURT

(First Chamber)

of 11 January 2005

in Case C-26/03 (reference for a preliminary ruling from the Oberlandesgericht Naumburg): Stadt Halle, RPL Recyclingpark Lochau GmbH v **Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna** [1]

(Directive 92/50/EEC - Public service contracts - Award with no public call for tenders - Award of the contract to a semi-public undertaking - Judicial protection - Directive 89/665/EEC)

(Language of the case: German)

In Case C-26/03: reference for a preliminary ruling under Article 234 EC from the Oberlandesgericht Naumburg (Higher Regional Court, Naumburg, Germany), made by decision of 8 January 2003, received at the Court on 23 January 2003, in the proceedings between Stadt Halle, RPL Recyclingpark Lochau GmbH and Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (the Court (First Chamber), composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues, E. Juhász (Rapporteur), M. Ilešič and E. Levits, Judges; C. Stix-Hackl, Advocate General; R. Grass, Registrar, has given a judgment on 11 January 2005, in which it has ruled:

Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, itself amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as meaning that the obligation of the Member States to ensure that effective and rapid remedies are available against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal and material scope of Directive 92/50, as amended. That possibility of review is available to any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects. The Member States are not therefore authorised to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50, as amended by Directive 97/52, with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied.

_____

[1] - OJ C 101 of 26.04.2003.

Opinion of Advocate General Stix-Hackl delivered on 23 September 2004. Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna. Reference for a preliminary ruling: Oberlandesgericht Naumburg - Germany. Directive 92/50/EEC - Public service contracts - Award with no public call for tenders - Award of the contract to a semi-public undertaking - Judicial protection - Directive 89/665/EEC. Case C-26/03.

I - Introduction

1. This reference for a preliminary ruling raises, essentially, two problems of procurement law: what protection does the law afford in the event of direct procurement (that is, where no formal tendering procedure is conducted), and what conditions attach to the exception in respect of what has been termed quasi-in-house procurement'? That second question goes to the interpretation of the judgment in Teckal. (2)

II - Legal background

2. The questions referred concern the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (3) (Directive 89/665') and of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (4) (Directive 92/50').

3. Article 1(1) of Directive 89/665, in the version in force at the material time, reads:

The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible, in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4. Article 1(a) of Directive 92/50 reads - in part - thus:

For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority...'.

5. Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (Directive 93/38') (5) was also cited before the national court. Article 13(1) of that directive reads:

1. This Directive shall not apply to service contracts which:

(a) a contracting entity awards to an affiliated undertaking;

(b) are awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Article 2(2) to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities,

provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

Where more than one undertaking affiliated with the contracting entity provides the same service or similar services, the total turnover deriving from the provision of services by those undertakings shall be taken into account.'

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III - Facts and proceedings before the national court

6. Stadt Halle (City of Halle) started planning in early 2001 with a view to having the pretreatment and recovery or disposal of the waste it was required to treat, and potentially the waste it was not required to treat, done by a municipally controlled operator. By decision of 12 December 2001, the City of Halle awarded RPL Recyclingpark Lochau GmbH (RPL') a contract to plan, obtain technical approval for and construct the establishment of the Thermische Abfallbeseitigungs- und Verwertungsanlage (thermal waste disposal and recovery plant, TABVA') in Lochau. At the same time the City of Halle decided, without first carrying out a formal procurement procedure, to conclude a contract with RPL for dealing with the residual waste of the City of Halle with effect from 1 June 2005. The contract, a draft of which had already been produced, would far exceed the threshold for such service contracts. The City of Halle also intends, in order to ensure that the capacity of the plant is sufficiently used, to enter into agreements with two neighbouring local authorities under which those authorities would transfer to the City of Halle the task of treating and recovering waste, so that the residual waste of those districts would ultimately also be treated in the TABVA operated by RPL. The City of Halle presumes that this is an in-house' transaction that does not come under the duty to conduct an award procedure.

7. RPL was established in 1996; it is a semi-public body in the form of a limited liability company. 75.1% of its shares are owned by Stadtwerke Halle GmbH (whose sole shareholder, Verwaltungsgesellschaft für Versorgungs- und Verkehrsbetriebe der Stadt Halle mbH, is wholly owned by the City of Halle), while 24.9% are owned by a private undertaking, RWE Umwelt Sachsen-Anhalt mbH. It was not until the end of 2001 that the current shareholdings were agreed and incorporated in the company's statutes in connection with the intended award of the contract for waste disposal services from 1 June 2005. According to its statutes, RPL's objects are the operation of recycling and waste disposal facilities (in particular the operation of facilities for composting organic waste, and treating construction site and industrial waste) and the construction and operation of facilities for treating and recycling sewage, recycling seepage water, gas from waste dumps and biogas and thermal waste recycling.

8. The statutes stipulate that shareholders' resolutions require a simple majority, except for certain decisions, including the appointment of the company's two directors, where a 75% majority is required. The company's management has to deliver a report to the shareholders each month, pursuant to Stadtwerke Halle GmbH's internal reporting rules. Certain transactions and measures, including the conclusion and amendment of operators' contracts, and any capital investment and borrowing operation in excess of a set amount, require approval by the shareholders' general meeting. At present, the commercial and technical management of RPL's business is contracted out to another undertaking. The oversight functions proper to a supervisory board are carried out by the supervisory board of Stadtwerke Halle GmbH. The statutes grant the City of Halle certain rights in respect of the annual accounts, in particular the right to conduct an audit, and to pass information directly on to the city's audit authority.

9. By letters of 21 December 2001 and 30 January 2002, Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (TREA') complained that the requirements for classification as an in-house transaction were not satisfied and that consequently the city's intention to award the contract for waste disposal services from 1 June 2005 without issuing a formal invitation to tender infringed procurement law. By letter dated 7 February 2002, and in talks on 19 February 2002, the City of Halle reaffirmed its view of the law. By a document of 21 February 2001, TREA applied for a review procedure before the Vergabekammer (Procurement Division) of the Regierungspräsidium (District Administration) Halle, seeking to have the City of Halle ordered to carry out a public tender procedure. The Vergabekammer of the Regierungspräsidium, by order of 27 May 2002, ordered the City of Halle to award the contract for the services - disposal of residual waste of the City of Halle from 1 June 2005' - on a competitive basis by means of a transparent procurement procedure

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in accordance with the national regulations.

10. The City of Halle and RPL both appealed immediately against that decision to the Oberlandesgericht (Higher Regional Court) Naumburg.

IV - The questions referred

11. The Oberlandesgericht Naumburg stayed the appeal and referred the following questions to the Court:

(1) Does the first sentence of Article 1(1) of [Directive 89/665] require Member States to ensure that the decision of a contracting authority not to award a public contract in a procedure which complies with the directives relating to the award of public contracts may be reviewed effectively and as rapidly as possible?

(2) Does the first sentence of Article 1(1) of [Directive 89/665] require Member States to ensure that decisions of contracting authorities made prior to the issue of a formal invitation to tender, in particular the decision on the preliminary questions of whether a particular procurement process falls within the personal or material scope of the directives relating to the award of public contracts or exceptionally is outside the scope of procurement law, may be reviewed effectively and as rapidly as possible?

(3) If Question 1 is answered in the affirmative and Question 2 is answered in the negative: Is the obligation of a Member State to ensure that the decision of a contracting authority not to award a public contract in a procedure which complies with the directives relating to the award of public contracts may be reviewed effectively and as rapidly as possible satisfied if the availability of review procedures depends on a specified, formal stage in the procurement procedure having been reached, for example the commencement of oral or written contractual negotiations with a third party?

(4) Where a contracting authority such as a regional or local authority intends to conclude in writing, with an entity which is formally distinct from it (the contracting partner), a service contract for pecuniary interest which would fall within [Directive 92/50], and that contract would exceptionally not be a public service contract within the meaning of Article 1(a) of [Directive 92/50] if the contracting partner were to be regarded as part of the public administration or, as the case may be, of the contracting authority's undertaking (a procurement-exempt self-supply), does the mere fact that a private undertaking is a shareholder in the contracting partner always preclude the classification of such a contract as a procurement-exempt self-supply?

(5) If Question 4 is answered in the negative: In what circumstances is a contracting partner whose shareholders include a private person (a semipublic company) to be regarded as part of the public administration or, as the case may be, of the contracting authority's undertaking? In particular:

(a) Does control by the contracting authority, for example within the meaning of Articles 1(2) and 13(1) of [Directive 93/38] as amended by the [Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 228)] and by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1), suffice, from the point of view of structure and degree of control, for a semi-public company to be regarded as part of the contracting authority's undertaking?

(b) Does any influence the private co-shareholder in the semi-public company may legally have on the contracting partner's strategic objectives and/or individual decisions relating to the management of its undertaking preclude regarding the semi-public company as part of the contracting authority's undertaking?

(c) Does a comprehensive right of direction, in respect only of decisions on concluding the contract

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and providing the services concerning the specific procurement procedure, suffice, from the point of view of structure and degree of control, for a semi-public company to be regarded as part of the contracting authority's undertaking?

(d) Does the fact that at least 80% of the undertaking's average turnover in the services sector within the Community during the last three years derives from providing those services for the contracting authority or for undertakings affiliated to or to be regarded as part of the contracting authority, or, where the mixed undertaking has not yet carried on business for three years, that it is to be expected by way of forecast that that 80% rule will be fulfilled, suffice, from the point of view of carrying out the essential part of its activities for the contracting authority, for a semi-public company to be regarded as part of the contracting authority's undertaking?'

V - Judicial protection (Questions 1 to 3)

A - Admissibility

12. As regards the questions relating to judicial protection, it must first be determined whether they are admissible, and, if so, to what extent.

13. The Court of Justice is bound in principle to give a preliminary ruling unless it is obvious that the request is in reality designed to induce the Court to give a ruling on a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or the interpretation of Community law requested bears no relation to the actual facts of the main action or its purpose, or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (6)

14. In the present proceedings, as the case-file shows, the process of making the prospective award which constitutes the subject-matter of the main action has reached a definable stage: there is now a draft contract. The questions referred are therefore admissible only in so far as they need to be answered in order to resolve the legal dispute as it relates to those specific facts. Although the questions raise important issues relating to judicial protection, procedural considerations make it inappropriate to address such general matters in the present context, as the circumstances to which they relate do not obtain in the specific case before the referring court. Nor has that court explained why it considers that an answer predicated on such facts is necessary for it to be able to decide the case before it.

15. Accordingly, since there is nothing to suggest that such an answer is needed in order to resolve the dispute in the main proceedings, these questions must be regarded as hypothetical and, accordingly, inadmissible. (7)

16. In so far as they seek to resolve general questions of law, therefore, the questions referred are inadmissible - likewise the matter of the compatibility of national law with Community law, raised in the third question. Subject to those reservations, however, the questions concerning judicial protection are admissible in other respects, in relation to the facts of the main action. As the first three questions all go to the same substantive issue - which acts on the part of a contracting authority are reviewable? - it seems advisable to consider and answer them together.

B - Merits

17. The issue raised by the questions concerning judicial protection against certain decisions by the contracting authority is basically this: from what stage prior to the actual award must the national review proceedings stipulated in Directive 89/665 be available? The task, essentially, is to determine the point at which a prospective procurement operation has crystallised sufficiently for judicial protection to be available.

18. The starting point is the principle that decisions' within the meaning of Article 1(1), likewise

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decisions' as reviewable acts within the meaning of Article 2(1)(b) of Directive 89/665 (that is, those acts on the part of the contracting authority which are subject to challenge), represent a concept which, according to the Court's caselaw, should be construed broadly.

19. In that case-law, the Court has held that Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature and content of those decisions'. (8)

20. Moreover, Article 1(3) of Directive 89/665 requires Member States to ensure that the review procedures provided for are available at least' to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of the Community law on public procurement or national rules transposing that law.

21. The question in the present proceedings is whether the broad concept of decisions' encompasses decisions upstream' - that is, in legal parlance, decisions taken prior to the commencement of an award procedure. The decisions at issue are thus more than mere deliberative exercises, and less than a decision to commence, or not to commence, an award procedure.

22. The purpose of Directive 89/665 - to ensure that effective review proceedings are available, as expressly stipulated in Article 1(1) - is such that it must cover decisions taken prior to the commencement of an award procedure.

23. In point of its reviewability, a decision not to conduct an award procedure is comparable to, and the counterpart of, a decision to terminate an award procedure.

24. Decisions to terminate an award procedure are among the acts on the part of an awarding authority that are amenable to review. The Court has expressly stated that this applies to the withdrawal of an invitation to tender. The full attainment of the objective pursued by Directive 89/665 would be compromised if it were lawful for contracting authorities to withdraw an invitation to tender for a public service contract without being subject to the judicial review procedures designed to ensure that the directives laying down substantive rules concerning public contracts and the principles underlying those directives are genuinely complied with.' (9)

25. By its very nature, of course, a decision not to conduct a tendering procedure within the meaning of the procurement directives (unlike a decision to revoke a procedure which has already been initiated) does not form part of a tendering procedure; however, that in no way precludes the application of Directive 89/665.

26. Indeed, as the Court has held, Directive 89/665, the aim of which is to promote judicial protection, encompasses more than just the review of infringements of the substantive procurement directives. Thus Article 1(1) of Directive 89/665 applies to all decisions taken by contracting authorities which are subject to the rules of Community law on public procurement', (10) the Court in that judgment deciding not to limit the scope of the provision to the rules laid down in the public procurement directives.

27. Member States are not obliged to make review proceedings available to any person wishing to obtain a public contract. Rather, they may require, in addition, that the person concerned has been, or risks being, harmed by the alleged infringement. (11) In principle, therefore, they may stipulate that a person must have participated in the relevant award procedure before he can demonstrate both an interest in a particular contract and also a risk of sustaining loss as a result of the allegedly illegal award.

28. However, the Court has already determined that, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have actually prevented it from being in a position to provide all the services requested, it is entitled to seek review of those specifications directly,

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even before the procedure for awarding the contract concerned is terminated. (12)

29. Just as an undertaking must be able to institute review proceedings immediately in order to challenge infringements, without awaiting the conclusion of the award procedure, (13) so also must it be able to obtain review of certain decisions relevant to the award without having to wait for an award procedure to be initiated. Typically, in the cases where this kind of issue arises, no award procedure within the meaning of the procurement directives occurs at all - and an undertaking can hardly be required to put in a bid where no award procedure has been initiated.

30. Whether or not any award procedure as provided for in the substantive procurement directives was actually conducted is thus not determinative in regard to the application of the remedies directives and, therefore, the review procedure. This is because the reach of the remedies directives depends, not on whether the substantive procurement directives such as Directive 93/38 were applied in a given situation, but on whether one of those directives should have been (or be) applied - in other words, whether the procedure of which review is sought is covered by one of those directives.

31. It follows that even certain acts performed before an award procedure is instituted are subject to review within the meaning of Directive 89/665. But there are limits.

32. One consideration telling against a blanket rule that all a contracting authority's acts are reviewable is the fact that the individual stages leading up to the instituting of an award procedure not only vary from Member State to Member State, but also depend on the specific project.

33. One particular criterion which the Court has developed in regard to the availability of judicial protection should also be borne in mind. Directive 89/665, it has held, is confined to reinforcing existing arrangements at both national and Community levels for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified '. (14)

34. Another judgment of the Court confirms that not every act on the part of a contracting authority is reviewable. The case in question concerned national legislation limiting review proceedings to certain decisions on the part of the contracting authority. The test applied by the Court was whether adequate judicial protection was available; the Court concluding that, in the circumstances, this was the case - even though, under the relevant national law, it was only possible to challenge procedural acts, if they decided, directly or indirectly, the substance of the case, made it impossible to continue the procedure or to put up a defence, or caused irreparable harm to legitimate rights or interests. (15)

35. If, then, it is permissible - that is, compatible with Directive 89/665 - for certain acts subsequent to the instituting of an award procedure to be excluded from review, it must a fortiori be permissible for certain acts prior to the instituting of an award procedure to be excluded.

36. Finally, it should be recalled that the aim of the procurement directives is merely to coordinate - to harmonise - the award procedure itself, not to regulate the stages preceding the award.

37. I conclude, therefore, that Directive 89/665 does not confer comprehensive preventive judicial protection.

38. One critical determinant of reviewability is the substantive law governing the particular situation - whether or not the relevant directives confer on a given undertaking a specific claim to have a particular action taken, or desisted from.

39. A claim for a prohibitory order is thus also, in principle, a possibility. Such a claim might perhaps seek to prohibit an entity subject to the procurement directives from effecting a procurement covered by the directives without conducting an award procedure required by the directives. That creates a parallel, in the judicial protection system, to an order prohibiting a contracting authority

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from making an award.

40. Hence the effect on the undertaking seeking review is a possible criterion for determining what acts preceding the institution of an award procedure must be reviewable. This is thus a condition for an undertaking's entitlement to bring proceedings.

41. However, the present proceedings concern solely the conditions that must be satisfied for an act to be capable of being challenged.

42. Moreover, since these are proceedings for a preliminary ruling, a further limitation follows from the procedural rules governing such proceedings before the Court. There can be no question here of providing a general definition of acts subject to challenge, but only of giving the national court a helpful answer in order to enable it to decide the case before it.

43. The object of those proceedings is therefore not to develop general criteria which could serve to identify the acts by contracting authorities which are subject to challenge, but merely to determine criteria by which the acts in the specific case before the national court should be assessed.

44. In this connection it is sufficient to point out that Directive 89/665 no more covers purely internal deliberations than it does an assessment of needs, the preparation of the specifications, or indeed pure market prospection. Nor does it extend to a situation in which a contracting authority deliberates internally on the legal question of whether or not a particular procurement operation falls within the scope of the procurement directives.

45. There is, moreover, no need in these proceedings to consider whether a mere decision to commence negotiations with another undertaking is amenable to review, or whether it is only when such negotiations have commenced that a review will lie. Such questions are hypothetical, since the subjectmatter of the main action, and hence of these proceedings for a preliminary ruling, is a situation in which a draft contract already exists.

46. In such circumstances, the contracting authority is in a position in which it is about to conclude a contract. That position corresponds to another commonly occurring procurement situation, the stage immediately prior to the award of a contract. There, depending on the national law applicable, the actual award either precedes the conclusion of a procurement contract, or itself creates the contract, the award being considered to constitute acceptance of the tender.

47. That in both those latter situations an award procedure will have been conducted, but not in the present situation, must not make any difference, in the light of the need to ensure effective judicial protection.

48. The answer to the first three questions should therefore be that, on a proper construction, Article 1(1) of Directive 89/665 requires Member States, under certain conditions, to ensure that certain decisions of the contracting authorities taken outside an award procedure may none the less be reviewed effectively and as rapidly as possible; such decisions may include a decision on the preliminary issue of whether to effect a particular procurement without conducting an award procedure.

VI - Quasi-in-house procurement (Questions 4 and 5)

49. The second set of questions concerns the conditions attaching to quasi-in-house procurement, as it has been termed. This, as the Austrian Government has correctly stressed, differs from in-house procurement (self-supply), in that it involves awards to an entity separate from the contracting authority, and having legal personality. If the entity responsible for the supply lacks legal personality, no contract could exist. One of the preconditions for a contract within the meaning of the procurement directives would then be missing.

50. What is strictly at issue in the present case is the interpretation of the concept of contract'

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- the existence of which is a precondition for the application of the procurement directives. The starting point must be Teckal : the Court held there that certain stages in the procurement process are not covered by the procurement directives.

51. Teckal stated that the procurement directives do not apply where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities'. (16)

52. The Court thus established two conditions which must be fulfilled for a procurement operation to fall beyond the reach of the procurement directives, and thereby narrowed the concept of contract' by interpreting it teleologically.

53. It must be stressed that the Court expressly stated that non-applicability of the directives in question remains the exception. The general principle that exceptions are to be construed narrowly must therefore apply, and must govern the examination of the two conditions to which I now turn.

54. I would also emphasise that, apart from the Teckal exception and certain other exceptions (for example, Article 6 of Directive 92/50), it is generally the case that awards to entities which are themselves contracting authorities (such as certain subsidiaries) are contracts' within the meaning of the concept. The application of the procurement directives therefore remains the rule. (17)

55. One should also bear in mind the origin of quasi-in-house operations, and hence of the Teckal exception, namely the special treatment of in-house operations and other arrangements which may be assimilated to them.

56. Finally, one should remember the aims of the procurement directives: to open up markets, and to safeguard competition.

57. These are the points of orientation which are relevant for the interpretation of the Teckal exception.

58. In general, it is necessary to distinguish between three different quasi-in-house scenarios: awards to wholly owned companies, owned 100% by the contracting authority or entities which may be equated with that authority; awards to joint public companies whose shares are held by a number of contracting authorities; and awards to semi-public companies, in which genuinely private parties hold a stake.

59. The action before the national court concerns a planned award by the City of Halle (a local authority, and hence clearly a contracting authority within the meaning of the procurement directives) to a great-grandchild' company. While the City of Halle holds 100% of the shares in the daughter company, and the latter likewise 100% of the shares in the grandchild company, that grandchild holds only 75.1% of the shares in the great-grandchild, the remainder being held by a purely private undertaking.

60. The present proceedings thus concern a semi-public' company: a majority of the shares are held (indirectly) by a contracting authority, while a party which is not a contracting authority has a minority stake.

61. For procedural reasons I shall confine the remainder of this Opinion to circumstances such as those in the main action. It remains the task of the national court to apply the law to the facts of the case before it. (18)

A - First criterion: Control similar to that which it exercises over its own departments

62. The first condition which must be met for the exception to apply (and accordingly for the procurement directives not to apply) concerns the nature of the control exercised by the contracting authority

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over the body to whom the contract is to be awarded. The Court requires that such control should be similar to that which [the authority] exercises over its own departments'.

63. The Court thus proceeds from a criterion taken from public law. However, as the concept of control', like that of contract' and contracting authority', must be understood in functional not formal terms, there is nothing to prevent it being applied to the relationship between a contracting authority and legal persons governed by private law, such as, in the present case, a limited liability company. The use of the term departments' derives from the original reason for setting up autonomous bodies, which was to move particular departments out of house.

64. The fact that in the Teckal judgment, in the language of the case, Italian, the Court requires only control which is analogous (analogo'), that is, comparable but not identical, provides further support for the view that the criterion in question may indeed be applied to other sets of circumstances. (19)

65. Hence any appraisal of the legal position of a majority shareholder must be governed in part by the relevant provisions of national law - in the present case, company law on limited liability companies. One must also consider the provisions - normally the company's statutes - which shape the specific relationship in question. Accordingly, it is not enough to make a purely abstract assessment based on the legal form (the type of legal personality, say) selected for the entity over which the control is exercised.

66. National provisions - generally in the form of legislation - are therefore of only limited significance. That is particularly true of rules setting out what rights minority shareholders have, and under what conditions. Essentially, such rules give shareholders certain specific oversight and blocking rights once their holding reaches a particular level - 10%, perhaps, or 25%, or over 50%.

67. However, such rules raise only a presumption as to what rights a minority shareholder has. It is the provisions governing the specific situation which are determinative. The most important case in this connection is a dominant party' agreement, whereby a particular shareholder is granted certain rights beyond the minimum required by law irrespective of the size of his shareholding.

68. Since it is the circumstances of the specific case which are determinative, rather than the provisions of national legislation, it follows that the level of the public contracting authority's shareholding (or, conversely, that of the minority shareholder) cannot be the only critical factor.

69. To focus on a set percentage would therefore make it more difficult to achieve a proper solution: it would make it impossible to consider the specific circumstances of any case, and would completely preclude the application of the criterion of control in situations where the relevant shareholding remained below the percentage set.

70. However, since entities in which there is a private minority shareholding may also pass the control test, it follows that the Teckal exception must extend not only to wholly owned companies but also to semi-public companies. There is therefore, in principle, no problem created by private businesses being involved.

71. Moreover, Advocate General Léger considered that the Teckal exception applied even where the level of the shareholding in question was 50.5%. (20)

72. At all events, the criterion of control developed by the Court entails more than a dominant influence' as that phrase is used in company law, or as it is used in the first article of the various procurement directives to classify certain bodies as contracting authorities; likewise it extends beyond the dominant influence' found in Article 1(3) read together with Article 13 of Directive 93/38. First, the provisions in question apply only to the specific sectors stated, and have no

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counterpart in the directive which applies to the present case; secondly, they constitute an exception, and exceptions must normally be construed narrowly.

73. Neither the Community legislature (in the directives) nor the Court (in Teckal) have suggested that the provisions of the procurement directives are the relevant criterion.

74. The level of control required cannot therefore be read across from particular provisions of the procurement directives; it exceeds what is required by other exceptions precisely because the situation contemplated is exceptional.

75. In the context of a reference for a preliminary ruling, it is for the national court to interpret the provisions of national law, and then apply these and other provisions to the facts of the case before it. In the present case, therefore, the referring court will need to ascertain what rights the City of Halle - the great-grandparent' company - enjoys in respect of its great-grandchild' RPL.

76. In applying the control test, the national court must start from the powers of the controlling body. Simply on grounds of legal certainty, issues such as whether, and how, such control is exercised in practice cannot be conclusive, much less any speculation as to how a majority shareholder might use his share (i.e. whether they might go so far as to override the wishes of the minority shareholder). The significance of any duty to act in good faith on the part of the majority shareholder must thus be seen in relative terms, especially as any similar obligations on the part of the minority shareholder should not be overlooked - as the City of Halle has indeed pointed out.

77. As to the object of the control, the Court did not confine its Teckal ruling to any specific decisions by the controlled body. Control merely over procurement decisions in general, or even over the specific procurement decision, is not enough.

78. The wording and purpose of the criterion of control similar to that which it exercises over its own departments' indicate that a more comprehensive possibility of control is required. Such control should not be confined to strategic market decisions, but should embrace individual management decisions as well. There is no need to go into greater detail in these preliminary ruling proceedings, since that is not necessary in order to resolve the dispute before the national court.

B - Second criterion: Essential part of the activities carried out with the owner of the shares

79. The second condition which must be met in order for the Teckal exception to apply concerns the activities of the body over which the control is exercised. As the relevant passage of the judgment states, the exception only applies if that person carries out the essential part of its activities with the controlling local authority or authorities'.

80. That criterion can be understood more broadly in that, first, it may extend not only to those with a direct shareholding but also, as in the present case, to great-grandparent' companies with an indirect shareholding and, second, it need not be restricted to regional and local authorities.

81. The Teckal criterion thus relates to a certain minimum proportion of the total activities performed by the controlled body. It is therefore necessary to ascertain the extent of all the activities performed and of those performed with the shareholder within the broad sense of that term.

82. In the present context, however, while the term shareholder' must not be construed too narrowly, that does not mean that activities for third parties are also covered, where the shareholder would otherwise have had to perform them itself. In practice, this relates to care services, and hence to local authorities, which are under an obligation vis-à-vis certain persons to provide certain services. That general question is not the subject-matter of these proceedings, since the referring court does not need an answer to it in order to be able to resolve the dispute before it.

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83. It should be clearly understood that what matters is what activities are actually performed - not what activities the law, or the company's statutes, permit, let alone what activities the entity may be under a duty to perform.

84. The central question is this: What shareholding is required for the Teckal threshold to be reached? Various answers have been mooted, from above 50%' via to a predominant extent' and almost exclusive' to exclusive'.

85. While some of this thinking is predicated on a positive approach (based on determining the extent of the services provided for the shareholder), the negative approach also has its adherents. The latter involves proceeding from the proportion of services provided for persons other than the shareholder. Such an approach features not only in submissions in these proceedings, but also in the Opinion of Advocate General Léger, which various parties to the present proceedings have cited. His view is that the directive is applicable where an entity carries out the essential part of its activity with operators or local authorities other than those of which the contracting authority is made up'. (21) However, since it is the positive approach which informs the Teckal exception, I shall not pursue the negative approach any further in this Opinion.

86. However, a further important issue was articulated in that passage from Advocate General Léger's Opinion, which should also be considered when determining the requisite shareholding.

87. The question is this: Does the Teckal exception permit only a quantitive approach, or should qualitative issues be considered as well? The latter might seem to follow from the wording and purpose of the exception, which contains no indication of how the activities are to be assessed. Moreover, the authentic (Italian) version of the corresponding passage in the Teckal judgment does not preclude an additional or alternative qualitative approach (la parte più importante della propria attività').

88. Furthermore, there is no indication in the Teckal exception as to how the requisite shareholding should be calculated. It is thus in no way self-evident that turnover should be the sole criterion.

89. Accordingly, it is the task of the national court to determine the essential part' of the activities on the basis of quantitative and qualitative parameters. The market situation of the controlled body may also be relevant (that is, in particular, its competitive situation vis-à-vis possible rivals).

90. As several parties have cited Advocate General Léger's Opinion in regard to the second Teckal condition, it should be borne in mind that an Opinion is authentic in the language chosen as the original language by the advocate general.

91. When considered on that basis, the Opinion in question presents the following features: it refers to the services being provided more or less exclusively' to the authority - quasi-exclusivité' is the phrase in the French original, (22) and also reflects the way the Teckal exception is expressed in Italian, the language of that case, using the words en grande partie' (23) when referring to the essential part', and later la plus grande partie de leur activité' (24) - the essential part of their activities'.

92. Several parties to these proceedings have suggested that the essential part' criterion might be defined more precisely by interpreting it in line with a provision governing awards to undertakings affiliated with the contracting authority, namely the 80% criterion in Article 13 of Directive 93/38. That criterion, it is contended, is objective' or appropriate'.

93. It must be said that a different fixed percentage might also be objective or appropriate. However, the very rigidity of a fixed percentage may represent an obstacle to an appropriate solution. Moreover, it does not permit qualitative factors to be taken into account.

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94. The principal argument against taking over the 80% criterion is that it is a derogation in a directive which itself applies only to certain sectors. The evaluation on which it is predicated was intended by the Community legislature to be confined to that specific directive. Even if the underlying thinking may in practice also be applied beyond the sectors in question, the fact remains that no such provision was enacted in the directive in point in the present proceedings, and that is conclusive.

95. There is a further argument against adducing Article 13 of Directive 93/38: paragraph 2 of that article obliges the contracting entities to notify certain information to the Commission, at its request. That procedural requirement thus balances the exception laid down in Article 13. In the case of the Teckal exception, however, the Court chose a different route, confining itself to establishing the two substantive preconditions set out in that judgment. However, precisely because there is no comparable procedural requirement, those preconditions must be construed strictly.

VII - Conclusion

96. In the light of the foregoing, I propose that the Court answer the questions referred as follows:

(1) Article 1(1) of Directive 89/665 must be interpreted as requiring Member States to ensure that certain decisions of contracting authorities taken outside an award procedure but connected with a procurement can be reviewed effectively and as rapidly as possible; such decisions may include a decision on the preliminary issue of whether to effect a particular procurement without conducting an award procedure.

(2) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that the fact that a private undertaking has a shareholding in the contracting authority's contractual partner in which the contracting authority has a direct or indirect holding does not in itself exclude the non-application of that directive.

(3) For a contractual partner with a privately owned shareholding - a semi-public company' - to be regarded as part of the public administration or as part of the contracting authority's undertaking, what matters is the specific form taken by the relationship, and the size of the shareholding is not in itself decisive.

It does not suffice that:

- the semi-public company is controlled by the contracting authority within the meaning of Articles 1(2) and 13(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

- there is a comprehensive right to give instructions with respect solely to procurement decisions in general or procurement decisions concerning the specific case.

(4) For a semi-public company to be regarded as part of the contracting authority's undertaking from the point of view of carrying out the essential part of its activities' for the contracting authority, unlike in Article 13 of Directive 93/38 the starting point is not whether at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to the contracting authority or to undertakings affiliated to or to be regarded as part of that authority or, where the semi-public undertaking has not yet carried on business for three years, it is to be expected by way of forecast that that 80% rule will be satisfied.

To decide whether a company should be so regarded, the national court must instead start from the actual activities and take account in particular of both quantitative and qualitative factors.

(1) .

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(2) - Case C-107/98 [1999] ECR I-8121.

(3) - OJ 1989 L 395, p. 33, amended by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(4) - OJ 1992 L 209, p. 1, amended on a number of occasions.

(5) - OJ 1993 L 199, p. 84, amended on a number of occasions.

(6) - On award procedures, see Case C-421/01 Traunfellner [2003] ECR I-11941, paragraph 37, and Case C-448/01 EVN and Wienstrom [2003] ECR I-14527, paragraph 76. See also, in particular, Case 244/80 Foglia [1981] ECR 3045, paragraph 18; Case C415/93 Bosman [1995] ECR I-4921, paragraph 61; Case C-134/95 USSL No 47 di Biella [1997] ECR I195, paragraph 12; and Case C-306/99 BIAO [2003] ECR I-1, paragraph 89.

(7) - Traunfellner , cited in footnote 6, paragraph 38 et seq., and EVN and Wienstrom , cited in footnote 6, paragraph 83; see also Case C-314/01 Siemens [2004] ECR I-2549, paragraph 36.

(8) - Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraph 35; Case C-92/00 HI [2002] ECR I-5553, paragraph 49; and Case C-315/01 GAT [2003] ECR I-6351, paragraph 52.

(9) - HI , cited in footnote 8, paragraph 53.

(10) - Particularly Case C-57/01 Makedoniko Metro and Michaniki [2003] ECR I-1091, paragraph 68. See also HI , cited in footnote 8, paragraph 37, and GAT , cited in footnote 8, paragraph 52.

(11) - Case C-230/02 Grossmann Air Service [2004] ECR I-1829, paragraph 25 et seq., and Case C249/01 Hackermüller [2003] ECR I-6319, paragraph 18.

(12) - Grossmann Air Service , cited in footnote 11, paragraph 28.

(13) - Grossmann Air Service , cited in footnote 11, paragraph 29 et seq.

(14) - Alcatel Austria and Others , cited in footnote 8, paragraph 33 (emphasis added); see also Case C433/93 Commission v Germany [1995] ECR I-2303, paragraph 23.

(15) - Case C-214/00 Commission v Spain [2003] ECR I-4667, paragraph 77 et seq.

(16) - Teckal , cited in footnote 2, paragraph 50 (emphasis added).

(17) - Case C-94/99 ARGE [2000] ECR I-11037, paragraph 40, and Teckal , cited in footnote 2, paragraph 50.

(18) - See the order of the Court of 14 November 2002 in Case C-310/01 Comune di Udine and Others (not published in the ECR).

(19) - However, see Advocate General Léger, who at point 66 of his Opinion of 15 June 2000 in ARGE (judgment cited in footnote 17) goes so far as to require that the contracting authority which is seeking the provision of various services from the operator must in fact be the very local authority that closely controls it, and not another authority'.

(20) - Opinion of Advocate General Léger in ARGE , cited in footnote 19 (judgment cited in footnote 17), point 60.

(21) - Ibid., point 93 (emphasis added).

(22) - Ibid., point 74.

(23) - Ibid., point 81.

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(24) - Ibid., point 83.

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SUB	Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	German
NATIONA	Federal Republic of Germany
PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl
JUDGRAP	Juhasz
DATES	of document: 23/09/2004 of application: 23/01/2003

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

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

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

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

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

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

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

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

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

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

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

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

(see paras 44-46, operative part 2)

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

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

27 December 2002

, received at the Court on 29 and

22 January 2003

, respectively, in the proceedings

Fabricom SA

v

Etat belge,

THE COURT (Second Chamber),

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

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

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

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

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

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

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

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11 November 2004,

gives the following

Judgment

Costs

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

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

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

2. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and, more particularly, Articles 2(1)(a) and 5 thereof, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and, more particularly, Articles 1 and 2 thereof, preclude the contracting entity from refusing, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

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

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93/36'), and, more particularly, of Article 5(7) thereof, of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by Directive 97/52 (Directive 93/37'), and, more particularly, of Article 6(6) thereof, and also of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by European Parliament and Council Directive 98/4/EC of 16 February 1998 (OJ 1998 L 101, p. 1) (Directive 93/38'), and, more particularly, of Article 4(2) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and the right to property. The references also concern the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) and, more particularly, of Articles 2(1)(a) and 5 thereof, and also of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) and, more particularly, of Articles 1 and 2 thereof.

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

Legal background

Community rules

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

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

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

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

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

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

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

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

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

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

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

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

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9. Article 2 of Directive 89/665 provides:

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

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

...'

10. Under Article 1 of Directive 92/13:

1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field [of] procurement or national rules implementing that law as regards:

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

and

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

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

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

11. Article 2 of Directive 92/13 provides:

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

either

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

and

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

or

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

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

...'

National rules

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

...

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

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

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

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

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

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

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

3. Paragraphs 1 and 2 shall not apply:

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

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

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

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

Main proceedings and questions referred to the Court

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

Case C-21/03

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

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

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

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

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

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

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

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

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

Case C-34/03

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

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

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

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

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

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

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

The questions referred to the Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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** AFFAIRE 34/2003 ** ; *A9* Conseil d'Etat (Belgique), section d'administration, arrêt no 114.149 du 27/12/2002 (A.84.600/VI-15.112) ; *A9* Conseil d'Etat (Belgique), section d'administration, arrêt no 114.150 du 27/12/2002 (A.84.973/VI-15.146)

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Timmermans

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Notice for the OJ

JUDGMENT OF THE COURT

(Second Chamber)

of 3 March 2005

in Joined Cases C-21/03 and C-34/03 (reference for a preliminary ruling from the Conseil d'État): Fabricom SA v État belge [1]

(Public procurement - Works, supplies and services - Water, energy, transport and telecommunications sectors - Prohibition on participation in a procedure of submission of a tender by a person who has contributed to the development of the works, supplies or services concerned)

(Language of the case: French)

In Joined Cases C-21/03 and C-34/03: reference for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decision of 27 December 2002, received at the Court on 29 and 22 January 2003, respectively, in the proceedings pending before that court between Fabricom SA and État belge - the Court (Second Chamber) composed of C.W.A. Timmermans, President of the Chamber (Rapporteur), C. Gulmann, J.-P. Puissochet, N. Colneric and J.N. Cunha Rodrigues, Judges; P. Léger, Advocate General; R. Grass, Registrar, gave a judgment on 3 March 2005 , the operative part of which is as follows:

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

2. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and, more particularly, Articles 2(1)(a) and 5 thereof, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and, more particularly, Articles 1 and 2 thereof, preclude the contracting entity from refusing, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

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[1] - OJ C 55 of 08.03.2003. OJ C 70 OF 22.03.2003.

Opinion of Mr Advocate General Léger delivered on 11 November 2004. Fabricom SA v Belgian State. Reference for a preliminary ruling: Conseil d'Etat - Belgium. Public procurement - Works, supplies and services - Water, energy, transport and telecommunications sectors - Prohibition on participation in a procedure of submission of a tender by a person who has contributed to the development of the works, supplies or services concerned. Joined cases C-21/03 and C-34/03.

1. Does the fact that a person has been involved in the preparatory work for a public contract preclude him, and the undertaking connected to him, from participating in that contract? Is such a rule, which seeks to prevent a person from being able to gain an advantage from the fact that he has participated in the preparations for a public contract and which would place him in a situation contrary to free competition in the procedure for the award of that contract, proportionate to the objective which it seeks to attain? These are essentially the questions which the Conseil d'Etat (Council of State) (Belgium) refers to the Court in these joined cases.

I - Legal background

A - Community legislation

2. Community substantive law on the procedure for the award of public contracts consists of Directive 97/52/EC amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (2) and Directive 98/4/EC amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. (3)

3. These two directives (4) take account of the necessary amendments which were made following the conclusion by the European Community of the agreement on public contracts within the framework of the World Trade Organisation (the WTO'). (5) Under Article VI(4) thereof:

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

4. These directives opened up the award of public contracts within the Community to competition and at the same time coordinated the procedures for awarding them. The main objectives of these directives are to ensure that the award of public contracts, both generally and in specific sectors, is transparent and observes the principle of free competition. (6)

5. Thus, Directive 89/665/EEC (7) (the review directive') was adopted in the field of public contracts. It governs the review procedures in this field. The aim is to ensure that decisions taken by contracting entities in breach of Community law on public contracts may be reviewed appropriately and rapidly.

B - National legislation

6. The directives were transposed into Belgian law by the Law of 24 December 1993 on public procurement and certain contracts for works, supplies and services. (8)

7. Article 32 of the Royal Decree of 25 March 1999 (9) amends Article 78 of the Royal Decree of 8 January 1996 on the public procurement of works, supplies and services and on public works concessions. Article 26 of the Royal Decree of 25 March 1999 amends Article 65 of the Royal Decree of 10 January 1996 on the public procurement of works, supplies and services in the water, energy, transport and telecommunications sectors. The two provisions lay down in an identical manner, one, an absolute prohibition on tendering for a public contract by persons who have been responsible for the research, testing, study or development of works, supplies or services and, two, a prohibition

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on tendering by any undertaking connected (10) to a person who has been responsible for preparatory work in connection with the public contract in question. However, the undertaking may reverse this presumption by providing information showing that its dominant influence has not affected the contract.

II - Main proceedings and questions referred to the Court

A - Case C-21/03

8. Fabricom SA (Fabricom') is an undertaking which covers all works in the sector of transport of energy and fluids. It is regularly required to submit tenders for public contracts, particularly in the water, energy, transport and telecommunications sectors.

9. By an application brought before the Conseil d'Etat on 25 June 1999, Fabricom seeks annulment of Article 26 of the Royal Decree of 25 March 1999. It asserts that this provision is contrary to the principle of equality between tenderers, the principle of the effectiveness of a judicial review as guaranteed by the review directive, the principle of proportionality, freedom of trade and industry and also to respect for the right to property as guaranteed by Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Belgian State disputes these assertions.

10. Taking the view that the resolution of the case before it requires an interpretation of certain provisions of the directives concerning public contracts, the Conseil d'Etat decided to stay proceedings and to refer the following three questions to the Court for a preliminary ruling pursuant to Article 234 EC:

1. Do Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [OJ 1993 L 199, p. 84], and in particular Article 4(2) thereof, and Directive 98/4/EC of 16 February 1998 of the European Parliament and of the Council amending Directive 93/38EEC, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property guaranteed in particular by Protocol No 1 of 20 March 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms, preclude any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services from being permitted to apply to participate in or to submit a tender for that contract where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition?

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

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

B - Case C-34/03

11. Fabricom also seeks, by an application brought before the Conseil d'Etat on 8 June 1999, annulment of Article 32 of the Royal Decree of 25 March 1999. The arguments put forward by Fabricom and

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the Belgian State are essentially the same as those set out in Case C-21/03.

12. In that case too the Conseil d'Etat decided to apply Article 234 EC, to stay proceedings and to refer the following three questions to the Court for a preliminary ruling:

1. Do Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and in particular Article 3(2) thereof [OJ 1992 L 209, p. 1], Council Directive 93/36/EC of 14 June 1993 coordinating procedures for the award of public supply contracts [OJ 1993 L 199, p. 1], and in particular Article 5(7) thereof, Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [OJ 1993 L 199, p. 54], in particular Article 6(6) thereof and Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning procedures for the award of public service contracts, public supply contracts and public works contracts, in particular Articles 2(1)(b) and 3(1)(b) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property guaranteed in particular by Protocol No 1 of 20 March 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms, preclude any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services from being permitted to apply to participate in or to submit a tender for that contract where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition?

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

3. May Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and in particular Articles 2(1)(a) and 5 thereof, be interpreted as meaning that a contracting authority may refuse, up to the end of the procedure for the examination of tenders, to allow an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition?'

13. By order of 4 March 2003, the President of the Court decided to join the two cases, on account of the objective connection between them.

III - Analysis

14. Since the three questions referred by the Conseil d'Etat are similar in the two cases referred to the Court, I propose to consider each of the questions relating to Case C-34/03 in turn. I shall indicate whether it appears that the solution adopted must be different as regards the specific sectors concerned in Case C-21/03.

15. The first and second questions referred by the national court are so closely connected that it would appear appropriate to consider them together. I shall therefore answer the first and second questions together and then answer the third.

16. It must be borne in mind at the outset that, although the Court may not, in a procedure under Article 234 EC, rule upon the compatibility of provisions of domestic law with Community law or interpret domestic legislation or regulations, it does have jurisdiction to supply the national

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court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it. (11)

A - First and second questions: exclusion from the tendering procedure of a person who participates in the preparatory stages of a public contract

17. By its first question, the Conseil d'Etat seeks to ascertain whether the directives on public contracts prevent any person who has participated in the preparatory stages of a public contract from being precluded from submitting a tender for that public contract where that person has not been given an opportunity to prove that that circumstance has not distorted competition between the tenderers for that public contract. As regards the second question, the Conseil d'Etat asks the Court whether its answer to the first question differs according to whether or not the directives refer only to private persons or persons providing services for valuable consideration.

1. Arguments of the parties

18. The plaintiff in the main proceedings, Fabricom, contends that Articles 26 and 32 of the Royal Decree of 25 March 1999 (the provisions of Belgian law') are contrary to Community law, (12) and, in particular, that they are contrary to the principle of non-discrimination laid down in the directives on public contracts and also to the caselaw established in Telaustria and Telefonadress , (13) which also underlies this principle. As Fabricom points out, non-discrimination is applicable to all tenderers, including those who have participated in the preparatory stage of the contract. The latter should be excluded from participating in a public contract only if it appears clearly and specifically that by such participation alone they have gained an advantage which distorts normal competition.

19. Thus, in Fabricom's submission, the irrebuttable presumption set out in the provisions at issue has an effect which is disproportionate to the objective which they pursue, namely to ensure fair competition between tenderers. Fabricom cites the case-law of the Court, (14) according to which Community law precludes a particular tender being eliminated as a matter of course and on the basis of a criterion which is applied automatically. (15)

20. Fabricom is supported by the Austrian and Finnish Governments, which point out in their observations that the exclusion of an undertaking in the particular case of participation in preparatory works must be preceded by a full and differentiated examination of the kind of preparatory works concerned, in particular as regards access to the contract specifications. Exclusion is possible only if the undertaking has obtained, through its preparatory activity, specific information relating to the contract which gives it a competitive advantage.

21. On the other hand, the Commission contends that the provisions of Belgian law seek to avoid possible discrimination and a competitive advantage to the person who has participated in the preparatory works when he submits his tender for the same contract. If the person who carries out the preparatory work could also be the successful tenderer, he might steer the preparation of the public contract in a direction favourable to him.

2. Analysis

22. Several judgments of the Court have already established the principles which, in Community law, govern the selection of tenderers for public contracts. (16) As I have already mentioned, the directives on public contracts, each of which covers a specific field, aim to promote the development of effective competition. (17) The implementation and the attainment of that objective can be effective only if the economic operators participating in the public contract are able to do so on an equal footing, without any discrimination whatsoever.

23. Consequently, Advocate General Ruiz-Jarabo Colomer rightly observed in the joined cases of

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Lombardini and Mantovani (18) that to this end, a system based on objectivity at all levels, in terms of both substance and form, is indispensable. Firstly, by setting objective criteria for participation in the tender and award of contracts. Secondly, by making provision for open procedures in which transparency is the norm.'

24. It is common ground that the directives on public contracts contain no specific provisions governing inability to participate in public tendering procedures. In particular, the directives contain no provisions to the effect that a person may not participate in a tender for a public contract where he has previously participated in the planning of the contract concerned.

25. It is also common ground that general principles, such as free competition, equal treatment and non-discrimination, are applicable to the award of public contracts. Consequently, it is not possible to discriminate between tenderers at any stage of the public contract award procedure.

26. Therefore we must see whether the directives on public contracts and the general principles of Community law allow a person who has participated in a contract to be excluded from submitting a tender for that contract. To that end, I shall examine, in accordance with methods of interpretation employed by the Court, (19) the wording, scheme and objectives of the directives on public contracts in order to reply to the national court.

27. Directives 92/50, (20) 93/36 (21) and 93/37, (22) as amended by Directive 97/52, and also Directive 93/38, (23) as amended by Directive 98/4, all establish in one of their initial provisions the rule that the contracting authorities must ensure that there is no discrimination between tenderers. (24)

28. Furthermore, the 10th recital in the preamble to Directive 97/52 and the 13th recital in the preamble to Directive 98/4 state that contracting authorities may request advice for the purpose of drawing up public contracts, provided that that does not distort competition. (25) It is interesting to note that these are the terms of the agreement on public contacts concluded within the framework of the WTO.

29. Thus, as Community law currently stands and as regards technical advice for the preparation of a public contract, there is nothing in the provisions of the directives on public contracts to preclude contracting entities from seeking or accepting advice which may be used in the preparation of specifications for a specific procurement by a person who may submit a tender. Community law precludes such action only where it has the effect of harming effective competition. (26)

30. This brief account of the provisions of the directive relating to the principles governing the procedures for the award of public contracts prompts me to make the following observations. First, it is clear from a textual interpretation that the directives allow the contracting authorities to seek advice from various sources for the preparation of a public contract, provided that such advice does not harm competition. However, the directives do not provide that the participation of a person in the preparatory stage of the public contract is incompatible with the subsequent submission of a tender for the same contract.

31. It is appropriate, at this stage, to interpret these articles of the directives on public contracts in the light of the other provisions contained in these directives and also of the general principles of Community law and fundamental rights. In particular, it is appropriate to examine them in the light of the other provisions which lay down objective participation and award criteria.

32. Although the directives do not provide for the possibility of eliminating, on grounds of ineligibility, a potential tenderer who has participated in the preparatory work, they do set out a list of criteria for selecting possible candidates for the award of a contract. When transposing the directives on public contracts, the Member States may lay down in the list of criteria other grounds for rejecting

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an application, provided that this is done in order to attain the objective pursued by the directive.

33. The references now contained in the directives on public contracts concerning the possibility for the contracting authorities to seek or accept advice which may be used in the preparation of specifications for a specific contract are not aimed at predetermining the persons eligible to compete for that public contract. I share the Commission's view that these provisions do not have as their objective to extend the possibilities of seeking or accepting advice in connection with the preparation of specifications for a public contract but to prevent such action from resulting in harm to fair competition. These references therefore express a distrust of a person who is involved both in the process of preparing the specifications for the public contract and in the award stage.

34. As we know, the directives standardise the procedures for awarding public contracts in order to ensure effective competition in this field. As I observed in the textual and structural interpretation of the directives, the directives do not cover all the details of the contract award procedures but leave the Member States a margin of discretion in implementing them. The Court has had occasion to state (27) that the directives on public contracts therefore do not lay down a uniform and exhaustive body of Community rules and that within the framework of the common rules which they contain, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law. (28)

35. Therefore, in the present case this freedom of the Member States continues to be delimited, first, by the objectives of the directives on public contracts and, second, by the general principles of Community law. It is apparent from the Court's case-law that the basic rules of the EC Treaty and the general principles of Community law may also define the extent of the obligations on the Member States in situations falling within the scope of the directives but in respect of which no obligation is specifically provided for. Accordingly, the Court added that the principle of equal treatment, which lies at the heart of the directives concerning the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with. (29)

36. That is why, as regards the ground on which a person may be ineligible to tender for a public contract, as the directives make no specific provision, the Member States may adopt rules which have the effect of safeguarding the objectives established by the directives. This can be the case, for example, as regards the ineligibility of a person who has participated in the preparation of a public contract to submit a tender. Such exclusion seeks to safeguard the principal objective of effective competition. However, does such a rule preserve the principle of non-discrimination also laid down by the directive? The rule thereby established also has the effect of eliminating certain tenderers.

37. In its judgment in Commission v Denmark , (30) the Court held that the duty to observe the principle of equal treatment lies at the very heart of the directives on public contracts. Accordingly, the system whereby tenderers apply on an equal footing, which must underlie the award of public contracts, means that any person who wishes to be awarded a public contract must know beforehand what he must or must not do in order to be awarded it. Specifically, if participation in the preparatory work for a public contract has the effect of excluding the participating person who would wish to tender for that public contract, every potential tenderer must be aware of these consequences and be free to decide to participate in the preparatory stage or to submit a tender for that public contract. (31)

38. Consequently, account must be taken both of the aim of guaranteeing effective competition and of compliance with the principle of equality between tenderers. However, the Court has consistently held that the principal objective of the Community legislation cannot be compromised. In this case,

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it is necessary to consider whether the principal objective of these directives is safeguarded by a law such as that at issue and, if so, whether the law runs counter to the principle of equal treatment which is connected to the application of these directives. Therefore, the question is whether the national legislation does what is necessary to ensure that the objective of the directives is implemented in a proper and proportionate manner.

39. I share the Commission's view (32) that in order to prevent conflicts of interest the rule on ineligibility at issue does in fact contribute to fair competition between potential tenderers and prevents the contracting authorities from discriminating between them. Such a provision would appear to be an appropriate means of attaining the objective laid down by the directives on public contracts.

40. Finally, it has to be considered whether that ineligibility is proportionate to the objective pursued by these directives. I believe that it is.

41. First, it should be reiterated that everyone is free to decide whether to take part in the preparatory stage of a public contract or to submit a tender for it. Depending on the interests concerned, a choice will be made to participate in one or the other stage of the public tender. I should also point out that this ineligibility is limited solely to the individual tender concerned.

42. The ineligibility rule seeks to prevent a situation in which competition is distorted from arising on account of the information held by a tenderer as a result of his participation in the preparation of that contract. It is virtually impossible to envisage any means of ensuring that the information and experience acquired during the preparatory stage will not operate to the advantage of the person concerned when he submits a tender. The knowledge acquired is for the most part subjective and difficult to identify, sometimes even for the person in question. (33)

43. Thus, in the interests of legal certainty, and above all in the interests of transparency, which is the fundamental principle of the directives on public contracts, it is necessary to prevent any possibility of a privileged position which would distort competition.

44. From that point of view, a measure which lays down an ineligibility rule such as that contained in Belgian law is consistent with the general principles of Community law and corresponds to an objective of general interest. (34)

45. By its second question the national court asks the Court whether a different answer must be given if the directives on public contracts are to be interpreted as prohibiting from tendering for a public contract only private persons who have been instructed to carry out research, experiments, studies or development in connection with the subject-matter of that contract and also persons who have provided services for valuable consideration.

46. I agree with all the interveners who expressed a view on this question before the Court that there is nothing to justify discrimination against private undertakings or undertakings which have supplied services for valuable consideration by comparison with the public undertakings with which they are competing for the same public contracts. In the past the Court's case-law has established that European law concerning public contracts applies in the same way irrespective of whether a public contract is awarded to a private person or to a person in which the public authorities have an interest. (35) In my view, this also applies to the condition relating to ineligibility.

47. The content of the directive concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property, does not preclude a national rule which provides that any person who has been instructed to carry out research, experiments, studies or development in connection with services, supplies or works is automatically

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deprived of the opportunity to submit an application to participate in or a tender for those contracts. It is irrelevant whether it is a private or a public person who participated in the preparatory work.

B - Third question: time of exclusion of the tendering undertaking connected to the person participating in the preparatory work

48. By its last question, the Conseil d'Etat asks the Court whether the review directive (36) precludes the contracting authority or contracting entity from refusing, up to the end of the procedure for examination of tenders, to permit an undertaking connected to any person who has been instructed to carry out research or experiments in connection with the preparatory work for the public contract to participate in the procedure or to submit a tender, although when questioned in that regard by the contracting authority that undertaking states that it has thereby obtained no unfair advantage capable of distorting the normal conditions of competition.

49. The parties agree that the review directive precludes the contracting authority from refusing, up to the end of the procedure for examination of tenders, to allow the participation of an undertaking which, when questioned, states that it has obtained no unfair advantage capable of distorting the normal conditions of competition. I share this view.

50. As we have already seen, the provisions of the national legislation at issue provide that any undertaking connected to a person who has been instructed to carry out preparatory work in connection with the public contract in question may reverse the presumption that it has a competitive advantage by pr oviding information on which it may be established that dominant influence has not affected the contract. However, the awarding authority is not subject to any timelimits and may at any time, and thus up to the end of the award procedure, eliminate the undertaking on account of the unfair advantage which it is presumed to have gained, if the evidence provided by the undertaking is deemed insufficient. (37)

51. In such a situation, a connected undertaking is unable to obtain a declaration by a court, if necessary, that in the particular case the presumption of exclusion equivalent to a reduction in competition is inapplicable, before the contract is awarded. However, it follows from the review directive and the Court's case-law that the Member States must ensure remedies whereby the procedure or decision to award the contract by the contracting authority can be suspended. (38) Therefore, it follows that the decision to exclude a connected undertaking must be notified before the decision awarding the public contract and such advance notice must be sufficient to enable that undertaking, if it considers it appropriate, to bring an action and have the exclusion decision annulled if the relevant conditions are met.

52. By allowing the decision to be taken to eliminate a connected undertaking which would wish to tender up to the end of the procedure for examination of the tenders, in such a manner that a review can be sought only at a stage where the infringements can no longer be rectified, as the public contract has been awarded in the meantime, and at a stage where the applicant is only able to obtain damages, the provisions of Belgian law compromise the effectiveness of the review directive.

53. This is why I consider that Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts precludes a national rule which allows the contracting entity to exclude, up to the end of the procedure for examination of tenders, an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services from participating in the procedure or submitting a tender, although the undertaking states that it has not obtained an unfair advantage capable of distorting the normal conditions of competition.

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54. In my view, the arguments expounded in connection with the questions in Case C-34/03 may be transposed to the identical questions in Case C-21/03, which relate to the directive concerning certain specific sectors such as water, energy, transport and telecommunications.

IV - Conclusion

55. I therefore propose that the Court answer the first and second questions referred by the national court as follows:

(1) European Parliament and Council Directive 97/52/EC of 13 October 1997, amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively and Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the law of property, does not preclude a national rule which provides that any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services is systematically denied the opportunity to submit an application to participate in or a tender for those contracts. It is irrelevant whether the person who participated in the preparatory work is a private or a public person.

(2) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors preclude a national rule which allows the contracting entity to refuse, up to the end of the procedure for examination of tenders, to allow an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with the works, supplies or services to participate in the procedure or to submit a tender, even though the undertaking states that it has obtained no unfair advantage capable of distorting the normal conditions of competition.

(1) .

(2) - European Parliament and Council Directive of 13 October 1997 (OJ 1997 L 328, p. 1).

(3) - European Parliament and Council Directive of 16 February 1998 (OJ 1998 L 101, p. 1).

(4) - Hereinafter referred to as the directives on public contracts'.

(5) - Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

(6) - See Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraph 18 in fine.

(7) - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33). A similar directive was adopted in respect of public contracts in specific sectors, that is to say Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

(8) - Moniteur belge of 22 January 1994.

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(9) - Moniteur belge of 9 April 1999, p. 11690.

(10) - For the purposes of Article 65(2) of the Royal Decree, undertaking connected' means any undertaking over which a person mentioned in paragraph 1 thereof can, directly or indirectly, exercise a dominant influence, and any undertaking which can exercise a dominant influence over that person or which, like the latter, is subject to the dominant influence of another undertaking by virtue of its ownership, financial participation or the rules which govern it. Dominant influence is to be presumed where an undertaking, directly or indirectly, with regard to another undertaking, holds more than half of the paid-up capital of the undertaking, is entitled to a majority of the votes attached to the shares issued by the undertaking, or may nominate more than half of the members of the body responsible for the administration, management or supervision of the undertaking.

(11) - See, inter alia, Case C292/92 Hünermund and Others [1993] ECR I6787, paragraph 8; Case C28/99 Verdonck and Others [2001] ECR I3399, paragraph 28; and Case C-399/98 Ordine degli Architetti and Others [2001] ECR I5409, paragraph 48.

(12) - It should be noted that Fabricom submitted a complaint concerning these provisions of Belgian law to the Commission. The Commission responded by stating that it was unable to establish an infringement of Community law.

(13) - Case C324/98 [2000] ECR I10745.

(14) - See, inter alia, Joined Cases C285/99 and C286/99 Lombardini and Mantovani [2001] ECR I9233.

(15) - In this case, this criterion is that of participation in the preparatory works by the tenderer.

(16) - See inter alia Case 31/87 Beentjes [1988] ECR 4635, and Lombardini and Mantovani , loc. cit.

(17) - Fratelli Costanzo , loc. cit.

(18) - See the Opinion in the case cited above (point 25).

(19) - See inter alia Case C208/98 Berliner Kindl Brauerei [2000] ECR I1741; Case C372/98 Cooke [2000] ECR I8683; and Case C341/01 Plato Plastik Robert Frank [2004] ECR I-0000.

(20) - See Article 3(2).

(21) - See Article 5(7).

(22) - See Article 6(6).

(23) - See Article 4(2).

(24) - Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.

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

(26) - A view also supported by the Austrian and Finnish Governments in their observations.

(27) - Joined Cases 27/86 to 29/86 CEI and Others [1987] ECR 3347, paragraph 15.

(28) - As the Court confirms in Beentjes , loc. cit., paragraph 20.

(29) - See Case C275/98 Unitron Scandinavia and 3-S [1999] ECR I8291, paragraph 31; Telaustria and Telefonadress , loc. cit., paragraph 61; and Order in Case C59/00 Vestergaard [2001] ECR

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I9505.

(30) - Case C243/89 [1993] ECR I3353, paragraph 33.

(31) - Observation of the principle of transparency also contained in the directives on public contracts gives rise to an obligation on the contracting authorities to provide tenderers with information so that they are aware of the procedures for participating in the tender for a public contract.

(32) - See observations, paragraph 27.

(33) - Often a person does not intentionally take advantage of the knowledge and information acquired during his participation in the preparatory work. Whether or not his intention is honest or dishonest has no bearing on the advantage it confers on that person by comparison with other tenderers.

(34) - See, to that effect, Case C-280/93 Germany v Council [1994] ECR I4973.

(35) - See inter alia Case C107/98 Teckal [1999] ECR I-8121.

(36) - It will be recalled that this is Directive 89/665 to which I referred under the heading Legal background' in this Opinion.

(37) - In the worstcase scenario, the undertaking will learn of its exclusion at the same time as the notification of the award of the public contract to the selected tenderer.

(38) - See inter alia Case C81/98 Alcatel Austria and Others [1999] ECR I7671.

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61998J0324 : N 35

SUB	Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	French
MISCINF	AFFAIRE : 62003J0034
NATIONA	Belgium
PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
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Notice for the OJ

Reference for a preliminary ruling by the Conseil d'Etat, Section d'Administration by judgment of that Court of 27 December 2002 in the case of La Société Anonyme Fabricom against l'Etat Belge

(Case C-34/03)

Reference has been made to the Court of Justice of the European Communities by judgment of the Conseil d'Etat, Section d'Administration (Council of State, Administrative Section) of 27 December 2002, received at the Court Registry on 29 January 2003, for a preliminary ruling in the case of La Société Anonyme Fabricom against l'Etat Belge (the Belgian State) on the following questions:

1.Do Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts[1], and in particular Article 3(2) thereof, Council Directive 93/36/EC of 14 June 1993 coordinating procedures for the award of public supply contracts[2], and in particular Article 5(7) thereof, Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts[3], in particular Article 6(6) thereof, and Article 97/52/EC of the European Parliament and of the Council of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning procedures for the award of public service contracts, public supply contracts and public works contracts[4], in particular Articles 2(1(b) and 3(1)(b) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the law of property guaranteed in particular by the protocol of 20 March 1992 to the Convention for the Protection of Human rights and Fundamental Freedoms, preclude the barring of the submission of an application to participate in or a tender for a public contract for works, supplies or services by any person who has been responsible for research, testing, study or development in respect of those works, supplies or services where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience he has acquired could not distort competition?

2.Would the answer to the preceding question be different if the abovementioned directives, considered in conjunction with the same principle, freedom and law, were interpreted as covering only private undertakings or undertakings which had supplied gratuitous services?

.../...

3.Can Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and in particular Articles 2(1)(a) and 5 thereof, be interpreted as meaning that a contracting authority may exclude, up to the end of the process of evaluation of the tenders, from participation in the procedure or submission of a tender, an undertaking connected to any person who has been responsible for research, testing, study or development in respect of the works, supplies or services, although when questioned in that regard by the contracting authority that undertaking declares that it has gained therefrom no unfair advantage of a nature such as to distort the normal conditions of competition?

_____

[1] - OJ L 209 of 24.07.1992, p. 1.

[2] - OJ L 199 of 09.08.1993, p. 1.

[3] - OJ L 199 of 09.08.1993, p. 54.

[4] - OJ L 328 of 28.11.1997, p. 1.

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JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

12 March 2008 (*)

(Public service contracts – Community tendering procedure – Provision of services for the development and provision of services in support of the Community Research and Development Service (CORDIS) – Rejection of a tender – Principles of equal treatment as between tenderers and transparency)

In Case T–345/03,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented initially by S. Pappas and subsequently by N. Korogiannakis, lawyers,

applicant,

v

Commission of the European Communities, represented by C. O'Reilly and L. Parpala, acting as Agents,

defendant,

APPLICATION for the annulment of the decision to award the contract which is the subject of the Commission's call for tenders ENTR/02/55 – CORDIS Lot 2 for the development and provision of services in support of the Community Research and Development Service (CORDIS),

THE COURT OF FIRST INSTANCEOF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 13 July 2006,

gives the following

Judgment

Legal context

1 Until 31 December 2002, the award of public service contracts by the Commission was governed by the provisions of Section 1 (Articles 56 to 64 *bis*) of Title IV of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), as amended by Council Regulation (EC, ECSC, Euratom) No 2673/99 of 13 December 1999 (OJ 1999 L 326, p. 1), which came into force on 1 January 2000 ('the Financial Regulation').

2 According to Article 56 of the Financial Regulation:

'When concluding contracts for which the amount involved is equal to or greater than the threshold provided for by the Council directives on the coordination of procedures for the award of public works, supplies and service contracts, each institution shall comply with the same obligations as are imposed upon bodies in the Member States by those directives.

The implementing measures provided for in Article 139 shall include appropriate provisions to that end.'

3 Article 139 of the Financial Regulation provides as follows:

'In consultation with the European Parliament and the Council and after the other institutions have delivered their opinions, the Commission shall adopt implementing measures for this Financial Regulation.'

4 Pursuant to Article 139 of the Financial Regulation, the Commission adopted Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation (OJ 1993 L 315, p. 1) ('the Implementing Rules'). Articles 97 to 105 and 126 to 129 of the Implementing Rules apply to the award of public service contracts.

5 In particular, Article 126 of the Implementing Rules provides as follows:

'The Council directives on public works, supplies and services shall be applicable to the award of contracts by the institutions whenever the amounts involved are equal to or greater than the amounts provided for in those directives.'

6 Article 3(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997, also amending Directives 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1), provides as follows:

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

Background to the dispute

I – CORDIS

7 The present case concerns the general call for tenders ENTR/02/55 relating to the development and provision of the new version of services in support of the Community Research and Development Information Service (CORDIS) ('the call for tenders at issue'). CORDIS is an informatics tool which enables framework programmes for European research to be implemented. It is the principal publishing and communication service for prospective or existing participants and for other groups with an interest in a framework programme for European research. It consists of a multi-purpose platform which can be adapted to the user's needs, a portal for those involved in European research and innovation and a tool for the dissemination of information to the public.

8 As of 1998, all the support services for CORDIS were supplied by a single contractor, namely Intrasoft International SA ('the existing contractor').

9 The adoption of the Sixth Framework Programme of the European Community for research, technological development and demonstration activities contributing to the creation of the European Research Area and to innovation (2002-2006) by Decision No 1513/2002/EC of the European Parliament and of the Council of 27 June 2002 (OJ 2002 L 232, p. 1) marked the beginning of a new phase in the implementation of CORDIS. For that new phase, the Commission decided to launch a call for tenders and to divide the project in question in the present case into five lots.

II – The call for tenders at issue, the successful tenderer and the award of the contested contract

10 On 13 February 2002, the prior information notice for the invitation to tender at issue was published in the Supplement to the *Official Journal of the European Communities* (OJ S 31). A prior information notice modifying it was published in the Supplement to the *Official Journal of the European Communities* of 7 August 2002 (OJ S 152).

11 On 20 November 2002, the contract notice for Lots 1 to 3 was published in the Supplement to the

Official Journal of the European Communities (OJ S 225).

12 Volume A of the tendering specifications for the call for tenders at issue, entitled 'the general part', ('Volume A of the tendering specifications') states, inter alia, as follows:

'Preamble

This is Volume A, the general part of the tendering specifications, applicable to all 5 lots.

For the specific parts, please refer to:

...

Lot 2 – Development

(development and maintenance of the technical infrastructure of all services)

...

1.3 Start date and duration of the contract

The contracts are expected to be signed in June 2003 and to start on the 1st of July 2003.

The first three months of the contracts are the "running-in phase" of the contracts.

Running-in serves the purpose to enable [sic] non-incumbent contractors to familiarise [themselves] with the CORDIS service. The previous contract specifies a "handover". New contractors will thus be able to access the service operations in order to prepare themselves for takeover of the services ... [at] the latest by the end of the running-in phase.

The running-in is not paid [sic].

It is not excluded, subject to the approval of the CPO and subject to the agreement of the existing contractor, that parts or all of the service are already taken over during the running-in phase (for payment of services taken over during the running-in phase, see point 1.7).

...

1.7 Payment

Payment for each lot shall be made within the delay [sic] fixed by the Commission's internal regulations for payment as follows:

...

– in [the] case that parts or all of the service are taken over by the new Contractor during the running-in phase (see 1.3), the new Contractor will be paid as of the date of successful takeover for the parts of the service taken over; ...

...

3.3 Evaluation of offers – award criteria

The contract will be awarded to the most cost-effective offer ("best value for money"), on the basis of the following award criteria:

– the qualitative award criteria

– the price

The first step in the assessment procedure is to evaluate the selected tender(s) according to the following qualitative award criteria and the corresponding weighting of each criterion.

Criterion	Qualitative award criteria	Weighting (max. points) for Lots 1, 2, 4, 5	Weighting (max. points) for Lot 3
1	Technical merit, conformity with the technical terms of reference and how these are addressed; proposed technical approach (functional completeness, compliance with technical requirements, appropriateness of proposed technology)	35	...
2	Quality of proposed methodology (working methods aiming at effectiveness, usability, security and confidentiality; service reliability / availability / recovery / maintenance; adopting best practices)	25	...
3	Creativity, degree of innovation (value of original ideas on how to innovate the service)	20	...
4	Quality of proposed schedule, contract management and control (proposed arrangements for the production of deliverables on time, and to ensure that the objectives and deadlines are met and quality is guaranteed)	20	...
5 ... (only for Lot 3)	...	...	...
	Total points	100	...

...

4. Technical specifications

Executive summary

There could be up to five independent Contractors to run the CORDIS service. These are specialising [sic] in the following way:

...

Lot 2 will assure [sic] the development of the technical infrastructure used by the other lots and the Commission, such as the Common Production System (CPS), the Web Content Management System (WCMS), the Information Dissemination System (IDS) with all its components (WWW server(s), FTP server(s), BBS, eMail server, firewall, LAN, WAN, broadband Internet access, etc.). Lot 2 will also develop new tools and features, some of which [are] for experimental purposes(s). Lot 2 will bring the know-how and the service-application software, whereas each other lot – and the Commission – will provide the underlying building blocks, i.e. hardware and software system(s), like [sic] database management system, router etc.

...'

13 Volume B of the tendering specifications for the call for tenders at issue, entitled 'Lot 2 Development' ('Volume B of the tendering specifications') sets out the specifications for Lot 2. It provides, inter alia, as follows:

'6.2.1 Technical and functional evolution of the system architecture and processes

...

The following specifications – on the basis of the current state of CORDIS as of June 2002 and the

predictable near future – concentrate on describing objectives and *basic requirements* of *what* is needed for the continuation and evolution of CORDIS. As far as the *how* is concerned, only *minimal requirements* are set out in these specifications. The Tenderer/Contractor will provide full information on how those requirements will be met.

...

6.2.3.3 Indexing, Specific Views and Taxonomies

The ability to present content using predefined profiles to reach targeted user communities and constituencies. Advanced meta-structure and tagging techniques would need to be applied to content objects. There exists the possibility to make use of available products to implement, for example, taxonomy building, but these should have long-term application and be consistent [compatible] with the CORDIS architecture.

...

6.8 Hand-over to the next Contractor

The Contractor will hand over to the next Contractor – respectively to the Commission, where the latter requests for them [sic] – all relevant objects, like [sic] requirements and design specifications, release plans, source code, procedures, test plans, migration plans, results, including full documentation in whatsoever form (paper and electronic). Also, the product licences, which have been acquired and/or taken over from the previous Contractor(s), will be orderly transferred [sic] to the next Contractor or to the Commission.'

14 On the same day, the Commission provided the prospective tenderers with a CD–ROM containing information on the computer equipment and the software in use at that time ('CD 1').

15 On 20 December 2002, the Commission provided the prospective tenderers with a second CD-ROM containing additional technical information ('CD 2').

16 At the end of December 2002, the Commission acquired a software product known as 'Autonomy', which is a contextual search tool enabling the final users of CORDIS to carry out targeted searches in the CORDIS data bases as well as multilingual terminological searches.

17 On 7 January 2003, an information day open to all prospective tenderers was organised by the Commission, as provided for in point 1.6 of Volume A of the tendering specifications.

18 On 5 February 2003, the Commission published on a temporary website specifically dedicated to the call for tenders at issue a list reiterating all the existing computer equipment and all the software in use at that time ('the asset list').

19 On 18 February 2003, the Commission also published on that site a document entitled 'Superquest – Implementation of Release 6 and beyond'. That document, which is dated 6 February 2003 and is called a 'draft', was drawn up by the existing contractor. It contained technical specifications for implementing the Autonomy software as well as a recommendation to acquire it.

20 On 9 March 2003, the applicant, Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, in consortium with a Belgian company, submitted a tender for Lot 2 of the project ('the contested contract').

21 The deadline for the submission of tenders laid down in the tendering specifications was set for 19 March 2003.

22 The tenders were opened on 26 March and 1 April 2003.

23 The Evaluation Committee met on several occasions between 27 March and 19 June 2003.

24 On 19 June 2003, the Evaluation Committee produced a report which included, inter alia, as regards the applicant's tender, the following comments:

Criteria	Comments	Points
1. Technical merit, conformity with the technical terms of reference …	Proposed technical platform based on J2EE (following FP6, eEurope etc), based on top of NCA but little detail on how NCA will be developed and maintained. Good generic justification of J2EE and associated benefits. WCMS proposal dependent on EC choice; assumes functions delivered by chosen WCMS. Search etc functionality assumptions based on Autonomy, mostly descriptive and including material copied from CORDIS Release 6 user requirements available from CFT2002 website. … … Generally, the understanding of the requirements and the necessary technology is well covered and encourages high marks. However, there is too much unnecessary detail and redundant material and a lack of concrete proposals. Too many 'will be considered' and 'solutions will be provided' with no substance.	21.6/35
2. Quality of proposed methodology …	… … … Good but generic mention of design patterns and software reuse. … …	14.8/25
3. Creativity, degree of innovation …	… … …	12.8/20
4. Quality of proposed schedule, contract management and control …	… … … … … …	12.8/20

25 The Evaluation Committee finally proposed that the tender of the Belgian company Trasys should be accepted for the contested contract. It based its decision on the results of a qualitative and financial evaluation of the applicant and Trasys, which were set out as follows:

	Qualitative aw points

Name			1 (3
Applicant	21.6	14.8	12
Trasys	25.6	16.2	14

Name	Total price (€)	Points – quality	Ratio – Value for money
Applicant	6 095 001.16	62.0	10.17
Trasys	5 543 392.07	69.6	12.56

26 On 6 July 2003, the Commission decided to accept the Evaluation Committee's recommendation and to award the contested contract to Trasys ('the successful tenderer'). The successful tenderer stated in its tender that, subject to how the work under the contested contract progressed, at least 35% of it would be subcontracted to the existing contractor.

27 By letter of 1 August 2003, the Commission informed the applicant that its tender had not been accepted.

Procedure and forms of order sought by the parties

28 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 30 September 2003.

29 The applicant claims that the Court should:

– annul the decision of the Commission to evaluate its tender as unsatisfactory;

– order the Commission to re-evaluate its tender;

– order the Commission to pay the costs.

30 The defendant contends that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

31 By letter lodged at the Court Registry on 16 September 2004, the applicant sought leave to reply to the rejoinder in writing.

32 On 26 October 2004, the Court informed the applicant of its decision to refuse such leave.

33 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure and, by way of measures of organisation of procedure provided for by Article 64 of its Rules of Procedure, it requested the parties, by letter of 20 June 2006, to reply in writing to additional questions.

34 By letters lodged at the Court Registry on 30 June 2006, the parties replied to the written questions of the Court.

35 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 13 July 2006.

36 By letter of 24 July 2006, the applicant provided additional explanations of its oral submissions.

37 On 14 September 2006, the Court decided to reopen the oral procedure.

38 By letters of 15 September 2006, the Court requested the applicant to produce in writing the calculation which it had carried out in the course of the hearing and to explain each of its separate stages.

39 The applicant replied to that request by letter lodged on 26 September 2006.

40 By letter lodged on 22 November 2006, the Commission set out its observations on the applicant's written response.

41 On 6 December 2006, the Court decided to close the oral procedure.

Law

I – Scope of the application for annulment

42 By the first head of claim in its application, the applicant seeks annulment of the Commission's decision to evaluate its tender as unsatisfactory. By its second head of claim, the applicant seeks an order that the Commission re-evaluate its tender.

43 As regards the first head of claim, it must be noted that the Commission did not decide that the applicant's tender was unsatisfactory.

44 Moreover, by writing on the copy of the decision to award the contested contract which was submitted to the Court as an annex to the application the words 'contested measure', the applicant itself indicated that it considered that measure to be the subject of its application for annulment.

45 As a consequence, the first head of claim seeks annulment of the decision to award the contested contract to a tenderer other than the applicant, whose tender was considered to be better ('the contested decision').

46 As regards the second head of claim, it is settled case-law that the Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions; rather, it is for the administration concerned to adopt the necessary measures to implement a judgment given in proceedings for annulment (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 200, and Joined Cases T-374/94, T-375/94, T–384/94 and T–388/94 *EuropeanNight Services and Others* v *Commission* [1998] ECR II–3141, paragraph 53).

47 Accordingly, the applicant's second head of claim must be rejected as inadmissible in so far as it seeks an order that directions be issued to the Commission.

II – The application for annulment of the contested decision

A – Pleas in law

48 In support of its action for annulment, the applicant puts forward four pleas in law, which are divided into a number of parts.

49 By its first plea, the applicant submits that the Commission failed, first, to communicate the information requested by the applicant and, second, to give sufficient reasons for its decisions. In particular, first of all, it considers that the Commission responded to a request for information made during the tendering procedure only after the closing date for submitting tenders. Secondly, the applicant considers that the Commission failed to provide it with full extracts of an alleged favourable recommendation made to the Advisory Committee on Procurement and Contracts in respect of its tender and that of the successful tenderer. Thirdly, the applicant considers that the Commission failed to make available to it information on the names of the successful tenderer's subcontractors. Fourthly, the applicant claims that an additional committee, not provided for in the Implementing Rules, participated in the evaluation of the tenders. By its second plea, the applicant submits that the Commission infringed the principle of equal treatment as between tenderers laid down in Article 126 of the Implementing Rules and in Article 3(2) of Directive 92/50, first of all, by laying down a requirement in the tendering specifications for an unpaid running-in phase and, secondly, by failing to make available to all prospective tenderers various relevant technical information from the beginning of the tendering procedure. By its third plea, the applicant maintains that the Commission committed manifest errors in the assessment of its tender and in the assessment of the successful tenderer's tender. Lastly, in its reply, the applicant submits that the Commission failed to define clear and objective evaluation rules for the call for tenders at issue.

50 The Court considers that it is appropriate to examine at the outset the second plea since the applicant claims that the principle of equal treatment as between tenderers was infringed from the beginning of the tendering procedure.

B – The second plea, alleging infringement of the principle of equal treatment as between tenderers

51 The second plea is based, first, on the requirement for an unpaid three-month running-in phase and, second, on the lack of access to certain technical information.

1. The first part of the second plea, concerning the requirement for an unpaid three-month running-in phase

a) Arguments of the parties

52 The applicant submits that the Commission infringed the general prohibition of discrimination as between tenderers, which is recognised as a general principle of Community law and is laid down in Article 56 of the Financial Regulation and in Article 3(2) of Directive 92/50. It claims that the requirement for an unpaid running-in period imposes a financial burden on all potential tenderers, with the exception of the existing contractor, which enjoys an equivalent advantage since it alone does not need to include in its financial offer the cost of three months' unpaid running-in activities.

53 The applicant submits that the fact that the existing contractor is a member of a 'consortium' with the successful tenderer, which was selected for the contested contract as a result of its lower financial offer, enabled the latter to enjoy a financial advantage which is contrary to the principle of the equal treatment as between tenderers.

54 The applicant is of the opinion that its tender would have obtained a higher ranking if its price/quality ratio had been calculated by disregarding the costs relating to the running-in phase. In that regard, the applicant submits that the costs of the running-in phase must be deducted from the cost of its tender.

55 Lastly, the applicant challenges the fifth paragraph of point 1.3 of Volume A of the tendering specifications. It is of the view that that provision makes it possible for the existing contractor to refuse to allow the new contractor to take over the services before the end of the three-month running-in period.

56 The defendant points out, first of all, that the successful tenderer and the existing contractor are not one and the same. The successful tenderer was simply to subcontract to the existing contractor and is, therefore, a new contractor for the contested contract.

57 The defendant considers, next, that the requirement for an unpaid running-in phase does not, of itself, constitute an infringement of the principle of equal treatment as between tenderers. It is obvious that, in order to take over such an important contract as the contract at issue, the new contractor could not be expected to be fully operational from the very first day. Since the running-in phase would, for each new contractor, be an acclimatisation phase, there would be no payment for that phase.

58 Consequently, the defendant rejects the argument that the successful tenderer benefited unduly from certain financial advantages.

59 With regard to the applicant's claim that the take-over of the services during the running-in phase was dependent on the goodwill of the existing contractor, the defendant submits that the earlier contract concluded with the existing contractor imposed an obligation to prepare in a timely fashion for the takeover of the services by the new contractor. Furthermore, the existing contractor was obliged to cooperate fully with the new contractor.

b) Findings of the Court

(i) Preliminary remarks

60 As has been recognised by established case-law, in accordance with the principle of equal treatment, comparable situations must not be treated differently and different situations must not

be treated in the same way (Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7, and Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28).

61 In the field of public procurement, the principle of equal treatment as between tenderers assumes a very particular importance. Indeed, it is apparent from the well-established case-law of the Court of Justice that the contracting authority is required to comply with the principle that tenderers should be treated equally (Joined Cases C-285/99 and C–286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 37, and Case C–315/01 *GAT* [2003] ECR I–6351, paragraph 73).

62 It is necessary to consider the first part of the second plea in the light of the principles set out above.

(ii) The alleged infringement of the principle of equal treatment as between tenderers

(1) General observations

63 It is to be recalled, first of all, that the applicant complains that the Commission failed to adhere to the principle of equal treatment by reason of the requirement in the tendering specifications for an unpaid running-in phase.

64 In the light of the case-law (see Case T-160/03 *AFConManagement Consultants and Others* v *Commission* [2005] ECR II–981, paragraph 75 and the case-law cited), according to the applicant, the Commission undermined the equality of opportunity that should be enjoyed by all tenderers.

(2) Whether the requirement for an unpaid running-in phase is discriminatory

General observations

65 The applicant maintains that the Commission failed to adhere to the principle of equal treatment as between tenderers, as laid down in Article 3(2) of Directive 92/50 and in Article 126 of the Implementing Rules.

66 It must be noted in that regard that, according to point 1.7 of Volume A of the tendering specifications, the requirement for an unpaid running-in phase is applicable without distinction to all tenders.

67 The question therefore arises as to whether the requirement in the tendering specifications for an unpaid running-in phase is, by its nature, discriminatory.

Whether the requirement for an unpaid running-in phase entails an inherent advantage for the existing contractor and a tenderer connected to that party by virtue of a subcontract

68 The requirement for a running-in phase enabling the new contractor to become familiar with the earlier version of the technology which it is required to replace seeks to ensure that the quality of the services to be provided is maintained at a high level during that phase. It must be noted that this is a phase during which, on the one hand, the provision of the services in question is still remunerated on the basis of the contract concluded with the existing contractor and, on the other hand, the new contractor is not yet in a position fully to guarantee the quality of services required for the application of the new version of the technology. Thus, the provision for a running-in phase is in the interest of the new contractor itself, since it enables that party in a timely fashion to become fully acquainted with technology with which it will be required to work at a time when it can provide only limited services. In view of the foregoing considerations, the fact that such a phase is unpaid is not, therefore, as such, discriminatory.

69 Nevertheless, according to the applicant, in the present case it is the specific situation in which the existing contractor is placed after the publication of the tendering specifications providing for an unpaid running-in phase, namely that it is envisaged that that party will be the subcontractor of one of the tenderers for the contested contract, which makes such a requirement discriminatory.

70 In that regard, it should be pointed out that the fact that an advantage may be conferred upon an

existing contractor by a running-in phase is not the consequence of any conduct on the part of the contracting authority. Unless such a contractor were automatically excluded from any new call for tenders or, indeed, were forbidden from having part of the contract subcontracted to it, it is inevitable that an advantage will be conferred upon the existing contractor or the tenderer connected to that party by virtue of a subcontract, since it is inherent in any situation in which a contracting authority decides to initiate a tendering procedure for the award of a contract which has been performed, up to that point, by a single contractor. That fact constitutes, in effect, an 'inherent de facto advantage'.

71 The Court of Justice recently held that Directive 92/50 and the other directives concerning the award of public contracts precluded a national rule whereby a tenderer which has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to submit a tender for those works, supplies or services and where that tenderer is not given the opportunity to prove that, in the circumstances of the case, the experience which it has thus acquired was not capable of distorting competition (Joined Cases C–21/03 and C–34/03 *Fabricom* [2005] ECR I–1559, paragraph 36).

72 If, according to that judgment, even the exceptional knowledge acquired by a tenderer as a result of work directly connected with the preparation of the tendering procedure in question by the contracting authority itself could not therefore lead to it automatically being excluded from that procedure, there must therefore be even less ground for excluding that tenderer from participating where such exceptional knowledge derives solely from the fact that it participated in the preparation of the call for tenders in collaboration with the contracting authority.

Whether the advantage inherent in the requirement for an unpaid running-in phase should be neutralised

73 It also follows from the case-law cited at paragraph 71 above that the principle that tenderers should be treated equally does not place any obligation upon the contracting authority to neutralise absolutely all the advantages enjoyed by a tenderer where the existing contractor is a subcontractor of that party.

74 To accept that it is necessary to neutralise in all respects the advantages enjoyed by an existing contractor or a tenderer connected to that party by virtue of a subcontract would, moreover, have consequences that are contrary to the interests of the service of the contracting institution in that such neutralisation would entail additional cost and effort for that institution.

75 Nevertheless, in order to comply with the principle of equal treatment in this particular situation, a balance must be struck between the interests involved.

76 Thus, in order to protect as far as possible the principle of equal treatment as between tenderers and to avoid consequences that are contrary to the interests of the service of the contracting institution, the potential advantages of the existing contractor or a tenderer connected to that party by virtue of a subcontract must none the less be neutralised, but only to the extent that it is technically easy to effect such neutralisation, where it is economically acceptable and where it does not infringe the rights of the existing contractor or the said tenderer.

77 With regard to the balancing of the interests concerned from an economic point of view, it must be recalled that the principle of equal treatment as between tenderers derives from the provisions in Section 1 (Articles 56 to 64 *bis*) of Title IV of the Financial Regulation. Article 2 of the Financial Regulation, which is one of the articles laying down the general principles in that regulation, states that '[t]he budget appropriations shall be used in accordance with the principles of economy and sound financial management'. Moreover, according to Article 248(2) EC, sound financial management constitutes a general rule of Community organisation laid down by the Treaty and the Court of Auditors of the European Communities ensures that that rule is complied with.

78 As is apparent from paragraph 68 above, in the present case, not only is the provision of the services in question during the running-in phase remunerated on the basis of the contract concluded with the existing contractor but also the new contractor is not yet at that stage in a position fully to guarantee the quality of the services required for the application of the new version of CORDIS. Moreover, the running-in phase not only ensures the optimum attainment of the quality objectives set out in the call for tenders but also affords the new contractor itself the opportunity for a period of acclimatisation.

79 Accordingly, given, first, that the rights of the existing contractor are not infringed and, secondly, that double payment for the running-in phase would be contrary to one of the principle objectives of the law governing the award of public contracts, which seeks, inter alia, to facilitate the acquisition of the service required in the most economic manner possible, it would be unreasonable, for the purposes of the performance of the contract in question, to waive the requirement for an unpaid running-in phase on the sole ground that one of the prospective tenderers may possibly be connected to the existing contractor by virtue of a subcontract.

80 It must therefore be concluded that, in the present case, the fact that a tenderer connected to the existing contractor by virtue of a subcontract may enjoy an advantage does not require the contracting authority to waive the requirement for an unpaid running-in phase in the tendering specifications in order to avoid an infringement of the principle of equal treatment as between tenderers.

(3) Whether it is possible to refuse to allow the new contractor to take over the services before the end of the three-month running-in period

81 As regards the claim that it is possible to refuse to allow the new contractor to take over the services before the expiry of the three-month running-in period, it must be noted that, according to point 1.3 of Volume A of the tendering specifications, '[i]t is not excluded, subject to the approval of the CPO and subject to the agreement of the existing contractor, that parts or all of the service are already taken over during the running-in phase'. Moreover, according to point 1.7 of Volume A of the tendering specifications, 'in [the] case that parts or all of the service are taken over by the new Contractor during the running-in phase (see 1.3), the new Contractor will be paid as of the date of successful takeover for the parts of the service taken over'.

82 The words 'subject to … the agreement of the existing contractor' must be understood in the light of all the conditions governing the takeover of the CORDIS support services and, in particular, those in the earlier contract concluded between the Commission and the existing contractor.

83 With regard to the take over of the CORDIS support services by the new contractor, it follows from point 3.2.1.2 of Annex II to the earlier contract, as amended by the second addendum, that the existing contractor was under an obligation to prepare for and contribute to a complete, timely and smooth takeover by the next contractors and to cooperate fully with the next contractors in order to achieve continuing high standards of quality for CORDIS support services during the takeover phase.

84 Therefore, short of contravening its contractual obligations, the existing contractor was, if necessary, under an obligation to comply with the requirements of any shortening of the three-month running-in phase, pursuant to its obligation of active cooperation.

85 Lastly, the applicant has failed to demonstrate how, from an economic standpoint, the existing contractor had any interest in hindering an early takeover of the CORDIS support services by a new contractor, given that the existing contractor did not, in any event, lose the right to be remunerated up to the end of its own contract.

86 It must therefore be concluded from the foregoing that the fifth paragraph of point 1.3 of Volume A of the tendering specifications does not permit the existing contractor to refuse to allow the new contractor to take over the CORDIS support services before the expiry of the three-month running-in period.

87 The argument put forward by the applicant in this regard must therefore be rejected.

88 In the light of the foregoing, the first part of the second plea in law must be rejected.

2. The second part of the second plea, relating to the failure to make available to all prospective tenderers various relevant technical information from the beginning of the tendering procedure

89 The applicant complains that the Commission failed to make available to all prospective tenderers two categories of relevant technical information, namely, first, information on the acquisition of the Autonomy software by the Commission and, second, information on the technical specifications and the source code for CORDIS.

a) Arguments of the parties

(i) Access to information on the acquisition of the Autonomy software

90 The applicant submits that the Commission failed to communicate in good time information on the acquisition of the Autonomy software to all prospective tenderers.

91 The tendering specifications and background technical documents made available to the prospective tenderers did not make any reference to the fact that, by acquiring the Autonomy software, a solution had in fact already been found to numerous technical problems encountered with CORDIS.

92 The applicant is of the view that the Autonomy software is the 'corner–stone' of CORDIS. It states that it is an intelligent operating system enabling operations to be automated for all forms of information used to conduct communication and business today. The core technology provides a platform for the automatic categorisation, hyper-linking, retrieval and profiling of unstructured information, making possible the automatic delivery of large volumes of personalised information.

93 The applicant explains that Lot 1 was concerned with the gathering and preparation of information and recommendations to the Commission on services for final users. A tender for Lot 1 could, therefore, state that there was a need for additional search software which, when a personal search is made, is able to make a distinction between certain information contained in CORDIS, such as the English word 'bank', meaning both 'bank' as an institution and 'river bank'. One of the aims of the contested contract was to find such solutions.

94 The applicant concludes from this that the lack of information on the acquisition of the Autonomy software at the beginning of the tendering procedure obliged it to redesign its whole technical architecture and to review the members of its team, since the introduction of the Autonomy software had an impact on a great number of other features.

95 By contrast, the successful tenderer, supported by its intended subcontractor, which was the existing contractor, was able to devote all its resources to preparing the best possible technical offer, using its privileged information.

96 The applicant disputes the Commission's contentions that it was open to the use of a better taxonomy system than that offered by the Autonomy software. According to the applicant, such an approach is contradictory in that it could lead to a situation in which the successful tenderer for Lot 1 based its proposal on the use of the Autonomy software and the successful tenderer for the contested contract proposed a solution based on a different taxonomy tool. Moreover, it is unlikely that the Commission, having spent a few hundred thousand euros on the Autonomy software, would take the risk that, at the conclusion of the tendering procedure in question, a tool other than that software would be chosen.

97 In the main, the defendant agrees with the applicant's descriptions of the functionality of the Autonomy software and the purpose of Lot 1 and the contested contract.

98 However, the defendant disputes the claim that its acquisition of the Autonomy software obliged the tenderers to review the architecture of the CORDIS system, given that that systematic classification tool does not form part of that architecture.

99 The defendant considers that the acquisition of the Autonomy software did not necessitate any change in the tendering specifications. It states that it remained open to any proposal for the acquisition of a taxonomy system that was better than that offered by the Autonomy software and to any other new ideas. Referring, in particular, to point 6.2.3.3 of Volume B of the tendering specifications, headed 'Indexing, Specific Views and Taxonomies', the Commission explains that the tenderers for the contested contract were obliged only to propose solutions which would enable complex searches to be carried out in CORDIS. Since the Autonomy software was on the market, the applicant could have included in its bid a proposal that that software or any other tool of that kind should be used. Thus, the second-placed tenderer submitted a very high–quality bid by proposing another system, which was 'innovative' as regards indexing and taxonomy.

100 At the hearing, in response to a question from the Court, the defendant stated that it had published, on a website specifically dedicated to the call for tenders at issue, information on the

Autonomy software in response to a request from tenderers and did so with the sole aim of ensuring transparency.

(ii) Access to documentation on the technical architecture and source code for CORDIS

101 The applicant considers that the Commission failed to adhere to the principle that tenderers should be treated equally in that the successful tenderer enjoyed exclusive access to certain technical information and was thus able to submit a much more competitive bid than that of all the other tenderers, obliging the latter to submit higher financial offers.

102 The applicant states that the existing contractor had exclusive access to technical information as to the actual status of the project and, in particular, the CORDIS source code. The applicant submits that no relevant up to date technical information was communicated to the other tenderers, notwithstanding the fact that such information was available. The only useful information communicated to the prospective tenderers was a document describing the technical design specifications for the application which was in place and actually used by the Commission at the time of the call for tenders in question, as well as the detailed and well–documented source code for the application.

103 With regard to CD 1 and CD 2 and the asset list provided to the potential tenderers, the applicant submits that that technical information related only to the earlier version of CORDIS. That information covered only the period from May 2002 and consisted essentially of bulk statistical data and extremely limited and poor quality technical information, which was therefore outdated, obsolete or of limited value. Lastly, at the hearing, the applicant referred to the fact that, on CD 2, the pages containing the two diagrams of the design for the CORDIS architecture, namely 'Three-tier architecture' and 'Internet Application Server Architecture', were inadequate.

104 As regards the asset list, the applicant states that a majority of software programmes are machine-specific. A tenderer for the contested contract must therefore describe the applications proposed in a language and with a source code that is specific to those machines. It does not consider the asset list to be clear. Indeed, on the basis of the asset list, it was not possible to determine where the specific programmes for the machines available were to be found. In particular, it was not possible to determine which applications were hosted in which machines, nor the manner in which they were hosted.

105 As regards the importance of the source code for tenders for the contested contract, the applicant explains that a well–documented source code is the 'corner-stone' of any project relating to information technology. In the present case, if the source code is not known, CORDIS is a 'black box'. The applicant states that a tenderer must envisage a number of options, without ever being able to exhaust all of them, in order to attempt properly to address all possible situations which it may face in the implementation phase. Moreover, it considers that if, in spite of all of this, it is successful, it must bear a significant cost in analysing thousands of lines of unknown source codes and in producing the missing analysis and documentation.

106 The applicant adds that it is necessary to know the source code in order to calculate the tender price. The calculation of bids for contracts in the field of new technology, where an existing application is being taken over, is greatly facilitated by the use of specialist cost-calculating software, such as the software known as 'Cocomo2' (COnstructive-COst-MOdel). The number of source code lines constitutes the basic input for use of the Cocomo2 software. In fact, in order to use Cocomo2 software, the first information to be input is the estimated number of lines of source code.

107 With regard to the defendant's argument that its intention was to foster creativity, the applicant states that, in order to be able to design future projects, it was essential to have very precise and detailed knowledge of the earlier version of CORDIS. It submits that, even if a tenderer were very creative, it would fail if it had to prepare its bid on the basis of incorrect assumptions and incorrect guidelines.

108 The defendant maintains that the successful tenderer did not have privileged access to relevant information. That is demonstrated by the fact that the successful tenderer estimated more staff days than the applicant.

109 The defendant states that, during the tendering procedure, it made every effort to provide

comprehensive information on the version of CORDIS in use. It points out that tasks were set in Volumes A and B of the tendering specifications. Additional information was provided at the Information Day held on 7 January 2003 and on the website specifically dedicated to the call for tenders in question.

110 With regard to the content of CD 1 and CD 2, the defendant states that CD 1 contained the specifications for the CORDIS architecture, in the version in use up to the end of the tendering procedure, as well as a special navigation tool designed to facilitate use of CD 1 by the tenderers. CD 2 contained the technical design specifications for CORDIS, test reports, conceptual diagrams of the CORDIS architecture, details of the applications, test plans and a user's guide, including a document for each data base. With regard to the two missing conceptual diagrams of the CORDIS architecture, that is, 'Three-tier Architecture' and 'Internet Application Server Architecture' (see paragraph 103 above), the defendant explains that these were not in fact visible. However, those architectures were described in the text and are standard information technology concepts which are not particular to the CORDIS system. The defendant also points out that it was informed of the fact that the two diagrams were not visible only on 14 March 2003, that is, on the Friday afternoon before the deadline for submitting tenders (19 March 2003). It made the missing diagrams available to the tenderers at midday on Tuesday 18 March 2003.

111 As regards the source code, the defendant expressly acknowledges that it was not made available to the tenderers. It states that the source code was neither necessary nor pertinent for the purposes of bidding and evaluation, nor, in particular, for cost calculations. The source code became relevant only at the point at which the services were to be handed over. That is why point 6.8 of Volume B of the tendering specifications provides that the existing contractor is to hand over to the new contractor all relevant objects, including, inter alia, the source code.

112 At the hearing, in response to questions from the Court, the defendant stated that, in its view, there was no particular reason, such as the protection of intellectual property rights, which could have prevented it from making the source code available to the prospective tenderers.

113 As regards the asset list, the defendant states that tenderers for the contested contract were not supposed to receive the bulk of the hardware and software available for the CORDIS project, since the bulk of such equipment was intended for Lot 3. It explains that, for the purpose of preparing tenders for future support services for CORDIS, taking account of the existing equipment was not necessarily the best solution, since some of the hardware is out of date. It was therefore provided in the tendering specifications that it was at the discretion of the tenderers to make alternative proposals.

114 In response to a question put by the Court at the hearing as to the reason for which the Commission had not made available all the technical information at the beginning of the tendering procedure, the Commission explained that, when the call for tenders was launched, the explanatory documents, in particular the asset list, were not yet ready. It therefore made those technical documents available to prospective tenderers only gradually as the preparatory work progressed. The defendant points out that the tendering procedure lasted four months, instead of the usual 36 days, and the prospective tenderers thus had sufficient time to adapt their bids in accordance with the new information. The defendant adds that the tendering specifications clearly state that provision would be made for missing information to be made available on the website specifically dedicated to the call for tenders in question at a later stage.

(iii) The impact on the applicant's bid of the fact that the applicant was not aware, or was aware only belatedly, of the acquisition of the Autonomy software, as well as the CORDIS technical architecture and source code

(1) The impact of the contested conduct of the Commission on the quality of the applicant's bid

115 In its argument concerning the alleged manifest errors of the Commission in its assessment of its bid and that of the successful tenderer (the third plea), the applicant disputes a number of allegedly negative comments in the Evaluation Committee's report on its bid.

116 The applicant submits that it is apparent from a number of negative comments made in the Evaluation Committee's report (see paragraph 24 above) that the missing technical information to which it was granted belated access had a negative impact on the assessment of the quality of its bid. With regard to the first award criterion, it refers to the first, second, third and sixth comments and, with regard to the second award criterion, to the fourth comment.

117 As regards the first award criterion and the first comment, the applicant considers essentially that, while some technical elements were succinctly described, that is simply because the accessible technical information was insufficiently detailed in that area. As regards the second comment, the applicant states that, since it did not have access to the information which was available to the existing contractor, it was obliged to 'develop lengthy scenarios' to cover all theoretically possible structures and practices. With regard to the third comment, it maintains that, while its bid was considered to be too descriptive as regards search and functionality assumptions, that is because the prospective tenderers had been made aware of the fundamental role of the Autonomy software in the CORDIS technical platform only at a very late stage. As regards the sixth comment, the applicant considers that, while its bid was considered to contain too much unnecessary detail and redundant material and to be lacking in concrete proposals, that is because its bid was based on the need to maintain in operation an existing information system, for which all the tenderers, with the exception of the existing contractor, did not have the full picture.

118 As regards the second award criterion and the fourth comment, the applicant submits that more CORDIS-specific discussion was not possible as that would have required more information on how CORDIS operated at that time. Only a tenderer with access to recent internal information could therefore have taken the risk of making firm statements in that regard.

119 The defendant disputes the assertion that the successful tenderer obtained higher marks as a result of its privileged access to information and material. In that regard, the defendant puts forward a number of examples to illustrate the weakness of the applicant's arguments.

120 With regard to the first award criterion, the Commission explains, in particular, that when the successful tenderer's bid was evaluated, it was criticised as being a technical proposal based on the existing system and lacking a fresh approach.

121 With regard to the second award criterion (fourth comment), the defendant refers, in particular, to point 6.2.1 of Volume B of the tendering specifications for the contested contract, according to which the tenderers were required only to describe the basic requirements of what is needed for the continuation and evolution of CORDIS and which stated that, as far as 'how' was concerned, the minimal requirements were set out in the tendering specifications.

(2) The impact of the contested conduct of the Commission on the price of the applicant's bid

122 In response to a written question by the Court, the applicant stated that, as information was missing or sent belatedly by the Commission during the tendering procedure, its bid was subject to a risk factor in the range of 25 to 30%. The risk factor as regards that information was broken down as follows:

– data base: 7%

– Autonomy software: 7%

– source code: 5%

– technical design specifications (logical design of the software) and documentation: 11%.

123 At the hearing, the applicant explained that it did those calculations using Cocomo2 software. In response to a question put by the Court, it clarified the purpose of the Cocomo2 software and how it functions.

124 Thus, Cocomo2 is based on a mathematical formula which takes as input the lines of source code and makes it possible to calculate the effort required to do any work based on them. The corresponding equation contains 22 parameters that represent equivalent real-life factors which influence the effort required to write a programme or implement any task related to a software application. The 5 parameters representing multiple-cost drivers are called 'Effort Multipliers' (EM) and the 17 parameters of additional costs are called 'Scale Factors' (SF).

125 Moreover, for each parameter, that model provides six possible ratings as well as detailed instructions for choosing the appropriate rating. The following ratings can thus be attributed to each parameter, depending on the case: 'Very Low', 'Low', 'Nominal', 'High', 'Very High' and 'Extra High'.

For each of those ratings, there is a corresponding value expressed in points. The number of points decreases in proportion to the rating given – i.e. the higher the rating attributed to the parameter, the lower the number of points will be.

126 The estimated effort for a project with a source code of a given size is expressed in person/months (PM) and is evaluated according to the following formula (A and B being constants):

$$PM = A \times size\ \ of\ \ code\ source^{E} \times \prod_{i=1}^{n} ME$$

where

$$E = B + 0{,}01 \times \sum_{j=1}^{5} FE$$

127 According to the applicant, in the case of the call for tenders at issue, it can be assumed that the 22 parameters will be evaluated in the same manner for each of the tenderers, regardless of their prior knowledge of CORDIS and the material available in the call for tenders at issue, with the exception of the two parameters representing, first, knowledge of the design of the application that is to be developed and, second, the environment used by the application, namely the 'PREC parameter', relating to the degree of familiarity, and the 'AEXP parameter', relating to experience of the application. The 'PREC parameter' is one of the 17 SF. The 'AEXP parameter' is one of the 5 EM.

128 According to the applicant, the formula set out at paragraph 126 above can be applied twice in order to calculate the impact in the two following cases:

– in the case of a tenderer who is very familiar with the earlier version of CORDIS, assuming that the rating 'Very High' will therefore be attributed for both the PREC and the AEXP parameters;

– in the case of a tenderer who has a very limited knowledge of the earlier version of CORDIS, assuming that the rating 'Very Low' will therefore be attributed for both the PREC and the AEXP parameters.

129 According to the applicant, by taking, for the purpose of that calculation, a source code estimated at 5 000 lines, the result will be an estimated effort of 15.4 PM for the bid of the tenderer in the first situation and an estimated effort of 25.9 PM for the bid of the tenderer in the second situation. That means that the estimated effort for the applicant would be approximately 40% higher than that in the case of a tenderer who is very familiar with all the technical information and the source code for the earlier version of CORDIS. The applicant also submits that, even if, for the purpose of the comparison, parameters corresponding to the ratings 'High' and 'Low', or indeed 'High' and 'Very Low', were to be substituted, there would still be a difference of 30%.

130 The defendant considers, first, that the calculations made using Cocomo2 software should be undertaken by an independent expert appointed for that purpose.

131 The defendant states that the applicant's decision as to the ratings to be attributed to the PREC and AEPX parameters was subjective. The defendant points out that, in the tender documentation, the applicant presented itself as an organisation with great experience in the field of information technology and communication, whereas now, in putting forward the risk factor created by the alleged lack of technical information, it presents itself as a tenderer with below average knowledge in that field.

132 The defendant doubts whether the basis on which the applicant gives itself a 'Very Low' rating score for the PREC and AEXP parameters is justified. It states that, for the purpose of the calculation using the Cocomo2 software, the applicant should have used the 'Nominal' rating for those parameters.

133 The defendant also disputes the 'Very High' rating score given by the applicant to the successful tenderer. In so doing, the applicant disregards the fact that the successful tenderer is not totally familiar with the CORDIS system either, even allowing for the fact that part of the contested contract was to be subcontracted to the existing contractor.

134 With regard, first, to the PREC parameter, the defendant explains that it deals with the following matters: the understanding of the undertaking in question of product objectives, experience of working with related software systems, the concurrent development of associated new hardware and operational procedures and the need for innovative data processing architecture (algorithms). The defendant doubts whether the applicant can properly categorise itself as 'Very Low' in respect of all those matters. That would mean that it has a 'general' understanding of the product objectives, 'moderate experience' and 'extensive need' for concurrent development and 'considerable need' for innovative data processing algorithms.

135 With regard, secondly, to the AEXP parameter, the defendant explains that the applicant once again gives itself a 'Very Low' score rating, which indicates less than two months' experience of the application concerned. The applicant thus claims that it is not at all familiar with the kind of project with which the call for tenders at issue is concerned and that its team has very limited experience of that kind of application.

136 The defendant is of the view, secondly, that the applicant has failed to explain the breakdown of the 30% risk factor into a number of elements relating, respectively, to the data bases (7%), the Autonomy software (7%), the source code (5%) and the technical design specifications (11%).

137 The Commission considers that the 11% increase in respect of person/day costs attributed to the alleged failure to communicate the technical specifications must be discounted, since those technical specifications were indeed made available to the applicant. Moreover, the fact that the two diagrams of the CORDIS architecture were not visible on CD 2 does not amount to a risk factor of 11%.

138 The defendant also disputes the 7% increase in costs attributed to the fact, as alleged, that it became aware only belatedly of the acquisition of the Autonomy software, given that that software is well known on the market.

139 Finally, the defendant questions whether the source code warrants only a 5% risk factor, when, in its view, the applicant's whole contention was that the failure to provide the technical design specifications (to which it gives an 11% rating) and the source code was a very serious matter.

b) Findings of the Court

(i) Preliminary remarks

140 By maintaining that the Commission granted access to certain essential information only to the successful tenderer, the applicant claims that the Commission failed to adhere to the principle that there should be no discrimination as between tenderers.

141 First of all, it is to be borne in mind that the principle of equal treatment is of particular importance in the field of public procurement (see paragraphs 60 to 61 above). In the context of such a procedure, the Commission is required to ensure, at each stage of the procedure, equal treatment and, thereby, equality of opportunity for all the tenderers (see *AFCon Management Consultants and Others* v *Commission*, paragraph 75 and the case-law cited).

142 The case-law demonstrates that the principle of equal treatment implies in particular an obligation of transparency so that it is possible to verify that that principle has been complied with (Case C-92/00 *HI* [2002] ECR I–5553, paragraph 45, and Case C–470/99 *Universale-Bau and Others* [2002] ECR I–11617, paragraph 91).

143 Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions (see, to that effect, Case C–19/00 *SIAC Construction* [2001] ECR I–7725, paragraph 34, and *Universale-Bau and Others*, paragraph 93).

144 The principle of transparency, which is its corollary, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or tendering specifications (Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraphs 109 to 111).

145 The principle of transparency therefore also implies that all technical information relevant for the purpose of a sound understanding of the contract notice or the tendering specifications must be made available as soon as possible to all the undertakings taking part in a public procurement procedure in order, first, to enable all reasonably well-informed and normally diligent tenderers to understand their precise scope and to interpret them in the same manner and, secondly, to enable the contracting authority actually to verify whether the tenderers' bids meet the criteria of the contract in question.

(ii) The alleged unequal treatment by comparison with the successful tenderer as regards access to certain technical information

(1) General observations

146 First of all, the applicant complains that the Commission failed to adhere to the principle of equal treatment because of an alleged delay in making certain technical information available to the tenderers, with the exception of the successful tenderer. In the light of the case-law cited at paragraphs 60 and 61 and at paragraphs 141 to 144 above, the Commission undermined the equality of opportunity of all the tenderers as well as the principle of transparency, which is the corollary of the principle of equal treatment.

147 Next, even on the assumption that it were correct, such an undermining of equality of opportunity and the principle of transparency would constitute a defect in the pre-litigation procedure adversely affecting the right of the parties concerned to information. According to settled case-law, a procedural defect can lead to the annulment of the decision in question only if it is shown that, but for that defect, the administrative procedure could have had a different outcome if the applicant had had access to the information in question from the beginning of that procedure and if there was even a small chance that the applicant could have brought about a different outcome to the administrative procedure (see Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 31 and the case-law cited, and Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraphs 340 and 430).

148 In that connection, the Court will examine, first of all, whether the unequal treatment alleged, consisting in a delay in providing the tenderers other than the successful tenderer with certain technical information, constitutes, as such, a procedural defect in that information that was in fact necessary for the preparation of the tenders was not made available to all the tenderers as soon as possible.

149 If such a defect is established, the Court will then examine whether, but for that defect, the procedure could have had a different outcome. From that point of view, such a defect can constitute an infringement of the equality of opportunity of tenderers only in so far as the explanations provided by the applicant demonstrate, in a plausible and sufficiently detailed manner, that the procedure could have had a different outcome as far as it was concerned.

(2) The late provision by the Commission of certain technical information

150 The Court notes, first of all, that the successful tenderer was fully aware of all the technical specifications for the CORDIS data bases as well as for the Autonomy software before the opening of the tendering procedure, given that its subcontractor, which, according to the tender submitted, was to carry out at least 35% of the proposed tasks, was the existing contractor at the time when the tendering procedure was opened.

151 Moreover, it is not disputed that the Commission had at its disposal technical specifications for the CORDIS data bases before the opening of the tendering procedure, namely at the end of November 2002.

152 Nor does the defendant dispute the fact that it made the technical specifications for the CORDIS data bases available to all the prospective tenderers only gradually during the tendering procedure.

153 In fact, the Commission only made available part of the technical specifications for the CORIDS data bases one month after the tendering procedure had opened, on 20 December 2002, on CD 2, and only published further technical information, in the asset list, on 5 February 2003, that is, only six weeks before the deadline for submitting tenders expired.

154 The justification put forward by the defendant, namely that it had not yet prepared all the information at the beginning of the tendering procedure, must be rejected since, in order to ensure that all prospective tenderers enjoyed equality of opportunity, it could have waited until it was in a position to make all the information in question available to all prospective tenderers in order to launch that tendering procedure.

155 The Court finds, next, that, given that its intended subcontractor for the performance of part of the contested contract was the incumbent contractor at the time of the opening of the tendering procedure, the successful tenderer was in a position, from the beginning of the tendering procedure, to have full knowledge of how the Autonomy software operated, since a trial version had been installed in the version of CORDIS in operation at that time. Moreover, the intended subcontractor of the successful tenderer was also involved in the preparation for the acquisition of the Autonomy software by the Commission, which took place during the tendering procedure. It is thus highly likely that the successful tenderer was fully aware of that acquisition from the outset.

156 The defendant does not dispute that the other tenderers were informed of that acquisition only via the publication of the document entitled ‘Superquest – Implementation of Release 6 and beyond’ on 18 February 2002, that is, only a month before the deadline for submitting tenders expired.

157 Therefore, the Court finds that the Commission made available to all the prospective tenderers information on the technical specifications for the CORDIS data bases and information on the acquisition of the Autonomy software only gradually during the tendering procedure, whereas the successful tenderer had that information from the beginning of that procedure, since it was provided that it would subcontract part of the contested contract to the existing contractor.

(3) Whether it is necessary to neutralise the advantages enjoyed by the successful tenderer

158 What is to be borne in mind in this regard are the considerations relating to the examination as to whether it is discriminatory to lay down a requirement for an unpaid running-in phase in the tendering specifications (see paragraphs 68 to 80 above), in which it was stated that the principle of equal treatment as between tenderers requires that the potential advantages that may be enjoyed by the existing contractor or the tenderer connected to that party by virtue of a subcontract must be neutralised only to the extent that it is not necessary for such advantages to be maintained, that is to say, where it is easy to effect such neutralisation, where it is economically acceptable and where it does not infringe the rights of the existing contractor or the said tenderer.

159 In the present case, the Commission had full information on the technical specifications for the CORDIS data bases at its disposal from the beginning of the tendering procedure in question. It could therefore easily have made it available to all the tenderers in the form of an annex to the tendering specifications. Moreover, it is clear that it could also have easily informed all the prospective tenderers, without incurring additional costs, of the acquisition of the Autonomy software immediately after it had taken place, namely at the end of December 2002. Lastly, it must be noted that the defendant expressly acknowledges that there was no particular reason, such as the protection of intellectual property rights, which could have prevented it from making the source code available to third parties.

160 It follows from the foregoing that, in the present case, in accordance with the principle of equal treatment as between tenderers, the advantages enjoyed by the existing contractor or by the successful tenderer must be neutralised. Consequently, it is apparent that the unequal treatment consisting in a delay in making certain technical information available to the tenderers, with the exception of the successful tenderer, constitutes a procedural defect.

161 It is therefore necessary to examine whether, but for that defect, the tendering procedure in question could have had a different outcome.

(iii) The relevance to the bids for the contested contract of the information belatedly made available by the Commission

162 If it were established that the information belatedly provided to the tenderers other than the successful tenderer was irrelevant for the purpose of preparing bids for the contested contract, a delay in communicating that information would not, in any event, represent an advantage for the successful tenderer and would not therefore constitute a procedural defect amounting to an infringement of the principle of equal treatment as between tenderers, as the applicant claims.

(1) The relevance of the information on the acquisition of the Autonomy software

163 With regard to the relevance of the information on the acquisition of the Autonomy software, the Court notes, first of all, that it is apparent from the parties' common descriptions that that software is a complex classification tool enabling final users to carry out searches in a number of contexts and, in particular, in a number of languages.

164 Secondly, it is clear from the description of the contested contract at point 4 of Volume A of the tendering specifications that tenderers for that contract were required in their bids to submit proposals which could ensure the development of the technical infrastructure used by the contractors for the other lots and the Commission, such as, for example, 'the Web Content Management System', and that the successful tenderer for the contested contract was also required to 'develop new tools and features, some of which [are] for experimental purposes'.

165 Thirdly, account must be taken of the fact that, according to point 6.2.3.3 of Volume B of the tendering specifications, headed 'Indexing, Specific Views and Taxonomies', there exists for the tenderers for the contested contract 'the possibility to make use of available products to implement, for example, "taxonomy building", but these should have long-term application and be consistent with the CORDIS architecture'.

166 It is apparent from the description of the tasks to be carried out by a tenderer for the contested contract and from point 6.2.3.3 of Volume B of the tendering specifications that the tenderers for the contested contract were free to propose any complex taxonomy software available on the market, including the Autonomy software.

167 It follows that the simple fact that the Commission purchased the Autonomy software during the tendering procedure did not lead it to evaluate a bid proposing a different complex research tool less favourably.

168 For the sake of completeness, that finding is also supported by the fact that the evaluation report states, with regard to the first award criterion, that the bid submitted by the second-placed tenderer for the contested contract was considered by the Evaluation Committee to be of very high quality, that tenderer having proposed another system, which was 'innovative' as regards indexing and taxonomy, which demonstrates that, in that regard, the Commission adhered to the relevant conditions laid down in the tendering specifications.

169 It follows that, throughout the tendering procedure, the knowledge that the Commission had acquired the Autonomy software could not have had any significance for the purpose of evaluating the bids.

170 In the light of the foregoing, the Court considers, with regard to the information on the acquisition of the Autonomy software, that the applicant has failed to demonstrate sufficiently how knowledge of the acquisition of the Autonomy software by the Commission could have constituted an advantage of any kind for the successful tenderer in bidding for the contested contract.

(2) The relevance of the information contained in the documentation on the CORDIS technical architecture and source code

171 First, as regards the allegedly incomplete documentation on the CORDIS technical architecture, the Court notes that the defendant does not dispute that the general purpose of the technical information on CD 1 and CD 2 was to supplement that already included in the tendering specifications.

172 Secondly, with regard to the asset list, the Court considers that the applicant explained

convincingly, and in such a manner that the Commission has not been able to counter its assertions, that knowledge of the materials and software used at that time could have assisted in the preparation of the applications to be provided by a tenderer for the contested contract, since such a tenderer had to ensure, first, the interoperability of the new hardware and existing hardware and, second, that the new applications functioned with the existing hardware.

173 It follows that knowledge of the technical information made available belatedly by the Commission and contained on CD 1 and CD 2 as well as in the asset list could have constituted added value for tenders for the contested contract.

174 As regards the source code, point 4 of Volume A of the tendering specifications requires tenderers for the contested contract to put forward in their bids proposals which could ensure the development of the technical infrastructure used by the contractors for the other lots and the Commission, 'such as … the Web Content Management System' and 'the Information Dissemination System', and requires the successful tenderer for the contested contract to 'also develop new tools and features'. It is therefore apparent that prior knowledge of the basic technical information referred to in the above paragraphs represented an advantage for the purpose of drafting a tender. In fact, the management and dissemination of complex data to be provided by a contractor for Lot 1 of CORDIS are generally carried out by special application software.

175 There is therefore no doubt that full knowledge of the source code for the management and dissemination applications of the earlier version of CORDIS was necessary for the purpose of the development of new tools and features which could be integrated into the new version of CORDIS.

176 Moreover, the applicant has demonstrated convincingly that, in order to use the calculation model on which the Cocomo2 software is based – that software frequently being used to calculate the effort required to carry out a given project in the field of new technology – it is necessary to estimate the number of lines of source code for the project, and the defendant has not put forward any facts capable of countering that assertion.

177 Consequently, knowledge of the source code for the earlier version of CORDIS would clearly have been necessary in order for it to be possible to base the calculations for the source code for the new version on a reasonable estimate.

178 The Court therefore concludes that the fact that the existing contractor and the successful tenderer had exclusive knowledge of the technical architecture of CORDIS, of the hardware and software used at the time and, especially, of the source code was liable to confer upon that tenderer, at least in part, an unjustified advantage at the opening of the tendering procedure.

179 Accordingly, given that the defendant does not dispute that the technical information belatedly made available to the prospective tenderers could have constituted added value for the bids for the contested contract, it cannot be precluded that the contested conduct on the part of the Commission may have given rise to an advantage for the existing contractor and the successful tenderer in tendering for the contested contract.

180 Therefore, by failing to communicate certain technical information as soon as possible to all the tenderers, the Commission committed a breach of procedure by disregarding the applicant's right to be informed.

181 It is therefore necessary to determine whether that breach of procedure undermined the equality of opportunity of the tenderers in that, but for that breach, the tendering procedure at issue might have resulted in the contested contract being awarded to the applicant.

182 However, that would not be the case if, in spite of the fact that the Commission failed to provide all the tenderers from the beginning of the tendering procedure with all the technical information on the earlier version of CORDIS, it were to be established that the information thus withheld was irrelevant for the purpose of the applicant's bid.

(iv) The relevance to the applicant's bid of the information belatedly made available by the Commission for the applicant's bid

(1) The effect of the delay in making certain technical information available on the quality of the

applicant's bid

183 In the light of the foregoing, the Court considers that the delay in communicating the technical information in question could potentially have entailed for all the tenderers, with the exception of the successful tenderer, wasted efforts and a waste of time, which could therefore have had an effect on the quality of the applicant's bid.

184 Notwithstanding that finding in principle, it must be noted that, in the present case, even full knowledge of the information in question could not, in any event, have had a decisive impact on the overall assessment of the applicant's bid.

185 First of all, the applicant submits that knowledge of that information would have improved, in particular, the value of its bid in terms of quality, in the light primarily of the first award criterion (technical merit) (see paragraph 117 above). It must be recalled that point 3.3 of Volume A of the tendering specifications provides that the maximum number of points that could be awarded under that criterion was 35 and that the applicant's bid was awarded 21.6 points.

186 Secondly, the applicant submits that the fourth comment on the second award criterion ('good but generic mention of design patterns and software reuse') is negative and that that is due to the fact that information on how CORDIS operated at that time was lacking. That assertion is too vague, given that it is apparent from point 6.2.1 of Volume B of the tendering specification that, with regard to the contested contract, the tenderers were required only to describe the basic requirements for the technical and functional development of the new version of CORDIS. Moreover, it is clear that that comment is only one of the six comments made in the assessment of the second award criterion, for which a maximum of 25 points can be awarded, 14.8 points being awarded to the applicant's bid.

187 In that regard, it is apparent from the table in the Evaluation Committee's report that the formula used to establish the most cost-effective offer for the purpose of point 3.3 of Volume A of the tendering specifications and to calculate the price-quality ratio of the various bids was as follows:

$$\text{ratio} = \frac{\text{points (quality)}}{\text{price (total)}} \times 1\,000\,000$$

188 By applying that formula to the bid tendered by the applicant, that is, by inserting the total price of the applicant's bid (EUR 6 095 001.16) and, first, the maximum number of points attainable under the first award criterion (35) and, second, the number of points the applicant's bid was actually awarded under criteria Nos 2 to 4, namely 14.8, 12.8 and 12.8 points respectively (see paragraph 24 above), the following ratio is given:

$$\frac{(35+14.8+12.8+12.8) \times 1000000}{6\,09500116} = 12.37$$

189 Given that the successful tenderer obtained a price-quality ratio of 12.56, the calculation demonstrates that, even if the applicant had been able, from the beginning of the tendering procedure, to prepare its bid in full knowledge of the technical information which it was lacking or which was made available to it only belatedly, and even if, as a result of that, it had obtained the maximum number of points under the first qualitative criterion (namely 35 points), the price-quality ratio of its bid would, in any event, have been lower than that of the successful tenderer, as the price of the applicant's bid was relatively high.

190 The Court therefore finds that it is clear that, however much it might be criticised, the Commission's conduct could in any event, in the present case, have had any impact on the award of the contested contract to the successful tenderer only to the extent that the price of the applicant's bid was actually affected by the late provision of the technical information.

(2) The effect of the delay in making certain technical information available on the price of the applicant's bid

191 Having regard to the overall effect of the belated communication of the technical information in question, the Court asked the applicant to demonstrate how, in its view, the contested conduct on the part of the Commission had placed the applicant at a disadvantage in determining the price of its bid.

192 In response to that question, the applicant submitted calculations made using Cocomo2 software. That software enables an estimate to be given of the effort required in developing a computer project, which is expressed in PM.

193 It is clear that the defendant does not dispute that the calculation method thus used is a genuine method which is well established in the market.

194 On the contrary, far from calling into question the genuine nature of the Cocomo2 software, the defendant simply disputes the manner in which the applicant applied that software. Thus, it merely challenges, first, the ratings attributed to the PREC and AEXP parameters on which the applicant bases its calculations to demonstrate that its bid would have been 30% lower if it had had full knowledge, from the beginning of the tendering procedure, of all the technical information that was missing or communicated belatedly and, second, the specific break-down of the risk factor into a number of elements relating, respectively, to the data bases, the Autonomy software, the source code and the technical design specifications and documentation.

195 With regard, first of all, to the ratings attributed to the parameters which the applicant used to make its calculations, it is apparent that, in so far as the defendant's argument seeks to challenge those ratings, the defendant fails to have regard to the reason for which those calculations were undertaken.

196 In fact, the purpose of the calculations made using the Cocomo2 software is not to make a direct comparison between the applicant's bid and that of the successful tenderer. On the contrary, they demonstrate the difference between the price actually submitted by the applicant and the price which the applicant would probably have been able to offer if it had had full knowledge of the technical information that was missing or communicated belatedly.

197 For the purposes of that comparison in the abstract, the applicant correctly attributes the rating 'Very High' to the PREC and AEXP parameters in order to calculate in PM, first of all, the effort required for the hypothetical bid of a tenderer which had all the relevant technical information available to it from the beginning of the tendering procedure.

198 Moreover, with regard to the parameters for calculating the price actually bid by the applicant, it is clear that, even if, as the defendant proposes, the rating 'Nominal' is attributed to the PREC and AEXP parameters, on the basis of a calculation made using the standard Cocomo2 software formula (see paragraph 126 above), the result will be a value of approximately 19.8 PM for the hypothetical bid envisaged by the applicant. Such a result thus shows a difference in estimated effort of at least 22% between a bid submitted by a tenderer with full knowledge of all the necessary information and the bid of a tenderer with only average knowledge.

199 Consequently, the defendant's objections are not capable of affecting the applicant's argument that the lack of certain technical information or the delay in making it available resulted in a considerable increase in the price of its bid.

200 Secondly, with regard to the specific break-down of the risk factor into a number of elements relating, respectively, to the technical architecture, the CORDIS source code and the acquisition of the Autonomy software (see paragraph 122 above), the question to be decided is whether unequal treatment of the tenderers by the Commission could have had a significant effect on the applicant's bid. The break-down of the price increase factor is irrelevant in that context.

201 In fact, the calculations made by the applicant using the Cocomo2 software are essentially based on the general rating (ranging from 'Very Low' to 'Nominal') given to knowledge of the technical data of the earlier version of CORDIS, expressed by the PREC and AEXP parameters, the break-down according to different technical information being totally irrelevant. As a consequence, the defendant's objections in that regard must be rejected.

202 It is also to be recalled that the present examination is concerned with the effects of the procedural defect consisting in the delay in making available certain technical information that was necessary

for the preparation of the tenders. As was held at paragraph 149 above, such a defect constitutes an infringement of the equality of opportunity of tenderers in so far as, but for that defect, the procedure could have had a different outcome for the applicant. Accordingly, there is no need to show that the contested contract would definitely have been awarded to the applicant. It is sufficient for the applicant to demonstrate that, but for that infringement, it would have had the chance of securing the contested contract.

203 In the light of the calculations made using the Cocomo2 software put forward by the applicant, the Court considers that it is credibly established that the lack of information available to the prospective tenderers on the documentation relating to the CORDIS technical architecture and source code could have had a considerable negative impact on the price bid by the applicant by depriving it of the chance of securing the contested contract.

204 In the light of the foregoing, it must be concluded that the Commission infringed the principle of equal treatment as between tenderers by failing to make available to all the prospective tenderers from the beginning of the tendering procedure the documentation relating to the CORDIS technical architecture and source code and that that infringement could thus have affected the award of the contested contract.

205 The second part of the second plea must therefore be upheld.

206 Consequently, without there being any need to examine the other pleas put forward by the applicant, the contested decision must be annulled, pursuant to Article 3(2) of Directive 92/50 and Article 126 of the Implementing Rules, on the ground that it infringed the principle of equal treatment as between tenderers.

Costs

207 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Annuls the decision of the Commission of 16 July 2003 to award the contract which is the subject of the call for tenders ENTR/02/55 – CORDIS Lot 2;

2. Orders the Commission to pay the costs.

Jaeger Azizi Cremona

Delivered in open court in Luxembourg on 12 March 2008.

E. Coulon M. Jaeger

Registrar President

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Costs

* Language of the case: English.

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Notice for the OJ

Action brought on 30 September 2003 by European Dynamics S.A. against the Commission of the European Communities

(Case T-345/03)

Language of the case: English

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 30 September 2003 by European Dynamics S.A., Athens, (Greece), represented by S. Pappas, lawyer.

The applicant claims that the Court should:

listnum "WP List 1" \l 1annul the Commission's (ENTERPRISE DIRECTORATE GENERAL) decision to evaluate European Dynamics' tender as not successful;

listnum "WP List 1" \l 1order the Commission (ENTERPRISE DIRECTORATE GENERAL) to re-evaluate the tender submitted by European Dynamics;

listnum "WP List 1" \l 1order the Commission to pay European Dynamics' legal and other fees and expenses incurred in connection with this Application.

Pleas in law and main arguments:

The object of the present case is the annulment of the Decision of the European Commission to reject the applicants bid, filed in response to the Call of Tender ENTR/02/055 - CORDIS for the "Development and Provision of Services in support of the Community R&D Information Service (CORDIS)" Lot 2 "Development" (OJ 2002/S 225-178776). This Decision concluded that the TRASYS/Intrasoft International Consortium bid was superior to that of the applicant.

CORDIS, the European Commission's research and development information service, is an informatics tool offering practical information on the European research programs and funding opportunities, facilitating research results take up and and technology transfers, hosting services on European innovation, covering all research and innovation related news developments and providing a central access to European and National contact points

In support of its conclusions, the applicant submits that:

- The violation of the principles of transparency and non-discrimination, in as much as the provisions on non-paid running-in periods seriously restrict competition by favouring the incumbent contractor since it has been given major financial advantages by the contracting authority unilateral, which allowed it to submit an offer significantly cheaper that any other competitor. Besides, the time-limit for providing information about the role of Autonomy in CORDIS (Enterprise Directorate General addresses such information just four weeks before the tender submission deadline) has given a big advantage to the TRASYS/Intrasoft consortium in relation to other Lot 2 tenderers. Additionally, ensuring the call for tender procedure, all bidders -except the incumbent contractor - were prevented from having access to a number of highly critical technical information on the actual status of the CORDIS projects and particularly on the CORDIS DATABASE SERVICE. Moreover, the Commission declined to communicate to all tenderers significant and useful details on the HW/SW, scripts, technology and processes currently in use for operating the CORDIS database services, while, at the same time, it asked the tenderers to specify what part of that "unknown" equipment is to be taken over, whilst all this information was fully available to TRASYS/Intrasoft right from the beginning.

- The Commission's assessments are based on wrong or unfounded assumptions. Contrary to what has been stated by the Commission, the proposed platform by the applicant was explained in great detail. Concretely, the Commission wrongly assumed that the Service Delivery Framework was not ITIL and that there was no mention of Prince2. All other assessments are not supported by the data of the file.

The applicant also invokes a violation of the duty of motivation of the legal acts.

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ARRÊT DU TRIBUNAL (troisième chambre)

12 mars 2008 (*)

« Marchés publics de services – Procédure d'appel d'offres communautaire – Prestation de services relatifs au développement et à la mise à disposition de services d'appui pour le service d'information sur la recherche et le développement communautaires (CORDIS) – Rejet de l'offre d'un soumissionnaire – Principes d'égalité de traitement des soumissionnaires et de transparence – Respect des critères d'attribution établis dans le cahier des charges »

Dans l'affaire T–332/03,

European Service Network (ESN) SA, établie à Bruxelles (Belgique), représentée par M^es^ R. Steichen et P.-E. Partsch, avocats,

partie requérante,

contre

Commission des Communautés européennes, représentée par MM. L. Parpala et E. Manhaeve, en qualité d'agents,

partie défenderesse,

ayant pour objet une demande de la requérante d'annuler la décision d'attribuer le marché faisant l'objet de l'appel d'offres ENTR/02/55 – CORDIS lot n° 1 de la Commission, concernant le développement et la mise à disposition de services d'appui pour le service d'information sur la recherche et le développement communautaires (CORDIS),

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (troisième chambre),

composé de MM. M. Jaeger, président, J. Azizi et M^me^ E. Cremona, juges,

greffier : M. J. Plingers, administrateur,

vu la procédure écrite et à la suite de l'audience du 13 juillet 2006,

rend le présent

Arrêt

Cadre juridique

I – Réglementation en vigueur jusqu'au 31 décembre 2002

1 Au cours de la période antérieure au 31 décembre 2002, la passation des marchés publics de services de la Commission était régie par les dispositions de la section 1 (articles 56 à 64 bis) du titre IV du règlement financier, du 21 décembre 1977, applicable au budget général des Communautés européennes (JO L 356, p. 1), tel qu'il a été modifié par le règlement (CE, CECA, Euratom) n° 2673/99 du Conseil, du 13 décembre 1999 (JO L 326, p. 1), lequel est entré en vigueur le 1^er^ janvier 2000 (ci-après le « règlement financier I »).

2 Selon l'article 56 du règlement financier I :

« Lors de la passation des marchés dont le montant atteint ou dépasse les seuils prévus par les directives du Conseil portant coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, chaque institution doit se conformer aux mêmes obligations que celles qui incombent aux entités des États membres en vertu de ces directives.

À cette fin, les modalités d'exécution prévues à l'article 139 comportent les dispositions appropriées. »

3 L'article 139 du règlement financier I prévoit :

« La Commission établit, en consultation avec l'Assemblée et le Conseil et après avis des autres institutions, les modalités d'exécution du [...] règlement financier. »

4 En vertu de l'article 139 du règlement financier I, la Commission a adopté le règlement (Euratom, CECA, CE) n° 3418/93, du 9 décembre 1993, portant modalités d'exécution de certaines dispositions du règlement financier (JO L 315, p. 1, ci-après les « modalités d'exécution I »). Les articles 97 à 105 et 126 à 129 des modalités d'exécution I s'appliquent à la passation de marchés publics de services.

5 En particulier, l'article 126 des modalités d'exécution I dispose :

« Les directives du Conseil en matière de marchés publics de travaux, de fournitures et de services sont applicables lors de la passation des marchés par les institutions, dès que le montant des marchés en question égale ou dépasse les seuils fixés par ces directives. »

6 L'article 3, paragraphe 2, de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), telle que modifiée par la directive 97/52/CE du Parlement européen et du Conseil, du 13 octobre 1997, modifiant également les directives , 93/36/CEE et 93/37/CEE portant coordination des procédures de passation des marchés publics de fournitures et des marchés publics de travaux respectivement (JO L 328, p. 1), dispose :

« Les pouvoirs adjudicateurs veillent à ce qu'il n'y ait pas de discrimination entre les différents prestataires de services. »

II – Réglementation en vigueur à partir du 1er janvier 2003

7 Depuis le 1er janvier 2003, la passation des marchés publics de services de la Commission est régie par les dispositions du titre V (articles 88 à 107) du règlement (CE, Euratom) n° 1605/2002 du Conseil, du 25 juin 2002, portant règlement financier applicable au budget général des Communautés européennes (JO L 248, p. 1, ci-après le « règlement financier II »).

8 Selon l'article 89, paragraphe 1, du règlement financier II :

« Tous les marchés publics financés totalement ou partiellement par le budget respectent les principes de transparence, de proportionnalité, d'égalité de traitement et de non-discrimination. »

9 Selon l'article 99 du règlement financier II :

« Pendant le déroulement d'une procédure de passation de marchés, les contacts entre le pouvoir adjudicateur et les candidats ou les soumissionnaires ne peuvent avoir lieu que dans des conditions qui garantissent la transparence et l'égalité de traitement. Ils ne peuvent conduire ni à la modification des conditions du marché, ni à celle des termes de l'offre initiale. »

10 Par la suite, la Commission a adopté le règlement (CE, Euratom) n° 2342/2002 de la Commission, du 23 décembre 2002, établissant les modalités d'exécution du règlement financier applicable au budget général des Communautés européennes (JO L 357, p. 1, ci-après les « modalités d'exécution II »). Son titre V (articles 116 à 159) s'applique à la passation des marchés publics.

11 L'article 148, paragraphe 3, des modalités d'exécution II dispose :

« Après l'ouverture des offres, dans le cas où une offre donnerait lieu à des demandes

d'éclaircissement ou s'il s'agit de corriger des erreurs matérielles manifestes dans la rédaction de l'offre, le pouvoir adjudicateur peut prendre l'initiative d'un contact avec le soumissionnaire, ce contact ne pouvant conduire à une modification des termes de l'offre. »

Antécédents du litige

I – CORDIS

12 La présente affaire concerne l'appel d'offres général ENTR/02/55, relatif au développement et à la mise à disposition de la nouvelle version des services d'appui pour le service d'information sur la recherche et le développement communautaires (CORDIS) (ci-après l'« appel d'offres en cause »). CORDIS est un outil informatique permettant d'assurer l'exécution des programmes-cadres de recherche européens. Il constitue le principal service de publication et de communication pour des participants potentiels et actuels ainsi que pour d'autres groupes ayant un intérêt dans un programme-cadre de recherche européen. Il se compose d'une plate-forme à buts multiples s'adaptant aux besoins des utilisateurs, d'un portail offert aux acteurs de la recherche et de l'innovation européennes ainsi que d'un outil de diffusion d'informations au public.

13 Depuis l'année 1998, la fourniture de l'ensemble des services d'appui pour CORDIS était assurée par un seul contractant, à savoir Intrasoft International SA.

14 L'adoption du sixième programme-cadre de la Communauté européenne pour des actions de recherche, de développement technologique et de démonstration contribuant à la réalisation de l'espace européen de la recherche et à l'innovation (2002-2006), par la décision n° 1513/2002/CE du Parlement européen et du Conseil, du 27 juin 2002 (JO L 232, p. 1), est à l'origine d'une nouvelle phase dans la mise en oeuvre de CORDIS. Pour cette nouvelle phase, la Commission a décidé de lancer un appel d'offres et de diviser le projet en cause dans la présente affaire en cinq lots.

II – Appel d'offres en cause, soumissionnaire retenu et passation du marché litigieux

15 Pour la passation du marché relatif à la nouvelle version des services d'appui pour CORDIS, une procédure d'appel d'offres ouverte a été choisie.

16 Le 13 février 2002, l'avis de préinformation concernant la procédure d'appel d'offres en cause a été publié au Supplément au *Journal officiel des Communautés européennes* (JO S 31). Un avis de préinformation rectificatif a été publié au Supplément au *Journal officiel des Communautés européennes* du 7 août 2002 (JO S 152).

17 Le 20 novembre 2002, l'avis de marché a été publié pour les lots n^{os} 1 à 3 au Supplément au *Journal officiel des Communautés européennes* (JO S 225).

18 Le volume A du cahier des charges de l'appel d'offres en cause, intitulé « Généralités » (ci-après le « volume A du cahier des charges ») prévoit, notamment :

« Préambule

Il s'agit du [v]olume A, contenant les généralités du cahier des charges, applicable aux [cinq] lots.

Pour les parties spécifiques, veuillez vous référer au :

Volume B – Lot 1 – Contenu

(développement, production et gestion du contenu ; traductions ; capacité web ; marketing ; relations clients)

Volume B – Lot 2 – Développement

(développement et maintenance de l'infrastructure technique de l'ensemble des services)

Volume B – Lot 3 – Diffusion

(mise à disposition, maintenance et exploitation de toutes les plates-formes matérielles et logicielles

pour la diffusion de l'information et l'interaction avec les utilisateurs)

Volume B – Lot 4 – Assurance qualité, contrôle des processus et bureau d'assistance

Volume B – Lot 5 – Surveillance externe et réaction des utilisateurs

[…]

1.3. Date de lancement et durée du contrat

Les contrats devraient être signés en juin 2003 et démarrer le 1er juillet 2003.

Les trois premiers mois des contrats constituent la 'phase de rodage'.

Le rodage permet aux nouveaux contractants de se familiariser avec le service CORDIS. Le contrat précédent prévoit un 'passage de relais'. Les nouveaux contractants pourront ainsi accéder aux opérations du service afin de se préparer à la reprise du service, au plus tard à la fin de la période de rodage.

Le rodage n'est pas rémunéré.

Il n'est pas exclu, sous réserve d'approbation par le responsable de projet de la Commission et d'accord du contractant en place, de reprendre déjà des parties ou l'ensemble du service au cours de la phase de rodage (pour la rémunération des services repris pendant la phase de rodage : voir point 1.7).

La Commission se réserve le droit de ne pas renouveler le(s) contrat(s).

Par la présente clause, le contractant offre à la Commission la possibilité de prolonger ce contrat dans les mêmes conditions pour une période supplémentaire d'un maximum de 24 mois. Une telle extension se fera, sur demande de la Commission, par un amendement au contrat.

[…]

1.6. Informations administratives complémentaires

[…]

De plus, des informations techniques de référence sont publiées à l'adresse [Internet] suivante :

http://www.cordis.lu/temp/CFT2002/

Une journée d'information est prévue le [7 janvier] 2003 à Luxembourg pour proposer un aperçu du présent appel d'offres et permettre aux intervenants de poser des questions.

[…]

1.7. Modalités de paiement

Le paiement pour chaque lot sera effectué dans le délai fixé par les règles internes de la Commission en matière de paiement, de la manière suivante :

[…]

– au cas où le nouveau contractant reprend des parties ou l'ensemble du service pendant la phase de rodage (voir 1.3), ce prestataire sera rémunéré à partir de la date de reprise effective des parties du service ; […]

[…]

2.3. Structure de l'offre

[…]

2.3.1. Section 1 : Informations administratives

[…]

Les offres émanant de *consortiums* d'entreprises ou de groupes des prestataires des services, de contractants ou de fournisseurs doivent fournir ces documents pour chacun des membres et préciser les principales conditions de leur regroupement. Elles doivent spécifier le rôle, les qualifications et l'expérience de chaque membre. Elles mentionneront les moyens de contrôle prévus par les dispositions régissant la constitution du groupement concerné.

Si une *offre conjointe* est envisagée, l'un des partenaires sera proposé comme partenaire principal en vue d'assumer par la suite la fonction de contractant si l'offre est retenue. Tous les autres partenaires seront alors considérés comme sous-traitants de ce partenaire principal.

[…]

2.3.2. Section 2 : Proposition technique

La proposition technique doit répondre aux spécifications techniques détaillées ci-dessous et comprendre au minimum :

[…]

f) pour tous les membres du personnel spécialisé proposé, des *CV* – présentés de préférence selon le modèle européen de curriculum vitae (voir à l'annexe 6) – indiquant notamment la formation reçue, l'expérience de fonctions similaires auprès d'autres employeurs ; les connaissances linguistiques de l'ensemble du personnel (spécialisé et de secrétariat) ; précisant le degré d'implication (temps complet/temps partiel) ; décrivant les procédures de formation et de rotation dans l'emploi/de recrutement accompagnés d'un organigramme général du personnel présentant le personnel de l'entreprise par profil (voir également 'Section 4 : Scénario d'activité spécifique (à chaque lot)', c'est-à-dire le nombre a) de salariés permanents (ayant un contrat à durée indéterminée dans l'entreprise à la date de l'offre) et b) de salariés temporaires qui correspondent aux profils proposés), ainsi qu'un organigramme général montrant le personnel de l'entreprise par profil au cours des trois dernières années ;

[…]

2.3.3. Section 3 : Proposition financière

L'attention du soumissionnaire est attirée sur les points suivants en rapport avec les prix.

[…]

La période opérationnelle démarre à l'issue des trois mois de rodage (voir point 1.3) ; la phase de rodage n'étant pas rémunérée, elle ne sera pas chiffrée dans l'offre ; concernant une éventuelle rémunération au cours de cette phase, voir point 1.7 ;

[…]

3. Sélection de soumissionnaires et attribution de marché

[…]

La procédure d'attribution du marché sera menée en trois étapes successives, décrites ci-dessous. Seules les offres répondant aux exigences d'une étape seront prises en considération à l'étape suivante.

– Exclusion de certains soumissionnaires conformément à l'article 29 de la directive 92/59 […]

– Sélection de soumissionnaires par la vérification :

  – de leurs compétences professionnelles et techniques,

  – de leur capacité économique et financière.

– Évaluation des offres : comparaison sur la base des critères d'attribution.

3.1. Exclusion des soumissionnaires

[…]

Conformément à l'article 29 de la directive 92/50 […], la Commission peut décider d'exclure un soumissionnaire de la procédure de sélection et d'attribution […]

3.2. Sélection de soumissionnaires – Critères de sélection

[…]

3.2.2. Compétence technique et professionnelle

La capacité des prestataires des services à exécuter le contrat sera évaluée plus particulièrement sur la base de leurs *qualifications*, de leur *efficacité*, de leur *expérience* et de leur *fiabilité*.

Il est à noter que tous les soumissionnaires et, le cas échéant, les membres concernés du consortium sont tenus de fournir la preuve qu'ils répondent à ces exigences par les moyens suivants :

[…]

a) indication du nombre de personnes par profil employées à titre permanent au cours des [trois] dernières années – de même que pour le personnel temporaire – ainsi que de leurs titres d'études et de leurs qualifications professionnelles et/ou ceux des cadres de l'entreprise et, en particulier, du ou des responsables de la prestation de services ; la qualité de l'équipe, les membres qui la composent, s'ils travaillent à temps complet ou partiel, leur formation en matière de développement personnel et l'assurance qualité correspondante ; les CV doivent être groupés par profil – suivant l'ordre adopté dans le tableau de scénario complet défini pour chaque lot ;

[…]

3.3. Évaluation des offres – Critères d'attribution

Le marché sera attribué à l'offre qui présentera le rapport coût-efficacité le plus avantageux. Les critères d'attribution suivants seront appliqués :

– critères d'attribution qualitatifs ;

– prix.

Dans un premier temps, l'offre retenue sera évaluée en fonction des critères d'attribution qualitatifs ci-dessous et du coefficient de pondération de chaque critère.

Critère	Critères d'attribution qualitatifs	Pondération (nombre maximal de points) pour les lots n^{os} 1 à 5	Pondération (nombre maximal de points) pour le lot n° 3
1	Valeur technique, conformité avec le cahier des charges et réponses aux spécifications ; approche technique proposée (exhaustivité fonctionnelle, respect des exigences techniques, adéquation des technologies proposées)	35	[…]

2	Qualité de la méthodologie proposée (méthodes de travail visant à l'efficacité, l'exploitabilité, la sécurité et la confidentialité ; fiabilité / disponibilité / récupération / maintenance du service ; adoption des meilleures pratiques)	25	[…]
3	Créativité, degré d'innovation (valeur des idées originales sur la manière d'apporter des innovations au service)	20	[…]
4	Qualité du calendrier proposé, de la gestion des contrats et du contrôle (dispositions proposées pour fournir à temps les produits requis et pour assurer le respect des objectifs, des délais et de la qualité)	20	[…]
5 […] (uniquement pour le lot n° 3)	[…]	[…]	[…]
	Total des points	100	[…]

Les offres n'obtenant pas au minimum 50 % des points par critère et au minimum 60 % du total des points, soit 60 points, ne seront pas prises en compte pour l'attribution du marché.

L'évaluation en fonction des critères d'attribution ci-dessus ne tient compte d'aucun service optionnel. Ces derniers seront pris en considération à part, ultérieurement, uniquement dans l'offre retenue pour chaque lot.

Critères d'attribution	
	Le prix, tel que défini dans le scénario complet pour chaque lot couvrant 48 mois d'activité, sans tenir compte du coût des options.

Il convient de noter que l'évaluation des offres sera axée sur la qualité des services proposés ; aussi les soumissionnaires doivent-ils fournir une offre détaillée pour tous les aspects abordés par le présent cahier des charges, de manière à obtenir le plus de points possible. Le fait de se limiter à reprendre les exigences exposées dans le présent cahier des charges sans entrer dans les détails ou sans proposer de valeur ajoutée ne permettra d'obtenir qu'un total très médiocre. En outre, si certains points essentiels du présent cahier des charges ne sont pas expressément abordés dans l'offre, la Commission pourra décider soit d'attribuer la note de zéro pour les critères d'attribution qualitatifs concernés, soit d'exclure l'offre de la procédure d'évaluation pour non-respect du cahier

des charges.

La Commission se réserve le droit – tout en n'étant pas tenue de le faire – d'exclure les offres qui dépassent le budget indicatif, comme il est mentionné dans le présent appel d'offres.

4. Spécifications techniques

Résumé

Jusqu'à cinq contractants indépendants pourraient gérer le service CORDIS, avec les spécialisations suivantes :

Le contractant du lot n° 1 sera chargé de fournir le contenu, c'est-à-dire de collecter et créer l'interface utilisateur et la navigation dans l'ensemble de l'espace d'information CORDIS ; assurer la qualité du contenu et de la navigation ; communiquer avec la presse spécialisée et d'autres multiplicateurs et donc informer le public de l'existence du service et de son évolution ; soutenir les fournisseurs d'information et les multiplicateurs. Le contractant du lot n° 1 spécifiera également les exigences pour les adaptations techniques des outils à livrer par le contractant du lot n° 2. Toutes les informations seront livrées au contractant du lot n° 3 pour diffusion via le système de production commun (CPS) et/ou le système de gestion du contenu sur [Internet] (WMCS).

[…]

4.3.2. Management du projet

[…]

4.3.2.3. L'autre personnel du contactant

Le contractant mettra à disposition du personnel professionnel qualifié afin d'exécuter les tâches contractuelles conformément aux règles pour l'engagement/remplacement d'un tel personnel. Les taux journaliers comprennent les coûts généraux tels que décrits ci-après.

4.3.2.4. Personnel qualifié

Le contractant devra :

– employer du personnel d'une qualité adéquate pour les tâches [en cause] en termes de qualifications et d'expérience appropriées et si nécessaire assurer un niveau adéquat de formation afin d'offrir un service de haute qualité pour chacune des tâches spécifiées ;

[…] »

19 Le volume B du cahier des charges de l'appel d'offres en cause, intitulé « Lot 1 – Contenu » (ci-après le « volume B du cahier des charges ») prévoit les spécifications pour le lot n° 1.

20 Comme il avait été prévu au point 1.6 du volume A du cahier des charges, un site Internet temporaire, spécialement consacré à l'appel d'offres en cause et auquel les soumissionnaires potentiels pouvaient se connecter, a été établi.

21 Le 22 novembre 2002, la Commission a transmis aux soumissionnaires potentiels un CD-ROM, qui contenait des informations techniques sur le projet en tant que tel (ci-après le « CD 1 »).

22 Le 20 décembre 2002, la Commission a transmis aux soumissionnaires potentiels un second CD-ROM contenant des informations techniques, dont des spécifications techniques supplémentaires, des tests et des guides pour l'utilisateur (ci-après le « CD 2 »).

23 À la fin du mois de décembre 2002, la Commission a acquis un logiciel, dénommé « Autonomy », qui constitue un outil de recherche contextuelle permettant aux utilisateurs finaux de CORDIS de faire des recherches ciblées dans les bases de données de CORDIS ainsi que des recherches terminologiques multilingues.

24 Le 7 janvier 2003, une journée d'information ouverte à tous les soumissionnaires potentiels a été

organisée par la Commission, comme cela avait été prévu au point 1.6 du volume A du cahier des charges.

25 Le 23 janvier 2003, à la suite d'une question posée par l'un des soumissionnaires potentiels sur le site Internet visé au point 20 ci-dessus, la Commission a révélé, sur ce site, l'acquisition du logiciel Autonomy.

26 Le 5 février 2003, la Commission a publié, sur le même site Internet, un document daté du 4 février 2003, intitulé « CORDIS Hardware and Software Inventory List » (ci-après la « liste d'inventaire »). La liste d'inventaire récapitulait tout le matériel informatique et tous les logiciels en place exploités à cette époque.

27 Le 18 février 2003, la Commission a en outre publié, sur ledit site, un document intitulé « Superquest – Implementation and Release 6 and beyond ». Ce document, daté du 6 février 2003 et intitulé « Projet », avait été rédigé par le contractant en place, Intrasoft International. Ledit document contenait des spécifications techniques pour la mise en œuvre du logiciel Autonomy. Il contenait également l'information selon laquelle une version d'essai du logiciel Autonomy était déjà utilisée, depuis le 20 septembre 2002, dans la version en vigueur de CORDIS. Enfin, le même document contenait la recommandation d'acquérir ledit logiciel.

28 La date limite arrêtée pour la soumission des offres prévue dans le cahier des charges était fixée au 19 mars 2003.

29 European Service Network (ESN) SA, la requérante, comptait parmi les soumissionnaires pour le lot n° 1 du projet (ci-après le « marché litigieux ») et a soumissionné au nom de cinq partenaires dont elle était la porte-parole.

30 Les 26 mars et 1er avril 2003, le comité d'évaluation des offres s'est réuni. Il a proposé de retenir l'offre d'Intrasoft International pour le marché litigieux. Ledit comité s'est fondé sur les résultats d'une évaluation qualitative et financière des offres de la requérante et d'Intrasoft International, se présentant comme suit :

Nom	Critères d'attribution qualitatifs/points					
		n° 1 (35)	n° 2 (25)	n° 3 (20)	n° 4 (20)	Total (100)
Requérante	29,4	19,5	16,6	14,0	79,4	
Intrasoft International	28	20	12,4	16,4	76,8	

Nom	Prix total pour 48 mois (euros)	Points qualité	Rapport qualité-prix
Requérante	21 198 870,00	79,4	3,75
Intrasoft International	16 515 312,00	76,8	4,65

31 Le 16 juillet 2003, les propositions du comité d'évaluation ont été entérinées par décision de l'ordonnateur compétent et le marché litigieux a ainsi été attribué à Intrasoft International (ci-après le « soumissionnaire retenu »).

32 Le 1er août 2003, un courrier a été envoyé par la Commission à la requérante afin de l'informer que son offre n'avait pas été retenue.

33 Par lettres à la Commission des 5, 8, 11, 20 et 22 août 2003, la requérante a contesté la procédure d'appel d'offres en cause et a posé une série de questions auxquelles une réponse a été donnée par la Commission le 2 septembre 2003. Enfin, la requérante a encore demandé des éclaircissements à la Commission par la lettre du 4 septembre 2003 et la Commission lui a répondu le 22 septembre 2003.

34 Le 28 janvier 2004, la Commission et le soumissionnaire retenu ont conclu le contrat ayant pour objet le marché litigieux. Ce contrat a pris effet au 1er février 2004.

Procédure et conclusions des parties

35 Par requête déposée au greffe du Tribunal le 29 septembre 2003, la requérante a introduit le présent recours.

36 La requérante conclut, dans sa requête, à ce qu'il plaise au Tribunal :

– annuler le marché litigieux ;

– lui réserver tous autres droits, voies, moyens et actions, et notamment la condamnation de la défenderesse à des dommages-intérêts en rapport avec le préjudice subi ;

– condamner la défenderesse aux dépens.

37 La défenderesse conclut à ce qu'il plaise au Tribunal :

– rejeter le recours en annulation comme non fondé ;

– déclarer la demande de dommages-intérêts manifestement irrecevable ;

– condamner la requérante aux dépens.

38 Lors de l'audience, la requérante a précisé que, par son recours, elle visait l'annulation de la décision d'attribution du marché litigieux telle que celle-ci lui avait été communiquée par la lettre du 1er août 2003 (ci-après la « décision attaquée »).

39 Dans sa réplique, la requérante a demandé à ce qu'il plaise au Tribunal faire droit aux conclusions contenues dans la requête et, pour autant que de besoin seulement, ordonner que la Commission aura à verser aux débats le contrat ayant pour objet le marché litigieux, les rapports d'évaluation des cinq lots du projet en cause ainsi que l'enregistrement et la transcription de la réunion d'information du 7 janvier 2003.

40 Par lettre du 6 juillet 2004, la requérante a demandé, sur le fondement de l'article 64, paragraphe 4, du règlement de procédure du Tribunal, de pouvoir répondre, par écrit, à la duplique.

41 Par lettre du 26 juillet 2004, le Tribunal a informé la requérante de sa décision de ne pas donner suite à cette demande à ce stade de la procédure.

42 Par lettre du 6 octobre 2004, la requérante a, de nouveau, demandé de pouvoir répondre, par écrit, à la duplique.

43 Par lettre du 29 octobre 2004, le Tribunal a informé la requérante de sa décision de ne pas donner suite à cette demande à ce stade de la procédure.

44 Par lettre du 29 février 2005, la requérante a redemandé de pouvoir répondre, par écrit, à la duplique.

45 Le 22 mars 2005, le Tribunal a informé la requérante, en se référant à sa lettre du 29 octobre 2004, qu'elle serait informée ultérieurement de la suite de la procédure.

46 Sur rapport du juge rapporteur, le Tribunal a décidé d'ouvrir la procédure orale et, au titre des mesures d'organisation de la procédure prévues à l'article 64 du règlement de procédure, il a demandé aux parties, par lettre du 9 juin 2006, de répondre, par écrit, à plusieurs questions.

47 Par lettre du 20 juin 2006, le Tribunal a demandé à la défenderesse, au titre des mesures d'organisation de la procédure prévues à l'article 64 du règlement de procédure, de répondre, par écrit, à des questions additionnelles.

48 Par lettres du 29 juin 2006, les parties ont répondu aux questions posées les 9 et 20 juin 2006.

49 Les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions posées par le Tribunal à l'audience du 13 juillet 2006.

En droit

I – Sur la représentation de Ring consortium par la requérante dans le cadre du présent recours

A – Arguments des parties

50 La défenderesse relève que la requérante omet d'indiquer dans la requête à quel titre elle agit. En particulier, elle n'indique pas dans la requête si elle intente le présent recours pour son propre compte ou pour le compte de la société momentanée de droit belge dénommée « Ring consortium », dont elle ferait partie et qui se serait portée soumissionnaire pour le marché litigieux.

51 La requérante déclare que le recours est introduit en son nom propre. Ainsi qu'il serait précisé dans leur offre, les partenaires de la requérante n'auraient envisagé de constituer avec celle-ci une société momentanée dénommée « Ring consortium » et d'en confier la gestion à la requérante qu'en cas de sélection de leur offre par la Commission.

52 À l'audience, les deux parties ont déclaré de façon concordante que, même au vu de l'arrêt de la Cour du 8 septembre 2005, Espace Trianon et Sofibail (C–129/04, Rec. p. I–7805), elles ne voient pas d'éléments pouvant entraîner l'irrecevabilité du recours dans la présente affaire.

B – Appréciation du Tribunal

53 Le Tribunal constate que la défenderesse n'a pas contesté l'affirmation de la requérante selon laquelle ni au moment de la soumission de l'offre par la requérante, ni par après, la requérante et ses partenaires n'ont constitué une société ou une société momentanée au nom de laquelle la requérante aurait pu agir.

54 Dès lors qu'il n'est pas établi que Ring consortium a été légalement constituée, il y a lieu d'estimer que l'offre a été soumise en tant qu'offre conjointe au sens du point 2.3.1 du volume A du cahier des charges.

55 Partant, puisque aucun consortium n'était juridiquement constitué, l'offre ainsi présentée par la requérante et ses partenaires ne pouvait qu'être considérée comme étant une offre conjointe, au sens du point 2.3.1 du volume A du cahier des charges. En conséquence, la requérante ne pouvait être qualifiée de « partenaire principal » au sens dudit point. Dans de telles circonstances, les autres partenaires mentionnés dans l'offre soumise par la requérante ne pouvaient être considérés que comme des sous-traitants de la requérante.

56 Le Tribunal constate, par ailleurs, que la lettre du 1er août 2003, par laquelle la Commission a informé ces soumissionnaires que leur offre n'avait pas été retenue et à laquelle la décision attaquée était annexée, a été adressée uniquement à la requérante.

57 Enfin, la requérante a déclaré expressément n'avoir introduit le présent recours qu'en son propre nom.

58 Au vu de ce qui précède, il y a lieu de constater que la requérante agit uniquement en son propre nom.

II – Sur la demande d'annulation de la décision attaquée

59 Au soutien de son recours en annulation, la requérante invoque, en substance, quatre moyens. Le premier est tiré des avantages financiers ayant été accordés uniquement au soumissionnaire retenu. Le deuxième est tiré de l'accès exclusif du soumissionnaire retenu à certaines informations essentielles. Le troisième est tiré de la non-conformité des critères de l'adjudication à ceux décrits dans le cahier des charges. Le quatrième est tiré de l'application discriminatoire des critères

d'attribution du marché publiés au cahier des charges.

A – Sur le premier moyen, tiré des avantages financiers accordés exclusivement au soumissionnaire retenu

60 La requérante estime que, premièrement, en subordonnant la reprise des services d'appui pour CORDIS à une période de rodage non rémunérée dans le cahier des charges et, deuxièmement, en imposant l'inclusion dans les offres de provisions substantielles pour l'acquisition des outils nécessaires au fonctionnement des bases de données de CORDIS, dont un certain nombre étaient déjà en place dans les services exploités par son contractant au moment de l'appel d'offres en cause, le soumissionnaire retenu, la Commission a donné un avantage financier à celui-ci.

1. Sur la première branche, tirée de l'exigence d'une phase de rodage non rémunérée d'une durée obligatoire de trois mois

a) Arguments des parties

61 La requérante affirme que la Commission a imposé aux seuls nouveaux contractants potentiels, une période de rodage non rémunérée et obligatoire de trois mois. En revanche, le soumissionnaire retenu qui était le contractant en place au moment de l'appel d'offres en cause n'aurait pas eu besoin d'inclure dans son offre des coûts comparables.

62 La requérante estime que, pour tous les candidats, les offres financières intègrent nécessairement 24 mois payés en plus de l'amortissement des 3 mois non rémunérés correspondant à la phase de rodage, à l'exception du soumissionnaire retenu, contractant en place, qui n'avait pas besoin d'amortir le coût correspondant à la phase de rodage non rémunérée et qui pouvait donc soumettre une offre moins disante.

63 La requérante affirme, que, s'il est vrai, selon le point 1.7 du volume A du cahier des charges, qu'un nouveau contractant peut reprendre les opérations en cours avant la fin des trois mois, cette possibilité dépend uniquement du bon vouloir du contractant en place, c'est-à-dire, en l'espèce, du soumissionnaire retenu.

64 En réponse à une question du Tribunal à l'audience, la requérante a expliqué que, dans son principe, elle ne contestait pas l'exigence d'une phase de rodage. Elle aurait pu accepter une période de rodage, mais pas d'une durée obligatoire de trois mois.

65 Quant à l'affirmation de la défenderesse selon laquelle l'ancien contrat conclu entre la Commission et le soumissionnaire retenu, contractant en place à l'époque, stipulait l'obligation pour ce dernier de collaborer avec un nouveau contractant à la reprise des services d'appui pour CORDIS, la requérante fait valoir que les soumissionnaires n'avaient pas connaissance du régime contractuel auquel le contractant en place était soumis.

66 De plus, la requérante met en doute le fait que le contrat, signé avec le soumissionnaire retenu au mois de janvier 2004 et ayant pris effet au 1er février 2004, prévoie les mêmes obligations quant à la mise en œuvre de la période de rodage.

67 La défenderesse estime que l'allégation d'une discrimination financière résultant de l'exigence d'une période de rodage repose sur une méconnaissance des termes du cahier des charges en ce qui concerne la phase de rodage. Elle souligne que la reprise du service avant l'échéance de la phase de rodage ne dépend pas du bon vouloir du contractant en place. La défenderesse invoque l'obligation de collaboration du contractant en place avec le nouveau contractant à la reprise des services d'appui pour CORDIS. Elle explique que cette obligation figure dans l'ancien contrat avec le contractant en place, dont des extraits ont été fournis au Tribunal et dont les soumissionnaires potentiels avaient été informés lors de la journée d'information du 7 janvier 2003.

68 Enfin, la défenderesse affirme, en mettant à la disposition du Tribunal une copie des passages pertinents du nouveau contrat signé entre elle et le soumissionnaire retenu le 28 janvier 2004, que ledit contrat est conforme au modèle de contrat annexé au cahier des charges.

b) Appréciation du Tribunal

Observations liminaires

69 La requérante estime, premièrement, que, en imposant une période de rodage d'une durée obligatoire de trois mois dans le cahier des charges, la défenderesse a violé le principe d'égalité de traitement prévu à l'article 126 des modalités d'exécution I et à l'article 3, paragraphe 2, de la directive 92/50.

70 La requérante affirme, deuxièmement, que, en ne prévoyant pas des dispositions équivalentes à celles du cahier des charges quant à la mise en œuvre d'une période de rodage dans le nouveau contrat conclu avec le soumissionnaire retenu, la défenderesse a violé le principe d'égalité de traitement prévu à l'article 89, paragraphe 1, du règlement financier II, lequel est, selon elle, applicable en l'espèce.

71 Tel qu'il a été reconnu par une jurisprudence constante, ce principe exige que des situations comparables ne soient pas traitées de manière différente et que des situations différentes ne soient pas traitées de manière égale (arrêts de la Cour du 19 octobre 1977, Ruckdeschel e.a., 117/76 et 16/77, Rec. p. 1753, point 7, et du 13 décembre 1984, Sermide, 106/83, Rec. p. 4209, point 28).

72 Or, en matière de passation de marchés publics, le principe d'égalité de traitement entre les soumissionnaires prend une importance toute particulière. En effet, il convient de rappeler qu'il résulte d'une jurisprudence bien établie de la Cour que le pouvoir adjudicateur est tenu au respect du principe d'égalité de traitement des soumissionnaires (arrêts de la Cour du 27 novembre 2001, Lombardini et Mantovani, C–285/99 et C–286/99, Rec. p. I–9233, point 37, et du 19 juin 2003, GAT, C–315/01, Rec. p. I–6351, point 73).

73 Il convient d'apprécier les deux branches du premier moyen à la lumière des principes énoncés ci-dessus.

Sur l'exigence dans le cahier des charges d'une phase de rodage non rémunérée d'une prétendue durée obligatoire de trois mois

74 Tout d'abord, il y a lieu de relever que l'exigence d'une phase de rodage non rémunérée est, selon le point 1.7 du volume A du cahier des charges, indistinctement applicable à toutes les offres.

75 Ensuite, il y a lieu de constater que la requérante ne conteste pas, dans son principe, l'exigence d'une phase de rodage non rémunérée, mais uniquement sa prétendue durée obligatoire de trois mois.

76 À cet égard, il convient de rappeler que le point 1.3 du volume A du cahier des charges prévoit que les trois premiers mois des contrats constituent la « phase de rodage » et qu'il n'est pas exclu, sous réserve de l'approbation par le responsable de projet de la Commission et de l'accord du contractant en place, de reprendre des parties ou l'ensemble du service au cours de la phase de rodage. En outre, selon le point 1.7 du volume A du cahier des charges, dans le cas où le nouveau contractant reprend des parties ou l'ensemble du service pendant la phase de rodage, ce prestataire sera rémunéré à partir de la date de reprise effective des parties du service.

77 À la lumière de ces dispositions, le Tribunal estime que le cahier des charges ne prévoyait pas une phase de rodage d'une durée obligatoire de trois mois. En effet, les passages des points 1.3 et 1.7 du cahier des charges mentionnés au point précédent excluent – sauf à les priver de leur sens et de tout effet utile – qu'il puisse être considéré que la durée de trois mois de la phase de rodage présente un caractère obligatoire.

78 Ce constat n'est pas infirmé par l'argumentation de la requérante qui se fonde sur le passage « sous réserve […] d'accord du contractant en place » pour en conclure que l'abrègement de la phase de rodage ainsi que le payement des services d'appui pour CORDIS repris avant le délai de trois mois dépendent, selon le cahier des charges, du bon vouloir du contractant en place.

79 En effet, le Tribunal relève à cet égard que le passage « sous réserve […] d'accord du contractant en place » doit être compris dans l'ensemble du déroulement d'une reprise des services d'appui pour CORDIS en général et notamment d'une reprise de l'ancien contrat conclu entre la Commission et le contractant en place à l'époque.

80 Or, en ce qui concerne le déroulement d'une reprise des services d'appui pour CORDIS par un nouveau contractant, il découle du point 3.2.1.2 de l'annexe II de l'ancien contrat, tel qu'il a été modifié par l'addendum n° 2, que le contractant en place était obligé de préparer et de contribuer à une reprise complète, à temps et en douceur par les prochains contractants ainsi que de coopérer entièrement avec le prochain contractant pour assurer une continuité dans le haut standard de qualité des services d'appui pour CORDIS, durant la phase de reprise.

81 Partant, sauf à contrevenir à ses obligations contractuelles, le contractant en place était, le cas échéant, dans l'obligation de se conformer aux exigences d'un éventuel abrégement de la phase de rodage de trois mois au titre de son obligation de coopération active.

82 Le seul fait que les soumissionnaires autres que le soumissionnaire retenu, contractant en place à l'époque, n'ont été informés de ladite clause de l'ancien contrat que lors de la journée d'information du 7 janvier 2003 ne saurait constituer une violation du principe d'égalité de traitement des soumissionnaires. En effet, dès lors que le cahier des charges prévoyait la possibilité d'une durée abrégée de la phase de rodage, celle-ci était en tout état de cause garantie par le cahier des charges et était, le cas échéant, exigible sur la base de celui-ci. Partant, l'information des autres soumissionnaires, le 7 janvier 2003, du fait que l'ancien contrat du soumissionnaire retenu était, par ailleurs, parfaitement conforme à cet engagement de la Commission, n'a aucune incidence sur le caractère non discriminatoire des dispositions pertinentes du cahier des charges.

83 Enfin, la requérante n'a pas démontré en quoi, d'un point de vue économique, le contractant en place avait intérêt à faire obstacle à la reprise anticipée des services d'appui pour CORDIS par un nouveau contractant, compte tenu du fait que le contractant en place ne perdait, en tout état de cause, pas son droit à être rémunéré jusqu'à la fin de son propre contrat.

84 Dès lors, il y a lieu de conclure de ce qui précède que le cahier des charges n'exige pas la prestation de services non rémunérés durant une phase de rodage d'une durée obligatoire de trois mois. Par conséquent, l'argumentation avancée par la requérante à cet égard doit être rejetée.

85 Partant, la première branche du premier grief tirée de la violation du principe d'égalité de traitement, au motif qu'il serait prévu dans le cahier des charges une phase de rodage non rémunérée d'une durée obligatoire de trois mois, n'est pas fondée.

Sur la reprise dans le contrat ayant pour objet le marché litigieux d'une phase de rodage non rémunérée d'une prétendue durée obligatoire de trois mois

86 En ce qui concerne la reprise, dans le contrat ayant pour objet le marché litigieux et finalement conclu entre le soumissionnaire retenu et la Commission, de l'exigence d'une phase de rodage non rémunérée prévue aux points 1.3 et 1.7 du volume A du cahier des charges, le Tribunal constate que le point 1.3 dudit contrat reprend presque littéralement les passages pertinents du cahier des charges. Par conséquent, ce contrat est conforme au modèle de contrat annexé au cahier des charges.

87 Il résulte de l'ensemble des considérations qui précèdent que la première branche du premier grief, tirée de la violation du principe d'égalité de traitement, au motif qu'il serait prévu dans le cahier des charges une phase de rodage non rémunérée d'une durée obligatoire de trois mois, n'est pas fondée.

2. Sur la deuxième branche, tirée de l'obligation d'inclure des provisions substantielles dans les offres pour l'acquisition des outils nécessaires au fonctionnement des bases de données de CORDIS

a) Arguments des parties

88 La requérante affirme que la Commission a exigé de tous les soumissionnaires l'inclusion de provisions substantielles dans leur offre pour l'acquisition de tous les outils nécessaires au fonctionnement des bases de données de CORDIS. De plus, la Commission aurait refusé de fournir le moindre détail à cet égard. Ainsi, dans les faits, seuls les soumissionnaires autres que le soumissionnaire retenu auraient été obligés d'inclure dans leur offre de telles provisions pour l'acquisition de ces outils, et ce même si, par après, cela devait s'avérer inutile.

89 À la suite d'une question écrite posée par le Tribunal, la défenderesse a mis à la disposition du Tribunal des extraits pertinents de l'ancien contrat conclu avec le soumissionnaire retenu,

contractant en place à l'époque.

b) Appréciation du Tribunal

90 S'agissant de la prétendue obligation d'inclure dans les offres des provisions substantielles pour l'acquisition des outils nécessaires au fonctionnement des bases de données de CORDIS, le Tribunal constate que la requérante n'a pas été en mesure, même après une question précise à cet égard au cours de l'audience, d'indiquer quel passage du cahier des charges contenait, selon elle, ladite prétendue obligation.

91 De plus, il ressort du point 3.2.1.2 de l'ancien contrat conclu entre la Commission et le soumissionnaire retenu, contractant en place à l'époque, que « [d]evront être remis tous les hardwares, logiciels et autres équipements capitaux payés par la Commission en conformité avec ce contrat, y compris la documentation pertinente ».

92 Il en résulte que, selon ledit contrat, le contractant en place était tenu de remettre à la Commission et, par conséquent, au nouveau contractant tous les équipements ayant été antérieurement payés par celle-ci.

93 Partant, la procédure n'a révélé aucun élément susceptible de démontrer qu'un nouveau contractant était obligé d'acquérir les outils nécessaires au fonctionnement des bases de données de CORDIS.

94 Par conséquent, la deuxième branche du premier moyen, tirée de la violation du principe de l'égalité de traitement qui résulterait de la prétendue obligation d'inclure dans les offres des provisions substantielles pour l'acquisition des outils nécessaires au fonctionnement des bases de données de CORDIS, n'est également pas fondée.

95 Au vu de ce qui précède, c'est donc à tort que la requérante prétend que la Commission a violé le principe de l'égalité de traitement en accordant certains avantages financiers au soumissionnaire retenu.

96 Partant, le premier moyen doit être rejeté.

B – Sur le deuxième moyen, tiré de l'accès exclusif du soumissionnaire retenu à certaines informations essentielles

97 Le moyen tiré de l'accès exclusif du soumissionnaire retenu à certaines informations essentielles concerne deux catégories d'informations, soit, d'une part, les informations relatives à l'acquisition du logiciel Autonomy par la Commission et, d'autre part, les informations relatives aux spécifications techniques des bases de données de CORDIS.

1. Arguments des parties

a) Sur l'accès aux informations relatives à l'acquisition du logiciel Autonomy

98 Alors que l'acquisition du logiciel Autonomy avait déjà eu lieu en décembre 2002, la requérante dénonce le fait pour la Commission de n'avoir révélé l'acquisition de la licence d'utilisation du logiciel Autonomy que trois mois après la publication de l'appel d'offres en cause, deux mois après l'acquisition de ladite licence et seulement un mois avant la date de clôture fixée pour le dépôt des soumissions. Les CD 1 et CD 2 comportant des renseignements sur l'appel d'offres en cause ne contiendraient pas non plus d'indications sur le logiciel Autonomy en lui-même.

99 La requérante souligne que le soumissionnaire retenu a eu un accès privilégié à tous les détails de ce logiciel et qu'il avait même utilisé une version d'essai du logiciel Autonomy dans la version de CORDIS en vigueur à l'époque. La requérante prétend qu'il a ainsi eu l'avantage de ne pas perdre de temps dans une recherche des solutions alternatives et qu'il avait ainsi pu concentrer tous ses efforts sur l'élaboration d'une offre techniquement centrée sur des bases de données de CORDIS fonctionnant avec le logiciel Autonomy.

100 La requérante évoque, à ce propos, le cahier des charges qui prévoit que toutes les opérations dans le cadre de CORDIS sont à effectuer manuellement. L'acquisition du logiciel Autonomy aurait

cependant éliminé de très nombreux points faibles de CORDIS qui seraient énumérés dans le cahier des charges. Par conséquent, le fait de disposer du logiciel Autonomy aurait fondamentalement modifié l'environnement et les possibilités du soumissionnaire retenu pour la préparation de son offre en ce qui concerne une nouvelle version des services d'appui pour CORDIS.

101 La requérante prétend que la défenderesse méconnaît la nature réelle du logiciel Autonomy. En se fondant sur plusieurs extraits du site Internet de l'entreprise Autonomy ainsi que sur plusieurs pages du document intitulé « Superquest – Implementation and Release 6 and beyond », elle explique son idée de la fonctionnalité du logiciel Autonomy.

102 La requérante cite des extraits des pages 22, 29, 31, 32, 62, 73, 83 et 96 du volume B du cahier des charges ainsi que des extraits des pages 21 et 23 du volume A de celui-ci. La requérante estime qu'il en résulte que la connaissance de l'acquisition du logiciel Autonomy était d'une grande importance pour un soumissionnaire au marché litigieux.

103 La requérante explique que, en ce qui concerne le marché litigieux, il s'agit de rassembler, de créer, de traiter des informations qui doivent alimenter CORDIS ainsi que de classifier toutes ces informations. Le logiciel Autonomy serait le système gérant le contenu de CORDIS. La requérante fait valoir ainsi que, après avoir été informée de l'acquisition du logiciel Autonomy par la Commission, elle a dû restructurer 80 % du projet d'offre qu'elle avait déjà élaboré.

104 La requérante fait valoir que, à la différence du soumissionnaire retenu et contractant en place, tous les autres soumissionnaires ont été obligés, à partir du moment où ils ont eu connaissance des informations relatives à l'acquisition du logiciel Autonomy, de renoncer à exploiter des études de marché qui se sont avérées être inutiles et qu'ils avaient effectuées en vue de proposer à la Commission des solutions pour faire face aux problèmes rencontrés dans CORDIS et connus par eux à ce stade. Ainsi, la communication tardive des informations relatives à l'acquisition du logiciel Autonomy aurait complètement anéanti des mois de recherches et la requérante aurait été obligée de remodeler entièrement son équipe d'experts.

105 La Commission aurait donc imposé à tous les soumissionnaires, à l'exception du soumissionnaire retenu, d'élaborer des propositions de solutions techniques détaillées et créatives en ce qui concerne des problèmes qui avaient été résolus par l'acquisition du logiciel Autonomy. La requérante affirme la qualité et la pertinence de ces propositions, lesquelles rempliraient les critères d'attribution n^{os} 1 à 3 et représenteraient un total de 75 % des points.

106 Enfin, la requérante réfute l'argumentation de la défenderesse selon laquelle la qualité supérieure de l'offre technique de la requérante démontre que le cahier des charges n'exigeait pas des soumissionnaires d'intégrer dans leur offre l'utilisation d'un système de recherche contextuelle, et a fortiori l'utilisation d'un logiciel spécifique tel que le logiciel Autonomy. La Commission aurait démontré elle-même que si elle avait « neutralisé », dans l'offre du soumissionnaire retenu, les passages reposant sur des informations auxquelles ce dernier avait eu un accès exclusif au lieu de les valoriser, le résultat d'évaluation de son offre obtenue par le soumissionnaire retenu aurait été sensiblement réduit.

107 La défenderesse conteste l'importance accordée au logiciel Autonomy pour l'accomplissement des tâches dont sera chargé le contractant dans le cadre du marché litigieux.

108 Elle précise que l'objet du marché litigieux, défini dans le volume B du cahier des charges, correspond au rassemblement de certaines informations – essentiellement les contacts avec les directions générales (DG) de la Commission « de la famille 'recherche' » – relatives à la création de certaines informations ainsi qu'au traitement et à la classification de toutes ces informations dans les bases de données afin que ces informations puissent être publiées sur un site Internet consacré au projet en cause.

109 La défenderesse estime que, étant donné l'absence de pertinence de la recherche contextuelle pour passer le marché litigieux, c'est à juste titre qu'elle n'a pas estimé opportun d'informer les soumissionnaires de son acquisition du logiciel Autonomy en décembre 2002 et qu'elle leur a demandé de ne pas tenir compte des informations relatives à cette acquisition pour la rédaction de leur offre.

b) Sur l'accès aux informations relatives aux spécifications techniques des bases de données de CORDIS

110 La requérante relève que, malgré plusieurs demandes de sa part, des informations pertinentes relatives notamment aux spécifications techniques des bases de données de CORDIS, à tous les outils qui y sont relatifs et aux méthodologies utilisées, qui étaient la propriété intégrale de la Commission, n'ont pas été rendues accessibles en temps utile aux soumissionnaires, à l'exception du soumissionnaire retenu qui les avait déjà utilisées avant l'appel d'offres en cause.

111 La requérante en conclut que la Commission a réservé un traitement inégal à tous ceux, parmi les soumissionnaires, qui, à défaut de s'être vu communiquer ces informations pertinentes en temps utile, n'ont pas été placés dans une position équitable leur permettant de soumettre une offre technique et financière ayant une véritable chance d'être sélectionnée par la Commission.

112 La requérante soutient qu'il n'a été possible de trouver des informations précises et utilisables ni dans le cahier des charges, ni dans les milliers de pages de documentation technique fournies aux candidats par la Commission sous la forme de CD 1 et CD 2, ni dans celles disponibles sur le site Internet spécialement consacré à l'appel d'offres en cause. En donnant des exemples, la requérante explique que, dans le cahier des charges ainsi que dans la documentation qui y était annexée, les données techniques des bases de données en ligne sont, selon elle, décrites de manière très générale et sans aucune spécification technique.

113 En se fondant, essentiellement, sur de nombreux passages tirés des trois différents volets du volume B du cahier des charges, la requérante explique en détail son approche des fonctions respectives du marché litigieux, du lot n° 2 et du lot n° 3. Elle conteste l'argumentation de la défenderesse selon laquelle les spécifications techniques des bases de données de CORDIS seraient peu importantes pour le marché litigieux.

114 La requérante affirme que la liste d'inventaire diffusée par la Commission ne contient pas d'informations utiles pour les soumissionnaires au marché litigieux, car les informations qu'elle contient ne concernent que le lot n° 3. La requérante affirme que la distribution de ladite liste était une manœuvre dilatoire tendant à induire en erreur les concurrents du soumissionnaire retenu.

115 En réponse à l'argumentation de la défenderesse selon laquelle les résultats qualitatifs obtenus par la requérante pour ses capacités techniques étaient – malgré la prétendue absence d'informations techniques – les meilleurs, la requérante fait valoir que son offre technique relative au traitement des « données structurées » (contenu des bases de données de CORDIS) a été considérée par la Commission comme un des points faibles de son offre. La requérante se réfère, à cet égard, à deux extraits du rapport du comité d'évaluation concernant son offre et estime qu'il ressort de ces extraits que si elle n'avait pas été désavantagée par rapport au soumissionnaire retenu en ce qui concerne l'accès aux informations relatives aux spécifications techniques des bases de données de CORDIS, le résultat de l'évaluation qualitative de son offre aurait nécessairement été supérieur.

116 La défenderesse estime qu'elle a tout mis en œuvre pour assurer la plus grande transparence possible dans le cadre de la procédure d'attribution du marché litigieux et qu'elle a neutralisé ainsi l'avantage compétitif dont pouvait disposer le contractant en place.

117 La défenderesse conteste le fait qu'elle n'ait pas fourni aux soumissionnaires toutes les informations pertinentes. Les informations techniques requises dans le cahier des charges auraient été complétées par les informations figurant sur les CD 1 et CD 2 et la liste d'inventaire aurait permis aux soumissionnaires d'avoir une parfaite connaissance du fonctionnement de CORDIS dans le passé, en leur permettant précisément d'être en mesure de proposer utilement une offre pour l'avenir.

118 À la suite d'une question du Tribunal posée au cours de l'audience quant à la raison pour laquelle la Commission n'avait pas mis à la disposition des candidats toutes les informations techniques dès le début de la procédure d'appel d'offres, la défenderesse a expliqué que, au moment du lancement de l'appel d'offres en cause, les documents explicatifs n'étaient pas encore tous prêts. Partant, ces documents techniques n'auraient été mis à la disposition des soumissionnaires potentiels qu'au fur et à mesure de l'avancement des travaux de préparation.

c) Sur l'impact de la prise de connaissance tardive par la requérante de certaines informations essentielles sur le contenu de son offre

119 En réponse à une question du Tribunal, la requérante a précisé que, dans la mesure où les informations qui lui ont été transmises par la Commission l'ont été au fur et à mesure du déroulement de la procédure d'appel d'offres, elle n'avait disposé que d'un mois pour élaborer son

offre initiale. Étant donné que l'organisation des procédures informatiques envisagées en aurait été bouleversée, le calcul du prix de son offre n'aurait pu être opéré que de manière approximative. La requérante n'aurait notamment pas disposé de suffisamment de temps pour déterminer toutes les conséquences de l'acquisition du logiciel Autonomy. Elle explique que, dans l'incertitude, la marge de sécurité a été évaluée trop largement, ce qui a nui à la compétitivité de son offre en ce qui concerne le prix. La requérante aurait ainsi dû intégrer dans son offre une prime de risque de 15 à 20 %.

120 Au cours de l'audience, le Tribunal a interrogé la requérante sur sa méthode de calcul de la prime de risque de 15 à 20 %. Elle a répondu qu'il s'avérait difficile d'aller plus loin dans la démonstration arithmétique, car il lui faudrait reconstituer les calculs de son offre dont la préparation avait déjà commencé dès le premier semestre de 2002. Malheureusement, certaines des personnes chargées de la préparation de son offre à l'époque auraient quitté la société entre-temps. De plus, elle a ajouté que les projets de son offre avaient été élaborés à partir de certaines données ou suppositions qui avaient évolué avec le temps.

121 La défenderesse conteste l'affirmation de la requérante selon laquelle celle-ci a dû prendre des dispositions dans son offre financière pour faire face aux défaillances du cahier des charges. La défenderesse estime que la requérante se montre incapable d'identifier ou de quantifier les coûts afférents aux prétendus efforts inutiles dont les coûts auraient été intégrés dans son offre.

2. Appréciation du Tribunal

a) Remarque liminaire

122 Le Tribunal rappelle l'importance particulière du principe d'égalité de traitement en matière de passation de marchés publics (voir points 71 et 72 ci-dessus). En effet, dans le cadre d'une telle procédure, la Commission est tenue de veiller, à chaque phase de la procédure, au respect de l'égalité de traitement et, par voie de conséquence, à l'égalité de chances de tous les soumissionnaires (voir arrêt du Tribunal du 17 mars 2005, AFCon Management Consultants e.a./Commission, T–160/03, Rec. p. II–981, point 75, et la jurisprudence citée).

123 En soutenant que la Commission a donné l'accès à certaines informations essentielles exclusivement au soumissionnaire retenu, la requérante fait valoir que cette dernière a violé le principe de non-discrimination des soumissionnaires.

124 Il ressort de la jurisprudence que le principe d'égalité de traitement implique une obligation de transparence afin de permettre de vérifier son respect (arrêts de la Cour du 18 juin 2002, HI, C–92/00, Rec. p. I–5553, point 45, et du 12 décembre 2002, Universale-Bau e.a., C–470/99, Rec. p. I–11617, point 91).

125 Le principe d'égalité de traitement entre les soumissionnaires, qui a pour objectif de favoriser le développement d'une concurrence saine et effective entre les entreprises participant à un marché public, impose que tous les soumissionnaires disposent des mêmes chances dans la formulation des termes de leurs offres et implique donc que celles-ci soient soumises aux mêmes conditions pour tous les compétiteurs (voir, en ce sens, arrêts de la Cour du 18 octobre 2001, SIAC Construction, C–19/00, Rec. p. I–7725, point 34, et Universale-Bau e.a., point 124 supra, point 93) .

126 Quant au principe de transparence, qui en constitue le corollaire, il a essentiellement pour but de garantir l'absence de risque de favoritisme et d'arbitraire de la part du pouvoir adjudicateur. Il implique que toutes les conditions et modalités de la procédure d'attribution soient formulées de manière claire, précise et univoque, dans l'avis de marché ou dans le cahier des charges (arrêt de la Cour du 29 avril 2004, Commission/CAS Succhi di Frutta, C–496/99 P, Rec. p. I–3801, points 109 à 111).

127 Le principe de transparence implique donc que toutes les informations techniques pertinentes pour la bonne compréhension de l'avis de marché ou du cahier des charges soient mises, dès que possible, à la disposition de l'ensemble des entreprises participant à un marché public, de façon, d'une part, à permettre à tous les soumissionnaires raisonnablement informés et normalement diligents d'en comprendre la portée exacte et de les interpréter de la même manière et, d'autre part, à mettre le pouvoir adjudicateur en mesure de vérifier effectivement si les offres des soumissionnaires correspondent aux critères régissant le marché en cause.

128 Il convient d'apprécier le deuxième moyen à la lumière des principes énoncés ci-dessus.

b) Sur la prétendue inégalité de traitement de la requérante par rapport au soumissionnaire retenu en ce qui concerne l'accès à certaines informations essentielles

Généralités

129 Tout d'abord, il y a lieu de rappeler que la requérante reproche à la Commission d'avoir enfreint le principe d'égalité de traitement en raison d'un prétendu retard dans la mise à la disposition, aux soumissionnaires autres que le soumissionnaire retenu, contractant en place à l'époque, de certaines informations techniques. Eu égard à la jurisprudence citée aux points 71 et 72 ci-dessus ainsi qu'aux points 124 à 126 ci-dessus, la Commission aurait porté atteinte à l'égalité des chances de l'ensemble des soumissionnaires ainsi qu'au principe de transparence en tant que corollaire du principe d'égalité de traitement.

130 Ensuite, il y a lieu de constater que, à la supposer avérée, une telle atteinte à l'égalité des chances et au principe de transparence constituerait une irrégularité de la procédure précontentieuse portant atteinte au droit à l'information des parties concernées. Or, conformément à une jurisprudence constante, une irrégularité procédurale ne peut entraîner l'annulation de la décision en cause que s'il est établi que, en l'absence de cette irrégularité, la procédure administrative aurait pu aboutir à un résultat différent dans l'hypothèse où la requérante aurait eu accès aux informations en question dès le début de la procédure et s'il existait, à cet égard, une chance – même réduite – que la requérante eût pu faire aboutir la procédure administrative à un résultat différent (voir arrêt de la Cour du 2 octobre 2003, Thyssen Stahl/Commission, C–194/99 P, Rec. p. I–10821, point 31, et la jurisprudence citée, et arrêt du Tribunal du 30 septembre 2003, Atlantic Container Line e.a./Commission, T–191/98 et T–212/98 à T–214/98, Rec. p. II–3275, points 340 et 430).

131 À cet égard, le Tribunal examinera, tout d'abord, si l'inégalité de traitement alléguée consistant en un retard dans la transmission de certaines informations techniques aux soumissionnaires autres que le soumissionnaire retenu constitue, en tant que telle, une irrégularité de la procédure en ce que des informations effectivement utiles à l'élaboration des offres n'auraient pas été mises, dès que possible, à la disposition de l'ensemble des soumissionnaires.

132 Dans le cas où une telle irrégularité serait établie, le Tribunal examinera, ensuite, si, en l'absence de celle-ci, la procédure aurait pu aboutir à un résultat différent. Dans cette perspective, une telle irrégularité ne saurait constituer une violation de l'égalité des chances des soumissionnaires que dans la mesure où il résulte de façon plausible et suffisamment circonstanciée des explications fournies par la requérante que le résultat de la procédure aurait pu être différent à son égard.

Sur le caractère tardif de la mise à disposition, par la Commission, de certaines informations techniques

133 Le Tribunal constate, tout d'abord, que le soumissionnaire retenu avait, avant l'ouverture de la procédure d'appel d'offres, pleine connaissance de toutes les spécifications techniques des bases de données de CORDIS, puisqu'il était le contractant en place à l'époque.

134 D'ailleurs, il n'est pas contesté que la Commission disposait des spécifications techniques des bases de données de CORDIS dès avant l'ouverture de la procédure d'appel d'offres, à savoir à la fin de novembre 2002.

135 La défenderesse ne conteste pas non plus qu'elle n'a mis à la disposition de tous les soumissionnaires potentiels les spécifications techniques des bases de données de CORDIS que progressivement au cours de la procédure d'appel d'offres.

136 En effet, la Commission n'a fourni une partie des spécifications techniques des bases de données de CORDIS qu'un mois après l'ouverture de la procédure d'appel d'offres, le 20 décembre 2002, à travers le CD 2, et elle n'a publié d'autres informations techniques que le 5 février 2003, à travers la liste d'inventaire, soit seulement six semaines avant l'expiration du délai prévu pour la soumission des offres.

137 La justification fournie par la défenderesse, selon laquelle elle n'avait pas encore préparé toutes les informations au début de la procédure d'appel d'offres, doit être rejetée dès lors que, afin que tous

les soumissionnaires potentiels disposent des mêmes chances, elle aurait pu attendre d'être en mesure de mettre toutes les informations pertinentes à la disposition de l'ensemble des soumissionnaires potentiels pour entamer ladite procédure d'appel d'offres.

138 Le Tribunal constate, ensuite, que le soumissionnaire retenu a pu, dès le début de la procédure d'appel d'offres, avoir pleine connaissance du fonctionnement du logiciel Autonomy grâce à l'installation d'une version d'essai dans la version de CORDIS en vigueur à l'époque. En outre, le soumissionnaire retenu a également préparé l'acquisition du logiciel Autonomy pour la Commission, acquisition qui a eu lieu au cours de la procédure d'appel d'offres. Ainsi, il est fort probable que le soumissionnaire retenu ait été pleinement informé de ladite acquisition dès son origine.

139 Par ailleurs, la défenderesse ne conteste pas que les autres soumissionnaires ont seulement été informés de ladite acquisition par le biais de la publication du document intitulé « Superquest – Implementation and Release 6 and beyond », le 18 février 2002, soit uniquement un mois avant l'expiration du délai prévu pour la soumission des offres.

140 Partant, le Tribunal relève que la Commission n'a mis à la disposition de l'ensemble des soumissionnaires potentiels les informations relatives aux spécifications techniques des bases de données de CORDIS ainsi que les informations relatives à son acquisition du logiciel Autonomy qu'au fur et à mesure de la procédure d'appel d'offres, alors que le soumissionnaire retenu disposait de ces informations dès le début de ladite procédure d'appel d'offres, compte tenu du fait qu'il était le contractant en place.

Sur la question de la neutralisation des avantages du soumissionnaire retenu

141 Le fait que tous les soumissionnaires, à l'exception du soumissionnaire retenu, contractant en place, n'ont disposé de certaines informations qu'au fur et à mesure de la procédure d'appel d'offres semble, à première vue, indiquer que la Commission a pu éventuellement violer, au début de la procédure, à savoir le 20 novembre 2002, le principe d'égalité de traitement des soumissionnaires potentiels prévu à l'article 126 des modalités d'exécution I et à l'article 3, paragraphe 2, de la directive 92/50, en vigueur à l'époque.

142 Cependant, il convient de prendre en considération le fait que la connaissance exclusive par le soumissionnaire retenu de certaines informations n'a pas été la conséquence d'un comportement critiquable du pouvoir adjudicateur. Un tel avantage est inhérent – et donc inévitable – à toute situation où un pouvoir adjudicateur se décide à déclencher une procédure d'appel d'offres pour la passation d'un marché qui a été exécuté, jusque-là, par un seul contractant. Cette circonstance constitue en quelque sorte un « avantage de facto inhérent ».

143 À cet égard, le Tribunal rappelle que la Cour a jugé que la directive 92/50 ainsi que les autres directives relatives à la passation des marchés publics s'opposaient à une règle nationale selon laquelle n'était pas admise la remise d'une offre pour un marché public de travaux, de fournitures ou de services par un soumissionnaire qui avait été chargé de la recherche, de l'expérimentation, de l'étude ou du développement de ces travaux, de ces fournitures ou de ces services, sans que lui soit laissée la possibilité de faire la preuve que, dans les circonstances de l'espèce, l'expérience qu'il avait ainsi acquise n'avait pu fausser la concurrence (arrêt de la Cour du 3 mars 2005, Fabricom, C–21/03 et C–34/03, Rec. p. I–1559, point 36).

144 Si, selon ledit arrêt, la connaissance extraordinaire acquise par un soumissionnaire grâce à des travaux liés directement à la préparation de la procédure de passation de marché en cause par le pouvoir adjudicateur lui-même ne pouvait donc entraîner son exclusion automatique de ladite procédure, sa participation à celle-ci devrait donc être d'autant moins exclue lorsque cette connaissance extraordinaire tient au seul fait de la participation, en collaboration avec le pouvoir adjudicateur, à la préparation de l'appel d'offres.

145 Il s'ensuit que le principe d'égalité de traitement des soumissionnaires n'exige pas de contraindre le pouvoir adjudicateur à neutraliser de façon absolue l'ensemble des avantages dont bénéficie un tel soumissionnaire.

146 Admettre qu'il conviendrait de neutraliser, à tous les égards, les avantages d'un contractant en place entraînerait, en outre, des conséquences allant à l'encontre de l'intérêt du service de l'institution adjudicataire dans la mesure où une telle neutralisation engendrerait pour elle des efforts coûteux supplémentaires.

147 Néanmoins, la mise en œuvre appropriée du principe d'égalité de traitement requiert, dans ce contexte particulier, une mise en balance des intérêts en cause.

148 Ainsi, afin de préserver autant que possible le principe d'égalité de traitement des soumissionnaires et d'éviter des conséquences contraires à l'intérêt du service de l'institution adjudicataire, une neutralisation des possibles avantages du contractant en place doit tout de même être effectuée, mais uniquement dans la mesure où celle-ci est techniquement facile à réaliser, lorsqu'elle est économiquement acceptable et lorsqu'elle ne viole pas les droits de celui-ci.

149 Quant à la mise en balance des intérêts en cause d'un point de vue économique, le Tribunal rappelle que le principe d'égalité de traitement entre les soumissionnaires résulte des dispositions de la section 1 (articles 56 à 64 bis) du titre IV du règlement financier I, applicable lors de la publication de l'avis de l'appel d'offres en cause. Or, l'article 2 du règlement financier I, qui fait partie de ceux consacrant les principes généraux dans ledit règlement, énonce que « [l]es crédits budgétaires doivent être utilisés conformément à des principes d'économie et de bonne gestion financière ». D'ailleurs, selon l'article 248, paragraphe 2, CE, la bonne gestion financière constitue une règle générale de l'organisation communautaire reconnue par le traité, dont la Cour des comptes des Communautés européennes s'assure du respect.

150 En conséquence, quant à la régularité de la procédure d'appel d'offres en cause, il y a lieu de relever, que, en l'espèce, dès lors que la Commission disposait des informations complètes sur les spécifications techniques des bases de données de CORDIS dès le début de ladite procédure, il lui était aisément possible de les mettre à la disposition de tous les soumissionnaires sous la forme d'une annexe au cahier des charges. Force est de constater, en outre, qu'il était également facile d'informer l'ensemble des soumissionnaires potentiels de l'acquisition du logiciel Autonomy immédiatement après qu'elle ait eu lieu, à savoir à la fin de décembre 2002.

Sur la pertinence des informations mises à disposition tardivement par la Commission pour les offres concernant le marché litigieux

151 Le Tribunal rappelle que, s'il s'avérait que les informations soumises tardivement par la Commission aux soumissionnaires autres que le soumissionnaire retenu n'étaient pas pertinentes pour l'élaboration des offres concernant le marché litigieux, un retard dans leur communication ne représenterait, en tout état de cause, pas un avantage pour le soumissionnaire retenu, contractant en place à l'époque, et ne serait donc pas constitutif d'un vice de procédure constituant une violation du principe d'égalité de traitement des soumissionnaires, ainsi que l'a affirmé la requérante.

– Sur la pertinence des informations relatives à l'acquisition du logiciel Autonomy

152 S'agissant de la pertinence des informations relatives à l'acquisition du logiciel Autonomy, le Tribunal constate qu'il découle de la description du marché litigieux figurant dans le résumé effectué au point 4 du volume A du cahier des charges ainsi que des explications fournies par la défenderesse données au Tribunal au cours de l'audience que les soumissionnaires pour le marché litigieux ne devaient soumettre que des données ayant vocation à former le contenu de la nouvelle version des services d'appui pour CORDIS. Cela n'englobe pas nécessairement des fonctions d'interrogation dudit contenu par des utilisateurs finaux de la nouvelle version de CORDIS.

153 Même si la formulation retenue au point 4 du volume A du cahier des charges (« fournir le contenu, c'est-à-dire […] gérer l'interface utilisateur et la navigation dans l'ensemble de l'espace d'information CORDIS ») peut être interprétée en ce sens que les soumissionnaires pour le marché litigieux auraient dû également prévoir, dans leurs offres, l'élaboration d'une proposition d'outils de recherche dans le contenu de la nouvelle version de CORDIS, il n'en reste pas moins que le cahier des charges n'impose pas l'utilisation d'un outil de recherche spécifique, et notamment pas celle du logiciel Autonomy.

154 Il s'ensuit que le simple fait que la Commission avait acheté, au cours de la procédure d'appel d'offres, le logiciel Autonomy ne l'a pas conduite à évaluer de façon moins favorable une offre proposant un outil de recherche différent.

155 À titre surabondant, ce constat est d'ailleurs confirmé par la circonstance que, lors de l'appréciation du critère d'attribution n° 1, le comité d'évaluation a considéré, d'une part, que l'offre de la requérante était « excellente » en ce qui concerne la « présentation de la classification sous le gestionnaire de contenu » et, d'autre part, que l'offre du soumissionnaire retenu était « bien décrite

et prometteuse » en ce qui concerne la « classification et l'approche d'indexation (par exemple Autonomy en ce qui concerne la recherche et le renvoi) ». Ces qualifications démontrent que le comité d'évaluation a estimé les offres de la requérante et du soumissionnaire retenu équivalentes en ce qui concerne les outils de classification proposés. Par conséquent, la connaissance, tout au long de la procédure d'appel d'offres, de l'acquisition du logiciel Autonomy par la Commission n'a pas pu avoir une quelconque importance dans l'évaluation des offres de la requérante et du soumissionnaire retenu.

156 Étant donné que le cahier des charges n'impose pas l'utilisation d'un outil de classification spécifique, notamment pas celle du logiciel Autonomy, le Tribunal estime que le grief tiré de la mise à disposition tardive des informations relatives à l'acquisition du logiciel Autonomy ne paraît pas être suffisamment étayé pour rendre plausible le fait que la connaissance de l'acquisition du logiciel Autonomy par la Commission aurait pu constituer un avantage pour le soumissionnaire retenu, contractant en place, quant à une soumission pour le marché litigieux.

– Sur la pertinence des informations relatives aux spécifications techniques des bases de données de CORDIS

157 S'agissant de la pertinence des informations relatives aux spécifications techniques des bases de données de CORDIS fournies aux soumissionnaires potentiels, le Tribunal relève que la requérante considère que le contenu de la liste d'inventaire n'est pas pertinent pour l'élaboration d'une offre pour le marché litigieux et qu'elle affirme que ni le CD 1 ni le CD 2 ne contenaient des informations précises et utilisables.

158 À cet égard, il y a lieu de constater que, dans la mesure où la requérante admet l'absence d'utilité des informations relatives aux spécifications techniques des bases de données de CORDIS pour l'élaboration des offres, elle ne saurait se prévaloir du caractère tardif de leur communication par la Commission. En effet, la requérante reconnaît ainsi que les spécifications techniques soumises tardivement aux soumissionnaires potentiels n'étaient pas pertinentes pour l'élaboration d'une offre pour le marché litigieux.

159 Ensuite, pour autant que l'argumentation de la requérante tende à dénoncer la prétendue absence de communication d'une autre catégorie d'informations techniques, à savoir des informations complémentaires aux informations fournies tardivement aux soumissionnaires potentiels, force est de constater qu'elle n'a pas été en mesure de préciser de quelles informations précises il s'agissait et en quoi leur absence de communication aurait constitué un avantage pour le soumissionnaire retenu.

160 En revanche, le Tribunal relève que la défenderesse affirme que les informations techniques contenues dans les CD 1 et CD 2 servent généralement à compléter les informations techniques déjà incluses dans le cahier des charges et que la liste d'inventaire permettait aux soumissionnaires d'avoir une parfaite connaissance du fonctionnement de CORDIS dans le passé, précisément pour être en mesure de proposer une offre pour l'avenir.

161 Le Tribunal estime que la défenderesse admet ainsi que les informations techniques communiquées tardivement aux soumissionnaires auraient pu constituer une valeur ajoutée pour toutes les offres concernant les services d'appui pour CORDIS, y compris les offres pour le marché litigieux.

162 Partant, le Tribunal constate qu'il n'est pas exclu que les informations relatives aux spécifications techniques des bases de données de CORDIS, auxquelles le soumissionnaire retenu a eu un temps exclusivement accès en tant que contractant en place à l'époque aient pu constituer, au moins partiellement, un avantage injustifié d'un des soumissionnaires potentiels.

163 Par conséquent, étant donné que la défenderesse admet que les spécifications techniques mises tardivement à la disposition des soumissionnaires aient pu constituer une valeur ajoutée pour les offres concernant le marché litigieux, le Tribunal considère qu'il n'est pas exclu que le comportement contesté de la Commission ait pu constituer un avantage pour le contractant en place quant à une soumission pour le marché litigieux.

164 Dès lors, en ne communiquant pas, dès que possible, certaines spécifications techniques à l'ensemble des soumissionnaires, la Commission a commis une irrégularité procédurale en méconnaissant le droit d'être informé de la requérante.

165 Partant, il y a lieu de vérifier si cette irrégularité a porté atteinte à l'égalité des chances des soumissionnaires, en ce que, en l'absence de cette irrégularité, la procédure d'appel d'offres en cause aurait pu éventuellement aboutir à une attribution du marché litigieux à la requérante.

166 Tel ne serait cependant pas le cas si, malgré le fait que la Commission n'a pas informé tous les soumissionnaires, dès le début de la procédure d'appel d'offres, de la totalité des spécifications techniques de l'ancienne version de CORDIS, il s'avérait que les informations ainsi retenues n'avaient pas été pertinentes pour l'offre de la requérante.

Sur la pertinence des informations mises à disposition tardivement par la Commission pour l'offre de la requérante

– Sur l'influence du retard dans la mise à disposition de certaines informations techniques sur la qualité de l'offre de la requérante

167 À la lumière de ce qui précède, le Tribunal estime probable que, ainsi que la requérante l'a affirmé, le retard dans la communication des informations visées aux points 133 à 140 ci-dessus ait pu avoir occasionné pour l'ensemble des soumissionnaires, à l'exception du soumissionnaire retenu, d'éventuels efforts inutiles et une perte de temps et que cela a pu influer sur la qualité de leurs offres.

168 Nonobstant ce constat de principe, il y a lieu de relever que, dans le cas d'espèce, en tout état de cause, même la pleine connaissance des informations en cause n'aurait pas eu une influence décisive sur l'appréciation d'ensemble de l'offre de la requérante.

169 Quant à l'influence sur la qualité de son offre du retard dans la mise à disposition par la Commission des informations techniques, la requérante fait valoir que la connaissance desdites informations aurait amélioré la valeur qualitative de son offre au regard des critères d'attribution n^{os} 1 à 3 décrits au cahier des charges.

170 À cet égard, le Tribunal relève que, ainsi qu'il ressort du tableau figurant au point 3.3 du volume A du cahier des charges, le nombre maximal de points pouvant être obtenus au titre desdits critères était de 80 (soit 35 + 25 + 20 points).

171 Il ressort du tableau figurant dans le rapport du comité d'évaluation que la formule mathématique utilisée afin de déterminer le « rapport coût-efficacité le plus avantageux » au sens du point 3.3 du volume A du cahier des charges et de calculer le rapport qualité-prix des différentes offres a été la suivante :

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172 Par application de ladite formule à l'offre soumise par la requérante, c'est-à-dire en y insérant le prix total dont était assortie l'offre de la requérante (21 198 879 euros), ainsi que l'addition, d'une part, du maximum de points pouvant être atteints au titre des critères n^{os} 1 à 3 (à savoir les critères correspondant aux éléments pour lesquels la qualité de l'offre de la requérante avait prétendument été altérée par la communication tardive par la Commission des informations techniques) et, d'autre part, des 14 points que l'offre de la requérante a effectivement obtenus au titre du critère n° 4 (voir point 30 ci-dessus), on parvient au rapport suivant :

$$\frac{94 \times 1\,000\,000}{21\,198\,870} = 4{,}43$$

173 Étant donné que le soumissionnaire retenu a obtenu un rapport-prix de 4,65, ce calcul démontre que, même si la requérante avait pu, dès le début de la procédure d'appel d'offres, élaborer son offre en pleine connaissance des informations techniques qui ne lui ont été communiquées que tardivement, et même si, à la suite de cela, elle avait obtenu le maximum de points au titre des critères qualitatifs n^{os} 1 à 3 (c'est-à-dire 80 points) ainsi que les 14 points obtenus au titre du critère n° 4, le rapport qualité-prix de son offre aurait été, en tout état de cause, moins bon que celui du soumissionnaire retenu, car le prix de l'offre de la requérante était relativement élevé.

174 Partant, le Tribunal constate qu'il est patent que le comportement de la Commission, aussi critiquable qu'il ait été, n'a, en tout état de cause, pu exercer en l'espèce une influence sur l'attribution du marché litigieux au soumissionnaire retenu que dans la mesure où le prix de l'offre de la requérante avait été effectivement influencé par la communication tardive des informations techniques.

– Sur l'influence du retard dans la mise à disposition de certaines informations techniques sur le prix de l'offre de la requérante

175 Le Tribunal note que la requérante n'a pas été en mesure, même à posteriori, d'exposer de façon précise le degré d'influence des efforts prétendument inutiles sur la détermination du prix de son offre. Elle se borne à affirmer de façon laconique que, si elle avait su qu'il était inutile de déployer de tels efforts, le prix de son offre aurait été de 10 à 15 % plus bas. Or, même en réponse aux questions précises posées à cet égard par le Tribunal au cours de l'audience, la requérante n'a pas été en mesure de soumettre au Tribunal le moindre élément permettant d'étayer cette affirmation.

176 Par conséquent, le Tribunal relève que, à défaut d'explications plausibles et suffisamment circonstanciées de la part de la requérante sur ce point, il n'est pas établi que l'irrégularité procédurale, consistant dans la communication tardive par la Commission des spécifications techniques des bases de donnés de CORDIS, ait pu avoir une répercussion sur le calcul du prix de l'offre de la requérante et, partant, qu'il ait pu constituer une violation de l'égalité des chances au détriment de la requérante.

177 Au vu de ce qui précède, le Tribunal considère que, s'il est vrai que la Commission a commis une irrégularité procédurale en ne communiquant pas à tous les soumissionnaires, dès le début de la procédure d'appel d'offres, la totalité des informations techniques relatives à l'ancienne version de CORDIS, cette irrégularité procédurale n'a pu, en l'espèce, conduire à un résultat différent de la procédure, étant donné qu'il est exclu que le comportement contesté de la Commission ait eu une influence décisive sur la qualité de l'offre de la requérante et que celle-ci n'a pas donné le moindre élément permettant de démontrer de façon plausible que ledit comportement de la Commission a effectivement conduit à une augmentation du prix de l'offre de la requérante et, par conséquent, que celle-ci aurait violé le principe d'égalité des chances au détriment de la requérante.

178 Partant, le deuxième moyen doit être rejeté.

C – Sur le troisième moyen, tiré de la non-conformité des critères de l'adjudication à ceux décrits dans le cahier des charges

1. Arguments des parties

179 La requérante estime que la Commission a modifié les critères d'attribution en accordant la même pondération au prix et à la qualité des offres au lieu d'utiliser une formule qui aurait fait primer la qualité sur le prix.

180 La requérante affirme qu'il aurait suffi d'accorder une pondération de 65 % à la qualité des offres pour que son offre soit retenue.

181 La pondération, retenue en l'espèce, à la fois pour la qualité et pour le prix des offres, l'a été, selon la requérante, en contradiction avec le point 3.3 du volume A du cahier des charges, aux termes duquel « [i]l convient de noter que l'évaluation des offres sera axée sur la qualité des services proposés ».

182 De plus, la requérante soutient que la Commission utilise régulièrement des formules accordant une importance différente à la qualité et au prix.

183 Enfin, la requérante affirme, en citant également des témoins, qu'un représentant de la Commission a confirmé, à la suite d'une question posée à cet égard au cours de la journée d'information du 7 janvier 2003, la prévalence des critères qualitatifs.

184 La défenderesse estime que la requérante se fonde sur une phrase du point 3.3 du volume A du cahier des charges, qui ne saurait être sortie de son contexte. En effet, la formulation invoquée par la requérante devrait être comprise uniquement à la lumière des seuils qualitatifs fixés.

185 La défenderesse constate que, même si une autre pondération que celle retenue avait été appliquée pour déterminer le « rapport coût-efficacité le plus avantageux », en tout état de cause, le résultat de l'évaluation comparative des offres de la requérante et du soumissionnaire retenu aurait été identique.

2. Appréciation du Tribunal

186 En ce qui concerne les critères d'attribution appliqués, il convient d'analyser les passages pertinents du volume A du cahier des charges, notamment le point 3.3 de celui-ci.

187 Le point 3.3 du cahier des charges est intitulé « Évaluation des offres – Critères d'attribution ». Ce point débute par une description générale des critères d'attribution, comme suit :

« Le marché sera attribué à l'offre qui présentera le rapport coût-efficacité le plus avantageux. Les critères d'attribution suivants seront appliqués :

– critères d'attribution qualitatifs ;

– prix. »

188 Ensuite, le texte précise la première phase de la procédure d'évaluation, dans les termes suivants (non souligné dans l'original) :

« *Dans un premier temps*, l'offre retenue sera évaluée en fonction des critères d'attribution *qualitatifs* ci-dessous et du coefficient de pondération de chaque critère. »

189 Cette phrase est suivie d'un tableau présentant les différents critères d'attribution qualitatifs et leurs coefficients de pondération respectifs. À la suite de ce tableau est énoncée la règle selon laquelle les offres qui n'atteignent pas le niveau minimal de qualité requis ne sont pas prises en compte pour l'attribution du marché.

190 Ces passages concernant l'évaluation des offres en fonction des critères d'attribution qualitatifs sont suivis d'un encadré, intitulé de façon très générale « Critères d'attribution » et ne contenant que la phrase suivante (souligné dans l'original) :

« *Le prix*, tel que défini dans le *scénario complet* pour chaque lot couvrant 48 mois d'activité, sans tenir compte du coût des options. »

191 C'est à la suite de cet encadré qu'un avant-dernier alinéa débute par la phrase sur laquelle se fonde la requérante. Cet alinéa se lit comme suit dans son ensemble :

« Il convient de noter que l'évaluation des offres sera axée sur la qualité des services proposés ; aussi les soumissionnaires doivent-ils fournir une offre détaillée […] de manière à obtenir le plus de points possible. »

192 Il y a lieu de relever qu'il ressort de l'économie de la présentation du point 3.3 du cahier des charges que l'évaluation comparative doit se faire, en principe, en deux phases :

– Tout d'abord, dans une première phase, il y a lieu de déterminer de façon chiffrée, pour chaque offre, grâce à l'attribution de points de pondération, le degré d'aptitude qualitative de l'offre. Dès lors qu'un minimum de points de qualité est requis, les critères d'attribution qualitatifs jouent le rôle d'une condicio sine qua non pour l'attribution finale du marché.

– Ensuite, dans une seconde phase, le facteur « prix » sera mis en relation avec le facteur « qualité » précédemment calculé, sans que le mode exact de calcul du rapport qualité-prix n'apparaisse dans le point 3.3.

193 Dès lors, force est de constater que les critères d'attribution qualitatifs jouent déjà, en tant que tels, un rôle primordial pour la présélection des offres susceptibles d'être retenues, c'est-à-dire avant même que la qualité d'une offre soit évaluée en rapport avec son prix.

194 Quant à l'interprétation de l'ensemble du point 3.3 du volume A du cahier des charges, le Tribunal

relève que ledit point du cahier des charges n'est pas clairement structuré. Cependant, il n'en découle pas que la Commission serait obligée d'utiliser, pour l'évaluation des offres, une formule qui ferait primer la qualité sur le prix.

195 La phrase du point 3.3 du volume A du cahier des charges qui est invoquée par la requérante doit s'interpréter, replacée dans son contexte, comme étant une simple accentuation de l'importance primordiale accordée au critère de qualité dans l'ensemble de la procédure, étant donné son rôle d'unique critère de présélection lors de la première phase de l'évaluation. En effet, dans cette première phase, les offres de qualité inférieure sont exclues sans que leur prix unitaire puisse être pris en considération.

196 De plus, le cahier des charges ne contient aucune indication relative à un éventuel rapport exact dans le calcul du rapport qualité-prix qui aurait pu fonder une quelconque attente des soumissionnaires quant à la pondération exacte qui devrait être respectivement accordée aux critères de qualité et de prix lors de la phase d'adjudication.

197 D'ailleurs, le Tribunal constate qu'une relation entre la qualité et le prix différente de celle qui a été retenue en l'espèce n'aurait pas pu changer le résultat de l'évaluation finale. En effet, une relation entre la qualité et le prix se traduit, en termes mathématiques, toujours par une fraction. Si l'on établit une relation d'ordre de grandeur entre deux fractions, celle-ci n'est aucunement modifiée par la multiplication de chacune des deux fractions par le même facteur, quel que soit le facteur choisi (règle du maintien de la relation d'ordre) :

$$\frac{\text{qualité A}}{\text{prix A}} \times \frac{\text{valeur qualité (par ex. 65)}}{\text{valeur prix (par ex. 35)}} > \frac{\text{qualité B}}{\text{prix B}} \times \frac{\text{valeur qualité (par ex. 65)}}{\text{valeur prix (par ex. 35)}}$$

198 Enfin, en ce qui concerne la prétendue confirmation d'une prévalence des critères qualitatifs dans l'évaluation des offres, au cours de la journée d'information du 7 janvier 2003, le Tribunal estime que cette affirmation de la requérante, même à la supposer avérée, ne saurait entacher la décision attaquée d'une quelconque illégalité.

199 En effet, à supposer même qu'il puisse être prouvé que les représentants de la Commission aient confirmé une prévalence des critères qualitatifs dans l'évaluation des offres, une telle déclaration n'aurait pas pu modifier le contenu du cahier des charges en tant que cadre juridique contraignant.

200 En effet, il résulte de la seconde phrase de l'article 99 du règlement financier II ainsi que de l'article 148, paragraphe 3, des modalités d'exécution II, en vigueur au moment de la journée d'information du 7 janvier 2003, qu'aucun contact avec les soumissionnaires potentiels ne peut conduire à une modification des termes de l'offre, notamment ceux du cahier des charges, lequel, dans le cas d'espèce, précise au point 3.3 que le marché sera attribué à l'offre qui présentera « le rapport coût-efficacité le plus avantageux ».

201 Partant, le Tribunal relève que la Commission, en accordant, dans le cadre de la dernière phase de la procédure d'adjudication, une même pondération au prix et à la qualité, n'a pas modifié les critères d'adjudication décrits au point 3.3 du cahier des charges.

202 Au vu de ce qui précède, le troisième moyen doit donc être rejeté.

D – Sur le quatrième moyen, tiré de l'application discriminatoire des critères d'attribution publiés au cahier des charges

1. Arguments des parties

203 La requérante affirme que la Commission n'a pas sélectionné l'offre qui présentait le meilleur rapport qualité-prix en utilisant le critère d'attribution n° 4, publié au point 3.3 du volume A du cahier des charges, pour atteindre l'objectif recherché. Ainsi, la Commission aurait utilisé les critères publiés de façon incomplète, donc de façon discriminatoire, et aurait avantagé le soumissionnaire retenu.

204 La requérante soutient que la Commission a évalué son offre financière pratiquement exclusivement par journées d'experts et qu'elle a omis d'apprécier la quantité et la qualité des ressources humaines. La requérante souligne que 90 % du marché litigieux consiste à mettre du

personnel à la disposition de la Commission. Or, le critère n° 4 imposerait à la Commission d'examiner son offre sous cet angle également et surtout les équipes d'experts ainsi proposées.

205 La requérante conteste l'argumentation de la défenderesse selon laquelle la qualité et l'expérience du personnel proposé ne sont pas prises en considération dans la phase d'adjudication, mais sont seulement examinées antérieurement, au cours de la phase de sélection des soumissionnaires. Elle prétend que, lors de la phase de sélection des soumissionnaires, c'est le personnel de la société et non le personnel proposé pour l'exécution du contrat envisagé qui est pris en considération.

206 La requérante réfute également l'argument, tiré d'un passage du point 3.2.2, sous a), du volume A du cahier des charges, sur lequel se fonde la défenderesse pour justifier le fait qu'elle n'a vérifié la compétence du personnel technique qu'au stade de la sélection des soumissionnaires. À cet égard, la requérante souligne que ledit passage figure dans un point du cahier des charges intitulé « Critères de sélection ». De plus, elle indique que ce passage contient une précision relative aux curriculum vitae du personnel demandé selon laquelle il est à noter que tous les soumissionnaires, et le cas échéant, les membres concernés du consortium, sont tenus de fournir la preuve qu'ils répondent à ces exigences, notamment par l'indication des titres d'études et de qualification professionnelle, en particulier, ceux du ou des responsables de la prestation de services. La logique de cette clause veut, selon la requérante, qu'il s'agisse des services fournis par la société de manière générale.

207 En se référant au point 2.3.2, sous f), du volume A du cahier des charges, la requérante constate qu'il y est explicitement demandé aux candidats d'insérer les curriculum vitae des experts proposés pour la réalisation du projet dans leur offre technique, c'est-à-dire dans la partie de l'offre qui fera l'objet d'une évaluation de la qualité, par opposition au point 2.3.1 du volume A du cahier des charges, intitulé « Informations administratives », lequel fait l'objet du processus de sélection.

208 De plus, en se référant, en particulier, aux points 4.3.2.3 et 4.3.2.4 du volume A du cahier des charges, la requérante conteste le fait que la Commission ait pu évaluer de manière objective et transparente si les candidats avaient, effectivement, en conformité notamment avec le point 4.3.2.4 du volume A du cahier des charges, proposé du personnel d'une qualité adéquate pour les tâches en cause en termes de qualifications et d'expérience appropriées et si nécessaire pour assurer un niveau adéquat de formation afin d'offrir un service de haute qualité pour chacune des tâches spécifiées, la Commission n'ayant pas soumis leurs curriculum vitae aux critères d'évaluation.

209 Selon la défenderesse, l'argumentation de la requérante est fondée sur une confusion entre les phases de sélection et d'attribution d'un marché public.

210 La défenderesse affirme que, en examinant les capacités du personnel proposé par les soumissionnaires uniquement dans le cadre de la phase de sélection des soumissionnaires, elle a agi en conformité avec les critères de sélection annoncés dans le cahier des charges et dans le respect de la distinction de principe qui y est opérée entre la phase de sélection des soumissionnaires et celle d'attribution du marché.

2. Appréciation du Tribunal

211 La requérante soutient que la Commission n'a pas appliqué les critères d'attribution publiés au volume A du cahier des charges, notamment le critère n° 4, puisque l'expérience et la qualification du personnel présenté par la requérante n'ont pas été évaluées dans le contexte des critères d'attribution qualitatifs.

212 La défenderesse ne conteste pas qu'elle n'a pas évalué la qualification du personnel présenté par la requérante dans le contexte des critères d'attribution qualitatifs, mais elle estime que le volume A du cahier des charges exclut que le pouvoir adjudicateur prenne en considération la qualité des ressources humaines proposées par les soumissionnaires dans le contexte des critères d'attribution qualitatifs.

213 Même s'il est vrai que, en principe, la qualité d'un service, à la différence, par exemple, de la qualité des fournitures, dépend en général surtout de la qualification du personnel employé, la légalité d'une passation de marché public de services doit néanmoins être appréciée au regard du cahier des charges de l'appel d'offres concerné. En effet, le cahier des charges est l'expression de la volonté du pouvoir adjudicateur, lequel choisit librement le mode d'évaluation de la qualité des offres d'un service dont il a besoin.

214 Partant, il convient d'analyser le volume A du cahier des charges à l'égard du mode de procéder choisi dans le cas d'espèce.

215 À cet égard, tout d'abord, le Tribunal relève qu'il y a lieu de rejeter l'argument de la requérante fondé sur des extraits du point 2 du volume A du cahier des charges, intitulé « Forme et contenu de l'offre ».

216 En effet, il ressort directement de l'intitulé des points du cahier des charges invoqués par la requérante, à savoir le point 2.2 (Soumission de l'offre) et le point 2.3 (Structure de l'offre), lequel inclut notamment le point 2.3.2 (Proposition technique) et le point 2.3.2, sous f), concernant l'exigence de preuve de la qualification du personnel spécialisé proposé, que ces passages du cahier des charges ne prévoient que des exigences purement formelles. Les passages invoqués par la requérante ne se réfèrent en aucun cas aux critères qualitatifs définis pour l'attribution de marché.

217 Ensuite, le Tribunal constate que les dispositions pertinentes pour le processus d'évaluation qualitative des offres ne se trouvent pas dans le point 2, mais dans le point 3 du volume A du cahier des charges, intitulé « Sélection de soumissionnaires et attribution du marché ».

218 Le troisième alinéa de l'introduction du point 3 du volume A du cahier des charges énonce :

« La procédure d'attribution du marché sera menée en trois étapes successives, comme décrit ci-dessous. Seules les offres répondant aux exigences d'une étape seront prises en considération à l'étape suivante.

– Exclusion de certains soumissionnaires conformément à l'article 29 de la directive 92/50 [...]

– Sélection de soumissionnaires par la vérification :

  – de leur compétences professionnelles et techniques,

  – de leur capacité économique et financière.

– Évaluation des offres : comparaison sur la base des critères d'attribution. »

219 Le processus de l'attribution du marché contient donc deux phases de présélection des soumissionnaires et une phase de comparaison des offres sur la base des critères qualitatifs.

220 La première présélection des soumissionnaires est effectuée sur la base des motifs d'exclusion prévus aux articles 93 et 94 du règlement financier II, en vigueur au moment de l'évaluation des offres, par exemple, pour faute grave en matière professionnelle ou manquement aux obligations relatives au paiement des cotisations de sécurité sociale.

221 La seconde présélection des soumissionnaires est effectuée selon, notamment, la compétence professionnelle et technique d'un soumissionnaire telle qu'elle ressort principalement de la qualification et de l'expérience du personnel spécialisé proposé. Au point 3.2.2, sous a), du cahier des charges, intitulé « Compétence technique et professionnelle », sont précisées, notamment, les exigences décisives en ce qui concerne les personnes qui sont en charge de l'exécution des services offerts (par exemple le nombre de personnes, les titres d'études, la qualité de l'équipe, le mode de travail à temps complet ou partiel).

222 Or, c'est afin de permettre de tels examens de présélection que le point 2.3.2, sous f), du volume A du cahier des charges, sur lequel se fonde la requérante, exige que l'offre technique contienne aussi les preuves des qualifications du personnel, sans qu'il soit besoin, à un stade antérieur, d'entrer dans une analyse substantielle de ces éléments.

223 Après ces deux phases de présélection s'effectue l'évaluation comparative des offres restantes avec pour objectif de choisir l'offre présentant « le rapport coût-efficacité le plus avantageux », tel que prévu au point 3.3 du volume A, premier alinéa du cahier des charges.

224 L'efficacité en termes de qualité, est, à ce stade de la procédure, appréciée sur la base des critères d'attribution qualitatifs, parmi lesquels figure le critère n° 4, dénommé « Qualité du calendrier proposé, de la gestion des contrats et du contrôle (dispositions proposées pour fournir à temps les

produits requis et pour assurer le respect des objectifs, des délais et de la qualité) ».

225 Le Tribunal estime dès lors que la Commission a pris en considération, en parfaite conformité avec le point 3.2 du volume A du cahier des charges, l'expérience et la qualification du personnel présenté par la requérante dans le cadre de la seconde phase de présélection des soumissionnaires.

226 Le reproche de la requérante, selon lequel la Commission aurait dû apprécier la quantité et la qualité des ressources humaines offertes au cours de l'évaluation qualitative, doit être rejeté, dès lors que le cahier des charges n'exige pas que la Commission prenne en considération l'expérience et la qualification du personnel présenté par la requérante en dehors du contexte de la seconde phase de présélection des soumissionnaires.

227 Partant, la Commission n'a pas utilisé de façon discriminatoire les critères d'adjudication publiés dans le cahier des charges.

228 Au vu de ce qui précède, le quatrième moyen doit être rejeté.

III – Sur le deuxième chef de conclusions

229 En ce qui concerne le deuxième chef de conclusions de la requête, le Tribunal rappelle que, aux termes de l'article 21, premier alinéa, du statut de la Cour de justice, applicable à la procédure devant le Tribunal conformément à l'article 53, premier alinéa, du même statut, ainsi qu'aux termes de l'article 44, paragraphe 1, sous c), du règlement de procédure, toute requête doit contenir notamment un exposé sommaire des moyens invoqués. Ces indications doivent être suffisamment claires et précises pour permettre à la partie défenderesse de préparer sa défense ou au Tribunal de statuer sur le recours, le cas échéant, sans autre information à l'appui. Afin de garantir la sécurité juridique et une bonne administration de la justice, il faut, pour qu'un recours soit recevable, que les éléments essentiels de fait et de droit sur lesquels il se fonde ressortent, à tout le moins sommairement, mais d'une façon cohérente et compréhensible, du texte de la requête elle-même (ordonnance du Tribunal du 29 novembre 1993, Koelman/Commission, T–56/92, Rec. p. II–1267, point 21 ; arrêts du Tribunal du 6 mai 1997, Guérin automobiles/Commission, T–195/95, Rec. p. II–679, point 20, et du 25 mai 2004, Distilleria Palma/Commission, T–154/01, Rec. p. II–1493, point 58).

230 De plus, selon l'article 48, paragraphe 2, du règlement de procédure, la production de nouveaux moyens en cours d'instance est interdite à moins que ces moyens ne se fondent sur des éléments de droit et de fait qui se sont révélés pendant la procédure.

231 En faisant valoir qu'elle veut se réserver « tous autres droits, voies, moyens et actions », la requérante indique uniquement qu'elle entend se réserver la possibilité d'exercer d'autres recours. Or, force est de constater que cette formule, qui ne trouve aucune précision dans la requête, ne remplit aucunement les conditions exigées par les dispositions suscitées, ni quant au type de recours ni quant aux éléments requis. En effet, la requérante ne précise aucunement la nature du recours qu'elle compte intenter et n'apporte aucun élément susceptible de fonder ce recours.

232 Partant, le deuxième chef de conclusions de la requête est irrecevable.

233 Il découle de ce qui précède que les quatre moyens formulés à l'appui du premier chef de conclusions ne sont pas fondés et que le deuxième chef de conclusions est irrecevable.

234 Partant, le recours doit être rejeté dans son ensemble.

Sur les dépens

235 Aux termes de l'article 87, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La requérante ayant succombé, il y a lieu de la condamner aux dépens, conformément aux conclusions de la Commission.

Par ces motifs,

LE TRIBUNAL (troisième chambre)

déclare et arrête :

1) Le recours est rejeté.

2) European Service Network (ESN) SA est condamnée aux dépens

M. Jaeger J. Azizi E. Cremona

Ainsi prononcé en audience publique à Luxembourg, le 12 mars 2008.

Le greffier Le président

E. Coulon M. Jaeger

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– Sur la pertinence des informations relatives à l'acquisition du logiciel Autonomy
– Sur la pertinence des informations relatives aux spécifications techniques des bases de données de CORDIS
Sur la pertinence des informations mises à disposition tardivement par la Commission pour l'offre de la requérante
– Sur l'influence du retard dans la mise à disposition de certaines informations techniques sur la qualité de l'offre de la requérante
– Sur l'influence du retard dans la mise à disposition de certaines informations techniques sur le prix de l'offre de la requérante
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1. Arguments des parties
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D – Sur le quatrième moyen, tiré de l'application discriminatoire des critères d'attribution publiés au cahier des charges
1. Arguments des parties
2. Appréciation du Tribunal
III – Sur le deuxième chef de conclusions

Sur les dépens

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* Langue de procédure : le français.

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Notice for the OJ

Action brought on 29 September 2003 by European Service Network against the Commission of the European Communities

(Case T-332/03)

Language of the case: French

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 29 September 2003 by European Service Network, established in Brussels, represented by René Steichen, lawyer, with an address for service in Luxembourg.

The applicant claims that the Court should:

(annul Invitation to tender ENTR/02/055 (CORDIS (Lot 1;

(order the Commission to pay the costs.

Pleas in law and main arguments:

The applicant submitted a tender pursuant to lot 1 of Invitation to tender ENTR/02/055 (CORDIS. The applicant was not successful.

The applicant contests the award of the contract to the successful tenderer. According to the applicant, the Commission did not comply with the principle of equal treatment of tenderers or the rule of transparency in the tendering procedure.

The applicant claims, first, that the successful tenderer received favourable financial treatment, to the detriment of the other tenderers. The applicant also alleges that the successful tenderer had privileged access to essential information. The applicant alleges in particular that the other tenderers did not have access to certain essential technical information on the current status of the database for the CORDIS project.

The applicant also submits that the criteria used in the award of the tender do not conform to those laid down in the contract documents and that the Commission applied in a discriminatory manner the criteria published in the contract documents for the selection of the tender giving the best quality/price ratio.

_____

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JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
17 March 2005 (1)

(Tacis Programme – Invitation to tender – Irregularities in the tendering procedure – Action for damages)

In Case T-160/03,

AFCon Management Consultants, established in Bray (Ireland),

Patrick Mc Mullin, resident in Bray,

Seamus O'Grady, resident in Bray,

represented by B. O'Connor, solicitor, and I. Carreño, lawyer,

applicants,

v

Commission of the European Communities, represented by J. Enegren and F. Hoffmeister, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for compensation for the damage allegedly suffered as a result of irregularities in the tendering procedure for a project financed by the Tacis programme ('Project FDRUS 9902 – Agricultural extension services in South Russia'),

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2004,

gives the following

Judgment

Facts

1
AFCon Management Consultants ('AFCon') is a consultancy company specialising in agricultural projects in countries whose economies are in transition. Mr Mc Mullin and Mr O'Grady are the directors, shareholders and founding members of the company (together with AFCon 'the applicants').

2
On 28 May 1999, the Commission launched a restrictive tender procedure within the Tacis programme for the supply of technical assistance services, entitled 'Agricultural Extension Services in South Russia' reference FDRUS 9902 ('the tender at issue').

3
On 29 July 1999, the evaluation committee drew up a list of ten companies from the 21 firms which had expressed interest in that call for tenders. The ten companies were then invited to submit a tender.

4
On 16 and 17 December 1999, the evaluation committee met to evaluate the eight tenders received ('the first evaluation'). The committee considered the tender of the GFA – Gesellschaft für Agrarprojekte mbH ('GFA-Agrar') and Stoas Agri-projects Foundation ('Stoas') consortium to be the best. AFCon's tender came in second place.

5
The Commission subsequently discovered that a conflict of interests existed as between a member of the evaluation committee and the GFA-Agrar and Stoas consortium ('GFA'). That member, Mr A, was employed by Agriment International BV, a subsidiary of Stoas. The Commission ended its association with Mr A and informed him that it would no longer require his services.

6
Because of that conflict of interests, the Commission, on 3 March 2000, decided to cancel the first evaluation and to appoint a committee of new members to carry out a second evaluation. The Commission informed the tenderers of that decision by letter of 28 March 2000.

7
On 15 and 16 May 2000, the evaluation committee carried out a second tender evaluation ('the second evaluation'). At the end of that evaluation, GFA's tender was ranked first. GFA's technical proposal scored 72.69 % (third place); its financial proposal was EUR 2 131 870 (first place). AFCon's tender was ranked second with a technical proposal scoring 75.32 % (first place) and a financial proposal of EUR 2 499 750 (sixth place).

8
In August 2000, the Commission awarded the tender to GFA. It informed AFCon of that by letter of 17 August 2000.

9
On 9 October 2000, AFCon complained to the Commission that the tender procedure had been mismanaged. It maintained that GFA's financial proposal was below the market rate. The Commission rejected that complaint on 9 November 2000.

10
By letters of 18 December 2000 and 31 January 2001, AFCon alleged that GFA had infringed the tendering rules. By letter of 28 February 2001, the Commission rejected that allegation.

11
By letter of 15 March 2001, AFCon repeated that GFA's proposal was in breach of the procedure for the award of Tacis contracts. The Commission did not reply to that letter.

12
On 15 May 2001, AFCon made a complaint to the European Ombudsman. According to that complaint:

– GFA's financial proposal was in breach of the tendering rules (first complaint);

– having discovered a conflict of interests, the Commission failed to take the measures required by the rules governing the award of contracts (second complaint);

– the Commission infringed the tendering rules by allowing the successful tenderer to replace the majority of its long-term experts by other persons within weeks of the signature of the contract (third complaint).

13
In his decision of 22 April 2002 (Decision 834/2001/GG), the Ombudsman held that only the first complaint was well founded. In that regard he stated:

'It is good administrative practice in tender procedures for the administration to adhere to the rules established for these procedures. … By allowing tenderers to include experts' fees under reimbursable items in the present case, the Commission failed to comply with the rules applicable to the tender and the aim pursued by these rules. This constitutes an instance of maladministration.'

14
As regards the second and third complaints, the Ombudsman concluded that there was no maladministration on the part of the Commission.

15
By letter of 25 May 2002, AFCon claimed that the Commission should pay it the following amounts by way of compensation for harm suffered as a result of not having been awarded the contract:

– loss of profit: EUR 624 937

– loss of ‘project profile’: EUR 600 000

– loss of ‘professional development’: EUR 150 000.

16
The Commission rejected that claim by letter of 25 July 2002.

17
By letter of 13 September 2002, AFCon requested the Commission to send it a number of documents pertaining to the procedure for the award of the tender at issue. The Commission acceded to that request on 3 October 2002, other than in respect of the evaluation committee’s evaluation reports and minutes and competitors’ bids, which fell under the exceptions provided for, respectively, in the second subparagraph of Article 4(3) and Article 4(1)(b) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

18
By letter of 11 October 2002, AFCon made a confirmatory application under Regulation No 1049/2001. It requested access to various documents relating to the tendering procedure at issue.

19
By letter of 22 November 2002, the Commission granted access to certain documents and, as to the remainder, upheld its refusal to provide the documents requested.

20
At the same time, in a letter of 4 September 2002 sent to Mr Byrne, Member of the Commission, the Irish Minister of State for European Affairs, Mr D. Roche, expressed support for AFCon and asked the Commission to find a solution to the dispute with AFCon.

21
By letters of 10 October and 4 November 2002, the Commission restated its position on the legality of the tender procedure at issue.

22
On 15 November 2002, Mr B. Crowley, a member of the European Parliament, put a written question (3365/02) to the Commission about the award of the contract at issue. Mr Patten, a member of the Commission, replied to it on 23 December 2002. Mr Crowley subsequently sent a letter to Mr Patten, to which the latter responded on 3 April 2003.

23
By letter of 18 February 2003, Mr Roche wrote a second time to Mr Byrne in support of AFCon. By letter of 8 April 2003, Mr Byrne restated the Commission’s position.

Procedure

24
By application lodged at the Court Registry on 12 May 2003, the applicants brought the present action.

25
Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and, as measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure of the Court of First Instance, put questions in writing to the parties and asked the Commission to produce certain documents. The parties complied with those requests within the prescribed time-limits.

26
The parties submitted oral argument and answered the questions put by the Court at the hearing on 6 July 2004.

Forms of order sought

27
The applicants claim that the Court should:

– order the Commission to pay damages in respect of the loss suffered as a result of the breach of the tendering procedure for the Tacis FDRUS 9902 project, plus compensatory interest, from the date on which the loss materialised;

– order the Commission to pay interest on the damages from the date of judgment;

–

– order the Commission to produce certain documents relating to the procedure for evaluating the tenders;

– order the Commission to pay the costs.

28 The Commission contends that the Court should:

– dismiss the application;

– order the applicants to pay the costs.

Law

A – *The request for measures of inquiry*

29 The applicants have asked the Court to order the Commission, under Article 65(b) of the Rules of Procedure, to produce certain documents relating to the tender procedure and, if necessary, to hear witnesses.

30 The Court, in the context of measures of organisation of procedure, requested the Commission, inter alia, to produce information concerning the tenderers' bids and the documentation relating to the first and second evaluations. Those requests coincide in the main with the applicants' requests for measures of inquiry. Therefore, the Court finds that the information in the documents before it is sufficient for it to give judgment in the proceedings without ordering the production of further documents or the hearing of witnesses.

B – *The claim for compensation*

31 Community law recognises a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51; and Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 and 42).

32 It is necessary to ascertain whether the applicants have established that the various conditions were met in this instance.

1. *The unlawfulness of the Commission's conduct*

33 The applicants claim, in essence, that there are three irregularities. First, GFA's bid did not comply with the rules of the tender at issue. Second, the Commission took account of unlawful criteria in the evaluation. Third, the Commission did not take the requisite measures once it had discovered there to be a conflict of interests.

a) The lawfulness of GFA's tender

Arguments of the parties

34 The applicants submit that GFA's bid failed to comply with the rules of the tender at issue. Those rules include:

– instructions to tenderers (European Commission, SCR(E) Tacis, version of 22 June 1999), in particular point C.2.1;

– guidelines for the preparation of the technical and financial proposal (European Commission, SCR(E) Tacis, January 1999 version) ('the guidelines'), in particular, the provisions relating to the preparation of Annexes B ('Organisation and methods') and D ('Breakdown of prices for Tacis contracts');

– terms of reference for the tender at issue (European Commission, 'Technical assistance to economic reform in the food and agriculture sector, Terms of reference for a project: Russia "Agricultural extension services in South Russia – Farm extension project"', of 4 June 1999).

35
In the applicants' submission, it is clear from those rules that the financial proposal must correspond to the technical proposal and show the remuneration of the persons responsible for training activities in the heading attributed to that purpose.

36
Those rules are unambiguous. They are intended to place all tenders on an equal footing in order that a comparison may be made. The rules were confirmed by the Commission's practice in a similar project which was contemporaneous with the project in question (FDRUS 9901).

37
GFA infringed those rules because:

– the number of man-days given in its technical proposal is higher than the number referred to in its financial proposal;

– in its financial proposal, GFA allocated a part of the remuneration for persons responsible for training to the heading 'reimbursable expenses', which is normally reserved for the reimbursement of costs relating to training activities 'such as flights, *per diem* for trainees, registration fees etc.'.

38
GFA thus succeeded in reducing the amount of its financial proposal. The differences between the two proposals are as follows:

Technical Proposal	Financial Proposal	Difference
2 687 man-days (EU experts)	2 200 man-days (EU experts)	(487) man-days
4 615 man-days (local experts)	2 250 man-days (local experts)	(2 365) man-days
5 300 man-days (support staff)	3 500 man-days (support staff)	(1 800) man-days
Total 12 602 man-days	7 950 man-days	(4 652) man-days

Those differences were allocated to reimbursable expenses.

39
The applicants submit that the Ombudsman, in substance, endorsed their argument when he found that the fact that the Commission had allowed GFA, in breach of the relevant tender rules, to include training fees as expenses within the heading restricted to reimbursable items constituted an instance of maladministration.

40
Finally, the applicants submit that their criticisms were borne out by the difficulties which the Commission encountered while GFA was performing the contract.

41
The applicants conclude from those matters that the Commission, in failing to exclude GFA on account of the irregularities, infringed the principles of equal treatment, of proportionality and of legitimate expectations.

42
The Commission contends that the way in which GFA presented its tender was not unlawful, since:

– the rules on which the applicants rely are not legally binding; they do not unequivocally prescribe how experts' fees are to be presented in the financial proposal;

– Article 117 of the Financial Regulation of 21 December 1997 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), as amended by Council Regulation (EC, ECSC, Euratom) No 2548/98 of 23 November 1998 (OJ 1998 L 320, p. 1; 'the Financial Regulation'), and Council Regulation (Euratom, EC) No 1279/96 of 25 June 1996 concerning the provision of assistance to economic reform and recovery in the New Independent States and Mongolia (OJ 1996 L 165, p. 1) (Article 7 and Annex III) contain no specific rules on the allocation of training fees to the heading reserved for reimbursable expenses;

– the Commission does not have an established practice in this regard and therefore the applicants cannot rely on an infringement of the principle of legitimate expectations;

– since the allocation of training fees to reimbursable expenses was not specifically prohibited, GFA could perfectly well use that method;

– GFA's presentation of its tender did not distort any comparison of the tenders, since the evaluators

were in a position to take into account in their comparative assessment the fact that the trainers' fees had been treated as reimbursable expenses;

– the Ombudsman's finding is not decisive;

– circumstances subsequent to the award of the tender, in particular the performance of the contract, are irrelevant.

Findings of the Court

43
Point C.2.1 of the instructions to tenderers provides:

'Breakdown of prices should be prepared in accordance with the format of Annex D of the draft contract and prices must be expressed in euros. Tenders in any other currency or an incorrect presentation of the breakdown of prices may lead to the rejection of the tender.'

44
Annex D to the guidelines contains an introductory section which sets out the method to be followed in presenting the tender. It also includes a form consisting of a table intended for the tenderers' data. The table contains the following four main headings:

'1.
Fees, including

a) Western experts

b) Local experts

c) Support staff

2.
Per diem

3.
Direct expenses

4.
Reimbursable expenses'.

45
According to the guidelines:

'The following notes are provided to assist tenderers in the preparation of Annex D (financial breakdown). … Where these guidelines are not followed, the tenderer is advised to justify deviations through an explanatory note. …

4. … The figures given in Annex D (for each category or individual expert) should exactly reflect the figures in the time allocation chart (time spent on the project for each expert) submitted as part of Annex B (summary input of staff).'

46
The Commission thus stated clearly and unequivocally that there was to be an 'exact' correspondence between the data in Annex B and those in Annex D, with any inconsistencies to be justified by an explanatory note.

47
The principle that the financial proposal and the technical proposal should tally is also mentioned in the explanatory notes preceding the form in Annex B to the guidelines, which state:

'Important: Above summary must be consistent with the input given in the breakdown of remuneration – Annex D.'

48
In order to ascertain whether GFA's tender complied with those provisions, it must be borne in mind that, as regards the 'training' section, GFA's technical proposal (Annex A) gave the following figures:

Table 1

Input (man-days)	Technical assistance	Training Replication Dissemination	Total
EU experts	2 200	487	2 687

Local experts	2 250	2 365	4 615
Support staff	3 500	1 800	5 300
Total	7 950	4 652	12 602

49
In the financial proposal (Annex D) GFA put forward the following figures under the heading ‘A. Fees’:

Table 2

	Input (man-days)	Amount EUR
EU experts	2 200	821 000
Local experts	2 250	58 750
Support staff	3 500	61 250
Total	7 950	941 000

50
The number of man-days (7 950) is 4 652 lower than the figure given in the technical proposal (12 602).

51
However, it is clear from the actual terms of GFA’s financial proposal that that difference arises because those 4 652 man-days have been treated as reimbursable expenses.

52
GFA’s financial proposal restates, in a footnote and an accompanying explanatory note, the data given in the technical proposal, which have been set out above (Table 1). That note explains that the difference between the two proposals arises because of the treatment of the costs of the fees of the staff responsible for training, replication and dissemination. GFA’s financial proposal also contains a table giving a detailed description of all the reimbursable expenses relating to those activities. It is clear from that table that in total 4 652 man-days were thus included as reimbursable expenses with a total value of EUR 282 425. Contrary to the applicants’ contention, the difference between the financial proposal and the technical proposal is therefore purely formal and it does not impede an effective comparison of the various tenderers’ bids.

53
Furthermore, GFA’s financial proposal included, in compliance with the terms of reference, supplies to the value of EUR 500 000 for training and EUR 200 000 for activities relating to replication and dissemination.

54
Consequently, the Court must reject the complaints that the Commission acted unlawfully in failing to reject GFA’s tender because of the alleged disparities between the technical proposal and the financial proposal.

b) The use of unlawful criteria in the evaluation

Arguments of the parties

55
The applicants complain that the Commission allowed the evaluators to take account, in the second evaluation, of AFCon’s previous experience on Tacis projects, in breach of the applicable rules. Point 3 of Annex III to Regulation No 1279/96, and point 3 of Annex IV to Council Regulation (EC, Euratom) No 99/2000 of 29 December 1999 concerning the provision of assistance to the partner States in Eastern Europe and Central Asia (OJ 2000 L 12, p. 1), provide that ‘specific experience of the tenderer in Tacis shall not be taken into account’ in the evaluation of tenders. By virtue of those provisions, the tender is evaluated solely ‘on the basis of a weighing of technical quality against price[; t]he weighing of the two criteria shall be announced in each invitation to tender, [and t]he technical evaluation shall be carried out according, in particular, to the following criteria: organisation, time schedule, methods and plan of work proposed for providing the services, the qualifications, experience, skills of the staff proposed for the provision of the services and the use made of local companies or experts, their integration into the project, and their contribution to the sustainability of the project results’.

56
In this instance, one of the members of the committee which conducted the second evaluation, Mr G. Rea, thought that the existing advisory centres established by Mr Mc Mullin and AFCon in the Tacis project FDRUS 9405 ‘Support to individually operated farms in Russia’, between 1996 and 1998, were not operational at the time of the interview and were not providing technical advice. That statement, which was incorrect, influenced the other evaluators.

57
Having obtained, pursuant to measures of organisation of procedure, disclosure of various documents relating to the work of the evaluation committee, the applicants claimed at the hearing that one of the evaluators, Ms K. Karttunen, specifically mentioned in her report that she had taken into account the fact that AFCon had no experience in other projects in Russia.

58
The Commission denies that there was any irregularity whatsoever. It acknowledges that it is required, under

Annex III, point 3, of Regulation No 1279/96, not to take into account the experience of the tenderers in other Tacis projects.

59
In this instance, the evaluation committee heard each tenderer in connection with its technical proposal. No general list of questions was prepared for that purpose; the interviews differed from one tenderer to the other. During the interview Mr Mc Mullin had an opportunity to rebut any statement detrimental to AFCon.

Findings of the Court

60
The complaints relating to the consideration of AFCon's experience in earlier projects funded by the Tacis programme are not sufficiently established.

61
The documentation relating to the evaluation of the tenders, produced to the Court following measures of organisation of procedure, does not establish that the members of the evaluation committee included in the criteria for evaluating the tenders the earlier experience of the tenderers in respect of projects financed by the Tacis programme. It is clear from the documents headed 'Detailed Technical Evaluation per Tenderer' that the evaluation committee took as its basis eight objective criteria relating to the experts' experience, the project's approach and the involvement of local experts. Moreover, the evaluators' note relating to the evaluation of AFCon's tender does not contain any negative appraisal about an alleged lack of experience or difficulties previously encountered in the implementation of Tacis programme projects. Thus, the members of the evaluation committee noted, as one of the strong points of AFCon's tender, the strength of the team leader and his experience in the region covered by the project. Among the weak points, the members of the evaluation committee noted, in particular, that the team leader had only limited Russian language skills and that, in general, the tender seemed too ambitious and, in some respects, too rigid.

62
As regards the arguments relating to the comments which Mr Rea is alleged to have made, it must be stated that in his final report he did not make any remarks at all about any difficulties which AFCon had encountered in previous projects.

63
Likewise, the report of the external evaluator, Ms Karttunen, to which the applicants referred at the hearing, contains no negative comments about AFCon's earlier experience in Tacis programme projects. That report drew attention, in particular, to the experience gained in Russia by the team leader whilst stating that in the interview 'he was not transparent regarding the current situation of the existing Farm Advisory Centres in the project area'.

64
Consequently, it is sufficient to state that the applicants have not established that the Commission relied on a negative assessment of AFCon's experience in earlier Tacis-programme projects when evaluating AFCon's tender. Therefore, the complaints relating to the unlawfulness of the criteria used in evaluating AFCon's tender must be rejected.

c) The consequences of the conflict of interests

Arguments of the parties

65
The applicants complain that the Commission failed to draw conclusions from the conflict of interests between a member of the evaluation committee, Mr A, and one of the tenderers, GFA. They submit, in essence, that the Commission did not act with due diligence once it had discovered that there was a conflict of interests and that it should not have allowed GFA to take part in the next stage of the tendering procedure.

66
As regards the first of those criticisms, the applicants maintain that the Commission did not use its discretion in a responsible manner when it refused to consider taking disciplinary action with regard to both Mr A and GFA. The Commission did not consider excluding GFA even though it had been informed by the Chairman of the evaluation committee of the links between GFA and one of the members of the evaluation committee. They are also in doubt as to whether the Commission tried to find out if GFA knew that Mr A was a member of the evaluation committee. Having analysed all the documentation relating to the tendering procedure, which was provided to them following the measures of organisation of procedure ordered by the Court, the applicants stated at the hearing that there was no evidence from which it could be concluded that the Commission had even asked itself whether disciplinary measures should be taken with regard to GFA.

67
The applicant's second criticism is that the Commission failed to comply with its obligation to manage Tacis-funded projects properly by failing to sanction GFA and by allowing the consortium to take part in the second evaluation. The fact that Mr A was employed full-time by one of the members of the GFA consortium should have prompted the Commission to exclude both the committee member concerned and the relevant tenderer.

68
The Commission contends that it acted lawfully and did not stray beyond the limits of its broad discretion.

69
In the absence of any evidence establishing that GFA sought to use Mr A's presence on the evaluation committee to influence the procedure for the award of the contract, the Commission contends that there is no rule which would have allowed it to exclude or sanction GFA. Indeed, Article 114(1) of the Financial Regulation provides:

'Participation in tendering procedures shall be open on equal terms to all natural and legal persons coming within the scope of application of the Treaties and to all natural and legal persons in the recipient State.'

70
Therefore, GFA could easily have challenged, as a breach of Article 114(1) of the Financial Regulation, any decision to exclude it from the tender at issue. Furthermore, the Commission contends that by reason of the proportionality principle it can exclude an undertaking from a tender procedure only in exceptional circumstances.

71
The conflict of interests was solely attributable to the evaluator. He infringed Article 12(4) of the General Regulations for Tenders and the Award of Service Contracts financed from Phare/Tacis funds. He was not connected to GFA but to one of the firms in the consortium. Since GFA had no authority over the evaluator, the conflict of interests could not be imputed to GFA.

72
What is more, the exclusion of GFA would have unduly advantaged AFCon, in breach of the principle of equal treatment.

73
Having excluded Mr A from its proceedings, the evaluation committee did not select AFCon. Although the Beneficiary Representative for the tender at issue was in favour of recommending that AFCon be awarded the contract, the three other members were against such an outcome.

Findings of the Court

74
The fact that a person who helps to evaluate and select tenders for a public contract has the contract awarded to him is highly questionable and constitutes a chargeable offence under the criminal law of several Member States, regard being had to the principle of equal treatment in the award of public contracts, the concern for sound financial management of Community funds and the prevention of fraud (Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraph 112).

75
After the discovery of a conflict of interests between a member of the evaluation committee and one of the tenderers, the Commission must act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. That obligation derives in particular from the principles of sound administration and equal treatment (see, by analogy, Case T-231/97 *New Europe Consulting and Brown* v *Commission* [1999] ECR II-2403, paragraph 41). The Commission is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (see, to that effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-0000, paragraph 108, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 164).

76
It is necessary to examine whether, in this instance, the Commission acted in accordance with that obligation.

77
In that regard, where a conflict of interests between one of the tenderers and a member of the committee responsible for evaluating the tenders comes to light, the Commission has some discretion to determine the measures which must be taken in respect of the conduct of the subsequent stages of the procedure for the award of the tender.

78
It is not disputed that, once it had been put on notice by the Chairman of the Evaluation Committee, the Commission did not investigate the links between Mr A and GFA in order to satisfy itself that GFA did not seek to influence the evaluation committee's proceedings. The Commission confirmed at the hearing that there was no evidence suggesting that GFA sought to influence the proceedings, using one of its employees sitting on the evaluation committee as an intermediary. In response to the Court's questions, the Commission none the less stated that it had taken no measures of inquiry in order to ascertain whether GFA and Mr A had collaborated during the tendering procedure. The Commission insisted on the fact that, in the absence of anything giving it grounds for suspecting there to have been fraud, there was no reason to investigate GFA's role.

79
Given the circumstances of the present case, such an assessment is manifestly incorrect. Since it had failed to investigate whether there was any collusion between GFA and Mr A, the Commission in fact had no grounds for

ruling out, with any reasonable degree of certainty, the possibility that GFA had sought to influence the tendering procedure. Rather, a number of objective and consistent factors should have led the Commission to take particular care and to consider the possibility that there was collusion between GFA and Mr A. Those factors reasonably gave grounds for forming the view that the conflict of interests could have arisen not merely as the result of a combination of circumstances but as the result of a fraudulent intention.

80
In the first place, it is necessary to stress the seriousness of the terms in which the Chairman of the evaluation committee criticised the questionable nature of the first evaluation. He proposed in a note of 4 January 2000 that the evaluation should be cancelled and that a further evaluation should take place before a committee with a different membership. The Chairman of the evaluation committee had, in particular, drawn attention to the 'highly questionable' nature of the results of the first evaluation owing to the fact that Mr A was then working 'as team leader in a Dutch Government sponsored project in Ukraine being implemented by Agriment International, a member of Stoas Holding Group'.

81
In addition to that conflict of interests, the Chairman of the evaluation committee also pointed out that there were signs that Mr A had, in fact, sought to give preferential treatment to GFA to the detriment of the other tenderers. The note stated that 'Mr A [had] placed the companies that the other three evaluators [had] ranked either first or second in fourth or fifth position'. He added that '[t]aking these issues together, there are significant suspicions of a "Conflict of Interest" and resulting preferential markings for the GFA/Stoas partnership'.

82
The Chairman of the evaluation committee had also stated that GFA's financial proposal of EUR 2.13 million 'was significantly below those of the first and second companies' and that 'such a low offer could be interpreted as a form of dumping'. It is thus clear from the statements and findings of the Chairman of the evaluation committee that the questionable nature of GFA's tender derived not only from the conflict of interests resulting from the presence of an employee of the consortium on the committee but also from the fact that its financial proposal was abnormally low.

83
In the second place, the circumstances were such as to give reasonable grounds for doubting that the conflict of interests in which Mr A found himself arose purely by chance or could be attributed exclusively to his negligence.

84
To start with, Mr A had failed to tell the Commission of his activities within the Stoas Group. Thus, when he applied for the post of external evaluator and in the course of the evaluation committee's subsequent work, Mr A did not disclose that he was carrying out managerial tasks for the Stoas Group in connection with an agricultural assistance project (see the note of 4 January 2000). The relevance of such information for the purposes of Mr A's appointment as an evaluator was particularly obvious given that the tender FDRUS 9902 concerned agricultural assistance services showing certain similarities with those for which Mr A was responsible in Ukraine.

85
Further, Mr A, far from merely failing to disclose his activities within the Stoas Group, expressly stated that he was not linked, directly or indirectly, with any of the tenderers, either individually or in their capacity as members of a consortium. It is evident that on 16 December 1999 Mr A had signed a declaration of impartiality, in which he stated:

'I have no direct or indirect links with any of the Tenderers, whether individuals or members of a consortium, who have replied to the Tender Dossier, nor with any of the sub-contractors proposed. I confirm that, should I discover during the course of evaluation that such a link exists, I will declare this immediately and resign from the Evaluation Committee. I understand that if such a link is known to me and I have neglected to declare it, the European Commission may decide to cancel the Tendering in question and I may be exposed to liabilities.'

86
Finally, the questionable nature of the foregoing matters is reinforced by the fact that, once Mr A had begun to examine GFA's tender, he could not claim to be unaware that he was in a situation which was incompatible with his undertaking to be impartial. The tender made it clear that Stoas was one of the members of the GFA consortium. Moreover, during the evaluation interview in which Mr A took part, GFA was represented by, inter alia, the director of the division responsible for the Stoas Group's international activities, Mr B. Although he was thus face to face with a person with a highly responsible position in the group which was employing him, Mr A, in breach of the terms of his declaration of impartiality set out above, failed to disclose his links with the group and to resign from the evaluation committee.

87
In the third place, particular importance must be attached to the fact that the seriousness of the situation gave reasonable grounds for suspecting that there might be collusion between Mr A and GFA.

88
First, it is reasonable to be in doubt as to the lawfulness of GFA's conduct. As was stated above, GFA was represented during the evaluation interview by the director of the division responsible for the Stoas Group's international activities, to which Mr A was answerable. According to GFA's tender, the division for which Mr B was

responsible consisted of just 25 people and the Commission could therefore reasonably assume that Mr B knew Mr A. Those facts should have prompted the Commission to ask itself why Mr B did not disclose the links which he had with one of the members of the evaluation committee.

89
Second, Mr A was appointed by the Commission as an external expert at the beginning of September 1999, at a time when GFA had not yet submitted its tender. Although Mr A had not taken part in drawing up the terms of reference, it was conceivable that during the two months between his appointment as external evaluator and the date of submission of tenders he had been in contact with representatives of the GFA consortium. On that point, the Commission acknowledged at the hearing that if such contacts had taken place, it would then have been obliged to exclude GFA from the procedure for the award of the tender at issue. The Commission did not, however, attempt to question Mr A on this point.

90
It follows from the foregoing that the Commission, in failing to investigate the relations between Mr A and the GFA consortium, made a manifest error of assessment. In infringing the principle of sound administration in that way, the Commission also violated the principle of equal treatment as between tenderers, which requires it to examine each tender impartially and objectively in the light of the requirements and general principles governing the tendering procedure, in order to ensure that all the tenderers are afforded the same opportunities.

91
The principle of equal treatment prohibits comparable situations from being treated differently and different situations from being treated alike, unless such treatment is objectively justified. In this instance, there were serious doubts as to the lawfulness of GFA's tender. As long as those doubts subsisted, the consortium's situation was different from that of all the other tenderers. By failing to open an inquiry aimed at putting an end to that situation, the Commission treated GFA in the same way as all the other tenderers, even though such treatment was not objectively justified. In infringing the principle of equal treatment in that way, the Commission violated a rule of law whose purpose is to confer rights on individuals.

92
However, since it has been established that the Commission failed to act with due diligence to take the steps needed to continue with the tendering procedure, the legality of the decision not to exclude GFA from the remainder of the procedure cannot be assessed. Whether the decision is lawful is directly dependent on the result of the inquiry which the Commission should have undertaken in order to satisfy itself that there was no collusion. Since the factual aspects of the case-file do not support a finding of such collusion, the Court must reject the complaints by which the applicants seek to show that the Commission should have excluded GFA from the tendering procedure.

93
As regards whether the illegality found is such as to cause the Community to incur liability, it is necessary to bear in mind that the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (see *Brasserie du Pêcheur and Factortame*, cited above, paragraph 55, and *Bergaderm and Goupil* v *Commission*, cited above, paragraph 43). The Court therefore holds that, on account of the abovementioned circumstances of the conflict of interests and of the risk of fraud which it entails, the Commission's omission is of a manifest and serious nature and is thus such as to cause the Community to incur liability.

2. *Damage and the causal connection*

94
The applicants point to a number of heads of damage, namely:

– loss sustained in the tender procedure;

– loss of profit;

– loss of 'profile';

– harm to AFCon's reputation and that of its directors, Mr Mc Mullin and Mr O'Grady.

a) Compensation for the harm corresponding to the losses sustained in the tender procedure

Arguments of the parties

95
The applicants claim compensation for damage corresponding to the losses sustained as a result of their taking part in the tender procedure. This entails the costs which AFCon incurred to no effect when it submitted its tender and the costs relating to the complaints made to the Commission and the Ombudsman. Those losses consist of the remuneration of the staff employed in developing the project and of all the travel and subsistence expenses

incurred as a consequence. On the basis of the unit costs indicated in AFCon's financial proposal, the applicants calculate that damage at EUR 82 570.

96
The Commission challenges those claims. It contends that, if AFCon had been awarded the contract, the costs reimbursement of which is sought would still have necessarily been incurred. Consequently, the Commission cannot be liable for such losses.

Findings of the Court

97
A distinction must be drawn between the loss represented by the costs and expenses incurred, on the one hand, in taking part in the tender procedure and, on the other, in challenging the legality of that procedure.

– Costs relating to the submission of AFCon's tender

98
It must be borne in mind that economic operators must bear the economic risks inherent in their activities, regard being had to the circumstances of each particular case. As regards a tendering procedure, those economic risks include, in particular, the costs relating to preparation of the tender. The expenses thus incurred therefore remain the responsibility of the undertaking which chose to take part in the procedure, since the opportunity to compete for a contract does not involve any certainty as to the outcome of the procedure. In accordance with that principle, Article 24 of the General Regulations for Tenders and the Award of Service Contracts financed from Phare/Tacis Funds provides that in the event of closure or annulment of a tendering procedure, the tenderers are not entitled to compensation. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages. However, the provision in question cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of Community law in the conduct of the tendering procedure has affected a tenderer's chances of being awarded the contract (Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraphs 75 and 97, and Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraphs 70 to 72).

99
In this instance, the applicants have established that there was a breach of Community law in the way the tendering procedure was conducted. That breach fundamentally undermined the tendering procedure and affected AFCon's chances of securing the tender at issue.

100
If the Commission had conducted an inquiry into the links between GFA and Mr A, it is possible that it would have concluded that there was collusion such as to warrant the exclusion of GFA from the remainder of the tendering procedure. In that regard, it is noteworthy that the Commission actually acknowledged, at the hearing, that if an inquiry had produced such a result, it would have then been obliged to penalise GFA by excluding it from the procedure.

101
In taking the decision to proceed with the tendering procedure without holding an inquiry, the Commission evaluated GFA's tender and awarded the contract to it even though there were a number of signs all of which suggested that there might have been collusion with a member of the evaluation committee. In acting in that way and failing to satisfy itself that GFA's participation entailed no irregularities, the Commission allowed GFA to remain in contention and accordingly undermined AFCon's chances of being awarded the contract.

102
It is true that any tenderer who participates in a tendering procedure must, as a general rule, accept the risk that he will remain liable for the costs associated with submission of his tender in the event of the contract being awarded to one of his competitors. However, that risk is accepted on the presumption inherent in any call for tenders that the Commission will act impartially in accordance with the principles set out at paragraph 90 above in order to ensure equal treatment as between the tenderers. By allowing GFA to take part in spite of the signs mentioned above and by failing to open an inquiry, the Commission disregarded that presumption and directly prejudiced AFCon's chances. Consequently, AFCon must be compensated for the loss relating to the costs incurred in participating in the procedure.

103
As regards quantum, the applicants assess their loss at EUR 31 070: in respect of costs incurred in a reconnaissance trip to south Russia (EUR 8 800), the time and costs entailed in preparing the tender (EUR 14 950) as well travel costs to Brussels in order to attend the two evaluation interviews (EUR 7 320). Since that estimate is not excessive, the loss sustained by AFCon in respect of costs relating to submission of its tender must be set at EUR 31 070.

– Costs incurred in challenging the legality of the tendering procedure

104
It must be held that this loss is present, real and certain and flows directly from the unlawfulness of the conduct for which the Commission is criticised. The applicants have maintained that this head of damages amounts to EUR

51 500, an amount made up of the following elements:

– resources allocated to the various complaints and proceedings other than this action instigated by AFCon following the award of the tender at issue to GFA (EUR 26 500);

– expenses for travel and meetings in Russia, Ireland and Belgium with contacts, politicians and lawyers (EUR 25 000).

105
In relation to the expenses connected with travelling, meetings and lawyers, the applicants have adduced neither any material allowing the Court to verify that those expenses constitute loss for which reparation may be granted nor any evidence capable of substantiating their estimate. In the absence of proof, these expenses therefore cannot be taken into account when quantifying the loss sustained.

106
There are two aspects to the estimate of the resources employed in the various complaints AFCon made to the Commission and the Ombudsman.

107
The first concerns the number of fee days which AFCon spent defending its interests in order to challenge the legality of the tendering procedure. For the period between AFCon being notified of the award of the contract on 17 August 2000 and the final occasion on which Irish Minister of State for European Affairs contacted a member of the Commission to express support for AFCon in February 2003 that number is calculated at 28 fee-days. The daily rate of fees is set at EUR 500 by reference to the rate applied by AFCon in its financial proposal. That estimate does not appear excessive. Consequently, the loss sustained by AFCon and attributable to the time thus spent in defending its interests must be set at EUR 14 000.

108
The second aspect concerns research costs amounting to EUR 12 500. However, the applicants have not produced any material showing exactly what those costs covered or any documentation substantiating the amount claimed. Therefore, the claim in respect of the research allegedly carried out cannot be allowed.

109
Consequently, the Commission must be ordered to pay AFCon EUR 14 000 as compensation for the loss sustained on account of costs incurred by AFCon in defending its interests.

b) Compensation for loss of profit

Arguments of the parties

110
As loss of profit, the applicants claim 25% of the value of AFCon's financial proposal, EUR 741 591. That amount corresponds to the profit margin which AFCon would have obtained if the contract had been awarded to it.

111
The Commission reserves its position on this calculation in the absence of any supporting evidence from AFCon.

Findings of the Court

112
The damage claimed in respect of loss of profit presupposes that AFCon was entitled to be awarded the contract. Even if the Commission had investigated the links between Mr A and GFA and had concluded that there was collusion such as to warrant GFA's exclusion from the procedure, AFCon would not have been certain of securing the contract.

113
The contracting authority is not bound by the evaluation committee's proposal but has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract (*TEAM* v *Commission*, cited above, paragraph 76). It is true that the applicants have cited in this regard the Court of Auditors' Special Report No 16/2000 on tendering procedures for service contracts under the Phare and Tacis programmes, together with the Commission's responses (OJ 2000 C 350, p. 1), from which it appears that out of 120 contracts entered into under those programmes the Commission followed the evaluation committee's recommendation on 117 occasions. However, it cannot be concluded from those statistics that in this case the contract would definitely have been awarded to AFCon if GFA had been excluded from the procedure.

114
Therefore, the damage represented by AFCon's loss of profit is not real and certain but conjectural. Therefore it cannot be the subject of compensation.

c) Compensation for loss of 'profile'

Arguments of the parties

115
The applicants claim that the award of the contract in question would have permitted AFCon to take part in other calls for tenders. After the tender procedure at issue, AFCon's business began to collapse. The award of the tender at issue to GFA harmed both AFCon's reputation and its business.

116
AFCon was automatically excluded from tendering in subsequent calls for tenders. From 2002, new rules on eligibility prevented AFCon from tendering, since the rules required tenderers to have an annual turnover and experience which AFCon no longer had.

117
The applicants provisionally estimate their loss of 'profile' at EUR 600 000.

118
The Commission disputes those assertions, which it contends are not substantiated.

Findings of the Court

119
The harm in respect of which reparation is sought is founded on the contention that the award of the tender at issue to GFA subsequently brought about a reduction in AFCon's activity to the point that it was, *de facto*, excluded from tendering for projects comparable to the one at issue in this case. That contention is not substantiated.

120
Consequently, the Commission cannot incur liability for that head of damage.

d) Compensation for the harm to AFCon's reputation and that of its directors

Arguments of the parties

121
The applicants maintain that AFCon's reputation was harmed by the fact of not having been awarded the contract and by the unlawful manner in which the tendering procedure was conducted.

122
The Commission discredited AFCon's technical and professional expertise. Its decision not to award the contract to AFCon has had wide-reaching repercussions, since, having been excluded from 27 tender procedures, AFCon has taken the decision not to tender for Phare and Tacis projects any more.

123
The applicants submit that those failures coincide with AFCon's complaints in relation to the FDRUS 9902 project. They state that they have evidence showing that AFCon has been 'blacklisted'. This head of damage is estimated at EUR 600 000 euros.

124
The applicants maintain that the harm to AFCon's reputation also affects Mr Mc Mullin's reputation and that of Mr O'Grady. They estimate this head of damage at EUR 75 000 per person.

125
The Commission submits that the applicants' claims are not substantiated. Any number of reasons other than the fact that GFA was awarded the tender at issue can explain AFCon's lack of success. It denies that a 'blacklist' exists. It also denies that it has caused any harm to Mr Mc Mullin's reputation or to that of Mr O'Grady.

Findings of the Court

126
It must be stated that the applicants have not proved that a blacklist exists or that any comments or practices detrimental to AFCon's reputation may be attributed to the Commission. Therefore, the harm alleged cannot be regarded as present, real and certain.

127
The claims relating to the harm which was allegedly caused to the reputations of Mr Mc Mullin and Mr O'Grady must be rejected on the same grounds.

e) Interest

Arguments of the parties

128
The applicants claim that the Court should increase the damages awarded by compensatory interest at a rate of 8% per annum, the rate currently applying in Ireland.

129
The applicants also claim that the Commission should be ordered to pay default interest, at the same rate, from the date of judgment in this action.

Findings of the Court

130
As regards the calculation of compensatory interest, such interest should start to run from the first day of the month following the month in which AFCon last took steps prior to commencing proceedings. Since that was during February 2003, the starting point must be fixed at 1 March 2003.

131
It is clear from the annexes to the application that, in their assessment of the harm they claim to have suffered, the applicants did not ask for compound interest. Therefore, in order to establish the amount which the Commission is to pay, simple interest must be applied.

132
The rate of compensatory interest must be calculated on the basis of the rate fixed by the European Central Bank for its principal refinancing operations, in force during the period concerned, increased by two percentage points, namely an annual rate of 4%. As at the date of delivery of this judgment, the Commission's debt to AFCon amounts to EUR 48 605, including interest.

133
To that sum must be added default interest from delivery of this judgment until full payment. The rate of default interest to be applied is calculated on the basis of the rate fixed by the European Central Bank for its principal refinancing operations, in force during the period concerned, increased by two percentage points. The amount of interest is to be calculated on the basis of compound interest.

Costs

134
Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1.
Orders the Commission to pay AFCon the sum of EUR 48 605, together with interest thereon from delivery of this judgment until full payment. The rate of interest to be applied is to be calculated on the basis of the European Central Bank's rate for its main refinancing operations, in force during the period concerned, plus two percentage points. The amount of interest is to be calculated on the basis of compound interest;

2.
Dismisses the application as to the remainder;

3.
Orders the Commission to pay the costs.

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 17 March 2005.

H. Jung P. Lindh

Registrar President

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1 – Language of the case: English.

Judgment of the Court of First Instance (Fifth Chamber)
First Instance (Fifth Chamber)First Instance (Fifth Chamber)2005. AFCon Management Consultants, Patrick Mc Mullin and Seamus O'Grady v Commission of the European Communities. Tacis Programme - Invitation to tender - Irregularities in the tendering procedure - Action for damages. Case T-160/03.

1. Non-contractual liability - Conditions - Unlawfulness - Damage - Causal link

(Art. 288, second para., EC)

2. European Communities' public procurement - Award of a contract as a result of an invitation to tender - Authority of the institutions with respect to the conduct of the tendering procedure - Conflict of interests between a tenderer and a member of the committee for the evaluation of the tenders - Commission's discretion - Limits - Infringement of the principles of sound administration and equal treatment - Incurring of Community liability

(Art. 288 EC)

3. European Communities' public procurement - Tendering procedure - Expenses incurred by a tenderer - Right to compensation - None - Exception - Infringement of Community law

1. Community law recognises a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties.

(see para. 31)

2. In accordance with the principles of sound administration and equal treatment, the Commission must, as far as concerns public procurement, after the discovery of a conflict of interests between a member of the evaluation committee and one of the tenderers, act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. The Commission is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers.

In that regard, it has some discretion as regards the measures to be taken in respect of the conduct of the procedure. However, where it does not investigate whether there is any collusion between one of the tenderers and a member of the evaluation committee, the Commission exceeds that discretion and manifestly and gravely disregards the limits on that discretion. Therefore, it commits an unlawful act which is liable to cause the Community to incur liability.

(see paras 75, 77, 79, 93)

3. Economic operators must bear the economic risks inherent in their activities which, as regards a tendering procedure, include, in particular, the costs relating to preparation of the tender. The expenses thus incurred therefore remain the responsibility of the undertaking which chose to take part in the procedure, since the opportunity to compete for a contract does not involve any certainty as to the outcome of the procedure. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages.

However, Article 24 of the General Regulations for Tenders and the Award of Service Contracts financed from Phare/Tacis Funds cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of Community law in the conduct of the tendering procedure has affected a tenderer's chances of being

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awarded the contract. Where the tenderer's chances have been prejudiced, he must be compensated for the loss relating to the costs incurred in participating in the procedure.

(see paras 98, 102)

In Case T-160/03,

AFCon Management Consultants, established in Bray (Ireland),

Patrick Mc Mullin, resident in Bray,

Seamus O'Grady, resident in Bray,

represented by B. O'Connor, solicitor, and I. Carreño, lawyer,

applicants,

v

Commission of the European Communities, represented by J. Enegren and F. Hoffmeister, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for compensation for the damage allegedly suffered as a result of irregularities in the tendering procedure for a project financed by the Tacis programme (Project FDRUS 9902 - Agricultural extension services in South Russia'),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on

6 July 2004,

gives the following

Judgment

Costs

134. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Orders the Commission to pay AFCon the sum of EUR 48 605, together with interest thereon from delivery of this judgment until full payment. The rate of interest to be applied is to be calculated on the basis of the European Central Bank's rate for its main refinancing operations, in force during the period concerned, plus two percentage points. The amount of interest is to be calculated on the basis of compound interest;

2. Dismisses the application as to the remainder;

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3. Orders the Commission to pay the costs.

Facts

1. AFCon Management Consultants (AFCon') is a consultancy company specialising in agricultural projects in countries whose economies are in transition. Mr Mc Mullin and Mr O'Grady are the directors, shareholders and founding members of the company (together with AFCon the applicants').

2. On 28 May 1999, the Commission launched a restrictive tender procedure within the Tacis programme for the supply of technical assistance services, entitled Agricultural Extension Services in South Russia' reference FDRUS 9902 (the tender at issue').

3. On 29 July 1999, the evaluation committee drew up a list of ten companies from the 21 firms which had expressed interest in that call for tenders. The ten companies were then invited to submit a tender.

4. On 16 and 17 December 1999, the evaluation committee met to evaluate the eight tenders received (the first evaluation'). The committee considered the tender of the GFA - Gesellschaft für Agrarprojekte mbH (GFA-Agrar') and Stoas Agri-projects Foundation (Stoas') consortium to be the best. AFCon's tender came in second place.

5. The Commission subsequently discovered that a conflict of interests existed as between a member of the evaluation committee and the GFA-Agrar and Stoas consortium (GFA'). That member, Mr A, was employed by Agriment International BV, a subsidiary of Stoas. The Commission ended its association with Mr A and informed him that it would no longer require his services.

6. Because of that conflict of interests, the Commission, on 3 March 2000, decided to cancel the first evaluation and to appoint a committee of new members to carry out a second evaluation. The Commission informed the tenderers of that decision by letter of 28 March 2000.

7. On 15 and 16 May 2000, the evaluation committee carried out a second tender evaluation (the second evaluation'). At the end of that evaluation, GFA's tender was ranked first. GFA's technical proposal scored 72.69 % (third place); its financial proposal was EUR 2 131 870 (first place). AFCon's tender was ranked second with a technical proposal scoring 75.32 % (first place) and a financial proposal of EUR 2 499 750 (sixth place).

8. In August 2000, the Commission awarded the tender to GFA. It informed AFCon of that by letter of 17 August 2000.

9. On 9 October 2000, AFCon complained to the Commission that the tender procedure had been mismanaged. It maintained that GFA's financial proposal was below the market rate. The Commission rejected that complaint on 9 November 2000.

10. By letters of 18 December 2000 and 31 January 2001, AFCon alleged that GFA had infringed the tendering rules. By letter of 28 February 2001, the Commission rejected that allegation.

11. By letter of 15 March 2001, AFCon repeated that GFA's proposal was in breach of the procedure for the award of Tacis contracts. The Commission did not reply to that letter.

12. On 15 May 2001, AFCon made a complaint to the European Ombudsman. According to that complaint:

- GFA's financial proposal was in breach of the tendering rules (first complaint);

- having discovered a conflict of interests, the Commission failed to take the measures required by the rules governing the award of contracts (second complaint);

- the Commission infringed the tendering rules by allowing the successful tenderer to replace the majority of its long-term experts by other persons within weeks of the signature of the contract

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(third complaint).

13. In his decision of 22 April 2002 (Decision 834/2001/GG), the Ombudsman held that only the first complaint was well founded. In that regard he stated:

It is good administrative practice in tender procedures for the administration to adhere to the rules established for these procedures. ... By allowing tenderers to include experts' fees under reimbursable items in the present case, the Commission failed to comply with the rules applicable to the tender and the aim pursued by these rules. This constitutes an instance of maladministration.'

14. As regards the second and third complaints, the Ombudsman concluded that there was no maladministration on the part of the Commission.

15. By letter of 25 May 2002, AFCon claimed that the Commission should pay it the following amounts by way of compensation for harm suffered as a result of not having been awarded the contract:

- loss of profit: EUR 624 937

- loss of project profile': EUR 600 000

- loss of professional development': EUR 150 000.

16. The Commission rejected that claim by letter of 25 July 2002.

17. By letter of 13 September 2002, AFCon requested the Commission to send it a number of documents pertaining to the procedure for the award of the tender at issue. The Commission acceded to that request on 3 October 2002, other than in respect of the evaluation committee's evaluation reports and minutes and competitors' bids, which fell under the exceptions provided for, respectively, in the second subparagraph of Article 4(3) and Article 4(1)(b) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

18. By letter of 11 October 2002, AFCon made a confirmatory application under Regulation No 1049/2001. It requested access to various documents relating to the tendering procedure at issue.

19. By letter of 22 November 2002, the Commission granted access to certain documents and, as to the remainder, upheld its refusal to provide the documents requested.

20. At the same time, in a letter of 4 September 2002 sent to Mr Byrne, Member of the Commission, the Irish Minister of State for European Affairs, Mr D. Roche, expressed support for AFCon and asked the Commission to find a solution to the dispute with AFCon.

21. By letters of 10 October and 4 November 2002, the Commission restated its position on the legality of the tender procedure at issue.

22. On 15 November 2002, Mr B. Crowley, a member of the European Parliament, put a written question (3365/02) to the Commission about the award of the contract at issue. Mr Patten, a member of the Commission, replied to it on 23 December 2002. Mr Crowley subsequently sent a letter to Mr Patten, to which the latter responded on 3 April 2003.

23. By letter of 18 February 2003, Mr Roche wrote a second time to Mr Byrne in support of AFCon. By letter of 8 April 2003, Mr Byrne restated the Commission's position.

Procedure

24. By application lodged at the Court Registry on 12 May 2003, the applicants brought the present action.

25. Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open

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the oral procedure and, as measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure of the Court of First Instance, put questions in writing to the parties and asked the Commission to produce certain documents. The parties complied with those requests within the prescribed time-limits.

26. The parties submitted oral argument and answered the questions put by the Court at the hearing on 6 July 2004.

Forms of order sought

27. The applicants claim that the Court should:

- order the Commission to pay damages in respect of the loss suffered as a result of the breach of the tendering procedure for the Tacis FDRUS 9902 project, plus compensatory interest, from the date on which the loss materialised;

- order the Commission to pay interest on the damages from the date of judgment;

- order the Commission to produce certain documents relating to the procedure for evaluating the tenders;

- order the Commission to pay the costs.

28. The Commission contends that the Court should:

- dismiss the application;

- order the applicants to pay the costs.

Law

A - The request for measures of inquiry

29. The applicants have asked the Court to order the Commission, under Article 65(b) of the Rules of Procedure, to produce certain documents relating to the tender procedure and, if necessary, to hear witnesses.

30. The Court, in the context of measures of organisation of procedure, requested the Commission, inter alia, to produce information concerning the tenderers' bids and the documentation relating to the first and second evaluations. Those requests coincide in the main with the applicants' requests for measures of inquiry. Therefore, the Court finds that the information in the documents before it is sufficient for it to give judgment in the proceedings without ordering the production of further documents or the hearing of witnesses.

B - The claim for compensation

31. Community law recognises a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, paragraph 51; and Case C352/98 P Bergaderm and Goupil v Commission [2000] ECR I-5291, paragraphs 41 and 42).

32. It is necessary to ascertain whether the applicants have established that the various conditions were met in this instance.

1. The unlawfulness of the Commission's conduct

33. The applicants claim, in essence, that there are three irregularities. First, GFA's bid did not comply with the rules of the tender at issue. Second, the Commission took account of unlawful

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criteria in the evaluation. Third, the Commission did not take the requisite measures once it had discovered there to be a conflict of interests.

a) The lawfulness of GFA's tender

Arguments of the parties

34. The applicants submit that GFA's bid failed to comply with the rules of the tender at issue. Those rules include:

- instructions to tenderers (European Commission, SCR(E) Tacis, version of 22 June 1999), in particular point C.2.1;

- guidelines for the preparation of the technical and financial proposal (European Commission, SCR(E) Tacis, January 1999 version) (the guidelines'), in particular, the provisions relating to the preparation of Annexes B (Organisation and methods') and D (Breakdown of prices for Tacis contracts');

- terms of reference for the tender at issue (European Commission, Technical assistance to economic reform in the food and agriculture sector, Terms of reference for a project: Russia Agricultural extension services in South Russia - Farm extension project', of 4 June 1999).

35. In the applicants' submission, it is clear from those rules that the financial proposal must correspond to the technical proposal and show the remuneration of the persons responsible for training activities in the heading attributed to that purpose.

36. Those rules are unambiguous. They are intended to place all tenders on an equal footing in order that a comparison may be made. The rules were confirmed by the Commission's practice in a similar project which was contemporaneous with the project in question (FDRUS 9901).

37. GFA infringed those rules because:

- the number of man-days given in its technical proposal is higher than the number referred to in its financial proposal;

- in its financial proposal, GFA allocated a part of the remuneration for persons responsible for training to the heading reimbursable expenses', which is normally reserved for the reimbursement of costs relating to training activities such as flights, per diem for trainees, registration fees etc.'.

38. GFA thus succeeded in reducing the amount of its financial proposal. The differences between the two proposals are as follows:

>lt>2

Those differences were allocated to reimbursable expenses.

39. The applicants submit that the Ombudsman, in substance, endorsed their argument when he found that the fact that the Commission had allowed GFA, in breach of the relevant tender rules, to include training fees as expenses within the heading restricted to reimbursable items constituted an instance of maladministration.

40. Finally, the applicants submit that their criticisms were borne out by the difficulties which the Commission encountered while GFA was performing the contract.

41. The applicants conclude from those matters that the Commission, in failing to exclude GFA on account of the irregularities, infringed the principles of equal treatment, of proportionality and of legitimate expectations.

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42. The Commission contends that the way in which GFA presented its tender was not unlawful, since:

- the rules on which the applicants rely are not legally binding; they do not unequivocally prescribe how experts' fees are to be presented in the financial proposal;

- Article 117 of the Financial Regulation of 21 December 1997 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), as amended by Council Regulation (EC, ECSC, Euratom) No 2548/98 of 23 November 1998 (OJ 1998 L 320, p. 1; the Financial Regulation'), and Council Regulation (Euratom, EC) No 1279/96 of 25 June 1996 concerning the provision of assistance to economic reform and recovery in the New Independent States and Mongolia (OJ 1996 L 165, p. 1) (Article 7 and Annex III) contain no specific rules on the allocation of training fees to the heading reserved for reimbursable expenses;

- the Commission does not have an established practice in this regard and therefore the applicants cannot rely on an infringement of the principle of legitimate expectations;

- since the allocation of training fees to reimbursable expenses was not specifically prohibited, GFA could perfectly well use that method;

- GFA's presentation of its tender did not distort any comparison of the tenders, since the evaluators were in a position to take into account in their comparative assessment the fact that the trainers' fees had been treated as reimbursable expenses;

- the Ombudsman's finding is not decisive;

- circumstances subsequent to the award of the tender, in particular the performance of the contract, are irrelevant.

Findings of the Court

43. Point C.2.1 of the instructions to tenderers provides:

Breakdown of prices should be prepared in accordance with the format of Annex D of the draft contract and prices must be expressed in euros. Tenders in any other currency or an incorrect presentation of the breakdown of prices may lead to the rejection of the tender.'

44. Annex D to the guidelines contains an introductory section which sets out the method to be followed in presenting the tender. It also includes a form consisting of a table intended for the tenderers' data. The table contains the following four main headings:

1. Fees, including

a) Western experts

b) Local experts

c) Support staff

2. Per diem

3. Direct expenses

4. Reimbursable expenses'.

45. According to the guidelines:

The following notes are provided to assist tenderers in the preparation of Annex D (financial breakdown).... Where these guidelines are not followed, the tenderer is advised to justify deviations through an explanatory note....

4. ... The figures given in Annex D (for each category or individual expert) should exactly reflect

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the figures in the time allocation chart (time spent on the project for each expert) submitted as part of Annex B (summary input of staff).'

46. The Commission thus stated clearly and unequivocally that there was to be an exact' correspondence between the data in Annex B and those in Annex D, with any inconsistencies to be justified by an explanatory note.

47. The principle that the financial proposal and the technical proposal should tally is also mentioned in the explanatory notes preceding the form in Annex B to the guidelines, which state:

Important: Above summary must be consistent with the input given in the breakdown of remuneration - Annex D.'

48. In order to ascertain whether GFA's tender complied with those provisions, it must be borne in mind that, as regards the training' section, GFA's technical proposal (Annex A) gave the following figures:

Table 1

>lt>3

49. In the financial proposal (Annex D) GFA put forward the following figures under the heading A. Fees':

Table 2

>lt>4

50. The number of man-days (7 950) is 4 652 lower than the figure given in the technical proposal (12 602).

51. However, it is clear from the actual terms of GFA's financial proposal that that difference arises because those 4 652 man-days have been treated as reimbursable expenses.

52. GFA's financial proposal restates, in a footnote and an accompanying explanatory note, the data given in the technical proposal, which have been set out above (Table 1). That note explains that the difference between the two proposals arises because of the treatment of the costs of the fees of the staff responsible for training, replication and dissemination. GFA's financial proposal also contains a table giving a detailed description of all the reimbursable expenses relating to those activities. It is clear from that table that in total 4 652 man-days were thus included as reimbursable expenses with a total value of EUR 282 425. Contrary to the applicants' contention, the difference between the financial proposal and the technical proposal is therefore purely formal and it does not impede an effective comparison of the various tenderers' bids.

53. Furthermore, GFA's financial proposal included, in compliance with the terms of reference, supplies to the value of EUR 500 000 for training and EUR 200 000 for activities relating to replication and dissemination.

54. Consequently, the Court must reject the complaints that the Commission acted unlawfully in failing to reject GFA's tender because of the alleged disparities between the technical proposal and the financial proposal.

b) The use of unlawful criteria in the evaluation

Arguments of the parties

55. The applicants complain that the Commission allowed the evaluators to take account, in the second evaluation, of AFCon's previous experience on Tacis projects, in breach of the applicable rules. Point 3 of Annex III to Regulation No 1279/96, and point 3 of Annex IV to Council Regulation

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(EC, Euratom) No 99/2000 of 29 December 1999 concerning the provision of assistance to the partner States in Eastern Europe and Central Asia (OJ 2000 L 12, p. 1), provide that specific experience of the tenderer in Tacis shall not be taken into account' in the evaluation of tenders. By virtue of those provisions, the tender is evaluated solely on the basis of a weighing of technical quality against price[; t]he weighing of the two criteria shall be announced in each invitation to tender, [and t]he technical evaluation shall be carried out according, in particular, to the following criteria: organisation, time schedule, methods and plan of work proposed for providing the services, the qualifications, experience, skills of the staff proposed for the provision of the services and the use made of local companies or experts, their integration into the project, and their contribution to the sustainability of the project results'.

56. In this instance, one of the members of the committee which conducted the second evaluation, Mr G. Rea, thought that the existing advisory centres established by Mr Mc Mullin and AFCon in the Tacis project FDRUS 9405 Support to individually operated farms in Russia', between 1996 and 1998, were not operational at the time of the interview and were not providing technical advice. That statement, which was incorrect, influenced the other evaluators.

57. Having obtained, pursuant to measures of organisation of procedure, disclosure of various documents relating to the work of the evaluation committee, the applicants claimed at the hearing that one of the evaluators, Ms K. Karttunen, specifically mentioned in her report that she had taken into account the fact that AFCon had no experience in other projects in Russia.

58. The Commission denies that there was any irregularity whatsoever. It acknowledges that it is required, under Annex III, point 3, of Regulation No 1279/96, not to take into account the experience of the tenderers in other Tacis projects.

59. In this instance, the evaluation committee heard each tenderer in connection with its technical proposal. No general list of questions was prepared for that purpose; the interviews differed from one tenderer to the other. During the interview Mr Mc Mullin had an opportunity to rebut any statement detrimental to AFCon.

Findings of the Court

60. The complaints relating to the consideration of AFCon's experience in earlier projects funded by the Tacis programme are not sufficiently established.

61. The documentation relating to the evaluation of the tenders, produced to the Court following measures of organisation of procedure, does not establish that the members of the evaluation committee included in the criteria for evaluating the tenders the earlier experience of the tenderers in respect of projects financed by the Tacis programme. It is clear from the documents headed Detailed Technical Evaluation per Tenderer' that the evaluation committee took as its basis eight objective criteria relating to the experts' experience, the project's approach and the involvement of local experts. Moreover, the evaluators' note relating to the evaluation of AFCon's tender does not contain any negative appraisal about an alleged lack of experience or difficulties previously encountered in the implementation of Tacis programme projects. Thus, the members of the evaluation committee noted, as one of the strong points of AFCon's tender, the strength of the team leader and his experience in the region covered by the project. Among the weak points, the members of the evaluation committee noted, in particular, that the team leader had only limited Russian language skills and that, in general, the tender seemed too ambitious and, in some respects, too rigid.

62. As regards the arguments relating to the comments which Mr Rea is alleged to have made, it must be stated that in his final report he did not make any remarks at all about any difficulties which AFCon had encountered in previous projects.

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63. Likewise, the report of the external evaluator, Ms Karttunen, to which the applicants referred at the hearing, contains no negative comments about AFCon's earlier experience in Tacis programme projects. That report drew attention, in particular, to the experience gained in Russia by the team leader whilst stating that in the interview he was not transparent regarding the current situation of the existing Farm Advisory Centres in the project area'.

64. Consequently, it is sufficient to state that the applicants have not established that the Commission relied on a negative assessment of AFCon's experience in earlier Tacis-programme projects when evaluating AFCon's tender. Therefore, the complaints relating to the unlawfulness of the criteria used in evaluating AFCon's tender must be rejected.

c) The consequences of the conflict of interests

Arguments of the parties

65. The applicants complain that the Commission failed to draw conclusions from the conflict of interests between a member of the evaluation committee, Mr A, and one of the tenderers, GFA. They submit, in essence, that the Commission did not act with due diligence once it had discovered that there was a conflict of interests and that it should not have allowed GFA to take part in the next stage of the tendering procedure.

66. As regards the first of those criticisms, the applicants maintain that the Commission did not use its discretion in a responsible manner when it refused to consider taking disciplinary action with regard to both Mr A and GFA. The Commission did not consider excluding GFA even though it had been informed by the Chairman of the evaluation committee of the links between GFA and one of the members of the evaluation committee. They are also in doubt as to whether the Commission tried to find out if GFA knew that Mr A was a member of the evaluation committee. Having analysed all the documentation relating to the tendering procedure, which was provided to them following the measures of organisation of procedure ordered by the Court, the applicants stated at the hearing that there was no evidence from which it could be concluded that the Commission had even asked itself whether disciplinary measures should be taken with regard to GFA.

67. The applicant's second criticism is that the Commission failed to comply with its obligation to manage Tacis-funded projects properly by failing to sanction GFA and by allowing the consortium to take part in the second evaluation. The fact that Mr A was employed full-time by one of the members of the GFA consortium should have prompted the Commission to exclude both the committee member concerned and the relevant tenderer.

68. The Commission contends that it acted lawfully and did not stray beyond the limits of its broad discretion.

69. In the absence of any evidence establishing that GFA sought to use Mr A's presence on the evaluation committee to influence the procedure for the award of the contract, the Commission contends that there is no rule which would have allowed it to exclude or sanction GFA. Indeed, Article 114(1) of the Financial Regulation provides:

Participation in tendering procedures shall be open on equal terms to all natural and legal persons coming within the scope of application of the Treaties and to all natural and legal persons in the recipient State.'

70. Therefore, GFA could easily have challenged, as a breach of Article 114(1) of the Financial Regulation, any decision to exclude it from the tender at issue. Furthermore, the Commission contends that by reason of the proportionality principle it can exclude an undertaking from a tender procedure only in exceptional circumstances.

71. The conflict of interests was solely attributable to the evaluator. He infringed Article 12(4)

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of the General Regulations for Tenders and the Award of Service Contracts financed from Phare/Tacis funds. He was not connected to GFA but to one of the firms in the consortium. Since GFA had no authority over the evaluator, the conflict of interests could not be imputed to GFA.

72. What is more, the exclusion of GFA would have unduly advantaged AFCon, in breach of the principle of equal treatment.

73. Having excluded Mr A from its proceedings, the evaluation committee did not select AFCon. Although the Beneficiary Representative for the tender at issue was in favour of recommending that AFCon be awarded the contract, the three other members were against such an outcome.

Findings of the Court

74. The fact that a person who helps to evaluate and select tenders for a public contract has the contract awarded to him is highly questionable and constitutes a chargeable offence under the criminal law of several Member States, regard being had to the principle of equal treatment in the award of public contracts, the concern for sound financial management of Community funds and the prevention of fraud (Case T277/97 Ismeri Europa v Court of Auditors [1999] ECR II-1825, paragraph 112).

75. After the discovery of a conflict of interests between a member of the evaluation committee and one of the tenderers, the Commission must act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. That obligation derives in particular from the principles of sound administration and equal treatment (see, by analogy, Case T231/97 New Europe Consulting and Brown v Commission [1999] ECR II-2403, paragraph 41). The Commission is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (see, to that effect, Case C496/99 P Commission v CAS Succhi di Frutta [2004] ECR I0000, paragraph 108, and Case T145/98 ADT Projekt v Commission [2000] ECR II387, paragraph 164).

76. It is necessary to examine whether, in this instance, the Commission acted in accordance with that obligation.

77. In that regard, where a conflict of interests between one of the tenderers and a member of the committee responsible for evaluating the tenders comes to light, the Commission has some discretion to determine the measures which must be taken in respect of the conduct of the subsequent stages of the procedure for the award of the tender.

78. It is not disputed that, once it had been put on notice by the Chairman of the Evaluation Committee, the Commission did not investigate the links between Mr A and GFA in order to satisfy itself that GFA did not seek to influence the evaluation committee's proceedings. The Commission confirmed at the hearing that there was no evidence suggesting that GFA sought to influence the proceedings, using one of its employees sitting on the evaluation committee as an intermediary. In response to the Court's questions, the Commission none the less stated that it had taken no measures of inquiry in order to ascertain whether GFA and Mr A had collaborated during the tendering procedure. The Commission insisted on the fact that, in the absence of anything giving it grounds for suspecting there to have been fraud, there was no reason to investigate GFA's role.

79. Given the circumstances of the present case, such an assessment is manifestly incorrect. Since it had failed to investigate whether there was any collusion between GFA and Mr A, the Commission in fact had no grounds for ruling out, with any reasonable degree of certainty, the possibility that GFA had sought to influence the tendering procedure. Rather, a number of objective and consistent factors should have led the Commission to take particular care and to consider the possibility that there was collusion between GFA and Mr A. Those factors reasonably gave grounds for forming

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the view that the conflict of interests could have arisen not merely as the result of a combination of circumstances but as the result of a fraudulent intention.

80. In the first place, it is necessary to stress the seriousness of the terms in which the Chairman of the evaluation committee criticised the questionable nature of the first evaluation. He proposed in a note of 4 January 2000 that the evaluation should be cancelled and that a further evaluation should take place before a committee with a different membership. The Chairman of the evaluation committee had, in particular, drawn attention to the highly questionable' nature of the results of the first evaluation owing to the fact that Mr A was then working as team leader in a Dutch Government sponsored project in Ukraine being implemented by Agriment International, a member of Stoas Holding Group'.

81. In addition to that conflict of interests, the Chairman of the evaluation committee also pointed out that there were signs that Mr A had, in fact, sought to give preferential treatment to GFA to the detriment of the other tenderers. The note stated that Mr A [had] placed the companies that the other three evaluators [had] ranked either first or second in fourth or fifth position'. He added that [t]aking these issues together, there are significant suspicions of a Conflict of Interest and resulting preferential markings for the GFA/Stoas partnership'.

82. The Chairman of the evaluation committee had also stated that GFA's financial proposal of EUR 2.13 million was significantly below those of the first and second companies' and that such a low offer could be interpreted as a form of dumping'. It is thus clear from the statements and findings of the Chairman of the evaluation committee that the questionable nature of GFA's tender derived not only from the conflict of interests resulting from the presence of an employee of the consortium on the committee but also from the fact that its financial proposal was abnormally low.

83. In the second place, the circumstances were such as to give reasonable grounds for doubting that the conflict of interests in which Mr A found himself arose purely by chance or could be attributed exclusively to his negligence.

84. To start with, Mr A had failed to tell the Commission of his activities within the Stoas Group. Thus, when he applied for the post of external evaluator and in the course of the evaluation committee's subsequent work, Mr A did not disclose that he was carrying out managerial tasks for the Stoas Group in connection with an agricultural assistance project (see the note of 4 January 2000). The relevance of such information for the purposes of Mr A's appointment as an evaluator was particularly obvious given that the tender FDRUS 9902 concerned agricultural assistance services showing certain similarities with those for which Mr A was responsible in Ukraine.

85. Further, Mr A, far from merely failing to disclose his activities within the Stoas Group, expressly stated that he was not linked, directly or indirectly, with any of the tenderers, either individually or in their capacity as members of a consortium. It is evident that on 16 December 1999 Mr A had signed a declaration of impartiality, in which he stated:

I have no direct or indirect links with any of the Tenderers, whether individuals or members of a consortium, who have replied to the Tender Dossier, nor with any of the sub-contractors proposed. I confirm that, should I discover during the course of evaluation that such a link exists, I will declare this immediately and resign from the Evaluation Committee. I understand that if such a link is known to me and I have neglected to declare it, the European Commission may decide to cancel the Tendering in question and I may be exposed to liabilities.'

86. Finally, the questionable nature of the foregoing matters is reinforced by the fact that, once Mr A had begun to examine GFA's tender, he could not claim to be unaware that he was in a situation which was incompatible with his undertaking to be impartial. The tender made it clear that Stoas was one of the members of the GFA consortium. Moreover, during the evaluation interview in which

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Mr A took part, GFA was represented by, inter alia, the director of the division responsible for the Stoas Group's international activities, Mr B. Although he was thus face to face with a person with a highly responsible position in the group which was employing him, Mr A, in breach of the terms of his declaration of impartiality set out above, failed to disclose his links with the group and to resign from the evaluation committee.

87. In the third place, particular importance must be attached to the fact that the seriousness of the situation gave reasonable grounds for suspecting that there might be collusion between Mr A and GFA.

88. First, it is reasonable to be in doubt as to the lawfulness of GFA's conduct. As was stated above, GFA was represented during the evaluation interview by the director of the division responsible for the Stoas Group's international activities, to which Mr A was answerable. According to GFA's tender, the division for which Mr B was responsible consisted of just 25 people and the Commission could therefore reasonably assume that Mr B knew Mr A. Those facts should have prompted the Commission to ask itself why Mr B did not disclose the links which he had with one of the members of the evaluation committee.

89. Second, Mr A was appointed by the Commission as an external expert at the beginning of September 1999, at a time when GFA had not yet submitted its tender. Although Mr A had not taken part in drawing up the terms of reference, it was conceivable that during the two months between his appointment as external evaluator and the date of submission of tenders he had been in contact with representatives of the GFA consortium. On that point, the Commission acknowledged at the hearing that if such contacts had taken place, it would then have been obliged to exclude GFA from the procedure for the award of the tender at issue. The Commission did not, however, attempt to question Mr A on this point.

90. It follows from the foregoing that the Commission, in failing to investigate the relations between Mr A and the GFA consortium, made a manifest error of assessment. In infringing the principle of sound administration in that way, the Commission also violated the principle of equal treatment as between tenderers, which requires it to examine each tender impartially and objectively in the light of the requirements and general principles governing the tendering procedure, in order to ensure that all the tenderers are afforded the same opportunities.

91. The principle of equal treatment prohibits comparable situations from being treated differently and different situations from being treated alike, unless such treatment is objectively justified. In this instance, there were serious doubts as to the lawfulness of GFA's tender. As long as those doubts subsisted, the consortium's situation was different from that of all the other tenderers. By failing to open an inquiry aimed at putting an end to that situation, the Commission treated GFA in the same way as all the other tenderers, even though such treatment was not objectively justified. In infringing the principle of equal treatment in that way, the Commission violated a rule of law whose purpose is to confer rights on individuals.

92. However, since it has been established that the Commission failed to act with due diligence to take the steps needed to continue with the tendering procedure, the legality of the decision not to exclude GFA from the remainder of the procedure cannot be assessed. Whether the decision is lawful is directly dependent on the result of the inquiry which the Commission should have undertaken in order to satisfy itself that there was no collusion. Since the factual aspects of the case-file do not support a finding of such collusion, the Court must reject the complaints by which the applicants seek to show that the Commission should have excluded GFA from the tendering procedure.

93. As regards whether the illegality found is such as to cause the Community to incur liability, it is necessary to bear in mind that the decisive test for finding that a breach of Community law

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is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (see Brasserie du Pêcheur and Factortame , cited above, paragraph 55, and Bergaderm and Goupil v Commission , cited above, paragraph 43). The Court therefore holds that, on account of the abovementioned circumstances of the conflict of interests and of the risk of fraud which it entails, the Commission's omission is of a manifest and serious nature and is thus such as to cause the Community to incur liability.

2. Damage and the causal connection

94. The applicants point to a number of heads of damage, namely:

- loss sustained in the tender procedure;

- loss of profit;

- loss of profile';

- harm to AFCon's reputation and that of its directors, Mr Mc Mullin and Mr O'Grady.

a) Compensation for the harm corresponding to the losses sustained in the tender procedure

Arguments of the parties

95. The applicants claim compensation for damage corresponding to the losses sustained as a result of their taking part in the tender procedure. This entails the costs which AFCon incurred to no effect when it submitted its tender and the costs relating to the complaints made to the Commission and the Ombudsman. Those losses consist of the remuneration of the staff employed in developing the project and of all the travel and subsistence expenses incurred as a consequence. On the basis of the unit costs indicated in AFCon's financial proposal, the applicants calculate that damage at EUR 82 570.

96. The Commission challenges those claims. It contends that, if AFCon had been awarded the contract, the costs reimbursement of which is sought would still have necessarily been incurred. Consequently, the Commission cannot be liable for such losses.

Findings of the Court

97. A distinction must be drawn between the loss represented by the costs and expenses incurred, on the one hand, in taking part in the tender procedure and, on the other, in challenging the legality of that procedure.

- Costs relating to the submission of AFCon's tender

98. It must be borne in mind that economic operators must bear the economic risks inherent in their activities, regard being had to the circumstances of each particular case. As regards a tendering procedure, those economic risks include, in particular, the costs relating to preparation of the tender. The expenses thus incurred therefore remain the responsibility of the undertaking which chose to take part in the procedure, since the opportunity to compete for a contract does not involve any certainty as to the outcome of the procedure. In accordance with that principle, Article 24 of the General Regulations for Tenders and the Award of Service Contracts financed from Phare/Tacis Funds provides that in the event of closure or annulment of a tendering procedure, the tenderers are not entitled to compensation. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages. However, the provision in question cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of Community law in the conduct of the tendering procedure has affected a tenderer's chances of being awarded the contract (Case T203/96 Embassy

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Limousines & Services v Parliament [1998] ECR II4239, paragraphs 75 and 97, and Case T13/96 TEAM v Commission [1998] ECR II4073, paragraphs 70 to 72).

99. In this instance, the applicants have established that there was a breach of Community law in the way the tendering procedure was conducted. That breach fundamentally undermined the tendering procedure and affected AFCon's chances of securing the tender at issue.

100. If the Commission had conducted an inquiry into the links between GFA and Mr A, it is possible that it would have concluded that there was collusion such as to warrant the exclusion of GFA from the remainder of the tendering procedure. In that regard, it is noteworthy that the Commission actually acknowledged, at the hearing, that if an inquiry had produced such a result, it would have then been obliged to penalise GFA by excluding it from the procedure.

101. In taking the decision to proceed with the tendering procedure without holding an inquiry, the Commission evaluated GFA's tender and awarded the contract to it even though there were a number of signs all of which suggested that there might have been collusion with a member of the evaluation committee. In acting in that way and failing to satisfy itself that GFA's participation entailed no irregularities, the Commission allowed GFA to remain in contention and accordingly undermined AFCon's chances of being awarded the contract.

102. It is true that any tenderer who participates in a tendering procedure must, as a general rule, accept the risk that he will remain liable for the costs associated with submission of his tender in the event of the contract being awarded to one of his competitors. However, that risk is accepted on the presumption inherent in any call for tenders that the Commission will act impartially in accordance with the principles set out at paragraph 90 above in order to ensure equal treatment as between the tenderers. By allowing GFA to take part in spite of the signs mentioned above and by failing to open an inquiry, the Commission disregarded that presumption and directly prejudiced AFCon's chances. Consequently, AFCon must be compensated for the loss relating to the costs incurred in participating in the procedure.

103. As regards quantum, the applicants assess their loss at EUR 31 070: in respect of costs incurred in a reconnaissance trip to south Russia (EUR 8 800), the time and costs entailed in preparing the tender (EUR 14 950) as well travel costs to Brussels in order to attend the two evaluation interviews (EUR 7 320). Since that estimate is not excessive, the loss sustained by AFCon in respect of costs relating to submission of its tender must be set at EUR 31 070.

- Costs incurred in challenging the legality of the tendering procedure

104. It must be held that this loss is present, real and certain and flows directly from the unlawfulness of the conduct for which the Commission is criticised. The applicants have maintained that this head of damages amounts to EUR 51 500, an amount made up of the following elements:

- resources allocated to the various complaints and proceedings other than this action instigated by AFCon following the award of the tender at issue to GFA (EUR 26 500);

- expenses for travel and meetings in Russia, Ireland and Belgium with contacts, politicians and lawyers (EUR 25 000).

105. In relation to the expenses connected with travelling, meetings and lawyers, the applicants have adduced neither any material allowing the Court to verify that those expenses constitute loss for which reparation may be granted nor any evidence capable of substantiating their estimate. In the absence of proof, these expenses therefore cannot be taken into account when quantifying the loss sustained.

106. There are two aspects to the estimate of the resources employed in the various complaints AFCon made to the Commission and the Ombudsman.

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107. The first concerns the number of fee days which AFCon spent defending its interests in order to challenge the legality of the tendering procedure. For the period between AFCon being notified of the award of the contract on 17 August 2000 and the final occasion on which Irish Minister of State for European Affairs contacted a member of the Commission to express support for AFCon in February 2003 that number is calculated at 28 fee-days. The daily rate of fees is set at EUR 500 by reference to the rate applied by AFCon in its financial proposal. That estimate does not appear excessive. Consequently, the loss sustained by AFCon and attributable to the time thus spent in defending its interests must be set at EUR 14 000.

108. The second aspect concerns research costs amounting to EUR 12 500. However, the applicants have not produced any material showing exactly what those costs covered or any documentation substantiating the amount claimed. Therefore, the claim in respect of the research allegedly carried out cannot be allowed.

109. Consequently, the Commission must be ordered to pay AFCon EUR 14 000 as compensation for the loss sustained on account of costs incurred by AFCon in defending its interests.

b) Compensation for loss of profit

Arguments of the parties

110. As loss of profit, the applicants claim 25% of the value of AFCon's financial proposal, EUR 741 591. That amount corresponds to the profit margin which AFCon would have obtained if the contract had been awarded to it.

111. The Commission reserves its position on this calculation in the absence of any supporting evidence from AFCon.

Findings of the Court

112. The damage claimed in respect of loss of profit presupposes that AFCon was entitled to be awarded the contract. Even if the Commission had investigated the links between Mr A and GFA and had concluded that there was collusion such as to warrant GFA's exclusion from the procedure, AFCon would not have been certain of securing the contract.

113. The contracting authority is not bound by the evaluation committee's proposal but has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract (TEAM v Commission , cited above, paragraph 76). It is true that the applicants have cited in this regard the Court of Auditors' Special Report No 16/2000 on tendering procedures for service contracts under the Phare and Tacis programmes, together with the Commission's responses (OJ 2000 C 350, p. 1), from which it appears that out of 120 contracts entered into under those programmes the Commission followed the evaluation committee's recommendation on 117 occasions. However, it cannot be concluded from those statistics that in this case the contract would definitely have been awarded to AFCon if GFA had been excluded from the procedure.

114. Therefore, the damage represented by AFCon's loss of profit is not real and certain but conjectural. Therefore it cannot be the subject of compensation.

c) Compensation for loss of profile'

Arguments of the parties

115. The applicants claim that the award of the contract in question would have permitted AFCon to take part in other calls for tenders. After the tender procedure at issue, AFCon's business began to collapse. The award of the tender at issue to GFA harmed both AFCon's reputation and its business.

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116. AFCon was automatically excluded from tendering in subsequent calls for tenders. From 2002, new rules on eligibility prevented AFCon from tendering, since the rules required tenderers to have an annual turnover and experience which AFCon no longer had.

117. The applicants provisionally estimate their loss of profile' at EUR 600 000.

118. The Commission disputes those assertions, which it contends are not substantiated.

Findings of the Court

119. The harm in respect of which reparation is sought is founded on the contention that the award of the tender at issue to GFA subsequently brought about a reduction in AFCon's activity to the point that it was, de facto , excluded from tendering for projects comparable to the one at issue in this case. That contention is not substantiated.

120. Consequently, the Commission cannot incur liability for that head of damage.

d) Compensation for the harm to AFCon's reputation and that of its directors

Arguments of the parties

121. The applicants maintain that AFCon's reputation was harmed by the fact of not having been awarded the contract and by the unlawful manner in which the tendering procedure was conducted.

122. The Commission discredited AFCon's technical and professional expertise. Its decision not to award the contract to AFCon has had wide-reaching repercussions, since, having been excluded from 27 tender procedures, AFCon has taken the decision not to tender for Phare and Tacis projects any more.

123. The applicants submit that those failures coincide with AFCon's complaints in relation to the FDRUS 9902 project. They state that they have evidence showing that AFCon has been blacklisted'. This head of damage is estimated at EUR 600 000 euros.

124. The applicants maintain that the harm to AFCon's reputation also affects Mr Mc Mullin's reputation and that of Mr O'Grady. They estimate this head of damage at EUR 75 000 per person.

125. The Commission submits that the applicants' claims are not substantiated. Any number of reasons other than the fact that GFA was awarded the tender at issue can explain AFCon's lack of success. It denies that a blacklist' exists. It also denies that it has caused any harm to Mr Mc Mullin's reputation or to that of Mr O'Grady.

Findings of the Court

126. It must be stated that the applicants have not proved that a blacklist exists or that any comments or practices detrimental to AFCon's reputation may be attributed to the Commission. Therefore, the harm alleged cannot be regarded as present, real and certain.

127. The claims relating to the harm which was allegedly caused to the reputations of Mr Mc Mullin and Mr O'Grady must be rejected on the same grounds.

e) Interest

Arguments of the parties

128. The applicants claim that the Court should increase the damages awarded by compensatory interest at a rate of 8% per annum, the rate currently applying in Ireland.

129. The applicants also claim that the Commission should be ordered to pay default interest, at the same rate, from the date of judgment in this action.

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Findings of the Court

130. As regards the calculation of compensatory interest, such interest should start to run from the first day of the month following the month in which AFCon last took steps prior to commencing proceedings. Since that was during February 2003, the starting point must be fixed at 1 March 2003.

131. It is clear from the annexes to the application that, in their assessment of the harm they claim to have suffered, the applicants did not ask for compound interest. Therefore, in order to establish the amount which the Commission is to pay, simple interest must be applied.

132. The rate of compensatory interest must be calculated on the basis of the rate fixed by the European Central Bank for its principal refinancing operations, in force during the period concerned, increased by two percentage points, namely an annual rate of 4%. As at the date of delivery of this judgment, the Commission's debt to AFCon amounts to EUR 48 605, including interest.

133. To that sum must be added default interest from delivery of this judgment until full payment. The rate of default interest to be applied is calculated on the basis of the rate fixed by the European Central Bank for its principal refinancing operations, in force during the period concerned, increased by two percentage points. The amount of interest is to be calculated on the basis of compound interest.

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APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Ireland
NOTES	Bernard, Elsa: Responsabilité du fait de l'irrégularité d'une procédure d'appel d'offres, Europe 2005 Mai Comm. no 154 p.15-16 ; Braun, Peter: Damages for Irregularities in the Award Process: Case T-160/03, AFCon Management Consultants v Commission, Public Procurement Law Review 2005 p.NA99-NA103 ; Pachner, Franz: Zusammenwirken zwischen (Best-)Bieter und einem Mitglied eines Ausschusses zur Angebotsbewertung, Zeitschrift für Vergaberecht und Beschaffungspraxis 2005 p.158-159 ; Kalbe, Peter: Practical Remedies for Bidders on TACIS Contracts: Additional Comments on Case T-160/03, Afcon Management Consultants, Mullin and Grady v Commission, Public Procurement Law Review 2005 p.NA121-N127
PROCEDU	Action for damages - successful;Action for damages - unfounded;Application for measures of inquiry - successful
DATES	of document: 17/03/2005 of application: 12/05/2003

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Notice for the OJ

JUDGMENT OF THE COURT OF FIRST INSTANCE

of 17 March 2005

in Case T-160/03 AFCon Management Consultants and Others v Commission of the European Communities [1]

(Tacis Programme - Invitation to tender - Irregularities in the tendering procedure - Action for damages)

(Language of the case: English)

In Case T-160/03: AFCon Management Consultants, established in Bray (Ireland), Patrick Mc Mullin, resident in Bray, Seamus O'Grady, resident in Bray, represented by B. O'Connor, solicitor, and I. Carreño, lawyer, against Commission of the European Communities (Agents: J. Enegren and F. Hoffmeister, with an address for service in Luxembourg) (application for compensation for the damage allegedly suffered as a result of irregularities in the tendering procedure for a project financed by the Tacis programme ('Project FDRUS 9902 - Agricultural extension services in South Russia') (the Court of First Instance (Fifth Chamber), composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges; D. Christensen, Administrator, for the Registrar, gave a judgment on 17 March 2005, in which it:

Orders the Commission to pay AFCon the sum of EUR 48 605, together with interest thereon from delivery of this judgment until full payment. The rate of interest to be applied is to be calculated on the basis of the European Central Bank's rate for its main refinancing operations, in force during the period concerned, plus two percentage points. The amount of interest is to be calculated on the basis of compound interest;

Dismisses the application as to the remainder;

Orders the Commission to pay the costs.

_____

[1] - OJ C 200 of 23.8.2003.

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Notice for the OJ

Removal from the register of Case C-407/02[1]

By order of 25 June 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-407/02: **Commission of the European Communities** v **Hellenic Republic**.

_____

[1] - OJ C 19 of 25.01.2003.

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Notice for the OJ

Action brought on 15 November 2002 by the Commission of the European Communities against the Hellenic Republic

(Case C-407/02)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 15 November 2002 by the Commission of the European Communities, represented by Michel Nolin and Minas Konstantinidis, of its Legal Service, with an address for service in Luxembourg.

The Commission claims that the Court should:

(declare that, as a result of the direct award by the municipality of Serres of the contract "Renewal of the town of Serres: framework of investigative study models and pilot realisation programme" without tenders first being invited, the Hellenic Republic has failed to fulfil its obligations under the provisions of Directive 92/50/EEC [1] (Article 8 et seq.) which require a tender procedure to be carried out and lay down the tender procedure for the award of public service contracts;

(order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The provisions of Directive 92/50 govern the choice of procedures for the award of public service contracts and lay down common rules in the field of design contests and in the technical field. Those provisions apply to contracts whose estimated value is equal to or exceeds a specified threshold.

According to the Commission, the contract "Renewal of the town of Serres: framework of investigative study models and pilot realisation programme" is a public service contract falling within the directive given its subject-matter and value. Nevertheless, the contract was not put out to tender but was awarded directly by the municipality of Serres to the Aristotle University of Thessaloniki.

The Commission further maintains that in the present case neither the exception in Article 6 of the directive (contract with an entity which is itself a contracting authority within the meaning of the directive) nor the exception in Article 1(a)(ix) is applicable.

_____

[1] - (Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ No L 209, 24.7.1992, p. 1).

Judgment of the Court (First Chamber)
of 2 June 2005
Commission of the European Communities v Hellenic Republic. Failure of a Member State to fulfil obligations - Directive 93/38/EEC - Public procurement in the water, energy, transport and telecommunications sectors - Contract for the construction of a conveyor-belt system for the thermal-electricity generation plant at Megalopolis - Failure to publish a contract notice - Technical reasons - Unforeseeable event - Extreme urgency. Case C-394/02.

1. Actions for failure to fulfil obligations - Right of the Commission to bring proceedings - Exercise of that right not dependent on a specific interest in bringing an action

(Art. 226 EC)

2. Actions for failure to fulfil obligations - Pre-litigation procedure - Subject-matter - Reasoned opinion - Content

(Art. 226 EC)

3. Approximation of laws - Review procedures in respect of the award of public supply and public works contracts in the water, energy, transport and telecommunications sectors - Directives 89/665 and 92/13 - Procedure enabling the Commission to take preventive action where there has been a clear and manifest infringement of the Community rules on public procurement - Unrelated to the infringement procedure under Article 226 EC

(Art. 226 EC; Council Directives 89/665, Art. 3, and 92/13, Art. 8)

4. Approximation of laws - Procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Derogations from common rules - Conditions - Strict interpretation - Burden of proof

(Council Directive 93/38, Art. 20(2)(c) and (d))

1. When exercising its powers under Article 226 EC, the Commission does not have to show that there is a specific interest in bringing an action. The Commission's function is to ensure, in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end. Article 226 EC is not therefore intended to protect that institution's own rights. It is for the Commission alone to decide whether or not it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and, depending on the circumstances, because of what conduct or omission those proceedings should be brought.

(see paras 14-16)

2. While, within the framework of an action for failure to fulfil obligations, the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty, the Commission is not, however, obliged to set out in that opinion the steps to be taken to remedy the infringement complained of.

The purpose of the prelitigation procedure is to define the subjectmatter of the action for failure to fulfil obligations in order to give the Member State an opportunity to comply with its obligations under Community law and to avail itself of its right to defend itself against the complaints made by the Commission.

Consequently, it is only where the Commission intends to make failure to adopt measures to enable the infringement complained of to be remedied the subjectmatter of its action for failure to fulfil obligations that it has to specify those measures in the reasoned opinion.

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(see paras 21-23)

3. The procedure for direct intervention established by Article 8 of Directive 92/13 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, and by Article 3 of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, under which the Commission may, if it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed, take up the matter with a Member State, is a preventive measure which can neither derogate from nor replace the powers of the Commission under Article 226 EC, with the result that the fact that the Commission used or did not use that procedure is irrelevant where it is a matter of deciding on the admissibility of infringement proceedings. Thus, the choice between the two procedures is within its discretion.

(see paras 27-28)

4. The provisions of Article 20(2)(c) and (d) of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, which in certain cases authorise contracting entities to use a procedure without prior call for competition, must, as derogations from the rules relating to procedures for the award of public procurement contracts, be interpreted strictly. Also, the burden of proof lies on the party seeking to rely on them.

As regards, first of all, Article 20(2)(c) of that directive, its application is subject to two cumulative conditions, namely, first, that there are technical reasons connected to the works which are the subjectmatter of the contract and, second, that those technical reasons make it absolutely necessary to award that contract to a particular contractor.

As regards, secondly, the derogation under Article 20(2)(d) of that directive, it is subject to three cumulative conditions, namely an unforeseeable event, extreme urgency rendering impossible the observance of the time-limits laid down for calls for tenders, and a causal link between the unforeseeable event and the extreme urgency resulting therefrom.

The fact that an authority which must approve the project concerned may impose timelimits is, in that regard, a foreseeable part of the procedure for approving that project.

(see paras 33-34, 40, 43)

In Case C-394/02,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 November 2002,

Commission of the European Communities, represented by M. Nolin and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic , represented by P. Mylonopoulos, D. Tsagkaraki and S. Chala, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Lenaerts, J.N. Cunha Rodrigues,

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M. Ilei and E. Levits, Judges,

Advocate General: F.G. Jacobs,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 8 December 2004,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2005,

gives the following

Judgment

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

1. Declares that, by reason of the award by the public electricity undertaking Dimosia Epicheirisi Ilektrismoy of the contract for the construction of a conveyorbelt system for the thermalelectricity generation plant at Megalopolis by means of a negotiated procedure without prior publication of a contract notice, the Hellenic Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/4/EC of the European Parliament and the Council of 16 February 1998, and, in particular, under Articles 20(1) and 21 thereof;

2. Orders the Hellenic Republic to pay the costs.

1. By its application, the Commission of the European Communities seeks a declaration by the Court that, by reason of the award by the public electricity company Dimosia Epicheirisi Ilektrismoy (hereinafter DEI') of a contract for the construction of a conveyor-belt system for the thermalelectricity generation plant at Megalopolis by means of a negotiated procedure without prior publication of a contract notice, the Hellenic Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1) (Directive 93/38'), and in particular Article 20 et seq. of that directive.

Relevant provisions

2. Under Article 15 of Directive 93/38,... works contracts... shall be awarded in accordance with the provisions of Titles III, IV and V'.

3. Article 20(1) of Directive 93/38 provides that [c]ontracting entities may choose any of the procedures described in Article 1(7) [that is open, restricted and negotiated procedures], provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21'.

4. Article 20(2) provides:

Contracting entities may use a procedure without prior call for competition ... :

...

(c) when, for technical... reasons... , the contract may be executed only by a particular... contractor... ;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time limits laid down for open and restricted procedures cannot be adhered to;

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...'

5. Article 21(1) of Directive 93/38 lays down the means whereby the call for competition may be made, in essence the publication of a notice in the Official Journal of the European Communities drawn up in accordance with the models contained in the annexes to the directive.

Facts and prelitigation procedure

6. In October 1997, DEI, for the purposes of an environmental impact assessment under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), submitted to the competent authority, namely the Ministry of Environment, Planning and Public Works, a project concerning the installation of a system for the desulphuration, stabilisation, transport and deposit of solid waste from the Megalopolis thermalelectricity generation plant.

7. By decisions of 29 October 1998 and 30 December 1999, that Ministry gave its approval for that project, subject, on the one hand, to DEI lodging a request within nine months, that is by September 2000, for final authorisation for the elimination of the waste produced by that plant and, on the other hand, to the installation within 12 months, that is by December 2000, of a conveyorbelt system for the transport of the ash between that plant and the mine of Thoknia, where the ash would be treated.

8. In view of those deadlines, DEI, on 27 July 1999, decided to carry out a negotiated award procedure without publication of a notice and invited the Koch/Metka consortium and Dosco Overseas Engineering Ltd (Dosco') to submit their offers.

9. On 18 January 2000, Dosco stated that it did not wish to take part in that procedure.

10. On 29 August 2000, after several months of negotiations, DEI awarded the contract for the construction of the conveyorbelt system for the transport of ash between the Megalopolis thermalelectricity generation plant and the mine of Thoknia (hereinafter the contract at issue') to the Koch/Metka consortium.

11. After giving the Hellenic Republic formal notice to submit its observations, the Commission, on 21 December 2001, issued a reasoned opinion stating that the contract at issue should have been made the subject of a notice in the Official Journal of the European Communities , in accordance with Directive 93/38. It therefore invited that Member State to adopt the measures necessary to comply with the reasoned opinion within a period of two months from the date of its notification. Since it was not satisfied by the Greek authorities' reply by letter of 3 April 2002, the Commission decided to bring this action.

The action

Admissibility

12. The Greek Government raises four pleas of inadmissibility on the grounds, respectively, of the Commission's lack of interest in bringing proceedings, the want of any purpose to the action, the imprecision of the reasoned opinion and abuse of process.

The Commission's lack of any interest in bringing proceedings

13. The Greek Government submits that the Commission had no legitimate interest in opening the procedure for failure to fulfil obligations since the alleged infringement of Community law had, when the period for compliance with the reasoned opinion expired, been fully or at least in large measure completed.

14. In that regard, it must be noted that, when exercising its powers under Article 226 EC, the

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Commission does not have to show that there is a specific interest in bringing an action (see Case 167/73 Commission v France [1974] ECR 359, paragraph 15, and Joined Cases C-20/01 and C28/01 Commission v Germany [2003] ECR I-3609, paragraph 29).

15. The Commission's function is to ensure, in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (see Commission v France , cited above, paragraph 15, and Commission v Germany , cited above, paragraph 29 and the caselaw there cited).

16. Article 226 EC is not therefore intended to protect that institution's own rights. It is for the Commission alone to decide whether or not it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and, depending on the circumstances, because of what conduct or omission those proceedings should be brought (see, to that effect, Case C-431/92 Commission v Germany [1995] ECR I2189, paragraph 22; Case C-476/98 Commission v Germany [2002] ECR I9855, paragraph 38, and Commission v Germany , cited in paragraph 14 above, paragraph 30).

The action's want of any purpose

17. The Greek Government submits that the action lacks any purpose, since the contract for works concluded between DEI and the Koch/Metka consortium for the purposes of the contract at issue, had, when the period fixed by the reasoned opinion expired, been almost fully performed. At that time, the works in question had been largely completed, that is to say to the extent of 85% of them. In actual fact, it was therefore no longer possible to comply with the reasoned opinion.

18. In that regard, it is indeed the case that, as far as concerns the award of public procurement contracts, the Court has held that an action for failure to fulfil obligations is inadmissible if, when the period prescribed in the reasoned opinion expired, the contract in question had already been completely performed (see, to that effect, Case C-362/90 Commission v Italy [1992] ECR I-2353, paragraphs 11 and 13).

19. Here, the contract concluded between DEI and the Koch/Metka consortium for the purposes of the contract at issue, was, when the period prescribed by the reasoned opinion expired, in course of performance, since only 85% of the works had been completed. That contract had therefore not been fully performed.

The imprecision of the reasoned opinion

20. The Greek Government submits that the reasoned opinion was too imprecise, in that the Commission had not specified the measures to be adopted in order to comply with it.

21. In that regard, it is clear from settled caselaw that, while the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the EC Treaty, the Commission is not, however, obliged to set out in that opinion the steps to be taken to remedy the infringement complained of (see, to that effect, Case C-247/89 Commission v Portugal [1991] ECR I3659, paragraph 22, and Case C-328/96 Commission v Austria [1999] ECR I7479, paragraph 39).

22. The purpose of the prelitigation procedure is to define the subjectmatter of the action for failure to fulfil obligations in order to give the Member State an opportunity to comply with its obligations under Community law and to avail itself of its right to defend itself against the complaints made by the Commission (see, to that effect, Commission v Austria , cited above, paragraph 34, and Case C476/98 Commission v Germany , paragraphs 46 and 47).

23. Consequently, it is only where the Commission intends to make failure to adopt measures to

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enable the infringement complained of to be remedied the subjectmatter of its action for failure to fulfil obligations that it has to specify those measures in the reasoned opinion (see, to that effect, Commission v Austria , cited above, paragraph 39).

24. Here, the subjectmatter of the action is limited to a declaration of failure to fulfil obligations by reason of the award of the contract at issue without prior publication of a notice. It does not therefore seek a declaration of a further infringement, based on failure to adopt measures to enable the first infringement to be remedied.

Abuse of process

25. The Greek Government submits that, instead of bringing an action for failure to fulfil obligations, the Commission should have intervened directly and ordered the suspension of the award of the contract at issue under Article 3 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

26. In that context, as regards the energy sector, it is not Directive 89/665, but Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), which is applicable.

27. Even if the Greek Government had cited Article 8 of Directive 92/13, which provides for a procedure essentially identical to that under Article 3 of Directive 89/665, it follows from settled caselaw that, even were it preferable that the Commission use the procedure for direct intervention established by those directives, such a procedure is a preventive measure which can neither derogate from nor replace the powers of the Commission under Article 226 EC (see, in the context of Directive 89/665, Case C-359/93 Commission v Netherlands [1995] ECR I157, paragraph 13; Case C-79/94 Commission v Greece [1995] ECR I1071, paragraph 11; Case C-353/96 Commission v Ireland [1998] ECR I8565, paragraph 22; and Commission v Austria , cited above, paragraph 57). The fact that the Commission used or did not use that procedure is therefore irrelevant where it is a matter of deciding on the admissibility of infringement proceedings.

28. The Commission alone is competent to decide whether it is appropriate to bring proceedings under Article 226 EC for failure to fulfil obligations (see, to that effect, Case C431/92 Commission v Germany , paragraph 22, and Case C476/98 Commission v Germany , paragraph 38). Thus, the choice between the two procedures is within its discretion.

29. It follows from the foregoing considerations that the pleas of inadmissibility must be rejected.

Substance

30. In support of its action, the Commission relies on a single complaint alleging, in essence, breach of Article 15 of Directive 93/38, read in conjunction with Articles 20(1) and 21 of that directive, on the ground that DEI awarded the contract at issue without prior publication of a contract notice in the Official Journal of the European Communities.

31. In that regard, it must be stated that the Greek Government does not dispute that the contract at issue is covered by Article 15 of Directive 93/38 and should therefore, as a rule, have been awarded in accordance with Titles III to V of that directive, which provide, in particular, for contracts to be put out to tender by the publication of a notice in the Official Journal.

32. The Government contends, however, that, under Article 20(2)(c) and (d) of Directive 93/38, the contract at issue could, in exceptional circumstances, have been awarded without publication of a notice. In its submission, first, only the Koch/Metka consortium was in a position to carry

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out the works in question in the light of the particular characteristics of the product to be transported and of the site's subsoil, as well as the need to attach the conveyor belts to the existing system. Secondly, the carrying out of those works was very urgent because of the timelimits set by the Ministry of Environment, Planning and Public Works.

33. In this respect, it should, as a preliminary point, be noted that, as derogations from the rules relating to procedures for the award of public procurement contracts, the provisions of Article 20(2)(c) and (d) of Directive 93/38 must be interpreted strictly. Also, the burden of proof lies on the party seeking to rely on them (see, to that effect, in the context of Directives 71/305 and 93/37, Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 14; Case C-57/94 Commission v Italy [1995] ECR I-1249, paragraph 23; and Case C-385/02 Commission v Italy [2004] ECR I8121, paragraph 19).

34. As regards, first of all, Article 20(2)(c) of Directive 93/38, it follows from the caselaw that the application of that provision is subject to two cumulative conditions, namely, first, that there are technical reasons connected to the works which are the subjectmatter of the contract and, second, that those technical reasons make it absolutely necessary to award that contract to a particular contractor (see, to that effect, in the context of Directives 71/305 and 93/37, Case C57/94 Commission v Italy , paragraph 24, and Case C385/02 Commission v Italy , paragraphs 18, 20 and 21).

35. In this case, as the Advocate General noted in paragraphs 40 to 45 of his Opinion, while the works in question involve technical reasons in the sense of Article 20(2)(c) of Directive 93/38, the Greek Government has not convincingly shown that the Koch/Metka consortium was alone in a position to carry them out and that it was, as a result, absolutely necessary to award it the contract.

36. Neither the particular characteristics of the product to be transported, nor the instability of the subsoil and the need to attach the system of conveyor belts to the existing one proves, by itself, that that consortium of companies was the only contractor in the Community with the necessary expertise to carry out the works in question.

37. Moreover, since it also invited Dosco to tender, DEI itself considered that a contractor other than the Koch/Metka consortium was, in principle, also capable of carrying out the works.

38. In addition, it is clear from the Court file that, as regards similar works to be carried out on the same site, DEI had, in the past, initiated public procurement procedures by publication of a contract notice.

39. It cannot therefore be maintained that, because of technical reasons, the contract at issue could be performed only by the Koch/Metka consortium.

40. As regards, secondly, the derogation under Article 20(2)(d) of Directive 93/38, the caselaw has made it subject to three cumulative conditions, namely an unforeseeable event, extreme urgency rendering impossible the observance of the timelimits laid down for calls for tenders, and a causal link between the unforeseeable event and the extreme urgency resulting therefrom (see, to that effect, in the context of Directive 71/305, Case C-107/92 Commission v Italy [1993] ECR I-4655, paragraph 12, and Case C318/94 Commission v Germany [1996] ECR I-1949, paragraph 14).

41. The Greek Government has not shown that those conditions were met in this case.

42. The need to carry out the works in question within the timelimits imposed by the competent authority for the environmental impact assessment cannot be regarded as extreme urgency resulting from an unforeseeable event.

43. The fact that an authority which must approve the project concerned may impose timelimits is a foreseeable part of the procedure for approving that project (see, to that effect, in the context of Directive 71/305, Case C318/94 Commission v Germany , cited above, paragraph 18).

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44. Also, DEI could, as regards the contract at issue, have launched the contract award procedure with publication of a contract notice when the procedure for the environmental impact assessment started, that is about three years prior to the expiry of the timelimits imposed.

45. It can therefore be no better maintained that extreme urgency resulting from events unforeseeable by DEI did not enable the timelimits laid down for calls for tenders to be observed.

46. In the light of all the foregoing, it must be declared that, by reason of the award by DEI of the contract for the construction of a conveyorbelt system for the thermalelectricity generation plant at Megalopolis by means of a negotiated procedure without prior publication of a contract notice, the Hellenic Republic has failed to fulfil its obligations under Directive 93/38 and, in particular, Articles 20(1) and 21 thereof.

Costs

47. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic has been unsuccessful, it must be ordered to pay the costs.

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CONCERNS Failure concerning 31993L0038 -A20P1
Failure concerning 31993L0038 -A21

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

AUTLANG Greek

APPLICA Commission ; Institutions

DEFENDA Greece ; Member States

NATIONA Greece

NOTES Brown, Adrian: Grounds for Failing to Advertise a Contract for a Conveyor-Belt System: A Note on Case C-394/02, Commission v Greece, Public Procurement Law Review 2005 p.NA111-NA113 ; Novelli, Roberta: Urgenza ed imprevedibilità come deroghe eccezionali al principio di pubblicità degli appalti, Diritto pubblico comparato ed europeo 2005 p.1788-1791 ; Meisse, Eric: Procédure de passation, Europe 2005 Août-Septembre Comm. no 293 p.23

PROCEDU Action for failure to fulfil obligations - successful

ADVGEN Jacobs

JUDGRAP Jann

DATES of document: 02/06/2005
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Notice for the OJ

JUDGMENT OF THE COURT

(First Chamber)

of 2 June 2005

in Case C-394/02: Commission of the European Communities v Hellenic Republic [1]

(Failure of a Member State to fulfil obligations - Directive 93/38/EEC - Public procurement in the water, energy, transport and telecommunications sectors - Contract for the construction of a conveyor-belt system for the thermal-electricity generation plant at Megalopolis - Failure to publish a contract notice - Technical reasons - Unforeseeable event - Extreme urgency)

(Language of the case: Greek)

In Case C-394/02: Commission of the European Communities (Agents: M. Nolin and M. Konstantinidis) v Hellenic Republic (Agents: P. Mylonopoulos, D. Tsagkaraki and S. Chala) - action under Article 226 EC for failure to fulfil obligations, brought on 8 November 2002 - the Court (First Chamber), composed of P. Jann (Rapporteur), President of the Chamber, K. Lenaerts, J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges; F.G. Jacobs, Advocate General; K. Sztranc, Administrator, for the Registrar, gave a judgment on 2 June 2005, in which it:

Declares that, by reason of the award by the public electricity undertaking Dimosia Epicheirisi Ilektrismoy of the contract for the construction of a conveyor-belt system for the thermal-electricity generation plant at Megalopolis by means of a negotiated procedure without prior publication of a contract notice, the Hellenic Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/4/EC of the European Parliament and the Council of 16 February 1998, and, in particular, under Articles 20(1) and 21 thereof;

Orders the Hellenic Republic to pay the costs.

_____

[1] - OJ C 19 of 25.01.2003.

Opinion of Mr Advocate General Jacobs delivered on 24 February 2005. Commission of the European Communities v Hellenic Republic. Failure of a Member State to fulfil obligations - Directive 93/38/EEC - Public procurement in the water, energy, transport and telecommunications sectors - Contract for the construction of a conveyor-belt system for the thermal-electricity generation plant at Megalopolis - Failure to publish a contract notice - Technical reasons - Unforeseeable event - Extreme urgency. Case C-394/02.

1. In this action brought under Article 226 EC the Commission seeks a declaration by the Court that, by reason of the award by the public electricity company Dimosia Epicheirisi Ilektrismoy (hereinafter DEI') of a contract for the construction of a conveyor-belt system for the thermal-electricity generation plant of Megalopolis (hereinafter the Megalopolis plant') by means of a negotiated procedure without previous publication of a notice, the Hellenic Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (hereinafter the Utilities Sectors Directive') (2) and in particular Article 20 et seq. thereof.

The facts and background to the case

2. Towards the end of 1997 DEI submitted to the competent national environmental authority, the Ministry of Environment, Planning and Public Works, a project concerning the installation of a system for the de-sulphuration, stabilisation and transport of ashes and solid waste from the Megalopolis plant for the purposes of an environmental impact assessment under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (hereinafter the Environmental Impact Assessment Directive'). (3) By decisions of 29 October 1998 and 30 December 1999, the competent national environmental authority gave its approval. That approval was subject, on the one hand, to DEI lodging a request for a final authorisation for the elimination of the resulting waste within 9 months and, on the other, to the installation within 12 months of a conveyor-belt system for the transport of the ashes between the Megalopolis plant and the mine of Thoknia, where the ashes would be treated.

3. Having been unofficially informed of the possibility of those deadlines being imposed, on 27 July 1999 DEI decided to carry out a negotiated award procedure without publication of a notice and invited the firms Koch/Metka and Dosco to submit offers.

4. On 18 January 2000, Dosco declared that it was not in a position to take part and withdrew from the award procedure.

5. On 29 August 2000, after price negotiations that lasted several months, DEI awarded the contract for the construction of the conveyor-belt system to the firm Koch/Metka.

6. By letter of 3 October 2000 the Commission requested information from Greece concerning the disputed contract award. After receiving a reply from Greece by letter of 9 November 2000, the Commission sent its letter of formal notice on 17 April 2001. Greece replied by letter of 30 July 2001. After giving Greece the opportunity to submit its observations, on 21 December 2001 the Commission issued a reasoned opinion in which it stated that the contract for the construction of the conveyor-belt system for the transport of ashes between the Megalopolis plant and the mine of Thoknia should have been the subject of a notice published in the Official Journal in accordance with the Utilities Sectors Directive. It requested Greece to adopt all necessary measures to comply with the reasoned opinion within two months. Not being satisfied by the reply given by Greece dated 3 April 2002, the Commission lodged the present action on 8 November 2002.

Relevant provisions of Community law

7. Article 15 of the Utilities Sectors Directive requires that supply and works contracts and

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contracts which have as their object services listed in Annex XVI A shall be awarded in accordance with the provisions of Titles III, IV and V'.

8. Article 20(1) of the Utilities Sectors Directive, which is contained in Title IV governing procedures for the award of contracts, provides that [c]ontracting entities may choose any of the procedures described in Article 1(7), provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21'.

9. Pursuant to paragraph 2 of the same provision:

Contracting entities may use a procedure without prior call for competition in the following cases: ...

(c) when, for technical or artistic reasons or for reasons connected with protection of exclusive rights, the contract may be executed only by a particular supplier, contractor or service provider;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time limits laid down for open and restricted procedures cannot be adhered to.'

10. Article 1(7) of the Utilities Sectors Directive defines the three types of award procedures - open, restricted and negotiated - that contracting entities must follow whenever the directive applies.

11. Article 21(1) of the Utilities Sectors Directive lays down the means whereby the call for competition may be made, in essence the publication of a notice in the Official Journal drawn up in accordance with the models contained in the annexes to the directive.

Admissibility

12. Greece objects to the admissibility of the Commission's action on two grounds.

13. First, the Commission did not specify the measures that it was required to adopt in order to comply with the reasoned opinion. Since the procurement in question concerned public works which were to a large extent - around 85% - completed by the deadline set for compliance in the reasoned opinion, it was impossible to give effect to the opinion. In view of this, Greece questions the interest of the Commission in pursuing an infringement procedure.

14. Secondly, the use of the infringement procedure under Article 226 EC constitutes an abuse of procedure. The Commission should have resorted to the procedure under Article 3 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (hereinafter the General Remedies Directive'), (4) which entitles the Commission to intervene directly in a national award procedure and request action from the Member State to tackle alleged clear and manifest breaches of the general public supply, public works and public services directives.

15. As regards Greece's first plea, it must first of all be noted that, pursuant to settled case-law, the Commission does not have to show that there is a specific interest in bringing an action when exercising its powers under Article 226 EC. Given its role as guardian of the Treaty, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a MemberState for failure to fulfil its obligations and to determine the conduct or omission attributable to the MemberState concerned on the basis of which those proceedings should be brought. (5)

16. The Court has further held that, where the effects of the breach subsist beyond the date for compliance laid down in the reasoned opinion, the Commission may have an interest in bringing an action. In the specific context of public procurement cases, without making a distinction between

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works, supply or services procurement contracts, the Court has held that the unlawful effects subsist during the entire performance of the contracts concluded in breach of the procurement directives. (6)

17. The Court has in the past also dismissed an objection of inadmissibility based on a claim that the alleged infringement had ceased in a situation in which the award procedures had been completed before the date on which the period laid down in the reasoned opinion expired, since the contracts had not been fully performed by that date. Here again the Court does not differentiate between the different procurement contracts covered by the various directives. (7)

18. In the present case it appears from the file that at the expiry of the period prescribed for compliance with the reasoned opinion, the contract was, by the defendant's own admission, still not fully implemented. In fact, the works were only completed in May 2002. It follows that the Commission's interest in bringing the action cannot be contested.

19. Greece's arguments as to the de facto impossibility of giving effect to the reasoned opinion, thereby rendering the Commission's action devoid of any purpose, must in my view also be dismissed.

20. First of all, as the Court has consistently held, even where the default has been remedied after the time-limit given in the reasoned opinion has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, towards other Member States, the Community or private parties'. (8) I would add that the same applies whenever the default may no longer be remedied.

21. The establishment of a basis for potential liability claims may be particularly relevant in the case of breaches of public procurement rules. It is generally agreed that the setting aside of a fully implemented contract by reason of a breach of the applicable Community rules on public procurement is not always the most sensible solution since it does not, as a general rule, satisfy either the public or private interests involved. That is especially so in the case of contracts for public works which have been for the most part executed. In those circumstances the best remedy to injured parties may lie in the award of damages. That is precisely the logic that underlies both the General Remedies Directive and Council Directive 92/13/EEC of 25 February 1992 (9) coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (hereinafter the Utilities Sectors Remedies Directive'). Article 2(6) of each of those directives enables Member States to provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement. A declaration by the Court that a breach has occurred may provide a basis for claims for damages before national courts, even where the contract has already been awarded and fully executed.

22. That is so, moreover, in the case of breaches of the Utilities Sectors Directive. Assuming that Greece has properly implemented its obligations under the Utilities Sectors Remedies Directive - which, as I shall discuss below, applies in the instant case - any party injured by a breach should benefit from the relatively generous damages regime established thereunder. (10)

23. Greece argues that, in any event, there is no third party in the instant case which could avail itself of the Court's judgment to claim damages at national level. That argument should also be rejected.

24. First, such argument is not borne out by reality. The spectrum of possible claimants is defined in very broad terms by both the Remedies directives as any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement'. Thus, the number of persons that could claim relief under the applicable provisions is, potentially,

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significant and their existence cannot, in my view, be excluded a priori. In the instant case, a second company, Dosco, took part in the preliminary stages of the award procedure but withdrew (for reasons not specified before the Court). In addition, the Commission, according to its submissions, took action following an individual complaint. Thus, contrary to the arguments put forward in the defence, the possibility cannot be excluded that there may be parties who could benefit from a declaration by the Court of a breach of the Community public procurement rules.

25. Secondly, accepting Greece's arguments would be tantamount to allowing national authorities a means to circumvent their obligations under the EC public procurement rules. In view of the length of the pre-litigation and judicial procedures under Article 226 EC, it is highly likely that by the time the Court has ruled on the substance the contract affected by the alleged infringement will be fully implemented, unless interim measures suspending the award procedure or the execution of the contract are granted. It would therefore suffice for Member States, while proceeding to the execution of the contested contract, systematically to oppose the Commission's allegations throughout the pre-litigation procedure, only to argue subsequently the inadmissibility of the Commission's action on grounds of the impossibility of implementing the reasoned opinion. Moreover, it would be unacceptable for a MemberState to be in a better position where the breach is a fait acccompli than where it can still be prevented.

26. Finally, the Court has held that since the finding of failure by a Member State to fulfil its obligations is not bound up with a finding as to the damage resulting therefrom, that Member State cannot rely on the fact that no third party had suffered damage from the alleged breach of the public procurement rules committed by the national contracting authorities. (11)

27. As regards the need to specify the measures to be adopted by the defaulting MemberState, it is settled case-law that the Commission cannot be required to indicate in the reasoned opinion the measures or steps to be taken to eliminate the infringement in question. (12) That case-law, which sanctions the usual practice of the Commission under Article 226 EC, constitutes in my view an expression in the context of that provision of what may be referred to as the principle of institutional autonomy' which governs the relationship between the Community and its Member States. (13) According to the system of the division of powers established by the EC Treaty, in the absence of applicable Community rules, the responsibility for the implementation, application and enforcement of Community rules falls upon the Member States in accordance with their national legal systems, (14) subject, of course, to the constraints of the principle of effectiveness as developed by the Court.

28. Greece refers however to the judgment in Commission v Austria in support of its plea. In that case the Court held, as an exception to its previous case-law, that the Commission must specifically indicate to the Member State concerned that it must adopt a certain measure if it intends to make the failure to adopt that measure the subject-matter of its infringement action'. (15) The Court interpreted part of the Commission's application as seeking a declaration that the defendant State ought to have cancelled the contracts concluded by the national authorities in breach of Community law. Since such a failure had not been specified during the pre-litigation procedure, the Court declared that part of the application inadmissible as the Commission had altered the subject-matter of the proceedings, thereby violating the rights of defence of the Republic of Austria.

29. In my view the circumstances in the instant case are not comparable to those in Commission v Austria. In the present case the Commission has throughout the entire pre-litigation and judicial procedures maintained the same subject-matter for its action, namely the failure by Greece to fulfil its obligations under the Utilities Sectors Directive by reason of the award by DEI of a contract following a negotiated procedure without previous publication of a notice. In its application, the Commission has not sought to require Greece to adopt measures other than those that it had already mentioned in its reasoned opinion. It has therefore not changed the subject-matter of

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its action and has not prejudiced the defendant's rights of defence.

30. In its second plea of inadmissibility relating to an abuse of procedure, Greece claims that the Commission should have resorted to the direct intervention procedure provided for in Article 3 of the General Remedies Directive.

31. Reference to that provision is surely an oversight by Greece since that directive cannot apply to the instant case. (16) Breaches of the Utilities Sectors Directive are covered by the Utilities Sectors Remedies Directive, which was specifically designed to cater for the peculiarities of public procurement procedures in the sectors covered and to fill the gap left by the General Remedies Directive as regards breaches of the provisions of the Utilities Sectors Directive. (17)

32. That having been said, the Utilities Sectors Remedies Directive also provides in its Article 8 for a special procedure enabling the Commission to intervene directly before the MemberState when a clear and manifest breach of the Utilities Sectors Directive is detected. Apart from the different deadline that it lays down for the reply of the MemberState to the notification of the Commission, the procedure is the same as that laid down by Article 3 of the General Remedies Directive. Although the Commission did not address this point in its written reply, at the hearing it noted that, despite its written submissions, the relevant procedure was that under Article 8 of the Utilities Sectors Remedies Directive. Thus, it might be inferred that Greece's plea refers to the procedure under Article 8 of the Utilities Sectors Remedies Directive rather than Article 3 of the General Remedies Directive

33. The Court has, in my view somewhat reluctantly, (18) held that the special procedure under [Article 3 of the General Remedies Directive] is a preliminary measure which can neither derogate from nor replace the powers of the Commission under Article [226] of the Treaty. That article gives the Commission discretionary power to bring an action before the Court where it considers that a Member State has failed to fulfil one of its obligations under the Treaty and that the State concerned has not complied with the Commission's reasoned opinion.' (19) In view of the practically identical nature of both provisions, those statements should also be taken to apply to the procedure laid down by Article 8 of the Utilities Sectors Remedies Directive.

34. Given that, owing to their particular features, breaches of public procurement rules require swift action in order to avoid a situation of fait accompli and that the Commission's powers under the special procedures laid down in both Remedies directives were specifically designed to avoid such situations when a clear and manifest breach is detected, one may sympathise with Greece's point of view in terms of the expediency of the choices made by the Commission. However, the use made by the Commission of the special procedure provided for in both Remedies directives falls within the realm of its discretion when deciding its enforcement policy in this area and, even if one might disagree from a practical point of view, it cannot be condemned from a strict legal point of view.

35. It follows from the foregoing that the objections of inadmissibility raised by Greece should be dismissed.

Substance

36. The Commission claims that the contract in question falls within the scope of the Utilities Sectors Directive and should therefore have been awarded in accordance with one of the procedures involving publication of a notice as required by Article 20(1) of that directive.

37. Greece does not dispute the fact that the contract falls, in principle, within the scope of the Utilities Sectors Directive but claims that it was exempted from its discipline by virtue of Article 20(2)(c) and (d) thereof. As regards subparagraph (c), the technical specificity of

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the works in question made the chosen firm Koch/Metka the only contractor capable of performing the works. As regards subparagraph (d), the extreme urgency was brought about by the unforeseen decisions of the competent national authorities imposing tight deadlines for the completion of the environmental procedures which rendered respect for any of the procedures involving publication unviable.

38. It must first be noted that as a derogation from the rules intended to ensure the effectiveness of the rights conferred by Community law in relation to public procurement, both subparagraphs mentioned by Greece must be interpreted strictly. In addition, the burden of proving the existence of exceptional circumstances justifying the derogation which they provide lies on the person seeking to rely on those circumstances. (20)

39. As regards Article 20(2)(c) of the Utilities Sectors Directive, Greece claims that three types of technical reasons justified the award of the contract to Koch/Metka. First, the specific characteristics of the ashes to be transported, resulting from the fact that the fuel used in the plant is lignite rather than coal, required special technical solutions. Lignite is used as a fuel, according to the technical studies submitted by Greece, in only one other plant in the world and the technical solutions required for lignite are very rarely used by plants using coal. Secondly, the unstable nature of the sub-soil rendered difficult the building of the foundations for the conveyor belts. Finally, it was necessary to attach the new conveyor belts to the existing ones, and therefore to ensure their compatibility. In view of those technical specificities, only Koch/Metka enjoyed, in the contracting authority's view, the necessary expertise for the realisation of the works.

40. I am not convinced that the arguments put forward by Greece adequately establish that Koch/Metka was the only contractor capable of performing the works. The fact that the works to be carried out were subject to exceptional technical constraints does not necessarily mean, as Greece seems to believe, that only one firm has the know-how to deal with such constraints. As the Court of Justice has held, a Member State may rely on an exception such as that provided for by Article 20(2)(c) of the Utilities Sectors Directive only if it can both establish the existence of technical reasons' within the meaning of that provision and prove that those technical reasons' made it absolutely essential that the contract in question be awarded to the chosen undertaking. (21)

41. The passages of the independent technical report quoted in the written submissions of Greece do confirm the rare character and the peculiar properties of the fuel used by the Megalopolis plant and their consequences for the transport of the resulting ashes. However, nowhere in the technical report is it stated that only Koch/Metka was in a position to provide the required service. In fact, the passage cited acknowledges that the technical solutions for lignite-fuelled plants can also be used in coal-fuelled ones, even though they are very rarely used.

42. The same reasoning applies in my view as regards the constraints relating to the configuration of the sub-soil and the need to attach the new conveyor-belt system to the existing one. The geological instability of the sub-soil and the need for compatibility between the new and existing conveyor belts are indeed technical reasons which may be taken into account by the contracting authority when choosing the successful bidder, but they do not on their own prove that Koch/Metka was the only firm capable of performing the contract.

43. Greece's position is further undermined by two more facts. First, the same contracting authority has published award notices in relation to similar works carried out in Megalopolis in the past and, second, Dosco was also invited to negotiate. As the Commission points out, the Greek reply of 9 November 2000 indicates that Dosco was initially considered to be technically capable of performing the contract. The absence of other possible contractors was not as apparent as Greece claims.

44. In brief, to the extent that it tries to shift the burden of proof to the Commission on this aspect of the case, the reasoning of Greece appears to be misguided for the reasons set out in

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point 40 above. It must be recalled that one of the main aims of the public procurement rules is to enable contracting authorities and firms throughout the EU to benefit from the possibilities offered by the European market. By not testing the market by means of a publication of the notice, Greece has defeated such an aim.

45. In view of the foregoing, I must conclude that Greece has failed to prove that the difficulties arising from the technical constraints of the works to be carried out made it absolutely essential, pursuant to Article 20(2)(c) of the Utilities Sectors Directive, to award the contract to Koch/Metka.

46. As regards the derogation based on reasons of extreme urgency, in order to invoke successfully that derogation under Article 20(2)(d) of the Utilities Sectors Directive three cumulative conditions must be met, namely the existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible and a link between the unforeseeable event and the extreme urgency resulting therefrom.

47. The unforeseeable event alleged by Greece in the instant case takes the form of the deadlines imposed by the decision of 30 December 1999 of the national authority competent for defining of the environmental conditions for the exploitation of the project. Pursuant to that decision the authorisation to dispose of the waste was to be obtained from the local authority by September 2000 and the new conveyor-belt system was to be operative by December 2000. Such short deadlines were allegedly the result of the pressures put on the competent national environmental authority by local authorities and the local population, who expressed their concerns about pollution problems resulting from the existing installations. According to Greece, failure to respect such deadlines would also have entailed serious legal consequences, principally in the form of sanctions.

48. In my opinion, any contracting authority exercising a normal standard of diligence must be aware of the compulsory authorisation procedures, environmental or otherwise, which it must respect under applicable rules at national level when planning the award of contracts falling within the scope of the public procurement directives. Contracting authorities are therefore bound to bear in mind such procedural steps, and their possible outcome, in their planning so as not to incur any breaches of Community law. In Commission v Germany , where, in view of the delay in approving the public works plans by the competent national environmental authority, the contracting authority decided to abandon the open procedure and to award the contract by negotiated procedure without prior publication of a tender notice, the Court held that the possibility that a body which must approve a project might, before expiry of the period laid down for this purpose, raise objections for reasons which it is entitled to put forward is... something which is foreseeable in plan approval procedure'. (22) I agree with the Commission that the same reasoning should apply here.

49. As the Commission points out, DEI had already submitted the project to which the contested contract award relates to the competent national environmental authority in the last quarter of 1997, that is, over 12 months before the deadlines were laid down in the decision of the competent national environmental authority. It also appears from the file that pollution caused by the existing solid waste transport installations at the site was a topical issue at both national and at local level. Furthermore, DEI had in the past carried out works which had in fact respected the applicable public procurement rules. One must therefore assume that DEI was fully familiar with the rules applicable both to environmental assessment and to public procurement procedures and was aware of the politically sensitive nature of the issue of pollution at the site.

50. In those circumstances, the establishment of tight deadlines by the competent national environmental authority cannot in my view qualify as an unforeseeable event within the meaning of Article 20(2)(d) of the Utilities Sectors Directive. Indeed there were apparently no unexpected changes either in the national regulatory framework or in the pollution levels at the site such as might have required immediate countervailing action.

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51. Moreover, what is alleged to have caused the breach of the obligations under the Utilities Sectors Directive was the decision of the Ministry of Environment, Planning and Public Works. However, it is settled case-law that the notion of State for the purposes of Community law and, in particular, for the purposes of an action under Article 226 EC, must be understood as including all public authorities. It is also settled case-law that a Member State cannot rely on provisions, practices or circumstances existing in its internal legal order in order to justify its failure to comply with the obligations... laid down in a directive'. (23) The Court has further stated that the Community directives governing the award of public contracts would be deprived of their effectiveness if the actions of a contracting authority were not to be imputable to the State'. (24)

52. It would be not only unreasonable but also dangerous to allow a Member State to justify a failure to comply with its obligations under Community law on the basis of the action (or inaction) of one of its constitutive elements, in the instant case an integral part of the Greek Government. The obligations arising from the public procurement directives fall upon Member States and it is therefore their duty to ensure that the action or inaction of one of their constitutive elements does not cause or force another State body or agency to fail in its obligations under Community law. It is to be noted that the ultimate liability under Community law of Greece as regards the actions of the DEI is not disputed by the parties.

53. The chronology of the facts also belies the argument to the effect that a situation of extreme urgency' was present. In this respect it suffices to note, first, that DEI presented the project for environmental approval in 1997 and that final approval, subject to conditions, did not come through until the end of 1999. Secondly, the negotiations with Koch/Metka over the price for the contracted works lasted over six months. Lastly, the works were in fact still uncompleted two years after the expiry of the tight' deadlines imposed by the decisions of the competent national environmental authority on grounds of environmental hazards. Whereas I fully accept that environmental or public health hazards could in certain circumstances justify a departure from the discipline of the public procurement directives, there is nothing to indicate that such extreme urgency was a consideration in the present case. In fact, as mentioned at point 5 above, price negotiations lasted for several months, which may suggest that it was the reduction in the price of the contract which took precedence.

Conclusion

54. In view of the above, I am of the opinion that the Court should:

(1) declare that, by reason of the award by DEI of a contract for the construction of a conveyor-belt system for the thermal-electricity generation plant of Megalopolis by means of a negotiated procedure without previous publication of a notice, the Hellenic Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and in particular Article 20 et seq. thereof;

(2) order the HellenicRepublic to pay the costs.

(1) .

(2) - OJ 1993 L 199, p. 84.

(3) - OJ 1985 L 175, p. 40.

(4) - OJ 1989 L 395, p. 33.

(5) - Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609, paragraphs 29 and 30 and the case-law cited therein.

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(6) - Commission v Germany , cited in footnote 5, paragraphs 33 to 39.

(7) - Case C-328/96 Commission v Austria [1999] ECR I-7479, paragraphs 43 to 45. See also Case C-125/03 Commission v Germany [2004] ECR I-0000, at paragraphs 12 and 13.

(8) - See for example Case C-166/00 Commission v Greece [2001] ECR I-9835, paragraph 9 and the case-law cited therein.

(9) - OJ 1992 L 76, p. 14.

(10) - This regime allows, inter alia, injured parties to claim damages representing the costs of preparing a bid or of participating in an award procedure without the need to show a better right to the contract. See Article 2(7) of the Utilities Sectors Remedies Directive.

(11) - See for example Joined Cases C-20/01 and C-28/01 Commission v Germany , cited in footnote 5, paragraph 42.

(12) - Case C-247/89 Commission v Portugal [1991] ECR I-3659, paragraph 22.

(13) - See further J.Rideau, Le rôle des Etats membres dans l'application du droit communautaire' (1972) Annuaire français de droit international , 864, at p. 865.

(14) - See the comments of Advocate General Alber in Commission v Austria ,cited in footnote 7, at point 47 et seq.

(15) - Commission v Austria , cited in footnote 7, at paragraph 39.

(16) - See Articles 1(1) and 3(1) of the General Remedies Directive and Articles 1(1)(a) and 8(1)(a) of the Utilities Sectors Remedies Directive. The scope of application of the General Remedies Directive was later extended to cover breaches of public services Directive 92/50 by Article 41 of the latter directive.

(17) - See the preamble to the Utilities Sectors Remedies Directive, in particular the fourth recital.

(18) - The Court has held that it is clear from the letter and spirit of the General Remedies Directive that it is very much to be preferred, in the interest of all the parties concerned, that the Commission use the direct intervention procedure provided for in Article 3(3) of the General Remedies Directive: see Case C-359/93 Commission v The Netherlands [1995] ECR I-157, at paragraph 12..

(19) - Ibid., paragraph 13. See also Case C-79/94 Commission v Greece [1995] ECR I-1071, paragraph 11.

(20) - See, inter alia, Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 14.

(21) - See, in the context of the identical wording of the derogation provided for by Article 9(b) of Directive 71/305, Case C-57/94 Commission v Italy [1995] ECR I-1249, paragraph 24.

(22) - Case C-318/94 Commission v Germany [1996] ECR I-1949, paragraph 18.

(23) - Case C-323/96 Commission v Belgium [1998] ECR I-5063, paragraph 42 and the case-law cited therein.

(24) - Commission v Austria ,cited in footnote 7, paragraph 75.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-04713
DOC	2005/02/24
LODGED	2002/11/08
JURCIT	11997E226 : N 15 25 27 51 31985L0337 : N 2 31989L0665 : N 14 21 31989L0665-A03 : N 30 32 31989L0665-A03P1 : N 31 31989L0665-A03P3 : N 33 31992L0013-A01P1LA : N 31 31992L0013-A02P6 : N 21 31992L0013-A02P7 : N 22 31992L0013-A08 : N 32 31992L0013-A08P1LA : N 31 31992L0050-A41 : N 31 31993L0038 : N 1 31993L0038-A01PT7 : N 10 31993L0038-A15 : N 7 31993L0038-A20 : N 1 31993L0038-A20P1 : N 8 31993L0038-A20P2 : N 9 31993L0038-A20P2LC : N 38 40 45 31993L0038-A20P2LD : N 38 46 50 31993L0038-A21P1 : N 11 61985J0199 : N 38 61989J0247 : N 27 61993J0359 : N 33 61994J0057 : N 40 61994J0079 : N 33 61994J0318 : N 48 61996C0328 : N 27 61996J0323 : N 51 61996J0328 : N 17 28 51 62000J0166 : N 20 62001J0020 : N 15 16 26 62003J0125 : N 17
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	English
APPLICA	Commission ; Institutions

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DEFENDA	Greece ; Member States
NATIONA	Greece
PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Jacobs
JUDGRAP	Jann
DATES	of document: 24/02/2005 of application: 08/11/2002

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Judgment of the Court (Second Chamber)
of 14 September 2004
Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil its obligations - Directive 93/37/EEC - Public works contracts - Negotiated procedure without prior publication of a contract notice. Case C-385/02.

1. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Derogations from common rules - Strict interpretation - Existence of exceptional circumstances - Burden of proof

(Council Directive 93/37, Art. 7(3))

2. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Derogations from common rules - Repetition of similar work awarded to the undertaking to which the original contract was awarded - Duration

(Council Directive 93/37, Art. 7(3)(e))

3. Actions for failure to fulfil obligations - Objective character - Excusable error - Not permissible

(Art. 226 EC)

1. Article 7(3) of Directive 93/37 concerning the procedures for the award of public works contracts which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in relation to public works contracts must be interpreted strictly and the burden of proving circumstances justifying a derogation lies on the person seeking to rely on those circumstances.

Having regard to the wording of Article 7(3)(b) of the directive, which provides that the contracting authorities may award their public works contracts by negotiated procedure without prior publication of a contract notice when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor', a Member State must prove that technical reasons make it necessary to award the relevant contracts to the contractor who was entrusted with the original contract.

It is true that the aim of ensuring the continuity of works under complex projects which relate to the flood safety of an area is a technical reason which must be recognised as being important. However, merely to state that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor, particularly where the works are subdivided into lots which will be carried out over many years.

(see paras 19-21)

2. Article 7(3)(e) of Directive 93/37 concerning the procedures for the award of public works contracts authorises the use of the negotiated procedure without prior publication of a contract notice for new works consisting in the repetition of similar works entrusted to the undertaking to which an earlier contract was awarded only during the three years following the conclusion of the original contract'.

In the light of a comparison of the language versions of that provision, the expression conclusion of the original contract' must be understood as meaning the time when the original contract was entered into and not as that of the completion of the works to which the contract relates.

That interpretation is confirmed by the objective of the provision in question and its place in the scheme of Directive 93/37.

First, as it is a derogating provision which falls to be strictly interpreted, the interpretation which restricts the period during which the derogation applies must be preferred rather than that

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which extends it. That objective is met by the interpretation which takes the starting point as being the date on which the original contract is entered into rather than the, necessarily later, date on which the works which are its subject-matter are completed.

Secondly, legal certainty, which is desirable where procedures for the award of public procurement contracts are involved, requires that the date on which the period in question begins can be defined in a certain and objective manner. While the date on which a contract is entered into is certain, numerous dates may be treated as representing the completion of the works and thus give rise to a corresponding level of uncertainty. Moreover, while the date on which the contract is entered into is clearly established at the outset, the date of completion of the works, whatever definition is adopted, may be altered by accidental or voluntary factors for so long as the contract is being carried out.

(see paras 33-34, 36-38)

3. Proceedings against a Member State for failure to fulfil obligations afford a means of determining the exact nature of the obligations of the Member States, particularly where there are differences of interpretation, and are based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation. Accordingly, the concept of excusable error cannot be relied on by a Member State to justify a failure to comply with the obligations imposed on it under a directive.

(see para. 40)

In Case C-385/02,

ACTION under Article 226 EC for failure to fulfil obligations,

brought before the Court on

28 October 2002

,

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

applicant,

v

Italian Republic , represented by M. Fiorilli, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

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

Advocate General: J. Kokott,

Registrar: M. Mugica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 March 2004,

after considering the observations submitted by the parties,

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

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29 April 2004,

gives the following

Judgment

Costs

43. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Declares that, as the Magistrato per il Po di Parma, a local agency of the Ministry of Public Works (now the Ministry for Infrastructure and Transport) awarded contracts for the completion of the construction of an overflow basin to retain flood waters of the Parma watercourse in the Marano area (in the Parma commune) as well as for works relating to the development and completion of an overflow basin for the Enza watercourse and to the retention of flood waters of the Terdoppio watercourse southwest of Cerano by the negotiated procedure without prior publication of a contract notice, when the conditions necessary in that regard were not satisfied, the Italian Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts;

2. Orders the Italian Republic to pay the costs.

1. By its application the Commission of the European Communities has brought an action for a declaration that, as the Magistrato per il Po di Parma, a local agency of the Ministry of Public Works (now the Ministry for Infrastructure and Transport) awarded contracts for the completion of the construction of an overflow basin to hold flood waters of the Parma watercourse in the Marano area (in the Parma commune) as well as for works relating to the development and completion of an overflow basin for the Enza watercourse and to the retention of flood waters of the Terdoppio watercourse southwest of Cerano by the negotiated procedure without prior publication of a contract notice, when the conditions necessary in that regard were not satisfied, the Italian Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) (hereinafter the Directive') and in particular Article 7(3) thereof.

Legal framework

2. Article 7(3)(b), (c) and (e) of the Directive provides:

The contracting authorities may award their public works contracts by negotiated procedure without prior publication of a contract notice, in the following cases:

...

(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;

(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

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...

(e) for new works consisting of the repetition of similar works entrusted to the undertaking to which the same contracting authorities awarded an earlier contact, provided that such works conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4.

As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting authorities when they apply the provisions of Article 6. This procedure may only be adopted during the three years following the conclusion of the original contract.'

3. Article 7(4) of the Directive states:

In all other cases, the contracting authorities shall award their public works contracts by the open procedure or by the restricted procedure.'

Facts

4. By Decrees Nos 11414 and 11416 of 9 October 1997 and No 11678 of 15 October 1997, the Magistrato per il Po di Parma approved contracts relating to the following works:

- the completion of the construction of an overflow basin to hold the flood waters of the Parma watercourse in the Marano area (in the Parma commune);

- the development and completion of an overflow basin for the Enza watercourse, and

- the retention of flood waters of the Terdoppio watercourse south-west of Cerano.

5. The value of those works amounted to approximately ITL 37 000 million, ITL 21 000 million and ITL 19 500 million respectively.

6. The original contracts for the works mentioned were awarded on the following dates:

- 22 December 1988, in the case of the Parma watercourse,

- 26 October 1982, in the case of the Enza watercourse, and

- 20 May 1988, in the case of the Terdoppio watercourse.

Pre-litigation procedure

7. By letter of 27 September 2000, the Commission requested the Italian authorities to provide information as to the procedure followed in awarding the contracts referred to in paragraph 4 of this judgment (hereinafter the relevant contracts').

8. By letters of 19 October 2000 and 26 March 2001, the Italian authorities replied, stating that the procedure followed by them complied with the requirements of Article 7(3)(e) of the Directive, as the works in question consisted in the repetition of works similar to those already entrusted by the Magistrato per il Po di Parma to the undertakings to which the original contracts had been awarded and conformed to a basic project for which an earlier contract was awarded according to the procedures referred to in Article 7(4) of the Directive. Furthermore, the right of the awarding authority to adopt the negotiated procedure was specified in the notices for the original contracts and the total estimated cost of the execution of each of the works had been taken into consideration by the Magistrato per il Po di Parma when applying the Community provisions. Lastly, the negotiated procedure was adopted during the three years following the conclusion of the original contract.

9. By letter of 23 April 2001, the Commission gave the Italian Republic formal notice to submit its observations.

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10. The Italian authorities replied by letters of 8 June and 17 December 2001, maintaining inter alia that the three years following the conclusion of the original contract referred to in Article 7(3)(e) of the Directive run from the date on which the works under the original contract are handed over, as that date represents the end of the contract.

11. As it was not satisfied with that reply, the Commission issued a reasoned opinion on 21 December 2001, calling on the Italian Republic to take the measures necessary to comply with it within two months of its notification. As the Italian Republic did not reply to that opinion, the Commission brought the present action.

Forms of order sought

12. The Commission claims that the Court should:

- declare that, as the Magistrato per il Po di Parma awarded contracts for the completion of the construction of an overflow basin to hold flood waters of the Parma watercourse in the Marano area (in the Parma commune) as well as for works relating to the development and completion of an overflow basin for the Enza watercourse and to the retention of flood waters of the Terdoppio watercourse southwest of Cerano by the negotiated procedure without prior publication of a contract notice, the Italian Republic has failed to fulfil its obligations under the Directive and in particular Article 7(3) thereof;

- order the Italian Republic to pay the costs.

13. The Italian Republic claims that, leaving aside the interpretation of Article 7(3) of the Directive for competition purposes, and interpreting it on the basis of its wording in the majority of the language versions, it should be held that the Italian Government made an excusable error due to the Italian version of the provision.

The infringement

14. It is not disputed that the relevant contracts are subject to the Directive and were concluded under the negotiated procedure without prior publication of a contract notice. That procedure is permitted only in the cases which are exhaustively listed in Article 7(3) of the Directive. In its defence, the Italian Government sets out three pleas in law seeking to show that the relevant contracts are covered by one of those cases.

15. The Italian Government argues, first, that between 1981 and 1990 the Magistrato per il Po di Parma initiated procedures for the implementation of flood safety measures for the territories and zones affected by the flood waters of the River Po and its tributaries through contracts for the development of the overall project and the carrying out of the works in lots as and when funding became available. The contracts relating to the development of the project and to the first lot of the works were awarded following a procedure which complied with Community law. The relevant contract notices contained a provision allowing the contracting authority to award the carrying out of the subsequent lots of the work to the same undertaking.

16. In the light of the complexity and the difficult nature of the works, the Public Works Authority stated in a technical opinion that those works were to be carried out by a single, qualified, contractor and that, if they were carried out in lots, it would be necessary to ensure their continuity. That technical opinion was reflected in the provision contained in the contract notice, as well as in the contracts for the development of the project and for the first lot of works. The adoption of the negotiated procedure without prior publication of a contract notice for the award of the relevant contracts represented the implementation of a contractual obligation.

17. According to the Italian Government, the awarding authority wished to address technical requirements relating to completion of the works by a single contractor. Completion by individual lots often

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causes problems arising from the fact that the work is not carried out in the same way and hence difficulties in establishing the respective liability for the damages due in respect of destruction or deterioration of the works.

18. That first defence plea must be understood as being based on Article 7(3)(b) of the Directive, inasmuch as that provision authorises the use of the negotiated procedure without prior publication of a contract notice for works which, for technical reasons, may only be carried out by a particular contractor.

19. The provisions of Article 7(3) of the Directive, which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in relation to public works contracts, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (see, to that effect, Case C57/94 Commission v Italy [1995] ECR I-1249, paragraph 23, and Case C318/94 Commission v Germany [1996] ECR I-1949, paragraph 13).

20. Accordingly, the Italian authorities must prove that technical reasons made it necessary to award the relevant contracts to the contractor who was entrusted with the original contract (see, to that effect, Commission v Italy , paragraph 24).

21. It is true that the aim of ensuring the continuity of works under complex projects which relate to the flood safety of an area is a technical reason which must be recognised as being important. However, merely to state that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor, particularly where the works are subdivided into lots which will be carried out over many years.

22. In the present case, the Italian Government has confined itself to referring in general terms to the contents of an opinion of the Public Works Authority, without providing the detailed explanations on which the need to use a single contractor could be based.

23. With respect to the Italian Government's argument that the use of the negotiated procedure without prior publication of a contract notice for the award of the relevant contracts represents the implementation of a contractual obligation, even assuming it to be relevant, it must be held that that Government has failed to establish that such an obligation exists. On the contrary, according to the information provided to the Court, the Magistrato per il Po di Parma was not obliged to award subsequent lots to the contractors undertaking the original lots of work, but merely had the option of doing so.

24. It follows that the defence plea based on Article 7(3)(b) of the Directive is not well founded and must be rejected.

25. Secondly, according to the Italian Government, the works required to be completed urgently in this case, in order to avoid the increased risk of flooding which would occur if they were not finished.

26. That second defence plea must be understood as being based on Article 7(3)(c) of the Directive, which authorises the use of the negotiated procedure without prior publication of a contract notice where, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities, the periods laid down for the normal procedures cannot be adhered to. The second sentence of that provision states that the circumstances invoked to justify extreme urgency cannot in any event be attributable to the contracting authorities.

27. In the present case, the original contracts relating to the flood protection works had been awarded in the 1980s. Furthermore, it had been anticipated from the start that the works would be carried out in lots as and when funding became available.

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28. Those matters do not establish any extreme urgency. On the contrary, they arise out of the arrangements put into place by the contracting authority.

29. It follows that the second defence plea, based on Article 7(3)(c) of the Directive, is not well founded and must be rejected.

30. Thirdly, the Italian Government relies on Article 7(3)(e) of the Directive, which authorises, subject to certain conditions, adoption of the negotiated procedure without prior publication of a contract notice for new works consisting in the repetition of similar works entrusted to the undertaking to which the same contracting authorities awarded an earlier contract.

31. The last sentence of that provision states that that possibility is only open during the three years following the conclusion of the original contract. The Italian Government argues that that period runs from the completion of the works under the original contract and not from the time when that contract was awarded.

32. In the alternative, the Italian Government asks the Court to find that it made an excusable error due to the Italian version of Article 7(3) of the Directive.

33. In that respect, it must be pointed out that Article 7(3)(e) of the Directive authorises the use of the negotiated procedure without prior publication of a contract notice for new works consisting in the repetition of similar works entrusted to the undertaking to which an earlier contract was awarded. The last sentence of that provision states however that the procedure may only be adopted during the three years following the conclusion of the original contract'.

34. In the light of a comparison of the language versions of that provision, the expression conclusion of the original contract' must be understood as meaning the time when the original contract was entered into and not as referring to the completion of the works to which the contract relates.

35. In particular, the Danish version indgaaelsen af den orprindelige kontrakt', the English version the conclusion of the original contract', the Spanish version formalizacion del contrato inicial' and the Portuguese version celebraçao do contrato inicial' refer unambiguously to the contract and cannot be understood as meaning the works which are its subject-matter.

36. That interpretation is confirmed by the objective of the provision in question and its place in the scheme of the Directive.

37. First, as it is a derogating provision which falls to be strictly interpreted, the interpretation which restricts the period during which the derogation applies must be preferred rather than that which extends it. That objective is met by the interpretation which takes the starting point as being the date on which the original contract is entered into rather than the, necessarily later, date on which the works which are its subject-matter are completed.

38. Secondly, legal certainty, which is desirable where procedures for the award of public procurement contracts are involved, requires that the date on which the period in question begins can be defined in a certain and objective manner. While the date on which a contract is entered into is certain, numerous dates may be treated as representing the completion of the works and thus give rise to a corresponding level of uncertainty. Moreover, while the date on which the contract is entered into is clearly established at the outset, the date of completion of the works, whatever definition is adopted, may be altered by accidental or voluntary factors for so long as the contract is being carried out.

39. It follows that in the present case the period of three years laid down in the final sentence of Article 7(3)(e) of the Directive ran from the date on which the original contracts were entered into in 1982 and 1988. As the relevant contracts were awarded in 1997, the derogation laid down by the provision concerned accordingly did not apply.

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40. With respect to the Italian Government's request that it be given the benefit of having made an excusable error, it must be pointed out that proceedings against a Member State for failure to fulfil obligations afford a means of determining the exact nature of the obligations of the Member States, particularly where there are differences of interpretation, and are based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation (see, to that effect, Case C-83/99 Commission v Spain [2001] ECR I-445, paragraph 23). Accordingly, the concept of excusable error cannot be relied on by a Member State to justify a failure to comply with the obligations imposed on it under a directive.

41. It follows from that that the third defence plea, based on Article 7(3)(a) of the Directive, must be rejected as unfounded.

42. Having regard to all the above considerations, it must be held that as the Magistrato per il Po di Parma awarded contracts for the completion of the construction of an overflow basin to retain flood waters of the Parma watercourse in the Marano area (in the Parma commune) as well as for works relating to the development and completion of an overflow basin for the Enza watercourse and to the retention of flood waters of the Terdoppio watercourse southwest of Cerano by the negotiated procedure without prior publication of a contract notice, when the conditions necessary in that regard were not satisfied, the Italian Republic has failed to fulfil its obligations under the Directive.

DOCNUM	62002J0385
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2004 Page I-08121
DOC	2004/09/14
LODGED	2002/10/28
JURCIT	31993L0037-A07P3 : N 14 19 32 31993L0037-A07P3LB : N 2 18 24 31993L0037-A07P3LC : N 2 26 29 31993L0037-A07P3LE : N 2 30 33 39 41 31993L0037-A07P4 : N 3 61994J0057 : N 19 20 61994J0318 : N 19 61999J0083 : N 40
CONCERNS	Failure concerning 31993L0037 -
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws

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AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
NOTES	Valat, Antoine: General Allowances and Home State Obligations under EC Law: Opinion Delivered in the De Groot Case, European Taxation 2002 p.446-449 ; De Rose, Claudio: La trattativa privata nei lavori pubblici: se e quando si puo fare. (Commento a Corte di giustizia U.E. 24 settembre 2004 in causa C-385/02), Il Consiglio di Stato 2004 II p.2049-2062 ; Brown, Adrian: Grounds for Dispensing with Competitoin Under Works Directive 93/37: A Note on Case C-385/02, European Commission v Italy on Flood Protection Works, Public Procurement Law Review 2005 p.NA5-NA7 ; Cassella, Fabrizio: La comparazione delle versioni linguistiche é indispensabile per l'interpretazione delle disposizioni comunitarie, Diritto pubblico comparato ed europeo 2005 p.361-364 ; Adamantidou, E.: I diadikasia tis "diapragmatefsis choris progenesteri prokirixi diagonismou" gia "technikous logous" i/kai "katepeigousa anagki", Dimosies Symvaseis & Kratikes Enischyseis 2005 p.206-211
PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Kokott
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Opinion of Advocate General Kokott delivered on 29 April 2004. Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil its obligations - Directive 93/37/EEC - Public works contracts - Negotiated procedure without prior publication of a contract notice. Case C-385/02.

I - Introduction

1. In these Treaty-infringement proceedings, the Commission asserts that the Italian Republic, when awarding three public works contracts, failed to comply with Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (hereinafter: Directive 93/37'). (2)

2. The central issue is whether, in the case of new works consisting of the repetition of similar earlier works, it is permissible - and if so, subject to what conditions - for a negotiated procedure to be conducted without prior publication of a contract notice. Directive 93/37 sets a three-year time-limit on such a procedure; how that time-limit should be calculated in the circumstances of this case forms the essential subject-matter of these proceedings. The Italian Republic maintains that, if it was indeed mistaken as to the method of calculation, any error was an excusable one.

II - Legal framework

3. The legislation governing these proceedings is contained in Article 7(3) and (4) of Directive 93/37. The relevant passages state:

3. The contracting authorities may award their public works contracts by negotiated procedure without prior publication of a contract notice, in the following cases:

...

(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;

(c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

...

(e) for new works consisting of the repetition of similar works entrusted to the undertaking to which the same contracting authorities awarded an earlier contact, provided that such works conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4.

As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting authorities when they apply the provisions of Article 6. This procedure may only be adopted during the three years following the conclusion of the original contract.

4. In all other cases, the contracting authorities shall award their public works contracts by the open procedure or by the restricted procedure'.

4. The first and second recitals in the preamble to Directive 93/37 state:

Whereas Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts has been amended substantially and on a number of occasions; whereas, for reasons of clarity and better understanding, the said Directive should be consolidated;

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Whereas the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts.'

5. The eighth recital in the preamble to the Directive states:

Whereas the negotiated procedure should be considered to be exceptional and therefore only applicable in certain limited cases.'

6. The first sentence of the tenth recital in the preamble states:

Whereas, to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community.'

III - Facts and pre-litigation procedure

7. Three public works contracts were awarded in 1997 by the Magistrato per il Pô di Parma, a local agency of the Italian Ministry of Public Works (now the Ministry for Infrastructure and Transport). (3) The contracts concerned additional lots in respect of work on the following flood protection projects:

- completion of the construction of an overflow basin for flood waters of the Parma watercourse in the area of Marano in the Parma commune;

- development and completion of an overflow basin for the Enza watercourse and

- retention of flood waters of the Terdoppio watercourse - Scolmatore canal south-west of Cerano.

8. The parties agree that the value of the lots - ITL 37 000 million, ITL 21 000 million and ITL 19 500 million - exceeded the threshold of ECU 5 million laid down in Article 6 of Directive 93/37.

9. The work was entrusted - by negotiated procedure, without prior publication of a contract notice - to the firms to which the previous lots had been awarded in the 1980s. These earlier lots related to:

- a works contract relating to the Parma watercourse, of 22 December 1988;

- a works contract relating to the Enza watercourse, of 26 October 1982, and

- a works contract relating to the Terdoppio watercourse, of 20 May 1988.

10. The Commission wrote to the Italian authorities on 27 September 2000, asking for detailed information concerning the procedure followed when the three lots were awarded in 1997. In their reply of 19 October 2000, the Italian authorities explained that they had applied the procedure pursuant to Article 7(3)(e) of Directive 93/37. The lots consisted in the repetition of similar works entrusted to the same undertakings to which the same contracting authorities had awarded an earlier contact; the works conformed to a basic project for which the first contract was awarded according to the procedures referred to in Article 7(4) of the Directive. As soon as the first project was put up for tender, notice had been given that the negotiated procedure without prior publication of a contract notice might later be adopted and the total estimated cost of the subsequent works was taken into consideration. The negotiated procedure was duly adopted within the three years following the conclusion of the original contract, that period having started to run when the previous works were handed over.

11. The Commission sent a letter of formal notice on 23 April 2001 in which it rejected the Italian

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authorities' interpretation of how the three-year time-limit should be calculated. The Italian Republic replied on 8 June 2001 and 17 December 2001, essentially reaffirming its position.

12. On 28 October 2002, having received no reply to its reasoned opinion of 21 December 2001, the Commission brought the present action against the Italian Republic under the second paragraph of Article 226 EC.

IV - Forms of order sought

13. The Commission claims the Court should:

- Declare that the Italian Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, in particular Article 7(3) thereof, in that the Magistrato per il Pô di Parma, a local agency of the Ministry of Public Works (now the Ministry for Infrastructure and Transport), awarded the contracts concerning additional lots in respect of work on completion of the construction of an overflow basin for flood waters of the Parma watercourse in the area of Marano in the Parma commune, development and completion of an overflow basin for the Enza watercourse and retention of flood waters of the Terdoppio watercourse - Scolmatore canal south-west of Cerano by the negotiated procedure without prior publication of a contract notice, when the conditions for such a procedure were not satisfied;

- Order the Italian Republic to pay the costs.

14. The Italian Republic is not claiming in terms that the action should be dismissed. However, it asks the Court, whatever its interpretation of Article 7(3) of Directive 93/37, to hold that the Italian version of that provision had led the Italian Government to commit an excusable error.

V - Assessment

A - Admissibility

15. The Court has consistently held that when the Commission exercises its powers under Article 226 EC, it does not have to show that there is a specific interest in bringing an action. The provision is not intended to protect the Commission's own rights. The Commission, as guardian of the Treaties in the general interest of the Community, must ensure that Member States give effect to Community law, and must obtain a declaration of any infringement with a view to bringing it to an end. Hence it is for the Commission alone to assess whether it is appropriate to institute Treaty-infringement proceedings, and to determine the act or omission on which such proceedings should be based. Even where a Member State's national legislation accords with Community law, the Commission may none the less seek a declaration that it has failed to fulfil its obligations, citing a specific instance in which Community rules were disregarded, and consequently, the result intended by a directive was not achieved. (4)

16. However, the subject-matter of an action brought under Article 226 EC is established by the Commission's reasoned opinion. Such an action becomes devoid of purpose, and accordingly inadmissible, to the extent that the alleged infringement is eliminated before the time-limit set by the Commission expires. (5) The Treaty-infringement procedure has then achieved its purpose in the course of the pre-litigation procedure.

17. In the present case, however, as the Italian Government acknowledges, it did nothing to eliminate the effects of any possible Treaty infringements in relation to the three public works contracts to which the Commission referred. While other award procedures were cancelled, technical considerations and the risks for public safety made it impossible to annul the award procedures at issue in these proceedings.

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18. Although public procurement law does not require Member States to annul contracts which have already been concluded, any contract awarded in contravention of the relevant directive constitutes an ongoing infringement of Community law. (6) Moreover, it is consistent with the meaning and purpose of both Treaty-infringement proceedings and the public procurement directives for the Commission to be able to bring specific situations before the Community Courts to determine whether public procurement rules have been observed. From a finding against a Member State with regard to a specific case it may thus be deduced that the Member State, as addressee of the Directive, has failed to do everything necessary to implement it. (7)

19. The Italian Government maintains that it is now guided solely by competition considerations when awarding public works contracts, pursuant to the most recent developments in Italian public procurement law and its own practice in making awards; the events which led to the infringement proceedings could never occur again.

20. However, merely claiming that award procedures will be conducted henceforth on the basis of competition criteria cannot itself preclude future procedural errors. As the Commission has pertinently observed, it is entirely possible that other contracting authorities in Italy might similarly misinterpret the three-year time-limit, particularly since the transfer of power to regional and local authorities has considerably increased the number of potential contracting authorities.

21. That risk of the infringement being repeated (8) constitutes a further reason why the action should be held to be admissible.

B - Substance

22. For the Commission's action to be well founded, the Italian Republic must have failed to fulfil an obligation under the Treaty (Article 228(1) EC). The duty to implement Directive 93/37, which the Commission claims the Italian Republic has failed to discharge, follows from the first paragraph of Article 10 EC in conjunction with the third paragraph of Article 249 EC.

1. Infringement of Directive 93/37

23. The three public works contracts in question were awarded in 1997 by negotiated procedure without prior publication of a contract notice. However, Article 7(4) of Directive 93/37 makes it clear that, in principle, public works contracts are to be awarded by the open procedure or the restricted procedure - and not , therefore, by the negotiated procedure. Only in exceptional cases is it permissible to use the negotiated procedure without prior publication of a contract notice. (9) These cases are listed exhaustively in Article 7(3) of the Directive. (10) The only conceivable basis for applying a negotiated procedure in the present case is Article 7(3)(b), (c) or (e); I shall consider them in turn.

(a) Technical reasons under Article 7(3)(b) of Directive 93/37

24. The Italian Government submits first that technical reasons made it necessary to award the three works contracts to the contractor to whom the earlier work had been awarded. It is thus conceivable at first sight that Article 7(3)(b) is applicable.

25. However, it is clear from the plain terms of that provision that it applies only when the works may only be carried out by a particular contractor. (11) According to the Court's case-law, that constitutes a derogation which must be interpreted strictly and therefore applies only where there exist exceptional circumstances. (12)

26. More specifically, merely deeming it expedient to award a follow-up contract to the contractor who had performed earlier work cannot suffice to justify application of Article 7(3)(b) of Directive 93/37, just as it is not sufficient to invoke technical constraints in formulaic and non-specific terms. A contracting authority must explain in detail why, in the circumstances of the case, technical

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reasons made it absolutely necessary for the contract to be awarded to the very contractor to whom the previous works had been entrusted, and to none other. In the absence of such a requirement, contracting authorities might abuse Article 7(3)(b) of Directive 93/37, invoking the situation described therein so as to avoid calls for tender, and thus subverting the general purpose of the Directive, which is to promote competition in the field of public procurement. (13)

27. The burden of proving the existence of exceptional circumstances lies on the person seeking to rely on them. (14) In the present case, the Italian Government merely stated that the competent authority wished to forestall any damage to or deterioration of the works already completed, and to avoid difficult questions as to the respective liability of a number of contractors. Hence even if it may have seemed expedient to re-commission the contractor responsible for the first tranche of works, no compelling technical reasons required the selection of that particular contractor. It was therefore not possible to base application of the negotiated procedure on Article 7(3)(b) of Directive 93/37.

28. At the hearing, the Italian Government stated in addition that when the three contracts were awarded, no other potential contractors were discernible; at least in that particular instance, therefore, competition had not been impaired. I do not find that argument convincing. The whole point of prior publication of a contract notice is to ensure that as many potential tenderers as possible know that a contract is about to be awarded. It is quite possible that, if a notice had been duly published, other prospective contractors might have come forward.

(b) Urgency under Article 7(3)(c) of Directive 93/37

29. The Italian Government further contends that the three contracts had to be awarded as a matter of particular urgency. It is thus conceivable that Article 7(3)(c) of Directive 93/37 might apply.

30. However, the very terms in which subparagraph (c) is couched - strictly necessary', extreme urgency', events unforeseen' - attach strict conditions to any reliance on it; moreover, as it constitutes a derogation it must be construed narrowly. (15) That is the only way to prevent abuse by contracting authorities and to serve the purpose of the directive, the development of effective competition in the field of public contracts. (16)

31. It is moreover clear from the second sentence of Article 7(3)(c) that a contracting authority may not seek to justify alleged urgency on the basis of circumstances attributable to themselves. In the present case, planning of the flood-protection measures had been in hand at least since the 1980s when the lots were awarded for the first tranche of work. Moreover, the work to which the present proceedings relate had been contemplated from the very beginning, as the Italian Government itself stated, and was only kept back to be the subject of a second, separate, contract for budgetary reasons. These facts suggest that the contracting authority was actuated not by any particular urgency, but by purely internal and organisational considerations.

32. The burden of proving urgency lies on the person seeking to rely on it. (17) In the present case the Italian Government has merely alleged that there was an urgent need to award the public works contracts since the previous works had - they say - increased the danger of flooding. Yet I am not aware of any factors which would have prevented the competent authorities from foreseeing such an increased flood-risk, especially as, under their original plans, flood-protection measures were to be carried out in various stages. Hence the conditions for the application of Article 7(3)(c) were not met.

(c) Repetition of similar works within three years under Article 7(3)(e) of Directive 93/37

33. The Italian Government finally invokes Article 7(3)(e) of Directive 93/37. It is common ground between the parties that, when the contracts were awarded, all the conditions for the application

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of this subparagraph were met, save for the three-year time-limit. What is at issue between the parties is solely when that three-year period starts to run; whether or not it was open to the contracting authority to conduct a negotiated procedure without prior publication of a contract notice depends on how that issue is resolved.

34. The Italian Government's understanding is that the period in question starts to run only on completion of the works covered by the first contract. It bases this interpretation on the Italian version of Directive 93/37, which uses the phrase conclusione dell'appalto iniziale' to indicate when the period starts to run, in contrast to the form of words in the earlier directive (18) (aggiudicazione dell'appalto iniziale'), which plainly referred to the award of the original contract.

35. As the Court has consistently held, (19) all language versions of a Community provision must, in principle, be recognised as having the same weight. It follows that the proper starting-point for the three-year period referred to in Article 7(3)(e) of Directive 93/37 should be determined not by considering a single language version in isolation, but on the basis of an overview of all language versions.

36. Alas, some language versions of the directive are not as clear as one would wish. The German version, for example, refers to the Abschluss des ersten Auftrags' and the French to the conclusion du marché initial', while the Dutch simply refers to the oorspronkelijke opdracht'. However, a number of other language versions clearly tell against the interpretation supported by the Italian Government, and support the Commission's position, namely the English (conclusion of the original contract'), the Danish (indgåelsen af den oprindelige kontrakt'), the Spanish (celebracion de contrato inicial'), and the Portuguese (celebraçao do contrato inicial').

37. What is also noteworthy is that the change in the text of Article 7(3)(e) of Directive 93/37, to which the Italian Government refers, occurs solely in the Italian version - conclusione' replacing aggiudicazione' - whereas the other versions retain the text of the preceding directive (20) unchanged. That alone suggests that the change was a drafting amendment to the Italian text rather than a substantive modification of the provision itself. That conclusion is supported by the first recital in the preamble to Directive 93/37, which speaks of the previous directive being consolidated for reasons of clarity and better understanding.

38. Ultimately, though, what matters is not the text on its own, but the context of the provision and the purpose it was intended to achieve. (21)

39. On the issue, first, of how the disputed time-limit provision relates to Directive 93/37 as a whole, I would point out that Article 1(a) of the directive uses the term contracts (and not, say, works) to define public works contracts, not least in the Italian version: gli appalti pubblici di lavori sono contratti a titolo oneroso...'. (22)

40. Moreover, it follows a contrario from Article 7(4), which describes the procedures which would ordinarily fall to be applied, that Article 7(3)(e) deals with a derogation, and should ipso facto be construed narrowly.

41. As to the purpose of the three-year time-limit, that has a crucial part to play in assisting the achievement of freedom of establishment and the freedom to provide services in the field of public works contracts, by promoting increased competition. (23) That consideration, too, must make the negotiated procedure, less advantageous for competitors, the exception - only permitted to be used in certain limited cases. (24)

42. Accordingly, both the context and the purpose of Article 7(3)(e) of Directive 93/37 tell in favour of a narrow interpretation of the three-year time-limit: time starts to run from the conclusion of the contract for the first works. To defer the starting-point until the first works had been

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completed would broaden the scope of the negotiated procedure, and work against the aim of creating competition in the field of public works contracts. It would also, as the Commission correctly observes, be detrimental to legal certainty: there is no compelling reason why the completion of construction work should be equated with acceptance by the principal - other events could conceivably be considered, such as the laying of the last stone, the dismantling of scaffolding, the closure of the site or the payment of the (outstanding) price. The date of conclusion of the contract, by contrast, can generally be determined unequivocally.

43. Thus on a proper construction of Article 7(3)(e) of Directive 93/37, the three-year time-limit referred to in the last sentence of that provision starts to run on the conclusion of the contract for the first works - not later, when work on the first tranche is completed. Thus the Italian Republic misinterpreted and misapplied Directive 93/37 with regard to the three public works contracts at issue in these proceedings.

(d) Interim conclusion

44. Since none of the derogating conditions prescribed in Article 7(3)(e) of Directive 93/37 obtains, it follows that the Italian Republic, in awarding the three public works contracts in question by the negotiated procedure without prior publication of a contract notice, failed to fulfil its obligations under the Treaty.

2. No excusable error of law

45. The Italian Government finally argues that, in the light of the Italian version of Article 7(3)(e) of Directive 93/37, the contracting authority's application of the Government's own interpretation of the starting-point for the three-year period constituted an errore scusabile' - an excusable error.

46. The concept of excusable error is indeed not entirely unknown to Community law, more particularly in the field of State liability. For although fault is in principle not a precondition for a Member State's liability in damages, (25) whether or not an error of law is excusable may be a factor in determining whether a national authority manifestly and gravely disregarded the limits on its discretion and consequently committed a sufficiently serious breach of a rule of Community law. (26) In the field of non-contractual liability, it is accepted that a Member State, or a Community institution, will not automatically incur financial liability vis-à-vis an individual every time it is in breach of the law: whether or not damages are awarded will turn on the nature of the infringement of Community law. (27)

47. These aspects of State liability law cannot, however, be transposed to Treaty-infringement proceedings. The purpose of the latter is to ensure that Community law is applied correctly and uniformly in all Member States, and that any infringements are brought to an end: (28) such infringements being established entirely objectively , with no reference to what prompted them, or to the nature or seriousness of their consequences. (29)

48. Furthermore, each Member State is entirely responsible to the Community for ensuring that all State authority is exercised in a manner consistent with Community law. That responsibility includes a duty to take all appropriate steps to comply with obligations arising under Community law and to refrain from any act or omission which might threaten their fulfilment (Article 10 EC). It applies irrespective of fault.

49. Thus in Treaty-infringement proceedings - if only to preclude any possibility of abuse - there must be severe restrictions on the defences available to Member States. Accordingly, the Court only allows one defence unrelated to fault - the absolute impossibility of complying with obligations under Community law. (30)

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50. By contrast, an error of law is not a permissible defence to a Treaty-infringement action. Thus the Court has held that a Member State may not rely on difficulties relating to the interpretation of a directive in order to delay transposing it until after the prescribed period has expired. (31)

51. Nor may a Member State plead that its infringement of Community law was only minor, or that no damage flowed from it. (32)

52. Moreover, it is settled case-law that Community law should not be interpreted and applied with reference to one single language version (as occurred here); but on the basis of an overall view of all language versions, mindful of the sense, purpose and context of the provision in question. (33) Any uncertainties should be taken up with the Commission, in accordance with the principle of cooperation in good faith established in Article 10 EC.

53. Only if the Commission itself has raised a legitimate expectation on the part of a Member State (perhaps in an opinion addressed to it) that that State's rights and duties under Community law should be interpreted in a particular way may such an expectation be subsequently pleaded in defence to Treaty-infringement proceedings. The Commission itself has very fairly pointed to cases where a Community institution's conduct caused a party to form an incorrect impression, or at least contributed significantly to that occurring. (34)

54. In the light of all the foregoing, the Italian Government cannot therefore succeed in its defence based on the assertion that the contracting authority committed an excusable error in determining when the period stipulated in Article 7(3)(e) of Directive 93/37 started to run.

3. Conclusion

55. It follows from the foregoing that the Italian Republic failed to fulfil its obligations under the Treaty in that it awarded the three public works contracts in question by negotiated procedure without prior publication of a contract notice, when the requirements set out for that purpose in Directive 93/37, particularly Article 7(3) thereof, were not fulfilled.

VI - Costs

56. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As is apparent from the foregoing, I consider that the Commission's action should succeed. Accordingly, since the Commission has applied for costs, and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

VII - Conclusion

57. For the reasons set out above, I propose that the Court should

1. Declare that the Italian Republic has failed to fulfil its obligations under the Treaty in that, through the Magistrato per il Pô di Parma, it awarded public works contracts by negotiated procedure without prior publication of a contract notice, when the requirements set out for that purpose in Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, in particular Article 7(3) thereof, were not fulfilled, for the following additional lots :

- completion of the construction of an overflow basin for flood waters of the Parma watercourse in the area of Marano in the Parma commune;

- development and completion of an overflow basin for the Enza watercourse and

- retention of flood waters of the Terdoppio watercourse -Scolmatore canal south-west of Cerano;

2. Order the Italian Republic to pay the costs.

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(1) .

(2) - OJ 1993 L 199, p. 54.

(3) - The relevant contracts were approved by the Magistrato per il Pô di Parma by Decrees Nos 11414 and 11416 of 9 October 1997 and Decree No 11678 of 15 October 1997.

(4) - See Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609, paragraphs 29 and 30, with further references.

(5) - Settled case-law: see for example Case C-209/02 Commission v Austria [2004] ECR I-0000, paragraphs 16 to 18, with further references, and Commission v Germany (cited in footnote 4), paragraph 32 et seq., with further references. In the older case-law the concept of the Rechtsschutzinteresse' (the interest in pursuing the action') is admittedly sometimes used, though to no different effect: see, for example, Case 240/86 Commission v Greece [1988] ECR 1835, paragraphs 14 to 16.

(6) - Commission v Germany (cited in footnote 4), paragraph 39.

(7) - Similarly Advocate General Geelhoed in his Opinion in Commission v Germany (cited in footnote 4), especially points 50, 53 and 54.

(8) - On that point see, for example, Case 26/69 Commission v France [1970] ECR 565, paragraphs 12 and 13; likewise Advocate General Lenz's Opinion of 13 January 1988 in Commission v Greece (cited in footnote 5), point 13.

(9) - See, too, the eighth recital in the preamble to Directive 93/37.

(10) - To that effect also Case C-323/96 Commission v Belgium [1998] ECR I-5063, paragraph 34.

(11) - My emphasis.

(12) - Case C-57/94 Commission v Italy [1995] ECR I-1249, paragraph 23. Although that judgment concerns Article 9(b) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682, hereinafter: Directive 71/305'), that provision is a textually identical precursor of the provision at issue here, Article 7(3)(b) of Directive 93/37. See also Case C-318/94 Commission v Germany [1996] ECR I-1949, paragraph 13. Similarly Advocate General Jacobs at paragraph 64 of his Opinion of 23 March 2000 in Case C-337/98 Commission v France [2000] ECR I-8377, 8379.

(13) - See the first sentence of the tenth recital in the preamble to Directive 93/37.

(14) - Commission v Italy (cited in footnote 12), paragraph 23.

(15) - Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 14. Although the judgment deals with Article 9(d) of Directive 71/305, that provision is a textually essentially identical precursor of the provision at issue here, Article 7(3)(c) of Directive 93/37. See also Commission v Germany (cited in footnote 12), paragraph 13. Similarly Advocate General Jacobs at paragraph 64 of his Opinion in Commission v France (cited at footnote 12).

(16) - See the first sentence of the tenth recital in the preamble to Directive 93/37.

(17) - Commission v Italy (cited in footnote 15), paragraph 14.

(18) - Article 5(3)(e) of Directive 71/305, as amended by Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1).

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(19) - See, among many others, Cases C-296/95 EMU Tabac and Others [1998] ECR I-1605, paragraph 36, and C-257/00 Givane and Others [2003] ECR I-345, paragraph 36.

(20) - Article 5(3)(e) of Directive 71/305 as amended by Directive 89/440.

(21) - See (among many others) Cases C-373/00 Truley [2003] ECR I-1931, paragraph 35; C-294/01 Granarolo [2003] ECR I-0000, paragraph 43; C-497/01 Zita Modes [2003] ECR I-0000, paragraph 34; and Givane (cited in paragraph 19), paragraphs 38 and 39.

(22) - My emphasis.

(23) - See the second recital, and the first sentence of the tenth recital, in the preamble to Directive 93/37.

(24) - See the eighth recital in the preamble to Directive 93/37.

(25) - Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, paragraphs 79 and 80; also Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C190/94 Dillenkofer and Others [1996] ECR I-4845, paragraph 28.

(26) - Brasserie du Pêcheur and Factortame (cited in footnote 25), paragraphs 55, 56 and 78; also Case C224/01 Köbler [2003] ECR I-0000, paragraphs 53 to 55.

(27) - Dillenkofer (cited in footnote 25), paragraph 20; Brasserie du Pêcheur and Factortame (cited in footnote 25), paragraph 38.

(28) - The lump sum and the periodic penalty payments which a Member State may be ordered to pay (Article 228(2) EC) should be viewed in that context.

(29) - Advocate General Tizzano, too, underscores the objective nature of infringement proceedings at point 14 of his Opinion of 18 January 2001 in Case C-316/99 Commission v Germany [2001] ECR I-2037, 2038.

(30) - Case 52/84 Commission v Belgium [1986] ECR 89, paragraph 16; Case 213/85 Commission v Netherlands [1988] ECR 281, paragraph 22, and Case C-404/00 Commission v Spain [2003] ECR I-6695, paragraph 45, with further references.

(31) - Case C-135/01 Commission v Germany [2003] ECR I-2837, paragraph 25, and Case C-316/99 Commission v Germany [2001] ECR I-2037, paragraph 9. Advocate General Tizzano quite properly states: given the objective nature of infringement proceedings, the good will of the government of the Member State concerned, albeit helpful and valuable, is not capable of expunging the fact of the infringement, if an infringement there has been.' (point 14 of his Opinion in Case C-316/99, cited at footnote 29).

(32) - Case C-263/ 96 Commission v Belgium [1997] ECR I-7453, paragraph 30, and Commission v Germany (cited at footnote 4), paragraph 42.

(33) - See inter alia Case 283/81 C.I.L.F.I.T. [1982] ECR 3415, paragraphs 16 to 20; also point 35 of the present Opinion and the case-law cited in footnote 19.

(34) - Case C-285/93 Dominikanerinnen-Kloster Altenhohenau [1995] ECR I-4069, paragraph 27, with further references.

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FORM Conclusions

TREATY European Economic Community

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JURCIT

11997E010 : N 48 52
11997E226 : N 15 16
11997E228-P2 : N 47
31971L0305-A05P3LE : N 34 37
31971L0305-A09LB : N 25
31971L0305-A09LD : N 30
31989L0440 : N 34
31993L0037 : N 4 34 36
31993L0037-A01P1LA : N 39
31993L0037-A07P3 : N 3 23 44 55
31993L0037-A07P3LB : N 23 - 27
31993L0037-A07P3LC : N 23 29 - 33
31993L0037-A07P3LE : N 23 33 35 37 40 42 43 45 54
31993L0037-A07P4 : N 3 23 40
31993L0037-C1 : N 37
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31993L0037-C8 : N 5 23 41
31993L0037-C10 : N 6 26 30 41
61969J0026 : N 21
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61985J0213 : N 49
61986J0240 : N 16
61986C0240 : N 21
61993J0046 : N 46
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61995J0296 : N 35
61996J0263 : N 51
61998C0337 : N 25 30
61999C0316 : N 47 50
62000J0257 : N 35
62000J0373 : N 38
62000J0404 : N 49
62001J0020 : N 15 18
62001C0020 : N 18
62001J0135 : N 50
62001J0224 : N 46

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62001J0294 : N 38
62001J0497 : N 38
62002J0209 : N 16

SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Kokott
JUDGRAP	Cunha Rodrigues
DATES	of document: 29/04/2004 of application: 28/10/2002

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Notice for the OJ

Removal from the register of Case C-380/02[1]

By order of 18 September 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-380/02 (Reference for a preliminary ruling by the Unabhängiger Verwaltungssenat des Landes Vorarlberg): **Fantom Gebäudereinigung Gesellschaft** GmbH v **Dornbirn**.

_____

[1] - OJ C 7 of 11.01.2003.

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Notice for the OJ

Reference for a preliminary ruling by the Unabhängiger Verwaltungssenat des Landes Vorarlberg by order of that Court of 15 October 2002 in the case of Fantom Gebäudereinigung Gesellschaft GmbH against Dornbirn

(Case C-380/02)

Reference has been made to the Court of Justice of the European Communities by order of the Unabhängiger Verwaltungssenat des Landes Vorarlberg (independent administrative chamber for Vorarlberg) of 15 October 2002, received at the Court Registry on 21 October 2002, for a preliminary ruling in the case of Fantom Gebäudereinigung Gesellschaft GmbH against Dornbirn on the following questions:

Question 1

Is Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts[1] to be interpreted as meaning that under it entitlement to apply for a review procedure is available to any person seeking to receive a specific public contract whose award is pending, irrespective of whether such person has suffered or may suffer loss as a result of the infringement of the law alleged?

Question 2

In the event that the answer to Question 1 is no:

Is the abovementioned provision of the directive to be construed as meaning that, where a bid was not eliminated by the contracting authority but the review body assumes and establishes as a preliminary matter that the bid had properly to be eliminated, an alleged infringement of the law - namely the contracting authority's acceptance of another bid as the best bid, has occasioned or may occasion loss to the bidder concerned, and the review procedure must therefore be available to that bidder?

_____

[1] - OJ L 395 [1989], p. 33.

Judgment of the Court (First Chamber)
of 14 October 2004
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil obligations - Directive 92/50/EEC - Procedure for the award of public service contracts - Assistance to the maitre d'ouvrage for a sewage treatment plant - Award to the successful candidate in an earlier design contest without prior publication of a contract notice in the OJEC.
Case C-340/02.

In Case C-340/02,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on

24 September 2002

,

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

applicant,

v

French Republic, represented by G. de Bergues, S. Pailler and D. Petrausch, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr and K. Schiemann (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after considering the observations submitted on behalf of the parties,

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

11 March 2004,

gives the following

Judgment

Costs

46. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Declares that, by virtue of the award by the Communauté urbaine du Mans of a study contract for assistance to the maitre d'ouvrage in respect of the Chauvinière sewage treatment plant, without

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publication of a contract notice in the Official Journal of the European Communities , the French Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and in particular Article 15(2) thereof;

2. Orders the French Republic to pay the costs.

1. By its application, the Commission of the European Communities seeks a declaration that by virtue of the award by the Communauté urbaine du Mans (the municipal community of Le Mans; the MCLM') of a study contract for, inter alia, assistance to the maitre d'ouvrage (responsible contracting authority) in respect of the Chauvinière sewage treatment plant, without publication of a contract notice in the Official Journal of the European Communities , the French Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; the Directive'), and in particular Article 15(2) thereof.

Legal background

2. Article 7(1) of the Directive states:

This directive shall apply to public service contracts, the estimated value of which, net of VAT, is not less than ECU 200 000.'

3. Pursuant to Article 8 of the Directive, contracts which have as their object services listed in Annex I.A thereto must be awarded in accordance with the provisions of Titles III to VI of that directive.

4. Article 15(2), which appears in Title V of the Directive, entitled Common advertising rules', states:

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

5. Article 11(3), which appears in Title III of the Directive, entitled Choice of award procedures and rules governing design contests', provides for derogation from the obligation of prior publication of a contract notice as follows:

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

...

(c) where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates. In the latter case, all successful candidates shall be invited to participate in the negotiations;

...'

6. Article 1(g) of the Directive states:

[For the purposes of the Directive] design contests shall mean those national procedures which enable the contracting authority to acquire, mainly in the fields of area planning, town planning, architecture and civil engineering, or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes'.

Facts

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7. The MCLM issued a number of calls for tenders for the provision of services connected with improvements to the Chauvinière sewage treatment plant.

8. To that end, a scheme of works was drawn up, consisting of the following three phases:

- First phase: feasibility study for a water treatment network with a view to bringing the Chauvinière sewage treatment plant into compliance with European environmental laws;

- Second phase: study contract to (1) assist the maitre d'ouvrage in drawing up detailed technical specifications on the basis of the solution chosen in the first phase, (2) draw up an impact assessment analysing all the effects of the works on the environment, and (3) assist the maitre d'ouvrage in appraising offers submitted in relation to the procedure comprising the third phase;

- Third phase: planning of the works and their execution.

9. Two contract notices were published, one in the Official Journal of 30 November 1996, Series S, No 233, and the other in the Official Journal of 10 December 1998, Series S, No 239.

10. The notice published on 30 November 1996 concerned a call under the restricted procedure, for tenders in respect of a design contest for the feasibility study required in the first phase. That design contest carried a prize of FRF 200 000 for each of the three selected participants, amounting to a total sum of FRF 600 000.

11. Point 2 of that notice also provided that the candidate whose solution was successful in the design contest relating to the first phase may be invited to cooperate in the execution of his idea, under a study contract for [inter alia] the provision of assistance to the maitre d'ouvrage ' envisaged in the first and third parts of the second phase.

12. The notice published on 10 December 1998 related to the third phase.

The pre-litigation procedure

13. By letter of 7 October 1999, the Commission called upon the French authorities to submit to it their observations on the circumstances and arrangements under which the calls for tenders referred to above had been conducted.

14. Since the French authorities failed to give any official response to that letter, on 3 August 2000 the Commission sent them a letter of formal notice in which it raised three complaints, alleging infringement of Article 27(2), Article 15(2) and Article 36(1) of the Directive.

15. By letter of 21 November 2000, the French authorities disputed all the complaints raised by the Commission. Finding that response unsatisfactory, the Commission delivered a reasoned opinion, by letter of 26 July 2001, in which it reiterated its complaints.

16. The French authorities replied to the reasoned opinion by letter of 4 February 2002. In that letter, they conceded that the first and third of the Commission's complaints were well founded.

17. In those circumstances, the Commission decided to bring the present action which concerns only the second complaint raised in the reasoned opinion.

The action

Arguments of the parties

18. In its application, the Commission asserts that the contract for assistance to the maitre d'ouvrage , which was the subject-matter of the second phase and the value of which was FRF 4 502 137.90, concerned services different from those relating to the design contest initiated by the notice of 30 November 1996. Therefore, that contract should have been advertised and put out to competition in accordance with the common rules on advertising and participation laid down in Titles V and

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VI of the Directive. In fact, that contract was awarded to the successful candidate in the design contest organised for the carrying out of the feasibility study provided for in the first phase, without any further advertising or putting out to competition at Community level.

19. The Commission submits that the statement in the contract notice published in 1996 that the successful candidate in the contest might be invited to cooperate in assisting the maitre d'ouvrage within the framework of the second phase is of no relevance and that it in no way allowed the contracting authority to avoid its obligations under the Directive.

20. The Commission adds that the principle of equal treatment of tenderers established by the Directive requires that the subject-matter of the contract be clearly defined and that it be not extended in the course of the procedure. That principle also requires that the award criteria be clearly identified. However, not only did the successful candidate have neither any certainty, nor any right as regards the provision of other services under a later contract for the provision of technical assistance to the maitre d'ouvrage , but, in addition, no award criterion had been identified for that later contract.

21. In its defence, the French Government submits, first, that the relevant provisions of the contract notice of 30 November 1996 and of the rules to which the notice refers for further information, left no room for doubt as to the intention of the MCLM to reserve the option of awarding the successful candidate in the design contest a study contract for the provision of assistance to the maitre d'ouvrage. Consequently, the contract for assistance to the maitre d'ouvrage could legitimately be awarded to the successful candidate in the design contest without prior publication of a new contract notice.

22. Second, the French Government submits that, pursuant to Article 11(3)(c) of the Directive, the requirement of prior publication of a contract notice does not apply in the present case.

23. The French Government maintains that the Commission's argument that, in breach of the principle of equal treatment of candidates, the award criteria for the contract for assistance to the maitre d'ouvrage were not defined in the contract notice of 30 November 1996 must be regarded as inadmissible in so far as it was first advanced in the application and the French Government was thus not able to defend itself against that charge during the pre-litigation procedure.

24. On that last point, the Commission submits that that argument is not a new charge but an observation in support of its position, namely that the subject-matter of the contract related only to the design contest.

Findings of the Court

Admissibility

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

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

27. Second, the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the EC Treaty (see, in particular, Case C-207/96 Commission v Italy

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[1997] ECR I-6869, paragraph 18, and Case C439/99 Commission v Italy , cited above, paragraph 12).

28. In the present case, at paragraphs 20 and 21 of the reasoned opinion the Commission claims, in connection with the second complaint, that the reference in the contract notice to the option for the successful candidate to cooperate in the execution of the selected idea ... provided the successful candidate with no certainty, nor any right as regards the provision of other services under a later contract for the provision of technical assistance to the maitre d'ouvrage ' and... that the contracting authority unlawfully failed to apply an advertising and competition procedure to the various services to assist the maitre d'ouvrage , planned for the second phase of the comprehensive scheme of works in question'.

29. In those circumstances, it must be held that, by submitting that, in breach of the principle of equal treatment of candidates, the award criteria for the contract to provide assistance to the maitre d'ouvrage were not defined in the contract notice of 30 November 1996, the Commission merely expanded on the charge set out in paragraphs 20 and 21 of the reasoned opinion and did not formulate a new charge. It follows that the defence of inadmissibility raised by the French Government must be rejected.

Substance

30. In this action, the Commission is essentially alleging that the French authorities awarded the contract for assistance to the maitre d'ouvrage provided for in the second phase without implementing the tendering procedure laid down in the Directive.

31. At the outset, it should be noted that the parties do not dispute that the conditions for application of the Directive are met in the present case. The studies and the assistance to the maitre d'ouvrage which are the subject-matter of the second phase constitute services within the meaning of Article 8 of and Annex I.A to the Directive. Moreover, the minimum value of the contract laid down in Article 7(1) of the Directive was exceeded.

32. Consequently, pursuant to Article 8 of the Directive, the contract for the provision of those services could be awarded only in accordance with the rules laid down in Title III of the Directive, in particular Articles 11 and 15(2) thereof. The latter provision required the contracting authorities to publish a contract notice.

33. The French Government submits, however, that the option, set out in the notice of 30 November 1996, of awarding the contract relating to the second phase to the successful candidate in the design contest releases the contracting authority from the obligation to publish another notice prior to the award of that contract.

34. That argument cannot be accepted. The principle of equal treatment of service providers, laid down in Article 3(2) of the Directive, and the principle of transparency which flows from it (see, by analogy, Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraphs 51 to 53, and Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 61) require the subject-matter of each contract and the criteria governing its award to be clearly defined.

35. That obligation exists where the subject-matter of a contract and the criteria selected for its award must be regarded as decisive for the purposes of determining which of the procedures provided for in the Directive is to be implemented and assessing whether the requirements related to that procedure have been observed.

36. It follows that in the present case the mere option of awarding the contract relating to the second phase according to criteria laid down in respect of a different contract, that is the one related to the first phase, does not amount to awarding the contract in accordance with one of the

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procedures laid down in the Directive.

37. The French Government also relies on Article 11(3) of the Directive, which authorises contracting authorities using a negotiated procedure to derogate from the obligation of prior publication in certain cases which are exhaustively listed. In particular, derogation is permissible under Article 11(3)(c) of the Directive where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates.'

38. In that regard, it should be recalled that, as the Commission correctly points out, that provision, as a derogation from a fundamental rule of the Treaty, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (see Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609, paragraph 58).

39. In the present case, as the Advocate General observes in point 40 of his Opinion, some of the services which make up the second phase do not come within the definition of a design contest given in Article 1(g) of the Directive, which refers to a plan or design'. While the first part of the second phase (assistance to the maitre d'ouvrage in drawing up detailed technical specifications on the basis of the solution chosen in the first phase) could perhaps be regarded as a plan or design within the meaning of Article 1(g) of the Directive, the third part of the second phase could not. The provision of assistance to the maitre d'ouvrage in appraising offers submitted in relation to the procedure planned for the third phase clearly does not constitute a plan or design within the meaning of Article 1(g) of the Directive.

40. In any event, the conditions for applying the derogation provided for in Article 11(3)(c) of the Directive are not met in the present case. It is clear from the wording of that provision that it is permissible to forgo publication of a notice only where the contract concerned follows a design contest and must be awarded to the successful candidate or to one of the successful candidates in that contest.

41. As the Advocate General stated in point 45 of his Opinion, the expression follows a design contest' as used in Article 11(3)(c) of the Directive implies that there must be a direct functional link between the contest and the contract concerned. Since the contest in question related to the first phase and was organised for the purpose of awarding the contract envisaged in that phase, the contract in the second phase cannot be regarded as following that contest.

42. Moreover, point 2 of the contract notice of 30 November 1996 simply provides for the option, but not the obligation, to entrust the second phase to the successful candidate in the contest relating to the first phase. Therefore, it cannot be asserted that the contract relating to the second phase must be awarded to the successful candidate or to one of the successful candidates in the contest.

43. Accordingly, the derogation from the obligation to publish a contract notice, provided for in Article 11(3)(c) of the Directive, does not apply in this case.

44. It follows from the foregoing considerations that, although the second phase came within the scope of the Directive, it was not the subject of a contract notice published in accordance with the rules of that directive.

45. In the light of the foregoing, it must be held that, by virtue of the award by the MCLM of a study contract for assistance to the maitre d'ouvrage in respect of the Chauvinière sewage treatment plant, without publication of a contract notice in the Official Journal, the French Republic has failed to fulfil its obligations under the Directive, and in particular Article 15(2) thereof.

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DOCNUM	62002J0340
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FORM	Judgment
TREATY	European Economic Community
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LODGED	2002/09/24
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CONCERNS	Failure concerning 31992L0050-A15P2
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	French
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NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Geelhoed
JUDGRAP	Schiemann
DATES	of document: 14/10/2004 of application: 24/09/2002

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Order of the Court (Second Chamber)
of 16 October 2003
Kauppatalo Hansel Oy v Imatran kaupunki.
Reference for a preliminary ruling: Korkein hallinto-oikeus - Finland.
Article 104(3) Rules of Procedure - Procurement contracts - Directive 93/36/EEC - Procedures for the award of public supply contracts - Incorrect assessment as regards the criterion for determining the most economically advantageous tender - Procurement procedure discontinued.
Case C-244/02.

In Case C-244/02,

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

Kauppatalo Hansel Oy

and

Imatran kaupunki,

on the interpretation of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1),

THE COURT (Second Chamber),

composed of: R. Schintgen, President of the Chamber, V. Skouris (Rapporteur) and N. Colneric, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

the national court having been informed that the Court proposes to give its decision by reasoned order in accordance with Article 104(3) of the Rules of Procedure,

the persons referred to in Article 23 of the Statute of the Court of Justice having been invited to submit any observations which they might wish to make in this regard,

after hearing the Advocate General,

makes the following

Order

Costs

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

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Korkein hallinto-oikeus by order of 1 July 2002, hereby rules:

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Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Directive 97/52/EC of the European Parliament and the Council of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, must be interpreted as meaning that a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of Community law on public procurement such as the principle of equal treatment.

1 By order of 1 July 2002, received at the Court on 4 July 2002, the Korkein hallinto-oikeus referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1) (Directive 93/36).

2 Those questions arose in proceedings between the company Kauppatalo Hansel Oy (Hansel) and Imatran Kaupunki (City of Imatra) regarding the City of Imatra's decision not to award a public supply contract for electricity for which Hansel had put in a tender.

Legal background

Community legislation

3 Article 7(2) of Directive 93/36 provides:

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

National legislation

4 Directive 93/36 was transposed into Finnish law by the Julkisista hankinnoista annettu laki (Law on public procurement) 1505/1992, as amended by Laws 1523/1994, 725/1995, 1247/1997 and 633/1999 (Law 1505/1992).

5 Under Paragraph 1 of Law 1505/1992, national and local authorities and other contracting authorities specified in the law must comply with the provisions of that law in order to create competition and ensure fair and non-discriminatory treatment of participants. Under Paragraph 2 of Law 1505/1992, contracting authorities include municipal authorities.

6 Paragraph 5(1) of Law 1505/1992 states that all the competition possibilities in existence are to be made use of for the award of the contract.

7 Paragraph 7(1) of Law 1505/1992 provides that the contract is to be awarded as advantageously as possible; the tender to be accepted is the one which is lowest in price or overall the most economically advantageous.

8 Procedures for the award of public contracts are regulated in more detail by the Asetus kynnysarvot ylittävistä tavara- ja palveluhankinnoista sekä rakennnusurakoista (Regulation on supply, service

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and works contracts exceeding the threshold values) 380/1998 (Suomen säädökokoelma No 378-381, p. 1210, Regulation 380/1998).

9 Subparagraph 4 of Paragraph 19 of Regulation 380/1998 provides:

The contracting authority must inform on request, candidates or tenderers of the reasons why it has decided not to award a contract for which an invitation to tender has been published, or to start the procedure for the award of the contract again. The contracting authority must also notify its decision to the Office for Official Publications of the European Communities.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 It is clear from the order for reference that, as the contracting authority, the City of Imatra in Finland addressed an invitation to tender to 20 electricity companies for the award of an electricity supply contract for certain areas in that city, specified in the invitation to tender, for the period 1 July 2000 to 30 June 2001. The invitation to tender, which was published on 2 March 2000 in the Julkiset Hankinnat (the public procurement section in the Finnish Official Journal), mentioned the lowest price as the criterion for the award of the contract.

11 Of the tenders received by the City of Imatra within the prescribed period, that from Hansel was the lowest in price.

12 During a meeting on 23 May 2000, the Imatran tekninen lautakunta (City of Imatra Technical Committee, the Technical Committee) realised that changing the supplier would give rise to additional costs which had not been taken into consideration and decided that the tender submitted by its then supplier, Imatran Seudun Sähkö Oy, was overall the most economically advantageous tender.

13 The City of Imatra's Technical Office prepared a draft decision, according to which the electricity supply contract with Imatran Seudun Sähkö Oy would be extended for the period 1 July 2000 to 30 June 2001. However, that draft decision was taken off the agenda of the Technical Committee's meeting, so that the award of the contract was not made on the basis of the invitation to tender at issue.

14 On 31 August 2000, the City of Imatra published a new invitation to tender in which, following a more comprehensive assessment of the overall cost of the contract, the estimated amount of electricity required was now stated to be 25 GWh per year instead of the 16 GWh per year stipulated in the first invitation to tender, in order to ensure that the best tender was also overall the most economically advantageous. In the new procedure, the best tender was submitted by Lappeenrannan Energia Oy, to which the contract was awarded.

15 Hansel lodged an appeal before the Kilpailuneuvosto (Finnish Competition Board) against the decision of the contracting authority to discontinue the procedure for the award of a contract commenced by publication of the invitation to tender of 2 March 2000, asking it to set aside that decision and to order the City of Imatra to compare the tenders submitted in accordance with the national legislation on public procurement or, in the alternative, to pay it compensation of 15% of the total value of the contract.

16 In support of its appeal, Hansel argued, inter alia, that the City of Imatra did not have any valid reason to reject a tender satisfying the required criteria and to discontinue the procedure for the award of the contract, and that the organisation of a new procedure, replacing the original criterion for the award of the contract, namely the lowest price, with the criterion of the overall most economically advantageous tender, was unlawful. Hansel further submitted that the new procedure for the award of the contract amounted to a bargaining round. In its view, the City of Imatra had sought, by way of the first invitation to tender, to obtain information on prices and had subsequently commenced a new procedure in order to negotiate the price of the tenders submitted, using the information

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which had become public during the first invitation to tender.

17 The Kilpailuneuvosto dismissed the appeal. In particular, it held that, with the exception of the obligation to publish a notice, there are no express provisions on the discontinuance of a procedure for the award of a contract which is under way. Taking the view that such discontinuance is only possible for duly justified reasons, the Kilpailuneuvosto held that the city of Imatra had a valid reason, in accordance with Article 5 of Law 1505/1992, taking into account the public interest and the efficient use of public funds.

18 In that regard, the Kilpailuneuvosto held that the preparation of the invitation to tender was defective, since not all the factors influencing the costs of the project had been taken into consideration. The City of Imatra could not, however, be compelled to award a contract which would lead to an increase in its overall costs. Moreover, the Kilpailuneuvosto held that the new procedure initiated by the second invitation to tender could not be regarded as a bargaining round.

19 Hansel appealed against the Kilpailuneuvosto's decision to the Korkein hallinto-oikeus, seeking annulment of that decision and an order that the city of Imatra pay as compensation 15% of the total value of the contract.

20 In its order for reference the Korkein hallinto-oikeus states that there are no specific provisions in the Finnish legislation governing the discontinuance of a procedure for the award of a contract which is under way, apart from the provisions concerning the obligation to publish a notice. Accordingly consideration of the case requires an interpretation of the relevant provisions of Community law in order to determine whether the City of Imatra acted wrongly when it discontinued a procurement procedure which had been started and was based on the criterion of the lowest price, without awarding the contract, on the ground that the content of the invitation to tender did not enable it to accept the overall most economically advantageous tender.

21 In that regard, the national court assumes, first, that the contracting authority became aware only after receipt of the tenders of the fact that the total cost of the purchase of electricity is also affected by other factors, and does not depend exclusively on the price of the electricity and, second, that discontinuing the procedure for the award of a contract on the basis of the criterion stated in the first invitation to tender was dictated by the concern to avoid accepting what was not overall the most economically advantageous tender.

22 Referring to Case C-27/98 Fracasso and Leitschutz [1999] ECR I-5697, the Korkein hallinto-oikeus states that that judgment does not resolve the issue of whether the contracting authority has discretion to discontinue the procedure for the award of a contract in the absence of express provisions, or whether the fact that the reason for discontinuing the procedure is an error of assessment affecting the content of the invitation to tender is relevant for assessing the justification for the discontinuance of the procedure.

23 In the light of those considerations, the Korkein hallinto-oikeus stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

1. Is Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts to be interpreted as meaning that a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of the content of the invitation to tender, it is not possible for it to accept the tender which is overall the most economically advantageous?

2. Is it of importance, as regards the acceptability of discontinuing the procedure, that the content of the invitation to tender is defective because of the incorrectness of the assessment previously

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made by the contracting authority?

The questions referred for a preliminary ruling

24 By its two questions, which may appropriately be considered together, the national court asks, essentially, whether Directive 93/36 must be interpreted as meaning that a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender.

25 Taking the view that the answer to the questions as thus reformulated may be clearly deduced from its existing case-law, the Court, in accordance with Article 104(3) of the Rules of Procedure, informed the national court that it intended to give its decision by reasoned order and invited the persons referred to in Article 23 of the Statute of the Court of Justice to submit any observations which they might wish to make in this regard.

26 None of those persons raised any objection to the Court's intention to give its decision by reasoned order referring to the existing case-law.

27 It must be observed that the only provision in Directive 93/36 relating specifically to the decision to discontinue a procedure for the award of a contract put out to tender is Article 7(2), which provides, inter alia, that where the contracting authorities have decided not to award a contract, they must promptly inform candidates and tenderers of the reasons for their decision.

28 The Court of Justice has already had occasion to define the scope of the obligation to notify reasons for abandoning the award of a contract in the context of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), in the version thereof resulting from Directive 97/52 (Directive 93/37) and in that of Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), in the version arising from Directive 97/52 (Directive 92/50), which contain in Articles 8(2) and 12(2) provisions with wording substantially identical to that of Article 7(2) of Directive 93/36.

29 In particular, in paragraphs 23 and 25 of its judgment in Fracasso and Leitschutz, cited above, the Court held that Article 8(2) of Directive 93/37 does not provide that the option of the contracting authority to decide not to award a public works contract put out to tender, implicity allowed by that directive, is limited to exceptional cases or must necessarily be based on serious grounds.

30 Moreover, in paragraph 41 of its judgment in Case C-92/00 HI [2002] ECR I-5553, the Court held that on a proper interpretation of Article 12(2) of Directive 92/50, although that provision requires the contracting authority to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public service contract, there is no implied obligation on that authority to carry the award procedure to its conclusion.

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

32 More particularly, in interpreting the duty to notify reasons for a decision to withdraw an invitation to tender, laid down by Article 12(2) of Directive 92/50 in the light of the two-fold objective of exposure to competition and transparency pursued by that directive, the Court held

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that that duty is dictated precisely by concern to ensure a minimum level of transparency in the contract-awarding procedures to which that directive applies and hence compliance with the principle of equal treatment (HI, cited above, paragraphs 43 to 46).

33 Therefore the Court held that, even though Directive 92/50 does not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, the contracting authorities are nevertheless required, when adopting such a decision, to comply with the fundamental rules of the Treaty in general, and the principle of non-discrimination on the ground of nationality, in particular (HI, paragraph 47).

34 Thus it is clear from the case-law of the Court that Directives 92/50, 93/36 and 93/37 which, taken as a whole, constitute the core of Community law on public contracts, are intended to attain similar objectives in their respective fields (Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, paragraph 90).

35 In those circumstances, there is no reason to give a different interpretation to provisions which fall within the same field of Community law and have substantially the same wording (Concordia Bus Finland, cited above, paragraph 91).

36 Therefore, the answer to the questions referred by the national court must be that Directive 93/36 is to be interpreted as meaning that a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of Community law on public procurement such as the principle of equal treatment.

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Judgment of the Court (Second Chamber)
of 7 October 2004
Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy.
Directive 93/37/EEC - Public works contracts - Award of contracts - Right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender.
Case C-247/02.

In Case C-247/02,

REFERENCE to the Court under Article 234 EC

from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of

26 June 2002

, received at the Court on

8 June 2002

, in the proceedings

Sintesi SpA

v

Autorità per la Vigilanza sui Lavori Pubblici,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet, R. Schintgen (Rapporteur), F. Macken and N. Colneric, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M. Mugica Azarmendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 May 2004,

after considering the observations submitted on behalf of:

- Sintesi SpA, by G. Caia, V. Salvadori and N. Aicardi, avvocati,
- Ingg. Provera e Carrassi SpA, by M. Wongher, avvocatessa,
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,
- the Greek Government, by S. Spyropoulos, D. Kalogiros and D. Tsagkaraki, acting as Agents,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the Commission of the European Communities, by K. Wiedner, R. Amorosi and A. Aresu, acting as Agents,

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

1 July 2004,

gives the following

Judgment

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Costs

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

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

Article 30(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is to be interpreted as meaning that it precludes national rules which, for the purpose of awarding public works contracts following open or restricted tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price.

1. The reference for a preliminary ruling concerns the interpretation of Article 30(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54; the Directive').

2. The reference was made in proceedings between Sintesi SpA (Sintesi') and the Autorità per la Vigilanza sui Lavori Pubblici (Public Works Supervisory Authority; the supervisory authority') concerning the award of a public works contract under the restricted tendering procedure.

Legal framework

Community rules

3. According to the second recital in the preamble to the Directive, ... the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

4. Article 30(1) of the Directive provides:

1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.'

National legislation

5. Article 30(1) of the Directive was transposed into Italian law by Article 21 of Law No 109 of 11 February 1994 (GURI No 41 of 19 February 1994, p. 5; Law No 109/1994'), which is the framework law on public works in Italy.

6. Article 21(1) and (2) of Law No 109/1994, in the version in force at the material time, is worded as follows:

Criteria for the award of contracts - Contracting authorities

1. The award of contracts by open or restricted tender shall be based on the criterion of lowest price, below the base price in the tender notice, and shall be determined as follows:

...

2. The award of contracts by call for competitive tenders and also the allocation of concessions

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by restricted calls for tender shall be made on the basis of the criterion of the most economically advantageous tender, taking into account the following factors which vary according to the work to be carried out:

...'

Main proceedings and questions referred to the Court

7. In February 1991, the City of Brescia (Italy) awarded Sintesi a concession contract for the construction and management of an underground car park.

8. Under the contract concluded between the City of Brescia and Sintesi in December 1999, Sintesi was required to submit the completion of the works to a restricted call for tenders, at European level, in accordance with the Community rules on public works.

9. By a notice published in the Official Journal of the European Communities on 22 April 1999, Sintesi made a restricted call for tenders based on the criterion of the most economically advantageous tender. This tender was to be assessed on the basis of price, technical merit and time necessary for completion of the works.

10. Following the preselection stage, Sintesi sent the selected undertakings a letter of invitation to tender and the file of tender documents. Ingg. Provera e Carrassi SpA (Provera'), one of the companies invited to submit a tender, sought and was granted an extension of the period for submitting its tender. However, it subsequently informed Sintesi that it would not take part in the tendering procedure, on the ground that it was unlawful.

11. On 29 May 2000, Sintesi awarded the contract, accepting the most economically advantageous tender.

12. Following a fresh complaint by Provera, the contracting authority, by letter of 26 July 2000, informed Sintesi that it regarded the tendering procedure in question as contrary to Law No 109/1994, and on 7 December 2000 it adopted Decision No 53/2000, which is worded as follows:

1. in the system governed by Framework Law No 109/1994 on public works, a contract can be awarded only on the basis of the criterion of the lowest price; the criterion of the most economically advantageous tender can be employed only in the hypotheses of competition for and the concession of the construction and management of public works;

2. the above rules are applicable to all works contracts, whatever the amount involved, including where that amount is above the Community threshold, and the system in question cannot be regarded as contrary to Article 30(1) of Directive 93/37/EEC...;

3. where, in cases where the law so allows, and therefore not in the case referred to us, assessment of the technical merit is provided for in the framework of the actual application of the criterion of the most economically advantageous tender, it is necessary, in order to allow such an assessment, that the project be capable of being altered by the candidates.'

13. Sintesi challenged that decision before the national court, claiming, in particular, that there had been a breach of Article 30(1) of the Directive.

14. It claimed that it follows from that provision that the two criteria for the award of public works contracts, namely the lowest price' criterion and the most economically advantageous' criterion, are placed on an equal footing. By excluding, on the basis of Law No 109/1994, the criterion of the most economically advantageous tender in the case of a public works contract concluded according to the restricted tendering procedure, the supervisory authority was, in Sintesi's submission, in breach of Article 30(1) of the Directive.

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15. The national court observes that Article 21(1) of Law No 109/1994 seeks to ensure transparency in the procedures for awarding public contracts, but is uncertain as to whether that provision is capable of ensuring free competition, since price does not on its own appear to constitute a factor capable of ensuring that the best tender will be accepted.

16. The national court also makes the point that the car park in question will be situated in the historical centre of the City of Brescia. Consequently, the works to be carried out would be very complex and would require an assessment of technical elements, which should be provided by the tenderers, so that the contract can be awarded to the undertaking most capable of carrying out the work.

17. In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay proceedings and refer the following two questions to the Court for a preliminary ruling:

1. Does Article 30(1) of [the Directive], in so far as it allows individual contracting authorities to choose either the lowest price or the most economically advantageous tender as the criterion for the award of a contract, constitute a logically consistent application of the principle of free competition which is already enshrined in Article 85 of the EC Treaty (now Article 81 EC) and requires that all tenders submitted as part of a procedure for the award of a contract announced within the single market be assessed in such a way as not to prevent, restrict or distort comparison between them?

2. Does Article 30 of [the Directive], as a strictly logical consequence, preclude Article 21 of Law No 109 of 11 February 1994 from excluding, for the award of public works contracts under open and restricted procedures, the choice by the contracting authority of the criterion of the most economical tender, and prescribing, as a general rule, that of the lowest price only?'

Admissibility of the reference for a preliminary ruling

18. The Italian Government has doubts as to the admissibility of the reference, on the ground that the questions are purely theoretical.

19. The Commission of the European Communities questions the very applicability of Article 30 of the Directive to the main proceedings, in so far as the award procedure was undertaken by a works concessionaire.

20. It states that under Article 3(3) and (4) of the Directive, only a public works concessionaire which is itself one of the contracting authorities referred to in Article 1(b) of the Directive is required, in respect of the work to be carried out by third parties, to comply with all the provisions of the Directive. Public works concessionaires other than contracting authorities, on the other hand, are only required to observe the rules on advertising set out in Article 11(4), (6), (7) and (9) to (13) and Article 16 of the Directive.

21. In that regard, it is settled case-law that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts (see, inter alia, Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 14, and Case C-314/01 Siemens and ARGE Telekom [2004] ECR I0000, paragraph 33, and the case-law cited there).

22. In the context of that cooperation, it is for the national court or tribunal seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Lourenço Dias , cited above, paragraph 15; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 18; and Siemens and ARGE Telekom , cited above, paragraph 34).

23. In the present case, it is by no means clear that the interpretation of Article 30 will be

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of no assistance in the resolution of the main dispute since, as stated in the decision for reference, under the contract concluded between the City of Brescia and Sintesi, the latter, in its capacity as concessionaire, was required, for the purpose of the works at issue in the main proceedings, to launch a restricted tender procedure, at European level, in accordance with the Community rules on public works.

24. The reference for a preliminary ruling must therefore be held to be admissible.

The questions for the Court

25. By its questions, which should be examined together, the national court is asking essentially whether Article 30(1) of the Directive is to be interpreted as meaning that it precludes national rules under which, when awarding public works contracts, following open or restricted tendering procedures, the contracting authorities are required to employ only the lowest-price criterion. In particular, it asks whether the objective pursued by that provision, which seeks to ensure effective competition in the field of public contracts, necessarily implies that the question must be answered in the affirmative.

Observations submitted to the Court

26. According to Sintesi, Article 30(1) of the Directive, in so far as it leaves to the contracting authority the free choice between lowest price and most advantageous tender as the criterion for awarding public works contracts, implements the principle of free competition. Reducing that authority's discretion to a mere analysis of the prices submitted by the tenderers, as required by Article 21(1) of Law No 109/1994, constitutes an obstacle to the selection of the best possible tender and is therefore contrary to Article 81 EC.

27. Provera and the Italian Government claim that in adopting Law No 109/1994 the national legislature was seeking, in particular, to combat corruption in the public works contracts sector by eliminating the administration's discretion in awarding contracts and by adopting transparent procedures apt to ensure free competition.

28. In their submission, it follows from the very wording of Article 30(1) that the Directive does not ensure that the contracting authority is free to choose one criterion rather than another, nor does it require that one or other criterion be used in certain specific circumstances. Article 30(1) merely sets out the two criteria applicable to the award of contracts and does not specify the cases in which they are to be used.

29. Nor does the national legislature's choice of the lowest price' criterion in restricted or open tendering procedures adversely affect tenderers' rights, since the same, pre-determined criterion is applied to each of them.

30. The Greek and Austrian Governments agree with that interpretation.

31. In particular, according to the Austrian Government, there is no indication in Article 30 of the Directive as to which of the two criteria, which are placed on an equal footing, the contracting authority must choose. The Directive thus leaves it to that authority to determine precisely what criterion it will use to obtain the best quality/price ratio in the light of its needs. However, Article 30 does not preclude the national legislature from itself directly making that choice, depending on the nature of the contracts in question, by authorising either both criteria, or only one of them, as the Directive does not confer on the contracting authority any subjective right to exercise such a choice.

32. The Commission also submits that the Directive does not express any preference for one or other of the two criteria set out in Article 30(1) of the Directive. That provision seeks only to ensure that contracting authorities do not adopt criteria for the award of public works contracts

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other than the two criteria which it sets out; it does not impose any choice between them. In order to preclude arbitrary conduct on the part of those authorities and to ensure healthy competition between undertakings, it is in principle immaterial whether the contract is concluded on the basis of the lowest price or the most economically advantageous tender. It is also essential that the award criteria be clearly stated in the contract notice and applied objectively and without discrimination.

33. The choice of the appropriate criterion is for the contracting authority, which examines each particular case when awarding a specific contract, or for the national legislature, which is entitled to adopt legislation applicable either to all public works contracts or only to certain types of contracts.

34. The Commission observes that, in the present case, Article 21(1) of Law No 109/1994 requires that the lowest-price criterion be used in order to ensure the greatest transparency of procedures relating to public works contracts, which is consistent with the objective pursued by the Directive, namely to ensure the development of effective competition. Such a provision is therefore not contrary to Article 30(1) of the Directive.

The Court's answer

35. According to the 10th recital thereto, the purpose of the Directive is to develop effective competition in the field of public contracts (see Case C-27/98 Fracasso and Leitschutz [1999] ECR I-5697, paragraph 26; Joined Cases C-285/99 and C286/99 Lombardini and Mantovani [2001] ECR I-9233, paragraph 34; and Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 89).

36. That objective, moreover, is expressly stated in the second subparagraph of Article 22(2) of the Directive, which provides that where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender is in any event to be sufficient to ensure genuine competition.

37. In order to meet the objective of developing effective competition, the Directive seeks to organise the award of contracts in such a way that the contracting authority is able to compare the different tenders and to accept the most advantageous on the basis of objective criteria (Fracasso and Leitschutz , cited above, paragraph 31).

38. Thus Article 30(1) of the Directive sets out the criteria on which the contracting authority relies when awarding contracts, namely either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit.

39. A national provision, such as that at issue in the main proceedings, which restricts the contracting authorities' freedom of choice, in the context of open or restricted tendering procedures, by requiring that the lowest price be used as the sole criterion for the award of the contract, does not prevent those authorities from comparing the different tenders and from accepting the best one on the basis of an objective criterion fixed in advance and specifically included among those set out in Article 30(1) of the Directive.

40. However, the abstract and general fixing by the national legislature of a single criterion for the award of public works contracts deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.

41. In the main proceedings, the national court has specifically highlighted the technical complexity of the work to be carried out and, accordingly, the contracting authority could profitably have

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taken that complexity into account when choosing objective criteria for the award of the contract, such as those set out, by way of example, in Article 30(1)(b) of the Directive.

42. It follows from the foregoing considerations that the answer to the questions referred to the Court must be that Article 30(1) of the Directive is to be interpreted as meaning that it precludes national rules which, for the purpose of the award of public works contracts following open or restricted tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price.

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Notice for the OJ

Reference for a preliminary ruling by the Bundesvergabeamt (Republic of Austria) by order of that Court of 14 May 2002 in the case of Neumayer Bau Ges.m.b.H against Abwasserverband Grossraum Bruck an der Leitha (Neusiedl/See

(Case C-231/02)

Reference has been made to the Court of Justice of the European Communities by order of the Bundesvergabeamt (Republic of Austria) of 14 May 2002, received at the Court Registry on 20 June 2002, for a preliminary ruling in the case of Neumayer Bau Ges.m.b.H against Abwasserverband Grossraum Bruck an der Leitha (Neusiedl/See on the following questions:

Question 1:

Is Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts[1] to be broadly interpreted as meaning that under it entitlement to apply for a review procedure must be available to any person seeking to receive a specific public contract whose award is pending, irrespective of whether such person has suffered or may suffer loss as a result of the alleged infringement of the law?

Question 2:

In the event that the answer to Question 1 is no:

Is the abovementioned provision of the Directive to be construed in such a way that (where a bid was eliminated otherwise than in accordance with the law but the review body in the course of its review procedure assumes and establishes as a preliminary matter that the bid had properly to be eliminated (the tenderer of that bid is entitled to bring an application in respect of an alleged infringement of the law (in the present case the contracting authority's decision to make the award to another bidder (because owing to the contracting authority's defective award procedure the applicant may in any event be presumed to have suffered loss and errors in the award procedure can no longer be remedied subsequently in the review procedure by substitution of decisions of the contracting authority, and the review procedure must therefore be available to the applicant?

_____

[1] - OJ L 395 [1989], p. 33.

Judgment of the Court (Sixth Chamber)
of 12 February 2004
Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v Republik Osterreich.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public procurement - Directive 89/665/EEC - Review procedures for the award of public contracts - Articles 1(3) and 2(1)(b) - Persons to whom review procedures must be available - Definition of interest in obtaining a public contract.
Case C-230/02.

In Case C-230/02,

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

Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG

and

Republik Osterreich,

on the interpretation of Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT

(Sixth Chamber),

composed of: V. Skouris, acting as President of the Sixth Chamber, C. Gulmann, J.N. Cunha Rodrigues, J.-P. Puissochet and R. Schintgen (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

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

after considering the written observations submitted on behalf of:

- Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG, by P. Schmautzer, Rechtsanwalt,

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

- the Commission of the European Communities, by K. Wiedner, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG, represented by P. Schmautzer, of the Austrian Government, represented by M. Winkler, acting as Agent, and of the Commission, represented by J.C. Schieferer, acting as Agent, at the hearing on 10 September 2003,

after hearing the Opinion of the Advocate General at the sitting on 16 October 2003,

gives the following

Judgment

Costs

44 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings,

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a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 14 May 2002, hereby rules:

1. Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

2. Article 1(3) of Directive 89/665, as amended by Directive 92/50, must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the Directive, he failed to refer the case to a conciliation committee such as Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, established by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Law on Public Procurement).

1 By order of 14 May 2002, received at the Registry of the Court on 20 June 2002, the Bundesvergabeamt (Federal Public Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (`Directive 89/665').

2 Those questions were raised in a dispute between Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG (`Grossmann') and Republik Osterreich (Republic of Austria), represented by the Federal Ministry of Finance (`the Ministry'), concerning an award procedure for a public contract.

Legal background

Community legislation

3 Articles 1(1) and (3) of Directive 89/665 provide:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC... , decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

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...

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

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

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

National legislation

5 Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Law on Public Procurement, BGBl. I, 1997/56, `the BVergG'). The BVergG provides for the creation of the Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, `the B-VKK') and of the Bundesvergabeamt (Federal Public Procurement Office).

6 Paragraph 109 of the BVergG sets out the powers of the B-VKK. It contains the following provisions:

`1. The B-VKK shall be competent:

(1) until such time as the contract is awarded, to reconcile any differences of opinion between the awarding body and one or more candidates or tenderers concerning the application of the present federal law or its implementing regulations.

...

6. A request for the B-VKK to take action made under paragraph 1(1) must be submitted to the directors of the Commission as soon as possible after the difference of opinion comes to light.

7. If the B-VKK does not take action following a request from the awarding body, it must inform that body immediately it does take action.

8. The awarding body may not award the contract until four weeks after ... it has been informed in accordance with paragraph 7, failing which the tendering procedure shall be declared void....'

7 Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. It provides:

`1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

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(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer.... '

8 Paragraph 115(1) of the BVergG provides that:

`Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.'

9 According to Paragraph 122(1) of the BVergG, `in the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure.'

10 Under Paragraph 125(2) of the BVergG, a claim for damages, which must be brought before the civil courts, is admissible only if the Bundesvergabeamt has made a declaration under Paragraph 113(3) prior to that claim being made. The civil court called upon to hear the claim for damages, and the parties to the proceedings before the Bundesvergabeamt, are bound by that declaration.

The dispute in the main proceedings and the questions referred to the Court for a preliminary ruling

11 On 27 January 1998, the Ministry invited tenders for `the provision for the Austrian Federal Government and its delegations of non-scheduled passenger transport services by air in executive jets and aircraft'. Grossmann participated in the award procedure for that contract by submitting a tender.

12 On 3 April 1998, the Ministry decided to annul the first invitation to tender, in accordance with Paragraph 55(2) of the BVergG, which provides that `the invitation to tender may be revoked when, after offers have been rejected pursuant to Paragraph 52, only one offer remains'.

13 On 28 July 1998, the Ministry issued another invitation to tender for non-scheduled passenger transport services by air for the Austrian Federal Government and its delegations. Grossmann obtained the documents for that invitation to tender, but it did not submit an offer.

14 By letter of 8 October 1998, the Austrian Government notified Grossmann of its intention to award the contract to Lauda Air Luftfahrt AG (`Lauda Air'). Grossmann received that letter on the following day. The contract with Lauda Air was concluded on 29 October 1998.

15 By application dated 19 October 1998, posted on 23 October and received at the Bundesvergabeamt on 27 October 1998, Grossmann applied to have the contracting authority's decision to award the contract to Lauda Air set aside. In support of its application Grossmann claimed essentially that the invitation to tender had been tailored from the beginning to one tenderer, namely Lauda Air.

16 By decision of 4 January 1999, the Bundesvergabeamt dismissed Grossmann's application pursuant to Paragraphs 115(1) and 113(2) and (3) of the BVergG, on the ground that Grossmann had failed to assert its legal interest in obtaining the entire contract and, that in any event, after the award of the contract, the Bundesvergabeamt no longer has competence to set it aside.

17 As regards the absence of interest, the Bundesvergabeamt found that since it did not have large aircraft available to it, Grossmann was not in a position to provide all the services requested,

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and that it had not submitted a tender in the second award procedure for the contract at issue.

18 Grossmann appealed to the Verfassungsgerichtshof (Constitutional Court) (Austria) seeking to have the Bundesvergabeamt's decision set aside. By judgment of 10 December 2001, the Verfassungsgerichtshof set aside that decision for breach of the constitutionally guaranteed right to proceedings before the ordinary courts, on the ground that the Bundesvergabeamt had wrongly failed to refer a question to the Court of Justice for a preliminary ruling relating to whether its interpretation of Paragraph 115(1) of the BVergG was in accordance with Community law.

19 In its order for reference, the Bundesvergabeamt explains that the provisions of Paragraph 109(1), (6) and (8) of the BVergG are intended to guarantee that no contract will be concluded during the conciliation procedure. It adds that if an amicable agreement is not reached during that procedure an undertaking may still request, before the conclusion of the contract, the annulment of any decision of the contracting authority, including the decision awarding the contract, but subsequently the Bundesvergabeamt is competent only to rule that the contract has not been awarded to the tenderer who made the best offer by reason of an infringement of the BVergG or its implementing rules.

20 The national court points out that, in this case, Grossmann's application to have the decision awarding the contract to Lauda Air set aside, was indeed received before the contract between Lauda Air and the contracting authority was concluded, but that it could be dealt with by the Bundesvergabeamt, within the time-limit prescribed, only after the conclusion of the contract. The Bundesvergabeamt also states that the application was only posted on 23 October 1998, although the contracting authority had notified Grossmann by letter of 8 October 1998, received the following day, of its intention to award the contract to Lauda Air.

21 The Bundesvergabeamt thus finds that Grossmann allowed 14 days to elapse between notification to it of the decision awarding the contract (9 October 1998) and the institution by Grossmann of proceedings before the Bundesvergabeamt (23 October 1998), without any request for conciliation being lodged with the B-VKK (a request which would have caused the four-week time-limit laid down in Paragraph 109(8) of the BVergG, during which the contracting authority may not award the contract, to begin to run) or, in the case of a failure of the conciliation process, without the B-VKK being requested to grant interim measures and to set aside the decision awarding the contract. Therefore, according to the national court, the question arises whether Grosmann can establish an interest in bringing proceedings, in accordance with Article 1(3) of Directive 89/665, since as it was not in a position to provide the services in question, owing, it claims, to provisions in the documents relating to the invitation to tender that are discriminatory within the meaning of Article 2(1)(b) of the Directive, it did not submit an offer in the contract award procedure at issue.

22 It was in those circumstances that the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

`(1) Is Article 1(3) of... Directive 89/665... to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure?

In the event that the answer to Question 1 is no:

(2) Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if - in addition to its participating in the public procurement procedure - it takes all steps available to it under national law to prevent the contract from being awarded to another bidder?

(3) Is Article 1(3) of Directive 89/665, in conjunction with Article 2(1) thereof, to be interpreted

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as meaning that an undertaking must be afforded the opportunity in law to seek review of an award procedure regarded by it as unlawful or discriminatory even where it is not capable of performing the totality of the services for which bids were invited and, for that reason, did not submit a bid in that award procedure.'

The first and third questions

23 In the light of the facts in the main proceedings, as described by the national court, the first and third questions, which it is appropriate to examine together, must be regarded as asking, essentially, whether Articles 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

24 In order to assess whether a person in a situation such as that referred to in the questions thus reformulated can establish an interest in bringing proceedings within the meaning of Article 1(3) of Directive 89/665, it is appropriate to consider the fact that he neither participated in the contract award procedure at issue nor did he appeal against the invitation to tender before the contract was awarded.

Failure to participate in the contract award procedure

25 In that regard, it must be recalled that, in accordance with Article 1(3) of Directive 89/665, the Member States are required to ensure that the review procedures provided for are available `at least' to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of the Community law on public procurement or national rules transposing that law.

26 It follows that the Member States are not obliged to make those review procedures available to any person wishing to obtain a public contract, but may also require that the person concerned has been or risks being harmed by the infringement he alleges (Case C-249/01 Hackermüller [2003] ECR I-6319, paragraph 18).

27 In that sense, as the Commission pointed out in its written observations, participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision.

28 However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.

29 On the one hand, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract

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are non-existent by reason of the existence of those specifications.

30 On the other hand, it is clear from the wording of Article 2(1)(b) of Directive 89/665 that the review procedures to be organised by the Member States in accordance with the Directive must, in particular, `set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications... '. It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.

Absence of proceedings against the invitation to tender

31 In this case, Grossmann complains that the contracting authority imposed requirements in respect of a contract for non-scheduled air transport services that only an air company offering scheduled flights would be in a position to fulfil, which had the effect of reducing the number of candidates capable of providing all the services required.

32 It is apparent, however, from the file that Grossmann did not seek review of the contracting authority's decision determining the specifications of the invitation to tender directly, but waited until the decision to award the contract to Lauda Air was notified before asking the Bundesvergabeamt to set that decision aside.

33 In that regard, in its order for reference the Bundesvergabeamt points out that, under Paragraph 115(1) of the BVergG, an undertaking may institute review proceedings against a decision of the contracting authority where it claims to have an interest in the conclusion of a contract in an award procedure and the unlawfulness on which it relies has caused or risks causing it harm.

34 The national court therefore asks, essentially, whether Article 1(3) of Directive 89/665 must be interpreted as meaning that it precludes a person who not only has not participated in the award procedure for a public contract but has not sought any review of the decision of the contracting authority determining the specifications of the invitation to tender either, from being regarded as having lost his interest in obtaining the contract and, therefore, the right of access to the review procedures provided for by the Directive.

35 This question must be examined in the light of the purpose of Directive 89/665.

36 In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraphs 33 and 34, Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 74, and Case C-410/01 Fritsch, Chiari & Partner and Others [2003] ECR I-6413, paragraph 30).

37 It must be pointed out that the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him, in so far as they effectively disqualify him from participating in the award procedure for the contract at issue, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665.

38 Such conduct, in so far as it may delay, without any objective reason, the commencement of the review procedures which Member States were required to institute by Directive 89/665 impairs the

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effective implementation of the Community directives on the award of public contracts.

39 In those circumstances, a refusal to acknowledge the interest in obtaining the contract in question and, therefore, the right of access to the review procedures provided for by Directive 89/665 of a person who has not participated in the contract award procedure, or sought review of the decision of the contracting authority laying down the specifications of the invitation to tender, does not impair the effectiveness of that directive.

40 Having regard to the foregoing, the answer to the first and third questions must be that Articles 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

Second question

41 In the light of the facts in the main proceedings, as set out by the national court, the second question must be understood as asking, essentially, whether Article 1(3) of Directive 89/665 must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the Directive, he failed to refer the case to a conciliation committee such as the B-VKK.

42 In that regard, it is sufficient to recall that, in paragraphs 31 and 34 of Fritsch, Chiari & Partner and Others, the Court held that, even though Article 1(3) of Directive 89/665 expressly allows Member States to determine the detailed rules according to which they must make the review procedures provided for in that directive available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement it none the less does not authorise them to give the term `interest in obtaining a public contract' an interpretation which may limit the effectiveness of that directive. The fact that access to the review procedures provided for by the Directive is made subject to prior referral to a conciliation committee such as the B-VKK would be contrary to the objectives of speed and effectiveness of that directive.

43 Accordingly, the answer to the second question must be that Article 1(3) of Directive 89/665 must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the Directive, he failed to refer the case to a conciliation committee such as the B-VKK.

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Notice for the OJ

Removal from the register of Case C-81/02 1

By order of 28 July 2004 the President of the Court of Justice of the European Communities has ordered the removal from the register of Case C-81/02 (reference for a preliminary ruling from thel'Oberster Gerichtshof): **Wolfgang Rohringer en qualité de syndic faillite dans la procédure de liquidation des biens de la société Eurokeramik GmbH & Co. KG** v **Gemeinnützige Salzburger Wohnbaugesellschaft mbH.**

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Notice for the OJ

Removal from the register of Case C-231/02[1]

By order of 18 September 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-231/02 (Reference for a preliminary ruling by the Bundesvergabeamt): **Neumayer Bau Ges.m.b.H** v **Abwasserverband Grossraum Bruck an der Leitha**.

_____

[1] - OJ C 219 of 14.09.2002.

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Notice for the OJ

Removal from the register of Case C-229/02[1]

By order of 18 September 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-229/02 (Reference for a preliminary ruling by the Bundesvergabeamt): **Tenderer: debis/AC and Others** v **Hauptverband der österreichischen Sozialversicherungsträger**.

_____

[1] - OJ C 219 of 14.09.2002.

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Notice for the OJ

Reference for a preliminary ruling by the Bundesvergabeamt by order of that Court of 14 May 2002 in the case of 1. Tenderer: debis/AC, 2. ARGE Telekom & Partner, 3. Tenderer: SIEMENS AUSTRIA CARD against Hauptverband der österreichischen Sozialversicherungsträger

(Case C-229/02)

Reference has been made to the Court of Justice of the European Communities by order of the Bundesvergabeamt (Federal Public Procurement Office) of 14 May 2002, received at the Court Registry on 20 June 2002, for a preliminary ruling in the case of 1. Tenderer: debis/AC, 2. ARGE Telekom & Partner, 3. Tenderer: SIEMENS AUSTRIA CARD against Hauptverband der österreichischen Sozialversicherungsträger on the following questions:

Question 1:

Is Article 1(3) of Council Directive 89/665/EEC of 21 December 1989[1] on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts to be interpreted as meaning that any person seeking the award of a specific pending public contract is entitled to institute a review procedure?

Question 2:

In the event that the answer given to Question 1 is no:

Is the abovementioned provision to be understood as meaning that, if a tenderer's bid is not eliminated by the contracting authority, but the review body finds in the course of the review procedure that the contracting authority would have been bound to eliminate it, the tenderer has been or risks being harmed by the infringement alleged by him (in this case the finding by the contracting authority that a rival tenderer submitted the best bid (and that he must therefore have the right to bring a review procedure?

_____

[1] - OJ L 395 [1989], p. 33.

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JUDGMENT OF THE COURT (Second Chamber)
24 June 2004 (1)

(Failure of a Member State to fulfil obligations – Directives 89/665/EEC and 92/13/EEC – Inadequate transposition – Obligation that legislation relating to the award of public contracts provide for a procedure whereby all unsuccessful tenderers may have the award decision set aside)

In Case C-212/02,

Commission of the European Communities, represented by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by C. Pesendorfer and M. Fruhmann, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, inasmuch as the Landesvergabegesetze (regional public procurement laws) of the Länder of Salzburg, Styria, Lower Austria and Carinthia do not in all cases provide for a review procedure whereby an unsuccessful tenderer may have an award decision set aside, the Republic of Austria has failed to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) and of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and admnistrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1991 L 76, p. 14),

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet (Rapporteur), R. Schintgen, F. Macken and N. Colneric, Judges,

Advocate General:M. Poiares Maduro,
Registrar:R. Grass,

having regard to the Report of the Judge-Rapporteur,

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

gives the following

Judgment

1
By an application lodged at the Registry of the Court on 5 June 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, inasmuch as the Landesvergabegesetze (regional public procurement laws) of the Länder of Salzburg, Styria, Lower Austria and Carinthia do not in all cases provide for a review procedure whereby an unsuccessful tenderer may have an award decision set aside, the Republic of Austria has failed to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative

provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) and of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1991 L 76, p. 14).

Legal framework

Community legislation

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

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

3
In addition, Article 2(1)(a) and (b) of Directive 89/665 states that Member States are to ensure that the measures which they adopt include, for cases where a dispute arises in respect of award of a public contract, provision for the powers to:

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

(b)
either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure'.

4
Article 1(3) and Article 2(1)(a) and (b) of Directive 92/13 contain essentially the same provisions.

National legislation

5
The Bundesvergabegesetz 2002 (Federal Procurement Law of 2002), which was published on 28 June 2002 (BGBl. I, 2002/99), lays down, inter alia, a definition of the award decision, an obligation to communicate that decision to tenderers and a suspension period during which the awarding authority cannot validly award the contract to a tenderer.

6
The Bundesvergabegesetz 2002 states that the rules concerning contract awards must be the same for the Federal State, the Länder and the communes.

7
At the Federal level, the Bundesvergabegesetz 2002 entered into force on 1 September 2002. For the Länder, the equivalent legislation – namely, the Landesvergabegesetze – is as follows:

– Styria: the Supplementary Law (LGB1. 2002/41) entered into force on 16 March 2002 and was notified to the Commission on 1 July 2002.

– Lower Austria: the Supplementary Law (LGB1. 7200-5) entered into force on 31 January 2002 and the parties agree that it was notified to the Commission.

– Carinthia: the Supplementary Law was adopted on 23 May 2002 and is expected to enter into force in October 2002.

– Salzburg: the equivalent provisions were to be introduced upon the entry into force in that Land of the Federal Law on 1 January 2003.

8
Before the entry into force of those laws, a Circular from the Austrian Federal Chancellery stated that there should

be a period between the award decision and the conclusion of the contract and an obligation on awarding authorities to communicate award decisions to all tenderers.

Pre-litigation procedure

9
The Commission, since it considered that the Austrian authorities had not satisfied the conditions laid down by the EC Treaty for the purpose of correctly transposing Directives 89/665 and 92/13 on the review procedures available to unsuccessful tenderers against award decisions, gave the Austrian Government notice by letter of 22 November 1999 to submit its observations within two months. The latter sent its response on 8 February 2000, stating that it acknowledged most of the complaints put forward by the Commission but pointing out that, in the meantime, the Federal legislation had been amended and new laws had been adopted at the level of the Länder.

10
On 18 July 2001, the Commission delivered a reasoned opinion in which it asked the Republic of Austria to adopt the measures necessary to comply with that opinion within two months of its notification. The Commission took into account the legislative amendments which had been made at Federal or regional level and retained only the complaints which in its opinion were still relevant.

11
The Austrian Government responded to the reasoned opinion by letter of 26 September 2001, stating that legislative amendments had meanwhile been made in the Länder of Burgenland and Tyrol.

12
The Commission nevertheless took the view that Directives 89/665 and 92/13 had not been wholly transposed into Austrian law at the end of the two-month period laid down in the reasoned opinion, which ended on 26 September 2001. No review procedure whereby an unsuccessful tenderer may have the award decision set aside before the conclusion of the contract awarded was provided for in the Landesvergabegesetze for the Länder of Salzburg, Styria, Lower Austria and Carinthia. The Commission accordingly decided to bring the present action.

Substance

Arguments of the parties

13
The Commission bases its action for failure to fulfil obligations on the position adopted by the Court in Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraph 43. The Court took the view that the provisions of Article 2(1)(a) and (b) of Directive 89/665 require Member States to provide in all cases a review procedure whereby an applicant may have set aside the contracting authority's decision prior to the conclusion of the contract as to the tenderer in a tender procedure with which it will conclude the contract. That right of review for tenderers is independent of the possibility for them to bring an action for damages once the contract has been concluded.

14
The Commission states that the Austrian system makes it impossible to contest the award decision for two reasons. First, the award decision and the conclusion of the contract occur at the same time, depriving interested parties of any possible review in order to have an unlawful award decision set aside or to prevent the contract from being concluded. Secondly, the decision of the contracting authority notified to the person to whom the contract is awarded may, as a general rule, not be contested as unsuccessful tenderers are not persons to whom that decision is addressed. The effect of the applicable national legislation is therefore to preclude the possibility of an action to have the award decision set aside. Such a situation is incompatible with the requirements of the Community law in question.

15
The relevant provisions of the directive must be implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (Case 168/85 *Commission* v *Italy* [1986] ECR 2945, paragraphs 11 and 13; Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 18; and Case C-225/97 *Commission* v *France* [1999] ECR I-3011, paragraph 37).

16
The Austrian Government maintains, as its principal argument, that there is no prohibition on communicating the award decision to tenderers in the Länder. There is therefore no obligation, for the purpose of complying with the Community legislation, to adopt specific provisions requiring the communication of the award decision. It refers to paragraph 49 of *Alcatel Austria and Others*, cited above, which states that it is necessary to consider whether national provisions cannot be interpreted in a manner consistent with Directive 89/665.

17
The Austrian Government contends that in the absence of explicit legislation in the Länder, contracting authorities and supervising bodies have latitude to fill possible gaps in the procedure by means of interpretation. It infers from this that national provisions which do not preclude compliant implementation constitute adequate transposition of the Directive, so that no action need be taken by the legislature.

18
Nevertheless, the Austrian Government accepts that, following *Alcatel Austria and Others*, the Federal Chancellery adopted a Circular intended to ensure, until legal provisions had been adopted, a procedure in compliance with that which follows from that judgment when awarding public contracts. In addition, it maintains that that Circular could serve as a basis for decrees by the Governments of the Länder of Salzburg and Carinthia.

19
While the Austrian Government recognises that that Circular and the decrees issued by the Länder are not binding in nature, it nevertheless considers that they create obligations for the authorities since the rules are interpreted solely within the framework of existing Community law and in no case against the law, thereby ensuring adequate transposition of the Directive.

Findings of the Court

20
The provisions of Directives 89/665 and 92/13, which are intended to protect tenderers against arbitrary decisions by the contracting authority, seek to reinforce existing arrangements for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified (*Commission* v *Germany*, paragraph 23). Such protection cannot be effective if the tenderer is not able to rely on those rules against the contracting authority.

21
Complete legal protection presupposes, first, an obligation to inform tenderers of the award decision. Legislation relating to access to administrative documents which merely requires that tenderers be informed only as regards decisions which directly affect them cannot offset the failure to require that all tenderers be informed of the contract award decision prior to conclusion of the contract, so that a genuine possibility to bring an action is available to them.

22
The fact that such information is not prohibited does not release the Republic of Austria from its obligation to adopt legal provisions for the purpose of complying with the requirement to give practical effect to Directives 89/665 and 92/13. That Member State cannot claim to have ensured proper implementation of those directives by maintaining that nothing prevents the contracting authority from publishing award decisions some time before the conclusion of the contract. Such a power would in effect allow the contracting authority to decide whether or not to inform tenderers of the award decision, whereas those directives are intended to protect tenderers against arbitrary action on the part of the contracting authority.

23
Complete legal protection also requires that it be possible for the unsuccessful tenderer to examine in sufficient time the validity of the award decision. Given the requirement that the Directive have practical effect, a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract in order, in particular, to allow an application to be made for interim measures prior to the conclusion of the contract.

24
The Republic of Austria was therefore required to put in place appropriate procedures to enable unlawful decisions to be set aside and, in accordance with Articles 1(3) of Directives 89/665 and 92/13, to ensure that review procedures are available at least to any person having an interest in obtaining a public contract. That effectiveness depends not only on the existence of a sufficiently long interval in which tenderers may react to the award decision but also on the obligation to keep tenderers informed of the award decision.

25
The Federal Circular subsequent to *Alcatel Austria and Others* invoked by the Austrian Government cannot be considered adequate transposition, even if its content might have influenced certain decrees issued in two Länder, since those decrees were issued after the time-limit laid down in the reasoned opinion. Since circulars are administrative practices which by their nature are alterable at will by the authorities and are not given the appropriate publicity, they cannot be regarded as constituting the proper fulfilment of Treaty obligations or as an adequate means to remedy, if necessary, the incompatibility of national legislative provisions with Community law (*Commission* v *Italy*, paragraphs 11 and 13; *Commission* v *Germany*, paragraph 18; and *Commission* v *France*, paragraph 37). Those circulars are merely provisional in nature, as the Austrian Government admitted in its observations on the Commission's reasoned opinion and letter of formal notice.

26
Transposition of a directive in a national legal order requires the definitive elimination of incompatibility through binding national provisions which have the same legal value as those which must be amended (see to that effect Case C-152/00 *Commission* v *France* [2002] ECR I-6973, paragraph 19). The Member State must establish a specific legal framework in the area in question, since the implementation of Community Directives must be ensured by adequate measures of implementation (Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851).

27
Finally, while the Austrian Government states that amending laws have since taken effect, it is clear from its statements that they entered into force after the period of two months laid down in the reasoned opinion.

28
The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State at the end of the period laid down in the reasoned opinion. The Court cannot take account of any subsequent changes (Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26, and Case C-354/99 *Commission* v *Ireland* [2001] ECR I-7657, paragraph 45).

29
Consequently, it must be held that, inasmuch as the Landesvergabegesetze (regional public procurement laws) of the Länder of Salzburg, Styria, Lower Austria and Carinthia do not in all cases provide for a review procedure whereby an unsuccessful tenderer may have an award decision set aside, the Republic of Austria has failed to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665 and of Council Directive 92/13.

Costs

30
Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked that the Republic of Austria be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1.
Declares that inasmuch as the Landesvergabegesetze (regional public procurement laws) of the Länder of Salzburg, Styria, Lower Austria and Carinthia do not in all cases provide for a review procedure whereby an unsuccessful tenderer may have an award decision set aside, the Republic of Austria has failed to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

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

Timmermans Puissochet Schintgen

Macken Colneric

Delivered in open court in Luxembourg on 24 June 2004.

R. Grass C.W.A. Timmermans

Registrar President of the Second Chamber

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Language of the case: German.

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Notice for the OJ

Reference for a preliminary ruling by the Oberster Gerichtshof (Republic of Austria) by order of that Court of 31 January 2002 in the case of Eurokeramik Gesellschaft mbh & Co KG against Gemeinnützige Salzburger Wohnbaugesellschaft mbH

(Case C-81/02)

Reference has been made to the Court of Justice of the European Communities by order of the Oberster Gerichtshof (Republic of Austria) of 31 January 2002, received at the Court Registry on 11 March 2002, for a preliminary ruling in the case of Eurokeramik Gesellschaft mbh & Co KG against Gemeinnützige Salzburger Wohnbaugesellschaft mbH on the following questions:

1. Does a social housing association established as a limited liability company of which there are two shareholders, each a regional or local authority, in carrying out the objects laid down in its statutes which consist in the provision of social housing, meet needs in the general interest not having an industrial or commercial character, and is the association therefore to be regarded as a body governed by public law for the purposes of Article 1(b) of Council Directive 93/37/EEC[1] of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, where it carries out its activities with a limited intention to make a profit and is subject to both competition generally and competition specifically from other social housing associations, but at the same time is supported by public funds and is subject to special State controls?

2. Is a national procurement law which permits contracting authorities to exclude tenderers, without giving any reasons, from procurement procedures in respect of works contracts below the Community law threshold and within a minimal amount of up to, for example, EUR 10 000, compatible with Community law?

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[1] - OJ L 199 1993, p. 54.

Order of the Court of First Instance (Fourth Chamber)
First Instance (Fourth Chamber)First Instance (Fourth Chamber)2004. Makedoniko Metro and Michaniki AE v Commission of the European Communities. Action for damages - Inadmissibility. Case T-202/02.

1. Non-contractual liability - Conditions - Lawfulness - Fact that the Commission did not initiate infringement proceedings - Not unlawful - Claim for compensation - Inadmissible - (Arts 226 EC and 288, second para., EC)

2. Actions for failure to fulfil obligations - Commission ' s right of action - Exercise of its discretion - Procedural position of parties who have submitted a complaint different from that in competition matters - (Art. 226 EC; Council Regulation No 17)

3. Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directive 89/665 - Procedure enabling the Commission to act where there has been a clear and manifest infringement of the Community rules on public procurement - Unrelated to the infringement procedure under Article 226 EC - Commission ' s choice not to make use of the procedure - Not unlawful - (Art. 226 EC; Council Directive 89/665, Art. 3)

4. Actions for annulment - Jurisdiction of the Community judicature - Unlimited jurisdiction - Issue of directions to an institution - Not permissible - (Art. 230 EC)

1. Since the Commission is not bound to commence infringement proceedings under Article 226 EC its decision not to institute such proceedings is not in any event unlawful, so that it cannot give rise to non-contractual liability on the part of the Community and the only conduct which might possibly be adduced as the source of damage is the conduct of the Member State concerned. Consequently, a claim for compensation based on the Commission ' s decision not to commence infringement proceedings against a Member State is inadmissible.

see paras 43-44

2. The procedural position of parties who have submitted a complaint to the Commission is fundamentally different in the case of a procedure under Article 226 EC from their position in the case of a proceeding under Regulation No 17.

The Commission is not bound to initiate a procedure under Article 226 EC but has a discretion which excludes the right for individuals to require it to adopt a specific position. It follows that, in the case of such a procedure, it is not open to persons who have lodged a complaint to bring an action before the Community judicature against a decision to take no further action on their complaint; nor do they have any procedural rights, comparable to those they may have in the case of a procedure under Regulation No 17, enabling them to require the Commission to inform them and to grant them a hearing.

see para. 46

3. Article 3 of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts provides that the Commission may invoke the procedure for which the following paragraphs of that article provide when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 93/37 concerning the coordination of procedures for the award of public works contracts.

The clear wording of that provision, which neither derogates from nor replaces Article 226 EC, shows that only the Commission is allowed to use the procedure for which it provides. Since the choice not to make use of such power is not unlawful, it cannot give rise to non-contractual liability

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on the part of the Community. In fact, even when called on to use it the Commission retains the option of considering the complaint referred to it under Article 226 EC.

see paras 49-50

4. The Community judicature may not give directions to a Community institution without encroaching upon the powers of the administration. That principle not only renders inadmissible, in an action for annulment, heads of claim seeking an order requiring a defendant institution to adopt the measures necessary for the enforcement of a judgment by which a decision is annulled, but it is also applicable, in principle, in proceedings in which the Court has unlimited jurisdiction.

see para. 53

In Case T-202/02,

Makedoniko Metro, established in Thessaloniki (Greece),

Mikhaniki AE, established in Maroussi Attikis (Greece),

represented by C. Gonis, lawyer, with an address for service in Luxembourg,

applicants,

v

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

defendant,

APPLICATION for compensation for the damage allegedly suffered by the applicants following the Commission ' s decision to take no further action on their complaint, No 97/4188/P, lodged on 23 January 1997 concerning the award by the Greek State of a public works contract for the design, construction, self-financing and operation of the Thessaloniki metro (Greece),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of:

H. Legal, President,

V. Tiili and

M. Vilaras, Judges,

Registrar: H. Jung,

makes the following

Order

Costs

56. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party ' s pleadings. Since the applicants have been unsuccessful, they must be ordered to pay, in addition to their own costs, the costs of the Commission, as applied for in the latter ' s pleadings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

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hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicants to pay the costs.

Background to the case

1. The first applicant is the consortium Makedoniko Metro (" Makedoniko Metro"), established in order to take part in the international public tendering procedure for the award of the contract for the design, construction, self-financing and operation of the Thessaloniki metro. The second applicant, Mikhaniki AE (" Mikhaniki"), is a limited company incorporated under Greek law and a member of Makedoniko Metro (together " the applicants").

2. The Greek State decided to issue an international invitation to tender in respect of the planning, construction, self-financing and operation of the Thessaloniki metro, amounting to GRD 65 000 000 000. It opted, in relation to the award of that contract, for a restricted procedure comprising six stages: preselection of candidates who would be invited to tender, submission of tenders by the preselected candidates, evaluation of their technical proposals, evaluation of their economic and financial proposals, negotiations between the contracting authority and the tenderer provisionally selected, and signature of the contract.

3. By decision of 18 June 1992, the Greek Minister for the Environment, Regional Development and Public Works (" the Minister") approved the contract notice initiating the first stage of the procedure (preselection of candidates). On conclusion of that stage, eight consortia, including Makedoniko Metro and the Thessaloniki Metro consortium (" Thessaloniki Metro"), were authorised to submit tenders.

4. By decision of 1 February 1993, the Minister approved the tender documentation for the second stage of the procedure (submission of tenders by the preselected candidates), including, in particular, the supplementary contract notice and the specific contract documents.

5. From those contract notices read together, it is apparent that during the second stage a preselected consortium could be enlarged by the addition of new members but that such enlargement was possible only until the deadline for submission of tenders.

6. During the second stage of the procedure, technical proposals, economic studies and financial proposals were submitted by, amongst others, Makedoniko Metro and Thessaloniki Metro.

7. When the preselection took place, Makedoniko Metro ' s members were Mikhaniki and the companies Edi-Stra-Edilizia Stradale SpA, Fidel SpA and Teknocenter-Centro Servizi Administrativi Srl, which held respectively 70%, 20%, 5% and 5% interests.

8. During the second stage of the procedure, Makedoniko Metro was extended to include AEG Westinghouse Transport Systems GmbH. The interests of the first four companies then amounted to 63%, 17%, 5% and 5% respectively, while AEG Westinghouse Transport Systems GmbH had a 10% stake.

9. On 14 June 1994 Makedoniko Metro was provisionally designated as the successful tenderer with that composition.

10. Following the formation, by decision of 24 June 1994, of the negotiating committee and following the commencement of negotiations between the Greek State and Makedoniko Metro as the provisionally designated successful tenderer, Makedoniko Metro gave notice to the Minister, by letter of 29 March 1996, of its new composition, which included as members Mikhaniki, ABB Daimler-Benz Transportation Deutschland GmbH (" Adtranz") and the Fidel Group, which in turn comprised Edi-Stra-Edilizia Stradale SpA, Fidel SpA and Teknocenter-Centro Servizi Administrativi Srl, their interests

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being 80% (Mikhaniki), 19% (Adtranz) and 1% (Fidel Group) respectively.

11. Subsequently, by letter of 14 June 1996, Makedoniko Metro informed the commission for major works, in response to questions concerning reports that members of the Fidel Group were insolvent and had gone into liquidation, that the companies within that group were no longer part of Makedoniko Metro and that, as of that date, the latter ' s members were Mikhaniki, Adtranz and Belgian Transport and Urban Infrastructure Consult (Transurb Consult), whose respective interests amounted to 80.65%, 19% and 0.35%.

12. Finding that Makedoniko Metro had substantially departed from the requirements laid down for the contract, the Minister took the view that the negotiations had failed and, by decision of 29 November 1996, terminated negotiations between the Greek State and Makedoniko Metro and called on Thessaloniki Metro to enter into negotiations as the new provisional contractor.

13. On 10 December 1996 Makedoniko Metro brought an action for annulment of the Minister ' s decision of 29 November 1996 before the Simvoulio tis Epikratias (Council of State, Greece). By judgment No 971 of 6 March 1998, the Council of State dismissed the action on the ground that Makedoniko Metro could not lawfully change its composition after tenders had been submitted and after having been chosen as provisional contractor, while also continuing to take part in the procedure at issue, and that, consequently, it was not entitled, with its new membership, to apply for annulment of the contested decision.

14. In addition, the applicants brought an action before the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens) for damages against the Greek State for reparation of the damage allegedly suffered in the wake of the breakdown of negotiations and the failure to award the contract in question to Makedoniko Metro. By judgment of 30 April 1999, the Administrative Court, following the interpretation given by the Council of State, dismissed that action.

15. After the applicants appealed against that judgment to the Diikitiko Efetio Athinon (Administrative Court of Appeal, Athens), that court decided to stay the proceedings and refer to the Court of Justice for a preliminary ruling a question on the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (" Directive 89/665").

16. Ruling on that question, the Court, in Case C-57/01 Makedoniko Metro and Mikhaniki [2003] ECR I-1091, held that Directive 93/37 does not preclude national rules which prohibit a change in the composition of a group consortium taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders. The Court also held that in so far as a decision of a contracting authority adversely affects the rights conferred on a consortium by Community law in the context of a procedure for the award of a public contract, that consortium must be able to avail itself of the review procedures provided for by Council Directive 89/665.

17. On 23 January 1997 Makedoniko Metro also lodged a complaint with the Commission, which was registered as No 97/4188/P. In that complaint Makedoniko Metro criticised the Minister ' s decision of 29 November 1996 referred to above, and submitted that by failing to award it the contract to build the Thessaloniki metro the Hellenic Republic had failed to fulfil its obligations under the Community ' s public procurement legislation. Makedoniko Metro therefore called on the Commission, in its capacity as guardian of the treaties, to institute against the Hellenic Republic all appropriate

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proceedings and actions, in particular proceedings under Article 226 EC for failure to fulfil obligations, and to initiate the procedure under Article 3 of Directive 89/665, which allows the Commission, where, prior to a contract being concluded, it considers that a clear and manifest infringement has been committed during a public contract award procedure, to intervene with the competent authorities of the Member State and the contracting authority concerned so that appropriate measures may be taken in order that any infringement complained of may be rectified quickly.

18. By fax of 30 July 1997, the Commission called upon the Greek authorities to suspend approval of the result of the procurement procedure and signature of the contract in question with the new provisional contractor until it had finished investigating this case.

19. Makedoniko Metro ' s complaint was initially discussed at the Commission ' s meeting on 7 April 1998. The Commission pointed out at the time that the voluminous documents relating to the invitation to tender contained provisions which might give rise to differing interpretations by the bidders of the specific requirements to which they were subject. However, in view of the complexity of the procedure and of the tender documents, the Commission drew the conclusion that it could not be argued that the contracting authority had not allowed a genuinely competitive procedure to take place. In that context, the Commission considered that it was not possible to show that there had been a clear infringement of the principle of equal treatment, requiring the institution of infringement proceedings. The Commission also decided on that occasion to authorise a member of the Commission, Mr Monti, to contact the competent Greek authorities to explain the Commission ' s position on this matter, and to gather the comments and obtain the assurances of those authorities concerning their future policy on the matter.

20. By letter of 20 May 1998, before the Commission gave its final decision on what action should be taken on the complaint, the Commissioner, Mr Monti, called on the Greek authorities to take all necessary measures to see to it that invitations to tender and contract documents were drawn up in such a way as to avoid differing interpretations and ensure compliance with the principle of equal treatment. In that regard, he asked those authorities to ensure that the relevant rules were complied with and to take appropriate measures to avoid a recurrence of such a situation in the future.

21. The Greek authorities gave their answer to that letter on 26 June 1998. Makedoniko Metro submitted its comments on the letter in a letter dated 15 July 1998.

22. By letter of 30 July 1998 the Director-General of the Commission Directorate General (DG) for the Internal Market and Financial Services informed Makedoniko Metro that his officials would suggest to the Commission that the case be closed, unless the applicants were in a position to provide additional evidence to show there had been an infringement of Community public procurement law.

23. By decision of 20 August 1998 (not 27 August 1998 as the applicants stated in the application), the Commission decided to take no further action on the case.

24. By letters dated 10 September, 7 and 21 October and 25 November 1998, sent to the Commissioner, Mr Monti, the applicants submitted to the Commission some additional evidence concerning in particular the allegedly unlawful way in which the competent authority conducted the negotiations with Makedoniko Metro, the abovementioned judgment of the Greek Council of State, and a number of alleged technical deviations in Thessaloniki Metro ' s bid. That evidence was alleged to show there had been clear and significant infringements of Community law, in particular the principle of equal treatment, and therefore to justify the institution of infringement proceedings. In their letter of 25 November 1998 the applicants also asked to be informed of the action the Commission proposed to take to prevent the signature of a concession contract which in their view was unlawful and deviated to

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a considerable extent from the tender documents.

25. After examining the applicants ' letters referred to above, the Director-General of the Directorate-General for the Internal Market and Financial Services informed the applicants by letter of 10 December 1998 that his officials considered that " no new evidence [had] been brought to their attention which justified instituting new infringement proceedings in that case".

26. Finally, following a complaint submitted by the applicants to the European Ombudsman by letters of 25 September and 23 November 1998, the Ombudsman, in his decision of 30 January 2001, observed that the Commission had demonstrated maladministration by failing to provide the complainant with sufficient reasons for its decision to take no further action on the case and by depriving the complainant of the opportunity to put forward its point of view before the case was closed. However, he rejected Makedoniko Metro ' s complaints alleging, first, that the Commission ' s decision to close the case was based on political criteria without any legal basis and was not motivated by public interest and, second, that the time taken to investigate the complaint and inform the complainant of the results of that investigation was excessively long. Lastly, referring to the case-law of the Court of Justice, he pointed out that the Commission had broad discretion with regard to instituting infringement proceedings under Article 226 EC.

Procedure and forms of order sought

27. By application lodged at the Registry of the Court of First Instance on 3 July 2002, the applicants brought the present action.

28. By a separate document lodged at the Registry of the Court on 8 October 2002, the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the Court.

29. The applicants submitted their observations on that objection on 16 December 2002. By a separate document lodged at the Registry of the Court the same day they applied for the adoption of measures of organisation of procedure concerning the production of certain documents by the Commission. The Commission submitted observations on that application on 7 January 2003.

30. In their application the applicants claim that the Court should:

declare the action admissible in its entirety;

order the Commission to pay:

to Mikhaniki the sums of EUR 23 578 050, with interest at the rate of 8% from 29 November 1996, or otherwise from [20] August 1998, and EUR 224 654 and EUR 60 000 000, both with interest for late payment at the rate of 8% from the lodging of the action;

to Mr Emfietzoglou, Chairman of Mikhaniki, EUR 15 000 000 with interest for late payment at the rate of 8% from the lodging of the action, as compensation for non-material damage;

to Mikhaniki EUR 1 025 839 598 with interest at the rate of 8% from the lodging of the present action, in respect of loss of earnings;

to Makedoniko Metro a total of EUR 110 754 352, 20% of that sum being for the benefit of Adtranz and 0.35% for Transurb Consult;

order the Commission to send a memorandum to all its departments in order to restore the name and reputation of Mikhaniki and its chairman Mr Emfietzoglou; order the Commission to add to the case-file and communicate to the applicant the minutes of the meetings of 7 April 1998 and 20 August 1988 and the decisions which were adopted at those meetings, together with the originals of the letters of Mr Mogg, Mr Monti and the President, Mr Prodi;

call as witnesses:

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the European Ombudsman at the time, Mr Söderman,

the latter ' s assistants, Mr Harden and Mr Verheecke,

the Chairman of Mikhaniki, Mr Emfietzoglou,

whomever may be considered necessary after the documents sought have been lodged by the Commission;

order the Commission to pay all the costs.

31. In its objection of inadmissibility the Commission claims that the Court should:

dismiss the application as inadmissible,

order the applicants to pay the costs.

32. In their observations on the objection of inadmissibility the applicants contend that the Court should:

dismiss the objection of inadmissibility;

in the alternative, join the objection of inadmissibility to the substance of the case;

order the Commission to pay the costs.

Admissibility

33. Under Article 114(1) of the Rules of Procedure, where a party so requests, the Court may rule on the admissibility without going into the substance of the case. Under Article 114(3), the remainder of the proceedings is to be oral unless the Court decides otherwise. In the present case, the documents in the case-file provide sufficient information to enable the Court to rule on the request without opening the oral procedure.

Admissibility of the claim for compensation

Arguments of the parties

34. The Commission submits that an action for compensation before the Community courts cannot be founded on decisions adopted in the course of investigation of a complaint under the procedure laid down in Article 226 EC. In that regard, it points to the settled case-law of the Court of Justice and the Court of First Instance, according to which the Commission is not bound to institute infringement proceedings under Article 226 EC. Hence its decision not to institute such proceedings against a Member State does not constitute unlawful behaviour and cannot therefore give rise to non-contractual liability on the part of the Community.

35. As regards the complainant ' s position in respect of the procedure laid down in Article 226 EC, the Commission argues that persons who have lodged a complaint do not have the option of bringing an action before the Community judicature against any decision to take no further action on their complaint, nor do they have procedural rights comparable to those they may enjoy, in particular, in the context of proceedings brought under Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 87). It follows that Commission decisions not to institute infringement proceedings and to take no further action on a complaint cannot be unlawful in that respect and thus provide grounds for the admissibility of an action for compensation, even where the Commission has failed to provide adequate reasons for the decision to take no further action on the complaint and has not given the complainants sufficient time to put their point of view before taking that decision.

36. At any event, it is clear from the application that in seeking compensation the applicants are in essence basing their case on the fact that the Commission ' s contested measures, in their

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view, led to the loss of the contract in question with the Greek State, and not on the fact that those measures stated inadequate reasons or were adopted in breach of the rights of the defence. In addition, the administrative measures adopted by the Commission when dealing with a complaint do not influence or alter the nature of the action for infringement provided for in Article 226 EC. In that regard, the Commission ' s discretion in the matter excludes the right for individuals to require the Commission to adopt a specific position and to bring an action for annulment against its refusal to institute infringement proceedings or to base an action for compensation on that refusal.

37. Lastly, contrary to what the applicants assert several times in the application, the Commission argues that, as its decision not to institute infringement proceedings under Article 226 EC is not legally binding (Case 48/65 Lütticke v EEC Commission [1966] ECR 19), that decision cannot " approve" , much less " impose" , the Greek State ' s allegedly unlawful measure excluding Makedoniko Metro from the negotiations leading to the award of the contract for the construction of the Thessaloniki metro. That submission is therefore totally incorrect and manifestly inadmissible.

38. The applicants allege, first of all, that by deciding to take no further action on the complaint, the Commission infringed the principles and fundamental rules of Community law, both substantive and procedural, such as the principles of equal treatment, transparency, proportionality, sound administration, due care and legitimate expectations. The Commission was, in particular, in breach of its duty to ensure sound administration by infringing the applicants ' right to be heard and informed and by failing to comply with the duty to state the reasons on which a decision is based, a breach which the Ombudsman recognised in his decision of 30 January 2001. For that reason, the applicants are applying for the Commission ' s decisions of 7 April and 20 August 1998, together with the minutes of the meetings at which those decisions were adopted, to be placed on the file. Such infringements can give rise to non-contractual liability on the part of the Community.

39. As regards the Commission ' s discretion as to whether or not to set in motion infringement proceedings under Article 226 EC, the applicants consider that this should not, as the Ombudsman pointed out in his decision of 30 January 2001, be regarded as a dictatorial or arbitrary power. Indeed, action taken by the Commission in the exercise of that discretion is not excluded from review by the Court (Case C-16/90 Nölle [1991] ECR I-5163, paragraph 12). In such cases, the Commission should observe the general principles of Community law, in particular the principle of due care stemming from the duty to ensure sound administration. In those circumstances, application of the principle of due care, together with respect for the right to be heard and compliance with the duty to state reasons, makes it possible to ensure the correctness of decisions taken by Community institutions and the lawfulness of their content.

40. The applicants go on to challenge the assertion that the complaint of 23 January 1997 related exclusively to institution of infringement proceedings against the Hellenic Republic under Article 226 EC. In that complaint, in addition to protesting against the Minister ' s decision of 29 November 1996, which was regarded as unlawful, and against the conduct of the Minister and the committees of the Ministry of Public Works, Makedoniko Metro requested the Commission, in its capacity as guardian of the treaties, a role conferred on it by Article 211 EC in particular, to adopt " the measures needed in order to apply the principles and fundamental rules of public procurement" and to apply Article 3 of Directive 89/665 in conjunction with Article 2 of that directive.

41. In conclusion, the applicants, restating the pleas and arguments contained in their application, consider that this action fulfils the conditions laid down in the second paragraph of Article 288 EC, which in their view does not provide for any specific restriction as to which persons are entitled to bring such an action. The application should therefore be declared admissible. In that regard,

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the non-binding nature of the measures adopted by the Commission during the investigation of the complaint and of the decision to take no further action on the case is irrelevant.

Findings of the Court

42. First of all, it should be pointed out that the applicants are seeking compensation for the damage they consider they have suffered, first, because of the Commission ' s failure to institute proceedings against the Hellenic Republic for infringement of Directives 89/665 and 93/37 and the general principles of law and, second, because of the Commission ' s failure to set in motion the procedure provided for in Article 3 of Directive 89/665. They argue that, by failing to institute such proceedings and set in motion that procedure and, in its capacity as guardian of the treaties, to adopt any measure that would make it possible to apply in this case the Community rules governing the award of public works contracts, the Commission exceeded the limits of its discretion and was guilty of a breach of the duty to take due care in dealing with the complaint and the duty to state reasons, capable of engaging the non-contractual liability of the Community.

43. As regards, first, the failure to institute infringement proceedings against the Hellenic Republic, it should be pointed out that, according to the case-law, since the Commission is not bound to commence infringement proceedings under Article 226 EC its decision not to institute such proceedings is not in any event unlawful, so that it cannot give rise to non-contractual liability on the part of the Community and the only conduct which might possibly be adduced as the source of damage is the conduct of the Member State concerned, in the present case the Greek State (order in Case C-72/90 Asia Motor France v Commission [1990] ECR I-2181, paragraph 13; judgment in Case T-571/93 Lefebvre and Others v Commission [1995] ECR II-2379, paragraph 61; order in Case T-201/96 Smanor and Others v Commission [1997] ECR II-1081, paragraph 30; order in Case T-361/99 Meyer v Commission and EIB [2000] ECR II-2031, paragraph 13; and judgment in Case T-209/00 Lamberts v Ombudsman [2002] ECR II-2203, paragraph 53).

44. Consequently, a claim for compensation based on the Commission ' s decision not to commence infringement proceedings against a Member State is inadmissible (Asia Motor France , cited in paragraph 43 above, paragraph 15, and Smanor and Others , cited in paragraph 43 above, paragraph 31).

45. That conclusion is not undermined by the applicants ' argument that during the investigation of the complaint the Commission allegedly infringed general principles of law, in particular the applicants ' procedural rights, such as the right to be heard or the duty to state reasons.

46. It should be pointed out that the procedural position of parties who have submitted a complaint to the Commission is fundamentally different in the case of a procedure under Article 226 EC from their position in the case of a proceeding under Regulation No 17. According to settled case-law, the Commission is not bound to initiate a procedure under Article 226 EC but has a discretion which excludes the right for individuals to require it to adopt a specific position (see, in particular, Case 247/87 Star Fruit v Commission [1989] ECR 291, paragraph 11, and the order in Case C-422/97 P Sateba v Commission [1998] ECR I-4913, paragraph 42). It follows that, in the case of a procedure under Article 226 EC, it is not open to persons who have lodged a complaint to bring an action before the Community judicature against a decision to take no further action on their complaint; nor do they have any procedural rights, comparable to those they may have in the case of a procedure under Regulation No 17, enabling them to require the Commission to inform them and to grant them a hearing (order in Case T-83/97 Sateba v Commission [1997] ECR II-1523, paragraph 32, upheld on appeal by the order in Sateba v Commission , cited above, paragraph 42).

47. It should also be noted that, as the applicants themselves accept, the findings contained in

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the Commission ' s decision not to take further action on Makedoniko Metro ' s complaint do not have the effect of resolving the dispute between the applicants and the competent national authority as to the lawfulness of the procedure for awarding the public works contracts initiated by that authority. The opinion notified in that decision is a factual element which the national court called upon to give a decision in the dispute may certainly take into account in the course of its examination of the case. However, findings resulting from an examination under Article 226 EC are not binding on national courts (order in Case T-83/97 Sateba v Commission , cited in paragraph 46 above, paragraph 41).

48. Second, the claim for compensation for the damage allegedly suffered by the applicants as a result of the Commission ' s failure to initiate the procedure provided for in Article 3 of Directive 89/665 is also inadmissible.

49. Article 3(1) of that directive provides that the Commission may invoke the procedure for which the following paragraphs provide when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 93/37.

50. The clear wording of that provision, which neither derogates from nor replaces Article 226 EC, shows that only the Commission is allowed to use the procedure for which it provides. Since the choice not to make use of such power is not unlawful, it cannot give rise to non-contractual liability on the part of the Community. In fact, even when called on to use it the Commission retains the option of considering the complaint referred to it under Article 226 EC (see, to that effect, Case C-359/93 Commission v Netherlands [1995] ECR I-157, paragraphs 12 and 13; Case C-353/96 Commission v Ireland [1998] ECR I-8565, paragraph 22; order in Case T-83/97 Sateba v Commission , cited in paragraph 46 above, paragraphs 36 and 37, upheld on appeal by order in Case C-422/97 P Sateba v Commission , cited in paragraph 46 above, paragraph 32).

51. In the light of the above, the claim for compensation in this action must be dismissed as inadmissible. In those circumstances, it is not necessary to adopt the measures of organisation of procedure or to order the measures of inquiry proposed by the applicants.

The claim for directions to be issued

52. In their third head of claim the applicants request the Court to direct the Commission " to send a memorandum to all its departments in order to restore the name and reputation of [Mikhaniki] and its chairman Mr ... Emfietzoglou".

53. It should be pointed out that the Community judicature may not give directions to a Community institution without encroaching upon the powers of the administration. That principle not only renders inadmissible, in an action for annulment, heads of claim seeking an order requiring a defendant institution to adopt the measures necessary for the enforcement of a judgment by which a decision is annulled, but it is also applicable, in principle, in proceedings in which the Court has unlimited jurisdiction (see, by analogy, Case T-156/89 Valverde Mordt v Court of Justice [1991] ECR II-407, paragraph 150).

54. That head of claim must therefore also be declared inadmissible.

55. In the light of all the preceding considerations, the application must be dismissed in its entirety as inadmissible.

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AUTHOR	Court of First Instance of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2004 Page II-00181
DOC	2004/01/14
LODGED	2002/07/03
JURCIT	11997E226 : N 43 46 47 50 31962R0017 : N 46 31991Q0530-A114P1 : N 33 31991Q0530-A114P3 : N 33 31989L0665 : N 42 31989L0665-A03 : N 42 31989L0665-A03P1 : N 49 31993L0037 : N 42 49 61990O0072 : N 43 44 61993B0571 : N 43 61996B0201 : N 43 44 61999B0361 : N 43 62000A0209 : N 43 61987J0247 : N 46 61997O0422 : N 46 50 61997B0083 : N 46 47 50 61993J0359 : N 50 61996J0353 : N 50 61989A0156 : N 53
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Liability
AUTLANG	Greek
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Greece
NOTES	Brown, Adrian: Inadmissibility of a Challenge to the Commission's Decision to Close its File on Thessaloniki Metro, Public Procurement Law Review 2004 p.NA91-NA94
PROCEDU	Action for damages - inadmissible
DATES	of document: 14/01/2004 of application: 03/07/2002

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Notice for the OJ

Order of the Court of First Instance of 14 January 2004 in Case T-202/02 Makedoniko Metro and Michaniki AE against the Commission of the European Communities [1]

(Public works contracts - Failure to initiate the Treaty infringement procedure - Article 3 of Directive 89/665/EEC - Action for damages - Inadmissible)

(Language of the case: Greek)

In Case T-202/02: Makedoniko Metro, established in Thessaloniki (Greece), and Michaniki AE, established in Marousi, Attica (Greece), represented by C. Gkonis, lawyer, with an address for service in Luxembourg, against the Commission of the European Communities (Agent: M. Konstantinidis) - application for compensation for the harm allegedly suffered by the applicants consequent upon the decision of the Commission to take no further action on their complaint No 97/4188/P lodged on 23 January 1997 concerning the award by the Greek State of a public works contract relating to studies for, and the construction, self-financing and operation of, the Thessaloniki Metro - the Court of First Instance (Fourth Chamber), composed of H. Legal, President, V. Tiili and M.Vilaras, Judges; H. Jung, Registrar, made an order on 14 January 2004, the operative part of which is as follows:

1. The action is dismissed as inadmissible.

2. The applicants shall pay the costs..

_____

[1] - OJ No C 274, 9.11.2002.

Judgment of the Court (Sixth Chamber)
of 4 December 2003
EVN AG et Wienstrom GmbH v Republik Osterreich.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Directive 93/36/EEC - Public supply contracts - Concept of the most economically advantageous tender - Award criterion giving preference to electricity produced from renewable energy sources - Directive 89/665/EEC - Public procurement review proceedings - Unlawful decisions - Possibility of annulment only in the case of material influence on the outcome of the tender procedure - Illegality of an award criterion - Obligation to cancel the invitation to tender.
Case C-448/01.

In Case C-448/01,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that body between

EVN AG,

Wienstrom GmbH

and

Republik Osterreich,

third parties:

Stadtwerke Klagenfurt AG

and

Kärntner Elektrizitäts-AG,

on the interpretation of Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of Articles 1 and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT

(Sixth Chamber),

composed of: V. Skouris (Rapporteur), acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen and N. Colneric, Judges,

Advocate General: J. Mischo,

Registrar: H.A. Rühl (Principal Administrator),

after considering the written observations submitted on behalf of:

- EVN AG and Wienstrom GmbH, by M. Ohler, Rechtsanwalt,

- the Republik Osterreich, by A. Gerscha, Rechtsanwalt,

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

- the Netherlands Government, by S. Terstal, acting as Agent,

- the Swedish Government, by K. Renman, acting as Agent,

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- the Commission of the European Communities, by M. Nolin, acting as Agent, and T. Eilmansberger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of EVN AG and Wienstrom GmbH, the Republik Osterreich, the Austrian Government and the Commission at the hearing on 23 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2003,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 13 November 2001, hereby rules:

1. The Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

On the other hand, that legislation does preclude such a criterion where

- it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,

- it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

2. The Community legislation on public procurement requires the contracting authority to cancel an invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

1 By order of 13 November 2001, received at the Court Registry on 20 November 2001, the Bundesvergabeamt (Federal Procurement Office) referred to the Court of Justice for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 26 of Council Directive 93/36/EEC

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of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of Articles 1 and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (`Directive 89/665').

2 Those questions were raised in proceedings between a group of undertakings consisting of EVN AG and Wienstrom GmbH on the one hand, and the Republik Osterreich in its capacity as the contracting authority on the other concerning the award of a public supply contract in respect of which the applicants in the main proceedings had submitted a tender.

The legal background

Community legislation

3 Article 26 of Directive 93/36, which appears in Chapter 3 of Title IV of the directive, entitled `Criteria for the award of contracts', provides:

`1. The criteria on which the contracting authority shall base the award of contracts shall be:

...

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

2. In the case referred to in point (b) of paragraph 1, the contracting authority shall state in the contract documents or in the contract notice all the criteria [it] intend[s] to apply to the award, where possible in descending order of importance.'

4 The sixth recital in the preamble to Directive 89/665 states that it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement.

5 Article 1 of Directive 89/665 states:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC... , decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

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

6 Article 2 of Directive 89/665 provides:

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

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...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

...

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

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

7 Recital 2 in the preamble to Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ 2001 L 283, p. 33) states:

`The promotion of electricity produced from renewable energy sources is a high Community priority as outlined in the White Paper on Renewable Energy Sources... for reasons of security and diversification of energy supply, of environmental protection and of social and economic cohesion...'.

8 Recital 18 of Directive 2001/77 states:

`It is important to utilise the strength of the market forces and the internal market and make electricity produced from renewable energy sources competitive and attractive to European citizens.'

9 It is clear from Article 1 of Directive 2001/77 that the purpose of that directive is to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof. To that end, Article 3(1) of the directive requires the Member States to take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2 of that article.

National legislation

10 Directives 89/665 and 93/36 were transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56; `the BVergG').

11 Paragraph 16 of the BVergG provides:

`1. Public contracts for services must be awarded, at reasonable prices, by way of a procedure provided for in this statute, in accordance with the principles of free and fair competition and of equal treatment of all applicants and tenderers, to undertakings which - at the latest at the time when the tenders are opened - are qualified, competent and reliable.

...

7. In the award procedure, due account is to be taken of the environmental impact of the services and the employment of persons on training contracts.'

12 Paragraph 53 of the BVergG provides:

`From the tenders remaining after the elimination process, the most advantageous in technical and

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economic terms, in accordance with the criteria laid down in the invitation to tender, is to be selected (principle of the best tender).'

13 Paragraph 115(1) of the BVergG states:

`Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.'

14 Paragraph 117 of the BVergG states:

`1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee ..., any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) is material to the outcome of the award procedure.

...

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.'

The dispute in the main proceedings and the questions referred

15 The defendant in the main proceedings invited tenders by way of an open procedure for the award of a public contract for the supply of electricity. The contract to be awarded consisted of a framework contract followed by individual contracts for the supply of electricity to all the Federal Republic's administrative offices in the Land of Kärnten (Carinthia). The contract term ran from 1 January 2002 to 31 December 2003. The invitation to tender, which was published in the Official Journal of the European Communities of 27 March 2001, included the following provision under the heading `Award criteria':

`The economically most advantageous tender according to the following criteria: impact of the services on the environment in accordance with the contract documents.'

16 The tender had to state the price in ATS per kilowatt hour (kWh). This was to apply for the whole contract term, and was not to be subject to any revision or adjustment. The electricity supplier had to undertake to supply the Federal offices with electricity produced from renewable energy sources, subject to any technical limitations, and in any case not knowingly to supply those offices with electricity generated by nuclear fission. The supplier was not, however, required to submit proof of his electricity sources. The contracting authority was to have a right to terminate the contract and a right to punitive damages in the event of a breach of either of those obligations.

17 It was stated in the contract documents that the contracting authority was aware that for technical reasons no supplier could guarantee that the electricity supplied to a particular consumer was actually produced from renewable energy sources but that the authority had nevertheless decided to contract with tenderers who could supply at least 22.5 gigawatt hours (GWh) per annum of electricity produced from renewable energy sources, since the annual consumption of the Federal offices was estimated to be around 22.5 GWh.

18 In addition, it was specified that tenders would be eliminated if they did not contain any proof that `in the past two years and/or in the next two years the tenderer has produced or purchased, and/or will produce or purchase, and has supplied and/or will supply to final consumers, at least 22.5 GWh electricity per annum from renewable energy sources'. The award criteria laid down were

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net price per kWh, with a weighting of 55%, and `energy produced from renewable energy sources', with a weighting of 45%. It was stated in relation to the latter award criterion that `only the amount of energy that can be supplied from renewable energy sources in excess of 22.5 GWh per annum will be taken into account'.

19 The four tenders submitted were opened on 10 May 2001. The tender submitted by the Kärntner Elektrizitäts-AG and Stadtwerke Klagenfurt AG group of tenderers (`KELAG') stated a price of 0.44 ATS/kWh and, under reference to a table showing the amounts and origin of electricity produced or supplied by those companies, affirmed that they were able to supply a total amount of renewable electricity of 3 406.2 GWh. Energie Oberösterreich AG also submitted a tender, in which it proposed a price of 0.4191 ATS/kWh for annual consumption in excess of 1 million GWh and, in a table relating to 1999 to 2002, showed the various amounts of the electricity from renewable energy sources that it was able to supply for each of the years in that period. The highest amount stated in that connection was 5 280 GWh per annum. BEWAG also submitted a tender, which stated a price of 0.465 ATS/kWh. The table included with its offer showed the proportion of the electricity produced or supplied by BEWAG that came from renewable energy sources, on the basis of which the contracting authority deduced that the amount stated in that connection was 449.2 GWh.

20 The tender submitted by the applicants in the main proceedings stated a price of 0.52 ATS/kWh. Those applicants did not provide any concrete figures for the amount of electricity that they could supply from such sources, but instead merely stated that they had their own electricity generating plants in which they produced electricity from such sources. In addition, they had purchase options on electricity produced by hydroelectric power stations belonging to the Osterreichische Elektrizitätswirtschafts-Aktiengesellschaft and other Austrian hydroelectric power stations, and other electricity purchased by them derived predominantly from long-term coordination contracts with the largest supplier of electricity certified as coming from renewable energy sources. In 1999 and 2000, they had purchased exclusively hydroelectric power from Switzerland, and this would continue to be the case. The total amount of electricity from renewable energy sources was several times the amount of electricity referred to in the invitation to tender.

21 The defendant in the main proceedings considered that, of the four tenders submitted, the best was KELAG's, and that group received the most points for each of the two award criteria. The applicants in the main proceedings received the fewest points in respect of both criteria.

22 After having informed the contracting authority as early as 9 and 30 May 2001 that they considered that various provisions in the invitation to tender, including the award criterion relating to `electricity produced from renewable energy sources', were unlawful, the applicants in the main proceedings applied on 12 June 2001 to institute conciliation proceedings before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission), which refused their application on the ground that such proceedings had no prospect of success.

23 The applicants in the main proceedings then instituted review proceedings before the Bundesvergabeamt, seeking, inter alia, annulment of the invitation to tender in its entirety, of a series of individual provisions in the contract documents and of a number of decisions of the contracting authority. Those decisions included, in particular, the decision to make the absence of proof of the production and purchase of electricity from renewable energy sources in a defined period or the absence of proof of future purchase of such electricity grounds for elimination, the decision to make proof of the production or purchase of a defined amount of electricity from such sources over a defined period a selection criterion, the decision to make the availability of electricity from renewable energy sources in excess of 22.5 GWh per annum an award criterion, and the decision refusing to cancel the invitation to tender. In addition, the applicants applied for an interim order prohibiting the contracting authority from awarding the contract.

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24 By decision of 16 July 2001, the Bundesvergabeamt granted the applicants' application and, initially, prohibited the contract from being awarded until 10 September 2001. On a further application by the applicants, the Bundesvergabeamt made an interim order, by decision of 17 September 2001, permitting the contracting authority to award the contract on condition that the award would be cancelled and the contract rescinded in the event that even only one of the applications made to that body by the applicants in the main proceedings were granted or the decision to award the contract in question to one of the applicants' co-tenderers proved to be unlawful on the basis of any other finding of the Bundesvergabeamt.

25 On 24 October 2001, the framework contract was awarded to KELAG, subject to the conditions subsequent laid down in the decision referred to above.

26 Taking the view that the interpretation of a number of provisions of Community law was necessary in order to resolve the dispute before it, the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

`1. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable energy sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates?

2. Do the provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Directive 89/665/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure?

3. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion?

4. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665/EEC that one of the award criteria it laid down is unlawful?'

The first question

27 It is clear from the explanations provided by the Bundesvergabeamt that the first question must be understood as having two parts. First of all, it seeks to determine whether the Community legislation on public procurement, in particular Article 26 of Directive 93/36, precludes a contracting authority from applying, in its assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources.

28 In second place, if the first part of its question is answered in the affirmative, the Bundesvergabeamt asks for clarification of the Community law requirements as regards the concrete application of such a criterion, given the specific wording of the criterion at issue in the dispute before it,

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and, consequently, the second part of its question can be broken down into several sub-questions.

29 More specifically, that body is unclear as to the compatibility of such a criterion with Community law given the circumstances set out in points (a) to (d) below, in other words, given that the criterion

(a) has a weighting of 45%;

(b) is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified, and does not necessarily serve to achieve the objective pursued;

(c) does not impose a defined supply period, and

(d) requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates.

The first part of the first question

30 Referring to the lack of clarity of the expression `the most economically advantageous tender' used in Article 26 of Directive 93/36, the Bundesvergabeamt first asks as a question of principle whether Community law allows the contracting authority to lay down criteria that pursue advantages which cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment.

31 In that regard, it should be noted that, in a judgment delivered after the lodging of the order for reference in this case, which concerned the interpretation of Article 36(1)(a) of Directive 92/50, whose wording is more or less identical to that of Article 26(1)(b) of Directive 93/36, the Court had occasion to rule on the question whether and in what circumstances a contracting authority may take ecological criteria into consideration in the assessment of the most economically advantageous tender.

32 More specifically, at paragraph 55 of the judgment in Case C-513/99 Concordia Bus Finland [2002] ECR I-7123, the Court held that Article 36(1)(a) of Directive 92/50 cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature.

33 The Court therefore accepted that where the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination (Concordia Bus Finland, cited above, paragraph 69).

34 It follows that the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources, provided that that criterion is linked to the subject-matter of the contract, does not confer an unrestricted freedom of choice on the authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of Community law, in particular the principle of non-discrimination.

The second part of the first question

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Second part, point (a)

35 In its order for reference, the Bundesvergabeamt states that even if an award criterion which relates to environmental issues, such as the one applied in the case at issue in the main proceedings, had to be regarded as compatible in principle with the Community rules on the award of public contracts, the fact that it was given a weighting of 45% would create another problem since it could be objected that the contracting authority is prohibited from allowing a consideration which is not capable of being assigned a direct economic value from having such a significant influence on the award decision.

36 The defendant in the main proceedings submits in that regard that given the discretion enjoyed by the contracting authority in its identification of the most economically advantageous tender, only a weighting which resulted in an unjustified distortion would be unlawful. In the case at issue in the main proceedings there is not only an objective relationship between the criteria of `price' and `electricity produced from renewable energy sources' but, in addition, precedence is accorded to purely arithmetical economic considerations, since the price has a weighting 10 points higher than that given to the capacity to supply such electricity.

37 It must be recalled that according to settled case-law it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer (see, to that effect, Case 31/87 Beentjes [1988] ECR 4635, paragraphs 19 and 26; Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraphs 36 and 37; and Concordia Bus Finland, paragraphs 59 and 61).

38 Furthermore, such criteria must be applied in conformity with both the procedural rules and the fundamental principles laid down in Community law (see, to that effect, Beentjes, paragraphs 29 and 31, and Concordia Bus Finland, paragraphs 62 and 63).

39 It follows that, provided that they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.

40 As regards the award criterion at issue in the main proceedings, the Court has already held that the use of renewable energy sources for producing electricity is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat (Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 73).

41 Moreover, as is clear, in particular from Recital 18 and Articles 1 and 3 of Directive 2001/77, it is for precisely that reason that that directive aims, by utilising the strength of market forces, to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity, an objective which, according to Recital 2 of the directive, is a high Community priority.

42 Having regard, therefore, to the importance of the objective pursued by the criterion at issue in the main proceedings, its weighting of 45% does not appear to present an obstacle to an overall evaluation of the criteria applied in order to identify the most economically advantageous tender.

43 In those circumstances, and since there is no evidence to support a finding that the requirements of Community law have been infringed, it must be held that the application of a weighting of 45% to the award criterion at issue in the main proceedings is not incompatible with the Community

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legislation on public procurement.

Second part, point (b)

44 The Bundesvergabeamt is also uncertain as to whether the award criterion at issue in the main proceedings is lawful under Community law, since the contracting authority itself has admitted that it does not have the technical ability to verify whether electricity supplied to it has actually been generated from renewable energy sources and it did not require the tenderers to supply proof of their actual supply obligations or existing electricity supply contracts.

45 The referring body is therefore essentially asking whether the Community law provisions governing the award of public contracts preclude a contracting authority from applying an award criterion which is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified.

46 In that context, the Bundesvergabeamt is also uncertain as to the extent to which such an award criterion is capable of achieving the objective which it pursues. Since there are no plans to verify how far the recipient of the award in fact helps by its production structure to increase the amount of electricity produced from renewable energy sources, it is possible that the application of that criteria may have no effect on the total amount of electricity produced in that way.

47 It should be recalled that the principle of equal treatment of tenderers which, as the Court has repeatedly held, underlies the directives on procedures for the award of public contracts (see, in particular, Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 91, and Case C-315/01 GAT [2003] ECR I-0000, paragraph 73) implies, first of all, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (SIAC Construction, paragraph 34).

48 More specifically, that means that when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers (SIAC Construction, cited above, paragraph 44).

49 Second, the principle of equal treatment implies an obligation of transparency in order to enable verification that it has been complied with, which consists in ensuring, inter alia, review of the impartiality of procurement procedures (see, to that effect, Universale-Bau and Others, paragraphs 91 and 92).

50 Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria.

51 It is thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure.

52 Therefore, an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement.

53 As regards the Bundesvergabeamt's question as to whether the award criterion at issue in the main proceedings infringes Community law in so far as it is not necessarily capable of helping to increase the amount of electricity produced from renewable energy sources, it need only be noted that even if that is in fact the case, such a criterion cannot be regarded as incompatible with the Community provisions in the field of public procurement simply because it does not necessarily serve to achieve the objective pursued.

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Second part, point (c)

54 The Bundesvergabeamt considers that since the contracting authority omitted to determine the specific supply period in respect of which the amount that could be supplied was to be stated, the criterion applied is incompatible with the principle of comparability of tenders, which derives from the requirement of transparency. As regards the proof required for the examination of the suitability of the tenderers, it was the period covering the two years preceding the invitation to tender and the period covering the following two years which were stated to be relevant as regards the amount of electricity which would in fact be required. According to the Bundesvergabeamt, even if that provision were also applied in the context of the award criterion, there would be no definite supply period allowing for an exact calculation of the amount which in fact had to be taken into account. On the contrary, in a period of four years, it might be that different amounts of electricity could be supplied. It would even be conceivable that tenderers would state amounts which relied on assumptions as to the construction of power stations or other merely potential means of production of electricity from renewable energy sources.

55 The defendant in the main proceedings explains that in Austria the electricity market was fully liberalised on 1 October 2001, and that since that date it has been possible to set up trading companies whose object is to buy and sell on electricity. As the invitation to tender was published approximately six months before that date, it was obliged to formulate the award criterion in terms which made it possible for both companies already on the market with their own means of electricity production and electricity trading companies which were only authorised to operate from 1 October 2001 to submit tenders. It therefore sought to give undertakings the possibility of stating the amount of electricity from renewable energy sources that they had produced or bought over the two years preceding the invitation to tender or to provide such information for the two coming years. Finally, all the undertakings provided in fact only information relating to the two years preceding the invitation to tender, and where the annual amounts were different the best tender was determined on the basis of the average.

56 It is clear from the Court's case-law that the procedure for awarding a public contract must comply, at every stage, with both the principle of the equal treatment of potential tenderers and the principle of transparency so as to afford all parties equality of opportunity in formulating the terms of their tenders (see, to that effect, Universale-Bau, paragraph 93).

57 More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way (SIAC Construction, paragraph 41).

58 Consequently, in the case at issue in the main proceedings, the fact that in the invitation to tender the contracting authority omitted to determine the period in respect of which tenderers had to state in their tenders the amount of electricity from renewable energy sources which they could supply could be an infringement of the principles of equal treatment and transparency were it to transpire that that omission made it difficult or even impossible for tenderers to know the exact scope of the criterion in question and thus to be able to interpret it in the same way.

59 Inasmuch as that requires a factual assessment, it is for the national court to determine, taking account of all the circumstances of the case, whether, despite that omission, the award criterion at issue in the main proceedings was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

Second part, point (d)

60 The Bundesvergabeamt explains that the award criterion at issue in the main proceedings consists in the allocation of points for the amount of electricity from renewable energy sources that the

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tenderers will be able to supply to a non-defined group of consumers, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the invitation to tender. In so far as that criterion thus concerns exclusively the total amount which the tenderer will be able to supply in general and not the amount which the tenderer will be able to supply specifically to the contracting authority, the Bundesvergabeamt is uncertain whether it is linked to any direct economic advantages for the contracting authority.

- Observations submitted to the Court

61 The applicants in the main proceedings, the Netherlands Government and the Commission submit that in so far as the criterion in question relates to an amount of electricity exceeding the consumption expected in the context of the invitation to tender, the requirement of a direct link with the contract to be awarded is not met in the present case. In their opinion, the only relevant factor is the amount of electricity from renewable energy sources which can be supplied to the contracting authority.

62 According to the Commission, it would have been enough for the contracting authority to have required the tenderer to have access to a certain amount of electricity produced from renewable energy sources or to be able simply to prove that it was capable of delivering a certain amount of electricity in excess of the annual consumption, for example by calculating for a reserve of 10%.

63 The applicants in the main proceedings additionally submit that the award criterion in question is in fact a disguised selection criterion inasmuch as it in fact concerns the tenderers' capacity to supply as much electricity as possible from renewable energy sources and, in that way, ultimately relates to the tenderers themselves.

64 On the other hand, the defendant in the main proceedings and the Austrian Government consider that, by taking into account the amount of electricity produced from renewable energy sources that each tenderer was able to supply over and above 22.5 GWh, which had to be supplied in any case, the contracting authority gave the reliability of supply of electricity, which is a function of the total amount of electricity to which an undertaking has access, the status of an award criterion. They explain that since electricity cannot be stored, that criterion is in no way irrelevant to the service provided since the more productive a tenderer is, the smaller the risk that the contracting authority's demand for electricity will not be met and that it will have to find a costly alternative in the short term.

65 More specifically, the Austrian Government submits that although the production of electricity from renewable energy sources, such as wind and solar energy, is seasonal, the demand is greatest in the winter. The purpose of the award criterion in question is thus to ensure that the tenderer can provide a continuous supply of electricity notwithstanding the fact that supply and demand are not linear throughout the year, a consideration which also justifies the heavy weighting of 45% given to that criterion.

- Findings of the Court

66 As recalled in paragraph 33 of this judgment, ecological criteria used by a contracting authority as award criteria for determining the most economically advantageous tender must, inter alia, be linked to the subject-matter of the contract.

67 In the case at issue in the main proceedings, the award criterion applied does not relate to the service which is the subject-matter of the contract, namely the supply of an amount of electricity to the contracting authority corresponding to its expected annual consumption as laid down in the invitation to tender, but to the amount of electricity that the tenderers have supplied, or will supply, to other customers.

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68 An award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract.

69 Moreover, the fact that, in accordance with the award criterion applied, it is the amount of electricity in excess of the expected annual consumption as laid down in the invitation to tender which is decisive is liable to confer an advantage on tenderers who, owing to their larger production or supply capacities, are able to supply greater volumes of electricity than other tenderers. That criterion is thus liable to result in unjustified discrimination against tenderers whose tender is fully able to meet the requirements linked to the subject-matter of the contract. Such a limitation on the circle of economic operators in a position to submit a tender would have the effect of thwarting the objective of opening up the market to competition pursued by the directives coordinating procedures for the award of public supply contracts.

70 Finally, even assuming that that criterion was a response to the need to ensure reliability of supplies - an assumption which it is for the national court to verify - it should be noted that while the reliability of supplies can, in principle, number amongst the award criteria used to determine the most economically advantageous tender, the capacity of tenderers to provide the largest amount of electricity possible in excess of the amount laid down in the invitation to tender cannot legitimately be given the status of an award criterion.

71 It follows that in so far as it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement, the award criterion applied in the case at issue is not compatible with the Community legislation on public procurement.

72 In the light of all the foregoing, the answer to the first question submitted to the Court must be that the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

On the other hand, that legislation does preclude such a criterion where

- it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,

- it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

The second and third questions

73 By these two questions, which can be examined together, the Bundesvergabeamt is essentially asking whether Article 2(1)(b) of Directive 89/665 precludes a provision of national law such as point 2 of Paragraph 117(1) of the BVergG, which makes the annulment in review proceedings of an unlawful decision by a contracting authority dependent on proof that the unlawful decision materially

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influenced the outcome of the procurement procedure and whether, having regard to Article 26 of Directive 93/36 in particular, the answer to that question must differ if the proof of that influence derives from the examination by the review body of whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion.

74 It should be noted at the outset that, according to settled case-law, in the context of the cooperation between the Court of Justice and national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59; PreussenElektra, paragraph 38; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 18; Case C-153/00 Der Weduwe [2002] ECR I-11319, paragraph 31, and Case C-318/00 Bacardi-Martini and Cellier des Dauphins [2003] ECR I-905, paragraph 40).

75 However, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see PreussenElektra, paragraph 39, and Canal Satélite Digital, paragraph 19). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (Der Weduwe, paragraph 32, and Bacardi-Martini and Cellier des Dauphins, paragraph 41).

76 Thus the Court must decline to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Bosman, paragraph 61; Case C-437/97 EKW and Wein & Co. [2000] ECR I-1157, paragraph 52; Case C-36/99 Idéal Tourisme [2000] ECR I-6049, paragraph 20, and Bacardi-Martini and Cellier des Dauphins, paragraph 42).

77 More specifically, it must be borne in mind that Article 234 EC is an instrument of judicial cooperation, by means of which the Court provides the national courts with the points of interpretation of Community law which may be helpful to them in assessing the effects of a provision of national law at issue in the disputes before them (see, in particular, Case C-300/01 Salzmann [2003] ECR I-0000, paragraph 28).

78 It follows that in order that the Court may perform its task in accordance with the Treaty, it is essential for national courts to explain, when the reasons are not clear beyond doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment (see, in particular, Bacardi-Martini and Cellier des Dauphins, paragraph 43).

79 In the present case, there is no information to that effect before the Court.

80 On the one hand, as observed in paragraph 23 of this judgment, the object of the review proceedings brought in the case at issue is, inter alia, the annulment of the invitation to tender in its entirety and the annulment of a series of individual conditions in the contract documents and of a number of decisions of the contracting authority relating to the requirements established by the award and selection criteria used in that tender procedure.

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81 Therefore, in the light of the information in the order for reference, it is apparent that all the decisions whose annulment is sought in the main proceedings have a decisive effect on the outcome of the tender procedure.

82 On the other hand, the Bundesvergabeamt has not provided any explanation as to the precise reasons for which it considers that it needs an answer to the question of the compatibility with the Community legislation on public procurement of the condition laid down in subparagraph 2 of Paragraph 117(1) of the BVergG in order to give judgment in the case pending before it.

83 Therefore, since there is no information before the Court to show that an answer to the second and third questions is needed in order to resolve the dispute in the main proceedings, those questions must be regarded as hypothetical and, accordingly, inadmissible.

The fourth question

84 By its fourth question the Bundesvergabeamt is essentially asking whether the provisions of Community law governing the award of public contracts, in particular Article 26 of Directive 93/36, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful.

85 According to the Bundesvergabeamt, if it is assumed that the review of the effects of unlawful decisions relating to award criteria is contrary to Community law, the only alternative where such a decision is unlawful seems to be cancellation of the invitation to tender, since otherwise the tender procedure would be carried out on the basis of a weighting of criteria which was neither laid down by the authority nor known by the tenderers.

Observations submitted to the Court

86 The Austrian Government submits that Community law does not recognise an express obligation to cancel invitations to tender, just as the directives on public procurement do not lay down a tendering obligation, and concludes that it is for the Member States, acting in accordance with the principles of Community law, to lay down rules determining whether, where a decision relating to an award criterion is recognised to be unlawful, the contracting authority is obliged to cancel the invitation to tender.

87 The defendant in the main proceedings states that, pursuant to Article 2(6) of Directive 89/665, the consequences of an infringement of the rules relating to the award of public contracts which is established after the contract has been awarded must be determined in accordance with national law. In its view, where the contract has been awarded the review body is confined pursuant to Paragraph 117(3) of the BVergG to making a finding as to the existence of the alleged illegality. It thus concludes that this question must be answered in the negative.

88 On the other hand, the applicants in the main proceedings and the Commission consider that if, after the tenders have been submitted or opened, the review body declares a decision relating to an award criterion unlawful, the contract cannot be awarded on the basis of the invitation to tender and the only option is to cancel the invitation to tender. Any amendment to the criteria would have an effect on the evaluation of the tenders, whereas the tenderers would no longer have the possibility of adapting their tenders, prepared at a completely different time and in different circumstances and on the basis of different criteria. The only option would therefore be to start the entire tender procedure afresh.

Findings of the Court

89 It should be noted that a finding that a decision relating to an award criterion is unlawful does not always lead to the annulment of that decision.

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90 As a result of the option granted to Member States under Article 2(6) of Directive 89/665 of providing that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement, where the review proceedings are instituted after the conclusion of the contract and the Member State concerned has made use of the option, if the review body finds that a decision relating to an award criterion is unlawful, it may not annul that decision, but only award damages.

91 It is clear from the explanations provided by the Bundesvergabeamt that the fourth question concerns the situation where the consequence of a finding that a decision relating to an award criterion is unlawful is the annulment of that decision. It must thus be understood as asking whether the Community legislation on public procurement requires the contracting authority to cancel an invitation to tender where it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

92 For the purpose of answering the question as reformulated, it should be pointed out that the Court has already held that the principles of equal treatment and transparency of tender procedures imply an obligation on the part of contracting authorities to interpret the award criteria in the same way throughout the procedure (see, to that effect, in particular SIAC Construction, paragraph 43).

93 As far as the award criteria themselves are concerned, it is a fortiori clear that they must not be amended in any way during the tender procedure.

94 It follows that where the review body annuls a decision relating to an award criterion, the contracting authority cannot validly continue the tender procedure leaving aside that criterion, since that would be tantamount to amending the criteria applicable to the procedure in question.

95 Therefore, the answer to the fourth question must be that the Community legislation on public procurement requires the contracting authority to cancel an invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

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31989L0665-A02P6 : N 6 90
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31993L0036-A26P1LB : N 3 31
31993L0036-A26P2 : N 3
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61999J0470 : N 47 49 56
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62000J0153 : N 74 75
62000J0318 : N 74 - 76 78
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Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services

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NATCOUR

A9 Bundesvergabeamt, BeschluA*ƒ* vom 13/11/2001
- Zeitschrift fAîr Vergaberecht und Beschaffungspraxis 2002 p.36-38

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PROCEDU Reference for a preliminary ruling

ADVGEN Mischo

JUDGRAP Skouris

DATES of document: 04/12/2003
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Order of the Court (Fourth Chamber)
of 9 April 2003
CS Communications & Systems Austria GmbH v Allgemeine Unfallversicherungsanstalt.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public contracts - Directive 89/665/EEC - Review procedures for the award of public contracts - Action for annulment of a decision of the contracting authority - Application for interim measures - Duty or discretion of the body responsible for review procedures to take account of the prospects of success of the substantive claim - Article 104(3) of the Rules of Procedure - Question the answer to which does not admit of any reasonable doubt.
Case C-424/01.

In Case C-424/01,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that body between

CS Communications & Systems Austria GmbH

and

Allgemeine Unfallversicherungsanstalt

on the interpretation of Article 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Fourth Chamber),

composed of: C.W.A. Timmermans (Rapporteur), President of the Chamber, A. La Pergola and S. von Bahr, Judges,

Advocate General: S. Alber,

Registrar: R. Grass,

the national court having been informed that the Court proposes to give its decision by way of a reasoned order in accordance with Article 104(3) of the Rules of Procedure,

the persons referred to in Article 23 of the EC Statute of the Court of Justice having been invited to submit any observations which they might wish to make in this regard,

after hearing the Advocate General,

makes the following

Order

Costs

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

On those grounds,

THE COURT (Fourth Chamber),

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in answer to the questions referred to it by the Bundesvergabeamt by decision of 25 October 2001, hereby rules:

Article 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as meaning that it does not preclude the Member States from providing that when a body responsible for review procedures for the award of public contracts decides an application for interim measures, it is bound or authorised to take account of the prospects of success of an application for a decision of a contracting authority to be set aside on the ground that it is unlawful, so long as the national rules thus governing the adoption of those interim measures are not less favourable than those governing similar domestic actions and do not make it practically impossible or excessively difficult to exercise the rights conferred by Community law.

1 By order of 25 October 2001, received at the Court on the following day, the Bundesvergabeamt (Federal Procurement Office) referred to the Court of Justice for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (Directive 89/665).

2 Those questions were raised in the course of proceedings between CS Communications & Systems Austria GmbH (CS Austria) and Allgemeine Unfallversicherungsanstalt (AUV), regarding the decision taken by the latter to reject, without considering its merits, the tender that CS Austria had made in relation to a contract to deliver, install and initialise various network electronic components, on the ground that it did not correspond to the specifications of the invitation to tender.

Community legal framework

3 As stated in the third recital in the preamble thereto, Directive 89/665 aims to increase the guarantees of transparency and non-discrimination in relation to the opening-up of public procurement to Community competition and to ensure, in particular, that effective and rapid remedies are available in Member States in the case of infringements of Community law in the field of public procurement or national rules implementing that law.

4 Article 2(1) of Directive 89/665 states, to that end, that the Member States are to ensure that the measures taken for the purpose of [guaranteeing that such effective and rapid remedies are available] include provision for the powers to:

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

5 As regards the adoption of interim measures, Article 2(4) provides:

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The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

6 Finally, under the first subparagraph of Article 2(8):

Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [234] of the Treaty and independent of both the contracting authority and the review body.

National legal framework

7 Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) (Federal Law on the award of public contracts, BGBl. 1993/462). That law was replaced in 1997 by a law of the same title (BGBl. I, 1997/56, the BVergG).

8 Paragraph 113 of the BVergG provides:

1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. Until the award of the contract, the Bundesvergabeamt may:

(a) grant interim orders, and

(b) set aside unlawful decisions of the contracting authority

in order to prevent infringements of this federal law and its implementing rules.

3. Once the contract has been awarded or the contract award procedure has been ended, the Bundesvergabeamt may determine that as a result of an infringement of this federal law, or of any regulations made hereunder, the award was not made to the tenderer who made the best offer. ...

9 Paragraph 116, concerning the adoption of interim orders, provides:

1. As soon as the review procedure is initiated the Bundesvergabeamt is bound in the case of an application to that effect to make without delay, by way of interlocutory order, the interim measures which appear necessary and appropriate to remove or prevent harm, existing or imminent, which adversely affects the applicant's interests on account of the alleged unlawful act.

...

3. Before making an interim order the Bundesvergabeamt must weigh the probable consequences of the measure to be taken for all the interests of the defendant, the other candidates or tenderers and the contracting authority likely to be harmed, as well as any specific public interest in continuing the contract award procedure. If it appears from that examination that the negative consequences of an interim order outweigh its advantages, it must not be granted.

4. An interim order may provisionally suspend the entire contract award procedure, or certain decisions of the contracting authority until any order to set aside the decision is made by the Bundesvergabeamt, or may prescribe any other appropriate measure. Further, it is appropriate to make an order for the interim measure which is the least onerous in the light of the aim pursued.

...

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6. Interim measures have immediate effect. Their implementation is governed by the Verwaltungsvollstreckungsgesetz 1991 [Law on the enforcement of administrative decisions, BGBl. 1991/53].

The main proceedings and the questions referred for a preliminary ruling

10 On 9 July 2001 the AUV published an invitation to tender for a contract to deliver, install and initialise various network electronic components and network management software. The value of that contract, which also included training on the use of that software, was estimated at EUR 1 000 000.

11 By letter of 10 September 2001, CS Austria submitted a tender for the contract stating, however, that the products that it sought to supply were not new products, but that they had been subject to a general overhaul.

12 By letter of 19 September 2001, the AUV informed CS Austria that its tender had been rejected, without consideration of the content, on the ground that it did not correspond to the specifications of the invitation to tender. The AUV relied, in that regard, on the case-law of the Austrian civil courts, according to which in the case of doubt and in the absence of any express provision to the contrary, only new products may be tendered for a public supply contract.

13 CS Austria brought an action before the Bundesvergabeamt under Paragraph 113 of the BVergG, seeking to have the rejection of its tender set aside, and for an interim measure restraining the contracting authority from awarding the contract until the Bundesvergabeamt had ruled on the substance of its application to have the decision set aside. In support of its application, CS Austria argued, firstly, that the invitation to tender did not contain any indication that the products supplied had to be new, but only required the products to satisfy all the safety rules in force, which was the case in these proceedings because the products that it proposed for tender had been subject to a general overhaul and, as regards the electronic switches, were not liable to any form of wear and tear. Secondly, CS Austria argued that it had submitted the tender which was the lowest in price, although fully equivalent technically to the tenders of the other tenderers, and that the contract should therefore have been awarded to it, so that the AUV's decision to dismiss its tender without examining its content was unlawful, and was likely to cause it serious financial loss.

14 The AUV contended that the interim measure should be set aside on the ground, firstly, that a delay of two months in the award of the contract would expose it to considerable financial loss and would jeopardise the treatment capacity of the hospitals to which the supplies at issue were destined and secondly, that the application for an interim measure amounted to an abuse of process because the application to have the contracting authority's decision set aside, that the application for an interim measure was intended to preserve, was in any event bound to fail. The AUV pointed out, in that connection, that CS Austria admitted that it had only offered second-hand reconditioned products, while Austrian civil courts have consistently held that in the absence of an express stipulation to the contrary, the goods supplied under a contract must always be new. As used goods had not been expressly authorised in the invitation to tender, CS Austria's tender had purely and simply to be dismissed.

15 By decision of 25 October 2001, the Bundesvergabeamt allowed CS Austria's application in part, in so far as it restrained the contracting authority from awarding the contract before 25 November 2001. However, it reserved its decision on the other aspects of the interlocutory application, on the ground that that depended on an interpretation of Article 2 of Directive 89/665. It observed, in that regard, that although the Austrian legislature had taken, in Paragraph 116(3) of the BVergG, the measures necessary for the transposition of Article 2(4) of Directive 89/665, the latter provision did not explicitly provide for consideration, by the body responsible for the review procedures for the award of public contracts, of the prospects of success of the application to set aside the

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contracting authority's decision.

16 According to the Bundesvergabeamt, firstly, that provision could be interpreted as meaning that only the factual difficulties that the grant of an interim measure involves, such as the delay in awarding the contract and the difficulties which arise from that, would be taken into consideration by that body. Such an interpretation could be justified by considerations relating to the essential effectiveness of the interlocutory procedure for the purposes of Directive 89/665, as consideration of the substantive application's prospects of success as early as at the stage of the decision relating to the interim measure in fact anticipates the outcome of the substantive proceedings.

17 Secondly, the Bundesvergabeamt points out that Article 2(4) of Directive 89/665 explicitly authorises the body responsible for review procedures for the award of public contracts to take account of the probable consequences of interim measures for all interests likely to be affected, including the public interest. It is thus possible that in weighing those competing interests, that body may also consider the prospects of success of the application to set aside the contracting authority's decision.

18 Taking the view, in those circumstances, that the resolution of the dispute pending before it depended on an interpretation of Community law, the Bundesvergabeamt decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

1. When balancing interests prior to deciding an application for interim measures, as required by Article 2(4) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 92/50/EEC of 18 June 1992, is the "body responsible for review procedures" within the meaning of Article 2(8) of Directive 89/665/EEC required to take into account the prospects of success of an application for an unlawful decision of a contracting authority to be set aside pursuant to Article 2(1)(b) of that directive?

2. If the answer to the first question is in the negative:

When balancing interests prior to deciding an application for interim measures, as required by Article 2(4) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 92/50/EEC of 18 June 1992, is the "body responsible for review procedures" within the meaning of Article 2(8) of Directive 89/665/EEC entitled to take into account the prospects of success of an application for an unlawful decision of a contracting authority to be set aside pursuant to Article 2(1)(b) of that directive?

19 The national court also asked the Court to deal with the reference for preliminary ruling by way of an accelerated procedure, in accordance with Article 104a of the Rules of Procedure, on the ground that the questions arise in the course of interlocutory proceedings and concern the award of a public contract which is still under way, that the contracting authority wished to award as soon as possible, having regard to the fact that any delay in the award of the contract was likely to lead to a reduction in the radiological treatment capacity of two large Austrian hospitals.

20 By decision of 20 November 2001 that request was rejected by the President of the Court, on the proposal of the Judge-Rapporteur, on the ground that the circumstances put forward by the national court did not establish that the questions referred for a preliminary ruling were matters of exceptional urgency.

The admissibility of the questions referred for a preliminary ruling

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21 Relying on the Bundesvergabeamt's decision of 11 July 2001 to make a reference in other proceedings on the award of public contracts, registered at the Court Registry under number C-314/01 and currently pending before the Court, the Commission has expressed doubt as to the judicial character of the referring body, on the ground that it had acknowledged in that decision that its decisions do not comprise directions to the contracting authority that are enforceable. In those circumstances, the Commission wishes to know whether the questions referred by the Bundesvergabeamt in the present proceedings are admissible, having regard to the case-law of the Court and in particular Case C-134/97 Victoria Film [1998] ECR I-7023, paragraph 14, and Case C-178/99 Salzmann [2001] ECR I-4421, paragraph 14, according to which a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

22 In that regard, it must be observed, firstly, that Paragraph 116(4) of the BVergG indicates expressly that the Bundesvergabeamt, hearing an application for interim relief, may stay the award procedure as a whole, or only certain decisions of the contracting authority, or order other appropriate measures.

23 Secondly, it is clear from Paragraph 116(6) that the orders made by the Bundesvergabeamt in the course of interlocutory proceedings are immediately enforceable, and that they are governed in that respect by the Law of 1991 on the enforcement of administrative decisions.

24 As the Commission has not put forward any argument to cast doubt on the binding nature of those orders there is no reason, having regard to the provisions of Paragraph 116(4) and (6) of the BVergG, to question the judicial character of the Bundesvergabeamt.

25 It follows that the questions referred by that body are admissible.

The questions referred for a preliminary ruling

26 By its two questions, which must be considered together, the national tribunal asks, essentially, whether it follows from Directive 89/665, and more particularly from Article 2(4), that when a body responsible for review procedures for the award of public contracts determines an application for interim relief, it is bound or, as the case may be, authorised to take account of the prospects of success of an application for annulment of the decision of the contracting authority based on the unlawfulness of that decision.

27 Taking the view that the answer to those questions did not admit of any reasonable doubt the Court, in accordance with Article 104(3) of the Rules of Procedure, informed the national tribunal that it intended to give judgment by reasoned order and invited the interested parties referred to in Article 23 of the EC Statute of the Court of Justice to submit observations on the matter.

28 Only the Commission submitted its observations within the time-limit. While it reiterated its doubts as to the admissibility of the questions referred, it expressed its agreement with the decision of the Court to give judgment by reasoned order.

29 It must be observed that the prospects of success of the substantive action are not mentioned among the factors which the body responsible for review procedures for the award of public contracts must or may take account of when it determines an application for interim measures under Article 2(1)(a) of Directive 89/665, but that provision does not preclude them from being considered. Article 2(4) of the directive merely states that the Member States may provide that when considering whether to order interim measures, the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits.

30 In the absence of specific Community rules governing the matter, it is therefore for the domestic

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legal system of each Member State to determine the rules governing the adoption of interim measures by the bodies responsible for review procedures for the award of public contracts, taking into account the purpose of Directive 89/665, which is to ensure that decisions taken by the contracting authority may be reviewed effectively and as rapidly as possible if there has been an infringement of Community law in the field of public procurement or of the national rules implementing that law.

31 However, according to settled case-law the Member States must ensure that the relevant national rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law (the principle of effectiveness) (see in particular to that effect Case C-92/00 HI [2002] ECR I-5553, paragraph 67, Case C-62/00 Marks &Spencer [2002] ECR I-6325, paragraph 34, and Case C-255/00 Grundig Italiana [2002] ECR I-8003, paragraph 33).

32 As regards the latter principle, it is plain that the fact that a national provision states that the body responsible for review procedures for public procurement is bound or, as the case may be, authorised to take account of the prospects of success of an application for a decision of a contracting authority to be set aside on the ground that it is unlawful is not such as to undermine the effectiveness of the rights conferred by the Community directives on the coordination of the procedures for the award of public contracts and, in particular, of the right to effective and rapid remedies laid down by Directive 89/665, because such a national provision merely provides for the consideration, in each particular case, of the degree of likelihood of an alleged infringement of Community law in the field of public procurement or the national rules implementing that law.

33 Therefore, the answer to the questions referred is that Article 2 of Directive 89/665 must be interpreted as meaning that it does not preclude the Member States from providing that when a body responsible for review procedures for the award of public contracts decides an application for interim measures, it is bound or authorised to take account of the prospects of success of an application for a decision of a contracting authority to be set aside on the ground that it is unlawful, so long as the national rules thus governing the adoption of those interim measures are not less favourable that those governing similar domestic actions and do not make it practically impossible or excessively difficult to exercise the rights conferred by Community law.

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31989L0665-A02P4 : N 5 18 26 29
31989L0665-A02P8 : N 6 18
31989L0665-C3 : N 3
31989L0665 : N 30 32
31991Q0704(02)-A104P3 : N 27
61997J0134 : N 21
61999J0178 : N 21
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NATCOUR *A9* Bundesvergabeamt, BeschluA*f* vom 25/10/2001

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PROCEDU Reference for a preliminary ruling

ADVGEN Alber

JUDGRAP Timmermans

DATES of document: 09/04/2003
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Judgment of the Court (Sixth Chamber)
of 16 October 2003
Traunfellner GmbH v Osterreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag).
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Directive 93/37/EEC - Public works contracts - Concept of a variant - Conditions for consideration and assessment for the purpose of awarding a contract.
Case C-421/01.

In Case C-421/01,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that tribunal between

Traunfellner GmbH

and

sterreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)

on the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

THE COURT

(Sixth Chamber),

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

Advocate General: S. Alber,

Registrar: M.F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- Traunfellner GmbH, by M. Oppitz, Rechtsanwalt,

- Osterreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag), by O. Sturm and F. Lückler, acting as Agents,

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

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

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

having regard to the Report for the Hearing,

after hearing the oral observations of the Austrian Government and the Commission at the hearing on 6 March 2003,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

Costs

40 The costs incurred by the French and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national tribunal, the

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decision on costs is a matter for that tribunal.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 25 September 2001, hereby rules:

1. Article 19 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is to be interpreted as meaning that the obligation to set out the minimum specifications required by a contracting authority in order to take variants into consideration is not satisfied where the contract documents merely refer to a provision of national legislation requiring an alternative tender to ensure the performance of work which is qualitatively equivalent to that for which tenders are invited.

2. Article 30 of Directive 93/37 can apply only to variants which have been properly taken into consideration by the contracting authority in accordance with Article 19 of that directive.

1 By order of 25 September 2001, received at the Court on 21 October 2001, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of the first and second paragraphs of Article 19 and Article 30(1) and (2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) (`the Directive').

2 Those questions have been raised in proceedings between the companies Traunfellner GmbH and Osterreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (`Asfinag') concerning the rejection of a tender submitted by Traunfellner for a public works contract.

Legal framework

Community legislation

3 Article 19 of the Directive provides:

`Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting authorities.

The contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They shall indicate in the tender notice if variants are not permitted.

Contracting authorities may not reject the submission of a variant on the sole grounds that it has been drawn up with technical specifications defined by reference to national standards transposing European standards, to European technical approvals or to common technical specifications referred to in Article 10(2) or again by reference to national technical specifications referred to in Article 10(5)(a) and (b).'

4 Article 30 of the Directive provides:

`1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according

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to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance....'

National legislation

5 The Directive was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (Federal Procurement Law 1997, BGBl. I, 1997/56, `the BVergG').

6 Paragraph 42 of the BVergG states:

`1. In procedures other than the negotiated procedure, tenderers must ensure that their tenders meet the requirements of the tender notice. The wording prescribed by the contract documents may not be amended or supplemented.

...

4. An alternative tender is admissible only if it ensures the performance of qualitatively equivalent work. It shall be for the tenderer to prove equivalence. An alternative tender may relate to the work as a whole, to parts of the work or to the legal conditions underlying the performance of the work. Alternative tenders shall be designated as such and shall be submitted separately.

...'

The main proceedings and the questions referred

7 Acting for and on behalf of Asfinag, the Federal Road Construction Division of the Government of the Land of Niederösterreich, which comes under the authority of the First Minister of that Land, published throughout the EU, on 27 November 1997, a call for tenders for the repair of the Neumarkt to Vienna section of the A 1 Westautobahn between kilometre 100.2 and kilometre 108.6. The contract concerned bridge and road construction works.

8 As regards performance of the road resurfacing work outside the areas covered by the motorway bridges, the tender notice stated, under the heading `Official Project', that concrete surfacing consisting of a two-layer high-grade concrete overlay should be laid without expressly making this a minimum specification.

9 The tender notice stated that alternative tenders were permissible but did not expressly set out the minimum technical requirements to be satisfied by such alternative tenders. It was merely stipulated that alternative tenders would be accepted only if accompanied by a full list of works as required by the tender notice (main tender).

10 No contract award criteria for assessing the economic and technical quality of tenders were defined for either tenders conforming to the tender notice or alternative tenders. Nor did the tender notice stipulate that alternative tenders had to ensure performance of work equivalent to that required by the official project and it was not explained what was meant by `performance of equivalent work'. The contract documents merely referred to Paragraph 42 of the BVergG.

11 Traunfellner submitted an alternative tender quoting a total price of ATS 78 327 748.53, which was the lowest of all the tenders. However, the lowest tender conforming to the tender notice, that is to say, to the official project, was submitted by the tenderers' consortium Ilbau - LSH Fischer - Heilit & Woerner, which quoted a total price of ATS 87 750 304.30.

12 In its alternative tender, Traunfellner proposed laying asphalt surfacing made from bitumen-based material rather than the concrete resurfacing provided for in the tender notice.

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13 On 17 February 1998, the Federal Road Construction Division asked Traunfellner for information on the technical quality of its alternative tender. After Traunfellner had provided the requested documents and explanations, the Federal Road Construction Division of the Government of the Land of Niederösterreich drew up a technical test report in which it was stated that experience gathered from previous contracts had shown that, despite careful execution of an asphalt design of this kind in compliance with the contract, grooves of some considerable depth had appeared after a short time, which had called for additional repair work.

14 According to that test report, preference had to be given to the general repair of the carriageway in concrete in accordance with the tender notice, particularly in view of the long life (30 years as opposed to 20 years in the case of an asphalt overlay) and deformation resistance of concrete. In particular, a concrete surface would have a 50% longer life and yet cost only 8.5% more. Consequently, Traunfellner's alternative tender had to be deemed not to meet the specifications of the official project and therefore had to be rejected.

15 On the basis of that report, the commission responsible for the award of contracts within the Federal Road Construction Division decided, on 17 March 1998, to propose that the contract should be awarded to the Ilbau - LSH Fischer - Heilit & Woerner consortium.

16 On 17 April 1998, Traunfellner applied to the Bundesvergabeamt for a declaration that the contracting authority's decision to reject its alternative tender was null and void.

17 On 21 April 1998, the Bundesvergabeamt dismissed Traunfellner's application, its basic reasoning being that the question of the possible technical equivalence of Traunfellner's alternative tender was irrelevant. According to the Bundesvergabeamt, that `alternative tender' departed from the specifications of the tender notice to such an extent that it was no longer an admissible alternative tender and had to be rejected in any event. Moreover, even if it were an admissible alternative tender, it would not be technically equivalent and should not therefore be taken into consideration.

18 On 3 June 1998, Traunfellner brought an appeal against the Bundesvergabeamt's decision of 21 April 1998 before the Verfassungsgerichtshof (Constitutional Court) (Austria). By judgment of 27 November 2000, the Verfassungsgerichtshof granted Traunfellner's appeal and annulled that decision on the ground that the constitutionally guaranteed right to equality before the law had been infringed. It held that that right is infringed, in particular, where an authority bases its decision on statements which have no value as supporting reasons. That was true of the present case since the Bundesvergabeamt had failed to set out the reasons on which it had based its finding that there was no `alternative tender'.

19 Under Austrian law, the Bundesvergabeamt is required to reconsider Traunfellner's application of 17 April 1998. However, as is explained in the order for reference, `the contracting authority's disputed decision may no longer be declared void' since the contract has already been awarded and, under the BVergG, the Bundesvergabeamt is merely required to determine whether a right has been infringed and thus whether the contracting authority's decision to exclude Traunfellner's alternative tender from consideration was lawful.

20 It was in the course of that re-examination that the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

`1. Is an alternative tender that consists in proposing an asphalt surface instead of overlaying the carriageway with concrete as specified in the tender notice a "variant" within the meaning of the first paragraph of Article 19 of Directive 93/37/EEC?

2. Can a criterion established in national legislation to determine the admissibility of the acceptance of a "variant" within the meaning of the first paragraph of Article 19 of Directive 93/37/EEC,

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whereby "the performance of qualitatively equivalent work is ensured" by the variant, properly be regarded as a "minimum specification", required and stated by the contracting authority in accordance with the first and second paragraphs of Article 19 of Directive 93/37/EEC, if the contract documents refer only to the national provision and do not specify the comparative parameters to be used to assess "equivalence"?

3. Does Article 30(1) and (2) of Directive 93/37/EEC in conjunction with the principles of transparency and equal treatment prohibit a contracting authority from making the acceptance of an alternative tender which differs from a tender conforming to the tender document in that it proposes a different technical quality conditional on a positive assessment based on a criterion in national legislation requiring that "the performance of qualitatively equivalent work is ensured" if the contract documents refer only to the national provision and do not specify the comparative parameters to be used to assess "equivalence"?

4. (a) If the answer to Question 3 is in the affirmative, may a contracting authority conclude a tendering procedure like that described in Question 3 by awarding the contract?

(b) If the answers to Questions 3 and 4(a) are in the affirmative, must a contracting authority conducting a tendering procedure as described in Question 3 reject variants proposed by tenderers without examining their contents, at any rate if it has not defined contract award criteria for assessing the technical differences between the variant and the tender notice?

5. If the answers to Questions 3 and 4(a) are in the affirmative and the answer to Question 4(b) is in the negative, must a contracting authority conducting a tendering procedure as described in Question 3 accept a variant whose technical differences from the tender document it is unable to assess on the basis of contract award criteria owing to the absence of appropriate statements in the tender document if this variant is the lowest tender and contract award criteria have not otherwise been defined?'

The first question

21 Under Article 234 EC, which is based on a clear separation of functions between national courts and tribunals and the Court of Justice, the latter is empowered to rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court or tribunal puts before it. However, it is for the national court or tribunal to apply the rules of Community law to a specific case. No such application is possible without a comprehensive appraisal of the facts of the case (Case C-107/98 Teckal [1999] ECR I-8121, paragraphs 29 and 31). The Court therefore has no jurisdiction to give a ruling on the facts in the main proceedings or to apply the rules of Community law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court or tribunal (see Case C-318/98 Fornasar and Others [2000] ECR I-4785, paragraph 32).

22 In the present case, the Bundesvergabeamt is not, by its first question, seeking to obtain from the Court an interpretation of Article 19 of the Directive to enable it then to assess whether Traunfellner's tender is a variant within the meaning of that article but is asking the Court to make that assessment itself.

23 Such an assessment would, however, lead the Court to apply itself the aforementioned Community provision to the dispute brought before the Bundesvergabeamt, a task which, in accordance with the case-law cited in paragraph 21 of this judgment, does not fall within the jurisdiction conferred on the Court by Article 234 EC.

24 It follows that the Court has no jurisdiction to answer the first question.

The second question

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25 By this question, the national tribunal is essentially asking whether Article 19 of the Directive is to be interpreted as meaning that the obligation to set out the minimum specifications required by the contracting authority in order to consider variants is satisfied where the contract documents refer only to a provision of national legislation requiring that the alternative tender ensure the performance of work which is qualitatively equivalent to that for which tenders have been invited, without further specifying the comparative parameters on the basis of which such equivalence is to be assessed.

26 It is apparent from the case-file that the provision of national legislation referred to in the second question is Paragraph 42(4) of the BVergG and that the term `alternative tender' used in that provision corresponds to the term `variant' used in Article 19 of the Directive.

27 This being so, it is clear from the very wording of the second paragraph of Article 19 of the Directive that, where the contracting authority has not excluded the submission of variants, it is under an obligation to set out in the contract documents the minimum specifications with which those variants must comply.

28 Consequently, the reference made in the contract documents to a provision of national legislation cannot satisfy the requirement laid down in the second paragraph of Article 19 of the Directive (see, by analogy, with respect to the reference made to a provision of national legislation with a view to defining the criteria for the award of a public works contract to the most economically advantageous tender, Case 31/87 Beentjes [1988] ECR 4635, paragraph 35, and Case C-225/98 Commission v France [2000] ECR I-7445, paragraph 73).

29 Tenderers may be deemed to be informed in the same way of the minimum specifications with which their variants must comply in order to be considered by the contracting authority only where those specifications are set out in the contract documents. This involves an obligation of transparency designed to ensure compliance with the principle of equal treatment of tenderers, which must be complied with in any procurement procedure governed by the Directive (see, to that effect, with respect to award criteria, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraphs 41 and 42).

30 In light of the above findings, the answer to the second question must be that Article 19 of the Directive is to be interpreted as meaning that the obligation to set out the minimum specifications required by a contracting authority in order to take variants into consideration is not satisfied where the contract documents merely refer to a provision of national legislation requiring an alternative tender to ensure the performance of work which is qualitatively equivalent to that for which tenders are invited.

The third question

31 In order to answer this question, a distinction must be drawn between the minimum specifications referred to in Article 19 of the Directive and the award criteria referred to in Article 30 thereof. Article 19 deals with the circumstances in which contracting authorities may take variants into consideration whereas Article 30, which lists the permissible criteria for the award of contracts, is concerned with a later stage in the procurement procedure. Accordingly, Article 30 can apply only to variants which have been properly taken into consideration in accordance with Article 19.

32 It is clear from paragraphs 27 and 30 of the present judgment that consideration of variants within the meaning of Article 19 of the Directive is subject to fulfilment of the requirement that the minimum specifications with which those variants must comply be set out in the contract documents and that a mere reference in those documents to a provision of national legislation is insufficient to satisfy that requirement.

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33 It follows that variants may not be taken into consideration where the contracting authority has failed to comply with the requirements laid down in Article 19 of the Directive with respect to the statement of the minimum specifications, even if they have not been declared inadmissible in the tender notice as provided for in the second paragraph of Article 19 of the Directive.

34 The answer to the third question must therefore be that Article 30 of the Directive can apply only to variants which have been properly taken into consideration by the contracting authority in accordance with Article 19 of the Directive.

The fourth and fifth questions

35 By these questions, which are referred only in the event that the third question is answered in the affirmative, the national tribunal seeks clarification as to the effect which irregularities in the assessment of variants may have on the subsequent conduct of the procurement procedure. In particular, the national tribunal is uncertain whether, in the event of such irregularities, the contracting authority may conclude the procurement procedure in question by awarding the contract (Question 4(a)) and, if so, whether the contracting authority must reject the variants proposed without examining their contents in view of the failure to define the award criteria for assessing the technical differences between the variant and the work for which tenders have been invited (Question 4(b)) or whether it must accept the variant where it is the lowest tender (Question 5).

36 The defendant in the main proceedings takes the view that Question 4(a) must be declared inadmissible as it bears no relation to the actual facts of the case in the main proceedings. On the same ground, the Austrian Government, which also points out that, under the BVergG, the national tribunal's competence is limited once the contract has been awarded (see paragraph 19 of this judgment), takes the view that the Court should declare Questions 4(a), 4(b) and 5 to be inadmissible.

37 It is settled case-law that, in the context of the cooperation between the Court of Justice and national courts and tribunals provided for in Article 234 EC, it is solely for the national court or tribunal before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver its decision and the relevance of the questions which it submits to the Court. The Court may refuse to rule on a question referred for a preliminary ruling by a national court or tribunal only where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main proceedings or to their purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted (see, in particular, Case C-399/98 Ordine degli Architetti and Others [2001] ECR I-5409, paragraph 41).

38 In the present case, it is clear from the case-file that the procurement procedure in question has already been concluded, that the contract has already been awarded and that the proceedings before the national tribunal are concerned not with the legality of the decision on the award but rather with the legality of the decision by which the contracting authority rejected Traunfellner's alternative tender. The question whether that procedure was properly conducted after the latter decision is therefore not the subject of the dispute brought before the national tribunal. The fourth and fifth questions, however, relate precisely to that stage in the procurement procedure.

39 It follows that those questions must be regarded as hypothetical and must therefore be declared inadmissible.

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Judgment of the Court (Sixth Chamber)
of 19 June 2003
Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others v Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag).
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Article 1(3) - Persons to whom review procedures must be available - Definition of interest in obtaining a public contract.
Case C-410/01.

In Case C-410/01,

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

Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others

and

Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag),

on the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT

(Sixth Chamber),

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

Advocate General: J. Mischo,

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

after considering the written observations submitted on behalf of:

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

- the French Government, by G. de Bergues and A. Bréville-Viéville, acting as Agents,

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

having regard to the Report for the Hearing,

after hearing the oral observations of Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others, represented by S. Wurst, Rechtsanwalt, the Austrian Government, represented by M. Fruhmann, the French Government, represented by S. Pailler, acting as Agent, and the Commission, represented by M. Nolin, assisted by R. Roniger, at the hearing on 16 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2003,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 8 October 2001, hereby rules:

Article 1(3) of Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, precludes an undertaking which has participated in a public procurement procedure from being considered as having lost its interest in obtaining that contract on the ground that, before bringing a review procedure under that directive, it failed to apply to a conciliation commission, such as the Bundes-Vergabekontrollkommission established by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Austrian Federal Law on Public Procurement).

1 By order of 8 October 2001, received at the Court on 16 October 2001, the Bundesvergabeamt (Federal Public Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, `Directive 89/665').

2 Those questions were raised in proceedings between several companies, among them Fritsch, Chiari & Partner, Ziviltechniker GmbH, which formed a consortium of tenderers (hereinafter together called `Fritsch and Others') and Autobahnen- und Schnellstraßen-Finanzierungs-AG (`Asfinag') concerning the award of a public service contract for which Fritsch and Others had tendered.

Legal context

Community provisions

3 Article 1 of Directive 89/665 provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions set out in the following articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being

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harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

4 Article 2 provides:

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement....

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

National legislation

5 Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56, `the BVergG'). The BVergG provides for the creation of a Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, `the B-VKK') and of a Bundesvergabeamt (Federal Public Procurement Office).

6 Paragraph 109 of the BVergG sets out the powers of the B-VKK. It contains the following provisions:

`1. The B-VKK shall be competent:

(1) until such time as the contract is awarded, to reconcile any differences of opinion between the awarding body and one or more candidates or tenderers concerning the application of the present federal law or its implementing regulations.

...

6. A request for the B-VKK to take action made under paragraph 1(1) must be submitted to the directors of the Commission as soon as possible after the difference of opinion comes to light.

7. If the B-VKK does not take action following a request from the awarding body, it must inform that body immediately it does take action.

8. The awarding body may not award the contract until four weeks after ... it has been informed in accordance with paragraph 7, failing which the tendering procedure shall be declared void....'

7 Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. It provides:

`1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt

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is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....'

8 Paragraph 115(1) of the BVergG provides:

`Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.'

9 Paragraph 122(1) of the BVergG provides that `in the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure.'

10 Under Paragraph 125(2) of the BVergG a claim for damages, which must be brought before the civil courts, is admissible only if the Bundevergabeamt has made a declaration under Paragraph 113(3). The civil court called upon to hear the claim for damages, and the parties to the proceedings before the Bundesvergabeamt, are bound by that declaration.

The main proceedings and the questions referred for a preliminary ruling

11 In the autumn of 1999 Asfinag invited tenders prior to the award of a public services contract for `site management in respect of the construction of principal and subsidiary toll barriers, including electrical, internal and technological work, and the introduction of a data-transmission facility as part of the "LKW Maut Osterreich" project'. The invitation to tender was published on 18 November 1999.

12 By letter of 28 January 2000 Fritsch and Others were informed that the bid they had submitted had been placed second in the evaluation of the bids and was therefore unsuccessful. By letter of 8 February 2001, they were told that the contract had been awarded and were informed of the contract price.

13 Fritsch and Others then instituted a procedure under Paragraph 113(3) of the BVergG for a review by the Bundesvergabeamt seeking a declaration that the contract had not been awarded to the best tenderer.

14 Before the Bundesvergabeamt, Asfinag stated that under Paragraph 115(1) of the BVergG only an undertaking claiming an interest in obtaining a contract falling within the scope of that Law is entitled to apply for review of a decision of the contracting authority challenging the lawfulness of the decision, where the alleged unlawfulness has caused or risks causing it harm. According to Asfinag, Fritsch and Others clearly had no interest in obtaining the contract since they had not submitted an application for conciliation to the B-VKK, as they were entitled to do under Paragraph 109(1) of the BVergG.

15 In support of its view, Asfinag maintained that public procurement law does not exist for its own sake but rather serves to determine where pre-contractual liability lies amongst the various parties to public procurement procedures, including the tenderers. According to Asfinag, if a tenderer considers that the award criteria do not comply with the law, it is required, as provided inter

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alia in Paragraph 109(6) of the BVergG, to raise that objection as soon as possible, even before the invitation to tender is issued. The principle of competition prohibits allowing a tenderer who considers that the award criteria do not comply with the law first to submit a bid in order to ascertain whether it is the best tenderer and then to decide on its actions according to how the contract is awarded, not making an application if it is the best tenderer or, if it fails to obtain the contract or is not the best tenderer, applying to the competent authorities in order to have `a second bite at the cherry' as a result of the invitation to tender being revoked.

16 According to Asfinag, it is therefore apparent from Paragraph 109(6) of the BVergG that the submission of a tender without a prior request for conciliation being made to the B-VKK means that no claim of illegality may be brought in respect of the tendering procedure of which the tenderer, if it had exercised due care, should have been aware at the time it prepared its bid. If in the present case Fritsch and Others had applied to the B-VKK before preparing their bid and had drawn Asfinag's attention to the alleged errors, no costs would have been incurred in preparing the bid.

17 Fritsch and Others denied the allegation that they had no interest, stating that, according to the practice consistently followed by the public procurement supervisory bodies, submission of a bid within the time-limit was sufficient to establish an interest in obtaining a contract.

18 Considering that the Austrian legislation applying to the case before it should be interpreted in the light of Article 1(3) of Directive 89/665 and that a decision in the case therefore required an interpretation of that provision, the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

`1. Is Article 1(3) of Directive 89/665... to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure?

2. In the event that the answer to Question 1 is no:

Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if, in addition to its participating in the public procurement procedure, it takes or took all steps available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself?'

The jurisdiction of the Court

19 On the basis of the order for reference made by the Bundesvergabeamt on 11 July 2001 in another case concerning public procurement, registered at the Court Registry under number C-314/01 and currently pending before the Court, the Commission expresses doubts as to the judicial nature of the body making the reference on the ground that it acknowledged in the order that its decisions `do not contain binding, enforceable directions addressed to the contracting authority'. In those circumstances, the Commission has doubts as to the admissibility of the questions referred for a preliminary ruling by the Bundesvergabeamt in the present proceedings in the light of the case-law of the Court, in particular Case C-134/97 Victoria Film [1998] ECR I-7023, paragraph 14, and Case C-178/99 Salzmann [2001] ECR I-4421, paragraph 14, according to which a national court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

20 It should be noted in that regard, first, that after the award of the contract the Bundesvergabeamt is competent, under Paragraph 113(3) of the BVergG, to determine whether as a result of an infringement of the relevant national legislation the contract has not been awarded to the best tenderer.

21 Secondly, it is apparent from the express wording of Paragraph 125(2) of the BVergG that a declaration made by the Bundesvergabeamt under Paragraph 113(3) of that Law not only constitutes

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a condition for admissibility of any claim for damages brought before the civil courts by reason of a culpable breach of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the case.

22 In those circumstances, neither the binding nature of a decision taken by the Bundesvergabeamt under Paragraph 113(3) of the BVergG nor, accordingly, the judicial nature of the latter can reasonably be called into question.

23 It follows that the Court has jurisdiction to reply to the questions raised by the Bundesvergabeamt.

The questions referred

24 In its order for reference, the Bundesvergabeamt points out, first, that under Paragraph 115(1) of the BVergG an undertaking may apply for review of a decision by a contracting authority where it claims to have an interest in the conclusion of a contract in a public procurement procedure and that the unlawfulness which it alleges causes it or risks causing it harm.

25 Secondly, the provisions of Paragraph 109(1), (6) and (8) of the BVergG are designed to ensure that no contract may be concluded while the mediation procedure is going on. In the event that a mediation procedure does not lead to amicable settlement the undertaking may, before the contract is concluded, apply for annulment of any decision of a contracting authority, including a decision to award the contract.

26 The national court therefore considers that for the purposes of reaching a decision in the main proceedings it is important to know whether the combined provisions of Paragraph 115(1) and 109(1), (6) and (8) of the BVergG, interpreted in the light of Article 1(3) of Directive 89/665, must be interpreted as meaning that a tenderer which, before the conclusion of the contract, has been informed by the contracting authority that the contract has been awarded to a competitor, and which has failed to avail itself of the review procedures available under national law to delay the conclusion of a contract and possibly to have the award decision amended in its favour, may reasonably claim that it has an interest in the conclusion of the contract and, accordingly, institute a review procedure for a declaration that the award decision is unlawful and to claim damages.

27 As regards Article 1(3) of Directive 89/665, the Bundesvergabeamt points out that in a judgment of 12 June 2001 (B 485/01-12, B 584/01-9, B 685/01-6) the Austrian Verfassungsgerichtshof (Constitutional Court) held, referring to its judgment of 8 March 2001 (B 707/00), that in accordance with the case-law of the Court (see Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraphs 34 and 35), locus standi for bringing a review procedure under Article 1(3) of Directive 89/665 is to be interpreted widely and must therefore be accorded to any person wishing to be awarded a particular public contract which has been put out for tender. The national court therefore considers that the question arises whether this must also be the case if that person has not availed itself of the opportunity afforded by the awarding authority of exhausting all remedies available under national public procurement law (first question) or whether a failure to exhaust all possible domestic remedies results in its forfeiting that interest (second question).

28 In the light of the foregoing considerations, the two questions referred for a preliminary ruling must be understood as seeking to ascertain whether Article 1(3) of Directive 89/665 must be interpreted as meaning that it precludes an undertaking which has participated in a public procurement procedure from being considered as having lost its interest in obtaining that contract on the ground that, before bringing a review procedure under that directive, it failed to apply to a conciliation commission such as the B-VKK.

29 It is in the light of the aims of Directive 89/665 that it is necessary to consider whether Article 1(3) allows a Member State to make a tenderer's interest in obtaining a specific contract,

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and therefore its right to have access to the review procedures established by that directive, dependent on the condition that it has beforehand applied to a conciliation commission such as the B-VKK.

30 In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Alcatel Austria, cited above, paragraphs 33 and 34, and Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 74).

31 The inevitable conclusion is that making access to the review procedures provided for by Directive 89/665 conditional on prior application to a conciliation commission such as the B-VKK is contrary to that directive's objective of speed and effectiveness.

32 First, prior application to such a conciliation commission inevitably has the effect of delaying the introduction of the review procedures which Directive 89/665 requires Member States to establish.

33 Secondly, a mere conciliation commission, such as the B-VKK, has none of the powers which Article 2(1) of Directive 89/665 requires Member States to grant the bodies responsible for carrying out those review procedures, so that referral to it does not ensure the effective application of the Community directives on public procurement.

34 It should be added that the fact that Article 1(3) of Directive 89/665 expressly allows Member States to determine the detailed rules according to which they must make the review procedures available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement none the less does not authorise them to give the term `interest in obtaining a public contract' an interpretation which may limit the effectiveness of that directive (see, to that effect, Universale-Bau, cited above, paragraph 72).

35 In the light of the above, the answer to be given to the questions referred for a preliminary ruling is that Article 1(3) of Directive 89/665 precludes an undertaking which has participated in a public procurement procedure from being considered as having lost its interest in obtaining that contract on the ground that, before bringing a review procedure under that directive, it failed to apply to a conciliation commission, such as the B-VKK established by the BVergG.

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**Judgment of the Court (Grand Chamber)
of 5 October 2004
Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV. Reference for a preliminary ruling: Arbeitsgericht Lörrach - Germany. Social policy - Protection of the health and safety of workers - Directive 93/104/EC - Scope - Emergency workers in attendance in ambulances in the framework of an emergency service run by the German Red Cross - Definition of 'road transport' - Maximum weekly working time - Principle - Direct effect - Derogation - Conditions. Joined cases C-397/01 to C-403/01.**

1. Social policy - Protection of the health and safety of workers - Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work - Directive 93/104 concerning certain aspects of the organisation of working time - Scope - Activity of emergency workers - Included - Activity not forming part of civil protection services or road transport excluded from such scope

(Council Directives 89/391, Art. 2, and 93/104, Art. 1(3))

2. Social policy - Protection of the health and safety of workers - Directive 93/104 concerning certain aspects of the organisation of working time - Maximum weekly working time - Derogation - Worker's consent - Employment contract referring to a collective agreement permitting the extension of that time - Insufficient

(Council Directive 93/104, Art. 18(1)(b)(i))

3. Social policy - Protection of the health and safety of workers - Directive 93/104 concerning certain aspects of the organisation of working time - Activity of emergency workers - National legislation permitting the extension of the maximum weekly working time by means of a collective or works agreement - Not permissible

(Council Directive 93/104, Art. 6(2))

4. Social policy - Protection of the health and safety of workers - Directive 93/104 concerning certain aspects of the organisation of working time - Article 6(2) - Direct effect - Powers and duties of the national court - Non-application of national provisions permitting the extension of the maximum weekly working time set by that article

(Council Directive 93/104, Art. 6(2))

1. Article 2 of Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work and Article 1(3) of Directive 93/104 concerning certain aspects of the organisation of working time must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service, falls within the scope of those directives.

In that regard, that activity does not come within the exclusion in the first subparagraph of Article 2(2) of Directive 89/391 relating to certain specific activities within the public service. That exclusion was adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers.

Likewise, the activity of emergency workers, even if it includes, at least in part, using a vehicle and accompanying a patient on his journey to hospital, cannot be regarded as road transport' and therefore must be excluded from the scope of Article 1(3) of Directive 93/104.

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(see paras 55, 63, 72, 74, operative part 1)

2. The first indent of Article 18(1)(b)(i) of Directive 93/104 concerning certain aspects of the organisation of working time, which confers the right not to apply Article 6 of that directive containing the rule as to the maximum weekly working time, is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of that directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension, since it is by no means certain that, when he entered into such a contract, the worker concerned knew of the restriction of the rights conferred on him by Directive 93/104.

(see paras 85-86, operative part 2)

3. Article 6(2) of Directive 93/104 concerning certain aspects of the organisation of working time must be interpreted as precluding legislation in a Member State the effect of which, as regards periods of duty time completed by emergency workers in the framework of an emergency medical service, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded.

First, it follows both from the wording of Article 6(2) of Directive 93/104 and from the purpose and scheme of that directive, that the 48-hour upper limit on weekly working time constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health, so that national legislation which authorises weekly working time in excess of 48 hours, including periods of duty time, is not compatible with the requirements of Article 6(2) of the directive. Second, periods of duty time completed by emergency workers must be taken into account in their totality in the calculation of maximum daily and weekly working time, regardless of the fact that they necessarily include periods of inactivity of varying length between calls.

(see paras 94-95, 100-101, 120, operative part 3)

4. Article 6(2) of Directive 93/104 concerning certain aspects of the organisation of working time fulfils all the conditions necessary for it to have direct effect, since it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it, which provides for a 48-hour maximum as regards average weekly working time. The fact that the directive leaves the Member States a degree of latitude to adopt rules in order to implement Article 6, and that it permits them to derogate from it, do not alter the precise and unconditional nature of Article 6(2).

Accordingly, when hearing a case between individuals, a national court, which is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by it, must do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by the said Article 6(2), is not exceeded.

(see paras 104-106, 119-120, operative part 3)

In Joined Cases C-397/01 to C-403/01,

REFERENCES for a preliminary ruling under Article 234 EC,

from the Arbeitsgericht Lörrach (Germany), made by orders of

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26 September 2001

, received at the Court on

12 October 2001

, in the proceedings

Bernhard Pfeiffer (C-397/01),

Wilhelm Roith (C-398/01),

Albert Süß (C-399/01),

Michael Winter (C-400/01),

Klaus Nestvogel (C-401/01),

Roswitha Zeller (C-402/01),

Matthias Döbele (C-403/01)

v

Deutsches Rotes Kreuz, Kreisverband Waldshut eV,

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.P. Puissochet and J.N. Cunha Rodrigues, Presidents of Chambers, R. Schintgen (Rapporteur), F. Macken, N. Colneric, S. von Bahr and K. Lenaerts, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Pfeiffer, Mr Roith, Mr Süß, Mr Winter, Mr Nestvogel, Ms Zeller and Mr Döbele, by B. Spengler, Rechtsanwalt,

- the Commission of the European Communities, by J. Sack and H. Kreppel, acting as Agents,

after considering the observations submitted on behalf of:

- Mr Pfeiffer, Mr Roith, Mr Nestvogel, Ms Zeller and Mr Döbele, by B. Spengler,

- Mr Süß and Mr Winter, by K. Lörcher, Gewerkschaftssekretär,

- the German Government, by W.-D. Plessing, acting as Agent,

- the French Government, by R. Abraham, G. de Bergues and C. BergeotNunes, acting as Agents,

- the Italian Government, by I.M. Braguglia, acting as Agent, and A. Cingolo, avvocato del Stato,

- the United Kingdom Government, by C. Jackson, acting as Agent, and A. Dashwood, Barrister,

- the Commission, by J. Sack and H. Kreppel,

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

6 May 2003,

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

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27 April 2004,

gives the following

Judgment

Costs

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

On those grounds, the Court (Grand Chamber) rules:

1. (a) Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and Article 1(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service, such as that at issue before the national court, falls within the scope of the directives.

b) On a proper construction, the concept of road transport' in Article 1(3) of Directive 93/104 does not encompass the activity of an emergency medical service, even though the latter includes using a vehicle and accompanying a patient on the journey to hospital.

2. - The first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension.

3. Article 6, point 2, of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time (Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded;

Article 6(2) of Directive 93/104 fulfils all the conditions necessary for it to have direct effect;

1. These references for a preliminary ruling concern the interpretation of Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) and of Articles 1(3), 6 and 18(1)(b)(i) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

2. The references were made to the Court in various sets of proceedings between (i) Mr Pfeiffer, Mr Roith, Mr Süß, Mr Winter, Mr Nestvogel, Ms Zeller and Mr Döbele, who work or used to work as emergency workers, and (ii) Deutsches Rotes Kreuz, Kreisverband Waldshut eV (German Red Cross, Waldshut section (Deutsches Rotes Kreuz')), a body which employs or employed the claimants in the main actions. The proceedings concern German legislation providing for weekly working time in excess of 48 hours.

Legal framework

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Community legislation

3. Directives 89/391 and 93/104 were adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

4. Directive 89/391 is the framework directive which lays down general principles concerning the health and safety of workers. Those principles were subsequently developed by a series of specific directives, including Directive 93/104.

5. Article 2 of Directive 89/391 defines the scope of the directive as follows:

1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.'

6. Article 1 of Directive 93/104, entitled Purpose and scope', provides as follows:

1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training;

4. The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.'

7. Under the heading Definitions', Article 2 of Directive 93/104 provides:

For the purposes of this Directive, the following definitions shall apply:

1. working time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. rest period shall mean any period which is not working time;

...'

8. Section II of the directive lays down the measures which the Member States must take to ensure that all workers are afforded, inter alia, daily minimum rest periods and weekly rest periods and it also regulates maximum weekly working time.

9. So far as maximum weekly working time is concerned, Article 6 of Directive 93/104 provides:

Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

...

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2. the average working time for each 7-day period, including overtime, does not exceed 48 hours.'

10. Article 15 of Directive 93/104 provides:

This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

11. Article 16 of the directive provides:

Member States may lay down:

...

2. for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

...'

12. Directive 93/104 sets out a set of exceptions to a number of its basic rules, in view of the specific features of certain activities and subject to compliance with certain conditions. In that connection, Article 17 provides:

1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities.

2. Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection:

2.1 from Articles 3, 4, 5, 8 and 16:

...

(c) in the case of activities involving the need for continuity of service or production, particularly;

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;

...

(iii) press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;

...

3. Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between

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the two sides of industry at a lower level.

...

The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

...

4. The option to derogate from point 2 of Article 16, provided in paragraph 2, points 2.1 and 2.2 and in paragraph 3 of this Article, may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.

...'

13. Article 18 of Directive 93/104 is worded as follows:

1. (a) Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 23 November 1996, or shall ensure by that date that the two sides of industry establish the necessary measures by agreement, with Member States being obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by this Directive are fulfilled.

(b) (i) However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

- no employer requires a worker to work more than 48 hours over a 7-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

- no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

- the employer keeps up-to-date records of all workers who carry out such work,

- the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

- the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

...'

National legislation

14. German labour law distinguishes between duty time (Arbeitsbereitschaft'), on-call time (Bereitschaftsdienst') and stand-by time (Rufbereitschaft').

15. The three concepts are not defined by national legislation but their features derive from case-law.

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16. Duty time (Arbeitsbereitschaft') covers the situation in which the worker must make himself available to his employer at the place of employment and is, moreover, obliged to remain continuously attentive in order to be able to act immediately should the need arise.

17. While a worker is on call (Bereitschaftsdienst'), he must be present at a place determined by his employer, either on or outside the latter's premises, and must keep himself available to take up his duties if so requested by his employer but he is authorised to rest or occupy himself as he sees fit as long as his services are not required.

18. Stand-by time (Rufbereitschaft') is characterised by the fact that the worker is not obliged to remain waiting in a place designated by the employer: it is sufficient for him to be reachable at any time so that he may be called upon at short notice to perform his professional tasks.

19. Under German labour law only duty time (Arbeitsbereitschaft') is, as a general rule, deemed to constitute full working time. Conversely, both on-call time (Bereitschaftsdienst') and stand-by time (Rufbereitschaft') are categorised as rest time, save for the part of the time during which the worker has in fact performed his professional tasks.

20. The German legislation on working time and rest periods is contained in the Arbeitszeitgesetz (Law on Working Time) of 6 June 1994 (BGBl. 1994 I, p. 1170; the ArbZG'), which was enacted to transpose Directive 93/104.

21. Paragraph 2(1) of the ArbZG defines working time as the period between the beginning and end of work, with the exception of breaks.

22. Paragraph 3 of the ArbZG provides:

Employees' daily working time must not exceed eight hours. It may be extended to a maximum of 10 hours but only on condition that an average 8-hour working day is not exceeded over 6 calendar months or 24 weeks.'

23. Paragraph 7 of the ArbZG is worded as follows:

(1) Under a collective agreement, or a works agreement based on a collective agreement, provision may be made:

1. by way of derogation from Paragraph 3,

(a) to extend working time beyond 10 hours per day, even without offset, where working time regularly includes significant periods of duty time (Arbeitsbereitschaft),

(b) to determine a different period of offset,

(c) to extend working time to 10 hours per day, without offset, for a maximum period of 60 days per year,

...'

24. Paragraph 25 of the ArbZG provides:

Where, at the date of entry into force of this law, an existing collective agreement or one continuing to produce effects after that date contains derogating rules under Paragraph 7(1) and (2)..., which exceed the maximum limits laid down in the provisions cited, those rules shall not be affected. Works agreements based on collective agreements are deemed equivalent to collective agreements such as those mentioned in the first sentence...'

25. The Tarifvertrag über die Arbeitsbedingungen für Angestellte, Arbeiter und Auszubildende des Deutschen Roten Kreuzes (Collective agreement on working conditions for German Red Cross employees, workers and apprentices; the DRK-TV') includes the following provision:

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Paragraph 14 Normal working time

(1) Normal working time, exclusive of breaks, shall be on average 39 hours (from 1 April 1990 38 and a half hours) per week. As a general rule, the average weekly working time shall be calculated on the basis of a period of 26 weeks.

In the case of workers who work in rotas or on shifts a longer period may be set.

(2) Normal working time may be extended...

(a) to 10 hours per day (49 hours per week on average) if it regularly includes duty time (Arbeitsbereitschaft) of at least 2 hours per day on average:

(b) to 11 hours per day (54 hours per week on average) if it regularly includes duty time (Arbeitsbereitschaft) of at least 3 hours per day on average,

(c) to 12 hours per day (60 hours per week on average) if the employee must merely be present at the work-place in order to carry out his duties should the need arise.

...

(5) The employee shall be required, if so directed by his employer, to remain outside normal working hours in a particular place selected by the employer, from where he may be called to work if the need arises (on-call time, Bereitschaftsdienst). The employer may require such on-call service only when some work is expected but, on the basis of experience, work-free time will predominate.

...'

26. An observation in the following terms is made in respect of Paragraph 14(2) of the DRK-TV:

Where Annex 2 concerning staff in the emergency and ambulance services applies, regard is to be had to the notice concerning Paragraph 14(2) of the [DRK-TV].'

27. Annex 2 includes special provisions under the collective agreement for staff in the emergency and ambulance services. The relevant notice provides that the maximum weekly working time of 54 hours provided for in Paragraph 14(2)(b) of the DRK-TV is to be progressively reduced. As a consequence, with effect from 1 January 1993, provision is made for the maximum period to fall from 54 to 49 hours.

The main proceedings and the questions referred for a preliminary ruling

28. Seven cases have given rise to these references for a preliminary ruling.

29. According to the documents available to the Court, the Deutsches Rotes Kreuz operates inter alia the land-based emergency service in a part of the Landkreis of Waldshut. The Deutsches Rotes Kreuz maintains the stations at Waldshut (Germany), Dettighoffen (Germany) and Bettmaringen (Germany), which are manned round the clock, and a station at Lauchringen (Germany), which is manned for 12 hours per day. Land-based emergency rescue is carried out by means of ambulances and emergency medical vehicles. An ambulance crew consists of two paramedics, whilst an emergency medical vehicle consists of an emergency worker and a doctor. When they are alerted of an emergency, these vehicles go to the relevant place in order to provide medical assistance to the patients. Subsequently, the patients are usually taken to hospital.

30. Mr Pfeiffer and Mr Nestvogel were formally employed by the Deutsches Rotes Kreuz as emergency workers, whilst the other claimants in the main proceedings were still employed by that body at the time when their actions before the national court were commenced.

31. The parties to the main proceedings are at odds in essence over whether, in calculating the period of maximum weekly working time, account should be taken of periods of duty time (Arbeitsbereitschaft')

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which the workers concerned have been required to do in the course of their employment in the service of the Deutsches Rotes Kreuz.

32. The actions brought by Mr Pfeiffer and Mr Nestvogel before the Arbeitsgericht Lörrach claim payment for hours they worked in excess of 48 hours per week. They claim that they were wrongly required to work more than 48 hours per week on average from June 2000 to March 2001. As a consequence, they asked the national court to order the Deutsches Rotes Kreuz to pay them DEM 4 335.45 gross (for 156.85 hours at the overtime rate of DEM 29.91 gross) and DEM 1 841.88 gross (for 66.35 hours at the overtime rate of DEM 27.76), together with interest for late payment.

33. As regards the actions brought by the other claimants in the proceedings before the national court, they seek to determine the maximum period which they must work per week for the Deutsches Rotes Kreuz.

34. The parties to the main proceedings agreed in their various contracts of employment that the DRK-TV should apply.

35. The Arbeitsgericht Lörrach found that, on the basis of the rules of the collective agreement, weekly working time in the emergency service operated by the Deutsches Rotes Kreuz was, on average, 49 hours. Normal working time was extended pursuant to Paragraph 14(2)(b) of the DRK-TV, given the obligation of those concerned to be available for duty (Arbeitsbereitschaft') for at least 3 hours per day on average.

36. The claimants in the main proceedings submit that the provision made by the Deutsches Rotes Kreuz to set weekly working time at 49 hours is unlawful. They rely in that connection on Directive 93/104 and on the judgment in Case C303/98 Simap [2000] ECR I7963. In their submission, Paragraph 14(2)(b) of the DRK-TV infringes Community law by providing for working time in excess of 48 hours per week. Furthermore, the rules of the collective agreement are not permissible under the derogation provided for in Paragraph 7(1)(i)(a) of the ArbZG. Indeed, the claimants in the main proceedings argue that the ArbZG does not correctly implement the provisions of Directive 93/104 in that respect. Accordingly, they submit that the derogation in the ArbZG must be interpreted in conformity with Community law and that if it is not, it does not apply at all.

37. Conversely, the Deutsches Rotes Kreuz contends that the actions should be dismissed. It maintains inter alia that its rules on the extension of working time comply with national legislation and the collective agreements.

38. With these cases before it, the Arbeitsgericht Lörrach is in doubt, first, as to whether the activity of the claimants in the main proceedings falls within the scope of Directive 93/104.

39. In the first place, Article 1(3) of Directive 93/104, which refers, as regards the directive's scope, to Article 2 of Directive 89/391, excludes from that scope a number of areas to the extent to which characteristics peculiar to certain specific activities inevitably conflict with it. However, in the referring court's view, that exclusion is intended to cover only those activities which aim to secure public safety and order, which are indispensable to the common good or which, owing to their nature, do not lend themselves to planning. It mentions, by way of example, major catastrophies. By contrast, emergency services should not be excluded from the scope of the two directives, even though emergency workers must be ready to respond round the clock, since the duties and working time of each of them remain amenable to planning.

40. Second, it is necessary to ascertain whether work in a land-based emergency service must be regarded as road transport' for the purposes of Article 1(3) of Directive 93/104. If that term were to be construed as including any activity in a vehicle travelling on the public highways, a service operated by means of ambulances and emergency medical vehicles would also have to be subsumed

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thereunder, since a significant part of that activity entails going to places where emergencies have occurred and conveying patients to hospital. However, the emergency service normally operates within a limited geographical area, in general within a Landkreis (provincial district), so the distances are not great and the operations are of limited duration. The work of a land-based emergency service is thus to be distinguished from the typical line of work in the road transport sector. Doubts none the less subsist on this point on account of the judgment in Case C76/97 Tögel [1998] ECR I5357, paragraph 40).

41. The referring court then asks whether the non-application of the 48-hour limit for the average working week as provided for under Article 18(1)(b)(i) of Directive 93/104 requires the express and unambiguous consent of the employee concerned or whether the employee's general consent to the application of a collective agreement as a whole is sufficient, since the latter provides inter alia for the possibility of weekly working time being extended beyond the 48-hour limit.

42. Finally, the Arbeitsgericht Lörrach asks whether Article 6 of Directive 93/104 is unconditional and sufficiently precise to be capable of being relied on by an individual before a national court in the event of a Member State having failed to implement the directive correctly. Under German law, if the provision at Paragraph 14(2)(b) of the DRKTV, which is applicable to the employment contracts concluded by the parties to the main proceedings, were covered by the provision made by the legislature in Paragraph 7(1)(i)(a) of the ArbZG, the latter would permit the employer to extend daily working time without compensation, with the result that the restriction of weekly working time to 48 hours on average which derives from Paragraph 3 of the ArbZG and from Article 6(2) of Directive 93/104 would be negated.

43. Taking the view that in those circumstances an interpretation of Community law was necessary to enable it to reach a decision in the cases before it, the Arbeitsgericht Lörrach decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions, which are cast in identical terms in Cases C397/01 to C403/01:

1. (a) Is the reference in Article 1(3) of Directive 93/104... to Article 2(2) of Directive 89/391..., under which [those] directives are not applicable where characteristics peculiar to certain specific activities in the civil protection services inevitably conflict with their application, to be construed as meaning that the claimants' activity as emergency workers is caught by this exclusion?

(b) Is the concept of road transport in Article 1(3) of Directive 93/104 to be construed as meaning that only driving activity which is inherently long-distance and for which, consequently, working times cannot be fixed owing to the unforeseeability of problems are excluded from the scope of the directive, or is road transport within the meaning of this provision to be taken to include the activity of land-based emergency services, which comprises at least in part the driving of emergency vehicles and attendance on patients during the journey?

2. In view of the judgment of the Court in... Simap (paragraphs 73 and 74), is Article 18(1)(b)(i) of Directive 93/104 to be construed as meaning that consent given individually by a worker must expressly refer to the extension of working time to more than 48 hours per week, or may such consent also reside in the worker's agreeing with the employer, in the contract of employment, that working conditions are to be governed by a collective agreement which itself allows working time to be extended to more than 48 hours on average?

3. Is Article 6 of Directive 93/104 in itself unconditional and sufficiently precise to be capable of being relied on by individuals before national courts where the State has not properly transposed the directive into national law?'

44. By order of the President of the Court of 7 November 2001, Cases C397/01 to C403/01 were joined for the purposes of the written and oral procedure and the judgment.

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45. By decision of 14 January 2003, the Court stayed proceedings in those cases until the hearing in Case C151/02 Jaeger [2003] ECR I-8389, in which judgment was delivered on 9 September 2003. That hearing took place on 25 February 2003.

46. By order of the Court of 13 January 2004, the oral procedure in Cases C397/01 to C403/01 was re-opened.

The questions referred for a preliminary ruling

Question 1(a)

47. By Question 1(a), the national court is essentially asking whether Article 2 of Directive 89/391 and Article 1(3) of Directive 93/104 must be interpreted as meaning that the activity of emergency workers, performed within an emergency medical service such as the service at issue in the main proceedings, falls within the scope of the directives.

48. In order to reply to that question, it must be borne in mind at the outset that Article 1(3) of Directive 93/104 defines the scope of the directive by referring expressly to Article 2 of Directive 89/391. Therefore, before determining whether an activity such as that of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of a service run by the Deutsches Rotes Kreuz falls within the scope of Directive 93/104, it is first necessary to examine whether that activity is within the scope of Directive 89/391 (see the judgment in Simap , paragraphs 30 and 31).

49. By virtue of Article 2(1) of Directive 89/391, the latter applies to all sectors of activity, both public and private', which include service activities as a whole.

50. However, as is clear from the first subparagraph of Article 2(2), the directive is not applicable where characteristics peculiar to certain specific activities, particularly in the civil protection services, inevitably conflict with it.

51. It must none the less be held that the activity of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of an emergency service for the injured or sick, run by a body such as the Deutsches Rotes Kreuz, is not covered by the exclusion referred to in the preceding paragraph.

52. It is clear both from the purpose of Directive 89/391 (encouraging the improvement of the health and safety of workers at work) and from the wording of Article 2(1) thereof that the directive must be taken to be broad in scope. It follows that the exclusions from its scope provided for in the first subparagraph of Article 2(2) must be interpreted restrictively (see the judgment in Simap , paragraphs 34 and 35, and the order of 3 July 2001 in Case C-241/99 CIG [2001] ECR I-5139, paragraph 29).

53. Furthermore, the first subparagraph of Article 2(2) of Directive 89/391 excludes from the directive's scope not the civil protection services as such but solely certain specific activities' of those services, whose characteristics are such as inevitably to conflict with the rules laid down by the directive.

54. This exclusion from the broadly-defined field of application of Directive 89/391 must therefore be interpreted in such a way that its scope is restricted to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect.

55. In that regard, the exclusion in the first subparagraph of Article 2(2) of Directive 89/391 was adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases, such as a catastrophe, the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do

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not lend themselves to planning as regards the working time of teams of emergency workers.

56. However, the civil protection service in the strict sense thus defined, at which the provision is aimed, can be clearly distinguished from the activities of emergency workers tending the injured and sick which are at issue in the main proceedings.

57. Even if a service such as the one with which the national court is concerned must deal with events which, by definition, are unforeseeable, the activities which it entails in normal conditions and which correspond moreover to the duties specifically assigned to a service of that kind are none the less capable of being organised in advance, including, in so far as they are concerned, the working hours of its staff.

58. The service thus exhibits no characteristic which inevitably conflicts with the application of the Community rules on the protection of the health and safety of workers and therefore is not covered by the exclusion in the first subparagraph of Article 2(2) of Directive 89/391, the directive instead applying to such a service.

59. It is apparent from the wording of Article 1(3) of Directive 93/104 that it applies to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391, with the exception of certain specific activities which are exhaustively listed.

60. None of those activities is relevant in relation to a service such as the one at issue in the main proceedings. In particular, it is clear that the activity of workers who, in the framework of an emergency medical service, attend on patients in an ambulance or emergency medical vehicle is not comparable to the activity of trainee doctors, to which Directive 93/104 does not apply by virtue of Article 1(3) thereof.

61. Consequently, an activity such as that with which the national court is concerned also falls within the scope of Directive 93/104.

62. As the Commission rightly pointed out, further support is lent to that finding by the fact that Article 17(2), point 2.1(c)(iii), of Directive 93/104 expressly refers to, inter alia, ambulance services. Such a reference would be redundant if the activity referred to was already excluded from the scope of Directive 93/104 in its entirety by virtue of Article 1(3). Instead, that reference shows that the Community legislature laid down the principle that the directive is applicable to activities of such a kind, whilst providing for the option, in given circumstances, to derogate from certain specific provisions of the directive.

63. In those circumstances, the answer to be given to Question 1(a) is that Article 2 of Directive 89/391 and Article 1(3) of Directive 93/104 must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service such as that at issue before the national court, falls within the scope of the directives.

Question 1(b)

64. By Question 1(b), the national court is essentially asking whether, on a proper construction, the concept of road transport' in Article 1(3) of Directive 93/104 encompasses the activity of an emergency medical service, on account of the fact that the activity consists, at least in part, of using a vehicle and attending the patient during the journey to hospital.

65. In that regard, it must be observed that under Article 1(3) of Directive 93/104, the latter [applies] to all sectors of activity... with the exception of air, rail, road, sea, inland waterway and lake transport ...'.

66. In its judgment in Case C133/00 Bowden and Others [2001] ECR I7031, the Court ruled that on a proper construction of Article 1(3) all workers employed in the road transport sector, including

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office staff, are excluded from the scope of that directive.

67. Since they are exceptions to the Community system for the organisation of working time put in place by Directive 93/104, the exclusions from the scope of the directive provided for in Article 1(3) must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which the exclusions are intended to protect (see, by analogy, the judgment in Jaeger , paragraph 89).

68. The transport sector was excluded from the scope of Directive 93/104 on the grounds that a Community regulatory framework already existed in that sector, which laid down specific rules for, inter alia, the organisation of working time on account of the special nature of the activity in question. That legislation does not apply, however, to transport for emergencies or assistance.

69. Furthermore, the judgment in Bowden is based on the fact that the employer belonged to one of the transport sectors specifically listed in Article 1(3) of Directive 93/104 (see paragraphs 39 to 41 of the judgment). However, it can hardly be argued that when the Deutsches Rotes Kreuz operates an emergency medical service such as that at issue in the main proceedings its activity pertains to the road transport sector.

70. The fact that that activity includes using an emergency vehicle and accompanying the patient on his journey to hospital is not decisive, since the main purpose of the activity concerned is to provide initial medical treatment to a person who is ill or injured and not to carry out an operation relating to the road transport sector.

71. Furthermore, it is necessary to bear in mind that ambulance services are specifically included in Article 17(2), point 2.1(c)(iii), of Directive 93/104. Their inclusion, which is intended to enable there to be a derogation from certain specific provisions of the directive, would be redundant if such services were already excluded from the field of application of the directive in its entirety pursuant to Article 1(3) thereof.

72. In those circumstances, the concept of road transport' in Article 1(3) of Directive 93/104 does not encompass an emergency medical service such as that at issue in the main proceedings.

73. That interpretation is not undermined by the judgment in Tögel , to which the national court refers, since the subject-matter of the judgment was not the interpretation of Directive 93/104 but rather that of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (JO 1992 L 209, p. 1), the contents and purpose of which are wholly irrelevant for the purpose of determining the scope of Directive 93/104.

74. In the light of all of the foregoing considerations, the answer to Question 1(b) must be that, on a proper construction, the concept of road transport' in Article 1(3) of Directive 93/104 does not encompass the activity of an emergency medical service, even though the latter includes using a vehicle and accompanying a patient on his journey to hospital.

The second question

75. By its second question, the national court is asking in substance whether the first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended or whether it is sufficient in that regard that the relevant person's employment contract refers to a collective agreement which permits such an extension.

76. In order to reply to the question formulated in this manner, it must be borne in mind, first, that it is apparent from Article 118a of the Treaty, the legal basis for Directive 93/104, from the first, fourth, seventh and eighth recitals in the preamble to the directive and from the actual

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wording of Article 1(1) of the directive that its objective is to guarantee the better protection of the safety and health of workers by affording them minimum rest periods - especially on a daily and weekly basis -and adequate breaks and by providing for an upper limit on weekly working time.

77. Second, under the system established by Directive 93/104, only some of its provisions, which are exhaustively listed, may form the subject-matter of derogations by the Member States or the two sides of industry. Furthermore, the implementation of such derogations is subject to strict conditions intended to secure effective protection for the safety and health of workers.

78. Thus, Article 18(1)(b)(i) of Directive 93/104 provides that Member States have the right not to apply Article 6 provided that they observe the general principles of the protection of the safety and health of workers and that they satisfy a certain number of conditions set out cumulatively in Article 18(1)(b)(i).

79. In particular, the first indent of Article 18(1)(b)(i) requires that working time should not exceed 48 hours over a 7-day period, calculated as an average for the reference period referred to in point 2 of Article 16 of Directive 93/104, the worker none the less being able to agree to work more than 48 hours per week.

80. In that regard, the Court has already held, in paragraph 73 of the judgment in Simap , that, as is apparent from its actual wording, the first indent of Article 18(1)(b)(i) of Directive 93/104 requires the consent of the individual worker.

81. In paragraph 74 of Simap , the Court concluded that the consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

82. That interpretation derives from the objective of Directive 93/104, which seeks to guarantee the effective protection of the safety and health of workers by ensuring that they actually have the benefit of, inter alia, an upper limit on weekly working time and minimum rest periods. Any derogation from those minimum requirements must therefore be accompanied by all the safeguards necessary to ensure that, if the worker concerned is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of all the facts. Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard.

83. Those considerations are equally relevant so far as the situation described in the second question is concerned.

84. It follows that, for a derogation from the maximum period of weekly working time laid down in Article 6 of Directive 93/104 (48 hours) to be valid, the worker's consent must be given not only individually but also expressly and freely.

85. Those conditions are not met where the worker's employment contract merely refers to a collective agreement authorising an extension of maximum weekly working time. It is by no means certain that, when he entered into such a contract, the worker concerned knew of the restriction of the rights conferred on him by Directive 93/104.

86. The answer to the second question must therefore be that the first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended. In that connection, it is not sufficient that the

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relevant worker's employment contract refers to a collective agreement which permits such an extension.

The third question

87. By its third question, the national court is essentially asking whether, if Directive 93/104 has been implemented incorrectly, Article 6(2) thereof may be taken to have direct effect.

88. As is clear both from its wording and from the context in which it occurs, there are two aspects to that question: the first concerns the interpretation of Article 6(2) of Directive 93/104 for the purpose of enabling the national court to decide whether the relevant rules of national law are compatible with the requirements of Community law, whilst the second concerns whether, if the Member State concerned has transposed Article 6(2) into national law incorrectly, that provision satisfies the conditions which would enable an individual to rely on it before the national courts in circumstances such as those in the main proceedings.

89. Those two issues must be examined in turn.

The import of Article 6(2) of Directive 93/104

90. As a preliminary point, it must be observed that Article 6(2) of Directive 93/104 requires the Member States to take the measures necessary to ensure, as a function of the requirement for the protection of workers' safety and health, that the average working time for each 7-day period, including overtime, does not exceed 48 hours.

91. It is apparent from Article 118a of the Treaty, which is the legal basis for Directive 93/104, from the first, fourth, seventh and eighth recitals in the preamble to the directive, from the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, points 8 and 19, first subparagraph, thereof, which are referred to in the fourth recital to the directive, and from the actual wording of Article 1(1) of the directive that the latter's purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. This Community-level harmonisation of the organisation of working time seeks to guarantee a better level of protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods - particularly daily and weekly - and adequate breaks (see Jaeger , paragraphs 45 to 47).

92. Thus, Directive 93/104 imposes more specifically (in Article 6(2)) a 48-hour limit for the average working week, a maximum which is expressly stated to include overtime.

93. In that context, the Court has already held that on-call time (Bereitschaftsdienst'), where the worker is required to be physically present at a place specified by his employer, must be regarded as wholly working time for the purposes of Directive 93/104, irrespective of the fact that, during periods of on-call time, the person concerned is not continuously carrying on any professional activity (see Jaeger , paragraphs 71, 75 and 103).

94. The same must be true of periods of duty time (Arbeitsbereitschaft') completed by emergency workers in the framework of an emergency service, which necessarily entails periods of inactivity of varying length in between calls.

95. Such periods of duty time must accordingly b e taken into account in their totality in the calculation of maximum daily and weekly working time.

96. Furthermore, it is evident that under the system established by Directive 93/104, although Article 15 allows generally for the application or introduction of national provisions more favourable to the protection of the safety and health of employees, only certain specifically mentioned provisions of the directive may form the subject-matter of derogations by the Member States or social partners

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(see Jaeger , paragraph 80).

97. However, in the first place, Article 6 of Directive 93/104 is referred to only in Article 17(1) and it is undisputed that the latter provision covers activities which bear no relation at all to those carried out by emergency workers such as the claimants in the main proceedings. By contrast, Article 17(2), point 2.1(c)(iii), refers to activities involving the need for continuity of service', including in particular ambulance services', but this provision gives scope for derogating from only Articles 3, 4, 5, 8 and 16 of the directive.

98. In the second place, Article 18(1)(b)(i) of Directive 93/104 provides that the Member States have the right not to apply Article 6 provided that they observe the general principles of protection of the safety and health of workers and that they satisfy a number of conditions set out cumulatively in Article 18(1)(b)(i), but it is not disputed that the Federal Republic of Germany has not availed itself of that option to derogate (see Jaeger , paragraph 85).

99. Moreover, by virtue of the Court's case-law the Member States cannot unilaterally determine the scope of the provisions of Directive 93/104 by attaching conditions or restrictions to the implementation of the workers' right under Article 6(2) of the directive not to work more than 48 hours per week (see, to that effect, Jaeger , paragraphs 58 and 59). Any other interpretation would misconstrue the purpose of the directive, which is intended to secure effective protection of the safety and health of workers by allowing them to enjoy minimum periods of rest (see Jaeger , paragraphs 70 and 92).

100. In those circumstances, it must be concluded that, in view of both the wording of Article 6(2) of Directive 93/104 and the purpose and scheme of the directive, the 48-hour upper limit on average weekly working time, including overtime, constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health (see, by analogy, Case C173/99 BECTU [2001] ECR I-4881, paragraphs 43 and 47), and therefore national legislation, such as that at issue in the main proceedings, which authorises weekly working time in excess of 48 hours, including periods of duty time (Arbeitsbereitschaft'), is not compatible with the requirements of Article 6(2) of the directive.

101. Accordingly, the answer to the third question, as regards the first aspect, is that Article 6(2) of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time (Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded.

The direct effect of Article 6(2) Directive 93/104 and the ensuing consequences in the cases before the national court

102. Since, in circumstances such as those in the main proceedings, the relevant national legislation is not compatible with the requirements of Directive 93/104 as regards maximum weekly working time, it remains to be considered whether Article 6(2) of the directive fulfils the conditions for it to have direct effect.

103. In that regard, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Joined Cases C6/90

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and C9/90 Francovich and Others [1991] ECR I5357, paragraph 11, and Case C62/00 Marks & Spencer [2002] ECR I6325, paragraph 25).

104. Article 6(2) of Directive 93/104 satisfies those criteria, since it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it, which provides for a 48-hour maximum, including overtime, as regards average weekly working time.

105. Even though Directive 93/104 leaves the Member States a degree of latitude when they adopt rules in order to implement it, particularly as regards the reference period to be fixed for the purposes of applying Article 6 of that directive, and even though it also permits them to derogate from Article 6, those factors do not alter the precise and unconditional nature of Article 6(2). First, it is clear from the wording of Article 17(4) of the directive that the reference period can never exceed 12 months and, second, the Member States' right not to apply Article 6 is subject to compliance with all the conditions set out in Article 18(1)(b)(i) of the directive. It is therefore possible to determine the minimum protection which must be provided in any event (see, to that effect, Simap , paragraphs 68 and 69).

106. As a consequence, Article 6(2) of Directive 93/104 fulfils all the conditions necessary for it to produce direct effect.

107. It still remains to determine the legal consequences which a national court must derive from that interpretation in circumstances such as those in the main proceedings, which involve individuals.

108. In that regard, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see, inter alia, Case 152/84 Marshall [1986] ECR 723, paragraph 48; Case C-91/92 Faccini Dori [1994] ECR I3325, paragraph 20; and Case C-201/02 Wells [2004] ECR I0000, paragraph 56).

109. It follows that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.

110. However, it is apparent from case-law which has also been settled since the judgment of 10 April 1984 in Case 14/83 Von Colson and Kamann [1984] ECR 1891, paragraph 26, that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see, inter alia, Case C106/89 Marleasing [1990] ECR I-4135, paragraph 8; Faccini Dori , paragraph 26; Case C126/96 Inter-Environnement Wallonie [1997] ECR I-7411, paragraph 40; and Case C131/97 Carbonari and Others [1999] ECR I1103, paragraph 48).

111. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

112. That is a fortiori the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C334/92 Wagner Miret [1993] ECR I-6911, paragraph 20).

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113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in Von Colson and Kamann , paragraph 26; Marleasing , paragraph 8, and Faccini Dori , paragraph 26; see also Case C63/97 BMW [1999] ECR I905, paragraph 22; Joined Cases C240/98 to C244/98 Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941, paragraph 30; and Case C408/01 Adidas-Salomon and Adidas Benelux [2003] ECR I-0000, paragraph 21).

114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C160/01 Mau [2003] ECR I-4791, paragraph 34).

115. Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, Carbonari , paragraphs 49 and 50).

116. In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

117. In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C456/98 Centrosteel [2000] ECR I6007, paragraphs 16 and 17).

118. In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, Marleasing , paragraphs 7 and 13).

119. Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.

120. In view of all the foregoing reasoning, the answer to the third question must be that:

- Article 6(2) of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods

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of duty time (Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded;

- the provision fulfils all the conditions necessary for it to have direct effect;

- when hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.

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31993L0104-C1 : N 76 91
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31993L0104-C7 : N 76 91
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61996J0129 : N 110
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61998J0303 : N 48 52 80 105
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PROCEDU	Reference for a preliminary ruling
ADVGEN	Ruiz-Jarabo Colomer
JUDGRAP	Schintgen
DATES	of document: 05/10/2004 of application: 12/10/2001

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 6 May 2003. Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV. Reference for a preliminary ruling: Arbeitsgericht Lörrach - Germany. Social policy - Protection of the health and safety of workers - Directive 93/104/EC - Scope - Emergency workers in attendance in ambulances in the framework of an emergency service run by the German Red Cross - Definition of 'road transport' - Maximum weekly working time - Principle - Direct effect - Derogation - Conditions. Joined cases C-397/01 to C-403/01.

1. The Arbeitsgericht (Labour Court), Lörrach, Germany, which rules at first instance on employment matters, has referred to the Court of Justice for a preliminary ruling three questions regarding the interpretation of various provisions of Directive 93/104/EC concerning certain aspects of the organisation of working time. (2) The questions relate specifically to Article 1, which defines the scope of the directive; to Article 6, which establishes maximum weekly working time; and to Article 18(1)(b)(i), which provides for Article 6 to be disapplied in certain circumstances.

I - The facts of the main proceedings

2. The national court has submitted to the Court of Justice seven orders referring questions for preliminary rulings in seven separate disputes. In view of the fact that the questions in each dispute are identical and the facts similar, the seven cases were joined in the written stage of the procedure by Order of the President dated 7 November 2001.

3. All the plaintiffs are rescue workers who are qualified to provide emergency medical assistance and to operate patient transport, are employees or former employees of the German Red Cross (Deutsches Rotes Kreuz), and are seeking payment for overtime in two cases, and confirmation of their right not to work more than 48 hours per week in the other cases.

4. The defendant provides, inter alia, land-based emergency medical assistance services in part of the district of Waldshut, and operates several rescue posts which are open 24 hours and one which is only operational for 12 hours during the day. The service is effected using ambulances manned by two rescue workers or paramedics (Rettungtransportfahrzuegen), and by ambulances manned by a doctor accompanied by a rescue worker or a paramedic (Notarzt-Einsatzfahrzeugen).

When the alert is given, the rescue vehicles go to the place where the injured or sick person is to provide medical assistance. Usually, the vehicles then transport the patient to hospital.

5. In their employment contracts, it was agreed by the parties that the provisions of the Collective Agreement on Working Conditions for German Red Cross Employees, Workers and Trainees (Tarifvertrag über Arbeitsbedingungen für Angestellte, Arbeiter und Auszubildende des Deutschen Roten Kreuzes), hereinafter referred to as the Red Cross collective agreement', would be applicable.

6. In accordance with the provisions of that collective agreement, the average working time in the undertaking's emergency medical assistance service is 49 hours per week. It is common ground that the substantive requirements for extending the working hours, which are set out in Article 14(2)(b) of the collective agreement and entail the performance of stand-by duty (Arbeitsbereitschaft) of at least three hours per day, are met.

II - The applicable German legislation

7. In Germany, working time and rest periods are governed by the Law on working time (Arbeitszeitgesetz) of 6 June 1994, which was adopted in order to transpose Directive 93/104 into national law.

8. Under Paragraph 2(1), working time is defined as the time between the beginning and the end of the working day, excluding breaks. Under Paragraph 3, working time must not exceed eight hours

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per working day, although it may be increased to 10 hours if the average period of working time over six calendar months, or 24 weeks, does not exceed eight hours per working day.

9. Under Paragraph 7(1)(1), by way of derogation from Article 3, under a collective or works agreement:

(a) the working day may be extended beyond 10 hours, even without compensation, where working time regularly includes a significant period of time spent on stand-by;

(b) the compensatory rest time may be postponed; and

(c) working hours may be extended, without compensation, to up to 10 hours per day for a maximum of 60 days per year.

10. Under Article 14(1) of the German Red Cross Collective Agreement, weekly working time, excluding breaks, must not exceed 39 hours (38ì hours with effect from 1 April 1990) per week. The average is usually calculated over a 26-week period.

In accordance with Article 14(2), normal working time may be increased to: (a) an average of 10 hours per day or 49 hours per week, if it includes a period of standby duty of at least two hours per day on average; (b) an average of 11 hours per day or 54 hours per week if the period of standby duty is three hours; and (c) an average of 12 hours per day or 60 hours per week if the employee remains in the workplace but only works when he is asked to do so.

Annex 2 contains special rules for staff in the emergency services. When the annex is applied to rescue workers attached to the ambulance service and to transport staff, account must be taken of the note on Article 14(2), pursuant to which the maximum working time of 54 hours per week, referred to in Article 14(2)(b), must be progressively reduced. From 1 January 1993, it was reduced to 49 hours.

III - The questions referred for a preliminary ruling

11. Before ruling on the disputes, the Arbeitsgericht Lörrach decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) (a) Is the reference in Article 1(3) of Council Directive 93/104/EC ... to Article 2(2) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, (3) under which the provisions of the directives are not applicable where characteristics peculiar to certain specific activities in the civil protection services inevitably conflict with their application, to be construed as meaning that the activity of the applicant, who is a qualified worker in the emergency medical assistance service, is caught by this exclusion?

(1) (b) Does the concept of road transport, for the purposes of Article 1(3) of Directive 93/104/EC, exclude from the scope of the directive only those driving activities in which, by their nature, great distances are covered and where working times cannot be fixed owing to the unforeseeability of any difficulties, or, alternatively, does it include rescue vehicle services, which comprise, at least in part, the driving of such vehicles and attendance on patients during the journey?

(2) In view of the judgment in Simap , (4) does Article 18(1)(b)(i) of Directive 93/104/EC require the express consent of an employee in order to extend the weekly working time to more than 48 hours, or, alternatively, does it suffice if it is agreed in the contract of employment that the working conditions are those established by collective agreements which allow weekly working time to be extended to more than 48 hours on average?

(3) Is the wording of Article 6 of Directive 93/104/EC sufficiently precise and unconditional to be capable of being relied upon by individuals before national courts where the State has not properly transposed the directive into national law?'

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IV - The Community legislation

12. An interpretation of the following provisions is sought:

Directive 89/391

Article 2

...

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.'

Directive 93/104

Article 1

...

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training;

...'

Article 6

Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

Article 18(1)

...

(b) (i) However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

- no employer requires a worker to work more than 48 hours over a seven-day period, calculated as

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an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

- no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

- the employer keeps up-to-date records of all workers who carry out such work,

- the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

- the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

Before the expiry of a period of seven years from the date referred to in (a), the Council shall, on the basis of a Commission proposal accompanied by an appraisal report, re-examine the provisions of this point (i) and decide on what action to take.

...'

V - Proceedings before the Court of Justice

13. Written observations in these proceedings were submitted, within the period laid down in Article 20 of the EC Statute of the Court of Justice, by the plaintiffs in the main proceedings and the Commission.

In view of the fact that none of the parties applied to present oral argument, the Court decided not to hold a hearing, in accordance with Article 104(4) of the Rules of Procedure.

VI - The observations submitted

14. It is the view of the plaintiffs in the main proceedings that the German Red Cross Collective Agreement allows the employer to decide unilaterally the average weekly working time, without the agreement of the employee, in the event that it is necessary to organise stand-by services at work. German academic opinion and case-law have defined such periods of duty, which are regarded as working time, as periods of active wakefulness under relaxed conditions. A collective agreement of this nature is contrary to Directive 93/104, since it provides for weekly working time to exceed 48 hours, from which it follows that, since the collective agreement complies with Paragraph 7(1)(1)(a) of the Law on working time, the German legislature has failed to implement correctly the provisions of the directive.

15. The Commission maintains that time spent by rescue workers on standby duty in their posts amounts to working time, which means that the activity they carry out is not covered by the exclusion in Article 2(2) of Directive 89/391 and is, therefore, included in the scope of Directive 93/104. The Commission also asserts that employees whose employer's activity is not in the road transport sector are not covered by the exclusion in respect of such activities which is laid down in Article 1(3) of Directive 93/104, even where the undertaking's activity includes the transport of goods or people. In the Commission's view, in order for weekly working time to exceed 48 hours, all the conditions set out in Article 18(1)(b)(i) of Directive 93/104 must be satisfied, including the condition which calls for the worker's express agreement. For that purpose, it will not suffice if the worker is merely aware that the employment relationship is governed by a collective agreement which allows for the weekly working time to be extended. The Commission argues that the wording of Article 6 of Directive 93/104 is sufficiently precise and unconditional to enable individuals to rely on it before national courts where a Member State has failed to implement it correctly.

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In such cases, the court must interpret national law in the light of the wording and purpose of the directive in order to achieve the result pursued.

VII - Analysis of the questions referred for a preliminary ruling

16. By the first question, which is in two parts, the national court asks the Court of Justice to define the scope of Directive 93/104, with a view to clarifying whether it covers the activity carried out by the plaintiffs in the main proceedings.

A - The first part of the first question

17. The Arbeitsgericht wishes to ascertain, firstly, whether Article 1(3) of Directive 93/104 and Article 2 of Directive 89/391 exclude from the scope of the directives the activity of rescue workers who work in an emergency medical assistance service.

18. As the Court pointed out in Simap , (5) Article 1(3) of Directive 93/104 defines its scope first by referring expressly to Article 2 of Directive 89/391 and, second, by providing for a number of exceptions in relation to certain specified activities. Accordingly, in order to determine whether the work of rescue workers in an emergency medical assistance service falls within the scope of Directive 93/104, it is necessary first to consider whether it is covered by Directive 89/391.

19. In accordance with Article 2(1) of Directive 89/391, the directive applies to all sectors of activity, both public and private, and in particular to industrial, agricultural, commercial, administrative, service, educational, cultural and leisure activities. However, Article 2(2) provides that the directive is not applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to the civil protection services, inevitably conflict with it.

20. In Simap , (6) the Court found that the specific public service activities, referred to in the provision, are intended to uphold public order and security, which are essential for the proper functioning of society, and that, under normal circumstances, the activities of medical staff who carry out on-call duty cannot be assimilated to such activities.

21. In the case before the Court, it is necessary to confirm whether the emergency medical assistance service provided by the Red Cross rescue workers is part of the civil protection services. In the event that the answer to that question is in the affirmative, it will then be appropriate to examine whether the treatment is included among the specific activities whose characteristics would inevitably preclude the application to them of Directive 93/104 on the organisation of working time.

22. As the Court also noted in Simap , (7) it is clear both from the object of Directive 89/391, namely to encourage improvements in the safety and health of workers at work, and from the wording of Article 2(1) thereof, that it must necessarily be broad in scope. It follows that the exceptions, including that provided for in Article 2(2), must be interpreted restrictively.

23. Usually, civil protection is a public service whose principal aim is to ensure the safety of people and property in situations involving a serious risk to the public, disasters and major catastrophes, where the safety and the lives of individuals could be in danger.

24. The aim of an urgent medical assistance service provided by doctors and rescue workers in ambulances, such as that which is operated by the Red Cross in the main proceedings, is to provide first aid to patients and to transport them in the right conditions to receive the medical treatment they need. Civil protection is intended to deal with general emergencies and it does not, therefore, include the activity carried out by the above medical service under normal circumstances.

25. In the event of a catastrophe or disaster, the public authorities supply the human and material

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resources available to them, while also relying on organisations and undertakings, and even on individuals, should the need arise. In such exceptional circumstances, there can be no doubt that any ambulance service would be under an obligation to contribute its manpower and equipment to civil protection duties.

26. To my mind, the exclusion of certain specific civil protection service activities from the scope of the directive can be attributed to a number of reasons. The first is the diversity and magnitude of emergency situations, of the needs they generate and of the human and material resources which must be mobilised in a short space of time. The second is that the activity of the civil protection services is performed using the organisation, planning, coordination and management systems of a number of public and private services, vis-à-vis the danger to be tackled. The third reason is that the civil protection services are entitled to call upon all the residents of a country to perform individual tasks, and they may also request the participation of the security services, the emergency medical assistance services, the public and private fire services, and even the media.

Those features highlight not only the unforeseeable nature of the activities of the civil protection services, but also the fact that the majority of people who are called upon to participate in the event of a disaster are employed in undertakings which rescue and assist people and recover property. When such people take part in a rescue operation, they perform the tasks for which they are qualified, in accordance with the measures for the protection against and prevention of risks which have been adopted in their undertaking pursuant to national legislation implementing Directive 89/391. Finally, since, in the majority of cases, the civil protection services do not operate in the same way as employee-based structures, it is logical that they should not fall within the scope of a directive designed to encourage improvements in the safety and health of workers.

27. As I have already pointed out, the scope ratione materiae of Directive 89/391 is very wide, and, under normal circumstances, includes the activity of the Red Cross, namely the provision of ambulance-based emergency medical assistance. Where, in the event of a national catastrophe or disaster, the Red Cross is called upon to assist by the civil protection services, Red Cross employees are required to perform the same, or similar, tasks as those which they normally carry out; accordingly, the obligations relating to the safety and health of workers, laid down in Directive 89/391, remain unchanged. Therefore, it cannot be claimed that characteristics peculiar to that activity inevitably conflict with the application of the directive to it.

Consequently, the disputed activity falls within the scope of Directive 89/391, both under normal circumstances and in cases where, in the event of a catastrophe, the Red Cross assists the civil protection services.

28. As concerns the material scope of Directive 93/104, I note that, apart from sectors which provide certain forms of transport, and carry out fishing and maritime activities, the only other exclusion applies to the work of doctors in training. (8)

Since the activity of rescue workers in an emergency medical assistance service is not included among the exclusions laid down, Article 1(3) of Directive 93/104 and Article 2 of Directive 89/391 must be construed as meaning that such activity falls within the scope of both directives.

B - The second part of the first question

29. The Arbeitsgericht goes on to consider the concept of road transport in Article 1(3) of Directive 93/104, in so far as it is excluded from the scope of the directive, in order to ascertain whether that sector includes the activity of an emergency rescue service which consists, at least in part, of driving vehicles and attending to patients during the journey.

30. The Court ruled on the aim of Directive 93/104 in BECTU , (9) noting that it is clear both

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from Article 118a of the Treaty, (10) which is its legal basis, and from the first, fourth, seventh and eighth recitals in its preamble, as well as the wording of Article 1(1), that the purpose of the directive is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. The Court went on to say that harmonisation at Community level is intended to guarantee better protection of the health and safety of workers, so that they are entitled to minimum rest periods and adequate breaks.

31. Thus, Directive 93/104 sets out the minimum health and safety requirements for the organisation of working time, which apply to minimum periods of daily and weekly rest, annual leave, breaks, and maximum weekly working time, as well as to certain aspects of night work, shift work and patterns of work.

32. In my view, road transport is excluded from the scope of Directive 93/104 because, when the directive was adopted, there was already Community legislation in place containing more specific rules for the organisation of working time and working conditions in that sector.

I refer specifically to Regulation (EEC) No 3820/85 (11) which governs various social aspects of road transport, such as driving periods, breaks and rest periods, and which excludes carriage by vehicles used in emergency or rescue operations, which, to my mind, includes ambulances. (12)

33. The Court examined the extent of the exclusion of road transport activities from the scope of Directive 93/104 in Bowden and Others , (13) stating that, by referring to air, rail, road, sea, inland waterway and lake transport', the Community legislature indicated that it was taking account of those sectors of activity as a whole, whereas in the case of other work at sea' and the activities of doctors in training' it chose to refer precisely to those specific activities as such'. (14) Therefore, the exclusion of the road transport sector in particular extends to all workers in that sector.

As the Commission points out, in that judgment the Court took into account the activity of the employer but did not assess the activity carried out by the employees of the undertaking. If an undertaking belongs to one of the sectors in the list which the Court concluded were referred to as a whole', for example the road transport sector, then all the employees of that undertaking are excluded from the scope of Directive 93/104.

34. The activity carried out by the Red Cross, which employs rescue workers to provide medical assistance at the place where the patient is located and to transport the patient by ambulance to a hospital to receive the treatment he needs, is not included in the road transport sector, regardless of the fact that carriage is by land, in the same way that carriage by light aircraft or helicopter in the most critical cases cannot be classified as air transport.

35. However, the German court questions the treatment to be accorded to transport by ambulance in the light of the judgment delivered in Tögel , (15) in which the Court ruled that aspects of the transport of injured and sick persons with a nurse in attendance come within Annex I A, Category No 2, to Directive 92/50/EEC (16) relating to the coordination of procedures for the award of public service contracts.

36. I do not consider that ruling to be conclusive as regards the definition of the scope of Directive 93/104 on the organisation of working time.

37. Directive 92/50 provides for two-tier application, depending on whether the service is included in the list in Annex I A or in the list in Annex I B. The contracts listed in Annex I A are awarded in accordance with the provisions of Titles III to VI, while those in Annex I B must comply with the rules set out in Articles 14 and 16. Where the services feature in both lists the

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procedure is determined by reference to their value.

In Tögel , the disputed services were listed in both Annex I A, Category 2 (land transport services), and in Annex I B, Category 25 (health and social services), which was why the Court found that the contract could be governed by either procedure, depending upon whether the value of the services under Annex I A was higher or lower than the value of the services under Annex I B.

38. However, the case before the Court is not concerned with ascertaining the correct procedure to use in the award of a public service contract, and therefore Directive 92/50 and the case-law relating to its interpretation are not applicable.

39. For the reasons set out, it should be held that the concept of road transport in Article 1(3) of Directive 93/104 does not include the activity of an emergency rescue service which consists, at least in part, of driving vehicles and attending to patients during the journey.

C - The second question

40. Next, the Arbeitsgericht asks whether, under Article 18(1)(b)(i), first indent, of Directive 93/104, the extension of weekly working time to more than 48 hours requires the express agreement of the employee, or whether, alternatively, it will suffice if the employee has agreed to the working conditions laid down by collective agreements which, in turn, permit the extension of weekly working time to more than 48 hours on average.

41. Under the provision in question, Member States are entitled not to apply Article 6 of Directive 93/104, which refers to maximum weekly working time, provided that they respect the general principles of the protection of the safety and health of workers, and provided that they take the necessary measures to ensure that no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, without that worker's consent.

42. As the Court noted in Simap , (17) the wording of the first indent of Article 18(1)(b)(i) requires the consent of the worker. If the intention of the Community legislature had been to replace the worker's consent by that of a trade union in the context of a collective agreement, Article 6 of Directive 93/104 would have been included in the list in Article 17(3) of the directive of those articles from which derogations may be made by a collective agreement or agreement between the two sides of industry.

43. The Arbeitsgericht also wishes to clarify whether it is enough that the employee has given his consent to the application of a collective agreement which grants the employer the power, under certain circumstances, to extend the weekly working time beyond the maximum of 48 hours on average per seven-day period, including overtime, laid down in Article 6 of Directive 93/104.

44. In my opinion, the reply must be in the negative for a number of reasons. First, because, from an employee's point of view, there is an important difference between extending the weekly working time beyond the maximum laid down in Directive 93/104 and the duty to work overtime at the request of the employer, which is liable to prolong the normal working hours or working week.

45. As regards the second situation, the Court has ruled that Article 2(2)(i) of Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, (18) referring as it does to normal working hours, is not concerned with overtime, the characteristic feature of which is that it is performed outside normal working hours and is additional thereto. However, the employer must notify the employee of any term of the employment contract or employment relationship pursuant to which the employee is required to work overtime. That information must be notified under the same conditions as those laid down for the essential elements of the contract expressly mentioned in Article 2(2) of the directive. It may, where appropriate,

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by analogy with the provisions of Article 2(3) of the directive concerning normal working hours, take the form of a reference to the relevant laws, regulations and administrative or statutory provisions or collective agreements. (19)

46. That option does not arise, however, where the employer proposes to alter the normal working time for each week, so that the working hours consistently exceed the maximum period which Article 6 of Directive 93/104 prescribes with a view to protecting the safety and health of workers. Member States which opt not to apply that provision undertake to fulfil the obligations imposed on them by Article 18(1)(b)(i) of the same directive.

47. The second reason why the reply to the question should be in the negative is that the condition requiring a worker's agreement is not the only condition which must be fulfilled under Article 18(1)(b)(i) in order for Article 6 not to apply. It must be recalled that the primary aim of Directive 93/104 is to safeguard the health and safety of workers, who are the most vulnerable party in an employment relationship. Quite rightly, in order to prevent an employer from obtaining from an employee, through subterfuge or intimidation, a waiver of that employee's right not to have his weekly working time extended beyond the maximum laid down, a whole series of guarantees are attached to the employee's consent; namely that the employee concerned must not be subjected to any detriment because he does not agree to work in excess of 48 hours per week under the conditions set out, that the employer must keep up-to-date records of all workers who carry out such work and whose working hours exceed the weekly maximum, that the records must be placed at the disposal of the competent authorities, and that the employer must provide the competent authorities, at their request, with information on cases in which consent has been given by workers.

The mere reference to a collective agreement in the employment contract, in the circumstances described by the Arbeitsgericht, does not fulfil those conditions.

48. The final reason why the question must receive a negative reply is that it is clear from the wording of Article 18(1)(b)(i) that the option not to apply Article 6 is not a power which is granted to the two sides of industry or to the parties to an employment contract, but rather to the Member States, who must comply with the general principles of the protection of the safety and health of workers and take the necessary measures to guarantee the result pursued, namely that consent must be express, informed and free, that a refusal to give consent must not result in any detriment, that a written record of the agreement must be kept, and that the information must be made available to the competent authorities.

49. Therefore, it is my view that Article 18(1)(b)(i) of Directive 93/104 requires Member States who opt not to apply Article 6 to take all steps necessary to ensure the achievement of certain results, which include the guarantee that no employer may require an employee to work, without that employee's consent, for more than 48 hours on average over each seven-day period. Acceptance by an employee in his contract that the working conditions are those provided for in collective agreements, which, in turn, permit the weekly working time to be extended, on average, beyond the threshold, does not constitute validly given consent for those purposes.

D - The third question

50. By this question, the German court seeks to ascertain whether the wording of Article 6 of Directive 93/104 is sufficiently precise and unconditional to enable individuals to rely on it before national courts in the event that the provisions of the directive have not been transposed into national law.

51. The Court has consistently held that, (20) whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied on by individuals against the State where that State fails to implement the directive

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in national law within the prescribed period or where it fails to implement it correctly. A Community provision is unconditional where it is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States. (21) A Community provision is sufficiently precise to be relied upon by an individual and applied by a court where it imposes an obligation in unequivocal terms. (22)

52. Article 6 of Directive 93/104 requires the Member States to take the measures necessary to ensure that, in order to meet the need to protect the safety and health of workers, the period of weekly working time is limited so that it does not exceed 48 hours on average for each seven-day period, including overtime.

The provision is drafted clearly and precisely and it does not, in principle, allow the Member States any leeway when implementing the provision in national law.

53. It must be borne in mind, however, that for the purposes of calculating the average working time, Article 16(2) provides that the reference period must not exceed four months, although, under Article 17(4), it can extend to six or 12 months.

In that connection, the Court ruled in Simap (23) that even if those provisions of Directive 93/104 leave the Member States a degree of latitude regarding the reference period for the purposes of applying Article 6, that does not alter its precise and unconditional nature, since that degree of latitude does not make it impossible to determine minimum rights. The Court went on to say that it is clear from the terms of Article 17(4) of the directive that the reference period may not exceed 12 months and that it is therefore possible to determine the minimum protection which must be provided.

54. In the light of that interpretation by the Court, even in cases where Member States derogate from the reference period laid down in Article 16(2), Article 6(2) of Directive 93/104 is clear, precise and unconditional. In addition, Article 6(2) grants rights to individuals, and, accordingly, it may be relied upon before national courts where a Member State has not implemented it correctly within the prescribed period. (24)

55. Under Article 18(1)(b)(i) of Directive 93/104, Member States have the right not to apply Article 6, from which it follows that individuals are not always in a position to rely on the direct effect of the provision.

However, in order to exercise that option, the Member States must comply with the general principles of the protection of the safety and health of workers and must also take the measures necessary to achieve the specific results listed. It is for the national court to establish whether the Member State has exercised that power and whether the conditions laid down in Article 18(1)(b)(i) have been met. (25)

56. It is well-known that the Court has consistently refused to recognise that an individual may rely on a directive against another individual where that directive has not been correctly implemented by a State within the relevant period, ruling that, under Article 249 EC, the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to each Member State to which it is addressed', from which it follows that a directive may not of itself impose obligations on an individual and that it may not therefore be relied on against that individual. (26)

57. In accordance with that case-law, the fact that the main proceedings involve disputes between individuals means that the employees are not entitled to invoke the direct effect of Article 6(2) of Directive 93/104. (27)

58. The Court has ruled, (28) in similar cases, that when applying national law, whether adopted

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before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 249 EC. Where it is seised of a dispute falling within the scope of a directive and arising from facts postdating the expiry of the period for transposing that directive, the national court must interpret the provisions of national law in such a way that they are applied in conformity with the aims of the directive.

Where it is impossible to provide an interpretation which conforms to the directive concerned, the national court must ensure the full effectiveness of Community law by setting aside on its own authority, where appropriate, any conflicting provisions of national law. The national court is not obliged to request or await the actual setting aside by the legislative authorities or by means of any other constitutional process. (29)

59. It is clear from the matters set out above that, where a Member State has not exercised the option envisaged in Article 18(1)(b)(i) of Directive 93/104, Article 6(2) of that directive precludes a provision, such as Article 7(1)(1)(a) of the German Law on working time, which allows for the extension of working hours beyond 10 hours, in a collective agreement or works agreement, where working time includes regular, significant periods of stand-by duty.

Accordingly, Article 14 of the German Red Cross Collective Agreement must be construed as meaning that, in so far as it is based on Article 7 above, the workers to whom it applies are not obliged to work in excess of 48 hours per week on average, having regard to the provisions of Article 16(2) and Article 17(4) of Directive 93/104 on the setting of the reference period for calculation of the average.

VIII - Conclusion

60. In the light of the foregoing considerations, I propose that the Court should give the following replies to the questions referred by the Arbeitsgericht Lörrach:

(1) (a) Article 1(3) of Council Directive 93/104/EEC of 23 November 1993 concerning certain aspects of the organisation of working time and Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work must be construed as meaning that the activity of rescue workers working in an emergency medical assistance service falls within the scope of both directives.

(1) (b) The concept of road transport in Article 1(3) of Directive 93/104 does not include the activity of an emergency rescue service which consists, at least in part, of driving vehicles and attending to patients during the journey.

(2) Article 18(1)(b)(i) of Directive 93/104 requires Member States who opt not to apply Article 6 to take all steps necessary to ensure that no employer may require an employee to work, without that employee's consent, for more than 48 hours on average over each seven-day period. Acceptance by an employee in his contract that the working conditions are those provided for in collective agreements which, in turn, permit the weekly working time to be extended, on average, beyond that threshold, does not constitute validly given consent for those purposes.

(3) Even in cases where Member States derogate from the reference period laid down in Article 16(2), Article 6(2) of Directive 93/104 is clear, precise and unconditional. In addition, Article 6(2) grants rights to individuals, and, accordingly, it may be relied upon before national courts where a Member State has not implemented it correctly within the prescribed period. However, in view of the fact that the main proceedings involve disputes between individuals, the employees may not invoke the direct effect of the provision.

Where a Member State has not exercised the option envisaged in Article 18(1)(b)(i) of Directive

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93/104, Article 6(2) of that directive precludes a provision, such as Article 7(1)(1)(a) of the German Law on working time, which allows for the extension of working hours to more than 10 hours in a collective agreement or works agreement, where working time includes regular, significant periods of stand-by duty. Accordingly, Article 14 of the Collective Agreement on Working Conditions for German Red Cross Employees, Workers and Trainees must be construed as meaning that, in so far as it is based on Article 7 above, the workers to whom it applies are not obliged to work in excess of 48 hours per week on average, having regard to the provisions of Article 16(2) and Article 17(4) of Directive 93/104 on the setting of the reference period for calculation of the average.

(1) .

(2) - Council Directive of 23 November 1993 (OJ 1993 L 307, p. 18).

(3) - OJ 1989 L 183, p. 1.

(4) - Case C-303/98 [2000] ECR I-7963.

(5) - Paragraphs 30 and 31 of the judgment.

(6) - Paragraphs 36 and 37 of the judgment.

(7) - Paragraphs 34 and 35 of the judgment.

(8) - That exclusion ceased to exist following the adoption of Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC to cover sectors and activities excluded from that Directive (OJ 2000 L 195, p. 41).

(9) - Judgment in Case C-173/99 [2001] ECR I-4881, paragraphs 37 and 38.

(10) - Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC.

(11) - Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport (OJ 1985 L 370, p. 1). The provisions of that directive were supplemented by Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJ 2002 L 80, p. 35), which must be implemented by no later than 23 March 2005.

(12) - Mayer, U.R., The European Legal Forum , 2001, p. 280 et seq., in particular p. 285.

(13) Judgment in Case C-133/00 [2001] ECR I-7031, paragraph 39.

(14) - In the judgment, the Court does not give any reasons explaining why it interprets differently the reference to some sectors when all are included, without distinction, in the list in Article 1(3) of Directive 93/104. Nor does the Court give a ruling in relation to another sector, namely sea fishing, which is also referred to in Article 1(3). I have confirmed that this omission is not an oversight' in the Spanish version, because no mention of the sector appears in the French and English versions either, and English was the language of procedure in the case concerned.

(15) - Case C-76/97 [1998] ECR I-5357.

(16) - Council Directive of 18 June 1992 (OJ 1992 L 209, p. 1).

(17) - Paragraph 73 of the judgment.

(18) - Council Directive of 14 October 1991 (OJ 1991 L 288, p. 32).

(19) - Judgment in Case C-350/99 Lange [2001] ECR I-1061, paragraphs 16 and 25.

(20) - Judgments in Case 8/81 Becker [1982] ECR 53, paragraph 25; Case 152/84 Marshall [1986] ECR 723, paragraph 46; Case 31/87 Beentjes [1988] ECR 4635, paragraph 40; Case 103/88 Fratelli

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Costanzo [1989] ECR 1839, paragraph 29; and Joined Cases C-6/90 and C9/90 Francovich and others [1991] ECR I-5357, paragraph 17.

(21) - Judgments in Case 28/67 Molkerei-Zentrale Westfalen [1968] ECR 211, and Case C-236/92 Comitato di coordinamento per la difesa della Cava and Others [1994] ECR I-483, paragraph 9.

(22) - Judgment in Case 71/85 Federatie Nederlandse Vakbeweging [1986] ECR 3855, paragraph 18.

(23) - Paragraph 68 of the judgment.

(24) - Judgment in Case 148/78 Ratti [1979] ECR 1629, paragraph 22.

(25) - At the hearing in Case C-151/02 Jaeger , in which the Court has also been asked to interpret certain provisions of Directive 93/104, the German Government's agent confirmed, in reply to a question put by me, that Germany has not relied on that provision in order to extend the weekly working time in the health care sector. See the Opinion which I delivered in that case on 8 April 2003.

(26) - Judgments in Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 9, Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 24; and Case C-192/94 El Corte Inglés [1996] ECR I-1281, paragraphs 16 and 17. Academic opinion has been rather critical of that case-law. See, for example, Tridimas, T., Horizontal effect of directives: a missed opportunity', European Law Review , 1994, p. 621 et seq., particularly p. 635; Turnbull, E., The ECJ Rejects Horizontal Direct Effect of Directives', European Business Law Review , 1994, p. 230 et seq., particularly p. 233; Vilà Costa, B., Revista Jurídica de Catalunya , 1995, p. 264 et seq., particularly p. 269; Bernard, N., The Direct Effect of Directives: Retreating from Marshall', Industrial Law Journal , 1994, p. 97 et seq., particularly p. 99; Turner, S., Horizontal Direct Enforcement of Directives Rejected', Northern Ireland Legal Quarterly , 1995, p. 244 et seq., particularly p. 246; Emmert, F. and Pereira de Azevedo, M., Les jeux sont faits: rien ne va plus ou une nouvelle occasion perdue pour la CJCE', Revue trimestrielle de droit européen , p. 11 et seq., particularly p. 19; Betlem, G., Medium Hard Law - Still No Horizontal Direct Effect of European Community Directives After Faccini Dori', The Columbia Journal of European Law , 1995, p. 469 et seq., particularly p. 488; Regaldo, F., Il caso Faccini Dori: una occasione perduta?', Rivista di diritto civile , 1996, p. 65 et seq., particularly p. 110; and Antoniolli Deflorian, L., Il formante giurisprudenziale e la competizioni fra il sistema comunitario e gli ordinamenti interni: la svolta inefficiente di Faccini Dori', Rivista critica di diritto privato , 1995, p. 735 et seq., particularly p. 749.

(27) - It must be pointed out that Advocate General Lenz, in the Opinion he delivered in Faccini Dori , expressed his conviction that, for the future, it was necessary to recognise, in the context of the development of case-law based on the EC Treaty and in the interests of uniform, effective application of Community law, the general applicability of precise, unconditional provisions in directives in order to respond to the legitimate expectations nurtured by citizens of the Union following the achievement of the internal market and the entry into force of the Treaty on European Union. In paragraph 47 and footnote 36, the Advocate General named several members of the Court who had spoken out in favour of the horizontal effect of directives prior to 1994.

(28) - Judgments in Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; Faccini Dori , paragraph 26; Joined Cases C240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941, paragraph 30; and Case C-456/98 Centrosteel [2000] ECR I-6007, paragraphs 16 and 17.

(29) - Judgment in Case 106/77 Simmenthal [1978] ECR 629, paragraph 25.

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JURCIT	11997E010 : N 18 23 11997E249-L3 : N 14 24 31965L0065 : N 41 31968L0151 : N 26 31971L0305 : N 41 31972L0166 : N 32 31976L0464 : N 38 31977L0091-A25 : N 31 31980L0987 : N 27 31983L0189-A08 : N 40 31983L0189-A09 : N 40 31983L0513 : N 38 31984L0005 : N 32 31986L0653 : N 34 31991Q0704(02)-A44P4 : N 3 31993L0013 : N 28 31993L0104 : N 46 31993L0104-A06PT2 : N 2 13 22 44 45 48 49 61964J0006 : N 42 61971J0048 : N 29 61977J0106 : N 42 61978J0148 : N 42 61981J0008 : N 22 61984J0152 : N 21 61984J0222 : N 23 61986J0014 : N 38 61986J0080 : N 38 61988J0103 : N 22 41 61989J0106 : N 21 24 26 61991J0101 : N 29 61992J0091 : N 24 61992J0334 : N 18 24 27 61993J0046 : N 45 61993J0441 : N 31 61994J0129 : N 32 61994J0194 : N 40 61994J0201 : N 41

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62002J0201 : N 41

SUB	Social provisions
AUTLANG	Spanish
MISCINF	AFFAIRES : 62001J0398 62001J0399 62001J0400 62001J0401 62001J0402 62001J0403
NATIONA	Federal Republic of Germany
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Notice for the OJ

Removal from the register of Case C-379/01[1]

By order of 16 September 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-379/01 (Reference for a preliminary ruling by the Bundesvergabeamt): **Ortner GmbH** v **Allgemeine Unfallversicherungsanstalt**.

_____

[1] - OJ C 3 of 5.01.2002.

Judgment of the Court (Sixth Chamber)
of 19 June 2003
Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Osterreichische Autobahnen und Schnellstraßen AG (OSAG).
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Power of the body responsible for review procedures to consider infringements of its own motion - Directive 93/36/EEC- Procedures for the award of public supply contracts - Selection criteria - Award criteria.
Case C-315/01.

In Case C-315/01,

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

Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT)

and

sterreichische Autobahnen und Schnellstraßen AG (OSAG),

on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1),

THE COURT

(Sixth Chamber),

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

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT), by S. Korn, Universitätsassistent,

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

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

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 October 2002,

gives the following

Judgment

Costs

75 The costs incurred by the Austrian Government and by the Commission, which have submitted observations

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to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 11 July 2001, hereby rules:

1. Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

2. Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

3. Directive 93/36/EEC precludes, in a procedure to award a public supply contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

1 By order of 11 July 2001, received at the Court on 13 August 2001, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (`Directive 89/665'), and of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2 Those questions were raised in proceedings between Gesellschaft für Abfallentsorgungs-Technik GmbH (`GAT') and Osterreichische Autobahnen und Schnellstraßen AG (`OSAG') concerning the award of a public supply contract for which GAT had tendered.

Legal context

Community provisions

Directive 89/665

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3 Article 1 of Directive 89/665 provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions set out in the following articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

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

4 Article 2 provides:

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

...

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [234] of [the Treaty] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period

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of office and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

Directive 93/36

5 Article 15(1) of Directive 93/36, which forms part of Chapter 1 (Common rules on participation) of Title IV, provides:

`Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 16, after the suitability of the suppliers not excluded under Article 20 has been checked by the contracting authorities in accordance with the criteria of economic and financial standing and of technical capacity referred to in Articles 22, 23 and 24.'

6 Article 23, which forms part of Chapter 2 (Criteria for qualitative selection) of Title IV, provides:

`1. Evidence of the supplier's technical capacity may be furnished by one or more of the following means according to the nature, quantity and purpose of the products to be supplied:

(a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:

- where effected to public authorities, evidence to be in the form of certificates issued or countersigned by the competent authority;

- where effected to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the supplier to have been effected;

...

(d) samples, descriptions and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;

...'.

7 Article 26, which forms part of Chapter 3 (Criteria for the award of contracts) of Title IV, states:

`1. The criteria on which the contracting authority shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

...'.

National legislation

8 Directives 89/665 and 93/36 were transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56, `the BVergG').

9 Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. It provides:

`1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance

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with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....'

10 Paragraph 115(1) and (5) of the BVergG provides:

`1. Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.

...

5. The application shall contain:

(1) an exact designation of the contract award procedure concerned and of the contested decision,

...'.

11 Under Paragraph 117(1) and (3) of the BVergG:

`1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) significantly affects the outcome of the award procedure.

...

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.'

12 Paragraph 122(1) of the BVergG provides that `in the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure.'

13 Under Paragraph 125(2) of the BVergG a claim for damages, which must be brought before the civil courts, is admissible only if the Bundevergabeamt has made a declaration under Paragraph 113(3). The civil court called upon to hear the claim for damages, and the parties to the proceedings before the Bundesvergabeamt, are bound by that declaration.

14 Pursuant to Paragraph 2(2)(c), point 40a, of the Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991 (Introductory Law to the Laws on Administrative Procedure, BGBl. 1991/50), the Allgemeines Verwaltungsverfahrensgesetz 1991 (General Law on Administrative Procedure, BGBl, 1991/51, hereinafter `the AVG') applies to the administrative procedure adopted by the Bundesvergabeamt.

15 Paragraph 39(1) and (2) of the AVG, in the version applicable to the main proceedings, provides:

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`1. The evaluation procedure shall be governed by the provisions of administrative law.

2. In so far as those provisions do not cover a matter, the authority shall proceed ex proprio motu and shall determine the procedure for the evaluation, subject to the provisions contained in this Part ...'.

The main proceedings and the questions referred for a preliminary ruling

16 On 2 March 2000 OSAG, represented by the Autobahnmeisterei (the Motorway Authority) for Sankt Michael/Lungau, issued an invitation to tender for the supply of a `special motor vehicle: new, ready-to-use and officially approved road sweeper for the A9 Phyrn motorway, delivery to the motorway authority for Kalwang', in an open European procedure.

17 The five tenders submitted were opened on 25 April 2000. GAT had submitted a tender at a price of ATS 3 547 020 excluding VAT. The tender submitted by the firm OAF & Steyr Nutzfahrzeuge OHG was ATS 4 174 290 net; that of another tenderer was ATS 4 168 690, excluding VAT.

18 As regards the evaluation of the tenders, Point B.1.13 of the invitation to tender provided:

`B.1.13 Tender evaluation

The determination of which tender is technically and economically the most advantageous shall be made in accordance with the best tenderer principle. It is a fundamental condition that the vehicles tendered satisfy the conditions in the invitation to tender.

The evaluation shall be carried out as follows:

Tenders shall be evaluated in each case by reference to the best tenderer and points shall be calculated relative to the best tenderer.

...

(2) Other criteria:

A maximum of 100 points shall be awarded for other criteria, and shall count for 20% of the overall evaluation.

2.1 Reference list of road sweeper vehicle customers in the geographical area comprising the part of the Alps within the European Union (references to be provided in German): weighting 20 points.

Evaluation formula

The highest number of customers divided by the next highest number and multiplied by 20 points.'

19 On 16 May 2000, OSAG eliminated GAT's tender on the ground that that tender did not comply with the conditions in the invitation to tender inasmuch as the pavement cleaning machine tendered could be operated only down to temperatures of 0 _C, whereas the invitation to tender had required a minimum operating temperature of -5 _C. In addition, despite a request by the contracting authority, the applicant had not arranged for the machine to be available for inspection within a 300 kilometre radius of the authority issuing the invitation to tender, as required therein. Furthermore, OSAG doubted that the price in GAT's tender was plausible. Finally, despite requests by the OSAG, GAT had not provided a sufficient explanation of the technical specifications concerning cleaning of the reflectors on the machine it had tendered.

20 In accordance with the award proposal of 31 July 2000, OAF &Steyr Nutzfahrzeuge OHG was awarded the contract by letter of 23 August 2000. By letter of 12 July 2000, the other tenderers were notified that a decision had been taken regarding the recipient of the award. GAT had been informed by letter of 17 July 2000 that its tender had been eliminated, and by letter of 5 October 2000 it was notified of the identity of the recipient of the award and the contract price.

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21 On 17 November 2000 GAT sought a review by the Bundesvergabeamt and a declaration that the award in the contract award procedure had not been made to the best tenderer, claiming that its tender had been eliminated unlawfully. The technical description included in its tender of the reflector cleaning had been sufficient for an expert. In addition, it had invited OSAG to visit its supplier's factory. GAT also contended that the award condition consisting of `the opportunity to inspect the subject of the invitation to tender within a 300 kilometre radius of the authority issuing the invitation to tender' contravened Community law because it constituted indirect discrimination. OSAG should have accepted any corresponding product in Europe. In addition, GAT argued, that criterion could be used only as an award criterion and not - as the contracting authority had subsequently wrongly used it - as a selection criterion. It was true that the basic version of the road sweeper GAT had tendered could be used only at temperatures down to 0 _C. However, OSAG had reserved the right to purchase an additional option. The additional option tendered by GAT could operate at -5 _C, as required in the invitation to tender. Finally, the price of GAT's tender was certainly not implausible. On the contrary, GAT was able to give OSAG an adequate explanation as to why its price was so favourable.

22 As the Bundesvergabeamt considered that an interpretation of several provisions of Community law was required in order to enable it to give a decision in the case before it, it decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

`1 (a) Is Article 2(8) of Directive 89/665, or any other provision of that directive or any other provision of Community law, to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from taking into account, of its own motion and independently of the submissions of the parties to the review procedure, those circumstances relevant under the law governing contract award procedures which the authority responsible for carrying out review procedures considers material to its decision in a review procedure?

(b) Is Article 2(1)(c) of Directive 89/665, if necessary considered in conjunction with other principles of Community law, to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from dismissing an application by a tenderer that is indirectly aimed at obtaining damages, where the contract award procedure is already vitiated by a substantive legal defect attributable to a decision taken by the contracting authority, other than the decision being contested by that tenderer, on the ground that if the contested decision had not been taken the tenderer would none the less have been harmed for other reasons?

2 If Question 1(a) is answered in the negative: Is Directive 93/36, in particular Articles 15 to 26 thereof, to be interpreted as prohibiting a public contracting authority conducting contract award procedures from taking account of references relating to the products offered by tenderers not as proof of the tenderers' suitability but to satisfy an award criterion, such that the fact that those references are given a negative evaluation would not exclude the tenderer from the contract award procedure but would merely result in the tender receiving a lower evaluation, for example under a points system in which poor evaluation of references might be offset by a lower price?

3 If Questions 1(a) and 2 are answered in the negative: Is it compatible with the relevant provisions of Community law, including Article 26 of Directive 93/36, the principle of equal treatment and the obligations of the Communities under public international law for an award criterion to provide that product references are to be evaluated on the basis of the number of references alone, there being no substantive examination as to whether contracting authorities' experiences of the product have been good or bad, and, moreover, that only references from the geographical area comprising

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the part of the Alps within the European Union are to be taken into account?

4 Is it compatible with Community law, in particular the principle of equal treatment, for an award criterion to permit opportunities to inspect examples of the subject of the invitation to tender to receive a positive evaluation only if available within a 300 kilometre radius of the authority issuing the invitation to tender?

5 If Question 2 is answered in the affirmative, or Question 3 or 4 in the negative: Is Article 2(1)(c) of Directive 89/665, if necessary considered in conjunction with other principles of Community law, to be interpreted as meaning that if the breach committed by the contracting authority consists in imposing an unlawful award criterion, the tenderer will be entitled to damages only if he can actually prove that, but for the unlawful award criterion, he would have submitted the best tender?'

23 The national court has also asked the Court to apply an accelerated preliminary ruling procedure under Article 104a of the Rules of Procedure, claiming that the first question arises in almost half of the review procedures brought before it and that the Verfassungsgerichtshof (Constitutional Court) has already set aside several of the Bundesvergabeamt's decisions specifically on the ground that it had raised ex proprio motu the unlawfulness of certain aspects of the award procedures at issue.

24 However, by decision of 13 September 2001, that request was denied by the President of the Court, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, on the ground that the circumstances referred to by the national court did not establish that a ruling on the questions referred to the Court was a matter of exceptional urgency.

The jurisdiction of the Court

25 On the basis of the order for reference made by the Bundesvergabeamt on 11 July 2001 in another case concerning public procurement, registered at the Court Registry under number C-314/01 and currently pending before the Court, the Commission expresses doubts as to the judicial nature of the body making the reference on the ground that it acknowledged in the order that its decisions `do not contain binding, enforceable directions addressed to the contracting authority'. In those circumstances, the Commission has doubts as to the admissibility of the questions referred for a preliminary ruling by the Bundesvergabeamt in the present proceedings in the light of the case-law of the Court, in particular Case C-134/97 Victoria Film [1998] ECR I-7023, paragraph 14, and Case C-178/99 Salzmann [2001] ECR I-4421, paragraph 14, according to which a national court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

26 It should be noted in that regard, first, that after the award of the contract the Bundesvergabeamt is competent, under Paragraph 113(3) of the BVergG, to determine whether as a result of an infringement of the relevant national legislation the contract has not been awarded to the best tenderer.

27 Secondly, it is apparent from the express wording of Paragraph 125(2) of the BVergG that a declaration made by the Bundesvergabeamt under Paragraph 113(3) of that Law not only constitutes a condition for admissibility of any claim for damages brought before the civil courts by reason of a culpable breach of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the case.

28 In those circumstances, neither the binding nature of a decision taken by the Bundevergabeamt under Paragraph 113(3) of the BVergG nor, accordingly, the judicial nature of the latter can reasonably be called into question.

29 It follows that the Court has jurisdiction to reply to the questions raised by the Bundesvergabeamt.

The admissibility of the questions referred

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30 The Austrian Government claims that Question 1(a) and Question 5 are not admissible because they were raised in proceedings brought under Paragraph 113(3) of the BVergG, which is not a review procedure within the meaning of Directive 89/665 but merely an application for a declaration.

31 It states that the Austrian legislature exercised the option offered by the second subparagraph of Article 2(6) of Directive 89/665 to provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement. However, in Austrian law the power to award such damages, for which Article 2(1)(c) of Directive 89/665 requires the Member States to make provision, was not conferred on the Bundesvergabeamt but, as is clear from Paragraphs 122 and 125 of the BVergG, on the civil courts.

32 The Austrian Government considers that in those circumstances a reply to Question 1(a) and to Question 5 is not necessary to a solution of the main proceedings.

33 The Court observes, first, that a division of the power provided for in Article 2(1)(c) of Directive 89/665 between several courts is not contrary to the directive, since Article 2(2) expressly allows the Member States to confer the powers specified in paragraph 1 of that provision on separate bodies responsible for different aspects of the review procedure.

34 Secondly, although after the award of the contract the Bundesvergabeamt is not competent to award damages to the person harmed by the infringement of Community law on public procurement or the national rules implementing that law, but only to find that as a result of that infringement the contract has not been awarded to the best tenderer, that finding, as is clear from paragraph 27 of this judgment, not only constitutes a condition for admissibility of any claim for damages brought before the civil courts by reason of a culpable infringement of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the case.

35 In those circumstances, it must be concluded that the Bundesvergabeamt, even if it is hearing a case brought under Paragraph 113(3) of the BVergG, conducts a review procedure as required by Directive 89/665 and, as has already been seen in paragraph 28 of this judgment, is called upon to adopt a binding decision.

36 Furthermore, as is confirmed by Paragraph 117(3) of the BVergG, in proceedings brought under Paragraph 113(3) of that Law the Bundesvergabeamt is competent to determine the existence of the alleged infringement. It is possible that, in the exercise of that competence, it may consider it necessary to refer questions to the Court for a preliminary ruling.

37 Where such questions, which the Bundesvergabeamt considers necessary to enable it to determine the existence of illegality, concern the interpretation of Community law they cannot be declared inadmissible (see to this effect, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38, and Case C-153/00 Der Weduwe [2002] ECR I-11319, paragraph 31).

38 On the other hand, the Bundesvergabeamt, which is not directly competent to award damages to persons harmed by unlawfulness, is not entitled to refer to the Court for a preliminary ruling questions relating to the award of damages or the conditions for awarding them.

39 It is thus clear that all the questions referred for a preliminary ruling in this case by the Bundesvergabeamt are admissible except Question 5, which specifically seeks to know under what conditions a tenderer who claims to have been harmed by the adoption of an unlawful award criterion is entitled to damages.

Questions 1(a) and 1(b)

40 In its order for reference, the Bundesvergabeamt states that it is clear from Paragraphs 113(3)

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and 115(1) of the BVergG that in a review procedure following the award of a contract it must examine the contested award decision as to its lawfulness, but can grant the application only if it is the contested unlawful decision that has caused the contract not to be awarded to the best tenderer within the meaning of that Law. Therefore, if the award procedure is already fundamentally unlawful because of another (possibly earlier) decision by the contracting authority, as a result of which the applicant is not in any event the best tenderer within the meaning of the Law, and the applicant has not contested that other decision of the contracting authority in the review procedure, an application for review cannot be granted. In such a case, the applicant has not been `harmed' by the contested infringement within the meaning of Article 2(1)(c) of Directive 89/665 because the harm, which may take the form of wasted tender costs, was caused by another infringement by the contracting authority.

41 The Bundesvergabeamt also points out that under Paragraph 39(2) of the AVG it must determine the relevant facts ex proprio motu and therefore consider ex proprio motu whether in the main proceedings award criteria other than that of the `inspection opportunity' contested by the applicant are lawful. It also points out that according to a judgment of the Austrian Verfassungsgerichtshof of 8 March 2001 (B 707/00) the question as to the applicability of rules of procedure characterised by the ex proprio motu principle - which enable the review body to take account of facts that are material under the law relating to contract award procedures, irrespective of the submissions of the parties - is likely to raise, in the light of the principle laid down in the second subparagraph of Article 2(8) of Directive 89/665 that both parties must be heard in the review procedure, certain problems of Community law, making a reference to the Court under the third paragraph of Article 234 EC mandatory.

42 The Bundesvergabeamt states that it is that precedent of the Verfassungsgerichtshof which has induced it to refer Question 1(a) and (b), even though it is itself fully aware that the requirement that both sides be heard in the procedure - which stems not from the second subparagraph of Article 2(8) of Directive 89/665, which applies only to `independent review bodies', but from the requirements imposed on a court within the meaning of Article 234 EC - is not inconsistent with the ex proprio motu rule applicable in administrative procedures, and that the Court has already implicitly found that the Bundesvergabeamt conducts a procedure in which both sides are heard, since it has recognised its right to refer questions for preliminary rulings.

43 It follows from the foregoing considerations, and from the legislation of which they form part, that by Questions 1(a) and (b) the national court is asking in essence whether Directive 89/665 precludes the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was, in any event, unlawful and that the harm the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

44 In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraphs 33 and 34, and Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 74).

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45 However, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of Community law concerning public contracts (see, in particular, Case C-327/00 Santex [2003] ECR I-1877, paragraph 47).

46 If there is no specific provision governing the matter, it is therefore for the domestic law of each Member State to determine whether, and in what circumstances, a court responsible for review procedures may raise ex proprio motu unlawfulness which has not been raised by the parties to the case brought before it.

47 Neither the aims of Directive 89/665 nor the requirement it lays down that both parties be heard in review procedures precludes the introduction of that possibility in the domestic law of a Member State.

48 Firstly, it cannot be inconsistent with the objective of that directive, which is to ensure compliance with the requirements of Community law on public procurement by means of effective and swift review procedures, for the court responsible for the review procedures to raise ex proprio motu unlawfulness affecting an award procedure, without waiting for one of the parties to do so.

49 Secondly, the requirement that both parties be heard in review procedures does not preclude the court responsible for those procedures from being able to raise ex proprio motu unlawfulness which it is the first to find, but simply means that before giving its ruling the court must observe the right of the parties to be heard on the unlawfulness raised ex proprio motu.

50 It follows that Directive 89/665 does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer.

51 However, it does not necessarily follow that the court may dismiss an application by a tenderer on the ground that, by reason of the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

52 Firstly, as is apparent from the case-law of the Court, Article 1(1) of Directive 89/665 applies to all decisions taken by contracting authorities which are subject to the rules of Community law on public procurement (see inter alia Case C-92/00 HI [2002] ECR I-5553, paragraph 37, and Case C-57/01 Makedoniko Metro and Michaniki [2003] ECR I-1091, paragraph 68) and makes no provision for any limitation as regards the nature and content of those decisions (see inter alia the judgments cited above in Alcatel Austria, paragraph 35, and HI, paragraph 49).

53 Secondly, among the review procedures which Directive 89/665 requires the Member States to introduce for the purposes of ensuring that the unlawful decisions of contracting authorities may be the subject of review procedures which are effective and as swift as possible is the procedure enabling damages to be granted to the person harmed by an infringement, which is expressly stated in Article 2(1)(c).

54 Therefore, a tenderer harmed by a decision to award a public contract, the lawfulness of which he is contesting, cannot be denied the right to claim damages for the harm caused by that decision on the ground that the award procedure was in any event defective owing to the unlawfulness, raised ex proprio motu, of another (possibly previous) decision of the contracting authority.

55 That conclusion is all the more obvious if a Member State has exercised the power conferred on Member States by the second subparagraph of Article 2(6) of Directive 89/665 to limit, after

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the conclusion of the contract following the award, the powers of the court responsible for the review procedures to award damages. In such cases, the unlawfulness alleged by the tenderer cannot be subject to any of the penalties provided for under Directive 89/665.

56 In the light of all the foregoing considerations, the reply to be given to Question 1 is that Directive 89/665 does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. However, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

Question 2

57 It is clear from paragraph 18 of this judgment, and from the wording of Question 3, that the call for tenders at issue in the main proceedings specified that in order to evaluate the tenders so as to determine which offer was the most economically advantageous the contracting authority had to take account of the number of references relating to the product offered by the tenderers to other customers, without considering whether the customers' experiences of the products purchased had been good or bad.

58 In those circumstances, Question 2 should be understood as seeking to ascertain whether Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

59 According to the scheme of Directive 93/36, in particular Title IV, the examination of the suitability of contractors to deliver the products which are the subject of the contract to be awarded and the awarding of the contract are two different operations in the procedure for the award of a public works contract. Article 15(1) of Directive 93/36 provides that the contract is to be awarded after the supplier's suitability has been checked (see to this effect, regarding public works contracts, Case 31/87 Beentjes [1988] ECR 4635, paragraph 15).

60 Even though Directive 93/36, which, according to the fifth and sixth recitals, is intended to achieve the coordination of national procedures for the award of public supply contracts while taking into account, as far as possible, the procedures and administrative practices in force in each Member State, does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules (see to this effect Beentjes, cited above, paragraph 16).

61 Article 15(1) of the directive provides that the suitability of tenderers is to be checked by the contracting authority in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 22, 23 and 24 of the directive. The purpose of these articles is not to delimit the power of the Member States to fix the level of financial and economic standing and technical knowledge required in order to take part in procedures for the award of public works contracts, but to determine the references or evidence which may be furnished in order to establish the suppliers' financial or economic standing and technical knowledge or ability (see to this effect Beentjes, cited above, paragraph 17).

62 As far as the criteria which may be used for the award of a public contract are concerned, Article 26(1) of Directive 93/36 provides that the authorities awarding contracts must base their decision

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either on the lowest price only or, when the award is made to the most economically advantageous tender, on various criteria according to the contract involved, such as price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

63 As is apparent from the wording of that provision, in particular the use of the expression `e.g.', the criteria which may be accepted as criteria for the award of a public contract to what is the most economically advantageous tender are not listed exhaustively (see to this effect, regarding public works contracts, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 35, and, regarding public service contracts, Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, paragraph 54).

64 However, although Article 26(1) of Directive 93/36 leaves it to the contracting authority to choose the criteria on which it intends to base its award of the contract, that choice may relate only to criteria aimed at identifying the offer which is the most economically advantageous (see to this effect Beentjes, paragraph 19, SIAC Construction, paragraph 36, and Concordia Bus Finland, paragraph 59).

65 However, the fact remains that the submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included among the references or evidence which, under Article 23(1)(a) of Directive 93/36, may be required to establish the suppliers' technical capacity.

66 Furthermore, a simple list of references, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the suppliers' previous customers without other details relating to the deliveries effected to those customers cannot provide any information to identify the offer which is the most economically advantageous within the meaning of Article 26(1)(b) of Directive 93/36, and therefore cannot in any event constitute an award criterion within the meaning of that provision.

67 In the light of the foregoing considerations, the reply to be given to the second question is that Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

Question 3

68 Since this question was predicated upon a negative reply to the second question, it need not be answered.

Question 4

69 By its fourth question, the national court is asking, in essence, whether Community law, in particular the principle of equal treatment, precludes a criterion for the award of a public supply contract according to which a tenderer's offer may be favourably assessed only if the product which is the subject of the offer is available for inspection by the contracting authority within a radius of 300 km of the authority.

70 The reply must be that such a criterion cannot constitute a criterion for the award of the contract.

71 Firstly, it is apparent from Article 23(1)(d) of Directive 93/36 that for public supply contracts the contracting authorities may require the submission of samples, descriptions and/or photographs of the products to be supplied as references or evidence of the suppliers' technical capacity to carry out the contract concerned.

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72 Secondly, a criterion such as that which is the subject of Question 4 cannot serve to identify the most economically advantageous offer within the meaning of Article 26(1)(b) of Directive 93/36 and therefore cannot, in any event, constitute an award criterion within the meaning of that provision.

73 In those circumstances, it is not necessary to consider whether that criterion is also contrary to the principle of equal treatment, which, as the Court has repeatedly held, underlies the directives on procedures for the award of public contracts (see, inter alia, the judgments in HI, paragraph 45, and Universale-Bau, paragraph 91).

74 In the light of the foregoing considerations, the reply to be given to Question 4 is that Directive 93/36 precludes, in a procedure to award a public supply contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

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31993L0036 : N 1 58 67 74
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61998J0081 : N 44 52
61998J0379 : N 37
61999J0178 : N 25
61999J0470 : N 44 73
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62000J0092 : N 52 73
62000J0153 : N 37
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Diman, Paolo: Diritto pubblico comparato ed europeo 2003 p.2013-2018
Dischendorfer, Martin: Public Procurement Law Review 2004 p.NA39-NA46
Muzina, Aleksij: Evropsko pravo in praksa 2004 nAo 4 p.37-38

PROCEDU Reference for a preliminary ruling

ADVGEN Geelhoed

JUDGRAP Schintgen

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Judgment of the Court (Sixth Chamber)
of 18 March 2004
Siemens AG Osterreich and ARGE Telekom & Partner v Hauptverband der österreichischen Sozialversicherungsträger.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Effects of a decision by the body responsible for review procedures annulling the decision by the contracting authority not to revoke the procedure by which a contract was awarded - Restriction on the use of subcontracting.
Case C-314/01.

In Case C-314/01,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that tribunal between

Siemens AG Osterreich,

ARGE Telekom & Partner

and

Hauptverband der österreichischen Sozialversicherungsträger,

joined party:

Bietergemeinschaft EDS/ORGA,

on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Sixth Chamber)

composed of: V. Skouris, acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: L.A. Geelhoed,

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

after considering the written observations submitted on behalf of:

- ARGE Telekom & Partner, by M. Ohler, Rechtsanwalt,

- Hauptverband der österreichischen Sozialversicherungsträger, by G. Lansky, Rechtsanwalt,

- Bietergemeinschaft EDS/ORGA, by R. Regner, Rechtsanwalt,

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

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

having regard to the Report for the Hearing,

after hearing the oral observations of Hauptverband der österreichischen Sozialversicherungsträger, represented by T. Hamerl, Rechtsanwalt; of the Austrian Government, represented by M. Fruhmann; and the Commission, represented by M. Nolin, assisted by R. Roniger, at the hearing on 18 September 2003,

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

20 November 2003,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT (Sixth Chamber)

in answer to the questions referred to it by the Bundesvergabeamt by order of 11 July 2001, hereby rules:

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and in particular Articles 1(1) and 2(7) thereof, must be construed as meaning that, in the case where a clause in an invitation to tender is incompatible with Community rules on public contracts, the national legal systems of the Member States must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

1. By order of 11 July 2001, received at the Court on 9 August 2001, the Bundesvergabeamt (Austrian Federal Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (Directive 89/665').

2. Those questions have arisen in a dispute between the companies Siemens AG (Siemens') and ARGE Telekom & Partner (ARGE Telekom'), on the one hand, and, on the other, the Hauptverband der österreichischen Sozialversicherungsträger (Central Association of Austrian Social Security Institutions) (the Hauptverband'), in its capacity as contracting authority, concerning an adjudication procedure for the award of a public supply and service contract.

Legal framework

Community law

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

The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions set out in the following articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public

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procurement or national rules implementing that law.'

4. Article 2 of Directive 89/665 sets out in this regard the obligations devolving on Member States. Article 2(1), (6) and (7) provides:

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.'

5. Directive 92/50 sets out common rules on participation in the procedure for the award of public service contracts. These include the possibility of sub-contracting part of the contract to third parties. Thus, Article 25 of Directive 92/50 provides:

In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

This indication shall be without prejudice to the question of the principal service provider's liability.'

6. Directive 92/50 also sets out qualitative selection criteria which make it possible to determine the candidates admitted to participate in the procedure for the award of a public service contract. Article 32 of Directive 92/50 is worded as follows:

1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

...

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

...

(h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

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3. The contracting authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.

...'

National legislation

7. Directives 89/665 and 92/50 were transposed in Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Procurement Law), BGBl. I 1997/56, in the version published in BGBl. I 2000/125 (the BVergG').

8. Paragraph 31 of the BVergG, relating to services to be performed by subcontracting undertakings, provides:

1. The documents relating to the invitation to tender shall specify whether subcontracting is permitted. The subcontracting of the whole contract is not permitted except in the case of purchase agreements and subcontracting to undertakings associated with the contractor. In the case of building contracts the subcontracting of the majority of the services constituting the object of the undertaking is not permitted. ... The contracting authority shall ensure that the contractor's subcontractors themselves perform the greater part of contracts subcontracted to them. In exceptional cases the contracting authority may specify in the contract documents, stating its reasons, that it is permissible for the majority of the contract to be subcontracted. Subcontracting parts of the contract is, moreover, permitted only if the subcontractor is qualified to perform his share of the work.

2. The contracting authority should ask the tenderer in the documents relating to the invitation to tender to indicate in his tender the proportion of the contract which he may intend to subcontract to third parties. This information shall be without prejudice to the issue of the contractor's liability.'

9. Paragraph 40(1) of the BVergG, which concerns the withdrawal of an invitation to tender, provides as follows:

During the tendering period the invitation to tender may be withdrawn for compelling reasons, especially if before the end of the tendering period circumstances become known which, had they been known earlier, would not have led to an invitation to tender or would have led to an invitation to tender essentially different in substance.'

10. Paragraph 52 et seq. of the BVergG deals with the examination of tenders. Paragraph 52(1) provides:

Before the contracting authority proceeds to the selection of the tender qualifying for the award of the contract, it should immediately eliminate the following tenders on the basis of the results of the assessment:

...

(9) tenders received from applicants who, immorally or contrary to the principle of effective competition, have come to agreements with other applicants which are disadvantageous to the contracting authority;

...'.

11. Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. Paragraph 113(2) and (3) provides:

2. In order to preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

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(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....'

12. Under Paragraph 117(1) and (3) of the BVergG:

1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) significantly affects the outcome of the award procedure.

...

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.'

13. Under Paragraph 125(2) of the BVergG a claim for damages, which must be brought before the civil courts, is admissible only if there has been a prior determination by the Bundesvergabeamt under Paragraph 113(3) of the BVergG. The civil court which is required to rule on such a claim for damages is bound by that determination, as are the parties to the proceedings before the Bundesvergabeamt.

14. Article 879(1) of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code) provides:

A contract shall be null and void if it infringes a statutory prohibition or is contrary to acceptable moral values.'

The dispute in the main proceedings and the questions referred for preliminary ruling

15. On 21 September 1999 the Hauptverband announced in the supplement to the Official Journal of the European Communities that it intended to initiate a two-stage contract award procedure for the award of a contract for the design, planning and implementation of a smart-card-based electronic data processing system, including the delivery, initialisation, personalisation, distribution and disposal of cards throughout Austria, delivery, installation and maintenance of sector terminals, support for a call-centre unit, card management and other services necessary for the operation of the system.

16. On 22 February 2000 the Hauptverband decided to invite five of the six groups of candidates which had taken part in the first phase of the procedure to submit tenders. At the same time the Hauptverband decided to eliminate the sixth candidate. Point 1.8 of the invitation to tender of 15 March 2000, which replicated Point 1.9 of the contract notice of 21 September 1999, stated:

A maximum of 30% of the services may be subcontracted, provided that the characteristic parts of the contract, namely, project management, system design, development, construction, delivery and management of the central components of the overall system specific to the project development, delivery and management of the life-cycle of the cards and development and delivery of the terminals remain with the tenderer or tender consortium'.

17. According to the order for reference, this clause, which stresses the personal responsibility of the card provider, was retained in order to guarantee proper technical performance of the contract.

18. Three of the four tender consortia which submitted tenders, namely, Siemens, ARGE Telekom and Debis Systemhaus Osterreich GmbH (Debis'), included the card provider Austria Card, Plastikkard

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und Ausweissysteme GmbH (Austria Card'), which was to be responsible for supplying the cards. The fourth consortium, to which Austria Card did not belong, was Bietergemeinschaft EDS/ORGA (EDS/ORGA'); which consisted of the undertakings Electronic Data Systems (EDS Austria) GmbH, Electronic Data Systems (EDS Deutschland) GmbH and ORGA Kartensysteme GmbH.

19. By letter of 18 December 2000, the first three tender consortia were informed that the Hauptverband was minded to award the contract to EDS/ORGA.

20. After having unsuccessfully attempted to have arbitration proceedings instituted before the Bundesvergabekontrollkommission (Federal Procurement Review Commission), the three unsuccessful consortia lodged review applications with the Bundesvergabeamt in which they sought, principally, annulment of the decision of the Hauptverband to award the contract to EDS/ORGA and, in the alternative, cancellation of the invitation to tender.

21. By decision of 19 March 2001, the Bundesvergabeamt dismissed all of the review applications brought before it as being inadmissible on the ground of lack of locus standi and interest in bringing proceedings inasmuch as the applicants' tenders ought in any event to have been eliminated by the Hauptverband pursuant to Paragraph 52(1) of the BVergG on the ground that Austria Card's membership of the three tender consortia in question was liable to distort free competition by reason of the exchange of information and negotiations on the terms of the tenders which such threefold membership made possible.

22. It appears from the case-file that this decision of the Bundesvergabeamt was annulled by judgment of the Verfassungsgerichtshof (Austrian Constitutional Court) of 12 June 2001 on the ground that the constitutional rights of the three consortia in question to have their case properly adjudged before a judicial body had been infringed inasmuch as the Bundesvergabeamt had, prior to taking its decision, failed to refer the matter to the Court of Justice for a preliminary ruling.

23. On 28 and 29 March 2001, Debis and ARGE Telekom lodged a second series of review applications before the Bundesvergabeamt in which they sought, inter alia, annulment of the Hauptverband's decision refusing to cancel the invitation to tender and, by way of interim measure, a prohibition on awarding the contract during a period of two months calculated from the instigation of proceedings, in the case of the application brought by Debis, or until such time as the Bundesvergabeamt had reached its decision in the main proceedings, in regard to the application brought by ARGE Telekom.

24. By decision of 5 April 2001, the Bundesvergabeamt, ruling on the applications for interim measures, prohibited the Hauptverband from awarding the contract until 20 April 2001.

25. By decision of 20 April 2001, the Bundesvergabeamt upheld the principal applications of Debis and ARGE Telekom and, pursuant to Paragraph 113(2)(2) of the BVergG, annulled the decision of the Hauptverband not to cancel the invitation to tender. As the essential grounds for its decision, it stated that the invitation to tender included an unlawful selection criterion inasmuch as the prohibition of subcontracting set out in Point 1.8 of the invitation to tender infringed the subcontractor's right, derived from Community legislation as interpreted by the Court (see, inter alia, Case C-176/98 Holst Italia [1999] ECR I8607), also to have recourse to a subcontractor in order to justify its capacity to perform the contract in question. In the present case, if the invitation to tender had not laid down this condition, the consortia which had been eliminated could have had recourse to a subcontractor for the supply of the cards.

26. Notwithstanding that decision, the Hauptverband decided, on 23 April 2001, to award the contract to EDS/ORGA. As it took the view that the effects of the interim measure adopted on 5 April 2001 by the Bundsvergabeamt had expired on 20 April 2001 without being extended and that the Bundesvergabeamt's decision of 20 April 2001 contained no more than a statement on setting aside the failure to cancel' which was difficult to understand, the Hauptverband took the view that no legally binding decision

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had been taken that its own decision to award the contract to the tender consortium which had submitted the lowest tender was invalid or ought to have been annulled.

27. The Hauptverband also decided to bring proceedings before the Verfassungsgerichtshof for annulment of the decision taken by the Bundesvergabeamt on 20 April 2001. According to the case-file forwarded by the Bundesvergabeamt and the observations lodged with the Court, the Verfassungsgerichtshof initially rejected, by order of 22 May 2001, the request by the Hauptverband that its application be recognised as having the effect of suspending operation of that decision, on the ground that the disputed contract had in any event already been awarded, and, subsequently, by judgment of 2 March 2002, the Verfassungsgerichtshof annulled that decision on the ground that it was logically impossible to annul a decision requiring something not to be done and that the proceedings brought by Debis and ARGE Telekom to secure that end ought to have been declared inadmissible.

28. On 30 April 2001, Siemens brought a fresh application before the Bundesvergabeamt by which it sought the annulment of several decisions taken by the Hauptverband after its decision to award the contract to EDS/ORGA. Siemens essentially argued in these proceedings that the annulment by the Bundesvergabeamt of the decision by the contracting authority not to annul the contract award procedure rendered unlawful the Hauptverband's decision to award the contract because it took place within the context of a second award procedure which had not been publicised in the requisite manner.

29. On 17 May 2001 ARGE Telekom also applied for annulment of 11 decisions taken by the Hauptverband after the latter had decided not to annul the disputed award procedure notwithstanding the decision of the Bundesvergabeamt of 20 April 2001.

30. As it took the view that resolution of this third series of disputes required an interpretation of several provisions of Directive 89/665, the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Is ... Directive 89/665... , and in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7) thereof, to be interpreted as meaning that the legal effect of a decision taken by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contracting authority's decision not to cancel a contract award procedure is that if national law does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the contract award procedure is automatically terminated by the national review body's decision, without the need for any further act by the contracting authority?

(2) Is Directive 89/665, in particular Article 2(7) thereof, if necessary in conjunction with... Directive 92/50... , in particular Articles 25 and 32(2)(c) thereof, or any other provisions of Community law, in particular having regard to the effet utile doctrine relating to the interpretation of Community law, to be construed as meaning that a provision in an invitation to tender which prohibits subcontracting material parts of the service concerned and, contrary to the case-law of the Court of Justice, in particular Case C-176/98 Holst Italia [1999] ECR I-8607, prevents the tenderer from using his contract with his subcontractor to prove that the services of a third party are actually available to him and which thus deprives him of his right to prove his own capability by relying on the services of a third party or to prove that he actually has available a third party's services, is so clearly contrary to Community law that a contract concluded on the basis of such an invitation to tender is to be regarded as invalid, in particular where national law in any case provides that illegal contracts are invalid?

(3) Is Directive 89/665, in particular Article 2(7) thereof, or any other provision of Community law, in particular having regard to the effet utile doctrine relating to the interpretation of

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Community law, to be construed as meaning that a contract concluded contrary to a decision by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contracting authority's decision not to cancel a contract award procedure is invalid, in particular where national law in any case provides that immoral or illegal contracts are void but does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority?

(4a) Is Directive 89/665, in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7), to be interpreted as meaning that where national law does not otherwise provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the review body has, by virtue of the direct application of Article 2(1)(b) in conjunction with Article 2(7), the power to issue a compulsory, enforceable order to the contracting authority to ensure that the unlawful decision is set aside, even though national law authorises the review body to issue only non-compulsory, non-enforceable orders to set aside contracting authorities' decisions in tenderers' applications for review within the meaning of Article 1(1) of Directive 89/665?

(4b) If Question 4a is answered in the affirmative: does Article 2(7) of Directive 89/665, if necessary in conjunction with other provisions of Community law, give the review body the power in such a case to threaten contracting authorities and the members of their executive organs with, and to impose on them, such fines or fines and imprisonment by way of coercive penalties as are necessary to enforce their orders and are calculated in accordance with judicial discretion, where the contracting authorities and the members of their executive organs do not comply with the orders issued by the review body?'

The admissibility of the reference for a preliminary ruling

31. It is clear from all of the questions submitted by the Bundesvergabeamt that the latter is unsure as to the compatibility with Directive 89/665 of the procedural rules contained in the Austrian legislation governing public contracts inasmuch as those rules are not adequate effectively to guarantee implementation of the decisions taken by the body responsible for review proceedings as, in the case in the main proceedings, notwithstanding the decision of the Bundesvergabeamt of 20 April 2001 setting aside the Hauptverband's decision not to annul the call for tenders, the contract in dispute was none the less awarded to EDS/ORGA.

32. It is common ground that the Verfassungsgerichtshof, by judgment of 2 March 2002, annulled the decision of 20 April 2001 taken by the Bundesvergabeamt.

33. According to settled case-law in this regard, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts (see, inter alia, Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 14, and Case C-112/00 Schmidberger [2003] ECR I5659, paragraph 30, and the case-law cited therein).

34. In the context of that cooperation, it is for the national court or tribunal seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Lourenço Dias , cited above, paragraph 15, Case C390/99 Canal Satélite Digital [2002] ECR I607, paragraph 18, and Schmidberger , cited above, paragraph 31).

35. The fact none the less remains that it is for the Court, if need be, to examine the circumstances in which the case was referred to it by the national court or tribunal, in order to assess whether it has jurisdiction and in particular to determine whether the interpretation of Community law

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which is requested bears any relation to the actual nature and subject-matter of the main proceedings, in order that the Court will not be required to give opinions on general or hypothetical questions. If it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment (Case 244/80 Foglia [1981] ECR 3045, paragraph 21; Lourenço Dias , paragraph 20; Canal Satélite Digital , cited above, paragraph 19; and judgment of 30 September 2003 in Case C167/01 Inspire Art [2003] ECR I0000, paragraphs 44 and 45).

36. In the light of the foregoing, it is appropriate to examine whether the questions referred by the Bundesvergabeamt have remained relevant for the resolution of the disputes in the main proceedings, even though the Verfassungsgerichtshof annulled the Bundesvergabeamt's decision of 20 April 2001.

37. In this regard, it is clear from the order for reference that it is the fact that this decision of 20 April 2001 was not mandatorily enforceable in Austrian law that provided the essential grounds for the present request for a preliminary ruling, with the result that, since the annulment of that decision, those questions have become purely hypothetical, as is, moreover, emphasised by the Verfassungsgerichtshof in its judgment of 2 March 2002.

38. It must, however, be acknowledged that the possibility cannot be discounted that a reply to the second question, which incidentally concerns the scope of the Holst Italia judgment, will have a bearing on the resolution of the disputes in the main proceedings, particularly in the event that those disputes, following a finding that the award procedure followed by the Bundesvergabeamt pursuant to Paragraph 113(3) of the BVergG, was unlawful, were to be continued before the civil courts, which, under Austrian legislation, are the courts having jurisdiction to rule on a claim for compensation following the award of a contract.

39. In the light of the foregoing, the first, third and fourth questions need not be answered and the Court's reply should be confined to the second question.

The second question

40. By this question, the Bundesvergabeamt is seeking essentially to ascertain whether Article 2(7) of Directive 89/665, read in conjunction with Articles 25 and 32(2)(c) of Directive 92/50, must be construed as meaning that a contract concluded at the end of the procedure for the award of a public supply and service contract, the proper conduct of which is affected by the incompatibility with Community law of a provision in the invitation to tender, must be treated as void if the applicable national law declares contracts that are illegal to be void.

41. This question is based on the premiss that a provision in an invitation to tender which prohibits recourse to subcontracting for material parts of the contract is contrary to Directive 92/50, as interpreted by the Court in Holst Italia.

42. It must be borne in mind in this regard that Directive 92/50, which is designed to eliminate obstacles to the freedom to provide services in the award of public service contracts, expressly envisages, in Article 25, the possibility for a tenderer to subcontract a part of the contract to third parties, as that provision states that the contracting authority may ask that tenderer to indicate in its tender any share of the contract which it may intend to subcontract. Furthermore, with regard to the qualitative selection criteria, Article 32(2)(c) and (h) of Directive 92/50 makes express provision for the possibility of providing evidence of the technical capacity of the service provider by means of an indication of the technicians or technical bodies involved, whether or not belonging directly to the undertaking of that service provider, and which the latter will have available to it, or by indicating the proportion of the contract which the service provider may intend to subcontract.

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43. As the Court ruled in paragraphs 26 and 27 of Holst Italia , it follows from the object and wording of those provisions that a party cannot be eliminated from a procedure for the award of a public service contract solely on the ground that that party proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities. This means that it is permissible for a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a public service contract to rely, vis-à-vis the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract.

44. However, according to the Court, the onus rests on a service provider which relies on the resources of entities or undertakings with which it is directly or indirectly linked, with a view to being admitted to participate in a tendering procedure, to establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (Holst Italia , paragraph 29).

45. As the Commission of the European Communities has correctly pointed out, Directive 92/50 does not preclude a prohibition or a restriction on the use of subcontracting for the performance of essential parts of the contract precisely in the case where the contracting authority has not been in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer.

46. It follows that the premiss on which the second question is based would prove to be accurate only if it were to be established that Point 1.8 of the invitation to tender prohibits, during the phase of the examination of the tenders and the selection of the successful tenderer, any recourse by the latter to subcontracting for the provision of essential services under the contract. A tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if the contract is awarded to it may be excluded only if it fails to demonstrate that those capacities are in fact available to it.

47. Point 1.8 of the invitation to tender does not appear to relate to the examination and selection phase of the procedure for award of the contract, but rather to the phase of performance of that contract and is designed precisely to avoid a situation in which the performance of essential parts of the contract is entrusted to bodies whose technical and economic capacities the contracting authority was unable to verify at the time when it selected the successful tenderer. It is for the Bundesvergabeamt to establish whether that is indeed the case.

48. If it were to transpire that a clause in the invitation to tender is in fact contrary to Directive 92/50, in particular inasmuch as it unlawfully prohibits recourse to subcontracting, it would then be sufficient to point out that, under Articles 1(1) and 2(7) of Directive 89/665, Member States are required to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible in the case where those decisions may have infringed Community law in the area of public procurement.

49. It follows that, in the case where a clause in the invitation to tender is incompatible with Community rules on public contracts, the national legal system of the Member State must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

50. The answer to the second question must therefore be that Directive 89/665, and in particular Articles 1(1) and 2(7) thereof, must be construed as meaning that, in the case where a clause in an invitation to tender is incompatible with Community rules on public contracts, the national legal systems of the Member States must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

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DOCNUM	62001J0314
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2001 ; J ; judgment
PUBREF	European Court reports 2004 Page 00000
DOC	2004/03/18
LODGED	2001/08/09
JURCIT	61980J0244 : N 35 31989L0665-A01P1 : N 3 48 50 31989L0665-A02P1 : N 4 31989L0665-A02P1LB : N 30 31989L0665-A02P6 : N 4 31989L0665-A02P7 : N 4 30 40 48 50 31989L0665-A02P8 : N 30 31989L0665 : N 1 31 49 61990J0343 : N 33 - 35 31992L0050-A25 : N 5 40 42 31992L0050-A32 : N 5 30 31992L0050-A32P2LC : N 30 40 42 31992L0050-A32P2LH : N 42 31992L0050 : N 1 45 48 11997E234 : N 33 61998J0176 : N 41 44 61999J0390 : N 34 35 62000J0112 : N 33 34 62001J0167 : N 35
CONCERNS	Interprets 31989L0665-A01P1 Interprets 31989L0665-A02P7
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	German
OBSERV	Austria ; Member States ; Commission ; Institutions
NATIONA	Austria
NATCOUR	*A9* Bundesvergabeamt, BeschluA*ƒ* vom 27/07/2001
NOTES	Muzina, Aleksij: Evropsko pravo in praksa 2004 nAo 3 p.57-58 Boesen, Arnold ; Upleger, Martin: Neue Zeitschrift fAîr Verwaltungsrecht 2004 p.919-924 Novak-Stief, Monika: European Law Reporter 2004 p.158-160

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Geelhoed
JUDGRAP	Schintgen
DATES	of document: 18/03/2004 of application: 09/08/2001

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Notice for the OJ

Correction to the Official Journal notice in Case C-310/01

(Official Journal of the European Union C 55 of 8 March 2003)

In the Official Journal notice in Case C-310/01 Comune di Udine, Azienda Multiservizi SpA (AMGA) and Diddi Dino Figli Srl, Associazione Nazionale Imprese Gestione servizi tecnici integrati (AGESI), the text should be replaced by the following:

Order of the Court (Fourth Chamber) of 14 November 2002 (reference for a preliminary ruling from the Consiglio di Stato): Comune di Udine, Azienda Multiservizi SpA (AMGA) and Diddi Dino Figli Srl, Associazione Nazionale Imprese Gestione servizi tecnici integrati (AGESI) [1]

(Article 104(3) of the Rules of Procedure - Question to which the answer may be clearly deduced from the case-law - Directive 92/50/EEC - Public contracts concerning both products and services - Value of the products greater than that of the services - Application of Directive 93/36/EEC)

(Language of the case: Italian)

In Case C-310/01: reference to the Court under Article 234 EC from the Consiglio di Stato (Italy) for a preliminary ruling in the proceedings pending before that court between Comune di Udine, Azienda Multiservizi SpA (AMGA) and Diddi Dino Figli Srl, Associazione Nazionale Imprese Gestione servizi tecnici integrati (AGESI) - on the interpretation of Articles 1(b), 2 and 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) - the Court (Fourth Chamber), composed of: C.W.A. Timmermans (Rapporteur), President of the Chamber, D.A.O. Edward and S. von Bahr, Judges; S. Alber, Advocate General; R. Grass, Registrar, has made an order on 11 November 2002, in which it has ruled:

Article 2 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that that directive does not apply to a public contract which concerns both products within the meaning of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and services within the meaning of Directive 92/50 if the value of the products included in the contract is greater than that of the services provided.

Directive 93/36 applies to such a contract unless the contracting authority exercises over the supplier a control which is similar to that which it exercises over its own departments and the supplier carries out the essential parts of its activities with the controlling contracting authority or authorities.

_____

[1] - OJ C 289 of 13.10.2001.

Judgment of the Court (Sixth Chamber)
of 16 October 2003
Commission of the European Communities v Kingdom of Belgium.
Failure by a Member State to fulfil its obligations - Procedures for the award of public service contracts - Directive 92/50/EEC - Renewal of a contract for surveillance of the Belgian coast by aerial photography.
Case C-252/01.

In Case C-252/01,

Commission of the European Communities, represented by H. van Lier, acting as Agent, assisted by J. Stuyck, avocat, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by A. Snoecx, acting as Agent, assisted by K. Ronse, avocat, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that:

- by failing, in respect of a contract to perform services involving coastal surveillance by means of aerial photography, to place a notice in the Official Journal of the European Communities, as required under Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1); and

- by making use, without justification, of the negotiated procedure without prior publication of a contract notice,

the Kingdom of Belgium has failed to fulfil its obligations under that directive and, in particular, Articles 11(3) and 15(2) thereof,

THE COURT

(Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, V. Skouris, N. Colneric, and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: S. Alber,

Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 30 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 29 June 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that:

- by failing, in respect of a contract to perform services involving coastal surveillance by means of aerial photography, to place a notice in the Official Journal of the European Communities, as required under Directive 92/50/EEC relating to the coordination of procedures for the award

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of public service contracts (OJ 1992 L 209, p. 1); and

- by making use, without justification, of the negotiated procedure without prior publication of a contract notice,

the Kingdom of Belgium has failed to fulfil its obligations under that directive and, in particular, Articles 11(3) and 15(2) thereof.

Legal framework

2 Article 4(2) of Directive 92/50 provides:

`This directive shall not apply to services which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires.'

3 Article 8 of Directive 92/50 states:

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

4 Article 9 of Directive 92/50 provides:

`Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

5 Article 11(3) of Directive 92/50 states:

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

...

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

...'

6 Under Article 15(2) of Directive 92/50:

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

7 By virtue of Article 30(1) of Directive 92/50:

`In so far as candidates for a public contract or tenderers have to possess a particular authorisation or to be members of a particular organisation in their home country in order to be able to perform the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.'

8 Annex I A, Category 12, to Directive 92/50 is set out as follows:

Category No	Subject	CPC Reference No
12	Architectural services; engineering services and integrated engineering services; urban planning	

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and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services

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9 Annex I B, Category 27, to Directive 92/50 is set out as follows:

Category No

Subject

CPC Reference No

27

Other services

Facts and pre-litigation procedure

10 On 7 April 1988, the Belgian waterways and maritime affairs authority issued a restricted invitation to tender for surveillance of the Belgian coast by means of aerial photography.

11 The contract was awarded to the Belgian undertaking Eurosense Belfotop NV (hereinafter `Eurosense Belfotop'), which was adjudged to be technically and financially the best candidate.

12 In view of the forthcoming regionalisation of the Belgian State, the then Ministerial Committee for Economic and Social Industrialisation decided to award the contract for one year only.

13 On 29 July 1989, the Flemish Government decided to extend the contract by six years on the basis of the 1988 tender.

14 That contract mainly concerned the provision of regular surveillance by means of aerial photography of the chain of dunes and beaches, both newly emerged and submerged, on the Belgian coast and the processing of the data obtained.

15 From 1992, the Flemish authorities examined the possibility of amending the contract by means of an addendum.

16 On 13 April 1995, following a negotiated procedure without prior notification, the Flemish minister for public works signed an addendum to the contract with Eurosense Belfotop, in the amount of BEF 534 000 000 (excluding VAT), for a duration of nine years.

17 On 27 December 1995, the Commission sent the Kingdom of Belgium a letter of formal notice claiming that the contract extended by the addendum of 13 April 1995 (hereinafter `the contract in issue') fell within the scope of Directive 92/50 and that, according to Article 15(1) and (2), an indicative notice and a contract notice should have been published in the Official Journal of the European Communities. The fact that no notice was published in respect of that contract constitutes an infringement of Article 15(1) and (2) of Directive 92/50. Furthermore, the award of a privately negotiated public contract cannot be justified on the basis of Article 11(3) thereof, which lays down the conditions under which awarding authorities may award their contracts by negotiated procedure without prior publication of a contract notice, since none of the conditions referred to in that paragraph had been met.

18 In its reply of 2 February 1996, the Belgian Government rejected the objections set down in the letter of formal notice of 27 December 1995.

19 First, Directive 92/50 does not apply to the contract in issue by virtue of Article 4(2) thereof. Next, the award of the contract by negotiated procedure was justified under Article 11(3)(b) of that directive. In that regard, the criteria set in the present case for awarding the contract

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by negotiated procedure are as follows: (a) possession of a military security certificate; (b) possession of a licence from the aviation authorities to engage in aviation activity; (c) possession of the requisite know-how, technology and equipment; (d) the above three elements to be in the possession of a single undertaking; (e) sufficient financial capacity to be able to provide services annually to the value of some BEF 80 000 000. Finally, other factors justified awarding the contract by negotiated procedure, such as the existence of exclusive rights (copyright), the availability of aircraft within two hours' flying time of the Belgian coast and knowledge of Dutch.

20 As those replies did not enable the Commission to withdraw its objections, it sent the Kingdom of Belgium a reasoned opinion on 10 March 1999, pursuant to Article 226 EC, in which it reiterated its objections and found that:

- by failing to cause to be published in the Official Journal of the European Communities the indicative notice and the contract notice required by Directive 92/50; and

- by failing to justify use of the negotiated procedure without prior publication of a contract notice,

the Kingdom of Belgium has failed to fulfil its obligations under Directive 92/50, in particular Articles 11(3) and 15(2) thereof.

21 The Commission called on the Kingdom of Belgium to take the measures necessary to comply with the reasoned opinion within two months of its notification.

22 The Belgian Government responded to the reasoned opinion by a letter of 1 June 1999. In particular, it claimed that the main object of the contract was to provide aerial photography services, which fall not within Category 12 of Annex I A to Directive 92/50 but within Category 27 (`Other services') of Annex I B. For the remainder, the Belgian Government referred to its reply to the letter of notice.

23 Not satisfied with that response, the Commission decided to bring the present action.

Substance

Pleas in law and arguments of the parties

24 By its action, the Commission essentially claims that the award of the contract in issue by way of a negotiated procedure without prior publication of a contract notice infringes Directive 92/50.

25 The Belgian Government puts forward three pleas in law in its defence. First, Directive 92/50 does not apply to the contract in issue because its performance must be accompanied by special security measures within the meaning of Article 4(2) thereof. Secondly, the services to which that contract relates fall within Annex I B to Directive 92/50 and, accordingly, the contract in issue is not subject to the provisions of that directive limiting the use of the negotiated procedure and requiring publication of a contract notice. Thirdly, use of the negotiated procedure is justified under Article 11(3) of the directive, in particular for technical reasons and for reasons to do with protection of exclusive rights.

26 By its first plea in law, the Belgian Government notes that one of the five criteria for obtaining award of the contract in issue was possession of a military security certificate. Undertakings which, when executing a public contract, have access to data, sites or equipment classified by the national authorities or NATO, can obtain a military security certificate after undergoing security checks. Those undertakings which do not possess a military security certificate must, before processing the data, transmit the results of their photography to the general intelligence services (SRG), which check to see whether they contain classified objects and, if necessary, make the latter unidentifiable.

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Those undertakings which do possess such a certificate receive a list of the classified items, allowing them to work directly on the results of their photography and, before publishing or distributing them, themselves conceal the classified objects. The intention behind that rule is obvious: classified material is of great strategic importance. The dissemination of geographical information concerning such objects entails serious risks of terrorism, sabotage or espionage. Thus, the military security certificate is a special security measure within the meaning of Article 4(2) of Directive 92/50, and it therefore does not apply to the contract in issue.

27 The Commission claims that the exception provided for by Article 4(2) of Directive 92/50, which must be interpreted strictly, does not apply in the present case. According to Belgian law, those undertakings which do not possess a military security certificate must, before processing their data, transmit the results of their photography to the Belgian security services, which then check whether such photography contains classified objects and conceal them as necessary. The whole purpose of obtaining a military security certificate is to allow undertakings which possess it to be exempt from such measures. Indeed, it would not be necessary for the security services to check the photography of an undertaking possessing such a certificate since the undertaking is authorised to work directly with uncensored aerial photographs.

28 It follows, in the Commission's submission, that the condition stipulated in the contract in issue that the contracting undertaking should possess a military security certificate constitutes a particular authorisation required of tenderers within the meaning of Article 30(1) of Directive 92/50 rather than a special security measure within the meaning of Article 4(2) thereof. The former provision does not preclude the application of Directive 92/50 but merely allows the adjudicating authority to impose an additional requirement. The requirement of a military security certificate in the context of the contract in issue does not therefore entail the non-application of the abovementioned directive.

Findings of the Court

29 Article 4(2) of Directive 92/50 provides in particular that the directive is not to apply to services the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned.

30 It is not disputed that the Kingdom of Belgium is responsible for protecting the security not only of its national installations but also of the installations of international organisations within its territory, such as NATO. It is therefore for the Belgian authorities to lay down the security measures necessary for the protection of such installations.

31 The Belgian Government stated to the Court, without being contradicted by the Commission, that all aerial photography in Belgium must be submitted to the Belgian security services for checking and possible censoring, unless the undertaking concerned possesses a military security certificate, in which case it is for that undertaking itself to conceal images of sites classified secret before any dissemination of its photographs.

32 The Belgian Government further stated, without being contradicted on the point by the Commission, that the procedure for obtaining the military security certificate is strictly applied and involves a thorough vetting of the undertaking concerned. The past record, circle of contacts, trips abroad and membership of organisations of every member of staff who has access to the photographs, as well as of the shareholders and managers of that undertaking, is looked into in detail.

33 Moreover, again according to the uncontradicted submission of the Belgian Government, in order to guarantee the protection of classified information in its possession, the undertaking in question must fulfil conditions as to security commensurate with the level of confidentiality of the information held. Special procedures for accessing the recorded material are necessary and the equipment for

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storing and using the uncensored results of photography must meet certain security requirements, such as that photographs and related documents must be kept in a bombproof building with a metal-clad main door protected by a double alarm system permanently linked to a security firm.

34 Obtention of a military security certificate does not, therefore, constitute a merely administrative formality but requires that certain operational conditions be met by the certified undertaking. Furthermore, it means that the undertaking continues to meet security requirements in subsequent operations.

35 Obtention of a military security certificate does not have the effect of exempting the certified undertaking from taking any other security measure. The only difference is that the systematic involvement of the national security services is obviated, while the certified undertaking remains subject to security requirements, in particular the obligation to conceal any classified objects itself prior to the possible dissemination of the photographs.

36 In view of the Belgian provisions as a whole as they have been laid before the Court, it must be concluded that execution of the services under the contract in issue must be accompanied by special security measures within the meaning of Article 4(2) of Directive 92/50, including the obtention by the undertaking providing the service of a military security certificate.

37 It follows that, in accordance with that provision, Directive 92/50 does not apply to the services covered by the contract in issue.

38 Accordingly, the application must be dismissed, without there being any need to examine the second and third pleas in law advanced by the Belgian Government in its defence.

Costs

39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Belgian Government has not applied for costs, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

DOCNUM	62001J0252
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2001 ; J ; judgment

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PUBREF	European Court reports 2003 Page 00000
DOC	2003/10/16
LODGED	2001/06/29
JURCIT	31992L0050-A04P2 : N 2 29 36 31992L0050-A08 : N 3 31992L0050-A09 : N 4 31992L0050-A11P3 : N 1 5 31992L0050-A15P2 : N 1 6 31992L0050-A30P1 : N 7 31992L0050-NIA : N 8 31992L0050-NIB : N 9 31992L0050 : N 1 37
CONCERNS	Failure concerning 31992L0050-A04P2
SUB	Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Dutch
APPLICA	Commission ; Institutions
DEFENDA	Belgium ; Member States
NATIONA	Belgium
NOTES	Brown, Adrian: Public Procurement Law Review 2004 p.NA33-NA35
PROCEDU	Proceedings concerning failure by Member State - unfounded
ADVGEN	Alber
JUDGRAP	Cunha Rodrigues
DATES	of document: 16/10/2003 of application: 29/06/2001

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Judgment of the Court (Sixth Chamber)
of 19 June 2003
Werner Hackermüller v Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED).
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Article 1(3) - Persons to whom review procedures must be available.
Case C-249/01.

In Case C-249/01,

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

Werner Hackermüller

and

Bundesimmobiliengesellschaft mbH (BIG),

Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED),

on the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT

(Sixth Chamber),

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

Advocate General: J. Mischo,

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

after considering the written observations submitted on behalf of:

- Mr Hackermüller, by P. Schmautzer, Rechtsanwalt,

- Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED), by J. Olischar and M. Kratky, Rechtsanwälte,

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

- the Italian Government, by U. Leanza, acting as Agent, assisted by M. Fiorilli, avocato dello Stato,

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

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Hackermüller, the Austrian Government and the Commission at the hearing on 16 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2003,

gives the following

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Judgment

Costs

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

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 25 June 2001, hereby rules:

1. Article 1(3) of Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, does not preclude the review procedures laid down by the directive being available to persons wishing to obtain a particular public contract only if they have been or risk being harmed by the infringement they allege.

2. Article 1(3) of Directive 89/665, as amended by Directive 92/50, does not permit a tenderer to be refused access to the review procedures laid down by the directive to contest the lawfulness of the decision of the contracting authority not to consider his bid as the best bid on the ground that his bid should have been eliminated at the outset by the contracting authority for other reasons and that therefore he neither has been nor risks being harmed by the unlawfulness which he alleges. In the review procedure thus open to the tenderer, he must be allowed to challenge the ground of exclusion on the basis of which the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful.

1 By order of 25 June 2001, received at the Court on 28 June 2001, the Bundesvergabeamt (Federal Public Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, `Directive 89/665').

2 Those questions were raised in proceedings between Mr Hackermüller, architect and qualified engineer, and the companies Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED) (`the defendants') concerning the defendants' decision not to accept the bid submitted by Mr Hackermüller for a public services contract.

Legal context

Community provisions

3 Article 1 of Directive 89/665 provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC... ,

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decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions set out in the following articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

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

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

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

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

(b) set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by infringement.'

National legislation

5 Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56, `the BVergG').

6 Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. It provides:

`1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....'

7 Paragraph 115(1) of the BVergG provides:

`Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.'

The main proceedings and the questions referred for a preliminary ruling

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8 The defendants invited tenders to select architectural designs and decision parameters in order to award general planning contracts for building the new Engineering Faculty for the Technical University in Vienna. The first stage of the procedure involved a competition designed to be an `open search for interested parties to identify ideas'.

9 Several interested parties, including Mr Hackermüller and the company Hans Lechner-ZT GmbH (`Lechner') replied to the invitation to tender and submitted projects. During the second stage of the procedure, the negotiation, the Beratungsgremium (the advisory panel) recommended pursuing the procedure in the short term with Lechner. By letter of 10 February 1999, the four other tenderers accepted for the negotiation procedure, including Mr Hackermüller, were informed that the Beratungsgremium had not recommended implementation of their project.

10 On 29 March 1999 Mr Hackermüller brought proceedings before the Bundesvergabeamt under Paragraph 113(2) of the BVergG seeking inter alia to have set aside (1) the decision in which the Beratungsgremium and/or the defendants accepted the bid of a rival tenderer as the best tender and recommended that the negotiation procedure should be pursued with the rival tenderer in the short term, and (2) the decision by which the selection of the bids was made without regard to the criteria laid down in the invitation to tender.

11 By decision of 31 May 1999 the Bundesvergabeamt, pursuant to Paragraph 115(1) of the BVergG, dismissed Mr Hackermüller's applications in their entirety on the grounds that he did not have locus standi because his bid should have been eliminated at the first stage of the procedure, under Paragraph 52(1), subparagraph 8, of the BVergG.

12 In support of its decision, the Bundesvergabeamt explained first of all that under Paragraph 115(1) of the BVergG a trader may apply for review only if he risks harm or some other disadvantage. It also pointed out that under Paragraph 52(1), subparagraph 8, of the BVergG the awarding body must, before selecting the successful bid, eliminate immediately, on the basis of the results of its examination of the bids, those which do not comply with the conditions of the invitation to tender or are incomplete or incorrect, if those errors have not been, or cannot be, rectified.

13 The Bundesvergabeamt went on to point out that point 1.6.7 of the invitation to tender expressly refers to Paragraph 36(4) of the Wettbewerbsordnung der Architekten (Competition rules for architects, `the WOA'), which provides that, where there is a ground for exclusion under Paragraph 8 of the WOA, the project in question must be rejected, and that Paragraph 8(1)(d) excludes from participation in architectural competitions, among others, persons who include in the portfolio information enabling the author to be identified.

14 Finally, having established that Mr Hackermüller had given his name under the heading `proposed organisation of overall planning', so that his project should have been eliminated under the combined provisions of Paragraph 52(1), subparagraph 8, of the BVergG and Paragraph 36(4) of the WOA, the Bundesvergabeamt concluded that the project could no longer be considered for the contract and that, since he could not be harmed by any potential infringements of the principle of the lowest tenderer and the rules of the negotiation procedure, Mr Hackermüller had no locus standi to claim the infringements alleged in his application.

15 On 7 July 1999, Mr Hackermüller brought an action for annulment of the Bundesvergabeamt's decision of 31 May 1999 before the Verfassungsgerichtshof (Constitutional Court), Austria. In its judgment of 14 March 2001 (B1137/99-9), the Verfassungsgerichtshof held that, in view of the broad interpretation that should be given, according to the Court's case-law (see, in particular, Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 46, and Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraphs 34 and 35), to the concept of locus standi to instigate a review procedure under Article 1(3) of Directive 89/665, it was questionable to interpret the

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conditions for making an application under Paragraph 115(1) in conjunction with Paragraph 52(1) of the BVergG as meaning that a tenderer who was not eliminated by the contracting authority may be excluded from the review procedure by a decision of the body responsible for the procedure rejecting his claim for a judicial remedy, if that body finds at the outset a reason which would have given grounds for eliminating the tenderer. It therefore annulled the Bundesvergabeamt's decision of 31 May 1999 for breach of the constitutional right to a procedure before the appropriate court.

16 It was in those circumstances that the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

`1. Is Article 1(3) of Directive 89/665... to be interpreted as meaning that any person seeking the award of a specific public contract is entitled to institute a review procedure?

2. In the event that the answer given to Question 1 is no:

Is the abovementioned provision to be understood as meaning that, if a tenderer's bid is not eliminated by the contracting authority, but the review body finds in the course of the review procedure that the contracting authority would have been bound to eliminate it, the tenderer has been or risks being harmed by the infringement alleged by him - in this case the finding by the contracting authority that a rival tenderer submitted the best bid - and that he must therefore be entitled to a review procedure?'

Question 1

17 In this connection, it need only be pointed out that, under Article 1(3) of Directive 89/665, Member States are required to ensure that the review procedures laid down by the directive are available `at least' to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of the Community law on public procurement or the national rules implementing that law.

18 It is thus apparent that the provision does not oblige the Member States to make those review procedures available to any person wishing to obtain a public contract but allows them to require, in addition, that the person concerned has been or risks being harmed by the infringement he alleges.

19 The reply which should therefore be given to Question 1 is that Article 1(3) of Directive 89/665 does not preclude the review procedures laid down by the directive being available to persons wishing to obtain a particular public contract only if they have been or risk being harmed by the infringement they allege.

Question 2

20 Since Question 2 has been raised in the event that Article 1(3) of Directive 89/665 should be interpreted as meaning that it allows access to the review procedures laid down by the directive to be made conditional on the fact that the alleged infringement has harmed or risks harming the applicant, it should be answered.

21 In the light of the facts in the main proceedings, this question must be understood as seeking to ascertain whether a tenderer seeking to contest the lawfulness of the decision of the contracting authority not to consider his bid as the best bid may be refused access to the review procedures laid down by Directive 89/665 on the ground that his bid should have been eliminated at the outset by the contracting authority for other reasons and that, therefore, he neither has been nor risks being harmed by the unlawfulness which he alleges.

22 In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of the directives relating to public procurement,

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in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Alcatel Austria, cited above, paragraphs 33 and 34, and Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 74).

23 It is thus plain that the full achievement of the objective of Directive 89/665 would be compromised if it were permissible for a body responsible for the review procedures provided for by the directive to refuse access to them to a tenderer alleging the unlawfulness of the decision by which the contracting authority had not considered its bid as being the best bid, on the ground that the same contracting authority was wrong not to eliminate that bid even before making the selection of the best bid.

24 There can be no doubt that a decision by which the contracting authority eliminates the bid of a tenderer even before making that selection is a decision of which it must be possible to seek review under Article 1(1) of Directive 89/665, since that provision applies to all decisions taken by contracting authorities which are subject to the rules of Community law on public procurement (see inter alia Case C-92/00 HI [2002] ECR I-5553, paragraph 37, and Case C-57/01 Makedoniko Metro and Michaniki [2003] ECR I-1091, paragraph 68) and makes no provision for any limitation as regards the nature and content of those decisions (see inter alia the aforementioned judgments in Alcatel Austria, paragraph 35, and HI, paragraph 49).

25 Therefore, if the tenderer's bid had been eliminated by the contracting authority at a stage prior to that of the selection of the best bid, he would have had to be allowed, as a person who has been or risks being harmed by that decision to eliminate his bid, to challenge the lawfulness of that decision by means of the review procedures provided for by Directive 89/665.

26 In those circumstances, if a review body were to refuse access to those procedures to a tenderer in a position like that of Mr Hackermüller, the effect would be to deny him not only his right to seek review of the decision he alleges to be unlawful but also the right to challenge the validity of the ground for exclusion raised by that body to deny him the status of a person who has been or risks being harmed by the alleged unlawfulness.

27 Admittedly, if in order to mitigate that situation the tenderer is afforded the right to challenge the validity of that ground of exclusion in the review procedure he instigates in order to challenge the lawfulness of the decision by which the contracting authority did not consider his bid as being the best bid, it is possible that at the end of that procedure the review body may reach the conclusion that the bid should actually have been eliminated at the outset and that the tenderer's application should be dismissed on the ground that, in the light of that circumstance, he neither has been nor risks being harmed by the infringement he alleges.

28 However, if the contracting authority has not taken a decision to exclude the tenderer's bid at the appropriate stage of the award procedure, the method of proceeding described in the previous paragraph must be regarded as the only one likely to guarantee the tenderer the right to challenge the validity of the ground for exclusion on the basis of which the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful and, accordingly, to ensure the effective application of the Community directives on public procurement at all stages of the award procedure.

29 In the light of the foregoing considerations, the reply which should be given to Question 2 is that Article 1(3) of Directive 89/665 does not permit a tenderer to be refused access to the review procedures laid down by the directive to contest the lawfulness of the decision of the contracting authority not to consider his bid as the best bid on the ground that his bid should have been eliminated at the outset by the contracting authority for other reasons and that therefore he neither has been

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nor risks being harmed by the unlawfulness which he alleges. In the review procedure thus open to the tenderer, he must be allowed to challenge the ground of exclusion on the basis of which the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful.

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PROCEDU Reference for a preliminary ruling

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Notice for the OJ

Removal from the register of Case C-179/01[1]

By order of 9 April 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-179/01 (Reference for a preliminary ruling by the Consiglio di Stato): **Impresa Binda & C. s.p.a.** v **Comune di Torino**, **ED.ART. s.r.l.**.

_____

[1] - OJ C 200 of 14.07.2001.

Judgment of the Court (Sixth Chamber)
of 23 January 2003
Makedoniko Metro and Michaniki AE v Elliniko Dimosio.
Reference for a preliminary ruling: Dioikitiko Efeteio Athinon - Greece.
Public works contracts - Rules for participating - Group of contractors submitting a tender - Change in the composition of the group - Prohibition laid down in the contract documents - Compatibility with Community law - Review procedures.
Case C-57/01.

In Case C-57/01,

REFERENCE to the Court under Article 234 EC by the Diikitiko Efetio Athinon (Greece) for a preliminary ruling in the proceedings pending before that court between

Makedoniko Metro,

Mikhaniki AE

and

Elliniko Dimosio,

on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

THE COURT

(Sixth Chamber),

composed of: C. Gulmann, acting for the President of the Sixth Chamber, V. Skouris, F. Macken, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Makedoniko Metro and Mikhaniki AE, by G. Karydis, A. Pliakos and N.I. Kampas, Dikigori,

- the Greek Government, by V. Kyriazopoulos, C. Georgiadis and D. Tsangarakis, acting as Agents,

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

- the Commission of the European Communities, by M. Nolin and P. Panayotopoulos, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Makedoniko Metro and Mikhaniki AE, represented by G. Karydis and A. Pliakos, of the Greek Government, represented by V. Kyriazopoulos, and of the Commission, represented by M. Nolin and M. Konstantinidis, acting as Agents, at the hearing on 6 June 2002,

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

gives the following

Judgment

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Costs

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

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the question referred to it by the Diikitiko Efetio Athinon by order of 26 October 2000, hereby rules:

1. Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts does not preclude national rules which prohibit a change in the composition of a group consortium taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders.

2. In so far as a decision of a contracting authority adversely affects the rights conferred on a consortium by Community law in the context of a procedure for the award of a public contract, the consortium must be able to avail itself of the review procedures provided for by Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

1 By order of 26 October 2000, received at the Court on 9 February 2001, the Diikitiko Efetio Athinon (Administrative Court of Appeal, Athens) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

2 That question has arisen in proceedings between (i) the consortium Makedoniko Metro (`Makedoniko Metro') and the company Mikhaniki AE (`Mikhaniki') and (ii) the Greek State concerning a contract for the construction of an underground railway in Thessaloniki.

Legal framework

Community law

3 Article 1 of Directive 89/665 provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EE, and 92/50/EEC... , decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

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

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

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

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

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

5 Under Article 5 of Directive 89/665, Member States were to bring into force, before 21 December 1991, the measures necessary to comply with the directive.

6 Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), which was amended on several occasions, has been repealed and replaced by Directive 93/37.

7 Article 1(a) and (d) of Directive 93/37 provides:

`For the purpose of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

...

(d) "public works concession" is a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment'.

8 Article 3(1) of Directive 93/37 provides:

`Should contracting authorities conclude a public works concession contract, the advertising rules as described in Article 11(3), (6), (7) and (9) to (13), and in Article 15, shall apply to that contract when its value is not less than [a specified amount].'

9 Pursuant to Articles 4 to 6 of Directive 93/37, the directive applies, subject to certain exceptions, to public works contracts whose value is not less than a specific amount.

10 Article 21 of Directive 93/37 provides:

`Tenders may be submitted by groups of contractors. These groups may not be required to assume

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a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.'

11 That provision is in essence identical to Article 21 of Directive 71/305, which it replaces.

12 Article 36(1) of Directive 93/37 repeals Directive 71/305 `without prejudice to the obligations of the Member States concerning the deadlines for transposition into national law and for application indicated in Annex VII'. According to that annex, the deadline for transposing Article 21 of Directive 71/305 was, as regards the Hellenic Republic, 1 January 1981.

13 Article 36(2) of Directive 93/37 provides that references to the repealed directive (71/305) are to be construed as references to Directive 93/37.

National law

14 It is apparent from the order for reference that the tender procedure at issue in the main proceedings is governed principally by Law No 1418/1984 (23 A) on public works and related matters and by Presidential Decree 609/1985 (223 A). That legislation provides, on certain conditions, for the substitution of a member of a consortium which has been awarded a particular contract. Such substitution, which is always subject to approval by the awarding authority, is provided for only at the stage when the works are being carried out, that is to say the phase which follows signature of the contract between the contractor and the awarding authority and not at a stage prior to award of the contract.

The main proceedings and the question referred for a preliminary ruling

15 The Greek State decided to issue an international invitation to tender in respect of the planning, construction, self-financing and operation of an underground railway for Thessaloniki, with a budget of GRD 65 000 000 000. It opted, in relation to the award of that contract, for a restricted procedure comprising six stages: preselection of candidates who would be invited to tender, submission of tenders by the preselected candidates, evaluation of their technical proposals, evaluation of their economic and financial proposals, negotiations between the contracting authority and the tenderer provisionally selected and signature of the contract.

16 By decision of 18 June 1992, the Greek Minister for the Environment, Regional Development and Public Works (`the Minister') approved the contract notice initiating the first stage of the procedure (preselection of candidates). On conclusion of that stage, eight consortia which had put themselves forward as candidates, including Makedoniko Metro and the Thessaloniki Metro consortium, were authorised to submit tenders.

17 By decision of 1 February 1993, the Minister approved the tender documentation for the second stage of the procedure (submission of tenders by preselected candidates), including, in particular, the supplementary contract notice (`the supplementary notice') and the specific contract documents.

18 Article 6(2) of the supplementary notice specified that the preselected consortia were authorised to take part in the form that they had taken during the first stage of the procedure, that the creation of groupings or other forms of cooperation between them was strictly precluded and, finally, that it was possible for a consortium to be enlarged by the addition of a new member, provided that the new member had not been included in any other consortium preselected to take part in the second stage of the procedure.

19 Article 12(2) of the supplementary notice provided that each tenderer's file should include all the documents showing that the tenderer constituted, from a legal perspective, a consortium and, in particular, a certificate from a notary that a consortium had been formed by all the members of the preselected group, including any new members, in accordance with Article 6 of the supplementary notice. Under Article 12(3) and (4) of the supplementary notice, the tenderers' files were also to contain certified minutes of the meetings of the boards of directors of the members of the consortium,

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authorising their participation therein, and copies, certified by the competent authorities, of the Articles of Association of any new members of the consortium. Finally, Article 12(6) of the supplementary notice required that the file contain all the items referred to in Article 7(1) to (4) of the notice relating to the first stage of the contract concerning any new members of a consortium.

20 Article 7(2) of the supplementary notice provided that the consortia concerned were to set out their intentions regarding the extent of their involvement in the financing of the project and to submit a statement attesting to their willingness to invest the capital sums which were essential, in addition to any subsidies, to ensure completion, maintenance and operation of the underground railway.

21 Article 7(3) of that notice stated that any construction undertaking or consultancy was required to submit a certificate of registration in the commercial register of the country in which it was established and to submit evidence of its financial and economic resources and its technical capabilities and skills. Article 7(4) of the notice provided that undertakings within the consortium which would have more specific responsibility for operating the underground railway were required to submit appropriate certificates demonstrating their capabilities and experience in operating transport facilities and in particular underground railways.

22 If the contract notices are read together, it is apparent that a consortium preselected during the first stage of the procedure could be enlarged during the second stage by the addition of new members but that such enlargement was possible only until the deadline for submission of tenders.

23 During the second stage of the procedure, technical proposals, economic studies and financial proposals were submitted by, amongst others, Makedoniko Metro and Thessaloniki Metro.

24 When the preselection took place, Makedoniko Metro's members were the companies Mikhaniki, Edi-Stra-Edilizia Stradale SpA, Fidel SpA and Teknocenter-Centro Servizi Administrativi Srl, which held respectively 70%, 20%, 5% and 5% interests.

25 During the second stage of the procedure, the Makedoniko Metro group was extended to include AEG Westinghouse Transport Systems GmbH. The interests of the four abovementioned companies then amounted to, respectively, 63%, 17%, 5% and 5%, while AEG Westinghouse Transport Systems GmbH had a 10% stake. That was the composition of Makedoniko Metro when it was provisionally designated as the successful tenderer on 14 June 1994. That composition is not at issue between the parties to the main proceedings.

26 Following the formation, by decision of 24 June 1994, of the negotiating committee and following the commencement of negotiations between the Greek State and Makedoniko Metro as the provisionally designated successful tenderer, Makedoniko Metro gave notice to the Minister, by letter of 29 March 1996, of its new composition, which included as members Mikhaniki, ABB Daimler-Benz Transportation Deutschland GmbH (`Adtranz') and the Fidel Group, which comprised Edi-Stra-Edilizia Stradale SpA, Fidel SpA and Teknocenter-Centro Servizi Administrativi Srl, whose respective stakes were 80% (Mikhaniki), 19% (Adtranz) and 1% (Fidel Group).

27 Subsequently, by letter of 14 June 1996, Makedoniko Metro informed the commission for major works, in response to questions concerning reports that members of the Fidel Group were insolvent and had gone into liquidation, that the companies within that group were no longer part of Makedoniko Metro and that, as of that date, the latter's members were Mikhaniki, Adtranz and Belgian Transport and Urban Infrastructure Consult (Transurb Consult), whose respective interests amounted to 80.65%, 19% and 0.35%. The document establishing Makedoniko Metro with that membership was not submitted to the authorities. That document was signed on 27 November 1996. It was as thus constituted that Makedoniko Metro brought the main action.

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28 Finding that Makedoniko Metro had substantially departed from the requirements laid down for the contract, the Minister took the view that the negotiations had failed and, by decision of 29 November 1996, terminated negotiations between the Greek State and Makedoniko Metro and called on Thessaloniki Metro to enter into negotiations as the first candidate for provisional contractor.

29 On 10 December 1996 Makedoniko Metro brought an action for annulment of the Minister's decision of 29 November 1996 before the Simvoulio tis Epikratias (Council of State, Greece). By judgment No 971/1998 of 6 March 1998, the Council of State dismissed the action on the ground that Makedoniko Metro could not lawfully change its composition after tenders had been submitted and after having been chosen as provisional contractor, whilst also continuing to take part in the procedure at issue, and that, consequently, it was not entitled, with its new membership, to apply for annulment of the contested decision.

30 In addition, Makedoniko Metro and Mikhaniki brought an action before the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens) for a declaration that the Greek State was liable to pay certain sums by way of compensation and financial satisfaction for non-material damage suffered by them in the wake of the unlawful decision and the administration's breach of duty. By judgment No 3794/1999 of 30 April 1999, the Administrative Court dismissed the action on the ground that Makedoniko Metro, as composed at the time when it commenced proceedings, was not entitled to claim compensation.

31 Makedoniko Metro and Mikhaniki appealed against that judgment to the Diikitiko Efetio Athinon, which decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

`Must a change in the composition of a consortium participating in procedures for the award of a public-works contract which occurs after submission of tenders and selection of the group as the provisional contractor and is tacitly accepted by the contracting authority be interpreted in such a way as to result in the loss of that consortium's right to participate in the tender procedure and, by extension, also of its right to, or interest in, the award of the contract for execution of the works?

Is such an interpretation consistent with the provisions and spirit of Directives 93/37/EEC and 89/665/EEC?'

Request that the oral procedure be reopened

32 By letter of 15 July 2002, Makedoniko Metro requested that the oral procedure be reopened `so that further information about the subject-matter of the national procedure giving rise to the questions referred for a preliminary ruling could be given to the Court'.

33 Makedoniko Metro supports its request by disputing, inter alia, point 35 of the Advocate General's Opinion, in which she reformulates the question referred for a preliminary ruling, and point 79 of the Opinion, which explains the subject-matter of the question. In Makedoniko Metro's submission, the Advocate General was wrong to conclude that the national authorities took a decision excluding Makedoniko Metro from the procedure for the award of the contract at issue on the grounds of the change in its composition. The contracting authority at no time took a decision to exclude Makedoniko Metro from the procedure on the grounds of the change in its composition and, consequently, such a decision could not form the subject-matter of the main proceedings.

34 It is appropriate to bear in mind that the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, order that the oral procedure be reopened, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been

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debated between the parties (see Joined Cases C-270/97 and C-271/97 Deutsche Post [2000] ECR I-929, paragraph 30, and Case C-299/99 Philips [2002] ECR I-5475, paragraph 20).

35 As regards Makedoniko Metro's arguments, it must nevertheless be observed, first, that, in accordance with settled case-law, the Court may, where appropriate, reformulate a question referred for a preliminary ruling in order to avoid exceeding its jurisdiction and to provide the referring court with an answer that will be of assistance to it (see, to that effect, Case C-17/92 Distribuidores Cinematograficos [1993] ECR I-2239, paragraph 8, and Case C-107/98 Teckal [1999] ECR I-8121, paragraph 33) and, second, that it is for the national court to decide what forms the subject-matter of the main proceedings.

36 The submissions which Makedoniko Metro seeks to put forward in the course of a reopened oral procedure relate solely to questions falling within the jurisdiction of the referring court.

37 Having regard to those considerations, the Court, after hearing the Advocate General, concludes that there is nothing in Makedoniko Metro's request to indicate that it is necessary to reopen the oral procedure or that it would serve any useful purpose to do so.

38 Makedoniko Metro's request must therefore be rejected.

The question referred for a preliminary ruling

Observations submitted to the Court

39 Makedoniko Metro and Mikhaniki argue that the decision of 29 November 1996 terminating negotiations between the Greek State and Makedoniko Metro was not based on the change in composition of the consortium. On the contrary, the decision treated Makedoniko Metro as though it were still a tenderer, that is as though, despite the changes in its composition, it retained the specific right to take part in the tender procedure at issue. Consequently, in its final composition, Makedoniko Metro remained entitled to engage in the legal relationships attendant upon the tender procedure at issue and could therefore rely on a capacity to bring legal proceedings and a legitimate interest in seeking compensation for infringement of the provisions of Directive 93/37 and for breach of the principle that tenderers should be treated equally which, as a general principle of Community law, also applies to the public contract at issue before the national court (even if it were to be classified as a public works concession). According to Makedoniko Metro and Mikhaniki, the present case concerns a typical public works contract but, even if the contract at issue in the main proceedings were to be classified as a public works concession, Directive 89/665 would none the less apply, since it is merely a specific expression of the general principle that the rights of persons adversely affected by breaches of Community law on public procurement must be protected.

40 Makedoniko Metro and Mikhaniki submit that the answer to the question referred should be that a change in the composition of a consortium which has responded to an invitation to tender for a public works contract or a public works concession - where the change has been tacitly accepted by the contracting authority and occurred after submission of tenders and after the consortium has been selected as provisional contractor and where, in addition, the change does not feature in the reasons given in support of the decision to terminate negotiations and exclude the consortium from the remainder of the procedure - cannot result in the consortium being deprived of its status as a tenderer, or in it or its members losing their interest in being awarded the public contract or their right to be awarded it or, by extension, in the loss of its legitimate interest in, or its capacity to bring proceedings to protect, the rights conferred on it by Community law, which form the subject-matter of the procedure at issue. Any other interpretation of the national provisions at issue would be at variance with the letter and the spirit of Directives 93/37 and 89/665 and especially with the general principle that the rights of persons subject to Community law must be effectively protected.

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41 The Greek Government observes that Directives 93/37 and 89/665 do not address the question of change in the composition of a consortium.

42 Since the question of the lawfulness or unlawfulness of a change in the composition of a consortium participating in a public works contract is not governed by Community law, the relevant provisions of national law apply, and these do not permit the substitution of a member of the group of contractors at the stage of the procedure preceding award of the contract.

43 The Greek Government concludes that the question referred for a preliminary ruling should be answered affirmatively.

44 The Austrian Government submits that the question should be reformulated in such a way that it seeks to ascertain whether Directive 93/37 precludes a change in the composition of a consortium after submission of tenders, thus depriving the consortium of the right to take part in the tender procedure and, by extension, of its rights and interest as regards the award of the contract to carry out the works.

45 It maintains that Directive 93/37 includes only rudimentary provisions on consortia. It seeks to protect the interests of economic operators established in one Member State who wish to offer goods or services to the contracting authorities established in another Member State. The information given in the order for reference contains no suggestion that the principles of Community law have been infringed.

46 In the light of those considerations, the Austrian Government concludes that the question, as reformulated, should be answered as follows: Directive 93/37 does not preclude a change in the composition of a consortium following submission of tenders; regard being had to that directive, the group does not lose its right to take part in the tender procedure and, by extension, does not lose its rights or interest as regards the award of the contract to carry out the works.

47 The Commission draws attention to the fact that the first part of the question could be construed as inviting the Court to rule on the interpretation of national law, which falls outside its jurisdiction. With a view to resolving that difficulty and providing an answer which will assist the national court, the Commission suggests that the question should be reformulated and addressed as three distinct questions, namely:

1. Does Directive 93/37 include rules permitting or prohibiting a change in the composition of a group which has already submitted a tender? More specifically, may a Member State provide in its national law, and may a contracting authority provide in the tender documentation, for rules providing that tenderers are not to alter their composition during the tender procedure and are to be excluded if they do?

2. Does Community law allow a contracting authority to continue to negotiate with a tenderer which has altered its composition in breach of rules laid down by national law and by the contract documentation?

3. Does a change in the composition of a group, in breach of rules laid down by national law and by the contract documentation, affect the exercise by that group of its rights under Directive 89/665 and, more specifically, the right to claim damages?

48 As regards the first of those questions, the Commission submits that Directive 93/37 contains no express provisions dealing with a change in the composition of a consortium. The only provision on groups is found in Article 21 of the directive, which allows them to submit tenders without being required to assume a specific legal form before the contract has been awarded. In the Commission's submission, no provision of Directive 93/37 requires contracting authorities to adopt a specific course of conduct as regards that aspect of the procedure. Consequently, the approach to be taken is a matter for national legislation or a specific decision by the contracting authority.

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49 Those observations, which refer to the general scheme of Directive 93/37, are also relevant to a contract for a public works concession. The specific arrangements provided for by Directive 93/37 for public works concessions are restricted to advertising rules and leave the awarding authority free to set the conditions on which candidates are selected and concessions awarded in accordance with rules of its national law.

50 Therefore, the Commission suggests that the answer to the first reformulated question is that Directive 93/37 contains no rules preventing national legislation or the contract documentation from providing that a change in the composition of a consortium will not be permissible after a certain stage in the tender procedure, and more specifically after submission of a tender.

51 As regards the second reformulated question, the Commission submits that there would be a breach of the principle of equal treatment as between tenderers if a contracting authority unilaterally departed, in favour of one tenderer, from the requirements and conditions laid down in the contract documents, where the conditions are stated to be unalterable, without reopening the whole procedure, thus enabling the other tenderers, including potential tenderers, to take advantage of that departure.

52 Thus, in response to that question, the Commission submits that Community law does not allow a contracting authority to continue to negotiate with a tenderer which has changed its composition in breach of rules laid down by national law and by the contract documents.

53 As to the third reformulated question, the Commission observes that under Article 1(1) of Directive 89/665, only decisions which are alleged to have infringed Community law or national rules implementing that law may be reviewed. It follows that the provision does not require Member States to provide for review procedures in respect of decisions taken in the course of an award procedure which infringe rules of national law which are not implementing Community directives on public procurement.

54 In those circumstances, the answer to the third reformulated question must be that a change in the composition of a group, in breach of rules laid down by national law and in the contract documents, does not affect the exercise by that group of its rights under Directive 89/665 and, more specifically, the right to claim damages, provided that the grounds for excluding the group are contrary to Community law on public procurement or to the rules of national law implementing Community law.

Findings of the Court

55 In the context of Article 234 EC the Court has no jurisdiction to rule either on the interpretation of provisions of national laws or regulations or on their conformity with Community law. It may, however, supply the national court with an interpretation of Community law that will enable that court to resolve the legal problem before it (Distribuidores Cinematograficos, paragraph 8, and Teckal, paragraph 33).

56 Furthermore, according to settled case-law, it is for the Court alone, where questions are formulated imprecisely, to extract from all the information provided by the national court and from the documents in the main proceedings the points of Community law which require interpretation, having regard to the subject-matter of those proceedings (Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 21, and Teckal, paragraph 34).

57 Having regard to the information included in the order for reference and given that the national court is posing its question from the point of view of both Directive 93/37 and Directive 89/665, the Court concludes that the national court is essentially asking:

1. whether Directive 93/37 precludes national rules prohibiting a change in the composition of a group of contractors taking part in a procedure for the award of a public-works contract which occurs after submission of tenders, and

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2. whether and to what extent Directive 89/665 confers rights of recourse on such a group of contractors.

58 As regards the first part of the question, the order for reference does not indicate whether the contract at issue in the main proceedings is a `public works contract' or a `public works concession' within the meaning of Directive 93/37. It is not for the Court, on a reference for a preliminary ruling, to resolve that question. In such circumstances, the question must be addressed by examining each of those hypotheses in turn.

59 If the contract at issue were a `public works contract' within the meaning of Directive 93/37, the directive would apply as provided in Articles 4 to 6.

60 The only provision of Directive 93/37 dealing with groups of contractors is Article 21. That is confined, first, to stating that tenders may be submitted by groups of contractors and, second, to preventing them from being required to assume a specific legal form before the contract has been awarded to the group selected.

61 It must be pointed out that Article 21 makes no provision about the composition of such groups. Rules about their composition are thus a matter for the Member States.

62 The same is true a fortiori if the contract at issue in the main proceedings is a `public works concession' within the meaning of Directive 93/37. It follows from Article 3(1) of the directive that Article 21 does not even apply to public works concessions.

63 Consequently, the answer to the first part of the question must be that Directive 93/37 does not preclude national rules which prohibit a change in the composition of a group of contractors taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders.

64 As regards the second part of the question, Article 1(1) of Directive 89/665 requires Member States to take the measures necessary to ensure that, as regards contract award procedures falling within the scope of the relevant Community directives, decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

65 Member States are also required, under Article 1(3), to ensure that the review procedures are available at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement.

66 It is thus in the light of those matters that it is necessary to consider whether, in circumstances such as those obtaining in the main proceedings, the review procedures provided for by Directive 89/665 must be available to a consortium such as Makedoniko Metro.

67 In that regard, the Court observes, first, that, as the order for reference shows and as pointed out at paragraph 28 of this judgment, the Minister took the view that Makedoniko Metro had departed substantially from the requirements laid down for the contract and, by decision of 29 November 1996, terminated negotiations with the consortium.

68 For the purpose of ascertaining whether the Minister's decision is covered by the expression `decisions taken by the contracting authorities' in Article 1(1) of Directive 89/665, it should be borne in mind that the Court has stated that that expression encompasses decisions taken by contracting authorities which are made subject to the Community law rules on public contracts (Case C-92/00 HI [2002] ECR I-5553, paragraph 37).

69 As to whether such rules apply to the present case, even if the Community directives on public procurement do not contain specifically applicable provisions, the general principles of Community law, and the principle of equal treatment in particular, also govern procedures for the award of

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public contracts (see Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 60, and HI, paragraph 47).

70 Since such principles have been held to apply to a decision taken in the context of a procedure for the award of a public contract, that decision also falls within the rules laid down by Directive 89/665 in order to ensure compliance with the rules of Community law on public contracts (see HI, paragraph 48).

71 Where appropriate, it will be for the referring court to decide, in light of the relevant factors, whether such principles apply in the main proceedings.

72 It will also be for the referring court to establish whether Makedoniko Metro can be regarded, including with its new membership, as having, or having had, an interest in obtaining the contract at issue in the main proceedings and as having been harmed by the Minister's decision of 29 November 1996 for the purposes of Article 1(3) of Directive 89/665.

73 In those circumstances, the answer to the second part of the question must be that, in so far as a decision of a contracting authority adversely affects the rights conferred on a consortium by Community law in the context of a procedure for the award of a public contract, the consortium must be able to avail itself of the review procedures provided for by Directive 89/665.

74 In light of the foregoing considerations, the answer to the question referred must be that:

1. Directive 93/37 does not preclude national rules which prohibit a change in the composition of a consortium taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders; and

2. in so far as a decision of a contracting authority adversely affects the rights conferred on a consortium by Community law in the context of a procedure for the award of a public contract, the consortium must be able to avail itself of the review procedures provided for by Directive 89/665.

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

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

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

applicant,

v

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

defendant,

supported by

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

intervener,

APPLICATIONS for declarations that:

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

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

THE COURT

(Fifth Chamber),

composed of: W. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and A. Rosas, Judges,

Advocate General: L.A. Geelhoed,

Registrar: M.-F. Contet, Administrator,

having regard to the Report for the Hearing,

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

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

gives the following

Judgment

Costs

69 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission sought an order for costs against the Federal Republic of Germany and the latter has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, the United Kingdom is to bear its own costs.

On those grounds,

THE COURT

(Fifth Chamber)

hereby:

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

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

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

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

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

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

- at the time of the award of a public service contract, the Federal Republic of Germany failed to fulfil its obligations under Article 8 and Article 11(3)(b) of Directive 92/50 by virtue of the fact that the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article

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11(3) for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met.

Legal context

2 Article 8 of Directive 92/50 provides that:

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

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

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

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

...

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

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

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

Facts and pre-litigation procedure

Case C-20/01

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

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

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

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

10 In a letter of 12 May 2000, the German Government once again acknowledged the breach of obligations complained of. It explained that on the basis of its intervention following the Commission's letter of formal notice, the Ministry of Internal Affairs of Lower Saxony, by decree of 21 June 1999,

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had instructed all local authorities in the Land to take appropriate measures to ensure that contracting authorities complied strictly with the Community provisions on the award of public contracts. In response to the reasoned opinion, the Government of Lower Saxony had insisted that those provisions must be complied with.

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

Case C-28/01

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

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

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

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

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

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

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

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

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

Admissibility of the application

Pleas in law and arguments of the parties

21 The German Government argues, first, that the actions are inadmissible, since there is no ongoing breach of obligations which must be brought to an end by the defendant Member State. The Community

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legislation on the award of public contracts consists solely of procedural rules. The effects of breach of those rules are exhausted as soon as the breach is committed. Once the Federal Republic of Germany had admitted the breach, there was no longer any objective interest in bringing infringement proceedings.

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

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

24 The German Government, supported by the United Kingdom Government on this point, submits that the contracts concluded by the contracting authorities are protected by Community law by virtue of being established rights. The principle pacta sunt servanda is enshrined in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33). By allowing national law to limit the powers of the bodies responsible for review procedures concerning the award of public contracts to awarding damages to any person harmed by an infringement of Community law on public procurement, Article 2(6) of Directive 89/665 specifically refrains from imposing a requirement that contracts which have been properly formed should be terminated or not complied with.

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

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

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

28 Furthermore, although it is true that the Court has dismissed as inadmissible an action for failure to fulfil obligations in the sphere of public procurement on the ground that the infringement had ceased to exist at the end of the period laid down in the reasoned opinion, that outcome arose

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as a result of the particular circumstances of the case. The present cases are different in that the contracts concluded in breach of Community law will continue to have effects for decades. The German Government has thus not put an end to the infringement. The fact that it is impossible to terminate the contracts concerned does not affect the admissibility of the action, since it is incumbent on the Member States to select the appropriate way of making good an infringement.

Findings of the Court

29 It is settled case-law that in exercising its powers under Article 226 EC the Commission does not have to show that there is a specific interest in bringing an action. The provision is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (Case 167/73 Commission v France [1974] ECR 359, paragraph 15; Case C-431/92 Commission v Germany [1995] ECR I-2189, paragraph 21; and Case C-476/98 Commission v Germany [2002] ECR I-0000, paragraph 38).

30 Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations (Commission v Germany, cited above, paragraph 22, and Case C-471/98 Commission v Belgium [2002] ECR I-0000, paragraph 39).

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

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

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

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

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

36 Therefore the adverse effect on the freedom to provide services arising from the infringement

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of Directive 92/50 must be found to subsist throughout the entire performance of the contracts concluded in breach thereof.

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

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

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

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

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

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

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

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

Substance

Pleas in law and arguments of the parties

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

46 In Case C-28/01 the Commission submits that the contract in question also falls within the scope of Directive 92/50. In its submission, the criteria allowing a negotiated procedure to be used without publication of a prior contract notice, as provided for in Article 11(3)(b) of Directive

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92/50, were not met. Neither the location of the undertaking selected, on account of its proximity to the place where the services were to be provided, nor the fact that award of the contract was urgent, provides a basis for the application of that provision in this instance.

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

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

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

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

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

Findings of the Court

Case C-20/01

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

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

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

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

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Case C-28/01

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

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

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

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

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

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

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

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

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

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

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

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92/50.

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

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

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

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

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31992L0050-N1A : N 2
31992L0050 : N 22 35 - 37 52 56
61992J0431 : N 29 30
61994J0318 : N 58
61996J0263 : N 42
61996J0328 : N 34
11997E226 : N 29
11997E232 : N 43
61998J0471 : N 30
61998J0476 : N 29
61999J0513 : N 60 62
62000J0019 : N 35
62001J0029 : N 32

CONCERNS Failure concerning 31992L0050-A08
Failure concerning 31992L0050-A11P3LB
Failure concerning 31992L0050-A15P2
Failure concerning 31992L0050-A16P1

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

AUTLANG German

MISCINF Joined case : 601J0028

APPLICA Commission ; Institutions

DEFENDA Federal Republic of Germany ; Member States

NATIONA Federal Republic of Germany

NOTES GjAêrtler, Peter: Lov & Ret 2003 p.32-33
Antonucci, Marco: Il Consiglio di Stato 2003 II p.809-814
Williams, Rhodri: Public Procurement Law Review 2003 p.NA109-NA115
Kalbe, Peter: EuropAñisches Wirtschafts- & Steuerrecht - EWS 2003 p.566-568

PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Geelhoed

JUDGRAP Jann

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

In Case C-18/01,

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

Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy,

Rakennuttajatoimisto Vilho Tervomaa

and

Varkauden Taitotalo Oy,

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

THE COURT

(Fifth Chamber),

composed of: C.W.A. Timmermans (Rapporteur), President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward, P. Jann, S. von Bahr and A. Rosas, Judges,

Advocate General: S. Alber,

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

after considering the written observations submitted on behalf of:

- Varkauden Taitotalo Oy, by H. Tuure, asianajaja,

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

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

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

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

having regard to the Report for the Hearing,

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

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

gives the following

Judgment

Costs

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

On those grounds,

THE COURT

(Fifth Chamber),

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

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

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

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

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

Legal context

Community legislation

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

`For the purposes of this Directive:

...

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

Body governed by public law means any body:

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- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

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

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

National legislation

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

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

The main proceedings and the questions referred for a preliminary ruling

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

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

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

9 By a first call for tenders of 6 July 1999, Teollisuuskylä asked for bids for the supply of design and construction services for the first stage of the building project described above, relating to construction of the Tyyskä 1 building, intended for the use of Honeywell-Measurex Oy, and the

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

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

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

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

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

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

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

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

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

Admissibility of the questions

15 On the basis of the Court's case-law according to which, in order to enable the Court to provide an interpretation of Community law which will be of use to the national court, that court must

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

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

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

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

19 As regards the French Government's doubts as to the need for the questions referred and the Commission's objections concerning the lack of detail as to the factual and legal context of the main proceedings, it should be recalled that, according to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, since the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling (see, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 18; and Case C-373/00 Adolf Truley [2003] ECR I-0000, paragraph 21).

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

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

22 First, it cannot be maintained that the interpretation of Community law which is sought bears no relation to the actual facts or purpose of the main proceedings or is hypothetical, since the admissibility of the main proceedings depends in particular on the proper extent of the term `body governed by public law' in Article 1(b) of Directive 92/50.

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

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

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

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

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

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

The questions referred for a preliminary ruling

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

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

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

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

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

The first and second questions

34 By its first two questions, which should be examined together, the national court essentially

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

Observations submitted to the Court

35 Taitotalo and the French Government consider that those two questions should be answered in the negative, as Taitotalo's activity is not intended to meet needs in the general interest and/or in any event has an industrial or commercial character.

36 Taitotalo submits that its sole object is to promote the conditions for the exercise of the activities of specific undertakings, not for the exercise generally of economic activity in the town of Varkaus, while the fact that it is owned and financed by a contracting authority is of no relevance, since, in the case in the main proceedings, it meets industrial or commercial needs. Taitotalo states, in particular, that it acquired at market price the land needed for the building works at issue in the main proceedings and that the financing of the project will be taken in hand essentially by the private sector, by means of bank loans secured by mortgages.

37 In reliance on the Court's judgment in Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, in which, it says, the Court was concerned to ascertain whether the activity of the entity at issue in that case - the Austrian State printing works - came under an essential prerogative of the State, the French Government considers for its part that the leasing of premises for industrial or commercial use cannot in any case be regarded as within the prerogatives which by their very nature are part of the exercise of public powers. Moreover, because of its commercial character, this activity cannot be compared with those at issue in BFI Holding and Case C-237/99 Commission v France [2001] ECR I-939, namely the collection and treatment of household waste and the construction of social housing.

38 In the Finnish Government's view, on the other hand, Taitotalo's activity typically appears among those which respond to a need in the general interest with no industrial or commercial character. First, Taitotalo's primary aim is not to generate profits by its activity but to create favourable conditions for the development of economic activities on the territory of the town of Varkaus, which fits in perfectly with the functions which regional and local authorities may assume by virtue of the autonomy guaranteed to them by the Finnish constitution. Second, the objective of Directive 92/50 would be compromised if such a company were not regarded as a contracting authority within the meaning of the directive, as municipalities might in that case by tempted to establish, in their traditional sphere of activity, other undertakings whose contracts would be outside the scope of the directive.

39 Finally, while not excluding the possibility that Taitotalo's activity may meet a need in the general interest because of the stimulus it gives to trade and the development of business activities on the territory of the town of Varkaus, the Austrian Government and the Commission state for their part that, in view of the incomplete information available, they are unable to assess the extent to which that need has an industrial or commercial character. They therefore invite the national court to perform that assessment itself, examining in particular the competition position of Taitotalo and whether it bears the risks associated with its activity.

Findings of the Court

40 The Court has already held that the second subparagraph of Article 1(b) of Directive 92/50

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draws a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character (see, inter alia, BFI Holding, paragraph 36, and Agorà and Excelsior, paragraph 32). To give a useful answer to the questions put, it must first be ascertained whether activities such as those at issue in the main proceedings in fact meet needs in the general interest and then, if necessary, it must be determined whether such needs have an industrial or commercial character.

41 As regards the question whether the activity at issue in the main proceedings meets a need in the general interest, it appears from the order for reference that Taitotalo's principal activity consists in buying, selling and leasing properties and organising and supplying property maintenance services and other related services needed for the management of those properties. The operation carried out by Taitotalo in the main proceedings consists, more precisely, in acquiring design and construction services in connection with a building project relating to the construction of several office blocks and a multi-storey car park.

42 In that that operation follows from the town of Varkaus's decision to create a technological development centre on its territory, and Taitotalo's stated intention is to buy the land from the town once the site has been parcelled out, and to make the newly constructed buildings available to firms in the technology sector, its activity is indeed capable of meeting a need in the general interest.

43 In this respect, it may be recalled that, on being asked whether a body whose objects were to carry on and facilitate any activity concerned with the organisation of trade fairs, exhibitions and conferences could be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 92/50, the Court held that activities relating to the organisation of such events meet needs in the general interest, in that an organiser of those events, in bringing together manufacturers and traders in one geographical location, is not acting solely in the individual interest of those manufacturers and traders, who are thereby afforded an opportunity to promote their goods and merchandise, but is also providing consumers who attend the events with information that enables them to make choices in optimum conditions. The resulting stimulus to trade may be considered to fall within the general interest (see Agorà and Excelsior, paragraphs 33 and 34).

44 Similar considerations may be put forward mutatis mutandis with respect to the activity at issue in the main proceedings, in that it is undeniable that, in acquiring design and construction services in connection with a building project relating to the construction of office blocks, Taitotalo is not acting solely in the individual interest of the undertakings directly concerned by that project but also in that of the town of Varkaus.

45 Activities such as those carried on by Taitotalo in the case in the main proceedings may be regarded as meeting needs in the general interest, in that they are likely to give a stimulus to trade and the economic and social development of the local authority concerned, since the location of undertakings on the territory of a municipality often has favourable repercussions for that municipality in terms of creation of jobs, increase of tax revenue and improvement of the supply and demand of goods and services.

46 A more difficult question, on the other hand, is whether such needs in the general interest have a character which is not industrial or commercial. While the Finnish Government submits that those needs have no industrial or commercial character, in that Taitotalo aims not so much to make a profit as to create favourable conditions for the location of undertakings on the territory of the town of Varkaus, Taitotalo puts forward the contrary argument, on the ground that it provides services precisely for commercial undertakings and that the financing of the building project in question is borne essentially by the private sector.

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47 According to settled case-law, needs in the general interest, not having an industrial or commercial character, within the meaning of Article 1(b) of the Community directives relating to the coordination of procedures for the award of public contracts are generally needs which are satisfied otherwise than by the availability of goods and services in the market place and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence (see, inter alia, BFI Holding, paragraphs 50 and 51, Agorà and Excelsior, paragraph 37, and Adolf Truley, paragraph 50).

48 In the present case, it cannot be excluded that the acquisition of services intended to promote the location of private undertakings on the territory of a particular local authority may, for the reasons referred to in paragraph 45 above, be regarded as meeting a need in the general interest whose character is not industrial or commercial. In assessing whether or not such a need in the general interest is present, account must be taken of all the relevant legal and factual elements, such as the circumstances prevailing at the time when the body concerned was established and the conditions under which it exercises its activity (see, to that effect, Adolf Truley, paragraph 66).

49 In particular, it must be ascertained whether the body in question carries on its activities in a situation of competition, since the existence of such competition may, as the Court has previously held, be an indication that a need in the general interest has an industrial or commercial character (see, to that effect, BFI Holding, paragraphs 48 and 49).

50 However, it also follows from the wording of that judgment that the existence of significant competition does not of itself permit the conclusion that there is no need in the general interest not having an industrial or commercial character (see Adolf Truley, paragraph 61). The same applies to the fact that the body in question aims specifically to meet the needs of commercial undertakings. Other factors must be taken into account before reaching such a conclusion, in particular the question of the conditions in which the body in question carries on its activities.

51 If the body operates in normal market conditions, aims to make a profit, and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims to meet are not of an industrial or commercial nature. In such a case, the application of the Community directives relating to the coordination of procedures for the award of public contracts would not be necessary, moreover, because a body acting for profit and itself bearing the risks associated with its activity will not normally become involved in an award procedure on conditions which are not economically justified.

52 According to settled case-law, the purpose of those directives is to avert both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by other than economic considerations (see, in particular, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 17; Case C-470/99 Universale-Bau and Others [2002] ECR I-0000, paragraph 52; and Adolf Truley, paragraph 42).

53 In reply to a written question put by the Court, the Finnish Government stated at the hearing that although, from a legal point of view, there are few differences between companies such as Taitotalo and limited companies owned by private operators, in that they bear the same economic risks as the latter and may similarly be declared bankrupt, the regional and local authorities to which they belong rarely allow such a thing to happen and will, if appropriate, recapitalise those companies so that they can continue to look after the tasks for which they were established, essentially the improvement of the general conditions for the pursuit of economic activity in the local authority area in question.

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54 In reply to a question put by the Court at the hearing, the Finnish Government further stated that, while it is not impossible that the activities of companies such as Taitotalo may generate profits, the making of such profits can never constitute the principal aim of such companies, since under Finnish law they must always aim primarily to promote the general interest of the inhabitants of the local authority area concerned.

55 In such conditions, and having regard to the fact mentioned by the national court that Taitotalo received public funding for carrying out the building project at issue in the main proceedings, it appears probable that an activity such as that pursued by Taitotalo in this case meets a need in the general interest not having an industrial or commercial character.

56 It is nevertheless for the national court, the only one to have detailed knowledge of the facts of the case, to assess the circumstances which prevailed when that body was set up and the conditions in which it carries on its activity, including in particular whether it aims at making a profit and bears the risks associated with its activity.

57 As to the Commission's observation that it cannot be excluded that the activity at issue in the main proceedings represents only a minor part of Taitotalo's activities, that fact, even were it to be established, would be of no relevance to the outcome of the main proceedings, in so far as that company continues to look after needs in the general interest.

58 According to settled case-law, the status of a body governed by public law is not dependent on the relative importance, within that body's activity, of the meeting of needs in the general interest not having an industrial or commercial character (see Mannesmann Anlagenbau Austria and Others, paragraphs 25, 26 and 31; BFI Holding, paragraphs 55 and 56; and Adolf Truley, paragraph 56).

59 In the light of the above considerations, the answer to the first and second questions must be that a limited company established, owned and managed by a regional or local authority meets a need in the general interest, within the meaning of the second subparagraph of Article 1(b) of Directive 92/50, where it acquires services with a view to promoting the development of industrial or commercial activities on the territory of that regional or local authority. To determine whether that need has no industrial or commercial character, the national court must assess the circumstances which prevailed when that company was set up and the conditions in which it carries on its activity, taking account in particular of the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question.

The third question

60 By its third question, the national court essentially asks whether the fact that the offices to be constructed are leased only to a single undertaking is capable of calling into question the lessor's status of a body governed by public law.

61 It suffices to state that it is clear from the answer to the first two questions that such a circumstance does not in principle prevent the lessor of the offices to be built from being classified as a body governed by public law, since, as the Advocate General observes in point 92 of his Opinion, the general interest is not measured by the number of direct users of an activity or service.

62 First, it is undeniable that the location of a single undertaking on the territory of a regional or local authority may likewise give a stimulus to trade and bring about favourable economic and social repercussions for that local authority and for all its inhabitants, since the location of that undertaking may inter alia act as a catalyst and stimulate the location of other undertakings in the region concerned.

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63 Second, that interpretation is also consistent with the purpose of Directive 92/50, which, according to the 20th recital in its preamble, is intended inter alia to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular. As the Finnish Government has observed, to accept that a body may fall outside the scope of that directive solely because the activity it carries on benefits one company only would amount to disregarding the very purpose of the directive, since, to avoid the rules it lays down, it would suffice for a company such as Taitotalo to maintain that the premises to be constructed were intended to be let to a single undertaking, which could then, as soon as the transaction were completed, transfer the premises to other undertakings.

64 In the light of the above considerations, the answer to the third question must therefore be that the fact that the premises to be constructed are leased only to a single undertaking is not capable of calling into question the lessor's status of a body governed by public law, where it is shown that the lessor meets a need in the general interest not having an industrial or commercial character.

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Judgment of the Court of First Instance (Third Chamber)
First Instance (Third Chamber)First Instance (Third Chamber)2002.
Scan Office Design SA v Commission of the European Communities.
Public procurement - Supply of office furniture - Action for damages.
Case T-40/01.

1. Non-contractual liability - Conditions - Procedures for the award of public supply contracts - Unlawfulness of alleged conduct - Damage - Causal link - None

(Art. 288, second para., EC; Council Directive 93/36)

2. Approximation of laws - Procedures for the award of public supply contracts - Directive 93/36 - Negotiated procedures - Power of the contracting authority to negotiate - Limits

(Council Directive 93/36, Art 1(f))

3. Procedure - Production of new pleas in law in the course of proceedings - Conditions - Amplification of an existing plea - Whether permissible

(Rules of Procedure of the Court of First Instance, Art. 48(2))

$$1. In order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the conduct alleged against the institution concerned, actual damage and the existence of a causal link between that conduct and the damage pleaded. If one of those conditions is not satisfied, the action must be dismissed in its entirety without its being necessary to examine the other conditions of non-contractual liability.

With respect to the first condition, which relates to unlawful conduct, there was a serious fault in the Commission's conduct where, in the course of a tender procedure published pursuant to Directive 93/36 coordinating procedures for the award of public supply contracts, it repeatedly denied the existence of documents which in reality existed and refused to communicate those documents or extracts from the successful bid, but, when an action was brought before the Court of First Instance, communicated those documents on its own initiative and without the slightest reservation. However, although the Commission committed a number of serious faults during that procedure which, individually or at the very least taken together, must be regarded as fulfilling the first of the three conditions necessary for the non-contractual liability of the Community to be incurred, the unsuccessful bidder failed to show that the Commission should have awarded it the contract.

(see paras 18, 26-27, 107, 121)

2. As regards Directive 93/36 coordinating procedures for the award of public supply contracts, even if the contracting authority has a certain margin of discretion in the context of a negotiated procedure, it is always bound to ensure observance of the terms and conditions of the tender specifications which it has freely chosen to make mandatory.

(see para. 76)

3. Under Article 48(2) of the Rules of Procedure of the Court of First Instance no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure. Thus, arguments which cannot be regarded as amplifying, directly or by implication, pleas already put forward in the original application and closely connected therewith are inadmissible.

(see para. 96)

In Case T-40/01,

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Scan Office Design SA, established in Brussels (Belgium), represented by B. Mertens and C. Steyaert, lawyers,

applicant,

v

Commission of the European Communities, represented by L. Parpala and D. Martin, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for compensation for loss allegedly suffered by the applicant as a result of the Commission's decision to award to a third party a contract pursuant to tender No 96/31/IX.C1 for the supply of office furniture,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,

Registrar: J. Palacio Gonzalez, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2002

gives the following

Judgment

Costs

123 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings.

124 However, under Article 87(3) of those Rules, the Court may order that the costs be shared or that each party bears its own costs, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional. The Court may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.

125 In the present case, in light of the numerous faults committed by the Commission in the course of the tendering procedure, the Commission should be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. Dismisses the application;

2. Orders the Commission to pay the costs.

Facts of the case and procedure

1 On 27 August 1996, acting pursuant to Article 56 of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), last amended, at the material time, in connection with the special provisions applicable to research and technological development appropriations, by Council Regulation (EC, Euratom, ECSC) No 2335/95 of 18 September 1995 (OJ 1995 L 240, p. 12) and also pursuant to Article 6(4) of Council

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Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), the Commission published invitation to tender No 96/31/IX.C1 in the Official Journal of the European Communities (OJ 1996 S 164, p. 25, and OJ 1996 C 249, p. 15) for the supply of hierarchical office furniture'. Three of the four lots under that invitation to tender were awarded, whilst the fourth, lot 2A, was not, because the goods proposed did not meet the tender specifications or were not of an acceptable quality.

2 In accordance with Article 6(3)(a) of Directive 93/36, on 1 July 1997 the Commission commenced a negotiated procedure (No 97/25/IX.C1) with a view to awarding lot 2A.

3 On 10 July 1997, an information meeting took place and the new specifications were sent out to 38 suppliers the next day. Those 38 suppliers included all those who had tendered for lot 2A under invitation to tender No 96/31/IX.C1. The deadline for tenders was initially set at 18 August 1997, but was postponed to 27 August 1997, the date of opening of tenders, which, according to the explanations provided by the Commission in its written pleadings, was due to confusion on its part concerning the address of the Frezza company, whose B offer was the one finally chosen (the specifications were erroneously sent to Frezza Italie instead of Frezza Belgium). Of the 38 suppliers, 17 submitted tenders.

4 The analysis of the documentation submitted by the tenderers led the Commission to reject the tenders of two suppliers, who had proposed goods which manifestly did not meet the specifications. A display of the furniture was held from 13 to 27 October 1997. One supplier withdrew, but 16 office sets were displayed by the other suppliers.

5 Around 100 suppliers were invited to take part in the assessment of the products proposed, of whom 34 accepted. Those assessors were divided into seven groups (including a technical assessment group) and received assessment sheets adapted to their group and allowing for a mark of 0 to 5 to be given for each of the samples according to how they met the qualitative criteria set out in the specifications. The form used for the technical assessment (hereinafter the technical assessment sheet') stipulated that marks of 5 and 0 shall be supported by reasons'. The administrative file note concerning the methods for assessing tenders stated that the rejection of the product assessed shall be deemed valid if, without concertation, at least three assessors give a rejection mark of 0, supported by detailed reasons'. The analysis of the furniture displayed did not lead the Commission to reject tenders on the basis of non-compliance with the requirements of the specifications.

6 After examining the furniture displayed by the other tenderers, the manufacturer of the furniture proposed by the applicant wrote to the Commission on 23 and 24 February 1998 to draw its attention to the fact that the furniture proposed by the applicant met the tender specifications, whereas the furniture proposed by other competitors, including SA Frezza Belgium (hereinafter Frezza'), failed to do so in a number of respects.

7 On 23 April 1998, the applicant, not having received any reply, reminded the Commission of its tender.

8 On 20 May 1998, the Commission informed the applicant that its tender had not been successful, and that the contract had been awarded to Frezza.

9 On 24 July 1998, the applicant asked the Commission to provide it with a copy of the administrative file.

10 In a letter of 5 August 1998, Mr Taverne, Head of Unit 1 Budget policy and management; tender procedures and contracts (Brussels)' of the D Resources' Directorate, Directorate-General (DG) IX Personnel and Administration', acting on behalf of the Commission, sent the applicant certain documents, including the Commission's report of 26 January 1998 to the Advisory Committee on Procurement

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and Contracts (ACPC) (except Annex 7, which was Frezza's tender). The Commission refused to divulge the tender made by Frezza on the ground that it was a document from a third party which the code of conduct on public access to Commission documents did not allow it to divulge.

11 On 3 September 1998, in accordance with the procedure referred to by Mr Taverne in his letter, the applicant made the same request to the Secretary-General of the Commission, insisting on its wish to obtain inter alia the technical assessment sheets.

12 In a letter of 9 September 1998, Mr Taverne informed the applicant that those sheets had not been formally drawn up by the Commission.

13 In a letter of 25 September 1998, the Secretary-General of the Commission confirmed to the applicant the decision to deny access to the information or documents requested, on the ground that those assessment sheets did not exist.

14 On 9 December 1998, the applicant brought an action before the Court of First Instance seeking annulment of the decision taken by the Secretary-General on behalf of the Commission refusing to communicate to the applicant certain technical information in the Commission's administrative file. That case was entered in the Registry of the Court of First Instance under case number T-194/98. As part of that procedure, the Commission acknowledged that it had in its possession technical assessment sheets and undertook to supply the applicant with the sheets dealing with the furniture of all the tenderers. Thus the Commission supplied the applicant with two types of assessment sheets: those drawn up by officials from the technical department concerning whether the tender met the tender specifications (technical assessment sheets) and those drawn up by the other groups of assessors concerning the quality of the furniture proposed (aesthetic and ergonomic aspects, solidity, etc.). Under those circumstances, the Court of First Instance, after hearing the parties, ordered on 16 May 2000 that Case T-194/98 be removed from the register.

15 By application lodged with the Registry of the Court of First Instance on 21 February 2001, the applicant brought the present action pursuant to Article 235 EC and the second paragraph of Article 288 EC, for damages and interest against the Commission.

Forms of order sought

16 The applicant claims that the Court of First Instance should:

- declare the action admissible and well founded;

- declare that the Commission committed a fault for the purposes of Article 288 EC by awarding the contract to Frezza and that that fault occasioned loss to the applicant,

- order the Commission to pay to it the sum of EUR 1 023 895, together with the costs of the present proceedings.

17 The Commission contends that the Court of First Instance should:

- dismiss the action for damages as unfounded;

- order the applicant to pay the costs.

Law

18 It has been consistently held that, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the conduct alleged against the institution concerned, actual damage and the existence of a causal link between that conduct and the damage pleaded (Case 26/81 Oleifici Mediterranei v EEC [1982] ECR 3057, paragraph 16; Case T-175/94 International Procurement Services v Commission [1996] ECR II-729, paragraph 44; Case T-336/94 Efisol v Commission [1996] ECR II-1343, paragraph 30; Case T-267/94 Oleifici Italiani v Commission [1997] ECR

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II-1239, paragraph 20). If one of those conditions is not satisfied, the action must be dismissed in its entirety without its being necessary to examine the other conditions of non-contractual liability (Case C-146/91 KYDEP v Council and Commission [1994] ECR I-4199, paragraph 19; Case T-170/00 Förde-Reederei v Council and Commission [2002] ECR II-515, paragraph 37).

The unlawful conduct alleged against the Commission

19 The applicant maintains that the Commission committed faults which led to the applicant's losing the contract to Frezza. The irregularities relied on by the applicant relate to: communication of the assessment sheets and the tender submitted by Frezza; the date of Frezza's tender; the failure to eliminate bids at the stage of the initial assessment of the furniture; examination of the technical assessment sheets; compliance of Frezza's tender with the specifications; assessment of other criteria and the financial assessment of its tender as compared to Frezza's.

20 The applicant concludes that it should have been awarded the contract because it was the only company whose tender complied with the specifications.

21 The Commission takes the view that the applicant's action is unfounded. It argues that the applicant has not adduced any evidence of the Commission's allegedly unlawful conduct and maintains that it complied fully with the rules governing public contracts and the principle of sound administration.

Communication by the Commission of the assessment sheets and the technical assessment sheets submitted by Frezza

22 The applicant states that the Commission forwarded the technical assessment sheets only after an action had been brought before the Community Courts. In not communicating those sheets on the pretext that they did not exist, the Commission failed to observe the principle of sound administration, a failure which could be deemed to be a serious breach and in respect of which it should assure liability for the injurious consequences suffered by the applicant.

23 The applicant further maintains that the systematic refusal by the Commission to communicate to it the tender submitted by Frezza and its production for the first time only at the stage of the present proceedings (without the slightest reservation concerning the confidential nature of those documents) also constitute a serious and manifest breach of the principle of sound administration.

24 The Court finds that the assessment sheets exist, despite the fact that the Commission has denied their existence on several occasions. Thus, in a letter of 9 September 1998, Mr Taverne stated that such sheets had not been formally drawn up. Moreover, in a letter of 25 September 1998, Mr Trojan, Secretary-General of the Commission, stated:

As regards the communication of the technical assessment sheets on compliance with the specifications required, such sheets do not exist ...'.

25 In paragraph 30 of its defence in Case T-194/98, the Commission stated:

The reason why the Commission has refused to communicate the technical assessment sheets is quite plain: they do not exist.'

26 It was only when the first action was brought before the Court of First Instance that the Commission communicated the technical assessment sheets. Likewise, on its own initiative and without the slightest reservation, the Commission attached by way of annexes to its defence extracts from Frezza's bid which it had previously refused to divulge on the grounds that they were documents from a third party which the code of conduct governing public access to Commission documents did not allow it to divulge.

27 It cannot but be concluded that the Commission, in repeatedly denying the existence of documents which in reality existed and by refusing to communicate documents on the ground that they were confidential,

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committed a serious fault.

The date of Frezza's tender

28 The applicant states that, after the information meeting on 10 July 1997, with the deadline for tenders set at 18 August 1997, it learned that the deadline had been postponed to 28 August 1997, according to the Commission, because the specifications had been erroneously sent to Frezza Italie instead of to Frezza. In those circumstances, the applicant expresses surprise that Frezza's tender is dated 18 August 1997. Likewise, the alleged confusion between the addresses of Frezza and Frezza Italie is surprising, since the companies are most likely in close contact with each other.

29 In that regard the Commission states that it was not for it to verify whether Frezza and Frezza Italie were in close contact with each other or not and that no loss could be caused to the other tenderers by the postponement of the deadline for tenders, since the content of all the tenders remained unknown until the expiry of the extended deadline, namely, 28 August 1997, the date of opening of the tenders. It stresses that, in any event, the postponement of the deadline for the submission of tenders was of no practical consequence, since Frezza's tender is dated 18 August 1997.

30 The Court finds, first, that the invitation to the information meeting held on 10 July 1997, as well as all the correspondence concerning the initial invitation to tender, were sent to Frezza, but that the specifications were sent to Frezza Italie on 11 July 1997. In this connection, the Commission states merely that human error during the holiday period led to the confusion as to the addresses, but has refrained from particularising that claim.

31 Next it should be pointed out that the Commission, in its defence and rejoinder, has indicated that Frezza's tender was dated 18 August 1997. However, in response to written questions from the Court, it has been found that Frezza's tender arrived at the Commission on 22 August 1997, that is, four days after the expiry of the deadline set for the submission of tenders. The Commission maintains on this point that it allowed an extension of the deadline following a request to that effect by Frezza. However, the responses to the questions asked by the Court show that it was only by letter dated 21 August 1997 that Frezza asked for an extension of the deadline. That letter was posted on 22 August 1997 and received by the Commission on 25 August 1997. It follows that the request for an extension of the deadline set for the submission of tenders was made by Frezza only after expiry of that deadline.

32 It follows from the foregoing that both the submission of Frezza's tender as well as its request for an extension of the deadline and thus a fortiori the agreement of the Commission to an extension all occurred after expiry of the deadline set for the submission of tenders.

33 Accordingly, the Commission committed a fault in accepting Frezza's late tender.

The failure to eliminate tenders when the furniture was first assessed

34 The applicant observes that, in the report sent to the Advisory Committee on Procurement and Contracts, the Commission indicates that an initial examination of the furniture displayed did not lead it to reject any of the 16 office sets displayed. The applicant considers this statement to be a cause of some concern because, in its view, an examination of the technical assessment sheets shows that none of the tenders, apart from its own and Frezza's, met the requirements of the specifications. Thus, the Commission, it is submitted, committed a fault at this stage in the assessment of compliance by the tenders with the specifications.

35 In that regard the Commission confirms that examination of the furniture displayed did not lead it to reject tenders on the ground of non-compliance with specifications and also states that it

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allowed a certain degree of flexibility concerning compliance.

36 In that regard the Court notes that, according to the technical assessment sheets of three of the five assessors, namely, Messrs Ackermans, Reynen and Gasparini, none of the furniture other than that of Frezza and the applicant met the requirements of the specifications, since they awarded them 0 marks and added the remark non-compliant'.

37 However, the complaint that the Commission, on the initial examination of the furniture displayed, should have rejected some of the 16 sets displayed is devoid of relevance. The results of an initial examination are, by their nature, provisional and subject to revision at later stages of the procedure.

38 It is appropriate to examine whether the procedure for awarding the contract was, from an overall standpoint, carried out correctly and, more precisely, whether it ultimately enabled tenders which did not meet the requirements to be rejected and a tender which did meet the specifications to be accepted, if such were the case. Thus, it is immaterial in the present case that no tenders were rejected, rightly or wrongly, on an initial examination on the ground of non-compliance with the specifications, even if subsequently some assessors considered that none of the tenders, except Frezza's and the applicant's, met the tender specifications.

39 It follows that this plea cannot be accepted.

The examination of the technical assessment sheets

40 The applicant claims essentially that of the five technical assessments, only one of the assessment sheets (Mr Reynen's) can be considered to have been completed by a person who actually examined the furniture displayed by the tenderers.

- The sheets drawn up by Mr Wood

41 The applicant observes, first, that the technical assessment sheets drawn up by Mr Wood are not signed or dated. Next, the sheets contain no remarks. Thus, the mark of 5 given to Frezza concerning compliance with specifications is not elucidated by any supporting remarks, yet the tender in question manifestly does not meet the requirements of the tender specifications. The applicant also questions whether Mr Wood's opinion can be altogether objective, given that he is the person in charge of furniture and is in constant contact with suppliers of office furniture, such as Frezza.

42 The Commission argues that Mr Wood's assessment is handwritten and that, consequently, the absence of a signature does not prevent its author from being identified or, a fortiori, invalidate his analysis. The applicant has not adduced any evidence in support of its allegation of a manifestly erroneous assessment.

43 In that regard the Court points out, first, that the assessors had received forms enabling them to give a mark of 0 to 5 for each of the specimens according to how well they met the qualitative requirements laid down in the tender specifications. On each form, it was stipulated that marks of 5 and 0 shall be supported by reasons'.

44 Next, it should be recalled, as an examination of the technical assessment sheets shows, that Mr Wood did not sign or date them; nor did he make any remarks to justify the marks of 5 which he gave (including to Frezza's B and C tenders).

45 Moreover, Mr Wood omitted to fill out the specific section compliance with tender specifications' for each of the tenders. The Commission has offered no explanation for this.

46 As regards the absence of signature and date, the Commission's argument that Mr Wood's assessment is handwritten and that, consequently, the absence of a signature does not prevent its author from being identified or, a fortiori, invalidate his analysis, must be rejected.

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47 In fact, even on the supposition that a signature is not absolutely necessary, mere handwritten notes on the technical assessment sheets in question, namely IXC3', WOOD' and A', are insufficient to identify their author and thus may not replace a signature, the principal function of which is to identify with certainty the author of the document.

48 In any event, it must further be stated that the Commission has not provided any explanation for the absence of detailed comments by Mr Wood to justify the marks of 5 awarded. The failure to give reasons for those marks, in breach of the instruction to the assessors, and the fact that Mr Wood also omitted to fill out the specific section compliance with tender specifications', are of such a nature in themselves as to invalidate the technical assessment sheets drawn up by him.

49 However, as regards the applicant's complaint that Mr Wood's opinion might not be entirely objective because he is the person in charge of furniture and thus has ongoing contact with suppliers of office furniture, including Frezza, suffice it to state that it is reasonable for the technical assessments to be made by officials who are experts in the area. Moreover, as pointed out by the Commission, the five technical assessors were all with the procurement, supplies' unit in Brussels or Luxembourg. Consequently, the objection raised against Mr Wood could also be raised concerning the five assessments. Finally, the assessors who were favourable to the applicant also work in the same unit as Mr Wood.

50 None the less it follows from the foregoing that the Commission committed a fault in taking account of Mr Wood's assessment sheets.

- The sheets drawn up by Mr Zastawnik

51 The applicant states that the sheets drawn up by Messrs Scholtes and Zastawnik were fictitious, contained no remarks and were not signed or dated. The applicant further observes that Mr Scholtes did not take the trouble to make the slightest remark on the marks awarded by him and notes that the marks varied only between 3 or 4 for all the tenders, whereas other assessors gave marks of 0. The applicant concludes that Mr Scholtes did not complete the technical assessment sheets with due professional care.

52 The Commission argues that the technical assessment sheet bearing the names of Messrs Scholtes and Zastawnik in fact amounts to a single assessment, carried out by Mr Zastawnik, who was replacing Mr Scholtes. Contrary to the applicant's assertion, Mr Zastawnik's sheets are correctly filled out, and are dated and signed on the first page. The Commission further stresses that the applicant's statement that the sheets were fictitious' is insulting and above all without foundation. In fact, that assessor's marks largely coincide with those given by other assessors and are strictly within the range of marks given by the other assessors.

53 The Commission maintains that the applicant's criticism of the manner in which Mr Zastawnik completed the technical assessment sheet is based solely on the fact that the marks given by him are not comparable to those given by other assessors more favourable to the applicant. According to the same line of reasoning, in the Commission's view, the opposite conclusion could be reached, namely, that the assessments of the three assessors favourable to the applicant must be rejected owing to a lack of objectivity.

54 The Court finds that, contrary to the applicant's assertion that Mr Zastawnik's sheets are not dated or signed, it appears that they are indeed dated and signed on the first page (it being noted that the technical assessment sheet for each tender comprises three stapled pages). It must be observed that this rather unusual way of signing a document by putting the signature on the first page does not affect the validity of the technical sheets at issue here. The signature offers proof, in the absence of evidence to the contrary, that its author is indeed the person who completed the technical assessment sheets.

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55 As for the argument that Mr Zastawnik did not take the trouble to add the slightest remark to the marks he gave, an examination of the sheets shows that he did not give marks of 0 or 5, with the result that no justificatory remark was necessary. Consequently, this argument is unfounded.

56 As regards the argument that the technical assessment sheets were not completed with due professional care, the marks given by Mr Zastawnik varying between 3 and 4 only, whereas other assessors gave marks of 0 supported by reasons, it is indeed surprising to observe that some assessors (Messrs Ackermans, Reynen and Gasparini) considered that all of the tenders (except the applicant's and Frezza's) did not comply with the specifications, whilst Mr Zastawnik gave all of the tenders marks of 3 or 4 (with one exception). None the less, this difference between assessments is not sufficient by itself, even together with the fact that the sheets are signed and dated on the front page only, for a finding that the sheets drawn up by Mr Zastawnik are invalid.

57 In fact, the purpose of the technical assessment sheets is to gather the assessments conducted by various assessors whose viewpoints may obviously differ.

58 It follows that the Commission was entitled to take Mr Zastawnik's technical assessment sheets into account and that, consequently, this plea must be rejected.

- The technical assessment sheets of Messrs Reynen, Ackermans and Gasparini

59 The applicant notes that Messrs Reynen, Ackermans and Gasparini completed identical technical assessment sheets and concludes from this that they conducted a joint assessment of the furniture displayed. It also alleges that Mr Reynen alone (or jointly with Messrs Ackermans and Gasparini) seems to have examined the furniture.

60 The Commission states that the sheets completed by Messrs Ackermans and Gasparini contain certain errors of detail, although these do not affect the result of the assessment. Thus, only the first page is signed and Mr Reynen's signature appears on pages 2 and 3 of the forms completed by Mr Ackermans; the functionality' criterion is not assessed at all on Mr Gasparini's form for Frezza's C furniture, which led him to give a mark of 0 for that criterion in the qualitative assessment.

61 It should be noted, first, that it was legitimate for Mr Reynen's technical assessment sheets to be taken into consideration by the Commission in the procedure at issue here. Moreover, the applicant does not argue that the Commission committed an irregularity by taking them into account.

62 Secondly, as regards Mr Ackermans's technical assessment sheets, it cannot but be noted that they simply reproduce the ones drawn up by Mr Reynen. As the Commission, moreover, acknowledges, the sheets drawn up by Mr Ackermans are photocopies of Mr Reynen's sheets, on which Mr Ackerman merely deleted Mr Reynen's name and added his own signature (without even deleting Mr Reynen's). On some pages, Mr Ackermans deleted Mr Reynen's name but did not add his own and did not sign it. On the sheet for the tender M from the company Mercator, Mr Reynen, like Mr Ackermans, made no assessment of compliance. On one assessment sheet only, the one for Frezza's C tender, Mr Ackermans deleted two marks given by Mr Reynen and increased the assessment for functionality and compliance (from 2 to 3), whilst leaving Mr Reynen's remarks and signature.

63 In those circumstances, it appears that the Commission was not entitled to take account of Mr Ackermans's sheets.

64 Thirdly, as regards Mr Gasparini's assessment, an examination of the technical assessment sheets completed by him shows that the marks awarded by him match in all cases those given by Mr Reynen and also, consequently, those given by Mr Ackermans. Although this may be accounted for in cases where, owing to non-compliance of bids, the mark awarded is 0, it is more surprising in the other cases, in particular that of the applicant and Frezza. The similarity, not to say the identical nature, of the remarks made by Mr Gasparini and Mr Reynen tend to indicate that the sheets were

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copied without any actual individual assessment being conducted or, at the very least, that their content is the result of a joint assessment.

65 In that regard it should be recalled that the technical assessment sheets state that a mark of 0 for the criteria of solidity and finishing will result in elimination if it is awarded by at least three persons and is supported by reasons'. The technical assessment sheets completed by Messrs Reynen, Ackermans and Gasparini gave a mark of 0 for those two criteria for all of the tenders except for those of the applicant and Frezza. In response to written questions on this point from the Court, the Commission stated that the tenders in question had none the less not been eliminated. Recalling that the note in the administrative file concerning methods of assessing tenders stated that the rejection of the product assessed shall be considered valid if, without concertation, at least three assessors award a rejection mark of 0, supported by detailed reasons', the Commission argued that since these three assessments had manifestly been carried out in a concerted manner rejection could not take place on this basis.

66 It follows that the Commission itself acknowledges that the three assessors evidently assessed the bids in a concerted manner. It is true that Directive 93/36 does not expressly impose a specific number of assessments or provide that assessors must conduct their assessment completely independently and without any concertation. None the less, the principle of sound administration, which governs the conduct of negotiated procedures for the award of public contracts, requires assessors called upon to assess bids from tenderers to do so in an independent manner, at least initially, by awarding marks on the basis of their own personal expertise.

67 It follows that, in the present case, the Commission was not entitled to take Mr Gasparini's assessments into account.

68 In conclusion, it follows from the foregoing that the assessments by Messrs Wood, Ackermans and Gasparini should have been rejected and that the Commission committed an error in taking them into account.

Compliance by Frezza's tender with the tender specifications

69 Before examining the alleged irregularities committed by the Commission in the assessment of compliance by Frezza's tender with the tender specifications, it is appropriate to determine the margin of discretion available to the Commission in the context of the negotiated procedure for the award of the contract.

70 In that regard the applicant considers that the flexibility available to the Commission in the context of the negotiated procedure must be examined in the light of the criteria set by the Commission itself for award of the contract. The applicant refers to the Vade-mecum on public procurement and contracts drawn up by the Advisory Committee on Procurement and Contracts and concludes that certain of the conditions governing the contract at issue are deemed to have mandatory effect and leave no margin of discretion to the Commission.

71 The applicant maintains that the Commission's assertion that it is not required to adhere strictly to the technical specifications of the terms and conditions of a tender in the context of a negotiated procedure is contrary to Article 16(1) of Directive 93/96, which provides that the contracting authority may take account only of tenders which meet the minimum specifications required. Whatever margin of discretion the Commission may have in negotiations, it cannot be that it would not be obliged to apply criteria which it itself has set. Moreover, the Commission must abide by the principle that all tenderers are to be treated equally.

72 The Commission observes that strict adherence to the tender specifications in the present case would have led to the elimination of all the tenders, including the applicant's. It maintains that

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it follows from Article 6(3)(a) of Directive 93/36 that, in the context of the negotiated procedure, the contracting authority has a right to negotiate. It may accept bids which do not entirely comply with the technical specifications but offer a solution acceptable to it, in conformity with the principle that all tenderers are to be treated equally.

73 The Commission stresses that it adhered to the principle that tenderers are to be treated equally, particularly as regards the applicant. It states that, first, following an unsuccessful invitation to tender, it invited a large number of suppliers to display their furniture. It then allowed for a certain amount of flexibility in relation to the technical specifications, particularly as regards the applicant, in order to choose the furniture best suited to those specifications and its needs. Finally, it made its choice on the basis of the same criteria and ancillary criteria for the award as those used during the unsuccessful invitation to tender which preceded the negotiated procedure, in opting for the most economically advantageous tender'.

74 With regard to the Commission's argument based on Article 6(3)(a) of Directive 93/36 concerning its claim to a right to negotiate, the Court notes that that provision sets out the circumstances in which a negotiated procedure may be initiated but does not indicate the manner in which it must be commenced. Accordingly, the Commission's plea based on that provision is unfounded.

75 It is true that Article 1(e) of Directive 93/36 provides that "negotiated procedures" are those national procedures whereby contracting authorities consult suppliers of their choice and negotiate the terms of the contract with one or more of them'.

76 However, even if the contracting authority has a certain margin of discretion in the context of a negotiated procedure, it is always bound to ensure observance of the terms and conditions of the tender specifications, which they have freely chosen to make mandatory.

77 This is confirmed by Article 16(1) of Directive 93/36, which provides that where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer when they meet the minimum specifications required by the contracting authorities.

78 In the present case, appended to the terms and conditions of the tender are the various data sheets describing the technical features, some of which are regarded as mandatory requirements: Failure to meet these requirements will result in the tender being rejected' (part XII of the data sheets).

79 It should also be noted that the letter of 1 July 1997 addressed by Mr Rosin (Head of Unit 3, Procurement, supply' of Directorate C Administration' of DG IX) to the tenderers in the course of the tender procedure, stated: In this regard, I wish to stress the importance of observing the terms and conditions of the tender specifications, including the mandatory requirements listed therein. Non-observance of those requirements will unfortunately result in the elimination of your bid altogether.' That letter shows the importance attached by the Commission to observance of the terms and conditions of the tender specifications, irrespective of the fact that, according to the Commission, it did not form part of the specifications sent to the tenderers but announced the opening of the negotiated procedure by inviting the addressees to submit a bid.

80 It follows from the foregoing that, although the Commission had a power to negotiate in the context of the negotiated procedure, it was none the less required to ensure observance of those terms and conditions of the tender specifications which were regarded as mandatory.

81 The applicant's arguments alleging non-compliance by Frezza's bid with the terms and conditions of the tender specifications must now be examined.

82 In that regard the applicant maintains that it is clear from the remarks of Messrs Reynen,

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Ackermans and Gasparini on the technical assessment sheets concerning Frezza's B and C tenders that those bids did not meet those requirements of the tender specifications regarded as mandatory. Thus, it notes that item VI-A did not have adjustable jacks; that the drawers of item VI-B did not open in such a way that the tray extended by 105% of its length; that no light colours were proposed; that the cut-away table for item V-F did not allow for versatile use to left and right of the desk; and that the dimensions of the furniture were non-compliant.

83 With regard to the dimensions of the furniture, the applicant maintains, in response to the Commission's argument concerning non-compliance of its bid on the ground that the dimensions of the meeting tables and desk tables proposed by it did not comply with the terms and conditions of the specifications, that if the dimensions were mandatory requirements, as the Commission maintains, then the dimensions of the desk tables and meeting tables mentioned in Frezza's tender were also not in conformity with the terms and conditions of the specifications.

84 The Court considers it therefore appropriate to examine whether the table dimensions formed part of the mandatory requirements which had to be met by the bids, failing which the bids would be eliminated for non-compliance with the terms and conditions of the tender specifications. In that regard it may be observed that the data sheets appended to the specifications expressly provided as regards both desk tables and meeting tables as follows: XII. Mandatory conditions. Failure to meet these requirements will result in non-compliance by the tender. ... Art. III: a minimum of 2 dimensions must be proposed'.

85 The Commission maintains that the dimensions defined within the parameters provided for in the terms and conditions of the specifications formed part of the mandatory conditions.

86 The applicant maintains that the data sheets concerning the tables did not mention that the dimensions were mandatory, unlike the data sheet for the item referenced 2.04, which provided for a mandatory height'.

87 In that regard the Court considers that the dimensions should be regarded as forming part of the mandatory conditions. The fact that a minimum of two dimensions were requested to be proposed implies that four tables, that is to say two meeting tables and two desk tables, having different dimensions but within the parameters referred to in the specifications, had to be included in the tender. Allowing tenderers to propose furniture having dimensions outside the parameters stipulated in the specifications would render nugatory the specification of dimensions in the invitation to tender.

88 The Court also notes that on other data sheets (for example, those for the casings or cupboards), the dimensions are not indicated in part XII concerning mandatory conditions and are preceded by the symbols +-'. It would thus appear that if the table dimensions had not formed part of the mandatory conditions, they would also have been preceded by the symbols +-' and the statement Art. III: a minimum of 2 dimensions must be proposed' would not have been included under the heading of mandatory conditions.

89 As for the applicant's comparison with the data sheet for the item referenced 2.04 indicating a mandatory height', it should be stated that the sheet in question defines the required dimensions in the following manner: (+- L. 120 x W. 80) x H. 72/75 cm'. Unlike the data sheets for the tables, the length and width are preceded by the symbols +-', which is why the wording mandatory height' was added.

90 Consequently, in regard to the tables, in order for the tenderers' bids to satisfy the mandatory conditions, they had to propose a minimum of two dimensions within the parameters indicated in the terms and conditions of the specifications.

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91 As regards compliance by Frezza's tender, it should be noted, first, that for the desk tables the specifications required dimensions of between 160 and 200 cm for length, 80 and 100 cm for width and 72 and 75 cm for height. As to the dimensions of the meeting tables, the specifications required dimensions of between 180 and 240 cm for length, 90 and 120 cm for width and 75 cm for height.

92 The Court finds that, for the desk tables, Frezza's bid proposed two tables which were entirely in compliance with the requirements of the tender specifications, namely, the ZNS 160 table, which measured 166 cm long, 80 cm wide and 72 cm high, and the ZNS 180 table, whose dimensions were 186 cm long, 80 cm wide and 74 cm high. Accordingly, the applicant's argument concerning non-compliance of the desk tables in Frezza's bid must be rejected.

93 As regards the meeting tables, the applicant points out that the dimensions proposed by Frezza were 186 cm long, 80 cm wide and 72 cm high, or 210 cm long, 110 cm wide and 72 cm high. In its replies to the written questions raised by the Court, the Commission acknowledged that the dimensions for the meeting tables were not entirely in conformity with the dimensions laid down in the terms and conditions of the specifications.

94 Without its being necessary to examine the other arguments raised by the applicant concerning compliance by Frezza's bid with the tender specifications, it is clear from the foregoing that the plea that Frezza's bid did not comply with the tender specifications is well founded in so far as the dimensions of the meeting tables are concerned. Consequently, the Commission committed a fault in accepting Frezza's bid.

The Commission's assessment of other criteria

95 In its reply, the applicant argues that there is nothing in the Commission's file concerning the manner in which the criteria relating to warranty and services were assessed by the technical group. It also argues that there was no assessment of compliance by the products with environmental criteria.

96 It should be pointed out that under Article 48(2) of the Rules of Procedure of the Court of First Instance no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure. In the present case, as the Commission has rightly pointed out, the arguments, first, that there is nothing in the Commission's file about the manner in which the criteria relating to warranty and services were assessed by the technical group and, secondly, that there was no assessment of compliance by the products with environmental criteria, cannot be regarded as amplifying, directly or by implication, pleas already put forward in the original application and closely connected therewith. Consequently, they must be declared inadmissible (see Case C-104/97 P Atlanta v European Community [1999] ECR I-6983, paragraphs 27 and 29; Case T-252/97 Dürbeck v Commission [2000] ECR II-3031, paragraph 43; and Case T-62/99 Sodima v Commission [2001] II-655, paragraphs 67 and 68).

The financial assessment of the applicant's and Frezza's tenders

97 The applicant submits that, as regards the assessment of the tenders, its own calculations of the points show that its tender gains more points than Frezza's. Accordingly, it challenges the Commission's conclusion that Frezza's tender was the better one from both a technical and financial viewpoint and submits that the Commission manifestly committed a fault in accepting the bid by Frezza.

98 In its reply, the applicant carries out a fresh calculation of points in which it excludes the technical assessment sheets drawn up by Messrs Wood and Scholtes, together with the points awarded for the warranty and services, and re-evaluates on a basis of equality the prices proposed for the drawer casings.

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99 The Commission confirms the result of its financial and qualitative assessment of all the tenders. It takes the view that the table attached to the application lacks clarity and, more importantly, does not take into account the weighting of each qualitative assessment criterion.

100 As regards the applicant's re-evaluation in its reply of the financial value of the tenders, the Commission essentially observes that the applicant is taking a selective approach to the criteria for awarding the contract, opting for or rejecting certain criteria or assessors according to what is favourable to its bid, and even inventing other criteria, while losing sight of the fact that the contracting authority is bound to apply the selection criteria provided for in the terms and conditions of the tender specifications.

101 In that regard the Court considers that the table attached to the application, in which the applicant re-evaluates the points given by the different groups of assessors, is totally lacking in clarity.

102 Likewise, the applicant's fresh calculation in its reply cannot be considered sufficiently reliable. Thus it may be observed, first, that, in its fresh calculations, the applicant included the technical assessment sheets drawn up by Messrs Reynen, Ackermans and Gasparini. However, as has been noted above, only the sheets completed by Messrs Reynen and Zastawnik were able to be used. Secondly, the applicant did not include the points awarded for warranty and services. However, it follows from the above analysis that the applicant's arguments on this point are inadmissible. Finally, the applicant calculated, without supporting evidence, additional costs of 40% for technical solutions which would allow 105% opening of desk drawers, whereas the Commission states that this additional cost would be no more than 11%. The applicant stated in its application that the supply of 105% opening desk drawers would increase the supply price by 10 to 15%.

103 Accordingly, this argument cannot be accepted.

104 The Commission goes on to state in its rejoinder that even were the applicant's assertions accepted concerning exclusion of the technical assessments by Messrs Wood and Zastawnik and the 40% estimate for the additional cost of the drawers, its tender would still rank below Frezza's. In that regard it should be observed that the difference between the applicant's analysis and the Commission's stems from the fact that the latter does not exclude points awarded for the warranty and services. Since the pleas concerning warranty and services have been declared inadmissible, the Commission cannot be criticised for having failed to take those two criteria into account.

105 Likewise, the file shows that even if the assessments by Messrs Ackermans, Gasparini and Wood which, as has been established, were not able to be taken into account by the Commission had been excluded and an additional cost of 40% for the drawers as proposed by the applicant were accepted, its tender would still rank lower than Frezza's.

106 It follows that the applicant's argument concerning the financial assessment of the tenders cannot be accepted.

107 In the light of the foregoing, it must be concluded, in regard to the unlawful conduct imputed to the Commission, that it committed a number of serious faults which, individually or at the very least taken together, must be regarded as fulfilling the first of the three conditions necessary for the non-contractual liability of the Community to be incurred under the terms of the case-law cited in paragraph 18 above.

Causal link

108 To prove the causal link between the faults committed by the Commission in awarding the contract and the alleged loss, the applicant essentially argues that, had it not been for those faults, it would have been awarded the contract and it would not have suffered any loss. It states that it

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can hardly be disputed that, if the Commission had not committed the faults established, its tender would have been found to be the only one which met the mandatory conditions of the tender specifications and would in any event have been considered to be the most economically advantageous tender with the result that the contract would have been awarded to it. It argues that the Commission did not have any margin of discretion.

109 In that regard it should be noted that, according to the case-law, in order to be successful the applicant must show that its tender met all of the tender specifications (see, by analogy, Case T-478/93 Wafer Zoo v Commission [1995] ECR II-1479, paragraph 49; and Case T-230/94 Farrugia v Commission [1996] ECR II-195, paragraph 46). Accordingly, it is appropriate to examine compliance by the applicant's tender with the terms and conditions of the tender specifications.

110 The Commission claims that non-compliance by the applicant's tender may be established in three respects. First, the dimensions of the meeting tables were not in accordance with the specifications; nor, secondly, were the dimensions of the desk tables; and thirdly, no desk-adjustment jack was installed. On this point the Commission states that the documentation submitted with the applicant's tender did not provide any alternative solutions, and that even though inserts were present, that does not negate the absence of adjustment jacks, which were required for the tender specifications to be met.

111 The applicant maintains that only its tender was fully in compliance with the terms and conditions of the tender specifications and observes that Mr Reynen awarded its bid a mark of 4/5 for compliance with tender specifications, whereas Frezza's tender received a mark of only 2/5.

112 As regards the meeting tables and the desk tables, the applicant maintains that the data sheet does not state that the dimensions were mandatory, and that the specifications merely stated that two dimensions had to be proposed. As for the adjustment jacks, the applicant expresses surprise that the jacks were not located on the furniture displayed and adds that the furniture was equipped with metallic inserts intended for installation of jacks.

113 In that regard it should be stated that, for the reasons set out above, the Court considers that the table dimensions formed part of the mandatory conditions.

114 First, as regards the dimensions of the meeting tables, the specifications provided for dimensions of between 180 and 240 cm long, 90 and 120 cm wide and 75 cm high. The Court points out that it is not disputed that the table displayed by the applicant was 180 cm long, 80 cm wide and 72 cm high, and that the alternative table proposed in the tender was 210 cm long, 120 cm wide and 72 cm high. Accordingly, as the Commission correctly points out, the Court finds that the two tables proposed did not meet the height specifications and that, in addition, the first table did not meet the width specifications.

115 Likewise, the Court finds, secondly, that the Commission correctly considered that the dimensions of the desk table did not comply with the terms and conditions of the tender specifications. The tender specifications required dimensions of between 160 and 200 cm long, 80 and 100 cm wide and 72 and 75 cm high, with a minimum of two different dimensions. The desk displayed by the applicant was 160 cm long, 80 cm wide and 72 cm high, whilst the alternative table proposed was 210 cm long, 120 cm wide and 72 cm high. Accordingly, as the Commission correctly observed, the alternative table proposed did not meet the length or width specifications, and the documentation submitted with the bid did not offer any alternative solution.

116 In these circumstances, it cannot be concluded that the tables proposed by the applicant did not comply with the mandatory conditions of the tender specifications.

117 Moreover, as regards the absence of adjustment jacks, the applicant merely expresses surprise

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that the jacks were not located on the furniture displayed and adds that the furniture was equipped with metallic inserts intended for installation of jacks. In response to a question from the Court, the applicant added that the presence of the metallic insert, to which only the jack may be fitted, confirms that the jacks indeed formed part of its bid.

118 It is none the less the case, however, that the applicant's furniture did not contain the adjustment jacks which were required to comply with specifications. Therefore, the furniture displayed did not comply with the terms and conditions of the tender specifications.

119 In those circumstances, the Court finds that the applicant has not established to the requisite legal standard that its tender satisfied all the conditions of tender specifications deemed to be mandatory.

120 Moreover, as paragraph 105 above makes clear, even when the sheets which could not be taken into account are eliminated and Frezza's tender price is increased by the additional cost connected with the desk drawers, the applicant's tender still appears less advantageous than Frezza's.

121 It follows that, although the Commission committed serious faults in the course of the tender procedure, the applicant has not, however, succeeded in showing that the Commission should have awarded it the contract and, therefore, has not established a causal link between the faults established and the loss alleged.

122 Consequently, and without its being necessary to examine whether the loss which the applicant claims to have suffered owing to the award of the contract to Frezza was actually sustained, the application must be dismissed.

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AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Belgium
PROCEDU	Action for damages - unfounded
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Judgment of the Court of First Instance (Fifth Chamber)
First Instance (Fifth Chamber)First Instance (Fifth Chamber)2003.
Renco SpA v Council of the European Union.
Case T-4/01.

In Case T-4/01,

Renco SpA, established in Milan, Italy, represented by D. Philippe and F. Apruzzi, lawyers, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by F. Van Craeyenest and M. Arpio Santacruz, acting as Agents, assisted by J. Stuyck, lawyer,

defendant,

APPLICATION for compensation for damage allegedly suffered by the applicant as a result of the Council's decision not to award it the contract forming the subject-matter of invitation to tender No 107865 issued on 30 July 1999 (OJ 1999 S 146) for general renovation and maintenance works in the Council's buildings,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

(Fifth Chamber),

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2002,

gives the following

Judgment

Costs

100 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Council has applied for costs, the applicant must be ordered to pay its own costs and those incurred by the Council.

On those grounds,

THE COURT OF FIRST INSTANCE

(Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay its own costs and those incurred by the Council.

Legal context

1 The award of public works contracts by the Council is governed by the provisions contained in the first section of Title IV (Articles 56 to 64a) of the Financial Regulation of 21 December

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1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), last amended before this action was brought by Council Regulation (EC, ECSC, Euratom) No 2673/1999 of 13 December 1999 (OJ 1999 L 326, p. 1).

2 Under Article 56 of the Financial Regulation, `each institution shall comply with the same obligations as are imposed upon bodies in the Member States' by the directives on public works contracts, when concluding contracts for which the amount involved is equal to or greater than the threshold provided for by those directives.

3 In the present case the relevant legislation is Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1).

4 Article 8 of Directive 93/37, as amended by Directive 97/52, provides:

`1. The contracting authority shall, within 15 days of the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of this application or his tender, and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

...'

5 Article 18 of Directive 93/37, as amended, provides:

`Contracts shall be awarded on the basis of the criteria laid down [in Articles 30 to 32 of this Directive]...'.

6 Article 30 of Directive 93/37 provides:

`1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.

3. ...

4. If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

...'

Facts

7 By Notice No 107865, published on 30 July 1999 (OJ 1999 S 146), the General Secretariat of the Council issued a restricted invitation to tender for general renovation and maintenance works

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in the Council's buildings in Brussels; that notice replaced a notice published on 4 June 1999 (OJ 1999 S 107). The procedure was to result in the conclusion of a five-year framework contract, renewable for 12-month periods. It was also stated in the notice that `[i]n 1998, the cost of the general renovation and maintenance work was in the order of EUR 5 000 000'.

8 The contract documents relating to the tendering procedure provided, in point IV.5 entitled `Selection criteria':

`(a) The [General Secretariat of the Council] shall select from among the tenders submitted the one which it considers the most advantageous in the light of the information provided by the undertaking. The following criteria are regarded as especially important:

- the conformity of the tender;

- the price of the tender;

- the experience and competence of the permanent team in providing services similar to those described in the contract documents;

- the experience and technical competence of the undertaking;

- the proposal made with regard to the safety coordinator;

- the quality of any subcontractors and suppliers proposed;

- the technical quality of the equipment and materials proposed;

- the measures proposed for observing the prescribed time-limits for completion.

...'

9 The contract documents stipulated that the contract constituted a framework agreement which bound the two parties for general administrative and technical matters, and for the procedures for fixing prices, qualities and time-limits.

10 The contract documents provided for three kinds of services. First, the contractor was to set up a permanent 16-man team covering various skills. Its role was to prepare, manage and coordinate the renovation and maintenance work and also to carry out part of it. Tenderers were required to state in part A of a summary the hourly rate for each member of the permanent team and the overall amount for the services of the permanent team based on an assumed total of 1 800 hours per member. The contract also included, in particular, two types of work. The first type of work covered renovation and maintenance works which were not yet defined by the Council. For those works, the tenderers were required to state, in part B of the summary, their price for each item in an illustrative list of services relating to labour and supply of materials. The second type of work covered seven items of work which the Council had already defined when it issued the invitation to tender, but which it subsequently might or might not decide to carry out. Tenderers were required to put in a price for those jobs in part C of the summary.

11 According to the contract documents, the work carried out by the permanent team would be remunerated at the price determined by application of the contractual rates to the actual time worked, whereas the work on the various jobs under parts B and C of the summary would be remunerated according to the prices submitted. In the three above cases, tenderers were required to state their rates and prices taking account of the fact that at the time of invoicing a cost plus rate or multiplication factor would be applied for `the undertaking's general office costs'.

12 The contract documents stated that the prices and rates for parts A, B and C of the summary did not include `services provided in the contractor's office or connected with it, such as (inter alia): indirect personnel costs in so far as they are not included in the rates; personnel management;

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general operating costs; general accounting costs; comprehensive site insurance and public liability insurance; the performance bond; the remuneration of company executives; staff training costs; the company's taxes [and] profits.' The `general office costs' as listed above were remunerated by a single cost plus rate or a multiplication factor which was to be fixed by the tenderers when they submitted their tenders and which would be applied to the prices and rates for the work covered by parts A, B and C of the summary. Furthermore, it is clear from the documents before the Court that, if the successful tenderer took on subcontractors to do the work, it was entitled to add to the prices charged by the subcontractors the cost plus rate quoted in its tender. The work in question could be the work provided for in the contract documents or work not so provided for.

13 It should be noted that the prices quoted for parts A and B represented only the approximate cost of the work concerned over one year, whereas the price quoted for part C was the price of certain projects identified in the contract documents to be carried out during the term of the contract.

14 On 28 October 1999, the candidates, eight in all, were informed that their applications to participate in the restricted tendering procedure had been accepted. Of those eight candidates, three submitted tenders conforming to the specifications: Strabag Benelux NV (`Strabag'), Entreprises Louis De Waele (`De Waele') and the applicant.

15 On 11 January 2000, the applicant submitted a tender in the amount of EUR 3 946 745.49 per annum. That tender was considered to conform to the provisions of the contract documents.

16 Following an initial examination of the applicant's tender, the Council considered that some of the prices it contained seemed `abnormally low' and that others `did not even [cover] the supply of materials and equipment'. By letter of 20 January 2000, it asked the applicant to check its calculations, specifying the items concerned. It also pointed out that the applicant had omitted to give certain prices for culinary equipment.

17 By letter to the Council of 24 January 2000, the applicant confirmed its prices, denied that they were abnormally low and stated:

`... we assessed and prepared our tender very carefully and involved our usual suppliers (with whom we have worked closely for many years) in the formulation of our prices; in this regard, our tender was designed to be extremely competitive (while complying with all the technical specifications) so that in the end we might be awarded the contract.'

18 By letter to the applicant dated 1 February 2000, the Council asked for details of certain prices omitted in its tender. It also stated that, although the applicant confirmed, in its letter of 24 January 2000, the prices for the items which the Council considered abnormally low, the letter did not give any justification for those prices, some of which, particularly in relation to plumbing, did not even cover the supply of the materials. The Council then asked for additional information about approximately a hundred items.

19 The representatives of the applicant and the Council met in Brussels on 9 February 2000 in order to clarify certain aspects of the tender. Following that meeting, the applicant, by letter of 11 February 2000, formally replied to the Council's letter of 1 February 2000, in general adhering to the prices quoted in its tender of 11 January 2000 and justifying them by the fact that the aggregation of the items made it possible for the various prices to offset each other. It stated inter alia:

`... our policy has been to assess each job on the basis of an inclusive price, splitting up the costs for the various items not always uniformly but in such a way as to save time in the preparation of the tender. That applies not only to the costs, but also to the profits anticipated in the tender. In the present case, we confirm our undertaking to carry out the work in whole or in part,

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in accordance with our tender and your requirements. We have assessed the risks connected with our decision.'

20 By decision of 12 April 2000, taken on the basis of an opinion of the Advisory Committee on Procurements and Contracts (`CCAM') dated 5 April 2000 and a report of the same date forwarded to the Committee (`the report to the CCAM'), the Council awarded the contract to De Waele, whose offer was EUR 4 088 938.10 per annum. That decision was the subject of Notice No 054869 published on 29 April 2000 (OJ 2000 S 84).

21 By letter of 14 April 2000, the Council informed the applicant that its tender had been rejected.

22 By letter of 26 April 2000, the applicant asked the Council to send it `within 8 days the official reasons adopted by the Community authority for [eliminating] the applicant from the aforementioned contract'. By letter of 10 May 2000, the applicant repeated that request.

23 By letter of 11 May 2000, the Council gave the following answer to the applicant's request:

`In accordance with the provisions of Directive 93/37... , the criteria for awarding the contract were set out in the contract documents relating to the invitation to tender...

Consequently, the three tenders received on 11 January 2000 were analysed and compared in the light of those criteria. The outcome was that the contract was awarded to De Waele, which had submitted the most economically advantageous tender.

For your information, I would add that Renco's tender was not ranked higher than De Waele's for any of the eight criteria referred to in the contract documents.'

24 By letter of 15 May 2000, the applicant, after pointing out that it considered that its tender was more advantageous than De Waele's, asked for additional information from the Council in respect of the rejection of its tender.

25 By fax of 24 May 2000, the applicant asked for a reply to its letter of 15 May 2000 and, by letter of 2 June 2000, repeated the request contained in its letter of 26 April 2000. It also asked for a `copy of the Committee's assessment reports on the tenders submitted in connection with the aforementioned contract'.

26 By letter of 14 June 2000, the Council replied to the applicant's letter of 15 May and 2 June 2000 and provided it with additional information in respect of the rejection of its tender. It indicated the position of the applicant's tender in relation to those of De Waele and Strabag for each of the eight award criteria. With regard, more particularly, to the price of the tender, it stated that the applicant's offer was ranked third because of `the large number of prices which were abnormally low and for which [it] had not provided adequate justification... , the high multiplication factor for general costs [and] the higher price of the contract when considered over the five-year term of the contract'. It concluded:

`Although the [applicant's] tender appears, in the short term, to be the lowest-priced, it has not been successful because of the amount of its quote over a five-year period and of the numerous questions regarding its prices, and because for other assessment criteria it is not ranked higher than De Waele.'

27 By letter of 21 June 2000, the applicant again asked the Council to send it a copy of the administrative file. By letter of 4 July 2000, the Council refused to accede to that request.

28 By application lodged at the Registry of the Court of First Instance on 3 August 2000 and registered under Case number T-205/00, the applicant brought an action for annulment of the Council's decision of 4 July 2000 refusing to grant it access to the administrative file relating to the assessment of the tenders.

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29 By letter lodged at the Registry of the Court of First Instance on 5 February 2001, the applicant informed the Court that, since the Council had finally forwarded - through the Registry - the administrative file on the assessment of the tenders, when it lodged its defence on 12 October 2000, the applicant was abandoning its action in Case T-205/00.

Procedure and forms of order sought

30 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 5 January 2001.

31 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. By way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure of the Court of First Instance, it posed written questions to the parties and asked the Council to furnish information, which was supplied within the time allowed.

32 The parties presented oral argument and their replies to the questions put by the Court at the hearing held on 7 February 2002.

33 The applicant claims that the Court should:

- declare the application admissible and well founded;

- order the Council to pay damages of EUR 26 063 000 together with compensatory interest thereon from 12 April 2000;

- order the Council to pay the costs.

34 The Council contends that the Court should:

- dismiss the application as unfounded;

- order the applicant to pay the costs.

Law

35 The applicant claims damages of EUR 26 063 000 to compensate for the harm which it has allegedly suffered as a result of the unlawful conduct of the Council in the procedure to award the contract in question. It maintains that the Council has exceeded the limits of its authority and administered the procedure with a manifest lack of diligence. The infringements attributable to the Council arise from:

- the reference in the contract documents to vague selection criteria permitting too wide a discretion having regard to the subject-matter of the contract;

- the use, in the final choice of contractor, of criteria not specified in the contract documents, in breach, inter alia, of Article 18 of Directive 93/37, thus frustrating the applicant's legitimate expectations;

- the failure to state reasons for rejecting its tender.

36 The Council considers that the applicant's claim is unfounded and, in the alternative, that the amount of compensation claimed is excessive. It maintains that it has committed none of the infringements alleged and that, in any event, those `infringements do not constitute sufficiently serious breaches' within the meaning of the case-law. In that regard, it recalls that, according to the judgment of the Court of Justice in Case C-352/98 P Bergaderm and Goupil v Commission [2000] ECR I-5291, it is only where the Member State or the institution in question has only considerably reduced, or even no, discretion that the mere infringement of Community law may be sufficient to establish the existence of a breach sufficiently serious to give rise to non-contractual liability on the part of the Community under Article 288 EC. Furthermore, it is settled case-law

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that, like the other institutions, the Council has a wide discretion in assessing the factors to be taken into account for the purpose of the decision awarding a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (Case 56/77 Agence européenne d'interims v Commission [1978] ECR 2215, paragraph 20, Case T-19/95 Adia interim v Commission [1996] ECR II-321, paragraph 49, Case T-203/96 Embassy Limousines & Services v Parliament [1998] ECR II-4239, paragraph 56, and Case T-139/99 AICS v Parliament [2000] ECR II-2849).

Arguments of the parties Use of vague selection criteria

37 The applicant criticises the Council for using too vague selection criteria in the contract documents. It states that `it is apparent from the contract documents that factors relating to the competence of the contractor or its subcontractors were to be considered most important... , criteria relating to the tender - other than its conformity and price - being, surprisingly, almost non-existent', whereas `only objective factors, concerning the execution of the contract and, therefore, the tender, [would have been] able to maintain equality of opportunity between the tenderers and thus avoid value judgments which were difficult to justify'. Furthermore, Article 30(1)(b) of Directive 93/37 concerning `the most economically advantageous tender' listed only factors relating to the tender itself, which do not cover, in the present case, some of the criteria in the contract documents, such as the experience and technical competence of the company and the quality of any subcontractors and suppliers, which are difficult to evaluate.

38 The Council considers that this view cannot be accepted. The invitation to tender clearly stated the eight criteria on the basis of which it was to take its decision awarding the contract (see paragraph 8 above). They make it clear that the conformity and price of the tender were not the only factors to be taken into account, but that the contract would be awarded `to the most economically advantageous tender' within the meaning of Article 30(1)(b) of Directive 93/37 (see paragraph 6 above). The Council considers that that provision contains only an illustrative list of the criteria which may be taken into account and that these may vary depending on the contract in question. In the present case, the invitation to tender clearly stated eight criteria, amongst them the experience and technical competence of the company and the quality of any subcontractors and suppliers proposed. The Council adds that the applicant has not established that it seriously and manifestly exceeded its discretion by listing those criteria. It points out that it is also clear both from its correspondence with the applicant and from the report to the CCAM that it carried out an objective examination of the three tenders received in the light of the eight criteria set out in the contract documents.

Use of criteria not specified in the contract documents

39 The applicant claims that the Council did not base its choice of tenderer on the criteria stated in the contract documents. It maintains that its tender was in conformity with the contract documents, that it adequately satisfied the other criteria laid down and that its price was very much lower than the other tenders. Therefore, by applying other criteria, of which the applicant was not advised, the Council frustrated the legitimate expectations which the applicant was entitled to have concerning the regularity of the procedure to award the contract and the observance of the conditions imposed, and infringed the general principle of diligence and rigour which the institutions are required by the Court to observe (Case T-73/95 Oliveira v Commission [1997] ECR II-381). The Council rejected the applicant's tender mainly on the basis of the abnormally low prices, a multiplication factor which was too high and overall prices which were too substantial over the whole five-year term of the contract. However, the applicant has given a satisfactory explanation of the way in which it determined each of those factors, showing that the criteria actually applied to guide the Council's choice were unjustified and had frustrated its legitimate expectations. The applicant adds that, if the Council had based its decision on the contract documents, there would be no justification

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for its elimination.

40 As regards the prices regarded as abnormally low, that assessment is explained by the fact `that the prices thus referred to were overall prices, not unit prices, so that certain low prices could have been offset by increases' (see, in particular, paragraphs 17 and 19 above). Furthermore, in its letter of 24 January 2000 (see paragraph 17 above), the applicant mentioned the special relations it enjoyed with its usual suppliers. Article 30(4) of Directive 93/37 does not in any case require the contracting authority to reject any abnormally low price. It only requires it to ask for details of the composition of tenders which seem abnormally low. Therefore, the quoting of abnormally low unit prices, when the overall prices of the various items were not abnormally low, cannot justify the Council's decision.

41 As regards the multiplication factor for general costs, the applicant wonders why the Council described a coefficient of 20% as high instead of being surprised that De Waele and Strabag used a multiplier coefficient of 6% to 8% when, in the light of the contract documents, that coefficient was to include all the costs set out in paragraph 12 above. The applicant applied the 20% coefficient taking account of the principles of sound company management. In the light of those principles, it would be impossible to contain the nine costs referred to in a margin of 6% to 8%. Furthermore, the contract documents did not, in any case, recommend that the coefficient should be as low as possible.

42 As for the calculation of the price of the tenders over the whole five-year term of the contract, the Council wrongly concluded that the applicant's tender was less competitive in the long term. The applicant points out that that criterion does not appear in the contract documents and that that method of calculation was therefore unforeseeable at the time the invitation to tender was issued. It also maintains that that method of calculation is incorrect, since it gives an overall price which cannot correspond to the actual cost over that term. It is undeniable that certain prices were likely to vary and that others were payable only once.

43 The applicant also points out that it was the only tenderer to conform to the contract documents and to allocate its profit margin to `part A' of its price - as it was required to do by the official documents governing the invitation to tender -, whereas Strabag and De Waele had allocated it to headings B and C. It was therefore inevitable that the globalisation of only heading A would be to the detriment of the applicant and that its offer on that point would be higher than those submitted by the other two companies (see paragraphs 10 to 13 above). Furthermore, the Council should not have considered the multiplication factor for general costs and the term of the contract cumulatively, because those two factors are really only one.

44 The applicant also considers that the reasoning adopted by the Council for assessing the criterion of the company's experience and technical competence is neither described nor clear.

45 The Council maintains that the applicant's argument cannot be accepted. It based its final choice on the criteria set out in the invitation to tender and in the contract documents and carefully examined the conformity of the three tenders with each of those criteria.

46 The Council states that its examination of the applicant's tender gave rise to the following conclusions:

`- conformity: all three candidates equal... ;

- price of tender: [the applicant] third;

- qualitative criteria: for three criteria [the applicant] is ranked in final position, for one criterion it is equal last and for two criteria the three tenderers are ranked equal'.

47 The Council submits that the criterion of the conformity of the tender is an absolute criterion

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in that a company which does not meet it is excluded at the outset, without its being necessary to examine its tender. The criterion of the price of the tender is an objective criterion since it allows the tenders to be ranked. The Council points out that it is more interested in the lowest-priced tender provided, however, that its meets the qualitative criteria. The other criteria are all qualitative and make it possible to assess the quality and competence of the company and of the methods it proposes. Nevertheless, they are all less important than conformity and price, since the qualitative criteria have already been examined, in part, during the first stage of the tendering procedure on the basis of their presentation file.

48 As regards the abnormally low prices, the Council states that it is required, under Article 30(4) of Directive 93/37, to reject any abnormally low price which cannot be justified. It adds that the provision allows it to ask for details of the abnormally low prices and to reject the tender if those details are not convincing. In accordance with that provision, the Council twice questioned the applicant about a large number of abnormally low prices, but the applicant gave only vague explanations about the prices and merely stated that they were fair (see, in particular, paragraphs 16 to 19 above). The Council adds that the `overall' method of replying to an invitation to tender used by the applicant is akin to speculation and therefore cannot be accepted.

49 Concerning the multiplication factor for general costs, the Council states that this is an important element of the organisation of the contract. That factor, according to the Council, was to be applied to the `basic' prices for every job and, as it was part of the `price of the tender' criterion, therefore appeared in the contract documents (see paragraphs 11 and 12 above). It points out that that coefficient was very high in the applicant's tender whereas it was significantly lower and in accordance with market practices in those of the other two tenderers. Therefore, the high percentage proposed by the applicant would have constituted a financial risk for the Council if the applicant, for tasks which were not provided for amongst the jobs specified in the summary, had had to call on subcontractors. In that situation, the actual cost for the Council would in fact have been made up of the price of the subcontracting or supply plus the aforementioned coefficient. In those circumstances, the actual cost for the Council would therefore have been significantly higher in the applicant's case than in the case of the other two tenderers. It is therefore for the applicant to show that the Council has seriously and manifestly exceeded its discretion by considering that the 20% coefficient which it proposed constituted a financial risk for the institution. Furthermore, the applicant has not adduced any evidence in support of its allegation that it was impossible to contain the nine costs referred to in the contract documents (see paragraph 12 above) within a margin of 6% to 8%, a margin which would have been in accordance with market practices.

50 The Council also points out that it was in its interest to compare the amount of the tenders not only over a year but also over the whole contractual period. It considers that, since the contract documents stated that the contract was concluded for a five-year term, it was natural, and in its interest, to examine the costs of the various tenders over that period. The Council adds that, on the basis of that comparison, the applicant's tender was not the most economically advantageous because of its high cost plus rate. It states that the works in part C of the tender (the predefined projects) were to be carried out only once whereas those in parts A and B might be carried out during the whole of the term of the contract. The Council analysed the offers submitted by the candidates on a financial level using objective and identical criteria. Those two criteria `[are shown] clearly in the contract documents:

- theoretical volume of work over one year (= amount of tender), equals: A + B + 50% C;

- theoretical volume of work over five years (= term of contract), equals: 5A + 5B + 100 C'.

51 As for the applicant's argument that the Council considered a high multiplication factor and the term of the contract cumulatively (see paragraph 43 above), the Council declares that it does

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not understand what it means.

52 In respect of the qualitative criteria, the Council also points out that the applicant has not given a proper reply with regard to the fifth criterion (concerning the safety coordinator) and that its reply regarding the sixth criterion (concerning the subcontractors) is unsatisfactory.

Failure to state reasons

53 The applicant maintains that the Council blatantly disregarded the provisions of Article 8 of Directive 93/37, which required it to communicate within 15 days of the date of the request the reasons for the rejection of its tender. It maintains that it has also infringed the national provisions (the Belgian Law of 24 December 1993 on public procurement and certain works, supply and services contracts) applicable to the award of public contracts. Those rules require contracting authorities to state the reasons for their decisions and prohibit discriminatory practices. However, in the present case, the Council has merely formulated vague considerations, giving the applicant no opportunity to assess its real chances of obtaining the contract or the reasons for the decision taken.

54 The applicant considers that the application of the Belgian Law cannot be ruled out on the ground that Directive 93/37 alone governs the transparency and duty to state reasons of the Community contracting authority. In was stated, on page 32 of the contract documents, that, `subject to specific provisions applicable to the European Communities, Belgian law is applicable to the contract'. The applicant also states that, by abandoning its application in Case T-205/00 (see paragraphs 28 and 29 above), it has not waived its right but only withdrawn the application. That application related only to the Council's decision to provide it with the administrative file requested and not the lawfulness of the Council's decision to reject its tender. The applicant claims that it may, in any event, still contest that latter decision as regards its statement of reasons under Article 8 of Directive 93/37.

55 The applicant claims that the Council's letter of 11 May 2000 (see paragraph 23 above), which is the first response to its request to be sent `the official reasons adopted by the Community authority in order to eliminate it from the contract', cannot constitute the communication of the reasons for the rejection required by Directive 93/37, because that letter does not state any reasons. It adds that the Council's letter of 14 June 2000 (see paragraph 26 above) likewise cannot constitute the required reasoning, because it was sent more than a month and a half after the applicant's first request and one month after its request for details of 15 May 2000 (see paragraph 24 above), and because it merely contains a classification of the three candidates according to the eight criteria, but without any reasons, except for the criterion concerning the price, the application of which is contested.

56 The Council considers that the applicant's claim alleging a lack of transparency is unfounded. It points out that the Belgian Law of 24 December 1993 is not applicable to the present case because the Council is required, as contracting authority for a public works contract, `to comply with Directive 93/37, which alone governs the transparency and duty to state reasons of the Community contracting authority'.

57 The Council points out that the applicant brought an action for annulment, under Article 8(1) of that Directive, against its decision refusing to accede to its request for the `administrative file' and that it abandoned that action because, during the proceedings before the Court of First Instance, the Council sent the file to it. It considers that it must be inferred from that abandonment that the applicant no longer contests - so far as concerns the reasons for the rejection decision - the lawfulness of that decision.

58 The Council states that it has fulfilled the duty to state reasons imposed by Directive 93/37

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in that, first of all, by letter of 14 April 2000, it informed the applicant that its tender had been rejected, and then, by letter of 11 May 2000, replied to its express request of 26 April and 10 May 2000 to send it `the official reasons adopted by the Community authority' in order to eliminate it from the contract. In the letter of 11 May 2000, the Council indicated to the applicant the procedure which had been followed, the reasons why its tender had been rejected and the reasons why De Waele's tender had been successful.

Findings of the Court

59 The second paragraph of Article 288 EC provides that, in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

60 In order for the Community to incur non-contractual liability, a number of conditions must be met: the conduct alleged against the institutions must be unlawful, the existence of damage must be shown, and there must be a causal link between the alleged conduct and the damage. With regard to the first of these conditions, case-law requires it to be shown that there has been a sufficiently serious breach of a rule of law intended to protect individuals (see to this effect Bergaderm and Goupil v Commission, cited above, paragraph 42, and Case T-210/00 Biret and Cie v Council [2002] ECR II-47, paragraph 52). If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (Case C-146/91 KYDEP v Council and Commission [1994] ECR I-4199, paragraph 19).

61 In the present case, as regards the condition relating to the unlawfulness of the Community's conduct, the applicant complains that the Council has infringed the provisions of Directive 93/37 by disregarding the limits of its power and manifestly failing to administer with diligence the procedure to award the contract, on account of the infringements stated in paragraph 35 above.

62 In that regard, it should be remembered that, according to settled case-law, the Council has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender (Agence européenne d'interims v Commission, paragraph 20, Adia interim v Commission, paragraph 49, and Embassy Limousines & Services v Parliament, paragraph 56).

63 When the institution has a discretion, the decisive test for finding that a breach of Community law is sufficiently serious is whether the institution concerned manifestly and gravely disregarded the limits on its discretion (see to this effect Joined Cases C-46/93 and C-48/93 Brasserie du pêcheur and Others [1996] ECR I-1029, paragraph 55; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 Dillenkofer and Others [1996] ECR I-4845, paragraph 25, and Bergaderm and Goupil v Commission, cited above, paragraph 43). It follows that the first condition for the Community to incur non-contractual liability is fulfilled only if it is established that the Council has committed the errors and infringements stated in paragraph 35 above and that they constitute a manifest and serious infringement of the limits on its discretion with regard to tendering procedures.

Preliminary observations

64 As a preliminary point, the Court considers it appropriate to recall some of the specific characteristics of the contract forming the subject of the invitation to tender in question. First, the contract was to be awarded not to the tender with the lowest price but to the most economically advantageous tender, which necessitates the application of various criteria which vary according to the contract in question (see, in particular, paragraph 65 below). Secondly, the procedure was to lead to the conclusion of a framework agreement for a term of five years renewable for 12-month periods. Thirdly, the contract was mixed and consisted of three different types of work for which the methods of determining the price varied. Furthermore, part B of the contract consisted of a large number of jobs to be

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defined and remunerated only during the execution of the contract. In the light of the specific characteristics of the contract in question, the comparative assessment of the tenders which the Council had to carry out necessarily meant that it not only had to check the accuracy and reliability of the unit prices given in the tenders but also had to estimate the total cost of the types of job covered by the contract over a five-year period on the basis of the contract terms and the prices stated in the tenders.

Use of vague criteria

65 As regards the alleged vagueness of the award criteria, it should be pointed out, first of all, that the Council, when applying Article 30(1) of Directive 93/37, did not state in its invitation to tender `the lowest price only' but `the most economically advantageous tender'. In that regard, Article 30(1)(b) of Directive 93/37, concerning the most economically advantageous tender, provides that the applicable criteria shall be `various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit'.

66 Under Article 30(2) of Directive 93/37, when a contract is awarded to the most economically advantageous tender, all the criteria on which the Council intends to base the award must be stated in the contract documents. Furthermore, the provision leaves it to the Council to choose the criteria on which it proposes to base its award of the contract, provided that the criteria chosen are aimed at identifying the offer which is economically the most advantageous. In order to determine the economically most advantageous tender, the Council must be able to exercise its discretion, taking a decision on the basis of qualitative and quantitive criteria that vary according to the contract in question (see to this effect Case 274/83 Commission v Italy [1985] ECR 1077, paragraph 25).

67 In that regard, the Court recalls that, in connection with similar provisions in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), the Court of Justice has held that Article 36(1)(a) of that directive cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature, because it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority (Case C-513/99 Concordia Bus Finland [2002] ECR I-0000, paragraph 55).

68 It follows that Article 30(1)(b) of Directive 93/37 cannot be interpreted as meaning that each of the award criteria used by the Council to identify the most economically advantageous tender had necessarily to be either quantitative or related solely to the prices or rates contained in the summary. Various factors which are not purely quantitative may affect the execution of work and, as a result, the economic value of a tender. For instance, the experience and technical competence of a tenderer and its team, the familiarity with the kind of work covered by the contract in question and the quality of the subcontractors proposed are all qualitative factors which, if they do not reach the level required by the contract, may cause delays in the execution of the work or make additional work necessary. It follows that, even if some of the criteria mentioned in the contract documents for assessing a tenderer's competence to carry out the works are not expressed in quantitative terms, they may be applied objectively and uniformly in order to compare the tenders and are clearly relevant for identifying the most economically advantageous tender.

69 In the present case, as the Council has stated (see paragraph 47 above), the eight criteria referred to in the contract documents, apart from the first criterion concerning the conformity of the tender, are qualitative and quantitative. Since the criterion concerning the conformity of the tender is absolute, a tender must be rejected if it does not conform with the contract documents. The second criterion, namely the price of the tender, is quantitative and serves as an objective basis for comparing the respective costs, prices and rates of the tenders. The other six criteria

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are qualitative and their principal role is to ensure that each tenderer has the competence and skill needed for executing the work of the contract. The Court considers that, although those six criteria, amongst them the experience and technical competence of the company and the quality of any subcontractors proposed, are not absolute or quantitative like the first two, they are nevertheless not vague and can all be evaluated objectively and specifically. Furthermore, it should be pointed out that criteria like the experience and technical competence of the company and the quality of any subcontractors proposed are factors which may affect the value of the tender and, contrary to what the applicant claims, it is appropriate that they should appear amongst the criteria of the contract documents.

70 The Court also notes that the applicant merely asserts that the award criteria mentioned in the contract documents did not make it possible to maintain equality of opportunity between the tenderers, without adducing the slightest evidence in that regard and without alleging that it had suffered discrimination itself. In any event, it is clear from the documents before the Court and the report to the CCAM that the three tenders in the case were examined with all due care and that the award criteria were applied without discrimination.

71 Consequently, it must be held that the eight award criteria listed in the contract documents were transparent and relevant in relation to the nature of the contract and that they sought to identify the most economically advantageous tender.

72 It is evident from the foregoing that the Council did not infringe the limits of its discretion when formulating the award criteria in the contract documents.

Use of criteria not specified in the contract documents

73 The applicant also considers that the Council did not base its choice of tenderer on the criteria indicated in the contract documents, but on other criteria of which the applicant was not advised, thus frustrating its legitimate expectations that the award procedure would be properly conducted. It rejected the applicant's tender on three grounds, namely the quoting in its tender of abnormally low prices, a multiplication factor which was too high and overall prices which were too substantial over the full five-year term of the contract. However, according to the applicant, it has given a reasonable explanation of the way in which it decided each of those elements, thus showing that the criteria actually applied to guide the Council's choice were unjustified and had frustrated its legitimate expectations.

74 With regard to the prices which the Council considered to be abnormally low, it is not disputed that the applicant, instead of providing individual prices for each item specified in the contract documents, as required, used overall rather than unit prices for certain items. According to the report to the CCAM, if a tenderer's prices were less than half as much as the prices of the other tenderers and of architects' estimates, they were regarded as abnormally low, which means that the prices in question were dubious. It is apparent from the file that the Council asked the applicant for details on several occasions about many prices which it considered did not even cover the supply of the materials and equipment. However, in spite of numerous contacts between the parties on that point, the applicant continued to retain the same prices in its tender. It stated that its practice was to give an overall price which allowed it to gain time when preparing its tender, and confirmed that its prices were correct. It also stated that it had prepared its tender in liaison with some of its usual suppliers and confirmed its undertaking to execute the work in accordance with its tender (see paragraph 17 above).

75 The Court finds that the applicant cannot criticise the Council for checking many of the prices quoted in its tender. It is apparent from the wording of Article 30(4) of Directive 93/37 that the Council is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers

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appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders (Joined Cases C-285/99 and C-286/99 Lombardini and Mantovani [2001] ECR I-9233, paragraph 55). The Court notes, for example, that the Council, in its defence, stated that it had questioned the applicant about very many of the abnormally low prices, namely the price of 319 items in the summary out of a total of 1 020. It also asked the applicant for clarification regarding a series of very blatant anomalies and particularly about the price of the doors, which are the same for single doors, double doors or glass doors. The applicant has not provided adequate explanations for those anomalies either in its reply or at the hearing.

76 In that regard, the Court observes that, although Article 30(4) of Direcrtive 93/37 does not require the Council to check each price quoted in each tender, it must examine the reliability and seriousness of the tenders which it considers to be generally suspect, which necessarily means that it must ask, if appropriate, for details of the individual prices which seem suspect to it, a fortiori when there are many of them. Furthermore, the fact that the applicant's tender was considered to conform to the contract documents did not relieve the Council of its obligation, under the same article, to check the prices of a tender if doubts arose as to their reliability during the examination of the tenders and after the initial assessment of their conformity.

77 The Court finds that the Council correctly followed the procedure laid down by Article 30(4) of Directive 93/37 and, in particular, satisfied the requirements relating to the inter partes nature of the procedure by providing the applicant, on several occasions, with the opportunity to demonstrate that its tender was serious. In that regard, it is apparent from the correspondence between the parties and, in particular, from the applicant's letters to the Council of 24 January and 11 February 2000 (see paragraphs 17 and 19 above) that the applicant, in spite of specific requests from the Council, merely confirmed generally that the prices quoted in its tender were reasonable, without adducing the slightest evidence to establish the reliability of the individual prices.

78 The Council did not manifestly and seriously disregard the limits of its discretion in the matter by taking into consideration, when assessing the applicant's tender, the quoting of many abnormally low prices and the failure to give a convincing explanation which persisted even after the inter partes procedure laid down in Article 30(4) of Directive 93/37.

79 Therefore, the applicant's arguments relating to the abnormally low prices must be rejected.

80 The applicant considers that the Council was wrong to regard as too high the multiplication factor of 20% given in its tender for the `general office costs' listed in paragraph 12 above. It maintains that it was impossible to contain those costs within a margin of 6% to 8% as De Waele and Strabag did in their tenders.

81 It should be observed that the applicant merely states that it was impossible without adducing any proof or evidence in that regard.

82 It should also be noted that the multiplication factor for the `general office costs' proposed by the applicant was markedly higher than that of the other tenderers and, according to the Council, represented a financial risk for it if the applicant, for jobs which were not included in the jobs specified in the summary of the contract documents, had had to call on subcontractors. In reply to a written question posed by the Court before the hearing with the aim of establishing the genuineness of the alleged financial risk, the Council made an extrapolation - on the basis of the work carried out on one of its buildings during the first year of the contract with De Waele - from the figures and multiplication factor given by the applicant in its tender, in order to determine what the work would have cost if it had been done by the applicant. The Council then compared that cost with

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the cost of the work carried out by De Waele over a period of one year and over a period of five years, the term of the contract. Given that a significant part of the work in question was carried out by subcontractors, the result of that simulation was that the Council might have had to pay the applicant a sum considerably higher than that paid to De Waele for doing the same work. It follows that the Council was right, when carrying out the assessment designed to obtain the most economically advantageous tender over the five years of the term of the contract, to take into consideration the potential effect of the difference between the multiplication factor of 20% proposed by the applicant and that proposed by the other tenderers.

83 The Court therefore considers that the applicant has not established that the Council committed a manifest and serious error of assessment by considering, when assessing its tender, that the multiplication factor of 20% represented a financial risk. Furthermore, the fact that the Council did not recommend, in the contract documents, that that factor should be as low as possible is irrelevant, because the very purpose of the summary is to require tenderers to quote all their prices, including the multiplication factor, whether they are high or not, which, depending on the circumstances, will bind the parties.

84 The applicant's arguments relating to the multiplication factor for the `general office costs' must therefore be rejected.

85 As regards the calculation, made by the Council when assessing the tenders, of their price over a five-year term, the applicant considers that the Council incorrectly concluded that its tender was less competitive in the long term. It points out inter alia that `the formula' of `5A + 5B + C' used by the Council does not appear in the contract documents and that that calculation method was unforeseeable at the time of the invitation to tender. It also maintains that the calculation method is misconceived because it gives an overall price which cannot correspond to the actual cost of the work over the five-year period.

86 The Court makes the preliminary point that, in regard to that matter, the Council had a wide discretion and the review of the Court must be limited to verifying the lack of a serious and manifest error. First of all, although the contract documents did not contain the formula in question, the invitation to tender and the contract documents clearly specified that the term of the contract was normally five years (see, in particular, paragraph 7 above). In fact, the application of the formula in question permitted an extrapolation, on the basis of the terms of the offers submitted by the three tenderers, of the total cost to the Council of the contract over five years taking into consideration the different characteristics of the jobs in parts A, B and C of the summary. Although the tender price of EUR 3 946 745.49 per annum submitted by the applicant (see paragraph 15 above) was lower than the annual price of the other two tenders, the extrapolation made by the Council enabled it to compare the overall economic advantages of the three tenders in the light of the five-year term of the contract and the specific characteristics of the jobs specified in parts A, B and C of the summary. That enabled the Council to judge that the applicant's tender was the most expensive in the long term. The Court finds that, although the formula stated in paragraph 85 above was not given in the contract documents, the use of such a formula was nevertheless foreseeable and reasonable, particularly in the light of the duration of the contract in this case.

87 The Court considers that the applicant's arguments set out in paragraph 43 above are incomprehensible. The applicant's replies to the questions put to it before and during the hearing were not sufficient to elucidate those arguments for the Court. They must therefore be rejected pursuant to Article 44(1)(c) of the Rules of Procedure (Case T-154/98 Asia Motor France and Others v Commission [1999] ECR II-1703, paragraph 49).

88 It is apparent from the foregoing that the applicant has not established that the Council committed a manifest and serious error in the assessment of the price of the tenders over the term of the

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contract. Consequently, the applicant's arguments relating to the evaluation of the tender prices must be rejected.

Failure to state reasons

89 As regards the alleged infringement of the duty to state reasons in this case, the Court points out that the claim for damages in the amount of EUR 26 063 000 lodged by the applicant (see paragraph 33 above) includes inter alia a claim for EUR 24 000 000 by way of compensation for the harm resulting from the loss of the chance of being awarded the contract in issue. It must be observed that, even if it were to be considered that the Council did not give adequate reasons for rejecting the applicant's tender, that does not mean that the award of the contract to De Waele constituted an error or that there is a causal link between that fact and the loss alleged by the applicant.

90 With regard to the Council's arguments set out in paragraph 57 above, the Court finds that the action brought by the applicant in Case T-205/00 sought the annulment of the Council's decision refusing to grant it access to the administrative file relating to the assessment of the tenders and was therefore brought against a decision other than the contested decision. That action, since the applicant has abandoned it, has no bearing on the present action.

91 As regards the applicant's argument set out in paragraph 54 above relating to the Belgian legal provisions on invitations to tender, the Court finds that the inclusion, in paragraph 26(a) of the contract documents, of the words `Belgian law is applicable to the contract' was intended to submit the eventual conclusion of the contract and the execution of the work to which it related to the relevant provisions of Belgian law. On the other hand, it does not cover the procedures prior to conclusion of the contract, which are governed exclusively by Directive 93/37. Consequently, it is necessary to determine the extent of the Council's duty to state reasons in respect of a tenderer who has not been successful in the award procedure under Article 8(1) of Directive 93/37, as amended by Directive 97/52.

92 It is apparent from this last provision and from the judgment in Adia interim v Commission, cited above, that the Council fulfils its obligation to state reasons if it first informs eliminated tenderers immediately of the fact that their tender has been rejected by a simple unreasoned communication and then subsequently, if expressly requested to do so, informs tenderers of the relative characteristics and advantages of the successful tender and the name of the successful tenderer within 15 days of receipt of a written request.

93 Such a manner of proceeding satisfies the purpose of the duty to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its power of review (Case T-166/94 Koyo Seiko v Council [1995] ECR II-2129, paragraph 103, and Aida interim v Commission, cited above, paragraph 32).

94 Consequently, in order to determine whether the Council fulfilled its obligation to state reasons, the Court considers that it is necessary to examine the letter of 11 May 2000 sent to the applicant in response to its express request of 26 April 2000.

95 Clearly, in its letter of 11 May 2000, the Council gave a sufficiently detailed statement of the reasons for which it had rejected the applicant's tender and stated the characteristics and advantages of De Waele's tender. That letter clearly indicates the procedure which was followed to evaluate the tenders of the three tenderers and the fact that De Waele's tender was successful because it was the most economically advantageous. The Court considers that the applicant could immediately identify the specific reason for the rejection of its tender, namely the fact that it

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was economically less advantageous than that of De Waele. The Council added that the applicant's tender was not ranked higher than De Waele's for any of the eight criteria referred to in the contract documents.

96 In any event, and contrary to what the applicant claims (see paragraph 55 above), the Council's letter of 14 June 2000 may also be taken into consideration in order to examine whether the statement of reasons in this case was adequate, because the duty to state reasons must be assessed in the light of the information available to the applicant at the time the application was brought. If, as in the present case, the applicant, before bringing an action but after the date laid down by Article 8(1) of Directive 93/37, asks the institution concerned for additional explanations about a decision and receives those explanations, it cannot ask the Court not to take them into consideration when determining whether the statement of reasons is adequate; however, the institution is not permitted to substitute an entirely new statement of reasons for the original statement of reasons, but that is not the position in this case. In its letter of 14 June 2000, the Council, supplementing its letter of 11 May 2000, provided explanations which were more detailed but which correspond to the explanations given in the letter of 11 May as regards the rejection of the applicant's tender. Moreover, the Court considers that the fact that fuller information was given in the letter of 14 June 2000 does not mean that the reasons stated in the letter of 11 May 2000 were inadequate.

97 It follows that the applicant cannot rely on the alleged infringement of the duty to state reasons.

98 It is apparent from the foregoing considerations that the applicant has not established that the Council disregarded the limits of its discretion or, therefore, that it committed a sufficiently serious infringement of Community law.

99 The first condition for Community liability, namely the unlawfulness of the conduct of the institution complained of, not having been satisfied, the applicant's claim for damages must be dismissed, without there being any need to consider whether the other conditions are satisfied.

DOCNUM	62001A0004
AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2001 ; A ; judgment
PUBREF	European Court reports 2003 Page II-00171
DOC	2003/02/25
LODGED	2001/01/05
JURCIT	31977Q1231-A56 : N 2 31977Q1231-TIT04 : N 1 61977J0056 : N 62 61983J0274 : N 66

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31991Q0530-A44P7LC : N 87
61991J0146 : N 60
31992L0050-A36P1LA : N 67
31992L0050 : N 67
31993L0037-A08 : N 4
31993L0037-A08P1 : N 91 96
31993L0037-A18 : N 5
31993L0037-A30 : N 6
31993L0037-A30P1 : N 65
31993L0037-A30P1LB : N 65 68
31993L0037-A30P2 : N 66
31993L0037-A30P4 : N 75 - 78
31993L0037 : N 3 61 91
61993J0046 : N 63
61994A0166 : N 93
61994J0178 : N 63
61995A0019 : N 62 92 93
61996A0203 : N 62
11997E253 : N 93
11997E288-L2 : N 59
31997L0052 : N 3 91
61998B0154 : N 87
61998J0352 : N 60 63
31999R2673 : N 1
61999J0286 : N 75
61999J0513 : N 67
62000A0205 : N 90
62000A0210 : N 60

SUB Public contracts of the European Communities

AUTLANG French

APPLICA Person

DEFENDA Council ; Institutions

NATIONA Italy

NOTES Antonucci, Marco: Il Consiglio di Stato 2003 II p.356-360
Caruso, Claudia: Diritto pubblico comparato ed europeo 2003 p.957-961
Braun, Peter: Public Procurement Law Review 2003 p.NA116-NA119

PROCEDU Action for damages - unfounded

DATES of document: 25/02/2003
of application: 05/01/2001

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Judgment of the Court (Fourth Chamber)
of 21 June 2001
Commission of the European Communities v French Republic.
Failure by Member State to fulfil its obligations - Directive 98/4/EC - Failure to transpose within the prescribed period.
Case C-439/00.

Member States - Obligations - Implementation of directives - Failure to fulfil obligations not contested

(Art. 226 EC)

In Case C-439/00,

Commission of the European Communities, represented by M. Nolin, acting as Agent, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and S. Pailler, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to adopt all the laws, regulations and administrative measures necessary to comply with Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1998 L 101, p. 1) or, at all events, by failing to communicate the same to the Commission, the French Republic has failed to comply with its obligations under that directive,

THE COURT (Fourth Chamber),

composed of: A. La Pergola, President of the Chamber, S. von Bahr (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: J. Mischo,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 2 May 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 28 November 2000, the Commission of the European Communities brought this action under Article 226 EC for a declaration that, by failing to adopt all the laws, regulations and administrative measures necessary to comply with Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998, amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1998 L 101, p. 1) or, at all events, by failing to communicate the same to the Commission, the French Republic has failed to comply with its obligations under that directive.

2 Under Article 2(1) of Directive 98/4 Member States were to bring into force the laws, regulations

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and administrative measures necessary to comply with the directive by 16 February 1999 and to inform the Commission thereof forthwith.

3 Taking the view that Directive 98/4 had not been transposed into French law within the prescribed period, the Commission started the procedure in respect of failure to fulfil Treaty obligations. Having given the French Republic formal notice to submit its observations, the Commission, on 18 February 2000, sent a reasoned opinion to the French Republic requesting it to adopt the measures necessary to comply with it within two months from the date of notification of the opinion. Since it received no information as to whether the transposition of the directive had been completed, the Commission brought the present action.

4 Pointing out the obligations of the Member States under the third paragraph of Article 249 EC, the Commission submits that the French Republic was required to take the measures necessary to comply with Directive 98/4 within the prescribed period.

5 The French Republic, which does not deny the failure, states that Directive 98/4 is in the course of transposition.

6 Since the directive has thus not been transposed within the prescribed period, the Commission's action must be regarded as well founded.

7 It must therefore be held that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative measures necessary to comply with Directive 98/4, the French Republic has failed to fulfil its obligations under that directive.

Costs

8 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber),

hereby:

1. Declares that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative measures necessary to comply with Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the French Republic has failed to comply with its obligations under that directive.

2. Orders the French Republic to pay the costs.

DOCNUM	62000J0439
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

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TYPDOC	6 ; CJUS ; cases ; 2000 ; J ; judgment
PUBREF	European Court reports 2001 Page I-04835
DOC	2001/06/21
LODGED	2000/11/28
JURCIT	31993L0038 : N 1 31998L0004-A02P1 : N 2 31998L0004 : N 1 6 7
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Mischo
JUDGRAP	von Bahr
DATES	of document: 21/06/2001 of application: 28/11/2000

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JUDGMENT OF THE COURT (Fifth Chamber)

14 November 2002 (1)

(Public service contracts - Directive 92/50/EEC - Scope *ratione materiae* - Moving offices of a central bank - Contract relating to both services listed in Annex I A to Directive 92/50 and services listed in Annex I B to that directive - Predominance in value terms of services listed in Annex I B)

In Case C-411/00,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between

Felix Swoboda GmbH

and

Österreichische Nationalbank,

on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), D.A.O. Edward, P. Jann and S. von Bahr, Judges,

Advocate General: J. Mischo,

Registrar: M.-F. Contet, Administrator,

after considering the written observations submitted on behalf of:

- the Österreichische Nationalbank, by I. Welser, Rechtsanwältin,

- the Austrian Government, by H. Dossi, acting as Agent,

- the United Kingdom Government, by R. Magrill, acting as Agent, and A. Robertson, Barrister,

- the Commission of the European Communities, by M. Nolin, acting as Agent, and R. Roniger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of the Österreichische Nationalbank, represented by I. Welser, of the Austrian Government, represented by M. Winkler, acting as Agent, and of the Commission, represented by M. Nolin and R. Roniger, at the hearing on 14 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2002,

gives the following

Judgment

1. By order of 29 September 2000, received at the Court on 10 November 2000, the Bundesvergabeamt referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2. Those questions arose in the course of proceedings between Felix Swoboda GmbH (Swoboda) and the Österreichische Nationalbank (the Austrian central bank) (ANB), concerning the ANB's decision to use a negotiated procedure for the award of a contract in order to nominate the service provider contracted to undertake a removal to new premises situated approximately 200 metres from the original address.

Legal framework

Community law

Directive 92/50

3. Article 1(d) to (f) of Directive 92/50 provides:

For the purposes of this directive:

...

(d) *open procedures* shall mean those national procedures whereby all interested service providers may submit a tender;

(e) *restricted procedures* shall mean those national procedures whereby only those service providers invited by the authority may submit a tender;

(f) *negotiated procedures* shall mean those national procedures whereby authorities consult service providers of their choice and negotiate the terms of the contract with one or more of them.

4. According to Article 2 of Directive 92/50:

If a public contract is intended to cover both products within the meaning of Directive 77/62/EEC and services within the meaning of Annexes I A and I B to this directive, it shall fall within the scope of this directive if the value of the services in question exceeds that of the products covered by the contract.

5. Article 7(3) of Directive 92/50 provides:

The selection of the valuation method shall not be used with the intention of avoiding the application of this directive, nor shall any procurement requirement for a given amount of services be split up with the intention of avoiding the application of this article.

6. According to Article 8 of Directive 92/50:

Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.

7. Article 9 of Directive 92/50 provides:

Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.

8. Article 10 of Directive 92/50 provides:

Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.

9. It follows from Article 11(4) of Directive 92/50 that the use of the negotiated procedure constitutes an exception in the context of the procedure for the award of public service contracts, the contracting authorities being obliged, outside the cases referred to in paragraphs 11(2) and (3), to award their contracts by the open procedure or by the restricted procedure.

10. Amongst the services in Annex I A to Directive 92/50 are, in Category 2, land transport services ... including armoured car services, and courier services, except transport of mail (and rail transport services) covered, respectively, by Category 4 of Annex I A and Category 18 of Annex I B to the directive. With respect to land transport services, there are listed reference numbers 712 (except 71235), 7512 and 87304 of the common product classification of the United Nations (the CPC nomenclature).

11. As for the services which are listed in Annex I B to Directive 92/50, they include in Category 20 Supporting and auxiliary transport services, which correspond to reference number 74 of the CPC nomenclature.

Directive 93/36/EEC

12. Article 1(a) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) provides:

For the purpose of this directive:

(a) *public supply contracts* are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations.

13. According to Article 5(6) of Directive 93/36

No procurement requirement for a given quantity of supplies may be split up with the intention of avoiding the application of this directive.

Directive 93/37/EEC

14. Article 1(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) provides that:

For the purpose of this directive:

(a) public works contracts are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

Directive 93/38/EEC

15. Article 1(4) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) provides:

For the purpose of this directive:

...

4. supply, works and service contracts shall mean contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider, having as their object:

(a) in the case of supply contracts, the purchase, lease, rental or hire-purchase, with or without

options to buy, of products;

(b) in the case of works contracts either the execution, or both the execution and design or the realisation, by whatever means, of building or civil engineering activities referred to in Annex XI. These contracts may, in addition, cover supplies and services necessary for their execution;

(c) in the case of service contracts, any object other than those referred to in (a) and (b) ...

...

Contracts which include the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract.

16. Finally, under Article 14(8) of Directive 93/98:

The basis for calculating the estimated value of a contract including both supplies and services shall be the total value of the supplies and services, regardless of their respective values. The calculation shall include the value of the siting and installation operations.

National legislation

17. Directive 92/50 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Federal law on the award of public contracts, BGBl. 1993/462, in the version published in BGBl. 1996/776, BVergG 1993). That law was replaced in 1997 by a law of the same title (BGBl. I, 1997/56, BVergG 1997).

18. In accordance with the terms of Directive 92/50, the regime applicable to public service contracts depends in Austria on the type of services provided. While all the provisions of the BVergG 1993 and 1997 apply to contracts for the services referred to in Annex III to those laws (which corresponds essentially to Annex I A to Directive 92/50), only the provisions of the first and fourth parts of those laws, concerning their scope and legal remedies, and four Paragraphs concerning the advertising of contracts, the use of the Common Procurement Vocabulary (CPV) and the technical specifications apply to contracts for the services referred to in Annex IV to the BVergGs of 1993 and 1997, which is identical, in essence, to Annex I B to Directive 92/50.

19. In addition, those laws contain a provision inspired by Article 10 of Directive 92/50 because in the case of contracts for services mentioned in Annex III and Annex IV to the laws Paragraph 1b(3) of BVergG 1993 and Paragraph 3(3) of BVergG 1997 make all the provisions of those laws applicable when the value of the services referred to in Annex III thereto exceeds that of the services referred to in Annex IV. Where the situation is reversed only the first and fourth parts are applicable to the contracts, together with the four Paragraphs referred to in the preceding paragraph of this judgment.

The main proceedings and the questions referred for a preliminary ruling

20. In autumn 1996, after using the restricted procedure to award a contract for a move from premises situated in Vienna (Austria) to new premises some 200 metres away (the procedure was annulled in March 1997), the ANB awarded that contract by the negotiated procedure and in April 1997 published the contract award notice. In the notice, the ANB indicated as the procedure chosen for the award of the contract the negotiated procedure for a service provided for in Paragraph 1b(2) and (3) of the BVergG 1993, with the predominant value made up of services referred to in Annex IV to the BVergG, while in order to designate the services constituting the contract, it referred to the CPV reference numbers 63100000-0 (Cargo handling and storage services), 63200000-4 (Other supporting services for land transport), 63400000-0 (Freight forwarding services) and 60240000-2 (Freight transportation services by road).

21. Swoboda challenged the ANB's contract award decision before the national court which has made the reference, seeking a declaration that the contract had not been awarded to the most favourable tenderer as the result of a breach of federal law on the award of public contracts or of the rules governing its application. It argued, in that regard, that the value of the services listed in Annex III to the BVergG 1993 and 1997 was far greater than the value of the services in Annex IV to the BVergG, so that the BVergG had to be applied in full.

22. The ANB contested that view before the national court. Contending that the majority of the services to be provided by the supplier of services concerned, in the present case, logistics and computerised task management, planning and coordination of all the tasks connected with the move and the provision of storage facilities - the move and the transportation of the contents of the premises represented only 6.94% of the total value of the contract - the ANB argued that the contract concerned mainly supporting and auxiliary transport services, referred to in Annex IV to the BVergG 1993 and 1997, to which only the first and fourth parts and the four Paragraphs mentioned in paragraph 18 of the present judgment apply. It relied in particular, in that regard, on the CPC nomenclature which brings together, in Chapter 74, all supporting and auxiliary transport services, including, in sub-chapter 742, storage and warehousing and in sub-chapter 7480, freight transport agency services, freight forwarding services (primarily transport organisation or arrangement services on behalf of the shipper or consignee), ship and aircraft space brokerage services and freight consolidation and break bulk services, which correspond essentially to coordination and logistics.

23. In those circumstances, being uncertain of the interpretation to be given to Directive 92/50 in view, in particular, of the judgments in Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329 and Case C-76/97 *Tögel* [1998] ECR I-5357, the Bundesvergabeamt decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Must a service which serves a single purpose, but which could be subdivided into part services, be classified as a single service consisting of a main service and accessory, supporting services in accordance with the scheme of Directive 92/50/EEC, and in particular the types of services contained in Annex I A and I B, and treated as a service listed in Annex I A or I B to the directive according to its main object, or must each part service instead be considered separately in order to establish whether the service is subject to the directive in full as a priority service or only to individual provisions thereof as a non-priority service?

(2) How far may a service which describes a specific type of service (e.g. transport services) be broken down into individual services in accordance with the scheme of Directive 92/50/EEC without infringing the provisions on the award of service contracts or undermining the *effet utile* of the directive on services?

(3) Must the services referred to in this case (having regard to Article 10 of Directive 92/50/EEC) be regarded as services falling within Annex I A to Directive 92/50/EEC (Category 2, Land transport services) so that contracts which have as their object such services are to be awarded in accordance with the provisions of Titles III to VI of the directive, or must they be classified as services falling within Annex I B to Directive 92/50/EEC (Category 20, Supporting and auxiliary transport services, and Category 27, Other services) so that contracts which have as their object such services are to be awarded in accordance with Articles 14 and 16, and under which CPC reference number must they be subsumed?

(4) In the event that consideration of the part services leads to the conclusion that a part service falling within Annex I A to the directive which, in principle, is subject in full to the provisions of Directive 92/50/EEC is, by way of an exception, not subject in full to the provisions of the directive on account of the principle of predominance laid down in Article 10 thereof, is there an obligation on the contracting authority to split off non-priority part services and to award contracts for them separately in order to respect the priority nature of the service?

Admissibility of the questions referred for a preliminary ruling

24. The arguments used by the Commission and the ANB to challenge the admissibility of the questions referred for a preliminary ruling must be examined first.

25. On the basis of the order for reference of the Bundesvergabeamt in Case C-314/01 *Siemens and Arge Telekom & Partner* pending before the Court, the Commission expresses doubts as to the judicial nature of the body making the reference on the ground that it acknowledged in the order that its decisions do not contain binding, enforceable directions addressed to the contracting authority. In those circumstances, the Commission has doubts as to the admissibility of the questions referred for a preliminary ruling by the Bundesvergabeamt in the present proceedings in the light of the case-law of the Court, in particular Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14, according to which a national court or tribunal may refer a question to the Court or tribunal only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a

decision of a judicial nature.

26. In that regard, it suffices to observe that the doubts expressed by the Commission as to the admissibility of the questions referred for a preliminary ruling on the ground that the decisions given by the Bundesvergabeamt are not binding, which was strongly contested during the hearing by both the ANB and the Austrian Government, are without relevance in the circumstances of the main proceedings.

27. As the Commission itself admitted during the hearing, in answer to a question put by the Court, the main case relates to the period after the award of the contract. However, it is common ground that in Austrian law both the parties and the civil courts which are seised of a claim in damages during that time are bound in any case by the findings of the Bundesvergabeamt.

28. In those circumstances, the binding nature of the decision of the Bundesvergabeamt in the main case cannot reasonably be called into question.

29. The ANB, for its part, doubts the admissibility of the questions referred for the following reasons. First, the applicant in the main proceedings did not participate in the tendering procedure in question either as a tenderer or as a candidate, so that it has no direct individual right on which it can rely vis-à-vis the contracting authority. Second, the Court of Justice has already ruled on similar facts and questions in *Tögel*, so that the questions referred should either be dismissed for lack of relevance or dealt with by way of a reasoned order in accordance with Article 104(3) of the Court's Rules of Procedure. Third, the contract at issue in the main proceedings did not contain any cross-border aspect, which relieves the contracting authority of the obligation to award the contract by a public tendering procedure at Community level. The ANB refers in that respect to Case C-108/98 *RI.SAN.* [1999] ECR I-5219, also concerning a public tendering procedure, in which the Court held that Article 55 of the EC Treaty (now Article 45 EC) does not apply in a situation such as that in the main proceedings in which all the facts are confined to ... a single Member State and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of freedom of movement for persons and freedom to provide services.

30. In relation, first, to the ANB's argument that the applicant in the main proceedings did not participate in the public tendering procedure at issue in the main proceedings as a candidate or a tenderer, it is sufficient to observe that the right to bring proceedings is a question governed by the national rules of procedure. It is not for the Court of Justice to rule on the application of those rules in the circumstances at issue in the main proceedings.

31. Next, concerning the argument that in *Tögel* the Court of Justice has already ruled on comparable facts and questions, making it unnecessary to rule in the present case, or at least enabling it to decide by reasoned order, it must be observed that the facts and questions referred in the present case appear to be substantially different from those which gave rise to the judgment in *Tögel*. In that judgment the Court of Justice was not called upon to rule, in particular, on the question whether a contract for a single purpose but composed of various services, some falling within Annex I A to Directive 92/50 and others within Annex I B, should be classified in accordance with its main purpose.

32. In any case, Article 104(3) of the Rules of Procedure permits the Court to give a decision by reasoned order in the three situations mentioned therein, but by no means requires it to do so; the Court always retains in such cases the right to rule by means of a judgment.

33. Finally, as regards the argument that it was unnecessary to bring the existence of the contract at issue in the main proceedings to the knowledge of traders established in Member States other than the Austrian Republic because the contract had no cross-border aspect, it must be observed that that fact, supposing it to be established, is not such as to relieve the contracting authority of its duty to comply with the obligations set down in Directive 92/50. As stated expressly in the 20th recital in the preamble, the very purpose of the directive is to improve access for suppliers of services to the contract award procedures in order to eliminate practices which restrict competition in general and participation in contracts by nationals of other Member States in particular.

34. In the light of the above, the questions referred by the Bundesvergabeamt for a preliminary ruling must be declared admissible.

The questions referred for a preliminary ruling

35. By the questions referred to the Court, the national court asks, in essence, which regime is applicable to public service contracts composed of both services falling within Annex I A to Directive 92/50 - described by that court as priority services - and services falling within Annex I B to the directive - described as non-priority. In that regard, it seeks to ascertain more particularly what regime applies to a removal contract such as that at issue in the main proceedings in which the transportation itself is only a relatively small part, the contract being essentially for coordination, logistics and the provision of storage facilities.

36. As the first, second and fourth questions relate to the scope of Directive 92/50, it is appropriate to examine them before the third question, which concerns the classification of the services at issue in the main proceedings in the annexes to the directive.

The first question

37. By its first question, the national court asks, in essence, whether the purpose of a contract is relevant in determining the applicable regime. It seeks to know more particularly whether, for the award of a contract with a single object but which is composed of several services, those services must be classified individually in the categories provided for in Annex I A and I B to Directive 92/50 in order to determine the regime applicable to the contract in accordance with Articles 8 to 10 of the Directive, or whether on the contrary the main purpose of the contract must be identified, in which case the ancillary services are governed by the same regime as the service relating to the main purpose. The Bundesvergabeamt refers in particular in that regard to the judgment in *Gestion Hotelera Internacional*, in which the Court laid down the principle that the main purpose of the contract determined which directive was applicable to a given contract.

Observations submitted to the Court

38. For the ANB and the United Kingdom Government, the latter approach is wholly excluded in the context of Directive 92/50. The directive does not contain any definition of what constitutes the main purpose of a contract, whilst Article 10 explicitly acknowledges, on the contrary, that a contract may have as its purpose the provision of different services falling under different annexes to the directive.

39. The United Kingdom Government also states in that respect that in *Tögel* the Court held that the references in the annexes to Directive 92/50 to the CPC nomenclature were binding. It is thus contrary to the purpose of the directive to classify a contract composed of several services, referred to in different sections of the CPC nomenclature, according to only one of those services.

40. As regards, moreover, the reference made by the Bundesvergabeamt to the judgment in *Gestion Hotelera Internacional*, the ANB and the United Kingdom Government maintain that the judgment is wholly irrelevant in the main case in so far as, first, its purpose was to determine whether a contract constituted a contract for works or a contract of another type, and secondly, the criterion adopted by the Court in that judgment was the merely incidental nature of repair work in relation to the main purpose of the contract based on the express definition of public works contracts at the time in Article 1(a) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as reproduced now in Article 1(a) of Directive 93/37. According to the ANB, if in the context of that judgment the Court had taken the view that the determining factor for distinguishing between contracts for works and contracts for services was the predominant nature of a service in terms of value, it would have clearly so ruled, referring to Article 10 of Directive 92/50 and not to the 16th recital in the preamble thereto, which provides that when those works are incidental rather than forming the object of a contract, they do not justify treating the contract as a public works contract.

41. On the other hand, the Austrian Government argues that for the award of a contract with a single object but composed of several services, it is the object and the corresponding principal service which, once identified, determine the classification of the contract.

42. The Austrian Government cites first in that regard the reference numbers of the CPC nomenclature and the explanatory notes to the CPC, which do not contain an exhaustive list of the services classified, but give a basic description of the typical composition of those services or of the activities necessary for the provision of such services.

43. Next, it refers to Article 7(3) of Directive 92/50 and Article 5(6) of Directive 93/36, from which it is clear that the division of a service into part services and the award of separate contracts relating to

them is unlawful, especially when the value of each part service does not reach the threshold applicable and the contracting authority therefore avoids the application of those directives.

44. Finally, the Austrian Government relies on Article 1(a) of Directive 93/36 and Article 1(4)(b) of Directive 93/38 on the definition of public supply contracts and public works contracts respectively. Those provisions make it plain that all the Community directives on the coordination of the procedures for the award of public contracts define what constitutes a main service, which is decisive for the classification of the contract.

Reply of the Court

45. Directive 92/50 pursues fundamentally the same object as the directives on the coordination of the procedures for the award of public works and supply contracts, which is, according to the settled case-law of the Court, to avoid the risk of preference being given to national tenderers or candidates whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities, or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, to that effect, Case C-44/96 *Mannesmann Anlagenbau Austria* [1998] ECR I-73, paragraph 33, Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 42 and 43, and Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 17). However, Directive 92/50 does not apply in the same way to all public service contracts.

46. Thus, the 21st recital in the preamble to Directive 92/50 states that the application of its provisions in full must be limited, for a transitional period, to contracts for services where its provisions will enable the full potential for increased cross-border trade to be realised, the contracts for other services during that period being subject only to monitoring.

47. To that end Directive 92/50 makes a distinction between contracts for services referred to in Annex I A, which under Article 8 are awarded in accordance with the provisions of Titles III to VI, and those for services referred to in Annex I B, which under Article 9 are subject to the provisions of Articles 14 and 16.

48. In Article 10, Directive 92/50 also provides that contracts which have as their object services listed in both Annex I A and Annex I B are to be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A exceeds the value of the services listed in Annex I B, and where this is not the case only in accordance with Articles 14 and 16.

49. It follows from those provisions that in the context of Directive 92/50 the argument that the main purpose of a contract determines the regime applicable to it cannot be accepted.

50. In the first place, Directive 92/50 itself states, in the seventh recital in the preamble, that for the application of procedural rules and for monitoring purposes the field of services is best described by subdividing it into categories corresponding to particular positions of a common classification, in this case the CPC nomenclature.

51. In paragraph 37 of the judgment in *Tögel*, the Court held that the reference made in Annexes I A and I B to Directive 92/50 to the CPC nomenclature was binding.

52. In the second place, Article 10 of Directive 92/50 provides an unequivocal test for the determination of the regime applicable to a contract composed of several services, which is based on the comparison of the value of the services referred to in Annex I A to the directive with the value of the services referred to in Annex I B.

53. In the light of the preceding observations, the answer to the first question must be that the determination of the regime applicable to public service contracts composed partly of services falling within Annex I A to Directive 92/50 and partly of services falling within Annex I B to the directive does not depend on the main purpose of those contracts and is to be made in accordance with the unequivocal test laid down by Article 10 of that directive.

The second and fourth questions

54. By its second and fourth questions, which it is appropriate to deal with together, the national court asks, in essence, whether in the award of a contract having one purpose but composed of several

services the classification of those services in Annexes I A and I B to Directive 92/50 deprives the directive of its effectiveness. It also asks whether there is an obligation on the part of the contracting authority, if as a result of that classification the value of the services falling within Annex I B exceeds that of the services falling within Annex I A, to separate the services referred to in Annex I B from the contract in question and to award separate contracts in respect of them.

55. In that regard, it suffices to observe that the answer given to the first question makes it clear that the classification of services in Annexes I A and I B to Directive 92/50 - even in the context of a contract with a single object - is in accordance with the system provided for by the directive as it appears, inter alia, in the seventh and 21st recitals in the preamble and in Articles 8 and 10, which envisage the application of the directive on two levels.

56. Directive 92/50 must be interpreted as in no way requiring the separate award of a contract for the services referred to in Annex I B thereto when, in accordance with the classification made by reference to the CPC nomenclature, the value of those services exceeds, for the contract in question, the value of the services referred to in Annex I A. As the Advocate General observed in point 55 of his Opinion, to require such a separation in that case would effectively deprive Article 10 of Directive 92/50 of any purpose. Under the second sentence of Article 10 of the directive the contract is subject only to Articles 14 and 16.

57. It would be the same if the contracting authority artificially grouped in one contract services of different types without there being any link arising from a joint purpose or operation, with the sole purpose of increasing the proportion of the services referred to in Annex I B to Directive 92/50 in the contract and thus of avoiding, by way of the second sentence of Article 10, the application of its provisions in full.

58. Moreover, that conclusion is supported by the wording of Article 7(3) of Directive 92/50, from which it is clear that the choice of the valuation method is not to be made with the intention of avoiding the application of the directive. Although that article relates to a different situation (the artificial splitting up of the contract), the purpose which inspires it (the concern to avoid any risk of manipulation) also precludes a contracting authority from artificially grouping different services in the same contract solely in order to avoid the application in full of the directive to that contract.

59. In the main case there can be no question, however, of such an artificial grouping in so far as the Bundesvergabeamt has clearly established that the services forming the object of the contract awarded by the ANB, although different in nature, all serve to achieve a single purpose.

60. In the light of the preceding observations, the answer to the second and fourth questions must be that in the award of a contract with a single object but composed of several services, the classification of those services in Annexes I A and I B to Directive 92/50, far from depriving it of its effectiveness, is in accordance with the system laid down by the directive. When, following the classification thus made by reference to the CPC nomenclature, the value of the services falling within Annex I B exceeds the value of the services falling within Annex I A, there is no obligation on the part of the contracting authority to separate from the contract in question the services referred to in Annex I B and to award separate contracts in respect of them.

The third question

61. By its third question, the national court wishes to know which annex to Directive 92/50 and which reference numbers of the CPC nomenclature cover the services at issue in the main proceedings.

62. In that regard, it must be observed that the classification of services in Annexes I A and I B to Directive 92/50 is primarily a question of fact for the contracting authority to determine, subject to review by the national courts.

63. In the present case, it is thus for the national court to review the classification made by the ANB, taking account, in particular, of the principles laid down in paragraphs 49 to 51 of the present judgment. The Bundesvergabeamt must verify, more particularly, that the services which make up the contract and the reference numbers of the CPC nomenclature correspond.

64. However, the Commission's argument that Category 20 of Annex I B to Directive 92/50, on supporting and auxiliary transport services, can be interpreted as covering the whole of the services forming the object of the contract in the main proceedings must in any case be rejected.

65. It follows from the title of that category that the services to which it refers do not include the transportation itself. In that regard, it is common ground that land transport services fall within Category 2 of Annex I A to Directive 92/50, with the exception of postal services and rail services, covered by Category 4 of Annex I B and Category 18 of Annex I B respectively.

66. In the light of those considerations, the answer to the third question must be that it is for the national court to determine the regime applicable to the contract forming the object of the procedure at issue in the main proceedings on the basis of Article 10 of Directive 92/50, in particular by verifying that the services which make up that contract and the reference numbers of the CPC nomenclature correspond. In any case, Category 20 of Annex I B to Directive 92/50 cannot be interpreted as also including land transport services themselves, as they are explicitly covered by Category 2 of Annex I A to the Directive.

Costs

67. The costs incurred by the Austrian and the United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 29 September 2000, hereby rules:

1. The determination of the regime applicable to public service contracts composed partly of services falling within Annex I A to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and partly of services falling within Annex I B to the directive does not depend on the main purpose of those contracts and is to be made in accordance with the unequivocal test laid down by Article 10 of that directive.

2. In the award of a contract with a single object but composed of several services, the classification of those services in Annexes I A and I B to Directive 92/50, far from depriving it of its effectiveness, is in accordance with the system laid down by the directive. When, following the classification thus made by reference to the nomenclature of the United Nations Common Product Classification, the value of the services falling within Annex I B exceeds the value of the services falling within Annex I A, there is no obligation on the part of the contracting authority to separate from the contract in question the services referred to in Annex I B and to award separate contracts in respect of them.

3. It is for the national court to determine the regime applicable to the contract forming the object of the procedure at issue in the main proceedings on the basis of Article 10 of Directive 92/50, in particular by verifying that the services which make up that contract and the reference numbers of the nomenclature of the United Nations Common Product Classification correspond. In any case, Category 20 of Annex I B to Directive 92/50 cannot be interpreted as also including land transport services in themselves, as they are explicitly covered by Category 2 of Annex I A to the Directive.

Wathelet
Timmermans
Edward

Jann
von Bahr

Delivered in open court in Luxembourg on 14 November 2002.

R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber

1: Language of the case: German.

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Notice for the OJ

JUDGMENT OF THE COURT

(Fifth Chamber)

14 November 2002

in Case C-411/00 (Reference for a preliminary ruling from the Bundesvergabeamt): Felix Swoboda GmbH v Österreichische Nationalbank,([1])

(Public service contracts (Directive 92/50/EEC (Scope ratione materiae (Moving offices of a central bank (Contract relating to both services listed in Annex I A to Directive 92/50 and services listed in Annex

I B to that directive (Predominance in value terms of services listed in Annex I B)

(Language of the case: German)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Case C-411/00: Reference to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between **Felix Swoboda GmbH** and **Österreichische Nationalbank**, on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), the Court (Fifth Chamber), composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), D.A.O. Edward, P. Jann and S. von Bahr, Judges; J. Mischo, Advocate General; M.-F. Contet, Administrator, for the Registrar, has given a judgment on 14 November 2002, in which it has ruled:

1.The determination of the regime applicable to public service contracts composed partly of services falling within Annex I A to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and partly of services falling within Annex I B to the directive does not depend on the main purpose of those contracts and is to be made in accordance with the unequivocal test laid down by Article 10 of that directive.

2.In the award of a contract with a single object but composed of several services, the classification of those services in Annexes I A and I B to Directive 92/50, far from depriving it of its effectiveness, is in accordance with the system laid down by the directive. When, following the classification thus made by reference to the nomenclature of the United Nations Common Product Classification, the value of the services falling within Annex I B exceeds the value of the services falling within Annex I A, there is no obligation on the part of the contracting authority to separate from the contract in question the services referred to in Annex I B and to award separate contracts in respect of them.

3.It is for the national court to determine the regime applicable to the contract forming the object of the procedure at issue in the main proceedings on the basis of Article 10 of Directive 92/50, in particular by verifying that the services which make up that contract and the reference numbers of the nomenclature of the United Nations Common Product Classification correspond. In any case, Category 20 of Annex I B to Directive 92/50 cannot be interpreted as also including land transport services in themselves, as they are explicitly covered by Category 2 of Annex I A to the Directive.

_____

[1] - OJ C 28 of 27.1.2001

Judgment of the Court (Fifth Chamber) of 14 November 2002 Felix Swoboda GmbH v Osterreichische Nationalbank. Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public service contracts - Directive 92/50/EEC - Scope ratione materiae - Moving offices of a central bank - Contract relating to both services listed in Annex I A to Directive 92/50 and services listed in Annex I B to that directive - Predominance in value terms of services listed in Annex I B. Case C-411/00.

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NOTES Oder, Martin: Zeitschrift für Vergaberecht und Beschaffungspraxis 2003 p.46-49
Brown, Adrian: Public Procurement Law Review 2003 p.NA28-NA33
Adamantidou, Elsa: Elliniki Epitheorisi Evropaïkou Dikaiou 2003 p.446-449

PROCEDU Reference for a preliminary ruling

ADVGEN Mischo

JUDGRAP Timmermans

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Judgment of the Court (Fifth Chamber)
of 27 February 2003
Adolf Truley GmbH v Bestattung Wien GmbH.
Reference for a preliminary ruling: Vergabekontrollsenat des Landes Wien - Austria.
Case C-373/00.

In Case C-373/00,

REFERENCE to the Court under Article 234 EC by the Vergabekontrollsenat des Landes Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Adolf Truley GmbH

and

Bestattung Wien GmbH,

on the interpretation of Article 1(b) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1),

THE COURT

(Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), P. Jann, S. von Bahr and A. Rosas, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Adolf Truley GmbH, by S. Heid, Rechtsanwalt,

- Bestattung Wien GmbH, by P. Madl, Rechtsanwalt,

- the Austrian Government, by H. Dossi, acting as Agent,

- the French Government, by G. de Bergues, A. Bréville-Viéville and S. Pailler, acting as Agents,

- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

- the EFTA Surveillance Authority, by E. Wright, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2002,

gives the following

Judgment

Costs

75 The costs incurred by the Austrian and French Governments and by the Commission and the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

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THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Vergabekontrollsenat des Landes Wien by order of 14 September 2000, hereby rules:

1. The term `needs in the general interest' in the second subparagraph of Article 1(b) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts is an autonomous concept of Community law.

2. The activities of funeral undertakers may meet a need in the general interest. The fact that a regional or local authority is legally obliged to arrange funerals - and, where necessary, to bear the costs of those funerals - where they have not been arranged within a certain period after a death certificate has been issued constitutes evidence that there is such a need in the general interest.

3. The existence of significant competition does not, of itself, allow the conclusion to be drawn that there is no need in the general interest, not having an industrial or commercial character. The national court must assess whether or not there is such a need, taking account of all the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activity.

4. A mere review does not satisfy the criterion of management supervision in the third indent of the second subparagraph of Article 1(b) of Directive 93/36. That criterion is, however, satisfied where the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a regional authority which holds, through another company, all the shares in the body in question.

1 By order of 14 September 2000, received at the Court on 11 October 2000, the Vergabekontrollsenat des Landes Wien (Public Procurement Review Chamber of the Land of Vienna) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 1(b) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2 Those questions have been raised in proceedings between Adolf Truley GmbH (`Truley'), established in Drosendorf an der Thaya, Austria, and Bestattung Wien GmbH (`Bestattung Wien'), established in Vienna, concerning the latter's decision not to accept the tender submitted by Truley in the procedure for award of a contract to supply coffin fixtures.

Legal framework

Community legislation

3 Article 1(b) of Directive 93/36 provides:

`For the purpose of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law" means any body:

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- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

the lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I to Directive 93/37/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35 of Directive 93/37/EEC.'

National legislation

Rules governing the award of public contracts

4 Under Austrian law, the regulation of public procurement falls partly within the competence of the State and partly within the competence of the federal units (the Länder). In the Land of Vienna, that sector is governed by the Wiener Landesvergabegesetz (Law on the award of public contracts of the Land of Vienna, LGBl. 1995/36, as published in LGBl. 1999/30, hereinafter `the WLVergG').

5 Paragraph 12(1) of the WLVergG provides:

`This Law shall apply to the award of contracts by contracting authorities. Contracting authorities within the meaning of this Law shall be:

1. Vienna as a Land or municipality and

2. bodies established under the law of the Land provided that they have been founded for the purpose of meeting needs in the general interest, not being commercial in character, if they have at least some legal capacity, and

(a) more than half of whose managers are appointed by bodies of the City of Vienna or of another entity within the meaning of points 1 to 4 or are persons appointed by bodies of the said entities for this purpose or

(b) whose management is subject to supervision by the City of Vienna or other entities within the meaning of points 1 to 4 or

(c) which are financed, for the most part, by the City of Vienna or other entities within the meaning of points 1 to 4,

3. ...

4. ...'.

The Vienna Municipal Constitution

6 Paragraph 71 of the Wiener Stadtverfassung (Vienna Municipal Constitution, LGBl. 1968/28, as published in LGBl. 1999/17, hereinafter `the WStV') provides:

`1. Undertakings within the meaning of this Constitution are economic entities on which the Municipal Council has conferred the status of undertaking. The Municipal Council may also decide that an undertaking shall be composed of several component undertakings.

2. The undertakings shall not have legal personality. The administration of their assets shall be separate from that of the other assets of the municipality. The undertakings shall be managed

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in accordance with economic principles. Where an undertaking is entered in the registry of companies, its corporate name must clearly indicate its status as an undertaking of the City of Vienna.

3. The Municipal Council shall adopt articles of association for these undertakings taking account, in particular, of Paragraph 67(2). The provisions on internal procedure and the distribution of functions (Paragraph 91) shall apply to the undertakings only in so far as such provisions refer expressly to them. Taking into account considerations of expediency, economy and effectiveness as well as the greater degree of independence of the undertakings as compared with other units of the Magistrat [of the City of Vienna (municipal administration of the City of Vienna)], the articles of association shall lay down detailed provisions on the bodies, their areas of competence, their organisation and their administration, their management in accordance with economic principles and on the principles of accounting and the submission of accounts. The powers devolving on municipal bodies in relation to personnel matters shall also apply to the undertakings. As regards the determination of other areas of competence, the following are reserved:

1. to the municipal council:

(a) the conferment and withdrawal of the status of undertaking;

(b) the division of an undertaking into component undertakings;

(c) the determination of the main objects of the undertaking, guidelines, target planning and administrative programmes;

...

...'.

7 Paragraph 73 of the WStV concerning the tasks of the Kontrollamt der Stadt Wien (Monitoring Office of the City of Vienna, hereinafter `the Kontrollamt'), which, in terms of organisation, forms part of the Magistrat of the City of Vienna, states further:

`(1) The Kontrollamt shall examine the overall conduct of the municipality and of the funds and foundations having legal personality and administered by municipal authorities for proper accounting, regularity, economy, efficiency and expediency (review of conduct)...

(2) The Kontrollamt shall also examine the conduct of commercial undertakings in which the municipality has a majority interest. Where such a commercial undertaking has a majority interest in another undertaking, the examination shall extend to that other undertaking. The Kontrollamt's powers of examination shall be assured by suitable measures.

(3) The Kontrollamt may further examine the conduct of entities (commercial undertakings, associations, etc.) in which the municipality has an interest other than that referred to in paragraph 2 or on whose organs the municipality is represented, provided that the municipality has reserved the right to carry out such a review. This shall also apply to entities which receive financial support from municipal resources or for which the municipality accepts liability.

...

(6) Upon decision of the Municipal Council or the Monitoring Committee or at the request of the Mayor or, in respect of the area of responsibility of his unit, of an office-holding city councillor, the Kontrollamt shall carry out special reviews of conduct and safety and shall inform the requesting authority of its findings.

...'.

The rules governing the exercise of the activity of funeral undertaker

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8 The activity of funeral undertaker is governed at federal level by Paragraphs 130 to 134 of the Gewerbeordnung 1994 (Austrian Trade Regulations, BGBl. 1994/194, as published in BGBl. I, 1997/63, hereinafter `the GewO'). Those provisions indicate that, under Austrian law, the activity of funeral undertaker is not reserved to specific legal persons such as the State, the Länder or the municipalities but that the exercise of such activity is subject to the issue of prior authority which is itself dependent on the existence of a current or future need. In this regard, Paragraph 131(2) of the GewO asks the authority competent to issue such authorisation to determine more specifically whether the municipality has adopted adequate provisions with regard to burials or cremations.

9 However, according to the information provided by the national court, the condition of the existence of a need is significant only in regard to obtaining authorisation to carry on a business as a funeral undertaker. If, subsequently, there is no longer a need, the administration cannot withdraw the authorisation previously granted.

10 Although the GewO also contains no provision restricting the exercise of the authorised activity to a particular geographical area, the Landeshauptmann (First Minister of the Land) is nevertheless competent, under Paragraph 132(1) of the GewO, to fix the maximum prices for funeral services either for the entire Land or by administrative unit or municipality.

11 In the Land of Vienna, the exercise of the activity of funeral undertaker is governed more specifically by the Wiener Leichen- und Bestattungsgesetz (Law of the Land of Vienna on the activity of funeral undertaker, LGBl. 1970/31, as published in LGBl. 1988/25, hereinafter `the WLBG'). Paragraph 10(1) of that law provides:

`Where no arrangements are made for the funeral of the deceased within five days of the death certification being issued, the Magistrat [of the City of Vienna] shall arrange the funeral (by burial or cremation) at a funeral facility of the City of Vienna. The City of Vienna shall bear the costs of the funeral only in so far as they are not to be met by third parties or covered by the deceased's estate.'

The main proceedings and the questions referred for a preliminary ruling

12 According to the order for reference, the provisions governing the business of funeral undertaker in Vienna have undergone significant amendments over the past few years.

13 Until 1999, those services were performed by Wiener Bestattung (Vienna Funerals), a component undertaking of the Wiener Stadtwerke (Vienna Public Utilities), which were themselves an undertaking of the City of Vienna within the meaning of Paragraph 71 of the WStV. As such, Wiener Bestattung - like Wiener Stadtwerke - lacked legal personality and formed part of the Magistrat of the City of Vienna. In connection with its activities, Wiener Bestattung had, on several occasions, organised calls for tenders in which Truley, which is a licensed funeral undertaker, had apparently participated successfully.

14 On 17 December 1998, the Municipal Council of the City of Vienna decided to separate the Wiener Stadtwerke from the municipal administration and to create a new company with its own legal personality, Wiener Stadtwerke Holding AG (`WSH'), which is wholly owned by the City of Vienna. That company comprises six operational subsidiaries which include, in particular, Bestattung Wien. According to the documents on the case-file, that company, the entire capital of which is held by WSH, has legal personality. The date on which its activity began was fixed, by order of the Magistrat of the City of Vienna, as being 12 June 1999.

15 Shortly after its creation, Bestattung Wien organised a tendering procedure, published both in the Amtlicher Lieferanzeiger (Official Bulletin of calls for tenders for supply contracts) and the Amstblatt der Stadt Wien (Official Journal of the City of Vienna), for the award of a public contract for the supply of coffin fittings. Truley submitted a tender during that procedure

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but was informed, by letter of 6 June 2000, that the contract had not been awarded to it on the ground that the price which it had quoted was too high.

16 Taking the view that the tender submitted by it was the only one which complied with the specifications in the call for tenders, Truley brought proceedings for review of the contract award procedure before the Vergabekontrollsenat des Landes Wien.

17 In those proceedings, Bestattung Wien claimed that it was no longer subject to the rules in Directive 93/36 and in the WLVergG as it had its own legal personality and was completely independent of the Magistrat of the City of Vienna, while Truley submitted that that directive and the WLVergG remained fully applicable by reason of the close ties which continued to bind that company to the City of Vienna. In that regard, Truley pointed out, inter alia, that all the shares in Bestattung Wien were held by WSH, which itself was wholly owned by the City of Vienna.

18 As it formed the view, in those circumstances, that the solution to the dispute pending before it depended on the interpretation of the concept of `contracting authority' in Article 1(b) of Directive 93/36, particularly in light of the judgments in Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73 and Case C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding [1998] ECR I-6821, the Vergabekontrollsenat des Landes Wien decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

`1. Must the term "needs in the general interest" in Article 1(b) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts be interpreted as meaning that

(a) the definition of needs in the general interest must be derived from the national legal system of the Member State?

(b) the fact that a regional or local authority's obligation is subsidiary is in itself sufficient for the existence of a need in the general interest to be assumed?

2. In interpreting the requirement "meeting needs... not having an industrial or commercial character" laid down in Directive 93/36/EEC, is (a) the existence of significant competition an imperative condition or (b) are the factual or legal circumstances the determinant factors in that respect?

3. Is the requirement laid down in Article 1(b) of Directive 93/36/EEC that the management of the body governed by public law must be subject to supervision by the State or a regional or local authority also fulfilled by a mere review as provided for through the Kontrollamt of the City of Vienna?'

The admissibility of the questions referred for a preliminary ruling

19 Referring to Case C-186/90 Durighello [1991] ECR I-5773 and Case C-134/95 USSL N_ 47 Di Biella [1997] ECR I-195, in which the Court held, inter alia, that a reference for a preliminary ruling made by a national court is to be rejected where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, Bestattung Wien submits that the question whether or not it has the status of an awarding authority is irrelevant to the case in the main proceedings.

20 In its view, it is clear from the actual wording of Paragraph 99 of the WLVergG that the Vergabekontrollsenat des Landes Wien is only competent to find, after the award of a contract, that the contract was not awarded to the tenderer who submitted the best tender as a result of an infringement of the provisions of that law and that review proceedings can be brought only if the decision which is alleged to be unlawful was decisive for the outcome of the procurement procedure. In the main proceedings, the tender submitted by Truley was given the second to last place in terms of the prices quoted for coffin fittings, with the result that it has no legal interest in obtaining the remedy it seeks

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as it was, in any event, not the best bidder within the meaning of Paragraph 99(1) of the WLVergG and, consequently, the contract could never have been awarded to it.

21 Suffice it to point out in this regard that, according to the settled case-law of the Court, in particular the above judgment in Durighello, cited by Bestattung Wien, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court (Durighello, paragraph 8). Consequently, since the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling.

22 Moreover, the Court has also consistently held that it may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 39, and Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 19).

23 In the present case, it is not entirely obvious that the questions referred by the national court fall within one of those situations.

24 First, there are no grounds for arguing that the interpretation of Community law sought bears no relation to the actual facts or the purpose of the main action since the assessment of the lawfulness of the decision on the award of the contract at issue in the main proceedings depends on whether the defendant can be treated as a contracting authority within the meaning of Article 1(b) of Directive 93/36.

25 Second, the national court has furnished the Court with all the material necessary to enable it to give a useful answer to the questions referred.

26 It follows that the reference for a preliminary ruling is admissible.

The first question

27 By its first question, which can be divided into two limbs, the national court essentially raises the question of the scope of the term `needs in the general interest' in the second subparagraph of Article 1(b) of Directive 93/36.

The first limb of the first question

28 By the first limb of its first question, the national court asks whether the term `needs in the general interest' is to be defined by Community law or by the national legal system of each Member State.

Observations submitted to the Court

29 According to Truley and the Austrian Government, the term `needs in the general interest' is a Community law concept which must be assessed independently without reference to the national legal systems of the Member States. In that regard, they rely on, first, the purpose of the Community directives on the coordination of public procurement procedures, which is to introduce competition to previously closed-off national markets and to inform interested parties established in the Community of the bodies which are to be regarded as contracting authorities. Second, they rely on the judgment in BFI Holding, cited above, in which the Court declared that the term `needs in the general interest' must be appraised objectively, without regard to the legal forms of the provisions in

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which those needs are mentioned.

30 On that basis, Truley submits that, having regard to the principle of legal certainty, it is unacceptable that the same activity may be regarded either as being in the general interest or as not being so, depending on the Member State in which it is exercised, while the Austrian Government claims that the case-law of the Court, in particular Case 327/82 Ekro [1984] ECR 107 and Case C-273/90 Meico-Fell [1991] ECR I-5569, shows that terms of Community law must be interpreted by reference to national concepts only in those - exceptional - cases in which reference is expressly or implicitly made to definitions laid down by the legal systems of the Member States, which is not the case here.

31 Whilst they share the view of Truley and the Austrian Government that the term `needs in the general interest' is a Community-law concept, Bestattung Wien, the French Government and the EFTA Surveillance Authority nevertheless take the view that application of that term to specific cases falls rather within the competence of the Member States, depending on the tasks which those States wish to carry out. They refer in particular in this connection to the purpose of the relevant Community directives, which is to coordinate - but not harmonise - the national rules on the award of public contracts, and to Annex I to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which contains a list of the bodies fulfilling the criteria laid down in Article 1(b) of Directive 93/36. According to Bestattung Wien, such a list of bodies regarded as being contracting authorities would serve no purpose whatever if the concept of general interest were conceived as being purely a Community-law concept. It is thus for each Member State, when determining the aims of its corporate policy, to state definitively what constitutes the general interest and, in each individual case, the legal and factual situation of the body concerned must be examined in order to assess whether or not there is a need in the general interest.

32 Finally, the Commission takes the view that the term `needs in the general interest' must be defined solely on the basis of national law. It relies in this regard on Mannesmann Anlagenbau Austria, cited above, in which the Court based its finding that the Austrian State printing office was established for the purpose of meeting needs in the general interest, not having an industrial or commercial character, on the relevant national provisions and on BFI Holding, in which the Court ruled, on the basis of, in particular, the list set out in Annex I to Directive 93/37, that the removal and treatment of household refuse is one of the services which a Member State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.

The Court's reply

33 First of all, it should be noted that Directive 93/36 does not define the term `needs in the general interest'.

34 The second subparagraph of Article 1(b) of that directive merely states that such needs must not have an industrial or commercial character, while it is clear from an overall reading of that article that meeting needs in the general interest which are not industrial or commercial in character is a necessary, but not sufficient, condition for designating a body as a `body governed by public law' and, therefore, a `contracting authority' within the meaning of Directive 93/36. In order to be covered by that directive, the body must also have legal personality and depend heavily, for its financing, management or supervision, on the State, regional or local authorities or other bodies governed by public law (see, with respect to the cumulative nature of the criteria laid down, in the same terms, in the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and the second subparagraph of Article 1(b) of Directive 93/37, Mannesmann Anlagenanbau Austria, paragraphs 21 and 38, BFI Holding, paragraph 29, Case C-237/99 Commission

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v France [2001] ECR I-939, paragraph 40, and Joined Cases C-223/99 and C-260/99 Agorà and Excelsior [2001] ECR I-3605, paragraph 26).

35 According to settled case-law, the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (see, inter alia, Ekro, cited above, paragraph 11, Case C-287/98 Linster and Others [2000] ECR I-6917, paragraph 43, and Case C-357/98 Yiadom [2000] ECR I-9265, paragraph 26).

36 In the present case, it is common ground that the second subparagraph of Article 1(b) of Directive 93/36 makes no express reference to the law of the Member States, with the result that the abovementioned terms must be given an autonomous and uniform interpretation throughout the Community.

37 That finding is not invalidated by the fact that the third subparagraph of Article 1(b) of Directive 93/36 refers to Annex I to Directive 93/37, which lists the bodies and categories of such bodies governed by public law which, in each Member State, fulfil the criteria laid down in the second subparagraph of Article 1(b) of Directive 93/36.

38 The Court notes, first, that that annex itself contains no definition of the term `needs in the general interest' featuring, in particular, in Article 1(b) of Directive 93/36 and in Article 1(b) of Directive 93/37.

39 Second, while it is clear from the wording of Article 1(b) of Directive 93/36 that the list in Annex I to Directive 93/37 is intended to be as complete as possible and may be revised pursuant to the procedure provided for in Article 35 of Directive 93/37, that list is in no way exhaustive (see, inter alia, BFI Holding, paragraph 50, and Agorà and Excelsior, paragraph 36) as its accuracy varies considerably from one Member State to another.

40 It follows that the term `needs in the general interest' in Article 1(b) of Directive 93/36 is a Community-law concept and must be interpreted in the light of the context of that article and the purpose of that directive.

41 The Court has already ruled on several occasions that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, in particular, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16, Case C-237/99 Commission v France, cited above, paragraph 41, Case C-92/00 HI [2002] ECR I-5553, paragraph 43, and Case C-470/99 Universale-Bau and Others [2002] ECR I-0000, paragraph 51).

42 Furthermore, settled case-law also shows that the purpose of the Community directives coordinating procedures for the award of public contracts is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, in particular, University of Cambridge, cited above, paragraph 17, Commission v France, cited above, paragraph 42, and Universale-Bau, cited above, paragraph 52).

43 Given the double objective of introducing competition and transparency, the concept of a body governed by public law must be interpreted as having a broad meaning.

44 Accordingly, if a specific body is not listed in Annex I to Directive 93/37, its legal and

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factual situation must be determined in each individual case in order to assess whether or not it meets a need in the general interest.

45 In light of the foregoing, the answer to the first limb of the first question must be that the term `needs in the general interest' in the second subparagraph of Article 1(b) of Directive 93/36 is an autonomous concept of Community law.

The second limb of the first question

46 By the second limb of its first question, the national court asks essentially whether the activity of funeral undertaker meets a need in the general interest. In that regard, it asks more specifically whether the fact that a regional or local authority is under a statutory obligation to arrange funerals - and, if necessary, to bear the costs of those funerals - where they have not been arranged within a certain period after a death certificate has been issued is sufficient, in itself, to establish a presumption that there is a need in the general interest.

Observations submitted to the Court

47 While, as an extension of their observations on the first limb of the first question, Truley and the Austrian Government argue that an obligation such as that laid down in Paragraph 10(1) of the WLBG is irrelevant to the question whether or not there is a need in the general interest, inasmuch as the decisive criterion for the assessment of that term is, in their view, one of Community and not national law, they nevertheless submit that there is no doubt that funeral services do in fact meet a need in the general interest. In that regard, they rely on Annex I to Directive 93/37, which, in regard to the Federal Republic of Germany, contains an express reference to cemeteries and burial services, and on the judgment in BFI Holding, in which the Court declared that the removal and treatment of household refuse was one of the activities which a Member State may require to be carried out by public authorities or over which it wishes to retain a decisive influence. According to Truley, funeral services are also part of the `hard core' of basic services provided by the State in the public interest.

48 That point of view is partially contested by the defendant in the main proceedings. Although Bestattung Wien, like Truley and the Austrian Government, considers Paragraph 10(1) of the WLBG to be irrelevant to the assessment of the possible existence of a need in the general interest, it none the less contends that, in the present case, that concept covers only burial services in the narrow sense of the term, namely, in its view, the interment and exhumation of bodies, cremation and the management of cemeteries and columbaria. On the other hand, services such as the issuing of death certificates, the placing and printing of death and funeral notices, the exposition of the deceased, the washing, dressing and placing in the coffin of the deceased, the transport of the deceased to his final resting place and the maintenance of graves - all activities which the defendant in the main proceedings classes as funeral services `in the broad sense of the term' - are not among those over which the State intends to retain influence and are therefore not covered by the term `needs in the general interest'. Bestattung Wien submits in particular that, in Austria, the activity of funeral undertaker is not subject to any particular supervision other than the authority conferred on the first ministers of the Länder to impose maximum prices for certain services.

49 Finally, according to the French Government, the Commission and the EFTA Surveillance Authority, a subsidiary legal obligation such as that provided for by Paragraph 10(1) of the WLBG does constitute strong evidence of the existence of a need in the general interest inasmuch as that paragraph provides for both the actual arrangement of funerals by the City of Vienna and the assumption by it of the costs of those funerals, where those are not covered by the deceased's estate.

The Court's reply

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50 The Court has already held that needs in the general interest, not having an industrial or commercial character, within the meaning of Article 1(b) of the Community directives coordinating the award of public contracts are generally needs which are satisfied otherwise than by the availability of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence (see BFI Holding, paragraphs 50 and 51, and Agorà and Excelsior, paragraph 37).

51 It cannot be disputed that the activities of funeral undertakers may indeed be regarded as meeting a need in the general interest.

52 First, such activities are linked to public policy in so far as the State has a clear interest in exercising close control over the issue of certificates such as birth and death certificates.

53 Second, the State may be justified in retaining influence over those activities and in taking measures such as those provided for in Paragraph 10(1) of the WLBG on manifest grounds of hygiene and public health where funerals have not been arranged within a certain period after the death certificate has been issued. The very existence of such a provision therefore constitutes evidence that the activities in question meet a need in the general interest.

54 In that context, it is, inter alia, appropriate to reject the interpretation advocated by the defendant in the main proceedings that, in contrast to funeral services `in the broad sense of the term' such as the placing of death notices, the placing of the deceased in the coffin or the transport of the deceased, only the burial or cremation of the body and the management of cemeteries and columbaria - classified as funeral services `in the narrow sense of the term' - are covered by the concept of needs in the general interest. Such a distinction is artificial as all or most of those services are normally provided by the same undertaking or public authority.

55 Furthermore, as the Advocate General has pointed out in paragraph 68 of his Opinion, funeral services are governed by a single law of the Land of Vienna, namely the WLBG. Paragraph 33(4) of that law expressly provides that `the employees of the legal entity or the employees of the undertaking appointed by the legal entity shall carry out the funeral ceremony... , transport the body or ashes to the grave ... They shall also open and close all graves, lower the body or ashes and carry out exhumations...'.

56 In any event, even if funeral services `in the narrow sense of the term' constitute only a relatively unimportant part of the services provided by a funeral undertaker, that fact is irrelevant since that undertaking continues to meet needs in the general interest. According to settled case-law, the status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character (see Mannesmann Anlagenanbau Austria, paragraphs 25, 26 and 31, and BFI Holding, paragraphs 55 and 56).

57 In light of the foregoing, the answer to the second limb of the first question must therefore be that the activities of funeral undertakers may meet a need in the general interest. The fact that a regional or local authority is legally obliged to arrange funerals - and, where necessary, to bear the costs of those funerals - where they have not been arranged within a certain period after a death certificate has been issued constitutes evidence that there is such a need in the general interest.

The second question

58 By its second question, the national court asks whether the activity of funeral undertaker meets a need in the general interest not having an industrial or commercial character within the meaning of Article 1(b) of Directive 93/36. Pointing out in this regard that more than 500 undertakings

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are active in the funeral-services sector in Austria but that, according to the applicant in the main proceedings, there is no competition on the local market in Vienna, the national court asks essentially whether the existence of significant competition is itself sufficient to justify the conclusion that there is no need in the general interest, not having an industrial or commercial character, or whether account must be taken of all the relevant legal and factual circumstances in each individual case.

59 In that regard, it is sufficient to observe that, faced with a similar question, the Court held, in paragraph 47 of BFI Holding, that the absence of competition is not a condition which must necessarily be taken into account in defining a body governed by public law. The requirement that there should be no private undertakings capable of meeting the needs for which the body financed by the State, regional or local authorities or other bodies governed by public law was set up would be liable to render meaningless the term `body governed by public law' used in Article 1(b) of Directive 93/36 (see, to that effect, BFI Holding, paragraph 44).

60 However, the Court stated, in paragraphs 48 and 49 of that judgment, that the existence of competition is not entirely irrelevant to the question whether a need in the general interest is other than industrial or commercial. The existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the marketplace, may be indicative of the absence of a need in the general interest not having an industrial or commercial character.

61 It follows from the same wording used in the judgment in BFI Holding that, although not entirely irrelevant, the existence of significant competition does not, of itself, permit the conclusion that there is no need in the general interest not having an industrial or commercial character.

62 In the present case, it is common ground that the activity of funeral undertaker is not reserved in Austria to specific legal persons and that the exercise of that activity is not, in principle, subject to any territorial restriction.

63 In contrast, it is clear from both the order for reference and the observations submitted to the Court that the exercise of that activity is subject to the grant of prior authorisation, which is dependent on the existence of a need in the general interest and on the provisions adopted by the municipalities in relation to funerals, and that the First Minister of the Land has competence to fix maximum prices for funeral services either for the entire Land or by administrative unit or municipality.

64 Furthermore, under Paragraph 10(1) of the WLBG, the City of Vienna is obliged to bear the costs of funerals where they have not been arranged by third parties or are not covered by the estate of the deceased.

65 That being so, the national court must, for the purpose of determining the exact nature of the needs met by Bestattung Wien, analyse all the legal and factual circumstances governing the activity of that company, as described in paragraphs 62 to 64 of the present judgment, the conditions of the separation from Wiener Stadtwerke and the transfer of the activities of Wiener Bestattung to Bestattung Wien and the terms of the exclusivity agreement which, according to the applicant in the main proceedings, links Bestattung Wien to the City of Vienna.

66 In light of the foregoing, the answer to the second question must be that the existence of significant competition does not, of itself, allow the conclusion to be drawn that there is no need in the general interest, not having an industrial or commercial character. The national court must assess whether or not there is such a need, taking account of all the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activity.

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The third question

67 Finally, by its third question, the national court seeks clarification of the scope of the criterion, in the third indent of the second subparagraph of Article 1(b) of Directive 93/36, of supervision of the management of the body concerned by the State, regional or local authorities or other bodies governed by public law. It wishes to know, more specifically, whether that criterion is satisfied in the case of a mere review of the management of the body in question.

68 In that regard, suffice it to note that, according to the settled case-law of the Court (see, inter alia, University of Cambridge, paragraph 20, and Commission v France, paragraph 44), each of the alternative conditions set out in the third indent of the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37 reflects the close dependency of a body on the State, regional or local authorities or other bodies governed by public law.

69 More specifically, as regards the criterion of management supervision, the Court has held that that supervision must give rise to dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of its administrative, managerial or supervisory organs, enabling the public authorities to influence their decisions in relation to public contracts (see Commission v France, paragraphs 48 and 49).

70 In the light of that case-law, the criterion of managerial supervision cannot be regarded as being satisfied in the case of mere review since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts.

71 However, as the Advocate General has pointed out in paragraphs 109 to 114 of his Opinion, the evidence supplied by the national court suggests that, in the present case, the supervision of Bestattung Wien's activities by the City of Vienna largely exceeds that of a mere review.

72 First, Bestattung Wien is, pursuant to Paragraph 73 of the WStV, subject to direct supervision by the City of Vienna as a result of its ownership by a company, WSH, which is wholly owned by that municipality.

73 Second, it is also apparent from the order for reference that Paragraph 10.3 of the shareholders' agreement governing Bestattung Wien expressly provides that the Kontrollamt is authorised to examine not only the annual accounts of the company but also its `conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency'. That paragraph of the shareholders' agreement governing Bestattung Wien also authorises the Kontrollamt to inspect the company's business premises and facilities and to report the results of those inspections to the competent bodies and to the company shareholders and the City of Vienna. Such powers therefore enable the Kontrollamt actively to control the management of that company.

74 In light of the foregoing, the answer to the third question must be that a mere review does not satisfy the criterion of management supervision in the third indent of the second subparagraph of Article 1(b) of Directive 93/36. That criterion is, however, satisfied where the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a regional authority which holds, through another company, all the shares in the body in question.

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NOTES Caruso, Claudia: Diritto pubblico comparato ed europeo 2003 p.957-961
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PROCEDU Reference for a preliminary ruling

ADVGEN Alber

JUDGRAP Timmermans

DATES of document: 27/02/2003
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Order of the Court (Second Chamber)
of 30 May 2002
Buchhändler-Vereinigung GmbH v Saur Verlag GmbH & Co. KG and Die Deutsche Bibliothek.
Reference for a preliminary ruling: Oberlandesgericht Düsseldorf - Germany.
Case C-358/00.

1. Preliminary rulings - Answer capable of being clearly deduced from case-law - Application of Article 104(3) of the Rules of Procedure

(Rules of Procedure of the Court of Justice, Art. 404(3))

2. Approximation of laws - Procedure for the award of public service contracts - Directive 92/50 as amended by Directive 97/52 - Scope - Concession contract for public publishing services - Exclusion

(Council Directives 92/50 and 97/52)

In Case C-358/00,

REFERENCE to the Court under Article 234 EC by the Oberlandesgericht Düsseldorf (Germany) for a preliminary ruling in the proceedings pending before that court between

Buchhändler-Vereinigung GmbH

and

Saur Verlag GmbH & Co. KG,

Die Deutsche Bibliothek,

on the interpretation of Articles 1 and 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1),

THE COURT (Second Chamber),

composed of: N. Colneric, President of the Chamber, R. Schintgen and V. Skouris (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,

Registrar: R. Grass,

after informing the court which made the reference that the Court proposes to give its decision by reasoned order in accordance with Article 104(3) of its Rules of Procedure,

after inviting the interested parties referred to in Article 20 of the EC Statute of the Court of Justice to submit any observations they may have in that regard,

after hearing the Advocate General,

makes the following

Order

1 By order of 2 August 2000, received at the Court on 27 September 2000, the Oberlandesgericht (Higher Regional Court) Düsseldorf referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 1 and 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1).

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2 That question was raised in proceedings brought by Buchhändler-Vereinigung GmbH (Buchhändler-Vereinigung) against Saur Verlag GmbH & Co. KG (Saur Verlag) and the Deutsche Bibliothek (German Library) concerning the intention of the Deutsche Bibliothek to conclude a public service concession contract for the reproduction and distribution of the German National Bibliography in printed form and on CD-Rom.

The Community rules

3 The eighth recital in the preamble to Directive 92/50 states:

... the provision of services is covered by this directive only in so far as it is based on contracts;... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered.

4 Article 1 of Directive 92/50 states:

For the purposes of this directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

....

5 Article 8 of the directive provides:

Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.

6 Category 15 of Annex I A to Directive 92/50 covers publishing and printing services on a fee or contract basis.

The main proceedings and the question referred for a preliminary ruling

7 It is apparent from the order for reference that, in accordance with the Gesetz über die Deutsche Bibliothek (German Library Act), the tasks of the Deutsche Bibliothek, a public-law institution having legal capacity which is directly accountable to the federal authority, include the establishment of the German National Bibliography, in other words, compilation of an inventory of German literature which is updated annually. It must also reproduce and market the bibliographical indexes which it has to compile.

8 On 3 March 2000, the Deutsche Bibliothek, by a restricted procedure, invited tenders for a contract for the reproduction and distribution of the German National Bibliography in printed form and on CD-Rom. The main contractual obligations provided for in that invitation were that the Deutsche Bibliothek was to compile the bibliographical indexes and make these available to the chosen contractor, which was to have the exclusive right to reproduce and distribute the German National Bibliography in printed form and as a CD-Rom. The invitation stipulated that the contractor was to reproduce and distribute the bibliography on its own account and to pay the Deutsche Bibliothek a fee on the basis of the publishing proceeds, for each copy sold. Moreover, the Deutsche Bibliothek was to have rights of supervision and codetermination with respect to the reproduction and distribution of the bibliography.

9 The Deutsche Bibliothek intended to award the contract to Buchhändler-Vereinigung. Saur Verlag objected to that by means of an application pursuant to the Gesetz gegen Wettbewerbsbeschränkungen (Act Prohibiting Restraints of Competition; the GWB) in which it complained of the infringement of certain provisions governing awards of public contracts.

10 By order of 26 May 2000, the Second Federal Procurement Chamber ruled on the application of Saur Verlag. It prohibited the Deutsche Bibliothek from awarding the contract to Buchhändler-Vereinigung

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on the basis of its previous assessment and ordered it to re-assess the bids of the two tenderers, taking into account the findings of that chamber, and to inform the tenderers which of them was to receive the contract at the latest 10 working days before awarding it.

11 Buchhändler-Vereinigung lodged an appeal against that order with the court making the present reference, claiming that the application of Saur Verlag was inadmissible on the ground that the contract in question is not covered by the public procurement rules but is a service concession.

12 In its order for reference, the Oberlandesgericht Düsseldorf states that the answer to the question whether a publishing contract of the kind at issue in the main proceedings is a contract governed by German law on the award of public contracts, namely Paragraphs 97 to 129 of the GWB, is primarily determined by whether such a contract falls within the scope of Directive 92/50.

13 The referring court finds that the contract constitutes a public service concession. It bases this finding on the fact that the contract involves the transfer of the right to exploit a particular service to the private undertaking, which bears the risk associated with that activity. It adds that the service provided by the undertaking is not paid for by the Deutsche Bibliothek by way of a fixed amount but that, on the contrary, a fee must be paid to the Deutsche Bibliothek by the undertaking itself. Furthermore, according to the referring court, the service tendered is performed in the public interest since the activity of the Deutsche Bibliothek, by reason of its nature, its purpose and the rules to which it is subject, falls within the responsibility of the State and since it is assigned to a private contractor subject to a right of supervision and codetermination of the Deutsche Bibliothek.

14 The referring court therefore concludes that the appeal pending before it can be granted only if service concessions fall within the scope of Directive 92/50. The court indicates that it is aware of the fact that a preliminary ruling concerning that question was sought from the Court of Justice in the proceedings which gave rise to the judgment of 7 December 2000 in Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, which was still pending before the Court at the time of the order for reference.

15 However, having regard to Article 8 of Directive 92/50 in conjunction with Category 15 of Annex I A to Directive 92/50, which refers to publishing and printing services on a fee or contract basis, the referring court is uncertain whether public service concessions, even if in general they do not fall within the scope of Directive 92/50, are in any event subject to procurement law when they have as their object publishing and printing.

16 In those circumstances, the Oberlandesgericht Düsseldorf decided to stay proceedings and refer to the Court the following question for a preliminary ruling:

Does Directive [92/50, as amended by Directive 97/52] also apply to a contract:

(a) by which the contracting authority confers on the contractor the exclusive publishing rights (right of reproduction and distribution) in a bibliography compiled by it - in this case the German National Bibliography,

(b) which requires the contractor to reproduce and market the bibliography on his own account and to pay the contracting authority an appropriate fee on the basis of the publishing proceeds for each copy sold, and

(c) in which the contracting authority reserves rights of supervision and codetermination with regard to the reproduction and distribution of the bibliography?

Findings of the Court

17 By its question, the referring court essentially asks whether a concession contract for public

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publishing services is excluded from the scope of Directive 92/50 even though, by reason of its specific object, it is covered by Annex I A to that directive to which Article 8 thereof refers.

18 Since it is considered that the answer to the question referred for a preliminary ruling could be clearly deduced from its case-law, the Court of Justice, in accordance with Article 104(3) of its Rules of Procedure, informed the referring court that it proposed to give its decision by reasoned order and invited the interested parties referred to in Article 20 of the EC Statute of the Court of Justice to submit any observations in that regard.

19 In the observations which they submitted under Article 104(3) of the Rules of Procedure, Buchhändler-Vereinigung, the Deutsche Bibliothek and the Commission did not object to the Court's intention to give its decision by reasoned order.

20 First of all, it should be stated, as the referring court did, that a contract which has as its object the services referred to in paragraph 8 of this order may be covered by Directive 92/50.

21 Secondly, in paragraphs 39 and 40 of the judgment in Telaustria and Telefonadress, cited above, which concerned a concession contract for the production and publication of telephone directories, the Court stated first of all that the contract had as its specific object services covered by various categories of Annex XVI A to Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) and that it was therefore covered by that directive.

22 In order to determine whether such a contract is covered by the definition of contracts for pecuniary interest concluded in writing in Article 1(4) of Directive 93/38, the Court then retraced the history of the directives governing public service contracts, including Directive 92/50.

23 In particular, in paragraph 46 of the judgment in Telaustria and Telefonadress, the Court pointed out that, both in its proposal 91/C 23/01 of 13 December 1990 for a Council Directive relating to the coordination of procedures on the award of public service contracts (OJ 1991 C 23, p. 1) and in its amended proposal 91/C 250/05 of 28 August 1991 for a Council Directive relating to the coordination of procedures on the award of public service contracts (OJ 1991 C 250, p. 4), which resulted in the adoption of Directive 92/50 which covers public service contracts in general, the Commission had expressly proposed that public service concessions be included within the scope of that directive.

24 In paragraph 47 of the judgment in Telaustria and Telefonadress, the Court pointed out, first, that, since that inclusion was justified by the intention to ensure coherent award procedures, the Commission had stated, in the 10th recital in the preamble to the proposal of 13 December 1990, that public service concessions should be covered by this directive in the same way as Directive 71/305/EEC applies to public works concessions. Second, the Court explained that, although the reference to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) was withdrawn from the 10th recital in the preamble to the proposal of 28 August 1991, that proposal none the less expressly maintained the purpose of ensuring coherent award procedures in that recital.

25 However, as the Court pointed out in paragraph 48 of the judgment in Telaustria and Telefonadress, during the legislative process the Council eliminated all references to public service concessions, in particular because of the differences between the Member States as regards the delegation of the management of public services and modes of delegation, which could have created a situation of very great imbalance in the opening-up of the public concession contracts (see paragraph 6 of document No 4444/92 ADD 1 of 25 February 1992, entitled Statement of reasons of the Council and annexed to the common position of the same date).

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26 Finally, in the light of those considerations, which it then compared to the evolution of the scope of the directives on public works contracts, the Court found, in paragraph 57 of the judgment in Telaustria and Telefonadress, that public service concession contracts do not come within the scope of Directive 93/38 and are therefore not included in the concept of contracts for pecuniary interest concluded in writing appearing in Article 1(4) of that directive.

27 The Court concluded therefrom, in the second indent of paragraph 58 of the judgment in Telaustria and Telefonadress, that, although it is covered by Directive 93/38, a contract such as the one at issue in that case, the consideration for which consists in the right of the successful tenderer to exploit for payment his own service, is excluded from the scope of that directive under Community law as it stands at present.

28 Although the judgment in Telaustria and Telefonadress was delivered in respect of a contract which had as its object services relating to one of the specific sectors governed by Directive 93/38, it can clearly be deduced from that judgment that public service concessions are excluded not only from the scope of Directive 93/38 but also from the scope of Directive 92/50 which is intended to apply to services in general.

29 Having regard both to the fact that there is no specific provision relating to public service concessions in Directive 92/50 and to the history of that directive's adoption, as it is related by the Court in paragraphs 46, 47 and 48 of the judgment in Telaustria and Telefonadress, it must be concluded that the Community legislature knowingly excluded such concessions from the scope of that directive. Therefore, the interpretation of the concept, appearing in Article 1(4) of Directive 93/38, of contracts for pecuniary interest concluded in writing which was adopted in that judgment applies equally to the identical concept appearing in Article 1 of Directive 92/50.

30 The answer to the referring court's question must therefore be that a concession contract for public publishing services is excluded, under Community law as it stands at present, from the scope of Directive 92/50 even though, by reason of its specific object, it is covered by Annex I A to that directive to which Article 8 thereof refers.

Costs

31 The costs incurred by the French, Italian, Netherlands and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

ruling on the question referred to it by the Oberlandesgericht Düsseldorf by order of 2 August 2000, hereby orders:

A concession contract for public publishing services is excluded, under Community law as it stands at present, from the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, even though, by reason of its specific object, it is covered by Annex I A to that directive to which Article 8 thereof refers.

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl
JUDGRAP	Skouris
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Judgment of the Court (Sixth Chamber)
of 27 February 2003
Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy.
Directive 93/36/EEC - Public supply contracts - Directive 89/665/EEC - Review procedures applicable to public contracts - Limitation period - Principle of effectiveness.
Case C-327/00.

In Case C-327/00,

REFERENCE to the Court under Article 234 EC by the Tribunale amministrativo regionale per la Lombardia (Italy) for a preliminary ruling in the proceedings pending before that court between

Santex SpA

and

Unità Socio Sanitaria Locale n. 42 di Pavia,

interveners:

Sca Mölnlycke SpA,

Artsana SpA

and

Fater SpA,

on the interpretation of Article 22 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Article 6(2) EU,

THE COURT

(Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen and V. Skouris (Rapporteur), F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Italian Government, by U. Leanza, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,

- the French Government, by A. Bréville-Viéville and G. de Bergues, acting as Agents,

- the Austrian Government, by H. Dossi, acting as Agent,

- Commission of the European Communities, by M. Nolin and R. Amorosi, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government, the French Government and the Commission at the hearing on 6 December 2001,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2002,

gives the following

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Judgment

Costs

68 The costs incurred by the Italian, French and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Tribunale amministrativo regionale per la Lombardia by order of 23 June 2000, hereby rules:

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as imposing on the competent national courts, where it is established that, by its conduct, a contracting authority has rendered impossible or excessively difficult the exercise of the rights conferred by the Community legal order on a national of the Union who has been harmed by a decision of that contracting authority, an obligation to allow as admissible pleas in law alleging that the notice of invitation to tender is incompatible with Community law, which are put forward in support of an application for review of that decision, by availing itself, where appropriate, of the possibility afforded by national law of disapplying national rules on limitation periods, under which, when the period prescribed for bringing proceedings for review of the notice of invitation to tender has expired, it is no longer possible to plead such incompatibility.

1 By order of 23 June 2000, received at the Court on 4 September 2000, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) referred for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 22 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Article 6(2) EU.

2 Those questions were raised in proceedings between Santex SpA (`Santex') and Unità Socio Sanitaria Locale n. 42 di Pavia (`USL') concerning a tendering procedure relating to a supply contract.

The legal context

The Community legislation

3 Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, hereinafter `Directive 89/665'), provides:

`The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC... , decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in

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particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4 Under Article 2(1)(b) of Directive 89/665:

`The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure'.

5 Directive 93/36 repealed Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1). The references made by Article 1(1) of Directive 89/665, in particular, to the directive thereby repealed must be construed as references to Directive 93/36 by virtue of the second paragraph of Article 33 of the latter.

6 Article 22 of Directive 93/36 provides:

`1. Evidence of the supplier's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

...

(c) a statement of the supplier's overall turnover and its turnover in respect of the products to which the contract relates for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which references other than those mentioned under paragraph 1 are to be produced.

3. If, for any valid reason, the supplier is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

The national legislation

7 Article 22 of Directive 93/36 was transposed into Italian law by Article 13 of Legislative Decree No 358 of 24 July 1992 entitled `Testo unico delle disposizioni in materia di appalti pubblici di forniture, in attazione delle direttive 77/62/CEE, 80/767/CEE e 88/295/CEE' (Consolidated provisions relating to public supply contracts, implementing Directives 77/62/EEC, 80/767/EEC and 88/295/EEC, GURI No 188 of 11 August 1992, supplemento ordinario No 104, p. 5, hereinafter `Legislative Decree No 358/1992'). The latter article provides:

`1. Evidence of the competing undertakings' financial and economic standing may be furnished by one of the following documents:

...

(c) a statement of the undertaking's overall turnover and the turnover in respect of the products to which the contract relates for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which of the documents mentioned in paragraph 1 must be produced and any references which are to be produced. ...

3. If, for any valid reason, the supplier is unable to provide the references requested, he may

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prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

8 Article 36(1) of Royal Decree No 1054 of 26 June 1924 approving the `Testo unico delle leggi sul Consiglio di Stato' (Consolidated laws on the Council of State, GURI No 158 of 7 July 1924, hereinafter `Royal Decree No 1054/1924'), the scope of which was extended to include the administrative courts by Article 19 of Law No 1034 of 6 December 1971 relating to the `Istituzione dei tribunali amministrative regionali' (Establishment of the Regional Administrative Courts, GURI No 314 of 13 December 1971, p. 7891), provides:

`Except where time-limits are prescribed by specific laws relating to applications for review, the time-limit for submitting an application for review to the Consiglio di Stato in its judicial capacity shall be 60 days from the date on which the administrative decision was notified in the form and manner laid down by regulation or from the date on which it is apparent that the person concerned became fully aware of it...'

9 Article 5 of Legge no 2248 sul contenzioso amministrativo (Law No 2248 of 20 March 1865 on administrative proceedings, hereinafter `Law No 2248/1865'), provides:

`The judicial authorities shall apply general and local administrative acts and regulations in so far as they are in conformity with primary legislation.'

The main proceedings and the questions referred for a preliminary ruling

10 The order for reference shows that, on 23 October 1996, USL published in the Official Journal of the European Communities a notice of invitation to tender for the direct supply to people's homes of absorbent incontinence products, for an amount estimated at ITL 1 067 372 000 per year.

11 That notice contained a clause according to which the only undertakings which would be eligible to tender were those which had achieved `over the last three financial years, in respect of an identical service to that forming the subject-matter of the invitation to tender, [an] overall turnover of at least three times the amount of the contract in question' (hereinafter `the disputed clause').

12 By letter of 25 November 1996, Santex informed the contracting authority that it considered that that clause constituted an unlawful restriction on competition. It stated that, in view of the fact that that type of service had only been provided by local health authorities very recently, the application of that clause would create an unfair advantage in favour of the undertaking which had obtained the contract at the time of the previous tendering procedure and would exclude many candidates, including itself, even though it had, over the previous year, achieved a turnover equal to twice the annual estimated amount of the contract.

13 In view of those comments, USL postponed the examination of the tenders. It requested the tenderers to send it further documents, stating that the disputed clause could be interpreted as referring to the undertakings' total turnover. The turnover relating to supplies of products identical to those forming the subject-matter of the contract in question would be taken into account, not as a condition of eligibility to tender, but as one of the criteria for assessing the quality of the tenders.

14 Sca Mölnlycke SpA (hereinafter `Mölnlycke'), which had obtained the contract for the supply of identical products for the previous period, objected to that interpretation. It sent USL a letter calling for strict compliance with the disputed clause.

15 By letter of 24 January 1997, USL, implicitly upholding that objection by Mölnlycke, again requested the tenderers to send it information on the turnover which they had achieved in respect of supplies of products identical to those forming the subject-matter of the contract in question, together with a list of the health institutions to which those products had been supplied.

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16 On 20 February 1997, USL adopted a decision excluding from the tendering procedure all companies which did not satisfy the economic condition laid down by the disputed clause, including Santex (hereinafter `the exclusion decision'). The contract was awarded to Mölnlycke by decision of 8 April 1997 (hereinafter `the award decision').

17 Taking the view that, if it had been allowed to tender, it would have been awarded the contract, Santex brought before the Tribunale amministrativo regionale per la Lombardia an action for the annulment of, in particular, the exclusion decision, as well as the award decision and the notice of invitation to tender, on grounds of infringement of the law and misuse of powers. It also sought, by way of interim relief, suspension of the application of the acts thereby contested.

18 Both USL and Mölnlycke, which intervened in the main proceedings, pleaded that the action for annulment directed against the notice of invitation to tender was out of time. Only that notice had caused damage directly to Santex by preventing it from participating in the tendering procedure.

19 By interim order of 29 May 1997, the Tribunale amministrativo regionale per la Lombardia suspended application of the contested acts. It held that, even though the action for annulment of the notice of invitation to tender was to be regarded as out of time, application of the disputed clause should nevertheless be barred on the ground of a breach of the principles of Community competition law.

20 By order of 29 August 1997, the Consiglio di Stato (Council of State) (Italy) set aside that order of the referring court.

21 The interim proceedings having been concluded, USL entered into a contract with Mölnlycke.

22 The Tribunale amministrativo regionale per la Lombardia, to which the Consiglio di Stato remitted the case for adjudication on the substance, states in its order for reference that it is of the opinion that the disputed clause limits the right of access to a tendering procedure in breach of the provisions of Article 22 of Directive 93/36, which are reproduced verbatim in Article 13 of Legislative Decree No 358/1992.

23 In particular, the referring court considers that the clause in question is contrary to the principles of proportionality and non-discrimination in so far as it goes beyond what is necessary in order to verify the economic and financial soundness of the tenderers. It thus grants an unfair advantage to undertakings which hold a dominant position on the market, to the detriment of those which are able to demonstrate their reliability by other means.

24 However, that court states that it is required to rule first on the plea of inadmissibility raised by USL and Mölnlycke. In that regard, it observes that, if it were accepted that the disputed clause prevented Santex from participating in the procedure at the stage of the notice of invitation to tender, the conclusion would have to be that the clause in question should have been challenged within 60 days from the date on which Santex became aware of it, in accordance with Article 36 of Royal Decree No 1054/1924.

25 The referring court argues that, taking as its basis Article 5 of Law No 2248/1865, the Consiglio di Stato held, in general terms, that an administrative court may, in the same way as an ordinary court, disapply a provision of a regulation which is contrary to a higher-ranking provision and affects an individual right.

26 However, it is clear, according to the referring court, from the settled case-law of the Consiglio di Stato concerning public contracts that acts which have the effect of directly infringing the right to participate in an invitation to tender must be challenged within the ordinary limitation period of 60 days if such a challenge is not to be out of time, and that, when that period has expired, it is no longer possible to disapply notices of invitations to tender or their clauses.

27 The referring court is of the opinion that the principle laid down in Article 5 of Law No 2248/1865

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should also apply to clauses in a public-contract notice which are contrary to Community law. It takes the view that, in order to ensure the effectiveness of the judicial protection of rights conferred by the Community legal order, it must be able to disapply the disputed clause regardless of whether national procedural rules have been complied with.

28 According to the referring court, the circumstances of the case in the main proceedings seem such as to warrant refusal to apply the disputed clause, in accordance with the approach described in the previous paragraph. On the one hand, it points out that USL led Santex to believe that the disputed clause would be interpreted restrictively or reformulated in the course of the tendering procedure. USL therefore created a situation of uncertainty prejudicial to the bringing of an action in time and thus made it excessively difficult, if not impossible, to apply Community law to the procedure for the award of the supply contract at issue in the main proceedings.

29 On the other hand, that court argues that a finding that the acts contested in the main proceedings are unlawful would serve the administration's interest, which is in opening the invitation to tender to as wide a participation as possible.

30 The Tribunale amministrativo regionale per la Lombardia also considers it relevant to examine these issues in the light of the judicial protection of fundamental rights afforded by Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

31 In the light of all those considerations, the Tribunale amministrativo regionale per la Lombardia decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

`1. May Article 22 of Directive 93/36/EEC of 14 June 1993 be interpreted as meaning that the competent national courts are required to protect citizens of the Union harmed by acts adopted in breach of Community law by resorting, in particular, to disapplication as provided for in Article 5 of the Italian law of 20 March 1865 with respect to clauses of an invitation to tender which are contrary to Community law but which were not challenged within the short limitation period laid down by national procedural law in order to apply Community law of their own motion whenever it is found, first, that the application of Community law has been seriously impeded or in any event rendered difficult and, second, that there is a public interest, of Community or national origin, which justifies such application?

2. Does Article 6(2) EU which, by providing for respect of the fundamental rights safeguarded by the European Convention for the Protection of Human Rights and Fundamental Freedoms, has adopted the principle of effective judicial protection enshrined in Articles 6 and 13 of that Convention, lead to the same conclusion?'

The first question

Observations submitted to the Court

32 The Italian Government argues that it is the principle of legal certainty which justifies the barring of challenges to a notice of invitation to tender where more than 60 days have elapsed since its publication. Otherwise the legitimate expectations of competitors convinced of the lawfulness of the tendering procedure would be infringed.

33 Referring also to the case-law of the Court, according to which, in the absence of Community rules, it is for the law of each Member State to lay down the detailed procedural rules governing proceedings before the courts to safeguard rights which individuals derive from provisions of Community law which have direct effect, the Italian Government argues that the requirements laid down by that case-law are fulfilled by the national legislation at issue in the main proceedings. It states, in particular, that there is no discrimination under Italian law, since any infringement of either national or Community law by an administrative act can result in the annulment of that act, and

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that there is nothing to prevent effective application of Community law.

34 The Italian Government also submits that the effect of allowing national courts to disapply national procedural rules whenever an unlawful act is challenged for being in breach of Community law would be to produce unjustified variations in the protection of individuals' rights depending on whether those rights derived from Community law or domestic law.

35 The French Government submits that a national court is not required to determine of its own motion whether a domestic legal act is compatible with a provision of Community law where that act has not been challenged within the time-limit laid down by the national procedural rules.

36 The rules on limitation periods at issue in the main proceedings are rules of public policy which cannot be disregarded by the parties or by the national court. In particular, the limitation period of 60 days is intended to implement the principle of legal certainty by regulating and limiting in time the right to challenge the clauses of an invitation to tender. That period cannot be regarded as rendering the exercise of the rights conferred by the Community legal order virtually impossible or excessively difficult.

37 According to the French Government, only where the contracting authority has, by its conduct, contributed to the non-compliance with the limitation period, is it possible to envisage allowing the party concerned, in addition to the possibility of obtaining compensation for the damage suffered, the right to bring proceedings after the expiry of that period. However, it contends that, in the circumstances of the case in the main proceedings, Santex could not disregard the need to protect itself against any eventuality by bringing, within the limitation period, proceedings for review of the notice of invitation to tender at issue in the main proceedings while continuing its discussions with the contracting authority.

38 The Austrian Government submits that, by its first question, the referring court is seeking to ascertain whether the provisions of Community law concerning public contracts preclude the application of rules under domestic law governing limitation periods. It infers from this that reference should be made to Directive 89/665.

39 In view of the fact that that directive does not contain any provision making the bringing of an action in connection with a procedure for the award of public contracts subject to a limitation period, the Member States are entitled to regulate this matter, on the twofold condition that the objectives of that directive are not undermined and that the principles of effectiveness and equal treatment under the EC Treaty are observed.

40 The Austrian Government adds that the national provisions at issue in the main proceedings have the effect not only of speeding up the tendering procedure, but also of reducing the likelihood of vexatious actions, while at the same time fostering the protection of the rights of all tenderers. Those provisions do not in any way infringe the principles of effectiveness and equality. Consequently, Directive 89/665 does not preclude their application.

41 The Commission likewise maintains that, since the main proceedings relate to a public contract, the first question should be examined in the light of Directive 89/665.

42 It observes in that regard that the directive in question provides for an obligation for Member States to ensure that decisions taken by the contracting authority can be reviewed effectively and rapidly, enabling unlawful decisions to be set aside regardless of whether an earlier decision has been challenged within the time-limit laid down. Both a decision excluding an applicant from an invitation to tender and a decision to award a contract constitute decisions taken by the contracting authority for the purposes of that directive.

Findings of the Court

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43 As a preliminary point, it should be observed that, as may be seen from paragraphs 22 and 23 of this judgment, the referring court considers it to have been established that the disputed clause is incompatible with both Article 22 of Directive 93/36 and Article 13 of Legislative Decree No 358/1992.

44 However, as that court points out in its order for reference, it cannot declare the action in the main proceedings admissible since it is applying national procedural rules under which, once the period prescribed for bringing an application for review of a notice of invitation to tender has expired, all pleas in law alleging that that notice is unlawful are also inadmissible for the purpose of challenging another decision of the contracting authority.

45 In addition, the order for reference shows that the Tribunale amministrativo regionale per la Lombardia considers that the conduct of the contracting authority in the case in the main proceedings rendered impossible or excessively difficult the exercise of the rights conferred by Community law on the tenderer harmed by the disputed clause.

46 It is therefore clear that the referring court is seeking guidance as to whether, in those circumstances, it is required, under Community law, to disapply the national rules on limitation periods in order to declare admissible the plea alleging that the disputed clause is in breach of Community law, which is put forward in support of the action brought against decisions which the contracting authority subsequently adopted on the basis of that clause.

47 It must be pointed out in this regard that the detailed rules for the judicial review of decisions adopted in connection with procedures for the award of public contracts are not covered by Directive 93/36, but only by Directive 89/665. The latter directive lays down the minimum conditions to be satisfied by the review procedures established in the national legal systems, so as to ensure compliance with the requirements of Community law concerning public contracts.

48 In the light of the foregoing considerations, the first question must be construed as asking, in essence, whether Directive 89/665 must be interpreted as imposing on the competent national courts, where it is established that, by its conduct, a contracting authority has rendered impossible or excessively difficult the exercise of the rights conferred by Community law on a national of the Union who has been harmed by a decision of that contracting authority, an obligation to allow as admissible pleas in law alleging that the notice of invitation to tender is incompatible with Community law, which are put forward in support of an application for review of that decision, by making use, where appropriate, of the possibility provided for by national law of disapplying national rules on limitation periods, under which, when the period prescribed for bringing applications for review of the notice of invitation to tender has expired, it is no longer possible to plead such incompatibility.

49 In order to answer the question thus reformulated, it must be recalled that the Court has already had occasion to rule in general terms on the compatibility with Directive 89/665 of national rules establishing limitation periods in connection with applications for review of contracting authorities' decisions covered by that directive.

50 In paragraph 79 of its judgment in Case C-470/99 Universale-Bau and Others v Entsorgungsbetriebe Simmering [2002] ECR I-0000, the Court held that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.

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51 In particular, the Court noted that, whilst it is for the internal legal order of each Member State to establish time-limits in respect of the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, those time-limits must not compromise the effectiveness of Directive 89/665, which seeks to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (Universale-Bau, paragraphs 71, 72 and 74).

52 It was in those circumstances that the Court held that the setting of reasonable limitation periods for bringing proceedings satisfies, in principle, the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty (Universale-Bau, paragraph 76).

53 It must therefore be established whether the limitation period at issue in the main proceedings satisfies the requirements of Directive 89/665, as identified by the case-law cited in paragraphs 50 to 52 of this judgment.

54 In that regard, it must be observed, first, that the limitation period of 60 days which applies to public contracts under Article 36(1) of Royal Decree No 1054/1924, as interpreted by the Consiglio di Stato, appears reasonable having regard both to the purpose of Directive 89/665 and to the principle of legal certainty.

55 Second, it must be held that such a period, which runs from the date of notification of the act or the date on which it is apparent that the party concerned became fully aware of it, is also in accordance with the principle of effectiveness since it is not in itself likely to render virtually impossible or excessively difficult the exercise of any rights which the party concerned derives from Community law.

56 However, for the purpose of applying the principle of effectiveness, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference, in particular, to the role of that provision in the procedure, its progress and its special features, viewed as a whole (see Case C-312/93 Peterbroeck and Others v Belgian State [1995] ECR I-4599, paragraph 14).

57 Consequently, although a limitation period such as that at issue in the main proceedings is not in itself contrary to the principle of effectiveness, the possibility that, in the context of the particular circumstances of the case before the referring court, the application of that time-limit may entail a breach of that principle cannot be excluded.

58 From that point of view, it is necessary to take into consideration the circumstance that, in this particular case, although the disputed clause was brought to the notice of the parties concerned at the time of the publication of the notice of invitation to tender, the contracting authority created, by its conduct, a state of uncertainty as to the interpretation to be given to that clause and that that uncertainty was removed only by the adoption of the exclusion decision.

59 As is apparent from the information provided by the referring court, USL indicated initially that it would take account of the reservations expressed by Santex and that it would not apply the economic condition laid down by the disputed clause at the tender admission stage. It was only by means of the exclusion decision, which eliminated from the tendering procedure all tenderers who did not satisfy that condition, that the contracting authority stated its definitive position regarding the interpretation of the disputed clause.

60 It must therefore be acknowledged that, in the circumstances of the case in the main proceedings, it was only when it was informed of the exclusion decision that the tenderer harmed was able to find out what interpretation the contracting authority actually placed upon that clause of the notice

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of invitation to tender. In view of the fact that, at that stage, the period prescribed for bringing proceedings for review of that notice had already expired, that tenderer was deprived, under the rules on limitation periods, of any opportunity to plead before a court, in proceedings for review of the subsequent decisions which caused it harm, the incompatibility of that interpretation with Community law.

61 In the circumstances of the case in the main proceedings, the changing conduct of the contracting authority may be considered, in view of a limitation period, to have rendered excessively difficult the exercise by the harmed tenderer of the rights conferred on him by Community law.

62 Since the referring court alone has jurisdiction to interpret and apply the national legislation, it falls to it, in circumstances such as those of the case in the main proceedings, to interpret, as far as is at all possible, the rules establishing that limitation period in such a way as to ensure observance of the principle of effectiveness deriving from Directive 89/665.

63 As is clear from the case-law of the Court, when applying domestic law the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of Community law (see, in particular, Case C-165/91 Van Munster v Rijksdienst voor Pensioenen [1994] ECR I-4661, paragraph 34, and Case C-262/97 Rijksdienst voor Pensioenen v Engelbrecht [2000] ECR I-7321, paragraph 39).

64 Where application in accordance with those requirements is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Community law (see, in particular, Case C-347/96 Solred v Administracion General del Estado [1998] ECR I-937, paragraph 30, and Engelbrecht, paragraph 40).

65 It follows that, in circumstances such as those of the case in the main proceedings, it is for the referring court to ensure observance of the principle of effectiveness under Directive 89/665 by applying its national law in such as way as to enable a tenderer harmed by a decision of the contracting authority adopted in breach of Community law to safeguard the possibility of raising pleas in law alleging that breach in support of applications for review of other decisions of the contracting authority, by availing itself, where appropriate, of the possibility afforded, according to the referring court, by Article 5 of Law No 2248/1865 of disapplying the national rules governing such applications so far as limitation periods are concerned.

66 The answer to the first question referred for a preliminary ruling must therefore be that Directive 89/665 must be interpreted as imposing on the competent national courts, where it is established that, by its conduct, a contracting authority has rendered impossible or excessively difficult the exercise of the rights conferred by the Community legal order on a national of the Union who has been harmed by a decision of that contracting authority, an obligation to allow as admissible pleas in law alleging that the notice of invitation to tender is incompatible with Community law, which are put forward in support of an application for review of that decision, by availing itself, where appropriate, of the possibility afforded by national law of disapplying national rules on limitation periods, under which, when the period prescribed for bringing proceedings for review of the notice of invitation to tender has expired, it is no longer possible to plead such incompatibility.

The second question

67 In view of the answer given to the first question, there is no need to answer the second question.

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PROCEDU Reference for a preliminary ruling

ADVGEN Alber

JUDGRAP Skouris

DATES of document: 27/02/2003
of application: 04/09/2000

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Judgment of the Court (Sixth Chamber)
of 16 October 2003
Commission of the European Communities v Kingdom of Spain.
Failure of a Member State to fulfil its obligations - Public procurement - Directive 93/37/EEC - Procedure for the award of public works contracts - State commercial company governed by private law - Company's object consisting of the implementation of a plan for repaying the costs of and establishing prisons - Concept of contracting authority.
Case C-283/00.

In Case C-283/00,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by M. Lopez-Monís Gallego, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental de Segovia (Experimental Educational Prison, Segovia) issued by the Sociedad Estatal de Infraestruturas y Equipamientos Penitenciarios S.A., a company falling within the definition of a contracting authority for the purposes of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), the amount of which far exceeds the threshold provided for by that directive, by failing to comply with all the provisions of that directive and, more specifically, the advertising rules laid down in Article 11(2), (6), (7) and (11), and the provisions of Articles 12(1), 29(3), 18, 27 and 30(4), the Kingdom of Spain has failed to fulfil its obligations under Community law,

THE COURT

(Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, V. Skouris (Rapporteur), N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 7 November 2002,

gives the following

Judgment

Costs

97 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

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On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. Declares that, by failing to comply with all the provisions of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental de Segovia issued by the Sociedad Estatal de Infraestruturas y Equipamientos Penitenciarios S.A. (`SIEPSA'), a company falling within the definition of a contracting authority for the purposes of Article 1(b) of the Directive, the Kingdom of Spain has failed to fulfil its obligations under that directive;

2. Orders the Kingdom of Spain to pay the costs.

1 By application lodged at the Court Registry on 18 July 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental de Segovia (Experimental Educational Prison, Segovia) issued by the Sociedad Estatal de Infraestruturas y Equipamientos Penitenciarios S.A. (`SIEPSA'), a company falling within the definition of a contracting authority for the purposes of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54, `the Directive'), the amount of which far exceeds the threshold provided for by that directive, by failing to comply with all the provisions of that directive and, more specifically, the advertising rules laid down in Article 11(2), (6), (7) and (11), and the provisions of Articles 12(1), 29(3), 18, 27 and 30(4), the Kingdom of Spain has failed to fulfil its obligations under that directive.

Legal background

The relevant provisions of Community law

2 The second recital in the preamble to the Directive states that `the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

3 According to Article 1(b) of the Directive:

`"[C]ontracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional

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or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. ...'

4 Article 11(2), (6), (7) and (11) of the Directive provides as follows:

`(2) Contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure referred to in Article 7(2), shall make known their intention by means of a notice.

...

(6) The notices referred to in paragraphs 1 to 5 shall be drawn up in accordance with the models given in Annexes IV, V and VI, and shall specify the information requested in those Annexes.

The contracting authorities may not require any conditions but those specified in Articles 26 and 27 when requesting information concerning the economic and technical standards which they require of contracts for their selection...

(7) The contracting authorities shall send the notices referred to in paragraphs 1 to 5 as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities...

...

(11) The notice shall not be published in the official journals or in the press of the country of the contracting authority before the date of dispatch to the Official Journal of the European Communities and it shall mention this date....'

5 Article 12(1) of the Directive provides as follows:

`In open procedures the time-limit for the receipt of tenders, fixed by the contracting authorities shall be not less than 52 days from the date of dispatch of the notice.'

6 Under Article 18 of the Directive:

`Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29.'

7 Article 24 of the Directive provides inter alia:

`Any contractor may be excluded from participation in the contract who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata;

(d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify;

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...

(g) is guilty of serious misrepresentation in supplying the information required under this Chapter.

...'

8 Under Article 27(1) of the Directive:

`Evidence of the contractor's technical capability may be furnished by:

...

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;

...

(e) a statement of the technicians or technical bodies which the contractor can call upon for carrying out the work, whether or not they belong to the firm.'

9 It is apparent from Article 29(3) of the Directive that certified registration in the official lists by the competent bodies is, for the contracting authorities of other Member States, to constitute a presumption of suitability for works corresponding to the contractor's classification, in particular, as regards Article 27(b) and (d).

10 Article 30(1) and (4) of the Directive provides:

`(1) The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

...

(4) If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it consider to be too low.

...'

11 Part V of Annex I to the Directive contains a list of the categories of the bodies governed by public law referred to in Article 1(b) in respect of Spain. Those categories are the following:

`- Entidades Gestoras y Servicios Comunes de la Seguridad Social (administrative entities and common services of the health and social services),

- Organismos Autonomos de la Administracion del Estado (independent bodies of the national administration),

- Organismos Autonomos de las Comunidades Autonomas (independent bodies of the autonomous communities),

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- Organismos Autonomos de las Entidades Locales (independent bodies of local authorities),

- Otras entidades sometidas a la legislacion de contratos del Estado español (other entities subject to Spanish State legislation on procurement).'

12 Article 1(1) and (2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), is worded as follows:

`For the purpose of this Directive:

(1) "[P]ublic authorities" shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

A body is considered to be governed by public law where it:

- is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature,

- has legal personality, and

- is financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or other bodies governed by public law;

(2) "[P]ublic undertaking" shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the majority of the undertaking's subscribed capital, or

- control the majority of the votes attaching to shares issued by the undertaking, or

- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body'.

The relevant provisions of national law

The general rules applicable to SIEPSA

13 The Directive was implemented in domestic Spanish law by the Ley 13/1995 de Contratos de las Administraciones Publicas (Law on public procurement) of 18 May 1995 (BOE No 119 of 19 May 1995, p. 14601).

14 Article 1(2) and (3) of Law No 13/1995 provides:

`(2) For the purposes of this law, "public authorities" shall mean:

(a) the central administrative authority of the State;

(b) the authorities of the autonomous communities;

(c) the bodies of which local authorities consist.

(3) This Law shall also apply to the award of contracts by independent bodies in all cases and by other bodies governed by public law and possessing legal personality, connected to or controlled by a public authority, if they meet the following criteria:

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(a) that they were established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,

(b) that they carry on activity which is financed, for the most part, by public authorities or other bodies governed by public law, or that their management is subject to supervision by those [public] bodies, or that more than half of the members of their administrative, managerial or supervisory board are appointed by the public authorities or by other bodies governed by public law'.

15 The sixth provision supplementing Law No 13/1995, entitled `Rules applicable to the award of contracts in the public sector', is worded as follows:

`When awarding public procurement contracts, commercial companies in the capital of which public authorities or their independent bodies, or bodies governed by public law, have a majority holding, whether direct or indirect, shall comply with the rules on advertising and competition, unless the nature of the transaction to be effected is incompatible with those rules'.

16 Since these proceedings were initiated, the Kingdom of Spain has, by means of Real Decreto Legislativo 2/2000 por el que se aprueba el texto refundido de la Ley de Contratos de las Administraciones Publicas (Royal Legislative Decree approving the consolidated text of the Law on public procurement) of 16 June 2000 (BOE No 148 of 21 June 2000, p. 21775), adopted a new consolidated version of that law confined, however, to grouping together and rearranging the earlier provisions, without amending their content.

17 Article 2(2) of the Ley 30/1992 de Régimen Jurídico de las Administraciones Publicas y del Procedimiento Administrativo Comun (Law on the legal rules governing public authorities and common administrative procedure) of 26 November 1992, as amended by Ley 4/1999 of 13 January 1999 (BOE No 12 of 14 January 1999, p. 1739, `Law No 30/1992'), provides:

`Bodies governed by public law and possessing separate legal personality, connected to or controlled by any public authority whatsoever shall also be regarded as public authorities. The activities of such bodies shall be regulated by this Law where those bodies exercise administrative powers, their other activities being governed by the rules applicable to their formation.'

18 It is clear from the 12th provision supplementing Ley 6/1997 de Organizacion y Funcionamento de la Administracion General del Estado (Law on the organisation and working of the central administration of the State) of 14 April 1997 (BOE No 90 of 15 April 1997, p. 11755, `Law No 6/1997'), that State commercial companies are governed wholly by private law, whatever their legal form, except in the spheres regulated by statute with regard to budget, accounts, financial audit and public procurement, and that they may in no circumstances have powers which might suggest the exercise of public authority.

19 Furthermore, SIEPSA is regulated in particular by the Texto Refundido de la Ley General Presupuestaria (consolidated version of the General Budget Law), approved by Royal Legislative Decree No 1091/1988 of 23 September 1988 (BOE No 234 of 29 September 1988, p. 28406), by the Texto Refundido de la Ley de Sociedades Anonimas (consolidated version of the Law on public limited companies), approved by Royal Legislative Decree No 1564/1989 of 22 December 1989 (BOE No 310 of 27 December 1989, p. 40012), by the general laws on public limited companies and by its statutes.

SIEPSA's statutes

20 SIEPSA is a State company created by decision of the Council of Ministers of 21 February 1992 in the form of a commercial public limited company. Originally created for a period of eight years, the company has since become a company of unlimited duration, following amendment of its statutes in October 1999. At the beginning of 2000 its capital came to ESP 85 622 000 000, fully subscribed and paid up by the Spanish State as the sole shareholder.

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21 In accordance with the provisions of its statutes, the company is directed and represented by a board of directors. The eight members of that board are appointed by the general meeting of shareholders, on a proposal made by the Ministries of Justice, the Economy and Finance. Its chairman is nominated by the board of directors and chosen from among the members of the board proposed by the Ministry of Justice.

22 Following the amendment to the statutes of 17 July 1998 the company has the following object:

`1. The development and execution of programmes and actions contained or which may in future be contained in the plan for repaying the costs of and establishing prisons, approved by decision of the Council of Ministers... so far as concerns the construction of prisons or annexes by the company itself or through others, and the repaying of the costs of or transfer of real property and centres which, once they have ceased to be used for prison services or for prison purposes, are to be assigned to the company pursuant to the plan, so that it may carry out in particular the following operations in accordance with the directives issued by the prison administration's central management:

(a) carrying on all town-planning management and consultancy activities necessary in order to implement the abovementioned plan and collaboration with public or private bodies for those purposes;

(b) locating and purchasing appropriate buildings or, if necessary, adapting those which prove suitable for being fitted out as new prisons or annexes, and making payment for the acquisitions made by the prison authorities by any means and for the purpose stated;

(c) drawing up works projects, making the plans and preparing the conditions for the award of the works involved in a procurement contract;

(d) organising and awarding the contracts for the performance of the works in accordance with statutory procedures, and taking such action as may be necessary for directing the works, quality control, measurements, certification and monitoring and everything relating to fittings and subsidiary material, in collaboration with technicians appointed by the prison authorities;

(e) organising and carrying out the necessary planning, construction, building and financing works and providing the necessary equipment for the commissioning of the new prisons and annexes.

2. The transfer of real property and prisons which, on no longer being used in the prison service or for such purposes, are assigned to it by the State... and which, where that would be expedient in order to increase the profits to be derived and the value of the transfer, may be in part transferred to the local authorities concerned or exchanged for other property belonging to those authorities, with which collaboration agreements may be concluded which allow of such improvement and which permit needs falling within their ambit to be met. The funds thus acquired shall be used to pay for the activities provided for in the plan.

...'

The pre-litigation procedure

23 A complaint was laid before the Commission concerning a procedure for the award of a public works contract for the Experimental Educational Prison, Segovia, initiated by SIEPSA in connection with a plan approved by the Ministry of Justice and of the Interior, the maximum budget being ESP 4 392 399 500, exclusive of VAT. The call for tenders in the procedure in question had been published in the daily newspaper El País on 3 April 1997.

24 By letter of 24 September 1997 the Commission drew to the attention of the Spanish authorities the fact that many provisions of the Directive had been disregarded in that call for tenders.

25 In their reply of 17 December 1997 the Spanish authorities maintained that SIEPSA, as a State commercial company governed by private law, was not a contracting authority for the purposes

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of the Directive and that the provisions of the Directive were therefore not applicable to the circumstances of the case.

26 In response to that reply, on 6 November 1998 the Commission sent the Spanish authorities a letter of formal notice in which it argued that SIEPSA had to be regarded as a contracting authority and that, by the same token, it was required to comply with all the provisions of the Directive, notwithstanding the wording of Law No 13/1995.

27 By letter of 26 January 1999 the Spanish authorities communicated their observations, stressing in the first place the argument that State companies such as SIEPSA do not fall within the ambit of the Directive or of Law No 13/1995, since they are governed by rules of private law. In the second place, they maintained that SIEPSA did not meet the first condition laid down in Article 1(b) of the Directive, since it met general-interest needs of a commercial character. Furthermore, SIEPSA had in their view complied sufficiently with the rules on advertising and competition by publishing tender notices in the national and local daily papers.

28 Considering that reply to be inadequate, on 25 August 1999 the Commission issued a reasoned opinion under Article 226 EC in which it repeated and added to its arguments set out in the letter of formal notice, concluding that in connection with the call for tenders for the works to be carried out on the Experimental Educational Prison, Segovia, issued by SIEPSA, the Kingdom of Spain had failed to fulfil its obligations under certain of the provisions of Directive 93/37.

29 The Spanish Government answered that reasoned opinion by letter of 22 November 1999 rejecting the Commission's analysis.

30 Taking the view that the observations submitted by the Spanish Government showed that the failures to fulfil obligations referred to in the reasoned opinion had not been remedied, the Commission decided to bring the present action.

Substance

Arguments of the parties

31 The Commission states that certain of the provisions of the Directive were not complied with during the procedure followed for the award of the works in question. Having stressed the preliminary point that the maximum budget exceeded the threshold provided by Directive 93/37, then standing at ECU 5 million, it notes that the tender notice appeared in the national press only, and was not published in the Official Journal of the European Communities, in contravention of Article 11(2), (7) and (11) of the Directive. Moreover, the time-limit for the receipt of tenders was 35 days only, whereas Article 12(1) of the Directive specifies a minimum time-limit of 52 days in open procedures.

32 The Commission also claims that, among the conditions laid down in order to be able to tender, the first requirement is to belong to one of 25 various sub-groups of State contractors, the second is to have paid-up share capital of at least ESP one milliard and the third is to have won at least four works contracts in the past five years (at least two of them for construction work) for a minimum final amount of ESP 2 milliard per contract, confirmed by the relevant certificates. In the Commission's submission, the third condition is redundant since under Article 29(3) of Directive 93/37 certified registration in the official lists constitutes a presumption of suitability for the contracting authorities of the other Member States in respect of the list of works completed in the past five years.

33 The Commission then notes that the eight criteria for award of the contract include `technical team permanently assigned to the works' and `quality of the execution of the contracts awarded by SIEPSA'. On that subject, it points out that while those two criteria appear in Article 27

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of Directive 93/37 among the factors which may constitute evidence of the contractor's technical capability and contribute to its being selected, they cannot however be used in determining the best tender, since the criteria for the award of contracts referred to in Article 30 of the Directive can relate only to the specific works in question. The Commission concludes therefore that it is contrary to Articles 18, 27 and 30(1) of Directive 93/37 to include those two criteria among the criteria for the award of the contract.

34 As regards the criterion of price, the Commission states that it is clear from the contract documents that `while they will not be excluded, tenders for an amount judged to be abnormally low will have points deducted, that is to say, where the amount differs by more than 10 units from the arithmetic average of the selected proposals'. According to the Commission, the effect of automatically penalising tenders for an amount considered to be abnormally low is equivalent to a practice of automatic exclusion of those offers, without allowing any opportunity of explaining the price, which is contrary to Article 30(4) of the Directive.

35 The Commission concludes that when it organised the call for tender at issue SIEPSA ought to have complied with the relevant provisions of the Directive for, according to the Court's case-law, the obligation placed on Member States by a directive to attain the result provided for by that act, and their duty under Article 10 EC, to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, are incumbent on all authorities of the Member States. Here the Commission refers in particular to Case C-353/96 Commission v Ireland [1998] ECR I-8565, paragraph 23, where it is held that the directives on the award of public contracts would be deprived of their effectiveness if the actions of a contracting authority were not imputable to the Member State concerned.

36 The Spanish Government does not deny that the call for tenders in respect of the procedure for the award of the public works contract for the Experimental Educational Prison, Segovia, issued by SIEPSA, did not conform to the requirements of the Directive, but contends that that company is not to be considered to be a contracting authority for the purposes of that directive.

37 The Spanish Government argues generally that Directive 93/37, just like Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), does not include commercial companies under public control, such as SIEPSA, within the notion of bodies governed by public law. That finding is borne out by the fact that Directive 93/38 draws a distinction between the concept of a body governed by public law, identical in all four directives, and the concept of a public undertaking, the definition of which corresponds to that of a public commercial company.

38 On that subject the Spanish Government notes that the Community legislature was aware that many undertakings in the private sector, although possessing the form of a public undertaking, specifically pursue a wholly commercial object, despite their dependency on the State, and operate on the market in accordance with the rules of free competition and in conditions of equality with other private undertakings strictly for the purpose of making profits. That is why the legislature confined the Directive's ambit to bodies cumulatively satisfying the three conditions set out in Article 1(b) thereof.

39 While that Government acknowledges that SIEPSA fulfils the two last conditions under Article 1(b) of the Directive, it argues that SIEPSA possesses the attributes of a commercial company, given that its objects and tasks are typically commercial, and that it therefore meets general-interest needs of a commercial character, which is not in keeping with the first criterion of that provision.

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40 In addition, referring to the list in Part V of Annex I to the Directive, which contains the categories of Spanish bodies governed by public law that meet the criteria laid down in the second paragraph of Article 1(b) of that directive, the Spanish Government asserts that SIEPSA does not belong to any of those categories, since it is not an independent body and since it is not subject to the Spanish laws on public procurement.

41 The Spanish Government explains that SIEPSA does not fall within the scope ratione personæ of Law No 13/1995 which, as Article 1 thereof makes clear, neither includes nor refers to State commercial companies. The only express reference to those State companies occurs in the sixth provision supplementing that Law, imposing on them the strict application of the advertising and competition rules in respect of procedures for the award of public procurement conducted by them, rules which it claims SIEPSA did observe in the circumstances of the case.

42 According to the Spanish Government, that exclusion from the scope ratione personæ of the Spanish rules on procedures for the award of public procurement contracts and, consequently, of the Community rules on public procurement is accounted for by the circumstance that, in the Spanish legal order, it is generally the task of public bodies governed by private law, a category consisting of commercial companies under public control, such as SIEPSA, to meet general-interest needs, which explains why they are under public control, but those needs are commercial or industrial in nature for, if that were not so, they could not be the object of a commercial company.

43 As more particularly regards SIEPSA, the Spanish Government states that its principal task entrusted to it, namely, the building of new prisons suited to the needs of society, consists of a general-interest requirement of a commercial character, which serves the ultimate purpose of contributing to prison policy, which is also in the general interest.

44 SIEPSA was created in order to carry out all actions which prove necessary to the proper management of the programmes and transactions provided for in the plan for paying off the costs of and establishing prisons, either itself or through others. Its attributes are those of a typical commercial company, it even being governed by commercial law, without prejudice to the exceptions provided for in the areas of budget, accounts and financial audit.

45 In order to attain those objectives, SIEPSA performs transactions which must, in the Spanish Government's submission, be objectively classified as commercial, such as locating and acquiring buildings to be fitted out as new prisons and the development and execution of preparatory and construction works.

46 That Government observes that, in carrying on those activities, SIEPSA makes a profit and that the performance of those operations with a view to generating profits is a typically commercial activity which can be successfully carried out only by a company subject to the free play of the commercial rules of the private sector with which it must necessarily engage. It goes on to say that that company's activity cannot be treated as administrative, since its objective is to acquire financial means or resources like any contractor, and that is so even though in the final analysis those resources are applied for other general-interest purposes.

47 Referring to Case C-360/96 BFI Holding [1998] ECR I-6821, paragraph 47, where the Court stated that the absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law, the Spanish Government argues that, whether or not SIEPSA is subject to market competition, it carries on activity which is commercial in nature, which quite simply means that it cannot fall within the notion of a contracting authority used by the Directive.

48 According to that Government, the fact that State commercial companies such as SIEPSA are regulated by private law is not so much the cause as the consequence of their actual nature. It states in this regard that that company is not commercial in character because it is governed by

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private law, but that it is precisely the commercial character of its activity that confers on it the attributes it possesses and results in its being governed by private law.

49 The Spanish Government submits that its is the only view that respects the autonomous definition of the criterion of the non-industrial or commercial character of needs in the general interest, as it emerges from paragraphs 32 and 36 of BFI Holding. It contends that, since the State serves the general interest and since it has a majority shareholding in State commercial companies, it is logical to suppose that those companies will always serve the general interest to a greater or lesser extent. If, in order for the body to be classified as a contracting authority, it were sufficient that it should perform tasks in the general interest, such as contributing to the imposition of criminal penalties, then the condition that those tasks should not be industrial or commercial in character would be meaningless.

50 The Government concludes therefore that SIEPSA ought to receive the same treatment as undertakings supplying gas, electricity or water, sectors which satisfy essential social requirements and which are at present in the hands of entirely private undertakings. In that connection it notes that those undertakings also pursue broader objectives in the general interest since they guarantee, inter alia, the proper working of spheres essential to the productive life of the nation.

51 By contrast, the Commission is of the view that SIEPSA fulfils all the conditions laid down in Article 1(b) of the Directive and that it is therefore a contracting authority for the purposes of that directive.

52 As a preliminary point, it observes that the scope ratione personæ of Directive 93/37 is determined by the Directive itself and not by provisions of national law and that SIEPSA's classification under Spanish law is in consequence immaterial. The Commission notes that, when implementing Community directives in domestic law, the Member States are required to respect the meaning of the words and concepts used in those measures, in order to guarantee uniform interpretation and application of Community legislation in the various Member States. As a result, the Spanish authorities are bound to give the expression `body governed by public law', used in the Directive, the meaning it has under Community law. Thus, according to the Commission, if SIEPSA is excluded from the ambit of the Community rules on the award of public procurement contracts by Law No 13/1995, that is because Directive 93/37 has not been properly transposed into Spanish law.

53 In addition, the Commission claims that the functional interpretation of the notion of `contracting authority' and, therefore, of `body governed by public law' adopted in the established case-law of the Court implies that the latter notion includes commercial companies under public control, provided that they fulfil the conditions laid down in the second paragraph of Article 1(b) of the Directive.

54 As regards the distinction alegedly drawn by Directive 93/38 between the definitions of a body governed by public law and a public undertaking, the Commission states that that directive does not clarify the concept of a body governed by public law, which is identical in the four directives in question, but extends the scope ratione personæ of the provisions of Community law relating to public procurement to certain sectors (water, energy, transport and telecommunications) excluded from Directives 93/36, 93/37 and 92/50, in order to cover certain bodies carrying on significant activity in those sectors, namely, public undertakings and those which enjoy special or exclusive rights granted by the authorities. In addition, it ought to be borne in mind that the concept of a public undertaking has always been different from that of a body governed by public law, in that bodies governed by public law are created specifically to meet needs in the general interest having no industrial or commercial character, whereas public undertakings act to satisfy needs of an industrial or commercial character.

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55 The Commission also disproves the Spanish Government's interpretation which makes the concept of `body governed by public law' dependent on the lists contained in Annex I to the Directive in respect of every Member State, with the result that a Community concept comes to have different meanings, depending on the way in which the various lists in Annex I were drawn up.

56 According to the Commission, the interpretation favoured by the Spanish Government runs counter to the primary object of the Directive, as set out in the second recital in the preamble thereto, and is also contrary to the third paragraph of Article 1(b) thereof, according to which the lists are to `be as exhaustive as possible'. The Commission stresses the point that that expression cannot be understood to mean anything other than that the lists are not exhaustive and that that interpretation has been confirmed by the Court in BFI Holding, paragraph 50. From that it deduces that the circumstance that State companies do not appear, directly or indirectly, in the list of `bodies governed by public law' in Part V of Annex I to the Directive does not mean that they fall outside the concept defined in the second paragraph of Article 1(b) thereof.

57 So far as the conditions laid down in the second paragraph of Article 1(b) of the Directive are more particularly concerned, the Commission observes that that provision makes no mention of the set of rules, whether public or private, under which bodies governed by public law have been formed, or of the legal form chosen, but rather refers to other standards, including the purpose for which the bodies in question were created.

58 The Commission submits that SIEPSA was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, videlicet to contribute to the implementation of State prison policy through the management of programmes and actions contained in the plan for paying off the costs of and establishing prisons approved by the Council of Ministers.

59 Referring to Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, paragraph 24, the Commission claims that that general interest, closely linked as it is to public order and the institutional operation of the State and even to the very essence of the State, inasmuch as the State holds the monopoly of power in the penal sphere consisting of the imposition of penalties depriving persons of their liberty, does not possess an industrial or commercial character.

60 The Commission next disproves the Spanish Government's argument that companies which, like SIEPSA, operate on the market subject to the principles of free competition in the same way as private undertakings and for the same purpose of making profits have a purely commercial object and by that token fall outside the ambit of the Community directives on public procurement. In particular, it refers by way of example to the award of works contracts for the construction of public prisons or the sale of the State's prison properties, which are two of SIEPSA's company objects and which cannot be regarded as activities subject to market competition.

61 Furthermore, the Commission submits that paragraph 47 of BFI Holding makes it clear that, even if it should be conceded that SIEPSA carries on activity subject to free competition, that fact does not mean that it cannot be regarded as a contracting authority.

62 In addition, the Commission claims that the Spanish Government's argument to the effect that all SIEPSA's activities are commercial is groundless.

63 In the first place, it states that, contrary to the claims made by the Spanish Government, SIEPSA's activity cannot be compared with private-sector activity. It explains that that company does not offer prisons on the penal establishments market (there is no such market) but rather acts as the representative of the State administration in order to assist the latter in a task of a typically State nature: the construction, management and selling of prison properties. On this subject the Commission notes that, as is clear from the company's statutes, in carrying out its tasks SIEPSA follows directives issued by the general management of the prison administration,

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and real property is sold and the sums so realised are used in accordance with the directives issued by the general management of State assets.

64 In the second place, the Commission observes that the Spanish Government separates the need to build prisons (from which it infers that it is of general interest and possessed of a commercial character) from the ultimate purpose, which is to contribute to penal policy (which it classifies as being in the general interest). It states that that separation, as well as being artificial in that the two needs are closely linked, is inconsistent with the reasoning followed by the Court in other cases, in which it has declared that the collection and treatment of waste (BFI Holding) or the printing of official administrative documents (Mannesmann Anlagenbau Austria and Others) are needs in the general interest, not having an industrial or commercial character, without separating those activities from their ultimate purpose: public health and environmental protection, on the one hand, and public order and the institutional operation of the State, on the other.

65 In the third place, the Commission claims that even if SIEPSA's objective were profit, that aim would not prevent the company from meeting needs in the general interest not having an industrial or commercial character. In its opinion, while the pursuit of profit may be a distinguishing feature of the company's activities, it is nowhere stated in the text of the Directive that that goal makes it impossible to consider that the general-interest needs to meet which SIEPSA was created have no industrial or commercial character.

66 It adds that it is debatable whether the pursuit of profit is an object for a State company such as SIEPSA, which is wholly funded out of public resources, and which was created for the purpose of drawing up and implementing a plan for paying off the costs of and establishing prisons. It is obvious to the Commission that in such a sphere making a profit is not a factor which a Member State would consider of prime importance. In support of its claim, it submits that the `Economic and Financial Reports of the State public sector' drawn up for the financial years 1997 and 1998 by the Intervencion General del Estado make it clear that SIEPSA recorded large losses for those years.

67 In any case, the Commission claims that, even on the assumption that SIEPSA did carry on activities of a commercial nature, those activities would amount to no more than a means of satisfying a need in the general interest not having an industrial or commercial character, viz. the implementation of the State's prisons policy, which the company was specifically established to meet.

Findings of the Court

68 As stated in paragraph 36 above, the Spanish Government does not deny that the call for tenders for the public works contract for the Experimental Educational Prison, Segovia, issued by SIEPSA, was not in keeping with the requirements of the Directive, but contends that the Directive is not applicable to procedures for the award of public procurement contracts conducted by that company, because the latter is not to be regarded as a body governed by public law or, in consequence, as a contracting authority for the purposes of the Directive.

69 A preliminary point to be noted is that, according to settled case-law, in order to be defined as a body governed by public law within the meaning of the second paragraph of Article 1(b) of the Directive an entity must satisfy the three cumulative conditions set out therein, requiring it to be a body established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, to possess legal personality and to be closely dependent on the State, regional or local authorities or other bodies governed by public law (Mannesmann Anlagenbau Austria and Others, paragraphs 20 and 21, and Case C-214/00 Commission v Spain [2003] ECR I-0000, paragraph 52).

70 In the circumstances of this case, although the parties agree that SIEPSA satisfies the conditions

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of the second and third indents of the second paragraph of Article 1(b) of the Directive, they differ as to whether or not the needs in the general interest to meet which SIEPSA was specifically created are commercial in character.

71 In Commission v Spain the Court rejected the Spanish Government's arguments based on the fact that, under the Spanish legislation applicable to the case, viz. Article 1(3) of Law No 13/1995 read in conjunction with the sixth provision supplementing that Law, commercial companies under public control such as SIEPSA are excluded from the ambit ratione personæ of both the Spanish rules or the Community rules on public procurement.

72 More specifically, in order to determine whether that exclusion constitutes correct transposition of the concept of `contracting authority' employed in Article 1(1) of Directive 89/665, the Court, considering that the ambit ratione personæ of that directive coincided with that of the Directive, referred to the scope of the concept of `body governed by public law' employed in the second paragraph of Article 1(b) of the Directive (Commission v Spain, paragraphs 48, 50 and 51).

73 In that context the Court noted that, in accordance with established case-law, in light of the dual purpose of opening up competition and of transparency pursued by the Directive, that concept must be given an interpretation as functional as it is broad (Commission v Spain, paragraph 53).

74 It is from that point of view that the Court has held that, following settled case-law, for the purposes of settling the issue of the classification of an entity governed by public law within the meaning of the second paragraph of Article 1(b) of the Directive, it is necessary to establish only whether or not the body concerned fulfils the three conditions set out in that provision, for that body's status as a body governed by private law does not constitute a criterion capable of excluding it from being classified as a contracting authority for the purposes of the Directive (Commission v Spain, paragraphs 54 and 55).

75 In addition, the Court has stated that that interpretation, the only one capable of maintaining the full effectiveness of the Directive, does not disregard the industrial or commercial character of the general-interest needs which the body concerned is intended to meet, for that aspect is necessarily taken into consideration for the purpose of determining whether or not that body satisfies the condition laid down in the first indent of the second paragraph of Article 1(b) of the Directive (Commission v Spain, paragraphs 56 and 58).

76 Nor is that conclusion invalidated by the want of an express reference in the Directive to the specific category of `public undertakings' which is, however, used in Directive 93/38. As the Commission has correctly observed, that last directive was adopted for the purpose of extending the application of the Community rules regulating public procurement to the water, energy, transport and telecommunications sectors which were not covered by other directives. From that point of view, by employing the concepts of `public authorities', on the one hand, and `public undertakings', on the other, the Community legislature adopted a functional approach similar to that adopted in Directives 92/50, 93/36 and 93/37. It was thus able to ensure that all the contracting entities operating in the sectors regulated by Directive 93/38 were included in its ambit ratione personæ, on condition that they satisfied certain criteria, their legal form and the rules under which they were formed being in this respect immaterial.

77 With regard on the other hand to the relevance of the Spanish Government's argument that SIEPSA does not fall within any of the categories of Spanish bodies governed by public law listed in Annex I to the Directive, the Court has held in Case C-373/00 Adolf Truley [2003] ECR I-0000, paragraph 39, that that list is in no way exhaustive, as its accuracy varies considerably from one Member State to another. The Court concluded therefrom that, if a specific body does not appear in that list, its legal and factual situation must be determined in each individual case in order to assess

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whether or not it meets a need in the general interest (Adolf Truley, paragraph 44).

78 Next, with more particular regard to the concept of `needs in the general interest, not having an industrial or commercial character' appearing in the first indent of the second paragraph of Article 1(b) of the Directive, the Court has already had occasion to clarify its purport in the context of various Community directives on the coordination of procedures for the award of public procurement contracts.

79 The Court has thus held that concept is one of Community law and must accordingly be given an autonomous and uniform interpretation throughout the Community, the search for which must take account of the background to the provision in which it appears and of the purpose of the rules in question (see, to that effect, Adolf Truley, paragraphs 36, 40 and 45).

80 According to settled case-law, needs in the general interest, not having an industrial or commercial character, within the meaning of Article 1(b) of the Community directives coordinating the award of public contracts are generally needs which are satisfied otherwise than by the supply of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence (see, inter alia, Adolf Truley, paragraph 50, and Case C-18/01 Korhonen [2003] ECR I-0000, paragraph 47).

81 The case-law makes it equally clear that in determining whether or not there exists a need in the general interest not having an industrial or commercial character account must be taken of relevant legal and factual circumstances, such as those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, inter alia, lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question (Adolf Truley, paragraph 66, and Korhonen, paragraphs 48 and 59).

82 As a matter of fact, as the Court found in Korhonen, paragraph 51, if the body operates in normal market conditions, aims at making a profit and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims at meeting are not of an industrial or commercial nature.

83 It is therefore in light of the conditions defined in the case-law that the question whether or not the needs in the general interest that SIEPSA is designed to meet are other than industrial or commercial in character must be considered.

84 It is common ground that SIEPSA was established for the specific purpose of putting into effect, alone, the programmes and actions provided for in the plan for paying off the costs of and establishing prisons for the purpose of implementing the Spanish State's prison policy. To that end, as its statutes show, it carries on all activities which prove necessary in order to construct, manage or sell that State's prison assets.

85 The needs in the general interest which SIEPSA is responsible for meeting being, therefore, a necessary condition of the exercise of the State's penal powers they are intrinsically linked to public order.

86 That intrinsic link is to be seen in particular in the decisive influence wielded by the State over the carrying through of the tasks entrusted to SIEPSA. It is not in fact disputed that the latter puts into effect a plan for paying off the costs of and establishing prisons approved by the Council of Ministers and that it carries out its activities in accordance with directives issued by the public authorities.

87 What is more, imposition of criminal penalties being one of the rights and powers of the State, there is no market for the goods and services offered by SIEPSA in the planning and establishment

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of prisons. As the Commission has rightly argued, activities such as paying off the costs of and establishment of prisons, which are among SIEPSA's primary objectives, are not subject to market competition. That company cannot, therefore, be regarded as a body which offers goods or services on a free market in competition with other economic agents.

88 As to the argument which the Spanish Government bases on the fact that SIEPSA carries on its activities for profit, it is enough to state that, even if SIEPSA's activities do generate profits, it would appear inconceivable that the pursuit of such profit should be in itself the company's chief aim.

89 It is clear from that company's statutes that activities such as the acquisition of buildings to be fitted out as new prisons, the development and performance of planning and building works or the sale of disused facilities are simply the means it employs in order to attain its main objective, which is to contribute to the implementation of State prison policy.

90 That conclusion is confirmed by the fact that, as the Commission has noted without being contradicted by the Spanish Government, SIEPSA recorded large financial losses for the years 1997 and 1998.

91 It must be added that, regardless of the question whether or not there is any official mechanism for offsetting any losses made by SIEPSA, it seems unlikely that it itself should have to bear the financial risks bound up with its activity. In fact, having regard to the fact that the performance of that company's duties is a fundamental constituent of the Spanish State's prison policy, it seems likely that that State, being the sole shareholder, would take all necessary measures to prevent the compulsory liquidation of SIEPSA.

92 In those circumstances, it is possible that in a procedure for the award of public contracts SIEPSA should allow itself to be guided by other than purely economic considerations. It is precisely in order to guard against such a possibility that it is essential to apply the Community directives on public contracts (see, to this effect, inter alia, Adolf Truley, paragraph 42, and Korhonen, paragraphs 51 and 52).

93 Having regard to all the legal and factual matters governing SIEPSA's activity, as set down in paragraphs 84 to 92 above, it must be concluded that the needs in the general interest to meet which the company was specifically established possess a character which is other than industrial or commercial.

94 It follows that a body such as SIEPSA must be treated as a body governed by public law for the purposes of the second paragraph of Article 1(b) of the Directive and, therefore, as a contracting authority for the purposes of the first paragraph thereof.

95 Consequently, the Directive is applicable to the procedures for the award of public works contracts conducted by that company.

96 Having regard to all the foregoing considerations, it must be declared that, by failing to comply with all the provisions of the Directive in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental de Segovia issued by the Sociedad Estatal de Infraestruturas y Equipamientos Penitenciarios S.A., a company falling within the definition of a contracting authority for the purposes of Article 1(b) of the Directive, the Kingdom of Spain has failed to fulfil its obligations under that directive.

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AUTLANG	Spanish
APPLICA	Commission ; Institutions
DEFENDA	Spain ; Member States
NATIONA	Spain
NOTES	Casalini, Dario: Il Foro amministrativo 2003 p.3544-3557 PongA¬rard-Payet, H.: Europe 2003 DA¬cembre Comm. nAo 394 p.14-15 GarcA¡a de EnterrA¡a, Eduardo: Revista espaA±ola de Derecho Administrativo 2003 p.668-677 Karpenschif, MichaA"l: L'actualitA¬ juridique ; droit administratif 2004

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p.526-533
Brown, Adrian: Public Procurement Law Review 2004 p.NA61-NA63
Bonechi, Leonardo: Diritto pubblico comparato ed europeo 2004 p.337-338
X: Giurisprudenza italiana 2004 p.1271

PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Alber

JUDGRAP Skouris

DATES of document: 16/10/2003
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Judgment of the Court (Sixth Chamber)
of 15 May 2003
Commission of the European Communities v Kingdom of Spain.
Failure of a State to fulfil obligations - Directive 89/665/EEC - Review procedures in the field of public procurement - Transposition - Definition of contracting authority - Body governed by public law - Reviewable measures - Interim measures.
Case C-214/00.

In Case C-214/00,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

defendant,

> "APPLICATION for a declaration that, by failing to adopt the measures needed to comply with the provisions of Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and in particular by failing to

- extend the system of review procedures provided for by that directive to decisions adopted by all contracting authorities, within the meaning of Article 1(b) of Directive 92/50, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), including companies governed by private law established for the specific purpose of meeting needs in the general interest not being of an industrial or commercial nature, which have legal personality, and are financed for the most part by public authorities or other entities governed by public law or are subject to supervision by the latter, or have an administrative, managerial or supervisory board more than half of whose members are appointed by public authorities or other entities governed by public law,

- allow review to be sought of all decisions adopted by the contracting authorities, including all procedural measures, during the procedure for the award of public contracts, and

- provide for the possibility of all types of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, including measures aimed at allowing administrative decisions to be suspended, removing for that purpose all difficulties and obstacles and in particular the need first to appeal against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under that directive,

THE COURT

(Sixth Chamber),

composed of: R. Schintgen, acting for the President of the Sixth Chamber, V. Skouris (Rapporteur), F. Macken, N. Colneric and J.N. Cunha Rodrigues, Judges,

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Advocate General: P. Léger,

Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 13 June 2002,

gives the following

Judgment

Costs

104 Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared where each party succeeds on some and fails on other heads. Since the Commission has failed on one head, it must be ordered to pay one third of the costs and the Kingdom of Spain two thirds of the costs.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. Declares that, by failing to adopt the measures needed to comply with the provisions of Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and in particular:

- by failing to extend the system of review procedures provided for by that directive to decisions adopted by companies governed by private law established for the specific purpose of meeting needs in the general interest not being of an industrial or commercial nature, which have legal personality, and are financed for the most part by public authorities or other entities governed by public law or are subject to supervision by the latter, or have an administrative, managerial or supervisory board more than half of whose members are appointed by public authorities or other entities governed by public law, and

- by making the possibility of interim measures being granted in relation to decisions adopted by the contracting authorities subject, as a general rule, to the need first to appeal against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under that directive;

2. Dismisses the remainder of the application;

3. Orders the Commission of the European Communities to pay one third of the costs and the Kingdom of Spain to pay two thirds of the costs.

1 By application lodged at the Court Registry on 30 May 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt the measures needed to comply with the provisions of Articles 1 and 2 of Council Directive 89/665/EEC

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of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (`Directive 89/665'), and in particular by failing to

- extend the system of review procedures provided for by that directive to decisions adopted by all contracting authorities, within the meaning of Article 1(b) of Directive 92/50, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), including companies governed by private law established for the specific purpose of meeting needs in the general interest not being of an industrial or commercial nature, which have legal personality, and are financed for the most part by public authorities or other entities governed by public law or are subject to supervision by the latter, or have an administrative, managerial or supervisory board more than half of whose members are appointed by public authorities or other entities governed by public law,

- allow review to be sought of all decisions adopted by the contracting authorities, including all procedural measures, during the procedure for the award of public contracts, and

- provide for the possibility of all types of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, including measures aimed at allowing administrative decisions to be suspended, removing for that purpose all difficulties and obstacles and in particular the need first to appeal against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under that directive.

Legal context

Community provisions

2 It is apparent from the first and second recitals in the preamble to Directive 89/665 that the arrangements existing at the time of its adoption at both national and Community levels to ensure the effective application of Community Directives on public procurement, in particular Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5) and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), were not always adequate to ensure compliance with the relevant Community provisions, particularly at a stage when infringements could be corrected.

3 The third recital of Directive 89/665 states that `the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination;... for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law'.

4 According to the fifth recital of the directive, `since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority' and `the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently'.

5 Article 1(1) and (3) of Directive 89/665 provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly

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as possible in accordance with the provisions set out in the following Articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public

works contract and who has been or risks being harmed by an alleged infringement...'

6 Under Article 2(1)(a), (3) and (4) of Directive 89/665:

`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

...

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that, when considering whether to order interim measures, the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.'

7 Directive 71/305 and Directive 77/62 were repealed by Directive 93/37 and Directive 93/36 respectively. The references in the first recital in the preamble to and Article 1(1) of Directive 89/665 to the repealed directives must be understood as made to Directives 93/37 and 93/36.

8 Under Article 1(b) of Directive 92/50, which is in essence identical in content to Article 1(b) of Directives 93/36 and 93/37:

`contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

...'

9 Article 1(1) and (2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement

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procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) reads as follows:

`For the purpose of this Directive:

1. "public authorities" shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

A body is considered to be governed by public law where it:

- is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature,

- has legal personality, and

- is financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or other bodies governed by public law;

2. "public undertaking" shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the majority of the undertaking's subscribed capital, or

- control the majority of the votes attaching to shares issued by the undertaking, or

- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body'.

10 The review procedures initiated against decisions taken by contracting authorities under Directive 93/38 are governed by Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative decisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), the fourth recital of which states that Directive 89/665 is limited to contract award procedures within the scope of Directives 71/305 and 77/62.

National provisions

11 The scope ratione personae of the Spanish legislation on public procurement is defined in Article 1 of Ley 13/1995 de Contratos de las Administraciones Publicas (Law on public procurement) of 18 May 1995 (BOE No 119 of 19 May 1995, p. 14601, hereinafter 'Law 13/1995'), which includes all public authorities, whether State authorities or authorities of the Autonomous Communities and regional or local authorities. Article 1(3) provides:

`This law shall also apply in every case to the awarding of contracts by autonomous bodies and by other bodies governed by public law having legal personality and connected with or under the control of a public authority, which fulfil the following criteria:

(a) they were established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature;

(b) they are financed, for the most part, by public authorities or other bodies governed by public law, or are subject to management supervision by those bodies, or have an administrative, managerial

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or supervisory board, more than half of whose members are appointed by public authorities or by other bodies governed by public law.'

12 The sixth additional provision of Law 13/1995, entitled `Rules applicable to the award of contracts in the public sector', reads as follows:

`Commercial companies in which public authorities or their autonomous bodies, or bodies governed by public law, hold, directly or indirectly, a majority shareholding, shall, when awarding contracts, comply with the advertising and competition rules, unless the nature of the operation to be carried out is incompatible with those rules.'

13 It should be pointed out that, since the present action was lodged, the Kingdom of Spain, by Real Decreto Legislativo 2/2000 por el que se aprueba el texto refundido de la Ley de Contratos de las Administraciones Publicas (Royal Decree-Law approving the codified text of the Law on public procurement) of 16 June 2000 (BOE No 148 of 21 June 2000, p. 21775), has adopted a new consolidated version of the aforementioned law; this, however, merely brings together and organises the previous provisions, without amending their substance.

14 As regards administrative appeals, Article 107 of Ley 30/1992 de Régimen Jurídico de las Administraciones Publicas y del Procedimiento Administrativo Comun (Law on the legal provisions governing public authorities and ordinary administrative procedure) of 26 November 1992, as amended by Ley 4/1999 of 13 January 1999 (BOE No 12 of 14 January 1999, p. 1739, hereinafter `Law 30/1992'), classifies as subject to direct appeal `procedural measures, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests.'

15 So far as concerns administrative appeal proceedings, Article 25(1) of Ley 29/1998 reguladora de la Jurisdiccion Contencioso-administrativa (Rules of Procedure for Administrative Appeal Proceedings) of 13 July 1998 (BOE No 167 of 14 July 1998, p. 23516, hereinafter `Law 29/1998'), using the same wording as Law 30/1992, provides:

`Administrative appeal proceedings are admissible in respect of provisions of a general nature and express and implicit measures, whether definitive or procedural, adopted by the public authority which bring an end to the administrative procedure, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests.'

16 Article 111 of Law 30/1992, entitled `Suspension of operation', provides:

`1. Unless otherwise provided, the lodging of an appeal will not suspend the operation of the contested measure.

2. Notwithstanding the provisions of the previous paragraph, the body responsible for carrying out review may, having weighed up the harm which suspension would cause to the public interest or third parties as against the harm caused to the applicant by the immediate implementation of the contested measure, and given adequate reasons, suspend operation of the contested measure, on its own initiative or at the request of the applicant, in one of the following circumstances:

(a) Operation is likely to cause harm which is irreparable or reparable only with difficulty.

(b) The dispute is based on one of the legal grounds for automatic invalidity ....

...

3. If the competent body has not given an express decision on the application for suspension of operation of the contested measure within a period of thirty days from the date on which the application was entered in the case-list, suspension will be deemed to have been granted.'

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17 According to the statement of reasons for Law 29/1998, `[i]n the light of the experience gained in recent years and of the increasing importance which the subject-matter of administrative appeal proceedings now has, suspension of the contested provision or measure should no longer be the only possible protective measure' and `[t]he Law therefore provides for the possibility of adopting any protective measure, including positive measures'.

18 Under Article 129(1) of Law 29/1998:

`The parties concerned may request, at any stage of the proceedings, the adoption of any measures to ensure the effectiveness of the judgment to be given.'

19 Article 136 of that Law provides:

`1. In the circumstances referred to in Articles 29 and 30, a protective measure shall be adopted, unless it is evident that the criteria laid down in those articles are not fulfilled or that the measure will seriously affect the general interest or the interests of third parties, which the court shall assess in detail.

2. In the circumstances mentioned in the previous paragraph, measures may also be applied for before the appeal is lodged, and the application shall be examined in accordance with the provisions of the previous article. In that event, the party concerned shall request confirmation of the measures when he lodges the appeal, which he is required to do within ten days from the date of notification of the adoption of the protective measures....

If no appeal ensues, the measures granted will be automatically void, and the applicant will be required to pay compensation for the damage caused by the protective measure.'

20 It should be added that Articles 29 and 30 of Law 29/1998 apply, first, to cases in which the authority is required, pursuant to a provision, a contract or a measure, to provide a particular service to one or more specific persons; secondly, to cases in which the authority does not implement its definitive measures; and, thirdly, to blatantly unlawful conduct.

Pre-litigation procedure

21 By letter of 18 December 1991, the Spanish Government notified the Commission of the legislation in force at that time which it considered transposed Directive 89/665 into national law, namely the Ley reguladora de la Jurisdiccion Contencioso-Administrativa (Rules of Procedure for Administrative Appeal Proceedings) of 27 December 1956, the Ley de Procedimiento Administrativo (Law governing administrative procedure) of 18 July 1958, the Ley de Contratos del Estado (Law on public procurement) and the Spanish Constitution.

22 On 21 June 1994, the Commission sent its preliminary observations on the content of the national implementing measures to Spain's Permanent Representative to the European Union.

23 The Commission considered that the reply given by the Spanish authorities on 13 September 1994 was unsatisfactory and therefore, on 29 May 1996, sent the Spanish Government a letter of formal notice in which it stated, first, that the scope of the national measures was not the same as that of Directive 89/665; secondly, that, according to those measures, `procedural' acts were subject to direct appeal only in exceptional circumstances, and, thirdly, that an appeal must first be brought against an administrative measure before suspension could be granted.

24 In its reply, dated 9 October 1996, the Spanish Government pointed out, with regard to the first point, that Law 13/1995 contained a literal transcription of the term `body governed by public law' referred to in Directives 92/50, 93/36 and 93/37. As regards the two other points, it reiterated the circumstances in which a procedural act may be subject to direct appeal and stressed the legal requirement that an appeal must be brought before an act may be suspended.

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25 Following a meeting held in October 1997 between the competent Spanish authorities and the Commission's staff, the former sent the Commission another letter, dated 30 January 1998, in which they affirmed all the views expressed in their reply of 9 October 1996.

26 During a meeting held in October 1998 and in a letter dated 14 January 1999, the Spanish authorities maintained their position in respect of scope of application and interim measures. As regards the question of reviewable measures, it referred to Law 29/1998, which had partly amended the rules applicable to procedural measures.

27 Finally, on 2 February 1999, the Spanish authorities sent the Commission official notification of Laws 29/1998 and 4/1999. After examining these new texts the Commission concluded that the Kingdom of Spain had not put an end to the infringements of Directive 89/665 and, on 25 August 1999, sent it a reasoned opinion calling upon it to adopt the measures necessary to comply with that reasoned opinion within two months of its notification.

28 The Spanish Government replied to that reasoned opinion by letter of 8 November 1999, in which it refuted the Commission's assessment.

29 It was in those circumstances that the Commission decided to bring the present action.

Substance

Transposition of the scope ratione personae of Directive 89/665

Arguments of the parties

30 The Commission points out first of all that, when transposing Community Directives into national law, the Member States are required to respect the meaning of the terms and definitions contained in them, in order to ensure uniform interpretation and implementation of the Community legislation in the different Member States. Consequently, the Spanish authorities are required to give the term `body governed by public law', used in Directives 92/50, 93/36 and 93/37, the meaning that it has in Community law.

31 In that regard, the Commission points out that those directives make no mention of the regime, public or private, under which the bodies governed by public law were set up, nor the legal form adopted, but focus rather on other criteria, amongst them the purpose for which the bodies in question were created. It states, in particular, that the functional interpretation of the term `contracting authority' and, accordingly, of the term `body governed by public law' adopted in the settled case-law of the Court of Justice implies that the latter term includes commercial companies under public control, provided, of course, that they fulfil the conditions laid down in the second subparagraph of Article 1(b) of the aforementioned directives; the legal form of the bodies concerned is irrelevant.

32 The Commission maintains that, although the wording of Article 1 of Law 13/1995 reproduces almost verbatim the content of the corresponding provisions of Directives 92/50, 93/36 and 93/37, it nevertheless contains one essential difference, since it excludes entities governed by private law from the scope of application of that law. Law 13/1995 adds a prerequisite linked to the method by which the entities concerned are set up, which is not provided for in the Community legislation, namely that the entity must be governed by public law.

33 The Commission considers that the exclusion contained in Article 1(3) of Law 13/1995 is confirmed by the sixth additional provision of that Law, whose sole raison d'être lies in the fact that the contracts to which it refers would otherwise be wholly excluded from the scope of application of that law.

34 Since bodies governed by private law are excluded from the scope ratione personae of the Spanish legislation on public procurement, they likewise fall outside the scope of the provisions governing

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the procedures for awarding public contracts and, therefore, of the review procedures relating to public contracts. That exclusion thus infringes the provisions of Directives 92/50, 93/36 and 93/37 which define their scope, and also the provisions of Directive 89/665, since it precludes the application of the procedural safeguards provided by that directive. The Commission therefore concludes that Directive 89/665 has not been correctly transposed into the Spanish legal system, since the latter does not ensure that the review procedures established by the Directive are coextensive with its scope ratione personae.

35 As its principal argument, the Spanish Government claims that that complaint is manifestly unfounded. It points out that, although the Commission alleges that it has infringed Directive 89/665, it makes no reference to that directive, but to the scope ratione personae of other directives, namely the substantive directives relating to the award of public contracts. It concludes that, in actual fact, what the Commission is putting in issue in the present case is the transposition of Article 1 of Directives 92/50, 93/36 and 93/37, not the incorrect transposition of Directive 89/665, which it alleges has been infringed.

36 Firstly, Directive 89/665 does not contain rules governing the procedure for awarding public contracts and therefore does not define the scope ratione personae of the procedural rules set out in Directives 92/50, 93/36 and 93/37. Secondly, it comes into play at a later stage, since it requires the Member States to arrange for effective and rapid review procedures if the rules laid down by the directives governing the procedures for the award of public contracts are infringed. Therefore, according to the Spanish Government, if the Court were to uphold that plea, it would be necessary, in the present case, to examine whether Directive 89/665 was correctly transposed, even though it does not govern the subject-matter which the Commission claims has been incorrectly transposed. In the opinion of the Spanish Government, the Commission should have brought different proceedings in order to establish whether the Kingdom of Spain correctly transposed Directives 92/50, 93/36 and 93/37, which do contain specific information and rules which define their scope ratione personae.

37 Alternatively, the Spanish Government contends that the scope ratione personae of Directives 92/50, 93/36 and 93/37 was correctly transposed.

38 The Spanish Government states that the term `body governed by public law' is not interpreted in a uniform way in the different Member States and that it is therefore not possible to find a general definitive solution. It therefore considers that, in order to determine whether or not a body fulfils the conditions which would bring it within the scope ratione personae of the directives in question, it is necessary to carry out a detailed case-by-case examination.

39 The Spanish Government states in that regard, first, that the expression `body governed by public law' used in the aforementioned directives refers to an entity governed by public law and that, in the Spanish legal system, the expressions `entity governed by public law' and `body governed by public law' are used indiscriminately.

40 It also maintains that, in Directives 92/50, 93/36 and 93/37, the term `body governed by public law' does not include commercial companies under public control and that the fact that Directive 93/38 makes a distinction between that term, which is the same in the four directives, and the term `public undertaking', the definition of which corresponds to that of `public commercial company', shows that they are two distinct concepts.

41 The Spanish Government also considers that, in order to define the term `body governed by public law', it is first necessary to specify the commercial or industrial nature of the `need in the general interest' which it is designed to meet. In that respect, it points out that, in the Spanish legal system, public commercial companies have, in principle, the task of meeting needs in the general interest, which explains why they are under public control. However, those needs are of a commercial

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and industrial nature because, if that were not the case, they would not be the subject of a commercial company.

42 The Spanish Government maintains that it is difficult to dispute that commercial or industrial companies or the needs they meet are commercial or industrial in nature, because they are so in every respect. In that regard, it refers to their legal form, which is private, to the legal rules applicable to their activities, which are the commercial rules, to the fact that the object of those companies is always a commercial activity, and to their aim, which is to make a profit unrelated to the general interest served by associations, foundations and bodies governed by public law, which never affects the private interests of the members.

43 In response to the Spanish Government's argument that the Commission's first complaint is manifestly unfounded, the Commission points out that Directive 89/665 itself defines - in Article 1(1) - its scope by reference to that of Directives 92/50, 93/36 and 93/37. It adds that, in order to define the scope of Directive 89/665, the Community legislature could have reproduced in that directive the necessary provisions of the other three directives. The fact that it did not do so, but used another device in order not needlessly to overload the content of Directive 89/665, cannot be relied on in order to prevent the Court reviewing the transposition of that directive into the Spanish legal system.

44 As regards the alleged distinction drawn by Directive 93/38 between the terms `body governed by public law' and `public undertaking', the Commission states that that directive does not clarify the term `body governed by public law', which is defined in the same way in the four directives in question, but extends the scope of the Community provisions on public procurement to certain sectors (water, energy, transport and telecommunications) excluded from Directives 92/50, 93/36 and 93/37, in order to include certain entities having a significant activity in those sectors, namely public undertakings and those which enjoy special or exclusive rights granted by the authorities. It should also be pointed out that the concept of public undertaking has always been different from that of body governed by public law, since bodies governed by public law are created specifically to meet needs in the general interest not having any industrial or commercial character, whereas public undertakings work to meet industrial or commercial needs.

45 Finally, as regards the Spanish Government's argument that each case needs to be examined individually, in order to determine whether or not a body fulfils the conditions for being subject to Directives 92/50, 93/36 and 93/37, the Commission maintains that it is not possible to exclude a priori, as the Spanish legislation does, a whole group of bodies, that it to say, entities governed by private law which meet the three conditions stated in the aforementioned directives, from the field of application of Directive 89/665, even if that exclusion is subject to review on a case-by-case basis.

46 Furthermore, that interpretation is in accordance with the broad logic of the provisions in question. According to the Commission, if the Community legislature had wanted to link the absence of an industrial or commercial nature to a body's legal regime rather than to the interests it pursued, the words `not having an industrial or commercial character' would not have been inserted in the indent relating to the needs to be met, but in the preceding line in order to characterise the body directly.

Findings of the Court

47 The parties agree that, under Article 1(3) of Law 13/1995, read in conjunction with the sixth additional provision of that Law, public bodies constituted under private law - a category composed, in the Spanish legal system, of commercial companies under public control - are excluded from the scope ratione personae of the Spanish rules governing procedures for awarding public contracts and, accordingly, of the rules governing the review of public contracts.

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48 It follows that, in order to determine whether that exclusion constitutes a correct transposition of Article 1(1) of Directive 89/665, it is necessary to ascertain whether the term `contracting authority' which appears in that provision refers only to bodies governed by public law, as the Spanish Government maintains, or whether bodies constituted under private law may also be covered by that term.

49 In that regard, it should be pointed out that, as is apparent from the first and second recitals, Directive 89/665 is designed to strengthen the existing arrangements, at both national and Community levels, in order to ensure the effective application of the directives relating to the award of public service contracts, supply contracts and works contracts, particularly at a stage when infringements could be corrected. To that end, Article 1(1) of the directive imposes on Member States the duty to ensure that unlawful decisions taken by contracting authorities in connection with contract award procedures falling within the scope of Directives 92/50, 93/36 and 93/37 may be reviewed effectively and as rapidly as possible.

50 Since Directive 89/665 applies to review procedures brought against decisions taken by contracting authorities under Directives 92/50, 93/36 and 93/37, its scope ratione personae is bound to coincide with that of those directives.

51 It follows that, in order to determine whether the Spanish legislation adopted to implement Article 1(1) of Directive 89/665 provides a correct transposition of the term `contracting authority' which appears in that article, it is necessary to refer to the definition of that term and, more particularly, to that of `body governed by public law' used, in essentially identical wording, in the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37.

52 The Court has already stated, in connection with the second subparagraph of Article 1(b) of Directive 93/37, that, in order to be defined as a body governed by public law within the meaning of that provision, an entity must satisfy the three cumulative conditions set out therein, according to which it must be a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law (Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, paragraphs 20 and 21).

53 Moreover, the Court has repeatedly held that, in the light of the dual objective of opening up competition and transparency pursued by the directives on the coordination of the procedures for the award of public contracts, the term `contracting authority' must be interpreted in functional terms (see, in particular, Case C-237/99 Commission v France [2001] ECR I-939, paragraphs 41 to 43, and Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraphs 51 to 53). The Court has also stated that, in the light of that dual purpose, the term `body governed by public law' must be interpreted broadly (Case C-373/00 Adolf Truley [2003] ECR-1931, paragraph 43).

54 It is from that point of view that the Court, for the purposes of settling the question whether various private law entities could be classified as bodies governed by public law, has proceeded in accordance with settled case-law and merely ascertained whether those entities fulfilled the three cumulative conditions set out in the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37, considering that the method in which the entity concerned has been set up was irrelevant in that regard (see to this effect, in particular, Mannesmann Anglagenbau Austria and Others, cited above, paragraphs 6 and 29; Case C-360/96 BFI Holding [1998] ECR I-6821, paragraphs 61 and 62; and Commission v France, cited above, paragraphs 50 and 60).

55 It is apparent from the rules thus identified in the case-law of the Court that an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority within the meaning of Article 1(b) of Directives 92/50, 93/36 and 93/37 and,

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accordingly, of Article 1(1) of Directive 89/665.

56 Furthermore, it should be pointed out that the effectiveness of Directives 92/50, 93/36 and 93/37 as well as of Directive 89/665 would not be fully preserved if the application of those directives to an entity which fulfils the three aforementioned conditions could be excluded solely on the basis of the fact that, under the national law to which it is subject, its legal form and rules which govern it fall within the scope of private law.

57 In the light of those considerations, it is not possible to interpret the term `body governed by public law' used in the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37 as meaning that Member States may automatically exclude commercial companies under public control from the scope ratione personae of those directives and, accordingly, of Directive 89/665.

58 Furthermore, it cannot be maintained that to reach that conclusion is to disregard the industrial or commercial character of the needs in the general interest which those companies meet, because that aspect is necessarily taken into consideration for the purpose of determining whether or not the entity concerned meets the condition set out in the first indent of the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37.

59 Nor is that conclusion invalidated by the lack of an express reference, in Directives 92/50, 93/36 and 93/37, to the specific category of `public undertakings' which is nevertheless used in Directive 93/38. In that regard, it need only be pointed out that the review procedures initiated against decisions taken by contracting authorities under Directive 93/38 are governed by Directive 92/13, not by Directive 89/665.

60 It therefore follows from the above that, to the extent that it automatically excludes companies governed by private law from the scope ratione personae of Directive 89/665, the Spanish legislation at issue in the present case is not a correct transposition of the term `contracting authority' appearing in Article 1(1) of that directive, as defined in Article 1(b) of Directives 92/50, 93/36 and 93/37.

61 In those circumstances, the Commission's first complaint should be upheld.

The transposition of the scope ratione materiae of Directive 89/665

Arguments of the parties

62 The Commission claims that the scope ratione materiae of Directive 89/665 has been improperly reduced since the Spanish review provisions, namely Article 107 of Law 30/1992 and Article 25(1) of Law 29/1998, preclude a challenge to certain unlawful decisions taken by contracting authorities. In particular, they limit the possibility of appealing against procedural acts, that is to say, administrative measures which do not bring administrative proceedings to an end. As the Court stated in Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, that directive does not provide for any derogation in that regard.

63 In support of its argument, the Commission refers to Articles 1(1), 2(1)(b) and 8 of Directive 89/665, from which it follows that it must be ensured that any allegedly illegal measure may be reviewed effectively and, in particular, as rapidly as possible.

64 The Commission claims that the first part of the proposition (`any allegedly illegal measure') must be understood as referring to all types of act alleged to be illegal, not only to definitive acts. Furthermore, the second part of the proposition (`reviewed effectively and ... as rapidly as possible') leads to the conclusion that the possibility of seeking review of procedural acts is one of the best means of ensuring the effectiveness and rapidity of review procedures, since to wait for the outcome of the contract award procedure is the best way of weakening, or even wholly undermining, the effectiveness and rapidity of the review procedures imposed by Directive 89/665.

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65 By way of example, the Commission cites a judgment of the Tribunal Supremo (Supreme Court, Spain) of 28 November 1994, concerning a negotiated procedure, in which the Spanish court held that a contracting authority's decision to ask the undertakings which had submitted tenders to provide additional documents to regularise their situation was not subject to review, because its validity could be called in question only in connection with the procedure to review the definitive act putting an end to the negotiated procedure. The consequence of classifying the request to produce documents as a procedural act was, therefore, that it could be challenged only if the undertaking concerned was excluded from the procedure because it failed to produce the additional documents requested. However, the Commission considers that that undertaking, although it was not excluded from the procedure, could nevertheless find itself in a weak position in relation to the other competing undertakings, and that it should therefore be able to appeal against the request to produce additional documents.

66 The Spanish Government refutes that claim, stating that the Commission has not demonstrated the existence of an infringement. Indeed, it has merely demanded the removal of the distinction between definitive acts and procedural acts without giving the least example to show how that distinction thwarts the objective of Directive 89/665 and, accordingly, without demonstrating that the Spanish legislation might prevent that directive from achieving its objective.

67 The Spanish Government contends that the Commission's position is based on a misinterpretation of the term `procedural act'. It considers that a procedural act, by definition, does not cause any harm to the interested party but is at most a step preparatory to a decision which will be favourable or unfavourable to him. Thus, a procedural act does not imply the adoption of a position but is part of a procedure initiated in order to reach a decision. In that regard, the Spanish Government states that, if an act which appears to be a procedural act entailed per se the adoption of a position, it would cease to be a procedural act in the strict sense and would be reviewable.

68 The Spanish Government adds that the Spanish legal provisions cited by the Commission concerning the possibility of challenging procedural acts are not specific to the award of public contracts, but apply equally to all procedures. The Government points out that that device, which seeks to avoid procedures being paralysed by successive claims and appeals at the stage of preparatory measures which do not yet definitively affect the rights of those concerned, is not only deeply-rooted in the Spanish legal system but also common to all the legal systems of the Member States.

69 Referring inter alia to Case C-282/95 P Guérin automobiles v Commission [1997] ECR I-1503, the Spanish Government points out that that conception is referred to in Community case-law itself. The Court has also held that the preparatory nature of the act against which the action is brought is one of the grounds of inadmissibility of an action for annulment, and that that is a ground which the Court may examine of its own motion (Case 346/87 Bossi v Commission [1989] ECR 303).

70 Taking as an example the subject of State aid, the Spanish Government points out in addition that neither the provisions relating to State aid in the Treaty nor Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), expressly provide that acts which are merely procedural and do not have any definitive consequences for the parties concerned may not be the subject of a separate action. Nevertheless, in principle, no action is admissible against the Commission's decision to initiate the Article 88(2) EC procedure, without prejudice to the pleas which may be raised against that decision, which is a procedural act, when the time comes to bring an action against the final decision. The Spanish Government therefore concludes that there was no reason to include in Directive 89/665 that elementary distinction enabling all administrative or legal review systems to operate.

71 Furthermore, it considers that the Commission likewise has not put forward the slightest reason to show how the criteria applied by the Tribunal Supremo in the judgment it has cited are contrary

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to the objectives of Directive 89/665. In that judgment, the Tribunal Supremo held that the request to produce additional documents was a procedural act, since it did not put an end to the tendering procedure, but was merely a preliminary to the award decision. The Spanish Government also states that the final award of the contract was challenged because the successful undertaking had not provided the documentation requested by the authority. However, the authority maintained that the missing documents were not essential and their absence was a defect which could be corrected. The Spanish Government adds that, in a negotiated procedure, which is not public and does not involve an exclusion stage, only the final award is relevant for the purposes of a possible action, owing to the very nature of the procedure, and that there is therefore no reason to distinguish between procedural acts and definitive acts.

72 The Commission replies that the Spanish Government's argument that the fact that an action may not be brought against procedural acts is a device which is deeply rooted in the Spanish legal system and common to all the legal systems of the Member States cannot be accepted, in so far as it seeks to interpret the wording of a directive using national legislation. The scope ratione materiae of the actions to which Directive 89/665 refers is determined by the directive itself, not by national provisions. If that were not the case, the directive would not be applied uniformly in the different Member States, which would risk negating the effectiveness of the harmonisation sought at Community level.

73 As regards the Spanish Government's arguments regarding the Community case-law on challenges to decisions taken by the Commission in the context of competition law and State aid, the Commission points out that these are judgments and provisions which are wholly unrelated to Directive 89/665 and which therefore cannot be used to show that the Spanish legal system is consistent with the directive. In that regard, it stresses the fact that a legal system contains a multiplicity of rules whereby different solutions are found to problems raised depending on the sector they govern and that the coherence of a legal system may not have the effect that it is uniform, or that the intention of the person interpreting it supplants the legislature's intention.

Findings of the Court

74 It should be noted at the outset that, under the Article 107 of Law 30/1992 and Article 25(1) of Law 29/1998, procedural acts are not open to administrative appeal or administrative appeal proceedings unless they decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure, make it impossible to put up a defence, or cause irreparable harm to legitimate rights or interests.

75 The parties agree that those provisions therefore have the effect of excluding procedural acts from the scope ratione materiae of Directive 89/665, unless they fulfil one of the abovementioned conditions.

76 Since Directive 89/665 does not expressly define the scope of the term `decisions taken by the contracting authorities' which appears in Article 1(1), the question whether procedural acts which do not fulfil one of the abovementioned conditions constitute decisions in respect of which the Member States must provide review procedures within the meaning of Directive 89/665 must be examined in the light of the aims of the directive, while ensuring that its effectiveness is not compromised.

77 In that regard, it should be pointed out that Directive 89/665, according to the sixth recital in its preamble and Article 1(1), seeks to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken by contracting authorities in infringement of Community law on the award of public contracts or of national rules transposing that law, and also the compensating of persons harmed by such an infringement.

78 As is apparent from Article 1(1) and (3) of the directive, the review procedures to which it

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refers must be conducted effectively and as rapidly as possible and must be available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement.

79 In that regard, it should be pointed out, first, that, as has been stated in paragraph 74 of this judgment, the Spanish legislation enables interested parties to bring actions against not only definitive acts but also procedural acts, if they decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests.

80 Secondly, the Commission has not established that that legislation does not provide adequate judicial protection for individuals harmed by infringements of the relevant rules of Community law or of the national rules transposing that law.

81 It follows from the above that the Commission's second complaint must be rejected.

The transposition of the system of interim measures provided for in Directive 89/665

Arguments of the parties

82 The Commission argues that the national provisions which transpose Article 2(1)(a) of Directive 89/665 into Spanish law, namely Articles 111 of Law 30/1992 and 129 to 136 of Law 29/1998, do not ensure the existence of an urgent procedure independent of the lodging of an appeal, designed to suspend the procedure for the award of a public contract or the implementation of any decision adopted by the contracting authorities.

83 More particularly, the Commission claims that, except in the exceptional case of Article 136(2) of Law 29/1998, the Spanish legislation does not provide any opportunity for adopting interim measures in the absence of an appeal on the merits. However, as is apparent from paragraph 11 of the judgment in Case C-236/95 Commission v Greece [1996] ECR I-4459, it must be possible to adopt, independently of any prior action, any interim measures.

84 The Commission also points out, first, that, in administrative appeals, the only interim measure which may be adopted is suspension of operation. Secondly, in administrative appeal proceedings, the court hearing the application for interim relief tends not to adopt measures other than suspension of operation. The Commission states that the settled case-law of the Tribunal Supremo shows that interim measures cannot relate to the substance, because they must not anticipate the outcome of the main proceedings. However, the rule that interim measures must be neutral as regards the substance of the main proceedings has the consequence that, contrary to the requirements of Article 2(1)(a) of Directive 89/665, the court hearing the application for interim relief cannot take all the measures necessary to correct an infringement.

85 The Spanish Government does not dispute that both the rules of administrative procedure and the rules governing administrative appeal proceedings have the effect that the adoption of an interim measure is linked to the prior lodging of an appeal and cannot, under any circumstances, be requested separately.

86 In respect of Article 136 of Law 29/1998, the Spanish Government states that, although, in the cases referred to therein, interim measures may be requested and granted even before an appeal is lodged, that provision does not imply that those measures are independent of the latter, since the person concerned is required to lodge such an appeal against the act he considers unlawful within a period of 10 days of notification of the decision granting the measures requested. He must then request confirmation of those measures and, if he does not lodge the appeal within the time-limit, the interim measures will automatically lapse.

87 As regards suspension by way of legal proceedings, the Spanish Government points out that administrative

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appeal proceedings are not initiated by application, but by a simple written document which must indicate the act challenged or allege inertia on the part of the authority, and in which the interested party may request suspension of the operation of the contested act without necessarily having to formulate his application. The Spanish Government states that, once an appeal is lodged, the court hearing it will ask the authority to forward the administrative file and that it is only after the applicant for review is in possession of the file that the time-limit within which he must formulate his application and set out the grounds for review will begin to run.

88 As for the lack of such a possibility in the legislation governing suspension by way of an administrative procedure, the Spanish Government points out that it is quite exceptional for it to be necessary to lodge an administrative appeal in respect of the award of public contracts and that in the unlikely case that it should be necessary to exhaust the administrative remedies, the time-limit laid down in Article 111(3) of Law 30/1992 is extremely short. Indeed, it considers that that provision contains rules which are particularly advanced in the field, because it provides that if the administrative authority has not adopted an express decision on the application for suspension within a period of 30 days, the suspension is deemed to be granted.

89 So far as concerns the question whether the requirement that an appeal be lodged against the act the illegality of which has given rise to the application for suspension of operation is justified, the Spanish Government points out that the interim measures mentioned in Article 2(1)(a) of Directive 89/665 are referred to as `interim' specifically because they are designed to secure the results of a case by creating a provisional situation until the outcome of the case and that that directive always presupposes that the interim measures are being sought by the person challenging the validity of the act. It follows that to demand that interim measures are as wholly independent as the Commission requires makes no sense since, by definition, any interim measure is an ancillary measure.

90 Furthermore, in the light of the fact that administrative appeal proceedings are initiated merely by letter, it would be inconceivable, on a teleological interpretation of Directive 89/665, for such a means of bringing those proceedings to be regarded as a hindrance or obstacle since the person concerned may request and obtain the interim measure which he seeks before specifying the grounds of the appeal he is bringing against the act considered unlawful.

91 The Spanish Government also refers to Articles 242 EC and 243 EC, and to Article 83 of the Rules of Procedure of the Court of Justice, from which it is apparent that, in the Community legal system, an application for interim measures is not an independent legal remedy, but rather an application ancillary to an action for annulment.

92 As regards the conclusion drawn by the Commission from the judgment in Commission v Greece, cited above, the Spanish Government considers that, if the isolated statement made by the Court in paragraph 11 of that judgment were to have the consequence attributed to it by the Commission, Directive 89/665 would require a court to be able to adopt interim measures without anyone having requested it to do so. Furthermore, it maintains that, even if the word `action' used by the Court was employed in a technical sense denoting a procedural act, that does not mean that the judgment confirms the Commission's argument. The independent measures called for by the Commission would also involve taking action before a court. In any event, the Spanish Government states that in that judgment the Court did not have to give a ruling on the merits of the alleged infringement, because the defendant State had conceded that it had not transposed the provisions of Directive 89/665 into its national legal system within the period laid down in the reasoned opinion.

93 As for the possibility of adopting positive measures, the Spanish Government claims that, as is apparent from the statement of grounds and Article 129 of Law 29/1998, that Law made it possible to seek and obtain any interim measure, including positive measures, and that it is for the court hearing the case to determine which measures are appropriate depending on the circumstances. It

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adds in that regard that the Spanish Tribunal Constitucional (Constitutional Court) has held that the right to obtain interim measures arises from the fundamental right to effective judicial protection. More particularly, in a judgment of 29 April 1993, which concerned an administrative order against which an action had been brought because it provided for more extensive minimum services than was necessary, that court held that Article 24 of the Spanish Constitution, which lays down the right to effective judicial protection, allows the court, as a protective measure, to reformulate any decision adopted in order to ensure minimum services in the event of a general strike.

94 Finally, the Spanish Government states that it does not understand the Commission's argument that the obligation to challenge the legality of an act of a contracting authority on the merits at the same time as bringing an application for interim measures negates the effectiveness of the system, since, in its view, any application for interim measures involves an examination of the merits, even if it is restricted to a prima facie assessment of the problem.

Findings of the Court

95 It is not disputed that, with the exception of the cases referred to in Article 136(2) of Law 29/1998, the Spanish legislation makes it a condition for the grant of interim measures that an appeal on the merits must be brought beforehand.

96 In order to ascertain whether that legislation is consistent with Directive 89/665, it should be noted at the outset that, as is apparent from the fifth recital in the preamble to the directive, the short duration of the procedures for the award of public contracts means that infringements of the relevant rules of Community law or national rules transposing that law which mar those procedures need to be dealt with urgently.

97 For that purpose, Article 2(1)(a) of that directive requires Member States to empower the review bodies to take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authorities.

98 In the judgment in Commission v Greece, cited above, which concerned the compliance with Directive 89/665 of national legislation which restricted interim judicial protection to proceedings for suspension of the operation of an administrative act and made the suspension conditional on bringing an action for the annulment of the contested act, the Court had the opportunity to define the scope of the obligations arising in that regard under that directive. In particular, it found that, under Article 2 of Directive 89/665, the Member States are under a duty more generally to empower their review bodies to take, independently of any prior action, any interim measures, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract in question (Commission v Greece, cited above, paragraph 11).

99 In that regard, it should be pointed out that, although the Spanish legislation provides for the possibility of adopting positive interim measures, it nevertheless cannot be regarded as a system of interim judicial protection which is adequate to remedy effectively any infringements that might have been committed by the contracting authorities, since, as a general rule, it requires proceedings on the merits to be brought beforehand as a condition for the adoption of an interim measure against a decision of a contracting authority.

100 That finding is not affected by the fact that, where suspension is sought by way of legal proceedings, that may be done merely by a written document and the application initiating the proceedings may be formulated after the request for grant of the interim measure, since the requirement that that formality be completed beforehand likewise cannot be regarded as consistent with the requirements of Directive 89/665, as set out in the judgment in Commission v Greece.

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101 It follows that the Commission's third complaint must be upheld.

102 In the light of all the foregoing considerations, it must be declared that, by failing to adopt the measures needed to comply with the provisions of Articles 1 and 2 of Directive 89/665, and in particular:

- by failing to extend the system of review procedures provided for by that directive to decisions adopted by companies governed by private law established for the specific purpose of meeting needs in the general interest not being of an industrial or commercial nature, which have legal personality, and are financed for the most part by public authorities or other entities governed by public law or are subject to supervision by the latter, or have an administrative, managerial or supervisory board more than half of whose members are appointed by public authorities or other entities governed by public law, and

- by making the possibility of interim measures being granted in relation to decisions adopted by the contracting authorities subject, as a general rule, to the need first to appeal against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under that directive.

103 The remainder of the application is dismissed.

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PROCEDU Proceedings concerning failure by Member State - successful ; Proceedings concerning failure by Member State - unfounded

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Notice for the OJ

Removal from the register of Case C-432/00[1]

By order of 13 May 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-432/00 (Reference for a preliminary ruling by the Tribunale Amminstrativo Regionale per la Lombardia): **Europetrol SpA** v **Azienda Lombarda Edilizia Residenziale Milano (A.L.E.R.), Orion SCRL**.

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[1] - OJ C 28 of 27.01.2001.

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Notice for the OJ

Removal from the register of Case C-405/00[1]

By order of 9 April 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-405/00 (Reference for a preliminary ruling by the Consiglio di Stato): **Coopsette Scrl** v **ANAS**, **Impresa Mambrini Costruzioni srl**.

_____

[1] - OJ C 372 of 23.12.2000.

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Notice for the OJ

Removal from the register of Case C-225/00[1]

By order of 6 May 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-225/00 (Reference for a preliminary ruling by the Consiglio di Stato): **Cavalleri Ottavio SpA** v **ANAS - Ente Nazionale per le Strade**, **Lauro Cantieri Valsesia SpA**.

_____

[1] - OJ C 233 of 12.08.2000.

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Notice for the OJ

Removal from the register of Case C-173/00[1]

By order of 14 January 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-173/00 (Reference for a preliminary ruling by the Consiglio di Stato): **ANAS - Ente Nazionale per le Strade** v **SCA RL CMC Cooperativa Muratori Cementisti Ravenna**, **SpA ICLA Costruzioni Generali** and **SpA Impresa Toto e Toto**.

_____

[1] - OJ C 192 of 08.07.2000.

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Notice for the OJ

Removal from the register of Case C-135/00[1]

By order of 6 May 2003 the President of the Court of Justice of the European Communities ordered the removal from the register of Case C-135/00 (Reference for a preliminary ruling by the Consiglio di Stato): **ANAS-Ente Nazionale per le Strade**, **Lauro Cantieri Valsesia Spa** v **Consorzio Cooperative Costruzioni**.

_____

[1] - OJ C 176 of 24.06.2000.

Judgment of the Court (Fourth Chamber)
of 8 March 2001
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Failure to transpose Directive 97/52/EC.
Case C-97/00.

Acts of the institutions Directives Implementation by Member States Need to ensure their effectiveness

(Arts 10, first para., EC, and 249, third para., EC)

$$Under the first paragraph of Article 10 EC, the Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions of the Community. Such action includes directives which, pursuant to the third paragraph of Article 249 EC, are binding as to the result to be achieved upon each Member State to which they are addressed. That obligation involves, for each Member State to which a directive is addressed, the adoption, within the framework of its national legal system, of all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues.

(see para. 9)

In Case C-97/00,

Commission of the European Communities, represented by M. Nolin, acting as Agent, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger and S. Pailler, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to communicate the laws, regulations and administrative provisions necessary to comply with all the provisions of European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1), or by failing to adopt the measures necessary to comply therewith, the French Republic has failed to fulfil its obligations under that directive,

THE COURT (Fourth Chamber),

composed of: A. La Pergola, President of the Chamber, D.A.O. Edward and S. von Bahr (Rapporteur), Judges,

Advocate General: J. Mischo,

Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2000,

gives the following

Judgment

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1 By application lodged at the Court Registry on 13 March 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to communicate the laws, regulations and administrative provisions necessary to comply with all the provisions of European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1; the Directive), or by failing to adopt the measures necessary to comply therewith, the French Republic has failed to fulfil its obligations under the Directive.

2 As provided by the first subparagraph of Article 4(1) of the Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 13 October 1998 and forthwith to inform the Commission thereof.

3 Since the Commission received no communication from the French Government concerning measures for transposing the Directive and had no other information from which it could conclude that the French Republic had adopted the provisions necessary for that purpose, it gave that Member State formal notice by letter of 18 December 1998 to submit its observations in that regard within two months.

4 The letter of formal notice remained unanswered by the French authorities. In those circumstances the Commission, by letter of 3 September 1999, sent a reasoned opinion to the French Republic and called on it to comply with the opinion within two months from notification.

5 By letter of 6 January 2000 the French authorities informed the Commission that the process for adoption of a decree intended to transpose the Directive was underway and that the draft would be submitted shortly to the French Conseil d'Etat (Council of State). They also indicated that the Directive had already been partly transposed into French law by an Order of the Minister for Economic Affairs, Finance and Industry of 22 April 1998, setting the thresholds above which contract notices had to be published in the Official Journal of the European Communities.

6 Since the Commission received no information to the effect that the abovementioned draft decree had been adopted, it brought the present action.

7 In its defence the French Government does not deny the infringement alleged against it. However, it asks the Court to find that the process for transposition of the Directive is in the course of being completed.

8 In this connection, the French Government points out, first, that the Directive has already been partly transposed by the Order of 22 April 1998 referred to in paragraph 5 of this judgment. Second, it states that a draft decree is undergoing interdepartmental examination and will be submitted to the Conseil d'Etat very shortly.

9 It should be remembered that, under the first paragraph of Article 10 EC, the Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions of the Community. Such action includes directives which, pursuant to the third paragraph of Article 249 EC, are binding as to the result to be achieved upon each Member State to which they are addressed. That obligation involves, for each Member State to which a directive is addressed, the adoption, within the framework of its national legal system, of all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues (see Case C-336/97 Commission v Italy [1999] ECR I-3771, paragraph 19).

10 In the present case, since the Directive was not fully transposed within the period set by it, the Commission's action must be considered well founded.

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11 It must therefore be held that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with the Directive, the French Republic has failed to fulfil its obligations under the Directive.

Costs

12 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. Declares that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, the French Republic has failed to fulfil its obligations under that directive;

2. Orders the French Republic to pay the costs.

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AUTLANG	French

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APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Mischo
JUDGRAP	von Bahr
DATES	of document: 08/03/2001 of application: 13/03/2000

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Judgment of the Court (Sixth Chamber)
of 18 June 2002
Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien.
Reference for a preliminary ruling: Vergabekontrollsenat des Landes Wien - Austria.
Public service contracts - Directive 92/50/EEC - Procedure for the award of public service contracts - Directive 89/665/EEC - Scope - Decision to withdraw an invitation to tender - Judicial review - Scope.
Case C-92/00.

1. Preliminary rulings - Reference to the Court - National court or tribunal within the meaning of Article 234 EC - Definition - Body competent to hear appeals concerning the award of public contracts

(Art. 234 EC)

2. Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directives 89/665 and 92/50 - Withdrawal of an invitation to tender - Member States under an obligation to provide for review procedures - Limitation of the extent of the review of the legality of the decision - None - Determination of the time to be taken into consideration for assessing the legality of the decision - Jurisdiction of the national court - Limits

(Council Directives 89/665, Art. 1(1), and 92/50)

$$1. In order to determine whether a body making a reference for a preliminary ruling is a court or tribunal within the meaning of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent

Those criteria are satisfied by the Vergabekontrollsenat des Landes Wien (Public-Procurement Review Chamber of the Vienna Region), which is established by the Viennese law on public procurement as a body with jurisdiction to rule, applying rules of law, following an inter partes procedure, and by decision with binding force, on review proceedings concerning procedures for the award of contracts. Moreover, the provisions governing the composition and functioning of that body guarantee its permanence and independence.

(see paras 25-27)

2. Article 1(1) of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 92/50 relating to the coordination of procedures for the award of public service contracts, requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.

That decision is subject to fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services. It also falls within the rules laid down by Directive 89/665 in order to ensure compliance with the rules of Community law on public contracts.

In the context of such a review procedure, Directive 89/665, as amended by Directive 92/50, precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary.

Determination of the time to be taken into consideration for assessing the legality of the decision

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by the contracting authority to withdraw an invitation to tender is a matter for national law, provided that the relevant national rules are not less favourable than those governing similar domestic actions and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law.

(see paras 42, 48, 55, 64, 68, operative parts 1-3)

In Case C-92/00,

REFERENCE to the Court under Article 234 EC by the Vergabekontrollsenat des Landes Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (HI)

and

Stadt Wien,

on the interpretation of Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Directive 92/50 in the version thereof resulting from European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet, V. Skouris (Rapporteur), and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (HI), by R. Kurbos, Rechtsanwalt,

- the Austrian Government, by H. Dossi, acting as Agent,

- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2001,

gives the following

Judgment

Costs

69 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

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On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Vergabekontrollsenat des Landes Wien by order of 17 February 2000, hereby rules:

1. Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.

2. Directive 89/665, as amended by Directive 92/50, precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary.

3. Determination of the time to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender is a matter for national law, provided that the relevant national rules are not less favourable than those governing similar domestic actions and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law.

1 By order of 17 February 2000, received at the Court on 10 March 2000, the Vergabekontrollsenat des Landes Wien (Public-Procurement Review Chamber of the Vienna Region) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; hereinafter Directive 89/665) and of Directive 92/50 in the version thereof resulting from European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1; hereinafter Directive 92/50).

2 Those questions were raised in a dispute between the German company Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (hereinafter HI) and the City of Vienna, concerning the latter's withdrawal of an invitation to tender for a public service contract for which HI had submitted a tender.

Legal background

Community legislation

3 Article 1(1) of Directive 89/665 provides:

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, in Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

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4 Under Article 2(1) and (5) of Directive 89/665:

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

...

...

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

5 Article 12(2) of Directive 92/50 provides:

Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award to a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if required. They shall also inform the Office for Official Publications of the European Communities of such decisions.

The national legislation

6 Paragraphs 32(2) to (4) of the Wiener Landesvergabegesetz (Viennese law on public procurement, hereinafter the WLVergG), LGBl. No 36/1995, in the version published in LGBl. No 30/1999, provide, under the heading Rectification and withdrawal of invitations to tender:

2. An invitation to tender may be withdrawn during the period for submission of tenders where events occur which, had they been previously known, would have excluded an invitation to tender being made or led to an invitation to tender with a substantially different content.

3. At the expiry of the period for submitting tenders, the invitation to tender must be withdrawn where compelling grounds exist. Compelling grounds exist in particular

(1) where the events described in subparagraph 2 are not known until after the expiry of the period for submitting tenders,

or

(2) where all the tenders had to be excluded.

4. An invitation to tender may be withdrawn, for example, where

(1) no tender acceptable from an economic point of view has been submitted,

or

(2) ... only one tender remains after the exclusion of other tenders.

7 Under the WLVergG, the Vergabekontrollsenat des Landes Wien has jurisdiction to rule on review proceedings concerning procedures for the award of public supply, works and service contracts.

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8 In particular, Paragraph 94(2) of the WLVergG provides that the Vergabekontrollsenat is to rule at first and last instance in review proceedings, and that its decisions cannot be amended or annulled through administrative channels. Under Paragraph 94(3), the procedure in such review proceedings is governed by the Allgemeine Verwaltungsverfahrensgesetz (General Code of Administrative Procedure) and the Verwaltungsvollstreckungsgesetz (Law on Execution in Administrative Matters), save where provision is made otherwise in the WLVergG.

9 Paragraph 95 of the WLVergG is worded as follows:

1. The Vergabekontrollsenat shall be composed of seven members, nominated by the Government of the Land for a mandate of six years. Mandates are renewable. Three members, who may also be employees of the Viennese municipal administration qualified in the area, shall be appointed after consultation with the municipal administration; one member shall be appointed after consultation with the Wirtschaftskammer (Vienna Chamber of Commerce); one member shall be appointed after consultation with the Kammer für Arbeiter und Angestellte (Chamber for Workers and Employees) of Vienna; and one member shall be appointed after consultation with the Architekten- und Ingenieurkonsultenkammer (Chamber of Architects and Consulting Engineers) for the Länder of Vienna, Lower Austria and Burgenland. The chairman shall be a judge, appointed after consultation with the President of the Oberlandesgericht Wien (Higher Regional Court, Vienna) ...

2. The members and their substitutes must have extensive knowledge of the are of the award of public contracts, especially, as regards members appointed after consultation with the municipal council, from the economic and technical standpoint:

...

3a. Any member under long-term incapacity from exercising his functions normally on account of physical or mental disability, or who has committed serious failures to fulfil his obligations, shall be removed from his mandate by decision of the Vergabekontrollsenat. That decision must be taken after hearing the person concerned, who may not take part in the vote.

4. The members of the Vergabekontrollsenat shall carry out their functions in full independence and shall not be bound by instructions.

5. The members of the Vergabekontrollsenat are under the duty of confidentiality, in accordance with Paragraph 20(3) of the Bundesverfassungsgesetz (Federal Constitutional Law).

6. The Vergabekontrollsenat shall sit when convened by the chairman. Where a member has a personal interest, or is temporarily prevented from fulfilling his functions, his substitute must be called. Members of the Vergabekontrollsenat may not adjudicate on a proceeding which involves the award of a contract within the area of operation of the institution (in the case of employees of the Vienna municipal administration, the service, the sub-contracting undertaking or the establishment) of which they form part. If there are serious reasons for doubting the impartiality of a member, he must refrain from exercising his functions and ask to be replaced. The parties may object to members of the Vergabekontrollsenat on grounds of partiality. Where the Vergabekontrollsenat rules on the possible partiality of a member and on objections, the member concerned shall not be entitled to vote. The names of the members of the Vergabekontrollsenat and of the institution (in the case of employees of the Vienna municipal administration, the service, the sub-contracting undertaking or the establishment) of which they form part shall be published in the Amtsblatt der Stadt Wien (Official Journal of the City of Vienna) at the beginning of each calendar year on the initiative of the chairman.

7. Review proceedings must be submitted to a vote in the order determined by the chairman. Five members constitute a quorum, decisions being taken by an absolute majority. Abstention is not allowed.

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The Vergabekontrollsenat does not sit in public. Sessions are minuted. Decisions must be adopted in writing and mention the names of the members of the Vergabekontrollsenat who took part in the vote. The decision must be signed by the chairman....

8. Members of the Vergabekontrollsenat perform that activity without remuneration. They are to be sworn in before the Landeshauptmann (Prime Minister of the Land).

...

10. The Vergabekontrollsenat shall adopt rules of procedure.

...

10 Paragraph 99 of the WLVergG, headed Jurisdiction of the Vergabekontrollsenat, provides:

1. The Vergabekontrollsenat shall have jurisdiction, on request, over review proceedings in accordance with the following provisions:

(1) until the date of the award to issue interim orders and to annul unlawful decisions of the award section of the awarding authority in order to eliminate infringements of the law within the meaning of Paragraph 101;

(2) after the award of the contract to hold that the contract was not awarded to the tenderer who submitted the best tender, by reason of an infringement of this law within the meaning of Paragraphs 47 and 48(2). In such proceedings, the Vegabekontrollsenat also has jurisdiction to make a finding, at the request of the awarding authority, whether the contract would have been awarded to a candidate or tenderer whose tender was not accepted in the absence of the legal infringements found.

2. The Vergabekontrollsenat shall be obliged to entertain review proceedings only in so far as the decision alleged to be unlawful is essential to the outcome of the contract awarding procedure.

11 Paragraph 101 of the WLVergG provides:

The Vergabekontrollsenat must set aside decisions of the awarding authority adopted in the course of a contract awarding procedure:

(1) where discriminatory technical, economic or financial specifications appear in the tender notice inviting undertakings to participate in a closed procedure or a negotiated tender, or in the invitation to tender or tender specifications; or

(2) where a tenderer is passed over in breach of the criteria appearing in the tender notice in which undertakings are invited to participate in a closed procedure or a negotiated tender and the awarding authority might have come to a decision more favourable to the applicant if the infringed provisions had been complied with.

The dispute in the main proceedings and the questions referred

12 The order for reference shows that the Mayor of the City of Vienna, acting on behalf of the contracting authority, the Wiener Krankenanstaltenverbund (Vienna Associated Hospitals), published an invitation to tender for a contract entitled Implementation of project management for realisation of the overall catering-supply concept in the premises of the Viennese associated hospitals in the Official Journal of the European Communities of 24 December 1996 and in the legal notices section of the Wiener Zeitung (Viennese Journal) of 30 December 1996.

13 After the submission of tenders, including the tender by HI, the City of Vienna withdrew the invitation to tender within the period for awarding the contract. It informed HI, by letter of 25 March 1997, that it had decided to abandon the procedure for compelling reasons in accordance with the first subparagraph of Paragraph 32(3) of the WLVergG.

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14 Following a request for information sent to it by HI, the City of Vienna explained the withdrawal of the invitation to tender as follows in a letter of 14 April 1997:

Having regard to the results of the project carried out by the Humanomed company in 1996, the initial plan has been modified. In the discussion of these circumstances, which took place at the end of the period laid down for the submission of tenders and during the period for the award of the contract within the coordination committee, it was found that the project would in future have to be developed in a decentralised manner. It was therefore decided not to make provision for a coordinating body and the award of the contract to an outside project leader was therefore not necessary.

It is thus clear that the reasons in question would have excluded an award if they had been known previously. If another project management were to be found necessary in the context of the "provision of meals" project, an invitation to tender with a different content would have to be carried out.

15 HI then brought a number of claims before the Vergabekontrollsenat, seeking, inter alia, the opening of review proceedings, an interim order, the annulment of certain tender documents and the annulment of the withdrawal of the invitation to tender. In an adjunct to the latter claim, HI cited new evidence proving, in its submission, that the decision to withdraw the invitation to tender was unlawful and again requesting that the latter be annulled.

16 In particular, HI referred to its suspicions that the City of Vienna had a direct or indirect stake in the capital of Humanomed. HI argued that that company had carried out substantial preparatory work for the invitation to tender, carried out project management and influenced the preparation of the masterplan, and that the City of Vienna had withdrawn the invitation to tender in order to circumvent the obligation to exclude Humanomed's tender with the aim of continuing its collaboration with that company. HI concluded therefrom that the withdrawal decision was discriminatory in so far as it was designed to favour an Austrian company to the detriment of a candidate from a Member State other than the Republic of Austria.

17 By decisions of 30 April and 10 June 1997, the Vergabekontrollsenat dismissed the claims for annulment of the withdrawal of the invitation to tender as inadmissible on the ground that, pursuant to Paragraph 101 of the WLVergG, only certain decisions adopted in the course of a tendering procedure, exhaustively listed, may be annulled.

18 The Verfassungsgerichtshof (Constitutional Court) (Austria), before which HI brought actions against those dismissal decisions, annulled them for infringement of the right to have the matter tried before a regular court. It held that the Vergabekontrollsenat was required to make a reference to the Court of Justice for a preliminary ruling as to whether the decision to withdraw an invitation to tender constituted a decision within the meaning of Article 2(1)(b) of Directive 89/665.

19 The referring court states at the outset that, in the event of unlawful withdrawal of an invitation to tender, the undertaking concerned may bring a civil action for damages under national law before the ordinary courts.

20 The order for reference further shows that the Vergabekontrollsenat considers that, since detailed rules for withdrawing an invitation to tender do not appear in the directives laying down substantive rules concerning public contracts, the decision to make such a withdrawal is not a decision covered by Article 2(1)(b) of Directive 89/665 and, therefore, is not a decision which, pursuant to that directive, must be capable of being the subject-matter of review proceedings.

21 Taking the view that the City of Vienna complied with the procedure laid down in Article 12(2) of Directive 92/50, the Vergabekontrollsenat is unsure whether, assuming Community law requires review of a decision withdrawing an invitation to tender, that review may concern solely the arbitrary or fictitious character of that decision.

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22 Concerning the date to be taken into consideration in order to assess the legality of such a decision, the referring court considers that the fact that the decision of the awarding authority is subject to review and thus constitutes the subject-matter of the dispute would lead to the date of that decision being used, but concedes that the principle of effectiveness, as contained in the recitals in the preamble to Directive 89/665, would lead rather to the date of the decision of the review body being used.

23 In the light of those considerations, the Vergabekontrollsenat des Landes Wien decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does Article 2(1)(b) of Directive 89/665/EEC... require the decision of a contracting authority to cancel the procedure for the award of a contract for services to be reviewable in review proceedings leading, if appropriate, to its being set aside?

(2) If Question 1 is answered affirmatively, is there any provision of Directive 89/665 or of Directive 92/50/EEC which precludes a review limited to examination of the issue whether cancellation of the award procedure was arbitrary or a sham?

(3) If Question 1 is answered affirmatively, which is the relevant moment in time for assessing whether the decision of the contracting authority to cancel he award procedure is lawful?

Admissibility of the questions referred

24 As a preliminary, it must be examined whether the Vergabekontrollsenat constitutes a court or tribunal within the meaning of Article 234 EC, and thus whether its questions are admissible.

25 It is settled case-law that, in order to determine whether a body making a reference for a preliminary ruling is a court or tribunal within the meaning of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 Dorsch Consult v Bundesbaugesellschaft Berlin [1997] ECR I-4961, paragraph 23, and Case C-103/97 Köllensperger and Atzwanger v Gemeindeverband Bezirkskrankenhaus Schwaz [1999] ECR I-551, paragraph 17).

26 In this case, Paragraph 94 of the WLVergG clearly shows that the Vergabekontrollsenat complies with the criteria of being established by law, having compulsory jurisdiction and an inter partes procedure, and applying rules of law.

27 In addition, Paragraph 95 of the WLVergG, which governs the composition and functioning of this body, guarantees its permanence and, in conjunction with Paragraph 94(3), its independence.

28 It follows that the Vergabekontrollsenat des Landes Wien must be regarded as a court or tribunal within the meaning of Article 234 EC and that its questions are admissible.

Substance

The first question

29 As the order for reference shows, the Vergabekontrollsenat wishes to know, in answer to its first question, whether the decision to withdraw an invitation to tender for a public service contract is a decision taken by the contracting authorities in respect of which Member States are required, under Article 1(1) of Directive 89/665, to establish effective review procedures in their national law which are as rapid as possible.

30 In that respect, whereas Article 2(1)(b) of Directive 89/665 delimits the scope of the directive, it does not define the unlawful decisions of which annulment may be sought, confining itself to

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listing measures which Member States are required to take for the purposes of the review proceedings referred to in Article 1 (see, to that effect, Case C-81/98 Alcatel Austria and Others v Bundesministerium für Wissenschaft und Verkehr [1999] ECR I-7671, paragraphs 30 and 31).

31 The first question must therefore be understood as asking, essentially, whether Article 1(1) of Directive 89/665 requires the decision of the awarding authority to withdraw the invitation to tender for a public service contract to be open to review proceedings, and to annulment in appropriate cases, on the ground that it infringed Community law on public contracts or the national rules transposing that law.

32 In order to reply to the question thus reformulated, it is therefore necessary to interpret the words decisions taken by the contracting authorities used in Article 1(1) of Directive 89/665.

33 The Austrian Government and the Commission essentially maintain that Member States are required to establish procedures allowing review proceedings to be brought against the withdrawal of an invitation to tender for a public service contract if that withdrawal is governed by Directive 92/50. In that respect, they consider that such withdrawal falls exclusively under national legal rules and therefore does not fall within the scope of Directive 89/665.

34 In particular, the Commission states that, in its proposal for a Council Directive 87/C 230/05 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on procedures for the award of public supply and public works contracts (OJ 1987 C 230, p. 6), it expressly proposed that the obligation of Member States to establish review procedures should extend not only to decisions taken by the contracting authorities in breach of Community law but also to those infringing national legal rules. However, in the course of the legislative process, the obligation to establish a review mechanism was limited to its present scope, so as to cover only decisions which infringe Community law on public contracts or the national rules transposing that law.

35 The Austrian Government argues that the conclusion that the decision to withdraw an invitation to tender does not constitute a decision within the meaning of Directive 89/665 is confirmed by Article 2(1)(b) of that directive, which exclusively concerns decisions which the contracting authority adopts during the procedure for the award of a public contract, whereas a decision to withdraw an invitation to tender brings such a procedure to an end. Thus, the Government argues, where an invitation to tender is withdrawn unlawfully, the national legislature is required, under Directive 89/665, only to ensure that the candidates and tenderers are given a right to damages.

36 It should be recalled as a preliminary observation that Article 1(1) of Directive 89/665 places an obligation on Member States to lay down procedures enabling review of decisions taken in a tender procedure on the ground that those decisions infringed Community law on public contracts or national rules transposing that law.

37 It follows that, if a decision taken by a contracting authority in a procedure for awarding a public contract is made subject to the Community law rules on public contracts and is therefore capable of infringing them, Article 1(1) of Directive 89/665 requires that that decision be capable of forming the subject-matter of an action for annulment.

38 Therefore, in order to determine whether the decision of the contracting authority to withdraw an invitation to tender for a public service contract may be regarded as one of those decisions in respect of which Member States are required, under Directive 89/665, to establish annulment action procedures, it needs to be examined whether such a decision falls within Community law rules on public contracts.

39 In that respect, it should be noted that the only provision in Directive 92/50 relating specifically

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to the decision to withdraw an invitation to tender is Article 12(2), which provides, inter alia, that where the contracting authorities have decided to abandon an award procedure, they must inform candidates and tenderers of the reasons for their decision as soon as possible.

40 The Court of Justice has already had occasion to define the scope of the obligation to notify reasons for abandoning the award of a contract in the context of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), in the version thereof resulting from Directive 97/52 (hereinafter Directive 93/37), which contains in Article 8(2) a provision similar to Article 12(2) of Directive 92/50. In particular, in its judgment in Case C-27/98 Fracasso and Leitschutz v Salzburger Landesregierung [1999] ECR I-5697, paragraphs 23 and 25, the Court held that Article 8(2) of Directive 93/37 does not provide that the option of the contracting authority to decide not to award a contract put out to tender, implicity allowed by Directive 93/37, is limited to exceptional cases or must necessarily be based on serious grounds.

41 It follows that, on a proper interpretation of Article 12(2) of Directive 92/50, although that provision requires the contracting authority to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public service contract, there is no implied obligation on that authority to carry the award procedure to its conclusion.

42 However, even though, apart from the duty to notify the reasons for the withdrawal of the invitation to tender, Directive 92/50 contains no specific provision concerning the substantive or formal conditions for that decision, the fact remains that the latter is still subject to fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services.

43 In that regard, the Court has consistently held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, inter alia, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16; Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 32).

44 Directive 92/50 pursues just such an objective. As the 20th recital in its preamble shows, it is designed to eliminate practices that restrict competition in general, and participation in contracts by other Member States' nationals in particular, by improving the access of service providers to procedures for the award of contracts.

45 The Court's case-law also demonstrates that the principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies in particular an obligation of transparency in order to enable verification that it has been complied with (see, to that effect, Case C-275/98 Unitron Scandinavia and 3-S v Ministeriet for Fødevarer, Landbrug og Fiskeri [1999] ECR I-8291, paragraph 31; Case C-324/98 Telaustria and Telefonadress v Telekom Austria [2000] ECR I-10745, paragraph 61).

46 In that respect, it should be noted that the duty to notify reasons for a decision to withdraw an invitation to tender, laid down by Article 12(2) of Directive 92/50, is dictated precisely by concern to ensure a minimum level of transparency in the contract-awarding procedures to which that directive applies and hence compliance with the principle of equal treatment.

47 It follows that, even though Directive 92/50 does not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, the contracting authorities are nevertheless required, when adopting such a decision, to comply with the fundamental rules of the Treaty in general, and the principle of non-discrimination on the ground of nationality, in

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particular (see, by way of analogy, concerning the conclusion of public service concessions, Telaustria and Telefonadress, paragraph 60).

48 Since the decision of a contracting authority to withdraw an invitation to tender for a public service contract is subject to the relevant substantive rules of Community law, it has to be concluded that it also falls within the rules laid down by Directive 89/665 in order to ensure compliance with the rules of Community law on public contracts.

49 That finding is corroborated, first, by the wording of the provisions of Directive 89/665. As the Court pointed out in paragraph 35 of its Alcatel Austria judgment, the provision in Article 1(1) of that directive does not lay down any restriction with regard to the nature and content of the decisions referred to therein. Nor can such a restriction be inferred from the wording of Article 2(1)(b) of that directive (see, to that effect, Alcatel Austria, paragraph 32). Moreover, a restrictive interpretation of the category of decisions in relation to which Member States must ensure the existence of review procedures would be incompatible with Article 2(1)(a) of the same directive, which requires Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities.

50 Next, the general scheme of Directive 89/665 requires a broad interpretation of that category, in so far as Article 2(5) of that directive authorises Member States to provide that, where damages are claimed on the ground that a decision by the contracting authority was taken unlawfully, the contested decision must first be set aside.

51 To hold that Member States are not required to lay down review procedures for annulment in relation to decisions withdrawing invitations to tender would amount to authorising them, by availing themselves of the option provided for in the provision mentioned in the paragraph above, to deprive tenderers adversely affected by such decisions, adopted in breach of the rules of Community law, of the possibility of bringing actions for damages.

52 Finally, it must be held that any other interpretation would undermine the effectiveness of Directive 89/665. As the first and second recitals in its preamble show, that directive is designed to reinforce existing arrangements at both national and Community level for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified, and it is precisely in order to ensure compliance with those directives that Article 1(1) of Directive 89/665 requires the Member States to establish effective review procedures that are as rapid as possible (Alcatel Austria, paragraphs 33 and 34).

53 The full attainment of the objective pursued by Directive 89/665 would be compromised if it were lawful for contracting authorities to withdraw an invitation to tender for a public service contract without being subject to the judicial review procedures designed to ensure that the directives laying down substantive rules concerning public contracts and the principles underlying those directives are genuinely complied with.

54 In the light of the foregoing considerations, it must be held that the decision to withdraw an invitation to tender for a public service contract is one of those decisions in relation to which Member States are required under Directive 89/665 to establish review procedures for annulment, for the purposes of ensuring compliance with the rules of Community law on public contracts and national rules implementing that law.

55 The answer to the first question must therefore be that Article 1(1) of Directive 89/665 requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.

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The second question

56 By its second question, the referring court asks, essentially, whether national rules limiting the extent of the review of the legality of the withdrawal of an invitation to tender for a public service contract to mere examination of whether that decision was arbitrary is compatible with Directives 89/665 and 92/50.

57 It should be noted at the outset that questions concerning the scope of judicial review of a decision adopted in the context of a procedure for the award of public contracts are not covered by Directive 92/50, but fall solely within the scope of Directive 89/665. The second question must therefore be understood as asking whether Directive 89/665 precludes national rules from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether that decision was arbitrary.

58 Since Directive 89/665 does no more than coordinate existing mechanisms in Member States in order to ensure the full and effective application of the directives laying down substantive rules concerning public contracts, it does not expressly define the scope of the remedies which the Member States must establish for that purpose.

59 Therefore, the question of the extent of the judicial review exercised in the context of the review procedures covered by Directive 89/665 must be examined in the light of the purpose of the latter, taking care that its effectiveness is not undermined.

60 In that respect, it should be recalled that, as is shown in the sixth recital in the preamble to, and in Article 1(1) of, Directive 89/665, the latter requires Member States to establish review procedures that are appropriate in the event of procedures for the award of public contracts being unlawful.

61 Therefore, having regard to the aim of strengthening remedies pursued by Directive 89/665, and in the absence of indications to the contrary, the scope of the judicial review to be exercised in the context of the review procedures referred to therein cannot be interpreted restrictively.

62 It follows that, even in cases where, as in the main proceedings, the relevant national legislation gives the contracting authorities a wide discretion in relation to the withdrawal of invitations to tender, the national courts must be able, pursuant to Directive 89/665, to check the compatibility of a decision to withdraw an invitation to tender with the relevant rules of Community law.

63 In those circumstances, it must be held that neither the letter nor the spirit of Directive 89/665 permits the conclusion that it is lawful for Member States to limit review of the legality of a decision to withdraw an invitation to tender to mere examination of whether it was arbitrary.

64 The answer to the second question must therefore be that Directive 89/665 precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary.

The third question

65 In its third question, the referring court asks what time is to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender.

66 In that respect, it is sufficient to note that, since Directive 89/665 is designed only to coordinate existing mechanisms in Member States in order to ensure that Community law in the matter of public contracts is complied with, it does not contain any provision as to the decisive moment for the purposes of assessing the legality of the decision to withdraw an invitation to tender.

67 Thus, in the absence of specific Community rules governing the matter, it is for the domestic

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legal system of each Member State to determine the decisive moment for the purposes of assessing the legality of the withdrawal decision, provided that the relevant national rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness) (see, by analogy, Case C-390/98 Banks v Coal Authority and Secretary of State for Trade and Industry [2001] ECR I-6117, paragraph 121; Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraph 29).

68 The answer to the third question must therefore be that determination of the time to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender is a matter for national law, provided that the relevant national rules are not less favourable than those governing similar domestic actions and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law.

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PROCEDU Reference for a preliminary ruling

ADVGEN Tizzano

JUDGRAP Skouris

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Judgment of the Court (Fifth Chamber)
of 18 October 2001
SIAC Construction Ltd v County Council of the County of Mayo.
Reference for a preliminary ruling: Supreme Court - Ireland.
Public works contracts - Award to the most economically advantageous tender - Award criteria.
Case C-19/00.

1. Approximation of laws - Procedures for the award of public works contracts - Directive 71/305 - Award of contracts - Principle that tenderers must be treated equally - Scope

(Council Directive 71/305)

2. Approximation of laws - Procedures for the award of public works contracts - Directive 71/305 - Award of contracts - Award criteria - Choice of criteria by the awarding authority - Limits

(Council Directive 71/305, Art. 29(1))

3. Approximation of laws - Procedures for the award of public works contracts - Directive 71/305 - Award of contracts - Award criterion relating to a factual element that could be known precisely only after the contract had been awarded - Whether permissible - Conditions - Compliance with the principle that tenderers must be treated equally

(Council Directive 71/305, Art. 29(1) and (2))

1. Compliance with the principle that tenderers must be treated equally, which lies at the very heart of Directive 71/305 concerning the coordination of procedures for the award of public works contracts, as amended by Directive 89/440, requires that tenderers be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority.

(see paras 33-34)

2. Article 29(1), second indent, of Directive 71/305 concerning the coordination of procedures for the award of public works contracts, as amended by Directive 89/440, does not list exhaustively the criteria which may be accepted as criteria for the award of a public works contract. The choice of criteria made by the appointing authority may, however, relate only to criteria designed to identify the offer which is economically the most advantageous and must not confer on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract to a tenderer.

(see paras 35-37)

3. In the case of the award of a public works contract coming within the scope of Directive 71/305 concerning the coordination of procedures for the award of public works contracts, as amended by Directive 89/440, the use of a criterion for awarding the contract which relates to a factual element that will be known precisely only after the contract has been awarded will be compatible with the requirements of equal treatment of tenderers only on condition that the transparency and objectivity of the procedure are respected, which presupposes that the criterion is mentioned in the contract documents or contract notice, that it is there formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret it in the same way, and that the adjudicating authority must keep to that interpretation throughout the procedure and apply the criterion in question objectively and uniformly to all tenderers.

Objectivity may be guaranteed by recourse to the professional opinion of an expert, on condition that his report is based, in all essential respects, on objective factors regarded in good professional practice as being relevant and appropriate to the assessment made.

(see paras 38, 40, 42-45 and operative part)

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In Case C-19/00,

REFERENCE to the Court under Article 234 EC by the Supreme Court of Ireland for a preliminary ruling in the proceedings pending before that court between

SIAC Construction Ltd

and

County Council of the County of Mayo,

on the interpretation of Article 29 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1),

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, A. La Pergola, L. Sevon, M. Wathelet and C.W.A. Timmermans, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- SIAC Construction Ltd, by B. Shipsey SC, instructed by McCann Fitzgerald and Philip Lee, Solicitors,

- the County Council of the County of Mayo, by M. Finlay SC, M. Boyce BL and N. Hyland BL, instructed by King & McEllin, Solicitors,

- the Irish Government, by L.A. Farrell, acting as Agent, assisted by A. O Brolchain SC and A.M. Collins BL,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Commission of the European Communities, by R.B. Wainwright, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of SIAC Construction Ltd, represented by B. Shipsey; of the County Council of the County of Mayo, represented by M. Finlay and N. Hyland; of the Irish Government, represented by D.J. O'Hagan, acting as Agent, assisted by A. O Brolchain; of the French Government, represented by S. Pailler, acting as Agent; and of the Commission, represented by R.B. Wainwright, at the hearing on 8 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 10 May 2001,

gives the following

Judgment

1 By order of 30 July 1999, received at the Court on 24 January 2000, the Irish Supreme Court referred to the Court for a preliminary ruling under Article 234 EC a question concerning the interpretation of Article 29 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1) (hereinafter referred to as Directive 71/305, as amended).

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2 That question has been raised in a dispute between SIAC Construction Ltd (SIAC) and the County Council of the County of Mayo (the County Council) with regard to the procedure governing the award of a public works contract.

The legal framework

3 Article 29(1) and (2) of Directive 71/305, as amended, provides:

1. The criteria on which the authorities awarding contracts shall base the award of contracts shall be:

- either the lowest price only;

- or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the latter instance, the authorities awarding contracts shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.

The dispute in the main proceedings and the question submitted

4 On 20 February 1992 the County Council advertised in the Official Journal of the European Communities for tenders for a public works contract to be awarded by open procedure and involving, inter alia, the laying of sewers, storm overflows, ventilating columns, storm water drains, rising mains and water supply pipes.

5 This contract was a measure-and-value contract, under which the quantities estimated for each item are set out in the bill of quantities. For this type of contract, the tenderer completes the bill of quantities by filling in a rate for each item and a total price for the estimated quantity. The price payable is determined by measuring the actual quantities on completion of the work and valuing them at the rates quoted in the tender.

6 Under the heading Award criteria (other than price), the contract notice provided that:

the contract shall be awarded to the competent contractor submitting a tender which is adjudged to be the most advantageous to the Council in respect of cost and technical merit, subject to the approval of the Minister for the Environment.

7 The tendering documentation sent to tenderers consisted of, inter alia, instructions to tenderers, the bill of quantities and schedule of basic prices, the specifications and terms and conditions of the contract.

8 Twenty-four contractors submitted tenders. The three lowest tenders were submitted by SIAC, Mulcair and Pierce Contracting Ltd. Following arithmetic checking and correcting, the tender totals were IEP 5 378 528 for SIAC, IEP 5 508 919 for Mulcair, and IEP 5 623 966 for Pierce Contracting Ltd.

9 In his report, the consulting engineer appointed by the County Council to judge the tenders stated, among other things, that the three lowest tenders were equal from the point of view of their technical merit.

10 On the other hand, he stated that he had serious reservations regarding the tender submitted by SIAC and that the pricing system which it had used certainly greatly reduces the freedom of the consulting engineer to properly and fully administer the contract in a way that, in his view, is the most economically advantageous to the Mayo County Council.

11 He also pointed out that, under the heading Materials, a provisional sum of IEP 90 000 was

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included to which each tenderer was instructed to add a percentage for overheads, profit, and so on. SIAC, however, deducted this provisional sum in the amount of 100%. The consulting engineer took the view that SIAC was not entitled to make such a deduction.

12 The consulting engineer's report went on to state that the approach adopted by SIAC greatly reduced control over all the items in the bill of quantities, which would in one way or another vary on final measurement. More specifically, SIAC had zero-rated 27.5% of the items, whereas Mulcair, for example, had zero-rated only 18% of the items and had, according to the consulting engineer, priced all major items of measured work.

13 The report of the consulting engineer concluded that Mulcair had submitted a tender that was more balanced than that of SIAC, and that Mulcair's tender might give better value for money and might even cost less.

14 In his recommendations, the consulting engineer stated that the tender submitted by Pierce Contracting Ltd had to be rejected simply on the ground that its price, as corrected, came to IEP 115 047.33 more than that of Mulcair. He recommended that the tender submitted by SIAC should not be accepted on the following grounds:

- SIAC's failure to submit a time for completion at the date of tender;

- SIAC's withdrawal, by means of a 100% reduction, of a provisional sum of IEP 90 000 against which it was allowed only to add a percentage for overheads, profit, and so forth;

- SIAC's failure to price major items of measured work throughout the various bills of quantities, which distorted its bill of quantities and rendered proper management and control extremely difficult, if, indeed, not impossible.

15 The consulting engineer recommended for those reasons that Mulcair's corrected tender be accepted.

16 The County Council accordingly entered into a contract with Mulcair. This contract has now been completed.

17 In response to a request by SIAC, the County Council informed it, by letter of 30 August 1993, of the reasons why it had not accepted its tender.

18 SIAC thereupon instituted two sets of proceedings before the Irish High Court challenging the County Council's decision to award the contract in question to Mulcair.

19 By judgment and order of the High Court of 17 June 1997, SIAC's two actions were dismissed.

20 The High Court ruled that, in choosing criteria which were stipulated in the contract notice and amplified in other documents, the County Council had exercised a discretionary power of selection which was largely predicated on the exercise of professional judgment.

21 The High Court considered that it had to confine itself to examining whether the County Council's decision was unreasonable. It concluded that this was not the case.

22 SIAC appealed to the Supreme Court against the judgment and order of the High Court.

23 SIAC submitted in its appeal that the County Council was required to accept the lowest-priced tender, which happened to be that which SIAC itself had submitted. Since it had been accepted that all tenderers had the requisite technical merit, the only relevant criterion could be cost, which had to be understood as synonymous with the tender price. The criterion of cost/price could not, in any event, have referred to the ultimate cost to the County Council.

24 By purporting to take account of ultimate cost, the County Council had, according to SIAC, departed from the criteria that had been specified as award criteria. In so doing, it infringed

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the principles of transparency, foreseeability of the adjudication process, and equality of tenderers.

25 Against this, the County Council claimed that it was entitled to exercise a discretion and to award the contract on the basis of a recommendation from its consulting engineer as to which tender the latter adjudged to be the most advantageous in respect of cost and technical merit. It also submitted that, in the particular context of a measure-and-value contract, the cost should be understood as being the cost of the contract to the County Council, that is to say, the contract price.

26 The County Council further submitted that it followed, inter alia, from the specifications that, in examining the bills of quantities, the consulting engineer was entitled to make comparisons between the prices quoted and his own estimates of cost. SIAC, it contended, was also aware from the outset that the criterion of cost referred to the probable cost of the contract to the County Council.

27 In those circumstances, the Supreme Court decided to stay proceedings and to submit the following question to the Court of Justice for a preliminary ruling:

In a situation where an authority is awarding a contract pursuant to the provisions of the second indent of Article 29(1) of Council Directive 71/305/EEC, Chapter 2, of 26 July 1971 as applied in the national law of a Member State, and where the authority shall have specified the "Award criteria (other than price)" as being that the contract would be awarded to "the competent contractor submitting a tender which is adjudged to be the most advantageous to the" (awarding authority) "in respect of cost and technical merit", and where the three lowest tenderers shall have been contractors of accepted competence and shall have submitted valid tenders of accepted technical merit, and where the tender prices of the three lowest tenderers shall not have diverged greatly, is the awarding authority obliged to award the contract to the contractor who shall have tendered the lowest price or is the awarding authority entitled to award the contract to the contractor with the second lowest price on the basis of the professional report of its consulting engineer that the ultimate cost of the contract to the awarding authority is likely to be less if the contract is awarded to the contractor who tendered the second lowest price than it would be if the contract were awarded to the contractor who tendered the lowest price?

The question submitted for preliminary ruling

28 By its question, the national court is asking essentially whether Article 29(1) and (2) of Directive 71/305, as amended, must be construed as allowing an awarding authority which has chosen to award a contract to the most economically advantageous tender to award that contract to the tenderer who has submitted the tender the ultimate cost of which is likely to be the lowest according to the professional opinion of an expert.

29 It should be noted at the outset that the parties to the main proceedings disagree as to whether the terms price and cost used in the tender documentation refer to the total price of the tender or to the ultimate cost of the contract. The High Court confined itself in this regard to holding that the terms price and cost had been used interchangeably.

30 In proceedings under Article 234 EC, the Court cannot resolve differences concerning the interpretation of terms used in tender documents, such interpretation being a matter for the national court.

31 It is, however, common ground that the requirements of Article 29(1) and (2) of Directive 71/305, as amended, must be examined in the light of the fact that the contract at issue in the main proceedings was awarded to a tenderer in consideration of the fact that its tender was, in the opinion of an expert, liable to represent the lowest ultimate cost.

32 The Court has held in this regard that the purpose of coordinating at Community level the procedures

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for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, inter alia, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16).

33 In accordance with that objective, the duty to observe the principle of equal treatment of tenderers lies at the very heart of Directive 71/305, as amended (Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 33).

34 More precisely, tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority (see, to this effect, Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 54).

35 As for the criteria which may be accepted as criteria for the award of a public works contract to what is the most economically advantageous tender, Article 29(1), second indent, of Directive 71/305, as amended, does not list these exhaustively.

36 Although that provision thus leaves it to the adjudicating authorities to choose the criteria on which they propose to base their award of the contract, that choice may relate only to criteria aimed at identifying the offer which is economically the most advantageous (Case 31/87 Beentjes [1988] ECR 4635, paragraph 19).

37 Further, an award criterion having the effect of conferring on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer would be incompatible with Article 29 of Directive 71/305, as amended (Beentjes, cited above, paragraph 26).

38 The mere fact that an award criterion relates to a factual element which will be known precisely only after the contract has been awarded cannot be regarded as conferring any such unrestricted freedom on the adjudicating authority.

39 The Court has already ruled that reliability of supplies is one of the criteria which may be taken into account in determining the most economically advantageous tender (Case C-324/93 Evans Medical and Macfarlan Smith [1995] ECR I-563, paragraph 44).

40 However, in order for the use of such a criterion to be compatible with the requirement that tenderers be treated equally, it is first of all necessary, as indeed Article 29(2) of Directive 71/305, as amended, provides, that that criterion be mentioned in the contract documents or contract notice.

41 Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31).

42 More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

43 This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure (see, along these lines, Commission v Belgium, cited above, paragraphs 88 and 89).

44 Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition.

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45 In the light of all the foregoing, the answer to the question submitted is that Article 29(1) and (2) of Directive 71/305, as amended, must be interpreted as permitting an adjudicating authority which has chosen to award a contract to the most economically advantageous tender to award that contract to the tenderer who has submitted the tender the ultimate cost of which, in the professional opinion of an expert, is likely to be the lowest, provided that the equal treatment of tenderers has been ensured, which presupposes that the transparency and objectivity of the procedure have been guaranteed and in particular that:

- this award criterion was clearly stated in the contract notice or contract documents; and

- the professional opinion is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made.

Costs

46 The costs incurred by the Irish, French and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Supreme Court of Ireland by order of 30 July 1999, hereby rules:

Article 29(1) and (2) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Council Directive 89/440/EEC of 18 July 1989, must be interpreted as permitting an adjudicating authority which has chosen to award a contract to the most economically advantageous tender to award that contract to the tenderer who has submitted the tender the ultimate cost of which, in the professional opinion of an expert, is likely to be the lowest, provided that the equal treatment of tenderers has been ensured, which presupposes that the transparency and objectivity of the procedure have been guaranteed and in particular that:

- this award criterion was clearly stated in the contract notice or contract documents; and

- the professional opinion is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made.

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Judgment of the Court of First Instance (Fifth Chamber)
First Instance (Fifth Chamber)First Instance (Fifth Chamber)2003.
Strabag Benelux NV v Council of the European Union.
Case T-183/00.

In Case T-183/00,

Strabag Benelux NV, established in Stabroek (Belgium), represented by A. Delvaux and V. Bertrand, lawyers, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by F. Van Craeyenest and M. Arpio Santacruz, acting as Agents, assisted by J. Stuyck, lawyer,

defendant,

APPLICATION for the annulment of the Council Decision of 12 April 2000 awarding to the company Entreprises Louis De Waele the contract forming the subject-matter of invitation to tender No 197865 issued on 30 July 1999 (OJ 1999 S 146) for general installation and maintenance work in the Council's buildings, and a claim for compensation for the damage allegedly suffered by the applicant as a consequence of the Council's conduct,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

(Fifth Chamber),

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2002,

gives the following

Judgment

Costs

87 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Council has applied for costs, the applicant must be ordered to pay the costs incurred by the Council.

On those grounds,

THE COURT OF FIRST INSTANCE

(Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and pay those incurred by the Council.

Legal context

1 The award of public works contracts by the Council is governed by the provisions contained in

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the first section of Title IV (Articles 56 to 64a) of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), last amended before this action was brought by Council Regulation (EC, ECSC, Euratom) No 2673/1999 of 13 December 1999 (OJ 1999 L 326, p. 1).

2 Under Article 56 of the Financial Regulation, `each institution shall comply with the same obligations as are imposed upon bodies in the Member States' by the directives on public works contracts, when concluding contracts for which the amount involved is equal to or greater than the thresholds provided for by those directives.

3 In the present case the relevant legislation is Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1).

4 Article 8 of Directive 93/37, as amended by Directive 97/52, provides:

`1. The contracting authority shall, within 15 days of the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of this application or his tender, and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

However, contracting authorities may decide that certain information on the contract award, referred to in the preceding subparagraph, be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between contractors.

2. ...

3. For each contract awarded, the contracting authorities shall draw up a written report which shall include at least the following:

- the name and address of the contracting authority, the subject and value of the contract,

- the names of the candidates or tenderers admitted and the reasons for their selection,

- the names of the candidates or tenderers rejected and the reasons for their rejection,

- the name of the successful tenderer and the reasons for his tender having been selected...'.

5 Article 18 of Directive 93/37, as amended, provides:

`Contracts shall be awarded on the basis of the criteria laid down [in Articles 30 to 32 of this Directive]...'.

6 Article 30 of Directive 93/37 provides:

`1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.

...'

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Facts

7 By Notice No 107865, published on 30 July 1999 (OJ 1999 S 146), the General Secretariat of the Council issued a restricted invitation to tender for general installation and maintenance works in the Council's buildings in Brussels; that notice replaced a notice published on 4 June 1999 (OJ 1999 S 107). The procedure was to result in the conclusion of a five-year framework contract, renewable for 12-month periods. It was also stated in the notice that `[i]n 1998, the cost of the general installation and maintenance work was in the order of EUR 5 000 000'.

8 The contract documents relating to the invitation to tender provided, in point IV.5 entitled `Selection criteria':

`(a) The [General Secretariat of the Council] shall select from among the tenders submitted the one which it considers the most advantageous in the light of the information provided by the company. The following criteria are regarded as especially important:

- the conformity of the tender;

- the price of the tender;

- the experience and competence of the permanent team in providing services similar to those described in the contract documents;

- the experience and technical competence of the undertaking;

- the proposal made with regard to the safety-coordinator;

- the quality of any subcontractors and suppliers proposed;

- the technical quality of the equipment and materials proposed;

- the measures proposed for observing the prescribed time-limits for the contract stages.

...'

9 Three undertakings submitted tenders conforming with the specifications: Renco SpA (`Renco'), Entreprises Louis de Waele (`De Waele') and the applicant.

10 The applicant's tender, which was submitted on 11 January 2000, was in the amount of EUR 4 468 110.74 per annum.

11 By decision of 12 April 2000 (`the contested decision'), taken on the basis of an opinion of 5 April 2000 of the Advisory Committee on Procurements and Contracts (`CCAM') and a report of the same date forwarded to the Committee (`the report to the CCAM'), the Council awarded the contract to De Waele, whose tender was in the amount of EUR 4 088 938.10 per annum. That decision was the subject of Notice No 054869 published on 29 April 2000 (OJ 2000 S 84).

12 By letters of 14 April 2000 the Council informed the applicant and Renco that their tenders had been rejected.

13 By letter of 26 April 2000 the applicant asked the Council for a copy of the decision awarding the contract and for the reasons on which the decision was based.

14 By letter of 11 May 2000 the Council gave the following answer to that request:

`In accordance with the provisions of Directive 93/37... , the criteria for awarding the contract were set out in the contract documents relating to the invitation to tender (p. 16 of doc. IMM 99/2046).

Consequently, the three tenders received on 11 January 2000 were analysed and compared in the light

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of those eight criteria. The outcome was that the contract was awarded to De Waele, which had submitted the most economically advantageous tender.

For your information, I would add that your tender was also ranked highly for the qualitative evaluation criteria but was unsuccessful because of its price.'

15 By letter of 19 June 2000 the applicant asked the Council to send it a copy of `all the documents which led to the rejection of [its tender] and to the award of the contract to... De Waele'.

16 By letter of 4 July 2000, the Council replied to that letter in the following terms:

`...

The analysis carried out by the staff of the General Secretariat of the Council led to the following assessment of your tender in relation to the other two competing tenders, for each of the eight criteria on which the selection was based:

- administrative conformity of the tender; all three candidates equal,

- price of the tender; second,

- experience and technical competence of the permanent team; first,

- experience and technical competence of the company; equal first,

- proposal of safety-coordinator; first,

- quality of subcontractors and suppliers; first,

- technical quality of the plant and materials proposed; all three candidates equal,

- measures proposed in order to observe the time-limits: all three candidates equal.

To sum up, the staff of the General Secretariat of the Council concluded that:

> "The [applicant's] proposal, for almost all the criteria, is ranked in first position: however, it was not successful because of its higher cost" (about 10% more than De Waele's proposal).

I am unable to accede to your request for all the documents, in the light of Article 8 of Directive [93/37] as amended by Directive 97/52 ...'.

Proceedings and forms of order sought by the parties

17 By application lodged at the Registry of the Court of First Instance on 13 July 2000 the applicant brought the present action.

18 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. By way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, the Court asked the Council to furnish certain information, which was supplied within the time allowed.

19 The parties presented oral argument and their replies to the questions put by the Court at the hearing held on 7 February 2002. At the hearing the applicant withdrew three of its pleas alleging that:

- by awarding the contract to a company whose tender did not conform to the contract documents, the Council acted in breach of the terms of those documents and the principle of equality between tenderers;

- by placing De Waele and the applicant equal in respect of the first, fourth and eighth criteria of the contract documents, the Council committed three manifest errors of assessment;

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- by accepting abnormally low prices from De Waele, the Council infringed Article 30(4) of Directive 93/37.

The Court took formal notice of the withdrawal of those pleas in the minutes of the hearing.

20 The applicant claims that the Court should:

- declare the applications for annulment and for compensation admissible and well founded;

- annul the contested decision;

- subject to the applicant's claiming a higher sum, order the Council to pay the sum of BEF 153 421 286 or EUR 3 803 214 together with interest thereon at the rate of 6% from 12 April 2000;

- order the Council to pay the costs.

21 The Commission contends that the Court should:

- declare the application for annulment inadmissible or, at least, unfounded;

- declare the application for compensation unfounded;

- order the applicant to pay the costs.

The application for annulment

Admissibility

Arguments of the parties

22 The Council challenges the admissibility of the action for annulment on the ground that the applicant is not an addressee of the contested decision and is not directly and individually concerned by it.

23 It points out that it adopted, first, the contested decision, addressed to De Waele, and, secondly, the two decisions of 14 April 2000, addressed to the applicant and Renco, informing them that their tenders had been rejected. Referring to the judgment of the Court of First Instance in Case T-19/95 Adia interim v Commission [1996] ECR II-321, it maintains that the applicant should have contested the decision of 14 April 2000 which had been addressed to it, or at least that decision and the contested decision.

24 The applicant maintains that it is directly and individually concerned by the contested decision. It contends that that decision includes a series of decisions, namely a positive decision to award the contract to De Waele and two negative decisions not to award the contract to the other two tenderers. Therefore, the applicant is an addressee of the contested decision. Consequently, the Council's argument that it ought to have challenged the decision of 14 April 2000 not to award it the contract is fallacious. That negative decision and the positive award decision are, in fact, the two facets of a single decision.

25 The applicant adds that the contested decision has binding legal effects which affect its position inasmuch as it rejects the applicant's tender, which also ceases to produce its effects.

26 In the alternative, the applicant states that, because of its special status as a tenderer, it is individually concerned by the contested decision. Furthermore, since the effect of the decision has the direct effect of eliminating the applicant from the award of the contract, without requiring the intervention of any authority, it directly concerns the applicant.

Findings of the Court

27 Under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings

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for the annulment of a decision addressed to that person or of a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former (Case C-403/96 P Glencore Grain v Commission [1998] ECR I-2405, paragraph 40).

28 It should be pointed out that a decision relating to the award of a contract to a single tenderer inevitably and inseparably entails a corresponding decision not to award the contract to the other tenderers. Since the Council awards the contract to one tenderer, the offers of the other tenderers are automatically rejected, and there is no need to adopt other decisions in that regard. It must therefore be held that the formal communication of the result of the tendering procedure to the rejected tenderers does not mean that a decision other than the decision awarding the contract will be adopted for the express purpose of stating a rejection.

29 In the present case the contested decision was formally addressed to De Waele. Therefore, it had the effect of awarding the contract in question to De Waele and, by so doing, of rejecting the offers of the other two tenderers. It follows that the contested decision is of direct and individual concern to the applicant and that it may be the subject of an action for annulment brought by the applicant.

30 It follows from the foregoing that the application is admissible.

Substance

31 The applicant puts forward three pleas in support of its action for annulment. The first plea alleges the non-existence of the contested decision. The second alleges infringement of the duty to state reasons and of Article 8(1) of Directive 93/37, and the third alleges infringement of Articles 18 and 30 of Directive 93/37 and of the contract documents.

The first plea, alleging the non-existence of the contested decision

- Arguments of the parties

32 In its reply the applicant asks the Court to declare that the contested decision does not exist.

33 It points out that, in its letter of 4 July 2000, the Council referred to a departmental document in which it had concluded: `[The applicant's] proposal is, for almost all the criteria, ranked first: however, it was not successful because its price was higher'. According to the applicant, that was probably an extract from the award decision. It points out that the Council did not, however, produce that decision or the report required under Article 8(3) of Directive 93/37. In those circumstances, it asks the Court either to declare that the decision does not exist or to order the Council to produce the document.

34 At the hearing the applicant conceded that this plea was not put forward in the application initiating the proceedings. However, it points out that the non-existence of the contested decision only emerged during the proceedings and in particular because the document in question was not communicated.

35 In its rejoinder the Council challenges the admissibility of this plea. It points out that Article 48(2) of the Rules of Procedure of the Court of First Instance prohibits the introduction of new pleas in law in the course of proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. Since this new plea refers to the letter of 4 July 2000, which is annexed to the application, it clearly is not based on a new matter. The Council also states that the record of the decision to award the contract in question does not exist in the form of a single document but in the form of three documents, namely the report to the CCAM, the CCAM's favourable opinion and the Notice of contract awarded published in the Official Journal of the European Communities (see paragraph 11 above). It adds that those three documents, which contain all the information referred to in Article 8(3) of Directive 93/37, were drawn up in connection with the invitation to tender in question and ensure transparency with regard

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to the method of and the reasons underlying the award of the contract and the rejection of the other tenders.

36 At the hearing, in reply to a question put by the Court, the Council stated that the formal decision to award the decision to De Waele consists only in a framework contract signed on 12 April 2000 between De Waele and the Council. The Court took formal note of that statement.

- Findings of the Court

37 As a preliminary point it should be noted that , according to settled case-law, the Community judicature, drawing inspiration from the principles identified by the national legal systems, declares that acts tainted by irregularities which are particularly serious and obvious are non-existent (Case 15/85 Consorzio Cooperative d'Abruzzo v Commission [1987] ECR 1005, paragraph 10, and Case C-137/92 P Commission v BASF and Others [1994] ECR I-2555, paragraph 49). This plea relates to public policy and it is for the Court, in an action for annulment brought under Article 230 EC, to consider, of its own motion, the issue of the existence of the contested measure if the parties put forward sufficient evidence in that regard (see, to that effect, Case T-9/89 Hüls v Commission [1992] ECR II-499, paragraph 384).

38 In the present case the arguments expounded by the applicant, particularly during the hearing, provide sufficient support for the suggestion that the contested decision is non-existent. It is therefore necessary to ascertain whether, in the present case, the contested decision is tainted within the meaning of the case-law cited in the previous paragraph, without its being necessary to consider the matter - raised by the Council - of the admissibility of this plea.

39 It should be pointed out that the rules governing the procedure for comparing tenders for public works contracts ensure the compliance at every stage with the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers (see, to that effect, Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 54).

40 In the present case the applicant puts forward, in essence, two arguments in support of the plea alleging the non-existence of the contested decision: the lack of a formal decision awarding the contract in question to De Waele and the Council's failure to draw up a report in accordance with Article 8(3) of Directive 93/37.

41 As regards the first argument, the first point to note is that, contrary to what the applicant claims, the passage from the Council's letter of 4 July 2000 to which it refers (see paragraph 33 above) is not an extract from the decision awarding the contract but comes from the report to the CCAM. In order to determine whether the contested decision is tainted with particularly serious and obvious irregularities, it is necessary to examine the context in which it was adopted.

42 The tendering procedure culminates in the drawing-up of an agreement between the Council and the successful tenderer in respect of the works stipulated in the contract documents. Under the rules laid down in the contract documents, tenderers are required, when submitting their tenders, to transmit to the Council a signed offer which commits them to carrying out the works in accordance with the contract documents and with the prices and rates indicated by the tenderers in their tenders where appropriate. When, at the end of the tendering procedure, a tender is accepted, it only remains for the Council to sign the successful tenderer's offer in order to conclude an agreement binding the parties.

43 It is not disputed that, in this case, the Council did not adopt any formal decision awarding the contract in question other than by signing the framework agreement with De Waele on 12 April 2000.

44 Therefore, the Court considers that, as the Council maintains, the signing of the agreement

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with De Waele and the decision to award the contract were simultaneous and that that signing is deemed to constitute the award of the contract. It should also be pointed out that the decision awarding the contract was taken after receipt of a copy of the report to the CCAM and the CCAM's favourable opinion and, therefore, in accordance with a procedure which complied with the principles of non-discrimination and transparency. It follows that, contrary to the applicant's claim, the contested decision is not tainted with irregularities.

45 As for the applicant's second argument, alleging failure to draw up a report pursuant to Article 8(3) of Directive 93/37, the Court considers that it cannot be accepted. In that regard, it should be pointed out that, under that provision, for each contract awarded, the contracting authority is required to draw up a report (in the English version, `a written report') containing at least the details listed in the provision. For the contract in the present case the report to the CCAM drawn up by the Council includes 12 annexes, amongst them the Contract Notice, the record of the opening of the tendering procedure and a copy of the framework agreement concluded with De Waele. It must be stated that all the information required under Article 8(3) of Directive 93/37 (see paragraph 4 above) was contained in the report to the CCAM, in the CCAM's favourable opinion and in the Notice of contract awarded. The Council cannot be criticised for having reproduced that information in three documents rather than in one. In any event, the requirement to draw up a report under that provision arises out of the concern to ensure compliance with the principles of non-discrimination and transparency in the awarding of public works contracts. It should be noted that the applicant has not adduced the slightest evidence that those principles were infringed and, as the Court has already pointed out in paragraph 44 above, the procedure awarding the contract to De Waele complied with those principles.

46 It follows from the above that the plea alleging the non-existence of the contested decision is unfounded.

The second plea, alleging infringement of the duty to state reasons

- Arguments of the parties

47 The applicant maintains that the contested decision should be annulled owing to the absence of a statement of reasons or, at the very least, to the inadequacy of the reasoning.

48 It claims that the reasoning given in the Council's letter of 11 May 2000 does not meet the requirements for stating reasons laid down by Article 253 EC and Article 8(1) of Directive 93/37 (see paragraph 4 above) in that it does not give the characteristics and relative advantages of De Waele's tender, but merely makes the general statement that it was the most economically advantageous.

49 The additional information given in the letter of 4 July 2000, following the applicant's request of 19 June 2000, cannot be taken into consideration because it was communicated outside the 15-day period calculated from the first request for reasons. In any event, the reasoning contained in that letter is inadequate, because it neither explains why the other tenders were considered to be of equal merit to the applicant's nor identifies the undertaking which ranked second in respect of the third, fifth and sixth criteria or the undertaking ranked equal with the applicant in respect of the fourth criterion. Furthermore, the applicant points out that, contrary to the Council's argument, its request of 19 June 2000 did not have the effect of reopening that 15-day period, since it sought to obtain not additional reasons but disclosure of the award procedure file.

50 As a preliminary point, the Council recalls the mechanism established by Directive 93/37 in respect of the obligation to state reasons. Under Article 8(1) of that directive the contracting authority is required, first of all, to inform the eliminated tenderer, by a simple, unreasoned letter, that his tender has been rejected. It need give reasons for its decision to reject the tender only to tenderers who expressly request that, and that within a period of 15 days from the

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time of the request. Furthermore, it is settled case-law that the purpose of the duty to state reasons is to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction (Adia interim v Commission, cited above, paragraphs 31 and 32).

51 Moreover, the Council claims that it gave adequate reasons, in its letter of 11 May 2000 - which had clearly been sent within the prescribed period of 15 days -, for its decision rejecting the applicant's tender. It points out that, in that letter, it clearly stated the name of the successful tenderer, the procedure which was followed, the reasons for rejecting the applicant's tender and the reasons for accepting De Waele's tender. The Council refers, in that regard, to paragraph 35 of the judgment in Adia interim v Commission, cited above. It adds that the applicant was obviously able to understand that, in the light, particularly, of the high price of its tender, it could not be regarded as the most economically advantageous.

52 According to the Council, the additional information contained in its letter of 4 July 2000 was communicated within the prescribed period of 15 days. The purpose of the letter was, in fact, to reply to a second request made by the applicant in its letter of 19 June 2000. It points out that, in that letter, it gave the applicant details of the comparison it had made between the various tenders.

53 The Council states that, in any event, the possible inadequacy of the reasons for rejecting the applicant's tender cannot invalidate the decision to award the contract to a third tenderer. The annulment of the decision to award the contract on the grounds of inadequate reasoning a posteriori for a decision to reject another tender is clearly a disproportionate penalty.

- Findings of the Court

54 It is apparent from Article 8(1) of Directive 93/37, as amended by Directive 97/52, and from the judgment in Adia interim v Commission, cited above, that the Council fulfils its obligation to state reasons if it first informs eliminated tenderers immediately of the fact that their tender has been rejected by a simple unreasoned communication and then subsequently, if expressly requested to do so, informs tenderers of the relative characteristics and advantages of the successful tender and the name of the successful tenderer within 15 days of receipt of a written request.

55 Such a manner of proceeding satisfies the purpose of the duty to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its supervisory jurisdiction (Case T-166/94 Koyo Seiko v Council [1995] ECR II-2129, paragraph 103, and Aida interim v Commission, cited above, paragraph 32).

56 Consequently, in order to determine whether the Council fulfilled its obligation to state reasons, the Court considers that it is necessary to examine the letter of 11 May 2000 sent to the applicant in response to its express request of 26 April 2000 for a copy of the decision awarding the contract and for the reasons for the decision.

57 Clearly, in the letter of 11 May 2000 (see paragraph 14 above) the Council gave a sufficiently detailed statement of the reasons for which it had rejected the applicant's tender and stated the characteristics and advantages of De Waele's tender. That letter clearly indicates the procedure which was followed in evaluating the tenders of the three tenderers and the fact that De Waele's tender was successful because it was the most economically advantageous. The Court considers that the applicant could immediately identify the specific reason for the rejection of its tender, namely the level of its price in relation to that of De Waele. The adequacy of that statement of reasons

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is not affected by the fact that, on 4 July 2000, the Council provided, at the express request of the applicant, an even more detailed explanation of the evaluation of its tender.

58 In any event, and contrary to what the applicant claims (see paragraph 49 above), the duty to state reasons must be assessed in the light of the information available to the applicant at the time when the action was brought. If, as in the present case, the applicant, before bringing an action but after the date laid down by Article 8(1) of Directive 93/37, asks the institution concerned for additional explanations about a decision and receives those explanations, he cannot ask the Court not to take them into consideration when determining whether the statement of reasons is adequate; however, the institution is not permitted to substitute an entirely new statement of reasons for the original statement of reasons, but that is not the position in this case.

59 It is apparent from the foregoing that the second plea, alleging infringement of the duty to state reasons, must be rejected.

The third plea, alleging infringement of Articles 18 and 30 of Directive 93/37 and of the contract documents

- Arguments of the parties

60 The applicant maintains that, since the Council used the method of the most economically advantageous tender, as defined in Article 30(1) of Directive 93/37, it should - in accordance with Article 18 of the Directive - have compared the three tenders submitted in the light of each of the eight criteria set out in the contract documents (see paragraph 8 above). However, it is clear from the Council's letters of 11 May and 4 July 2000 that this rule was not observed in the present case, because the decisive criterion for awarding the contract was the price and the assessment of that criterion was not counterbalanced by the assessment of the other criteria. By so doing, the Council infringed Articles 18 and 30 of Directive 93/37 and also the contract documents.

61 The applicant states that, according to Article 30(2) of Directive 93/37, when a contract is awarded to the most economically advantageous tender, all the criteria on which the award is based are to be stated in the contract documents `where possible in descending order of importance'. The applicant considers that, since, in the present case, the contract documents did not list the award criteria in descending order of importance, the eight criteria selected all had the same value. It follows that, pursuant to that rule, the Council should have awarded the contract to the applicant since, as is clear from the report to the CCAM, it was ranked first for seven award criteria whereas De Waele was ranked first for only five.

62 In its reply the applicant points out that, contrary to what the Council states, it is not apparent from the report to the CCAM that, for the three criteria in which it ranks higher than De Waele, the differences between the two companies are insignificant. Thus, as regards the experience and competence of the permanent team, the report to the CCAM states that the applicant proposes to use again the permanent team which has technical `know-how' of the Council's buildings, which is a considerable advantage. Similarly, as regards the quality of subcontractors and suppliers, the report to the CCAM states that the applicant supplied a list of 60 subcontractors whereas De Waele's list contained only about 20. This difference is all the more significant because, as the Council points out, `the Council's general undertaking contract requires the contractor to arrange for competitive tendering between the subcontractors in order to obtain the best possible terms for the General Secretariat of the Council' and therefore `a high number of subcontractors is desirable'. Also, as regards the safety-coordinator, the applicant had proposed three independent companies whereas De Waele had designated only one.

63 In response to this the Council states that it is clear, both from the report to the CCAM and from its letter of 11 May 2000, that the three tenders were examined in the light of the eight

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criteria set out in the contract documents and that the price of the tender was not the only criterion adopted.

64 It states that the financial analysis - on which the CCAM's opinion is based - which was carried out to evaluate the amount of the tender did not contain solely the analysis of the price but also that of the multiplication factor for the general costs and a comparison of the tenders over the whole five-year term of the contract. It points out, in that regard, that the applicant's tender was 10% higher than that of De Waele. It is clear from this analysis that De Waele's offer was more advantageous from a financial point of view.

65 With regard to the other criteria, the Council points out that, as stated in the final paragraph of its letter of 11 May 2000, they were `qualitative'. It considers that, when, as in the present case, the candidates - in respect of the qualitative criteria - are of equal merit or there is no significant difference between them, it cannot be criticised for having chosen the candidate ranked first for the financial criteria.

66 The Council submits that it must be concluded from those considerations that it compared the various tenderers in the light of the different award criteria and that, in view of the fact that there were no significant differences between the applicant and De Waele with regard to the `qualitative' criteria and that, on a financial level, De Waele's offer was clearly more advantageous, it was fully entitled, in the exercise of its discretion, to judge that tender to be the most economically advantageous.

67 In its rejoinder the Council rejects the applicant's argument that the eight criteria were of equal value. It points out that the first criterion, namely `conformity of the tender' (see paragraph 8 above), is an absolute criterion in that the tenderer who does not meet it is excluded at the outset. The second criterion, `price of the tender' (see paragraph 8 above), is an objective criterion since it allows an order to be established between the tenders. The other criteria are all `qualitative' and make it possible to assess the quality and competence of the company and of the methods it proposes. Those last criteria are, however, less important that the first two.

68 The Council disputes the applicant's argument that, if there is no weighting, the eight criteria are bound to have the same value. It contends that, in a tendering procedure in which the contract is awarded to the most economically advantageous tender, it goes without saying that, when the financial criteria are placed first, the awarding authority has given them more weight than the others.

69 It challenges the validity of the applicant's claim that it was ranked first for seven award criteria. For the fourth criterion, it was ranked equal with De Waele and, for the seventh and eighth criteria, it was ranked equal with De Waele and Renco.

70 However that may be, since it was ranked last for the price criterion, the applicant could have been successful only if the differences between it and De Waele for the other criteria had actually been significant, which was not the case.

71 Furthermore, as regards the criterion relating to the experience and competence of the permanent team, the Council points out that it considered that the applicant's advantage in that regard, namely the fact that it was already working in the Council's buildings, could not prevail, since the specific purpose of a tendering procedure is to avoid monopoly situations and to allow an undertaking whose tender is the most economically advantageous to be selected.

72 Moreover, as regards the quality of the subcontractors and suppliers, the applicant was ranked in a better position than De Waele because of the number of subcontractors on the list enclosed with the tender. However, the number of 20 subcontractors proposed by De Waele was more than sufficient to satisfy the conditions of the contract documents, which require that at least three companies

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Judgment of the Court of First Instance (Fifth Chamber)

First Instance (Fifth Chamber)First Instance (Fifth Chamber)1996. International Procurement Services SA v Commission of the European Communities. Action for damages - Public contract - European Development Fund - Non-contractual liability - Determination of the origin of goods. Case T-175/94.

International agreements ° Third Lomé ACP-EEC Convention ° Provisions concerning financial and technical cooperation ° Procedure for the award of public supply contracts ° Respective roles of the ACP State and the Commission ° Competence of the ACP State to conclude contracts ° Commission' s power of review ° Doubt concerning the Community origin of goods ° Liability of the Community alleged by reason of the request for evidence made by the Commission ° Excluded

(Third ACP-EEC Convention of 8 December 1984)

In the context of financial and technical cooperation under the Third ACP-EEC Convention, contracts financed by the European Development Fund remain national contracts which only the ACP States have the responsibility of preparing, negotiating and concluding. For their part, undertakings which submit tenders for or are awarded the contracts in question remain outside the exclusive dealings conducted on this matter between the Commission and the ACP States.

However, the Commission has not only the right but also the duty to ensure, before any payments are made out of Community funds, that the conditions for such payments are in fact fulfilled. To that end, it is under a duty in particular to seek the necessary information in order to ensure the economical administration of the resources of the European Development Fund and to refuse to endorse invoices submitted to it where it has serious grounds for doubting that the conditions for Community financing have been satisfied.

Since one of those conditions is that the goods in question must be of Community origin, proof of which is the responsibility of the successful tenderer, the Commission cannot be accused of unlawful or improper conduct for having, as a result of serious doubts, required the successful tenderer to produce documents or provide information evidencing the Community origin of the goods.

In Case T-175/94,

International Procurement Services SA, a company governed by Belgian law, whose registered office is in Brussels, represented by Peter De Troyer, of the Audenarde Bar, and Lydia Lorang, of the Luxembourg Bar, with an address for service in Luxembourg at the latter' s Chambers, 6 Rue Heine,

applicant,

v

Commission of the European Communities, represented by Etienne Lasnet, Legal Adviser, acting as Agent, assisted by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation of BFR 14 797 706 for damage allegedly suffered by the applicant following reduction of the financial assistance granted to the other party to a contract concluded by it in relation to a project financed by the European Development Fund,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. Schintgen, President, R. García-Valdecasas and J. Azizi, Judges,

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Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 7 May 1996,

gives the following

Judgment

Costs

62 Under Article 87(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party' s pleadings. Since the applicant has been unsuccessful and the defendant has applied for costs, the applicant must be ordered to pay the costs in their entirety.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Facts

1 On 21 March 1990 the Unidade de Coordenaçao dos Programas de Importaçao (Import Programme Coordination Unit, hereinafter "the UCPI") of the Ministry of Commerce of the People' s Republic of Mozambique issued an invitation to tender for a public contract for the supply of 11 batches of goods for a project financed by the European Community through the European Development Fund (hereinafter "the EDF") (OJ 1990 S 56, p. 5). The invitation to tender expressly indicated that the supplies must without fail originate in States of the European Economic Community or African, Caribbean or Pacific States (hereinafter "ACP") signatories to the Third Lomé ACP-EEC Convention signed in Lomé on 8 December 1984 (OJ 1986 L 86, p. 3).

2 For one of the batches, comprising 7 400 tonnes of steel billets, the UCPI accepted the tender submitted by the applicant, International Procurement Services SA, to which it sent a contract letter under reference LC 25/90/EEC on 13 July 1990.

3 The price stipulated in the contract for that batch (hereinafter "the contract") was BFR 97 561 461, that is to say BFR 13 320 per tonne.

4 Transport of the goods commenced in March 1991 and the final delivery was made on 24 April 1991.

5 On 17 and 30 April 1991, the South African branch of Société Générale de Surveillance (hereinafter "SGS"), an undertaking which on request carries out analyses of goods, issued inspection certificates in Johannesburg for the goods delivered, indicating that the inspections had taken place in March and April 1991.

6 On 20 June 1991, the UCPI received from the company Cifel, the end user of the steel billets, a message to the effect that, according to the documents accompanying the goods delivered, they came from ("proveniente da") the South African company Iscor and the consignee ("consignatario") was the South African company John Palmer Steel.

7 On 2 July 1991, the UCPI sent a telex to the applicant stating that the documents accompanying the goods gave the names of Iscor as supplier and John Palmer Steel as buyer. It requested clarification in view of the lack of any transport documents.

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8 On 20 July 1991 the Lugano Chamber of Commerce, at the request of a Swiss company named by the applicant as its supplier, drew up a certificate of origin mentioning the names of the applicant, the UCPI (preceded by the word "to"), and Cifel (preceded by the abbreviation "imp"), together with the number of the invitation to tender relating to the contract at issue and describing the goods as comprising three batches of steel billets of a total weight of 7 324 434 kg. The certificate gave Italy as the country of origin.

9 By telex of 25 July 1991, the UCPI asked the company RIH, a distributor of Iscor products, to confirm to it that the 7 400 tonnes of steel billets supplied to Cifel in April of that year by John Palmer Steel had been manufactured in South Africa by Iscor.

10 On 2 August 1991, RIH replied that it had received from the London company Gover, Horowitz & Blunt an order for 7 400 tonnes of steel billets, with instructions to forward the goods to the UCPI in Maputo. It also stated that the proposed price related to South African products.

11 By fax of 20 August 1991, the defendant asked SGS to forward to it the "work certificates of tests and analysis" and the "rail consignment notes" referred to by the inspection certificates drawn up by that company on 17 and 30 April 1991. It also asked it to confirm the identity of the manufacturer.

12 On the same day SGS informed the defendant that the requested documents had been forwarded to the company by which it had been instructed, Gover, Horowitz & Blunt. The next day it reported that, before forwarding the requested documents to third parties, it would first have to obtain the consent of that company.

13 On 22 August 1991, the defendant sent a fax to the applicant asking it urgently to obtain as a matter of urgency a copy of the work certificates of tests and analysis and the rail consignment notes from the company responsible for the pre-dispatch inspection of the goods. The next day the applicant replied that it would seek the requested certificates from the seller.

14 By telex of 19 September 1991, the UCPI, at the defendant' s suggestion, asked the applicant for a "bona fide" document indicating the identity of the manufacturer and the route of the goods from the manufacturing plant to the Cifel warehouse. It also stated that if the applicant failed to produce that document it would conclude that the contractual clause concerning the origin of the goods had been breached.

15 By fax of 6 November 1991, the defendant instructed its Mozambique delegation to inform the Mozambique authorities that the applicant had been unable to prove that the goods delivered had been manufactured in the Community or an ACP country and that the UCPI could therefore either cancel the contract or pay for the goods the market price corresponding to their presumed place of origin.

16 By letter of 25 November 1991, in reply to a letter from the applicant of 24 October 1991, the defendant stated that it could not pay the balance until it had received authorization from the UCPI and that no such authorization had been received. It also recommended that the applicant send the UCPI a request for payment if it considered that it had fulfilled all its obligations.

17 By telex to the applicant of 6 December 1991, the UCPI indicated that it had not received the requested "bona fide" document: it therefore considered that the goods had originated in South Africa and would pay for them at the price prevailing on that market.

18 By fax of 11 March 1992, the defendant asked its Mozambique delegation to inform the local authorities that, having regard to the contradictory documents produced by the applicant and Cifel, it endorsed the view of those authorities that the amount of the contract as a whole should be calculated on the basis of the price prevailing on the South African market.

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19 By telex of 9 June 1992, the applicant stated that its financial situation left it no choice but to come to terms with the UCPI. However, it stressed that it would regard the payment to be made as a payment on account. It stated that it would refer to arbitration the question of the difference between the price initially agreed and the amount calculated on the basis of the South African price.

20 The next day the UCPI replied to the applicant that the defendant would not agree to issue a partial payment order if the balance was to be the subject of arbitration and that it would not effect payment until the file was closed. It expressed the view that two possibilities were open to the applicant: either to bring the dispute to an end by concluding an agreement for a reduced price or to initiate the arbitration procedure immediately.

21 On 17 July 1992, the applicant and the UCPI concluded an agreement recording acceptance of the goods, reduction of the price on the basis of the price prevailing on the South African market, set at BFR 12 000 per tonne, and waiver of the right to have recourse to arbitration (hereinafter "the agreement").

Procedure

22 By application lodged at the Registry of the Court of First Instance on 20 April 1994 the applicant brought the present action under the second paragraph of Article 215 of the EC Treaty.

23 The Judge-Rapporteur was assigned to the Fifth Chamber, and the case was therefore assigned to that Chamber.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. By way of measure of organization of procedure, the parties were asked to reply in writing to a number of questions before the hearing and to produce certain documents.

25 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 7 May 1996.

Forms of order sought

26 The applicant claims that the Court should:

° order the defendant to pay it BFR 14 797 706 as compensation for the damage suffered by it or any other amount ° even if greater ° to be determined by the Court ex aequo et bono or by an expert, together with default interest at a rate to be fixed by the Court;

° order the defendant to pay the costs.

27 The defendant contends that the Court should:

° dismiss the application;

° order the applicant to pay the costs.

Summary of the pleas in law and arguments of the parties

28 The applicant criticizes the Commission for having authorized financing of the contract only as to 92.49% of the total amount even though it fulfilled all the conditions of that contract.

29 According to the applicant, the defendant acted unlawfully in that, first, it did not prevent consumption of the goods by Cifel even before acceptance of them by the other party to the contract with the applicant and transfer of title; secondly, it played an active role by calling for certificates of tests and analysis and rail consignment notes which were not required to be produced under the contract, and also a "bona fide" document, the nature of which was never clearly described; and,

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thirdly, it took the view, without justification, that the financing conditions had not been fulfilled, without giving any credence to the certificate of origin drawn up by the Brussels Chamber of Commerce.

30 Regarding the latter point, it maintains that a certificate of origin adequately establishes the origin of goods since chambers of commerce issue such certificates only on production of supporting documents. In contrast to the documents submitted by Cifel, which strengthened the defendant' s doubts as to the origin of the goods delivered, the certificate of origin, being an authenticated original document, carefully describes the goods to which it relates. On the other hand, the documents forwarded by Cifel are barely legible, unauthenticated photocopies of certificates concerning a casting test of steel regularly used in Mozambique. There is no evidence to show that those documents, drawn up eight months after delivery of the goods, relate to the steel used for the goods delivered.

31 The applicant maintains that it has suffered a loss corresponding to the difference between the initial contract price and the amount that it actually received (BFR 9 668 253), together with financial costs (BFR 5 129 453) which it claims it unavoidably incurred as a result of the defendant' s refusal to pay in full the price initially agreed, that is to say, a total loss of BFR 14 797 706.

32 It submits that the damage derives from the fact that the defendant considered that the conditions for the financing of the contract had not been fully satisfied and that it was appropriate to calculate the amount to be paid on the basis of the prices prevailing on the South African market.

33 Referring to the case-law of the Court of Justice to the effect that contracts financed under the EDF are national contracts to which the Commission is not a party, the defendant concludes that the action, purporting to be a claim for non-contractual liability, is inconsistent since the applicant criticizes it for having unilaterally changed the conditions of the contract.

34 It also considers that none of the conditions for non-contractual liability is fulfilled.

35 It contends that it did not act unlawfully. Good reasons for the serious doubts that it entertained as to the origin of the goods were provided, first, by the content of the letter from Cifel received by the UCPI on 20 June 1991 and RIH' s telex of 2 August 1991 and, secondly, as it stated at the hearing, by the fact that the inspection certificates drawn up by the SGS related to inspections carried out in South Africa. In that connection, the defendant had then sent numerous requests to the applicant for documents unambiguously proving the Community origin of the goods delivered. The defendant states that the applicant has produced neither those documents nor the pre-shipment inspection report referred to in Article IX.5 of the schedule of special requirements. However, it is incumbent on the applicant to prove the Community origin of the goods.

36 It casts doubt on the credibility of the certificate of origin produced by the applicant since it was drawn up by the Brussels Chamber of Commerce several months after delivery of the goods in question on the basis of a certificate issued by the Lugano Chamber of Commerce, which was not in a position to carry out any on-the-spot checks in Italy.

37 Finally, it emphasizes that the applicant was not able to give it details of the route by which the goods were transported or the name of the vessel carrying them or to produce the supporting documents on the basis of which the certificates of origin had been drawn up, whereas it could easily have at least allayed the doubts as to the existence of contractual relations with the South African companies Iscor and John Palmer Steel.

38 Referring to the judgments of the Court of Justice in Case 126/83 STS v Commission [1984] ECR 2769 and Case 118/83 CMC and Others v Commission [1985] ECR 2325, the defendant considers that it was entitled to verify compliance with the financing conditions, in particular the requirement concerning the origin of the goods, by asking for further information about the origin of the goods

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in order to dispel the doubts raised by the contradictory nature of the documents in its possession.

39 The defendant denies that the applicant has suffered any damage. The difference between the initial contract price and the amount actually received is merely the result of the agreement for reduction of the price of the goods and waiver of the right to have recourse to arbitration, an agreement freely entered into by the applicant and the UCPI on 17 July 1992. Moreover, the defendant contends that no damage arose in respect of financial costs because it paid the balance due following that agreement within the stipulated period.

40 The defendant also denies that there was any causal link between any unlawful conduct and the alleged damage. The difference between the initial price and the final price resulted not from its conduct but from the agreement entered into by the UCPI and the applicant on 17 July 1992. Not does it consider that any responsibility for the financial costs at issue can be imputed to it since it was required under Article 8.2 of the contract letter to await payment authorization from the UCPI. Responsibility for that part of the damage falls upon the applicant, which, in 1991 and 1992, temporized rather than producing evidence of the Community origin of the goods.

41 In its reply, the applicant claims that the agreement it concluded with the UCPI on 17 July 1992 is effective only between the parties to it and has no bearing on any claim for non-contactual liability. It emphasizes that it was the defendant which suggested recourse to the South African price. As far as it is concerned, the conclusion of that agreement was dictated by a need for liquid funds and, in the event, it had to choose between accepting a reduction in the price or not being paid at all in the short term.

42 According to the defendant, either the applicant freely entered into the agreement reducing the price of the goods and therefore cannot claim to have suffered damage or else it signed that agreement under duress so that the appropriate course would have been to challenge it, which it did not do.

Findings of the Court

43 The Court observes first that according to settled case-law contracts financed by the EDF remain national contracts which only the ACP States have the responsibility of preparing, negotiating and concluding. For their part, undertakings which submit tenders for or are awarded the contracts in question remain outside the exclusive dealings conducted on this matter between the Commission and the ACP States (STS v Commission, cited above, paragraph 18, Case C-257/90 Italsolar v Commission [1993] ECR I-9, paragraph 22, Case T-451/93 San Marco v Commission [1994] ECR II-1061, paragraph 42).

44 Furthermore, Community liability depends on proof by the applicant of the unlawfulness of the alleged conduct of the Community institution concerned, the reality of the damage and the existence of a causal link between that conduct and the alleged damage (Joined Cases 197/80, 198/80, 199/80, 200/80, 243/80, 245/80 and 247/80 Ludwigshafener Walzmuehle and Others v Council and Commission [1981] ECR 3211, paragraph 18, Italsolar, cited above, paragraph 33, Joined Cases T-481/93 and T-484/93 Exporteurs in Levende Varkens and Others v Commission [1995] ECR II-0000, paragraph 80).

45 Finally, the Commission has not only the right but also the duty to ensure, before any payments are made out of Community funds, that the conditions for such payments are in fact fulfilled (CMC, cited above, paragraph 44). To that end, it is under a duty in particular to seek the necessary information in order to ensure the economical administration of the resources of the EDF (same judgment, paragraph 47, and Case C-370/89 SGEEM and Etroy v EIB [1993] ECR I-2583, paragraph 31) and to refuse to endorse invoices submitted to it (San Marco, cited above, paragraph 50).

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46 It is in the light of those factors that it must be considered whether the defendant has been guilty of unlawful or improper conduct.

47 In this case it was incumbent on the defendant to ensure, in particular, compliance with the precondition for financing, according to which the goods delivered had to originate in the Community or an ACP State.

48 The applicant cannot criticize the defendant for not having prevented consumption of the goods before their acceptance and transfer of title. Since contracts financed by the EDF are national contracts to which only the ACP State and the contractor are parties, it would certainly not have been appropriate for the defendant to interfere in such matters, which are of a purely contractual nature.

49 Nor can the applicant criticize the defendant for doubting, despite the existence of a certificate of origin from the Brussels Chamber of Commerce evidencing the Italian, and thus Community, origin of the goods, that the latter fulfilled the prescribed conditions. It is clear from a telex from Cifel to the UCPI that the documents accompanying the goods delivered mentioned that they came from a South African company. Moreover, the applicant has not denied that the inspection documents relating to the goods were not provided prior to their shipment and related to inspections carried out by a South African company. Furthermore, it was from South Africa that the goods came to Mozambique. However, South Africa is not a signatory to the Third Lomé Convention.

50 Since proof of the origin of the goods delivered was the responsibility of the successful tenderer, the defendant was, in the light of the foregoing considerations, fully entitled to require documents or additional information to support the certificate of origin. It must be pointed out that the applicant has produced no evidence such as to enable the Community origin of the goods delivered to be established beyond doubt. It has not even been able to provide the supporting documents on the basis of which the Lugano Chamber of Commerce drew up its certificate of origin, on which the Brussels Chamber of Commerce relied in issuing its own. In response to a written request from the Court, the applicant did no more than produce an incomplete copy of a documentary credit containing no information as to the origin of the goods sold, an undated letter from an Italian transport company certifying that the applicant is known as an exporter, consignee, principal or guarantor in respect of transactions involving goods, in particular steel, carried by Messrs Jadroplov between autumn 1989 and summer 1991, and extracts from Lloyds Registers concerning vessels bearing the name Africa mentioned on the export permit. The applicant cannot in any event base any argument on the imprecise nature of the term "bona fide document" since it has produced nothing to support its certificate of origin. The Court also considers that the applicant was fully informed as to the evidence that it was required to produce (see paragraphs 13 and 14, above).

51 It follows that the defendant was fully entitled to conclude that the financing condition concerning the origin of the goods was not satisfied in this case.

52 Finally, the applicant has no grounds for criticizing the defendant for playing an active role by requesting documents whose production was not required by the contract. The defendant did no more than inform the Mozambique authorities of its position and of the possibilities open to them. It did not, by so doing, in any way undermine the sovereignty of the People' s Republic of Mozambique. It is also apparent from the letter which it sent to the applicant on 25 November 1991 (see paragraph 16, above) and the fax that it sent to its delegation in Mozambique (see paragraph 18, above) that the Mozambique Government continued to take its own decisions independently.

53 Consequently, the applicant has not demonstrated that the defendant was guilty of any unlawful or improper action regarding the relations between the People' s Republic of Mozambique and the applicant.

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54 It follows that the applicant has not proved any unlawful or improper conduct on the part of the defendant.

55 Furthermore, according to settled case-law the damage must be a sufficiently direct consequence of the conduct complained of (Joined Cases 64/76, 113/76, 167/78 239/78, 27/79, 28/79 and 45/79 Dumortier Frères and Others v Council [1979] ECR 3091, paragraph 21; see also, with regard to Article 40 of the ECSC Treaty, which is similarly worded and can be applied by analogy to this case, Joined Cases C-363/88 and C-364/88 Finsider and Others v Commission [1992] ECR I-359, paragraph 25, and the cases cited therein).

56 It is clear from the documents before the Court and the arguments presented at the hearing that the damage of which the applicant complains derives, primarily, from two factors: first, the People' s Republic of Mozambique' s ultimate refusal to pay the agreed price in its entirety and, secondly, the agreement of 17 July 1992 following that refusal whereby the initially agreed price was reduced and the right to have recourse to arbitration was waived.

57 The Court observes that, even though the defendant may have indirectly influenced the conduct of the Mozambique Government by suggesting the conclusion of that agreement, the fact remains that the applicant has not shown that either party entered into it under duress. Moreover, rather than concluding that agreement, the applicant could, as the UCPI suggested to it (see paragraph 20, above), have had recourse to arbitration in order to settle the difference. The fact that, according to the applicant, it chose not to follow that course because it was in urgent need of liquid funds cannot have the effect of attaching responsibility for the damage to the defendant, since the motive referred to does not involve it in any way.

58 It should also be borne in mind that it has been held that, where a contractual dispute between the State awarding a contract financed by the EDF and the successful tenderer has not been settled earlier on an amicable basis or by arbitration, the successful tenderer is unable to establish that the Commission' s action caused it to sustain damage distinct from the damage in respect of which it ought to have sought compensation from the State which awarded the contract, in accordance with the appropriate procedure (Case 33/82 Murri Frères v Commission [1985] ECR 2759, paragraph 38).

59 In this case the applicant seeks compensation for damage corresponding exactly to the price reduction which it granted to the UCPI under the agreement it concluded with the latter on 17 July 1992 together with the financial costs incurred as a result of that agreement. Since it has not challenged, in accordance with the appropriate procedure, that agreement and the refusal of the Mozambique Government to pay the full price initially agreed, the applicant is unable to establish that the defendant' s action caused it to sustain damage distinct from the damage in respect of which it ought to have sought compensation from that State.

60 Nor, for the same reason, has it established any causal link between the conduct for which the defendant is criticized and the alleged damage.

61 It follows that the action must be dismissed in its entirety.

DOCNUM	61994A0175
AUTHOR	Court of First Instance of the European Communities
FORM	Judgment

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TREATY	European Economic Community
PUBREF	European Court reports 1996 Page II-00729
DOC	1996/07/11
LODGED	1994/04/20
JURCIT	11992E215-L2 : N 22 11951K040 : N 55 21986A0331(01) : N 1 31991Q0530-A87P2 : N 62 61976J0064 : N 55 61980J0197 : N 44 61982J0033 : N 58 61983J0118 : N 38 43 61983J0126 : N 38 43 45 61988J0363 : N 55 61989J0370 : N 45 61990J0257 : N 43 44 61993A0451 : N 43 45 61993J0481 : N 44
SUB	External relations ; European Development Fund ; Public contracts of the European Communities
AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Belgium
NOTES	Ritleng, D. ; Simon, Denys: Europe 1996 Octobre Comm. no 342 p.9-10 ; Gautier, Yves: Journal du droit international 1997 p.503-506
PROCEDU	Action for damages - unfounded
DATES	of document: 11/07/1996 of application: 20/04/1994

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be suggested. As for the safety-coordinator, the contract documents required the introduction of one or more persons or bodies able to assume those tasks and De Waele's tender fulfilled that requirement.

- Findings of the Court

73 It is settled case-law that the Council has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and that the Court's review must be limited to verifying that there has been no serious and manifest error (Case 56/77 Agence européenne d'interims v Commission [1978] ECR 2215, paragraph 20; Adia interim v Commission, cited above, paragraph 49, and Case T-139/99 AICS v Parliament [2000] ECR II-2849, paragraph 39).

74 In the present case, it is apparent from the file that the contract was awarded to the most economically advantageous tender. However, it should be pointed out that Article 30(2) of Directive 93/37 does not list the criteria which may be adopted as criteria for the award of a contract to what is the most economically advantageous tender. Although that provision thus leaves it to the Council to choose the criteria on which it proposes to base its award of the contract, that choice may relate only to criteria aimed at identifying the offer which is economically the most advantageous (see, to that effect, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraphs 35 and 36). In order to determine which is the most economically advantageous tender, the Council must be able to exercise its discretion in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question (see, to that effect, Case 274/83 Commission v Italy [1985] ECR 1077, paragraph 25).

75 In that regard, the parties agree that the Council set out in the contract documents eight award criteria which it intended to use. Notwithstanding the applicant's assertions, the documents before the Court clearly show that the Council correctly assessed and classified the three tenders submitted in the present case in respect of each of those eight criteria. The Court also considers that the applicant's argument that its tender was wrongly assessed in relation to that of De Waele in respect of the criteria relating to the experience and competence of the permanent team, to the quality of the subcontractors and suppliers and to the safety-coordinator cannot be accepted.

76 Admittedly, the applicant's tender was ranked first for most of the criteria listed in the contract documents. However, the Council considered, as is apparent from the conclusion of the report to the CCAM, that, although `the tenders submitted by both De Waele and [the applicant met] the criteria of the contract documents best overall, De Waele's financial proposal [was] the more advantageous'. It must be inferred from that that, although its tender was ranked higher for most of the eight criteria in question, the applicant was eliminated because of the relatively high price of its tender.

77 However, it should be pointed out that the Council listed the eight award criteria in question without specifying the order of importance applied to them. This is not incompatible with Article 30(2) of Directive 93/37, which does not prescribe but merely recommends that the criteria for awarding a contract should be placed in order of importance. In those circumstances, it should be pointed out that, contrary to what the applicant claims, each of the eight criteria does not necessarily have the same value unless there is an indication to the contrary in the contract documents. The Court considers that the Council has a wide discretion not only in choosing the contract-award criteria which it intends to follow but also as regards the relative weight it accords to the various criteria for the purpose of taking a decision to award a contract following a tendering procedure, provided that the assessment it carries out is designed to identify the most economically advantageous offer.

78 It is important to point out that the eight criteria referred to in paragraph 8 above are, apart from the first criterion concerning the conformity of the tender, qualitative and quantitative.

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The Court considers that the criterion concerning the conformity of the tender is absolute. If the tender does not comply with the contract documents, it must be rejected. The second criterion, the price of the tender, is quantitative and provides an objective basis for comparing the financial costs of the tenders. The other six criteria are all qualitative and their main function is to verify that each tenderer has the skills and aptitudes necessary for executing the contract works. However, it must be held that, as, in the present case, the three tenders revealed no significant differences - with regard to the qualitative criteria - which might affect their respective definitive financial values, the Council was entitled, within the limits of its discretion, to accord more weight to the second criterion, concerning the price of the tender.

79 As for the applicant's complaint that the Council had not taken sufficient account of the differences between the applicant and De Waele in respect of three criteria, namely those relating to the experience and competence of the permanent team, to the quality of the proposed subcontractors and suppliers, and to the safety-coordinator, the Court considers that that complaint must be rejected. With regard to the criterion concerning the experience and competence of the permanent team, the Court considers that, as the Council rightly submits, the fact that the applicant is already working in the Council's buildings cannot be a preponderant factor if the effectiveness of the tendering procedure is not to be negated. In any event, the applicant does not demonstrate the alleged lack of experience and competence of De Waele's permanent team. As regards the criteria of the quality of the subcontractors and suppliers and of the safety-coordinator, the applicant merely refers to the fact that it proposed more companies than De Waele, without challenging the quality of De Waele's proposals.

80 It follows that the Council has not infringed the contract documents and Articles 18 and 30 of Directive 93/37 by awarding the contract to the lowest-priced tender, all things being relatively equal otherwise.

81 It is apparent from the foregoing that this plea must be rejected in its entirety.

The claim for compensation

82 The applicant requests payment of the sum of BEF 153 421 286 or EUR 3 803 214, subject to increase, together with interest thereon at the rate of 6% from 12 April 2000, by way of damages for the harm which it has suffered owing to the unlawful conduct of the Council during the procedure for the award of the contract in question.

83 In accordance with settled case-law, for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the conduct alleged against the institution concerned, the fact of damage and the existence of a causal link between that conduct and the damage complained of (Case T-175/94 International Procurement Services v Commission [1996] ECR II-729, paragraph 44; Case T-336/94 Efisol v Commission [1996] ECR II-1343, paragraph 30, or Case T-267/94 Oleifici Italiani v Commission [1997] ECR II-1239, paragraph 20). Where one of those conditions is not fulfilled, the action must therefore be dismissed in its entirety and it is not necessary to examine the other conditions for that liability (Case C-146/91 KYDEP v Council and Commission [1994] ECR I-4199, paragraph 19).

84 It follows from the Court's conclusions relating to the application for annulment that the applicant has not adduced proof of unlawful conduct on the part of the Council.

85 It follows that the claim for compensation must be rejected.

86 It follows from all the above considerations that the application must be dismissed in its entirety.

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AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2000 ; A ; judgment
PUBREF	European Court reports 2003 Page II-00135
DOC	2003/02/25
LODGED	2000/07/13
JURCIT	31977Q1231-A56 : N 2 31977Q1231-TITIV : N 1 61977J0056 : N 73 61983J0274 : N 74 61985J0015 : N 37 61989A0009 : N 37 61991J0146 : N 83 61992J0137 : N 37 31993L0037-A08 : N 4 31993L0037-A08P1 : N 54 58 31993L0037-A08P3 : N 45 31993L0037-A18 : N 5 80 31993L0037-A30 : N 6 80 31993L0037-A30P2 : N 74 77 31993L0037 : N 3 61994A0166 : N 55 61994A0175 : N 83 61994A0267 : N 83 61994A0336 : N 83 61994J0087 : N 39 61995A0019 : N 54 55 73 61996J0403 : N 27 11997E230-L4 : N 27 11997E230 : N 37 11997E253 : N 55 31997L0052 : N 3 4 54 31999R2673 : N 1 61999A0139 : N 73 62000J0019 : N 74
SUB	Public contracts of the European Communities
AUTLANG	French
MISCINF	POURVOI : C-186/03
APPLICA	Person
DEFENDA	Council ; Institutions

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NATIONA	Belgium
NOTES	Antonucci, Marco: Il Consiglio di Stato 2003 II p.367-372 Caruso, Claudia: Diritto pubblico comparato ed europeo 2003 p.957-961 Braun, Peter: Public Procurement Law Review 2003 p.NA120-NA122
PROCEDU	Application for annulment - unfounded ; Action for damages - unfounded
DATES	of document: 25/02/2003 of application: 13/07/2000

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Judgment of the Court of First Instance (Fifth Chamber)
First Instance (Fifth Chamber)First Instance (Fifth Chamber)2002.
Esedra SPRL v Commission of the European Communities.
Public contract for the supply of services - Day nursery management services - Principle of non-discrimination - Contract notice - Contract documents - Reasons stated for decision not to award contract - Misuse of powers.
Case T-169/00.

1. Budget of the European Communities - Financial Regulation - Provisions applicable to tendering procedures - Prohibition of all contact between the institution and the tenderer after tenders have been opened - Scope - Limits

(Commission Regulation No 3418/93, Art. 99(h), second subpara.)

2. Public procurement in the European Communities - Conclusion of a contract following an invitation to tender - Discretion of the institutions - Judicial review - Limits

3. Acts of the institutions - Statement of reasons - Obligation - Scope - Decision to reject a tender under the procedure for the award of a public service contract

(Art. 253 EC; Council Directive 92/50, Art. 12(1))

4. Actions for annulment - Pleas in law - Misuse of powers - Concept

1. According to the second subparagraph of Article 99(h) of Regulation No 3418/93 laying down detailed rules for the implementation of certain provisions of the Financial Regulation, any contact in tendering procedures between the institution and the tenderer after the tenders have been opened is prohibited save, exceptionally, if some clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected. In those cases, the institution may take it upon itself to contact the tenderer and, in the event of a dispute, it is necessary to determine whether the tenderer's reply to the Commission's request for clarification should be regarded as clarifying the terms of its tender or whether it goes beyond that and modifies the substance of the tender by reference to the requirements of the contract documents.

(see paras 49, 52)

2. The Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review must be limited to verifying that there has been no serious and manifest error.

(see paras 95, 114, 135, 152, 162)

3. It follows from Article 12(1) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, which, pursuant to Article 126 of Regulation No 3418/93, applies to contracts awarded by the institutions where the value of the contract exceeds the threshold fixed by Article 7(1) of that directive, that the Commission must, within 15 days of receipt of his request, inform an unsuccessful tenderer of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer, except for information described as confidential.

This manner of proceedings satisfies the purpose of the obligation to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights; and, on the other, to enable the Court to exercise its power of review.

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(see paras 188-190)

4. The concept of misuse of powers has a precisely defined scope in Community law and refers to cases where an administrative authority exercises its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated.

(see para. 198)

In Case T-169/00,

Esedra SPRL, established in Brussels (Belgium), represented by G. Vandersanden, E. Gillet and L. Levi, avocats, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by X. Lewis and L. Parpala, and, subsequently, by H. van Lier and L. Parpala, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION, first, for suspension of operation of the Commission's decision not to award to the applicant the public contract relating to invitation to tender No 99/52/IX.D.1, notified to the applicant by letter of 31 May 2000, and the Commission's decision to award the contract to a group of Italian companies represented by Centro Studi Antonio Manieri Srl, notified to the applicant by letter of 9 June 2000, and, second, for compensation for the damage allegedly caused by those decisions,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 18 September 2001,

gives the following

Judgment

Costs

214 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the costs, including those incurred in the proceedings for interim relief.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

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1. Dismisses the application;

2. Orders the applicant to bear its own costs and pay those of the Commission, including the costs incurred in the proceedings for interim relief.

Legal context

1 The award of public contracts for the supply of services by the Commission is subject to the provisions of Section 1 (Articles 56 to 64b) of Title IV of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), as last amended, at the material time, by Council Regulation (EC, Euratom, ECSC) No 2673/99 of 13 December 1999 (OJ 1999 L 326, p. 1) which entered into force on 1 January 2000 (the Financial Regulation).

2 Under Article 56 of the Financial Regulation:

... when concluding contracts for which the amount involved is equal to or greater than the threshold provided for by the Council directives on the coordination of procedures for the award of public works, supplies and services contracts, each institution shall comply with the same obligations as are imposed upon bodies in the Member States by those directives. The implementing measures shall include appropriate provisions to that end.

3 Article 139 of the Financial Regulation provides that [in] consultation with the European Parliament and the Council and after the other institutions have given their opinions, the Commission shall adopt implementing measures for this Financial Regulation.

4 Accordingly, the Commission adopted Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation (OJ 1993 L 315, p. 1). Articles 97 to 105 and 126 to 129 of that regulation apply to the award of public contracts for the supply of services. In particular, Article 126 provides as follows:

The Council directives on public works, supplies and services contracts shall be applicable to the award of contracts by the institutions whenever the amounts involved are equal to or greater than the amounts provided for in those directives.

5 In the present case, the relevant directive is Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 97/52/EC of 13 October 1997 of the European Parliament and the Council (OJ 1997 L 328, p. 1) (Directive 92/50), Article 7(1)(a) of which provides for an application threshold of EUR 200 000 for public service contracts for, in particular, health and social services.

Facts giving rise to the dispute

6 In 1994 the Commission decided to entrust to a private company the management of the Centre de la Petite Enfance Clovis, which is a day nursery and kindergarten for children of the staff of the European institutions situated on its premises in Boulevard Clovis, Brussels (the CPE Clovis). The Commission issued an invitation to tender and subsequently awarded the contract to two Italian companies, Aristea and Cooperativa Italiana di Ristorazione. The management of the CPE Clovis was then entrusted to the applicant company, which was set up by the two aforementioned companies. The management contract was concluded for an initial term of two years from 1 August 1995, renewable for three one-year periods.

7 By letter of 15 April 1999, the applicant informed the Commission that it did not intend to seek renewal of the contract for 1999/2000.

8 On 26 May 1999, the Commission, pursuant to Council Directive 92/50, published in the Supplement

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to the Official Journal a first contract notice for the services relating to the management of the CPE Clovis (contract notice No 99/S 100-68878/FR, OJ 1999 S 100, p. 35). Those services are within category 25, Health and social services, of Annex I B to Directive 92/50. Three undertakings, among them the applicant and Centro Studi Manieri Srl (Manieri), applied to participate.

9 By letter of 2 July 1999, the Commission informed the applicant that it had decided not to award the contract for the management of the CPE Clovis within the framework of the procedure initiated on 26 May 1999 because the number of candidates was too low to ensure adequate competition.

10 On 10 July 1999, the Commission published a further contract notice for the management services of the CPE Clovis (contract notice No 99/S 132-97515/FR, OJ 1999 S 132). This notice was worded like the first and stated that the contract would be awarded to the economically most advantageous tender taking account of the prices tendered and the quality of the services proposed (details in the contract documents). Seven undertakings, including the applicant undertakings and Manieri, applied to participate.

11 The applications were examined on 28 October 1999 by an assessment panel consisting of four Commission officials (the assessment panel). The seven applicant undertakings were selected.

12 On 29 October 1999, the Commission sent the contract documents to the seven undertakings. The criteria on which the contract would be awarded were as follows:

The contract will be awarded to the economically most advantageous tender taking account of:

- the prices tendered and

- the quality of the tender and of the services proposed, evaluated, in descending order of importance, according to:

(a) the quality of the teaching programme (40%)

(b) the measures and resources employed to provide cover for staff absences (30%)

(c) the methodology and monitoring devices proposed for monitoring of: (30%)

- the quality of service and management

- the maintenance of staffing levels

- the implementation of the teaching programme.

13 The contract documents were supplemented by the report of the site visit and of the mandatory information meeting on 24 and 25 November 1999 (the contract documents).

14 By 7 February 2000, the final date set for that purpose, four undertakings, including the applicant and Manieri, had submitted tenders.

15 The tenders were opened on 14 February 2000. The Commission then asked for further particulars from the tenderers. The applicant received and replied to three such requests from the Commission, dated 25 and 29 February and 17 March 2000. Manieri received five requests dated 25 (two requests) and 29 February, 3 and 10 March 2000, to which it replied on 10 and 14 March 2000.

16 The tenders were then examined by three assessment panels.

17 First, they were considered from the viewpoint of quality by an assessment panel consisting of six representatives of the Commission and a representative of the parents' association (the qualitative assessment panel). That panel delivered its report on 5 April 2000. The report placed Manieri's tender first, before that of Esedra.

18 Secondly, the tenders submitted by the four bidders were assessed from the viewpoint of price

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by Commission officials (the price assessment panel). That panel compiled a financial evaluation table of the tenders, which placed Manieri's tender second, before that of Esedra.

19 Thirdly, the qualitative assessment panel report and the abovementioned table were examined by a panel composed of six persons, of whom five were appointed in their capacity as Commission officials and the sixth in her capacity as representative of the Parents' Association (the tender assessment panel). That panel delivered its final assessment on 7 April 2000. The assessment repeats the conclusions of the two previous panels and concludes that Manieri's tender is the first and lowest tender in accordance with the requirements and qualitatively the best.

20 Following that examination, and after the favourable opinion of the Advisory Committee for Purchases and Contracts of 30 May 2000, the Commission awarded the contract in question to a group of Italian companies represented by Manieri, consisting of the latter and six other undertakings.

21 By letter of 31 May 2000, the Commission informed the applicant that it had not been awarded the contract in question (the refusal decision).

22 By letter of 2 June 2000, the applicant's lawyers asked the Commission to inform them of the reasons for the refusal decision. They also asked the Commission to suspend any measure designed to implement the decision to award the contract to another candidate (the award) and, consequently, not to conclude the contract referred to in the contract documents.

23 By fax of 9 June 2000, the Commission provided information regarding the reasons for awarding the contract to the Italian group represented by Manieri. Moreover, the Commission refused to suspend the operation of the award.

24 Following the award, the group represented by Manieri decided to entrust the work to a newly formed company incorporated under Belgian law called Sapiens in order to satisfy various obligations laid down by the Member State where the services were to be provided, in relation to employment law, tax law and social law (social insurance contributions and other employees' rights, payment of taxes, availability of a value-added tax (VAT) number, supervision of the management of facilities for small children in Belgium, etc.). The same procedure had been followed on the award of the previous contract.

Procedure and forms of order sought by the parties

25 The applicant brought the present action by application lodged at the Court Registry on 20 June 2000.

26 By separate document lodged at the Registry on the same day, the applicant submitted an application for interim relief in the form of suspension of the operation of the award decision and the refusal decision.

27 By order of 20 July 2000 in Case T-169/00 R Esedra v Commission [2000] ECR II-2951, the President of the Court of First Instance dismissed the application for interim relief.

28 In its application and reply, the applicant asked the Court to request the Commission to produce a number of documents and to allow it to submit its observations on them.

29 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of the measures of organisation of procedure under Article 64 of the Rules of Procedure, requested the applicant to reply to a question and the Commission to produce certain documents and also to reply to several questions. The applicant replied to the Court's question by letters of 28 and 29 June 2001 and the Commission produced the documents and replied to the Court's questions by letters of 22 June, 9 and 24 July 2001.

30 The parties presented oral argument and gave their replies to the Court's questions at the hearing

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on 18 September 2001. At the hearing, the applicant stated that the documents produced by the Commission were sufficient for it to prepare its case properly and therefore it considered that its request for production of the documents had been satisfied.

31 The applicant claims that the Court should:

- rule that the application is admissible and well founded;

- annul the refusal decision;

- annul the award decision;

- order the Commission to pay the applicant damages of EUR 1 001 574.09;

- order the Commission to pay the costs.

32 The Commission contends that the Court should:

- dismiss the application for annulment as unfounded;

- dismiss the claim for damages as unfounded;

- order the applicant to pay the costs.

33 By letter of 22 October 2001 the applicant requested the Court to reopen the oral procedure on the ground that the applicant had just become aware of a new fact which justified the reopening of that procedure. By letter of 27 November 2001 the Commission submitted its observations on that request and took the view that it was neither necessary nor justified to reopen the oral procedure.

The claims for annulment

34 The applicant puts forward five pleas in law in support of its application for annulment. The first plea alleges breach of the principle of non-discrimination. The second plea alleges disregard of the contract notice and the contract documents with regard to the evaluation of the successful tenderers' financial and technical standing. The third plea alleges disregard of the contract documents with regard to the appraisal of prices and the quality of the tenders. The fourth plea alleges breach of the obligation to state reasons, and the fifth plea misuse of powers.

The first plea, alleging breach of the principle of non-discrimination

35 The applicant claims that the Commission breached the principle of non-discrimination, which is a fundamental principle in relation to public contracts and is directly referred to in Article 3(2) of Directive 92/50, which provides that contracting authorities shall ensure that there is no discrimination between different services providers. Consequently the applicant contends, first, that the time it was allowed for submitting its tender was not the same as that allowed to the other applicants; second, that the Commission put questions to the tenderers which went beyond a request for clarification or the correction of obvious clerical errors in the tenders and, third, that the tenderers were not evaluated impartially.

1. The allegation that the applicant was not allowed the same time as the other tenderers for submitting its tender

Arguments of the parties

36 The applicant considers that the time it was allowed for submitting its tender was not the same as that allowed to the other tenderers. It observes that the final date for submitting tenders, which, according to the contract documents, was originally 6 January 2000, was postponed to 7 February 2000. The applicant states that it was the only candidate which was not informed of this as the Commission's letter in Italian dated 20 December 1999 stated that the final date had been deferred

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to 7 January 2000, not 7 February 2000. The applicant points out that the other candidates were informed of the later date by letter or telephone. In particular, the applicant observes that Manieri, which had also received a letter in Italian with the same mistake as to the new final date, was informed of the mistake by telephone. According to the applicant, it was only on 7 January 2000, when its representative went to the Commission's offices to lodge its tender, that he was informed that in fact the final date had been postponed to 7 February 2000.

37 The applicant states that it had made arrangements to meet the final date which it had been given, namely 7 January 2000. Therefore the fact that it could have taken back its tender of 7 January in order to supplement it and lodge it on 7 February did not put the applicant back on an equal footing with the other candidates, who had been able to spread the work over a longer period from the beginning. In this connection the applicant notes that it was not able to start work again on its tender until 24 January, when some of its staff who had taken part in drawing up the tender returned from holiday and the external consultants instructed to prepare it were able to free themselves from other commitments undertaken after 7 January 2000.

38 The Commission disputes the applicant's arguments because in any case the final date for the submission of tenders was the same for all the candidates, namely 7 February 2000 and the applicant was able to lodge its tender after 6 January 2000. According to the Commission, the error as to the date in the latter of 20 December 1999 did not lead to discrimination against the applicant.

Findings of the Court

39 There is no factual support for the applicant's assertion that it was not given the same deadline as the other candidates because its final date for the submission of a tender was deferred to the same date as for the other candidates.

40 It is clear from the facts set out above that the Commission originally set 6 January 2000 as the final date for the submission of bids. That date was shown in paragraph 2 of the terms and conditions in the contract documents which the Commission sent on 29 October 1999 to the seven successful candidates in the selection process.

41 On 20 December 1999 the final date was deferred to 7 February 2000. As a result of a copying error in the Commission's fax to Esedra and Manieri, they were informed that the final date had been deferred to 7 January, not 7 February, 2000. The mistake was noticed by Manieri, which contacted the Commission for clarification and was informed, by fax of 22 December 1999, that the final date had been deferred to 7 February 2000. Esedra, however, was misled and went to the Commission to lodge its tender on 7 January. Nevertheless, it was able to withdraw the tender and was allowed the extension to 7 February.

42 On this point it must be observed that it was Manieri which sent the Commission a fax on 21 December 1999 to inform it of the error as to the date, which the Commission rectified the next day by returning Manieri's fax with a handwritten note that the final date for the submission of bids had been deferred to 7 February 2000.

43 Although it is regrettable that the Commission, after being informed of the error, did not see fit to check whether the fax to Esedra contained the same error as that to Manieri so as to rectify it by contacting the applicant, nevertheless, if the applicant was unable to revise its tender before 24 January 2000, the reasons it puts forward in this connection are attributable to itself and not to the fact that the Commission was slow in informing it that the final date had been postponed. Moreover, the applicant has produced nothing at all to prove its assertion that it was unable to forewarn in good time the external consultants it used, who are said to have had other commitments from 7 January and would therefore not be free until 24 January.

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44 In any case, the applicant does not claim that the fact that it was informed of the postponement of the final date on 7 January 2000, and not on 22 December 1999 like Manieri (or 20 December 1999, like the other candidates) had the consequence that the tender it presented was insufficiently detailed.

45 For those reasons the applicant's complaint of discrimination against it by reason of the postponement of the final date must be rejected.

2. The allegation that the Commission put questions to the tenderers which went beyond the request for clarification or the correction of obvious clerical errors in the tenders

Arguments of the parties

46 The applicant claims that the Commission put questions to Manieri which went beyond a request for clarification or the rectification of obvious clerical errors in the wording of Manieri's tender. In doing so, according to the applicant, the Commission infringed the second subparagraph of Article 99(h) of the detailed rules for the implementation of the Financial Regulation, which states that the Commission may not contact a tenderer after tenders have been opened unless some clarification is required or unless obvious clerical errors in the tender must be corrected. The Commission is also said to have breached the principle of non-discrimination underlying that provision.

47 The applicant claims that Manieri received several requests from the Commission, dated 25 and 29 February and 3 March 2000, which enabled it to finalise its bid. Likewise the Commission's requests entailed questions from Manieri, which was a further infringement of the second subparagraph of Article 99(h) of the detailed rules for the implementation of the Financial Regulation.

48 The Commission disputes the applicant's reasoning. According to the Commission, the questions put to all the tenderers on 25 and 29 February 2000 had already been dealt with in the tenders and the replies merely provided clarification, without which none of the tenderers would have been able to finalise its bid. The Commission adds that Manieri did not finalise its tender, which was lodged within the specified period. The Commission also contends that the three requests for clarification to which the applicant refers are entirely in accordance with the second subparagraph of the said Article 99(h) and, in that connection, cites the judgment in Case T-19/95 Adia Interim v Commission [1996] ECR II-321. The Commission adds that the only question raised by Manieri concerned the practical arrangements for speaking to the children in a different Community language.

Findings of the Court

49 It should be noted that, according to the second subparagraph of Article 99(h) of the detailed rules for the implementation of the Financial Regulation, any contact between the institution and the tenderer after the tenders have been opened is prohibited save, exceptionally, if some clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected. In those cases, the institution may take it upon itself to contact the tenderer (see the judgment in Adia Interim v Commission, cited above, paragraph 43).

50 In this connection, the documents produced by the Commission in response to several measures of organisation of procedure show that Manieri received five requests for clarification from the Commission dated 25 February (two requests), 29 February, and 3 and 10 March 2000, and that it replied to them on 10 and 14 March 2000.

51 In the context of the measures of organisation of procedure, the Commission also produced Manieri's replies to the requests for clarification, and also extracts from Manieri's tender specifically relating to questions 1, 2, 5 and 6 in the first fax of 25 February 2000 and to the questions in the first, third and fourth indents of the fax of 3 March 2000. In addition, the Commission indicated, for each of the seven aforementioned questions, the parts of the contract documents to which the

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extracts from Manieri's tender and the requests for clarification relate.

52 For each of the seven questions considered below, it is necessary to determine whether Manieri's replies to the Commission's requests for clarification should be regarded as clarifying the terms of its tender or whether the replies go beyond that and modify the substance of the tender by reference to the requirements of the contract documents. The other questions are not contested by the applicant.

53 In the first question in the first fax of 25 February 2000 the Commission asked Manieri to provide very specific examples of a simulated staff training plan (frequency, type of sequence, type of training). It is clear from the file that Manieri's tender contained a detailed description of its training plan and that, in reply to the Commission's request, Manieri supplied a simulated training plan accompanied by a table entitled staff training plan.

54 In the light of those documents, it must be noted that the data used by Manieri in its reply had already appeared in the training plan included in its tender, in accordance with the requirements of the contract documents. Therefore Manieri's reply merely clarifies the data given in the tender, without modifying its terms.

55 In the second question in the first fax of 25 February 2000 the Commission asked Manieri to provide a description of the psychological and vocational tests (frequency, type of tests). The file shows that Manieri's tender contained a list of measures intended to limit staff absenteeism and these included the organisation of regular psychological and vocational tests of staff. In response to the Commission's request, Manieri provided the description required.

56 It must be observed, in the light of those documents, that psychological and vocational tests were not expressly required by the contract documents. However, Manieri's tender tackled the problem of staff absenteeism by envisaging the introduction of such tests and that is why the Commission requested clarification regarding those measures. Consequently Manieri's reply does no more than clarify for the Commission the concept of the psychological and vocational tests mentioned in the tender, without modifying its terms.

57 The fifth question in the first fax of 25 February 2000 was as follows: Is the entrance charge for museums and/or the charge for excursions paid by the contractor, with details of the number of excursions planned for each year, frequency and age groups. The file shows that Manieri's tender described the proposed visits and excursions, without expressly stating that the cost would be borne by the tenderer. In reply to the Commission's request, Manieri stated that it would indeed meet the cost. Manieri also provided information on the number and frequency of excursions and the age groups concerned.

58 In the light of those documents it must be observed, regarding the cost of visits and excursions, that the fact that Manieri's tender did not expressly mention that the cost would be borne by Manieri has no bearing on the present case. The contract documents stated that it could not be otherwise, but they did not require this to be stated in the tender. Therefore a negative response by Manieri to the Commission's request for clarification would have logically entailed the rejection of its tender, whereas a positive response in no way alters the tender. Likewise, with regard to, first, the frequency of excursions and, second, the age groups concerned, it must be observed that Manieri's reply merely repeats the information given in the tender and specifies the age of the children concerned, which does not mean that the tender was modified.

59 The sixth question in the first fax of 25 February 2000 was as follows: Stability of groups: is this a part-time staff member in terms of working hours and, if so, how many hours per week? Or is this a part-time staff member by virtue of function, but with effective full-time presence? Show on the basis of the general organisation chart and in the same structure, numbering each staff member from 1 to 50 paediatric nurses (e.g. P1, P2, P3, P4, etc.) in the division of each room

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and in the function of each person (A, B, C, part-time) and the same for the teachers. The file shows that Manieri's tender described the measures envisaged to ensure the stability of groups of pupils and groups of teachers. In particular, the tender stated that part-time teachers would carry out specific tasks or would provide for the presence of a third nurse in certain situations. In response to the Commission's request, Manieri gave the clarification required with regard to the question of part-time staff and supplied the organisation chart sought by the Commission.

60 In the light of those documents it must be observed that, on the question of part-time staff, Manieri's reply merely repeats the terms of its tender without modifying its substance. Moreover, it should be noted that, as regards the organisation chart desired by the Commission, that chart serves merely to illustrate Manieri's reply, without replacing the complete and detailed organisation chart required by the contract documents, which was included in Manieri's tender.

61 The first, third and fourth questions in the fax of 3 March 2000 were as follows:... please name the theoretical manual [Hazard Analysis Critical Control Point ("HACCP")] applicable on starting-up of the contract and state its period of adaptation.... Please describe the internal checks carried out by your company and what are the external checks made by Laboraco. Please state the types of checks, their frequency and numbers. It appears from the file that Manieri's tender contained, first, a general and theoretical description of the measures to be taken for health and cleanliness and that it considered health questions as an integral part of a general system of quality control. In addition, in its tender Manieri stated that it undertook to ensure the health quality of its services by using the services of a specialist firm, Laboraco. In response to those requests by the Commission, Manieri gave the clarification required and supplied an organisation chart of the proposed quality and self-regulation system, together with a description of the persons in charge of it, a theoretical list of checks and a theoretical HACCP manual.

62 In the light of those documents it must be observed that Manieri's reply merely clarifies the wording of its tender without modifying it in substance. Manieri's tender meets the requirements of the contract documents, which require each candidate to include with its tender a brief note of its own progress in the matter of health, the human resources and qualifications used and, failing that, the measures taken at present to ensure the health quality of its services, and Manieri's reply merely gives details of the proposed internal and external checks for that purpose. Likewise, sending a theoretical HACCP manual in response to a request from the Commission cannot be regarded as a modification of the tender because the latter contained a general and theoretical description of the measures to be taken for health and cleanliness, the HACCP manual being only one means to that end.

63 In conclusion, the foregoing examination of the contract documents, Manieri's tender, the requests for clarification and Manieri's replies show that the Commission did not breach the principle of non-discrimination enshrined in Article 3(2) of Directive 92/50 and the second subparagraph of Article 99(h) of the detailed rules for the implementation of the Financial Regulation. Manieri's replies to the Commission's requests constitute clarification of the terms of its tender and they in no way modify the substance of the tender in relation to the requirements laid down by the contract documents.

64 Consequently the applicant's complaints relating to discrimination against it by reason of Manieri's replies to the Commission's requests for clarification must be rejected.

3. The applicant's allegation that the assessment of the tenders was not impartial

65 According to the applicant, the assessment of the tenders was not impartial because the parents' association and the Joint Management Committee of the Early Childhood Centre (Cocepe), two bodies hostile to the applicant for illegitimate reasons, took part in the assessment. The applicant also

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considers that the Commission wished to make a clean sweep of the past and to exclude the applicant from the CPE Clovis because the applicant managed the CPE when alleged paedophilic acts were committed there in 1997.

66 First, the applicant observes that the deputy chairman of the parents' association took part in the procedure for assessing tenders in the present case. However, the chairman of that association had informed the Commission of her dissatisfaction by sending it a copy of a letter she had written to a member of Cocepe, complaining of the way in which the applicant had managed the CPE Clovis. Moreover, the parents' association had asked the Commission to terminate the contract current at that time.

67 The Court considers that there can be no objection to the participation of a representative of the parents' association in the assessment of tenders in view of the importance of the parents' contribution to the cost of the CPE Clovis and their interest in educational matters connected with the welfare of the children.

68 Similarly, discrimination against the applicant cannot be inferred from the dissatisfaction expressed by the chairman of the parents' association concerning the way in which Esedra managed the CPE Clovis. The letter on which that allegation is based was addressed to a member of Cocepe and a copy was sent to the Commission for information. Examination of the letter shows that it was sent by a parent of pupils in her personal capacity and not on behalf of the parents' association. The writer of the letter never refers to her position as chairman of the parents' association. Furthermore, it appears that in the final analysis she did not wish to damage the applicants' image or its business, as she made clear in response to the action brought against her by Esedra.

69 In addition, the applicant's allegation that the parents' association asked the Commission to terminate the applicant's management contract at the time is based solely on a leaflet of the local staff committee and that document does not justify attributing such a request to the parents' association.

70 Consequently, the applicant's complaint relating to the participation of a representative of the parents' association in the procedure for awarding the contract in question must be rejected.

71 Second, the applicant contends that Cocepe followed the progress of the procedure for awarding the contract and the procedure had been mentioned at the 221st meeting of that body on 24 March 2000. On this point the applicant observes that Cocepe is a joint body consisting of representatives of the staff committees. Like the parents' association, the local staff committee is hostile to the applicant, as shown by its objection to the privatisation of the activities of the CPE Clovis in 1995.

72 The Court observes that it appears from the specifications annexed to the contract documents that Cocepe is a joint body consisting of management representatives and staff committee representatives, with four representatives of the Commission, two of the Council, two of the Economic and Social Committee and of the Committee for the Regions, and two representatives of the Parliament. Within the framework of the CPE Clovis management contract, Cocepe assists the Commission in its task of monitoring, inter-institutional coordination and permanent evaluation. It also helps in observing the functioning of the CPE Clovis, considers requests by parents and delivers opinions on the operation of the Centre.

73 It must be noted that none of the members of Cocepe took part in appraising the tenders within the framework of the procedure for awarding the contract in question. In particular, the Commission states, without being contradicted by the applicant, that Cocepe cannot have access to tenders, which can only be disclosed to the assessment panels.

74 In addition, there is no basis for the applicant's assertion that the fact that Cocepe followed

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the procedure for awarding the contract or that it intervened in the preparation of the management contract infringes the principle of non-discrimination. Although Cocepe followed the procedure, this was only by way of a general outline of the progress of the invitation to tender at the 221st meeting, which had no influence on the assessment process.

75 The applicant's complaint that Cocepe took part in the procedure for awarding the contract in question must therefore be rejected.

76 Third, the applicant states that, as a result of alleged paedophilic acts committed in 1997, pressure was brought to bear on the Commission to exclude the applicant from the management of the CPE Clovis and that, in yielding to such pressure, the Commission's intention was to make a clean sweep of the past.

77 The Court observes that the applicant has not adduced the slightest evidence to show that the alleged paedophilic acts in 1997 resulted in any discrimination whatever against the applicant.

78 Accordingly, it must be made clear that it was the applicant, not the Commission, which terminated the contract for the management of the CPE Clovis, which is sufficient proof that the Commission did not regard the applicant as responsible for the events which are said to have occurred in 1997.

79 Likewise, the fact that the local staff committee criticised the way in which the applicant executed the contract and asked the Commission to make other arrangements for the management of the CPE Clovis does not affect the assessment of the applicant's tender because the staff committee did not take part in the assessment process.

80 Therefore the applicant's complaint that the Commission intended to eliminate the applicant because it managed the CPE Clovis at the time of alleged paedophilic acts in 1997 must be rejected.

81 It follows from the foregoing that the applicant is wrong in its submission that the Commission did not carry out an impartial assessment of the tenders.

82 The first plea in law must therefore be dismissed.

The second plea, alleging that the notice of invitation to tender and the contract documents were disregarded in relation to the assessment of the successful tenderer's financial and technical standing

83 The applicant contends that the successful tenderer, namely the group of companies represented by Manieri, does not have the financial and technical standing required by the notice of invitation to tender and the contract documents.

1. The successful tenderer's financial standing

Arguments of the parties

84 The applicant contends that the Commission ought to have eliminated Manieri from the procedure for the award of the contract in question because its financial standing and that of the other companies in the group it represents is insufficient. On this point the Commission disregarded the notice of invitation to tender and the contract documents, made a manifestly incorrect assessment and infringed Article 34 of Directive 92/50 and also the principle of non-discrimination.

85 Thus, the applicant notes that on 28 October 1999 the assessment panel decided to select the group represented by Manieri without having in its possession the balance sheets of three of the companies forming the group. Following the Commission's request of 13 October 1999, the balance sheets were received by the Commission only on 3 November 1999. On this point the applicant observes that the absence of the balance sheets could not be made up for by the joint and several undertaking given by the members of the group represented by Manieri because the Commission did not know the financial standing of three of them. Likewise, according to the applicant, the balance sheets supplied

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at the selection stage did not make it possible to establish that the candidate in question had the requisite financial standing as the annual financial value of the contract, which the applicant estimates at BEF 140 000 000 (EUR 3 470 509.34) was greater than the total turnover of the four members of the group represented by Manieri, whose balance sheet was given to the Commission, which was approximately BEF 60 000 000 (EUR 1 487 361.15) in 1998.

86 The applicant also criticises the assessment panel's preference for analysing technical standing rather than financial standing. The applicant contends that it is incumbent on the Commission to assess the financial criterion as well as the technical criterion, and not to prefer one to the other. From this viewpoint the applicant contends that, if the financial standing of the group represented by Manieri was not made clear in its application, the Commission ought to have obtained further particulars on that point, in accordance with Article 34 of Directive 92/50. The applicant adds that the different rules in force in the Member States governing the presentation of balance sheets and trading accounts of companies and legal persons cannot, in the absence of complete harmonisation in the matter, justify the abandonment of a criterion intended by the Community legislature. In this connection the applicant sees no reason why the balance sheets or accounts of a legal person should not include the figures requested, in particular the general turnover, the turnover specific to operating in the market in question and government aid, if any.

87 In addition, the applicant observes that the letter of 3 February 2000 from Deutsche Bank makes no significant contribution to the discussion because it was out of time and merely states, firstly, that Manieri can fulfil its financial obligations, but does not mention the amount of the contract in question and, secondly, that Manieri has a good reputation in its field of business, which is not that of the contract in question because it involves secondary education of the second grade.

88 The Commission contests the applicant's arguments and submits that the group represented by Manieri had the requisite financial standing to be selected, as proved by the documents it produced within the framework of the procedure for awarding the contract in question, in accordance with Articles 31 and 34 of Directive 92/50.

Findings of the Court

89 It should be observed that Article 31 of Directive 92/50 provides as follows:

1. Proof of the service provider's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance;

(b) the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established;

(c) a statement of the undertaking's overall turnover and its turnover in respect of the services to which the contract relates for the previous three financial years.

2. The contracting authorities shall specify in the contract notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which other references are to be produced.

3. If, for any valid reason, the service provider is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.

90 In addition, Article 34 of Directive 92/50 provides that within the limits of Articles 29 to 32, contracting authorities may invite the service providers to supplement the certificates and

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documents submitted or to clarify them.

91 Therefore, in accordance with Article 31(2) of Directive 92/50, the contract notice is the relevant document for determining whether the Commission made a serious and manifest error in selecting the application from the group of companies represented by Manieri.

92 Paragraph 13 of the contract notice, relating to information on the service provider's own situation and the formalities necessary for appraising the minimum financial and technical standing required, states that candidates must produce, together with their request to participate and mentioning reference 99/52/IX.D.1, the following documents:

...

(3) copies of the balance sheets and trading accounts for the last three years or if, for any valid reason, the candidate is unable to produce them, any other document proving his financial standing;

(4) a statement of the overall annual turnover in the last three financial years;

(5) a statement of the specific annual turnover in the sector to which the present invitation to tender relates, in the last three financial years;

...

93 In addition, paragraph 9 of the contract notice states that, if the tender is submitted on behalf of a group of service providers, all the members of the group must be jointly and severally responsible for the performance of the contract, while paragraph 12 states that the successful tenderer will be required to furnish a performance bond in the sum of EUR 400 000 before the contract takes effect.

94 Finally, the contract notice allows the Commission a certain discretion because paragraph 15(2) provides that the Commission may automatically reject an application which does not include all the information required in paragraph 13. Therefore the contract notice does not oblige the Commission to reject an incomplete application.

95 On this point, it must be observed that the Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review must be limited to verifying that there has been no serious and manifest error (see the judgments in Case 56/77 Agence Européenne d'Intérims v Commission [1978] ECR 2215, paragraph 20; the case of Adia Intérim v Commission, cited above, paragraph 49, and Case T-139/99 AICS v Parliament [2000] ECR II-2849, paragraph 39).

96 In the present case, the financial standing of Manieri and the other members of the group represented by it was appraised at two levels: at the time when applications were selected and, at a later stage, before the contract in question was awarded.

97 With regard to the first stage, it appears from the file that, when the selection of applications was carried out, Manieri's application was accompanied, firstly, by copies of the balance sheets and trading accounts for the last three years of four of the seven undertakings forming the group represented by Manieri, together with a substitute statement for the other three members (in accordance with paragraph 13(3) of the contract notice) and, secondly, a statement of the overall annual turnover in the last three financial years of each of the seven undertakings (in accordance with paragraph 13(4) of the contract notice) and a statement of the specific annual turnover in the sector to which the invitation to tender relates, in the last three financial years (in accordance with paragraph 13(5) of the contract notice).

98 Therefore, in view of the discretion granted to the Commission by the contract notice, the Commission cannot be criticised for not having rejected Manieri's application merely on the ground that Manieri

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gave no reason for the absence of copies of the balance sheets and trading accounts of three of the seven members of the group which it represents.

99 It must be observed that the Commission had other information which enabled it to determine the financial standing of the Manieri group in the absence of the balance sheets and trading accounts in question.

100 For example, the letter of 17 June 1999 from the bank Rolo Banca, which was annexed to Manieri's application, stated that Manieri had sufficient financial resources at its disposal. Such a document could be deemed an appropriate statement from a bank for the purposes of Article 31(1)(a) of Directive 92/50 which was in itself sufficient to prove the financial standing of a candidate and could be taken into account by the Commission on the basis of its discretion.

101 Manieri's offer of 23 October 1999 to furnish immediately the bank guarantee for EUR 400 000 mentioned in paragraph 12 of the contract notice also enabled the Commission to regard Manieri's financial standing as sufficient.

102 The same applies to the statement annexed to Manieri's letter of 23 October 1999, in which the seven members of the group represented by Manieri undertook jointly and severally to perform the contract in accordance with paragraph 9 of the contract notice.

103 In the present case these factors appear particularly relevant in so far as the financial standing of candidates for a public services contract must be assessed by reference to their ability to pay their staff and creditors if they are awarded the contract in question rather than by reference to the value of the contract. The draft framework contract accompanying the contract documents states accordingly that the Commission undertakes to pay the amounts due within a period of 60 days, which limits most of the risk associated with the candidate's financial standing to the expenses incurred in the two months during which it may have to allow the Commission credit and not, for example, to the annual value of the contract estimated by the Commission at EUR 4 000 000. In those circumstances a bank certificate, an offer of a guarantee or a joint and several undertaking are particularly appropriate for assessing a candidate's financial standing.

104 Furthermore, the priority given to technical standing over financial standing in the selection of candidates does not mean that financial standing was not considered at all. The conclusions of the assessment panel that the candidates' financial standing was not clear from the turnover figures given because of the different aids and subsidies they had received indicate expressly that a detailed check would have to be made of the proposed tenderer's financial cover before the contract was awarded.

105 In this connection it must be noted that, in conformity with the abovementioned request of the assessment panel, the Commission checked the financial standing of the Manieri group after it had been proposed for receiving the contract.

106 Consequently the balance sheets and the trading accounts of the three members of the group represented by Manieri which were not included with Manieri's application and which the Commission asked for on 13 October 1999 or, at least, the reason for their absence, as required by Article 34 of Directive 92/50, reached the Commission on 3 November 1999, thus completing the application.

107 Subsequently Manieri passed to the Commission a letter dated 3 February 2000 from Deutsche Bank which states that Manieri, taken on its own, has the financial resources at its disposal, it can meet its commitments and has a good reputation. This second letter, in addition to that from Rolo Banca 1473 of 17 June 1999, is further evidence of this applicant's financial standing.

108 It follows from the foregoing that, when considering the financial standing of Manieri and the other members of the group represented by it, the Commission did not disregard the contract

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notice or the contract documents, nor was there a manifest error of assessment on the Commission's part, nor did it infringe Article 34 of Directive 92/50 or the principle of non-discrimination.

109 Therefore the applicant's complaints relating to the successful tenderer's inadequate financial standing must be dismissed.

2. The successful tenderer's technical standing

Arguments of the parties

110 The applicant contends that the Commission ought to have eliminated Manieri from the procedure for the award of the contract in question by reason of its inadequate technical standing. On this point, the Commission disregarded the contract notice and erred manifestly in its assessment.

111 With regard to the technical standing of the successful tenderer, the applicant observes that Manieri's company object has no connection with the management of day nurseries because it relates to secondary education of the second grade. The applicant goes on to observe that, of all the companies in the group represented by Manieri, only the company Garden Bimbo, which has a staff of only 11 persons, has activities connected with very young children and a company object defined in relation to the nature of the market concerned. The applicant adds that the company object does not indicate the appropriate technical standing for fulfilling the contract in question because it also relates to sets of children under the age of one year.

112 Furthermore, the applicant observes that the contract in question was entrusted by the Manieri group to a company incorporated under Belgian law, Sapiens. However, the latter did not have the standing required to fulfil the contract because its only shareholders were a natural person and Manieri, none of the shares being held by other members of the group, particularly Garden Bimbo. Likewise, the applicant contends that the staff recruited by Sapiens are insufficiently qualified and do not have the requisite seniority, which was borne out by the negative reactions of which the applicant had heard regarding the fulfilment of the contract in question.

113 The Commission confirms that the successful tenderer meets the technical criteria required by the contract notice and that it has sufficient technical standing.

Findings of the Court

114 As a preliminary point, it must be observed that, with regard to the question under consideration, the Commission has a broad discretion and the Court's review must be limited to verifying that there has been no serious and manifest error (see paragraph 95 above).

115 On this point, it should be noted that paragraph 13 of the contract notice lists the particulars which are necessary for appraising candidates' minimum technical standing as follows:

...

(6) a statement of the candidate's annual average work force and the number of managerial staff in the last three years;

(7) a list of the main contracts in the field of the present invitation to tender carried out in the last three years, showing the amounts, dates and names and addresses of the persons receiving the services;

(8) a full description of the various measures taken by the candidate for quality control of the services;

(9) details of the part [of the] contract which the candidate intends, if necessary, to sub-contract, and the arrangements for quality control and supervision of the proposed sub-contract.

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116 As in the case of information on financial standing, a tender which gives no or only incomplete information on technical standing may be automatically eliminated by the Commission in accordance with paragraph 15(2) of the contract notice.

117 With regard to the applicant's argument concerning the company objects of the members of the group represented by Manieri, it must be observed that the company object is not one of the criteria listed in the contract notice which may be taken into account for assessing a candidate's technical standing. Moreover, such a criterion could be misleading in so far as a company object may be worded in very broad terms and may be altered.

118 Moreover, there is no factual foundation for this argument in relation to Manieri. IIn fact, examination of its company object shows that it relates not only to secondary education of the second grade but also, and in particular, to nursery school and kindergarten, which therefore includes activities connected with very young children.

119 With regard to the applicant's criticism of Sapiens, it must be observed that, firstly, the formation of that company in June 2000 occurred after the selection of candidates and the award of the contract in question and such criticism therefore is irrelevant for assessing the Manieri group's technical standing and, secondly, the Commission maintains, without being contradicted, that most of the staff employed by Sapiens were previously employed by the applicant.

120 In addition, as the Commission pointed out in its note of 10 May 2000 to the Advisory Committee on Procurements and Contracts, the formation of a company under Belgian law such as Sapiens is a means of fulfilling a number of obligations laid down by the Member State where the services are provided, in relation to employment law, tax law and social law (social insurance contributions and other employees' rights, payment of taxes, availability of a VAT number, supervision of management of facilities for small children in Belgium, etc.).

121 Moreover, when the selection of candidates was carried out, the Manieri group's application included a statement of the average workforce and the number of managerial staff in the last three years, in accordance with paragraph 13(6) of the contract notice.

122 Nevertheless, with regard to the figures for the workforce, it appears from the findings of the assessment panel that those figures were not reliable and conclusive as the contract would not have been carried out by the applicants directly, but by a company incorporated under Belgian law which they were to form and most of the staff were to be recruited on the spot.

123 Consequently the technical standing of the candidates was assessed on the basis of the other criteria laid down by the contract notice, namely the list of the main contracts in the field of the present invitation to tender carried out in the last three years (paragraph 13(7) of the contract notice), the measures taken for quality control (paragraph 13(8) of the contract notice) and the part of the contract which was subcontracted, if any, and the arrangements for the quality control of the sub-contract (paragraph 13(9) of the contract notice).

124 In the present case, the assessment panel took the view that Manieri's application, like that of the other six candidates, was satisfactory. In particular, it is clear from the panel's findings that Manieri, like the other six candidates, fulfilled the conditions laid down in paragraph 13(7) to (9) of the contract notice by furnishing all the information requested.

125 The applicant is therefore wrong in claiming that the Commission disregarded the contract notice and manifestly erred in its assessment when examining the technical standing of Manieri or the other members of the group which it represents. Accordingly the applicant's complaints concerning the successful tenderer's inadequate technical standing must be rejected.

126 Consequently the second plea in law must be dismissed.

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The third plea, alleging that the contract documents were disregarded in relation to the evaluation of prices and the quality of the tenders

127 The applicant claims that Manieri's tender cannot be better than its own with respect to the price and quality criteria laid down by the contract documents.

128 In this connection, it should be observed that the criteria for awarding the contract in question, as set out in the contract documents, are as follows:

The contract will be awarded to the economically most advantageous tender taking account of:

- the prices tendered and

- the quality of the tender and of the services proposed, evaluated, in descending order of importance, according to:

(a) the quality of the teaching programme (40%)

(b) the measures and resources implemented to provide cover for staff absences (30%)

(c) the methodology and monitoring devices proposed for monitoring: (30%)

- the quality of service and management

- the maintenance of staffing levels

- the implementation of the teaching programme.

1. Evaluation of the prices offered by the tenderers

129 The following facts are common ground between the parties.

130 The starting point for the evaluation of the prices offered by the tenderers consists of the information supplied in accordance with the instructions in the tender schedule 2 of 3 (the schedule) annexed to the contract documents. This schedule required the tender of an overall fixed monthly price including all constraints of performance for the complete administrative and teaching management of the CPE Clovis on the basis of a distinction between the day nursery and the kindergarten. The schedule distinguished between five categories of prices:

- the price per child enrolled at the CPE Clovis (in EUR/month);

- the price per place reserved for a maximum of four months without attendance by the child at the CPE Clovis day nursery (in EUR/month);

- the price per child enrolled at the CPE Clovis kindergarten (in EUR/month);

- the price per place reserved for a maximum of four months without attendance by the child at the CPE Clovis kindergarten (in EUR/month);

- the price supplement beyond a quarter of an hour or part thereof outside the normal opening hours of the CPE [Clovis] (in EUR/quarter of an hour).

131 The tender prices were evaluated by the Commission on the basis of the information supplied in accordance with the instructions in the schedule (i.e. the price relating to each of the five categories mentioned above), by reference to three hypotheses regarding attendance at the CPE Clovis:

- hypothesis A: average number of children actually present in 1999;

- hypothesis B: number of children, forecast average occupation of rooms;

- hypothesis C: number of children, maximum occupation of rooms.

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132 According to the applicant, the Commission failed to comply with the contract documents and therefore acted unlawfully in considering three attendance hypotheses and not just the information required by the schedule. The applicant observed during the hearing that an evaluation in conformity with the requirements of the contract documents, i.e. on the basis of an aggregate of the price offered for each of the five categories mentioned in the schedule, would have led the Commission to find that the applicant's tender was lower than Manieri's.

133 Alternatively, the applicant notes that, even if the Commission had been entitled to disregard the tender schedules, it would also have been necessary for it to state the reason. However, the reason given, namely that direct comparison of the different price components given in the tender schedule was not possible, does not entitle the Commission to disregard the contract documents.

134 The Commission contends, on the contrary, that the prices were evaluated in strict accordance with the criteria laid down beforehand in the contract documents.

135 As a preliminary point, the Court observes that, with regard to the question before it, the Commission has a broad discretion and the Court's review must be limited to verifying that there has been no serious and manifest error (see paragraph 95 above).

136 As stated above, the starting point for the method of evaluating the tender prices was the price offered by each tenderer for each of the five categories shown in the schedule. The prices offered by Esedra and Manieri were as follows:

- Esedra: EUR 1 090 per child enrolled at the day nursery; EUR 430 per place reserved in the day nursery; EUR 965 per child enrolled at the kindergarten; EUR 300 per place reserved in the kindergarten and EUR 5 for each additional quarter of an hour;

- Manieri: EUR 1 050 per child enrolled at the day nursery; EUR 880.64 per place reserved in the day nursery; EUR 940 per child enrolled at the kindergarten; EUR 788.37 per place reserved in the kindergarten and EUR 6 for each additional quarter of an hour.

137 It should be added that the prices tendered for each of the abovementioned categories are unit prices (for each child enrolled at the day nursery or the kindergarten, for each place reserved in the day nursery or the kindergarten or for each quarter of an hour).

138 Each of those prices was then multiplied by the corresponding number of children enrolled in the day nursery or the kindergarten, reserved places in the day nursery or kindergarten or quarters of an hour envisaged by the Commission for each of the three hypotheses for attendance at the CPE Clovis. Those figures were as follows:

- hypothesis A (average number of children actually present in 1999): 211.08 children enrolled in the day nursery; 2 places reserved in the day nursery; 60.33 children enrolled in the kindergarten; 2 places reserved in the kindergarten and 12.5 additional quarters of an hour;

- hypothesis B (number of children, forecast average occupation of rooms): 253 children enrolled in the day nursery; 2 places reserved in the day nursery; 55 children enrolled in the kindergarten; 2 places reserved in the kindergarten and 12.5 additional quarters of an hour;

- hypothesis C (number of children, maximum occupation of rooms): 270 children enrolled in the day nursery; 0 places reserved in the day nursery; 108 children enrolled in the kindergarten; 0 places reserved in the kindergarten and 12.5 additional quarters of an hour.

139 With regard to hypothesis A (average number of children actually present in 1999), the results of the evaluation were as follows:

- Esedra: for each category, the monthly price was EUR 230 080.83, i.e. EUR 1 090 x 211.08 (children enrolled in the day nursery); EUR 860, i.e. EUR 430 x 2 (places reserved in the day nursery);

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EUR 58 221.67, i.e. EUR 965 x 60.33 (children enrolled in the kindergarten); EUR 600, i.e. EUR 300 x 2 (places reserved in the kindergarten) and EUR 62.50, i.e. EUR 5 x 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 289 825.

- Manieri: for each category, the monthly price was EUR 221 637.50, i.e. EUR 1 050 x 211.08 (children enrolled in the day nursery); EUR 1 761.28, i.e. EUR 880.64 x 2 (places reserved in the day nursery); EUR 56 713.33, i.e. EUR 940 x 60.33 (children enrolled in the kindergarten); EUR 1 576.74, i.e. EUR 788.37 x 2 (places reserved in the kindergarten) and EUR 75, i.e. EUR 6 x 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 281 763.85.

140 With regard to hypothesis B (number of children, forecast average occupation of rooms), the results of the evaluation were as follows:

- Esedra: for each category, the monthly price was EUR 275 770, i.e. EUR 1 090 x 253 (children enrolled in the day nursery); EUR 860, i.e. EUR 430 x 2 (places reserved in the day nursery); EUR 53 075, i.e. EUR 965 x 55 (children enrolled in the kindergarten); EUR 600, i.e. EUR 300 x 2 (places reserved in the kindergarten) and EUR 62.50, i.e. EUR 5 x 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 330 367.50.

- Manieri: for each category, the monthly price was EUR 265 650, i.e. EUR 1 050 x 253 (children enrolled in the day nursery); EUR 1 761.28, i.e EUR 880.64 x 2 (places reserved in the day nursery); EUR 51 700, i.e. EUR 940 x 55 (children enrolled in the kindergarten); EUR 1 576.74, i.e. EUR 788.37 x 2 (places reserved in the kindergarten) and EUR 75, i.e. EUR 6 x 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 320 763.02.

141 With regard to hypothesis C (number of children, maximum occupation of rooms), the results of the evaluation were as follows (NB: this hypothesis does not envisage any reserved places in the day nursery or the kindergarten):

- Esedra: for each category, the monthly price was EUR 294 300, i.e. EUR 1 090 x 270 (children enrolled in the day nursery); EUR 104 220, i.e. EUR 965 x 108 (children enrolled in the kindergarten) and EUR 62.50, i.e. EUR 5 x 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 398 582.50.

- Manieri: for each category, the monthly price was EUR 283 500, i.e. EUR 1 050 x 270 (children enrolled in the day nursery); EUR 101 520, i.e EUR 940 x 108 (children enrolled in the kindergarten) and EUR 75, i.e. EUR 6 x 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 385 095.

142 The results of the Commission's evaluation of the tender prices on the basis of the method described above show that, on each of the three hypotheses in question, Manieri's tender is more favourable than that of Esedra.

143 It cannot be denied that the unit prices per child are multiplied by the total number of units (children enrolled in the day nursery or the kindergarten, places reserved in the day nursery or the kindergarten, or additional quarters of an hour) so as to make it possible to evaluate the prices of the different tenders.

144 The applicant's position in this respect is wholly illogical. To take account only of the unit prices per child does not make it possible to determine the total monthly price which the Commission must pay the service provider for managing the CPE Clovis because that total must necessarily take account of the number of children enrolled in the day nursery and the kindergarten, places reserved in the day nursery and the kindergarten, and additional quarters of an hour. The total price of the tenders can be determined and the tenders can be compared only by multiplying each unit price per child by the anticipated total number of children, reserved places and quarters of

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an hour.

145 Moreover, it must be observed that the three hypotheses regarding attendance envisaged by the Commission are based on reasonable data, namely the actual average attendance at the CPE Clovis during one reference year, 1999, the average attendance anticipated and the maximum possible attendance, and that most of those figures were known to the applicant. For example, with regard to hypothesis B, the contract documents state the average number of children enrolled in the day nursery (253). The contract documents also state, with regard to hypothesis C, the maximum number which can be enrolled at the day nursery (270) and the kindergarten (108). The figures for the numbers of children enrolled in the day nursery and the kindergarten are the most important for evaluating the tender prices under consideration on the three hypotheses envisaged by the Commission, taking account of their respective amounts (253 or 270 children enrolled in the day nursery, 55 or 108 children enrolled in the kindergarten) compared with the figures for the other three categories (2 or 0 places reserved in the day nursery or the kindergarten, 12.5 additional quarters of an hour). Finally, the applicant cannot pretend to be unaware of the figures relating to hypothesis A because the applicant itself provided the services in question in 1999, which was chosen as the reference year for determining historic attendance.

146 It follows from the foregoing that there was no manifest error by the Commission in its assessment of Manieri's and Esedra's tenders with regard to the criterion of prices. Consequently the applicant's arguments concerning the evaluation of the tender prices must be rejected.

2. Evaluation of the quality of the tenders

(a) Evaluation of the quality of tenders in general

Arguments of the parties

147 The applicant contends that there was a manifest error of assessment on the Commission's part in deciding that Manieri's tender was better than the applicant's with regard to the criterion of quality.

148 The applicant points out that it has obtained the quality certificate ISO 9001:94 and is therefore subject to regular and exacting internal and external checks. The applicant adds that its tender included different initiatives intended to improve the quality of its services, such as special programmes for handicapped children and the establishment of a five-year plan for each of its services.

149 The applicant questions the competence of the members of the qualitative assessment panel and notes that they did not go to the places where the tenderers provided their services, unlike what happened in the case of the preceding procedure for the award of a contract, which would have shown them that none of the companies in the group represented by Manieri - with the partial exception of Garden Bimbo, which works with children aged 12 months and above, whereas the contract in question also relates to children of under 12 months - provides services of the nature of those referred to by the invitation to tender, as demonstrated by the objects of those companies.

150 The Commission challenges that submission and observes that the qualitative assessment of tenders was carried out on the basis of the qualitative criteria announced beforehand in the contract documents and pursuant to a method laid down on 9 February 2000, i.e. between the date of the submission of tenders (7 February 2000) and the date when they were opened (14 February 2000). On this point, the Commission observes that the summary drawn up on the final assessment of tenders shows that there was a significant difference in quality between Manieri, which was placed first, and Esedra, which was second.

151 The Commission adds that the report of the qualitative assessment panel and the annexes thereto show that Esedra received fewer points than Manieri in relation to two of the three qualitative

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criteria.

Findings of the Court

152 As a preliminary point, it must be observed that, with regard to the question under consideration, the Commission has a broad discretion and the Court's review must be limited to verifying that there has been no serious and manifest error (see paragraph 95 above).

153 Before examining the results of the Commission's assessment, mention should be made of the qualitative criteria used by the Commission for assessing the tenders.

154 In the present case, the contract documents stated that the contract was to be awarded to the economically most advantageous tender taking account of:

the quality of the tender and of the services proposed, evaluated, in descending order of importance, according to:

(a) the quality of the teaching programme (40%)

(b) the measures and resources implemented to provide cover for staff absences (30%)

(c) the methodology and monitoring devices proposed for monitoring: (30%)

- the quality of service and management

- the maintenance of staffing levels

- the implementation of the teaching programme.

155 In this connection, it is clear from the final table compiled by the qualitative assessment panel that:

- Manieri's tender received 27.6 points in respect of the quality of the teaching programme, 21.6 points in respect of the measures and resources implemented to provide cover for staff absences and 21 points in respect of the methodology and devices for monitoring, i.e. a total of 70.2 points, which corresponds to the index 100, which meant that it was the best tender in terms of quality;

- Esedra's tender received 21.1 points in respect of the quality of the teaching programme, 13.2 points in respect of the measures and resources implemented to provide cover for staff absences, 22.2 points in respect of the methodology and devices for monitoring, i.e. a total of 56.5 points, which corresponds to the index 80.4, which meant that it was the second best tender in terms of quality.

156 It must be observed that the applicant has not adduced the slightest evidence to show that there was a serious and manifest error of assessment on the Commission's part when appraising the tenders in general.

157 For example, neither the fact that the applicant has obtained the quality certificate ISO 9001:94 and that it is subject to regular and exacting internal and external checks, nor the fact that its tender included different initiatives intended to improve the quality of its services are factors demonstrating that the quality of its tender exceeds that of Manieri's.

158 With regard to the applicant's submission that the members of the group represented by Manieri do not provide or provide hardly at all the services required by the contract in question, it must be observed that, apart from the fact that that argument does not apply in the present case (see paragraphs 117 and 118 above), the quality of the tenders must be assessed on the basis of the tenders themselves and not on that of the experience acquired by the tenderers with the contracting authority in connection with previous contracts or on the basis of the selection criteria (such as the technical standing of candidates) which were checked at the stage of selecting applications and which cannot

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be taken into account again for the purpose of comparing the tenders (see, to that effect, judgment in Case 31/87 Beentjes [1988] ECR 4635, paragraph 15).

159 So far as concerns the applicant's doubts regarding the competence of the members of the qualitative assessment panel and the absence of on-the-spot inspections of the premises where the tenderers provide their services, it must be observed that the applicant has not adduced any arguments capable of casting doubt on the competence of those persons who have, by virtue of their functions within the Commission, sufficient experience to evaluate tenders from the qualitative point of view, and that such inspections were not required in connection with the procedure for awarding the contract in question.

160 Consequently the applicant's submissions concerning the qualitative evaluation of its tender and that of the successful tenderer in general must be rejected.

(b) The qualitative evaluation of certain parameters of the tenders

161 The applicant also submits that the qualitative evaluation of certain parameters of its tender and that of the successful tenderer reveals a manifest error of assessment.

162 It must be observed that, with regard to the question under consideration, the Commission has a broad discretion and the Court's review must be limited to verifying that there has been no serious and manifest error (see paragraph 95 above).

163 The Court finds that the applicant has not adduced the slightest evidence to show that there was a serious and manifest error of assessment on the Commission's part when appraising certain parameters of the tenders. The applicant's submissions concerning each parameter are examined below.

(i) Parameters A.2 level of the continuous training plan for teachers and B.1 level of training of replacement staff

164 The applicant observes that it received a poor mark (2 points) and the comment information and not training, confusion between the roles of educational psychologist and instructor, whereas Manieri received an excellent mark (10 points). The applicant contends that the word confusion is mistaken because one of the main functions of an educational psychologist is to instruct adults who work with children and not to be in contact with children, which is the teacher's role. Likewise the finding information and not training is incorrect because Esedra's quality assurance system provides for setting up and complying with different training organisation and identification procedures. Furthermore, the quality of the training provided by the applicant has been praised by a study carried out by two students of the Catholic University of Louvain and a report of the Institut d'Enseignement De Mot-Couvreur on the courses attended by trainee paediatric nurses.

165 According to the applicant, such remarks also apply with regard to parameter B.1 level of training of replacement staff, for which it received 1 point as against 4 for Manieri.

166 The Court points out, as does the Commission, that that institution has sufficient knowledge to assess the quality of the training plan and the role of a team of educational psychologists in the light of the experience acquired in the contractual supervision and management of a group of three day nurseries with more than 600 children.

167 On this point, it should be observed that, although the teaching team may, in addition to its advisory role in the teaching and teacher-training fields, also play a part as instructor, nevertheless, firstly, the team inevitably needs external support and expertise (consultants, specialist organisers, etc.) in the various fields appertaining to early childhood and, secondly, that the training it provides internally or externally must be the subject of a general scheme within the framework of a training plan in correlation with the principles laid down in the teaching programme.

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168 However, the Commission can make comparisons between tenders in that field only if the tenderers provide training plans that are as detailed as possible. From this viewpoint, the checks carried out as part of the Esedra quality assurance system, the assessments by the students of the Catholic University of Louvain and the results of training courses at the CPE Clovis during the period of the applicant's management are not factors which reveal that the quality of the applicant's tender is superior to that of Manieri's tender.

169 The applicant's complaint in respect of the evaluation of parameters A.2 and B.1 must therefore be rejected.

(ii) Parameter A.4 quality and quantity of teaching aids (toys, equipment, etc.) for children

170 The applicant states that it was awarded the same mark (4 points) as the successful tenderer. However, the applicant points out that its equipment, of which a complete inventory was provided with the tender, was bought by Sapiens. Therefore the applicant is uncertain what equipment was described by Manieri in its tender if Manieri had subsequently to purchase from it the equipment required by the contract documents.

171 The Court observes, as does the Commission, that, since Manieri supplied an inventory of teaching aids in accordance with the requirements of the contract documents, it is immaterial whether Sapiens purchased some of the equipment from the applicant or acquired it from another supplier.

172 Consequently the applicant's complaint in respect of the evaluation of parameter A.4 must be rejected.

(iii) Parameter A.7 possibility of expression of the pace suitable for each child...

173 The applicant questions whether Manieri's teaching programme for children aged two or under exists because the only company in its group which had experience in that field (Garden Bimbo) only accepts children from the age of one year.

174 The Court observes that, as stated in paragraphs 114 to 126 above, the Commission could properly decide that Manieri had the technical standing necessary for its application to be selected and that this question did not have to be considered in connection with the award of the contract in question.

175 Furthermore, it appears from the file that the Commission considered that the teaching programme and activities offered by Manieri were suited to the different age groups covered by the contract in question.

176 The applicant's complaint in respect of the evaluation of parameter A.7 must therefore be rejected.

(iv) Parameters C.1.1 quality level of means of supervision and proposed actions and C.1.2 quality of management staff

177 The applicant observes that it has the quality certificate ISO 9001:94 and that it therefore undergoes half-yearly external checks. The applicant also provided a complete organisation chart going beyond the requirements of the contract documents and including, in particular, a quality assurance function coordinated by two persons working full-time. However, that function is not provided for within Sapiens and consequently the latter company did not take on the person responsible for the quality assurance function in Esedra on 31 July 2000. In this connection, the applicant considers that the award of equal points (8 points for parameter C.1.1 and 3 points for parameter C.1.2) to its own tender and to that of Manieri is manifestly erroneous. The applicant adds that, to its knowledge, the qualifications and length of service of the staff employed by Sapiens did not meet the requirements of the contract documents as only 10 of the 20 contracts of employment expiring on 31 July 2000 were renewed by Sapiens.

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178 The Court observes that the applicant's remarks concerning Sapiens are not relevant because that company was formed after the tenders were evaluated by the Commission. Similarly, the fact that the applicant has the quality certificate ISO 9001:94 and that it therefore undergoes half-yearly external checks does not show that there was a serious and manifest error of assessment on the Commission's part in awarding the same marks to the applicant and to Manieri.

179 In addition, it must be observed that the Commission's analysis rests on the presentation of specific training plans and not on the results of checks carried out in the past.

180 The applicant's complaint in respect of the evaluation of parameters C.1.1 and C.1.2 must therefore be rejected.

181 It follows from the foregoing that it has not been shown that there was a serious and manifest error of assessment on the Commission's part in concluding that Manieri's tender was qualitatively superior to that of Esedra.

182 Consequently the third plea in law must be dismissed.

Fourth plea, breach of the obligation to state reasons

Arguments of the parties

183 The applicant contends that the Commission failed in its obligation to state reasons under Article 253 EC, and infringed the principle of transparency which is given the status of a general principle of law by Article 255 EC, and also infringed Article 12 of Directive 92/50 as interpreted by the judgment in the case of Adia Interim v Commission, cited above, because the Commission's letter of 9 June 2000 in reply to the applicant's request for information on the reasons for which the contract in question was not awarded to it does not make it possible to assess the legality of the contested decisions.

184 In this connection, the applicant contends that the statement of reasons is insufficient because it merely discloses the marks awarded to the applicant and to Manieri for each of the award criteria referred to by the contract documents, without giving details of the evaluation method used and of the practical application of that method to the respective tenders. In particular, the applicant states that it does not understand how the different factors used for setting the prices required by the contract documents could have been evaluated globally by the Commission.

185 The applicant adds that it was given no information (making due allowance for the legitimate commercial interests of the successful tenderer) concerning Manieri's tender which would have enabled it to examine the legality of the contested decisions. The applicant is also unaware of the identity of the Italian companies forming the group represented by Manieri and the corporate ties between them and with Sapiens, which is described as the company formed by Manieri to carry out the contract in question.

186 The Commission points out that, with a view to transparency, in its letter of 9 June 2000 it informed the applicant of the characteristics and the advantages of the selected tender and the name of the successful tenderer in accordance with the requirements of Article 12(1) of Directive 92/50. The Commission adds that the applicant, which received the abovementioned reply in good time (by fax of 9 June), did not request any further information. In particular, the Commission notes that the applicant did not ask for the evaluation method used or information concerning the successful tenderer's tender mentioned in the application.

Findings of the Court

187 First of all, it is necessary to establish what is the Commission's obligation to state reasons in relation to a tenderer who was not successful in the procedure for the award of the contract

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in question.

188 Article 12(1) of Directive 92/50 provides as follows:

The contracting authority shall, within 15 days of the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender, and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

However, contracting authorities may decide that certain information on the contract award, referred to in the first subparagraph, be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between service providers.

189 Pursuant to the abovementioned provision, the Commission must, within 15 days of receipt of his request, inform an unsuccessful tenderer of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer, except for information described as confidential.

190 This manner of proceedings satisfies the purpose of the obligation to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights; and, on the other, to enable the Court to exercise its power of review (see judgments in Case T-166/94 Koyo Seiko v Council [1995] ECR II-2129, paragraph 103, and in Adia Interim v Commission, cited above, paragraph 32).

191 In the present case, the Commission's letter of 9 June 2000 contained the following information:

1. Seven firms were invited to submit a tender, following the stage of selection of applications provided for in the contract notice.

2. Of the seven, four sent in a tender, two withdrew in writing and one did not reply.

3. The successful tenderer is a group of Italian firms represented by Centro Studi Antonio Manieri SRL (Via Faleria 21, I-00183 Rome).

4. Esedra's tender compares as follows with the successful tender with regard to the two criteria for the award of the contract (price and quality) laid down in paragraph 7 of the terms and conditions of the contract documents:

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(1) Compared with the lowest tender in accordance with the requirements, on the basis of forecast attendance (minimum index: 100)

(2) Compared with the tender which received the best appraisal (maximum index: 100)

Esedra's tender is therefore 2.9% more expensive than that of the proposed successful tenderer (which is the lowest of all the tenders meeting the requirements).

In addition, the tenders assessment panel considered that the quality of Esedra's offer was inferior (index 80.4) to that of the successful tenderer (which submitted the best tender, with an index of 100).

5. The ratings received by Esedra and by the successful tenderer for each of the three qualitative sub-criteria are as follows:

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6. It may be concluded from the foregoing points that the successful tenderer has presented the economically most advantageous tender, [namely] the lowest tender in accordance with the requirements and receiving the best rating with respect to the criterion of quality.

...

192 It must be found that, in the letter of 9 June 2000, the Commission gave a sufficiently detailed explanation of the reasons for which it rejected the applicant's tender by giving the name of the successful tenderer and the relative advantages of the tender selected by comparison with the applicant's tender with respect to the criteria laid down by the contract documents. That statement of reasons also has enabled the applicant to assert its rights and the Court to exercise its power of review.

193 It follows from the foregoing that the plea of breach of the obligation to state reasons must be dismissed.

Fifth plea, misuse of powers

Arguments of the parties

194 The applicant contends that the Commission misused its powers in failing to award it the contract in question on the ground that alleged paedophilic acts were committed on the premises of the CPE Clovis and that the parents' association and the bodies representing the staff were hostile to the applicant.

195 In addition, the applicant considers that the Commission's decision to close the first invitation to tender issued by the contract notice of 26 May 1999 amounts to a misuse of powers because the Commission had a suitable number of applications (three) for genuine competition in the matter of public contracts. In this connection the applicant cites the judgment in Case C-27/98 Fracasso and Leitschutz [1999] ECR I-5697 and adds that, if Manieri's application to participate in the first invitation to tender was irregular, that was evidence of misuse of powers, like the other irregularities of which it complains in its action.

196 The Commission denies those allegations. It claims that the only reason for which it withdrew the first invitation to tender was to enlarge competition in accordance with Article 27(2) of Directive 92/50 and adds that this succeeded because seven candidates, not three, replied to the second invitation to tender.

197 The Commission also observes that the applicant has not adduced the slightest evidence to show that the first invitation to tender was closed for a reason other than that given above. The Commission contends that the applicant's allegations are invalidated by the fact that Manieri also submitted its application in response to the first invitation to tender and that it was the applicant which did not wish to extend its contract.

Findings of the Court

198 The concept of misuse of powers has a precisely defined scope in Community law and refers to cases where an administrative authority exercises its powers for a purpose other than that for which they were conferred. In that respect, it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (see, for example, the judgment in Joined Cases T-149/94 and T-181/94 Kernkraftwerke Lippe-Ems v Commission [1997] ECR II-161, paragraphs 53 and 149, upheld on appeal by judgment of the Court of Justice in Case C-161/97 P Kernkraftwerke Lippe-Ems v Commission [1999] ECR I-2057).

199 In the present case, the matters raised by the applicant do not show that the Commission pursued

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any object other than that of awarding the contract to the lowest and economically most advantageous bid, taking account of the criteria laid down in the contract notice and the contract documents.

200 Accordingly, the applicant has not adduced objective, relevant and consistent evidence, within the meaning of the judgment cited above, to show that the Commission exercised its powers to eliminate the applicant from the contract in question by reason of the allegations that paedophilic acts were committed at the CPE Clovis when it was under the applicant's management and by reason of the alleged hostility to the applicant on the part of the parents' association and the bodies representing the staff.

201 Similarly, the fact that only three candidates, of which Esedra and Manieri were two, responded to the first invitation to tender cannot justify the claim that the Commission misused the powers conferred upon it by the Financial Regulation and Directive 92/50 in deciding to close the invitation to tender so as not to award the contract in question to the applicant.

202 In that connection the judgment in the case of Fracasso and Leitschutz, cited above, offers no support for the applicant's argument. In that case, a national court referred to the Court of Justice a question as to whether Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by Directive 97/52, must be interpreted as meaning that the contracting authority must award the contract to the only candidate deemed suitable for participation. The Court's reply was in the negative, observing in particular that, in order to meet the objective of the development of genuine competition in the field of public works contracts, Article 22(2) of Directive 93/37 (which is in similar terms to Article 27(2) of Directive 92/50) provides that, where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender must in any event be sufficient to ensure genuine competition (see the judgment in Fracasso and Leitschutz, cited above, paragraph 27).

203 The Commission could therefore properly decide to close the first invitation to tender issued by the contract notice of 26 May 1999 on the ground that it did not have a sufficient number of applications to ensure genuine competition.

204 The plea alleging misuse of powers must therefore be dismissed.

205 Consequently it follows from the foregoing that all the claims for annulment must be dismissed.

The claim for damages

206 The applicant seeks damages of EUR 1 001 574.09 on the ground that the Commission acted unlawfully in the procedure for the award of the contract in question.

207 It is settled case-law that, in order for the Community to incur non-contractual liability, a number of conditions must be satisfied concerning the illegality of the conduct alleged against the Community institutions, the fact of the damage and the existence of a causal link between that conduct and the damage complained of (see the judgments in Case C-87/89 Sonito and Others v Commission [1990] ECR I-1981, paragraph 16, and Case T-13/96 TEAM v Commission [1998] ECR II-4073, paragraph 68).

208 The examination of the claims for annulment has shown that, in the course of the procedure for the award of the contract in question, there was no irregularity in the Commission's conduct which might have given rise to its liability vis-à-vis the applicant.

209 Consequently, as the condition relating to unlawful conduct on the part of the institution concerned is not satisfied, the applicant's claim for damages must be dismissed and it is unnecessary to examine whether the other conditions governing liability on the part of the Community are satisfied.

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The application for the reopening of the oral procedure

210 In its letter of 22 October 2001, the applicant claims that, in connection with another action against the Commission for payment of the price in respect of a day's strike by the staff of Esedra on 22 June 2000, the Commission attempted, in supplementary pleadings lodged at the registry of the Court of First Instance, Brussels, on 9 August 2001, to refute the submission that the strike was a case of force majeure and to show that the strike was not unforeseeable by arguing that on 2 July 1999 the problem of the contractual transfer of the undertaking was raised and the participation [of Esedra] in the procedure for the invitation to tender did not affect the certainty that the [existing] contract would come to an end on 31 July 2000 and the [new] contract would most probably be awarded to another tenderer. According to the applicant, that statement is a clear indication that the Commission did not intend in July 1999 to award the contract to the applicant, that is to say, from the opening of the procedure for the invitation to tender. The applicant therefore submits that it did not receive equal and impartial treatment and that the procedure for the invitation to tender was flawed, and it seeks the reopening of the oral procedure.

211 In its letter of 27 November 2001, the Commission observes that the sentence singled out by the applicant was taken out of its context and that, when put back into the context of the national proceedings and their purpose, it cannot amount to an admission in relation to points of law raised in the proceedings before the Court of First Instance. In any case, and regardless of the perhaps somewhat elliptical terms used by the Commission's lawyer, the statement in question does not, having regard to the already lengthy discussion of this matter and the Commission's arguments to show that the procedure was properly conducted, constitute sufficiently objective, relevant and consistent evidence to justify reopening the oral procedure.

212 In assessing the implications of the sentence in question, it must be observed that it was written in the context of national proceedings the object of which was not to determine whether the procedure for the award of the contract was impartial, but to ascertain whether Esedra's failure to fulfil its contractual obligations could be justified by a strike within the CPE Clovis. It must also be noted that the strike took place on 22 June 2000, that is to say, after the contract was awarded to Manieri, and the matters to which the sentence quoted relate arose in July 1999, namely more than two years before the supplementary pleadings were lodged. Finally, it must be found that it is clear from the foregoing analysis that the procedure for the award of the contract took place without the slightest irregularity, discrimination or misuse of powers. In those circumstances, the statement in question does not contribute relevant evidence such as to cast doubt on the award procedure and justifying the reopening of the oral procedure.

213 The Court therefore finds that there are no grounds for reopening the oral procedure.

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AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
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61999A0139 : N 95

SUB Public contracts of the European Communities

AUTLANG French

APPLICA Person

DEFENDA Commission ; Institutions

NATIONA Belgium

PROCEDU Application for annulment - unfounded

DATES of document: 26/02/2002
of application: 20/06/2000

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Order of the President of the Court of First Instance
of 20 July 2000
Esedra SPRL v Commission of the European Communities.
Public contracts for the supply of services - Community tendering procedure - Proceedings for interim measures - Suspension of operation - Urgency - None.
Case T-169/00 R.

1. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Pecuniary damage

(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

2. Applications for interim measures - Suspension of operation of a measure - Conditions for granting - Serious and irreparable damage - Non-pecuniary damage

(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

1. Pecuniary damage cannot, in principle, be regarded as irreparable, or even reparable only with difficulty, if it may be the subject of subsequent compensation. Consequently, it constitutes a loss which can be redressed economically by means of the legal remedies provided for by the Treaty, particularly Article 235 EC.

(see paras 44, 47)

2. The refusal to award a public contract will not necessarily cause irreparable damage to the reputation and credibility of tenderers whose offers were rejected. Participation in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants, and the elimination of a tenderer under the rules on tenders is not, in itself, prejudicial.

(see para. 48)

In Case T-169/00 R,

Esedra SPRL, established in Brussels, Belgium, represented by G. Vandersanden, E. Gillet and L. Levi, of the Brussels Bar, with an address for service in Luxembourg at the office of Société de Gestion Fiduciaire SARL, 2-4 Rue Beck,

applicant,

v

Commission of the European Communities, represented by X. Lewis and L. Parpala, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION, first, for the suspension of operation of the Commission's decisions not to award to the applicant the contract forming the subject-matter of Notice No 99/S 132-97515/FR for services relating to the management of a day nursery and to award that contract to another undertaking and, second, for the Commission to be directed to take the necessary steps to suspend implementation of the decision to award that contract or any contract concluded in pursuance of that decision,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES

makes the following

Order

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On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Facts and procedure

1 In 1994 the Commission decided to entrust to a private company the management of the Centre de la Petite Enfance Clovis, which is a day nursery and kindergarten for children of the staff of the European institutions situated on its premises in Boulevard Clovis, Brussels (hereinafter the CPE Clovis). It issued an invitation to tender and subsequently awarded the contract to two Italian companies, Aristea and Cooperativa Italiana di Ristorazione. The management of the CPE Clovis was entrusted to the applicant, which was formed of the two aforementioned companies. The management contract was concluded for an initial term of two years from 1 August 1995, renewable for three one-year periods.

2 By letter of 15 April 1999, the applicant informed the Commission that it had decided not to seek renewal of the contract. The letter included the following passage:

Furthermore, the company can already state that it will be available to participate in any future invitations to tender, if the objective will be to provide a more efficient management of the service and to foster the relations which ought to exist between the interested parties, especially in the case of non-contracting parties.

3 On 26 May 1999 the Commission, pursuant to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), published in the Supplement to the Official Journal of the European Communities a first notice of invitation to tender (OJ 1999 S 100, p. 35), by restricted procedure, for the services relating to the management of the CPE Clovis. Three undertakings, amongst them the applicant and the company Centro Studi Antonio Manieri (hereinafter the Centro Studi), applied to participate.

4 The Commission considered that the number of candidates was too low to ensure proper competition, and therefore published on 10 July 1999 a further notice of invitation to tender (OJ 1999 S 132) for the management of a day nursery (No 99/S 132-97515/FR). The notice specified that the contract would be awarded to the economically most advantageous tender taking account of the prices tendered and the quality of the services proposed (details in the contract documents).

5 Following the selection of candidates, as described in the notice of invitation to tender, the contract documents were sent on 29 October 1999 to the seven companies invited to tender. It was made clear in the documents that tenders had to be submitted by 6 January 2000 at the latest, that the tender was valid for a term of nine months from 6 January 2000 and that the contract was for an initial two-year period, renewable for three one-year periods. Moreover, the criteria on which the contract would be awarded were as follows:

The contract will be awarded to the economically most advantageous tender taking account of:

- the prices tendered and

- the quality of the tender and of the services proposed, evaluated, in descending order of importance, according to:

(a) the quality of the teaching programme (40%)

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(b) the measures and resources implemented to provide cover for staff absences (30%)

(c) the methodology and monitoring devices proposed for monitoring: (30%)

- the quality of service and management

- the maintenance of staffing levels

- the implementation of the teaching programme.

6 According to the report of the site visit and mandatory information meeting on 24 and 25 November 1999, the Commission's staff added further details to the contract documents on those occasions.

7 By fax of 20 December 1999, written in Italian, the Commission informed the applicant that the final date for submission of tenders had been deferred to 7 January 2000. In addition, it was stated with regard to the specific criteria contained in the contract documents:

The current contracting party has... stated that it will keep on staff and assign them to other posts if the contract is not awarded to it. Accordingly, the problem of safeguarding the rights of workers would not arise at all.

8 On 7 January 2000, a representative of the applicant went to the Commission's offices to submit a tender. He was told that, in fact, the final date had been deferred to 7 February 2000, and not to 7 January 2000 as had been wrongly copied in the fax of 20 December 1999. The applicant's representative therefore took back the tender.

9 By the final date set for the purpose, four companies, amongst them the Centro Studi and the applicant, had submitted tenders.

10 When the tenders had been submitted, the Commission sent the candidates two requests for further particulars, on 25 and 29 February 2000.

11 The tenders were examined by an appraisal committee composed of six people, of whom five were appointed in their capacity as officials in the Directorate-General for Personnel and Administration, and the sixth in her capacity as representative of the Parents' Association. This sixth person, who was the Vice-President of the Association, did not have a child attending the CPE Clovis day nursery.

12 By letter of 31 May 2000, the applicant was informed that it had not been awarded the contract in question (hereinafter the refusal).

13 By letter of 2 June 2000, the applicant's lawyers asked the Commission to inform them of the reasons for that decision. They also asked the institution to suspend any measure designed to implement the decision to award the contract at issue to another candidate (hereinafter the award) and, consequently, not to conclude the contract referred to in the contract documents.

14 By fax of 9 June 2000, the Commission provided information regarding the reasons for the refusal. It pointed out, in particular, that the tender submitted by the Centro Studi was better than that of the applicant in respect of both price and quality (in the first place, the applicant's price rating was 102.9 whereas the Centro Studi's was 100 as against the tender of the lowest bidder, and secondly the applicant's quality rating was 80.4 while that of the Centro Studi was 100 in relation to the bid which obtained the best assessment). Moreover, the Commission refused to suspend the operation of the award.

15 By an application lodged at the Court Registry on 20 June 2000, the applicant brought an action under the fourth paragraph of Article 230 EC before the Court of First Instance for annulment of the award and the refusal, and a claim for compensation to redress the damage it has allegedly suffered on account of those decisions.

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16 By a separate document lodged at the Court Registry on the same day, the applicant brought the present application seeking, first, suspension of the operation of the Commission's award and refusal and a direction to the Commission to take the steps necessary to suspend the legal effects of the award or of any contract concluded in pursuance thereof and, secondly, under Article 105(2) of the Rules of Procedure of the Court of First Instance, a ruling to be given as a matter of urgency on these requests for suspension.

17 On 21 June 2000, the President of the Court asked the Commission to answer questions concerning the progress made in the tendering procedure at issue and to produce any contract it had concluded with the Centro Studi.

18 On 22 June 2000 the Commission replied to the questions put to it. It produced the contract concluded with the Centro Studi and pointed out that it had been signed on 21 June 2000 and would take effect on 1 August 2000.

19 On 26 June 2000 the Commission was requested to produce documents relating to the Centro Studi.

20 On 30 June 2000, the Commission submitted its observations on this application for interim measures, and enclosed the documents requested. It stated that the Centro Studi's tender and the letter of guarantee were confidential and should not be communicated to the applicant.

21 The President of the Court therefore decided not to add those documents to the file.

Law

22 Under the combined provisions of Articles 242 EC and 243 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court may, if it considers that the circumstances so require, order the suspension of the operation of the contested measure or prescribe the necessary interim measures.

23 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case (fumus boni juris) for the measures applied for. These requirements are cumulative; accordingly, an application for suspension of operation must be dismissed if one of them is lacking (order of the President of the Court of First Instance in Case T-211/98 R Willeme v Commission [1999] ECR-SC I-A-15 and II-57, paragraph 18). Also, where appropriate, the judge hearing the application for interim measures weighs up the interests involved (order of the President of the Court of Justice in Case C-107/99 R Italy v Commission [1999] ECR I-4011, paragraph 59).

24 Having regard to the documents in the case, the President of the Court considers that he has all the information necessary to give a ruling on this application for suspension of operation, without the need to hear oral argument from the parties first.

25 It is necessary, in the present case, to examine the condition relating to urgency.

Arguments of the parties

26 The applicant points out that the implementation of the award and of the refusal are liable to cause it serious and irreparable damage. Its action on the merits could only lead to an award for compensation which, in this instance, would be inadequate in the circumstances of the case and having regard to the main purpose of its action.

27 The damage allegedly suffered by the applicant is not exclusively pecuniary. It consists, on the one hand, of direct loss, which can be evaluated at BEF 40 000 000 (EUR 991 574.09) and, on the other hand, indirect loss, in the light of the fact that the applicant set up an original,

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collaborative scheme for day nursery management, based on franchise agreements. Such a structure can succeed only if supported by an adequate volume of business. The loss of the management of the CPE Clovis places that structure at risk.

28 According to the applicant, the contract in question is a reference contract, on which the selected candidate may quite properly rely in order to obtain future contracts. Consequently, references play a decisive role in awarding the public contracts. It adds that this is also apparent from the qualitative selection process established by Directive 92/50, Article 32 of which lays down criteria based, in particular, on the experience which the service provider may refer to when submitting a tender.

29 Consequently, the applicant will not be able, in the future, to rely on the contract in question and the damage incurred thereby cannot be redressed by an award of damages. The interim measures sought will make it possible for the applicant to avoid being precluded, once and for all, in spite of the illegality of the award decision, from obtaining the contract.

30 Arguing that no lesson can be drawn from the Community case-law relating specifically to the notion of loss of references in respect of public contracts, the applicant proposes to refer to the case-law of the Belgian courts, since Belgian law is, after all, the law applicable to the contract in question. According to that case-law, the loss of a reference or prestige contract is, to a certain extent, regarded as coming under the heading of risk of serious damage reparable only with difficulty.

31 In the present case, the contract was a reference contract, and the award and refusal adversely affected the applicant's credibility and reputation. In that connection, it states that the contract is especially significant on account of both its annual financial value (EUR 3 470 509.35) and the number of child placements (400). The quality and very specific and prestigious nature of the contracting authority should also be taken into account. For the applicant, which had obtained the previous contract to manage the CPE Clovis, the fact of not being awarded the one in question amounts to a public rejection very detrimental to its business interests and compromises its credibility and reputation. Consequently, various projects in which the applicant is involved, and which are based on the reference provided by the contract at issue, will be jeopardised.

32 The applicant also maintains that it has some 95 assistants (members of staff), whose work is organised in such a way as to comply with the ISO 9001:94 management and organisation principles. It has held an ISO 9001 certificate since February 1998. It will probably be unable to redeploy them all and will therefore lose the main potential of its service-providing company and the investments made in acquiring the quality label afforded by the aforementioned certificate.

33 The situation is also urgent because the contract in question will be not only concluded but also, to a large extent, performed before judgment is delivered on the merits. The judgment in the main action will therefore have no useful effect (see, to that effect, the orders of the President of the Court of Justice in Case 45/87 R Commission v Ireland [1987] ECR 783, in Case 194/88 R Commission v Italy [1988] ECR 5647, and in Case C-272/91 R Commission v Italy [1992] ECR I-457, delivered in actions for failure to fulfil obligations).

34 Finally, the applicant states that the Commission was informed that it intended to contest the award and the refusal; the fact that the institution has taken steps to implement them by concluding the contract cannot prevent the present application from being upheld (see, by analogy, the order of the President of the Court of Justice in Case C-87/94 R Commission v Belgium [1994] ECR I-1395).

35 The Commission considers that the damage alleged by the applicant is neither serious nor irreparable within the meaning of the case-law of the Court of First Instance. The applicant is in a position

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to quantify the direct damage, which may therefore be fully redressed by the payment of damages.

36 As regards the other head of damage which the applicant claims to have suffered and describes as indirect loss, this is the loss of a reference contract. By describing this head of damage as indirect loss, the applicant has acknowledged that there is no causal link between that damage and the award and refusal, and that its position with regard to other contracts is uncertain. The applicant has been unable to establish a link between obtaining the contract in question and obtaining other contracts. Furthermore, Community law provides no protection against the indirect consequences of acts of the Community institutions.

37 Moreover, damage arising from the loss of a reference contract is not defined, in Belgian case-law, as serious and irreparable damage, but rather as serious damage reparable only with difficulty. For a candidate not to retain a limited-term contract when a new invitation to tender is issued is the inevitable consequence of the periodic nature of invitations to tender for public service contracts. In any event, the applicant's argument that the interim measures should be imposed to prevent it being precluded from obtaining the contract in dispute is not well founded.

38 The Commission points out that, contrary to what the applicant claims, references do not play a decisive part in awarding contracts, the criteria for which are listed in Articles 36 and 37 of Directive 92/50. They are one of many factors in the qualitative selection made before contracts are awarded, pursuant to Article 32 of the Directive.

39 The Commission also considers that the applicant has not shown that there are exceptional circumstances enabling the pecuniary damage it has incurred to be defined as serious and irreparable. Indeed, the applicant did not adduce proof that, if the interim measures it seeks are not granted, it risks being placed in a position which might jeopardise its very existence or irremediably alter its share of the market.

40 The Commission then states that the alleged loss of profit from part of the applicant's investment, in particular in staff training in order to obtain an ISO 9001 certificate, which would result if the staff were made redundant, is also purely pecuniary damage.

41 The applicant's argument that the matter is urgent because the contract concluded between the Commission and the candidate whose tender was successful will have been performed, to a large extent, before a ruling is given on the merits, is irrelevant in this case. The applicant relies on the case-law applicable to actions for failure to fulfil obligations. These are very specific cases and cannot give rise to a claim for compensation before the Community court. Moreover, the facts in the order in Commission v Italy, cited by the applicant, are not comparable to those in the present case. If the Court of First Instance were to annul the award in this case, the Commission could arrange another tendering procedure, in which the applicant could participate without encountering any particular difficulty.

42 Finally, the Commission points out that it was the applicant itself which had expressed the wish not to continue with the contract to manage the CPE Clovis. It is thus impossible to define as serious and irreparable damage a loss which was contemplated on its own initiative.

Findings of the Court

43 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party who requests the interim measure. It is for that party to adduce proof that it cannot await the outcome of the main action without suffering such damage (orders of the President of the Court of First Instance in Case T-73/98 R Prayon-Rupel v Commission [1998] ECR II-2769, paragraph 36, in Joined Cases T-38/99 R to T-42/99 R, T-45/99 R and T-48/99 R Sociedade Agrícola

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dos Arinhos and Others v Commission [1999] ECR II-2567, paragraph 42, and in Case T-144/99 R IMA v Commission [2000] ECR II-2067, paragraph 42).

44 As regards the pecuniary damage alleged by the applicant, it should be noted that, as the Commission has pointed out, according to settled case-law such damage cannot, in principle, be regarded as irreparable, or even reparable only with difficulty, if it may be the subject of subsequent compensation (orders of the President of the Court of Justice in Case C-213/91 R Abertal and Others v Commission [1991] ECR I-5109, paragraph 24, and in Case T-70/99 R Alpharma v Council [1999] ECR II-2027, paragraph 128).

45 Pursuant to those principles, the requested suspension would be justified, in the circumstances of this case, only if it appeared that, if the measure were not granted, the applicant would find itself in a situation which could jeopardise its very existence or irremediably alter its position in the market.

46 The applicant has not been able to establish that, if the interim measures it has requested are not granted, the loss of the management of the CPE Clovis would jeopardise the day nursery management structure it has set up or, in any event, the applicant's very existence. In that regard, it should be noted that the applicant has referred to several other projects in which it is already involved and which could lead to the establishment of day nurseries with a capacity of over 410 places.

47 It follows that the financial damage alleged by the applicant must be considered to be reparable. The damage constitutes a loss which can be redressed economically by means of the legal remedies provided for by the Treaty, particularly Article 235 EC (order of the President of the Court of First Instance in Case T-230/97 R Comafrica and Dole Fresh Fruit Europe v Commission [1997] ECR II-1589, paragraph 38).

48 As regards the non-pecuniary damage alleged by the applicant, and its argument that interim measures are urgent because of the irreparable damage which would be caused to its reputation and credibility, it should be noted that the refusal will not necessarily cause such damage. Participation in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants, and the elimination of a tenderer under the rules on tenders is not, in itself, prejudicial (order of the President of the Court of Justice in Case 118/83 R CMC v Commission [1983] ECR 2583, paragraph 51). Furthermore, the applicant was aware of the risk when it decided not to seek renewal of its contract with the Commission, leading the Commission to initiate a new public contract tendering procedure.

49 As for the applicant's argument that references play a decisive role in the award of public contracts, it should be noted, as the Commission has rightly indicated, that it is apparent from Article 32 of Directive 92/50 that references represent merely one of many criteria taken into account in the qualitative selection of service providers. Furthermore, the prejudicial effects which the applicant claims would result if its credibility and reputation were compromised cannot be regarded as an inevitable consequence of the implementation of the award and refusal. The harm which that implementation could cause the applicant is therefore purely hypothetical (order of the President of the Court of First Instance in Case T-322/94 R Union Carbide v Commission [1994] ECR II-1159, paragraph 31).

50 In the same way, as regards the damage which would allegedly be occasioned by the redundancy of its members of staff, the fact that the applicant itself describes this as likely shows that it is hypothetical.

51 Finally, the fact that the performance of the contract concluded with the Centro Studi will already have commenced before judgment is delivered in the main action is not a circumstance establishing

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urgency. If the Court of First Instance considers the main action well founded, the Commission will have to adopt the measures necessary to ensure appropriate protection of the applicant's interests (order of the President of the Court of First Instance in Case T-108/94 R Candiotte v Council [1994] ECR II-249, paragraph 27). The applicant has not referred to any circumstance which might prevent its interests from being protected, possibly by payment of compensation together with a new tendering procedure.

52 In the circumstances, it must be concluded that the evidence adduced by the applicant has not established to the requisite legal standard that the non-pecuniary damage which it alleges is certain or irreparable and is the direct consequence of the decisions taken by the Commission or of their implementation.

53 It follows from the above that the applicant has not succeeded in proving that it will suffer serious and irreparable damage if the requested interim measures are not granted.

54 Accordingly, the application for interim measures must be dismissed, and it is not necessary to consider whether the other conditions for granting suspension of operation are fulfilled.

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61999B0070-N128 : N 44
61999B0144-N42 : N 43
61999O0107-N59 : N 23

SUB	Public contracts of the European Communities
AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	France
NOTES	Brown, Adrian: Public Procurement Law Review 2001 p.NA51-NA53
PROCEDU	Application for annulment ; Application for interim measures - unfounded
DATES	of document: 20/07/2000 of application: 20/06/2000

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Judgment of the Court of 17 September 2002

Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne.

Reference for a preliminary ruling: Korkein hallinto-oikeus - Finland.

Public service contracts in the transport sector - Directives 92/50/EEC and 93/38/EEC - Contracting municipality which organises bus transport services and an economically independent entity of which participates in the tender procedure as a tenderer - Taking into account of criteria relating to theprotection of the environment to determine the economically most advantageous tender - Whether permissible when the municipal entity which is tendering meets those criteria more easily.

Case C-513/99.

Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Award of contracts - Most economically advantageous tender - Criteria - Protection of the environment - Whether permissible - Conditions - Criterion which can be satisfied only by a few undertakings, one of which belongs to the contracting entity - No effect - Same result if Directive 93/38 applicable

(Council Directives 92/50, Art. 36(1)(a), and 93/38, Art. 34(1)(a))

$$Article 36(1)(a) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

Moreover, the principle of equal treatment does not preclude the taking into consideration of such criteria solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

It would be no different if the procedure for the award of the public contract in question fell within the scope of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. Since the directives concerning public procurement, whose provisions relating to award criteria have substantially the same wording, aim to achieve similar objectives in their respective fields, and the duty to observe the principle of equal treatment lies at the very heart of those directives, there is no reason to give them different interpretations.

(see paras 69, 86, 88-93, operative part 1-3)

In Case C-513/99,

REFERENCE to the Court under Article 234 EC by the Korkein hallinto-oikeus (Finland) for a preliminary ruling in the proceedings pending before that court between

Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab,

and

Helsingin kaupunki,

HKL-Bussiliikenne,

on the interpretation of Articles 2(1)(a), (2)(c) and (4) and 34(1) of Council Directive 93/38/EEC

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of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), and Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann and F. Macken (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, M. Wathelet, R. Schintgen and V. Skouris (Rapporteur), Judges,

Advocate General: J. Mischo,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Concordia Bus Finland Oy Ab, by M. Heinonen, oikeustieteen kandidaatti,

- Helsingin kaupunki, by A.-L. Salo-Halinen, acting as Agent,

- the Finnish Government, by T. Pynnä, acting as Agent,

- the Greek Government, by D. Tsagkaraki and K. Grigoriou, acting as Agents,

- the Netherlands Government, by M.A. Fierstra, acting as Agent,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Swedish Government, by A. Kruse, acting as Agent,

- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by E. Savia, avocat,

having regard to the Report for the Hearing,

after hearing the oral observations of Concordia Bus Finland Oy Ab, represented by M. Savola, asianajaja; Helsingin kaupunki, represented by A.-L. Salo-Halinen; the Finnish Government, represented by T. Pynnä; the Greek Government, represented by K. Grigoriou; the Austrian Government, represented by M. Winkler, acting as Agent; the Swedish Government, represented by A. Kruse; the United Kingdom Government, represented by R. Williams, Barrister; and the Commission, represented by M. Nolin, assisted by E. Savia, at the hearing on 9 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2001,

gives the following

Judgment

Costs

94 The costs incurred by the Finnish, Greek, Netherlands, Austrian, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

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THE COURT,

in answer to the questions referred to it by the Korkein hallinto-oikeus by order of 17 December 1999, hereby rules:

1. Article 36(1)(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

2. The principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

3. The answer to the second and third questions would not be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

1 By order of 17 December 1999, received at the Court on 28 December 1999, the Korkein hallinto-oikeus (Supreme Administrative Court) referred for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 2(1)(a), (2)(c) and (4) and 34(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) (Directive 93/38), and Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 Those questions were raised in proceedings between Concordia Bus Finland Oy Ab (Concordia) and Helsingin kaupunki (City of Helsinki) and HKL-Bussiliikenne (HKL) concerning the validity of a decision of the Liikepalvelulautakunta (commercial service committee) of the city of Helsinki awarding the contract for the operation of a route in the urban bus network of Helsinki to HKL.

Legal background

Community legislation

Directive 92/50

3 Article 1 of Directive 92/50 provides:

For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

...

(ii) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC

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or fulfilling the conditions in Article 6(2) of the same Directive;

...

4 Article 36 of Directive 92/50, headed Criteria for the award of contracts, reads as follows:

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) the lowest price only.

2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.

Directive 93/38

5 Article 2 of Directive 93/38 provides:

1. This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. Relevant activities for the purposes of this Directive shall be:

...

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

...

4. The provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same condition as the contracting entities.

...

6 Under Article 34 of Directive 93/38:

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall be:

(a) the most economically advantageous tender, involving various criteria depending on the contract

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in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

(b) the lowest price only.

2. In the case referred to in paragraph 1(a), contracting entities shall state in the contract documents or in the tender notice all the criteria which they intend to apply to the award, where possible in descending order of importance.

...

7 Article 45(3) and (4) of Directive 93/38 states:

3. Directive 90/531/EEC shall cease to have effect as from the date on which this Directive is applied by the Member States and this shall be without prejudice to the obligations of the Member States concerning the deadlines laid down in Article 37 of that Directive.

4. References to Directive 90/531/EEC shall be construed as referring to this Directive.

National legislation

8 Directives 92/50 and 93/38 were transposed into Finnish law by the Julkisista hankinnoista annettu laki (Law on Public Procurement) 1505/1992, as amended by Laws 1523/1994 and 725/1995 (Law 1505/1992).

9 Under Paragraph 1 of Law 1505/1992, State and local authorities and other contracting entities specified in the law must comply with the provisions of the law in order to create competition and ensure fair and non-discriminatory treatment of participants in tender procedures.

10 Under Paragraph 2 of Law 1505/1992, contracting entities include municipal authorities.

11 Paragraph 7(1) of Law 1505/1992 provides, first, that contracts are to be awarded as favourably as possible and, second, that the tender to be approved is the one which is cheapest in price or most advantageous in overall economic terms.

12 Procedures for the award of public contracts in Finland are regulated in more detail by Regulation 243/1995 on supply, service and works contracts exceeding the threshold values and by Regulation 567/1994 on contracts of entities operating in the water, energy, transport and telecommunications sectors exceeding the threshold value, as amended by Regulation 244/1995 (Regulation 567/1994).

13 Paragraph 4(1) of Regulation 243/1995 excludes from the scope of that regulation contracts to which Regulation 567/1994 applies. Paragraph 1(10) of the latter excludes from its scope contracts to which Regulation 243/1995 applies.

14 Paragraph 43 of Regulation 243/1995 provides:

1. The contracting entity must approve either the tender which is economically most advantageous overall according to the assessment criteria for the contract or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, completion date, costs of use, quality, life cycle costs, aesthetic or functional characteristics, technical merit, maintenance services, reliability of delivery, technical assistance and environmental questions.

...

15 Similarly, Paragraph 21(1) of Regulation 567/1994 lays down that the contracting entity must approve the tender which is economically most advantageous overall according to the assessment criteria for the supply, service or works, or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, costs of use, life

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cycle costs, quality, environmental effects, aesthetic and functional characteristics, technical merit, maintenance services and technical assistance.

The main proceedings and the questions referred for a preliminary ruling

Organisation of bus transport services in the city of Helsinki

16 It appears from the order for reference that the Helsinki city council decided on 27 August 1997 to introduce tendering progressively for the entire bus transport network of the city of Helsinki, in such a way that the first route to be awarded would start operating from the autumn 1998 timetable.

17 Under the rules governing public transport in the city of Helsinki, the planning, development, implementation and other organisation and supervision of public transport, unless provided otherwise, are the responsibility of the Joukkoliikennelautakunta (public transport committee) and the Helsingin kaupungin liikennelaitos (transport department of the city of Helsinki, the transport department) which is subordinate to it.

18 According to the regulations applicable, the commercial service committee of the city of Helsinki is responsible for decisions on awarding public transport services within the city in accordance with the objectives adopted by the Helsinki city council and the public transport committee. In addition, the purchasing unit of the city of Helsinki is responsible for carrying out operations relating to contracts for urban public transport services.

19 The transport department is a commercial undertaking of the municipality which is divided operationally and economically into four production units (buses, trams, metro, and track and property services). The production unit for buses is HKL. The department also includes a head unit, which consists of a planning unit and an administrative and economic unit. The planning unit acts as an order-placing office concerned with the preparation of proposals for the public transport committee, the routes to be put out to tender, and the level of service to be required. The production units are economically distinct from the rest of the transport department and have separate accounting and balance sheets.

The tender procedure at issue in the main proceedings

20 By letter of 1 September 1997 and a notice published in the Official Journal of the European Communities of 4 September 1997, the purchasing unit of the city of Helsinki called for tenders for operating the urban bus network within the city of Helsinki, in accordance with routes and timetables described in a document in seven lots. The main proceedings concern lot 6 of the tender notice, relating to route 62.

21 It appears from the documents in the case that, according to the tender notice, the contract would be awarded to the undertaking whose tender was most economically advantageous overall to the city. That was be assessed by reference to three categories of criteria: the overall price of operation, the quality of the bus fleet, and the operator's quality and environment management.

22 As regards, first, the overall price asked, the most favourable tender would receive 86 points and the number of points of the other tenders would be calculated by using the following formula: Number of points = amount of the annual operating payment of the most favourable tender divided by the amount of the tender in question and multiplied by 86.

23 As regards, next, the quality of the vehicle fleet, a tenderer could receive a maximum of 10 additional points on the basis of a number of criteria. Thus points were awarded inter alia for the use of buses with nitrogen oxide emissions below 4 g/kWh (+2.5 points/bus) or below 2 g/kWh (+3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus).

24 As regards, finally, the operator's quality and environment programme, additional points were to be awarded for various certified quality criteria and for a certified environment protection

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programme.

25 The purchasing office of the city of Helsinki received eight tenders for lot 6, including those from HKL and from Swebus Finland Oy Ab (Swebus, subsequently Stagecoach Finland Oy Ab (Stagecoach), then Concordia). The latter's tender comprised two offers, designated A and B.

26 The commercial service committee decided on 12 February 1998 to choose HKL as the operator for the route in lot 6, as its tender was regarded as the most economically advantageous overall. According to the order for reference, Concordia (then Swebus) had submitted the lowest-priced tender, obtaining 81.44 points for its A offer and 86 points for its B offer. HKL obtained 85.75 points. As regards the bus fleet, HKL obtained the most points, 2.94 points, Concordia (then Swebus) obtaining 0.77 points for its A tender and -1.44 points for its B tender. The 2.94 points obtained for vehicle fleet by HKL included the maximum points for nitrogen oxide emissions below 2 g/kWh and a noise level below 77 dB. Concordia (then Swebus) did not receive any extra points for the criteria relating to the buses' nitrogen oxide emissions and noise level. HKL and Concordia obtained maximum points for their quality and environment certification. In those circumstances, HKL received the greatest number of points overall, 92.69. Concordia (then Swebus) took second place with 86.21 points for its A offer and 88.56 points for its B offer.

The proceedings before the national courts and tribunals

27 Concordia (then Swebus) made an application to the Kilpailuneuvosto (Finnish Competition Council) for the decision of the commercial service committee to be set aside, arguing inter alia that the award of additional points to a fleet with nitrogen oxide emissions and noise levels below certain limits was unfair and discriminatory. It submitted that additional points had been awarded for the use of a type of bus which only one tenderer, HKL, was in fact able to offer.

28 The Kilpailuneuvosto dismissed the application. It considered that the contracting entity was entitled to define the type of vehicle it wanted to be used. The selection criteria and their weight had to be determined objectively, however, taking into account the needs of the contracting entity and the quality of the service. The contracting entity had to be able, if necessary, to give reasons to justify its choice and the application of its criteria of assessment.

29 The Kilpailuneuvosto observed that the city of Helsinki's decision to give preference to low-pollution buses was an environment policy decision aimed at reducing the harm caused to the environment by bus traffic. That did not constitute a procedural defect. If that criterion was applied to a tenderer unfairly, it was possible to intervene. The Kilpailuneuvosto found, however, that all the tenderers had the possibility, if they so wished, of acquiring buses powered by natural gas. It therefore concluded that it had not been shown that the criterion in question discriminated against Concordia.

30 Concordia (then Stagecoach) appealed to the Korkein hallinto-oikeus to have the decision of the Kilpailuneuvosto set aside. It argued that awarding additional points to the least polluting and least noisy buses favoured HKL, the only tenderer which was able in practice to use a fleet which could obtain those points. It further submitted that, in the overall assessment of the tenders, no account can be taken of ecological factors which are not directly linked to the subject-matter of the tender.

31 In its order for reference, the Korkein hallinto-oikeus states, first, that in order to decide whether Regulation 243/1995 or Regulation 567/1994 is applicable in the present case, it is necessary to examine whether the contract at issue in the main proceedings falls within the scope of Directive 92/50 or Directive 93/38. It notes that Annex VII to Directive 93/38 mentions, with respect to Finland, both the public or private entities which operate bus transport in accordance with the Laki luvanvaraisesta henkilöliikenteestä tiellä (Law on licensed passenger transport by road) 343/1991, and also the transport department which operates the metro and tram networks in Helsinki.

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32 It states, next, that examination of the case also requires the interpretation of provisions of Community law as to whether a municipality, when awarding a contract of the kind at issue in the main proceedings, may take account of ecological considerations concerning the bus fleet tendered. If Concordia's argument as regards the points awarded for the environmental criteria and in other respects were accepted, that would mean that the number of points obtained by its B offer exceeded the points obtained by HKL.

33 It observes that Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 do not mention environmental questions in the list of criteria for determining the economically most advantageous tender. It notes that the Court has ruled in Case 31/87 Gebroeders Beentjes [1988] ECR 4635 and Case C-324/93 Evans Medical and Macfarlan Smith [1995] ECR I-563 that in selecting the most economically advantageous tender the contracting authorities are free to choose the criteria to be used in awarding the contract. Their choice may relate only, however, to criteria designed to identify the most economically advantageous tender.

34 It refers, finally, to the Commission's communication of 11 March 1988, Public Procurement in the European Union (COM(1998) 143 final), in which the Commission considers that it is legitimate to take environmental considerations into account for the purpose of choosing the economically most advantageous tender overall, if the organiser of the tender procedure itself benefits directly from the ecological qualities of the product.

35 In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

1. Are the provisions on the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ..., in particular Article 2(1)(a), (2)(c) and (4), to be interpreted as meaning that that directive applies to a procedure of a city which is a contracting entity for the award of a contract concerning the operation of bus transport within the city, if

- the city is responsible for the planning, development, implementation and other organisation and supervision of public transport in its area,

- for the above functions the city has a public transport committee and a city transport department subordinate thereto,

- within the city transport department there is a planning unit which acts as an ordering unit which prepares proposals for the public transport committee on which routes should be put out to tender and what level of quality of services should be required, and

- within the city transport department there are production units, economically distinct from the rest of the transport department, including a unit which provides bus transport services and takes part in tender procedures relating thereto?

2. Are the Community provisions on public procurement, in particular Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts ... or the equivalent Article 34(1) of Directive 93/38/EEC, to be interpreted as meaning that, when organising a tender procedure concerning the operation of bus transport within the city, a city which is a contracting entity may, among the criteria for awarding the contract on the basis of the economically most advantageous tender, take into account, in addition to the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet, the low nitrogen oxide emissions and low noise level of the bus fleet offered by a tendering undertaking, in a manner announced beforehand in the tender notice, such that if the nitrogen oxide emissions or noise level of the individual buses are below

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a certain level, extra points for the fleet may be taken into account in the comparison?

3. If the answer to the above question is affirmative, are the Community provisions on public procurement to be interpreted as meaning that the awarding of extra points for the abovementioned characteristics relating to nitrogen oxide emissions and noise level of the fleet is, however, not permitted if it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity is able to offer a bus fleet possessing the above characteristics, which in the circumstances only a few undertakings in the sector are otherwise able to offer?

The questions referred for a preliminary ruling

36 It should be observed to begin with that, as may be seen from the order for reference, the arguments put forward by Concordia in support of its appeal to the Korkein hallinto-oikeus relate solely to the alleged unlawfulness of the points system for the criteria relating to the bus fleet specified in the invitation to tender at issue in the main proceedings.

37 Thus by its second and third questions the national court essentially asks, first, whether Article 36(1) of Directive 92/50 or Article 34(1)(a) of Directive 93/38 permits the inclusion, among the criteria for the award of a public contract on the basis of the most economically advantageous tender, of a reduction of the nitrogen oxide emissions or the noise level of the vehicles in such a way that if those emissions or that noise level is below a certain ceiling additional points may be awarded for the comparison of tenders.

38 It also asks, second, whether the rules laid down by those directives, in particular the principle of equal treatment, permit the taking into account of such criteria where it appears from the outset that the transport undertaking which belongs to the municipality organising the tender procedure is one of the few undertakings able to offer buses which satisfy those criteria.

39 It is clear that the provisions of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 have substantially the same wording.

40 Moreover, as appears from the order for reference, there was no discussion in the main proceedings as to the national or Community legislation applicable.

41 As may be seen from the wording of the first question, the Korkein hallinto-oikeus is not asking the Court about the applicability of Directive 92/50, but only about the applicability of Directive 93/38 to the main proceedings.

42 It must therefore be considered, first, that the second and third questions relate to the compatibility with the relevant provisions of Directive 92/50 of award criteria such as those at issue in the main proceedings, and, second, that by its first question the national court essentially asks whether the answer to those questions would be different if Directive 93/38 were applicable. It follows that the second and third questions should be considered in turn, followed by the first question.

The second question

43 By its second question, the national court essentially asks whether Article 36(1)(a) of Directive 92/50 is to be interpreted as meaning that, where in the context of a public contract for the provision of urban bus transport services the contracting authority decides to award that contract to the tenderer submitting the most economically advantageous tender, it may take into account the reduction of nitrogen oxide emissions or the noise level of the vehicles in such a way that, if those emissions are or that noise level is below a certain ceiling, additional points may be awarded for the purposes of comparing the tenders.

Observations submitted to the Court

44 Concordia contends that in a public tender procedure the criteria for the decision must, in

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accordance with the wording of the relevant provisions of Community law, always be of an economic nature. If the objective of the contracting authority is to satisfy ecological or other considerations, recourse should be had to a procedure other than a public tender procedure.

45 On the other hand, the other parties to the main proceedings, the Member States which have submitted observations and the Commission submit that it is permissible to include ecological criteria in the criteria for the award of a public contract. They refer, first, to Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38, which list merely as examples factors which the contracting entity may take into account when awarding such a contract; next, they refer to Article 6 EC, which requires environmental protection to be integrated into the other policies of the Community; finally, they refer to the Beentjes and Evans Medical and Macfarlan Smith judgments, which allow a contracting entity to choose the criteria it regards as relevant when it assesses the tenders submitted.

46 In particular, the city of Helsinki and the Finnish Government state that it is in the interest of the city and its inhabitants for noxious emissions to be limited as much as possible. For the city of Helsinki itself, which is responsible for protection of the environment within its territory, direct economies follow from this, especially in the medico-social sector, which represents about 50% of its overall budget. Factors which contribute even on a modest scale to improving the overall state of health of the population enable it to reduce its charges rapidly and to a considerable extent.

47 The Greek Government adds that the discretion given to the national authorities as to the choice of the criteria for awarding public contracts presumes that that choice is not arbitrary and the criteria taken into consideration do not infringe the provisions of the EC Treaty, in particular the fundamental principles enshrined in it, such as freedom of establishment, freedom to provide services and prohibition of discrimination on grounds of nationality.

48 The Netherlands Government states that the criteria for awarding public contracts applied by the contracting authority must always have an economic dimension. It contends, however, that that condition is satisfied in the main proceedings, as the city of Helsinki is both the contracting authority and the body with financial responsibility for environment policy.

49 The Austrian Government submits that Directives 92/50 and 93/38 introduce two essential restrictions on the choice of the criteria for awarding public contracts. First, the criteria chosen by the contracting entity must relate to the contract to be awarded and make it possible to determine the most economically advantageous tender for it. Second, the criteria must be capable of guiding the discretion of the contracting entity on an objective basis and must not include elements of arbitrary choice. Moreover, according to the Government, the award criteria must be directly linked to the subject-matter of the contract, have effects which can be measured objectively, and be quantifiable at the economic level.

50 Similarly, the Swedish Government submits that the contracting entity's choice is limited, in that the award criteria must be related to the contract to be awarded and suitable for determining the most advantageous tender from the economic point of view. It adds that the criteria must also be consistent with the Treaty provisions on the free movement of goods and services.

51 According to the United Kingdom Government, the provisions of Article 36(1) of Directive 92/50 and Article 34(1) of Directive 93/38 must be interpreted as meaning that, when arranging an award procedure for the operation of bus transport services, a contracting authority or entity may, among other criteria for awarding the contract, take environmental criteria into consideration for assessing the economically most advantageous tender, provided that those criteria allow a comparison of all the tenders, are linked to the services to be provided, and have been published beforehand.

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52 The Commission contends that the criteria for the award of public contracts which may be taken into consideration when assessing the economically most advantageous tender must satisfy four conditions. They must be objective, apply to all the tenders, be strictly linked to the subject-matter of the contract in question, and be of direct economic advantage to the contracting authority.

Findings of the Court

53 Article 36(1)(a) of Directive 92/50 provides that the criteria on which the contracting authority may base the award of contracts may, where the award is made to the economically most advantageous tender, be various criteria relating to the contract, such as, for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, or price.

54 In order to determine whether and under what conditions the contracting authority may, in accordance with Article 36(1)(a), take into consideration criteria of an ecological nature, it must be noted, first, that, as is clear from the wording of that provision, in particular the use of the expression for example, the criteria which may be used as criteria for the award of a public contract to the economically most advantageous tender are not listed exhaustively (see also, to that effect, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 35).

55 Second, Article 36(1)(a) cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of a tender.

56 Moreover, as the Court has already held, the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the free movement of services and goods (see, inter alia, SIAC Construction, paragraph 32).

57 In the light of that objective and also of the wording of the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, transferred by the Treaty of Amsterdam in slightly amended form to Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender.

58 However, that does not mean that any criterion of that nature may be taken into consideration by the contracting authority.

59 While Article 36(1)(a) of Directive 92/50 leaves it to the contracting authority to choose the criteria on which it proposes to base the award of the contract, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender (see, to that effect, concerning public works contracts, Beentjes, paragraph 19, Evans Medical and Macfarlan Smith, paragraph 42, and SIAC Construction, paragraph 36). Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract.

60 It should be recalled, first, that, as the Court has already held, in order to determine the economically most advantageous tender, the contracting authority must be able to assess the tenders submitted and take a decision on the basis of qualitative and quantitative criteria relating to the contract in question (see, to that effect, concerning public works contracts, Case 274/83 Commission

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v Italy [1985] ECR 1077, paragraph 25).

61 Further, it also appears from the case-law that an award criterion having the effect of conferring on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer would be incompatible with Article 36(1)(a) of Directive 92/50 (see, to that effect, Beentjes, paragraph 26, and SIAC Construction, paragraph 37).

62 Next, it should be noted that the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising. It follows that, in accordance with Article 36(2) of that directive, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope (see, to that effect, concerning public works contracts, Beentjes, paragraphs 31 and 36, and Case C-225/98 Commission v France [2000] ECR I-7445, paragraph 51).

63 Finally, such criteria must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, Beentjes, paragraph 29, and Commission v France, paragraph 50).

64 It follows from the above considerations that, where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

65 With respect to the main proceedings, it must be stated, first, that criteria relating to the level of nitrogen oxide emissions and the noise level of the buses, such as those at issue in those proceedings, must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services.

66 Next, criteria whereby additional points are awarded to tenders which meet certain specific and objectively quantifiable environmental requirements are not such as to confer an unrestricted freedom of choice on the contracting authority.

67 In addition, as stated in paragraphs 21 to 24 above, the criteria at issue in the main proceedings were expressly mentioned in the tender notice published by the purchasing office of the city of Helsinki.

68 Finally, whether the criteria at issue in the main proceedings comply in particular with the principle of non-discrimination falls to be examined in connection with the answer to the third question, which concerns precisely that point.

69 Consequently, in the light of all the foregoing, the answer to the second question must be that Article 36(1)(a) of Directive 92/50 is to be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

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The third question

70 By its third question, the national court essentially asks whether the principle of equal treatment precludes the taking into consideration of criteria concerned with protection of the environment, such as those at issue in the main proceedings, because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

Observations submitted to the Court

71 Concordia submits that the possibility of using buses powered by natural gas, which were in practice the only ones to meet the additional criterion of reducing the level of nitrogen oxide emissions and the noise level, was very limited. At the date of the invitation to tender, there was only one service station in the whole of Finland supplying natural gas. Its capacity enabled it to supply about 15 gas-powered buses. Shortly before the invitation to tender, HKL placed an order for 11 new gas-powered buses, which meant that the station's capacity was fully used and it was not possible to supply fuel to other vehicles. Moreover, the service station was only a provisional one.

72 Concordia concludes that HKL was the only tenderer which had a real possibility of offering gas-powered buses. It therefore proposes that the answer to the third question should be that awarding points according to the nitrogen oxide emissions and reduced noise levels of the buses cannot be permitted, at least in a case where not all the operators in the sector in question have, even theoretically, the possibility of offering services eligible for those points.

73 The city of Helsinki submits that it was not under any obligation to put its own bus transport services out to tender, either under Community legislation or under Finnish legislation. Since an award procedure always involves additional work and expense, it would have had no reasonable ground for organising that procedure if it had known that the undertaking it owns was the only one able to offer a bus fleet satisfying the conditions laid down in the tender notice, or if it had really wished to reserve to itself the operation of that transport.

74 The Finnish Government submits that assessing the objectivity of the criteria stated in the invitation to tender at issue in the main proceedings is ultimately a matter for the national court.

75 The Netherlands Government submits that it follows from the Court's case-law that the award criteria must be objective and that there must be no discrimination between tenderers. It says, however, that in paragraphs 32 and 33 of the judgment in Case C-27/98 Fracasso and Leitschutz [1999] ECR I-5697 the Court indeed held that where, following a procedure for the award of a public contract, only one tender remains, the contracting authority is not required to award the contract to the only tenderer judged to be suitable. But it does not follow that if, as a result of the award criteria applied, there is only one tenderer left, those criteria are unlawful. In any event, it is for the national court to determine whether, in the case at issue in the main proceedings, competition was in fact distorted.

76 According to the Austrian Government, the use of the award criteria at issue in the main proceedings may in principle be permitted, even in a case where, as here, only a comparatively small number of tenderers are able to satisfy those criteria. It appears, however, according to the Court's case-law (Case 45/87 Commission v Ireland [1988] ECR 4929), that there is a limit to the permissibility of certain minimum ecological standards where the criteria applied restrict the market for the services or goods to be supplied to the point where there is only one tenderer remaining. There is no indication, however, that that was the case in the main proceedings.

77 The Swedish Government submits that the taking into account of the criterion relating to nitrogen oxide emissions in the way in which this was done in the case at issue in the main proceedings meant

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that a tenderer which had buses powered by gas or alcohol was rewarded. According to the Government, there was nothing to prevent the other tenderers from acquiring such buses. They had been available on the market for some years.

78 The Swedish Government maintains that the award of additional points for low nitrogen oxide emissions and noise levels of the buses which the tenderer intends to operate does not constitute direct discrimination, but is applied without distinction. Moreover, it does not appear to be indirect discrimination, in the sense of necessarily having the effect of benefiting HKL.

79 According to the United Kingdom Government, Directive 93/38 does not prohibit the awarding of additional points in the assessment of tenders where it is known beforehand that few undertakings will be able to obtain those additional points, as long as the contracting entity has made it known at the stage of the tender notice that such additional points may be obtained.

80 The Commission considers that, in view of the divergent opinions of the parties in the context of the main proceedings, it is not in a position to determine whether the criteria which were applied breach the principle of equal treatment of tenderers. It is therefore for the national court to rule on that question and to determine, on the basis of objective, relevant and consistent evidence, whether those criteria were adopted with the sole purpose of selecting the undertaking which was eventually selected or were defined to that end.

Findings of the Court

81 It must be stated that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition (see, to that effect, Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 33).

82 Thus, according to the case-law cited in paragraph 63 above, the award criteria must observe the principle of non-discrimination as it follows from the Treaty provisions on freedom of establishment and freedom to provide services.

83 In the present case, it should be noted, first, that, as is apparent from the order for reference, the award criteria at issue in the main proceedings were objective and applied without distinction to all tenders. Next, the criteria were directly linked to the fleet offered and were an integral part of a system of awarding points. Finally, under that system, additional points could be awarded on the basis of other criteria linked to the fleet, such as the use of low-floor buses, the number of seats and tip-up seats and the age of the buses.

84 Moreover, as Concordia acknowledged at the hearing, it won the tender for route 15 of the Helsinki urban bus network, even though that invitation to tender specifically required the operation of gas-powered vehicles.

85 It must therefore be held that, in such a factual context, the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a breach of the principle of equal treatment.

86 In those circumstances, the answer to the third question must be that the principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

The first question

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87 By its first question, the national court essentially asks whether the answer to the second and third questions would be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Directive 93/38.

88 On this point, it must be noted, first, that the provisions of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 have substantially the same wording.

89 Second, the provisions concerning award criteria of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and those of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) also have substantially the same wording as those of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38.

90 It should be observed, third, that those directives taken as a whole constitute the core of Community law on public contracts and are intended to attain similar objectives in their respective fields.

91 In those circumstances, there is no reason to give a different interpretation to two provisions which fall within the same field of Community law and have substantially the same wording.

92 It should also be noted that the Court has already held, in paragraph 33 of Commission v Denmark, that the duty to observe the principle of equal treatment lies at the very heart of all the public procurement directives. The documents in the main proceedings have not disclosed anything to show that, as regards the contracting entity's choice of award criteria, the interpretation of that principle should depend in this case on the particular directive applicable to the contract in question.

93 The answer to the first question must therefore be that the answer to the second and third questions would not be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Directive 93/38.

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SUB
Freedom of establishment and services ; Right of establishment ; Free movement of services

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PROCEDU Reference for a preliminary ruling

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Judgment of the Court (Sixth Chamber)
of 12 December 2002
Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) OSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH.
Reference for a preliminary ruling: Vergabekontrollsenat des Landes Wien - Austria.
Directive 93/37/EEC - Public works contracts - Definition of 'contracting authority' - Body governed by public law - Restricted procedure - Rules for weighting of criteria for selecting candidates invited to tender - Advertisement - Directive 89/665/EEC - Review procedures relating to public procurement - Time-limits for review.
Case C-470/99.

In Case C-470/99,

REFERENCE to the Court under Article 234 EC by the Vergabekontrollsenat des Landes Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Universale-Bau AG,

Bietergemeinschaft: 1. Hinteregger & Söhne Bauges.mbH Salzburg,

2. OSTU-STETTIN Hoch- und Tiefbau GmbH,

and

Entsorgungsbetriebe Simmering GesmbH,

on the interpretation of Article 1(a), (b) and (c) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT

(Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, C. Gulmann, V. Skouris (Rapporteur), and F. Macken, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Universale-Bau AG, by M. Neidhart, Direktor der Rechtsabteilung, and J. Mauch, Vorstandsdirektor Ingenieur,

- the Bietergemeinschaft 1. Hinteregger & Söhne Bauges.mbH Salzburg, 2. OSTU-STETTIN Hoch- und Tiefbau GmbH, by J. Olischar and M. Kratky, Rechtsanwälte,

- Entsorgungsbetriebe Simmering GesmbH, by T. Wenger, Rechtsanwalt,

- the Austrian Government, by H. Dossi, acting as Agent,

- the Netherlands Government, by M. Fierstra, acting as Agent,

- the Commission of the European Communities, by M. Nolin, acting as Agent, and by R. Roniger, Rechtsanwalt,

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having regard to the Report for the Hearing,

after hearing the oral observations of Entsorgungsbetriebe Simmering GmbH, represented by C. Casati, Rechtsanwalt, of the Austrian Government, represented by M. Fruhmann, acting as Agent, and of the Commission, represented by H. van Lier, acting as Agent, assisted by R. Roniger, at the hearing on 12 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2001,

gives the following

Judgment

Costs

101 The costs incurred by the Austrian and Netherlands Governments, and by the Commission, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Vergabekontrollsenat des Landes Wien by order of 12 November 1999, hereby rules:

1. A body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since satisfied, fulfils the requirement of the first indent of the second subparagraph of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts so as to be regarded as a body governed by public law within the meaning of that provision, on condition that the assumption of responsibility for the satisfaction of those needs can be established objectively.

2. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.

3. Directive 93/37 is to be interpreted as meaning that where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules for weighting the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or tender documents.

1 By order of 12 November 1999, received at the Court on 7 December 1999, the Vergabekontrollsenat des Landes Wien (Public Procurement Review Chamber of the Land of Vienna) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article

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1(a), (b) and (c) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, hereinafter `Directive 89/665').

2 Those questions were raised in the course of proceedings between Universale-Bau AG (hereinafter `Universale'), and the consortium of undertakings (`Bietergemeinschaft') formed by Hinteregger & Söhne Bauges.mbH and OSTU-STETTIN Hoch- und Tiefbau GmbH (hereinafter `the consortium'), and Entsorgungsbetriebe Simmering GesmbH (hereinafter `EBS'), concerning a procedure for the award of a public works contract.

Relevant provisions

Community legislation

3 It is apparent from the first and second recitals in the preamble to Directive 89/665 that the mechanisms, which existed at the date of its adoption at both national and Community levels, for ensuring the effective application of Community directives in relation to public procurement, were not always adequate to ensure compliance with the relevant Community provisions, particularly at a stage when infringements could still be corrected.

4 In the terms of the third recital in the preamble to that directive, `the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination and... for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law'.

5 Article 1(1) and (3) of Directive 89/665 provide:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

6 As is apparent from the first recital in its preamble, Directive 93/37, for reasons of clarity and better understanding, consolidated Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5), as subsequently amended.

7 In the words of its second recital, `the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails

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not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

8 The 10th recital in the preamble to Directive 93/37 states that, `to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community; whereas the information contained in these notices must enable contractors established in the Community to determine whether the proposed contracts are of interest to them; whereas, for this purpose, it is appropriate to give them adequate information on the works undertaken and the conditions attached thereto; whereas, more particularly, in restricted procedures advertisement is intended to enable contractors of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions'.

9 Further, it is apparent from the 11th recital in the preamble to Directive 93/37 that `additional information concerning contracts must, as is customary in Member States, be given in the contract documents for each contract or else in an equivalent document'.

10 Article 1(a) to (c) of Directive 93/37 provides:

`For the purposes of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

...

(c) a "work" means the outcome of building or civil engineering works, taken as a whole that is sufficient of itself to fulfil an economic and technical function.'

11 Article 7(2) of Directive 93/37 provides:

`The contracting authorities may award their public works contracts by negotiated procedure, with prior publication of a contract notice and after having selected the candidates according to publicly known qualitative criteria, in the following cases:

...'

12 Article 13(2)(e) of Directive 93/37, which applies to restricted and negotiated procedures provides:

`The contracting authorities shall simultaneously and in writing invite the selected candidates

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to submit their tenders. The letter of invitation shall be accompanied by the contract documents and supporting documents. It shall include at least the following information:

...

(e) the criteria for the award of the contract if these are not given in the notice.'

13 Article 30(1) and (2) of Directive 93/37 provides:

`1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.'

Austrian legislation

14 Paragraph 48(2) of the Wiener Landesvergabegesetz (Law of the Land of Vienna on public procurement, LGBl. No 36/1995, hereinafter `the WLVergG'), provides:

`The contract must be awarded to the tender which is technically and economically the most advantageous in the light of the criteria stated in the contract notice...'

15 Paragraph 96(1) and (2) of the WLVergG, entitled `Pre-litigation procedure', provides:

`(1) If a contractor considers that a decision taken by a contracting authority before the award of a contract infringes this Law and he has been or risks being harmed thereby, he shall formally communicate in writing to the contracting authority a statement of reasons and his intention to institute review proceedings.

(2) On receipt of the communication under subparagraph 1, the contracting authority shall either rectify the alleged infringement without delay and inform the contractor thereof or communicate in writing to the complainant why the alleged infringement does not exist.'

16 Paragraph 97 of the WLVergG, entitled `Application for review', is as follows:

`(1) An application for review prior to the award of a contract shall be admissible only if the contractor has formally notified the contracting authority of the alleged infringement and of his intention to apply for review (Paragraph 96(1)) and the contracting authority has not informed him within two weeks that the infringement has been rectified.

(2) Review may be applied for by:

1. a contractor who claims a business interest in the conclusion of a supply, works, works concession or service contract or a contract in the water, energy, transport or telecommunications sectors, in respect of a ground of nullity under Paragraph 101;

2. a tenderer who claims that the contract was not awarded to him in spite of the inapplicability of the grounds of elimination within the meaning of Paragraph 47 and contrary to Paragraph 48(2).

(3) The application under subparagraph 2 shall contain:

1. the precise designation of the award procedure concerned and of the decision challenged;

2. the precise designation of the contracting authority;

3. a precise statement of the facts;

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4. particulars of how the applicant risks being or already has been harmed;

5. the grounds on which the allegation of infringement is based;

6. a specific request for a declaration of nullity or amendment;

7. in cases under subparagraph 1, evidence that the contracting authority was notified in a pre-litigation procedure in accordance with Paragraph 96 of the alleged infringement and of the intention to apply for review, and reference to the contracting authority's failure to rectify the infringement within the specified time-limit.

(4) The review procedure does not have suspensory effect on the contract award procedure to which it relates.

...'

17 In addition, Paragraph 98 of the WLVergG, entitled `Time-limits', provides:

`Applications for review on the ground of the following alleged infringements shall be lodged with the Vergabekontrollsenat within the following time-limits:

1. as regards applications which are refused, two weeks, and where Paragraph 52 applies, three days after notification of the refusal;

2. as regards provisions in the notification by which contractors are invited to apply to take part in a restricted or negotiated procedure or as regards provisions of the invitation to tender, two weeks, and where Paragraph 52 applies, one week before expiry of the date for submitting applications or tenders;

3. as regards the award of a contract, two weeks after the publication of the award in the Official Journal of the European Communities or, where the award is not published, six months after the award of the contract.

...'

The main proceedings and the questions referred for a preliminary ruling

18 It is apparent from the order for reference that EBS issued a public invitation to tender for the award, under a restricted procedure, of a public works contract (terrassing, large-scale and specialist works) for the construction of the second biological treatment phase of the principal sewage treatment plant of Vienna.

19 In the invitation to tender, which was published in the Amstblatt der Stadt Wien of 17 March 1999, it was stated, under the heading `Criteria for the award of the contract', that the contract would be awarded to the economically most favourable tender according to the criteria set out in the invitation to tender.

20 In the explanatory notes concerning applications to take part, EBS stated the criteria for ranking those applications in the following manner:

`For the ranking of the applications to take part, the technical operating capacity over the last five years of the candidate, of each member of the consortium of contractors and of the sub-contractors indicated will be taken into account.

The five highest ranked candidates shall be invited to submit a tender.

The evaluation of the applications submitted shall be made according to a scoring procedure.

The following works shall be analysed in the following order:

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1. sewage treatment plants, 2. prestressed components, 3. large-scale foundations supported by columns in gravel, 4. oscillating pressure compaction, 5. high pressure soil consolidation.'

21 EBS also stated to the candidates, in the said explanatory notes, that the required references would be evaluated according to a `scoring' method lodged with a notary and that it had lodged with a notary on 9 April 1999, that is prior to the receipt of the first application to take part, the detailed rules of that method.

22 Universale and the consortium of undertakings (hereinafter together `the applicants in the main proceedings') made known their interest in taking part in the restricted procedure, without first of all seeking review of the conditions or terms of the invitation to tender. After being informed by EBS, by letter of 7 July 1999, that they were not amongst the five best-ranked candidates and were therefore not invited to submit a tender, they challenged the award procedure before the Vergabekontrollsenat.

23 In its application dated 3 August 1999, Universale sought a declaration by the Vergabekontrollsenat that the contracting authority's decision to engage in a restrictive procedure was unlawful and void; alternatively, that the limitation of the number of invited contractors to the five best-ranked candidates was unlawful and void; alternatively, that the `scoring' method applied did not observe the principles of transparency and reconstructability and that therefore the contracting authority's decision on the ranking of applications to take part was unlawful and void; finally, alternatively, that if the `scoring' method had been correctly applied, the applicants should have been ranked among the five best candidates and that the contracting authority's ranking was therefore unlawful and void.

24 In its application dated 20 September 1999, the consortium of undertakings sought a declaration that the decision not to include it among the five best-ranked candidates was unlawful and, alternatively, that the restricted procedure was unlawful.

25 The applicants in the main proceedings also applied for an interlocutory order restraining EBS from awarding the contract.

26 In the order for reference, the Vergabekontrollsenat states, on the one hand, that under the WLVergG, it has jurisdiction to determine applications for review of procedures for the award of public supply, works, and service contracts and, on the other hand, that under Paragraph 6(1) of the Allgemeines Verwaltungsverfahrensgesetz of 1991 (Code of Administrative Procedure, BGBl. No 1991/51), in the version of BGBl. I No 1998/158 (hereinafter `the AVG'), it is bound to confirm, of its own motion, that it has jurisdiction. It adds that, under Paragraph 6(2) of the AVG, the parties' consent can neither found nor vary the jurisdiction of an administrative authority and that, therefore, the fact that EBS stated in its invitation to tender that the WLVergG was applicable cannot suffice to establish the jurisdiction of the Vergabekontrollsenat.

27 Therefore, in order to decide whether it has jurisdiction, the Vergabekontrollsenat has to establish, first of all, whether EBS is a `contracting authority' within the meaning of Article 1(b) of Directive 93/37.

28 The Vergabekontrollsenat notes that it is clear from the judgment of the Court in Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, paragraph 21, that an entity must satisfy the three conditions set out in the second subparagraph of Article 1(b) of Directive 93/37 to be regarded as a body governed by public law within the meaning of that provision.

29 After finding that EBS has legal personality and is majority-controlled by the city of Vienna, that is a regional or local authority, the Vergabekontrollsenat concludes that EBS satisfies the conditions set out in the second and third indents of the second subparagraph of Article 1(b) of Directive 93/37.

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30 With regard to the condition laid down in the first indent of that provision, the Vergabekontrollsenat stated that it was apparent from EBS's statutes at the time of its establishment that it operated, on a commercial basis, sewage treatment installations. It states that such activities were not reserved or allotted to the public sector and that there was no indication in the said statutes that EBS was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

31 According to the findings of the Vergabekontrollsenat, a substantial change took place when EBS was made responsible for the operation of the city of Vienna's principal sewage treatment plant. In particular, in 1985 EBS entered into a lease with the city of Vienna, under which it undertook to manage the said sewage plant with staff supplied by the city of Vienna, which undertook to reimburse EBS the expenses occasioned by such personnel. Under two contracts made between the city of Vienna and EBS on 8 and 18 July 1996, the city of Vienna further undertook to transfer to EBS an appropriate global amount to cover the operating expenses. In that regard the Vergabekontrollsenat explains that EBS did not carry on that branch of its activities for profit. It was in fact an activity of general interest which the city of Vienna delegated to EBS and which was managed in such a way as to cover the expenses. The Vergabekontrollsenat concludes therefore that that activity is not of an industrial or commercial character.

32 According to the Vergabekontrollsenat, the possibility that it was an evasive manoeuvre can be ruled out since EBS was established in 1976 as a sanitation undertaking whereas the transfer of the management of the main sewage treatment plant did not take place until 1 January 1986. In particular, it considers that such a time-scale, as well as the fact that the Republic of Austria was not, at that time, a member of the European Union and that EBS was not, in any event, covered by Directive 71/305, which was then in force, which used the term `legal persons governed by public law', indicate the absence of any intention of evasion.

33 Nevertheless, since EBS was not responsible for satisfying needs in the general interest having a character other than industrial or commercial at the time of its establishment, but after changes in its sphere of activities, the Vergabekontrollsenat raises the question whether EBS satisfies the condition set out in the first indent of the second subparagraph of Article 1(b) of Directive 93/37.

34 In addition, the Vergabekontrollsenat points out that clause I of the contract made between EBS and the city of Vienna on 8 July 1996 stipulates that EBS is to carry out the enlargement of the main sewage treatment plant and to enter into the necessary contracts in its own name and on its own account. No specific condition is laid down as regards the detailed performance of that undertaking. Clauses II and III of the contract none the less impose on EBS a specified method of operating the main sewage treatment plant, without however specifying the actual form of the project.

35 Furthermore, it is apparent from a decision of the Buildings Department of 30 December 1998 that EBS has obtained permission to build on a site of which the city of Vienna is the proprietor. In a letter of 8 September 1999, EBS stated that the sewage treatment plant in question is to be built in its name and on its account, writing in particular: `We will have ownership of the sewage plant in question. The sewage plant will be transferred in the event of termination of the lease and management contract entered into for an indefinite period with the city of Vienna. In that case the city of Vienna is obliged to buy back our sewage plant. It must pay us the current market value of the sewage plant'.

36 In those circumstances, the Vergabekontrollsenat inquires whether, in light of the abovementioned agreements between EBS and the city of Vienna which, as a regional or local authority, is in any event a `contracting authority', the contract at issue in the case before it is a public works contract

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within the meaning of the combined provisions of Article 1(a) and (c) of Directive 93/37.

37 Next, if it is appropriate for it to declare that it has jurisdiction to hear the dispute before it, the Vergabekontrollsenat inquires whether the provisions of Paragraphs 96 to 98 of the WLVergG are compatible with Directive 89/665 inasmuch as they provide that an application for review of a particular provision in the invitation to tender is admissible only if made within a certain time-limit. In that regard, it states that, if no application for review of a specific provision of the invitation to tender is brought, or if such an application is brought out of time, it is not then possible to review the contracting authority's decision as to whether that provision of the invitation to tender infringes the WLVergG or Directive 89/665 and that that question is relevant to the dispute before it, because EBS expressly relies upon the fact that the application for review was brought out of time.

38 Finally, the Vergabekontrollsenat states that, in the context of the dispute before it, it is also called upon to decide whether it was correct for the applications of the applicants in the main proceedings to take part to be not accepted as a result of the `scoring' method adopted by the contracting authority, the detailed rules of which were only made known after expiry of the time-limit for applications and the award of the contract. The Vergabekontrollsenat makes clear that it cannot be excluded that the results of that method had a decisive influence on the contracting authority's decision.

39 Having regard to all those considerations, the Vergabekontrollsenat des Landes Wien decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

`1. Does a legal person constitute a "contracting authority" within the meaning of Article 1(b) of Directive 93/37/EEC even if it was not established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but now meets such needs?

2. If Entsorgungsbetriebe Simmering GesmbH is not a contracting authority, does the planned construction of the second biological treatment phase of the principal sewage plant, Vienna, constitute the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority, and thus a "public works contract" within the meaning of Article 1(a), read in conjunction with Article 1(c), of Directive 93/37/EEC?

3. If Question 1 or Question 2 is answered in the affirmative, does Directive 89/665/EEC preclude a national provision which fixes a time-limit for the review of an individual decision of the contracting authority so that on expiry of that time-limit the decision can no longer be challenged in the course of the ongoing contract award procedure? Is it necessary, for the persons concerned to plead every defect, failure to do so entailing loss of their right to do so?

4. If Question 1 or Question 2 is answered in the affirmative, is it sufficient for the body inviting tenders to determine that the applications will be evaluated according to a method lodged with a notary, or is it necessary for the evaluation criteria already to have been communicated in the call for candidates or the tender documents?'

The first question

40 By its first question, the Vergabekontrollsenat is asking, in essence, whether an entity which was not established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has subsequently been actually meeting, fulfils the condition required by the first indent of the second subparagraph of Article 1(b) of Directive 93/37 so as to be capable of being regarded as a body governed by public law within the meaning of that provision.

Admissibility

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41 On a preliminary point, it is appropriate to point out that, as is apparent from the order for reference, the Vergabekontrollsenat seeks clarification as to whether an entity such as EBS is a `contracting authority' within the meaning of Article 1(b) of Directive 93/37, in order to determine whether it has jurisdiction in connection with the applications for review of a decision by that company made by the applicants in the main proceedings.

42 In that regard, it must be recalled that, according to settled case-law, it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (see, in particular, Case C-446/93 SEIM [1996] ECR I-73, paragraph 32, and Case C-54/96 Dorsch Consult [1997] ECR I-4691, paragraph 40).

43 However, the Court has power to explain to the national court points of Community law which may help to solve the problem of jurisdiction with which that court is faced (see, in particular, SEIM, cited above, paragraph 33, and Joined Cases C-10/97 to C-22/97 IN.CO.GE.'90 and Others [1998] ECR I-6307, paragraph 15).

44 Furthermore, the character of EBS as a contracting authority affects the replies to the third and fourth questions referred, whose admissibility is not disputed.

45 Therefore, the question must be answered.

Substance

46 In the dispute in the main proceedings, it is common ground that, since EBS took over the operation of the main sewage treatment plant, under the contract made in 1985 with the city of Vienna, that company satisfies a need in the general interest not having an industrial or commercial character. Therefore, its treatment as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37 depends on the answer to be given to the question whether the condition set out in the first indent of that provision precludes an entity from being regarded as a `contracting authority' where it was not established for the purposes of satisfying needs in the general interest having a character other than industrial or commercial, but has undertaken such tasks as a result of a subsequent change in its sphere of activities.

Observations submitted to the Court

47 EBS submits that it cannot be regarded as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37, on the ground that it is clear from the actual wording of the first indent of that provision that the sole deciding factor is the task which it was given at the date of its establishment. It adds that the fact that it has, subsequently, taken responsibility for tasks in the general interest having a character other than industrial or commercial does not affect its status since it continues to carry out industrial and commercial assignments.

48 The Commission also maintains that EBS cannot be regarded as a `contracting authority' within the meaning of Article 1(b) of Directive 93/37, because the change in its activities stems neither from an amendment to that effect of its objects as defined in its statutes, nor from a legal obligation.

49 In contrast, the applicants in the main proceedings, as well as the Austrian and Netherlands Governments, submit that it is EBS's current activity which is to be taken into consideration and not its purpose at the date of its establishment, and they assert that a different interpretation would mean that, notwithstanding the fact that an entity corresponded as a matter of fact to the

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definition of `contracting authority' in Directive 93/37, it would not be required, in awarding public works contracts, to observe the requirements of that directive. In addition, they maintain that a functional interpretation of the term `contracting authority' is the only one capable of preventing possible evasion, since, otherwise, Directive 93/37 could easily be circumvented by transferring tasks in the general interest having a character other than industrial or commercial not to an entity newly established for that purpose, but to an existing one which previously had another object.

Findings of the Court

50 The Court has already had occasion to clarify the scope of the term `body governed by public law' in Article 1(b) of Directive 93/37, in the light, in particular, of the purpose of that directive.

51 Thus the Court has held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, in particular, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16, and Case C-237/99 Commission v France [2001] ECR I-939, paragraph 41).

52 It has deduced therefrom that the aim of Directive 93/37 is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, in particular, both cases cited above, University of Cambridge, paragraph 17, and Commission v France, paragraph 42).

53 The Court has therefore held that it is in the light of those objectives that the concept of `body governed by public law' in the second subparagraph of Article 1(b) of Directive 93/37 must be interpreted in functional terms (see, in particular, Commission v France, cited above, paragraph 43).

54 Thus, at paragraph 26 of the judgment in Mannesmann Anlagenbau Austria and Others, cited above, in relation to the treatment of an entity which had been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, but which also carried on commercial activities, the Court held that the condition laid down in the first indent of the second subparagraph of Article 1(b) of Directive 93/37 does not entail that the body concerned may be entrusted only with meeting needs in the general interest, not having an industrial or commercial character.

55 In particular, as is clear from paragraph 25 of the judgment in Mannesmann Anlagenbau Austria and Others, cited above, the Court has held that it is immaterial that, in addition to the specific task of meeting needs in the general interest, the entity concerned is free to carry out other activities, but, on the other hand, decided that it is a critical factor that it should continue to attend to the needs which it is specifically required to meet.

56 It follows therefrom that, for the purposes of deciding whether a body satisfies the condition set out in the first indent of the second subparagraph of Article 1(b) of Directive 93/37, it is necessary to consider the activities which it actually carries on.

57 In that regard, it should be pointed out that the effectiveness of Directive 93/37 would not be fully upheld if the application of the scheme of the directive to a body which satisfies the conditions set out in the second subparagraph of Article 1(b) thereof, could be excluded owing solely to the fact that the tasks in the general interest having a character other than industrial or commercial which it carries out in practice were not entrusted to it at the time of its establishment.

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58 The same concern to ensure the effectiveness of the second subparagraph of Article 1(b) of Directive 93/37 also militates against drawing a distinction according to whether the statutes of such an entity were or were not amended to reflect actual changes in its sphere of activity.

59 In addition, the wording of the second subparagraph of Article 1(b) of Directive 93/37 contains no reference to the legal basis of the activities of the entity concerned.

60 It is appropriate, furthermore, to point out that, in relation to the definition of the expression `body governed by public law' in the second subparagraph of Article 1(b) of Directive 92/50, which is in terms identical to those contained in the second subparagraph of Article 1(b) of Directive 93/37, the Court has already held that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that regard (Case C-360/96 BFI Holding [1998] ECR I-6821, paragraph 63).

61 It follows that the fact that, in the main proceedings, the extension of EBS's sphere of activities did not give rise to an amendment to the provisions of its statutes concerning its objects is irrelevant.

62 Although EBS's assumption of responsibility for needs in the general interest not having an industrial or commercial character has not been formally incorporated in its statutes, it is none the less set out in the contracts which EBS made with the city of Vienna and is therefore capable of being objectively established.

63 It is therefore appropriate to reply to the first question that a body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since actually satisfied, fulfils the condition required by the first indent of the second subparagraph of Article 1(b) of Directive 93/37 so as to be capable of being regarded as a body governed by public law within the meaning of that provision, on condition that the assumption of responsibility for the satisfaction of those needs can be established objectively.

The second question

64 In light of the reply to the first question, there is no need to reply to the second question, since it was referred to the Court only in the event of a negative reply to the first question.

The third question

65 By its third question, the referring court is asking, in essence, whether Directive 89/665 precludes national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity.

Observations submitted to the Court

66 The applicants in the main proceedings claim that the short periods prescribed for the commencement of applications for review by Paragraphs 97 and 98 of the WLVergG do not allow interested parties to check the grounds of a contracting authority's negative decision and, if appropriate, to ascertain the wrongful nature of the reasons advanced. Thus, it would be practically impossible for a reasoned application having some chance of success to be commenced within those periods.

67 Universale adds that candidates from other Member States cannot, as a general rule, comply with the time-limit of two weeks laid down in Paragraph 98 of the WLVergG, which is contrary to the fundamental principles of Community policy in the public procurement sector, namely, first,

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that of awarding public procurement contracts without discrimination and, secondly that of access for undertakings to a common market with large-scale opportunities strengthening the competitiveness of European undertakings.

68 In contrast, EBS submits that Directive 89/665 itself establishes a swift and effective procedure, calling for short time-limits after the expiry of which contracting authorities should be able to be sure that they can proceed with the procedure for awarding contracts. The necessity for short time-limits has clearly been shown in the main proceedings.

69 EBS emphasises, in particular, that nothing prevented the applicants in the main proceedings from the timeous expression of their reservations with regard to the invitation to tender, since it had mentioned to them, both that it would apply a `scoring' procedure to select the candidates who would be invited to tender and that it would not disclose the precise nature of the decision-making process. EBS adds that the application for review of the decision to invite certain candidates to tender had to be decided very quickly, otherwise it could not have pursued the procedure for the award of the contract. EBS points out finally that a time-limit of two weeks for applications for review of administrative decisions continues to be the general rule, citing as an example Paragraph 63(5) of the AVG, which provides that any decision of an administrative authority must be challenged within a time-limit of two weeks.

70 The Austrian and Netherlands Governments and the Commission maintain, in essence, that Directive 89/665 leaves it to Member States to lay down the specific detailed rules governing applications for review of public procurement procedures. They deduce therefrom that the Member States have discretion to fix the time-limits for applications for review, on the dual condition that the purposes of Directive 89/665 are not circumvented and that the fundamental principles of Community law are observed. The Austrian Government submits further that the time-limits for applications for review at issue in the main proceedings prevent public procurement procedures from being delayed more than necessary and reduce the risk of improper recourse to litigation, which are both in accordance with the objectives of Directive 89/665.

Findings of the Court

71 It should be noted, first of all, that, whilst the objective of Directive 89/665 is to guarantee the existence, in all Member States, of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures, it contains no provision specifically covering time-limits for the applications for review which it seeks to establish. It is therefore for the internal legal order of each Member State to establish such time-limits.

72 None the less, since there are detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, they must not compromise the effectiveness of Directive 89/665.

73 It is therefore appropriate to determine whether, in light of the purpose of that directive, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on individuals by Community law.

74 In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in its preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible.

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75 The full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringement of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements.

76 Moreover, the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying, in principle, the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty (see, by analogy, in relation to the principle of the effectiveness of Community law, Case C-261/95 Palmisani [1997] ECR I-4025, paragraph 28, and Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 33).

77 In light of the foregoing considerations, it must be held, first, that the conditions governing time-limits such as those at issue in the main proceedings appear to be reasonable with regard both to the objectives of Directive 89/665, as set out in paragraph 74 of this judgment, and to the principle of legal certainty.

78 Secondly, there can be no doubt that penalties such as prescription are such as to ensure that unlawful decisions of contracting authorities, from the moment they become known to those concerned, are challenged and corrected as soon as possible, which is also in accordance both with the objectives of Directive 89/665 and with the principle of legal certainty.

79 The answer to the third question must therefore be that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.

The fourth question

80 By its fourth question, the referring court is asking whether Directive 93/37 prohibits, in the context of a restricted procedure, the contracting authority from selecting those candidates who will be invited to tender according to methods of evaluation which have not been set out in the contract notice or in the tender documents, even if documents specifying those methods have been lodged with a notary.

Observations submitted to the Court

81 The applicants in the main proceedings claim that the procedure followed by EBS of not revealing to the candidates either the detailed rules of the `scoring' procedure or the importance of the different criteria for ranking the applications to take part is incompatible with the principles of transparency and objectivity. They add that the respective importance of the different ranking criteria must, in any event, appear in the contract notice, so as to exclude any arbitrariness in the contracting authority's decision and to enable the candidates to scrutinise the lawfulness thereof and to make use of their right of review.

82 In contrast, EBS and the Austrian Government submit that a procedure such as depositing with a notary documents specifying the detailed rules for evaluating the applications to take part is sufficient guarantee of compliance with the principles of non-discrimination and objectivity. They submit that, whilst it is clear from those principles that the contracting authority must prescribe in advance the procedure which it will use to choose the candidates and that such method of selection may not be subsequently changed, they do not thereby require the contracting authorities to divulge the precise details of the rules for evaluating the candidatures.

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83 EBS makes clear that, in the main proceedings, it set out the principal criteria for ranking the applications to take part in the order of their importance, and that it was precisely to encourage lawful and fair competition that it did not make known in advance to the candidates the precise detailed rules for evaluating the applications. EBS in fact sought the five construction undertakings which were objectively the best for the works contract in issue, and not undertakings which adapt their tenders to the contracting authority's views, which usually show through in the choice of evaluation methods.

Findings of the Court

84 At the outset, it is appropriate to state that, in the main proceedings, it is common ground that EBS ordained from the beginning the value which would be attributed to each of the selection criteria which it intended using, but provided no indication in that respect in the invitation to tender, merely lodging the documents relating to the `scoring' procedure with a notary.

85 It is also clear that in this case the national court does not seek to ascertain whether a contracting authority is obliged, under Community law, to lay down prior to the contract notice the rules as to the ranking of the selection criteria which it intends to use, but that it is asking the Court only about compliance with the requirements for advertisement under Directive 93/37 in a situation where the contracting authority has laid down such rules in advance.

86 The fourth question must therefore be understood as asking whether Directive 93/37 is to be interpreted as meaning that, where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules as to the weighting of the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or the tender documents.

87 In order to reply to the question thus rephrased, it is appropriate to point out, from the outset, that Directive 93/37 contains no specific provision relating to the requirements for prior advertisement concerning the criteria for selecting the candidates who will be invited to tender in the context of a restrictive procedure.

88 The title of Directive 93/37 and the second recital in its preamble show that its aim is simply to coordinate national procedures for the award of public works contracts, although it does not lay down a complete system of Community rules on the matter (Joined Cases C-285/99 and C-286/99 Lombardini and Mantovani [2001] ECR I-9233, paragraph 33).

89 The Directive nevertheless aims, as is clear from its preamble and 2nd and 10th recitals, to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States (see, among others, Lombardini and Mantovani, cited above, paragraph 34).

90 As the Court has already stated in respect of Directive 71/305, which, as was pointed out in paragraph 6 of this judgment, was consolidated by Directive 93/37, in order to meet that aim, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts (Case 31/87 Beentjes [1988] ECR 4635, paragraph 21).

91 The principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with (see, in particular, Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 61, and Case C-92/00 HI [2002] ECR I-5553, paragraph 45).

92 That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed

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(see Telaustria and Telefonadress, cited above, paragraph 62).

93 It follows therefrom that the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in a restricted procedure, both with the principle of the equal treatment of the potential tenderers and the principle of transparency so as to afford all equality of opportunity in formulating the terms of their applications to take part and their tenders (see, to that effect, in relation to the stage of comparison of tenders, Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 54).

94 It is in that perspective that, in accordance with the 10th and 11th recitals in its preamble, Directive 93/37 lays down advertising requirements in respect of both the criteria for selecting candidates and those for awarding the contract.

95 Thus, in relation, first, to the selection criteria, Article 7(2) of Directive 93/37, which concerns negotiated procedures, requires that the candidates are to be selected according to known qualitative criteria.

96 In relation, secondly, to the criteria for awarding contracts, Article 13(2)(e) of that directive, relating both to negotiated and restricted procedures, provides that they form part of the minimum information which must be mentioned in the letter of invitation to tender, if they do not already appear in the contract notice.

97 Similarly, for all types of procedure, where the award of the contract is made to the most economically advantageous tender, Article 30(2) of Directive 93/37, which applies both to the open procedure and the restricted and negotiated procedures, imposes on the contracting authority the obligation to state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of their importance. Also according to that article, where the contracting authority has set out a ranking in their order of importance of the criteria for the award which it intends to use, it may not confine itself to a mere reference thereto in the contract documents or in the contract notice, but must, in addition, inform the tenderers of the ranking which it has used.

98 As the Court has stated in respect of Article 27(2) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1), the terms of which are substantially the same as those of Article 30(2) of Directive 93/37, the requirement thus imposed on the contracting authorities is intended precisely to inform all potential tenderers, before the preparation of their tenders, of the award criteria to be satisfied by these tenders and the relative importance of those criteria, thus ensuring the observance of the principles of equal treatment of tenderers and of transparency (see, Commission v Belgium, cited above, paragraphs 88 and 89).

99 It is therefore clear that the interpretation according to which, where, in the context of a restricted procedure, the contracting authority has laid down prior to the publication of the contract notice the rules for the weighting of the selection criteria it intends to use, it is obliged to bring them to the prior knowledge of the candidates, is the only interpretation which complies with the objective of Directive 93/37, as explained in paragraphs 88 to 92 of this judgment, since it is the only one which is apt to guarantee an appropriate level of transparency and, therefore, compliance with the principle of equal treatment in the procedures awarding contracts to which that directive applies.

100 Therefore, the answer to the fourth question referred must be that Directive 93/37 is to be interpreted as meaning that where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules for weighting the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or tender documents.

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CONCERNS	Interprets 31989L0665 Interprets 31993L0037-A01LBL2 Interprets 31993L0037
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	German
OBSERV	Austria ; Netherlands ; Member States ; Commission ; Institutions
NATIONA	Austria
NATCOUR	*A9* Vergabekontrollsenat des Landes Wien, BeschluÃƒ vom 12/11/1999
NOTES	Oder, Martin: Zeitschrift fÃîr Vergaberecht und Beschaffungspraxis 2003 p.82-84 Thienel, Rudolf: Zeitschrift fÃîr Vergaberecht und Beschaffungspraxis 2003 p.68-73 Krohn, Wolfram: European Law Reporter 2003 p.160-161 Antweiler, Clemens: EuropÃñische Zeitschrift fÃîr Wirtschaftsrecht 2003 p.330-333 Dischendorfer, Martin: Public Procurement Law Review 2003 p.NA34-NA40 Bonechi, Leonardo: Diritto pubblico comparato ed europeo 2003 p.953-955 X: Il Foro italiano 2004 IV Col.337-339
PROCEDU	Reference for a preliminary ruling
ADVGEN	Alber
JUDGRAP	Skouris
DATES	of document: 12/12/2002 of application: 07/12/1999

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Judgment of the Court (Sixth Chamber) of 27 November 2001

Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente nazionale per le strade and Società Italiana per Condotte d'Acqua SpA (C-285/99) and Impresa Ing. Mantovani SpA v ANAS - Ente nazionale per le strade and Ditta Paolo Bregoli (C-286/99).

Reference for a preliminary ruling: Consiglio di Stato - Italy.

Directive 93/37/EEC - Public works contracts - Award of contracts - Abnormally low tenders - Detailed rules for explanation and rejection applied in a Member State - Obligations of the awarding authority under Community law.

Joined cases C-285/99 and C-286/99.

Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Award of contracts - Abnormally low tenders - Automatic exclusion - Not permissible - Duty to use an examination procedure allowing the parties to be heard - Application of a mathematical criterion for identifying abnormally low tenders not revealing the exclusion threshold to the undertakings concerned before submission of their tenders - Whether permissible - Conditions - Exclusion of certain justifications - Not permissible

(Council Directive 93/37, Art. 30(4))

$$Article 30(4) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts must be interpreted as precluding legislation and administrative practice of a Member State which, first, allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions, and, second, require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data.

However, provided all the requirements it imposes are otherwise complied with and the aims pursued by Directive 93/37 are not defeated, that Article 30(4) does not in principle preclude legislation and administrative practice of a Member State which, in the matter of identifying and examining abnormally low tenders, first, require all tenderers, under threat of exclusion from participation in the contract, to accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and, second, apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file, the result produced by applying that calculation method having, however, to be capable of being reconsidered by the contracting authority.

(see para. 86 and operative part)

In Joined Cases C-285/99 and C-286/99,

REFERENCE to the Court under Article 234 EC by the Consiglio di Stato (Italy) for a preliminary ruling in the proceedings pending before that court between

Impresa Lombardini SpA - Impresa Generale di Costruzioni

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and

ANAS - Ente nazionale per le strade,

Società Italiana per Condotte d'Acqua SpA (C-285/99),

and between

Impresa Ing. Mantovani SpA

and

ANAS - Ente nazionale per le strade,

Ditta Paolo Bregoli (C-286/99),

intervener:

Coopsette Soc. coop. arl (C-286/99),

on the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

THE COURT (Sixth Chamber),

composed of: N. Colneric, President of the Second Chamber, acting as President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and V. Skouris, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Impresa Lombardini SpA - Impresa Generale di Costruzioni, by A. Cinti, R. Ferola and L. Manzi, avvocati,

- Impresa Ing. Mantovani SpA, by A. Cancrini, avvocato,

- Coopsette Soc. coop. arl, by S. Panunzio, avvocato,

- the Italian Government, by U. Leanza, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato,

- the Austrian Government, by W. Okresek, acting as Agent,

- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by M. Moretto, avvocato,

having regard to the Report for the Hearing,

after hearing the oral observations of Impresa Lombardini SpA - Impresa Generale di Costruzioni, represented by R. Ferola, of Impresa Ing. Mantovani SpA, represented by C. De Portu, avvocato, of Coopsette Soc. coop. arl, represented by S. Panunzio, of the Italian Government, represented by D. Del Gaizo, Avvocato dello Stato, and of the Commission, represented by M. Nolin, assisted by M. Moretto, at the hearing on 3 May 2001,

after hearing the Opinion of the Advocate General at the sitting on 5 June 2001,

gives the following

Judgment

Costs

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87 The costs incurred by the Italian and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Consiglio di Stato by orders of 26 May 1999, hereby rules:

Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts must be interpreted as follows:

- it precludes a Member State's legislation and administrative practice which allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions;

- it also precludes a Member State's legislation and administrative practice which require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data;

- however, provided all the requirements it imposes are otherwise complied with and the aims pursued by Directive 93/37 are not defeated, it does not in principle preclude a Member State's legislation and administrative practice which, in the matter of identifying and examining abnormally low tenders, first, require all tenderers, under threat of exclusion from participation in the contract, to accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and, second, apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file; the result produced by applying that calculation method must, however, be capable of being reconsidered by the contracting authority.

1 By two orders of 26 May 1999, received at the Court Registry on 30 July 1999, the Consiglio di Stato referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54; the Directive).

2 The questions have been raised in two cases between the Italian companies Impresa Lombardini SpA - Impresa Generale di Costruzioni (Lombardini) (C-285/99) and Impresa Ing. Mantovani SpA (Mantovani) (C-286/99) and ANAS - Ente nazionale per le strade (National Road Agency; ANAS), the contracting authority under public law in Italy, concerning the rejection of tenders submitted by Lombardini and Mantovani in two restricted public works tendering procedures on the ground that those tenders were abnormally low.

Legal background

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3 The directive was adopted on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100A of the EC Treaty (now, after amendment, Article 95 EC).

4 According to the second recital in its preamble, the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts.

5 Article 30 of the Directive, which appears in Chapter 3, headed Criteria for the award of contracts, of Title IV, headed Common rules on participation, provides:

1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

...

4. If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

However, until the end of 1992, if current national law so permits, the contracting authority may exceptionally, without any discrimination on grounds of nationality, reject tenders which are abnormally low in relation to the works, without being obliged to comply with the procedure provided for in the first subparagraph if the number of such tenders for a particular contract is so high that implementation of this procedure would lead to a considerable delay and jeopardise the public interest attaching to the execution of the contract in question....

National legislation

6 Article 30(4) of the directive was transposed into Italian law by Article 21(1a) of Law No 109 of 11 February 1994 (GURI No 41 of 19 February 1994, p. 5), the framework law on public works.

7 In the version as amended by Article 7 of Decree-Law No 101 of 3 April 1995 (GURI No 78 of 3 April 1995, p. 8), ratified by Law No 216 of 2 June 1995 (GURI No 127 of 2 June 1995, p. 3), that provision reads as follows:

In cases of awards of contracts for works worth ECU 5 million or more on the basis of the lowest-bid criterion mentioned in paragraph 1, the authority concerned must assess the irregularity, for the purposes of Article 30 of Council Directive 93/37 of 14 June 1993, of any tender which offers a higher discount than the percentage fixed before 1 January of each year by decree of the Minister

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of Public Works, after hearing the views of the Osservatorio (Monitoring Authority) for public works, having regard to the tenders admitted in the procedures held in the previous year.

To that end, the public administration may take account only of explanations based on the economy of the construction method or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer, but not of explanations relating to all those elements for which minimum values are laid down by legislation, regulations or administrative provisions or for which minimum values can be ascertained from official data. Tenders must be accompanied, when submitted, by explanations concerning the most significant price components, indicated in the tender notices or the letters of invitation, which together add up to not less than 75% of the basic contract value.

8 By ministerial decrees of 28 April 1997 (GURI No 105 of 8 May 1997, p. 28) and 18 December 1997 (GURI No 1 of 2 January 1998, p. 26), both issued under the first subparagraph of Article 21(1a) of Law No 109/94, as amended, and determining the threshold at which tenders in tender notices were to be regarded as abnormal, the Minister of Public Works, having recognised the impossibility of setting a single threshold for the whole country and in view of the fact that the Osservatorio had not been established, decided that the percentage discount giving rise to the obligation on the contracting authority to undertake an examination of abnormal tenders would be fixed for 1997 and 1998 at a measure equal to the arithmetic mean of the discounts, in percentage terms, in the case of all tenders admitted, increased by the average arithmetic divergence of the discounts, in percentage terms, which exceed the said mean.

The main proceedings and the questions referred for a preliminary ruling

Case C-285/99

9 In 1997, Lombardini took part in a restricted procedure for the award of a public works contract issued by the ANAS, with a view to carrying out works widening a section of motorway to three lanes, with a basic contract value of ITL 122 250 216 000.

10 Both the contract notice and the letter of invitation to submit tenders stated that the contract would be awarded in accordance with Article 21 of Law No 109/94, amended by Law No 216/95, the criterion to be applied being the maximum discount on the price schedule and on the cost of the rough work contracted for, and that the contracting authority would determine which tenders were to be considered as being abnormally low by applying the criterion laid down by the ministerial decree of 28 April 1997.

11 In accordance with Article 21(1a), the letter of invitation required tenderers to include with their bids explanations concerning the most significant price components equivalent to 75% of the basic contract value mentioned in the tender notice. The tender and the explanations as to its composition were, under threat of exclusion, to be drafted in accordance with the rules attached to that invitation and included in the envelope containing the administrative documentation. It was also stipulated, again under threat of exclusion, that the explanatory documentation necessary to check the soundness of the prices bid for the significant components of the contract was to be inserted into a separate sealed envelope, which was to be opened and its contents examined only in respect of tenders offering a discount higher than the arithmetical anomaly threshold. In the event that the contract was awarded to a tenderer whose bid offered such a discount, it was further provided that the price analyses and explanations produced in support of the tender were to form an integral part of the latter and were to be attached to the contract with contractual force.

12 Having fixed the anomaly threshold for the contract in question at 28.004%, in accordance with the detailed rules set out in the ministerial decree of 28 April 1997, the competent authority opened only envelopes containing the explanatory documentation in respect of those tenders offering a discount shown to be above that threshold, which included the tender by Lombardini.

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13 Following the examination of that documentation, the authority declared all tenders offering a discount above that threshold inadmissible, without however giving the undertakings concerned the opportunity to submit other explanations after their tenders had been judged to be abnormally low and before the final awarding of the contract.

14 Lombardini's tender, which offered a discount of 29.88%, was thus excluded and the contract was awarded to Società Italiana per Condotte d'Acqua SpA, whose tender, offering a discount of 27.70%, was the lowest of the bids not regarded as being abnormally low.

15 Lombardini then brought an action before the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio, Italy), arguing that the Italian legislation did not comply with the requirements of the Directive inasmuch as, in order to remove any suspicion of abnormality, it was not sufficient to assess the explanations supplied on the submission of the tender, which might, moreover, concern only 75% of the basic contract price, but that, in the light of the directive, it was essential for the contracting authority then to ask the undertaking in question for details and clarifications in the context of a genuine exchange of information and argument.

16 The Administrative Court having dismissed its action by a decision of 1 July 1998, Lombardini brought the dispute before the Consiglio di Stato.

17 The Consiglio makes the point that Italian legislation and administrative practice require undertakings participating in a tender procedure, on the submission of their tenders, to provide explanations, on forms prepared for the purpose, and corresponding to at least 75% of the basic contract value, under threat of automatic exclusion from the tender, even though those operators are not able to know, at the time they submit their file and before the examination of all the tenders admitted to the procedure, the level of discount which the contracting authority will regard as abnormal. The Consiglio di Stato takes the view that resolution of the dispute requires it to be determined whether that legal situation complies with the Directive or whether, on the contrary, the Directive requires the contracting authority to exchange information and argument after the submission of the tenders, by means of an individual review in discussion with the operator concerned, without any time-limit for the provision by the latter of evidence capable of corroborating the credibility of his tender.

18 The Consiglio di Stato further questions the compatibility of the Italian legislation with Community law in so far as that legislation excludes any explanation relating to those elements for which minimum values are laid down by law, regulation or administrative provision or for which minimum values can be ascertained from official data. The provision in question might prove incompatible with Community law in so far as it risked hindering the operation of free competition and infringing the principle of finding the undertakings which submit the best tender, a principle which should be regarded as fundamental in Community law.

19 Considering that resolution of the case thus required interpretation of Community law, the Consiglio di Stato decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Are clauses in calls for tenders for public works contracts which prevent the participation of undertakings which have not submitted with their tenders explanations in respect of the price indicated, being equal to at least 75% of the basic contract value, incompatible with Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts?

2. Is a mechanism for automatically calculating the anomaly threshold of tenders to be subjected to a check on their authenticity, based on a statistical criterion and an arithmetical mean, such that undertakings are unable to ascertain that threshold in advance, incompatible with Article

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30(4) of Directive 93/37?

3. Is provision for a prior exchange of views, without the undertaking which has allegedly submitted an abnormal tender having the opportunity to state its reasons after the opening of the envelopes and before the adoption of the decision excluding that tender, incompatible with Article 30(4) of Directive 93/37?

4. Is a provision whereby the contracting authority may take account only of explanations relating to the economy of the construction method or the technical solutions adopted or the exceptionally favourable conditions available to the tenderer incompatible with Article 30(4) of Directive 93/37?

5. Is the exclusion of explanations relating to items for which minimum figures can be ascertained from official lists incompatible with Article 30(4) of Directive 93/37?

Case C-286/99

20 In 1997, Mantovani took part in a restricted tendering procedure initiated by the ANAS for construction work on a stretch of country road. That contract notice indicated that the contract would be awarded to the tendering undertaking which allowed the largest discount in relation to the basic contract value, amounting to ITL 15 720 000 000.

21 The anomaly threshold having been fixed at 40.865%, Mantovani's tender, which involved a discount of 41.460%, above that threshold, was excluded for reasons similar to those which led to the exclusion of Lombardini's tender in Case C-285/99.

22 The works were awarded to the undertaking Paolo Bregoli, whose tender was the lowest amongst those not regarded as abnormally low.

23 Mantovani's action before the Tribunale Amministrativo Regionale del Lazio was dismissed by a decision of 26 June 1998.

24 Mantovani having brought the dispute before the Consiglio di Stato, the latter, basing its argument on considerations similar to those set out in connection with Case C-285/99, decided to stay proceedings and refer five questions to the Court of Justice for a preliminary ruling, worded identically with those in Case C-285/99.

25 Coopsette Soc. coop. arl has been given leave to intervene in the main proceedings in support of Mantovani.

26 By Order of the President of the Court of Justice of 14 September 1999, Cases C-285/99 and C-286/99 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred for a preliminary ruling

27 It must be borne in mind at the outset that, although the Court may not, under Article 234 EC, rule upon the compatibility of a provision of domestic law with Community law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, for example, Case C-292/92 Hünermund and Others [1993] ECR I-6787, paragraph 8; Case C-28/99 Verdonck and Others [2001] ECR I-3399, paragraph 28; Case C-399/98 Ordine degli Architetti and Others [2001] ECR I-5409, paragraph 48).

28 In those circumstances, the questions referred, which it will be convenient to examine together, should be understood as asking essentially whether Article 30(4) of the Directive is to be interpreted as precluding legislation and administrative practice of a Member State which:

- first, allow the contracting authority to reject as abnormally low tenders offering a discount exceeding the anomaly threshold - calculated in accordance with a mathematical formula by reference

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to the whole of the tenders received for the procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file -, where that authority makes its decision taking account only of explanations of the proposed prices, relating to at least 75% of the basic contract value referred to in the contract notice, which the tenderers were required, under threat of being excluded from participation, to attach to their tender, without giving them the opportunity to express their point of view, after the opening of the envelopes, concerning the elements of the prices proposed which gave rise to suspicions, and

- second, require the contracting authority to take into consideration, for the purposes of checking abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data.

29 The orders for reference and the documents before the court show that, under the legislation and administrative practice applicable in the main proceedings in the two cases, every tender had to be accompanied, at the time of submission, by explanations of the most significant price components representing at least 75% of the basic value of the contract in question. That information had to be submitted in a separate sealed envelope, the contents of which were to be examined only if the tender of the undertaking concerned offered a discount exceeding the anomaly threshold, which is fixed for each contract by reference to all the bids made by the tenderers, so that the latter do not know that threshold at the time they submit their file.

30 The facts show that the contracting authority sets aside as abnormally low those tenders offering a discount greater than the anomaly threshold so calculated, and systematically awards the contract to the undertaking whose tender is the lowest amongst the other tenders. The exclusion of abnormally low tenders and the award of the contract take place solely on the basis of an assessment by the competent authority of the explanations submitted at the same time as the tenders themselves and relating to only 75% of the basic contract value, without that authority asking the undertakings concerned for further details and without the latter having the possibility of supplying other explanations after their tender has been suspected of being abnormal.

31 The relevant national legislation further provides, first, that the contracting authority may take into account only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, while, secondly, precluding the contracting authority from basing its decision on explanations relating to any element for which a minimum values is laid down by law, regulation or administrative provision or which can be ascertained from official data.

32 It is in the light of those legal and factual characteristics that the Court must answer the questions referred for a preliminary ruling, as reformulated in paragraph 28 of this judgment.

The detailed rules for identifying, verifying and excluding abnormally low tenders

33 As regards this first aspect of the questions referred, the title of the Directive and the second recital in its preamble show that its aim is simply to coordinate national procedures for the award of public works contracts, although it does not lay down a complete system of Community rules on the matter.

34 The Directive nevertheless aims, as is clear from its preamble and second and tenth recitals, to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States (Ordine degli Architetti, paragraph 52).

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35 The primary aim of the Directive is thus to open up public works contracts to competition. It is exposure to Community competition in accordance with the procedures provided for by the Directive which avoids the risk of the public authorities indulging in favouritism (Ordine degli Architetti, paragraph 75).

36 The coordination at Community level of procedures for the award of public works contracts is thus essentially aimed at protecting the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State and, to that end, to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body governed by public law may choose to be guided by considerations other than economic ones (see, to that effect Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraphs 16 and 17; Case C-237/99 Commission v France [2001] ECR I-939, paragraphs 41 and 42).

37 The contracting authority is therefore required to comply with the principle that tenderers should be treated equally, as indeed is expressly shown by Article 22(4), the fourth subparagraph of Article 30(4) and Article 31(1) of the Directive.

38 In addition, the principle of non-discrimination on grounds of nationality implies, in particular, an obligation of transparency in order to allow the contracting authority to ensure that it has been complied with [see, by analogy, in relation to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31].

39 It is in that perspective that, as the twelfth recital in its preamble shows, the Directive provides common rules for participation in public works contracts, including both qualitative selection criteria and criteria for the award of the contract.

40 More particularly concerning those criteria for the award of the contract, these are defined in particular in Article 30 of the Directive.

41 As the first recital in its preamble shows, the Directive constitutes a consolidation of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682) and subsequent amendments thereto. As the Court has already held in paragraph 13 of its judgment in Case C-304/96 Hera [1997] ECR I-5685), Article 30(4) of the Directive corresponds to Article 29(5) of Directive 71/305, as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).

42 In its initial version, Article 29(5) of Directive 71/305 was worded as follows:

If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.

For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.

...

43 The Court has already held that when, in the opinion of the authority awarding a public works contract, a tenderer's offer is obviously abnormally low in relation to the transaction, Article 29(5) of Directive 71/305 requires the authority to seek from the tenderer, before coming to a decision as to the award of the contract, an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal and to allow him a reasonable time within which to submit further details (Case 76/81 Transporoute [1982] ECR 417, paragraph 18).

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44 In paragraph 17 of that judgment, the Court held that the contracting authority may not in any circumstances reject an abnormally low tender without even seeking an explanation from the tenderer, since the aim of Article 29(5) of Directive 71/305, which is to protect tenderers against arbitrariness on the part of the authority awarding contracts, could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations.

45 Similarly, the Court has consistently held that Article 29(5) of Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive (Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraphs 19 and 21; Case C-295/89 Donà Alfonso [1991] ECR I-2967 (Summary publication), paragraphs 1 and 2 of the operative part).

46 The Court thus held that Article 29(5) of Directive 71/305 requires the awarding authority to examine the details of tenders which are obviously abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations (Fratelli Costanzo, paragraph 16).

47 According to the Court, a mathematical criterion in accordance with which tenders which exceeded the basic value fixed for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated, deprives tenderers who have submitted particularly low tenders of the opportunity to demonstrate that those tenders are genuine ones, so that application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts (Fratelli Costanzo, paragraph 18).

48 The Court also observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those tenders were genuine ones, and thus to ensure the opening up of public works contracts, that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low, and that that aim would be jeopardised if Member States were able, when implementing that provision, to depart from it to any material extent (Fratelli Costanzo, paragraph 20).

49 It added, finally, that the examination procedure under Article 29(5) of Directive 71/305 had to be applied whenever the awarding authority was contemplating the elimination of tenders because they were abnormally low in relation to the transaction, so that tenderers could be sure that they would not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tenders (Fratelli Costanzo, paragraph 26).

50 Since the requirements laid down by both the initial and the amended version of Article 29(5) of Directive 71/305 are in substance identical to those imposed by Article 30(4) of the Directive, the foregoing considerations apply equally in relation to the interpretation of the latter provision.

51 In consequence, Article 30(4) of the Directive necessarily presupposes the application of an inter partes a procedure for examining tenders regarded by the contracting authority as abnormally low, placing the latter under an obligation, after it has inspected all the tenders and before awarding the contract, first to ask in writing for details of the elements in the tender suspected of anomaly which gave rise to doubts on its part in the particular case and then to assess that tender in the light of the explanations provided by the tenderer concerned in response to that request.

52 Apart from the fact that, under the legislation and administrative practice applicable in the main proceedings, the tendering undertakings are required at the time they submit their file to

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provide explanations in respect of only 75% of the value of the contract, whereas it is necessary for them to be able to prove the genuine nature of their tender in respect of all its constituent elements, such prior explanations are not in any event in accordance with the spirit of the inter partes examination procedure established by Article 30(4) of the Directive.

53 It is essential that each tenderer suspected of submitting an abnormally low tender should have the opportunity effectively to state his point of view in that respect, giving him the opportunity to supply all explanations as to the various elements of his tender at a time - necessarily after the opening of all the envelopes - when he is aware not only of the anomaly threshold applicable to the contract in question and of the fact that his tender has appeared abnormally low, but also of the precise points which have raised questions on the part of the contracting authority.

54 The above interpretation is, moreover, the only one which complies with both the wording and the purpose of Article 30(4) of the Directive.

55 It is apparent from the very wording of that provision, drafted in imperative terms, that the contracting authority is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders. It is therefore not possible to regard the requirements inherent in the inter partes nature of the procedure for examining abnormally low tenders, within the meaning of Article 30(4) of the Directive, as having been complied with unless all the steps thus described have been successively accomplished.

56 Moreover, it is only subject to strict conditions laid down in the fourth subparagraph of Article 30(4) that the Directive allows the contracting authority to dispense with that inter partes procedure for examining abnormally low offers. Here there is no dispute that, in both sets of main proceedings, that derogatory provision is inapplicable ratione temporis.

57 Furthermore, the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer constitutes a fundamental requirement of the Directive, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings.

58 Having regard to the foregoing considerations, it must be held that Article 30(4) of the Directive precludes legislation and administrative practice, such as that applicable in the cases referred, which allow the contracting authority to exclude a tender as abnormally low solely on the basis of explanations of the most significant price components, produced at the same time as the tender itself, without carrying out any inter partes examination of the suspect tenders by requesting clarification on points of doubt emerging on first examination and giving the undertakings concerned the opportunity to put forward their arguments in that regard before the final decision is taken.

59 In the tendering procedures at issue in the main proceedings, at the time when the tenderer submits his tender, which must be accompanied by explanations covering 75% of the basic contract value mentioned in the contract notice, he is not aware of the precise aspects of his tender which will be suspected of being abnormal, so that, at that stage of the procedure, he is not in a position to supply useful and complete explanations in support of the various elements constituting his tender.

60 The national court also asks whether Article 30(4) of the Directive similarly precludes legislative provisions and administrative practice of a Member State, such as those at issue in the main proceedings, whereby, first, tenderers are required, under threat of being excluded from participation in the contract, to accompany their tender with price explanations, covering at least 75% of the basic value of that contract, using forms designed for the purpose and, second, the anomaly threshold for tenders is calculated, in respect of each contract, on the basis of a mathematical formula which

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is a function of all the tenders actually lodged in the tendering procedure in question.

61 It should be noted that the Directive does not contain specific requirements in the matter.

62 More particularly concerning the first of the rules on matters of detail referred to in paragraph 60 of this judgment, this appears to be a requirement which affects all tenderers without distinction and appears to be intended to ensure a certain uniformity in the presentation of tenders, likely to facilitate an initial examination by the contracting authority and to allow a prima facie assessment to be made of the seriousness of the tender. It may indeed happen that, on the basis of those explanations alone, the contracting authority becomes convinced that, although the tender appears abnormally low, it is serious and the authority therefore accepts it. In that way, this rule contributes to accelerating the procedure for verifying tenders.

63 It is true that, as the Commission has rightly pointed out, a national procedure for awarding public works contracts would be incompatible with the requirements of Article 30(4) of the Directive if it did not ensure that the inter partes examination of abnormally low tenders required by that provision took place.

64 That would in particular be the case, as has already been held in paragraphs 58 and 59 of this judgment, if the contracting authority rejected a tender as abnormally low basing its argument solely on the explanations submitted at the time the tender was lodged, without carrying out inter partes examination required by the Directive, after the opening of the envelopes and before the final decision.

65 However, such a defect would originate not in the obligation itself to submit certain explanations together with the lodging of the tender, but rather in the disregard of the requirements of the Directive at a subsequent stage of the procedure for examining abnormally low tenders.

66 Article 30(4) of the Directive does not therefore preclude a requirement to provide explanation in advance, such as that at issue in the main proceedings, taken in isolation, provided that all the requirements arising from that provision are otherwise complied with by the contracting authorities.

67 As regards the second rule referred to in paragraph 60 of this judgment, it is undisputed that the Directive does not define the concept of an abnormally low tender and, a fortiori, does not determine the method of calculating an anomaly threshold. That is therefore a task for the individual Member States.

68 As for the anomaly threshold applied in the cases in the main proceedings, this results from a calculation carried out for each contract notice and is based essentially on the average of the tenders submitted for that contract.

69 Such a method of calculation appears at first sight to be objective and non-discriminatory.

70 The mere fact, cited by some of the tenderers involved in the main proceedings, that the anomaly threshold is not known to the undertakings at the time when they make their tender - since it is not determined until all the tenders have been submitted - is in any event not capable of affecting its compatibility with the Directive. At that stage of the procedure, all the tenderers, like the contracting authority itself, are unaware of what that threshold will be.

71 Some of the tenderers involved in the main proceedings have, however, argued that a method for calculating the anomaly threshold based on the average of the tenders for a given contract risks being falsified by tenders not corresponding to a genuine wish to contract but merely seeking to influence the result of that calculation. Competition might also be distorted, with tenderers seeking to submit not the best tender possible but that which, particularly on the basis of statistical criteria, stood the best probability of being the first amongst the non-suspect tenders, to which the contract is automatically awarded.

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72 It is true that the result reached by a method for calculating the anomaly threshold based on the average of tenders may be significantly influenced by practices such as those described in the previous paragraph, which would be contrary to the aims of the Directive, as defined in paragraphs 34 to 36 of this judgment. That is why, for the effectiveness of the Directive to be fully preserved, that result must not be beyond challenge and must be capable of being reconsidered by the contracting authority should that prove necessary having regard in particular to the level of the anomaly threshold for tenders applied in comparable contracts and to the lessons derived from common experience.

73 It follows that, although, as stated in paragraphs 45 and 47 of this judgment, it is settled case-law that Community law precludes the automatic exclusion from public works contracts of certain tenders determined in accordance with a mathematical criterion, Community law does not in principle preclude a mathematical criterion, such as the anomaly threshold applied in the cases referred, from being used for the purposes of determining which tenders appear to be abnormally low, so long as the result to which application of that criterion leads is not beyond challenge, and the requirement for inter partes examination of those tenders in accordance with Article 30(4) of the Directive is complied with.

74 Some of the tenderers involved in the main proceedings have also argued, without having their allegations credibly refuted by the Italian government, that the two rules of Italian tendering procedure referred to in paragraph 60 of this judgment cannot be examined in isolation, given that the various aspects of that procedure are indissolubly interlinked.

75 They have argued in particular that the condition concerning the provision of explanations at the time of submission of the tender itself finds its justification only in the fact that the contracting authority takes its decision on the acceptance or rejection of the tender on the basis of those explanations alone, without allowing the undertakings to provide fuller explanations later. Moreover, they argue that that condition does not apply to the tenderers without distinction, in that only the envelopes of undertakings whose tenders appear abnormally low are opened, so that a tenderer not suspected of making an anomalous bid could be awarded the contract even if he submitted, as explanations, an envelope containing nothing at all. Finally, a distortion of competition between undertakings might result, because the obligation to accompany the tender with voluminous explanatory documentation entails for tenderers offering a particularly advantageous price not only a heavier administrative burden but also the inconvenience of having first to reveal information which might be confidential, and because it places undertakings from other Member States at a disadvantage in any event.

76 As regards those assertions, it is sufficient to observe that, whilst all the requirements imposed by Community law must unquestionably be complied with in the context of the various aspects of the national procedures for awarding public works contracts, which must moreover be applied in such a manner as to ensure compliance with the principles of free competition and equal treatment of tenderers and the obligation of transparency, the fact remains that the Court of Justice is not in a position to rule on those assertions.

77 To determine whether they are well founded requires findings and assessments of fact and an interpretation of domestic law which falls within the sole jurisdiction of the national court. The principles of interpretation concerning the scope of Article 30(4) of the Directive and the spirit and purpose of the latter, set out in paragraphs 34 to 40 of this judgment, provide that court with all the guidance necessary to enable it to assess the compatibility of the national provisions in question with Community law for the purposes of judging the cases before it.

The taking into account of explanations for abnormally low tenders

78 In relation to the second aspect of the questions referred, as reformulated in paragraph 28

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of this judgment, it should be pointed out that, in the words of the second subparagraph of Article 30(4) of the Directive, the contracting authority may take into consideration explanations relating to the economy of the construction method, the technical solutions chosen, the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

79 As is apparent from its very wording, that provision simply gives the contracting authority the possibility of basing its decision on certain types of objective explanation of the price proposed by a given tenderer, and does not impose upon it any obligation to do so.

80 Put back into its context, that provision is designed only to add further precision to the rule set out in the first subparagraph of Article 30(4) of the Directive, whereby the contracting authority is to request from the tenderer concerned details of the constituent elements of the tender which it considers relevant and verify those constituent elements taking account of the explanations received.

81 In that respect, the Court has already underlined, in paragraphs 51 to 59 of this judgment, the importance of the principle whereby, before the contracting authority can reject a tender as abnormally low, the tenderer must have a proper opportunity, in an inter partes procedure, to put forward his point of view on each of the various price components proposed.

82 Since, with a view to the development of effective competition in the area of public contracts, it is essential for that opportunity to be as full and as wide as possible, the tenderer must be able to submit in support of his tender all the explanations, and in particular those set out in the second subparagraph of Article 30(4) of the Directive, which, bearing in mind the nature and characteristics of the contract in question, he considers appropriate, without any limitation in that respect. The contracting authority is required to take into consideration all the explanations put forward by the undertaking before adopting its decision whether to accept or reject the tender in question.

83 It follows that, having regard to both its wording and its purpose, the second subparagraph of Article 30(4) of the Directive does not establish an exhaustive catalogue of explanations that are capable of being submitted, but merely gives examples of explanations which the tenderer may provide in order to demonstrate the genuineness of the various price elements proposed. A fortiori, the provision in question does not authorise the exclusion of certain types of explanation.

84 As the Austrian Government and the Commission have argued in their observations, and the Advocate General has emphasised in paragraphs 50 and 51 of his Opinion, any limitation in that regard would clearly contradict the Directive's aim of facilitating the operation of free competition between the tenderers as a whole. Such a limitation would involve the outright exclusion of tenders explained by considerations other than those allowed by the applicable national legislation, despite a price which may be more advantageous.

85 It follows that Article 30(4) of the Directive precludes national legislation, such as that applicable in the main proceedings, which, first, requires the contracting authority, for the purposes of verifying abnormally low tenders, to take into account only certain explanations exhaustively listed, that listing omitting moreover explanations relating to the originality of the tenderer's proposed works, even though such explanations are expressly referred to in the second subparagraph of the above provision, and, second, expressly excludes certain types of explanation, such as those relating to any elements for which minimum values are laid down by law, regulation or administrative provision or for which minimum values can be ascertained from official data.

86 In view of all the foregoing considerations, the answer to the questions referred must be that Article 30(4) of the Directive is to be interpreted as follows:

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- it precludes a Member State's legislation and administrative practice which allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions;

- it precludes a Member State's legislation and administrative practice which require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data;

- however, provided all the requirements it imposes are otherwise complied with and the aims pursued by the Directive are not defeated, it does not in principle preclude a Member State's legislation and administrative practice which, in the matter of identifying and examining abnormally low tenders, first, require all tenderers, under threat of exclusion from participation in the contract, to accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and, second, apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file; the result produced by applying that calculation method must, however, be capable of being reconsidered by the contracting authority.

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NATCOUR ** AFFAIRE 286/1999 **
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Judgment of the Court (Fifth Chamber)
of 1 February 2001
Commission of the European Communities v French Republic.
Failure by a Member State to fulfil obligations - Directive 93/37/EEC - Public works contracts - Concept of 'contracting authority'.
Case C-237/99.

Approximation of laws Procedures for the award of public works contracts Directive 93/37 Contracting authorities Body governed by public law Definition Low-rent housing corporations Included Conditions

(Council Directive 93/37, Art. 1(b))

$$Under Article 1(b), second subparagraph, of Directive 93/37 concerning the coordination of procedures for the award of public works contracts, a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law. With regard to that third condition characterising a body governed by public law, contained in the third indent of the second subparagraph of Article 1(b) of the Directive, since management supervision constitutes one of the three criteria referred to in that provision, it must give rise to dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of the managerial organs of the body.

Consequently, low-rent housing corporations which meet needs in the general interest, not having an industrial or commercial character, which have legal personality and whose management is subject to supervision by the public authorities which allows the latter to influence their decisions in relation to public contracts, fulfil the three cumulative conditions which characterise a body governed by public law within the meaning of Directive 93/37 and are contracting authorities.

(see paras 39-40, 44, 49, 59-60)

In Case C-237/99,

Commission of the European Communities, represented by M. Nolin, acting as Agent, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger and also by F. Million and S. Pailler, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by R.V. Magrill, acting as Agent, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that, in the context of various procedures for the award of public contracts for the construction of housing organised by public development and construction entities and by low-rent housing corporations, the French Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for

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the award of public works contracts (OJ 1993 L 199, p. 54), in particular Article 11(2) thereof,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann (Rapporteur) and L. Sevon, Judges,

Advocate General: J. Mischo,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2000,

gives the following

Judgment

Costs

63 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs. The United Kingdom, which has intervened in the proceedings, must bear its own costs, pursuant to Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, since the public management and construction entities of Val-de-Marne and Paris and the low-rent housing corporation Logirel did not publish contract notices in the Official Journal of the European Communities concerning the public contracts announced by notices in the Bulletin Officiel des Annonces des Marchés Publics of 7 and 16 February 1995 and the Moniteur des Travaux Publics et du Bâtiment of 17 February 1995, the French Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, in particular Article 11(2) thereof;

2. Orders the French Republic to pay the costs;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

1 By application lodged at the Court Registry on 24 June 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, in the context of various procedures for the award of public works contracts for the construction of housing organised by offices publics d'aménagement et de construction (public development and construction entities, hereinafter OPACs) and by sociétés anonymes d'habitations à loyer modéré (low-rent housing corporations, hereinafter SA HLMs), the French Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54, hereinafter the Directive), in particular Article 11(2) thereof.

Legal framework

Community legislation

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2 The Directive provides in Article 1(b):

> "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

having legal personality, and

financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies.

3 Article 11(2) of the Directive provides:

Contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure referred to in Article 7(2), shall make known their intention by means of a notice.

National legislation

4 The relevant provisions of French law are to be found in Book IV of the Construction and Housing Code (hereinafter the Code). According to Article L. 411-1, those provisions are designed to determine the rules applicable to the construction, acquisition, development, improvement, repair and management of collective or individual housing, whether urban or rural, which satisfies the technical characteristics and those relating to cost price determined by administrative decision and are intended for persons and families of modest means.

5 According to Article L. 411-2 of the Code, low-rent housing bodies consist of:

public development and construction entities;

public low-rent housing entities;

low-rent housing corporations;

low-rent housing cooperatives;

mortgage corporations;

low-rent housing foundations.

6 Article L. 421-1 of the Code defines OPACs as public industrial or commercial establishments.

7 According to Article L. 422-2 of the Code, SA HLMs are intended to carry out, under the conditions determined by their statutes and primarily with a view to making rented housing available, the operations set out in Article L. 411-1 of the Code.

8 Article L. 451-1 of the Code provides that low-rent housing bodies are to be subject to supervision by the administration. According to Article R. 451-1 of the Code, that supervision is to be carried

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out by the Minister responsible for finance and the Minister responsible for construction and housing.

9 Article L. 451-2 of the Code states that the officials responsible for supervising those bodies may, in the exclusive interest of performing their supervisory duties, consult any accounts, copy letters and documents relating to income and expenditure at the premises of the architects or developers who have dealt with bodies subject to that supervision.

10 Article L. 422-7 of the Code states:

In the event of serious irregularities, gross mismanagement or failure to act on the part of the administrative board, or of the managerial board and the supervisory board, of a low-rent housing corporation or mortgage corporation, the Minister responsible for construction and housing may, after hearing the observations of the corporation or after the latter has been duly invited to submit its observations, order that it be wound up and appoint a liquidator.

11 According to Article L. 422-8 of the Code, the Minister responsible for housing may in such cases merely suspend the managerial organs and appoint a provisional administrator, to whom all the powers of the managerial organs to continue the operations in progress are automatically transferred.

12 The first paragraph of Article L. 423-1 of the Code provides:

Any low-rent housing body which manages fewer than 1 500 housing units and has not built at least 500 housing units or granted 300 loans over a 10-year period may be dissolved and a liquidator appointed by decree of the Minister responsible for construction and housing or, in the case of a public low-rent housing entity or a public development and construction entity, by decree adopted jointly by that Minister and the Minister of the Interior.

13 Article L. 423-2 of the Code provides:

Any low-rent housing body which manages more than 50 000 housing units may be given formal notice, by decree of the Minister responsible for construction and housing, to transfer all or part of the housing units in excess of that number to one or more bodies designated by name.

14 By Decree No 93-236 of 22 February 1993 (JORF, 24 February 1993, p. 2941), an interministerial task force for the inspection of social housing was set up. Article 3 of that decree provides:

The task force shall be responsible for supervising natural or legal persons involved in social housing.

It shall carry out documentary and on-the-spot inspections of operations relating to the construction, acquisition or improvement of housing in respect of which financial assistance has been provided by the State or State-controlled funds have been used, or which form the subject-matter of an agreement with the State or are supported by tax-exempt resources.

...

It may be instructed by the Ministers to whom it is responsible to carry out checks and inquiries and also studies, audits or assessments in the field of social housing.

It shall draw up proposals as to the action to be taken following its inspection reports and shall ensure that the persons concerned by its inspections implement the measures taken by the Ministers to whom it is responsible.

The task force shall provide support to the decentralised departments of the ministries responsible for the economy, finance and budget and materials, when those departments so request.

Pre-litigation procedure

15 On 7 December 1995, the Commission sent the French authorities a formal letter, in which it

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questioned the compatibility with Community law of the procedures for the award of public works contracts by various low-rent housing management bodies.

16 More specifically, the Commission referred to an open call for tenders published in the Bulletin Officiel des Annonces des Marchés Publics of 7 February 1995 by the Val-de-Marne OPAC, to a limited call for tenders which SA HLM Logirel, established in Lyons (France), had published in the Moniteur des Travaux Publics et du Bâtiment of 17 February 1995 and to a notice of negotiated contracts which the Paris OPAC had published in the Bulletin Officiel des Annonces des Marchés Publics of 16 February 1995.

17 The Commission pointed out that the bodies in question had not published those notices in the Official Journal of the European Communities, contrary to the requirements of Article 11(2) of the Directive.

18 In reply, the French authorities maintained that the bodies in question were not contracting authorities within the meaning of the Directive.

19 The Commission was not satisfied with that reply and, in the light of the consistent practice of the bodies in question of not publishing notices of contracts in the Official Journal of the European Communities, it sent a reasoned opinion to the French Republic on 10 August 1998, stating that the French Republic had failed to fulfil its obligations under the Directive.

20 Since in its letter in reply to the reasoned opinion the French Republic merely reiterated the arguments already put forward in response to the formal letter, the Commission brought the present action.

Subject-matter of the action

21 The Commission requests the Court to declare that, in the context of various procedures for the award of public supply contracts for the construction of housing organised by OPACs and SA HLMs, the French Republic has failed to fulfil its obligations under the Directive.

22 However, the present action originates in three very specific award procedures, organised by the Paris and Val-de-Marne OPACs and by SA HLM Logirel. It is failure to comply with the Directive in relation to those three awards of public contracts that has formed the substance of the charge against the French Republic throughout the pre-litigation procedure.

23 It is true that the Commission stated in the reasoned opinion that it also criticised the French Republic for not having adopted a general measure in order to ensure compliance with Community law in relation to procedures for the award of public supply contracts organised by OPACs and SA HLMs. However, that complaint was not reproduced in the application to the Court.

24 The subject-matter of the present action should therefore be considered as confined to the three award procedures expressly referred to by the Commission in its application.

Substance

Arguments of the parties

25 As regards the application of the Directive to OPACs, the Commission refers first of all to Articles L. 411-1 and L. 421-1 of the Code in order to demonstrate that those provisions were adopted for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. Next, it observes that OPACs have legal personality. Last, the Commission maintains, in particular, that it is clear from the composition of the administrative boards of the OPACs that the public authorities play a predominant role therein.

26 The Commission infers that OPACs thus fulfil the three conditions characteristic of a body

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governed by public law set out in the second subparagraph of Article 1(b) of the Directive.

27 The Commission concludes that, in those circumstances, the OPACs should have complied with the obligation laid down in Article 11(2) of the Directive to publish the contract notices in question in the Official Journal of the European Communities.

28 As regards the application of the Directive to SA HLMs, the Commission refers to the conditions laid down in the second subparagraph of Article 1(b) of the Directive and infers from Articles L. 411-1 and L. 422-2 of the Code that those bodies also meet needs in the general interest, not having an industrial or commercial character. Furthermore, they have legal personality.

29 As regards the third condition characteristic of a body governed by public law, the Commission observes that it consists of three alternative criteria. It contends that the criterion in respect of management supervision by the public authorities is satisfied. It refers in that regard to Articles L. 451-2 and R. 451-1 of the Code, which provide that SA HLMs are to be subject to State supervision. That supervision is explained in Articles L. 422-7 and L. 422-8 of the Code.

30 The Commission also refers to Articles L. 423-1 and L. 423-2 of the Code, and also to the standard clauses which must be included in the statutes of SA HLMs pursuant to Article R. 422-1 of the Code, which provides, in particular, that all accounting documents and reports presented at shareholders' meetings and the minutes thereof are to be submitted to the public authorities.

31 The Commission further claims that the interministerial task committee for the inspection of social housing set up by Decree No 93-236 also has extensive supervisory powers.

32 The French Government does not dispute that the OPACs and SA HLMs referred to in the action would have been required to comply with the obligation to publish contract notices laid down in the Directive if they had to be regarded as bodies governed by public law.

33 In the light of the judgments in Case C-44/96 Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck [1998] ECR I-73 and Case C-360/96 Arnhem and Rheden v BFI Holding [1998] ECR I-6821, the French Government now also agrees with the Commission's conclusion that OPACs are bodies governed by public law.

34 However, while it accepts that SA HLMs satisfy the first two parts of the definition of a body governed by public law in the second subparagraph of Article 1(b) of the Directive, the French Government contends that they do not meet any of the three alternative criteria in the third part of that definition.

35 As regards, in particular, management supervision, the French Government claims that the supervision exercised by the public authorities in the present case corresponds to supervision of an administrative nature and not to management or investment supervision. The State has no influence on decisions concerning the proper functioning of SA HLMs. The French Government maintains that Article L. 422-7 of the Code can apply only in exceptional circumstances and that it cannot be inferred from that provision that the management of those corporations is subject to supervision by the public authorities on a regular and consistent basis. It claims that Article L. 422-8 of the Code also concerns exceptional circumstances: first, an administrator can be appointed only in the event of serious irregularities or gross mismanagement and, second, such an appointment is envisaged as being only pro tempore.

36 The French Government also claims that the supervision provided for in Articles L. 451-2 and R. 451-1 of the Code consists in checking the accounts of the bodies concerned. In practice, those provisions are more in the nature of a threat constantly hanging over the bodies which are liable to be visited than management supervision in the strict sense, resulting in decisions as to the choice of strategy or investment. Those provisions do not provide a means of exerting significant

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influence on the management of the bodies in question and the measures referred to therein are of no practical importance.

37 The French Government further maintains in its rejoinder that the supervision exercised pursuant to Decree No 93-236 takes the form of an inspection visit of an administrative nature, which ensures that the rules are observed, that the funds used by SA HLMs are applied in a transparent manner and that the Minister responsible for construction and housing is kept duly informed.

38 The United Kingdom, which was granted leave by order of the President of the Court of Justice of 26 January 2000 to intervene in the present proceedings in support of the form of order sought by the French Republic, also argues that management supervision covers neither mere verification of legality or of the appropriate use of funds nor exceptional measures capable of being taken vis-à-vis a specific body.

Findings of the Court

39 Since the present proceedings concern the possible classification of various bodies as bodies governed by public law within the meaning of the second subparagraph of Article 1(b) of the Directive, it should be pointed out that, according to that provision, a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law (see Mannesmann Anlagenbau Austria, cited above, paragraph 20).

40 Furthermore, the three conditions set out in that provision are cumulative (Mannesmann Anlagenbau Austria, cited above, paragraph 21).

41 As far as the purpose of the Directive is concerned, moreover, the Court has held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, most recently, Case C-380/98 The Queen v H.M. Treasury, ex parte University of Cambridge [2000] ECR I-8035, paragraph 16).

42 Consequently, the aim of the Directive is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (University of Cambridge, paragraph 17).

43 It is in the light of those objectives that contracting authority, including a body governed by public law, must be interpreted in functional terms (see, to that effect, most recently, Case C-353/96 Commission v Ireland [1998] ECR I-8565, paragraph 36).

44 As regards the alternative conditions set out in the third indent of the second subparagraph of Article 1(b) of the Directive, each reflects the close dependency of a body on the State, regional or local authorities or other bodies governed by public law (University of Cambridge, paragraph 20).

45 In the light of that case-law, it must be held, as regards OPACs, that it actually follows from the rules relating to them, as described by the Commission, whose arguments, moreover, have not been contradicted on that point by the French Government, that they fulfilled the thee conditions that characterise a body governed by public law set out in the second subparagraph of Article 1(b) of the Directive.

46 It follows that the action is well founded in that the charge against the French Republic is

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that the two OPACs expressly referred to did not comply with the obligation to publish the notices of contract in the Official Journal of the European Communities laid down in Article 11(2) of the Directive.

47 As regards SA HLMs, it is common ground, and it is not disputed by the French Government, that they meet needs in the general interest, not having an industrial or commercial character, and that they have legal personality.

48 As regards the third condition that characterises a body governed by public law, it is necessary to consider whether the various controls to which SA HLMs are subject render them dependent on the public authorities in such a way that the latter are able to influence their decisions in relation to public contracts.

49 As the Advocate General has observed at point 48 of his Opinion, since management supervision within the meaning of the third indent of the second subparagraph of Article 1(b) of the Directive constitutes one of the three criteria referred to in that provision, it must give rise to dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of its managerial organs.

50 In that regard, although, as the Advocate General observes at points 53 to 64 of his Opinion, SA HLMs are commercial companies, their activities are very narrowly circumscribed.

51 Article L. 411-1 of the Code defines their activities in general terms and provides that the technical characteristics and cost prices are to be determined by administrative decision. According to Article R. 422-1 of the Code, their statutes are to contain clauses consistent with the standard clauses set out in an annex to the Code, and those clauses are very detailed, in particular as regards the objects of those entities.

52 As the Advocate General observes at point 67 of his Opinion, since the rules of management are very detailed, the mere supervision of compliance with them may in itself lead to significant influence being conferred on the public authorities.

53 Second, as regards the supervision of SA HLMs' activities, in accordance with Articles L. 451-1 and R. 451-1 of the Code, low-rent housing bodies are subject to supervision by the administration and, more specifically, by the Minister responsible for finance and also by the Minister responsible for construction and housing. Those provisions do not specify the limits within which such supervision is to be exercised or whether it is to be confined to merely checking the accounts, as the French Government claims, although it has not adduced any evidence whatsoever to support the truth of that allegation.

54 Next, the Minister responsible for construction and housing is empowered by Article L. 422-7 of the Code to order that an SA HLM be wound up and to appoint a liquidator, and is also empowered under Article L. 422-8 of the Code to suspend the managerial organs and appoint a provisional administrator.

55 Those powers are provided for in the event of serious irregularities, gross mismanagement or failure to act on the part of the administrative board, or of the managerial board and the supervisory board. As the Advocate General observes at points 72 to 75 of his Opinion, the latter two cases fall within the management policy of the company concerned and not the mere verification of legality.

56 Furthermore, even accepting that, as the French Government maintains, the exercise of the powers conferred on the competent Minister by those provisions is in fact the exception, it none the less implies permanent supervision, which provides the only means of detecting gross mismanagement or failure to act on the part of the managerial organs.

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57 Furthermore, it follows from Articles L. 423-1 and L. 423-2 of the Code that the Minister responsible for construction and housing may impose a specific course of management action on SA HLMs, either by requiring that they display a minimum level of dynamism or by placing limits on what is considered to be excessive activity.

58 Last, the interministerial task force for the inspection of social housing set up by Decree No 93-236 may, in addition to its responsibilities for conducting documentary and on-the-spot inspections of the operations of low-cost housing bodies, be made responsible for carrying out studies, audits or assessments in the field of social housing and may draw up proposals as to the action to be taken following its inspection reports. It also ensures that the persons concerned by its inspections implement the measures adopted by the Ministers to whom it is responsible.

59 It follows from all the provisions referred to in paragraphs 51 to 58 of the present judgment that the management of SA HLMs is subject to supervision by the public authorities which allows the latter to influence the decisions of the SA HLMs in relation to public contracts.

60 Consequently, SA HLMs, which also satisfy at least one of the three alternative criteria referred to in the third indent of the second subparagraph of Article 1(b) of the Directive, thus fulfil the three conditions which characterise a body governed by public law within the meaning of the Directive and are contracting authorities.

61 It follows that the action is also well founded in so far as it concerns the award of a public contract by SA HLM Logirel.

62 Accordingly, it must be held that since the Val-de-Marne and Paris OPACs and SA HLM Logirel did not publish contract notices in the Official Journal of the European Communities concerning the public contracts announced by notices in the Bulletin Officiel des Annonces des Marchés Publics of 7 and 16 February 1995 and the Moniteur des Travaux Publics et du Bâtiment of 17 February 1995, the French Republic has failed to fulfil its obligations under the Directive, in particular Article 11(2) thereof.

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CONCERNS Failure concerning 31993L0037-A11P2

SUB Freedom of establishment and services ; Right of establishment ; Free movement of services

AUTLANG French

APPLICA Commission ; Institutions

DEFENDA France ; Member States

NATIONA France

NOTES Benjamin, Marie-Yvonne: Droit administratif 2001 no 86
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PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Mischo

JUDGRAP Jann

DATES of document: 01/02/2001
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Judgment of the Court (Fifth Chamber)
of 10 May 2001
Agorà Srl and Excelsior Snc di Pedrotti Bruna & C. v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc. coop. arl.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy.
Public service contracts - Definition of contracting authorities - Body governed by public law.
Joined cases C-223/99 and C-260/99.

Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Contracting authorities - Body governed by public law - Meaning - Body which carries on activities relating to the organisation of fairs and exhibitions, which operates according to performance criteria and in a competitive environment - Exclusion

(Council Directive 92/50, Art. 1(b), second subpara.)

$$Under 1(b) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, with legal personality and closely dependent on the State, regional or local authorities or other bodies governed by public law.

The first condition is not met by a body whose object is to carry on activities relating to the organisation of fairs, exhibitions and other similar initiatives, which is non-profit-making but is administered according to the criteria of performance, efficiency and cost-effectiveness, and which operates in a competitive environment.

(see paras 25, 43 and operative part)

In Joined Cases C-223/99 and C-260/99,

REFERENCE to the Court under Article 234 EC by the Tribunale amministrativo regionale per la Lombardia (Italy) for a preliminary ruling in the proceedings pending before that court between

Agorà Srl

and

Ente Autonomo Fiera Internazionale di Milano,

and between

Excelsior Snc di Pedrotti Bruna & C.

and

Ente Autonomo Fiera Internazionale di Milano,

Ciftat soc. coop. arl,

on the interpretation of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann (Rapporteur) and L. Sevon, Judges,

Advocate General: S. Alber,

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Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Agorà Srl, by L. Tamos and C. Piana, avvocati,

- Excelsior Snc di Pedrotti Bruna & C., by E. Brambilla, avvocatessa,

- Ente Autonomo Fiera Internazionale di Milano, by M. Bassani and A. Tizzano, avvocati,

- the Commission of the European Communities, by M. Nolin, acting as Agent, and M. Moretto, avvocato,

having regard to the Report for the Hearing,

after hearing the oral observations of Agorà Srl, represented by L. Tamos, Ente Autonomo Fiera Internazionale di Milano, represented by M. Bassani and F. Sciaudone, avvocato, and the Commission, represented by M. Nolin and M. Moretto, at the hearing on 30 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2001,

gives the following

Judgment

Costs

44 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Tribunale amministrativo regionale per la Lombardia by orders of 26 and 27 November 1998, hereby rules:

A body

- whose object is to carry on activities relating to the organisation of fairs, exhibitions and other similar initiatives;

- which is non-profit-making but is administered according to the criteria of performance, efficiency and cost-effectiveness; and

- which operates in a competitive environment

does not constitute a body governed by public law for the purposes of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

1 By orders of 26 and 27 November 1998, received at the Court on 10 June and 13 July 1999 respectively, the Tribunale amministrativo regionale (Regional Administrative Court) per la Lombardia referred for a preliminary ruling under Article 234 EC a question on the interpretation of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, hereinafter the Directive).

2 Those questions were raised in proceedings between Agorà Srl (hereinafter Agora) and Excelsior Snc di Pedrotti Bruna & C. (hereinafter Excelsior), on the one hand, and the Ente Autonomo Fiera

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Internazionale di Milano (Governing Board for the Milan International Fair, hereinafter Ente Fiera) on the other, concerning, inter alia, whether the latter is a body governed by public law for the purposes of the Directive.

Legal background

3 Article 1 of the Directive provides as follows:

For the purposes of this Directive:

[...]

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30(b) of that Directive;

...

The main proceedings

4 Ente Fiera was founded as a committee at the beginning of the last century and converted into a legal person incorporated under private law in 1922. Article 1 of its articles of association provided, in the version applicable at the time of the facts in the main proceedings, as follows:

1. The objects of the Ente Autonomo Fiera Internazionale di Milano ... are to carry on and facilitate any activity concerned with the organisation of fairs and exhibitions and conferences and any other initiative which, by fostering trade relations, promotes the presentation of the production of goods and services and if possible their sale. The Ente is a non-profit-making body and carries on activities in the public interest. Its operations are governed by the principles of the Civil Code.

2. Management of the Ente shall be based on the criteria of performance, efficiency and cost-effectiveness.

3. The Ente may effect any operations not prohibited to it by law or its articles of association, including financial operations, loans and the conclusion of commercial guarantees in respect of movable and immovable property in pursuance of its objects; furthermore, it may form companies or bodies whose objects are similar, related or linked to its own, or acquire stakes or shares in such companies or bodies.

5 Article 3 of the articles of association, again in the version in force at the time of the facts in the main proceedings, provides that the Ente shall pursue the objects for which it was created using the proceeds arising from carrying on its activities, from administration (including special administration) and management of its assets and from contributions by legal or natural persons.

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The factual background to Case C-223/99

6 By a request of 2 December 1997, supplemented on 24 December 1997, Agorà sought disclosure to it by Ente Fiera, under Article 25 of Law No 241 of 7 August 1990 containing new provisions relating to administrative procedure and the right of access to administrative documents (GURI No 192 of 18 August 1990, p. 7), of the documents concerning the award procedure for the hire of fixtures and fittings for reception areas and information points referred to in a notice of tender of 2 August 1997.

7 By decision of 5 January 1998, Ente Fiera refused to disclose those documents on the ground that it was not bound to comply with the requirements of transparency laid down by the public procurement rules.

8 Agorà challenged that decision before the Tribunale amministrativo regionale per la Lombardia which, by judgment of 3 March 1998, upheld its application.

9 Ente Fiera appealed to the Sixth Chamber of the Consiglio di Stato (Council of State) which, by decision of 8 July 1998, found that there was a flaw vitiating the entire procedure at first instance, which led to the case being referred back to the Tribunale amministrativo regionale per la Lombardia.

10 By notice served on 19 October 1998, Agorà repeated its request before that court to be sent the documents and argued, on the question of the applicability to Ente Fiera of the rules on public service contracts, that it would be appropriate to make a reference for a preliminary ruling to the Court of Justice.

11 In its order for reference, the Tribunale amministrativo regionale per la Lombardia states that the question whether the duty to comply with the requirements of transparency relied on by Agorà applies to Ente Fiera depends on whether that body is classified as a contracting authority. In that regard, it refers first of all to Judgment No 353 of 21 April 1995 of the Consiglio di Stato and to Judgment No 1365 of 17 November 1995 of the Tribunale amministrativo regionale per la Lombardia, both of which found that Ente Fiera is a body governed by public law for the purposes of Article 1(b) of the Directive and, secondly, to Judgment No 1267 of 16 September 1998, in which the Consiglio di Stato reversed the case-law in holding that Ente Fiera carries on an economic activity.

The factual background to Case C-260/99

12 By a notice published in the Official Journal of the European Communities of 29 July 1997, Ente Fiera launched a restricted invitation to tender for the provision of cleaning services in respect of its exhibition premises for the period 1 January to 31 December 1998, with the possibility of a two-year extension.

13 Excelsior submitted a tender for consideration in respect of four out of the five lots to which the invitation to tender related. At the end of the procedure, the third lot was awarded to the Miles consortium. However, Ente Fiera subsequently cancelled the contract it had entered into with that consortium, alleging a serious breach of contract. The lot in question was then provisionally awarded to Ciftat soc. coop. arl (hereinafter Ciftat) for the period 13 February to 30 June 1998. On 7 March 1998, a fresh invitation to tender was published in the Official Journal of the European Communities relating to the third lot for the period 1 July to 31 December 1998, with an option to extend for the periods 1 January to 31 December 1999 and 1 January to 31 December 2000.

14 By applications served on 10 and 11 April 1998, Excelsior challenged before the national court the temporary award to Ciftat of the third lot, and the new invitation to tender relating to that lot published in the Official Journal of the European Communities on 7 March 1998.

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15 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay proceedings and refer to the Court of Justice for a preliminary ruling the following question, which is identically worded in both cases:

May the definition of a body governed by public law contained in Article 1(b) of Directive 92/50/EEC of 18 June 1992 be deemed applicable to the Ente Autonomo Fiera di Milano?

16 By Order of the President of the Court of Justice of 14 September 1999, Cases C-223/99 and C-260/99 were joined for the purposes of the written and oral procedure and the judgment.

Admissibility of the request for a preliminary ruling in Case C-223/99

17 Ente Fiera argues, first of all, that the question referred to the Court in Case C-223/99 is inadmissible because the main proceedings concern the applicability of the Italian legislation on transparency and not the public procurement rules. Thus, whether Ente Fiera is classed as a body governed by public law is irrelevant to the main proceedings which relate to the right of access to administrative documents.

18 In that connection, it is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59).

19 In this case, the national court clearly indicated that an interpretation of Article 1(b) of the Directive is necessary in order to enable it to decide whether Ente Fiera is bound to comply with the national rules on transparency to which the main proceedings relate.

20 The Court may not decline to give a ruling on a question referred to it by a national court unless it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Bosman, cited above, paragraph 61).

21 It follows that the reference for a preliminary ruling in Case C-223/99 is admissible.

The question referred

22 It must first of all be observed that the question referred, as formulated by the national court, concerns the definition of a body governed by public law for the purposes of Article 1(b) of the Directive as applied to a particular body, namely Ente Fiera.

23 It must be borne in mind that it is for the national court, by virtue of the division of functions provided for by Article 234 EC, to apply the rules of Community law, as interpreted by the Court, to a specific case (Case C-320/88 Shipping and Forwarding Enterprise Safe [1990] ECR I-285, paragraph 11, and Case C-107/98 Teckal [1999] ECR I-8121, paragraph 31).

24 However, it is for the Court to extract from all the information provided by the national court, and in particular the grounds of the order for reference, the points of Community law which require interpretation, having regard to the subject-matter of the proceedings (Case 35/85 Tissier [1986] ECR 1207, paragraph 9).

25 It must first of all be observed, therefore, that the question relates to the interpretation of the second subparagraph of Article 1(b) of the Directive, which provides that a body governed

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by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, with legal personality and closely dependent on the State, regional or local authorities or other bodies governed by public law.

26 In that regard, it should be noted that the three conditions set out in that provision are cumulative (Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, paragraph 21).

27 Secondly, it is apparent from the two orders for reference that the national court considers that Ente Fiera in any event satisfies two of those three conditions, and that it is uncertain only as to whether the Ente was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

28 It also appears from Article 1 of its articles of association that Ente Fiera's objects are to carry on and facilitate any activity concerned with the organisation of fairs and exhibitions, conferences and any other initiative which, by fostering trade relations, promotes the presentation of the production of goods and services and, if possible, their sale.

29 As the Commission states, this activity is pursued at international level by a number of different operators established in large cities in the various Member States who are in competition with each other.

30 In addition, although Ente Fiera is a non-profit-making organisation, it is managed according to the criteria of performance, efficiency and cost-effectiveness.

31 It follows from the foregoing that the question referred for a preliminary ruling must be understood as asking essentially whether a body whose object is to carry on activities relating to the organisation of fairs, exhibitions and other similar initiatives, which is non-profit-making, but managed according to the criteria of performance, efficiency and cost-effectiveness, and which operates in a competitive environment, meets needs in the general interest, not having an industrial or commercial character within the meaning of the first indent of the second subparagraph of Article 1(b) of the Directive.

32 In order to reply to the question thus reformulated, it must be borne in mind that the Court has already held that the second subparagraph of Article 1(b) of Directive 92/50 draws a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character (Case C-360/96 BFI Holding [1998] ECR I-6821, paragraph 36).

33 In that regard, it is clear, first of all, that activities relating to the organisation of fairs, exhibitions and other similar initiatives meet needs in the general interest.

34 An organiser of such events, in bringing together manufacturers and traders in one geographical location, is not acting solely in the individual interest of those manufacturers and traders, who are thereby afforded an opportunity to promote their goods and merchandise, but is also providing consumers who attend the events with information that enables them to make choices in optimum conditions. The stimulus to trade which results may be considered to fall within the general interest.

35 Secondly, the question arises whether, in the light of the information on the file, the needs in question are lacking an industrial or commercial character.

36 In that regard, it is useful to refer to the list of bodies governed by public law contained in Annex I to Directive 71/305/EEC of the Council of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 93/37/EEC of 14 June 1993 (OJ 1993 L 199, p. 54), to which Article 1(b) of Directive 92/50 refers. Though not exhaustive, that list is intended to be as complete as possible.

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37 Analysis of the list reveals that the needs in question are generally, first, those which are met otherwise than by the availability of goods or services in the market place and, secondly, those which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence (see to that effect BFI Holding, cited above, paragraphs 50 and 51).

38 Furthermore, although the Court has held that the term needs in the general interest, not having an industrial or commercial character does not exclude needs which are or can be satisfied by private undertakings as well (BFI Holding, cited above, paragraph 53), it has also found that the existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the market place, may be indicative of the absence of a need in the general interest, not having an industrial or commercial character (BFI Holding, cited above, paragraph 49).

39 It must first of all be observed that the organisation of fairs, exhibitions and other similar initiatives is an economic activity which involves offering services on the market place. In this case, it is clear from the file that the body in question provides such services to exhibitors in consideration for payment. By its activity, it meets the commercial needs of, first of all, exhibitors who benefit from being able to promote the goods or services which they exhibit, and, on the other hand, visitors who wish to gather information with a view to making purchasing decisions.

40 Next, even if the body in question is non-profit-making, it does operate, as it clear from Article 1 of its articles of association, according to criteria of performance, efficiency and cost-effectiveness. Since there is no mechanism for offsetting any financial losses, it bears the economic risk of its activities itself.

41 Furthermore, the Commission's interpretative communication concerning the application of the Single Market rules to the sector of fairs and exhibitions (OJ 1998 C 143, p. 2) also gives an indication serving to confirm that holding fairs and exhibitions constitutes an industrial or commercial activity. That communication is intended, inter alia, to explain the manner in which freedom of establishment and the free movement of services benefit the organisers of fairs and exhibitions. It is clear that this does not involve needs which the State generally chooses to meet itself or over which it wishes to retain a decisive influence.

42 Lastly, the fact that a body such as that in issue in the main proceedings operates in a competitive environment - which it is for the national court to verify, having regard to all its activities at the international, national and regional levels - tends to confirm the view that the activity of organising fairs and exhibitions does not meet the criterion laid down by the first indent of the second subparagraph of Article 1(b) of the Directive.

43 The answer to the question referred must therefore be that a body

- whose object is to carry on activities relating to the organisation of fairs, exhibitions and other similar initiatives;

- which is non-profit-making but is managed according to the criteria of performance, efficiency and cost-effectiveness; and

- which operates in a competitive environment

does not constitute a body governed by public law for the purposes of the second subparagraph of Article 1(b) of the Directive.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
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CONCERNS	Interprets 31992L0050-A01LBL2
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
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OBSERV	Commission ; Institutions
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NATCOUR	** AFFAIRE 260/1999 ** *A9* Tribunale Amministrativo Regionale della Lombardia, Sezione III, ordinanza del 27/11/1998 12/05/1999 (RG 1488/98) *A9* Tribunale Amministrativo Regionale della Lombardia, Sede di Milano, Sezione III, ordinanza del 26/11/1998 05/03/1999 (10/99) - Giurisprudenza italiana 1999 p.2184-2186 - Rivista italiana di diritto pubblico comunitario 1999 p.295-299 - X: Giurisprudenza italiana 1999 p.2184
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Belorgey, Jean-Marc ; Gervasoni, Stéphane ; Lambert, Christian: L'actualité juridique ; droit administratif 2001 p.946-949
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Adamantidou, Elsa: Nomiko Vima 2002 p.920-947

PROCEDU Reference for a preliminary ruling

ADVGEN Alber

JUDGRAP Jann

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Judgment of the Court (Sixth Chamber)
of 25 January 2001
Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen.
Reference for a preliminary ruling: Korkein oikeus - Finland.
Directive 77/187/EEC - Safeguarding of employees' rights in the event of transfers of undertakings - Directive 92/50/EEC - Public service contracts - Non-maritime public transport services.
Case C-172/99.

1. Social policy Approximation of laws Transfers of undertakings Safeguarding of employees' rights Directive 77/187 Scope Taking over by an undertaking of activities operated by another undertaking following a procedure for the award of a public service contract under Directive 92/50 Included

(Council Directive 77/187, Art. 1(1))

2. Social policy Approximation of laws Transfers of undertakings Safeguarding of employees' rights Directive 77/187 Scope Transfer Definition No direct contractual link between the two undertakings Included Taking over by an undertaking of activities operated by another undertaking with no transfer of significant tangible assets between the two undertakings Excluded

(Council Directive 77/187, Art. 1(1))

1. The taking over by an undertaking of non-maritime public transport activities such as the operation of scheduled local bus routes previously operated by another undertaking, following a procedure for the award of a public service contract under Directive 92/50 relating to the coordination of procedures for the award of public service contracts, may fall within the material scope of Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, as set out in Article 1(1) of that directive.

(see para. 25, and operative part 1)

2. Article 1(1) of Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as meaning that that directive may apply where there is no direct contractual link between two undertakings which are successively awarded, following procedures for the award of public service contracts conducted in accordance with Directive 92/50 relating to the coordination of procedures for the award of public service contracts, a non-maritime public transport service such as the operation of scheduled local bus routes by a legal person governed by public law. However, in such a situation, Directive 77/187 does not apply where there is no transfer of significant tangible assets between the two undertakings.

(see para. 44, and operative part 2)

In Case C-172/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Korkein oikeus (Finland), for a preliminary ruling in the proceedings pending before that court between

Oy Liikenne Ab

and

Pekka Liskojärvi,

Pentti Juntunen,

on the interpretation of Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 on

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the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet (Rapporteur), R. Schintgen and N. Colneric, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

Oy Liikenne Ab, by O. Rauhamaa,

Mr Liskojärvi and Mr Juntunen, by T. Räty,

the Finnish Government, by T. Pynnä, acting as Agent,

the Netherlands Government, by M.A. Fierstra, acting as Agent,

the United Kingdom Government, by J.E. Collins, acting as Agent, and K. Smith,

the Commission of the European Communities, by D. Gouloussis and E. Paasivirta, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Oy Liikenne Ab, represented by O. Rauhamaa, Mr Liskojärvi and Mr Juntunen, represented by T. Räty and O. Sulkunen, the Finnish Government, represented by E. Bygglin, acting as Agent, and the Commission, represented by P. Hillenkamp, acting as Agent, and E. Paasivirta, at the hearing on 14 September 2000,

after hearing the Opinion of the Advocate General at the sitting on 12 October 2000,

gives the following

Judgment

Costs

45 The costs incurred by the Finnish, Dutch and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Korkein oikeus by order of 27 April 1999, hereby rules:

1. The taking over by an undertaking of non-maritime public transport activities such as the operation of scheduled local bus routes previously operated by another undertaking, following a procedure for the award of a public service contract under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, may fall within the material scope of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, as set out in Article 1(1) of that

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directive.

2. Article 1(1) of Directive 77/187 must be interpreted as meaning that

that directive may apply where there is no direct contractual link between two undertakings which are successively awarded, following procedures for the award of public service contracts conducted in accordance with Directive 92/50, a non-maritime public transport service such as the operation of scheduled local bus routes by a legal person governed by public law;

in a situation such as that in the main proceedings, Directive 77/187 does not apply where there is no transfer of significant tangible assets between those two undertakings.

1 By order of 27 April 1999, received at the Court on 7 May 1999, the Korkein oikeus (Supreme Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26).

2 That question was raised in proceedings between Oy Liikenne Ab (Liikenne), a bus transport undertaking, and two of its drivers, Mr Liskojärvi and Mr Juntunen, concerning its refusal to grant them the same conditions of employment as those under which they had worked for their previous employer.

Legal background

3 Directive 77/187 applies, as stated in Article 1(1) thereof, to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger. Under Article 1(3), it does not apply to sea-going vessels.

4 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) is intended, as the 20th recital in its preamble states, to improve the access of service providers to procedures for the award of contracts, in order to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular.

5 Article 1(a) of Directive 92/50 defines public service contracts as contracts for pecuniary interest concluded in writing between a service provider and a contracting authority. Under Article 1(b), contracting authorities are the State, regional or local authorities, bodies governed by public law, and associations formed by one or more of such authorities or bodies governed by public law.

6 Article 3(1) of Directive 92/50 prescribes that in awarding public service contracts contracting authorities are to apply procedures adapted to the provisions of the directive. Under Article 3(2), they must ensure that there is no discrimination between different service providers.

7 By virtue of Annex I A, to which Article 8 refers, Directive 92/50 covers inter alia land transport services.

The main proceedings

8 Following a tender procedure, Pääkaupunkiseudun yhteistyövaltuuskunta (Greater Helsinki Joint Board, YTV) awarded the operation of seven local bus routes, previously operated by Hakunilan Liikenne Oy (Hakunilan Liikenne), to Liikenne for three years.

9 Hakunilan Liikenne, which operated those routes with 26 buses, thereupon dismissed 45 drivers, 33 of whom that is, all those who applied were re-engaged by Liikenne. Liikenne also engaged 18 other drivers. The former Hakunilan Liikenne drivers were re-engaged on the conditions laid down

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by the national collective agreement in the sector, which are less favourable overall than those which applied in Hakunilan Liikenne.

10 When Liikenne replaced Hakunilan Liikenne, no vehicles or other assets connected with the operation of the bus routes concerned were transferred. Liikenne merely leased two buses from Hakunilan Liikenne for two or three months while waiting for the 22 new buses it had ordered to be delivered, and bought from Hakunilan Liikenne the uniforms of some of the drivers who entered its service.

11 Mr Liskojärvi and Mr Juntunen are among the 33 drivers dismissed by Hakunilan Liikenne and taken on by Liikenne. Since they considered that there had been a transfer of an economic entity between the two undertakings and they were therefore entitled to continue to enjoy the conditions of employment applied by their former employer, they brought an action against Liikenne in the Vantaan käräjäoikeus (Vantaa District Court). Liikenne denied that a transfer had taken place.

12 By judgment of 17 June 1996, the Vantaan käräjäoikeus ruled in favour of Mr Liskojärvi and Mr Juntunen. The Helsingin hovioikeus (Helsinki Court of Appeal) dismissed Liikenne's appeal against that decision by judgment of 23 October 1997, and Liikenne appealed on a point of law to the Korkein oikeus.

13 In its order for reference, the Korkein oikeus considers that the concept of a transfer of an undertaking remains unclear, especially in cases such as this one where the taking over of an activity is not based on a contract between the parties and no significant assets are transferred. It further observes that the context of the case before it is an award procedure conducted in accordance with Directive 92/50. Application of Directive 77/187 in such a context, while protecting the rights of employees, may obstruct competition between undertakings and prejudice the aim of effectiveness pursued by Directive 92/50. The Korkein oikeus is uncertain as to the interrelationship of the two directives in those circumstances.

14 Since it considered that the outcome of the case thus depended on the interpretation of Article 1(1) of Directive 77/187, the Korkein oikeus stayed the proceedings and referred the following question to the Court for a preliminary ruling:

Is a situation in which the operation of bus routes passes from one bus undertaking to another as a consequence of a tender procedure under Directive 92/50/EEC on public service contracts to be regarded as a transfer of a business for the purposes of Article 1(1) of Directive 77/187/EEC?

The question referred for a preliminary ruling

15 By its question the national court asks essentially whether the taking over by an undertaking of non-maritime public transport activities such as the operation of scheduled local bus routes previously operated by another undertaking, following a procedure for the award of a public service contract under Directive 92/50, may fall within the material scope of Directive 77/187, as set out in Article 1(1) of that directive.

16 Liikenne submits that the answer to the Korkein oikeus's question must necessarily be in the negative. First, Hakunilan Liikenne and itself did not enter into any contractual relationship when the contract was awarded and did not agree on any objective of transferring an operation. While the Court has held that a transfer may take place in two stages through the intermediary of a third party such as the owner or the person putting up the capital, YTV is not such a third party, since it is not the owner of the bus routes it awards or the assets needed to operate those routes. Second, a transfer must relate to an economic entity, and a bus route or even a group of routes clearly does not constitute such an entity. Third, the assets of Hakunilan Liikenne needed to operate the routes in question were not taken over by Liikenne. Fourth, the Hakunilan Liikenne drivers taken on by Liikenne were engaged at their request by Liikenne, which could moreover have recruited

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any worker entitled to carry on that occupation. Finally, application of Directive 77/187 to awards of road transport services would cause serious problems, as the successful undertaking would have to take on obligations it had no knowledge of.

17 Mr Liskojärvi and Mr Juntunen, the Finnish, Netherlands and United Kingdom Governments and the Commission submit that the test for establishing the existence of a transfer is whether the economic entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed. It makes no difference that the transfer takes place on the occasion of a procedure for the award of public contracts, that there is no direct contractual relationship between the transferor and the transferee, and that the transfer follows from a unilateral decision of the public authorities.

18 Mr Liskojärvi and Mr Juntunen consider that in those circumstances the Korkein oikeus's question should be answered in the affirmative. The three Governments which submitted observations pursuant to Article 20 of the EC Statute of the Court of Justice and the Commission submit that it is for the national court to determine, on the basis of all the factual circumstances of the transaction at issue in the main proceedings, whether a transfer actually took place in the present case.

19 It must be recalled that the aim of Directive 77/187 is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The fact that the activity carried on by such an entity is awarded successively to different operators by a public body cannot exclude the application of Directive 77/187, if passenger transport by bus does not involve the exercise of public authority (see, to that effect, Joined Cases C-173/96 and C-247/96 Sanchez Hidalgo and Others [1998] ECR I-8237, paragraphs 21 and 24).

20 The Court has thus held that Directive 77/187 may apply to a situation in which a public body which has contracted out its home-help service for persons in need or awarded a contract for the surveillance of some of its premises to one undertaking decides, on expiry or after termination of its contract with that undertaking, to contract out that service or award that contract to another undertaking (Sanchez Hidalgo, paragraph 34).

21 That conclusion cannot be challenged on the ground that the contract for bus transport in question was awarded following a public procurement procedure conducted in accordance with Directive 92/50. Directive 77/187 does not provide for any such exception to its scope, nor does Directive 92/50 contain any provision to that effect. So the circumstance that a transaction comes under Directive 92/50 does not of itself rule out the application of Directive 77/187 (see, similarly, the advisory opinions of the EFTA Court in Case E-2/95 Eidesund v Stavanger Catering A/S, Report of the EFTA Court 1 July 1995 31 December 1996, p. 1, paragraph 50, and Case E-3/96 Ask and Others v ABB Offshore Technology AS and Aker Offshore Partner AS, Report of the EFTA Court 1997, p. 1, paragraph 33).

22 The fact that the provisions of Directive 77/187 may in certain cases be applicable in the context of a transaction which comes under Directive 92/50 cannot be seen as calling into question the objectives of the latter directive. Directive 92/50 is not intended to exempt contracting authorities and service providers who offer their services for the contracts in question from all the laws and regulations applicable to the activities concerned, in particular in the social sphere or that of safety, so that offers can be made without any constraints. The aim of Directive 92/50 is that, in compliance with those laws and regulations and under the conditions it lays down, economic operators may have equal opportunities, in particular for putting into practice their rights of freedom of establishment and freedom to provide services.

23 In such a context, operators retain their room to manoeuvre and compete with one another and submit different bids. In the field of passenger transport by scheduled bus services they may,

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for instance, adjust the standard of facilities of the vehicles and their performance in terms of energy and ecology, the efficiency of the organisation and methods of contact with the public, and, as with any undertaking, the profit margin desired. An operator who makes a bid must also be able to assess whether, if his bid is accepted, it will be in his interests to acquire significant assets from the present contractor and take over some or all of his staff, or whether he will be obliged to do so, and, if so, whether he will be in a situation of a transfer of an undertaking within the meaning of Directive 77/187.

24 That assessment, and that of the costs involved in the various possible solutions, are also part of the workings of competition and, contrary to Liikenne's submissions, cannot be regarded as disclosing an infringement of the principle of legal certainty. Any action in the field of competition will be subject to some uncertainty in relation to a number of factors, and it is the responsibility of operators to make realistic analyses. Admittedly, unlike its competitors, the undertaking which formerly had the contract knows precisely the costs it incurs in order to provide the service which is the subject of the contract; but this is inherent in the system and cannot justify not applying the social legislation, and that advantage is probably offset in most cases by the greater difficulty for that undertaking of changing its operating conditions in order to adapt them to the new conditions of the call for tenders, compared with competitors who make a bid from scratch.

25 The first answer to be given to the national court must therefore be that the taking over by an undertaking of non-maritime public transport activities such as the operation of scheduled local bus routes previously operated by another undertaking, following a procedure for the award of a public service contract under Directive 92/50, may fall within the material scope of Directive 77/187, as set out in Article 1(1) of that directive.

26 In view of the possible application of Directive 77/187 to a situation such as that before the national court, that court should, second, be given the criteria necessary to enable it to assess whether there was a transfer within the meaning of Article 1(1) of that directive in the present case. The national court observes in this respect that the takeover of the bus routes was not based on a contract between the old and new contractors and no significant assets were transferred between them.

27 The test for establishing the existence of a transfer within the meaning of Directive 77/187 is whether the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed (Case 24/85 Spijkers [1986] ECR 1119, paragraphs 11 and 12, and Case C-234/98 Allen and Others [1999] ECR I-8643, paragraph 23).

28 While the absence of any contractual link between the transferor and the transferee or, as in this case, between the two undertakings successively entrusted with the operation of bus routes may point to the absence of a transfer within the meaning of Directive 77/187, it is certainly not conclusive (Case C-13/95 Süzen [1997] ECR I-1259, paragraph 11).

29 Directive 77/187 is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business and entering into the obligations of an employer towards employees of the undertaking. Thus there is no need, in order for that directive to be applicable, for there to be any direct contractual relationship between the transferor and the transferee: the transfer may take place in two stages, through the intermediary of a third party such as the owner or the person putting up the capital (see, inter alia, Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys [1996] ECR I-1253, paragraphs 28 to 30, and Süzen, paragraph 12).

30 Directive 77/187 can therefore apply where there is no direct contractual link between two undertakings successively awarded a contract, following procedures for the award of public service contracts

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in accordance with Directive 92/50, for a non-maritime public transport service, such as the operation of scheduled local bus routes, by a legal person governed by public law.

31 For Directive 77/187 to be applicable, however, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract (Case C-48/94 Rygaard [1995] ECR I-2745, paragraph 20). The term entity thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective (Süzen, paragraph 13).

32 It is for the national court to establish if necessary, in the light of the guiding factors set out above, whether the operation of the bus routes at issue in the main proceedings was organised as an economic entity within Hakunilan Liikenne before being entrusted to Liikenne.

33 However, to determine whether the conditions for the transfer of an economic entity are satisfied, it is also necessary to consider all the factual circumstances characterising the transaction in question, including in particular the type of undertaking or business involved, whether or not its tangible assets such as buildings and movable property are transferred, the value of its intangible assets at the time of the transfer, whether or not the core of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. These are, however, merely single factors in the overall assessment which must be made, and cannot therefore be considered in isolation (see, in particular, Spijkers, paragraphs 13, and Süzen, paragraph 14).

34 So the mere fact that the service provided by the old and the new contractors is similar does not justify the conclusion that there has been a transfer of an economic entity between the two undertakings. Such an entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it (Süzen, paragraph 15, Sanchez Hidalgo, paragraph 30, and Allen, paragraph 27; see also Joined Cases C-127/96, C-229/96 and C-74/97 Hernandez Vidal and Others [1998] ECR I-8179, paragraph 30).

35 As pointed out in paragraph 32 above, the national court, in assessing the facts characterising the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to the various criteria for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, and indeed the production or operating methods employed in the relevant undertaking, business or part of a business (Süzen, paragraph 18, Hernandez Vidal, paragraph 31, and Sanchez Hidalgo, paragraph 31).

36 On this point, the Commission submits, referring to Süzen, that the absence of a transfer of assets between the old and new holders of the contract for bus transport is of no importance, whereas the fact that the new contractor took on an essential part of the employees of the old contractor is decisive.

37 The Court has indeed held that an economic entity may, in certain sectors, be able to function without any significant tangible or intangible assets, so that the maintenance of the identity of such an entity following the transaction affecting it cannot, logically, depend on the transfer of such assets (Süzen, paragraph 18, Hernandez Vidal, paragraph 31, and Sanchez Hidalgo, paragraph 31).

38 The Court thus held that, since in certain sectors in which activities are based essentially on manpower a group of workers engaged in a joint activity on a permanent basis may constitute an

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economic entity, it must be recognised that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over an organised body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis (Süzen, paragraph 21, Hernandez Vidal, paragraph 32, and Sanchez Hidalgo, paragraph 32).

39 However, bus transport cannot be regarded as an activity based essentially on manpower, as it requires substantial plant and equipment (see, reaching the same conclusion with respect to driveage work in mines, Allen, paragraph 30). The fact that the tangible assets used for operating the bus routes were not transferred from the old to the new contractor therefore constitutes a circumstance to be taken into account.

40 At the hearing, the representative of the defendants in the main proceedings emphasised the economic value of the contract between the contracting authority YTV and Liikenne, and submitted that this was a significant intangible asset. That value cannot be denied; but in the context of an award which is to be renewed, the value of such an intangible asset in principle falls to nil on the expiry of the old contract, since the award is necessarily thrown open again.

41 If an award procedure such as that at issue in the main proceedings provides for the new contractor to take over the existing contracts with customers, or if the majority of the customers may be regarded as captive, then it should nevertheless be considered that there is a transfer of customers.

42 However, in a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity.

43 Consequently, in a situation such as that in the main proceedings, Directive 77/187 does not apply in the absence of a transfer of significant tangible assets from the old to the new contractor.

44 The second answer to be given to the national court must therefore be that Article 1(1) of Directive 77/187 is to be interpreted as meaning that

that directive may apply where there is no direct contractual link between two undertakings which are successively awarded, following procedures for the award of public service contracts conducted in accordance with Directive 92/50, a non-maritime public transport service such as the operation of scheduled local bus routes by a legal person governed by public law;

in a situation such as that in the main proceedings, Directive 77/187 does not apply where there is no transfer of significant tangible assets between those two undertakings.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1999 ; J ; judgment

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PUBREF	European Court reports 2001 Page I-00745
DOC	2001/01/25
LODGED	1999/05/07
JURCIT	31977L0187-A01P1 : N 1 3 15 25 26 44 31977L0187-A01P3 : N 3 31977L0187 : N 19 - 23 27 - 30 43 61985J0024 : N 27 33 31992L0050-A01LA : N 5 31992L0050-A01LB : N 5 31992L0050-A03P1 : N 6 31992L0050-A03P2 : N 6 31992L0050-C20 : N 4 31992L0050-NIA : N 7 31992L0050 : N 15 21 22 25 30 44 61994J0048 : N 31 61994J0171 : N 29 61995J0013 : N 28 29 31 33 - 38 61996J0127 : N 34 35 37 61996J0173 : N 19 20 34 35 37 61998J0234 : N 27 34 39
CONCERNS	Interprets 31977L0187-A01P1
SUB	Social provisions ; Approximation of laws
AUTLANG	Finnish
OBSERV	Finland ; Netherlands ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Finland
NATCOUR	*A7* Vantaan käräjäoikeus, tuomio 17/06/1996 (5506 ; 95/9236) *A8* Helsingin hovioikeus, tuomio 23/10/1997 (3826 ; S 96/1294) *A9* Korkein oikeus, päätös 27/04/1999 (Diaarinro S 97/2101 ; Nro 1027) *P1* Korkein oikeus, päätös 27/04/2001 (S97/2101 ; 0848)
NOTES	X: Revue de jurisprudence sociale 2001 p.470 Baudenbacher, Carl: European Law Reporter 2001 p.35-36 Thüsing, Gregor: Entscheidungen zum Wirtschaftsrecht 2001 p.429-430 Davies, Paul: Industrial Law Journal 2001 p.231-235 Foglia, Raffaele ; Saggio, Antonio: Il Corriere giuridico 2001 p.831-832 Passalacqua, Pasquale: Massimario di giurisprudenza del lavoro 2001 p.496-502
PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Puissochet
DATES	of document: 25/01/2001 of application: 07/05/1999

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Judgment of the Court (Sixth Chamber)
of 7 December 2000
ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public service contracts - Directive 92/50/EEC - Procedure for the award of public procurement contracts - Equal treatment of tenderers - Discrimination on grounds of nationality - Freedom to provide services.
Case C-94/99.

Approximation of laws Procedures for the award of public service contracts Directive 92/50 Principle of equal treatment of tenderers Participation of tenderers receiving subsidies from contracting authorities enabling them to submit tenders at prices lower than those of their competitors Not covert discrimination

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC); Council Directive 92/50)

$$The mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment laid down in Directive 92/50 relating to the coordination of procedures for the award of public service contracts.

The mere fact that a contracting authority allows such bodies to take part in a procedure for the award of a public service contract does not constitute either covert discrimination or a restriction contrary to Article 59 of the Treaty (now, after amendment, Article 49 EC).

(see paras 32, 38, and operative parts 1-2)

In Case C-94/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between

ARGE Gewässerschutz

and

Bundesministerium für Land- und Forstwirtschaft,

on the interpretation of Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and of Article 59 of the EC Treaty (now, after amendment, Article 49 EC),

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, J.-P. Puissochet and F. Macken, Judges,

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

ARGE Gewässerschutz, by J. Schramm, Rechtsanwalt, Vienna,

the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

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the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. Bréville-Viéville, Chargé de Mission in that Directorate, acting as Agents,

the Commission of the European Communities, by M. Nolin, of its Legal Service, acting as Agent, and R. Roniger, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of ARGE Gewässerschutz, represented by M. Ohler, Rechtsanwalt, Vienna; of the Austrian Government, represented by M. Fruhmann, of the Chancellor's Office, acting as Agent; of the French Government, represented by S. Pailler, Rédacteur in the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent, and of the Commission, represented by M. Nolin, assisted by R. Roniger at the hearing on 16 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2000,

gives the following

Judgment

Costs

41 The costs incurred by the Austrian and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by decision of 5 March 1999, hereby rules:

1. The mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment laid down in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

2. The mere fact that a contracting authority allows such bodies to take part in a procedure for the award of a public service contract does not constitute either covert discrimination or a restriction contrary to Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

1 By decision of 5 March 1999, received at the Court on 17 March 1999, the Bundesvergabeamt (Federal Procurement Office), Austria, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions on the interpretation of Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and of Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

2 Those questions were raised in proceedings between ARGE Gewässerschutz (ARGE) and the Bundesministerium für Land- und Forstwirtschaft (Federal Ministry of Agriculture and Forestry), the contracting authority, concerning the participation of semi-public tenderers in a procedure for the award of

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public service contracts.

The relevant Community provisions

3 The objective of Directive 92/50 is to coordinate procedures for the award of public service contracts. According to the second recital in the preamble thereto, the directive contributes to the progressive establishment of the internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

4 The sixth recital explains that the directive is intended to avoid obstacles to the free movement of services. The 20th recital adds that, in order to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts.

5 For the purposes of the directive, Article 1(b) of Directive 92/50 defines contracting authorities as the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

6 As provided in Article 1(b), a body governed by public law is any body:

established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, and

having legal personality, and

financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to managerial supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

7 Article 1(c) defines service provider as any natural or legal person, including a public body, which provides services. A service provider who submits a tender is designated by the term tenderer.

8 Further, Article 1(d) defines open procedures as those national procedures whereby all interested service providers may submit a tender.

9 Article 3 provides as follows:

(1) In awarding public service contracts... contracting authorities shall apply procedures adapted to the provisions of this Directive.

(2) Contracting authorities shall ensure that there is no discrimination between different service providers.

10 Article 6 sets out an exception to the application of the procedures for the award of public service contracts:

This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

11 The first paragraph of Article 37, on the rejection of abnormally low tenders, provides as follows:

If, for a given contract, tenders appear to be abnormally low in relation to the service to be provided, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

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The dispute in the main proceedings

12 ARGE, an association of undertakings and civil engineers, submitted tenders in an open procedure calling for tenders organised by the Bundesministerium für Land- und Forstwirtschaft, in which the public contracts in question concerned the taking and analysis of samples of water from various lakes and rivers in Austria for the years 1998/99 and 1999/2000. In addition to ARGE's tender, tenders were also submitted by service providers from the public sector, namely Osterreichische Forschungszentrum Seibersdorf GmbH and Osterreichische Forschungs- und Prüfungszentrum Arsenal GmbH, which are research and testing institutes.

13 In arbitration proceedings before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission), ARGE challenged the participation of those companies in the procedure for the award of the public procurement contracts concerned, claiming that, as semi-public tenderers, they received substantial State subsidies which were not actually linked to specific projects.

14 The Bundes-Vergabekontrollkommission considered that it was not contrary to paragraph 16 of the Bundesvergabegesetz (Federal Law on Public Procurement Contracts), which provides, inter alia, that the principles of free and fair competition must be observed and that all tenderers must be treated equally, for those institutes to participate, in competition with private tenderers.

15 ARGE then applied to the Bundesvergabeamt (Federal Procurement Office) for review.

16 The Bundesvergabeamt, taking the view that interpretation of Community law was essential to resolution of the dispute, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Does the decision of a contracting authority to admit to an award procedure bodies which receive subsidies of any kind, either from the authority itself or from other contracting authorities, which enable those bodies to tender in an award procedure at prices which are substantially below those of their commercially active competitors, infringe the principle of equal treatment of all tenderers and candidates in an award procedure?

(2) Does the decision of a contracting authority to admit such bodies to an award procedure constitute covert discrimination, if the bodies which receive such subsidies without exception have the nationality of, or are established in, the Member State in which the contracting authority is also established?

(3) Does the decision of a contracting authority to admit such bodies to an award procedure, even on the assumption that it does not discriminate against the other tenderers and candidates, constitute a restriction of the freedom to provide services which is not compatible with the provisions of the EC Treaty, in particular Article 59 et seq. thereof?

(4) May the contracting authority conclude service contracts with bodies which are exclusively or at least predominantly in public ownership and provide their services exclusively or at least predominantly to the contracting authority or other State institutions, without making the service the subject of an award procedure in competition with commercially active tenderers in accordance with Directive 92/50/EEC?

Preliminary observations

17 According to the order for reference, ARGE applied for arbitration in order to resolve the question whether permitting public-sector tenderers to take part in an award procedure under the Bundesvergabegesetz at the same time as purely private tenderers was compatible with the principles of free and fair competition and equal treatment of tenderers laid down in Article 16 of that Law.

18 In its order, the Bundesvergabeamt observes that if, as in the case in point, some of the tenderers

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are public bodies or undertakings which, as such, receive aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) or enjoy special advantages in terms of costs, the contracting authority is unable to ascertain reliably whether the price offered by those tenderers is reasonable or corresponds to the market situation, since it does not always reflect real economic costs. Those tenderers enjoy a substantial competitive advantage compared to other tenderers, in so far as the Member State concerned bears at least part of the costs, both fixed and variable, which are relevant to the calculation of their tender.

19 The Bundesvergabeamt thus raises the fundamental question of whether it is contrary to Community law for a contracting authority to allow bodies which are relieved by the Member State of some of the costs relevant to the calculation of their tender, in some circumstances by the granting of aid within the meaning of Article 92 of the Treaty, to take part in a tender procedure with unsubsidised tenderers.

20 By its first three questions, it asks, specifically, whether the decision to allow bodies thus enjoying an advantage to take part, when the advantages they enjoy enable them to submit tenders at prices appreciably lower than those of their competitors, infringes the principle of equal treatment of tenderers which, in its view, is inherent in Directive 92/50 and, in so far as the advantaged bodies are all Austrian, whether that decision amounts to covert discrimination or an obstacle to freedom to provide services contrary to Article 59 of the Treaty.

21 It considers that it is not impossible that the answer to those questions will reveal that it is contrary to Community law for advantaged bodies to take part. Nevertheless, it considers that the consequences of such a solution would be out of all proportion, since all State bodies possessing separate legal personality would be excluded from providing services for the State for pecuniary interest on the basis of a written contract. It is against that background that it poses the fourth question, by which it seeks a definition of the limits to the in-house providing exception to the application of the directives governing the award of public procurement contracts, relating to contracts concluded by a contracting authority with certain public bodies connected to it.

The first question

22 ARGE maintains that the Community directives applicable in the sphere of public contracts are based on the principle that tenderers must compete against each other under normal market conditions, that is to say, without the market's being distorted by, in particular, the actions of the Member State concerned. That is made explicit in the Treaty, which prohibits in principle restrictions on competition, whether attributable to private undertakings or to the Member States. It is also clear from the directives themselves: in accordance with Article 37 of Directive 92/50 and Article 34(5) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), the contracting authority must first examine in more detail those tenders which appear abnormally low and which, it is suspected, were made possible by the grant of aid. According to ARGE, if the legislature had considered that it was acceptable for subsidised bodies and undertakings to take part in award procedures, such provisions would have been unnecessary.

23 ARGE submits that the participation of tenderers receiving public subsidies necessarily entails unequal treatment and discrimination against unsubsidised tenderers in the determination of the best offer. In short, such participation is, in its view, unlawful in the light of the objective of Directive 92/50, as expressed in the 20th recital in the preamble thereto, namely, to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular.

24 The Court must observe that, as the Bundesvergabeamt has noted, the contracting authority is

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bound, under Directive 92/50, to observe the principle of equal treatment of tenderers. Under Article 3(2) of the directive, contracting authorities are to ensure that there is no discrimination between different service providers.

25 Nevertheless, as the Austrian and French Governments and the Commission have argued, the mere fact that contracting authorities allow bodies which receive subsidies enabling them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public procurement contract does not amount to a breach of the principle of equal treatment.

26 If the Community legislature had intended to require contracting authorities to exclude such tenderers, it would have stated this explicitly.

27 Articles 23 and 29 to 37 of Directive 92/50 lay down detailed criteria for the selection of service providers permitted to submit a tender and the criteria for the award of the contract, but none of those provisions provides that tenderers may be excluded or their tenders rejected simply because they receive public subsidies.

28 On the contrary, Article 1(c) of Directive 92/50 expressly authorises the participation, in a procedure for the award of a public procurement contract, of bodies funded in some cases out of the public purse. It provides that a tenderer means a service provider which has submitted a tender and defines that provider as any natural or legal person, including a public body, which offers its services.

29 While it is not, therefore, contrary in itself to the principle of equal treatment of tenderers for public bodies to take part in a procedure for the award of public procurement contracts, even in circumstances such as those described in the first question, it is not excluded that, in certain specific circumstances, Directive 92/50 requires, or at the very least allows, the contracting authorities to take into account the existence of subsidies, and in particular of aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid.

30 The Commission correctly states in this connection that a tenderer may be excluded from a selection procedure where the contracting authority considers that it has received aid incompatible with the Treaty and that the obligation to repay illegal aid would threaten its financial well-being, so that that tenderer may be regarded as unable to offer the necessary financial or economic security.

31 However, in order to answer the question of principle raised in the main proceedings, it is neither necessary nor indeed possible, having regard to the contents of the case-file, to define the conditions in which contracting authorities would be bound, or entitled, to exclude tenderers which receive subsidies.

32 In answer to the first question it is, therefore, sufficient to state that the mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment laid down in Directive 92/50.

The second and third questions

33 In its order for reference, the Bundesvergabeamt states that the subsidies received by certain tenderers benefit solely those bodies which have their principal place of business in Austria and which are connected to Austrian regional or local authorities. It considers it possible that the assumption of all or some of the operating costs of national bodies, thus enabling them to submit tenders at prices lower than those of any other, unsubsidised, tenderers, might be regarded as covert

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discrimination on grounds of nationality contrary to Article 59 of the Treaty. It adds that, while there might exist in other Member States bodies granted comparable subsidies by their Member State which could take part in the procedure for the award of a public service contract, commercial service providers of other Member States are not to be expected to encounter, in such a procedure, Austrian tenderers enjoying a considerable competitive advantage over them through subsidies received from Austrian regional or local authorities.

34 For the Bundesvergabeamt, even if permitting advantaged national bodies to take part in a tender procedure does not amount to covert discrimination, it must nevertheless be regarded as a restriction on freedom to provide services in other Member States since, relying on provisions which ensure that their costs are covered in whole or in part, such bodies can, in addition to the public interest purposes for which they were established, offer services on conditions and at prices which the other, unsubsidised, tenderers cannot match.

35 ARGE maintains that the fact that advantaged tenderers can take part in a tendering procedure is contrary to the prohibition of discrimination on grounds of nationality.

36 As the Commission has observed in its written observations, as a rule aid is granted to undertakings established on the territory of the Member State granting it. Such a practice, and the consequent unequal treatment of undertakings of other Member States is thus inherent in the concept of State aid. It does not, however, amount in itself to covert discrimination or a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.

37 Furthermore, in the dispute in the main proceedings it is not contended that participation in the procedure in question was subject, de jure or de facto, to a condition requiring in effect that subsidised tenderers should possess the nationality of the Member State to which the adjudicating authority belongs or that they should have their seat in that State.

38 In those circumstances, the reply to be given to the second and third questions must be that the mere fact that a contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not constitute either covert discrimination or a restriction contrary to Article 59 of the Treaty.

The fourth question

39 In view of the replies given to the first three questions and given the context in which the fourth question has been posed (see paragraph 21 above), there is no need to answer it.

40 It is also relevant to point out that the Court considered a similar question in its judgment in Case C-107/98 Teckal v Comune di Viano [1999] ECR I-8121, concerning Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1). It ruled that that directive is applicable where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

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AUTHOR	Court of Justice of the European Communities

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FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1999 ; J ; judgment
PUBREF	European Court reports 2000 Page I-11037
DOC	2000/12/07
LODGED	1999/03/17
JURCIT	11992E059 : N 1 16 20 33 36 38 11992E092 : N 18 19 31992L0050-A01LB : N 5 6 31992L0050-A01LC : N 7 28 31992L0050-A01LD : N 8 31992L0050-A03P1 : N 9 31992L0050-A03P2 : N 9 24 31992L0050-A06 : N 10 31992L0050-A23 : N 27 31992L0050-A29 : N 27 31992L0050-A37 : N 11 31992L0050-C20 : N 4 31992L0050-C2 : N 3 31992L0050-C6 : N 4 31992L0050 : N 1 3 16 20 24 29 32 31993L0036 : N 40 61998J0107 : N 40
CONCERNS	Interprets 11992E059 Interprets 31992L0050
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	German
OBSERV	Austria ; France ; Commission ; Member States ; Institutions
NATIONA	Austria
NATCOUR	*A9* Bundesvergabeamt, VorlagebeschluÃƒ vom 05/03/1999
NOTES	Greco, Guido: Rivista italiana di diritto pubblico comunitario 2000 p.1461-1469 Claisse, Yves: Petites affiches. La Loi / Le Quotidien juridique 2001 nAo 56 p.16-20 Aûhler, Matthias: Public Procurement Law Review 2001 p.NA54-NA56 Schramm, Johannes ; Lutz, Christian: European Law Reporter 2001 p.182-183 Volpe, Luigi: Diritto pubblico comparato ed europeo 2001 p.346-357 Adamantidou, Elsa: Nomiko Vima 2002 p.920-947
PROCEDU	Reference for a preliminary ruling
ADVGEN	LA¬ger

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JUDGRAP Gulmann

DATES of document: 07/12/2000
of application: 17/03/1999

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ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

26 May 1998 (1)

(Interim measures - Application for interim measures - Commission decision rejecting a tender)

In Case T-60/98 R,

Ecord Consortium for Russian Co-operation , a joint venture under Danish law comprising the following members:

- **Danagro Adviser A/S,** a company governed by Danish law, established at Glostrup (Denmark),

- **Plunkett Foundation,** a foundation governed by English law, established at Long Hanborough (United Kingdom),

- **Irish Agri-Food Development Ltd,** a company governed by Irish law, established at Dublin,

represented by Mia Declercq-Devisch and Kurt Haegeman, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Marie-Josée Jonczy, Legal Adviser, acting as Agent, with an address for service at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for interim measures relating to a Commission Decision of 17 March 1998 declaring inadmissible a tender submitted by the applicant in response to an invitation to tender for a project financed under the TACIS programme (Project FDRUS 9701, entitled 'Russia: Promoting Co-operative Ventures by Independent Farmers),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts and Procedure

1. The applicant is a joint venture set up by three firms in order to draw up a joint tender for a project concerning the provision of technical assistance in Russia (Project FDRUS 9701, entitled 'Russia: Promoting Co-operative Ventures by Independent Farmers). The project is financed by Commission funds under the TACIS programme (Programme for Technical Assistance to the Commonwealth of Independent States and Mongolia).

2. On 16 January 1998 the Commission sent the applicant an invitation to tender for this project ('the invitation to tender).

3. The invitation to tender stated that the tender was to be sent to the following address: TACIS Procurement Unit, Rue de la Loi 99, B-1040 Brussels.

4. It stated, in particular:

'*Attention*: When addressing your offer to the Tacis Procurement Unit please strictly limit yourself to above address.

Avoid to add or to use any other terms (e.g. Commission, European Union, ...). In these cases your offer may be submitted to the wrong place and risks to be delivered at the Procurement Unit after the deadline.

5. The tender had to be submitted by 11.00 hrs local time on 16 March 1998 at the latest.

6. The file and oral pleadings reveal that the management of the TACIS programme was entrusted to a private firm governed by Luxembourg law. The TACIS Procurement Unit, which is responsible for that management, thus constitutes a technical assistance unit independent of the Commission. Its role is *inter alia* to assist the Commission in issuing invitations to tender, the organisation of assessment committees, for which it provides the secretarial services, and the drafting of contracts.

7. On 13 March 1998 the applicant dispatched its tender by DHL courier.

8. The following indications were given on DHL's air consignment note:

'2 To (Receiver)

Company name

European Commission

Delivery address

TACIS Procurement Unit

Rue de la Loi, 99

Brussels.

9. In accordance with the Commission's instructions of 15 November 1991 that all mail for the Commission be delivered to the central mail office at Rue de Genève 12, B-1140 Evere, DHL delivered the applicant's tender to that address on 16 March 1998 at 8.30 hrs.

10. According to statements by the Commission - which are not disputed by the applicant - DHL, following its usual practice, returned to the central mail office approximately two hours later, that is to say towards 10.30 hrs, to retrieveconsignments not intended for the Commission. At that point the applicant's consignment was handed back to DHL so that it could deliver it to the right address.

11. The following day, 17 March 1998, the applicant's tender was delivered by DHL to the TACIS Procurement Unit in Brussels, at 99 Rue de la Loi.

12. By letter of 17 March 1998 (hereinafter the 'contested decision), the Commission rejected the applicant's tender on the ground that it was submitted to the TACIS Procurement Unit after the deadline.

13. By application lodged at the Court Registry on 6 April 1998, the applicant brought an action for annulment of that decision. The case was registered under number T-60/98.

14. By a separate application lodged at the Court Registry the same day it also brought an application for interim measures pursuant to Articles 185 and 186 of the Treaty.

15. The applicant claims that the President of the Court of First Instance should:

- order the Commission to consider the applicant's tender and, if appropriate, admit the applicant to the talks it conducts with the other tenderers;

- in the alternative, 'order the Commission to reissue the invitation to tender for the project to the companies on the same shortlist in accordance with the normal procedure in the very near future.

16. In its written observations lodged on 14 April 1998 the Commission contended that the application should be dismissed in its entirety.

17. The oral submissions of the parties were heard on 5 May 1998.

Law

18. Under the combined provisions of Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom, of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC, of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, in any cases before it prescribe any necessary interim measures.

19. Article 104(1) of the Rules of Procedure provides that an application to suspend the operation of any measure is to be admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. Paragraph 2 of that Article provides that an application for the adoption of interim measures is to statethe circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. The measures applied for must be of a provisional nature in that they must not prejudge the decision on the substance (see, most recently, Case T-86/96 R *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1998] ECR II-0000, paragraph 24).

20. In view of the circumstances of the case, we should first consider the condition relating to the establishment of a *prima facie* case.

Arguments of the parties

21. In support of its application for interim measures the applicant argues that the contested decision constitutes a *prima facie* breach of the principle of the protection of legitimate expectations. It maintains, in support of that argument, that it followed the Commission's instructions scrupulously. The address of TACIS Procurement Unit was given on DHL's air consignment note as stipulated in the invitation to tender.

22. It was only because of the Commission's contradictory instructions that the applicant's consignment was delivered in time but to a different place. That change in its destination was the result of a permanent instruction of the Commission, dating from 1991, that all mail was to be delivered to a central mail office within the Commission, even where the address given in the air consignment note differed from the usual postal address of the Commission.

23. The applicant argues that, if the Commission had not given those instructions to DHL, its tender would have reached the TACIS Procurement Unit in time. The applicant submits that, in the circumstances, it could legitimately expect that its tender would be delivered to the correct address.

24. In reply to a question put by the President of the Court, the applicant pointed out that, although the invitation to tender stipulated that any reference to the Commission was to be avoided, the Commission itself had contributed to the confusion by printing the invitation to tender on its own headed notepaper.

25. The Commission had, therefore, committed a wrongful act in rejecting the applicant's tender. The contested decision, it is alleged, constitutes a *prima facie* breach of the principle of the protection of legitimate expectations, a principle which forms part of the Community legal order (Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019).

26. The Commission submits that, as the applicant's tender was submitted after the deadline, it had no choice but to reject it under the rules applied by the institution regarding invitations to tender. Their purpose was to guarantee equal treatment oftenderers. The Commission submits that to accept the applicant's tender would entail discrimination against the other firms which did submit their tenders in time.

27. As regards the existence of a *prima facie* case, it points out that the applicant, contrary to its claims, did not follow scrupulously the instructions given in the invitation to tender in that it wrote the name of the Commission on DHL's air consignment note. Under the circumstances it should have been aware of the risk that the tender would be delivered to the wrong address, and consequently would arrive at the TACIS Procurement Unit after the deadline.

Findings of the court hearing the application for interim measures

28. In support of its application for interim measures the applicant confines itself to pleading that the contested decision constitutes a *prima facie* breach of the principle of the protection of legitimate expectations.

29. Despite the express warning in the invitation to tender (see paragraph 4 above), the applicant indicated on DHL's air consignment note that the consignment in question was intended for the 'European Commission (see paragraph 8 above).

30. The application for interim measures is therefore based on the incorrect premiss that the applicant followed scrupulously the instructions in the invitation to tender.

31. As is clear from the oral pleadings, the purpose of those instructions was precisely to prevent events such as those which occurred in this case. If the Commission's name features on the air consignment note there is a great risk that the consignment in question will be delivered to the central mail office at Evere, in accordance with the general instructions of 1991 (see paragraph 9 above).

32. The applicant cannot plead lack of experience in this area. It does not dispute the Commission's claims, first, that it had already responded to invitations to tender from the TACIS Procurement Unit without making any mistakes in the address and, second, that it recently signed an extension of contract following an invitation to tender organised in the same way as that in this case.

33. As it did not heed the warning in the invitation to tender, it could not legitimately expect that its tender would be delivered in time to the TACIS Procurement Unit. Accordingly, the plea alleging breach of the principle of the protection of legitimate expectations appears *prima facie* to be unfounded.

34. In the absence of any other pleas in fact or in law which would justify *prima facie* the adoption of the interim measures applied for, the application for interim measures must be dismissed, without there being any need to consider whether the other conditions for the adoption of interim measures have been met in this case.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. The decision as to costs is reserved.

Luxembourg, 26 May 1998.

H. Jung

Registrar

B. Vesterdorf

President

1: Language of the case: French. </HTML

Judgment of the Court of First Instance (Fifth Chamber)

First Instance (Fifth Chamber)First Instance (Fifth Chamber)2000. Alsace International Car Service (AICS) v European Parliament. Public services contract - Passenger transport by chauffeur-driven vehicles - Invitation to tender - Compliance with national law - Principles of sound administration and of the duty to cooperate in good faith - Rejection of a tender. Case T-139/99.

1. Actions for annulment - Natural or legal persons - Interest in bringing proceedings - Claim by tenderer whose bid was not accepted - Admissibility

(Art. 230, fourth para., EC)

2. European Community public procurement - Conclusion of a contract following an invitation to tender - Discretion of the institutions - Judicial review - Limits

3. Procedure - Introduction of new pleas in law in the course of the proceedings - Conditions - New plea - Concept

(Rules of Procedure of the Court of First Instance, Arts 44(1)(c) and 48(2))

1. An action brought by a natural or legal person is admissible only if that person can show a legal interest in bringing proceedings. In the context of a procedure for the award of public contracts, the awarding institution cannot claim that the tenderer whose bid was not accepted has no legal interest in bringing proceedings on the ground that it submitted a tender which was in any event unacceptable. Inasmuch as annulment of the contested decision would entail reopening the tender procedure under different conditions, the applicant does indeed have a legal interest in bringing the proceedings in order to be able to submit a fresh tender without being faced by competition from the previously successful tenderer.

(see paras 28, 33)

2. Like the other institutions, the Parliament has a wide discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error. Nevertheless, in accordance with the principles of sound administration and solidarity as between the Community institutions and the Member States, the institutions are required to ensure that the conditions laid down in an invitation to tender do not induce potential tenderers to infringe the national legislation applicable to their business.

(see paras 39, 41)

3. It is clear from the provisions of Articles 44(1)(c) and 48(2) of the Rules of Procedure of the Court of First Instance, taken together, that the application initiating proceedings must indicate the subject-matter of the dispute and set out in summary form the pleas raised and that no fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure. However, the fact that the applicant became aware of a factual matter during the course of the procedure before the Court of First Instance does not mean that that element constitutes a matter of fact coming to light in the course of the procedure. A further requirement is that the applicant was not in a position to be aware of that matter previously.

(see paras 59, 62)

In Case T-139/99,

Alsace International Car Services (AICS), established in Strasbourg (France), represented by C. Imbach and A. Dissler, of the Strasbourg Bar, with an address for service in Luxembourg at

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the Chambers of P. Schiltz, 4 Rue Béatrix de Bourbon,

applicant,

v

European Parliament, represented by P. Runge Nielsen and O. Caisou-Rousseau, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Secretariat-General of the European Parliament, Kirchberg,

defendant,

APPLICATION, first, for the annulment of the Parliament's decision not to accept the applicant's tender submitted in response to invitation to tender no 99/S 18-8765/FR, concerning a contract for passenger transport using vehicles with drivers during the sessions of the European Parliament in Strasbourg and, secondly, for damages for loss allegedly suffered by the applicant as a result of that decision,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. García-Valdecasas, President, P. Lindh and J.D. Cooke, Judges,

Registrar: G. Hertzig, Administrator,

having regard to the written procedure and further to the hearing on 14 March 2000,

gives the following

Judgment

Costs

71 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as asked for by the Parliament.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and pay those of the Parliament.

Facts

1 On 27 January 1999 the European Parliament, under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), published in the Official Journal of the European Communities a notice of an invitation to tender under the open procedure (99/S 18-8765/FR) (OJ 1999 S 18, p. 28 (the Notice)) for passenger transport using vehicles with drivers (the invitation to tender). The conditions for submitting a tender were set out in the Notice, in the description of the services to be provided, which contained administrative and technical clauses, and in the draft framework contract.

2 The Notice stated at point 2 that the contract was to take the form of a framework contract with a company providing passenger transport services using vehicles with drivers carried out on the

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basis of order forms specific to each job. The place of performance of the services was to be Strasbourg (point 3). According to point 5, the contract was divided into two lots. Lot No 1 concerned the hire of cars and minibuses with drivers, whilst Lot No 2 related to the hire of buses. The present action concerns solely the award of Lot No 1 of the contract.

3 According to point 13 of the Notice tenderers could be companies, individual contractors, as well as groupings of companies and/or individual contractors.

4 Paragraph 14 of the Notice stated: Service providers: Tenderers (or their executive(s)) must prove that they have been active in the sector for 3 years. They must also prove that they have a minimum annual turnover of FRF 2 000 000 for lot 1 and FRF 68 750 for lot 2

5 By way of criteria for awarding the contract, the notice stated at paragraph 16 that the economically most advantageous tender would be accepted, regard being had to the prices tendered and the tender's technical merit.

6 Paragraph 1.1.3 of the specification of the services to be provided (administrative clauses) stipulated that the approximate requirements of the European Parliament were for between 25 and 60 cars and 2 to 4 minibuses on average for the daily provision of services of between 6 and 12 hours' work. The hours were laid down at paragraph 5 (technical clauses), under which provision of services was to begin at 07.30 hrs and to cease with the end of parliamentary business (between 22.00 hrs and 24.00 hrs, depending on the day). In that same paragraph it was further stated:

Given that peak activity is recorded between 7.30 and 9.00 and between 20.00 and 22.00, the contractor shall undertake in its tender that it will be able to deal with a request for reinforcement in case of need. The minimum duration of the service shall be two consecutive hours.

7 At paragraph 2.1 (technical clauses) the Parliament also stated that the transport in question was to be effected in unmarked vehicles.

8 The last subparagraph of paragraph 6 (administrative clauses) provided:

The tender for and provision of the services must be in conformity with the applicable legislation.

9 Similarly, the draft framework contract annexed to the tender (Article VI, second paragraph) stated:

Moreover, the contractor shall ensure that, in providing the services tendered for, the applicable national and local rules are strictly observed.

10 On 10 February 1999 the applicant submitted its tender to the Parliament. It was worded as follows:

We tender for lot 1 in regard to the daily segment of hours outside the peak periods at the hourly rates given in Annex 1.

We can make available to the Parliament 30 vehicles with drivers (...) from Monday to Friday during the Strasbourg sessions of the Parliament.

However, we cannot offer services during the peak periods (...) that is to say from 07.00 hrs to 9.00 hrs and from 19.00 hrs to 22.00 hrs.

Services during the peak periods are technically and financially unfeasible.

Our company cannot in fact undertake to make available so many vehicles during the peak periods. No undertaking in the region could so without subcontracting to taxi operators working outside the legislation.

...

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11 In Annex 2 to its tender the applicant appended a document entitled L'action civile en concurrence déloyale (civil action for unfair competition) in which it pointed out that civil proceedings followed by criminal proceedings had been brought in connection with the activities of the Association Centrale des Autos Taxis de la Communauté Urbaine de Strasbourg (Central Taxi Association for the municipality of Strasbourg (ACATS TAXI 13) which undertook, on the Parliament's account under a contract for the hire of cars with drivers, the transport in unmarked vehicles of officials and members of the European Parliament. The applicant observed that only a limousine service enabled the Parliament's requirements to be satisfied in compliance with the legislation governing the conveyance of persons for valuable consideration. The applicant developed its point of view in that document.

12 On 24 February 1999 the Parliament asked tenderers to let it know the number of vehicles which they had available on that date and the number of vehicles which they reckoned on having available if they were awarded the contract.

13 In reply the applicant pointed out that it had five limousines and that it was in the process of buying three other vehicles. It further stated:

We can make available to you from Monday to Friday (outside rush hour times) during each parliamentary session sixty vehicles conforming to the technical clauses of the tender procedure.

14 The Parliament decided to accept the tender submitted by Coopérative Taxi 13 as the most advantageous, regard being had to the award criteria contained in the Notice.

15 By a letter of 7 April 1999 the Parliament informed the applicant that its tender had been unsuccessful owing to the difference in price as between its tender and the tender by the undertaking to which the contract had been awarded following the invitation to tender (the contested decision).

16 By a letter dated 15 April 1999 the applicant explained to the Parliament that it was given to understand that the latter was renewing the contract entered into with l'Association (ou coopérative) des Artisans Taxis. It once again expressed its doubts as to the legality of such a contract under French law. In that connection it attached particular weight to the legal impossibility of taxis carrying out the transport of members and officials of the European Parliament under the conditions laid down in the award procedure (unmarked vehicles). It stated that, although the tender submitted by the Artisans Taxis Strasbourgeois might be financially more advantageous, the services would nevertheless be provided outside any legal framework, contrary to the terms of the invitation to tender. It also pointed out that it did not enjoy the numerous fiscal benefits granted to taxis and that its concern to observe the laws and regulations in force precluded it from submitting a tender at a competitive price. Therefore, it was faced, in its view, with a situation of unfair competition. Finally, it asked the Parliament to express a view on these arguments.

17 By letter dated 19 April 1999 the applicant, following up its letter of 15 April 1999, submitted a report dated March 1992 from the Interior Ministry (Inspectorate General for Administration) concerning the taxi business in the municipality of Strasbourg and the airport of Strasbourg-Entzheim.

18 In a letter dated 11 May 1999 Mr Rieffel, Director-General of Administration in the Parliament, replied:

Your letters dated 15 and 19 April 1999, in which you communicated to us certain information concerning French legislation on the taxi business and also requested the European Parliament to form a view on your observations as to whether the services provided by Coopérative Taxi 13 comply with that legislation, call for the following comments on my part.

In order to avoid any subsequent disputes, the European Parliament in its invitation to tender no 99/S 18-8765/FR made it an obligation that "the contracting party is to ensure that the applicable local and national legislation is strictly applied in the performance of the services requested"

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(Article VI(2) of the draft contract). In that connection I would point out that it is not for the European Parliament but for the competent French judicial authorities to interpret the legislation.

As regards the abovementioned invitation to tender, the European Parliament, for its part, observed all the rules and procedures for the award of contracts and, first and foremost, the terms of Directive 92/50.

As to the provision of services no information has come to my notice which would lead me to believe that the Coopérative Taxi 13 is not observing the conditions laid down in the invitation to tender. Besides, no administrative or judicial authority has hitherto raised any query with the European Parliament concerning the conditions under which the contract is being implemented.

...

19 It was under those circumstances that, by an application lodged with the Court of First Instance on 8 June 1999, the applicant brought the present proceedings.

20 Since the applicant did not lodge a reply within the period prescribed, the written procedure was closed on 20 September 1999.

21 By a letter dated 20 January 2000, the applicant lodged an application for the written procedure to be reopened under the second paragraph of Article 42 of the EC Statute of the Court of Justice rendered applicable to proceedings before the Court of First Instance by Article 46 thereof.

22 By decision of the President of the fifth Chamber of 31 January 2000 that application was refused.

23 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. Oral argument and the replies by the parties to questions put to them by the Court were presented at the hearing in open court on 14 March 2000.

Forms of order sought by the parties

24 The applicant claims that the Court should:

- annul the contested decision;

- order the Parliament to pay to it, in accordance with Article 288 EC, damages of FRF 1 000 000 for losses suffered,

25 The defendant contends that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

Admissibility

Arguments of the parties

26 Whilst not formally raising an objection of inadmissibility, the Parliament submits that the applicant has no interest in bringing the present action since it submitted a tender which in no event could be accepted. The applicant, it claims, is not in a position to provide the services requested by the Parliament, as set out in the description of the services to be provided.

27 At the hearing the applicant retorted that, although it is true that it could not cover transport requirements during peak times (see paragraph 6 above), the reason for that was that such services could not feasibly be provided and that, therefore, as it had informed the Parliament in the course of the tender procedure, no undertaking in the region was able to do so without subcontracting to taxi operators working in breach of the legislation.

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Findings of the Court

28 In accordance with settled case-law, an action brought by a natural or legal person is admissible only if that person can show a legal interest in bringing proceedings (judgment in Case T-117/95 Corman v Commission [1997] ECR II-95, paragraph 83 and order in Case T-5/99 Andriotis v Commission and Cedefop [2000] ECR II-0000, paragraph 36).

29 It is true that the applicant has confined itself to seeking the annulment of the decision not to accept its tender. It is also true that the applicant stated that it was unable to satisfy all the conditions laid down by the Parliament in the description of the services to be provided.

30 However, in its tender the applicant stated that it was bidding for lot no 1 daily segment outside peak periods. It stated that it was unable to provide transport services during peak periods, that is to say from 07.00 hrs to 09.00 hrs and from 19.00 hrs to 22.00 hrs owing to the fact that the provision of such services was technically and financially not feasible. In that connection the applicant emphasised that no undertaking could make available so many vehicles during the peak periods without subcontracting to taxi operators working in breach of the legislation. In the document appended as Annex 2 to its tender, it stated that to use taxis to transport persons in unmarked vehicles under the contract with the Parliament was contrary to the ban under French legislation on taxis being operated for valuable consideration without their distinctive markings (see paragraph 11 above).

31 By a letter dated 11 May 1999 the Parliament replied that it was for the competent French judicial authorities and not for it to interpret the French legislation. However, it affirmed that it had available to it no information which would lead it to believe that Coopérative Taxi 13 was not observing the conditions of the invitation to tender. Besides, the Parliament stated that no reference had been made to it by any administrative or judicial authority to challenge the conditions under which the contract at issue was being implemented (see paragraph 18 above).

32 It follows that the present dispute primarily concerns the question whether the Parliament was entitled to take the view that Coopérative Taxi 13 was able to observe the conditions for the performance of the contract at issue in accordance with French legislation.

33 Accordingly, the Parliament cannot claim that the applicant has no legal interest in bringing proceedings on the ground that it submitted a tender which was in any event unacceptable. Inasmuch as annulment of the contested decision, owing to the fact that use of taxis under the contract at issue is not permitted under French legislation, would entail reopening the tender procedure, the applicant does indeed have a legal interest in bringing the present proceedings in order to be able to submit a fresh tender without being faced by competition from taxi companies operating outside the legislation.

34 Accordingly, the allegation by the Parliament that the present action is inadmissible must be rejected.

The claim for annulment

35 In its application the applicant raises two pleas alleging, first, infringement of the French law applicable to the taxi business and of the description of services to be provided and, secondly, breach of the principle of non-discrimination, inasmuch as the Parliament is said to have disregarded French legislation when it issued the invitation to tender. At the hearing the applicant raised a third plea alleging breach of the condition in the notice under which service providers had to prove that they had been active in the sector for three years.

First plea: infringement of the French law applicable to the taxi business and of the description of services to be provided

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Arguments of the parties

36 The applicant contends that the award of the contract at issue to Coopérative Taxi 13, or to any other taxi undertaking, is in breach of the French legislation applicable to the taxi business. That legislation prohibits the use of taxis as unmarked vehicles for the transport of persons for valuable consideration. In fact, taxis enjoy certain exemptions which cannot be extended to other business. Thus, in entering into the contract at issue with Coopérative Taxi 13, the Parliament infringed the condition laid down in Article 6 of the description of services to be provided (administrative clauses) under which the tender for, and performance of, services must be in conformity with the applicable legislation.

37 The Parliament observes that the French legislation applicable to the activities described in the tender is Law No 82-1153 of 30 December 1982 laying down guidelines for domestic transport (Official Journal of the French Republic of 31 December 1982) and Decree No 87-242 of 7 April 1987 defining and laying down the conditions governing performance of private non-urban passenger transport by road (Official Journal of the French Republic of 8 April 1987, p. 3980). According to the Parliament, that legislation in no way prohibits the provision of the services forming the subject-matter of the tender. On the contrary, Article 3 of Decree No 87-242 requires undertakings providing vehicles with drivers to be entered in the register of undertakings engaged in public passenger transport by road. Coopérative Taxi 13 forwarded with its tender a certificate of entry in that register enabling it to offer vehicles for hire for passenger transport in unmarked vehicles.

38 Moreover, the Parliament contends that the applicant is not entitled to bring proceedings under Article 6 of the description of services to be provided (administrative clauses) challenging the award of the contract at issue. The purpose of that provision is to protect the rights of the Parliament by allowing it to rescind the contract awarded as a result of the invitation to tender if the successful tenderer fails to observe the applicable legislation. Accordingly, that stipulation cannot be invoked against the decision awarding the contract by unsuccessful tenderers.

Findings of the Court

39 Like the other institutions, the Parliament has a wide discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (see Case 56/77 Agence Européenne d'Intérims v Commission [1978] ECR 2215, paragraph 20, Case T-19/95 Adia Intérim v Commission [1996] ECR II-321, paragraph 49, and Case T-203/96 Embassy Limousines & Services v Parliament [1998] ECR II-4239, paragraph 56).

40 Furthermore, under the second paragraph of Article 230 EC, the Court has jurisdiction, in the context of annulment proceedings, to adjudicate in actions for lack of competence, infringement of essential procedural requirements, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers. It follows that the Court cannot treat the alleged infringement of French legislation as a question of law for which unlimited judicial review is available. Review of that kind is a matter exclusively for the French authorities.

41 Nevertheless, in accordance with the principles of sound administration and solidarity as between the Community institutions and the Member States, the institutions are required to ensure that the conditions laid down in an invitation to tender do not induce potential tenderers to infringe the national legislation applicable to their business.

42 In the present case, the Parliament stated that the French legislation did not ban the provision in unmarked taxis of the transport services forming the subject-matter of the invitation to tender, provided that those services were covered by an entry in the register of undertakings engaged in public passenger transport by road. It must be observed that the applicant has failed to demonstrate

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that that assertion by the Parliament was manifestly erroneous. The applicant merely invoked the French legislation concerning the taxi business; it has not established that the legislation on non-urban private passenger transport services by road could not apply to taxis operating unofficially, where the latter provide the services provided for in the invitation to tender. Moreover, it is not contested that Coopérative Taxi 13 provided a certificate establishing that it is entered in the register of undertakings engaged in public passenger transport by road. The Parliament has shown that that registration was required by the abovementioned French legislation on private transport services, which lends credence to its arguments.

43 In those circumstances, the applicant has not demonstrated that the Parliament manifestly misdirected itself in its interpretation of the French legislation.

44 Nor, moreover, is the applicant entitled in law to rely on the clause in the draft framework contract under which the services must be provided in conformity with the legislation in force. That clause cannot be interpreted as imposing a requirement on the Parliament to check, not only that the person to whom the contract is awarded is entered in the register, as mentioned above, but also that that person is performing the contract in accordance with French legislation. As the Parliament has clearly stated, under that clause, the person to whom the contract is awarded must ensure that he is acting in conformity with the French legislation and, consequently, must suffer the consequences of a failure to do so.

45 It should be added that the Parliament stated at the hearing that, should it be wrong in its interpretation of the French legislation, it would be compelled to rescind the contract under that clause.

46 It follows from the foregoing that the first plea based on an infringement of the French legislation applicable to the taxi business and of the description of services to be provided must be rejected.

The second plea: breach of the principle of non-discrimination

Arguments of the parties

47 The applicant maintains that, like the other operators of limousines which had submitted tenders, it was discriminated against on financial grounds.

48 It observes that, under French legislation, taxis receive a free road-tax disc (vignette) and tax reductions on fuel. They are also exempt from professional charges.

49 Thus, the applicant contends that, even if the Parliament was not the instigator of that discrimination, it has in fact infringed the principle of non-discrimination.

50 The Parliament argues that this plea relates in fact to the legislative choices open to a Member State concerning two separate economic activities. However, it goes on to argue that is not for the Community judicature to assess the validity of national legislation in the context of an action for annulment, that not being a head of jurisdiction under the second paragraph of Article 230 EC.

51 In the alternative the Parliament maintains that it has not infringed the principle of non-discrimination in the present case. Even on the supposition that there is a difference of treatment under French law as between taxi operators and operators of limousines with drivers, the procedure for the award of public contracts to which the Community institutions are subject does not allow cognisance to be taken of that difference.

Findings of the Court

52 It should first of all be observed that the applicant is not claiming that the Parliament is the instigator of the alleged discrimination between operators of limousines and taxi companies.

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Indeed, the applicant acknowledges that that discrimination is due solely to the difference of treatment as between those two occupational categories under French law.

53 However, since the applicant has not demonstrated that the Parliament's interpretation of the French legislation applicable to the services forming the subject-matter of the invitation to tender was manifestly erroneous (see paragraph 43 above), it is no more entitled to claim that the Parliament infringed the principle of non-discrimination on the ground that it failed to take account of that difference of treatment. The Parliament cannot, under the applicable Community legislation, take into consideration differences in market opportunities engendered by French law. It is obliged to accept the financially most advantageous tender, regard being had to the criteria set out in the Notice.

54 Accordingly, the second plea must also be rejected.

The third plea: breach of the condition in the Notice under which service providers had to show that they had been operating in that sector for three years

55 At the hearing the applicant claimed that the Parliament had failed to observe the requirement of three years' activity in the area concerned laid down in point 14 of the Notice (see paragraph 4 above) on the ground that Coopérative Taxi 13 was established in October 1998 and its registration took effect only on 1 December 1998.

56 The applicant explained the delay in raising this plea by the fact that it was only on reading the defence that it became aware of the fact that the awarding authority had not observed that requirement.

57 At the hearing the Parliament observed that there is no reference in the application to the alleged irregularity of the tender procedure constituted by the fact that tenderers had to prove that they had been active in this sector for three years. On that ground it considers that plea to be inadmissible.

58 In any event it contended that that plea is unfounded. Although it is true that Coopérative Taxi 13 was established recently, nevertheless its members, who carried on their activity within the framework of the earlier taxi cooperative, have the requisite experience. In that connection, the Parliament explained that the experience required by the Notice and the description of services to be provided is to be assessed not in regard to the undertaking but in regard to the drivers called on to conduct the transport operations in question.

Findings of the Court

59 It is clear from the provisions of Articles 44(1)(c) and 48(2) of the Rules of Procedure of the Court of First Instance, taken together, that the application initiating proceedings must indicate the subject-matter of the dispute and set out in summary form the pleas raised and that no fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure (see, inter alia, judgments in Case 306/81 Verros v Parliament [1983] ECR 1755, paragraph 9, Case T-207/95 Ibarra Gil v Commission [1997] ECR-SC I-A-13 and II-31, paragraph 51 and Case T-217/95 Passera v Commission [1997] ECR-SC I-A-413 and II-1109, paragraph 87).

60 The plea in question was not raised, either directly or by implication, in the application, nor is it closely linked with the other pleas raised therein. It is therefore a fresh plea, as the applicant itself acknowledges. It follows that it is inadmissible unless it is based on matters of law or of fact which have come to light in the course of the written procedure.

61 The applicant claimed that it was only on reading the defence that it became aware of the fact that Coopérative Taxi 13 did not meet the requirement that tenderers had to prove that they had been active in the sector for three years.

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62 It is important to point out, in that connection, that the fact that the applicant became aware of a factual matter during the course of the procedure before the Court of First Instance does not mean that that element constitutes a matter of fact coming to light in the course of the procedure. A further requirement is that the applicant was not in a position to be aware of that matter previously (see judgment in Case T-141/97 Yasse v EIB [1999] ECR-SC II-929, paragraphs 126 to 128).

63 As is clear from the case-file, the applicant was indeed in a position to be able to ascertain, prior to lodgment of the application, the circumstances under which Coopérative Taxi 13 was set up. It stated in its letter to the Parliament of 15 April 1999 that it was given to understand that the Parliament was renewing the contract which had been entered into with the association (coopérative) des artisans taxis. In that letter it went on to state that although the tender submitted by the artisans taxis strasbourgeois might be financially more favourable, the services provided would not be covered by any legal framework, contrary to the terms of the invitation to tender.

64 In response to those allegations the Parliament's Director-General for Administration, in his letter of 11 May 1999, clearly stated that the successful tenderer was Coopérative Taxi 13 (see paragraph 18 above). On lodging its application on 8 June 1999, the applicant was therefore perfectly aware of the fact that Coopérative Taxi 13 had obtained the contract as a result of the invitation to tender. It could therefore have made inquiries with the competent authority as to the date on which Coopérative Taxi 13 was set up.

65 Consequently, on the supposition that it was only on reading the defence that the applicant noticed that there might be an inconsistency between acceptance of the tender by Coopérative Taxi 13 and the condition in the Notice under which tenderers had to prove that they had been active in the sector for three years, it cannot be heard to say that it was not possible for it to raise that inconsistency in the application.

66 Therefore, since the applicant was in a position to raise in its originating application the plea based on an infringement of the abovementioned condition, it cannot, under the terms of Article 48(2) of the Rules of Procedure, raise it at the stage of the hearing (see judgment in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 Limburgse Vinyl Maatschappij and Others v Commission [1999] ECR II-931, paragraph 63).

67 In light of the foregoing, the abovementioned plea put forward for the first time at the hearing is not based on matters of law or fact coming to light during the course of the procedure and must consequently be declared inadmissible.

The claim for damages

68 Under the second paragraph of Article 288 EC and the general principles to which that provision refers, Community liability depends on fulfilment of a set of conditions as regards the unlawfulness of the conduct alleged against the institution, the fact of damage and the existence of a causal link between the conduct in question and the damage complained of (see judgment in Case T-336/94 Efisol v Commission [1996] ECR II-1343, paragraph 30).

69 Since in its pleas and arguments set out above the applicant has not shown that the Parliament's conduct was unlawful, its claim for damages must be dismissed.

70 It follows from all the foregoing that the application must be dismissed in its entirety.

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AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2000 Page II-02849
DOC	2000/07/06
LODGED	1999/06/08
JURCIT	11997E230-L2 : N 40 11997E288-L2 : N 68 31991Q0530-A44P1LC : N 59 31991Q0530-A48P2 : N 59 66 61977J0056-N20 : N 39 61981J0306-N09 : N 59 61994A0305-N63 : N 66 61994A0336-N30 : N 68 61995A0019-N49 : N 39 61995A0117-N83 : N 28 61995A0207-N51 : N 59 61995A0217-N87 : N 59 61996A0203-N56 : N 39 61997A0141-N126-128 : N 62 61999B0005-N36 : N 28
SUB	Public contracts of the European Communities
AUTLANG	French
MISCINF	POURVOI : C-330/00
APPLICA	Person
DEFENDA	European Parliament ; Institutions
NATIONA	France
NOTES	Ritleng, D.: Europe 2000 Octobre Comm. no 293 p.13-14 ; Dischendorfer, Martin: The Principle of Sound Administration and the Duty to Co-operate in Good Faith, Tender Specifications Violating National Law, and New Pleas Before the Court of First Instance; A Note on Case T-139/99, Alsace International Car Services (AICS) v. European Parliament, Public Procurement Law Review 2000 p.NA142-NA144
PROCEDU	Action for annulment - unfounded;Action for annulment - inadmissible;Action for damages - unfounded
DATES	of document: 06/07/2000 of application: 08/06/1999

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Judgment of the Court (Sixth Chamber)
of 12 July 2001
Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti and Leopoldo Freyrie v Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy.
Public works contracts - Directive 93/37/EEC - National legislation under which the holder of a building permit or approved development plan may execute infrastructure works directly, by way of set-off against a contribution - National legislation permitting the public authorities to negotiate directly with an individual the terms of administrative measures concerning him.
Case C-399/98.

1. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Purpose - Effectiveness

(Council Directive 93/37, Art. 1(a))

2. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Criteria for assessment

(Council Directive 93/37, Art. 1(a), (b) and (c))

3. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Scope - National rule allowing direct execution of infrastructure works - Included - Condition

(Council Directive 93/37)

4. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Public works contracts - Definition - Existence of a contract - Public authorities concerned not able to choose the other party to the contract under a development plan - No effect - Conditions

(Council Directive 93/37, Art. 1(a))

5. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Public works contracts - Definition - Pecuniary nature of the contract

(Council Directive 93/37, Art. 1(a))

6. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Public works contracts - Definition - Contractor - Classification not dependent on direct performance with own resources

(Council Directive 93/37, Art. 1(a))

7. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Application of the rules concerning publicity provided for under the Directive by persons other than the contracting authority - Whether permissible - Conditions

(Council Directive 93/37, Art. 1(a), (b) and (c) and Art. 3(4))

8. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - National rule providing for the direct execution of infrastructure works of a value equal to or exceeding the ceiling fixed by the Directive by a holder of a building permit or approved development plan by way of set-off against a contribution - Not permissible

(Council Directive 93/37)

9. Preliminary rulings - Admissibility of reference - Request not specifying the legislative context

(Art. 234 EC)

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1. Since the existence of a public works contract is a condition for application of Directive 93/37 concerning the coordination of procedures for the award of public works contracts, Article 1(a) must be interpreted in such a way as to ensure that the Directive is given full effect. It is clear that the Directive aims to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition. The development of such competition entails the publication at Community level of contract notices. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism.

(see para. 52)

2. Directive 93/37 concerning the coordination of procedures for the award of public works contracts gives definitions of contracting authority (Article 1(b)), works (Article 1(a) and Annex II) and a work (Article 1(c)).

The definition given by the Community legislature confirms that those elements are closely related to the aim of the Directive. They must play a decisive role, therefore, when it falls to be determined whether a public works contract exists for the purposes of the Directive.

This means that in circumstances involving the execution, or the design and execution, of works or the execution of a work for a contracting authority within the meaning of the Directive, the assessment of the situation in terms of the other elements referred to in Article 1(a) of the Directive must be made in such a way as to ensure that the Directive is not deprived of practical effect, particularly where that situation displays special characteristics because of the provisions of national law applicable to it.

(see paras 53-55)

3. The fact that a provision of national law allowing direct execution of infrastructure works forms part of a set of urban development regulations that are of a special nature and pursue a specific aim, separate from that of Directive 93/37 concerning the coordination of procedures for the award of public works contracts, is not sufficient to exclude the direct execution of works from the scope of the Directive when the elements needed to bring it within its scope are present.

(see para. 66)

4. It does not follow from the fact that, under a development plan, the municipal authorities in question are not free to choose the other party to the contract since by law that person must be the owner of the land in question that the relationship between the authorities and the developer does not constitute a contract, since it is the development agreement concluded between them which determines in each case the various infrastructure works to be undertaken, together with the related terms and conditions, including the requirement that the projects for such works be approved by the municipality.

(see para. 71)

5. The pecuniary nature of the contract within the meaning of Article 1(a) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts relates to the consideration due from the public authority concerned in return for the execution of the works which are the object of the contract referred to in Article 1(a) of the Directive and which will be at the disposal of the public authority.

(see para. 77)

6. Article 1(a) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts does not require that, in order to be classed as a contractor, a person who enters

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into a contract with a contracting authority must be capable of direct performance using his own resources. The person in question need only be able to arrange for execution of the works in question and to furnish the necessary guarantees in that connection.

(see para. 90)

7. In order to comply with Directive 93/37 concerning the coordination of procedures for the award of public works contracts in cases concerning the execution of infrastructure works, the municipal authorities constituting a local authority within the meaning of Article 1(b) of the Directive need not themselves apply the award-of-contract procedures laid down therein. The Directive would still be given full effect if the national legislation allowed the municipal authorities to require the developer holding the building permit, under the agreements concluded with them, to carry out the work contracted for in accordance with the procedures laid down in the Directive so as to discharge their own obligations under the Directive. In such a case, the developer must be regarded, by virtue of the agreements concluded with the municipality exempting him from the infrastructure contribution in return for the execution of public infrastructure works, as the holder of an express mandate granted by the municipality for the construction of that work. Article 3(4) of the Directive expressly allows for the possibility of the rules concerning publicity to be applied by persons other than the contracting authority in cases where public works are contracted out.

(see paras 57, 100)

8. Directive 93/37 concerning the coordination of procedures for the award of public works contracts precludes national urban development legislation under which, without the procedures laid down in the Directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

(see para. 103 and operative part)

9. When the national court has not identified the provisions of Community law of which it seeks an interpretation, nor specified precisely which aspects of the relevant national legislation raise difficulties in terms of Community law when applied in the case before it, it is not possible to identify the specific problem arising in the main proceedings concerning the interpretation of Community law and therefore the question referred for a preliminary ruling must be held inadmissible.

(see paras 105-107)

In Case C-399/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by Tribunale Amministrativo Regionale per la Lombardia (Italy) for a preliminary ruling in the proceedings pending before that court between

Ordine degli Architetti delle Province di Milano e Lodi,

Piero De Amicis,

Consiglio Nazionale degli Architetti,

Leopoldo Freyrie

and

Comune di Milano,

and

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Pirelli SpA,

Milano Centrale Servizi SpA,

Fondazione Teatro alla Scala, formerly Ente Autonomo Teatro alla Scala,

on the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris (Rapporteur), J.-P. Puissochet, R. Schintgen and F. Macken, Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Ordine degli Architetti delle Province di Milano e Lodi and Piero de Amicis, by P. Mantini, avvocato,

- Consiglio Nazionale degli Architetti and L. Freyrie, by A. Tizzano, avvocato,

- City of Milan, by F.A. Roversi Monaco, G. Pittalis, S. De Tuglie, L.G. Radicati di Brozolo, avvocati, and A. Kronshagen, avocat,

- Pirelli SpA, by G. Sala, A. Pappalardo and G. Greco, avvocati,

- Milano Centrale Servizi SpA, by G. Sala, A. Pappalardo and L. Decio, avvocati,

- Fondazione Teatro alla Scala di Milano, by P. Barile, S. Grassi and V.D. Gesmundo, avvocati,

- Italian Government, by U. Leanza, acting as Agent, assisted by P.G. Ferri and subsequently by M. Fiorilli, Avvocati dello Stato,

- Commission of the European Communities, by P. Stancanelli and M. Nolin, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Ordine degli Architetti delle Province di Milano e Lodi, represented by P. Mantini; the Consiglio Nazionale degli Architetti, represented by F. Sciaudone, avvocato; the City of Milan, represented by L.G. Radicati di Brozolo; Pirelli SpA, represented by G. Sala, A. Pappalardo and G. Greco; Milano Centrale Servizi SpA, represented by L. Decio; Fondazione Teatro alla Scala, represented by V.D. Gesmundo; the Italian Government, represented by M. Fiorilli; and the Commission, represented by P. Stancanelli, at the hearing on 12 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 7 December 2000,

gives the following

Judgment

Costs

108 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

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On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunale Amministrativo Regionale per la Lombardia by order of 11 June 1998, hereby rules:

Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts precludes national urban development legislation under which, without the procedures laid down in the Directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

1 By order of 11 June 1998, received at the Court on 9 November 1998, the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court of Lombardy) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54, hereinafter the Directive).

2 Those questions were raised in the course of two actions brought against the City of Milan. The plaintiffs in the first action are the Ordine degli Architetti delle Province di Milano e Lodi (Order of Architects of the Provinces of Milan and Lodi; hereinafter the Order of Architects) and Piero de Amicis, an architect; the second action was brought by the Consiglio Nazionale degli Architetti (National Council of Architects; hereinafter the CNA) and Leopoldo Freyrie, an architect. Pirelli SpA (hereinafter Pirelli), Milano Centrale Servizi SpA (hereinafter MCS) and the Fondazione Teatro alla Scala, formerly the Ente Autonomo Teatro alla Scala (hereinafter the FTS) were joined as defendants.

Legal background

Community legislation

3 The Directive was adopted on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100a of the EC Treaty (now, after amendment, Article 95 EC).

4 According to the second recital in the preamble to the Directive, the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts.

5 According to the tenth recital, to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community.

6 Under Article 1(a), (b) and (c) of the Directive:

For the purposes of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

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(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...

(c) a "work" means the outcome of building or civil engineering, works taken as a whole that is sufficient of itself to fulfil an economic and technical function.

7 The activities referred to in Annex II, mentioned in Article 1(a) of the Directive, are the building and civil engineering works in Class 50 of the general industrial classification of economic activities within the European Communities (NACE). The construction of buildings is expressly listed among those activities.

8 Article 3(4) of the Directive provides:

Member States shall take the necessary steps to ensure that a concessionaire other than a contracting authority shall apply the advertising rules listed in Article 11(4), (6), (7), and (9) to (13), and in Article 16, in respect of the contracts which it awards to third parties when the value of the contracts is not less than [EUR] 5 000 000.

9 Articles 4 and 5 specify the types of contract to which the Directive does not apply, namely (i) contracts governed by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1); (ii) works contracts which are declared secret or the execution of which must be accompanied by special security measures or when the protection of the basic interests of the Member State's security so requires; and (iii) public contracts governed by different procedural rules and awarded in pursuance of certain international agreements or pursuant to the particular procedure of an international organisation.

10 Article 6(1) states that the Directive applies to public works contracts whose estimated value net of VAT is not less than [EUR] 5 000 000.

11 With respect to the procedures for awarding public works contracts, Article 7(2) and (3) of the Directive specify the circumstances in which contracting authorities may employ negotiated procedures, these being defined in Article 1(g) of the Directive as procedures where contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them.

12 Article 7(2) of the Directive lists three cases in which the negotiated procedure must be preceded by publication of a contract notice. Article 7(3) lists five cases in which prior publication of a contract notice is not necessary: (i) where an open or restricted procedure has proved unsuccessful; (ii) when, for practical or legal reasons, the works may only be carried out by a particular contractor; (iii) in cases of extreme urgency brought about by events unforeseen by the contracting authorities; (iv) in cases requiring additional works not provided for in a contract which has already been awarded; and (v) for works consisting in the repetition of similar works provided for under an earlier contract, awarded in accordance with the open procedure or the restricted procedure.

13 Article 7(4) of the Directive states that, in all other cases, contracting authorities are to award their public works contracts in accordance with the open procedure or the restricted procedure.

14 Under Article 11(2) of the Directive, a contracting authority which wishes to award a public works contract by open, restricted or negotiated procedure in one of the cases referred to in Article 7(2) must advertise that intention by means of a notice.

15 Under Article 11(9) of the Directive, the notice must be published in full in the Official

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Journal of the European Communities.

National legislation

Italian legislation on urban development

16 It is clear from the documents before the Court that in Italy construction is subject to the control of the public authorities. Under Article 1 of Law No 10 of 28 January 1977 laying down rules concerning the suitability of land for development (GURI No 27 of 29 January 1977, hereinafter Law No 10/77), [a]ny activity involving the urban development of municipal land and building works on such land entails liability to contribute to the related costs and the execution of such works is conditional upon permission being granted by the mayor.

17 Article 3 of Law No 10/77 provides, under the heading, Charge for the grant of building permission, that the grant of permission entails liability to pay a proportion of the urban development and construction costs (hereinafter the infrastructure contribution).

18 The infrastructure contribution is paid to the municipality when permission is granted. However, under Article 11(1) of Law No 10/77, by way of total or partial set-off against the amount due, the holder of the permission may undertake to execute the infrastructure works directly, in accordance with the procedures and standards laid down by the municipality.

19 Under Article 4(1) of Law No 847 of 29 September 1964 - entitled Authorisation for municipalities and groups of municipalities to arrange loans for the purchase of land for the purposes of Law No 167 of 18 April 1962 - as amended by Article 44 of Law No 865 of 22 January 1971 and Article 17 of Law No 67 of 11 March 1988 (hereinafter Law No 847/64), primary infrastructure works comprise residential streets, leisure areas, parking space, sewers, networks for the distribution of water, electricity and gas, street lighting and formal parks and gardens.

20 Under Article 4(2) of Law No 847/64, secondary infrastructure works comprise pre-school facilities; primary and secondary schools; buildings and campuses to accommodate higher and further education facilities; local markets; municipal branch offices; churches and other religious buildings; local sports facilities; community centres; cultural and health and fitness facilities; and local parks and gardens.

21 Provisions similar to those in Article 11(1) of Law No 10/77, albeit relating solely to primary infrastructure works, were already included in Article 31(4) of Law No 1150 of 17 August 1942 on urban development (GURI No 244 of 17 August 1942), as amended by Framework Law No 765 of 6 August 1967 (hereinafter Law No 1150/42), which provides that in no case shall permission to build be granted unless the primary infrastructure is already in place or unless the municipalities have made provision for its installation within three years thereafter or unless private persons undertake to execute those works at the same time as the construction work in respect of which they have been granted permission.

22 Specifically with regard to the coordinated execution of a number of works under a single development plan - as in the present case - Article 28(5) of Law No 1150/42 provides:

Permission from the municipality is conditional upon conclusion of an agreement, to be registered by or on behalf of the owner, under which:

(1) ... the land required for secondary infrastructure works shall be transferred free of charge, subject to the provisions of subparagraph (2) below;

(2) the owner shall undertake to bear the costs of the primary infrastructure works; the owner shall also undertake to meet part of the cost of the secondary infrastructure works involved in the development project or of the works necessary to link the area to the various public utilities;

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the amount payable shall be commensurate with the nature and extent of the project works;

(3) the works referred to in subparagraph (3) above must be completed within ten years;

....

23 Article 28(9) of Law No 1150/42 provides that infrastructure works for which the owner is responsible must be executed within ten years.

24 At regional level, Article 8 of Lombard Regional Law No 60 of 5 December 1977 (Bolletino Ufficiale della Regione Lombardia, 2nd supplement, No 49, of 12 December 1977; hereinafter LRL No 60/77) provides that private persons may, in applications for permission, request authorisation to execute the primary or secondary infrastructure works directly, by way of total or partial set-off against the infrastructure contribution, such authorisation being granted by the municipality in so far as [it] is considered to be in the public interest.

25 On the other hand, execution of the infrastructure works involved in a development plan is governed by Article 12 of LRL No 60/77, as amended by LRL No 31 of 30 July 1986 (Bolletino Ufficiale della Regione Lombardia, 2nd supplement, No 31, of 4 August 1986, hereinafter LRL No 31/86). Article 12(1) provides:

[t]he agreement necessary for the grant of building permission in respect of the operations planned under the development project must provide for:

(a) ...;

(b) the execution, by or on behalf of the owners, of all the primary infrastructure works and part of the secondary infrastructure works or those necessary to link the area to public utilities;... where execution of those works involves costs lower than those estimated respectively for primary and secondary infrastructures within the meaning of the present Law, the balance must be paid; in any event, it shall be open to the municipality to require, rather than direct execution of the works, payment of a sum commensurate with the actual cost of the infrastructure works involved in the development projects and with the nature and extent of the building works, and in any event of an amount not lower than the charges provided for in the municipal resolution referred to in Article 3 of the present Law.

26 Cultural facilities are included in the list of secondary infrastructure works set out in Article 22(b) of Lombard Regional Law No 51 of 15 April 1975.

The Italian legislation relating to the administrative procedure

27 Under Article 11 of Law No 241 of 7 August 1990 introducing new rules governing administrative procedure and the right of access to administrative documents (GURI No 192 of 18 August 1990, hereinafter Law No 241/90), the administrative authorities may conclude, without prejudice to the rights of third parties and in pursuit of the public interest, agreements with interested parties with a view to determining the discretionary terms of the final measure or, in cases for which the law so provides, to substituting such agreements for that measure.

The dispute before the national court and the questions submitted for a preliminary ruling

28 It appears from the order for reference that the present request for a preliminary ruling has arisen in the course of two actions for the annulment of Resolution No 82/96 of 12 September 1996 and Resolution No 6/98 of 16 and 17 February 1998, adopted by the Milan City Council (hereinafter the contested resolutions).

29 By Resolution No 82/96 of 12 September 1996, the Milan City Council approved the Scala 2001 Project, a programme of works involving various separate operations.

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30 The project provided for execution of the following works:

- restoration and conversion of the Teatro alla Scala, a historical building occupying an area of approximately 30 000 m2;

- conversion of municipal buildings forming part of the Ansaldo complex;

- construction, in the area known as the Bicocca, of a new theatre (commonly known as the Teatro alla Bicocca, but officially called the Teatro degli Arcimboldi) with seating for 2 300, on a piece of land covering 25 000 m2 (plus 2 000 m2 parking space), intended initially, throughout the period required for the restoration and conversion of the La Scala opera house, to accommodate the activities normally housed there, and later to accommodate all the activities associated with the performance of dramatic works and other cultural events.

31 In the Bicocca area, according to the order for reference, a large-scale development project - privately promoted and known as the Bicocca project - was already under way. This was aimed at transforming the old industrial estate of Bicocca and involved the conversion of a huge complex of buildings. Pirelli, together with other private operators, was the owner-developer of that project. At the material time, the project, which had been started in 1990, was nearing completion. One of the urban development measures planned by the City of Milan for the Bicocca area was a multi-communal general-purpose complex. It decided that the new theatre planned for under the Scala 2001 Project should form part of that complex.

32 By Resolution No 82/96, the Comune di Milano (Milan Municipal Council) also assumed a number of commitments in relation to the Scala 2001 Project, concerning the execution of works, timetables and funding, when it approved a special agreement which the City of Milan had concluded with Pirelli, the Ente Autonomo Teatro alla Scala and MCS, as agent for the promoters of the Bicocca project. That agreement, which was signed on 18 October 1996, provided inter alia that the Bicocca element of the Scala 2001 Project would be executed in accordance with the following rules:

- Pirelli was to bear the cost of coordinating the preliminary and final stages of the project and its execution, as well as the building operations involved in the restoration of the La Scala opera house, the conversion of the buildings in the Ansaldo complex and the construction of the Teatro alla Bicocca; the actual task of coordination was to be entrusted to MCS;

- MCS, as agent for the promoters of the development project, would be responsible for construction of the Teatro alla Bicocca (as well as the adjacent car-park) in the area covered by the development project and on the land earmarked for that purpose, which the promoters had undertaken to transfer free of charge to the City of Milan; that construction would be classed as secondary infrastructure and undertaken in return for reduction of the infrastructure contribution due to the City of Milan under Italy's national and regional legislation. MCS's responsibility was expressly confined to execution of the outer shell of the building, ready for fitting out. One of MCS's obligations was to hand over the building before the end of 1998;

- Responsibility for fitting out the Teatro alla Bicocca, on the other hand, was to remain with the City of Milan, which would organise a tendering procedure for that purpose.

33 The Order of Architects and Mr De Amicis in his own right brought proceedings before the Regional Administrative Court of Lombardy for annulment of Resolution No 82/96.

34 Following changes in policy made at the beginning of 1998 by the new municipal administration, which wanted the Teatro alla Bicocca to be capable of accommodating larger audiences than the original La Scala building, the Comune di Milano adopted Resolution No 6/98 which, inter alia:

- approved the preliminary plan for construction of the new theatre in the Bicocca area;

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- confirmed that execution of that work would in part be undertaken directly by the promoters in accordance with their contractual obligations under the development plan - the associated costs being estimated at ITL 25 billion - and in part on the basis of a tendering procedure organised by the City of Milan;

- amended the agreement of 18 October 1996 with regard to the time-limits set for certain of the operations planned; in particular, the date set for completion of the Teatro alla Bicocca became 31 December 2000.

35 The CNA and Mr Freyrie, acting in his own right, brought actions before the Regional Administrative Court of Lombardy for annulment of Resolution No 6/98.

36 In both actions (joined for the purposes of the final judgment), the applicants challenge the validity of the contested resolutions both under Italian law on urban development and public procurement and under Community law. As regards the latter, they argue that the Teatro alla Bicocca is in the nature of public works and that the Comune di Milano ought therefore to have followed the Community procedure for inviting tenders. However, by the contested resolutions the Council had awarded the contract on the basis of private negotiations, thereby damaging the interests represented by the Order of Architects and the applicant architects.

37 In the order for reference, the national court concludes that the City of Milan correctly applied the Italian legislation, both national and regional, on urban development. However, suspecting that the Italian legislation should be disapplied - since it permits infrastructure works to a value higher than the ceiling fixed by the Directive to be executed without a prior call for tenders - the national court decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Is national and regional legislation which allows a builder (who holds a building permit or approved development plan) to carry out infrastructure works directly, by way of total or partial set-off against the contribution payable (Article 11 of Law No 10/77, Articles 28 and 31 of Law No 1150 of 17 August 1942, Articles 8 and 12 of Law No 60 of the Lombardy Region of 5 December 1977), contrary to Directive 93/37/EEC, having regard to the strict tendering principles imposed on Member States by Community law in respect of all public works of a value of [EUR] 5 million or more?

2. Notwithstanding the principles concerning tendering referred to above, may agreements between the administrative authorities and a private person (generally permitted by Article 11 of Law No 241 of 7 August 1990) be regarded as compatible with Community law in areas where the procedure is that the administrative authorities choose a party with whom a contract for services is to be concluded, in cases where such services exceed the threshold laid down by the relevant directives?

Question 1

Admissibility

38 The City of Milan and the FTS contend that the first question is unrelated to the subject-matter of the main proceedings.

39 They argue that, since the applicants in the main proceedings are either architects or professional bodies representing architects, the national court has confined admissibility of the main proceedings to issues arising from the award of contracts for the design of the Teatro alla Bicocca, to the exclusion of those for building works. Design work constitutes the provision of services. However, the first question concerns the interpretation of Directive 93/37 which covers public works contracts, not public service contracts, which are governed by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L

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209, p. 1).

40 Moreover, the design work in question was, quite simply, provided free of charge to the City of Milan, which means that the cost of that work cannot be included in the cost of constructing the Teatro alla Bicocca, direct execution of which, by way of set-off against the infrastructure contribution, would damage the interests of architects.

41 It is settled law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, for example, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main proceedings or to their purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted (see, in particular, PreussenElektra, cited above, paragraph 39).

42 In the present case, it is clear from the order for reference that the applicants in the main proceedings seek annulment of the contested resolutions because they permitted a public work - the Teatro alla Bicocca - to be executed directly, without recourse to a Community tendering procedure, thus damaging the applicants' interests. It is also clear from the order for reference that those actions have been declared admissible.

43 There is no doubt that, if a Community tendering procedure had to be organised for the construction of the Teatro alla Bicocca, it could also cover the related design work. The fact that such work is covered by the Directive is confirmed by the wording of Article 1(a), which defines public works contracts, for the purposes of the Directive, as contracts which have as their object either the execution, or both the execution and design, of works.

44 Consequently, the Court must reject the argument that the first question, in so far as it concerns the interpretation of the Directive, bears no relation to the subject-matter of the dispute in the main proceedings.

45 Accordingly, the fact that the design work on the Teatro alla Bicocca was provided free of charge does not cast any doubt on the relevance of the first question.

46 That question must therefore be answered.

Substance

47 The first question concerns the compatibility with the Directive of the national and regional legislation at issue in the main proceedings, under which infrastructure works may be executed directly in return for exemption, wholly or in part, from the contribution due.

48 It should be noted at the outset that, in the context of proceedings brought under Article 177 of the Treaty, the Court does not have jurisdiction to give a ruling on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it (see, inter alia, Joined Cases C-37/96 and C-38/96 Sodiprem and Others [1998] ECR I-2039, paragraph 22).

49 The first question should therefore be understood as seeking to ascertain whether the Directive precludes national urban development legislation under which the holder of a building permit or

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of an approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of such permission in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

50 In order to answer that question (thus understood), it must be determined whether the direct execution of infrastructure works, such as those at issue in the main proceedings, constitutes a public works contract within the meaning of Article 1(a) of the Directive.

51 According to the definition given in that provision, a public works contract necessarily comprises the following elements: a contract for pecuniary interest, concluded in writing, between a contractor and a contracting authority as defined in Article 1(b) of the Directive, which has as its object either the execution of a certain work or of works as defined by the Directive.

52 Since the existence of a public works contract is a condition for application of the Directive, Article 1(a) must be interpreted in such a way as to ensure that the Directive is given full effect. It is clear from the preamble to the Directive and from the second and tenth recitals, in particular, that the Directive aims to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition. As the tenth recital states, the development of such competition entails the publication at Community level of contract notices.

53 Furthermore, the Directive gives definitions of contracting authority (Article 1(b)), works (Article 1(a) and Annex II) and a work (Article 1(c)).

54 The definition given by the Community legislature confirms that those elements are closely related to the aim of the Directive. They must play a decisive role, therefore, when it falls to be determined whether a public works contract exists for the purposes of the Directive.

55 This means that in circumstances involving the execution, or the design and execution, of works or the execution of a work for a contracting authority within the meaning of the Directive, the assessment of the situation in terms of the other elements referred to in Article 1(a) of the Directive must be made in such a way as to ensure that the Directive is not deprived of practical effect, particularly where that situation displays special characteristics because of the provisions of national law applicable to it.

56 Those are the criteria in the light of which it must be determined whether the notion of public works contracts covers the direct execution of infrastructure works, such as the building of the outer shell of a theatre, under conditions such as those provided for by Italian urban development legislation.

The element relating to a contracting authority

57 It is common ground that the municipality involved in the main proceedings constitutes a local authority within the meaning of Article 1(b) of the Directive and it therefore falls within the definition of contracting authority given in that provision.

The element relating to the execution of works or of a work as defined in Article 1(a) of the Directive

58 Under Article 1(a) of the Directive, public works contracts must have as their object:

- the execution, or both the execution and design, of works related to one of the activities referred to in Annex II; or

- the execution, or both the execution and design, of a work as defined in Article 1(c), that is to say the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function; or

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- the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

59 Infrastructure works of the kind listed in Article 4 of Law No 847/64 constitute either building or civil engineering works, hence activities of the kind referred to in Annex II to the Directive, or works sufficient in themselves to fulfil an economic and technical function. They thus satisfy, at the very least, the criteria laid down in the first and second indents of paragraph 58 above.

60 Specifically, construction of the outer shell of a theatre (the activity at issue in the main proceedings) is an activity in Group 501 of the NACE, entitled Construction of... buildings, both residential and non-residential, referred to in Annex II to the Directive.

61 Consequently, the execution of infrastructure works such as the construction of the outer shell of a theatre constitutes works for the purposes of Article 1(a) of the Directive.

62 It thus follows from paragraphs 57 to 61 above that the situation at issue includes the two important elements - a contracting authority and works or a work - which must both be present if it is to be concluded that a public works contract exists.

The element relating to the existence of a contract

63 According to the Milan City Council, Pirelli, MCS and the FTS, this element is lacking because the direct execution of infrastructure works is provided for by a rule contained in the Italian national and regional legislation on urban development, which differs from the Community public procurement legislation in terms of its subject-matter, purpose, characteristics and the interests protected.

64 The above parties also contend that the local authority has no power to choose the person to be given responsibility for executing works since, by operation of law, that person is the owner of the land to be developed.

65 Lastly, both the Comune di Milano and the other defendants in the main proceedings contend that, even if it were accepted that direct execution could be carried out on the basis of commitments incorporated in the development agreement, the contractual element would still be lacking. The development agreement is governed by public law and concluded in the exercise of public authority, not private initiative. It cannot, therefore, be a contract for the purposes of the Directive. The municipality retains the powers delegated to it by the State for the management of its territory, one of which is the power to amend or revoke development plans in the light of changing circumstances or to adopt new criteria of assessment which better meet those needs (judgment No 6941 of 25 July 1994 of the Corte Suprema di Cassazione, Combined Chambers). For the same reason, they say, the typical elements constituting the raison d'être of a works contract are also lacking.

66 It should be noted, first, that the fact that the provision of national law allowing direct execution of infrastructure works forms part of a set of urban development regulations that are of a special nature and pursue a specific aim, separate from that of the Directive, is not sufficient to exclude the direct execution of works from the scope of the Directive when the elements needed to bring it within the scope of the Directive are present.

67 In that regard, as the national court pointed out, the infrastructure works referred to in Article 4 of Law No 847/64 are fully capable of constituting public works, partly because they are specifically designed to meet development requirements over and above the construction of housing and partly because they come wholly under the control of the competent administrative authority since it holds a legal right over the use of such works, so as to ensure that they remain at the service of all members of the local community.

68 These are important considerations because they confirm that the planned works are intended,

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as has always been maintained, for the benefit of the public.

69 Moreover, it is clear from the order for reference that Article 28(5) of Law No 1150/42 allows for the possibility of secondary infrastructure works being executed directly as part of a development project and that, according to Article 12 of LRL No 60/77, as amended by Article 3 of LRL No 31/86, direct execution is the norm. However, those provisions do not preclude the existence of a contract, as required by Article 1(a) of the Directive.

70 By effect of the above provision of Lombard regional legislation, the municipal authorities retain at all times the power to require in lieu of the direct execution of works payment of a sum commensurate with the actual costs of the works and with the extent and nature of those works. Moreover, where infrastructure works are executed directly, a development agreement must always be concluded between the municipal authorities and the owner or owners of the land to be developed.

71 It is true that the municipal authorities are not free to choose the other party to the contract since by law that person must be the owner of the land in question. However, it does not follow that the relationship between the authorities and the developer does not constitute a contract, since it is the development agreement concluded between them which determines in each case the various infrastructure works to be undertaken, together with the related terms and conditions, including the requirement that the projects for such works be approved by the municipality. Furthermore, it is by virtue of the commitments assumed by the developer in that agreement that the municipality acquires legal rights over use of the works contracted for, so that they can be made available to the public.

72 In the main proceedings, that is borne out by the fact that pursuant to the contested resolutions the Teatro alla Bicocca must be brought into being partly through direct execution by the developers in accordance with their contractual obligations under the development plan and partly through a tendering procedure organised by the City of Milan.

73 Lastly, contrary to the argument put forward by the Comune di Milano and the other defendants in the main proceedings, the fact that the development agreement is governed by public law and was concluded in the exercise of public power does not preclude, but rather militates in favour of, the existence of a contract as required by Article 1(a) of the Directive. In several Member States, any contract concluded between a contracting authority and a contractor is an administrative contract, which as such is governed by public law.

74 In the light of the above considerations, the terms of the development agreement and the agreements concluded under it are sufficient to provide the contractual element required by Article 1(a) of the Directive.

75 Moreover, that interpretation is consistent with the basic aim of the Directive which, as stated in paragraph 52 above, is to open up public works contracts to competition. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism. Accordingly, the fact that the public authorities are not free to choose the contractor cannot in itself justify non-application of the Directive, since that would ultimately preclude from Community competition the execution of works to which the Directive would otherwise apply.

The element relating to a contract for pecuniary interest

76 According to the Comune di Milano and the other defendants in the main proceedings, the contract is not bilateral, since no consideration is due from the municipality. The developer's right to obtain building permission is not the quid pro quo for payment of the infrastructure contribution or the direct execution of infrastructure works, and the provision of services to the site, which

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takes place as part of the process of transforming the area, does not depend either on the benefits arising from that transformation or on the advantage gained by the holder of the building permit.

77 It must be pointed out that the pecuniary nature of the contract relates to the consideration due from the public authority concerned in return for the execution of the works which are the object of the contract referred to in Article 1(a) of the Directive and which will be at the disposal of the public authority.

78 In a case such as that before the national court, the question whether - in circumstances where infrastructure works have been executed directly - the contract is of a pecuniary nature for the municipal authorities must be considered from a specific viewpoint, because of the peculiarities of Italian urban development legislation.

79 Thus, under Article 28(5)(2) of Law No 1150/42 and Article 12(b) of LRL No 60/77, as amended by Article 3 of LRL No 31/86, it is the owners of the land to be developed who bear the costs of primary infrastructure works as well as a proportion of the costs of the secondary infrastructure works needed for the project or of other works needed in order to link the area concerned to public utilities.

80 That being so, Article 11(1) of Law No 10/77 provides that the holder of building permission may undertake to carry out the infrastructure works directly... by way of total or partial set-off against the amount payable in respect of the infrastructure contribution, payment of which is linked to the grant of permission, pursuant to Article 3 of that Law.

81 The phrase by way of set-off used in Article 11(1) of Law No 10/77 suggests that, in consenting to the direct execution of infrastructure works, the municipal authorities waive recovery of the amount due in respect of the contribution provided for in Article 3 of that Law.

82 However, several parties - the Comune di Milano and the other defendants in the main proceedings, and the Italian Government - contend that this interpretation is incorrect, primarily because provision is made for payment of the infrastructure contribution as an alternative to the direct execution of works and, consequently, it is erroneous to believe that there is a financial obligation towards the municipality in any event, which is waived in cases where the works are executed directly. The real effect of the direct execution of works is that it gives the owner-developer freedom to build, relieving him of the obligation to pay the infrastructure contribution due as a result of the grant of building permission. The term set-off refers, therefore, to the fact that execution of the works discharges an obligation, not to consideration or some other benefit granted to the developers by the municipality.

83 Those objections concern the interpretation of Italian urban development legislation and the way in which the legislature envisaged the relationship between the direct execution of works and the obligation to pay the infrastructure contribution. Reference must be made, therefore, to the appraisal of that relationship made by the national court.

84 The national court states in the order for reference that, contrary to the arguments put forward by the defendants in the main proceedings, a holder of a building permit or an approved development plan who executes infrastructure works is not providing any service free of charge, since he is in fact settling a debt to the same value (but involving no cash adjustment) which arises towards the municipality - namely, the infrastructure contribution - and the fact that that obligation may be met in either of two forms - a cash payment or direct execution of the works - does not mean that the basis of the obligation can be differentiated according to the alternative that is chosen (or predetermined by the legislature).

85 That interpretation of the national legislation is consistent with the aim of the Directive,

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referred to in paragraph 52 of this judgment, and is therefore conducive to ensuring that the Directive has full effect.

86 Accordingly, the requirement that the contract be of a pecuniary nature must be held to be satisfied.

The element relating to a contract concluded in writing

87 It is not contested that there is a written contract in the present case: the development agreement between the municipality and the owner(s)-developer(s) was concluded in writing.

The element relating to the contractor

88 According to the Comune di Milano, the other defendants in the main proceedings and the Italian Government, that element is lacking because the developer is not necessarily the contractor or a construction undertaking, but derives his status from the fact that he owns the site to be developed. He is not required to satisfy particular conditions concerning his technical capabilities, solvency and so forth, save for the obligation to provide the municipality with appropriate guarantees in relation to the commitments entered into under the development agreement.

89 Furthermore, it is apparent from the replies to a question put by the Court that the responsibility of choosing the contractors to be entrusted with designing and executing the works lies solely with the developer holding the building permit. The works are executed in his name, not in the name of the municipality. He undertakes to hand over the infrastructure works to the municipality once they have been completed.

90 It should be noted that Article 1(a) of the Directive does not require that, in order to be classed as a contractor, a person who enters into a contract with a contracting authority must be capable of direct performance using his own resources. The person in question need only be able to arrange for execution of the works in question and to furnish the necessary guarantees in that connection.

91 Thus, Article 20 of the Directive states that [i]n the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

92 Along the same lines, the Court ruled that Directive 92/50 permits a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract (see Case C-176/98 Holst Italia [1999] ECR I-8607).

93 According to the documents before the Court, in a situation such as that at issue in the main proceedings, the developer holding a building permit has an obligation by virtue of the commitments entered into under the development agreement with the municipality to give the latter sufficient guarantees that the completed works will be handed over to the municipality and that the operator selected to execute the works will subscribe to the agreements concluded with the municipal authorities. That is the position in the present case, in so far as MCS signed the agreements entered into by the City of Milan with Pirelli.

94 In those circumstances, neither the fact that the developer is unable to execute the work using his own resources nor the fact that the operator who will be entrusted to carry out the work is chosen by the developer holding the building permit rather than by the municipal authorities means that the abovementioned element is lacking.

95 Furthermore, the fact that the infrastructure works are carried out by the holder of the building

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permit in his own name, before being handed over to the municipality, is not sufficient to divest the latter of its status as contracting authority in relation to the execution of such works.

96 Consequently, the contractor element must also be regarded as present.

97 In the light of the foregoing, it must be concluded that the direct execution of infrastructure works in the circumstances provided for by the Italian legislation on urban development constitutes a public works contract within the meaning of Article 1(a) of the Directive.

98 It follows that, when the estimated value, net of VAT, of such works is equal to or exceeds the ceiling fixed by Article 6(1) thereof, the Directive applies.

99 Consequently, the municipal authorities are under an obligation to comply with the procedures laid down in the Directive whenever they award a public works contract of that nature.

100 That does not mean that, in cases concerning the execution of infrastructure works, the Directive is complied with only if the municipal authorities themselves apply the award-of-contract procedures laid down therein. The Directive would still be given full effect if the national legislation allowed the municipal authorities to require the developer holding the building permit, under the agreements concluded with them, to carry out the work contracted for in accordance with the procedures laid down in the Directive so as to discharge their own obligations under the Directive. In such a case, the developer must be regarded, by virtue of the agreements concluded with the municipality exempting him from the infrastructure contribution in return for the execution of public infrastructure works, as the holder of an express mandate granted by the municipality for the construction of that work. Article 3(4) of the Directive expressly allows for the possibility of the rules concerning publicity to be applied by persons other than the contracting authority in cases where public works are contracted out.

101 With regard to the procedures laid down by the Directive, it is clear from Articles 7(4) and 11(2) and (9), read together, that contracting authorities which wish to award a public works contract must advertise their intention by publishing a notice in the Official Journal of the European Communities, except in any of the cases exhaustively listed in Article 7(3) of the Directive where the contracting authority is authorised to use the negotiated procedure without first publishing a contract notice.

102 In the present case, there is nothing in the documents before the Court to suggest that the direct execution of infrastructure works under the conditions laid down by the Italian legislation on urban development is capable of falling within one of the cases contemplated in Article 7(3).

103 It should therefore be stated in answer to the first question that the Directive precludes national urban development legislation under which, without the procedures laid down in the Directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

Question 2

104 The CNA maintains that this question is irrelevant. Since none of the conditions provided for by Article 11 of Law No 241/90 is satisfied in the case before the national court and having regard to the fact that the agreements concluded for the award of public contracts outside the procedures laid down by the relevant directives undoubtedly impair the rights of contractors or of members of a profession seeking to have the contract awarded to them, Article 11 of Law No 241/90 does not apply in circumstances such as those at issue.

105 Without there being any need to evaluate the CNA's arguments, it must be observed that the

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national court has not identified the provisions of Community law of which it seeks an interpretation; nor does it specify precisely which aspects of the relevant Italian legislation raise difficulties in terms of Community law when applied in the case before it.

106 In the absence of such information, it is not possible to identify the specific problem arising in the main proceedings concerning the interpretation of Community law.

107 It must therefore be concluded that the second question is inadmissible.

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CONCERNS	Interprets 31993L0037
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
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NOTES	Dischendorfer, Martin: Public Procurement Law Review 2001 p.NA127-NA134 FernA!ndez, TomA!s-RamA3n: Actualidad jurA¡dica Aranzadi 2001 nAo 505 p.1-6 Ballesteros Arribas, Silvia: Diario la ley 2001 nAo 5428 p.14-16 Tejedor Bielsa, Julio C.: Revista espaA±ola de Derecho Administrativo 2001 p.597-611 Quaglia, Mario Alberto: Rivista italiana di diritto pubblico comunitario 2001 p.842-852 Marchegiani, Giannangelo: Rivista italiana di diritto pubblico comunitario 2001 p.852-866 Fernandez, TomA!s-RamA3n: Rivista italiana di diritto pubblico comunitario 2001 p.1194-1208 Iannotta, R.: Il Foro amministrativo 2001 p.3090-3091 Belorgey, Jean-Marc ; Gervasoni, StA¬phane ; Lambert, Christian: L'actualitA¬ juridique ; droit administratif 2001 p.946-949 Nasti, Ivana: Il Corriere giuridico 2002 p.185-191 Radicati Di Brozolo, Luca G.: Il Corriere giuridico 2002 p.247-255 Girimonte, Simona: Giurisprudenza italiana 2002 p.2025-2028 Lora-Tamayo VallvA¬, Marta: Revista de AdministraciA3n PAoblica 2002 nAo 159 p.257-278 Floridia, Daniela: Nuove autonomie Anno XI (2002), n. 3, p.395-406 WAîrfel, Wolfgang ; Butt, Mark: Neue Zeitschrift fAîr Verwaltungsrecht 2003 p.153-158
PROCEDU	Reference for a preliminary ruling
ADVGEN	LA¬ger
JUDGRAP	Skouris
DATES	of document: 12/07/2001 of application: 09/11/1998

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Judgment of the Court (Fifth Chamber)
of 3 October 2000
The Queen v H.M. Treasury, ex parte The University of Cambridge.
Reference for a preliminary ruling: High Court of Justice (England &Wales), Queen's Bench Division (Divisional Court) - United Kingdom.
Public contracts - Procedure for the award of public contracts for services, supplies and works - Contracting authority - Body governed by public law.
Case C-380/98.

1. Approximation of laws - Procedures for the award of public service contracts, public supply contracts, and public works contracts - Directives 92/50, 93/36 and 93/37 - Contracting authorities - Bodies governed by public law - Financed by the State - Definition - Research awards and grants, student grants - Included - Payments made for the provision of services - Excluded - Activity financed for the major part by the State - Definition - Percentage of public financing - Assessment

(Council Directives 92/50, Art. 1(b), second subpara., third indent, 93/36, Art. 1(b), second subpara., third indent, and 93/37, Art. 1(b), second subpara., third indent)

2. Approximation of laws - Public procurement procedures - Services, supplies, works - Contracting authorities - Bodies governed by public law - Financed by the State - Definition - Percentage of public financing - Reference period - Determination

(Council Directives 92/50, Art. 1(b), second subpara., third indent, 93/36, Art. 1(b), second subpara., third indent, and 93/37, Art. 1(b), second subpara., third indent)

1. Article 1(b) of Directives 92/50 relating to the coordination of procedures for the award of public service contracts, 93/36 coordinating procedures for the award of public supply contracts and 93/37 concerning the coordination of procedures for the award of public works contracts provides, in its first subparagraph, that contracting authorities covers inter alia, bodies governed by public law, and in its second subparagraph, that a body governed by public law means any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (first indent), having legal personality (second indent) and financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law (third indent).

In the third indent, the expression financed... by [one or more contracting authorities] , properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives.

On a proper construction, the term for the most part in Article 1(b), second subparagraph, third indent, cited above, means more than half.

In order to determine correctly the percentage of public financing of a particular body, account must be taken of all of its income, including that which results from a commercial activity.

(see paras 26, 33, 36, and operative part 1-3)

2. The decision as to whether a body such as a university is a contracting authority within the meaning of Article 1(b) of Directives 92/50 relating to the coordination of procedures for the

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award of public service contracts, 93/36 coordinating procedures for the award of public supply contracts and 93/37 concerning the coordination of procedures for the award of public works contracts must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a contracting authority for the purposes of the above directives when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of those directives until such time as the relevant procedure has been completed.

(see para. 44, and operative part 4)

In Case C-380/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), for a preliminary ruling in the proceedings pending before that court between

The Queen

and

H.M. Treasury,

ex parte: University of Cambridge,

on the interpretation of Article 1 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Article 1 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, P.J.G. Kapteyn (Rapporteur), A. La Pergola, P. Jann and H. Ragnemalm, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the University of Cambridge, by D. Vaughan QC, A. Robertson, Barrister, and G. Godar, Solicitor,

- the United Kingdom Government, by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, and K. Parker QC,

- the Netherlands Government, by M.A. Fierstra, Head of the European Law Department at the Ministry of Foreign Affairs, acting as Agent,

- the Austrian Government, by W. Okresek, Departmental Head at the Chancellor's Office, acting as Agent,

- the Commission of the European Communities, by R. Wainwright, Principal Legal Adviser, and M. Shotter, a national civil servant on secondment to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

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after hearing the oral observations of the University of Cambridge, represented by D. Vaughan and A. Robertson, the United Kingdom Government, represented by G. Amodeo, of the Treasury Solicitor's Department, acting as Agent, and R. Williams, Barrister, the French Government, represented by G. Taillandier, rédacteur in the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent, the Austrian Government, represented by M. Winkler, of the Chancellor's Office, acting as Agent, and the Commission, represented by R. Wainwright and M. Shotter, at the hearing on 9 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2000,

gives the following

Judgment

Costs

45 The costs incurred by the Governments of the United Kingdom, France, the Netherlands and Austria, and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court) by order of 21 July 1998, hereby rules:

1. The expression financed... by [one or more contracting authorities] in Article 1(b), second subparagraph, third indent, of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives.

2. On a proper construction, the term for the most part in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37 means more than half.

3. In order to determine correctly the percentage of public financing of a particular body account must be taken of all of its income, including that which results from a commercial activity.

4. The decision as to whether a body such as the University of Cambridge is a contracting authority must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a contracting authority for the purposes of Directives 92/50, 93/36 and 93/37 when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of those directives until such time as the relevant procedure has been completed.

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1 By order of 21 July 1998, which was received at the Court on 26 October 1998, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions concerning the interpretation of Article 1 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Article 1 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

2 The questions arose in proceedings brought by the University of Cambridge (the University) in the High Court following the decision of H.M. Treasury (the Treasury) to retain universities of the United Kingdom of Great Britain and Northern Ireland in the list of bodies governed by public law notified to the Commission and reproduced in Annex I to Directive 93/37, while amending the text of that annex.

Community legislation

3 Article 1 of Directive 93/37 provides:

For the purpose of this directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, [or] associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies;

...

4 Article 1(b) of Directive 92/50 and Article 1(b) of Directive 93/36 were drafted in terms essentially identical to Article 1(b) of Directive 93/37.

5 As far as the United Kingdom is concerned, the list of bodies and categories of bodies governed by public law in Annex I to Directive 93/37 includes universities and polytechnics, maintained schools and colleges.

National legislation

6 Directives 92/50, 93/36 and 93/37 were transposed into United Kingdom law by the following measures:

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- Public Services Contracts Regulations 1993 (S.I. 1993/3228)

- Public Supply Contracts Regulations 1995 (S.I. 1995/201)

- Public Supply Contracts Regulations 1991 (S.I. 1991/2680).

7 Those regulations do not reproduce Annex I to Directive 93/37. However, each of them contains a definition of the bodies governed by public law based on the definition provided by Community law.

The main proceedings and the questions referred

8 In 1995 and 1996 the Committee of Vice-Chancellors and Principals of the Universities communicated to the Treasury its view that Directives 92/50, 93/36 and 93/37 did not apply universally to universities, so that the reference to universities in Annex I to Directive 93/37, to which the third indent of Article 1(b) of those directives refers, should be deleted.

9 On 17 January 1997 the Treasury suggested to the Commission that the reference to Universities and polytechnics, maintained schools and colleges be replaced by the words Maintained schools. Universities and colleges financed for the most part by other contracting authorities, thereby restricting the circumstances in which the abovementioned directives were applicable in the case of universities and taking into account the most recent developments, the Further and Higher Education Act of 1992 having rendered obsolete, in this context, the title of polytechnics.

10 That proposal has not yet been adopted by the Commission under the procedure provided for in Article 35 of Directive 93/37.

11 The amendment to Annex I of Directive 93/37 proposed by the Treasury did not satisfy the University, which brought an application for judicial review (dated 7 November 1996) in the High Court contesting the position adopted by the Treasury.

12 On 21 March 1997 the matter came before the Queen's Bench Division of the High Court, which gave the University leave to seek judicial review on the ground that there was a substantive issue concerning the interpretation of Directives 92/50, 93/36 and 93/37, and more specifically the exact interpretation of the expression financed, for the most part by one or more contracting authorities.

13 By order of 21 July 1998, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), stayed proceedings pending a preliminary ruling on the following questions:

1. Where Article 1 of Council Directive 92/50/EEC, Council Directive 93/37/EEC and Council Directive 93/36/EEC ("the directives") refers to any body "financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law" what monies are to be included in the expression "financed... by [one or more contracting authorities]"? In particular, in relation to payments to an entity such as the University of Cambridge, does the expression include:-

(a) awards or grants paid by one or more contracting authorities for the support of research work;

(b) consideration paid by one or more contracting authorities for the supply of services comprising research work;

(c) consideration paid by one or more contracting authorities for the supply of other services, such as consultancy or the organisation of conferences;

(d) student grants paid by local education authorities to universities in respect of tuition for named students?

2. What percentage or other meaning is to be given to the expression "for the most part" in Article

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1 of the directives?

3. If the expression "for the most part" is defined in terms of a percentage figure, is the calculation limited to considering sources of finance for academic and related purposes or should it include finance obtained in relation to commercial activities as well?

4. Over what period should any calculation be made for determining whether a university is a "contracting authority" in respect of any particular procurement, and how are foreseeable or future changes to be taken into account?

First question

14 As appears from the order for reference, universities in the United Kingdom are financed from various sources and those funds are provided for a variety of purposes and on various grounds. Some funds go to universities on the basis of periodical assessments of the quality of the research they do and/or depending on the number of students they receive; other funds come from awards, grants or the supply of food and accommodation; still others represent payment for services commissioned by charities, government departments, industry or commerce.

15 It is therefore necessary to determine the real nature of each of the forms of financing referred to in the first question in order to determine their significance for the University and hence the influence they have on whether that body is to be regarded as a contracting authority.

16 It should be borne in mind at the outset that, as far as the purpose of Directives 92/50, 93/36 and 93/37 is concerned, the Court has held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, to that effect, Case C-360/96 Gemeente Arnhem, Gemeente Rheden v BFI Holding [1998] ECR I-6821, paragraph 41).

17 Consequently, the aim of the directives is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, to that effect, Case C-44/96 Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck [1998] ECR I-73, paragraph 33, and BFI Holding, cited above, paragraphs 42 and 43).

18 According to Article 1(b), second subparagraph, of Directives 92/50, 93/36 and 93/37, a body governed by public law means any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (first indent), having legal personality (second indent) and financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law (third indent).

19 In the main proceedings it is common ground that the University meets the two conditions mentioned in the first two indents of Article 1(b), second subparagraph, of the directives. Consequently, whether the University is to be included in the list for Annex I of Directive 93/37 depends in this case solely on the answer to the question whether that university is financed for the most part by one or more contracting authorities within the meaning of the third indent of that provision.

20 As regards the alternative conditions set out in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37, paragraph 20 of the judgment in Mannesmann Anlagenbau Austria (cited above) indicates that each reflects the close dependency of a body on the State, regional

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or local authorities or other bodies governed by public law. The provision thus defines the three forms of body governed by public law as three types of close dependency on another contracting authority.

21 Whilst the way in which a particular body is financed may reveal whether it is closely dependent on another contracting authority, it is clear that that criterion is not an absolute one. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as public financing.

22 It follows that payments in the form of awards or grants for the support of research work, such as those referred to in paragraph (a) of the first question, may be regarded as financing by a contracting authority. Though the recipient of such financing need not be the university itself, but a member of it in his capacity as a provider of services, we are concerned with financing that goes to the institution as a whole in the context of its research work.

23 Similarly, the grants referred to in paragraph (d) of the first question may be classified as public financing. Those payments constitute a social measure introduced for the benefit of certain students who by themselves would not be able to meet tuition fees which are sometimes very high. Since there is no contractual consideration for those payments, they should be regarded as financing by a contracting authority in the context of its educational activities.

24 The position is quite different in the case of the sources of financing referred to in paragraphs (b) and (c) of the first question. The sums paid by one or more contracting authorities constitute in that case consideration for contractual services provided by the university, such as the execution of particular research work or the organisation of seminars and conferences. It matters little in this context whether those activities of a commercial nature happen to coincide with the teaching and research activities of the university. The contracting authority has in fact an economic interest in providing the service.

25 Naturally, such a contractual relationship may also make the body concerned dependent on the contracting authority. However, as the Advocate General has noted in paragraph 46 of his Opinion, the nature of the relationship is not the same as that which would result from a mere subsidy. Rather, it is analogous to the dependency that exists in normal commercial relationships formed by reciprocal contracts freely negotiated between the contracting parties. Consequently, the payments referred to in paragraphs (b) and (c) of the first question do not fall within the concept of public financing.

26 Accordingly, the reply to the first question is that the expression financed... by [one or more contracting authorities] in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives.

Second question

27 The second question asks, in essence, what meaning is to be given to the expression financed for the most part in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37.

28 For that purpose it is necessary to consider whether for the most part means a specific percentage, or whether it is to have some other meaning.

29 Contrary to the submissions of the Commission and the Governments under Article 20 of the EC

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Statute of the Court of Justice, supporting a quantitative interpretation of the term for the most part, so that it would refer to public financing in excess of 50%, the University maintains that it is to be interpreted qualitatively. The University contends that account should be taken only of payments which confer on those making them control of procurement. However, if the interpretation should be quantitative, then the term must on any view be taken to mean that the financing in question is predominant. This, according to the University, can only be the case where it represents three quarters of the total financing.

30 That interpretation cannot be upheld. Apart from the fact that there is no support for it in the wording of Directives 92/50, 93/36 and 93/37, it does not reflect the ordinary meaning of the phrase for the most part, which in normal usage always means more than half, without it being necessary for one group to be predominant or preponderant as regards another.

31 That is, moreover, borne out by the wording of Article 1(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which defines public undertaking as, inter alia, an undertaking in which the public authorities hold, directly or indirectly, the majority of the undertaking's subscribed capital or control, directly or indirectly, the majority of the votes attaching to shares issued by the undertaking. As the Advocate General noted in paragraph 58 of his Opinion, if such quantitative criteria are sufficient to classify an undertaking as a public undertaking, that must be the case a fortiori when determining the conditions under which public financing is to be regarded as for the most part.

32 In addition, interpreting for the most part as meaning more than half is consistent with the provisions in respect of one of the other cases referred to in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37. According to those provisions, the term body governed by public law also includes any body having an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

33 Accordingly, the reply to the second question is that, on a proper construction, the term for the most part in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37 means more than half.

Third question

34 In the third question, which is closely linked to the previous two, the national court asks, in essence, what is to be included in the basis for calculating the financing which is for the most part public. In particular, it asks whether all sources of financing for the university are to be taken into account when determining whether financing is for the most part public or whether regard should be had only to sources of finance for academic and related activities.

35 As to that, it is sufficient to note that when Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37 refers to financing which is for the most part from public sources, that necessarily implies that a body may also be financed in part in some other way without thereby losing its character as a contracting authority.

36 The reply to the third question is therefore that in order to determine correctly the percentage of public financing of a particular body account must be taken of all of its income, including that which results from a commercial activity.

Fourth question

37 In the fourth question the national court asks what period is to be taken into consideration in calculating the university's financing and how account is to be taken of changes which may occur

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in the course of a procurement procedure, when determining whether the university is a contracting authority for the purposes of a particular procurement.

38 It is to be noted at the outset that in the absence of an express provision to that effect in Directives 92/50, 93/36 and 93/37, the reply to both parts of this question must take into account the requirement of legal certainty, as stated by the Court in paragraph 34 of Mannesmann Anlagenbau Austria (cited above). Although in determining whether a body is to be regarded as a contracting authority for the purposes of a specific procurement regard must be had to its precise financial situation, it is also necessary to ensure a measure of foreseeability for the procurement procedure, when the financing of a body such as the University may vary from one year to the next.

39 Although the directives are silent as to the period to be taken into consideration when determining whether a body is a contracting authority, they do contain provisions regarding the publication of indicative notices from time to time which may provide useful guidance for the reply to this question. Article 15(1) of Directive 92/50 and Article 9(1) of Directive 93/36 provide expressly that indicative notices are to be published by the contracting authorities as soon as possible after the beginning of the budgetary year where the total amount of the procurement which they envisage awarding during the subsequent 12 months is equal to or greater than ECU 750 000. The provisions thus imply that the contracting authority retains that status for 12 months from the beginning of each budgetary year.

40 Accordingly, the decision as to whether a body such as the University is a contracting authority must be made annually and the budgetary year during which the procurement procedure is commenced must be regarded as the most appropriate period for calculating how that body is financed.

41 That being so, legal certainty and transparency require that both the University and third parties concerned are in a position to know from the beginning of the budgetary year whether the procurement contracts they envisage awarding during that year fall within the scope of Directives 92/50, 93/36 and 93/37. It follows that for the purposes of deciding whether a university is a contracting authority the way in which it is financed must be calculated on the basis of the figures available at the beginning of the budgetary year, even if they are only provisional.

42 As regards the second part of the fourth question, the national court asks, in essence, whether, and if so how, account is to be taken of any changes in financing which may occur during a procurement procedure compared with the way in which the body had been financed at the date of the commencement of the procedure.

43 As the Court noted in paragraph 34 of Mannesmann Anlagenbau Austria (cited above), the principle of legal certainty requires that the Community rules be clear and their application foreseeable for all those concerned. As a result of that requirement, and of those pertaining to the protection of the interests of tenderers, it is necessary for a body which on the date of the commencement of the procurement procedure constitutes a contracting authority for the purposes of Directives 92/50, 93/36 and 93/37 to remain, as far as that procurement is concerned, subject to the requirements of those directives until the relevant procedure has been completed.

44 Accordingly, the reply to the fourth question is that the decision as to whether a body such as the University is a contracting authority must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a contracting authority for the purposes of Directives 92/50, 93/36 and 93/37 when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of those directives until such time as the relevant procedure has been completed.

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CONCERNS	Interprets 31992L0050-A01LBL2T3 Interprets 31993L0036-A01LBL2T3 Interprets 31993L0037-A01LBL2T3
SUB	Approximation of laws

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AUTLANG	English
OBSERV	United Kingdom ; France ; Netherlands ; Austria ; Commission ; Member States ; Institutions
NATIONA	United Kingdom
NATCOUR	*A9* High Court of Justice (England), Queen's Bench Division, Divisional Court, order of 21/07/1998 (CO/3908/96)
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**Judgment of the Court
of 5 October 2000
Commission of the European Communities v French Republic.
Failure to fulfil obligations - Public procurement contracts in the transport sector - Directive 93/38/EEC - Applicability ratione temporis - Rennes urban district light railway project - Contract awarded by negotiated procedure without a prior call for competition.
Case C-337/98.**

1. Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Effects of the directive on decisions of the contracting authority adopted before expiry of the period for transposition - None

(Council Directive 93/38)

2. Actions for failure to fulfil obligations - Proof of failure - Burden on Commission - Submission of evidence that the obligation has not been fulfilled

(EC Treaty, Art. 169 (now Art. 226 EC))

1. In the area of public procurement, Community law does not require an awarding authority in a Member State to intervene, at the request of an individual, in existing legal relations established for an indefinite period or for several years where those relations came into being before expiry of the period prescribed for transposition of the directive in question. That general principle can be applied to all the stages of a procedure for the award of a contract which are completed before the expiry of the period prescribed for transposition of a directive but form part of a procedure which ended after that date. Accordingly, Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors is not applicable to the choice made by the contracting entity's decision to use a negotiated procedure without a prior call for competition to award a contract, made before the expiry of the period prescribed for transposing that directive and forming part of an award procedure which was not completed until after the expiry of the period prescribed.

(see paras 38-39, 41-42)

2. In proceedings under Article 169 of the Treaty (now Article 226 EC) for failure to fulfil an obligation, it is incumbent on the Commission to prove that the obligation has not been fulfilled and to place before the Court the evidence necessary to enable it to determine whether that is the case.

(see para. 45)

In Case C-337/98,

Commission of the European Communities, represented by M. Nolin, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the Chambers of C. Gomez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. Viéville-Bréville, chargé de mission in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

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APPLICATION for a declaration that, by its decision of 22 November 1996 to award the turnkey contract for the Rennes urban district light railway project to Matra-Transport, the French Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), and Articles 4(2) and 20(2)(c) thereof in particular,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida and L. Sevon (Presidents of Chambers), P.J.G. Kapteyn, J.-P. Puissochet, P. Jann, H. Ragnemalm, M. Wathelet and V. Skouris (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 February 2000, at which the Commission was represented by M. Nolin and the French Republic by J.-F. Dobelle, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and K. Rispal-Bellanger,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2000,

gives the following

Judgment

Costs

58 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the French Republic has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Commission of the European Communities to pay the costs.

1 By application lodged at the Court Registry on 14 September 1998 the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by its decision of 22 November 1996 to award the turnkey contract for the Rennes urban district light railway project to Matra-Transport (hereinafter Matra), the French Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199 p. 84, hereinafter the Directive), and Articles 4(2) and 20(2)(c) thereof in particular.

Legal background

The Community legislation

Directive 93/38

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2 Article 4(1) and (2) of Directive 93/38 provides:

1. When awarding supply, works or service contracts, or organising design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.

2. Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.

3 Article 20(2)(c) of Directive 93/38 provides:

Contracting entities may use a procedure without prior call for competition in the following cases:

(c) when, for technical or artistic reasons or for reasons connected with protection of exclusive rights, the contract may be executed only by a particular supplier, contractor or service provider.

4 Article 45(1) and (3) of Directive 93/38 provides:

1. Member States shall adopt the measures necessary to comply with the provisions of this Directive and shall apply them by 1 July 1994.

...

3. Directive 90/531/EEC shall cease to have effect as from the date on which this Directive is applied by the Member States and this shall be without prejudice to the obligations of the Member States concerning the deadlines laid down in Article 37 of that Directive.

Directive 90/531/EEC

5 Apart from certain differences in drafting, the provisions of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1), concerning the principle of non-discrimination between suppliers or contractors (Article 4) and authorised use of a procedure without prior call for competition (Article 15) were essentially the same as the corresponding provisions of Directive 93/38, reproduced at paragraphs 2 and 3 of this judgment.

6 Article 37(1) and (2) of Directive 90/531 provides:

1. Member States shall adopt the measures necessary to comply with this Directive by 1 July 1992. They shall forthwith inform the Commission thereof.

2. Member States may stipulate that the measures referred to in paragraph 1 shall apply only from 1 January 1993.

...

The national legislation

7 Article 104, II, of the Code des Marchés Publics (Public Procurement Code) reads as follows:

Negotiated contracts may be entered into without a prior call for competition when only one specific contractor or supplier is capable of carrying them out.

This applies in the following cases:

(1) when requirements can be met only by [work or supplies] which necessitate recourse to a patent, a licence or exclusive rights held by a single contractor or supplier;

(2) when requirements can be met only by [work or supplies] which, by reason of technical necessity, substantial preliminary investment, special plant or equipment or know-how, can be contracted out only to a specific contractor or supplier;

(3) in the case of the [work or supplies] mentioned in the last sentence of Article 108.

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Such contracts need not be the subject of a public competition notice pursuant to Article 38.

Background to the dispute

8 By resolution No 89-18 of 26 October 1989, the committee of the Syndicat intercommunal des transports collectifs de l'agglomération rennaise (the joint municipal grouping responsible for public transport in the Rennes district, hereinafter Sitcar) voted:

(1) to confirm previous decisions to provide a reserved-track network for the district,

(2) to confirm, for the first line, the main principles set out in the "TAU" research, that is to say:

- a service for Villejean from West to East;

- a line through the historic centre from North to South;

- a service to the station with improved connections between the three urban, inter-urban and rail networks;

- a service for the suburbs of Alma-Châtillon and Blosne in the most important South-Eastern sector...

(3) to opt for the "VAL" automatic light railway system,

(4) to seek the highest possible level of government funding,

(5) to establish all such contacts as may be useful with the Region and the Département on the basis previously indicated...

(6) to authorise the Bureau to engage in the necessary consultations with a view to consideration at a forthcoming meeting of the Committee of the contract for drawing up preliminary specifications...

(7) to investigate at the earliest possible date an amendment to the current apportionment of the contribution of the municipalities to Sitcar ...

9 By resolution No 90-25 of 19 July 1990, the Committee of Sitcar voted:

(1) to record that the design and execution of the "system and equipment linked to the system" will be the subject of a turnkey contract with Matra-Transport once it is in a position to agree to a guaranteed guide price,

(2) to approve in principle the conclusion with that company of a support and research contract to accompany the preliminary specifications for the "Civil engineering work and equipment not linked to the system" part of the work and to authorise the chairman of the Committee to sign it.

10 In a letter dated 9 July 1991 from its chairman and managing director to the chairman of the Committee of Sitcar, Matra stated that the guaranteed price for the reference programme of March 1991 was FRF 987 million at January 1991 prices. However, the chairman and managing director of Matra pointed out that on the basis of that price Matra had, at Sitcar's request, sought savings both by means of additional contributions from Matra-Transport and proposed adjustments to programmes which did not adversely affect the standard of the service provided. On that basis, the chairman and managing director of Matra suggested certain changes to the programme data to Sitcar and announced that if those new data were approved the system part of the VAL project could be reduced to a guaranteed price of FRF 953.2 million excluding tax and at January 1991 prices.

11 By resolution No 93-44 of 30 March 1993, the Urban District Council of Rennes (hereinafter the District Council), which replaced Sitcar in 1992, first, approved the turnkey contract offered

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by Matra under the negotiated procedure and, second, authorised the semi-public company operating public transport in the Rennes conurbation (hereinafter Semtcar) to sign the contract with Matra in accordance with the provisions of the mandate agreement approved by the District Council by decision of 15 January 1993.

12 By judgment of 16 February 1994 the Tribunal Administratif (Administrative Court), Rennes, annulled the declaration of public interest of 15 February 1993 concerning the Rennes urban district light railway project (hereinafter the UDP), which meant, inter alia, that the proposed State subsidy to finance the work could not be paid.

13 By resolution No 95-233 of 22 September 1995, the District Council decided to withdraw its previous resolution of 30 March 1993 approving the contract with Matra and authorising its signature by Semtcar, that resolution not having been implemented even inchoately and having become redundant. By resolution No 95-234 it also decided to request Semtcar to resume detailed negotiation/finalisation of the contract with Matra within the framework of the provisional budget for the operation and to submit it anew to the District Council for approval.

14 Finally, by resolution No 96-280 of 22 November 1996 the District Council approved the terms of the draft negotiated contract to be concluded with the company Matra-Transport International for the work on the system and equipment linked to the system, the total amount of the contract being FRF 1 054 360 000 without tax and at November 1996 prices, comprising a fixed part amounting to FRF 1 050 490 000 without tax and a conditional part amounting to FRF 3 870 000 without tax. It also authorised Semtcar to sign the contract pursuant to Article 7.4 of the mandate agreement of 23 November 1993.

Pre-litigation procedure

15 Having received a complaint concerning the award of the contract for the Rennes urban district light railway project to Matra, the Commission, by letter of 7 January 1997, asked the French authorities to provide it with certain information concerning the award of that contract and to justify their recourse, in awarding the contract, to a negotiated procedure on the basis of Article 104, II, of the Public Procurement Code without a prior call for competition.

16 The French authorities replied to the Commission by letter of 17 February 1997 and by two additional notes of 25 February and 4 March 1997. They stated, inter alia, that the contract at issue had been awarded by a resolution of the Committee of Sitcar of 26 October 1989, the date on which the contracting entity had chosen a VAL type light railway supplied by Matra. According to the French authorities, that resolution awarded the contract before the entry into force on 1 January 1993 of Directive 90/531 and a fortiori before the entry into force, on 1 July 1994, of Directive 93/38 and Articles 4(2) and 20(2)(c) thereof in particular. Furthermore, the French authorities stated, as a secondary point, that Matra was the only company capable of meeting the requirements of the local authority. They contended, in that regard, that the company had already made significant preliminary investments at the Rennes site and concluded that no Community rule had been breached.

17 As it considered that reply to be unsatisfactory, the Commission, by letter of 17 June 1997, gave the French authorities formal notice pursuant to Article 169 of the Treaty, that they should submit their observations within six weeks, inter alia concerning the compatibility of the provisions of Article 104, II, of the Public Procurement Code, which was the legal basis of the decision of the contracting entity, with the requirements of Article 20(2)(c) of Directive 93/38.

18 By letter of 20 August 1997 the French authorities replied to the letter of formal notice, confirming that the decision to award the turnkey contract to Matra had been taken by resolution of 26 October 1989 and, contending, in the alternative, that Article 104, II, of the Public Procurement Code was compatible with Article 20(2)(c) of Directive 93/38. Two further replies were sent on

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29 September and 7 November 1997.

19 As it considered that those replies did not contain anything which addressed the complaints made in the letter of formal notice, the Commission, on 15 March 1998, sent the French Republic a reasoned opinion, to which it replied on 12 June 1998.

20 It is against that legal and factual background that the Commission brought this action.

Merits

21 The Commission contends that the award to Matra of the turnkey contract for the Rennes urban district light railway project by negotiated procedure without a prior call for competition constitutes a breach of Directive 93/38 and, in particular, Articles 4(2) and 20(2)(c) thereof.

22 Since it is clear from paragraphs 8 to 11 of the present judgment that some of the events relating to the contract at issue took place before the expiry of the period prescribed for the transposition of Directive 93/38, it is necessary to consider, before deciding whether that directive has been infringed, as alleged, whether it is applicable to the procedure at issue.

23 It is clear inter alia from the resolution by the Committee of Sitcar of 19 July 1990, and, in particular, the statement that the design and execution of the system and equipment linked to the system would be the subject of a turnkey contract with Matra-Transport once it was in a position to agree to a guaranteed guide price, that, on that date, negotiations between the contracting entity and Matra were already under way.

24 Furthermore, in his letter of 9 July 1991 the chairman and managing director of Matra confirmed that if certain changes to the reference project which he proposed were approved the system part of the VAL project could be reduced to a guaranteed price of FRF 953.2 million without tax and at January 1991 prices, which is a serious indication that, on that date, negotiations between the contracting entity and Matra were at an advanced stage.

25 It is thus clear that the negotiations between the contracting entity and Matra were begun before 1 July 1994, the date on which the period prescribed for transposition of Directive 93/38 expired, and even before 9 August 1993, the date of the publication of that directive in the Official Journal of the European Communities.

26 Since negotiations are the defining characteristic of a negotiated procedure for the award of a contract, it must be held that, in the present case, the procedure at issue was initiated before the adoption of Directive 93/38 and a fortiori before the expiry of the period prescribed for its transposition. That directive does not lay down any transitional rules for procedures already initiated before 1 July 1994 and still in progress on that date.

27 Accordingly, in order to rule on the application of the provisions of Directive 93/38 invoked by the Commission in the present case and since the procedure at issue took place over a long period, the law applicable to that procedure ratione temporis must first be ascertained.

28 The Commission submits that, in determining the law applicable to an award procedure, the date of the award of the contract must normally be taken into account. The Commission does not rule out the possibility of also taking account of the date of the initiation of the award procedure. However, it states that the length of time between such initiation and the award of the contract must be reasonable, which it is not in this case.

29 According to the Commission, the contract in question was not awarded until the resolution of 22 November 1996, that is to say, long after the entry into force of Directive 93/38. It maintains that the resolution of 26 October 1989 only concerned the decision to opt for the VAL light railway technology, which had been developed at the time by at least two manufacturers. Even on 19 July

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1990 it was still not possible to speak of a contract with Matra, as there was no agreement on any price or on the terms of a contract. Accordingly, the decision to award the contract to Matra was not made until the resolution of the District Council of 30 March 1993, that is to say after that company had formally committed itself to a guaranteed price.

30 The Commission states that, if everything had been decided by that date it would not have brought this action, although Directive 90/531 had already entered into force. However, it notes that, following the annulment of the UDP by the Tribunal Administratif, Rennes, the contracting entity withdrew the resolution of 30 March 1993, although there was no legal requirement that it do so. In French administrative law, withdrawal is equivalent to annulment in a contentious matter. The Commission concludes that, since the withdrawal was not challenged by Matra, it has become definitive, which means that the resolution is deemed never to have existed. The contract at issue was therefore awarded to Matra by the resolution of 22 November 1996.

31 The French Government, on the other hand, contends that, even though public contracts are defined in Community law as contracts concluded in writing, that does not prevent the date of the initiation of the award procedure from being taken into account in determining the law applicable to that procedure. Moreover, the requirement that the time between the initiation of the procedure and the award of the contract should be reasonable if the initiation is to be taken into account in determining the applicable law has no foundation in either Community legislation or the case-law of the Court.

32 The French Government contends that the appointment of Matra as the contractor does not date from the resolution of 22 November 1996 but, implicitly, from that of 26 October 1989, as, since VAL was one of Matra's products, no firm other than Matra could have been selected by the contracting entity as contractor. The resolution of 19 July 1990, it contends, constitutes a decision to award. According to the French Government, once the resolution became enforceable and Matra had committed itself to a price, Matra was entitled to rely on that resolution since it created subjective rights in that company's favour. As Matra had committed itself to an objective guaranteed price of FRF 953.2 million without tax on 9 July 1991, it had from that time a right to the conclusion of a turnkey contract with the Rennes Urban District Council.

33 As regards the withdrawal of the resolution of 30 March 1993, the French Government submits, first, that it was imposed on the contracting entity and, second, that it was not the result of a wish to renegotiate the substantive terms of the contract. Moreover, it was not its purpose, or its effect, to call into question the decision taken on 19 July 1990 to enter into a contract with Matra. In withdrawing that measure, the District Council simply postponed the signature of the contract, thereby acting in consequence of the annulment of the UDP, an act of the Préfet, the annulment of which could be attributed neither to the Rennes urban district nor to Matra, the party to which the contract had been awarded.

34 The French Government accepts that the withdrawal of that measure entails the eradication of the contract in law for the future and for the past. However, aside from purely formal, procedural considerations, the substantive contractual terms were, if not validated, at least beyond all reproach and, as a result, the procedure for the award of the contract was, in fact if not in law, merely suspended pending a new UDP. Consequently, the withdrawal of the resolution of 30 March 1993 was purely formal and cannot therefore undermine the continuity of the substantive procedure.

35 It must be observed, first, that by this action for failure to fulfil obligations, the Commission claims that the French Republic has committed a breach of Directive 93/38 which stems from a specific decision taken by the contracting entity. That decision concerned the contracting entity's choice of a negotiated procedure without a prior call for competition in awarding the contract at issue. It is that choice, according to the Commission, which has no basis in Article 20(2) of Directive 93/38.

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36 It must be borne in mind, second, that the decision by a contracting entity concerning the type of procedure to be followed and whether it is necessary for a prior call for competition to be issued for the award of a public contract constitutes a distinct stage in the procedure, a stage during which the essential characteristics of the execution of the procedure are defined and which may, as a rule, take place only at the point when that procedure is initiated.

37 Accordingly, in determining whether Directive 93/38 is applicable to such a decision and, therefore, what were the obligations of the contracting entity under Community law in that regard, account must be taken, as a rule, of the point in time at which that decision was adopted.

38 It is true that, in the present case, the decision to use a negotiated procedure without a prior call for competition forms part of an award procedure which did not end until November 1996, that is to say more than two years after the expiry of the period prescribed for transposition of Directive 93/38. However, according to the case-law on public procurement, Community law does not require an awarding authority in a Member State to intervene, at the request of an individual, in existing legal relations established for an indefinite period or for several years where those relations came into being before expiry of the period prescribed for transposition of the directive (see, to that effect, Case C-76/97 Tögel [1998] ECR I-5357, paragraph 54).

39 Whilst the judgment in Tögel, cited above, concerned a contract already concluded before the expiry of the period prescribed for the transposition of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), the general principle set out in it can none the less be applied to all the stages of a procedure for the award of a contract which are completed before the expiry of the period prescribed for transposition of a directive but form part of a procedure which ended after that date.

40 As regards the Commission's argument that the date to be taken for the purpose of determining the applicability of Directive 93/38 ratione temporis is that of the award of the contract, it need merely be observed that it would be contrary to the principle of legal certainty to determine the applicable law by reference to the date of the award of the contract since that date marks the end of the procedure, while the decision of the contracting entity to proceed with or without a prior call for competition is normally taken at the initial stage of that procedure.

41 In the present case, even though it is not clear from the documents before the Court that there was a formal decision by the contracting entity to proceed by way of negotiated procedure without a prior call for competition to award the contract at issue, it is important to bear in mind that, in its resolution of 19 July 1990, the Committee of Sitcar voted to record that the design and execution of the "system and equipment linked to the system" will be the subject of a turnkey contract with Matra-Transport. It is clear from that sentence that, by the date of that resolution at the latest, and thus well before the expiry of the period prescribed for transposition of Directive 93/38, the decision of the contracting entity to proceed by way of negotiated procedure without a prior call for competition had already been adopted.

42 Accordingly, it must be concluded that Directive 93/38 is not applicable to the choice made by the contracting entity to use a negotiated procedure without a prior call for competition to award the contract for the Rennes urban district light railway project.

43 However, it must be observed that, by two separate resolutions of 22 September 1995, the contracting entity, first, withdrew the resolution of 30 March 1993 awarding the contract to Matra and, second, asked Semtcar to continue negotiations with that company.

44 Accordingly, it must be considered whether the negotiations opened after 22 September 1995 were substantially different in character from those already conducted and were, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, so

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that the application of the provisions of Directive 93/38 might be justified.

45 In that regard, it must be observed, as a preliminary point, that, according to settled case-law, in proceedings under Article 169 of the Treaty for failure to fulfil an obligation, it is incumbent on the Commission to prove that the obligation has not been fulfilled and to place before the Court the evidence necessary to enable it to determine whether that is the case (see, inter alia, Case C-96/98 Commission v France [1999] ECR I-8531, paragraph 36).

46 It follows that, in the present case, it is for the Commission to adduce all such evidence as is necessary to prove that fresh negotiations were commenced after 22 September 1995 and were such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, which would justify the application of the provisions of Directive 93/98.

47 In that regard, the Commission submits that an analysis of the resolutions of 30 March and 22 November 1996 shows that they concerned different offers in terms of subject-matter and price. According to the Commission, the 1993 offer concerns the VAL 206 system for an amount of FRF 966.4 million without tax, while the 1996 offer proposes a VAL 208 system for FRF 1 054 million without tax.

48 First, the difference in the number serves in fact to distinguish two different versions of the VAL technology. Second, in financial terms, the two offers differed by almost FRF 90 million, that is to say there was an increase of 10% of the value of the contract between January 1993 and November 1996, which is more than the rate of inflation over that period.

49 The Commission concludes on the basis of that information that there are substantial differences in terms of technology and price between the two offers by Matra, which proves that they did not concern the same contract.

50 It must be observed, to begin with, that the fact that the 1993 offer concerned the VAL 206 system whereas the 1996 offer concerned the VAL 208 system does not constitute proof that an essential term of the contract was renegotiated, which would justify the application of Directive 93/38.

51 First, as the French Government has pointed out, that alteration in the terms of the contract is attributable to the development of equipment between 1993 and 1996 and concerns its dimensions, and then only marginally (2 cm in width). Second, it cannot be ruled out that, in a negotiated procedure which, by its nature, may extend over a long period of time, the parties might take account of technological developments which take place while the negotiations are under way, without that being regarded each time as a renegotiation of the essential terms of the contract justifying the application of new rules of law.

52 Second, as regards the Commission's argument concerning the difference in price between the contract proposed in 1993 and that proposed in 1996, it must be observed that, even if that difference was greater than the rate of inflation during that period, that fact likewise does not prove that the negotiations opened after the withdrawal of the resolution of 30 March 1993 were intended to renegotiate an essential term of the contract.

53 As the French Government has pointed out, without being contradicted by the Commission, the increase in price was a result of the exact application of the formula for the revision of prices contained in the draft contract approved by the two parties in 1993. That fact is thus an indication of the continuity of the procedure rather than evidence that an essential term of the contract had been renegotiated.

54 Third, it must be added that it is clear from certain documents placed before the Court that the negotiations in fact resumed shortly after 22 September 1995 on the basis of everything that had previously taken place.

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55 First, the phrase resume detailed negotiation/finalisation used in the second resolution of 22 September 1995 clearly implies the continuation and updating of negotiations. Second, the French Government produced a letter dated 30 November 1995 sent by Matra to Semtcar, stating that Matra had studied the impact of adjustments to the planned execution of the work and, in view of the agreement to update the schedule of special administrative clauses, confirmed the continued validity until 30 September 1996 of its offer negotiated in early 1993.

56 Accordingly, it must be held that the Commission has not adduced evidence capable of proving that fresh negotiations demonstrating the intention of the parties to renegotiate the essential terms of the contract were opened following the withdrawal of the resolution of 30 March 1993 and, therefore, after the expiry of the period prescribed for the transposition of Directive 93/38.

57 Accordingly, having regard to all the foregoing considerations, the application must be dismissed.

DOCNUM	61998J0337
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1998 ; J ; judgment
PUBREF	European Court reports 2000 Page I-08377
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CONCERNS	Failure concerning 31993L0038-A04P2 Failure concerning 31993L0038-A20P2LC
SUB	Approximation of laws

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AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
NOTES	Dischendorfer, Martin: Public Procurement Law Review 2001 p.NA20-NA23 Di Comite, Valeria: Diritto pubblico comparato ed europeo 2001 p.334-339 Adamantidou, Elsa: Nomiko Vima 2002 p.920-947
PROCEDU	Proceedings concerning failure by Member State - unfounded
ADVGEN	Jacobs
JUDGRAP	Skouris
DATES	of document: 05/10/2000 of application: 14/09/1998

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Judgment of the Court (Sixth Chamber)
of 7 December 2000
Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public service contracts - Directive 92/50/EEC - Public service contracts in the telecommunications sector - Directive 93/38/EEC - Public service concession.
Case C-324/98.

Approximation of laws Public procurement procedures of entities operating in the water, energy, transport and telecommunications sectors Directive 93/38 Scope Contract for pecuniary interest concluded in writing between a contracting authority and a private undertaking for the provision of public telecommunication services Included Consideration consisting in an exploitation right Excluded Obligations of the contracting entities

(Council Directive 93/38)

$$Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories).

However, although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

Notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, that principle implying, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

(see paras 58, 60-63, and operative parts 1-4)

In Case C-324/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt, Austria, for a preliminary ruling in the proceedings pending before that court between

Telaustria Verlags GmbH,

Telefonadress GmbH

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and

Telekom Austria AG, formerly Post & Telekom Austria AG,

joined party:

Herold Business Data AG,

on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84),

THE COURT (Sixth Chamber),

composed of: V. Skouris (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, J.-P. Puissochet and F. Macken, Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

Telaustria Verlags GmbH, by F.J. Heidinger, Rechtsanwalt, Vienna,

Telekom Austria AG, by C. Kerres and G. Diwok, Rechtsanwälte, Vienna,

the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

the Danish Government, by J. Molde, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

the French Government, by K. Rispal-Bellanger, Head of Subdirectorate at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. Bréville-Viéville, Chargé de Mission in the same directorate, acting as Agents,

the Netherlands Government, by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

the Commission of the European Communities, by M. Nolin and J. Schieferer, of its Legal Service, acting as Agents, assisted by R. Roniger, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Telaustria Verlags GmbH, represented by F.J. Heidinger; of Telekom Austria AG, represented by C. Kerres, P. Asenbauer, and M. Gregory, Director of Commercial Law in the office of the Legal Service of Telekom Austria AG, acting as Agent; of Herold Business Data AG, represented by T. Schirmer, Rechtsanwalt, Vienna; of the Austrian Government, represented by M. Fruhmann, of the Federal Chancellor's Office, acting as Agent; of the French Government, represented by S. Pailler, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by M. Nolin, assisted by R. Roniger, at the hearing on 23 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2000,

gives the following

Judgment

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Costs

67 The costs incurred by the Austrian, Danish, French and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 23 April 1998, hereby rules:

1. Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories);

although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

2. Notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, that principle implying, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

3. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

4. It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

1 By order of 23 April 1998, received at the Court on 26 August 1998, the Bundesvergabeamt (Federal Procurement Office) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) seven questions on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

2 Those questions have been raised in proceedings between Telaustria Verlags GmbH (Telaustria) and Telefonadress GmbH (Telefonadress), on the one hand, and Telekom Austria AG (Telekom Austria), on the other, concerning the conclusion by Telekom Austria of a concession contract with Herold Business Data AG (Herold) for the production and publication of printed and electronically accessible

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lists of telephone subscribers (telephone directories).

Legislative framework

Community legislation

Directive 92/50

3 Article 1 of Directive 92/50 states:

For the purposes of this directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

....

4 The eighth recital in the preamble to Directive 92/50 states:

... the provision of services is covered by this directive only in so far as it is based on contracts;... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered.

5 Furthermore, the 17th recital in the preamble to Directive 92/50 states:

... the rules concerning service contracts as contained in Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [OJ 1990 L 297, p. 1] should remain unaffected by this directive.

Directive 93/38

6 Under Article 45(3) of Directive 93/38, Directive 90/531 is to cease to have effect as from the date on which Directive 93/38 is applied. Article 45(4) states, moreover, that references to Directive 90/531 are to be construed as referring to Directive 93/38.

7 Under the 24th recital in the preamble to Directive 93/38:

... the provision of services is covered by this directive only in so far as it is based on contracts;... the provision of services on other bases, such as law, regulations or administrative provisions or employment contracts, is not covered.

8 Article 1(2) of Directive 93/38 defines public undertaking as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

hold the majority of the undertaking's subscribed capital....

9 Article 1(4) of Directive 93/38 defines supply, works and service contracts as contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider, having as their object:

(a) in the case of supply contracts...

(b) in the case of works contracts...

(c) in the case of service contracts, any object other than those referred to in (a) and (b) and to the exclusion of:

....

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10 The last indent of Article 1(4) thereof states:

Contracts which include the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract.

11 Furthermore, Article 1(15) of Directive 93/38 defines public telecommunications services and telecommunications services as follows:

> "public telecommunications services" shall mean telecommunications services the provision of which the Member States have specifically assigned notably to one or more telecommunications entities;
>
> "telecommunications services" shall mean services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television.

12 Article 2(1) and (2) of Directive 93/38 states:

1. This directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

...

2. Relevant activities for the purposes of this directive shall be:

...

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

The national legislation

13 The Telekommunikationsgesetz (Telecommunications Law, BGBl. I No 100/1997), which entered into force on 1 August 1997, determines, in particular, the obligations of providers, concessionaires and operators of a voice telephony service.

14 Under Paragraph 19 of the Telekommunikationsgesetz, every provider of a public voice telephony service must maintain an up-to-date list of subscribers, maintain an information service about subscribers' numbers, provide for calls free of charge to emergency services, and make telephone directories available at least weekly in electronically readable form on request to the regulatory authority free of charge and to other providers for an appropriate charge, for the purposes of giving information or publishing directories.

15 Under Paragraph 26(1) of the Telekommunikationsgesetz, the regulatory authority is to ensure that a comprehensive directory of all subscribers to public voice telephony services is available. Concessionaires who offer a public voice telephony service via a fixed or mobile network are obliged to transmit subscriber data to the regulatory authority, against payment, for that purpose.

16 Furthermore, under Paragraph 96(1) of that Law, the operator of a public telecommunications service must produce a directory of telephone subscribers. This may take the form of a printed document or a telephone information service, Bildschirmtext (videotex system), electronic data support or any other technical form of communication. Paragraph 96 further regulates the minimum requirements for the data and the structure of those directories and the communication of subscriber data to the regulatory authority or to third parties.

The main proceedings and the questions referred for a preliminary ruling

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17 Telekom Austria, founded under the Telekommunikationsgesetz, is a limited company in which the Republic of Austria holds all the shares. It is the successor to the former Post & Telegraphenverwaltung (Post and Telegraph Administration; the PTV) and carries out the former functions of the PTV, including the obligation to ensure that a directory of all subscribers to public voice telephony services is available.

18 Whereas until 1992 the PTV fulfilled by its own means its obligation to publish, in particular, an official telephone directory known as the White Pages, in 1992, because of the high cost of printing and distributing that directory, it decided to seek a partner and concluded a contract with a private undertaking for the publication of that directory.

19 Since that contract was to expire on 31 December 1997, on 15 May 1997, Telekom Austria, which had replaced the PTV, published in the Amtsblatt zur Wiener Zeitung (bulletin annexed to the Austrian Official Journal) an invitation to submit tenders for a public service concession for the production and publication of printed and electronically accessible lists of telephone subscribers (telephone directories) commencing with the 1998/99 edition and then for an indefinite period.

20 Since Telaustria and Telefonadress took the view that the procedures prescribed by Community and national law for the award of public contracts should have been applied to the contract which would be concluded as a result of the abovementioned invitation to submit tenders, on 12 and 17 June 1997 respectively, they made applications to the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission) for an arbitration procedure to be initiated under Paragraph 109 of the Bundesvergabegesetz 1997 (Federal Procurement Law, BGBl. I No 56/1997; the BVergG).

21 After having joined those two applications, the Bundes-Vergabekontrollkommission issued a reasoned recommendation in favour of the applicants, concluding on 20 June 1997 that the provisions of the BVergG applied to the planned contract.

22 Since Telekom Austria had continued negotiations on the conclusion of that contract, on 24 June 1997, Telaustria made an application to the Bundesvergabeamt for a re-examination procedure to be initiated, combined with an application for an interim order. By application of 4 July 1997, Telefonadress applied to be joined in those proceedings. On 8 July 1997, Herold, which is the company with which Telekom Austria was negotiating, also joined in the proceedings as a third party in support of the forms of order sought by Telekom Austria.

23 Before the Bundesvergabeamt, Telekom Austria submitted that the contract to be concluded fell outside the scope of the directives on the award of public service contracts on the grounds, first, that the contract was not for pecuniary interest and, second, that the case concerned a public service concession excluded from the scope of Directives 92/50 and 93/38.

24 Having first adopted an interim order in favour of the applicants, on 10 July 1997, the Bundesvergabeamt replaced that order with a new order giving provisional permission for the conclusion of the contract between Telekom Austria and Herold, on condition that provision be made for the possibility for that contract to be terminated in order to resume a proper procurement procedure if it transpired that the planned contract fell within the scope of the Community and national rules on public procurement.

25 On 1 December 1997, Herold, to which the concession was to be granted shortly thereafter, passed into the ownership of the undertaking GTE which, on 3 December 1997, ceded to Telekom Austria a holding of 26% in the capital of Herold, which thus became a joint subsidiary of GTE and Telekom Austria. On 15 December 1997, the contract at issue in the main proceedings was formally concluded between Herold and its minority shareholder, namely Telekom Austria.

26 In the grounds of its order for reference, the Bundesvergabeamt observes that that contract, consisting of several, partly interlocking contracts, concerns the production of printed telephone

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directories and provides, in particular, for the provision of the following services on the part of Herold: collecting, processing and arranging subscriber data, production of telephone directories and certain advertising services. As regards the payment of the other contracting party, the contract stipulates that Herold is not to be directly remunerated for providing the services, but that it may exploit them commercially.

27 In view of all those facts, and in particular of the method by which the service provider is to be remunerated, such as to result in the classification of that contract as one of service concession, and in view of its own considerations, the Bundesvergabeamt, being uncertain as to the interpretation of Directives 92/50 and 93/38, decided to stay proceedings and to refer the following questions to the Court of Justice.

Principal question:

Can it be inferred from the legislative history of Directive 92/50/EEC, in particular the proposal of the Commission (COM (90) 372 final, OJ 1991 C 23, p. 1), or from the definition of the term "public service contract" in Article 1(a) of Directive 92/50/EEC, that certain categories of contracts concluded by contracting authorities subject to that directive with undertakings which provide services are to be excluded a priori from the scope of the directive, solely on the basis of certain common characteristics as specified in that proposal of the Commission, without the need to rely on Article 1(a)(i) to (viii) or Articles 4 to 6 of Directive 92/50/EEC?

If the principal question is answered in the affirmative:

Do such categories of contracts also exist, having regard in particular to the 24th recital in the preamble to Directive 93/38/EEC, within the scope of Directive 93/38/EEC?

If the second question is answered in the affirmative:

May those categories of contracts excluded from the scope of Directive 93/38/EEC be adequately described, by analogy with Commission Proposal COM (90) 372 final, as having as their essential feature that a contracting entity which falls within the scope ratione personae of Directive 93/38/EEC cedes a service for which it is responsible to an undertaking of its choice in return for the right to operate the service concerned for financial gain?

Supplementary to the first three questions:

Is a contracting entity which falls within the scope ratione personae of Directive 93/38/EEC obliged, where a contract concluded by it contains elements of a service contract within the meaning of Article 1(4)(a) of Directive 93/38/EEC together with elements of a different contractual nature which are not within the scope of that directive, to sever the part of the overall contract which is subject to Directive 93/38/EEC, in so far as that is technically possible and economically reasonable, and make that part the subject of a procurement procedure under Article 1(7) of that directive, as the Court of Justice held in Case C-3/88 before the entry into force of Directive 92/50/EEC with respect to a contract which was not subject as a whole to Directive 77/62/EEC?

If that question is answered in the affirmative,

Is the contractual concession of the exclusive right to operate a service for financial gain, which will give the service provider an income which cannot be determined but which in the light of general experience will not be inconsiderable and may be expected to exceed the costs of providing the service, to be regarded as payment for the provision of the service, as the Court of Justice held in Case C-272/91 in connection with a supply contract and a right ceded by the public authorities in lieu of payment?

Supplementary to the above questions:

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Are the provisions of Article 1(4)(a) and (c) of Directive 93/38/EEC to be interpreted as meaning that a contract which provides for the provision of services within the meaning of Annex XVI A, category 15, loses the nature of a service contract and becomes a supply contract if the result of the service is the production of a large number of identical tangible objects which have an economic value and thus constitute goods within the meaning of Articles 9 and 30 of the EC Treaty?

If that question is answered in the affirmative,

Is the judgment of the Court of Justice in Case C-3/88 to be interpreted as meaning that such a supply contract is to be severed from the other components of the service contract and made the subject of a procurement procedure under Article 1(7) of Directive 93/38/EEC, in so far as this is technically possible and economically reasonable?

The first and second questions

28 By the first and second questions, which can be examined together, the national court raises essentially two issues.

29 The first is whether a contract for pecuniary interest is covered, by reason of the contracting parties and its specific object, by Directives 92/50 or 93/38 where under that contract, which was concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories).

30 By the second issue raised, the national court seeks essentially to ascertain whether such a contract, whose specific object is the services mentioned in the preceding paragraph, although it is covered by one of those directives, is excluded, as Community law stands at present, from the scope of the directive which covers it, because, in particular, the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

31 In order to deal with the first issue raised, it should be noted at the outset that, as is clear from the 17th recital in the preamble to Directive 92/50, the provisions of that directive must not affect those of Directive 90/531 which, since it preceded Directive 93/38, also applied, like that directive, to procurement procedures in the water, energy, transport and telecommunications sectors.

32 Since Directive 90/531 was replaced by Directive 93/38, as is clear from Article 45(3) of that directive, and since the references to Directive 90/531 are to be construed, according to Article 45(4) of Directive 93/38, as referring to Directive 93/38, it must be concluded, as under the regime applicable when the sectoral Directive 90/531 was in force, that the provisions of Directive 92/50 must not affect those of Directive 93/38.

33 Consequently, where a contract is covered by Directive 93/38 governing a specific sector of services, the provisions of Directive 92/50, which are intended to apply to services in general, are not applicable.

34 In those circumstances, it is necessary only to examine whether the contract at issue in the main proceedings can be covered, by reason of the contracting parties and its specific object, by Directive 93/38.

35 In this respect, it is necessary to determine, first, whether an undertaking, such as Telekom Austria, falls within the scope ratione personae of Directive 93/38 and, second, whether a contract,

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whose object is the services mentioned in paragraph 26 above, comes within the material scope of that directive.

36 As regards the scope ratione personae of Directive 93/38, it is common ground, as is clear from the order for reference, that Telekom Austria, whose capital belongs entirely to the Austrian public authorities, constitutes a public undertaking over which those authorities may, by virtue of the fact that the Republic of Austria holds the entire capital, exercise a dominant influence. It follows that Telekom Austria must be regarded as a public undertaking for the purpose of Article 1(2) of that directive.

37 Furthermore, it is common ground that, under the Telekommunikationsgesetz under which it was founded, that public undertaking carries on the activity which consists in the provision of public telecommunications services. It follows that Telekom Austria constitutes a contracting entity for the purpose of Article 2(1)(a) of Directive 93/38 in conjunction with Article 2(2)(d) thereof.

38 Moreover, since it is also common ground that the aforementioned contract provides for the performance of services which are Telekom Austria's responsibility under the Telekommunikationsgesetz and consist in the provision of public telecommunications services, it is sufficient, in order to determine whether the contract at issue in the main proceedings comes within the material scope of Directive 93/38, to determine whether the specific object of that contract is covered by the provisions of Directive 93/38.

39 In this respect, it should be noted, as in the order for reference, that the services which are Herold's responsibility include:

collecting, processing and arranging of subscriber data, in order to make them technically accessible, operations which require data gathering, data processing and tabulation, and services of data banks, which are in category 7, entitled Computer and related services, of Annex XVI A to Directive 93/38;

production of printed telephone directories, which comes under category 15 of Annex XVI A to that directive, a category covering Publishing and printing services on a fee or contract basis;

advertising services, which come under category 13 of Annex XVI A to Directive 93/38.

40 Since those services are directly linked to an activity relating to the provision of public telecommunications services, it must be concluded that the contract at issue in the main proceedings, whose specific object is the services referred to in the preceding paragraph, is covered by Directive 93/38.

41 In answering the second issue raised by the national court, it must be noted at the outset that the court links its questions to Proposal 91/C 23/01 of 13 December 1990 for a Council Directive relating to the coordination of procedures on the award of public service contracts (OJ 1991 C 23, p. 1; the proposal of 13 December 1990) and adopts the definition of public service concession proposed in that document by the Commission.

42 In that regard, it is necessary to state that the Court is in a position to deal with the second issue raised without its being necessary for it to adopt the definition of public service concession referred to in Article 1(h) of the proposal of 13 December 1990.

43 It should be noted at the outset that Article 1(4) of Directive 93/38 refers to contracts for pecuniary interest concluded in writing and, without making express reference to public service concessions, provides only indications about the contracting parties and about the object of the contract, defining them in particular in the light of the method of remunerating the service provider and without drawing any distinction between contracts in which the consideration is fixed and those in which the consideration consists in a right of exploitation.

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44 Telaustria proposes that Directive 93/38 be interpreted as meaning that a contract under which the consideration consists in a right of exploitation also comes within its scope. In its submission, in order for Directive 93/38 to apply to such a contract, it is sufficient, in accordance with Article 1(4) of that directive, for the contract to be for pecuniary interest and concluded in writing. It would therefore be unjustified to infer that such contracts are excluded from the scope of Directive 93/38 simply because that directive is silent about the method by which the service provider is to be remunerated. Telaustria adds that the fact that the Commission did not propose to include provisions about that type of contract within the scope of the Directive indicates that it considered that the Directive covers any contract for the provision of services, regardless of the arrangements for remunerating the provider.

45 Since Telekom Austria, the Member States which have submitted observations and the Commission dispute that interpretation, it is necessary to assess its merits in the light of the history of the relevant directives, in particular in the field of public service contracts.

46 In that regard, it should be recalled that both in its proposal of 13 December 1990 and in its amended proposal 91/C 250/05 of 28 August 1991 for a Council Directive relating to the coordination of procedures on the award of public service contracts (OJ 1991 C 250, p. 4; the proposal of 28 August 1991), which resulted in the adoption of Directive 92/50 which covers public service contracts in general, the Commission had expressly proposed that public service concessions be included within the scope of that directive.

47 Since that inclusion was justified by the intention to ensure coherent award procedures, the Commission stated, in the 10th recital in the preamble to the proposal of 13 December 1990, that public service concessions should be covered by this directive in the same way as Directive 71/305/EEC applies to public works concessions. Although the reference to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) was withdrawn from the 10th recital in the preamble to the proposal of 28 August 1991, that proposal none the less expressly maintained the purpose of ensuring coherent award procedures in that recital.

48 However, during the legislative process, the Council eliminated all references to public service concessions, in particular because of the differences between the Member States as regards the delegation of the management of public services and modes of delegation, which could create a situation of very great imbalance in the opening-up of the public concession contracts (see point 6 of document No 4444/92 ADD 1 of 25 February 1992, entitled Statement of reasons of the Council and annexed to the common position of the same date).

49 The outcome was the same for the Commission's position expressed in its amended proposal 89/C 264/02 of 18 July 1989 for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1989 C 264, p. 22), which resulted in the adoption of Directive 90/531, which was the first directive in those sectors on the award of public contracts and preceded Directive 93/38, in which the Commission had also proposed for those sectors certain provisions designed to govern public service concessions.

50 None the less, as is clear from point 10 of document No 5250/90 ADD 1 of 22 March 1990, entitled Statement of reasons of the Council and annexed to the Council's common position of the same date on the amended proposal for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the Council did not act on that Commission proposal to include in Directive 90/531 rules on public service concessions, on the ground that such concessions existed in only one Member State and that it was inappropriate to proceed with their regulation in the absence of a detailed study of the various forms of public service concessions granted in the Member States in those sectors.

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51 In view of those circumstances, the Commission did not propose the inclusion of public service concessions in its proposal 91/C 337/01 of 27 September 1991 for a Council Directive amending Directive 90/531 (OJ 1991 C 337, p. 1), which subsequently resulted in the adoption of Directive 93/38.

52 That finding is also supported by the way in which the scope of the directives on public works contracts evolved.

53 Article 3(1) of Directive 71/305, which was the first directive on the subject, expressly excluded concession contracts from its scope.

54 None the less, Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305 (OJ 1989 L 210, p. 1) inserted in Directive 71/305 Article 1b which expressly addressed public works concessions by making the advertising rules laid down in Articles 12(3), (6), (7), (9) to (13) and 15a thereof applicable to them.

55 Subsequently, Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which replaced Directive 71/305 as amended, expressly refers to public works concessions among the contracts within its scope.

56 On the other hand, Directive 93/38, adopted on the same day as Directive 93/37, provided for no rule on public service concessions. It follows that the Community legislature decided not to include such concessions within the scope of Directive 93/38. If it had wished to, it would have done so expressly, as it did when adopting Directive 93/37.

57 Since public service concession contracts do not therefore come within the scope of Directive 93/38, it must be concluded that, contrary to the interpretation proposed by Telaustria, such contracts are not included in the concept of contracts for pecuniary interest concluded in writing appearing in Article 1(4) of that directive.

58 The answers to the first and second questions must therefore be that:

Directive 93/38 covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories);

although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

59 However, the fact that such a contract does not fall within the scope of Directive 93/38 does not preclude the Court from helping the national court which has sent it a series of questions for a preliminary ruling. To that end, the Court may take into consideration other factors in making an interpretation which may assist the determination of the main proceedings.

60 In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.

61 As the Court held in Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31, that principle implies, in particular, an obligation of transparency in order to enable the

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contracting authority to satisfy itself that the principle has been complied with.

62 That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

63 It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

The third and fifth questions

64 In view of the answers given to the first and second questions, it is not necessary to answer the third, since it was raised only in the event that the Court answered the second question in the affirmative.

65 Furthermore, since the fifth question was referred to the Court for the purpose of clarification on the third question, it is not necessary to answer that question either.

The fourth, sixth and seventh questions

66 In view of the answers given to the first and second questions, it is likewise unnecessary to answer the fourth, sixth or seventh questions, since they were raised only in the event that the Court declared that Directive 93/38 was applicable to the contract at issue in the main proceedings.

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31993L0038-A01PT2 : N 8 36
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31993L0038-A01PT4LA : N 27
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- Gutknecht, Brigitte: Public Procurement Law Review 1998 p.CS173-CS175
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PROCEDU Reference for a preliminary ruling

ADVGEN Fennelly

JUDGRAP Skouris

DATES of document: 07/12/2000
of application: 26/08/1998

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Judgment of the Court (First Chamber)
of 18 November 1999
Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri.
Reference for a preliminary ruling: Klagenævnet for Udbud - Denmark.
Public supply contracts - Directive 93/36/EEC - Award of public supply contracts by a body other than a contracting authority.
Case C-275/98.

Approximation of laws - Procedures for the award of public supply contracts - Directive 93/36 - Article 2(2) - Independent in scope from Directive 92/50 - Where the contracting authority grants to a body other than such an authority the right to engage in a public service - Obligatory to require compliance with the principle of non-discrimination - No obligation to require compliance with tendering procedures

(Council Directives 92/50 and 93/36, Art. 2(2))

$$Article 2(2) of Directive 93/36 coordinating procedures for the award of public supply contracts - which is independent in scope from the provisions of Directive 92/50 relating to the coordination of procedures for the award of public service contracts - is to be interpreted as follows:

- it requires a contracting authority which grants to a body other than such a contracting authority special or exclusive rights to engage in a public service activity to require of that body, in relation to the public supply contracts which it awards to third parties in the context of that activity, that it comply with the principle of non-discrimination on grounds of nationality;

- it does not, however, require in those circumstances that the contracting authority demand that, in awarding such public supply contracts, the body in question comply with the tendering procedures laid down by Directive 93/36.

In Case C-275/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Klagenævnet for Udbud (Denmark) for a preliminary ruling in the proceedings pending before it between

Unitron Scandinavia A/S, 3-S A/S, Danske Svineproducenters serviceselskab,

and

Ministeriet for Fødevarer, Landbrug og Fiskeri,

on the interpretation of Article 2(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1),

THE COURT

(First Chamber),

composed of: L. Sevon, President of the Chamber, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: S. Alber,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Ministeriet for Fødevarer, Landbrug og Fiskeri, by P. Biering, of the Copenhagen Bar,

- the Commission of the European Communities, by H.C. Støvlbæk, of its Legal Service, acting as agent,

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having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 July 1999,

gives the following

Judgment

1 By order of 15 July 1998, received at the Court on 20 July 1998, the Klagenævnet for Udbud (hereinafter `the Procurement Review Board') referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 2(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2 Those questions were raised in proceedings between, on the one hand, Unitron Scandinavia A/S (`Unitron') and 3-S A/S, Danske Svineproducenters Serviceselskab (`3-S') and, on the other, the Ministeriet for Fødevarer, Landbrug og Fiskeri (Ministry of Agriculture, Food and Fisheries; `the Ministry') concerning the award of a public contract for eartags for pigs.

Legal background

3 Article 1(b) of Directive 93/36 provides:

`For the purposes of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, and associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.'

4 Article 2(2) of Directive 93/36 provides:

`When a contracting authority within the meaning of Article 1(b) grants to a body other than a contracting authority - regardless of its legal status - special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties.'

5 The Procurement Review Board was established by Danish Law No 344 of 6 June 1991, subsequently amended several times, in the context of the implementation of

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), since amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

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The dispute in the main proceedings

6 In accordance with Council Directive 92/102/EEC of 27 November 1992 on the identification and registration of animals (OJ 1992 L 355, p. 32), eartags must be applied to pigs in order to enable their provenance to be determined. The Danish legislation transposing that directive provides that, after their approval by the Veterinary Department of the Ministry, the tags are to be supplied by Danske Slagterier (Danish abattoirs; `DS'), which is a private undertaking.

7 In order to limit the number of approved eartags for pigs, the Veterinary Department and DS established a tendering procedure. In November 1996, DS, which was entrusted with its implementation, sent tendering documents to a number of potential suppliers and, at the conclusion of the procedure, entered into supply contracts for three years from 1 April 1997 with Allflex dan-mark ApS and Daploma A/S.

8 Unitron and 3-S are producers of eartags for pigs. In a complaint submitted to the Procurement Review Board, they argued that DS serves a public interest and in reality acts on behalf of the Ministry, so that it should be treated as a contracting authority within the meaning of Article 1(b) of Directive 93/36. In the alternative, the applicants in the main proceedings maintain that DS should have followed the procedure laid down by Article 2(2) of Directive 93/36.

9 By decision of 22 January 1998, the Procurement Review Board first held that DS was effectively the purchasers of the eartags from the suppliers and that the value of that contract exceeded the threshold under Article 5 of Directive 93/36.

10 It then held that the Ministry's award to an undertaking of the management of the eartag system should probably have been the subject of a tendering procedure in accordance with Directive 93/36. It found, however, that that question was not the issue in the procedure pending before it.

11 Finally, having held that DS was not a contracting authority within the meaning of Article 1(b) of Directive 93/36, the Procurement Review Board dismissed the applicants' argument that that directive had to be applied to DS by analogy.

12 As regards the alternative plea based on Article 2(2) of Directive 93/36, the Procurement Review Board points out that that provision essentially reproduces the content of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), which was adopted at a time when there was as yet no directive in existence concerning public contracts for services.

13 Since public contracts for services formed the subject-matter of Directive 92/50, the Procurement Review Board is uncertain as to the present scope of Article 2(2) of Directive 93/36, since it essentially reproduces a text prior to Directive 92/50.

14 In those circumstances, the Procurement Review Board decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

`1. Does Article 2(2) of Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts still have an independent meaning after the adoption of Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts (as both amended by European Parliament and Council Directive 97/52/EC)?

2. If Question 1 is answered in the affirmative, does the provision accordingly mean that, where a contracting authority entrusts the administration of a pig eartagging scheme to a private undertaking which is not a contracting authority, the contracting authority should stipulate, on the one hand, that the undertaking should comply with the prohibition against discrimination on the ground of nationality in public supply contracts which the undertaking awards to third parties and, on the other hand, that the procurement of goods linked to the scheme should be put out to public tender

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if the value of the goods to be procured exceeds the threshold value in Council Directive 93/36?'

Admissibility

15 As a preliminary point, it must be observed that, as the Advocate General has rightly found in paragraphs 17 and 18 of his Opinion, the Procurement Review Board is a court or tribunal within the meaning of Article 177 of the Treaty.

16 In the Ministry's submission, the Court should refuse to reply to the questions, since, whatever interpretation is given to the provision at issue, the legal position of the applicants will not thereby be altered.

17 If, on the one hand, Article 2(2) of Directive 93/36 had to be interpreted as merely requiring the Ministry to insist that DS comply with the principle of non-discrimination, that interpretation would change nothing as regards Unitron and 3-S, which are both established in Denmark. If, on the other hand, it had to be interpreted as imposing a tendering obligation in accordance with that directive, the Ministry submits that that interpretation could not benefit the applicants either, since a fresh tendering procedure in accordance with Directive 93/36 took place after the tendering procedure which formed the subject-matter of the main proceedings, causing any infringement which there might have been to disappear.

18 It is sufficient to observe, on this point, that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Case C-415/93 Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others [1995] ECR I-4921, paragraph 59). A request from a national court may be refused by the Court of Justice only where it is obvious that the interpretation of a Community rule or assessment of its validity which is sought bears no relation to the facts or purpose of the main action, or if the Court of Justice does not have before it the factual or legal material necessary to give a useful answer to the questions (see, in particular, Bosman, paragraph 61; Case C-60/98 Butterfly Music v CEMED [1999] ECR I-0000, paragraph 13).

19 That is not the case here. It is not impossible that the answers to the questions referred might cause the Procurement Review Board to annul the tendering procedure at issue in the main proceedings or to hold that it was irregular. It is not for the Court of Justice to assess the possible consequences in national law of the fact that a new tendering procedure in accordance with Directive 93/36 took place after the main proceedings were brought.

20 The questions referred to the Court are therefore admissible.

Question 1

21 The first point to note is that Directive 93/36 was adopted after Directive 92/50.

22 Secondly, the second recital in the preamble to Directive 93/36 shows that that directive is intended, in particular, to align the provisions on the awarding of public supply contracts on the provisions of Directive 92/50. The latter were thus expressly taken into consideration when Directive 93/36 was adopted.

23 It follows that the provisions of Directive 92/50 cannot influence the scope of the provisions of Directive 93/36, including those which already appeared in Directive 77/62.

24 As regards, more particularly, Article 2(2) of Directive 93/36, that interpretation is confirmed by the fact that that provision does not govern only those situations in which Directive 92/50 is applicable. It cannot therefore be maintained that Directive 92/50 has deprived that provision

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of its purpose.

25 The answer to the first question must therefore be that Article 2(2) of Directive 93/36 is independent in scope from the provisions of Directive 92/50.

Question 2

26 The national court's findings show that DS is not a contracting authority within the meaning of Article 1(b) of Directive 93/36.

27 It follows that the obligation under Article 6(1) of Directive 93/36 to apply the tendering procedures defined in Article 1(d), (e) and (f) of that directive does not apply to a body such as DS.

28 Moreover, Directive 93/36 contains no provision comparable to Article 3(3) of Directive 92/50 or Article 2(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which requires contracting authorities to ensure compliance with the provisions of those directives in the case of certain contracts awarded by bodies other than contracting authorities.

29 On the contrary, under Article 2(2) of Directive 93/36, where a contracting authority grants to a body which is not a contracting authority special or exclusive rights to engage in a public service activity, the only requirement is that the measure whereby that right is granted must stipulate that, in relation to the public supply contracts which it awards to third parties in the context of that activity, the body in question must comply with the principle of non-discrimination on grounds of nationality.

30 A systematic interpretation of that provision therefore shows that the contracting authority is not required to demand that the body in question comply with the tendering procedures laid down by Directive 93/36.

31 It should be noted, however, that the principle of non-discrimination on grounds of nationality cannot be interpreted restrictively. It implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that it has been complied with.

32 The answer to the second question must therefore be that Article 2(2) of Directive 93/36 is to be interpreted as follows:

- It requires a contracting authority which grants to a body other than such a contracting authority special or exclusive rights to engage in a public service activity to require of that body, in relation to the public supply contracts which it awards to third parties in the context of that activity, that it comply with the principle of non-discrimination on grounds of nationality.

- It does not, however, require in those circumstances that the contracting authority demand that, in awarding such public supply contracts, the body in question comply with the tendering procedures laid down by Directive 93/36.

Costs

33 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

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(First Chamber),

in answer to the questions referred to it by the Klagenævnet for Udbud by order of 15 July 1998, hereby rules:

1. Article 2(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts is independent in scope from the provisions of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

2. Article 2(2) of Directive 93/36 must be interpreted as follows:

- It requires a contracting authority which grants to a body other than such a contracting authority special or exclusive rights to engage in a public service activity to require of that body, in relation to the public supply contracts which it awards to third parties in the context of that activity, that it comply with the principle of non-discrimination on grounds of nationality.

- It does not, however, require in those circumstances that the contracting authority demand that, in awarding such public supply contracts, the body in question comply with the tendering procedures laid down by Directive 93/36.

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CONCERNS	Interprets 31993L0036-A02P2
SUB	Approximation of laws
AUTLANG	Danish
OBSERV	Commission ; Institutions
NATIONA	Denmark
NATCOUR	*A9* Klagenævnet for Udbud, kendelse den 15/07/98 (97-128.153)
NOTES	Kauff-Gazin, Fabienne: Europe 2000 Janvier Comm. no 28 p.22 Gerscha, Arnold: European Law Reporter 2000 p.90-91 Mader, Oliver: Europäisches Wirtschafts- & Steuerrecht - EWS 2000 p.79-80 Wagner, Olav: Europäische Zeitschrift für Wirtschaftsrecht 2000 p.249-251 Brown, Adrian: Public Procurement Law Review 2000 p.CS45-CS46 Barone, A.: Il Foro italiano 2000 IV Col.109-110 Bonechi, Leonardo: Diritto pubblico comparato ed europeo 2000 p.229-232 Savia, Elena: Defensor Legis 2000 no 5 p.826-835
PROCEDU	Reference for a preliminary ruling
ADVGEN	Alber
JUDGRAP	Jann
DATES	of document: 18/11/1999 of application: 20/07/1998

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**Judgment of the Court
of 26 September 2000
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Public works contracts - Directives 71/305/EEC, as amended by Directive 89/440/EEC, and 93/37/EEC - Construction and maintenance of school buildings by the Nord-Pas-de-Calais Region and the Département du Nord.
Case C-225/98.**

1. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Common rules on advertising - Publication of a prior information notice by the contracting authorities - Scope - Limits

(Council Directive 93/37, Arts 11(1), 12 and 13)

2. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Award of contracts - Award criteria - Condition linked to the campaign against unemployment - Permissible - Conditions - Rules on advertising

(Council Directive 93/37, Art. 30)

3. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Number of candidates invited to tender in the context of a restricted procedure - Limitation to a maximum number of five tenderers - Not permissible

(Council Directive 93/37, Art. 22(2))

4. Freedom to provide services - Procedures for the award of public works contracts - Directive 71/305 - Designation of the lots by reference to classifications of national professional organisations - Proof of the tenderer's professional qualification - Requirement of proof of registration with the national Ordre des Architectes - Not permissible

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC); Council Directive 71/305, Arts 23 to 26)

1. The purpose of the rules on advertising laid down in Directive 93/37 concerning the coordination of procedures for the award of public works contracts, including publication of the prior information notice, is to inform all potential tenderers at the Community level in good time about the main points of a contract in order that they may submit their tender within the time-limits. That purpose shows that whether the prior information notice is compulsory must be determined by reference to the provisions of that directive relating to the time-limits for the receipt of tenders submitted by tenderers.

In this respect, Articles 12(1) and 13(3) of the Directive, which fix as a general rule the normal time-limits for the receipt of tenders at 52 days in respect of open procedures and 40 days in respect of restricted procedures, make no reference to the preliminary publication of a prior information notice. On the other hand, Articles 12(2) and 13(4) of the Directive, which confer on the contracting authorities the power to reduce the time-limits laid down in Articles 12 and 13, expressly link that power to the preliminary publication of a prior information notice. It follows that the publication of a prior information notice is compulsory only where the contracting authorities exercise their option to reduce the time-limits for the receipt of tenders.

(see paras 35-38)

2. Under Article 30(1) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts, the criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically

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advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit. In the latter case, the contracting authorities are required to state these criteria in the contract notice or the contract documents.

None the less, that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services.

Furthermore, even if such a criterion is not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising. It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence.

(see paras 49-51, 73)

3. A Member State which, in contract notices, limits to five the number of candidates invited to tender for the contracts in question fails to fulfil its obligations under Article 22(2) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts.

Although it is true that Article 22(2) of the Directive does not provide for a minimum number of candidates which the contracting authorities are required to invite where they do not opt in favour of fixing a range as provided by that provision, the Community legislature none the less considered that, in the context of a restricted procedure and where the contracting authorities prescribe a range, a number of candidates below five is not sufficient to ensure genuine competition. The same must be true a fortiori in cases where the contracting authorities opt for inviting a maximum number of candidates. It follows that the number of undertakings which a contracting authority intends to invite to tender in the context of a restricted procedure cannot ever be less than five.

(see paras 59-63)

4. A Member State which, in contract notices, uses as the mode of designating the lots references to classifications of national professional organisations and also requires from the designer, as minimum standards for participation, proof of registration with the Ordre des Architectes fails to fulfil its obligations under Article 59 of the Treaty (now, after amendment, Article 49 EC) and under Directive 71/305 concerning the coordination of procedures for the award of public works contracts.

To the extent that the designation of the lots by reference to classifications of French professional organisations is likely to have a dissuasive effect on tenderers who are not French, it thereby constitutes indirect discrimination and, therefore, a restriction on the freedom to provide services, within the meaning of Article 59 of the Treaty. Moreover, first, the requirement of proof that the designer is registered with the Ordre des Architectes can only give advantage to the provision of services by French architects, which constitutes discrimination against Community architects and, accordingly, a restriction on their freedom to provide services. Second, Directive 71/305 precludes a Member State from requiring a tenderer established in another Member State to furnish proof by any means other than those prescribed in Articles 23 to 26 of that directive, that he satisfies the criteria laid down in those provisions and relating to his qualifications.

(see paras 82-84, 87-88, 90)

In Case C-225/98,

Commission of the European Communities, represented by M. Nolin, of its Legal Service, acting

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as Agent, with an address for service in Luxembourg at the office of C. Gomez de la Cruz, of the same service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. Viéville-Bréville, Chargé de Mission in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

APPLICATION for a declaration that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1), in particular under Articles 12, 26 and 29 thereof, and under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), in particular under Articles 8, 11, 22 and 30 thereof,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevon and R. Schintgen (Presidents of Chambers), J.-P. Puissochet, P. Jann, H. Ragnemalm and V. Skouris (Rapporteur), Judges,

Advocate General: S. Alber,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 February 2000, at which the Commission was represented by M. Nolin and the French Republic by S. Pailler, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2000,

gives the following

Judgment

Costs

96 Under Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. Since the Commission has failed on two heads and the French Republic on the others, each party must be ordered to bear its own costs.

On those grounds,

THE COURT,

hereby:

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1. Declares that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Articles 12(5), 26 and 29(2) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Council Directive 89/440/EEC of 18 July 1989, and under Articles 8(3), 11(5), 22(2) and 30(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts;

2. Dismisses the application as to the remainder;

3. Orders the French Republic and the Commission of the European Communities to bear their own costs.

1 By application lodged at the Court Registry on 22 June 1998, the Commission of the European Communities brought an action, pursuant to Article 169 of the EC Treaty (now Article 226 EC), for a declaration that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1; Directive 71/305), in particular under Articles 12, 26 and 29 thereof, and under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), in particular under Articles 8, 11, 22 and 30 thereof.

The relevant legislation

Directive 93/37

2 According to the first recital in the preamble thereto, Directive 93/37 consolidated the provisions of Directive 71/305 for reasons of clarity and better understanding.

3 Article 8(3) of Directive 93/37 provides:

For each contract awarded, the contracting authorities shall draw up a written report which shall include at least the following:

- the name and address of the contracting authority, the subject and value of the contract,

- the names of the candidates or tenderers admitted and the reasons for their selection,

- the names of the candidates or tenderers rejected and the reasons for their rejection,

- the name of the successful tenderer and the reasons for his tender having been selected and, if known, any share of the contract the successful tenderer may intend to subcontract to a third party,

- for negotiated procedures, the circumstances referred to in Article 7 which justify the use of these procedures.

This report, or the main features of it, shall be communicated to the Commission at its request.

4 Under Article 11(1) of Directive 93/37, [C]ontracting authorities shall make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold laid down in Article 6(1).

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5 According to Article 11(5) of Directive 93/37, Contracting authorities who have awarded a contract shall make known the result by means of a notice.....

6 Article 11(7) of Directive 93/37 provides:

The contracting authorities shall send the notices referred to in paragraphs 1 to 5 as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities. In the case of the accelerated procedure referred to in Article 14, the notice shall be sent by telex, telegram or telefax.

The notice referred to in paragraph 1 shall be sent as soon as possible after the decision approving the planning of the works contracts that the contracting authorities intend to award.

The notice referred to in paragraph 5 shall be sent at the latest 48 days after the award of the contract in question.

7 Article 11(11) of Directive 93/37 provides:

The notice shall not be published in the official journals or in the press of the country of the contracting authority before the date of dispatch to the [Office for Official Publications] of the European Communities and it shall mention this date. It shall not contain information other than that published in the Official Journal of the European Communities.

8 Article 12(1) and (2) of Directive 93/37 provides:

1. In open procedures the time-limit for the receipt of tenders fixed by the contracting authorities shall be not less than 52 days from the date of dispatch of the notice.

2. The time-limit for the receipt of tenders laid down in paragraph 1 may be reduced to 36 days where the contracting authorities have published the notice [provided] for in Article 11(1), drafted in accordance with the specimen in Annex IV A, in the Official Journal of the European Communities.

9 Article 13(3) and (4) of Directive 93/37 provides as follows:

3. In restricted procedures, the time-limit for receipt of tenders fixed by the contracting authorities may not be less than 40 days from the date of dispatch of the written invitation.

4. The time-limit for the receipt of tenders laid down in paragraph 3 may be reduced to 26 days where the contracting authorities have published the notice provided for in Article 11(1), drafted in accordance with the model in Annex IV A, in the Official Journal of the European Communities.

10 Under Article 22(2) of Directive 93/37:

[W]here the contracting authorities award a contract by restricted procedure, they may prescribe the range within which the number of undertakings which they intend to invite will fall. In this case the range shall be indicated in the contract notice.... The range shall be determined in the light of the [nature] of the work to be carried out. The range must number at least 5 undertakings and may be up to 20.

In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition.

11 Article 27 of Directive 93/37 provides:

1. Evidence of the contractor's technical capability may be furnished by:

(a) the contractor's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for carrying out the works;

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory

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execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where necessary, the competent authority shall submit these certificates to the contracting authority direct;

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;

(d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the technicians or technical bodies which the contractor can call upon for carrying out the work, whether or not they belong to the firm.

2. The contracting authorities shall specify [in the notice or] in the invitation to tender which of these references are to be produced.

12 Finally, under Article 30(1) and (2) of Directive 93/37:

1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.

Directive 71/305

13 Apart from a number of differences in wording, the provisions of Directive 71/305, concerning the drawing up and communication of written reports (Article 5a), the detailed rules for publication with which the contracting authorities must comply (Article 12), the time-limits for the receipt of tenders and of requests to participate (Articles 13 and 14), proof of the contractor's technical knowledge or ability (Article 26) and the criteria for the award of contracts (Article 29(1) and (2)), had the same content as the corresponding provisions of Directive 93/37, set out in paragraphs 3 to 12 above.

Background to the dispute and pre-litigation procedure

14 The documents before the Court show that, at the beginning of 1993, the Commission's attention was drawn to the tendering procedure for a public works contract issued by open procedure and relating to the construction of the Lycée Polyvalent (multipurpose secondary school) at Wingles (Département du Pas-de-Calais). Since the value of that contract exceeded the Community threshold of ECU 5 million, a contract notice was published in the Official Journal of the European Communities (the Official Journal) of 21 January 1993, in accordance with Directive 71/305.

15 The Commission received a complaint and took the view that Directive 71/305 had not been complied with. Accordingly, by letter of 27 September 1993, in accordance with the procedure laid down in Article 169 of the Treaty, it gave the French authorities formal notice to submit their observations within two months of the notification of that notice. The Commission's allegations related to the time-limit for the receipt of tenders, which was less than 52 days, the discriminatory description of the lots, the discriminatory minimum standards, the criteria for the award of the contract which did not comply with Directive 71/305, the improper award of the contract and the failure to inform an eliminated tenderer of the reasons for rejection of his tender.

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16 By letter of 20 December 1993, the French authorities provided the Commission with some information in response to the allegations set out in the formal notice.

17 The Commission took the view that that letter was not satisfactory and on 8 September 1995 sent a reasoned opinion to the French Republic. No reply was sent by the French authorities.

18 Meanwhile, pursuant to Directive 93/37, the Nord-Pas-de-Calais Region published in the Official Journal of 18 February 1995 a series of 14 contract notices in connection with an operation known as Plan Lycées (Secondary School Plan), with an aggregate value of FRF 1.4 thousand million. The notices were identical for all the contracts and concerned restricted invitations to tender relating to the completion of contracts of modernisation and maintenance works over a period of 10 years. Groupings of undertakings were permitted to tender and minimum standards for participation were imposed, in particular concerning references and qualifications. Furthermore, those notices stated that the tenders would be assessed by taking account of various award criteria, including the quality/price ratio of the technical response and the services, the time-limit for completion of the works of construction and renovation excluding maintenance, and the mode of action and an additional criterion relating to employment. A further contract notice was published in the Official Journal of 24 June 1995, concerning the design and building of a secondary school to a high environmental standard, which required higher levels of qualification and that the architect be qualified to practise in France.

19 On 10 February 1995, an agreement was signed between the President of the Commission PME-Marchés des Constructions Scolaires of the Fédération Régionale du Bâtiment, the President of the Fédération Régionale des Travaux Publics and the Nord-Pas-de-Calais Regional Delegate of the Syndicat National du Béton Armé et des Techniques Industrialisées in order to define the detailed arrangements according to which regional and local PME (Petites et Moyennes Entreprises; small and medium-sized firms), represented by the signatories, could tender for the global contract for the construction and maintenance of the secondary schools of the Nord-Pas-de-Calais Region in the form of joint groupings of mutually supportive undertakings divided into three categories per contract notice published. That agreement was published in the Moniteur du Bâtiment et des Travaux Publics of 17 February 1995, in the section entitled Textes Officiels (official instruments).

20 By letter of 21 November 1995, also sent pursuant to Article 169 of the Treaty, the Commission gave the French authorities formal notice to submit their observations on the irregularities noted in the course of the procedure for the award of the contracts coming under the Plan Lycées. The Commission objected to the policy adopted by the Nord-Pas-de-Calais Region and, incidentally, the Département du Nord in awarding public works contracts for school buildings. Basing its assessment on the features of the Plan Lycées, but also on the precedent of the Wingles secondary school and certain procedures followed by the Conseil Général of the Département du Nord, the Commission called into question the policy of the contracting authorities of the Lille conurbation which was designed, in the long term, to award contracts for school buildings for which they were responsible to undertakings in the Nord-Pas-de-Calais Region. The Commission also called into question the use of an additional criterion relating to local employment which stemmed from Interministerial Circular TEFP 14/93 of 29 December 1993 (published in the Moniteur du Bâtiment et des Travaux Publics of 14 January 1994, p. 235).

21 The French authorities did not reply to that letter of formal notice. The Nord-Pas-de-Calais Region none the less republished in the Official Journal of 5 January 1996, for reasons of budgetary planning, four contract notices concerning four secondary schools which had already formed the subject-matter of the Plan Lycées in February 1995.

22 The Commission received information about the forward programme of investment for the secondary schools of the Nord-Pas-de-Calais Region for the period 1996-1998. The breadth of that programme

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led the Commission to consider all the contract notices relating to school buildings in the Nord-Pas-de-Calais Region and the Département du Nord which had been published since 1993, the year in which the Wingles secondary school contract was awarded. Those procedures related to contracts issued by the two contracting authorities, namely the Nord-Pas-de-Calais Region and the Département du Nord, over a period of three years.

23 By a supplementary letter of formal notice of 8 May 1996, the Commission restated its allegations and requested the French authorities, in particular, to send it all relevant information on the use by the Nord-Pas-de-Calais Region of the additional criterion relating to employment and its links with the Nord-Pas-de-Calais Region's plan known as Lycées Emploi Formation, the operation of the agreement published in the Moniteur du Bâtiment et des Travaux Publics of 17 February 1995, referred to in paragraph 19 above, the prior information and award notices and the written reports for all procedures for the award of the abovementioned contracts. It also requested them to take appropriate measures to ensure that the two contracting authorities in question fulfil their obligations under Community law within six weeks.

24 The French authorities replied on 9 August 1996 and provided various documents showing a marked improvement in the procedures for the award of contracts by the Nord-Pas-de-Calais Region in respect of its new contracts. As to the remainder, the French authorities disputed the allegations put forward by the Commission.

25 As in respect of the Wingles secondary school, the Commission took the view that that letter did not satisfactorily respond to all the allegations in the letter of formal notice and, on 7 April 1997, sent a reasoned opinion to the French Republic. The French authorities did not reply to that reasoned opinion.

26 The Commission then brought the present action based on eight complaints which relate to the prior information procedure, the additional criterion relating to employment, the number of candidates selected, the method known as award by reference to the Code des Marchés Publics (French Code of Public Procurement), the mode of designating the lots, the minimum standards for participation, the procedure of information on contract awards and the failure to communicate the written reports.

Substance

The complaint relating to failure to observe the prior information procedure

27 The Commission claims that it is clear from Article 11(1), (7) and (11) of Directive 93/37 that prior information is a compulsory preliminary, to be effected first in the Official Journal, to publication of any individual contract notice. According to the Commission, the Nord-Pas-de-Calais Region in this case simply published 14 separate contract notices for the first time on 18 February 1995 without having recourse to a preliminary prior information procedure.

28 Furthermore, on the basis of an examination of the contract notices published in the Supplement (S) to the Official Journal in 1993, 1994 and 1995, the Commission considers that the Nord-Pas-de-Calais Region has only rarely adhered to the prior information procedure laid down in Articles 12 of Directive 71/305 and 11 of Directive 93/37.

29 The Commission also points out that it has not found any prior information notice published by the Département du Nord over the period concerned and finds, on the basis of the information at its disposal, that there has been a repeated failure to fulfil the obligations of prior information laid down in Articles 12 of Directive 71/305 and 11 of Directive 93/37.

30 The French Government does not deny that, considered in isolation, Article 11(1) of Directive 93/37 appears to be of a mandatory nature. It none the less contends that the compulsory nature of the advertising of a prior information notice before the advertising of any contract notice is

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not so clearly evident from Articles 12 and 13 of Directive 93/37. Those latter provisions provide that the time-limits for the receipt of tenders (52 days in open procedures and 40 days in restricted procedures) may be reduced, respectively, to 36 and 26 days where the contracting authorities have published an indicative prior information notice, which implies, according to the French Government, that the prior information notice provided for under Article 11(1) of Directive 93/37 is not compulsory.

31 It should be borne in mind, first, that, under Article 11(1) of Directive 93/37, contracting authorities are to make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold laid down in Article 6(1) of that directive.

32 Second, it follows from Articles 12(1) and (2) and 13(3) and (4) of Directive 93/37 that, as a general rule, the time-limits for the receipt of tenders may not be less than 52 days from the date of dispatch of the contract notice in respect of open procedures and 40 days from the date of dispatch of the written invitation in respect of restricted procedures, but that they may be reduced, respectively, to 36 and 26 days only where the contracting authorities have published the prior information notice.

33 Since the compulsory or optional nature of the prior information notice is not expressly clear from the wording of those provisions, it is necessary to take account of the scheme which Directive 93/37 was intended to establish overall and, consequently, to examine Articles 11(1), 12(1) and (2) and 13(3) and (4) of Directive 93/37 jointly and systematically in order to arrive at a coherent interpretation and application of that directive.

34 The prior information procedure is one of the rules on advertising laid down in Directive 93/37. As is clear in particular from the 10th recital in the preamble to that directive, the purpose of those rules is to ensure development, at the Community level, of effective competition in the field of public works contracts, by ensuring that potential tenderers from other Member States are in a position to respond to the various invitations in circumstances comparable to those prevailing for national tenderers.

35 It follows that the purpose of the rules on advertising laid down in Directive 93/37, including publication of the prior information notice, is to inform all potential tenderers at the Community level in good time about the main points of a contract in order that they may submit their tender within the time-limits. That purpose shows that whether the prior information notice is compulsory must be determined by reference to the provisions of that directive relating to the time-limits for the receipt of tenders submitted by tenderers.

36 In this respect, Articles 12(1) and 13(3) of Directive 93/37, which fix as a general rule the normal time-limits for the receipt of tenders at 52 days in respect of open procedures and 40 days in respect of restricted procedures, make no reference to the preliminary publication of a prior information notice.

37 On the other hand, Articles 12(2) and 13(4) of Directive 93/37, which confer on the contracting authorities the power to reduce the time-limits laid down in Articles 12(1) and 13(3), expressly link that power to the preliminary publication of a prior information notice.

38 It follows that the publication of a prior information notice is compulsory only where the contracting authorities exercise their option to reduce the time-limits for the receipt of tenders.

39 If the publication of a prior information notice were compulsory for every award procedure, whatever the time-limit for the receipt of tenders, the reference to it in Articles 12(2) and 13(4) of Directive 93/37 would be superfluous.

40 By linking the exercise, by the contracting authorities, of the option to reduce the time-limits

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for the receipt of tenders to the obligation to publish a prior information notice, the Community legislature intended to give potential tenderers, as regards the time at their disposal to draw up their tender, safeguards comparable to those which they would have enjoyed if the normal time-limits had been applied.

41 That interpretation is furthermore borne out by the travaux préparatoires for Directive 89/440, which inserted the prior information procedure into Directive 71/305. In its proposal for a Council Directive amending Directive 71/305 (COM (86) 679 final), the Commission had initially proposed the insertion of an obligation to publish a prior information notice at least six months before the date on which such contracts are due to be put up for competition by also providing that the time-limit for the receipt of tenders would be doubled in the case of contracting authorities which had failed to fulfil that obligation. However, that proposal, which expressly characterised the prior information procedure as an obligation, was not accepted by the Council.

42 As regards, finally, the Commission's argument that the compulsory nature of the prior information notice was clearly acknowledged by the Court of Justice in Case C-272/91 Commission v Italy [1994] ECR I-1409, it is clear that that case concerned the indicative notice provided for under Article 9(1) of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62 and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 127, p. 1; Directive 77/62).

43 The indicative notice provided for under Article 9(1) of Directive 77/62 does not, unlike the notice provided for under Article 11(1) of Directive 93/37, introduce any possibility of reducing the time-limits for the receipt of tenders. The problem of interpretation at issue in Commission v Italy, cited above, did not therefore arise in terms analogous to those in the present case.

44 In the light of all the foregoing considerations and given the fact that, in this case, it is clear from the case-file that the contracting authorities in question did not reduce the time-limits for the receipt of tenders in relation to the disputed contracts, it must be concluded that those contracting authorities were not in breach of their obligations under Directives 71/305 and 93/37, as regards the prior information procedure.

45 Consequently, the Commission's complaint relating to failure to publish prior information notices must be rejected as unfounded.

The complaint relating to the additional criterion linked to the campaign against unemployment

46 The Commission claims that, in expressly setting forth as an award criterion in a number of contract notices a condition relating to employment linked to a local project to combat unemployment, the French authorities have infringed Article 30 of Directive 93/37. The Commission acknowledges that the taking into account of employment-related projects may be regarded as a condition of performance for the purpose of the rule in Beentjes (Case 31/87 Beentjes v Netherlands State [1988] ECR 4635, paragraphs 28 and 37), but it points out that, in the present case, that possibility was characterised as an award criterion in the contract notices in question. Under Article 30 of Directive 93/37, award criteria must be based either on the lowest price or on the most economically advantageous tender.

47 Relying on paragraphs 28 and 37 of Beentjes, the French Government contends that an additional award criterion of that kind has been permitted by the Court of Justice. It states, furthermore, that the award criterion in question in this case does not constitute a primary criterion, such as those referred to in Article 29 of Directive 71/305, the purpose of which is to make it possible to determine which is the most advantageous tender, but a secondary criterion which is not decisive.

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48 The first point to be noted here is that, by this complaint, the Commission alleges that the French Republic has infringed Article 30(1) of Directive 93/37 purely and simply by referring to the criterion linked to the campaign against unemployment as an award criterion in some of the disputed contract notices.

49 Under Article 30(1) of Directive 93/37, the criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit.

50 None the less, that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, Beentjes, paragraph 29).

51 Furthermore, even if such a criterion is not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising (see, to that effect, on Directive 71/305, Beentjes, paragraph 31). It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence (see, to that effect, Beentjes, paragraph 36).

52 As regards the Commission's argument that Beentjes concerned a condition of performance of the contract and not a criterion for the award of the contract, it need merely be observed that, as is clear from paragraph 14 of Beentjes, the condition relating to the employment of long-term unemployed persons, which was at issue in that case, had been used as the basis for rejecting a tender and therefore necessarily constituted a criterion for the award of the contract.

53 In this case, as has been stated in paragraph 48 above, the Commission criticises only the reference to such a criterion as an award criterion in the contract notice. It does not claim that the criterion linked to the campaign against unemployment is inconsistent with the fundamental principles of Community law, in particular the principle of non-discrimination, or that it was not advertised in the contract notice.

54 In those circumstances, the Commission's complaint relating to the additional award criterion linked to the campaign against unemployment must be rejected.

The complaint relating to the number of candidates selected

55 The Commission states that, in the contract notices published in the Official Journal of 18 February 1995, the text under heading 13 states: Maximum number of candidates which may be invited to submit a tender: 5. The Commission points out that, even if the French authorities seem to take the view, in their reply to the formal notice, that that maximum of five candidates fulfils the obligation to ensure genuine competition imposed by Directive 93/37, the disputed indication under heading 13 in the abovementioned contract notices suggests that the number of candidates invited to submit a tender might be less than five. Consequently, the French authorities have not fulfilled the obligation laid down in Article 22 of Directive 93/37.

56 The French Government, on the other hand, contends that the maximum number of five candidates fixed in the contract notices complies with the letter and the spirit of Article 22 of Directive 93/37 and, because of the characteristics of the type of contract in question, is sufficient in this case to fulfil the obligation to ensure genuine competition. The French Government infers from Article 22(2) of Directive 93/37 that there is nothing to prohibit a contracting authority

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from restricting to five the number of candidates invited to tender, so long as it considers that that number is sufficient to ensure genuine competition under objective and non-discriminatory conditions.

57 It should be recalled that, under the first subparagraph of Article 22(2) of Directive 93/37, where the contracting authorities award a contract by restricted procedure, they may prescribe the range within which the number of undertakings which they intend to invite will fall. Under the same provision, the range must number at least five undertakings and may be up to 20.

58 Furthermore, under the second subparagraph of Article 22(2) of Directive 93/37, the number of candidates invited to tender is, in any event, to be sufficient to ensure genuine competition.

59 It is true that Article 22(2) of Directive 93/37 does not provide for a minimum number of candidates which the contracting authorities are required to invite where they do not opt in favour of fixing a range as provided by that provision.

60 However, if the Community legislature considered that, in the context of a restricted procedure and where the contracting authorities prescribe a range, a number of candidates below five is not sufficient to ensure genuine competition, the same must be true a fortiori in cases where the contracting authorities opt for inviting a maximum number of candidates.

61 It follows that the number of undertakings which a contracting authority intends to invite to tender in the context of a restricted procedure cannot ever be less than five.

62 In this case, the conclusion to be drawn must be that, as the French Government itself accepts, the wording Maximum number of candidates which may be invited to submit a tender: 5 appearing in the contract notices published in the Official Journal of 18 February 1995 implies that it is the maximum number of candidates invited to tender for the contracts in question which was fixed at five. It follows that, on the basis of the disputed contract notices, a number of candidates below five was regarded as acceptable.

63 In those circumstances, it must be held that the Commission's complaint concerning the number of candidates selected is well founded and that the French Republic has failed to fulfil its obligations under Article 22(2) of Directive 93/37.

The complaint relating to the method known as award by reference to the Code des Marchés Publics

64 The Commission points out that, in most of the contract notices published between 1993 and 1995, the contracting authorities in question had recourse, in order to indicate the award criteria, to the method known as award by reference to the Code des Marchés Publics, which, it claims, is contrary to Articles 29(2) of Directive 71/305 and 30(2) of Directive 93/37. By referring generally to various provisions of the French Code des Marchés Publics, the abovementioned contract notices do not satisfy the requirement as to advertising, as stated in Beentjes.

65 Relying on the case-law of the Court (see Case 51/83 Commission v Italy [1984] ECR 2793), the French Government contends, first, that that complaint by the Commission must be regarded as inadmissible in that it was raised for the first time in the reasoned opinion.

66 Admittedly, in its supplementary letter of formal notice of 8 May 1996, the Commission adopted a position on the criteria for the award of the contracts in question and, in this respect, drew the French authorities' attention to the fact that the contract notices must enable contractors to assess whether the proposed contracts were of interest to them. However, the French Government submits that that reference did not apply expressly to the complaint relating to the method of award by reference to the Code des Marchés Publics, but formed part of the complaint concerning the additional criterion relating to employment. Thus that reference did not enable the French Government to define the complaint as relating to the method of award by reference to the Code des Marchés Publics, a method to which the Commission did not expressly refer until the reasoned opinion.

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67 In the alternative, the French Government submits that Article 30(2) of Directive 93/37 does not require that the criteria for the award of the contract be listed in the contract notice, but permits the contracting authority to include them either in the contract notice or in the contract documents. In this case, the award criteria are expressly listed in the contract documents.

68 As regards the admissibility of this complaint of the Commission, it should be borne in mind, first, that it follows from the purpose assigned to the pre-litigation stage of the Treaty infringement procedure that the letter of formal notice is intended to define the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence (Case 274/83 Commission v Italy [1985] ECR 1077, paragraph 19).

69 Second, according to consistent case-law, the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the Treaty infringement procedure (see, in particular, Case 51/83, paragraph 5; and Case 274/83, paragraph 20).

70 Although it follows that the reasoned opinion provided for in Article 169 of the Treaty must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the Court cannot impose such strict requirements as regards the letter of formal notice, which of necessity will contain only an initial brief summary of the complaints. There is nothing therefore to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in its letter of formal notice (see Case 274/83, paragraph 21).

71 In this respect, it is clear from the documents before the Court that, in the supplementary letter of formal notice of 8 May 1996, the Commission made a general criticism of the award criteria in the disputed contract notices. It drew the French authorities' attention to the fact that the contract notices must enable undertakings to determine whether the information they contain enables them to assess whether the proposed contracts are of interest to them. It also referred to the case-law of the Court according to which a general reference to a provision of national legislation cannot satisfy the requirements as to advertising in respect of contract notices.

72 It follows that the formal notice, even if its wording was not very explicit as regards the method known as award by reference to the Code des Marchés Publics, none the less enabled the French Government to be aware of the complaint made against it. Therefore, the criticism of the award criteria subsequently made by the Commission in its reasoned opinion is a lawful detailed specification of the complaints raised in the letter of formal notice. The Commission's complaint is therefore admissible.

73 As regards the substance of the complaint, where the authorities awarding the contract do not take the lowest price as the sole criterion for awarding the contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state these criteria in the contract notice or the contract documents. Consequently, a general reference to a provision of national legislation cannot satisfy the publicity requirement (Beentjes, paragraph 35).

74 The French Government does indeed contend that, in this case, the award criteria are expressly included in the contract documents. However, it did not supply the Court with any evidence which might prove that assertion.

75 It must therefore be concluded that the Commission's complaint relating to the method known as an award by reference to the Code des Marchés Publics is well founded and that the French Republic has failed to fulfil its obligations under Articles 29(2) of Directive 71/305 and 30(2) of Directive

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93/37.

The complaint relating to the mode of designating the lots

76 The Commission claims that many of the contract notices examined refer, under the heading Works. Designation of lots and qualifications, to the classifications of French professional organisations, in particular the OPQCB and Qualibat - Qualifélec. As an example, the Commission gives the qualification Qualibat Chauffage 5312, which corresponds to a design office of approved technical expertise in environmental engineering with at least four years' practical experience and at Level 6 in the Convention Collective ETAM des Bâtiment et Travaux Publics (collective agreement for the construction and civil engineering industry).

77 Admittedly, the French authorities pointed out, in their reply to the letter of formal notice, that those notices do not state that the certificates which may be taken into account are exclusively certificates issued by Qualibat or Qualifélec. The Commission claims, none the less, that the technical specifications selected by the contracting authorities in question may have the effect of giving advantage to French undertakings, which are familiar with that system of quality certification and are accustomed to submitting documents or services in conformity with the references required in the contract notice.

78 The French Government contends that such references are purely indicative and, that being so, cannot be discriminatory. The addition of a classification number is quite superfluous since it features alongside the description of each lot in everyday language (electricity, plumbing, and so on).

79 Furthermore, the reference, under heading 3 of the contract notices, to classifications defined by professional organisations does not of itself have a discriminatory effect since it does not give to French candidates as opposed to candidates who are nationals of other Member States any additional information about the services to be provided. It is not a question of specifying, under that heading, information relating to the selection criteria or the criteria for the award of the contract, but of giving guidance about the nature of the lots which is explained in greater detail in the contract documents.

80 According to the Court's case-law the principle of equal treatment, of which Article 59 of the Treaty is a specific expression, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, to that effect, Case 3/88 Commission v Italy [1989] ECR 4035, paragraph 8).

81 In this case, although the reference to classifications of French professional organisations does not imply that the certificates which may be taken into account are exclusively those issued by those bodies, it remains the case that the technical specifications selected are so specific and abstruse that, as a rule, only French candidates are able immediately to discern their relevance. Consequently, the use of those references to designate the lots has the effect of supplying more information to French undertakings about the nature of the lots, thereby making it easier for those undertakings to submit tenders which comply with the coded references appearing in the contract notice.

82 On the other hand, it is more difficult for tenderers from other Member States to submit tenders within the brief time-limit set since they must first find out from the contracting authorities in question the purpose and content of those references.

83 Therefore, to the extent that the designation of the lots by reference to classifications of French professional organisations is likely to have a dissuasive effect on tenderers who are not

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French, it thereby constitutes indirect discrimination and, therefore, a restriction on the freedom to provide services, within the meaning of Article 59 of the Treaty.

84 Consequently, the Commission's complaint relating to the mode of designating the lots is well founded and the French Republic has failed to fulfil its obligations under Article 59 of the Treaty.

The complaint relating to the minimum standards for participation

85 The Commission claims that the minimum standards for participation specified under heading 10 in a certain number of contract notices published by the Département du Nord require from the designer proof of registration with the Ordre des Architectes (French association for architects). It states that, notwithstanding the distinction drawn by the French authorities between, on the one hand, the scheme of registration and, on the other, the scheme of permission to pursue the profession of architect in France, in the majority of cases heading 10 of the contract notices states unambiguously for the designer: proof of registration with the Ordre des Architectes. Consequently, the Département du Nord has failed to fulfil its obligations under Article 59 of the Treaty by imposing restrictions on Community architects' freedom to provide services.

86 The Commission also points out that, as regards the Wingles secondary school, the minimum standards referred to in the contract notice required the provision of a certificate of OPQCB, Qualifélec, FNTP professional qualification. First, Articles 23 to 28 of Directive 71/305 lay down the qualitative criteria for selection of candidate undertakings and, more specifically, Article 26 defines the means of furnishing proof of technical knowledge or ability. Second, it is clear from Case 76/81 Transporoute v Ministère des Travaux Publics [1982] ECR 417 that evidence of an undertaking's professional qualification cannot be furnished by a means of proof which falls outside the closed category of those authorised by Article 26 of Directive 71/305. Therefore, the contracting authority concerned has failed to fulfil its obligation under that provision.

87 In this respect, the Court finds, first, that the requirement of proof that the designer is registered with the Ordre des Architectes can only give advantage to the provision of services by French architects, which constitutes discrimination against Community architects and, accordingly, a restriction on their freedom to provide services.

88 Second, according to the case-law, Directive 71/305 precludes a Member State from requiring a tenderer established in another Member State to furnish proof by any means other than those prescribed in Articles 23 to 26 of that directive, that he satisfies the criteria laid down in those provisions and relating to his qualifications (see, to that effect, Transporoute, paragraph 15).

89 In any event, the French Government itself recognises that those criticisms by the Commission are well founded but submits that the infringements committed are essentially the result of the inexperience of the contracting authorities in question in applying the Community rules on the award of public contracts.

90 Consequently, it must be concluded that the Commission's complaint relating to the minimum standards for participation is well founded and that the French Republic has failed in its obligations under Articles 59 of the Treaty and 26 of Directive 71/305.

The complaints relating to the procedure of information on contract awards and the failure to communicate the written reports

91 The Commission claims that, during the period from 1993 to 1995, the Nord-Pas-de-Calais Region failed to fulfil the obligation to publish information on contract awards, as provided for in Articles 12(5) of Directive 71/305 and 11(5) of Directive 93/37. The award notices seem to have been published only by the Département du Nord, which constitutes an additional failure to fulfil its obligations on the part of the Nord-Pas-de-Calais Region.

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92 Furthermore, the Commission states that the French authorities did not send it the information required by its supplementary letter of formal notice of 8 May 1996, in particular the written reports on all the procedures criticised. Consequently, the French authorities have failed to fulfil their obligations under the second subparagraph of Article 8(3) of Directive 93/37.

93 The French Government admits, first, that the Nord-Pas-de-Calais Region did not publish award notices in accordance with Articles 11(5) of Directive 93/37 and 12(5) of Directive 71/305 and, second, that the written reports on the procedures in question were not sent to the Commission in accordance with Article 8(3) of Directive 93/37. It adds that that failure can only be explained by the inexperience of those contracting authorities in applying the Community rules on the award of public contracts.

94 Therefore, it must be concluded that the complaints relating to the procedure of information on contract awards and the failure to communicate the written reports are well founded and that the French Republic has failed in its obligations under Article 12(5) of Directive 71/305 and Articles 8(3) and 11(5) of Directive 93/37.

95 In the light of all the foregoing, the Court finds that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the Treaty as well as under Articles 12(5), 26 and 29(2) of Directive 71/305 and under Articles 8(3), 11(5), 22(2) and 30(2) of Directive 93/37.

DOCNUM	61998J0225
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1998 ; J ; judgment
PUBREF	European Court reports 2000 Page I-07445
DOC	2000/09/26
LODGED	1998/06/22
JURCIT	31975L0305-A12 : N 28 31975L0305-A12P5 : N 91 94 95 31975L0305-A26 : N 86 90 95 31975L0305-A29 : N 47 95 31975L0305-A29P2 : N 64 75 31975L0305 : N 1 13 88 31977L0062-A09P1 : N 43 31977L0062 : N 42 61981J0076-N15 : N 88

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61981J0076 : N 86
61983J0051 : N 69
61983J0274-N19 : N 68
61983J0274-N20 : N 69
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61987J0031-N14 : N 52
61987J0031-N28 : N 46 47
61987J0031-N29 : N 50
61987J0031-N35 : N 73
61987J0031-N36 : N 51
61987J0031-N37 : N 46 47
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11992E059 : N 1 80 83 84 90 95
31993L0037-A08P3 : N 3 92 94 95
31993L0037-A11 : N 28
31993L0037-A11P1 : N 4 27 31 33 43
31993L0037-A11P11 : N 7 27
31993L0037-A11P5 : N 5 91 94 95
31993L0037-A11P7 : N 6 27
31993L0037-A12P1 : N 8 32 33 36 37
31993L0037-A12P2 : N 8 32 33 37 39
31993L0037-A13P3 : N 9 32 33 36 37
31993L0037-A13P4 : N 9 32 33 37 39
31993L0037-A22 : N 55
31993L0037-A22P2 : N 10 57 - 59 63 95
31993L0037-A23 : N 86
31993L0037-A24 : N 86
31993L0037-A25 : N 86
31993L0037-A26 : N 86
31993L0037-A27 : N 11 86
31993L0037-A28 : N 86
31993L0037-A30 : N 46
31993L0037-A30P1 : N 12 48 49
31993L0037-A30P2 : N 12 64 75 95
31993L0037-C1 : N 2
31993L0037 : N 1 2 51

CONCERNS

Failure concerning 31975L0305-A29P2
Failure concerning 31975L0305-A26
Failure concerning 11992E059
Failure concerning 11992E169
Failure concerning 31993L0037-A30P1
Failure concerning 31993L0037-A11P1
Failure concerning 31993L0037-A12P1
Failure concerning 31993L0037-A12P2
Failure concerning 31993L0037-A13P3
Failure concerning 31993L0037-A13P4

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	Failure concerning 31993L0037-A22P2
SUB	Approximation of laws
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
NOTES	Lambert, Christian: L'actualité juridique ; droit administratif 2000 p.1058-1059 Benedict, Christoph: Europäisches Wirtschafts- & Steuerrecht - EWS 2000 p.514-515 Seidel, Ingelore: Europäische Zeitschrift für Wirtschaftsrecht 2000 p.762-763 Lefèvre, Pascal: Journal des tribunaux / droit européen 2000 no 74 p.245-247 Brown, Adrian: Public Procurement Law Review 2001 p.NA9-NA12 Arnould, Joel: Public Procurement Law Review 2001 p.NA13-NA19 Benedict, Christoph: Neue juristische Wochenschrift 2001 p.947-949 Dreher, Meinrad: Juristenzeitung 2001 p.140-141 Williams, Rhodri: Public Procurement Law Review 2001 p.NA75-NA80 Joel, Jacques: Journal des tribunaux 2001 p.561-564 Krüger, Kai: Europarättslig tidskrift 2002 p.57-67 Adamantidou, Elsa: Nomiko Vima 2002 p.920-947
PROCEDU	Proceedings concerning failure by Member State - successful ; Proceedings concerning failure by Member State - unfounded
ADVGEN	Alber
JUDGRAP	Skouris
DATES	of document: 26/09/2000 of application: 22/06/1998

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Order of the President of the Court of 26 November 1999 Azienda nazionale autonoma delle strade (ANAS). Reference for a preliminary ruling: Corte dei Conti - Italy. Article 177 of the EC Treaty (now Article 234 EC) - Definition of "court or tribunal of a Member State" - Directive 92/50/EC - Procedures for the award of public service contracts. Case C-192/98.

Preliminary rulings - Reference to the Court - Court or tribunal of a Member State within the meaning of Article 177 of the Treaty (now Article 234 EC) - Meaning - To be determined on the basis of the body's constitution and role - Role of the Corte dei Conti (Italian Court of Auditors), in the context within which reference was made to the Court, consisting in the evaluation and verification of the results of administrative action - Not a judicial function

(EC Treaty, Art. 177 (now Art. 234 EC))

$$The question whether a body may refer a question to the Court falls to be determined on the basis of criteria relating both to the constitution of that body and to its function. Thus, a national body may be classified as `a court or tribunal' within the meaning of Article 177 of the Treaty when it is performing judicial functions, but when exercising other functions - of an administrative nature, for example - it cannot be recognised as such.

It follows that in order to establish whether a national body, entrusted by law with different categories of function, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, it is necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling from the Court. For the purposes of that analysis, no relevance is to be attributed to the fact that, when otherwise configured, the body concerned falls to be classified as a court or tribunal for the purposes of Article 177 of the Treaty (even the same entity whose status is in issue, when it is exercising powers other than those in the context of which the reference was made).

The Corte dei Conti (Court of Auditors) is not performing a judicial function - and cannot therefore make a reference to the Court of Justice - when, in the context in which reference is made, it is exercising its powers of ex post facto review which is an administrative role consisting in the evaluation and verification of the results of administrative action.

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AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
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PUBREF	European Court reports 1999 Page I-08583
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LODGED	1998/05/19
JURCIT	61965J0061 : N 20 61985O0318-N04 : N 21 11992E177 : N 20 - 24 61994J0111-N09 : N 21 61996J0054-N23 : N 20 61996J0416-N17 : N 20 61997J0134-N14 : N 21
SUB	Approximation of laws
AUTLANG	Italian
OBSERV	Italy ; Austria ; Commission ; Member States ; Institutions
NATIONA	Italy
NATCOUR	*A9* Corte dei Conti, Sezione del Controllo, ordinanza del 20/03/1998 07/04/1998 (46A/98) - Il Foro italiano 1998 III Col.369-374 - D'Auria, G.: Il Foro italiano 1998 III Col.369-370
NOTES	Rigaux, Anne: Europe 2000 Janvier Comm. no 17 p.17-18 Corongiu, S.: Il diritto dell'Unione Europea 2000 p.687-690 Goletti, Giovanni Battista: Il Foro amministrativo 2000 p.735-739
PROCEDU	Reference for a preliminary ruling - inadmissible
ADVGEN	Cosmas
JUDGRAP	Edward
DATES	of document: 26/11/1999 of application: 19/05/1998

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Judgment of the Court (Fifth Chamber)
of 2 December 1999
Holst Italia SpA v Comune di Cagliari, intervener: Ruhrwasser AG International Water Management.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Sardegna - Italy.
Directive 92/50/EEC - Public service contracts - Proof of standing of the service provider - Possibility of relying on the standing of another company.
Case C-176/98.

Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Service provider relying on the standing of another company as proof of its own standing - Conditions - Assessment by the national court

(Council Directive 92/50)

$$Directive 92/50 relating to the coordination of procedures for the award of public service contracts is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract. It is for the national court to assess, in the light of the evidence adduced to that effect, whether that has been shown.

In Case C-176/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale Amministrativo Regionale per la Sardegna, Italy, for a preliminary ruling in the proceedings pending before that court between

Holst Italia SpA

and

Comune di Cagliari,

intervener:

Ruhrwasser AG International Water Management,

"on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT

(Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Sixth Chamber, acting as President of the Fifth Chamber, L. Sevon, C. Gulmann, J.-P. Puissochet (Rapporteur) and M. Wathelet, Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Holst Italia SpA, by C. Colapinto, of the Rimini Bar, P. Leone, of the Rome Bar, and A. Tizzano and G.M. Roberti, of the Naples Bar,

- the Municipality of Cagliari, by F. Melis and G. Farci, of the Cagliari Bar,

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- Ruhrwasser AG International Water Management, by M. Vignolo and G. Racugno, of the Cagliari Bar, and R.A. Jacchia, of the Milan Bar,

- the Italian Government, by Professor U. Leanza, Head of the Contentious Diplomatic Affairs Department in the Ministry of Foreign Affairs, acting as Agent, assisted by F. Quadri, Avvocato dello Stato,

- the Netherlands Government, by T.T. van den Hout, acting Secretary- General of the Ministry of Foreign Affairs, acting as Agent,

- the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

- the Commission of the European Communities, by P. Stancanelli, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Holst Italia SpA, represented by C. Colapinto, P. Leone, G.M. Roberti and F. Sciaudone, of the Naples Bar; of the Municipality of Cagliari, represented by F. Melis and G. Farci; of Ruhrwasser AG International Water Management, represented by M. Vignolo and R.A. Jacchia; of the Italian Government, represented by F. Quadri; and of the Commission, represented by P. Stancanelli, at the hearing on 20 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 23 September 1999,

gives the following

Judgment

Costs

32 The costs incurred by the Italian, Netherlands and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the question referred to it by the Tribunale Amministrativo Regionale per la Sardegna by order of 10 February 1998, hereby rules:

Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract. It is for the national court to assess whether the requisite evidence in that regard has been adduced in the main proceedings.

1 By order of 10 February 1998, received at the Court on 11 May 1998, the Tribunale Amministrativo Regionale per la Sardegna (Regional Administrative Court for Sardinia) referred to the Court

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for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 That question was raised in proceedings between Holst Italia SpA (`Holst Italia') and the Municipality of Cagliari concerning the award by the latter to Ruhrwasser AG International Water Management (`Ruhrwasser'), by negotiated tender procedure, of a contract for the collection and purification of domestic waste water.

The Community legislation

3 Directive 92/50 lays down qualitative selection criteria for the determination of candidates admitted to take part in procedures for the award of a public service contract.

4 Article 31 of that directive provides:

`1. Proof of the service provider's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance;

(b) the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established;

(c) a statement of the undertaking's overall turnover and its turnover in respect of the services to which the contract relates for the previous three financial years.

2. The contracting authorities shall specify in the contract notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which other references are to be produced.

3. If, for any valid reason, the service provider is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

5 Article 32 of Directive 92/50 is in the following terms:

`1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

(a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services;

(b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided;

- where provided to contracting authorities, evidence to be in the form of certificates issued or countersigned by the competent authority,

- where provided to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected;

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

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(d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the tool, plant or technical equipment available to the service provider for carrying out the services;

(f) a description of the service provider's measures for ensuring quality and his study and research facilities;

(g) where the services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country in which the service provider is established, subject to that body's agreement, on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;

(h) an indication of the proportion of the contract which the service provider may intend to subcontract.

3. The contracting authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.

4. The extent of the information referred to in Article 31 and in paragraphs 1, 2 and 3 of this Article must be confined to the subject of the contract; contracting authorities shall take into consideration the legitimate interests of the service providers as regards the protection of their technical or trade secrets.'

6 Article 25 of Directive 92/50 further provides:

`In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

This indication shall be without prejudice to the question of the principal service provider's liability.'

7 Lastly, Article 26 of Directive 92/50 provides:

`1. Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.

2. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity, shall not be rejected solely on the grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be either natural or legal persons.

3. Legal persons may be required to indicate in the tender or the request for participation the names and relevant professional qualifications of the staff to be responsible for the performance of the service.'

The main proceedings

8 In 1996 the Municipality of Cagliari conducted a negotiated tendering procedure for the award, on the basis of the most advantageous tender submitted, of a three-year contract for the management of water purification and sewage disposal plants.

9 The invitation to tender, published in the Official Journal of the European Communities on 3 January 1997, provided that interested undertakings were to provide proof, in particular, of (a) an average annual turnover equal to or greater than ITL 5 000 million during the period from 1993 to 1995 in the field of the management of water purification and sewage disposal plants and

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(b) actual management of at least one domestic waste water purification plant for a period of two consecutive years during the previous three years, and that, in the absence of such proof, such undertakings were to be excluded from the tendering procedure.

10 Ruhrwasser, which had been registered as a company since only 9 July 1996, was unable to show any turnover whatsoever for the period from 1993 to 1995 or to show that it had actually managed at least one domestic waste water purification plant during the previous three years.

11 In order to establish its standing to take part in the tendering procedure, on the conclusion of which it was awarded the contract, Ruhrwasser provided documentation relating to the financial resources of another entity, the German public-law body Ruhrverband. That body is the sole shareholder in the undertaking RWG Ruhr-Wasserwirtschafts-Gesellschaft, which, together with five other companies, set up Ruhrwasser as a joint venture undertaking in the form of a company limited by shares and governed by German law, owned as to one sixth by each of the parent companies, the object of which is to enable those companies to win contracts abroad for the collection and treatment of water.

12 Holst Italia also took part in the procedure, but its offer was regarded as less advantageous by the committee awarding the contract. It thereupon brought proceedings before the Tribunale Amministrativo Regionale per la Sardegna for annulment of the decision of the Cagliari Municipal Council approving the award of the contract to Ruhrwasser, on the ground that the latter had not produced the documentation needed in order to be eligible to submit a tender.

13 Ruhrwasser intervened in the proceedings before the Tribunale and lodged an interlocutory application for a declaration that the invitation to tender was illegal in so far as it prohibited a candidate undertaking from producing references concerning another undertaking with a view to establishing its own standing to submit a tender.

14 Following examination of the relationship between Ruhrwasser and the companies by which it had been formed, the Tribunale considered that there was a `close connection between Ruhrverband and Ruhrwasser which allows the latter to avail itself of the facilities and organisation of the former'. In those circumstances, it took the view that it was necessary to verify whether Directive 92/50 was to be interpreted as meaning that references concerning an entity connected with the candidate undertaking could be accepted as proof of the latter's standing.

15 According to the Tribunale, although the Court accepted, in its judgments in Case C-389/92 Ballast Nedam Groep v Belgian State [1994] ECR I-1289 (`Ballast Nedam Groep I') and Case C-5/97 Ballast Nedam Groep v Belgian State [1997] ECR I-7549 (`Ballast Nedam Groep II') that an undertaking may prove that it has the necessary standing by furnishing references in respect of other companies within the same group, the situation at issue in those judgments is to be distinguished from that in the present case, inasmuch as, first, it concerned public works contracts governed by Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (OJ, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), and not public service contracts, and, second, the company concerned in Ballast Nedam Groep I and Ballast Nedam Groep II, unlike Ruhrwasser, enjoyed a dominant position within the group of companies which, it claimed, had the requisite standing as the parent company of its subsidiaries.

16 In order to ascertain whether, despite those differences of law and fact, the decision reached by the Court in its previous judgments was also applicable to a situation such as that in issue in the main proceedings, the Tribunale Amministrativo Regionale per la Sardegna decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

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`Does Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts permit a company to prove that it possesses the technical and financial qualifications laid down for participation in a procedure for the award of a public service contract by relying on the references of another company which is the sole shareholder of one of the companies having a holding in the first-mentioned company?'

The question referred for a preliminary ruling

17 According to Holst Italia, references concerning an entity other than the candidate undertaking may be relied on, in the context of Directive 92/50, only if that company can show the existence of a clear structural link connecting it with the company possessing the standing needed for performance of the contract.

18 Such a structural link, constituting, according to the plaintiff in the main proceedings, a fundamental guarantee for the contracting authority, presupposes, according to the Court's case-law, that the company submitting the tender exerts a dominant influence on the entity whose references it uses and actually has at its complete disposal all the latter's resources. That is not the case where the tenderer merely relies on obligations of a commercial nature entered into by an entity indirectly holding a minority share of its capital. To accept, in such circumstances, that the standing of a third party may be taken into account would mean that the standing claimed would cease to be personal in character.

19 The Italian Government likewise doubts that a subsidiary indirectly owned by an entity is capable of claiming that it has at its disposal the technical and financial resources of that entity. It acknowledges, however, that it is for the national court to assess the evidence provided in that connection by the tenderer.

20 By contrast, Ruhrwasser, like the Netherlands and Austrian Governments, considers that the legal nature of the link established between associated undertakings cannot in any circumstances be asserted against those undertakings as a ground for refusing to take into account, in favour of one member of the group, the standing of another member. Irrespective of the nature of the organisation found to exist, the only relevant consideration is the consequences to which it gives rise in terms of the availability of its resources.

21 It follows, according to Ruhrwasser, that where, in addition to structural links relating, in particular, to possession of the capital, there exist mandatory obligations requiring resources to be made available to the subsidiary participating in the tendering procedure, that effectively proves actual possession of the resources needed to perform the contract.

22 According to the Commission, the basic ruling arrived at by the Court in its judgments in Ballast Nedam Groep I and Ballast Nedam Groep II is applicable by analogy to a situation such as that in the present case. However, it emphasises that a tenderer cannot be presumed actually to have at its disposal the resources necessary for the performance of the contract, whatever the nature of its legal relationship with the members of the group of which it forms part, and that the availability of those resources must be the subject of a careful examination by the national court of the evidence which the party concerned is required to provide. The order for reference does not conclusively show that any such examination has been carried out in the main proceedings on the basis of adequate documentation.

23 The Court observes first of all that, as is apparent from the sixth recital in the preamble thereto, Directive 92/50 is designed to avoid obstacles to freedom to provide services in the award of public service contracts, just as Directives 71/304 and 71/305 are designed to ensure freedom to provide services in the field of public works contracts (Ballast Nedam Groep I, paragraph 6).

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24 To that end, Chapter 1 of Title VI of Directive 92/50 lays down common rules on participation in procedures for the award of public service contracts, including the possibility of subcontracting part of the contract to third parties (Article 25) and of the submission of tenders by groups of service providers without their being required to assume a specific legal form in order to do so (Article 26).

25 In addition, the criteria for qualitative selection laid down in Chapter 2 of Title VI of Directive 92/50 are designed solely to define the rules governing objective assessment of the standing of tenderers, particularly as regards financial, economic and technical matters. One of those criteria, provided for in Article 31(3), allows tenderers to prove their financial and economic standing by means of any other document which the contracting authority considers appropriate. A further provision, contained in Article 32(2)(c), expressly states that evidence of the service provider's technical capability may be furnished by an indication of the technicians or technical bodies, whether or not belonging directly to the service provider, on which it can call to perform the service (see, to the same effect, as regards Directive 71/305, Ballast Nedam Groep I, paragraph 12).

26 From the object and wording of those provisions, it follows that a party cannot be eliminated from a procedure for the award of a public service contract solely on the ground that that party proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities (see, to the same effect, as regards Directives 71/304 and 71/305, Ballast Nedam Groep I, paragraph 15).

27 It is therefore permissible for a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a public service contract to rely, vis-à-vis the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract.

28 However, such recourse to external references is subject to certain conditions. As stated in Article 23 of Directive 92/50, the contracting authority is required to verify the suitability of the service providers in accordance with the criteria laid down. That verification is intended, in particular, to enable the contracting authority to ensure that the successful tenderer will indeed be able to use whatever resources it relies on throughout the period covered by the contract.

29 Thus, where, in order to prove its financial, economic and technical standing with a view to being admitted to participate in a tendering procedure, a company relies on the resources of entities or undertakings with which it is directly or indirectly linked, whatever the legal nature of those links may be, it must establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (see, to the same effect, as regards Directives 71/304 and 71/305, Ballast Nedam Groep I, paragraph 17).

30 It is for the national court to assess the relevance of the evidence adduced to that effect. In the context of that assessment, Directive 92/50 does not permit the exclusion, without due analysis, of specific types of proof or the assumption that the service provider has available to it resources belonging to third parties merely by virtue of the fact that it forms part of the same group of undertakings.

31 Consequently, the answer to be given to the question referred must be that Directive 92/50 is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract. It is for the

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national court to assess whether the requisite evidence in that regard has been adduced in the main proceedings.

DOCNUM	61998J0176
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1998 ; J ; judgment
PUBREF	European Court reports 1999 Page I-08607
DOC	1999/12/02
LODGED	1998/05/11
JURCIT	31971L0304 : N 23 26 29 31971L0305 : N 23 26 29 31992L0050-A23 : N 28 31992L0050-A25 : N 6 24 31992L0050-A26 : N 7 24 31992L0050-A31 : N 4 31992L0050-A31P3 : N 25 31992L0050-A32 : N 5 31992L0050-A32P2LC : N 25 31992L0050-C6 : N 23 31992L0050 : N 1 16 30 31 61992J0389-N06 : N 23 61992J0389-N12 : N 25 61992J0389-N15 : N 26 61992J0389-N17 : N 29
CONCERNS	Interprets 31992L0050
SUB	Approximation of laws
AUTLANG	Italian
OBSERV	Italy ; Netherlands ; Austria ; Commission ; Member States ; Institutions
NATIONA	Italy
NATCOUR	*A9* Tribunale Amministrativo Regionale della Sardegna, sentenza del 10/02/98

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Puissochet

DATES of document: 02/12/1999
of application: 11/05/1998

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Judgment of the Court (Fifth Chamber)
of 9 September 1999
RI.SAN. Srl v Comune di Ischia, Italia Lavoro SpA and Ischia Ambiente SpA.
Reference for a preliminary ruling: Tribunale amministrativo regionale della Campania - Italy.
Freedom of establishment - Freedom to provide services - Organisation of urban waste collection service.
Case C-108/98.

Freedom of movement for persons - Freedom of establishment - Freedom to provide services - Derogations - Situations purely internal to a Member State - Derogation not possible

(EC Treaty, Arts 55 and 66 (now Arts 45 EC and 55 EC))

$$The possibility - provided for in Article 55 of the Treaty (now Article 45 EC), read together, where appropriate, with Article 66 thereof (now Article 55 EC) - of derogating from the Treaty provisions concerning freedom of establishment and freedom to provide services does not arise in a situation in which all the facts are confined to within a single Member State and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of freedom of movement for persons or freedom to provide services.

In Case C-108/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale Amministrativo Regionale della Campania, Italy, for a preliminary ruling in the proceedings pending before that court between

RI.SAN. Srl

and

Comune di Ischia, Italia Lavoro SpA, formerly GEPI SpA, Ischia Ambiente SpA,

on the interpretation of Articles 55 and 90(2) of the EC Treaty (now Articles 45 EC and 86(2) EC),

THE COURT

(Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann (Rapporteur), C. Gulmann, D.A.O. Edward and L. Sevon, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- the Comune di Ischia, by Roberto Montemurro, of the Naples Bar,

- Italia Lavoro SpA, by Francesco Castiello and Giuseppe Ricapito, of the Rome Bar,

- the Italian Government, by Professor Umberto Leanza, Head of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato,

- the Commission of the European Communities, by Michel Nolin and Laura Pignataro, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

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after hearing the oral observations of RI.SAN. Srl, represented by Arcangelo d'Avino, of the Naples Bar; of Italia Lavoro SpA, represented by Antonio Tizzano and Francesco Sciaudone, of the Naples Bar; of Ischia Ambiente SpA, represented by L. Bruno Molinaro, of the Naples Bar; of the Italian Government, represented by Pier Giorgio Ferri; and of the Commission, represented by Michel Nolin and Laura Pignataro, at the hearing on 4 February 1999,

after hearing the Opinion of the Advocate General at the sitting on 18 March 1999,

gives the following

Judgment

1 By orders of 19 November and 11 December 1997, received at the Court on 9 April 1998, the Tribunale Amministrativo Regionale della Campania (General Administrative Court for Campania) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 55 and 90(2) of the EC Treaty (now Articles 45 EC and 86(2) EC).

2 Those questions have been raised in proceedings between RI.SAN. Srl (hereinafter `RI.SAN.') and the Municipality of Ischia, Italia Lavoro SpA (hereinafter `Italia Lavoro'), formerly GEPI SpA (hereinafter `GEPI'), and Ischia Ambiente SpA (hereinafter `Ischia Ambiente') concerning the organisation by the Municipality of a solid urban waste collection service.

The national legislation

3 Article 22(3) of Law No 142/90 of 8 June 1990 on local autonomy (GURI No 135 of 12 June 1990) provides that municipalities and provinces may use the following management forms for local public services for which they are responsible under the law:

`(a) public management, where, owing to the small size or the characteristics of the service, it is not expedient to create an institution or an undertaking;

(b) concessions to third parties, where there are technical, economic or social expediency reasons;

(c) by special undertakings, inter alia for the management of several services of economic and commercial interest;

(d) by institutions, for the provision of social services not having any commercial interest;

(e) by mixed-capital limited companies with a majority public holding, where participation by other public or private persons appears expedient owing to the nature of the service to be provided.'

4 Article 4(6) of Law No 95/95 of 29 March 1995 on mixed-capital public service companies (GURI No 77 of 1 April 1995), amending Decree-Law No 26/95 of 31 January 1995 (GURI No 26 of 31 January 1995), provides:

`In order to promote employment or re-employment of workers, the municipalities and the provinces may form limited companies with GEPI SpA, inter alia for the purpose of operating local public services.'

5 Article 4(8) of that Law provides that `the shareholdings of GEPI SpA in the companies referred to in this article shall be transferred within five years by public tender'.

6 GEPI is a financial company formed pursuant to Article 5 of Law No 184/71 of 22 March 1971 (GURI No 105 of 28 April 1971). Its objects are to assist in maintaining and increasing the level of employment. Its share capital is held entirely by the Treasury Minister.

Facts and main proceedings

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7 By decision of the municipal council of 19 March 1996, the Municipality of Ischia formed a mixed-capital limited company under Article 22(3)(e) of Law No 142/90 to run the solid urban waste collection service. Pursuant to Article 4(6) of Law No 95/95, the share capital of the company was held as to 51% by the municipality and as to 49% by GEPI. By decision of 7 November 1996, the municipal council entrusted to that company, Ischia Ambiente, the solid urban waste collection service which had previously been provided by RI.SAN., which held a contract due to expire on 4 January 1997.

8 By two actions, RI.SAN. challenged the municipal council decisions claiming, in particular, that the choice of private partner should have been made through public tender procedure and that the waste collection service should also have been awarded under such a procedure.

9 The court which has made this reference has expressed doubts about the compatibility with community law, more particularly with the principle of freedom to provide services and the principle of free competition, of Article 4(6) of Law No 95/95, which allows a local authority to choose GEPI as a partner for the management of local public services without any prior invitation to tender.

10 It ruled, however, that Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) was not relevant in determining the case, since the case did not concern the award of a public service contract but the award of a public service concession.

11 In those circumstances the Tribunale Amministrativo Regionale della Campania decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

`1 Must Article 55 of the Treaty (which is applicable inter alia to the services sector by virtue of the reference in Article 66 of the Treaty), pursuant to which "[t]he provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority", be interpreted so widely as to include the activities of GEPI SpA (now Italinvest SpA) as a participant in local authorities' mixed companies for the management of local public services, within the meaning of Article 4(6) of Law No 95 of 29 March 1995 (converting into law, with amendments, Decree-Law No 26 of 31 January 1995), where that participation purports to be for the purpose of "promoting employment or re-employment of workers" already assigned to the service the management of which is at issue, having regard to Article 5 of Law No 184 of 22 March 1971 establishing GEPI SpA, which gives GEPI the task of "contributing to the maintenance and growth of employment levels facing temporary difficulties, such as to demonstrate the specific possibility of reorganising the undertakings concerned", in the manner set out therein?

2. In view of the abovementioned legislation governing GEPI SpA (now Italinvest SpA), may there be applicable to this case the derogation provided for in Article 90(2) of the Treaty, according to which "[u]ndertakings entrusted with the operation of services of general economic interest... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of those rules does not obstruct the performance in law or in fact, of the particular tasks assigned to them"?'

The subject-matter of the reference

12 The Municipality of Ischia, Italia Lavoro, Ischia Ambiente, the Italian Government and the Commission have submitted observations on the question whether the procedure for choosing the entity entrusted with running the waste collection service may be covered by the provisions of Directive 92/50.

13 That directive applies to the award of public service contracts which are defined, in Article 1(a), as contracts for pecuniary interest concluded in writing between a service provider and a

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contracting authority.

14 The national court has, however, expressly excluded the relevance of Directive 92/50, on the ground that only a public service concession was involved, and not a public service contract.

15 The definition of public service concession within the meaning of the Community rules on public contracts and the question whether such a concession is excluded from the scope of Directive 92/50 are matters governed by Community law. Such questions may therefore be the subject of a reference for a preliminary ruling, under Article 177 of the Treaty, if a national court considers that a decision on one of those questions is necessary in order to give judgment.

16 However, even supposing, contrary to the position taken here by the referring court, that Directive 92/50 is relevant in determining the case before it, it must be observed that the reference and the questions raised relate only to the provisions of the Treaty and that the referring court has not provided the factual information which would be necessary for the Court to rule on the interpretation of that directive.

17 In those circumstances, the Court must confine its answer to the provisions of the Treaty expressly mentioned in the questions referred for a preliminary ruling.

The first question

18 By its first question, the referring court asks essentially whether Article 55 of the Treaty is to be interpreted as allowing a municipality to choose, without any prior invitation to tender, a financial company as a partner in a mixed-capital company with a majority public shareholding having as its object the running of the solid urban waste collection service.

19 As far as that question is concerned, it should be observed that the application of Article 55 of the Treaty, read in combination, where appropriate, with Article 66 of the EC Treaty (now Article 55 EC), in so far as they form a derogation from the provisions of the Treaty relating respectively to freedom of establishment and to the freedom to provide services, presupposes that those latter provisions are applicable in principle.

20 According to the referring court's analysis, the correctness of which the Court is unable to verify, the award of a public service contract is not at issue in the main proceedings. However, that does not rule out the possibility that provisions of the Treaty on freedom of movement, which impose in particular on the Member States obligations to ensure equal treatment and transparency vis-à-vis economic operators from other Member States, may be relevant.

21 However, the case-file shows that RI.SAN., which challenges the legality of the choice made by the municipality, has its seat in Italy and does not operate on the Italian market in reliance on freedom of establishment or freedom to provide services.

22 Such a situation does not therefore have any connecting link with one of the situations envisaged by Community law in the area of the free movement of persons and services.

23 The answer to be given to the first question must therefore be that Article 55 of the Treaty does not apply in a situation such as that in the main proceedings in which all the facts are confined to within a single Member State and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of the freedom of movement for persons and freedom to provide services.

The second question

24 By its second question, the national court asks essentially whether Article 90(2) of the Treaty is to be interpreted as allowing a municipality to choose, without any prior invitation to tender, a financial company as partner in a mixed limited company with a majority public shareholding having

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as its object the running of the solid urban waste collection service.

25 It must be remembered that Article 90(2) constitutes a derogation from the rules of the Treaty, in particular its competition rules, whose application it therefore presupposes.

26 However, as indicated above, in paragraphs 19 to 22, the provisions relating to freedom of movement for persons and freedom to provide services do not apply in a situation such as that existing in the main proceedings. Moreover, neither the order for reference nor the written observations provide the Court with the factual and legal information which would enable it to interpret the other rules of the Treaty, in particular the competition rules, in relation to the situation created by the choice, without a prior invitation to tender, of GEPI as partner in a company with a majority public shareholding having as its object the running of the solid urban waste collection service.

27 In those circumstances, the Court is unable to provide a useful answer to the second question.

Costs

28 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Tribunale Amministrativo Regionale della Campania by orders of 19 November and 11 December 1997, hereby rules:

Article 55 of the EC Treaty (now Article 45 EC) does not apply in a situation such as that in the main proceedings in which all the facts are confined to within a single Member State and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of the freedom of movement for persons and freedom to provide services.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1998 ; J ; judgment
PUBREF	European Court reports 1999 Page I-05219
DOC	1999/09/09
LODGED	1998/04/09

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JURCIT	11992E055 : N 1 11 18 - 23 11992E066 : N 19 11992E090-P2 : N 1 11 24 25 11992E177 : N 15 31992L0050-A01LA : N 13 31992L0050 : N 15 16
CONCERNS	Interprets 11992E055
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws ; Competition ; Rules applying to undertakings
AUTLANG	Italian
OBSERV	Italy ; Commission ; Member States ; Institutions
NATIONA	Italy
NATCOUR	*A9* Tribunale Amministrativo Regionale della Campania, Sede di Napoli, Sezione I, sentenza del 19/11/97 11/12/97 (999/98)
NOTES	X: Giurisprudenza italiana 1999 p.2391-2392 Savia, Elena: Defensor Legis 2000 no 5 p.826-835
PROCEDU	Reference for a preliminary ruling
ADVGEN	Alber
JUDGRAP	Jann
DATES	of document: 09/09/1999 of application: 09/04/1998

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Judgment of the Court (Fifth Chamber)
of 18 November 1999
Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia.
Reference for a preliminary ruling: Tribunale amministrativo regionale per l'Emilia-Romagna - Italy.
Public service and public supply contracts - Directives 92/50/EEC and 93/36/EEC - Award by a local authority of a contract for the supply of products and provision of specified services to a consortium of which it is a member.
Case C-107/98.

1 Preliminary rulings - Jurisdiction of the Court - Extraction of the relevant points of Community law - Jurisdiction of the national courts - Application of provisions as interpreted

(EC Treaty, Art. 177 (now Art. 234 EC))

2 Approximation of laws - Procedures for the award of public supply contracts - Directive 93/36 - Scope - Contracts awarded by a contracting authority to a distinct and independent body - Covered - Where the successful tenderer is itself a contracting authority - Irrelevant

(Council Directives 92/50, Art. 6, and 93/36)

1 Where, under the procedure provided for by Article 177 of the Treaty (now Article 234 EC), questions are formulated imprecisely, the Court may extract - from all the information provided by the national court and from the documents concerning the main proceedings - the points of Community law requiring interpretation, having regard to the subject-matter of the dispute. In order to provide the national court with a satisfactory answer, the Court may deem it necessary to consider provisions of Community law which the national court has not mentioned in its question. On the other hand, by virtue of the division of functions provided for under the above provision, it is for the national court to apply the rules of Community law, as interpreted by the Court, to a specific case. No such application is possible without a comprehensive appraisal of the facts of the case.

2 Directive 93/36 coordinating procedures for the award of public supply contracts is applicable in cases where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making - which is not the position where the local authority exercises over a legally distinct person a form of control similar to that exercised over its own departments and, at the same time, the person carries out the essential part of its activities together with the controlling local authority or authorities - a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

The only permitted exceptions to the application of Directive 93/36 are those which are exhaustively and expressly mentioned therein. That Directive does not contain any provision comparable with Article 6 of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, which excludes from its scope public contracts awarded, under certain conditions, to contracting authorities.

In Case C-107/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale Amministrativo Regionale per l'Emilia-Romagna, Italy, for a preliminary ruling in the proceedings pending before that court between

Teckal Srl

and

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Comune di Viano, Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia

on the interpretation of Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT

(Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevon, J.-P. Puissochet, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: G. Cosmas,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Teckal Srl, by A. Soncini and F. Soncini, of the Parma Bar, and P. Adami, of the Rome Bar,

- Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, by E.G. Di Fava, of the Reggio d'Emilia Bar, and G. Cugurra, of the Parma Bar,

- the Italian Government, by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato,

- the Belgian Government, by J. Devadder, General Adviser in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

- the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

- the Commission of the European Communities, by P. Stancanelli, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Teckal Srl, represented by A. Soncini and P. Adami; Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, represented by G. Cugurra; the Italian Government, represented by P.G. Ferri; the French Government, represented by A. Bréville-Viéville, Chargé de Mission in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by P. Stancanelli, at the hearing on 6 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 1 July 1999,

gives the following

Judgment

Costs

52 The costs incurred by the Italian, Belgian, French and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber),

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in answer to the question referred to it by the Tribunale Amministrativo Regionale per l'Emilia-Romagna by order of 10 March 1998, hereby rules:

Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts is applicable in the case where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision- making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

1 By order of 10 March 1998, received at the Court on 14 April 1998, the Tribunale Amministrativo Regionale per l'Emilia-Romagna (Regional Administrative Court for Emilia Romagna) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 That question has arisen in proceedings between Teckal Srl (`Teckal'), on the one hand, and the Municipality of Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (`AGAC'), on the other, concerning the award by that municipality of the contract for the management of the heating services for certain municipal buildings.

Community legislation

3 Article 1(a) and (b) of Directive 92/50 provides as follows:

`For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority...

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

...'

4 Article 2 of Directive 92/50 provides:

`If a public contract is intended to cover both products within the meaning of Directive 77/62/EEC and services within the meaning of Annexes I A and I B to this Directive, it shall fall within the scope of this Directive if the value of the services in question exceeds that of the products covered by the contract.'

5 Article 6 of Directive 92/50 provides that:

`This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

6 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) repealed Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1). References to the repealed directive are, pursuant to Article 33 of Directive 93/36, to be construed as references to the latter directive.

7 Article 1(a) and (b) of Directive 93/36 provides as follows:

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`For the purpose of this Directive:

(a) "public supply contracts" are contracts for pecuniary interest concluded in writing involving the purchase, lease [,] rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...'

National legislation

8 Under Article 22(1) of Italian Law No 142 of 8 June 1990 on the organisation of local authorities (GURI No 135 of 12 June 1990) (`Law No 142/90'), municipalities are to provide for the management of public services involving the production of goods and the performance of activities designed to achieve social purposes and to promote economic and civil development of local communities.

9 Article 22(3) of Law No 142/90 provides that municipalities may ensure the performance of these services on a work-and-materials basis, by way of concession to third parties, or by having recourse to special undertakings, non profit-making institutions or companies in which local public authorities hold the majority of shares.

10 Article 23 of Law No 142/90, which defines special undertakings and non-profit making institutions, provides as follows:

`1. A special undertaking is a body (ente strumentale) established by a local entity, having legal personality, commercial autonomy and its own statutes, approved by the municipal or provincial council.

...

3. The organs of the undertaking and of the institution shall be the board of management, the chairman and the director who assumes managerial responsibility. The detailed arrangements for appointment and removal of members of the board of management shall be laid down by the statutes of the local authority.

4. In performing their activities, the undertaking and institution must satisfy criteria of effectiveness, efficiency and profitability, and must achieve a balanced budget by balancing costs and receipts, including transfers.

...

6. The local administration shall provide the start-up capital, define objectives and policy, approve the documents of constitution, exercise supervision, monitor management results, and cover any social costs which may arise.

...'

11 Under Article 25 of Law No 142/90, the municipalities and provinces may, for purposes of the joint management of one or more services, set up a consortium in accordance with the provisions governing the special undertakings referred to in Article 23. To that end, each municipal council must approve, by absolute majority, an agreement at the same time as the statutes of the consortium. The general meeting of the consortium shall be composed of the representatives of the member entities, represented by the mayor, the chairman or their deputies. The general meeting shall elect the board of management and approve the documents of constitution prescribed by the statutes.

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12 AGAC is a consortium set up by several municipalities - including that of Viano - to manage energy and environmental services, pursuant to Article 25 of Law No 142/90. Under Article 1 of its Statutes (`the Statutes'), it has legal personality and operational autonomy. Article 3(1) of the Statutes states that its function is to assume direct responsibility for, and manage, a number of listed public services, which include `gas for civil and industrial purposes; heating for civil and industrial purposes; activities related and ancillary to the above'.

13 Under Article 3(2) to (4) of the Statutes, AGAC may extend its activities to other related or ancillary services, hold shares in public or private companies or have interests in bodies for the management of related or ancillary services, and, finally, provide services or supplies to private persons or to public bodies other than the member municipalities.

14 Under Articles 12 and 13 of the Statutes, the most important managerial acts, which include preparation of accounts and budgets, must be approved by the general meeting of AGAC, consisting of representatives of the municipalities. The other managerial bodies are the council, the chairman of the council and the director-general. They are not answerable to the municipalities for their managerial acts. The natural persons who sit on these bodies do not exercise any functions in the member municipalities.

15 Under Article 25 of the Statutes, AGAC must achieve a balanced budget and operational profitability. Pursuant to Article 27 of the Statutes, the municipalities provide AGAC with funds and assets, in respect of which AGAC pays them annual interest. Article 28 of the Statutes provides that any profits in the financial year are to be allocated among the member municipalities, retained by AGAC to increase its reserve funds, or reinvested in other AGAC activities. Under Article 29 of the Statutes, where a loss occurs, the financial deficit may be corrected through, inter alia, the injection of new capital by the member municipalities.

16 Article 35 of the Statutes provides for arbitration to resolve any disputes between the member municipalities or between those municipalities and AGAC.

The dispute in the main proceedings

17 By Decision No 18 of 24 May 1997 (`the Decision'), the municipal council of Viano conferred on AGAC the management of the heating service for a number of municipal buildings. That decision was not preceded by any invitation to tender.

18 The task of AGAC lies, specifically, in the area of the operation and maintenance of the heating installations of the municipal buildings in question, including any necessary repairs and improvements, and the supply of fuel.

19 The remuneration of AGAC was fixed at ITL 122 million for the period from 1 June 1997 to 31 May 1998. Of that amount, the value of the fuel supplied represents 86 million and the cost of operation and maintenance of the installations represents 36 million.

20 Under Article 2 of the Decision, at the expiry of the initial one-year period, AGAC undertakes to continue providing the service for a further period of three years, at the request of the Municipality of Viano, following modification of the conditions set out in the Decision. Provision is also made for a subsequent extension.

21 Teckal is a private company operating in the area of heating services. In particular, it supplies heating oil to individuals and public bodies, purchasing it beforehand from producer undertakings. It also services oil- and gas-operated heating installations.

22 Teckal brought proceedings before the Tribunale Amministrativo Regionale per l'Emilia-Romagna, in which it argued that the Municipality of Viano should have followed the tendering procedures for public contracts required under Community legislation.

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23 The national court, which is uncertain as to whether Directive 92/50 or Directive 93/36 is applicable, takes the view that, in any event, the application threshold of ECU 200 000 laid down in both directives was exceeded.

24 In view of the twofold nature of the task entrusted to AGAC, which consists, first, in providing a variety of services, and, second, in supplying fuel, the national court formed the view that it could not discount the applicability of Article 6 of Directive 92/50.

25 In those circumstances, the Tribunale Amministrativo Regionale stayed proceedings and requested the Court to interpret Article 6 of Directive 92/50 `from the points of view set out in the grounds of this judgment'.

Admissibility

26 AGAC and the Austrian Government contend that the question submitted for preliminary ruling is inadmissible. AGAC submits, first, that the amount of the contract at issue in the main proceedings is below the threshold laid down in Directives 92/50 and 93/36. The price of fuel, it argues, should be deducted from the estimated amount of the contract, inasmuch as AGAC, being itself a contracting authority, acquires its stock of fuels through public tendering procedures. Furthermore, the contract in question is not one of indeterminate duration.

27 Second, AGAC contends that the request for a preliminary ruling concerns in reality the interpretation of national law. The national court is in fact asking the Court to interpret certain provisions of national law to enable it to determine whether the exception under Article 6 of Directive 92/50 applies.

28 For its part, the Austrian Government submits that the request for a preliminary ruling is inadmissible on the ground that it does not contain any question. In the area of the law relating to public contracts, it is particularly important that questions should be precisely formulated.

29 As regards, first of all, the question whether the value of the contract in question exceeds the threshold laid down in Directives 92/50 and 93/36, it should be borne in mind that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, which means that, when ruling on the interpretation or validity of Community provisions, the Court of Justice is empowered to do so only on the basis of the facts which the national court puts before it (see, in particular, Case C-30/93 AC-ATEL Electronics Vertriebs v Hauptzollamt München-Mitte [1994] ECR I-2305, paragraph 16).

30 In that context, it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (AC-ATEL Electronics Vertriebs, cited above, paragraph 17).

31 While it is true, therefore, that the method for calculating the amount of the contract is defined in the Community provisions, that is to say, Article 7 of Directive 92/50 and Article 5 of Directive 93/36, on the interpretation of which the national court may, if necessary, submit questions for a preliminary ruling, it is, none the less, by virtue of the division of functions provided for by Article 177 of the Treaty, for the national court to apply the rules of Community law to a specific case. No such application is possible without a comprehensive appraisal of the facts of the case (see Case C-320/88 Staatssecretaris van Financien v Shipping and Forwarding Enterprise Safe [1990] ECR I-285, paragraph 11).

32 It follows that the Court cannot substitute its own appraisal in regard to the calculation of the value of the contract for that of the national court and conclude, on the basis of its appraisal, that the reference for a preliminary ruling is inadmissible.

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33 Next, it must be pointed out that in the context of Article 177 of the Treaty the Court has no jurisdiction to rule either on the interpretation of provisions of national laws or regulations or on their conformity with Community law. It may, however, supply the national court with an interpretation of Community law that will enable that court to resolve the legal problem before it (Case C-17/92 Federacion de Distribuidores Cinematograficos v Spanish State [1993] ECR I-2239, paragraph 8).

34 Finally, according to settled case-law, it is for the Court alone, where questions are formulated imprecisely, to extract from all the information provided by the national court and from the documents in the main proceedings the points of Community law which require interpretation, having regard to the subject-matter of those proceedings (Case 251/83 Haug-Adrion v Frankfurter Versicherungs-AG [1984] ECR 4277, paragraph 9, and Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 21).

35 In the light of the information contained in the order for reference, the national court must be understood to be asking, essentially, whether the provisions of Community law governing the award of public contracts are applicable in a case where a local authority entrusts the supply of products and the provision of services to a consortium of which it is a member, in circumstances such as those in point in the main proceedings.

36 The reference for a preliminary ruling must therefore be declared admissible.

Substance

37 It is clear from the order for reference that the Municipality of Viano entrusted to AGAC, by a single measure, both the provision of certain services and the supply of certain products. It is also common ground that the value of those products is greater than that of the services.

38 It follows a contrario from Article 2 of Directive 92/50 that, if a public contract relates both to products within the meaning of Directive 93/36 and to services within the meaning of Directive 92/50, it will fall within the scope of Directive 93/36 if the value of the products covered by the contract exceeds that of the services.

39 In order to provide a satisfactory answer to the national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in its question (Case 35/85 Procureur de la République v Tissier [1986] ECR 1207, paragraph 9, and Case C-315/88 Bagli Pennacchiotti [1990] ECR I-1323, paragraph 10).

40 It follows that, in order to provide an interpretation of Community law which will be of assistance to the national court in this case, it is necessary to interpret the provisions of Directive 93/36, not Article 6 of Directive 92/50.

41 In order to determine whether the fact that a local authority entrusts the supply of products to a consortium in which it has a holding must give rise to a tendering procedure as provided for under Directive 93/36, it is necessary to consider whether the assignment of that task constitutes a public supply contract.

42 If that is the case, and if the estimated amount of the contract, without value added tax, is equal to or greater than ECU 200 000, Directive 93/36 will apply. Whether the supplier is or is not a contracting authority is not conclusive in this regard.

43 It should be pointed out that the only permitted exceptions to the application of Directive 93/36 are those which are exhaustively and expressly mentioned therein (see, with reference to Directive 77/62, Case C-71/92 Commission v Spain [1993] ECR I-5923, paragraph 10).

44 Directive 93/36 does not contain any provision comparable to Article 6 of Directive 92/50,

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which excludes from its scope public contracts awarded, under certain conditions, to contracting authorities.

45 It should also be noted that this finding does not affect the obligation on those contracting authorities to apply in turn the tendering procedures laid down in Directive 93/36.

46 In its capacity as a local authority, the Municipality of Viano is a contracting authority within the meaning of Article 1(b) of Directive 93/36. It is therefore a matter for the national court to ascertain whether the relationship between the Municipality of Viano and AGAC also meets the other conditions which Directive 93/36 lays down for a public supply contract.

47 That will, in accordance with Article 1(a) of Directive 93/36, be the case if the contract in question is a contract for pecuniary interest, concluded in writing, involving, inter alia, the purchase of products.

48 It is common ground in the present case that AGAC supplies products, namely fuel, to the Municipality of Viano in return for payment of a price.

49 As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons.

50 In that regard, in accordance with Article 1(a) of Directive 93/36, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

51 The answer to the question must therefore be that Directive 93/36 is applicable in the case where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

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SUB Approximation of laws

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PROCEDU Reference for a preliminary ruling

ADVGEN Cosmas

JUDGRAP Jann

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Judgment of the Court (Sixth Chamber)
of 28 October 1999
Alcatel Austria AG and Others, Siemens AG Osterreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public procurement - Procedure for the award of public supply and works contracts - Review procedure.
Case C-81/98.

1 Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directive 89/665 - Decision awarding contracts - Member States under an obligation to provide full legal protection for tenderers

(Council Directive 89/665, Art. 2(1)(a) and (b) and Art. 2(6), second subpara.)

2 Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directive 89/665 - Member States under an obligation to provide for review procedures in respect of decisions awarding contracts - Where national legislation does not enable the protection provided for by the Directive to be ensured - Obligation to remedy damage to individuals where it is not possible to interpret national law consistently with the Directive

(Council Directive 89/665, Art. 2(1)(a) and (b))

1 The combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts must be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review under a procedure whereby unsuccessful tenderers may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.

2 Article 2(1)(a) and (b) of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts cannot be interpreted to the effect that, even where there is no award decision which may be the subject of an application to have it set aside, the bodies in the Member States having power to review public procurement procedures may hear applications under the conditions laid down in that provision.

In such circumstances, if provisions of national law cannot be interpreted in a manner consistent with Directive 89/665, those concerned may seek compensation, in accordance with the appropriate procedures under national law, for the damage suffered by reason of the failure to transpose the Directive within the prescribed period.

In Case C-81/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between

Alcatel Austria AG and Others,

Siemens AG Osterreich,

Sag-Schrack Anlagentechnik AG

and

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Bundesministerium für Wissenschaft und Verkehr

on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33),

THE COURT

(Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), acting for the President of the Chamber, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: J. Mischo,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Alcatel Austria AG and Others, by S. Köck and M. Oder, Rechtsanwälte, Vienna,

- Siemens AG Osterreich, by M. Breitenfeld, Rechtsanwalt, Vienna,

- Bundesministerium für Wissenschaft und Verkehr, by W. Peschorn, Oberkommissär in the Finanzprokuratur,

- the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

- the Commission of the European Communities, by M. Nolin and B. Brandtner, of its Legal Service, acting as Agents, with R. Roniger, of the Brussels Bar,

- the EFTA Surveillance Authority, by H. Ottarsdottir, Officer, Legal and Executive Affairs, EFTA Surveillance Authority, and T. Thomassen, Senior Officer, Goods Directorate, EFTA Surveillance Authority, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Siemens AG Osterreich, represented by M. Breitenfeld, of the Bundesministerium für Wissenschaft und Verkehr, represented by W. Peschorn, of the Austrian Government, represented by M. Fruhmann of the Federal Chancellor's Office, acting as Agent, of the German Government, represented by W.-D. Plessing, Ministerialrat in the Federal Ministry of Finance, acting as Agent, of the United Kingdom Government, represented by M. Hoskins, Barrister, and of the Commission, represented by R. Roniger, at the hearing on 28 April 1999,

after hearing the Opinion of the Advocate General at the sitting on 10 June 1999,

gives the following

Judgment

Costs

51 The costs incurred by the Austrian, German and United Kingdom Governments, by the Commission of the European Communities and by the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

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(Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 3 March 1998, hereby rules:

1. The combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts must be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.

2. Article 2(1)(a) and (b) of Directive 89/665 cannot be interpreted to the effect that, even where there is no award decision which may be the subject of an application to have it set aside, the bodies in the Member States having power to review public procurement procedures may hear applications under the conditions laid down in that provision.

1 By order of 3 March 1998, received at the Court on 25 March 1998, the Bundesvergabeamt (Federal Procurement Office) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

2 The questions arose in a dispute between Alcatel Austria AG and Others, Siemens AG Osterreich and Sag-Schrack Anlagentechnik AG on the one hand and the Bundesministerium für Wissenschaft und Verkehr (Federal Ministry of Science and Transport, `the Bundesministerium') on the other concerning the award of a public supply and works contract.

Legal background

Community law

3 Article 1 of Directive 89/665 provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

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4 Article 2(1) of Directive 89/665 provides:

`The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) ...'.

5 Article 2(6) of Directive 89/665 states:

`The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

Austrian law

6 In Austria public procurement is governed, with regard to the Federal State, by the Bundesvergabegesetz (Federal Procurement Law, BGBl. No 462/1993, `the BVergG'), in the version prior to the 1997 amendments (BGBl. No 776/1996).

7 Paragraph 9, point 14, thereof defines the award as the declaration made to the tenderer, accepting his tender.

8 Under Paragraph 41(1), the contractual relationship between the authority and the tenderer comes into being, within the period allowed for making the award, when the tenderer receives notification of the acceptance of his offer.

9 Under Paragraph 91(2), the Bundesvergabeamt may, up to the time the award is made, adopt interim measures and set aside unlawful decisions of the awarding department of the contracting authority for the purpose of removing infringements of the BVergG and of the regulations made thereunder.

10 Paragraph 91(3) provides that, once the contract has been awarded, the Bundesvergabeamt has power to determine that as a result of an infringement of the BVergG or of the regulations made thereunder the award was not made to the tenderer making the best offer.

11 Paragraph 94 provides inter alia:

`1. The Bundesvergabeamt must set aside by way of a decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure which

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) significantly affects the outcome of the award procedure.

...'.

Facts

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12 On 23 May 1996, the Bundesministerium published an invitation to tender for the supply, installation and demonstration of all the hardware and software components of an electronic system for automatic data transmission to be installed on Austrian motorways.

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13 The invitation to tender was issued in accordance with the open procedure provided for in Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

14 On 5 September 1996 the contract in question was awarded to Kapsch AG and it was signed on the same day. The other tenderers, who learned of the contract through the press, applied between 10 and 22 September 1996 to the Bundesvergabeamt for review.

15 On 18 September 1996, the Bundesvergabeamt dismissed the applications for interim measures to suspend performance of the contract on the ground that, pursuant to Paragraph 91(2) of the BVergG, once an award is made it no longer has power to make interim orders. A complaint was lodged against that decision with the Verfassungsgerichtshof (Constitutional Court).

16 Pursuant to Paragraph 91(3) of the BVergG, the Bundesvergabeamt determined, by decision of 4 April 1997, that various breaches of the BVergG had occurred and brought the review procedure to an end.

17 The decision of the Bundesvergabeamt of 18 September 1996 was set aside by the Verfassungsgerichtshof.

18 In view of that judgment, the Bundesvergabeamt reopened the procedure terminated on 4 April 1997 in order to examine the merits, and on 18 August 1997 made an order provisionally prohibiting the contracting authority from further performance of the contract concluded on 5 September 1996.

19 The Republic of Austria lodged a complaint against that order before the Verfassungsgerichtshof which, by order of 10 October 1997, gave suspensive effect to the complaint, with the result that the interim measure adopted by the Bundesvergabeamt on 18 August 1997 was provisionally inoperative.

20 In its order for reference, the Bundesvergabeamt states that the BVergG does not deal separately with the public law and private law aspects in the procedure for the award of contracts. Rather, the contracting authority participates in the procedure exclusively as a bearer of private rights, which means that the State as contracting authority employs the rules, forms and methods of civil law. Under Paragraph 41(1) of the BVergG, the contractual relationship between the authority and the tenderer comes into being, within the period allowed for making the award, when the tenderer receives notification of the acceptance of his offer.

21 Consequently, the national court states, the award and the conclusion of the contract in Austria do not as a rule formally occur at the same time. The decision of the contracting authority as to the party with whom it wishes to contract is normally made before it is incorporated in writing, and the decision on its own is not sufficient to create the contract, since the tenderer must at the very least receive notice of that decision; in practice, however, the contracting authority's decision as to whom to award the contract is one taken internally without, under Austrian law, any public manifestation thereof. Accordingly, from the outsider's point of view the declaration of the award and the conclusion of the contract occur together, since, as a rule, the outsider does not have and cannot have, at any rate legally, any knowledge of the internal decision of the contracting authority. The award decision itself, that is to say the decision of the contracting authority as to the party with whom it wishes to contract, is not open to challenge. The point in time at which the award is made is of decisive importance for the review procedure before the Bundesvergabeamt.

22 The national court states that under Paragraph 91(2) of the BVergG the Bundesvergabeamt has power up to the time the award is made to adopt interim measures and to set aside unlawful decisions

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of the awarding department of the contracting authority for the purpose of removing infringements of the BVergG and of the regulations made thereunder. After the award has been made, it merely has power to determine that as a result of an infringement of the BVergG or of the regulations made thereunder the award was not made to the tenderer making the best offer. In the case of culpable infringement of the BVergG by agents of an awarding body, Paragraph 98(1) thereof provides that compensation is payable to the unsuccessful candidate or tenderer by the contracting authority to which the conduct of those agents is attributable.

23 Lastly, the national court notes that, under Paragraph 102(2) of the BVergG, a claim for compensation before the ordinary courts in such a case is admissible only if there has been a prior determination by the Bundesvergabeamt within the meaning of Paragraph 91(3). Irrespective of Paragraph 91(3), the courts and the parties to the procedure before the Bundesvergabeamt are bound by that determination. It is evident from the structure of the review procedure that, in respect of the area covered by the BVergG, the Austrian federal legislature has opted under Article 2(6) of Directive 89/665/EEC to limit the remedy to an award of damages.

Questions referred for a preliminary ruling

24 In those circumstances, the Bundesvergabeamt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

`1. When implementing Directive 89/665/EEC, are Member States required by Article 2(6) thereof to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which, in the light of the procedure's results, it will conclude the contract (i.e. the award decision) is in any event open to a procedure whereby an applicant may have that decision annulled if the relevant conditions are met, notwithstanding the possibility once the contract has been concluded of restricting the legal effects of the review procedure to an award of damages?

2. If Question 1 is answered in the affirmative:

Is the obligation described in Question 1 sufficiently clear and precise to confer on individuals the right to a review corresponding to the requirements of Article 1 of Directive 89/665/EEC, in which the national court must in any event be able to adopt interim measures within the meaning of Article 2(1)(a) and (b) of that directive and to annul the contracting authority's award decision, and the right to rely in proceedings on that obligation as against a Member State?

3. If Question 2 is answered in the affirmative:

Is the obligation described under Question 1 also sufficiently clear and precise to mean that in such a procedure the national court must disregard contrary provisions of national law which would prevent the court from fulfilling that obligation, and must fulfil that obligation directly as part of Community law even if national law lacks any basis on which to act?'

Admissibility

25 The Bundesministerium and the Austrian Government contend that, in so far as the contract has already been performed in its entirety, there is in reality no longer a dispute in the main proceedings. The answer to the questions raised will therefore be irrelevant, since the applicants in the main proceedings can only obtain damages at this stage, the award of which is in any case provided for under the BVergG.

26 Although the Commission has expressed doubts as to the admissibility of the questions referred to the Court, it considers that a ruling by the Court could have an effect on subsequent developments in the main case, in particular because the level of any damages payable to the applicants in the main proceedings could be affected by the answer to the questions raised, and that the answer to

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the first question could mean that the contract or the award decision must be set aside, which would then make it necessary to deal with the second and third questions.

27 In the order for reference, the national court stated that, under domestic law, the question arose whether it was entitled or even required under Community law to set aside its decision of 4 April 1997 terminating the first award procedure on the ground that the contract had not been awarded to the tenderer which had made the best offer. In the light of that procedural issue, the questions referred to the Court for a preliminary ruling would remain pertinent even if the award procedure in question had in the meantime been settled.

28 In the circumstances, it must be held that as the answer to the questions raised may affect the outcome of the dispute in the main proceedings the questions are admissible.

First question

29 By its first question, the national court is asking essentially whether the combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Directive 89/665 must be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision, prior to the conclusion of the contract, as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, regardless of the possibility, once the contract has been concluded, of obtaining an award of damages.

30 Article 2(1) of Directive 89/665 lists the measures to be taken concerning the review procedures which the Member States must make available in national law. According to Article 2(1)(a), they must include provision for the adoption of interim measures by way of interlocutory procedures. Article 2(1)(b) refers to the possibility of setting aside or ensuring the setting aside of decisions taken unlawfully, and Article 2(1)(c) concerns the award of damages.

31 It is common ground that Article 2(1)(b) of Directive 89/665 does not define the decisions taken unlawfully which a party may ask to have set aside. The Community legislature confined itself to stating that such decisions include those containing discriminatory technical, economic or financial specifications in the documents relating to the contract award procedure in question.

32 Nothing in Article 2(1)(b) of Directive 89/665 indicates that an unlawful decision awarding a public contract does not fall within the category of decisions taken unlawfully in respect of which application may be made to have them set aside.

33 As is clear from the first and second recitals in the preamble to Directive 89/665, the directive reinforces existing arrangements at both national and Community level for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified (Case C-433/93 Commission v Germany [1995] ECR I-2303, paragraph 23).

34 In that regard, Article 1(1) of Directive 89/665 requires the Member States to establish effective review procedures that are as rapid as possible to ensure compliance with Community directives on public procurement.

35 It is clear from that provision that the subject-matter of those review procedures will be decisions taken by the contracting authorities, on the ground that they infringe Community law on public procurement or the national rules transposing it; the provision does not, however, lay down any restriction with regard to the nature and content of those decisions.

36 The Bundesministerium and the Austrian Government contend, essentially, that the organisation of the procedure before the Bundesvergabeamt, whereby once a contract has been concluded the decision of a contracting authority may be challenged only in so far as the unlawful nature of the decision has resulted in damage to the party seeking review in national proceedings, and whereby the procedure

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is to be limited to easing the conditions for the award of damages by the ordinary courts, complies with Article 2(6) of Directive 89/665.

37 As the Advocate General observed in points 36 and 37 of his Opinion, it is clear from the actual wording of Article 2(6) of Directive 89/665 that the limitation of review procedures provided for therein applies only after the conclusion of the contract following the awarding decision. Directive 89/665 thus draws a distinction between the stage prior to the conclusion of the contract, to which Article 2(1) applies, and the stage subsequent to its conclusion, in respect of which a Member State may, according to the second subparagraph of Article 2(6), provide that the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement.

38 Moreover, the interpretation proposed by the Bundesministerium and the Austrian Government might lead to the systematic removal of the most important decision of the contracting authority, that is to say the award of the contract, from the purview of the measures which, under Article 2(1) of Directive 89/665, must be taken concerning the review procedures referred to in Article 1, thereby undermining the purpose of Directive 89/665 which, as noted in paragraph 34 of this judgment, is to establish effective and rapid procedures to review unlawful decisions of the contracting authority at a stage where infringements may still be rectified.

39 The Austrian Government also contends that if Directive 89/665 must be interpreted as drawing a distinction between the decision awarding a contract and the conclusion of that contract, the directive fails to specify in any way what time should elapse between the two stages. The United Kingdom Government indicated at the hearing that no time should be fixed since there are different types of award procedure.

40 The argument based on the lack of an intervening period between the decision awarding a contract and the conclusion of the contract is irrelevant. The fact that there is no express provision in that connection cannot justify interpreting Directive 89/665 in such a way as to remove decisions awarding public contracts systematically from the purview of the measures which, according to Article 2(1) of Directive 89/665, must be taken concerning the review procedures referred to in Article 1.

41 With regard to the time which must elapse between the decision awarding a contract and its conclusion, the United Kingdom Government also states that no such time is specified in Directive 93/36 and that the directive's provisions, as Articles 7, 9 and 10 thereof show, are exhaustive.

42 All that need be stated in that regard, as the Advocate General noted in points 70 and 71 of his Opinion, is that those provisions correspond to the equivalent provisions in the directives which preceded Directive 89/665, the first recital in the preamble to which states that they `do not contain any specific provision ensuring their effective application'.

43 It follows from those considerations that the combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Directive 89/665 are to be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.

Second and third questions

44 By its second and third questions, which may be examined together, the national court is asking essentially whether Article 2(1)(a) and (b) of Directive 89/665 must be interpreted to the effect

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that, where that provision has not been fully transposed into national law, the bodies in the Member States having power to review public procurement procedures may also hear applications under the conditions laid down in that provision.

45 Paragraph 91(2) of the BVergG provides that the Bundesvergabeamt may examine the legality of award procedures and decisions within the ambit of the BVergG; the national legislature has thereby fulfilled its obligation to make provision for review, as the Advocate General observed at point 90 of his Opinion.

46 However, as the national court indicated in its order (see paragraphs 20 to 22 of this judgment), the contracting authority's decision as to whom to award the contract is one taken internally without, under Austrian law, any public manifestation thereof.

47 The explanations given in the order for reference show that the State, as contracting authority, employs the rules, forms and methods of civil law in the award procedure, so that the award of a public contract is effected by the conclusion of a contract between that authority and the tenderer.

48 Since the announcement of the award of a contract and its conclusion in practice occur together, in such a system there is no administrative law measure of which the persons concerned can acquire knowledge and which may be the subject of an application to have it set aside as provided for in Article 2(1)(b).

49 In such circumstances, where it is doubtful that the national court is in a position to give effect to the right of individuals to obtain review in matters concerning public procurement under the conditions set out in Directive 89/665, in particular Article 2(1)(a) and (b), it is useful to recall that, if national provisions cannot be interpreted in a manner consistent with Directive 89/665, those concerned may seek compensation, under the appropriate procedures in national law, for the damage suffered by reason of the failure to transpose a directive within the prescribed period (see, in particular, Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 Dillenkofer and Others [1996] ECR I-4845).

50 Consequently, the answer to the second and third questions must be that Article 2(1)(a) and (b) of Directive 89/665 cannot be interpreted to the effect that, even where there is no award decision which may be the subject of an application to have it set aside, the bodies in the Member States having power to review public procurement procedures may hear applications under the conditions laid down in that provision.

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FORM	Judgment
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CONCERNS	Interprets 31989L0665-A02P1LA Interprets 31989L0665-A02P1LB Interprets 31989L0665-A06L2
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OBSERV	Austria ; Federal Republic of Germany ; United Kingdom ; Commission ; AELE ; Member States ; Institutions
NATIONA	Austria
NATCOUR	*A9* Bundesvergabeamt, Vorlagebeschluß vom 03/03/1998 - Osterreichische Zeitschrift für Wirtschaftsrecht 1998 p.49-50 - Platzer, Martin: Osterreichische Zeitschrift für Wirtschaftsrecht 1998 p.50-52 - Gutknecht, Brigitte: Public Procurement Law Review 1998 p.CS173-CS175
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PROCEDU Reference for a preliminary ruling

ADVGEN Mischo

JUDGRAP Kapteyn

DATES of document: 28/10/1999
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Judgment of the Court (Fourth Chamber)
of 16 September 1999
Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH v Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public works contract - Contract awarded to sole tenderer judged to be suitable.
Case C-27/98.

1 Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Award of contracts - Whether it is compulsory to award the contract to the sole tenderer considered suitable - No such obligation

(Council Directive 93/37, Art. 18(1))

2 Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Article 18(1) - Direct effect

(Council Directive 93/37, Art. 18(1))

1 Article 18(1) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts, as amended by Directive 97/52, must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.

In the first place, Directive 93/37 contains no provision expressly requiring a contracting authority which has put out an invitation to tender to award the contract to the sole tenderer; secondly, the contracting authority is not required to complete a procedure for the award of a public works contract.

2 Since no specific implementing measure is necessary for compliance with the requirements listed in Article 18(1) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts, as amended by Directive 97/52, the resulting obligations for the Member States are unconditional and sufficiently precise. Accordingly, that provision can be relied on by an individual before the national courts.

In Case C-27/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt, Austria, for a preliminary ruling in the proceedings pending before that court between

Metalmeccanica Fracasso SpA,

Leitschutz Handels- und Montage GmbH

and

Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten,

on the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1),

THE COURT

(Fourth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), President of the Chamber, J.L. Murray and H. Ragnemalm,

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Judges,

Advocate General: A. Saggio,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH, by Andreas Schmid, Rechtsanwalt, Vienna,

- Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten, by Kurt Klima, adviser to Finanzprokuratur Wien, acting as Agent,

- the Austrian Government, by Wolf Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, acting as Agent, assisted by Bertrand Wägenbaur, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten, represented by Kurt Klima; of the Austrian Government, represented by Michael Fruhmann, of the Federal Chancellor's Office, acting as Agent; of the French Government, represented by Anne Bréville-Viéville, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by Hendrik van Lier, assisted by Bertrand Wägenbaur, at the hearing on 28 January 1999,

after hearing the Opinion of the Advocate General at the sitting on 25 March 1999,

gives the following

Judgment

1 By order of 27 January 1998, the Bundesvergabeamt referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 18(1) of Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1).

2 This question was raised in proceedings between Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH (hereinafter `Fracasso and Leitschutz') and Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten (hereinafter `the Amt') concerning the latter's cancellation of an invitation to tender for a public works contract for which Fracasso and Leitschutz had submitted a tender.

Legal background

3 Directive 93/37 codified Council Directive 71/305/EEC of 26 July 1971 concerning coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5). Under Article 18(1) of Directive 93/37, as amended by Directive 97/52 (hereinafter `Directive 93/37'):

`Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial

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standing and of technical knowledge or ability referred to in Articles 26 to 29.'

4 Under Paragraph 56(1) of the Bundesvergabegesetz (Federal law on the acceptance of tenders - `the BVergG') the procedure for the award of a contract is terminated by the conclusion of a contract (the acceptance of a tender) or with the cancellation of the invitation to tender. The BVergG does not provide for another way of terminating the tendering procedure.

5 Paragraph 52(1) of the BVergG provides:

`(1) Before selecting the tender on the basis of which the contract is to be awarded, the contracting authority, in the light of the results of its examination, shall forthwith eliminate the following tenders:

1. tenders by bidders who do not have the necessary authorisation or economic and financial standing and technical knowledge or ability, or credibility;

2. tenders by bidders who are excluded from the procedure under Paragraph 16(3) or 16(4);

3. tenders the total price of which is not plausibly established;

...'

6 Paragraph 55(2) of the BVergG provides:

`The invitation to tender may be cancelled if, following the elimination of tenders in accordance with Paragraph 52, only one tender remains.'

7 Paragraph 16(5) of the BVergG provides:

`Tendering procedures shall be carried out only where it is intended actually to award a contract in respect of the obligations to be performed.'

The dispute in the main proceedings

8 In the spring of 1996 the Amt issued an invitation to tender for surface works, including the erection of concrete barriers for the central reservation on a stretch of the A1 Westautobahn. The contract was awarded to ARGE Betondecke-Salzburg West.

9 In November 1996 the Amt decided, for technical reasons, that the central reservation on the stretch of motorway in question was to be fitted with protective barriers made of steel rather than concrete as stipulated in the invitation to tender. It then issued a further invitation to tender under an open procedure for the erection of steel safety rails for the central reservation. The tendering procedure began in April 1997.

10 Four undertakings, or groupings of undertakings, submitted tenders, including the grouping comprising Fracasso and Leitschutz.

11 After the Amt had examined all the tenders and eliminated those of the other three tenderers on the basis of Paragraph 52(1) of the BVergG, only the tender submitted by Fracasso and Leitschutz remained.

12 In the end the Amt decided to use concrete instead of steel for the construction of the central reservation barrier and to cancel the relevant invitation to tender pursuant to Paragraph 55(2) of the BVergG. It informed Fracasso and Leitschutz of those two decisions by letter.

13 Those companies then asked the BundesVergabekontrollkommission (Federal Procurement Review Commission) to conduct a conciliation procedure pursuant to Paragraph 109(1)(1) of the BVergG concerning the question whether the decision by the Amt to cancel the invitation to tender and its intention to issue a fresh invitation to tender for safety rails were in conformity with the

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provisions of the BVergG.

14 On 19 August 1997 the parties reached an amicable agreement on the new invitation to tender proposed by the conciliator, concerning the construction of steel safety rails for the sides of the motorway. This contract was to be awarded under a restricted procedure admitting in principle all the tenderers who had taken part in the cancelled tendering procedure.

15 Fracasso and Leitschutz then asked the BundesVergabekontrollkommission to complete the conciliation procedure, arguing that the dispute concerning the legality of the cancellation of the invitation to tender for safety rails for the central reservation had not been settled.

16 As the BundesVergabekontrollkommission declared that it had no authority in that regard, Fracasso and Leitschutz submitted to the Bundesvergabeamt an application for annulment of the decision by the Amt to cancel the invitation to tender.

17 Being in some doubt as to whether Paragraph 55(2) of the BVergG was compatible with Article 18(1) of Directive 93/37, the Bundesvergabeamt decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

`Is Article 18(1) of Directive 93/37/EEC, according to which contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29, to be interpreted as requiring contracting authorities to accept a tender even if it is the only tender still remaining in the tendering procedure? Is Article 18(1) sufficiently specific and precise for it to be relied on by individuals in proceedings under national law and, as part of Community law, to be used to oppose provisions of national law?'

The first part of the question

18 By the first part of the question the national court is asking whether Directive 93/37 must be interpreted as meaning that the contracting authority which has called for tenders is required to award the contract to the only tenderer judged to be suitable.

19 According to Fracasso and Leitschutz, the effect of Articles 7, 8, 18 and 30 of Directive 93/37, as interpreted by the Court, is that the contracting authority's option to refuse to award a public works contract or to reopen the procedure must be limited to exceptional cases and may be exercised only on serious grounds.

20 On the other hand, the Amt, the Austrian and French Governments and the Commission argue, essentially, that Directive 93/37 does not prohibit a contracting authority from taking no further action in a tendering procedure.

21 It is common ground that Directive 93/37 contains no provision expressly requiring a contracting authority which has put out an invitation to tender to award the contract to the only tenderer judged to be suitable.

22 Despite the fact that there is no such provision, it must be considered whether, under Directive 93/37, the contracting authority is required to complete a procedure for the award of a public works contract.

23 In the first place, as regards the provisions of Directive 93/37 cited by Fracasso and Leitschutz, it must be observed that Article 8(2) of Directive 93/37, which requires a contracting authority to inform candidates or tenderers as soon as possible of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure, does not provide that such a decision is to be limited to exceptional cases or has necessarily

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to be based on serious grounds.

24 Similarly, as regards Articles 7, 18 and 30 of Directive 93/37, governing the procedures to be followed for the award of public works contracts and determining the applicable criteria for awarding them, it need merely be observed that no obligation to award the contract in the event that only one undertaking proves to be suitable can be inferred from those provisions.

25 It follows that the contracting authority's option, implicitly recognised by Directive 93/37, to decide not to award a contract put out to tender or to recommence the tendering procedure is not made subject by that directive to the requirement that there must be serious or exceptional circumstances.

26 Second, it should be observed that, according to the 10th recital in the preamble to Directive 93/37, the aim of that directive is to ensure the development of effective competition in the award of public works contracts (see also, on the subject of Directive 71/305, Case 31/87 Beentjes [1988] ECR 4635, paragraph 21).

27 In that connection, as the Commission has rightly pointed out, Article 22(2) of Directive 93/37 expressly pursues that objective in providing that, where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender must in any event be sufficient to ensure genuine competition.

28 Furthermore, Article 22(3) of Directive 93/37 provides that where the contracting authorities award a contract by negotiated procedure as referred to in Article 7(2), the number of candidates admitted to negotiate may not be less than three provided that there is a sufficient number of suitable candidates.

29 It must also be observed that Article 18(1) of Directive 93/37 provides that contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV thereof.

30 The provisions in Chapter 3 include Article 30, paragraph 1 of which lays down the criteria on which the contracting authorities are to base the award of contracts, that is to say, either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability or technical merit.

31 It follows that, to meet the objective of developing effective competition in the area of public contracts, Directive 93/37 seeks to organise the award of contracts in such a way that the contracting authority is able to compare the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in Article 30(1) (see, to that effect, on the subject of Directive 71/305, Beentjes, cited above, paragraph 27).

32 Where, on conclusion of one of the procedures for the award of public works contracts laid down by Directive 93/37, there is only one tender remaining, the contracting authority is not in a position to compare prices or other characteristics of various tenders in order to award the contract in accordance with the criteria set out in Chapter 3 of Title IV of Directive 93/37.

33 It follows from the foregoing that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.

34 The answer to the first part of the question is, therefore, that Article 18(1) of Directive 93/37 must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.

The second part of the question

35 By the second part of the question, the national court is asking whether Article 18(1) of Directive

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93/37 can be relied on before the national courts.

36 In that connection, it need merely be observed that, since no specific implementing measure is necessary for compliance with the requirements listed in Article 18(1) of Directive 93/37, the resulting obligations for the Member States are therefore unconditional and sufficiently precise (see, to that effect, on the subject of Article 20 of Directive 71/305, essentially reproduced in Article 18(1) of Directive 93/37, Beentjes, cited above, paragraph 43).

37 The answer to the second part of the question is, therefore, that Article 18(1) of Directive 93/37 can be relied on by an individual before the national courts.

Costs

38 The costs incurred by the Austrian and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fourth Chamber),

in answer to the question referred to it by the Bundesvergabeamt by order of 27 January 1998, hereby rules:

1. Article 18(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.

2. Article 18(1) of Directive 93/37, as amended by Directive 97/52, can be relied on by an individual before the national courts.

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CONCERNS	Interprets 31993L0037-A18P1
SUB	Approximation of laws
AUTLANG	German
OBSERV	Austria ; France ; Commission ; Member States ; Institutions
NATIONA	Austria
NATCOUR	*A9* Bundesvergabeamt, Vorlagebeschluß vom 27/01/1998 - Europäisches Wirtschafts- & Steuerrecht - EWS 1998 p.232 (résumé)
NOTES	Essers, M.J.J.M.: Nederlands tijdschrift voor Europees recht 1999 p.259 Dischendorfer, Martin: Public Procurement Law Review 1999 p.CS159-CS162 Ritleng, D.: Europe 1999 Novembre Comm. no 378 p.18 Barone, A.: Il Foro italiano 1999 IV Col.508-509 Lesobre, Olivier: Petites affiches. La Loi / Le Quotidien juridique 2000 no 27 p.14-15 X: Giurisprudenza italiana 2000 p.613-614 Volpe, Luigi: Diritto pubblico comparato ed europeo 2000 p.257-262 Killmann, Bernd-Roland: Osterreichische Zeitschrift für Wirtschaftsrecht 2001 p.7-10
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JUDGRAP	Kapteyn
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**Judgment of the Court
of 5 October 2000
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Directive 93/38/EEC - Public works contracts in the water, energy, transport and telecommunications sectors - Electrification and street lighting works in the département of the Vendée - Definition of work.
Case C-16/98.**

1. Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Work - Definition - Criterion - Economic and technical function of the result of the works - Artificial splitting of a single work - Electrification and street lighting works - Assessment

(Council Directive 93/38, Art. 14(10), subpara. 1, second sentence, and (13))

2. Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Work - Definition - Existence of a single contracting entity and possibility of a single undertaking's carrying out the whole of the works - Not decisive criteria

(Council Directive 93/38, Art. 14(10), subpara. 1, second sentence)

3. Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Principle of non-discrimination between tenderers - Scope

(Council Directive 93/38, Art. 4(2))

1. In order to determine whether several lots of a single work have been artificially split within the meaning of Article 14(3) of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, that provision must be taken into account in conjunction with Article 14(10), first subparagraph, of that directive. In that connection, it is clear from the definition of work in Article 14(10), first subparagraph, second sentence, of Directive 93/38 that the existence of a work must be assessed in the light of the economic and technical function of the result of the works concerned.

It follows that, in the case of a series of specific maintenance and extension works on the existing electricity supply and street lighting networks, the result of which, once completed, will be subsumed within the function fulfilled by the networks concerned, the question whether there is a work must be assessed in the light of the economic and technical function fulfilled by the electricity supply and street lighting networks in question. An electricity supply network is intended, from a technical point of view, to transport the electricity produced by a supplier to individual end consumers; in terms of economics, they must pay the supplier for what they consume.

A street lighting network, on the other hand, is intended, from a technical point of view, to light public places using the electricity provided by the electricity supply network. The authority providing the street lighting assumes the cost itself, but subsequently recovers the amounts spent from the population served, without adjusting the sums demanded according to the benefit derived by the individuals concerned. It follows that an electricity supply network and a street lighting network have a different economic and technical function and that works on the electricity supply and street lighting networks cannot be considered to constitute lots of a single work artificially split contrary to Article 14(10), first subparagraph, and (13) of the Directive.

(see paras 31, 36-38, 52-56)

2. While the existence of a single contracting entity and the possibility of a Community undertaking's carrying out the whole of the works described in the contracts concerned may, according to circumstances, constitute corroborative evidence of the existence of a work within the meaning of Directive 93/38

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coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, they cannot constitute decisive criteria on that point. Thus, if there is a number of contracting entities and the whole of the works concerned cannot be carried out by a single undertaking, this will not call into question the existence of a single work where that conclusion results from the application of the criteria concerning function set out in Article 14(10), first subparagraph, second sentence, of the Directive. The definition of the term work in that subparagraph does not make the existence of a work dependent on matters such as the number of contracting entities or whether the whole of the works can be carried out by a single undertaking.

(see paras 42-43)

3. The principle of non-discrimination between tenderers laid down by Article 4(2) of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, applies to all the stages of the tendering procedure and not only from the time when a contractor submits a tender. That interpretation is consistent with the purpose of the Directive which is to open up the contracts to which it applies to Community competition. That purpose would be undermined if a contracting entity could organise a tendering procedure in such a way that contractors from Member States other than that in which the contracts are awarded were discouraged from tendering. It follows that Article 4(2) of the Directive, in prohibiting any discrimination between tenderers, also protects those who are discouraged from tendering because they have been placed at a disadvantage by the procedure followed by a contracting entity.

(see paras 107-109)

In Case C-16/98,

Commission of the European Communities, represented by H. van Lier, Legal Adviser, and O. Couvert-Castéra, a national civil servant on secondment to the Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gomez de la Cruz, of the same service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and P. Lalliot, Secretary for Foreign Affairs in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

APPLICATION for a declaration that, in the course of the procurement procedure initiated by the Syndicat Départemental d'Electrification de la Vendée in December 1994 for the award of contracts for electrification and street lighting work, the French Republic failed to fulfil its obligations under Articles 4(2), 14(1), (10) and (13), together with Articles 21, 24 and 25 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199 p. 84),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, L. Sevon and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, M. Wathelet and V. Skouris (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

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Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2000,

gives the following

Judgment

Costs

114 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 69(3) provides that the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads.

115 Since the Commission and the French Republic have been partially unsuccessful, they should bear their own costs.

On those grounds,

THE COURT,

hereby:

1. Declares that in so far as the French entities responsible for the tendering procedure for electrification contracts held in Vendée in December 1994

- split the work,

- did not publish in the Official Journal of the European Communities a call for competition for all the contracts comprised in that work above the threshold laid down in Article 14(10), second subparagraph, last sentence, of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors but confined themselves to doing so for six of them only,

- did not communicate all the information required by Annex XII to Directive 93/38 as regards the six calls for competition published in the Official Journal of the European Communities,

- did not communicate to the Commission the information required regarding the award of all the contracts comprised in that work above the threshold laid down in Article 14(10), second subparagraph, last sentence, of Directive 93/38,

the French Republic has failed to fulfil its obligations under Articles 4(2) and 14(1), (10) and (13) together with Articles 21(1) and (5), 24(1) and (2) and 25(5) of that directive;

2. Dismisses the remainder of the application;

3. Orders the Commission of the European Communities and the French Republic to bear their own costs.

1 By application lodged at the Court Registry on 22 January 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, in the course of the procurement procedure initiated by the Syndicat départemental d'Electrification de la Vendée (hereinafter Sydev) in December 1994 for the award of contracts for electrification and street lighting work, the French Republic failed to fulfil its obligations

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under Articles 4(2), 14(1), (10) and (13), together with Articles 21, 24 and 25 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199 p. 84, hereinafter the Directive).

Legal background

2 The purpose of the Directive is to open up public procurement markets in the water, energy, transport and telecommunications sectors.

3 Under Article 1(1) and (6) of the Directive:

For the purpose of this Directive:

1. "public authorities" shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

A body is considered to be governed by public law where it:

- is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature,

- has legal personality, and

- is financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or other bodies governed by public law;

...

6. "tenderer" shall mean a supplier, contractor or service provider who submits a tender...

4 Article 2(1) and (2) of the Directive provides:

1. This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

...

2. Relevant activities for the purposes of this Directive shall be:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water; or

(ii) electricity; or

(iii) gas or heat;

or the supply of drinking water, electricity, gas or heat to such networks;

...

5 Under Article 4(2) of the Directive:

2. Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.

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6 Article 14(1), (10) and (13) of the Directive provides:

1. This Directive shall apply to contracts the estimated value, net of VAT, for which is not less than:

...

(c) ECU 5 000 000 in the case of works contracts.

...

10. The basis for calculating the value of a works contract for the purposes of paragraph 1 shall be the total value of the work. "Work" shall mean the result of building and civil engineering activities, taken as a whole, which are intended to fulfil an economic and technical function by themselves.

In particular, where a supply, work or service is the subject of several lots, the value of each lot shall be taken into account when assessing the value referred to in paragraph 1. Where the aggregate value of the lots equals or exceeds the value laid down in paragraph 1, that paragraph shall apply to all the lots. However, in the case of works contracts, contracting entities may derogate from paragraph 1 in respect of lots the estimated value, net of VAT, for which is less than ECU 1 million, provided that the aggregate value of those lots does not exceed 20% of the overall value of the lots.

...

13. Contracting entities may not circumvent this Directive by splitting contracts or using special methods of calculating the value of contracts.

7 Article 20(1) of the Directive provides that contracting entities may choose open, restricted or negotiated procedures, provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21.

8 Article 21(1) and (5) provides:

1. In the case of supplies, works or service contracts, the call for competition may be made:

(a) by means of a notice drawn up in accordance with Annex XII A, B or C; or

(b) by means of a periodic indicative notice drawn up in accordance with Annex XIV; or

(c) by means of a notice on the existence of a qualification system drawn up in accordance with Annex XIII.

...

5. The notices referred to in this Article shall be published in the Official Journal of the European Communities.

9 Article 24(1) and (2) of the Directive provides:

1. Contracting entities which have awarded a contract or organised a design contest shall communicate to the Commission, within two months of the award of the contract and under conditions to be laid down by the Commission in accordance with the procedure laid down in Article 40, the results of the awarding procedure by means of a notice drawn up in accordance with Annex XV or Annex XVIII.

2. Information provided under Section I of Annex XV or under Annex XVIII shall be published in the Official Journal of the European Communities.

...

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10 Article 25(1) and (5) of the Directive provides:

1. The contracting entities must be able to supply proof of the date of dispatch of the notices referred to in Articles 20 to 24.

...

5. Contracts or design contests in respect of which a notice is published in the Official Journal of the European Communities pursuant to Article 21(1) or (4) shall not be published in any other way before that notice has been dispatched to the Office for Official Publications of the European Communities. Such publication shall not contain information other than that published in the Official Journal of the European Communities.

11 Article 45(1) of the Directive provides:

Member States shall adopt the measures necessary to comply with the provisions of this Directive and shall apply them by 1 July 1994. They shall forthwith inform the Commission thereof.

Facts and pre-litigation procedure

12 On 21 December 1994, Sydev, the organisation comprising the various joint municipal groupings responsible for electrification within the French département of Vendée, sent for publication in the Bulletin Officiel des Annonces des Marchés Publics (the official French bulletin of notices concerning public works and service contracts, hereinafter the BOAMP) a series of 37 notices of invitation to tender for electrification or street lighting works to be carried out over a three-year period in the département. Those notices, published in the BOAMP on 12 January 1995, concerned works amounting in total to FRF 609 000 000 over the three years, FRF 483 000 000 of which was for contracts for electrification and FRF 126 000 000 for contracts for street lighting.

13 In all the notices published in the BOAMP, Sydev was stated to be the body which awards the contract; tenders were to be sent to the works management office of Sydev, indicating the name of the municipal grouping concerned in each case. The description of the work to be carried out on the electricity supply networks was the same in all the cases: electrification work and associated generated work such as, for example, civil engineering on the telephone network, civil engineering on the cable television network, the public address system. The description of the work to be done on the lighting networks was also the same in the relevant notices: street lighting work and associated generated work such as, for example, the public address system.

14 Also on 21 December 1994, Sydev sent for publication at Community level the six main contract notices concerning electrification. Those notices, which were published on 6 January 1995 in the Official Journal of the European Communities (OJ S 3, p. 211), stated that tenders were to be sent to Sydev, indicating in each case the name of the local entity concerned. In all those notices Sydev was given as the name of the contracting entity, followed in all cases but one by the name of the local entity concerned.

15 The contracts were awarded under the restricted tendering procedure on the basis of price lists and order forms. The records of the tendering procedures disclosed by the French Government show that the contracts were awarded in accordance with the following procedure: initially, a shortlist was drawn up of candidates who had produced all the certificates attesting to compliance with administrative requirements and had the capacity to carry out the work in question; subsequently, one of the candidates was selected, probably on the basis of the lowest offer. Tenders were in the form of a percentage difference from the proposed list of prices; the successful candidate was to be given orders to carry out specific items of work over the three-year period.

16 Notices of the award of the 37 contracts at issue in this case (hereinafter the contested contracts), including the six contracts published in the Official Journal of the European Communities (hereinafter

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the OJEC), were published in the BOAMP on 29 September 1995. In those notices Sydev was described as the body which awarded the contract. On the other hand, no notice of award of the contracts was sent to the OJEC for publication.

17 The Commission took the view that the contested contracts were lots of a single work, which originated with a single contracting entity, that is to say Sydev, and that the rules of the Directive should have been applied to all of them, not merely to the six main lots. On 17 January 1996 it therefore sent a letter of formal notice to the French authorities, objecting to the splitting of the lots into different contracts, the failure to publish two-thirds of the lots at Community level and the use of a formula derived from the procedure for permanent tendering concerning which the Commission had already initiated another infringement procedure.

18 By letter of 14 June 1996, the French authorities denied the infringement complained of, contending that the contested contracts had not been artificially split but had genuinely been concluded by each of the joint municipal electrification groupings concerned in the département of Vendée and that, therefore, the threshold for publication of a notice in the OJEC had to be applied to each of the contracts individually. The French authorities also contended in their letter that the joint municipal groupings concerned did not use a procedure for permanent tendering during the currency of a contract.

19 On 7 April 1997, the Commission sent the French authorities a reasoned opinion alleging that in the procedure initiated by Sydev and its members in December 1994 the French Republic had failed to fulfil its obligations under the Directive, and in particular Articles 1(1), (5) and (7), 4(2), 14(1), (10) and (13), and Articles 21, 24 and 25. The Commission called on the French Government to take the measures necessary to comply with that reasoned opinion within one month of its notification. It also called on that government to provide it, within the same period, in accordance with Article 41 of the Directive, with all the information necessary to assess the exact position of the contract holders, inter alia, records of the award procedure and the contracts themselves.

20 By letter of 2 July 1997, the French authorities replied to that reasoned opinion, reiterating their previous arguments. They attached to that letter the records concerning the contested contracts and the tender documents relating to those contracts.

21 By note of 16 December 1997, the French authorities sent the Commission additional documentation, namely the schedules of special administrative clauses and the lists of prices for the contested contracts.

22 As it was not satisfied with the reply of the French Government to the reasoned opinion, the Commission brought this action.

Applicability of the Directive to the contested contracts given that it had not been transposed at the material time

23 It is common ground that at the end of 1994 and the beginning of 1995, when the procedure for the award of the contested contracts was under way, the French Republic had not yet transposed the Directive into its national law (see Case C-311/96 Commission v France [1997] ECR I-2939).

24 However, that fact does not preclude the applicability of the Directive to the contested contracts since the period prescribed in Article 45(1) for its transposition expired on 1 July 1994, that is to say before the procedure for the award of those contracts took place.

The complaints relied on

25 In support of its action the Commission relies on two series of complaints.

26 First, the contested contracts were concluded in breach of Article 14(1), (10) and (13) and

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Articles 21, 24, 25 and 4(2) of the Directive: although they were in fact lots of a single work, that contract was artificially split on technical and geographical pretexts, in breach of the provisions of the Directive concerning the threshold, publication and equality of treatment between tenderers.

27 Second, the contract notices which the French authorities sent for publication in the OJEC were incomplete, which constituted a further instance of failure to fulfil obligations under the Directive.

28 In order to rule on the failure to fulfil obligations complained of, it should first be considered whether a single work was artificially split into several contracts within the meaning of Article 14(10), first subparagraph, and (13). If, once this question has been considered, it appears that this was in fact the case, the other instances of failure complained of should be considered in the light of the other provisions of the Directive.

The complaint that a single work was artificially split within the meaning of Article 14(10), first subparagraph, and (13) of the Directive

Preliminary observations

29 In order to define the term work for the purposes of this dispute, it must first be observed that, under Article 14(10), first subparagraph, of the Directive: The basis for calculating the value of a works contract for the purposes of paragraph 1 shall be the total value of the work. "Work" shall mean the result of building and civil engineering activities, taken as a whole, which are intended to fulfil an economic and technical function by themselves.

30 Article 14(13) provides: Contracting entities may not circumvent this Directive by splitting contracts or using special methods of calculating the value of contracts.

31 That paragraph sets out clearly the specific obligations deriving for contracting entities from Article 14(10), first subparagraph, of the Directive and must, therefore, be taken into account together with that subparagraph in ruling as to whether a work was split.

32 The French Government disputes the relevance of the term work in this case. It contends that it is not the fact that a work is being carried out which requires the procedures provided for by the Directive to be applied where the threshold laid down in it is reached but the fact that the contracts in question concern building or civil engineering activities referred to in Annex XI of that Directive, as specified in Article 1(4)(b) thereof.

33 It must be observed that the argument relied on by the French Government concerns the conditions for the application of the Directive to a works contract as defined in Article 1(4)(b) and not the conditions under which works contracts within the meaning of that subparagraph are to be regarded as forming part of a single work for the purpose of ascertaining whether the threshold for the application of the Directive, laid down by Article 14(1)(c), has been reached. Only the latter question is of relevance in the present case, as the Commission claims that the French Republic failed to observe that threshold by artificially splitting the work concerned.

34 Accordingly, that argument by the French Republic must be dismissed.

35 The criteria for deciding whether there is a work must also be established.

36 In that connection, it is clear from the definition of work in Article 14(10), first subparagraph, of the Directive that the existence of a work must be assessed in the light of the economic and technical function of the result of the works concerned.

37 The present case concerns a series of specific maintenance and extension works on the existing electricity supply and street lighting networks, the result of which, once completed, will be subsumed within the function fulfilled by the networks concerned.

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38 It follows that, in the case of that type of works, the question whether there is a work must be assessed in the light of the economic and technical function fulfilled by the electricity supply and street lighting networks in question.

39 In the written procedure, both the Commission and the French Government expanded on their arguments concerning the premiss that the existence of a single contracting entity is a necessary condition in order for a series of contracts to be considered to be for the execution of a single work.

40 In answer to questions on that subject at the hearing, the Commission stated, however, that the existence of a single contracting entity is not a necessary condition, but merely an indication of the existence of a single work.

41 At the hearing the Commission also argued that contracts must be considered to be for the execution of a single work when they are so linked that a Community undertaking is likely to regard them as a single economic operation and tender for the whole operation.

42 It should be observed that, while the existence of a single contracting entity and the possibility of a Community undertaking's carrying out the whole of the works described in the contracts concerned may, according to circumstances, constitute corroborative evidence of the existence of a work within the meaning of the Directive, they cannot, on the other hand, constitute decisive criteria on that point. Thus, if there is a number of contracting entities and the whole of the works concerned cannot be carried out by a single undertaking, this will not call into question the existence of a single work where that conclusion results from the application of the criteria concerning function set out in Article 14(10), first subparagraph, second sentence, of the Directive.

43 The definition of the term work in that subparagraph does not make the existence of a work dependent on matters such as the number of contracting entities or whether the whole of the works can be carried out by a single undertaking.

44 That interpretation is consistent with the objective of the Directive which is to ensure that undertakings from other Member States will be able to tender for contracts or bundles of contracts likely to be of interest to them for objective reasons relating to their value.

45 First, it is conceivable that, for administrative or other reasons, a programme of works for the execution of a work within the meaning of the Directive might be the subject of several procedures originating with various contracting authorities. This might be so, for example, in the case of the construction of a road crossing the territory of several local authorities, each having administrative responsibility for a section of the road. In such a case, the above objective would be thwarted if the applicability of the Directive were ruled out on the ground that the estimated value of each section of the work was below the threshold of ECU 5 000 000.

46 Second, a Community undertaking may wish to be informed of the value of all the lots making up a work, even if it is not in a position to carry out all of them, as it is only in that way that it can assess the exact scope of the contract and adjust its prices according to the number of lots for which it proposes to tender, including, if necessary, those whose value is below the threshold of ECU 5 000 000.

47 It follows from the foregoing that in this case the question whether there is a work must be answered on the basis of the criteria laid down by Article 14(10), first subparagraph, second sentence, of the Directive, as set out in paragraph 38 of this judgment.

48 As the Commission complained that the French Republic had split the work concerned both on a technical basis (separate contracts for electrification and street lighting) and a geographical basis (separate contracts for each joint municipal grouping), it must first be considered whether electrification work and street lighting work was split, either at the level of the département

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as a whole or of the individual municipal groupings; if that is not the case, it must be ascertained, second, whether there was splitting within each of the two categories of works.

The complaint that the work was artificially split into electrification works and street lighting works

49 In support of its complaint, the Commission relies inter alia on the fact that the public address network is mentioned both in all the contract notices concerning electrification and in those concerning street lighting. It also cites the contract notices published by the relevant bodies in the départements of the Dordogne and Calvados which did not distinguish between street lighting work and electrification work.

50 The French Government contends that the present case concerns local electricity supply or street lighting networks which are independent of one another and that, therefore, the works on those networks are not contributing to the execution of a single work with functional or economic continuity.

51 In line with the finding at paragraph 38 of this judgment, in order to rule on this complaint, it is necessary to consider the economic and technical function fulfilled by the electricity supply and street lighting networks in question.

52 An electricity supply network is intended, from a technical point of view, to transport the electricity produced by a supplier to individual end consumers; in terms of economics, they must pay the supplier for what they consume.

53 However, a street lighting network is intended, from a technical point of view, to light public places using the electricity provided by the electricity supply network. The authority providing the street lighting assumes the cost itself, but subsequently recovers the amounts spent from the population served, without adjusting the sums demanded according to the benefit derived by the individuals concerned.

54 It follows that an electricity supply network and a street lighting network have a different economic and technical function.

55 It should be added that this difference of function is the same, whether at the level of the whole département or of the joint municipal groupings.

56 Accordingly, works on the electricity supply and street lighting networks cannot be considered to constitute lots of a single work artificially split contrary to Article 14(10), first subparagraph, and (13) of the Directive.

57 That finding is not affected by the considerations put forward by the Commission.

58 First, the fact that the works on the public address system are mentioned both in the notices concerning electrification and in those concerning street lighting does not mean that the respective networks fulfil the same economic and technical function. Their inclusion might be explained by the fact that parts of a public address network are carried by electricity supply ducts and street lighting masts, so that work on either of those networks entails work on the public address system.

59 Second, the fact that in two other French départements the contracting entities chose to include electrification work and street lighting work in the same contract notice does not alter the different economic and technical function which those networks are intended to fulfil.

60 Accordingly, the complaint alleging artificial splitting of the work into electrification works and street lighting works must be rejected.

The complaint that the electrification work was artificially split

61 The Commission complains that the French authorities artificially split the work in respect

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of electrification works. In that connection it points to the geographical contiguity of the networks, the simultaneity of the work programmes, the identical nature of the work descriptions in each contract notice and the overall coordination by Sydev.

62 The French Government contends that each joint municipal grouping concluded a separate contract for the network falling within its authority. It explains, on that point, that the joint municipal groupings are responsible for the low voltage electricity supply networks radiating from transformer substations which supply consumers in their territory with electricity.

63 The fact that those transformers may themselves be linked to a network of high-voltage lines does not mean that the whole system constitutes a single network and that, therefore, all the action taken on that network must be viewed as part of a single work. If that were the case, any action on the French electricity supply network as a whole would have to be considered to be a lot of a single work; such an interpretation would be too far-reaching and would run counter to the letter and spirit of the Community legislation on public procurement contracts, the sole purpose of which is to allow the tendering procedures for such contracts to be coordinated.

64 It must be observed in that regard that, even if, for administrative reasons, the joint municipal groupings in Vendée are responsible for the low-voltage electricity supply networks in the territory of the municipalities which those groupings comprise, that fact cannot, for the reasons stated in paragraphs 43 and 45 of this judgment, be of decisive importance, since those networks are interconnectable and, taken as a whole, they fulfil one economic and technical function, which consists in the supply and sale to consumers in the département of Vendée of electricity produced and supplied by Electricité de France.

65 As regards the contention of the French Government that such reasoning could be applied to the whole of the French electricity supply network, it must be observed that each tender for a contract must be assessed according to its context and its particular characteristics. In the present case, there are important factors which militate in favour of those contracts being aggregated at that level, such as the fact that the invitations for tenders for the contested contracts were made at the same time, the similarities between the contract notices and the fact that Sydev, the body comprising the joint municipal groupings responsible for electrification within the département, initiated and coordinated the contracts within a single geographical area.

66 This complaint of the Commission must, therefore, be upheld and it must be held that the contracts for electrification form part of a single work which has been artificially split. Accordingly, the French Republic has failed to fulfil its obligations under Article 14(10), first subparagraph, and (13) of the Directive.

The complaint that the street lighting work was artificially split

67 The Commission submits that the work was artificially split in respect of street lighting works between several entities within the département of Vendée. It puts forward the same arguments in support of its complaint as those raised in support of the complaint concerning electrification.

68 In the written procedure, the French Government stressed the local nature and the autonomy of the street lighting networks.

69 It must be observed in that regard that, unlike electricity supply networks, street lighting networks are, from a technical point of view, not necessarily interdependent, as they can be restricted to built-up areas and no interconnection between them is necessary. Similarly, it is possible, in economic terms, for each of the local entities concerned to assume the financial burden arising from the operation of such a network. In the light of these factors, it is for the Commission to establish that, from a technical and economic point of view, the street lighting networks concerned

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in this case formed one unit within the département. The Commission has put forward no evidence to that effect.

70 It follows that, even if the economic and technical function of each street lighting network is the same as that of all the others within the département of Vendée, it is not possible to consider all those networks to form a whole with a single economic and technical function within the département.

71 Accordingly, that complaint of the Commission must be rejected.

72 At the hearing, the French Government expressed doubt as to whether street lighting works fall within the scope of the Directive or Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199 p. 54). On that point, it contended that a street lighting network does not involve the production, supply, transport or distribution of electricity as required by Article 2(2)(a) of the Directive, but, rather, concerns its consumption.

73 Leaving aside the question whether such a plea should be considered, given the stage of the procedure at which it was raised, suffice it to note that, in the light of the findings in paragraphs 56 and 71 of this judgment, there is no need to consider whether street lighting works fall within the scope of the Directive.

The complaint that obligations were not fulfilled as regards the threshold derived from Article 14(1)(c) and (10), second subparagraph, of the Directive

74 The Commission complains that, by artificially splitting the contract for the works at issue, the French authorities infringed the provisions of the Directive as regards the threshold.

75 It must be observed that Article 14(1)(c) established the threshold for the applicability of the Directive at ECU 5 000 000 and that, as regards the lots of a work, Article 14(10), second subparagraph, whilst requiring the value of all the lots to be aggregated, allows derogation from the Directive in respect of lots the estimated value, net of VAT, for which is less than ECU 1 million, provided that the aggregate value of those lots does not exceed 20% of the overall value of the lots.

76 In view of the finding made at paragraph 66 of this judgment, it must be ascertained whether the value of the contracts for electrification exceeds the above thresholds.

77 The documents before the Court show that those contracts, of which there are 19, account for a total estimated value, net of VAT, of FRF 483 000 000 over the three year period envisaged. That sum is well in excess of the threshold of ECU 5 000 000, which, at the material time, was equivalent to FRF 33 966 540.

78 It follows that the French authorities should have applied the Directive to all the lots making up the contract for electrification work, apart from those whose estimated individual value, net of VAT, was below the threshold of ECU 1 million which, at the material time, was equivalent to an amount of FRF 6 793 308, provided that their aggregate value did not exceed 20% of the overall value of the lots.

79 The evidence put forward by the Commission in reply to a question put by the Court shows that, of the electrification contracts only one, the estimated value, net of VAT, of which was FRF 6 000 000, did not exceed the threshold of ECU 1 million. The value of that contract was also less than 20% of the estimated total value, net of VAT, of all the electrification work.

80 The French authorities did not publish an invitation to tender at Community level for the 18 other electrification contracts, but only for six of them. Accordingly, the French Republic has failed to fulfil its obligations under Article 14(1)(c), and (10), second subparagraph, of the

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Directive.

The complaint that Article 21(1) and (5) of the Directive was disregarded

81 It must be observed that, according to Article 21(1) of the Directive, the call for competition for a contract must be made by means of a notice drawn up in accordance with Annex XII of the Directive; that Annex provides in paragraph 5 that the notice must be published in the OJEC.

82 The Commission complains, first, that, because they split the work in respect of electrification works, the French authorities failed to publish a call for competition in the OJEC for all the contracts forming part of that work, confining themselves to doing so for only six of them.

83 Second, the notices concerning those six contracts, which the French authorities sent for publication in the OJEC, did not, according to the Commission, conform to the model in Annex XII to the Directive, because the information provided in those notices was insufficient to enable several of the headings set out in the model to be filled in. That conduct constituted a further failure to fulfil obligations under Article 21(1) of the Directive.

84 As already observed at paragraph 80 of this judgment, the French authorities confined themselves to publishing a call for competition at Community level in respect of only six of the 18 contracts for electrification works for which they were required to publish such a notice. The French Republic has thereby failed to fulfil its obligations under Article 21(1) and (5) of the Directive as regards the other 12 contracts.

85 It must be held that, as the French Republic acknowledges, the notices published in the OJEC concerning the six contracts for electrification are incomplete.

86 It follows that, as regards those notices, the French Republic has also failed to fulfil its obligations under Article 21(1) of the Directive.

The complaint that Article 24(1) and (2) of the Directive was disregarded

87 The Commission complains that the French authorities failed to notify it of the outcome of the tendering procedure for the electrification contracts, including those for which a contract notice was published in the OJEC, which prevented the publication in the OJEC of notices of the award of those contracts, in breach of the obligations deriving from Article 24 of the Directive.

88 The French Government admits the failure to fulfil its obligations complained of as regards the six contracts for which a notice was published in the OJEC. As regards the other contracts, it reiterates its argument that, in the absence of technical or geographical splitting, the Directive was not applicable to those contracts.

89 It must be observed that Article 24(1) of the Directive requires contracting entities which have awarded a contract to communicate to the Commission the results of the awarding procedure by means of a notice. Article 24(2) sets out the information to be published in the OJEC.

90 In the present case it is common ground that the French authorities did not communicate to the Commission the results of the 18 tendering procedures for the electrification contracts to which the Directive was applicable.

91 Accordingly, it must be held that the French Republic failed to fulfil its obligations under Article 24(1) and (2) of the Directive.

The complaint that Article 25 of the Directive was disregarded

92 The Commission submits that the failure of the French Republic to fulfil its obligations under Articles 21 and 24 of the Directive also entails a failure to fulfil its obligations under Article 25 thereof, concerning the dispatch and publication of the notices.

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93 It must be observed that, under Article 25(1) of the Directive, the contracting entities must be able to supply proof of the date of dispatch of the notices referred to in Articles 20 to 24. Article 25(5) provides that contracts in respect of which a notice is published in the OJEC are not to be published before that notice has been dispatched to the Office for Official Publications of the European Communities.

94 Given its general wording, the Commission's complaint seems to concern both the cases involving contracts for electrification where no notice of contract or of the award of the contract could have been dispatched to or published in the OJEC and the cases in which a contract notice, albeit incomplete, was published in it.

95 The Court must, therefore, distinguish between the two types of cases in order to assess the complaint raised by the Commission.

96 First, as regards the electrification contracts for which no contract notice or notice of award was sent for publication in the OJEC, although the Directive was applicable to them, there can be no failure to fulfil obligations under Article 25(1) of the Directive precisely because nothing was sent, since that paragraph is only applicable where a notice was actually sent.

97 However, since in all the cases notices were published in the BOAMP, it must be held that there was a failure to fulfil obligations under Article 25(5) of the Directive.

98 Second, as regards the cases of electrification contracts where a contract notice was published in the OJEC, even if the Commission's complaint did concern them, it must be observed, in the light of the documents produced to the Court, that those notices gave the date of their dispatch, which is not disputed by the Commission, and were dispatched for publication in the BOAMP on the same day.

99 In those circumstances, it cannot be held that there was a failure to fulfil obligations under Article 25(1) and (5).

The complaint that Article 4(2) of the Directive was disregarded

100 The Commission complains that the French Republic infringed Article 4(2) of the Directive. That complaint is based on the fact that all the electrification contracts were published at national level but only some of them were published at Community level, and then only incompletely.

101 The difference between the two series of notices published in the BOAMP and the OJEC is such, the Commission claims, as to mislead and place at a disadvantage tenderers from other Member States compared with their competitors from the Member State in which the contracts are to be awarded. There is less incentive for an undertaking which is not based in the area to respond to six different calls for tender each for an amount of little more than ECU 5 000 000, than to a call for tenders of around ECU 100 million. Moreover, a tenderer unaware of the exact scale of the contract, will, the Commission argues, normally put forward a less competitive price, all other things being equal, than a tenderer with knowledge of all the contracts.

102 The French Government reiterates its principal argument that there was no artificial splitting in the present case. In the alternative it contends that the procedure followed did not entail discrimination between tenderers because all candidates were asked to express their tender in the form of the amount by which it exceeded or undercut the list of prices proposed by the contracting entities.

103 It must be observed that, according to Article 4(2) of the Directive, Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.

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104 Having regard to the nature of the Commission's complaint, it must first be ascertained whether that paragraph requires that there be no discrimination between tenderers including potential tenderers.

105 In that connection, regard must be had to Article 1(6) of the Directive, which provides that tenderer is to mean a supplier, contractor or service provider who submits a tender.

106 It follows that, when it refers to suppliers, contractors or service providers, Article 4(2) of the Directive also concerns tenderers.

107 As to whether that paragraph also concerns potential tenderers, it must be held that the principle of non-discrimination applies to all the stages of the tendering procedure and not only from the time when a contractor submits a tender.

108 That interpretation is consistent with the purpose of the Directive which is to open up the contracts to which it applies to Community competition. That purpose would be undermined if a contracting entity could organise a tendering procedure in such a way that contractors from Member States other than that in which the contracts are awarded were discouraged from tendering.

109 It follows that Article 4(2) of the Directive, in prohibiting any discrimination between tenderers, also protects those who are discouraged from tendering because they have been placed at a disadvantage by the procedure followed by a contracting entity.

110 Second, it must be ascertained whether publication at Community level of only some of the electrification contracts constituted discrimination within the meaning of Article 4(2).

111 It must be observed in that connection that, in the absence of full publication at Community level of the electrification contracts to which the Directive applied, contractors from other Member States were not in a position to take a decision in the light of all the relevant information which should have been available to them. On the other hand, contractors who were able to consult the BOAMP, the majority of whom were probably nationals of the Member State in which the electrification contracts were awarded, had information concerning the exact scope of the work as regards electrification works.

112 Accordingly, it must be held that the French Republic has failed to fulfil its obligations under Article 4(2) of the Directive.

113 Having regard to all the foregoing considerations, it must be held that in so far as the French entities responsible for the tendering procedure for electrification contracts initiated in Vendée in December 1994

- split the work,

- did not publish in the OJEC a call for competition for all the contracts comprised in that work above the threshold laid down in Article 14(10), second subparagraph, last sentence, of the Directive but confined themselves to doing so for six of them only,

- did not communicate all the information required by Annex XII to that Directive as regards the six calls for competition published in the OJEC,

- did not communicate to the Commission the information required regarding the award of all the contracts comprised in that work above the threshold laid down in Article 14(10), second subparagraph, last sentence, of the Directive,

the French Republic has failed to fulfil its obligations under Articles 4(2) and 14(1), (10) and (13), together with Articles 21(1) and (5), 24(1) and (2) and 25(5) of the Directive.

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CONCERNS	Failure concerning 31993L0038-A04P2 Failure concerning 31993L0038-A14P1 Failure concerning 31993L0038-A14P10 Failure concerning 31993L0038-A14P13 Failure concerning 31993L0038-A21P1 Failure concerning 31993L0038-A21P5 Failure concerning 31993L0038-A24P1 Failure concerning 31993L0038-A24P2 Failure concerning 31993L0038-A25P5

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SUB	Approximation of laws
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
NOTES	Brown, Adrian: Public Procurement Law Review 2001 p.NA24-NA26 Caranta, Roberto: Diritto pubblico comparato ed europeo 2001 p.329-333 X: Giurisprudenza italiana 2001 p.595-596 Adamantidou, Elsa: Nomiko Vima 2002 p.920-947
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Jacobs
JUDGRAP	Skouris
DATES	of document: 05/10/2000 of application: 22/01/1998

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ORDER OF THE COURT (Fourth Chamber)

17 July 1998 (1)

(Appeal - Public supply contracts - Decision to take no further action on a complaint concerning the conduct of the contracting authority)

In Case C-422/97 P,

Société Anonyme de Traverses en Béton Armé (Sateba), a company incorporated under French law, with its registered office in Paris, represented by JacquesManseau, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

appellant,

APPEAL against the order of the Court of First Instance of the European Communities (First Chamber) of 29 September 1997 in Case T-83/97 *Sateba* v *Commission* [1997] ECR II-1523, seeking to have that order set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (Fourth Chamber),

composed of: H. Ragnemalm (Rapporteur), President of the Chamber, J.L. Murray and K.M. Ioannou, Judges,

Advocate General: N. Fennelly,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1. By application lodged at the Registry of the Court on 12 December 1997, Société Anonyme de Traverses en Béton Armé (hereinafter 'Sateba') brought an appeal against the order of 29 September 1997 in Case T-83/97 *Sateba* v *Commission* [1997] ECR II-1523, (hereinafter 'the contested order') in which the Court of First Instance dismissed as inadmissible its application for annulment of the Commission's decision to take no further action on its complaint against Société Nationale des Chemins de Fer Belges (SNCB) of failing to comply with Community law in awarding a contract for the supply of concrete sleepers for use on its high-speed train line.

2. The context of the dispute and the factual background to the application are set out in the contested order as follows:

'1 The applicant, Sateba, is a company established in France which produces reinforced concrete sleepers for railway tracks. Its dispute with Société Nationale des Chemins de Fer Belges (the Belgian National Railway Company, hereinafter "the SNCB") arose in the context of a restricted call for tenders issued by the SNCB for the supply of monobloc concretesleepers for use on the Belgian TGV network, when the tender submitted by the applicant for the supply of duo-bloc concrete sleepers was not accepted by the contracting authority.

2 The applicant had previously been permitted to take part in a supplier qualification procedure organised by the SNCB, notice of which had been published in the Supplement to the *Official Journal of the European Communities* on 27 July 1994 (OJ 1994 S 142, p. 132). On 19 December 1994, while that qualification procedure was taking place, the applicant received a copy of the restricted call for tenders in which the SNCB invited it to submit a tender for the supply, by 31 August 1995 and 30 September 1995 respectively, of 50 000 and 10 000 monobloc concrete sleepers (Special Conditions 8133.8504.001 of 14.12.1994).

3 In its reply dated 10 January 1995 Sateba offered to supply duo-bloc concrete sleepers, which it considered were compatible with the Belgian TGV network and satisfied the SNCB's requirements for use. In order to justify submission of a "variant" offer, the applicant first explained that, in view of the short periods for delivery laid down in the call for tenders, it would not be in a position to produce 60 000 monobloc sleepers without jeopardising its commitments to the Société Nationale des Chemins de Fer Français (French National Railway Company) (SNCF). It also noted that certain technical specifications sent to it by the SNCB were incompatible with those used in its factories which, nevertheless, regularly produce sleepers for use on TGV lines and have received an "Assurance Qualité Ferroviaire AQF2" (Railway Quality Assurance) certificate from the SNCF.

4 In a letter dated 24 March 1995 the SNCB informed the applicant that its tender had not been accepted "for failure to meet technical requirements". The SNCB considered that duo-bloc sleepers are different products from monobloc sleepers, as are wooden sleepers, and cannot therefore constitute a "variant" under Belgian law, since that term is reserved for solutions which are similar to the original concept and for which provision is made in the Special Conditions. The SNCB also pointed out that the applicant's approval procedure was not yet complete and followed the Q1 specification applicable to the supplier qualification system devised by it, notice of which had been published in the *Official Journal of the European Communities*.

5 In a letter dated 28 April 1995 to the SNCB the applicant challenged the decision to reject its tender "for failure to meet technical requirements". Sateba claimed that Article 18(5) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84, hereinafter "Directive 93/38") prohibits reference in the specifications to a specific type of concrete sleeper, such as "monobloc", inthe present case, unless it is accompanied by the phrase "or equivalent". According to that provision, "[t]echnical specifications which mention ... a particular process and which have the effect of favouring or eliminating certain undertakings, shall not be used unless such specifications are indispensable for the subject of the contract". From this the applicant concluded that the proposed duo-bloc concrete sleepers were perfectly substitutable for the monobloc concrete sleepers and that the SNCB could not reject tenders for the supply of goods which were perfectly fitted for the use for which they were intended. According to the applicant, the substitutability of the two types of concrete sleeper was, furthermore, confirmed in an article on the Belgian TGV network which was published in a specialised journal and written by a director of the SNCB.

6 Furthermore, in its letter of 28 April 1995 the applicant claimed that the qualification system devised by the SNCB did not comply with the aforementioned directive. First, the fact that applicants for qualification were invited to submit tenders in restricted procurement procedures constituted an infringement of Article 31 of the directive, which provides that "the number of candidates selected must, however, take account of the need to ensure adequate competition". The SNCB thus reserved the right to eliminate candidates previously invited to submit tenders and, in so doing, rendered illusory the goal of ensuring adequate competition. Second, the alleged difficulty in approving the duo-bloc concrete sleepers produced by the applicant was contrary to Articles 30 and 34 of the directive. Since those goods were currently used on several thousand kilometres of track, in particular on the SNCF's TGV network, there was already objective evidence that the goods in question satisfied the L.23 technical specifications and thus the minimum requirements imposed by the contracting authority. The qualification procedure devised by the SNCB thus served to duplicate that objective evidence.

7 By letter dated 12 July 1995 the applicant lodged a complaint with the Secretariat-General of the Commission against the SNCB. In that letter it claimed that the position adopted by the SNCB served to restrict competition and constituted an obstacle to the free movement of goods, but it did not specify the provisions of the EC Treaty which it considered to have been breached or on which it based its complaint. The text of the complaint, under the heading "failure to comply with Directive 93/38/EEC of 14 June 1993", contained a short summary of the objections raised in the letter of 28 April 1995 to the SNCB, which is annexed to the applicant's complaint together with 13 other annexes.

8 By letter dated 22 July 1995 the Secretariat-General acknowledged receipt of the applicant's letter and informed it that its complaint would be examined by the Commission in the light of the applicable provisions of Community law. The fourth paragraph of that letter mentioned thepossibility ”of the Commission deciding to bring infringement proceedings against the Member State in question for failure to comply with Community law” and drew the applicant's attention to ”the purpose and nature of infringement proceedings under Article 169 of the EC Treaty”, which were set out in an annex.

9 On 1 December 1995 the applicant informed the Commission that it had submitted a tender in the context of a new restricted call for tenders launched by the SNCB on 14 July 1995. That tender, which included the same variant, was rejected on grounds similar to those relied upon in order to justify the rejection of its previous tender.

10 By letter dated 27 September 1996 the applicant expressed its disagreement, from both a legal and a technical point of view, with the conclusions of the experts consulted by the Commission. According to their reports, monobloc sleepers and duo-bloc sleepers are ”comparable”, rather than ”equivalent”, products. In its letter the applicant considered that ”the question is not whether two products are different, comparable or equivalent, but whether they are substitutable or interchangeable”, since those are the criteria usually applied in competition matters, both by the Court of Justice of the European Communities and by the French Cour de Cassation (Court of Cassation). It also noted that, in this sector, there is one single market for concrete sleepers, and not separate markets for monobloc sleepers and duo-bloc sleepers. The European standard defining the general technical characteristics to be exhibited by reinforced concrete sleepers, which is currently undergoing approval, confirms that view and demonstrates that monobloc and duo-bloc sleepers are intended for the same use and are, consequently, perfectly substitutable.

11 On 20 January 1997 the Directorate-General for Internal Market and Financial Services (DG XV), which is responsible for the drafting and implementation of Community public procurement law, informed the applicant of the Commission's decision to close the file on the ground that, in the case in point, there was not sufficient Community interest to justify pursuing the matter by formally initiating a procedure against the Belgian State. The Commission based that conclusion on the following considerations:

- the fact, of which the applicant complained, that the SNCB restricted its qualification system to suppliers of monobloc concrete sleepers, and which, according to the applicant, amounts to discrimination against suppliers of duo-bloc concrete sleepers, did not constitute an infringement of Community public procurement law, in particular Directive 93/38;

- on the basis of the information available to it and the current state of knowledge, the Commission could not conclude that the two products should be characterised as equivalent products. On the contrary, various technical experts considered that, although the products were comparable and could both be used in the construction of a high-speed train line, they were not equivalent products since they exhibited different characteristics, and presented different advantages and disadvantages. In addition to the relative advantages and disadvantages presented by the various types of sleeper, the contracting authority could take account of other technical information when fixing the criteria according to which it selected its material;

- at Community level there were approximately 60 suppliers of monobloc concrete sleepers and between 35 and 40 suppliers of duo-bloc sleepers. Effective competition could therefore be guaranteed even if it was limited to suppliers of monobloc sleepers or of duo-bloc sleepers.‘

3. On 1 April 1997, the appellant brought an action before the Court of First Instance for annulment of the Commission's decision to take no further action.

4. On 5 May 1997, the Commission raised a plea of inadmissibility, on the basis of Article 114(1) of the Rules of Procedure of the Court of First Instance, in respect of that application.

The contested order

5. In the contested order, the Court of First Instance dismissed the application pursuant to Article 114 of its Rules of Procedure which enables the Court of First Instance, where one of the parties has so requested, to rule on the inadmissibility of an action without considering the substance of the case and, where appropriate, without opening the oral procedure.

6. The Court of First Instance pointed out, at paragraph 32, that the procedural position of parties who have submitted a complaint to the Commission is fundamentally different in the case of a procedure under Article 169 of the Treaty from their position in a procedure under Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, 1959-1962 (I), p. 87).

7. The Court of First Instance stated, at paragraph 33, that in the present case, the complaint submitted by the applicant to the Commission could be properly examined by that institution under the procedure established by Article 169 of the Treaty.

8. It first pointed out, at paragraph 34, that the complaint formally identified the 'failure to comply with Directive 93/38' and that that formal heading was consistent with the substantive content of the complaint.

9. The Court of First Instance then noted, at paragraph 35, that the applicant had itself claimed that the position adopted by the SNCB served to restrict competition and constituted an obstacle to the free movement of goods. The Court of First Instance stated that the applicant could not deny that the appropriate procedure to be followed by the Commission in respect of possible infringements of Article 30 of the Treaty was that provided for in Article 169 of the Treaty.

10. Finally, as regards the procedure, the Court of First Instance added, at paragraph 36, that the appropriate nature, in the present case, of the Commission's action was not altered by the fact that the applicant's complaint related exclusively to conduct by a contracting entity, namely the SNCB, and did not criticise the relevant national legislation or the conduct of the Belgian Government. In that respect, the Court of First Instance recalled that acts of contracting entities are imputable to the Member States to which those entities belong and may therefore be condemned in the context of the infringement procedure established by Article 169 of the Treaty.

11. The Court of First Instance considered the alleged failure by the Commission to consider, on the basis of Regulation No 17, the anticompetitive practices supposedly committed by SNCB. The Court of First Instance noted, at paragraph 38, that as regards the exercise of the Commission's powers under Regulation No 17, the complaint submitted by the applicant did not contain any specific indication enabling it to be characterised as a request submitted under Article 3(2)(b) of that regulation. The Court of First Instance added that at no time had the applicant addressed to the Commission the requests which it claimed to have submitted and that it was only in the application for annulment that the applicant had referred for the first time to Article 86 of the Treaty and had identified the abuse of a dominant position allegedly committed by the SNCB.

12. Furthermore, the Court of First Instance pointed out, at paragraph 39, that the procedure under Regulation No 17 remains independent of the procedure for a finding that the conduct of a Member State infringes Community law and for termination of that conduct. The two procedures serve different purposes and are governed by different rules. The Court of First Instance concluded, at paragraph 40, that the decision to take no further action, which is challenged by the appellant, related exclusively to the procedure for a declaration of failure to fulfil obligations and did not constitute an implied rejection of a complaint submitted under Regulation No 17.

13. Finally, the Court of First Instance pointed out, at paragraph 41, that the findings contained in the Commission's letter did not have the effect of resolving the dispute between Sateba and the SNCB as to the legality of the public procurementprocedures undertaken by the latter and that the opinion notified in that letter was a factual element which the national court called upon to give a decision in the dispute must take into account in the course of its examination of the case but which is not binding on it.

14. In those circumstances, the Court of First Instance concluded, at paragraph 42, that the Commission had not committed any abuse of procedure and that it had acted properly in examining the complaint on the basis of Article 169 of the Treaty. The Commission's decision to discontinue the procedure for a declaration of failure to fulfil obligations was not subject to judicial review, which meant that the application had to be declared inadmissible.

The pleas put forward by the appellant

15. In support of its claim for annulment of the contested order, the appellant puts forward two pleas in law.

16. By its first plea, which is divided into three parts, the appellant alleges that the Court of First Instance committed an error of law by holding that the Commission had been entitled to examine the complaint under Article 169 of the Treaty, even though it was clear from the documents before the Court of First Instance that the complaint should have been examined on the basis of Regulation No 17. First of all, the appellant complains that the Court of First Instance misinterpreted Regulation No 17. Next it alleges that it applied an erroneous interpretation of Article 169 of the Treaty. Finally, it considers that the Court of First Instance misconstrued the concept of actionable measure and incorrectly held that it was not adversely affected by the Commission's decision.

17. By its second plea, the appellant alleges that the Court of First Instance seriously infringed the right of the defence and distorted the subject-matter of the proceedings by holding that the Commission had been entitled to adopt its decision on the basis of Article 169 of the Treaty.

18. The Commission considers that the Court of First Instance did not commit any error of law and that the appeal is clearly unfounded.

Findings of the Court

19. Pursuant to Article 119 of its Rules of Procedure, when the appeal is clearly inadmissible or clearly unfounded, the Court may, at any time, dismiss it by reasoned order.

The first part of the first plea

20. The appellant submits that the Court of First Instance misinterpreted Regulation No 17 by failing to examine the complaint in the light of the competition ruleswithin the framework of that regulation even though, according to the appellant, the complaint referred to a restriction on competition and, pursuant to Article 3(1) of Regulation No 17, the Commission may take action upon its own initiative in respect of an infringement of Articles 85 or 86 of the Treaty.

21. In that respect it should be pointed out that the Court of First Instance held, at paragraph 38 of the contested order, that the complaint did not contain any specific indication enabling it to be characterised as a request submitted under Regulation No 17 and that it was only in the application for annulment that the applicant referred for the first time to the competition rules in Article 86 of the Treaty.

22. The Court of First Instance held, at paragraph 34 of the contested order, that the complaint formally identified the 'failure to comply with Directive 93/38' and that that formal heading was consistent with the substantive content of the complaint.

23. The Court of First Instance therefore rightly held that, since the appellant's complaint concerned the public procurement rules in Directive 93/38, it could properly be examined by the Commission within the framework established by Article 169 of the Treaty and not from the point of view of the competition rules contained in Article 86 of the Treaty, which were not mentioned in the complaint.

24. Furthermore, the mere fact that reference is made to a restriction of competition is not sufficient to characterise an infringement of the competition rules in Article 86 of the Treaty when such a restriction is mentioned in the context of infringement of the public procurement rules contained in Directive 93/38. It is clear from the second, eleventh and twelfth recitals in the preamble to Directive 93/38 that one of its objectives is to ensure the free movement of goods by reacting against the absence of Community-wide competition for the supply to entities such as the SNCB, operating in the rail transport sector. The establishment of increased competition for the supply to such entities is thus one of the consequences of compliance with that directive. In those circumstances, a straightforward reference to a restriction on competition may therefore be interpreted as intended to supplement the allegation of infringement of the public procurement rules contained in Directive 93/38 and not as constituting a separate allegation based on the competition rules contained in the Treaty.

25. The fact that the Commission may take action upon its own initiative, pursuant to Article 3(1) of Regulation No 17, in order to examine a possible infringement of the competition rules contained in the Treaty cannot alter that conclusion, contrary to what the appellant appears to suggest.

26. The first part of the first plea must therefore be dismissed as clearly unfounded.

The second part of the first plea

27. Second, the appellant submits that the Court of First Instance applied an erroneous interpretation of Article 169 of the Treaty. It states that the Commission failed to state the legal basis for its decision in its letter concerning the closure of the file, and that the Court of First Instance was wrong in holding that the legal basis was Article 169 of the Treaty. Furthermore, it is not sufficient that Directive 93/38 be involved in order for Article 169 to apply, since the complaint related only to the conduct of the SNCB. Finally, the Court of First Instance did not establish the appropriate nature of the procedure by citing the case-law of the Court of Justice according to which acts of contracting entities are imputable to the Member States.

28. As regards the alleged lack of legal basis for the Commission's decision to take no further action, it is sufficient to point out that the appellant made no such allegation at any time before the Court of First Instance and, on the contrary, considered that the Commission had relied on Article 169 of the Treaty. Such a claim is therefore clearly inadmissible.

29. Pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings, unless it is based on matters of law or of fact which come to light in the course of the procedure.

30. To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the Court of First Instance (Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59).

31. As regards the argument that it is not sufficient that Directive 93/38 be involved in order for Article 169 to apply, that argument overlaps with the first part of the first plea in so far as it criticises the Court of First Instance for having held that Article 169 applied. The argument must therefore be rejected as clearly unfounded for the same reasons as those set out at paragraphs 23 to 25 above.

32. Finally, as regards the argument that the Court of First Instance failed to establish the appropriate nature of the procedure, the Court of First Instance cited the relevant case-law of the Court of Justice, at paragraph 36 of the contested order, referring, in particular, to Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043. As the Court of First Instance rightly pointed out, it follows from the application of the Community rules on public procurement and the case-law of the Court of Justice, that acts of contracting entities are imputable to the Member States to which those entities belong and may therefore be condemned in the context of the infringement procedure established by Article 169 of the Treaty.

33. The second part of the first plea must therefore be dismissed as both clearly unfounded and clearly inadmissible.

The third part of the first plea

34. Third, the appellant considers that by attributing a legal basis which did not exist to the Commission's decision not to take further action, the Court of First Instance misconstrued the concept of actionable measure in so far as it proceeded on the premiss that the Commission's decision did not affect the appellant's legal position in the context of a possible procedure in application of the competition rules. In particular, the appellant criticises the Court of First Instance for characterising as facts the findings contained in the Commission's letter concerning its decision to take no further action, since that characterisation, in so far as it may be taken into account by third parties, including a national court, is prejudicial to the appellant's interests.

35. In so far as the appellant's argument concerns an alleged lack of legal basis for the Commission's decision, it overlaps with the second part of the first plea and must be rejected as inadmissible for the same reasons as those set out at paragraph 28 above.

36. As regards the alleged effect of the Commission's decision on the appellant's legal position in the context of a competition procedure, the Court of First Instance rightly pointed out, at paragraphs 39 to 41 of the contested order, that the procedure under Regulation No 17 was independent of the procedure based on Article 169 of the Treaty for a finding that the conduct of a Member State

infringes Community law and for termination of that conduct. The two procedures serve different purposes and are governed by different rules. The Court of First Instance rightly cited the case-law of the Court of Justice according to which the initiation of a procedure under Article 169 of the Treaty cannot automatically entail the adoption of a decision on the basis of Regulation No 17.

37. The Court of First Instance rightly concluded that the Commission's decision to take no further action related exclusively to the procedure for a declaration of failure to fulfil obligations and did not constitute an implied rejection of a complaint submitted under Regulation No 17.

38. Furthermore, the Court of First Instance correctly held that, although they constituted a factual element, the Commission's findings were not prejudicial to the appellant's interests in a possible procedure under the competition rules or the public procurement rules. As regards the latter procedure, the Court of First Instance was also correct in holding that the findings at issue were not binding on national courts.

39. As regards a possible competition procedure, it should be added that, according to the case-law of the Court of Justice, letters from the Commission concerning its decision to close a competition file may be taken into account by a national court called upon to resolve a dispute within the same field. However, the national court remains free to accept or reject the Commission's observations (see, in particular, Joined Cases 253/78 and 1/79 to 3/79 *Giry and Guerlain and Others* [1980] ECR 2327, paragraphs 12 and 13). The same is, *a fortiori*, true when the decision to close the file was adopted by the Commission in respect of matters falling within the scope of the public procurement rules, rather than the competition rules of the Treaty.

40. It follows that the third part of the first plea must be dismissed and that the first plea must be dismissed as both clearly unfounded and clearly inadmissible.

The second plea

41. In support of its second plea, the appellant claims that the Court of First Instance manifestly undermined the rights of the defence by laying down the principle that a person who has submitted a complaint has no procedural rights in the context of a procedure under Article 169 of the Treaty. Furthermore, the Court of First Instance distorted the subject-matter of the proceedings since it was aware that the case before it concerned an application for annulment of a decision adversely affecting the interests of a person in the sense contemplated in Article 173 of the Treaty.

42. As regards the first argument, concerning the absence of procedural rights for complainants under Article 169, the Court of First Instance rightly pointed out, at paragraph 32 of the contested order, that the procedural position of parties who have submitted a complaint to the Commission is fundamentally different in the case of a procedure under Article 169 of the Treaty from their position in the case of a proceeding under Regulation No 17. According to the settled case-law of the Court of Justice, the Commission is not bound to initiate a procedure under Article 169 but has a discretion which excludes the right for individuals to require it to adopt a specific position (see, in particular, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11). It follows that the Court of First Instance was correct in stating that, in the case of a procedure under Article 169 of the Treaty, it is not open to persons who have lodged a complaint to bring an action before the Community judicature against a decision to take no further action on their complaint; nor do they have any procedural rights, comparable to those they may have in the case of a procedure under Regulation No 17, enabling them to require the Commission to inform them and to grant them a hearing. The appellant's argument must therefore be rejected as clearly unfounded.

43. As regards the second argument according to which the Court of First Instance distorted the subject-matter of the proceedings, that argument overlaps with thefirst plea. For the reasons set out at paragraphs 23 to 25 above, that argument should also be rejected as clearly unfounded.

44. In those circumstances, pursuant to Article 119 of the Rules of Procedure of the Court of Justice, the appeal must be dismissed as both clearly unfounded and clearly inadmissible.

Costs

45. Under Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful, it must be ordered to pay

the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby orders:

1. The appeal is dismissed;

2. The appellant is ordered to pay the costs of these proceedings.

Luxembourg, 17 July 1998.

R. Grass

Registrar

H. Ragnemalm

President of the Fourth Chamber

1: Language of the case: French. </HTML

Order of the Court (Fourth Chamber)
of 17 July 1998
Société Anonyme de Traverses en Béton Armé (Sateba) v Commission of the European Communities.
Appeal - Public supply contracts - Decision to take no further action on a complaint concerning the conduct of the contracting authority.
Case C-422/97 P.

1 Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Complaint by a tenderer alleging that the conduct of the contracting entity infringes the directive and restricts competition - Examination by the Commission under the procedure applicable to a failure by a Member State to fulfil its obligations - Whether permissible - Commission's power to take action upon its own initiative under the competition rules - Not relevant

(EC Treaty, Art. 169; Council Regulation No 17, Art. 3(1); Council Directive 93/38)

2 Appeals - Pleas in law - Plea put forward for the first time in the appeal - Inadmissible

(EC Statute of the Court of Justice, Art. 51)

3 Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Acts of the contracting entities - Acts imputable to the Member States - Applicability of the procedure for a declaration of failure to fulfil obligations

(EC Treaty, Art. 169; Council Directive 93/38)

4 Actions for failure to fulfil obligations - Procedure - Independent of the competition procedure

(EC Treaty, Art. 169; Council Regulation No 17)

5 Actions for failure to fulfil obligations - Commission's right of action - Exercise of its discretion - Procedural position of parties who have submitted a complaint different from that in competition matters

(EC Treaty, Art. 169; Council Regulation No 17)

1 In the case of a complaint submitted to the Commission by a tenderer for a public contract falling within the scope of Directive 93/38, criticising the conduct of the contracting entity, the mere fact that reference is made to a restriction of competition is not sufficient to indicate an infringement of the competition rules in Article 86 of the Treaty when such a restriction is mentioned in the context of infringement of the rules in that directive, but can legitimately be interpreted as intended to supplement that allegation. The fact that the Commission may take action upon its own initiative, pursuant to Article 3(1) of Regulation No 17, in order to examine a possible infringement of the competition rules contained in the Treaty cannot alter that conclusion.

2 A plea in law put forward for the first time in the appeal before the Court of Justice must be rejected as inadmissible. To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the Court of First Instance.

3 It follows from the application of the Community rules on public procurement, in this case those covered by Directive 93/38, that acts of contracting entities are imputable to the Member States to which those entities belong and may therefore be condemned in the context of the infringement procedure established by Article 169 of the Treaty.

4 The procedure under Regulation No 17 in the field of competition is independent of the procedure

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based on Article 169 of the Treaty for a finding that the conduct of a Member State infringes Community law and for termination of that conduct. The two procedures serve different purposes and are governed by different rules, so that the initiation of a procedure under Article 169 of the Treaty cannot automatically entail the adoption of a decision on the basis of Regulation No 17. It follows that a decision by the Commission to take no further action in the context of a procedure for a declaration of failure to fulfil obligations relates exclusively to that procedure and does not constitute an implied rejection of a complaint submitted under Regulation No 17.

5 The procedural position of parties who have submitted a complaint to the Commission is fundamentally different in the case of a procedure under Article 169 of the Treaty from their position in the case of a proceeding under Regulation No 17 in the field of competition. As regards the former, the Commission is not bound to initiate the procedure but has a discretion which excludes the right for individuals to require it to adopt a specific position. Consequently it is not open to persons who have lodged a complaint in the case of a procedure under Article 169 of the Treaty to bring an action before the Community judicature against a decision to take no further action on their complaint; nor do they have any procedural rights, comparable to those they may have in the case of a procedure under Regulation No 17, enabling them to require the Commission to inform them and to grant them a hearing.

DOCNUM	61997O0422
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1997 ; O ; order
PUBREF	European Court reports 1998 Page I-04913
DOC	1998/07/17
LODGED	1997/12/12
JURCIT	31962R0017-A03P1 : N 20 31962R0017 : N 20 61978J0253-N12-13 : N 39 61987J0247-N11 : N 42 31991X0530(01)-A48P2 : N 29 11992E085 : N 20 11992E086 : N 20 11992E169 : N 42 61992J0136-N59 : N 30 31993L0038-C11 : N 24 31993L0038-C12 : N 24 31993L0038-C2 : N 24

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	31993L0038 : N 24 61994J0087 : N 32
CONCERNS	Confirms 61997B0083
SUB	Approximation of laws
AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	France
PROCEDU	Application for annulment ; Appeal - inadmissible ; Appeal - unfounded
ADVGEN	Fennelly
JUDGRAP	Ragnemalm
DATES	of document: 17/07/1998 of application: 12/12/1997

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Judgment of the Court (Fifth Chamber)
of 17 December 1998
Connemara Machine Turf Co. Ltd v Coillte Teoranta.
Reference for a preliminary ruling: High Court - Ireland.
Public supply contracts - Definition of contracting authority.
Case C-306/97.

Approximation of laws - Procedures for the award of public supply contracts - Directive 77/62 - Contracting authorities - Bodies corresponding to legal persons governed by public law - Annex I to Directive 77/62 - Public authorities whose public supply contracts are subject to control by the State

(Council Directive 77/62, Art. 1(b) and Annex I, Point VI)

A body such as Coillte Teoranta (Irish Forestry Board) is a contracting authority within the meaning of Article 1(b) of Directive 77/62 coordinating procedures for the award of public supply contracts.

Such a body, which has legal personality and does not award public contracts on behalf of the State or a regional or local authority, cannot be regarded as being the State or a regional or local authority, but constitutes a body corresponding to legal persons governed by public law within the meaning of Article 1(b) of Directive 77/62 in conjunction with Point VI (Ireland) of Annex I thereto, where the State may exercise control, at least indirectly, over the award of public supply contracts.

In Case C-306/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the High Court (Ireland) for a preliminary ruling in the proceedings pending before that court between

Connemara Machine Turf Co. Ltd

and

Coillte Teoranta

on the interpretation of Article 1 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1), and of Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1),

THE COURT

(Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann (Rapporteur), J.C. Moitinho de Almeida, C. Gulmann and M. Wathelet, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Connemara Machine Turf Co. Ltd, by Philip Lee and Lee McEvoy, Solicitors,

- Coillte Teoranta, by Philippa Watson, Barrister, instructed by Denis Cagney, Solicitor,

- the Irish Government, by Michael A. Buckley, Chief State Solicitor, acting as Agent, and

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Patrick Mooney BL,

- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Paul Lasok QC and Rhodri Williams, Barrister,

- the Commission of the European Communities, by Richard Wainwright, Principal Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Connemara Machine Turf Co. Ltd, represented by Bill Shipsey SC and Philip Lee, Solicitor; Coillte Teoranta, represented by Philippa Watson; the Irish Government, represented by Michael A. Buckley and Donal O'Donnell SC; the French Government, represented by Philippe Lalliot, Secretary for Foreign Affairs in the Legal Department of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Paul Lasok and Rhodri Williams; and the Commission, represented by Richard Wainwright, at the hearing on 28 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 July 1998,

gives the following

Judgment

1 By order of 29 May 1997, received at the Court on 2 September 1997, the High Court (Ireland) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 1 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1), and of Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2 Those questions were raised in proceedings between Connemara Machine Turf Co. Limited (hereinafter `Connemara'), a company incorporated under Irish law engaged in the production of machine-cut turf and the sale of chemical fertilisers, and Coillte Teoranta (The Irish Forestry Board Limited) concerning the award by the latter of two public supply contracts.

3 Until 1994 the award of public supply contracts was governed in the Community by Directive 77/62, as amended inter alia by Directive 88/295.

4 Article 1 of Directive 77/62 defines `contracting authority' as follows:

`For the purpose of this directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I;

...'.

5 Point VI of Annex I to Directive 77/62 specifies, with respect to Ireland, that the corresponding bodies are `other public authorities whose public supply contracts are subject to control by the State'.

6 Directive 77/62 was repealed by Directive 93/36. That directive's provisions were to be transposed into national law by 14 June 1994 at the latest; Ireland had not yet done so on that date.

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7 Under Article 1 of Directive 93/36,

`For the purpose of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law...'.

8 The establishment of Coillte Teoranta in the form of a private company was provided for by Section 9 of the Irish Forestry Act 1988 (hereinafter `the Act').

9 Under the Act, the objects of Coillte Teoranta are to carry on the business of forestry and related activities on a commercial basis and, in accordance with efficient silvicultural practices, to establish and carry on woodland industries, and to participate with others in forestry activities consistent with those objects.

10 Under Paragraph 3(14) of its memorandum of association, the objects of Coillte Teoranta, as owner of 12 national parks, access to which is free of charge, also include the provision of recreation, sporting, educational, scientific and cultural facilities.

11 The Irish Government transferred to Coillte Teoranta land and other property worth approximately IEP 700 000 000. In return for those assets, Coillte Teoranta issued shares to the Minister for Finance, who is thus its majority shareholder.

12 As regards the structure of Coillte Teoranta, it follows from the Act and its memorandum and articles of association that it was established by the Minister for Energy (hereinafter `the Minister'), that its memorandum and articles and any amendments thereto must be approved by him (Sections 11 and 15), that the chairman and other directors are appointed and their remuneration determined by him (Section 15(2)(b) and (d)), that the first Chief Executive is to be appointed by the Minister and hold office on the terms determined by him (Section 35), that the appointment of the company's auditors must be approved by the Minister (Section 15(2)(e)) and that the company is to comply with State policy and any ministerial directives with regard to the remuneration, allowances and conditions of employment of its employees (Section 36). Some of the Minister's decisions require the consent of the Minister for Finance.

13 In managing its business Coillte Teoranta must comply with the following obligations: the Minister may issue written directions requiring it to comply with State policy decisions of a general kind concerning forestry, or to provide or maintain specified services or facilities, or to maintain or use specified land or premises in its possession for a particular purpose (Section 38 of the Act); it is obliged to consult the Minister for Finance concerning forestry development in areas of scientific interest (Section 13); it must submit each year to the Minister a programme for the sale and acquisition of land (Section 14); the establishment and acquisition of subsidiaries must be approved by the Minister (Section 15(2)(g)); a general meeting must be convened if the two ministers

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so request (Paragraph 15 of the articles); and its annual report and auditor's report must be laid before the Irish Parliament (Sections 30 and 31 of the Act).

14 As regards finance, under the relevant provisions, Coillte Teoranta's share capital must be approved by the Minister for Finance (Section 10 of the Act). It is not authorised to borrow without the approval of the Minister (Section 24), and the Minister for Finance may guarantee repayment of any borrowings (Section 25). It may invest a sum not exceeding IEP 250 000 in other undertakings. That sum may be increased with the approval of the Minister given with the consent of the Minister for Finance (Section 15(2)(h)). He may also make sums available to Coillte Teoranta on particular terms for specific purposes.

15 On 12 March 1993 and 10 March 1994 Coillte Teoranta called for tenders for fertiliser supply contracts worth over ECU 200 000 in each case, without publishing a notice of tender in the Official Journal of the European Communities.

16 Connemara submitted tenders in each procedure, but they were not accepted.

17 On 21 June 1994 Connemara brought proceedings in the High Court inter alia for a declaration that the tender and award procedure of Coillte Teoranta was contrary to Directive 77/62. Coillte Teoranta submitted in this respect that it was not a contracting authority within the meaning of that directive.

18 In these circumstances, the High Court referred the following questions to the Court of Justice for a preliminary ruling:

`1. Is the defendant a "contracting authority" within the definition of the term "contracting authorities" contained in Article 1(b) of Council Directive 77/62/EEC of 21 December 1976?

2. Is the defendant a "contracting authority" within the definition of the term "contracting authorities" contained in Article 1(b) of Council Directive 93/36/EEC of 14 June 1993?'

19 Connemara and the Commission consider that, by virtue of the various provisions governing the status of Coillte Teoranta, it must be regarded as falling within the notion of the State, as defined by the Court in Case 31/87 Beentjes v Netherlands State [1988] ECR 4635.

20 In that judgment, they claim, the Court gave a functional interpretation to the concept of the State for the purposes of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), which contained the same definition of contracting authorities as Directive 77/62. Following that interpretation, a body whose composition and functions are laid down by legislation and which largely depends on the public authorities must be regarded as falling within the notion of the State, even if it is not formally part of the State administration.

21 Connemara and the Commission further consider that Coillte Teoranta may also be regarded as an `other' public authority whose public supply contracts are subject to control by the State within the meaning of Point VI of Annex I to Directive 77/62.

22 The Irish Government and Coillte Teoranta, on the other hand, consider that the latter is not a contracting authority within the meaning of either Directive 77/62 or Directive 93/36.

23 They submit that Coillte Teoranta is a private undertaking subject to the Companies Act. It is thus a commercial company belonging to the State. The powers of appointing and removing its officers and defining its general policy are no more extensive than those provided for in the memorandum and articles of a private company which is owned almost entirely by a single shareholder. Its day-to-day business, on the other hand, is managed independently and the State has no influence on the award of contracts.

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24 The French and United Kingdom Governments concentrate their observations on the question whether Coillte Teoranta is a body governed by public law within the meaning of Article 1(b) of Directive 93/36.

25 It must first be stated that the facts of the present case fall exclusively within the scope of Directive 77/62. At the time when the invitation to tender was issued, and even when the contract in question was awarded, the period for transposing Directive 93/36 had not yet expired, and Ireland had not yet transposed it.

26 It follows that the Court must confine itself to answering the question whether a body such as Coillte Teoranta is a contracting authority within the meaning of Directive 77/62.

27 On this point, it must be noted that, unlike the body concerned in Beentjes, Coillte Teoranta has legal personality. Moreover, it is common ground that it does not award public contracts on behalf of the State or a regional or local authority.

28 In those circumstances, Coillte Teoranta cannot be regarded as being the State or a regional or local authority within the meaning of Article 1(b) of Directive 77/62. It must still be considered, however, whether it is one of the bodies corresponding to legal persons governed by public law listed in Annex I to Directive 77/62.

29 With reference to Ireland, that annex describes as contracting authorities other public authorities whose public supply contracts are subject to control by the State.

30 It must be borne in mind that the purpose of coordinating at Community level the procedures for the award of public supply contracts is to eliminate barriers to the free movement of goods.

31 In order to give full effect to the principle of free movement, the term `contracting authority' must be interpreted in functional terms (see, to that effect, the judgment of 10 November 1998 in Case C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding [1998] ECR I-6821, paragraph 62).

32 It must be emphasised here that it is the State which set up Coillte Teoranta and entrusted specific tasks to it, consisting principally of managing the national forests and woodland industries, but also of providing various facilities in the public interest. It is also the State which has power to appoint the principal officers of Coillte Teoranta.

33 Moreover, the Minister's power to give instructions to Coillte Teoranta, in particular requiring it to comply with State policy on forestry or to provide specified services or facilities, and the powers conferred on that Minister and the Minister for Finance in financial matters give the State the possibility of controlling Coillte Teoranta's economic activity.

34 It follows that, while there is indeed no provision expressly to the effect that State control is to extend specifically to the awarding of public supply contracts by Coillte Teoranta, the State may exercise such control, at least indirectly.

35 Consequently, Coillte Teoranta must be regarded as a `public authority whose public supply contracts are subject to control by the State' within the meaning of Point VI of Annex I to Directive 77/62.

36 The answer to the questions referred for a preliminary ruling must therefore be that a body such as Coillte Teoranta is a contracting authority within the meaning of Article 1(b) of Directive 77/62, as amended by Directive 88/295.

Costs

37 The costs incurred by the Irish, French and United Kingdom Governments and by the Commission,

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which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the High Court by order of 20 May 1997, hereby rules:

A body such as Coillte Teoranta is a contracting authority within the meaning of Article 1(b) of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Council Directive 88/295/EEC of 22 March 1988.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1997 ; J ; judgment
PUBREF	European Court reports 1998 Page I-08761
DOC	1998/12/17
LODGED	1997/09/02
JURCIT	31971L0305 : N 20 31977L0062-A01 : N 1 31977L0062-A01LB : N 18 28 36 31977L0062-N1PT6 : N 28 29 35 31977L0062 : N 20 25 26 61987J0031 : N 20 27 31993L0036-A01 : N 1 31993L0036-A01LB : N 18 31993L0036 : N 25 61996J0360-N62 : N 31
CONCERNS	Interprets 31977L0062-N1PT6
SUB	Approximation of laws
AUTLANG	English

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OBSERV	Ireland ; France ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Ireland
NATCOUR	*A9* High Court (Ireland), judgment of 26/08/1997
NOTES	Casati, Claus: European Law Reporter 1999 p.97-98 Gazin, F.: Europe 1999 Février Comm. no 75 p.19-20 Scotti, Elisa: Il Foro italiano 1999 IV Col.140-146 Fernandez Martín, José M.: Public Procurement Law Review 1999 p.CS47-CS52 Scotti Camuzzi, Sergio: Diritto pubblico comparato ed europeo 1999 p.719-736 Moreno Molina, José Antonio: Revista de Administracion Publica 2000 no 151 p.319-342
PROCEDU	Reference for a preliminary ruling
ADVGEN	Alber
JUDGRAP	Jann
DATES	of document: 17/12/1998 of application: 02/09/1997

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Judgment of the Court (Sixth Chamber)
of 4 March 1999
Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v
Landeskrankenanstalten-Betriebsgesellschaft.
Reference for a preliminary ruling: Unabhängiger Verwaltungssenat für Kärnten - Austria.
Public service contracts - Effect of a directive not transposed into national law.
Case C-258/97.

1 Approximation of laws - Review procedures in relation to the award of public supply and public works contracts - Directive 89/665 - Bodies with jurisdiction to review procedures - Applicability of the conditions laid down in Article 2(8), second subparagraph, of Directive 89/665 - Conditions - `Courts or tribunals' - Not applicable

(Council Directive 89/665, Art. 2(8), second subpara.)

2 Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Provision requiring Member States to establish bodies with jurisdiction to review procedures - Failure to transpose the Directive - Consequences - Whether possible for bodies with jurisdiction in relation to public supply and public works contracts also to hear appeals concerning public service contracts - Not axiomatic - National courts required to determine whether appeals are possible on the basis of the domestic law in force

(Council Directives 89/665, Art. 2(8), and 92/50, Art. 41)

3 Approximation of laws - Procedure for the award of public service contracts - Directive 92/50 - Scope - Engineering services, including planning, consultancy and studies relating to the running of a hospital - Covered - Falling within Category No 12 of Annex I A

(Council Directive 92/50, Annex I A)

4 Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Direct effect

(Council Directive 92/50)

1 The conditions laid down in Article 2(8) of Council Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts do not apply to authorities whose composition and functioning are governed by rules such as those governing the Unabhängiger Verwaltungssenat für Kärnten (an independent administrative authority responsible for verifying the legality of administrative measures adopted by the Land of Carinthia), which displays all the characteristics required for it to be recognised as a court or tribunal within the meaning of Article 177 of the Treaty.

2 Neither Article 2(8) nor any other provisions of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts may be interpreted as meaning that, if Directive 92/50 relating to the coordination of procedures for the award of public service contracts has not been transposed by the end of the period prescribed for that purpose, the review bodies in the Member States - established under Article 2(8) of Directive 89/665 - with jurisdiction to review procedures for the award of public supply and public works contracts may also hear appeals concerning procedures for the award of public service contracts.

However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts.

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The national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

3 Services relating to a number of engineering services, including planning, consultancy and studies for various medical facilities, and concerning tasks relating to the preparation and execution of projects for the construction of a paediatric clinic in a hospital and the corresponding medical facilities, fall within Category No 12 of Annex I A to Directive 92/50 relating to the coordination of procedures for the award of public service contracts.

4 The provisions of Titles I and II of Directive 92/50 may be relied upon directly by individuals before national courts. The provisions of Titles III to VI may also be relied upon by an individual before a national court if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise.

The detailed provisions of Titles III to VI of Directive 92/50 on the choice of award procedures and the rules applicable to competitions, common technical and advertising rules, and participation and selection and award criteria, are, subject to exceptions and qualifications which are apparent from their terms, unconditional and sufficiently clear and precise to be relied on by service providers before national courts.

In Case C-258/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Unabhängiger Verwaltungssenat für Kärnten (Austria) for a preliminary ruling in the proceedings pending before that body between

Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI)

and

Landeskrankenanstalten-Betriebsgesellschaft

on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) and of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT

(Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), President of the Chamber, G. Hirsch, J.L. Murray, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: A. Saggio,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI), by Rainer Kurbos, Rechtsanwalt, Graz,

- Landeskrankenanstalten-Betriebsgesellschaft, by Klaus Messiner and Ute Messiner, Rechtsanwälte, Klagenfurt,

- the Austrian Government, by Wolf Okresek, Sektionschefrat at the Federal Chancellor's Office, acting as Agent,

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- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Claudia Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Landeskrankenanstalten-Betriebsgesellschaft, represented by Klaus Messiner and Gerhard Maderthaner, Leiter der Rechtsabteilung, the Austrian Government, represented by Michael Fruhmann, of the Federal Chancellor's Office, and the Commission, represented by Hendrik van Lier and Claudia Schmidt, at the hearing on 17 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 1 October 1998,

gives the following

Judgment

Costs

40 The costs incurred by the Austrian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, pending before the referring body, the decision on costs is a matter for that body.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Unabhängiger Verwaltungssenat für Kärnten by order of 8 July 1997, hereby rules:

1. The conditions laid down in Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts do not apply to authorities whose composition and functioning are governed by rules such as those to which that body is subject.

2. Neither Article 2(8) nor any other provisions of Directive 89/665 may be interpreted as meaning that, if Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts has not been transposed by the end of the period prescribed for that purpose, the review bodies in the Member States with jurisdiction to review procedures for the award of public supply contracts and public works contracts, established under Article 2(8) of Directive 89/665, may also hear appeals concerning procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the case in the main proceedings, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

3. Services of the kind with which the defendant's invitation to tender is concerned, namely tasks relating to the preparation and execution of projects for the construction of a paediatric clinic in a hospital and the corresponding medical facilities, fall within Category No 12 of Annex I A to Directive 92/50.

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4. The provisions of Titles I and II of Directive 92/50 may be relied on directly by individuals before national courts. As regards the provisions of Titles III to VI, they may also be relied on by an individual before a national court if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise.

1 By order of 8 July 1997, received at the Court on 17 July 1997, the Unabhängiger Verwaltungssenat für Kärnten (Independent Administrative Senate for Carinthia) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty five questions on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) and of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 Those questions were raised in proceedings between Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) (hereinafter `the plaintiff') and Landeskrankenanstalten-Betriebsgesellschaft (the establishment responsible for the management of Land hospitals, hereinafter `the defendant') concerning the award of a service contract relating to the construction of a paediatric hospital in Klagenfurt.

Community law

3 Article 1(1) of Council Directive 89/665/EEC, as amended by Article 41 of Directive 92/50, provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4 Article 1(2) and (3) of Directive 89/665 provide:

`2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

5 Article 2 of the same directive provides:

`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender,

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the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

...

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

6 Articles 8, 9 and 10 of Directive 92/50 provide:

Article 8

`Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.'

Article 9

`Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

Article 10

`Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

7 Under Article 168 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21), Directive 92/50 was to be transposed into Austrian law before 1 January 1995.

Austrian law

8 As far as the Land of Carinthia is concerned, Directive 89/665 was transposed by the Kärntner

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Auftragsvergabegesetz (Law of the Land of Carinthia on the award of public contracts) which entered into force on 1 January 1994 (LGBl. No 55/1994). In Section VIII (`Remedies'), Article 59(1) provides that the procedure for awarding public contracts under that Law is to be subject to monitoring by the Unabhängiger Verwaltungssenat für Kärnten (an independent administrative authority responsible for verifying the legality of administrative measures adopted by the Land, hereinafter `the UVK').

9 The provisions concerning that authority are contained in a special statute, the Kärntner Verwaltungssenatsgesetz (LGBl. No 104/1990). It governs in particular the terms of reference of the authority, its composition and its independence.

10 It is common ground that, in the Land of Carinthia, the transposition of Directive 92/50 did not take effect until 1 July 1997.

The questions referred

11 The plaintiff submitted a tender in a procedure for the award of a contract organised by the defendant for the construction of a paediatric hospital in Klagenfurt. The procedure related to a number of engineering services, including planning, consultancy and studies for the various medical facilities.

12 After the contract was awarded to the Viennese company CMT Medizintechnik Gesellschaft mbH, the plaintiff, which had also participated in the procedure, commenced proceedings before the UVK, alleging that the tendering procedure had infringed the Community rules on public service contracts and was therefore unlawful.

13 Considering that it was unable to adjudicate on the dispute before it without seeking clarification as to the interpretation of Directives 89/665 and 92/50, the UVK stayed proceedings pending a preliminary ruling from the Court of Justice on the following five questions:

`1. Is Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts to be interpreted as meaning that the Unabhängiger Verwaltungssenat für Kärnten fulfils the conditions for a body responsible for review procedures with respect to services?

2. Are these or other provisions of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, from which there derives an individual right to have review proceedings conducted before authorities or courts which comply with the provisions of Article 2(8) of Directive 89/665/EEC, to be interpreted as being sufficiently precise and specific that, in the event of non-transposition of the directive in question by the Member State, an individual may successfully assert that legal right against the Member State in legal proceedings?

3. Are the provisions of Article 41 of Directive 92/50/EEC in conjunction with Directive 89/665/EEC, which are the basis of an individual's right to have review proceedings conducted, to be interpreted as meaning that a national court with the characteristics of the Unabhängiger Verwaltungssenat für Kärnten may, when conducting review proceedings on the basis of national provisions such as Article 59 et seq. of the Carinthian Auftragsvergabegesetz and the regulations relating thereto, disregard those provisions if they prevent the carrying out of review proceedings under the Carinthian Auftragsvergabegesetz for the award of public service contracts, and therefore nevertheless conduct review proceedings in accordance with Article 8 of the Carinthian Auftragsvergabegesetz?

4. Are the services mentioned in the facts of the case, with reference to Article 10 of Directive 92/50/EEC, to be classified as services coming under Annex IA, Category No 12, of Directive 92/50/EEC (architectural services; engineering services and integrated engineering services; urban

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planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services)?

5. Are the provisions of Directive 92/50/EEC to be interpreted as satisfying the conditions laid down in the judgment in Case 41/74 Van Duyn (paragraph 12) for the direct applicability of a Community directive, with the result that services coming under Annex IA of the directive are to be awarded under the procedure therein mentioned, or are the relevant provisions of the directive in connection with the services mentioned in Annex IA capable of fulfilling the conditions laid down in the said case?'

The first question

14 By its first question the referring body seeks essentially to ascertain whether provisions such as those which govern its composition and functioning conform with the conditions laid down in Article 2(8) of Directive 89/665.

15 That provision is concerned with bodies hearing appeals against decisions adopted by authorities responsible for awarding public contracts falling within the scope of that directive.

16 Under the first subparagraph of Article 2(8) of Directive 89/665, Member States have two options in organising review procedures for public contracts.

17 The first option consists in vesting the power to hear appeals in judicial authorities. Under the second option, that power is, initially, granted to non-judicial authorities. In such circumstances, the decisions of those authorities must be amenable to judicial review or to review by another authority which meets the special requirements laid down in the second subparagraph of Article 2(8) of Directive 89/665 in order to ensure that an adequate remedy is available (Case C-103/97 Köllensperger [1999] ECR I-551, paragraph 29).

18 As the Advocate General observed in points 12 to 14 of his Opinion, a body such as the UVK displays all the characteristics required for it to be recognised as a court or tribunal within the meaning of Article 177 of the Treaty.

19 It follows that if, as in a case such as this, the reviewing authority is of a judicial nature, the particular requirements of the second subparagraph of Article 2(8) of Directive 89/665 do not apply.

20 Accordingly, the answer to be given to the referring body must be that the conditions laid down in Article 2(8) of Directive 89/665 do not apply to authorities whose composition and functioning are governed by rules such as those to which that body is subject.

The second and third questions

21 By its second and third questions, which it is appropriate to consider together, the referring body seeks essentially to ascertain whether Article 2(8) or other provisions of Directive 89/665 must be construed as meaning that, if Directive 92/50 has not been transposed by the end of the period laid down for that purpose, the review bodies in the Member States with jurisdiction to review procedures for the award of public supply contracts and public works contracts, established under Article 2(8) of Directive 89/665, may also hear appeals concerning procedures for the award of public service contracts.

22 It must be noted at the outset that, in Case C-54/96 Dorsch Consult v Bundesbaugesellschaft Berlin [1997] ECR I-4961, paragraph 40, and Case C-76/97 Tögel v Niederösterreichische Gebietskrankenkasse [1998] ECR I-5357, paragraph 22), the Court held that it was for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law but that in each case the Member States must ensure that those

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rights are effectively protected. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction which may arise within the national judicial system from the classification of certain legal situations based on Community law.

23 In paragraphs 41 and 23 of those judgments, respectively, the Court went on to state that although Article 41 of Directive 92/50 requires the Member States to adopt the measures necessary to ensure effective review in the field of public service contracts, it does not indicate which national bodies are to be the competent bodies for that purpose or whether those bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts.

24 It is nevertheless undisputed that, on the date on which the plaintiff instituted proceedings before the UVK, Directive 92/50 had not yet been transposed into domestic law in Carinthia. The Law transposing it did not enter into force until 1 July 1997.

25 Having regard to similar circumstances, in paragraphs 43 and 25 respectively of Dorsch Consult and Tögel, cited above, the Court stated that the Member States' obligation arising from a directive to achieve the result prescribed by the directive and their duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It followed that, when applying national law, whether adopted before or after the directive, the national court having to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (see the judgments in Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; and in Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 26).

26 In paragraphs 44 and 26 respectively of its judgments in Dorsch Consult and Tögel, cited above, the Court also pointed out that the question of the designation of a body competent to hear appeals in relation to public service contracts is relevant even where Directive 92/50 has not been transposed. Where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, the Court has recognised, subject to certain conditions, the right of individuals to rely in law on a directive as against a defaulting Member State. Although this minimum guarantee cannot justify a Member State in absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, in particular, the judgment in Case C-253/95 Commission v Germany [1996] ECR I-2423, paragraph 13), it may nevertheless have the effect of enabling individuals to rely, as against a Member State, on the substantive provisions of Directive 92/50.

27 Finally, in paragraphs 45 and 27 respectively of the same judgments, the Court reiterated that, if the relevant domestic provisions cannot be interpreted in conformity with Directive 92/50, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed (see, in particular, the judgment in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others [1996] ECR I-4845).

28 The answer to the second and third questions must therefore be that neither Article 2(8) nor any other provisions of Directive 89/665 may be interpreted as meaning that, if Directive 92/50 has not been transposed by the end of the period prescribed for that purpose, the review bodies in the Member States with jurisdiction to review procedures for the award of public supply contracts and public works contracts, established under Article 2(8) of Directive 89/665, may also hear appeals concerning procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement

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that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the case in the main proceedings, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

The fourth question

29 By its fourth question the referring body seeks to ascertain whether services such as those with which the defendant3s invitation to tender was concerned fall within Category No 12 of Annex I A to Directive 92/50.

30 Category No 12 of Annex I A to Directive 92/50 comprises architectural services, engineering services and integrated engineering services, urban planning and landscape architectural services, related scientific and technical consulting services and technical testing and analysis services.

31 For the reasons given by the Advocate General in point 25 of his Opinion, it is clear that services such as those with which the defendant's invitation to tender is concerned fall within Category No 12 of Annex I A to Directive 92/50.

32 The answer to the fourth question must therefore be that services of the kind with which the defendant's invitation to tender is concerned, namely tasks relating to the preparation and execution of projects for the construction of a paediatric clinic in a hospital and the corresponding medical facilities, fall within Category No 12 of Annex I A to Directive 92/50.

The fifth question

33 By its fifth question the referring body seeks essentially to ascertain whether Directive 92/50 may be relied on by individuals before national courts.

34 As the Court held in paragraph 42 of Tögel, cited above, it is settled case-law (see the judgment in Case 31/87 Beentjes v Netherlands State [1988] ECR 4635, paragraph 40) that whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied on by individuals against the State where that State fails to implement the directive in national law within the prescribed period or where it fails to implement it correctly.

35 It is therefore necessary to consider whether the relevant provisions of Directive 92/50 appear, as regards their content, to be unconditional and sufficiently precise to be relied on by an individual against the State.

36 It was held in paragraph 44 of Tögel, cited above, that the provisions of Title I, concerning the matters and persons covered by the directive, and of Title II, on the procedures applicable to contracts for the services listed in Annexes I A and I B, are unconditional and sufficiently precise to be relied on before a national court.

37 It was also held, in paragraph 45 of Tögel, that under Articles 8 and 10, which form part of Title II, the awarding authorities are required, in unconditional and precise terms, to award public contracts for services in accordance with national procedures in conformity with the provisions of Titles III to VI in the case of services coming wholly or mainly under Annex I A and with the provisions of Articles 14 and 16 in the case of services coming wholly or mainly under Annex I B. Article 14 constitutes Title IV whilst Article 16 appears under Title V.

38 Finally, the Court held in paragraph 46 of Tögel that the detailed provisions of Titles III to VI of Directive 92/50 on the choice of award procedures and the rules applicable to competitions,

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common technical and advertising rules, and participation and selection and award criteria, are, subject to exceptions and qualifications which are apparent from their terms, unconditional and sufficiently clear and precise to be relied on by service providers before national courts.

39 The answer to the fifth question must therefore be that the provisions of Titles I and II of Directive 92/50 may be relied on directly by individuals before national courts. As regards the provisions of Titles III to VI, they may also be relied on by an individual before a national court if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise.

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61996J0054-N44 : N 26
61996J0054-N45 : N 27
61997J0076-N22 : N 22
61997J0076-N23 : N 23
61997J0076-N25 : N 25
61997J0076-N26 : N 26
61997J0076-N27 : N 27
61997J0076-N42 : N 34
61997J0076-N44 : N 36
61997J0076-N45 : N 37
61997J0076-N46 : N 38
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NOTES Berrod, F.: Europe 1999 Mai Comm. no 161 p.8-9 + Comm. no 184 p.18
Gutknecht, Brigitte: Public Procurement Law Review 1999 p.CS97-CS102
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PROCEDU Reference for a preliminary ruling

ADVGEN Saggio

JUDGRAP Kapteyn

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Judgment of the Court (Sixth Chamber)
of 19 May 1999
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil obligations - Freedom to provide services - Public procurement procedures - Water, energy, transport and telecommunications sectors.
Case C-225/97.

1 Approximation of laws - Public procurement in the water, energy, transport and telecommunications sectors - Application of the Community rules to public procurement procedures - Directive 92/13 - Judicial remedies at national level - Obligation for Member States to confer appropriate jurisdiction on review bodies - Where power is conferred on the courts to impose fines - Obligation fulfilled

(Council Directive 92/13, Arts 2(1)(c) and 5)

2 Approximation of laws - Public procurement in the water, energy, transport and telecommunications sectors - Application of the Community rules to public procurement procedures - Directive 92/13 - Attestation system and conciliation procedure - Obligation for the Member States to adopt implementing measures

(Council Directive 92/13, Arts 3 to 7 and 9 to 11)

1 Chapter 1 (Articles 1 and 2) of Directive 92/13 relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors provides that the Member States are to take the measures necessary to ensure that appropriate judicial remedies are made available to prospective suppliers and operators in the event of infringement by the contracting entities of the rules applicable to contract award procedures. It also authorises the Member States to choose between various options as regards the powers to be exercised by the courts.

These requirements are satisfied where a Member State chooses the option provided for in Article 2(1)(c) of the Directive - the introduction of measures permitting, by means of appropriate procedures, the making of an order for the payment of a particular sum in cases where the infringement has not been corrected or prevented - and provides that a court has the power to impose a fine, the level of which it is to fix according to its assessment of the circumstances of each particular case. Such a fine meets the requirements set out in Article 2(5).

2 Chapter 2 (Articles 3 to 7) of Directive 92/13 relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors provides for an attestation system enabling the contracting entities to obtain an attestation that they have correctly applied the rules governing the award of contracts. Chapter 4 (Articles 9 to 11) of the Directive provides for a conciliation mechanism at Community level for the amicable settlement of any differences arising between the undertakings involved and the contracting entities.

The fact that the Directive offers the entities falling within its scope the possibility of recourse to an attestation system in no way signifies that the transposition of that system into national law is optional. The relevant provisions of the Directive must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. Transposition into national law is also necessary in order to ensure that persons having an interest know of the existence of such a procedure and may have recourse to it.

In Case C-225/97,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

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applicant,

v

French Republic, represented by Kareen Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Philippe Lalliot, Secretary for Foreign Affairs in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

APPLICATION for a declaration that, by not adopting all the measures necessary to comply with Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), the French Republic has failed to fulfil its obligations under Articles 1(2), 2(1)(c) and 2(5) of that Directive, and under Chapters 2 and 4 thereof,

THE COURT

(Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), President of the Chamber, G. Hirsch and G.F. Mancini, Judges,

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 22 October 1998, at which the Commission was represented by Hendrik van Lier and the French Government by Anne Viéville-Bréville, chargé de mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 19 January 1999,

gives the following

Judgment

Costs

44 Under Article 69(3) of the Rules of Procedure, the Court may order that the parties are to bear their own costs if each party succeeds on some and fails on other heads. Since the Commission and the French Republic have been partly unsuccessful in their pleadings, they must be ordered to bear their own costs.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. Declares that, by not adopting within the prescribed period all the measures necessary to comply with the provisions of Chapters 2 and 4 of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules

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on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the French Republic has failed to fulfil its obligations under Article 13(1) thereof;

2. Rejects the remainder of the application;

3. Orders each of the parties to bear its own costs.

1 By application lodged at the Court Registry on 17 June 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by not adopting all the measures necessary to comply with Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14; hereinafter `the Directive'), the French Republic has failed to fulfil its obligations under Articles 1(2), 2(1)(c) and 2(5) of that Directive, and under Chapters 2 and 4 thereof.

Community law

2 Article 13 of the Directive provides that the Member States are to take the measures necessary to comply with the Directive before 1 January 1993 and to inform the Commission thereof immediately.

Penalty payments

3 Chapter 1 of the Directive (Articles 1 and 2) concerns remedies at national level.

4 Article 1 provides:

`1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field of procurement or national rules implementing that law as regards:

(a) contract award procedures falling within the scope of Council Directive 90/531/EEC; and

(b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim for injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

...'

5 Article 2 of the Directive provides:

`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;

and

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(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

2. The powers referred to in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that, when considering whether to order interim measures, the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

5. The sum to be paid in accordance with paragraph 1(c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement. The payment of that sum may be made to depend upon a final decision that the infringement has in fact taken place.

...'

Attestation

6 Chapter 2 of the Directive (Articles 3 to 7) concerns the attestation system.

7 Article 3 provides that Member States are to give contracting entities the possibility of having recourse to an attestation system in accordance with Articles 4 to 7.

8 Article 4 provides:

`Contracting entities may have their contract award procedures and practices which fall within the scope of Directive 90/531/EEC examined periodically with a view to obtaining an attestation that, at that time, those procedures and practices are in conformity with Community law concerning the award of contracts and the national rules implementing the law.'

9 Article 7 of the Directive provides that the provisions of Articles 4, 5 and 6 are to be considered as essential requirements for the development of European standards on attestation.

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The conciliation procedure

10 Chapter 4 of the Directive (Articles 9 to 11) concerns the conciliation procedure.

11 Article 9 provides:

`1. Any person having or having had an interest in obtaining a particular contract falling within the scope of Directive 90/531/EEC and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of Community law in the field of procurement or national rules implementing that law may request the application of the conciliation procedure provided for in Articles 10 and 11.

2. The request referred to in paragraph 1 shall be addressed in writing to the Commission or to the national authorities listed in the Annex. These authorities shall forward requests to the Commission as quickly as possible.'

French law

12 Under cover of a letter of 14 January 1994, the French authorities sent the Commission a copy of Law No 93-1416 of 29 December 1993 on review procedures relating to the award of certain supply and works contracts in the water, energy, transport and telecommunications sectors (JORF of 1 January 1994, p. 10).

13 Article 1 of that Law provides:

`Article 7 of Law No 92-1282 of 11 December 1992 on procedures relating to the award of certain contracts in the water, energy, transport and telecommunications sectors shall be followed by Articles 7-1 and 7-2 which provide as follows:

> "Art. 7-1. In the case of failure to comply with the requirements to give notice and put up for tender, which apply to the award of contracts defined in Article 1 and governed by private law, the court may not adjudicate before conclusion of the contract save in the circumstances set out hereunder.

On application by any person with an interest in concluding the contract and likely to be harmed by non-compliance, the President of the appropriate court, or his deputy, may order the defaulting party to comply with its obligations. He shall prescribe the period within which the defaulting party must comply. He may also order a periodic penalty payment to be made as from the expiry of that period. He may nonetheless take into account the probable consequences of such a measure for all interests likely to be harmed, as well as the public interest, and may decide not to order such a measure where its negative consequences could exceed its benefits.

The application may also be submitted by the Ministère Public [Public Prosecutor's Office] where the Commission of the European Communities has notified the State of the reasons for which it maintains that there has been a clear and manifest breach of the obligations referred to in the first paragraph.

In setting the amount of the penalty payment, regard shall be had to the conduct of the party against which the order has been made and to the difficulties which it has encountered in order to comply therewith.

The President of the appropriate court, or his deputy, shall rule on such applications by way of an interlocutory decision which is not open to appeal.

If, on settlement of the periodic penalty payment, the infringement in question has not been corrected, the court may order payment of a fixed sum. In that case, the court's decision shall be by way of an interlocutory decision open to appeal in accordance with the rules governing proceedings for

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interim relief.

The penalty payment, whether periodic or fixed, shall be wholly distinct from damages. Orders to make periodic or fixed penalty payments shall be cancelled, wholly or in part, if it is established that the default or delay in implementing the court's order has been caused, wholly or in part, by external factors.

Art. 7-2. In the case of failure to comply with the requirements to give notice and put up for tender, which apply to the award of contracts which are defined in Article 1 and governed by public law, any person with an interest in concluding the contract and who is likely to be harmed by non-compliance may apply to the court, before conclusion of the contract, for the measures provided for in Article L. 23 of the Code des Tribunaux Administratifs et des Cours Administratives d'Appel.'"

14 Article 4 of Law No 93-1416 states:

`Article L. 23 of the Code des Tribunaux Administratifs et des Cours Administratives d'Appel provides as follows:

> "Art. L. 23. The President of the administrative court, or his deputy, may adjudicate in the case of failure to comply with the requirements to give notice and put up for tender, which apply to the award of contracts falling within the scope of Article 7-2 of Law No 92-1282 of 11 December 1992 concerning the award of certain contracts in the water, energy, transport and telecommunications sectors. The court may adjudicate before conclusion of the contract only in the circumstances set out hereunder.

A right of action lies with those persons who have an interest in concluding the contract and are likely to be harmed by the infringement.

The President of the administrative court, or his deputy, may order the defaulting party to comply with its obligations. He shall prescribe the period within which the defaulting party must comply. He may also order a periodic penalty payment to be made as from the expiry of that period. He may nonetheless take into account the probable consequences of such a measure for all interests likely to be harmed, as well as the public interest, and may decide not to order such a measure where its negative consequences could exceed its benefits.

In setting the amount of the penalty payment, regard shall be had to the conduct of the party against which the order has been made and to the difficulties which it has encountered in order to comply therewith.

Save in the case of procurement contracts awarded by the State, an application may also be submitted by the State where the Commission of the European Communities has notified it of reasons for which it maintains that there has been a clear and manifest breach of the above obligations.

The President of the administrative court, or his deputy, shall rule on such applications by way of an interlocutory decision which is not open to appeal.

If, on settlement of the periodic penalty payment, the infringement identified has not been corrected, the court may order payment of a fixed sum. In that case, the court shall rule by way of an interlocutory decision open to appeal in accordance with the rules governing proceedings for interim relief.

The penalty payment, whether periodic or fixed, shall be wholly distinct from damages. Orders to make periodic or fixed penalty payments shall be cancelled, wholly or in part, if it is established that the default or the delay in implementing the court's order has been caused, wholly or in part, by external factors.'"

The pre-litigation procedure

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15 By letter of formal notice of 8 September 1995, the Commission informed the French authorities that the transposition into national law of the penalty payment system provided for in the Directive was inadequate, and the provisions of the Directive concerning the attestation system and the conciliation procedure had not been transposed into national law. Pursuant to Article 169 of the Treaty, the Commission called on the French Government to submit its comments within two months and to adopt the necessary amendments.

16 The French authorities replied on 13 November 1995, giving further details concerning the system of penalty payments and commenting on the provisions of the Directive concerning the conciliation procedure, which were not transposed into national law by Law No 93-1416.

17 However, in its reasoned opinion of 8 November 1996, the Commission maintained the charges regarding the penalty payment system and the non-transposition into national law of Chapters 2 and 4 of the Directive.

18 In their reply of 20 February 1997, the French authorities stated that, in their view, the operative part of Law No 93-1416 satisfied the requirements of the Directive; that they proposed shortly to publish a circular to provide individuals with guidance on the operation of the conciliation procedure; and that the departments concerned were studying possible means of ensuring that the Law's requirements concerning attestation were properly implemented.

19 Considering that reply to be unsatisfactory, the Commission brought the present proceedings.

The penalty payment

20 The first point to note is that it is common ground that the Commission does not dispute the French Republic's decision to avail itself of the option provided for in Article 2(1)(c) of the Directive.

21 As regards that choice, however, the Commission maintains, first, that the transposition into national law of Article 2(5) of the Directive - under which the sum to be paid in accordance with Article 2(1)(c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement - requires a provision relating specifically to the level of penalty payments, either stating that they must be such as to have the dissuasive effect required or limiting the discretion enjoyed by the courts in determining that level. According to the Commission, if no such provision is made, the competent court will be prey to uncertainty.

22 The French Government contends that the Directive is silent as to any obligation on Member States to determine the amount of the payment and, given the diversity of the circumstances which may arise, it is important to allow the courts to set the amount in keeping with their assessment of the facts in each case, since it must be sufficiently high to ensure that the Directive's objectives are attained.

23 Article 2(5) of the Directive expressly provides that the sum to be paid in accordance with Article 2(1)(c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement, but does not indicate whether the amount is to be fixed by the legislature or by the competent court.

24 As the Advocate General pointed out in point 13 of his Opinion, a penalty payment, being a coercive measure primarily intended to ensure that the court's decisions are complied with, is a deterrent in itself. Consequently, a provision laying down that the sum to be paid in accordance with Article 2(1) of the Directive must be set at a level high enough to be dissuasive does not as such affect or reinforce the latter provision.

25 Furthermore, the French Government contends - and the Commission offers no effective rebuttal - that in French law the penalty payment is by nature a coercive measure and an effective means

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of preventing non-compliance with court orders.

26 The Commission's next ground of complaint concerns the fact that Articles 1 and 4 of Law No 93-1416 provide, not only that the fixed penalty payment can be ordered only once the periodic penalty payment order has been cancelled, but also that, in setting the level of the fixed payment, account must be taken of the conduct of the party against whom the order was made and the difficulties it may have encountered in complying therewith. According to the Commission, the discretion thus left to the courts is limited by considerations which have been so vaguely defined that the system will be unable to operate properly.

27 On that point, it should be noted first that Article 2(1)(c) of the Directive merely requires the Member States which have chosen that option to take measures so that, in cases where the infringement has not been corrected or prevented, an order may be made under appropriate procedures for payment of a specific sum. Article 2(5) provides that this must be set at a level sufficiently high to dissuade the contracting entity from committing or persisting in an infringement, but does not specify whether the penalty payment must be fixed or periodic. Contrary to the Commission's assertion, Article 2(5) does not provide that the courts may order only fixed penalty payments in order to prevent or correct an infringement.

28 Secondly, as regards the Commission's argument that Articles 1 and 4 of Law No 93-1416 create - wrongly, in its view - a link between the penalty payment and the conduct of the party ordered to pay, it follows by definition from the right to a fair trial that, in procedures of the type laid down in Article 2(1)(c) of the Directive, the courts cannot disregard the conduct of that party or the difficulties which it has encountered in order to comply.

29 Lastly, the Commission submits that in so far as Law No 93-1416 does not really guarantee that the penalty payment will have a deterrent effect, it has established a procedure which is specific and less coercive than that provided for under French civil law, thereby infringing Article 1(2) of the Directive. The Commission maintains that there is a difference between the provisions governing penalty payments set out in Law No 93-1416 and the provisions of Law No 91-650 of 9 July 1991 on the reform of civil enforcement procedures (JORF of 14 July 1991, p. 9228). That difference, according to the Commission, indicates an intention on the part of the French legislature to make the special rules laid down in Law No 93-1416 less coercive than the general rules laid down in Law No 91-650.

30 In this connection it need only be pointed out that - as the French Government has maintained, without any real rebuttal from the Commission - the two Laws in question have different objectives. Law No 91-650, which aims to give a creditor with a right to recovery the means to enforce that right against the debtor's assets - in the context of the settlement of debts which have been acknowledged to be quantified and recoverable - does not confer on the courts any power to intervene in a contracting entity's procurement procedures.

31 As the Advocate General pointed out in point 17 of his Opinion, although Law No 91-650 introduced a penalty payment procedure, it could not provide a basis for the transposition into national law of the Directive.

32 Consequently, the Commission's allegation that the French legislature sought to set up a special procedure distinct from the rules of civil law in force and not providing the guarantees required under the Directive is unfounded.

33 It follows from the above considerations that the Commission's allegation concerning the inadequate transposition into national law of Articles 2(1)(c) and 2(5) of the Directive cannot be upheld.

The attestation

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34 The Commission maintains that the attestation system provided for in Chapter 2 of the Directive has not been transposed into French law.

35 The French Government contends that, although the Member States are obliged to transpose Article 3 of the Directive into national law, that obligation may be discharged either by appointing attestators directly, as provided for by Article 6(2) of the Directive, or by entrusting a specialised body to do so, as is indirectly permitted by Article 7 thereof. It claims that the first option does not necessarily entail the adoption of a transposition measure; it merely requires that the contracting entities be informed of the options open to them under Community law. The French Government adds that it accorded the Directive the necessary publicity.

36 On that point, it should be noted that Article 3 of the Directive expressly requires the Member States to give contracting entities the possibility of having recourse to an attestation system in accordance with Articles 4 to 7. As the Commission has rightly pointed out, the provision made by the Directive for the entities falling within its scope to have recourse to an attestation system in no way signifies that the transposition of that system into national law is optional.

37 So far as concerns the publicity given to the Directive by the French Government, it need merely be recalled that, according to established case-law, the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (Case C-59/89 Commission v Germany [1991] ECR I-2607, paragraph 24).

38 It must therefore be held that the attestation system provided for in Chapter 2 of the Directive has not been transposed into French law within the prescribed period.

The conciliation procedure

39 Lastly, the Commission claims that the French Republic has failed to transpose into national law Articles 9 to 11 of the Directive, concerning the conciliation procedure.

40 The French Government contends that the conciliation procedure provided for in Article 9(2) of the Directive - which does not require Member States to do more than forward immediately to the Commission any request for conciliation made by a person having an interest - does not necessarily require the adoption of an implementing law or regulation. Moreover, in order to facilitate implementation of the conciliation procedure, the French Government apprised interested undertakings of the Directive's provisions by publishing the text in the April-May issue of Marchés Publics, the review to which all the professionals concerned refer.

41 On that point, it is enough to note that Article 9(1) of the Directive provides that any person having or having had an interest in obtaining a particular contract falling within the scope of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1) and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of Community law in the field of procurement or national rules impelementing that law may request the application of the conciliation procedure provided for in Articles 10 and 11 of the Directive. Transposition into national law is therefore necessary in order to ensure that persons having an interest know of the existence of such a procedure and may have recourse to it.

42 Accordingly, it must be concluded that Articles 9 to 11 of the Directive, concerning the conciliation procedure, have not been transposed into national law within the prescribed period.

43 In view of all the foregoing, it must be held that, by not adopting within the prescribed period all the measures necessary to comply with the provisions of Chapters 2 and 4 of Directive 92/13,

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the French Republic has failed to fulfil its obligations under Article 13(1) thereof.

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FORM	Judgment
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SUB	Approximation of laws
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France

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NOTES	Dischendorfer, Martin: Public Procurement Law Review 1999 p.CS163-CS165 Lesobre, Olivier: Petites affiches. La Loi / Le Quotidien juridique 2000 no 26 p.12-13
PROCEDU	Proceedings concerning failure by Member State - successful ; Proceedings concerning failure by Member State - unfounded
ADVGEN	La Pergola
JUDGRAP	Kapteyn
DATES	of document: 19/05/1999 of application: 17/06/1997

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Judgment of the Court (Sixth Chamber)
of 24 September 1998
EvoBus Austria GmbH v Niederösterreichische Verkehrsorganisations GmbH (Növog).
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public procurement in the water, energy, transport and telecommunications sectors - Effect of a directive which has not been transposed.
Case C-111/97.

Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 92/13 - Provision requiring Member States to establish review bodies - Non-transposition - Consequences - Power for the review bodies having competence in relation to public works contracts and public supply contracts also to hear applications for review in the water, energy, transport and telecommunications sectors - Not a necessary consequence - Obligation on the part of national courts to determine whether it is possible to bring review proceedings under domestic law

(Council Directive 92/13)

Article 1(1) to (3), Article 2(1), and (7) to (9) and the other provisions of Council Directive 92/13 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors cannot be interpreted as meaning that, where the directive has not been transposed by the end of the period prescribed for that purpose, the review bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear applications for review relating to procedures for the award of public contracts in the water, energy, transport and telecommunications sectors. However, in order to observe the requirement that domestic law be interpreted in conformity with Directive 9213 and the requirement that the rights of individuals be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring review proceedings in relation to awards of public contracts in the water, energy, transport and telecommunications sectors. The national court must, in particular, verify whether that right to bring review proceedings can be exercised before the same bodies as those established to hear applications for review concerning the award of public supply contracts and public works contracts.

If the provisions of domestic law are incapable of being interpreted in conformity with Directive 92/13, the persons concerned may, in accordance with the appropriate procedures under domestic law, claim compensation for damage suffered as a result of the failure to transpose the directive within the prescribed time-limit.

In Case C-111/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that body between

EvoBus Austria GmbH

and

Niederösterreichische Verkehrsorganisations GmbH (Növog)

> "on the interpretation of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14),

THE COURT

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(Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, G.F. Mancini, P.J.G. Kapteyn (Rapporteur), J.L. Murray and K.M. Ioannou, Judges,

Advocate General: N. Fennelly,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Austrian Government, by Wolf Okresek, Ministerialrat in the Constitutional Affairs Service of the Federal Chancellor's Office, acting as Agent,

- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Claudia Schmidt, of its Legal Service, acting as Agents,$

having regard to the Report for the Hearing,

after hearing the oral observations of the Niederösterreichische Verkehrsorganisations GmbH (Növog), represented by Claus Casati, trainee lawyer, Vienna, the Austrian Government, represented by Michael Fruhmann, of the Federal Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by Hendrik van Lier and Claudia Schmidt, at the hearing on 12 February 1998,

after hearing the Opinion of the Advocate General at the sitting on 2 April 1998,

gives the following

Judgment

Costs

24 The costs incurred by the Austrian Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national referring body, the decision on costs is a matter for that body.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 25 November 1996, hereby rules:

Article 1(1) to (3), Article 2(1), (7) to (9) and the other provisions of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors cannot be interpreted as meaning that, where the directive has not been transposed by the end of the period prescribed for that purpose, the review bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear applications for review relating to procedures for the award of public contracts in the water, energy, transport and telecommunications sectors. However, in order to observe the requirement that domestic law be interpreted in conformity with Directive 92/13 and the requirement that the rights of individuals be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring review proceedings in relation to awards of public contracts in the water, energy, transport and telecommunications sectors. The national court must, in particular,

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verify whether that right to bring review proceedings can be exercised before the same bodies as those established to hear applications for review concerning the award of public supply contracts and public works contracts. If the provisions of domestic law are incapable of being interpreted in conformity with Directive 92/13, the persons concerned may, in accordance with the appropriate procedures under domestic law, claim compensation for damage suffered as a result of the failure to transpose the directive within the prescribed time-limit.

1 By order of 25 November 1996, received at the Court on 17 March 1997, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

2 Those questions were raised in proceedings between EvoBus Austria GmbH (hereinafter `EvoBus') and the Niederösterreichische Verkehrsorganisations GmbH (hereinafter `Növog') relating to the award of a public supply contract in respect of buses.

Legal background

3 Directive 92/13 requires the Member States to lay down appropriate procedures for reviewing the legality of the procurement process in the sectors specified in the directive not later than 1 January 1993.

4 Article 1 of the Directive is worded as follows:

`1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2 (8), on the grounds that such decisions have infringed Community law in the field [of] procurement or national rules implementing that law...

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim for injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting entity of the alleged infringement and of his intention to seek review.'

5 Article 2 provides:

`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract,

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the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

...

7. Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.

8. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measures taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the Treaty and independent of both the contracting entity and the review body.

The members of the independent body referred to in the first paragraph shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

6 In Austria, the Bundesgesetz über die Vergabe von Aufträgen (Federal Law on Public Procurement, BGBl. (Bundesgesetzblatt = Federal Law Gazette) No 463/1993, hereinafter `the BVergG'), which entered into force on 1 January 1994, transposed into national law:

- Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), and

- Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

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7 Paragraph 7(2) of the BVergG provides:

`This Law only applies in the water, energy, transport and telecommunications sectors to the extent provided for in the fourth chapter of the third part. The provisions of the fourth part do not apply to procurement in those sectors.'

8 The fourth part of the BVergG relating to legal protection (Rechtsschutz) provides for a procedure for review by the Bundesvergabeamt. Thus, Paragraph 91(3) provides that an unsuccessful tenderer may appeal against the award of a public sector contract to the Bundesvergabeamt within two weeks of being informed of the award.

9 In the fourth chapter, entitled `Specific provisions relating to awarding authorities in the water, energy, transport and telecommunications sectors', Paragraph 67(1) of the BVergG provides: `Only the provisions of this chapter apply to public awarding authorities, to the extent that they carry out an activity within the meaning of subparagraph 2, and to private awarding bodies.'

10 Directive 92/13 was transposed into domestic law by the federal law amending the federal law on the award of public contracts and the law on the employment of foreigners (BGBl. No 776/1996). That law entered into force on 1 January 1997.

The main proceedings

11 On 18 July 1996, EvoBus requested the Bundesvergabeamt to set in motion a review procedure under Paragraph 91(3) of the BVergG. That request related to the tendering procedure initiated by Növog in respect of the delivery of 36 to 46 buses for the regular inter-urban express bus service.

12 In support of its application, EvoBus claimed that, in the course of that procedure, the successful tender had been subsequently amended and the repurchase price of the buses thus increased from 34% to 55%.

13 In the circumstances, the Bundesvergabeamt decided to stay proceedings and to refer the following questions for a preliminary ruling:

`(1) May an individual derive, from Article 1(1) to (3), Article 2(1), (7) to (9) or any other provisions of Directive 92/13/EEC, a specific right to have review proceedings conducted before authorities or courts or tribunals complying with Article 2(9) of Directive 92/13/EEC, which is so sufficiently precise and specific that, in the event of non-transposition by a Member State of the provisions of the directive in question, an individual may rely on that provision?

If Question 1 is answered in the affirmative:

(2) In conducting a review procedure, must a national court having the attributes of the Bundesvergabeamt disregard provisions of national law such as Paragraph 7(2) in conjunction with Paragraph 67(1) of the Bundesvergabegesetz which preclude it from conducting a review procedure even where such review procedure is intended by the national legislature solely to serve the purpose of transposing Directive 89/665/EEC?

If Question 1 is answered in the affirmative:

(3) Must the adjudicating court disregard those or any comparable procedural provisions of national law in such circumstances, if they impede or prevent a review procedure from being effectively conducted?'

The first and second questions

14 By the first and second questions, which it is appropriate to deal with together, the national court is essentially asking whether Articles 1(1) to (3) and 2(1) and (7) to (9) or any other provisions of Directive 92/13 must be interpreted as meaning that, where the directive has not been transposed

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by the end of the period prescribed for that purpose, the review bodies of the Member States having competence in relation to procedures for the award of public supply and public works contracts may also hear applications for review relating to procedures for the award of public contracts in the water, energy, transport and telecommunications sectors.

15 It must first be pointed out that in its judgment in Dorsch Consult (Case C-54/96 [1997] ECR I-4961, paragraph 40), the Court observed that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system.

16 Next, it must be observed that, although Article 1 of Directive 92/13 requires the Member States to adopt the measures necessary to ensure effective review in the field of public service contracts in the water, energy transport and telecommunications sectors, it does not indicate which national bodies are to be the competent bodies for this purpose and, furthermore, does not require that those bodies be the same as those which the Member States have designated in the field of public works contracts and public supply contracts.

17 It is common ground that, at the time when EvoBus made its application for review before the Bundesvergabeamt, namely 18 July 1996, Directive 92/13 had not been transposed into Austrian law.

18 In regard to such circumstances, the Court pointed out at paragraph 43 of the Dorsch Consult judgment, cited above, that Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, when applying national law, whether adopted before or after the directive, the national court called upon to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result which it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (see Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; and Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 26).

19 That obligation requires the national court to determine whether the relevant provisions of domestic law allow recognition of a right for individuals to review in relation to awards of public service contracts in the water, energy, transport and telecommunications sectors. In circumstances such as those in point in the main proceedings, the national court is required in particular to determine whether that right to review may be exercised before the same bodies as those established to hear applications for review concerning the award of public supply contracts and public works contracts (see the judgment in Dorsch Consult, cited above, end of paragraph 46).

20 In the main proceedings, it is, however, common ground that, pursuant to Paragraphs 7(2) and 67(1) of the BVergG, the awarding authorities under Paragraph 67(2) are expressly excluded from the system of review established by that Law pursuant to Directive 89/665.

21 In those circumstances it must be pointed out that, if the relevant provisions of domestic law cannot be interpreted in conformity with Directive 92/13, the persons concerned may, in accordance with the appropriate procedures under domestic law, claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed (Dorsch Consult, cited above, paragraph 45; on the question of Member States' liability in the event of non-transposition of a directive see, in particular, Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR

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I-5357 and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others [1996] ECR I-4845).

22 Accordingly, the answer to be given to the first and second questions is that Article 1(1) to (3), Article 2(1), (7) to (9) and the other provisions of Directive 92/13 cannot be interpreted as meaning that, where the Directive has not been transposed by the end of the period prescribed for that purpose, the review bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear applications for review relating to procedures for the award of public contracts in the water, energy, transport and telecommunications sectors. However, in order to observe the requirement that domestic law be interpreted in conformity with Directive 92/13 and the requirement that the rights of individuals be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring review proceedings in relation to awards of public contracts in the water, energy, transport and telecommunications sectors. The national court must, in particular, verify whether that right to bring review proceedings can be exercised before the same bodies as those established to hear applications for review concerning the award of public supply contracts and public works contracts. If the provisions of domestic law are incapable of being interpreted in conformity with Directive 92/13, the persons concerned may, in accordance with the appropriate procedures under domestic law, claim compensation for damage suffered as a result of the failure to transpose the directive within the prescribed time-limit.

The third question

23 In view of the answer given to the first and second questions, it is not necessary to answer the third question.

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NOTES Pelzl, Alexander: European Law Reporter 1998 p.473-474
Pietri, Martin ; Simon, Denys: Europe 1998 Novembre Comm. no 353 p.9-10
Dios, José María de: Revista Jurídica de Catalunya 1999 p.620-623

PROCEDU Reference for a preliminary ruling

ADVGEN Fennelly

JUDGRAP Kapteyn

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Judgment of the Court (Sixth Chamber)
of 4 February 1999
Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz.
Reference for a preliminary ruling: Tiroler Landesvergabeamt - Austria.
National 'court or tribunal' within the meaning of Article 177 of the EC Treaty - Procedures for the award of public supply contracts and public works contracts - Body responsible for review procedures.
Case C-103/97.

1 Preliminary rulings - Reference to the Court - National court or tribunal within the meaning of Article 177 of the Treaty - Definition - Body competent to hear appeals concerning the award of public contracts

(EC Treaty, Art. 177)

2 Approximation of laws - Review procedures concerning the award of public supply and public works contracts - Directive 89/665 - Bodies responsible for review procedures - Applicability of the guarantee provisions of the second subparagraph of Article 2(8) of the directive - Conditions - Bodies of a judicial character - Not applicable

(Council Directive 89/665, Art. 2(8), second subpara.)

1 In order to determine whether a body making a reference for a preliminary ruling is a court or tribunal within the meaning of Article 177 of the Treaty, which is a question governed by Community law alone, account must be taken of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. Those criteria are satisfied by the Tiroler Landesvergabeamt (Public Procurement Office of the Land of Tyrol), established by the Law of the Land of Tyrol on the Award of Contracts to review procedures for the award of public contracts.

It is apparent from the provisions on its composition and functioning that that body complies with the first five criteria, and that the independence of its members is guaranteed by the application of the General Law on Administrative Procedure, which contains very specific provisions on the circumstances in which members of the body in question must withdraw, failure to comply with that obligation constituting a procedural defect which may be challenged by the parties concerned. In addition, under the Land law, the giving of instructions to members of the Tiroler Landesvergabeamt in the performance of their duties is prohibited.

2 The conditions set out in Article 2(8) of Council Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts do not apply to provisions such as those governing the composition and functioning of the Tiroler Landesvergabeamt, since the guarantee provisions in that article do not apply to a body responsible for review procedures which is of a judicial character.

It is only if Member States have chosen to give jurisdiction over such reviews to bodies which are not of a judicial character that their decisions must be capable of being the subject of judicial review or of review by another body which must satisfy the particular requirements of Article 2(8) of the directive, so as to guarantee an adequate review.

In Case C-103/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tiroler Landesvergabeamt, Austria, for a preliminary ruling in the proceedings pending before that tribunal between

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Josef Köllensperger GmbH & Co. KG,

Atzwanger AG

and

Gemeindeverband Bezirkskrankenhaus Schwaz

"on the interpretation of Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33),

THE COURT

(Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), President of the Chamber, G. Hirsch, G.F. Mancini, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: A. Saggio,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Gemeindeverband Bezirkskrankenhaus Schwaz, by C.C. Schwaighofer and M.E. Sallinger, Rechtsanwälte, Innsbruck,

- the Austrian Government, by W. Okresek, Ministerialrat in the Federal Chancellor's Office, acting as Agent,

- the Commission of the European Communities, by H. van Lier, Legal Adviser, and C. Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Austrian Government, represented by M. Fruhmann, of the Federal Chancellor's Office, acting as Agent, and the Commission, represented by H. van Lier and C. Schmidt, at the hearing on 18 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 24 September 1998,

gives the following

Judgment

1 By order of 7 November 1996, received at the Court on 10 March 1997, the Tiroler Landesvergabeamt (Procurement Office of the Land of Tyrol) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

2 Those questions were raised in proceedings between Josef Köllensperger GmbH & Co. KG (`Köllensperger') and Atzwanger AG (`Atzwanger') and Gemeindeverband Bezirkskrankenhaus Schwaz (Association of Municipalities for the Schwaz District Hospital) concerning the award of a contract for works relating to an extension to the Schwaz District Hospital.

3 Directive 89/665 aims to ensure that the Community directives in the field of public procurement are applied as effectively and rapidly as possible. Since the existing remedies in that field at

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national and Community level generally did not appear adequate and the individual directives did not provide for any specific remedies, that directive required the Member States to bring into force before 21 December 1991 adequate review procedures in the case of unlawful procedures for the award of public contracts (Articles 1(1) and 5).

4 Under Article 2(8) of Directive 89/665:

`Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

5 In Austria, Directive 89/665 was transposed at federal level by the Bundesvergabegesetz (Federal Procurement Law, hereinafter `the BVergG'). That Law provides for two procedures, an arbitration procedure before the Bundesvergabekontrollkommission (Federal Procurement Review Commission) and a procedure before the Bundesvergabeamt (Federal Procurement Office).

6 In the Land of Tyrol, the directive was transposed by the Tiroler Gesetz über die Vergabe von Aufträgen (Law of the Land of Tyrol on the Award of Contracts, hereinafter `the TVergG'). That Law gives the Tiroler Landesvergabeamt jurisdiction to review procedures for the award of public supply and public works contracts and concessions.

7 Paragraph 6 of the TVergG states:

`1. The Landesvergabeamt shall be established at the Amt der Tiroler Landesregierung (Office of the Government of the Land of Tyrol). It shall consist of:

(a) a person familiar with public procurement matters, as President,

(b) an official of the Amt der Tiroler Landesregierung who has a knowledge of law, as rapporteur,

(c) a member of the judiciary,

(d) a member each to be proposed by the Wirtschaftskammer Tirol (Chamber of Commerce of Tyrol), the Architekten- und Ingenieurkonsultentenkammer für Tirol und Vorarlberg (Chamber of Architects and Consulting Engineers for Tyrol and Vorarlberg), the Kammer für Arbeiter und Angestellte für Tirol (Chamber of Workers and Employees for Tyrol) and the Tiroler Gemeindeverband (Tyrol Association of Municipalities), familiar with public procurement matters.

...

3. The members of the Landesvergabeamt are to be appointed by the Land Government for a term of five years. They must be eligible for election to the Landtag. In the case of the members referred to in subparagraphs 1(d) and 2, the Land Government must invite the bodies entitled to propose members to make a proposal within a period to be reasonably determined. If a proposal is not made in due time, the appointment is to be made without a proposal. Before appointing the member referred to in subparagraph 1(c), the President of the Oberlandesgericht (Court of Appeal) Innsbruck is to be heard. For each member a substitute is to be appointed in the same manner. Each member shall

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be represented by his substitute member in the event of being unable to act.

4. A member or substitute member of the Landesvergabeamt shall leave office early if he resigns or the appointment is revoked, and a member referred to in subparagraph 1(b) and (c) also on leaving his office or profession. Resignation shall be declared to the Land Government in writing ... An appointment is to be revoked if the conditions for appointment are no longer met or if circumstances occur which prevent proper exercise of the office and are likely to do so for a long time. If a member or substitute member leaves office early, a new member or substitute member is to be appointed immediately for the remainder of his term of office.

...

6. The Landesvergabeamt shall have a quorum qualified to decide by vote if all the members have been duly summoned and the President, the rapporteur, the member from the judiciary and at least one other member are present. It shall take its decisions by a simple majority of votes. If the votes are equal, the President's vote shall be decisive. Abstentions shall not be permitted.

7. The members of the Landesvergabeamt shall not be bound by instructions in the exercise of their office. Their decisions shall not be subject to administrative annulment or amendment.

8. The secretarial work of the Landesvergabeamt shall be dealt with by the Amt der Tiroler Landesregierung.'

8 On 6 April 1995 Köllensperger and Atzwanger applied to the Tiroler Landesvergabeamt for review of the award of the contract for works on the extension to the Schwaz District Hospital, seeking its annulment on the ground of infringement of the TVergG.

9 By decision of 27 June 1995 the Landesvergabeamt dismissed the application on the ground that the contract had been awarded to the company which made the best offer. In the Landesvergabeamt's view, it followed that even if the TVergG had been complied with by the contracting authority, the contract would not in any event have been awarded to Köllensperger and Atzwanger.

10 Köllensperger and Atzwanger thereupon complained to the Verfassungsgerichtshof (Constitutional Court).

11 On 12 June 1996 the Verfassungsgerichtshof set aside the Landesvergabeamt's decision on the ground that on the date when it gave its decision, 27 June 1995, its composition did not fulfil the conditions laid down by Article 2(8) of Directive 89/665.

12 According to the Verfassungsgerichtshof, the President of the Landesvergabeamt - an engineer - did not possess the legal and professional qualifications required for members of the judiciary, so that the decision of 27 June 1995 had infringed the applicants' constitutionally guaranteed right to a hearing before the judge specified by the law.

13 On 16 July 1996 the President of the Landesvergabeamt who had held office at the time of the contested decision resigned his office with effect from 12 July, and a new president was appointed by the Tyrol Land Government.

14 When the proceedings were resumed before the Landesvergabeamt, Gemeindeverband Bezirkskrankenhaus Schwaz submitted that the composition of that body still did not comply with Directive 89/665.

15 Since the Landesvergabeamt had doubts with respect to the members referred to in Paragraph 6(1)(d) of the TVergG, it decided to refer the following two questions to the Court for a preliminary ruling:

`1. Is Article 2 of Council Directive 89/665/EEC of 21 December 1989 to be interpreted as meaning that the (Tiroler) Landesvergabeamt (Procurement Office of the Land of Tyrol), established by the (Tiroler) Landesgesetz über die Vergabe von Aufträgen (Law of the Land of Tyrol on the Award

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of Contracts) of 6 July 1994, Landesgesetzblatt für Tirol (Official Journal of the Land of Tyrol) LGBl. No 87/1994, is a review body within the meaning of Article 2(8) of the Directive?

2. Does the Gesetz über die Vergabe von Aufträgen (Law on the Award of Contracts) of 6 July 1994, LGBl. No 87/1994, adequately provide for the transposition into national law of Council Directive 89/665/EEC of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, in relation to the review procedures mentioned in Article 1 thereof?'

Admissibility of the questions referred for a preliminary ruling

16 It must first be considered whether the Tiroler Landesvergabeamt is a court or tribunal within the meaning of Article 177 of the Treaty, and consequently whether the questions are admissible.

17 It is settled case-law that, in order to determine whether a body making a reference for a preliminary ruling is a court or tribunal within the meaning of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, as the most recent authority, Case C-54/96 Dorsch Consult v Bundesbaugesellschaft Berlin [1997] ECR I-4961, paragraph 23, and Case 61/65 Vaassen (neé Göbbels) [1966] ECR 261; Case 14/86 Pretore di Salo v Persons unknown [1987] ECR 2545, paragraph 7; Case 109/88 Danfoss [1989] ECR 3199, paragraphs 7 and 8; Case C-393/92 Almelo and Others [1994] ECR I-1477; and Case C-111/94 Job Centre [1995] ECR I-3361, paragraph 9).

18 The first five criteria are not in doubt. It is apparent from the provisions of Paragraph 6 of the TVergG on its composition and functioning that the Tiroler Landesvergabeamt complies with them.

19 It is not clear, on the other hand, that the condition of independence is satisfied.

20 As the Advocate General observes in point 25 of his Opinion, the TVergG does not contain any specific provisions on challenges to, or withdrawals by, members of the Landesvergabeamt.

21 Moreover, the passage in Paragraph 6(4) of the TVergG concerning removal of members `if the conditions for appointment are no longer met or if circumstances occur which prevent proper exercise of the office and are likely to do so for a long time' appears prima facie too vague to guarantee against undue intervention or pressure on the part of the executive.

22 On this point, it must be observed, first, that Paragraph 5(2) of the TVergG expressly states that, unless otherwise provided, the Allgemeines Verwaltungsverfahrensgesetz (General Law on Administrative Procedure) 1991 is to apply to review procedures concerning awards of contracts. That Law contains very specific provisions on the circumstances in which members of the body in question must withdraw. Moreover, according to the case-law of the Verfassungsgerichtshof, failure to comply with that obligation constitutes a procedural defect which may be challenged by the parties concerned.

23 Second, Paragraph 6(7) of the TVergG must be considered. By expressly prohibiting the giving of instructions to members of the Tiroler Landesvergabeamt in the performance of their duties, that provision repeats the terms of Article 20 of the Austrian Federal Constitutional Law on the independence of members of collegiate bodies with a judicial element, which include the Landesvergabeamt.

24 Those provisions, taken together, cannot therefore support any conclusion that Paragraph 6(4) of the TVergG does not guarantee the independence of the members of the Landesvergabeamt. It is not for the Court to infer that such a provision is applied in a manner contrary to the Austrian constitution and the principles of a State governed by the rule of law.

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25 It follows that the Tiroler Landesvergabeamt must be regarded as a court or tribunal within the meaning of Article 177 of the Treaty and that its questions are admissible.

The questions referred for a preliminary ruling

26 By its questions the Tiroler Landesvergabeamt essentially asks whether provisions such as those which govern its composition and functioning satisfy the conditions set out in Article 2(8) of Directive 89/665.

27 That provision concerns the bodies responsible for review procedures relating to decisions taken by the competent bodies for the award of public contracts within the scope of Directive 89/665.

28 Under the first subparagraph of Article 2(8), the Member States may choose between two solutions in establishing arrangements for the review of public contracts.

29 The first solution is to give jurisdiction over reviews to bodies of a judicial character. The second solution is to give that jurisdiction, at a first stage, to bodies which are not of such a character. In that case, the decisions of those bodies must be capable of being the subject of judicial review or of review by another body which must satisfy the particular requirements of the second subparagraph of Article 2(8) of Directive 89/665, so as to guarantee an adequate review.

30 It follows that if, as in a case such as that in the main proceedings, the body responsible for review procedures is of a judicial character, those guarantee provisions do not apply.

31 Accordingly, the answer to the Landesvergabeamt's questions must be that the conditions set out in Article 2(8) of Directive 89/665 do not apply to provisions such as those governing its composition and functioning.

Costs

32 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Tiroler Landesvergabeamt by order of 7 November 1996, hereby rules:

The conditions set out in Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts do not apply to provisions such as those governing the composition and functioning of the Tiroler Landesvergabeamt.

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FORM	Judgment

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PROCEDU	Reference for a preliminary ruling
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Judgment of the Court (Sixth Chamber)
of 24 September 1998
Walter Tögel v Niederösterreichische Gebietskrankenkasse.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public service contracts - Direct effect of a directive not transposed into national law - Classification of services for the transport of patients.
Case C-76/97.

1 Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Provision requiring Member States to establish review bodies - Failure to transpose - Consequences - Whether review bodies with jurisdiction to review procedures for the award of public supply and works contracts may hear appeals concerning procedures for the award of public service contracts - Not a necessary consequence - Obligation on the part of national courts to determine whether it is possible to appeal under domestic law

(Council Directive 89/665, Arts 1(1) and (2) and 2(1) and Council Directive 92/50, Art. 41)

2 Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Scope - Services for the transport of injured and sick persons with a nurse in attendance - Included - Classification as Land transport services in Annex I A, Category No 2, and as Health and social services in Annex I B, Category No 25

(Council Directive 92/50, Annexes I A and I B)

3 Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Direct effect

(Council Directive 92/50)

4 Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Effects of the directive on existing legal situations concluded before expiry of the period for transposition - None

(Council Directive 92/50)

1 Neither Article 1(1) and (2), Article 2(1) nor any other provision of Directive 89/665, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, may be interpreted as meaning that, if Directive 92/50 relating to the coordination of procedures for the award of public service contracts has not been transposed by the end of the period laid down for that purpose, the review bodies in the Member States with jurisdiction to review procedures for the award of public supply contracts and public works contracts, established under Article 2(8) of Directive 89/665, may also hear appeals concerning procedures for the award of public service contracts.

However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In that respect, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

2 Services consisting in the transport of injured and sick persons with a nurse in attendance come within both Annex I A, Category No 2, and Annex I B, Category No 25, to Directive 92/50, so that a contract for those services is covered by Article 10 of Directive 92/50.

Both Annex I A and Annex I B refer to the CPC nomenclature (common product classification)

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of the United Nations and those annexes clearly distinguish between transport and medical services delivered in the ambulance. The seventh recital in the preamble to Directive 92/50 clearly indicates that the reference in those Annexes to that nomenclature is binding. CPC reference number 93, appearing in Category No 25 (Health and social services) in Annex I B, clearly indicates that this category relates solely to the medical aspects of health services governed by a public contract, to the exclusion of the transport aspects, which come under Category No 2 (Land transport services), which have the CPC reference number 712.

3 The provisions of Titles I and II of Directive 92/50 may be relied on directly by individuals before national courts. As regards the provisions of Titles III to VI, these may also be relied on by an individual before a national court if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise.

The detailed provisions of Titles III to VI of the directive, on the choice of award procedures and the rules applicable to competitions, common technical and advertising rules, and participation and selection and award criteria, are, subject to exceptions and qualifications which are apparent from their terms, unconditional and sufficiently clear and precise to be relied on by service providers before national courts.

4 Community law does not require an awarding authority in a Member State to intervene, at the request of an individual, in existing legal situations concluded for an indefinite period or for several years where those situations came into being before expiry of the period for transposition of Directive 92/50.

In Case C-76/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that body between

Walter Tögel

and

Niederösterreichische Gebietskrankenkasse

on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), and of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT

(Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, G.F. Mancini, P.J.G. Kapteyn (Rapporteur), J.L. Murray and K.M. Ioannou, Judges,

Advocate General: N. Fennelly,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Niederösterreichische Gebietskrankenkasse, by Karl Preslmayr, Rechtsanwalt, Vienna,

- the Austrian Government, by Wolf Okresek, Ministerialrat at the Federal Chancellor's Office - Department responsible for constitutional matters, acting as Agent,

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- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Claudia Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Tögel, represented by Claus Casati, Rechtsanwaltsanwärter, Vienna, the Niederösterreichische Gebietskrankenkasse, represented by Dieter Hauck, Rechtsanwalt, Vienna, the Austrian Government, represented by Michael Fruhmann, of the Federal Chancellor's Office - Department responsible for constitutional matters, acting as Agent, the French Government, represented by Philippe Lalliot, Secretary for Foreign Affairs at the Directorate of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by Hendrik van Lier and Claudia Schmidt, at the hearing on 12 February 1998,

after hearing the Opinion of the Advocate General at the sitting on 2 April 1998,

gives the following

Judgment

Costs

55 The costs incurred by the French and Austrian Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the referring body, the decision on costs is a matter for that body.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 5 December 1996, hereby rules:

1. Neither Article 1(1) and (2), Article 2(1) nor any other provision of Council Directive 89/665/EEC of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, may be interpreted as meaning that, if Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts has not been transposed by the end of the period laid down for that purpose, the review bodies in the Member States with jurisdiction to review procedures for the award of public supply contracts and public works contracts, established under Article 2(8) of Directive 89/665, may also hear appeals concerning procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

2. Services consisting in the transport of injured and sick persons with a nurse in attendance come within both Annex I A, Category No 2, and Annex I B, Category No 25, to Directive 92/50, so that a contract for those services is covered by Article 10 of Directive 92/50.

3. The provisions of Titles I and II of Directive 92/50 may be relied on directly by individuals

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before national courts. As regards the provisions of Titles III to VI, these may also be relied on by an individual before a national court if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise.

4. Community law does not require an awarding authority in a Member State to intervene, at the request of an individual, in existing legal situations concluded for an indefinite period or for several years where those situations came into being before expiry of the period for transposition of Directive 92/50.

1 By order of 5 December 1996, received at the Court on 20 February 1997, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), and of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 Those questions have been raised in proceedings between Mr Tögel and the Niederösterreichische Gebietskrankenkasse (Sickness Insurance Fund for Lower Austria) concerning the procedure for the award of public contracts for the transport of injured and sick persons.

Legal framework

3 Article 1(1) of Directive 89/665, as amended by Article 41 of Directive 92/50, provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract-award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4 Article 1(2) and (3) of Directive 89/665 is worded as follows:

`2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

5 Article 2 of Directive 89/665 provides:

`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender,

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the contract documents or in any other document relating to the contract-award procedure;

(c) award damages to persons harmed by an infringement.

...

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

6 Moreover, Article 8 of Directive 92/50 provides for the observance of the provisions of Titles III to VI in the case of contracts which have as their object services listed in Annex I A thereto, whilst Article 9 provides that contracts which have as their object the services set out in Annex I B are to be awarded in accordance with Articles 14 and 16 thereof.

7 Article 10 of Directive 92/50 provides:

`Contracts which have as their object services listed in both Annex I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

8 Annex I A (Services within the meaning of Article 8) of Directive 92/50 is worded as follows:

`Category No Subject CPC Reference No

1 ... ...

2 Land transport services, including services, except transport of mail 712 (except 71235), armoured car services, and courier services 7512, 87304

3 ... ...'

9 Annex I B (Services within the meaning of Article 9) of Directive 92/50 is in the following terms:

`Category No Subject CPC Reference No

... ...

25 Health and social services 93

... ...'

10 According to the seventh recital in the preamble to Directive 92/50, Annexes I A and I B refer to the CPC nomenclature (common product classification) of the United Nations.

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11 Article 1 of Council Regulation (EEC) No 3696/93 of 29 October 1993 on the statistical classification of products by activity (CPA) in the European Economic Community (OJ 1993 L 342, p. 1) provides:

`1. The purpose of this Regulation is to establish a classification of products by activity within the Community in order to ensure comparability between national and Community classifications and hence national and Community statistics.

2. ...

3. This Regulation shall apply only to the use of this classification for statistical purposes.'

12 According to Point 1 of Commission Recommendation 96/527/EC of 30 July 1996 on the use of the Common Procurement Vocabulary (CPV) for describing the subject-matter of public contracts (OJ 1996 L 222, p. 10), the contracting entities covered by the Community directives dealing with the award of public contracts are recommended to use the terms and codes of the Common Procurement Vocabulary (CPV) published in Supplement 169 to the Official Journal of the European Communities for 1996.

13 Under Austrian law, Directive 89/665 was transposed into national law by the Bundesgesetz über die Vergabe von Aufträgen (Federal Law on the Award of Public Contracts, BGBl. 462/1993), which entered into force on 1 January 1994.

14 By virtue of Article 168 of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, of 24 June 1994 (OJ 1994 C 241, p. 21), Directive 92/50 was to be transposed into Austrian law by 1 January 1995. It is not disputed that transposition into national law occurred only on 1 January 1997, that is to say after the order for reference was made.

The main proceedings

15 Under national legislation the Austrian social security institutions are required to reimburse to insured persons the costs of transport incurred by them or by members of their families when they have had to call on medical assistance. Reimbursement includes the cost of transport within the country for transport to the nearest hospital for treatment or from the hospital to the patient's home and also, for outpatient treatment, to the nearest approved doctor or the nearest approved institution, reimbursement being made at the rates laid down by agreement.

16 As regards the transport of patients in the broad sense, a distinction is made between transport by ambulance with a duty doctor, the transport of injured and sick persons with a nurse and unaccompanied transport by ambulance without medical attendance.

17 The relationship between the social security institutions and the transporting undertakings are governed by private-law contracts which must afford insured persons and members of their families insured under them adequate access to the benefits provided for by the law and under agreements.

18 Thus, in 1984, the Niederösterreichische Gebietskrankenkasse entered into framework agreements with the Austrian Red Cross, regional section for Lower Austria, and the Austrian Federation of Samaritan Workers, for the provision of patient transport of all three types. Tariffs under these framework agreements are adjusted annually. Pursuant to these contracts, persons engaged in the transport of patients are not only required to undertake all transport on the ground, that is say transport accompanied by a duty doctor, the transport of injured and sick persons as well as unaccompanied transport by ambulance but must also coordinate and use dual-mode or multi-mode transport.

19 On 1 December 1992, the Bezirkshauptmannschaft Wien Umgebung (Chief Local Government Office

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for Vienna and District) granted Mr Tögel a licence to carry on a hire-car business, limited to the transport of injured and sick persons. The Niederösterreichische Gebietskrankenkasse repeatedly turned down the applicant's request for a direct-charging contract for that type of transport on the ground that that type of transport was adequately provided for under the two existing agreements. On 22 August 1996 Mr Tögel therefore applied to the Bundesvergabeamt for a declaration that the contract at issue concerned a service covered by Annex I A to Directive 92/50 and that, consequently, a public tender procedure should be carried out.

20 In those circumstances, the Bundesvergabeamt stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

`1. May an individual derive, from Article 1(1) and (2), Article 2(1) or any other provisions of Council Directive 89/665/EEC, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, a specific right to have review proceedings conducted before authorities or courts which comply with the provisions of Article 2(8) of Directive 89/665/EEC, which right is so sufficiently precise and specific that, in the event of non-transposition of the directive in question by the Member State, an individual may successfully assert that legal right against that Member State in legal proceedings?

2. In conducting a review procedure on the basis of an individual's right, founded on Article 41 of Directive 92/50/EEC in conjunction with Directive 89/665/EEC, to the conduct of a review procedure, must a national court having the attributes of the Bundesvergabeamt disregard provisions of national law such as Paragraph 91(2) and (3) of the Bundesvergabegesetz, which confer on the Bundesvergabeamt powers of review only in the case of infringements of the Bundesvergabegesetz and regulations adopted thereunder, on the ground that those provisions preclude a review procedure from being conducted under the Bundesvergabegesetz for awards of contracts for services, and must such a national court conduct a review procedure in accordance with the fourth part of the Bundesvergabegesetz?

3(a). Are the services mentioned in the facts of the case (with reference to Article 10 of Directive 92/50/EEC) to be classified as services coming under Annex I A, Category No 2 (Land transport services) and contracts for such services thus to be awarded in accordance with the provisions of Titles III and IV of the Directive, or are they to be classified as services coming under Annex I B to Directive 92/50/EEC (Health services) with the result that contracts for such services are to be awarded in accordance with the provisions of Articles 13 and 14, or do those services fall entirely outside the sphere of application of Directive 92/50/EEC?

3(b). Do the provisions of Articles 1 to 7 of Directive 92/50/EEC satisfy the preconditions laid down in paragraph 12 of the judgment in Case 41/74 Van Duyn v Home Office on the direct applicability of a Community directive, with the result that services coming under Annex 1 B to the Directive are to be awarded under the procedure therein mentioned or are the relevant provisions of the Directive for the services mentioned in Annex 1 A capable of fulfilling the preconditions laid down in the abovementioned case?

4. Is there under Article 5 or other provisions of the EC Treaty, or under Directive 92/50/EEC, an obligation on the State to intervene in existing legal situations concluded for an indefinite period or for several years but which were not entered into in accordance with the abovementioned directive?'

The first and second questions

21 By its first and second questions, which it is appropriate to examine together, the national court is asking essentially whether Article 1(1) and (2), Article 2(1), or any other provisions of Directive 89/665, must be interpreted as meaning that, if Directive 92/50 has not been transposed

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by the end of the period laid down for that purpose, the review bodies in the Member States with jurisdiction in regard to procedures for the award of public supply and public works contracts established under Article 2(8) of Directive 89/665 also have jurisdiction in regard to appeals in connection with procedures for the award of contracts for services.

22 In that connection, it should be recalled first of all that in paragraph 40 of its judgment in Case C-54/96 Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin [1997] ECR I-4961 the Court held that it was for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law but that in each case the Member States must ensure that those rights are effectively protected. Subject to that proviso, it is not for the Court to involve itself in the resolution of questions of jurisdiction which may arise within the internal judicial system from the classification of certain legal situations based on Community law.

23 At paragraph 41 of that judgment the Court went on to declare that, although Article 41 of Directive 92/50 requires the Member States to adopt the measures necessary to ensure effective review in the field of public service contracts, it does not indicate which national bodies are to be the competent bodies for this purpose or whether these bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts.

24 However, it is undisputed that on 22 August 1996, the date on which Mr Tögel brought his application before the Bundesvergabeamt, Directive 92/50 had not been transposed into Austrian law. In fact, the Law giving effect to the directive entered into force only on 1 January 1997.

25 In view of those circumstances, the Court reiterated, at paragraph 43 of its judgment in Dorsch Consult, that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It followed that, when applying national law, whether adopted before or after the directive, the national court having to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (see the judgments in Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; and in Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 26).

26 At paragraph 44, the Court went on to point out that the question of the designation of a body competent to hear appeals in relation to public service contracts is relevant even where Directive 92/50 has not been transposed. Where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, the Court has recognised, subject to certain conditions, the right of individuals to rely in law on a directive as against a defaulting Member State. Although this minimum guarantee cannot justify a Member State in absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, in particular, the judgment in Case C-253/95 Commission v Germany [1996] ECR I-2423, paragraph 13), it may nevertheless have the effect of enabling individuals to rely, as against a Member State, on the substantive provisions of Directive 92/50.

27 Finally, at paragraph 45 of the judgment in Dorsch Consult, the Court reiterated that, if the relevant domestic provisions cannot be interpreted in conformity with Directive 92/50, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed (see, in particular, the judgment in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer

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and Others [1996] ECR I-4845).

28 The reply to be given to the first and second questions must therefore be that neither Article 1(1) and (2), Article 2(1) nor any other provision of Directive 89/665 may be interpreted as meaning that, if Directive 92/50 has not been transposed by the end of the period laid down for that purpose, the review bodies in the Member States with jurisdiction to review procedures for the award of public supply contracts and public works contracts, established under Article 2(8) of Directive 89/665, may also hear appeals concerning procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

The third question

The first part of the third question

29 By the first part of the third question the national court asks whether services consisting in the transport of injured and sick persons with a nurse in attendance, which are the services at issue in the main proceedings, come within Annex I A or Annex I B to Directive 92/50, to which Article 10 of that directive refers.

30 As regards the designation of the services governed by contracts covered by Directive 92/50, Articles 8 and 9 thereof refer to respectively Annex I A and Annex I B to that directive. In that connection, both Annex I A and Annex I B to Directive 92/50 refer to the CPC nomenclature.

31 According to Article 10 of Directive 92/50, contracts which have as their object services listed in both Annex I A and I B are to be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they are to be awarded in accordance with Articles 14 and 16.

32 According to the Niederösterreichische Gebietskrankenkasse, the services in question constitute services listed in Annex I B, Category No 25 (Health and social services). In that connection, it refers in particular to the CPV, Heading 85, which lists `ambulance services' amongst the `health and social services' to which it refers.

33 The Austrian Government takes the view that neither the CPC nomenclature nor the CPA nor the CPV enable the services to be classified in any of the categories mentioned in Annex I A or Annex I B.

34 On the other hand, in the Commission's view, it follows from the CPC nomenclature, the CPV and the CPA that the services in question must be classified as services mentioned in both Annex I A, Category No 2 (Land transport services) and Annex I B, Category No 25 (Health and social services).

35 In that connection, it should be observed that, according to Article 1(3) of Regulation No 3696/93, the classification provided for in the CPA must be used for statistical purposes and that, according to point 1 of Recommendation 96/527, the CPV is intended only to be used for the drawing up of notices and other communications published in connection with public tendering procedures.

36 It follows that the designations of services listed in Category No 2 of Annex I A and Category No 25 of Annex I B cannot be interpreted in the light of the CPA or the CPV.

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37 On the other hand, as Advocate General Fennelly observes at paragraph 32 of his Opinion, the seventh recital in the preamble to Directive 92/50 clearly indicates that the reference in Annexes I A and I B to the CPC nomenclature is binding.

38 It must be observed next that, as Advocate General Fennelly explains more fully at paragraphs 36 to 48 of his Opinion, the global approach advocated by France at the hearing, which consists in allocating each service in its entirety to either Annex I A or Annex I B depending on the presence or absence of medical assistance, does not reflect the clear distinction in the Annexes between transport and medical services delivered in the ambulance.

39 Consequently, CPC reference number 93 appearing in Category No 25 (Health and social services) in Annex I B, clearly indicates that this category relates solely to the medical aspects of health services governed by a public contract such as the one at issue in the main proceedings, to the exclusion of the transport aspects, which come under Category No 2 (Land transport services), which have the CPC reference number 712.

40 The reply to be given to the first part of the third question must therefore be that services consisting in the transport of injured and sick persons with a nurse in attendance come within both Annex I A, Category No 2, and Annex I B, Category No 25, to Directive 92/50, so that a contract for those services is covered by Article 10 of Directive 92/50.

The second part of the third question

41 By the second part of the third question the national court is essentially seeking to ascertain whether the provisions of Titles I to VI of Directive 92/50 may be relied on by individuals before national courts.

42 It must be recalled here that the Court has consistently held (see the judgment in Case 31/87 Beentjes v Netherlands State [1988] ECR 4635, paragraph 40) that whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied on by individuals against the State where that State fails to implement the directive in national law within the prescribed period or where it fails to implement it correctly.

43 The question is, therefore, whether the relevant provisions of Directive 92/50 appear to be, as regards their content, unconditional and sufficiently precise to be relied on by an individual as against the State.

44 It should be observed first of all here that the provisions of Title I, concerning the matters and persons covered by the directive, and of Title II, on the procedures applicable to contracts for the services listed in Annexes I A and I B, are unconditional and sufficiently precise to be relied on before a national court.

45 Under Articles 8 and 10, which form part of Title II, the awarding authorities are required, in unconditional and precise terms, to award public contracts for services in accordance with national procedures in conformity with the provisions of Titles III to VI in the case of services coming wholly or mainly under Annex I A and with the provisions of Articles 14 and 16 in the case of services coming wholly or mainly under Annex I B. Article 14 appears under Title IV whilst Article 16 appears under Title V.

46 As Advocate General Fennelly observes at paragraph 57 of his Opinion, the detailed provisions of Titles III to VI of the directive, on the choice of award procedures and the rules applicable to competitions, common technical and advertising rules, and participation and selection and award criteria, are, subject to exceptions and qualifications which are apparent from their terms, unconditional and sufficiently clear and precise to be relied on by service providers before national courts.

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47 The reply to be given to the second part of the third question must therefore be that the provisions of Titles I and II of Directive 92/50 may be relied on directly by individuals before national courts. As regards the provisions of Titles III to VI, these may also be relied on by an individual before a national court if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise.

The fourth question

48 By its fourth question the national court asks whether a Member State is required, under Article 5 or any other provision of the EC Treaty or under Directive 92/50/EEC, to intervene in existing legal situations concluded for an indefinite period or for several years in a manner not in conformity with the abovementioned directive.

49 Since the directive had not yet been transposed into Austrian law at the time when the order for reference was made, that question cannot, in the present case, concern any obligation on the Austrian legislature to intervene in this area.

50 The fourth question must therefore be construed as seeking to ascertain whether Community law requires an awarding authority of a Member State to intervene at the request of an individual in existing legal situations concluded for an indefinite period or for several years in a manner not in conformity with Directive 92/50.

51 It should be recalled here that it is settled case-law that unconditional and sufficiently precise provisions of a directive may be relied on before a national court by the persons concerned against any public authority required to apply laws, regulations or administrative provisions of national law which are not in conformity with that directive, even if that directive has not yet been transposed into the domestic legal order of the State in question.

52 It follows that an individual may rely before a national court on the provisions of Directive 92/50 if they are unconditional and sufficiently precise, when an awarding body of a Member State has awarded a public service contract in breach of those provisions, provided, however, that the award was made after expiry of the transposition period provided for by that directive.

53 In this instance, the file shows that the framework contracts at issue in the main proceedings were entered into in 1984, that is to say even before adoption of the directive.

54 The reply to be given to the fourth question must therefore be that Community law does not require an awarding authority in a Member State to intervene, at the request of an individual, in existing legal situations concluded for an indefinite period or for several years where those situations came into being before expiry of the period for transposition of Directive 92/50.

DOCNUM	61997J0076
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1997 ; J ; judgment
PUBREF	European Court reports 1998 Page I-05357

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DOC 1998/09/24

LODGED 1997/02/20

JURCIT
61974J0041-N12 : N 20
61987J0031-N40 : N 42
31989L0665-A01P1 : N 20 21 28
31989L0665-A01P2 : N 20 21 28
31989L0665-A02P1 : N 20 21 28
31989L0665-A02P8 : N 20 21 28
61989J0106-N08 : N 25
11992E005 : N 20 25 48
31992L0050-A08 : N 30 45
31992L0050-A09 : N 30 45
31992L0050-A10 : N 20 29 31 40 45
31992L0050-A13 : N 20
31992L0050-A14 : N 20 31 45
31992L0050-A16 : N 31 45
31992L0050-A41 : N 20 23
31992L0050-NIA : N 20 29 31 36 - 38 40 44 45
31992L0050-NIB : N 20 29 31 36 - 40 44 45
31992L0050 : N 21 24 48 50 52 - 54
61992J0091-N26 : N 25
61992J0334-N20 : N 25
31993R3696-A01P3 : N 35
61994J0178 : N 27
61995J0253-N13 : N 26
31996X0527-PT1 : N 35
61996J0054-N40 : N 22
61996J0054-N41 : N 23
61996J0054-N43 : N 25
61996J0054-N44 : N 26
61996J0054-N45 : N 27

CONCERNS
Interprets 31989L0665-A01P1
Interprets 31989L0665-A01P2
Interprets 31989L0665-A02P1
Interprets 31989L0665-A02P8
Interprets 31992L0050-NIA
Interprets 31992L0050-NIB

SUB Approximation of laws

AUTLANG German

OBSERV Austria ; France ; Commission ; Member States ; Institutions

NATIONA Austria

NATCOUR *A9* Bundesvergabeamt, Vorlagebeschluß vom 05/12/96

NOTES Pelzl, Alexander: European Law Reporter 1998 p.471-472

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Pietri, Martin ; Simon, Denys: Europe 1998 Novembre Comm. no 353 p.9-10
Benedict, Christoph G.: Europäische Zeitschrift für Wirtschaftsrecht 1999 p.77-81
Dios, José María de: Revista Jurídica de Catalunya 1999 p.620-623

PROCEDU Reference for a preliminary ruling

ADVGEN Fennelly

JUDGRAP Kapteyn

DATES of document: 24/09/1998
of application: 20/02/1997

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Judgment of the Court (Sixth Chamber)
of 17 July 1997
Commission of the European Communities v Italian Republic.
Failure to fulfil obligations - Directive 93/36/EEC - Failure to transpose within the prescribed period.
Case C-43/97.

Member States - Obligations - Implementation of directives - Failure to fulfil obligations not contested

(EC Treaty, Art. 169)

In Case C-43/97,

Commission of the European Communities, represented by Paolo Stancanelli, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Umberto Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and by failing to notify those provisions, the Italian Republic has failed to fulfil its obligations under the first subparagraph of Article 34(1) of that directive,

THE COURT

(Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, J.L. Murray, G. Hirsch, H. Ragnemalm (Rapporteur) and R. Schintgen, Judges,

Advocate General: C.O. Lenz,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 12 June 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 3 February 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty, seeking a declaration that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and by failing to notify those provisions, the Italian Republic has failed to fulfil its obligations under the first subparagraph of Article 34(1) of that directive.

2 Under the first subparagraph of Article 34(1) of Directive 93/36, Member States were to bring

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into force the laws, regulations and administrative provisions necessary to comply with the directive before 14 June 1994 and immediately to inform the Commission thereof.

3 On 9 August 1994, not having been informed of the measures taken to transpose Directive 93/36 and not having any other information from which it was possible to conclude that the Italian Republic had fulfilled its obligations, the Commission gave the Italian Government notice to submit its observations within two months.

4 On 25 October 1995, not having received any reply, the Commission sent the Italian Government a reasoned opinion, requesting it to adopt the necessary measures within a period of two months from that notification.

5 The Commission did not receive any reply from the Italian authorities and therefore brought the present action.

6 The Italian Republic does not deny that it has failed to fulfil its obligations as set out in the application and merely states that it will shortly adopt measures to remedy the situation. It states that under the draft 1995/1996 Community Law, currently before the Italian Parliament, responsibility is to be delegated to the Government for transposing Directive 93/96 into national law by means of a legislative decree which will be adopted as soon as the 1995/1996 Community Law enters into force.

7 Since Directive 93/96 has not been transposed within the period laid down therein, the Italian Republic must be found to have failed to fulfil its obligations as contended by the Commission.

8 That conclusion cannot be called into question by the Italian Government's argument that the failure with which it is charged is of minor importance inasmuch as the basic provisions concerning procedures for the award of public supply contracts have long formed part of the national legal system as a result of the implementation of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended on several occasions.

9 The Italian Government does not deny that Directive 93/96 imposes new obligations on the Member States, which they were to implement by 14 June 1994 at the latest.

10 Contrary to what the Commission claims, however, the Court does not have to take account of the failure to notify the laws, regulations or administrative provisions necessary to comply with the directive, since the Italian Republic did not adopt those provisions within the period prescribed in the reasoned opinion (see Case C-147/94 Commission v Spain [1995] ECR I-1015, paragraph 7).

11 It must therefore be found that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Directive 93/36, the Italian Republic has failed to fulfil its obligations under the first subparagraph of Article 34(1) of that directive.

Costs

12 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

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1. Declares that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, the Italian Republic has failed to fulfil its obligations under the first subparagraph of Article 34(1) of that directive;

2. Dismisses the remainder of the application;

3. Orders the Italian Republic to pay the costs.

DOCNUM	61997J0043
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1997 ; J ; judgment
PUBREF	European Court reports 1997 Page I-04671
DOC	1997/07/17
LODGED	1997/02/03
JURCIT	31977L0062 : N 8 31993L0036-A34P1L1 : N 1 2 11 31993L0036 : N 1 - 11 61994J0147-N07 : N 10
CONCERNS	Failure concerning 31993L0036-A34P1L1
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
NOTES	Salvadori, Maria Margherita: Il diritto dell'economia 1997 p.701-709
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz

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JUDGRAP Ragnemalm

DATES of document: 17/07/1997
of application: 03/02/1997

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Judgment of the Court (Third Chamber)
of 18 December 1997
Ballast Nedam Groep NV v Belgische Staat. Reference for a preliminary ruling: Raad van State - Belgium. Freedom to provide services - Public-works contracts - Registration of contractors - Relevant entity. Case C-5/97.

In Case C-5/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Raad van State, Belgium, for a preliminary ruling in the proceedings pending before that court between

Ballast Nedam Groep NV

and

Belgian State

on the interpretation of the judgment of the Court of 14 April 1994 in Case C-389/92 Ballast Nedam Groep [1994] ECR I-1289,

THE COURT

(Third Chamber),

composed of: J.C. Moitinho de Almeida, acting for the President of the Chamber, J.-P. Puissochet (Rapporteur) and L. Sevon, Judges,

Advocate General: A. La Pergola,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Ballast Nedam Groep NV, the applicant in the main proceedings, by Marc Senelle, of the Brussels Bar,

- the Belgian Government, by Jan Devadder, General Adviser at the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

- the Commission of the European Communities, by Hendrik van Leer, Legal Adviser, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 October 1997,

gives the following

Judgment

1 By judgment of 18 December 1996, received at the Court on 13 January 1997, the Raad van State (Council of State), Belgium, referred to the Court under Article 177 of the EC Treaty a question concerning the interpretation of the judgment given by the Court in Case C-389/92 Ballast Nedam Group v Belgian State [1994] ECR I-1289 (hereinafter `BNG I').

2 The question has been raised in proceedings between Ballast Nedam Groep, a company incorporated under Netherlands law (hereinafter `BNG'), and the Belgian State concerning non-renewal of the registration of that undertaking. Those proceedings have already given rise to the submission of a preliminary question on the interpretation of Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches

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(OJ, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

3 The question submitted by the Raad van State in its first reference for a preliminary ruling was as follows:

`Do Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, in particular Articles 1, 6, 21, 23 and 26, permit, in the event of the Belgian rules on the registration of contractors being applied to the dominant legal person within a "group" governed by Netherlands law, in connection with the assessment of the criteria relating inter alia to technical competence which a contractor must satisfy, account to be taken only of that dominant legal person as a legal entity and not of the "companies within the group" each of which, having its own legal personality, belongs to that "group"?'

4 In its judgment in BNG I, the Court replied to that question that Directives 71/304 and 71/305 had to be interpreted as permitting, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group was being examined, account to be taken of companies belonging to that group, provided that the legal person in question established that it actually had available the resources of those companies which were necessary for carrying out the works. It was for the national court to assess whether such proof had been produced in the main proceedings.

5 Since the parties to the proceedings cannot agree on the meaning of that ruling, the Raad van State has decided to refer to the Court a further question for a preliminary ruling, worded as follows:

`Should the word "permit" in the phrase "permit... account to be taken ..." appearing in the operative part of the judgment given on 14 April 1994 in Case C-389/92 be understood as meaning "require"?

If the word "permit" in the abovementioned phrase is not to be understood as being equivalent to the word "require", does that mean that the Member State in question enjoys a discretionary power in the matter, even where the condition laid down by the Court is satisfied?

In which cases and on what grounds is it then appropriate to take account of the companies belonging to a dominant legal person of a group?'

6 By this question the national court is asking in effect whether it follows from the judgment in BNG I that Directives 71/304 and 71/305 are to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where that person is established as having actual power of disposition over the resources of the companies belonging to the group necessary for performing works contracts, to take account of those companies.

7 BNG and the Commission consider that that question calls for an affirmative reply. In their view, where proof is produced that the dominant legal person of a group has actual power of disposition over the resources of the companies belonging to that group, the competent authority must necessarily take account of those companies.

8 For its part, the Belgian Government contends, with reference to the judgment of the Court in Joined Cases 27/86, 28/86 and 29/86 CEI and Others [1987] ECR 3347, that the Member States enjoy a margin of discretion in assessing the classification criteria to be satisfied by a contractor

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upon examination of an application for registration lodged by a dominant legal person of a group, even if the condition laid down by the Court is satisfied.

9 The reference to that case is not relevant. Whilst, as the Court pointed out at paragraph 22 of the judgment in CEI and Others, the criteria for classification in the various official lists of recognized contractors provided for in Article 28 of Directive 71/305 are not harmonized, that is not true of some of the qualitative selection criteria laid down in Articles 23 to 28, in particular references attesting to contractors' financial and economic standing and their technical knowledge and ability provided for in Articles 25 and 26. It is clear from the judgment in BNG I that the condition laid down by the Court therein specifically relates to references for demonstrating the technical, financial and economic standing of a company seeking registration on an official list of approved contractors.

10 In that judgment, the Court stated first that a holding company which does not itself execute works may not, because its subsidiaries which do carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures (paragraph 15).

11 It went on to state that it is for the contract-awarding authorities, as Article 20 of Directive 71/305 specifies, to check the suitability of contractors in accordance with the criteria referred to in Articles 25 to 28 of that directive (paragraph 16).

12 Finally, the Court explained that when a company produces references relating to its subsidiaries in order to prove its economic and financial standing and technical knowledge, it must establish that, whatever the nature of its legal link with those subsidiaries, it actually has available to it the resources of the latter which are necessary for carrying out the contracts. It is for the national court to assess, in the light of the factual and legal circumstances before it, whether such proof has been produced in the main proceedings (paragraph 17).

13 It follows from all the foregoing considerations that a holding company which does not itself carry out works may not be precluded from participating in procedures for the award of public works contracts, and, therefore, from registration on an official list of approved contractors if it shows that it actually has available to it the resources of its subsidiaries necessary to carry out the contracts, unless the references of those subsidiaries do not themselves satisfy the qualitative selection criteria mentioned in Articles 23 to 28 of Directive 71/305.

14 The reply to the question submitted must therefore be that Directives 71/304 and 71/305 are to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take account of the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in Articles 23 to 28 of Directive 71/305.

Costs

15 The costs incurred by the Belgian Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Third Chamber),

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in answer to the question referred to it by the Raad van State, Belgium, by judgment of 18 December 1996, hereby rules:

Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts are to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take account of the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in Articles 23 to 28 of Directive 71/305.

DOCNUM	61997J0005
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1997 Page I-07549
DOC	1997/12/18
LODGED	1997/01/13
JURCIT	31971R0304 : N 14 31971R0305 : N 14 31971R0305-A23 : N 91 61992J0389 : N 1 9 61992J0389-N15 : N 10 61992J0389-N16 : N 11 61992J0389-N17 : N 12 61986J0027 : N 8 61986J0027-N22 : N 9
CONCERNS	Interprets 31971L0304 - Interprets 31971L0305 -
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	Dutch
OBSERV	Belgium ; Commission ; Member States ; Institutions

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NATIONA	Belgium
NATCOUR	*A9* Raad van State (Belgie), afdeling administratie, arrest no 63.653 van 18/12/1996 (A. 36.189/IV-11.984) ; *P1* Raad van State (Belgie), afdeling administratie, arrest no 84.723 van 18/01/1998 (A.36.189/XII-537)
NOTES	Prévédourou, Evgenia: I symmetochi ton etairion chartofylakiou stis proskliseis ypovolis prosforon sto plaisio tis diadikasias synapseos dimosion ergon, Epitheorisis Dimosiou Dikaiou kai Dioikitikou Dikaiou 1998 p.991-995
PROCEDU	Reference for a preliminary ruling
ADVGEN	La Pergola
JUDGRAP	Puissochet
DATES	of document: 18/12/1997 of application: 13/01/1997

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Opinion of Mr Advocate General La Pergola delivered on 23 October 1997 Ballast Nedam Groep NV v Belgische Staat. Reference for a preliminary ruling: Raad van State - Belgium. Freedom to provide services - Public-works contracts - Registration of contractors - Relevant entity. Case C-5/97.

DOCNUM	61997C0005
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
PUBREF	European Court reports 1997 Page I-07549
DOC	1997/10/23
LODGED	1997/01/13
JURCIT	31971R0304 : N 5 31971R0305 : N 5
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	Italian
NATIONA	Belgium
PROCEDU	Reference for a preliminary ruling
ADVGEN	La Pergola
JUDGRAP	Puissochet
DATES	of document: 23/10/1997 of application: 13/01/1997

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Order of the Court of First Instance (First Chamber)
First Instance (First Chamber)First Instance (First Chamber)1997.
Société anonyme de traverses en béton armé (Sateba) v Commission of the European Communities.
Public procurement - Complaint - Proceedings for a declaration of failure to fulfil obligations - Decision to close the file - Action for annulment - Inadmissibility.
Case T-83/97.

Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Complaint by a tenderer alleging that the conduct of the contracting entity infringes the directive and restricts competition and constitutes an obstacle to the free movement of goods - Examination by the Commission under the procedure applicable to failure by a Member State to fulfil its obligations - Permissibility - Failure to initiate the procedure under Regulation No 17 - Abuse of procedure - None - Distinct and independent character of the two procedures

(EC Treaty, Art. 169; Council Regulation No 17; Council Directive 93/38)

It is proper for the Commission to examine under the procedure established by Article 169 of the Treaty a complaint in which a tenderer for a procurement contract alleges that the conduct of the contracting entity constitutes an infringement of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, and serves to restrict competition and constitutes an obstacle to the free movement of goods. Recourse to that procedure is no less justified by the fact that the complaint related exclusively to conduct by the contracting entity and did not comprise any criticism of the relevant national legislation or the conduct of the government concerned since, in the application of the Community rules on public procurement, the acts of contracting entities must be imputed to the Member States to which those entities belong.

In so far as such a complaint does not contain any specific indication which would enable it to be characterized as a request submitted under Article 3(2)(b) of Regulation No 17, the Commission does not, therefore, commit any abuse of procedure by not examining it in the light of competition law.

Furthermore, and even supposing that the complainant did properly request the Commission to initiate the procedure under Regulation No 17, that procedure remains independent of the procedure for a finding that the conduct of a Member State infringes Community law and for termination of that conduct. The two procedures serve different purposes and are governed by different rules. The fact that the Commission decides not to initiate a procedure for a declaration of failure to fulfil obligations or decides to discontinue such a procedure, cannot therefore imply that it is prevented from finding that the conduct of the contracting entity at issue constitutes an infringement of the competition rules and ordering termination of the infringement. It follows that a decision to close the file, adopted in the context of a procedure for a declaration of failure to fulfil obligations, relates exclusively to that procedure and does not constitute an implied rejection of a complaint submitted under Regulation No 17, meaning that it does not affect the complainant's legal position in the context of a possible procedure in application of the competition rules.

DOCNUM	61997B0083
AUTHOR	Court of First Instance of the European Communities
FORM	Order

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TREATY European Economic Community

TYPDOC 6 ; CJUS ; cases ; 1997 ; B ; order

PUBREF European Court reports 1997 Page II-01523

DOC 1997/09/29

LODGED 1997/04/01

JURCIT
31962R0017-A03 : N 39
31962R0017-A03P2LB : N 38
31962R0017-A19P1 : N 32
31962R0017-A19P2 : N 32
31962R0017 : N 32 38 - 40
31963R0099 : N 32
61976J0015-N26 : N 39
61976J0015-N27 : N 39
61976J0015-N28 : N 39
61987J0045-N12 : N 35
61987J0045-N13 : N 35
61987J0045-N14 : N 35
61987J0045-N15 : N 35
61987J0045-N16 : N 35
61987J0045-N17 : N 35
61987J0045-N18 : N 35
61987J0045-N19 : N 35
61987J0045-N20 : N 35
61987J0045-N21 : N 35
61987J0045-N22 : N 35
61987J0045-N23 : N 35
61987J0045-N24 : N 35
61987J0045-N25 : N 35
61987J0045-N26 : N 35
61987J0045-N27 : N 35
31991X0530(01)-A111 : N 18
31991X0530(01)-A114 : N 17
61991A0016-N49 : N 39
61991A0016-N50 : N 39
61991A0016-N52 : N 32
11992E030 : N 35
11992E086 : N 38 39
11992E169 : N 31 - 33 35 - 37 39 41 42
31993L0038 : N 34
61993A0461-N35 : N 39
61993A0461-N36 : N 39
61993C0359-N04 : N 37
61993C0359-N05 : N 37
61993J0019-N22 : N 39
61993J0019-N23 : N 39

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61993J0359-N11 : N 37
61993J0359-N12 : N 37
61993J0359-N13 : N 37
61993J0359-N14 : N 37
61993J0359-N15 : N 37
61994J0087-N91 : N 36
61994O0325-N23 : N 39
61994O0325-N24 : N 39
61994O0325-N25 : N 39
61994O0325-N26 : N 39

COURTDEC Confirmed by..... 61997O0422

SUB Approximation of laws ; Competition

AUTLANG French

MISCINF POURVOI : C-422/97

APPLICA Person

DEFENDA Commission ; Institutions

NATIONA France

NOTES Berrod, F. ; Lagondet, F.: Europe 1997 Novembre Comm. no 340 p.10

PROCEDU Application for annulment - inadmissible ; Application to intervene - decision unnecessary

DATES of document: 29/09/1997
of application: 01/04/1997

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Judgment of the Court
of 10 November 1998
Gemeente Arnhem and Gemeente Rheden v BFI Holding BV.
Reference for a preliminary ruling: Gerechtshof Arnhem - Netherlands.
Public service contracts - Meaning of contracting authority - Body governed by public law.
Case C-360/96.

1 Approximation of laws - Procedures for concluding public service contracts - Directive 92/50 - Contracting authorities - Body governed by public law - Needs in the general interest, not having an industrial or commercial character - Meaning - Existence of private undertakings capable of satisfying such needs - Not relevant

(Council Directive 92/50, Art. 1(b), second subpara.)

2 Approximation of laws - Procedures for concluding public service contracts - Directive 92/50 - Exception provided for by Article 6 of the directive - Condition - Observance of Treaty provisions

(EC Treaty, Art. 85 et seq.; Council Directive 92/50, Art. 6)

3 Approximation of laws - Procedures for concluding public service contracts - Directive 92/50 - Contracting authorities - Body governed by public law - Status not dependent on the relative importance of activities designed to satisfy needs in the general interest and of the way they are carried out

(Council Directive 92/50, Art. 1(b), second subpara.)

4 Approximation of laws - Procedures for concluding public service contracts - Directive 92/50 - Contracting authorities - Body governed by public law - Needs in the general interest, not having an industrial or commercial character - Legal form of provisions defining such needs - Not relevant

(Council Directive 92/50, Art. 1(b), second subpara.)

5 The second subparagraph of Article 1(b) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, which provides that `[b]ody governed by public law means any body... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character', must be interpreted as meaning that the Community legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

The term `needs in the general interest not having an industrial or commercial character' does not exclude needs which are or can be satisfied by private undertakings as well. The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations.

However, the existence of competition is not entirely irrelevant to the question whether a need in the general interest is other than industrial or commercial. The latter needs are as a general rule met otherwise than by the availability of goods or services in the marketplace. In general, needs of that kind are those for which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence.

The removal and treatment of household refuse may be regarded as constituting a need in the general interest. Since the degree of satisfaction of that need considered necessary for reasons of public health and environmental protection cannot be achieved by using disposal services wholly or partly available to private individuals from private economic operators, that activity is one of those which the State may require to be carried out by public authorities or over which it wishes to

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retain a decisive influence.

6 Recourse to Article 6 of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, which provides that `[t]his directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b)', is subject to the condition that the laws, regulations or administrative provisions on which the exclusive right of a body governed by public law is based must be compatible with the Treaty. The protection of competitors of bodies governed by public law is thus assured by Article 85 et seq. of the Treaty.

7 The status of a body governed by public law referred to in the second subparagraph of Article 1(b) of Directive 92/50 relating to the coordination of public service contracts is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.

8 The second subparagraph of Article 1(b) of Directive 92/50 relating to coordination of public service contracts must be interpreted as meaning that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal forms of the provisions in which those needs are mentioned being immaterial in that respect.

In Case C-360/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Gerechtshof te Arnhem (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Gemeente Arnhem,

Gemeente Rheden

and

BFI Holding BV,

on the interpretation of Articles 1(b) and 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet and P. Jann (Rapporteur) (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevon, M. Wathelet, R. Schintgen and K.M. Ioannou, Judges,

Advocate General: A. La Pergola,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Gemeente Arnhem and Gemeente Rheden, by L.H. van Lennep, of the Hague Bar,

- BFI Holding BV, by P. Glazener, of the Amsterdam Bar, and J.J.M. Essers, of the Utrecht Bar,

- the Netherlands Government, by A. Bos, Legal Adviser, Ministry of Foreign Affairs, acting as Agent,

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- the Danish Government, by P. Biering, Head of Directorate, Ministry of Foreign Affairs, acting as Agent,

- the French Government, by Catherine de Salins, Head of Sub-directorate in the Legal Directorate, Ministry of Foreign Affairs, and P. Lalliot, Secretary for Foreign Affairs, in the same Directorate, acting as Agents,

- the Austrian Government, by Wolf Okresek, Ministerialrat in the Federal Chancellor's Office, acting as Agent,

- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

having regard to the written answers given to the questions put by the Court:

- for Gemeente Arnhem and Gemeente Rheden, by L.H. van Lennep,

- for BFI Holding BV, by P. Glazener,

- for the Netherlands Government, by J.G. Lammers, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- for the Danish Government, by J. Molde, Legal Adviser and Head of Directorate, Ministry of Foreign Affairs, acting as Agent,

- for the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

- for the Spanish Government, by S. Ortiz Vaamonde, Abogado del Estado, acting as Agent,

- for the French Government, by K. Rispal-Bellanger, Head of Sub-directorate (International Economic Law and Community Law), in the Legal Directorate, Ministry of Foreign Affairs, acting as Agent, and P. Lalliot,

- for the Austrian Government, by W. Okresek,

- for the Finnish Government, by H. Rotkirch, Ambassador, Head of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent,

- for the Swedish Government, by L. Nordling, Rättschef in the Ministry of Foreign Affairs, acting as Agent, and

- for the United Kingdom Government, by J.E. Collins, of the Treasury Solicitor's Department, acting as Agent, and K.P.E. Lasok QC and R. Williams, Barrister,

- for the Commission, by H. van Lier,

after hearing the oral observations of Gemeente Arnhem and Gemeente Rheden, represented by L.H. van Lennep; of BFI Holding BV, represented by P. Glazener and J.J.M. Essers; of the Netherlands Government, represented by J.S. van den Oosterkamp, Deputy Legal Adviser, Ministry of Foreign Affairs, acting as Agent; of the French Government, represented by P. Lalliot; of the Austrian Government, represented by M. Fruhmann, of the Federal Chancellor's Office, acting as Agent; of the United Kingdom Government, represented by J.E. Collins, K.P.E. Lasok QC and R. Williams; and of the Commission, represented by H. van Lier, at the hearing on 18 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 19 February 1998,

gives the following

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Judgment

Costs

64 The costs incurred by the Netherlands, Danish, German, Spanish, French, Austrian, Finnish, Swedish and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Gerechtshof, Arnhem, by judgment of 29 October 1996, hereby rules:

1. The second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that the legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

2. The term `needs in the general interest, not having an industrial or commercial character' does not exclude needs which are or can be satisfied by private undertakings as well.

3. The status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.

4. The second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that respect.

1 By judgment of 29 October 1996, received at the Court Registry on 5 November 1996, the Gerechtshof (Regional Court of Appeal), Arnhem, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty seven questions on the interpretation of Articles 1(b) and 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 Those questions were raised in proceedings brought by Gemeente Arnhem and Gemeente Rheden (Municipalities of Arnhem and Rheden, hereinafter `the municipalities') against BFI Holding BV (hereinafter `BFI'), which claims that the award of a contract for refuse collection should be subject to the procedure laid down in the abovementioned directive.

The applicable Community legislation

3 Article 1 of Directive 92/50 provides:

`For the purposes of this Directive:

...

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public

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law.

Body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive;

...'

4 Article 6 of Directive 92/50 provides:

`This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

The Netherlands provisions

5 Directive 92/50 was transposed into Netherlands law by a framework law of 31 March 1993 (Stbl. 12) relating to the Community rules for the award of public contracts for the supply of goods, the execution of works and the supply of services, combined with Article 13 of the order of 4 June 1993 (Stbl. 305), as amended by the order of 30 May 1994 (Stbl. 379).

6 Articles 10.10 and 10.11 of the Wet Milieubeheer (Law on the Environment) require municipalities to ensure that, at least weekly, household refuse is collected from all properties in their districts where waste may regularly accumulate. The municipalities must designate an authority to undertake responsibility for such collection.

7 Under Article 2 of the Afvalstoffenverordening (Regulation on Waste) of Gemeente Rheden, as amended on 21 December 1993, the collecting authority is the Dienst Openbare Werken en Woningzaken, Afdeling Wegen en Reiniging, or such independent service as may replace it. Article 2 of the Regulation on Waste of Gemeente Arnhem, as amended on 4 July 1994, designates as the collecting authority the Dienst Milieu en Openbare Werken. It also states that `[a]s from 1 July 1994, that service shall be provided by the company ARA, an independent municipal cleaning service'.

The dispute in the main proceedings

8 In 1993 the municipalities planned merging the municipal refuse collection services and entrusting them to a new legal entity. By decisions of 6 and 28 June 1994 the Municipalities of Arnhem and Rheden decided to establish ARA, a public limited company, and to entrust to it a series of tasks defined by law in the field of waste collection and, in the case of Gemeente Arnhem, cleaning of the municipal road network.

9 ARA was incorporated on 1 July 1994. Article 2 of its statutes provides:

`1. The objects of the company shall be:

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(a) the performance of all economic operations aimed at collecting (or having collected and, so far as possible, recycling or having recycled), in an efficient, effective and environmentally responsible manner, waste such as household refuse, industrial waste and separable parts thereof to be specified, together with activities relating to the cleaning of highways, the elimination of vermin and disinfection;

(b) the (joint) setting up, cooperation with, participation in, the (joint) provision of management and supervision for, as well as the taking over and financing of, other undertakings whose activities have any connection with the objects set out under (a);

(c) the performance of all economic operations which are connected with the foregoing or may be conducive to the operations, activities and action defined above (provided that needs in the general interest are thereby met).

2. The company shall carry out such activities in a socially acceptable manner.'

10 Under Article 6 of its statutes, the shareholders of ARA may only be legal persons governed by public law or companies at least 90% of whose shares are held by such entities and, in addition, the company itself. Under Article 13(2) of the statutes, the municipalities are to appoint at least five of the minimum seven and maximum nine of the members of the supervisory board.

11 The framework agreements which the municipalities concluded with ARA specify, in particular in their preambles, that the municipalities wish to have the tasks in question carried out exclusively by ARA, and accordingly they grant it concessions for that purpose.

12 As far as ARA's remuneration is concerned, Article 8 of the framework agreement between Gemeente Rheden and ARA provides, in particular:

`8.1 Rheden shall pay ARA remuneration for services rendered, at a rate to be specified.

8.2 The remuneration for services referred to in the preceding paragraph shall be defined in a financial clause to be added to the specifications and quality standards for each operation contained in the partial contracts.

8.3 The actual remuneration for services rendered will be fixed:

(a) either on the basis of the unit prices agreed beforehand for each operation, result or batch of work;

(b) or on the basis of a fixed price agreed beforehand for a particular task;

(c) or on the basis of an invoice for costs actually incurred.

...'

13 Article 9 of the framework agreement contains the following provisions:

`9.1 Advances on the above remuneration shall be paid on dates to be specified or on the basis of groups of operations, results or batches of work. Such advances shall be deducted from the final payments.

9.2 If ARA invoices and/or carries out operations for which payment is collected on behalf of Gemeente Rheden or receives any other payment from third parties in the name of Gemeente Rheden, that income must be transferred to the municipality in accordance with procedures to be agreed upon. As regards risks associated with the payment of such amounts, more detailed rules shall also be adopted.'

14 The service agreement for the collection of household refuse concluded between Gemeente Rheden and ARA provides, in Article 7, that the remuneration to be paid to ARA by the municipality

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for the collection and transport of waste and the method of calculation of such remuneration are to be set out in the implementation plan.

15 The same procedures for remuneration were agreed between Gemeente Arnhem and ARA.

16 Although initially ARA carried out all collection of household refuse, street cleaning and collection of industrial waste, those activities were subsequently split between it and Aracom, a public limited company. Whilst ARA continues to collect household refuse, Aracom was entrusted with the collection of industrial waste. Also, a holding company, ARA Holding NV, was incorporated and holds all the capital of those two companies.

17 BFI is a private undertaking whose business includes the collection and treatment of household and industrial waste.

18 On 2 November 1994 BFI brought proceedings before the Arrondissementsrechtbank (District Court), Arnhem, for a declaration that Directive 92/50 applied to the award of the contract granted to ARA, with the result that the municipalities should observe the tendering procedure laid down by that directive. By judgment of 18 May 1995 the Arrondissementsrechtbank, Arnhem, found in favour of BFI. It considered that the task in question had not been entrusted to an authority on the basis of an exclusive right which it enjoyed pursuant to a published law, regulation or administrative provision, so that the exception provided for in Article 6 of the directive was inapplicable.

19 The municipalities appealed against that decision to the Gerechtshof, Arnhem.

20 In its interlocutory judgment of 25 June 1996 the Gerechtshof, Arnhem, rejected the Arrondissementsrechtbank's interpretation to the effect that the contract had not been awarded to an authority on the basis of an exclusive right which it enjoyed pursuant to a published law, regulation or administrative provision within the meaning of Article 6 of Directive 92/50.

21 It took the view that, under the Wet Milieubeheer, the municipalities are under an obligation to ensure that household refuse is collected. In order to discharge that obligation, they appointed ARA, by orders of 6 and 28 June 1994, as sole operator responsible for waste collection. They also expressly amended their regulations on waste, which specifically grant ARA an exclusive right, since they prohibit any other body from collecting household refuse without the prior authority of the municipal council.

22 The Gerechtshof, Arnhem, therefore considered that ARA fell within the exception provided for in Article 6 of Directive 92/50 in so far as it was to be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 92/50.

23 In those circumstances the national court stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

`1. For the purposes of interpreting Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (the Directive), is the first indent of the second subparagraph of Article 1(b) of the Directive, which specifies that body governed by public law means any body ... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, to be interpreted as distinguishing

(i) between needs in the general interest and needs having an industrial or commercial character, or

(ii) between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character?

2. If the answer to the first question is that the distinction to be drawn is that set out in (i),

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(a) is the phrase "needs in the general interest" to be understood as meaning that there can be no question of meeting needs in the general interest where private undertakings meet such needs?

and

(b) if so, is the phrase "needs having an industrial or commercial character" to be understood as meaning that needs having an industrial or commercial character are met whenever private undertakings meet such needs?

3. If the answer to the first question is that the distinction to be drawn is that set out in (ii), is the difference between "needs in the general interest not having an industrial or commercial character" and "needs in the general interest having an industrial or commercial character" to be determined according to whether (competing) private undertakings meet such needs or not?

4. Is the requirement that the body must be established "for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character" to be interpreted as meaning that such a "specific purpose" can exist only where the body was established exclusively to meet such needs?

5. If not, must a body meet needs in the general interest, not having an industrial or commercial character, almost exclusively, substantially, preponderantly or to some other degree in order to be or remain able to meet the requirement that it must be established for the specific purpose of meeting such needs?

6. Does it make any difference to the answers to Questions 1 to 5 whether the needs in the general interest, not having an industrial or commercial character, which the body was set up to meet, derive from legislation in the formal sense, from administrative provisions, from acts of the administration or otherwise?

7. Does it make any difference to the answer to Question 4 if responsibility for the commercial activities is entrusted to a separate legal entity forming part of a single group or concern within which activities meeting needs in the general interest are also carried out?'

24 It must be noted at the outset that, in its written observations, the French Government submits that contracts between the municipalities and ARA may be regarded as public service concessions which, as such, fall outside the scope of Directive 92/50. It maintains that, for there to be a public service concession as defined in Community law, the contracting authority must be remunerated either on the basis of its right to operate the service or on the basis of that right and a price linked to it.

25 Without its being necessary to interpret the term public service concession, which is not at issue in the questions from the national court, it need merely be pointed out that it is clear from the information given by the municipalities in response to a question put to them by the Court, and in particular from Articles 8 and 9 of the framework agreement concluded between Gemeente Rheden and ARA and from Article 7 of the service agreement for the collection of household refuse concluded between the same parties, that the remuneration paid to ARA comprises only a price and not the right to operate the service.

26 The French Government also maintains that ARA should be classified as an association formed by one or more authorities within the meaning of Article 1(b) of Directive 92/50. Such an association is, in its view, a contracting authority ipso jure, there being no need to consider whether it is a body governed by public law.

27 It must be observed, as stressed by the Advocate General in points 40 and 41 of his Opinion, that an entity cannot fall simultaneously within both the categories described in Article 1(b) of Directive 92/50 and that the term association has only a residual function, a fact confirmed

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by its position in the wording of that provision. It is therefore necessary to consider whether a company such as ARA, although set up on the initiative of two municipalities, can be characterised as a body governed by public law.

28 In that connection, it is clear from the second subparagraph of Article 1(b) of Directive 92/50 that a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law (see Case C-44/96 Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck [1998] ECR I-73, paragraph 20).

29 As the Court held in paragraph 21 of Mannesmann Anlagenbau Austria, cited above, the three conditions set out in that provision are cumulative.

30 The national court considers that the second and third conditions are fulfilled. Its questions thus relate only to the first condition.

The first question

31 By its first question, the national court seeks clarification as to the relationship between the terms `needs in the general interest' and `not having an industrial or commercial character'. It asks in particular whether the latter expression is intended to limit the term `needs in the general interest' to those which are not of an industrial or commercial character or, on the contrary, whether it means that all needs in the general interest are not industrial or commercial in character.

32 In that regard, it is clear from the second subparagraph of Article 1(b) of Directive 92/50, in its different language versions, that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term `needs in the general interest' as used in that provision.

33 In paragraphs 22 to 24 of Mannesmann Anlagenbau Austria, cited above, the Court adopted the same interpretation in relation to the second subparagraph of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), a provision which is, essentially, the same as the second subparagraph of Article 1(b) of Directive 92/50.

34 Moreover, the only interpretation capable of guaranteeing the effectiveness of the second subparagraph of Article 1(b) of Directive 92/50 is that it creates, within the category of needs in the general interest, a sub-category of needs which are not of an industrial or commercial character.

35 If the Community legislature had considered that all needs in the general interest were not of an industrial or commercial character it would not have said so because, in that context, the second component of the definition would serve no purpose.

36 The answer to the first question must therefore be that the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that the legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

The second question

37 The answer given to the first question makes it unnecessary to answer the second.

The third question

38 By its third question, the national court asks essentially whether the term `needs in the general interest, not having an industrial or commercial character' excludes needs which are also met by

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private undertakings.

39 According to BFI, the possibility of a body governed by public law must be ruled out where private undertakings may carry out the same activities, such activities therefore being capable of being performed on a competitive basis. In this case, more than half the municipalities in the Netherlands entrust the collection of waste to private economic operators. There is thus a commercial market and the entities active in it do not constitute bodies governed by public law within the meaning of Article 1(b) of Directive 92/50.

40 It must first be emphasised here that the first indent of the second subparagraph of Article 1(b) of Directive 92/50 refers only to the needs which the entity must meet and does not say whether or not those needs may also be met by private undertakings.

41 Next, it must be borne in mind that the purpose of coordinating at Community level the procedures for the award of public service contracts is to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer goods or services to contracting authorities in another Member State.

42 Consequently, the objective of Directive 92/50 is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities (see, to that effect, Mannesmann Anlagenbau Austria, cited above, paragraph 33).

43 The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations. Thus, for example, such a body might consider it appropriate to incur financial losses in order to follow a particular purchasing policy of the body upon which it is closely dependent.

44 Moreover, since it is hard to imagine any activities that could not in any circumstances be carried on by private undertakings, the requirement that there should be no private undertakings capable of meeting the needs for which the body in question was set up would be liable to render meaningless the term `body governed by public law' used in Article 1(b) of Directive 92/50.

45 It is of no avail to object that, by recourse to Article 6 of Directive 92/50, the contracting authorities could evade competition from private undertakings which considered themselves capable of meeting the same needs in the general interest as the entity concerned. The protection of competitors of bodies governed by public law is already assured by Article 85 et seq. of the EC Treaty since the application of Article 6 of Directive 92/50 is subject to the condition that the laws, regulations or administrative provisions on which the body's exclusive right is based must be compatible with the Treaty.

46 It was for that reason that, in Mannesmann Anlagenbau Austria, cited above, paragraph 24, the Court held, without considering whether private undertakings might meet the same needs, that a State printer met needs in the general interest not having an industrial or commercial character.

47 It follows that Article 1(b) of Directive 92/50 may apply to a particular body even if private undertakings meet, or may meet, the same needs as it and that the absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law.

48 It must be emphasised, however, that the existence of competition is not entirely irrelevant to the question whether a need in the general interest is other than industrial or commercial.

49 The existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the marketplace, may be indicative of the absence of a need in the general interest, not having an industrial or commercial character.

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50 Conversely, the latter needs are as a general rule met otherwise than by the availability of goods or services in the marketplace, as evidenced by the list of bodies governed by public law contained in Annex I to Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Directive 93/37, to which Article 1(b) of Directive 92/50 refers. Although not exhaustive, that list is intended to be as complete as possible.

51 An analysis of that list shows that in general the needs in question are ones which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence.

52 In this case it is undeniable that the removal and treatment of household refuse may be regarded as constituting a need in the general interest. Since the degree of satisfaction of that need considered necessary for reasons of public health and environmental protection cannot be achieved by using disposal services wholly or partly available to private individuals from private economic operators, that activity is one of those which the State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.

53 In the light of the foregoing, the answer to the third question must be that the term `needs in the general interest, not having an industrial or commercial character' does not exclude needs which are or can be satisfied by private undertakings as well.

The fourth, fifth and seventh questions

54 By its fourth, fifth and seventh questions, the national court asks whether the condition that a body must have been set up for the specific purpose of meeting needs in the general interest means that the activity of that body must, to a considerable extent, be concerned with meeting such needs.

55 It must be borne in mind here that, in Mannesmann Anlagenbau Austria, cited above, paragraph 25, the Court held that it was immaterial whether, in addition to its duty to meet needs in the general interest, an entity was free to carry out other activities. The fact that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by that entity is also irrelevant, provided that it continues to attend to the needs which it is specifically required to meet.

56 Since the status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character, it is a fortiori immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.

57 Conversely, the fact that one of the undertakings of a group or concern is a body governed by public law is not sufficient for all of them to be regarded as contracting authorities (see, to that effect, Mannesmann Anlagenbau Austria, cited above, paragraph 39).

58 The answer to the fourth, fifth and seventh questions must therefore be that the status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.

The sixth question

59 By its sixth question, the national court, finally, wishes to ascertain what inferences are to be drawn from the fact that the provisions setting up the entity in question and specifying the needs which it must meet are in the nature of laws, regulations or administrative or other provisions.

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60 It must be stated here that, whilst the requirement that the exclusive right be based on published laws, regulations or administrative provisions must be met for Article 6 of Directive 92/50 to be applicable, it forms no part of the definition of a body governed by public law.

61 The wording of the second subparagraph of Article 1(b) of Directive 92/50 makes no reference to the legal basis of the activities of the entity concerned.

62 Furthermore, it must be borne in mind that, with a view to giving full effect to the principle of freedom of movement, the term `contracting authority' must be interpreted in functional terms (see, to that effect, Case 31/87 Beentjes v Netherlands State [1988] ECR 4635, paragraph 11). In view of that need, no distinction should be drawn by reference to the legal form of the provisions setting up the entity and specifying the needs which it is to meet.

63 The answer to the sixth question must therefore be that the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that respect.

DOCNUM	61996J0360
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; J ; judgment
PUBREF	European Court reports 1998 Page I-06821
DOC	1998/11/10
LODGED	1996/11/05
JURCIT	31971L0305-N01 : N 50 61987J0031-N11 : N 62 11992E085 : N 45 31992L0050-A01LB : N 1 23 27 44 47 31992L0050-A01LBL2 : N 28 - 36 38 40 49 - 53 61 63 31992L0050-A06 : N 1 23 45 60 61996C0360-N40-41 : N 27 61996J0044-N20 : N 28 61996J0044-N21 : N 29 61996J0044-N22-24 : N 33 61996J0044-N25 : N 55 61996J0044-N33 : N 42 61996J0044-N39 : N 57

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CONCERNS	Interprets 31992L0050-A01LBL2
SUB	Approximation of laws
AUTLANG	Dutch
OBSERV	Netherlands ; Denmark ; Federal Republic of Germany ; Spain ; France ; Austria ; Finland ; Sweden ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A7* Arrondissementsrechtbank Arnhem, vonnis van 18/05/1995 (KT 1994/1901) - Euridica 1995 no 7 p.15 (résumé) - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken ; NJ-Kort 1995 no 26 - Milieu en recht 1996 Jur. p.164-168 - Veldt, Marc: Nederlandse staatscourant 1995 no 215 p.4 - Essers, M.J.J.M.: Nederlands tijdschrift voor Europees recht 1995 p.161-163 - Van Hulst, N.: Nederlandse staatscourant 1996 no 60 p.5 *A8* Gerechtshof Arnhem, tussenarrest van 25/06/1996 (95/403) - Nederlands tijdschrift voor Europees recht 1996 p.159-160 - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken ; NJ-Kort 1997 no 64 - Essers, M.J.J.M.: Nederlands tijdschrift voor Europees recht 1996 p.160-161 *A9* Gerechtshof Arnhem, 3e civiele kamer, arrest van 29/10/1996 (95/403) *P1* Gerechtshof Arnhem, 3e civiele kamer, arrest van 15/02/2000 (95/403)
NOTES	Flinterman, Felix: Nederlandse staatscourant 1998 no 236 p.2 Novak-Stief, Monika: European Law Reporter 1998 p.545-547 Mok, M.R.: TVVS ondernemingsrecht en rechtspersonen 1998 p.379 Van der Burg, F.H.: Administratiefrechtelijke beslissingen ; Rechtspraak bestuursrecht 1999 no 31 Gazin, F.: Europe 1999 Janvier Comm. no 28 p.17-18 Sura, Martin: Europäische Zeitschrift für Wirtschaftsrecht 1999 p.19-20 Kortenbach-Buys, I.L.: Nederlands tijdschrift voor Europees recht 1999 p.5-8 Weidemann, Clemens ; Otting, Olaf: Europäisches Wirtschafts- & Steuerrecht - EWS 1999 p.41-43 Williams, Rhodri: Public Procurement Law Review 1999 CS5-CS8 Mameli, Barbara: Giurisprudenza italiana 1999 p.394-402 Scotti, Elisa: Il Foro italiano 1999 IV Col.140-146 Nizzo, Carlo: Giornale di diritto amministrativo 1999 p.319-323 Williams, Rhodri: Public Procurement Law Review 1999 p.43-53 Luteijn, R.D.: Nederlands juristenblad 1999 p.1371-1377 De Dios, José M¬: Revista Jurídica de Catalunya 1999 p.913-916 Greco, Guido: Rivista italiana di diritto pubblico comunitario 1999 p.184-192 Schima, Bernhard: Ecolex 1999 p.586-588 Iannotta, R.: Il Foro amministrativo 1999 p.1683-1684 Gogos, Konstantinos E.: Elliniki Epitheorisi Evropaïkou Dikaiou 1999 p.79-95 Brinker, Ingo: Juristenzeitung 1999 p.892-895

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Scotti Camuzzi, Sergio: Diritto pubblico comparato ed europeo 1999 p.719-736
Savia, Elena: Defensor Legis 2000 no 5 p.826-835
Koutoupa-Regkakou, Evangelia: Elliniki Epitheorisi Evropaïkou Dikaiou 2000 p.563-572

PROCEDU Reference for a preliminary ruling

ADVGEN La Pergola

JUDGRAP Jann

DATES of document: 10/11/1998
of application: 05/11/1996

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Judgment of the Court (Fifth Chamber)
of 17 December 1998
Commission of the European Communities v Ireland.
Failure of a Member State to fulfil obligations - Public supply contracts - Review procedures - Definition of contracting authority.
Case C-353/96.

1 Approximation of laws - Review procedures in respect of the award of public supply and public works contracts - Directive 89/665 - Procedure enabling the Commission to take preventive action where there has been a clear and manifest infringement of Community provisions in the field of public procurement - Procedure unrelated to the infringement procedure under Article 169 of the Treaty

(EC Treaty, Art. 169; Council Directive 89/665)

2 Approximation of laws - Procedures for the award of public supply contracts - Directive 77/62 - Contracting authorities - Bodies corresponding to legal persons governed by public law - Annex I to Directive 77/62 - Public authorities whose public supply contracts are subject to control by the State

(Council Directive 77/62, Art. 1(b) and Annex I, Point VI)

1 The procedure under Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, which enables the Commission, where it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed, to take up the matter with a Member State, constitutes a preventive measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty, so that the way in which the Commission has used that procedure is irrelevant in assessing the admissibility of an action for failure to fulfil obligations brought by the Commission against a Member State by reason of its infringement of Community provisions in the field of public procurement.

2 A body such as Coillte Teoranta (Irish Forestry Board) is a contracting authority within the meaning of Article 1(b) of Directive 77/62 coordinating procedures for the award of public supply contracts.

Such a body, which has legal personality and does not award public contracts on behalf of the State or a regional or local authority, cannot be regarded as being the State or a regional or local authority, but constitutes a body corresponding to legal persons governed by public law within the meaning of Article 1(b) of Directive 77/62 in conjunction with Point VI (Ireland) of Annex I thereto, where the State may exercise control, at least indirectly, over the award of public supply contracts.

In Case C-353/96,

Commission of the European Communities, represented by Richard Wainwright, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Ireland, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, and Eoghan Fitzsimons SC and Feargal O Dubhghaill BL, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

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defendant,

"APPLICATION for a declaration that, by failing to comply with the provisions of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1), and in particular by failing to publish its invitation to tender for the supply of fertiliser on behalf of Coillte Teoranta (The Irish Forestry Board Limited) in the Official Journal of the European Communities, Ireland has failed to fulfil its obligations under the EC Treaty,

THE COURT

(Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann (Rapporteur), J.C. Moitinho de Almeida, C. Gulmann and M. Wathelet, Judges,

Advocate General: S. Alber,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 28 May 1998, at which the Commission was represented by Richard Wainwright and Ireland by Michael A. Buckley and Donal O'Donnell SC,

after hearing the Opinion of the Advocate General at the sitting on 16 July 1998,

gives the following

Judgment

Costs

43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since Ireland has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

(Fifth Chamber)

hereby:

1. Declares that, since Coillte Teoranta failed to have a notice of tender for a contract for the supply of fertiliser published in the Official Journal of the European Communities, Ireland has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Council Directive 88/295/EEC of 22 March 1988;

2. Orders Ireland to pay the costs.

1 By application lodged at the Court Registry on 29 October 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to comply with the provisions of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1), and in particular by failing to

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publish its invitation to tender for the supply of fertiliser on behalf of Coillte Teoranta in the Official Journal of the European Communities, Ireland had failed to fulfil its obligations under the EC Treaty.

Relevant Community legislation

2 Until 1994 the award of public supply contracts was governed in the Community by Directive 77/62, as amended inter alia by Directive 88/295.

3 Article 1 of Directive 77/62 defines `contracting authority' as follows:

`For the purpose of this directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I;

...'.

4 Point VI of Annex I to Directive 77/62 specifies, with respect to Ireland, that the corresponding bodies are `other public authorities whose public supply contracts are subject to control by the State'.

5 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) repealed Directive 77/62. Its provisions were to be transposed into national law by 14 June 1994 at the latest; Ireland had not yet done so on that date.

6 Under Article 1 of that directive,

`For the purpose of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

...'.

7 Article 3 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) provides:

`1. The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within

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the scope of Directives 71/305/EEC and 77/62/EEC.

2. The Commission shall notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.

3. Within 21 days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected; or

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission in accordance with paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(8). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. ...'

Background to the dispute

8 The establishment of Coillte Teoranta in the form of a private company was provided for by Section 9 of the Irish Forestry Act 1988 (hereinafter `the Act').

9 According to the Act, the objects of Coillte Teoranta are to carry on the business of forestry and related activities on a commercial basis and, in accordance with efficient silvicultural practices, to establish and carry on woodland industries, and to participate with others in forestry activities consistent with those objects.

10 Under Paragraph 3(14) of its memorandum of association, the objects of Coillte Teoranta, as owner of 12 national parks, access to which is free of charge, also include the provision of recreation, sporting, educational, scientific and cultural facilities.

11 The Irish Government transferred to Coillte Teoranta land and other property worth approximately IEP 700 000 000. In return for those assets, Coillte Teoranta issued shares to the Minister for Finance, who is thus its majority shareholder.

12 As regards the structure of Coillte Teoranta, it follows from the Act and its memorandum and articles of association that it was established by the Minister for Energy (hereinafter `the Minister'), that its memorandum and articles and any amendments thereto must be approved by him (Sections 11 and 15), that the chairman and other directors are appointed and their remuneration determined by him (Section 15(2)(b) and (d)), that the first Chief Executive is to be appointed by the Minister and hold office on the terms determined by him (Section 35), that the appointment of the company's auditors must be approved by the Minister (Section 15(2)(e)) and that the company is to comply with State policy and any ministerial directives with regard to the remuneration, allowances and conditions of employment of its employees (Section 36). Some of the Minister's decisions require the consent of the Minister for Finance.

13 In managing its business Coillte Teoranta must comply with the following obligations: the Minister may issue written directions requiring it to comply with State policy decisions of a general kind concerning forestry, or to provide or maintain specified services or facilities, or to maintain or use specified land or premises in its possession for a particular purpose (Section 38 of the Act); it is obliged to consult the Minister for Finance concerning forestry development in areas

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of scientific interest (Section 13); it must submit each year to the Minister a programme for the sale and acquisition of land (Section 14); the establishment and acquisition of subsidiaries must be approved by the Minister (Section 15(2)(g)); a general meeting must be convened if the two ministers so request (Paragraph 15 of the articles); and its annual report and auditor's report must be laid before the Irish Parliament (Sections 30 and 31 of the Act).

14 As regards finance, under the relevant provisions, Coillte Teoranta's share capital must be approved by the Minister for Finance (Section 10 of the Act). It is not authorised to borrow without the approval of the Minister (Section 24), and the Minister for Finance may guarantee repayment of any borrowings (Section 25). It may invest a sum not exceeding IEP 250 000 in other undertakings. That sum may be increased with the approval of the Minister given with the consent of the Minister for Finance (Section 15(2)(h)). He may also make sums available to Coillte Teoranta on particular terms for specific purposes.

15 On 10 March 1994 Coillte Teoranta called for tenders for a fertiliser supply contract worth over ECU 200 000 for the period from 1 April 1994 to 31 March 1995. It did not have a notice published in the Official Journal of the European Communities. On 30 May 1994 it awarded the contract. On 21 June 1994 Connemara Machine Turf Co. Ltd, an undertaking whose tender had not been accepted, brought proceedings in the High Court challenging the award of the contract.

16 On 18 May 1994, before the contract was awarded, the Commission received a complaint concerning the tendering procedure. Pursuant to Article 3(1) of Directive 89/665, it sent a letter to the Irish Government on 30 June 1994. In that letter the Commission expressed doubts as to whether the award procedure complied with the Community rules on public supply contracts, and stated that the letter was deemed to be a letter of formal notice in accordance with Article 169 of the Treaty. It essentially argued that Coillte Teoranta as contracting authority had failed to publish an invitation to tender in the Official Journal of the European Communities as required by Directive 77/62, in particular Article 9 thereof.

17 The Irish Government, by letter of 22 July 1994, contested the Commission's arguments. It submitted that the procedure provided for in Article 3(1) and (2) of Directive 89/665 was not applicable, since the contract had been concluded before the Commission's letter was received; that, as provided for in Article 3(4) of Directive 89/665, the alleged infringement was already the subject of proceedings before a national court in Ireland; that Coillte Teoranta was not in any event a contracting authority within the meaning of either Directive 93/36 or Directive 77/62; that Ireland had correctly transposed the directives into national law; and that even if there had been a breach of the Community rules on public supply contracts, proceedings under Article 169 of the Treaty were inappropriate, in view of the existence of another remedy provided for in Directive 89/665.

18 Since it was not satisfied with the response, the Commission sent Ireland a reasoned opinion on 23 February 1996 pursuant to the first paragraph of Article 169 of the Treaty, to which Ireland replied by letter of 7 June 1996, confirming the position it had adopted in its earlier letter.

19 It was in these circumstances that the Commission brought the present action for failure to fulfil obligations.

Admissibility

20 While not formally contesting the admissibility of the application, the Irish Government raises the question whether proceedings under Article 169 of the Treaty may be initiated when other means exist of remedying a possible failure to fulfil obligations, such as those provided for in Article 3 of Directive 89/665.

21 It submits that, since proceedings were brought in the High Court on 21 June 1994, it is Article

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3(4) of that directive which applies in the present case. It is in the context of those proceedings that any infringement of the relevant provisions on the award of public contracts should be assessed. Moreover, such an infringement would not be the result of a failure by Ireland to fulfil its obligations, but would be attributable to Coillte Teoranta if it were to be regarded as a contracting authority.

22 On this point, it must be noted that the special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty. That article gives the Commission discretionary power to bring an action before the Court where it considers that a Member State has failed to fulfil an obligation under the Treaty and that the State concerned has not complied with the Commission's reasoned opinion (Case C-359/93 Commission v Netherlands [1995] ECR I-157, paragraph 13).

23 As regards the question whether Ireland may be held liable for the actions of Coillte Teoranta as contracting authority, it is sufficient to state that the directives on public contract awards would be deprived of their effectiveness if the actions of a contracting authority were not imputable to the Member State concerned.

24 The application is accordingly admissible.

Substance

25 The Commission considers that only Directive 77/62 is relevant. It submits that by virtue of the various provisions governing the status of Coillte Teoranta, it must be regarded as falling within the notion of the State, as defined by the Court in Case 31/87 Beentjes v Netherlands State [1988] ECR 4635.

26 In that judgment, it claims, the Court gave a functional interpretation to the concept of the State for the purposes of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), which contained the same definition of contracting authorities as Directive 77/62. Following that interpretation, a body whose composition and functions are laid down by legislation and which largely depends on the public authorities must be regarded as falling within the notion of the State, even if it is not formally part of the State administration.

27 The Commission further considers that Coillte Teoranta may also be regarded as an `other' public authority whose public supply contracts are subject to control by the State within the meaning of Point VI of Annex I to Directive 77/62.

28 According to the Irish Government, Coillte Teoranta cannot be regarded as a contracting authority within the meaning of either Directive 77/62 or Directive 93/36.

29 It submits that Coillte Teoranta is a private undertaking subject to the Companies Act. It is thus a commercial company belonging to the State. The powers of appointing and removing its officers and defining its general policy are no more extensive than those provided for in the memorandum and articles of a private company which is owned almost entirely by a single shareholder. Its day-to-day business, on the other hand, is managed independently and the State has no influence on the award of contracts.

30 On the other hand, Ireland does not dispute that if Coillte Teoranta were to be classified as a contracting authority, it should have published a notice of tender for the public contract in question.

31 It must first be stated that the facts of the present case fall exclusively within the scope of Directive 77/62. At the time when the invitation to tender was issued, and even when the contract in question was awarded, the period for transposing Directive 93/36 had not yet expired, and Ireland

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had not yet transposed it.

32 On the question whether Coillte Teoranta is a contracting authority for the purposes of Directive 77/62, it must be noted that, unlike the body concerned in Beentjes, Coillte Teoranta has legal personality. Moreover, it is common ground that it does not award public contracts on behalf of the State or a regional or local authority.

33 In those circumstances, Coillte Teoranta cannot be regarded as being the State or a regional or local authority within the meaning of Article 1(b) of Directive 77/62. It must still be considered, however, whether it is one of the bodies corresponding to legal persons governed by public law listed in Annex I to Directive 77/62.

34 With reference to Ireland, that annex describes as contracting authorities other public authorities whose public supply contracts are subject to control by the State.

35 It must be borne in mind that the purpose of coordinating at Community level the procedures for the award of public supply contracts is to eliminate barriers to the free movement of goods.

36 In order to give full effect to the principle of free movement, the term `contracting authority' must be interpreted in functional terms (see, to that effect, the judgment of 10 November 1998 in Case C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding [1998] ECR I-6821, paragraph 62).

37 It must be emphasised here that it is the State which set up Coillte Teoranta and entrusted specific tasks to it, consisting principally of managing the national forests and woodland industries, but also of providing various facilities in the public interest. It is also the State which has power to appoint the principal officers of Coillte Teoranta.

38 Moreover, the Minister's power to give instructions to Coillte Teoranta, in particular requiring it to comply with State policy on forestry or to provide specified services or facilities, and the powers conferred on that Minister and the Minister for Finance in financial matters give the State the possibility of controlling Coillte Teoranta's economic activity.

39 It follows that, while there is indeed no provision expressly to the effect that State control is to extend specifically to the awarding of public supply contracts by Coillte Teoranta, the State may exercise such control, at least indirectly.

40 Consequently, Coillte Teoranta must be regarded as a `public authority whose public supply contracts are subject to control by the State' within the meaning of Point VI of Annex I to Directive 77/62.

41 Coillte Teoranta is therefore a contracting authority within the meaning of Directive 77/62. It was consequently obliged in the present case to have a notice of tender published in the Official Journal of the European Communities.

42 It must therefore be held that, since Coillte Teoranta failed to have a notice of tender for a contract for the supply of fertiliser published in the Official Journal of the European Communities, Ireland has failed to fulfil its obligations under Directive 77/62, as amended by Directive 88/295.

DOCNUM 61996J0353

AUTHOR Court of Justice of the European Communities

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FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; J ; judgment
PUBREF	European Court reports 1998 Page I-08565
DOC	1998/12/17
LODGED	1996/10/29
JURCIT	31977L0062-A01LB : N 33 31977L0062-N1 : N 33 34 31977L0062-N1P6 : N 40 31977L0062 : N 1 31 - 32 41 - 42 61987J0031 : N 32 31988L0295 : N 1 42 31989L0665-A03 : N 20 31989L0665-A03P4 : N 21 31989L0665 : N 22 11992E169 : N 22 31993L0036 : N 31 61993J0359-N13 : N 22 61996J0360-N62 : N 36
CONCERNS	Failure concerning 31977L0062 Failure concerning 31988L0295
SUB	Approximation of laws
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	Ireland ; Member States
NATIONA	Ireland
NOTES	Gazin, F.: Europe 1999 Février Comm. no 75 p.19-20 Mok, M.R.: Ondernemingsrecht 1999 p.199 Fernandez Martín, José M.: Public Procurement Law Review 1999 p.CS47-CS52 Scotti Camuzzi, Sergio: Diritto pubblico comparato ed europeo 1999 p.719-736
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Alber
JUDGRAP	Jann
DATES	of document: 17/12/1998 of application: 29/10/1996

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Judgment of the Court (Sixth Chamber)
of 16 December 1997
Commission of the European Communities v Federal Republic of Germany.
Failure of a Member State to fulfil its obligations - Directive 93/36/EEC - Failure to transpose within the prescribed period.
Case C-341/96.

In Case C-341/96,

Commission of the European Communities, represented by Claudia Schmidt, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in the same Ministry, acting as Agents, D - 53107 Bonn,

defendant,

APPLICATION for a declaration that, by failing to adopt within the prescribed period all the laws and regulations necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and, in the alternative, by failing to notify the Commission immediately of the measures adopted in order to transpose that directive, the Federal Republic of Germany has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty and Article 34(1) of the directive,

THE COURT

(Sixth Chamber),

composed of: H. Ragnemalm (Rapporteur), President of the Chamber, G.F. Mancini, P.J.G. Kapteyn, J.L. Murray and K.M. Ioannou, Judges,

Advocate General: N. Fennelly,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 October 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 October 1996 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt within the prescribed period all the laws and regulations necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and, in the alternative, by failing to notify it immediately of the measures adopted in order to transpose that directive, the Federal Republic of Germany has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty and Article 34(1) of the said directive.

2 Under Article 34(1) of Directive 93/36 Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive before 14 June 1994 and immediately

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to inform the Commission thereof.

3 Having received no notification of the measures taken to transpose Directive 93/36 into German law and in the absence of any other information from which it could conclude that the Federal Republic of Germany had fulfilled its obligations, the Commission initiated the procedure for failure to fulfil obligations provided for by Article 169 of the Treaty by sending a letter of formal notice to that Member State on 9 August 1994.

4 By letter of 6 October 1994 the German Government referred the Commission to a letter dated 25 July 1994 in which it informed the Commission that Directive 93/36 was to be transposed by means of an amendment to Part A of the Verdingungsordnung für Leistungen - ausgenommen Bauleistungen (Rules regarding Public Supply Contracts except in the Construction Sector, hereinafter `the VOL/A') and that that amendment was expected to be published in the autumn of 1994.

5 In the absence of any information concerning the proposed measures of transposition, the Commission, by letter of 16 January 1996, sent a reasoned opinion to the Federal Republic of Germany requesting it to take the measures necessary to comply with its obligations under Directive 93/36 within two months from notification.

6 In a letter dated 10 April 1996 the German Government informed the Commission that, in so far as Directive 93/36 constituted a restatement of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), which has been amended several times, it had already been transposed into German law by the rules which entered into force at the beginning of 1994.

7 In the same letter the German Government indicated that the transposition of the new elements contained in Directive 93/36 was under way. In that respect, it was necessary for the draft measures, which had previously been sent to the Commission, to be voted on by the German Government and approved by the Bundesrat (Federal Council). However, as a result of the Federal Republic of Germany's federal structure, it had not been possible to complete the process leading to adoption of those measures within the prescribed period.

8 Having received no information concerning the adoption of those draft measures or the entry into force of the corresponding provisions, the Commission brought the present action.

9 The Federal Republic of Germany does not deny the alleged infringement. It submits, however, that the important amendment of Directive 93/36 concerning the definition of `contracting authority' had already been incorporated into Paragraph 57(a)(1)(2) of the Zweites Gesetz zur Änderung des Haushaltsgrundsätzegesetzes (Second Law amending the Law on Budgetary Principles, BGBl. I, p. 1928).

10 Furthermore, according to the German Government, draft measures amending the VOL/A and the order governing the award of public supply contracts have been drawn up. Those draft measures provide that the amended VOL/A is to be given force of law. The legislation could enter into force during the first six months of 1997.

11 Since Directive 93/96 has not been fully transposed within the period prescribed therein the Commission's action is well founded.

12 It must therefore be held that, by failing to adopt within the prescribed period all the laws and regulations necessary to comply with Directive 93/96, the Federal Republic of Germany has failed to fulfil its obligations under Article 34(1) of that directive.

Costs

13 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay

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the costs. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. Declares that, by failing to adopt within the prescribed period all the laws and regulations necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, the Federal Republic of Germany has failed to fulfil its obligations under Article 34(1) of that directive;

2. Orders the Federal Republic of Germany to pay the costs.

DOCNUM	61996J0341
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; J ; judgment
PUBREF	European Court reports 1997 Page I-07271
DOC	1997/12/16
LODGED	1996/10/15
JURCIT	31993L0036-A34P1 : N 2 12 31993L0036 : N 1 11
CONCERNS	Failure concerning 31993L0036-A34P1
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Federal Republic of Germany ; Member States
NATIONA	Federal Republic of Germany
PROCEDU	Proceedings concerning failure by Member State - successful

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ADVGEN Fennelly

JUDGRAP Ragnemalm

DATES of document: 16/12/1997
of application: 15/10/1996

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**Judgment of the Court
of 28 October 1999
Commission of the European Communities v Republic of Austria.
Failure of a Member State to fulfil its obligations - Public works contracts - Admissibility - Compatibility with Community law of conditions governing invitations to tender - Failure to publish a contract notice in the Official Journal of the European Communities.
Case C-328/96.**

1 Actions for failure to fulfil obligations - Pre-litigation procedure - Subject-matter - Reasoned opinion - Content

(EC Treaty, Art. 169 (now Art. 226 EC))

2 Actions for failure to fulfil obligations - Pre-litigation procedure - Purpose - Time granted to the Member State concerned - Requirement that a reasonable length of time be allowed - Criteria for assessment

(EC Treaty, Art. 169 (now Art. 226 EC))

3 Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directive 89/665 - Procedure enabling the Commission to take preventive action where there has been a clear and manifest infringement of the Community rules on public procurement - Unrelated to the infringement procedure under Article 169 of the Treaty (now Article 226 EC)

(EC Treaty, Art. 169 (now Art. 226 EC); Council Directive 89/665)

4 Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Where the Community rules are infringed by a contracting authority controlled and financed by one of the States within a Member State with a federal structure - Infringement imputable to the Member State

(Council Directive 93/37, Art. 1(b))

1 Since the subject-matter of an action brought under Article 169 of the Treaty (now Article 226 EC) is delimited by the pre-litigation procedure provided for therein, the action cannot be founded on any complaints other than those formulated in the reasoned opinion delivered by the Commission. Although the Commission is not obliged to indicate in the reasoned opinion the measures to be taken to eliminate the alleged infringement, it must, if it intends to make the failure to adopt a certain measure the subject-matter of its infringement action, specifically indicate to the Member State concerned that that measure must be adopted.

2 In the context of an action for failure to fulfil obligations, the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, effectively to put forward its defence to the complaints made by the Commission.

In view of the fact that the pre-litigation procedure has thus a dual purpose, the Commission must allow Member States a reasonable period to reply to letters of formal notice and to comply with reasoned opinions, or, where appropriate, to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case. Thus, very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts.

3 The procedure by which, pursuant to Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public

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supply and public works contracts, the Commission may - where it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed - take up the matter with a Member State, constitutes a preventive measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty (now Article 226 EC). It follows that the detailed provisions to which that special procedure is subject cannot affect the admissibility of an action brought under that provision.

4 A Member State which has a federal structure may be held liable for the actions of a contracting authority - within the meaning of Article 1(b), second subparagraph, of Directive 93/37 concerning the coordination of procedures for the award of public works contracts - all the activities of which are controlled and financed by one of the component States. If the actions of such a contracting authority were not imputable to the Member State concerned, the provisions of Community law governing the award of public contracts would be deprived of their effectiveness.

In Case C-328/96,

Commission of the European Communities, represented by H. van Lier, Legal Adviser, and, C. Claudia Schmidt, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Republic of Austria, represented by W. Okresek, Sektionschef in the Chancellery, acting as Agent, with an address for service in Luxembourg at the Austrian Embassy, 3 Rue des Bains,

defendant,

> "APPLICATION for a declaration that in connection with the building at Sankt Pölten of a new administrative and cultural centre for the Land of Lower Austria the Republic of Austria, in awarding contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled, has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) as well as under Article 30 of the EC Treaty (now, after amendment, Article 28 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevon (Presidents of Chambers), C. Gulmann (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann and M. Wathelet, Judges,

Advocate General: S. Alber,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 November 1998, at which the Commission was represented by H. van Lier, assisted by B. Wägenbaur, Rechtsanwalt, Hamburg, and the Republic of Austria by W. Okresek and C. Kleiser, of the Amt der Niederösterreichischen Landesregierung, Sankt Pölten, acting as Agent,

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after hearing the Opinion of the Advocate General at the sitting on 19 January 1999,

gives the following

Judgment

Costs

80 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Republic of Austria has failed in its submission, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby declares:

1. In connection with the building at Sankt Pölten of the new administrative and cultural centre for the Land of Lower Austria, the Republic of Austria, in awarding the contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled, has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, under Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

2. The Republic of Austria is ordered to pay the costs.

1 By application lodged at the Registry of the Court on 7 October 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, in connection with the building at Sankt Pölten of a new administrative and cultural centre for the Land of Lower Austria, the Republic of Austria, in awarding contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled, had failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) as well as under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

Facts and prelitigation procedure

2 According to the case-file, in 1986 the Government of the Land of Lower Austria decided to transfer its headquarters, which until then had been in Vienna, to Sankt Pölten.

3 The works for completing this big project, which comprises the complete construction of new buildings to house the government and the administration as well as the construction of a cultural centre at Sankt Pölten, commenced in 1992. Completion was scheduled for 1996, when Austria's millennium was to be commemorated.

4 At the beginning of February 1995, the Commission was informed, following a complaint, of an invitation to tender concerning a public supply contract, to be awarded in connection with the project, published in the Niederösterreichisches Amtsblatt (Lower Austrian Official Gazette). That invitation to tender was based on the Allgemeine Angebots- und Vertragsbedingungen (General Tendering Contract

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Conditions, hereinafter referred to as `the AAVB'), which the Commission considered to be contrary to Community law for infringement, in particular, of the advertising rules, the rules regarding specifications and the obligations to provide information to and for the protection of tenderers.

5 In a letter of 12 April 1995, the Commission informed the Austrian Government of its findings.

6 A few months later, the Commission received, not the expected amendments, but the notification of a Law relating to the awarding of contracts, enacted on 31 March 1995 by the Land of Lower Austria, which also raised objections because in practice it excluded from its scope of application the contracts relating to the project in question.

7 At the end of November 1995, the situation concerning those contracts was examined at a meeting between Austrian officials and Commission officials. In view of the fact that, at that time, contracts of considerable value were still to be awarded, the Commission insisted that Community law had to be observed with immediate effect. The Austrian authorities undertook to carry out the required amendments. However, they said that it was necessary to have a sufficiently reasonable transition period owing to technical problems linked to the adaptation.

8 The Commission considered that this statement was insufficient, at least with regard to the amendment of the AAVB and contract-awarding practices, which could be adapted immediately by a simple decision of the contracting authority, namely Niederösterreichische Landeshauptstadt Planungsgesellschaft mbH (hereinafter `Nöplan').

9 In those circumstances, the Commission, by letter of 15 December 1995, decided to initiate against the Republic of Austria the procedure provided for in Article 169 of the Treaty by requiring it to submit it observations on the alleged infringements within a period of one week from receipt of its letter.

10 By letter of 22 December 1995, the Austrian Government replied that the AAVB had been amended in the way required by the Commission, that Nöplan had taken the decision `to apply with immediate effect the Community directives to all invitations to tender' and that a draft Law amending the Law relating to the award of contracts enacted by the Land of Lower Austria had been drawn up.

11 The Commission took the view that that document did not make it clear that measures had been adopted to bring all the alleged infringements to an end. It therefore issued a reasoned opinion on 21 February 1996 in which it requested the Republic of Austria to take all the measures required to comply with it within a period of 14 days from its notification.

12 In its reply of 22 March 1996, the Austrian Government stated in particular that:

- contract-awarding practices had been amended on 6 February 1996, so that as from that date current awards had been suspended and observance of Community law was ensured for contract-award procedures which had still not been completed by that date;

- contracts of a total value of about ATS 360 million, awarded between 27 November 1995 (the date of the meeting between the Austrian officials and the Commission officials) and 6 February 1996, could not, for various reasons, be suspended or cancelled.

13 The Commission, taking the view that those contracts had been awarded in breach of Community law and that the conduct of the Republic of Austria was not justified, decided to bring this action.

The relevant law

The Community rules

14 In Article 8(1), Directive 93/37 provides:

`The contracting authority shall, within 15 days of the date on which the request is received,

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inform any eliminated candidate or tenderer who so requests of the reasons for rejection of his application or his tender, and, in the case of a tender, the name of the successful tenderer.'

15 Article 10(6) of the same directive provides, as regards the technical specifications contained in the contractual clauses relating to a given contract:

`Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of trade marks, patents, types, or of a specific origin or production shall be prohibited. However, if such indication is accompanied by the words "or equivalent", it shall be authorised in cases where the contracting authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.'

16 Article 11 of Council Directive 93/37/EEC lays down the common advertising rules which contracting authorities must observe in relation to contracts which they intend to award. In particular, the first paragraph of Article 11(6) and Article 11(11) provide:

`6. The notices referred to in paragraphs 1 to 5 shall be drawn up in accordance with the models given in Annexes IV, V and VI and shall specify the information requested in those Annexes.

...

11. The notice shall not be published in the official journals or in the press of the country of the contracting authority before the date of dispatch to the Official Journal of the European Communities and it shall mention this date. It shall not contain information other than that published in the Official Journal of the European Communities.'

17 Article 12(1) of this Directive further provides:

`In open procedures the time limit for the receipt of tenders, fixed by the contracting authorities shall be not less than 52 days from the date of dispatch of the notice.'

18 Article 24 of Directive 93/37 lays down criteria for qualitative selection of contractors, that is to say legitimate reasons for which a contractor may be excluded from participation in a contract.

19 Finally, Article 30 of the Directive lays down criteria for the award of contracts. Paragraph (1) provides:

`The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.'

20 Article 1(1) and (3) of Directive 89/665 provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 72/62/EEC, decisions taken by the contracting authorities may be reviewed effectively [...] on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

2. ...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest

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in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. ...'

21 Article 2(1)(c) of the Directive provides:

`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(c) award damages to persons harmed by an infringement.'

The conditions governing invitations to tender for the contracts in question

22 According to the case-file, in their version of 1 January 1995, the AAVB contained in particular the following points:

- point 2.5, entitled `Selection of tenders by the contract-awarding authority', provided that the contract-awarding authority reserved the right in all cases to select or to reject any tender without this giving rise, for tenderers, to any right, in particular for loss of profits. It was also provided that the contract-awarding authority was at liberty to decide on the award of the contract and that tenderers could not derive rights either from the statutory provisions or from standard ONORM A 2050. The contract-awarding authority was not under any obligation to give the reasons for which it had refused or awarded a contract.

- point 2.10 of the AAVB, entitled `Samples of specified/tendered products/makes/materials,' stated that, where materials were technically equivalent and offered at the same price, materials originating from Lower Austria or supplies from Lower Austrian firms would be preferred.

23 Moreover, a notice published in the Niederösterreichisches Amtsblatt of 6 January 1995, concerning the contract relating to the centralised management system for the Sankt Pölten administrative centre, contained the following clauses in the specifications for the work:

`The operating system for the administrative centre must meet IEEE 1003.X (POSIX) standards and must therefore be a UNIfied eXtension System V - product (Unix is a registered trade mark of the company AT&T)' (page 60 of the notice inviting tenders). As operating systems for the Unix command system, OS/2, Windows or Windows-NT are accepted (page 61 of the notice inviting tenders). As technical specifications of the system interfaces, OSF or X/OPEN were also required as well as, for the user interfaces for the operating software, OSF/Motiv, Unix and X-Windows.

24 According to the same notice, the period allowed for submission of tenders was set at three weeks.

Admissibility

25 The Austrian Government raises five objections of inadmissibility to the action. They are (i) that the complaint on which the action is based is inadmissible, (ii) that the infringements alleged in the reasoned opinion have ceased, (iii) that the time-limits set during the pre-litigation procedure were too short, (iv) that the form of order sought is too imprecise and (v) that the alleged infringements are irreparable.

The alleged inadmissibility of the complaint on which the action is based

26 The Austrian Government considers that the Commission's complaint, as defined in the form of order sought, relates to `contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled'. That claim, in the form of order sought, was not contained in the reasoned opinion.

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27 It should be observed that the objection of inadmissibility raised by the Republic of Austria is based on a reading of the claim contained in the application to the effect that the subject-matter of the application is the failure by the Republic of Austria to fulfil its obligation to cancel, as far as possible, the contracts concluded before 6 February 1996 but still not fully performed by the end of the period set in the reasoned opinion.

28 It must therefore be determined whether that definition of the subject-matter of the action is correct.

29 A reading of the form of order sought, as set out in paragraph 1 of this judgment, in the light of the submissions in, in particular, part II of the application, entitled `Subject-matter of the application' and setting out the alleged infringements, shows first of all that the Commission complains that the Republic of Austria has infringed a number of provisions of Community law in procedures for the award of contracts which took place under the version of the AAVB in force on 1 January 1995, in so far as those procedures led to contracts which were concluded before

6 February 1996 but which on 7 March 1996 had still not been fully performed.

30 In this part of its application, the Commission does not set out any complaint regarding the fact that the Republic of Austria did not cancel contracts which had been concluded.

31 It is only in part I of the application, setting out the facts and the pre-litigation procedure, that the Commission sets forth, as one of the aims of initiating the Treaty infringement proceedings, the aim of `ensuring, as far as possible, the annulment of contracts concluded in breach of Community law but still not performed'. At the end of that same part, it explains that it brought this action owing to the failure by the Republic of Austria to cancel contracts concluded in breach of Community law.

32 In those circumstances, the action brought by the Commission must be understood as relating to the Republic of Austria's Treaty infringement resulting from the breach of provisions of Community law affecting the procedures for the award of contracts which took place under the version of the AAVB in force on 1 January 1995. The references made in part I and in the form of order sought to the contracts concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled serve at any rate the purpose of defining the contracts to which this complaint relates.

33 In so far as the purpose of those references, beyond that of defining the contracts at which the complaint in the application relating to the breach of provisions of Community law is directed, is also to complain that the Republic of Austria failed to fulfil its obligation to cancel the contracts concluded before 6 February 1996 in so far as they could reasonably have been cancelled, it must be ascertained whether such a complaint was set out in the reasoned opinion.

34 According to settled case-law, the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission. The subject-matter of an action brought under Article 169 of the Treaty is therefore delimited by the pre-litigation procedure provided for by that article. Consequently, the action cannot be founded on any complaints other than those formulated in the reasoned opinion (Case C-206/96 Commission v Luxembourg [1998] ECR I-3401, paragraph 13).

35 In its reasoned opinion, the Commission set out the various infringements, committed in the conduct of contract-awarding procedures, of which the Republic of Austria was accused. It was also pointed out that the reply given by the Austrian authorities to the notice calling for its observations did not refer to `the contracts for which an award procedure had already been initiated,

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by means in particular of national publication, but which had not yet been the subject of an award decision' and pointed out that it was for the `Austrian authorities to take all appropriate measures to rectify the infringement in question' indicating that `this was also the case for contracts for which a definitive decision has still not been taken' or `for which a contract-awarding procedure has not yet been initiated'.

36 It follows that, although, in its reasoned opinion of 21 February 1996, the Commission was referring to the infringements committed in the contract-awarding procedures conducted under the version of the AAVB in force on 1 January 1995, it nowhere expressly referred to an obligation to cancel contracts concluded before 6 February 1996 in so far as this was reasonably possible.

37 That finding is, moreover, corroborated by the circumstance that, in the letter of formal notice of 15 December 1995, the Commission expressly referred `to those lots already awarded' and requested the Republic of Austria `to suspend the legal effects of the contracts already awarded contrary to Community law'. The fact that such a passage did not appear in the reasoned opinion therefore prompts the conclusion that the corresponding complaint was abandoned by the Commission in that opinion.

38 The Commission maintains, however, that the fact that in its reasoned opinion it requested the Austrian Government to take `all appropriate measures to rectify the infringement in question' was sufficient because, according to the case-law of the Court (Case C-247/89 Commission v Portugal [1991] ECR I-3659, paragraph 22), the Commission is not obliged to set out in its reasoned opinion the measures or steps to be taken to eliminate the infringement in question. It also points out that, in its reply to the reasoned opinion, the Austrian Government devoted a section to the `contracts already awarded', which indicated that the government had already addressed itself, in the pre-litigation procedure, to that claim.

39 It must be observed in this regard that, although, according to the case-law of the Court, the Commission is not obliged to indicate in the reasoned opinion the measures or steps to be taken to eliminate the infringement in question (see the judgment in Case C-247/89 Commission v Portugal, cited above, paragraph 22), that does not mean that it is not obliged to indicate in its reasoned opinion the complaints which will be the subject of its application to the Court (see, to this effect, Commission v Luxembourg, cited above, paragraph 13). Thus, the Commission must specifically indicate to the Member State concerned that it must adopt a certain measure if it intends to make the failure to adopt that measure the subject-matter of its infringement action. That procedural requirement, specific to the proceedings brought before the Court, does not, however, limit the rights which individuals have under the Community legal order and which may be invoked directly before the national court.

40 The fact that, in its reply to the reasoned opinion, the Austrian Government referred at length to the contracts already awarded and also explained the reasons for which the contracts concerned could not, in its view, be cancelled is not relevant in considering whether the omission in the reasoned opinion of the complaint relating to the failure to cancel the contracts already concluded was remedied. The safeguarding of the rights of the defence depends solely on the complaints contained in the application being identical to those in the reasoned opinion, and not on arguments taken up, spontaneously or following informal contacts in the reply which the Member State gives to the opinion.

41 Having regard to the foregoing considerations, it must be held that the Commission's complaint, in so far as it could be interpreted as seeking a declaration that the Republic of Austria ought, in any event, to have cancelled the contracts concluded in breach of Community law before 6 February 1996, must be held to be inadmissible.

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Cessation of the infringements in question

42 The Austrian Government explains that, on 7 March 1996, the date on which the period set in the reasoned opinion expired, it had entirely brought to an end the infringements alleged in the reasoned opinion, since the AAVB had been amended in the way sought by the Commission and contract-awarding practice had also been amended after 6 February 1996.

43 Having regard to the findings in paragraphs 32 and 41 above, it must be determined whether, on the date on which the period set in the reasoned opinion expired, the Republic of Austria had brought to an end the alleged infringement arising from the breach of Community law affecting the contract-awarding procedures conducted under the version of the AAVB applying from 1 January 1995.

44 Although it is true that the Republic of Austria has, from 12 December 1995, amended the AAVB in the way indicated by the Commission and that, from 6 February 1996, it has applied the new version of the AAVB to all procedures already underway on that date, it is also established that it has done nothing in relation to the contract-awarding procedures conducted entirely under the version of the AAVB applying on 1 January 1995, so that any effects contrary to Community law produced by these procedures still subsisted on the date on which the period set in the reasoned opinion expired.

45 This objection of inadmissibility must therefore be dismissed.

Setting of excessively short periods in the pre-litigation procedure

46 The Austrian Government contests the admissibility of the action on the ground that the period of one week set for replying to the letter of formal notice and the period of 14 days set for complying with the reasoned opinion were unreasonably short.

47 It argues first of all that there was no urgency, since the situation objected to by the Commission antedated 6 February and was therefore entirely in the past and that the Commission was aware of this when it issued its reasoned opinion, since the Austrian authorities had informed it in writing, on 7 February 1996, that their contract-awarding practices had been adapted to Community law. Moreover, the Commission itself took almost a month to address to the Republic of Austria the reasoned opinion the sending of which had already been announced in a press release on 25 January 1996.

48 Secondly, the Republic of Austria contends that the periods set did not take account of the time needed for coordination between the federal authorities, the Land of Lower Austria and Nöplan following a re-evaluation of the legal position by the Land of the procedures objected to.

49 Lastly, in assessing whether the period set by the Commission in its reasoned opinion was reasonable, reference must be made to Article 3(3) of Directive 89/665, which mentions a period of 21 days.

50 The Commission replies that the periods set were justified having regard to the situation to which it was objecting. In particular, the period set in the letter of formal notice was justified because, following information received from the Austrian authorities themselves, at the beginning of December 1995 there were still contracts of considerable value to be awarded and it was therefore necessary to obtain as quickly as possible an assurance from the Austrian Government that those contracts would be awarded in compliance with Community law and that the existing infringements would be remedied. The period set in the reasoned opinion was also appropriate because the reply to the letter of formal notice did not seem to provide a guarantee that the Austrian Government was prepared to remedy all the infringements complained of, especially since it had not complied with the Commission's request to send it a list of, in particular, the contracts which were still to be published.

51 It must be observed in this regard that, according to the case-law of the Court, the dual purpose

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of the pre-litigation procedure (see paragraph 34 above) requires the Commission to allow Member States a reasonable period to reply to letters of formal notice and to comply with reasoned opinions, or, where appropriate, to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case. Thus, very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts (judgment in Case 293/85 Commission v Belgium [1988] ECR 305, paragraph 14).

52 The question to be examined is therefore whether the shortness of the periods set by the Commission was justified in view of the particular circumstances of this case.

53 As regards, first of all, the one-week period set in the letter of formal notice, it must be concluded that, as the Commission quite rightly indicated without being effectively contradicted by the Austrian Government, the situation objected to was urgent, having regard to the contracts of considerable value which were still in the process of being awarded during the pre-litigation procedure on the basis of procedures which the Commission considered to be contrary to Community law.

54 Moreover, the adaptation to Community law of contract-awarding practices did not require any time-consuming coordination between the various authorities or departments since a simple decision by the contracting authority would have been sufficient. Besides, the Austrian authorities had already been informed of the Commission's complaints from the time of the meeting which had taken place at the end of November 1995.

55 Next, as regards the 14-day period set in the reasoned opinion, it is common ground that, at the time when that opinion was adopted, the Republic of Austria had not sent to the Commission the list of contract awards completed under the version of the AAVB in force on 1 January 1995, so that the Commission was unable to assess to what extent the notification made by the Republic of Austria on 7 February 1996 concerning the adaptation to Community law of contract-awarding practice with effect from 6 February 1996 was capable of guaranteeing that there would be no more contract-awarding procedures contrary to Community law. Similarly, the fact that the Commission issued its reasoned opinion nearly a month after the reports concerning the opinion appeared in the press, though regrettable, was not such as to detract from the urgency of the situation in question.

56 It follows that the periods set by the Commission in the letter of formal notice and in the reasoned opinion must be regarded as reasonable.

57 As regards the argument which the Austrian Government bases on Article 3(3) of Directive 89/665, it is sufficient to reiterate that the special procedure under that directive is a preventive measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty (see Case C-353/96 Commission v Ireland [1998] ECR I-8565, paragraph 22). It follows that the detailed provisions to which that special procedure is subject cannot affect the admissibility of an action brought under Article 169 of the Treaty.

58 Consequently, this objection of inadmissibility must be dismissed.

Imprecise nature of the form of order sought

59 The Austrian Government contends that the action is inadmissible on the ground that in the form of order it seeks and at several places in its application the Commission refers both to the possibility of cancellation without indicating, in the part of the application devoted to its legal assessment, the criteria on the basis of which that possibility is to be assessed.

60 It is sufficient to observe that this objection has become devoid of purpose since in paragraph

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41 above the Court held that, in so far as the Commission's application is to be understood as based on a complaint that the contracts concluded were not cancelled, it is inadmissible.

The objection that the alleged infringements are irreparable

61 The Austrian Government contests the admissibility of the application on the ground that the alleged infringement, consisting of a failure to cancel contracts already awarded, is by its nature incapable of being made good.

62 In any event, this objection is also devoid of purpose for the reason indicated in paragraph 60 above.

Substance

63 The Commission observes first of all that, as from the time of its accession to the European Union on 1 January 1995, the Republic of Austria was bound to observe Community legislation, which include the directives relating to the award of public contracts.

64 It contends, secondly, that, during the procedures for the award of contracts under the version of the AAVB in force as from 1 January 1995, the Republic of Austria infringed a number of provisions of Community law.

65 First of all, it infringed several provisions of Directive 93/37. Thus, it appears from the AAVB, in the version in force on 1 January 1995, and from the contract notice published in the Niederösterreichisches Amtsblatt of 6 January 1995 concerning the contract for the centralised management system for the Sankt Pölten administrative centre that Nöplan had not respected either the advertising rules laid down in Article 11(6) and (11) of that directive or the provision concerning a minimum period for the receipt of tenders laid down in Article 12 of that directive.

66 It also emerges from the AAVB, in particular point 2.5, that Nöplan had likewise not respected the obligation to provide reasons to tenderers whose applications were rejected, laid down in Article 8 of Directive 93/37.

67 Next, it follows in particular from point 2.5 of the AAVB that no account had been taken of either the qualitative selection criteria laid down by Directive 93/37, such as the grounds for exclusion laid down in Article 24, in the determination whether an undertaking fulfilled the conditions necessary for being able to participate in a tendering procedure, or of the criteria for the award of contracts laid down in Article 30 of that Directive.

68 Finally, as regards the technical aspect, Nöplan had, at least as regards the procedure for awarding the contract relating to the centralised management system for the Sankt Pölten administrative centre, infringed Article 10(6) of Directive 93/37 in so far as it included in the tender documents a specific specification concerning the operating system for the building control centre which had the effect of favouring `Unix products'.

69 Thirdly, the Commission complains that the Republic of Austria infringed its obligations under Article 30 of the Treaty. It claims that this is the case with regard to the insertion of the technical specification favouring `Unix products' which in its view entails an obstacle to the free movement of goods.

70 According to the Commission, the same applies as regards the preference which point 2.10 of the AAVB accords, in the case of equivalent tenders, to materials produced in Lower Austria or to Austrian undertakings.

71 Lastly, the Commission contends that the Republic of Austria infringed Directive 89/665. In particular, point 2.5 of the AAVB absolutely excludes from the outset all the rights which tenderers might assert in a selection procedure, which is contrary to the principles relating to

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the protection of tenderers laid down in Article 1(1) and (3) and Article 2(1)(c) of that directive.

72 The Austrian Government confines its defence to contesting the applicability of Directives 89/665 and 93/37 on the ground that, in its application, the Commission failed to indicate the legal reason for which Nöplan, as an independent legal entity and therefore itself a contracting authority within the meaning of the second subparagraph of Article 1(b) of Directive 93/37, should have applied those directives directly. That question is of decisive importance, because the law of Lower Austria then in force concerning the award of public contracts had expressly excluded the Sankt Pölten project from its scope. Moreover, the Commission has not explained the reason for which Nöplan's conduct was imputable to the Republic of Austria.

73 The Austrian Government also maintains that the Commission also fails to indicate in its application the reason for which the construction of the new Sankt Pölten administrative and cultural centre, which it clearly considers to be a single project, in accordance with Article 1(c) and 6(3) and (4) of Directive 93/97, ought to have been subject, from the accession of the Republic of Austria to the European Union, to Directives 89/665 and 93/37.

74 The Court observes in this regard that it is common ground that Nöplan is a contracting authority within the meaning of the second subparagraph of Article 1(b) of Directive 93/37 and that, as the Austrian Government itself admits in its defence, it has not contested the detailed analysis made by the Commission in the reasoned opinion of the relationship between the Land of Lower Austria and Nöplan whereby the Land of Lower Austria controls and finances all activities regarding the construction of the administrative centre. In those circumstances, Nöplan was under an obligation to respect the Community provisions governing the awarding of contracts, irrespective of any possibility for the operators concerned to invoke against it provisions governing the awarding of contracts which have direct effect.

75 As regards the question whether the Republic of Austria may be held liable for the actions of Nöplan as contracting authority, it is sufficient to state that the Community directives governing the award of public contracts would be deprived of their effectiveness if the actions of a contracting authority such as Nöplan were not imputable to the Member State concerned (see, to this effect, Commission v Ireland, cited above, paragraph 23).

76 Finally, it is clear from the case-file that, contrary to the assertions of the Austrian Government, the Commission did not in any way suggest that the construction of the new administrative and cultural centre at Sankt Pölten was to be regarded as a single project. On the contrary, in all the stages of these proceedings, it indicated to the Austrian Government that, having regard to the fact that the value of the contracts still to be awarded, from 1 January 1995, the date on which the Republic of Austria acceded to the European Union, exceeded the threshold laid down in Directive 93/37, that Member State had to comply with the Community provisions on the award of public contracts.

77 It follows that the objections made by the Republic of Austria to the applicability of Directives 89/665 and 93/37 must be dismissed.

78 The Austrian Government has not contested the substance of the infringements of which it is accused.

79 Having regard to the foregoing, it must be held that, in connection with the building at Sankt Pölten of the new administrative and cultural centre for the Land of Lower Austria, the Republic of Austria, in awarding the contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled, has failed to fulfil its obligations under Directives 93/37 and 89/665 and under Article 30 of the Treaty.

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DOCNUM	61996J0328
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
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LODGED	1996/10/07
JURCIT	61984J0293-N14 : N 51 31989L0665-A01P1 : N 20 31989L0665-A01P3 : N 20 57 31989L0665-A02P1LC : N 21 31989L0665 : N 1 77 79 61989J0247-N22 : N 38 39 11992E030 : N 1 69 79 11992E169 : N 34 57 31993L0037-A01LB : N 74 31993L0037-A08P1 : N 14 31993L0037-A10P6 : N 15 31993L0037-A11P6 : N 16 31993L0037-A12P1 : N 17 31993L0037-A24 : N 18 31993L0037-A30 : N 19 31993L0037 : N 1 76 77 79 61996J0206-N13 : N 34 39
CONCERNS	Failure concerning 31989L0665 Failure concerning 31993L0037
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Austria ; Member States
NATIONA	Austria
NOTES	Hofstötter, Michael: European Law Reporter 1999 p.509-510 Griller, Stefan: Ecolex 2000 p.4-10 Dischendorfer, Martin ; Oehler, Matthias: Public Procurement Law Review 2000 p. CS50-CS53 Hofstötter, Michael ; Toggenburg, Gabriel: Diritto pubblico comparato ed europeo 2000 p.237-239 Keiser, Christohph: Osterreichische Juristenzeitung 2001 p.94-97

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PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Alber
JUDGRAP	Gulmann
DATES	of document: 28/10/1999 of application: 07/10/1996

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Judgment of the Court (Sixth Chamber)
of 17 September 1998
Commission of the European Communities v Kingdom of Belgium.
Failure by a Member State to fulfil obligations - Public works contracts - Directives 89/440/EEC and 93/37/EEC - Failure to publish a contract notice - Application of negotiated procedure without justification.
Case C-323/96.

1 Approximation of laws - Procedures for the award of public works contracts - Directives 71/305 and 93/37 - Scope - Contracting authority - State - Definition - Bodies exercising legislative, executive and judicial powers - Bodies of the federal authorities of a federal State - Included

(Council Directive 71/305, Art. 1(b), as amended by Directives 89/440, Art. 1(1), and 93/37, Art. 1(b))

2 Member States - Obligations - Implementation of directives - Failure to fulfil obligations - Justification - Not permissible

(EC Treaty, Art. 169)

1 The term `the State' referred to in the definition of contracting authority in Article 1(b) of Directive 71/305, as amended by Article 1(1) of Directive 89/440, and in Article 1(b) of Directive 93/37 necessarily encompasses all the bodies which exercise legislative, executive and judicial powers. The same is true of the bodies which, in a federal State, exercise those powers at federal level.

2 A Member State cannot rely on provisions, practices or circumstances existing in its internal legal order in order to justify its failure to comply with the obligations and time-limits laid down by a directive.

In Case C-323/96,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Michel Flamée, of the Brussels Bar, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by failing to publish a contract notice in the Official Journal of the European Communities both for the overall project and for each of the lots relating to the construction of the premises of the Vlaamse Raad, and by failing to apply the award procedures laid down in Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1), and in Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and, more specifically, by having awarded Lot No 4 by negotiated procedure without justification, the Kingdom of Belgium has failed to fulfil its obligations under those directives and, more specifically, Articles 7 and 11 of Directive 93/37,

THE COURT

(Sixth Chamber),

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composed of: H. Ragnemalm, President of the Chamber, G.F. Mancini, P.J.G. Kapteyn, J.L. Murray and K.M. Ioannou (Rapporteur), Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 February 1998, during which the Commission was represented by Henrik van Lier and the Belgian Government by Philippe Colle and Katelijne Ronse, of the Brussels Bar,

after hearing the Opinion of the Advocate General at the sitting on 19 March 1998,

gives the following

Judgment

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. Declares that,

- by failing to publish a contract notice in the Official Journal of the European Communities both for the overall project and for each of the lots relating to the construction of the premises of the Vlaamse Raad, and

- by failing to apply the award procedures laid down in Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Council Directive 89/440/EEC of 18 July 1989, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts and, more specifically, by having awarded lot No 4 by negotiated procedure without justification,

the Kingdom of Belgium has failed to fulfil its obligations under those directives and, more specifically, under Articles 7 and 11(2) and (9) of Directive 93/37;

2. Orders the Kingdom of Belgium to pay the costs.

1 By application lodged at the Registry of the Court on 2 October 1996 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that:

- by failing to publish a contract notice in the Official Journal of the European Communities (hereinafter `OJEC'), both for the overall project and for each of the lots relating to the construction of the premises of the Vlaamse Raad, and

- by failing to apply the award procedures laid down in Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1), and in Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and, more specifically, by having awarded Lot No 4 by negotiated procedure without justification,

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the Kingdom of Belgium has failed to fulfil its obligations under those directives and, more specifically, Articles 7 and 11 of Directive 93/37.

Facts

2 It is apparent from the documents before the Court that, in 1993, the Vlaamse Raad, the Flemish Parliament in the Belgian federal system, decided to have premises of its own built in Brussels.

3 For the construction of those new premises the Vlaamse Raad followed a restricted procedure, in which 32 undertakings were invited to participate. No notice was published in the OJEC, either for the overall project or for the various lots, even though each lot exceeded the threshold laid down in the Community rules.

4 Lot No 4 (finishing and sanitary installations) was the subject of a `non-open' national procedure which commenced on 17 February 1994, without prior publication in the OJEC. After considering the 14 offers submitted in that context in the light of the award criteria, the lowest price, the Régie des Bâtiments selected the offer of an undertaking which had, in the meantime, been declared insolvent.

5 By decision of 19 May 1994 the executive of the Vlaamse Raad therefore annulled the tendering procedure and applied the single tender procedure, again without prior publication in the OJEC.

The pre-litigation procedure

6 By telex of 17 June 1994 the Commission informed the Belgian authorities that the procedure applied by the Vlaamse Raad constituted a clear and manifest infringement of the Community rules relating to public works contracts, and of the principle of equal treatment of candidates, which forms the basis for those rules. It consequently requested the Belgian authorities to annul the procedure relating to Lot No 4 immediately.

7 In the absence of any decision, notwithstanding the undertaking made by the Belgian authorities at a meeting on 1 July 1994 to adopt a decision as quickly as possible concerning the procedure for the award of Lot No 4, the Commission initiated the procedure under Article 169 of the Treaty by sending a letter of formal notice to the Belgian Government on 28 July 1994.

8 By letter of 31 August 1994 the Belgian Government replied that the Belgian public procurement legislation applied only to the executive authority, that is to say the administrations of the State, the Communities and the Regions and, so long as Directive 93/37 had not been correctly transposed with regard to the legislative authority, the latter was not required to comply with Community law. As regards Lot No 4 more specifically, the Belgian Government informed the Commission that the executive of the Vlaamse Raad had refused to annul the tendering procedure.

9 By letter of 16 November 1995 the Commission issued a reasoned opinion calling upon the Kingdom of Belgium to adopt the measures necessary to comply with it within 30 days of having cognisance of it.

10 By letter of 15 December 1995 the Belgian Permanent Representation to the European Union submitted a letter to the Commission dated 14 December 1995, in which the President of the Vlaamse Raad pointed out that there was no national legislation ensuring the independence of the Vlaamse Raad, as a parliamentary institution, when awarding public contracts. Furthermore, the letter stated that specific draft measures were being prepared and that the Vlaamse Raad was discussing the matter with the federal authority.

11 By letter of 10 April 1996 the Belgian Permanent Representation to the European Union subsequently submitted a further letter to the Commission, dated 25 February 1996 and signed by the President of the Vlaamse Raad, according to which, since it was no longer possible to wait for the opinion

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of the federal authority, the Vlaamse Raad was preparing a decree to transpose the directives concerned and would send further information to the Commission shortly.

12 In the absence of any communication since that time, the Commission brought the present proceedings.

Directive 93/37

13 As is clear from the first recital in its preamble, Directive 93/37 is intended, for reasons of clarity and better understanding, to consolidate the provisions of Council Directive 71/305/EEC of 26 July 1971 concerning coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) and the provisions amending them.

14 Article 1 of Directive 93/37 provides:

`For the purpose of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...

...

(e) "open procedures" are those national procedures whereby all interested contractors may submit tenders;

(f) "restricted procedures" are those national procedures whereby only those contractors invited by the contracting authority may submit tenders;

(g) "negotiated procedures" are those national procedures whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them;

...'

15 Article 6(1) and (3) of Directive 93/37 states:

`1. The provisions of this Directive shall apply to public works contracts whose estimated value net of VAT is not less than ECU 5 000 000.

...

3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to in paragraph 1. Where the aggregate value of the lots is not less than the amount referred to in paragraph 1, the provisions of that paragraph shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than ECU 1 000 000 provided that the total estimated value of all the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.'

16 Article 7 of Directive 93/37 provides:

`1. In awarding public works contracts the contracting authorities shall apply the procedures defined in Article 1(e), (f) and (g), adapted to this Directive.

2. The contracting authorities may award their public works contracts by negotiated procedure, with prior publication of a contract notice and after having selected the candidates according to publicly known qualitative criteria, in the following cases:

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...

3. The contracting authorities may award their public works contracts by negotiated procedure without prior publication of a contract notice, in the following cases:

(a) in the absence of tenders or of appropriate tenders in response to an open or restricted procedure in so far as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission at its request;

(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the work may only be carried out by a particular contractor;

(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

(d) for additional works not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the carrying out of the work described therein, on condition that the award is made to the contractor carrying out such work:

- when such works cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities, or

- when such works, although separable from the execution of the original contract, are strictly necessary to its later stages.

However, the aggregate amount of contracts awarded for additional works may not exceed 50% of the amount of the main contract;

(e) for new works consisting of the repetition of similar works entrusted to the undertaking to which the same contracting authorities awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4.

As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting authorities when they apply the provisions of Article 6. This procedure may only be adopted during the three years following the conclusion of the original contract.

4. In all other cases, the contracting authorities shall award their public works contracts by the open procedure or by the restricted procedure.'

17 Finally, Article 11(2) and (9) of Directive 93/37 provides:

`2. Contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure referred to in Article 7(2), shall make known their intention by means of a notice.

...

9. The notices referred to in paragraphs 2, 3 and 4 shall be published in full in the Official Journal of the European Communities and in the TED data bank in the original languages. A summary of the important elements of each notice shall be published in the other official languages of the Community, the original text alone being authentic.'

18 According to Article 36(1) of Directive 93/37, Directive 71/305 is repealed, together with the provisions which amended it, without prejudice to the obligations of the Member States concerning

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the deadlines for transposition into national law and for application.

Directive 89/440

19 Directive 89/440 is one of the directives which amended Directive 71/305, prior to the adoption of Directive 93/37.

20 With the exception of a few differences in drafting, the provisions of Directive 71/305 as amended by Directive 89/440 concerning the definition of contracting authorities (Article 1(b)), the definition of the material scope (Article 4a), the procedures to be applied by the contracting authorities (Article 5) and the detailed rules concerning the publication of notices with which they were to comply, in particular when applying the negotiated procedure (Article 12(2) and (9)) were identical to the corresponding provisions of Directive 93/37, reproduced in paragraphs 14 to 17 above.

The application

21 As a preliminary point, it should be noted that, in its application, the Commission claims that the Kingdom of Belgium has failed to comply with Directives 89/440 and 93/37. It is apparent from the documents before the Court that Directive 89/440 was in force when the first tendering procedure was initiated and that Directive 93/37 was in force when the procedure relating to Lot No 4 was initiated. Furthermore, it should be recalled that Directive 93/37 repealed and replaced Directive 71/305, including the provisions which amended it, inter alia those in Directive 89/440.

22 The Commission argues that, in the present case, since `non-open' procedures were applied, without a contract notice and without publication in the OJEC, the Belgian Government failed to comply with Directive 89/440 and Article 11(2) and (9) of Directive 93/37.

23 It also points out that, in order to award a contract by negotiated procedure, the conditions laid down in Article 7 of Directive 93/37 must be satisfied. Thus, a contracting authority may only award a contract by negotiated procedure without prior publication of a notice when the conditions laid down in Article 7(3) of that directive are satisfied.

24 Therefore, by applying a negotiated procedure for the second phase of Lot No 4, notwithstanding the fact that none of the justifications required by Article 7 of Directive 93/37 were satisfied, the Kingdom of Belgium infringed that provision.

25 In order to resolve the dispute now before the Court, it is first necessary to consider whether the Vlaamse Raad is a contracting authority within the meaning of Article 1(b) of Directive 71/305 as amended by Article 1(1) of Directive 89/440, and within the meaning of Article 1(b) of Directive 93/37.

26 The definition of contracting authority, which is identical in both directives, states that, for the purposes of each, `"contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law'.

27 The term `the State' referred to by that provision necessarily encompasses all the bodies which exercise legislative, executive and judicial powers. The same is true of the bodies which, in a federal state, exercise those powers at federal level.

28 Furthermore, in Case 31/87 Beentjes [1988] ECR 4635, paragraphs 11 to 13, the Court, after stating that the term `the State', within the meaning of Article 1(b) of Directive 71/305 should be interpreted in functional terms, held that a local land consolidation committee fell within that definition notwithstanding the fact that it was not an integral part of the State administration in formal terms. It would be inconsistent to hold that a legislative body does not fall within the definition of the State for the purposes of the Community directives on public works contracts,

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when a body which is not an integral part of the State administration in formal terms has been held to fall within that definition for the purposes of the application of one of those directives.

29 It follows that a legislative body such as the Vlaamse Raad must be held as falling within the definition of the State and thus constituting a contracting authority within the meaning of Article 1(b) of Directive 71/305 as amended by Article 1(1) of Directive 89/440, and within the meaning of Article 1(b) of Directive 93/37.

30 Furthermore, it is not disputed that each of the lots which were the subject of the works contracts put out to tender by the Vlaamse Raad exceeded the threshold laid down by Article 4a of Directive 71/305, as inserted by Article 1(6) of Directive 89/440, and by Article 6 of Directive 93/37.

31 In those circumstances, the contracts put out to tender by the Vlaamse Raad fell within the scope of Directive 71/305, as amended by Directive 89/440, and Directive 93/37 and should therefore have been awarded in accordance with the rules set out therein.

32 Among those rules, Article 12(2) and (9) of Directive 71/305, as amended by Article 1(12) of Directive 89/440, provides that contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure referred to in Article 5(2) are to make known their intention by means of a notice published in the OJEC.

33 Similarly, Article 11(2) and (9) of Directive 93/37 requires `contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure referred to in Article 7(2)' to make known their intention by publishing a notice in the OJEC.

34 It follows from those provisions that the obligation to publish a notice does not exist only when the contracting authorities intend to award a public works contract by negotiated procedure referred to in Article 5(3) of Directive 71/305, as amended by Directive 89/440, or in Article 7(3) of Directive 93/37.

35 In the present case, the Belgian Government does not contest the fact that no notice was published in the OJEC, nor the fact that the conditions laid down in Article 5(3) of Directive 71/305, as amended by Directive 89/440, and in Article 7(3) of Directive 93/37 for carrying out a negotiated procedure without prior publication of a notice were not satisfied.

36 At the hearing, however, the Belgian Government referred to Article 4 of Directive 93/37 in support of a submission that, under certain circumstances, a Member State could legitimately dispense with the obligations laid down in that directive.

37 That article provides that Directive 93/37 does not apply to:

`(a) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC or fulfilling the conditions in Article 6(2) of that Directive;

(b) works contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of the Member State's security so requires'.

38 Quite apart from the question of the belated nature of that plea, which the Belgian Government raised for the first time at the hearing without submitting any valid reason to explain the delay, it should be observed that the Belgian Government has not put forward anything to show that the works contracts put out to tender by the Vlaamse Raad came within one of the situations referred to in Article 4.

39 That plea must therefore be dismissed.

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40 The Belgian Government also submitted that, at national level, the Law of 14 July 1976, which was in force at the material time, Article 2(1) of which provides that `Every Minister has authority, within the limits of his powers, to adopt decisions concerning the conclusion and performance of contracts of the State and the bodies which fall under its hierarchial authority', did not apply to legislative bodies, inter alia, because the independence and supremacy of the legislative authority under the Belgian Constitution prevented the legislative chambers, and thus the Vlaamse Raad, from being subject to Ministerial authority.

41 First, it should be pointed out that this plea, based on national law, affects neither the finding that the Vlaamse Raad constitutes a contracting authority within the meaning of Article 1(b) of Directive 71/305 as amended by Article 1(1) of Directive 89/440, and within the meaning of Article 1(b) of Directive 93/37, nor the resulting obligation to comply with the provisions of those directives as regards publication and award procedures.

42 According to settled case-law, a Member State cannot rely on provisions, practices or circumstances existing in its internal legal order in order to justify its failure to comply with the obligations and time-limits laid down by a directive (see, in particular, Case C-144/97 Commission v France [1998] ECR I-613, paragraph 8).

43 That plea must therefore also be dismissed.

44 In view of all the foregoing considerations, it must be held that

- by failing to publish a contract notice in the OJEC both for the overall project and for each of the lots relating to the construction of the premises of the Vlaamse Raad, and

- by failing to apply the award procedures laid down in Directive 71/305, as amended by Directive 89/440, and Directive 93/337 and, more specifically, by awarding Lot No 4 by negotiated procedure without justification,

the Kingdom of Belgium has failed to fulfil its obligations under those directives and, more specifically, under Articles 7 and 11(2) and (9) of Directive 93/37.

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DOC	1998/09/17
LODGED	1996/10/02
JURCIT	31971L0305-A01LB : N 25 29 41 31971L0305-A04BIS : N 30

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31971L0305-A05P2 : N 32
31971L0305-A05P3 : N 34 35
31971L0305-A12P2 : N 32
31971L0305-A12P9 : N 32
31971L0305 : N 21 44
61987J0031-N11-13 : N 28
31989L0440-A01PT12 : N 32
31989L0440-A01PT1 : N 25 29 41
31989L0440-A01PT6 : N 30
31989L0440 : N 21 22 44
31993L0037-A01LB : N 25 29 41
31993L0037-A04 : N 36 - 38
31993L0037-A06 : N 30
31993L0037-A07 : N 44
31993L0037-A07P3 : N 23 34 35
31993L0037-A11P2 : N 22 33 44
31993L0037-A11P9 : N 22 33 44
31993L0037 : N 21 44
61997J0144-N08 : N 42

CONCERNS Failure concerning 31993L0037-A07
Failure concerning 31993L0037-A11P2
Failure concerning 31993L0037-A11P9

SUB Approximation of laws

AUTLANG Dutch

APPLICA Commission ; Institutions

DEFENDA Belgium ; Member States

NATIONA Belgium

NOTES X: Giurisprudenza italiana 1999 p.169

PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Alber

JUDGRAP Ioannou

DATES of document: 17/09/1998
of application: 02/10/1996

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Judgment of the Court (Sixth Chamber)
of 29 May 1997
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Directive 93/36/EEC - Failure to transpose within the prescribed period.
Case C-312/96.

Member States - Obligations - Implementation of directives - Failure to fulfil obligations not contested

(EC Treaty, Art. 169)

In Case C-312/96,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by Catherine de Salins, Deputy Director in the Legal Department of the Ministry of Foreign Affairs, and Philippe Martinet, Secretary for Foreign Affairs in the same department, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

defendant,

APPLICATION for a declaration that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and, in the alternative, by failing to inform the Commission forthwith of the adoption of such measures, the French Republic has failed to fulfil its obligations under the directive and in particular Article 34 thereof,

THE COURT

(Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, J.L. Murray, C.N. Kakouris, P.J.G. Kapteyn and H. Ragnemalm (Rapporteur), Judges,

Advocate General: C.O. Lenz,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 6 March 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 24 September 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and, in the alternative, by failing to inform the Commission forthwith of the adoption of such measures, the French Republic had failed to fulfil

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its obligations under the directive and in particular Article 34 thereof.

2 The first paragraph of Article 34(1) of Directive 93/36 provides that Member States are to adopt the laws, regulations and administrative provisions necessary to comply with the directive before 14 June 1994 and immediately inform the Commission thereof.

3 On 9 August 1994, having received no notification from the French Government of measures transposing Directive 93/36, the Commission gave the Government formal notice to submit its observations within two months, pursuant to the first paragraph of Article 169 of the Treaty.

4 Having received no reply, the Commission addressed a reasoned opinion to the French Government on 10 May 1995, requiring it to adopt the necessary measures within two months of the date of notification.

5 By letter of 17 August 1995, the French authorities informed the Commission that a bill had been laid before the Senate.

6 Having received no information to the effect that the legislative process had been completed, the Commission brought the present action.

7 The French Republic does not deny the failure to fulfil its obligations and merely states that, in order to remedy the situation, a bill together with implementing decrees will be adopted shortly.

8 Since Directive 93/36 has not been transposed within the period prescribed therein, the Commission's action must be held to be well founded.

9 The Court therefore finds that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Directive 93/36, the French Republic has failed to fulfil its obligations under the first paragraph of Article 34(1) of that directive.

Costs

10 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the French Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. Declares that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, the French Republic has failed to fulfil its obligations under the first paragraph of Article 34(1) of that directive;

2. Orders the French Republic to pay the costs.

DOCNUM	61996J0312
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

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TYPDOC	6 ; CJUS ; cases ; 1996 ; J ; judgment
PUBREF	European Court reports 1997 Page I-02947
DOC	1997/05/29
LODGED	1996/09/24
JURCIT	31993L0036-A34P1L1 : N 1 2 9 31993L0036 : N 1 - 9
CONCERNS	Failure concerning 31993L0036-A34P1L1
SUB	Approximation of laws
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
NOTES	X: Europe 1997 Juillet Comm. no 227 p.16
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Ragnemalm
DATES	of document: 29/05/1997 of application: 24/09/1996

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Judgment of the Court (Sixth Chamber)
of 29 May 1997
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Directive 93/38/EEC - Failure to transpose within the prescribeb period.
Case C-311/96.

Member States - Obligations - Implementation of directives - Failure to fulfil obligations not contested

(EC Treaty, Art. 169)

In Case C-311/96,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by Catherine de Salins, Deputy Director in the Legal Department of the Ministry of Foreign Affairs, and Philippe Martinet, Secretary for Foreign Affairs in the same department, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

defendant,

APPLICATION for a declaration that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) and, in the alternative, by failing to inform the Commission forthwith of the adoption of such measures, the French Republic has failed to fulfil its obligations under the directive and in particular Article 45 thereof,

THE COURT

(Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, J.L. Murray, C.N. Kakouris, P.J.G. Kapteyn and H. Ragnemalm (Rapporteur), Judges,

Advocate General: C.O. Lenz,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 6 March 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 24 September 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) and, in the alternative, by failing to inform the Commission forthwith of the adoption

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of such measures, the French Republic had failed to fulfil its obligations under the directive and in particular Article 45 thereof.

2 Article 45(1) of Directive 93/38 provides that Member States are to adopt the measures necessary to comply with the directive by 1 July 1994 and inform the Commission thereof forthwith.

3 As the Commission did not receive notification from the French Government of the measures for implementing Directive 93/38, it initiated the procedure under Article 169 of the Treaty by sending the Government a letter of formal notice on 20 January 1995.

4 That letter having produced no effect, the Commission delivered a reasoned opinion to the French Government on 16 January 1996, requiring it to adopt the necessary measures within two months from the date of notification.

5 By letter of 17 August 1995, the French authorities informed the Commission that a bill had been laid before the Senate.

6 Having received no information to the effect that the legislative process had been completed, the Commission brought the present action.

7 The French Republic does not deny the failure to fulfil its obligations and merely states that a bill together with implementing decrees will be adopted shortly.

8 Since Directive 93/38 has not been transposed within the period prescribed therein, the Commission's action must be held to be well founded.

9 The Court therefore finds that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Directive 93/38, the French Republic has failed to fulfil its obligations under Article 45(1) of that directive.

Costs

10 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the French Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. Declares that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the French Republic has failed to fulfil its obligations under Article 45(1) of that directive;

2. Orders the French Republic to pay the costs.

DOCNUM	61996J0311
AUTHOR	Court of Justice of the European Communities
FORM	Judgment

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TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; J ; judgment
PUBREF	European Court reports 1997 Page I-02939
DOC	1997/05/29
LODGED	1996/09/24
JURCIT	31993L0038-A45P1 : N 1 2 9 31993L0038 : N 1 - 9
CONCERNS	Failure concerning 31993L0038-A45P1
SUB	Approximation of laws
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
NOTES	X: Europe 1997 Juillet Comm. no 227 p.16
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Ragnemalm
DATES	of document: 29/05/1997 of application: 24/09/1996

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Judgment of the Court (Fourth Chamber)
of 16 October 1997
Hera SpA v Unità sanitaria locale no 3 - genovese (USL) and Impresa Romagnoli SpA.
Reference for a preliminary ruling: Tribunale amministrativo regionale della Liguria - Italy.
Directive 93/37/EEC - Public procurement - Abnormally low tenders.
Case C-304/96.

1 Preliminary rulings - Jurisdiction of the Court - Limits - Question manifestly irrelevant

(EC Treaty, Art. 177)

2 Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Award of contracts - Abnormally low tenders - Rejected on application of the provisions in Article 30(4), last subparagraph, for derogation - Option available until 31 December 1992

(Council Directive 93/37, Art. 30(4))

3 With regard to the procedure for preliminary rulings under Article 177 of the Treaty, it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought bears no relation to the facts of the main action or to its purpose.

4 Article 30(4), last subparagraph, of Directive 93/37 concerning the coordination of procedures for the award of public works contracts, which introduces temporary, derogating arrangements constituting an exception to the normal procedure laid down by Community legislation, must be interpreted as precluding contracting authorities from rejecting abnormally low tenders after 31 December 1992 without following the verification procedure provided for in the first subparagraph of that provision.

In Case C-304/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale Amministrativo Regionale della Liguria (Italy) for a preliminary ruling in the proceedings pending before that court between

Hera SpA

and

Unità Sanitaria Locale No 3 - Genovese (USL),

Impresa Romagnoli SpA,

on the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

THE COURT

(Fourth Chamber),

composed of: H. Ragnemalm (Rapporteur), President of the Chamber, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: C.O. Lenz,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Italian Government, by Professor U. Leanza, Head of the Legal Department of the Ministry

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of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato,

- the Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, and Paolo Stancanelli, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 29 May 1997,

gives the following

Judgment

1 By order of 4 July 1996, received at the Court on 19 September 1996, the Tribunale Amministrativo Regionale (Regional Administrative Court), Liguria, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

2 That question was raised in proceedings brought by Hera SpA against Unità Sanitaria Locale No 3 - Genovese (the local health authority, hereinafter `the USL') and Impresa Romagnoli SpA concerning a decision excluding Hera from a tendering procedure.

3 On 19 December 1995 the USL published an invitation to tender for a contract for works relating to the internal reorganization and technological adaptation of its property, the `Vecchio Istituto del Presidio Socio Sanitario' in Genoa. According to the invitation to tender, the contract was to be awarded to the tenderer offering the maximum discount against the base price of LIT 16 463 000 000.

4 Hera submitted the best tender, offering a discount of 17.3%. However, that bid was excluded from the tendering procedure on the ground that it was abnormally low, with the result that the contract was awarded to Impresa Romagnoli SpA.

5 The contracting authority's decision was based on Article 21(1a) of Law No 109 (GURI, Supplement No 29, of 19 February 1994), as amended by Decree Law No 101 (GURI No 78 of 3 April 1995) and Law No 216 (GURI No 127 of 2 June 1995). This provides that `until 1 January 1997, tenders in which the percentage discount exceeds by more than one-fifth the average of the discounts in all the tenders admitted shall be excluded from public works contracts for amounts above or below the Community threshold'.

6 In proceedings before the national court contesting the contracting authority's decision, Hera claimed, inter alia, that the USL had infringed Article 30(4) of Directive 93/37, which provides that:

`If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

...

However, until the end of 1992, if current national law so permits, the contracting authority may exceptionally, without any discrimination on grounds of nationality, reject tenders which are abnormally low in relation to the works, without being obliged to comply with the procedure provided for in the first subparagraph if the number of such tenders for a particular contract is so high that implementation of this procedure would lead to a considerable delay and jeopardize the public [interest] attaching to the execution of the contract in question. Recourse to this exceptional procedure shall be mentioned

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in the notice referred to in Article 11(5).'

7 The national court pointed out that the USL had correctly applied the Italian legislation providing for the exclusion of abnormally low tenders. It held, however, that there was a discrepancy between that legislation and Article 30(4) of Directive 93/37.

8 The national court decided to stay proceedings in the case pending a preliminary ruling from the Court on whether the Community rules `allow - and if so in what cases - a Member State to make temporary exceptions regarding the entry into force of directives where the latter set an express time-limit'.

9 It is clear from the order for reference that the national court's question is essentially whether Article 30(4) of Directive 93/37 is to be interpreted as allowing the contracting authority to reject abnormally low tenders after 31 December 1992 without following the verification procedure provided for in the first subparagraph of that provision.

Admissibility

10 The Italian Government maintains that there is no need to reply to the question referred, given that provisions corresponding to those of Article 30(4) of Directive 93/37 already had direct effect, that the Directive does not allow Member States to make any exceptions and that an explanatory circular has been published by the Italian Ministry of Public Works, calling on the authorities concerned to interpret and apply Article 21(1a) of Law No 109 in a manner consistent with Directive 93/37.

11 In that regard the Court has consistently held that it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought bears no relation to the facts of the main action or to its purpose (see Case C-143/94 Furlanis v ANAS and Itinera [1995] ECR I-3633, paragraph 12). However, that is not the case here.

12 The Court must therefore answer the question referred.

The question

13 It should be recalled at the outset that, as the Commission has pointed out, Directive 93/37 consolidates Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682) and subsequent amendments thereto. Article 30(4) of Directive 93/37 corresponds to Article 29(5) of Directive 71/305 as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).

14 Article 30(4) of Directive 93/37 lays down strict conditions circumscribing the contracting authority's power to waive the verification procedure for tenders which appear to be abnormally low. It may dispense with that procedure - exceptionally and provided that it does not discriminate on grounds of nationality - if the number of such tenders for a particular contract is so high that implementation of the procedure would lead to a considerable delay and jeopardize the public interest attaching to the execution of the contract in question. Moreover, that option is available only until 31 December 1992.

15 Furthermore, the Court, when called upon in Furlanis to adjudicate with regard to the provision in question - as it appeared in Directive 71/305, amended by Directive 89/440 - stated in paragraphs 17 and 20 of its judgment that the exception provided for was available only for procedures in which the definitive award was made by 31 December 1992 at the latest, emphasizing that the provision

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in question, which introduces temporary, derogating arrangements constituting an exception to the normal procedure, must be interpreted strictly.

16 It should therefore be stated in reply to the question referred for a preliminary ruling that Article 30(4) of Directive 93/37 must be interpreted as precluding contracting authorities from rejecting abnormally low tenders after 31 December 1992 without following the verification procedure provided for in the first subparagraph of that provision.

Costs

17 The costs incurred by the Italian Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fourth Chamber),

in answer to the question referred to it by the Tribunale Amministrativo Regionale della Liguria by order of 4 July 1996, hereby rules:

Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts must be interpreted as precluding contracting authorities from rejecting abnormally low tenders after 31 December 1992 without following the verification procedure provided for in the first subparagraph of that provision.

DOCNUM	61996J0304
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; J ; judgment
PUBREF	European Court reports 1997 Page I-05685
DOC	1997/10/16
LODGED	1996/09/19
JURCIT	31971L0305-A29P5 : N 13 - 15 31971L0305 : N 13 31989L0440 : N 13 11992E177 : N 11 31993L0037-A30P4 : N 1 13 - 16 31993L0037 : N 13

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61994J0143-N12 : N 11
61994J0143-N17 : N 15
61994J0143-N20 : N 15

CONCERNS Interprets 31993L0037-A30P4

SUB Approximation of laws

AUTLANG Italian

OBSERV Italy ; Commission ; Member States ; Institutions

NATIONA Italy

NATCOUR *A9* Tribunale Amministrativo Regionale della Liguria, Sezione II, ordinanza del 04/07/1996 12/08/1996 (290 - RG 750/96)
P1 Tribunale Amministrativo Regionale della Liguria, Sezione II, sentenza del 10/02/2000 11/02/2000

NOTES Bock, Christian: European Law Reporter 1998 p.48-49
Zoppolato, Maurizio: Rivista italiana di diritto pubblico comunitario 1998 p.200-205
Tserkezis, Giorgos: Armenopoulos 1998 p.509-510
Adamantidou, Elsa: Elliniki Epitheorisi Evropaïkou Dikaiou 1998 p.107-111

PROCEDU Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Ragnemalm

DATES of document: 16/10/1997
of application: 19/09/1996

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**Judgment of the Court
of 17 September 1997
Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH.
Reference for a preliminary ruling: Vergabeüberwachungsausschuß des Bundes - Germany.
Meaning of 'national court or tribunal' for the purposes of Article 177 of the Treaty - Procedures for the award of public service contracts - Directive 92/50/EEC - National review body.
Case C-54/96.**

1 Preliminary rulings - Reference to the Court - National court or tribunal within the meaning of Article 177 of the Treaty - Definition - Body competent to hear appeals concerning the award of public contracts

(EC Treaty, Art. 177)

2 Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Provision requiring Member States to set up appeal bodies - Non-transposition - Consequences - Power of appeal bodies having competence in relation to procedures for the award of public works contracts and public supply contracts to hear appeals relating to procedures for the award of public service contracts as well - Not a necessary consequence - Obligation for the national courts to determine whether the national law in force provides a possibility of appeal

(Council Directive 92/50, Art. 41)

3 In order to determine whether a body making a reference to the Court of Justice is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, a number of factors must be taken into account, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. The German Federal Public Procurement Awards Supervisory Board, which is established by law as the only body competent to determine, upon application of rules of law and after hearing the parties, whether lower review bodies have committed an infringement of the provisions applicable to procedures for the award of public contracts, whose decisions are binding and which carries out its task independently and under its own responsibility, satisfies those criteria.

4 It does not follow from Article 41 of Directive 92/50, relating to the coordination of procedures for the award of public service contracts, which requires Member States to ensure that decisions taken by contract-awarding authorities can be reviewed effectively, that, where the directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with the directive and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In this regard, the national court may be required in particular to determine whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

In Case C-54/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Vergabeüberwachungsausschuß des Bundes (Germany) for a preliminary ruling in the proceedings pending before that body between

Dorsch Consult Ingenieurgesellschaft mbH

and

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Bundesbaugesellschaft Berlin mbH

on the interpretation of Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, G.F. Mancini, J.C. Moitinho de Almeida, J.L. Murray and L. Sevon (Presidents of Chambers), C.N. Kakouris, P.J.G. Kapteyn, C. Gulmann, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur), H. Ragnemalm, M. Wathelet and R. Schintgen, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Dorsch Consult Ingenieurgesellschaft mbH, by Franz Günter Siebeck, Rechsanwalt, Munich,

- the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry for Economic Affairs, and Bernd Kloke, Oberregierungsrat at the same ministry, acting as Agents,

- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Claudia Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Dorsch Consult Ingenieurgesellschaft mbH, of the German Government and of the Commission at the hearing on 28 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 15 May 1997,

gives the following

Judgment

Costs

47 The costs incurred by the German Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that body.

On those grounds,

THE COURT,

in answer to the question referred to it by the Vergabeüberwachungsausschuß des Bundes by order of 5 February 1996, hereby rules:

It does not follow from Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law

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allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

1 By order of 5 February 1996, received at the Court on 21 February 1996, the Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board, hereinafter `the Federal Supervisory Board') referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 The question has been raised in proceedings between Dorsch Consult Ingenieurgesellschaft mbH (hereinafter `Dorsch Consult') and Bundesbaugesellschaft Berlin mbH (hereinafter `the awarding authority') concerning a procedure for the award of a service contract.

3 On 28 June 1995 the awarding authority published in the Official Journal of the European Communities a notice advertising the award of a contract for architectural and construction engineering services. On 25 August 1995 Dorsch Consult submitted its tender to the awarding authority. In all, 18 tenders were received, of which seven, including that of Dorsch Consult, were chosen for further consideration. On 30 November 1995, two companies, together with an architect, were chosen to form a working party to perform the services which were the subject of the contract. The contract itself was signed on 12 January 1996. Dorsch Consult was informed on 25 January 1996 that its tender was not the most advantageous economically.

4 Having learned that the awarding authority had not chosen it for the contract but before its tender was formally rejected, Dorsch Consult had applied, on 14 December 1995, to the Bundesministerium für Raumordnung, Bauwesen und Städtebau (Federal Ministry for Regional Planning, Building and Urban Planning), as the body responsible for reviewing public procurement awards (Vergabeprüfstelle), seeking to have the contract-awarding procedure stopped and the contract awarded to it. It considered that, in concluding the contract with another undertaking, the awarding authority had acted in breach of both Directive 92/50 and Paragraph 57a(1) of the Haushaltsgrundsätzegesetz (Budget Principles Law, hereinafter `the HGrG'). By decision of 20 December 1995, the review body held that it had no competence in the matter on the ground that, under Paragraphs 57a and 57b of the HGrG, it had no power to review the award of contracts when they related to services.

5 In those circumstances, on 27 December 1995 Dorsch Consult lodged an application for a determination by the Federal Supervisory Board on the ground that the review body had wrongly declined jurisdiction. It stated that, in so far as Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) had not been transposed, it was directly applicable and had to be complied with by the review bodies.

6 The Federal Supervisory Board found that the Federal Republic of Germany had not yet transposed Directive 92/50. Although a circular had been issued by the Federal Ministry for Economic Affairs on 11 June 1993 stating that the directive was directly applicable and that it had to be applied by the administration, it could not be regarded as a proper transposition of the directive. According to the Federal Supervisory Board, where public service contracts are concerned, German domestic law does not empower a review body to determine whether the provisions governing public procurement have been complied with. It is quite possible that the provisions of Directive 92/50 have direct effect. Finally, the Federal Supervisory Board is unsure whether, by virtue of Article 41 of Directive 92/50, the competence of existing review bodies also applies directly to the award of

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public service contracts.

7 The Federal Supervisory Board therefore suspended proceedings and referred the following question to the Court of Justice:

`Is Article 41 of Council Directive 92/50/EEC of 18 June 1992 to be interpreted to the effect that, after 30 June 1993, the bodies set up by the Member States which, under Council Directive 89/665/EEC of 21 December 1989, are competent to review procedures for the award of public contracts falling within the scope of Directives 71/305/EEC and 77/62/EEC are also competent to review procedures for the award of public service contracts within the meaning of Directive 92/50/EEC in order to determine whether alleged infringements of Community public procurement law or of domestic rules enacted in implementation of that law have taken place?'

Legal background

8 The purpose of Directive 92/50 is to regulate the award of public service contracts. It applies to contracts having a value above a certain limit. As far as the matter of legal protection is concerned, Article 41 provides:

`Article 1(1) of Council Directive 89/665/EEC... shall be replaced by the following:

> "1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law."'

.9 In accordance with Article 44(1), Directive 92/50 had to be transposed by the Member States before 1 June 1993.

10 Article 2(8) of Directive 89/665 provides:

`Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

11 Directive 89/665 was transposed into German law by a Law of 26 November 1993 (BGBl. I, p. 1928), which supplemented the HGrG by adding Paragraphs 57a to 57c.

12 Paragraph 57a(1) of the HGrG provides:

`In order to meet obligations arising from directives of the European Communities, the Federal Government shall regulate, by means of regulations, with the assent of the Bundesrat, the award of public supply contracts, public works contracts and public service contracts and the procedures for awarding public service contracts...'

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13 Paragraph 57b(1) of the HGrG makes provision for the procedures for awarding public supply contracts, public works contracts and public service contracts mentioned in Paragraph 57a(1) to be reviewed by review bodies. Under Paragraph 57b(2), the Federal Government is to adopt, in the form of regulations, with the assent of the Bundesrat, the provisions governing the competence of those review bodies. According to subparagraph (3), a review body must initiate a review procedure if there is evidence of a breach of procurement rules applicable under a regulation adopted pursuant to Paragraph 57a. In particular, it must initiate that procedure where a person who has, or had, an interest in a particular contract claims that the aforementioned provisions were contravened.

14 According to Paragraph 57b(4) of the HGrG, the review body must determine whether the provisions adopted pursuant to Paragraph 57a have been complied with. It may compel the awarding authority to annul unlawful measures or decisions or to take lawful measures or decisions. It may also provisionally suspend a procedure for the award of a contract. Under Paragraph 57b(5), a review body may require the awarding authority to provide the information necessary for it to carry out its task. Subparagraph (6) provides that actions for damages in the event of breach of the provisions applicable in relation to the award of contracts are to be brought before the ordinary courts.

15 Paragraph 57c(1) of the HGrG provides that the Federation and the Länder must each establish a supervisory board, performing its functions independently and on its own responsibility, to supervise procedures for the award of contracts in the fields concerning them. According to subparagraphs (2), (3) and (4) of that provision, each supervisory board is to sit in chambers composed of a chairman, an official assessor and a lay assessor, who are to be independent and subject only to observance of the law. The chairman and one of the assessors must be public officials. As regards annulment or withdrawal of their appointment and their independence and dismissal, various provisions of the Richtergesetz (Law on the Judiciary) apply by analogy. As regards the annulment or withdrawal of a lay member's appointment, certain provisions of the Richtergesetz also apply by analogy. Where a lay member commits a serious breach of his duties, his appointment must be annulled. The term of office of a supervisory board's lay members is five years.

16 Under subparagraph (5), the supervisory board is to determine the legality of determinations made by review bodies but it does not review the way in which they ascertain the facts. Where a determination is found to be unlawful, the supervisory board directs the review body to make a fresh determination taking account of its own legal findings. Paragraph 57c(6) of the HGrG provides that any person claiming that the provisions governing the award of public contracts have been infringed may make application to the supervisory board within a period of four weeks following the relevant determination of the review body.

17 Paragraph 57c(7) of the HGrG establishes a Federal Supervisory Board (Vergabeüberwachungsausschuß des Bundes). Its official members are the chairman and assessors from the decision-making departments of the Bundeskartellamt (Federal Cartel Office). The president of the Bundeskartellamt decides on the composition of the Federal Supervisory Board and the formation and composition of its chambers. He appoints lay assessors and their deputies on a proposal from the leading public-law trade boards. He also exercises administrative supervisory control on behalf of the Federal Government. The Federal Supervisory Board adopts its own internal rules of procedure.

18 Pursuant to Paragraph 57a of the HGrG the Federal Government adopted a regulation on the award of contracts. This regulation is, however, applicable only to supply contracts and works contracts and not to contracts for services. Directive 92/50 has not yet been transposed by the Federal Republic of Germany.

19 Pursuant to Paragraphs 57b and 57c of the HGrG, the Federal Government has adopted a regulation on the procedure for review of public procurement awards (Verordnung über das Nachprüfungsvesfahren für öffentliche Verträge, BGBl. I 1994, p. 324). Paragraph 2(3) of the regulation provides:

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`The review body's determination regarding the awarding authority shall be given in writing, contain a statement of reasons and be notified without delay. The review body shall send without delay to the person claiming that there has been a breach of public procurement provisions the text of its determination, shall draw attention to the possibility of making application for a determination by the supervisory board within a period of four weeks and shall name the competent supervisory board.'

20 Paragraph 3 provides:

`(1) Procedure before the Public Procurement Awards Supervisory Board shall be governed by Paragraph 57c of the Haushaltsgrundsätzegesetz and by this regulation according to the rules of procedure which the board shall adopt.

(2) The Public Procurement Awards Supervisory Board shall be obliged, under Article 177 of the Treaty establishing the European Community, to make a reference to the Court of Justice of the European Communities when it considers that a preliminary ruling on a question relating to the interpretation of that Treaty or to the validity and interpretation of a legal act adopted on that basis is necessary in order to enable it to make its determination.

(3) Before a chamber makes any determination, the parties to the procedure before the procurement review body shall be heard.

(4) A chamber shall not be empowered to suspend a procedure for the award of a contract or to give other directions concerning a procedure for the award of a contract.

(5) A chamber shall reach its determination by an absolute majority of votes. Determinations shall be in writing, contain a statement of reasons and shall be sent to the parties without delay.'

21 The rules of procedure of the Federal Supervisory Board regulate the organization and allocation of cases and the conduct of procedure, which consists of a hearing to which the persons concerned are called, and the conditions governing determinations of the Federal Supervisory Board.

Admissibility

22 Before the question submitted by the national court is addressed, it is necessary to examine whether the Federal Supervisory Board, in the procedure which led to this reference for a preliminary ruling, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty. That question must be distinguished from the question whether the Federal Supervisory Board fulfils the conditions laid down in Article 2(8) of Directive 89/665, which is not in point in this case.

23 In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, the judgments in Case 61/65 Vaassen (neé Göbbels) [1966] ECR 261; Case 14/86 Pretore di Salo v Persons unkown [1987] ECR 2545, paragraph 7; Case 109/88 Danfoss [1989] ECR 3199, paragraphs 7 and 8; Case C-393/92 Almelo and Others [1994] ECR I-1477; and Case C-111/94 Job Centre [1995] ECR I-3361, paragraph 9).

24 As regards the question of establishment by law, the Commission states that the HGrG is a framework budgetary law which does not give rise to rights or obligations for citizens as legal persons. It points out that the Federal Supervisory Board's action is confined to reviewing determinations made by review bodies. However, in the field of public service contracts, there is, as yet, no competent review body. The Commission therefore concludes that in such matters the Federal Supervisory Board has no basis in law on which it can act.

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25 It is sufficient to note in this regard that the Federal Supervisory Board was established by Paragraph 57c(7) of the HGrG. Its establishment by law cannot therefore be disputed. In determining establishment by law, it is immaterial that domestic legislation has not conferred on the Federal Supervisory Board powers in the specific area of public service contracts.

26 Nor is there any doubt about the permanent existence of the Federal Supervisory Board.

27 The Commission also submits that the Federal Supervisory Board does not have compulsory jurisdiction, a condition which, in its view, may mean two things: either that the parties must be required to apply to the relevant review body for settlement of their dispute or that determinations of that body are to be binding. The Commission, adopting the second interpretation, concludes that German legislation does not provide for the determinations made by the Federal Supervisory Board to be enforceable.

28 It must be stated first of all that Paragraph 57c of the HGrG establishes the supervisory board as the only body for reviewing the legality of determinations made by review bodies. In order to establish a breach of the provisions governing public procurement, application must be made to the supervisory board.

29 Secondly, under Paragraph 57c(5) of the HGrG, when the supervisory board finds that determinations made by a review body are unlawful, it directs that body to make a fresh determination, in conformity with the supervisory board's findings on points of law. It follows that determinations of the supervisory board are binding.

30 The Commission also submits that since, according to the Federal Supervisory Board's own evidence, procedure before that body is not inter partes, it cannot be regarded as a court or tribunal within the meaning of Article 177 of the Treaty.

31 It must be reiterated that the requirement that the procedure before the hearing body concerned must be inter partes is not an absolute criterion. Besides, under Paragraph 3(3) of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, the parties to the procedure before the procurement review body must be heard before any determination is made by the chamber concerned.

32 According to the Commission, the criterion relating to the application of rules of law is not met either, because, under Paragraph 57c of the HGrG and Paragraph 3(1) of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, procedure before the Federal Supervisory Board is governed by rules of procedure which it itself adopts, which do not take effect in relation to third parties and which are not published.

33 It is, however, undisputed that the Federal Supervisory Board is required to apply provisions governing the award of public contracts which are laid down in Community directives and in domestic regulations adopted to transpose them. Furthermore, general procedural requirements, such as the duty to hear the parties, to make determinations by an absolute majority of votes and to give reasons for them are laid down in Paragraph 3 of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, which is published in the Bundesgesetzblatt. Consequently, the Federal Supervisory Board applies rules of law.

34 Finally, both Dorsch Consult and the Commission consider that the Federal Supervisory Board is not independent. They point out that it is linked to the organizational structure of the Bundeskartellamt, which is itself subject to supervision by the Ministry for Economic Affairs, that the term of office of the chairman and the official assessors is not fixed and that the provisions for guaranteeing impartiality apply only to lay members.

35 It must be observed first of all that, according to Paragraph 57c(1) of the HGrG, the supervisory board carries out its task independently and under its own responsibility. According to Paragraph

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57c(2) of the HGrG, the members of the chambers are independent and subject only to observance of the law.

36 Under Paragraph 57c(3) of the HGrG, the main provisions of the Richtergesetz concerning annulment or withdrawal of their appointments and concerning their independence and removal from office apply by analogy to official members of the chambers. In general, the provisions of the Richtergesetz concerning annulment and withdrawal of judges' appointments apply also to lay members. Furthermore, the impartiality of lay members is ensured by Paragraph 57c(2) of the HGrG, which provides that they must not hear cases in which they themselves were involved through participation in the decision-making process regarding the award of a contract or in which they are, or were, tenderers or representatives of tenderers.

37 It must also be pointed out that, in this particular instance, the Federal Supervisory Board exercises a judicial function, for it can find that a determination made by a review body is unlawful and it can direct the review body to make a fresh determination.

38 It follows from all the foregoing that the Federal Supervisory Board, in the procedure which led to this reference for a preliminary ruling, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, so that the question it has referred to the Court is admissible.

Substance

39 By its question, the Federal Supervisory Board is asking in effect whether it follows from Article 41 of Directive 92/50 that, if that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts.

40 It must be stated first of all that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (judgment in Case C-446/93 SEIM [1996] ECR I-73, paragraph 32).

41 Although Article 41 of Directive 92/50 requires the Member States to adopt the measures necessary to ensure effective review in the field of public service contracts, it does not indicate which national bodies are to be the competent bodies for this purpose or whether these bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts.

42 It is, however, common ground that Paragraphs 57a to 57c of the HGrG were designed to transpose Directive 89/665 and that Paragraph 57a was to be the basis for the transposition of Directive 92/50 which the Federal Government has still not undertaken.

43 That being the case, it must be reiterated first of all that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, when applying national law, whether adopted before or after the directive, the national court having to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve

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the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (see the judgments in Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; and in Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 26).

44 Secondly, the question of the designation of a body competent to hear appeals in relation to public service contracts is relevant even where Directive 92/50 has not been transposed. Where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, the Court has recognized, subject to certain conditions, the right of individuals to rely in law on a directive as against a defaulting Member State. Although this minimum guarantee cannot justify a Member State absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, in particular, the judgment in Case C-253/98 Commission v Germany [1996] ECR I-2423, paragraph 13), it may nevertheless have the effect of enabling individuals to rely, as against a Member State, on the substantive provisions of Directive 92/50.

45 If the relevant domestic provisions cannot be interpreted in conformity with Directive 92/50, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed (see, in particular, the judgment in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others [1996] ECR I-4845).

46 The answer to be given to the question referred to the Court must accordingly be that it does not follow from Article 41 of Directive 92/50 that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

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SUB Approximation of laws

AUTLANG German

OBSERV Federal Republic of Germany ; Commission ; Member States ; Institutions

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NATCOUR *A9* Vergabeüberwachungsausschuß des Bundes, Vorlagebeschluß vom 05/02/1996 (1 VÜ 8/95)
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PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Jann

DATES of document: 17/09/1997
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Judgment of the Court
of 15 January 1998
Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public procurement - Procedure for the award of public works contracts - State printing office - Subsidiary pursuing commercial activities.
Case C-44/96.

1 Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Contracting authorities - Body governed by public law - Definition - Body such as the Austrian State printing office - Included - Public works contracts - Definition - Works contracts awarded by the body in question - Included irrespective of the nature of the contract

(Council Directive 93/37, Art. 1(a) and (b))

2 Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Contracting authorities - Body governed by public law - Definition - Undertaking carrying on commercial activities and owned by a contracting authority - Excluded - Public works contracts - Definition - Contract relating to a works project which, from the outset, falls within the objects of an undertaking which is not a contracting authority - Excluded

(Council Directive 93/37, Art. 1(a) and (b))

3 Economic and social cohesion - Structural operations - Community funding - Condition - Conformity of the action concerned with the relevant Community legislation - Funding of a works project not covered by the public procurement legislation - Not subject to compliance with the relevant review procedures

(Council Regulation No 2081/93, Art. 7(1); Council Directives 89/665 and 93/37, Art. 1(b))

4 The first subparagraph of Article 1(b) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts defines contracting authorities as, inter alia, bodies governed by public law; the second subparagraph provides that the latter means any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, having legal personality and closely dependent on the State, regional or local authorities or other bodies governed by public law.

An entity such as the Osterreichische Staatsdruckerei (Austrian State Printing Office, `OS') must be regarded as a body governed by public law and thus as a contracting authority within the meaning of the provisions referred to above, in so far as

- the documents which the OS must produce are closely linked to public order and the institutional operation of the State and require guaranteed supply and production conditions which ensure that standards of confidentiality and security are observed, bearing in mind, in that respect, that the condition that the body must have been established for the `specific' purpose of meeting needs in the general interest, not having an industrial or commercial character, does not mean that it should be entrusted only, or even primarily, with meeting such needs;

- the OS has legal personality;

- the Director-General of the OS is appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries, the OS is subject to scrutiny by the Court of Auditors, the majority of its shares are still held by the Austrian State and a State control service is responsible for monitoring the printed matter which is subject to security measures.

Works contracts entered into by that entity are to be considered to be public works contracts within the meaning of Article 1(a) of the directive whatever their nature and irrespective of the relative

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proportion, whether large or small, which they represent of the activities of the OS pursued for the purpose of meeting needs not having an industrial or commercial character.

5 An undertaking which carries on commercial activities and in which a contracting authority, within the meaning of the first subparagraph of Article 1(b) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts, has a majority shareholding is not to be regarded as a body governed by public law within the meaning of the second subparagraph of that provision - according to which it must be a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character - and thus as a contracting authority on the sole ground that that undertaking was established by the contracting authority or that the contracting authority transfers to it funds derived from activities pursued in order to meet needs in the general interest, not having an industrial or commercial character.

Furthermore, a public works contract is not subject to the provisions of the directive when it relates to a project which, from the outset, falls entirely within the objects of an undertaking which is not a contracting authority and when the works contracts relating to that project were entered into by a contracting authority on behalf of that undertaking.

6 Pursuant to Article 7(1) of Regulation No 2081/93, amending Regulation No 2052/88, measures financed by the Structural Funds or receiving assistance from the European Investment Bank or from another existing financial instrument are to be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning the rules on competition, the award of public contracts and environmental protection and the application of the principle of equal opportunities for men and women. In that respect, the requirement that the measures referred to must be in conformity with Community law presupposes that those measures fall within the scope of the relevant Community legislation.

It follows that the aforementioned provision must be interpreted as meaning that Community funding of a works project is not conditional upon the recipients complying with the review procedures within the meaning of Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, if they are not themselves contracting authorities within the meaning of Article 1(b) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts.

In Case C-44/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between

Mannesmann Anlagenbau Austria AG and Others

and

Strohal Rotationsdruck GesmbH

on the interpretation of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Article 7(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193, p. 5),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet and R. Schintgen (Presidents

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of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn (Rapporteur), J.L. Murray, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevon, Judges,

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mannesmann Anlagenbau Austria AG and Others, by M. Winischhofer, of the Vienna Bar,

- Strohal Rotationsdruck GesmbH, by W. Wiedner, of the Vienna Bar,

- the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

- the Austrian Government, by W. Okresek, Ministerialrat in the Bundeskanzleramt-Verfassungsdienst, acting as Agent,

- the Commission of the European Communities, by H. van Lier, Legal Adviser, and C. Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mannesmann Anlagenbau Austria AG and Others, represented by M. Winischhofer; of Strohal Rotationsdruck GesmbH, represented by W. Wiedner; of the French Government, represented by P. Lalliot, Foreign Affairs Secretary in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; of the Netherlands Government, represented by M. Fierstra, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by H. van Lier, at the hearing on 3 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1997,

gives the following

Judgment

Costs

50 The costs incurred by the Austrian, French and Netherlands Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesvergabeamt by order of 2 February 1996, hereby rules:

1. An entity such as the Osterreichische Staatsdruckerei must be regarded as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, and thus as a contracting authority within the meaning of the first subparagraph of that provision so that works contracts, of whatever nature, entered into by that entity are to be considered to be public works contracts within the meaning of Article 1(a) of that directive.

2. An undertaking which carries on commercial activities and in which a contracting authority has a majority shareholding is not to be regarded as a body governed by public law within the meaning

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of Article 1(b) of Directive 93/37, and thus as a contracting authority within the meaning of that provision, on the sole ground that that undertaking was established by the contracting authority or that the contracting authority transferred to it funds which it has earned from activities pursued in order to meet needs in the general interest, not having an industrial or commercial character.

3. A public works contract is not subject to the provisions of Directive 93/37 when it relates to a project which, from the outset, falls entirely within the objects of an undertaking which is not a contracting authority and when the works contracts relating to that project were entered into by a contracting authority on behalf of that undertaking.

4. Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993, is to be interpreted as meaning that Community funding of a works project is not conditional upon the recipients complying with the review procedures within the meaning of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts if they are not themselves contracting authorities within the meaning of Article 1(b) of Directive 93/37.

1 By order of 2 February 1996, received at the Court on 14 February 1996, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty seven questions on the interpretation of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and Article 7(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193, p. 5).

2 Those questions were raised in proceedings brought before that court by Mannesmann Anlagenbau Austria AG and Others against Strohal Rotationsdruck GesmbH (hereinafter `SRG') concerning the application of the Austrian public procurement legislation at the initiation of such a procurement procedure.

The relevant Community provisions

Directive 93/37

3 Article 1 of Directive 93/37, which consolidates Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as last amended by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1), provides:

`For the purpose of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

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A "body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I....'

Directive 89/665

4 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) required Member States to take `the measures necessary to ensure that ... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible... on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law'. According to Article 5, those measures were to be adopted before 21 December 1991.

Regulation No 2052/88

5 Article 7(1) of Regulation (EEC) No 2052/88 as amended by Regulation (EEC) No 2081/93 reads as follows:

`Measures financed by the Structural Funds or receiving assistance from the EIB or from another existing financial instrument shall be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning the rules on competition, the award of public contracts and environmental protection and the application of the principle of equal opportunities for men and women.'

The Austrian legislation

6 Paragraph 1 of the Bundesgesetz über die Osterreichische Staatsdruckerei (Staatsdruckereigesetz) of 1 July 1981 (Federal Law on the Austrian State Printing Office, Bundesgesetzblatt für die Republik Osterreich 340/1981; hereinafter the `StDrG'), reads as follows:

`Economic entity "Osterreichische Staatsdruckerei" Paragraph 1.

(1) An independent economic entity is established with the name "Osterreichische Staatsdruckerei" (hereinafter the "Staatsdruckerei"). It has its registered office in Vienna and has legal personality.

(2) The Staatsdruckerei is a trader for the purposes of the Commercial Code. It must be registered in Part A of the Commercial Register of the Vienna Commercial Court.

(3) The activities of the Staatsdruckerei are to be pursued in accordance with the rules governing trade.'

7 The tasks to be carried out by the Osterreichische Staatsdruckerei (hereinafter the `OS') are described in Paragraph 2 of the StDrG. According to Paragraph 2(1), those tasks consist, in particular, of the production for the federal administration of printed matter requiring secrecy or security measures, such as passports, driving licences, identity cards, the federal official journal, the federal reports of laws and decisions, forms and the Wiener Zeitung. Those activities are collectively

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referred to as `public service obligations'.

8 Those activities, for which, according to Paragraph 2(3), the OS has sole responsibility, are, by virtue of Paragraph 13(1) of the StDrG, monitored by a State control service. Pursuant to Paragraph 12 of that Law, the prices for those orders are fixed - in accordance with commercial principles and taking into account, in particular, the need to keep capacity available - at the request of the Director-General of the OS, by the economic council, which, according to Paragraph 8(2), is composed of 12 members, eight of whom are appointed by the Federal Chancellery or various ministries and four by the works council. In accordance with Paragraph 5(2) of the StDrG, the Director-General of the OS is appointed by the economic council.

9 Furthermore, pursuant to Paragraph 15(6) of the StDrG, the OS is subject to scrutiny by the Court of Auditors.

10 According to Paragraph 2(2) of the StDrG, the OS may pursue other activities, such as the production of other printed matter and the publication and distribution of books, newspapers, etc. Finally, according to Paragraph 3 of that Law, the OS may acquire holdings in undertakings.

The dispute in the main proceedings

11 In February 1995, the OS took over Strohal Gesellschaft mbH, whose activities consisted of rotary `heatset' printing. On 11 October 1995, Strohal set up SRG, in which it holds 99.9% of the share capital, with the object of producing printed matter using the abovementioned process in printing works in Müllendorf.

12 In order to reduce the waiting period prior to those printing works becoming operational, while SRG was still in the process of being set up, the OS initiated a tendering procedure for a project relating to the technical installations on 18 October 1995. To that end, it incorporated into each of the works contracts a clause reserving the right to assign all its rights and obligations under those contracts to a third party of its choice at any time. Following a conciliation procedure before the Bundesvergabekontrollkommission (Federal Procurement Review Commission) which resulted in an amicable settlement, that call for tenders was withdrawn. After initiating a new tendering procedure, the OS informed tenderers that the firm responsible for the call for tenders and awarding contracts was SRG.

13 A conciliation procedure was subsequently initiated at the request of the Verband der Industriellen Gebäudetechnikunternehmen Osterreichs (Association of Industrial Construction Undertakings in Austria) in order to determine whether or not the tendering procedure should be conducted in accordance with the national legislation on public works contracts. In contrast to that association, SRG and the OS challenged the applicability of that legislation and claimed that, since there was no contracting authority, there was no public works contract in the present case.

14 The Bundesvergabekontrollkommission decided in their favour and held that the question did not fall within its jurisdiction. It did not, however, exclude the possibility of the need to comply with Directive 89/665 if the entity awarding the contract was in receipt of Community funds, in accordance with Article 7(1) of Regulation No 2081/93.

15 Since no amicable settlement was reached, Mannesmann Anlagebau and Others initiated a review procedure before the Bundesvergabeamt.

16 The Bundesvergabeamt was uncertain of the interpretation to be given to the Community law and referred the following questions for a preliminary ruling:

`1. Can a provision of a national law, such as Paragraph 3 of the Staatsdruckereigesetz in the present case, which confers special and exclusive rights on an undertaking, establish that undertaking as meeting needs in the general interest not having an industrial or commercial character within

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the meaning of Article 1(b) of Directive 93/37/EEC and make such an undertaking as a whole fall within the scope of that directive, even if those activities form only part of the undertaking's activity and the undertaking in addition participates in the market as a commercial undertaking?

2. In the event that such an undertaking falls within the scope of Directive 93/37/EEC only with respect to the special and exclusive rights conferred on it, is such an undertaking obliged to take organisational measures to prevent financial means obtained from earnings from those special and exclusive rights being switched to other sectors of activity?

3. If a contracting authority starts a project and that project is therefore to be classified as a public works contract within the meaning of Directive 93/37/EEC, may the intervention of a third party who prima facie does not fall within the personal scope of the directive have the effect of altering the classification of a project as a public works contract, or should such a proceeding be regarded as an evasion of the personal scope of the directive and incompatible with the aim and purpose of the directive?

4. If a contracting authority establishes undertakings for carrying on commercial activities and holds majority holdings in them which enable it to exercise economic control over those undertakings, does the classification as a contracting authority then also apply to those associated undertakings?

5. If a contracting authority transfers funds which it has earned from special and exclusive rights conferred on it to purely commercial undertakings in which it owns a majority holding, does that have the effect that, regardless of the legal position of the associated undertaking, that undertaking as a whole must let itself be treated and behave as a contracting authority within the meaning of Directive 93/37/EEC?

6. If a contracting authority which both meets needs in the general interest not having an industrial or commercial character and also carries on commercial activities establishes operating installations which are capable of serving both purposes, is the award of the contract for constructing such operating installations to be classified as a public works contract within the meaning of Directive 93/37/EEC, or does Community law contain criteria according to which such an operating installation can be classified either as serving public needs or as serving commercial activities, and if so, which criteria?

7. Does Article 7(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments make the recipients of the Community subsidies subject to the review procedures within the meaning of Directive 89/665/EEC, even if they themselves are not contracting authorities within the meaning of Article 1 of Directive 93/37/EEC?'

The first and sixth questions

17 By its first and sixth questions the national court is, essentially, asking whether an entity such as the OS should be regarded as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37 and, thus, as a contracting authority within the meaning of the first subparagraph of that provision. If so, the national court further asks whether all works contracts, of whatever nature, entered into by that entity, constitute public works contracts within the meaning of Article 1(a) of that directive.

18 According to the applicants in the main proceedings, the Commission and the French Government, Article 1(a) of Directive 93/37 applies to all works contracts entered into by a body such as the OS, which pursues both activities intended to meet needs in the general interest not having an industrial or commercial character and activities of a commercial nature.

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19 SRG and the Austrian and Netherlands Governments, on the other hand, consider that a body such as the OS does not satisfy the criteria set out in the second subparagraph of Article 1(b) of Directive 93/37 and should not therefore be regarded as a body governed by public law within the meaning of that provision.

20 Under the second subparagraph of Article 1(b) of Directive 93/37, a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law.

21 It is clear from that provision that the three conditions set out therein are cumulative.

22 As regards the first condition, it should be noted, first, that the OS was established in order to produce, on an exclusive basis, official administrative documents, some of which require secrecy or security measures, such as passports, driving licences and identity cards, whilst others are intended for the dissemination of legislative, regulatory and administrative documents of the State.

23 Furthermore, the prices for the printed matter which the OS is required to produce are fixed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries and a State control service is responsible for monitoring the printed matter which is subject to security measures.

24 According to the legislation applicable to it, therefore, that entity was established for the purpose of meeting needs in the general interest, not having an industrial or commercial character. The documents which the OS must produce are closely linked to public order and the institutional operation of the State and require guaranteed supply and production conditions which ensure that standards of confidentiality and security are observed.

25 Furthermore, it is apparent from Paragraphs 1(1) and 2(1) of the StDrG that the OS was established for the specific purpose of meeting those needs in the general interest. In that respect, it is immaterial that such an entity is free to carry out other activities in addition to that task, such as the production of other printed matter and the publication and distribution of books. The fact, raised by the Austrian Government in its written observations, that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by the OS is also irrelevant, provided that it continues to attend to the needs which it is specifically required to meet.

26 The condition, laid down in the first indent of the second subparagraph of Article 1(b) of the directive, that the body must have been established for the `specific' purpose of meeting needs in the general interest, not having an industrial or commercial character, does not mean that it should be entrusted only with meeting such needs.

27 As regards the second condition laid down in the second subparagraph of Article 1(b) of Directive 93/37, it should be noted that, according to the national Law, the OS has legal personality.

28 As regards the third condition, it should be noted that the Director-General of the OS is appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries. Furthermore, it is subject to scrutiny by the Court of Auditors and a State control service is responsible for monitoring the printed matter which is subject to security measures. Finally, according to the statements made at the hearing by SRG, the majority of the shares in the OS are still held by the Austrian State.

29 It follows that an entity such as the OS must be classified as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37 and must thus be regarded as a contracting authority within the meaning of the first subparagraph of that provision.

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30 The Austrian and Netherlands Governments object that it is not possible to disregard the fact that the overall activity of an entity such as the OS is dominated by those activities pursued in order to meet needs having an industrial or commercial character.

31 In that respect, it should be recalled that, as stated at paragraph 26 above, the wording of the second subparagraph of Article 1(b) of Directive 93/37 does not exclude the possibility that a contracting authority may pursue other activities in addition to its specific task of meeting needs in the general interest, not having an industrial or commercial character.

32 As regards such activities, it should be noted first that Article 1(a) of the directive makes no distinction between public works contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task.

33 The fact that no such distinction is made is explained by the aim of Directive 93/37 to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities.

34 Finally, to interpret the first indent of the second subparagraph of Article 1(b) of Directive 93/37 in such a way that its application would vary according to the relative proportion of its activities pursued for the purpose of meeting needs not having an industrial or commercial character would be contrary to the principle of legal certainty which requires a Community rule to be clear and its application foreseeable by all those concerned.

35 The answer to the first and sixth questions referred by the national court should therefore be that an entity such as the OS must be regarded as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37, and thus as a contracting authority within the meaning of the first subparagraph of that provision, so that works contracts, of whatever nature, entered into by that entity are to be considered to be public works contracts within the meaning of Article 1(a) of that directive.

The second question

36 In view of the answer given to the first and sixth questions, there is no need to answer the second question.

The fourth and fifth questions

37 By its fourth and fifth questions, the national court is essentially asking whether an undertaking which carries on commercial activities and in which a contracting authority has a majority shareholding must itself be considered to be a contracting authority within the meaning of Article 1(b) of Directive 93/37, if that undertaking was established by the contracting authority in order to carry on commercial activities or if the contracting authority transfers to it funds derived from activities it pursues in order to meet needs in the general interest, not having an industrial or commercial character.

38 As pointed out at paragraph 21 above, it is clear from the wording of the second subparagraph of Article 1(b) of Directive 93/37 that the three conditions set out therein are cumulative.

39 It is therefore not sufficient that an undertaking was established by a contracting authority or that its activities are financed by funds derived from activities pursued by a contracting authority in order for it to be regarded as a contracting authority itself. It must also satisfy the condition set out in the first indent of Article 1(b) of Directive 93/37, that it must be a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

40 If that condition is not satisfied, an undertaking such as the one referred to by the national

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court cannot be considered to be a contracting authority within the meaning of Article 1(b) of the directive.

41 The answer to the fourth and fifth questions referred by the national court must therefore be that an undertaking which carries on commercial activities and in which a contracting authority has a majority shareholding is not to be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 93/37, and thus as a contracting authority within the meaning of that provision, on the sole ground that that undertaking was established by the contracting authority or that the contracting authority transfers to it funds derived from activities pursued in order to meet needs in the general interest, not having an industrial or commercial character.

The third question

42 By its third question, the national court is seeking to ascertain whether a project which must be classified as a public works contract within the meaning of Article 1(a) of Directive 93/37 continues to be subject to the provisions of that directive when, before completion of the work, the contracting authority transfers its rights and obligations in the context of a call for tenders to an undertaking which is not itself a contracting authority within the meaning of Article 1(b) of that directive.

43 In that respect, it is clear from Article 1(a) of Directive 93/37 that a contract which satisfies the conditions set out in that provision cannot cease to be a public works contract when the rights and obligations of the contracting authority are transferred to an undertaking which is not a contracting authority. The aim of Directive 93/37, which lies in the effective realisation of freedom of establishment and freedom to provide services in the field of public works contracts, would be undermined if the application of the rules in the directive could be excluded on the sole ground that the rights and obligations of a contracting authority in the context of a call for tenders are transferred to an undertaking which does not satisfy the conditions set out in Article 1(b) of Directive 93/37.

44 The contrary would be true only if it were to be established that, from the outset, the whole of the project at issue fell within the objects of the undertaking concerned and the works contracts relating to that project were entered into by the contracting authority on behalf of that undertaking.

45 It is for the national court to ascertain whether that is the case here.

46 The answer to the third question referred by the national court must therefore be that a public works contract is not subject to the provisions of Directive 93/37 when it relates to a project which, from the outset, falls entirely within the objects of an undertaking which is not a contracting authority and when the works contracts relating to that project were entered into by a contracting authority on behalf of that undertaking.

The seventh question

47 By its seventh question, the national court is essentially seeking to ascertain whether Article 7(1) of Regulation No 2052/88 as amended by Regulation No 2081/93 is to be interpreted as meaning that Community funding of a works project is conditional upon the recipients complying with the review procedures laid down by Directive 89/665, even if they themselves are not contracting authorities within the meaning of Article 1(b) of Directive 93/37.

48 As the Advocate General noted at point 105 of his Opinion, it is clear from the wording of Article 7(1) of Regulation No 2052/88 that the requirement that the measures referred to must be in conformity with Community law presupposes that those measures fall within the scope of the relevant Community legislation.

49 The answer to the seventh question referred by the national court must therefore be that Article 7(1) of Regulation No 2052/88 as amended by Regulation No 2081/93 is to be interpreted as meaning

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that Community funding of a works project is not conditional upon the recipients complying with the review procedures within the meaning of Directive 89/665, if they are not themselves contracting authorities within the meaning of Article 1(b) of Directive 93/37.

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Kapteyn

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Judgment of the Court of First Instance (Fourth Chamber)
First Instance (Fourth Chamber)First Instance (Fourth Chamber)December 1998.
Embassy Limousines & Services v European Parliament.
Arbitration clause - Existence of a contract - Non-contractual liability - Withdrawal of an invitation to tender - Legitimate expectations - Assessment of damage.
Case T-203/96.

1 Procedure - Reference to the Court of Justice on the basis of an arbitration clause - Condition - Existence of a valid contract - Contract governed by Directive 92/50 requiring a written agreement - Requirement not fulfilled - Application inadmissible

(EC Treaty, Art. 181; Council Decision 88/591; Council Directive 92/50, Art. 1)

2 European Community public procurement contracts - Conclusion of a contract following an invitation to tender - Discretion of the institutions - Judicial review - Limits

3 Community law - Principles - Protection of legitimate expectations - European Community public procurement contracts - Tenderer encouraged, before the contract is awarded, to make irreversible investments - Community's non-contractual liability thereby incurred

4 European Community public procurement contracts- Tendering procedure - Obligation to comply with the principles of the equal treatment of tenderers and of transparency and to adopt a coherent line of conduct

5 European Community public procurement contracts - Tendering procedure - Expenses incurred by a tenderer - Right to compensation - None

6 The jurisdiction of the Court of First Instance, on the basis of the combined provisions of Decision 88/591, as amended, and Article 181 of the Treaty, to hear actions brought before it by natural or legal persons pursuant to an arbitration clause presupposes that the contract containing the clause is a valid contract.

An application made on the basis of an arbitration clause provided for in a framework contract forming part of an invitation to tender for the award of a contract by a Community institution is therefore inadmissible, where the framework contract has never been signed, in so far as such a contract is governed by Directive 92/50, which defines the contracts concerned as contracts concluded in writing. In that last regard, the existence of a valid contract cannot be inferred from the fact that a committee on procurements and contracts - an advisory body within the institution at issue - has given an opinion in favour of awarding the contract to the applicant, notwithstanding the importance generally accorded, in practice, to such an opinion in connection with an invitation to tender.

7 The institutions have a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and the Court's review should be limited to checking that there has been no serious and manifest error.

8 The right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain justified expectations. Although it is true, in that regard, that traders must bear the economic risks inherent in their activities and that, in connection with a tendering procedure for a public procurement contract, those economic risks include, inter alia, the costs connected with the preparation of the bid, there may be a breach of the principle of the protection of legitimate expectations capable of giving rise to liability on the part of the Community where, before the contract in question is awarded to the successful tenderer, a tenderer is encouraged by the contracting institution to make irreversible investments in advance and thereby to go beyond

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the risks inherent in the business under consideration, consisting in making a bid.

9 In procedures for concluding public procurement contracts, the contracting institution must comply, at each stage of a tendering procedure, not only with the principle of the equal treatment of tenderers, but also with the principle of transparency. Therefore, a person who is closely involved in a tendering procedure and who has even been judged to be the successful tenderer, must receive, without any delay, precise information concerning the conduct of the entire procedure.

Furthermore, the institution is obliged to show a coherent and consistent attitude towards its tenderers. Any interventions by various administrative and political bodies within that institution cannot therefore justify the failure to comply with its obligations to the tenderers.

10 It is clear from the General Terms and Conditions applicable to the Communities' public procurement contracts that the contracting institution is not liable for any compensation with respect to tenderers whose tenders have not been accepted. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage capable of being remedied by the award of damages.

In Case T-203/96,

Embassy Limousines & Services, a company incorporated under Belgian law, established in Diegem (Belgium), represented by Eric Boigelot, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 2 Rue du Fort Rheinsheim,

applicant,

v

European Parliament, represented by François Vainker and Anders Neergaard, of its Legal Service, acting as Agents, assisted by Charles Price, of the Brussels Bar, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for compensation for the damage allegedly suffered by the applicant on account of the wrongful conduct of the Parliament in connection with Invitation to Tender No 95/S 158-76321/FR relating to a contract for passenger transport using chauffeur-driven vehicles, brought pursuant to Article 181 of the EC Treaty, under the arbitration clause in the third paragraph of Article 6 of the specifications of that invitation to tender and Article VIII of framework contract PE-TRANS-BXL-95/6, and, in the alternative, pursuant to Article 178 and the second paragraph of Article 215 of that Treaty,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

(Fourth Chamber),

composed of: P. Lindh, President, K. Lenaerts and J.D. Cooke, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 July 1998,

gives the following

Judgment

Costs

110 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to

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pay the costs, if they have been applied for in the successful party's pleadings. Since the Parliament has been unsuccessful and the applicant has applied for costs, the Parliament must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE

(Fourth Chamber)

hereby:

1. Orders the European Parliament to pay to the applicant a sum of BEF 5 000 000;

2. Declares that that sum will bear interest at an annual rate of 8% with effect from the date of this judgment and until due payment;

3. Orders the Parliament to pay its own costs and the costs of the applicant.

Background to the dispute

1 On 22 August 1995 the European Parliament, pursuant to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, hereinafter `Directive 92/50'), published in the Official Journal of the European Communities a tender notice (OJ 1995 S 158, p. 23, hereinafter `the notice'), in accordance with the open procedure, in respect of a contract for passenger transport using chauffeur-driven vehicles, in this case for Members of the European Parliament (Invitation to Tender No 95/S 158-76321/FR, hereinafter `the contested invitation to tender').

2 The notice indicated that the contract would take the form of a framework contract with a company providing the service and that it would be carried out on the basis of order forms specific to each operation. The contract would be concluded for a period of three years and renewable for two one-year periods. The place of delivery would be Brussels and the service providers would have to provide evidence to the effect that they had been active in the sector for five years. As contract award criteria, the notice stated that the economically most advantageous tender would be selected, taking account of the prices tendered and the technical merit of the tender.

3 On 13 September 1995 the General Secretariat of the Parliament, in the person of Mr Candidi, Head of the Human Resources and Administration Department, sent the applicant, Embassy Limousines &Services SA (hereinafter `Embassy'), in response to its written request of the same date, all the documents relating to the contested invitation to tender, namely framework contract PE-TRANS-BXL-95/6 (hereinafter `the framework contract'), the specifications relating to the invitation to tender and the technical specifications relating thereto.

4 The framework contract (Article VIII) and the specifications of the contested invitation to tender (third paragraph of Article 6) made the contracts awarded subject to Luxembourg law and provided for the exclusive jurisdiction of the Court of Justice of the European Communities. Any matters not governed by the specifications would be subject to the `General Terms and Conditions Applicable to Contracts' drawn up by the Commission of the European Communities (hereinafter `the General Terms and Conditions').

5 On 16 October 1995 the applicant submitted its tender.

6 On 4 December 1995 the Parliament, in the person of Mr Candidi, contacted Mr Hautot, the then Managing Director of Embassy, to tell him that the Advisory Committee on Procurements and Contracts (hereinafter `the ACPC') had that day delivered an opinion in favour of the authorising officer's

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proposal to award the contract to his company.

7 On 12 December 1995 the applicant sent to the Parliament a letter in which it reported on the measures it had taken in order to respond to the urgency of the situation in which the Parliament found itself. It stated that it had entered into contracts for leasing cars and renting mobile telephones (GSM), engaged drivers and attended to their social security, health insurance and tax situation. In the same letter the applicant reacted to rumours and gossip referring to an alleged lack of good character on the part of its executives and/or shareholders and questioning the quality of the services it provided.

8 As a result of those rumours and articles in the press casting doubt on the probity of certain Embassy executives, two of the latter, Mr Hautot and Mr Heuzer, were asked to go to Strasbourg in order to produce any documents required to show the good repute of their company. That meeting took place on 13 December 1995.

9 After that meeting Mr Feidt, the Director-General of Administration, sent a memorandum to the Secretary-General of the Parliament, which reads as follows:

`Further to the request made by the Bureaux of the European Parliament, an inquiry has been conducted by my departments in order to check whether the accusations made against the Embassy company... were well-founded.

The executives of that company were invited to travel to Strasbourg where they answered the questions put to them after supplying all the documents requested...

Thorough examination of those documents has shown that the allegations are completely without foundation.

In those circumstances, and given the need for the new company to organise on a practical level the setting up of the services, a decision urgently needs to be taken: it is imperative that the administration guarantee transport for Members of Parliament as soon as they return in January 1996.

Consequently I request your agreement to the signing of that contract as soon as possible.'

10 Nevertheless, on 19 December 1995 Mr Feidt referred to the ACPC a proposal that a contract with the company then responsible for provision of the services at issue (hereinafter `Company A') should be extended for one month. The minutes of the ACPC meeting of that date state inter alia:

`The ACPC,

...

- having regard to its opinion of 4 December 1995 in favour of concluding a contract with the Embassy company... , the successful candidate in the above tendering procedure,

- taking formal note that the internal decisions of the Parliament authorising the signing of the contract with the Embassy company... could not be finalised before the end of 1995,

- on the basis of Article 59(b) of the Financial Regulation and Article 11(3)(d) of Directive 92/50... , delivers an opinion in favour of a contract from 1 January 1996 to 31 January 1996 with Company [A ...] (the company which made the second lowest bid in the above tendering procedure) on the terms of the original contract and renewable for a maximum of one month (February 1996) after a further reference to the ACPC.

- invites the authorising officer to take all appropriate measures to ensure that the contract with the company which made the successful bid in the open tendering procedure is signed as soon as possible.'

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11 A contract with Company A was concluded on 5 January 1996.

12 By letter of 25 January 1996 the applicant told the Parliament that it did not understand why that institution had not yet adopted the final decision on the contested invitation to tender.

13 At two meetings of 22 January 1996 and 26 February 1996 the ACPC delivered opinions in favour of two one-month extensions to the contract concluded with Company A. Finally, at a meeting of 1 April 1996, the ACPC gave an opinion in favour of a three-month extension to the contract concluded with that same company.

14 On 16 February 1996 the applicant sent a letter to Mr Ribeiro, a member of the College of Quaestors (the body responsible for making recommendations to the Bureau on questions concerning Members), in particular to clarify certain questions relating to the qualifications and experience of Embassy drivers.

15 By letters of 29 February and 4 March 1996 sent to the Parliament the applicant again expressed surprise at having not yet received the signed contract.

16 On 8 May 1996 the Bureau of the Parliament recommended to the authorising officer the initiation of a new tendering procedure.

17 On 28 May 1996 the applicant sent the Parliament a letter in which it asked it to indicate its reasons for deciding to reopen the procedure.

18 On 31 May 1996 the ACPC delivered an opinion in favour of annulling the contested invitation to tender. At the same time it also delivered an opinion, on a proposal from the authorising officer, in favour of signing a contract with Company A for the period from 1 July to 31 December 1996, while waiting for the results of the new invitation to tender. The minutes of that meeting show:

`The ACPC,

...

1. as to the annulment of Invitation to Tender No 95/S 158-76321/FR

...

- whereas the decision of the authorising officer to annul that invitation to tender is based on the opinion given by the Bureau at its meeting of 8 May 1996;

- whereas according to that opinion, which confirms the position taken by the College of Quaestors, "the present procedure is not likely to give Members a transport service of appropriate quality";

...

- delivers an opinion (eight votes for and one abstention) in favour of annulling the invitation to tender under discussion while pointing out that it is for the authorising officer to verify the economic basis of a new invitation to tender (its cost, difference in results compared with the first, etc.).

...'

19 By registered letter of 19 June 1996 the Parliament informed the applicant that the contested invitation to tender had been annulled and that the procedure had been reopened. That letter explained, in particular, that the Parliament had considered that none of the tenders received had been judged completely satisfactory and that the institution had been particularly concerned to give Members of Parliament a service of the highest technical quality, provided by very experienced professional drivers, all of which was not unarguably demonstrated in the documents presented by the tenderers. A new open invitation to tender would be launched, specifying the requirements of the Parliament

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more explicitly and more fully.

20 By letter dated 22 July 1996 the applicant formally requested the Parliament either not to annul the contested invitation to tender and to award it the contract, or to pay it satisfactory compensation.

21 After acknowledging that letter on 21 August 1996, Mr Feidt, by letter of 14 October 1996, rejected the applicant's requests. He stated:

`It is agreed that, in this case, no contract has been concluded between the Parliament... and... Embassy... since:

- the ACPC has no competence other than to deliver an opinion to the competent authorising officer, in this case myself; the ACPC does not take any decisions;

- according to Article 1 of Council Directive 92/50/EEC, to which you refer in your letter, "`public service contracts' shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority (the European Parliament)";

- there is no written contract, since proposed framework contract PE-TRANS-BXL-95/6, which formed part of the specifications and was therefore received by Embassy, has not been signed.'

22 Mr Feidt continued:

`If Embassy believed, from 4 December 1995, that it had or would have a contract for passenger transport in Brussels as a result of the invitation to tender..., any misunderstanding should have been very quickly cleared up at the meeting of 13 December 1995.... According to the minutes of that meeting, which have been sent to me, Mr Hautot and Mr Heuzer of Embassy "have been informed that the ACPC had indeed expressed an opinion in favour of the authorising officer's proposal to award them the contract but that that opinion had the status of advice only and that the authorities had the power of final decision".'

23 Mr Feidt concluded that the Parliament saw no reason justifying the withdrawal or annulment of its decision to reopen the tendering procedure which had been communicated to Embassy by letter of 19 June 1996. He added that the ground justifying the reopening of the tendering procedure was not incompatible with the need felt by Mr Hautot to give a thorough account, in his letter of 16 February 1996 to Mr Ribeiro, of the considerable professional training and experience of the Embassy drivers.

Procedure and forms of order sought by the parties

24 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 10 December 1996, the applicant brought these proceedings.

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. In accordance with Article 64 of the Rules of Procedure, the parties were invited to reply to certain questions and to produce certain documents.

26 By order of 5 June 1998, the Court of First Instance, pursuant to Article 65(c) of its Rules of Procedure, ordered the hearing, as witnesses, of Mr Candidi and Ms Lahousse, officials of the Parliament, and of Mr Hautot and Mr Heuzer, representatives of the applicant company. The order provided that the witnesses would be heard on the content of the meeting which was held in Strasbourg on 13 December 1995. Mr Candidi and Mr Hautot would be heard on the subject and content of their telephone conversation of 4 December 1995. Finally, Mr Candidi and Ms Lahousse would be heard on their reaction to the applicant's letter of 12 December 1995 on the subject of certain investments it had made.

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27 The parties and the witnesses were heard at the public hearing of 2 July 1998.

28 Embassy, the applicant, claims that the Court should:

- declare the application admissible and well founded and consequently order the Parliament to pay it the sum of BEF 21 028 460, subject to an increase or reduction in that amount in the course of the proceedings, by way of compensation for the financial, commercial and non-material damage which it has suffered on account of the wrongful conduct of the Parliament;

- order the Parliament to bear all the costs.

29 The Parliament, the defendant, contends that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

30 In its application and reply the applicant stated that its action was brought pursuant to the third paragraph of Article 6 of the specifications of the contested invitation to tender and Article VIII of the framework contract, and therefore on the basis of Article 181 of the EC Treaty, and in the alternative, on the basis of Article 178 and the second paragraph of Article 215 of the Treaty, and that it concerned a claim for damages to compensate for the damage caused to the applicant by the wrongful conduct of the Parliament in connection with the contested invitation to tender.

Contractual liability of the Community

Arguments of the parties

31 The applicant claims that, although a contract between the parties had been properly concluded, the Parliament withdrew from it unilaterally and refused to perform it on the terms and conditions agreed.

32 It maintains, first, that the award of the contract at issue results from valid, public and unequivocal consensus ad idem. It stresses in that regard that, during their telephone conversation of 4 December 1995, Mr Candidi informed Mr Hautot that the decision to award the contract to Embassy had been taken and consequently invited him to do everything to ensure that the company was in a position to provide the services at issue from the beginning of January 1996. The applicant insists that, by officially informing him of the decision taken by the ACPC, the Parliament expressed its intent and thereby made its offer irrevocable. The Parliament thus showed its intention to contract with the applicant, thereby conferring on the applicant a contractual right which meant that the Parliament could not go back on its decision.

33 The applicant adds that, in reality, it is the ACPC which takes the decision to award a contract to an undertaking, since the authorising officer's only function is to formalise what has, in fact, already been decided by the ACPC.

34 Secondly, the applicant maintains that, at the very least, it should be considered that there is an apparent contract. It claims that all the factors necessary for the formation of a contract are present. In that regard it underlines the validity of its tender, the information given by Mr Candidi and the fact that the Parliament required it to begin to implement, from December 1995, the measures necessary for the performance of the contract from the first working day in January 1996.

35 The Parliament considers that, since no contract between the parties has been signed, the applicant's action for damages in contract is inadmissible. It points out that both the General Terms and Conditions and Directive 92/50 require any contract between the contracting authority and the successful

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tenderer to be in writing. It also contends that the last document of the invitation to tender constitutes a draft framework contract which must be signed by the service provider and by the authorising officer. However, that framework contract has never been signed either by the applicant or by the authorising officer.

36 It refutes moreover the applicant's allegation that it is in reality the ACPC which takes the decision to award a contract to an undertaking, by referring in that regard to the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), from which it is clear that the ACPC constitutes only an advisory committee.

37 It considers, finally, that the doctrine of apparent contract which is invoked by the applicant does not correspond to any `general principle common to the laws of the Member States' so that it cannot be usefully invoked in this case.

Assessment by the Court

38 In accordance with the combined provisions of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as subsequently amended, and Article 181 of the Treaty, the Court of First Instance has jurisdiction to hear, at first instance, actions in contract brought before it by natural or legal persons pursuant to an arbitration clause.

39 It is important to stress, however, that, in the words of Article 1 of Directive 92/50, applicable pursuant to Article 126 of Commission Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977 (OJ 1993 L 315, p. 1), inasmuch as the value of the contract at issue exceeds the threshold laid down in Article 7(1) of that directive, `public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'.

40 In this case, it is not disputed that the value of the contract exceeds that threshold. The existence of contractual relations between the parties therefore presupposes that they have entered into a written contract. In that regard, it is appropriate to refer also to Article 3 of the General Terms and Conditions (applicable, in this case, pursuant to the first paragraph of Article 6 of the specifications). That article provides:

`3.1 The contracts shall be made binding by the agreement in writing of the parties thereto.

3.2 A contract shall be concluded by notification to the tenderer that his tender has been accepted.

Such notification shall be in the form of a purchase order or letter.

3.3 If the acceptance does not conform in all respects with the tender or if the Commission's decision is advised after the expiry of the period during which the tender was valid, the conclusion of the contract shall be subject to the tenderer's agreement in writing.

3.4 The contract may also take the form of a contract signed by both parties.'

41 It follows that the contract could not be finally awarded without the framework contract being signed by the two parties. However, since the framework contract has never been signed, it must be concluded that there is no valid contract in this case.

42 Moreover, the favourable opinion of the ACPC, as an opinion of an advisory body, cannot change that conclusion, notwithstanding the importance which is generally accorded to that opinion, in practice, in connection with an invitation to tender.

43 The applicant's allegation that there is an `apparent' contract must also be refuted. Without

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there being any need to consider the foundation of the doctrine of apparent contract in Community law or the conditions governing its application in this case, it is clear that the evidence put forward by the applicant does not permit any derogation from the requirement of a written contract. The representatives of Embassy have, furthermore, recognised in their testimony that they were aware of the need for a written agreement for the contract to be validly awarded.

44 It follows that, since the applicant has failed to demonstrate the existence of a valid contract, in so far as its application is made on the basis of Article 181 of the Treaty it must be declared inadmissible.

Non-contractual liability of the Community

45 The non-contractual liability of the Community under the second paragraph of Article 215 of the Treaty and the general principles to which that provision refers depends on fulfilment of a set of conditions as regards the unlawfulness of the conduct alleged against the institution, the fact of damage and the existence of a causal link between the conduct in question and the damage complained of.

Unlawfulness of the conduct alleged

46 In support of its application for compensation under Article 178 and the second paragraph of Article 215 of the Treaty, the applicant alleges an infringement of Directive 92/50 and the wrongful conduct of the Parliament in connection with the tendering procedure.

Infringement of Directive 92/50

- Arguments of the parties

47 The applicant points out that its tender was perfectly proper in form and content, in that it met in every particular the criteria of the contested invitation to tender. However, according to the applicant, it is unarguably clear that, from the beginning of January 1996, the Parliament, first by monthly contracts, then by subsequent contracts, awarded the service contract for the transport of Members of Parliament in chauffeur-driven motor vehicles to another company, also a tenderer and the second lowest bidder.

48 Embassy considers that its bid, which had been judged to be the economically most advantageous, must have been set aside for improper reasons and given way to a contract negotiated with another service provider. In that regard it quotes Article 11(3) of Directive 92/50 which states:

`Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

(a) in the absence of tenders or of appropriate tenders in response to an open or restricted procedure provided that the original terms of the contract are not substantially altered and that a report is communicated to the Commission at its request;

... '.

49 The Parliament contends that the reason for which it annulled the contested invitation to tender was that the condition requiring providers to have at least five years' experience in the sector, mentioned in the notice, had not been reproduced in the documents constituting the contested invitation to tender. The fact that that requirement was included in the notice but not reproduced in the invitation to tender could have been criticised, with justification, by a potential tenderer in a position to satisfy the terms eventually included in the invitation to tender, but who had not submitted a tender because he could not show evidence of five years' experience. That would be a breach of the principle of equal treatment of tenderers, which is an essential principle for the application of Directive 92/50 (see Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraphs

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33 and 39, and Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 51).

50 The Parliament contends moreover that it wanted to avoid any risk of unlawfulness connected with contacts that certain of its officials had had with tenderers before the opening of bids, inter alia the contacts between Mr Candidi and the applicant. Contrary to what is laid down in Article 100 of Regulation No 3418/93 of 9 December 1993, cited above, no note for the file was drawn up following those contacts.

51 The Parliament also points out that Article 12(2) of Directive 92/50 expressly provides for the contracting authority to be able to decide not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure for the award of the contract. In addition, Article 4 of the General Terms and Conditions provides that fulfilment of an adjudication or invitation-to-tender procedure does not involve the institution in any obligation to award the contract.

52 The Parliament states finally that the contract was temporarily awarded to Company A in accordance with Article 11(3)(d) of Directive 92/50 which provides for such a solution in cases of extreme urgency brought about by unforeseeable events. The need to ensure continuity of service in this case allegedly constitutes appropriate justification.

53 The Parliament infers from the foregoing that its decisions to annul the contested invitation to tender and to award the contract on a provisional basis to Company A were perfectly legitimate and that the adoption of those decisions does not therefore constitute a fault giving rise to liability on the part of the Community.

- Assessment by the Court

54 It is necessary, first, to point out that the contracting authority is not bound to follow through to its end a procedure for awarding a contract. It is clear from Article 12(2) of Directive 92/50 that, if the procedure is annulled, the contracting authority is simply bound to inform candidates or tenderers who so request in writing of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure.

55 Moreover, Article 4 of the General Terms and Conditions states, first, that fulfilment of an adjudication or invitation-to-tender procedure does not involve the institution in any obligation to award the contract and, secondly, that it is not liable for any compensation with respect to tenderers whose tenders have not been accepted.

56 In addition, it must be recalled that the Parliament has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (see Case 56/77 Agence Européenne d'Intérims v Commission [1978] ECR 2215, paragraph 20, and Case T-19/95 Adia Intérim v Commission [1996] ECR II-321, paragraph 49).

57 In this case the contested procedure for awarding the contract was not completed. Therefore, having received from the applicant a request in writing dated 28 May 1996, the Parliament informed it, by letter of 19 June 1996, of the grounds justifying the annulment of the contested invitation to tender and the reopening of the procedure (see paragraph 19 above).

58 In response to the applicant's allegations, Mr Feidt then pointed out in his letter of 14 October 1996 (see paragraphs 21 to 23 above) that the Parliament `[saw] no reason to withdraw or annul its decision to reopen the tendering procedure which has been communicated to Embassy by letter of 19 June 1996. The grounds of that decision are not incompatible with the need felt by Mr Hautot, who was obviously anxious, to give a thorough account to Mr Ribeiro, a member of the College of Quaestors of the European Parliament, in his letter of 16 February 1996, of the considerable professional

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training and experience of the Embassy drivers: Mr Hautot referred in his letter to the worries that Mr Ribeiro might have had about the quality of the drivers recruited by Embassy... '.

59 It follows that, whatever the legal worth of the different explanations given by the Parliament concerning the risk of discriminatory treatment of tenderers, it is clear that it followed the procedure laid down in the legal provisions applicable when it annulled the contested invitation to tender.

60 Furthermore, the applicant has put forward no evidence to show that the Parliament, in considering that none of the tenders received was totally satisfactory, has committed a grave and manifest error. Although the doubts about the competence of the drivers recruited by Embassy constituted a decisive ground of the Parliament's decision not to accept its bid, the applicant has not shown that the Parliament went beyond the proper bounds given the broad discretion it enjoys in that regard.

61 Since the annulment of the contested invitation to tender was not unlawful, the non-contractual liability of the Community cannot consequently be incurred on that account.

62 It is also necessary to reject the applicant's argument that the Parliament unlawfully awarded the contract, on a provisional basis, to Company A. In these proceedings the applicant is seeking, in substance, to obtain compensation for the damage caused to it on account of the allegedly wrongful conduct of the Parliament in connection with the contested invitation to tender. However, the provisional award of the contract at issue to Company A was made at the end of a negotiated procedure without prior publication, which is different from the open procedure disputed in this case. It follows that, even if the applicant succeeded in proving the unlawfulness of the negotiated procedure followed by the Parliament to compensate for the suspension of the contested invitation to tender, it could not be the cause of the damage allegedly suffered by the applicant in connection with the contested invitation to tender.

63 It follows from the foregoing that the liability of the Community cannot be incurred on account of an infringement of Directive 92/50 by the Parliament.

Unlawful conduct of the Parliament during the tendering procedure

- Arguments of the parties

64 The applicant claims that the conduct of the Parliament during the tendering procedure was wrongful and therefore gives rise to liability on the part of the Community, in so far as it could legitimately and reasonably lead the applicant to believe in the imminent conclusion of the agreement for the provision of services. Embassy states that the Parliament asked it on 4 December 1995 to engage in an important series of investments with a view to the immediate implementation of the agreement at the very beginning of January 1996. The applicant emphasises, in that regard, that, in reality, it is the ACPC which takes the decision to award a contract to an undertaking, so that the information given to the applicant concerning the favourable opinion of the ACPC constitutes de facto a decision.

65 It states, moreover, that the Parliament confirmed the imminent signing of the contract at issue, in particular during the visit of its representatives to Strasbourg on 13 December 1995, and that no-one has ever disputed that it had been decided to award it the contract. For seven and a half months from 4 December 1995 it was never disputed by anyone within the Parliament that the contract had indeed been awarded to the applicant, who had even been called the `successful candidate' by the ACPC.

66 The applicant therefore considers that the Parliament was at fault in requiring from it, in view of the urgency of the situation, preparations which were particularly demanding in terms of time, energy and resources, especially financial, for a contract which it eventually decided not to conclude and which it claims is non-existent. It considers that the Parliament's attitude constitutes an infringement of a general rule of conduct amounting to negligence. It adds that, in any event,

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the Parliament should have told it directly that the contract would not be performed at the beginning of January 1996, so that it could have immediately put an end to the steps it was taking and limited as far as possible the amount of damage it claims to have suffered.

67 Finally, the applicant claims that, in reality, the Parliament acted with the aim of favouring another company, namely the company which proved to be the second lowest bidder and which, in the course of 1996, provided the service at issue on a temporary basis. Embassy infers that the Parliament exceeded the powers conferred on it, in the more general context of a misuse of procedure designed to favour a third party. That unlawfulness constitutes a fault.

68 The Parliament contends that no fault giving rise to liability on the part of the Community can be imputed to it. First, it is clear from the papers in the file that the only communication from the Parliament which could possibly have constituted a wrongful act is the telephone conversation which Mr Candidi had with Mr Hautot on 4 December 1995 after the meeting of the ACPC on the same day. However, according to the Parliament, during that conversation Mr Candidi confined himself to confirming that the ACPC had given an opinion in favour of the proposal to award the contract to the applicant. He never told the applicant that a decision had been taken in its favour.

69 The Parliament adds that, if the applicant thought it wise, in those circumstances, to incur expenses and to make irreversible investments, it manifestly acted with a lack of judgment which cannot be expected on the part of a reasonably prudent trader. That is all the more true because Article 12(2) of Directive 92/50 provides for the possibility of annulling an invitation to tender and Article 4 of the General Terms and Conditions not only provides for the possibility of such an annulment but also excludes any compensation for tenderers in such a case. The telephone conversation of 4 December 1995 was not, moreover, followed by any written confirmation on the part of the Parliament.

70 The Parliament also contends that, even if Mr Candidi was imprudent and the applicant was misled, any possible misunderstanding was cleared up during the visit of the Embassy representatives to Strasbourg on 13 December 1995, on which occasion they were told that the opinion of the ACPC was purely advisory and that the authorities were responsible for the final decision.

71 The Parliament considers therefore that neither in the telephone conversation of 4 December 1995 nor during the visit of 13 December 1995 can a fault be identified on its part such as to give the applicant a right to damages. That conclusion may be drawn from the case-law of the Court of Justice and the Court of First Instance (see Joined Cases 19/69, 20/69, 25/69 and 30/69 Richez-Parise and Others v Commission [1970] ECR 325, paragraphs 36 to 41, Case 137/79 Kohll v Commission [1980] ECR 2601, paragraphs 12 to 15, and Case T-133/89 Burban v Parliament [1990] ECR II-245, paragraph 36, confirmed by Case C-255/90 P Burban v Parliament [1992] ECR I-2253, paragraphs 10 to 12).

72 Secondly, the Parliament states that the applicant must have known that Directive 92/50 and the General Terms and Conditions, both of which are applicable to the contract in question, provide that all contracts must be concluded in writing. Consequently, by inferring from Mr Candidi's statements that the contract had already been awarded, or that its award was imminent or that some decision had been taken by the Parliament which could justify incurring the expenses necessary to perform the contract, the applicant itself acted imprudently irrespective of any fault on the part of the Parliament (see Case C-330/88 Grifoni v EAEC [1991] ECR I-1045, and Case T-133/89 Burban v Parliament [1990] ECR II-245, paragraph 36).

- Assessment by the Court

73 The applicant claims, in substance, that, by fuelling its expectations of winning the contract and by encouraging it to take all the necessary steps in order to be operational from the beginning of January 1996, the Parliament caused it damage. It is necessary, consequently, to determine,

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in particular, whether the conduct of the Parliament during the contested tendering procedure constitutes a breach of the principle of the protection of legitimate expectations such as to give rise to liability on the part of the Community.

74 It is apparent from the case-law that the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain justified expectations (see, to this effect, Case 265/85 Van den Bergh en Jurgens and Lopik v Commission [1987] ECR 1155, paragraph 44, Case C-152/88 Sofrimport v Commission [1990] ECR I-2477, paragraph 26, Case T-489/93 Unifruit Hellas v Commission [1994] ECR II-1201, paragraph 51, Joined Cases T-481/93 and T-484/93 Exporteurs in Levende Varkens and Others v Commission [1995] ECR II-2941, paragraph 148, and Case T-336/94 Efisol v Commission [1996] ECR II-1343, paragraph 31).

75 In that regard, it is important to determine whether a prudent trader could have guarded against the risks run in this case by the applicant. Generally, it must be remembered that traders must bear the economic risks inherent in their activities, taking account of the circumstances of each case (see, inter alia, Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraph 7, and Case 267/82 Développement and Clemessy v Commission [1986] ECR 1907, paragraph 33). In connection with a tendering procedure, those economic risks include, inter alia, the costs connected with the preparation of the bid. The expenses thus incurred must therefore be borne by the undertaking which has chosen to participate in the procedure, since it in no way follows from the mere fact that an undertaking has the right to take part in a tendering procedure that its tender will be accepted (see paragraphs 54 and 55 above, and the Opinion of Advocate General Mancini in Développement and Clemessy v Commission, p. 1908, 1912).

76 On the other hand, if, before the contract in question is awarded to the successful tenderer, a tenderer is encouraged by the contracting institution to make irreversible investments in advance and thereby to go beyond the risks inherent in the business under consideration, consisting in making a bid, non-contractual liability may be incurred on the part of the Community (see, to that effect, Sofrimport v Commission, paragraphs 28 and 29).

77 In this case, it is common ground that the Parliament, in the person of Mr Candidi, took the initiative of telephoning the applicant on 4 December 1995 to tell it that the ACPC had delivered that day an opinion in favour of the authorising officer's proposal to award it the contract. It is clear from Mr Candidi's testimony that that initiative was not part of the normal procedure which provided, on the contrary, for the finalisation of the contract by the Parliament before any contact with the successful undertaking. However, in this case, the new company had to be in a position to provide its services from the beginning of January 1996 and it was therefore a matter of urgency that all necessary preparations be made in order to avoid an interruption in the service. Mr Candidi confirmed moreover that, at the time when he contacted the applicant, there was nothing to indicate to him that a final decision against the applicant would be taken.

78 That version of the facts is corroborated, moreover, by the testimony of Ms Lahousse. She confirmed that the successful undertaking had to be operational from 1 January 1996. Consequently the applicant, as the successful tenderer in the contested invitation to tender, had to make preparations in order to be in a position to perform the contract with effect from 1 January 1996. However, according to Ms Lahousse, the Bureau had raised, at a meeting of 11 December 1995, the problem of the integrity of the executives of the applicant company, and this was discussed during the meeting of 13 December 1995. As a consequence, a huge information campaign regarding the ability of the applicant to manage the contract in question was undertaken by a large number of drivers. That led to the suspension of the procedure between December 1995 and May 1996. For that reason, the administration did not receive precise instructions from the authorities on what to do about the contested invitation to

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tender until May 1996.

79 It follows that, at the beginning of December 1995, both the Parliament and the applicant believed that Embassy would perform the contract with effect from 1 January 1996. Consequently, although the applicant was not expressly invited to make the investments needed in order to have an infrastructure capable of providing the service required with effect from 1 January 1996, it is clear, given the circumstances of the case, that, in so doing, it acted in a reasonable and realistic way in order to satisfy the requirements expressed by the Parliament. It is not disputed that Embassy, in order to be able to provide those services with effect from 1 January 1996, was bound to take the measures necessary for the performance of the contract immediately after receiving the information from Mr Candidi on 4 December 1995. That argument is, moreover, supported by the lack of reaction from the officials of the Parliament to the applicant's letter of 12 December 1995. That letter referred, in particular, to the making of certain investments by reason of the urgency of the situation in which the Parliament found itself (see paragraph 7 above).

80 In those circumstances, the Parliament cannot rely on the case-law according to which an incorrect interpretation of a provision does not constitute in itself a wrongful act (see Richez-Parise and Others v Commission, Kohll v Commission and Case T-133/89 Burban v Parliament [1990] ECR II-245). That case-law, concerning actions by officials who had received erroneous information as to their rights under the Staff Regulations, cannot be applied to the circumstances of this case. A simple error of information about the interpretation of certain provisions of the Staff Regulations is not comparable to a situation in which the Parliament induced in its intended co-contracting party the certainty of winning a contract and, in addition, encouraged that party to make irreversible investments.

81 The Parliament cannot argue either that the applicant, as a tenderer in the tendering procedure, should have remained in a state of readiness in all circumstances and hence that it was Embassy's responsibility to have the infrastructure needed to perform the contract. In that regard, attention should be given to the statements of the Embassy representatives at the witness hearing, according to which the contract at issue, involving about 40 chauffeur-driven cars, was of some magnitude and extremely important for the applicant's business. It should have been clear to the Parliament that Embassy, as a new provider of the services requested, could not be ready without considerable investments.

82 Furthermore, contrary to the Parliament's contention, Embassy's certainty of winning the contract was not removed at the visit of its representatives to Strasbourg on 13 December 1995. At that meeting, the discussion centred on the truthfulness of certain rumours and articles in the press relating to the probity of the Embassy executives and not on the question of whether the company would win the contract at issue. However, that problem of probity was apparently resolved on the very day of the meeting. It is apparent from the testimony of Mr Heuzer, the applicant's representative, that Mr Candidi told him and Mr Hautot, by telephone, on their way back from Strasbourg, that that problem had been resolved. That information, which is not disputed by the Parliament, is moreover confirmed by Mr Feidt's internal memorandum written on the same day (see paragraph 9 above), explaining that the allegations concerning the probity of the Embassy executives were without any foundation and requesting the agreement of the Secretary-General to the signing of the contract with Embassy as soon as possible.

83 It is therefore clear from the file that it was not until several days after the meeting of 13 December 1995 that the Parliament decided not to award the contract to Embassy with effect from 1 January 1996, but to award it, on a provisional basis, to Company A which was a party to the preceding contract.

84 On 19 December 1995 Mr Feidt referred to the ACPC a proposal that the contract with Company

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A should be extended for one month. It is clear from the minutes of the ACPC meeting (see paragraph 10 above) that the internal Parliament decisions allowing the signing of the contract with the applicant could not be finalised before the end of 1995 and that a contract running from 1 to 31 January 1996 would be concluded with Company A (as it was on 5 January 1996). On that occasion, moreover, the ACPC invited the authorising officer to make all necessary preparations for Embassy to sign the contract as soon as possible.

85 In that regard, without being contradicted on that point by the Parliament, Mr Hautot testified that nobody within the Parliament had contacted him in order to inform him that the contract had been provisionally awarded to another company for the period from 1 to 31 January 1996. It is therefore confirmed that it was as a result of steps he took himself that Mr Hautot discovered, shortly before Christmas, that the Parliament had, provisionally, awarded the contract to Company A. On that subject, it should be noted that the contracting body must comply, at each stage of a tendering procedure, not only with the principle of the equal treatment of tenderers, but also with the principle of transparency (see Commission v Belgium, cited above, paragraph 54). Therefore, a company which is closely involved in a tendering procedure and which has even been judged to be the successful tenderer, must receive, without any delay, precise information concerning the conduct of the entire procedure. Consequently, the Parliament ought to have informed the applicant before Christmas 1995 of the precise reasons for which it would not be awarded the contract with effect from 1 January 1996 as had been previously envisaged.

86 It follows from the foregoing that the Parliament, first, induced on the part of the applicant a legitimate expectation by encouraging it to take a risk which went beyond that normally run by tenderers in a tendering procedure and, secondly, failed to inform the applicant of an important change in the conduct of the tendering procedure.

87 In that regard it is not necessary to determine whether the officials of the Parliament acted in a way that was excusable. As the contracting body in the procedure for the award of contracts, the Parliament is obliged to show a coherent and consistent attitude towards its tenderers. The interventions of various administrative and political bodies within the Parliament cannot therefore justify the failure to comply with its obligations to the applicant.

88 It follows that the Parliament has committed a fault which gives rise to non-contractual liability on the part of the Community.

Damage and causal link

Arguments of the parties

89 The applicant considers that it has suffered the following damage:

(a) expenses and charges incurred by reason of its certainty of winning the contract, which can be broken down, according to invoices lodged with the reply, as follows:

- cost of active fleet reserved for the Parliament from 1 January 1996 until 31 March 1996 and insurance, namely 36 cars in total: BEF 3 272 545 (incl. VAT (including Value-Added Tax));

- parking expenses for the period from 1 January 1996 to 31 March 1996 for 36 vehicles: BEF 635 105 (incl. VAT);

- expenses of breaking off the contract for the fleet of 25 vehicles: BEF 1 146 980 (incl. VAT);

- telephone costs (GSM): BEF 424 480;

(b) expenses of organising the contract, consultants and other: BEF 886 600, split as follows:

- preparation of the contract, feasibility study and statistical analysis: BEF 131 325;

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- assistance and preparation of data, tender and organisational advice: BEF 181 500 (incl. VAT);

- preparation, negotiation for fleet of vehicles, telephone contract and parking: BEF 124 963;

- travel and representation expenses (flat-rate basis): BEF 150 000;

- secretarial expenses (flat-rate basis): BEF 52 000;

- fax, telephones, administration, copying and printing (flat-rate basis): BEF 100 000;

- expenses in connection with recruitment, medical examinations, training (drafting of contracts, hiring of a meeting room) and familiarisation expenses for the drivers: BEF 200 000;

- fees of Mr Hautot, working exclusively on the tender and subsequently on the setting up of the Parliament contract from October 1995 until 30 June 1996: BEF 540 000;

(c) loss of profit estimated over five years on the basis of a three-year contract renewable for two twelve-month periods: BEF 10 000 000.

90 In addition, the applicant claims that the wrongful attitude of the Parliament caused it non-material damage. It explains that, in the certainty that it would be awarded the contract, it made promises not only to its shareholders, but also to third parties, with a view to expansion and commercial success. The particularly unclear circumstances in which the contract was not awarded (rumours about its solvency, capital base, the quality of its services and the reliability of its shareholders and/or administrators) were circulated in Belgian society, and particularly in Brussels society, which is particularly closed and narrow.

91 The applicant estimates that, subject to an increase or reduction in that amount, the non-material damage must be assessed at a flat rate of BEF 5 000 000.

92 The applicant states, moreover, that, had it not, in one way or another, been certain of winning the contract, it would never have invested the sums spent on setting up the services promised, so that the existence of the causal link between the fault alleged and the damage claimed, as required by the case-law, is proven. Furthermore, the particularly negative rumours which, at one time, circulated about it would not have been repeated or had any effect at all in terms of image and commercial reputation if, at the end of the day, the contract had been performed and/or concluded normally.

93 The Parliament considers that the applicant limits itself to pleading various heads of damage without adducing the slightest evidence to show that it really suffered the harm alleged. It adds that the applicant has adduced no proof that the invoices which it has produced corresponded to expenses incurred in connection with their supposed relations.

94 Furthermore, the Parliament disputes owing the applicant anything in respect of supposed non-material damage. First, the applicant adduces no evidence to show that its reputation was damaged and, secondly, it has no evidence showing that the Parliament was the cause of, or participated in, the spreading of the rumours which it pleads in support of its application.

95 The Parliament contends, finally, that the causal link between the fault alleged and the damage claimed is completely lacking, by reason of the circumstance that, as early as 13 December 1995, at the meeting in Strasbourg, the applicant had been told that the opinion of the ACPC was purely advisory and that the Parliament took the final decision about the granting of the contract. It adds that the expenses which the applicant incurred in the preparation and performance of the contract, and its loss of profit, are not, in any event, compensable, since Embassy has not shown that the first contract had been effectively awarded to it.

Assessment of the Court

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96 In this case, it has been established that the fault committed by the Parliament gives rise to non-contractual liability on the part of the Community. On the other hand, no contractual liability has been incurred. In the circumstances the applicant is not justified in claiming compensation for its loss of profit, since that would result in giving effect to a contract which never existed.

97 Next, it is clear from Article 4 of the General Terms and Conditions that the contracting institution is not liable for any compensation with respect to tenderers whose tenders have not been accepted. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages (see Case T-13/96 TEAM v Commission [1998] ECR I-4073, paragraph 71). In this case the applicant has provided no evidence that would permit a derogation from that principle. The applicant is therefore not justified in claiming reimbursement of the expenses relating to the preparation of the tender.

98 It remains, therefore, to determine the damage which is connected with the investments made by Embassy by reason of the information received on 4 December 1995 showing that the ACPC had delivered an opinion in its favour.

99 On that subject, it is clear from the file that, after receiving that information, the applicant immediately took the measures necessary for the performance of the contract. In a letter dated 5 December 1995 Mr Hautot expresses himself in these terms: `I will take responsibility for all recruitment... and all the working meetings with [the Parliament].... bringing together the necessary fleet is the responsibility of [Mr Heuzer] and his assistants.... I would ask everyone to make the effort required to put in place a flawless organisation for 1.1.96...' Next, a letter of 6 December 1995 from Budget Rent a Car reads: `... further to your express request, we confirm that we are proceeding with the official order and, thereafter, with the registration of the vehicles requested for 1996. ... to avoid duplication of effort we would remind you again that we are currently proceeding with the acquisition of the telecommunications infrastructure (GSM) needed for the proper conduct of your business.'

100 In addition the applicant, in its letter of 12 December 1995, reported on the measures it had taken in order to be capable of dealing with the urgency of the situation announced by the Parliament. In that letter the applicant therefore mentioned the contracts for leasing cars and GSM rental, the recruitment of drivers and attending to the latters' social security, health insurance and tax situation (see paragraph 7 above).

101 It follows that the aforementioned investments show a direct causal link with the telephone conversation of 4 December 1995.

102 In addition, by making those investments, Embassy did not exhibit a lack of prudence. First, it has already been established that its certainty of winning the contract had not been removed at the meeting in Strasbourg on 13 December 1995 (see paragraph 82 above). Secondly, the Parliament has put forward no argument which casts doubt on the truthfulness of the version of the facts given by the Embassy representatives, under oath, according to which the investments mentioned in the letter of 12 December 1995 had all been made in December 1995. Thirdly, it is clear from the testimony of the Parliament officials that Embassy did not receive any information to indicate that it might not eventually win the contract (see paragraphs 82 to 85 above).

103 It goes without saying that, in the absence of a clear refusal to award it the contract, the applicant had no reason to annul, during the first months of 1996, the contracts already concluded. It is useful to recall, in that regard, the minutes of 19 December 1995 in which the ACPC, while giving an opinion in favour of a contract from 1 January 1996 to 31 January 1996 with Company A, invites the authorising officer to do everything necessary in order for the contract with Embassy

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to be signed as soon as possible. That confirms that the Parliament itself intended, at that juncture, to award the contract to Embassy.

104 In view of the foregoing, the compensable damage can be considered to be made up of the damage pleaded by the applicant and mentioned above at paragraph 89(a), `expenses and charges incurred by reason of its certainty of winning the contract', and those mentioned under (b), `expenses of recruitment, medical examinations, training and familiarisation expenses for the drivers' and `preparation, negotiation for fleet of vehicles, telephone contract and parking'.

105 In that regard the Court rejects the argument of the Parliament according to which the applicant's invoices do not show that the expenses were incurred in connection with their relations. No document in the file goes to disprove the fact that those invoices correspond to the measures which Embassy took in order to respond to the urgency of the situation in which the Parliament found itself, measures on which Embassy had already reported in its letter of 12 December 1995.

106 However, it is clear from the file produced by the applicant that the GSM rental costs (BEF 424 450) cover the period from 19 January 1996 to 18 October 1996. The fact that the rental began to run only on 19 January 1996 is said to be due to a special offer of a rent-free period. However, the Court finds it reasonable to limit the recoverable costs to those relating to the period from 19 January 1996 to 31 March 1996. Inasmuch as the applicant did not relinquish that contract at the end of March 1996, at which point it should have realised that it was very likely that the Parliament contract would not be awarded to it, it must itself bear the costs incurred thereafter. The sum recoverable for GSM rental, including the estimated cost for breaking off the contract, can therefore be assessed at BEF 200 000.

107 Since the Parliament has not disputed the correctness of the sums claimed by the applicant, it is appropriate to assess Embassy's loss on the basis of the figures it has supplied (see paragraph 89 above). Compensation for the damage suffered by the applicant therefore amounts to the total sum of BEF 5 579 593 (incl. VAT). However, since the VAT paid by the undertaking can be reclaimed and is not, consequently, borne by Embassy, it cannot be taken into account in calculating the damages. It is therefore necessary to take into consideration the sums claimed exclusive of VAT, namely, according to Embassy's invoices, BEF 1 875 000 + BEF 829 583 for car rental, BEF 947 917 for breaking off the contract, BEF 524 880 for the parking of cars, and BEF 103 275 for the file relating to cars and telephone costs. To that must be added the sum for GSM rental, earlier calculated at BEF 200 000, and the flat-rate sum relating to the recruitment of drivers, amounting to BEF 200 000. The sum of the material damage suffered by the applicant amounts therefore to BEF 4 680 655.

108 Given the circumstances of this case it is also necessary to compensate the applicant for the non-material damage it has suffered. It has certainly neither shown that its reputation has been damaged nor proved that the Parliament was responsible for causing such damage. However, it is clear from the file that, although, from December 1995, Embassy took preparatory measures in order to respond to the urgency of the situation outlined by the Parliament officials, it did not know until 19 June 1996 that the contract would not be awarded to it (see paragraph 19 above). In those circumstances, by sending it no information - which had however been requested on many occasions - concerning the outcome of the tendering procedure, the Parliament placed Embassy in a position of uncertainty and forced it to make useless efforts with a view to responding to the urgency of the situation.

109 Consequently, the Court considers it equitable to quantify the damage, both material and non-material, suffered by the applicant at a total sum of BEF 5 000 000.

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APPLICA	Person
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NATIONA	Belgium
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151 p.319-342

PROCEDU Arbitration clause

DATES of document: 17/12/1998
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Judgment of the Court of First Instance (Second Chamber)
First Instance (Second Chamber)First Instance (Second Chamber)1999.
CAS Succhi di Frutta SpA v Commission of the European Communities.
Common agricultural policy - Food aid - Tendering procedure - Payment of successful tenderers in fruit other than those specified in the notice of invitation to tender.
Joined cases T-191/96 and T-106/97.

1 Actions for annulment - Natural or legal persons - Measures of direct and individual concern to them - Commission decision amending, after the award of supply contracts for food aid, the form of payment for successful tenderers - Action brought by an unsuccessful tenderer - Admissible

(EC Treaty, Art. 173, fourth para. (now, after amendment, Art. 230, fourth para., EC))

2 Actions for annulment - Action seeking annulment of a decision confirming an earlier decision not contested in good time - Inadmissible - Meaning of a `confirmatory' decision - Where a decision is adopted after reconsideration of an earlier decision and on the basis of new evidence - Not a confirmatory decision

(EC Treaty, Art. 173 (now, after amendment, Art. 230 EC))

3 Actions for annulment - Interest in bringing proceedings - Action contesting a decision which has been implemented - Action brought by a tenderer contesting the award to competitors of a contract which has been implemented in full - Admissible

(EC Treaty, Art. 173 (now, after amendment, Art. 230 EC))

4 Agriculture - Common agricultural policy - Food aid - Programmes for the free supply of agricultural products intended for the people of Armenia and Azerbaijan - Regulation No 228/96 - Contract award procedure - Principles of the equal treatment of tenderers and of transparency - Scope - Amendment by the contracting authority of one of the conditions in the notice of invitation to tender - Breach

(Commission Regulation No 228/96)

5 Actions for annulment - Time-limits - Point from which time starts to run - Date on which the measure came to the applicant's knowledge - Obligation on learning of the existence of the measure to request the whole text thereof within a reasonable period

(EC Treaty, Art. 173, fifth para. (now, after amendment, Art. 230, fifth para., EC))

1 Persons other than those to whom a decision is addressed may claim to be individually concerned, for the purposes of the fourth paragraph of Article 173 of the Treaty (now, after amendment, Article 230, fourth paragraph, EC), only if the decision at issue affects them by reason of certain attributes peculiar to them or by reason of factual circumstances in which they are distinguished from all other persons, and by virtue of those factors distinguishes them individually in the same way as the person addressed.

A decision adopted in implementation of a food aid programme, by which the Commission provides that peaches are to be substituted for the apples and oranges initially provided for in the notice of invitation to tender as the means of paying successful tenderers, and which amends the coefficients of equivalence as between those products, established in an earlier decision, must be regarded as an independent decision - distinct from that earlier decision - which amends the conditions of the invitation to tender. Such a decision is of individual concern, within the meaning of the fourth paragraph of Article 173 of the Treaty, to an unsuccessful tenderer. Such a tenderer is not individually concerned merely by the Commission decision which determines the fate, be it favourable or unfavourable, of each of the tenders submitted in answer to the notice of invitation to tender. It also retains

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an individual interest in ensuring that the conditions of the notice of invitation to tender are complied with at the stage when the award itself is implemented.

2 A decision adopted by the Commission in implementation of a food aid programme by means of a tendering procedure, following reconsideration of an earlier decision, cannot be regarded as a measure which is merely confirmatory of the earlier decision, where the new decision lays down different conditions in the invitation to tender and is based on new evidence. An action for annulment of that decision cannot be declared inadmissible, therefore, on the ground that the earlier decision was not contested in good time.

3 Even where a decision to award a contract has been fully implemented for the benefit of other competitors, a tenderer retains an interest in the annulment of such a decision; such interest consists either in the tenderer's being properly restored by the Commission to his original position or in prompting the Commission to make suitable amendments in the future to the system of invitations to tender if that system is found to be incompatible with certain legal requirements.

4 In the context of the tendering system for the implementation of Regulation No 228/96 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, the procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders. The contracting authority is obliged to specify clearly in the notice of invitation to tender the subject-matter and the conditions of the tendering procedure, and to comply strictly with the conditions laid down.

A decision by which the Commission authorises successful tenderers to take by way of payment for their supplies products other than those specified in the notice of invitation to tender, whereas that substitution was not provided for in that notice as prescribed by the Regulation, and which fixes coefficients of equivalence in relation to those products by reference to circumstances arising after the award infringes the notice of invitation to tender and also the principles of transparency and equal treatment.

5 The point from which time starts to run for the purposes of bringing an action for annulment cannot be fixed at the date on which the applicant claims to have had sight of the full text of the contested decision, where it is established that the applicant already had knowledge of the existence of that measure and a reasonable period for requesting the full text thereof had long since elapsed by that date. It is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period.

In Joined Cases T-191/96 and T-106/97,

CAS Succhi di Frutta SpA, a company incorporated under Italian law, established in Castagnaro, Italy, represented by Alberto Miele, of the Padua Bar, Antonio Tizzano and Gian Michele Roberti, of the Naples Bar, and Carlo Scarpa, of the Venice Bar,

applicant,

v

Commission of the European Communities, represented by Paolo Ziotti, of its Legal Service, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decisions C (96) 2208 of 6 September 1996 (Case T-191/96) amending its decision of 14 June 1996, and C (96) 1916 of 22 July 1996 (Case T-106/97)

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on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan provided for in Regulation (EC) No 228/96,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

(Second Chamber),

composed of: A. Potocki, President, C.W. Bellamy and A.W.H. Meij, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 10 February 1999,

gives the following

Judgment

Costs

104 Under the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. According to Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bear its own costs, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

105 Since the Commission has been unsuccessful in Case T-191/96, it must be ordered to pay the costs in that case, as applied for by the applicant. As regards the proceedings for interim relief in Case T-191/96 R, the Court of First Instance considers it appropriate, in the light of the order of the President of the Court of First Instance of 26 February 1997, to order each party to bear its own costs.

106 By contrast, since the applicant has been unsuccessful in Case T-106/97, it must be ordered to pay the costs in that case, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE

(Second Chamber)

hereby:

1. Annuls Commission Decision C (96) 2208 of 6 September 1996;

2. Dismisses the application in Case T-106/97 as inadmissible;

3. Orders the Commission to pay the costs in Case T-191/96, orders each party to bear its own costs in Case T-191/96 R, and orders the applicant to pay the costs relating to Case T-106/97.

Legal framework, facts and procedure

1 On 4 August 1995, the Council adopted Regulation (EC) No 1975/95 on actions for the free supply of agricultural products to the peoples of Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan (OJ 1995 L 191, p. 2). The first two recitals in the preamble to that regulation state that `it is advisable to supply Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan with agricultural products in order to improve the food supply situation, taking into account the diversity of local situations without compromising development towards supplies according to market rules', and that `the Community has agricultural products in stock following intervention measures and it is advisable, exceptionally, to dispose, in priority, of these products in carrying out the action envisaged'.

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2 Article 1 of Regulation No 1975/95 states:

`Under the conditions laid down by this Regulation, measures shall be taken for the free supply to Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan of agricultural products, to be determined, which are available as a result of intervention measures; in the case where the products are temporarily not available in intervention they may be mobilised on the Community market in order to meet the commitments of the Community.'

3 Article 2 of Regulation No 1975/95 provides:

`1. The products shall be supplied unprocessed or in processed form.

2. The measures may also relate to foodstuffs available or which may be obtained on the market by payment with products coming from intervention stocks and belonging to the same group of products.

3. The supply costs, including transport and, where applicable, processing costs, shall be determined by invitation to tender or, for reasons connected with urgency or with difficulties of transportation, by direct agreement procedure.

...'

4 Subsequently, the Commission adopted Regulation (EC) No 2009/95 of 18 August 1995 laying down detailed rules for the free supply of agricultural products held in intervention stocks to Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan pursuant to Regulation No 1975/95 (OJ 1995 L 196, p. 4).

5 The second recital in the preamble to Regulation No 2009/95 states:

`... free supplies are foreseen in the form of agricultural products from intervention stocks without further processing and of products not available from intervention stocks but belonging to the same group of products;... therefore, specific detailed rules should be laid down for supplies of processed products;... provisions should be made in particular for such supplies to be paid for in raw materials from intervention stocks'.

6 Article 2(2) of Regulation No 2009/95 provides:

`The invitation to tender may relate to the quantity of products to be removed physically from intervention stocks as payment for the supply of processed products from the same group of products to a delivery stage to be determined in the notice of invitation to tender'.

7 According to Article 6(1)(e)(1) of Regulation No 2009/95, where Article 2(2) applies, tenders are only valid where they indicate `the proposed quantity of product, expressed in tonnes (net weight), to be exchanged for one tonne (net) of finished product under the conditions and to the delivery stage specified in the invitation to tender'.

8 Under Article 6(2) of Regulation No 2009/95:

`Tenders submitted which are not in accordance with the conditions of the present Article, or which only conform partially to the conditions of the tender Regulation or which contain conditions other than those laid down in this Regulation may be rejected.'

9 According to Article 15(1) of Regulation No 2009/95, notices of invitation to tender are to specify in particular:

`- the additional terms and conditions,

- the lots...,

...

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- the main physical and technical characteristics of the various lots,

...'.

10 According to Article 15(2) of Regulation No 2009/95, in the case of invitations to tender as provided for in Article 2(2), the notice is to specify in particular:

`- the lot or group of lots to be taken over in payment for the supply,

- the characteristics of the processed product to be supplied, namely type, quantity, quality, packaging, etc.'.

11 The Commission then adopted Regulation (EC) No 228/96 of 7 February 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan (OJ 1996 L 30, p. 18).

12 The first and second recitals in the preamble to Regulation No 228/96 state:

`... Regulation (EC) No 1975/95 provides that actions for the free supply of agricultural products may relate to foodstuffs available or capable of being obtained on the market by means of payment with products available following intervention measures;

... to respond to requests from the beneficiary States for fruit juices and fruit jams, it is appropriate to open a tender to determine the most advantageous conditions for the supply of such products and to provide the payment of the successful tenderer with fruit withdrawn from the market following the withdrawal operations in application of Articles 15 and 15A of Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organisation of the market in fruit and vegetables (OJ 1972 L 118, p. 1), as last amended by Commission Regulation (EC) No 1363/95 (OJ 1995 L 132, p. 8).'

13 According to Article 1 of Regulation No 228/96:

`A tendering procedure is hereby initiated for the supply of a maximum of 1 000 tonnes of fruit juice, 1 000 tonnes of concentrated fruit juice and 1 000 tonnes of fruit jams as indicated in Annex I, in accordance with the provisions of Regulation (EC) No 2009/95, and in particular Article 2(2) thereof and the specific provisions of the present Regulation.'

14 Annex I to Regulation No 228/96 contains the following details:

Lot No 1 Product to be supplied: 500 tonnes (net) of apple juice Product to be withdrawn: Apples

Lot No 2 Product to be supplied: 500 tonnes (net) of apple juice concentrated to 50%

Product to be withdrawn: Apples

Lot No 3 Product to be supplied: 500 tonnes (net) of orange juice Product to be withdrawn: Oranges

Lot No 4 Product to be supplied: 500 tonnes (net) of orange juice concentrated to 50%

Product to be withdrawn: Oranges

Lot No 5 Product to be supplied: 500 tonnes net of diverse fruit jams Product to be withdrawn: Apples

Lot No 6 Product to be supplied: 500 tonnes net of diverse fruit jams Product to be withdrawn: Oranges

For each of the lots, the delivery date is fixed at 20 March 1996.

15 By letter of 15 February 1996, the applicant submitted a tender for Lots Nos 1 and 2, offering to withdraw 12 500 tonnes and 25 000 tonnes of apples respectively as payment for the supply of

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its products for those two lots.

16 Trento Frutta SpA (`Trento Frutta') and Loma GmbH (`Loma') offered, respectively, to withdraw 8 000 tonnes of apples for Lot No 1 and 13 500 tonnes of apples for Lot No 2. In addition, Trento Frutta stated that, in the event of there not being enough apples, it was prepared to accept peaches.

17 On 6 March 1996, the Commission sent to the Azienda di Stato per gli Interventi nel Mercato Agricolo (the Italian intervention agency, `AIMA'), with a copy to Trento Frutta, Memorandum No 10663 stating that it had awarded Lots Nos 1, 3, 4, 5 and 6 to Trento Frutta. According to that memorandum, Trento Frutta would receive as payment, in priority, the following quantities of fruit withdrawn from the market:

Lot No 1 8 000 tonnes of apples or, alternatively, 8 000 tonnes of peaches;

Lot No 3 20 000 tonnes of oranges or, alternatively, 8 500 tonnes of apples or 8 500 tonnes of peaches;

Lot No 4 32 000 tonnes of oranges or, alternatively, 13 000 tonnes of apples or 13 000 tonnes of peaches;

Lot No 5 18 000 tonnes of apples or, alternatively, 18 000 tonnes of peaches;

Lot No 6 45 000 tonnes of oranges or, alternatively, 18 000 tonnes of apples or 18 000 tonnes of peaches.

18 On 13 March 1996, the Commission sent Memorandum No 11832 to AIMA informing it that it had awarded Lot No 2 to Loma in return for the withdrawal of 13 500 tonnes of apples.

19 Pursuant to Regulation No 228/96, AIMA took the measures necessary for giving effect to Commission Memoranda Nos 10663 and 11832, cited above, by means of Circular No 93/96 of 21 March 1996 which reproduced their content.

20 On 14 June 1996, the Commission adopted Decision C (96) 1453 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, pursuant to Regulation No 228/96 (`the Decision of 14 June 1996'). According to the second recital in the preamble to that decision, since the award, the quantities of products in question withdrawn from the market had been negligible in comparison with the quantities required, although the withdrawal season was virtually over. It was therefore necessary, in order to complete that operation, to allow the successful tenderers wishing to do so to take as payment, in place of apples and oranges, other products withdrawn from the markets in predetermined quantities reflecting the processing equivalence of the products in question.

21 Article 1 of the Decision of 14 June 1996 provides that the products withdrawn from the market be made available to the successful tenderers (namely Trento Frutta and Loma) at their request, according to the following coefficients of equivalence:

(a) 1 tonne of peaches for 1 tonne of apples, (b) 0.667 tonne of apricots for 1 tonne of apples, (c) 0.407 tonne of peaches for 1 tonne of oranges, (d) 0.270 tonne of apricots for 1 tonne of oranges.

22 That decision was addressed to the Italian Republic, the French Republic, the Hellenic Republic and the Kingdom of Spain.

23 On 22 July 1996 the Commission adopted Decision C (96) 1916 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, pursuant to Regulation No 228/96 (`the Decision of 22 July 1996'). According to the third recital in the preamble to that decision, the quantity of peaches and apricots available would not be sufficient to complete the operation

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and it was appropriate to allow, in addition, the substitution of nectarines for the apples to be withdrawn by the successful tenderers.

24 Article 1 of the Decision of 22 July 1996 provides that the products withdrawn from the market are made available to Trento Frutta and Loma, at their request, according to the coefficient of equivalence of 1.4 tonnes of nectarines for 1 tonne of apples.

25 That decision was addressed to the Italian Republic.

26 By action brought before the Tribunale Amministrativo Regionale (Regional Administrative Court), Lazio, and notified to AIMA on 24 July 1996, the applicant sought the annulment of AIMA's Circular No 93/96, cited above.

27 On 26 July 1996, at the meeting organised at its request with the staff of Commission Directorate-General VI-Agriculture (DG VI), the applicant presented its objections to the substitution, authorised by the Commission, of other fruit for apples and oranges and obtained a copy of the Decision of 14 June 1996.

28 On 2 August 1996, the applicant sent to the Commission Technical Report No 94 prepared by the Dipartimento Territorio e Sistemi Agro-Forestali (Department of Land and Forestry Management) of the University of Padua on the coefficients of economic equivalence of certain fruit to be used for processing into juice.

29 On 6 September 1996, the Commission adopted Decision C (96) 2208 amending the Decision of 14 June 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, pursuant to Regulation No 228/96 (`the Decision of 6 September 1996'). According to the second recital in the preamble to that decision, in order to bring about a more balanced substitution of products, over the whole withdrawal period for peaches, between the apples and oranges used for the supply of fruit juice to the people of the Caucasus, on the one hand, and the peaches withdrawn from the market to pay for those supplies, on the other, it was appropriate to amend the coefficients established in the Decision of 14 June 1996. The new coefficients were to be applied only to products which had not yet been withdrawn by the successful tenderers as payment for supplies.

30 Under Article 1 of the Decision of 6 September 1996, Article 1(a) and (c) of the Decision of 14 June 1996 were amended as follows:

`(a) 0.914 tonne of peaches for 1 tonne of apples,... (c) 0.372 tonne of peaches for 1 tonne of oranges.'

31 That decision was addressed to the Italian Republic, the French Republic, the Hellenic Republic and the Kingdom of Spain.

32 By application lodged at the Registry of the Court of First Instance on 25 November 1996, the applicant brought an action for annulment of the Decision of 6 September 1996. That case was registered under number T-191/96.

33 By order of 26 February 1997 in Case T-191/96 R CAS Succhi di Frutta v Commission [1997] ECR II-211, the President of the Court of First Instance dismissed an application for suspension of the operation of the Decision of 6 September 1996, made by the applicant on 16 January 1997.

34 By application lodged at the Registry of the Court of First Instance on 9 April 1997, the applicant brought an action for annulment of the Decision of 22 July 1996, claiming that it had received a copy of that decision only on 30 January 1997, in the context of the proceedings for interim relief. That case was registered under number T-106/97.

35 By order of 20 March 1998, the President of the Second Chamber of the Court of First Instance dismissed an application by Allione Industria Alimentare SpA for leave to intervene in support

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of the form of order sought by the applicant in Case T-191/96 CAS Succhi di Frutta v Commission [1998] ECR II-575.

36 By order of 14 October 1998, the President of the Second Chamber of the Court of First Instance ordered that Cases T-191/96 and T-106/97 be joined for the purposes of the oral procedure and the judgment.

37 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without taking any measures of preparatory inquiry. However, it requested the Commission to indicate in writing before the hearing what had been the state of apple stocks available to the intervention agencies at the material time. The Commission complied with that request within the time-limit prescribed. The hearing took place on 10 February 1999.

Forms of order

38 In Case T-191/96, the applicant claims that the Court should:

- annul the Decision of 6 September 1996 amending the Decision of 14 June 1996;

- order the Commission to pay the costs.

39 In Case T-106/97, the applicant claims that the Court should:

- annul the Decision of 22 July 1996;

- order the Commission to pay the costs.

40 In these two cases, the Commission contends that the Court should:

- dismiss the application as inadmissible or, in the alternative, unfounded;

- order the applicant to pay the costs.

Case T-191/96

Admissibility

Arguments of the parties

41 The Commission contends that the application is inadmissible on two grounds: the applicant is not directly and individually concerned by the Decision of 6 September 1996, and it has no interest in obtaining its annulment.

42 The Commission points out first of all that the applicant does not dispute the award of the lots for which it submitted a tender. It contends that the act contested in this case did not provide for the replacement of apples and oranges by peaches, but merely amended the coefficients of equivalence between those fruits, that substitution having been authorised by the Decision of 14 June 1996.

43 The fact that those coefficients of equivalence may be more or less favourable to the successful tenderers can be of individual concern only to them. The applicant's situation, in relation to the Decision of 6 September 1996, is not in any way different from that of any operator in the sector concerned, other than the successful tenderers for the contract (see, in particular, order in Case T-183/94 Cantina Cooperativa fra Produttori Vitivinicoli di Torre di Mosto and Others v Commission [1995] ECR II-1941, paragraph 49).

44 The case-law on challenging a tendering procedure, in particular, Case 92/78 Simmenthal v Commission [1979] ECR 777, is not relevant. The Decision of 6 September 1996 is a measure independent of the notice of invitation to tender, adopted after the award of the contract, which it does not amend in any way. The successful tenderers are indeed those tenderers who offered to accept the smallest quantity of apples as payment. In those circumstances, the fact that the applicant took part in

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the tendering procedure in question does not confer on it any special attribute, as compared with any other third person, in relation to the Decision of 6 September 1996.

45 Furthermore, the mere fact that a measure may exert an influence on the competitive relationships existing on the market in question is not sufficient to enable any trader in any form of competitive relationship with the addressee of the measure to be regarded as directly and individually concerned by that measure (Joined Cases 10/68 and 18/68 Eridania Zuccherifici and Others v Commission [1969] ECR 459, paragraph 7).

46 Moreover, since the contested decision amended the coefficients of equivalence fixed in the Decision of 14 June 1996 along the lines the applicant wished, it had no interest in requesting the annulment of that decision since the effect of that annulment would be to reinstate the previous coefficients (see orders in Case T-6/95 R Cantine dei Colli Berici v Commission [1995] ECR II-647, paragraph 29; and in Case T-6/95 Cantine dei Colli Berici v Commission, not published in the ECR, paragraph 46).

47 The Commission states, finally, that the arguments put forward by the applicant could have been directed against the Decision of 14 June 1996, which was more unfavourable to it, but which it did not challenge within the prescribed time.

48 The applicant claims that it is directly concerned by the contested decision. It is also individually concerned by the contested decision, first, in its capacity as tenderer (Simmenthal v Commission, paragraphs 25 and 26) and, second, by reason of the extremely serious economic loss that it has suffered because of the allocation to competitors, as payment for their supplies, of substitute fruits in excessive quantities. It points out that the contested decision was adopted after the Commission had, at its request, fully reconsidered the situation.

49 The applicant also claims that it retains an interest in seeking the annulment of the contested decision, even if the award of the contract for the benefit of its competitors has been fully implemented (Simmenthal v Commission, paragraph 32).

Findings of the Court

50 The fourth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC), confers on natural or legal persons the right to bring an action for annulment against decisions addressed to them and against decisions which, although in the form of a regulation or a decision addressed to another person, are of direct and individual concern to them.

51 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned, for the purpose of that provision, only if the decision at issue affects them by reason of certain attributes peculiar to them or by reason of factual circumstances in which they are distinguished from all other persons, and by virtue of those factors distinguishes them individually in the same way as the person addressed (judgment in Case 25/62 Plaumann v Commission [1963] ECR 95; see, for example, judgment in Case T-86/96 Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd Fluggesellschaft v Commission [1999] ECR II-0000, paragraph 42; and the case-law cited therein).

52 It is common ground in this case that the applicant took part in the bidding for Lots Nos 1 and 2, and that Lot No 1 was awarded to Trento Frutta.

53 Moreover, the Commission does not dispute the fact that its Memorandum No 10663 of 6 March 1996, cited above, contains elements which do not correspond to the conditions laid down in the notice of invitation to tender provided for by Regulation No 228/96, in so far as it provides, inter alia, for the substitution of peaches for apples and oranges as the means of payment for the supplies from Trento Frutta. That memorandum therefore amends the arrangements for payment prescribed

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for the different lots.

54 The amendment of the arrangements for payment prescribed for the different lots was confirmed by the Decision of 14 June 1996 with regard to all the successful tenderers. Subsequently, the applicant asked the Commission to reconsider that decision. For that purpose, a meeting between the staff of DG VI and the applicant took place on 26 July 1996, following which the applicant sent to the Commission Technical Report No 94 (paragraphs 27 to 28 above).

55 In the light of the new information brought to its attention in this way and of a reconsideration of the situation as a whole, in particular of the level of the price of peaches on the Community market recorded by its staff in mid-August 1996 (see the DG VI working document, Annex 11 to the defence), the Commission adopted the contested Decision of 6 September 1996, laying down new coefficients of equivalence between peaches, on the one hand, and apples and oranges, on the other.

56 Consequently, the contested decision must be regarded as an independent decision, taken following a request from the applicant, on the basis of new information, and it amends the conditions of the invitation to tender in that it provides, with different coefficients of equivalence, for the substitution of peaches for apples and oranges as a means of payment to the successful tenderers in spite of the contacts which took place in the interim between the parties.

57 In those circumstances, it must be held that the applicant is individually concerned by the contested decision. It is concerned, first, in its capacity as unsuccessful tenderer in so far as one of the important conditions of the invitation to tender - that concerning the means of payment for the supplies at issue - was later amended by the Commission. Such a tenderer is not individually concerned merely by the Commission decision which determines the fate, be it favourable or unfavourable, of each of the tenders submitted in answer to the notice of invitation to tender (Simmenthal v Commission, paragraph 25). It also retains an individual interest in ensuring that the conditions of the notice of invitation to tender are complied with at the stage when the award itself is implemented. The fact that the Commission did not point out in the notice of invitation to tender the possibility for successful tenderers to obtain fruit other than those prescribed as payment for their supplies denied the applicant the chance of submitting a tender different from that which it had submitted, and of thus having the same opportunity as Trento Frutta.

58 Second, in the particular circumstances of the case, the applicant is individually concerned by the contested decision because it was adopted after a reconsideration of the situation as a whole, undertaken at the applicant's request and in the light, in particular, of the additional information which it presented to the Commission.

59 The applicant is also directly concerned by the contested decision since the Commission did not leave any margin of discretion to the national authorities in the matter of the methods for implementing that decision (see, for example, the judgment in Joined Cases 41/70, 42/70, 43/70, 44/70 International Fruit Company and Others v Commission [1971] ECR 411, paragraphs 25 to 28).

60 Furthermore, the argument based on the fact that the applicant did not challenge the Decision of 14 June 1996 within the prescribed time-limit must be rejected, since the contested decision cannot be regarded as a measure which is merely confirmatory of that decision. As stated above, the Commission agreed, at the applicant's request, to reconsider the Decision of 14 June 1996, and the contested decision was adopted following that reconsideration. Furthermore, the contested decision lays down different coefficients of equivalence and is based on new evidence. In those circumstances, the applicant's action cannot be declared inadmissible on that basis (see judgments in Case T-82/92 Cortes Jimenez and Others v Commission [1994] ECR-SC II-237, paragraph 14; Case T-331/94 IPK v Commission [1997] ECR II-1665, paragraph 24; Case T-130/96 Aquilino v Council [1998] ECR-SC II-1017, paragraph 34; and Case T-100/96 Vicente-Nuñez v Commission

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[1998] ECR-SC II-1779, paragraphs 37 to 42).

61 The argument according to which the applicant has no interest in bringing proceedings since the sole effect of annulling the contested decision would be to reinstate the coefficients laid down in the Decision of 14 June 1996, which are less favourable to the applicant, must also be rejected.

62 It should not be presumed, for the purpose of determining whether the present action is admissible, that a judgment annulling the Decision of 6 September 1996 would have the effect merely of reviving the coefficients of equivalence laid down by the Decision of 14 June 1996, having regard, in particular, to the Commission's obligation to take the necessary measures to comply with the present judgment in accordance with Article 176 of the EC Treaty (now Article 233 EC) (see the judgment in Joined Cases 97/86, 99/86, 193/86 and 215/86 Asteris v Commission [1988] ECR 2181, paragraphs 27 to 32).

63 In any event, it is clear from paragraph 32 of Simmenthal v Commission that, even where a decision to award a contract has been fully implemented for the benefit of other competitors, a tenderer retains an interest in the annulment of such a decision; such interest consists either in the tenderer's being properly restored by the Commission to his original position or in prompting the Commission to make suitable amendments in the future to the system of invitations to tender if that system is found to be incompatible with certain legal requirements. That case-law is applicable to the present case, particularly since it is common ground that the operations prescribed by the notice of invitation to tender at issue had not yet been fully implemented at the time when the contested decision was adopted.

64 It follows that the application is admissible.

Substance

65 In support of its claim for the annulment of the Decision of 6 September 1996, the applicant bases its case on seven pleas in law alleging: (1) infringement of Regulation No 228/96 and breach of the principles of transparency and equal treatment; (2) infringement of Regulations Nos 1975/95 and 2009/95; (3) misuse of powers; (4) manifest errors of assessment; (5) infringement of Articles 39 of the EC Treaty (now Article 33 EC) and 40(3) of the EC Treaty (now, after amendment, Article 34(3) EC) and of Regulation No 1035/72 of 18 May 1972, cited above; (6) an inadequate statement of reasons; and (7) manifest inappropriateness of the replacement mechanism.

66 The first plea, alleging infringement of Regulation No 228/96 and breach of the principles of transparency and equal treatment, should first be examined.

Arguments of the parties

67 The applicant claims that, by authorising the successful tenderer to withdraw, in payment for the supply, a product different from that prescribed by Regulation No 228/96, the Commission infringed that regulation and was in breach of the principles of transparency and equal treatment.

68 The Commission contends, first, that the aim of the legislation at issue is to supply humanitarian aid to the people of Armenia and Azerbaijan by using products withdrawn from the market by the intervention agencies in order to maintain the prices of agricultural products. In that context, the possibility of replacing the fruit specified in Annex I to Regulation No 228/96 by other fruit withdrawn from the market is apparent from the first and second recitals in the preamble to that regulation, and from Regulations Nos 1975/95 and 2009/95.

69 The first and second recitals in the preamble to Regulation No 228/96 and the second recital in the preamble to Regulation No 1975/95 provide only that the fruit handed over in payment to the successful tenderers is taken from the fruit stocks withdrawn from the market following intervention

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measures, without stating that that fruit given in payment to the successful tenderers must be expressly referred to in the notice of invitation to tender. In particular, Article 2(2) of Regulation No 1975/95 and Article 2(2) of Regulation No 2009/95 do not require that the fruit withdrawn from the intervention stocks be identical to that which is to be supplied by the successful tenderers, but merely that it must belong `to the same group of products'.

70 Furthermore, such an obligation cannot be reconciled with the real needs of the States receiving the aid at issue. Thus, if one of them needs orange juice and there are not enough oranges withdrawn from the market, it is clear that the successful tenderers would be paid with other fruit. Equally, in payment for the supply of various fruit jams which are the subject-matter of Lots Nos 5 and 6 of Regulation No 228/96, the product to be withdrawn is oranges or apples.

71 The replacement, after the award, of the fruits to be received as payment does not in any way constitute a breach of the principles of equal treatment and transparency in that it had no influence on the course of the tendering procedure. The tenderers all competed under the same conditions, namely those laid down by Regulation No 228/96 and Annex I thereto. Since the replacement of fruit took place after the award, it did not have the slightest influence on the course of the operation.

Findings of the Court

72 In connection with Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), the Court of Justice held that, when a contracting entity had laid down prescriptive requirements in the contract documents, observance of the principle of equal treatment of tenderers required that all the tenders must comply with them so as to ensure objective comparison of the tenders (judgments in Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 37; and Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 70). In addition, it has been held that the procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders (Commission v Belgium, cited above, paragraph 54).

73 That case-law can be applied to this case. It thus follows that the Commission was obliged to specify clearly in the notice of invitation to tender the subject-matter and the conditions of the tendering procedure, and to comply strictly with the conditions laid down, so as to afford equality of opportunity to all tenderers when formulating their tenders. In particular, the Commission could not subsequently amend the conditions of the tendering procedure, and in particular those relating to the tender to be submitted, in a manner not laid down by the notice of invitation to tender itself, without offending against the principle of transparency.

74 As stated above, the contested decision allows the successful tenderers, namely Trento Frutta and Loma, to take as payment for their supplies products other than those specified in the notice of invitation to tender and, in particular, peaches instead of apples and oranges.

75 Such a substitution is not provided for in the notice of invitation to tender as set out in Regulation No 228/96. It is clear from Annex I to that regulation, interpreted in accordance with Article 15(1) and (2) of Regulation No 2009/95 (see paragraphs 9 to 13 above), that only the products listed, namely, as regards Lots Nos 1, 2 and 5, apples, and, in respect of Lots Nos 3, 4 and 6, oranges, could be withdrawn by the successful tenderers as payment for the supplies.

76 Furthermore, it is clear from Article 6(1)(e)(1) of Regulation No 2009/95 (see paragraph 7 above) that tenders were to be valid only where they indicated the quantity of product requested by the tenderer as payment for the supply of processed products under the conditions laid down in the notice of invitation to tender.

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77 The substitution of peaches for apples or oranges as payment for the supplies concerned, and the fixing of the coefficients of equivalence between those fruits therefore constitute a significant amendment of an essential condition of the notice of invitation to tender, namely the arrangements for payment for the products to be supplied.

78 However, contrary to what the Commission contends, none of the provisions it cites, in particular, the first and second recitals in the preamble to Regulation No 228/96 and Article 2(2) of Regulation No 1975/95 (paragraphs 3 and 12 above), authorises such a substitution, even by implication. Neither is substitution provided for in the situation, put forward by the Commission, where the quantities of fruit in the intervention stocks are insufficient and the substitute fruit supplied as payment to the successful tenderers belongs to the `same group of products' as their supplies.

79 Furthermore, the contested decision not only provides for the substitution of peaches for apples and oranges, but also fixes coefficients of equivalence by reference to circumstances arising after the award, namely the level of the prices of the fruit concerned on the market in mid-August 1996 although the taking into consideration of such evidence, available after the award, in order to determine the arrangements for payment applicable to the supplies at issue, is not in any way provided for in the notice of invitation to tender.

80 In addition, the information supplied by the Commission in the course of the proceedings (see Annex 3 to the defence and the Commission's reply to the questions put to it by the Court) does not show that, at the time when the contested decision was adopted, apples were not available in the intervention stocks, so as to prevent the performance of the operations specified in the notice of invitation to tender.

81 Even if there had been such a lack of availability, at the Community level, of apples which could be withdrawn, the fact remains that it was for the Commission to lay down, in the notice of invitation to tender, the precise conditions for any substitution of other fruit for that prescribed as payment for the supplies at issue, in order to comply with the principles of transparency and equal treatment. Failing that, it was for the Commission to initiate a new tendering procedure.

82 It follows from the foregoing that the contested decision infringes the notice of invitation to tender prescribed in Regulation No 228/96 and also the principles of transparency and equal treatment, and that it must therefore be annulled, without its being necessary to rule on the other pleas in law put forward by the applicant.

Case T-106/97

83 The admissibility of the action must be examined.

Arguments of the parties

84 The Commission contends that the action brought on 9 April 1997 was brought after the expiry of the time-limit laid down in the fifth paragraph of Article 173 of the Treaty, and that time began to run on 31 October 1996.

85 The applicant was certainly aware of the content of the Decision of 22 July 1996 at the hearing of 31 October 1996 before the Tribunale Amministrativo Regionale, Lazio. At that date (and even 10 days before, that is 21 October 1996, according to AIMA's pleading), AIMA had produced in the case pending before that court Commission Memorandum No 29903 of 23 July 1996 (Annex 11 to the defence in Case T-106/97). That memorandum reiterates the content of the Decision of 22 July 1996 and, in particular, the coefficient of equivalence between apples and nectarines. The text of that decision was even annexed to it.

86 In its application in Case T-191/96 (paragraph 12), lodged at the Registry of the Court of First Instance on 25 November 1996, the applicant furthermore claimed to know that on 22 July

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1996 the Commission had adopted a decision which extended, in relation to the Decision of 14 June 1996, the `possibility of substitution' of fruit. The applicant also showed that it knew the content of the Decision of 22 July 1996 by making express reference, in paragraph 23 of the application in Case T-191/96, to `the fruits in question (apples and oranges, on the one hand, peaches and apricots and nectarines, on the other)'.

87 The fact that the applicant did not request a copy of Memorandum No 29903 of 23 July 1996, cited above, in the context of the proceedings before the Tribunale Amministrativo Regionale, Lazio, and that it did not take the trouble to have that document communicated to it, even though it had brought an action against AIMA in respect of the tendering procedure at issue, constitutes grave negligence and cannot be pleaded in justification of its failure to observe the time-limit for bringing proceedings in the present case.

88 Even if the applicant did not in fact have knowledge of the whole text of the Decision of 22 July 1996, it should, in any event, have formally requested it from the Commission (judgment in Case T-12/90 Bayer v Commission [1991] ECR II-219; orders in Case C-102/92 Ferriere Acciaierie Sarde v Commission [1993] ECR I-801, paragraph 17 et seq.; and in Case T-468/93 Frinil v Commission [1994] ECR II-33, paragraph 31 et seq.).

89 The applicant claims that it had knowledge of the text of the Decision of 22 July 1996 only when the Commission submitted its defence in Case T-191/96 on 30 January 1997.

90 At the meeting of 26 July 1996 with the staff of DG VI, the applicant expressly requested information on any decision which might have extended the possibility of substitution of fruit for that specified in the notice of invitation to tender. However, it did not receive any details from the officials present.

91 Although the pleading lodged by AIMA in the proceedings before the Italian administrative court mentioned, in an annex, Memorandum No 29903 of 23 July 1996, cited above, the applicant did not receive a copy of that document and did not request one, taking the view that it was a memorandum analogous to the others, relating to the replacement of apples and oranges by peaches and apricots. Moreover, AIMA's observations contained no reference to the Decision of 22 July 1996. Nor was that decision mentioned at the hearing on 31 October 1996.

92 By letter of 5 September 1997 replying to a request from the applicant, AIMA stated, furthermore, that it could find no trace in its files of `the Commission decision which was adopted on 22 July 1996' (Annex 3 to the reply in Case T-106/97).

Findings of the Court

93 In paragraph 12 of its application in Case T-191/96, the applicant stated that, at the meeting of 26 July 1996 (see paragraph 27 above), it had learned that, by two separate decisions, of 14 June and 22 July 1996 respectively, the Commission had allowed the successful tenderers to withdraw, as payment for the supplies at issue, fruit other than that specified in the notice of invitation to tender. The second of those decisions, which had not been communicated to the applicant, had `again extended the possibility of substitution'.

94 It is thus clear that, on 26 July 1996, the applicant had knowledge of the adoption by the Commission on 22 July 1996 of a decision which extended the possibility of substitution of fruit for apples and oranges laid down by the Decision of 14 June 1996.

95 Next, in its pleading of 21 October 1996 lodged at the Tribunale Amministrativo Regionale, Lazio (Annex 4 to the reply in Case T-191/96), AIMA stated:

`It is a fact that the contested conversion parameters between the fruit (apples, oranges, peaches, apricots and nectarines) used as payment for the supplies, to be used for the benefit of Trento

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Frutta and Loma, are derived from Community decisions (see Memoranda No 24700 of 20 June 1996 and No 29903 of 23 July 1996) which AIMA had necessarily to apply, while informing interested parties of them.'

96 That document stated that Commission Memorandum No 29903 of 23 July 1996 was annexed to it. It is not disputed that that memorandum reiterates the content of the Commission Decision of 22 July 1996.

97 The hearing before the Tribunale Amministrativo Regionale, Lazio, was held on 31 October 1996.

98 It thus follows that, by 31 October 1996 at the latest, the applicant had knowledge, at the very least, of the fact that the Commission had adopted a decision allowing the substitution of nectarines for the fruit prescribed in payment for the supplies provided by Trento Frutta and Loma, and that the content of that decision was reiterated in Commission Memorandum No 29903 of 23 July 1996.

99 That finding finds support in the fact that, in paragraph 23 of its application in Case T-191/96, lodged at the Registry of the Court of First Instance on 25 November 1996, the applicant referred to the possibility of substitution of nectarines for the fruit specified in the notice of invitation to tender.

100 Even if, as it asserts, the applicant did not have knowledge of the whole text of the Decision of 22 July 1996 before 30 January 1997, the date on which the defence was lodged in Case T-191/96, with a copy of that decision annexed to it, it must be borne in mind that, according to the settled case-law of the Court of Justice, it is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period (order in Ferriere Acciaierie Sarde v Commission, paragraph 18).

101 However, in this case, it has not been established that the applicant asked the Commission to provide it with the full text of the Decision of 22 July 1996, either after the meeting of 26 July 1996, or even after AIMA's pleading had been lodged at the Tribunale Amministrativo Regionale, Lazio, on 21 October 1996, or even after the hearing before that court on 31 October 1996.

102 In those circumstances, the applicant is not justified in claiming that the point from which time starts to run for bringing proceedings must be fixed at the date of 30 January 1997. It is clear from the foregoing that a reasonable period for requesting the full text of the Decision of 22 July 1996 had long since elapsed by that date.

103 It follows that the action brought on 9 April 1997 must be held to be out of time and, accordingly, inadmissible.

DOCNUM	61996A0191
AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; A ; judgment
PUBREF	European Court reports 1999 Page II-03181

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DOC	1999/10/14
LODGED	1996/11/25
JURCIT	61962J0025 : N 51 61970J0041-N25-28 : N 59 31971L0305 : N 72 61978J0092-N25 : N 57 61978J0092-N32 : N 63 61986J0097-N27-32 : N 62 61989J0243-N37 : N 72 11992E173-L4 : N 50 11992E176 : N 62 61992A0082-N14 : N 60 61992O0102-N18 : N 100 61994A0331-N24 : N 60 61994J0087-N54 : N 72 61994J0087-N70 : N 72 31995R1975-A01 : N 2 31995R1975-A02 : N 3 31995R1975-A02P2 : N 78 31995R1975 : N 1 31995R2009-A02P2 : N 6 31995R2009-A06P1LE : N 7 76 31995R2009-A06P2 : N 8 31995R2009-A15P1 : N 9 75 31995R2009-A15P2 : N 10 75 31995R2009-C2 : N 5 31995R2009 : N 4 31996R0228-A01 : N 13 31996R0228-C1 : N 12 78 31996R0228-C2 : N 12 78 31996R0228-NI : N 14 75 31996R0228 : N 11 75 61996A0086-N42 : N 51 61996A0100-N37-42 : N 60 61996A0130-N34 : N 60 11997E230 : N 50 11997E233 : N 62
SUB	External relations ; Food aid ; Development cooperation
AUTLANG	Italian
MISCINF	Joined case : 697A0106POURVOI : C-496/99
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Italy

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NOTES	Berrod, F.: Europe 1999 Décembre Comm. no 406 p.9
PROCEDU	Application for annulment - successful ; Application for annulment - inadmissible
DATES	of document: 14/10/1999 of application: 25/11/1996

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Judgment of the Court (Fifth Chamber)
of 2 May 1996
Commission of the European Communities v Hellenic Republic.
Failure to fulfil obligations - Directive 92/50/EEC.
Case C-311/95.

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Acts of the institutions ° Directives ° Implementation by the Member States ° Mere administrative practices inadequate

(EC Treaty, Art. 189, third para.)

Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of Member States' obligations under a directive in accordance with Article 189 of the Treaty.

In Case C-311/95,

Commission of the European Communities, represented by Dimitrios Gouloussis, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Ioanna Galani-Maragkoudaki, special assistant legal adviser in the Community Legal Department of the Ministry of Foreign Affairs, and Dimitra Tsagkaraki, adviser to the Deputy Minister of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by failing to adopt or to communicate to the Commission within the prescribed period the necessary laws, regulations and administrative provisions to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), the Hellenic Republic has failed to fulfil its obligations under the EC Treaty,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.-P. Puissochet, P. Jann (Rapporteur), L. Sevon and M. Wathelet, Judges,

Advocate General: C.O. Lenz,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

1 By application received at the Court Registry on 29 September 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt or to communicate to the Commission within the prescribed period the necessary laws, regulations

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and administrative provisions to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, hereinafter "the Directive"), the Hellenic Republic had failed to fulfil its obligations under the EC Treaty.

2 Under the first subparagraph of Article 44(1) of the Directive, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 1 July 1993, and were to inform the Commission thereof forthwith.

3 Since the Commission had not been informed of the measures adopted by the Hellenic Republic to comply with the Directive, on 9 August 1993 it gave the Greek Government formal notice to submit its observations within two months.

4 No response to the letter of formal notice having reached it, on 6 May 1994 the Commission sent the Greek Government a reasoned opinion inviting it to take the necessary measures to comply within two months.

5 No response to the reasoned opinion was forthcoming and the Commission brought the present action.

6 The Greek Government does not dispute that it failed to transpose the Directive into national law within the prescribed period. It nevertheless asks for the application to be dismissed. It submits firstly that in November 1994 a committee to carry out the preparatory legislative work was set up by a decision of the Ministry of the National Economy, in order to transpose the Directive. Secondly, the Ministry of the Environment, Planning and Public Works sent all the public sector bodies concerned the text of the Directive, by means of a ministerial circular of 27 August 1993 containing instructions for the provisional application of the Directive. Finally, that ministry produced a draft presidential decree for the transposition into the national legal order of all the provisions of the Directive.

7 It has consistently been held that mere administrative practices, which by their nature are alterable at will by the administration and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State' s obligations under the Treaty (see inter alia Case C-242/94 Commission v Spain [1995] ECR I-3031, paragraph 6). The Greek Government' s argument based on the distribution of the ministerial circular cannot therefore be accepted.

8 Since transposition of the Directive did not take place within the prescribed period, the Commission' s application in that respect must be regarded as well founded.

9 Consequently, it must be held that, by failing to adopt within the prescribed period the necessary laws, regulations and administrative provisions to comply with the Directive, the Hellenic Republic has failed to fulfil its obligations under Article 44(1) of the Directive.

Costs

10 .

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by failing to adopt within the prescribed period the necessary laws, regulations and administrative provisions to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the Hellenic Republic has failed to fulfil its obligations under Article 44(1) of that directive;

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2. Orders the Hellenic Republic to pay the costs.

DOCNUM	61995J0311
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; J ; judgment
PUBREF	European Court reports 1996 Page I-02433
DOC	1996/05/02
LODGED	1995/09/29
JURCIT	31992L0050-A44P1L1 : N 2 9 31992L0050 : N 1 61994J0242-N06 : N 7
CONCERNS	Failure concerning 31992L0050-A44P1
SUB	Approximation of laws
AUTLANG	Greek
APPLICA	Commission ; Institutions
DEFENDA	Greece ; Member States
NATIONA	Greece
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Jann
DATES	of document: 02/05/1996 of application: 29/09/1995

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Judgment of the Court (Fifth Chamber)
of 2 May 1996
Commission of the European Communities v Federal Republic of Germany.
Failure of a Member State to fulfil its obligations - Directive 92/50/EEC.
Case C-253/95.

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1. Member States ° Obligations ° Implementation of directives ° Failure to fulfil obligations ° Justification ° Not permissible

(EC Treaty, Art. 169)

2. Acts of the institutions ° Directives ° Right of persons affected to rely on directives in the absence of adequate implementing measures ° Effect not releasing Member States from their obligation to implement directives

(EC Treaty, Art. 189, third para.)

1. A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive.

2. The effect of the third paragraph of Article 189 of the Treaty is that Community directives must be implemented by appropriate implementing measures taken by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189, cannot justify a Member State' s absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive.

In Case C-253/95,

Commission of the European Communities, represented by Claudia Schmidt, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Roeder, Ministerialrat at the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat at the same ministry, acting as Agents, D-53107 Bonn,

defendant,

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions needed in order to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and, in the alternative, by failing to inform the Commission forthwith of the measures taken, the Federal Republic of Germany has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty in conjunction with Article 44(1) of that directive,

THE COURT (Fifth Chamber),

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composed of: D.A.O. Edward, President of the Chamber, J.-P. Puissochet, P. Jann (Rapporteur), L. Sevon and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 20 July 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt the laws, regulations and administrative provisions needed in order to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and, in the alternative, by failing to inform the Commission forthwith of the measures taken, the Federal Republic of Germany has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty in conjunction with Article 44(1) of that directive.

2 Under the first paragraph of Article 44(1) of the directive, Member States were to bring into force the laws, regulations and administrative provisions needed in order to comply with the directive before 1 July 1993 and to inform the Commission thereof forthwith.

3 Since it had not been notified of the provisions adopted by the Federal Republic of Germany in order to comply with the directive, the Commission gave the German Government formal notice on 9 August 1993 to submit its observations within two months.

4 On 5 November 1993 the German Government informed the Commission that work was in progress to transpose the directive into national law and attached to its reply the draft of the second Law amending the Haushaltsgrundsaetzegesetz (Framework Law on the budget). On 27 December 1993 the Commission was informed that the Law had been adopted on 26 November 1993. That Law, which, according to the German Government, was intended to transpose all the directives in the field of public contracts into national law, was to enter into force on 1 January 1994.

5 On 7 February 1994 the German Government also sent to the Commission two draft Regulations on the application of the framework law on the budget.

6 Finally, on 7 April 1994, the Federal Republic of Germany sent to the Commission at its request the definitive version of the Verordnung ueber die Vergabebestimmungen fuer oeffentliche Auftraege (Regulation on the award of public contracts) and the Verordnung ueber das Nachpruefungsverfahren fuer oeffentliche Auftraege (Regulation on verification of public contracts). Those two regulations entered into force on 1 March 1994.

7 Since examination of those provisions showed that the measures needed in order to ensure the application of the directive to public service contracts had not been taken, the Commission sent the German Government a reasoned opinion on 4 August 1994 calling upon it to adopt the requisite measures in order to comply with that opinion within two months.

8 By letter of 29 September 1994 the German Government stated that the Regulation on the award of public contracts, adopted on the basis of the second Law amending the framework law on the budget, which was intended to transpose all the European Community directives in the field of the award of public contracts into national law, entered into force on 1 March 1994 in respect of supply

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and works contracts and that the legislative procedure intended to extend it to service contracts was in hand. The German Government further undertook to send to the Commission the amended regulation immediately after its adoption.

9 Since it received no further information, the Commission brought the present action.

10 The German Government does not deny the infringement. It submits, however, that, immediately after the expiry of the time-limit for transposition of the directive into national law, the Federal Ministry of Economic Affairs indicated to the relevant contracting authorities that, as from 1 July 1993, the directive was directly applicable to the award of service contracts.

11 The German Government further submits that the work aimed at bringing about the legislative changes needed in order to transpose the directive into national law is in progress. In this regard it refers to the draft amendment to the Verdingungsordnung fuer Leistungen (Rules applicable to the award of supply contracts) and to the draft rules designed to replace the Verdingungsordnung fuer die Vergabe freiberuflicher Leistungen (Rules applicable to the award of contracts concerning the provision of services by the liberal professions). Likewise, a draft amendment to the Regulation on the award of public contracts which renders both sets of rules legally binding is about to be submitted to the Federal Government. The Laender, however, have not yet approved it.

12 The first point to note is that, according to the settled case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case C-259/94 Commission v Greece [1995] ECR I-1947, paragraph 5).

13 Secondly, the effect of the third paragraph of Article 189 of the Treaty is that Community directives must be implemented by appropriate implementing measures taken by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of directives under the third paragraph of Article 189, cannot justify a Member State absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, in particular, Case C-433/93 Commission v Germany [1995] ECR I-2303, paragraph 24). The German Government' s argument based on the direct effect of the directive cannot therefore be accepted either.

14 Since the directive has not been transposed into national law within the prescribed period, the Commission' s action in that respect is well founded.

15 It must therefore be held that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions needed to comply with the directive, the Federal Republic of Germany has failed to fulfil its obligations under Article 44(1) thereof.

Costs

16 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party' s pleadings. The Commission has applied for costs and, since the Federal Republic of Germany has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

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hereby:

1. Declares that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions needed in order to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the Federal Republic of Germany has failed to fulfil its obligations under Article 44(1) of that directive;

2. Orders the Federal Republic of Germany to pay the costs.

DOCNUM	61995J0253
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; J ; judgment
PUBREF	European Court reports 1996 Page I-02423
DOC	1996/05/02
LODGED	1995/07/20
JURCIT	11992E189-L3 : N 1 13 31992L0050-A44P1L1 : N 1 2 15 31992L0050 : N 1 61993J0433-N24 : N 13 61994J0259-N05 : N 12
CONCERNS	Failure concerning 31992L0050-A44P1
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Federal Republic of Germany ; Member States
NATIONA	Federal Republic of Germany
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	La Pergola

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JUDGRAP Jann

DATES of document: 02/05/1996
of application: 20/07/1995

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Judgment of the Court (Fifth Chamber) of 19 September 1996 Commission of the European Communities v Hellenic Republic. Failure by a Member State to fulfil its obligations - Failure to implement Directive 89/665/EEC within the prescribed period - Review procedures relating to public supply and public works contracts. Case C-236/95.

++++

1. Acts of the institutions ° Directives ° Implementation by the Member States ° Transposition of a directive without legislative action ° Conditions ° Legal certainty guaranteed to individuals ° Inadequacy of case-law securing for individuals, in the absence of legislation, the rights provided for by the directive

(Council Directive 89/665, Art. 2)

2. Acts of the institutions ° Directives ° Implementation by the Member States ° Directive 89/665 ° Obligation for Member States to organize for public contracts a procedure allowing the Commission to intervene in the event of an infringement of Community law ° Possibility for Member States to confer the responsibilities of contracting authorities on private persons ° Implementation unable to be secured by the mere application of Article 5 of the Treaty ° Need for implementing measures

(EC Treaty, Art. 5; Council Directive 89/665, Art. 3)

1. As far as the implementation of directives is concerned, it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts.

This is not the case where, in a Member State, case-law interprets national legislation in accordance with Directive 89/665 on review procedures relating to public contracts and the view is taken that this constitutes an adequate system of interim judicial protection for the purposes of the directive, but that legislation does not transpose correctly the requirements laid down in Article 2 of the directive as regards the power of review bodies in the Member States to take any interim measures with regard to the award of public contracts independently of any prior action.

2. In so far as private persons may be given the responsibilities of contracting authorities in connection with the award of contracts covered by Directive 89/665 on review procedures relating to public contracts, the obligation of bona fide cooperation and assistance to which the Member States are subject under Article 5 of the EC Treaty in order to facilitate the achievement of the Commission' s tasks is not sufficient to secure the implementation of Article 3 of the directive, which organizes the procedure for the intervention of the Commission with the Member State' s competent authorities and the contracting authority in question if it considers that a clear and manifest infringement of Community law has been committed during a procedure for the award of a public contract.

In Case C-236/95,

Commission of the European Communities, represented by Dimitrios Gouloussis, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Aikaterini Samoni-Rantou, Assistant Special Legal Adviser

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in the Special Department for Community Legal Affairs in the Ministry of Foreign Affairs, and Dimitra Tsagkaraki, Adviser to the Deputy Minister for Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by not adopting or not notifying to the Commission within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and that directive,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida (Rapporteur), C. Gulmann, L. Sevon and M. Wathelet, Judges,

Advocate General: P. Léger,

Registrar: H.A. Ruehl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 May 1996, at which the Hellenic Republic was represented by Aikaterini Samoni-Rantou and Dimitra Tsagkaraki, and the Commission by Dimitrios Gouloussis and Dimitrios Triantafyllou, of its Legal Service, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 20 June 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 6 July 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not adopting or not notifying to it within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33, hereinafter "the directive"), the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and that directive.

2 According to Article 1(1) of the directive, the Member States are to take the measures necessary to ensure that, as regards award procedures for public supply and public works contracts, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible where Community law in the field of public procurement or national rules implementing that law have been infringed. Article 1(3) further provides that the Member States must ensure that the review procedures introduced are available at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement.

3 Under Article 2 of the directive, the bodies responsible for the review procedure must be empowered to take interim measures to suspend a procedure for the award of a public contract or the implementation of any decision taken by the contracting authority, set aside unlawful decisions and award damages to persons harmed by an infringement.

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4 In addition, Article 3 of the directive authorizes the Commission to intervene with the competent authorities of the Member State and the contracting authority, if it considers that a clear and manifest infringement has been committed during a procedure for the award of a public contract, so as to ensure that appropriate measures are taken in order rapidly to remedy any alleged infringement.

5 Lastly, under Article 5 of the directive, Member States are to bring into force, before 21 December 1991, the measures necessary to comply with the directive and to communicate to the Commission the texts of the main national laws, regulations and administrative provisions which they adopt in the field governed by the directive.

6 Since it had received no notification of the measures adopted and had no other information suggesting that the Hellenic Republic had fulfilled its obligations under the directive, the Commission sent it a letter before action on 20 May 1992. By letter dated 17 June 1993, the Greek Government informed the Commission that Presidential Decree No 23 of 15 January 1993 had been adopted in order to implement the directive as far as public works contracts were concerned. Since no measure had been adopted in the field of public supply contracts, the Commission delivered a reasoned opinion on 4 July 1994. By letter dated 18 August 1994, the Greek Government informed the Commission that an implementing presidential decree was in preparation. The Commission thereupon decided to bring these proceedings.

7 It should first be observed that, as the Commission made clear at the hearing, the action relates only to the failure to transpose the provisions of the directive on the award of public supply contracts.

8 The Hellenic Republic admits that it failed to adopt within the prescribed period the measures necessary formally to transpose the directive in the field of public supply contracts. It argues nevertheless that the Greek legislation in force on public works and supply contracts, considered together with the provisions of the Code of Civil and Administrative Procedure and the Statutes of the Council of State, more particularly Article 52 of Presidential Decree No 18/89 entitled "Codification of legislative provisions relating to the Council of State", already affords sufficient judicial protection to meet the requirements of the directive, bearing in mind that that protection has been further reinforced by recent case-law of the Council of State. In addition, the Greek Government states that a draft presidential decree was drawn up and notified to the Commission on 22 July 1994 and is now at the stage of final signature. The subsequent delay in adopting the draft decree is attributable to formal and procedural difficulties and to recent changes in the case-law of the judicial division of the Council of State.

9 That argument cannot be accepted.

10 As far as the suspension of procedures for the award of public contracts referred to in Article 2(1)(a) of the directive is concerned, the national legislation referred to and, more specifically, Article 52 of Presidential Decree No 18/89 constitute general provisions on the procedure for the suspension of operation of an administrative measure against which an action for annulment has been brought, and could not suffice in themselves to secure the correct transposition of the directive.

11 The suspension procedure provided for by Article 52 of Presidential Decree No 18/89 expressly covers only applications for annulment brought by legal persons governed by public law, whereas, under Article 1 of the directive, the review procedures introduced by the Member States must be "available... at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement". What is more, Article 52 of the decree in question relates only to procedures for suspension of operation of measures and presupposes the existence of a main action seeking to have the contested administrative measure annulled, whereas, under Article 2 of the directive, the Member States are under a duty more generally to empower their review bodies to take, independently of any prior

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action, any interim measures "including measures to suspend or to ensure the suspension of the procedure for the award of a public contract".

12 Admittedly, the Council of State interprets Article 52 of the presidential decree in conformity with the directive and holds that any interested party has the capacity to seek suspension of operation of measures of contracting authorities.

13 However, the Court has consistently held that it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts (see to this effect Case 29/84 Commission v Germany [1985] ECR 1661, paragraph 23, Case 363/85 Commission v Italy [1987] ECR 1733, paragraph 7, and C-59/89 Commission v Germany [1991] ECR I-2607, paragraph 18).

14 Having regard, however, to the wording of Article 52 of the presidential decree, which seems to confine the capacity to bring proceedings to legal persons governed by public law, case-law such as that of the Council of State cannot, in any event, satisfy those requirements of legal certainty.

15 Moreover, the national legislation referred to contains no provision on damages, as provided for in Article 2(1)(c) of the directive, for persons harmed in the event of an infringement of Community law in the field of public procurement or national rules implementing that law.

16 Neither does the national legislation mentioned transpose Article 3 of the directive, which organizes the procedure for the intervention of the Commission with the Member State' s competent authorities and the contracting authority in question if it considers that a clear and manifest infringement has been committed during a procedure for the award of a public contract.

17 Private persons and, in particular, undertakings receiving subsidies from public authorities may, in certain circumstances, be given the responsibilities of contracting authorities in connection with the award of contracts covered by the directive. To that extent, the obligation of bona fide cooperation and assistance to which the Member States are subject under Article 5 of the EC Treaty in order to facilitate the achievement of the Commission' s tasks is not sufficient to secure the implementation of Article 3 of the directive. The Member States should therefore implement that provision in order to ensure that it is also complied with by such private persons.

18 Lastly, as regards the formal and procedural difficulties referred to by the Hellenic Republic in order to justify the delay in adopting the draft presidential decree, it should be observed that, as the Court has repeatedly held, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case C-147/94 Commission v Spain [1995] ECR I-1015, paragraph 5, Case C-259/94 Commission v Greece [1995] ECR I-1947, paragraph 5, and Case C-253/95 Commission v Germany [1996] ECR I-0000, paragraph 12).

19 Consequently, it should be held that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with the directive, the Hellenic Republic has failed to fulfil its obligations under Article 5 of that directive.

Costs

20 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

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THE COURT (Fifth Chamber)

hereby:

1. Declares that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, the Hellenic Republic has failed to fulfil its obligations under Article 5 of that directive;

2. Orders the Hellenic Republic to pay the costs.

DOCNUM	61995J0236
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; J ; judgment
PUBREF	European Court reports 1996 Page I-04459
DOC	1996/09/19
LODGED	1995/07/06
JURCIT	61984J0029 : N 13 61985J0363 : N 13 31989L0665-A01P1 : N 2 31989L0665-A01P3 : N 2 31989L0665-A02 : N 3 11 31989L0665-A02P1LA : N 10 31989L0665-A02P1LC : N 15 31989L0665-A03 : N 4 16 17 31989L0665-A05 : N 4 19 31989L0665 : N 1 12 61989J0059 : N 13 11992E005 : N 17 61994J0147 : N 18 61994J0259 : N 18 61995J0253 : N 18
CONCERNS	Failure concerning 31989L0665-A05
SUB	Approximation of laws

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AUTLANG	Greek
APPLICA	Commission ; Institutions
DEFENDA	Greece ; Member States
NATIONA	Greece
NOTES	Lagondet, F.: Europe 1996 Novembre Comm. no 400 p.12 Fernandez Martín, José María: Public Procurement Law Review 1997 p.CS1-CS3 Scognamiglio, Andreina: Il Foro amministrativo 1997 p.384-387 Gogos, Konstantinos E.: Elliniki Epitheorisi Evropaïkou Dikaiou 1997 p.470-478 X: Giurisprudenza italiana 1998 p.145-146 Kanava, Margarita: Diki 1998 p.1412-1414
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Léger
JUDGRAP	Moitinho de Almeida
DATES	of document: 19/09/1996 of application: 06/07/1995

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Judgment of the Court (Fifth Chamber)
of 2 May 1996
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Directive 92/50/EEC.
Case C-234/95.

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Member States ° Obligations ° Implementation of directives ° Failure to fulfil obligations not contested

(EC Treaty, Art. 169)

In Case C-234/95,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by Catherine de Salins, Assistant Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Philippe Martinet, Secretary of Foreign Affairs in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince Henri,

defendant,

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions needed in order to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and, in the alternative, by failing to inform the Commission of such measures forthwith, the French Republic has failed to fulfil its obligations under that directive and, in particular, Article 44 thereof,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.-P. Puissochet, P. Jann (Rapporteur), L. Sevon and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 5 July 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt the laws, regulations and administrative provisions needed in order to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and, in the alternative, by failing to inform the Commission of such measures forthwith, the French Republic has failed to fulfil its obligations

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under that directive and, in particular, Article 44 thereof.

2 Under the first paragraph of Article 44(1) of the directive, Member States were to bring into force the laws, regulations and administrative provisions needed in order to comply with the directive before 1 July 1993 and to inform the Commission thereof forthwith.

3 Since it had not been notified of the provisions adopted by the French Republic in order to comply with the directive, the Commission gave the French Government formal notice on 9 August 1993 to submit its observations within two months.

4 In the absence of a reply, the Commission sent a reasoned opinion to the French Government on 26 September 1994 calling upon it to adopt the requisite measures in order to comply with that opinion within two months.

5 In reply to that reasoned opinion, the French Government informed the Commission that a draft law concerning in particular service contracts had been submitted to the Senate. In the absence of any other information on that legislative procedure, the Commission brought the present action.

6 The French Government does not deny the infringement.

7 However, since private bodies operating in the general interest and under public control are involved, it states that a draft law has been submitted which is intended primarily to extend Law No 91-3 of 3 January 1991 on the transparency and legality of award procedures to service contracts awarded by those bodies. That law, which makes the award of certain contracts subject to rules on publication and competition, at present concerns only works contracts awarded by those bodies. Those procedures are to be extended to service contracts by the adoption of an implementing decree amending Decree No 92-311 of 31 March 1992.

8 The French Government emphasizes that, as regards contracts concluded by the State and local authorities, the directive is to be transposed into national law by means of a decree of the Conseil d' Etat which is at present the subject of final inter-ministerial consultations as to its wording.

9 Since the directive has not been transposed into national law within the prescribed period, the Commission' s action in that respect must be considered to be well founded.

10 It must therefore be held that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions needed to comply with the directive, the French Government has failed to fulfil its obligations under Article 44(1) thereof.

Costs

11 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party' s pleadings. The Commission has applied for costs and, since the French Republic has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions needed in order to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the French Republic has failed to fulfil its obligations under Article 44(1) of that directive;

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2. Orders the French Republic to pay the costs.

DOCNUM	61995J0234
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; J ; judgment
PUBREF	European Court reports 1996 Page I-02415
DOC	1996/05/02
LODGED	1995/07/05
JURCIT	31992L0050-A44P1L1 : N 2 10 31992L0050 : N 1
CONCERNS	Failure concerning 31992L0050-A44P1
SUB	Approximation of laws
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
NOTES	Terneyre, Philippe: Recueil Dalloz Sirey 1996 Som. p.316-317
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	La Pergola
JUDGRAP	Jann
DATES	of document: 02/05/1996 of application: 05/07/1995

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Judgment of the Court of First Instance (Fourth Chamber)
First Instance (Fourth Chamber)First Instance (Fourth Chamber)1996.
Adia Interim SA v Commission of the European Communities.
Public service contract - Agency staff - Tender vitiated by a calculation error - Statement of reasons for the decision rejecting the tender - No obligation for the contracting authority to contact the tenderer.
Case T-19/95.

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1. Acts of the institutions ° Statement of reasons ° Obligation ° Scope ° Decision to reject a tender under the procedure for the award of a public service contract

(EC Treaty, Art. 190; Council Directive 92/50, Art. 12(1))

2. Budget of the European Communities ° Financial Regulation ° Provisions applicable to tendering procedures ° Obligation for an institution to contact a tenderer after the tenders have been opened ° None

(Commission Regulation No 3418/93, Art. 99(h), second para.)

3. Public procurement in the European Communities ° Conclusion of a contract following an invitation to tender ° Discretion of the institutions ° Judicial review ° Limits

1. It follows from Article 12(1) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, which is applicable by virtue of Article 126 of Regulation No 3418/93 to contracts awarded by Community institutions where the value of the contract in question exceeds the threshold laid down by Article 7(1) of that directive, that an institution fulfils its obligation vis-à-vis eliminated tenderers to state reasons if it first merely informs them immediately of the fact that their tender has been rejected by a mere communication not setting out any reasons and subsequently provides tenderers making an express request to that effect with a reasoned explanation within 15 days.

That manner of proceeding is consonant with the duty to state reasons enshrined in Article 190 of the Treaty, according to which the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and, on the other, to enable the Court to exercise its supervisory jurisdiction.

The fact that interested tenderers receive a reasoned decision only if they make an express request to that effect does not restrict their ability to assert their rights before the Court. The period for bringing proceedings laid down in the fifth paragraph of Article 173 of the Treaty does not begin to run until the reasoned decision is notified, provided that the tenderer made his request for a reasoned decision within a reasonable period after he was apprised of the fact that his tender had been rejected.

2. The existence of an obligation to contact a tenderer who made a calculation error cannot be inferred from the fact that the second paragraph of Article 99(h) of Regulation No 3418/93 laying down detailed rules for the implementation of certain provisions of the Financial Regulation, albeit prohibiting any contact between the institution and the tenderer after the tenders have been opened, provides, exceptionally, that the institution may take it upon itself to contact the tenderer "if some clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected".

Neither may such an obligation be imposed by virtue of the principles of sound administration or equal treatment where the body responsible for examining the tenders detected in one of them a systematic

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calculation error which could not be described as particularly obvious and whose exact nature and cause it was unable to determine. In such a case, any contact made with the tenderer would involve a risk of a new tender being submitted under the guise of a mere correction, which might give rise to an infringement of the principle of equal treatment, since the other competing undertakings would not have the same opportunity.

3. The institutions have a broad discretion in assessing the factors to be taken into account for the purpose of taking a decision to award a contract following an invitation to tender and the Court' s review should be limited to checking that there has been no serious and manifest error.

In Case T-19/95,

Adia Interim SA, a company incorporated under Belgian law, having its registered office in Brussels, represented by Vincent Thiry, of the Liège Bar, Christian Jacobs, Rechtsanwalt, Bremen, Hans Joachim Priess and Klaus Heinemann, Rechtsanwaelte, Cologne, with an address for service in Luxembourg at the Chambers of Tom M. Gilliams, 47 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Xénophon A. Yataganas and Hendrik van Lier, Legal Advisers, acting as Agents, with at address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission decision, communicated to the applicant on 5 December 1994, informing it that the tender which it submitted in response to invitation to tender No 94/21/IX.C.1 on the supply of agency staff had been rejected, and for annulment of the Commission' s decision, communicated to the applicant on 21 December 1994, awarding the contracts in question to the companies Ecco, Gregg and Manpower,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: K. Lenaerts, President, P. Lindh and J.D. Cooke, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 February 1996,

gives the following

Judgment

Costs

53 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

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2. Orders the applicant to pay the costs.

Facts

1 In order to ensure the availability of agency staff, the Commission of the European Communities periodically concludes framework agreements with employment agencies, which it selects on the basis of invitations to tender. In view of the imminent expiry of the framework agreements in force in 1994, the Commission published in the Supplement to the Official Journal of the European Communities of 13 July 1994 (OJ 1994 S 132, p. 129) an open invitation to tender for the supply of agency staff (open invitation to tender No 94/21/IX.C.1). It appears from point 2 of that invitation to tender that the Commission was proposing to conclude framework agreements with three employment agencies.

2 Point 15 of the invitation to tender specifies the criteria for the award of the contracts as follows:

"° coverage of the different job and language profiles;

° organization, customer service, flexibility;

° price".

3 The price was to be calculated in accordance with the instructions laid down in the specifications. On the basis of the reference pay scales set out by the Commission, tenderers had to establish for each type of service, first, net hourly wages; secondly, gross hourly wages; and thirdly, an hourly billing rate. The latter constituted the tender price.

4 Net and gross hourly wages were to be expressed in Belgian francs, whereas the billing rates had to be expressed in ecus. Gross hourly wages were calculated by applying to the net hourly wages the relevant Belgian social security and tax provisions. In order to convert the gross hourly wages into billing rates, the tenderers had to determine a coefficient reflecting all their costs, their profit margins and a Belgian franc/ecu conversion rate.

5 The applicant company is engaged exclusively in the business of supplying agency staff. It is undisputed that at the material time it was the main supplier of agency staff to the Commission and had always performed its contracts with the Commission to the latter' s satisfaction.

6 On 30 August 1994, the applicant submitted a tender in response to invitation to tender No 94/21/IX.C.1. It is common ground that the tender contained a systematic calculation error.

7 The tenders were opened on 6 October 1994. In order to assess which of them satisfied the formal requirements and the selection criteria, the selection committee allocated 30 points to the criterion of job coverage and language profiles, 30 points to the criterion of organization, customer service and flexibility and 40 points to the criterion of price.

8 It appears from Annex 7(d) to the selection committee' s minutes, which summarize the assessment of the three award criteria, that the applicant was in second place with 48 points out of a possible 60, following the evaluation of the criteria of coverage of job and language profiles, on the one hand, and organization, customer service and flexibility, on the other.

9 In order to evaluate the price criterion, the selection committee used the following formula: it granted maximum points (40) to the lowest tender and then deducted five points from the other tenders depending on the percentage by which they exceeded the lowest tender. Thus tenders up to 5% more expensive than the lowest tender were given 35 points; those between 5 and 10% more expensive 30 points; those between 10 and 15% more expensive 25 points and so on down to a minimum of 10 points. Since the prices proposed by the applicant exceeded the lowest tender by more than 50%, its tender

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was given only 10 points for the price criterion, and fell from second to tenth position.

10 The three tenders accepted by the Commission each obtained 73 or 74 points. The applicant' s tender received 58 points (28 for the criterion of job coverage and language profiles, 20 for organization, customer service and flexibility and 10 for the price criterion).

11 It is undisputed that the selection committee was aware that there was a calculation error in the applicant' s tender. Its minutes of 3 November 1994 state that "the tender of Adia, although the present main contractor, has obtained a poor mark because the billing rates it gave diverge excessively from the average for the other tenders. The difference ° of more than 50% ° found in Adia' s tender is due to a systematic error in the calculation of the billing rates on the basis of the gross hourly wages."

12 By letter dated 5 December 1994, the Commission informed the applicant that its tender had been rejected in the following terms:

> "Thank you for having taken part in the abovementioned tendering procedure. I regretfully inform you that, following an in-depth comparative study of the tenders and after obtaining the prior opinion of the Advisory Committee on Procurement and Contracts ° CCAM °, the Commission considered that it was unable to accept your proposal."

13 By letter dated 9 December 1994, the applicant asked to be informed of the reasons for which its tender had been rejected.

14 By letter dated 21 December 1994, the Commission answered that request in the following terms:

> "Thank you for your letter of 9 December 1994 asking for information as to the reasons for which your company' s tender was rejected.

The procedure applied by the tender selection committee was as follows:

1. The committee analysed each tender in the same non-discriminatory way. This means in particular that the fact that a particular company had already had a contract with the Commission did not place it at a de facto advantage over the other tenderers.

2. As stated in the specifications, only three tenders were to be accepted, and not six as had previously been the case.

3. 22 tenders were received by the deadline, of which the committee dealing with the opening of tenders found that two were not in order.

4. Two of the 20 remaining tenders did not satisfy the conditions for participating in the tender set out in point 6 of the specification.

5. Six of the 18 tenders satisfying the conditions for participating in the tender did not fulfil all the selection criteria set out in point 7 of the specifications.

6. The twelve tenders selected, which included that of your company, were then assessed on the basis of the three award criteria set out in point 8 of the specification, namely:

° coverage of the different job and language profiles;

° organization, customer service, flexibility;

° price.

7. On the basis of that assessment, the selection committee adopted the tenders which had obtained the most points as being the most economically advantageous ones. These were the tenders of the companies Ecco, Gregg and Manpower.

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Accordingly, the outcome of the invitation to tender and the non-acceptance of the tender by your company resulted solely from a strict application of competitive criteria. However, this outcome does not detract from the satisfaction which the Commission has had in working with your company under the previous framework agreement."

Procedure and forms of order sought by the parties

15 It was in those circumstances that the applicant brought these proceedings by application lodged at the Registry of the Court of First Instance on 7 February 1995.

16 The applicant claims that the Court should:

° annul the Commission' s decision, communicated to it on 5 December 1994, not to accept the tender submitted by the applicant pursuant to invitation to tender No 94/21/IX.C.1;

° annul the Commission' s decision, communicated to it on 21 December 1994, to award the public contract relating to invitation to tender No 94/21/IX.C.1 to the companies Ecco, Gregg and Manpower;

° order the Commission to pay the costs.

17 The Commission claims that the Court should:

° dismiss the first two pleas in the application as unfounded and the third as inadmissible;

° in the alternative, dismiss the application as unfounded in its three pleas;

° order the applicant to pay the costs.

The claim for annulment

18 The applicant raises three pleas in support of its application. The first two pleas, raised in the application, allege breach of the duty to state reasons, on the one hand, and infringement of the principle of equal treatment together with manifest error of assessment, on the other. The third plea, raised in the reply, alleges infringement of the principle of sound administration, of essential procedural requirements and of the second paragraph of Article 99(h) of Commission Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977 (OJ 1993 L 315, p. 1).

Admissibility

Arguments of the parties

19 The Commission contests the admissibility of the third plea on the ground that it was not raised until the reply and is not based on matters which came to light in the course of the proceedings.

20 The applicant argues that the third plea is based on "matters contained in the defence and in the documents appended thereto".

Findings of the Court

21 The Court points out that, under Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

22 There are two limbs to the third plea. In the first limb, the applicant argues that the invitation to tender published in the Supplement to the Official Journal infringes Article 99 of Regulation No 3418/93 on the ground that it does not contain most of the particulars required by that provision. In the second limb, it argues that the second paragraph of Article 99(h) of Regulation No 3418/93, read in the light of the principle of sound administration, obliged the Commission to contact it

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in order to clarify the terms of its tender.

23 As far as the first limb of this plea is concerned, the Court finds that the applicant could have had cognizance, before it brought its action, both of the invitation to tender, to which it responded, and of Regulation No 3418/93, which was published in the Official Journal of 16 December 1993 (OJ 1993 L 315). It follows that the first limb of the plea is not based on matters which came to light in the course of the procedure within the meaning of Article 48(2) of the Rules of Procedure and so must be declared inadmissible.

24 As far as the second limb of the plea is concerned, the Court considers that it should be declared admissible inasmuch as it is based on a relevant matter of fact which came to light in the course of the procedure, namely the fact that the selection committee was aware of the existence of a systematic calculation error in the applicant' s tender. Since, however, in this second limb of the third plea the applicant merely reiterates an argument set out in its second plea, the Court will consider it when it assesses the second plea.

Substance

The first plea, alleging infringement of the duty to state reasons

° Arguments of the parties

25 The applicant asserts in the first place that a tenderer participating in a procedure for the award of a public contract organized by a Community institution is entitled to be given, at the very time when it is informed that its tender has been rejected, an individual statement of the reasons for the rejection of its tender. It takes the view that that right flows directly from Article 190 of the EC Treaty such that the Court ought not to apply Article 12(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), in conjunction with Article 126 of Regulation No 3418/93, if those provisions have the effect of enabling the institutions to give the reasons for their decisions rejecting tenders a posteriori.

26 The applicant considers that it follows from this that, in order to determine whether the Commission complied with its duty to state the reasons on which its decision was based, the Court should take account only of the reasons set forth in the letter of 5 December 1994 and not of those contained in the letter of 21 December 1994, which was late. Since it is undisputed that the letter of 5 December 1994 contains no reasons whatsoever, the applicant considers that the Court must conclude that there has been an infringement of Article 190 of the Treaty.

27 Secondly, the applicant argues that, in any event, the reasons set out in the letter of 21 December 1994 must be regarded as inadequate, since they do not enable the precise grounds on which its tender was rejected to be identified. While the invitation to tender and the specifications set out three precise award criteria, the applicant considers that the letter of 21 December 1994 makes no reference to these and is based merely on a general reference to "the more economically advantageous" tenders of the three successful companies.

28 The Commission states in response that it is clear from Article 12(1) of Directive 92/50 that it is entitled to give a reasoned decision only to eliminated tenderers who make an express request to that effect. It considers that that provision is applicable in this case by virtue of Article 126 of Regulation No 3418/93, which provides that the Council directives on contracts for public works, supplies and services are to be applicable to the award of contracts by the institutions whenever the amounts involved are greater than the amounts provided for in those directives.

29 Consequently, it considers that it was only the letter of 21 December 1994 which needed to furnish justification for the rejection of the applicant' s tender and that that letter does in fact provide

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adequate grounds for the contested decision in that it describes the procedure followed, sets forth the criteria applied and mentions the names of the successful tenderers.

° Findings of the Court

30 It is necessary to determine first which duties to give reasons are applicable to the institutions vis-à-vis tenderers eliminated from Community procedures for the award of public contracts.

31 In this connection, the Court observes that Directive 92/50 is applicable in this case by virtue of Article 126 of Regulation No 3418/93, since the value of the contract in question exceeds the threshold laid down by Article 7(1) of that directive. However, it appears from Article 12(1) of Directive 92/50 that the institution concerned fulfils its obligation to state reasons if it first informs eliminated tenderers immediately of the fact that their tender has been rejected by a simple unreasoned communication provided it subsequently, if expressly requested to do so, furnishes them within 15 days with a reasoned explanation.

32 The Court considers that such a manner of proceeding satisfies the purpose of the duty to state reasons enshrined in Article 190 of the Treaty, according to which the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights; and, on the other, to enable the Court to exercise its supervisory jurisdiction (Case T-166/94 Koyo Seiko v Council [1995] ECR II-2129, paragraph 103).

33 In this context, it must be emphasized that the fact that interested tenderers receive a reasoned decision only if they make an express request to that effect does not restrict their ability to assert their rights before the Court. The period for bringing proceedings laid down in the fifth paragraph of Article 173 of the Treaty does not in effect begin to run until the reasoned decision is notified, subject to the tenderer having made his request for a reasoned decision within a reasonable time after he was apprised of the rejection of his tender (see Case T-465/93 Consorzio Gruppo di Azione Locale "Murgia Messapica" v Commission [1994] ECR II-361, paragraph 29, and Joined Cases T-432/93, T-433/93 and T-434/93 Socurte and Others v Commission [1994] ECR II-503, paragraph 49).

34 Accordingly, in order to determine whether the Commission complied with its duty to state reasons, the Court takes the view that it is necessary to examine the letter dated 21 December 1994 sent to the applicant in response to its express request for an individual explanation.

35 In this regard, it is clear from that letter that the Commission did provide sufficiently detailed reasons for its rejection of the tender in question, because it confirmed that it satisfied all the formal requirements of the procedure but was considered to be less economically advantageous than the tenders of Ecco, Gregg and Manpower at the stage when the three award criteria were applied.

36 The sufficiency of that reasoning is borne out by the fact that ° as the applicant confirmed at the hearing ° when it was informed that its tender had been rejected in December 1994, it was able immediately to identify the precise reason for its rejection, to wit the presence of a systematic error in the calculation of the price.

37 It follows from the foregoing that the first plea alleging infringement of the obligation to state reasons must be rejected.

The second and third pleas considered together, alleging infringement of the principles of equal treatment and sound administration, the second paragraph of Article 99(h) of Regulation No 3418/93 and manifest error of assessment

° Arguments of the parties

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38 The applicant puts forward two separate arguments in support of this plea. First, it argues that, in order to guarantee compliance with the principles of equal treatment and sound administration, the Commission was itself obliged either to correct the error which it had found or to contact the applicant in order to enable it to correct the error. In this context, the applicant avers that it is clear from the documents produced by the Commission during the proceedings that, if the formula "billed hourly rates = gross hourly wages x 2.16 : 39.5" had been correctly applied, it would have obtained at least sufficient points under the price criterion to be classed in joint third place. In addition, it draws the Court' s attention to the wording of Article 99(h) of Regulation No 3418/93, which in its view, confirms that a contracting institution may take it upon itself to contact a tenderer in order to correct obvious clerical errors. Lastly, at the hearing, the applicant based an argument on Article 37 of Directive 92/50, from which it appears that a contracting authority is not entitled to reject a tender which appears abnormally low without requesting particulars in writing on its make-up. It adds moreover that the Commission made a manifest error of assessment in awarding it points for its flexibility and customer service by comparison with the points which it awarded under those heads to Ecco.

39 The Commission responds by stating in the first place that if it had corrected the applicant' s tender, that in itself would have constituted an infringement of the principle of equal treatment. It considers that corrections of clerical errors may be envisaged only in so far as they have no discriminatory effect. However, in view of the key importance played by the tender price in assessing the tender, any correction of the applicant' s tender or any request made to it to submit a new tender would have been bound to infringe the principle of non-discrimination.

40 In so far as the applicant contests the assessment made by the selection committee of its flexibility and its customer service, the Commission contends that it is not for the applicant to substitute its assessment for that of the contracting authority in proceedings relating to legality.

° Findings of the Court

41 It is common ground that the existence of a "systematic error in the calculation of the billing rates on the basis of the gross wages" was adverted to by the Commission at the meeting of its selection committee (see paragraph 11, above).

42 In view of that factor, the applicant claims that, by refraining from contacting it, the Commission infringed the principle of equal treatment in so far as it did not assess the real value of all the tenders submitted to it, but simply compared the value of the applicant' s tender, which it knew to be distorted, with the apparent real value of the other tenders. The applicant adds that, at the same time, the Commission infringed the principle of sound administration and the second paragraph of Article 99(h) of Regulation No 3418/93.

43 In that regard, it should be noted that according to the second paragraph of Article 99(h) of Regulation No 3418/93 any contact between the institution and the tenderer after the tenders have been opened is prohibited save, exceptionally, "if some clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected". In those cases, the institution may take it upon itself to contact the tenderer.

44 The Court considers that it is clear from the precise terms of that provision that it empowers the institutions to contact tenderers in the exceptional, limited circumstances which it identifies. It follows that that provision cannot be interpreted as imposing a duty on the institutions to contact tenderers.

45 Next, it is necessary to enquire whether, in this case, that power might nevertheless have given rise to a duty on the part of the Commission by virtue of the superior principles of law invoked by the applicant (see paragraph 42, above) having regard to the fact that the calculation error

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in question was particularly obvious.

46 As to that, the Court considers it sufficient to observe that the systematic calculation error in question was not particularly obvious. Whilst the selection committee succeeded in attributing the error to the "calculation of the billing rates on the basis of the gross hourly wages" (see paragraph 11, above), it was unable for all that to determine, on the basis solely of the applicant' s tender, whether the error was a calculation error made in applying the formula presented by the applicant, as it has maintained before the Court; an error in determining the coefficient for converting the gross hourly wages into billing rates, which, according to the specifications, takes in all the tenderer' s costs, its profit margin and the Belgian franc/ecu conversion rate (see paragraph 4, above); or simply a clerical error.

47 It follows that, even though the selection committee detected the presence of a systematic calculation error, it was unable to ascertain its exact nature or cause. In those circumstances, any contact made by the Commission with the applicant in order to seek out jointly with it the exact nature and cause of the systematic calculation error would have involved a risk that other factors taken into account in order to establish its tender price ° in particular those relating to the calculation of the coefficient encompassing its profit margin ° might have been adjusted, and this would have entailed, contrary to the applicant' s claims, an infringement of the principle of equal treatment to the detriment of the other tenderers, all of whom, in common with the applicant, are under an equal duty to take care in drawing up their tenders.

48 The Court further notes that the applicant has neither shown nor even alleged that the Commission contacted, in the course of the procedure at issue, other tenderers who were in a comparable situation to its own in order to correct any errors in their tenders or to provide additional information. In this connection, the Court observes that it appears from Annexes 7(d) and 9 to the report to the CCAM that the selection committee used, as an assessment criterion, the clarity and precision of the tenders and penalized some tenders because they were insufficiently precise about the quality of the service which the tenderers undertook to provide. Yet, whilst those tenderers were in a situation comparable to that of the applicant in so far as they could have increased the value of their tenders if the Commission had taken it upon itself to contract them in order to obtain explanations, the Court finds that the report to the CCAM and the documents appended thereto do not mention any contact made by the Commission with tenderers, but confirm that the Commission strictly applied the conditions of the tendering procedure.

49 Lastly, the Court considers that the Commission did not commit a manifest error in assessing the applicant' s organizational ability. In this regard, the Court recalls that the Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court' s review should be limited to checking that there has been no serious and manifest error (Case 56/77 Agence Européenne d' Interims v Commission [1978] ECR 2215, paragraph 20). In this case, the Court finds, with regard to the points awarded to the applicant for its customer service, that it is undisputed that the applicant' s tender ° unlike that of Ecco ° made no reference to the quality of the customer service which it undertook to provide and hence the Commission made no manifest error of assessment in giving Ecco three points more than the applicant for its customer service. As regards the points awarded to the applicant for flexibility, unlike Ecco' s tender, that of the applicant did not undertake to provide a "contact person" permanently at the Commission' s offices, with the result that the Commission did not make any manifest error of assessment in awarding Ecco two points more than the applicant for flexibility.

50 In addition, the Court would point out that the first and second paragraphs of Article 37 of Directive 92/50, which place the contracting authority under a duty to verify that the terms of

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the tender are not the outcome of the economy of the method by which the service is provided, the technical solutions chosen, the exceptionally favourable conditions available to the tenderer for the provision of the service or the originality of the service; are concerned with a tender which appears to be abnormally low, whereas the tender at issue in this case is one which appears to be abnormally high.

51 For all of these reasons it follows that the Commission has not infringed the principles of equal treatment and sound administration or the second paragraph of Article 99(h) of Regulation No 3418/93, nor has it committed a manifest error of assessment, and therefore the second and third pleas must be rejected.

52 It follows that the application must be dismissed in its entirety.

DOCNUM	61995A0019
AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; A ; judgment
PUBREF	European Court reports 1996 Page II-00321
DOC	1996/05/08
LODGED	1995/02/07
JURCIT	61977J0056-N20 : N 49 31991X0530(01)-A48P2 : N 21 11992E190 : N 32 31992L0050-A07P1 : N 31 31992L0050-A12P1 : N 31 31992L0050-A37L1 : N 50 31992L0050-A37L2 : N 50 31992L0050 : N 31 31993R3418-A126 : N 31 31993R3418-A99H42 : N 18 22 37 42 43 51 31993R3418 : N 22 23 61993A0432-N49 : N 33 61993A0465-N29 : N 33 61994A0166-N103 : N 32
SUB	Public contracts of the European Communities
AUTLANG	French

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APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Belgium
NOTES	Rigaux, Anne ; Simon, Denys: Europe 1996 Juillet Comm. no 265 p.5 Bock, Christian: St. Galler Europarechtsbriefe 1996 p.240 Brown, Adrian: Public Procurement Law Review 1997 p.CS4-CS7
PROCEDU	Application for annulment - inadmissible ; Application for annulment - unfounded
DATES	of document: 08/05/1996 of application: 07/02/1995

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Judgment of the Court (Fifth Chamber)
of 28 March 1996
Commission of the European Communities v Federal Republic of Germany.
Failure to fulfil obligations - Public works contracts - Failure to publish a tender notice.
Case C-318/94.

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Approximation of laws ° Procedures for the award of public works contracts ° Directive 71/305 ° Derogations from common rules ° Conditions ° Refusal by a body within a Member State, during the procedure provided for under national legislation, to give its approval for a public works project ° Refusal not an unforeseeable event within the meaning of the directive

(Council Directive 71/305, as amended by Directive 89/440, Art. 5(3)(c))

The possibility under Article 9(d) of Directive 71/305 concerning the coordination of procedures for the award of public works contracts, in its original version, and under Article 5(3)(c) of the version resulting from the amendment by Directive 89/440 of bypassing the tendering procedure in order to apply the negotiated procedure is available only if a number of conditions are satisfied concurrently, one of which is the occurrence of an unforeseeable event. If one of those conditions is not satisfied, use of the negotiated procedure will not be justified.

The fact that a body in a Member State which must, in the procedure for approval of public works projects provided for under national legislation, approve a project may, before expiry of the period laid down for that purpose, raise objections for reasons which it is entitled to put forward cannot constitute an unforeseeable event.

A Member State whose competent authorities, after deciding not to award a public works contract by open procedure by reason of the delay resulting from the refusal by a body to approve the work plans originally envisaged, award a contract for partial work by negotiated procedure without prior publication of a tender notice, will therefore be in breach of its obligations under the directive.

In Case C-318/94,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, and, initially, by Angela Bardenhewer, and, subsequently, by Claudia Schmidt, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Roeder, Ministerialrat in the Federal Ministry for Economic Affairs, and Gereon Thiele, Assessor in the same ministry, acting as Agents, D-53107 Bonn,

defendant,

APPLICATION for a declaration that, the Waterways and Navigation Office, Emden having awarded the public works contract for the dredging of the lower Ems between Papenburg and Oldersum by negotiated procedure without prior publication of a tender notice in the Official Journal of the European Communities, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1),

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THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida, P. Jann (Rapporteur), L. Sevon and M. Wathelet, Judges,

Advocate General: M.B. Elmer,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 February 1996,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 6 December 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, the Waterways and Navigation Office, Emden having awarded the public works contract for the dredging of the lower Ems between Papenburg and Oldersum by negotiated procedure without prior publication of a tender notice in the Official Journal of the European Communities, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1, hereinafter "the Directive").

2 In September 1989, at the request of the town of Papenburg, a plan was drawn up to alter the bed of the lower Ems with a view to making it navigable for "Panama" class vessels with a 6.80 metre draught. The deepening of this section of the Ems river was of major economic significance for the region. Moreover, during 1990, the Meyer-Werft shipyard, the largest employer in the region, contracted to deliver a "Panama" class vessel by 18 February 1992 at the latest. A per diem penalty of USD 80 000 was laid down in the event of failure to comply with that scheduled delivery date. Delivery of the vessel on that date could take place only after completion of this work.

3 Under German legislation, the plans for deepening the lower Ems had to be approved by a procedure requiring, in particular, the agreement of the Weser-Ems Regional Authority. At the end of May 1991, the date envisaged for conclusion of this procedure, the Weser-Ems Regional Authority, which had not previously raised any objection, gave notice that it did not agree to the project on ecological grounds. A decision was then taken to continue the procedure with a view to obtaining approval only of the plans for that part of the project which consisted in temporarily deepening the river bed in order to enable the vessel being built by the Meyer-Werft shipyard to pass through. The plans for this partial project were definitively approved on 15 August 1991.

4 However, on 15 April 1991, the Waterways and Navigation Office, Emden (hereinafter "the Office"), which intended to award the work in accordance with the open procedure, sent a prior information notice concerning the work envisaged which was published in a supplement to the Official Journal of the European Communities on 20 April 1991.

5 Given the delay in approving the plans, the Office decided to abandon the open procedure and to award the contract by negotiated procedure without prior publication of a tender notice. The contract was awarded on 15 August 1991 pursuant to the latter procedure.

6 By formal notice of 12 November 1991, the Commission instituted Treaty-infringement proceedings against the Federal Republic of Germany under Article 169 of the Treaty on the ground that it had acted in breach of the rules governing the procedure for the award of public works contracts.

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The Commission pointed out that, in this case, the choice of negotiated procedure could not be justified under Article 5(3)(c) of the Directive. In a letter of 6 March 1992, the German Government disputed that contention.

7 In its reasoned opinion of 27 April 1993, the Commission restated its view and called on the German Government to take the measures necessary to comply with the reasoned opinion and, in particular, to suspend the contract in question, as well as any other contract negotiated on the same terms, within two months of notification of the opinion.

8 In its statement of position of 28 September 1993, the German Government stressed that it was imperative for the work to be completed by 18 February 1992, the date on which the vessel was to be delivered, so that it had to be begun by no later than mid-August 1991. In view of the difficulties arising in the procedure for approval of the plans, it was not possible to follow the open procedure, which would have lasted at least 72 days.

9 The Commission took the view that this reply was unsatisfactory and brought the present action.

10 It is necessary to consider whether the Federal Republic of Germany was entitled, on the basis of Article 5(3)(c) of the Directive, to award the contract in question by negotiated procedure without prior publication of a tender notice. Article 5(3)(c) provides that:

> "The contracting authorities may award their public works contracts by negotiated procedure without prior publication of a tender notice, in the following cases:
>
> ...
>
> (c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 above cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities ...".

11 Before Directive 71/305 was amended by Directive 89/440, Article 9 of the earlier directive provided that:

> "Authorities awarding contracts may award their works contracts without applying the provisions of this Directive, except those of Article 10, in the following cases:
>
> ...
>
> (d) in so far as is strictly necessary when, for reasons of extreme urgency brought [about] by events unforeseen by the authorities awarding contracts, the time-limit laid down in other procedures cannot be kept...".

12 In so far as Article 5(3)(c) of the Directive reproduces the wording of the former Article 9(d), those provisions must be given the same interpretation.

13 The Court has held in this regard that the provisions of Article 9 of Directive 71/305, which authorize derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in relation to public works contracts, must be interpreted strictly and that the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (Case C-57/94 Commission v Italy [1995] ECR I-1249, paragraph 23).

14 The Court has also held that, according to Article 9(d) of Directive 71/305, the derogation for which it provides, namely exemption from the obligation to publish a notice of a call for tenders, is available only if three conditions are fulfilled concurrently. That derogation requires the

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existence of an unforeseeable event, extreme urgency, rendering the observance of time-limits laid down by other procedures impossible, and, finally, a causal link between the unforeseeable event and the extreme urgency resulting therefrom (Case C-107/92 Commission v Italy [1993] ECR I-4655, paragraph 12). If one of those conditions is not satisfied, use of the negotiated procedure will not be justified.

15 According to the German Government, the event which the contracting authorities could not have foreseen was the totally unexpected refusal by the Weser-Ems Regional Authority to grant its approval following its deliberation.

16 That argument cannot be accepted.

17 It must be stressed that, in order to take account of the public and private interests concerned in procedures for approving public works projects, Member States may confer on natural or legal persons potentially concerned by a project certain rights which the competent authorities must respect.

18 The possibility that a body which must approve a project might, before expiry of the period laid down for this purpose, raise objections for reasons which it is entitled to put forward is, consequently, something which is foreseeable in plan approval procedure.

19 The refusal of the Weser-Ems Regional Authority to approve the project for dredging the lower Ems, thereby obliging the competent authorities to amend that project, cannot therefore be regarded as an event unforeseen by the contracting authorities within the meaning of Article 5(3)(c) of the Directive.

20 It follows from the foregoing, without its being necessary to determine whether the other derogation conditions were satisfied in this case, that, the Waterways and Navigation Office, Emden having awarded the public works contract for the dredging of the lower Ems between Papenburg and Oldersum by negotiated procedure without prior publication of a tender notice in the Official Journal of the European Communities, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Council Directive 89/440/EEC of 18 July 1989.

Costs

21 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, the Waterways and Navigation Office, Emden having awarded the public works contract for the dredging of the lower Ems between Papenburg and Oldersum by negotiated procedure without prior publication of a tender notice in the Official Journal of the European Communities, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Council Directive 89/440/EEC of 18 July 1989;

2. Orders the Federal Republic of Germany to pay the costs.

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DOCNUM	61994J0318
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; J ; judgment
PUBREF	European Court reports 1996 Page I-01949
DOC	1996/03/28
LODGED	1994/12/06
JURCIT	31971L0305-A09LD : N 13 - 19 31989L0440-A05P3LC : N 12 19 61992J0107-N12 : N 14 61994J0057-N23 : N 13
CONCERNS	Failure concerning 31971L0305 Failure concerning 31989L0440
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Federal Republic of Germany ; Member States
NATIONA	Federal Republic of Germany
NOTES	Fernandez Martín, José María: Public Procurement Law Review 1996 p.CS131-CS133 X: Revue de jurisprudence de droit des affaires 1996 p.853-854 Bock, Christian: St. Galler Europarechtsbriefe 1996 p.194-195
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Elmer
JUDGRAP	Jann
DATES	of document: 28/03/1996 of application: 06/12/1994

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Judgment of the Court (Fourth Chamber)
of 26 October 1995
Furlanis Costruzioni Generali SpA v Azienda Nazionale Autonoma Strade (ANAS).
Reference for a preliminary ruling: Tribunale amministrativo regionale del Lazio - Italy.
Council Directives 71/305/EEC and 89/440/EEC - Public contracts - Abnormally low tenders in relation to the transaction.
Case C-143/94.

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1. Preliminary rulings ° Jurisdiction of the Court ° Limits ° Question obviously irrelevant

(EC Treaty, Art. 177)

2. Approximation of laws ° Procedures for the award of public works contracts ° Directive 71/305 ° Award of contracts ° Abnormally low tenders ° Rejection pursuant to the derogating provisions of the last subparagraph of Article 29(5) ° Conditions ° Definitive award to have been made by 31 December 1992

(Council Directive 71/305, Art. 29(5))

1. In the preliminary rulings procedure provided for in Article 177 of the Treaty, it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action.

2. The last subparagraph of Article 29(5) of Directive 71/305 concerning the coordination of procedures for the award of public works contracts, as amended by Article 1(20) of Directive 89/440, which introduces temporary, derogating arrangements constituting an exception to the procedure normally laid down by the Community rules, must be interpreted as meaning that only procedures in which the definitive award was made by 31 December 1992 are entitled to qualify for the derogation provided for in that provision as regards the rejection of abnormally low tenders.

In Case C-143/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale Amministrativo Regionale del Lazio (Italy) for a preliminary ruling in the proceedings pending before that court between

Furlanis Costruzioni Generali SpA

and

Azienda Nazionale Autonoma Strade (ANAS)

Itinera Co. Ge. SpA, formerly Edilvie Srl

on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682), as amended by Article 1(20) of Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1),

THE COURT (Fourth Chamber),

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composed of: C.N. Kakouris (Rapporteur), President of the Chamber, P.J.G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: C.O. Lenz,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Furlanis Costruzioni Generali SpA, by A. Biagini and N. Marcone, of the Rome Bar,

° Itinera CO. GE. SpA, formerly Edilvie Srl, by V. Biagetti and G. Cignitti, of the Rome Bar

° the Italian Government, by U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Mr Fiorilli, Avvocato dello Stato,

° the Commission of the European Communities, by A. Aresu, of the Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument from Furlanis Costruzioni Generali SpA, Iterina CO. GE. SpA, the Italian Government and the Commission at the hearing on 11 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 29 June 1995,

gives the following

Judgment

1 By order of 31 March 1994, received at the Court on 24 May 1994, the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682), as amended by Article 1(20) of Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).

2 The question was raised in proceedings brought by Furlanis Costruzioni Generali (hereinafter "Furlanis") against a decision adopted by Azienda Nazionale Autonoma Strade (hereinafter "ANAS"), a contracting authority governed by public law, in connection with a restricted procedure for the award of a public works contract.

3 Article 29(5) of Directive 71/305, as amended by Article 1(20) of Directive 89/440, lays down the procedure to be followed in the context of the award of public works contracts in the case of tenders which appear to be abnormally low in relation to the transaction. According to the first subparagraph of that provision,

> "If, for a given contract, tenders appear to be abnormally low in relation to the transaction, before it may reject those tenders the contracting authority shall request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received."

4 A temporary derogation from that rule is set out in the last subparagraph of the provision, according to which

> "However, until the end of 1992, if current national law so permits, the contracting authority may exceptionally, without any discrimination on grounds of nationality, reject tenders which are abnormally low in relation to the transaction, without being obliged to comply with the procedure provided for in the first subparagraph if the number of such tenders for a particular contract

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is so high that implementation of this procedure would lead to a considerable delay and jeopardize the public interest attaching to the execution of the contract in question. Recourse to this exceptional procedure shall be mentioned in the notice referred to in Article 12(5)."

5 Directive 89/440 was implemented in Italian law by Presidential Decree No 406/91 of 19 December 1991. The sixth paragraph of Article 29 of that decree, which implements the aforementioned derogating provision, provides that, until 31 December 1992, "... the contracting authority may automatically exclude tenders which appear to be abnormally low..., if the number of tenders received exceeds 30. The fact that certain tenders may be excluded and the percentage increase over the average must be mentioned in the contract notice".

6 According to the documents before the Court, by a contract notice dated 28 September 1992 and published in the Italian Official Gazettte of 2 October 1992, ANAS opened a restrictive procedure, pursuant to Article 29 of Presidential Decree No 406/91, for the award of a contract for works on the Ascoli Piceno-Comunanza section of the Piceno-Aprutina road, second lot, second tranche, for a maximum of LIT 36 900 000 000.

7 The contract notice stated that tenders whose percentage reduction (calculated by reference to the basic price fixed for the tendering procedure) exceeded the average percentage for tenders allowed, plus seven points, would be regarded as being abnormally low in relation to the transaction within the meaning of the provision in question.

8 Furlanis submitted a request to participate, accompanied by the requisite documents, following which it received by letter of 12 December 1992 an invitation to participate in the tendering procedure to take place on 4 February 1993. Following that invitation to tender, Furlanis put in a tender. On 4 February 1993, the contracting authority awarded the contract to the Edilvie company, which has since become Itinera CO. GE. SpA (hereinafter "Itinera"). Furlanis was excluded on the ground that its tender had to be regarded as abnormally low on the basis of the criterion laid down in the contract notice.

9 Furlanis contested the decision awarding the works in question to Edilvie before the Tribunale Amministrativo Regionale del Lazio. Before that court, Furlanis argued essentially that, both under the Community rules and under the Italian implementing decree, the derogating procedure provided for for abnormally low tenders applied only to award procedures which had become definitive before 31 December 1992 and that the mere publication of the contract notice before that date was not sufficient in order for the derogation to be able to apply.

10 Taking the view that a question of interpretation arose with regard to the date of 31 December 1992 as the latest date for the applicability of the derogating provision in question, the national court stayed the proceedings and referred the following question to the Court for a preliminary ruling:

"Must the provisions of Article 1(20) of Directive 89/440/EEC, amending the earlier Directive 71/305/EEC concerning procedures for the award of public works contracts, be interpreted as meaning that the exception to the procedure for the verification of tenders that appear to be abnormally low in relation to the transaction, which was available only until the end of 1992, relates (a) to tendering procedures actually completed by that date or (b) to tendering procedures commenced before that date?"

Admissibility

11 Itinera questions the relevance and hence the admissibility of the national court' s question on the ground that the content of the Community provision in question could not give rise to any uncertainty as regards its interpretation. In accordance with the general principle that the rules

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applicable to a procedure, such as that preceding the award of a public contract, are determined by the measure initiating that procedure, the date of 31 December 1992 should be regarded as referring only to the publication of the contract notice.

12 In that regard the Court has consistently held that it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action (see, most recently, the judgment in Case C-62/93 Supergas [1995] ECR I-0000, paragraph 10). But that is not the case here.

13 Consequently, the Court must consider the national court' s question.

The question referred for a preliminary ruling

14 By its question the national court seeks to establish essentially whether the last subparagraph of Article 29(5) of Directive 71/305, as amended, must be interpreted as meaning that only procedures in which the definitive award was made by 31 December 1992 may qualify for the derogation provided for in that provision or whether all procedures for which a contract notice was published before that date so qualify.

15 Itinera and the Italian Government submit that procedures for which the contract notice was published before 31 December 1992 but in which the definitive award has not yet been made are also covered by the derogating provision in question in so far as the actual course of an award procedure is governed by the rules laid down in the contract notice, which legally has the effect of an act of self-limitation on the part of the contracting authority

16 Furlanis and the Commission argue for their part that, since the provision in question constitutes a derogation, it must be interpreted strictly as covering only award procedures terminated before 31 December 1992.

17 According to the wording of the provision in question, until the end of 1992 the contracting authority may "reject" tenders which are abnormally low in relation to the transaction. Consequently, the terms of the provision relate to the decision by which the contracting authority rules definitively on the tenders submitted to it and not merely to the measure by which the award procedure was initiated.

18 That interpretation is corroborated by the fact that the provision in question is set out in the chapter of the directive entitled "criteria for qualitative selection", which is concerned with the final phase of the award procedure.

19 There are other reasons which militate in favour of its being given a strict interpretation.

20 The Court held in Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 14, that provisions which authorized derogations from the rules of the directive intended to ensure the effectiveness of the rights conferred by the Treaty in the field of public works contracts must be interpreted strictly. This holds good also as regards the provision at issue, which introduces temporary, derogating arrangements constituting an exception to the procedure normally laid down by the Community rules.

21 A further factor favouring a strict interpretation of the provision in question is that the derogating, temporary arrangement in question was introduced, as the Commission has pointed out, at the request of one Member State alone on account of specific difficulties arising in its national system.

22 Accordingly, it should be stated in reply to the question from the national court that the last

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subparagraph of Article 29(5) of Directive 71/305, as amended by Article 1(20) of Directive 89/440, must be interpreted as meaning that only procedures in which the definitive award was made by 31 December 1992 are entitled to qualify for the derogation provided for in that provision.

Costs

23 The costs incurred by the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question referred to it by the Tribunale Amministrativo Regionale del Lazio by order of 31 March 1994, hereby rules:

The last subparagraph of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Article 1(20) of Council Directive 89/440/EEC of 18 July 1989, must be interpreted as meaning that only procedures in which the definitive award was made by 31 December 1992 are entitled to qualify for the derogation provided for in that provision.

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SUB	Approximation of laws
AUTLANG	Italian
OBSERV	Italy ; Commission ; Member States ; Institutions
NATIONA	Italy
NATCOUR	*A9* Tribunale Amministrativo Regionale del Lazio, Sezione III, sentenza del 01/12/93 31/03/94 (764/94) - I tribunali amministrativi regionali 1994 I p.1362-1367 - Il Foro amministrativo 1994 p.1906-1910 - Rivista italiana di diritto pubblico comunitario 1994 p.1385-1391 ºNOTESº - G. F. C.: Rivista italiana di diritto pubblico comunitario 1994 p.1386
NOTES	Mok, M.R.: TVVS ondernemingsrecht en rechtspersonen 1995 p.340 Simon, Denys: Europe 1995 Décembre Comm. no 413 p.6 Manzella, Gian Paolo ; Ziotti, Paolo: Giornale di diritto amministrativo 1996 p.139-140 Fernandez Martín, José M.: Public Procurement Law Review 1996 p.CS65-CS66 Simon, Denys: Journal du droit international 1996 p.484-487 M.A.: Rivista italiana di diritto pubblico comunitario 1996 p.469-470
PROCEDU	Reference for a preliminary ruling
ADVGEN	Lenz
JUDGRAP	Kakouris
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Judgment of the Court (Fifth Chamber)
of 25 April 1996
Commission of the European Communities v Kingdom of Belgium.
Public contracts - Transport sector - Directive 90/531/EEC.
Case C-87/94.

++++

1. Approximation of laws ° Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ° Directive 90/531 ° Scope ° Absence of a condition concerning the nationality or seat of tenderers ° Obligation on contracting entities to apply the rules applicable to the type of procedure chosen

(Council Directive 90/531, Art. 4(1) and 15(1))

2. Approximation of laws ° Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ° Directive 90/531 ° Award of contracts ° Principle of equal treatment of tenderers and principle of transparency ° Taking into account, after the opening of tenders, amendments made to one of them ° Contract awarded on the basis of figures not corresponding to the prescriptive requirements of the contract documents ° Taking into account variants of the award criteria not mentioned either in the contract documents or in the tender notice ° Breach

(Council Directive 90/531)

1. The procedure laid down by Directive 90/531 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors must be observed irrespective of the nationality or seat of the tenderers. The obligation, imposed on contracting entities by Article 4(1) of the directive, to apply procedures which are adapted to the provisions of the directive is not subject to any such condition and it is always possible that undertakings established in other Member States may be concerned directly or indirectly by the award of a contract.

Although under Article 15(1) of the directive contracting entities obliged to apply the procedures in the directive do indeed have a degree of choice regarding the procedure to be applied to a contract, once they have issued an invitation to tender under one particular procedure they are required to observe the rules applicable to it, until the contract has been finally awarded.

2. It follows from the terms of Directive 90/531 on the procurement procedures of entitites operating in the water, energy, transport and telecommunications sectors that the contracting entity' s procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency.

A Member State which, in the procedure for the award of a public contract by a public undertaking operating a bus service,

° takes into account fuel consumption figures submitted by a tenderer after the opening of tenders, where those figures exceed a limit which the tenderer himself stipulated in his initial tender in regard to any change in fuel consumption figures,

° awards the contract to the same tenderer on the basis of figures which do not correspond to the prescriptive requirements of the contract documents for calculating the notional penalty of the tenderer in question for maintenance costs in respect of engine and gear box replacement,

° takes into account, when comparing tenders for certain lots, the cost-saving features suggested by the same tenderer, without having referred to them in the contract documents or in the tender notice, uses them to offset the financial differences between the tenders in first place and those of the tenderer in question and accepts some of the same tenderer' s tenders as a result of taking those features into account,

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fails to fulfil that obligation.

In Case C-87/94,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Jan Devadder, Director at the Ministry of Foreign Affairs, Foreign Trade and Cooperation for Development, acting as Agent, and by Michel Waelbroeck and Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by taking into account, in the procedure for the award of a public contract by the Société Régionale Wallonne du Transport, amendments made to one of the tenders after the opening of those tenders, by admitting to the procedure for the award of the contract a tenderer who did not meet the selection criteria laid down in the contract documents and by accepting a tender which did not meet the criteria for the award of the contract laid down in the contract documents, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1) and to comply with the principle of equal treatment, which underlies all the rules on procedures for the award of public contracts,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward (Rapporteur), President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, P. Jann and L. Sevon, Judges,

Advocate General: C.O. Lenz,

Registrar: H.A. Ruehl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 July 1995,

after hearing the Opinion of the Advocate General at the sitting on 12 September 1995,

gives the following

Judgment

Costs

96 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party' s pleadings. Since the Kingdom of Belgium has been unsuccessful and the Commission has applied for costs, the former must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

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hereby:

1. Declares that, by taking into account, in the procedure for the award of a public contract by the Société Régionale Wallonne du Transport, information on fuel consumption submitted by EMI in its supplementary note of 24 August 1993 and, therefore, after the opening of tenders, by awarding the contract to EMI on the basis of figures which did not correspond to the prescriptive requirements of Annex 23 of the special conditions for calculating the notional penalty of EMI for maintenance costs in respect of engine and gear box replacement, by taking into account, when comparing the tenders for Lots Nos 4, 5 and 6, the cost-saving features suggested by EMI without having referred to them in the contract documents or in the tender notice, by using them to offset the financial differences between the tenders in first place and those of EMI placed second, and by accepting some of EMI' s tenders as a result of taking those features into account, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

2. Orders the Kingdom of Belgium to pay the costs.

1 By application lodged at the Court Registry on 11 March 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by taking into account, in the procedure for the award of a public contract by the Société Régionale Wallonne du Transport (SRWT), amendments made to one of the tenders after the opening of those tenders, by admitting to the procedure for the award of the contract a tenderer who did not meet the selection criteria laid down in the contract documents and by accepting a tender which did not meet the criteria for the award of the contract laid down in the contract documents, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1, hereinafter "the Directive") and to comply with the principle of equal treatment, which underlies all the rules on procedures for the award of public contracts.

The Directive

2 The 32nd and 33rd recitals in the preamble to the Directive state that the rules to be applied by the entities concerned should establish a framework for sound commercial practice and leave a maximum of flexibility and that, as a counterpart for such flexibility and in the interest of mutual confidence, a minimum level of transparency must be ensured.

3 Article 2 of the Directive mentions, as one of the contracting entities to which the Directive applies, public undertakings operating a network providing a public bus service. Under the second subparagraph of Article 2(2)(c) such a network exists where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

4 Article 4(1) provides that, when awarding supply contracts, the contracting entities are to apply procedures which are adapted to the provisions of the Directive.

5 Article 4(2) states that contracting entities are to ensure that there is no discrimination between different suppliers or contractors.

6 Article 27(2) provides that where the contract is to be awarded to the most economically advantageous tender "... contracting entities shall state in the contract documents or in the tender notice all the criteria they intend to apply to the award, where possible in descending order of importance".

7 Finally, Article 27(3) states:

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"Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting entities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting entities. Contracting entities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. Where variants are not permitted, they shall so indicate in the contract documents."

8 A joint statement by the Council and the Commission concerning Article 15 of the Directive (OJ 1990 L 297, p. 48) provides:

"The Council and the Commission state that in open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting entities and provided this does not involve discrimination."

The facts

9 By a tender notice published in the supplement to the Official Journal of the European Communities of 22 April 1993 (OJ 1993 S 78, p. 76), the SRWT, which is based in Namur (Belgium), issued an invitation to tender for the award, under an open procedure, of a public contract for the supply of 307 standard vehicles. That contract, for an estimated sum of over BFR 2 000 000 000 (excluding VAT) and divided into eight lots, was to be performed over a period of three years.

10 The contract documents consisted of the Cahier des Charges Type No 1 (hereinafter "the general conditions") and the Cahier Spécial des Charges No 545 (hereinafter "the special conditions"), which amended the general conditions in certain respects.

11 Point 20.2 of the special conditions provided that the contract was to be awarded to the most economically advantageous tender. That tender would be selected on the basis of an evaluation of the tenders by reference to the award criteria under headings which are set out in point 59 of the Advocate General' s Opinion. An evaluation was to be made, in particular, of the basic price of the bus, increased by the price of variants taken into account and then adjusted in accordance with the advantages and disadvantages resulting from the application of ten technical assessment criteria (hereinafter "the technical criteria").

12 The SRWT expressly requested potential tenderers to propose certain variants concerning the financial structure of the contract, such as staggered payment terms, lease or hire of the vehicles.

13 As regards the technical criteria, the special conditions laid down, under each heading, a formula enabling the SRWT to allocate for certain features of the buses offered a notional bonus or penalty in "francs fictifs", the amount of which depended on the variables of the formula and was to be added to or deducted from the basic price.

14 After sending the contract documents to the interested parties, the SRWT issued three notices of amendment, dated 30 April, 5 May and 28 May 1993, rectifying and clarifying the contract documents in certain respects. In the second notice the SRWT clarified certain aspects of the contract documents relating to the minimum number of seated places, the desired total number of places, the maximum height of the floor and the formula for calculating one of the notional penalties. Each notice stated that tenderers had to indicate clearly in their tenders that they had received the notices of amendment and that they had taken them into account.

15 By 7 June 1993, the date fixed by the tender notice for both the receipt and the public opening of tenders, the following five companies had submitted tenders: EMI (Aubange), Van Hool (Koningshooikt),

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Mercedes-Belgium (Brussels), Berkhof (Roeselaere) and Jonckheere (Roeselaere).

16 The SRWT examined those tenders during June and July 1993. A memorandum dated 24 August 1993, drawn up for the meeting of the conseil d' administration on 2 September 1993, recommended the award of Lot No 1 to Jonckheere and Lots Nos 2 to 6 to Van Hool.

17 In the meantime, on 3, 23 and 24 August 1993 EMI had sent to the contracting entity three "supplementary" notes commenting on certain points of its initial tenders, in particular fuel consumption, the frequency of engine and gearbox replacements, and certain aspects of the technical quality of the material offered.

18 After examining those three notes, the technical department of the contracting entity drew up a memorandum on 31 August 1993 stating that EMI' s supplementary notes contained changes to its initial tenders and could not therefore be taken into account. The proposals for the award of contracts in the memorandum drawn up for the meeting on 2 September 1993 should therefore still stand.

19 At the meeting on 2 September 1993 the conseil d' administration took the view that it had insufficient information to adopt a final decision. In particular it was unsure whether it could take EMI' s three supplementary notes into account and decided to ask for a legal opinion on that question from the Walloon Minister of Transport.

20 By letter of 14 September 1993 the Walloon Minister of Transport replied that, as regards most of the points mentioned, no legal problem would be raised by taking into account EMI' s three supplementary notes. He therefore suggested that the file be re-examined in the light of his observations.

21 On 28 September 1993 the SRWT requested EMI to confirm the fuel consumption figures indicated in its supplementary note of 24 August 1993 and also the frequency of the engine and gear box replacements referred to in the supplementary note of 23 August 1993. By letter of 29 September 1993 EMI confirmed that the information it had supplied was correct.

22 Following that confirmation, the SRWT undertook a fresh comparison of the tenders, taking into account the content of the three supplementary notes. A memorandum prepared for the meeting of the conseil d' administation on 6 October 1993 proposed awarding Lot No 1 to Jonckheere and Lots Nos 2 to 6 to EMI.

23 At its meeting on 6 October 1993 the conseil d' administration decided, first, to adopt those proposals and thus award Lot No 1 to Jonckheere and Lots Nos 2 to 6 to EMI and, secondly, to postpone until 1996 an order for 30 vehicles.

24 On the same day, Van Hool applied to the Belgian Conseil d' Etat for an order suspending the operation of that decision under the emergency procedure. That application was dismissed by judgment of 17 November 1993.

25 On 30 November 1993 the Commission, with which Van Hool had lodged a complaint, gave the Kingdom of Belgium formal notice to submit its observations pursuant to Article 169 of the Treaty. By letter of 15 December 1993 the Belgian Government stated that the allegation that it had failed to fulfil its obligations was unfounded. The Commission was not satisfied by that reply and delivered a reasoned opinion to the Belgian Government, requesting it to intervene with the competent authorities to suspend the legal effects of the contract concluded between the SRWT and EMI. In its reply to that opinion, the Belgian Government claimed that the Commission had not proved any failure to fulfil obligations.

26 On 11 March 1994 the Commission brought the present action and applied for interim measures to suspend both SRWT' s decision to award the contract and the measures implementing that decision. That application was dismissed by order of 22 April 1994.

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27 By letter of 9 June 1995 the Commission abandoned its second plea, which alleged that the Kingdom of Belgium had accepted tenders from EMI which did not meet the selection criteria laid down in the special conditions.

28 The application, as so amended, seeks a declaration that the Kingdom of Belgium has failed to fulfil its obligations under the Directive and to comply with the principle of equal treatment of tenderers which underlies all the rules on procedures for the award of public contracts, in that, in the procedure for the award of a public contract by the SRWT,

° it took into account amendments made to one of the tenders after the opening of tenders, and

° it accepted a tender which did not meet the criteria for the award of the contract laid down in the contract documents.

29 Before examining those heads of complaint it is necessary to consider the Belgian Government' s claim that the Directive does not apply in the present case.

The applicability of Community law

30 It is not disputed that the SRWT is a public undertaking operating a network providing a public bus service within the meaning of Article 2 of the Directive and that it therefore had to comply with the rules of the Directive, in conformity with Article 4, when it awarded the contract for the supply of the eight lots of buses at the origin of this action.

31 However, since all the tenderers are Belgian companies, the Belgian Government claims that the case concerned a purely internal situation to which Community law did not apply.

32 That argument cannot be accepted.

33 The obligation imposed on contracting entities by Article 4(1) of the Directive is not subject to any condition concerning the nationality or seat of tenderers. Moreover, as the Advocate General has pointed out in point 24 of his Opinion, it is always possible that undertakings established in other Member States may be concerned directly or indirectly by the award of a contract. The procedure laid down by the Directive must therefore be observed irrespective of the nationality or seat of the tenderers.

34 In the course of the procedure the Belgian Government also claimed that the contracting entity was not obliged to award the contract through an open procedure. It could have chosen a negotiated procedure and its conduct would have been in conformity with such a procedure.

35 Suffice it to state that, although under Article 15(1) of the Directive contracting entities obliged to apply the procedures in the Directive do indeed have a degree of choice regarding the procedure to be applied to a contract, once they have issued an invitation to tender under one particular procedure, they are required to observe the rules applicable to it, until the contract has been finally awarded.

The heads of complaint

36 The Commission considers that, by taking into account information submitted to it in EMI' s three supplementary notes concerning, in particular, fuel consumption, the frequency of engine and gear box replacements, and certain aspects of the technical quality of the material offered, EMI breached the principle of the equal treatment of tenderers.

37 As regards fuel consumption, the Commission complains that, when evaluating the tenders, the Kingdom of Belgium took into account the new consumption indicated by EMI to the SRWT after the opening of the tenders, which had been changed from the figure in its initial tenders.

38 As regards the frequency of engine and gear box replacements, the Commission complains that

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the Kingdom of Belgium took into account information supplied by EMI after the opening of tenders, which amended its initial tenders and also failed to comply with the prescriptive requirements of the contract documents.

39 As regards the technical quality of the material offered, the Commission considers that, when evaluating EMI' s tenders, the SRWT wrongly took into account matters not included amongst the award criteria.

Fuel consumption

40 Point 20.2.2.1 of the special conditions provides:

"20.2.2.1 Fuel consumption

When comparing tenders, a notional advantage equivalent to the value of 6 000 litres of diesel for a standard bus (official price at the date of the opening of tenders) will be awarded for each whole litre per 100 km difference between the fuel consumption guaranteed in the tender (including tolerance) under the test cycle laid down in Annex 10 to these contract documents and the fuel consumption of the vehicle with the highest consumption."

41 Under the conditions laid down in that annex, the test was to be performed with a vehicle loaded with a weight corresponding to the minimum number of passengers.

42 In its original tenders, EMI indicated a fuel consumption of 54 litres per 100 km in respect of Lots Nos 2 to 6. However, in Note No 1 (hereinafter "Note 1") annexed to its tenders EMI claimed that, since consumption of 54 litres per 100 km had been obtained in tests on a vehicle which had not been run in and was not particularly well-tuned, the consumption which would be recorded with a vehicle which was both run in and optimally tuned could be reduced by 5 to 8% in relation to the consumption indicated in its tenders.

43 EMI also confirmed in its initial tenders that it had received the three notices of amendment and that it had taken them into account.

44 The SRWT carried out a first evaluation of the tenders on the basis of the fuel consumption indicated by EMI in its initial tenders, namely 54 litres per 100 km. Since it had the highest fuel consumption of all the tenders submitted for those lots, that consumption was, according to the method of calculation stipulated in the special conditions, to be used as the basis for evaluating the notional advantages of the other tenders. It is clear from Annexes 5 and 6 to the memorandum drawn up for the meeting of 2 September 1993 that in the course of that evaluation EMI' s tenders were not accorded any notional advantage in respect of fuel consumption, whereas all the other tenderers were accorded such advantages, calculated by reference to the consumption indicated by EMI.

45 In its first supplementary note of 3 August 1993, EMI informed the SRWT of its interpretation of the purport of notice of amendment No 2. EMI claimed that, as a consequence of that notice, the total number of places stipulated in the special conditions as an absolute contractual requirement had been waived. That waiver affected the calculation of fuel consumption, since the equal treatment of tenderers logically required that the calculation be made on the basis of maximum authorized weight. It concluded that, for its data to be compared with those of the other tenderers, it was necessary to take into account the consumption indicated in its initial tenders, reduced by 8%.

46 Thereafter, in its supplementary note of 24 August 1993, EMI informed the SRWT, after referring to the contents of Note 1, that it had carried out further tests, this time under optimal conditions, and that these had shown a fuel consumption for its tenders relating to Lots Nos 2 to 6 of 45 litres per 100 km, representing a reduction of 16.7% on the consumption of 54 litres per 100 km. EMI requested the SRWT to take that new consumption into account when evaluating its tenders.

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47 The Belgian Government has confirmed that SRWT did take that new consumption into account when awarding the contract to EMI.

48 Since EMI' s new fuel consumption was no longer the highest, the SRWT re-evaluated the notional advantages awarded to all the tenderers. Annexes 1 and 2 to the memorandum drafted for the meeting of 6 October 1993 show that in the second evaluation the notional advantages of tenderers other than EMI were reduced in relation to those awarded on the first evaluation, so that Jonckheere no longer had any notional advantages, whereas EMI' s tenders were awarded an advantage.

49 The Commission considers that SRWT breached the principle of the equal treatment of tenderers by taking into account, when allocating the contract, the data supplied by EMI in its supplementary note of 24 August 1993 which amended, after the opening of tenders, the consumption initially indicated by EMI.

50 The Belgian Government submits, first, that the principle of equality of treatment actually required EMI' s correction of its fuel consumption to be taken into account in the award of the contract, since the other tenderers had indicated already optimized results in their initial tenders. Secondly, it points out that fuel consumption is objective and verifiable; the amendment was therefore not a matter of choice, nor was it made after negotiations with the contracting entity. Finally, the change had no effect on the technical characteristics of the vehicle or its engine and EMI' s initial tenders were not therefore amended.

51 It is to be noted at the outset that in Case C-243/89 Commission v Denmark [1993] ECR I-3353 (the "Storebaelt case"), at paragraph 33, the Court held that the duty to observe the principle of equal treatment of tenderers lies at the heart of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

52 As is shown by Article 4(2) the position is the same in the case of the Directive in question here.

53 Furthermore, the 33rd recital in the preamble shows that the Directive aims to ensure a minimum level of transparency in the award of the contracts to which it applies.

54 The procedure for comparing tenders therefore had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders.

55 When, as in the present case, a contracting entity opts for an open procedure, such equality of opportunity is ensured by the requirement under Article 16(1)(a) of the Directive for the contracting entity to act in accordance with Annex XII A of the Directive. It must therefore both set a final date for receipt of tenders, so that all tenderers have the same period after publication of the tender notice within which to prepare their tenders, and set the date, hour and place of opening tenders, which also reinforces the transparency of the procedure, since the terms of all the tenders submitted are revealed at the same time.

56 When a contracting entity takes into account an amendment to the initial tenders of only one tenderer, it is clear that that tenderer enjoys an advantage over his competitors, which breaches the principle of the equal treatment of tenderers and impairs the transparency of the procedure.

57 In the present case it is not disputed that, first, the reduction in fuel consumption indicated by EMI in its supplementary note of 24 August 1993 considerably exceeded the limit of 8% referred to by EMI in Note 1 annexed to its initial tenders and, secondly, that in its final comparison of the tenders the SRWT took into account that last figure of consumption.

58 Without it even being necessary to decide whether the SRWT could have taken into account the

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new consumption indicated by EMI in its supplementary note of 3 August 1993, which was within the 8% limit stipulated in its tender, the fact that that limit was exceeded shows that the new consumption of 45 litres per 100 km constituted an amendment of EMI' s initial tenders. Indeed, in its supplementary notes EMI referred to points in the notices of amendment, which it claimed to have taken into account in its initial tender, and did not explain why its new tests could not have been carried out before the final date for receipt of tenders. It follows that the consumption of 45 litres per 100 km should not on any view have been taken into account.

59 Moreover, the taking into account of those figures placed the other tenderers at a disadvantage by changing the amount of notional advantages resulting from the first comparison of tenders, thus affecting their ranking.

60 It must therefore be held that, by taking into account information on fuel consumption submitted by EMI in its supplementary note of 24 August 1993 and, therefore, after the opening of tenders, the Kingdom of Belgium failed to fulfil its obligations under the Directive.

The frequency of engine and gear box replacements

61 Point 20.2.2.2 of the special conditions provides:

"20.2.2.2 Assembly and dismantling times, price of spare parts

The tenderer shall set out the prices of spare parts and the assembly and dismantling times of the items listed in Annex 23.

In conformity with the table in Annex 23, a notional penalty will be applied automatically to all tenders to take account of maintenance costs."

62 According to the table in Annex 23 a notional penalty was to be imposed in regard to the maintenance costs of only 45 components of the bus. For each component mentioned, that penalty was calculated by reference to a formula in which the variables were the number of identical items of that component in the bus, the dismantling time, the assembly time, the price and the foreseeable number of replacements of the component.

63 However, for the purposes of calculating the notional penalty, Annex 23 of the special conditions asked tenderers to indicate figures for only the first three variables. As regards the foreseeable number of replacements, Annex 23 set out, on the basis of SRWT' s experience, a fixed number for each component, the figures for engine and gear box replacement being two and three respectively. Potential tenderers were therefore not asked to state the foreseeable number of replacements for those two components.

64 In conformity with the terms of Annex 23, EMI did not, when completing the table provided, indicate any proposal regarding the foreseeable number of replacements for the components mentioned. However, in its supplementary note of 23 August 1993 it stressed to the SRWT that provision should be made for only one engine and 1.25 gear boxes when using its buses and that the figures fixed by the SRWT in Annex 23 should not, therefore, be applied to its tenders.

65 The Belgian Government accepts that, when the SRWT calculated the notional penalty for EMI' s tenders, the SRWT used those new figures instead of the figures appearing in the table in Annex 23, whereas when calculating the notional penalties for all other tenders it applied the latter figures.

66 The Commission considers that such conduct infringes the principle of equal treatment of tenderers in two respects. First, by taking the figures in question into account when awarding the contract, the SRWT allowed one of the tenderers to amend the terms of its initial tenders after they had been opened. Secondly, since those new figures did not comply with the prescriptive requirements

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of the table in Annex 23, the SRWT awarded the contract to a tenderer in disregard of the award criteria it had itself laid down in the special conditions.

67 As regards the first of those complaints, the Commission considers that if, following the observations submitted by EMI, the SRWT believed that, in the light of the tenders lodged, the prescriptive requirements it had laid down were wrong, it could have amended them by offering the other tenderers the same opportunity to depart from them. However, since it gave such an opportunity only to EMI, it breached the principle of equal treatment of tenderers.

68 The Belgian Government considers that EMI did not amend its initial tenders, since the material offered remained precisely the same. All the other tenderers could also have informed the SRWT that the performance of their buses exceeded the requirements of Annex 23. It concludes that, if the SRWT could not take the figures in question into account, it would be precluded from taking into consideration the advantages of vehicles of more recent design.

69 It should be recalled that Annex 23 of the special conditions did not ask tenderers to indicate the frequency of spare part replacements for their buses. On the contrary, the SRWT had fixed a figure for that element in respect of each component in the table. Moreover, in point 20.2.2.2 of the special conditions the SRWT had stated that a notional penalty would be applied to all tenders "in accordance with the table in Annex 23". The figures in that table must therefore be considered to be prescriptive requirements of the special conditions.

70 The Court held in the Storebaelt case, at paragraph 37, that when a contracting entity had laid down prescriptive requirements in the contract documents, observance of the principle of equal treatment of tenderers required that all the tenders must comply with them so as to ensure objective comparison of the tenders.

71 Accordingly, the requirements of Annex 23 continued to be applicable to all the tenders and those tenders had to comply with them. It must therefore be held that EMI was not entitled to "amend" the terms of its initial tenders regarding those requirements and that the SRWT was not entitled to calculate EMI' s notional penalties by reference to its new figures, which did not correspond to the prescriptive requirements of the special conditions.

72 The fact that EMI' s new figures were taken into account necessarily gave it a real advantage when the tenders were compared. According to Annex 23, the figure relating to the frequency of spare part replacements acts, for the purposes of calculating the notional penalty, as a multiplier of the other figures provided by the tenderers relating to costs. As regards EMI' s notional penalty, the SRWT used a figure for the number of replacements which was lower than that laid down in Annex 23 and, therefore, lower than those used in the calculation for the other tenders. The notional penalty for the maintenance of the components in question in EMI' s buses was therefore obtained by using a lower multiplier.

73 Since the SRWT permitted only EMI to disregard the requirements in question, it is not necessary to decide whether the Commission is correct in considering that the SRWT could after opening the tenders have altered the prescriptive requirements fixed by the contract documents, giving all tenderers the same opportunity to disregard those requirements.

74 It must therefore be held with regard to this part of the complaint that, by awarding the contract to EMI on the basis of figures which did not correspond to the prescriptive requirements of Annex 23 of the special conditions for calculating its notional penalty for maintenance costs for engine and gear box replacement, the SRWT infringed the award criteria laid down in the special conditions and also the principle of equal treatment of tenderers. The Kingdom of Belgium therefore failed to fulfil the obligations which the directive imposes on it in that regard.

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The technical quality of the material offered

75 In its supplementary note of 3 August 1993 EMI claimed that "the day-to-day running" of the buses it offered "enables significant savings" to be made by the operator. EMI drew up two lists of features of the bus which enabled those savings to be made (hereinafter "the cost-saving features").

76 The first list, entitled "Quantifiable features", concerned the cantilever seats offered, a mechanism for demisting the side windows, and a special modular assembly system. EMI indicated, for each of those features, the financial advantage which would result during the lifetime of each bus, namely BFR 480 000, BFR 240 000 and BFR 100 000 respectively.

77 The second list, entitled "Non-quantifiable features", included eight features which contributed to "cost-savings", although EMI did not evaluate them in its initial tenders or in its supplementary note of 3 August 1993.

78 The Commission contends that the SRWT took those cost-saving features into account when deciding to award the contract to EMI, although they did not appear in the award criteria listed in the tender notice or in the contract documents. Under Article 27(2) of the Directive, which applies in the present case, only the criteria stated in the tender notice or in the contract documents should have been taken into account by the SRWT when awarding the contract. Furthermore, the SRWT took account of those features solely when assessing EMI' s tenders, while for the other tenders it applied strictly the award criteria set out in point 20.2 of the special conditions. That conduct breached, once again, the principle of equal treatment.

79 In the memorandum drawn up for the meeting of 6 October 1993 SRWT' s management referred to all those cost-saving features when recommending the award of Lots Nos 2 to 6 to EMI. It stated, in the reasons for its recommendation in respect of Lot No 2, that the cost-saving features had "a not inconsiderable financial impact", so that they were "likely to have a favourable influence on the vehicle' s operating costs, to an extent greatly exceeding the financial difference resulting solely from the valuation criteria adopted".

80 According to the file, as regards Lots Nos 4, 5 and 6, the comparison of tenders solely on the basis of the award criteria laid down in point 20.2 of the special conditions had led to one of Van Hool' s tenders being placed first, whereas one of EMI' s tenders, even taking into account the figures supplied by it in its supplementary notes regarding fuel consumption and engine and gear box replacements, was placed second. The differences between the best tenders of Van Hool and the second-placed tenders of EMI amounted to BFR 294 799, BFR 471 513 and BFR 185 897 respectively for the three lots. However, after the cost-saving features had been taken into account, that initial ranking was reversed, so that, despite those differences, an EMI tender replaced the Van Hool tender as the tender recommended for those lots.

81 The Belgian Government has formally accepted that all the cost-saving features were taken into account in the decision to award the contract and that this had a decisive influence on the choice of EMI as supplier for Lots Nos 2 to 6.

82 The Belgian Government observes that point 20.2.1 of the special conditions expressly permitted the SRWT to take account of any suggestions, such as the cost-saving features. Moreover, Article 27(3) of the Directive also authorized the SRWT to take account of such suggestions, provided that they met the minimum specifications required.

83 It adds that the cost-saving features, which were in conformity with the minimum specifications in the contract documents, were not evaluated when the tenders were compared, but were taken into account as un-quantified comfort and quality features, leading to the conclusion that, taken as a whole, EMI' s offer was economically the most advantageous. Furthermore, both the tender notice

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and the special conditions referred to the technical qualities of the material offered as being a criterion of award. It concludes that the SRWT was therefore entitled to take account of the cost-saving features at issue.

84 The Commission accepts that tenderers have the right to submit variants and that those variants may be taken into account by a contracting entity, provided, however, that the principle of equal treatment is observed. It contends that it was not observed in the present case, since the derogation from the criteria laid down in the special conditions resulted in an advantage being granted only to EMI.

85 The Court finds that the cost-saving features were not amongst the award criteria adopted by the SRWT for the award of the contract.

86 Admittedly the headings for the award criteria set out in point 20.2 of the special conditions could be interpreted ° if no regard is had to the subsequent definitions ° as having a wide scope (see, for example, in point 20.2.2.4 of the special conditions, the heading for the seven technical criteria, namely "the technical qualities of the material offered"), so that, as the Belgian Government submits, all the characteristics relating to the technical qualities of the material offered would be relevant when comparing the tenders.

87 However, the SRWT itself defined all the technical criteria using a precise formula set out under each heading (see paragraph 13 of this judgment). Accordingly, the scope of the technical criteria, whatever the wording of the headings, was restricted by the formulas used by the SRWT to define them.

88 The requirement under Article 27(2) of the Directive for the contracting entities to state "in the contract documents or in the tender notice all the criteria they intend to apply to the award, where possible in descending order of importance" is intended precisely to inform potential tenderers of the features to be taken into account in identifying the economically most advantageous offer. All the tenderers are thus aware of the award criteria to be satisfied by their tenders and the relative importance of those criteria. Moreover, that requirement ensures the observance of the principles of equal treatment of tenderers and of transparency.

89 Furthermore, although Article 27(3) of the Directive does indeed enable contracting entities to take account of variants, that provision must be interpreted in the light both of the principles underlying the Directive and of Article 27(2). Accordingly, in order to ensure that a contract is awarded on the basis of criteria known to all the tenderers before the preparation of their tender, a contracting entity can take account of variants as award criteria only in so far as it expressly mentioned them as such in the contract documents or in the tender notice.

90 As regards the Belgian Government' s submissions concerning the taking into account of "suggestions", suffice it to note that Article 27(3) of the Directive recognizes only the taking into account of variants, not suggestions. Moreover, the Directive makes no reference to them as award criteria and, consequently, such suggestions cannot be taken into account by a contracting entity when awarding the contract either.

91 In the present case it is sufficient to find that the principles of equal treatment of tenderers and of transparency of the procedure have not been observed and it is not therefore necessary to decide whether the rule laid down in Article 27(2) of the Directive precludes a contracting entity from changing its award criteria during the course of the procedure, provided that it observes those principles.

92 It is clear that, for Lots Nos 4, 5 and 6, the SRWT applied, in the case of EMI alone, the cost-saving features suggested by EMI to offset the financial differences, amounting to BFR 294

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799, BFR 471 513 and BFR 185 897, between the tenders of Van Hool in first place and those of EMI placed second. Even if, as the Belgian Government submits, the SRWT did not allocate a precise value to the cost-saving features, EMI provided it with a list of "Quantifiable features" (see paragraph 76 of this judgment), the total amount of which for each lot (BFR 820 000) more than sufficed to offset those differences.

93 On the other hand, as regards Lots Nos 2 and 3, it is evident from the memorandum drawn up for the meeting of 6 October 1993 that the tenders of EMI at issue were in first place even before the SRWT had taken the cost-saving features into account. The SRWT could not therefore have attached decisive importance to the cost-saving features relating to those lots, since EMI' s tenders were already regarded as the most economically advantageous. This part of the complaint has not therefore been established.

94 It must be concluded that, by taking into account, in its comparison of tenders for Lots Nos 4, 5 and 6, the cost-saving features suggested by EMI without having referred to them in the contract documents or in the tender notice, by using them to offset the financial differences between the tenders in first place and those of EMI placed second and by accepting some of EMI' s tenders as a result of taking those features into account, the Kingdom of Belgium failed to fulfil its obligations under the Directive.

95 Accordingly, the Court finds that

° by taking into account information on fuel consumption submitted by EMI in its supplementary note of 24 August 1993 and, therefore, after the opening of tenders,

° by awarding the contract to EMI on the basis of figures which did not correspond to the prescriptive requirements of Annex 23 of the special conditions for calculating the notional penalty of EMI for maintenance costs in respect of engine and gear box replacement,

° by taking into account, when comparing the tenders for Lots Nos 4, 5 and 6, the cost-saving features suggested by EMI without having referred to them in the contract documents or in the tender notice, by using them to offset the financial differences between the tenders in first place and those of EMI placed second, and by accepting some of EMI' s tenders as a result of taking those features into account,

the Kingdom of Belgium has failed to fulfil its obligations under the Directive.

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CONCERNS	Failure concerning 31990L0531
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AUTLANG	French
APPLICA	Commission ; Institutions
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NOTES	Brouwer, O.W.: Nederlandse staatscourant 1996 no 115 p.4 Essers, M.J.J.M.: Nederlands tijdschrift voor Europees recht 1996 p.132-133 Lagondet, F.: Europe 1996 Juin Comm. no 243 p.9-10 Fernandez Martín, José María: Public Procurement Law Review 1996 p.CS133-CS139 Bock, Christian: St. Galler Europarechtsbriefe 1996 p.238-239 Van Marissing, J.P.L.: S.E.W. ; Sociaal-economische wetgeving 1997 p.115 Van Marissing, J.P.L.: S.E.W. ; Sociaal-economische wetgeving 1997 p.449-450
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Edward
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Order of the President of the Court of 22 April 1994 Commission of the European Communities v Kingdom of Belgium. Application for interim measures - Interim measures - Urgency - Balance of interests - Public safety - Public procurement - Transport sector - Council Directive 90/531/EEC. Case C-87/94 R

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Application for interim measures ° Interim measures ° Conditions for granting ° Urgency ° Consideration given to the applicant' s failure to display due diligence before lodging an application for interim measures ° Balance of interests at stake ° Public safety ° Application to suspend a decision awarding a public supply contract already in course of performance

(EEC Treaty, Art. 186; Rules of Procedure of the Court of Justice, Art. 83(2))

The Commission may, in its capacity as guardian of the Treaties, bring proceedings for the adoption of interim measures in parallel with an action against a Member State for failure to fulfil its obligations, in connection with a disputed procedure for the award of a public contract. Failure to comply with a directive in this field constitutes a serious threat to the legality of the Community order, and a subsequent declaration to the effect that the Member State in question has failed to fulfil its obligations, usually after the contract has been performed, cannot reverse the damage suffered by the Community legal order and by all the tenderers whose rights have been impaired.

Since the directives on that subject give precedence at national level to review before conclusion of the contract, the Commission must act at Community level as far as possible before the contract is concluded, or at least inform the Member State concerned, quickly and unambiguously, that it is in the process of reviewing possible infringements of the rules applicable to the contract at issue and that it intends to seek the suspension of the procedure for awarding the contract, or of the contract itself. If, on the basis of that information, the Member State proceeds with the award of the contract or with its performance, it does so at its own risk.

By allowing more than three months to elapse between receiving a complaint alleging irregularities in the procedure for awarding the contract and informing the Member State of its intention to seek suspension of the contract, the Commission did not display the diligence to be expected of a party which subsequently lodged an application for interim measures.

Furthermore, the Member State concerned cannot, in principle, on the basis of the balance of the interests at stake, rely on the risk to which a delay in the performance of the contract would expose users of a public utility when it is that State' s own inaction that has given rise to the situation in question; the Court may, however, in certain circumstances and in cases where the risk involved is serious, consider that it must not itself exacerbate that risk by granting the measure applied for.

In Case C-87/94 R,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Jan Devadder, Director in the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent, assisted by Michel

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Waelbroeck and Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for the adoption of interim measures suspending the legal consequences of the decision taken on 6 October 1993 by the Société Régionale Wallonne du Transport (Walloon Regional Transport Company) awarding a public contract for the supply of buses to Espace Mobile International SA, and suspending the legal consequences of the contractual links established between those two companies as a result of the decision awarding the contract,

THE PRESIDENT OF THE COURT

makes the following

Order

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 22 April 1994.

The dispute

A - Procedure

1 By application lodged at the Court Registry on 11 March 1994, the Commission of the European Communities brought an action before the Court under Article 169 of the EC Treaty for a declaration that:

- by taking into account, in the procedure for the award of a public contract by the Société Régionale Wallonne du Transport (hereinafter "SRWT"), amendments made to one of the tenders after the opening of tenders,

- by admitting to the procedure for awarding the contract a tenderer who did not meet the selection criteria laid down in the contract documents,

- and by accepting a tender which did not meet the criteria for the award of the contract laid down in the contract documents,

the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1), and to comply with the principle of equal treatment, which governs all procedures for the award of public contracts.

2 By a separate document, lodged at the Court Registry on the same date, the applicant made an application for interim measures, pursuant to Article 186 of the Treaty, Article 36 of the Protocol on the Statute of the Court of Justice and Article 83 of the Rules of Procedure of the Court of Justice, in which it sought an order requiring the Kingdom of Belgium to adopt all necessary measures to suspend the legal consequences of SRWT' s decision of 6 October 1993 awarding the contract, together with all necessary measures to suspend the legal consequences of the contractual links established between SRWT and the company to which the contract was awarded, namely Espace

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Mobile International SA (hereinafter "EMI"), pending the Court' s final ruling in the main proceedings.

3 The Kingdom of Belgium lodged its written observations on 30 March 1994. The parties were given the opportunity to submit their oral observations on 14 April 1994.

B - Background

4 SRWT, which is based in Namur (Belgium), put out an invitation to tender with a view to awarding a public contract for the supply, over a period of three years, of eight lots of public transport buses, comprising 307 standard vehicles, for the estimated sum of BFR 2 022 918 000 (excluding VAT). A contract notice was published in the Official Journal of the European Communities on 22 April 1993.

5 By 7 June 1993, the final date indicated in the contract notice, five tenders had been received from EMI (Aubange), Van Hool (Koningshooikt), Mercedes-B Belgium (Brussels), Berkhof (Roeselaere) and Jonckheere (Roeselaere) respectively.

6 During the months of June and July, SRWT examined those tenders. A memorandum was drawn up in preparation for the meeting of the Board of Directors to be held on 2 September 1993. It recommended that the contract for Lot No 1 (37 vehicles) be awarded to Jonckheere, and for Lots Nos 2 to 6 (280 vehicles in all) to Van Hool.

7 On 3, 23 and 24 August 1993, the contracting authority received three additional memoranda from EMI.

8 In those memoranda, EMI amplified its observations, particularly with regard to the following items in its tender:

- memorandum of 3 August: quantity discount; offer of financing; waiver of the price-variation clause with respect to buses ready for delivery during the course of 1994; fuel consumption rates of the vehicles; data required for the evaluation, both quantifiable and non-quantifiable, of the technical quality of the vehicles offered;

- memorandum of 23 August: estimated number of replacement engines and gear-boxes;

- memorandum of 24 August: fuel consumption rates.

9 On 31 August 1993 the contracting authority circulated an internal memorandum which concluded, following an analysis of the three additional memoranda, that they contained amendments to the original tender. It accordingly confirmed that the proposals regarding the award of the lots, set out in the abovementioned memorandum prepared for the Board meeting of 2 September 1993, were justified.

10 On 2 September 1993 the Board of Directors of SRWT took the view that they did not have sufficient information at their disposal to take a final decision and resolved to continue the discussion at a later meeting.

11 In his letter of 14 September 1993, the Walloon Minister for Transport communicated to the managing director of SRWT various observations concerning the tenders submitted by Van Hool and EMI, including the three memoranda mentioned above. He concluded with the suggestion that the company' s Board of Directors undertake a further review of the file, in the light of his observations.

12 On 28 September 1993, SRWT asked EMI to confirm the rates of fuel consumption quoted in the memorandum of 24 August, together with the maximum number of engine and gear-box replacements, as estimated in the memorandum of 23 August. EMI confirmed those details of its tender by letter of 29 September 1993.

13 The management of SRWT drafted a new memorandum comparing the tenders in preparation for the Board meeting on 6 October 1993. That memorandum, which took into consideration the information

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contained in EMI' s three additional memoranda, proposed that Lot No 1 (37 vehicles) be awarded to Jonckheere and Lots Nos 2 to 6 (reduced to 278 vehicles) to EMI.

14 By a decision of 6 October 1993, the Board of Directors of SRWT decided to postpone the order for 30 buses until 1996, while awarding the contract for Lot No 1 (37 vehicles) worth a total of BFR 212 759 250, excluding VAT, to Jonckheere, and Lots Nos 2 to 6 (278 vehicles) worth a total of BFR 1 797 719 210, excluding VAT, to EMI.

15 On the same day, Van Hool applied to the Belgian Conseil d' Etat for an order suspending the operation of the decision in question under the emergency procedure.

16 By judgment of 7 October 1993, the President of the Sixième Chambre des Référés (Sixth Chamber hearing applications for interim measures) of the Conseil d' Etat ordered provisional suspension of the enforcement of the decision taken on 6 October 1993 by the Board of Directors of SRWT.

17 However, by judgment of 17 December 1993, the Conseil d' Etat failed to confirm that order and dismissed the applications for suspension and for the adoption of interim measures lodged by Van Hool.

18 By letter of the same date, SRWT notified EMI of the order for Lots Nos 2 to 6.

19 On 30 November 1993 the Commission, with whom Van Hool had lodged a complaint, gave the Kingdom of Belgium formal notice to submit its observations, pursuant to Article 169 of the Treaty. The Commission alleged that the Kingdom of Belgium had failed to fulfil its obligations under Council Directive 90/531/EEC or to comply with the principle of equal treatment, which governs all procedures for the award of public contracts.

20 In its observations, which were communicated to the Commission on 15 December 1993, the Kingdom of Belgium claimed that the alleged failure to fulfil its obligations had not been proved.

21 On 8 February 1994, the Commission delivered a reasoned opinion to the Kingdom of Belgium, requesting it to adopt the measures necessary for compliance within a period of ten days, particularly by using its influence with the competent authorities to secure the suspension of the legal consequences of the contract concluded by SRWT and EMI.

22 In its reply of 18 February 1994, the Kingdom of Belgium maintained its point of view.

Grounds

23 According to Article 186 of the Treaty:

"The Court of Justice may in any cases before it prescribe any necessary interim measures."

24 Pursuant to Article 83(2) of the Rules of Procedure, an order for interim measures is conditional upon the existence of circumstances giving rise to urgency and of pleas of fact and law establishing a prima facie case for granting the relief sought. As the Court has consistently held, it also presupposes that the balance of the interests at stake is conducive to granting such relief.

25 Those conditions are cumulative.

26 The urgency of the application must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure.

27 Moreover, the risk of serious and irreparable damage, which is the criterion for assessing urgency, is the first factor to be taken into account in determining the balance of interests.

28 In the present case, it is necessary to consider, overall, whether the conditions with regard to urgency and the balance of interests are satisfied.

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29 The Commission claims that urgency is manifest. Delivery of the 1994 instalment (128 buses out of the total of 278) may begin during April 1994. Thus there is a risk of serious and irreparable damage being caused, in that the award of the contract and especially the first deliveries would confront the Commission, as guardian of the Treaties responsible for ensuring the application of Community law, with a fait accompli, and would pose a serious and immediate threat to the legality of the Community order. The greater the number of deliveries completed, the more difficult it would be to reverse the damage caused. If no interim measures were adopted, the judgment in the main proceedings would, if it upheld the action, be rendered ineffective.

30 According to the Kingdom of Belgium, the condition of urgency is not satisfied where the applicant has been too slow in taking action, or has itself brought about the urgent situation which it seeks to rely upon. That is so in the case of the Commission, which waited for more than five months after the decision awarding the contract was taken before initiating these proceedings. In an action against a Member State for failure to fulfil its obligations, the Commission should, in order to substantiate the existence of serious and irreparable damage, also demonstrate the existence of a special requirement necessitating the adoption of interim measures, such as the need to prevent a breach of Community law before the decision awarding the contract is taken; it cannot confine itself to the general allegation that it has sustained damage in its capacity as guardian of the Treaties, an allegation that falls to be made whenever Community law is infringed by a Member State.

31 It should be noted that failure to comply with a directive applicable to a public contract constitutes a serious threat to the legality of the Community order and that the ensuing declaration by the Court on the basis of Article 169 of the Treaty - usually after the contract has been performed - to the effect that the Member State in question has failed to fulfil its obligations, cannot reverse the damage suffered by the Community legal order and by all the tenderers who were either rejected or deprived of the opportunity to compete effectively in compliance with the principle of equal treatment. The Commission, in its capacity as guardian of the Treaties, may therefore bring proceedings for the adoption of interim measures in parallel with an action against a Member State for failure to fulfil its obligations, in connection with a disputed procedure for the award of a public contract.

32 Furthermore,

- Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), and

- Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (Official Journal 1992 L 76, p. 14),

impose an obligation to ensure at national level that decisions which have infringed Community law with respect to the award of public contracts or national rules implementing Community law are reviewed effectively and as rapidly as possible; in the present case, Van Hool sought such redress before the Belgian Conseil d' Etat but failed ultimately to secure the suspension applied for.

33 As the Belgian Government has emphasized in the proceedings before the Court, both the travaux préparatoires and the actual provisions of those directives reveal that the Community legislature, aware of the differences between national laws and mindful of the need not to undermine in any way the principle of legal certainty, at first gave precedence to review before conclusion of the contract.

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In deciding that the consequences of review for a contract which has already been concluded are determined by national law, and by permitting Member States to limit those consequences to the award of damages to the injured party, the Community legislature acknowledged that a State may refuse at national level to set aside a contract which has already taken effect.

34 In those circumstances, the Commission itself must act at Community level as far as possible before the contract is concluded, or at least inform the Member State concerned, quickly and unambiguously, that it is in the process of reviewing possible infringements of the rules applicable to the contract in issue, and that it intends to seek the suspension either of the procedure for awarding the contract or of the contract entered into. That being so, the Member State may proceed with the award of the contract or with its performance, at its own risk.

35 At the hearing, the parties acknowledged that under the relevant provisions of national law, the contract was deemed to be concluded as a result of the notification of the order to EMI by SRWT on 17 November 1993. At the same time, they also recognized that, contrary to a statement in the defendant' s written observations, the substantive provisions of Belgian law, according to the most recent case-law, do not preclude a public contract which has already been concluded from being set aside.

36 It is common ground that, in principle, the first deliveries of buses were scheduled to take place at the end of April 1994.

37 Thus, on the date that proceedings for interim measures were initiated, the application for relief concerned a contract which had not only been concluded but was already being carried out. The process of obtaining the necessary materials and of manufacturing and assembling the buses called for the implementation of an appropriate plan several months before the first deliveries.

38 After stating in its application in the main action that a complaint from Van Hool had first been laid before it on 6 October 1993, the Commission pointed out orally on 14 April 1994, then in writing on 15 April, that in fact it had been apprized of the matter by letter of 29 October 1993, as recorded in the case-file. In any event, the Commission evinced the intention of seeking the suspension of the contract only in its reasoned opinion of 8 February 1994, that is to say, more than three months after receiving the letter of 29 October 1993 and more than two months after sending its letter of formal notice of 30 November 1993, which did not contain any reference to that point. Therefore, the Commission failed to act in such a way as to make the contracting authority aware as early as possible that it could proceed only at its own risk with the performance of a contract which had been concluded with exceptional speed on the same day - 17 November 1993 - as the decision of the Belgian Conseil d' Etat. Yet, in its complaint of 29 October 1993, Van Hool had stressed in alarmist terms the urgent need for action by the Commission. In those circumstances, the Commission has not displayed the diligence to be expected of a party which has subsequently lodged an application for interim measures.

39 On the question of the balance of interests, the Kingdom of Belgium disputes the Commission' s allegation of serious and irreparable damage by referring to the state of SRWT' s bus fleet. That fleet contains numerous old vehicles, in particular 194 vehicles which were brought into service during 1976, 1977 and 1978. The condition of those vehicles has given rise to urgent requests for replacements from some of SRWT' s regional managers. It is likely to cause problems, even accidents, which could have dramatic consequences for the staff, the passengers and the good name of the company generally. A woman passenger has already been the victim of an accident necessitating hospital treatment: her foot went through the deck of a bus which she had just boarded. Suspension of the contract would entail its immediate termination, followed by the opening of a new procedure for the award of a public contract, which would delay each of the scheduled deliveries by approximately thirteen months.

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40 The defendant' s submissions regarding the state of the buses to be replaced are supported by the documents produced. Their condition effectively undermines the safety requirements which should govern all public utilities. However, the defendant has itself contributed significantly to the creation of this state of affairs. While, according to its own recommendations, the normal length of service for the buses to be replaced should have been from ten to twelve years, it did not consider it necessary to ensure the timely replacement of the vehicles, a large number of which have now been in use for 16 to 18 years. What is more, it allowed more than two years to elapse between a request for the replacement of 103 buses whose state of dilapidation was emphasized by the local management concerned, and the publication of the contract notice on 22 April 1993. Thus the Kingdom of Belgium has omitted to ensure that all appropriate measures were taken to avoid endangering the safety of SRWT' s customers and staff, as well as that of other road-users.

41 In principle, such an omission is likely to prevent the balance of interests from tilting in favour of the party in default (see the order of the President of the Court in Case 194/88 R Commission v Italy [1988] ECR 5647, at paragraph 16). However, in the circumstances of the present case and in view of the seriousness of the risk involved, it is likewise incumbent on the Court not to exacerbate that risk.

42 In the light of the foregoing it is clear that the Commission has failed to display the diligence required of a party relying on the urgency of interim measures, and that the balance of interests tilts in favour of the Kingdom of Belgium.

43 In those circumstances, the application for interim measures must be dismissed without there being any need to consider whether the Kingdom of Belgium, in its pleadings and documents adduced in support, has successfully established that the Commission' s ostensibly well-founded submissions as to the existence of a prima facie case are in fact groundless.

DOCNUM	61994O0087
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; O ; order
PUBREF	European Court reports 1994 Page I-01395
DOC	1994/04/22
LODGED	1994/03/11
JURCIT	61988O0194(02)-N16 : N 41 31989L0665 : N 32 31990L0531 : N 1 19 31991X0704(02)-A83P2 : N 24 31992L0013 : N 32

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SUB	Approximation of laws
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	Belgium ; Member States
NATIONA	Belgium
NOTES	Bergerès, Maurice-Christian: Recueil Dalloz Sirey 1995 Jur. p.121-122 Flamme, Maurice-André ; Flamme, Philippe: Revue française de droit administratif 1995 p.600-613 Charbit, Nicolas: Les petites affiches 1995 no 87 p.22-27 Tserkezis, Giorgos: Armenopoulos 1995 p.697 Van der Klis, G.W.: S.E.W. ; Sociaal-economische wetgeving 1995 p.526-528
PROCEDU	Proceedings concerning failure by Member State ; Application for interim measures - unfounded
ADVGEN	Lenz
JUDGRAP	Edward
DATES	of document: 22/04/1994 of application: 11/03/1994

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Judgment of the Court (Fifth Chamber)
of 4 May 1995
Commission of the European Communities v Hellenic Republic.
Failure of a Member State to fulfil its obligations - Directive 77/62/EEC - Framework agreement for the exclusive supply of dressing material for use in Greek hospitals and by the Greek army.
Case C-79/94.

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1. Approximation of laws ° Review procedures in connection with the award of public supply and public works contracts ° Directive 89/665 ° Procedure allowing the Commission to intervene in the event of a clear and manifest breach of the Community rules on the award of contracts ° Procedure unrelated to proceedings for failure to fulfil obligations under Article 169 of the Treaty

(EC Treaty, Art. 169; Council Directive 89/665)

2. Approximation of laws ° Procedures for the award of public supply contracts ° Directive 77/62 ° Scope ° Derogations from common rules ° Conditions

(Council Directive 77/62, as amended, Arts 5(1)(a) and 6(4)(c))

1. The procedure under which the Commission, pursuant to Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, may, if it forms the view that there has been a clear and manifest breach of the Community provisions relating to the award of public contracts, take the matter up with a Member State is a preliminary measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty, with the result that the manner in which the Commission has employed that procedure is immaterial in deciding on the admissibility of an action for failure to fulfil obligations which it has brought by reason of the breach by the Member State concerned of the Community provisions on the award of public contracts.

2. A Member State cannot bring the conclusion of a public supply contract outside the scope of application of the rules laid down in Directive 77/62 by claiming that the contract in question merely constitutes a framework agreement which is no more than a structure within which numerous contracts are to be awarded, the value of none of which will exceed the threshold laid down in the first indent of Article 5(1)(a) of the directive. Nor can that Member State have recourse to the derogation permitted under Article 6(4)(c) of the directive by arguing that the successful suppliers were the only ones who had expressed an interest in contracting.

In Case C-79/94,

Commission of the European Communities, represented by X.A. Yataganas, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by V. Kontolaimos, Deputy Legal Adviser to the State Legal Council, and E.-M. Mamouna, Secretary in the Special Department for Community Legal Affairs in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by concluding a framework agreement for the exclusive supply

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by six Greek textile undertakings of dressing material for use in Greek hospitals and by the Greek army and by failing to publish the relevant notice in the Official Journal of the European Communities, the Hellenic Republic has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as last amended by Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1),

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, J.C. Moitinho de Almeida (Rapporteur), D.A.O. Edward, J.-P. Puissochet and L. Sevon, Judges,

Advocate General: C.O. Lenz,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 January 1995,

after hearing the Opinion of the Advocate General at the sitting on 16 February 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 1 March 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by concluding a framework agreement for the exclusive supply by six Greek textile undertakings of dressing material for use in Greek hospitals and by the Greek army and by failing to publish the relevant notice in the Official Journal of the European Communities, the Hellenic Republic has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as last amended by Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1) ("the directive").

2 By a decree of 19 July 1991, the Greek Ministry for Industry, Energy and Technology ratified the framework agreement which it had signed with six Greek textile undertakings. Under that agreement, all hospitals and health-care units, as well as the Greek army, were required to purchase certain types of dressing material from the above undertakings under the conditions set out in the framework agreement and for a period of three years which could be extended for two further years.

3 It is common ground that no tendering procedure was set in motion for those supplies and that no notice relating to the contract in question was published in the Official Journal of the European Communities.

4 By letter of 9 September 1991 the Commission drew the Greek Government' s attention to the fact that such an agreement and the procedure used to conclude it failed to comply with the directive and in particular Article 9 thereof. Since no reply was forthcoming, the Commission, by letter of 14 November 1991, put the Greek Government on notice to take all measures necessary to comply with the directive. The Commission refused to accept the views expressed by the Greek Government in its reply of 8 January 1992 and addressed to it a reasoned opinion requesting it to adopt within two months the measures necessary to comply with the directive.

5 In its letters of 10 December 1992 and 13 February 1993, the Greek Government accepted that it was in breach of the directive. It also declared its intention unilaterally to rescind the agreement before its expiry date and to launch a new call for tenders for the supply of dressing material during 1993. Since these declarations were not acted upon, the Commission brought the present action.

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Admissibility

6 The Hellenic Republic contests the admissibility of the present action.

7 It first points out in this connection that, in the letters referred to above, it acknowledged the breach of which the Commission accuses it and undertook to adopt the measures necessary to ensure that Community law would be complied with in future. It contends that in the proceedings which resulted in the judgment in Case 199/85 Commission v Italy [1987] ECR 1039, the Commission treated as sufficient a written undertaking by the Municipality of Milan that it would comply in future with all the provisions of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682). In bringing the present action, it argues, the Commission has thus failed to respect the principle that Member States should be treated in the same way.

8 The Hellenic Republic then goes on to submit that under Article 3(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), the Commission must act prior to conclusion of the contract in question if it forms the view that there has been an infringement of Community provisions relating to the award of public contracts. In the present case, the Commission took action only once the agreement in question was in the course of being performed.

9 That argument cannot be accepted.

10 So far as the alleged breach of the principle of equal treatment is concerned, suffice it to point out that, even assuming that the Commission v Italy case, mentioned above, was comparable to the present case ° which it was not, as the Advocate General has demonstrated at point 17 of his Opinion ° the Commission was not in any event obliged to take the same view in the present case. It may also be observed that if the Commission were always bound to satisfy itself with mere undertakings by Member States binding for the future, this would provide Member States with an easy way of protecting themselves against proceedings under Article 169 of the Treaty for failure to fulfil obligations.

11 With regard to the argument derived from Article 3(1) of Directive 89/665, cited above, it must be pointed out (judgment of 24 January 1995 in Case C-359/93 Commission v Netherlands [1995] ECR I-0000, paragraph 13) that the special procedure provided for by that directive can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty.

12 In those circumstances, the action must be declared admissible.

Substance

13 Explaining the reasons for its non-compliance with the advertising rules laid down in Article 9 of the directive, the Greek Government states that the framework agreement is no more than a structure within which numerous supply contracts are awarded, the value of none of which exceeds the threshold of ECU 200 000 laid down in the first indent of Article 5(1)(a) of the directive. The Greek Government also states that the dressing material in question could have been supplied only by the six Greek producers which were parties to the framework agreement since no producer established in any other Member State has as yet expressed any interest in this type of contract. For those reasons, the Greek Government argues, the framework agreement was concluded in accordance with the derogation provided for in Article 6(4)(c) of the directive.

14 That argument cannot be accepted.

15 So far as concerns the argument based on the value of the contracts in question, the framework agreement turns into a whole the various contracts which it governs and the total value of those

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contracts is greater than ECU 200 000. Furthermore, as the Commission has correctly pointed out, any other interpretation of the first indent of Article 5(1)(a) of the directive would allow contract awarders to circumvent the obligations which it imposes.

16 With regard to the Greek Government' s assertion that only the six producers party to the framework agreement could supply the products in question, even if this were proved, this circumstance would not come within the scope of the derogations provided for in Article 6(4) of the directive and, in particular, that under heading (c).

17 It must accordingly be held that there has been a failure to fulfil obligations within the terms of the forms of order sought by the Commission.

Costs

18 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by concluding a framework agreement for the exclusive supply by six Greek textile undertakings of dressing material for use in Greek hospitals and by the Greek army and by failing to publish the relevant notice in the Official Journal of the European Communities, the Hellenic Republic has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as last amended by Directive 88/295/EEC of 22 March 1988;

2. Orders the Hellenic Republic to pay the costs.

DOCNUM	61994J0079
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; J ; judgment
PUBREF	European Court reports 1995 Page I-01071
DOC	1995/05/04
LODGED	1994/03/01
JURCIT	31977L0062-A05P1LA : N 13 15 31977L0062-A06 : N 4 31977L0062-A06P4LC : N 13 16

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31977L0062-A09 : N 13
31977L0062 : N 1
61985J0199 : N 7
31988L0295 : N 1
31989L0665-A03P1 : N 8 11
11992E169 : N 10 11
61993J0359-N13 : N 11
61994C0079-N17 : N 10

CONCERNS Failure concerning 31977L0062

SUB Approximation of laws

AUTLANG Greek

APPLICA Commission ; Institutions

DEFENDA Greece ; Member States

NATIONA Greece

NOTES Gazin, F. ; Simon, Denys: Europe 1995 Juillet Comm. no 250 p.6-7
X: Europe 1995 Juillet Comm. no 249 p.6
Van de Meent, G.W.A.: Nederlands tijdschrift voor Europees recht 1995 p.159-160
Ioannidou, Stella: Elliniki Epitheorisi Evropaïkou Dikaiou 1997 p.961-966

PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Lenz

JUDGRAP Moitinho de Almeida

DATES of document: 04/05/1995
of application: 01/03/1994

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Judgment of the Court of 18 May 1995 Commission of the European Communities v Italian Republic. Action for failure to fulfil obligations - Public works contracts - Failure to publish a notice of invitation to tender. Case C-57/94.

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1. Actions against Member States for failure to fulfil obligations ° Action dismissed as inadmissible because of inconsistency between the reasoned opinion and the application ° Lodging of a new application without a fresh pre-litigation procedure ° Whether permissible

(EEC Treaty, Art. 169)

2. Approximation of laws ° Procedures for the award of public works contracts ° Directive 71/305 ° Derogations from the common rules ° Strict interpretation ° Existence of exceptional circumstances ° Burden of proof

(Council Directive 71/305, Art. 9(b))

1. Where an action brought under Article 169 of the Treaty has been held inadmissible on the grounds that the Commission' s application was based on an objection that was different from that set out in the reasoned opinion, the Commission may remedy the defects found by the Court by lodging a fresh application on the same facts based on the same objections, pleas in law and arguments as the reasoned opinion originally issued, without having to recommence the entire pre-litigation procedure or issue a complementary reasoned opinion.

2. The provisions of Article 9 of Directive 71/305 concerning the coordination of procedures for the award of public works contracts, which authorize derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public works contracts, must be interpreted strictly. The burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.

In view of the wording of Article 9(b) of the directive, pursuant to which authorities awarding works contracts may do so without applying the provisions of the directive, in particular those providing for publication of an invitation to tender, "when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor", a Member State must, in order to justify recourse to a private contract procedure for the works in question, not only establish the existence of technical reasons within the meaning of that provision, but also prove that those technical reasons made it absolutely essential that the contract in question be awarded to a specific undertaking.

In Case C-57/94,

Commission of the European Communities, represented by Antonio Aresu, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Commission' s Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Umberto Leanza, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adelaïde,

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defendant,

APPLICATION for a declaration that, in so far as the provincial administration of Ascoli Piceno awarded a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway "Ascoli-Mare" entitled "Stage IV ° Project 5134" and failed to publish a notice of invitation to tender in the Official Journal of the European Communities, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler (Rapporteur), P.J.G. Kapteyn and P. Jann (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, J.L. Murray, J.-P. Puissochet, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: M.B. Elmer,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 February 1995,

after hearing the Opinion of the Advocate General at the sitting on 28 March 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 9 February 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, in so far as the provincial administration of Ascoli Piceno awarded a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway "Ascoli-Mare" entitled "Stage IV ° Project 5134" and failed to publish a notice of invitation to tender in the Official Journal of the European Communities, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682, hereinafter "Directive 71/305").

2 At the beginning of the 1970s, the provincial administration of Ascoli Piceno awarded various public works contracts relating to the construction of a rapid transit highway to link the town of Ascoli Piceno to the A 14 motorway and national highway No 16, which runs along the Adriatic coast. The work was divided into four stages.

3 Stage IV was awarded to the undertaking Rozzi Costantino. Twelve supplementary reports were subsequently produced on the work relating to that stage, which involved a substantial prolongation of the route as initially conceived. The work envisaged by those reports was also awarded to Rozzi Costantino. On 21 May 1990 the provincial administration of Ascoli Piceno awarded to that undertaking a private contract for work envisaged by the eleventh and twelfth reports for a total amount of LIT 36 250 million.

4 The Commission considered that the award of the public works contracts envisaged in those two reports fell within the scope of Directive 71/305 and was not covered by any of the derogations provided for in Article 9 and that consequently a notice of invitation to tender should have been published in the Official Journal of the European Communities in accordance with the requirements of the directive. Accordingly, by letter of 17 January 1991 the Commission called on the Italian

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Government, pursuant to Article 169 of the EEC Treaty, to submit its observations on the alleged infringement within 30 days.

5 Since no reply was received from the Italian Government within that period, the Commission reiterated its views in the reasoned opinion which it sent to the Italian Republic on 1 August 1991, concluding that "in so far as the provincial administration of Ascoli Piceno awarded a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway 'Ascoli-Mare' entitled 'Stage IV ° Project 5134' and failed to publish a notice of invitation to tender in the Official Journal of the European Communities, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC". The Commission called on the Italian Republic to comply with the reasoned opinion within two months.

6 By letter of 30 December 1991 the Italian Government sent to the Commission a letter of 31 October 1991 in which the provincial administration of Ascoli Piceno provided further information about the contract in question and relied on Article 5(b) of Law No 584 of 8 August 1977, which transposed Article 9(b) of Directive 71/305 into Italian law, to justify the award of the contract at issue to the undertaking Rozzi Costantino.

7 Since the Commission did not regard that communication as a satisfactory response to its reasoned opinion, by application lodged at the Court Registry on 6 July 1992 it brought an action requesting the Court to declare that, by allowing the provincial administration of Ascoli Piceno to award a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway "Ascoli-Mare" entitled "Stage IV ° Project 5134" and to fail to publish a notice of invitation to tender in the Official Journal of the European Communities, and by not taking steps to preclude at the outset the legal effects thereof which infringed Community law, the Italian Republic had failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts.

8 Finding that the conclusions in the Commission' s reasoned opinion and the form of order sought in its application to the Court were not the same, by judgment of 12 January 1994 the Court dismissed the application as inadmissible (Case C-296/92 Commission v Italy [1994] ECR I-1) on the ground that the scope of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article and that consequently the action cannot be founded on any complaints other than those formulated in the reasoned opinion.

9 Following that judgment the Commission lodged the present application without initiating a fresh pre-litigation procedure.

Admissibility

10 The Italian Government considers that, following the Court' s judgment of 12 January 1994, the Commission should have recommenced the entire pre-litigation procedure laid down in Article 169 of the Treaty, or at the very least have supplemented the reasoned opinion of 1 August 1991 by a further opinion.

11 In that connection the Italian Government claims, first, that the Court did not hold the application in Case C-296/92 inadmissible on the basis of defects affecting the pre-litigation documents or defects affecting the procedural documents taken separately, but rather the necessary functional correlation between the two.

12 That argument is unfounded. The judgment of 12 January 1994 makes it clear that inadmissibility resulted from the fact that inasmuch as it sought a declaration from the Court that the Italian Republic had failed to fulfil its obligations under Directive 71/305 by allowing the provincial administration of Ascoli Piceno to award the public works contract by way of a private agreement

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and to fail to publish a notice of invitation to tender in the Official Journal of the European Communities, without taking steps to preclude the effects thereof, the Commission was founding its action on a basis different from that formulated in the reasoned opinion, in which the Commission had complained to the Italian Republic about the conduct of the provincial administration of Ascoli Piceno itself.

13 It should, moreover, be pointed out that the facts on which Case C-296/92 was founded and those of the present case are exactly the same. Both cases concern the award by the provincial administration of Ascoli Piceno of the contract in question by a private agreement procedure and a failure to publish a notice of invitation to tender in the Official Journal of the European Communities.

14 In the circumstances it must be concluded that in order to remedy the defects found by the Court in its judgment of 12 January 1994 it sufficed for the Commission to submit an application based on the same complaints, pleas in law and arguments as the reasoned opinion of 1 August 1991.

15 The Italian Government observes, secondly, that in its reasoned opinion of 1 August 1991 the Commission claimed that recourse to a private contract procedure was not justified by a situation of extreme urgency as provided for in Article 9(d) of Directive 71/305, whereas in its application the Commission maintains that recourse to that procedure could not be founded on "technical reasons" within the meaning of Article 9(b) of that directive.

16 No argument can be drawn from that fact. As the Advocate General stated in point 12 of his Opinion, the discrepancy pointed out by the Italian Government arose from the fact that the Italian Government did not reply to the letter of formal notice addressed to it by the Commission on 17 January 1991 and only in its belated response to the Commission' s reasoned opinion did it for the first time rely on Article 9(b) of Directive 71/305 to justify the award of the contract by a private agreement procedure.

17 It should, moreover, be noted that, in view of the Italian Government' s failure to adduce any justification within the prescribed period, the Commission would have been entitled to confine itself, both during the pre-litigation procedure and in its application initiating proceedings, to stating that the case did not fall within any of the exceptional circumstances capable of justifying, under Article 9 of Directive 71/305, recourse to a private contract procedure, without examining in detail either circumstance, which, it appeared, given the lack of adequate information, might be relied on in particular.

18 It follows from the foregoing that the action is admissible.

Substance

19 The parties agree that in the circumstances only application of Article 9(b) of Directive 71/305 could justify recourse to a private contract procedure in awarding the contract in question. Pursuant to that provision, authorities awarding works contracts may do so without applying the provisions of the directive, in particular those providing for publication of an invitation to tender in the Official Journal of the European Communities, "when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor".

20 The Italian Government contends, first, that even if the term "technical reasons" in Article 9(b) of Directive 71/305 should be interpreted restrictively, that interpretation cannot go so far as to deprive that derogating provision of all practical significance. Thus it argues that "technical reasons" capable of justifying the carrying out of works by a particular contractor should not be construed as the technical capacity of a particular undertaking alone to carry out certain works and considers that objective circumstances and conditions which affect the execution of works in a particular situation may constitute such reasons.

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21 The Italian Government maintains, secondly, that in this case "technical reasons" within the meaning of Article 9(b) of Directive 71/305 justified the contract in question being awarded to a particular contractor, namely the undertaking already responsible for carrying out the works in progress. In that connection it refers to the technical interplay between the works in progress and the work involved in the contract at issue. Thus it would have been impossible to complete the work which was the subject of the tenth supplementary report before putting in place part of the structures which were the subject of the eleventh and twelfth reports, to set up two different building sites at the same time because of the shortage of space, and to carry out the work in progress separately from the work at issue, because of the close structural connection of the foundations.

22 The Commission denies that those circumstances can constitute "technical reasons" within the meaning of Article 9(b) of Directive 71/305. For that purpose it refers to a technical opinion given by an independent expert from which it appears, in substance, that the three arguments relied on by the Italian Government express a single technical need, that of planning, coordinating and supervising the works, and that in any event coordination of the timing and siting of the work in progress and the work at issue was required even if all the works were awarded to one undertaking.

23 It follows from the Court' s judgment in Case 199/85 Commission v Italy [1987] ECR 1039, at paragraph 14, that the provisions of Article 9 of Directive 71/305, which authorize derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public works contracts, must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.

24 In view of the wording of Article 9(b) of Directive 71/305, the Italian Government was obliged, in order to justify recourse to a private contract procedure for the works in question, not only to establish the existence of "technical reasons" within the meaning of that provision, but also to prove that those "technical reasons" made it absolutely essential that the contract in question be awarded to the undertaking Rozzi Costantino, which was responsible for the works in progress.

25 Even assuming that the circumstances relied on by the Italian Government could constitute "technical reasons" within the meaning of Article 9(b) of Directive 71/305, it is clear that the Italian Government has not adduced proof that those circumstances made it absolutely essential that the contract at issue be awarded to the undertaking in question.

26 The Italian Government did produce plans relating to the works in question, together with a series of photographs, and, referring to the technical explanations of the chief engineer of the provincial administration of Ascoli Piceno itself, pointed to the technical interplay between the work in progress and the work in question.

27 The Italian Government has not, however, convincingly shown, in order to challenge, if necessary by obtaining its own technical report from an independent expert, the findings and conclusions contained in the technical opinion submitted by the Commission, that the difficulties arising from those technical interconnections could not have been surmounted if the works in question had been awarded to an undertaking other than the one already responsible for the works in progress, so that the contract had to be awarded to that undertaking.

28 It follows from the above that the Commission' s action is founded.

Costs

Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

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On those grounds,

THE COURT

hereby:

1. Declares that, in so far as the provincial administration of Ascoli Piceno awarded a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway "Ascoli-Mare" entitled "Stage IV ° Project 5134" and failed to publish a notice of invitation to tender in the Official Journal of the European Communities, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts;

2. Orders the Italian Republic to pay the costs.

DOCNUM	61994J0057
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; J ; judgment
PUBREF	European Court reports 1995 Page I-01249
DOC	1995/05/18
LODGED	1994/02/09
JURCIT	31971L0305-A09 : N 4 17 23 31971L0305-A09LB : N 6 15 19 - 27 31971L0305-A09LD : N 15 31971L0305 : N 1 61985J0199-N14 : N 23 11992E169 : N 8 - 17 61992J0296 : N 8 - 14 61994C0057-N12 : N 16
CONCERNS	Failure concerning 31971L0305
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States

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NATIONA	Italy
NOTES	Gazin, F. ; Simon, Denys: Europe 1995 Juillet Comm. no 250 p.6-7 Muller, M.H.: Nederlands tijdschrift voor Europees recht 1995 p.200-203 Mok, M.R.: TVVS ondernemingsrecht en rechtspersonen 1995 p.340
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Elmer
JUDGRAP	Schockweiler
DATES	of document: 18/05/1995 of application: 09/02/1994

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Judgment of the Court of 11 August 1995
Commission of the European Communities v Federal Republic of Germany.
Actions against Member States for failure to fulfil obligations - Public works and public supply contracts.
Case C-433/93.

++++

1. Actions against Member States for failure to fulfil obligations ° Examination by the Court as to whether an action is well founded ° Situation to be taken into consideration ° Situation at the expiry of the period set by the reasoned opinion

(EC Treaty, Art. 169)

2. Acts of the institutions ° Directives ° Implementation by Member States ° Transposition of a directive without legislative action ° Conditions ° Existence of a general legal context guaranteeing full application of the directive ° Inadequacy of administrative rules

(EC Treaty, Art. 189, third para.)

3. Acts of the institutions ° Directives ° Right of persons affected to rely on directives in the absence of adequate implementing measures ° Effect not releasing Member States from their obligation to implement directives

(EC Treaty, Art. 189, third para.)

1. In an action brought under Article 169 of the Treaty for a declaration that a Member State has failed to fulfil its obligations by not ensuring the correct transposition of a directive, amendments made to national legislation are irrelevant for the purpose of giving judgment on the subject-matter of the action if they have not been implemented before the expiry of the period set by the reasoned opinion.

2. The transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation, and a general legal context may, depending on the content of the directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before national courts.

In the case of rules regarding participation and advertising in directives coordinating procedures for the award of public contracts, the protection which such rules are intended to confer on tenderers against arbitrariness on the part of a contract-awarding authority cannot be effective if a tenderer is not able to rely on those rules as against a contract awarder and, if necessary, to plead their breach before national courts.

Provisions of national law applied as administrative rules, which do not confer any right on individuals capable of being relied on before national courts, do not, for that reason, guarantee the full application of such directives.

3. The effect of the third paragraph of Article 189 of the Treaty is that Community directives must be implemented by appropriate implementing measures taken by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the

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Member States by the effect of the directives under the third paragraph of Article 189, cannot justify a Member State' s absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive.

In Case C-433/93,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, and Angela Bardenhewer, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Kay Hailbronner, Professor at the University of Konstanz, and Bernd Kloke, Regierungsrat in the Federal Ministry of Economic Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to adopt or notify within the prescribed period all the measures necessary to comply with the requirements arising under Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 127, p. 1) and under Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty, now the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler, P.J.G. Kapteyn (Rapporteur) and P. Jann (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, J.L. Murray, G. Hirsch, H. Ragnemalm and L. Sevon, Judges,

Advocate General: M.B. Elmer,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 11 May 1995,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 3 November 1993, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt or notify within the prescribed period all the measures necessary to comply with the requirements arising under Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 127, p. 1) (hereafter "Directive 88/295") and under Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1) (hereafter "Directive 89/440"), the Federal Republic of Germany has failed to fulfil its

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obligations under the EEC Treaty, now the EC Treaty.

2 Under Article 20 of Directive 88/295 Member States were required to adopt the measures necessary to comply with the directive by 1 January 1989 and forthwith to inform the Commission thereof. Likewise, Article 3 of Directive 89/440 required Member States to transpose that directive into national law no later than one year after its notification, that was to say, by 19 July 1990, and forthwith to inform the Commission thereof.

3 For the purpose of transposing Directive 88/295 in the Federal Republic of Germany, "a" paragraphs were added to the Verdingungsordnung fuer Leistungen ° ausgenommen Bauleistungen ° Teil A (Contracting Rules for the Award of Supply Contracts, with the Exception of Building Contracts, Part A) (hereafter "VOL/A"). The altered text was published under the title "Neufassung der VOL/A, Ausgabe 1990" in the Bundesanzeiger (Federal Gazette) No 45A of 6 March 1990.

4 The provisions of Directive 89/440 were incorporated in the form of "a" paragraphs in the Verdingungsordnung fuer Bauleistungen, Teil A (Contracting Rules for the Award of Building Contracts, Part A) (hereafter "VOB/A"). The text of the VOB/A was published in the Bundesanzeiger No 132 of 19 July 1990.

5 In its two letters of formal notice of 27 February 1992, the Commission contended that Directives 88/295 and 89/440 had not been transposed in accordance with the relevant requirements of Community law. Where a directive was intended to confer subjective rights on individuals, its transposition required the adoption of binding legal provisions enabling the intended beneficiaries to be aware of the full scope of their rights and, if necessary, to rely on those rights before national courts. Transposing a directive by mere administrative practice, which could be altered at any moment, was therefore inadequate.

6 According to the Commission, the Verdingungsordnungen were negotiated by German committees on placing of contracts by tender. These committees, consisting of representatives of local authorities, as well as trade representatives and trade-union representatives, were purely private bodies that did not form part of the public administration. The Verdingungsordnungen were therefore no more than purely private procedural rules which were not binding on contract-awarding authorities. Even assuming that those rules took the form of administrative provisions which heads of administration declared to be applicable to those working under them, they would not amount to legal rules and would not give rise to any subjective rights for individuals outside administrative departments, whereas the directives in question were designed to protect tenderers against arbitrary conduct on the part of the contract-awarding authorities.

7 By letter of 2 July 1992, the German Government forwarded to the Commission the draft legislation intended to amend the Haushaltsgrundsaetzegesetz (Law on the Principles of Budgetary Law) (hereafter "the Budgetary Law") in order to provide a legal basis for the adoption of a regulation relating to provisions governing the award of contracts applicable to public contracts, in which the Verdingungsordnungen were to be incorporated (hereafter referred to as "the budgetary solution").

8 On 3 December 1992, the Commission sent to the Federal Republic of Germany two reasoned opinions setting out once again the arguments contained in the letters of formal notice. The Commission also stated that even if, as the German Government envisaged in the budgetary solution, the Verdingungsordnungen were to become regulatory, the draft legislation would not create subjective rights for tenderers, since the German Government took the view that neither Directive 88/295, Directive 89/440, nor the abovementioned draft legislation was intended to confer any such rights on individuals.

9 By letter of 11 March 1993, the German Government forwarded to the Commission a slightly modified version of the draft legislation amending the Budgetary Law.

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10 Since it took the view that transposition of Directives 88/295 and 89/440 by the Verdingungsordnungen did not, even under the budgetary solution, meet the requirements of Community case-law, the Commission instituted the present proceedings.

11 The Zweites Gesetz zur AEnderung des Haushaltsgrundsaetzegesetzes (Second Law amending the Law on the Principles of Budgetary Law), Bundesgesetzblatt 1993, Part I, p. 1928, was adopted on 26 November 1993 and entered into force on 1 January 1994. On this basis the German Government, on 26 January 1994, adopted the Verordnung ueber die Vergabebestimmungen fuer oeffentliche Auftraege ° Vergabeverordnung (Regulation on Provisions for the Award of Public Contracts), Bundesgesetzblatt 1994, Part I, p. 321 (hereafter "the VGV") and the Nachpruefungsverordnung (Regulation on Control Procedures), Bundesgesetzblatt 1994, Part I, p. 324. The German Government takes the view that, by this latter regulation, it has transposed Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) (hereafter "Directive 89/665"). The Commission was notified of the adoption of those regulations on 7 February 1994.

12 Under Articles 1 and 2 of the VGV, the contract-awarding authorities referred to in Paragraph 57a(1)(1) to (3) of the Budgetary Law are required, when awarding public supply and public works contracts, to apply the rules on the award of public contracts, that is to say the VOL/A, as amended on 3 August 1993 (Bundesanzeiger No 175a of 17 September 1993), and the VOB/A, as amended on 12 November 1992 (Bundesanzeiger No 223a of 27 November 1992).

The subject-matter of the proceedings

13 In their pleadings, the parties dealt essentially with the question whether the measures envisaged and subsequently adopted by the German Government for the purpose of giving effect to the "budgetary solution" properly transposed Directives 88/295 and 89/440 into national law.

14 At the hearing, however, the Commission pointed out that, in the forms of order set out in its application, it was only seeking a declaration that the Federal Republic of Germany had failed to fulfil its obligations under the Treaty in so far as on 3 February 1993, the date on which the period set in the reasoned opinions expired, it had still not correctly transposed Directives 88/295 and 89/440.

15 According to settled case-law (see the judgment in Case C-80/92 Commission v Belgium [1994] ECR I-1019, paragraph 19), amendments made to national legislation are irrelevant for the purpose of giving judgment on the subject-matter of an action for failure to fulfil obligations if they have not been implemented before the expiry of the period set by the reasoned opinion.

16 Consequently, it will be sufficient in these proceedings to examine whether on 3 February 1993 the transposition of Directives 88/295 and 89/440 into the "a" paragraphs of, respectively, the VOL/A, published under the title "Neufassung der VOL/A, Ausgabe 1990" in Bundesanzeiger No 45A of 6 March 1990, and the VOB/A, published in Bundesanzeiger No 132 of 19 July 1990, satisfies the requirements of Community law, and it will be unnecessary to consider the "budgetary solution".

The question whether the action is well founded

17 According to the German Government, the domestic law in force prior to 3 February 1993 already allowed Directives 88/295 and 89/440 to be correctly applied. At federal level and at Land and commune level, contract-awarding authorities were bound to act in compliance with the Verdingungsordnungen as administrative directions.

18 It should first be pointed out that the Court has consistently held (see, in particular, the judgment in Case C-361/88 Commission v Germany [1991] ECR I-2567, paragraph 15) that the transposition

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of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation, and that a general legal context may, depending on the content of the directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.

19 Next, it should be noted that the rules regarding participation and advertising in directives coordinating procedures for the award of public contracts are intended to protect tenderers against arbitrariness on the part of the contract-awarding authority (see the judgment in Case 31/87 Beentjes v Netherlands [1988] ECR 4635, paragraph 42). Such protection cannot be effective if a tenderer is not able to rely on those rules as against the contract awarder and, if necessary, to plead a breach of those rules before national courts.

20 The German Government does not deny that, at the expiry of the period set in the reasoned opinions, the Verdingungsordnungen, which were applied only as administrative rules, did not confer any right on individuals which could be relied on before national courts.

21 The German Government submits here that it was only with the adoption of Directive 89/665 that rules were established to govern the procedure to be followed in actions brought against breaches of Directives 88/295 and 89/440. In any event, according to the German Government, it follows from the case-law on the direct effect of directives that it is open to individuals to rely on them before national courts as against public authorities where the latter have infringed the rules on tendering contained in those directives.

22 The argument based on Directive 89/665 is irrelevant. The German Government has itself acknowledged that the directive was completely transposed into national law only by the abovementioned Nachpruefungsverordnung adopted on 26 January 1994 pursuant to the Budgetary Law.

23 In any event, the adoption of Directive 89/665 has no bearing on the transposition of Directives 88/295 and 89/440. As is clear from the first and second recitals in the preamble to Directive 89/665, this directive is confined to reinforcing existing arrangements at both national and Community levels for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified.

24 Nor can the argument based on the direct effect of Directives 88/295 and 89/440 be accepted. The effect of the third paragraph of Article 189 is that Community directives must be implemented by appropriate implementing measures taken by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189, cannot justify a Member State' s absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, in particular, the judgment in Case 102/79 Commission v Belgium [1980] ECR 1473, paragraph 12).

25 Since the German Government did not properly transpose Directives 88/295 and 89/440 within the period prescribed, the Commission' s claim for a declaration that there has been a failure to fulfil obligations in this regard must be upheld.

26 It must accordingly be held that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with the requirements arising under Directives 88/295 and 89/440, the Federal Republic of Germany has failed to fulfil its obligations

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under the EC Treaty.

Costs

27 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party' s pleadings. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with the requirements arising under Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC and under Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty;

2. Orders the Federal Republic of Germany to pay the costs.

DOCNUM	61993J0433
AUTHOR	COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
FORM	JUDGMENT
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; CASES ; 1993 ; J ; JUDGMENT
PUBREF	European Court Reports 1995 page I-2303
DOC	1995/08/11
LODGED	1993/11/03
JURCIT	31988L0295 : N 1 13 - 26 31989L0440 : N 1 13 - 26 31989L0440-A03 : N 2 31988L0295-A20 : N 2 31989L0665 : N 11 21 22 61992J0080-N19 : N 15 61988J0361-N15 : N 18 61987J0031-N42 : N 19 31989L0665-C1 : N 23 31989L0665-C2 : N 23 11957E189-L3 : N 24 61979J0102-N12 : N 24
CONCERNS	Z 31988L0295 Z 31989L0440

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SUB	APPROXIMATION OF LAWS
AUTLANG	GERMAN
APPLICA	Commission
DEFENDA	Federal Republic of Germany
NATIONA	FEDERAL REPUBLIC OF GERMANY
NOTES	Von Meibom, Wolfgang ; Byok, Jan: Europäische Zeitschrift für Wirtschaftsrecht 1995 p.629-632 Dreher, Meinrad: Europäische Zeitschrift für Wirtschaftsrecht 1995 p.637-638 X: Europe 1995 Octobre Comm. no 335 p.6 Urlesberger, Franz: Wirtschaftsrechtliche Blätter 1995 p.457-459 Brinker, Ingo: Juristenzeitung 1996 p.89-91 Trybus, Martin: Public Procurement Law Review 1996 p.CS45 Dreher, Meinrad: Neue Zeitschrift für Verwaltungsrecht 1996 P.345-347 Terneyre, Philippe: Recueil Dalloz Sirey 1996 Som. p.316-317
PROCEDU	PROCEEDINGS CONCERNING FAILURE BY MEMBER STATES-SUCCESSFUL
ADVGEN	Elmer
JUDGRAP	Kapteyn
DATES	OF DOCUMENT.....: 11/08/1995 OF APPLICATION....: 03/11/1993

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Judgment of the Court
of 26 March 1996
The Queen v H. M. Treasury, ex parte British Telecommunications plc.
Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom.
Reference for a preliminary ruling - Interpretation of Directive 90/531/EEC - Telecommunications - Transposition into national law - Obligation to pay compensation in the event of incorrect implementation.
Case C-392/93.

++++

1. Approximation of laws ° Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ° Directive 90/531 ° Determination of the telecommunications services excluded from its scope ° Power vested in the contracting entities ° Incorrect transposition by a Member State ° Obligation of the State to pay compensation for damage suffered by a contracting entity ° None

(Council Directive 90/531, Art. 8(1))

2. Approximation of laws ° Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ° Directive 90/531 ° Scope ° Exclusion of contracts concluded by entities offering their services under competitive conditions ° Verification as a matter of fact and of law ° Criteria

(Council Directive 90/531, Art. 8(1))

3. Community law ° Breach by a Member State ° Implementation of a directive ° Obligation to pay compensation for damage caused to individuals ° Conditions

1. It is not open to a Member State, when transposing into national law Directive 90/531 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, to determine which telecommunications services are to be excluded from its scope in implementation of Article 8(1), since that power is vested in the contracting entities themselves.

However, where a Member State has itself determined, in transposing that directive into national law, which services of a contracting entity are to be excluded in implementation of Article 8, it is not obliged under Community law to pay that entity compensation for damage suffered by it as a result of the error thus committed.

In the present case, the conditions which must be fulfilled in order for a Member State to incur liability to compensate individuals for damage caused to them as a result of a breach of Community law committed by it in the exercise of legislative functions in which it has a discretion, such as the transposition of a directive, are not wholly met. There has not been a sufficiently serious breach of Community law, since Article 8(1), which has been incorrectly transposed, is imprecisely worded and the interpretation given to it in good faith by the Member State in question, albeit erroneous, was not manifestly contrary to the wording of the directive or to the objective pursued by it.

2. In the light of its wording and purpose, the criterion which Article 8(1) of Directive 90/531 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors lays down in order to exclude from the scope of the directive certain contracts awarded by entities providing services in the fields in question, namely that "other entities are free to offer the same services in the same geographical area and under substantially the same conditions", is to be verified as a matter of law and of fact, having regard in particular to all the characteristics of the services concerned, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity' s position on the market and any legal constraints.

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3. In the case of a breach of Community law for which a Member State, acting in a field in which it has a wide discretion in taking legislative decisions, can be held responsible, Community law confers on injured parties a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

Those conditions are applicable to the situation in which a Member State incorrectly transposes a Community directive into national law. A restrictive approach to State liability is justified in such a situation, for the reasons already given to justify the strict approach to non-contractual liability of Community institutions or Member States when exercising legislative functions in areas covered by Community law where the institution or State has a wide discretion ° in particular, the concern to ensure that the exercise of those legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests.

In Case C-392/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice, Queen' s Bench Division, Divisional Court, for a preliminary rul ing in the proceedings pending before that court between

The Queen

and

H.M. Treasury

ex parte: British Telecommunications plc

on the interpretation of Article 8(1) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C.N. Kakouris, D.A.O. Edward and J.-P. Puissochet (Presidents of Chambers), G.F. Mancini, F.A. Schockweiler, J.C. Moitinho de Almeida (Rapporteur), C. Gulmann and J.L. Murray, Judges,

Advocate General: G. Tesauro,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° British Telecommunications plc, by G. Barling QC, T. Sharpe and H. Davies, Barristers, instructed by C. Green, Solicitor and Chief Legal Adviser,

° the United Kingdom, by J. Collins, Assistant Treasury Solicitor, acting as Agent, and M.J. Beloff QC,

° the French Government, by H. Duchène, Secretary for Foreign Affairs in the Ministry of Foreign Affairs, and C. de Salins, Foreign Affairs Adviser in that Ministry, acting as Agents,

° the Commission of the European Communities, by H. van Lier, Legal Adviser, and D. McIntyre, a national civil servant on secondment to the Commission' s Legal Service, acting as Agents,

having regard to the Report for the Hearing,

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after hearing the oral observations of British Telecommunications plc, represented by G. Barling QC, T. Sharpe and H. Davies, the United Kingdom, represented b y J. Collins, K.P.E. Lasok QC and S. Richards, Barrister, the German Government, represented by E. Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, the Italian Government, represented by I. Braguglia, Avvocato dello Stato, and the Commission, represented by H. van Lier and D. McIntyre, at the hearing on 26 October 1994,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1995,

gives the following

Judgment

Costs

47 The costs incurred by the French, German and Italian Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice, Queen' s Bench Division, Divisional Court, by order of 28 July 1993, hereby rules:

1. It is not open to a Member State, when transposing into national law Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, to determine which telecommunications services are to be excluded from its scope in implementation of Article 8(1), since that power is vested in the contracting entities themselves.

2. The criterion laid down by Article 8(1) of Directive 90/531, namely that "other entities are free to offer the same services in the same geographical area and under substantially the same conditions", is to be verified as a matter of law and of fact, having regard in particular to all the characteristics of the services concerned, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity' s position on the market and any legal constraints.

3. Community law does not require a Member State which, in transposing Directive 90/531 into national law, has itself determined which services of a contracting entity are to be excluded from its scope in implementation of

Article 8, to compensate that entity for any loss suffered by it as a result of the error committed by the State.

1 By order of 28 July 1993, received at the Court on 23 August 1993, the High Co urt of Justice, Queen' s Bench Division, Divisional Court ("the Divisional Court"), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Article 8(1) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 19 90 L 297, p. 1, "the directive").

2 Those questions arose in proceedings brought by British Telecommunications plc ("BT") against the Government of the United Kingdom for annulment of Sched ule 2 to the Utilities Supply and Works Contracts Regulations 1992 ("the 1992 Regulations"), implementing Article 8(1) of the directive.

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3 Article 2(2)(d) of the directive provides that relevant activities for the purposes of the directive are to include, in particular, "the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services".

4 According to Article 2(1)(b), the directive is to apply to contracting entities which, "when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State". Article 2(3)(a) further provides that, for the purpose of applying Article 2(1)(b), a contracting entity is to be considered to enjoy special or exclusive rights in particular where, "for the purpose of constructing the networks or facilities referred to in paragraph 2, it may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway".

5 According to Article 2(6), "the contracting entities listed in Annexes I to X shall fulfil the criteria set out above". Annex X, which specifically concerns the "Operation of telecommunications networks or provision of telecommunications services", refers in particular, as regards the United Kingdom, to BT, Mercury Communications Ltd ("Mercury") and the City of Kingston upon Hull ("Hull").

6 Article 8 of the directive provides as follows:

> "1. This directive shall not apply to contracts which contracting entities ... aw ard for purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions.

2. The contracting entities shall notify the Commission at its request of any services they regard as covered by the exclusion referred to in paragraph 1. The Commission may periodically publish the list of services which it considers to be covered by this exclusion, for information, in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information."

7 Lastly, Article 33(1) provides:

> "1. Contracting entities shall keep appropriate information on each contract which shall be sufficient to permit them at a later date to justify decisions taken in connection with:

...

(d) non-application of Titles II, III and IV in accordance with the derogations provided for in Title I."

8 In the United Kingdom, Article 8(1) of the directive has been transposed into national law by Regulation 7(1) of the 1992 Regulations, which provides as follo ws:

> "These Regulations shall not apply to the seeking of offers in relation to a contract by a utility specified in Schedule 2 for the exclusive purpose of enabling it to provide one or more of the public telecommunications services specified in the Part of Schedule 2 in which the utility is specified."

9 Part B of Schedule 2 is set out thus:

> "British Telecommunications plc.

Kingston Communications (Hull) plc.2. All public telecommunications services, other than the following services when they are provided within the geographical area for which the provider is licensed as a public telecommunications operator: basic voice telephony services, basic data transmission services, the provision of private leased circuits and maritime services".

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10 Regulation 7(2) further provides:

> "A utility specified in Schedule 2 when requested shall send a report to the Minister for onward transmission to the Commission describing the public telecommunications services provided by it which it considers are services specified in the Part of Schedule 2 in which the utility is specified."

11 BT is a joint stock limited liability company set up on 1 April 1984 under the British Telecommunications Act 1984 ("the 1984 Act"), which transferred to it t he property, together with all rights and obligations, of the former public corporation also known as British Telecommunications, itself the successor, pursuant to the British Telecommunications Act 1981, to the Post Office, which had previously held an exclusive monopoly in the running of telecommunications systems throughout almost the entire national territory.

12 In the field of fixed-link telecommunications services (including fixed-terminal vo ice telephony), the Government granted the necessary licences under the 1984 Act to BT and Mercury. In order to ensure greater competition, the 1984 Act required interconnection of the two networks. BT and Mercury thereby acquired the exclusive right to operate fixed-link telecommunications services until 1990 (the "duopoly" period).

13 The duopoly policy was abandoned in that sector in the early 1990s. Numerous licences were issued by the Government. However, in 1992 BT still controlled 9 0% of telephone business, with Mercury controlling 7% and the new operators o nly 3%. Between 1984 and July 1993 the Government gradually sold off its remaining shareholding in BT.

14 The licence granted to BT for 25 years imposes an obligation to provide voice telephony services throughout the United Kingdom, subject to certain exceptions , to anyone who asks for them, even where demand is insufficient to cover the c osts of providing them (the "universal service obligation"). BT is the only licens ee which is subject to regulation in respect of tariff changes (the "price cap").

15 In transposing Article 8 of the directive into national law, the 1992 Regulations exclude almost all of the operators in the sector concerned, including Mercury, from the obligation to comply therewith as regards contracts for the supply of telecommunications services. Only BT (and Hull, in the area for which it holds a licence) remains subject to the provisions of the directive, albeit solely as regard s basic voice-telephony services, basic data-transmission services, the provision of private leased circuits and maritime services.

16 In its action before the Divisional Court, BT seeks annulment of Schedule 2 to t he 1992 Regulations on the ground that Regulation 7(1) and Schedule 2 implem ent Article 8 of the directive incorrectly. BT claims that the Government should have transposed the criteria laid down in Article 8(1) of the directive rather than proceeded to apply them. By determining, in respect of each contracting entity, which of the services provided meet those criteria, the Government is alleged to have deprived BT of the power conferred on it by the directive to make its own decisions.

17 BT further claims damages for the loss it claims to have suffered as a result of incorrect implementation of the directive, namely the additional expense borne by it in complying with the 1992 Regulations. Furthermore, those regulations have allegedly prevented it from concluding profitable transactions and placed it at a commercial and competitive disadvantage, by subjecting it to the requirement, from which the other operators in the sector are exempt, to publish its procurement plans and contracts in the Official Journal.

18 The Divisional Court has decided to stay the proceedings brought by BT and to refer the following questions to the Court of Justice for a preliminary ruling:

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"1. On the proper interpretation of Council Directive 90/531, does it fall within the discretion accorded to a Member State by Article 189 of the Treaty, when implementing Article 8(1) of the directive, itself to identify the telecommunication services provided by each contracting entity in respect of which the exclusion in that article does or does not apply?

2. (a) Do the words 'where other entities are free to offer the same services in the same geographical area and under substantially the same conditions' in Article 8(1) refer only to 'freedom' and to 'conditions' of a legal or regulatory nature?

(b) If the answer to Question 2(a) is in the negative:

(i) what other matters do the words refer to; and

(ii) is a contracting entity' s position in the market for a particular telecommunications service relevant to those matters; and

(iii) if its position is relevant, how is it relevant and, in particular, i n what circumstances may it be conclusive?

(c) Are the answers to questions (ii) and (iii) in subparagraph (b) abov e affected by the fact that the entity is subject to regulatory constraints and, if so, in what respects are they affected?

3. If the answer to Question 1 is in the affirmative:

(a) in the event of a dispute between a contracting entity and the national authorities charged with the implementation of Article 8(1), how is the national court seised with the dispute to ensure that the criteria for the application of the exclusion in Article 8(1) are properly applied and, in particular, must it substitute its own assessment of the application of the exclusion in Article 8(1) for that made by the national authorities charged with the implementation of Article 8(1);

(b) if the national court finds that the definitions of certain telecommunications services, adopted by the national authorities charged with the implementation of Article 8(1) in order to determine whether or not a particular service is or is not covered by the exclusion, are such that it is impossible for the contracting entity to ascertain whether a particular service is or is not so covered, has Directive 90/531 or any general principle of Community law, in particular the requirement of legal certainty, been infringed;

(c) in defining certain telecommunications services is a Member State entitled to adopt definitions based upon descriptions of the technica l means by which a service is provided rather than a description of the service itself?

4. If a Member State has erred in its implementation of Article 8(1) of Cou ncil Directive 90/531, is that Member State liable as a matter of Community law to compensate a contracting entity in damages for loss which it has suffered as a result of that error and, if so, under what conditions does su ch liability arise?"

Question 1

19 By its first question, the Divisional Court seeks in essence to ascertain whether a Member State may, when transposing the directive into national law, determine which telecommunications services are to be excluded from its scope pursuant to Article 8(1), or whether that determination is a matter for the contracting entities themselves.

20 The French, German and Italian Governments and the United Kingdom consider that the directive does not preclude the Member States from determining which of the telecommunications services provided by each contracting entity are covered by the exemption laid down in Article 8(1). In so doing,

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the Member States specify the content of that provision and permit the exercise of judicial review, which would not otherwise be possible.

21 In addition, the German Government and the United Kingdom consider that it may be particularly necessary to implement Article 8(1) in that way where, as in the present case, there is disagreement between a Member State and a contracting entity as to the scope of the exclusion. The German Government adds that the Member States are in a much better position than the Commission to assess whether competition exists in the telecommunications market as regards a specific service and, consequently, that the determination by those States of the matters covered by Article 8(1) will permit the exercise of more effective control than that exercised by the Commission on the basis of information obtained pursuant to Article 8(2).

22 Lastly, the German Government observes that Articles 8(2) and 33(1)(d) do not support the conclusion that it is for the contracting entities alone to determine which services are to be regarded as excluded. The fact that those provisions require such entities to notify the Commission of services which are excluded, an d to keep appropriate information on each contract to enable them at a later da te to justify non-application of Titles II, III and IV of the directive, does not mean that the Member States cannot be regarded as empowered themselves to determine the scope of the exception laid down in Article 8(1).

23 Those arguments cannot be accepted.

24 Article 8(2) of the directive, like Articles 6(3) and 7(2), provides that contracting entities are to notify the Commission at its request of any services which they regard as excluded under the aforementioned articles. If it were for the Member States to determine the services in question, they would also be obliged to notify the Commission of the services so excluded from the scope of the directive, in order to enable the Commission to accomplish the task assigned to it by those provisions.

25 Since the directive does not impose any such obligation on the Member States, as it does in Article 3(4), it is for the contracting entities alone to determine the services excluded pursuant to Article 8(1).

26 That interpretation is confirmed by the objective of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), namely to provide adequate legal protection for suppliers or contractors in the event of infringement of Community legislation on public procurement (see, in that regard, the fifth recital in the preamble to Directive 92/13).

27 If the decision to exclude certain services from the scope of the directive were left to the Member States, economic operators would be denied recourse to the legal remedies afforded by Directive 92/13 in the event of infringement by contracting entities of the Community rules on public procurement, in particular the right to claim damages and to apply for injunctive relief, as provided for by Article 2(1), with a view to prevention or termination of any infringement.

28 Lastly, that interpretation makes it possible to ensure equality of treatment between contracting entities and their suppliers, who thereby remain subject to the same rules.

29 The answer to Question 1 must therefore be that it is not open to a Member State, when transposing the directive into national law, to determine which telecommunications services are to be excluded from its scope in implementation of Article 8(1), since that power is vested in the contracting entities themselves.

Question 2

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30 By its second question, the Divisional Court asks whether the criterion laid down by Article 8(1), namely that "other entities are free to offer the same services in the same geographical area and under substantially the same conditions", is to be verified only as a matter of law or also as a matter of fact. In the latter case, the national court wishes to know which matters are to be taken into account for the purposes of assessing whether, as regards a particular service, real competition exists in the telecommunications market.

31 BT maintains that the criterion laid down in Article 8(1) is fulfilled where there are legal or regulatory provisions guaranteeing, in law, freedom of competition in the sector concerned, so obviating any need to examine whether such competition exists in practice.

32 That interpretation runs counter to the wording and purpose of Article 8(1). The criterion that other contracting entities must be able to offer the same services under substantially the same conditions is couched in general terms in Article 8(1). Moreover, the 13th recital in the preamble states that, to fall outside the scope of the directive, activities of contracting entities must be "directly exposed to competitive forces in markets to which entry is unrestricted".

33 Consequently, the criterion laid down by Article 8(1) is to be interpreted as meaning that other contracting entities must not only be authorized to operate in the market for the services in question, without any legal barrier to entry thereto, but must also be in a position actually to provide the services in question under the same conditions as the contracting entity.

34 In those circumstances, a decision to exclude certain services from the scope of the directive must be taken on an individual basis, having regard in particular to all their characteristics, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity' s position on the market and the existence of any legal constraints.

35 The answer to Question 2 must therefore be that the criterion laid down by Article 8(1) of the directive, namely that "other entities are free to offer the same services in the same geographical area and under substantially the same conditions", is to be verified as a matter of law and of fact, having regard in particular to all the characteristics of the services concerned, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity' s position on the market and any legal constraints.

Question 3

36 In the light of the answer to Question 1, there is no need to reply to Question 3.

Question 4

37 By its fourth question, the Divisional Court seeks to ascertain whether a Member State which, in transposing the directive into national law, has itself determined which services of a contracting entity are to be excluded from its scope pursuant to Article 8, is required by Community law to compensate that undertaking for any loss suffered by it as a result of the error committed by the State.

38 It should be recalled, as a preliminary point, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (judgments in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 35, and in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-0000, paragraph 31). It follows that that principle holds good for any case in which a Member State breaches Community law (judgment in Brasserie du Pêcheur and Factortame, cited above, paragraph 32).

39 In the latter judgment the Court also ruled, with regard to a breach of Community law for which a Member State, acting in a field in which it has a wide discretion in taking legislative decisions,

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can be held responsible, that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (paragraphs 50 and 51).

40 Those same conditions must be applicable to the situation, taken as its hypothesis by the national court, in which a Member State incorrectly transposes a Community directive into national law. A restrictive approach to State liability is justified in such a situation, for the reasons already given by the Court to justify the strict approach to non-contractual liability of Community institutions or Member States when exercising legislative functions in areas covered by Community law where the institution or State has a wide discretion ° in particular, the concern to ensure that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests (see, in particular, the judgments in Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraphs 5 and 6, and in Brasserie du Pêcheur and Factortame, paragraph 45).

41 Whilst it is in principle for the national courts to verify whether or not the conditions governing State liability for a breach of Community law are fulfilled, in the present case the Court has all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law.

42 According to the case-law of the Court, a breach is sufficiently serious where, in the exercise of its legislative powers, an institution or a Member State has manifestly and gravely disregarded the limits on the exercise of its powers (judgments in HNL and Others v Council and Commission, cited above, paragraph 6, and in Brasserie du Pêcheur and Factortame, paragraph 55). Factors which the competent court may take into consideration include the clarity and precision of the rule breached (judgment in Brasserie du Pêcheur and Factortame, paragraph 56).

43 In the present case, Article 8(1) is imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely devoid of substance (see paragraphs 20 to 22 above). That interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the directive or to the objective pursued by it.

44 Moreover, no guidance was available to the United Kingdom from case-law of the Court as to the interpretation of the provision at issue, nor did the Commission raise the matter when the 1992 Regulations were adopted.

45 In those circumstances, the fact that a Member State, when transposing the directive into national law, thought it necessary itself to determine which services were to be excluded from its scope in implementation of Article 8, albeit in breach of that provision, cannot be regarded as a sufficiently serious breach of Community law of the kind intended by the Court in its judgment in Brasserie du Pêcheur and Factortame.

46 The answer to Question 4 must therefore be that Community law does not require a Member State which, in transposing the directive into national law, has itself determined which services of a contracting entity are to be excluded from its scope in implementation of Article 8, to compensate that entity for any loss suffered by it as a result of the error committed by the State.

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PROCEDU REFERENCE FOR A PRELIMINARY RULING

ADVGEN Tesauro

JUDGRAP Moitinho de Almeida

DATES OF DOCUMENT.....: 26/03/1996
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Judgment of the Court of 24 January 1995 Commission of the European Communities v Kingdom of the Netherlands. Tender notices for public supply contracts - Review procedure - Notification - Technical specifications. Case C-359/93.

++++

1. Approximation of laws ° Review procedures in respect of the award of public supply and public works contracts ° Directive 89/665 ° Procedure enabling the Commission to take preventative action where there has been a clear and manifest infringement of Community provisions in the field of public procurement ° Procedure unrelated to actions against Member States for failure to fulfil obligations under Article 169 of the Treaty

(Art. 169, EC Treaty; Council Directive 89/665)

2. Approximation of laws ° Procedures for the award of public supply contracts ° Directive 77/62 ° Information which must be given in tender notices ° Information concerning the opening of tenders ° Use of technical specifications defined by reference to a trade mark ° Condition

(Art. 30, EC Treaty; Council Directive 77/62)

1. The procedure under Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, which enables the Commission, where it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed, to take up the matter with a Member State, constitutes a preventative measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty, so that the way in which the Commission used that procedure is irrelevant in assessing the admissibility of an action against a Member State for failure to fulfil obligations brought by the Commission on account of an infringement by the Member State concerned of Community provisions in the field of public procurement.

2. A Member State fails to fulfil its obligations under Directive 77/62 coordinating procedures for the award of public supply contracts where it:

° fails to indicate in a tender notice the persons authorized to be present at the opening of tenders or the date, time and place of opening, when that information is compulsorily and unconditionally required by the directive in order to enable potential suppliers to discover the identity of their competitors and to check whether they meet the criteria laid down for qualitative selection;

° fails in such notice to add the words "or equivalent" after a technical specification defined by reference to a particular trade mark, when the directive requires them to be added and when failure to do so may impede the flow of imports in intra-Community trade, contrary to Article 30 of the Treaty.

In Case C-359/93,

Commission of the European Communities, represented by H. van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by J.W. de Zwaan and T. Heukels, Assistant Legal Advisers at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg

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at the Netherlands Embassy, 5 Rue C.M. Spoo,

defendant,

APPLICATION for a declaration that the Kingdom of the Netherlands has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Council Directives 80/767/EEC (OJ 1980 L 215, p. 1) and 88/295/EEC (OJ 1988 L 127, p. 1), and also under Article 30 of the EEC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn (President of Chamber), G.F. Mancini, C.N. Kakouris, J.L. Murray, D.A.O. Edward (Rapporteur) and G. Hirsch, Judges,

Advocate General: G. Tesauro,

Registrar: R Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 17 November 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 July 1993, the Commission of the European Communities brought an action under Article 169 of the Treaty for a declaration that the Kingdom of the Netherlands had failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Council Directives 80/767/EEC and 88/295/EEC, and also under Article 30 of the EEC Treaty.

2 According to Article 9(5) of Directive 77/62, as amended by Article 9 of Directive 88/295, notices of supply contracts "shall be drawn up in accordance with the models given in Annex III". It is clear from point 7 of part "A. Open procedures" of this Annex that contract notices must contain the following information:

"(a) the persons authorized to be present at the opening of tenders ..."

and

"(b) the date, time and place of this opening... ".

3 Under Article 7(6) of Directive 77/62, as amended by Article 8 of Directive 88/295, unless the technical specifications referred to in Annex II "are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention goods of a specific make or source or of a particular process and which have the effect of favouring or eliminating certain undertakings or products. In particular, the indication of trade marks, patents, types or specific origin or production shall be prohibited; however, such an indication accompanied by the words 'or equivalent' shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned."

4 Article 3 of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts provides as follows:

"(1) The Commission may invoke the procedure for which this article provides when, prior to

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a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.

(2) The Commission shall notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.

(3) Within 21 days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected; or

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a)."

5 On 10 December 1991 Nederlands Inkoopcentrum NV, the Netherlands contracting authority, published a tender notice in the Official Journal of the European Communities concerning the supply and maintenance of a meteorological station.

6 That tender notice, which was laid out like the model in Annex III to Directive 77/62, contained no reference to the persons authorized to be present at the opening of the tenders or to the date, time and place of opening.

7 Moreover, the contracting authority' s general terms and conditions stated that the operating system required was the "UNIX", which is the name of a software system developed by Bell Laboratories of ITT (USA) for connecting several computers of different makes.

8 Taking the view that those two points in the notice, namely the failure to publish the information provided for in point 7(a) and (b) of Annex III and the reference in the general terms and conditions to a specific product, were not in keeping with the requirements of Articles 9(5) and 7(6) of Directive 77/62, on Thursday 25 June 1992 the Commission sent a letter to the Permanent Representation of the Netherlands, in accordance with Article 3(1) and (2) of Directive 89/665. It drew the attention of the Netherlands Government to the fact that the letter constituted formal notice for the purposes of Article 169 of the Treaty and that the subsequent communication from the Netherlands Government would be treated as the observations provided for in that article.

9 The Commission' s letter was received on Friday 26 June by the Permanent Representation in Brussels, which forwarded it to the relevant ministry in the Netherlands where it was received on Monday 29 June. That same day, the Commission sent a copy of the letter by fax to the contracting authority, although the agreement awarding the contract had just been signed.

Admissibility

10 In the light of the foregoing, the Netherlands Government raised two objections of inadmissibility. First, the Commission' s conduct did not comply with the requirements of Article 3(1) and (2) of Directive 89/665/EEC, in so far as the Commission was out of time in informing the Member State and the contracting authority of the reasons which led it to conclude that an infringement of Directive 77/62 had been committed, and secondly, since the Commission itself referred to the technical specifications of the UNIX system in a contract notice published after the one at issue in these proceedings, it is not entitled to rely on the alleged infringement, which it has committed as well.

11 With regard to the objection based on the Commission' s conduct, Article 3(1) and (2) of Directive 89/665 provides that where, "prior to a contract being concluded", the Commission considers that

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a clear and manifest infringement of Community law has been committed during a contract award procedure falling within the scope of Directive 77/62, it is to notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that such an infringement has been committed and request its correction.

12 It is clear from the letter and spirit of Directive 89/665 that it is very much to be preferred, in the interest of all the parties concerned, that the Commission should give notice of its objections to the Member State and the contracting authority as soon as possible before the contract is concluded, thereby giving the Member State and the contracting authority time to answer it, in accordance with Article 3(3) of Directive 89/665, and if necessary to correct the alleged infringement before the contract is awarded.

13 However, that special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty. That article gives the Commission discretionary power to bring an action before the Court where it considers that a Member State has failed to fulfil one of its obligations under the Treaty and that the State concerned has not complied with the Commission' s reasoned opinion.

14 Furthermore, a declaration that a State has failed to fulfil its obligations under Article 169 does not depend on the existence of a clear and manifest infringement within the meaning of Directive 89/665. Such a declaration is confined to the finding that a Member State has not fulfilled an obligation under Community law and does not in any way prejudge the nature or seriousness of the infringement.

15 The first plea of inadmissibility raised by the Netherlands Government must therefore be rejected.

16 With regard to the objection that the action is inadmissible because the Commission itself referred to the same technical specification, that is to say the UNIX system, in a contract notice published after the one at issue in these proceedings, it should be noted that, even on the assumption that the Commission is subject to the rules laid down by Directive 77/62 and has infringed them, such an infringement cannot justify any which may have been committed by the Netherlands authorities.

17 Accordingly, the second plea of inadmissibility must also be rejected.

Substance

18 The Commission' s first allegation is that the contracting authority failed to indicate in the notice in question the persons authorized to be present at the opening of tenders or the date, time and place of opening, contrary to the requirements of Article 9(5) and point 7 of Annex III to Directive 77/62.

19 The Netherlands Government, which does not dispute the facts, maintains that the information in question is necessary only where the contracting authority intends to restrict the opportunity to attend the opening of tenders, but since opening in this case was public and any interested persons could attend, it was unnecessary to identify them.

20 The first point to note is that the information mentioned in point 7 of Annex III to Directive 77/62 is compulsorily and unconditionally required. As the Advocate General correctly observed at point 8 of his Opinion, that information enables potential suppliers to discover the identity of their competitors and to check whether they meet the criteria laid down for qualitative selection.

21 Furthermore, even when tenders are opened in public, and any interested person may therefore attend, there can be no real opportunity of doing so if the date, time and place are not published.

22 It follows that, by failing to publish the information referred to in point 7 of Annex III to Directive 77/62, the contracting authority has failed to fulfil its obligations under Article

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9(5) of the directive.

23 The Commission' s second charge is that, by failing to add the words "or equivalent" after the term UNIX system, the contracting authority has failed to fulfil its obligations under Article 7(6) of Directive 77/62 and Article 30 of the Treaty.

24 The Netherlands Government contends that the UNIX system must, in the field of information technology, be regarded as a technical specification generally recognized by traders and that, accordingly, it is unnecessary to add the words "or equivalent".

25 It should be borne in mind that Article 7(6) of Directive 77/62 prohibits the indication of trade marks unless it is accompanied by the words "or equivalent" since the subject-matter of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.

26 The parties agree, however, that the UNIX system is not standardized and that it is the name of a specific make of product.

27 Hence the fact that the term UNIX was not followed by the words "or equivalent" may not only deter economic operators using systems similar to UNIX from taking part in the tendering procedure, but may also impede the flow of imports in intra-Community trade, contrary to Article 30 of the Treaty, by reserving the contract exclusively to suppliers intending to use the system specifically indicated.

28 Accordingly, the contracting authority should have added the words "or equivalent" after the term UNIX, as required by Article 7(6) of Directive 77/62.

29 It follows from the foregoing that, by failing to indicate in the contract notice at issue the persons authorized to be present at the opening of the tenders and the date, time and place of opening, and by introducing into the general terms and conditions a technical specification defined by reference to a product of a specific make, the Kingdom of the Netherlands has failed to fulfil its obligations under Directive 77/62 and under Article 30 of the Treaty.

Costs

30 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of the Netherlands has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by failing to indicate in the contract notice at issue the persons authorized to be present at the opening of tenders and the date, time and place of opening, and by introducing into the general terms and conditions a technical specification defined by reference to a product of a specific make, the Kingdom of the Netherlands has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Council Directives 80/767/EEC and 88/295/EEC, and also under Article 30 of the Treaty;

2. Orders the Kingdom of the Netherlands to pay the costs.

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DOCNUM	61993J0359
AUTHOR	COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
FORM	JUDGMENT
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; CASES ; 1993 ; J ; JUDGMENT
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LODGED	1993/07/16
JURCIT	31977L0062 : N 1 11 16 29 31980L0767 : N 1 31988L0295 : N 1 11957E030 : N 1 23 27 29 31977L0062-A09P5 : N 2 8 18 22 31977L0062-N3LAPT7 : N 2 6 8 18 20 22 31977L0062-A07P6 : N 3 8 23 - 28 31989L0665-A03P1 : N 4 8 10 11 14 31989L0665-A03P2 : N 4 8 10 11 14 31989L0665-A03P3 : N 4 12 11957E169 : N 8 13 14 61993C0359-N08 : N 20
CONCERNS	Z 31977L0062 Z 31980L0767 Z 31988L0295 Z 11957E030
SUB	APPROXIMATION OF LAWS ; FREE MOVEMENT OF GOODS ; QUANTITATIVE RESTRICTIONS ; MEASURES HAVING EQUIVALENT EFFECT
AUTLANG	DUTCH
APPLICA	Commission
DEFENDA	Netherlands
NATIONA	NETHERLANDS
NOTES	Gazin, F. ; Simon, Denys: Europe 1995 Mars Comm. no 94 p.9 + no 101 p.11 Fernandez Martín, José María: Public Procurement Law Review 1995 p.CS74-CS79 Van de Meent, G.W.A.: Nederlands tijdschrift voor Europees recht 1995 p.42-44 Bergerès, Maurice-Christian: Recueil Dalloz Sirey 1996 Jur. p.23
PROCEDU	PROCEEDINGS CONCERNING FAILURE BY MEMBER STATES-SUCCESSFUL
ADVGEN	Tesauro
JUDGRAP	Edward
DATES	OF DOCUMENT.....: 24/01/1995 OF APPLICATION....: 16/07/1993

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Judgment of the Court
of 28 March 1995
The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd.
Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom.
Free movement of goods - Importation of a narcotic drug (diamorphine).
Case C-324/93.

++++

1. Free movement of goods ° Quantitative restrictions ° Measures having equivalent effect ° Article 30 of the Treaty ° Scope ° Prohibition of the importation of narcotic drugs covered by the 1961 Single Convention and marketable under it ° Included ° Maintenance of the measure pursuant to Article 234 of the Treaty ° Irrelevant

(EEC Treaty, Arts 30 and 234)

2. Free movement of goods ° Quantitative restrictions ° Measures having equivalent effect ° Article 30 of the Treaty ° Direct effect ° Function of the national court in the light of obligations towards non-member countries resulting from agreements predating the EEC Treaty and irreconcilable with the obligations arising under Article 30 ° Application of the rule of precedence of Article 234

(EEC Treaty, Arts 30 and 234)

3. Free movement of goods ° Derogations ° Article 36 of the Treaty ° Scope ° Measure designed to ensure the survival of an undertaking ° Excluded ° Protection of public health ° Measure designed to guarantee, through a prohibition of imports, the reliability of supplies of narcotic drugs for medical purposes offered by recourse to national production ° Whether permissible ° Conditions

(EEC Treaty, Art. 36)

4. Approximation of laws ° Procedures for awarding public supply contracts ° Directive 77/62 ° Award of contracts ° Most economically advantageous tender ° Criteria ° Reliability of supplies ° Whether permissible ° Conditions

(Council Directive 77/62, Art. 25)

1. Article 30 of the Treaty applies to a national practice prohibiting importation of narcotic drugs covered by the 1961 Single Convention on Narcotic Drugs and marketable under that convention.

In so far as they are goods taken across a frontier for the purposes of commercial transactions, such drugs are subject to Article 30, whatever the nature of those transactions. The fact that the prohibition of importation may result from an international agreement predating the Treaty or accession by a Member State and that the Member State maintains the measure pursuant to Article 234, despite the fact that it constitutes a barrier, does not remove it from the scope of Article 30, since Article 234 takes effect only if the agreement imposes on a Member State an obligation that is incompatible with the Treaty.

2. Article 30 of the Treaty is to be interpreted as requiring a Member State to ensure that this provision is fully effective by disapplying a national practice contrary to it unless that practice is necessary in order for the Member State concerned to comply with obligations towards non-member countries laid down in an agreement concluded prior to entry into force of the Treaty or to accession by that Member State.

In proceedings for a preliminary ruling, however, it is not for the Court of Justice but for the national court to determine which obligations are imposed by an earlier international agreement

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on the Member State concerned and to ascertain their ambit so as to be able to determine the extent to which they thwart application of Articles 30 and 36 of the Treaty. In that connection, when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure.

3. A national practice of refusing licences for importation of drugs from another Member State is not covered by the derogation provided for in Article 36 of the Treaty if it is based on the need to safeguard an undertaking' s survival but that derogation may apply to it if protection of the health and life of humans requires a reliable supply of drugs for essential medical purposes to be safeguarded and that objective cannot be achieved as effectively by measures that are less restrictive of intra-Community trade than is an exclusive supply established in favour of national production.

4. Directive 77/62 coordinating procedures for the award of public supply contracts, as amended by Directive 88/295, is to be interpreted as authorizing the bodies covered by that directive which wish to obtain a narcotic drug for medical purposes, in this case diamorphine, to award the contract on the basis of the tendering undertakings' ability to provide reliable and continuous supplies to the Member State concerned.

Provided that it is clearly indicated as a criterion for the award of a contract, reliability of supplies is one of the criteria which may be taken into account under Article 25 of the directive in order to determine the most economically advantageous tender for a contract for the supply, to the authorities concerned, of the product in question.

In Case C-324/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice (Queen' s Bench Division) for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for the Home Department,

ex parte Evans Medical Ltd and Macfarlan Smith Ltd,

intervener: Generics (UK) Ltd,

on the interpretation of Articles 30, 36 and 234 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler and P.J.G. Kapteyn (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.L. Murray (Rapporteur) and D.A.O. Edward, Judges,

Advocate General: C.O. Lenz,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Macfarlan Smith Ltd, by Mark Barnes QC;

° Generics (UK) Ltd, by Michael Burton QC and Nicholas Green, Barrister;

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° the United Kingdom, by S. Lucinda Hudson, of the Treasury Solicitor' s Department, and Richard Plender QC, acting as Agents;

° the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Department of the Ministry of Foreign Affairs, and Hélène Duchène, Secretary of Foreign Affairs in that Department, acting as Agents;

° Ireland, by Michael A. Buckley, Chief State Solicitor, acting as Agent, and James Hamilton, Barrister-at-law;

° the Portuguese Government, by Luís Fernandes, Director in the Legal Service of the Directorate-General for the European Communities in the Ministry of Foreign Affairs, and Maria Luísa Duarte, Legal Adviser in the same Ministry, acting as Agents;

° the Commission of the European Communities, by Richard Wainwright, Legal Adviser, and Virginia Melgar, a national official on secondment to the Commission' s Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Macfarlan Smith Ltd, represented by Mark Barnes QC and Alan Griffiths, Barrister, Generics (UK) Ltd, represented by Stephen Kon and Michael Rose, Solicitors, the United Kingdom and the Commission at the hearing on 5 July 1994,

after hearing the Opinion of the Advocate General at the sitting on 4 October 1994,

gives the following

Judgment

Costs

51 The costs incurred by the United Kingdom, the French Government, Ireland, the Portuguese Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice (Queen' s Bench Division) by order of 23 June 1993, hereby rules:

1. Article 30 of the EEC Treaty applies to a national practice prohibiting importation of narcotic drugs covered by the 1961 Single Convention on Narcotic Drugs and marketable under that Convention.

2. Article 30 of the EEC Treaty is to be interpreted as requiring a Member State to ensure that this provision is fully effective by disapplying a national practice contrary to it unless that practice is necessary in order for the Member State concerned to comply with obligations towards non-member States laid down in an agreement concluded prior to entry into force of the Treaty or to accession by that Member State.

3. A national practice of refusing licences for importation of drugs from another Member State is not covered by the derogation provided for in Article 36 of the EEC Treaty if it is based on the need to safeguard an undertaking' s survival but that derogation may apply to it if protection of the health and life of humans requires a reliable supply of drugs for essential medical purposes to be safeguarded and that objective cannot be achieved as effectively by measures less restrictive

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of intra-Community trade.

4. Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Council Directive 88/295/EEC of 22 March 1988, is to be interpreted as authorizing the bodies covered by that directive which wish to obtain diamorphine to award the contract on the basis of the tendering undertakings' ability to provide reliable and continuous supplies to the Member State concerned.

1 By order of 23 June 1993, received at the Court on 25 June 1993, the High Court of Justice (Queen' s Bench Division) referred for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 30, 36 and 234 of the EEC Treaty and of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1) ("the directive").

2 Those questions have arisen in proceedings brought by Evans Medical Ltd ("Evans") and Macfarlan Smith Ltd ("Macfarlan") against the Secretary of State for the Home Department ("the Secretary of State"), supported by Generics (UK) Ltd ("Generics"), in connection with Generics' importation into the United Kingdom of a consignment of diamorphine originating in the Netherlands.

3 Under the Misuse of Drugs Act 1971 the importation of diamorphine is prohibited unless licensed by the Secretary of State under section 3(2)(b).

4 Diamorphine, which is an opium derivative, is occasionally used as an analgesic in medical treatment. This is particularly so in the United Kingdom since, according to information provided by the national court, 238 of the 241 kilograms of diamorphine used world-wide for medical purposes in 1990 were used in that State.

5 Diamorphine is covered by the 1961 Single Convention on Narcotic Drugs (United Nations Treaty Series, 520, p. 204) ("the Convention"), which entered into force in the United Kingdom in 1964 and which is also applicable in the other Member States.

6 The Convention provides in particular that the Contracting States are to:

° "take such legislative and administrative measures as may be necessary: ... to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs" (Article 4(c));

° "require that the trade in and distribution of drugs be under licence except where such trade or distribution is carried out by a State enterprise or State enterprises" (Article 30(1)(a)); and

° "control under licence the import and export of drugs except where such import or export is carried out by a State enterprise or State enterprises" (Article 31(3)(a)).

7 Until 1992, under the policy prevailing at that time in the United Kingdom, the Secretary of State prohibited importation of diamorphine and allowed Macfarlan to have the exclusive right to manufacture the product in powder form from concentrated poppy straw imported from non-member States and Evans to have the exclusive right to process the product (by freezing, dehydration and packaging) for medical use and marketing within the United Kingdom.

8 According to the Secretary of State, this practice was justified by the need to avoid the risk of diamorphine being diverted to illicit trade and to ensure that supplies were reliably maintained in the United Kingdom.

9 In September 1990 the Secretary of State rejected an application by Generics for a licence

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to import a consignment of diamorphine from the Netherlands. After obtaining leave, Generics brought an action for judicial review of the decision refusing a licence in which it sought a declaration that the decision was contrary to Article 30 of the Treaty and could not be justified under Article 36. In the course of those proceedings the Secretary of State acknowledged that the refusal to grant a licence to Generics was not justified and stated that his decision was being reviewed.

10 By two letters of 17 August 1992 the Secretary of State informed Evans and Macfarlan that he was authorizing Generics to import the consignment of diamorphine as he considered that the policy then in force impeded intra-Community trade and that reliability of supplies could be satisfactorily guaranteed, in full compliance with Community law, through the introduction of a tendering scheme.

11 The applicants in the main proceedings then brought an action before the High Court in which they seek a declaration that the legal reasoning in those letters supporting the grant of a licence and therefore abandonment of the previous policy is vitiated by an error of law so that those decisions must be set aside.

12 They contend that the requirements of the Convention are incompatible with Articles 30 and 36 of the Treaty. They accordingly submit, first, that those Treaty articles are not applicable to trade in narcotic drugs by virtue of Article 234 of the Treaty on the ground that the Convention was concluded prior to the United Kingdom' s accession to the Communities, given that Article 234 of the Treaty provides that: "The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty." Thus, according to the applicants, the Convention requires that the previous arrangements be maintained.

13 Second, the applicants contend that, even if Article 30 of the Treaty were applicable, the Secretary of State could, on the one hand, have relied on Article 36 to justify the refusal to grant an import licence to Generics and, on the other hand, ought to have satisfied himself beforehand that the tendering scheme could be implemented, that it was compatible with the Convention and that it made it possible to ensure continuity of supplies of diamorphine for the National Health Service.

14 Those are the circumstances in which the national court has referred the following questions to the Court of Justice for a preliminary ruling:

"1. Upon the true construction of Articles 30, 36 and 234 of the EEC Treaty, is a Member State entitled to refuse to issue a licence, required by the law of that Member State, to import from another Member State narcotic drugs either originating in or in free circulation in the second Member State on the ground that

(a) the provisions of Articles 30 to 36 are inapplicable to trade in narcotic drugs within the meaning or ambit of the Single Convention on Narcotic Drugs concluded at New York on 30 March 1961; and/or

(b) compliance with the Convention would in practice require the arbitrary allocation of quotas between imports and local manufacturers; and/or that the system of controls laid down by the Convention would otherwise be less effective; and/or

(c) (in the circumstances that the Community has failed to adopt any directive or other regime on trade in narcotic drugs such as would enable it to declare itself a 'single territory' under Article 43 of the Single Convention and several Member States that manufacture narcotic drugs prohibit their importation) the importation of narcotic drugs from another Member State would threaten the viability of a sole licensed manufacturer of those drugs in the Member State, and that the reliability of supply of those drugs for essential medical purposes in that Member State

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would be jeopardized?

2. On the proper interpretation of Council Directive 77/62 of 21 December 1976, OJ 1977 L 13, p. 1, as amended, is a public authority, when charged with the task of purchasing essential pain-relieving drugs for medical use, entitled to take into account the need for reliability and continuity of supply when awarding contracts for the supply of such drugs?"

Appositeness of the questions submitted

15 The Commission submits first that there is no need to reply to the questions submitted since the first question concerns the compatibility with Community law of a practice which has now been discontinued and which consisted in prohibiting imports of diamorphine from other Member States, and since the second question seeks from the Court an interpretation of Community law in relation to a purely hypothetical situation, namely where there is a procedure for obtaining diamorphine within the framework of the directive.

16 It need only be observed here that the Secretary of State reached the view that the national practice of prohibiting imports of diamorphine was contrary to Community law since reliability of supplies to the United Kingdom market could be ensured, in conformity with Community law, within the framework of the directive. The preliminary questions have therefore been submitted in order to enable the national court to determine whether the change in national practice was indeed necessary in order to ensure compliance with Community law. The High Court of Justice will then have to determine, on the basis of the replies to its questions, whether under its own national law the decisions of the Secretary of State must be set aside for error of law.

17 Consequently, the questions submitted by the national court should be answered.

Question 1(a)

18 By this question the national court wishes to know whether Article 30 of the Treaty applies to a national practice prohibiting importation of narcotic drugs covered by the Convention and marketable under it.

19 As the Court found in its judgments in Case 221/81 Wolf v Hauptzollamt Duesseldorf [1982] ECR 3681 and Case 240/81 Einberger v Hauptzollamt Freiburg [1982] ECR 3699, the drugs covered by the Convention are subject, in all the Member States, to a range of measures strictly regulating their importation and marketing so as to ensure that they are used in the Member States only for pharmaceutical or medical purposes, in accordance with the Convention.

20 According to the Court' s case-law, goods taken across a frontier for the purposes of commercial transactions are subject to Article 30 of the Treaty, whatever the nature of those transactions (judgment in Case C-2/90 Commission v Belgium [1992] ECR I-4431, paragraph 26). Since they have those characteristics, the drugs covered by the Convention and marketable under it are subject to Article 30.

21 It is also settled case-law that all measures capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute a barrier to trade (judgment in Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837).

22 Under that case-law, a national practice prohibiting imports of drugs is caught by Article 30 of the Treaty since it affects trade in the way described above.

23 The fact that such a measure may have been adopted under an international agreement predating the Treaty or accession by a Member State and that the Member State maintains the measure pursuant to Article 234, despite the fact that it constitutes a barrier, does not remove it from the scope of Article 30, since Article 234 takes effect only if the agreement imposes on a Member State

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an obligation that is incompatible with the Treaty.

24 The answer to this question must therefore be that Article 30 of the Treaty applies to a national practice prohibiting importation of narcotic drugs covered by the Convention and marketable under it.

Question 1(b)

25 By this question the national court essentially wishes to know whether Article 30 of the Treaty is to be interpreted as meaning that a Member State must give full effect to that provision by disapplying a national practice prohibiting importation of diamorphine where that practice, which proves to be incompatible with the Community rule, is designed to implement an agreement, such as the Convention on Narcotic Drugs, which was concluded by the Member State concerned with other Member States and non-member States prior to entry into force of the Treaty or to that Member State' s accession and compliance with which would require allocation of quotas among the undertakings concerned and introduction of an effective system of controls.

26 It should be noted in this regard that it is settled case-law that Article 30 of the Treaty takes precedence over any contrary measure of national law.

27 However, as the judgment in Case C-158/91 Levy [1993] ECR I-4287 explains, the purpose of the first paragraph of Article 234 of the Treaty is to make clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of non-member States under an earlier agreement and to comply with its corresponding obligations.

28 Consequently, in order to determine whether a Community rule may be deprived of effect by an earlier international agreement, it is necessary to examine whether that agreement imposes on the Member State concerned obligations whose performance may still be required by non-member States which are parties to it (judgment in Levy, cited above, paragraph 13).

29 However, in proceedings for a preliminary ruling, it is not for this Court but for the national court to determine which obligations are imposed by an earlier international agreement on the Member State concerned and to ascertain their ambit so as to be able to determine the extent to which they thwart application of Articles 30 and 36 of the Treaty (judgment in Levy, cited above, paragraph 21).

30 It is therefore for the national court to examine whether compliance with the Convention in relation to non-member States requires allocation of quotas among the undertakings concerned and whether allowing imports would make it impossible for the Member State to exercise the degree of control required by the Convention.

31 In the course of the proceedings the United Kingdom submitted that the Convention allowed the Contracting States to prohibit imports of narcotic drugs into their territory but did not require them to adopt such a measure.

32 As to that point, when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure.

33 The answer to this question must therefore be that Article 30 of the Treaty is to be interpreted as requiring a Member State to ensure that this provision is fully effective by disapplying a national practice contrary to it unless that practice is necessary in order for the Member State concerned to comply with obligations towards non-member States laid down in an agreement concluded prior to entry into force of the Treaty or to accession by that Member State.

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Question 1(c)

34 By this question the national court asks whether a Member State is entitled to refuse a licence for importation of narcotic drugs from another Member State on the ground that importation of such drugs from another Member State threatens the viability of the sole licensed manufacturer in the first State and jeopardizes reliability of supply of diamorphine for medical purposes.

35 Article 36 of the Treaty allows a Member State to maintain or introduce measures prohibiting or restricting trade if those measures are justified on, inter alia, grounds of public morality, public policy, public security or the protection of health and life of humans, and provided that they do not constitute a means of arbitrary discrimination or a disguised restriction on intra-Community trade.

36 It is clear from the Court' s case-law that Article 36 relates to measures of a non-economic nature (judgment in Case 238/82 Duphar and Others v Netherlands [1984] ECR 523). A measure which restricts intra-Community trade cannot therefore be justified by a Member State' s wish to safeguard the survival of an undertaking.

37 On the other hand, the need to ensure that a country has reliable supplies for essential medical purposes may, under Article 36 of the Treaty, justify a barrier to intra-Community trade if that objective is one of protecting the health and life of humans.

38 It must, however, be borne in mind that the derogation provided for in Article 36 cannot apply to national rules or practices if the health and life of humans can be as effectively protected by measures less restrictive of intra-Community trade (see, in particular, the judgment in Case 104/75 De Peijper [1976] ECR 613, paragraph 17).

39 The answer to this question must therefore be that a national practice of refusing licences for importation of drugs from another Member State is not covered by the derogation provided for in Article 36 of the Treaty if it is based on the need to safeguard an undertaking' s survival but that derogation may apply to it if protection of the health and life of humans requires a reliable supply of drugs for essential medical purposes to be safeguarded and that objective cannot be achieved as effectively by measures less restrictive of intra-Community trade.

Question 2

40 By this question the national court wishes to ascertain whether the bodies covered by the Community legislation applicable to the awarding of public contracts, in particular Directive 77/62, may, when seeking to obtain diamorphine, award the contract on the basis of the ability of the tendering undertakings to guarantee reliability and continuity of supplies in the country.

41 Article 25(1) of Directive 77/62 provides as follows:

"The criteria on which the contracting authority shall base the award of contracts shall be:

(a) ...

(b) ... , when the award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance."

42 According to the judgment of the Court in Case 31/87 Beentjes v Netherlands [1988] ECR 4635, in selecting the most economically advantageous tender contracting authorities may choose the criteria which they intend to apply, but their choice may relate only to criteria designed to identify the most economically advantageous tender.

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43 That judgment, which concerns public works contracts, also applies to public supply contracts in so far as there is no difference in this respect between the two types of contract.

44 It follows that reliability of supplies is one of the criteria which may be taken into account under Article 25 of the directive in order to determine the most economically advantageous tender for a contract for the supply, to the authorities concerned, of a product such as that in question in the main proceedings.

45 However, in such a case reliability of supplies must be clearly indicated as a criterion for the award of a contract, in accordance with Article 25(2) of Directive 77/62, which provides that:

> "... , the contracting authorities shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award where possible in descending order of importance."

46 The Portuguese Government, however, submits that the special character of diamorphine, particularly considering the security measures which must be taken in order to prevent any diversion of the product, justifies private contracts with no open or restricted invitations to tender. It bases that view on Article 6(4) of the directive, as amended, which provides as follows:

> "The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice in the following cases:
>
> ...
>
> (c) when, for technical... reasons,... the goods supplied may be manufactured or delivered only by a particular supplier;
>
> ..."

47 The French Government, basing its analysis on Article 6(1)(g) of the directive, in its original version, which allows the conclusion of private contracts

> "when supplies are declared secret or when their delivery must be accompanied by special security measures in accordance with the provisions laid down by law, regulation or administrative action in force in the Member State concerned, or when the protection of the basic interests of that State' s security so requires",

reaches the same conclusion.

48 With regard to those arguments the Court recalls that it has held (see, most recently, the judgment in Case C-328/92 Commission v Spain [1994] ECR I-1569, paragraph 15) that Article 6 of the directive, as amended, which authorizes derogations from the rules intended to ensure effectiveness of rights conferred by the Treaty in the public supply contracts sector, must be interpreted strictly.

49 The information provided to the Court does not at this stage warrant the conclusion that the special nature of diamorphine and the security measures to be taken in order to prevent its diversion make it impossible to have an open or restricted invitation to tender. On the contrary, a tenderer' s ability to implement proper security measures could be taken into account as a criterion for the award of a contract, in accordance with Article 25 of the directive.

50 Having regard to those considerations, the reply to the second question must be that Directive 77/62 is to be interpreted as authorizing the bodies covered by that directive which wish to obtain diamorphine to award the contract on the basis of the tendering undertakings' ability to provide reliable and continuous supplies to the Member State concerned.

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JURCIT	11992E177 : N 15 - 19 11957E030 : N 18 - 39 61981J0221 : N 19 61981J0240 : N 19 61990J0002-N26 : N 20 61974J0008 : N 21 11957E234 : N 23 61991J0158 : N 27 11957E234-L1 : N 27 61991J0158-N13 : N 28 61991J0158-N21 : N 29 11957E036 : N 29 35 - 39 61982J0238 : N 36 61975J0104-N17 : N 38 31977L0062-A25P1 : N 41 - 49 61987J0031 : N 42 31977L0062-A25P2 : N 45 - 49 31977L0062-A06P4 : N 46 31977L0062-A06P1LG : N 47 61992J0328-N15 : N 48 31977L0062-A06 : N 48 31988L0295 : N 48
CONCERNS	I 11957E030 I 11957E036 I 31977L0062 I 31988L0295
SUB	FREE MOVEMENT OF GOODS ; QUANTITATIVE RESTRICTIONS ; MEASURES HAVING EQUIVALENT EFFECT
AUTLANG	ENGLISH
OBSERV	United Kingdom ; France ; Ireland ; Portugal ; Commission
NATIONA	UNITED KINGDOM
NATCOUR	*A9* High Court of Justice (England), Queen's Bench Division,Divisional Court, order of 09/03/93 (CO/2447/92)
NOTES	Vos, Jan Anne: Nederlandse staatscourant 1995 no 90 p.4 Simon, Denys: Europe 1995 Mai Comm. no 174 p.10-11 Urlesberger, Franz: Wirtschaftsrechtliche Blätter 1995 p.266-269 Fernandez Martín, José María: Public Procurement Law Review 1995 p.CS80-CS83 Pisuisse, C.S.: Nederlands tijdschrift voor Europees recht 1995 p.76-78 Berr, Claude J.: Journal du droit international 1996 p.499-500
PROCEDU	REFERENCE FOR A PRELIMINARY RULING
ADVGEN	Lenz

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DATES OF DOCUMENT.....: 28/03/1995
OF APPLICATION....: 25/06/1993

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Judgment of the Court (Fifth Chamber)
of 14 April 1994
Ballast Nedam Groep NV v Belgian State.
Reference for a preliminary ruling: Raad van State - Belgium.
Freedom to provide services - Public works contracts - Registration of contractors - Relevant entity.
Case C-389/92.

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Approximation of laws - Procedures for the award of public works contracts - Directives 71/304/EEC and 71/305/EEC - Registration of contractors - Application by a holding company not itself carrying out the works but availing itself, for the purpose of proving its standing and competence, of references relating to its subsidiaries - Whether permissible - Conditions - Assessment by the national court

(Council Directives 71/304 and 71/305)

Directive 71/304 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Directive 71/305 concerning the coordination of procedures for the award of public works contracts must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works.

In a disputed case, it is for the national court to assess, in the light of the factual and legal circumstances before it, whether such proof has been produced.

In Case C-389/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van State, Belgium, for a preliminary ruling in the proceedings pending before that court between

Ballast Nedam Groep NV

and

Belgian State

on the interpretation of Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (Official Journal, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, R. Joliet, G.C. Rodríguez Iglesias, F. Grévisse (Rapporteur) and M. Zuleeg, Judges,

Advocate General: C. Gulmann,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Ballast Nedam Groep NV, the applicant in the main proceedings, by Marc Senelle, of the Brussels

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Bar,

- the Commission of the European Communities, by Hendrik van Lier, Legal Advisor, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the applicant in the main proceedings and the Commission at the hearing on 13 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 24 February 1994,

gives the following

Judgment

1 By a judgment of 29 September 1992, which was received at the Court on 6 November 1992, the Raad van State, Belgium, referred to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty a question concerning the interpretation of Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (Official Journal, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

2 The question arose in the course of a dispute between Ballast Nedam Groep, a company governed by Netherlands law (hereinafter referred to as "BNG"), and the Belgian State concerning the non-renewal of BNG' s registration as a contractor.

3 In the course of a review of the position of registered contractors provided for by a Royal Decree of 9 August 1982 laying down measures for the application of a Decree-Law of 3 February 1947 organizing the registration of contractors, the Minister for Public Works decided in 1987 not to renew the registration hitherto granted to BNG. The Minister' s decision, which followed an adverse opinion by the Committee for the Registration of Contractors, was taken on the grounds that the company could not be regarded as a works contractor because, as a holding company, it did not itself execute works but, for the purpose of proving its standing and competence, referred to works carried out by its subsidiaries, which were separate legal persons.

4 BNG applied to the Raad van State for the annulment of both the Registration Committee' s opinion and the decision of the Minister for Public Works.

5 The Raad van State considered that the case turned on the interpretation of the Community directives concerning public works contracts and decided to refer the following question to the Court for a preliminary ruling:

> "Do Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, in particular Articles 1, 6, 21, 23 and 26, permit, in the event of the Belgian rules on the registration of contractors being applied to the dominant legal person within a 'group' governed by Netherlands law, in connection with the assessment of the criteria relating inter alia to technical competence which a contractor must satisfy, account to be taken only of that dominant legal person as a legal entity and not of the 'companies within the group' each of which, having its own legal personality, belongs to that 'group' ?"

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6 Directives 71/304 and 71/305 are designed to ensure freedom to provide services in the field of public works contracts. Thus the first of those directives imposes a general duty on Member States to abolish restrictions on access to, participation in and the performance of public works contracts and the second directive provides for coordination of the procedures for the award of public works contracts (see the judgment in Case 76/81 Transporoute [1982] ECR 417, at paragraph 7).

7 In regard to such coordination, Title IV of Directive 71/305 has laid down a number of common rules on the participation of contractors in public works contracts. Amongst those rules are to be found in particular Article 21, which authorizes groups of contractors to submit tenders and Article 28 which, in connection with the drawing up of official lists of recognized contractors, refers to the criteria for qualitative selection defined by Articles 23 to 26, which also specify the manner in which undertakings may furnish proof that they satisfy those criteria (see the judgment in Transporoute, cited above, at paragraph 8).

8 The applicant in the main proceedings and the Commission maintain, in essence, that for the purposes of the assessment of the criteria which must be satisfied by a contractor when an application for registration submitted by the dominant legal person in a group governed by Netherlands law is being examined, those directives permit account to be taken of companies which, while each retaining its own legal personality, belong to the group.

9 In order to reply to the question raised by the national court, consideration must be given to whether a holding company may be precluded from participating in procedures for public works contracts on the ground that it does not itself carry out such works and, if that is not the case, under what conditions it may show that it has the necessary standing and competence to participate.

10 It is clear from the actual wording of Directive 71/304 that public works contracts may be awarded to persons covered by that directive who carry out the work through agencies or branches.

11 Article 21 of Directive 71/305, one of the common rules on participation in contract award procedures, expressly authorizes groups of contractors to submit tenders and the awarding authority may not require such groups to assume a specific legal form before the contract is awarded. Article 16(k) of Directive 71/305, which is one of the common rules for advertising tendering procedures, provides only that, in open procedures, the notice is to lay down the specific legal form which will, if necessary, be assumed by the group of contractors to whom the contract is awarded.

12 Finally, the sole purpose of the criteria for qualitative selection laid down in Articles 23 to 26 of Directive 71/305, to which Article 28 of that directive on official lists of recognized contractors refers, is to define the rules relating to the objective assessment of the standing and, in particular, technical knowledge and ability of contractors. Article 26(e) provides expressly that a statement of the technicians or technical divisions which the contractor can call upon for carrying out the work, whether or not they belong to the firm, may be furnished as proof of such technical knowledge or ability.

13 As the Commission rightly points out, it is clear from all those provisions that not only a natural or legal person who will himself carry out the works but also a person who will have the contract carried out through agencies or branches or will have recourse to technicians or outside technical divisions, or even a group of undertakings, whatever its legal form, may seek to be awarded public works contracts.

14 Moreover, it should be noted that Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC (Official Journal 1989 L 210, p. 1), in particular with the aim of defining more precisely what is meant by public works contracts, expressly stated in Article 1 that such contracts have as their object either the execution, or both the execution and design, of works or a work, or "the execution by whatever means of a work corresponding to the requirements specified by the contracting

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authority". That definition confirms that a contractor who has neither the intention nor the resources to carry out the works himself may participate in a procedure for the award of a public works contract.

15 Accordingly a holding company which does not itself execute works may not, because its subsidiaries which do carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures.

16 However, it is for the authorities awarding contracts, as Article 20 of Directive 71/305 specifies, to check the suitability of contractors in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28 of that directive.

17 When, in this connection, a company produces references relating to its subsidiaries in order to prove its economic and financial standing and technical knowledge and ability for the purpose of registration on the official list of recognized undertakings, it must establish that, whatever the nature of its legal link with those subsidiaries, it actually has available to it the resources of the latter which are necessary for carrying out the contracts. It is for the national court to assess, in the light of the factual and legal circumstances before it, whether such proof has been produced in the main proceedings.

18 The reply to the question referred to the Court for a preliminary ruling must therefore be that Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works. It is for the national court to assess whether such proof has been produced in the main proceedings.

Costs

19 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Raad van State, Belgium, by judgment of 29 September 1992, hereby rules:

Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works. It is for the national court to assess whether such proof

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has been produced in the main proceedings.

DOCNUM	61992J0389
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1992 ; J ; judgment
PUBREF	European Court reports 1994 Page I-01289
DOC	1994/04/14
LODGED	1992/11/06
JURCIT	31971L0304 : N 6 18 31971L0305-A01 : N 14 31971L0305-A16LK : N 11 31971L0305-A20 : N 16 31971L0305-A21 : N 7 11 31971L0305-A23 : N 7 12 31971L0305-A25 : N 16 31971L0305-A26LE : N 12 31971L0305-A28 : N 7 12 31971L0305 : N 6 - 18 61981J0076-N7 : N 6 61981J0076-N8 : N 7 31989L0440-A01 : N 14 11992E177 : N 17
CONCERNS	Interprets 31971L0304 Interprets 31971L0305
SUB	Approximation of laws ; Freedom of establishment and services ; Free movement of services
AUTLANG	Dutch
OBSERV	Commission ; Institutions
NATIONA	Belgium
NATCOUR	*A9* Raad van State (Belgie), afdeling administratie, arrest no 40.518

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van 29/09/92
- Europäisches Wirtschafts- & Steuerrecht - EWS 1993 p.196

NOTES Chavrier, Henri: L'actualité juridique ; droit administratif 1994 p.652
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PROCEDU Reference for a preliminary ruling

ADVGEN Gulmann

JUDGRAP Grévisse

DATES of document: 14/04/1994
of application: 06/11/1992

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Judgment of the Court (Sixth Chamber)
of 19 April 1994
Gestion Hotelera Internacional SA v Comunidad Autonoma de Canarias, Ayuntamiento de Las Palmas de Gran Canaria and Gran Casino de Las Palmas SA.
Reference for a preliminary ruling: Tribunal Superior de Justicia de Canarias - Spain.
Directive 71/305/CEE - Definition of "public works contracts".
Case C-331/92.

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Approximation of laws ° Procedures for the award of public works contracts ° Directive 71/305 ° Scope ° Mixed contract relating both to the performance of works and to the assignment of property ° Performance of the works incidental to the assignment of property ° Exclusion ° Assessment by the national court

(Council Directive 71/305)

A mixed contract relating both to the performance of works and to the assignment of property does not fall within the scope of Directive 71/305 concerning coordination of procedures for the award of public works contracts if the performance of the works is merely incidental to the assignment of property.

It is for the national court to determine whether the works are incidental to the main object of the award.

In Case C-331/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Superior de Justicia de Canarias (Spain) for a preliminary ruling in the proceedings pending before that court between

Gestion Hotelera Internacional SA

and

Comunidad Autonoma de Canarias

Ayuntamiento de Las Palmas de Gran Canaria

Gran Casino de Las Palmas SA

on the interpretation of Article 1(a) of Council Directive 71/305/EEC of 26 July 1971 concerning coordination of procedures for the award of public works contracts,

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, M. Díez de Velasco, C.N. Kakouris, F.A. Schockweiler and P.J.G. Kapteyn, Judges,

Advocate General: C.O. Lenz,

Registrar: J.-G. Giraud,

after considering the written observations submitted on behalf of:

- Comunidad Autonoma de Canarias, by Manuel Aznar Vallejo, Letrado del Servicio Jurídico de la Administracion de la Comunidad Autonoma de Canarias, of the Bar of Las Palmas de Gran Canaria,

- Ayuntamiento de Las Palmas de Gran Canaria, by Francisco Lopez Díaz, Procurador de los Tribunales, and Claudio Piernavieja Domínguez, of the Bar of Las Palmas de Gran Canaria,

- the Kingdom of Spain, by Alberto José Navarro Gonzalez, Director General for Coordination

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in Matters involving Community Law and Institutions, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents,

- the Commission of the European Communities, initially by Rafael Pellicer, a member of its Legal Service, acting as Agent, and subsequently by Hendrik van Lier, Legal Adviser, and María Blanca Rodríguez Galindo, a member of its Legal Service, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 9 December 1993,

gives the following

Judgment

1 By order of 10 July 1992, which was received at the Court on 31 July 1992, the Tribunal Superior de Justicia de Canarias referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682, hereinafter referred to as "Directive 71/305").

2 Those questions arose in proceedings between Gestion Hotelera Internacional and the Comunidad Autonoma de Canarias (Autonomous Community of the Canary Islands, hereinafter referred to as "the Comunidad Autonoma"), the Ayuntamiento de Las Palmas de Gran Canaria (hereinafter referred to as "the Municipality of Las Palmas") and the company Gran Casino de Las Palmas.

3 By a departmental order of the Office of the Presidential Counsellor to the Government of the Canary Islands of 17 July 1989, published in the Boletín Oficial de Canarias of 19 July 1992, two invitations to tender were issued, one of which concerned the award of the final concession for the installation and opening of a gaming establishment on the premises of the Hotel Santa Catalina in Las Palmas and the other of which concerned the use of the hotel installations and the operation of the hotel business. Since the hotel in question was owned by the Municipality of Las Palmas, the second of the invitations to tender was issued by the Government of the Canary Islands on behalf of that municipality pursuant to a cooperation agreement between those two authorities.

4 The conditions of tender relating to the grant of the concession for the opening and installation of the gaming establishment are set out in Annex I to the aforesaid departmental order (hereinafter referred to as "Annex I"). The conditions to be fulfilled by the tenderers include, in Article 2(1)(c) and (i) of that Annex, the following:

> "(c) (their) sole and exclusive object shall consist in the operation of gaming establishments. However, the object of the undertaking may include the right to offer and provide the additional services referred to in Article 2(2) of these conditions of tender.
>
> ...
>
> (i) (the tenderers shall) participate in the invitation to tender relating to the use of the hotel installations and the operation of the hotel business, the conditions of tender in respect of which are set out in Annex II to this order".

5 Article 3(3)(g) of Annex I provides that tenders are to be accompanied by the plans and proposals for the gaming establishment indicating all technical features, including such additional works or works of adaptation as may prove to be necessary.

6 Article 4(3) of Annex I lists the matters which must be brought to the notice of the successful tenderer, such as the games to be authorized, unlimited or restricted access to the casino and the non-transferable nature of the concession. Article 5(2)(b) provides that applications for the concession

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for the opening and installation of the gaming establishment are to be accompanied by a copy of the municipal authorization to undertake certain works and by a certificate confirming the completion of those works.

7 The conditions of tender relating to the award of the use of the hotel installations and the operation of the hotel business are set out in Annex II to the departmental order (hereinafter referred to as "Annex II") and state in Article 2 that only those undertakings which effectively participate in the invitation to tender for the award of the final concession for the installation and opening of the gaming establishment may tender for the award of that second contract.

8 Article 2(2)(a) of Annex II provides that the successful tenderer must invest at least 1 000 million pesetas in fitting out the hotel and must pay at least 1 000 million pesetas for the use of the entire hotel and casino complex throughout the initial period of validity of the concession. Article 2(2)(b) provides that the successful tenderer is to carry out the necessary works for the renovation, conversion and restoration of the installations so that the hotel and its surroundings can retain their five-star status and can offer the obligatory additional services. Article 3(3) of Annex II states that tenders relating to those works must specify the basic proposals for the works, the budgets for them and the time-limits for their completion.

9 In the proceedings before the national court Gestion Hotelera Internacional, which was the lessee of the hotel at the time of the tender procedure, applied for the annulment of the invitations to tender issued by the Government of the Canary Islands and of the contract which had in the meantime been awarded, by departmental order of 10 January 1990, to the company Gran Casino de Las Palmas. The application for annulment is founded on the fact that, according to the conditions of tender, the successful tenderers were to carry out renovation works to the casino and the hotel and that, consequently, the departmental order containing the invitations to tender should have been published in the Official Journal of the European Communities, in accordance with Directive 71/305.

10 The Tribunal Superior de Justicia de Canarias, uncertain as to the interpretation to be given to the rules of Community law, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

> "1. Is a mixed contract for the performance of works and the assignment of property to be regarded as included in the concept of 'public works contracts' set out in Article 1(a) of Council Directive 71/305/EEC of 26 July 1971?

2. Are, therefore, 'authorities awarding contracts' which wish to award a contract having those characteristics obliged to publish a notice of that contract in the Official Journal of the European Communities?"

Admissibility

11 The Comunidad Autonoma and the Municipality of Las Palmas do not consider that there was any need for the national court to refer the case to the Court, because Directive 71/305 has been transposed into national law, so that there is no longer any need to refer to it.

12 It should be noted in that regard that, as the Court has consistently held, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the question which it submits to the Court (see in particular the judgment in Case C-127/92 Enderby [1993] ECR I-5535, paragraph 10).

13 Moreover, as the Court has consistently held, the interpretation of a directive may be useful to the national court for the purpose of enabling it to ensure that the statute which implements

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it in domestic law is interpreted and applied in accordance with the requirements of Community law (see the judgment in Case 111/75 Mazzalai [1976] ECR 657, paragraph 10).

14 It is necessary, therefore, to examine the questions put by the court making the reference.

Substance

Question 1

15 It should be noted, as a preliminary point, that Article 1 of Directive 71/305 defines public works contracts. Subparagraph (a) of that article states that such contracts are "contracts for pecuniary consideration concluded in writing between a contractor (a natural or legal person) and an authority awarding contracts...", which is defined in subparagraph (b) as the State, regional or local authorities and the legal persons governed by public law specified in Annex I to the directive.

16 Furthermore, such contracts must have as their object one of the activities referred to in Article 2 of Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (Official Journal, English Special Edition 1971 (II), p. 678). The list of professional trade activities annexed to that directive mentions activities relating to construction.

17 In order to provide the court making the reference with the elements of interpretation which will be of use to it for the purpose of giving a decision in the main proceedings, it is necessary, next, to analyse the contract at issue, as described in the documents before the Court.

18 The procedure for the award of the contracts was initiated by the Government of the Canary Islands, which issued two invitations to tender. The first, which concerned a casino, was issued on behalf of the Autonomous Community of the Canary Islands, whilst the second, relating to the operation of a hotel, was issued on behalf of the Municipality of Las Palmas.

19 The awarding authority intended to arrange for the installation of a gaming establishment in the premises of the Hotel Santa Catalina, which was owned by the Municipality. It sought to award that contract to an undertaking which would also assume responsibility for the operation of the hotel business. To that end, Article 2 of Annex II specified that eligibility to participate was to extend only to those undertakings which also submitted tenders for the award of the final concession for the installation and opening of the gaming establishment.

20 In the first place, it is apparent from the cooperation agreement between the Municipality of Las Palmas and the Government of the Canary Islands, as described by the court making the reference, and from Article 2(2)(b) of Annex II, that the successful tenderer would be required to carry out a series of works, not only in the outbuildings of the hotel but also in those of the casino. Those works were to be such as to make the premises suitable for the activities for which they were intended.

21 Secondly, Annex II, which sets out the minimum requirements to be satisfied in order to obtain the concession for the installation and opening of the casino, together with the use of the premises intended for that installation and the operation of the hotel business, required the successful tenderer to carry out the renovation, conversion and restoration works in respect of the hotel installations for a total sum amounting to not less than 1 000 million pesetas.

22 Lastly, the successful tenderer was, pursuant to Article 2(2)(b) of Annex II, to ensure that the hotel retained its five-star status and was able to offer the obligatory additional services. In that regard, Article 3(3)(g) of Annex I imposed on that tenderer the obligation to indicate such additional works or works of adaptation as might prove necessary for the installation of the casino.

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23 It follows from the foregoing analysis that the main object of the award of the contracts was, first, the installation and opening of a casino and, secondly, the operation of a hotel business. It is common ground that those contracts, considered as such, do not fall within the scope of Directive 71/305.

24 It is next apparent, first, that the documents mentioned above did not contain any description of the subject-matter of the works to be carried out, either as regards the installation and opening of the casino or as regards the operation of the hotel, secondly, that there was no provision for remuneration for those works and thirdly, that the successful tenderer was not in a position to carry them out itself, by reason of the strict definition of its object in Article 2(1)(c) of Annex I.

25 The question which arises for the national court is whether a mixed contract relating both to the performance of works and to the assignment of property falls within the scope of Directive 71/305.

26 The answer must be that, where the works to be carried out in the hotel and the casino are merely incidental to the main object of the award, the award, taken in its entirety, cannot be characterized as a public works contract within the meaning of Directive 71/305.

27 Corroboration for that interpretation is to be found in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (Official Journal 1992 L 209, p. 1). According to the sixteenth recital in the preamble to that directive, it follows from Directive 71/305 that, for a contract to be a public works contract, its object must be the achievement of a work and that, in so far as those works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract.

28 It is for the national court to determine whether the works are incidental to the main object of the award.

29 The answer to the first question must therefore be that a mixed contract relating both to the performance of works and to the assignment of property does not fall within the scope of Directive 71/305 if the performance of the works is merely incidental to the assignment of property.

Question 2

30 In view of the reply given to the first question, there is no need to examine the second question.

Costs

31 The costs incurred by the Spanish Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunal Superior de Justicia de Canarias, by order of 10 July 1992, hereby rules:

A mixed contract relating both to the performance of works and to the assignment of property does not fall within the scope of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts if the performance of the works is merely incidental to the assignment of property.

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DOCNUM	61992J0331
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1992 ; J ; judgment
PUBREF	European Court reports 1994 Page I-01329
DOC	1994/04/19
LODGED	1992/07/31
JURCIT	31971L0304-A02 : N 16 31971L0305-A01LA : N 10 15 31971L0305-A01LB : N 15 31971L0305 : N 1 - 29 61975J0111 : N 13 31992L0050-C16 : N 27 61992J0127 : N 12
CONCERNS	Interprets 31971L0305
SUB	Approximation of laws ; Freedom of establishment and services ; Free movement of services
AUTLANG	Spanish
OBSERV	Spain ; Commission ; Member States ; Institutions
NATIONA	Spain
NATCOUR	*A9* Tribunal Superior de Justicia de Canarias, Sala de lo Contencioso-Administrativo de Las Palmas, auto de 10/07/92 *P1* Tribunal Superior de Justicia de Canarias, Sala de lo Contencioso-Administrativo de Las Palmas, sentencia de 11/10/97 (933/1997)
NOTES	Greco, Guido: Rivista italiana di diritto pubblico comunitario 1994 p.1262-1268 Foglia, Raffaele ; Saggio, Antonio: Il Corriere giuridico 1994 p.1022-1023
PROCEDU	Reference for a preliminary ruling
ADVGEN	Lenz
JUDGRAP	Kapteyn
DATES	of document: 19/04/1994 of application: 31/07/1992

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Judgment of the Court
of 3 May 1994
Commission of the European Communities v Kingdom of Spain.
Failure to fulfil obligations - Public supply contracts - Pharmaceutical products and specialities.
Case C-328/92.

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Approximation of laws ° Procedures for the award of public supply contracts ° Directive 77/62 ° Derogations from common rules ° Strict interpretation ° Existence of exceptional circumstances ° Burden of proof

(Council Directive 77/62, Art. 6(1)(b) and (d))

Article 6(1)(b) and (d) of Directive 77/62 coordinating procedures for the award of public supply contracts, which authorize derogations from the rules intended to ensure the effectiveness of rights conferred by the Treaty in that sector, must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances. They cannot in any way justify general and indiscriminate recourse to the single-tender procedure for all supplies of pharmaceutical products and specialities to social security institutions.

If Article 6(1)(b) is to apply, it is not sufficient for the pharmaceutical products and specialities to be protected by exclusive rights; they must also be capable of being manufactured or delivered only by a particular supplier, a requirement which is satisfied only with respect to those products and specialities for which there is no competition in the market.

With regard to the derogation on the grounds of urgency provided for in Article 6(1)(d), although, having regard to the freedom of doctors to prescribe pharmaceutical products, an urgent need for a particular pharmaceutical speciality may well arise in a hospital pharmacy, that cannot justify systematic recourse to the single-tender procedure for all supplies of pharmaceutical products and specialities to hospitals and, in any event, even if the requirement of urgency were considered to have been satisfied in a particular case, the derogation provided for by that provision may be relied on only if all the conditions it lays down are satisfied cumulatively.

In Case C-328/92,

Commission of the European Communities, represented by Rafael Pellicer, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Spain, represented by Alberto José Navarro Gonzalez, Director-General for Community Legal and Institutional Coordination, and Gloria Calvo Díaz, Abogado del Estado, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

defendant,

APPLICATION for a declaration that, by requiring in the basic legislation concerning social security that the administrative authority award public contracts for the supply of pharmaceutical products and specialities to social security institutions by way of a single-tender procedure, and by awarding directly nearly all of those supply contracts without publishing a contract notice in the Official Journal of the European Communities, the Kingdom of Spain has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for

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the award of public supply contracts (Official Journal 1977 L 13, p. 1),

THE COURT,

composed of: G.F. Mancini, President of Chambers, acting as President, J.C. Moitinho de Almeida and M. Díez de Velasco (Presidents of Chambers), C.N. Kakouris, F.A. Schockweiler (Rapporteur), F. Grévisse, M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: C.O. Lenz,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 March 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 30 July 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by requiring in the basic legislation concerning social security that the administrative authority award public contracts for the supply of pharmaceutical products and specialities to social security institutions by way of a single-tender procedure, and by awarding directly nearly all of those supply contracts without publishing a contract notice in the Official Journal of the European Communities, the Kingdom of Spain has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 L 13, p. 1).

2 In Spain the award of public contracts is governed by the Ley de Contratos del Estado (Law on State Contracts, hereinafter "the LCE") and the Reglamento General de Contratacion del Estado (General Regulations concerning State Contracts, hereinafter "the RGCE"), as amended, in order to bring them into line with EEC directives, by the Real Decreto Legislativo No 931/86 of 2 May 1986 (BOE No 114 of 13 May 1986, p. 16920) and the Real Decreto No 2528/86 of 28 November 1986 (BOE No 297 of 12 December 1986, p. 40546) respectively. Pursuant to the first final clause of those two decrees, the provisions of the LCE and the RGCE also apply to public contracts awarded by social security bodies.

3 Article 2(3) and (8) of the LCE provide as follows:

> "Notwithstanding the provisions of the previous article, this Law shall not apply to the following contracts and legal acts of the administration:
>
> ...
>
> 3. transactions which the administration effects with private individuals with respect to goods or rights, dealings in which are regulated (' mediatizado') by law, or controlled products (' intervenidos') which are the subject of a monopoly (' estancados') or prohibited (' prohibidos');
>
> ...
>
> 8. contracts expressly excluded by a Law."

4 The purchase of pharmaceutical products and specialities by hospitals within the social security system is governed by Article 107 of the Ley General de la Seguridad Social (General Law on Social Security, hereinafter "the LGSS"), as laid down by Decree No 2065/74 of 30 May 1974 approving the consolidated version of that law (BOE No 174 of 20 July 1974, p. 1482). That provision,

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entitled "Purchase and distribution of pharmaceutical products and specialities" provides as follows:

"...

(2) The social security authority shall purchase directly from the centres of production those pharmaceutical products which are to be used in its institutions, whether open or closed, and for that purpose shall select, according to rigorous scientific criteria, the pharmaceutical products necessary for the care provided in those institutions...

(3) In all cases, the distribution of pharmaceutical products intended for use outside the institutions referred to in the previous paragraph shall be carried out through legally established pharmacies, which shall be obliged to carry out such distribution...

(4) The social security authority shall agree with the laboratories and pharmacies, acting through their legal, trade union and trade representatives, the prices and other economic terms governing the purchase of pharmaceutical products and specialities referred to in the previous two paragraphs...".

5 On 5 June 1986, on the basis of Article 107(4) of the LGSS, the State administrative authority entered into an Agreement with Farmaindustria, the national association of pharmaceutical companies, relating to the prices and other terms governing the direct purchase of pharmaceutical specialities intended for use in open or closed social security institutions, and the indirect purchase of such products intended for use outside those institutions (hereinafter "the Agreement").

6 The Commission, which became aware of the Agreement and its legislative basis following a reference to the Court for a preliminary ruling, considered that the scheme for awarding public supply contracts for pharmaceutical products, in the form established by the agreement and the legislation, was contrary to both Directive 77/62 and Article 30 of the Treaty. Since the proceedings for a preliminary ruling were not completed, owing to the withdrawal of the plaintiff in the main proceedings, the Commission initiated against the Kingdom of Spain the procedure provided for in Article 169 of the Treaty, giving formal notice on 6 July 1990 and then, on 18 March 1991, delivering a reasoned opinion to the Spanish Government inviting it to take the necessary measures to comply with that opinion within one month of its receipt. That period was then extended until 18 June 1991.

7 Since the Spanish Government contended in its reply of 17 June 1991 that the Agreement had come to an end on 31 December 1990, the Commission concluded that Directive 77/62 had not been complied with in Spain at least until that date, and, by agreement with the Spanish authorities, decided to monitor the situation from that date and at the same time to carry out an inquiry regarding the situation in that particular sector in the other Member States. Since the inquiries showed, according to the Commission, that during the 1991 financial year and the first few months of 1992 the competent Spanish authorities had not, unlike the authorities of several other Member States, published notices concerning public supply contracts of pharmaceutical products and specialities in the Official Journal of the European Communities (with some exceptions, as in the case of vaccines), the Commission brought this action.

8 First of all it is apparent from the form of order sought in the application, as set out in paragraph 1 of this judgment, that the Commission' s action does not relate either to Article 30 of the Treaty or to the Agreement between the administrative authority and Farmaindustria as such. As the Commission states in its application, its action concerns the statutory procedure for purchasing pharmaceutical products and specialities, as laid down by Article 2 of the LCE in conjunction with Article 107 of the LGSS and as applied by hospitals within the social security system, irrespective of the form and the legal nature of the contract used by the administrative authority for that purpose, and thus irrespective of whether the single-tender procedure for the award of contracts was used during the period for which the Agreement was in force or thereafter.

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9 Furthermore, it is not disputed that while the Agreement was in force, and after 1 January 1991 as well, nearly all public contracts for the supply of pharmaceutical products and specialities to social security institutions have been awarded by the single-tender procedure, or that some of those contracts were for an estimated value (net of VAT) of ECU 200 000, which Article 5(1)(a) of Directive 77/62 lays down as a condition for its application.

10 Since Article 107 of the LGSS governs the purchase of pharmaceutical products and specialities by hospitals within the social security system, the relevant provisions of the LCE, and consequently those of Directive 77/62 which the LCE transposes into national law, are, under Article 2(3) of the LCE, inapplicable to supply contracts concluded for that purpose by the competent social security bodies.

11 The Spanish Government does not accept that Directive 77/62 is wholly and unconditionally applicable to supplies of pharmaceutical products and specialities to social security institutions. It contends that the medicinal products market is highly regulated by Community law itself and that the Spanish legislation ultimately complies with the restrictions resulting therefrom. It refers in particular to Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion in the scope of national health insurance systems (Official Journal 1989 L 40, p. 8), the object of which, according to the fifth recital in the preamble thereto, is "to obtain an overall view of national pricing arrangements" and which, according to the Spanish Government, does not affect the relevant national laws.

12 It is sufficient to point out that, in paragraph 10 of its judgment in Case C-71/92 Commission v Spain [1993] ECR I-5923, the Court observed that the only permissible exceptions to the application of Directive 77/62 are those which are expressly and exhaustively mentioned in it.

13 However, Article 2(2) and Article 3 of Directive 77/62, which list the public supply contracts to which that directive does not apply, do not refer to contracts relating to pharmaceutical products and specialities. Moreover, as the Court held in that same judgment (paragraph 11), none of the exceptions authorized by the directive is defined by reference to the type of product in question or the legal rules applicable to it.

14 The Spanish Government also contends that recourse to the single-tender procedure for the award of public contracts for the supply of pharmaceutical products and specialities is justified by Article 6(1)(b) and (d) of Directive 77/62, which provide that the contracting authorities may award their supply contracts without applying the open or restricted procedures referred to in Article 4(1) and (2) and thus without publishing a notice of the contract in the Official Journal of the European Communities, "when... for reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier", and "in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities, the time limit laid down in the procedures covered by Article 4(1) and (2) cannot be kept".

15 In that regard, Article 6 of Directive 77/62, which authorizes derogations from rules intended to ensure the effectiveness of rights conferred by the Treaty in the public supply contracts sector, must be interpreted strictly (see the judgment in Commission v Spain, cited above, paragraph 36).

16 Furthermore, the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (see, with regard to public works contracts, the judgment in Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 14).

17 If Article 6(1)(b) is to apply, it is not sufficient for the pharmaceutical products and specialities in question to be protected by exclusive rights; they must also be capable of being manufactured or delivered only by a particular supplier. Since that requirement is satisfied only with respect to those products and specialities for which there is no competition in the market, Article 6(1)(b)

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cannot in any way justify general and indiscriminate recourse to the single-tender procedure for all supplies of all pharmaceutical products and specialities.

18 The position is the same with regard to Article 6(1)(d). Admittedly, having regard to the freedom of doctors to prescribe pharmaceutical products, to which the Spanish Government refers, an urgent need for a particular pharmaceutical speciality may well arise in a hospital pharmacy; however, that freedom to prescribe pharmaceutical products cannot justify a priori systematic recourse to the single-tender procedure for all supplies of pharmaceutical products and specialities to hospitals. Moreover, even if the requirement of urgency were considered to have been satisfied in a particular case, Article 6(1)(d) would not necessarily apply. The Court has consistently held that, in order to rely on the derogation provided by that provision, all the conditions it lays down must be satisfied cumulatively (see, with respect to the corresponding provision applicable to public works contracts, the judgment in Case C-24/91 Commission v Spain [1992] ECR I-1989, paragraph 13).

19 It follows from all the foregoing considerations that the Commission' s action is well founded and that a declaration that the Kingdom of Spain has failed to fulfil its obligations must be made in the terms sought in the application.

Costs

20 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Spain has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by requiring in the basic legislation concerning social security that the administrative authority award public contracts for the supply of pharmaceutical products and specialities to social security institutions by way of a single-tender procedure, and by awarding directly nearly all of those supply contracts without publishing a contract notice in the Official Journal of the European Communities, the Kingdom of Spain has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1986 coordinating procedures for the award of public supply contracts;

2. Orders the Kingdom of Spain to pay the costs.

DOCNUM	61992J0328
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1992 ; J ; judgment
PUBREF	European Court reports 1994 Page I-01569

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DOC	1994/05/03
LODGED	1992/07/30
JURCIT	11957E030 : N 6 8 31977L0062-A02P2 : N 13 31977L0062-A02PT3 : N 10 31977L0062-A03 : N 13 31977L0062-A05P1LA : N 9 31977L0062-A06 : N 15 31977L0062-A06P1LB : N 14 17 31977L0062-A06P1LD : N 14 18 31977L0062 : N 1 6 - 18 61985J0199 : N 16 31989L0105-C5 : N 11 61991J0024 : N 18 61992J0071 : N 12 13 15
CONCERNS	Failure concerning 31977L0062
SUB	Approximation of laws
AUTLANG	Spanish
APPLICA	Commission ; Institutions
DEFENDA	Spain ; Member States
NATIONA	Spain
NOTES	Dios, José María de: Revista Jurídica de Catalunya 1995 p.285-286 Fernandez Martín, José María: Public Procurement Law Review 1995 p.CS48-CS52
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Schockweiler
DATES	of document: 03/05/1994 of application: 30/07/1992

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Judgment of the Court of 12 January 1994 Commission of the European Communities v Italian Republic. Action for failure to fulfil obligations - Public works contracts - Inadmissibility. Case C-296/92.

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Actions against Member States for failure to fulfil obligations - Scope of proceedings - Determined in the course of the pre-litigation procedure - Subsequent widening - Not permissible

(EEC Treaty, Art. 169)

The scope of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article. Consequently the action cannot be founded on any complaints other than those formulated in the reasoned opinion.

In Case C-296/92,

Commission of the European Communities, represented by Antonio Aresu and Rafael Pellicer, members of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, a member of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by allowing the provincial administration of Ascoli Piceno to award a private contract for the 11th and 12th supplementary reports for the completion of the section of rapid transit highway "Ascoli - Mare", entitled "Stage IV - Project 5134" and to fail to publish a notice of invitation to tender in the Official Journal of the European Communities, and by not taking steps to preclude at the outset the legal effects thereof which infringe Community law, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682),

THE COURT,

composed of: G.F. Mancini, President of the Second and Sixth Chambers, acting for the President, J.C. Moitinho de Almeida and D.A.O. Edward (Presidents of Chambers), R. Joliet, F.A. Schockweiler (Rapporteur), G.C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg and J.L. Murray, Judges,

Advocate General: C. Gulmann,

Registrar: Lynn Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 18 November 1993,

gives the following

Judgment

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1 By application lodged at the Court Registry on 6 July 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by allowing the provincial administration of Ascoli Piceno to award a private contract on 21 May 1990 for the 11th and 12th supplementary reports for the completion of the section of rapid transit highway "Ascoli - Mare", entitled "Stage IV - Project 5134" and to fail to publish a notice of invitation to tender in the Official Journal of the European Communities, and by not taking steps to preclude at the outset the legal effects thereof which infringe Community law, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

2 At the beginning of the 1970s the provincial administration of Ascoli Piceno awarded various public works contracts for the construction of a rapid transit highway to link the town of Ascoli Piceno to the A14 motorway and national highway No 16 which runs along the Adriatic coast. The work was divided into four stages.

3 Stage IV was awarded to the undertaking Rozzi Costantino. Twelve supplementary reports were subsequently carried out on the work relating to this stage which resulted in a substantial extension of the initial path of the road. The work envisaged by those reports was also awarded to Rozzi Costantino. On 21 May 1990 the provincial administration of Ascoli Piceno awarded to that undertaking a private contract for work envisaged by the 11th and 12th reports for a total amount of LIT 36 250 million.

4 The Commission considered that the award of the public works contracts envisaged in those two reports fell within the scope of the said Directive 71/305 and did not fall within any of the cases referred to in Article 9 and that consequently a notice of invitation to tender should have been published in the Official Journal of the European Communities in accordance with that directive and by letter of 17 January 1991 it called on the Italian Government, pursuant to Article 169 of the Treaty, to submit its observations on the alleged infringement within 30 days.

5 Having received no reply from the Italian Government within that period the Commission reiterated its views in the reasoned opinion which it sent to the Italian Republic on 1 August 1991 in which it found that "in so far as the provincial administration of Ascoli Piceno has awarded a private contract for the construction of a section of rapid transit highway 'Ascoli - Mare' entitled 'Stage IV' , and failed to publish a notice of invitation to tender in the Official Journal of the European Communities, the Italian Republic has failed to fulfil its obligations under Directive 71/305/EEC". The Commission called on the Italian Republic to comply with that reasoned opinion within two months.

6 By letter of 30 December 1991 the Italian Government forwarded to the Commission a note of 31 October 1991 in which the provincial administration of Ascoli Piceno gave some details of the contract in question and relied on Article 5(b) of Law No 584 of 8 August 1977 which transposed into Italian law Article 9(b) of Directive 71/305 to justify the award of the contract at issue to the undertaking Rozzi Costantino.

7 The Commission considered that that letter represented a belated response to its reasoned opinion which was unsatisfactory and therefore brought the present action which seeks, as mentioned in paragraph 1 of this judgment, a declaration that the Italian Republic has failed to fulfil its obligations under Directive 71/305 by allowing without demur the provincial administration of Ascoli Piceno to utilize the procedure for the award of a private contract.

8 In its defence the Italian Government merely claims that the obligation incumbent on Member States to ensure that Directive 71/305/EEC is applied is different from the actual obligation

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to apply that directive which is incumbent on the awarding authorities. It adds that a Member State can be found to have failed to fulfil its supervisory obligation only if the breach of a directive by an awarding authority is clear and manifest to the point that there is no justification for that State not to intervene.

9 In its rejoinder the Italian Government has submitted documents intended to prove the existence as regards the works in question of "technical reasons" within the meaning of Article 9(b) of Directive 71/305 justifying the award of the work in question to a given undertaking and therefore, recourse to the procedure for the award of a private contract. It further maintains first that it had already pleaded Article 9(b) of Directive 71/305 in the course of the pre-litigation procedure and that, secondly, it had not placed further reliance in its defence on those "technical reasons" because in the form of order sought in its application the Commission' s complaint against the Italian Republic related not to the conduct of the provincial administration of Ascoli Piceno which was allegedly contrary to Directive 71/305 but to the failure to take steps to prevent such conduct or to remedy its effects.

10 In the written observations which it was permitted to submit in response to the rejoinder, the Commission primarily claims that the technical documents submitted by the Italian Government were "new pleas in law" the introduction of which in the course of proceedings is prohibited by Article 42(2) of the Rules of Procedure. In the alternative the Commission maintains that the technical arguments based on those documents are without foundation.

11 It should be noted first that the Court has consistently held (see in particular Case 76/86 Commission v Germany [1989] ECR 1021, paragraph 8) that the scope of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article. Consequently the action cannot be founded on any complaints other than those formulated in the reasoned opinion (see Case C-157/91 Commission v Netherlands [1992] ECR I-5899, paragraph 17).

12 In its reasoned opinion the Commission complained that the Italian Republic had failed to comply with its obligations under Directive 71/305 in so far as the provincial administration of Ascoli Piceno had awarded the public works at issue by a private contract and had failed to publish a notice of invitation to tender in the Official Journal of the European Communities. In its application, on the other hand, the Commission asks the Court to declare that the Italian Republic has failed to comply with those obligations by allowing the provincial administration of Ascoli Piceno to act in that way and by not taking steps to preclude the effects thereof.

13 While it is true that each Member State is responsible vis-à-vis the Community for any breach of Community law by one of its bodies it must nevertheless be emphasized that in this case the subject-matter of the action is not a declaration of such a breach and in any event the application is founded on a complaint which is different from that formulated in the reasoned opinion; that difference has given rise to the dispute referred to in paragraphs 9 and 10 of this judgment regarding the presentation by the Italian Government of its defence.

14 Consequently the Commission' s application must be dismissed.

Costs

15 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

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1. Dismisses the application as inadmissible;
2. Orders the Commission to pay the costs.

DOCNUM	61992J0296
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1992 ; J ; judgment
PUBREF	European Court reports 1994 Page I-00001
DOC	1994/01/12
LODGED	1992/07/06
JURCIT	11957E169 : N 13 31971L0305-A09LB : N 6 9 31971L0305 : N 1 7 8 61986J0076 : N 11 31991X0704(02)-A42P2 : N 10 61991J0157 : N 11
CONCERNS	Failure concerning 31971L0305
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - inadmissible
ADVGEN	Gulmann
JUDGRAP	Schockweiler
DATES	of document: 12/01/1994 of application: 06/07/1992

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Judgment of the Court
of 2 August 1993
Commission of the European Communities v Italian Republic.
Failure of a Member State to fulfil its obligations - Procedures for the award of public works contracts - Derogation.
Case C-107/92.

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Approximation of laws ° Procedures for the award of public works contracts ° Directive 71/305 ° Derogation from the general rules ° Conditions ° Existence of exceptional circumstances

(Council Directive 71/305, Art. 9(d))

Article 9(d) of Directive 71/305 concerning the coordination of procedures for the award of public works contracts allows, in exceptional circumstances, derogations from the general rules, in particular those concerning advertising. However, such derogations are not available if the authorities awarding contracts have sufficient time to arrange for an accelerated tendering procedure of the kind provided for in Article 15 of the directive.

In Case C-107/92,

Commission of the European Communities, represented by Antonio Aresu and Rafael Pellicer, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Legal Affairs Department of the Ministry for Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaide,

defendant,

APPLICATION for a declaration that, by failing to send to the Office for Official Publications of the European Communities for publication in the Official Journal of the European Communities a contract notice for the construction of an avalanche barrier in the locality of Colle Isarco/Brennero, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts,

THE COURT,

composed of: O. Due, President, G.C. Rodríguez Iglesias, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, J.C. Moitinho de Almeida, F. Grévisse and D.A.O. Edward, Judges,

Advocate General: C. Gulmann,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 31 March 1993,

after hearing the Opinion of the Advocate General at the sitting on 12 May 1993,

gives the following

Judgment

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1 By application lodged at the Court Registry on 1 April 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by failing to send to the Office for Official Publications of the European Communities for publication in the Official Journal of the European Communities a contract notice for the construction of an avalanche barrier in the locality of Colle Isarco/Brennero, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

2 Title III of the directive includes rules on adequate advertising of invitations to tender to ensure that all interested undertakings in the Community can learn of tendering procedures and, if they so wish, take part in them.

3 According to Article 12 of the directive, notices of tendering procedures are to be sent to the Office for Official Publications of the European Communities, which publishes them in the Official Journal of the European Communities not later than nine days after the date of dispatch. The fourth paragraph of Article 12 provides, however, that, under the accelerated procedure provided for in Article 15, the notice will be published not later than five days after the date of dispatch.

4 Under Article 14 of the directive, the time-limits for receipt of requests to participate and for the receipt of tenders which the selected candidates are invited to submit are each not less than 21 days as from, respectively, the date of dispatch of the notice and the date of sending the written invitation to candidates. Article 15 provides, however, that in cases where urgency renders impracticable the time-limits laid down in Article 14, the authority awarding contracts may apply shorter time-limits, namely 12 days as from the date of dispatch of the notice for requests to participate and 10 days as from the written invitation for tenders. That accelerated procedure thus reduces the total duration of the advertising procedure from a minimum of 42 days to a minimum of 22 days.

5 Article 9 of the directive grants exemption from application of the provisions on advertising in a number of cases. More specifically, Article 9(d) provides for an exception "in so far as is strictly necessary when, for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time-limit laid down in other procedures cannot be kept".

6 On 18 June 1988, the Bolzano Ufficio del Genio Civile (Civil Engineering Department), a department of the Italian Ministry of Public Works, awarded a public works contract to the Italian undertaking Collini e Rabbiosi SpA for the construction of an avalanche barrier in the Alpe Gallina region near Colle Isarco/Brennero, without prior publication of a notice of an invitation to tender in the Official Journal of the European Communities.

7 Regarding that omission as an infringement of the directive, the Commission, by letter of 24 January 1990, formally called upon the Italian Republic to submit its observations within a month.

8 The Italian Government' s reply of 15 March 1990 to that letter prompted the Commission to send it a reasoned opinion on 13 February 1991. In the absence of any response thereto, the Commission brought this action.

9 The Commission considers that the Italian Government has not demonstrated the existence of extreme urgency resulting from unforeseeable events, as provided for in Article 9(d) of the directive. It states, first, that more than three months elapsed between the presentation to the competent national authorities on 10 June 1988 of the report from the Geological Department of the Ministry of the Environment recommending urgent action and the commencement of the works on 21 September 1988 and that, during that period, the Italian Government could have set in motion the 22-day accelerated procedure provided for by the directive. It also maintains that the last avalanche recorded in the Brenner region, in 1975, could not justify urgent action.

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10 According to the Italian Government, the Commission' s view takes no account of the new situation resulting from the abovementioned geological report regarding the unforeseeable and imminent risk of avalanches in the region. It contends that, in view of the urgency indicated by the report, the Italian authorities considered that the works had to be commenced without fail before the end of autumn 1988, that the administrative procedure therefore had to be completed during the brief period of the three summer months and that, in consequence, compliance with the directive had proved impossible.

11 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

12 According to Article 9(d) of the directive, the derogation for which it provides, namely exemption from the obligation to publish a notice of a call for tenders, is available only if three conditions are fulfilled concurrently. That provision requires the existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible and, finally, a casual link between the unforeseeable event and the extreme urgency resulting therefrom.

13 The sequence of events analysed in detail by the Advocate General in paragraphs 8 and 13 of his Opinion shows that there was nothing to prevent the Italian Government in this case from complying with the time-limits of the accelerated procedure provided for by the directive.

14 Consequently, it must be recognized that, as the Commission claims, the Italian Government has not demonstrated the existence of extreme urgency within the meaning of Article 9(d) of the directive.

15 Therefore, without there being any need to consider whether the other two conditions for the exemption were fulfilled in this case, it must be held that, by failing to send to the Office for Official Publications of the European Communities for publication in the Official Journal of the European Communities a contract notice for the construction of an avalanche barrier in the locality of Colle Isarco/Brennero, the Italian Republic has failed to fulfil its obligations under the directive.

Costs

16 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by failing to send to the Office for Official Publications of the European Communities for publication in the Official Journal of the European Communities a contract notice for the construction of an avalanche barrier in the locality of Colle Isarco/Brennero, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts;

2. Orders the Italian Republic to pay the costs.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1992 ; J ; judgment
PUBREF	European Court reports 1993 Page I-04655
DOC	1993/08/02
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JURCIT	31971L0305-A09LD : N 5 9 12 14 31971L0305-A12L4 : N 3 31971L0305-A14 : N 4 31971L0305-A15 : N 4 31971L0305 : N 1 15
CONCERNS	Failure concerning 31971L0305
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
NOTES	X: Giurisprudenza italiana 1994 I Sez.I Col.1681-1684 Massimino, Fausto: Rivista di diritto industriale 1995 II p.320-331
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Gulmann
JUDGRAP	Edward
DATES	of document: 02/08/1993 of application: 01/04/1992

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**Judgment of the Court
of 17 November 1993
Commission of the European Communities v Kingdom of Spain.
Actions against Member States for failure to fulfil obligations - Public works and supply contracts.
Case C-71/92.**

++++

1. Approximation of laws ° Procedures for award of public works and supply contracts ° Directives 71/305 and 77/62 ° Field of application ° Recourse to procedure for privately negotiated contracts ° Proof of capacity of tenderers ° Security to be provided by tenderers ° Technical specifications

(Council Directives 71/305 and 77/62)

2. Approximation of laws ° Procedures for award of public works contracts ° Directive 71/305 ° Field of application ° Reference to Article 2 of Directive 71/304

(Council Directives 71/304, Art. 2(2), and 71/305, Art. 1(a))

1. A Member State which

° excludes from the field of application of national rules on public procurement the transactions effected by the administrative authorities with individuals as regards goods or rights, dealings in which are governed by legal provisions, or products which are controlled, subject to monopoly or prohibited, when the exclusion of such transactions is not included amongst the exceptions exhaustively and expressly authorized by Directive 77/62 and when the specific nature of the supplies involved is not in any event of such a kind as to place the contracts to which they give rise entirely outside the scope of the rules on public procurement;

° excludes from the field of application of the national rules on public procurement the contracts for which a law expressly lays down an exception, when the said directives list exhaustively and expressly the exceptions which they authorize and when the transposition of directives must comply with requirements of clarity and precision which cannot be met by wording which conveys the impression that other exceptions may be made, in addition to those authorized by the directives and incorporated in national legislation;

° permits the award of privately negotiated contracts in cases other than those exhaustively envisaged by the directives or makes recourse to the procedure for privately negotiated contracts subject to conditions less strict than those which the directives lay down;

° prescribes certain methods of furnishing proof of tenderers' legal capacity which do not appear amongst those which the directives make it permissible to require;

° subjects undertakings from other Member States which choose certain means of attesting their capacity, as envisaged by Directive 71/305, to conditions not provided for therein;

° provides that, for the purposes of the classification of undertakings, preference is to be given to an assessment of the personal, material and financial means available to them on the national territory, when Directive 71/305 does not authorize the introduction of such criteria;

° does not recognize, as required by the directives, the value of certificates, issued by the authorities of other Member States, attesting the capacity of undertakings;

° exempts from the obligation to provide security only undertakings whose capacity is attested by their registration in its own classification lists;

° does not have regard, in the case of technical specifications defined in supply contracts, to the order of preference of the standards set out in Directive 77/62;

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fails to comply with its obligations under Directives 71/305 and 77/62 coordinating procedures for the award of public works and supply contracts respectively.

2. It follows from the reference in Article 1(a) of Directive 71/305, defining the public works contracts to which it applies, to Article 2 of Directive 71/304 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, that the directive does not apply to contracts concerning industrial installations of the mechanical, electrical or energy-producing variety, with the exception of any part of such installations as comes within the sphere of building or civil engineering or to those concerning excavation, shaft-sinking, dredging and waste disposal works carried out in connection with the extraction of minerals (mining and quarrying industries).

In Case C-71/92,

Commission of the European Communities, represented initially by Rafael Pellicer, of its Legal Service, then by Hendrik Van Lier, Legal Adviser, and María Blanca Rodríguez Galindo, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Spain, represented by Alberto José Navarro Gonzalez, Director General for Legal, Institutional and Community Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, Community Legal Affairs Department, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6, Boulevard Emmanuel Servais,

defendant,

APPLICATION for a declaration that, by maintaining in force certain provisions constituting an exclusion from the field of application of the national rules on public procurement, certain provisions allowing the award of privately negotiated contracts, certain provisions relating to the rules governing participation and criteria for qualitative selection, certain provisions relating to technical standards and certain provisions on award criteria, the Kingdom of Spain has failed to fulfil its obligations under Articles 30 and 59 of the EEC Treaty, Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1),

THE COURT,

composed of: G.F. Mancini, President of the Second and Sixth Chambers, acting as President, J.C. Moitinho de Almeida and Diez de Velasco (Presidents of Chambers), C.N. Kakouris, F.A. Schockweiler, F. Grévisse, M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: C. Gulmann,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 May 1993,

after hearing the Opinion of the Advocate General at the sitting on 30 June 1993,

gives the following

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Judgment

Costs

65 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Spain has been essentially unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that

° by maintaining in force certain provisions constituting an exclusion from the field of application of the national legislation on public procurement, namely Article 2, points 3 and 8, of the Law on State Contracts and Article 2, points 3 and 8, of the General Regulation on the Award of State Contracts;

° by maintaining in force certain provisions allowing the award of privately negotiated contracts, namely Article 37, paragraph 1, points 1, 2, 7 and 8, and Article 87, paragraph 4, points 1, 2 and 5, of the Law on State Contracts, Articles 117 and 247 of the General Regulation on the Award of State Contracts and Article 120 of the amended local regulations;

° by maintaining in force certain provisions relating to the rules on participation and criteria for qualitative selection, namely Article 25, paragraph 1, points 1 and 3, Article 284, paragraph 5, Article 287, paragraph 2, Article 312, paragraph 2, Article 320, paragraph 3, point 5, and Article 341 of the General Regulation on the Award of State Contracts;

° by maintaining in force certain provisions relating to technical standards, namely Article 244 of the General Regulation on the Award of State Contracts;

the Kingdom of Spain has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts;

2. Dismisses the remainder of the application;

3. Orders the Kingdom of Spain to pay the costs.

1 By application lodged at the Court Registry on 6 March 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by maintaining in force certain provisions constituting an exclusion from the field of application of the national rules on public procurement, certain provisions allowing the award of privately negotiated contracts, certain provisions relating to the rules on participation and criteria for qualitative selection, certain provisions relating to technical standards and certain provisions relating to award criteria, the Kingdom of Spain has failed to fulfil its obligations under Articles 30 and 59 of the Treaty, Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1).

2 In Spain Directives 71/305 and 77/62 were transposed into national law by Royal Legislative

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Decree 931/1986 of 2 May 1986 amending the Law on State Contracts (Ley de Contratos del Estado, hereinafter "the LCE", BOE No 114 of 13 May 1986, p. 16920) and by Royal Decree 2528/1986 of 28 November 1986, amending the General Regulation on the Award of State Contracts (Reglamento General de Contratacion del Estado, hereinafter "the RGCE", BOE No 297 of 12 December 1986, p. 40546).

3 The Commission took the view that several provisions of the LCE and the RGCE, together with other provisions capable of affecting the system of public procurement in Spain, contained in the amended version of the local regulations (Royal Legislative Decree 781/1986 of 18 April 1986, BOE No 96 and 97 of 22 and 23 April 1986), the Law of 24 November 1939 on the Organization and Protection of National Industry (Jefatura del Estado, BOE of 15 December 1939, hereinafter "the Law of 24 November 1939") and Royal Decree 946/1978 of 14 April 1978 relating to a procedure for the evaluation and control of pharmaceutical services (BOE No 108 of 8 May 1978, hereinafter "Royal Decree 946/1978") were contrary, as the case may be, to Articles 30 or 59 of the Treaty and/or to Directives 71/305 or 77/62. The Commission therefore initiated against the Kingdom of Spain the procedure provided for in Article 169 of the Treaty and subsequently brought this action before the Court.

4 During the course of the proceedings before the Court, the Commission withdrew that part of its application which related to the Law of 24 November 1939 and to Article 11 of Royal Decree 946/1978 on the ground that they had since been repealed.

5 The provisions of national legislation with regard to which the Court is called upon to give judgment are therefore:

° Article 2, point 3, of the LCE and Article 2, point 3, of the RGCE, which exclude from the field of application of the national rules on public supply contracts, and thus from that of Directive 77/62, certain transactions concluded by the administrative authorities with individuals;

° Article 2, point 8, of the LCE and Article 2, point 8, of the RGCE, which exclude from the field of application of the national rules on public works and supply contracts, and consequently from that of both directives, "contracts for which a law expressly lays down an exception";

° Article 29 bis, paragraph 1, points 1 and 3, of the LCE and Article 93 ter of the RGCE, which exempt certain contracts from the requirement of publication in the Official Journal of the European Communities, laid down in Directive 71/305;

° various provisions of national legislation relating to privately negotiated contracts which are alleged to conflict with the provisions of both directives, namely Article 37, paragraph 1, points 1, 2, 7 and 8 and Article 87, paragraph 4, points 1, 2 and 5 of the LCE, Articles 117 and 247 of the RGCE and Article 120 of the amended text of the local regulations;

° certain provisions of national legislation laying down, in contravention of the terms of both directives and of Article 30 or 59 of the Treaty, the criteria for qualitative selection and the rules for the participation of undertakings in public procurement, namely Article 24, paragraph 1, point 1, Article 25, paragraph 1, points 1 and 3, Article 284, paragraph 5, Article 287, paragraph 2, Article 312, paragraph 2, Article 320, paragraph 3, point 5, and Article 341 of the RGCE;

° finally Article 244 of the RGCE, which lays down certain rules in the technical field which are alleged to be contrary to Article 7 of Directive 77/62.

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Article 2, point 3, of the LCE and Article 2, point 3, of the RGCE

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7 The Commission considers that by excluding from the national rules on public procurement "transactions effected by the administrative authorities with individuals as regards goods or rights, dealings in which are governed (' mediatizado') by legal provisions, or products controlled (' intervenidos'), subject to a monopoly (' estancados') or prohibited (' prohibidos')", Article 2, point 3, of the LCE and Article 2, point 3, of the RGCE are incompatible with Directive 77/62 in two respects. First, those provisions are so general and their wording so unclear that they give rise to legal uncertainty and do not comply with the requirement that directives must be correctly transposed. Secondly, in breach of the directive, those provisions exclude public supply contracts from its field of application.

8 To demonstrate the compatibility of the contested provisions with Directive 77/62 the Spanish Government contends in the first place that Article 2, point 3, of the LCE and the corresponding provision of the RGCE are reference provisions which can be applied and produce legal consequences only in relation to the legislative provisions to which they refer. Contrary to the Commission' s contention, those provisions serve to increase legal certainty inasmuch as they list exhaustively the contracts excluded from their field of application and require any exclusion to be laid down by law.

9 Those arguments must be rejected.

10 It is apparent from the ninth recital in the preamble to Directive 77/62 that:

> "... provision must be made for exceptional cases where measures concerning the coordination of procedures may not necessarily be applied, but such cases must be expressly limited".

It follows that the only permitted exceptions to the application of Directive 77/62 are those which are exhaustively and expressly mentioned therein.

11 Articles 2(2) and 3 of Directive 77/62, which list the public supply contracts to which it does not apply, do not include those relating to the products referred to in Article 2, point 3, of the LCE and Article 2, point 3, of the RGCE. Moreover, as the Commission has correctly emphasized, none of the exceptions authorized by the directive is defined by reference to the type of, or the legal arrangements relating to, the product concerned, in contrast to the contested provisions of the Spanish legislation.

12 In those circumstances those provisions cannot be regarded as effecting a correct transposition of Directive 77/62 into national law. That finding is confirmed by the fact that the Spanish Government, without citing specific laws, has indicated that, by virtue of the contested provisions, contracts relating to products such as medicinal products, postage stamps, stamped paper, tobacco, electricity and gas are excluded from the application of the rules on public procurement.

13 Secondly, the Spanish Government contends that the contested provisions are justified in the light of other provisions of Community law, in particular Articles 36, 90(2) and 223 of the Treaty.

14 That argument cannot be upheld either.

15 It is true that national rules applicable to trade in certain products, which are compatible with Community law by virtue of the aforementioned provisions of the Treaty, must also be observed in connection with the award of public supply contracts. However, that fact is not such as to justify a priori a general failure to apply the rules relating to the award of such contracts as far as those products are concerned.

16 The Spanish Government contends, in the third place, that the exclusion of certain contracts provided for in Article 2, point 3, of the LCE and the corresponding provision of the RGCE may be justified by Article 6(1)(b) of Directive 77/62, according to which authorities awarding contracts may award their supply contracts without applying the open or restricted procedures referred to

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in Article 4(1) and (2),

> "when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier".

17 In that respect it is sufficient to note that the contracts covered by that provision, even though they need not be awarded according to the open or restricted procedures, are not excluded from the field of application of the directive but remain subject, in accordance with Article 4(3) thereof, to Article 7 on common rules in the technical field.

18 It follows from the foregoing considerations that the Commission' s complaint with regard to Article 2, point 3, of the LCE and Article 2, point 3, of the RGCE must be regarded as well founded.

Article 2, point 8, of the LCE and Article 2, point 8, of the RGCE

19 The Commission considers that Article 2, point 8, of the LCE and Article 2, point 8, of the RGCE, which exclude from the field of application of the national rules on public procurement "contracts for which a law expressly lays down an exception", constitute a further exclusion of a general nature which is contrary to both Directive 71/305 and Directive 77/62.

20 The Spanish Government contends, on the other hand, that the contested provisions are merely reference provisions which in themselves are not contrary to Community law.

21 That argument cannot be upheld.

22 In the first place, as the Court has stated in paragraph 10 of this judgment, the only permitted exceptions to the application of Directive 77/62 are those exhaustively and expressly mentioned therein. That applies equally to Directive 71/305, the seventh recital in the preamble to which is identical to the ninth recital, previously quoted, in the preamble to Directive 77/62.

23 Moreover it follows that, as the Court has consistently held (see, in particular, the judgment in Case C-131/88 Commission v Germany [1991] ECR I-825, paragraph 6), the transposition of a directive into national law does not necessarily require that its provisions be incorporated formally and verbatim in express specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned may ascertain the full extent of their rights and, where appropriate, rely on them before the national courts. Those requirements of clarity and precision are all the more imperative where, as in this case, exceptions to or derogations from the rules laid down by a directive are to be transposed into national law.

24 In addition, as the Commission has pointed out without being challenged by the Spanish Government, all the exceptions exhaustively and expressly listed by Directives 71/305 and 77/62 have been incorporated in express, specific provisions of the LCE or the RGCE. Consequently a provision allowing other exceptions to be introduced by other laws is likely to create an ambiguous legal situation making it impossible for those concerned to ascertain their rights and obligations without ambiguity.

25 In those circumstances, the general exception laid down in Article 2, point 8, of the LCE and in Article 2, point 8, of the RGCE by reference to other unspecified laws does not constitute a transposition into national law corresponding fully to the requirements of clarity and certainty in legal situations which directives seek to fulfil (see, in particular, the judgment in Case 102/79 Commission v Belgium [1980] ECR 1473, paragraph 11).

26 It follows that the Commission' s complaint with regard to those provisions is also well founded.

Article 29 bis, paragraph 1, points 1 and 3, of the LCE and Article 93 ter of the RGCE

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27 The Commission claims that Directive 71/305 contains no exception of the kind laid down by Article 29 bis, paragraph 1, points 1 and 3, of the LCE and Article 93 ter of the RGCE, exempting from the requirement of publication in the Official Journal of the European Communities, set out in Article 12 of Directive 71/305, contracts "concerning industrial installations of the mechanical, electrical or energy-producing variety, with the exception of any part of such installations as comes within the sphere of building or civil engineering" and those "concerning excavation, shaft-sinking, dredging and waste disposal works carried out in connection with the extraction of minerals (mining and quarrying industries)". In view of the exhaustive nature of the exceptions laid down, those provisions of national legislation are therefore alleged to be contrary to Directive 71/305.

28 The Spanish Government denies that the contracts in question come within the field of application of Directive 71/305. In that respect it contends in particular that such contracts are not "public works contracts", as defined in Article 1(a) thereof.

29 That point of view must be upheld.

30 It follows from Article 1(a) of Directive 71/305 that "public works contracts" within the meaning of the directive are those "which have as their object one of the activities referred to in Article 2 of the Council Directive" (71/304/EEC) "of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in the field of public works contracts and on the award of public works contracts to contractors acting through agencies or branches" (OJ, English Special Edition 1971 (II), p. 678). According to Article 2(2) of the latter directive, it specifically does not apply to the works mentioned by the contested provisions of the Spanish legislation.

31 However, the Commission argues that the reference to Article 2 of Directive 71/304, contained in Article 1(a) of Directive 71/305, must be regarded as relating exclusively to paragraph 1 of that provision. It takes the view that Directive 71/304, which reaffirms the fundamental principle of the abolition of restrictions on freedom to provide services, laid down in Article 59 of the Treaty, cannot in any event restrict the field of application of Directive 71/305, particularly as, since the expiry of the transitional period, Article 2(2) of Directive 71/304 has had no practical effect by reason of the fact that Article 59 of the Treaty, as the Court has recognized, is directly applicable.

32 That line of argument cannot be upheld either.

33 As the Advocate General states in section 27 of his Opinion, although the prohibition of restrictions on freedom to provide services, laid down by the Treaty, applies in principle to all fields of Community law, it is nevertheless for the Council to supplement that prohibition, which follows directly from the Treaty, with rules coordinating or harmonizing national provisions which do not conflict with the prohibition, and consequently to determine the field of application of such rules.

34 It follows from the foregoing considerations that the Commission' s complaint with regard to Article 29 bis, paragraph 1, points 1 and 3, of the LCE and Article 93 ter of the RGCE must be rejected.

Article 37, paragraph 1, points 1, 2, 7 and 8, and Article 87, paragraph 4, points 1, 2 and 5, of the LCE, Articles 117 and 247 of the RGCE and Article 120 of the amended local regulations

35 The Commission considers that various provisions of Spanish legislation authorizing the award of privately negotiated contracts, that is to say, for public works contracts, Article 37, paragraph 1, points 1, 2, 7 and 8, of the LCE and Article 117, paragraph 1, points 1, 2, 7 and 8, of the RGCE and, for public supply contracts, Article 87, paragraph 4, points 1, 2 and 5 of the LCE, Article 247, paragraph 4, points 1, 2 and 5 of the RGCE and Article 120, paragraph 1, points 1, 2 and 6 of the amended local regulations, are contrary to Article 9 of Directive 71/305 and

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Article 6 of Directive 77/62 respectively, on the ground that the cases to which they relate do not correspond, or do not exactly correspond, to those listed by the said provisions of the two directives.

36 It should be stressed first of all that the provisions of Article 9 of Directive 71/305 and of Article 6 of Directive 77/62, which authorize derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in the field of public works and supply contracts, must be strictly interpreted (see, as regards Article 9 of Directive 71/305, the judgment in Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 14). For the same reasons, the abovementioned provisions specifying the cases in which privately negotiated contracts may be concluded must be regarded as exhaustive.

37 It follows from a comparison of the provisions of Spanish legislation at issue with the relevant provisions of the Community directives, made by the Advocate General in sections 37 to 59 of his Opinion, that the Spanish rules either allow the award of privately negotiated contracts in cases not envisaged by the directives or impose for the procedure for privately negotiated contracts conditions less strict than those resulting from the corresponding provisions of the directives.

38 It follows that the Commission' s complaint with regard to the contested provisions of Spanish legislation allowing the award of privately negotiated contracts is well founded.

Article 24, paragraph 1, point 1, and Article 25, paragraph 1, points 1 and 3, of the RGCE

39 The Commission claims that the evidential requirements laid down by Article 25, paragraph 1, points 1 and 3, of the RGCE in order to establish, as required by Article 24, paragraph 1, point 1, thereof, the legal personality and capacity of tenderers to enter into contracts and to assume obligations are not provided for by Directives 71/305 and 77/62 and cannot therefore justify the exclusion of tenderers who do not fulfil them. It takes the view, moreover, that in so far as those provisions apply to works contracts they are also contrary to Article 59 of the Treaty, inasmuch as they apply only to foreign undertakings or impose on them burdens in addition to those which they already bear in their country of origin and which are not justified by any objective in the public interest.

40 The Court considers that this complaint in fact relates only to Article 25, paragraph 1, points 1 and 3, of the RGCE, inasmuch as those provisions prescribe certain methods of attesting the legal capacity of tenderers. Moreover, the Commission expressly conceded at the hearing that it did not deny that the requirement that tenderers should have legal capacity was, in itself, compatible with Community law.

41 With regard to the complaint as thus clarified, it should be pointed out that in its judgment in Case 76/81 Transporoute v Minister of Public Works ([1982] ECR 417, paragraph 9) the Court has already stated that Directive 71/305 does not authorize the Member States to seek references other than those expressly mentioned in the directive except for the purpose of assessing the financial and economic standing of the contractors as provided for in Article 25 thereof. That finding applies by analogy to Directive 77/62, the relevant rules of which correspond in substance to those of Directive 71/305.

42 However, the documentary evidence envisaged in that respect by Article 25, paragraph 1, points 1 and 3, of the RGCE is not intended to establish the financial and economic standing of undertakings, nor does it form part of the evidence production of which may be required by virtue of the other relevant provisions of the two directives.

43 Accordingly the complaint alleging infringement of Directives 71/305 and 77/62 must be held to be well founded and consequently it is unnecessary to inquire whether the contested provisions are also contrary to Article 59 of the Treaty.

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Article 284, paragraph 5, of the RGCE

44 The Commission considers that by requiring contractors from other Member States who wish to furnish proof of their capacity by means other than classification in Spain in the official list of recognized contractors referred to in Article 28(1) of Directive 71/305 to produce a certificate issued by the Advisory Committee for Public Contracts to the effect that they have not been classified or that their classification has not been suspended or cancelled, Article 284, paragraph 5, of the RGCE imposes a condition, not envisaged by Directive 71/305 and therefore contrary thereto, upon the contractor' s option to use such means. That condition is also alleged to be contrary to Article 59 of the Treaty in so far as it imposes an administrative burden on the contractors concerned, which deprives of any practical effect the right of such persons to attest their capacity by means other than classification.

45 It should be stressed in the first place that there is nothing in Article 28 of Directive 71/305 to support the view that registration in the official list of contractors recognized in the State in which the contract is to be awarded may be required of contractors established in other Member States. On the contrary, Article 28(3) entitles contractors registered in an official list in any Member State whatever to use such registration, within the limits laid down in that provision, as an alternative means of proving before the awarding authority of another Member State that they satisfy the criteria for qualitative selection listed in Articles 23 to 26 of the directive (see the judgments in Transporoute, previously cited, paragraphs 12 and 13, and in Joined Cases 27 to 29/86 CEI v Association Intercommunale pour les Autoroutes des Ardennes [1987] ECR 3347, paragraph 24). Undertakings therefore have the choice of furnishing proof of their capacity either by such registration or by the means and documents mentioned in Article 23 to 26.

46 Furthermore, Directive 71/305 does not make the exercise of that choice subject to any condition of the type envisaged in Article 284, paragraph 5, of the RGCE and does not mention the certificate referred to by that provision as one of the documents which undertakings intending to furnish proof of their capacity by means other than registration in an official list of recognized contractors may be requested to produce.

47 It follows that the Commission' s complaint alleging infringement of Directive 71/305 must be regarded as well founded and that consequently there is no need to inquire whether the provision at issue is also contrary to Article 59 of the Treaty.

Article 287, paragraph 2, of the RGCE

48 According to the Commission, Article 287, paragraph 2, of the RGCE is contrary to Directive 71/305 and to Article 59 of the Treaty inasmuch as it provides that for the purpose of classification of contractors in Spain, "preference shall be given to an assessment of the personal, material and financial means permanently available to the undertakings on the national territory".

49 It should be emphasized, in the first place, that Article 28(4) of Directive 71/305 provides that "for the registration of contractors of other Member States in such a list" (the official list of recognized contractors) "no further proofs and statements may be required other than those requested of nationals and, in any event, only those provided for under Articles 23 to 26".

50 Secondly, those provisions do not envisage the production of proof or statements relating to the matters referred to in Article 287, paragraph 2, of the RGCE. With regard to Article 26(c) and (d) of Directive 71/305, on which the Spanish Government relies, it is important to note that although that provision makes it possible to require statements of the tools, plant and technical equipment available to the contractor for carrying out the work and of the firm' s average annual manpower and the size of its managerial staff for the past three years, it makes no distinction as to whether or not those items are situated on the territory of the State in which the contract

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is to be awarded.

51 Hence the complaint alleging infringement of Directive 71/305 must be considered well founded, and there is no need to inquire whether Article 287, paragraph 2, of the RGCE is contrary to Article 59 of the Treaty.

Article 312, paragraph 2, and Article 320, paragraph 3, point 5, of the RGCE

52 As regards Article 312, paragraph 2, of the RGCE, it is sufficient to state that the Spanish Government does not dispute that that provision, which defines the probative value in Spain of classification certificates issued by another Member State, takes no account of the provisions of Article 26(b) and (d) of Directive 71/305 and is therefore contrary to the first subparagraph of Article 28(3) thereof.

53 The same applies to Article 320, paragraph 3, point 5, of the RGCE, which provides that the technical ability of suppliers may be evidenced by product quality certificates issued by Spanish official institutes or agencies. The Spanish Government admits that that provision is contrary to Article 23(1)(e) of Directive 77/62, which permits a requirement that such certificates are to be produced by the person concerned but not that they are to be drawn up by an agency of the State in which the contract is to be awarded.

54 In those circumstances, the complaint relating to Article 312, paragraph 2, and Article 320, paragraph 3, point 5, of the RGCE must be regarded as well founded and consequently there is no need to inquire whether Article 320, paragraph 3, point 5, also conflicts with Article 30 of the Treaty, as the Commission has claimed.

Article 341 of the RGCE

55 The Commission considers that Article 341 of the RGCE, which authorizes the government to exempt contractors who have obtained classification in Spain from giving provisional security in the case of tenders for works contracts, is incompatible with Directive 71/305 and with Article 59 of the Treaty in so far as such an exemption constitutes a financial incentive to obtain classification and has the effect of restricting in practice the right of undertakings to tender without being classified.

56 It should be borne in mind that, as the Court has stated in paragraph 45 of this judgment, Directive 71/305 entitles contractors to furnish proof of their capacity either by the means referred to in Articles 23 to 26 of the directive or by their registration in an official list of recognized contractors, which need not necessarily be that of the State in which the contract is to be awarded. The exercise of that right is impaired by a provision such as Article 341 of the RGCE, which makes it possible to exempt only contractors registered in such a list from giving provisional security.

57 However, the Spanish Government contends that the giving of provisional security fulfils a function comparable to that of the requirement of classification itself, which is to guarantee the performance of the contracts concluded, with the result that exemption cannot be granted to contractors who have furnished proof of their capacity by a method other than classification.

58 That argument cannot be upheld.

59 As the Commission has correctly stated, subparagraphs (d) and (g) of the first paragraph of Article 23 of Directive 71/305, which make it possible to exclude from participation in a contract any contractor who has been guilty of grave professional misconduct or has been guilty of serious misrepresentation with regard to the criteria laid down for qualitative selection, provide the authorities awarding contracts with sufficient means to ensure, with the same effectiveness as classification itself or the threat of its suspension, the performance of the contracts concluded. There is therefore no need to restrict the grant of the exemption in question to those contractors who have furnished

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proof of their capacity by classification in Spain.

60 It follows from the foregoing considerations that the Commission' s complaint with regard to Article 341 of the RGCE is well founded and there is consequently no need to inquire whether that provision also conflicts with Article 59 of the Treaty.

Article 244 of the RGCE

61 The first point to note is that the Spanish Government has acknowledged that this provision did not correctly transpose into national law the order of preference of the standards by reference to which the technical specifications in public supply contracts are to be defined, as laid down in Article 7(1) of Directive 77/62. The fact invoked by the Spanish Government that that provision was substantially amended by Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC coordinating procedures for the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1980 L 127, p. 1), which granted the Kingdom of Spain an additional period for its implementation, is not such as to justify that acknowledged failure to fulfil its obligations. In any event the period prescribed for the transposition of Directive 88/295 into Spanish law expired on 1 March 1992.

62 Furthermore, Article 244, paragraph 2, of the RGCE requires the words "or equivalent" to be included only in the case of references to trade marks, patents or types, whereas Article 7(2) of Directive 77/62 requires the inclusion of those words also in cases in which the technical specifications mention goods of a specific origin or make.

63 In those circumstances the Commission' s complaint relating to Article 244 of the RGCE must be regarded as well founded.

64 In the light of all the foregoing considerations, it must be held in terms of the form of order sought by the Commission that the Kingdom of Spain has failed to fulfil its obligations under Directives 71/305 and 77/62, except in so far as concerns the Law of 24 November 1939, Article 11 of Royal Decree 946/1978, Article 29 bis, paragraph 1, points 1 and 3, of the LCE and Article 24, paragraph 1, point 1, and Article 93 ter of the RGCE.

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61985J0199 : N 36
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AUTLANG Spanish

APPLICA Commission ; Institutions

DEFENDA Spain ; Member States

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NATIONA Spain

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PROCEDU Proceedings concerning failure by Member State - successful ; Proceedings concerning failure by Member State - unfounded

ADVGEN Gulmann

JUDGRAP Schockweiler

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Judgment of the Court of First Instance (First Chamber)
First Instance (First Chamber)First Instance (First Chamber)1995.
Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v Commission of the European Communities.
Competition - Non-existence of measures - Decisions of associations of undertakings - Complex rules - Infringement - Effect on trade between States - Exemption - Fines.
Case T-29/92.

++++

1. Acts of the institutions ° Inalterability ° Alleged infringement ° Recourse by the Community judicature to measures of inquiry ° Conditions

2. Competition ° Agreements, decisions and concerted practices ° Undermining of competition ° Concertation between undertakings as to how to respond to an invitation to tender ° Exchange of information

(EEC Treaty, Art. 85(1))

3. Competition ° Agreements, decisions and concerted practices ° Undermining of competition ° Joint determination by the undertakings participating in a tendering procedure of the calculation costs to be incorporated in their respective tenders

(EEC Treaty, Art. 85(1))

4. Competition ° Agreements, decisions and concerted practices ° Undermining of competition ° System of rules operating within a trade organization, intended to assure protection in a tendering procedure for the undertaking which, after concertation between the competitors, is found to have submitted the lowest tender

(EEC Treaty, Art. 85(1))

5. Competition ° Agreements, decisions and concerted practices ° Undermining of competition ° System of rules operating within a trade organization, which, in tendering procedures, places the participating undertakings in a more advantageous position than the others

(EEC Treaty, Art. 85(1))

6. Competition ° Agreements, decisions and concerted practices ° Effect on trade between Member States ° Criteria ° Agreement covering the entire territory of a Member State

(EEC Treaty, Art. 85(1))

7. Competition ° Agreements, decisions and concerted practices ° Prohibition ° Effect on trade between Member States ° Potential effect ° Appreciable effect

(EEC Treaty, Art. 85(1))

8. Competition ° Agreements, decisions and concerted practices ° Prohibition ° Exemption ° Commission' s obligation to take account of the specific characteristics of the field of activity of the applicant undertakings

(EEC Treaty, Art. 85(3))

9. Competition ° Agreements, decisions and concerted practices ° Prohibition ° Exemption ° Undertaking' s obligation to prove that its application is well founded

(EEC Treaty, Art. 85(3))

10. Acts of the institutions ° Statement of reasons ° Obligation ° Scope ° Decision rejecting

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an application for exemption under the competition rules

(EEC Treaty, Art. 190)

11. Actions for annulment ° Commission decision based on Article 85(3) of the Treaty ° Complex economic evaluation ° Review by the Court ° Limits

(EEC Treaty, Arts 85(3) and 173)

12. Community law ° Principles ° Principle of subsidiarity ° Not one of the general legal principles applicable before the entry into force of Article 3b of the EC Treaty

(EC Treaty, Art. 3b)

13. Competition ° Fines ° Prohibition of the imposition of fines for action taken under a notified agreement ° Agreement enjoying an exemption from notification and not notified ° Inapplicable

(Council Regulation No 17, Arts 4(2) and 15(5)(a))

14. Competition ° Community rules ° Infringements ° Committed intentionally ° Meaning

(Council Regulation No 17, Art. 15)

15. Competition ° Fines ° Amount ° Determination ° Turnover taken into account ° Turnover of all the undertakings making up an association of undertakings ° Permissible

(Council Regulation No 17, Art. 15(2))

1. Only where a measure is challenged on the basis of serious and convincing evidence of breach of the principle of inalterability of Community measures can the Court accede to a request that it order production of a decision, in the language or languages in which it is binding, authenticated by the signatures of the President and the Executive Secretary, in order to verify that the texts notified conform exactly with the text adopted by the college of Commissioners.

2. Where there is concertation by undertakings regarding the manner in which they intend responding to an invitation to tender, involving the exchange of information regarding, inter alia, the costs of the product concerned, its specific characteristics and a breakdown of the price tenders, having in particular the object and effect of revealing to his competitors the course of conduct which each contractor has decided to adopt or contemplates adopting on the market and being capable of leading to the fixing of certain conditions for the transaction, practical cooperation between contractors is deliberately substituted for the risks of competition and an infringement of Article 85(1) of the Treaty is thereby committed.

3. The joint fixing of the price increases which all the undertakings participating in a tendering procedure will include in their price tenders, and which will be received by the successful undertaking but passed on to a trade organization entrusted with sharing them among all the undertakings that submitted tenders, making it possible to ensure that the contract awarder bears, on a flat-rate basis, the calculation costs incurred by all the participants in the tendering procedure, is caught by the prohibitions laid down in Article 85(1)(a) of the Treaty. First, it constitutes fixing of part of the price and, secondly, it restricts competition between undertakings as regards their calculation costs and, lastly, it leads to a general increase in prices.

4. The prohibitions laid down by Article 85(1) of the Treaty apply to a system of rules operating within a trade organization which, in relation to contracts in tendering procedures, makes it possible, through agreements between the undertakings concerned, after comparison of the prices that they intend proposing, to designate the undertaking offering the lowest price, which will enjoy protection against the risk of submission by its competitors of price tenders adjusted downwards, and will

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be the only one authorized to negotiate the content of its tender with the contract awarder.

Even if such protection is in fact accorded to the undertaking submitting the best tender from the tenderers' point of view, it is for the party awarding the contract to reach its own conclusion, which may involve subjective preferences on matters such as the reputation of the contractor, his availability and his proximity.

5. A system of rules operating within a trade organization which, as between the undertakings interested in a tendering procedure, organizes the exchange of information and excludes certain forms of competition is caught by the prohibitions contained in Article 85(1) of the Treaty, since its very existence undermines the freedom of contractors to join or not join it, inasmuch as non-membership deprives them of certain advantages afforded by the system and brings them into competition, not with a number of contractors acting independently from each other, but with a number of contractors which have common interests and information and therefore behave in the same way.

6. An agreement which extends over the whole territory of one of the Member States has, by its very nature, the effect of reinforcing compartmentalization of national markets, thereby holding up the economic interpenetration which the Treaty is intended to bring about.

7. For restrictive arrangements to be prohibited by Article 85(1) of the Treaty, it is not necessary for them appreciably to affect trade between Member States but merely to be capable of having that effect. Since a potential effect is sufficient, future development of trade may be taken into account in assessing the effect of the restrictive arrangements on trade between Member States, whether or not it was foreseeable. As regards the appreciable nature of that effect, the more limited the trade the greater is the likelihood that it will be affected by the restrictive arrangements.

8. It is for the Commission, exercising its power under Article 85(3) of the Treaty, to grant exemption from the prohibitions contained in Article 85(1) and to take account of the particular nature of different branches of the economy and the problems peculiar to them.

9. It is for undertakings seeking an exemption under Article 85(3) to establish, on the basis of documentary evidence, that an exemption is justified.

Accordingly, they have no reason to criticize the Commission for failing to put forward alternative solutions or to indicate in what respects it would regard the grant of an exemption as justified.

10. In applying the competition rules, all that is incumbent upon the Commission, by virtue of its obligation to state reasons, is to mention the matters of fact and of law and the considerations which prompted it to take a decision rejecting an application for exemption, and the applicants may not require it to discuss all the matters of fact and law raised by them in the administrative procedure.

11. The review carried out by the Community judicature of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article 85(3) of the Treaty in relation to each of the four conditions laid down therein must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.

12. The principle of subsidiarity did not, before the entry into force of the Treaty on European Union, constitute a general principle of law by reference to which the legality of Community acts should be reviewed. No measure adopted before the entry into force of the second paragraph of Article 3b of the EC Treaty may be reviewed by reference to that provision, since the latter would thereby be endowed with retroactive effect.

13. The prohibition of imposing fines laid down in Article 15(5)(a) of Regulation No 17 applies

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only in relation to agreements which have actually been notified and not to agreements of which notification is unnecessary by virtue of Article 4(2)(1) of that regulation. Consequently, even if an agreement is covered by Article 4(2) of Council Regulation No 17, the Commission is entitled to impose fines on the undertakings which applied it, since the agreement had not been notified.

14. In order for an infringement of the competition rules to be regarded as having been committed intentionally, it is not necessary for the undertaking to have been aware that it was transgressing the prohibition laid down by those provisions; it is sufficient that it could not have been unaware that the conduct concerned had the object or effect of restricting competition in the Common Market.

15. The general term "infringement" used in Article 15(2) of Regulation No 17 covers, without distinction, agreements, concerted practices and decisions of associations of undertakings and its use indicates that the upper limits for fines laid down in that provision apply in the same way to agreements and concerted practices as to decisions of associations of undertakings. It follows that the upper limit of 10% of the turnover must be calculated by reference to the turnover achieved by each of the undertakings that are parties to the agreements and concerted practices concerned or by all the members of the associations of undertakings, at least where the internal rules of the association empower it to bind its members. The correctness of this analysis is confirmed by the fact that, in determining the amount of the fines, account may be taken inter alia of such influence as the undertaking may have been able to exercise in the market, in particular by reason of its size and economic power, of which its turnover may give an indication. The influence which an association of undertakings may have had on the market depends not on its own "turnover", which reveals neither its size nor its economic power, but rather on the turnover of its members, which gives an indication of its size and economic power.

In Case T-29/92,

Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid, an association governed by Netherlands law, established in Amersfoort, Netherlands,

Amsterdamse Aannemers Vereniging, an association governed by Netherlands law, established in Amsterdam, Netherlands,

Algemene Aannemersvereniging voor Waterbouwkundige Werken, an association governed by Netherlands law, established in Utrecht, Netherlands,

Aannemersvereniging van Boorondernemers en Buizenleggers, an association governed by Netherlands law, established in Soest, Netherlands,

Aannemersvereniging Velsen, Beverwijk en Omstreken, an association governed by Netherlands law, established in Velsen, Netherlands,

Aannemers Vereniging Haarlem-Bollenstreek, an association governed by Netherlands law, established in Heemstede, Netherlands,

Aannemersvereniging Veluwe en Zuidelijke Ijsselmeerpolders, an association governed by Netherlands law, established in Apeldoorn, Netherlands,

Combinatie van Aannemers in het Noorden, an association governed by Netherlands law, established in Leeuwarden, Netherlands,

Vereniging Centrale Prijsregeling Kabelwerken, an association governed by Netherlands law, established in Leeuwarden, Netherlands,

Delftse Aannemers Vereniging, an association governed by Netherlands law, established in Rotterdam, Netherlands,

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Economisch Nationaal Verbond van Aannemers van Sloopwerken, an association governed by Netherlands law, established in Utrecht, Netherlands,

Aannemersvereniging "Gouda en Omstreken", an association governed by Netherlands law, established in Rotterdam, Netherlands,

Gelderse Aannemers Vereniging inzake Aanbestedingen, an association governed by Netherlands law, established in Arnhem, Netherlands,

Gooise Aannemers Vereniging, an association governed by Netherlands law, established in Huizen, Netherlands,

' s-Gravenhaagse Aannemers Vereniging, an association governed by Netherlands law, established in The Hague, Netherlands,

Leidse Aannemersvereniging, an association governed by Netherlands law, established in Leiden, Netherlands,

Vereniging Markeer Aannemers Combinatie, an association governed by Netherlands law, established in Tilburg, Netherlands,

Nederlandse Aannemers- en Patroonsbond voor de Bouwbedrijven, an association governed by Netherlands law, established in Dordrecht, Netherlands,

Noordhollandse Aannemers Vereniging voor Waterbouwkundige Werken, an association governed by Netherlands law, established in Amsterdam, Netherlands,

Oostnederlandse-Vereniging-Aanbestedings-Regeling, an association governed by Netherlands law, established in Delden, Netherlands,

Provinciale Vereniging van Bouwbedrijven in Groningen en Drenthe, an association governed by Netherlands law, established in Groningen, Netherlands,

Rotterdamse Aannemersvereniging, an association governed by Netherlands law, established in Rotterdam, Netherlands,

Aannemersvereniging "de Rijnstreek", an association governed by Netherlands law, established in Rotterdam, Netherlands,

Stichting Aanbestedingsregeling van de Samenwerkende Bouwbedrijven in Friesland, a foundation governed by Netherlands law, established in Leeuwarden, Netherlands,

Samenwerkende Prijsregelend Vereniging Nijmegen en Omstreken, an association governed by Netherlands law, established in Nijmegen, Netherlands,

Samenwerkende Patroons Verenigingen in de Boouwbedrijven Noor-Holland-Noord, an association governed by Netherlands law, established in Alkmaar, Netherlands,

Utrechtse Aannemers Vereniging, an association governed by Netherlands law, established in Utrecht, Netherlands,

Vereniging Wegenbouw Aannemers Combinatie Nederland, an association governed by Netherlands law, established in Zeist, Netherlands, and

Zuid Nederlandse Aannemers Vereniging, an association governed by Netherlands law, established in Heeze, Netherlands,

represented by Louis H. van Lennep, of the Hague Bar, and Erik H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Luc Frieden, 6, Avenue Guillaume,

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applicants,

v

Commission of the European Communities, represented by Berend J. Drijber, of the Commission' s Legal Service, acting as Agent, assisted by P. Glazener, of the Rotterdam Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision 92/204/EEC of 5 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and 32.571 ° Building and Construction Industry in the Netherlands (OJ 1992 L 92, p. 1) is non-existent or, alternatively, for a declaration that it is void,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: R. Schintgen, President of the Chamber, H. Kirschner, B. Vesterdorf, K. Lenaerts and C.W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 11 July 1994

gives the following

Judgment

Costs

412 Under Article 87(2) of the Rules of Procedure, the unsuccessful parrty is to be ordered to pay the costs if they have been applied for in the successful party' s pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs jointly and severally, including the costs of the application for interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicants jointly and severally to pay the costs, including those relating to the application for interim measures.

The facts

1 As from 1952, a number of associations of contractors came into being in the Netherlands building market, grouped according to sector or region. They drew up rules for their members with a view to organizing competition.

2 In 1963, those associations set up the Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (hereinafter "the SPO") whose object, according to Article 3 of its statutes, is "to promote and administer orderly competition, to prevent improper conduct in price tendering and to promote the formation of economically justified prices". To that end, the SPO draws up rules and regulations (hereinafter "the rules" or "the rules and regulations") providing for "institutionalized

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regulation of prices and competition" and is empowered to impose penalties on contractors affiliated to its member organizations if they breach their obligations under those rules. Implementation of the rules is entrusted to eight executive offices, whose operations are controlled by the SPO. The member associations of the SPO at present number 28 and their total membership exceeds 4 000 building undertakings established in the Netherlands.

3 In 1969, most of the sectoral or regional associations acceded to the SPO.

4 In the period from 1973 to 1979, the various associations undertook standardization of their rules (hereinafter "the previous rules").

5 On 3 June 1980, the Erecode voor Ondernemers in het Bouwbedrijf (Code of honour for contractors in the building industry, hereinafter "Code of Honour") was adopted by the General Assembly of the SPO and made binding on all the contractors belonging to the member associations of the SPO. The Code of Honour provides for a uniform system of penalties for infringements of the rules standardized between 1973 and 1979 and certain material provisions necessary for the application of those rules. The Code of Honour entered into force on 1 October 1980.

6 On 16 August 1985 the Commission sent to the SPO under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, 1959-62, p. 87, hereinafter "Regulation No 17") a request for information concerning the participation of foreign undertakings in the SPO.

7 By Ministerial Decree of 2 June 1986, the Netherlands authorities adopted the Uniform Aanbestedingsreglement (uniform rules on tendering, hereinafter "the UAR") laying down the rules for the award of public contracts, which entered into force on 1 November 1986.

8 On 9 October 1986, the General Assembly of the SPO adopted two (Uniforme Prijsregelende Reglementen (Uniform Price-Regulating Rules, hereinafter "UPR rules") laying down the procedural framework for competition between contractors tendering for building works. The first set of UPR rules concerns invitations to tender under the restricted procedure (hereinafter "the UPRR rules") and the second set concerns invitations to tender under the open procedure (hereinafter "the UPRO rules"). The two sets of rules have the same structure and contain precise and detailed provisions concerning the obligations incumbent on undertakings belonging to the SPO and the operating conditions thereof. The UPR rules are themselves supplemented by four regulations and three annexes. All those rules and regulations entered into force on 1 April 1987.

9 By Royal Decree of 29 December 1986 the Netherlands Government declared those rules non-binding, with the exception of those which fulfilled certain conditions. That decree entered into force on 1 April 1987. The UPR rules fulfilled the conditions laid down by the royal decree.

10 On 15 June 1987 the Commission carried out inspections at the SPO under Article 14 of Regulation No 17. In July and November of the same year it did likewise at the Zuid Nederlandse Aannemers Vereniging (hereinafter "the ZNAV"). The purpose of those inspections was to establish whether the SPO rules were liable to affect trade between Member States.

11 On 13 January 1988 the SPO notified the UPR rules and the Code of Honour to the Commission with a view to obtaining a negative clearance or, in the alternative, an exemption under Article 85(3) of the EEC Treaty (hereinafter "the Treaty").

12 On 23 June 1988 the UPR rules were amended. The amendment entered into force on 1 July 1988.

13 On 13 July 1989, the SPO supplemented its notification of 13 January 1988.

14 On 26 July 1989 the municipality of Rotterdam (Netherlands) complained to the Commission concerning certain parts of the SPO' s rules and regulations.

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15 On 7 November 1989 the Commission decided to initiate a procedure against the SPO and sent a statement of objections to it on 5 December 1989.

16 The SPO responded to the statement of objections on 5 April 1990.

17 The administrative hearing provided for by Article 19 of Regulation No 17 was held on 12 June 1990.

18 On 15 March 1991 the SPO entered into discussions with the Commission to examine whether the rules and regulations notified might qualify for an exemption if they were amended. The SPO and the Commission exchanged letters on this matter between 12 April 1991 and 15 January 1992.

19 On 5 February 1992 the Commission adopted the contested decision.

20 On 12 February 1992 a decision dated 5 February 1992 bearing reference number C(92) 66 def. was sent to the applicants. It was notified on 17 February 1992. A passage from that decision was missing and the addresses of various associations of undertakings mentioned in the operative part of the decision were incorrect.

21 On 26 February 1992 a decision dated 5 February 1992 bearing reference number C(92) 66 def. rev. was sent to the applicants (and reached the SPO on 2 March 1992). The text of that decision included the passage missing from the text notified on 17 February 1992 and subsequently added. The errors in the addresses of certain associations of undertakings had also been rectified.

22 In Article 1 of the decision the Commission finds that the statutes of the SPO of 10 December 1963, as subsequently amended, the two sets of UPR rules of 9 October 1986 and the regulations and annexes forming part of them, the previous and similar UPR rules which replaced them and the Code of Honour, except for Article 10 thereof, constituted infringements of Article 85(1) of the Treaty.

23 In Article 2 of its decision, the Commission rejects the application made on 13 January 1988 for an exemption under Article 85(3) of the Treaty in respect of the UPR rules of 9 October 1986 and the Code of Honour.

24 In Article 3(1) and (2) of the decision the Commission requires the SPO and its member organizations to bring to an end immediately the infringements found and to inform the undertakings concerned in writing of the content of the decision and the fact that the infringements have been brought to an end, indicating the practical consequences thereof, such as the freedom of each of such undertakings to withdraw at any time from the said rules and regulations. The SPO and its member organizations were also required to communicate to the Commission, within two months following notification of the decision, the information transmitted to the undertakings in accordance with Article 3(2).

25 In Article 4 of the decision the Commission imposed fines totalling ECU

22 498 000 on the 28 associations concerned.

Procedure

26 By application lodged at the Registry of the Court of First Instance on 13 April 1992 the SPO and 28 member associations of it brought an action under the second paragraph of Article 173 of the Treaty seeking a declaration from the Court that Commission Decision 92/204/EEC of 5 February 1992 relating to a proceeding pursuant to Article 85 of the Treaty (IV/31.572 and IV/31.571 ° Building and Construction Industry in the Netherlands OJ 1992 L 92, p. 1) was non-existent or, alternatively, a declaration that it was void.

27 By a separate document received at the Registry of the Court of First Instance on the same day the applicants also applied under Articles 185 and 186 of the Treaty and Article 105(2) of

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the Rules of Procedure of the Court of First Instance for interim measures suspending the operation of the contested decision.

28 The parties presented oral argument on 18 June 1992.

29 On 16 July 1992, the President of the Court of First Instance made an order, the operative part of which is as follows:

1. Operation of Article 3 of the Commission decision relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and IV/ 31.571 ° Building and Construction Industry in the Netherlands) is suspended in so far as it concerns elements of the contested rules and regulations that are not linked to the existence of a concerted practice and an exchange of information between contractors, to the granting of preference or the direct passing on to contract awarders of amounts relating to reimbursements for calculation costs and contributions to trade organizations.

2. The applicants shall communicate to the Commission and the Court of First Instance, not later than 1 October 1992, the measures they have taken to make the system function in conformity with this order.

3. For the rest, the application for suspension of operation is dismissed.

4. Costs are reserved.

30 By letter received at the Registry of the Court of First Instance on 14 August 1992 the applicants forwarded to the President of the Court the provisional instructions, applicable since 20 July 1992, which the first applicant had sent to the other applicants in compliance with the order of the President of the Court of First Instance of 16 July 1992.

31 On 27 August 1992 the Netherlands company Dennendael BV sought leave to intervene in support of the defendant pursuant to Article 37 of the Protocol on the Statute (EEC) of the Court of Justice.

32 By order of 12 January 1993 the Court of First Instance granted leave for that company to intervene in support of the defendant.

33 On 21 January 1993 the intervener lodged its statement in intervention.

34 By letter of 17 November 1993 the intervener informed the Court of First Instance that it wished to withdraw its intervention, and the Court took formal note thereof by order of 4 May 1994.

35 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory inquiry. However, the Court invited the parties to answer certain questions in writing before the hearing.

36 Following the judgment delivered by the Court of Justice on 15 June 1994 in Case 137/92 P Commission v BASF and Others [1994] ECR I-2555, the Court of First Instance, by order of 27 June 1994, called on the Commission to "produce the decision adopted by the Commission at its sitting of 5 February 1992 relating to a procedure pursuant to Article 85 of the EEC Treaty (IV/31.572 and IV/32.571 ° Building and Construction Industry in the Netherlands) authenticated at that time in the language in which it is binding by the signatures of the President and the Executive Secretary pursuant to the first paragraph of Article 12 of the Commission' s Rules of Procedure as in force at that time" and to forward that document to the Court of First Instance "no later than 6 July 1994".

37 Following that order, by letter of 4 July 1994 the Commission lodged a copy of the Commission decision of 5 February 1992 bearing reference number C(92) 66 def. rev. and the signature of the President of the Commission and of its Secretary General, preceded by the words "the present decision

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was adopted by the Commission at its 1092nd meeting held in Brussels on 5 February 1992. It comprises 92 pages plus annexes". It also lodged certain other documents.

38 The first of those documents is a letter which counsel for one of the applicants sent to the relevant official of the Directorate-General for Competition (DG IV) on 19 February 1992 indicating that in the decision which had been notified to him something was missing between pages 86 and 87. He asked that official to undertake the necessary checks and take the necessary rectifying measures.

39 The second document is a fax, also dated 19 February 1992, which the official in question sent to an official of the Secretariat General of the Commission, asking him to establish "whether the version of the decision adopted by the Commission and notified to its addressees conforms perfectly with the draft and, if necessary, to take the action needed to ensure that the addressees of the decision are formally apprised of the full text thereof".

40 The third document is a letter of 21 February 1992 sent to the relevant official of DG IV by one of the lawyers for the applicants in which he asks the Commission to notify only to SPO the copies of the rectified version of the decision since the addresses of some of its member organizations were incorrect.

41 The fourth document is a letter from the relevant official of DG IV, also dated 21 February 1992, to counsel for the applicants in which he states that, following a telephone conversation with one of them, the Secretary General was considering different methods of (re-)notification with respect to all the organizations to which the decision was addressed (at their rectified addresses, where appropriate).

42 The parties presented oral argument and answered questions put to them by the Court at the hearing on 11 July 1994. During the hearing, a film concerning the rules and regulations at issue in this case was shown at the request of the applicants and their expert was heard.

Forms of order sought

43 The applicants claim that the Court should:

(i) declare that the Commission' s measure entitled "Commission decision of 5 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and IV/32.571 ° Building and Construction Industry in the Netherlands)" is non-existent;

(ii) in the alternative, annul the Commission decision of 5 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and IV/32.571 ° Building and Construction Industry in the Netherlands);

(iii) take any other measures considered necessary by the Court;

(iv) order the Commission to pay the costs, including those relating to the application for interim measures lodged under Articles 185 and 186 of the EEC Treaty.

The Commission contends that the Court should:

(i) dismiss the applicants' claims;

(ii) order the applicants to pay the costs, including those of the application for interim measures.

Pleas in law and arguments of the parties

44 The applicants seek two orders: primarily, they seek a finding that the contested decision is non-existent or, at least, void for infringement of essential procedural requirements; in the alternative, they seek annulment of that decision.

The principal claim

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Arguments of the parties

45 The applicants claim, primarily, that by virtue of the case-law of the Court of First Instance the contested decision is non-existent (judgment in Case T-79/89 and others BASF and Others v Commission [1992] ECR II-315) for breach of the principle of inalterability of measures and lack of competence ° a page having been added thereto without the approval of the college of the Commissioners ° and infringement of the rules on languages, since the college of Commissioners did not adopt the decision only in the language in which it was binding. A passage was missing from Decision No C(92) 66 def. of 5 February 1992 which was sent to the applicants on 12 February 1992 and notified to them on 17 February 1992 and the addresses of various associations of undertakings mentioned in the operative part of the decision were incorrect.

46 On 26 February 1992, a decision dated 5 February 1992 bearing reference number C(92) 66 def. rev. was sent to the applicants (and reached the SPO on 2 March 1992). It included the passage missing from the text notified on 17 February 1992 and subsequently added. The errors in the addresses of various associations of undertakings had also been rectified.

47 The applicants also state that the document bearing reference number C(92) 66 def. was first sent to each of the applicants by letter of 12 February 1992 signed by the Secretary General of the Commission and that it had not been notified until about 17 February. The fact that the text of the contested decision was not available on the day after 5 February 1992 confirms, in their view, that the text notified to the applicants was not the same as that which had been submitted to the college of Commissioners. The fact that the revised document was given a new reference (C(92) 66 def. rev.) supports the same conclusion. Moreover, they maintain, the Commission does not deny that document C(92) 66 def. rev. was never submitted as such to the college of Commissioners.

48 Consequently, the applicants call on the Commission to prove, by means of a certified extract from the minutes of the Commission meeting of 5 February 1992, that it in fact met to consider the Dutch version of the contested decision and that it was that text which it adopted.

49 The Commission replies that the applicants have produced no evidence to show that the principle of the inalterability of measures was infringed after the adoption of the decision. In the absence of such evidence, the decision should be regarded as lawful (see the judgment of the Court of First Instance in Case T-10/89 Hoechst v Commission [1992] ECR II-629, paragraph 375).

50 It contends that the decision was sent to the applicants a second time because a page was missing from the text sent on 12 February 1992 and that, in the case of certain applicants, it had been sent to an address which was no longer correct. The disappearance of one page was attributable to a technical defect in the Commission' s internal electronic mail system which arose after adoption of the decision.

51 The Commission also states that the college of Commissioners did have before it, on 5 February 1992, the text of the draft decision in all the Community languages, including Dutch. That draft was adopted at that meeting.

Findings of the Court

52 The Court finds, first, that it follows from paragraph 52 of the judgment of the Court of Justice in Case C-137/92P, Commission v BASF, cited above, that the gravity of the irregularities complained of by the applicants, which concern the procedure for adoption of the Commission decision, is not so clear that the decision must be regarded as legally non-existent.

53 It follows that the applicants' main claim must be rejected in so far as it seeks a finding that the contested decision is non-existent.

54 However, it is necessary to consider, secondly, whether the irregularities complained of by

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the applicants might, as they claim in the alternative, be such that the contested decision should be annulled for infringement of the principle of inalterability of measures and of the rules on the use of languages.

55 As regards the inalterability of measures, the Court considers that it is apparent from paragraph 59 of the judgment of the Court in Case C-137/92P that only where a measure is challenged on the basis of serious and convincing evidence of breach of the principle of inalterability of Community measures can the Court accede to a request that it order production of a decision, in the language or languages in which it is binding, authenticated by the signatures of the President and the Executive Secretary, in order to verify that the texts notified conform exactly with the text adopted by the college of Commissioners.

56 In the present case, the Court considered, on the basis of the information available to it at that time, that the fact that the text of the decision notified on 17 February 1992 did not correspond to the text notified on 26 February 1992 constituted, at first sight, serious and convincing evidence that the changes made to the first text had not been adopted by the college of Commissioners. It was for that reason that, on 27 June 1994, it ordered production of the decision adopted by the Commission at its meeting of 5 February 1992, authenticated at that time, in the language in which it is binding, by the signatures of the President and the Executive Secretary pursuant to the first paragraph of Article 12 of the Commission' s Rules of Procedure in force at that time.

57 However, the Court finds that the documents produced by the Commission in response to its order of 27 June 1994 confirm that the difference between the first text notified and the second was attributable to a technical defect in the operation of its electronic mail system which caused the loss of a page and that, consequently, the text notified on 26 February 1992 conformed perfectly with the text adopted by the college of Commissioners at its meeting of 5 February 1992. Indeed, counsel for the applicants informed the Commission on 19 February 1992 that "in the SPO decision, there is something missing between pages 86 and 87. I should be grateful if you would look into this and take the measures necessary to rectify matters. If it is discovered that an error found its way into the text, I should be grateful if you would send an amendment to all the addressees". The addressee of that letter, the relevant official of DG IV, sent a memorandum on the same date to the Secretariat General of the Commission asking that the necessary checks be carried out. According to that memorandum, "I have received from your department the text of the abovementioned decision in the Dutch language. In that document, a passage is missing which was definitely included in the draft submitted to the Commission. May I ask you to check whether the text adopted by the Commission and notified to the addressees of the decision conforms exactly with the draft and, if necessary, to take the action needed to ensure that the addressees are formally apprised of the full text of the decision? Please find enclosed as annex I hereto: the cover page of document C(92) 66 def.[...] pages 86 and 87 of that document. Please find enclosed as annex II hereto: pages 85, 86 and 87 of the draft decision in question (version in the Dutch language, as submitted to the Commission): the passage missing from that document, C(92) 66 def., is clearly indicated".

58 In view of that information, of which the Commission' s interpretation has not been challenged by the applicants, the evidence produced by the applicants can no longer be regarded as serious and convincing.

59 It has thus been established that the text of the decision notified to the applicants on 26 February 1992 is in perfect conformity with the text adopted by the college of Commissioners on 5 February 1992.

60 As regards compliance with the rules on the use of languages, the Court considers that it is clear from the letter sent by the DG IV official to the Secretariat General that the draft decision was submitted to the Commission in its Dutch language version, which is also borne out by the fact

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that, on 5 February 1992, the operative part of the decision was notified by fax to the applicants in the Dutch language.

61 It follows that there can be no question of any infringement of the rules on the use of languages in this case.

62 The Court also notes that, in response to its order of 27 June 1994, the Commission produced the text of the Commission decision of 5 February 1992 bearing reference number C(92) 66. def. rev. and the signatures of the President of the Commission and its Secretary General preceded by the words "the present decision was adopted by the Commission at its 1092nd meeting held in Brussels on 5 February 1992. It comprises 92 pages plus annexes". At the hearing, the applicants objected to the fact that that document does not give the date on which the signatures of the President and the Secretary General were appended. In his covering letter of 4 July 1994 and at the hearing the Agent for the Commission stated that that document was the text of the decision as adopted by the college of Commissioners on 5 February 1992 and as authenticated at that time. In response to a question from the Court, the Agent for the Commission explained that his statement on that point is borne out by the fact that, when the decision was adopted the Commission had already been alerted to the inferences which the Court might draw from the absence of authentication of its measures since, at that time, the hearing had already been held in Joined Cases T-79/89 and others BASF and Others v Commission, and the Court had already ordered production of the text of the decision at issue in that case, authenticated by the signatures of the President and the Executive Secretary pursuant to the first paragraph of Article 12 of the Commission' s Rules of Procedure in force at that time. The Court notes that the applicants did not object to the explanation given by the Agent for the Commission.

63 On the basis of the aforementioned documents and the information supplied by the Agent for the Commission, the Court finds that the document bearing reference number C(92) 66 def. rev. produced by the Commission is the text of the decision as adopted by the college of Commissioners on 5 February 1992 and as authenticated at that time.

64 It follows that the applicants' main claim must be dismissed.

The alternative claim

65 The applicants base their alternative claim on nine grounds of challenge which may be condensed into five pleas in law. The first plea is that Article 85(1) of the Treaty was infringed by the Commission' s having incorrectly defined the relevant market, misapprehended the scope of the rules and regulations at issue and wrongly considered that they appreciably affected trade between Member States. The second plea alleges infringement of Article 85(3) of the Treaty; the Commission (i) failed to take account of the particular characteristics of the building industry in the Netherlands and reversed the burden of proof; (ii) misunderstood the scope of the rules and regulations at issue in relation to the four preconditions for the grant of an exemption, in particular by refusing to take account of the amendments made by the applicants "in the context of the notification"; and (iii) breached the principles of proportionality and subsidiarity by refusing to grant the requested exemption. The third plea alleges infringement of Articles 4(2)(1) and 15(2) of Regulation No 17 in that the Commission imposed a fine even though the infringement had not been established or, at least, was covered by immunity, and wrongly considered that the infringement had been committed deliberately or negligently and imposed an excessive fine. The fourth plea alleges infringement of Article 190 of the Treaty in that the Commission did not give an adequate statement of reasons regarding either infringement of Article 85(1) of the Treaty or rejection of the application for an exemption under Article 85(3) of the Treaty. The fifth plea alleges breach of the applicants' rights of defence.

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First plea: infringement of Article 85(1) of the Treaty

First limb: incorrect definition of the relevant market

Arguments of the parties

66 The applicants state that the Court of First Instance has held that appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behaviour (judgment of the Court of First Instance in Joined Cases T-68, 77 and 78/89 SIV and Others v Commission [1992] ECR II-1403). In the present case, they maintain, the Commission failed to define the relevant product market and geographical market.

67 As regards the product market, they state that the eight sectors of the building industry covered by the rules and regulations at issue do not come within a single product market but constitute at least as many ° if not more ° distinct product markets, in so far as the activities covered by them are not interchangeable from the point of view of either supply or demand.

68 The applicants add that, although they took the view in their notification that the Netherlands building market constitutes a sole and single product market, that was in the context of an application for a negative clearance or exemption for the UPR rules which were introduced in 1987 and were for the first time applicable without distinction to the eight product markets concerned. The context of the contested decision is entirely different since it is directed not only against the 1987 UPR rules but also against the previous rules, which differ for each of the sectors of the building industry. Consequently, the Commission should have drawn a distinction according to the product markets concerned, at least to the extent to which it sought to incriminate the rules applicable before 1 April 1987.

69 As regards the geographical market, they observe that the Commission found in paragraph 23 of the decision that there were various relevant geographical markets within the market to which the rules apply. It thus conceded that the scope of the relevant geographical market may vary according to the sector and the nature of the activities concerned. Since the geographical market for smaller-scale works is more limited, the Commission should have found that all the rules fall outside the scope of Article 85 of the Treaty in so far as they relate to such works since they cannot affect trade between Member States (see below, third limb of the plea).

70 As regards the product market, the Commission replies, first, that the relevant market should not be defined by reference to the substitutability of the products concerned but rather on the basis of the activities actually undertaken by the contractors and the scope of the rules. The UPR rules and the Code of Honour apply without distinction to the various sectors mentioned by the applicants, regardless of the nature, extent or location of the works. That approach is fully in conformity with the views put forward by the applicants in the course of the administrative procedure.

71 The Commission also contends that it is inappropriate to distinguish between the rules prior to 1987 and the UPR rules as regards definition of the relevant product market since the previous rules applicable to the various sectors were standardized between 1973 and 1979 under the aegis of the SPO.

72 As regards the geographical market, the Commission replies that the regular fluctuations in demand, the breadth of activities of large and medium-sized undertakings and the fact that even some small undertakings submit tenders on occasion for works to be undertaken outside the region where they are established show that there are no distinct geographical markets within the construction market to which the incriminated regulations apply. It also states that the applicants did not at any stage of the administrative procedure refer to the existence of different geographical markets or supply information enabling their extent to be defined.

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Findings of the Court

73 The Court considers that it is necessary, at the outset, to determine the scope of the Commission' s obligation to define the relevant market before finding an infringement of Articles 85 and 86 of the Treaty.

74 The approach to defining the relevant market differs according to whether Article 85 or Article 86 of the Treaty is to be applied. For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour (judgment of the Court of First Instance in Joined Cases T-68/69, T-77/89 and T-78/89 SIV and Others v Commission, cited above, paragraph 159), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. For the purposes of applying Article 85, the reason for defining the relevant market is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the Common Market.

75 That is why, for the purposes of Article 85, the applicants' objections to the definition of the market adopted by the Commission cannot be seen in isolation from those concerning the impact on trade between Member States and the impairing of competition. The merits of this approach are confirmed by the fact that, in their application for negative clearance or an exemption, the applicants dealt with the issue of definition of the market only in the part concerning effects on trade between Member States.

76 It is important to note that, in treating the building market in the Netherlands as a whole as the relevant market, the Commission merely followed the approach adopted by the applicants in their notification of the UPR rules with a view to obtaining a negative clearance or an exemption and in their reply to the statement of objections. In the administrative procedure, the applicants never claimed that the eight sectors of the construction industry constituted separate markets for the purposes of the Community competition rules or that distinct geographical markets existed. On the contrary, they stated in their notification (p. 19, paragraph 2.2.1.) that

Naar het oordeel van de SPO dient als de relevante produktmarkt vanuit een macro-perspectief te worden aangemerkt de markt voor het aannemen van bouwwerken. Slechts die produktmarkt lijkt vanuit kartelrechtelijk oogpunt relevant. Dit is een omvangrijke markt. Weliswaar is het in beginsel (wellicht) mogelijk binnen deze markt talloze marktsegmenten te onderscheiden naar gelang de aard en de omvang van de aan te nemen bouwwerken, doch het is twijfelachtig of dergelijke segmenten zouden kunnen worden aangemerkt als afzonderlijke produktmarkten in het licht van het Europees mededingingsrecht. Zowel de aanbodzijde als de vraagzijde van de betrokken markt heeft een dermate diverse samenstelling, dat het in beginsel onmogelijk lijkt bepaalde submarkten te isoleren, waarop bepaalde categorieen aanbesteders en aannemers bij uitsluiting opereren. Een - noodgedwongen - kunstmatige indeling van de bouwmarkt in submarkten is bovendien niet dienstig voor de beoordeling van de onderhavige mededingingsregelingen, aangezien enerzijds de Erecode van toepassing is op bouwwerken van alle categorieen, terwijl het UPR betrekking heeft op alle werken van de categorieen, genoemd onder nr. 2.1.1..

["According to the SPO, the relevant product market from the macroeconomic point of view is the construction market. Only that product market appears relevant from the point of view of competition law. It is an extensive market. Whilst it may be possible, in principle, to identify within that market innumerable market segments reflecting the nature and size of the constructions to be erected, it is nevertheless doubtful that such segments could be described as separate product markets for the purpose of European competition law. Both supply and demand are so diversified in that market

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that it would appear, in principle, impossible to isolate submarkets in which only certain categories of contract awarders and contractors operate. A necessarily artificial division of the construction market into submarkets would, moreover, be unhelpful in assessing the competition rules in question, since, first, the Code of Honour applies to all building work and, secondly, the UPR rules cover all works in the categories mentioned in paragraph 2.1.1." (that is to say, all those to which the Commission claims that the UPR rules apply).

77 The Commission properly adopted that definition of the market, since the rules introduced in 1987 apply without distinction to all the eight sectors concerned. In their reply, moreover, the applicants subscribed to that approach regarding the assessment of the UPR rules introduced in 1987.

78 However, they maintain their criticism of the definition of the market as regards the previous rules, asserting that the view adopted by them in the administrative procedure was dictated by the fact that their application for a negative clearance or exemption related to the rules introduced in 1987 whereas the decision also incriminates the previous rules, which were different for each sector.

79 In that connection, it is important to note that, whilst it is true that the considerations set out in the notification related only to the rules introduced in 1987, the statement of objections was directed also against the previous rules. Consequently, the applicants' reply to that statement [see pages 23 to 71 and in particular Title 3: "De relevante markt: de bouwmarkt in Nederland" ("The relevant market: the building market in the Netherlands")], in which they maintained the same view regarding definition of the market, also related to the previous rules.

80 It follows that, in the administrative procedure, the applicants did not consider that a different approach was called for regarding definition of the market in the case of the previous rules.

81 Similarly, the Court considers that the Commission was also right to adopt that definition of the market in relation to the previous rules as well. First, the applicants have not been able to indicate any substantial differences between the previous rules and the rules introduced in 1987 or as between the various sets of previous rules themselves. It must be concluded that the various sets of previous rules applied in the same way to each of the sectors and each of the geographical areas covered by them. Furthermore, the applicants stated at the hearing that all building products were covered throughout the Netherlands by the various sets of previous rules, being covered either by regional rules covering several products, or by rules specific to certain products but extending throughout the territory of the Netherlands.

82 It follows that the Commission was right to adopt the Netherlands building market as the relevant market as regards both the previous rules and the rules introduced in 1987 in order to consider whether they affected trade between the Member States or undermined competition.

83 This limb of the plea must therefore be rejected in so far as it does not overlap with the other two limbs of the plea and must be considered with the latter in all other respects.

Second limb: misapprehension of the content and scope of the contested rules

I ° Overview

Arguments of the parties

84 According to the applicants, it is essential to keep in mind the end purpose of the contested rules when considering their compatibility with Community competition law: to prevent haggling by setting up a binding system under which contractors compete on only one occasion and to improve the transactional structure of the market by attributing to each construction project awarded the design costs to which it gave rise.

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85 They claim that the Commission misapplied Article 85(1) of the Treaty by taking the view that the rules seriously infringed that provision. That misapplication derived from the Commission' s purely theoretical and abstract approach to the manner in which competition must be upheld by that provision, a view which is a priori inimical to any regulation of the market.

86 The Commission replies that, for the purposes of Article 85(1) of the Treaty, all that is important is to establish that there is a restriction of competition ° not whether or not a restriction of competition is acceptable. In answering that question, the Commission analysed the economic and legal context of the infringement. It therefore focused its appraisal on the building market and not on a "standardized market operating ideally". It nevertheless refused to concede that restrictive agreements are inevitable in the building market and considers that undistorted competition provides a specific means of attaining the objectives of the Treaty.

Findings of the Court

87 The Court notes that, according to the decision, the system established by the rules introduced in 1987 may be described as follows. Those rules seek to establish a procedure to be observed by the applicants' members where they intend submitting a price tender for a particular project. According to the applicants, that procedure has a twofold purpose: to combat the haggling in which contracting authorities tend to engage and correct imbalances between supply and demand resulting from a lack of openness on the supply side of the market and the high transaction costs incurred in respect of tenders.

88 To that end, the applicants established physical and human infrastructures in order to apply the procedure introduced by the rules. That procedure, which differs somewhat according to whether invitations to tender are open or restricted or whether or not they are simultaneous, comprises several stages between notification to the appropriate SPO office of the intention to submit a price tender for a particular project and conclusion of the contract between the contract awarder and the successful tenderer.

89 Those stages may be summarized as follows: any contractor who is a member of the applicants must notify the relevant SPO office if he intends submitting a price tender for a particular project, so that that office can apply the rules (decision, paragraph 24).

90 If there are several notifications, the office summons the notifying undertakings to a meeting. They must attend, failing which they are penalized. At the meeting, chaired by an official from the office, certain decisions will be taken either by a majority or unanimously (decision, paragraph 25). The first decision is whether to designate an entitled undertaking, which will be one of the contractors participating in the meeting, who will alone be entitled to have dealings with the contract awarder in order to negotiate the content and price of his tender (decision, paragraphs 26 and 39 to 41). If it is decided that an entitled undertaking will be designated, the meeting goes on to determine the data on the basis of which the various price tenders will be compared. Thus, according to the applicants, the meeting decides whether the invitations for price tenders are or can be rendered comparable and, according to the Commission, whether the price tenders of the various contractors are or can be rendered comparable (decision, paragraph 27). If the answer is affirmative, an entitled undertaking may be designated by the meeting. Before designating the entitled undertaking, the meeting decides on which basis price increases will be defined. Those increases, to be borne by the client, are essentially of two kinds: reimbursements for calculation costs and contributions to the operating costs of the trade organizations, including SPO and its offices (decision, paragraphs 31 to 33). Once that decision has been taken, each contractor indicates his tender figure (referred to as a blank figure) and hands it to the chairman (decision, paragraph 28). That figure does not yet include the price increases. At that time, a contractor may ask the meeting to grant him preference, that is to say to designate him as an entitled undertaking provided that he submits a price tender

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equal to the lowest blank figure (decision, paragraph 30). The chairman then examines the figures and may disclose them to the participants if the meeting so decides (decision, paragraph 28). After examining the others' figures, each contractor may decide to withdraw his tender, subject to the loss of certain rights (decision, paragraph 29). In principle, the contractor who submitted the lowest blank figure is designated as the entitled undertaking (decision, paragraph 39). Each contractor thereupon adds to his blank figure price increases calculated on the basis previously determined by the meeting. Those increases are the same for each contractor and are intended in particular to cover all the calculation costs of all the participants in the meeting. They will be borne by the client if the latter awards the contract to one of the members of the SPO (decision, paragraphs 31 to 33). The successful tenderer to which they are paid will have to transfer them to the office, which will for the most part repay them to the contractors in respect of calculation costs and to the trade organizations in respect of the contributions payable to them (decision, paragraphs 42 to 46). Finally, the differences between the tender prices of the various contractors may be increased or decreased by the meeting (decision, paragraph 38).

91 If the office receives only one notification for a contract, the latter will be regarded as a private contract and only the notifying undertaking will have the status of entitled undertaking, which means that any member undertakings of the applicants consulted subsequently will be able to submit a tender only with its consent or, in the event of a dispute, that of an arbitration committee (decision, paragraphs 41, 52 and 53). However, it is possible that between the notification from the first contractor and award of the contract to him, the client may consult other contractors who are members of the applicants and whose notifications are received after the contract is awarded. In such cases, the successful tenderer is required to pay the office an amount equal to 3% of the price in respect of price increases (decision, paragraph 60).

92 There are also rules laying down a procedure applicable to tenders by subcontractors which essentially incorporate the provisions applicable to other price tenders, adjusting them to the specific requirements of subcontracting (decision, paragraphs 55 to 59).

93 The Court notes that the decision raises essentially four types of objections against the rules drawn up by the applicants. The first concerns the fact that they establish concertation between contractors involving the exchange of information on the cost components of the contract, the characteristics of the tenders and the prices proposed by each contractor. The second group of objections is directed against the fact that, during such concertation, parts of prices are fixed, the prices proposed are sometimes changed and partial prices are also fixed. The third group of objections relates to the fact that following such concertation, one of the contractors ° the entitled undertaking ° enjoys protection from the other participants in the concertation since the latter lose the right to negotiate their tender with the client. The entitled undertaking also enjoys protection from the other members of the applicants in that, if they are subsequently approached, they will be able to submit a tender only with its consent or that of a committee of contractors, and only then if that tender is lower by a specified percentage than that of the entitled undertaking. The fourth group of objections concerns the fact that the rules confer on the members of the applicants advantages in their competition with third parties.

94 The applicants look at those groups of objections from various angles: they either draw attention to the beneficial effects which the rules have on competition and therefore for consumers, or they challenge the factual basis of the objections, or else they reject the legal characterization of the facts as constituting an infringement of Article 85(1) of the Treaty.

95 The Court finds, first, that the Commission was right to consider the applicants' rules as forming a single whole from which the various components cannot be artifically isolated.

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96 The beneficial effects of the rules described by the applicants cannot be taken into consideration for the purposes of Article 85(1) of the Treaty but are pertienent only to the application of the criteria laid down by Article 85(3) of the Treaty. It follows that those various arguments must be examined in the context of the second plea in law.

97 Accordingly, as far as the present plea in law is concerned, it is appropriate only to examine the applicants' arguments concerning the correctness of the facts and the assessment of them under Article 85(1) of the Treaty. The Court will therefore consider in turn the arguments relating to concertation between contractors intending to submit a price tender, concerted fixing of prices or parts of prices, limitation of contractors' freedom to negotiate, and the conduct of the SPO towards non-member contractors.

II ° Concertation between contractors intending to submit a price tender

Arguments of the parties

(1) The obligation to notify the intention to submit a price tender (decision, paragraphs 24 and 79)

98 The applicants, which do not challenge the description of this aspect of the regulations contained in paragraph 24 of the decision, claim that the obligation to notify, and the notification itself, do not, as such, have any significance in competition law. They consider, in particular, that the third subparagraph of paragraph 79 of the decision is misconceived in that it criticizes the fact that the office may, on request, disclose to a notifying undertaking the number of undertakings which have lodged a notification.

99 The Commission replies that the obligation to notify must not be examined per se but as an integral part of the rules. It adds that the information obtained from the notifications enables the notifying undertakings to anticipate the intensity of competition and therefore, indirectly, the foreseeable level of the final tender.

(2) The meetings held in accordance with the UPR rules (decision, paragraphs 25 to 58 and 80 to 92).

(a) Agreement on the principle of designating an entitled undertaking (decision, paragraphs 26 and 80).

100 The applicants contest the statement in paragraph 80 of the decision that the number of cases in which the meeting decides to forgo designation of an entitled undertaking is small and contend that their research shows that an entitled undertaking is appointed only in 39% of cases.

101 The Commission replies that paragraph 80 refers to the number of cases in which the meeting forgoes designation of an entitled undertaking a priori, that is to say before ruling on the comparability of the information concerning the tendering procedure, and not to the number of cases in which, without waiving designation in advance, the meeting does not designate an entitled undertaking, in most cases because it has found that the information relating to the tendering procedure is not comparable.

(b) Comparison of the cost elements of the contract (decision, paragraphs 27 and 81). GROUNDS CONTINUED UNDER DOC.NUM : 692A0029.1

102 The applicants maintain that the decision misstates the nature of the information exchanged at the meeting. That information relates solely to particulars provided by the client awarding the contract. It is necessary to exchange such information to check that the invitations to which the participants in the meeting are responding are comparable and thereby to ensure that there is no comparison of blank figures relating to different invitations to tender. As a result, that exchange

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of information enhances competition, to the greater satisfaction of contract awarders.

103 They also claim that the information must cover certain tendering conditions where the latter are unreasonable, in order to ensure that the contract awarders do not make contractors bear unforeseeable risks. Without such concertation, contractors would individually be confronted with the following dilemma: either to accept unreasonable conditions ° and therefore experience problems in carrying out the works ° or to make their price tender subject to other conditions ° and therefore leave the way open for a competitor to be chosen. Thus, concertation regarding performance times is possible only if the time-limits set by the contract awarder are unrealistic.

104 The applicants add that the exchange of information prompts contractors to formulate price tenders calculated within narrower limits because the risks are more foreseeable, and ultimately the contract awarders benefit from this.

105 They consider that the criticism of the exchange of information concerning the contract awarder' s requirements is not only incorrect as regards the context of such information but also displays confusion between tendering arrangements and an oligopolistic situation, as a result of which the Commission regards any exchange of information concerning a tendering procedure as contrary to the Treaty.

106 In short, the applicants criticize the Commission for considering that any exchange of information between competitors which is liable to reduce uncertainties in an entirely opaque market in itself constitutes a restriction of competition.

107 The Commission replies that the applicants have given a false impression of the content of the information exchanged. It is impossible to check whether the tenders called for are comparable or may be rendered comparable without knowing how the participants in the meeting intend to react to the invitation to tender. Exchange of information thus relates to particular aspects of the works known only to one or other of the participants, who is thus deprived of a competitive advantage. As a result, competition is not enhanced but curtailed. The Commission has produced a number of reports of contractors' meetings in support of its statements.

108 It adds that it is not for contractors to decide together whether certain conditions in invitations to tender, such as completion times or the dimension of foundations, are unreasonable, still less to lay down their own conditions in concertation where they consider it appropriate to do so.

109 The Commission states that the exchange of information occurring at the meeting is just as damaging to competition as that which takes place between competitors in an oligopolistic market.

(c) Handing over of blank figures (decision, paragraphs 28 and 82)

110 The applicants maintain that the handing over of unalterable blank figures to the chairman of the office does not restrict competition but merely brings forward the time at which competition takes place. Delivery of tender prices to the contract awarder is replaced by delivery of blank figures to the independent chairman of the SPO office concerned. The fact that the blank figures may not be altered after they have been delivered ensures that competition is not distorted but is merely brought forward in order to avoid the practice of successive bargaining.

111 For the Commission, it is not the delivery of unalterable blank figures itself which constitutes an infringement but rather the fact that they have been fixed on the basis of information exchanged at the meeting. It adds that the delivery of blank figures forms an integral part of a procedure which substitutes practical cooperation between contractors for the risks of competition, and must be regarded as such.

(d) Possibility of withdrawal after comparison of prices (decision, paragraphs 29, 83 and 84)

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112 The applicants maintain that the possibility of withdrawing after prices have been compared not only involves no restriction of competition but in fact reinforces competition in that it enables contractors to calculate their tenders within narrower limits, since they know that, if they make an error which might lead to economically unjustified prices, they will be able to withdraw their tender. That possibility is, moreover, used only where one of the contractors who handed in a blank figure made an error in calculating his tender.

113 They also state that the comparison of prices carried out after the blank figures have been handed in cannot have an anti-competitive effect since the blank figures can no longer be changed. Moreover, the information obtained from that comparison, such as the price variance between the tender of the entitled undertaking and those of its competitors, cannot be exploited by the entitled undertaking in its negotiations with the contract awarder since the blank figures are definitive.

114 The Commission replies that even if ° and that is not the case ° withdrawal is resorted to only in the event of an error leading to an economically unjustified price, it is not for contractors unilaterally to judge whether a price is economically justified and deprive the contract awarder of an advantageous price tender, particularly where those competing contractors make that judgment after exchanging price information.

115 It adds that the entitled undertaking may use the information available to it regarding the prices quoted by other tenderers in its negotiations with the contract awarder since the difference between its price and those of the others represents the margin within which it is protected, the latter being unable to tender a lower price (see below, in relation to protection of the entitled undertaking). In that context, the comparison of prices also restricts competition.

Findings of the Court

116 The Court finds that the concertation starts with the obligation of the applicants' members to notify the relevant SPO office of their intention to submit a price tender. The Court agrees with the Commission that the fact that the relevant office can disclose to those notifying undertakings which so request the number of undertakings which have lodged a notification may be liable to restrict competition since the notifying undertakings are thereby enabled to anticipate the intensity of competition between them and to modify their conduct accordingly, as well as to obtain information not yet available at that stage to undertakings which are not SPO members.

117 The concertation between contractors objected to in the decision starts only if the meeting does not from beginning waive designation of an entitled undertaking. Otherwise, the participants exchange information. There is thus concertation, even if it leads to the conclusion that the price tenders are not and cannot be rendered comparable, so that an entitled undertaking cannot be designated. In response to the applicants' statement that an entitled undertaking is designated in only 39% of cases, it must be observed, first, that at least in such cases the concertation between contractors condemned in the decision can operate fully and, secondly, that in the other cases the applicants have neither claimed nor proved that the meeting decides from the beginning not to designate an entitled undertaking, thereby rendering any further concertation pointless. The applicants have not therefore succeeded in rebutting the statement contained in paragraph 80 of the decision that "the number of cases in which the meeting of firms decides to forgo such designation, thus allowing undistorted competition to operate, is small". That statement relates to the number of cases in which the meeting decides from the start to forgo designation of an entitled undertaking, whereas the applicants' statement relates to the number of cases in which it has not been possible to designate an entitled undertaking, either because such designation has been decided against from the start or because the price tenders were not comparable and could not be rendered comparable.

118 Where the meeting does not forgo designation of an entitled undertaking from the start, it

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is in the participants' interest to decide on the basis of what technical and economic data they will compare prices, since an entitled undertaking can be designated only on the basis of comparable price tenders. In that connection, the parties differ as to the nature of the information exchanged in order to assess the comparability of price tenders: the applicants maintain that such information relates exclusively to the contract awarder' s invitation to tender and is exchanged solely in order to establish whether all the participants are relying on the same data. They concede, however, that the information exchanged may also concern the stance which should be taken regarding certain conditions imposed by the contract awarder where those conditions are unreasonable. The Commission contends that the exchange of information goes much further and relates to the manner in which the various contractors intend responding to the invitation to tender.

119 The Court finds, first, that concertation by contractors regarding the manner in which they intend responding to an invitation to tender is incompatible with Article 85(1) of the Treaty, even where the invitation sets unreasonable conditions. It is for each contractor to determine independently what he regards as reasonable or unreasonable and to conduct himself accordingly.

120 It must next be observed that, contrary to the applicants' assertions, the information exchanged does not relate solely to the invitation to tender. It is apparent from Articles 1(b) and 6.2 of the UPRO rules and 6.3 of the UPRR rules, read in conjunction, that that information concerns matters other than the invitation to tender. Indeed, Articles 6.2 and 6.3 of the UPR rules provide:

> "Before the forms containing the PEs (proposed evaluations for execution of the works) are completed, the meeting shall determine, on the basis of the information relating to the invitation to tender supplied by the contract awarding party and all other information relevant to a comparative and objective examination of prices, the data which must be relied on in entering the PE on the form provided for that purpose. It shall also determine, in accordance with the provisions of the present article, the figures and details to be mentioned in the note containing the PE.",

whilst Article 1(b) provides that the "information relating to the invitation to tender" are to contain

> "all documents, including the specifications, drawings, invitation to tender, the form for recording the intention to bid, all similar documents and all instructions or notifications relevant to submission of the tender".

This shows that, the "other information relevant to a comparative and objective examination of prices" includes items which do not appear in the information relating to the invitation to tender. Furthermore, the reports of certain meetings of contractors clearly show that at such meetings they discuss the manner in which they intend formulating their tenders, comparing the characteristics of the works which they intend proposing and therefore matters taken into account in the determination of prices. Thus, at a meeting of 14 March 1988, the participants concluded that the tenders were not comparable because one of the contractors had proposed a round silo and the other a square silo (annex 1 to the rejoinder). Apart from the fact that the contractors compare the technical characteristics of the tenders which they propose submitting, they sometimes compare the various components of each of the price tenders. Thus, the report of meeting 040388 concerning a project at Tilburg (Netherlands) shows that one of the contractors participating in the meeting "wil blanken maar geen inzicht geven in samenstelling prijsaanbieding. Prijsvergelijking daarom niet mogelijk. VH stapt kwaad op. Verliest rechten" ["wishes to submit a blank figure but refuses to disclose the composition of his price tender. Comparison of prices is therefore impossible. VH leaves in great anger. Forfeits his rights"]. The statement that "comparison of prices is therefore impossible" indicates that what the applicants call an examination of the comparability of the data relating to a tendering procedure in fact presupposes that the participants in the meeting are prepared to disclose the breakdown of their price tenders to each other.

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121 It follows that the Commission has sufficiently established that, at the meetings held by them under their rules, the contractors exchange information relating in particular to the costs of the product concerned, its specific characteristics and a breakdown of the price tenders, although that is information which an independent operator would keep strictly secret as confidential business information (judgment of the Court of First Instance in Case T-7/89 Hercules Chemicals v Commission [1991] ECR II-1711, paragraph 217).

122 It should also be noted that at those meetings the participants exchange price information. Articles 6.4 and 7 of the UPR rules allow disclosure of blank figures to all those present at the meeting. Whilst it is true, as pointed out by the applicants, that in principle such exchange of information occurs at a time when those figures can no longer be altered (but see below, paragraph 157), the applicants cannot justify this by stating that the rules merely change the moment at which competition takes place from the time of submission of tenders to the awarding party to the time of delivery of the blank figures to the chairman of the office and that, consequently, the exchange of information on prices occurs after competition has already taken place. As the applicants indicated at the hearing, the delivery of blank figures does not end competition because negotiations remain possible between the client and the entitled undertaking and between the client and undertakings which did not attend the meeting. However, in the context of such negotiations, the entitled undertaking will possess information relating in particular to the specific characteristics of the product and the price at which the participants in the meeting are authorized to submit a tender or are not prepared to submit a tender where they have withdrawn under Article 10 of the UPR rules, thus depriving the client of an advantageous tender of which he might have been able to secure the performance by court order if it had been submitted to him without any concertation between the contractors.

123 It follows that the Commission was right to consider in its decision (paragraph 81) that such concertation between contractors, having in particular the object and effect of revealing to his competitors the course of conduct which each contractor has decided to adopt or contemplates adopting on the market (judgment of the Court of Justice in Case 40/73 Suiker Unie v Commission [1975] ECR 1663, paragraphs 173 and 174; see also the judgment of the Court of First Instance in the judgment of the Court of First Instance of 17 December 1991, cited above, paragraph 260) and may lead to the fixing of certain conditions for the transaction, means that practical cooperation between contractors is deliberately substituted for the risks of competition (judgment in Case 40/73, cited above, paragraph 191), and therefore constitutes an infringement of Article 85(1) of the Treaty.

III ° The concerted fixing of prices or parts of prices

Arguments of the parties

(1) Price increases in cases of simultaneous tenders (decision, paragraphs 31 to 34, 42 to 46, 86, 87 and 96).

124 The applicants maintain, first, that the system of reimbursement of calculation costs has no adverse effect on competition between contractors since when they deliver their blank figures, each of them is in a position to anticipate the amount of the reimbursement which he will receive, because the latter is, in principle, based on the average of the blank figures presented by the undertakings and that average may be anticipated because the blank figures submitted do not differ greatly. The reimbursement could also be anticipated if it were calculated on another basis. In the context of the UPRR rules, each tenderer can do this by applying the reimbursement tables in force (for smaller-scale works), anticipating the tender put in by each contractor whose reimbursement constitutes a percentage (where a blank figure is not given), or by assuming that he himself will bid lowest (where the amount of the reimbursement is fixed by the person who gave the lowest blank figure). The applicants add that the fact that, in the context of the UPRO rules, reimbursements are paid over annually through the calculation fund does not preclude anticipation of the amount of the payments,

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since each contractor can anticipate the number of points which he may earn if he bids lowest and the value of such points, which hardly varies from one year to the next. Finally, reliance on the value of supplies provided or works done by the contract awarding party or by third parties, for calculation of the reimbursement, likewise does not preclude anticipation of the amounts payable, since that value is known or can be estimated approximately.

125 The applicants state, secondly, that the system of reimbursing calculation costs has the purpose and effect of improving the transactional structure of the market by allowing the transaction costs arising from each project to be allocated to that project.

126 The Commission replies, first, that the system of reimbursing calculation costs is detrimental to competition for the reasons set out in the decision. Contrary to the applicants' assertions, the amount to be reimbursed cannot be anticipated with such precision that the system is neutralized because it depends in all cases on factors which cannot be known with sufficient certainty when the blank figures are handed in. Consequently, all contractors tend simply to include the payments in respect of calculation expenses in their price tender without adjusting the tender. That is why the Netherlands authorities describe the reimbursements as "increases". In any event, even if the payments are regularly anticipated, the system nevertheless continues to constitute direct fixing of part of selling prices within the meaning of Article 85(1) of the Treaty.

127 Secondly, the Commission rejects the view that the system of reimbursing calculation costs enhances the efficiency of the market by limiting transaction costs because contract awarders have no right to obtain disclosure of the reimbursements in respect of calculation expenses applied to them.

(2) Price increases in respect of private contracts (decision, paragraphs 60, 61 and 100)

128 The applicants contest paragraph 61 of the decision, according to which the rules give rise to a general increase of 3% in the prices of private contracts because, if the contract awarder contacts other contractors after receiving the tender from the first tenderer and nevertheless awards the contract to the latter after receiving the tenders asked for subsequently, the first tenderer is required to pay a sum equal to a maximum of 3% of the contract value in respect of the price increases provided for by the rules.

129 They maintain that the Commission has confused an obligation to transfer 3% of the price to the SPO office with the obligation to take that 3% into account in the price tender. Moreover, 3% is a maximum figure which is rarely applied. The Commission also failed to take account of the fact that if contractors exercise their right to waive a priori the rights deriving from the status of entitled undertaking, the 3% does not have to be paid in any circumstances and if the contract awarder actually intends concluding the contract with the first contractor consulted and negotiates on an open-budget or team basis, he will be able to establish whether a provision for risk is included in the price and have it cancelled if he awards the contract without approaching other contractors.

130 The applicants also claim that there are two ways for the contractor first approached to make provision for risk in his price tender without the contract price thereby being increased if it is concluded on a private basis. First, he could reserve the right to increase his price tender by a maximum of 3% in the event of the client seeking other tenders subsequently. Secondly, he could, when submitting his tender, inform the contract awarder that it contains a risk provision which could be removed if the contract awarder did not seek other tenders subsequently. In most cases, they maintain, the contractor does not include any risk provision.

131 They state, finally, that the keen competition between contractors and the position of strength on the demand side means, beyond doubt, that the 3% would ultimately be refunded to contract awarders in the event that the risk was provided against but did not subsequently materialize.

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132 The Commission replies, first, that it established that contractors are regularly called on to make payments to the office under the 3% rule.

133 It doubts whether contractors have recourse to the possibilities described by the applicants, so as to take account of the risk deriving from the 3% rule, because contractors may, without exposing themselves to any risk, merely include in their price tender a provision covering that 3%.

134 According to the Commission, a contractor who includes such a provision in his tender suffers no competitive disadvantage because the other contractors approached subsequently must do the same, unless outsiders have been invited to bid, which occurs fairly infrequently.

135 What is important, it concludes, is that in the absence of the 3% rule contractors would not have to account in their price tenders for the risk of ultimately having to pay the 3%.

(3) Increases in subcontract prices (decision, paragraphs 55 to 59 and the third subparagraph of paragraph 100)

136 The applicants state that the fact that the main contractor can be made to bear only the tendering costs incurred by the subcontractors who have submitted a price tender to him ° to the exclusion therefore of the costs incurred by the subcontractors who have submitted price tenders to other main contractors ° in no way conflicts with the general philosophy underlying the rules on tendering costs, in that it results in the allocation to each contract-awarding party of the transaction costs arising in connection with the latter' s invitation to tender. A main contractor cannot be answerable for tendering costs for which he is in no way responsible. Moreover, this system of specific allocation makes it possible to ensure that subcontractors who, in connection with the same contract, have submitted tenders to several main contractors cannot receive double, or even triple, reimbursements.

137 They claim, finally, that the Commission has no grounds for saying that the rules on subcontracting lead to a systematic increase of 3% in price tenders in cases where the main contractor seeks to negotiate a price privately. They refer in that connection to their submissions regarding private contracts.

138 The Commission contends that the system established by the rules on subcontracting is incompatible with the general philosophy of the system of reimbursing tendering costs as described by the applicants. Where subcontracting is resorted to, not all the tendering costs arising in connection with a project are attributed to it since the subcontractors of a main contractor who are unsuccessful receive no reimbursement and are therefore forced to include their tendering costs in their general costs. Consequently, in subsequent tendering procedures, the client has to bear not only the payments in respect of calculation costs but also the general costs arising from non-reimbursement of tendering costs incurred in respect of previous contracts.

139 The Commission adds that the system does in fact lead to an increase of 3% in price tenders, as in the case of private contracts.

Findings of the Court

140 First of all, the Court must again point out that the applicants' arguments concerning improvement of the transactional structure of the market are irrelevant in the context of a plea in law relating to infringement of Article 85(1) of the Treaty: those arguments will be considered in connection with the plea concerning infringement of Article 85(3) of the Treaty.

141 The rules provide for two types of price increases to be added uniformly to the price tenders of the various contractors taking part in the meeting, which will therefore be borne by the party awarding the contract. They are, first, the reimbursement of calculation expenses (decision, paragraphs 32, 33, 86 and 87) and, secondly, the contributions to the operating costs of the trade organizations (decision, paragraphs 34 to 37).

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142 The applicants' objections relate essentially to the way in which the Commission analysed the former. The price tenders of the various contractors are increased by the same amount, which is deemed to represent the sum of the calculation costs incurred by all the contractors taking part in the meeting. Those price increases are calculated by reference to the scales for the various sectors annexed to the UPR rules. Those scales, which fix the maximum reimbursements, are applied to the average of the blank figures or the estimated value of the project, as the case may be (for further details, see paragraphs 32 and 33 of the decision, which are not objected to by the applicants). The result of that system is that the contract awarder bears, at a standard rate, all the calculation costs to which his invitation to tender has given rise, including therefore the costs of unsuccessful tenderers. Its aim is to induce contract awarders to consider the benefits and disadvantages of inviting a greater or lesser number of contractors to tender. Those price increases, which are included in the price tender, are received by the successful tenderer, which must repay the bulk of them to the office, which then shares them amongst the various contractors and itself. That repayment occurs contract by contract in the case of the UPRR rules and by calendar year in the case of the UPRO rules. Moreover, this price-increase system has its counterpart in the case of private contracts and subcontract arrangements. In such cases, the contractor approached must forearm himself against the risk that the party awarding the contract or the main contractor may approach other contractors and the risk of having in such circumstances to repay a sum representing 3% of the contract to the office in order to cover the calculation costs of the contractors who are approached subsequently but who are unsuccessful (for further details, see paragraphs 55 to 59 of the decision).

143 The applicants, without challenging the decision' s description of the price-increase system, maintain that it does not restrict competition since contractors participating in a tendering procedure can anticipate the amount of the reimbursement which they will receive in respect of their calculation costs. Thus, because of its flat-rate basis, the system is neutral for competition purposes since, knowing that they will receive a reimbursement exceeding the costs incurred, contractors who carry out their calculations most efficiently can reduce their price tender correspondingly. The Commission replies that the possibilities of anticipating the amounts involved are insufficient to neutralize the system and that, in any event, the joint fixing of such reimbursement constitutes fixing of part of the price.

144 The Court notes that the decision essentially criticizes the system of price increases in three respects. It involves, first, fixing of part of the price; secondly, a non-competition clause regarding calculation costs (decision, third subparagraph of paragraph 86); and, thirdly, the system leads to an increase in price levels for contract awarders which invite a large number of contractors to tender and in respect of private contracts and subcontracts (decision, paragraphs 57, 87 and 100).

145 First, it must be pointed out that the applicants have advanced no argument to show that the joint fixing of price increases uniformly applied to the price tenders of the various contractors does not constitute fixing of a part of the price within the meaning of Article 85(1)(a) of the Treaty. The applicants' arguments concerning the possibility of anticipating the amount of price increases are entirely irrelevant in that respect and relate solely to the question whether the price-increase system has the effect of eliminating competition between contractors regarding their calculation costs, which is a separate issue.

146 It follows that the Commission was right to consider that the joint fixing of price increases constitutes fixing of a part of the price prohibited by Article 85(1)(a) of the Treaty.

147 Secondly, as regards the question whether such fixing of a part of the price results in the elimination of competition between contractors in relation to calculation costs, thereby favouring

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the least efficient contractors in that respect at the expense of the most efficient, it is ncessary to consider whether, as the applicants claim, the contractors are in a position to anticipate correctly the amount of the reimbursement they will receive in respect of calculation costs and, if so, whether, because of its flat-rate basis, the system is entirely neutral in so far as each contractor can reduce his price tender by an amount equal to the difference between the calculation costs actually incurred and the reimbursement due.

148 On that point it suffices to observe that there is no absolute certainty of being able correctly to anticipate the amount of the reimbursement. Indeed, it is impossible to anticipate the amount with absolute accuracy since the price tender must be calculated at a time when certain parameters essential for such a forecast are still unknown (average of the blank figures, estimated value of the works, lowest price tender).

149 Under the UPRO rules, even minimally accurate forecasts are impossible by reason of the system of paying over compensation annually and the difficulty of predicting the number of points and the value thereof.

150 The case in which the best forecast seems possible is where, under the UPRR rules, the meeting leaves to the contractor who submitted the lowest blank figure the task of defining the price increases. In such cases, each contractor presumes that he will be the lowest bidder and will be able to determine the reimbursement himself. However, in such circumstances, the contractor will have to take account of the risk that he may not be the lowest bidder and that he may have to include in his price tender the amount determined by the lowest bidder, which might exceed or fall short of his own figure for calculation costs. Whilst it is true that each contractor could adjust his blank figure according to the amount of the reimbursement which he himself would determine, the fact remains that, for him to be able correctly to incorporate in his blank figure the amount of the reimbursement finally fixed, he must know the intentions in that regard of all his competitors, each of whom might be the lowest bidder and might therefore be prompted to determine the amount of the reimbursement on the basis of his own calculation costs. However, contractors cannot obtain such information, it being a matter of business secrecy for each of them.

151 A further consequence of this system may be to deprive the contract awarder of the benefit of a given contractor' s greater efficiency regarding calculation costs. Thus, where contractor A, who calculates his costs very efficiently, proposes to fix the amount of compensation at 12 in the event of his being the lowest bidder with his blank figure of 105, whereas contractor B, who is less efficient, proposes to fix them as 20 in the event of his being the lowest bidder with his blank figure of 100, the following situation is liable to arise: B, proving to be the lowest bidder, decides to fix the reimbursement of 20. Consequently, his price bid to the client will be 120, whereas A' s tender will be 125. If competition had operated freely, A would have tendered 117 and B 120. The client thus has B rather than A as the lowest bidder as regards the definitive tender, and at a higher price than he would have obtained following undistorted competition. If A had known that B would fix the amount of the reimbursement at 20, he could have lowered his blank figure from 105 to 97, knowing that his total would still be the 117 which he needed, and would thus become the lowest bidder. However, A could only know the amount at which B would fix his reimbursement after unlawful concertation with B, a result which certainly does not indicate that the system is objectively transparent and allows perfect forecasting of the amount of the reimbursement, as claimed by the applicants.

152 It follows that, in all cases, competition between contractors regarding their calculation costs is restricted by the system of reimbursements for calculation costs and that the client is thus deprived of the benefits of such competition.

153 Thirdly, it is necessary to consider whether the system of reimbursing calculation costs, like

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the system of contributions to the operating costs of trade organizations, leads to a general increase in prices. In that respect, a distinction must be drawn between three areas: that of simultaneous tenders, that of private contracts and that of subcontracts.

154 As regards the first area, it is indisputable that the system involves a price increase for contract awarders who address their invitation to tender to a large number of contractors since they will have to bear the calculation costs of each of them. Similarly, this system deprives contract awarders of more advantageous tenders than the one from the entitled undertaking whenever the greater efficiency of a contractor regarding calculation costs more than compensates for his lesser efficiency in other spheres and that contractor, unaware of the extent of his greater efficiency, has been unable to pass it on entirely to his blank figure (see above, paragraph 151). Finally, the contribution to the operating costs of the trade organization also leads to a price increase.

155 In the second and third areas, it is common ground that contractors tendering for a private contract or a subcontract are exposed to the risk of having to pay the SPO office a sum representing 3% of the contract price if either the party awarding the contract or the main contractor approaches others with a view to awarding the contract in question. Whilst it is true, as the applicants observe, that it is open to the awarding party or the main contractor to seek to persuade those contractors not to provide against that risk and not to incorporate it in the price, it must nevertheless be concluded that the system, as such, encourages contractors to pass that risk on to their contract awarders and forces the latter to undertake negotiations if they wish to avoid this. It follows that in this area too this system may result in a price increase.

156 It follows from the foregoing that the Commission was right to consider that the price-increase system constitutes fixing of part of the price, restricts competition between contractors regarding calculation costs and leads to an increase of prices which, in the case of the UPR rules, is larger if a contract awarder wishes to obtain competitive bids from a larger number of contractors.

157 The Court also observes that the applicants do not deny that, after the price increases have been added to the blank figures, the tender prices of contractors other than the entitled undertaking may be reduced provided that they do not affect the sequential order of the blank figures, so that the differences between the price tenders forwarded to the party which is to award the contract do not appear excessive. Nor do they deny that price tenders may be increased where preference has been granted in order to place the entitled undertaking in a privileged position or that partial prices or unitary prices may be fixed in order to ensure that the contract awarder does not award part-contracts for the works.

158 Such price manipulations undeniably constitute concerted price fixing within the meaning of Article 85(1)(a) of the Treaty since, as the applicants have repeatedly stated, it remains possible for the contract awarder to award the contract to a contractor other than the lowest bidder.

IV ° Limitation of contractors' and contract awarders' freedom of negotiation

Arguments of the parties

(1) Preference (decision, paragraphs 30 and 85)

159 The applicants maintain that the preference system does not lead to marketing sharing since each tendering procedure must be regarded as an ad hoc market in which the identity of the tenderers is determined by the contract awarder. The contractors cannot share the works amongst themselves since none of them has any guarantee that he will ultimately be in competition with the contractor to which preference has been accorded and therefore be able to receive compensation from the latter.

160 They also state that, in principle, the unanimous agreement of all the participants in the meeting is required for preference to be granted. The granting of preference is thus rare (0.3%

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of cases in 1988).

161 Finally, the applicants draw attention to the fact that the beneficiary of the preference is required to submit a tender equivalent to the lowest tender, which increases the risks for him, those risks being commensurate with his interest in securing the contract for the project.

162 The Commission replies that the interest which a contractor has in a project must be reflected by the price which he bids and not by the obtaining of a right of preference from his competitors.

163 It states that the granting of preference to one of the tenderers constitutes sharing of the relevant market, since it is the competitors who decide amongst themselves who will be protected against competition from the others.

(2) Protection of the entitled undertaking (decision, paragraphs 39 to 41, 52 to 54 and 93 to 95).

164 The applicants, who do not object to the decision' s theoretical description of the operation of the system, state that the decision takes no account of the objective of the system, which is the prevention of successive bargaining or "playing-off", and incorrectly analyses the system' s practical effects on competition.

165 As regards the prevention of successive bargaining, which occurs where a contract awarder plays off tenders which he has obtained simultaneously or successively from several contractors against each other in order to obtain a price reduction, the applicants state that protection against playing-off is desired by all those active in the market and is essential to combat the risk that economically unjustified prices might emerge where the demand side is stronger than the supply side, to prevent the effectiveness of the transactional structure of the market from being adversely affected by expectations of affecting the first price tenders and to prevent the objectiveness of tendering procedures from being impaired by the fact that, in the course of such bargaining, contract awarders might give priority to subjective preferences rather than to the lowest price. They claim that the system at issue goes no further than is necessary to deal with the problem of playing-off and state that it is less rigorous than national and Community legislation having the same aim.

166 Against that background, the applicants emphasize that protection of the entitled undertaking is the result of an objective procedure leading to automatic designation as the entitled undertaking of the lowest bidder and therefore, far from restricting competition, it merely changes the time at which competition takes place. They also claim that the Commission cannot criticize the rules for preventing the contract awarder from giving priority to considerations other than the price in his negotiations with contractors since the fact that the contract awarder asks for comparable tenders shows his intention to concentrate competition on the price.

167 They consider that the rules on non-simultaneous price tenders and partial price tenders are essential to ensure that the rules on simultaneous price tenders are not evaded by successive price tenders or partial price tenders being played off against each other.

168 As regards the practical consequences of the system, the applicants deny that the system creates a temporary monopoly for the entitled undertaking in respect of a given contract. First, the system does not operate in such a manner that, in the case of simultaneous tenders, the party awarding the contract cannot award it to a tenderer other than the entitled undertaking. Secondly, in the case of non-simultaneous tenders, the system does not prevent contractors tendering after the entitled undertaking from submitting a price tender but makes it conditional, in the case of calls for comparable tenders, either upon consent of the entitled undertaking or that of an ad hoc committee established to check that the tenders are not the result of successive bargaining. Such consent is in fact rarely withheld and cannot be withheld if the new tender is lower by a certain percentage than the tender of the entitled undertaking. That percentage, which differs according to the sector involved,

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reflects the advantage which might accrue to the contractor submitting the new tender if he was apprised of the old tender. It is clear from Hartelust' s empirical study entitled "Balance of demand and supply on the Netherlands building market during the period 1975-1979" that if the new tenders reflect an invitation which is not comparable to that reflected by the previous tenders relating to the tendering procedure, the entitled undertaking is never protected. Indeed, in the case of non-simultaneous tenders, the system results in protection for the entitled undertaking in only 10.5% of cases.

169 The Commission replies that the system of protection of the entitled undertaking leads not only to protection of contractors against "haggling" and the severely damaging competition which would ensue, but also against all forms of competition since it excludes tenderers other than the entitled undertaking from negotiations with the contracting party or, at least, makes participation in those negotiations subject to consent from the entitled undertaking or a committee of contractors.

170 It considers that the applicants cannot compare the system of protection of the entitled undertaking to the legislative rules applicable in other Member States and those introduced by Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682, hereinafter "Directive 71/305/EEC"). Those rules concern only public contracts and pursue an aim different from that of the rules at issue here since they seek to preserve equality of opportunity for contractors vis-à-vis the public authorities. Moreover, the rules at issue not only limit the freedom of negotiation of the contract awarder, as do the Community and national provisions, but also provide for exchange of information and mutual prior adjustment of price tenders. Finally, the Commission observes that the Netherlands legislation, too, provides a degree of protection for contractors in the negotiations following the submission of price tenders and that the system established by the rules was not therefore as necessary as the applicants claim.

171 The Commission also states that the applicants cannot claim that the protection of the entitled undertaking arises only after competition has taken place. In the case of simultaneous tenders, the procedure in which the entitled undertaking is designated is not as objective as the applicants claim, in particular where the contractors themselves judge the comparability of tenders. The Commission adds that the applicants' arguments are based on the misconception that a contract awarder who obtains several price tenders has, for that very reason, decided that he will base his choice on the price. A contract awarder may legitimately consider it necessary to negotiate with tenderers other than the lowest bidder and there is no justification for his being deprived of that possibility by a unilateral decision by the contractors.

172 In its view, the system of protection of the entitled undertaking is even less justifiable in the case of non-simultaneous price tenders. In such cases, protection of the entitled undertaking operates as soon as the contract awarder decides, after initially receiving only one price tender, to seek another one or others, that is to say at a time when competition has not yet taken place. However, the effect of such protection of the entitled undertaking is that the contractors subsequently invited to participate will be unable, if the call for tenders is comparable with that to which the entitled undertaking responded, to submit their tender to the contract awarder unless it is lower by a specified percentage than that of the entitled undertaking. That percentage exceeds by a considerable margin the percentage needed to protect the first tenderer against use of the content of his tender by subsequent tenderers.

173 The Commission also maintains that the system of fixing partial or unitary prices is entirely unnecessary to protect contractors from haggling since, contrary to the applicants' assertion, it is open to them to make their partial price tenders conditional upon the entirety of the works being awarded to them.

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174 It observes that in any event the applicants have admitted that, in 10.5% of cases, the entitled undertaking retains its status thanks to the priority provided for in the rules on non-simultaneous price tenders. According to the Commission, that 10.5% represents those cases in which that status entitled the undertaking in question to prevent the submission of subsequent price tenders lower than its own.

175 The Commission emphasizes, with regard to transparency of the market, that the system established by the applicants renders the market entirely opaque for occasional clients. In such cases, it is the contractors who are in a position of strength in the market, not the reverse.

(3) Subcontracting (decision, paragraphs 55 to 59 and the third subparagraph of paragraph 100)

176 The applicants maintain that the rules on subcontracting are intended to ensure that main contractors do not haggle on the basis of the tenders received by them from different subcontractors. To that end, the general rules were adjusted to the specific nature of subcontracting, by moving from the client-tenderer relationship to the main contractor-subcontractor relationship.

177 The Commission refers to its submissions concerning protection of the entitled undertaking regarding the need to protect subcontractors against the risks of haggling.

Findings of the Court

178 The Court finds, first, that the applicants' arguments to the effect that protection of the entitled undertaking is necessary to avoid haggling, which would lead to ruinous competition, are irrelevant in the context of a plea concerning infringement of Article 85(1) of the Treaty; they will be examined in connection with the plea concerning infringement of Article 85(3) of the Treaty.

179 Where the price tenders of the various participants in the meeting have been adjudged comparable or made comparable by the meeting, the procedure provided for seeks to result in the designation of an entitled undertaking. It is necessary, first, to outline the aim of the protection enjoyed by the entitled undertaking. Only that undertaking is entitled to negotiate its tender with the contract awarder. The other tenderers are deprived of the right to contact the contract awarder to negotiate the price of services or other matters covered by the contract (Article 28 of the UPRR rules and Article 30 of the UPRO rules in conjunction with Article 5(2) of the Code of Honour). They can thus obtain the contract only by accepting it at the price tendered by them and in accordance with the specifications. In the case of non-simultaneous price tenders, protection of the entitled undertaking also extends to subsequent price tenders (Article 28 of the UPRR rules, Article 30 of the UPRO rules and Article 5(3) of the Code of Honour). Contractors approached subsequently by a contract awarder are prohibited from submitting a price without the consent of the entitled undertaking or, in the event of refusal, the consent of an ad hoc committee appointed by the office concerned. That committee can give an affirmative decision only if the price proposed in the subsequent tender falls considerably short (by 2.5% to 10%, according to the sector concerned) of the price tendered by the entitled undertaking. That protection of the entitled undertaking lasts for two to five years (according to the value of the contract concerned).

180 The rules provide for three methods of designating the entitled undertaking. This will either be the lowest bidder at the meeting, or the contractor first approached in the case of non-simultaneous price tenders, or, finally, the contractor designated a priori as such by the meeting in accordance with the preference procedure.

181 As regards simultaneous price tenders where there is no withdrawal or grant of preference, the entitled undertaking is the contractor whose blank figure is lowest. The question arises, however, whether or not that protection, besides coming into being after an anti-competitive exchange of information has taken place and follows the fixing of parts of prices, itself likewise results in

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a restriction of competition. GROUNDS CONTINUED UNDER DOC.NUM : 692A0029.2

182 The system of protecting the entitled undertaking is intended to grant the contractor who has submitted the lowest blank figure at the meeting (that is to say the lowest price tender from which the price increases have been subtracted) protection of his tender as regards its content and price against negotiations which might take place between the contract awarder and other members of the SPO, both those who took part in the meeting and those who did not, the former being precluded from negotiating their tenders whilst the latter must obtain the consent of the entitled undertaking or an arbitration committee in order to be able to tender. To that end, the contractors taking part in the meeting start by agreeing between themselves the terms on which they will compete. Thus, they determine what should be the content of the various tenders so that they can provide equivalent alternatives for the contract awarder, from which a choice must be made thereafter only on the basis of the price.

183 It must be emphasized that, even if, at the meeting, the judgment as to the comparability of the tenders is as objective as possible, it is unacceptable for contractors unilaterally to substitute their judgment for that of the party awarding the contract, which must legitimately be entitled to bring to bear subjective preferences, such as the reputation of the contractor, his availability and his proximity, and to make a judgment itself, as future user, as to the equivalence, from its own point of view, of the various tenders.

184 In the case of non-simultaneous price tenders, it is important to note that the applicants merely state that it is essential to designate the first contractor approached as the entitled undertaking in order to ensure that the rules on simultaneous price tenders are not evaded, but that they do not deny in that connection that protection is granted without competition having taken place. It follows that the restriction of competition deriving from the protection enjoyed by the entitled undertaking in the case of non-simultaneous invitations to tender is not disputed, but that it will be necessary to consider whether that mechanism, as a necessary complement to the rules on simultaneous invitations to tender, fulfils the prescribed conditions for an exemption to be granted under Article 85(3) of the Treaty (see below, second plea in law).

185 As regards preference, this enables the person concerned to be designated as the entitled undertaking by the participants in the meeting, whatever the blank figure submitted by him, provided that he adopts as his definitive tender figure the lowest blank figure plus the applicable reimbursements. As the Commission points out (decision, paragraph 85), the preference mechanism constitutes a sharing of the market in that it is the participants in the meeting who decide which of them is to benefit from protection as the entitled undertaking at a time when competition has not yet taken effect. By so doing, they share the market amongst themselves to the detriment of the freedom enjoyed by consumers to choose their suppliers (judgment of the Court of Justice in Suiker Unie, cited above, paragraph 180). In that regard, it is of little importance that the participants in the meeting do not compete with each other on a permanent and structured basis because of the specific features of each project. Indeed, there is absolutely no need to inquire into the motives of undertakings which share the market amongst themselves in order to determine whether such sharing of the market is caught by the prohibition laid down in Article 85(1) of the Treaty.

186 It may be true that the machinery for protecting the entitled undertaking does not entirely eliminate the freedom of choice of the contract awarder, who may still award the contract to a participant in the meeting other than the entitled undertaking (but without being able to negotiate his tender) or to another contractor (subject to the consent of the entitled undertaking or an arbitration committee if he is a member of the SPO). It must nevertheless be stated that such freedom of choice is extremely restricted by the protection conferred on the entitled undertaking since the other participants in the meeting can accept the contract only in the form contained in their price tenders. Thus,

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the contract awarder will be deprived of the right to exercise his preferences regarding content and price within each tender and will therefore be limited to choosing between tenders as a whole. Moreover, his possibility of selecting parts of the tender from the entitled undertaking will be severely limited since that undertaking knows that it is protected and is aware of the extent of the protection available to it in relation to SPO members since it knows the figures tendered by the other participants in the meeting and the scales applicable to non-simultaneous price tenders.

187 It follows that the protection afforded to the entitled undertaking restricts competition, and that it will be necessary to consider in relation to the second plea in law whether that protection, which is intended to safeguard contractors from haggling, should qualify for an exemption under Article 85(3) of the Treaty.

V ° Behaviour of the SPO towards non-participating contractors (decision, paragraphs 49 to 51, 98 and 99)

Arguments of the parties

188 The applicants maintain that contractors are entirely free as to whether or not to join the SPO permanently or to be bound by its rules for a particular contract. No pressure is brought to bear on non-member contractors to join. However, they consider that, in order to ensure that certain contractors do not abuse the system by sometimes being bound by it and sometimes not, it is necessary to provide for penalties. Since the system of rules constitutes a single whole, it is necessary to ensure that no-one takes the benefits without bearing the burdens.

189 They recognize that the SPO offices have contacts with non-member contractors but, they say, these are occasional and cannot in any circumstances be regarded as constituting pressure. At most, certain non-members would from time to time be invited to take part in a meeting.

190 The applicants also reject the statement contained in the second subparagraph of paragraph 99 of the decision that, in order to operate in the Netherlands market, foreign undertakings must enter into an association with a Netherlands undertaking bound by the rules. That statement, they say, is contradicted by the figures produced by them regarding both the number of cooperation contracts signed and the number of contracts obtained by foreign undertakings which have not subscribed to the rules.

191 They concede that, at meetings, efforts are made to determine whether, besides the participants, third parties have also been invited to tender but they claim that that exchange of information does not restrict competition. The information exchanged is of little value and does not enable participants to adjust their conduct accordingly, in particular in determining their blank figure, because the latter is dependent upon other economic factors.

192 The applicants deny that the rules enable SPO members to protect themselves effectively against competition from third parties. In arguing thus the Commission overlooks the fact that the members of the SPO none the less compete with each other and with third parties. They therefore deny that, with regard to the designation of an entitled undertaking or the fixing of reimbursements for calculation costs, the participants act differently according to whether or not external competitors present themselves. In particular, the figure of 80% quoted in paragraph 51 of the decision does not indicate that the participants in the meeting enjoy a greater likelihood of obtaining a contract than non-participants, still less that such greater likelihood is the result of collusion.

193 The applicants conclude that the accusations made by the Commission without having undertaken an inquiry are without foundation. As evidence of this, they state that if non-member contractors were really victims of the behaviour of SPO members, they would either have complained about such conduct or would have become members of the SPO. Moreover, it should not be forgotten that in

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most cases it is the person awarding the contract who, by issuing a restricted invitation to tender, determines the number and identity of the contractors which will compete for the project under tender.

194 The Commission replies that the system of penalties provided for in the rules may encourage non-members to be bound by the rules more or less permanently, even if the purpose of the system is to avoid abuse of the rules.

195 It observes that the applicants do not deny that the offices contact non-member undertakings and states that its inquiries have established that such contacts are not confined to asking those undertakings to be bound by the rules.

196 The Commission also claims that the freedom to comply or not comply with the rules is somewhat relative as far as foreign undertakings are concerned since in most cases they must operate through the intermediary of cooperation with a Netherlands undertaking to gain entry to the market, as is apparent from a recommendation from the German-Dutch Chamber of Commerce ° and most of the contractors with which cooperation is possible are SPO members. The Commission considers that the figures produced by the applicants are biased since they relate only to formal associations of undertakings.

197 It refers again to the fact that the nature of the information exchanged at meetings places participants at an advantage over outside undertakings, as shown in the decision paragraphs 49 to 51, 98 and 99.

198 The Commission concludes that there is a restriction of competition since each outsider is confronted by the following dilemma: either to take action alone to attack the united front put up by the participants at the meeting or to participate in that united front and thereby restrict its opportunities to compete with other undertakings.

Findings of the Court

199 The Court considers that, quite apart from any occasional pressure brought to bear by the applicants on non-members to join the SPO, the system of rules in itself, conferring as it does on the participating undertakings considerable advantages, particularly in terms of exchange of information and reimbursement of calculation costs, by its very existence constitutes pressure exerted on non-members to join the SPO (see paragraph 98 of the decision).

200 Moreover, by its nature, the system of rules comes closer to attaining its objectives if a large number of undertakings agree to be bound by them. The limitation of transaction costs and the effort to reduce haggling are more effective if the number of cases in which contracts are awarded to non-SPO members is reduced. Accordingly, the award of a contract to a non-member is regarded as a risk against which precautionary measures must be taken by payment of part of the price increases into a guarantee fund intended inter alia to cover that risk (decision, paragraph 43).

201 It follows that the conditions are fulfilled for pressure to be exerted on non-members to join the system. In those circumstances, the mere fact, admitted by the applicants, that the SPO offices contact non-member undertakings may be regarded as constituting pressure.

202 Moreover, it is common ground that the rules enable the meeting to decide a priori not to designate an entitled undertaking (see paragraphs 100, 101 and 117 above) and to apply price increases. Those possibilities enable the participants in the meeting to modify their conduct on the market according to the degree of external competition. They may thus participate in such competition with the advantage that they have, in advance, been reimbursed by the system for calculation costs, so that they are able in specific cases to allocate no calculation costs to the project for which they are competing with undertakings which are not members of the applicants. Similarly, where it is decided from the start not to designate an entitled undertaking, they are, if need be, able to participate in

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haggling which would bring them up against non-member undertakings and thereby increase the likelihood of one of them securing the contract.

203 It must also be observed that the fact that the applicants' members are constrained to adopt a defensive attitude in concert when confronted with outside competition confirms their interest in increasing their membership and therefore decreasing the number of outside competitors likely to make them give up the advantages of their membership of the applicants.

204 It follows from all the foregoing that the Commission was right to consider that the system of rules introduced in 1987 undermines the freedom of contractors to join or not join it, since non-membership deprives them of certain advantages afforded by the system and brings them into competition, not with a number of contractors acting independently from each other, but with a number of contractors which have common interests and information and therefore behave in the same way.

205 It follows that the rules introduced in 1987 constitute an infringement of Article 85(1) of the Treaty.

206 As regards the previous rules, the Court notes that after finding that they differed from the rules introduced in 1987 in certain essential respects, such as the inclusion of a counter-notification procedure, the possibility of improving and amending prices and a procedure for granting preference, leading to an increase in the prices of all the participants, the Commission took the view in its decision (paragraphs 62 to 65) that the rules introduced in 1987 were, in essence, merely a continuation of the previous rules and that, consequently, its legal assessment of the former also applied mutatis mutandis to the latter (paragraph 114). The Commission also considers (decision, paragraph 138) that, as from 1 October 1980, the various previous rules were sufficiently standardized, since they were approved by the SPO (paragraphs 15, 62 and 138) and were also subject to a standard system of penalties established by the Code of Honour and made binding on SPO members by resolution of its General Assembly with effect from 1 October 1980 (paragraphs 12, 13 and 138).

207 The Court finds that, in response to those statements, the applicants maintain, first, that the regulations introduced in 1987 do not constitute a "continuation of agreements of the same nature concluded earlier" but rather "a departure" from them (application, paragraph 3.14 of the legal submissions) and, secondly, that the SPO never drew up the "Burger- and Utiliteitsbouw Openbaar" UPR rules (governing residential and non-residential construction under the open procedure) which took effect on 1 January 1973 since the various associations continued to apply their own rules individually until 1987 (reply, p. 24).

208 It must be observed, first, that, far from contradicting paragraphs 62 and 65 of the decision, the arguments put forward by the applicants in fact constitute an admission that the Commission' s analysis in those paragraphs is well founded. To show that the rules introduced in 1987 mark a "departure" from the agreements of the same nature concluded previously, they state that those rules no longer include certain possibilities such as "counter-notification" or "improvements" or "price corrections", the first of which, they concede, "was liable to offer the contractors concerned the opportunity to engage in unlawful concertation" and, in the case of the second possibility, that it had been prohibited "because it was applied not only in a disastrous competitive situation but also because, being intended to measure the phenomenon of price compression, that system inevitably incorporated a number of arbitrary factors" (application, paragraph 3.14 of the legal submissions). Thus, by stating that the rules introduced in 1987 are less restrictive of competition than the previous rules and that it is in that respect that they mark a departure from the former, the applicants have indicated that the former are a continuation of the latter.

209 Consequently, the Commission was right to consider that there was continuity between the previous rules and the rules introduced in 1987 and that, in certain respects, the former incorporated restrictions

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of competition at least as extensive as those contained in the latter.

210 It must be observed, secondly, that, contrary to the view which the applicants appear to take in their reply, the decision does not say that, as from 1 October 1980, the various previous rules were adopted by the SPO. The decision merely states that, as from that date, those regulations had to be approved by the SPO, a statement not contradicted by the applicants, which have merely stated that until 1987 it was the associations which adopted those rules. It must also be observed, as the Commission points out, that in those respects the decision merely repeats the information provided to it by the applicants in the answers which they gave on 19 December 1988 in response to the requests for information sent to them by the Commission (rejoinder, annex 2). Moreover, it is important to note that the applicants have not denied that, as from 25 November 1980, Article 4 of the Besluit Algemene Bepalingen (Decision concerning geneal provisions) required the approval of the SPO for the adoption and implementation of the rules of the various applicants.

211 It must be observed, thirdly, that as from 1 October 1980, the various previous regulations were indeed subject to a system of standard penalties introduced by the Code of Honour and made binding on the SPO members by resolution of its General Assembly as from that date.

212 It follows that, in all the circumstances, it was proper for the decision not to undertake a separate analysis of the content of the previous rules and to consider that they restricted competition at least as much as the rules introduced in 1987, which represented a continuation of them. It is also correctly concluded in the decision that, as from 1 October 1980, the various rules had been sufficiently standardized by the system of SPO approval and the standard system of penalties to be regarded as a cohesive whole.

213 It follows from all the foregoing that the second limb of the first plea in law must be rejected.

Third limb: no effect on trade between Member States

Arguments of the parties

214 The applicants maintain that Article 85 of the Treaty is applicable to agreements limited to the territory of a single Member State only if they appreciably affect trade between Member States. This presupposes, first, that there is trade between the Member States in the market concerned (judgment of the Court of Justice in Case 22/78 Hugin v Commission [1979] ECR 1869) and, secondly, that such trade is adversely and appreciably affected by the agreements in question (judgment of the Court of Justice in Case 320/87 Ottung v Klee & Weilbach and Others [1989] ECR 1177, paragraph 19). In the present case, none of those requirements is met and Article 85 of the Treaty is therefore not applicable.

215 As regards the first requirement, the applicants claim that it is apparent in particular from the study carried out by Mr Hartelust that trade between Member States is almost non-existent in the construction market, in terms both of numbers of sites and of value, and that it is wholly non-existent in specific product markets such as that of demolition or marking. In their reply, they add that the Commission cannot contend, by relying on the judgment of the Court of Justice in Case 19/77 Miller v Commission [1978] ECR 131, that regard must be had not only to existing trade but also to the future development of trade shaped by legislative amendments or other factors. They consider that the legislative amendments referred to by the Commission were unforeseeable when the applicants drew up and applied their respective rules and regulations.

216 As regards the second requirement, the applicants consider, essentially, that in the absence of trade the rules cannot adversely and appreciably affect trade, unless the Commission establishes that the absence of significant trade is attributable to the rules. In the present case, the Commission has not proved this for the simple reason that the absence of trade is attributable to structural

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factors, such as the limited geographical area of activity of undertakings, high transport costs, the role of the main contractor, problems connected with the diversity of (standardized) specifications, culture, taste, languages, and so forth, and to the fact that it is the party awarding the contract which defines the number and quality of contractors it approaches. Moreover, the Commission has not shown that in the case of each of the previous sets of rules there has been international trade in each product market and in each of the geographical markets covered by those rules separately. The Commission may not here apply the "bundle theory" where this presupposes that the various agreements operate in the same product market and the same geographical market. They consider that they have proved that each sector constitutes a separate market (see above, first limb of the plea). Finally, those rules should be seen in parallel with the Community legislation on public works contracts which, by fixing a threshold of ECU 5 million (which is significantly higher than the threshold of ECU 200 000 fixed by the directive on public supply contracts) indicates that only very large construction projects can give rise to substantial international trade.

217 They also claim that in any event the rules do not have the effect of partitioning the Netherlands market since they apply without distinction to foreign contractors and Dutch contractors, both categories being free to choose whether or not to be bound by them.

218 The applicants deny that the rules reduce recourse to open tendering procedures and thus operate to the detriment of foreign undertakings. Open tendering procedures are no less frequent in the Netherlands than elsewhere and foreigners take no greater part in them than in restricted procedures.

219 Furthermore, they consider that the effects which the rules allegedly have on demand in the Netherlands originating from clients established in other Member States do not come within the concept of trade between Member States within the meaning of Article 85 of the Treaty and that, in any event, the Commission' s reasoning is based on the misconception that the rules bring about a uniform increase of prices in the Netherlands.

220 Finally, the applicants maintain that the thesis of the alleged competitive "advantage" available to Dutch undertakings acting in the market of other Member States, resulting from the rules and more particularly from the system of allocating calculation costs, is disproved by the low profitability of building undertakings in the Netherlands and by the comparison undertaken by PRC BV Management Consultants ("PRC") between, on the one hand, the amount of general costs plus reimbursements in respect of calculation costs in the Netherlands and, on the other, the percentage applied in respect of general costs in four other Member States.

221 The Commission replies by referring to paragraphs 103 to 108 of the decision. It adds that, far from requiring that the regulations oust foreign contractors from the Netherlands market, the consistent case-law of the Court of Justice merely requires that the rules should be capable of appreciably affecting trade between Member States. Consequently, account should be taken not only of present inter-State trade but also of potential inter-State trade (judgment of the Court of Justice in Miller v Commission, cited above).

222 The Commission considers that it is entirely inappropriate to invoke the judgment of the Court of Justice in Hugin v Commission, cited above, since that case was concerned with adverse effects on competition which, far from affecting the entire territory of a Member State, covered only a small part or fell into a category entirely different from that of the present rules. Agreements covering the entire territory of a Member State, as in the present case, are inherently liable to give rise to partitioning of the national market in a manner conflicting with the economic interpenetration which the Treaty is designed to bring about (judgment of the Court of Justice in Case 8/72 Vereniging van Cementhandelaren v Commission [1972] ECR 977). Such agreements result in subdivision of the Common Market into several national markets characterized by artificially differentiated conditions (judgment of the Court of Justice in Case 246/86 Belasco v Commission [1989] ECR 2117). According

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to the Commission, it has the responsibility not of establishing that the rules oust foreign contractors from the Netherlands building market but rather, as it has demonstrated in the decision, that they radically affect conditions of competition under which foreign contractors must operate, both when they participate in the system and when they submit tenders as outsiders. It adds that that type of effect on trade between Member States was covered by the statement of objections (paragraph 98 et seq.) and by the decision (paragraph 106 et seq.).

223 In the present case, it considers that trade between Member States is limited but exists and that Mr Hartelust' s study is not significant because it takes no account of trade not covered by the rules, does not state whether it covers the minutes of all the meetings held under the rules and covers only a limited period from 1 January 1986 to 1 October 1988.

224 Moreover, it considers that, by means of the system of reimbursements for calculation costs, the rules have the effect of discouraging contract awarders from having recourse to open procedures. However, open procedures are the best way of allowing foreign contractors access to the Netherlands markets since, when they are used, the identity of the tenderers is not determined by the contract awarder. In support of this, the Commission refers to the complaint lodged by the municipality of Rotterdam.

225 The Commission infers from this that the rules are indeed liable to affect trade between Member States. It adds that it is pointless for the applicants to draw distinctions based on periods of time and the unified nature or otherwise of the rules, since the rules applied prior to 1 April 1987 were in even greater conflict with Article 85(1) of the Treaty than the rules at present in force. They had been drawn up and standardized under the auspices or control of the SPO and, as from 1980, were subject to a uniform system of penalties laid down by the Code of Honour. Consequently, it is important to determine not whether, in certain sectors, there was trade between the Member States but whether the rules, seen as a whole, are liable to affect trade between Member States (see above, first limb of the plea).

Findings of the Court

226 The Commission took the view that the rules affected trade between Member States in three different ways: by affecting supply from other Member States (paragraphs 103 to 111 of the decision), demand from other Member States (paragraph 112) and supply from participating undertakings in the other Member States (paragraph 113).

227 It will be recalled, first, that the condition concerning the effect on trade between the Member States, contained in Articles 85 and 86 of the Treaty, is intended to determine the scope of Community law in relation to that of the laws of the Member States (judgment of the Court of Justice in Joined Cases 56 and 58/64 Consten & Grundig v Commission [1966] ECR 299).

228 It is sufficient therefore if one of the three adverse effects on trade between the Member States referred to by the Commission in paragraphs 103 to 113 of the decision is established for Article 85 of the Treaty to be applicable to the rules adopted by the applicants.

229 It should also be borne in mind that it has been consistently held that an agreement which extends over the whole territory of one of the Member States has, by its very nature, the effect of reinforcing compartmentalization of national markets, thereby holding up the economic interpenetration which the Treaty is intended to bring about (judgments of the Court of Justice in Vereniging van Cementhandelaren, cited above, paragraph 29, and Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 22).

230 In the present case, it is undisputed that the rules introduced in 1987 apply throughout the Netherlands. As regards the previous rules, it should be borne in mind that they are similar to

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each other and that, as a whole, they cover the Netherlands in its entirety and the whole construction market (see paragraph 81 above). Consequently, none of those sets of rules can be considered separately from the others with which they form a whole, particularly since those rules were the subject of standardized penalty procedures imposed by a single association as from 1980. The previous rules must thus be treated in the same way as the rules introduced in 1987 (see above, paragraphs 206 to 212). All those rules are, therefore, inherently liable to affect trade between the Member States since they affect the conditions of competition in the Netherlands by differentiating them artificially from those obtaining in other Member States and thus result in fragmentation of the Common Market.

231 In any event, the Court considers that the Commission was right to find that the rules are liable to have an appreciable impact on supply from other Member States and on supply from participating undertakings in the other Member States.

232 As regards the impact of the rules on supply from other Member States, it must be noted, as the Commission observes, that the applicants themselves stated that the system of reimbursements for calculation costs is intended in particular to encourage contract awarders to weigh the advantages and disadvantages of approaching a larger or smaller number of tenderers since, the transaction costs having become visible, the contract awarder knows that he will have to bear the burden of them. In general, such a system leads to higher transaction costs. In order to attain that objective, the system encourages contract awarders to focus their calls for tenders more narrowly and thus to invite a smaller number of tenderers, causing those seeking to award contracts to bear the calculation costs of all the tenderers they have approached. Since it is possible to limit the number of tenderers approached by contract awarders only under a restricted procedure, the system favours restricted rather than open procedures and, within the category of restricted procedures, those which are most restricted, as indicated in the complaint from the municipality of Rotterdam (paragraphs 19 and 34 of that complaint).

233 The Commission is right to consider that the open procedure provides the best opportunity for foreign contractors to penetrate the Netherlands market.

234 It follows that in that respect the rules are liable to have a direct or indirect effect on supply from the other Member States.

235 As the Commission rightly states, the applicants are not entitled to invoke the limited extent of trade between the Member States in seeking to reject that analysis since they do not contest the figures produced by the Commission in the decision which show that, although limited, there is indeed real trade between Member States. Thus, the applicants do not deny that about 150 undertakings established in other Member States comply, more or less permanently, with the UPR rules. Those undertakings are established mainly in Germany and Belgium and include all the largest German and Belgian undertakings, the others being French, Luxembourg or Italian undertakings. The Court of Justice has held that, for restrictive arrangements to be prohibited by Article 85(1) of the Treaty, it is not necessary for them appreciably to affect trade between Member States but merely to be capable of having that effect (judgment of the Court of Justice in Miller v Commission, cited above, paragraph 15). Since a potential effect is sufficient, future development of trade may be taken into account in assessing the effect of the restrictive arrangements on trade between Member States, whether or not it was foreseeable. Finally, as regards the appreciable nature of that effect, it must be noted, as the Commission observes, that the more limited the trade the greater is the likelihood that it will be affected by the restrictive arrangements.

236 The Court also considers that the applicants may not rely on the threshold of ECU 5 million laid down by Directive 71/305/EEC. As the Commission pointed out in its decision (paragraph 105), the aims pursued by Article 85 of the Treaty and by the directive differ too much for the threshold laid down by the latter to serve as a point of reference for the level at which Article 85 applies.

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It should be observed that the legal basis of that directive has no connection with Article 85 of the Treaty and that provision is not mentioned in its preamble. It cannot therefore be contended that the threshold laid down in that directive is to guide the Commission in its application of Article 85 of the Treaty.

237 As regards the impact of the rules on supply from participating undertakings in the other Member States, it is indisputable that, when operating in relation to a given project outside the scope of the rules, as is the case outside the Netherlands, the member undertakings of the applicants enjoy advantages over non-member undertakings.

238 In that regard, the comparison made by the applicants is a general comparison, whereas the advantage available to Netherlands undertakings when operating abroad must be assessed case by case. It is undisputable that the system of allocating calculation costs, including the guarantee fund, enables the applicants' members not to include in their general costs the calculation costs incurred in respect of tenders where they have not been successful, whereas foreign contractors have to include those costs in their general costs. Thus, for a given contract, tendered for outside the Netherlands, the applicants' members have to include in their tender only the calculation costs generated by that contract, whereas the other contractors have to include part of the calculation costs incurred in respect of all the tenders in which they have participated unsuccessfully. Thus, they enjoy an artificial competitive advantage over competing undertakings which carry on the bulk of their business in other Member States. Trade between Member States is thereby affected.

239 The applicants cannot refute the probative force of those factors by referring to the low profit margins of Dutch construction undertakings, which, they claim, is apparent from a comparison between the amount of general costs plus reimbursements for calculation costs in the Netherlands and the percentage applied in respect of general costs in four other Member States. The low profitability of Netherlands undertakings may be attributed to numerous factors other than the system of allocating calculation costs.

240 It follows that the rules are liable appreciably to affect trade between Member States and that this limb of the plea must therefore be dismissed.

241 It follows from all the foregoing that the first plea cannot be upheld.

Second plea: infringement of Article 85(3) of the Treaty

First limb: failure to take account of the characteristics of the market and of the rules concerning the burden of proof

(1) The characteristics of the market

Arguments of the parties

242 The applicants claim that it is apparent from the judgment of the Court of Justice in Case 45/85 Verband der Sachversicherer v Commission [1987] ECR 405, paragraphs 14 and 15, that, although the Community competition rules apply fully to the Netherlands building sector, that certainly does not mean that Community competition law does not enable account to be taken of the particular features of certain areas of economic activity. It is for the Commission, within the scope of its power to grant exemptions under Article 85(3) of the Treaty from the prohibitions laid down in Article 85, to take account of the particular nature of various economic sectors and the of difficulties associated with those sectors. In the present case, they claim, the Commission failed to take account of the particular characteristics of the building sector, such as the fact that it typically comprises small and medium-sized undertakings, and the difficulties peculiar to the sector, which would have justified adoption of the notified rules, which are typically sectoral in character.

243 Among those characteristics, they draw attention in particular to the fact that each contract

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awarder defines his product and the product can therefore be used only once, the nature of the building business (there is an asymmetrical relationship between the size of the undertaking and the size of the site; there are problems of continuity and no economies of scale; the fact that, in a single product market, building undertakings are largely interchangeable; and the absence of an access threshold for small-scale operators), the fact that the price of the works must be fixed in advance, that the preparation of a tender involves high transaction costs and, finally, the fact that recourse to tendering procedures as a way of awarding contracts is liable to lead to economically unjustified prices.

244 The applicants maintain that those various characteristics lead to structural imbalances in the market between, on the one hand, the awarder of the building contract, for whom the market is entirely transparent and who is able to determine the identity of the undertakings which will have access to it and has the power to set the various tenders submitted to him against each other and, on the other hand, suppliers for whom the market is not transparent, who depend upon the choice made by awarders of building contracts and who must bear high transaction costs in order to enter the market. This structural imbalance leads to economically unjustified prices and ruinous competition.

245 According to the applicants, that structural imbalance between supply and demand, evidenced by numerous specialized studies, is particularly marked in the Netherlands, first because the main contractor is responsible to the contract awarder for the proper execution of the works, including those executed by subcontractors, and, secondly, because the Netherlands legislation does not contain the same rigorous prohibition as the legislation of other Member States whereby a contract awarder may not "play off" the various contractors one against the other.

246 The applicants claim that the rules at issue are intended solely to correct that structural imbalance, essentially by reducing the transaction costs incurred in respect of tenders and preventing "playing-off". The small profit margins observed in the Netherlands construction market support that analysis. That objective is common to all those involved in the market and the Netherlands authorities themselves, because if the prohibited rules did not exist there would either be severely damaging competition or secret agreements designed to rectify the imbalances.

247 In their reply, the applicants claim that none of the Commission' s allegations concerning the operation of other markets in services or the building market in other Member States is founded on any analysis or investigation carried out by the Commission and that they are therefore unjustified. The Commission has, they claim, merely examined, in microeconomic terms, the extent to which the freedom of action of economic agents is restricted and has treated any restriction of freedom of action as if it were a restriction of competition, whereas it should have examined the rules in macroeconomic terms.

248 The Commission concedes that the characteristics of the construction sector must be taken into account in so far as they determine the economic and legal background against which the contested rules must be examined. However, the effect of those characteristics cannot be to remove those regulations wholly or partly from the scope of Article 85. In those circumstances, an abstract discussion of the characteristics of the market, as engaged in by the applicants, is irrelevant.

249 It contends that the construction sector in the Netherlands does not differ from other service sectors or the building sector in other Member States to such an extent that a considerably different approach should be taken in examining it in the light of Article 85 of the Treaty. Consequently, the fact that the market in the various sectors operates correctly in the absence of rules of the kind declared unlawful entirely undermines the view that the contested rules provide the requisite remedy for structural imbalances in the Netherlands building sector.

250 The Commission also refers to paragraphs 71 to 77 of the decision in which it has already answered

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the applicants' arguments.

251 It states in particular, in reply to the assertion that recourse to tendering procedures as a method of awarding contracts leads to economically unjustified prices, that there is no economically justified level of prices, since the overall cost price is different for each undertaking and varies according to the circumstances. In certain situations, it would in fact be economically justified to charge prices lower than the average cost in order to amortize fixed costs.

252 Finally, the Commission considers that it is not open to criticism for failing to take account of the macroeconomic aspect of the rules. In order to obtain an exemption, it is incumbent upon the applicants to establish, in particular, that the rules make a specific contribution to improving production or distribution or promoting technical or economic progress. In those circumstances, it is insufficient to invoke macroeconomic progress, which has certainly not been proved to be ascribable to the regulations.

Findings of the Court

253 The Court of Justice has held that it is for the Commission, exercising its power under Article 85(3) of the Treaty, to grant exemption from the prohibitions contained in Article 85(1), to take account of the particular nature of different branches of the economy and the problems peculiar to them (judgment of the Court of Justice in Verband der Sachversicherer, cited above, paragraph 15).

254 In the present case, the applicants object to the Commission' s undertaking a microeconomic analysis of the rules when their aim was to rectify imbalances existing at macroeconomic level between supply and demand as a result of the characteristics of the undertakings operating in that sector and the characteristics of the products involved, and the shortcomings of the Netherlands legislation which imposes responsibility on the main contractor and does not facilitate effective action to counteract "playing-off".

255 The Court finds that, in its decision, the Commission noted the characteristics of the market described by the applicants (paragraphs 71 to 77) but considered that those characteristics did not justify an exemption (paragraphs 115 to 128). Their arguments concerning the characteristics of the market must therefore be taken into account when the Court examines the rejection of the applicant' s application made under Article 85(3) of the Treaty for the rules at issue to be exempted.

256 It must also be pointed out that the Commission was right to refer ° and in so doing was not contradicted by the applicants ° to the fact that no rules similar to those at issue in these proceedings exist either in other service sectors having characteristics similar to those of the construction market or in the building sector in other Member States. The Commission was also right to reject the view, advanced by the applicants, that restrictive agreements are inevitable in the building industry. The assertion that, if an exemption is not granted to a notified agreement, other more restrictive arrangements will emerge, cannot be justification for exemption under Article 85(3) of the Treaty. Similarly, it is unacceptable for undertakings to counteract legislation which they consider excessively favourable to consumers by entering into restrictive arrangements intended to offset the advantages granted to consumers by that legislation, on the pretext that it has created an imbalance detrimental to them.

257 It follows from the foregoing that the applicants' arguments concerning inadequate consideration by the Commission of the characteristics of the market must be rejected to the extent to which they are presented separately in respect of this limb of this plea in law.

(2) The burden of proof

Arguments of the parties

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258 First, the applicants claim that in view of all the facts which they brought to the Commission' s attention with a view to obtaining an exemption, the Commission was not entitled merely to reject their arguments outright and should have shown that an exemption was not economically justified. Accordingly, in their view, it should in particular have demonstrated that, without the rules, the Netherlands construction market would function better or else it should have indicated what aspects of the rules it considered acceptable.

259 They also maintain that the Commission should have discussed with them the advantages and disadvantages of the rules from the economic point of view instead of rejecting any economic justification outright. In the present case, the Commission did not satisfy its obligation under the case-law to assist actively in the granting of an exemption (judgment of the Court of Justice in Consten & Grundig, cited above).

260 The Commission replies that the Court of Justice has consistently held that it is incumbent first and foremost on the undertakings to convince it, on the basis of documentary evidence, that an exemption is justified. Such cooperation as undertakings may claim from the Commission consists in consideration of the arguments which the undertakings put to it in support of their application for an exemption (see the judgment in Consten & Grundig, cited above, at 347). That cooperation does not mean that the Commission is under any obligation to put forward other solutions. A fortiori the Commission cannot be required to demonstrate that an exemption is not justified or to indicate what it regards as acceptable.

261 The Commission states that the rules form a single whole, as the applicants themselves have repeatedly emphasized. For that reason, it considers that, although certain aspects of the contested rules satisfied the conditions laid down by Article 85(3) of the Treaty, it could not exempt them separately. In those circumstances, there could be no question of a conditional exemption.

Findings of the Court

262 It is settled law that it is for undertakings seeking an exemption under Article 85(3) to establish, on the basis of documentary evidence, that an exemption is justified.

Accordingly, the Commission cannot be criticized for failing to put forward alternative solutions or to indicate in what respects it would regard the grant of an exemption as justified (see the judgment of the Court of Justice in Joined Cases 43 and 63/82 VBVB and VBBB v Commission [1984] ECR 19, paragraph 52). In applying the competition rules, all that is incumbent upon the Commission, by virtue of its obligation to state reasons, is to mention the matters of fact and of law and the considerations which prompted it to take a decision rejecting the application for exemption, and the applicants may not require it to discuss all the matters of fact and law raised by them in the administrative procedure (judgment of the Court of Justice in Remia v Commission, cited above, paragraphs 26 and 44).

263 It follows that it is incumbent on the applicants in this case to establish that the Commission committed an error of law or of fact by refusing to grant it an exemption under Article 85(3) of the Treaty.

264 In that connection, it must be emphasized that in the course of the administrative procedure the applicants stated repeatedly that the rules constituted a cohesive whole which should be granted an exemption as such. Accordingly, the Commission was right to confine itself, in its decision, to considering whether or not the two central elements of the regulations, the specific purpose of which is to correct the alleged macroeconomic imbalances in the market, namely protection of the entitled undertaking and reimbursement of calculation costs, satisfied the four conditions for the grant of an exemption laid down in Article 85(3) of the Treaty.

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265 It follows that the first limb of the second plea in law must be dismissed.

Second limb: failure to observe the conditions for granting an exemption

266 The Court considers that it is appropriate to examine, first, whether the rules contribute to improving production or distribution of products or promoting technical or economic progress, whilst at the same time leaving users a fair share of the resulting profit and, secondly, whether the rules impose on the undertakings concerned restrictions which are not necessary for the attainment of those objectives and whether they enable such undertakings to eliminate competition in respect of a substantial part of the products concerned, in order to establish whether the Commission was right to refuse to grant an exemption, under Article 85(3) of the Treaty, for the rules in question.

267 It must first be borne in mind that the four conditions for granting an exemption under Article 85(3) of the Treaty are cumulative (see in particular the judgment in Consten & Grundig, cited above; and the judgment of the Court of First Instance in Joined Cases T-39/92 and T-40/92 CB and Europay v Commission [1994] ECR II-49, paragraph 110) and that therefore non-fulfilment of only one of those conditions will render it necessary to confirm the decision rejecting the application for exemption. Accordingly, the Court will consider more particularly whether the Commission was right to conclude that the rules did not leave users a fair share of the benefit resulting from the rules and that the restriction of competition imposed by the rules on contractors was not necessary for the attainment of those objectives.

(1) The contribution of the rules to improvement of distribution of products or to promotion of technical or economic progress and the fair share of benefits left to the consumer

Arguments of the parties GROUNDS CONTINUED UNDER DOC.NUM : 692A0029.3

268 As regards the contribution of the rules to improved distribution of products or to promotion of technical or economic progress, the applicants state that the contested rules have essentially two objectives: first, to counteract "playing-off" induced by the structural weakness of supply as against demand, which might lead to ruinous competition, and, secondly, to improve the transactional structure of the market by allocating, as far as possible, the transaction costs to the project for which they were incurred. The machinery for reimbursing calculation costs set up for that purpose encourages parties awarding building contracts to weigh the advantages and disadvantages of approaching a greater or lesser number of tenderers and therefore better to target their calls for tenders, and also to weigh the advantages and disadvantages of more or less rigorous wording of the invitation to tender since, once the transaction costs have become visible, the contract awarder knows that he will have to bear them. Such a system, in their view, leads to a lower overall level of transaction costs and a fairer sharing of costs than a system in which the transaction costs imposed by contract awarders on contractors are allocated to the latter' s general costs, which they blindly incorporate in all their prices, with the result that all awarders of contracts have to bear the high transaction costs for which only some of them are responsible. The aims of the rules are common to all those involved in the market and the Netherlands authorities themselves, since in the absence of the prohibited rules there would either be ruinous competition or secret agreements designed to rectify those imbalances.

269 They consider that the Commission committed an error by confining itself to considering the effects of the system of reimbursements of calculation costs in respect of each tendering procedure individually without taking account of the reduction in transaction costs and therefore of prices at macroeconomic level. The need to undertake a macroeconomic analysis is confirmed by scientific studies, which establish, first, that the system does not discourage awarders of contracts from organizing open tendering procedures ° as confirmed by the fact that suspension of the system following the order of the President of the Court of First Instance of 16 July 1992 did not lead to an

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increase in procedures of that kind ° and, secondly, that general costs, including tendering costs, are in several nearby Member States the same as, or higher than, general costs in the Netherlands, together with the reimbursements for calculation costs and contributions to the operating costs of the trade organizations.

270 According to the applicants, the way in which the Netherlands building market functions is evidence of the real beneficial effects of the rules in question on production and technical and economic progress. The economic analyses show, on a proportionally comparable basis, that the Netherlands building industry operates very effectively and that its productivity is among the fastest growing in Europe, whereas costs, prices and profit margins in the industry are among the lowest in Europe.

271 They maintain that the Commission misunderstood the nature of the mechanisms established by the rules in concluding that they did not satisfy the first condition for the grant of an exemption. They refer to the criticisms made by them in connection with the second limb of the first plea.

272 As regards the fair share of the resultant benefits for consumers, the applicants maintain that the Commission' s misapplication of that condition is apparent from the fact that awarders of building contracts are satisfied with the way the market operates and that the only contract awarder which criticized it (the municipality of Rotterdam) is in favour of adjustments to the rules rather than outright prohibition of them. By its nature, the criterion of a "fair share" is not a "fixed" criterion, so that there are few cases in which positive or negative proof of it could be required. It is precisely from that point of view that the factors just referred to are of particular importance. In their reply, the applicants state that, by contrast perhaps with individuals, large awarders of building contracts are interested not in maximum exploitation of the transactional structure of the market, which would yield them a short-term advantage, but in the existence of a healthy market. That is why they are unanimously in favour of the rules.

273 The applicants maintain that, contrary to the Commission' s view, the PRC study showed that a system of reimbursements of calculation costs is certainly not less effective than a system whereby the costs incurred by an unsuccessful tenderer are charged to his general costs.

274 They also claim that the Commission overlooked the fact that, ultimately, the contract awarder also secures benefits from a tendering system which produces clear and unequivocal results. Moreover, the machinery for preventing tenderers from being played off against one another helps to open up the Netherlands market because it makes it more difficult for contract awarders to favour Dutch contractors at the expense of foreign contractors.

275 The applicants again refer to their submissions regarding the second limb of the first plea.

276 The applicants conclude that their whole analysis is confirmed by the fact that Netherlands contractors have low profit margins, showing that the benefits of their great productivity are fairly shared between contractors and contract awarders.

277 As regards the first condition, the Commission replies that it has already refuted the applicants' arguments concerning the content of the rules in connection with the second limb of the first plea.

278 It states that, having no right to examine the question of reimbursements for calculation costs, the contract awarder is unable, to use the applicants' phrase, "effectively to weigh the advantages and disadvantages" of using one method or another for the award of contracts. Moreover, the scales attached to the UPR rules indicate only maximum levels and do not therefore allow clients to ascertain the extent of the transaction costs actually incurred.

279 The Commission also claims that the reimbursements of calculation costs may encourage contract awarders not to resort to open tendering procedures. In that connection, the fact, referred to by the applicants, that the order of the President of the Court of First Instance of 16 July

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1992 did not result in an increased number of open tendering procedures is not significant, in view of the length of the period involved.

280 It also contends, with regard to the redistribution of reimbursements for calculation costs, that the difference between the amounts received by the contract awarder, on the one hand, and those paid over to the other contractors, on the other, results in strengthening of the position of those contractors who have obtained contracts as against those who have not.

281 The Commission adds that the PRC report does not illustrate how the system of reimbursements of calculation costs makes the tendering procedure more efficient, since that report deals with the level of general costs, which is dependent upon so many factors that it is impossible to draw any conclusion from it.

282 Moreover, it observes that the applicants have not shown that the favourable performance of the Netherlands building industry as a whole is attributable to the rules and rejects the view that the rules operate to the satisfaction of all parties concerned. In support of that view, it refers in particular to the complaint lodged by the municipality of Rotterdam and the intervention of Dennendael BV in the present proceedings.

283 As regards the second condition, the Commission considers that the fact that certain contract awarders are in favour of adjustments to the rules rather than outright prohibition of them is not a sufficient basis for stating that that condition is fulfilled. The intervention of Dennendael BV also shows that certain contract awarders are very critical of the rules, which entail substantial and unnecessary increases of costs for them.

284 It adds that the level of profit margins in the Netherlands building sector as a whole is dependent upon so many factors that it is impossible to draw any conclusions from it as to whether a fair share of the alleged benefits accrues to consumers.

285 For the rest, the Commission refers to its answer to the second limb of the first plea.

Findings of the Court

286 In view of the cumulative nature of the four conditions laid down by Article 85(3) of the Treaty for the grant of an exemption, the Court will focus its analysis more particularly on the condition concerning the fair share of benefits for consumers.

287 The arguments of the applicants and of the Commission are on different levels. The applicants base their arguments on a macroeconomic analysis of the advantages which, in their view, may arise from the rules. They consider, referring to macroeconomic analyses such as that carried out by PRC, that the performance of the Netherlands building industry, which charges very low prices and has very narrow profit margins, is evidence of the positive effect of the rules. They consider that that better performance is a consequence of the rules by reason in particular of the fact that the rules make it possible to prevent the formation in the Netherlands of "underground cartels" of the kind found in other Member States of the Community. On the other hand, the Commission' s arguments are in the microeconomic sphere in that they look at the situation through the eyes of individual awarders of building contracts and analyse the effects of the rules on their circumstances. It considers that that microeconomic approach is the only one possible since, unlike the applicants, it categorically rejects the view that underground cartels between contractors are inevitable in the building industry and that the rules have the merit of preventing such cartels. It also considers that the applicants have not successfully proved the existence of a link between the rules and the performance of the Netherlands building industry, in so far as that performance may be attributable to other factors.

288 In view of those differing approaches to the rules, which lead to divergent views as to whether

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they are eligible for an exemption under Article 85(3) of the Treaty, the review carried out by the Court of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article 85(3) of the Treaty in relation to each of the four conditions laid down therein must, as previously held by the Court of Justice, be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (see the judgment of the Court of Justice in Joined Cases 142 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 62, and the judgment of the Court of First Instance in CB and Europay, cited above, paragraph 109).

289 In the present case, the Court must therefore establish whether the facts on which the Commission based its decision to reject the application for exemption are materially correct and whether the Commission committed any manifest error of assessment in rejecting the macroeconomic approach proposed by the applicants and in adopting a microeconomic approach to the rules.

290 In relation to those issues, the Court finds, first, that the Commission was right to consider that it was inappropriate to take as the starting point for analysing the effects of the rules at issue the fact that without them even more serious infringements of Article 85(1) of the Treaty would be committed on the Netherlands building market and that it could reasonably take the view that the formation of underground cartels was not inevitable.

291 The Court finds, secondly, that the Commission was also right to consider that the applicants have not managed to prove, in particular by relying on the macroeconomic studies which they produced, that a causal link exists between the rules and the performance of the Netherlands building industry; if substantiated, that performance might be attributable to numerous other factors. Thus, it is apparent from the first PRC study (application, annex II, p. 13) that hourly productivity is very high in the Netherlands and that building materials are cheaper there than in neighbouring countries. Moreover, it is apparent from the study dated 22 January 1993 (annex 2 to the reply, pp. 22 to 24) that the best way of comparing the efficiency of the organization of the building process is probably to compare the transaction costs with the contractor' s "production costs". However, that study shows that, from that point of view, the Netherlands market is not more efficient than the French market and is less efficient than the Belgian market, and in neither of those markets are there any rules similar to those at issue in the present proceedings.

292 In view of those two factors, the Commission, by taking note of the applicants' statement that, on the basis of the macroeconomic analysis presented by them, the rules had beneficial effects and by weighing their analysis against a microeconomic analysis based on specific examinations, tender by tender, of the practical effects of the rules on competition (decision, paragraphs 76 and 120 to 123), committed no manifest error of assessment.

293 It must be emphasized, in particular, that the correctnes of the Commission' s approach is clear from, inter alia, the fact that the applicants have stated repeatedly that the machinery for protecting the entitled undertaking is intended to prevent prices from reaching an unjustified level, which indicates that the applicants themselves concede that that aspect of the rules is intended to maintain prices at a higher level than would result from competition unaffected by the rules. The benefit of the action to counteract "playing-off", if it is assumed to be lawful, thus accrues to the contractors. Moreover, because of that system, the party having a building contract to award can negotiate only with the entitled undertaking, whereas if the rules did not exist it could have negotiated both with the entitled undertaking and with the other contractors participating in the meeting.

294 The applicants' response that such negotiations would necessarily lead to ruinous competition which would ultimately have adverse repercussions on contract awarders themselves is not right.

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As the Commission observed, it is impossible to distinguish between normal competition and ruinous competition. Potentially, any competition is ruinous for the least efficient undertakings. That is why, by taking action to counteract what they regard as ruinous competition, the applicants necessarily restrict competition and therefore deprive consumers of its benefits.

295 Similarly, the claimed limitation of transaction costs operates almost exclusively to the benefit of the contractors. By ensuring that their costs are borne by the contract awarder in their entirety, the system facilitates reduction of transaction costs which would otherwise have to be borne by the contractors, particularly where they are not awarded a contract. Consequently, a cost is transferred from the supply side to the demand side. Whilst it is true that such a transfer of costs is not entirely without economic justification, in so far as the extent of the transaction costs is linked in particular to the number of contractors invited to tender by the contract awarder, who is thus the only person able to limit them, such a limitation of transaction costs nevertheless presupposes that the contract awarder will limit the number of contractors he consults, which limits his choice and therefore limits competition. Even if that limitation may lead to a decrease in the contract awarder' s transaction costs since he will have to examine a smaller number of tenders, that benefit is limited by comparison with the disadvantages which he must bear and the benefits obtained from that system by contractors.

296 Moreover, the benefit which contract awarders are deemed to derive from the fact that contractors no longer have to incorporate in their general costs the calculation costs which they had to bear in relation to all the contracts not awarded to them offsets the disadvantage of their having to bear the reimbursements for calculation costs only for those of them who regularly award a large number of contracts covered by the rules. A contract awarder who awards contracts only rarely must necessarily pay reimbursements in respect of calculation costs which considerably outweigh any benefit which he might obtain from the fact that, under the system, the successful tenderer was able to reduce his general costs and therefore the amount of his price tender. Moreover, a result of that system is that contract awarders who feel it necessary to approach a large number of contractors must necessarily pay for reimbursements of calculation costs which considerably exceed the costs which they would have had to bear if the system did not exist.

297 The Commission was right to consider that that system leads to fewer open tendering procedures (see paragraph 232 above) and that the period following the order of the President of the Court of First Instance was not of significant length.

298 Consequently, the system of reimbursements of calculation costs, even if conducive to overall reduction of transaction costs in the market, does not allow of that reduction to be shared fairly between contractors and contract awarders.

299 Contrary to the applicants' assertion, their view is not shared by all those in the market place. It is clear from the complaint which it submitted to the Commission that the municipality of Rotterdam opposes maintenance of the system of reimbursement of calculation costs as provided for by the rules. In particular, it insists that the amount of the reimbursements for calculation costs is excessive and that there is no justification for such reimbursements to be calculated not on the basis of the lowest blank figure but by reference to the average of blank figures submitted by the various contractors.

300 It is apparent from all the foregoing that the Commission was right to consider that, particularly by providing for reimbursements of calculation costs to be borne by contract awarders and for protection of the entitled undertaking against negotiations which the party awarding the contract might conduct with other contractors participating in the meeting, the rules do not let consumers have a fair share of such benefits as may accrue from them.

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(2) The indispensability of the restrictions and the impossibility of eliminating competition

Arguments of the parties

301 As regards the rules notified, the applicants maintain that the restrictions of competition are essential to attain their objective, namely to counteract "playing-off" and make the transactional structure of the market more efficient. They state that the Commission misapprehended the significance of the system for protecting the entitled undertaking and the system for reimbursing calculation costs, as well as the role of the guarantee fund. They consider it normal that the first system should operate only where tenders are comparable and that paragraph 125 of the decision is therefore incorrect. As regards the system for providing reimbursement, it is precisely its flat rate and comprehensive basis which enables competition to be promoted, unlike a system of reimbursement on an individual basis which, moreover, would be impracticable, contrary to the assertion in paragraph 126 of the decision. The rules on subcontracting likewise provide no support the Commission' s view.

302 The applicants also state that they informed the Commission that they were prepared to discuss with it the need for the various provisions of the rules and that, in that connection, they submitted a number of suggestions for amendments concerning essential aspects of the system. In response to those proposals, the Commission let it be understood that it intended prohibiting the rules in their entirety, thus making any discussion of the indispensability of certain aspects of the rules pointless. By refusing to discuss those proposals, the Commission committed an error of assessment regarding the indispenability of the restrictions of competition found to exist.

303 Rejecting the Commission' s view, they argue that the suggestions for amendments proposed by the SPO can be dealt with in the present proceedings. In view of the circumstances of this case, the Commission' s entire conduct in the administrative procedure should be reviewed by the Court, otherwise the applicants' rights of defence would be infringed. That is the only way of ensuring that the Court reviews the legality of the rejection of the amendments proposed by the SPO since the applicants are unable to institute proceedings under Article 173 of the Treaty against the various administrative letters rejecting those proposals (see the judgment of the Court of First Instance in Case T-116/89 Vereniging Prodifarma and Others v Commission [1990] ECR II-843).

304 The applicants add that, in view of the circumstances of this case, they cannot be criticized for failing to incorporate those amendments in the rules and failing formally to amend the notification in respect of the rules. The consequences of those amendments for the organization of the SPO and its staff were so wide-ranging that it was neither reasonable nor possible to draw up comprehensively amended UPR rules before having obtained the Commission' s approval, at least in respect of their broad outlines. Moreover, the SPO expressly submitted those proposals to the Commission in the context of its notification of 13 January 1988, indicating that it was prepared to amend the rules notified in accordance with the proposals as soon as the Commission gave its go-ahead.

305 They go on to explain how their suggestions for amendments to the rules were capable of satisfying the requirements of Article 85(3) of the Treaty.

306 The applicants conclude that those amendments removed any ° theoretical ° possibility that contractors might distort competition.

307 The Commission replies, with respect to the rules notified, by referring to the content of the decision (paragraphs 124 to 128) and its rebuttal of the second limb of the present plea. It repeats in particular that a system in which all tenderers receive a reimbursement borne by the contract awarder does not contribute to the effectiveness of the tendering procedure. It adds that the payments made by the guarantee fund where the contract is awarded to an outsider provide tenderers that are members of the SPO with a mutual defence against outsiders.

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308 It replies, with regard to the suggestions for amendments to the rules which were the subject of consultations with its staff, that those suggestions were not capable of meeting its objections to the rules. It was for that reason that they had been rejected by its officials.

309 The Commission adds that, since the applicants did not make the proposed amendments to the rules and likewise did not amend the notification relating to them, there was no reason for the Commission to examine the amendment proposals in its decision. Consequently, the decision relates solely to the rules as they stood when the decision was adopted and not to the suggestions for amendments made by the applicants. Accordingly, the proposed amendments are entirely irrelevant (see the judgment of the Court of First Instance in Publishers Association, cited above, paragraph 90). By so doing, the Commission did not deprive the applicants of any remedy against the rejection of their proposals for amendments since it would have been sufficient for them to incorporate the amendments in their rules or modify the notification for the Commission to be obliged to give a decision on them, failing which proceedings could be brought against it for failure to act (see the judgment of the Court of First Instance in Case T-23/90 Peugeot v Commission [1991] ECR II-653). Modification of the notification was essential because only agreements actually notified can be the subject of an exemption. It states that the applicants could have confined themselves to amending the notification without immediately implementing the proposed changes, if and to the extent to which their implementation came up against practical difficulties.

Findings of the Court

310 The Court finds ° unnecessarily having regard to the fact that the rules do not let consumers have a fair share of the benefits ° that the restrictions of competition brought about by the rules are likewise not indispensable in order to attain the aims which the applicants claim they have, namely to improve the transactional structure of the market by limiting transaction costs and to counteract "playing-off", which could give rise to ruinous competition. The Commission was right to consider that the serious restrictions of competition which it had found were not indispensable in order to attain the rules' intended objectives.

311 In that connection, it must be observed, first of all, that the fact that the entire process culminating in the designation of an entitled undertaking takes place in the absence of the party having a contract to award does not in any respect seem indispensable for the attainment of the intended objectives. It is the awarding party itself which is best placed to reach a judgment, with the contractors, as to the comparability of their price tenders, so as to ensure that the information exchanged at the meeting does not affect competition, and to ensure that the prices tendered by the various contractors are not altered in order to increase the competitive advantage of some or reduce the competitive disadvantage of others.

312 Secondly, it must be observed that the fact that, under the rules on subcontracting, only subcontractors who have submitted a tender to the main contractor designated as successful tenderer receive reimbursement for calculation costs indicates that the applicants themselves do not consider that it is indispensable, in order to improve the transactional structure of the market, to allocate to each contract awarder all the calculation costs to which his invitation to tender gave rise. Moreover, the applicants have been unable to show that the amount of the reimbursements of calculation costs corresponds overall to the average costs actually incurred by contractors. Against that background, it must be observed that the various bases for the calculation of the reimbursements seem very high, as the municipality of Rotterdam pointed out in its complaint. Moreover, the fact that the scales applied for calculating the reimbursement in respect of calculation costs are maximum values which are not always reached, whereas the contract awarder is not told which scale was applied and has no remedy against application of the maximum scale, shows that the rules do nothing to ensure that the reimbursement of calculation costs does not exceed what is necessary to cover the transaction

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costs of the various contractors.

313 As regards protection of the entitled undertaking, the Court observes that this takes place following concertation between the contractors wishing to submit tenders, a process from which the contract awarder is excluded and which substitutes joint decisions by the contractors alone for the choice preferred by the contract awarder.

314 It follows from the foregoing that the restrictions of competition contained in the rules notified by the applicants to the Commission are not indispensable for attainment of their intended objectives.

315 It follows that the grounds of challenge advanced by the applicants in that regard must be dismissed.

316 The Court also considers that the Commission was right not to make any finding in its decision concerning the suggestions for amendments proposed by the applicants in their discussions with the Commission between April 1991 and January 1992, since the applicants had neither withdrawn their first notification nor formally notified those amendments to the Commission. Consequently, the Commission was still under an obligation to give a decision on the rules as notified and, in the absence of formal notification, had no power to give a decision on the compatibility of the proposed amendments with Article 85(3) of the Treaty.

317 It follows that the applicants cannot criticize the Commission for adopting a decision only on the rules as notified to it.

318 As the Commission has pointed out, that solution does not mean that the applicants have no way of obtaining a review of the conformity with Article 85(3) of the Treaty of the informal rejection by the Commission of their suggestions for amendments. If the applicants had wished to have that rejection reviewed by the Court, they needed only to make those changes to the rules and re-notify them or amend the notification. If the Commission had failed to give a ruling in response to those notifications, the applicants would have been able to compel it to give a ruling by bringing proceedings for failure to act (judgment of the Court of First Instance in Peugeot v Commission, cited above).

319 Nor can the applicants rely on the fact that immediate modification of the rules would have had excessively far-reaching consequences for their functioning and that they could not therefore undertake such a modification without any guarantee of obtaining an exemption from the Commission. In order for the Commission to be required to give a decision on the proposals for amendments submitted by the applicants, the latter do not necessarily have to bring them into force but need merely adopt them and notify them formally to the Commission.

320 It follows from the foregoing that, having regard to the cumulative nature of the four conditions for an exemption under Article 85(3) of the Treaty, the second limb of the second plea in law put forward by the applicants must be dismissed, it being unnecessary to consider whether the fourth condition is fulfilled.

Third limb: breach of the principles of proportionality and subsidiarity

Arguments of the parties

321 The applicants state that, by refusing to exempt the rules under Article 85(3) of the Treaty, the Commission contravened the principles of proportionality and subsidiarity.

322 As regards the principle of proportionality, they claim that, by refusing to grant an exemption for the rules and by prohibiting them outright, the Commission went further than was necessary to attain the objectives of the Treaty, to such an extent as to achieve a result contrary to those objectives, in view of the characteristics of the sector concerned. In support of that assertion, they refer to the views of the various economic agents in the market, which, they claim, all oppose

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outright prohibition of the rules. By adhering to an inflexible and abstract view of competition, precluding any measure regulating competition in a market, the Commission breached the principle of proportionality by virtue of which the Commission is required to promote "efficient competition". Furthermore, the Commission breached the principle of proportionality by not even considering the possibility of granting an exemption subject to conditions or an exemption for a limited period, subject to an obligation to draw up reports. The Commission also breached the principle of proportionality by not limiting its action to what is strictly necessary to ensure free access to the Netherlands building market for builders established in other Member States. The Commission should have acted with particular restraint in this case since only one national market is involved, for which the competition policy to be followed is closely linked with planning policy, an area outside the Commission' s purview.

323 As regards the principle of subsidiarity, the applicants claim that by reason of their experience of the Netherlands building market the Netherlands authorities were much better placed than the Commission to apply competition law to the rules at issue. They state that the Netherlands authorities cannot be criticized for failing to take action to uphold competition since they prohibited certain parts of the rules which they considered to be contrary to national competition law.

324 They add, finally, that it is for the Court to penalize breaches of the principle of subsidiarity and that in view of the fact that, according to the Commission itself, that principle existed by implication before being expressly incorporated in the second paragraph of Article 3b of the EC Treaty, the Commission cannot contend that a decision antedating the entry into force of the Treaty on European Union which introduced that provision cannot be reviewed in the light of that principle.

325 The Commission replies that, by the present plea, the applicants are challenging the expediency of the decision and that that plea is misplaced since its assessments in relation to Article 85(1) and (3) are matters of law.

326 As regards breach of the principle of subsidiarity, the Commission contends that, as matters stand at present, the principle of subsidiarity is not one of the general principles of law by reference to which the legality of Community measures antedating the entry into force of the Treaty on European Union must be assessed.

Findings of the Court

327 Since the Court has found that the Commission was right to consider that the notified rules did not fulfil the second and third conditions for the grant of an exemption under Article 85(3) of the Treaty, there can be no question of any breach of the principle of proportionality, particularly since the applicants emphasized, during the administrative procedure and the procedure before the Court, that the rules constitute a single whole from which the various component parts cannot be artificially isolated.

328 Moreover, the arguments put forward by the applicants to challenge the expediency of the decision are, as the Commission points out, based on the ° erroneous ° view that all those active in the market favour maintenance of the rules, whereas both the municipality of Rotterdam and the consumers' organizations have expressed the view that they should be substantially modified in order to qualify for an exemption under Article 85(3) of the Treaty.

329 It follows from the foregoing that the applicants' complaint of breach of the principle of proportionality must be rejected.

330 As regards breach of the principle of subsidiarity, the Court finds that the second paragraph of Article 3b of the EC Treaty had not yet entered into force when the decision was adopted and that it is not to be endowed with retroactive effect.

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331 It must also be noted that, contrary to the applicants' assertion, the principle of subsidiarity did not, before the entry into force of the Treaty on European Union, constitute a general principle of law by reference to which the legality of Community acts should be reviewed.

332 It follows that the applicants' complaint of breach of the principle of subsidiarity must be rejected.

333 It follows from all the foregoing that the applicants' second plea in law, alleging infringement of Article 85(3) of the Treaty, must be dismissed.

Third plea in law: infringement of Articles 4(2)(1) and 15(2) of Regulation No 17

First limb: absence of any infringement and immunity from fines

Arguments of the parties

334 The applicants state that they have demonstrated in connection with their first plea in law that they have not committed any infringement. They consider therefore that, if their plea is upheld, the fine imposed upon them should be cancelled.

335 They also submit that, by considering that the previous rules were subject to the obligation of notification laid down in Article 4(1) of Regulation No 17, the Commission infringed Article 4(2)(1) thereof. Since the rules are decisions of associations of undertakings, the requirement of notification should have been waived because the members of the association concerned all, with one exception (ZNAV), belong to the same Member State, no foreign contractor ever having been a member of any of those associations during the period concerned.

336 The applicants claim, in the alternative, that, if the criterion of participation in the rules should be adopted, as the Commission contends, no foreign contractor was a party to three sets of rules, at least during the period concerned, and that, as regards the others, the Commission has not established that the position was different, still less that it was different as regards the entire period.

337 They maintain that, in view of the applicability of Article 4(2) of Regulation No 17, the Commission had no right to object that previous rules were not notified. Indeed, it was reasonable for the applicants to consider that the lack of notification did not preclude the possibility of an exemption being granted. In order to justify fines under Article 4(2), the Commission should at least have shown that each of the applicants should have been aware for many years that the previous rules could never have qualified for exemptions. In their submission, it has failed to prove this.

338 The Commission first states that it has proved, to the required legal standard, that Article 85(1) of the Treaty has been infringed.

339 As regards the alleged infringement of Article 4(2)(1) of Regulation No 17, it contends that the applicants' arguments are irrelevant in so far as the fines relate to the period from 1 April 1987 to 13 January 1988.

340 The Commission adds that, even if it were assumed that the previous rules did not have to be notified, which, in its view, is not the case, Article 4(2)(1) of Regulation No 17 confers no immunity from fines since the previous rules could never have qualified for an exemption because they incorporated even more serious restrictions of competition than the UPR rules for which an exemption was also refused.

341 The Commission points out, finally, that the possibility of non-notification under Article 4(2)(1) of Regulation No 17 does not imply that no fine may be imposed in respect of the agreement or decision concerned.

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Findings of the Court

342 The Court of Justice has held that the prohibition of imposing fines laid down in Article 15(5)(a) of Regulation No 17 applies only in relation to agreements which have actually been notified and not to agreements of which notification is unnecessary by virtue of Article 4(2)(1) of that regulation (judgment of the Court of Justice in Joined Cases 240 to 242, 261, 262, 268 and 269/82 Stichting Sigarettenindustrie and Others v Commission [1985] ECR 3831, paragraphs 73 to 78).

343 Consequently, even if the previous rules were covered by Article 4(2) of Council Regulation No 17, the Commission is entitled to impose fines on the undertakings which applied it, since the agreement had not been notified.

344 The Court also finds that the Commission was right to consider that the rules constituted an infringement of Article 85(1) of the Treaty.

345 It follows that this limb of the plea must be rejected.

Second limb: lack of intent or negligence

Arguments of the parties

346 The applicants observe that the Commission stated in the decision that they had committed infringements "deliberately or, at the very least, through serious negligence", that is to say through what might be termed "intentional negligence". They observe that the amount of the fine was fixed on the basis of that assessment, even though there was no negligence, still less serious negligence. It was incumbent upon the Commission to demonstrate that they knew, or should have known, that the rules fell within the scope of Article 85(1) and could not be exempted under Article 85(3) of the Treaty. They submit that it is apparent from the first two pleas in law that, if there was an infringement, it was not a clear infringement and that failure to be aware of it did not constitute negligence.

347 They claim that various factors contributed to their enduring conviction that the rules were lawful: first, the Netherlands competition authorities always responded actively to the rules and their action was reflected in the Royal Decree of 29 December 1986, by which the UPR rules were again expressly endorsed specifically in relation to competition law; secondly, the specialists and economic agents with an interest in this sphere, who always examined the rules closely, likewise never expressed the slightest doubt as to the compatibility of the rules with Community competition law; certain specialists even expressed the view that the rules did not restrict competition; thirdly, the attitude of the various protagonists in the market, in particular on the demand side, comforted the applicants in their conviction; fourthly, the fact that the Commission raised no objections to the rules before 1987, although it had probably been aware of them for a long period because they were in the public domain and certainly since 1982, because the rules had been the subject of a request for a preliminary ruling from the Court of Justice in Case 34/82 Peters Bauunternehrung v ZNAV [1983] ECR 987, contributed to the applicants' enduring conviction that the rules were in conformity with Community law. The applicants also cite a 1976 report of the Organization for Economic Co-operation and Development (OECD) specifically devoted to collusion in the building industry. In that report, of which the Commission could not have been unaware, one of the sets of rules antedating the UPR rules is commented on at length.

348 According to the applicants, the Commission' s allegation that an infringement of extreme gravity had been committed is belied by the fact that it became apparent in the course of the administrative procedure that, for a long period, the Commission itself was not certain whether the European Community rules applied. Moreover, it is apparent from its defence that the Commission itself deliberately deferred commencement of an investigation by first contacting the Netherlands authorities.

349 They add that, in view of the fact that the Commission itself recognizes that the fines were

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imposed in respect of the previous rules, their reasoning applies with greater force; since the Commission was under an obligation to prove intention or serious negligence on the part of each of the associations responsible for the sectoral or regional rules, whereas those associations could not have been aware that the condition concerning an adverse impact on intra-Community trade was fulfilled since there was practically no international trade either in the geographical markets or in the product markets to which those rules related.

350 The Commission replies that it is immaterial whether or not the applicants' breach of the prohibition laid down in Article 85(1) of the Treaty was deliberate. What is important is whether the applicants knew, or should have known, that the rules restricted competition and might affect intra-Community trade (see the judgment of the Court of Justice in Miller, cited above; the judgment in Joined Cases 32/78, 36/78 to 87/78 BMW and Others v Commission [1979] ECR 2435; the judgment in Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ and Others v Commission [1983] ECR 3369; Stichting Sigarettenindustrie and Others v Commission, cited above; and the judgment of the Court of First Instance in Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR II-1931, paragraph 157). In the present case, it is difficult to see how the applicants could have been unaware that a system like the one at issue in these proceedings restricted competition.

351 It goes on to reject the various arguments put forward by the applicants to support their denial of serious negligence. First, the applicants wrongly give the impression that the rules were fully approved of by the public authorities in the Netherlands, whereas certain parts of the previous rules were declared non-binding by the 1986 Royal Decree of 29 December 1986 based on Article 10 of the Wet economische mededinging (Law on Economic Competition). Under the scheme of that provision, the fact that rules concerning competition are not declared non-binding implies at most that the public authorities consider that they are not contrary to the public interest. It certainly does not mean that the rules concerned do not restrict competition. Moreover, their effects on trade between Member States play no part in the application of that provision.

352 Secondly, it contends that the two specialists mentioned by the applicants took the view that the rules restricted competition. Moreover, the applicants could not have believed that the rules were not capable of affecting intra-Community trade merely because their application was limited to the territory of the Netherlands (see also in that connection the judgment of the Court of Justice in Stichting Sigarettenindustrie and Others v Commission, cited above, paragraph 65). Even if the Netherlands authorities had in any way given the impression that Article 85 was not applicable to the case, that would not have released the applicants from their responsibility.

353 The Commission states that if the applicants had actually assumed that the rules could qualify for an exemption under Article 85(3) of the Treaty, they would have notified them. However, they did not do so until after the Commission had initiated its investigation.

354 It maintains that, since the previous rules had never been notified to it, the applicants cannot complain of lack of action on its part ° it was not apprised either of the existence or of the content of all the sets of rules, which had never been made public. Since the judgment of the Court of Justice in Peters Bauunternehmung v ZNAV, cited above, was concerned with a question from the Hoge Raad der Nederlanden concerning the interpretation of Article 5(1) of the Brussels Convention in relation to the application of one of the sets of rules at issue, the competition law aspects were not touched upon.

355 The Commission concedes that it sent a request for information to the SPO in 1985 and that, after examining the replies, the Commission agreed with the SPO that it would carry out an investigation in April 1986. It also informed the public authorities in the Netherlands. In April 1986, the Ministry of Economic Affairs asked the Commission not to proceed with the planned investigation or, at least, to defer it because of the imminent adoption of the 1986 Royal Decree. The decree

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was promulgated on 29 December 1986 and the Commission again informed the Ministry of Economic Affairs, in March 1987, of its intention to carry out an investigation concerning the SPO. The investigation took place in June 1987 and was followed by an inspection at the premises of one of the applicants, in July 1987. In no circumstances could the applicants have taken the Commission' s action to mean that it considered at that time that the contested rules did not fall within the scope of Article 85(1) of the Treaty. It adds that the applicants cannot invoke the fact that it did not exercise its power under Article 15(6) of Regulation No 17 since that provision could have led to the Commission' s imposing heavier fines on them.

Findings of the Court

356 As the Commission points out, it is settled law that, in order for an infringement to be regarded as having been committed intentionally, it is not necessary for the undertaking to have been aware that it was transgressing the prohibition laid down by Article 85 of the Treaty; it is sufficient that it could not have been unaware that the conduct concerned had the object or effect of restricting competition in the Common Market (see the judgment of the Court of Justice in Case C-279/87

Tipp-Ex v Commission [1990] ECR I-262, paragraph 29; see also the judgment of the Court of First Instance in Dansk Pelsdyravlerforening v Commission, cited above, paragraph 157).

357 In the present case, in view of the seriousness of the restrictions of competition resulting both from the rules introduced in 1987 (see above, paragraphs 116 to 123, 140 to 158, 178 to 187 and 199 to 205) and from the previous rules (see above, paragraphs 206 to 212), the applicants could not have been unaware that the agreements to which they were parties restricted competition.

358 Similarly, the applicants could not have been unaware that the rules introduced in 1987 and the previous rules were liable to affect trade between Member States. As associations of undertakings, which in turn were members of an association covering the entirety of the Netherlands, the applicants could not have been unaware that their rules, drawn up by them but approved by the latter association, formed part of a wider framework of rules covering the entire building industry in the Netherlands and that the cumulative effect of those rules was such as to affect trade between Member States (see above, paragraphs 226 to 240). In that connection, it should be noted that the Commission imposed no fine for the period over which the various previous rules were standardized under the auspices of the SPO and were enforced by a uniform penalty system (see above, paragraph 206) or for the period in which the rules introduced in 1987 were not notified to the Commission.

359 In those circumstances, the applicants could have had no doubt that their rules came within the scope of Article 85(1) of the Treaty. The relatively benevolent attitude of the Netherlands authorities regarding the rules should have encouraged the applicants to notify the rules to the Commission with a view to obtaining an exemption under Article 85(3) of the Treaty and enjoying the immunity from fines available only to agreements which have been formally notified.

360 The applicants cannot criticize the Commission for not taking action against the rules at an earlier stage. The fact that the rules were public and had attracted numerous comments in the specialized press cannot place the Commission under any obligation to initiate a procedure under Article 85(1) of the Treaty in the absence of a formal complaint. In that respect too, the applicants' arguments amount to criticizing the Commission for failing to take action earlier whereas the applicants were entitled to notify their rules to the Commission in order to obtain an exemption and immunity from fines.

361 Accordingly, the Commission was right to conclude in paragraph 136 of the decision that the applicants' infringements were committed deliberately or at least through serious negligence and therefore to impose fines.

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362 It follows from all the foregoing that the second limb of the third plea in law must be rejected.

Third limb: excessive fine

Arguments of the parties

363 In the further alternative, the applicants claim that the fines imposed are too high having regard to the seriousness and duration of the infringements and the ceilings laid down in Article 15(2) of Regulation No 17.

364 As regards the matter of seriousness, the applicants maintain that it is clear from all the pleas in law put forward by them that, whilst the Commission may have identified an infringement in the rules drawn up under the auspices of the SPO, that infringement was not as serious as alleged in the decision. In particular, they claim, first, that, this being the first instance of Commission action in the building industry, it should have decided not to impose fines, as it did for the same reason in Decision 92/521/EEC of 27 October 1992 relating to a proceeding undere Article 85 of the EEC Treaty (IV/33.384 and IV/33.378 ° Distribution of package tours during the 1990 World Cup, OJ 1992 L 326, p. 31, paragraph 125). They also consider that the Commission was wrong to treat as an aggravating factor the fact that the rules were not notified until 1988, particularly since, prior to 1987, notification was unnecessary by virtue of Article 4(2)(1) of Regulation No 17. They add that it is impossible, from a reading of the decision, to discover how the Commission took account of the attenuating circumstances which it purports to have considered. In their view, the fact that the fines were set at the upper limit gives the impression that the Commission took no account of attenuating circumstances.

365 As regards the duration of the alleged infringements, they maintain that if the Commission had taken action against the rules earlier, as it should have done since it was aware that they existed, the infringement would have been of shorter duration. The Commission should have taken account of its own inexplicably passive attitude when calculating the fines, the course followed by the Court of Justice in its judgment in Joined Cases 6/73 and 7/73 Istituto Chemioterapico and Commercial Solvents v Commission [1974] ECR 223. Moreover, they maintain that the Commission adduced no evidence and undertook no investigation whatsoever regarding the period from 1980 to 1982, even though it took account of that period in calculating the amount of the fine.

366 The applicants also submit, in their reply, that the previous rules covered by points IV, V, VI and IX in annex 9 to the decision, had already been withdrawn before the period taken into account by the Commission in the contested decision, that is to say before 1980. Their inclusion in the present procedure was therefore improper.

367 As regards the calculation of the fines, the applicants maintain that the Commission exceeded the upper limit of 10% of the turnover achieved in the previous year by the various associations of undertakings and that it failed to differentiate those fines according to the various relevant markets.

368 Finally, comparing the amount of the fine which the Commission imposed on them with the fine imposed in its Decision 88/491/EEC of 26 July 1988 (OJ 1988 L 262, p. 27) in a proceeding pursuant to Article 85 of the Treaty (IV/31.379 - Bloemenveilingen Alsmeer, OJ L 262, p. 27), in a case where rules were observed by more than 4 100 members and the applicability of Article 85 of the Treaty was more obvious than in the present case, the applicants complain that the Commission infringed the principle of equal treatment.

369 The Commission replies by referring, essentially, to paragraphs 136, 140 and 141 of the decision. It states that it did not treat the belated notification as an aggravating factor but indicated why it did not consider that the notification of the rules at issues constituted an attenuating

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factor, by contrast with the view taken by it in other cases. It adds that the applicants' reasoning overlooks the dissuasive effect that fines must have.

370 As regards the duration of the infringement, it repeats that it was unable to take action earlier because it was unaware of the content of the rules for the reasons set out above and that the applicants' reference to the judgment of the Court of Justice in the Commercial Solvents case is inappropriate. It adds, with regard to the period from 1980 to 1982, that it did not need to undertake a separate investigation because the applicants had not claimed that the situation was any different during that period.

371 The Commission also observes that, by claiming, in their reply, that various sets of previous rules had been withdrawn before 1980, the applicants are putting forward a new plea in law, which must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance.

372 It adds, in the alternative, that it is untrue that those rules were withdrawn before 1980, as is apparent from the answers given by the applicants listed under paragraphs 3, 5, 6 and 26 in Article 4 of the decision between 12 and 16 December 1988.

373 The Commission considers that the infringements committed by the applicants display nothing new and that the fact that the decision represented its first intervention in the building industry was no reason for it not to impose a fine, otherwise any undertakings operating in sectors in which no Commission decision had yet been adopted could contravene the competition rules with impunity.

374 As regards the calculation of the fines, the Commission states that the applicants are wrong to consider that the upper limit of the fines must be determined according to their own turnover. It is clear from Article 15(2) of Regulation No 17 that it is the turnover of the members of the applicants which must be taken into account for that purpose. In the present case, the Commission maintains that it kept well within the prescribed upper limits.

375 It considers that the fines cannot be described as high since their total amount represents less than 0.5% of the average annual value of the contracts concerned and therefore they fall considerably short of the fines generally imposed for infringements of this type.

376 Finally, the Commission considers that the applicants' reference to Decision 88/491 of 26 July 1988 in the Bloemenveilingen Alsmeer case is entirely irrelevant in view of the different nature and effects of the two infringements.

Findings of the Court

377 First, examination of the first plea in law shows that the infringement was indeed as serious as stated in the decision. In that connection, it must be emphasized that the fine relates to the previous rules for a period of six-and-a-half years and to the rules introduced in 1987 for nine-and-a-half months. It is important to have regard to the particular seriousness of the restrictions of competition inherent in the previous rules, particularly as regards the concerted action on prices mentioned in paragraph 64 of the decision. Since the Court has upheld that paragraph (see above, paragraphs 206 to 212), it must be taken into account in considering paragraph 140 of the decision, according to which "the concerted action on prices and the assignment of contracts are among the most serious infringements prosecuted, prohibited and penalized by the Commission".

378 It must next be observed that all the attenuating circumstances referred to by the applicants in their pleadings were taken into consideration in determining the amount of the fine, as shown by paragraph 141 of the decision and indicated by the fact that the Commission imposed on the applicants a fine representing ° and the Commission' s figure has not been challenged by the applicants ° only 0.5% of the average annual value of the contracts concerned.

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379 It will be observed, however, that, important as they may be, particularly in so far as they relate to the public nature of the rules, those attenuating circumstances must not conceal the fact that the applicants did not exercise their right to notify the rules to the Commission with a view to obtaining a negative clearance or an exemption under Article 85(3) of the Treaty.

380 Furthermore, the applicants cannot criticize the Commission for failing to act earlier, since they had the means of constraining it to do so by notifying the rules to it. The circumstances which gave rise to the judgment of the Court of Justice of 6 March 1974 in the Commercial Solvents case, cited above, differed considerably from those of the present case since, as pointed out by the Commission, in that case it had received a complaint but had not acted upon it immediately. In the present case, the Commission received a complaint from the municipality of Rotterdam only after the applicants had notified the rules. This difference is important in that, where the Commission receives a complaint, it receives details of the conduct complained of, whereas in the present case the Commission received details of the rules only through notification of them.

381 It follows that the applicants' argument must be rejected.

382 As regards the fact that the Commission undertook no investigation in respect of the period 1980 to 1982, the Court upholds the Commission' s objection that the applicants did not claim, either in the administrative procedure or in their pleadings before the Court, that the situation was different during that period.

383 As regards the withdrawal of the previous rules covered by points IV, V, VI and IX in annex 9 to the decision, the Court considers that the plea concerning them is new and must be declared inadmissible under Article 48(2) of its Rules of Procedure.

384 It must also be pointed out that, whilst the Commission was wrong to bring those rules within the scope of the present procedure, it did so as a result of errors made by certain applicants in their answers to the Commission' s requests for information (see the answer of Aannemersvereniging van Boorondernemers en Buizenleggers of 12 December 1988, that of Aannemers Vereniging Haarlem-Bollenstreek of 16 December 1988, that of Aannemersvereniging Veluwe en Zuidelijke IJsselmeerpolders of 15 December 1988 and that of Utrechtse Aannemers Vereniging of 12 December 1988). They cannot therefore raise objections concerning a mistake prompted by their own mistakes.

385 Finally, the Court finds that the applicants are wrong in their assertion that the fine exceeds the upper limit laid down in Article 15(2) of Regulation No 17, namely 10% of the turnover achieved during the preceding business year. It must be borne in mind that the general term "infringement" used in Article 15(2) of Regulation No 17 covers, without distinction, agreements, concerted practices and decisions of associations of undertakings and that its use indicates that the upper limits for fines laid down in that provision apply in the same way to agreements and concerted practices as to decisions of associations of undertakings. It follows that the upper limit of 10% of the turnover must be calculated by reference to the turnover achieved by each of the undertakings that are parties to the agreements and concerted practices concerned or by all the members of the associations of undertakings, at least where the internal rules of the association empower it to bind its members. The correctness of this analysis is confirmed by the fact that, in determining the amount of the fines, account may be taken inter alia of such influence as the undertaking may have been able to exercise in the market, in particular by reason of its size and economic power, of which its turnover may give an indication (judgment of the Court of Justice in Joined Cases 100/80 to 103/80 Musique Diffusion française and Others v Commission [1983] ECR 1825, paragraphs 120 and 121) and of the dissuasive effect which such fines must have (judgment of the Court of First Instance in Case T-12/89 Solvay v Commission [1992] ECR II-907, paragraph 309). The influence which an association of undertakings may have had on the market depends not on its own "turnover", which reveals neither its size nor its economic power, but rather on the turnover of its members which gives an indication

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of its size and economic power (judgment of the Court of First Instance in CB and Europay, cited above, paragraphs 136 and 137).

386 It must also be emphasized that the applicants cannot rely on the fact that, in Decision 88/491 of 26 July 1988 given in the Bloemenveiligen Alsmeer case, the Commission imposed lower fines since in that case the nature of the infringement and its effects were, as pointed out by the Commission, entirely different.

387 It follows from the foregoing that this limb of the plea must be rejected.

388 Accordingly, the plea in law alleging infringement of Regulation No 17 must be dismissed.

Fourth plea in law: infringement of Article 190 of the Treaty

Arguments of the parties

389 The applicants claim that the Commission infringed its obligation to state the reasons for decisions it adopts. By virtue of that obligation, it should not only have reproduced in its decision the applicants' main defence submissions put forward in the administrative procedure but should also have replied in detail to each of those submissions. According to the judgment of the Court of First Instance in SIV and Others v Commission, cited above, paragraph 159, "even if the Commission is not required to discuss in its decisions all the arguments raised by the undertakings... having regard to the arguments of the applicants... the Commission ought to have examined more fully... in order to show why the conclusions drawn by the applicants were groundless".

390 They maintain that, in the present case, the Commission did not even indicate in its decision the main arguments put forward by them in their answer to the statement of the objections and at the administrative hearing.

391 The applicants also claim, in their reply, that in so far as it refers to the Code of Honour as such, to all the statutes of the SPO, and to all the previous rules, the operative part of the decision is not covered by the statement of the reasons on which it is based. In the case of the Code of Honour, they submit that, in so far as it finds that, with the exception of Article 10 thereof, the Code of Honour, as made binding on the members of the SPO by its decision of 3 June 1980, constitutes an infringement of Article 85(1) of the Treaty, Article 1(2) of the operative part of the contested decision is wider in scope than paragraph 1 of the grounds of the decision, which indicates that the proceeding concerns the SPO decision of 3 June 1980 making the Code of Honour and the annexes thereto binding on the undertakings belonging to its member organizations. Consequently, no reason is stated to support the finding that the Code of Honour as such constitutes an infringement.

392 As regards the statutes of the SPO, the applicants state that, in so far as it finds that the statutes of the SPO of 10 December 1963, as subsequently amended, constitute an infringement of Article 85(1) of the Treaty, Article 1(1) of the operative part of the decision is wider in scope than the grounds of the decision, which relate only to Article 3 of those statutes. However, most of the provisions of those statutes have no bearing on matters of competition and relate exclusively to the internal functioning of the SPO. They maintain that the Commission has confused the statutes of the SPO with the decisions based on them, which prompted the Commission to declare the SPO unlawful as such, without stating any reasons for doing so.

393 Finally, as regards the previous rules, they state that they are considerably more numerous than those mentioned in annex 9 to the decision and that, contrary to the purport of the decision, the "Burger ° & Utiliteitsbouw Openbaar" UPR rules were not drawn up by the SPO but by an individual association of contractors. They also criticize the Commission for making an all-embracing and undifferentiated judgment regarding all the previous rules, without taking account of their differences

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and specific features. Finally, they state that certain sets of previous rules were withdrawn before 1980.

394 The Commission replies that its decision gives an adequate statement of the reasons on which it is based and that it was under no obligation to produce specialist studies to refute those produced by the applicants, inasmuch as the latter were irrelevant.

395 As regards more particularly the grounds on which the decision rejects the application for exemption lodged by the applicants, it considers that to require it, as the applicants wish, to prove that the rules could not qualify for an exemption would amount to a reversal of the burden of proof.

396 The Commission also contends that the applicants' arguments disputing the finding that the Code of Honour as such, the statutes of the SPO as a whole and the previous rules are unlawful do not appear in that form in the application and are at least in part based on submissions not previously put forward. It considers that they therefore constitute a new plea in law, which must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance. In the alternative, it contends that the reference in paragraph 1 of the decision to the decision of 3 June 1980 as the subject-matter of the proceeding, in that it makes the Code of Honour and the annexes thereto binding on the undertakings belonging to the member organizations of the SPO, can refer only to the Code of Honour as such, since the decision of 3 June 1980 has no independent signficance for competition law purposes.

397 As regards the statutes of the SPO, the Commission concedes that only Article 3 thereof raises a problem concerning competition law, the other provisions of those statutes having no independent significance in that regard. However, it considers that, in so far as those other provisions are directed towards enabling the SPO to achieve its objects, as defined in Article 3, they must be covered by the decision. It states that the decision is not intended to declare the SPO unlawful as such but only to the extent to which its object as an association is to restrict competition.

398 As regards the previous rules, the Commission states that it relied on the answers from the applicants to its requests for information in order to determine the number of sets of rules in existence and the role of the SPO in relation to the "Burger- &Utiliteitsbouw Openbaar" UPR rules. It adds that it confined itself to a general reference to the previous rules in its decision because they are more severely restrictive of competition than the UPR rules. Finally, it again states that it is not true that certain sets of previous rules were withdrawn before 1980.

Findings of the Court

399 The Court does not consider that the Commission has infringed the obligation to state the reasons for decisions laid down in Article 190 of the Treaty. The Commission answered all the relevant arguments put forward by the applicants in the administrative procedure, regarding both the application of Article 85(1) of the Treaty and that of Article 85(3).

400 With more particular regard to Article 85(3), the Court considers that the Commission was right to focus its analysis of the contested rules on the protection of entitled undertakings and reimbursements for calculation costs. Those are two central factors conducive to the attainment of the aims pursued by the rules, namely counteracting "playing-off" and limitation of transaction costs. Since the applicants asserted throughout the administrative procedure that the rules formed a single whole and the Commission arrived at the conclusion that the two factors at the heart of that whole could not qualify for an exemption under Article 85(3) of the Treaty, it was no longer necessary for it to examine any advantages which might occasionally arise from any particular provision of the rules at issue.

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401 As regards the lack of a statement of reasons for the Commission' s rejection of the suggestions for amendments to the rules proposed by the applicants, suffice it to refer to the reasons given for rejection of the second limb of the second plea, from which it is apparent that the Commission was under no obligation to take a position concerning proposals for amendments which had not been notified to it.

402 Finally, the Court considers that by claiming, in their reply, that the operative part of the decision is not covered by the statement of reasons in so far as they refer to the Code of Honour as such, the statutes of the SPO in their entirety and all the previous rules, the applicants have put forward a new plea in law, which is inadmissible by virtue of Article 48(2) of the Rules of Procedure. Moreover, it must be borne in mind that the operative part must be read in the light of the statement of the reasons on which it is based and that Article 1(2) of the operative part of the contested decision is not intended to declare the SPO unlawful as such. Similarly, paragraph 1 of the decision, by referring to the "SPO' s decision of 3 June 1980 making binding on the undertakings belonging to its member organizations the Erecode voor ondernemers in het Bouwbedrijf and the annexes thereto" did not refer to the decision of 3 June 1980 as such but to the Code of Honour which was made binding by that decision, and the same applies to the operative part of the contested decision.

403 Finally, the Court considers that the Commission was right to confine itself to a general reference in its decision to the previous rules. It states that the previous rules had the same object as the rules introduced in 1987 and that, in so far as they differed from the latter, they restricted competition at least to the same extent (decision, paragraphs 62 to 65 and 114; see above, paragraphs 206 to 212).

404 It must be observed that, during the administrative procedure, the applicants put forward no specific arguments to show that the previous rules differed in fundamental respects from the rules introduced in 1987 or that they were less restrictive of competition than the latter.

405 Consequently, the Commission was likewise entitled, in dealing with the previous rules, to confine itself to referring essentially to the grounds of the decision concerning the rules introduced in 1987.

406 It follows that this plea in law must be dismissed.

Fifth plea in law: infringement of the rights of the defence

Arguments of the parties

407 In their reply, the applicants claim, essentially, that the Commission infringed the rights of the defence, first by considering that the Code of Honour constituted an infringement of Article 85(1) of the Treaty, whereas the Code of Honour was not, as such, dealt with in the administrative procedure (reply, p. 19) since it related solely to the SPO binding decision of 3 June 1980, making the Code of Honour binding on the members of the associations belonging to the SPO and, secondly, by relying on "leading questions" put to foreign contractors concerning the reasons for their membership of the SPO and concluding as a result, in the decision, that the contested measures affected trade between Member States.

408 The Commission replies that that assertion constitutes a new plea in law which must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance. In the alternative, it rejects that assertion.

Findings of the Court

409 The Court considers that the applicants' allegation as to infringement of their rights of defence constitutes a new plea in law which must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure and that it is, in any event, unfounded.

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410 It must be emphasized that, at the hearing, the applicants did not contradict the statement made by the Commission in its rejoinder to the effect that its objections to the Code of Honour had been dealt with in paragraphs 18, 33 to 35, 41, 42, 44 and 46 to 48 of the statement of objections. Moreover, the Commission did not rely on the answers to the questions criticized by the applicants in declaring that the measures at issue affected trade between Member States.

411 It follows from all the foregoing that the application must be dismissed.

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31992D0204 : N 26 - 411
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61992A0039-N110 : N 267
61992A0039-N136 : N 386
61992A0039-N137 : N 386
61992J0137-N52 : N 52
61992J0137-N59 : N 55

CONCERNS Confirms 31992D0204

SUB Competition ; Rules applying to undertakings ; Concerted practices

AUTLANG Dutch

MISCINF POURVOI : C-137/95

APPLICA Person

DEFENDA Commission ; Institutions

NATIONA Netherlands

NOTES Mok, M.R.: TVVS ondernemingsrecht en rechtspersonen 1995 p.108-110
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PROCEDU Application for annulment - unfounded

DATES of document: 21/02/1995
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**Judgment of the Court
of 26 April 1994
Commission of the European Communities v Italian Republic.
Concession for the lottery computerization system.
Case C-272/91.**

++++

1. Freedom of movement for persons - Freedom of establishment - Freedom to provide services - Procedures for the award of public supply contracts - Invitation to tender restricting the right to tender for the concession of the lottery computerization system to bodies controlled by the public sector - Contract not relating to activities connected with the exercise of official authority - Not permissible

(EEC Treaty, Arts 52, 55, first para., and 59; Council Directive 77/62, Arts 17 to 25)

2. Approximation of laws - Procedures for the award of public supply contracts - Directive 77/62 - Scope - Certain supplies not constituting traditional forms of sales included

(Council Directives 77/62 and 88/295, Art. 2)

1. Article 52 of the Treaty on freedom of establishment and Article 59 of the Treaty on freedom to provide services are infringed where a Member State restricts participation in a contract for the concession of the lottery computerization system to bodies the majority of whose capital is held by the public sector where that contract, which relates to the premises, supplies, installations, maintenance, operation and transmission of data and everything else that is necessary for the conduct of the lottery, does not involve any transfer of responsibility to the concessionaire for the various activities inherent in the lottery with the result that the derogation in the first paragraph of Article 55 of the Treaty regarding activities connected with the exercise of official authority does not apply. Such a practice also constitutes an infringement of Articles 17 to 25 of Directive 77/62 coordinating procedures for the award of public supply contracts.

2. The fact that a contract for the supply of an integrated computerized system for the conduct of the lottery which involves the supply of certain goods to the administration stipulates that the system in question is not to become the property of the administration until the end of the contractual relationship with the successful tenderer and that the "price" for that supply is to take the form of an annual payment in proportion to the revenue does not remove the contract from the scope of Directive 77/62 coordinating procedures for the award of public supply contracts. The fact that Article 2 of Directive 88/295 extended the scope of the directive to contracts such as those for the lease, rental or hire purchase, with or without option to buy, of products is a reflection of the Community legislature' s wish to bring within the scope of the directive the supply of products which do not necessarily become the property of the public administration and for which the consideration is fixed in abstract terms.

In Case C-272/91,

Commission of the European Communities, represented by Antonio Aresu and Rafael Pellicer, members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato

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dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by failing to make known, for the purposes of publication in the Official Journal of the European Communities, first, at the beginning of 1990, an indicative notice setting out the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 and which the Italian Finance Ministry envisaged awarding during 1990 and secondly, in November 1990, a notice concerning the invitation to tender for the concession of the lottery computerization system and by restricting participation in that contract exclusively to bodies, companies, consortia and groupings a majority of whose capital, considered individually or in aggregate, was publicly owned, the Italian Republic has failed to fulfil its obligations under Articles 30, 52 and 59 of the EEC Treaty and Articles 9 and 17 to 25 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (Official Journal 1988 L 127, p. 1),

THE COURT,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida (Rapporteur) and M. Díez de Velasco (Presidents of Chambers), C.N. Kakouris, R. Joliet, F.A. Schockweiler, F. Grévisse, M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: C. Gulmann,

Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 May 1993,

after hearing the Opinion of the Advocate General at the sitting on 14 July 1993,

gives the following

Judgment

Costs

37 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has been essentially unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by failing to make known, for the purposes of publication in the Official Journal of the European Communities, first, at the beginning of 1990, an indicative notice setting out the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 and which the Italian Finance Ministry envisaged awarding in 1990 and secondly, in November 1990, a notice concerning the invitation to tender for the concession of the lottery computerization system, and by restricting participation in that contract exclusively to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, was held by the public sector, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Articles 9 and 17 to 25 of Council Directive 77/62/EEC of 21 December

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1976 coordinating procedures for the award of public supply contracts, as amended by Council Directive 88/295/EEC of 22 March 1988;

2. Dismisses the rest of the application;

3. Orders the Italian Republic to pay the costs.

1 By application lodged at the Court Registry at 18 October 1991, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by failing to make known, for the purposes of publication in the Official Journal of the European Communities, first, at the beginning of 1990, an indicative notice setting out the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 and which the Italian Finance Ministry envisaged awarding during 1990 and secondly, in November 1990, a notice concerning the invitation to tender for the concession of the lottery computerization system and by restricting participation in that contract exclusively to bodies, companies, consortia and groupings a majority of whose capital, considered individually or in aggregate, was publicly owned, the Italian Republic has failed to fulfil its obligations under Articles 30, 52 and 59 of the EEC Treaty and Articles 9 and 17 to 25 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (Official Journal 1988 L 127, p. 1).

2 The background to the dispute is summarized in paragraphs 6 to 16 of the Order of the President of the Court of 31 January 1992 (C-272/91 R, [1992] ECR I-457) on the application for interim relief made by the Commission in connection with this application which ordered the Italian Republic to take the measures necessary to suspend the legal effect of the decree of the Minister for Finance of 14 June 1991 awarding the concession for the lottery computerization system and performance of the contract concluded for that purpose with the consortium Lottomatica.

The complaint of infringement of Articles 52 and 59 of the Treaty

3 The Commission claims that by restricting participation in the contract for the concession for the computerization system for the Italian lottery to "bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, is held by the public sector" the Italian Republic has failed to comply with its obligations under Articles 52 and 59 of the Treaty.

4 The Commission contends that this is a specific instance of the implementation of the restriction declared unlawful by the Court in Case C-3/88 Commission v Italy [1989] ECR 4035 under which only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements with the Italian State for the development of data-processing systems for the public authorities.

5 The Italian Government denies the alleged infringement. It maintains that the contracts envisaged by the abovementioned judgment were for the procurement of data-processing systems which were also to be managed by the supplier as a service to the administration; the contract in issue here, on the other hand, relates, according in particular to the technical programme annexed to the special specifications for the invitation to tender at issue, to a concession by which the administration in question entrusts a third party with carrying out an activity relating to official authority, namely part of the powers of organization, checking and certification in connection with the lottery which, under Italian legislation, are strictly confined to the State. Article 55 of the Treaty provides that Articles 52 and 59 do not apply to activities which in Member States are connected with the exercise of official authority.

6 It should be noted that, as the Advocate General showed in points 18 to 23 of his Opinion, the

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introduction of the computerized system at issue which, according to the invitation to tender relates to the premises, supplies, installations, maintenance, operation and transmission of data and everything else that is necessary for the conduct of the lottery, does not involve any transfer of responsibility to the concessionaire for the various activities inherent in the lottery.

7 First, the lottery collectors continue to be responsible for accepting bets and the function of the concessionaire' s terminal is merely to register, automatically check and transmit the data resulting from the steps taken by the person managing the registration point. The technical programme states that the latter must be able, in the event of a mistake being made, to rectify what has been registered and even to cancel a ticket issued by the terminal.

8 Second, the draws are carried out by the Draw Committees (Commissioni di Estrazione) which are State bodies, like the Area Committees (Commissioni di Zona) which retain responsibility for checking and validating winning tickets.

9 Third, as the Italian Government itself admitted, it is always the public administration which ultimately approves and pays out prizes.

10 Fourth, the fact that the first point of the technical programme states that the tender also relates to "everything else that is necessary for the conduct of the lottery" does not justify the conclusion that the concessionaire takes part in the exercise of public authority but merely signifies that he must operate within the bounds of the concession.

11 Fifth, the Italian Government' s argument that the voluntary payments made by players in the lottery constitute a fiscal charge which entails that the concessionaire is taking part in the exercise of public authority is ill-founded.

12 Accordingly, the services to be provided by the concessionaire of the lottery computerization system, in particular the design of a computerized system and the necessary software and the operation of that system, are no different from the technical services under the agreements for the development of data-processing systems for the public administration at issue in Case C-3/88 Commission v Italy, cited above.

13 Since the activities in question do not therefore fall under the derogation in Article 55 of the Treaty, it must be held that the restriction at issue is contrary to Articles 52 and 59 of the Treaty and the complaint of infringement of those articles must be upheld.

The complaint that Article 30 of the Treaty has been infringed

14 In support of its complaint of infringement of Article 30, in the pre-litigation procedure the Commission merely stated that the restriction at issue reserving the right to tender to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, is held by the public sector in fact excludes companies from other Member States which are prevented from offering their computer systems and their software for operating the service covered by the contract. Consequently, the Commission says, the effect of that reservation, like the measure at issue in Case C-21/88 Du Pont de Nemours Italiana v Unità Sanitaria Locale No 2 di Carrara [1990] ECR I-889 whereby a set percentage of public-supply contracts were reserved to companies established in certain regions of the national territory, is that products originating in other Member States suffer discrimination in comparison with products manufactured in the Member State in question, with the result that the normal course of intra-Community trade is hindered.

15 It is to be noted that the Commission did not at that stage set out the reasons for its view that excluding foreign companies from participation in the contract at issue prevented the successful tenderer from using products originating in other Member States in setting up the computerized system in question.

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16 According to the Court' s case-law (see, in particular, Case 325/82 Commission v Germany [1984] ECR 777) the letter of formal notice and the reasoned opinion must contain a sufficient statement of reasons to enable the Member State to prepare its defence. For the reasons set out above, that was not done in this case.

17 Consequently, the Court must of its own motion declare the complaint of infringement of Article 30 inadmissible.

The complaints of infringement of Directive 77/62, as amended by Directive 88/295

18 The Commissions claims, first, that the Italian Republic has infringed Article 9 of Directive 77/62 as amended by Directive 88/295 ("the Directive") by failing to make known, for the purposes of publication in the Official Journal of the European Communities, first, at the beginning of 1990, an indicative notice setting out the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 which the Italian Finance Ministry envisaged awarding in 1990 and, secondly, in November 1990 a notice concerning the invitation to tender for the concession for the lottery computerization system. The Commission further considers that by restricting participation in that latter contract to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, is held by the public sector the Italian Republic has also infringed Articles 17 to 25 of the Directive.

19 Article 9(1), (2) and (4) of the Directive provides:

> "1. The contracting authorities listed in Annex I to Directive 80/767/EEC shall make known, as from 1 January 1989, as soon as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement by product area of which the estimated value, taking into account the provisions of Article 5 of this Directive, is equal [to] or greater than ECU 750 000 and which they envisage awarding during the coming 12 months.

The Council, acting on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide before 1 March 1990 on the extension of this obligation to the other contracting authorities covered by Article 1.

2. Contracting authorities who wish to award a public supply contract by open, restricted, or, under the conditions laid down in Article 6(3), by negotiated procedure within the meaning of Article 1 shall make known their intention by means of a notice.

...

4. The notices referred to in paragraphs 1, 2 and 3 shall be sent as rapidly as possible by the most appropriate channels to the Office for Official Publications of the European Communities. In the case of the accelerated procedure referred to in Article 12 the notice shall be sent by telex, telegram or facsimile.

(a) The notice referred to in paragraph 1 shall be sent as soon as possible after the beginning of each budgetary year;

(b) the notice referred to in paragraph 3 shall be sent at the latest 48 days after the award of the contract in question."

20 Articles 17 to 25 of the Directive set out the criteria for qualitative selection and for the award of contracts.

21 The Italian Government contends that those provisions are not applicable in this case.

22 It maintains first that the invitation to tender at issue falls outside the scope of the Directive since the contract in question does not relate to the supply of goods for the contracting authorities

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but concerns the concession by the administration to a third party of an activity which forms part of the exercise of public authority in fiscal matters and is characterized by the absence of any transfer of goods and of any price corresponding to such a transfer.

23 This argument must be rejected.

24 As is clear from paragraphs 7 to 11 of this judgment, the introduction of the computerized system in question does not involve any transfer of responsibilities to the concessionaire in respect of the various operations inherent in the lottery. Moreover, it is common ground that the contract at issue relates to the supply of an integrated computerized system including in particular the supply of certain goods to the administration.

25 Contrary to the position of the Italian Government, it is irrelevant in that connection that the system in question does not become the property of the administration until the end of the contractual relationship with the successful tenderer and that the "price" for that supply takes the form of an annual payment in proportion to the revenue. As the Advocate General rightly stated in point 40 of his Opinion, the fact that Article 2 of Directive 88/295 extended the scope of the Directive to "contracts... involving the purchase, lease, rental or hire purchase, with or without option to buy, of products" is a reflection of the Community legislature' s wish to bring within the scope of the Directive the supply of products which do not necessarily become the property of the public administration and for which the consideration is fixed in abstract terms.

26 The Italian Government argues secondly that the contracting authority, the Autonomous State Monopolies Administration ("AAMS") is not included in the list of contracting authorities in Annex I to Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC (Official Journal 1980 L 215, p. 1). Consequently, Article 9 of Directive 77/62 as amended, which lays down advertising rules applying to contracting authorities referred to in that annex, is not applicable in this instance. The Italian Government believes that its view is borne out by footnote 2 to the part of the list relating to Italy which, as regards the Finance Ministry, makes the following reservation: "Not including purchases made by the tobacco and salt monopolies". The Italian Government maintains that that reservation relates not only to contracts concluded by the tobacco and salt monopolies which were under the authority of the AAMS at the time when the Directive was adopted, but also all the other activities which are now under the authority of that administration.

27 That argument is ill-founded.

28 As the Commission rightly pointed out, it is clear from Article 4(4) of Italian Law No 528 of 2 August 1982 (GURI No 222 of 13 August 1982), as amended by Article 2 of Law No 85 of 19 April 1990 (GURI No 97 of 27 April 1990), that the Italian Finance Ministry is the sole real contracting authority for the contract at issue. In any event the AAMS, which conducts the lottery, is a mere administrative department - without separate legal personality - of the Finance Ministry so that even acts which may formally be ascribed to the AAMS are in substance subject to the decision-making power of that Ministry.

29 As regards footnote 2 to Annex I to Directive 80/767, its actual wording shows that it relates only to contracts awarded by the tobacco and salt monopolies.

30 The Italian Government contends finally that in any event since what is in question here is the grant to the concessionaire of the special and exclusive right to engage in a public service activity, namely, at least in part, the conduct of the lottery, the only rule to be complied with is that laid down in Article 2(3) of the Directive. It provides: "When the State, a regional or local authority or one of the legal persons governed by public law or corresponding bodies specified in Annex I grants to a body other than the contracting authority - regardless of its legal status

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- special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties".

31 That argument must also be rejected.

32 As shown in paragraphs 7 to 11 of this judgment, the conduct of the lottery is not transferred to the concessionaire whose task is confined to technical activities relating to the setting up and operation of the computerized system. Those activities comprise the supply of services to the public administration and also the supply of certain goods to it.

33 It must therefore be concluded that the provisions of the Directive relied on by the Commission are applicable in this case and the complaints relating to the infringement thereof must be examined.

34 As regards the complaint of the infringement of Article 9 of the Directive, the Italian Government does not deny that the notices in question were not sent.

35 As regards the complaint of infringement of Articles 17 to 25 of the Directive, it should be noted that those provisions contain a binding and exhaustive list of the criteria for qualitative selection and for the award of the contract and do not envisage the possibility of restricting participation in that contract to bodies, companies, consortia or groupings the majority of whose capital, considered individually or in aggregate, is publicly owned.

36 It follows that the complaints of infringement of Directive 77/62, as amended by Directive 88/295, must also be upheld.

DOCNUM	61991J0272
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1991 ; J ; judgment
PUBREF	European Court reports 1994 Page I-01409
DOC	1994/04/26
LODGED	1991/10/18
JURCIT	11957E030 : N 14 - 17 11957E052 : N 3 - 13 11957E055 : N 5 - 13 11957E059 : N 3 - 13 31977L0062-A02P3 : N 30 31977L0062-A09 : N 18 19 34 31977L0062-A17 : N 20 - 35 31977L0062-A18 : N 20 - 35

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31977L0062-A19 : N 20 - 35
31977L0062-A20 : N 20 - 35
31977L0062-A21 : N 20 - 35
31977L0062-A22 : N 20 - 35
31977L0062-A23 : N 20 - 35
31977L0062-A24 : N 20 - 35
31977L0062-A25 : N 20 - 35
31980L0767-N1 : N 26 - 29
61982J0325 : N 16
31988L0295-A02 : N 25
31988L0295 : N 18
61988J0003 : N 4 12
61988J0021 : N 14
61991C0272 : N 6 25
61991O0272 : N 2

CONCERNS Failure concerning 11957E052
Failure concerning 11957E059
Failure concerning 31977L0062-A24
Failure concerning 31977L0062-A25
Failure concerning 31977L0062-A09
Failure concerning 31977L0062-A17
Failure concerning 31977L0062-A18
Failure concerning 31977L0062-A19
Failure concerning 31977L0062-A20
Failure concerning 31977L0062-A21
Failure concerning 31977L0062-A22
Failure concerning 31977L0062-A23
Failure concerning 31988L0295

SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws

AUTLANG Italian

APPLICA Commission ; Institutions

DEFENDA Italy ; Member States

NATIONA Italy

PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Gulmann

JUDGRAP Moitinho de Almeida

DATES of document: 26/04/1994
of application: 18/10/1991

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Order of the President of the Court of 31 January 1992 Commission of the European Communities v Italian Republic. Concession for the lottery computerization system. Case C-272/91 R.

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Application for interim measures - Interim measures - Conditions for granting - Prima facie case - Serious and irreparable damage - Balancing of all the interests involved - Account to be taken of judgment declaring a Member State to have failed to fulfil obligations analogous to those in issue

(EEC Treaty, Art. 186)

In Case C-272/91 R,

Commission of the European Communities, represented by A. Aresu and R. Pellicer, Members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, head of the Department for Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adelaïde,

defendant,

APPLICATION for the adoption of interim measures requiring the Italian Republic to take the measures necessary to suspend the award of the concession for the lottery computerization system,

THE PRESIDENT OF THE COURT

makes the following

Order

1 By application lodged at the Court Registry on 18 October 1991, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by failing to make known, for the purposes of publication in the Official Journal of the European Communities, first, at the beginning of 1990, an indicative notice setting out the total procurement which the Italian Ministry of Finance was envisaging awarding during that year and secondly, in November 1990, a notice concerning the invitation to tender for the concession of the lottery computerization system, and by restricting participation in that tender exclusively to bodies, companies, consortia and groupings a majority of whose capital, considered individually or in aggregate, was publicly owned, the Italian Republic has failed to fulfil its obligations under Articles 30, 52 and 59 of the EEC Treaty and Articles 9 and 17 to 25 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (Official Journal 1988 L 127, p. 1).

2 By a separate document lodged at the Court Registry on the same day, the Commission also applied for interim relief under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure, seeking an order requiring the Italian Republic to take the necessary measures to suspend the legal effect of the decree of the Minister for Finance of 14 June 1991 awarding the contract in question

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or the legal effect of any contract subsequently concluded.

3 The defendant submitted written observations on the application for interim measures on 31 October 1991 and the parties presented oral argument on 2 December 1991.

4 At the hearing, the defendant filed two documents and the parties were invited to submit additional observations arising therefrom. The Commission submitted observations on 9 December and the defendant on 16 December 1991.

5 Before considering the merits of the application for interim measures, it is appropriate to summarize the background to the dispute.

6 On 13 November 1990, the Italian Ministry of Finance published a contract notice in the Italian press concerning an invitation to tender for the concession of the computerization system for the "lotto", the State lottery.

7 It is apparent from the documents before the Court that the lottery is a game of chance operated by the Autonomous State Monopolies Administration ("the Administration"), an administrative body attached to the Ministry of Finance. The system involves players betting on one or more numbers with a view to weekly draws. The stakes are taken at authorized collection points (in particular, tobacconists) and there is a draw every Saturday in each of the ten lottery areas (ruote) into which Italy is subdivided. A bet may be entered either in the draw for the area in which the relevant collection point is situated or in the draw for all the areas. The amount of the winnings is determined, by reference in particular to the stake, in accordance with a formula laid down by Italian legislation, and winnings are payable at the collection point or, if they exceed a certain sum, at the local offices of the Ministry of Finance.

8 The lottery computerization system which was the subject of the contract comprised, according to the invitation to tender, premises, supplies, equipment, maintenance, operation, transmission of data and everything else necessary for running the lottery.

9 The invitation to tender provided that the concession was for nine years only and that when it expired the entire computerized system, including premises, apparatus, terminals at collection points, equipment, structures, programs, records and everything else necessary for operating and managing the system was to be handed over without charge for the exclusive use of the Administration.

10 It specified that the concession comprised three phases: in the first phase the equipment was to be supplied, installed and tested in parallel with the manual system, at the end of which the computerized system was to become operational in one lottery area; in the second phase the system was to be extended to all the lottery areas; and finally in the third, fully operational, phase the number of collection points was to be progressively increased. Tenders had to indicate the time within which each phase would be completed.

11 The computerization system concessionaire would receive no remuneration during the first phase, but during the second and third phases would receive a percentage of the gross receipts from automatically recorded bets. That percentage was to be indicated in the tender.

12 The invitation to tender also specified economic and technical criteria for the selection of bodies or undertakings wishing to submit tenders.

13 The invitation reserved the right to tender to bodies, companies or consortia and groups the majority of whose capital, considered individually or in aggregate, was held by the public sector. The Ministry of Finance was to take into account the particular nature and importance of the computerized operation of the lottery which, as a State monopoly operated for maximum returns, required special guarantees and absolute reliability and security for the setting-up and operation of the system.

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14 Three bodies or undertakings were invited to submit tenders. By a decree of the Ministry of Finance of 14 June 1991, the concession was awarded to the consortium Lottomatica.

15 The Commission sent the Italian authorities a formal notice on 8 April 1991 followed by a reasoned opinion on 2 September 1991, in which it stated in particular that the restriction of the tendering procedure in issue exclusively to companies or bodies the majority of whose capital was held by the public sector, in so far as it favoured Italian undertakings, constituted an infringement of Articles 52 and 59 of the EEC Treaty and a measure having equivalent effect prohibited by Article 30 of the Treaty. The Commission pointed out to the Italian authorities that in its judgment in Case C-3/88 Commission v Italy [1989] ECR 4035, the Court had held that Italian legislation providing that only companies held as to a majority by the public sector could conclude agreements for the development of data-processing systems for the public authorities infringed in particular Articles 52 and 59 of the EEC Treaty, and ruled that Italy had failed to fulfil its obligations. The Commission stated that the Italian authorities had not yet taken the necessary measures to comply with that judgment and that it had for that reason brought proceedings under Article 171 of the EEC Treaty.

16 In their reply to the reasoned opinion, the Italian authorities claimed in particular that the contract in question was not one of those envisaged by the abovementioned judgment, which concerned contracts for the procurement of data-processing systems under which the suppliers were also responsible for operating the systems but as a service provided to the authorities; the contract in issue, on the other hand, concerned a concession by which the administration entrusted a third party with carrying out an activity relating to official authority, namely the processing of lottery bets. Article 55 of the EEC Treaty provided that Articles 52 and 55 did not apply to activities which in Member States were connected with the exercise of official authority.

17 It should be noted that under Article 186 of the EEC Treaty, the Court may in any cases before it prescribe any necessary interim measures.

18 Article 83(2) of the Rules of Procedure provides that an order for interim measures such as those sought in these proceedings will only be granted if the circumstances give rise to urgency and the factual and legal grounds establish a prima facie case for the order. The Court has consistently held that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable harm to the party requesting such measures.

19 It is appropriate to consider whether those conditions are satisfied in this case.

20 As far as concerns, first, the requirement for a prima facie case, the Commission states that the infringement of Articles 52 and 59 of the EEC Treaty is manifest and that the situation here is wholly analogous to that underlying the abovementioned judgment in Case C-3/88. In particular, the concession of the computerization system in issue cannot be considered to involve the exercise of official authority within the meaning of the first paragraph of Article 55 of the Treaty. The Italian Government used the same argument concerning the contracts to develop data-processing systems for the public authorities which were in issue in Case C-3/88. The Court pointed out that the exception in Article 55 of the EEC Treaty from the freedom of establishment and the freedom to provide services must be restricted to activities which in themselves involve a direct and specific connection with the exercise of official authority, and declared that that was not the case for activities concerning the design, programming and operation of data-processing systems, which are activities of a technical nature.

21 The defendant claims that the concession of the lottery computerization system involves a real transfer of official powers to the concessionaire and cannot be treated in the same way as a contract

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to provide goods or services. That would be irreconcilable with the remuneration of the concessionaire by a percentage of the receipts. Gaming in the form of the lottery is under Italian legislation strictly reserved to the State and any activity relating to the lottery accordingly falls within the exercise of official powers, which for the purposes of the first paragraph of Article 55 of the EEC Treaty include not only powers to take decisions but also powers to organize, inspect or certify. The technical specification for the invitation to tender, filed by the defendant at the hearing, sets out the powers which the concession transfers to the concessionaire. They include in particular the taking of bets, since in order to be valid the lottery tickets must be issued by the concessionaire' s terminals installed at the collection points, and the determining of the winning tickets, to be done by the concessionaire' s record centres in each lottery area.

22 It should be noted first that the introduction of the computerized system in issue does not appear at first sight to change the various operations inherent in the lottery, as currently implemented according to the description in the specification filed by the defendant. On the face of it, no responsibility for any of these processes is transferred to the concessionaire. The collection points remain responsible for taking the bets, while the function of the concessionaire' s terminal is simply to record, to check automatically, and to transmit the data entered by the person in charge of the collection point who, according to the specification, must be able to correct the entry if there is an error and even cancel a ticket issued by the terminal. Similarly for the determination of the winning tickets, the Area Commission, an administrative body, retains responsibility for checking and validating the tickets.

23 Secondly, the services to be provided by the concessionaire of the lottery computerization system do not appear at first sight to differ from those entailed by the contracts for the development of data-processing systems for the public authorities at issue in Case C-3/88. Both cases involve developing computerized systems, providing the necessary hardware and software and operating the system. Although the lottery computerization system does not become State property until the term of the concession has expired, and the concessionaire' s remuneration consists of a share of the returns from operating the system, those factors are, on the face of it, irrelevant to the rules of Community law in issue.

24 It must therefore be held, taking account of the abovementioned judgment in Case C-3/88, that the Commission' s application does not appear at this stage to be without substance and that the requirement for a prima facie case is satisfied.

25 As far as concerns the requirement for urgency, the Commission claims that it cannot wait until the decision on the substance without suffering serious and irreparable damage in its capacity as the institution responsible for ensuring the application of the Treaty. By the time the Court decided on the substance, the lottery computerization would have been in place for some time, and the Commission would have to accept the fait accompli, notwithstanding the flagrant violation of Community law. In order for the forthcoming judgment of the Court to be effective, the Commission claims that it is necessary for interim relief to be ordered.

26 The defendant, for its part, observes that the concession with the consortium Lottomatica was signed on 22 November 1991; the first phase of the concession should be completed by 1 April 1992 and the second phase by 31 December 1992. Implementing the computerization system will considerably improve the lottery, which is the only way of eradicating clandestine gambling which is currently widespread. The loss of revenue for the State if the computerization system is not implemented can be estimated at LIT 500 000 million a year. Elimination of clandestine gambling and the very significant fiscal revenue resulting from the lottery computerization should accordingly be weighed against the Commission' s interest in ensuring compliance with specific Treaty rules.

27 It should be held that, as the Commission has stated, if it succeeds in the main proceedings,

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the judgment would have no practical effect in the absence of interim measures.

28 As to the balance of interests, the defendant' s interest in rapidly completing the lottery computerization must be set against the Commission' s interest, as guardian of the Treaties, in preventing any breach of fundamental rules in the Treaties. In the light in particular of the judgment of the Court in Case C-3/88, the interest of the Commission must prevail over that of the Member State in issue.

29 Since the condition as to urgency is thus also satisfied, the interim measures sought should be ordered.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The Italian Republic shall take the measures necessary to suspend the legal effect of the decree of the Minister for Finance of 14 June 1991 awarding the concession for the lottery computerization system and performance of the contract concluded for that purpose with the consortium Lottomatica;

2. The costs are reserved.

Luxembourg, 31 January 1992.

DOCNUM	61991O0272
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1991 ; O ; order
PUBREF	European Court reports 1992 Page I-00457
DOC	1992/01/31
LODGED	1991/10/17
JURCIT	11957E030 : N 1 15 11957E052 : N 1 15 16 20 11957E055-L1 : N 16 20 21 11957E059 : N 1 15 16 20 11957E171 : N 15 11957E186 : N 17 31977L0062-A09 : N 1 31977L0062-A17 : N 1 61988J0003 : N 15 20 23 24 28 31991X0704(02)-A83P2 : N 18

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SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State ; Application for interim measures - successful
ADVGEN	Gulmann
JUDGRAP	Moitinho de Almeida
DATES	of document: 31/01/1992 of application: 17/10/1991

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**Judgment of the Court
of 18 March 1992
Commission of the European Communities v Kingdom of Spain.
Directive 71/305/CEE - Awarding of public contracts - Advertising of contracts - Derogation in urgent cases.
Case C-24/91.**

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Approximation of laws - Award procedures for public works contracts - Directive 71/305/EEC - Derogation from the common rules - Conditions - Existence of exceptional circumstances

(Council Directive 71/305, Art. 9(d))

Article 9(d) of Directive 71/305 concerning the coordination of procedures for the award of public works contracts permits, in exceptional circumstances, derogations from the common rules, in particular those on advertising. That provision does not, however, apply if sufficient time is available to the authorities awarding contracts to organize an accelerated award procedure such as that provided for in Article 15 of the directive.

In Case C-24/91,

Commission of the European Communities, represented by R. Pellicier, a member of its Legal Service, acting as Agent, with an address for service at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Spain, represented initially by C. Bastarreche Sagues, then by A. Navarro Gonzalez, Director General for Legal, Institutional and Community Co-ordination, and R. Silva de Lapuerta, Abogado del Estado, Head of the Legal Service, appointed to represent the Spanish Government before the Court of Justice of the European Communities, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

defendant,

APPLICATION for a declaration that, inasmuch as the governing council of the Universidad Complutense, Madrid, decided to award by private treaty contracts for works connected with the extension and renovation of the university' s Faculty of Political Science and Sociology and the School of Social Work, the Kingdom of Spain has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682),

THE COURT,

composed of: O. Due, President, F. Grévisse and P.J.G. Kapteyn, (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, M. Díez de Velasco, M. Zuleeg and J.L. Murray, Judges,

Advocate General: C.O. Lenz,

Registrar: J.A. Pompe, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 9 January 1992 at which the Kingdom of Spain was represented by G. Calvo Diaz, Abogado del Estado, acting as Agent,

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after hearing the Opinion of the Advocate General at the sitting on 6 February 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 January 1991, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, inasmuch as the governing council of the Universidad Complutense, Madrid, decided to award by private treaty contracts for works connected with the extension and renovation of the university' s Faculty of Political Science and Sociology and the School of Social Work, the Kingdom of Spain has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

2 Title III of the directive lays down, inter alia, rules relating to the adequate advertising of invitations to tenders, so that all interested contractors in the Community may be given the possibility of being informed of an award procedure and of participating in it.

3 In accordance with Article 12 of the directive, notices of tender must be sent to the Office for Official Publications of the European Communities which is to publish them in the Official Journal of the European Communities not later than nine days after the date of dispatch. The fourth paragraph of that Article provides, however, that, in the case of accelerated procedure provided for in Article 15, publication is to be not later than five days after the date of dispatch.

4 In accordance with Article 14 of the directive concerning restricted procedures, the time-limit for receipt of requests to participate and for the receipt of tenders which the selected candidates are invited to submit are in each case to be fixed at not less than 21 days from the date of sending the notice and the date of sending the written invitation to the candidates respectively. However, Article 15 provides that, in cases where urgency renders impracticable the time-limits laid down in Article 14, the authorities awarding contracts may apply shorter time-limits, namely 12 days from the date of sending the notice for requests to participate and 10 days from the invitation to tender for the receipt of tenders.

5 Article 9 of the directive provides for a number of exemptions from the application of the provisions on advertising. In particular, Article 9(d) provides for a derogation "in so far as is strictly necessary when, for reasons of extreme urgency brought [about] by events unforeseen by he authorities awarding contracts, the time-limit laid down in other procedures cannot be kept."

6 On 9 February 1989 the governing council of the Universidad Complutense, Madrid, declared that it was urgent for works to be carried out for the extension and renovation of the Faculty of Political Science and Sociology and the School of Social Work for a total budgeted amount of PTA 430 256 250. That amount was made available to it by the Ministry of Education in January 1989.

7 On 27 February 1989 the governing council of the university opened a competitive tender for those works in the form of a notice of tender published in four Spanish newspapers.

8 It is apparent from the documents before the Court that the completion of the works contemplated would, according to the architect in charge, take seven and a half months and would be completed before the beginning of the 1989 academic year.

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 The Commission considers that in the present case there was no warrant for having recourse to

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the award of contracts on a private-treaty basis, since the conditions for the application of Article 9(d) of the directive were not met. In that connection, it explains that the growing number of students is a problem which has existed for years, with the result that the intake of new students in October 1989 could not be deemed to be an unforeseen circumstance of extreme urgency for the purposes of that provision.

11 The Commission argues, moreover, that the governing council of the university could have published the notice of the invitation to tender in the Official Journal of the European Communities in accordance with the accelerated procedure provided for in Article 15 of the directive, the shorter time-limits under that procedure enabling the authorities awarding contracts to comply with the advertising obligations in less than one month. It considers that time-limit to have been entirely consistent with the timetable of works drawn up by the governing council.

12 On the other hand, the Spanish government considers that recourse to Article 9(d) of the directive was justified. It insists that it was necessary to complete the works before 1 October 1989 and stresses the delay which the Community publication procedures would have caused. It states in that connection that the faculty and school premises concerned were entirely inappropriate for receiving the large number of new students expected at the beginning of the 1989 academic year.

13 It should first be observed that the conditions for the application of Article 9(d) are concurrent. Consequently, if one of those conditions is not satisfied, the authorities awarding contracts may not derogate from the provisions of the directive, in particular those relating to advertising.

14 In the present case the extreme urgency relied on by the Spanish Government was not incompatible with the time-limits provided for in the context of the accelerated procedure under Article 15 of the directive.

15 The requisite budgetary appropriations had been granted to the university in January 1989 and the extension and renovation works, which were expected to last for seven-and-a-half months, were due to be completed before the academic year beginning in October 1989. Sufficient time was thus available to it to organize the invitation to tender under the accelerated procedure which is laid down in Article 15 of the directive and under which the time-limits may, as pointed out at paragraph 4 above, be restricted to 22 days, namely 12 days for requests to participate and 10 days for the receipt of tenders.

16 Accordingly, as a result of the decision of the governing council of the Universidad Complutense, Madrid, to award by private treaty contracts for works connected with the extension and renovation of the Faculty of Political Science and Sociology and the School of Social Work, the Kingdom of Spain has failed to fulfil its obligations under the directive, in particular Articles 9 and 12 to 15.

Costs

17 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Spain has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, as a result of the decision of the governing council of the Universidad Complutense, Madrid, to award by private treaty contracts for the extension and renovation of the Faculty of Political Science and Sociology and the School of Social Work, the Kingdom of Spain has failed

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to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, and in particular Articles 9 and 12 to 15 thereof;

2. Orders the Kingdom of Spain to pay the costs.

DOCNUM	61991J0024
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1991 ; J ; judgment
PUBREF	European Court reports 1992 Page I-01989
DOC	1992/03/18
LODGED	1991/01/23
JURCIT	31971L0305-A09LD : N 5 10 12 13 16 31971L0305-A12 : N 3 16 31971L0305-A14 : N 4 16 31971L0305-A15 : N 3 4 11 14 15 16
CONCERNS	Failure concerning 31971L0305-A09LD Failure concerning 31971L0305-A15
SUB	Approximation of laws
AUTLANG	Spanish
APPLICA	Commission ; Institutions
DEFENDA	Spain ; Member States
NATIONA	Spain
NOTES	Manzoni, Massimo: Diritto comunitario e degli scambi internazionali 1992 p.715-716 Balestreri, Adolfo M.: Rivista italiana di diritto pubblico comunitario 1993 p.123-128
PROCEDU	Proceedings concerning failure by Member State - successful

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ADVGEN Lenz

JUDGRAP Kapteyn

DATES of document: 18/03/1992
of application: 23/01/1991

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**Judgment of the Court
of 31 March 1992
Commission of the European Communities v Italian Republic.
Failure of a Member State to fulfil obligations - Public supply contracts - Admissibility.
Case C-362/90.**

++++

Failure of a Member State to fulfil obligations - Infringement terminated before the expiry of the period laid down in the reasoned opinion - Inadmissibility

(EEC Treaty, second para. of Art. 169)

Under the second paragraph of Article 169 of the Treaty, an action for failure to fulfil an obligation may only be brought before the Court if the Member State in question has not complied with the reasoned opinion within the period laid down by the Commission. An action for failure to fulfil obligations is therefore inadmissible if, upon the expiry of the period laid down in the reasoned opinion, the infringement complained of, which had produced its effects without the Commission' s having employed all the means available to it to prevent it, no longer existed.

In Case C-362/90,

Commission of the European Communities, represented initially by Guido Berardis and subsequently by Antonio Aresu, members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of Roberto Hayder, representative of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, with an address for service at Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, since the Unità Sanitaria Locale (Local Health Authority) XI, Genoa 2, imposed the condition that 50% of the minimum amount of supplies made over the preceding three years and required for admission to participate in a public supply contract had to be made up of supplies should have been supplied to public administrative authorities, the Italian Republic has failed to fulfil its obligations under Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 L 13, p. 1),

THE COURT,

composed of: O. Due, President, R. Joliet, F.A. Schockweiler and P.J.G. Kapteyn (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, G.C. Rodríguez Iglesias, M. Díez de Velasco and J.L. Murray, Judges,

Advocate General: C.O. Lenz,

Registrar: J.A. Pompe, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 January 1992,

after hearing the Opinion of the Advocate General at the sitting on 26 February 1992,

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gives the following

Judgment

1 By application received at the Court on 1 December 1990, the Commission of the European Communities brought an action pursuant to Article 169 of the EEC Treaty for a declaration that, since the Unità Sanitaria Locale XI (Local Health Authority, hereinafter referred to as the "USL"), Genoa 2, imposed the requirement that 50% of the minimum amount of supplies required to have been made over the preceding three years in order to enable tenderers to participate in a public supply contract should have been supplied to public administrative authorities, the Italian Republic has failed to fulfil its obligations under Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 L 13, p. 1).

2 USL published in the Gazzetta Ufficiale della Reppublica Italiana, Part II, No 238, of 10 October 1988, a contract notice for the supply of several products, including in particular fresh beef valued at LIT 5 800 000 000. That notice laid down as a condition for admittance to participate in the contract that, during the three previous years (1985/1986/1987), the potential tenderer should have supplied identical products to the value of at least six times the value of each supply for which they proposed to tender, 50% of that amount to be made up of supplies to public administrative authorities.

3 The Commission considered that that condition, in so far as it concerned supplies of 50% of the products in question to public administrative authorities, was contrary to Article 23 of Directive 77/62, which had to be regarded as listing exhaustively the means of proof of the suppliers' technical capacity which the contracting authorities could demand and that, by virtue of Article 14(d), this condition should not have been inserted in the contract notice published by the USL.

4 In accordance with Article 169 of the Treaty, the Commission, by letter of 10 February 1989, formally requested the Italian Government to submit within 15 days its observations on the breach of obligations with which it was charged. Since the Commission considered that the explanations which the Italian Government had sent to it by letter of 30 June 1989 were not satisfactory, it called upon the Italian Republic, by reasoned opinion of 27 March 1990, to adopt the measures required to comply with that opinion within 15 days from the notification thereof.

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 In its defence the Italian Government contended that the action brought by the Commission had become devoid of purpose, since the effects of the supply contract which followed the contract notices in question became exhausted in their entirety on 31 December 1989 and the contract notices for 1990 and 1991, published in Official Journal S 213 and 216, did not contain the condition at issue. Consequently, it asked the Commission to discontinue its action and, should the Commission not do so, requested the Court to dismiss it. In its rejoinder it added that the infringement complained of had ceased to exist even before the expiry of the 15-day period which the Commission had allowed to it in the reasoned opinion of 27 March 1990 and, in the face of the Commission' s refusal to discontinue the proceedings, contended that the action should be dismissed as inadmissible.

7 In its reply, the Commission denied that its action was devoid of purpose, since, taking into account the arguments put forward by the Italian Government as to the substance of the case, it was not at all established that the conditions at issue would not be included in another contract notice in the future. At the hearing the Commission again pointed out that it had issued the first reasoned opinion on 17 August 1989 and that it had only issued the reasoned opinion of 27 March

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1990 in order to take account of the response of the Italian Government to its letter of formal notice, which it received on 6 July 1989.

8 As a preliminary point, it should be noted that the fact that the Italian Government formally pleaded the inadmissibility of the action only in its rejoinder cannot prevent the Court from examining this issue. The arguments relied upon in that respect by the Italian Government had already been submitted in its defence, in which it had formally contended that the action be dismissed. The Commission therefore had the opportunity to answer those arguments in its reply. Furthermore, and in any event, the Court may of its own motion examine the question whether the conditions laid down in Article 169 of the Treaty for the bringing of an action for failure to fulfil an obligation are satisfied.

9 In that respect it should first be noted that it follows from the very terms of the second paragraph of Article 169 of the Treaty that the Commission may bring an action for failure to fulfil obligations before the Court only if the Member State concerned does not comply with the opinion within the period laid down by the Commission for that purpose.

10 Secondly, the Court has consistently held that the action brought under the second paragraph of Article 169 is for a declaration that the State concerned has failed to fulfil an obligation under the Treaty and that it has not put an end to that infringement within the time laid down to that effect by the Commission in its reasoned opinion (judgment in Case C-347/88 Commission v Greece [1990] ECR I-4747, paragraph 40). The Court has consistently held that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion (judgment in Case C-200/88 Commission v Greece [1990] ECR I-4299, paragraph 13).

11 In the present case it is common ground that, first of all, the effects of the contract notice at issue had been exhausted on 31 December 1989, that is to say, before the issue of the reasoned opinion of 27 March 1990. Secondly, the contract notices for 1990 and 1991, published, respectively, on 4 November 1989, that is to say before the issue of the reasoned opinion, and on 3 November 1990, that is to say before the present action was brought, no longer contained the condition at issue.

12 It should be stated, moreover, that the Commission did not act in good time in order to prevent, by means of procedures available to it, the infringement complained of from producing effects and did not even invoke the existence of circumstances preventing it from concluding the pre-litigation procedure laid down in Article 169 of the Treaty before the infringement ceased to exist. The fact, alleged at the hearing, that the Commission had already issued a first reasoned opinion on 17 August 1989 is irrelevant in that respect, since it was not referred to in the course of the proceedings and that the application is not based on it. Furthermore, that circumstance cannot constitute a matter of law or fact which has come to light in the course of the procedure, for the purposes of Article 42(2) of the Rules of Procedure, so that any plea based on it must be regarded as out of time and, consequently, be dismissed as inadmissible.

13 It follows from the foregoing considerations that, at the date of expiry of the period laid down in the Commission' s reasoned opinion of 27 March 1990, the infringement complained of no longer existed. Consequently, the action brought by the Commission must be dismissed as inadmissible.

Costs

14 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

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THE COURT

hereby:

1. Dismisses the application as inadmissible;

2. Orders the Commission to pay the costs.

DOCNUM	61990J0362
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1990 ; J ; judgment
PUBREF	European Court reports 1992 Page I-02353
DOC	1992/03/31
LODGED	1990/12/11
JURCIT	11957E169-L2 : N 9 11957E169 : N 8 10 31977L0062-A14LD : N 3 31977L0062-A23 : N 3 31977L0062 : N 1 61988J0200 : N 10 61988J0347 : N 10 31991X0704(02)-A42P2 : N 12
CONCERNS	Failure concerning 31977L0062
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
NOTES	Simon, Denys: Journal du droit international 1993 p.397-400 Bieber, Roland: Common Market Law Review 1993 p.1197-1208

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PROCEDU	Proceedings concerning failure by Member State - inadmissible
ADVGEN	Lenz
JUDGRAP	Schockweiler
DATES	of document: 31/03/1992 of application: 11/12/1990

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**Judgment of the Court
of 3 June 1992
Commission of the European Communities v Italian Republic.
Freedom to provide services - Award of public works contracts.
Case C-360/89.**

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1. Freedom to provide services ° Principle of non-discrimination ° Covert discrimination ° Included

(EEC Treaty, Art. 59)

2. Freedom to provide services ° Procedures for the award of public works contracts ° National rules favouring local undertakings ° Prohibited

(EEC Treaty, Art. 59; Council Directive 71/305)

1. Article 59 of the Treaty prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

2. A Member State which reserves any public works to companies which have their registered offices in the region where the works are to be carried out and establishes a preference for temporary associations which include undertakings carrying on their main activity in that region is in breach of its obligations under Article 59 of the EEC Treaty and Directive 71/305 concerning the coordination of procedures for the award of public works contracts.

In Case C-360/89,

Commission of the European Communities, represented initially by Guido Berardis, then by Antonio Aresu, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission' s Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Department for Legal Affairs of the Ministry for Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaide,

defendant,

APPLICATION for a declaration that, by enacting Law No 80/87 (special provisions for accelerating the completion of public works), which contains provisions incompatible with the Community rules on public works contracts, the Italian Republic has failed to fulfil its obligations under Article 59 of the EEC Treaty and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682),

THE COURT,

composed of: O. Due, President, R. Joliet, F.A. Schockweiler and P.J.G. Kapteyn, (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, G.C. Rodríguez Iglesias, M. Diez de Velasco and J.L. Murray, Judges,

Advocate General: C.O. Lenz,

Registrar: J.A. Pompe, Deputy Registrar,

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having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 January 1992,

after hearing the Opinion of the Advocate General at the sitting on 26 February 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 28 November 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by enacting Law No 80/87 (special provisions for accelerating the completion of public works), which contains provisions incompatible with Community rules on public works contracts, the Italian Republic has failed to fulfil its obligations under Article 59 of the EEC Treaty and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

2 Under Article 2(1) of Law No 80/87, written invitations to tender from the authority awarding contracts must stipulate that the successful tenderer is to entrust a minimum proportion of between 15 and 30% of the works to undertakings which have their registered offices in the region in which the works are to be carried out.

3 Article 3(3) of the same Law provides that where more than 15 undertakings are interested the authority or agency awarding contracts must invite at least 15 undertakings to tender and that, in the selection of the undertakings to be invited to tender, preference is to be given to temporary associations and consortia made up of undertakings which carry on their main activity in the region in which the works are to be carried out.

4 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 In the course of the procedure, the Commission withdrew its complaints other than those concerning Articles 2(1) and 3(3) of Law No 80/87.

The alleged infringement of Article 59 of the Treaty

6 According to the Commission, Article 2(1) of Law No 80/87 infringes Article 59 of the Treaty in that it favours undertakings which have their registered offices in the region in question, to the detriment of undertakings established in other Member States.

7 It must be observed that Article 59 of the Treaty requires the abolition of all discrimination against providers of services established in a Member State other than that in which the service is to be provided.

8 The fact that Article 2(1) of Law No 80/87 reserves part of the works to sub-contractors having their registered offices in the region where the works are to be carried out constitutes discrimination against undertakings established in other Member States.

9 Whilst it is true, as the Italian Government contends, that that provision also excludes undertakings established in Italy which have their registered offices outside the region in question from that part of the works, the fact remains that all the sub-contractors which it favours are Italian undertakings.

10 As regards Article 3(3) of Law No 80/87, the Commission considers that the preference which it affords to temporary associations and consortia that include local undertakings constitutes a restriction on the freedom to provide services which is prohibited by Article 59 of the Treaty.

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11 The Court has consistently held that Article 59 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, in particular, Case C-3/88 Commission v Italy [1989] ECR 4035, paragraph 8).

12 Although Article 3(3) of Law No 80/87 applies, as the Italian Government contends, to all Italian and foreign companies without distinction, it essentially favours those established in Italy. As the Commission has rightly observed, such undertakings are much more likely to carry on their main activity in the region of Italy where the works are to be carried out than undertakings established in the other Member States.

13 The Italian Government also observes that the abovementioned provisions of Law No 80/87 are intended to offset the disadvantages encountered by small and medium-sized undertakings as a result of the system of overall awards of contract provided for in that Law, by virtue of which various works are awarded under a single contract. The grouping in a single contract of services which, if separated, would be of interest only to regional undertakings, has the effect of excluding the latter from a number of contracts of lesser importance.

14 It need merely be observed, in that connection, that such considerations are matters neither of public policy, public security or public health referred to in Articles 66 and 56 of the Treaty, taken together, nor reasons of overriding public interest which might justify the obstacles in question (Case C-353/89 Commission v Netherlands [1991] ECR I-4069, paragraphs 17 and 18, and Case C-288/89 Collectieve Antennevoorziening Gouda v Commissariaat voor de Media [1991] ECR I-4007).

15 It follows from the foregoing considerations that the complaint of infringement of Article 59 of the Treaty must be upheld.

The alleged infringement of Directive 71/305

16 The Commission considers that Article 3(3) of Law No 80/87 infringes the first paragraph of Article 22 of Directive 71/305 by adopting a selection criterion different from those provided for in Articles 23 to 26 of that directive.

17 It must be observed that, according to the first paragraph of Article 22 of Directive 71/305, in restricted procedures within the meaning of Article 5(2) ° the kind at issue in this case ° the authorities awarding contracts must select the candidates they are to invite to tender on the basis of the information given in accordance with Article 17(d) of the directive.

18 Article 17(d) refers to information relating to the personal position of the contractor and the minimum economic and technical standards which the authorities awarding contracts require of contractors for their selection; those requirements may not be other than those specified in Articles 25 and 26.

19 According to Article 3(3) of Law No 80/87 in selecting undertakings to be invited to tender, preference is to be accorded to temporary associations or consortia which include undertakings carrying on their main activity in the region where the works are to be carried out.

20 Such preference constitutes a criterion of selection which is not mentioned in Articles 23 to 26 and, in particular, does not relate to any of the economic and technical standards provided for in Articles 25 and 26.

21 Consequently, Article 3(3) of Law No 80/87 infringes the first paragraph of Article 22 of Directive 71/305 in so far as the selection criterion laid down therein relates to matters of fact which cannot form part of the information on the basis of which the authorities awarding contracts are to select, on the basis of the latter provision, the candidates that they will invite to tender.

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22 It follows that the complaint of infringement of Directive 71/305 must also be upheld.

23 It must therefore be held that, by enacting Law No 80/87 of 17 February 1987 (Special provisions for accelerating the completion of public works, published in Gazzetta Ufficiale della Repubblica Italiana No 61 of 14 March 1987), the Italian Republic has failed to fulfil its obligations under Article 59 of the EEC Treaty and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts.

Costs

24 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by enacting Law No 80/87 of 17 February 1987, the Italian Republic has failed to fulfil its obligations under Article 59 of the EEC Treaty and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts;

2. Orders the Italian Republic to pay the costs.

DOCNUM	61989J0360
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1989 ; J ; judgment
PUBREF	European Court reports 1992 Page I-03401
DOC	1992/06/03
LODGED	1989/11/28
JURCIT	11957E056 : N 14 11957E059 : N 1 6 - 15 11957E066 : N 14 31971L0305-A17LD : N 17 18 31971L0305-A22L1 : N 16 - 23 31971L0305-A23 : N 16 20 31971L0305-A24 : N 16 20 31971L0305-A25 : N 16 20

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31971L0305-A26 : N 16 20
31971L0305 : N 1
61988J0003-N8 : N 11
61989J0288-N13 : N 14
61989J0353-N17 : N 14
61989J0353-N18 : N 14

CONCERNS Failure concerning 11957E059
Failure concerning 31971L0305

SUB Approximation of laws ; Freedom of establishment and services ; Free movement of services

AUTLANG Italian

APPLICA Commission ; Institutions

DEFENDA Italy ; Member States

NATIONA Italy

NOTES Manzoni, Massimo: Diritto comunitario e degli scambi internazionali 1992 p.361-364
Barone, Anselmo: Il Foro italiano 1993 IV Col.80-82
Boutard-Labarde, Marie-Chantal: Journal du droit international 1993 p.427-428

PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Lenz

JUDGRAP Kapteyn

DATES of document: 03/06/1992
of application: 28/11/1989

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Judgment of the Court (First Chamber)
of 18 June 1991
Impresa Donà Alfonso di Donà Alfonso & Figli v Consorzio per lo sviluppo industriale del comune di Monfalcone, Regione Friuli-Venezia Giulia, Impresa Luigi Tacchino SpA and Impresa Carlutti Costruttori SRL.
Reference for a preliminary ruling: Tribunale amministrativo regionale del Friuli-Venezia Giulia - Italy.
Public works contracts - Abnormally low tenders.
Case C-295/89.

++++

Approximation of laws - Procedures for the award of public works contracts - Directive 71/305 - Award of contracts - Abnormally low tenders - Automatic disqualification - Not permissible - Obligation to conduct an examination procedure - Tenders subject to examination

(Council Directive 71/305, Art. 29(5))

Article 29(5) of Council Directive 71/305, from which the Member States may not depart to any material extent when implementing it, prohibits Member States from introducing provisions which require the automatic disqualification from the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations.

The Member States may require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

(In this judgment the Court' s ruling is in the same terms as those of the judgment in Case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR

I-1839, in which the questions referred to it were essentially the same.)

In Case C-295/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale Amministrativo Regionale (Regional Administrative Court), Friuli-Venezia Giulia, Italy, for a preliminary ruling in the proceedings pending before that Court between

Impresa Donà Alfonso di Donà Alfonso & Figli

and

Consorzio per lo Sviluppo Industriale del Comune di Monfalcone,

Regione Friuli-Venezia Giulia,

Impresa Luigi Tacchino SpA,

Impresa Carlutti Costruttori Srl,

on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682),

THE COURT (First Chamber),

composed of: G.C. Rodríguez Iglesias, President of the Chamber, Sir Gordon Slynn and R. Joliet, Judges,

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(The grounds of the judgment are not reproduced.)

in reply to the questions referred to it by order of the Tribunale Amministrativo Regionale, Friuli-Venezia Giulia, of 7 April 1989, hereby rules:

1. Article 29(5) of Council Directive 71/305 of 26 July 1971 concerning the coordination of procedures for the award of public works contracts prohibits Member States from introducing provisions which require the automatic disqualification from the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations;

2. When implementing Council Directive 71/305, Member States may not depart, to any material extent, from the provisions of Article 29(5) thereof;

3. Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

DOCNUM	61989J0295
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1989 ; J ; judgment
PUBREF	European Court reports 1991 Page I-02967 Pub.RJ Page Pub somm
DOC	1991/06/18
LODGED	1989/09/26
JURCIT	31971L0305-A29P5 : N 1 3 4 12 13 16 - 19 61988J0103 : N 15 16 - 19
CONCERNS	Interprets 31971L0305-A29P5
SUB	Approximation of laws
AUTLANG	Italian
OBSERV	Spain ; Commission ; Member States ; Institutions
NATIONA	Italy

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NATCOUR	*A9* Tribunale Amministrativo Regionale del Friuli-Venezia Giulia, ordinanza del 07/04/89 11/09/89 (222 - RG 262/88) - Il Foro amministrativo 1990 p.456-458 *P1* Tribunale Amministrativo Regionale del Friuli-Venezia Giulia, sentenza del 12/05/92 16/07/92 (340 - RG 262/88)
PROCEDU	Reference for a preliminary ruling
ADVGEN	Lenz
JUDGRAP	Joliet
DATES	of document: 18/06/1991 of application: 26/09/1989

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Judgment of the Court
of 11 July 1991
Commission of the European Communities v Portuguese Republic.
Failure to publish notice of a supply contract.
Case C-247/89.

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1. Actions against Member States for failure to fulfil obligations - Pre-litigation procedure - Reasoned Opinion - Contents

(EEC Treaty, Art. 169)

2. Approximation of legislation - Procedures for concluding public supply contracts - Directive 77/62/EEC - Scope as defined by Article 2(2)(a) of the original version - Bodies which administer transport services - Excluded

(Council Directive 77/62, Art. 2(2))

1. The reasoned opinion issued by the Commission in the pre-litigation procedure must contain a coherent and detailed statement of the reasons which persuaded the Commission that the State concerned had failed to fulfil one of its obligations under the Treaty, but could not be required to indicate what steps should be taken to eliminate the impugned conduct.

2. In excluding public supply contracts awarded by bodies which administer transport services from the scope of Directive 77/62 coordinating procedures for the award of public supply contracts, Article 2(2)(a) of the original version of the Directive referred to the transport services sector in general.

In Case C-247/89,

Commission of the European Communities, represented by Antonio Caero, Legal Adviser, and Rafael Pellicer and Luis Miguel Antunes, members of the Commission' s Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission' s Legal Service, Wagner Centre, Luxembourg,

applicant,

v

Portuguese Republic, represented by Joao Mota de Campos, Luis Inez Fernandes, Director of the Legal Department of the European Communities Directorate General in the Ministry of Foreign Affairs, Domingos Oehen Gonçalves, Director of the European Affairs Office of the Ministry of Finance, and Jaime Pina Gomes, a member of the European Communities Office in the Ministry of Public Works, Transport and Communications, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,

defendant,

APPLICATION for a declaration that, by not sending to the Official Publications Office of the European Communities, for the purposes of publication in the Official Journal of the European Communities, a notice of invitation to tender issued by the undertaking Aeroportos e Navegaçao Aérea in respect of the supply and assembly of a telephone exchange at Lisbon Airport, the Portuguese Republic has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976, in particular Article 9 thereof (Official Journal 1977 L 13, p. 1),

THE COURT,

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composed of: O. Due, President, G.F. Mancini, T.F. O' Higgins, J.C. Moitinho de Almeida and M. Díez de Velasco (Presidents of Chambers), C.N. Kakouris, F.A. Schockweiler, M. Zuleeg and P.J.G. Kapteyn, Judges,

Advocate General: C.O. Lenz,

Registrar: H.A. Ruhl, Principal Administrator,

after hearing oral argument presented by the parties at the hearing on 23 January 1991,

after hearing the Opinion of the Advocate General at the sitting on 13 March 1991,

gives the following

Judgment

Costs

44 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Commission to pay the costs.

1 By application lodged at the Court Registry on 4 August 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by not sending to the Official Publications Office of the European Communities, for the purposes of publication in the Official Journal of the European Communities, a notice of invitation to tender issued by the undertaking Aeroportos e Navegaçao Aérea with respect to the supply and assembly of a telephone exchange at Lisbon Airport, the Portuguese Government had failed to fulfil its obligations under Council Directive 77/62 of 21 December 1976 coordinating procedures for the award of public supply contracts, in particular Article 9 thereof (Official Journal 1977 L 13, p. 1).

2 Article 1(a) of Directive 77/62 defines public supply contracts as contracts for pecuniary consideration concluded in writing between a supplier (a natural or legal person) and a contracting authority for delivery of products. Article 1(b) defines contracting authorities as the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I to the directive.

3 Article 26 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (hereinafter "the Act of Accession"), in conjunction with Section IX(D) of Annex I thereto (Official Journal 1985 L 302, pp. 21 and 139), made the following addition to the list, contained in Annex I to the directive, of legal persons governed by public law and corresponding bodies referred to in Article 1(b):

"....

XIII In Portugal:

other corporate bodies governed by public law subject to a procedure for the award of contracts".

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4 Article 9 of Directive 77/62 stipulates that contracting authorities who wish to award a public supply contract must send the notice by which they make known their intention as soon as possible by the most appropriate channels to the Office for Official Publications of the European Communities for publication in the Official Journal.

5 Article 2(2)(a) of the directive excludes supply contracts awarded by bodies which administer transport services from the scope of the directive.

6 Pursuant to Articles 392 and 395 of the Act of Accession, the Portuguese State should have transposed the directive into national law by 1 January 1986.

7 The public undertaking Aeroportos e Navegaçao Aérea ("ANA-EP") is a legal person governed by public law established by Decree-Law No 246/79 of 25 July 1979 (Diario da Républica No 170, series I). Pursuant to the Decree-Law and the constitution of ANA-EP annexed thereto, the undertaking is responsible for operating and developing support activities in the field of civil aviation in order to guide, direct and control air traffic, and to enable aircraft to take off and land safely; it is also responsible for freight, embarcation and disembarcation, and the movement of passengers and mail. ANA-EP also performs the tasks and provides the services that form an integral part of the airport and air-navigation infrastructure at Lisbon Airport and elsewhere. Lastly it is responsible for the analysis, planning, construction and development of new civil-airport and air-navigation infrastructure.

8 In 1987 ANA-EP invited tenders for the supply and assembly of a telephone exchange at Lisbon Airport. Accordingly, it published an announcement in the Portuguese weekly "O Expresso" on 29 August 1987.

9 The announcement came to the notice of the Commission, which found that all the conditions for the application of Directive 77/62 were fulfilled and that none of the exceptions relating to the scope of the directive was applicable.

10 Having found that ANA-EP, being the contracting authority, had failed to comply with the requirement to send notice of the tendering procedure to the Office for Official Publications of the European Communities, as provided for in Article 9 of Directive 77/62, the Commission sent the Portuguese Government a letter of formal notice on 28 September 1987.

11 In its reply of 20 October 1987 the Portuguese Government denied that Directive 77/62 was applicable.

12 The Commission considered that the arguments adduced by the Portuguese Government were not capable of justifying the failure to publish notice of the tendering procedure in the Official Journal of the European Communities and, on 21 November 1988, issued the reasoned opinion provided for in the first paragraph of Article 169 of the Treaty, requesting the Portuguese Government to take the necessary steps to comply with the opinion within one month from the date of service.

13 In its reply to the reasoned opinion the Portuguese Government stated that it intended to amend Portuguese legislation. The Commission did not consider that an adequate response, and accordingly decided to institute these proceedings.

14 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

15 The Portuguese Government maintains that the action is inadmissible. It adduces a number of arguments, some founded on the contention that the alleged infringement could not be attributed

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to the Portuguese State; others, on the contradiction between the grounds of the reasoned opinion and those put forward in the application; the ambiguous nature of the Commission' s position; and the insufficiency of the period allowed in the reasoned opinion.

16 In regard to the contention that the alleged infringement could not be attributed to the Portuguese State, the Portuguese Government maintains that Article 9 of Directive 77/62 only requires a State to publish notices of tendering procedures in the Official Journal when the State itself is the contracting authority. ANA-EP being a legal person distinct from the State, a failure to publish notices of its tendering procedures could not be attributed to the State. The Portuguese Government adds that, since the directive has not been transposed into the national legal order, ANA-EP was under no obligation to publish notices of its public supply contracts.

17 The Commission asserts that, in view of the degree of control which the Portuguese State exerts over ANA-EP' s award of public contracts, the latter is a contracting authority within the meaning of Directive 77/62. Accordingly the Portuguese State is answerable for ANA-EP' s failure to publish its tendering procedures in the Official Journal; the fact that the Directive has still not been transposed into national legislation does not negate that interpretation.

18 On that point it is sufficient to note that determining whether ANA-EP' s conduct may properly be attributed to the Portuguese Republic involves a factual appraisal forming part of the examination of the merits of the application rather than its admissibility.

19 The question should therefore be considered in connection with the examination of the merits of the application.

20 In regard to the contradiction between the reasons set out in the reasoned opinion and those advanced in the application, the Portuguese Government claims that in the reasoned opinion the Commission had described ANA-EP as a contracting authority within the meaning of Directive 77/62, because the award by it of public contracts was subject to approval or authorization by the Portuguese Government; however, in the application, the Commission had stated that abolishing the approval or authorization procedure for public contracts would have no effect on ANA-EP' s status as a contracting authority within the meaning of the directive. The Government further maintains that the Commission' s position was ambiguous inasmuch as it had never specified what sort of measures would need to be taken to terminate the infringement. It emphasizes that the Commission had not opposed its stated intention to repeal the requirement for State authorization or approval for some public contracts. Finally, the time allowed in the reasoned opinion was not sufficient for it to amend the legislation concerned.

21 The Commission argues that none of these arguments is well founded. It states there had not been any change in the description of the impugned conduct on the part of the Portuguese State: both the reasoned opinion and the application stated that the charge concerned the tendering procedure launched by ANA-EP. The Commission maintains that it never asked for the Portuguese legislation to be amended. It also denies that there was a duty to state, in the reasoned opinion, what steps should be taken to eliminate the impugned conduct. Finally it affirms that the period prescribed in the reasoned opinion was reasonable and sufficient, since the Commission' s first communication to the Portuguese State, the letter of formal notice, was dated 28 September 1987.

22 In that connection, it should be noted that, according to the Court' s case-law, the reasoned opinion must contain a coherent and detailed statement of the reasons which persuaded the Commission that the State concerned had failed to fulfil one of its obligations under the Treaty (judgment in Case 274/83 Commission v Italy [1985] ECR 1077). However, the Commission cannot be required to indicate in the reasoned opinion what steps should be taken to eliminate the impugned conduct.

23 It appears from the text of the reasoned opinion in the file that it fulfils the requirements

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laid down in the case-law: the Commission set out therein a sufficiently detailed statement of the context, facts and legal background, and of the arguments which had persuaded it that the Portuguese Republic had failed to fulfil the obligation imposed by Article 9 of Directive 77/62. At no stage - neither in the pre-litigation procedure, nor during the litigation itself - did the Commission alter that line of argument, which consequently cannot be deemed ambiguous.

24 Moreover, the reasoning in the reasoned opinion is essentially the same as that in the application. In both the charge is the same: infringement of Article 9 of Directive 77/62.

25 As for the period prescribed in the reasoned opinion, it should be emphasized that the charge against the Portuguese Government was brought to the latter' s attention by the letter of formal notice of 28 September 1987, hence more than a year before the reasoned opinion of 21 November 1988. It should also be pointed out that, from the start of the pre-litigation procedure, the Portuguese Government disputed the charge against it, arguing both that Directive 77/62 was inapplicable to the facts of the case, and that the infringement could not properly be attributed to the Portuguese State. In those circumstances, the period of one month prescribed in the reasoned opinion for the Portuguese Government to comply with its obligations must be deemed to be both reasonable and sufficient.

26 It follows from the foregoing that the pleas concerning the inadmissibility of the application must be rejected.

The substance

27 The Commission maintains that, under Article 9 of Directive 77/62, ANA-EP was bound to send a notice of the tendering procedure in question to the Office for Official Publications of the European Communities for publication in the Official Journal, since all the requirements necessary for Article 9 to apply were fulfilled, and the situation was not covered by any of the exceptions listed in the Directive.

28 The Portuguese Government takes the view that the provisions of Directive 77/62 did not apply to the award of the contract in question.

29 It supports that plea first by stating that ANA-EP' s activities (defined by the aforementioned Decree-Law No 246/79 and by ANA-EP' s constitution) and air-transport services complemented each other and were indissolubly linked: ANA-EP should therefore be deemed to be a body which administers transport services within the meaning of Article 2(2)(a) of Directive 77/62, and whose awards of public supply contracts fall outside the scope of the directive.

30 The Portuguese Government then refers to Council Directive 90/531/EEC of 17 September 1990, on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (Official Journal 1990 L 297, p. 1). That directive, it contends, covers inter alia public contracts in sectors excluded from the scope of Directive 77/62, as last amended by Council Directive 88/295/EEC of 22 March 1988 (Official Journal 1988 L 127, p. 1); it concludes that the fact of ANA-EP' s being included among the bodies subject to the rules laid down in Directive 90/531 proves that ANA-EP is not covered by Directive 77/62.

31 The Portuguese Government also emphasizes that the meaning of Article 2(2)(a) of Directive 77/62, which excludes from the scope of the Directive "bodies which administer transport services", is broader than that of the new text as amended by Article 3 of Directive 88/295: the new text only excludes "carriers by land, air, sea and inland waterway". The difference demonstrates that Article 2(2)(a) of Directive 77/62, in the version in force at the time of the tendering procedure, covered bodies which, like ANA-EP, administered ground services.

32 The Commission' s view is that ANA-EP is not a body which administers transport services within the meaning of Directive 77/62. Citing the Guide to Public Contracts in the Community

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(Official Journal 1987 C 358, p. 1) the Commission maintains that Article 2(2)(a) of the directive should be interpreted restrictively: it only covered organizations carrying passengers or goods between two points. The Commission adds that the new text of Article 2(2)(a) resulting from Directive 88/295 is intended to clarify, not amend, the scope of the provision concerned. Finally, the Commission states that the reference to ANA-EP in the text of Directive 90/531 is an expression of the aim of the directive, which is to place on an equal footing public bodies which administer airports, and their private sector counterparts.

33 It should be pointed out first of all that, according to Article 2(2)(a) of Directive 77/62, in the version in force at the time the notice of invitation to tender was issued, the directive does not apply to public supply contracts awarded by bodies which administer transport services.

34 The reasons for that exclusion are set out in the sixth and seventh recitals in the preamble to Directive 77/62, which state:

> "... the bodies currently administering transport services in the Member States are governed in some cases by public law, in others by private law;... in accordance with the objectives of the common transport policy equality of treatment should be ensured not only between separate undertakings concerned with the same mode of transport but also between such undertakings and undertakings concerned with other modes of transport;
>
> ... pending the drafting of measures for the coordination of procedures applicable to transport bodies and in view of the said special circumstances, those authorities referred to above, which by reason of their status would fall within it, should be excluded from the scope of the Directive".

35 It should be noted further that the concept of bodies which administer transport services, mentioned in Article 2(2)(a) of Directive 77/62, in the version in force at the material time, refers to the transport-services sector in general.

36 ANA-EP' s activities pursuant to Decree-Law No 246/79 and to its own constitution are associated closely with the carriage by air of passengers and freight, which is impossible without the requisite infrastructure and airport services.

37 It should also be emphasized that the common transport policy referred to in the recitals quoted at paragraph 34 above includes activities associated with the operation of the requisite infrastructure, and that the need for equality of treatment referred to there also relates to bodies which carry out the functions and provide the services which are intrinsically associated with airport and air navigation infrastructure in Member States, some being governed by public, others by private law.

38 It follows from the foregoing that a body which, like ANA-EP, carries out the activities and provides the services described above must be deemed to be a body which administers transport services within the meaning of Article 2(2)(a) of Directive 77/62, in the version in force at the time of the tendering procedure concerned.

39 The above conclusion is borne out by the provisions and scope of Directive 90/531 on the procurement procedures in the water, energy, transport and telecommunications sectors, adopted by the Council on 17 September 1990.

40 By virtue of Article 2(2)(b)(ii) of Directive 90/531, whose purpose is, inter alia, to establish rules governing procedures for the award of contracts in the transport sector, the directive applies to the exploitation of a geographical area for the purpose of the provision of airports to carriers by air. ANA-EP is listed in Annex VIII to that directive as a contracting entity which fulfils the criteria set out in Article 2(6) of the Directive.

41 It appears clearly from the sixth and seventh recitals in the preamble to Directive 90/531 that the transport sector is one of the sectors excluded from the scope of Directive 77/62, as last

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amended by Directive 88/295.

42 It is therefore not possible to accept the Commission' s argument, based on Article 2(2)(a) of Directive 77/62, that the concept of body which administers transport services should be interpreted restrictively.

43 In the light of all the foregoing considerations, and without its being necessary to rule on the other pleas in law advanced by the Portuguese Government in its defence, it must be held that ANA-EP, being a body which administers transport services within the meaning of Article 2(2)(a) of Directive 77/62, did not, at the time of the tendering procedure in issue, come within the scope of the directive and that accordingly the action for a declaration that Portugal has failed to fulfil its obligations under the Treaty is unfounded.

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CONCERNS	Failure concerning 31977L0062-A09
SUB	Approximation of laws ; Free movement of goods
AUTLANG	Portuguese
APPLICA	Commission ; Institutions
DEFENDA	Portugal ; Member States
NATIONA	Portugal
NOTES	Mota de Campos, Joao: Divulgaçao do Direito Comunitario 1992 no 10 p.383-391 Senor, Monica: Giurisprudenza italiana 1993 I Sez.I Col.1129-1132
PROCEDU	Proceedings concerning failure by Member State - unfounded
ADVGEN	Lenz
JUDGRAP	Kapteyn
DATES	of document: 11/07/1991 of application: 04/08/1989

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Judgment of the Court
of 22 June 1993
Commission of the European Communities v Kingdom of Denmark.
Award of a works contract - Bridge over the "Storebaelt".
Case C-243/89.

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1. Actions against Member States for failure to fulfil obligations ° Subject-matter of the proceedings ° Determination during the pre-litigation procedure ° Subject-matter subsequently widened ° Not permissible

(EEC Treaty, Art. 169)

2. Actions against Member States for failure to fulfil obligations ° Examination by the Court as to whether an action is well founded ° Acknowledgement by the Member State concerned of its failure to fulfil its obligations and of its liability with regard to individuals ° Not material

(EEC Treaty, Art. 169)

3. Approximation of laws ° Procedures for the award of public works contracts ° Directive 71/305 ° Award of contracts ° Condition requiring the use to the greatest possible extent of national products and labour ° Negotiations with a tenderer on the basis of a tender not complying with the tender conditions ° Free movement of goods ° Freedom of movement for persons ° Freedom to provide services ° Not permissible

(EEC Treaty, Arts 30, 48 and 59; Council Directive 71/305)

1. In actions brought under Article 169, the pre-litigation stage defines the subject-matter of the proceedings and this cannot subsequently be widened. The possibility for the Member State concerned to submit its observations constitutes an indispensable guarantee required by the Treaty and observance of that guarantee is an essential formal requirement of the procedure for establishing that a Member State has failed to fulfil its obligations.

2. In an action for failure to fulfil obligations, brought by the Commission under Article 169 of the Treaty, whose expediency only the Commission decides, it is for the Court to determine whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognizes that any individuals who have suffered damage because of it have a right to compensation. Otherwise, by admitting their breach of obligations and accepting any ensuing liability, Member States would be at liberty at any time during Article 169 proceedings before the Court to have them brought to an end without any judicial determination of the breach of obligations and of the basis of their liability.

3. By letting tenders be invited, in a procedure for the award of public works contracts, on the basis of a condition requiring the use to the greatest possible extent of national materials, consumer goods, labour and equipment and by letting negotiations be conducted with the selected tenderer on the basis of a tender not complying with the tender conditions, a Member State fails to fulfil its obligations under Articles 30, 48 and 59 of the Treaty and under Directive 71/305.

In Case C-243/89,

Commission of the European Communities, represented by Hans Peter Hartvig and Richard Wainwright, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

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v

Kingdom of Denmark, represented by Joergen Molde, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, assisted by Gregers Larsen, Advokat, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal,

defendant,

APPLICATION for a declaration that, since Aktieselskabet Storebaeltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment, and negotiations were conducted with the selected consortium on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark has failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the EEC Treaty as well as Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682),

THE COURT,

composed of: O. Due, President, C.N. Kakouris, G.C. Rodríguez Iglesias, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse and P.J.G. Kapteyn, Judges,

Advocate General: G. Tesauro,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 September 1992, at which the Kingdom of Denmark was represented by Joergen Molde, acting as Agent, assisted by Gregers Larsen and Sune F. Svendsen, Advokater,

after hearing the Opinion of the Advocate General at the sitting on 17 November 1992,

gives the following

Judgment

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Denmark has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by reason of the fact that Aktieselskabet Storebaeltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment and the fact that negotiations with the selected consortium took place on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the Treaty as well as Council Directive 71/305/EEC;

2. Orders the Kingdom of Denmark to pay the costs.

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1 By application lodged at the Court Registry on 2 August 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, since

° Aktieselskabet Storebaeltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment, and

° negotiations with the selected consortium were conducted on the basis of a tender which did not comply with the tender conditions,

the Kingdom of Denmark had failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the EEC Treaty as well as Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682, hereinafter "the directive").

2 Aktieselskabet Storebaeltsforbindelsen (hereinafter "Storebaelt") is a company wholly controlled by the Danish State. It is responsible for drawing up the project and, as the contracting authority, for the construction of a road and rail link across the Great Belt. Part of the project involves the construction of a bridge across the Western Channel of the Great Belt. The value of the contract for the construction of the Western Bridge is estimated at DKR 3 billion.

3 On 9 October 1987, Storebaelt published in the supplement to the Official Journal of the European Communities (1987 S 196, p. 16) a restricted invitation to tender for the construction of a bridge over the Western Channel. On 28 April 1988 it invited five groups of companies to submit tenders.

4 Condition 6, Clause 2, of the general conditions which form part of the contract documents (hereinafter "the general conditions") provides as follows:

> "The contractor is obliged to use to the greatest possible extent Danish materials, consumer goods, labour and equipment" (hereinafter "the Danish content clause").

5 Condition 3, Clause 3, of the general conditions sets out the conditions governing alternative tenders for alternative projects instead of the three different projects for the bridge which Storebaelt itself had designed and which serve as a basis for assessment of those tenders. Condition 3, Clause 3, provides that the tender price for an alternative project is to be based on the assumption that the contractor will undertake the detailed design of the project which it will submit to the contracting authority for approval and that it will assume full responsibility for the project and for its execution. That condition also specifies that the contractor is to accept the risk of variations in the quantities on which the alternative tender is based. Lastly, according to that condition,

> "if the contractor submits a tender for an alternative project for which he assumes responsibility, he must state a price allowing for a reduction in the event that the contracting authority decides to take over the detailed planning of the project".

6 Five international consortia, comprising a total of 28 undertakings, were invited to submit tenders. One of those five consortia was the European Storebaelt Group (hereinafter "ESG"), whose members were Ballast Nedam from the Netherlands, Losinger Ltd from Switzerland, Taylor Woodrow Construction Ltd from the United Kingdom and three Danish contracting firms. ESG submitted an alternative tender to Storebaelt for the construction of a concrete bridge.

7 Storebaelt then entered into discussions with the various tenderers in order to compare and assess their respective tenders and to quantify the cost of the numerous reservations which they contained. After cutting down the number of tenders, Storebaelt continued negotiations with ESG regarding its alternative tender. Those negotiations culminated in the signature, on 26 June 1989, of a contract between ESG and Storebaelt.

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8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas in law and the arguments of the parties, which are mentioned or discussed below only in so far as is necessary for the reasoning of the Court.

Admissibility

9 Having reserved the right, at the end of its application, to supplement and develop if necessary the two grounds of its application, the Commission, in its reply, elaborated its arguments on the basis of information provided by the Danish Government in its statement of defence. The Commission also made two amendments to the forms of order sought in its application.

10 In the first place it seeks a declaration from the Court, in relation to its second ground of application, set out above (paragraph 1), that Denmark had failed to fulfil its obligations since Storebaelt had, on the basis of a tender which did not comply with the tender conditions, conducted with ESG negotiations resulting in a final contract which contained amendments to the conditions of tender favouring that tenderer alone and relating in particular to price-related factors.

11 Secondly, on the question of the legal rules allegedly infringed by the defendant, the Commission claims that the Kingdom of Denmark infringed Directive 71/305, "including the principle of equal treatment which underlies that directive".

12 The Danish Government seeks from the Court a declaration that the application is inadmissible in so far as the Commission extended the subject-matter of the action beyond that of the pre-litigation procedure.

13 Before considering that claim, it should be recalled that, according to the case-law of the Court (see the judgment in Case C-306/91 Commission v Italy [1993] ECR I-2151, paragraph 22), in actions brought under Article 169 the pre-litigation stage defines the subject-matter of the proceedings and this cannot subsequently be widened. The possibility for the Member State concerned to submit its observations constitutes an indispensable guarantee required by the Treaty and observance of that guarantee is an essential formal requirement of the procedure for establishing that a Member State has failed to fulfil its obligations.

14 The Danish Government contends, first, that the Commission may not widen the subject-matter of the proceedings, either in its application or, in particular, in its reply, beyond the matters of fact and law mentioned in the letter of formal notice and the reasoned opinion.

15 On this issue the Court must find that the only matters at issue at the pre-litigation stage were Condition 6, Clause 2, of the general conditions, that is to say, the Danish content clause, and the commencement of negotiations on the basis of a tender which did not comply with Condition 3, Clause 3, of those conditions, concerning the tenderer' s responsibilities where an alternative project was tendered for.

16 It follows that the action is admissible only in so far as the two grounds of application relate to those two provisions of the general conditions.

17 As regards the ground of application relating to the Danish content clause, the Commission is not, however, barred from supporting its arguments in that regard by referring to other provisions of the contract documents which amplify that clause on specific points.

18 The Danish Government further contends that, by altering in the course of the proceedings the terms of the form of order sought, the Commission changed the subject-matter of the proceedings and infringed the rights of the defence in so far as it had no opportunity, as the defendant State, to submit its observations on the new points in good time and in the prescribed manner. Consequently, according to the Danish Government, the question whether the action is well founded must be considered only in relation to the form of order sought in the application initiating the proceedings.

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19 That plea in law raises the question whether the re-wording of the second part of the form of order sought widens its scope and, secondly, the question whether the reference, in the reply, to the "principle of equal treatment underlying that directive" introduces a new element into the legal basis of the alleged failure to fulfil obligations.

20 With respect to the first point, it need only be observed that the Commission was entitled to clarify the form of order sought in order to take into account the information, furnished by the Danish Government in its defence, concerning the conduct of the tendering procedure and the negotiations between Storebaelt and ESG.

21 With regard to the second point, first of all, as the Advocate General points out in point 13 of his Opinion, the Commission had already complained in the course of the pre-litigation procedure that the Danish Government had acted in breach of that principle and both the reasoned opinion and the application make express mention of this. It follows that the Danish Government had the opportunity to submit observations in that connection, as is evident from its reply to the reasoned opinion and from the terms of its defence.

22 Secondly, the Danish Government' s argument that the principle of equal treatment constitutes a new legal basis for the charge of failure to fulfil obligations raises a question concerning the interpretation of the directive which will be examined together with the issues of substance.

Substance

The first ground of application, concerning the Danish content clause

23 The Danish content clause, as set out in Condition 6, Clause 2, of the general conditions, is incompatible with Articles 30, 48 and 59 of the Treaty, a fact which is moreover undisputed by the Danish Government.

24 However, the Danish Government contends, first, that it deleted the clause in question before the signature of the contract with ESG on 26 June 1989 and that it thereby complied with the reasoned opinion even before it was notified on 14 July 1989. At the hearing, the Danish Government, relying on the judgment in Case C-362/90 Commission v Italy [1992] ECR I-2353 also argued that the Commission had failed to act in good time to prevent, by the procedures available to it, the infringement complained of from producing legal effects.

25 That argument cannot be accepted.

26 In the first place, even though the clause in question was deleted shortly before signature of the contract with ESG and consequently before notification of the reasoned opinion, the fact remains that the tendering procedure was conducted on the basis of a clause which was not in conformity with Community law and which, by its nature, was likely to affect both the composition of the various consortia and the terms of the tenders submitted by the five preselected consortia. It follows that the mere deletion of that clause at the final stage of the procedure cannot be regarded as sufficient to make good the breach of obligations alleged by the Commission.

27 It should also be noted that, in its letter of formal notice of 21 June 1989, the Commission requested the Danish Government to arrange for signature of the contract in dispute to be postponed and that if the Danish Government had acceded to that request the breach of obligations complained of would not have produced any legal effects.

28 The Danish Government contends, secondly, that in its statement of 22 September 1989, delivered to the Court at the hearing of the application for interim measures, it not only recognized that the Danish content clause constituted an infringement of Community law but also accepted liability towards the tenderers, so that the action on this point is devoid of purpose.

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29 That argument must also be rejected.

30 In an action for failure to fulfil obligations, brought by the Commission under Article 169 of the Treaty, whose expediency only the Commission decides, it is for the Court to determine whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognizes that any individuals who have suffered damage because of it have a right to compensation. Otherwise, by admitting their breach of obligations and accepting any ensuing liability, Member States would be at liberty at any time during Article 169 proceedings before the Court to have them brought to an end without any judicial determination of the breach of obligations and of the basis of their liability.

31 It follows from those considerations that the Commission' s application is well founded in relation to the first ground of application, concerning the Danish content clause.

The second ground of application, concerning negotiations on the basis of a tender which did not comply with the tender conditions

32 Since the Commission claims in its pleadings, which were re-worded in its reply, that Storebaelt acted in breach of the principle that all tenderers should be treated alike, the Danish Government' s argument that that principle is not mentioned in the directive and therefore constitutes a new legal basis for the complaint of breach of State obligations must be considered first.

33 On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured.

34 In its reply the Commission based its claims on a series of provisions in the final version of the contract which, in its view, constituted amendments to the tender conditions and had some effect on prices. However, as was explained above (paragraphs 14 and 15), only the amendments relating to Condition 3, Clause 3, of the general conditions may be taken into consideration by the Court.

35 The Commission' s second ground of application, so defined, is essentially that the Kingdom of Denmark infringed the principle of equal treatment of tenderers by reason of the fact that Storebaelt, on the basis of a tender which did not comply with the tender conditions, conducted negotiations with ESG, which, in the final version of the contract, led to amendments to Condition 3, Clause 3, concerning price-related factors which favoured that tenderer alone.

36 In order to assess the compatibility of the negotiations so conducted by Storebaelt with the principle of equal treatment of tenderers, it must first be considered whether that principle precluded Storebaelt from taking ESG' s tender into consideration.

37 In this regard, it must be stated first of all that observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.

38 This is confirmed by Article 11 of the directive, which, whilst allowing a tenderer, where there is the option of submitting variations on a project of the administration, to use a method for pricing the works which differs from that used in the country where the contract is being awarded, nevertheless requires that the tender accord with the tender conditions.

39 With regard to the Danish Government' s argument that Danish legislation governing the award of public contracts allows reservations to be accepted, it should be observed that when that legislation is applied, the principle of equal treatment of tenderers, which lies at the heart of the directive

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and which requires that tenders accord with the tender conditions, must be fully respected.

40 That requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them to do so.

41 The tender submitted by ESG, concerning an alternative project for the construction of a concrete bridge, did not comply with Condition 3, Clause 3, of the general conditions in so far as it failed to satisfy the requirements stipulated therein, that is to say that the proposed price was not based on the fact that, as tenderer, it had to undertake the detailed design of a project and assume full responsibility for it, as regards both its planning and its execution, as well as accept the risk of variation in quantities in relation to those envisaged.

42 Lastly, it should be noted that Condition 3, Clause 3, of the general conditions constitutes a fundamental requirement of the tender conditions, since it specifies the conditions governing the calculation of prices, taking into account the tenderer' s responsibility for the detailed design and execution of the project and for accepting the risks.

43 In those circumstances, and since the condition in question did not give tenderers the option of incorporating reservations into their tenders, the principle of equal treatment precluded Storebaelt from taking into consideration the tender submitted by ESG.

44 Consequently, the second ground of application concerning the conduct of negotiations on the basis of a tender which did not comply with the tender conditions is well founded.

45 It follows from all the foregoing considerations that, by reason of the fact that Aktieselskabet Storebaeltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment and the fact that negotiations with the selected consortium took place on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the Treaty as well as Council Directive 71/305/EEC.

DOCNUM	61989J0243
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1989 ; J ; judgment
PUBREF	European Court reports 1993 Page I-03353 Swedish special edition XIV Page I-00229 Finnish special edition XIV Page I-00263
DOC	1993/06/22
LODGED	1989/08/02

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JURCIT	11957E030 : N 23 11957E048 : N 23 11957E059 : N 23 11957E169 : N 9 - 21 30 31971L0305-A11 : N 38 31971L0305-C09 : N 33 31971L0305 : N 11 32 - 45 61989C0243 : N 21 61990J0362 : N 24 61991J0306-N22 : N 13
CONCERNS	Failure concerning 11957E030 Failure concerning 11957E048 Failure concerning 11957E059 Failure concerning 31971L0305
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Freedom of establishment and services ; Free movement of services ; Right of establishment
AUTLANG	Danish
APPLICA	Commission ; Institutions
DEFENDA	Denmark ; Member States
NATIONA	Denmark
NOTES	La Marca, Luigi: Rivista di diritto europeo 1990 p.803-859 Gormley, Laurence: European Business Law Review 1993 p.166 Boutard-Labarde, Marie-Chantal: Journal du droit international 1994 p.499-500
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Tesauro
JUDGRAP	Kapteyn
DATES	of document: 22/06/1993 of application: 02/08/1989

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Order of the Court
of 26 January 1990
Falciola Angelo SpA v Comune di Pavia.
Reference for a preliminary ruling: Tribunale amministrativo régionale della Lombardia - Italy.
Compatibility with Community law of a national law.
Case C-286/88.

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References for a preliminary ruling - Jurisdiction of the Court - Limits - Manifestly irrelevant question

(EEC Treaty, Art. 177)

The procedure provided for in Article 177 of the Treaty is an instrument of cooperation between the Court of Justice and the national courts, whereby the former supplies the latter with the information on the interpretation of Community law which is necessary in order to enable them to settle disputes which are brought before them . A request from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or to the subject-matter of the main action.

In Case C-286/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunale amministrativo regionale per la Lombardia (Regional Administrative Court for Lombardy) for a preliminary ruling in the action pending before that court between

Impresa Falciola Angelo SpA

and

Comune di Pavia (Municipality of Pavia)

on the interpretation of Articles 5 and 177 and the third paragraph of Article 189 of the EEC Treaty,

THE COURT

composed of : O. Due, President, Sir Gordon Slynn, C. N. Kakouris, F . A. Schockweiler and M. Zuleeg (Presidents of Chambers), T . Koopmans, G. F. Mancini, R. Joliet, T. F. O' Higgins, J. C . Moitinho de Almeida, G. C. Rodríguez Iglesias, F. Grévisse and M . Diez de Velasco, Judges,

Advocate General : F. G. Jacobs

Registrar : J.-G. Giraud

after hearing the views of the Advocate General,

makes the following

Order

1 By order dated 24 September 1988 which was received at the Court on 29 September 1988, the First Chamber of the tribunale amministrativo regionale per la Lombardia referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Community law, in particular Articles 5 and 177 and the third paragraph of Article 189 of the EEC Treaty .

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2 Those questions arose during the course of proceedings originating out of an application to that court by Impresa Falciola Angelo for the annulment, together with that of all decisions related thereto, of the deliberation of 29 July 1987 by which the Municipal Council of Pavia approved the decision of the Awards Committee on a restricted invitation to tender, awarding a road works contract to the Consorzio cooperative costruzioni di Bologna.

3 According to the order for reference, the contract is governed, by reason of the value of the contract, by Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal 1971, English Special Edition 1971 II, pp. 678 and 682).

4 Those are the circumstances in which the tribunale asked the Court for a preliminary ruling on the following questions :

"(1) The Court of Justice is requested to state whether, apart from the Community and Italian legal orders, there is today also a third legal order (Community-cum-Italian) which is accompanied by the Community-cum-English, Community-cum-German legal orders, and so forth, and which is characterized :

(a) by the fact that the rules governing it are to be found primarily in the provisions of Community law and sub-primarily in the provisions of Italian law (the two categories of provisions - primary and sub-primary - merge to form a unitary legislative framework);

(b)by the fact that it concerns substantial Community interests which are realized also through Italian instruments.

(2) The Court of Justice is requested to state whether the third paragraph of Article 189, and Articles 177 and 5 of the EEC Treaty must be interpreted as meaning that the Member States, when they give effect to the Community directives, must also provide for the relevant procedural instruments regarded as necessary for ensuring adequate judicial protection, which entails the obligation to alter for the better the judicial instruments already in existence and, in any event, the duty not to alter those instruments for the worse.

(3) The Court of Justice is requested to state whether it necessarily follows from Articles 5 and 177 and the third paragraph of Article 189 of the EEC Treaty, read together, that there is a duty - on the part of the Member States - to provide that disputes relating to matters governed by 'Community-cum-Italian' law (and thus governed primarily by Community provisions and sub-primarily by Italian provisions) must be decided by national judges who, as regards the essence of the judicial function, are on the same footing as the Court of Justice (and accordingly are not 'less judicial' than the Court).

(4) (In the alternative) The Court of Justice is requested to state whether it necessarily follows from Articles 5 and 177 and the third paragraph of Article 189 of the EEC Treaty, read together, that there is an obligation on the part of the Member States to provide, as regards the 'implementation of the Community directives' , that disputes relating to matters governed by 'Community-cum-Italian' law shall be decided by institutions vested with 'real' , and not 'apparent' , judicial power (' utilis, non inutilis jurisdictio')."

5 It is clear from the grounds of the order for reference that the aim actually sought by the tribunale amministrativo regionale per la Lombardia in its four questions is that the Court should state whether the Italian courts can still offer whatever guarantees Community law may require to ensure that national judges are able to carry out their duties as Community judges in a satisfactory,

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wholly independent and completely impartial manner notwithstanding the enactment of Italian Law No 117/88 of 13 April 1988 on compensation for damage caused in the exercise of judicial functions and the civil liability of the judiciary (Gazzetta ufficiale della Repubblica italiana No 88, 15.4.1988, p. 3).

6 The tribunale doubts whether the law in question "ensures the impartiality of the judge, in view of the fact that it does not appear to guarantee that he need harbour no fear of suffering any damage ". As a result, "precisely because he may be called upon to meet a personal liability", an Italian judge may be "a judge in appearance only" and "in reality an institution which may be led to give judgment in a manner other than that dictated by knowledge and conscience, in flagrant infringement of the Community rules on the 'essence' of the judicial function ".

7 As the Commission pointed out in its written observations submitted to the Court in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, the procedure provided for in Article 177 of the Treaty is an instrument of cooperation between the Court of Justice and the national courts, whereby the former supplies the latter with the information on the interpretation of Community law which is necessary in order to enable them to settle disputes which are brought before them .

8 The Court has held (see the judgment of 16 June 1981 in Case 126/80 Salonia v Poidomani and Giglio ((1981)) ECR 1563, paragraph 6) that a request from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or to the subject-matter of the main action.

9 That is the situation in the present case, in which the questions raised bear no relation to the subject-matter of the action, since the request from the tribunale amministrativo regionale per la Lombardia does not concern the interpretation of Council Directives 71/304 and 71/305, and the tribunale merely informs the Court that it will have to apply those directives in the dispute which has been brought before it . It is clear from the actual wording of the order for reference that the tribunal is in doubt only as to the possible psychological reactions of certain Italian judges as a result of the enactment of the Italian Law of 13 April 1988, cited above. Consequently, the preliminary questions submitted to the Court do not involve an interpretation of Community law objectively required in order to settle the dispute in the main action.

10 In those circumstances, the Court of Justice clearly has no jurisdiction to rule on the questions submitted to it by the tribunale amministrativo regionale per la Lombardia.

11 Article 92 of the Rules of Procedure must therefore be applied, and it must be found that the Court has no jurisdiction in this case.

On those grounds,

THE COURT

hereby orders :

The Court has no jurisdiction to answer the questions put by the tribunale amministrativo regionale per la Lombardia.

Luxembourg, 26 January 1990.

DOCNUM 61988O0286

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AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1988 ; O ; order
PUBREF	European Court reports 1990 Page I-00191
DOC	1990/01/26
LODGED	1988/09/29
JURCIT	11957E005 : N 1 11957E177 : N 1 7 11957E189-L3 : N 1 31959X0301-A92 : N 11 31971L0304 : N 3 9 31971L0305 : N 3 9 61980J0126 : N 8
SUB	Approximation of laws
AUTLANG	Italian
NATIONA	Italy
NATCOUR	*A9* Tribunale Amministrativo Regionale della Lombardia, Sezione I, ordinanza del 25/05/88 (947 - RG 2800/87) - I Tribunali Amministrativi Regionali 1988 I p.3330-3340 - Il Foro amministrativo 1988 p.3705-3712 - Sospensive - Casi di processo cautelare amministrativo 1990 p.1304-1310
NOTES	Tizzano, A.: Il Foro italiano 1990 IV Col.157
PROCEDU	Reference for a preliminary ruling - inadmissible
ADVGEN	Jacobs
JUDGRAP	Grévisse
DATES	of document: 26/01/1990 of application: 29/09/1988

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**Order of the President of the Court
of 27 September 1988
Commission of the European Communities v Italian Republic.
Award of a public works contract - Incinerator.
Case 194/88 R.**

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Application for interim measures - Interim measures - Conditions for granting - Prima-facie case - Weighing up all the interests involved

(EEC Treaty, Art. 186; Rules of Procedure, Art. 83 (2))

In Case 194/88 R

Commission of the European Communities, represented by Guido Berardis, a member of its Legal Department, acting as agent, with an address for service in Luxembourg at the office of Georgios Kremlis, Jean Monnet Building, Kirchberg,

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Ivo Braguglia and Pier Giorgio Ferri, avvocati dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5, rue Marie-Adelaïde,

defendant,

APPLICATION for interim measures for the suspension of the award by the Consorzio per la costruzione e la gestione di un impianto per l' incenerimento e trasformazione dei rifiuti solidi urbani (Consortium for the construction and management of the incinerator and processing plant for solid urban refuse), whose headquarters are at the offices of the City of La Spezia, of a public-works contract in connection with the consortium' s incinerator,

Judge Koopmans, acting for the President of the Court in accordance with the second paragraph of Article 85 and Article 11 of the Rules of Procedure,

makes the following

Order

1 By an application lodged at the Court Registry on 18 July 1988, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that as a result of the failure of the Consorzio per la costruzione e la gestione di un impianto per l' incenerimento e trasformazione dei rifiuti solidi urbani (hereinafter referred to as "the Consortium "), whose headquarters are at the Town Hall of La Spezia, to publish in the Official Journal of the European Communities a notice concerning the award of a contract for works connected with the Consortium' s incinerator, the Italian Republic had failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

2 By an application lodged at the Court Registry on the same date, the Commission also applied, under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure, for an interim order requiring the Italian Republic to adopt all the necessary measures to suspend the award of the contract in question in this case until the Court has given judgment in the main action. In the alternative, should the contract already have been awarded, the Court is requested to order

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the Italian Republic to adopt all the measures which are appropriate in order to cancel the award of the contract or, at the very least, to preserve the status quo until final judgment is given.

3 By an order of 20 July 1988, the President of the Court, by way of an interlocutory decision, provisionally ordered that the Italian Republic should adopt all the necessary measures to suspend the award of the public works contract in question until 15 September 1988 or such other date as might be fixed by a subsequent order of the Court. By an order of 13 September 1988, the President of the Court, by way of an interlocutory decision, extended those protective measures until the date of the final order in these interlocutory proceedings.

4 The Italian Republic submitted its written observations on 2 September 1988. The parties' oral submissions were heard on 23 September 1983.

5 The Consortium is an association of municipalities situated in the province of La Spezia, in Liguria, which is responsible for the disposal of solid urban waste. For that purpose, it operates an incinerator in Boscalino di Arcola. On 31 December 1986, the Pretore (Magistrate) of La Spezia ordered the incinerator to be closed down and made its reopening subject to its renovation. The disputed contract relates to the carrying out of that renovation work.

6 The burden of the Commission' s charge against the Italian Republic is that in the course of awarding the contract the Consortium infringed the advertising rules laid down in Directive 71/305/EEC by failing to publish a contract notice in the Official Journal of the European Communities, without providing evidence of circumstances of such a nature as to justify a derogation under the provisions of the directive, in particular Article 9 thereof. It requests that the award of the contract be suspended immediately in order to prevent it causing immediate and serious damage to the Commission, as protector of the Community' s interests, and to the undertakings which would have been able to take part in the tendering procedure had a contract notice been published in accordance with the directive.

7 It is an established and undisputed fact that no notice of the contract in question was published in the Official Journal of the European Communities.

8 Article 186 of the Treaty provides that the Court may prescribe any interim measures requested in cases before it. In order for such a measure to be granted, an application for interim measures must, according to Article 83 (2) of the Rules of Procedure, state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima-facie case for the interim measure applied for.

9 First of all, the Italian Government takes the view that there is no prima-facie case for granting the interim measure sought, since Directive No 71/305/EEC does not apply to the contract in question. In the first place, the contract is only exploratory and does not come within the definition of public works contracts laid down in Article 1 of the directive. Secondly, should that not be the case, the directive itself states in Article 9 (d) that the provisions relating to advertising do not apply when extreme urgency prevents the time-limit from being adhered to. The Italian Government goes on to dispute the urgency of the interim measure applied for, since in its view the start of renovation work on the incinerator is much more urgent that any compliance with the formal requirements laid down by the directive. Finally, the balance of interests tilts in favour of having a rapid start made on the works, given the public health interests at stake when solid refuse can no longer be satisfactorily disposed of .

10 The argument that the contested invitation to tender was exploratory must be rejected straight away. The Italian Government explained in this respect that, under Italian legislation, works contracts may be awarded on the basis of exploratory invitations to tender intended to identify the economically and technically most advantageous tender, in accordance with predetermined conditions;

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in such a case, the public authorities are not in fact required to award the contracts so that the invitation to tender cannot be regarded as relating to a "public works contract" within the meaning of the directive . This argument must be rejected since, as the Commission has rightly stated, the directive governs the procedure for awarding contracts for certain works whenever such contracts are awarded by public authorities; the scope of the directive does not, and cannot, depend on the particular rules laid down by national legislation as regards the duties of the awarding authorities.

11 Consequently, the Italian Government' s other arguments should be examined together; they are all based on the urgency of the renovation works on the incinerator in question and on the emergency situation which the Consortium was in at the time when the invitation to tender was issued . In order to weigh the importance of these arguments for the purposes of these interlocutory proceedings, they must be considered with reference to the chronological order of the facts underlying the dispute in the main proceedings.

12 The documents and oral explanations provided by both parties enable the Court to regard the following facts as agreed for the purpose of the interlocutory proceedings :

(a) on 15 December 1982, a presidential decree was brought into force relating to waste disposal; the Consortium was aware of the fact that the incinerator at Boscalino di Arcola did not comply with the technical specifications laid down in that decree;

(b) in May and June 1986, the Consortium approved plans for renovating the incinerator;

(c) meanwhile, the Regional Council of Liguria gave its authorization, on 26 April 1984, for the opening of a dump at Vallescura, in the municipality of Ricco del Golfo, for the disposal of solid urban refuse from a number of municipalities in the province of La Spezia;

(d) in December 1986, the Pretore of La Spezia ordered the incinerator at Boscalino di Arcola to be closed down, making its reopening subject to renovation; in July 1987, the Pretore stated that the technical requirements had to be met in full;

(e) during the first few months of 1987, the Ligurian regional authorities found that the dumping of waste in Vallescura had led to seepage into a stream situated below the tip; in July, the Vallescura dump was closed; an old dump in Saturnia was temporarily used, but with great hygiene problems and dangers to public health; a second tip in Vallescura was brought into use, at first for a few months;

(f) on 27 November 1987, the Consortium applied for a loan from theCassa Depositi e Prestiti in order to finance the works for renovating the incinerator;

(g) in December 1987, the Consortium decided to issue an exploratory invitation to tender for the award of a contract for the renovating work; the award was subject to the grant of a loan by the Cassa; the Consortium expressly stated that shortness of time did not allow another system of awarding contracts to be used, which would necessarily have taken longer; the Consortium sent a letter to seven Italian undertakings, appearing on national lists of specialized construction companies, and invited them to submit tenders;

(h) in February 1988, work was started on a third dump at Vallescura;

(i) on 2 June 1988, a ministerial decree was adopted which included the renovation of the incinerator in Boscalino di Arcola among the 17 priority projects for which the Cassa Depositi e Prestiti was authorized to grant loans;

(j) on 15 July 1988, an order made by the Ligurian regional authorities laid down the conditions for the tipping of refuse on the second and third dumps at Vallescura; the limits set for the use of the second dump were almost reached.

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13 To complete this summary of the facts, it should be added that, on the day of the hearing, the loan for the financing of the renovation work on the incinerator had still not been granted by the Cassa Depositi e Prestiti.

14 The chronology of the facts shows first that, however urgent the works to be undertaken may be, that urgency is not due to unforeseeable events, since the Consortium has known since 1982 that the renovation of the incinerator was necessary. In order that the exception provided for in Article 9 (d) of Directive 71/305/EEC may be relied on, the "extreme urgency" brought about by events unforeseen by the authorities awarding contracts must prevent the time-limit laid down for the application of the directive from being kept. There are, therefore, sufficient factual and legal elements for assuming that, prima facie, the directive applies.

15 At the interlocutory hearing, the argument between the parties in fact concentrated mainly on the urgency relied on by the Commission, on the one hand, and the urgent need to complete the renovation of the incinerator quickly, on the other. The Commission argued that the length of time needed in order to comply with the advertising requirements of the directive was quite relative, since compliance with the advertising rules laid down in Article 12 et seq. of the directive requires a period of only about 40 days, and in urgent cases 25 days, whereas the invitation to tender itself dated from December 1987 . The Italian Government emphasized the serious risks to public health which additional delays would entail, particularly in view of the uncertainty about the future possibility of using the tip at Vallescura .

16 Given those arguments, it must be recognized that the observance of further time-limits in the completion of the renovation works on the incinerator might entail serious risks for public health and the environment . However, it should also be borne in mind that the Consortium, which is responsible for the work, brought about this situation itself by its slowness in meeting the new technical requirements. Furthermore, the Commission' s argument that a failure to comply with the directive constitutes a serious breach of Community law, particularly since a declaration of illegality by the Court obtained under Article 169 of the Treaty cannot make good the damage suffered by undertakings established in other Member States whch were excluded from the tendering procedure, must be accepted.

17 Whilst being aware of the difficulties in which the Consortium now finds itself, the Court considers that the Commission has established the urgency of the interim measure applied for and that in the final analysis the balance of interests tilts in its favour. In this regard, the Court has taken into account in particular the fact that the dumping of refuse at Vallescura must continue for quite a considerable period in any case. In fact, the Italian legislation laying down urgent provisions governing the disposal of waste, which is applicable in this case, allows a period of 120 days between the grant of the loan and the beginning of the works, which must be completed within the ensuing 18 months. In comparison with those periods, those entailed in complying with the directive appear to be negligible .

18 Consequently, the suspension already ordered must be extended until the date of delivery of the judgment in the main action.

On those grounds,

Judge Koopmans, replacing the President of the Court in accordance with the second paragraph of Article 85 (2) and Article 11 of the Rules of Procedure,

by way of interlocutory decision,

hereby orders :

(1) The Italian Republic shall adopt all the necessarymeasures to suspend the award of a public works contract by the Consorzio per la costruzione e la gestione di un impianto per l' incenerimento

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e trasformazione dei rifiuti solidi urbani, whose headquarters are at the offices of the City of La Spezia, until the date of delivery of the judgment determining the main action.

(2) Costs are reserved.

Luxembourg, 27 September 1988.

DOCNUM	61988O0194(02)
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1988 ; O ; order
PUBREF	European Court reports 1988 Page 05647
DOC	1988/09/27
LODGED	1988/07/18
JURCIT	11957E186 : N 8 31959X0301-A83P2 : N 8 31971L0305-A01 : N 9 31971L0305-A09LD : N 9 14 31971L0305-A12 : N 15 31971L0305 : N 1 6 61988O0194(01) : N 3 61988O0194 : N 3
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
NOTES	La Marca, Luigi: Rivista di diritto europeo 1989 p.383-398 X: Il Foro italiano 1990 IV Col.306-308
PROCEDU	Proceedings concerning failure by Member State ; Application for interim measures - successful

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ADVGEN Darmon

JUDGRAP Koopmans

DATES of document: 27/09/1988
of application: 18/07/1988

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Judgment of the Court
of 22 June 1989
Fratelli Costanzo SpA v Comune di Milano.
Reference for a preliminary ruling: Tribunale amministrativo regionale della Lombardia - Italy.
Public works contracts - Abnormally low tenders - Direct effect of directives in relation to administrative authorities.
Case 103/88.

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1 . Approximation of laws - Procedures for the award of public works contracts - Directive 71/305 - Award of contracts - Abnormally low tenders - Automatic disqualification - Not permissible - Obligation to conduct an examination procedure - Tenders subject to examination - Obligations of national judicial and administrative authorities

(Council Directive 71/305/EEC, Art. 29(5))

2 . Measures adopted by the institutions - Directives - Direct effect - Conditions - Implications

(EEC Treaty, Art. 189, third paragraph)

1 . Article 29(5) of Directive 71/305, from which Member States may not depart to any material extent when implementing it, prohibits the Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations.

Member States may require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

Administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of the Directive and to refrain from applying provisions of national law which are inconsistent with them.

2 . Wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the directive correctly.

When the conditions under which individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

In Case 103/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Tribunal for Lombardy) for a preliminary ruling in the proceedings before that court between

Fratelli Costanzo SpA, a company incorporated under Italian law, whose registered office is at Misterbianco,

and

Comune di Milano (Municipality of Milan)

on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning

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the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682) and the third paragraph of Article 189 of the EEC Treaty,

THE COURT

composed of O. Due, President, R. Joliet and F. Grévisse (Presidents of Chambers), Sir Gordon Slynn, G. F. Mancini, F. A. Schockweiler and J. C. Moitinho de Almeida, Judges,

Advocate General : C. O. Lenz

Registrar : H. A. Ruehl, Principal Administrator

after considering the observations submitted on behalf of :

Fratelli Costanzo SpA, the plaintiff in the main proceedings, by L. Acquarone, M. Ali, F. P. Pugliese, M. Annoni and G. Ciampoli, Avvocati, in the written procedure and by L. Acquarone in the oral procedure,

the Comune di Milano, the defendant in the main proceedings, by P. Marchese, C . Lopopolo and S. Ammendola, avvocati, in the written procedure and by P. Marchese in the oral procedure,

Ing . Lodigiani SpA, the intervener in the main proceedings, by E. Zauli and G . Pericu, avvocati, in the written procedure and by G. Pericu in the oral procedure,

the Government of the Kingdom of Spain, by J. Conde de Saro and R. Silva de Lapuerta, acting as Agents, in the written procedure and by R . Silva de Lapuerta, acting as Agent, in the oral procedure,

the Government of the Italian Republic, by Professor L. Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by I. M. Braguglia, avvocato dello Stato,

the Commission of the European Communities, by G. Berardis, a member of its Legal Department, acting as Agent, in the written and oral procedures,

having regard to the Report for the Hearing and further to the hearing on 7 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 April 1989,

gives the following

Judgment

Costs

34 The costs incurred by the Spanish Government, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunale amministrativo regionale per la Lombardia by order of 16 December 1987, hereby rules :

(1) Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts

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of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations.

(2) When implementing Council Directive 71/305/EEC, Member States may not depart to any material extent from the provisions of Article 29(5) thereof.

(3) Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

(4) Administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them .

1 By order of 16 December 1987, which was received at the Court Registry on 30 March 1988, the Tribunale amministrativo regionale per la Lombardia referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II),p . 682) and the third paragraph of Article 189 of the EEC Treaty .

2 The questions were raised in proceedings brought by Fratelli Costanzo SpA (hereinafter referred to as "Costanzo "), the plaintiff in the main proceedings, for the annulment of a decision of the Giunta municipale (Municipal Executive Board) of Milan eliminating the tender submitted by Costanzo from a tendering procedure for a public works contract and awarding the contract in question to Ing. Lodigiani SpA (hereinafter : "Lodigiani ").

3 Article 29(5) of Council Directive 71/305/EEC provides as follows

> "If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.
>
> For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.
>
> If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low."

4 Article 29(5) of Directive 71/305 was implemented in Italy by the third paragraph of Article 24 of Law No 584 of 8 August 1977 amending the procedures for the award of public works contracts in accordance with the directives of the

European Economic Community (Gazzetta Ufficiale della Repubblica Italiana (Official Journal of the Italian Republic) No 232 of 26 August 1977, p. 6272). That provision is worded as follows :

> "If, for a given contract, tenders are abnormally low in relation to the transaction, the authority awarding the contract shall, after requesting the tenderer to furnish the necessary explanations and after indicating, where appropriate, which parts it considers unacceptable, examine the details of the tenders and may disallow them if it takes the view that they are not valid; in that event, if the call for tenders provides that the lowest tender price is the criterion for the award of the contract, the awarding authority is obliged to notify the rejection of the tenders, together with its reasons for doing so, to the Ministry of Public Works, which is responsible for forwarding

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the information to the Advisory Committee for Public Works Contracts of the European Economic Community within the period laid down by the first paragraph of Article 6 of this Law ."

5 Subsequently, in 1987, the Italian Government adopted three decree laws in succession which provisionally amended the third paragraph of Article 24 of Law No 584 (Decree Law No 206 of 25 May 1987, Gazzetta Ufficiale No 120, 26.5.1987, p. 5; Decree Law No 302 of 27 July 1987, Gazzetta Ufficiale No 174, 28.7.1987, p. 3; and Decree Law No 393 of 25 September 1987, Gazzetta Ufficiale No 225, 26.9.1987, p. 3).

6 The three decree laws each contain an Article 4 worded in identical terms, as follows :

"In order to speed up the procedures for the award of public works contracts, for a period of two years from the date on which this decree enters into force tenders with a percentage discount greater than the average percentage divergence of the tenders admitted, increased by a percentage which must be stated in the call for tenders, shall be considered abnormal for the purposes of the third paragraph of Article 24 of Law No 584 of 8 August 1977 and shall be excluded from the tendering procedure."

7 The decree laws lapsed because they were not converted into laws within the period prescribed by the Italian Constitution. However, a subsequent law provided that the effects of legal measures adopted pursuant to them were to remain valid (Article 1(2) of Law No 478 of 25 November 1987, Gazzetta Ufficiale No 277, 26.11.1987, p. 3).

8 In preparation for the 1990 World Cup for football, to be held in Italy, the Comune di Milano issued a restricted call for tenders for alteration work on a football stadium. The criterion chosen for awarding the contract was that of the lowest price.

9 The call for tenders stated that in accordance with Article 4 of Decree Law No 206 of 25 May 1987 tenders which exceeded the basic amount fixed for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated .

10 The tenders admitted to the procedure exceeded the basic amount fixed for the price of the work by an average of 19.48 %. In accordance with the call for tenders any tender which did not exceed the basic amount by at least 9.48% was to be automatically eliminated

11 The tender submitted by Costanzo was less than the basic amount. Accordingly, on 6 October 1987 the Giunta Municipale, on the basis of Article 4 of Decree Law No 393 of 25 September 1987, which in the mean time had replaced the decree law cited in the call for tenders, decided to exclude Costanzo' s bid from the tendering procedure and to award the contract to Lodigiani, which had submitted the lowest tender of those which fulfilled the condition set out in the call for tenders

12 Costanzo challenged that decision in proceedings before the Tribunale amministrativo regionale per la Lombardia, claiming inter alia that it was illegal on the ground that it was based on a decree law which was itself incompatible with Article 29(5) of Council Directive 71/305.

13 The national court therefore referred the following questions to the Court of Justice for a preliminary ruling :

"A - Given that, under Article 189 of the EEC Treaty, the provisions contained in a directive may relate to the 'result to be achieved' (hereinafter referred to as 'provisions as to results') or else be concerned with the 'form and methods' required to achieve a given result (hereinafter referred to as 'provisions as to form and methods'), is the rule contained in Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 (where it provides that - should a tender be obviously abnormally low - the authority must 'examine the details' of the tender and request the tenderer to furnish the necessary explanations, indicating where appropriate which parts

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it finds unacceptable) a 'provision as to results' and therefore of such a nature that the Italian Republic was obliged to 'transpose' it without any amendment of substance (as indeed it did, by the third paragraph of Article 24 of Law No 584 of 8 August 1977) or is it a 'provision as to form and methods' , with the result that the Italian Republic could derogate from it by providing that where a tender is abnormally low the tenderer must automatically be eliminated from the tendering procedure, without any 'examination of the details' and without any request to the tenderer to furnish 'explanations' for the 'abnormal tender' ?

B - If the reply to Question A is negative (in the sense that Article 29(5) of Council Directive 71/305/EEC is to be held to be a 'provision as to form and methods'):

B - 1 . Did the Italian Republic (after 'transposing' the aforesaid provision by way of Law No 584 of 8 August 1977 without introducing any amendment of substance regarding the procedure to be followed in cases where a tender is abnormally low) retain the power to amend the domestic implementing provision? In particular, could Article 4 of Decree Law No 206 of 25 May 1987, Decree Law No 302 of 27 July 1987 and Decree Law No 393 of 25 September 1987 (whose wording is identical) amend Article 24 of Law No 584 of 8 August 1977?

B - 2 . Could the (identically worded) Articles 4 of the decree laws mentioned above amend Article 29(5) of Council Directive 71/305/EEC, as implemented by Law No 584 of 8 August 1977, without stating adequate reasons therefor, regard being had to the fact that a statement of reasons - which is necessary for Community legislation (see Article 190 of the EEC Treaty) - appears also to be necessary for domestic legislation introduced to give effect to Community provisions (which is therefore 'sub-primary' legislation and, in the absence of indication to the contrary, must also be subject to the rule which requires 'primary' legislation to state reasons)?

C - Is there, in any event, a conflict between Article 29(5) of Council Directive 71/305/EEC and the following provisions :

(a) the third paragraph of Article 24 of Law No 584 of 8 August 1977 (which refers to 'abnormally low' tenders, whereas the directive is concerned with tenders which are 'obviously' abnormally low and provides for examination of the details only in cases of 'obvious' abnormality);

(b) Article 4 of Decree Laws Nos 206 of 25 May 1987, 302 of 27 July 1987 and 393 of 25 September 1987 (which make no allowance for preliminary examination of the details or a request for clarification to the party concerned, contrary to Article 29(5) of the Directive; furthermore, the decree laws mentioned above do not refer to 'obviously' abnormal tenders and to that extent appear to be invalid, as does Law No 584 of 8 August 1977)?

D - If the Court of Justice rules that the aforesaid Italian legislative provisions conflict with Article 29(5) of Council Directive 71/305/EEC, was the municipal authority empowered, or obliged, to disregard the domestic provisions which conflicted with the aforesaid Community provision (consulting the central authorities if necessary), or does that power or obligation vest solely in the national courts?"

14 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the applicable legislation, the course of the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

The second part of the third question and the first question

15 In the second part of the third question the Tribunale amministrativo regionale seeks in essence to establish whether Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public

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works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations. In its first question it asks whether the Member States may, when implementing Council Directive 71/305, depart to any material extent from Article 29(5) thereof.

16 With regard to the second part of the third question it should be noted that Article 29(5) of Directive 71/305 requires the awarding authority to examine the details of tenders which are obviously abnormally low, and for that purpose obliges the authority to request the tenderer to furnish the necessary explanations. Article 29(5) further requires the awarding authority, where appropriate, to indicate which parts of those explanations it finds unacceptable. Finally, if the criterion adopted for the award of the contract is the lowest price tendered, the awarding authority must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 (Official Journal, English Special Edition 1971 (II), p. 693) the rejection of tenders which it considers to be too low.

17 The Comune di Milano and the Italian Government maintain that it is in keeping with the aim of Article 29(5) to replace the examination procedure which it envisages, giving the tenderer an opportunity to state its views, with a mathematical criterion for exclusion . They point out that the aim of that provision is, as the Court ruled in its judgment of 10 February 1982 in Case 76/81 Transporoute v Minister for Public Works ((1982)) ECR 417, at p. 428), to protect tenderers against arbitrariness on the part of the authority awarding the contract. A mathematical criterion for exclusion affords an absolute safeguard. It has the further advantage of being faster in its application than the procedure laid down by the Directive .

18 That argument cannot be upheld. A mathematical criterion for exclusion deprives tenderers who have submitted exceptionally low tenders of the opportunity of demonstrating that those tenders are genuine ones. The application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts.

19 The answer to the second part of the third question must therefore be that Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations.

20 With regard to the first question, it should be observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those tenders are genuine ones that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low . That aim would be jeopardized if Member States were able, when implementing Article 29(5) of the directive, to depart from it to any material extent.

21 The answer to the first question must therefore be that when implementing Council Directive 71/305 Member States may not depart to any material extent from the provisions of Article 29(5) thereof.

The second question

22 In its second question the national court asks whether, after implementing Article 29(5) of Council Directive 71/305 without departing from it to any material extent, Member States may subsequently amend the domestic implementing provision, and if so whether they must give reasons for doing so.

23 The national court raised this question only in the event that the answer to the first question

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should be that Member States could, when implementing Article 29(5) of Directive 71/305, depart materially from it.

24 In the light of the answer given to the first question the second question is devoid of purpose.

The first part of the third question

25 In the first part of its third question the national court seeks to establish whether Article 29(5) of Council Directive 71/305 allows Member States to require the examination of tenders whenever they appear to be abnormally low, and not only when they are obviously abnormally low.

26 The examination procedure must be applied whenever the awarding authority is contemplating the elimination of tenders because they are abnormally low in relation to the transaction. Consequently, whatever the threshold for the commencement of that procedure may be, tenderers can be sure that they will not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tenders.

27 It follows that the answer to be given to the first part of the third question is that Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

The fourth question

28 In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

29 In its judgments of 19 January 1982 in Case 8/81 Becker v Finanzamt Muenster-Innenstadt ((1982)) ECR 53, at p. 71 and 26 February 1986 in Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority ((1986) ECR 723, at p. 748) the Court held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

30 It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

31 It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

32 With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

33 The answer to the fourth question must therefore be that administrative authorities, including

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municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.

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PROCEDU Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Joliet

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Judgment of the Court
of 20 March 1990
Du Pont de Nemours Italiana SpA v Unità sanitaria locale No 2 di Carrara.
Reference for a preliminary ruling: Tribunale amministrativo regionale della Toscana - Italia.
Public supply contracts - Reservation of 30 % of such contracts to undertakings located in a particular region.
Case C-21/88.

++++

1.Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Reservation of a proportion of a public supply contract to undertakings located in a particular region of the national territory - Not permissible - Measure benefiting only part of domestic production - No effect

(EEC Treaty, Art. 30)

2.Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Measure which might be regarded as aid within the meaning of Article 92 of the Treaty - Applicability of the prohibition of measures having equivalent effect not precluded by that possibility

(EEC Treaty, Arts 30 and 92)

1.Article 30 of the Treaty precludes national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts.

Although the restrictive effects of a preferential system of that kind are borne in the same measure both by products manufactured by undertakings from the Member State in question which are not situated in the relevant region and by products manufactured by undertakings established in the other Member States, the fact remains that all the products benefiting by the preferential system are domestic products. Moreover, the fact that the restrictive effect exercised by a State measure on imports does not benefit all domestic products but only some cannot exempt the measure in question from the prohibition set out in Article 30.

2.The Treaty provisions on aid may in no case be used to frustrate the Treaty rules on the free movement of goods. They both pursue a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition. The fact that a national measure might be regarded as aid within the meaning of Article 92 is therefore not a sufficient reason to exempt it from the prohibition contained in Article 30.

In Case C-21/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunale amministrativo regionale della Toscana (Regional Administrative Tribunal for Tuscany) for a preliminary ruling in the proceedings pending before that court between

Du Pont de Nemours Italiana SpA

and

Unità sanitaria locale No 2 di Carrara (Local Health Authority No 2, Carrara)

on the interpretation of Articles 30, 92 and 93 of the EEC Treaty,

THE COURT

composed of : O. Due, President, C. N. Kakouris, F. A. Schockweiler and M. Zuleeg (Presidents of Chambers), T. Koopmans, G . F . Mancini, R. Joliet, J. C. Moitinho de Almeida, G. C.

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Rodríguez Iglesias, F. Grévisse and M. Diez de Velasco, Judges,

Advocate General : C. O. Lenz

Registrar : B. Pastor, Administrator

after considering the written observations submitted on behalf of

the plaintiff in the main proceedings, supported by Du Pont de Nemours Deutschland GmbH, by Gian Paolo Zanchini and Mario Siragusa, of the Rome Bar, and by Giuseppe Scassellati Sforzolini, of the Bologna Bar,

3M Italia SpA, intervening in the main proceedings, by Enrico Raffaelli, Cosimo Rucellai and Carlo Lessona, of the Florence Bar,

the Government of the Italian Republic, by Pier Giorgio Ferri, avvocato dello Stato, acting as Agent,

the Government of the French Republic, by Claude Chavance, attaché principal d' administration centrale in the Ministry of Foreign Affairs, acting as Agent,

the Commission of the European Communities, by Guido Berardis, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 18 October 1989,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1989,

gives the following

Judgment

1 By order of 1 April 1987, which was received at the Court on 20 January 1988, the tribunale amministrativo regionale della Toscana (Regional Administrative Tribunal for Tuscany) referred three questions to the Court pursuant to Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Articles 30, 92 and 93 of the EEC Treaty in order to determine the compatibility with those provisions of Italian rules reserving to undertakings established in the Mezzogiorno (Southern Italy) a proportion of public supply contracts .

2 Those questions were raised in a dispute between Du Pont de Nemours Italiana SpA, supported by Du Pont de Nemours Deutschland GmbH, and Unità sanitaria locale No 2 di Carrara (Local Health Authority No 2, Carrara, hereinafter referred to as "the local health authority "), supported by 3M Italia SpA, concerning the conditions governing the award of contracts for the supply of radiological films and liquids .

3 Under Article 17(16) and (17) of Law No 64 of 1 March 1986 (Disciplina organica dell' intervento straordinario nel Mezzogiorno - system of rules governing special aid for Southern Italy), the Italian State extended to all public bodies and authorities, as well as to bodies and companies in which the State has a shareholding, and including local health authorities situated throughout Italy, the obligation to obtain at least 30% of their supplies from industrial and agricultural undertakings and small businesses established in Southern Italy in which the products concerned undergo processing.

4 In accordance with the provisions of that national legislation, the local health authority laid down by decision of 3 June 1986 the conditions governing a restricted tendering procedure for the supply of radiological films and liquids. According to the special terms and conditions set out in the annex, it divided the contract into two lots, one, equal to 30% of the total amount, being reserved to undertakings established in Southern Italy. Du Pont de Nemours Italiana challenged

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that decision before the tribunale amministrativo regionale della Toscana, on the ground that it had been excluded from the tendering procedure for that lot because it did not have an establishment in Southern Italy. By decision of 15 July 1986, the local health authority proceeded to award the contract for the lot corresponding to 70% of the total amount in question. Du Pont de Nemours Italiana also challenged that decision before the same court.

5 In the course of its consideration of the two actions the national court decided to request the Court to give a preliminary ruling on the following questions :

(1) Must Article 30 of the EEC Treaty, in so far as it imposes a prohibition on quantitative restrictions on imports and all measures having equivalent effect, be interpreted as precluding the national legislation in question?

(2) Is the reserved quota which is provided for by Article 17 of Law No 64 of 1 March 1986 in the nature of "aid" within the meaning of Article 92 inasmuch as it is intended "to promote the economic development" of a region "where the standard of living is abnormally low" by leading to the establishment of undertakings so as to contribute to the socio-economic development of such areas?

(3) Does Article 93 of the EEC Treaty confer exclusively on the Commission the power to determine whether aid within the meaning of Article 92 of the EEC Treaty is permissible, or is that power also vested in the national court to be exercised in connection with the examination of any conflicts arising between national law and Community law?

6 Reference is made to the Report for the Hearing for a fuller account of the facts, the applicable legislation and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

A - First question

7 In its first question, the national court seeks to ascertain whether national rules reserving to undertakings established in certain regions of the national territory a proportion of public supply contracts are contrary to Article 30, which prohibits quantitative restrictions on imports and all measures having equivalent effect.

8 It must be stated in limine that, as the Court has consistently held since the judgment in Dassonville (judgment of 11 July 1974 in Case 8/74 Procureur du Roi v Dassonville ((1974)) ECR 837, paragraph 5), Article 30, by prohibiting as between Member States measures having an effect equivalent to quantitative restrictions on imports, applies to all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

9 It must be pointed out, moreover, that according to the first recital in the preamble to Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977, L 13, p. 1), which was in force at the material time, "restrictions on the free movement of goods in respect of public supplies are prohibited by the terms of Articles 30 et seq. of the Treaty ".

10 Accordingly, it is necessary to determine the effect which a preferential system of the kind at issue in this case is likely to have on the free movement of goods.

11 It must be pointed out in that regard that such a system, which favours goods processed in a particular region of a Member State, prevents the authorities and public bodies concerned from procuring some of the supplies they need from undertakings situated in other Member States. Accordingly, it must be held that products originating in other Member States suffer discrimination in comparison with products manufactured in the Member State in question, with the result that the normal course of intra-Community trade is hindered.

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12 That conclusion is not affected by the fact that the restrictive effects of a preferential system of the kind at issue are borne in the same measure both by products manufactured by undertakings from the Member State in question which are not situated in the region covered by the preferential system and by products manufactured by undertakings established in other Member States.

13 It must be emphasized in the first place that, although not all the products of the Member State in question benefit by comparison with products from abroad, the fact remains that all the products benefiting by the preferential system are domestic products; secondly, the fact that the restrictive effect exercised by a State measure on imports does not benefit all domestic products but only some cannot exempt the measure in question from the prohibition set out in Article 30 .

14 Furthermore, it must be observed that, on account of its discriminatory character, a system such as the one at issue cannot be justified in the light of the imperative requirements recognized by the Court in its case-law; such requirements may be taken into consideration only in relation to measures which are applicable to domestic products and to imported products without distinction (judgment of 17 June 1981 in Case 113/80 Commission v Ireland ((1981)) ECR 1625).

15 It must be added that neither does such a system fall within the scope of the exceptions exhaustively listed in Article 36 of the Treaty .

16 However, the Italian Government has invoked Article 26 of Directive 77/62 (cited above), which provides that "this directive shall not prevent the implementation of provisions contained in Italian Law No 835 of 6 October 1950 (Official Gazette No 245, of 24.10.1950, of the Italian Republic) and in modifications thereto in force on the date on which this directive is adopted; this is without prejudice to the compatibility of these provisions with the Treaty ".

17 It should be pointed out in that regard, first, that the content of the national legislation to which the national court refers (Law No 64/86) is in some respects different and more extensive than it was at the time of the adoption of the directive (Law No 835/50) and, secondly, that Article 26 specifies that the directive is to apply "without prejudice to the compatibility of these provisions with the Treaty ". In any event, the directive cannot be interpreted as authorizing the application of national legislation whose provisions are contrary to those of the Treaty and, consequently, as impeding the application of Article 30 in a case such as this.

18 It must therefore be stated in answer to the national court' s first question that Article 30 must be interpreted as precluding national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts .

B - Second question

19 In its second question, the national court seeks to establish whether in the event that the rules in question might be regarded as aid within the meaning of Article 92 that might exempt them from the prohibition set out in Article 30.

20 In that regard, it is sufficient to recall that, as the Court has consistently held (see, in particular, the judgment of 5 June 1986 in Case 103/84 Commission v Italy ((1986)) ECR 1759), Article 92 may in no case be used to frustrate the rules of the Treaty on the free movement of goods. It is clear from the relevant case-law that those rules and the Treaty provisions relating to State aid have a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition. As the Court made clear in the judgment cited above, the fact that a national measure might be regarded as aid within the meaning of Article 92 is therefore not a sufficient reason to exempt it from the prohibition contained in Article 30 .

21 In the light of that case-law - there being no need to consider whether the rules in question are in the nature of aid - it must be stated in answer to the national court' s second question

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that the fact that national rules might be regarded as aid within the meaning of Article 92 cannot exempt them from the prohibition set out in Article 30 .

C - Third question

22 It follows from the answers given to the preceding questions that, in a case such as this, the national court must ensure the full application of Article 30. Accordingly, the third question, which is concerned with the role of the national court in assessing the compatibility of aid with Article 92, has become otiose.

Costs

23 The costs incurred by the Italian Government, the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the tribunale amministrativo regionale della Toscana, by order of 1 April 1987, hereby rules :

(1) Article 30 of the EEC Treaty must be interpreted as precluding national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts .

(2) The fact that national rules might be regarded as aid within the meaning of Article 92 of the Treaty cannot exempt them from the prohibition set out in Article 30 of the Treaty.

DOCNUM	61988J0021
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1988 ; J ; judgment
PUBREF	European Court reports 1990 Page I-00889 Swedish special edition X Page 00359 Finnish special edition X Page 00377
DOC	1990/03/20
LODGED	1988/01/20
JURCIT	11957E030 : N 1 - 22

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11957E036 : N 15
11957E092 : N 1 5 19 - 22
11957E093 : N 1 5
61974J0008 : N 8
31977L0062-A26 : N 16 17
31977L0062-C1 : N 9
61980J0113 : N 14
61984J0103 : N 20

CONCERNS Interprets 11957E030
Interprets 11957E092

SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Competition ; State aids ; Approximation of laws

AUTLANG Italian

OBSERV Italy ; France ; Commission ; Member States ; Institutions

NATIONA Italy

NATCOUR *A9* Tribunale Amministrativo Regionale della Toscana, ordinanza dell'01/04/87 23/10/1987 (1167 - RR 2026/86 E 3491/86)
- Il Foro amministrativo 1988 p.1803-1806
- Juristenzeitung 1992 p.198-199
P1 Tribunale Amministrativo Regionale della Toscana, Sezione I, sentenza del 22/09/1990 (830)
- I Tribunali Amministrativi Regionali 1990 I p.3944-3947

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Ehlers, Dirk: Juristenzeitung 1992 p.199-200

PROCEDU Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Diez de Velasco

DATES of document: 20/03/1990
of application: 20/01/1988

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Judgment of the Court
of 5 December 1989
Commission of the European Communities v Italian Republic.
Failure of a Member State to fulfil its obligations - Public supply contracts in the data-processing sector - Undertakings partly or wholly in public ownership - National legislatrion not in compliance with obligations under Community law.
Case C-3/88.

++++

1.Community law - Principles - Equal treatment - Discrimination by reason of nationality - Prohibition - Covert discrimination - Included

(EEC Treaty, Arts 52 and 59)

2.Freedom of movement - Freedom of establishment - Freedom to provide services - Derogations - Activities connected with the exercise of official authority - Technical activities in the field of data processing carried out for the public authorities - Excluded

(EEC Treaty, Arts 52, 55, 1st paragraph, 59 and 66)

3.Freedom of movement - Freedom of establishment - Freedom to provide services - Procedures for the award of public supply contracts - National legislation giving companies controlled by the national public sector exclusive rights to supply goods in the field of data processing - Not permissible

(EEC Treaty, Arts 52 and 59; Council Directive 77/62)

1.The principle of equal treatment, of which Articles 52 and 59 of the Treaty embody specific instances, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

2.The exception to freedom of establishment and freedom to provide services provided for by the first paragraph of Article 55 and by Article 66 of the EEC Treaty must be restricted to those of the activities referred to in Articles 52 and 59 which in themselves involve a direct and specific connection with the exercise of official authority . That is not the case in respect of activities concerning the design, programming and operation of data-processing systems for the public authorities, since they are of a technical nature and thus unrelated to the exercise of official authority.

3.A Member State which provides that only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities thereby fails to fulfil its obligations under Articles 52 and 59 of the Treaty and Directive 77/62 coordinating procedures for the award of public supply contracts .

In Case C-3/88

Commission of the European Communities, represented by Guido Berardis, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Diplomatic Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo Braguglia, avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adélaïde,

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defendant,

APPLICATION for a declaration that the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977, L 13, p. 1),

THE COURT

composed of : O. Due, President, Sir Gordon Slynn and F. A. Schockweiler (Presidents of Chambers), G. F. Mancini, R. Joliet, J . C . Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General : J. Mischo

Registrar : D. Louterman, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 21 June 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 October 1989,

gives the following

Judgment

1 By an application lodged at the Court Registry on 6 January 1988 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty seeking a declaration that, by adopting provisions under which only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements with the Italian State for the development of data-processing systems for the public authorities, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977, L 13, p. 1, hereinafter referred to as "the directive ").

2 It had come to the Commission' s notice that the legislation in force in Italy authorized the State to conclude agreements, in a number of sectors of public activity (taxation, health, agriculture and urban property), only with companies in which all or a majority of the shares were directly or indirectly in public or State ownership . The Commission considered that those rules were contrary to the abovementioned provisions of Community law, and on 3 December 1985 it addressed a letter of formal notice to the Italian Government, thus setting in motion the procedure provided for in Article 169 of the Treaty .

3 On 1 July 1986, as no communication had been received from the Italian Government, the Commission delivered the reasoned opinion provided for in the first paragraph of Article 169 of the Treaty.

4 At the request of the Italian Government, two meetings were held with officials of the Commission, one in Rome on 25 to 27 January 1987 and the other in Brussels on 10 March 1987, with a view to clarifying the situation. On 5 May 1987, the Italian Government stated its position on the reasoned opinion. The Commission considered that position unsatisfactory and decided to bring the present action.

5 Reference is made to the Report for the Hearing for a fuller account of the Italian legislation in issue, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Failure to comply with Articles 52 and 59 of the EEC Treaty

6 In the Commission' s view, by providing that only companies in which all or a majority of the shares are directly or indirectly in public or State ownership may conclude agreements for the

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development of data-processing systems for the public authorities, the laws and decree-laws in issue, although applicable without distinction to Italian undertakings and to those of other Member States, are discriminatory and constitute a barrier to the freedom of establishment and the freedom to provide services laid down in Articles 52 and 59 of the Treaty.

7 The Italian Government claims first of all that the laws and decree-laws in dispute make no distinction on the basis of the nationality of companies which may conclude the agreements in issue. Consequently, since the Italian State owns all or a majority of the share capital not only in certain Italian companies but also in certain companies of other Member States, both types of company may take part without any discrimination in the establishment of the data-processing systems in issue.

8 According to the Court' s case-law the principle of equal treatment, of which Articles 52 and 59 of the Treaty embody specific instances, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, in particular, the judgment of 29 October 1980 in Case 22/80 Boussac v Gerstenmeier ((1980)) ECR 3427).

9 Although the laws and decree-laws in issue apply without distinction to all companies, whether of Italian or foreign nationality, they essentially favour Italian companies. As the Commission has pointed out, without being contradicted by the Italian Government, there are at present no data-processing companies from other Member States all or the majority of whose shares are in Italian public ownership.

10 In justification of the public ownership requirement, the Italian Government claims that it is necessary for the public authorities to control the performance of the contracts in order to adapt the work to meet developments which were unforeseeable at the time when the contracts were signed. It also claims that for certain types of activity which the companies have to carry out, particularly in strategic sectors, which involve, as in the present case, confidential data, the State must be able to employ an undertaking in which it can have complete confidence.

11 In that regard it must be stated that the Italian Government had sufficient legal powers at its disposal to be able to adapt the performance of contracts to meet future and unforeseeable circumstances and to ensure compliance with the general interest, and that in order to protect the confidential nature of the data in question the Government could have adopted measures less restrictive of freedom of establishment and freedom to provide services than those in issue, in particular by imposing a duty of secrecy on the staff of the companies concerned, breach of which might give rise to criminal proceedings . There is nothing in the documents before the Court to suggest that the staff of companies none of whose share capital is in Italian public ownership could not comply just as effectively with such a duty .

12 The Italian Government also maintains that in view of their confidential nature the activities necessary for the operation of the data-processing systems in question are connected with the exercise of official authority within the meaning of Article 55.

13 As the Court has already held (see the judgment of 21 June 1974 in Case 2/74 Reyners v Belgium ((1974)) ECR 631), the exception to freedom of establishment and freedom to provide services provided for by the first paragraph of Article 55 and by Article 66 of the EEC Treaty must be restricted to those of the activities referred to in Articles 52 and 59 which in themselves involve a direct and specific connection with the exercise of official authority. That is not the case here, however, since the activities in question, which concern the design, programming and operation of data-processing systems, are of a technical nature and thus unrelated to the exercise of official authority .

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14 Finally, the Italian Government claims that in view of the purpose of the data-processing systems in question and the confidential nature of the data processed, the activities necessary for their operation concern Italian public policy within the meaning of Article 56(1) of the Treaty.

15 That argument must also be dismissed. It need merely be pointed out that the nature of the aims pursued by the data-processing systems in question is not sufficient to establish that there would be any threat to public policy if companies from other Member States were awarded the contracts for the establishment and operation of those systems . It must also be borne in mind that the confidential nature of the data processed by the systems could be protected, as stated above, by a duty of secrecy, without there being any need to restrict freedom of establishment or freedom to provide services.

16 It follows from the foregoing considerations that the claim based on failure to comply with Articles 52 and 59 of the Treaty must be upheld .

Failure to comply with Directive 77/62/EEC

17 The Commission considers that the laws and decree-laws in issue infringe the provisions of the directive as regards the purchase by the public authorities of the equipment necessary for the establishment of the data-processing systems in question. Since such equipment is to be regarded as "products" within the meaning of Article 1(1)(a) of the directive and since the value of the relevant public supply contracts exceeds the amount fixed in Article 5, the competent authorities should have followed the award procedures prescribed in the directive and complied with the obligations laid down in Article 9, which requires notices of such contracts to be published in the Official Journal of the European Communities.

18 The Italian Government objects, first, that in addition to the purchase of the hardware a data-processing system comprises the creation of software, the planning, installation, maintenance and technical commissioning of the system and sometimes its operation. The interdependence of those activities means that complete responsibility for the establishment of the data-processing systems provided for by the laws and decree-laws in issue must be given to a single company. Therefore, and bearing in mind that the hardware is an ancillary element in the establishment of a data-processing system, the directive is inapplicable. The Italian Government adds that according to Article 1(a) of the directive the concept of public supply contracts covers only contracts the principal object of which is the delivery of products.

19 That argument cannot be accepted. The purchase of the equipment required for the establishment of a data-processing system can be separated from the activities involved in its design and operation. The Italian Government could have approached companies specializing in software development for the design of the data-processing systems in question and, in compliance with the directive, could have purchased hardware meeting the technical specifications laid down by such companies .

20 The Italian Government then claims that Council Decision 79/783/EEC of 11 September 1979 adopting a multiannual programme (1979-83) in the field of data-processing (Official Journal 1979, L 231, p . 23), as amended by Decision 84/559/EEC of 22 November 1984 (Official Journal 1984, L 308, p. 49), should be interpreted as meaning that until such time as the programme is completed the temporary exemption referred to in Article 6(1)(h) of the directive is to remain in force.

21 Under that provision, contracting authorities need not apply the procedures provided for in Article 4(1) and (2) "for equipment supply contracts in the field of data processing, and subject to any decisions of the Council taken on a proposal from the Commission and defining the categories of material to which the present exception does not apply. There can no longer be recourse to the present exception after 1 January 1981 other than by a decision of the Council taken on a proposal from the Commission to modify this date ".

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22 The decisions mentioned by the Italian Government were adopted on the basis of Article 235 of the Treaty and not pursuant to Article 6(1)(h) of the directive. They relate to the implementation of a programme in the field of data processing which does not concern, either directly or indirectly, the rules applicable to contracts for the supply of data-processing equipment.

23 In the Italian Government' s submission, the supply contracts in issue also fall within the exceptions provided for in Article 6(1)(g) of the directive, which authorizes contracting authorities not to follow the procedures referred to in Article 4(1) and (2) "when supplies are declared secret or when their delivery must be accompanied by special security measures in accordance with the provisions laid down by law, regulation or administrative action in force in the Member State concerned, or when the protection of the basic interests of that State' s security so requires ". It refers, in that regard, to the secret nature of the data involved, which is essential in the fight against crime, particularly in the areas of taxation, public health and fraud in agricultural matters.

24 That objection concerns the confidential nature of the data entered in the data-processing systems in question. As has already been pointed out, however, observance of confidentiality by the staff concerned is not dependent on the public ownership of the contracting company .

25 The Italian Government also claims that the activities to be carried out by the specialized companies chosen for the development of the data-processing systems in question constitute a public service activity . Agreements concluded between the State and the companies chosen to carry out those activities are therefore excluded from the scope of the directive, Article 2(3) of which provides :

> "When the State, a regional or local authority or one of the legal persons governed by public law or corresponding bodies specified in Annex I grants to a body other than the contracting authority - regardless of its legal status - special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties."

26 That argument cannot be accepted. The supply of the equipment required for the establishment of a data-processing system and the design and operation of the system enable the authorities to carry out their duties but do not in themselves constitute a public service.

27 Finally, the Italian Government claims that the derogation provided for in Article 6(1)(e) of the directive should be applied in the case of the data-processing system at the Finance Ministry. Under that subparagraph, contracting authorities need not apply the procedures referred to in Article 4(1) and (2) "for additional deliveries by the original supplier which are intended either as part replacement of normal supplies or installations, or as the extension of existing supplies or installations where a change of supplier would compel the contracting authority to purchase equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties of operation or maintenance ".

28 In that regard it is sufficient to note that such cases of additional deliveries cannot justify a general rule that only companies in which all or a majority of the share capital is in Italian public ownership may be awarded supply contracts.

29 It follows from the foregoing that the claim based on failure to comply with Directive 77/62/EEC must also be upheld.

30 It must therefore be held that by providing that only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements

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for the development of data-processing systems for the public authorities, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976.

Costs

31 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby :

(1)Declares that by providing that only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976;

(2)Orders the Italian Republic to pay the costs.

DOCNUM	61988J0003
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1988 ; J ; judgment
PUBREF	European Court reports 1989 Page 04035 Swedish special edition X Page 00269 Finnish special edition X Page 00285
DOC	1989/12/05
LODGED	1988/01/06
JURCIT	11957E052 : N 1 6 - 16 30 11957E055-L1 : N 12 13 11957E056-P1 : N 14 11957E059 : N 1 6 - 16 30 11957E066 : N 13 11957E235 : N 22 61974J0002 : N 13 31977L0062-A01P1LA : N 17 18

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31977L0062-A02P3 : N 25
31977L0062-A04P1 : N 21 23 27
31977L0062-A04P2 : N 21 23 27
31977L0062-A05 : N 17
31977L0062-A06P1LE : N 27
31977L0062-A06P1LG : N 23
31977L0062-A06P1LH : N 20 - 22
31977L0062-A09 : N 17
31977L0062 : N 1 17 - 30
31979D0783 : N 20 22
61980J0022 : N 8
31984D0559 : N 20 22
31984D0559 : N 20 22

CONCERNS Failure concerning 11957E052
Failure concerning 11957E059
Failure concerning 31977L0062

SUB Freedom of establishment and services ; Right of establishment ; Free movement of services

AUTLANG Italian

APPLICA Commission ; Institutions

DEFENDA Italy ; Member States

NATIONA Italy

NOTES Boutard-Labarde, Marie-Chantal: Journal du droit international 1990 p.471-472
X: Il Foro italiano 1990 IV Col.113
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PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Mischo

JUDGRAP Moitinho de Almeida

DATES of document: 05/12/1989
of application: 06/01/1988

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Judgment of the Court
of 22 September 1988
Commission of the European Communities v Ireland.
Public works contract - Community tender procedure - Applicability of Article 30 of the EEC Treaty.
Case 45/87.

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1 . Approximation of legislation - Procedures for the award of public works contracts - Directive 71/305 - Scope - Exclusion of water and energy services - Publication in the Official Journal of a notice relating to a contract covered by the exception - Effect - Applicability of the directive - None

(Council Directive 71/305, Art. 3 (5))

2 . Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Public works contract - Invitation to tender - Technical specification requiring the materials used to comply with a national standard - Not permissible

(EEC Treaty, Art. 30)

1 . Directive 71/305 on the procedures for the award of public works contracts, Article 3 (5) of which excludes from its scope contracts awarded by the production, distribution, transmission or transportation services for water and energy, cannot apply to such a contract notwithstanding that provision simply because the Member State in question requested the publication of a contract notice in the Official Journal of the European Communities by reference to the obligatory publication of contract notices laid down by the directive . Such a step, whether taken because of an error or because the Member State initially intended to seek a financial contribution from the Community, cannot cause an exception not to apply where the exception is laid down in a provision which is wholly unambiguous and justified by reasons unaffected by that step.

2 . In so far as it allows a public body for whose acts it is responsible to include in the contract specification for tender for a public works contract a clause stipulating that the materials used must be certified as complying with a national technical standard, a Member State fails to fulfil its obligations under Article 30 of the Treaty . Such a clause is liable to impede imports in so far as it may cause economic operators utilizing materials equivalent to those certified as complying with the relevant national standards to refrain from tendering.

In Case 45/87

Commission of the European Communities, represented by Eric L. White, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, Jean Monnet Building, Kirchberg,

applicant,

supported by

The Kingdom of Spain, represented by Jaime Folguera Crespo, Deputy Director General for Coordination of Community Affairs with responsibility for Legal Affairs, and Rafael Garcia-Valdecasas Fernandez, Head of the Legal Department for matters before the Court of Justice of the European Communities, acting as Agents,

v

Ireland, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by

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E. Fitzsimons, SC, with an address for service in Luxembourg at the Irish Embassy, 28 route d' Arlon,

defendant,

APPLICATION for a declaration that by allowing the inclusion in the contract specification for the Dundalk Water Supply Augmentation Scheme - Contract No 4 of Clause 4.29 providing that asbestos cement pressure pipes are to be certified as complying with Irish Standard 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards and consequently refusing to consider (or rejecting without adequate justification) a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability (such as ISO 160), Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC,

THE COURT

composed of : Lord Mackenzie Stuart, President, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, Y. Galmot, C. N. Kakouris and T . F . O' Higgins, Judges,

Advocate General : M. Darmon

Registrar : J.-G. Giraud

having regard to the Report for the Hearing and further to the hearing on 27 April 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 June 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 February 1987, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by allowing the inclusion in the contract specification for the Dundalk Water Supply Augmentation Scheme - Contract No 4 of a clause providing that the asbestos cement pressure pipes should be certified as complying with Irish Standard 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards (IIRS) and consequently refusing to consider (or rejecting without adequate justification) a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

2 Dundalk Urban District Council is the promoter of a scheme for the augmentation of Dundalk' s drinking water supply. Contract No 4 of that scheme is for the construction of a water-main to transport water from the River Fane source to a treatment plant at Cavan Hill and thence into the existing town supply system. The invitation to tender for that contract by open procedure was published in the Official Journal of the European Communities on 13 March 1986 (Official Journal S 50, p . 13).

3 Clause 4.29 of the specification relating to Contract No 4, which formed part of the contract specification, included the following paragraph :

"Asbestos cement pressure pipes shall be certified as complying with Irish Standard Specification

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188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards. All asbestos cement watermains are to have a bituminous coating internally and externally. Such coatings shall be applied at the factory by dipping."

4 The dispute stems from complaints made to the Commission by an Irish undertaking and a Spanish undertaking. In response to the invitation to tender for Contract No 4, the Irish undertaking had submitted three tenders, one of which provided for the use of pipes manufactured by the Spanish undertaking. In the Irish undertaking' s view, that tender, which was the lowest of the three submitted by it, gave it the best chance of obtaining the contract. The consulting engineers to the project wrote a letter to the Irish undertaking concerning that contract stating that there would be no point in its coming to the pre-adjudication interview if proof could not be provided that the firm supplying the pipes was approved by the IIRS as a supplier of products complying with Irish Standard 188:1975 (" IS 188 "). It is common ground that the Spanish undertaking in question had not been certified by the IIRS but that its pipes complied with international standards, and in particular with ISO 160:1980 of the International Organization for Standardization.

5 Reference is made to the Report for the Hearing for a fuller account of the relevant provisions, the background to the case and the submissions and arguments of the parties and of the intervener, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 In the Commission' s view, this action raises inter alia the question of the compatibility with Community law, in particular Article 30 of the EEC Treaty and Article 10 of Directive 71/305, of the inclusion in a contract specification of clauses like the disputed Clause 4.29 . It further argues that the Irish authorities' rejection, without any examination, of a tender providing for the use of Spanish-made pipes not complying with Irish standards also infringed those provisions of Community law. It is appropriate to examine first the issues raised by Clause 4.29.

Directive 71/305

7 Article 10 of Directive 71/305, to which the Commission refers, provides that Member States are to prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of types or of a specific origin or production is to be prohibited. However, such indication is permissible if it is accompanied by the words "or equivalent" where the authorities awarding contracts are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned . The words "or equivalent" do not appear in Clause 4.29 of the contract notice at issue in this case.

8 The Irish Government argues that the provisions of Directive 71/305 do not apply to the contract in question. It points out that Article 3 (5) of the directive provides that the directive is not to apply to "public works contracts awarded by the production, distribution, transmission or transportation services for water and energy ". There is no doubt that the contract in this case was a public works contract to be awarded by a public distribution service for water .

9 The Commission does not deny that fact but points out that Ireland requested the publication of the relevant notice in the Official Journal by reference to the obligatory publication of contract notices laid down by the directive. The Commission, in common with the Spanish Government, which intervened in support of its conclusions, considers that, having voluntarily brought itself within the scope of the directive, Ireland was obliged to comply with its provisions.

10 With regard to this point, the Irish Government' s argument must be accepted . The actual wording of Article 3 (5) is wholly unambiguous, in so far as it excludes public works contracts of the

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type at issue from the scope of the directive. According to the preamble to the directive, that exception to the general application of the directive was laid down in order to avoid the subjection of distribution services for water to different systems for their works contracts, depending on whether they come under the State and authorities governed by public law or whether they have separate legal personality . There is no reason to consider that the exception in question no longer applies, and the reasons underlying it are no longer valid, where a Member State has a contract notice published in the Official Journal of the European Communities, whether through an error or because it initially intended to seek a contribution from the Community towards the financing of the work.

11 The application must therefore be dismissed in so far as it is based on the infringement of Directive 71/305.

Article 30 of the Treaty

12 It must be observed at the outset that the Commission maintains that Dundalk Urban District Council is a public body for whose acts the Irish Government is responsible. Moreover, before accepting a tender, Dundalk Council has to obtain the authorization of the Irish Department of the Environment. Those facts have not been challenged by the Irish Government.

13 It must also be noted that according to the Irish Government the requirement of compliance with Irish standards is the usual practice followed in relation to public works contracts in Ireland.

14 The Irish Government points out that the contract at issue relates not to the sale of goods but to the performance of work, and the clauses relating to the materials to be used are completely subsidiary . Contracts concerned with the performance of work fall under the Treaty provisions relating to the free supply of services, without prejudice to any harmonization measures which might be taken under Article 100. Consequently, Article 30 cannot apply to a contract for works.

15 In that connection, the Irish Government cites the case-law of the Court and, in particular, the judgment of 22 March 1977 in Case 74/76 Iannelli & Volpi v Meroni ((1977)) ECR 557, according to which the field of application of Article 30 does not include obstacles to trade covered by other specific provisions of the Treaty.

16 That argument cannot be accepted. Article 30 envisages the elimination of all measures of the Member States which impede imports in intra-Community trade, whether the measures bear directly on the movement of imported goods or have the effect of indirectly impeding the marketing of goods from other Member States. The fact that some of those barriers must be considered in the light of specific provisions of the Treaty, such as the provisions of Article 95 relating to fiscal discrimination, in no way detracts from the general character of the prohibitions laid down by Article 30.

17 The provisions on the freedom to supply services invoked by the Irish Government, on the other hand, are not concerned with the movement of goods but the freedom to perform activities and have them carried out; they do not lay down any specific rule relating to particular barriers to the free movement of goods. Consequently, the fact that a public works contract relates to the provision of services cannot remove a clause in an invitation to tender restricting the materials that may be used from the scope of the prohibitions set out in Article 30.

18 Consequently, it must be considered whether the inclusion of Clause 4.29 in the invitation to tender and in the tender specifications was liable to impede imports of pipes into Ireland.

19 In that connection, it must first be pointed out that the inclusion of such a clause in an invitation to tender may cause economic operators who produce or utilize pipes equivalent to pipes certified as complying with Irish standards to refrain from tendering

20 It further appears from the documents in the case that only one undertaking has been certified by the IIRS to IS 188:1975 to apply the Irish Standard Mark to pipes of the type required for

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the purposes of the public works contract at issue. That undertaking is located in Ireland . Consequently, the inclusion of Clause 4.29 had the effect of restricting the supply of the pipes needed for the Dundalk scheme to Irish manufacturers alone.

21 The Irish Government maintains that it is necessary to specify the standards to which materials must be manufactured, particularly in a case such as this where the pipes utilized must suit the existing network . Compliance with another standard, even an international standard such as ISO 160:1980, would not suffice to eliminate certain technical difficulties.

22 That technical argument cannot be accepted. The Commission' s complaint does not relate to compliance with technical requirements but to the refusal of the Irish authorities to verify whether those requirements are satisfied where the manufacturer of the materials has not been certified by the IIRS to IS 188. By incorporating in the notice in question the words "or equivalent" after the reference to the Irish standard, as provided for by Directive 71/305 where it is applicable, the Irish authorities could have verified compliance with the technical conditions without from the outset restricting the contract only to tenderers proposing to utilize Irish materials.

23 The Irish Government further objects that in any event the pipes manufactured by the Spanish undertaking in question whose use was provided for in the rejected tender did not meet the technical requirements, but that argument, too, is irrelevant as regards the compatibility with the Treaty of the inclusion of a clause like Clause 4.29 in an invitation to tender.

24 The Irish Government further maintains that protection of public health justifies the requirement of compliance with the Irish standard in so far as that standard guarantees that there is no contact between the water and the asbestos fibres in the cement pipes, which would adversely affect the quality of the drinking water.

25 That argument must be rejected. As the Commission has rightly pointed out, the coating of the pipes, both internally and externally, was the subject of a separate requirement in the invitation to tender . The Irish Government has not shown why compliance with that requirement would not be such as to ensure that there is no contact between the water and the asbestos fibres, which it considers to be essential for reasons of public health.

26 The Irish Government has not put forward any other argument to refute the conclusions of the Commission and the Spanish Government and those conclusions must consequently be upheld.

27 It must therefore be held that by allowing the inclusion in the contract specification for tender for a public works contract of a clause stipulating that the asbestos cement pressure pipes must be certified as complying with Irish Standard 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty.

The rejection of the tender providing for the use of the Spanish-made pipes

28 The second limb of the Commission' s application is concerned with the Irish authorities' attitude to a given undertaking in the course of the procedure for the award of the contract at issue.

29 It became apparent during the hearing that the second limb of the application is in fact intended merely to secure the implementation of the measure which is the subject of the first limb. It must therefore be held that it is not a separate claim and there is no need to rule on it separately.

Costs

30 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Nevertheless, by virtue of the first subparagraph of Article 69 (3) the Court may order the parties to bear their own costs in whole or in part where each party succeeds on some

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and fails on other heads. As the Commission has failed in one of its submissions, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby :

(1) Declares that by allowing the inclusion in the contract specification for tender for a public works contract of a clause stipulating that the asbestos cement pressure pipes must be certified as complying with Irish Standard 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty;

(2) Dismisses the remainder of the application;

(3) Orders the parties, including the intervener, to bear their own costs .

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FORM	Judgment
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PUBREF	European Court reports 1988 Page 04929 Swedish special edition IX Page 00631 Finnish special edition IX Page 00651
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CONCERNS	Failure concerning 11957E030 Failure concerning 31971L0305-A10
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent

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	effect ; Approximation of laws
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	Ireland ; Member States
NATIONA	Ireland
NOTES	Terneyre, Philippe: Recueil Dalloz Sirey 1989 Som. p.217-218 Gormley, Laurence: European Law Review 1989 p.156-162 Ricatte, J.: Gazette du Palais 1993 III Doct. p.418-423
PROCEDU	Proceedings concerning failure by Member State - successful ; Proceedings concerning failure by Member State - unfounded
ADVGEN	Darmon
JUDGRAP	Koopmans
DATES	of document: 22/09/1988 of application: 13/02/1987

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Order of the President of the Court
of 13 March 1987
Commission of the European Communities v Ireland.
Public works contract - Community tender procedure - Article 30 of the EEC Treaty.
Case 45/87 R.

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APPLICATION FOR INTERIM MEASURES - INTERIM MEASURES - CONDITIONS FOR GRANTING - PRIMA FACIE CASE - SERIOUS AND IRREPARABLE DAMAGE - WEIGHING UP ALL THE INTERESTS AT STAKE

(EEC TREATY, ART. 186; RULES OF PROCEDURE, ART. 83 (2)*)

IN CASE 45/87 R

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY ITS AGENT, E . L . WHITE, A MEMBER OF ITS LEGAL DEPARTMENT, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF G. KREMLIS, JEAN MONNET BUILDING, KIRCHBERG,

APPLICANT,

V

IRELAND, REPRESENTED BY ITS AGENT, J. L. DOCKERY, CHIEF STATE SOLICITOR, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE IRISH EMBASSY, 28 ROUTE D' ARLON,

DEFENDANT,

APPLICATION PRIMARILY FOR AN INTERIM ORDER THAT THE DEFENDANT SHOULD TAKE SUCH MEASURES AS MAY BE NECESSARY TO PREVENT, UNTIL SUCH TIME AS THE COURT HAS GIVEN FINAL JUDGMENT IN THIS CASE OR A SETTLEMENT HAS BEEN REACHED BETWEEN THE COMMISSION AND IRELAND, THE AWARD OF A CONTRACT FOR WORK RELATING TO THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME : CONTRACT NO 4,

THE PRESIDENT OF THE COURT OF JUSTICE

OF THE EUROPEAN COMMUNITIES

MAKES THE FOLLOWING

ORDER

ON THOSE GROUNDS,

THE PRESIDENT,

BY WAY OF INTERIM DECISION,

HEREBY ORDERS AS FOLLOWS :

(1) THE APPLICATION IS DISMISSED.

(2) THIS ORDER CANCELS AND REPLACES THE ORDER OF 16 FEBRUARY 1987.

(3) COSTS ARE RESERVED.

LUXEMBOURG, 13 MARCH 1987.

1 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON 13 FEBRUARY 1987, THE

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COMMISSION OF THE EUROPEAN COMMUNITIES BROUGHT AN ACTION UNDER ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT BY ADOPTING THE TENDERING PROCEDURE RELATING TO THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME : CONTRACT NO 4, IRELAND HAD FAILED TO COMPLY WITH ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY AND COUNCIL DIRECTIVE 71/305/EEC OF 26*JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1971 (II), P. 682), AND IN PARTICULAR ARTICLE 10 (2) THEREOF.

2 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON THE SAME DAY, THE APPLICANT REQUESTED THE COURT, UNDER ARTICLE 186 OF THE EEC TREATY AND ARTICLE 83 OF THE RULES OF PROCEDURE, PRIMARILY TO MAKE AN INTERIM ORDER THAT IRELAND SHOULD TAKE SUCH MEASURES AS MAY BE NECESSARY TO PREVENT, UNTIL SUCH TIME AS THE COURT HAS GIVEN FINAL JUDGMENT IN THIS CASE OR A SETTLEMENT HAS BEEN REACHED BETWEEN THE COMMISSION AND IRELAND, THE AWARD OF A CONTRACT FOR THE WORK RELATING TO THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME : CONTRACT NO 4. ALSO IN THAT APPLICATION, IN THE EVENT THAT SUCH A CONTRACT SHOULD ALREADY HAVE BEEN AWARDED, THE COMMISSION REQUESTED THE COURT TO ORDER THE DEFENDANT TO TAKE SUCH MEASURES AS MAY BE NECESSARY TO CANCEL THAT CONTRACT .

3 IT APPEARS FROM THE DOCUMENTS IN THE CASE, IN PARTICULAR A LETTER DATED 3 FEBRUARY 1987, THAT IRELAND GAVE AN UNDERTAKING TO THE COMMISSION NOT TO AWARD THE CONTRACT BEFORE 20 FEBRUARY 1987. IRELAND STATED, MOREOVER, THAT IT WOULD NOT BE ABLE TO DELAY THE AWARD ANY FURTHER UNLESS THE COURT OF JUSTICE SO ORDERED.

4 BY ORDER OF 16 FEBRUARY 1987 PURSUANT TO ARTICLE 84 (2) OF THE RULES OF PROCEDURE, THE PRESIDENT OF THE COURT OF JUSTICE THEREFORE DECIDED IN THE INTERESTS OF JUSTICE AND IN ORDER TO MAINTAIN THE STATUS QUO TO ORDER THE DEFENDANT TO TAKE SUCH MEASURES AS MIGHT BE NECESSARY TO PREVENT THE AWARD OF THE CONTRACT IN QUESTION BY DUNDALK URBAN DISTRICT COUNCIL BEFORE THE FINAL ORDER WAS DELIVERED IN THE PROCEEDINGS FOR INTERIM MEASURES IN CASE 45/87 R.

5 IRELAND PRESENTED ITS WRITTEN OBSERVATIONS ON 2 MARCH 1987. THE PARTIES PRESENTED ORAL ARGUMENT ON 9 MARCH 1987.

6 BEFORE CONSIDERING THE MERITS OF THIS APPLICATION FOR INTERIM MEASURES IT MAY BE USEFUL TO GIVE A BRIEF DESCRIPTION OF THE BACKGROUND TO THIS CASE AND IN PARTICULAR OF THE VARIOUS FACTS THAT PROMPTED THE COMMISSION TO BRING THE MAIN PROCEEDINGS.

7 DUNDALK URBAN DISTRICT COUNCIL IS THE PROMOTER OF THE PROJECT KNOWN AS THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME. CONTRACT NO 4 OF THAT SCHEME CONCERNS THE CONSTRUCTION OF A WATER MAIN TO TRANSPORT WATER FROM THE RIVER FANE SOURCE TO A TREATMENT PLANT AT CAVAN HILL AND THENCE INTO THE EXISTING TOWN SUPPLY SYSTEM. THE INVITATION TO TENDER FOR THIS CONTRACT BY OPEN PROCEDURE WAS PUBLISHED ON PAGE 13 OF SUPPLEMENT NO S*50 OF THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES OF 13 MARCH 1986. AT POINT 13 OF THE PUBLISHED NOTICE IT WAS STATED THAT :

"THE CONTRACT WILL BE AWARDED, SUBJECT TO THE DUNDALK URBAN DISTRICT

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COUNCIL BEING SATISFIED AS TO THE ABILITY OF THE CONTRACTOR TO CARRY OUT THE WORK, TO THE CONTRACTOR WHO SUBMITS A TENDER, IN ACCORDANCE WITH THE TENDER DOCUMENTS, WHICH IS ADJUDGED TO BE THE MOST ECONOMICALLY ADVANTAGEOUS TO THE COUNCIL IN RESPECT OF PRICE, PERIOD OF COMPLETION, TECHNICAL MERIT AND RUNNING COSTS.

THE LOWEST OR ANY TENDER NEED NOT NECESSARILY BE ACCEPTED."

8 IN RESPONSE TO THAT INVITATION TO TENDER, AN IRISH CONTRACTOR, P.*J.*WALLS (CIVIL) LTD (HEREINAFTER REFERRED TO AS "WALLS"),SUBMITTED THREE TENDERS. ONE WAS BASED ON THE USE OF ASBESTOS CEMENT PIPES SUPPLIED BY A SPANISH COMPANY, URALITA SA. WALLS CONSIDERED THAT THAT TENDER, WHICH WAS THE LOWEST IT HAD SUBMITTED, OFFERED IT THE BEST POSSIBILITY OF OBTAINING THE CONTRACT. HOWEVER, THE ENGINEERS CONSULTED BY THE DUNDALK AUTHORITIES CONCERNING THE PROJECT CONSIDERED THAT THE TENDER DID NOT COMPLY WITH CLAUSE 4.29 OF THE SPECIFICATION FOR THE CONTRACT. THAT CLAUSE PROVIDES THAT :

"ASBESTOS CEMENT PRESSURE PIPES SHALL BE CERTIFIED AS COMPLYING WITH IRISH STANDARD SPECIFICATION 188-1975 IN ACCORDANCE WITH THE IRISH STANDARD MARK LICENSING SCHEME OF THE INSTITUTE FOR INDUSTRIAL RESEARCH AND STANDARDS. ALL ASBESTOS CEMENT WATER MAINS ARE TO HAVE A BITUMINOUS COATING INTERNALLY AND EXTERNALLY. SUCH COATINGS SHALL BE APPLIED AT THE FACTORY BY DIPPING."

THE CONSULTING ENGINEERS THEREFORE INFORMED WALLS THAT THAT TENDER COULD NOT BE CONSIDERED. WALLS AND URALITA THEN COMPLAINED TO THE COMMISSION THAT THEIR TENDER HAD NOT BEEN DULY CONSIDERED.

9 IN FACT ONLY ONE MANUFACTURER HAS OBTAINED APPROVAL FROM THE INSTITUTE FOR INDUSTRIAL RESEARCH AND STANDARDS AS REGARDS IRISH STANDARD (IS) 188 AND IS AUTHORIZED TO AFFIX THE IRISH STANDARD MARK TO PIPES OF THE TYPE REQUIRED FOR THE WORK IN QUESTION. THAT COMPANY IS TEGRAL PIPES LTD, OF DROGHEDA, IRELAND.

10 THE COMMISSION TOOK THE VIEW THAT CLAUSE 4.29 INFRINGED ARTICLES 30 TO 36 OF THE EEC TREATY AND ARTICLE 10 OF COUNCIL DIRECTIVE 71/305/EEC AND THEREFORE INITIATED THE PRE-LITIGATION PROCEDURE UNDER ARTICLE 169 OF THE EEC TREATY BY A TELEX DATED 11 AUGUST 1986. THAT TELEX DREW IRELAND' S ATTENTION TO THE ALLEGED INFRINGEMENTS AND INVITED IT TO SUBMIT ITS OBSERVATIONS. BY LETTER DATED 9 SEPTEMBER 1986 THE DEFENDANT STATED THAT IT DID NOT ACCEPT THE VALIDITY OF THE COMPLAINT SINCE THE COMPLAINANTS HAD NOT SUBMITTED ANY EVIDENCE THAT THEIR PRODUCTS MET THE REQUIREMENTS OF IS 188 OR ANY EQUIVALENT RECOGNIZED INTERNATIONAL STANDARD.

11 BY LETTER DATED 20 OCTOBER 1986 THE COMMISSION FORMALLY REITERATED ITS VIEWS TO THE DEFENDANT AND INVITED IT TO SUBMIT ITS OBSERVATIONS WITHIN TWO WEEKS OF RECEIVING THE LETTER. IRELAND' S REPLY DID NOT SATISFY THE COMMISSION WHICH, BY LETTER OF 13 JANUARY 1987, DELIVERED A REASONED OPINION STATING THAT CLAUSE 4.29 INFRINGED ARTICLES 30 TO 36 OF THE EEC TREATY AND ARTICLE 10 OF COUNCIL DIRECTIVE 71/305/EEC; THE COMMISSION REQUESTED IRELAND TO TAKE ALL NECESSARY MEASURES TO COMPLY WITH THE REASONED OPINION WITHIN 15 DAYS FOLLOWING NOTIFICATION. BY LETTER DATED 3 FEBRUARY 1987 IRELAND

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STATED THAT IT STOOD BY THE VIEWS EXPRESSED IN ITS LETTER OF 9*SEPTEMBER 1986. IT DID, HOWEVER, ALSO UNDERTAKE NOT TO AWARD THE CONTRACT BEFORE 20 FEBRUARY 1987. SINCE IRELAND HAD NOT COMPLIED WITH THE REASONED OPINION, THE COMMISSION APPLIED TO THE COURT ON 13 FEBRUARY 1987 PURSUANT TO ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT IRELAND HAD FAILED TO FULFIL ITS OBLIGATIONS UNDER THE TREATY .

12 PURSUANT TO ARTICLE 186 OF THE EEC TREATY, THE COURT OF JUSTICE MAY IN CASES BEFORE IT PRESCRIBE ANY NECESSARY INTERIM MEASURES.

13 AS A CONDITION FOR THE GRANT OF A MEASURE SUCH AS THAT REQUESTED, ARTICLE 83 (2) OF THE RULES OF PROCEDURE PROVIDES THAT AN APPLICATION FOR INTERIM MEASURES MUST STATE THE CIRCUMSTANCES GIVING RISE TO URGENCY AND THE FACTUAL AND LEGAL GROUNDS ESTABLISHING A PRIMA FACIE CASE FOR THE INTERIM MEASURES APPLIED FOR.

14 IN ORDER TO ESTABLISH A PRIMA FACIE CASE FOR THE INTERIM MEASURE IT SEEKS THE APPLICANT REFERS TO THE TWO SUBMISSIONS ON WHICH IT BASES ITS MAIN APPLICATION. ITS FIRST SUBMISSION IS THAT, HAVING REGARD TO ITS DETAILED TECHNICAL REQUIREMENTS, CLAUSE 4.29 OF THE SPECIFICATIONS FOR THE CONTRACT IS INCOMPATIBLE WITH ARTICLE 10 OF COUNCIL DIRECTIVE 71/305/EEC .

15 ARTICLE 10 (1) OF DIRECTIVE 71/305 STATES THAT THE "TECHNICAL SPECIFICATIONS MAY BE DEFINED BY REFERENCE TO NATIONAL STANDARDS ". HOWEVER, ARTICLE 10 (2) LAYS DOWN CERTAIN CONDITIONS WITH WHICH SUCH TECHNICAL SPECIFICATIONS MUST COMPLY. IT PROVIDES : "UNLESS SUCH SPECIFICATIONS ARE JUSTIFIED BY THE SUBJECT OF THE CONTRACT, MEMBER STATES SHALL PROHIBIT THE INTRODUCTION INTO THE CONTRACTUAL CLAUSES RELATING TO A GIVEN CONTRACT OF TECHNICAL SPECIFICATIONS WHICH MENTION PRODUCTS OF A SPECIFIC MAKE OR SOURCE OR OF A PARTICULAR PROCESS AND WHICH THEREFORE FAVOUR OR ELIMINATE CERTAIN UNDERTAKINGS. IN PARTICULAR, THE INDICATION OF TRADE MARKS, PATENTS, TYPES OR OF A SPECIFIC ORIGIN OR PRODUCTION, SHALL BE PROHIBITED. HOWEVER, IF SUCH INDICATION IS ACCOMPANIED BY THE WORDS 'OR EQUIVALENT' , IT SHALL BE AUTHORIZED IN CASES WHERE THE AUTHORITIES AWARDING CONTRACTS ARE UNABLE TO GIVE A DESCRIPTION OF THE SUBJECT OF THE CONTRACT USING SPECIFICATIONS WHICH ARE SUFFICIENTLY PRECISE AND INTELLIGIBLE TO ALL PARTIES CONCERNED."

16 THE COMMISSION' S SECOND SUBMISSION IS THAT CLAUSE 4.29 INSERTED IN THE SPECIFICATIONS BY DUNDALK URBAN DISTRICT COUNCIL, A BODY SUBJECT TO THE AUTHORITY OF THE IRISH DEPARTMENT OF THE ENVIRONMENT, CREATES A BARRIER TO TRADE WHICH IS CONTRARY TO ARTICLE 30 OF THE EEC TREATY SINCE IT HAS THE EFFECT OF EXCLUDING THE USE OF PIPES MANUFACTURED IN OTHER MEMBER STATES WHICH WOULD PROVIDE GUARANTEES OF SAFETY, PERFORMANCE AND RELIABILITY EQUIVALENT TO THOSE OFFERED BY PIPES MANUFACTURED BY THE IRISH COMPANY, TEGRAL PIPES LTD, WHICH IS THE ONLY UNDERTAKING CERTIFIED TO IS 188 AS REQUIRED BY THAT CLAUSE. IRELAND HAS, MOREOVER, NOT PUT FORWARD ANY GROUND BASED ON ARTICLE 36 OF THE EEC TREATY OR ON THE "MANDATORY REQUIREMENTS" WITHIN THE MEANING OF THE COURT' S CASE-LAW TO JUSTIFY THAT INFRINGEMENT OF ARTICLE 30 OF THE EEC TREATY. THE EXISTENCE OF SUCH AN INFRINGEMENT IS ALSO CLEARLY BORNE OUT BY THE FACT THAT CONTRACTORS WHICH MIGHT HAVE CONSIDERED SUBMITTING A TENDER BASED ON THE USE OF IMPORTED PIPES WERE DETERRED FROM DOING SO AND A CONTRACTOR WHO DID IN FACT SUBMIT SUCH A

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TENDER WAS HAMPERED BY THE FACT THAT HE WAS UNAWARE OF THE ADDITIONAL CONDITIONS WHICH MIGHT BE IMPOSED IF OTHER PIPES WERE TO BE USED .

17 IN THE WRITTEN OBSERVATIONS SUBMITTED BY IT IN THESE PROCEEDINGS FOR INTERIM MEASURES, THE DEFENDANT ARGUES THAT ARTICLE 30 OF THE EEC TREATY IS NOT APPLICABLE SINCE THERE IS NO BARRIER TO TRADE OR, IN ANY EVENT, NO BARRIER TO TRADE AS A RESULT OF A COMMERCIAL PROVISION OR OTHER MEASURE ADOPTED BY IRELAND. IT REFERS TO THE JUDGMENT OF THE COURT OF 22 MARCH 1977 (IANNELLI & VOLPI SPA V MERONI ((1977)) ECR 577) IN PARAGRAPH 9 OF WHICH THE COURT STATED THAT THE FIELD OF APPLICATION OF ARTICLE 30 OF THE EEC TREATY "DOES NOT INCLUDE OBSTACLES TO TRADE COVERED BY OTHER PROVISIONS OF THE TREATY ". IT POINTS OUT THAT, IN ANY EVENT, ANY BARRIER TO TRADE IN THIS FIELD WOULD BE COVERED BY OTHER PROVISIONS OF COMMUNITY LAW, NAMELY COUNCIL DIRECTIVE 71/305/EEC ADOPTED PURSUANT TO ARTICLE 57 (2) AND ARTICLES 66 AND 100 OF THE EEC TREATY, AND IS THUS EXCLUDED FROM THE SCOPE OF ARTICLE 30 OF THE TREATY. THE PROPER COURSE FOR THE COMMISSION TO TAKE IN ORDER TO PUT AN END TO THE BARRIERS TO TRADE RESULTING FROM DISPARITY BETWEEN NATIONAL STANDARDS IS TO PROPOSE MEASURES OF HARMONIZATION UNDER ARTICLE 100 OF THE EEC TREATY RATHER THAN TO APPLY ARTICLE 30 .

18 IT DOES NOT APPEAR THAT THE FIRST SUBMISSION RELIED ON BY THE COMMISSION CAN ESTABLISH A PRIMA FACIE CASE FOR THE INTERIM MEASURES APPLIED FOR . IT IS CLEAR FROM THE SIXTH RECITAL IN THE PREAMBLE TO DIRECTIVE 71/305/EEC READ IN CONJUNCTION WITH ARTICLE 5 (3), WHICH PROVIDES THAT :

> "THE PROVISIONS OF THIS DIRECTIVE SHALL NOT APPLY TO PUBLIC WORKS CONTRACTS AWARDED BY THE PRODUCTION, DISTRIBUTION, TRANSMISSION OR TRANSPORTATION SERVICES FOR WATER AND ENERGY",

THAT THE PUBLIC WORKS CONTRACT NO 4 OF THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME DOES NOT FALL WITHIN THE SCOPE OF THAT DIRECTIVE AND IS NOT SUBJECT TO THE REQUIREMENTS LAID DOWN THEREIN.

19 AS REGARDS THE COMMISSION' S SECOND SUBMISSION, IT SHOULD BE POINTED OUT THAT ONCE IT IS FOUND THAT PRIMA FACIE DIRECTIVE 71/305/EEC DID NOT APPLY TO THE PUBLIC WORKS CONTRACT IN QUESTION, IRELAND' S ARGUMENTS AGAINST THE APPLICABILITY OF ARTICLE 30 OF THE EEC TREATY WHICH IT BASES ON THE JUDGMENT IN IANNELLI & VOLPI SPA V MERONI BECOME WHOLLY IRRELEVANT. FURTHERMORE, AS THE COMMISSION HAS RIGHTLY POINTED OUT, SECONDARY COMMUNITY LEGISLATION SUCH AS A DIRECTIVE CANNOT DEROGATE FROM A DIRECTLY APPLICABLE PROVISION OF THE EEC TREATY SUCH AS ARTICLE 30.

20 THE NEXT STEP IS TO EXAMINE WHETHER CLAUSE 4.29 OF THE SPECIFICATIONS MAY AMOUNT TO A BARRIER TO TRADE AND WHETHER SUCH A BARRIER IS IMPUTABLE TO A MEASURE ADOPTED BY IRELAND.

21 ALTHOUGH IT WOULD SEEM NORMAL THAT IN A PUBLIC WORKS CONTRACT SUCH AS THAT AT ISSUE THE MATERIALS TO BE USED MAY BE REQUIRED TO COMPLY WITH A CERTAIN TECHNICAL STANDARD, EVEN A NATIONAL STANDARD, IN ORDER TO ENSURE THAT THEY ARE APPROPRIATE AND SAFE, SUCH A TECHNICAL STANDARD CANNOT, WITHOUT CREATING PRIMA FACIE A BARRIER TO TRADE WHICH IS CONTRARY TO ARTICLE 30 OF THE EEC TREATY, HAVE THE EFFECT OF EXCLUDING, WITHOUT SO MUCH AS AN EXAMINATION, ANY TENDER BASED ON ANOTHER TECHNICAL STANDARD RECOGNIZED

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IN ANOTHER MEMBER STATE AS PROVIDING EQUIVALENT GUARANTEES OF SAFETY, PERFORMANCE AND RELIABILITY

22 IN THIS CASE IT SHOULD BE OBSERVED THAT THE AUTOMATIC EFFECT OF CLAUSE 4.29 OF THE SPECIFICATIONS, BY ITSELF AND WITHOUT ANY OTHER JUSTIFICATION, IS TO EXCLUDE ANY TENDER BASED ON THE USE OF ANY TYPES OF PIPES OTHER THAN THOSE CERTIFIED TO COMPLY WITH IS 188, THAT IS TO SAY THOSE MANUFACTURED BY THE ONLY UNDERTAKING CERTIFIED TO THAT STANDARD, TEGRAL PIPES LTD, IRELAND, ALTHOUGH THERE ARE A NUMBER OF FEATURES IN THE DOCUMENTS BEFORE THE COURT THAT SUGGEST THAT THE POSSIBILITY CANNOT NECESSARY BE RULED OUT THAT EQUIVALENT TECHNICAL STANDARDS EXIST IN OTHER MEMBER STATES.

23 SINCE THAT CLAUSE WAS INSERTED IN THE SPECIFICATIONS BY DUNDALK URBAN DISTRICT COUNCIL, A BODY SUBJECT TO THE AUTHORITY OF THE MINISTER FOR THE ENVIRONMENT AND FOR WHOSE ACTS IRELAND IS RESPONSIBLE, THE BARRIER TO INTRA-COMMUNITY TRADE TO WHICH IT PRIMA FACIE GIVES RISE IS IMPUTABLE TO IRELAND.

24 IN THE LIGHT OF THE FOREGOING IT MUST BE CONSIDERED THAT THE COMMISSION HAS INDEED RAISED A MATERIAL ARGUMENT WHICH ESTABLISHES A PRIMA FACIE CASE FOR THE INTERIM MEASURE APPLIED FOR.

25 ALTHOUGH IT MAY BE CONSIDERED THAT IN THIS CASE THE COMMISSION HAS INDICATED FACTUAL AND LEGAL GROUNDS ESTABLISHING A PRIMA FACIE CASE FOR THE INTERIM MEASURE APPLIED FOR, THE COURT STILL HAS TO ASSESS THE CIRCUMSTANCES GIVING RISE TO URGENCY.

26 THE COURT HAS CONSISTENTLY HELD THAT THE URGENCY REQUIRED BY ARTICLE 83 (2) OF THE RULES OF PROCEDURE IN REGARD TO AN APPLICATION FOR INTERIM MEASURES MUST BE ASSESSED ON THE BASIS OF THE NEED TO ADOPT SUCH MEASURES IN ORDER TO AVOID SERIOUS AND IRREPARABLE DAMAGE TO THE PARTY SEEKING THOSE MEASURES.

27 THE COMMISSION SUBMITS THAT IF THE CONTRACT IN QUESTION WERE AWARDED IN A MANNER CONTRARY TO COMMUNITY LAW, IRREPARABLE HARM WOULD BE CAUSED NOT ONLY TO THE INTERESTS OF THE COMMUNITY BUT ALSO TO THOSE OF CONTRACTORS WHOSE TENDERS WERE NOT CONSIDERED AS A RESULT OF CLAUSE 4.29 AND THEIR SUPPLIERS. THE AWARD OF THE CONTRACT WILL CREATE A SITUATION WHEREBY THE INFRINGEMENT BECOMES PROGRESSIVELY IRREVERSIBLE AS COMMITMENTS ARE ENTERED INTO BY THE CONTRACTOR, ORDERS ARE PLACED AND PHYSICAL WORK COMMENCES ON THE EXECUTION OF THE CONTRACT. THE URGENCY FOR THE INTERIM MEASURES APPLIED FOR IS SUFFICIENTLY HIGHLIGHTED BY THE MERE FACT THAT IRELAND' S UNDERTAKING NOT TO AWARD THE CONTRACT IN QUESTION EXPIRED ON 20 FEBRUARY 1987.

28 THE COMMISSION ALSO STATES THAT A DELAY IN THE AWARD OF THE CONTRACT WILL NOT INVOLVE SERIOUS INCONVENIENCE FOR THE IRISH AUTHORITIES SINCE OTHER PHASES OF THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME ARE STILL AT THE DESIGN STAGE. A DELAY IN THE AWARD OF THE CONTRACT IN QUESTION WILL THEREFORE SCARCELY DELAY THE ACHIEVEMENT OF THE ULTIMATE OBJECTIVE OF INCREASING THE WATER SUPPLY IN THE DUNDALK AREA.

29 IRELAND CONTENDS THAT THE COMMISSION HAS NOT RAISED ANY SERIOUS ARGUMENTS SHOWING THAT THE DAMAGE TO WHICH THE SITUATION WOULD ALLEGEDLY GIVE RISE

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WOULD BE SERIOUS AND IRREPARABLE. THE COMMISSION HAS MERELY INFERRED AS MUCH FROM THE TRITE OBSERVATION THAT THE PIPELINE CAN ONLY BE CONSTRUCTED ONCE AND REFERENCE TO ALL THE CONSEQUENCES THAT ENTAILS. IT HAS NOT STATED WHO WILL SUFFER DAMAGE AND HOW OR THE NATURE AND EXTENT OF THE DAMAGE. BESIDES, TENDERERS WRONGFULLY EXCLUDED FROM CONSIDERATION FOR THE CONTRACT CAN ALWAYS CLAIM DAMAGES.

30 IRELAND EMPHASIZES THAT CONTRARY TO WHAT THE COMMISSION ASSERTS, THE INTERIM MEASURE APPLIED FOR WOULD HAVE THE EFFECT OF DELAYING COMPLETION OF THE SCHEME ITSELF WHICH WOULD HAVE VERY SERIOUS IMPLICATIONS FOR THE PEOPLE OF DUNDALK AND THE SURROUNDING REGION.

31 IRELAND CITES THE FOLLOWING EXAMPLES OF THE REPERCUSSIONS FOR THE PEOPLE OF DUNDALK IF THE INTERIM MEASURE APPLIED FOR IS GRANTED :

THE OVERALL PROJECT, WHOSE OBJECTIVE IS TO PROVIDE WATER TO THE TOWN OF DUNDALK BY 1990, HAS BEEN SUBDIVIDED INTO EIGHT CONTRACTS. THE COMPLETION OF THREE OF THOSE CONTRACTS IS DEPENDENT ON THE COMMENCEMENT OF WORK ON THE CONTRACT AT ISSUE, CONTRACT NO 4. THE WORK UNDER CONTRACT NO 4 MUST BE STARTED BY JUNE AT THE LATEST IF THE PROJECT IS TO BE COMPLETED BY 1990.

FROM A PUBLIC INQUIRY HELD IN 1982 IT EMERGED THAT THE 30*000 INHABITANTS OF DUNDALK HAVE FOR MANY YEARS BEEN FACED BY ACUTE WATER SHORTAGES WHICH HAVE FREQUENTLY NECESSITATED WATER RATIONING. EVIDENCE WAS ALSO GIVEN AT THE INQUIRY THAT THE WATER SHORTAGE CONSTITUTES A SERIOUS FIRE HAZARD AND EVEN A HEALTH HAZARD. IT IS ALSO A SERIOUS DISINCENTIVE TO ATTRACTING INDUSTRY TO THE REGION.

32 ALTHOUGH AT FIRST SIGHT THE PROBLEM SEEMS TO BE A MATTER OF SOME URGENCY, PARTICULARLY SINCE THE DAMAGE TO THE COMMISSION, AS GUARDIAN OF THE INTERESTS OF THE COMMUNITY, WILL ARISE AS SOON AS THE CONTRACT AT ISSUE IS AWARDED, IT MAY BE NECESSARY IN PROCEEDINGS FOR INTERIM MEASURES UNDER ARTICLES 185 AND 186 OF THE EEC TREATY TO WEIGH AGAINST EACH OTHER ALL THE INTERESTS AT STAKE.

33 IN THIS CASE THE OBJECTIVE OF THE PUBLIC WORKS CONTRACT IN QUESTION, NAMELY TO SECURE WATER SUPPLIES FOR THE INHABITANTS OF THE DUNDALK AREA BY 1990 AT THE LATEST, AND THE AGGRAVATION OF THE EXISTING HEALTH AND SAFETY HAZARDS FOR THEM IF THE AWARD OF THE CONTRACT AT ISSUE IS DELAYED TILT THE BALANCE OF INTERESTS IN FAVOUR OF THE DEFENDANT. IT SHOULD BE STRESSED THAT A QUITE DIFFERENT ASSESSMENT MIGHT BE ARRIVED AT IN THE CASE OF OTHER PUBLIC WORKS CONTRACTS SERVING DIFFERENT PURPOSES WHERE A DELAY IN THE AWARD OF THE CONTRACT WOULD NOT EXPOSE A POPULATION TO SUCH HEALTH AND SAFETY HAZARDS .

DOCNUM 61987O0045(01)

AUTHOR Court of Justice of the European Communities

FORM Order

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TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1987 ; O ; order
PUBREF	European Court reports 1987 Page 01369
DOC	1987/03/13
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SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Approximation of laws
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	Ireland ; Member States
NATIONA	Ireland
NOTES	Gormley, Laurence: European Law Review 1989 p.156-162 Ricatte, J.: Gazette du Palais 1993 III Doct. p.418-423
PROCEDU	Proceedings concerning failure by Member State ; Application for interim measures - unfounded
ADVGEN	Mancini
JUDGRAP	Koopmans
DATES	of document: 13/03/1987 of application: 13/02/1987

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**Order of the President of the Court
of 16 February 1987
Commission of the European Communities v Ireland.
Public works contract - Community tender procedure.
Case 45/87 R.**

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APPLICATION FOR INTERIM MEASURES - INTERIM MEASURES - POWERS OF THE PRESIDENT UNDER ARTICLE 84 (2) OF THE RULES OF PROCEDURE

(EEC TREATY, ART. 186; RULES OF PROCEDURE, ART. 84 (2)*)

IN CASE 45/87 R,

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY ITS AGENT, ERIC L . WHITE, MEMBER OF ITS LEGAL SERVICE, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF G. KREMLIS, JEAN MONNET BUILDING, KIRCHBERG,

APPLICANT,

V

IRELAND, REPRESENTED BY J. L. DOCKERY, CHIEF STATE SOLICITOR, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE IRISH EMBASSY, 28, ROUTE D' ARLON,

DEFENDANT,

APPLICATION FOR INTERIM MEASURES TO PREVENT THE AWARD OF A CONTRACT RELATING TO THE DUNDALK WATER SUPPLY UNTIL THE FINAL JUDGMENT IN THE MAIN ACTION IN THE PRESENT CASE,

THE PRESIDENT OF THE COURT OF JUSTICE

OF THE EUROPEAN COMMUNITIES

MAKES THE FOLLOWING

ORDER

1 DUNDALK URBAN DISTRICT COUNCIL IS THE PROMOTER OF A PROJECT KNOWN AS THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME. CONTRACT NO*4 OF THIS SCHEME CONCERNS THE CONSTRUCTION OF A WATER MAIN TO TRANSPORT WATER FROM THE RIVER FANE SOURCE TO A TREATMENT PLANT AT CAVAN HILL AND THENCE INTO THE EXISTING TOWN SUPPLY SYSTEM. THE INVITATION TO TENDER FOR THIS CONTRACT BY OPEN PROCEDURE WAS PUBLISHED IN SUPPLEMENT 50 OF THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES OF 13 MARCH 1986, P . 13. AT POINT 13 OF THE PUBLISHED NOTICE IT WAS STATED THAT

> "THE CONTRACT WILL BE AWARDED, SUBJECT TO THE DUNDALK URBAN DISTRICT COUNCIL BEING SATISFIED AS TO THE ABILITY OF THE CONTRACTOR TO CARRY OUT THE WORK, TO THE CONTRACTOR WHO SUBMITS A TENDER, IN ACCORDANCE WITH THE TENDER DOCUMENTS, WHICH IS ADJUDGED TO BE THE MOST ECONOMICALLY ADVANTAGEOUS TO THE COUNCIL IN RESPECT OF PRICE, PERIOD OF COMPLETION, TECHNICAL MERIT AND RUNNING COSTS.

THE LOWEST OR ANY TENDER NEED NOT NECESSARILY BE ACCEPTED."

2 THE COMMISSION RECEIVED COMPLAINTS THAT ONE OF THE TENDERS SUBMITTED WAS BEING UNFAIRLY EXCLUDED FROM CONSIDERATION. ONE OF THE COMPLAINANTS

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IS AN IRISH CONTRACTOR TENDERING FOR THE CONTRACT, P. J . WALLS (CIVIL) LTD (" WALLS "), AND THE OTHER IS THE SPANISH COMPANY OFFERING TO SUPPLY ASBESTOS CEMENT PIPES FOR THE CONTRACT, URALITA SA (" URALITA ").

3 WALLS SUBMITTED THREE OFFERS IN RESPONSE TO THE TENDER INVITATION, ONE OF WHICH BASED ON THE USE OF PIPES SUPPLIED BY "URALITA" OF SPAIN, WAS THE LOWEST TENDER OFFERED. THE CONSULTING ENGINEERS TO THE PROJECT HAVE, HOWEVER, STATED THAT THIS TENDER IS NOT IN ACCORDANCE WITH CLAUSE 4.29 OF THE SPECIFICATION TO THE CONTRACT WHICH PROVIDES THAT :

> "ASBESTOS CEMENT PRESSURE PIPES SHALL BE CERTIFIED AS COMPLYING WITH IRISH STANDARD SPECIFICATION 188-1975 IN ACCORDANCE WITH THE IRISH STANDARD MARK LICENSING SCHEME OF THE INSTITUTE FOR INDUSTRIAL RESEARCH AND STANDARDS. ALL ASBESTOS CEMENT WATERMAINS ARE TO HAVE A BITUMINOUS COATING INTERNALLY AND EXTERNALLY. SUCH COATINGS SHALL BE APPLIED AT THE FACTORY BY DIPPING ".

ONLY PIPES MADE BY TEGRAL PIPES LTD OF DROGHEDA, IRELAND, ARE CURRENTLY CERTIFIED TO THIS STANDARD.

4 FOLLOWING VARIOUS DISCUSSIONS, THE COMMISSION INSTITUTED PROCEEDINGS UNDER ARTICLE 169 OF THE EEC TREATY ON 20 OCTOBER 1986, SETTING OUT ITS VIEW THAT THIS CLAUSE OF THE SPECIFICATION CONSTITUTED A BREACH OF ARTICLES 30 TO 36 OF THE EEC TREATY AND OF ARTICLE 10 OF COUNCIL DIRECTIVE OF 71/305/EEC OF 26 JULY 1971 COORDINATING PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OFFICIAL JOURNAL L*185 OF 25 AUGUST 1971, P. 5 (ENGLISH SPECIAL EDITION P. 682)*). THE IRISH GOVERNMENT REPLIED ON 14 NOVEMBER 1986. THE COMMISSION WAS NOT SATISFIED WITH THIS REPLY AND ADDRESSED A REASONED OPINION TO THE IRISH GOVERNMENT ON 13 JANUARY 1987. THE IRISH GOVERNMENT REPLIED ON 3 FEBRUARY 1987. THE IRISH GOVERNMENT AGREED TO UNDERTAKE NOT TO AWARD THE CONTRACT UNTIL 20 FEBRUARY 1987.

5 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON 13*FEBRUARY 1987, THE COMMISSION APPLIED FOR A DECLARATION THAT BY THE INCLUSION OF CLAUSE 4.29 IN THE CONTRACT AND BY THE REFUSAL TO ACCEPT THE USE OF ASBESTOS CEMENT PIPES MANUFACTURED TO AN EQUIVALENT STANDARD, IRELAND HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY AND ARTICLE 10 OF COUNCIL DIRECTIVE 71/305/EEC.

6 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON 13*FEBRUARY 1987, THE APPLICANT REQUESTED THE COURT, PURSUANT TO ARTICLE 186 OF THE EEC TREATY AND ARTICLE OF THE RULES OF PROCEDURE, TO ORDER IRELAND TO TAKE SUCH MEASURES AS MAY BE NECESSARY TO PREVENT, UNTIL SUCH TIME AS THE COURT HAS GIVEN FINAL JUDGMENT IN THIS CASE OR A SETTLEMENT HAS BEEN REACHED BETWEEN THE COMMISSION AND IRELAND, THE AWARD OF A CONTRACT FOR THE WORKS TO WHICH THIS CASE RELATES, OR IF SUCH A CONTRACT SHOULD ALREADY HAVE BEEN AWARDED, TO ORDER IRELAND TO TAKE SUCH MEASURES AS MAY BE NECESSARY TO CANCEL SUCH A CONTRACT.

7 ACCORDING TO ARTICLE 84 (2) OF THE RULES OF PROCEDURE, THE PRESIDENT MAY GRANT AN APPLICATION FOR INTERIM MEASURES EVEN BEFORE THE OBSERVATIONS OF THE OPPOSITE PARTY HAVE BEEN SUBMITTED. THAT DECISION MAY BE VARIED OR CANCELLED EVEN WITHOUT ANY APPLICATION BEING MADE BY ANY PARTY.

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8 IT APPEARS NECESSARY TO MAKE USE OF THIS POWER IN THE PRESENT CASE SO AS TO ENSURE THAT THE APPLICATION FOR INTERIM MEASURES IS NOT PREJUDICED BY THE EXISTENCE OF A FAIT ACCOMPLI. IF THE CONTRACT IN QUESTION WERE AWARDED BEFORE THE APPLICATION FOR INTERIM MEASURES IS DECIDED, DIFFICULT QUESTIONS MIGHT ARISE AS TO THE POSSIBILITY OF SUBSEQUENTLY CANCELLING IT. MOREOVER, THE COMMISSION STATES THAT OTHER PHASES OF THE SCHEME (FOR EXAMPLE, THE PUMPING STATION) ARE STILL AT THE DESIGN STAGE AND THAT A DELAY IN THE AWARD IS THEREFORE UNLIKELY TO DELAY THE ULTIMATE OBJECTIVE OF INCREASING WATER SUPPLY IN THE DUNDALK AREA. THE INTERESTS OF JUSTICE AND OF THE PARTIES INVOLVED CAN THEREFORE BEST BE MAINTAINED BY AN ORDER MAINTAINING THE STATUS QUO UNTIL THERE HAS BEEN THE POSSIBILITY OF HEARING THE PARTIES AND DECIDING THE APPLICATION FOR INTERIM MEASURES WITH ALL DUE DELIBERATION.

On those grounds,

THE PRESIDENT OF THE COURT,

by way of an interim decision,

hereby orders as follows :

(1) Ireland shall take such measures as may be necessary to prevent, until such time as the application by the Commission for interim measures has been disposed of or until further order, the award by Dundalk Urban District Council of Contract No*4 of the Dundalk Water Supply Augmentation Scheme.

(2) The costs are reserved.

Done at Luxembourg on 16 February 1987.

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TREATY	European Economic Community
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	31959X0301-A84P2 : N 7 31971L0305-A10 : N 4 5
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Approximation of laws
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	Ireland ; Member States
NATIONA	Ireland
NOTES	Flamme, M.-A.: L'entreprise et le droit 1987 p.394 (PM) Alvargonzalez Figaredo, Mercedes: Noticias CEE 1988 no 41 p.121-124 Gormley, Laurence: European Law Review 1989 p.156-162
PROCEDU	Proceedings concerning failure by Member State ; Application for interim measures - successful
ADVGEN	Mancini
JUDGRAP	Koopmans
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Judgment of the Court (Fourth Chamber)
of 20 September 1988
Gebroeders Beentjes BV v State of the Netherlands.
Reference for a preliminary ruling: Arrondissementsrechtbank 's-Gravenhage - Netherlands.
Procedure for the award of public works contracts.
Case 31/87.

++++

1 . Approximation of laws - Procedure for the award of public works contracts - Directive 71/305 - Scope - Contracts awarded by a body which falls within the notion of the State although it is not formally part of the State administration - Included

(Council Directive 71/305, Art. 1)

2 . Approximation of laws - Procedure for the award of public works contracts - Directive 71/305 - Technical ability and knowledge of tenderers - Criteria for checking - Award of contracts - Most economically advantageous tender - Condition concerning employment of long-term unemployed persons - Permissibility - Conditions - Publicity requirements - Direct effect of Articles 20, 26 and 29 of the directive

(Council Directive 71/305, Arts 20, 26 and 29)

3 . Measures adopted by the institutions - Directives - Implementation by the Member States - Need to ensure effectiveness of directives - Obligation of national courts

(EEC Treaty, Art. 5 and Art. 189, third paragraph)

4 . Measures adopted by the institutions - Directives - Direct effect

(EEC Treaty, Art. 189, third paragraph)

1 . A body whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award must be regarded as falling within the notion of the State for the purpose of Article 1 of Directive 71/305, so that that directive applies to public works contracts awarded by that body.

2 . With regard to the award of a public works contract falling within the scope of Directive 71/305,

(i)the criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors pursuant to Articles 20 and 26 of the directive. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents;

(ii)the criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice. It follows from Article 29 (1) and (2) of the directive that where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents;

(iii)the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the

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contract notice.

Articles 20, 26 and 29 of the directive may be relied on by an individual before the national courts.

3 . The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts. It follows that in applying national law, in particular the provisions of a national law specifically introduced in order to implement a directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty

4 . Where the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied on by individuals against the State where that State fails to implement the directive in national law within the prescribed period or where it fails to implement the directive correctly.

In Case 31/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sixth Chamber of the Arrondissementsrechtbank (District Court), The Hague, for a preliminary ruling in the proceedings pending before that court between

Gebroeders Beentjes BV

and

State of the Netherlands,

on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p . 682),

THE COURT (Fourth Chamber)

composed of : G. C. Rodríguez Iglesias, President of the Chamber, T . Koopmans and C. N. Kakouris, Judges,

Advocate General : M. Darmon

Registrar : J.-G. Giraud

after considering the observations submitted on behalf of :

the Italian Government, by P. G. Ferri,

the Commission of the European Communities, by R. Wainwright and R . Barents,

having regard to the Report for the Hearing and further to the hearing on 8 March 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 May 1988,

gives the following

Judgment

Costs

45 The costs incurred by the Commission of the European Communities and by the Italian Republic are not recoverable. As these proceedings are, in so far as the parties to the main proceedings

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are concerned, a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Arrondissementsrechtbank, The Hague, by a judgment of 28 January 1987, hereby rules :

(1) Directive 71/305 applies to public works contracts awarded by a body such as the local land consolidation committee.

(2) The criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents.

The criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice. It follows from Article 29 (1) and (2) of the directive that where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents.

The condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

(3) The provisions of Articles 20, 26 and 29 of Directive 71/305 may be relied on by an individual before the national courts.

1 By a judgment of 28 January 1987, which was received at the Court on 3 February 1987, the Arrondissementsrechtbank, The Hague, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II) p. 682).

2 These questions arose in proceedings between Gebroeders Beentjes BV and the Netherlands Ministry of Agriculture and Fisheries in connection with a public invitation to tender for a public works contract in connection with a land consolidation operation.

3 In the main proceedings, Beentjes, the plaintiff, claimed that the decision of the awarding authority rejecting its tender, although it was the lowest, in favour of the next-lowest bidder had been taken in breach of the provisions of the abovementioned directive.

4 It was in these circumstances that the Arrondissementsrechtbank stayed the proceedings and asked the Court for a preliminary ruling on the following questions :

"(1) Is a body with the characteristics of a 'local committee' , as provided for in the Ruilverkavelingswet 1954 and described in paragraph 5.3 of ((the national court' s)) judgment to be regarded as 'the State' or a 'regional or local authority' for the purposes of Council Directive 71/305/EEC

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of 26 July 1971?

(2) Does Directive 71/305/EEC allow a tenderer to be excluded from a tendering procedure on the basis of considerations such as those mentioned in paragraph 6.2 of ((the national court' s)) judgment if in the invitation itself no qualitative criteria are laid down in this regard (but reference is simply made to general conditions containing a general reservation such as that relied upon by the State in this case)?

(3) May parties such as Beentjes in a civil action such as this rely on the provisions of Directive 71/305/EEC indicating the cases in which and the conditions under which a tenderer may be excluded from the tendering procedure on qualitative grounds, even if in the incorporation of those provisions of the directive in national legislation the contracting authority is given wider powers to refuse to award a contract than are permitted under the directive?"

5 As regards the second question, it should be stated that the considerations referred to in the national court' s judgment concern the reasons for which Beentjes' tender was rejected by the awarding authority, which considered that Beentjes lacked sufficient specific experience for the work in question, that its tender appeared to be less acceptable and that it did not seem to be in a position to employ long-term unemployed persons. It is apparent from the documents before the Court that the first two criteria cited above were provided for in Article 21 of the Uniform Rules on Invitations to Tender of 21 December 1971 (Uniform Aanbestedingsreglement, hereinafter referred to as "the Uniform Rules "), to which the contested invitation to tender referred, while the condition regarding the employment of long-term unemployed persons was expressly set out in the invitation to tender.

6 Reference is made to the Report for the Hearing for a more detailed account of the facts of the main proceedings, the relevant provisions of Community and national law, the written observations submitted to the Court and the course of the proceedings, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

7 By its first question, the national court seeks in substance to establish whether Directive 71/305/EEC applies to the award of public works contracts by a body such as the local land consolidation committee .

8 It appears from the documents before the Court that the local land consolidation committee is a body with no legal personality of its own whose functions and composition are governed by legislation and that its members are appointed by the Provincial Executive of the province concerned . It is bound to apply rules laid down by a central committee established by royal decree, whose members are appointed by the Crown . The State ensures observance of the obligations arising out of measures of the committee and finances the public works contracts awarded by the local committee in question.

9 The objective of Directive 71/305/EEC is to coordinate national procedures for the award of public works contracts concluded in Member States on behalf of the State, regional or local authorities or other legal persons governed by public law.

10 Pursuant to Article 1 (b) of the Directive, the State, regional or local authorities and the legal persons governed by public law specified in Annex I are to be regarded as "authorities awarding contracts ".

11 For the purposes of this provision, the term "the State" must be interpreted in functional terms. The aim of the directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation,

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is not formally a part of the State administration.

12 Consequently, a body such as that in question here, whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award, must be regarded as falling within the notion of the State for the purpose of the abovementioned provision, even though it is not part of the State administration in formal terms.

13 In reply to the first question put by the national court, it should therefore be stated that Directive 71/305/EEC applies to public works contracts awarded by a body such as the local land consolidation committee .

The second question

14 The second question put by the national court seeks, in the first place, to establish whether Directive 71/305/EEC precludes the rejection of a tender on the following grounds :

(i)lack of specific experience relating to the work to be carried out;

(ii)the tender does not appear to be the most acceptable in the view of the awarding authority;

(iii) inability of the contractor to employ long-term unemployed persons .

Secondly, it seeks to determine what prior notice is required by the directive as regards the use of such criteria, should they be regarded as compatible with the directive.

15 According to the structure of the directive, in particular Title IV (Common rules on participation), the examination of the suitability of contractors to carry out the contracts to be awarded and the awarding of the contract are two different operations in the procedure for the award of a public works contract. Article 20 of the directive provides that the contract is to be awarded after the contractor' s suitability has been checked.

16 Even though the directive, which is intended to achieve the coordination of national procedures for the award of public works contracts while taking into account, as far as possible, the procedures and administrative practices in force in each Member State (second recital in the preamble), does not rule out the possibility that examination of the tenderer' s suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules.

17 Article 20 provides that the suitability of contractors is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28. The purpose of these articles is not to delimit the power of the Member States to fix the level of financial and economic standing and technical knowledge required in order to take part in procedures for the award of public works contracts but to determine the references or evidence which may be furnished in order to establish the contractor' s financial and economic standing and technical knowledge or ability (see judgment of 9 July 1987 in Joined Cases 27 to 29/86 CEI and Bellini ((1987)) ECR 3347). Nevertheless, it is clear from these provisions that the authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability.

18 As far as the criteria for the award of contracts is concerned, Article 29 (1) provides that the authorities awarding contracts must base their decision either on the lowest price only or, when the award is made to the most economically advantageous tender, on various criteria according to the contract : e.g. price, period for completion, running costs, profitability, technical merit.

19 Although the second alternative leaves it open to the authorities awarding contracts to choose

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the criteria on which they propose to base their award of the contract, their choice is limited to criteria aimed at identifying the offer which is economically the most advantageous. Indeed, it is only by way of exception that Article 29 (4) provides that an award may be based on criteria of a different nature "within the framework of rules whose aim is to give preference to certain tenderers by way of aid, on condition that the rules invoked are in conformity with the Treaty, in particular Articles 92 et seq ."

20 Furthermore, the directive does not lay down a uniform and exhaustive body of Community rules; within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services (judgment of 9 July 1987, cited above).

21 Finally, in order to meet the directive' s aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts.

22 To this end, Title III of the directive sets out rules for Community-wide advertising of contracts drawn up by awarding authorities in the Member States so as to give contractors in the Community adequate information on the work to be done and the conditions attached thereto, and thus enable them to determine whether the proposed contracts are of interest. At the same time additional information concerning contracts must, as is customary in the Member States, be given in the contract documents for each contract or else in an equivalent document (see ninth and tenth recital in the preamble to the directive).

23 The different aspects of the question put by the national court must be examined in the light of the foregoing.

24 In this case specific experience relating to the work to be carried out was a criterion for determining the technical knowledge and ability of the tenderers. It is therefore a legitimate criterion for checking contractors' suitability under Articles 20 and 26 of the directive .

25 The exclusion of a tenderer because its tender appears less acceptable to the authorities awarding the contract was provided for, as appears from the documents before the Court, in Article 21 of the Uniform Rules. Under Article 21 (3), "the contract shall be awarded to the tenderer whose tender appears the most acceptable to the awarding authority ".

26 The compatibility of such a provision with the directive depends on its interpretation under national law. It would be incompatible with Article 29 of the directive if its effect was to confer on the authorities awarding contracts unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer.

27 On the other hand, such a provision is not incompatible with the directive if it is to be interpreted as giving the authorities awarding contracts discretion to compare the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in Article 29 (2) of the directive

28 As regards the exclusion of a tenderer on the ground that it is not in a position to employ long-term unemployed persons, it should be noted in the first place that such a condition has no relation to the checking of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability or to the criteria for the award of contracts referred to in Article 29 of the directive.

29 It follows from the judgment of 9 July 1987, cited above, that in order to be compatible with

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the directive such a condition must comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services .

30 The obligation to employ long-term unemployed persons could inter alia infringe the prohibition of discrimination on grounds of nationality laid down in the second paragraph of Article 7 of the Treaty if it became apparent that such a condition could be satisfied only by tenderers from the State concerned or indeed that tenderers from other Member States would have difficulty in complying with it. It is for the national court to determine, in the light of all the circumstances of the case, whether the imposition of such a condition is directly or indirectly discriminatory.

31 Even if the criteria considered above are not in themselves incompatible with the directive, they must be applied in conformity with all the procedural rules laid down in the directive, in particular the rules on advertising. It is therefore necessary to interpret those provisions in order to determine what requirements must be met by the various criteria referred to by the national court

32 It appears from the documents before the Court that in this case the criterion of specific experience relating to the work to be carried out and that of the most acceptable tender were not mentioned in the contract documents or in the contract notice; these criteria are derived from Article 21 of the Uniform Rules, to which the notice made a general reference. On the other hand, the requirement regarding the employment of long-term unemployed persons was the subject of special provisions in the contract documents and was expressly mentioned in the notice published in the Official Journal of the European Communities.

33 As regards the criterion of specific experience relating to the work to be carried out, it should be stated that although the last sentence of Article 26 of the directive requires the authorities awarding contracts to specify in the contract notice which of the references concerning the technical knowledge and ability of the contractor are to be produced, it does not require them to list in the notice the criteria on which they propose to base their assessment of the contractors' suitability.

34 Nevertheless, in order for the notice to fulfil its role of enabling contractors in the Community to determine whether a contract is of interest to them, it must contain at least some mention of the specific conditions which a contractor must meet in order to be considered suitable to tender for the contract in question. However, such a mention cannot be required where, as in this case, the condition is not a specific condition of suitability but a criterion which is inseparable from the very notion of suitability.

35 As regards the criterion of "the most acceptable offer", it should be noted that even if such a criterion were compatible with the directive in the circumstances set out above, it is clear from the wording of Article 29 (1) and (2) of the directive that where the authorities awarding the contract do not take the lowest price as the sole criterion for awarding the contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state these criteria in the contract notice or the contract documents. Consequently, a general reference to a provision of national legislation cannot satisfy the publicity requirement.

36 A condition such as the employment of long-term unemployed persons is an additional specific condition and must therefore be mentioned in the notice, so that contractors may become aware of its existence .

37 In reply to the second question put by the national court it should therefore be stated that :

(i) the criterion of specific experience for the work to be carried out is a legitimate criterion

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of technical ability and knowledge for the purpose of ascertaining the suitability of contractors. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents;

(ii) the criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice. It follows from Article 29 (1) and (2) of the directive that where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents;

(iii) the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

The third question

38 The third question seeks in substance to establish whether Articles 20, 26 and 29 of Directive 71/305 may be relied upon by individuals before the national courts.

39 As the Court held in its judgment of 10 April 1984 in Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen ((1984)) ECR 1891, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts. It follows that in applying national law, in particular the provisions of a national law specifically introduced in order to implement a directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty.

40 Furthermore, the Court has consistently held (see most recently the judgment of 26 February 1986 in Case 152/84 Marshall v Southampton and South-West Hampshire Health Authority ((1986)) ECR 723) that where the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied on by individuals against the State where that State fails to implement the directive in national law within the prescribed period or where it fails to implement the directive correctly.

41 It is therefore necessary to consider whether the provisions of Directive 71/305 in question are, as far as their subject-matter is concerned, unconditional and sufficiently precise to be relied on by an individual against the State.

42 As the Court held in its judgment of 10 February 1982 in Case 76/81 Transporoute v Minister for Public Works ((1982)) ECR 417, in relation to Article 29, the directive' s rules regarding participation and advertising are intended to protect tenderers against arbitrariness on the part of the authority awarding contracts.

43 To this end, as has been stated in relation to the reply to the second question, the rules in question provide inter alia that in checking the suitability of contractors the awarding authorities must apply criteria of economic and financial standing and technical knowledge and ability, and that the contract is to be awarded either solely on the basis of the lowest price or on the basis

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of several criteria relating to the tender. They also set out the requirements regarding publication of the criteria adopted by the awarding authorities and the references to be produced. Since no specific implementing measure is necessary for compliance with these requirements, the resulting obligations for the Member States are therefore unconditional and sufficiently precise.

44 In reply to the third question it should therefore be stated that the provisions of Articles 20, 26 and 29 of Directive 71/305 may be relied on by an individual before the national courts.

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CONCERNS	Interprets 31971L0305 Interprets 31971L0305-A20 Interprets 31971L0305-A26 Interprets 31971L0305-A29 Interprets 31971L0305-A29P1 Interprets 31971L0305-A29P2
SUB	Approximation of laws ; Freedom of establishment and services ; Free movement of services ; Right of establishment
AUTLANG	Dutch
OBSERV	Italy ; Commission ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A9* Arrondissementsrechtbank 's-Gravenhage, vonnis van 28/01/1987 (85/6575)
NOTES	Fierstra, M.A.: S.E.W. ; Sociaal-economische wetgeving 1990 p.76-79 Rodríguez-Arana Muñoz, Jaime F.: Noticias CEE 1990 no 65 p.133-138 Colabianchi, Alberto: Giustizia civile 1990 I p.586-588 Benedict, Christoph: Neue juristische Wochenschrift 2001 p.947-949
PROCEDU	Reference for a preliminary ruling
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Judgment of the Court (Sixth Chamber)
of 9 July 1987
SA Constructions et entreprises industrielles (CEI) and others v Société coopérative "Association intercommunale pour les autoroutes des Ardennes" and others.
References for a preliminary ruling: Conseil d'Etat - Belgium.
Procedure for the award of public works contracts - Determination of the constructor's financial and economic standing.
Joined cases 27/86, 28/86 and 29/86.

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1 . APPROXIMATION OF LAWS - PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS - TENDERER' S FINANCIAL AND ECONOMIC STANDING - REFERENCES REQUIRED - MEMBER STATES' DISCRETION - FIXING OF MAXIMUM VALUE OF THE WORKS WHICH MAY BE CARRIED OUT AT ONE TIME - PERMISSIBLE

(COUNCIL DIRECTIVE 71/305, ART. 25)

2 . APPROXIMATION OF LAWS - PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS - TENDERER' S FINANCIAL AND ECONOMIC STANDING - LEVEL REQUIRED - MEMBER STATES' DISCRETION - RECOGNITION IN A MEMBER STATE - PROBATIVE VALUE IN REGARD TO AN AWARDING AUTHORITY IN ANOTHER MEMBER STATE - LIMITS

(COUNCIL DIRECTIVE 71/305, ARTS 25, 26 AND 28)

1 . THE REFERENCES ENABLING A CONTRACTOR' S FINANCIAL AND ECONOMIC STANDING TO BE DETERMINED ARE NOT EXHAUSTIVELY ENUMERATED IN ARTICLE 25 OF COUNCIL DIRECTIVE 71/305 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS.

A STATEMENT OF THE TOTAL VALUE OF THE WORKS AWARDED TO A CONTRACTOR MAY BE REQUIRED FROM TENDERERS AS A REFERENCE WITHIN THE MEANING OF THE SAID ARTICLE 25 AND NEITHER THAT ARTICLE NOR ANY OTHER PROVISION OF THE DIRECTIVE PRECLUDES A MEMBER STATE FROM FIXING THE VALUE OF THE WORKS WHICH MAY BE CARRIED OUT AT ONE TIME.

2 . ARTICLES 25, 26 AND 28 OF DIRECTIVE 71/305 MUST BE INTERPRETED AS NOT PRECLUDING AN AWARDING AUTHORITY FROM REQUIRING A CONTRACTOR RECOGNIZED IN ANOTHER MEMBER STATE TO FURNISH PROOF THAT HIS UNDERTAKING HAS THE FINANCIAL AND ECONOMIC STANDING AND TECHNICAL CAPACITY REQUIRED BY NATIONAL LAW EVEN WHEN THE CONTRACTOR IS RECOGNIZED IN THE MEMBER STATE IN WHICH HE IS ESTABLISHED IN A CLASS EQUIVALENT TO THAT REQUIRED BY THE NATIONAL LAW BY VIRTUE OF THE VALUE OF THE CONTRACT TO BE AWARDED UNLESS THE CLASSIFICATION OF UNDERTAKINGS IN BOTH MEMBER STATES CONCERNED IS BASED ON EQUIVALENT CRITERIA IN REGARD TO THE CAPACITIES REQUIRED.

IN JOINED CASES 27, 28 AND 29/86

REFERENCES TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE THIRD CHAMBER OF THE ADMINISTRATIVE APPEALS SECTION OF THE CONSEIL D' ETAT (STATE COUNCIL) OF BELGIUM FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT

IN CASE 27/86 BETWEEN

CONSTRUCTIONS ET ENTREPRISES INDUSTRIELLES SA (CEI)

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AND

ASSOCIATION INTERCOMMUNALE POUR LES AUTOROUTES DES ARDENNES,

WHOSE SUCCESSOR IN TITLE IS THE FONDS DES ROUTES (ROAD FUND), REPRESENTED BY THE MINISTER FOR PUBLIC WORKS;

IN CASE 28/86 BETWEEN

ING . A . BELLINI & CO. SPA, A LIMITED COMPANY INCORPORATED UNDER ITALIAN LAW,

AND

REGIE DES BATIMENTS (BUILDING COMMISSION), REPRESENTED BY THE MINISTER FOR PUBLIC WORKS;

INTERVENER :

CONFEDERATION NATIONALE DE LA CONSTRUCTION ASBL;

IN CASE 29/86 BETWEEN

ING . A . BELLINI & CO. SPA

AND

BELGIAN STATE, REPRESENTED BY THE MINISTER FOR DEFENCE,

ON THE INTERPRETATION OF COUNCIL DIRECTIVE 71/305/EEC OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1971 (II), P . 682),

THE COURT (SIXTH CHAMBER)

COMPOSED OF : C. KAKOURIS, PRESIDENT OF CHAMBER, T.*F. O' HIGGINS, T . KOOPMANS, K. BAHLMANN AND G.*C. RODRIGUEZ IGLESIAS, JUDGES,

ADVOCATE GENERAL : J. MISCHO

REGISTRAR : B. PASTOR, ADMINISTRATOR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF

CONSTRUCTIONS ET ENTREPRISES INDUSTRIELLES SA, THE PLAINTIFF IN THE MAIN PROCEEDINGS IN CASE 27/86, BY R. LIBIEZ, J. PUTZEYS AND X. LEURQUIN, AVOCATS,

ING . A . BELLINI & CO. SPA, THE PLAINTIFF IN THE MAIN PROCEEDINGS IN CASES 28 AND 29/86, BY J. PUTZEYS AND X. LEURQUIN, AVOCATS,

ASSOCIATION INTERCOMMUNALE POUR LES AUTOROUTES DES ARDENNES, NOW THE FONDS DES ROUTES, THE DEFENDANT IN THE MAIN PROCEEDINGS IN CASE 27/86, BY P . LAMBERT, AVOCAT,

REGIE DES BATIMENTS, THE DEFENDANT IN THE MAIN PROCEEDINGS IN CASE 28/86, BY P . LAMBERT, AVOCAT,

THE BELGIAN STATE, THE DEFENDANT IN THE MAIN PROCEEDINGS IN CASE 29/86, BY J.*P. PIERARD, AGENT FOR THE MINISTER FOR DEFENCE,

CONFEDERATION NATIONALE DE LA CONSTRUCTION, THE INTERVENER IN THE MAIN PROCEEDINGS IN CASE 28/86, BY L. GOFFIN AND J.-L. LODOMEZ, AVOCATS,

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THE KINGDOM OF SPAIN, BY L.*J. CASANOVA FERNANDEZ, SECRETARY-GENERAL FOR EUROPEAN COMMUNITIES AFFAIRS,

THE ITALIAN REPUBLIC, BY IVO BRAGUGLIA, AVVOCATO DELLO STATO,

THE COMMISSION OF THE EUROPEAN COMMUNITIES, BY M. GUERRIN, LEGAL ADVISER,

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 13 MAY 1987,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 11 JUNE 1987,

GIVES THE FOLLOWING

JUDGMENT

1 BY THREE JUDGMENTS OF 15 JANUARY 1986, WHICH WERE RECEIVED AT THE COURT ON 3 FEBRUARY 1986, THE CONSEIL D' ETAT OF BELGIUM REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY SEVERAL QUESTIONS ON THE INTERPRETATION OF COUNCIL DIRECTIVE 71/305/EEC OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1971 (II), P. 682).

2 THOSE QUESTIONS AROSE IN THE CONTEXT OF PROCEEDINGS FOR THE ANNULMENT OF DECISIONS AWARDING VARIOUS PUBLIC WORKS CONTRACTS.

3 THE PLAINTIFF IN THE MAIN PROCEEDINGS IN CASE 27/86 (CEI) WAS EXCLUDED IN FAVOUR OF AN UNDERTAKING WHICH HAD SUBMITTED A HIGHER TENDER ON THE GROUND THAT THE TOTAL VALUE OF THE WORKS, BOTH PUBLIC AND PRIVATE, WHICH CEI HAD IN HAND AT THE TIME OF THE AWARD OF THE CONTRACT EXCEEDED THE LIMIT LAID DOWN BY THE APPLICABLE BELGIAN RULES

4 THE TENDERS SUBMITTED BY THE PLAINTIFF IN THE MAIN PROCEEDINGS IN CASES 28 AND 29/86 (BELLINI) WERE ALSO EXCLUDED IN FAVOUR OF UNDERTAKINGS WHICH HAD SUBMITTED HIGHER TENDERS ON THE GROUND THAT BELLINI DID NOT SATISFY THE CRITERIA LAID DOWN BY THE BELGIAN LEGISLATION FOR RECOGNITION IN THE CLASSES REQUIRED BY THE CONTRACT DOCUMENTS NOTWITHSTANDING THE FACT THAT IT HAD SUBMITTED A CERTIFICATE OF RECOGNITION ISSUED IN ITALY IN A CLASS WHICH ENTITLED IT TO BID IN ITALY FOR CONTRACTS OF A VALUE CORRESPONDING TO THAT OF THE BELGIAN CONTRACTS IN QUESTION.

5 IN THE THREE MAIN PROCEEDINGS, THE PLAINTIFFS ALLEGE IN SUPPORT OF THEIR APPLICATIONS FOR ANNULMENT OF THE DECISIONS AWARDING THE CONTRACTS, INTER ALIA, THAT THOSE DECISIONS WERE CONTRARY TO THE PROVISIONS OF DIRECTIVE 71/305.

6 SINCE IT CONSIDERED THAT AN INTERPRETATION OF CERTAIN PROVISIONS OF THAT DIRECTIVE WAS NECESSARY, THE CONSEIL D' ETAT STAYED PROCEEDINGS AND REFERRED THE FOLLOWING QUESTIONS TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING :

A - IN CASE 27/86

> "(1) ARE THE REFERENCES ENABLING A CONTRACTOR' S FINANCIAL AND ECONOMIC STANDING TO BE DETERMINED EXHAUSTIVELY ENUMERATED IN ARTICLE 25 OF DIRECTIVE 71/305/EEC?

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(2) IF NOT, CAN THE VALUE OF THE WORKS WHICH MAY BE CARRIED OUT AT ONE TIME BE REGARDED AS A REFERENCE ENABLING A CONTRACTOR' S FINANCIAL AND ECONOMIC STANDING TO BE DETERMINED WITHIN THE MEANING OF ARTICLE 25 OF THE DIRECTIVE?"

B - IN CASES 28 AND 29/86

"DOES DIRECTIVE 71/305/EEC OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS, AND IN PARTICULAR ARTICLE 25 AND ARTICLE 26 (D) THEREOF, PERMIT A BELGIAN AWARDING AUTHORITY TO REJECT A TENDER SUBMITTED BY AN ITALIAN CONTRACTOR ON THE GROUNDS THAT THE UNDERTAKING HAS NOT SHOWN THAT IT POSSESSES THE MINIMUM AMOUNT OF OWN FUNDS REQUIRED BY BELGIAN LEGISLATION AND THAT IT DOES NOT HAVE IN ITS EMPLOY ON AVERAGE THE MINIMUM NUMBER OF WORKERS AND MANAGERIAL STAFF REQUIRED BY THAT LEGISLATION, WHEN THE CONTRACTOR IS RECOGNIZED IN ITALY IN A CLASS EQUIVALENT TO THAT REQUIRED IN BELGIUM BY VIRTUE OF THE VALUE OF THE CONTRACT TO BE AWARDED?"

7 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE BACKGROUND TO THE MAIN PROCEEDINGS, THE COMMUNITY AND NATIONAL LEGISLATION AT ISSUE, THE WRITTEN OBSERVATIONS SUBMITTED TO THE COURT AND THE CONDUCT OF THE PROCEDURE, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT.

THE QUESTION CONCERNING THE EXHAUSTIVE NATURE OF THE LIST OF REFERENCES IN ARTICLE 25 OF THE DIRECTIVE

8 THE FIRST PARAGRAPH OF ARTICLE 25 OF THE DIRECTIVE PROVIDES THAT PROOF OF THE CONTRACTOR' S ECONOMIC AND FINANCIAL STANDING MAY, AS A GENERAL RULE, BE FURNISHED BY ONE OR MORE OF THE REFERENCES MENTIONED THEREIN . UNDER THE SECOND PARAGRAPH, THE AUTHORITIES AWARDING CONTRACTS ARE REQUIRED TO SPECIFY IN THE NOTICE OR IN THE INVITATION TO TENDER WHICH REFERENCES THEY HAVE CHOSEN FROM AMONG THOSE MENTIONED IN THE PREVIOUS PARAGRAPH "AND WHAT REFERENCES OTHER THAN THOSE MENTIONED UNDER (A), (B) OR (C) ARE TO BE PRODUCED ".

9 IT CAN BE SEEN FROM THE VERY WORDING OF THAT ARTICLE AND, IN PARTICULAR, THE SECOND PARAGRAPH THEREOF, THAT THE LIST OF REFERENCES MENTIONED THEREIN IS NOT EXHAUSTIVE.

10 THE REPLY TO THE NATIONAL COURT MUST THEREFORE BE THAT THE REFERENCES ENABLING A CONTRACTOR' S FINANCIAL AND ECONOMIC STANDING TO BE DETERMINED ARE NOT EXHAUSTIVELY ENUMERATED IN ARTICLE 25 OF DIRECTIVE 71/305/EEC.

THE QUESTION CONCERNING THE VALUE OF THE WORKS WHICH MAY BE CARRIED OUT AT ONE TIME

11 WITH REGARD TO THE NATIONAL COURT' S SECOND QUESTION IN CASE 27/86, IT SHOULD BE NOTED THAT THE TOTAL VALUE OF THE WORKS AWARDED TO A CONTRACTOR AT A PARTICULAR MOMENT MAY BE A USEFUL FACTOR IN DETERMINING, IN A SPECIFIC INSTANCE, THE FINANCIAL AND ECONOMIC STANDING OF A CONTRACTOR IN RELATION TO HIS OBLIGATIONS. SINCE THE REFERENCES ARE NOT EXHAUSTIVELY ENUMERATED IN ARTICLE 25 OF THE DIRECTIVE, THERE IS THEREFORE NO REASON WHY SUCH INFORMATION SHOULD NOT BE REQUIRED OF TENDERERS BY WAY OF A REFERENCE WITHIN THE MEANING

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OF THAT ARTICLE.

12 HOWEVER, IN THE LIGHT OF THE GROUNDS OF THE ORDER FOR REFERENCE, THE CONTENT OF THE BELGIAN LEGISLATION MENTIONED THEREIN AND THE ARGUMENTS BEFORE THIS COURT, THE NATIONAL COURT' S QUESTION MUST BE UNDERSTOOD AS ALSO SEEKING TO ASCERTAIN WHETHER A NATIONAL RULE FIXING THE MAXIMUM VALUE OF WORKS WHICH MAY BE CARRIED OUT AT ONE TIME IS COMPATIBLE WITH THE DIRECTIVE.

13 IN THAT REGARD, IT SHOULD BE NOTED THAT THE FIXING OF SUCH A LIMIT IS NEITHER AUTHORIZED NOR PROHIBITED BY ARTICLE 25 OF THE DIRECTIVE, BECAUSE THE PURPOSE OF THAT PROVISION IS NOT TO DELIMIT THE POWER OF THE MEMBER STATES TO FIX THE LEVEL OF FINANCIAL AND ECONOMIC STANDING REQUIRED IN ORDER TO TAKE PART IN PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS BUT TO DETERMINE THE REFERENCES OR EVIDENCE WHICH MAY BE FURNISHED IN ORDER TO ESTABLISH THE CONTRACTOR' S FINANCIAL AND ECONOMIC STANDING.

14 IN ORDER TO RULE ON THE COMPATIBILITY OF SUCH A LIMIT WITH THE DIRECTIVE AS A WHOLE, THE PURPOSE AND OBJECT OF THE DIRECTIVE MUST BE BORNE IN MIND. THE PURPOSE OF DIRECTIVE 71/305 IS TO ENSURE THAT THE REALIZATION WITHIN THE COMMUNITY OF FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES IN REGARD TO PUBLIC WORKS CONTRACTS INVOLVES, IN ADDITION TO THE ELIMINATION OF RESTRICTIONS, THE COORDINATION OF NATIONAL PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS . SUCH COORDINATION "SHOULD TAKE INTO ACCOUNT AS FAR AS POSSIBLE THE PROCEDURES AND ADMINISTRATIVE PRACTICES IN FORCE IN EACH MEMBER STATE" (SECOND RECITAL IN THE PREAMBLE TO THE DIRECTIVE). ARTICLE 2 EXPRESSLY PROVIDES THAT THE AUTHORITIES AWARDING CONTRACTS ARE TO APPLY THEIR NATIONAL PROCEDURES ADAPTED TO THE PROVISIONS OF THE DIRECTIVE.

15 THE DIRECTIVE THEREFORE DOES NOT LAY DOWN A UNIFORM AND EXHAUSTIVE BODY OF COMMUNITY RULES. WITHIN THE FRAMEWORK OF THE COMMON RULES WHICH IT CONTAINS, THE MEMBER STATES REMAIN FREE TO MAINTAIN OR ADOPT SUBSTANTIVE AND PROCEDURAL RULES IN REGARD TO PUBLIC WORKS CONTRACTS ON CONDITION THAT THEY COMPLY WITH ALL THE RELEVANT PROVISIONS OF COMMUNITY LAW AND, IN PARTICULAR, THE PROHIBITIONS FLOWING FROM THE PRINCIPLES LAID DOWN IN THE TREATY IN REGARD TO THE RIGHT OF ESTABLISHMENT AND THE FREEDOM TO PROVIDE SERVICES.

16 THE FIXING IN A MEMBER STATE OF A MAXIMUM VALUE FOR WORKS WHICH MAY BE CARRIED OUT AT ONE TIME IS NOT CONTRARY TO THE SAID PRINCIPLES AND THERE IS NOTHING TO SUGGEST THAT IT HAS THE EFFECT OF RESTRICTING ACCESS BY CONTRACTORS IN THE COMMUNITY TO PUBLIC WORKS CONTRACTS.

17 IN THOSE CIRCUMSTANCES, IT MUST BE HELD THAT AS COMMUNITY LAW NOW STANDS, THERE IS NO REASON WHY THE MEMBER STATES, IN THE CONTEXT OF THEIR POWERS IN REGARD TO PUBLIC WORKS CONTRACTS, SHOULD NOT FIX A MAXIMUM VALUE FOR WORKS WHICH MAY BE CARRIED OUT AT ONE TIME.

18 THE REPLY TO THE NATIONAL COURT SHOULD THEREFORE BE THAT A STATEMENT OF THE TOTAL VALUE OF THE WORKS AWARDED TO A CONTRACTOR MAY BE REQUIRED FROM TENDERERS AS A REFERENCE WITHIN THE MEANING OF ARTICLE 25 OF DIRECTIVE 71/305 AND THAT NEITHER THAT ARTICLE NOR ANY OTHER PROVISION OF THE DIRECTIVE

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PRECLUDES A MEMBER STATE FROM FIXING THE VALUE OF THE WORKS WHICH MAY BE CARRIED OUT AT ONE TIME.

THE QUESTION CONCERNING THE EFFECTS OF BEING INCLUDED IN AN OFFICIAL LIST OF RECOGNIZED CONTRACTORS IN ONE MEMBER STATE VIS-A-VIS THE AUTHORITIES AWARDING CONTRACTS IN OTHER MEMBER STATES

19 IN ORDER TO REPLY TO THIS QUESTION, IT IS NECESSARY TO MAKE CLEAR THE FUNCTION OF A CONTRACTOR' S INCLUSION IN AN OFFICIAL LIST OF RECOGNIZED CONTRACTORS IN A MEMBER STATE IN THE OVERALL SCHEME OF THE DIRECTIVE .

20 UNDER ARTICLE 28 (1), MEMBER STATES WHICH HAVE OFFICIAL LISTS OF RECOGNIZED CONTRACTORS MUST ADAPT THEM TO THE PROVISIONS OF ARTICLE 23 (A) TO (D) AND (G) AND OF ARTICLES 24 TO 26.

21 THE SAID PROVISIONS OF ARTICLE 23 DEFINE THE CIRCUMSTANCES RELATING TO THE INSOLVENCY OR DISHONESTY OF A CONTRACTOR JUSTIFYING HIS EXCLUSION FROM PARTICIPATION IN A CONTRACT. THE PROVISIONS OF ARTICLES 25 AND 26 CONCERN THE REFERENCES WHICH MAY BE FURNISHED AS PROOF OF THE CONTRACTOR' S FINANCIAL AND ECONOMIC STANDING, ON THE ONE HAND, AND TECHNICAL KNOWLEDGE OR ABILITY ON THE OTHER.

22 THE HARMONIZATION OF OFFICIAL LISTS OF RECOGNIZED CONTRACTORS PROVIDED FOR IN ARTICLE 28 (1) IS THEREFORE OF LIMITED SCOPE. IT CONCERNS IN PARTICULAR REFERENCES ATTESTING TO THE FINANCIAL AND ECONOMIC STANDING OF CONTRACTORS AND THEIR TECHNICAL KNOWLEDGE AND ABILITY . ON THE OTHER HAND, THE CRITERIA FOR THEIR CLASSIFICATION ARE NOT HARMONIZED.

23 ARTICLE 28 (2) PROVIDES THAT CONTRACTORS REGISTERED IN SUCH LISTS MAY, FOR EACH CONTRACT, SUBMIT TO THE AUTHORITY AWARDING CONTRACTS A CERTIFICATE OF REGISTRATION ISSUED BY THE COMPETENT AUTHORITY . THAT CERTIFICATE IS TO STATE THE REFERENCES WHICH ENABLED THEM TO BE REGISTERED IN THE LIST AND THE CLASSIFICATION GIVEN IN THAT LIST .

24 ARTICLE 28 (3) ENTITLES CONTRACTORS REGISTERED IN AN OFFICIAL LIST IN ANY MEMBER STATE WHATEVER TO USE SUCH REGISTRATION, WITHIN THE LIMITS LAID DOWN IN THAT PROVISION, AS AN ALTERNATIVE MEANS OF PROVING BEFORE THE AUTHORITY OF ANOTHER MEMBER STATE AWARDING CONTRACTS THAT THEY SATISFY THE QUALITATIVE CRITERIA LISTED IN ARTICLES 23 TO 26 OF THE DIRECTIVE (JUDGMENT OF 10 FEBRUARY 1982 IN CASE 76/81 TRANSPOROUTE V MINISTER FOR PUBLIC WORKS ((1982)) ECR 417).

25 IN REGARD, IN PARTICULAR, TO EVIDENCE OF CONTRACTORS' ECONOMIC AND FINANCIAL STANDING AND TECHNICAL KNOWLEDGE OR ABILITY, REGISTRATION IN AN OFFICIAL LIST OF RECOGNIZED CONTRACTORS MAY THEREFORE REPLACE THE REFERENCES REFERRED TO IN ARTICLES 25 AND 26 IN SO FAR AS SUCH REGISTRATION IS BASED UPON EQUIVALENT INFORMATION.

26 INFORMATION DEDUCED FROM REGISTRATION IN AN OFFICIAL LIST MAY NOT BE QUESTIONED BY THE AUTHORITIES AWARDING CONTRACTS. NONE THE LESS, THOSE AUTHORITIES MAY DETERMINE THE LEVEL OF FINANCIAL AND ECONOMIC STANDING AND TECHNICAL KNOWLEDGE AND ABILITY REQUIRED IN ORDER TO PARTICIPATE IN A GIVEN CONTRACT.

27 CONSEQUENTLY, THE AUTHORITIES AWARDING CONTRACTS ARE REQUIRED TO ACCEPT

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THAT A CONTRACTOR' S ECONOMIC AND FINANCIAL STANDING AND TECHNICAL KNOWLEDGE AND ABILITY ARE SUFFICIENT FOR WORKS CORRESPONDING TO HIS CLASSIFICATION ONLY IN SO FAR AS THAT CLASSIFICATION IS BASED ON EQUIVALENT CRITERIA IN REGARD TO THE CAPACITIES REQUIRED. IF THAT IS NOT THE CASE, HOWEVER, THEY ARE ENTITLED TO REJECT A TENDER SUBMITTED BY A CONTRACTOR WHO DOES NOT FULFIL THE REQUIRED CONDITIONS

28 THE REPLY TO THE NATIONAL COURT SHOULD THEREFORE BE THAT ARTICLE 25, ARTICLE 26 (D) AND ARTICLE 28 OF THE DIRECTIVE MUST BE INTERPRETED AS NOT PRECLUDING AN AWARDING AUTHORITY FROM REQUIRING A CONTRACTOR RECOGNIZED IN ANOTHER MEMBER STATE TO FURNISH PROOF THAT HIS UNDERTAKING HAS THE MINIMUM OWN FUNDS, MANPOWER AND MANAGERIAL STAFF REQUIRED BY NATIONAL LAW EVEN WHEN THE CONTRACTOR IS RECOGNIZED IN THE MEMBER STATE IN WHICH HE IS ESTABLISHED IN A CLASS EQUIVALENT TO THAT REQUIRED BY THE NATIONAL LAW BY VIRTUE OF THE VALUE OF THE CONTRACT TO BE AWARDED.

COSTS

29 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES, THE KINGDOM OF SPAIN AND THE ITALIAN REPUBLIC, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE. SINCE THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED, IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT, THE DECISION ON COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS,

THE COURT (SIXTH CHAMBER),

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE CONSEIL D' ETAT OF BELGIUM BY JUDGMENTS OF 15 JANUARY 1986, HEREBY RULES :

(1) THE REFERENCES ENABLING A CONTRACTOR' S FINANCIAL AND ECONOMIC STANDING TO BE DETERMINED ARE NOT EXHAUSTIVELY ENUMERATED IN ARTICLE 25 OF COUNCIL DIRECTIVE 71/305/EEC OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS.

(2) A STATEMENT OF THE TOTAL VALUE OF THE WORKS AWARDED TO A CONTRACTOR MAY BE REQUIRED FROM TENDERERS AS A REFERENCE WITHIN THE MEANING OF ARTICLE 25 OF DIRECTIVE 71/305/EEC AND NEITHER THAT ARTICLE NOR ANY OTHER PROVISION OF THE DIRECTIVE PRECLUDES A MEMBER STATE FROM FIXING THE VALUE OF THE WORKS WHICH MAY BE CARRIED OUT AT ONE TIME.

(3) ARTICLE 25, ARTICLE 26 (D) AND ARTICLE 28 OF DIRECTIVE 71/305/EEC MUST BE INTERPRETED AS NOT PRECLUDING AN AWARDING AUTHORITY FROM REQUIRING A CONTRACTOR RECOGNIZED IN ANOTHER MEMBER STATE TO FURNISH PROOF THAT HIS UNDERTAKING HAS THE MINIMUM OWN FUNDS, MANPOWER AND MANAGERIAL STAFF REQUIRED BY NATIONAL LAW EVEN WHEN THE CONTRACTOR IS RECOGNIZED IN THE MEMBER STATE IN WHICH HE IS ESTABLISHED IN A CLASS EQUIVALENT TO THAT REQUIRED BY THE NATIONAL LAW BY VIRTUE OF THE VALUE OF THE CONTRACT TO BE AWARDED.

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DOCNUM	61986J0027
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1986 ; J ; judgment
PUBREF	European Court reports 1987 Page 03347
DOC	1987/07/09
LODGED	1986/02/03
JURCIT	31971L0305-A02 : N 14 31971L0305-A23 : N 21 31971L0305-A25 : N 6 8 - 13 18 28 31971L0305-A25L1 : N 8 31971L0305-A25L2 : N 8 9 31971L0305-A26 : N 21 31971L0305-A26LD : N 6 28 31971L0305-A28 : N 28 31971L0305-A28P1 : N 20 22 31971L0305-A28P2 : N 23 31971L0305-A28P3 : N 24 31971L0305-C2 : N 14 31971L0305 : N 1 14 61981J0076 : N 24
CONCERNS	Interprets 31971L0305-A25 Interprets 31971L0305-A26LD Interprets 31971L0305-A28
SUB	Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	French
MISCINF	Joined cases : 686J0028 686J0029
OBSERV	Spain ; Italy ; Commission ; Member States ; Institutions
NATIONA	Belgium
NATCOUR	** AFFAIRE 27/86 ** *A9* Conseil d'Etat (Belgique), 3e chambre, arrêt no 26.058 du 15/01/86 (A.24.443/III-7081) *P1* Conseil d'Etat (Belgique), 3e chambre, arrêt no 33.448 du 21/11/89 (A.24.443/III-7081) - Administration publique 1989 M p.170 ** AFFAIRE 28/86 ** *A9* Conseil d'Etat (Belgique), 3e chambre, arrêt no 26.059 du 15/01/86 (A.25.062/III-7245)

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P1 Conseil d'Etat (Belgique), 3e chambre, arrêt no 34.777 du 20/04/90 (A.25.062/III-7245)
** AFFAIRE 29/86 **
A9 Conseil d'Etat (Belgique), 3e chambre, arrêt no 26.060 du 15/01/86 (A.25.399/III-7389)
P1 Conseil d'Etat (Belgique), 3e chambre, arrêt no 34.778 du 20/04/90 (A.25.399/III-7389)

NOTES X: Journal des tribunaux 1988 p.163
Santias Viada, José Antonio: Noticias CEE 1988 no 43-44 p.213-218

PROCEDU Reference for a preliminary ruling

ADVGEN Mischo

JUDGRAP Rodriguez Iglesias

DATES of document: 09/07/1987
of application: 03/02/1986

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Judgment of the Court of 16 May 1991 Commission of the European Communities v Italian Republic. Failure of a Member State to fulfil its obligations - Measure having equivalent effect - Aid for the purchase of motor vehicles of domestic manufacture. Case C-263/85.

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1. Free movement of goods - Quantitative restrictions - Measure having equivalent effect - Reservation of part of a public contract to undertakings established in a given region of the national territory - Not permissible - Measure favouring only part of national production - No impact

(EEC Treaty, Art. 30)

2. Free movement of goods - Quantitative restrictions - Measure having equivalent effect - Measure capable of being classified as aid within the meaning of Article 92 of the Treaty - Possibility not excluding the applicability of the prohibition of measures having equivalent effect

(EEC Treaty, Arts 30 and 92)

1. Article 30 of the Treaty precludes national legislation which reserves to undertakings established in particular regions of the national territory a proportion of public supply contracts.

2. Since only national producers, albeit not all of them, may benefit from the advantage granted, it is of little consequence that such a preferential system also has a restrictive effect as regards national producers (see judgment in Case C-21/88 Du Pont de Nemours Italiana [1990] ECR-I 889).

3. As the Court has already held (judgments in Case 103/84 Commission v Italy [1986] ECR 1759 and in Case C-21/88 Du Pont de Nemours Italiana, supra), the fact that a national measure may be classified as aid within the meaning of Article 92 of the Treaty is not a sufficient reason for exempting it from prohibition under Article 30.

In Case C-263/85,

Commission of the European Communities, represented by Gianluigi Campogrande, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Department, Centre Wagner, Kirchberg,

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Legal Department at the Ministry for Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5-7, Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by requiring public bodies to purchase vehicles of domestic manufacture in order to qualify for the aid provided for by Law No 151 of 10 April 1981, the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O' Higgins and G. C. Rodríguez Iglesias (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

(The grounds of the judgment are not reproduced.)

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hereby:

1. Declares that, by requiring public bodies to purchase vehicles of domestic manufacture in order to qualify for the aid provided for by Law No 151 of 10 April 1991, the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty;

2. Orders the Italian Republic to pay the costs.

DOCNUM	61985J0263
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1985 ; J ; judgment
PUBREF	European Court reports 1991 Page I-02457 Pub.RJ Page Pub somm
DOC	1991/05/16
LODGED	1985/08/27
JURCIT	11957E030 : N 1 10 - 14 11957E092-P3LC : N 10 11957E092 : N 10 12 11957E093 : N 7 31977L0062-A26 : N 5 61984J0103 : N 12 61988J0021 : N 9 - 12
CONCERNS	Failure concerning 11957E030
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Competition ; State aids
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful

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ADVGEN Lenz

JUDGRAP O'Higgins

DATES of document: 16/05/1991
of application: 27/08/1985

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**Judgment of the Court
of 10 March 1987
Commission of the European Communities v Italian Republic.
Failure to publish a notice of a public works contract.
Case 199/85.**

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APPROXIMATION OF LAWS - PROCEDURE FOR THE AWARD OF PUBLIC WORKS CONTRACTS - DEROGATIONS FROM THE COMMON RULES - STRICT INTERPRETATION - EXISTENCE OF EXCEPTIONAL CIRCUMSTANCES - BURDEN OF PROOF

(COUNCIL DIRECTIVE 71/305, ART. 9 (B) AND (D)*)

ARTICLE 9 OF DIRECTIVE 71/305 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS ALLOWS DEROGATIONS FROM THE COMMON RULES IN A NUMBER OF CASES WHICH INCLUDE THOSE SET OUT IN PARAGRAPHS (B) AND (D). THOSE DEROGATIONS FROM THE RULES INTENDED TO ENSURE THE EFFECTIVENESS OF THE RIGHTS CONFERRED BY THE TREATY IN THE FIELD OF PUBLIC WORKS CONTRACTS MUST BE INTERPRETED STRICTLY AND THE BURDEN OF PROVING THE ACTUAL EXISTENCE OF EXCEPTIONAL CIRCUMSTANCES JUSTIFYING A DEROGATION LIES ON THE PERSON SEEKING TO RELY ON THOSE CIRCUMSTANCES.

IN CASE 199/85

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY GUIDO BERARDIS, A MEMBER OF ITS LEGAL DEPARTMENT, ACTING AS AGENT, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF GEORGE KREMLIS, ALSO A MEMBER OF ITS LEGAL DEPARTMENT, JEAN MONNET BUILDING, KIRCHBERG,

APPLICANT,

V

ITALIAN REPUBLIC, REPRESENTED BY LUIGI FERRARI BRAVO, HEAD OF THE DEPARTMENT FOR CONTENTIOUS DIPLOMATIC AFFAIRS, ACTING AS AGENT, ASSISTED BY PIER GIORGIO FERRI, AVVOCATO DELLO STATO, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE ITALIAN EMBASSY,

DEFENDANT,

APPLICATION FOR A DECLARATION THAT THE ITALIAN REPUBLIC, MORE PARTICULARLY THE MUNICIPALITY OF MILAN, AS A LOCAL PUBLIC AUTHORITY, BY DECIDING TO AWARD BY PRIVATE CONTRACT A CONTRACT FOR THE CONSTRUCTION OF A PLANT FOR THE RECYCLING OF SOLID URBAN WASTE AND THUS FAILING TO PUBLISH A CONTRACT NOTICE IN THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER COUNCIL DIRECTIVE 71/305/EEC CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS,

THE COURT

COMPOSED OF : LORD MACKENZIE STUART, PRESIDENT, T. F. O' HIGGINS AND F . SCHOCKWEILER (PRESIDENTS OF CHAMBERS), T. KOOPMANS, K. BAHLMANN, R . JOLIET AND G. C. RODRIGUEZ IGLESIAS, JUDGES,

ADVOCATE GENERAL : C. O. LENZ

REGISTRAR : D. LOUTERMAN, ADMINISTRATOR

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HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 6 NOVEMBER 1986,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 13 JANUARY 1987,

GIVES THE FOLLOWING

JUDGMENT

1 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON 28 JUNE 1985 THE COMMISSION OF THE EUROPEAN COMMUNITIES BROUGHT AN ACTION UNDER ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT THE ITALIAN REPUBLIC, MORE PARTICULARLY THE MUNICIPALITY OF MILAN, AS A LOCAL PUBLIC AUTHORITY, BY DECIDING TO AWARD BY PRIVATE CONTRACT A CONTRACT FOR THE CONSTRUCTION OF A PLANT FOR THE RECYCLING OF SOLID URBAN WASTE AND THUS FAILING TO PUBLISH A NOTICE THEREOF IN THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER COUNCIL DIRECTIVE 71/305 OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1971 (II), P.*682).

2 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR THE FACTS AND THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT.

I - ADMISSIBILITY

3 THE ITALIAN REPUBLIC HAS RAISED AN OBJECTION OF INADMISSIBILITY. IT MAINTAINS THAT IT FULLY COMPLIED WITH THE REASONED OPINION DELIVERED BY THE COMMISSION AND THAT, CONSEQUENTLY, AN ACTION BEFORE THE COURT OF JUSTICE UNDER ARTICLE 169 OF THE EEC TREATY IS NO LONGER ADMISSIBLE .

4 IN ITS REASONED OPINION DELIVERED IN THE PRE-LITIGATION PROCEDURE THE COMMISSION REQUESTED THE ITALIAN REPUBLIC "TO ADOPT THE MEASURES NECESSARY TO COMPLY WITH THIS REASONED OPINION WITHIN 30 DAYS OF NOTIFICATION HEREOF" AND IN THE FINAL PARAGRAPH THEREOF STATED THAT "BY NECESSARY MEASURES IS MEANT ABOVE ALL A WRITTEN UNDERTAKING BY THE MUNICIPALITY OF MILAN THAT IT WILL COMPLY WITH ALL THE PROVISIONS OF DIRECTIVE 71/305/EEC IN FUTURE ".

5 IN RESPONSE TO THE REASONED OPINION, THE ITALIAN AUTHORITIES SENT TO THE COMMISSION A COPY OF A LETTER IN WHICH THE MINISTER FOR THE INTERIOR INSTRUCTED THE PREFECT OF MILAN TO ENJOIN THE MUNICIPALITY OF MILAN STRICTLY TO ENSURE THAT THE DIRECTIVE WAS COMPLIED WITH IN FULL IN FUTURE TOGETHER WITH THE FOLLOWING WRITTEN DECLARATION BY THE MAYOR OF MILAN DATED 19 APRIL 1984 :

> "... ALTHOUGH CONVINCED THAT THE MUNICIPAL ADMINISTRATION ACTED, AS ON EVERY OTHER OCCASION, IN A LAWFUL MANNER IN AUTHORIZING THE AWARD BY PRIVATE CONTRACT OF A CONTRACT FOR THE CONSTRUCTION OF THE SAID PLANT FOR THE RECYCLING OF SOLID URBAN WASTE,
>
> I HEREBY DECLARE,
>
> AS REQUESTED IN THE AFOREMENTIONED OPINION, THAT THE MUNICIPALITY OF MILAN WILL ENSURE THAT, IN THE FUTURE, TOO, ITS ADMINISTRATIVE ACTION

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IS IN CONFORMITY WITH THE PROVISIONS OF PRIMARY AND SECONDARY LEGISLATION, INCLUDING ALL THE PROVISIONS OF DIRECTIVE 71/305/EEC, BY ACCORDING THEM FULL RESPECT, IN BOTH FORM AND SUBSTANCE ".

6 IT IS CLEAR FROM THE DOCUMENTS BEFORE THE COURT THAT SUBSEQUENTLY THERE WERE CONSIDERABLE DELAYS IN THE CONSTRUCTION OF THE PROPOSED PLANT, THE AWARD OF THE CONTRACT FOR WHICH WAS OBJECTED TO BY THE COMMISSION IN ITS REASONED OPINION, AND THAT CONSIDERABLE CHANGES HAD TO BE MADE TO THE PROJECT. HOWEVER, NO STEPS WERE TAKEN WITH A VIEW TO PROCEEDING TO A FRESH INVITATION TO TENDER UNDER CONDITIONS COMPLYING WITH THE TERMS OF THE REASONED OPINION.

7 IT MUST BE POINTED OUT THAT THE PURPOSE OF THE PROCEDURE PROVIDED FOR IN ARTICLE 169 OF THE EEC TREATY IS, INTER ALIA, TO AVOID A SITUATION IN WHICH A MEMBER STATE' S CONDUCT IS PUT AT ISSUE BEFORE THE COURT WHEN, FOLLOWING THE COMMENCEMENT BY THE COMMISSION OF THE INFRINGEMENT PROCEDURE, THE STATE ADMITS THE BREACH OF OBLIGATIONS WITH WHICH IT IS CHARGED AND REMEDIES THAT BREACH WITHIN THE PERIOD FIXED BY THE COMMISSION.

8 IN THIS CASE, HOWEVER, THE DECLARATION ISSUED BY THE MAYOR OF MILAN DISPUTES THE VIEW EXPRESSED BY THE COMMISSION IN ITS REASONED OPINION AS TO THE EXISTENCE OF AN INFRINGEMENT AND NO PRACTICAL MEASURE ENTAILING ACCEPTANCE OF THAT POINT OF VIEW HAS BEEN ADOPTED BY THE ITALIAN AUTHORITIES.

9 IN THOSE CIRCUMSTANCES, THE ITALIAN REPUBLIC CANNOT BE CONSIDERED TO HAVE COMPLIED WITH THE REASONED OPINION DELIVERED BY THE COMMISSION AND THEREFORE THE ACTION BROUGHT BY THE COMMISSION UNDER ARTICLE 169 OF THE EEC TREATY CANNOT BE CONSIDERED INADMISSIBLE. CONSEQUENTLY, THE ACTION MUST BE DECLARED ADMISSIBLE.

II - SUBSTANCE

10 BY REFERENCE TO THE OBSERVATIONS SUBMITTED TO THE COMMISSION BY THE MUNICIPALITY OF MILAN DURING THE PRE-LITIGATION PROCEDURE, THE DEFENDANT JUSTIFIED THE AWARD BY PRIVATE CONTRACT OF THE CONTRACT IN QUESTION BY RELYING UPON ARTICLE 9 (B) AND (D) OF DIRECTIVE 71/305.

11 ACCORDING TO THE DEFENDANT, THE CONSTRUCTION OF THE TYPE OF PLANT ENVISAGED INVOLVED THE USE OF EXCLUSIVE RIGHTS HELD BY THE UNDERTAKINGS TO WHICH THE CONTRACT WAS AWARDED AND SECONDLY, AS THE RESULT OF CERTAIN EVENTS, IN PARTICULAR THE ACCIDENT AT SEVESO, THE CONSTRUCTION OF THE PLANT WAS A MATTER OF EXTREME URGENCY.

12 IT SHOULD BE OBSERVED THAT DIRECTIVE 71/305 IS INTENDED TO FACILITATE THE EFFECTIVE ATTAINMENT WITHIN THE COMMUNITY OF FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES IN RESPECT OF PUBLIC WORKS CONTRACTS. TO THAT END IT LAYS DOWN COMMON RULES, IN PARTICULAR REGARDING ADVERTISING AND PARTICIPATION, SO THAT PUBLIC WORKS CONTRACTS IN THE MEMBER STATES ARE OPEN TO ALL UNDERTAKINGS IN THE COMMUNITY .

13 ARTICLE 9 OF THE DIRECTIVE PERMITS AWARDING AUTHORITIES TO AWARD THEIR WORKS CONTRACTS WITHOUT APPLYING THE COMMON RULES, EXCEPT THOSE CONTAINED IN ARTICLE 10, IN A NUMBER OF SITUATIONS, INCLUDING (B) AND (D), DESCRIBED UNDER THE FOLLOWING :

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"WHEN, FOR TECHNICAL OR ARTISTIC REASONS OR FOR REASONS CONNECTED WITH THE PROTECTION OF EXCLUSIVE RIGHTS, THE WORKS MAY ONLY BE CARRIED OUT BY A PARTICULAR CONTRACTOR"; (B)

AND

"IN SO FAR AS IS STRICTLY NECESSARY WHEN, FOR REASONS OF EXTREME URGENCY BROUGHT BY EVENTS UNFORESEEN BY THE AUTHORITIES AWARDING CONTRACTS, THE TIME-LIMIT LAID DOWN IN OTHER PROCEDURES CANNOT BE KEPT"; (D).

14 THOSE PROVISIONS, WHICH AUTHORIZE DEROGATIONS FROM THE RULES INTENDED TO ENSURE THE EFFECTIVENESS OF THE RIGHTS CONFERRED BY THE TREATY IN THE FIELD OF PUBLIC WORKS CONTRACTS, MUST BE INTERPRETED STRICTLY AND THE BURDEN OF PROVING THE ACTUAL EXISTENCE OF EXCEPTIONAL CIRCUMSTANCES JUSTIFYING A DEROGATION LIES ON THE PERSON SEEKING TO RELY ON THOSE CIRCUMSTANCES.

15 IN THE PRESENT CASE, NO FACTS OF SUCH A NATURE AS TO SHOW THAT THE CONDITIONS JUSTIFYING THE DEROGATIONS PROVIDED FOR IN THE AFOREMENTIONED PROVISIONS WERE SATISFIED HAVE BEEN PUT FORWARD. CONSEQUENTLY, THE COMMISSION' S APPLICATION MUST BE GRANTED WITHOUT ANY NEED TO EXAMINE THE FACTS AT ISSUE MORE CLOSELY.

16 IT MUST THEREFORE BE DECLARED THAT SINCE THE MUNICIPALITY OF MILAN DECIDED TO AWARD BY PRIVATE CONTRACT A CONTACT FOR THE CONSTRUCTION OF A PLANT FOR THE RECYCLING OF SOLID URBAN WASTE AND THUS DID NOT PUBLISH A CONTRACT NOTICE IN THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER COUNCIL DIRECTIVE 71/305 OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS

COSTS

17 ACCORDING TO ARTICLE 69 (2) OF THE RULES OF PROCEDURE, THE UNSUCCESSFUL PARTY IS TO BE ORDERED TO PAY THE COSTS. SINCE THE DEFENDANT HAS FAILED IN ITS SUBMISSIONS, IT MUST BE ORDERD TO PAY THE COSTS .

ON THOSE GROUNDS,

THE COURT

HEREBY :

(1) DECLARES THAT SINCE THE MUNICIPALITY OF MILAN DECIDED TO AWARD BY PRIVATE CONTRACT A CONTRACT FOR THE CONSTRUCTION OF A PLANT FOR THE RECYCLING OF SOLID URBAN WASTE AND THUS DID NOT PUBLISH A CONTRACT NOTICE IN THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER COUNCIL DIRECTIVE 71/305/EEC OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS;

(2) ORDERS THE ITALIAN REPUBLIC TO PAY THE COSTS.

DOCNUM 61985J0199

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1985 ; J ; judgment
PUBREF	European Court reports 1987 Page 01039
DOC	1987/03/10
LODGED	1985/06/28
JURCIT	11957E169 : N 7 31971L0305-A09LB : N 10 13 31971L0305-A09LD : N 10 13 31971L0305-A10 : N 13 31971L0305 : N 1 4 5 12 16
CONCERNS	Failure concerning 31971L0305
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
NOTES	Cartou, Louis: Recueil Dalloz Sirey 1987 Som. p.395 Mok, M.R.: TVVS ondernemingsrecht en rechtspersonen 1988 p.315 (PM)
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Rodriguez Iglesias
DATES	of document: 10/03/1987 of application: 28/06/1985

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Judgment of the Court
of 16 June 1987
Commission of the European Communities v Italian Republic.
Transparency of financial relations between Member States and public undertakings.
Case 118/85.

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COMPETITION - PUBLIC UNDERTAKINGS - TRANSPARENCY OF FINANCIAL RELATIONS BETWEEN MEMBER STATES AND PUBLIC UNDERTAKINGS - DISTINCTION BETWEEN THE ROLE OF THE STATE AS PUBLIC AUTHORITY AND AS A PRODUCER OR AS A PROVIDER OF SERVICES - BODY INTEGRATED INTO THE ADMINISTRATION OF THE STATE - DESIGNATION AS PUBLIC UNDERTAKING - LACK OF LEGAL PERSONALITY DISTINCT FROM THAT OF THE STATE - NO EFFECT

(COMMISSION DIRECTIVE 80/723, ART. 2)

THE DISTINCTION BETWEEN "PUBLIC AUTHORITIES" AND "PUBLIC UNDERTAKINGS" PROVIDED FOR IN ARTICLE 2 OF DIRECTIVE 80/723 ON THE TRANSPARENCY OF FINANCIAL RELATIONS BETWEEN MEMBER STATES AND PUBLIC UNDERTAKINGS FLOWS FROM THE RECOGNITION OF THE FACT THAT THE STATE MAY ACT EITHER BY EXERCISING PUBLIC POWERS OR BY CARRYING ON ECONOMIC ACTIVITIES OF AN INDUSTRIAL OR COMMERCIAL NATURE BY OFFERING GOODS AND SERVICES ON THE MARKET. IN ORDER TO MAKE SUCH A DISTINCTION, IT IS THEREFORE NECESSARY, IN EACH CASE, TO CONSIDER THE ACTIVITIES EXERCISED BY THE STATE AND TO DETERMINE THE CATEGORY TO WHICH THOSE ACTIVITIES BELONG.

THE STATE MAY CARRY OUT THE SAID ACTIVITIES THROUGH A SEPARATE BODY OVER WHICH IT MAY EXERCISE THE DOMINANT INFLUENCE REQUIRED BY ARTICLE 2 OF THE DIRECTIVE OR CARRY OUT THOSE ACTIVITIES DIRECTLY THROUGH A BODY FORMING PART OF THE STATE ADMINISTRATION. THE FACT THAT A BODY HAS OR HAS NOT, UNDER NATIONAL LAW, LEGAL PERSONALITY DISTINCT FROM THAT OF THE STATE IS IRRELEVANT IN DECIDING WHETHER IT MAY BE REGARDED AS A PUBLIC UNDERTAKING WITHIN THE MEANING OF DIRECTIVE 80/723, BECAUSE, ON THE ONE HAND, THE PURPOSE OF THAT DIRECTIVE WOULD BE CALLED IN QUESTION IF ITS APPLICATION DEPENDED ON WHETHER OR NOT STATE BODIES HAD LEGAL PERSONALITY DISTINCT FROM THAT OF THE STATE, AND, ON THE OTHER, THE ABSENCE OF LEGAL PERSONALITY DISTINCT FROM THAT OF THE STATE DOES NOT PREVENT THE EXISTENCE OF FINANCIAL RELATIONS BETWEEN THE STATE AND THOSE OF ITS BODIES WHICH CARRY OUT ECONOMIC ACTIVITIES

IN CASE 118/85

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY SERGIO FABRO, A MEMBER OF ITS LEGAL DEPARTMENT, ACTING AS AGENT, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF GEORGES KREMLIS, A MEMBER OF THE COMMISSION' S LEGAL DEPARTMENT, JEAN MONNET BUILDING, KIRCHBERG,

APPLICANT,

V

ITALIAN REPUBLIC, REPRESENTED BY LUIGI FERRARI BRAVO, HEAD OF THE LITIGATION DEPARTMENT FOR DIPLOMATIC AFFAIRS, ACTING AS AGENT, ASSISTED BY IVO M. BRAGUGLIA, AVVOCATO DELLO STATO, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE ITALIAN EMBASSY,

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DEFENDANT,

APPLICATION FOR A DECLARATION THAT THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 5 (2) OF COMMISSION DIRECTIVE 80/723 OF 25 JUNE 1980 ON THE TRANSPARENCY OF FINANCIAL RELATIONS BETWEEN MEMBER STATES AND PUBLIC UNDERTAKINGS (OFFICIAL JOURNAL, L 195, P . 35),

THE COURT

COMPOSED OF : LORD MACKENZIE STUART, PRESIDENT, C. KAKOURIS, T.F. O' HIGGINS AND F. SCHOCKWEILER (PRESIDENTS OF CHAMBERS), G. BOSCO, T.*KOOPMANS, K. BAHLMANN, R. JOLIET AND G.C. RODRIGUEZ IGLESIAS, JUDGES,

ADVOCATE GENERAL : J. MISCHO

REGISTRAR : H.A. RUEHL, PRINCIPAL ADMINISTRATOR

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 30 SEPTEMBER 1986,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 4 NOVEMBER 1986,

GIVES THE FOLLOWING

JUDGMENT

1 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON 29 APRIL 1985, THE COMMISSION OF THE EUROPEAN COMMUNITIES BROUGHT AN ACTION BEFORE THE COURT UNDER ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT BY REFUSING TO SUPPLY INFORMATION TO IT CONCERNING THE AMMINISTRAZIONE AUTONOMA DEI MONOPOLI DI STATO, THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 5 (2) OF COMMISSION DIRECTIVE 80/723 OF 25 JUNE 1980 ON THE TRANSPARENCY OF FINANCIAL RELATIONS BETWEEN MEMBER STATES AND PUBLIC UNDERTAKINGS (OFFICIAL JOURNAL L 195, P . 35).

2 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR THE FACTS OF THE CASE, THE COURSE OF THE PROCEDURE AND THE ARGUMENTS OF THE PARTIES, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT.

3 IT IS NOT CONTESTED THAT THE AMMINISTRAZIONE AUTONOMA DEI MONOPOLI DI STATO (HEREINAFTER REFERRED TO AS THE "AAMS ") EXERCISES AN ECONOMIC ACTIVITY INASMUCH AS IT OFFERS GOODS AND SERVICES ON THE MARKET IN THE MANUFACTURED TOBACCO SECTOR. FURTHERMORE, IT IS COMMON GROUND THAT THE AAMS DOES NOT HAVE LEGAL PERSONALITY SEPARATE FROM THAT OF THE STATE.

4 THE ITALIAN GOVERNMENT DEFENDS ITS REFUSAL TO SUPPLY THE INFORMATION SOUGHT BY THE COMMISSION ON THE GROUND THAT THE AAMS MAY NOT BE REGARDED AS A "PUBLIC UNDERTAKING" WITHIN THE MEANING OF ARTICLE 2 OF DIRECTIVE 80/723, BUT MUST BE REGARDED AS ONE OF THE "PUBLIC AUTHORITIES" WITHIN THE MEANING OF THE SAME ARTICLE. IN THAT REGARD, IT CONTENDS THAT IF THE AAMS, AS A STATE BODY, IS A PUBLIC AUTHORITY, IT CANNOT BE AT THE SAME TIME A PUBLIC UNDERTAKING WITHIN THE MEANING OF THE DIRECTIVE.

5 ACCORDING TO ARTICLE 2 OF DIRECTIVE 80/723, "PUBLIC AUTHORITIES" MEANS "THE STATE AND REGIONAL OR LOCAL AUTHORITIES" AND "PUBLIC UNDERTAKING"

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MEANS "ANY UNDERTAKING OVER WHICH THE PUBLIC AUTHORITIES MAY EXERCISE DIRECTLY OR INDIRECTLY A DOMINANT INFLUENCE BY VIRTUE OF THEIR OWNERSHIP OF IT, THEIR FINANCIAL PARTICIPATION THEREIN, OR THE RULES WHICH GOVERN IT ".

6 IT SHOULD BE NOTED, AS THE COURT STATED IN ITS JUDGMENT OF 6 JULY 1982 (JOINED CASES 188 TO 190/80 FRENCH REPUBLIC, ITALIAN REPUBLIC AND UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND V COMMISSION ((1982)) ECR 2545) THAT THE ESSENTIAL PURPOSE OF DIRECTIVE 80/723 IS TO PROMOTE THE EFFECTIVE APPLICATION TO PUBLIC UNDERTAKINGS OF THE PROVISIONS CONTAINED IN ARTICLES 92 AND 93 OF THE TREATY CONCERNING STATE AID . AS CAN BE SEEN FROM THE RECITALS IN THE PREAMBLE TO THE DIRECTIVE, THE COMPLEXITY OF THE RELATIONS BETWEEN NATIONAL PUBLIC AUTHORITIES AND PUBLIC UNDERTAKINGS TENDS TO HINDER THE PERFORMANCE BY THE COMMISSION OF ITS SUPERVISORY DUTIES WITH THE RESULT THAT A FAIR AND EFFECTIVE APPLICATION OF THE AID RULES IN THE EEC TREATY IS POSSIBLE ONLY IF THOSE FINANCIAL RELATIONS ARE MADE TRANSPARENT. IN PARTICULAR, THE SIXTH RECITAL IN THE PREAMBLE STATES THAT WITH REGARD TO PUBLIC UNDERTAKINGS, SUCH TRANSPARENCY SHOULD ENABLE A CLEAR DISTINCTION TO BE MADE BETWEEN THE ROLE OF THE STATE AS PUBLIC AUTHORITY AND ITS ROLE AS PROPRIETOR.

7 THE DISTINCTION PROVIDED FOR IN THE SIXTH RECITAL FLOWS FROM THE RECOGNITION OF THE FACT THAT THE STATE MAY ACT EITHER BY EXERCISING PUBLIC POWERS OR BY CARRYING ON ECONOMIC ACTIVITIES OF AN INDUSTRIAL OR COMMERCIAL NATURE BY OFFERING GOODS AND SERVICES ON THE MARKET. IN ORDER TO MAKE SUCH A DISTINCTION, IT IS THEREFORE NECESSARY, IN EACH CASE, TO CONSIDER THE ACTIVITIES EXERCISED BY THE STATE AND TO DETERMINE THE CATEGORY TO WHICH THOSE ACTIVITIES BELONG.

8 IT MUST BE OBSERVED THAT FOR THAT PURPOSE, IT IS OF NO IMPORTANCE THAT THE STATE CARRIES OUT THE SAID ECONOMIC ACTIVITIES BY WAY OF A DISTINCT BODY OVER WHICH IT MAY EXERCISE, DIRECTLY OR INDIRECTLY, A DOMINANT INFLUENCE ACCORDING TO THE CRITERIA LAID DOWN IN ARTICLE 2 OF THE DIRECTIVE OR THAT IT CARRIES OUT THE ACTIVITIES DIRECTLY THROUGH A BODY FORMING PART OF THE STATE ADMINISTRATION. IN THE LATTER CASE, THE FACT THAT THE BODY IS INTEGRATED INTO THE STATE ADMINISTRATION IMPLIES AUTOMATICALLY THE EXERCISE OF A DOMINANT INFLUENCE WITHIN THE MEANING OF THE SAID ARTICLE 2. IN SUCH CASES, THE FINANCIAL RELATIONS CAN BE EVEN MORE COMPLEX AND THE TRANSPARENCY WHICH THE DIRECTIVE SEEKS TO ACHIEVE THEREFORE BECOMES EVEN MORE NECESSARY. IN THIS CASE, THE FACT THAT THE AAMS IS INTEGRATED INTO THE STATE ADMINISTRATION DOES NOT THEREFORE PREVENT ITS BEING REGARDED AS A PUBLIC UNDERTAKING WITHIN THE MEANING OF DIRECTIVE 80/723.

9 THE ITALIAN GOVERNMENT ALSO CONTENDS THAT IN ORDER FOR THE PUBLIC AUTHORITIES TO EXERCISE AN INFLUENCE ON A PUBLIC UNDERTAKING, THEY MUST BE LEGALLY DISTINCT FROM THE LATTER. IN ITS OPINION, A PUBLIC UNDERTAKING MUST THEREFORE NECESSARILY HAVE A LEGAL PERSONALITY DISTINCT FROM THAT OF THE STATE.

10 THAT ARGUMENT CANNOT BE ACCCEPTED. THE PURPOSE OF DIRECTIVE 80/723, AS INDICATED ABOVE, WOULD BE CALLED INTO QUESTION IF ITS APPLICATION DEPENDED ON WHETHER OR NOT STATE BODIES HAD LEGAL PERSONALITY DISTINCT FROM THAT OF THE STATE. THE RESULT WOULD BE THAT, ACCORDING TO THE LEGAL FORM CHOSEN BY THE MEMBER STATES, THE ECONOMIC ACTIVITIES OF AN INDUSTRIAL OR COMMERCIAL

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NATURE CARRIED ON BY CERTAIN STATE BODIES WOULD BE COVERED BY THE DIRECTIVE WHEREAS THOSE CARRIED ON BY OTHER BODIES WOULD NOT. FURTHERMORE, THE APPLICATION OF THE DIRECTIVE IN REGARD TO THE SAME ACTIVITY WOULD DIFFER FROM ONE MEMBER STATE TO ANOTHER ACCORDING TO THE LEGAL FORM WHICH EACH MEMBER STATE GIVES TO THE PUBLIC UNDERTAKINGS CARRYING ON THAT ACTIVITY.

11 IN THAT REGARD, IT MUST BE POINTED OUT, AS THE COURT HAS FREQUENTLY EMPHASIZED IN ITS DECISIONS, THAT HAVING RECOURSE TO MEMBER STATES' DOMESTIC LAW IN ORDER TO LIMIT THE SCOPE OF PROVISIONS OF COMMUNITY LAW UNDERMINES THE UNITY AND EFFECTIVENESS OF THAT LAW AND CANNOT, THEREFORE, BE ACCEPTED. CONSEQUENTLY, THE FACT THAT A BODY HAS OR HAS NOT, UNDER NATIONAL LAW, LEGAL PERSONALITY SEPARATE FROM THAT OF THE STATE IS IRRELEVANT IN DECIDING WHETHER IT MAY BE REGARDED AS A PUBLIC UNDERTAKING WITHIN THE MEANING OF THE DIRECTIVE.

12 THE ITALIAN GOVERNMENT ALSO CONSIDERS THAT THE CONCEPT OF "FINANCIAL RELATIONS", THE TRANSPARENCY OF WHICH THE DIRECTIVE SEEKS TO ENSURE, PRESUPPOSES RELATIONS BETWEEN DISTINCT LEGAL PERSONS.

13 IT MUST BE OBSERVED IN THAT REGARD THAT THE FACT THAT A BODY CARRYING OUT ECONOMIC ACTIVITIES OF AN INDUSTRIAL OR COMMERCIAL NATURE IS INTEGRATED INTO THE STATE ADMINISTRATION AND DOES NOT HAVE LEGAL PERSONALITY SEPARATE THEREFROM DOES NOT PREVENT THE EXISTENCE OF FINANCIAL RELATIONS BETWEEN THE STATE AND THAT BODY. THROUGH THE MECHANISM OF BUDGETARY APPROPRIATIONS, THE STATE DISPOSES BY DEFINITION OF THE POWER TO INFLUENCE THE ECONOMIC MANAGEMENT OF THE UNDERTAKING, PERMITTING IT TO GRANT COMPENSATION FOR OPERATING LOSSES AND TO MAKE NEW FUNDS AVAILABLE TO THE UNDERTAKING, AND MAY THEREFORE PERMIT THAT UNDERTAKING TO CARRY OUT ITS ACTIVITIES INDEPENDENTLY OF THE RULES OF NORMAL COMMERCIAL MANAGEMENT, WHICH IS PRECISELY THE SITUATION WHICH THE DIRECTIVE SEEKS TO MAKE TRANSPARENT.

14 FINALLY, THE ITALIAN GOVERNMENT CONTENDS THAT IT FOLLOWS FROM ANNEX I TO COUNCIL DIRECTIVE 80/767 OF 22 JULY 1980 ADAPTING AND SUPPLEMENTING IN RESPECT OF CERTAIN CONTRACTING AUTHORITIES DIRECTIVE 77/62/EEC COORDINATING PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY CONTRACTS (OFFICIAL JOURNAL L 215, P. 1) THAT THE AAMS FORMS PART OF THE ITALIAN MINISTRY OF FINANCE. A FOOTNOTE TO ANNEX I CONCERNING THE MINISTRY OF FINANCE EXCLUDES THE TOBACCO AND SALT MONOPOLIES FROM THE LIST OF ITALIAN PURCHASING ENTITIES COMING WITHIN THE SCOPE OF THE DIRECTIVE .

15 IN THAT REGARD, IT MUST BE OBSERVED THAT IN THE CONTEXT OF DIRECTIVE 80/767, AS THE ITALIAN GOVERNMENT STATES, THE AAMS IS REGARDED AS FORMING PART OF THE MINISTRY OF FINANCE. HOWEVER, AS CAN BE SEEN FROM THE COURT' S REASONING ABOVE, THAT CIRCUMSTANCE IS OF NO CONSEQUENCE IN REGARD TO WHETHER OR NOT IT IS A PUBLIC UNDERTAKING WITHIN THE MEANING OF DIRECTIVE 80/723.

16 IT FOLLOWS FROM THE FOREGOING CONSIDERATIONS THAT THE AAMS MUST BE REGARDED AS A PUBLIC UNDERTAKING WITHIN THE MEANING OF ARTICLE 2 OF DIRECTIVE 80/723.

17 IT MUST THEREFORE BE DECLARED THAT BY REFUSING TO SUPPLY INFORMATION TO THE COMMISSION CONCERNING THE AMMINISTRAZIONE AUTONOMA DEI MONOPOLI

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DI STATO, THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 5 (2) OF COMMISSION DIRECTIVE 80/723 OF 25 JUNE 1980 ON THE TRANSPARENCY OF FINANCIAL RELATIONS BETWEEN MEMBER STATES AND PUBLIC UNDERTAKINGS.

COSTS

18 UNDER ARTICLE 69 (2) OF THE RULES OF PROCEDURE, THE UNSUCCESSFUL PARTY IS TO BE ORDERED TO PAY THE COSTS. SINCE THE ITALIAN REPUBLIC HAS FAILED IN ITS SUBMISSIONS, IT MUST BE ORDERED TO PAY THE COSTS.

On those grounds,

THE COURT

hereby :

(1) Declares that by refusing to supply information to the Commission concerning the Amministrazione Autonoma dei Monopoli di Stato, the Italian Republic has failed to fulfil its obligations under Article 5 (2) of Commission Directive 80/723 of 25 June 1980 on the transparency of financial relations between Member States and public undertakings;

(2) Orders the Italian Republic to pay the costs.

DOCNUM	61985J0118
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1985 ; J ; judgment
PUBREF	European Court reports 1987 Page 02599
DOC	1987/06/16
LODGED	1985/04/29
JURCIT	11957E092 : N 6 11957E093 : N 6 31977L0062 : N 14 31980L0723-A02 : N 4 8 16 31980L0723-A05P2 : N 1 17 31980L0723-C : N 6 31980L0723-C6 : N 6 7 31980L0767-N1 : N 14 61980J0188 : N 6
CONCERNS	Failure concerning 31980L0723-A05P2

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SUB	Competition ; Rules applying to undertakings ; Agriculture ; Tobacco
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
NOTES	Boutard-Labarde, Marie-Chantal: La Semaine juridique - édition générale 1988 II 20943 Martínez Lopez-Muñiz, J.L.: Noticias CEE 1988 no 42 p.163-167 Eslava Rodríguez, Manuela: La ley - Comunidades Europeas 1988 no 1 p.52-60 Menegazzi, Francesca: Diritto comunitario e degli scambi internazionali 1988 p.99-106
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Mischo
JUDGRAP	O'Higgins
DATES	of document: 16/06/1987 of application: 29/04/1985

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Judgment of the Court
of 28 March 1985
Commission of the European Communities v Italian Republic.
Directive - Coordination of procedures for the award of public works contracts.
Case 274/83.

1 . ACTION FOR FAILURE OF A STATE TO FULFIL OBLIGATIONS - PROCEDURE PRIOR TO THE APPLICATION TO THE COURT - FORMAL INVITATION TO SUBMIT OBSERVATIONS - DEFINITION OF THE SUBJECT-MATTER OF THE DISPUTE - REASONED OPINION - DETAILED LIST OF COMPLAINTS - PERMISSIBILITY

(EEC TREATY , ART. 169)

2.APPROXIMATION OF LAWS - PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS - AWARD OF CONTRACTS - CRITERIA - THE MOST ECONOMICALLY ADVANTAGEOUS TENDER

(COUNCIL DIRECTIVE 71/305/EEC , ART. 29 (1))

3.MEMBER STATES - IMPLEMENTATION OF DIRECTIVES - OBLIGATION TO PROVIDE INFORMATION - FAILURE TO PROVIDE INFORMATION - FAILURE TO FULFIL OBLIGATIONS

(EEC TREATY , ARTS 5 AND 155)

1 . IT FOLLOWS FROM THE PURPOSE ASSIGNED BY ARTICLE 169 OF THE EEC TREATY TO THE PRELIMINARY STAGE OF THE PROCEDURE UNDER ARTICLE 169 , OF WHICH THE INITIAL LETTER IS PART , THAT THE LETTER IS INTENDED TO DEFINE THE SUBJECT-MATTER OF THE DISPUTE AND TO INDICATE TO THE MEMBER STATE WHICH IS INVITED TO SUBMIT ITS OBSERVATIONS THE FACTORS ENABLING IT TO PREPARE ITS DEFENCE. THE OPPORTUNITY FOR THE MEMBER STATE CONCERNED TO SUBMIT ITS OBSERVATIONS CONSTITUTES AN ESSENTIAL GUARANTEE REQUIRED BY THE TREATY AND , EVEN IF THE MEMBER STATE DOES NOT CONSIDER IT NECESSARY TO AVAIL ITSELF THEREOF , OBSERVANCE OF THAT GUARANTEE IS AN ESSENTIAL FORMAL REQUIREMENT OF THE PROCEDURE UNDER ARTICLE 169.

ALTHOUGH IT FOLLOWS THAT THE REASONED OPINION PROVIDED FOR IN ARTICLE 169 MUST CONTAIN A COHERENT AND DETAILED STATEMENT OF THE REASONS WHICH LED THE COMMISSION TO CONCLUDE THAT THE STATE IN QUESTION HAS FAILED TO FULFIL ONE OF ITS OBLIGATIONS UNDER THE TREATY , THE COURT CANNOT IMPOSE SUCH STRICT REQUIREMENTS AS REGARDS THE INITIAL LETTER , WHICH OF NECESSITY WILL CONTAIN ONLY AN INITIAL BRIEF SUMMARY OF THE COMPLAINTS AND THERE IS NOTHING THEREFORE TO PREVENT THE COMMISSION FROM SETTING OUT IN DETAIL IN THE REASONED OPINION THE COMPLAINTS WHICH IT HAS ALREADY MADE MORE GENERALLY IN ITS INITIAL LETTER.

2.FOR THE PURPOSES OF ARTICLE 29 (1) OF DIRECTIVE 71/305 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS THE AWARD OF A CONTRACT ON THE BASIS OF THE CRITERION OF THE MOST ECONOMICALLY ADVANTAGEOUS TENDER PRESUPPOSES THAT THE AUTHORITY MAKING THE DECISION IS ABLE TO EXERCISE ITS DISCRETION IN TAKING A DECISION ON THE BASIS OF QUALITATIVE AND QUANTITATIVE CRITERIA THAT VARY ACCORDING TO THE CONTRACT IN QUESTION AND IS NOT RESTRICTED SOLELY TO THE QUANTITATIVE CRITERION OF THE AVERAGE PRICE STATED IN THE TENDERS

3.THE MEMBER STATES ARE OBLIGED , BY VIRTUE OF ARTICLE 5 OF THE EEC TREATY , TO FACILITATE THE ACHIEVEMENT OF THE COMMISSION ' S TASKS WHICH , UNDER ARTICLE 155 OF THE EEC TREATY , CONSIST IN PARTICULAR OF ENSURING THAT

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THE PROVISIONS OF THE TREATY AND THE MEASURES ADOPTED BY THE INSTITUTIONS PURSUANT THERETO ARE APPLIED.

WHERE , FOR THAT PURPOSE , A DIRECTIVE IMPOSES UPON THE MEMBER STATES AN OBLIGATION TO PROVIDE INFORMATION IN ORDER TO ENABLE THE COMMISSION TO CHECK WHETHER THE DIRECTIVE HAS BEEN IMPLEMENTED EFFECTIVELY AND COMPLETELY , THE FAILURE BY A MEMBER STATE TO PROVIDE THE INFORMATION CONSTITUTES A FAILURE TO FULFIL ITS OBLIGATIONS , EVEN IF THE COMMISSION WAS , IN FACT , ABLE TO OBTAIN INFORMATION REGARDING THE IMPLEMENTING PROVISIONS ADOPTED BY THAT STATE.

IN CASE 274/83

COMMISSION OF THE EUROPEAN COMMUNITIES , REPRESENTED BY ALBERTO PROZZILLO , ACTING AS AGENT , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF MANFRED BESCHEL , A MEMBER OF ITS LEGAL SERVICE , JEAN MONNET BUILDING , KIRCHBERG ,

APPLICANT ,

V

ITALIAN REPUBLIC , REPRESENTED BY ARNALDO SQUILLANTE , HEAD OF THE DEPARTMENT FOR CONTENTIOUS DIPLOMATIC AFFAIRS , ACTING AS AGENT , ASSISTED BY IVO BRAGUGLIA , AVVOCATO DELLO STATO , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE ITALIAN EMBASSY ,

DEFENDANT ,

APPLICATION FOR A DECLARATION THAT , BY ADOPTING CERTAIN PROVISIONS CONCERNING THE AWARD OF PUBLIC WORKS CONTRACTS AND BY FAILING TO NOTIFY THE COMMISSION OF THE MAIN PROVISIONS OF NATIONAL LAW WHICH IT ADOPTED IN THE FIELD COVERED BY COUNCIL DIRECTIVE 71/305/EEC OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1971 (II), P. 682), THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER THE EEC TREATY ,

III - COSTS

44 UNDER ARTICLE 69 (2) OF THE RULES OF PROCEDURE , THE UNSUCCESSFUL PARTY IS TO BE ORDERED TO PAY THE COSTS. AS THE DEFENDANT HAS FAILED IN THE MAJORITY OF ITS SUBMISSIONS , IT MUST BE ORDERED TO PAY THE COSTS.

ON THOSE GROUNDS ,

THE COURT

HEREBY :

(1) DECLARES THAT THE ITALIAN REPUBLIC , BY ADOPTING ARTICLE THE FIRST , THIRD AND FIFTH PARAGRAPHS OF 10 AND ARTICLE 13 OF LAW NO 741 , HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER DIRECTIVE 71/305/EEC.

(2)DECLARES THAT THE ITALIAN REPUBLIC , BY FAILING TO NOTIFY THE COMMISSION OFFICIALLY OF THE TEXT OF LAW NO 741 , HAS ALSO FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 33 OF DIRECTIVE 71/305.

(3)ORDERS THE DEFENDANT TO PAY THE COSTS.

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1 BY APPLICATION LODGED AT THE COURT REGISTRY ON 16 DECEMBER 1983 , THE COMMISSION OF THE EUROPEAN COMMUNITIES BROUGHT AN ACTION PURSUANT TO ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT , BY ADOPTING CERTAIN PROVISIONS CONCERNING THE AWARD OF PUBLIC WORKS CONTRACTS AND BY FAILING TO NOTIFY THE COMMISSION OF THE MAIN PROVISIONS OF NATIONAL LAW WHICH IT ADOPTED IN THE FIELD COVERED BY COUNCIL DIRECTIVE 71/305/EEC OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1971 (II), P. 682), THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER THE EEC TREATY.

2 ON 26 JULY 1971 , THE COUNCIL OF THE EUROPEAN COMMUNITIES ADOPTED TWO DIRECTIVES FOR ATTAINING FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES IN RELATION TO PUBLIC WORKS CONTRACTS. THE FIRST , DIRECTIVE 71/304/EEC (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1971 (II), P . 678) IMPLEMENTS , WITH REGARD TO PUBLIC WORKS CONTRACTS , THE PRINCIPLE OF THE PROHIBITION OF DISCRIMINATION BASED ON NATIONALITY IN THE MATTER OF FREEDOM TO PROVIDE SERVICES. THE SECOND , DIRECTIVE 71/305/EEC (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1971 (II), P. 682), PROVIDES FOR THE COORDINATION OF NATIONAL PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS AND LAYS DOWN IN PARTICULAR :

COMMON ADVERTISING RULES (ARTICLE 12 ET SEQ.);

COMMON RULES ON PARTICIPATION (TITLE IV) COMPRISING THE INTRODUCTION OF OBJECTIVE CRITERIA BOTH FOR QUALITATIVE SELECTION OF UNDERTAKINGS (ARTICLE 23 ET SEQ.) AND FOR THE AWARD OF CONTRACTS (ARTICLE 29).

3 IN ITS JUDGMENT OF 22 SEPTEMBER 1976 (CASE 10/76 COMMISSION V ITALY (1976) ECR 1359) THE COURT HELD THAT BY FAILING TO ADOPT , WITHIN THE PRESCRIBED PERIOD , THE MEASURES NECESSARY TO COMPLY WITH COUNCIL DIRECTIVE 71/305 , THE ITALIAN REPUBLIC HAD FAILED TO FULFIL AN OBLIGATION UNDER THE TREATY. ON 8 AUGUST 1977 THE ITALIAN REPUBLIC ADOPTED , IN RESPONSE TO THAT JUDGMENT , LAW NO 584 (GAZZETTA UFFICIALE (OFFICIAL GAZETTE) NO 232 OF 26 AUGUST 1977 , P. 6272), WHICH IN THE COMMISSION ' S OPINION DULY IMPLEMENTED THE DIRECTIVE

4 ON 10 DECEMBER 1981 , THE ITALIAN LEGISLATURE ADOPTED LAW NO 741 CONCERNING ' SUPPLEMENTARY RULES TO SPEED UP PROCEDURES FOR THE PERFORMANCE OF PUBLIC WORKS ' (GAZZETTA UFFICIALE NO 344 OF 16 DECEMBER 1981 , P. 8271). SINCE THE COMMISSION CONSIDERED THAT SEVERAL OF THE PROVISIONS OF THAT LAW , ESPECIALLY ARTICLES 9 , 10 , 11 , 13 AND 15 , INFRINGED IN PARTICULAR THE PROVISIONS OF DIRECTIVE 71/305 CONCERNING THE PUBLICATION OF CONTRACT NOTICES IN THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES , PROOF OF THE FINANCIAL , ECONOMIC AND TECHNICAL CAPACITY OF THE CONTRACTOR AND THE CRITERIA FOR THE AWARD OF CONTRACTS AND THAT , MOREOVER , BY FAILING TO NOTIFY IT OF THE TEXT OF THAT LAW , ITALY HAD FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 33 OF THE DIRECTIVE , IT REQUESTED THE ITALIAN GOVERNMENT , BY A LETTER DATED 17 DECEMBER 1982 , PURSUANT TO ARTICLE 169 OF THE EEC TREATY , TO SUBMIT ITS OBSERVATIONS WITH REGARD TO THE EIGHT ALLEGATIONS THEREIN CONTAINED WITHIN TWO MONTHS OF RECEIPT OF THE LETTER .

5 BY A LETTER DATED 24 FEBRUARY 1983 FROM ITS PERMANENT REPRESENTATION , THE ITALIAN GOVERNMENT ADMITTED THAT THE COMPLAINTS WITH REGARD TO THE

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THIRD , FOURTH AND FIFTH PARAGRAPHS OF ARTICLE 10 AND ARTICLE 13 OF LAW NO 741 WERE JUSTIFIED BUT CONTESTED THE ALLEGATIONS WITH REGARD TO ARTICLE 9 , THE FIRST PARAGRAPH OF ARTICLE 10 AND ARTICLE 11 AND THE FIRST SENTENCE OF THE SECOND PARAGRAPH OF ARTICLE 15 OF THE LAW. THE ITALIAN GOVERNMENT SENT TO THE COMMISSION , IN AN ANNEX TO THAT LETTER , THE TEXT OF A PRELIMINARY DRAFT LAW DRAWN UP BY THE MINISTER OF PUBLIC WORKS IN RESPONSE TO THE REQUESTS MADE BY THE COMMISSION.

6 SINCE THE COMMISSION TOOK THE VIEW THAT IT WAS UNABLE TO TAKE THAT PRELIMINARY DRAFT LAW INTO ACCOUNT IN SO FAR AS IT AMOUNTED MERELY TO ' A VAGUE AND INCOMPLETE INTENTION ON THE PART OF THE COMPETENT AUTHORITIES TO COMPLY WITH THE PROVISIONS OF THE DIRECTIVE ' , IT DELIVERED A REASONED OPINION DATED 2 AUGUST 1983 WHICH REPEATED ALL THE COMPLAINTS WHICH HAD ALREADY APPEARED IN ITS INITIAL LETTER. IN THAT OPINION , THE ITALIAN REPUBLIC WAS INVITED TO ADOPT THE NECESSARY MEASURES WITHIN ONE MONTH.

7 BY A TELEX MESSAGE DATED 27 SEPTEMBER 1983 , THE ITALIAN GOVERNMENT , IN RESPONSE TO THE REASONED OPINION , INFORMED THE COMMISSION OF THE INTENTION OF THE MINISTER OF PUBLIC WORKS TO LAY THE AFOREMENTIONED DRAFT BEFORE THE ITALIAN PARLIAMENT ONCE AGAIN SINCE IT HAD LAPSED AT THE END OF THE PREVIOUS LEGISLATIVE PERIOD. SINCE NO FURTHER STEPS WERE TAKEN THE COMMISSION DECIDED TO BRING AN ACTION BEFORE THE COURT.

8 LAW NO 687 AMENDING LAW NO 741 AND THE PROVISIONS RELATING TO PROVISIONAL SECURITY AND ADVERTISING WAS NOT ADOPTED UNTIL 8 OCTOBER 1984 .

9 IN THIS ACTION THE COMMISSION ALLEGES IN THE FIRST PLACE THAT ON 10 DECEMBER 1981 , ITALY ADOPTED LAW NO 741 CONCERNING SUPPLEMENTARY RULES TO SPEED UP PROCEDURES FOR THE PERFORMANCE OF PUBLIC WORKS (GAZZETTA UFFICIALE NO 344 OF 16 DECEMBER 1981 , P. 8271) ARTICLES 9 , 10 , 11 , 13 AND 15 OF WHICH INFRINGE CERTAIN PROVISIONS OF DIRECTIVE 71/305 AND IN THE SECOND PLACE THAT CONTRARY TO ARTICLE 33 OF THAT DIRECTIVE ITALY DID NOT NOTIFY THE TEXT OF THE LAW TO THE COMMISSION .

I - THE ADOPTION OF CERTAIN PROVISIONS IN LAW NO 741

(A) ADMISSIBILITY OF INCREASED TENDERS

10 THE COMMISSION CONTENDS THAT ARTICLE 29 (1) OF THE DIRECTIVE PROVIDES FOR ONLY TWO CRITERIA FOR THE AWARD OF CONTRACTS , THAT IS TO SAY THE LOWEST PRICE OR THE MOST ECONOMICALLY ADVANTAGEOUS TENDER , WHILST ARTICLE 9 OF THE ITALIAN LAW PERMITS THE ACCEPTANCE OF AN INCREASED TENDER NOT CORRESPONDING TO EITHER OF THOSE TWO CRITERIA IN THE CASE OF A RESTRICTED INVITATION TO TENDER.

11 THE ITALIAN GOVERNMENT REPLIES TO THAT ALLEGATION THAT THE POSSIBILITY OF SUBMITTING TENDERS INCREASED WITH REGARD TO THE BASIC PRICE FOR TENDERS FIXED BY THE ADMINISTRATION CONFORMS TO THE CRITERION OF ' THE LOWEST PRICE ' PROVIDED FOR IN ARTICLE 29 (1) OF THE DIRECTIVE. ARTICLE 9 OF THE ITALIAN LAW PROVIDES THAT THE CONTRACT IS TO BE AWARDED TO THE TENDERER WHO SUBMITS THE OFFER WHICH EXCEEDS THE PRICE FIXED BY THE SMALLEST MARGIN SO THAT THE CONTRACT IS ALWAYS AWARDED TO THE PERSON WHO TENDERS ' THE LOWEST PRICE '.

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12 IN THE LIGHT OF THE SUBMISSIONS MADE BY THE ITALIAN GOVERNMENT , THE COMMISSION HAS WITHDRAWN ITS COMPLAINT WITH REGARD TO THAT MATTER

(B) PROCEDURE FOR MAKING INCREASED TENDERS

13 ACCORDING TO THE COMMISSION , ARTICLE 9 OF ITALIAN LAW NO 741 OF 10 DECEMBER 1981 , IN CONJUNCTION WITH THE THIRD PARAGRAPH OF ARTICLE 1 OF LAW NO 504 OF 3 JULY 1970 (GAZZETTA UFFICIALE NO 179 OF 17 JULY 1970), PROVIDES THAT THE CALCULATION OF PRICES IN THE CONTEXT OF TENDERING PROCEDURES IS TO INCLUDE THE POSSIBILITY OF MAKING HIGHER TENDERS ACCORDING TO THE ' ANONYMOUS ENVELOPE ' PROCEDURE , WHEREAS ARTICLE 29 (3) OF THE DIRECTIVE PROHIBITS THE CALCULATION OF PRICES IN ACCORDANCE WITH THAT PROCEDURE AFTER THE EXPIRY OF THE TIME-LIMITS REFERRED TO THEREIN.

14 THE ITALIAN GOVERNMENT REPLIES TO THAT ALLEGATION THAT RECOURSE TO THE ANONYMOUS ENVELOPE PROCEDURE DOES NOT FOLLOW FROM ARTICLE 9 OF THE LAW OF 1981 AND THAT IN PRACTICE THAT PROCEDURE IS NEITHER PROVIDED FOR NOR USED IN CONNECTION WITH THE AWARD OF CONTRACTS UNDER ARTICLE 9 . IT IS ONLY IN ORDER TO CLARIFY THE POSITION AND TO ELIMINATE THE COMMISSION ' S DOUBTS THAT ARTICLE 1 OF THE DRAFT LAW , APPROVED ON 22 DECEMBER 1983 , PROHIBITS THE USE OF THE ANONYMOUS ENVELOPE PROCEDURE PROVIDED FOR IN ARTICLE 1 OF LAW NO 504/70 WITH REGARD TO CONTRACTS FALLING WITHIN THE SCOPE OF THE DIRECTIVE.

15 SINCE THE DRAFT LAW WAS ADOPTED ON 8 OCTOBER 1984 THE COMMISSION HAS WITHDRAWN ITS COMPLAINT IN THE COURSE OF THE ORAL PROCEDURE.

(C) SECRET TENDER EQUAL TO OR CLOSEST TO THE AVERAGE TENDER

16 ACCORDING TO THE COMMISSION THE CRITERION FOR THE AWARD OF A CONTRACT , FOR WHICH IN ITALY THE FIRST PARAGRAPH OF ARTICLE 10 OF LAW NO 741 REFERS TO ARTICLE 4 OF LAW NO 14 OF 2 FEBRUARY 1973 AND THEREFORE TO ARTICLE 1 (D) OF THAT LAW WHICH PROVIDES THAT THE CONTRACT IS TO BE AWARDED TO THE TENDERER WHOSE TENDER EQUALS THE AVERAGE TENDER OR FAILING THAT IS THE NEAREST TENDER BELOW THAT AVERAGE , DOES NOT CORRESPOND TO EITHER OF THE TWO CRITERIA PROVIDED FOR IN ARTICLE 29 (1) OF THE DIRECTIVE , THAT IS TO SAY THE LOWEST PRICE OR THE MOST ECONOMICALLY ADVANTAGEOUS TENDER ACCORDING TO VARIOUS CRITERIA DEPENDING ON THE CONTRACT.

17 THE ITALIAN GOVERNMENT , ON THE CONTRARY , CONSIDERS THAT THE CRITERION OF THE AVERAGE PRICE ENABLES THE MOST ECONOMICALLY ADVANTAGEOUS TENDER TO BE DETERMINED BY VIRTUE OF THE SPECIFIC RULES RELATING TO THE APPLICATION OF THAT CRITERION AS DEFINED IN ARTICLE 4 OF LAW NO 14/73. MOREOVER , IN THE COURSE OF THE ORAL PROCEDURE THE ITALIAN GOVERNMENT HAS RAISED AN OBJECTION OF INADMISSIBILITY ON THE GROUND THAT IN THE COMMISSION ' S INITIAL LETTER THE FIRST PARAGRAPH OF ARTICLE 10 OF LAW NO 741 WAS ALLEGED TO BE INCOMPATIBLE ONLY WITH ARTICLE 29 (3) OF THE DIRECTIVE , WHEREAS IN ITS REASONED OPINION THE COMMISSION MAINTAINED THAT THE CRITERION FOR THE AWARD OF A CONTRACT IN QUESTION DID NOT CORRESPOND TO EITHER OF THE CRITERIA PROVIDED FOR IN ARTICLE 29 (1) OF THE DIRECTIVE.

18 IT SHOULD BE RECALLED THAT UNDER ARTICLE 169 OF THE TREATY THE COMMISSION MAY BRING BEFORE THE COURT AN ACTION FOR A DECLARATION THAT A STATE HAS FAILED TO FULFIL ITS OBLIGATIONS ONLY IF THAT STATE DOES NOT COMPLY WITH

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THE REASONED OPINION WITHIN THE PERIOD LAID DOWN THEREIN BY THE COMMISSION. THE COMMISSION DOES NOT DELIVER ITS REASONED OPIONION UNTIL THE MEMBER STATE HAS BEEN GIVEN AN OPPORTUNITY TO SUBMIT ITS OBSERVATIONS.

19 IT FOLLOWS FROM THE PURPOSE ASSIGNED TO THE PRELIMINARY STAGE OF THE PROCEDURE UNDER ARTICLE 169 THAT THE INITIAL LETTER IS INTENDED TO DEFINE THE SUBJECT-MATTER OF THE DISPUTE AND TO INDICATE TO THE MEMBER STATE WHICH IS INVITED TO SUBMIT ITS OBSERVATIONS THE FACTORS ENABLING IT TO PREPARE ITS DEFENCE.

20 AS THE COURT HELD IN ITS JUDGMENT OF 11 JULY 1984 (CASE 51/83 COMMISSION V ITALY (1984) ECR 2793) THE OPPORTUNITY FOR THE MEMBER STATE CONCERNED TO SUBMIT ITS OBSERVATIONS CONSTITUTES AN ESSENTIAL GUARANTEE REQUIRED BY THE TREATY AND , EVEN IF THE MEMBER STATE DOES NOT CONSIDER IT NECESSARY TO AVAIL ITSELF THEREOF , OBSERVANCE OF THAT GUARANTEE IS AN ESSENTIAL FORMAL REQUIREMENT OF THE PROCEDURE UNDER ARTICLE 169 .

21 ALTHOUGH IT FOLLOWS THAT THE REASONED OPINION PROVIDED FOR IN ARTICLE 169 OF THE EEC TREATY MUST CONTAIN A COHERENT AND DETAILED STATEMENT OF THE REASONS WHICH LED THE COMMISSION TO CONCLUDE THAT THE STATE IN QUESTION HAS FAILED TO FULFIL ONE OF ITS OBLIGATIONS UNDER THE TREATY , THE COURT CANNOT IMPOSE SUCH STRICT REQUIREMENTS AS REGARDS THE INITIAL LETTER , WHICH OF NECESSITY WILL CONTAIN ONLY AN INITIAL BRIEF SUMMARY OF THE COMPLAINTS. AS THE COURT STATED IN ITS JUDGMENT OF 31 JANUARY 1984 (CASE 74/82 COMMISSION V IRELAND (1984) ECR 317) THERE IS NOTHING THEREFORE TO PREVENT THE COMMISSION FROM SETTING OUT IN DETAIL IN THE REASONED OPINION THE COMPLAINTS WHICH IT HAS ALREADY MADE MORE GENERALLY IN ITS INITIAL LETTER.

22 IN THAT RESPECT IT IS CLEAR FROM THE DOCUMENTS ON THE FILE THAT IN ITS INITIAL LETTER DATED 17 DECEMBER 1982 THE COMMISSION ALLEGED THAT THE FIRST PARAGRAPH OF ARTICLE 10 OF LAW NO 741 INFRINGED ARTICLE 29 (3) OF DIRECTIVE 71/305 WHICH PROHIBITS THE ANONYMOUS ENVELOPE PROCEDURE . BUT IT ALSO STATED , AFTER CITING THE TEXT OF THE LAW , THAT THE PROVISION INFRINGED THE DIRECTIVE ' IN A MANNER ANALAGOUS TO THAT INDICATED IN THE PRECEDING PARAGRAPH '. IN THAT PARAGRAPH IT COMPLAINED THAT ARTICLE 9 OF LAW NO 741 PROVIDED INTER ALIA FOR A CRITERION FOR THE AWARD OF CONTRACTS WHICH WAS NOT COMPATIBLE WITH EITHER OF THE TWO CRITERIA PROVIDED FOR IN ARTICLE 29 (1) OF THE DIRECTIVE .

23 CONSEQUENTLY , ALTHOUGH ITS WORDING IS NOT VERY EXPLICIT , THE INITIAL LETTER DID GIVE NOTICE TO THE ITALIAN GOVERNMENT OF THE COMPLAINT AGAINST IT. THE COMMISSION ' S COMPLAINT IS THEREFORE ADMISSIBLE .

24 WITH REGARD TO THE SUBSTANCE OF THE COMPLAINT IT APPEARS THAT THE FIRST PARAGRAPH OF ARTICLE 10 OF LAW NO 741 CONTAINS , IN ADDITION TO THE CRITERIA FOR THE AWARD OF CONTRACTS OF THE LOWEST PRICE AND THE MOST ECONOMICALLY ADVANTAGEOUS TENDER , WHICH ARE PROVIDED FOR IN THE DIRECTIVE , THE CRITERION OF THE AVERAGE PRICE CALCULATED ON THE BASIS OF THE TENDERS IN THE LOWER HALF OF THE SCALE BETWEEN THE LOWEST AND HIGHEST TENDERS.

25 THE ITALIAN GOVERNMENT ' S CONTENTION THAT THE CRITERION FOR THE AWARD OF THE CONTRACT TO THE PERSON WHO SUBMITS ' THE TENDER WHICH EQUALS THE

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AVERAGE TENDER OR IS THE CLOSEST TO IT ' SERVES TO DETERMINE ' THE MOST ECONOMICALLY ADVANTAGEOUS TENDER ' WITHIN THE MEANING OF ARTICLE 29 OF THE DIRECTIVE IS INCORRECT. IN ORDER TO DETERMINE THE MOST ECONOMICALLY ADVANTAGEOUS TENDER , THE AUTHORITY MAKING THE DECISION MUST BE ABLE TO EXERCISE ITS DISCRETION IN TAKING A DECISION ON THE BASIS OF QUALITATIVE AND QUANTITATIVE CRITERIA THAT VARY ACCORDING TO THE CONTRACT IN QUESTION AND CANNOT THEREFORE RELY SOLELY ON THE QUANTITATIVE CRITERION OF THE AVERAGE PRICE.

26 IT IS THEREFORE NECESSARY TO DECLARE THAT THE FIRST PARAGRAPH OF ARTICLE 10 (1) OF LAW NO 741 IS NOT COMPATIBLE WITH DIRECTIVE 71/305 IN SO FAR AS IT CONTAINS A CRITERION FOR THE AWARD OF CONTRACTS WHICH IS NOT PROVIDED FOR IN ARTICLE 29 (1) OF THE DIRECTIVE.

(D) PUBLICATION OF CONTRACT NOTICES

27 THE COMMISSION ALSO MAINTAINS THAT THE THIRD PARAGRAPH OF ARTICLE 10 OF LAW NO 741 , IN SO FAR AS IT SUSPENDS UNTIL 31 DECEMBER 1983 THE OPERATION OF ARTICLE 7 OF LAW NO 14 OF 2 FEBRUARY 1973 AND THE PROVISIONS OF LAW NO 584 OF 8 AUGUST 1977 WITH REGARD TO THE PUBLICATION OF CONTRACT NOTICES , IS INCOMPATIBLE WITH ARTICLE 12 OF THE DIRECTIVE WHICH LAYS DOWN AN OBLIGATION TO PUBLISH CONTRACT NOTICES FALLING WITHIN THE SCOPE OF THE DIRECTIVE IN THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES. ACCORDING TO THE COMMISSION THE FOURTH PARAGRAPH OF ARTICLE 10 CONCERNING THE PUBLICATION OF AWARDS IS ALSO INCOMPATIBLE WITH ARTICLE 12 OF THE DIRECTIVE WHICH PROVIDES THAT CONTRACT NOTICES ARE NOT TO BE PUBLISHED IN THE DAILY PRESS BEFORE THEY HAVE BEEN DISPATCHED TO THE OFFICIAL JOURNAL.

28 THE ITALIAN GOVERNMENT DOES NOT DISPUTE THAT THESE COMPLAINTS ARE WELL-FOUNDED. IT IS THEREFORE NECESSARY TO DECLARE THAT IT HAS FAILED TO FULFIL ITS OBLIGATIONS IN THE MANNER ALLEGED.

(E) THE CONTRACTOR ' S FINANCIAL AND ECONOMIC STANDING AND TECHNICAL KNOWLEDGE AND ABILITY

29 THE FIFTH PARAGRAPH OF ARTICLE 10 OF LAW NO 741 , TO THE EXTENT TO WHICH IT SUSPENDS UNTIL 31 DECEMBER 1983 ARTICLES 17 AND 18 OF LAW NO 584 OF 8 AUGUST 1977 , WHICH IMPLEMENT ARTICLES 25 AND 26 OF THE DIRECTIVE , IS IN THE COMMISSION ' S OPINION INCOMPATIBLE NOT ONLY WITH THE PROVISIONS LISTING THE REFERENCES WHICH THE AUTHORITY AWARDING THE CONTRACT MAY REQUIRE IN ORDER TO ASSESS THE CONTRACTOR ' S FINANCIAL AND ECONOMIC STANDING AND TECHNICAL KNOWLEDGE AND ABILITY , BUT ALSO WITH ARTICLES 17 (D), 20 , 22 AND 27 OF THE DIRECTIVE , ACCORDING TO WHICH THE SUITABILITY OF CONTRACTORS IS TO BE CHECKED IN ACCORDANCE WITH THE CRITERIA OF ECONOMIC AND FINANCIAL STANDING AND TECHNICAL KNOWLEDGE AND ABILITY REFERRED TO IN ARTICLES 25 , 26 AND 27 OF THE DIRECTIVE.

30 THE ITALIAN GOVERNMENT DOES NOT DISPUTE THAT THESE COMPLAINTS ARE WELL-FOUNDED. IT IS THEREFORE NECESSARY TO DECLARE THAT IT HAS FAILED TO FULFIL ITS OBLIGATIONS.

(F) ADDITIONAL OR MODIFIED WORKS

31 THE COMMISSION CONTENDS THAT ARTICLE 11 OF LAW NO 741 , BY AUTHORIZING THE ADMINISTRATION TO PROCEED WITH ' THE AWARD OF ADDITIONAL OR MODIFIED

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WORKS , ONCE A FAVOURABLE OPINION HAS BEEN DELIVERED BY THE COMPETENT CONSULTATIVE BODY OR DELIBERATIVE BODY WITH REGARD TO APPROVAL OF THE RELEVANT EXPERTISE ' IS INCOMPATIBLE WITH ARTICLE 9 (F) OF THE DIRECTIVE IN SO FAR AS IT FAILS TO TAKE ACCOUNT OF ANY OF THE CONDITIONS PROVIDED FOR BY THAT PROVISION WITH REGARD TO THE AWARD OF ADDITIONAL WORKS TO THE CONTRACTOR WHO SUCCESSFULLY TENDERED FOR THE MAIN WORKS.

32 THE ITALIAN GOVERNMENT STATES , ON THE CONTRARY , THAT ARTICLE 11 RELATES SOLELY TO ' THE AWARD OF ADDITIONAL OR MODIFIED WORKS ' AND DOES NOT RELATE TO THE CONDITIONS ON WHICH ADDITIONAL WORKS ARE TO BE AWARDED TO THE CONTRACTOR WHO WAS AWARDED THE MAIN CONTRACT PROVIDED FOR IN ARTICLE 9 (F) OF THE DIRECTIVE. THOSE CONDITIONS CONTINUE TO BE GOVERNED BY ARTICLE 5 (F) OF LAW NO 584/77 WHICH CONFORMS TO THE AFOREMENTIONED ARTICLE 9 (F) OF THE DIRECTIVE. WHERE THE CONDITIONS IN ARTICLE 5 (F) ARE SATISFIED , ARTICLE 11 PERMITS , AT THE MOST , THE AWARD OF WORKS TO THE SUCCESSFUL TENDERER BEFORE THE CONTRACT FOR ADDITIONAL WORKS HAS BEEN APPROVED IN ORDER TO SPEED UP PROCEDURES FOR THE PERFORMANCE OF PUBLIC WORKS. THE HYPOTHESIS ON WHICH THE COMMISSION ' S COMPLAINT IS BASED , NAMELY THAT ARTICLE 11 INTRODUCES A DEROGATION FROM THE PROVISIONS OF ARTICLE 9 (F) OF THE DIRECTIVE , THEREFORE LACKS ANY FOUNDATION.

33 IN THE LIGHT OF THE SUBMISSIONS MADE BY THE ITALIAN GOVERNMENT , THE COMMISSION HAS STATED THAT IT IS NOT PROCEEDING WITH THIS COMPLAINT .

(G) URGENCY

34 THE COMMISSION MAINTAINS THAT ARTICLE 13 OF LAW NO 741 , IN SO FAR AS IT PERMITS , BY REFERENCE TO ARTICLE 41 (5) OF THE REGOLAMENTO (REGULATION) APPROVED BY REGIO DECRETO (ROYAL DECREE) NO 827 OF 23 MAY 1924 , THE AWARD OF PRIVATE CONTRACTS ' WHEN THE URGENCY OF THE WORKS , PURCHASES , TRANSPORT AND MATERIALS IS SUCH THAT THERE MUST BE NO DELAY ' , IS INCOMPATIBLE WITH ARTICLE 9 (D) OF THE DIRECTIVE TO THE EXTENT TO WHICH IT PERMITS URGENCY TO BE RELIED UPON IN CIRCUMSTANCES WHICH DO NOT CORRESPOND TO THE CONDITIONS PROVIDED FOR EXPRESSLY IN ARTICLE 9 (D).

35 THE ITALIAN GOVERNMENT HAS NOT CONTESTED THAT ALLEGATION. IT IS THEREFORE NECESSARY TO DECLARE THAT IT HAS FAILED TO FULFIL ITS OBLIGATIONS IN THE MANNER ALLEGED.

(H) SECURITY

36 FINALLY THE COMMISSION CONSIDERS THAT THE FIRST SENTENCE OF THE SECOND PARAGRAPH OF ARTICLE 15 OF LAW NO 741 , ACCORDING TO WHICH ' IF IT IS PROVIDED THAT THE UNDERTAKING INVITED TO TENDER CAN BE AWARDED ONLY ONE CONTRACT THAT UNDERTAKING SHALL PROVIDE ONLY ONE PROVISIONAL DEPOSIT , CALCULATED ON THE BASIS OF THE AMOUNT OF THE MOST VALUABLE CONTRACT ' , IS INCOMPATIBLE WITH ARTICLES 25 AND 26 OF THE DIRECTIVE TO THE EXTENT TO WHICH THE PROVISION OF SECURITY IS NOT MENTIONED IN THE EXHAUSTIVE LIST OF REFERENCES IN ARTICLES 25 AND 26 THAT MAY BE REQUIRED AT THE TENDERING STAGE AS PROOF OF THE CONTRACTOR ' S FINANCIAL AND ECONOMIC STANDING AND TECHNICAL KNOWLEDGE AND ABILITY. SINCE A DEPOSIT SERVES AS A GUARANTEE TO THE AUTHORITY AWARDING IN THE CONTRACT THAT THE WORKS WILL BE PERFORMED PROPERLY , IT CAN BE REQUIRED ONLY OF THE CONTRACTOR TO WHOM THE CONTRACT IS AWARDED.

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37 ACCORDING TO THE ITALIAN GOVERNMENT , THIS COMPLAINT IS INADMISSIBLE ON THE GROUND THAT THE COMMISSION HAS NO INTEREST IN THE MATTER IN SO FAR AS THE COMPLAINT IS BASED SOLELY ON THE FIRST SENTENCE OF THE SECOND PARAGRAPH OF ARTICLE 15 OF LAW NO 741 SINCE IT IS NOT THAT PROVISION WHICH REQUIRES CONTRACTORS TO PROVIDE A PROVISIONAL DEPOSIT IN ORDER TO TAKE PART IN THE TENDERING PROCEDURE , BUT OTHER PROVISIONS WHICH ARE NOT IMPUGNED. THE FIRST SENTENCE OF THE SECOND PARAGRAPH OF ARTICLE 15 MERELY PROVIDES A POWER TO PERMIT A CONTRACTOR WHO IS TAKING PART IN SEVERAL TENDER PROCEDURES TO LODGE ONLY ONE PROVISIONAL DEPOSIT.

38 IN ADDITION , THE ITALIAN GOVERNMENT CONTENDS THAT ARTICLE 16 (I) OF THE DIRECTIVE REFERS IN GENERAL TERMS TO ' DEPOSITS AND ANY OTHER GUARANTEES , WHATEVER THEIR FORM , WHICH MAY BE REQUIRED BY THE AUTHORITIES AWARDING CONTRACTS ' AND THEREFORE REFERS NOT ONLY TO THE DEFINITIVE DEPOSIT TO BE PAID BY THE TENDERER TO WHOM THE CONTRACT IS AWARDED , BUT ALSO TO A PROVISIONAL DEPOSIT WHOSE SPECIFIC PURPOSE IS TO GUARANTEE THAT THE TENDER IS SERIOUS AND TO COMPENSATE THE ADMINISTRATION IN ADVANCE FOR ANY INJURY. THE PROVISIONAL DEPOSIT MERELY REINFORCES THE OBLIGATION LAID DOWN IN ARTICLE 16 (M) OF THE DIRECTIVE THAT THE TENDERER MUST KEEP OPEN HIS TENDER FOR A CERTAIN PERIOD OF TIME.

39 SINCE ITALIAN LAW NO 687 AMENDING LAW NO 741 AND IN PARTICULAR THE PROVISIONS RELATING TO PROVISIONAL SECURITIES WAS ADOPTED ON 8 OCTOBER 1984 , THE COMMISSION HAS WITHDRAWN ITS COMPLAINT IN THE COURSE OF THE ORAL PROCEDURE.

II - FAILURE TO NOTIFY THE TEXT OF LAW NO 741

40 THE COMMISSION CLAIMS THAT , BY FAILING TO NOTIFY IT OF THE TEXT OF LAW NO 741 OF 10 DECEMBER 1981 , ITALY HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 33 OF DIRECTIVE 71/305.

41 THE ITALIAN GOVERNMENT FOR ITS PART CONSIDERS THAT THIS COMPLAINT HAS CEASED TO BE MATERIAL IN SO FAR AS THE COMMISSION WAS WELL AWARE OF THE TEXT OF THE LAW WHEN IT DELIVERED ITS REASONED OPINION.

42 IN THAT RESPECT IT IS NECESSARY TO DECLARE THAT EVEN IF THE COMMISSION WAS AWARE OF LAW NO 741 WHEN IT DELIVERED ITS REASONED OPINION , THE FACT REMAINS THAT THE ITALIAN GOVERNMENT HAS NOT NOTIFIED IT OFFICIALLY OF THE TEXT OF THE LAW AS IT IS OBLIGED TO DO UNDER ARTICLE 33. IT SHOULD BE EMPHASIZED IN THAT RESPECT THAT THE MEMBER STATES ARE OBLIGED , BY VIRTUE OF ARTICLE 5 OF THE EEC TREATY , TO FACILITATE THE ACHIEVEMENT OF THE COMMISSION ' S TASKS WHICH , UNDER ARTICLE 155 OF THE EEC TREATY , CONSIST IN PARTICULAR OF ENSURING THAT THE PROVISIONS OF THE TREATY AND THE MEASURES ADOPTED BY THE INSTITUTIONS PURSUANT THERETO ARE APPLIED. IT IS FOR THOSE REASONS THAT ARTICLE 33 OF THE DIRECTIVE IN QUESTION , LIKE OTHER DIRECTIVES , IMPOSES UPON THE MEMBER STATES , AN OBLIGATION TO PROVIDE INFORMATION . IN THE ABSENCE OF SUCH INFORMATION , THE COMMISSION IS NOT IN A POSITION TO ASCERTAIN WHETHER THE MEMBER STATE HAS EFFECTIVELY AND COMPLETELY IMPLEMENTED THE DIRECTIVE.

43 IT IS THEREFORE NECESSARY TO DECLARE THAT THE ITALIAN REPUBLIC , BY FAILING TO NOTIFY THE COMMISSION OFFICIALLY OF THE TEXT OF LAW NO 741 , HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 33 OF DIRECTIVE 71/305.

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PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Lenz

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Judgment of the Court (Fourth Chamber)
of 10 July 1985
CMC Cooperativa muratori e cementisti and others v Commission of the European Communities.
European Development Fund - Amarti River diversion project. Case 118/83.

1 . INTERNATIONAL AGREEMENTS - SECOND LOME ACP-EEC CONVENTION - PROVISIONS ON FINANCIAL AND TECHNICAL COOPERATION - PROCEDURE FOR PLACING PUBLIC WORKS CONTRACTS - RESPECTIVE ROLES OF THE ACP STATE AND THE COMMISSION - POWER OF THE ACP STATE TO CONCLUDE CONTRACTS - ACT OR OMISSION OF THE COMMISSION IN RESPECT OF WHICH AN ACTION FOR ANNULMENT OR FOR FAILURE TO ACT MAY BE BROUGHT BY A TENDERER - NONE - ALLEGATION OF LIABILITY ON THE PART OF COMMUNITY-ADMISSIBILITY

(EEC TREATY , ART. 173 , SECOND PARA., ART. 175 , THIRD PARA., ART . 178 AND ART. 215 , SECOND PARA ; SECOND ACP-EEC CONVENTION OF 31 OCTOBER 1979 , ARTS 120 TO 123)

2 . INTERNATIONAL AGREEMENTS - SECOND LOME ACP-EEC CONVENTION - PROVISIONS ON FINANCIAL AND TECHNICAL COOPERATION - PROCEDURE FOR PLACING PUBLIC WORKS CONTRACTS - RESPECTIVE ROLES OF THE ACP STATE AND THE COMMISSION - AWARD OF CONTRACT SUBJECT TO COMMISSION APPROVAL - OBLIGATION OF COMMISSION TO ENSURE JUDICIOUS USE OF EDF FUNDS.

(SECOND ACP-EEC CONVENTION OF 31 OCTOBER 1979 , ARTS 121 AND 123).

1 . IN THE FRAMEWORK OF THE FINANCIAL AND TECHNICAL COOPERATION PROVIDED FOR BY THE SECOND ACP-EEC CONVENTION THE PROCEDURE FOR PLACING PUBLIC WORKS CONTRACTS INVOLVES A DIVISION OF POWERS BETWEEN THE COMMISSION AND THE AUTHORITIES OF THE ACP STATE CONCERNED. WHEREAS THE COMMISSION ADOPTS THE FINANCING DECISIONS ON BEHALF OF THE COMMUNITY , THE AUTHORITIES OF THE ACP STATE ARE RESPONSIBLE FOR PREPARING , NEGOTIATING AND CONCLUDING CONTRACTS. IT FOLLOWS THAT THERE CAN BE NO ACT OR OMISSION ON THE PART OF THE COMMISSION IN RESPECT OF WHICH TENDERERS MAY BRING AN ACTION FOR ANNULMENT OR FOR FAILURE TO ACT , UNDER ARTICLE 173 , SECOND PARAGRAPH , OR ARTICLE 175 , THIRD PARAGRAPH , OF THE EEC TREATY. THEY MAY HOWEVER BRING AN ACTION FOR DAMAGES , SINCE IT WOULD BE WRONG TO DISMISS THE POSSIBILITY THAT ACTS OR CONDUCT OF THE COMMISSION OR ITS OFFICIALS AND AGENTS IN CONNECTION WITH PROJECTS FINANCED BY THE EUROPEAN DEVELOPMENT FUND MIGHT CAUSE DAMAGE TO THIRD PARTIES.

2 . HAVING REGARD TO THE RESPONSIBILITIES CONFERRED ON IT IN THE INTEREST OF THE COMMUNITY BY ARTICLES 121 AND 123 OF THE SECOND ACP-EEC CONVENTION , THE COMMISSION IS UNDER A DUTY , IN ORDER TO ENSURE THE ECONOMICAL ADMINISTRATION OF THE RESOURCES OF THE EUROPEAN DEVELOPMENT FUND , TO MAKE CERTAIN , BEFORE APPROVING THE AWARD OF A CONTRACT FINANCED BY THAT FUND , THAT THE TENDER ACCEPTED IS THE LOWEST , IS ECONOMICALLY THE MOST ADVANTAGEOUS AND DOES NOT EXCEED THE SUM EARMARKED FOR THE CONTRACT.

IN CASE 118/83

CMC COOPERATIVA MURATORI E CEMENTISTI , RAVENNA (ITALY),

CRC COOPERATIVA REGGIANA COSTRUZIONI , REGGIO EMILIA (ITALY),

CMB COOPERATIVA MURATORI E BRACCIANTI , CARPI , MODENA (ITALY),

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LIMITED LIABILITY CO-OPERATIVE COMPANIES GOVERNED BY ITALIAN LAW , REPRESENTED BY PROFESSOR GIORGIO BERNINI , OF THE BOLOGNA BAR , AND STANLEY A . CROSSICK , SOLICITOR OF THE SUPREME COURT OF ENGLAND AND WALES , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF ERNEST ARENDT , 34 B RUE PHILIPPE II ,

APPLICANTS ,

V

COMMISSION OF THE EUROPEAN COMMUNITIES , REPRESENTED BY ITS LEGAL ADVISER , ANTHONY MCCLELLAN , AND DANIEL JACOB , A MEMBER OF ITS LEGAL DEPARTMENT , ACTING AS AGENTS , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF GEORGES KREMLIS , A MEMBER OF THE COMMISSION ' S LEGAL DEPARTMENT , JEAN MONNET BUILDING , KIRCHBERG ,

DEFENDANT ,

APPLICATION PRIMARILY FOR A DECLARATION THAT THE COMMISSION DECISION DEPRIVING THE APPLICANTS OF THE AWARD OF A PUBLIC WORKS CONTRACT FINANCED BY THE FIFTH EUROPEAN DEVELOPMENT FUND IS VOID , AND , SECONDARILY , FOR A DECLARATION THAT THE COMMISSION ILLEGALLY FAILED TO ACT , AND FOR AN ORDER THAT THE COMMISSION SHOULD COMPENSATE THE APPLICANTS FOR THE DAMAGE CAUSED TO THEM BY ITS DECISION , ITS FAILURE TO ACT OR ITS ILLEGAL CONDUCT.

COSTS

50 UNDER ARTICLE 69 (3) OF THE RULES OF PROCEDURE THE COURT MAY , WHERE THE CIRCUMSTANCES ARE EXCEPTIONAL , ORDER THAT THE PARTIES BEAR THEIR OWN COSTS. IN THIS CASE IT SHOULD BE BORNE IN MIND THAT EVEN IF IT COULD NOT LEGALLY BIND THE EUROPEAN DEVELOPMENT FUND , THE SIGNATURE BY THE COMMISSION ' S LOCAL DELEGATE OF THE MINUTES OF THE MEETING OF THE TENDER COMMITTEE WITHOUT RESERVE OR QUALIFICATION LED THE APPLICANTS TO BELIEVE THAT THEIR LEGAL POSITION WAS THAT WHICH THEY HAVE ASSERTED BEFORE THE COURT. IT THEREFORE APPEARS FAIR AND REASONABLE TO ORDER THAT THE PARTIES BEAR THEIR OWN COSTS.

ON THOSE GROUNDS ,

THE COURT (FOURTH CHAMBER)

HEREBY :

(1) DISMISSES THE APPLICATION MADE BY THE APPLICANTS UNDER ARTICLE 91 OF THE RULES OF PROCEDURE FOR AN ORDER REQUIRING THE COMMISSION TO PRODUCE CERTAIN DOCUMENTS ;

(2)DISMISSES THE APPLICATION AS INADMISSIBLE IN SO FAR AS IT IS BASED ON ARTICLES 173 AND 175 OF THE EEC TREATY ;

(3)DISMISSES THE APPLICATION AS UNFOUNDED IN SO FAR AS IT IS BASED ON ARTICLE 178 AND THE SECOND PARAGRAPH OF ARTICLE 215 OF THE EEC TREATY ;

(4)ORDERS THE PARTIES TO PAY THEIR OWN COSTS.

1 BY APPLICATION LODGED AT THE COURT REGISTRY ON 28 JUNE 1983 COOPERATIVA

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MURATORI E CEMENTISTI , OF RAVENNA , ITALY , COOPERATIVA REGGIANA COSTRUZIONI , OF REGGIO EMILIA , ITALY , AND COOPERATIVA MURATORI E BRACCIANTI , OF CARPI , MODENA , ITALY , ACTING AS A CONSORTIUM , BROUGHT AN ACTION UNDER ARTICLES 173 , 175 AND 178 AND THE SECOND PARAGRAPH OF ARTICLE 215 OF THE EEC TREATY FOR THE ANNULMENT OF A COMMISSION DECISION THE EFFECT OF WHICH WAS TO DEPRIVE THE APPLICANTS OF THE AWARD OF A CONTRACT FOR THE CONSTRUCTION OF A HYDRO-ELECTRIC DAM IN ETHIOPIA , THE AMARTI RIVER DIVERSION PROJECT , FINANCED BY THE EUROPEAN DEVELOPMENT FUND AND CARRIED OUT UNDER THE PROVISIONS ON FINANCIAL AND TECHNICAL CO-OPERATION OF THE SECOND ACP-EEC CONVENTION , SIGNED AT LOME ON 31 OCTOBER 1979 AND APPROVED BY COUNCIL REGULATION (EEC) NO 3225/80 OF 25 NOVEMBER 1980 (OFFICIAL JOURNAL 1980 , L 347 , P. 1 ; HEREINAFTER REFERRED TO AS ' THE CONVENTION '). IN THE ALTERNATIVE , THE APPLICANTS SEEK A DECLARATION THAT THE COMMISSION FAILED TO ACT , SHOULD IT BE FOUND THAT IT FAILED TO EXERCISE ITS POWERS IN THE CONTEXT OF THE TENDER PROCEDURE , GOVERNED BY TITLE VII OF THE CONVENTION. IN THE EVENT THAT IT IS FOUND TO BE NO LONGER POSSIBLE TO AWARD THE CONTRACT TO THE APPLICANTS , THEY CLAIM DAMAGES FOR THE LOSS THEREBY CAUSED TO THEM.

2 IT APPEARS FROM THE DOCUMENTS BEFORE THE COURT THAT IN DECEMBER 1981 THE ETHIOPIAN GOVERNMENT , ACTING THROUGH THE INTERMEDIARY OF THE ETHIOPIAN ELECTRIC LIGHT AND POWER AUTHORITY (HEREINAFTER REFERRED TO AS ' EELPA '), AS ' EMPLOYER ' , ISSUED AN INVITATION TO TENDER IN RESPECT OF CONSTRUCTION WORK ON THE AMARTI RIVER DIVERSION , CONSISTING OF THE DIVERSION OF THAT RIVER , ON THE CENTRAL PLATEAU ABOUT 190 KILOMETRES NORTH-WEST OF ADDIS ABABA , TOWARDS THE EXISTING FINCHAA RESERVOIR. THE INVITATION TO TENDER , BASED ON DOCUMENTS PUBLISHED UNDER THE TITLE ' NOTES ON DOCUMENTS FOR CIVIL ENGINEERING CONTRACTS ' BY THE INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS (FIDIC), WHOSE HEADQUARTERS IS IN LAUSANNE , WAS PUBLISHED UNDER NO 1824 IN SUPPLEMENT TO THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES , S 132 OF 14 JULY 1982 , PAGE 3. THE WORKS ARE FINANCED BY THE EUROPEAN DEVELOPMENT FUND AS PART OF ITS ACTION TO PROMOTE ECONOMIC DEVELOPMENT .

3 UNDER THE CONDITIONS OF TENDER , TENDERERS WERE REQUIRED TO DEMONSTRATE THEIR TECHNICAL EXPERIENCE AND COMPETENCE TO UNDERTAKE THE WORKS , THE MAJOR FACTOR BEING SUCCESSFUL EXECUTION , IN THE CAPACITY OF PRIME CONTRACTOR AND IN RECENT YEARS , OF A PROJECT OR PROJECTS CONTAINING ELEMENTS SIMILAR IN NATURE AND AT LEAST EQUAL IN SCALE TO THOSE SPECIFIED IN THE PROJECT (CLAUSE IT-1 , 4 (C)). THE TENDERERS WERE ALSO REQUIRED TO DEMONSTRATE THEIR CURRENT FINANCIAL CAPABILITY (CLAUSE IT-1 , 4 (D)).

4 THE QUALIFICATIONS OF THE TENDERERS WERE TO BE EXAMINED BY A TENDER COMMITTEE APPOINTED BY THE EMPLOYER ; THAT COMMITTEE WAS ASSISTED BY THE EEC DELEGATE AT ADDIS ABABA AND BY A CONSULTING ENGINEER (CLAUSE IT-1 , 4 , THIRD PARAGRAPH).

5 WITH REGARD TO THE AWARD OF THE CONTRACT IT WAS STATED IN THE CONDITIONS OF TENDER THAT THE EMPLOYER DID NOT BIND ITSELF TO AWARD THE CONTRACT TO THE LOWEST TENDERER , BUT WOULD TAKE INTO CAREFUL CONSIDERATION THE WHOLE OF THE INFORMATION GIVEN IN THE TENDER AND IN ITS APPENDICES. IT WAS ADDED THAT THE TENDERER CHOSEN WOULD BE INFORMED THAT HIS OFFER HAS BEEN ACCEPTED AND INVITED TO SEND TO ADDIS ABABA A REPRESENTATIVE WITH A FULL POWER OF ATTORNEY FOR THE PURPOSE OF SIGNING THE CONTRACT (CLAUSE

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IT-11).

6 THE FINAL DATE SET FOR THE SUBMISSION OF TENDERS WAS 5 NOVEMBER 1982 (SEE THE CORRIGENDUM TO THE INVITATION TO TENDER PUBLISHED IN OFFICIAL JOURNAL , S 193 OF 6 OCTOBER 1982 , P.3), AND ON THAT DATE EELPA HAD RECEIVED THREE OFFERS , SUBMITTED BY THE ITALIAN CONSORTIUM , BY RUSH & TOMPKINS BV , A COMPANY INCORPORATED UNDER NETHERLANDS LAW , AND BY BOSKALIS WESTMINSTER-BARESEL , A COMPANY INCORPORATED UNDER ENGLISH LAW.

7 IT SHOULD BE NOTED THAT THE TENDER OF RUSH & TOMPKINS BV WAS SUBMITTED ONLY IN THE FORM OF A TELEX COMMUNICATION , SINCE THE DESPATCH OF THE TENDER DOCUMENTS TO ADDIS ABABA HAD BEEN DELAYED BECAUSE OF DIFFICULTIES BEYOND THE CONTROL OF THE TENDERER. THE ETHIOPIAN AUTHORITIES ACCEPTED THAT THE CIRCUMSTANCES AMOUNTED TO A CASE OF FORCE MAJEURE AND THAT THE TENDER COULD THEREFORE BE CONSIDERED .

8 WHEN THE TENDERS WERE OPENED ON 8 NOVEMBER 1982 THE FOLLOWING TENDERS (EXPRESSED IN MILLIONS OF ECU) WERE ESTABLISHED :

1) RUSH & TOMPKINS BV : 24.3

2) ITALIAN CONSORTIUM : 26.7

3) BOSKALIS WESTMINSTER-BARESEL : 28.2

9 THE TENDER DOCUMENTS WERE THEN EXAMINED BY THE ETHIOPIAN AUTHORITIES , IN CONSULTATION WITH KAMPSAX , A DANISH FIRM OF CONSULTING ENGINEERS. IT SHOULD BE NOTED THAT KAMPSAX WAS CHOSEN BY THE ETHIOPIAN AUTHORITIES , ALTHOUGH ITS FEES WERE TO BE PAID BY THE EUROPEAN DEVELOPMENT FUND. THE COMMISSION HAS EMPHASIZED THAT ALTHOUGH IT ENTERED INTO CONTACT WITH KAMPSAX THAT FIRM ' S TASK WAS TO ADVISE THE ETHIOPIAN GOVERNMENT AND ITS SUCCESSIVE ASSESSMENTS OF THE TENDERS COULD NOT BIND THE COMMISSION.

10 ON 24 FEBRUARY 1983 THE TENDER COMMITTEE PROVIDED FOR IN THE CONDITIONS OF TENDER MET IN ADDIS ABABA , IN THE PRESENCE OF THE COMMISSION ' S LOCAL DELEGATE , TO EXAMINE THE REPORT OF KAMPSAX ON THE TENDERS SUBMITTED. WITH THE AGREEMENT OF THE ETHIOPIAN AUTHORITIES THE MINUTES OF THAT MEETING WERE PRODUCED TO THE COURT. IT APPEARS FROM THOSE MINUTES THAT THE MEMBERS OF THE COMMITTEE HAD RECEIVED IN ADVANCE A DRAFT REPORT AND A FINAL REPORT FROM KAMPSAX , AND THAT AT THE LAST MOMENT THE CONSULTANTS HAD MADE A FURTHER SLIGHT MODIFICATION TO THEIR CONCLUSIONS , AFTER CONSIDERING ADDITIONAL DOCUMENTS SUBMITTED BY RUSH & TOMPKINS BV. THE MINUTES SHOW THAT THE COMMITTEE WAS UNANIMOUS IN REJECTING THE TENDER OF RUSH & TOMPKINS BV , ALTHOUGH IT WAS THE MOST FAVOURABLE , ON THE GROUND OF A LACK OF TECHNICAL AND FINANCIAL CAPABILITY. THE COMMITTEE THEREFORE RECOMMENDED THAT THE SECOND TENDERER , THE ITALIAN CONSORTIUM , BE INVITED TO ATTEND IN ORDER TO NEGOTIATE THE CONTRACT. THE COMMITTEE ALSO DECIDED THAT SHOULD THE NEGOTIATIONS WITH THE ITALIAN CONSORTIUM FAIL , BOSKALIS WESTMINSTER-BARESEL SHOULD BE CONSIDERED THE SECOND QUALIFIED TENDERER.

11 ON 28 FEBRUARY 1983 THE FINAL REPORT OF KAMPSAX WAS TRANSMITTED BY THE ETHIOPIAN AUTHORITIES TO THE COMMISSION , IN THE PERSON OF THE CHIEF AUTHORIZING OFFICER OF THE EUROPEAN DEVELOPMENT FUND. IMMEDIATELY AFTERWARDS , ON 3 MARCH , EELPA SENT A TELEX COMMUNICATION TO THE ITALIAN CONSORTIUM INVITING

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IT TO ATTEND IN ADDIS ABABA ON 14 MARCH TO BEGIN NEGOTIATIONS FOR THE CONCLUSION OF THE CONTRACT. WHEN , HOWEVER , THE REPRESENTATIVES OF THE CONSORTIUM ARRIVED AT THE HEAD OFFICE OF EELPA ON THE DATE INDICATED , THEY WERE NOT ABLE TO MEET EELPA OFFICIALS. THE FOLLOWING DAY , 15 MARCH 1983 , THEY WERE INFORMED BY THE ETHIOPIAN AUTHORITIES THAT THE NEGOTIATIONS COULD NOT TAKE PLACE SINCE THE COMMISSION HAD REQUESTED THAT NEGOTIATIONS BE OPENED WITH RUSH & TOMPKINS BV.

12 IT APPEARS FROM THE DOCUMENTS BEFORE THE COURT THAT WHEN THE COMMISSION RECEIVED THE REPORT OF THE TENDER COMMITTEE IT DISAGREED WITH THE REJECTION OF THE LOWEST OFFER AND ASKED THE ETHIOPIAN AUTHORITIES AND , THROUGH THEM , KAMPSAX TO RECONSIDER THE QUESTION OF THE LACK OF TECHNICAL AND FINANCIAL QUALIFICATIONS OF RUSH & TOMPKINS BV . IN THE COURSE OF THAT REVIEW DIRECT CONTACTS TOOK PLACE BETWEEN THE COMMISSION AND KAMPSAX. DURING THE SAME PERIOD THE ITALIAN CONSORTIUM MADE REPRESENTATIONS TO THE COMMISSION ON SEVERAL OCCASIONS , AND WAS INFORMED ORALLY OF THE REASONS FOR THE COMMISSION ' S ACTION .

13 THE COMMISSION STATES THAT IN THE COURSE OF THOSE EFFORTS TO CLARIFY THE MATTER IT ESTABLISHED THAT RUSH & TOMPKINS BV WAS IN FACT A SUBSIDIARY OF AN ENGLISH GROUP , RUSH & TOMPKINS GROUP PLC , WHICH , TAKEN AS A GROUP , APPEARED TO IT TO HAVE THE TECHNICAL AND FINANCIAL CAPABILITIES NECESSARY FOR A PROJECT OF THIS SIZE. IN ITS SUCCESSIVE STATEMENTS KAMPSAX GRADUALLY CHANGED ITS VIEW AND FINALLY AGREED THAT , TAKING INTO ACCOUNT THE GUARANTEES PROVIDED BY ITS RELATIONSHIP WITH THE RUSH & TOMPKINS GROUP , MANIFESTED BY AN EXPRESS AND UNCONDITIONAL WRITTEN GUARANTEE (CORPORATE GUARANTEE) DATED 22 APRIL 1983 AND REPEATED IN IDENTICAL TERMS ON 21 JUNE 1983 , RUSH & TOMPKINS BV DID IN FACT POSSESS THE TECHNICAL AND FINANCIAL CAPABILITIES REQUIRED FOR THE COMPLETION OF THE PROJECT.

14 AT FIRST , THE ETHIOPIAN AUTHORITIES FOUND IT DIFFICULT TO AGREE WITH THAT ASSESSMENT , AS IS INDICATED BY A TELEX COMMUNICATION OF 25 APRIL 1983 SENT TO THE ITALIAN CONSORTIUM IN WHICH THEY STATED THAT PRESSURE HAD BEEN BROUGHT TO BEAR ON THEM BY THE COMMISSION.

15 ON 6 JUNE 1983 KAMPSAX SUBMITTED A FINAL REPORT RECOMMENDING , THIS TIME , THAT THE CONTRACT SHOULD BE AWARDED TO RUSH & TOMPKINS BV , SUPPORTED BY RUSH & TOMPKINS GROUP PLC. THAT REPORT WAS IMMEDIATELY ACCEPTED BY THE ETHIOPIAN AUTHORITIES , IN THE PERSON OF THE NATIONAL AUTHORIZING OFFICER. ON 10 JUNE 1983 THE CHIEF AUTHORIZING OFFICER OF THE EUROPEAN DEVELOPMENT FUND GAVE HIS AGREEMENT , AND THE CONTRACT BETWEEN THE ETHIOPIAN AUTHORITIES AND RUSH & TOMPKINS BV WAS SIGNED ON 6 JULY 1983 AND ENDORSED BY THE COMMISSION ' S DELEGATE ON THE AUTHORITY OF THE CHIEF AUTHORIZING OFFICER .

16 IN A TELEX COMMUNICATION OF 22 JUNE 1983 EELPA INFORMED THE ITALIAN CONSORTIUM THAT AS A RESULT OF DISCUSSIONS WITH KAMPSAX AND THE COMMISSION IT WAS NOW SATISFIED THAT THE LOWEST TENDERER , RUSH & TOMPKINS BV , HAD ALL THE QUALIFICATIONS REQUIRED IN ORDER TO UNDERTAKE THE AMARTI PROJECT. IT THEREFORE ASKED THE ITALIAN CONSORTIUM NOT TO PURSUE THE MATTER.

17 ON 24 JUNE 1983 THE ITALIAN CONSORTIUM BROUGHT THIS ACTION , TOGETHER WITH AN APPLICATION FOR THE ADOPTION OF INTERIM MEASURES. THAT APPLICATION RESULTED IN AN ORDER OF 5 AUGUST 1983 WHICH EXPRESSED DOUBTS WITH REGARD

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TO THE REGULARITY OF THE PROCEDURE BUT DID NOT GRANT THE MEASURES REQUESTED ((1983) ECR 2583).

18 TWO ISSUES OF A PRELIMINARY NATURE WERE RAISED BY THE PARTIES DURING THE PROCEEDINGS :

IN ITS APPLICATION THE APPLICANT CONSORTIUM REQUESTED THE PRODUCTION BY THE COMMISSION OF A NUMBER OF DOCUMENTS. SINCE THE COMMISSION DID NOT ACCEDE TO THAT REQUEST , EXCEPT IN REGARD TO CERTAIN DOCUMENTS REFERRED TO BELOW , THAT CLAIM WAS REPEATED DURING THE PROCEEDINGS , IN THE FORM OF AN INTERLOCUTORY APPLICATION UNDER ARTICLE 91 OF THE RULES OF PROCEDURE , THEN IN ITS REPLY AND AT THE HEARING ;

FOR ITS PART , THE COMMISSION RAISED AN OBJECTION OF INADMISSIBILITY WITH REGARD BOTH TO THE ACTION FOR ANNULMENT AND THE ACTION FOR FAILURE TO ACT AND TO THE ACTION FOR DAMAGES AND THE INTERLOCUTORY APPLICATION FOR THE PRODUCTION OF DOCUMENTS.

19 THOSE ISSUES MUST BE RESOLVED BEFORE THE SUBSTANCE OF THE CASE IS DEALT WITH .

THE PRODUCTION OF DOCUMENTS

20 IT APPEARS FROM THE CLAIMS OF THE APPLICANTS THAT THEY WISH TO HAVE ACCESS TO THREE SETS OF DOCUMENTS WHICH MAY CONTAIN INFORMATION RELEVANT TO THEIR ACTION : THE TENDER DOCUMENTS OF RUSH & TOMPKINS , WHICH ARE IN THE POSSESSION OF THE ETHIOPIAN AUTHORITIES ; THE REPORTS DRAWN UP BY KAMPSAX FOR THOSE AUTHORITIES ; FINALLY , THE COMMUNICATIONS BETWEEN THE COMMISSION ON THE ONE HAND AND THE ETHIOPIAN AUTHORITIES AND KAMPSAX ON THE OTHER.

21 DURING THE PROCEEDINGS THE COMMISSION VOLUNTARILY PRODUCED THE FOLLOWING DOCUMENTS , HAVING FIRST OBTAINED THE AGREEMENT OF THE ETHIOPIAN AUTHORITIES OR OF RUSH & TOMPKINS BV AS APPROPRIATE :

A SUMMARY OF THE CONTENTS OF APPENDIX A CONCERNING THE QUALIFICATIONS OF THE TENDERER , ANNEXED TO THE TENDER OF RUSH & TOMPKINS BV ;

A WRITTEN GUARANTEE OF 22 APRIL 1983 PROVIDED TO EELPA BY THE RUSH & TOMPKINS GROUP PLC , IN FAVOUR OF RUSH & TOMPKINS BV , REPLACED BY THAT OF 21 JUNE 1983 ;

THE MINUTES OF THE MEETING OF THE TENDER COMMITTEE AT ADDIS ABABA ON 24 FEBRUARY 1983.

THE AUTHENTICITY OF THOSE DOCUMENTS IS NOT DISPUTED.

22 ON 23 DECEMBER 1983 THE APPLICANTS MADE AN APPLICATION UNDER ARTICLE 91 (1) OF THE RULES OF PROCEDURE SEEKING AN ORDER FOR THE PRODUCTION OF ALL THE OTHER DOCUMENTS REQUESTED BY THEM IN THEIR MAIN APPLICATION .

23 IN ITS OBSERVATIONS SUBMITTED PURSUANT TO ARTICLE 91 (2) THE COMMISSION ARGUES THAT A CLAIM FOR THE PRODUCTION OF DOCUMENTS DOES NOT CONSTITUTE A ' PRELIMINARY OBJECTION ' OR A ' PROCEDURAL ISSUE ' WITHIN THE MEANING OF THE PROVISION REFERRED TO. SUCH A CLAIM OVERLAPS WITH THE NORMAL EXAMINATION OF THE CASE AS PROVIDED FOR IN ARTICLE 45 ET SEQ. OF THE RULES OF PROCEDURE AND IS INADMISSIBLE.

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24 WITH REGARD TO THE SUBSTANCE OF THE REQUESTS MADE , THE COMMISSION STATES THAT THE APPLICANTS ARE SEEKING TO BECOME PRIVY TO ALL THE DOCUMENTS IN THE COMMISSION ' S POSSESSION AND ARE THUS ATTEMPTING TO ALTER THE PRINCIPLES REGARDING THE BURDEN OF PROOF , INASMUCH AS IT IS FOR EACH PARTY TO PROVE HIS ALLEGATIONS WITHOUT CLAIMING A RIGHT TO ' FISH ' FOR ARGUMENTS IN HIS ADVERSARY ' S FILES . THE COMMISSION ALSO DRAWS ATTENTION TO THE CONFIDENTIAL NATURE OF THE DOCUMENTS REQUESTED BY THE APPLICANTS INASMUCH AS THEY RELATE TO A TENDER PROCEDURE FOR WHICH THE ACP STATE CONCERNED WAS RESPONSIBLE AND TO COMMUNICATIONS BETWEEN THE COMMISSION AND ITS LOCAL REPRESENTATIVE ON THE ONE HAND AND THE AUTHORITIES OF A NON-MEMBER COUNTRY ON THE OTHER .

25 BY ORDER OF 29 FEBRUARY 1984 THE COURT DECIDED TO RESERVE UNTIL FINAL JUDGMENT ITS DECISION ON THE PROCEDURAL ISSUE. DURING ITS EXAMINATION OF THE CASE IT DID NOT REQUIRE THE PRODUCTION OF DOCUMENTS OTHER THAN THOSE MENTIONED ABOVE WHICH WERE PROVIDED TO IT BY THE COMMISSION . IN THE COURSE OF THAT EXAMINATION IT BECAME APPARENT THAT ONCE THE COMMISSION HAD SUBMITTED CERTAIN DOCUMENTS VOLUNTARILY THE COURT WAS IN POSSESSION OF ALL THE INFORMATION NECESSARY FOR THE RESOLUTION OF THE CASE , AS WILL BECOME APPARENT FROM THE CONSIDERATIONS SET OUT BELOW REGARDING THE ADMISSIBILITY AND THE SUBSTANCE OF THE APPLICATION. THE REPEATED CLAIMS OF THE APPLICANTS MUST THEREFORE BE DISMISSED AS IRRELEVANT , AND IT IS NOT NECESSARY TO CONSIDER THE QUESTION WHETHER THE DOCUMENTS TO WHICH THEY WISH TO HAVE ACCESS ARE CONFIDENTIAL IN NATURE.

ADMISSIBILITY

26 THE COMMISSION CHALLENGES THE JURISDICTION OF THE COURT TO HEAR ACTIONS REGARDING INVITATIONS TO TENDER IN EUROPEAN DEVELOPMENT FUND PROJECTS . ACCORDING TO THE COMMISSION , IT IS THE ACP STATE CONCERNED WHICH IS RESPONSIBLE FOR PREPARING , NEGOTIATING AND CONCLUDING CONTRACTS IN RELATION TO A PARTICULAR PROJECT. IT FOLLOWS THAT THE DIRECT INTERLOCUTOR OF THE TENDERERS IS THE ACP STATE AND NOT THE COMMISSION . IT IS THAT STATE WHICH TAKES THE VARIOUS DECISIONS REQUIRED IN THE COURSE OF THE PROCEEDINGS , INCLUDING THE FINAL DECISION TO AWARD THE CONTRACT. ANY DISPUTE REGARDING THE AWARD OF A CONTRACT IS NECESSARILY A DISPUTE BETWEEN THE TENDERER AND THE ACP STATE AND MUST THEREFORE BE RESOLVED BY ARBITRATION IN ACCORDANCE WITH ARTICLE 132 (1) OF THE CONVENTION , WHICH APPLIES EQUALLY TO DISPUTES ARISING BETWEEN AN ACP STATE AND AN UNSUCCESSFUL TENDERER. IN THE ABSENCE OF ANY ACT OF THE COMMISSION ADDRESSED TO THE APPLICANTS THE COURT THEREFORE HAS NO JURISDICTION IN THE MATTER. ACCORDING TO THE COMMISSION BOTH THE CLAIM FOR ANNULMENT AND THE CLAIM FOR DAMAGES ARE INADMISSIBLE.

27 THE APPLICANTS DENY THAT RECOURSE TO ARBITRATION IS AN APPROPRIATE SOLUTION , AT LEAST IN THE CASE OF AN UNSUCCESSFUL TENDERER . THEY CONSIDER THAT THE COMMISSION CANNOT ESCAPE FROM ITS OBLIGATION TO ACCOUNT BEFORE THE COURT OF JUSTICE FOR ITS CONDUCT IN CARRYING OUT THE FUNCTIONS ATTRIBUTED TO IT IN THE CONTEXT OF THE EUROPEAN DEVELOPMENT FUND.

28 IN SO FAR AS THE APPLICATION IS BASED ON ARTICLES 173 AND 175 OF THE EEC TREATY REFERENCE SHOULD BE MADE TO THE CONSIDERATIONS SET OUT IN THE JUDGMENT OF 10 JULY 1984 (CASE 126/83 , STS V COMMISSION , (1984) ECR 2769), WHERE THE COURT

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ANALYSED IN THE FOLLOWING TERMS THE RELATIONSHIPS WHICH ARISE IN CONNECTION WITH THE AWARD OF PUBLIC WORKS CONTRACTS FINANCED BY THE EUROPEAN DEVELOPMENT FUND BETWEEN THE COMMISSION AND THE ACP STATE CONCERNED ON THE ONE HAND AND BETWEEN THAT STATE AND UNDERTAKINGS WHICH SUBMIT TENDERS OR ARE AWARDED CONTRACTS ON THE OTHER :

' CONTRACTS FINANCED BY THE FUND REMAIN NATIONAL CONTRACTS WHICH THE AUTHORITIES OF EACH ACP STATE HAVE THE POWER TO PREPARE , NEGOTIATE AND CONCLUDE. IT IS FOR THE COMMISSION , ON THE OTHER HAND , TO ADOPT ON BEHALF OF THE COMMUNITY THE FINANCING DECISIONS REQUIRED FOR THE IMPLEMENTATION OF THE PROJECTS AND PROGRAMMES DECIDED UPON IN AGREEMENT WITH THE ACP STATES.

SUCH A DIVISION OF POWERS REQUIRES CLOSE COLLABORATION BETWEEN THE COMMISSION AND THE ACP STATE CONCERNED IN THE PROCEDURE FOR PLACING PUBLIC CONTRACTS FINANCED BY THE FUND , AND ACCORDING TO THE GENERAL SCHEME OF THE CONVENTION SUCH COLLABORATION IS RESTRICTED TO THE TWO PARTNERS PRESENT AT THE TIME.... IT IS THUS CLEAR THAT THE MEASURES ADOPTED BY THE COMMISSION ' S REPRESENTATIVES DURING THAT PROCEDURE , WHETHER APPROVALS OR REFUSALS TO APPROVE , ENDORSEMENTS OR REFUSALS TO ENDORSE , ARE SOLELY INTENDED TO ESTABLISH WHETHER OR NOT THE CONDITIONS FOR COMMUNITY FINANCING ARE MET. THEY ARE NOT INTENDED TO INTERFERE WITH THE PRINCIPLE THAT THE CONTRACTS IN QUESTION REMAIN NATIONAL CONTRACTS WHICH THE ACP STATES ALONE ARE RESPONSIBLE FOR PREPARING , NEGOTIATING AND CONCLUDING , AND THEY CANNOT HAVE THAT EFFECT . . .. FOR THEIR PART , UNDERTAKINGS WHICH SUBMIT TENDERS FOR OR ARE AWARDED THE CONTRACTS IN QUESTION REMAIN OUTSIDE THE EXCLUSIVE DEALINGS CONDUCTED ON THIS MATTER BETWEEN THE COMMISSION AND THE ACP STATES ; THE MEASURES ADOPTED BY THE COMMISSION ' S REPRESENTATIVES IN THE COURSE OF THE PROCEDURE FOR THE PLACING OR IMPLEMENTATION OF THOSE CONTRACTS CANNOT BE REGARDED AS BEING ADDRESSED TO THEM AND THEY CANNOT CLAIM THAT THOSE MEASURES ARE ' ' OF DIRECT CONCERN ' TO THEM WITHIN THE MEANING OF THE SECOND PARAGRAPH OF ARTICLE 173 OF THE EEC TREATY . SUCH UNDERTAKINGS HAVE LEGAL RELATIONS ONLY WITH THE ACP STATE WHICH IS RESPONSIBLE FOR THE CONTRACT , AND MEASURES ADOPTED BY THE REPRESENTATIVES OF THE COMMISSION CANNOT SUBSTITUTE IN RELATION TO THEM A COMMUNITY DECISION FOR THE DECISION OF THE ACP STATE , WHICH HAS SOLE POWER TO CONCLUDE AND SIGN THAT CONTRACT. '

29 IT FOLLOWS FROM THOSE CONSIDERATIONS THAT IN THIS CASE THERE IS NO MEASURE CAPABLE OF BEING THE SUBJECT OF PROCEEDINGS UNDER ARTICLE 173 OF THE TREATY ; NOR CAN IT BE SAID THAT THERE IS A FAILURE TO ADOPT SUCH A MEASURE IN REGARD TO THE APPLICANTS IN RESPECT OF WHICH AN ACTION MAY BE BROUGHT UNDER ARTICLE 175. AS A RESULT IT ALSO FOLLOWS THAT THE APPLICANT ' S CLAIMS ARE UNFOUNDED IN SO FAR AS THEY SEEK TO OBTAIN THE PRODUCTION OF DOCUMENTS WHICH MIGHT CONSTITUTE EVIDENCE OF AN ACT OR FAILURE TO ACT ON THE PART OF THE COMMISSION IN RESPECT OF WHICH AN ACTION MIGHT LIE.

30 THE APPLICATION IS THEREFORE INADMISSIBLE IN SO FAR AS IT IS BASED ON ARTICLES 173 AND 175 OF THE TREATY.

31 HOWEVER , THE OBJECTION OF INADMISSIBILITY RAISED BY THE COMMISSION MUST BE REJECTED IN SO FAR AS IT REFERS TO THE ACTION FOR DAMAGES BROUGHT PURSUANT TO ARTICLE 178 AND THE SECOND PARAGRAPH OF ARTICLE 215 OF THE TREATY. IT WOULD BE WRONG TO DISMISS THE POSSIBILITY THAT ACTS OR CONDUCT OF THE

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COMMISSION OR ITS OFFICIALS AND AGENTS IN CONNEXION WITH PROJECTS FINANCED BY THE EUROPEAN DEVELOPMENT FUND MIGHT CAUSE DAMAGE TO THIRD PARTIES. ANY PERSON WHO CLAIMS TO HAVE BEEN INJURED BY SUCH ACTS OR CONDUCT MUST THEREFORE HAVE THE POSSIBILITY OF BRINGING AN ACTION , IF HE IS ABLE TO ESTABLISH LIABILITY , THAT IS , THE EXISTENCE OF DAMAGE CAUSED BY AN ILLEGAL ACT OR BY ILLEGAL CONDUCT ON THE PART OF THE COMMUNITY.

THE ACTION FOR DAMAGES

32 IN SUBSTANCE THE APPLICANTS COMPLAIN THAT BY MAKING REPRESENTATIONS TO THE ETHIOPIAN AUTHORITIES AND THE CONSULTING ENGINEERS THE COMMISSION DEPRIVED THEM OF THEIR STATUS OF ' LOWEST QUALIFIED TENDERER ' , RECOGNIZED BY THE TENDER COMMITTEE IN ITS MEETING OF 24 FEBRUARY 1983 , AND GAVE PREFERENCE TO A TENDERER , RUSH & TOMPKINS BV , WHICH HAD NOT ESTABLISHED ITS TECHNICAL AND FINANCIAL CAPABILITY. IN PARTICULAR THE APPLICANTS COMPLAIN THAT THE COMMISSION PERMITTED THE ALTERATION OF THE TENDER DOCUMENTS BY ALLOWING RUSH & TOMPKINS , AFTER THE DATE ON WHICH THE TENDERS WERE OPENED , TO SUBMIT GUARANTEES PROVIDED BY THE RUSH & TOMPKINS GROUP PLC , WHICH IS INCONSISTENT WITH NORMAL PRACTICE IN INTERNATIONAL TENDERS AND IS CONTRARY TO THE PRINCIPLE OF EQUALITY OF TENDERERS .

33 IN VIEW OF THE EXTREMELY SUMMARY NATURE OF THE STATEMENT OF FACTS AND ARGUMENTS PRESENTED IN THIS REGARD BY THE APPLICANTS DURING THE WRITTEN PROCEDURE THE COURT ASKED THEM TO PRESENT MORE DETAILED ARGUMENT ON THE FOLLOWING QUESTIONS DURING THE ORAL PROCEDURE :

' AS REGARDS THE CLAIM FOR DAMAGES , THE APPLICANTS ARE ASKED TO SPECIFY WHAT THEY CONSIDER TO BE THE COMMISSION ' S CONDUCT WHICH GAVE RISE TO THE DAMAGE WHICH THEY CLAIM TO HAVE SUFFERED AND WHAT ARE THE CIRCUMSTANCES WHICH HAVE LED THEM TO THE VIEW THAT THE COMMISSION ' S CONDUCT IS ILLEGAL.

IN THAT CONTEXT THE TWO PARTIES ARE ASKED TO GIVE PARTICULAR CONSIDERATION TO THE QUESTION WHETHER THE INVESTIGATIONS UNDERTAKEN BY THE COMMISSION FOLLOWING THE FIRST ASSESSMENT MADE BY THE ETHIOPIAN AUTHORITIES OF THE TECHNICAL AND FINANCIAL QUALIFICATIONS OF THE LOWEST TENDERER ARE COMPATIBLE WITH INTERNATIONALLY ACCEPTED STANDARDS IN THE MATTER AND ESPECIALLY WITH CLAUSE 12 OF THE INSTRUCTIONS TO TENDERERS IN THE NOTES ON DOCUMENTS FOR CIVIL ENGINEERING CONTRACTS OF THE INTERNATIONAL FEDERATION FOR CONSULTING ENGINEERS (FIDIC). '

34 IT SHOULD NOTED THAT AT THE HEARING THE APPLICANTS ONLY REPLIED TO THE SECOND QUESTION. IN THAT REGARD THEY STATED THAT TO ALLOW THE EX POST FACTO INTRODUCTION OF DOCUMENTS SUCH AS THE ' CORPORATE GUARANTEE ' SUBMITTED BY RUSH & TOMPKINS BV WENT BEYOND THE SCOPE OF THE ' CLARIFICATIONS ' PERMITTED UNDER CLAUSE 12 OF THE FIDIC DOCUMENT AFTER THE OPENING OF A TENDER. ON THAT ISSUE THEY SUBMITTED EXPERTS ' OPINIONS FROM WHICH THE FOLLOWING POINTS MAY BE DRAWN.

35 A FIRST OPINION WAS DRAWN UP ON 6 NOVEMBER 1984 BY MR MARK LITTMAN , QC , A SPECIALIST IN THE FIELD OF INTERNATIONAL CONSTRUCTION CONTRACTS . AFTER OBSERVING THAT THE DUTCH SUBSIDIARY OF RUSH & TOMPKINS WAS PERMITTED TO SUBMIT A TECHNICAL AND FINANCIAL GUARANTEE BY ITS PARENT COMPANY AFTER THE OPENING OF TENDERS , HE DRAWS THE FOLLOWING CONCLUSIONS :

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' THIS APPEARS TO ME TO BE IN CERTAIN RESPECTS CONTRARY TO THE PRINCIPLES INVOLVED IN GOOD INTERNATIONAL TENDERING PRACTICE :

(1) IT SEEMS TO INVOLVE THE SUBMISSION OF A NEW TENDER BY THE DUTCH SUBSIDIARY AFTER THE FINAL DATE FOR THE SUBMISSION OF THE TENDERS , I.E . A TENDER FOR THE FIRST TIME ACCOMPANIED BY A TECHNICAL AND FINANCIAL GUARANTEE. THE PRINCIPLES WHICH I HAVE OUTLINED ABOVE , NAMELY , EQUALITY AND AVOIDANCE OF DISCRIMINATION BETWEEN THE TENDERERS , WOULD SUGGEST THAT SUCH A TENDER SHOULD HAVE BEEN REJECTED

(2)ONE WOULD DOUBT WHETHER THE SUBSIDIARY BECAME QUALIFIED BY SUCH GUARANTEES . THE NECESSITY FOR THE GUARANTEES WOULD APPEAR TO SHOW THAT THE DUTCH TENDERER WAS UNQUALIFIED. IF A COMPANY WHICH WAS UNQUALIFIED COULD BECOME QUALIFIED BY THE ISSUE OF GUARANTEES THIS WOULD MEAN THAT A COMPANY WITH NO FINANCIAL RESOURCES AND WITHOUT ANY TECHNICAL EXPERTISE COULD SO QUALIFY.

(3)IN SUBSTANCE WHAT HAPPENED IS THAT A NEW TENDERER HAS BEEN ALLOWED TO TENDER AFTER THE FINAL DATE FOR THE SUBMISSION OF TENDERS , NAMELY THE PARENT COMPANY. THIS WOULD ALSO BE CONTRARY TO THE ABOVE PRINCIPLES . OF COURSE , THE TENDER IS PRESENTED AS BEING ONE MADE BY THE SUBSIDIARY AND NO DOUBT THE PARENT COMPANY HAD ITS OWN REASONS FOR MAKING THE SUBSIDIARY RATHER THAN THE PARENT THE TENDERER. HOWEVER , THE SUBSTANCE OF THE MATTER APPEARS TO ME AS STATED. '

36 A SECOND OPINION WAS DRAWN UP ON 11 NOVEMBER 1984 BY CYRIL ARTHUR GILLOTT , AN ENGINEER SPECIALIZING IN INTERNATIONAL CONSTRUCTION CONTRACTS . AFTER ANALYSING THE SITUATION HE CONSIDERS THAT THE PROCEDURE FOLLOWED WAS NOT CONSISTENT WITH NORMAL PRACTICE. HE TAKES THE VIEW THAT IN REFERRING TO ' CLARIFICATIONS ' ITEM 12 OF THE FIDIC DOCUMENT IS PRIMARILY CONCERNED WITH ENSURING THAT AMBIGUITIES , OMISSIONS , MODIFICATIONS OF CLAUSES AND SPECIFICATIONS AND THE LIKE ARE EXPLAINED , MADE GOOD OR REMOVED SO THAT ALL TENDERS CAN BE COMPARED ON AN EQUAL BASIS. HE CONSIDERS THAT THE GUARANTEE BELATEDLY REQUESTED FROM THE RUSH & TOMPKINS GROUP PLC WENT WELL BEYOND THE SCOPE OF SUCH CLARIFICATIONS.

37 IN ITS DEFENCE THE COMMISSION ARGUES THAT IT CANNOT BE BOUND BY ANY ASSESSMENTS MADE BY THE TENDER COMMITTEE AT THE MEETING OF 24 FEBRUARY 1983 AND THAT IT WAS UNDER A DUTY TO REVIEW CRITICALLY THE PROPOSALS MADE BY THE COMMITTEE. IN THAT REGARD IT PROVIDES THE FOLLOWING DETAILS.

38 IN THE FIRST PLACE , THE COMMISSION POINTS OUT THAT THE MINUTES OF THE MEETING OF THE TENDER COMMITTEE ON 24 FEBRUARY 1983 WERE SENT FROM ADDIS ABABA ON 28 FEBRUARY AND WERE RECEIVED BY THE COMMISSION AT THE BEGINNING OF MARCH ; IT WAS ONLY THEN THAT ITS OFFICERS WERE IN A POSITION TO EXAMINE THE PAPERS. THE FACT THAT AT THE SAME TIME THE ETHIOPIAN AUTHORITIES HAD ALREADY INVITED THE APPLICANTS TO ATTEND FOR NEGOTIATIONS ON THE CONCLUSION OF THE CONTRACT THEREFORE SEEMS PREMATURE ON THEIR PART , AND CANNOT BIND THE AUTHORITIES OF THE EUROPEAN DEVELOPMENT FUND. IN THAT REGARD THE COMMISSION EMPHASIZES THAT ALTHOUGH ITS LOCAL REPRESENTATIVE SIGNED THE MINUTES OF THE MEETING HE WAS NOT A MEMBER OF THE TENDER COMMITTEE , WHICH WAS RESPONSIBLE ONLY TO THE ETHIOPIAN AUTHORITIES , AND THAT HE HAD NO POWER TO BIND THE EUROPEAN DEVELOPMENT FUND. SO LONG AS THE CHIEF AUTHORIZING OFFICER HAD NOT GIVEN HIS APPROVAL THE NATIONAL AUTHORIZING OFFICER AND

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THE EMPLOYER HAD NO LEGAL BASIS FOR OPENING NEGOTIATIONS WITH ANY ONE OF THE TENDERERS.

39 ACCORDING TO THE COMMISSION , AFTER CAREFUL STUDY OF THE TENDER DOCUMENTS THE OFFICERS OF THE EUROPEAN DEVELOPMENT FUND DISCOVERED INCONSISTENCIES IN THE POSITION TAKEN BY KAMPSAX. THEY ALSO FOUND THAT THE DOCUMENTS CONTAINED EVIDENCE THAT RUSH & TOMPKINS BV WAS SUPPORTED BY THE RUSH & TOMPKINS GROUP PLC , WHOSE QUALIFICATIONS IN THE FIELD WERE INDISPUTABLE. THAT WAS THE CONCLUSION DRAWN FROM APPENDIX A TO THE TENDER OF RUSH & TOMPKINS BV , OF WHICH THE COMMISSION HAS SUBMITTED A SUMMARY TO THE COURT. THE COMMISSION THEREFORE CONCLUDED THAT THERE WAS NO VALID REASON TO EXCLUDE THE TENDERER WHICH HAD SUBMITTED THE MOST FAVOURABLE TENDER. KAMPSAX GRADUALLY CAME ROUND TO THAT POINT OF VIEW , AND IN AN AIDE-MEMOIRE OF 6 JUNE 1983 IT RECOMMENDED THAT THE CONTRACT SHOULD BE AWARDED TO RUSH & TOMPKINS BV SUPPORTED BY THE RUSH & TOMPKINS GROUP. THAT WAS ACCEPTED BY THE EMPLOYER AND THE CHIEF AUTHORIZING OFFICER GAVE HIS AGREEMENT ON 10 JUNE ; THE CONTRACT WAS EXECUTED BETWEEN THE EMPLOYER AND RUSH & TOMPKINS BV ON 6 JULY 1983 AND ENDORSED BY THE NATIONAL AUTHORIZING OFFICER AND THE COMMISSION DELEGATE ON THE AUTHORITY OF THE CHIEF AUTHORIZING OFFICER.

40 THE COMMISSION CONSIDERS THAT ITS ACTION IS JUSTIFIED BY THE PROVISIONS OF ARTICLES 121 (2) AND 123 (2) (C) OF THE CONVENTION. TO REQUEST CLARIFICATIONS , WITHIN THE SCOPE OF ITS RESPONSIBILITIES , ON THE POINTS INITIALLY DISPUTED , THAT IS , THE TECHNICAL AND FINANCIAL CAPABILITY OF THE LOWEST TENDERER , IS NORMAL PRACTICE IN SUCH MATTERS AND IS CONSISTENT WITH FIDIC STANDARDS. INASMUCH AS THE REQUEST FOR INFORMATION DID NOT RESULT IN ANY MODIFICATION OF THE AMOUNT OF THE TENDER THERE WAS NO DISCRIMINATION AGAINST THE OTHER TENDERERS . THE COMMISSION DENIES THAT IT EXERTED ANY PRESSURE WHATEVER ON THE EMPLOYER AND THE CONSULTANTS ; ITS ACTIONS DID NOT GO BEYOND THE DISCUSSION NORMAL IN SUCH MATTERS.

41 IN SUPPORT OF THIS LAST POINT THE COMMISSION SUBMITS THE REPORT OF AN EXPERT , K. N. DROBIG , A CONSULTANT TO THE FIRM W. S. ATKINS & PARTNERS , DRAWN UP ON 16 FEBRUARY 1984. IN THAT REPORT THE EXPERT RAISES THE QUESTION WHETHER THE EVALUATION PROCESS FOLLOWED BY THE EMPLOYER WAS REASONABLE AND IN CONFORMITY WITH GOOD PRACTICE. AFTER REFERRING TO THE FACT THAT IN THIS CASE AN OPEN TENDER PROCEDURE WITHOUT A PRE-QUALIFICATION STAGE HAD BEEN CHOSEN , SO THAT IT WAS NECESSARY TO EVALUATE THE CAPABILITY OF TENDERERS TO CARRY OUT THE WORKS AT THE SAME TIME AS ALL THE OTHER QUESTIONS RAISED IN THE TENDER PROCEDURE , HE MAKES THE FOLLOWING REMARKS :

' ON GROUNDS OF PUBLIC ACCOUNTABILITY IT IS NOT UNREASONABLE TO ARGUE THAT THE EMPLOYER WAS UNDER AN OBLIGATION TO CALL FOR FURTHER INFORMATION IF THERE WAS REASONABLE DOUBT PARTICULARLY BEARING IN MIND THAT A THIRD PARTY WAS FINANCING THE PROJECT. IN THE EVENT IT WOULD APPEAR THAT THERE WAS REASONABLE DOUBT. ACCORDINGLY , IT APPEARS TO ME THAT THE EMPLOYER SHOULD HAVE ASKED FOR SUCH CLARIFICATION INITIALLY (AND SUCH FURTHER CLARIFICATION AS WAS SUBSEQUENTLY CONSIDERED NECESSARY) AND THIS IS THE ACTION THAT WAS TAKEN. IN THE FINAL EVENT SOUND EVALUATION PROCEDURES WERE FOLLOWED AND THE ORIGINAL OBJECTION AGAINST RUSH & TOMPKINS BV APPEARED TO HAVE BEEN WITHDRAWN AS THE FURTHER INFORMATION BECAME AVAILABLE

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AND THE SITUATION CLARIFIED. VIEWING THE SITUATION WITH HINDSIGHT IT APPEARS UNFORTUNATE THAT IN THE PROCESS SO MUCH DELAY OCCURRED. NEVERTHELESS , I BELIEVE THE RIGHT PROCEDURE WAS FOLLOWED ALBEIT THAT THE PROCESS WAS EXTENDED AS A CONSEQUENCE. '

42 THE COMMISSION THEREFORE CONSIDERS THAT ITS CONDUCT IN THE MATTER CANNOT BE HELD TO BE ILLEGAL AND THAT THE ESSENTIAL BASIS FOR ANY FINDING OF LIABILITY ON THE PART OF THE COMMUNITY IS THEREFORE LACKING

43 THE ARGUMENTS SUBMITTED BY THE PARTIES CALL FOR THE FOLLOWING OBSERVATIONS.

44 AS THE COURT EMPHASIZED IN ITS JUDGMENT OF 10 JULY 1984 , REFERRED TO ABOVE , THE COMMISSION IS RESPONSIBLE FOR PREPARING AND ADOPTING FINANCING DECISIONS ON PROJECTS AND PROGRAMMES. THE SATISFACTORY IMPLEMENTATION OF SUCH DECISIONS REQUIRES THAT THE COMPETENT AGENTS OF THE COMMISSION ENSURE , BEFORE ANY PAYMENTS ARE MADE OUT OF COMMUNITY FUNDS , THAT THE CONDITIONS FOR SUCH PAYMENTS ARE IN FACT FULFILLED. IN THAT CONNECTION , IT SHOULD BE NOTED IN PARTICULAR THAT ARTICLE 121 (2) OF THE CONVENTION CONFERS ON BOTH THE CHIEF AUTHORIZING OFFICER AND THE COMMISSION ' S DELEGATE THE TASK OF ENSURING EQUALITY OF CONDITIONS FOR PARTICIPATIONS IN INVITATIONS TO TENDER , THAT THERE IS NO DISCRIMINATION AND THAT THE TENDER SELECTED IS ECONOMICALLY THE MOST ADVANTAGEOUS. FOR THAT REASON ARTICLES 122 AND 123 OF THE CONVENTION LAY DOWN A PROCEDURE FOR THE PLACING OF CONTRACTS WHICH ENABLES THE COMMISSION ' S REPRESENTATIVES TO ENSURE THAT THOSE CONDITIONS ARE FULFILLED.

45 IT FOLLOWS FROM THE FOREGOING THAT THE DECISION OF THE TENDER COMMITTEE ESTABLISHED BY THE ETHIOPIAN GOVERNMENT , RECORDED IN THE MINUTES OF THE MEETING OF 24 FEBRUARY 1983 , DID NOT BIND THE CHIEF AUTHORIZING OFFICER. THE FACT THAT THE LOCAL DELEGATE SIGNED THOSE MINUTES COULD NOT HAVE THAT EFFECT. ACCORDING TO SUBPARAGRAPHS (B), (C) AND (E) OF ARTICLE 123 (2) OF THE CONVENTION , THE EUROPEAN DEVELOPMENT FUND CAN ONLY BECOME BOUND AT THE END OF A PROCEDURE CONSISTING OF A PROPOSAL FOR THE PLACING OF THE CONTRACT MADE BY THE NATIONAL AUTHORIZING OFFICER , FOLLOWED BY THE AGREEMENT OF THE CHIEF AUTHORIZING OFFICER , WHICH MAY BE GIVEN THROUGH THE AGENCY OF THE LOCAL DELEGATE , AFTER AN EXAMINATION BY THE COMMISSION OF THE QUESTION WHETHER THE TENDER COMPLIES WITH THE CRITERIA LAID DOWN IN ARTICLE 123 (2) (C) AND ARTICLE 130 (1), THAT IS , WHETHER THE TENDER SELECTED IS THE LOWEST , IT IS ECONOMICALLY THE MOST ADVANTAGEOUS AND DOES NOT EXCEED THE SUM EARMARKED FOR THE CONTRACT. IT IS CLEAR THAT AT THE TIME OF THE TENDER COMMITTEE ' S DISCUSSION THOSE CONDITIONS WERE NOT YET MET. AT NO TIME , THEREFORE , WERE THE APPLICANTS DESIGNATED AS ' LOWEST QUALIFIED TENDERER ' IN CIRCUMSTANCES SUCH AS TO COMMIT THE EUROPEAN DEVELOPMENT FUND.

46 AS A RESULT THE EMPLOYER ' S INVITATION TO THE APPLICANTS AND ITS SUBSEQUENTLY EXPRESSED PREFERENCE FOR THEM COULD IN NO WAY HAVE THE EFFECT OF BINDING THE CHIEF AUTHORIZING OFFICER. IN PARTICULAR , THE COMMUNICATIONS OF THE ETHIOPIAN AUTHORITIES AND THE CRITICISMS OF THE COMMISSION CONTAINED THEREIN DO NOT CONSTITUTE EVIDENCE OF CONDUCT ON THE PART OF THE COMMISSION FOR WHICH THE COMMUNITY MIGHT INCUR LIABILITY .

47 WITH REGARD TO THE CLARIFICATIONS WHICH THE OFFICERS OF THE EUROPEAN

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DEVELOPMENT FUND SOUGHT TO OBTAIN ON THE POINTS INITIALLY DISPUTED BY THE CONSULTANTS AND BY THE TENDER COMMITTEE REGARDING THE TECHNICAL AND FINANCIAL QUALIFICATION OF THE LOWEST TENDERER , IT MUST BE STATED THAT THE COMMISSION WAS NOT ONLY ENTITLED BUT WAS IN FACT UNDER A DUTY TO OBTAIN THAT INFORMATION IN FULFILMENT OF THE RESPONSIBILITIES CONFERRED ON IT IN THE INTEREST OF THE COMMUNITY BY ARTICLES 121 AND 123 OF THE CONVENTION , IN ORDER TO ENSURE THE ECONOMICAL ADMINISTRATION OF THE RESOURCES OF THE EUROPEAN DEVELOPMENT FUND . CONTRARY TO THE APPLICANTS ' ASSERTIONS , THE REQUESTS FOR CLARIFICATIONS , WHICH LED TO THE SUBMISSION BY RUSH & TOMPKINS BV OF A GUARANTEE FURNISHED BY THE RUSH & TOMPKINS GROUP PLC , DID NOT HAVE THE EFFECT OF SUBSTITUTING THE PARENT COMPANY FOR ITS SUBSIDIARY OR OF ALTERING A POSTERIORI THE CONDITIONS OF THE TENDER PROCEDURE . IRRESPECTIVE OF THE CONCLUSIONS WHICH THE COMMISSION COULD DRAW FROM THE TENDER DOCUMENTS THEMSELVES , THE PURPOSE OF THE GUARANTEE PROVIDED BY THE GROUP WAS ONLY TO MAKE EXPLICIT A LEGAL SITUATION WHICH ALREADY EXISTED OBJECTIVELY WHEN RUSH & TOMPKINS BV SUBMITTED ITS TENDER , BY REASON OF ITS RELATIONSHIP WITH THE GROUP OF WHICH IT WAS A MEMBER. IT SHOULD BE ADDED THAT THE CLARIFICATIONS SOUGHT DID NOT PREJUDICE THE EQUALITY OF THE TENDERERS , SINCE , BY ELIMINATING DOUBTS WHICH HAD ARISEN AS TO ITS QUALIFICATIONS , THEY SERVED ONLY TO RE-ESTABLISH THE LOWEST TENDERER IN THE POSITION TO WHICH IT WAS ENTITLED BY REASON OF THE AMOUNT OF ITS TENDER.

48 IT MAY THEREFORE BE HELD , ON THE BASIS OF THE CASE AS IT STANDS AND WITHOUT SEEKING FURTHER DOCUMENTARY EVIDENCE , THAT THE ACTION OF THE COMMISSION AND ITS OFFICERS CANNOT BE CONSIDERED ILLEGAL AND THAT THERE IS NO LEGAL BASIS FOR THE ACTION FOR DAMAGES. THE QUESTION OF THE ASSESSMENT OF THE DAMAGE ALLEGED TO HAVE BEEN SUFFERED BY THE APPLICANTS THEREFORE BECOMES IRRELEVANT.

49 IT FOLLOWS FROM THE FOREGOING THAT THE APPLICATION MUST BE DISMISSED AS UNFOUNDED IN SO FAR AS IT IS BASED ON ARTICLE 178 AND THE SECOND PARAGRAPH OF ARTICLE 215 OF THE TREATY.

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SUB Public contracts of the European Communities ; European Development Fund ; External relations ; African Caribbean and Pacific States

AUTLANG Italian

APPLICA Person

DEFENDA Commission ; Institutions

NATIONA Italy

NOTES Brown, William: Remedies of Unsuccessful Tenderers for E.D.F. - Financed Contracts, European Law Review 1985 p.421-431 ; Flamme, Philippe: Internationale offerte-aanvraag, L'entreprise et le droit 1987 p.385 (PM) ; Bertolini, C.: Il Foro italiano 1988 IV Col.266-273 ; Kalugina, Serge: Les voies de recours des entrepreneurs dans les marchés publics finances par le F.E.D., Droit et pratique du commerce international 1988 p.511-556

PROCEDU Action for annulment - inadmissible;Action for failure to act - inadmissible;Action for damages - unfounded

ADVGEN VerLoren van Themaat

JUDGRAP Pescatore

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**Order of the President of the Court
of 5 August 1983
CMC Cooperativa Muratori e Cementisti and others v Commission of the European Communities.
European Development Fund - Amarti Diversion Project. Case 118/83 R.**

1 . PROCEEDINGS ON APPLICATION FOR ADOPTION OF INTERIM MEASURES - INTERIM MEASURES - JURISDICTION OF JUDGE HEARING APPLICATION FOR ADOPTION OF INTERIM MEASURES WHERE ONE OF THE PARTIES DISPUTES THE ADMISSIBILITY OF THE MAIN APPLICATION

(EEC TREATY , ARTS 185 AND 186)

2 . INTERNATIONAL AGREEMENTS - AGREEMENTS CONCLUDED BY THE COMMUNITY - SECOND ACP-EEC CONVENTION - PROVISIONS ON FINANCIAL AND TECHNICAL COOPERATION - PROCEDURE FOR AWARDING PUBLIC WORKS CONTRACTS - JUDICIAL PROTECTION OF TENDERERS - APPLICATION OF THE PROVISIONS OF THE EEC TREATY NOT PRECLUDED

(SECOND ACP-EEC CONVENTION OF 31 OCTOBER 1979 , ARTS 91 TO 154)

3 . INTERNATIONAL AGREEMENTS - AGREEMENTS CONCLUDED BY THE COMMUNITY - SECOND ACP-EEC CONVENTION - PROVISIONS ON FINANCIAL AND TECHNICAL COOPERATION - PROCEDURE FOR AWARDING PUBLIC WORKS CONTRACTS - ACTS OF THE COMMISSION - SUBJECT TO JUDICIAL REVIEW BY THE COMMUNITY COURT

(SECOND ACP-EEC CONVENTION OF 31 OCTOBER 1979 , ARTS 91 TO 154)

4 . INTERNATIONAL AGREEMENTS - AGREEMENTS CONCLUDED BY THE COMMUNITY - SECOND ACP-EEC CONVENTION - PROVISIONS ON FINANCIAL AND TECHNICAL COOPERATION - PROCEDURE FOR AWARDING PUBLIC WORKS CONTRACTS - POWERS OF THE COMMISSION

(SECOND ACP-EEC CONVENTION OF 31 OCTOBER 1979 , ARTS 91 TO 154)

1 . WHERE THE PRELIMINARY OBJECTIONS RAISED BY A PARTY REGARDING THE JURISDICTION OF THE COURT AND THE ADMISSIBILITY OF THE MAIN APPLICATION CONSTITUTE A PREREQUISITE FOR THE DECISION ON THE ADMISSIBILITY OF THE APPLICATION FOR THE ADOPTION OF INTERIM MEASURES , THE JUDGE HEARING THAT APPLICATION CANNOT ESCAPE THE NECESSITY OF RESOLVING PROVISIONALLY THE VARIOUS PROBLEMS RAISED. FROM HIS POINT OF VIEW , IT IS SUFFICIENT IF HE CAN ESTABLISH , WITH A SUFFICIENT DEGREE OF PROBABILITY , THAT THERE IS A BASIS , ALBEIT PARTIAL , ON WHICH THE COURT MAY FOUND ITS JURISDICTION IN ORDER TO ENABLE HIM TO ACKNOWLEDGE THE EXISTENCE OF A LEGITIMATE INTEREST IN THE ADOPTION OF INTERIM MEASURES DESIGNED TO PRESERVE THE EXISTING POSITION PENDING A DECISION ON THE SUBSTANCE OF THE CASE.

2.IT IS IMPOSSIBLE TO ACCEPT THE VIEW THAT , BY PARTICIPATING IN A TENDER ORGANIZED , UNDER THE PROVISIONS OF THE SECOND ACP-EEC CONVENTION WHICH RELATE TO FINANCIAL AND TECHNICAL COOPERATION , BY AN ACP STATE , IN CLOSE COOPERATION WITH THE COMMUNITY INSTITUTIONS , WITH A VIEW TO THE EXECUTION OF A PROJECT FINANCED ENTIRELY BY THE EUROPEAN DEVELOPMENT FUND , AN UNDERTAKING ESTABLISHED IN THE COMMUNITY IS AUTOMATICALLY PLACED OUTSIDE THE JUDICIAL PROTECTION AFFORDED TO IT BY THE PROVISIONS OF THE EEC TREATY.

3.WHILST IT SEEMS CERTAIN THAT A CONTRACT FOR PUBLIC WORKS CONCLUDED BETWEEN THE AUTHORITIES OF AN ACP STATE AND THE SUCCESSFUL TENDERER UNDER THE PROVISIONS ON FINANCIAL AND TECHNICAL COOPERATION CONTAINED IN THE SECOND ACP-EEC CONVENTION FALLS OUTSIDE THE JURISDICTION OF THE COURT , THAT

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DOES NOT MEAN THAT THERE CAN BE NO JUDICIAL REVIEW UNDER THE EEC TREATY OF ACTS OF THE COMMISSION IN THE CONTEXT OF THE TENDER PROCEDURE SET UP BY THE CONVENTION.

4.ALTHOUGH THE FUNCTIONS WHICH , UNDER THE PROVISIONS ON FINANCIAL AND TECHNICAL COOPERATION CONTAINED IN THE SECOND ACP-EEC CONVENTION , ARE PERFORMED BY THE COMMISSION IN CONNECTION WITH THE VARIOUS STAGES OF THE PREPARATION OF PROJECTS AND WITH PUTTING THOSE PROJECTS OUT TO TENDER ARE CLOSELY LINKED TO THE ACTS OF THE ACP STATE BENEFITING FROM THEM , THE FACT REMAINS THAT , ON THE ONE HAND , ALL THE DECISIVE OPERATIONS RELATING TO THE AWARD OF THE CONTRACT ARE SUBJECT TO THE APPROVAL OF THE COMMISSION AND , ON THE OTHER HAND , THE COMMISSION , IN ITS CAPACITY AS MANAGER OF THE EUROPEAN DEVELOPMENT FUND , RETAINS CONTROL OVER THE ALLOCATION AND TRANSFER OF FUNDS EARMARKED FOR THE EXECUTION OF THE VARIOUS PROJECTS UNTIL SUCH TIME AS THEY ARE USED.

IN CASE 118/83 R

1 . CMC COOPERATIVA MURATORI E CEMENTISTI , RAVENNA (ITALY),

2.CRC COOPERATIVA REGGIANA COSTRUZIONI , REGGIO EMILIA (ITALY),

3.CMB COOPERATIVA MURATORI E BRACCIANTI , CARPI , MODENA (ITALY),

REPRESENTED BY PROFESSOR GIORGIO BERNINI , AVVOCATO AND PROCURATORE , MEMBER OF THE BOLOGNA BAR , AND STANLEY A. CROSSICK , SOLICITOR OF THE SUPREME COURT OF ENGLAND AND WALES , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF ERNEST ARENDT , 34 B RUE PHILIPPE-II

APPLICANT ,

V

COMMISSION OF THE EUROPEAN COMMUNITIES , REPRESENTED BY ITS LEGAL ADVISER , ANTHONY MCCLELLAN , ACTING AS AGENT , ASSISTED BY DANIEL JACOB , OF THE BRUSSELS BAR , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF ORESTE MONTALTO , A MEMBER OF THE COMMISSION ' S LEGAL DEPARTMENT , JEAN MONNET BUILDING , KIRCHBERG ,

DEFENDANT ,

APPLICATION FOR SUSPENSION OF THE PERFORMANCE OF A WORKS CONTRACT RELATING TO THE EXECUTION OF THE AMARTI DIVERSION PROJECT , PRESENTED BY THE PROVISIONAL MILITARY GOVERNMENT OF SOCIALIST ETHIOPIA AND FINANCED BY THE EUROPEAN DEVELOPMENT FUND ,

ON THOSE GROUNDS ,

THE PRESIDENT OF THE SECOND CHAMBER , EXERCISING THE FUNCTIONS OF PRESIDENT OF THE COURT UNDER THE SECOND PARAGRAPH OF ARTICLE 85 AND ARTICLE 11 OF THE RULES OF PROCEDURE ,

BY WAY OF INTERIM DECISION ,

HEREBY ORDERS AS FOLLOWS :

1 . THE APPLICATION FOR THE ADOPTION OF INTERIM MEASURES IS DISMISSED

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;

2 . THE COSTS ARE RESERVED.

19 SINCE THE PROBLEMS RAISED BY THE APPLICATION ARE IN ALL RESPECTS NOVEL , IT IS APPROPRIATE FIRST OF ALL TO DEFINE THE LEGAL CONTEXT IN WHICH THEY ARISE. IT IS IN THAT LIGHT THAT THE QUESTION OF JURISDICTION WILL HAVE TO BE CONSIDERED BEFORE THE CONDITIONS LAID DOWN BY THE SECOND PARAGRAPH OF ARTICLE 83 OF THE RULES OF PROCEDURE CAN BE EXAMINED.

THE LEGAL CONTEXT OF THE DISPUTE

20 THE EXECUTION OF THE PROJECT WHICH HAS GIVEN RISE TO THIS DISPUTE MUST BE SEEN IN THE CONTEXT OF THE PROVISIONS ON FINANCIAL AND TECHNICAL COOPERATION WHICH FORM THE SUBJECT-MATTER OF TITLE VII (ARTICLES 91 TO 154) OF THE SECOND ACP-EEC CONVENTION. THAT CONVENTION WAS DULY ENTERED INTO BY THE COMMUNITY AND MUST THEREFORE BE REGARDED AS AN INTEGRAL PART OF THE COMMUNITY LEGAL ORDER , AS THE COURT HAD OCCASION TO EMPHASIZE , IN CONNECTION WITH AN AGREEMENT CONCLUDED UNDER SIMILAR CIRCUMSTANCES , IN ITS JUDGMENT OF 30 APRIL 1974 (CASE 181/73 HAEGEMAN V BELGIAN STATE (1974) ECR 449).

21 ACCORDING TO ARTICLE 95 OF THE CONVENTION , PROJECTS AND PROGRAMMES ENVISAGED BY TITLE VII ARE TO BE FINANCED BY THE EUROPEAN DEVELOPMENT FUND , THE ADMINISTRATION OF WHICH IS ENTRUSTED TO THE COMMISSION .

22 UNDER THE TERMS OF ARTICLE 108 , ' ' OPERATIONS FINANCED BY THE COMMUNITY ARE TO BE IMPLEMENTED BY THE ACP STATES AND THE COMMUNITY IN CLOSE COOPERATION , THE CONCEPT OF EQUALITY BETWEEN THE PARTIES BEING RECOGNIZED . ' ' THE SAME ARTICLE DEFINES THE RESPONSIBILITIES REGARDING THE ADMINISTRATION OF THE PROGRAMME OF FINANCIAL AND TECHNICAL COOPERATION WHICH ARE TO BE BORNE BY THE ACP STATES , THE ACP STATES AND THE COMMUNITY JOINTLY AND THE COMMUNITY. FOR THE PURPOSES OF THE PRESENT CASE IT SHOULD BE POINTED OUT IN THAT REGARD THAT :

THE ACP STATES ARE RESPONSIBLE FOR CHOOSING THE PROJECTS , FOR PRESENTING THEM FOR COMMUNITY FINANCING , FOR PREPARING , NEGOTIATING AND CONCLUDING CONTRACTS AND FOR IMPLEMENTING PROJECTS (ARTICLE 108 (2) (B) (D) AND (E));

THE ACP STATES AND THE COMMUNITY ARE JOINTLY RESPONSIBLE FOR APPRAISING PROJECTS , FOR TAKING THE NECESSARY IMPLEMENTING MEASURES TO ENSURE EQUALITY OF CONDITIONS FOR PARTICIPATION IN INVITATIONS TO TENDER AND CONTRACTS AND FOR ENSURING THAT THE PROJECTS FINANCED BY THE COMMUNITY ARE EXECUTED IN ACCORDANCE WITH THE ARRANGEMENTS DECIDED UPON AND WITH THE PROVISIONS OF THE CONVENTION (ARTICLE 108 (4) (C) (D) AND (F));

THE COMMUNITY IS RESPONSIBLE FOR PREPARING AND TAKING FINANCIAL DECISIONS ON PROJECTS (ARTICLE 108 (5)).

23 ARTICLES 111 , 112 AND 113 LAY DOWN DETAILED PROVISIONS CONCERNING THE APPRAISAL OF PROJECTS. ARTICLE 111 PROVIDES THAT PREPARATION OF THE DOSSIERS IS TO BE THE RESPONSIBILITY OF THE ACP STATES CONCERNED AND ARTICLE 112 PROVIDES THAT APPRAISAL OF PROJECTS IS TO BE UNDERTAKEN IN CLOSE COLLABORATION BETWEEN THE COMMUNITY AND THE ACP STATES. ARTICLE 113 ADDS THAT THE CONCLUSIONS OF THE APPRAISAL ARE TO BE SUMMARIZED IN A FINANCING PROPOSAL , WHICH IS TO SERVE AS THE BASIS FOR THE COMMISSION ' S DECISION. ACCORDING TO

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ARTICLE 113 (2), THE FINANCING PROPOSALS ARE TO BE DRAWN UP BY THE RELEVANT DEPARTMENTS OF THE COMMUNITY AND TRANSMITTED TO THE ACP STATES CONCERNED. ARTICLE 115 PROVIDES THAT THE FINANCING PROPOSAL IS TO BE THE SUBJECT OF A FINANCING AGREEMENT BETWEEN THE COMMISSION , ACTING ON BEHALF OF THE COMMUNITY , AND THE ACP STATE CONCERNED.

24 UNDER THE TERMS OF ARTICLE 120 , IT IS FOR THE ACP STATES TO IMPLEMENT THE PROJECTS FINANCED BY THE COMMUNITY. ACCORDINGLY THEY ARE TO BE RESPONSIBLE IN PARTICULAR FOR PREPARING , NEGOTIATING AND CONCLUDING THE NECESSARY CONTRACTS FOR THE IMPLEMENTATION OF THOSE OPERATIONS .

25 THE ADMINISTRATIVE MEASURES NECESSARY FOR THAT PURPOSE ARE THE SUBJECT OF A SET OF PRACTICAL ARRANGEMENTS PRESCRIBED IN ARTICLES 120 TO 124 OF THE CONVENTION. OF THOSE PROVISIONS THE FOLLOWING DETAILS ARE OF PARTICULAR RELEVANCE TO THE PRESENT CASE. ACCORDING TO ARTICLE 121 , THE COMMISSION IS TO APPOINT THE ' ' CHIEF AUTHORIZING OFFICER ' ' OF THE FUND , WHO IS TO ENSURE THAT FINANCING DECISIONS ARE CARRIED OUT AND IS TO BE RESPONSIBLE FOR MANAGING THE FUND ' S RESOURCES. IT IS THE CHIEF AUTHORIZING OFFICER WHO IS TO COMMIT , CLEAR AND AUTHORIZE EXPENDITURE AND KEEP THE ACCOUNTS OF COMMITMENTS AND AUTHORIZATIONS. UNDER THE TERMS OF ARTICLE 121 (2), THE CHIEF AUTHORIZING OFFICER , IN CLOSE COOPERATION WITH THE NATIONAL AUTHORIZING OFFICER , ' ' SHALL ENSURE EQUALITY OF CONDITIONS FOR PARTICIPATION IN INVITATIONS TO TENDER , AND SEE TO IT THAT THERE IS NO DISCRIMINATION AND THAT THE TENDER SELECTED IS ECONOMICALLY THE MOST ADVANTAGEOUS. IN THIS CONNECTION THE CHIEF AUTHORIZING OFFICER SHALL APPROVE THE DOSSIERS BEFORE INVITATIONS TO TENDER ARE ISSUED , RECEIVE THE RESULT OF THE EXAMINATION OF THE TENDERS AND APPROVE THE PROPOSAL FOR THE PLACING OF THE CONTRACT. ' '

26 ACCORDING TO ARTICLE 122 , THE GOVERNMENT OF EACH ACP STATE IS TO APPOINT A ' ' NATIONAL AUTHORIZING OFFICER ' ' TO REPRESENT THE AUTHORITIES OF HIS COUNTRY IN ALL OPERATIONS FINANCED FROM THE FUND ' S RESOURCES ADMINISTERED BY THE COMMISSION. THE NATIONAL AUTHORIZING OFFICER MAY DELEGATE SOME OF THOSE FUNCTIONS. UNDER THE TERMS OF ARTICLE 122 (2), THE NATIONAL AUTHORIZING OFFICER IS IN HIS TURN TO ENSURE , IN CLOSE COOPERATION WITH THE CHIEF AUTHORIZING OFFICER , ' ' THAT THERE IS EQUALITY OF CONDITIONS FOR PARTICIPATION IN INVITATIONS TO TENDER , THAT THERE IS NO DISCRIMINATION AND THAT THE TENDER WHICH IS ECONOMICALLY THE MOST ADVANTAGEOUS IS CHOSEN ' ' (ARTICLE 122 (2) (A)). HE IS TO PREPARE INVITATION TO TENDER DOSSIERS AND SUBMIT THEM TO THE DELEGATE FOR AGREEMENT BEFORE INVITATIONS TO TENDER ARE ISSUED ; HE IS TO ISSUE INVITATIONS TO TENDER , RECEIVE TENDERS , PRESIDE OVER THE EXAMINATION OF TENDERS , DECIDE THE OUTCOME OF THAT EXAMINATION AND TRANSMIT IT TO THE DELEGATE WITH A PROPOSAL FOR THE PLACING OF THE CONTRACT ; FINALLY IT IS HE WHO SIGNS THE CONTRACTS (ARTICLE 122 (2) (B), (C), (D) AND (E)).

27 UNDER ARTICLE 123 , THE COMMISSION IS TO APPOINT A ' ' DELEGATE ' ' TO EACH ACP STATE OR GROUP OF STATES TO REPRESENT IT FOR THE PURPOSE OF FACILITATING THE APPLICATION OF THE CONVENTION. THE DELEGATE IS TO WORK IN CLOSE COOPERATION WITH THE NATIONAL AUTHORIZING OFFICER AND DEAL WITH THAT OFFICER ON BEHALF OF THE COMMISSION. IN THAT CAPACITY HE IS TO APPROVE THE INVITATION TO TENDER DOSSIER AND BE PRESENT AT THE OPENING OF TENDERS (ARTICLE 123 (2)

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(A) AND (B)). HE IS TO APPROVE THE NATIONAL AUTHORIZING OFFICER ' S PROPOSAL FOR THE PLACING OF THE CONTRACT WHEREVER THE FOLLOWING THREE CONDITION ARE FULFILLED : THE TENDER SELECTED IS THE LOWEST , IT IS ECONOMICALLY THE MOST ADVANTAGEOUS AND DOES NOT EXCEED THE SUM EARMARKED FOR THE CONTRACT (ARTICLE 123 (2) (C)).

28 IT IS STRESSED IN ARTICLES 125 OF 127 THAT , AS REGARDS OPERATIONS FINANCED BY THE COMMUNITY , PARTICIPATION IN INVITATIONS TO TENDER AND CONTRACTS IS TO BE OPEN ON EQUAL TERMS TO ALL NATURAL PERSONS AND COMPANIES OR FIRMS FALLING WITHIN THE SCOPE OF THE TREATY AND TO ALL NATURAL PERSONS AND COMPANIES OR FIRMS OF THE ACP STATES AND THAT WORKS CONTRACTS FINANCED BY THE FUND ' S RESOURCES MANAGED BY THE COMMISSION ARE TO BE CONCLUDED FOLLOWING AN OPEN INVITATION TO TENDER.

29 UNDER THE TERMS OF ARTICLE 130 (1), THE CRITERIA FOR SELECTING THE TENDER WHICH IS ECONOMICALLY THE MOST ADVANTAGEOUS ARE TO TAKE INTO ACCOUNT , IN RESPECT OF EACH OPERATION , INTER ALIA , ' ' THE QUALIFICATIONS OF AND THE GUARANTEES OFFERED BY THE TENDERERS , THE NATURE AND CONDITIONS OF IMPLEMENTATION OF THE WORKS OR SUPPLIES AND THE PRICE , OPERATING COSTS AND TECHNICAL VALUE OF THOSE WORKS OR SUPPLIES . ' '

30 ACCORDING TO ARTICLE 131 , THE GENERAL CONDITIONS APPLICABLE TO THE AWARD AND PERFORMANCE OF WORKS CONTRACTS FINANCED FROM THE FUND ' S RESOURCES ADMINISTERED BY THE COMMISSION ARE CONTAINED IN THE GENERAL CONDITIONS WHICH , ON A PROPOSAL FROM THE COMMISSION , ARE TO BE ADOPTED BY DECISION OF THE COUNCIL OF MINISTERS. PENDING THAT DECISION - WHICH HAS AS YET NOT BEEN ADOPTED - THE JOINT DECLARATION FORMING ANNEX XII TO THE CONVENTION REFERS , IN THE CASE OF ACP STATES WHICH , LIKE ETHIOPIA , WERE NOT YET PARTIES TO THE YAOUNDE CONVENTION , TO THE ' ' NATIONAL LEGISLATION ' ' OF THE STATES CONCERNED OR TO ' ' ESTABLISHED PRACTICES REGARDING INTERNATIONAL CONTRACTS.

31 ARTICLE 132 PROVIDES AS FOLLOWS WITH REGARD TO THE SETTLEMENT OF DISPUTES :

' ' 1 . ANY DISPUTE ARISING BETWEEN THE AUTHORITIES OF AN ACP STATE AND A CONTRACTOR , SUPPLIER OR PROVIDER OF SERVICES ON THE OCCASION OF THE PLACING OR PERFORMANCE OF A CONTRACT FINANCED BY THE FUND SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH RULES OF PROCEDURE ADOPTED BY THE COUNCIL OF MINISTERS.

2 . THE RULES OF PROCEDURE REFERRED TO ABOVE SHALL BE ADOPTED , ON A PROPOSAL , BY A DECISION OF THE COUNCIL OF MINISTERS NOT LATER THAN ITS FIRST MEETING FOLLOWING THE ENTRY INTO FORCE OF THIS CONVENTION. ' '

32 SINCE THE RULES REFERRED TO IN ARTICLE 132 HAVE NOT YET BEEN ADOPTED , REFERENCE MUST BE MADE TO ANNEX XIII OF THE CONVENTION , WHICH IS ENTITLED ' ' JOINT DECLARATION ON ARTICLE 132 OF THE CONVENTION ' ' AND IS WORDED AS FOLLOWS :

' ' AS A TRANSITIONAL MEASURE PENDING THE IMPLEMENTATION OF THE DECISION PROVIDED FOR IN ARTICLE 132 THE FINAL DECISION ON ALL DISPUTES SHALL BE TAKEN IN ACCORDANCE WITH THE RULES ON CONCILIATION AND ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE. ' '

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JURISDICTION OF THE COURT

33 THE COMMISSION CLAIMS THAT THE COURT HAS NO JURISDICTION TO ENTERTAIN EITHER THE MAIN APPLICATION OR THE APPLICATION FOR THE ADOPTION OF INTERIM MEASURES. IT RAISES TWO FUNDAMENTAL OBJECTIONS REGARDING THE JURISDICTION OF THE COURT AND AN OBJECTION OF INADMISSIBILITY BASED ON TWO GROUNDS WITH PARTICULAR REFERENCE TO THE ACTION FOR ANNULMENT.

34 IN THE FIRST PLACE , THE COMMISSION ARGUES THAT THE ACP STATE IS RESPONSIBLE FOR THE PREPARATION , NEGOTIATION AND CONCLUSION OF THE CONTRACT . IT FOLLOWS THAT IT IS THE ACP STATE AND NOT THE COMMISSION WHICH DEALS DIRECTLY WITH THE TENDERERS. WHILST IT IS TRUE THAT THE CONVENTION PROVIDES FOR COOPERATION BETWEEN THE COMMUNITY AND THE ACP STATE , THE FACT REMAINS THAT THE STATE IN QUESTION TAKES THE VARIOUS DECISIONS REQUIRED IN THE COURSE OF THE PROCEDURE , INCLUDING THE FINAL DECISION ON THE AWARD OF THE CONTRACT. THE COOPERATION TO BE GIVEN BY THE COMMISSION IN THAT CONNECTION IS THEREFORE SAID TO BE OF A PURELY ' ' INTERNAL ' ' NATURE.

35 IN THE SECOND PLACE , THE COMMISSION CONTENDS THAT ARTICLE 132 OF THE CONVENTION AND THE JOINT DECLARATION WHICH FORMS THE SUBJECT-MATTER OF ANNEX XIII HAVE SET UP AN ARBITRATION PROCEDURE , WITH THE RESULT THAT ANY DISPUTE BETWEEN A TENDERER AND AN ACP STATE FALLS OUTSIDE THE JURISDICTION OF THE COURT.

36 WITH PARTICULAR REFERENCE TO THE ACTION FOR ANNULMENT , THE COMMISSION ARGUES THAT IN THIS CASE THERE WAS , ON ITS PART , NO DECISION WITHIN THE MEANING OF THE SECOND PARAGRAPH OF ARTICLE 173 OF THE EEC TREATY. THE ' ' ORDER ' ' TO ELIMINATE THE APPLICANTS AND TO GIVE PREFERENCE TO RUSH AND TOMPKINS BV WHICH , THE APPLICANTS ALLEGE , THE COMMISSION GAVE TO THE ETHIOPIAN AUTHORITIES AND WHICH CAME TO THE APPLICANTS ' KNOWLEDGE WHEN THEY VISITED ADDIS ABABA ON 15 MARCH 1983 , DID NOT , ACCORDING TO THE COMMISSION , CONSTITUTE A MEASURE WHICH COULD BE THE SUBJECT OF ANNULMENT. IN ANY EVENT , THE ACTION AGAINST THAT ' ' ORDER ' ' IS OUT OF TIME SINCE THE APPLICANTS THEMSELVES STATE THAT IT CAME TO THEIR KNOWLEDGE ON 15 MARCH 1983.

37 THE ANSWERS TO ALL THOSE QUESTIONS , THE COMPLEXITY OF WHICH SHOULD NOT BE UNDERESTIMATED , IS A MATTER FOR THE COURT ' S DECISION ON THE SUBSTANCE OF THE MAIN APPLICATION. HOWEVER , SINCE THE PRELIMINARY OBJECTIONS RAISED BY THE COMMISSION REGARDING THE JURISDICTION OF THE COURT AND THE ADMISSIBILITY OF THE MAIN APPLICATION CONSTITUTE A PREREQUISITE FOR THE DECISION ON THE ADMISSIBILITY OF THE APPLICATION FOR THE ADOPTION OF INTERIM MEASURES , THE JUDGE HEARING THAT APPLICATION CANNOT ESCAPE THE NECESSITY OF RESOLVING PROVISIONALLY THE VARIOUS PROBLEMS RAISED. FROM HIS POINT OF VIEW , IT IS SUFFICIENT IF HE CAN ESTABLISH , WITH A SUFFICIENT DEGREE OF PROBABILITY , THAT THERE IS A BASIS , ALBEIT PARTIAL , ON WHICH THE COURT MAY FOUND ITS JURISDICTION IN ORDER TO ENABLE HIM TO ACKNOWLEDGE THE EXISTENCE OF A LEGITIMATE INTEREST IN THE ADOPTION OF INTERIM MEASURES DESIGNED TO PRESERVE THE EXISTING POSITION PENDING A DECISION ON THE SUBSTANCE OF THE CASE.

38 SUBJECT TO THOSE RESERVATIONS , THE FOLLOWING OBSERVATIONS MAY BE MADE WITH REGARD TO THE PRELIMINARY OBJECTIONS RAISED BY THE COMMISSION .

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39 AS THE COMMISSION RIGHTLY POINTED OUT , THE TENDERERS ESTABLISHED A LEGAL RELATIONSHIP SOLELY WITH THE ETHIOPIAN NATIONAL AUTHORITY AND MORE PARTICULARLY WITH THE NATIONAL AUTHORIZING OFFICER , WHO , ACCORDING TO THE INFORMATION SUPPLIED DURING THE PROCEEDINGS , IS THE ETHIOPIAN GOVERNMENT ACTING , FOR THE PURPOSES OF THE PRESENT PROJECT , THROUGH THE INTERMEDIARY OF EELPA , UNDER THE TERMS OF CLAUSE IT-I , PARAGRAPH (2), OF THE CONDITIONS OF TENDER.

40 NEVERTHELESS THE PROVISIONS OF THE CONVENTION AT THE SAME TIME IMPOSE SPECIFIC OBLIGATIONS ON THE COMMISSION AND MORE PARTICULARLY ON THE CHIEF AUTHORIZING OFFICER WITH REGARD TO ENSURING EQUALITY OF CONDITIONS FOR PARTICIPATION IN INVITATIONS TO TENDER , THE ELIMINATION OF DISCRIMINATION , SELECTION OF THE TENDER WHICH IS ECONOMICALLY THE MOST ADVANTAGEOUS , THE OPEN NATURE OF TENDERS AND THE PARTICIPATION ON EQUAL TERMS OF ALL NATURAL PERSONS AND COMPANIES OR FIRMS FALLING WITHIN THE SCOPE OF THE EEC TREATY.

41 IT IS IMPOSSIBLE THEREFORE TO ACCEPT THE VIEW THAT , BY PARTICIPATING IN A TENDER ORGANIZED , UNDER THE TERMS OF THE CONVENTION , BY AN ACP STATE , IN CLOSE COOPERATION WITH THE COMMUNITY INSTITUTIONS , WITH A VIEW TO THE EXECUTION OF A PROJECT FINANCED ENTIRELY BY THE EUROPEAN DEVELOPMENT FUND , AN UNDERTAKING ESTABLISHED IN THE COMMUNITY IS AUTOMATICALLY PLACED OUTSIDE THE JUDICIAL PROTECTION AFFORDED TO IT BY THE PROVISIONS OF THE EEC TREATY.

42 IT DOES NOT APPEAR THAT ARTICLE 132 , CONCERNING THE SETTLEMENT OF DISPUTES , AND THE JOINT DECLARATION ON THAT SUBJECT , EMBODIED IN ANNEX XIII TO THE CONVENTION , HAS THE EFFECT OF ELIMINATING ANY JUDICIAL PROTECTION WITH MAY BE AVAILABLE UNDER THE TREATY. AS THE COMMISSION HAS ACKNOWLEDGED , THE CONVENTION COULD NOT DEROGATE , AS FAR AS COMMUNITY SUBJECTS ARE CONCERNED , FROM THE PROVISIONS OF THE EEC TREATY GOVERNING ACCESS TO THE COURT. MOREOVER , IT WAS APPARENT FROM THE ARGUMENTS OF THE PARTIES THAT IT REMAINS DOUBTFUL WHETHER ARTICLE 132 APPLIES ONLY TO DISPUTES WHICH MAY ARISE , ON THE OCCASION OF THE PLACING OR PERFORMANCE OF A CONTRACT , BETWEEN THE ACP STATE AND THE UNDERTAKING WHICH IS AWARDED THE CONTRACT OR WHETHER THAT PROVISION IS ALSO APPLICABLE TO DISPUTES WHICH ARISE BETWEEN THE ACP STATE AND ANY UNDERTAKING WHICH IS NOT AWARDED THE CONTRACT BUT HAS PARTICIPATED IN THE TENDER PROCEDURE. THAT DOUBT IS INCREASED BY THE UNCERTAINTY REGARDING THE INTERPRETATION WHICH THE ACP STATES , AND ETHIOPIA IN PARTICULAR , MAY GIVE TO THE TERMS OF ARTICLE 132 AND ANNEX XIII .

43 MOREOVER , THE QUESTION ARISES WHETHER , IN ARBITRATION PROCEEDINGS INITIATED PURSUANT TO ARTICLE 132 AND ANNEX XIII , THAT IS TO SAY WITHIN THE FRAMEWORK OF THE PROCEDURE FOR CONCILIATION AND ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE , ACTS OF THE COMMISSION MAY BE CHALLENGED AND WHETHER AN ARBITRAL DECISION TO BE GIVEN IN THAT CONTEXT MAY CONTAIN A JUDGMENT ON THE VALIDITY OF ACTS OF THE COMMISSION OR ESTABLISH A BASIS FOR COMMUNITY LIABILITY.

44 CONSEQUENTLY , WHILST IT SEEMS CERTAIN THAT THE CONTRACT CONCLUDED BETWEEN THE ACP STATE AND THE SUCCESSFUL TENDERER FALLS OUTSIDE THE JURIDICTION

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OF THE COURT , THAT DOES NOT MEAN THAT THERE CAN BE NOT JUDICIAL REVIEW UNDER THE EEC TREATY OF ACTS OF THE COMMISSION IN THE CONTEXT OF THE TENDER PROCEDURE SET UP BY THE CONVENTION .

45 AS REGARDS THE OBJECTION OF INADMISSIBILITY RAISED BY THE COMMISSION IN RELATION TO THE ACTION FOR ANNULMENT , IN VIEW OF THE FACT THAT IT WOULD BE IMPOSSIBLE TO IDENTIFY , IN THE COOPERATIVE DECISION-MAKING PROCESS SET UP BY THE CONVENTION , A DECISION OF THE COMMISSION WHICH COULD BE THE SUBJECT OF AN ACTION , IT SHOULD BE OBSERVED THAT THE FUNCTIONS PERFORMED BY THE COMMISSION IN CONNECTION WITH THE VARIOUS STAGES OF THE PREPARATION OF PROJECTS AND WITH PUTTING THOSE PROJECTS OUT TO TENDER ARE UNDOUBTEDLY CLOSELY LINKED TO THE ACTS OF THE ACP STATE BENEFITING FROM THEM. NEVERTHELESS , ON THE ONE HAND , ALL THE DECISIVE OPERATIONS RELATING TO THE AWARD OF THE CONTRACT ARE SUBJECT TO THE APPROVAL OF THE COMMISSION AND , ON THE OTHER HAND , THE COMMISSION , IN ITS CAPACITY AS MANAGER OF THE EUROPEAN DEVELOPMENT FUND , RETAINS CONTROL OVER THE ALLOCATION AND TRANSFER OF FUNDS EARMARKED FOR THE EXECUTION OF THE VARIOUS PROJECTS UNTIL SUCH TIME AS THEY ARE USED.

46 ALTHOUGH IT HAS NOT BEEN POSSIBLE AT THIS STAGE TO ESTABLISH WHETHER THERE WAS AN ' ' ORDER ' ' BY THE COMMISSION TO ELIMINATE THE APPLICANTS AND TO GIVE RUSH AND TOMPKINS BV PREFERENCE OVER THEM , IT IS CLEAR FROM THE INFORMATION SUPPLIED BY THE COMMISSION ITSELF THAT THE CONTRACT CONCLUDED WITH RUSH AND TOMPKINS BV ON 6 JULY 1983 BECAME EFFECTIVE ONLY BY VIRTUE OF THE APPROVAL OF THE CHIEF AUTHORIZING OFFICER AND THE ENDORSEMENT OF THE LOCAL COMMISSION DELEGATE.

47 UNDER THOSE CIRCUMSTANCES , IT CANNOT BE EXCLUDED THAT A THOROUGH EXAMINATION MIGHT REVEAL THE EXISTENCE OF AN ACT OF THE COMMISSION WHICH CAN BE ISOLATED FROM ITS CONTEXT AND WHICH MAY BE OF SUCH A NATURE AS TO ENABLE AN ACTION TO BE BROUGHT FOR ITS ANNULMENT.

48 THE COMMISSION ' S OBJECTION THAT THE ACTION IS OUT OF TIME MUST BE REJECTED . THE APPLICANTS HAVE EXPLAINED AT GREAT LENGTH THE DIFFICULTIES WHICH THEY EXPERIENCED IN OBTAINING INFORMATION REGARDING THE ATTITUDE TAKEN BY THE COMMISSION IN THIS CASE AND THE REASONS FOR THEIR ELIMINATION. THE INFORMATION WHICH THEY WERE ABLE TO OBTAIN IN ADDIS ABABA ON 15 MAY 1983 WAS NO MOR THAN HEARSAY. SUCH INFORMATION CANNOT THEREFORE BE REGARDED AS FULFILLING THE CONDITION LAID DOWN BY THE THIRD PARAGRAPH OF ARTICLE 173 OF THE EEC TREATY.

49 IT FOLLOWS FROM THE FOREGOING THAT , ALTHOUGH THE PLACING OF THE PUBLIC WORKS CONTRACT IN QUESTION OCCURRED OUTSIDE THE SPHERE OF JURISDICTION OF THE COMMUNITY , THERE ARE NEVERTHELESS SUFFICIENT CONNECTING FACTORS BETWEEN THE CIRCUMSTANCES OF THE DISPUTE AND THE PROVISIONS OF THE TREATY GOVERNING ACCESS TO THE COURT - NAMELY , THE ACTIVE PARTICIPATION OF THE COMMISSION IN THE PROCESS FOR REACHING A DECISION ON THE AWARD OF THE CONTRACT , THE FINANCING OF THE PROJECT IN QUESTION BY THE EUROPEAN DEVELOPMENT FUND AND THE JUDICIAL PROTECTION TO WHICH THE APPLICANTS ARE , AS COMMUNTY SUBJECTS , ENTITLED TO CLAIM IN THE IMPLEMENTATION OF A CONVENTION CONCLUDED BY THE COMMUNITY - TO ALLOW THE FINDING THAT THERE EXISTS A LEGITIMATE INTEREST IN THE ADOPTION OF INTERIM MEASURES PENDING THE COURT ' S DECISION

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ON THE QUESTIONS OF JURISDICTION AND ADMISSIBILITY RAISED BY THE COMMISSION.

URGENCY

50 THE APPLICANTS CLAIM THAT AN INTERIM DECISION OF THE COURT IS REQUIRED AS A MATTER OF URGENCY OWING TO THE IRREPARABLE DAMAGE WHICH WOULD BE CAUSED TO THEIR CORPORATE REPUTATION IN THE INTERNATIONAL TENDER MARKET IF THEY WERE ELIMINATED IN SPITE OF THEIR STATUS AS ' ' LOWEST QUALIFIED TENDERER ' ' IN THE TENDER PROCEDURE IN QUESTION , PARTICULARLY SINCE IT HAS RECEIVED WIDE INTERNATIONAL PUBLICITY. ONLY THE INTERVENTION OF THE COURT AT THIS STAGE COULD PREVENT DAMAGE WHICH OTHERWISE WOULD BE IRREVERSIBLE FOR THEM.

51 THE APPLICANTS ARE MISTAKEN IN THINKING THAT IN THE CIRCUMSTANCES THEIR ELIMINATION WOULD DAMAGE THEIR REPUTATION. PARTICIPATION IN A PUBLIC TENDER PROCEDURE , BY NATURE HIGHLY COMPETITIVE , INVOLVES RISKS FOR ALL THE PARTICIPANTS AND THE ELIMINATION OF A TENDERER UNDER THE TENDER RULES IS NOT IN ITSELF IN ANY WAY PREJUDICIAL. THAT IS ALL THE MORE TRUE SINCE THE APPLICANTS ' TENDER WAS NOT THE LOWEST AND SINCE THE FAVOURABLE PROSPECTS WHICH SEEMED TO BE EMERGING AT THE BEGINNING OF THE PROCEDURE FOR THE AWARD OF THE CONTRACT WERE DUE NOT TO THE CHARACTERISTICS OF THEIR TENDER BUT TO THE FACT THAT THERE WAS SOME DOUBT AT THAT TIME CONCERNING THE QUALIFICATIONS OF A COMPETING TENDERER .

52 ON THE OTHER HAND , IT MUST BE ACKNOWLEDGED THAT THE APPLICANTS HAVE A LEGITIMATE INTEREST IN SEEKING THE ADOPTION OF AN INTERIM MEASURE AS SOON AS POSSIBLE , IN ORDER TO PREVENT - SHOULD THE PROCEDURE FOR THE AWARD OF THE CONTRACT BE FOUND TO BE IRREGULAR - A CONTRACT FROM BEING CONCLUDED AND , SHOULD IT BE CONCLUDED , ITS PERFORMANCE FROM REACHING A STAGE AT WHICH AN IRREVERSIBLE DE FACTO SITUATION WOULD BE CREATED. IN THAT SENSE THE REQUIREMENT OF URGENCY LAID DOWN BY ARTICLE 83 OF THE RULES OF PROCEDURE MUST BE RECOGNIZED AS BEING SATISFIED.

THE NATURE OF A POSSIBLE INTERIM MEASURE AND THE GROUNDS ESTABLISHING A CASE FOR ITS ADOPTION

53 FOR THE REASONS STATED ABOVE , THE COURT HAS NO POWER TO INTERVENE IN THE CONCLUSION AND PERFORMANCE OF A CONTRACT CONCLUDED BETWEEN THE TENDERER AND AN AUTHORITY OF A NON-MEMBER COUNTRY. ON THE OTHER HAND , THERE DOES NOT SEEM TO BE ANY REASON PRECLUDING THE COURT FROM ISSUING , ON A PROVISIONAL BASIS , APPROPRIATE INJUNCTIONS TO THE COMMISSION EITHER IN ORDER TO PREVENT THE CONCLUSION OF A CONTRACT AS A RESULT OF A TENDER WHICH APPEARS TO BE CONTRARY TO THE RULES OF THE CONVENTION , OR TO OTHER RELEVANT RULES , OR IN ORDER TO PROHIBIT THE COMMISSION FROM ALLOCATING FUNDS FOR THE PERFORMANCE OF SUCH A CONTRACT IF IT HAS ALREADY BEEN CONCLUDED.

54 THE QUESTION ARISES WHETHER THE APPLICANTS HAVE BEEN ABLE TO MAKE OUT A PRIMA FACIE CASE FOR THE EXISTENCE OF CIRCUMSTANCES WHICH COULD JUSTIFY SUCH A MEASURE.

55 THE FACTS WHICH THE APPLICANTS HAVE ALLEGED AND WHICH THE COMMISSION HAS BEEN UNABLE TO CONTEST DO INDEED RAISE SERIOUS DOUBTS CONCERNING THE REGULARITY OF THE PROCEDURE FOLLOWED FOR THE AWARD OF THE CONTRACT. AS HAS ALREADY BEEN MENTIONED , THE APPLICANTS HAD BEEN SUMMONED BY THE

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COMPETENT NATIONAL AUTHORITY IN CIRCUMSTANCES WHICH AFFORDED GROUNDS FOR BELIEVING THAT THE CONTRACT WOULD BE SIGNED UPON THE CONCLUSION OF A FINAL ROUND OF NEGOTIATIONS. IT APPEARS FROM THE COMMUNICATIONS OF THE EMPLOYER , ENDORSING THE FINDINGS OF THE TENDER COMMITTEE AND THE CONSULTANT ENGINEER , THAT THE LOWEST TENDERER WAS NOT REGARDED AS TECHNICALLY AND FINANCIALLY QUALIFIED AND FOR THAT REASON IT HAD ORIGINALLY BEEN INTENDED TO AWARD THE CONTRACT TO THE APPLICANTS . IT ALSO APPEARS THAT THAT SITUATION WAS CHANGED NOT AS A RESULT OF A DECISION OF THE EMPLOYER BUT AT THE REQUEST OF THE COMMISSION .

56 WHEN THE COMMISSION WAS QUESTIONED ON THIS MATTER , IT STATED THAT FOLLOWING INVESTIGATIONS WHICH ARE NORMAL IN PUBLIC TENDER PROCEDURES IT BECAME APPARENT THAT THE LOWEST TENDERER , RUSH AND TOMPKINS BV , WHICH IS A MEMBER OF THE BRITISH RUSH AND TOMPKINS GROUP , WHOSE TECHNICAL AND FINANCIAL QUALIFICATIONS ARE UNDENIABLE , HAD THE BACKING OF THAT GROUP AND THAT THE GROUP UNDERTOOK TO GUARANTEE , FOR THE BENEFIT OF ITS NETHERLANDS SUBSIDIARY , THAT THE WORK WOULD BE SUCCESSFULLY COMPLETED. THE COMMISSION PRODUCED IN THAT CONNECTION A LETTER OF GUARANTEE ISSUED BY THE RUSH AND TOMPKINS GROUP , DATED 21 JUNE 1983 .

57 THE APPLICANTS CONTEST THE REGULARITY OF THAT PROCEDURE. IN THEIR VIEW , THE INTRODUCTION OF THE LETTER OF GUARANTEE HAD THE EFFECT OF ALTERING , AFTER THE OPENING OF THE TENDERS , CERTAIN ESSENTIAL TENDER CONDITIONS , TO SUCH AN EXTENT THAT IT IS DOUBTFUL WHETHER THE TENDERER AND THE UNDERTAKING TO WHICH THE CONTRACT WAS AWARDED ARE STILL STRICTLY IDENTICAL.

58 IN REPLY TO THAT ARGUMENT , THE COMMISSION CONTENDED THAT THE TENDER SUBMITTED ON 4 NOVEMBER 1982 ALREADY CONTAINED A GUARANTEE BY THE RUSH AND TOMPKINS GROUP , BUT IT WAS NOT IN A POSITION TO PRODUCE A COPY OF THAT LETTER OR TO INDICATE IN WHAT WAY THE GUARANTEE OF 21 JUNE 1983 , WHICH WAS APPARENTLY A DECISIVE FACTOR IN THE AWARD OF THE CONTRACT , DIFFERED FROM THE ORIGINAL GUARANTEE.

59 CONSEQUENTLY , VIEWED AS A WHOLE , THE CIRCUMSTANCES IN WHICH THE UNDERTAKING WHICH WAS AWARDED THE CONTRACT WAS CHOSEN SEEM TO BE QUESTIONABLE. HOWEVER , IT IS NOT POSSIBLE AT THIS STAGE TO DETERMINE WHETHER THERE WAS IN THIS CASE ANY IRREGULARITY OF SUCH A NATURE AS TO VITIATE THE TENDER PROCEDURE OR WHETHER THE INQUIRIES AND CLARIFICATIONS REGARDING THE LOWEST TENDERER ARE IN ACCORDANCE WITH NORMAL PRACTICE IN PUBLIC TENDER PROCEDURES.

60 HOWEVER , THOSE DOUBTS , EVEN THOUGH THEY ARE GENUINE , DO NOT CONSTITUTE SUFFICIENT JUSTIFICATION FOR A MEASURE AS SERIOUS AS THE SUSPENSION OF THE PERFORMANCE OF THE CONTRACT , CONCLUDED BY THE ETHIOPIAN AUTHORITIES AND ENDORSED BY THE COMMISSION , BY MEANS OF THE BLOCKING OF THE FUNDS EARMARKED FOR THE PERFORMANCE OF THE CONTRACT.

61 IT MUST BE BORNE IN MIND THAT THE APPLICANTS WERE ONLY THE SECOND LOWEST TENDERERS. THE COMMISSION , WHICH IS RESPONSIBLE FOR THE FINANCIAL ADMINISTRATION OF THE FUND , WAS THEREFORE UNDER A DUTY TO GIVE PRIORITY TO ITS EXAMINATION OF THE TENDER SUBMITTED BY THE LOWEST TENDERER WITH A VIEW TO CLARIFYING , IN CONFORMITY WITH THE CRITERIA LAID DOWN BY ARTICLE 130 OF THE CONVENTION , THE QUESTION OF THE QUALIFICATIONS AND GUARANTEES OF THAT TENDERER WHICH WERE IN DISPUTE. AS REGARDS THE DESIGNATION ' ' LOWEST QUALIFIED TENDERER

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' ' , WHICH THE APPLICANTS BESTOWED UPON THEMSELVES , FOLLOWING A PRELIMINARY APPRAISAL MADE BY THE EMPLOYER , IT SHOULD BE OBSERVED THAT THAT STATUS WAS AT NO TIME CONFERRED UPON THEM BY THE COMPETENT AUTHORITY , NAMELY THE NATIONAL AUTHORIZING OFFICER.

62 IT APPEARS , MOREOVER , FROM THE EXPLANATIONS SUPPLIED BY THE COMMISSION THAT , FOLLOWING CHECKS CARRIED OUT ON THE TECHNICAL AND FINANCIAL QUALIFICATIONS OF THE LOWEST TENDERER , BOTH THE NATIONAL AUTHORIZING OFFICER AND THE CHIEF AUTHORIZING OFFICER ARE NOW SATISFIED WITH THE CHOICE MADE FOR THE AWARD OF THE CONTRACT. THIS ATTITUDE EMERGES FROM A TELEX MESSAGE SENT ON 22 JUNE 1983 BY EELPA TO THE APPLICANTS , IN WHICH THE EMPLOYER , AFTER EXPLAINING THE SITUATION , REQUESTS THE APPLICANTS ' ' TO DROP THE WHOLE MATTER AND LET BYGONES BE BYGONES. ' '

63 IN THOSE CIRCUMSTANCES IT SEEMS THAT THE BLOCKING OF THE FUNDS EARMARKED FOR THE EXECUTION OF THE PROJECT , WITH THE GRAVE CONSEQUENCES WHICH SUCH A MEASURE WOULD ENTAIL FOR ALL THE PARTIES CONCERNED , WOULD BE A DISPROPORTIONATE RESPONSE TO THE DOUBTS WHICH THE FACTS ALLEGED BY THE APPLICANTS HAVE RAISED CONCERNING THE REGULARITY OF THE TENDER PROCEDURES.

64 IT IS OPEN TO THE APPLICANTS TO PURSUE THEIR ACTION WITH A VIEW TO ENABLING THE COURT , AFTER A MORE THOROUGH EXAMINATION OF THE MATTERS INVOLVED IN THE DISPUTE , TO GIVE JUDGMENT ON ITS OWN JURISDICTION AND TO STATE THE CONSEQUENCES TO BE DRAWN FROM ANY IRREGULARITIES IN THE TENDER PROCEDURE , IN PARTICULAR WITH REGARD TO THE ISSUE OF LIABILITY.

65 FOR ALL THOSE REASONS , IT MUST BE HELD THAT , AT THIS STAGE , THE APPLICANTS HAVE FAILED TO ESTABLISH CIRCUMSTANCES MAKING OUT A PRIMA FACIE CASE FOR AN INTERIM MEASURE WITHIN THE MEANING OF ARTICLES 185 OR 186 OF THE EEC TREATY.

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NOTES Kalugina, Serge: Les voies de recours des entrepreneurs dans les marchés publics finances par le F.E.D., Droit et pratique du commerce international 1988 p.511-556

PROCEDU Action for annulment;Action for failure to act;Action for damages;Application for interim measures - unfounded

ADVGEN VerLoren van Themaat

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JUDGRAP Pescatore

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Judgment of the Court
of 10 February 1982
SA Transporoute et travaux v Minister of Public Works.
Reference for a preliminary ruling: Conseil d'Etat - Grand Duchy of Luxembourg.
Freedom to provide services - Directives on public works contracts.
Case 76/81.

1 . FREEDOM TO PROVIDE SERVICES - COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS - PROOF OF TENDERER ' S GOOD STANDING AND QUALIFICATIONS - REQUIREMENT OF AN ESTABLISHMENT PERMIT - NOT PERMISSIBLE

(EEC TREATY , ART. 59 ; COUNCIL DIRECTIVE 71/305 , ARTS. 23 TO 26)

2 . FREEDOM TO PROVIDE SERVICES - COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS - ABNORMALLY LOW TENDER - OBLIGATIONS OF THE AUTHORITY AWARDING THE CONTRACT

(COUNCIL DIRECTIVE 71/305 , ART. 29 (5))

1 . COUNCIL DIRECTIVE 71/305 MUST BE INTERPRETED AS PRECLUDING A MEMBER STATE FROM REQUIRING A TENDERER IN ANOTHER MEMBER STATE TO FURNISH PROOF BY ANY MEANS , FOR EXAMPLE BY AN ESTABLISHMENT PERMIT , OTHER THAN THOSE PRESCRIBED IN ARTICLES 23 TO 26 OF THAT DIRECTIVE , THAT HE SATISFIES THE CRITERIA LAID DOWN IN THOSE PROVISIONS AND RELATING TO HIS GOOD STANDING AND QUALIFICATION.

THE RESULT OF THAT INTERPRETATION OF THE DIRECTIVE IS ALSO IN CONFORMITY WITH THE SCHEME OF THE TREATY PROVISIONS CONCERNING THE PROVISION OF SERVICES. TO MAKE THE PROVISION OF SERVICES IN ONE MEMBER STATE BY A CONTRACTOR ESTABLISHED IN ANOTHER MEMBER STATE CONDITIONAL UPON THE POSSESSION OF AN ESTABLISHMENT PERMIT IN THE FIRST STATE WOULD BE TO DEPRIVE ARTICLE 59 OF THE TREATY OF ALL EFFECTIVENESS , THE PURPOSE OF THAT ARTICLE BEING PRECISELY TO ABOLISH RESTRICTIONS ON THE FREEDOM TO PROVIDE SERVICES BY PERSONS WHO ARE NOT ESTABLISHED IN THE STATE IN WHICH THE SERVICE IS TO BE PROVIDED .

2 . WHEN IN THE OPINION OF THE AUTHORITY AWARDING A PUBLIC WORKS CONTRACT A TENDERER ' S OFFER IS OBVIOUSLY ABNORMALLY LOW IN RELATION TO THE TRANSACTION ARTICLE 29 (5) OF DIRECTIVE 71/305 REQUIRES THE AUTHORITY TO SEEK FROM THE TENDERER , BEFORE COMING TO A DECISION AS TO THE AWARD OF THE CONTRACT , AN EXPLANATION OF HIS PRICES OR TO INFORM THE TENDERER WHICH OF HIS TENDERS APPEAR TO BE ABNORMAL , AND TO ALLOW HIM A REASONABLE TIME WITHIN WHICH TO SUBMIT FURTHER DETAILS

IN CASE 76/81

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE COMITE DU CONTENTIEUX DU CONSEIL D ' ETAT (JUDICIAL COMMITTEE OF THE STATE COUNCIL) OF THE GRAND DUCHY OF LUXEMBOURG FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT TRIBUNAL BETWEEN

SA TRANSPOROUTE ET TRAVAUX , BRUSSELS ,

AND

THE MINISTER OF PUBLIC WORKS , GRAND DUCHY OF LUXEMBOURG ,

ON THE INTERPRETATION OF COUNCIL DIRECTIVE 71/304 OF 26 JULY 1971 CONCERNING

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THE ABOLITION OF RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES IN RESPECT OF PUBLIC WORKS CONTRACTS AND ON THE AWARD OF PUBLIC WORKS CONTRACTS TO CONTRACTORS ACTING THROUGH AGENCIES OR BRANCHES , AND COUNCIL DIRECTIVE 71/305 , OF THE SAME DATE , CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1971 (II), P . 678 AND P. 682),

1 BY JUDGMENT OF 11 MARCH 1981 WHICH WAS RECEIVED AT THE COURT ON 7 APRIL 1981 THE COMITE DU CONTENTIEUX DU CONSEIL D ' ETAT (JUDICIAL COMMITTEE OF THE STATE COUNCIL) OF THE GRAND DUCHY OF LUXEMBOURG REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY TWO QUESTIONS CONCERNING THE INTERPRETATION OF COUNCIL DIRECTIVES 71/304 AND 71/305 OF 26 JULY 1971 CONCERNING , RESPECTIVELY , THE ABOLITION OF RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES IN RESPECT OF PUBLIC WORKS CONTRACTS AND ON THE AWARD OF PUBLIC WORKS CONTRACTS TO CONTRACTORS ACTING THROUGH AGENCIES OR BRANCHES (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1971 (II), P. 678), AND THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (IDEM , P . 682).

2 THE QUESTIONS AROSE IN THE COURSE OF A DISPUTE THE ORIGIN OF WHICH LAY IN A NOTICE OF INVITATION TO TENDER ISSUED BY THE ADMINISTRATION DES PONTS ET CHAUSSEES (BRIDGES AND HIGHWAYS AUTHORITY) OF THE GRAND DUCHY OF LUXEMBOURG , IN RESPONSE TO WHICH SA. TRANSPOROUTE ET TRAVAUX (HEREINAFTER REFERRED TO AS ' ' TRANSPOROUTE ' '), A COMPANY INCORPORATED UNDER BELGIAN LAW , HAD SUBMITTED THE LOWEST TENDER.

3 THE TENDER WAS REJECTED BY THE MINISTER OF PUBLIC WORKS BECAUSE TRANSPOROUTE WAS NOT IN POSSESSION OF THE GOVERNMENT ESTABLISHMENT PERMIT REQUIRED BY ARTICLE 1 OF THE REGLEMENT GRAND-DUCAL (GRAND-DUCAL REGULATION) OF 6 NOVEMBER 1974 (MEMORIAL (GAZETTE) A , 1974 , P. 1660 ET SEQ .) AND BECAUSE THE PRICES IN TRANSPOROUTE ' S TENDER WERE CONSIDERED BY THE MINISTER OF PUBLIC WORKS TO BE ABNORMALLY LOW WITHIN THE MEANING OF THE FIFTH AND SIXTH PARAGRAPHS OF ARTICLE 32 OF THAT REGULATION . AS A RESULT , THE MINISTER OF PUBLIC WORKS OF THE GRAND DUCHY OF LUXEMBOURG AWARDED THE CONTRACT TO A CONSORTIUM OF LUXEMBOURG CONTRACTORS WHOSE TENDER WAS CONSIDERED TO BE ECONOMICALLY THE MOST ADVANTAGEOUS.

4 TRANSPOROUTE BROUGHT AN ACTION BEFORE THE CONSEIL D ' ETAT FOR THE ANNULMENT OF THE DECISION. IN SUPPORT OF ITS APPLICATION IT CONTENDED INTER ALIA THAT THE REASONS GIVEN FOR REJECTING ITS TENDER AMOUNTED TO AN INFRINGEMENT OF COUNCIL DIRECTIVE 71/305 , IN PARTICULAR ARTICLES 24 AND 29 (5) THEREOF.

5 CONSIDERING THAT THE DISPUTE THUS RAISED QUESTIONS CONCERNING THE INTERPRETATION OF COMMUNITY LAW , THE CONSEIL D ' ETAT REFERRED TO THE COURT FOR A PRELIMINARY RULING TWO QUESTIONS CONCERNING THE INTERPRETATION OF COUNCIL DIRECTIVES 71/304 AND 71/305.

FIRST QUESTION

6 THE FIRST QUESTION ASKS WHETHER IT IS CONTRARY TO THE PROVISIONS OF COUNCIL DIRECTIVES 71/304 AND 71/305 , IN PARTICULAR THOSE OF ARTICLE 24 OF DIRECTIVE 71/305 , FOR THE AUTHORITY AWARDING THE CONTRACT TO REQUIRE AS A CONDITION FOR THE AWARD OF A PUBLIC WORKS CONTRACT TO A TENDERER ESTABLISHED

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IN ANOTHER MEMBER STATE THAT IN ADDITION TO BEING PROPERLY ENROLLED IN THE PROFESSIONAL OR TRADE REGISTER OF THE COUNTRY IN WHICH HE IS ESTABLISHED THE TENDERER MUST BE IN POSSESSION OF AN ESTABLISHMENT PERMIT ISSUED BY THE GOVERNMENT OF THE MEMBER STATE IN WHICH THE CONTRACT IS AWARDED.

7 DIRECTIVES 71/304 AND 71/305 ARE DESIGNED TO ENSURE FREEDOM TO PROVIDE SERVICES IN THE FIELD OF PUBLIC WORKS CONTRACTS. THUS THE FIRST OF THOSE DIRECTIVES IMPOSES A GENERAL DUTY ON MEMBER STATES TO ABOLISH RESTRICTIONS ON ACCESS TO , PARTICIPATION IN AND THE PERFORMANCE OF PUBLIC WORKS CONTRACTS AND THE SECOND DIRECTIVE PROVIDES FOR COORDINATION OF THE PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS.

8 IN REGARD TO SUCH COORDINATION CHAPTER I OF TITLE IV OF DIRECTIVE 71/305 IS NOT LIMITED TO STATING THE CRITERIA FOR SELECTION ON THE BASIS OF WHICH CONTRACTORS MAY BE EXCLUDED FROM PARTICIPATION BY THE AUTHORITY AMENDING THE CONTRACT. IT ALSO PRESCRIBES THE MANNER IN WHICH CONTRACTORS MAY FURNISH PROOF THAT THEY SATISFY THOSE CRITERIA.

9 THUS ARTICLE 27 STATES THAT THE AUTHORITY AWARDING CONTRACTS MAY INVITE THE CONTRACTOR TO SUPPLEMENT THE CERTIFICATES AND DOCUMENTS SUBMITTED ONLY WITHIN THE LIMITS OF ARTICLES 23 TO 26 OF THE DIRECTIVE , ACCORDING TO WHICH MEMBER STATES MAY REQUEST REFERENCES OTHER THAN THOSE EXPRESSLY MENTIONED IN THE DIRECTIVE ONLY FOR THE PURPOSE OF ASSESSING THE FINANCIAL AND ECONOMIC STANDING OF THE CONTRACTORS AS PROVIDED FOR IN ARTICLE 25 OF THE DIRECTIVE.

10 SINCE THE ESTABLISHMENT PERMIT IN QUESTION IS INTENDED , AS THE LUXEMBOURG GOVERNMENT HAS ACKNOWLEDGED IN ITS WRITTEN OBSERVATIONS , TO ESTABLISH NOT THE FINANCIAL AND ECONOMIC STANDING OF UNDERTAKINGS BUT THE QUALIFICATIONS AND GOOD STANDING OF THOSE IN CHARGE OF THEM , AND SINCE THE EXCEPTION PROVIDED FOR IN ARTICLE 25 OF DIRECTIVE 71/305 DOES NOT APPLY , THE PERMIT CONSTITUTES A MEANS OF PROOF WHICH DOES NOT COME WITHIN THE CLOSED CATEGORY OF THOSE AUTHORIZED BY THE DIRECTIVE .

11 THE LUXEMBOURG GOVERNMENT SUBMITS , HOWEVER , THAT THE GRANT OF AN ESTABLISHMENT PERMIT IS EQUIVALENT TO REGISTRATION OF THE CONTRACTOR IN QUESTION IN A LIST OF RECOGNIZED CONTRACTORS WITHIN THE MEANING OF ARTICLE 28 OF DIRECTIVE 71/305 AND THEREFORE COMPLIES WITH THE TERMS OF THAT PROVISION.

12 IT SHOULD BE POINTED OUT , IN REPLY TO THAT ARGUMENT , THAT EVEN IF THE ESTABLISHMENT PERMIT MAY BE EQUATED WITH REGISTRATION IN AN OFFICIAL LIST OF RECOGNIZED CONTRACTORS WITHIN THE MEANING OF ARTICLE 28 OF DIRECTIVE 71/305 , THERE IS NOTHING IN THAT PROVISION TO JUSTIFY THE INFERENCE THAT REGISTRATION IN SUCH A LIST IN THE STATE AWARDING THE CONTRACT MAY BE REQUIRED OF CONTRACTORS ESTABLISHED IN OTHER MEMBER STATES.

13 ON THE CONTRARY , ARTICLE 28 (3) ENTITLES CONTRACTORS REGISTERED IN AN OFFICIAL LIST IN ANY MEMBER STATE WHATEVER TO USE SUCH REGISTRATION , WITHIN THE LIMITS LAID DOWN IN THAT PROVISION , AS AN ALTERNATIVE MEANS OF PROVING BEFORE THE AUTHORITY OF ANOTHER MEMBER STATE AWARDING CONTRACTS THAT THEY SATISFY THE QUALITATIVE CRITERIA LISTED IN ARTICLES 23 TO 26 OF DIRECTIVE 71/305.

14 IT SHOULD BE NOTED THAT THE RESULT OF THAT INTERPRETATION OF DIRECTIVE

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71/305 IS IN CONFORMITY WITH THE SCHEME OF THE TREATY PROVISIONS CONCERNING THE PROVISION OF SERVICES. TO MAKE THE PROVISION OF SERVICES IN ONE MEMBER STATE BY A CONTRACTOR ESTABLISHED IN ANOTHER MEMBER STATE CONDITIONAL UPON THE POSSESSION OF AN ESTABLISHMENT PERMIT IN THE FIRST STATE WOULD BE TO DEPRIVE ARTICLE 59 OF THE TREATY OF ALL EFFECTIVENESS , THE PURPOSE OF THAT ARTICLE BEING PRECISELY TO ABOLISH RESTRICTIONS ON THE FREEDOM TO PROVIDE SERVICES BY PERSONS WHO ARE NOT ESTABLISHED IN THE STATE IN WHICH THE SERVICE IS TO BE PROVIDED.

15 ACCORDINGLY , THE REPLY TO THE FIRST QUESTION MUST BE THAT COUNCIL DIRECTIVE 71/305 MUST BE INTERPRETED AS PRECLUDING A MEMBER STATE FROM REQUIRING A TENDERER ESTABLISHED IN ANOTHER MEMBER STATE TO FURNISH PROOF BY ANY MEANS , FOR EXAMPLE BY AN ESTABLISHMENT PERMIT , OTHER THAN THOSE PRESCRIBED IN ARTICLES 23 TO 26 OF THAT DIRECTIVE , THAT HE SATISFIES THE CRITERIA LAID DOWN IN THOSE PROVISIONS AND RELATING TO HIS GOOD STANDING AND QUALIFICATIONS.

SECOND QUESTION

16 THE SECOND QUESTION ASKS WHETHER THE PROVISIONS OF ARTICLE 29 (5) OF DIRECTIVE 71/305 REQUIRE THE AUTHORITY AWARDING THE CONTRACT TO REQUEST A TENDERER WHOSE TENDERS , IN THE AUTHORITY ' S OPINION , ARE OBVIOUSLY ABNORMALLY LOW IN RELATION TO THE TRANSACTION , TO FURNISH EXPLANATIONS FOR THOSE PRICES BEFORE INVESTIGATING THEIR COMPOSITION AND DECIDING TO WHOM IT WILL AWARD THE CONTRACT , OR WHETHER IN SUCH CIRCUMSTANCES THEY ALLOW THE AUTHORITY AWARDING THE CONTRACT TO DECIDE WHETHER IT IS NECESSARY TO REQUEST SUCH EXPLANATIONS.

17 ARTICLE 29 (5) OF DIRECTIVE 71/305 PROVIDES THAT IF A TENDER IS OBVIOUSLY ABNORMALLY LOW THE AUTHORITY AWARDING THE CONTRACT IS TO EXAMINE THE DETAILS OF THE TENDER AND , FOR THAT PURPOSE , REQUEST THE TENDERER TO FURNISH THE NECESSARY EXPLANATIONS. CONTRARY TO THE VIEW EXPRESSED BY THE LUXEMBOURG GOVERNMENT , THE FACT THAT THE PROVISION EXPRESSLY EMPOWERS THE AWARDING AUTHORITY TO ESTABLISH WHETHER THE EXPLANATIONS ARE ACCEPTABLE DOES NOT UNDER ANY CIRCUMSTANCES AUTHORIZE IT TO DECIDE IN ADVANCE , BY REJECTING THE TENDER WITHOUT EVEN SEEKING AN EXPLANATION FROM THE TENDERER , THAT NO ACCEPTABLE EXPLANATION COULD BE GIVEN. THE AIM OF THE PROVISION , WHICH IS TO PROTECT TENDERERS AGAINST ARBITRARINESS ON THE PART OF THE AUTHORITY AWARDING CONTRACTS , COULD NOT BE ACHIEVED IF IT WERE LEFT TO THAT AUTHORITY TO JUDGE WHETHER OR NOT IT WAS APPROPRIATE TO SEEK EXPLANATIONS.

18 THE REPLY TO THE SECOND QUESTION MUST THEREFORE BE THAT WHEN IN THE OPINION OF THE AUTHORITY AWARDING A PUBLIC WORKS CONTRACT A TENDERER ' S OFFER IS OBVIOUSLY ABNORMALLY LOW IN RELATION TO THE TRANSACTION ARTICLE 29 (5) OF DIRECTIVE 71/305 REQUIRES THE AUTHORITY TO SEEK FROM THE TENDERER , BEFORE COMING TO A DECISION AS TO THE AWARD OF THE CONTRACT , AN EXPLANATION OF HIS PRICES OR TO INFORM THE TENDERER WHICH OF HIS TENDERS APPEAR TO BE ABNORMAL , AND TO ALLOW HIM A REASONABLE TIME WITHIN WHICH TO SUBMIT FURTHER DETAILS.

COSTS

19 THE COSTS INCURRED BY THE GOVERNMENT OF THE KINGDOM OF BELGIUM , THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE COMMISSION OF THE EUROPEAN

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COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION BEFORE THE NATIONAL COURT , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE COMITE DU CONTENTIEUX OF THE CONSEIL D ' ETAT OF THE GRAND DUCHY OF LUXEMBOURG BY JUGDMENT OF 11 MARCH 1981 , HEREBY RULES :

COUNCIL DIRECTIVE 71/305 MUST BE INTERPRETED AS PRECLUDING A MEMBER STATE FROM REQUIRING A TENDERER IN ANOTHER MEMBER STATE TO FURNISH PROOF BY ANY MEANS , FOR EXAMPLE BY AN ESTABLISHMENT PERMIT , OTHER THAN THOSE PRESCRIBED IN ARTICLES 23 TO 26 OF THAT DIRECTIVE THAT HE SATISFIES THE CRITERIA LAID DOWN IN THOSE PROVISIONS AND RELATING TO HIS GOOD STANDING AND QUALIFICATIONS.

WHEN IN THE OPINION OF THE AUTHORITY AWARDING A PUBLIC WORKS CONTRACT A TENDERER ' S OFFER IS OBVIOUSLY ABNORMALLY LOW IN RELATION TO THE TRANSACTION ARTICLE 29 (5) OF DIRECTIVE 71/305 REQUIRES THE AUTHORITY TO SEEK FROM THE TENDERER , BEFORE COMING TO A DECISION AS TO THE AWARD OF THE CONTRACT , AN EXPLANATION OF HIS PRICES OR TO INFORM THE TENDERER WHICH OF HIS TENDERS APPEAR TO BE ABNORMAL , AND TO ALLOW HIM A REASONABLE TIME WITHIN WHICH TO SUBMIT FURTHER DETAILS

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
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DOC	1982/02/10
LODGED	1981/04/07
JURCIT	11957E059 : N 14 31971L0304 : N 1 5 6 7 31971L0305-A23 : N 9 31971L0305-A24 : N 4 6 9 31971L0305-A25 : N 9 10

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31971L0305-A26 : N 9
31971L0305-A27 : N 9
31971L0305-A28 : N 11 12
31971L0305-A28P3 : N 13
31971L0305-A29P5 : N 4 16 17 18
31971L0305 : N 1 4 5 6 7 14 15

CONCERNS Interprets 31971L0305
Interprets 31971L0305-A23
Interprets 31971L0305-A24
Interprets 31971L0305-A25
Interprets 31971L0305-A26
Interprets 31971L0305-A29P5

SUB Freedom of establishment and services ; Free movement of services ; Approximation of laws

AUTLANG French

OBSERV Belgium ; Italy ; Commission ; Member States ; Institutions

NATIONA Luxembourg

NATCOUR *A9* Conseil d'Etat (Grand-Duché de Luxembourg), comité du contentieux, arrêt du 11/03/81 (6890)
- L'entreprise et le droit 1981 p.83-87
ºNOTESº
- Flamme, M.-A.: L'entreprise et le droit 1981 p.87-89
P1 Conseil d'Etat (Grand-Duché de Luxembourg), comité du contentieux, arrêt du 18/05/82 (6890)

NOTES J.A.U.: The Journal of Business Law 1982 p.220-221
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Gormley, L.W.: New Law Journal 1983 p.533-534
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PROCEDU Reference for a preliminary ruling

ADVGEN Reischl

JUDGRAP Mackenzie Stuart

DATES of document: 10/02/1982
of application: 07/04/1981

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**Judgment of the Court
of 17 February 1981
Commission of the European Communities v Italian Republic.
Non-implementation of a directive / Public supply contracts.
Case 133/80.**

MEMBER STATES - OBLIGATIONS - IMPLEMENTATION OF DIRECTIVES - FAILURE TO FULFIL - JUSTIFICATION - NOT PERMISSIBLE

(EEC TREATY , ART. 169)

A MEMBER STATE MAY NOT PLEAD PROVISIONS , PRACTICES OR CIRCUMSTANCES EXISTING IN ITS INTERNAL LEGAL SYSTEM IN ORDER TO JUSTIFY A FAILURE TO COMPLY WITH OBLIGATIONS AND TIME-LIMITS RESULTING FROM COMMUNITY DIRECTIVES .

IN CASE 133/80

COMMISSION OF THE EUROPEAN COMMUNITIES , REPRESENTED BY ALBERTO PROZILLO , A MEMBER OF THE COMMISSION ' S LEGAL DEPARTMENT , ACTING AS AGENT , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF MARIO CERVINO , LEGAL ADVISER TO THE COMMISSION , JEAN MONNET BUILDING , KIRCHBERG ,

APPLICANT ,

V

ITALIAN REPUBLIC , REPRESENTED BY ARNALDO SQUILLANTE , HEAD OF THE DEPARTMENT FOR DIPLOMATIC DISPUTES , TREATIES AND LEGISLATIVE MATTERS , ACTING AS AGENT , ASSISTED BY PIER GIORGIO FERRI , AVVOCATO DELLO STATO , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE ITALIAN EMBASSY ,

DEFENDANT ,

APPLICATION FOR A DECLARATION THAT THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER THE EEC TREATY BY NOT ADOPTING WITHIN THE PRESCRIBED PERIODS THE PROVISIONS NEEDED TO COMPLY WITH COUNCIL DIRECTIVE 77/62/EEC COORDINATING PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY CONTRACTS (OFFICIAL JOURNAL 1977 , L 13 , P. 1),

1 BY APPLICATION LODGED AT THE COURT REGISTRY ON 2 JUNE 1980 THE COMMISSION OF THE EUROPEAN COMMUNITIES BROUGHT AN ACTION UNDER ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT BY FAILING TO ADOPT WITHIN THE PRESCRIBED PERIOD THE PROVISIONS NEEDED TO COMPLY WITH COUNCIL DIRECTIVE 77/62/EEC OF 21 DECEMBER 1976 COORDINATING PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY CONTRACTS (OFFICIAL JOURNAL 1977 , L 13 , P. 1) THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER THE EEC TREATY.

2 COUNCIL DIRECTIVE 77/62/EEC CONTAINS A NUMBER OF PROVISIONS INTENDED TO ENSURE THAT THE PROHIBITION OF RESTRICTIONS ON THE FREE MOVEMENT OF GOODS LAID DOWN BY ARTICLES 30 TO 37 OF THE EEC TREATY IS OBSERVED IN THE FIELD OF PUBLIC SUPPLY CONTRACTS. THE OBJECT OF THE PROVISIONS OF THE DIRECTIVE IS TO COORDINATE NATIONAL PROCEDURES CONCERNING PUBLIC SUPPLY CONTRACTS , IN PARTICULAR BY INTRODUCING EQUAL CONDITIONS OF COMPETITION FOR SUCH CONTRACTS IN ALL THE MEMBER STATES , AND TO ENSURE A DEGREE OF TRANSPARENCY ALLOWING THE OBSERVANCE OF THE PROHIBITION CONTAINED IN ARTICLES 30 TO 37 MENTIONED ABOVE TO BE BETTER SUPERVISED.

3 UNDER ARTICLE 30 OF THE DIRECTIVE MEMBER STATES WERE OBLIGED TO ADOPT

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THE MEASURES NECESSARY TO COMPLY WITH IT WITHIN 18 MONTHS OF ITS NOTIFICATION AND TO INFORM THE COMMISSION THEREOF FORTHWITH. UNDER ARTICLE 31 THEY WERE , AND STILL ARE , FURTHER OBLIGED TO COMMUNICATE TO THE COMMISSION THE TEXTS OF THE BASIC PROVISIONS OF DOMESTIC LAW , WHETHER LAWS , REGULATIONS OR ADMINISTRATIVE PROVISIONS , WHICH THEY ADOPT IN THE FIELD IN QUESTION.

4 THE PERIOD LAID DOWN BY ARTICLE 30 EXPIRED ON 23 JUNE 1978 WITHOUT THE ITALIAN REPUBLIC ' S HAVING ADOPTED THE NECESSARY MEASURES AND THE COMMISSION GAVE IT A FIRST REMINDER OF ITS OBLIGATION BY A LETTER OF 27 OCTOBER 1978. IT TOOK UP THE MATTER AGAIN AT THE MEETING ON 9 AND 10 NOVEMBER 1978 OF THE ADVISORY COMMITTEE FOR PUBLIC CONTRACTS.

5 SEEING THAT ITS REMINDERS HAD NOT LED TO THE ADOPTION OF THE NECESSARY MEASURES , ON 13 MARCH 1979 THE COMMISSION INVITED THE GOVERNMENT OF THE ITALIAN REPUBLIC IN ACCORDANCE WITH THE PROCEDURE LAID DOWN BY ARTICLE 169 OF THE EEC TREATY TO SUBMIT ITS OBSERVATIONS WITHIN A PERIOD OF 20 DAYS. THE GOVERNMENT DID SO BY A TELEX MESSAGE OF 9 APRIL 1979. IN THAT MESSAGE IT WAS EXPLAINED THAT THE DRAFT LAW TO INCORPORATE THE DIRECTIVE INTO THE ITALIAN LEGAL SYSTEM HAD BEEN PASSED ONCE BY THE CHAMBER OF DEPUTIES ON 27 SEPTEMBER 1978 AND THEN BY THE SENATE ON 13 DECEMBER 1978 , BUT THAT CERTAIN AMENDMENTS HAD MADE IT NECESSARY FOR THE DRAFT TO BE REMITTED TO THE CHAMBER OF DEPUTIES . OWING TO THE DISSOLUTION OF THE LEGISLATURE PARLIAMENT COULD NOT COMPLETE ITS SCRUTINY OF THE DRAFT LAW. THE SITUATION REMAINED UNCHANGED THROUGHOUT 1979 AND ON 6 DECEMBER OF THAT YEAR THE COMMISSION ISSUED A REASONED OPINION DECLARING THAT THERE HAD BEEN A FAILURE ON THE PART OF THE ITALIAN REPUBLIC TO FULFIL ITS OBLIGATIONS UNDER THE TREATY AND INVITING IT TO COMPLY WITH THAT OPINION WITHIN A PERIOD OF TWO MONTHS.

6 THAT INVITATION WAS NOT ACTED UPON AND ON 2 JUNE 1980 THE COMMISSION LODGED AN APPLICATION FOR A DECLARATION ESTABLISHING THE NON-COMPLIANCE. THE ITALIAN REPUBLIC POINTED OUT IN ITS DEFENCE THAT THE DELAY WAS DUE TO THE DISSOLUTION OF THE LEGISLATURE , CAUSING ALL DRAFT LAWS UNDER DISCUSSION TO LAPSE AND THEREBY RENDERING NECESSARY A NEW DRAFT , WHICH HAD BEEN PRESENTED TO THE SENATE ON 9 DECEMBER 1979 ; BUT IT DID NOT CLAIM THAT THE APPLICATION SHOULD BE DISMISSED.

7 THE CIRCUMSTANCES WHICH HAVE BEEN DESCRIBED CANNOT EXPUNGE THE NON-COMPLIANCE COMPLAINED OF. ACCORDING TO WELL-ESTABLISHED CASE-LAW A MEMBER STATE MAY NOT PLEAD PROVISIONS , PRACTICES OR CIRCUMSTANCES EXISTING IN ITS INTERNAL LEGAL SYSTEM IN ORDER TO JUSTIFY A FAILURE TO COMPLY WITH THE OBLIGATIONS IMPOSED BY COMMUNITY DIRECTIVES.

8 IT IS THEREFORE NECESSARY TO DECLARE THAT BY NOT ADOPTING WITHIN THE PRESCRIBED PERIOD THE PROVISIONS NEEDED TO COMPLY WITH COUNCIL DIRECTIVE 77/62/EEC OF 21 DECEMBER 1976 THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ONE OF ITS OBLIGATIONS UNDER THE TREATY.

9 UNDER ARTICLE 69 (2) OF THE RULES OF PROCEDURE THE UNSUCCESSFUL PARTY IS TO BE ORDERED TO PAY THE COSTS IF THEY HAVE BEEN ASKED FOR IN THE SUCCESSFUL PARTY ' S PLEADINGS. SINCE THE DEFENDANT HAS BEEN UNSUCCESSFUL IT MUST BE ORDERED TO PAY THE COSTS.

ON THOSE GROUNDS ,

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THE COURT ,

HEREBY :

1 . DECLARES THAT , BY NOT ADOPTING WITHIN THE PRESCRIBED PERIOD THE PROVISIONS NEEDED TO COMPLY WITH COUNCIL DIRECTIVE 77/62/EEC OF 21 DECEMBER 1976 COORDINATING PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY CONTRACTS (OFFICIAL JOURNAL 1977 , L 13 , P. 1), THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER THE EEC TREATY ;

2.ORDERS THE DEFENDANT TO PAY THE COSTS.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1980 ; J ; judgment
PUBREF	European Court reports 1981 Page 00457
DOC	1981/02/17
LODGED	1980/06/02
JURCIT	11957E030 : N 2 11957E037 : N 2 31977L0062-A30 : N 3 4 31977L0062-A31 : N 3 31977L0062 : N 1 2 8
CONCERNS	Failure concerning 31977L0062
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful

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ADVGEN Reischl

JUDGRAP Mertens de Wilmars

DATES of document: 17/02/1981
of application: 02/06/1980

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**Judgment of the Court
of 23 November 1978
Agence européenne d'interims SA v Commission of the European Communities. Case 56/77.**

REQUEST FOR TENDERS - CONCLUSION OF A CONTRACT FOLLOWING A REQUEST FOR TENDERS - DISCRETION OF THE ADMINISTRATION - JUDICIAL REVIEW - LIMITS

(FINANCIAL REGULATION NO 73/91 (ECSC , EEC , EURATOM), ART. 59 (2))

ALTHOUGH THE COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE DEPARTMENTS OF THE COMMISSION TO DECIDE WHETHER THERE IS ANY MISUSE OF POWERS OR A SERIOUS AND MANIFEST ERROR OF JUDGMENT IT MUST , HOWEVER , RESPECT THE DISCRETION GIVEN TO THE COMPETENT AUTHORITIES IN ASSESSING THE FACTORS TO BE TAKEN INTO ACCOUNT IN THE INTERESTS OF THE DEPARTMENT WITH A VIEW TO TAKING A DECISION TO ENTER INTO A CONTRACT FOLLOWING A REQUEST FOR TENDERS UNDER ARTICLE 59 (2) OF THE FINANCIAL REGULATION OF 25 APRIL 1973.

IN CASE 56/77

AGENCE EUROPEENNE D ' INTERIMS S. A. A COMPANY INCORPORATED UNDER BELGIAN LAW , WHOSE REGISTERED OFFICE IS AT 19 AVENUE DE LA RENAISSANCE , BRUSSELS , REPRESENTED AND ASSISTED BY MICHEL WAELBROECK AND ROBERT LIBIEZ , ADVOCATES OF THE BRUSSELS BAR , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF ANDRE ELVINGER , 84 GRAND RUE ,

APPLICANT ,

COMMISSION OF THE EUROPEAN COMMUNITIES , REPRESENTED BY GIANLUIGI CAMPOGRANDE , A MEMBER OF THE LEGAL SERVICE OF THE COMMISSION , ACTING AS AGENT , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF MARIO CERVINO , A MEMBER OF THE LEGAL SERVICE OF THE COMMISSION , JEAN MONNET BUILDING , KIRCHBERG ,

DEFENDANT ,

SUPPORTED BY

RANDSTAD S.A., A COMPANY INCORPORATED UNDER BELGIAN LAW , WHOSE REGISTERED OFFICE IS AT 184 AVENUE DE LA FORET , BRUSSELS , REPRESENTED AND ASSISTED BY L. JEDID AND X. MAGNEE , ADVOCATES OF THE BRUSSELS BAR , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF E. ARENDT , CENTRE LOUVIGNY , 34/B/IV RUE PHILIPPE II ,

INTERVENER ,

APPLICATION FOR ANNULMENT OF THE DECISION OF THE COMMISSION DATED 1 MARCH 1977 BY WHICH THE COMMISSION REJECTED THE APPLICANT ' S OFFER TO MAKE TEMPORARY STAFF AVAILABLE AND FOR AN ORDER THAT THE DEFENDANT PAY TO THE APPLICANT THE SUM OF BFRS 26 600 000 AS COMPENSATION FOR DAMAGE CAUSED TO THE APPLICANT BY THE SAID DECISION AND BY THE ACTS OF CERTAIN OFFICIALS OF THE COMMISSION.

1BY APPLICATION REGISTERED AT THE COURT ON 3 MAY 1977 THE APPLICANT , AGENCE EUROPEENNE D ' INTERIMS S.A., CLAIMS ON THE ONE HAND THE ANNULMENT OF THE DECISION OF THE COMMISSION DATED 1 MARCH 1977 BY WHICH THE COMMISSION REJECTED THE APPLICANT ' S TENDER LODGED IN RESPONSE TO THE COMMISSION ' S INVITATION

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TO TENDER FOR THE SUPPLY OF TEMPORARY STAFF AND FURTHER AN ORDER THAT THE COMMISSION PAY COMPENSATION FOR THE DAMAGE THE APPLICANT SUFFERED AS A RESULT OF THE SAID DECISION AND BECAUSE OF THE CONDUCT OF CERTAIN OFFICIALS OF THE COMMISSION .

2IT APPEARS FROM THE FILE THAT AFTER THE COMMISSION HAD DECIDED IN NOVEMBER 1976 TO TERMINATE THE CONTRACTS WHICH IT HAD HAD WITH THE APPLICANT SINCE 1970 FOR THE SUPPLY OF TEMPORARY STAFF IT ISSUED ON 7 DECEMBER 1976 A RESTRICTED INVITATION TO TENDER FOR THE SUPPLY OF TEMPORARY STAFF WITHIN THE MEANING OF ARTICLE 59 (2) OF THE FINANCIAL REGULATION OF 25 APRIL 1973 APPLICABLE TO THE GENERAL BUDGET OF THE EUROPEAN COMMUNITIES (OFFICIAL JOURNAL L 116 , P. 1) AND THAT THE APPLICANT DULY FOLLOWED THE PROCEDURE.

3ALTHOUGH NOT REQUIRED TO DO SO THE COMMISSION PREVIOUSLY SOUGHT AN OPINION FROM THE PURCHASES AND CONTRACTS ADVISORY COMMITTEE ON THE CONTENT AND WORDING OF THE TENDER AND THE PROCEDURE TO BE FOLLOWED.

4THE APPLICANT , ALONG WITH 18 OTHERS , LODGED A TENDER IN ACCORDANCE WITH THE CONDITIONS LAID DOWN IN THE INVITATION TO TENDER.

5IN ACCORDANCE WITH ARTICLE 62 OF THE FINANCIAL REGULATION THE TENDERS WERE SUBMITTED FOR THE OPINION OF THE PURCHASES AND CONTRACTS ADVISORY COMMITTEE. ON 25 FEBRUARY 1977 THE LATTER PRONOUNCED ITSELF IN FAVOUR OF THE CONCLUSION OF A CONTRACT WITH RANDSTAD S.A. FOR THE SUPPLY OF TEMPORARY STAFF TO THE COMMISSION.

6THE AUTHORIZING OFFICER ACCEPTED THE ASSESSMENT OF THE PURCHASES AND CONTRACTS ADVISORY COMMITTEE AND THE COMMISSION DECIDED TO ENTER INTO A CONTRACT WITH RANDSTAD AFTER OBTAINING AUTHORIZATION FROM THE FINANCIAL COMPTROLLER.

7BY LETTER DATED 1 MARCH 1977 THE COMMISSION INFORMED THE APPLICANT THAT ITS TENDER HAD NOT BEEN ACCEPTED.

8SUBSEQUENTLY THE MAJORITY OF THE TEMPORARY STAFF WHICH HAD PREVIOUSLY BEEN EMPLOYED BY THE APPLICANT OFFERED THEIR SERVICES TO RANDSTAD WHO THEREUPON SIGNED THEM UP.

9BY ORDER DATED 30 NOVEMBER 1977 THE COURT GAVE RANDSTAD LEAVE TO INTERVENE IN SUPPORT OF THE COMMISSION ' S CLAIM TO REJECT THE APPLICATION AS UNFOUNDED.

10THE APPLICANT IS SEEKING THE ANNULMENT OF THE COMMISSION ' S DECISION OF 1 MARCH 1977 BY WHICH THE COMMISSION REJECTED THE APPLICANT ' S TENDER AND ALLEGES DISREGARD OF ESSENTIAL PROCEDURAL REQUIREMENTS , INFRINGEMENT OF THE FINANCIAL REGULATION OF 25 APRIL 1973 AND OF THE MEASURES IMPLEMENTING IT AND MISUSE OF POWERS , ALL OF WHICH CLAIMS ARE CONTESTED BY THE COMMISSION.

11NONE OF THE PARTIES HAS QUESTIONED THE LAWFULNESS OF THE EXTENT OF THE COMMISSION ' S RECOURSE TO THE EMPLOYMENT OF TEMPORARY STAFF TO PROVIDE THE NECESSARY STAFF FOR THE PERFORMANCE OF ITS NORMAL WORK.

12IN THE FIRST PLACE THE APPLICANT SAYS THE COMMISSION DISREGARDED ESSENTIAL PROCEDURAL REQUIREMENTS WHEN GIVING NOTICE OF REJECTION OF THE TENDER BY LETTER DATED 1 MARCH 1977 SINCE , CONTRARY TO THE OBLIGATION ON THE COMMISSION UNDER ARTICLE 190 OF THE TREATY TO STATE ITS REASONS , NO REASONS WERE GIVEN.

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13SINCE THE REJECTION OF THE APPLICANT ' S TENDER WAS ONLY THE NECESSARY AND INEVITABLE CONSEQUENCE OF THE DECISION TO ACCEPT RANDSTAD ' S TENDER IT WAS UNNECESSARY FOR THE REASONS TO BE SEPARATELY STATED.

14IN THE SECOND PLACE THE APPLICANT ALLEGES THAT THE DECISION TAKEN IN FAVOUR OF THE INTERVENER INFRINGES THE PROVISIONS OF ARTICLE 59 (2) OF THE FINANCIAL REGULATION IN SO FAR AS IT INVOLVES THE REJECTION OF THE APPLICANT ' S TENDER WHEREAS

(A) THIS TENDER WAS , FROM THE POINT OF VIEW OF THE FACTORS OF ASSESSMENT LISTED IN THAT PARAGRAPH , MORE ATTRACTIVE THAN THE TENDER WHICH WAS ACCEPTED ; AND

(B) THE COMMISSION DID NOT SERIOUSLY CONSIDER THE TENDERS SUBMITTED AND MORE PARTICULARLY THE ONE WHICH IT ACCEPTED.

15ARTICLE 59 (2) OF THE FINANCIAL REGULATION PROVIDES :

' ' A CONTRACT FOLLOWING A REQUEST FOR TENDERS IS A CONTRACT ENTERED INTO BY THE CONTRACTING PARTIES FOLLOWING AN INVITATION TO TENDER. IN THIS CASE , THE OFFER THOUGHT TO BE THE MOST ATTRACTIVE MAY BE FREELY CHOSEN , TAKING INTO ACCOUNT THE COST OF PERFORMANCE , RUNNING COSTS INVOLVED , TECHNICAL MERIT , THE TIME FOR PERFORMANCE , TOGETHER WITH THE FINANCIAL GUARANTEES AND THE GUARANTEES OF PROFESSIONAL COMPETENCE PUT FORWARD BY EACH OF THE TENDERERS.

A REQUEST FOR TENDERS... IS SAID TO BE RESTRICTED WHERE IT IS ADDRESSED ONLY TO THOSE WHOM IT HAS BEEN DECIDED TO CONSULT BECAUSE OF THEIR SPECIAL QUALIFICATIONS. ' '

16ACCORDING TO THIS PROVISION OF THE FINANCIAL REGULATION THE ADMINISTRATION MAY FREELY CHOOSE THE OFFER THOUGHT TO BE THE MOST ATTRACTIVE ; THIS GIVES IT A CERTAIN DISCRETION.

17IT IS NOT STIPULATED THAT IN THE ASSESSMENT OF THE TECHNICAL AND FINANCIAL FACTORS THE PRICE MUST CONSTITUTE THE SOLE CRITERION.

18BY PROVIDING IN ARTICLE 62 THAT CONTRACTS INVOLVING AMOUNTS EXCEEDING 12 000 UNITS OF ACCOUNT SHALL , BEFORE THE AUTHORIZING OFFICER TAKES A DECISION , BE SUBMITTED FOR THE OPINION OF A PURCHASES AND CONTRACTS ADVISORY COMMITTEE THE FINANCIAL REGULATION ITSELF CONTAINS A PROCEDURE FOR REVIEW OF THE ADMINISTRATION ' S JUDGMENT.

19IN THE PRESENT CASE THE PROPOSAL TO ENTER INTO A CONTRACT WITH RANDSTAD RECEIVED A FAVOURABLE OPINION FROM THE PURCHASES AND CONTRACTS ADVISORY COMMITTEE.

20ALTHOUGH THE COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE DEPARTMENTS OF THE COMMISSION TO DECIDE WHETHER THERE IS ANY MISUSE OF POWERS OR A SERIOUS AND MANIFEST ERROR OF JUDGMENT IT MUST , HOWEVER , RESPECT THE DISCRETION GIVEN TO THE COMPETENT AUTHORITIES , INCLUDING THE PURCHASES AND CONTRACTS ADVISORY COMMITTEE , IN ASSESSING THE FACTORS TO BE TAKEN INTO ACCOUNT IN THE INTERESTS OF THE DEPARTMENT FOR THE PURPOSE OF DECIDING TO ENTER INTO A CONTRACT FOR THE SUPPLY OF TEMPORARY STAFF TO AN INSTITUTION.

21BY PRODUCING A NUMBER OF COMPARATIVE TABLES OF FIGURES THE APPLICANT

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HAS ATTEMPTED TO SHOW THE OBVIOUSLY ERRONEOUS NATURE OF THE COMMISSION ' S FINDING THAT RANDSTAD ' S TENDER WAS THE LOWEST.

22ON THE OTHER HAND AT THE REQUEST OF THE COURT THE COMMISSION HAS FILED CALCULATIONS IN SUPPORT OF ITS CLAIM THAT THE PRICES OFFERED BY RANDSTAD WERE MORE ATTRACTIVE THAN THOSE PROPOSED BY THE APPLICANT.

23THE APPLICANT HAS FILED WRITTEN OBSERVATIONS ON THE COMMISSION ' S CALCULATIONS.

24PROVIDED THAT THE COMMISSION HAS ASSESSED THE TENDERS FAIRLY ON THE SAME BASIS AND ACCORDING TO THE SAME CRITERIA THE CHOICE OF METHODS WHICH IT HAS EMPLOYED TO COMPARE THE TENDERS CANNOT BE QUESTIONED .

25IT IS ACCORDINGLY NECESSARY TO CONSIDER THE METHODS OF COMPARISON EMPLOYED BY THE COMMISSION.

26THE COMMISSION HAS EXPLAINED THE BASIC PRINCIPLE OF THE CALCULATIONS MADE BY ITS DEPARTMENTS WHEN CONSIDERING THE PRICES OF THE TENDERS .

27ACCORDING TO ITS EXPLANATIONS IT DREW UP A SCALE OF THE NET HOURLY SALARIES OF ITS OFFICIALS AND OTHER SERVANTS DOING THE SAME WORK AS THAT REQUIRED OF THE TEMPORARY STAFF IN THE INVITATION TO TENDER.

28A NET FIGURE IN RESPECT OF THE GROSS SALARIES PROPOSED BY THE TENDERERS WAS OBTAINED BY ADDING 14.8 % FOR HOLIDAY PAY AND MAKING THE NORMAL DEDUCTIONS , INCLUDING SOCIAL SECURITY CONTRIBUTIONS FOR WHICH THE WORKER IS LIABLE.

29COMPARISON OF THE AMOUNTS SO CALCULATED WITH THE SCALE OF NET SALARIES OF OFFICIALS OR OTHER SERVANTS OF THE COMMISSION SHOWED THAT THE APPLICANT ' S TENDER DID NOT IN MOST CASES COMPLY WITH THE PROVISIONS OF ARTICLE 10 OF THE BELGIAN LAW OF 28 JUNE 1976 (MONITEUR BELGE , 7 AUGUST 1976) WHICH CAME INTO FORCE ON 1 DECEMBER 1976 AND REQUIRES THAT THE SALARY OF TEMPORARY STAFF SHOULD NOT BE LESS THAN THAT TO WHICH SUCH STAFF WOULD HAVE BEEN ENTITLED IF THEY HAD BEEN EMPLOYED ON THE SAME TERMS AS A PERMANENT WORKER AND THE COMMISSION , THEREFORE , IN ACCORDANCE WITH THE REVIEW CLAUSE WHICH THE APPLICANT ' S TENDER CONTAINED CALCULATED THE NECESSARY COEFFICIENTS OF INCREASE AND APPLIED THEM TO THE PRICES SOUGHT BY THE APPLICANT.

30ONCE THE REVIEW CLAUSE WAS APPLIED IT WAS APPARENT THAT THE APPLICANT ' S PRICES WERE ALMOST ALL HIGHER THAN RANDSTAD ' S PRICES ALL OF WHICH WERE ALREADY ABOVE THE COMMISSION ' S SCALE.

31AFTER THE COMMISSION HAD MADE A FORECAST OF THE USE OF TEMPORARY STAFF ACCORDING TO THE STAFF POLICY WHICH IT CONTEMPLATED PURSUING IT COMPARED THE COSTS OF THE TENDERS BY MULTIPLYING THE HOURLY RATES PROPOSED BY THE TENDERERS , AFTER APPLYING THE REVIEW CLAUSE IN THE CASE OF THE APPLICANT , BY THE NUMBER OF HOURS STATED IN THE SAID FORECAST AND TAKING ACCOUNT OF ANY EFFECT THE INDEX AND REDUCTIONS MIGHT HAVE .

32AS REGARDS THE INDEX THE VARIATIONS IN 1976 WERE TAKEN.

33AS A RESULT OF THE ABOVE-MENTIONED OPERATIONS THE APPLICANT ' S PRICES WERE HIGHER THAN THOSE OF RANDSTAD.

34THE OBJECTIONS RAISED BY THE APPLICANT AGAINST THE METHODS OF CALCULATION ADOPTED BY THE COMMISSION BASICALLY CONCERN THE FACTORS OF ASSESSMENT WHICH THESE INVOLVE AND IN PARTICULAR THE CHOICE OF THE NET SALARIES OF

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THE OFFICIALS OF THE COMMISSION APPLICABLE ON 31 DECEMBER 1976 AS A CRITERION OF CONFORMITY WITH ARTICLE 10 OF THE BELGIAN LAW , THE FORECAST OF THE USE OF TEMPORARY STAFF AND REFERENCE TO THE VARIATIONS IN THE INDEX IN 1976 AS A CRITERION FOR THE INFLUENCE OF THE INDEX ON THE PRICES PROPOSED.

35IN VIEW OF THE FACT THAT WHEN THE COMMISSION HAD TO APPLY THE BELGIAN LAW FOR THE PURPOSE OF ITS CALCULATIONS THAT LAW HAD JUST ENTERED INTO FORCE AND HAVING REGARD TO THE ABSENCE OF PRECISE INDICATIONS IT IS NOT POSSIBLE TO REPROACH THE COMMISSION FOR HAVING ADOPTED AS A CRITERION OF THE CONFORMITY OF THE TWO TENDERS WITH THE PROVISIONS OF ARTICLE 10 OF THE BELGIAN LAW THE NET HOURLY SALARY AS AT 31 DECEMBER 1976 OF OFFICIALS OF THE COMMISSION DOING THE SAME WORK AS THAT STATED IN THE INVITATION TO TENDER FOR TEMPORARY STAFF.

36FURTHER , THE COMMISSION HAD TO JUDGE THE TENDERS ON THE BASIS OF AN ASSESSMENT OF ITS FUTURE NEEDS AND IN PARTICULAR OF THE NUMBER OF HOURS OF USE OF THE TEMPORARY STAFF AND THE ALLOCATION OF THESE ACCORDING TO OCCUPATIONS AND ONLY THE COMMISSION IS IN A POSITION TO MAKE THIS ASSESSMENT.

37IT IS APPARENT FROM THE COMMISSION ' S CALCULATIONS THAT THIS ASSESSMENT RELATES IN TURN TO THE CALCULATION OF THE AMOUNT OF REDUCTIONS OFFERED RESPECTIVELY BY THE APPLICANT AND BY RANDSTAD.

38IT IS NOT POSSIBLE FROM THE FACTS ADDUCED BY THE APPLICANT TO SHOW THAT THE METHODS OF CALCULATION OF THE COMMISSION OR THE CRITERIA WHICH IT HAS ADOPTED ARE SUCH AS TO DISTORT THE COMPARISON OF PRICES PROPOSED IN THE TWO TENDERS OR THE COMMISSION ' S CONCLUSION THAT RANDSTAD ' S TENDER WAS THE LOWEST.

39EVEN ASSUMING THAT IN A PROCEDURE FOR REQUEST FOR TENDERS THE COMMISSION CHOSE AN UNDERTAKING WHOSE OFFER WAS HIGHER IN PRICE THAN THE OTHERS , THIS IS NOT IN ITSELF DECISIVE.

40OTHER FACTORS REFERRED TO BY THE COMMISSION TO JUSTIFY ITS CHOICE , IN PARTICULAR THE REFERENCES OF RANDSTAD AND THE FACT THAT THE SALARY PAID BY IT TO TEMPORARY STAFF WAS , IN RELATION TO THE PRICES PAID BY THE COMMISSION , AMONG THE HIGHEST , CAME WITHIN THE CONSIDERATIONS OF A TECHNICAL NATURE WHICH IT COULD TAKE INTO ACCOUNT UNDER ARTICLE 59 (2) OF THE FINANCIAL REGULATION FOR THE PURPOSE OF MAKING ITS CHOICE.

41AS HAS ALREADY BEEN STATED , THE APPLICANT CLAIMS THAT THERE WAS A MISUSE OF POWERS IN THAT THE PROCEDURE FOR REQUEST FOR TENDERS WAS USED NOT TO SUPPLY THE COMMISSION WITH THE MOST ATTRACTIVE SERVICES OF COMPETING FIRMS BUT TO FAVOUR RANDSTAD.

42THIS IS APPARENT , ACCORDING TO THE APPLICANT , NOT ONLY FROM THE FACT THAT THE PRICE PROPOSALS MADE BY IT WERE MORE ATTRACTIVE THAN THOSE OF RANDSTAD BUT ALSO FROM THE FACT THAT RANDSTAD SIGNED UP THE APPLICANT ' S TEMPORARY STAFF IN MARCH 1977 IMMEDIATELY AFTER THE PROCEDURE FOR REQUEST FOR TENDERS AND THAT THE COMMISSION ' S OFFICIALS WERE INVOLVED IN THIS , AS WAS NECESSARY IF RANDSTAD WAS TO FULFIL ITS CONTRACTUAL OBLIGATIONS TOWARDS THE COMMISSION.

43ON 17 MARCH 1977 AT A MEETING HELD IN BRUSSELS RANDSTAD , WITH THE IMPROPER

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ASSISTANCE OF CERTAIN OFFICIALS OF THE COMMISSION , PROCEEDED TO SIGN UP ALMOST THE WHOLE OF THE TEMPORARY STAFF WHICH THE APPLICANT HAD MADE AVAILABLE TO THE COMMISSION.

44THIS WRONGFUL CONDUCT BY THE COMMISSION ' S OFFICIALS CORROBORATES THE APPLICANT ' S CLAIM THAT THE PROCEDURE FOR REQUESTS FOR TENDERS WAS USED TO FAVOUR ONE OF THE TENDERERS , NAMELY RANDSTAD.

45NEVERTHELESS , SUCH CONDUCT , WHICH , HOWEVER , IS DENIED BY THE COMMISSION , IS NO GROUND FOR CHALLENGING THE CHOICE OF RANDSTAD MADE PREVIOUSLY BY THE COMMISSION HAVING REGARD TO THE FACT THAT THE APPLICANT HAS NOT SUCCEEDED IN ESTABLISHING THE UNJUSTIFIED NATURE OF THE SAID CHOICE FOR THE REQUIREMENTS OF THE COMMISSION AND HAVING REGARD TO ARTICLE 59 (2) OF THE FINANCIAL REGULATION.

46ACCORDINGLY THE APPLICATION FOR ANNULMENT MUST BE DISMISSED.

47THE APPLICANT CLAIMS FURTHER IN ITS APPLICATION THAT BY REJECTING ITS TENDER AND ACCEPTING THE LESS ATTRACTIVE TENDER OF RANDSTAD , THE COMMISSION ACTED WRONGLY AND THIS IS CORROBORATED BY THE ABOVE-MENTIONED CONDUCT OF ITS OFFICIALS WHICH RENDERS IT LIABLE TO MAKE GOOD THE DAMAGE ENSUING TO THE APPLICANT BY THE LOSS OF THE CONTRACT ENTERED INTO WITH RANDSTAD AND FOR THE LOSS OF STAFF.

48IN ITS REPLY THE APPLICANT STATES MORE PARTICULARLY THAT ITS RECRUITMENT EFFORTS AND SELECTION OF STAFF WERE LARGELY NULLIFIED BY THE CONDUCT OF THE COMMISSION WHICH ASSISTED IN THE SIGNING UP OF THIS STAFF BY RANDSTAD.

49SINCE IT HAS NOT BEEN ESTABLISHED THAT THE CHOICE OF RANDSTAD ' S TENDER WAS UNJUSTIFIED , THE APPLICANT ' S CLAIM FOR DAMAGES FOR THE LOSS OF THE CONTRACT MUST BE DISMISSED.

50AS REGARDS THE DAMAGE WHICH THE APPLICANT SUFFERED BY THE LOSS OF ITS TEMPORARY STAFF , IT APPEARS FROM THE FILE THAT THE CONTRACTUAL TIES BETWEEN THE APPLICANT AND SUCH STAFF DID NOT CONTINUE BEYOND THE DURATION OF A CONTRACT BETWEEN THE APPLICANT AND THE PERSON WHO USED THE SERVICES OF THE TEMPORARY STAFF.

51ACCORDINGLY THE APPLICANT CANNOT CLAIM ANY LEGALLY PROTECTED INTEREST IN RETAINING ITS TEMPORARY STAFF AFTER ITS CONTRACTUAL TIES WITH SUCH A PERSON HAVE BEEN TERMINATED.

52FURTHER IT APPEARS THAT THE APPLICANT DID NOT HAVE ANY IMPORTANT CUSTOMERS OTHER THAN THE COMMISSION SO THAT IT COULD NOT OFFER EMPLOYMENT PROSPECTS TO THE TEMPORARY STAFF WHICH HAD PREVIOUSLY BEEN ON ITS BOOKS.

53IN THESE CIRCUMSTANCES EVEN ASSUMING THAT CERTAIN OFFICIALS OF THE COMMISSION HAD ACTED IN SUCH A WAY AS TO BRING TO THE NOTICE OF THE TEMPORARY STAFF IN QUESTION THE DECISION OF THE COMMISSION TO TERMINATE THE CONTRACT WITH THE APPLICANT AND THE POSSIBILITY OF CONTINUING TO WORK FOR THE COMMISSION AS TEMPORARY EMPLOYEES OF RANDSTAD , SUCH CONDUCT , MOTIVATED BY CONSIDERATIONS OF THE INTERESTS OF THE SERVICE OR SOCIAL CONSIDERATIONS IS NOT AN ACT GIVING RISE TO LIABILITY ON THE PART OF THE COMMISSION TOWARDS THE APPLICANT.

54IT FOLLOWS FROM THE PREMISES THAT THE CLAIM FOR DAMAGES IN RESPECT OF THE APPLICANT ' S LOSS OF TEMPORARY STAFF MUST ALSO BE DISMISSED.

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COSTS

55ARTICLE 69 (2) OF THE RULES OF PROCEDURE PROVIDES THAT THE UNSUCCESSFUL PARTY SHALL BE ORDERED TO PAY THE COSTS.

56THE APPLICANT HAS FAILED IN ITS SUBMISSIONS.

57HOWEVER , IT IS RIGHT TO ORDER THE COMMISSION TO PAY THE COSTS RELATING TO THE FURTHER HEARING NECESSITATED BY ITS BELATED NOTIFICATION OF THE ABOVE-MENTIONED CALCULATIONS.

ON THOSE GROUNDS ,

THE COURT ,

HEREBY :

1 . DISMISSES THE APPLICATION ;

2 . ORDERS THE APPLICANT TO PAY THE COSTS , SAVE THOSE RELATING TO THE RE-OPENING OF THE HEARING WHICH ARE TO BE BORNE BY THE COMMISSION

DOCNUM	61977J0056
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Coal and Steel Community ; European Economic Community ; European Atomic Energy Community
PUBREF	European Court reports 1978 Page 02215 Greek special edition Page 00679 Portuguese special edition Page 00761
DOC	1978/11/23
LODGED	1977/05/03
JURCIT	31973Q0091-A59P2 : N 2 14 15 40 45 31973Q0091-A62 : N 5 18 11957E190 : N 12
SUB	Provisions governing the Institutions ; Liability ; Own resources ; Financial provisions
AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions

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NATIONA	Belgium
PROCEDU	Action for annulment - unfounded;Action for damages - unfounded
ADVGEN	Reischl
JUDGRAP	Mackenzie Stuart
DATES	of document: 23/11/1978 of application: 03/05/1977

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Opinion of Mr Advocate General Reischl delivered on 11 October 1978. Agence européenne d'interims SA v Commission of the European Communities. Case 56/77.

DOCNUM	61977C0056
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Coal and Steel Community ; European Economic Community ; European Atomic Energy Community
PUBREF	European Court reports 1978 Page 02215 Greek special edition Page 00679 Portuguese special edition Page 00761
DOC	1978/10/11
LODGED	1977/05/03
JURCIT	31973Q0091-A59P2 : P 2241 - 2244 61976J0023 : P 2241 2244 61976C0023 : P 2241 2242 11957A146 : P 2241 11957E173 : P 2241 11957E173-L2 : P 2242 31959Q0301-A38 : P 2243 11957E178 : P 2243 31975Q0375-A61L2 : P 2244
SUB	Provisions governing the Institutions ; Liability ; Own resources ; Financial provisions
AUTLANG	German
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Belgium
PROCEDU	Action for annulment - unfounded;Action for damages - unfounded
ADVGEN	Reischl
JUDGRAP	Mackenzie Stuart

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DATES of document: 11/10/1978
of application: 03/05/1977

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Judgment of the Court
of 22 September 1976
Commission of the European Communities v Italian Republic.
Public works contracts.
Case 10-76.

DIRECTIVES - MANDATORY NATURE - TIME-LIMITS - COMPLIANCE THEREWITH

(EEC TREATY , ARTICLE 189)

THE MANDATORY NATURE OF DIRECTIVES ENTAILS THE OBLIGATION FOR ALL MEMBER STATES TO COMPLY WITH THE TIME-LIMITS CONTAINED THEREIN IN ORDER THAT THEIR IMPLEMENTATION SHALL BE ACHIEVED UNIFORMLY WITHIN THE WHOLE COMMUNITY.

IN CASE 10/76

COMMISSION OF THE EUROPEAN COMMUNITIES , REPRESENTED BY ITS LEGAL ADVISER , ANTONINO ABATE , ACTING AS AGENT , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF MARIO CERVINO , LEGAL ADVISER OF THE COMMISSION , BATIMENT CFL , PLACE DE LA GARE ,

APPLICANT ,

V ITALIAN REPUBLIC , REPRESENTED BY ITS AMBASSADOR ADOLFO MARESCA , ACTING AS AGENT , ASSISTED BY IVO MARIA BRAGUGLIA , VICEAVVOCATO DELLO STATO , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE ITALIAN EMBASSY ,

DEFENDANT ,

APPLICATION FOR A DECLARATION THAT THE GOVERNMENT OF THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER COUNCIL DIRECTIVE NO 71/305/EEC OF 26 JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OJ , ENGLISH SPECIAL EDITION 1971 (II), P. 682 ,

1 BY AN APPLICATION WHICH WAS RECEIVED AT THE REGISTRY ON 5 FEBRUARY 1976 THE COMMISSION HAS BROUGHT BEFORE THE COURT UNDER ARTICLE 169 OF THE EEC TREATY AN ACTION SEEKING A DECLARATION THAT THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER DIRECTIVE NO 71/305/EEC OF THE COUNCIL OF 26 JULY 1971 (OJ , ENGLISH SPECIAL EDITION , 1971 (II), P. 682).

2 IN CONJUNCTION WITH DIRECTIVE NO 71/304/EEC OF THE SAME DATE CONCERNING THE ABOLITION OF RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES IN RESPECT OF PUBLIC WORKS CONTRACTS , DIRECTIVE NO 71/305/EEC SEEKS TO COORDINATE THE NATIONAL PROCEDURES FOR THE AWARD OF THESE CONTRACTS. UNDER ARTICLE 32 MEMBER STATES WERE TO ADOPT THE MEASURES NECESSARY TO COMPLY WITH THE DIRECTIVE WITHIN TWELVE MONTHS OF ITS NOTIFICATION TO THEM , WHICH PERIOD EXPIRED ON 29 JULY 1972.

3 SUBSEQUENT TO THIS DIRECTIVE THE ITALIAN REPUBLIC ADOPTED THE LAW OF 2 FEBRUARY 1973 RELATING TO THE PROCEDURES FOR THE AWARD OF PUBLIC CONTRACTS BY RESTRICTED INVITATION TO TENDER (LICITAZIONE PRIVATA) THE TEXT OF WHICH WAS CONVEYED TO THE COMMISSION ON 16 AUGUST 1973.

IN APPLICATION OF ARTICLE 169 OF THE EEC TREATY THE COMMISSION , HOWEVER , INFORMED THE ITALIAN REPUBLIC BY LETTER OF 10 JUNE 1974 THAT IT CONSIDERED THAT THE OBLIGATIONS ARISING FROM THE ABOVEMENTIONED DIRECTIVE HAD NOT BEEN SATISFIED BY THE ADOPTION OF THE LAW.

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4 IN THE FIRST PLACE IT WAS CLAIMED THAT THE DEFENDANT HAD EXCLUDED FROM THE SCOPE OF THE LAW PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS OTHER THAN BY RESTRICTED INVITATION TO TENDER.

5 SECONDLY , IT WAS ALLEGED THAT THE DEFENDANT HAD NOT COMPLIED WITH ARTICLE 29 OF THE DIRECTIVE WHEREBY THE ITALIAN ' ANONYMOUS ENVELOPE ' PROCEDURE HAD TO BE ABOLISHED BY 29 JULY 1975 OR 29 JULY 1979 ACCORDING TO THE ESTIMATED VALUE OF THE CONTRACT AS THE ITALIAN LAW OF 2 FEBRUARY 1973 MADE NO PROVISION IN THIS RESPECT.

6 IN ADDITION , UNDER ARTICLE 12 OF THE DIRECTIVE , AUTHORITIES AWARDING CONTRACTS WHO WISH TO AWARD A PUBLIC WORKS CONTRACT BY OPEN OR RESTRICTED PROCEDURE MUST MAKE THEIR INTENTION KNOWN BY MEANS OF A NOTICE PUBLISHED IN THE OFFICIAL JOURNAL OF THE COMMUNITIES WHEREAS THE ITALIAN LAW LIMITS ITSELF TO PROVIDING FOR THE PUBLICATION OF A NOTICE IN THE OFFICIAL JOURNAL OF THE ITALIAN REPUBLIC.

7 THE ITALIAN LAW DOES NOT CONTAIN THE PROVISIONS REFERRED TO IN ARTICLES 14 , 15 , 16 AND 17 OF THE DIRECTIVE CONCERNING THE TIME-LIMIT FOR THE RECEIPT OF REQUESTS TO PARTICIPATE , THE FORM REQUIRED FOR TENDERS AND THE COMPULSORY INDICATION OF THE TIME-LIMIT FOR THE COMPLETION OF THE WORKS PUT OUT TO TENDER.

8 FINALLY , ARTICLES 20 , 24 , 25 AND 26 OF THE DIRECTIVE LAY DOWN THE CRITERIA FOR QUALITATIVE SELECTION WHICH ALLOW CERTAIN UNDERTAKINGS TO BE EXCLUDED FROM PARTICIPATION IN THE CONTRACTS , WHILE THE ITALIAN LAW CONTAINS NO PROVISION TO THIS EFFECT AND RETAINS THE WIDE DISCRETION CONFERRED ON AUTHORITIES AWARDING CONTRACTS BY ARTICLE 89 OF THE ROYAL DECREE OF 23 MAY 1924.

9 THE DEFENDANT DID NOT CONTEST THE ALLEGED FAILURES AND , ON 5 JULY 1974 , CONVEYED TO THE COMMISSION A PRELIMINARY DRAFT OF A BILL ' CONTAINING THE COMMUNITY RULES IN FULL. '

10 THE DRAFT , WHICH ACCORDING TO THE COMMISSION SATISFIES THE ESSENTIAL REQUIREMENTS OF THE DIRECTIVE , WAS CONVEYED TO THE ITALIAN PARLIAMENT ON 13 AUGUST 1974 BUT HAS STILL NOT BEEN ADOPTED WITH THE RESULT THAT THE MEASURES INTENDED TO ENSURE THE IMPLEMENTATION OF THE DIRECTIVE ARE NOT YET IN FORCE AT THE DATE OF THIS JUDGMENT.

11 ARTICLE 189 OF THE TREATY PROVIDES THAT A DIRECTIVE SHALL BE BINDING , AS TO THE RESULT TO BE ACHIEVED , UPON EACH MEMBER STATE TO WHICH IT IS ADDRESSED BUT LEAVES TO THE NATIONAL AUTHORITIES THE CHOICE OF FORM AND METHODS.

12 THE MANDATORY NATURE OF DIRECTIVES ENTAILS THE OBLIGATION FOR ALL MEMBER STATES TO COMPLY WITH THE TIME-LIMITS CONTAINED THEREIN IN ORDER THAT THE IMPLEMENTATION SHALL BE ACHIEVED UNIFORMLY WITHIN THE WHOLE COMMUNITY.

13 IT FOLLOWS THAT AS THE ITALIAN REPUBLIC HAS FAILED TO ADOPT , WITHIN THE PRESCRIBED PERIOD , THE MEASURES NECESSARY TO COMPLY WITH DIRECTIVE NO 71/305/EEC OF THE COUNCIL CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS , IT HAS FAILED TO FULFIL AN OBLIGATION UNDER THE TREATY.

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COSTS

14 UNDER ARTICLE 69 (2) OF THE RULES OF PROCEDURE OF THE COURT OF JUSTICE , THE UNSUCCESSFUL PARTY SHALL BE ORDERED TO PAY THE COSTS.

THE DEFENDANT HAS FAILED IN ITS SUBMISSIONS.

IT MUST THEREFORE BE ORDERED TO PAY THE COSTS.

ON THOSE GROUNDS ,

THE COURT

HEREBY RULES :

1 . AS THE ITALIAN REPUBLIC HAS FAILED TO ADOPT , WITHIN THE PRESCRIBED PERIOD , THE MEASURES NECESSARY TO COMPLY WITH DIRECTIVE NO 71/305/EEC OF THE COUNCIL CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS , IT HAS FAILED TO FULFIL AN OBLIGATION UNDER THE TREATY.

2 . THE DEFENDANT SHALL PAY THE COSTS.

DOCNUM	61976J0010
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1976 ; J ; judgment
PUBREF	European Court reports 1976 Page 01359 Greek special edition 1976 Page 00519 Portuguese special edition 1976 Page 00559
DOC	1976/09/22
LODGED	1976/02/05
JURCIT	11957E189 : P 1365 31971L0304 : P 1363 31971L0305-A12 : P 1364 31971L0305-A14 : P 1364 31971L0305-A15 : P 1364 31971L0305-A17 : P 1364 31971L0305-A20 : P 1364 31971L0305-A24 : P 1364 31971L0305-A25 : P 1364 31971L0305-A26 : P 1364

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	31971L0305-A32 : P 1364 31971L0305-A69 : P 1364 31971L0305 : P 1363 1365 1366
CONCERNS	Failure concerning 31971L0305
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Reischl
JUDGRAP	Mertens de Wilmars
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Opinion of Mr Advocate General Geelhoed delivered on 11 March 2004.
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil obligations - Directive 92/50/EEC - Procedure for the award of public service contracts - Assistance to the maitre d'ouvrage for a sewage treatment plant - Award to the successful candidate in an earlier design contest without prior publication of a contract notice in the OJEC.
Case C-340/02.

1. In this case the Commission seeks a declaration that the French Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (2) (hereinafter the Directive') and, more specifically, Article 15(2) of that Directive.

2. The case was prompted by the award by the Communauté urbaine du Mans (municipality of Le Mans, hereinafter the municipality') of a study contract providing for assistance to the person responsible with the improvement of the Chauvinière sewage treatment works, without its having previously published a tender notice in the Official Journal of the European Communities.

I - Legal background

3. The following provisions of the Directive are relevant in this case:

- Article 1(g) reads: [For the purposes of this Directive] design contests shall mean those national procedures which enable the contracting authority to acquire, mainly in the fields of area planning, town planning, architecture and civil engineering, or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.'

- Article 7(1) reads: This Directive shall apply to public service contracts, the estimated value of which, net of VAT, is not less than ECU 200 000.'

- Article 8 reads: Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.'

- Article 11(3), opening clause and (c). This provision is included in Title III of the Directive under the heading Choice of award procedures and rules governing design contests.' It reads: Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

...

(c) where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates. In the latter case, all successful candidates shall be invited to participate in the negotiations;

...'

- Article 13 contains the provisions which apply to design contests forming part of a procedure for the award of a service contract whose estimated value net of VAT is not less than the value referred to in Article 7(1).

- Article 15(2) appears in Title V of the Directive under the heading Common advertising rules'. It reads: Contracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11, negotiated procedure, shall make known their intention by means of a notice.'

II - Facts of the case and pre-litigation procedure

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4. By letter of 7 October 1999 the Commission services requested the French authorities to explain the circumstances and procedures relating to a number of invitations for tenders issued by the municipality for the provision of services connected with improvements to the Chauvinière sewage treatment works.

5. The two notices of relevance to this case were placed in the Official Journal of 30 November 1996, Series S, No 233, and the Official Journal of 10 December 1998, Series S, No 239. The notice of 30 November 1996 concerned a restricted procedure for a contest relating to a feasibility study for a network of sewage treatment plants with a view to the requisite adaptation of the Chauvinière sewage treatment works to European environmental norms. In this contest FRF 200 000 was available for each of the three selected participants.

6. According to the notice of 30 November 1996, this contest formed the first of the three phases of a scheme of works for the improvement of the aforementioned sewage treatment works. The second phase consisted of the call for tenders for studies to assist the person responsible for the work with the establishment of the technical specifications on the basis of the successful design emerging from the contest, the drawing up of an environmental impact report for the operation and, finally, assistance to the person responsible for the performance of the work with the examination of the tenders received during the award procedure, with which the third phase was to begin. This third phase also involved the drawing up of the contract documents for the work and its performance.

7. The publication of the second notice of a call for tenders of 10 December 1998 concerned the provision of services in support of the person responsible for the work. It marked the beginning of the second phase, as described above.

8. When no official response was received from the French authorities to the Commission's letter of 7 October 1999, the Commission put them on formal notice by letter of 3 August 2000. The letter in question raised three complaints. They relate to the infringement of, respectively, Article 15(2), Article 27(2) and Article 36(1) of the Directive. In the same letter the Commission requested the French authorities to forward their comments and to take the necessary corrective measures within a period of two months.

9. In their letter of 21 November 2000 the French authorities completely rejected the Commission's complaints, as described in the letter of formal notice. The Commission considered this response unsatisfactory and, by letter of 26 July 2001, sent them a reasoned opinion.

10. In its reasoned opinion the Commission maintained the three complaints raised in the letter of formal notice. In its first complaint the Commission accused the French authorities of failing in the first award procedure to fulfil their obligation to ensure effective competition. Its second complaint was that the authorities had awarded a contract for assistance to the person responsible for the work to the successful candidates in the contest that formed part of the first phase of the project. That contract was for some FRF 5 million and was awarded without any prior public notice and without its being possible for potential competitors to be considered. In the third complaint the Commission maintained that in the public notice of 10 December 1998 the contracting authority had wrongly referred only to the tenderers' qualifications and capacities as award criteria. In its view, those factors might be used as selection criteria in the assessment of the admissibility of tenders, but not as award criteria.

11. By letter of 4 February 2002 the French authorities reacted to the Commission's reasoned opinion, acknowledging that its first and third complaints were justified.

12. That being the case, the Commission decided to bring this action which concerns only the second complaint formulated in the letter of formal notice and the reasoned opinion.

III - Proceedings

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13. In its application, which was received at the Court on 24 September 2002, the Commission claims that the Court should:

- declare that, by virtue of the fact that the municipality awarded a study contract providing for assistance to the person responsible for the Chauvinière sewage treatment works, without previously publishing a tender notice in the Official Journal of the European Communities , the French Republic has failed to fulfil its obligations under Directive 92/50/EEC and in particular Article 15(2) thereof;

- order the French Republic to pay the costs.

14. The French Government claims that the Court should:

- dismiss the action;

- order the Commission to pay the costs.

IV - Assessment

15. The Commission essentially advances two interconnected arguments in support of its view that the French Government has failed to fulfil its obligations under Article 15(2) of the Directive.

16. It maintains that it is clear from the notice of 30 November 1996 announcing a contest in which the participants were to submit conceptual solutions, in the form of feasibility studies, for the adaptation of sewage treatment works to the relevant European norms, and from the documents to which that notice referred, that the overall project was divided into three phases: the search for a sound solution, assistance with the development of that solution into technical specifications and, finally, the setting up and implementation of the final project.

17. For the selected participants in the first phase, the contest, a total amount of FRF 600 000 was set aside as remuneration. For assistance to the person responsible for the work during the second phase a total amount of over FRF 4.5 million was provided for.

18. From the contest notice and associated documents it was also clear, the Commission continues, that the first and second phases differed significantly in terms of their substantive subject-matter. The first phase concerned the search for possible solutions for the adaptation of the sewage treatment works. The second phase concerned cooperation with the person responsible for the work in the implementation of his design under a study contract.

19. According to the contest notice, involvement in the implementation might encompass three activities:

- assistance to the person responsible for the work with the technical development of the design;

- drawing up of an environmental impact report in connection with the intended work;

- assistance to the person responsible for the work with analysis of the bids for the implementation of the third phase of the work.

20. This more detailed description of the second phase goes much farther, the Commission contends, than the subject-matter of a design contest, as defined in Article 1(g) of the Directive.

21. The Commission infers therefrom that the contest announced in the notice of 10 November 1996 can have concerned only the first phase of the work.

22. This view, it considers, is further corroborated by the wording of the notice itself, which states that the winner of the prize may be asked to become involved in the implementation of his design under a study contract.

23. This provision of the notice can be of no relevance because it presupposes that the subject-matter

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of that (subsequent) contract was clearly defined and that clear criteria for its award had been included in the notice.

24. As neither was the case, there could be no certainty on the part of the successful candidate that he would be awarded the contract for the implementation of the second phase of the work, let alone be entitled thereto.

25. The Commission states that the implementation of the second phase of the work should have formed the subject-matter of a second award procedure as distinct from the design contest of the first phase.

26. For its part, the French Government argues that there could have been absolutely no doubt about the contracting authority's desire to retain the option of awarding the successful candidate a study contract committing him to assist the person responsible for the work. Both the contest notice of 30 November 1996 and the associated award rules were clear in this respect.

27. It was therefore permissible for the contracting authority in the second phase to award the study contract to the winner of the design contest without prior publication of a second notice in the Official Journal of the European Communities.

28. That view of the matter was, moreover, confirmed by the fact that only FRF 600 000 was available as prize money for the contest. That was less than half of the minimum amount at which publication of the contest in the Official Journal became compulsory. The contracting authority was therefore not requested to publish the notice if it concerned only the contest provided for in the first phase of the work.

29. It was in turn to be inferred therefrom that publication of the notice in the Official Journal demonstrated the willingness of the contracting authority to indicate that this case involved not only a design contest but also, subsequently, a study contract the remuneration for which exceeded the minimum specified by Community law.

30. Secondly, the French Government goes on, the procedure followed in the present case complied with the relevant Community legislation, and in particular with Article 11(3)(c) of the Directive. Pursuant to that provision, the study contract, which followed the contest, might, in accordance with the notice, be awarded to the winner or winners of the contest. The fact that, according to the notice, the award to the successful candidates in the present case was optional could not detract from the applicability of the aforementioned provision.

31. In their reply and rejoinder the Commission and the French Government focus their arguments on the interpretation to be given to Article 11(3)(c) of the Directive.

32. According to the Commission, which relies in that connection on the Court's case-law, (3)the provisions authorising a departure from the rules seeking to ensure the effectiveness of Community law must be strictly interpreted.

33. In the present case the contest notice merely provided for the possibility of the study contract being awarded to the successful candidate, whereas Article 11(3)(c) of the Directive permits an award by negotiated procedure, without prior publication of a contract notice, only if the contract follows a design contest and must , under the rules applying, be awarded to one of the successful candidates.

34. From this the Commission infers that in the present case the limits to the exception to the general award requirements, which is to be interpreted strictly, were exceeded.

35. The French Government disputes the Commission's view. It maintains that Article 11(3)(c) of the Directive must be interpreted as meaning that the contracting authority may reserve the

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right to invite competitive tenders for the contract which follows from the contest in an open procedure if express provision is made for that option in the notice, read, if necessary, with the rules concerning calls for tenders.

36. Such an interpretation would mean that the exception provided for in Article 11(3)(c) might be relied on only if the subsequent contract was awarded to the winner of the preceding contest. In all other cases there would have to be a further award procedure in accordance with the provisions of the Directive.

37. It seems to me that the Commission's objections to the failure to invite tenders for the second phase of the activities associated with the adaptation of the Chauvinière sewage treatment works are justified, although the arguments on which those objections are based are not entirely apposite.

38. Article 1(g) of the Directive defines the instances in which a contracting authority may proceed to the somewhat exceptional procedure of a contest.

39. It is clear from the notice of 30 November 1996 that the first phase of the activities - the carrying out of feasibility studies into the various options for the improvement of the sewage treatment works - complies in every respect with the definition in Article 1(g) of the Directive. The plans or designs concerned relate to hydraulic engineering.

40. However, the activities scheduled for the second phase of the activities only partly conform to the definition in Article 1(g) of the Directive. While this may be true of the first stage of those activities, namely assistance to the person responsible for the work with the establishment of detailed technical specifications, it is not true of the second and third stages. Neither the drawing up of an environmental impact report nor assistance to the person responsible with the analysis of the tenders for the implementation of the third phase conforms to the definition given in Article 1(g) of the Directive. Nor do these activities necessarily follow on from the contest.

41. The result of the foregoing is that a contest limited in content expands into a far wider range of activities, with a fairly substantial market value of more than FRF 4.5 million. In the procedure adopted by the contracting authority the general rules of the Directive on the award of public service contracts were not applied to those activities.

42. This prejudices the useful effect of the Directive, the very aim of which is to ensure that candidates for a public contract are in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority. (4)

43. An examination of the procedure adopted in this call for tenders for compatibility with Article 11(3)(c) of the Directive corroborates this finding.

44. That provision, after all, permits an exception to the general rules in connection with prior design contests only if two conditions are satisfied:

(a) the contract concerned must ensue from the preceding contest;

(b) it must, under the rules applying, be awarded to the successful candidate or one of the successful candidates participating in that contest.

45. In the case at issue not even the first condition is satisfied, for the reasons given in paragraphs 40 and 41: if the contract is far wider in substance than the preceding contest, it cannot be maintained that there is a functional link between the contest and the subsequent contract such that the latter follows' the former.

46. Nor, according to the letter of Article 11(3)(c), is the second condition satisfied. The notice, after all, expressly states that the successful candidate may be invited to become involved in the implementation of his idea.

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47. Unlike the French Government, I am of the opinion that this second condition must be strictly interpreted. That follows from the cumulative nature of the two conditions in Article 11(3)(c): there must be a functional link between the contest and the subsequent contract such that the contracting authority can state in advance, i.e. in the contest notice, that the successful candidate, or one of the successful candidates, must become involved in the subsequent contract. In the absence of such functional link the subsequent contract cannot be reserved for the successful candidate and should be awarded separately with due regard for the general provisions of the Directive.

48. As the exception for which Article 11(3)(c) of the Directive provides cannot be relied on for the award of the study contract at issue, the contracting authority should, pursuant to Article 15(2) of the Directive, have made known its intention in this respect by means of a notice published in the Official Journal of the European Communities .

49. I therefore conclude that the Commission is right in regard to its allegations against the French Government concerning the call for tenders for a study contract for assistance to the person responsible with works at the Chauvinière sewage treatment plant.

50. As the Commission seeks an order for costs against the French Republic, I propose that the latter should be ordered to pay the costs in accordance with Article 69(2) of the Rules of Procedure.

V - Conclusion

51. In view of the foregoing I propose that the Court should:

- declare that, by virtue of the fact that the municipality of Le Mans awarded a study contract providing for assistance to the person responsible for the Chauvinière sewage treatment plant, without previously publishing a tender notice in the Official Journal of the European Communities , the French Republic has failed to fulfil its obligations under Directive 92/50/EEC and, in particular, Article 15(2) thereof;

- order the French Republic to pay the costs.

(1) .

(2) - OJ 1992 L 209, p. 1.

(3) - Case C-57/94 Commission v Italy [1995] ECR I-1249.

(4) - Case C-19/00 SIAC Construction [2001] ECR I-7725.

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Opinion of Advocate General Stix-Hackl delivered on 1 July 2004.
Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy.
Directive 93/37/EEC - Public works contracts - Award of contracts - Right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender.
Case C-247/02.

I - Introduction

1. The present case raises the question whether Member States may require the contracting authorities in a tendering procedure to award a contract solely on the basis of the criterion of the lowest price.

II - Legal background

A - Community law

2. The relevant provisions of Community law are set out in Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (2) (Directive 93/37').

3. Although Directive 93/37 applies in principle to the award of public works contracts, Article 3 also lays down provisions governing the award of public works concessions. Article 3 also contains provisions concerning the award of contracts by the concessionaire.

4. Article 3(3) applies where the concessionaire is himself a contracting authority, as referred to in Article 1(b). In such circumstances, he is to comply with the provisions of this Directive in the case of works to be carried out by third parties'.

5. Article 3(4) concerns the award of contracts by a concessionaire other than a contracting authority and, in that regard, provides as follows:

Member States shall take the necessary steps to ensure that a concessionaire other than a contracting authority shall apply the advertising rules listed in Article 11(4), (6), (7), and (9) to (13), and in Article 16, in respect of the contracts which it awards to third parties when the value of the contracts is not less than ECU 5 000 000 ....'

6. The basic rules on the criteria for the award of contracts are set out in Article 30 of Directive 93/37, which provides in paragraph 1 that:

1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e. g. price, period for completion, running costs, profitability, technical merit.'

B - National law

7. Article 21 of Framework Law No 109 of 11 February 1994 on public works (the Framework Law') lays down inter alia the criteria for the award of contracts. In the version applicable to the main proceedings, Article 21(1) of that law provides that the award of contracts under open or restricted procedures must be based on the criterion of the lowest price.

III - Facts, main proceedings and questions referred to the Court

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8. In December 1989 and January 1990, the City of Brescia approved a project for the construction of an underground car park at Fossa Bagni, together with the relevant notice for the award of a concession contract to construct and manage that car park and a draft of the concession contract. In February 1991 the City of Brescia entrusted the construction and management of the car park to Sintesi SpA (Sintesi').

9. The final text of the agreement between the City of Brescia and Sintesi provided that Sintesi, as concessionaire, , must award the works contract by means of restricted invitation to tender at European level in accordance with the rules governing public works contracts.

10. On 22 April 1999, Sintesi published an invitation to tender on the basis of the most economically advantageous tender, to be assessed on the basis of price, technical merit and the time necessary for completion of the work.

11. After the pre-selection phase, Sintesi sent the pre-qualifying undertakings an invitation to tender together with the contract documentation. Ingg. Provera e Carrassi SpA (Provera'), which was also invited to tender, sought and was granted an extension of the period for submitting its tender. However, Provera informed Sintesi that it would not take part in the tendering procedure, which it claimed was unlawful. Nevertheless, Provera did not institute any legal proceedings directed against the subsequent procedural measures.

12. In May 2000, the tender identified as the most economically advantageous tender was accepted. In December 2000, the Autorità per la Vigilanza sui Lavori Pubblici adopted an unfavourable decision on the grounds that under the Framework Law the contract may be awarded only on the basis of the criterion of the lowest price and the criterion of the most economically advantageous tender can be applied only in the case of notices to tender for public construction and management concessions.

13. Sintesi challenged that decision before the Tribunale Amministrativo Regionale per la Lombardia on the ground, inter alia, of breach of Article 3 and Article 7 et seq. of Law No 241 of 7 August 1990 and breach of the law consisting in failure to comply with Article 30(1) of Directive 93/37.

14. The Tribunale takes the view that only the plea relating to Article 30 of Directive 93/37 is decisive and that it is therefore necessary to determine the discretion conferred on the contracting authority. Disapplication of national law can be justified only in the light of Article 81 EC. The contracting authorities are free to decide whether to award the contract on the basis of one criterion or the other. The principle of competition is relevant as regards the choice of the type of tendering procedure but not as regards the choice of the criterion for the award of contracts.

15. The Tribunale Amministrativo Regionale per la Lombardia therefore stayed proceedings and referred the following questions to the Court for a preliminary ruling:

1. Does Article 30(1) of Directive 93/37 of 14 June 1993, in so far as it allows individual contracting authorities to choose either the lowest price or the most economically advantageous tender as the criterion for the award of a contract, constitute a logically consistent application of the principle of free competition which is already enshrined in Article 85 of the Treaty (now Article 81 EC) and requires that all tenders submitted as part of a procedure for the award of a contract announced within the single market be assessed in such a way as not to prevent, restrict or distort comparison between them?

2. Does Article 30 of Directive 93/37 of 14 June 1993, as a strictly logical consequence, preclude Article 21 of Law No 109 of 11 February 1994 from excluding, for the award of public works contracts under open and restricted procedures, the choice by the contracting authority of the criterion of the most economically advantageous tender, and prescribing, as a general rule, that of the lowest price only?

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IV - Admissibility of the questions

16. It is first necessary to consider the argument that neither the relevant legal provisions nor the facts have been set out correctly and that the questions referred are theoretical. In that regard, reference must be made to the principles developed by the Court on the admissibility of references for preliminary rulings.

17. According to the Court's case-law, the admissibility of questions referred for a preliminary ruling turns on whether the national court defines the factual and legislative context of the questions it is asking or, at the very least, explains the factual circumstances on which those questions are based. (3)

18. Although the order for reference in this case does not contain an exhaustive description of the legal and factual situation, the information provided by the national court is adequate and the questions relate to specific technical points, thus enabling the Court to give a useful reply. According to the Court's case-law, (4) that is sufficient.

19. A further criterion for the admissibility of questions referred for a preliminary ruling is that the information provided in orders for reference must not only enable the Court usefully to reply but also give the Governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the Statute of the Court of Justice. It is the Court's duty to ensure that the opportunity to submit observations is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties. (5)

20. The number and content of the written observations submitted to the Court show that this requirement was fulfilled.

21. Finally, the order for reference also fulfils the requirement that the national court give details of the precise reasons which prompted it to consider the interpretation of Community law and to deem it necessary to refer questions to the Court of Justice for a preliminary ruling. (6)

22. It is now necessary to consider the argument put forward by several parties that the second question relates to the interpretation of national law and its compatibility with Article 30 of Directive 93/37.

23. In that regard it should be noted that the grounds of the order for reference refer to the compatibility of Article 21(1) of Law No 109 of 11 February 1994 with Article 81 EC et seq.', whereas the second question refers to the lawfulness of this national provision in the light of Article 30 of the directive.

24. On the basis of the principle that it is not for the Court to examine the compatibility of national law in the context of a reference for a preliminary ruling, the second question is inadmissible in so far as it relates to the compatibility of national provisions with Community law. However, the second question is admissible in so far as it concerns the interpretation of Community law, namely of Article 30(1) of Directive 93/37. As thus re-interpreted, the second question is therefore admissible without there being any need for it to be expressly reformulated.

V - The questions

25. For the purpose of providing the national court with useful information, it would appear appropriate to deal with both questions together.

26. There is no need to undertake a separate examination of Article 81 EC, referred to in the first question, since it must be concluded that it is Article 30 of Directive 93/37 and not Article 81 EC that is to be applied in the present case. Although there may indeed be situations in which

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the provision of competition law must be applied in cases relating to the award of public contracts, it is not evident from the question itself or from the other explanations provided by the national court that the main proceedings relate to the independent application of Article 81 EC. As well as procedural grounds, there are also substantive grounds which preclude Member States' legislative activities from being assessed on the basis of their compatibility with Article 81 EC, because that provision is directed at undertakings.

27. Nor does the present case relate to the validity of Article 30 of Directive 93/37 and its examination in the light of Article 81 EC. This provision may be taken into account at most as a criterion for an interpretation in conformity with primary law, that is to say an interpretation of Article 30 of the directive which is guided by the principle of competition.

A - Directives on the award of public contracts and the principle of competition in general

28. A number of parties refer in various ways to the importance of competition in relation to the directives on the award of public contracts. In that regard, it should be pointed out that, as the Commission notes, Directive 93/37 does not serve to implement Article 81 EC.

29. As regards the importance of the principle of free competition or principle of competition in relation to the directives on the award of public contracts, it is also appropriate to examine the legal basis of those directives. The three classic directives on services, supplies and works are based on Article 57(2) and Article 66 of the EC Treaty (now Article 47(2) EC and Article 55 EC), on Article 100a of the EC Treaty (now, after amendment, Article 95 EC) or on all three provisions.

30. Those legal bases are concerned with fundamental freedoms or with the Common Market, but do not relate expressly to competition.

31. However, the three classic directives on the award of public contracts - and not only those - have a different connection to competition. Thus, the development of effective competition in the field of public contracts is expressly stated as an objective in the preamble to each of them. (7) In numerous judgments the Court has confirmed that the aim of the directives is to ensure such competition. (8)

32. The Court has consistently held (9) that the directives, just like Community law in general, (10) are designed, first, to eliminate practices that restrict competition and, second, to open up the procurement market concerned to competition, that is to say, to ensure free access in particular for undertakings from other Member States.

33. The principle of competition is therefore one of the fundamental principles of Community law on the award of public contracts.

34. It fulfils several protective purposes. Firstly, the principle of competition is aimed at relations between the undertakings themselves, that is to say the candidates or tenderers. There is to be parallel competition between them when they respond to a call for tenders.

35. Secondly, the principle of competition concerns the relationship between the contracting authorities which must be classified as undertakings and the undertakings, in particular the conduct of a contracting authority in a dominant position on the market vis-à-vis the undertakings or of an undertaking in a dominant position on the market vis-à-vis the contracting authority, and the assessment of that conduct in the light of Article 82 EC. (11)

36. Thirdly, the principle of competition is designed to protect competition as an institution.

37. The principle of competition is expressed in the actual provisions of the directives on the award of public contracts, which include, first, the provisions on the permissible forms of procedure

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for the award of contracts and the conduct thereof, in particular the time-limits to be complied with in the various phases of the procedure, and the prohibition on renegotiation. (12)

38. Concrete expressions of the principle of competition also include, second, the provisions on contract documents, primarily technical specifications, the provisions on the selection of undertakings, and the provisions on the criteria for the award of contracts to which this case relates.

39. A minimum degree of transparency is required to guarantee competition. To that end, the directives on the award of contracts lay down a number of obligations concerning publicity. The obligation placed on the contracting authority to define the criteria in advance and also to adhere to them thereafter serves competition. On the other hand, in certain cases the need to ensure competition makes it necessary to withhold certain information about an undertaking from other undertakings. (13)

40. Finally, the participation in a tender procedure of those undertakings which were involved in the preparatory work therefor is also an important aspect of competition. (14)

B - Criteria for the award of contracts and competition

41. As regards the effect on competition of the two criteria for the award of contracts, it must be concluded that these criteria, laid down both in Article 30(1) of Directive 93/37 and also in the parallel provisions of the other directives on the award of public contracts, are intended to ensure genuine competition. (15)

42. An assessment of the effect on competition of the two criteria for the award of contracts in the context of the main proceedings is, in so far as it constitutes the application of the provisions of Community law to a specific case, not the object of the reference for a preliminary ruling.

43. A general assessment as to whether the criterion of the lowest price has, as a general rule, more favourable effects on competition than the criterion of the most economically advantageous tender cannot form the subject-matter of a legal analysis in a reference for a preliminary ruling. It must not be forgotten that the criterion of the most economically advantageous tender allows not only competition on price but also competition through other factors, that is to say, competition in respect of conditions. An assessment of the effects on competition of a particular criterion must be made on the basis of the specific circumstances, in particular the market concerned, and is therefore a matter for the national court.

44. In that respect the national court has to take account of the following: the primary decisive factor as regards the effects on competition is whether the same, objective criteria are applied to all the undertakings. (16) As regards the criterion of the most economically advantageous tender, it is the way in which it is precisely defined in the specific tendering procedure, that is to say the individual factors taken into account in assessing the most economically advantageous offer, that is decisive. Like the criteria for selecting tenderers, these factors must always be examined in the light of primary law. That naturally also includes the provisions of competition law.

45. However, the interpretation by the Court of the provisions of Community law on competition also depends on certain conditions being satisfied. For example, according to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary for the national court to define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. Those requirements are of particular importance in certain areas, such as that of competition, where the factual and legal situations are often complex.' (17)

C - Power of the Member States to lay down a particular criterion for the award of contracts

46. Central to this case is the question whether the Member States have the power to lay down,

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as a general rule, the criterion of the lowest price in respect of certain types of contract. Such a power of the Member States would also restrict the freedom of choice of the contracting authority which is affected by such a criterion.

47. At this juncture it should borne in mind generally that although the Member States enjoy a certain margin of discretion in transposing directives, they must observe the limits imposed by Community law. The Member States are also bound by those limits where they adopt measures to attain Community objectives, such as ensuring greater transparency in the field of the law governing public contracts and stemming abuse by contracting authorities.

48. Therefore, it is first necessary to consider the argument put forward by a number of the parties concerned that the legal act to be interpreted in the present case is a directive. In that regard, it should be noted that it cannot be inferred from the fact that the directives on the award of public contracts, like other directives, are addressed to the Member States, that the Member States are therefore empowered to lay down a particular criterion for the award of contracts.

49. It is also necessary to consider the argument that Directive 93/37 does not lay down a complete set of rules on the award of contracts. On that view, the fact that the aim of Directive 93/37 is not to lay down a complete system of legislation governing public contracts but simply to coordinate national procedures for the award of public works contracts, in the same way as the other directives on the award of contracts, might militate in favour of the Member States being empowered to lay down the criterion for the award of contracts. (18) Whilst it is necessary to concur with that conclusion, it cannot consequently be inferred that Directive 93/37 does not contain definitive rules on certain stages or aspects of the tendering procedure. Instead, this argument must be qualified in so far as the directives on the award of contracts definitively harmonise certain aspects of the tendering procedure.

50. On the other hand, the fact that the parties concerned - apart from certain purely private companies, as covered by the sectoral directive - are generally public contracting authorities, that is to say they can be associated with the relevant Member State, militates in favour of the Member States being able to lay down a criterion in an abstract manner. That follows from the definition of the term contracting authority' and finds expression in the possibility, recognised in the case-law, (19) of penalising infringements committed by them by means of the procedure for failure to fulfil obligations laid down in Article 226 EC.

51. From that aspect, the choice of criterion is therefore, strictly speaking, also a choice by the Member State. However, the difference concerning the criterion in the main proceedings lies in the fact that it was laid down in the Framework Law, that is to say, in a general and abstract manner, and at a different level, in fact by the legislature and not the contracting authority itself.

52. In order to answer the central question whether the Member States have the power to lay down in the abstract just a single criterion for the award of contracts, it is necessary to proceed from the following consideration.

53. The directives on the award of contracts expressly provide for two kinds of power, namely those of the Member States, such as the power to permit certain kinds of transmission, (20) and those of the contracting authorities, such as the ability, in certain cases, to carry out a negotiated procedure, permit variants, and prescribe a range.

54. On the other hand, certain provisions impose express obligations either on the Member States or on the contracting authorities. The latter category of provisions includes inter alia the provision of Article 30(1) of Directive 93/37 (The criteria on which the contracting authorities shall base the award of contracts shall be: (a) either ... (b) or...'), which is relevant to this case, and the parallel provisions of the other directives on the award of contracts. Therefore, that provision

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does not establish an express power on the part of the contracting authority, but the requirement that only one of the two available criteria for the award of contracts be applied also includes the power of the contracting authority to choose one of the two.

55. The contracting authority loses this power in so far as its' Member State limits this choice, for example where it requires the contracting authorities to allow for only the criterion of the lowest price in certain cases.

56. Even if the contracting authorities have no subjective right to this freedom of choice, the question arises as to whether the Member States may oblige the contracting authorities to lay down a particular criterion.

57. Firstly, the fact that neither Article 30(1) of Directive 93/37 nor the other directives on the award of contracts provide for a corresponding power of the Member States militates against this. However, the need for such an express provision may be inferred from the fact that the directives on the award of contracts do indeed, as a general rule, provide for a power of the Member States to restrict the contracting authorities' right to lay down certain criteria. For example, the second sentence of Article 23(1) of Directive 93/37 and Article 28(1) of Directive 92/50 empower the Member States to oblige the contracting authorities to provide certain information in the contract documents.

58. However, there is no comparable provision as regards the criteria for the award of contracts.

59. The argument that Member States have the powers to impose on the contracting authorities a single criterion for the award of contracts is also countered by the fact that the equality of the two criteria provided for in all the directives on the award of contracts is thereby removed.

60. Finally, reference should be made to the Court's case-law, (21) which specifically states that the provision which is relevant in this case allows the contracting authorities to choose the criteria for the award of contracts.

61. Although this conclusion by the Court concerned the factors relating to the identification of the tender which is economically the most advantageous, it can be applied to the choice of the criterion for the award of contracts itself.

62. Aspects relating to competition may also be relied on to show that Member States do not have the power to lay down the criterion for the award of contracts. For example, laying down such a criterion restricts the contracting authorities' freedom to choose the criterion which is most appropriate for ensuring free competition in a specific tendering procedure. This possibility would disappear if the legislature laid down one criterion as a general rule. As the Italian Government also stated, Article 30 of Directive 93/37 precisely does not link to particular provisions the choice of one of the two criteria for the award of contracts.

63. Finally, according to the Court's case-law, (22) the aim of the directives on the award of contracts, namely to facilitate the operation of free competition between the tenderers as a whole, must be taken into account in interpreting the directive.

64. The judgment which is relevant to the present case in this respect is that in Impresa Lombardini and Others , in which the Court held as follows: It follows that Article 30(4) of the Directive precludes national legislation, such as that applicable in the main proceedings, which, first, requires the contracting authority, for the purposes of verifying abnormally low tenders, to take into account only certain explanations exhaustively listed... and, second, expressly excludes certain types of explanation...'. (23)

65. That judgment shows that the national legislature is barred from limiting the discretion of the contracting authorities in a manner not expressly permitted by the directive.

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66. When the arguments put forward, and further developed here, for and against the Member States' power of relevance to these proceedings are weighed up, it is clear that the stronger arguments militate against such power.

VI - Conclusion

67. I therefore propose that the Court should answer the questions referred for a preliminary ruling as follows:

1. Article 30(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is to be interpreted as allowing the individual contracting authorities to choose either the lowest price or the most economically advantageous tender as the criterion for the award of a contract. In addition, the national court must interpret this provision in the light of the principle of free competition within the meaning of Article 81 EC.

2. Article 30(1) of Directive 93/37 is to be interpreted as precluding national legislation which excludes, for the award of public works contracts under open and restricted procedures, the choice by the contracting authority of the criterion of the most economically advantageous tender, and prescribes, as a general rule, that of the lowest price only.

(1) .

(2) - OJ 1993 L 199, p. 54, amended on several occasions.

(3) - Joined Cases C320/90, C321/90 and C322/90 Telemarsicabruzzo and Others [1993] ECR I393, paragraph 6; order in Case C157/92 Banchero [1993] ECR I1085, paragraph 4; order in Case C378/93 La Pyramide [1994] ECR I3999, paragraph 14; order in Case C458/93 Saddik [1995] ECR I511, paragraph 12; and order in Case C116/00 Laguillaumie [2000] I4979, paragraph 15.

(4) - Case C316/93 Vaneetveld [1994] ECR I 763, paragraph 13; order in Case C326/95 Banco de Fomento e Exterior [1996] ECR I1385, paragraph 8; and order in Case C66/97 Banco de Fomento e Exterior [1997] ECR I3757, paragraph 9.

(5) - Joined Cases 141/81, 142/81 und 143/81 Holdijk and Others [1982] ECR 1299, paragraph 6; order in Case C458/93, cited in footnote 3 above, paragraph 13; and order in Case C116/00, cited in footnote 3 above, paragraph 24.

(6) - Order in Case C101/96 Italia Testa [1996] ECR I3081, paragraph 6; order in Case C9/98 Agostini [1998] ECR I4261, paragraph 6; and order in C116/00, cited in footnote 3 above, paragraph 16.

(7) - Twentieth recital in the preamble to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1); fourteenth recital in the preamble to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1); and tenth recital in the preamble to Directive 93/37.

(8) - See Case 31/87 Beentjes [1988] ECR 4635, paragraph 21; Case C243/89 Commission v Denmark [1993] ECR I3353, paragraph 33; Case C27/98 Metalmeccanica Fracasso and Leitschutz Handels- und Montage [1999] ECR I5697, paragraph 26; Case C513/99 Concordia Bus Finland Oy [2002] ECR I7213, paragraph 81; and Case C470/99 Universale-Bau [2002] ECR I11617, paragraph 89.

(9) - See Case C399/98 Ordine degli Architetti delle province di Milano e Lodi [2001] ECR I5409, paragraph 75; Joined Cases C285/99 and C286/99 Impresa Lombardini and Others [2001] ECR I9233, paragraph 35; Case C92/00 Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft [2002] ECR I5553, paragraph 44; Case C411/00 Felix Swoboda [2002] ECR I10567, paragraph

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33; Case C470/99, cited in footnote 8 above, paragraph 89; and Case C214/00 Commission v Spain [2003] ECR I4667, paragraph 53.

(10) - Case C 324/98 Telaustria Verlags GmbH and Telefonadress GmbH [2000] ECR I10745, paragraph 62.

(11) - Where contracting authorities do not have to be classified as undertakings for the purposes of competition law, consideration must be given to applying the provisions on competition in conjunction with Article 10 EC.

(12) - See Case C399/98, cited in footnote 9 above, paragraph 75, and Joined Cases C285/99 and C286/99, cited in footnote 9 above, paragraph 35.

(13) - Article 16(5) of Directive 92/50, Article 9(3) of Directive 93/36 and Article 11(5) of Directive 93/37.

(14) - Tenth recital in the preamble to European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1).

(15) - Case C243/89, cited in footnote 8 above, paragraph 33, and Case C513/99, cited in footnote 8 above, paragraph 81.

(16) - See Case 31/87, cited in footnote 8 above, paragraph 27, and Case C 27/98, cited in footnote 8 above, paragraph 31.

(17) - Joined Cases C320/90 to C322/90, cited in footnote 3 above, paragraphs 6 and 7; Case C284/95 Safety Hi-Tech [1998] ECR I4301, paragraphs 69 and 70; Case C341/95 Bettati [1998] ECR I4355, paragraphs 67 and 68; Case C67/96 Albany [1999] ECR I5751, paragraph. 39; Joined Cases C115/97 to C117/97 Brentjens' [1999] ECR I 6025, paragraph 38; and Joined Cases C180/98 to C184/98 Pavel Pavlov and Others [2000] ECR I6451, paragraph 51.

(18) - See, for example, Joined Cases C285/99 and C286/99, cited in footnote 9 above, paragraph 33.

(19) - Joined Cases C20/01 and C28/01 Commission v Germany [2003] ECR I3609, concerning a municipality, Case C237/99 Commission v France [2001] ECR I939, concerning low-rent housing bodies; and Case C328/96 Commission v Austria [1999] ECR I7479 and Case C353/96 Commission v Ireland [1998] ECR I8565, concerning companies governed by private law.

(20) - Article 23(2) of Directive 92/50 or Article 18(2) of Directive 93/37, both as amended by Directive 97/52, cited in footnote 14 above.

(21) - See, for example, Case C19/00 SIAC Construction [2001] ECR I7725, paragraph 36, and Case C315/01 Gesellschaft für Abfallentsorgungs-Technik [GAT] [2003] ECR I6351, paragraph 64.

(22) - Joined Cases C285/99 and C286/99, cited in footnote 9 above, paragraph 84 et seq.

(23) - Joined Cases C285/99 and C286/99, cited in footnote 9 above, paragraph 85.

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FORM	Conclusions
TREATY	European Economic Community
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SUB Freedom of establishment and services ; Right of establishment ; Free movement of services

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PROCEDU Reference for a preliminary ruling

ADVGEN Stix-Hackl

JUDGRAP Schintgen

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Opinion of Mr Advocate General Geelhoed delivered on 16 October 2003.
Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v Republik Osterreich.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public procurement - Directive 89/665/EEC - Review procedures for the award of public contracts - Articles 1(3) and 2(1)(b) - Persons to whom review procedures must be available - Definition of interest in obtaining a public contract.
Case C-230/02.

I - Introduction

1 In this case the Austrian Bundesvergabeamt (Federal Public Procurement Office) has submitted for a preliminary ruling certain questions concerning the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (1) as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (2) (`Directive 89/665').

2 These questions have arisen in a dispute between Grossmann Air Service and the Republic of Austria.

II - Legal background

A - Community law

3 Article 1(1) and (3) of Directive 89/665 provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EE, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

4 Article 2(1)(b) of Article 89/665 provides:

`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;'.

B - National law

5 Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56; `the BVergG').

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The BVergG provides for the creation of a Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission; `the B-VKK') and of a Bundesvergabeamt (Federal Public Procurement Office).

6 Under Paragraph 109 of the BVergG, the B-VKK is to be competent, until such time as the contract is awarded, to reconcile any differences of opinion between the awarding body and one or more candidates or tenderers concerning the application of this law or its implementing regulations (subparagraph 1). A request for the B-VKK to take action must be submitted to the directors of the Commission as soon as possible after the difference of opinion comes to light (subparagraph 6). Furthermore, the awarding body may not award the contract until four weeks after it has been informed of the request to take action, failing which the tendering procedure is to be declared void (subparagraph 8).

7 Under Paragraph 113 of the BVergG, the Bundesvergabeamt is responsible on application for carrying out a review procedure (subparagraph 1). To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award to adopt interim measures and to set aside unlawful decisions of the contracting authority (subparagraph 2). After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this law or of any regulations issued under it, the contract has not been awarded to the best tenderer (subparagraph 3).

8 Paragraph 115(1) of the BVergG provides that where a trader claims to have an interest in the conclusion of a contract within the scope of this law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.

III - Factual and procedural background

9 On 27 January 1998 the Federal Ministry for Finances invited bids in respect of the provision for the Austrian Federal Government and its delegations of non-scheduled passenger transport services by air in jet and propellor aircraft. Grossmann Air Service subsequently submitted a bid.

10 However, on 3 April 1998 the contract award procedure was discontinued. On 28 July 1998 bids were once again invited for these transport services. Although Grossmann Air Service requested the relevant tender documents, it did not submit a further bid.

11 By letter of 8 October 1998 the Austrian Government informed Grossmann Air Service of its intention to award the contract to Lauda Air Luftfahrt AG (`Lauda Air'). This letter was received by Grossmann Air Service on 9 October 1998. The contract with Lauda was entered into on 29 October 1998.

12 By an application dated 19 October 1998, which was posted on 23 October 1998 and received by the Bundesvergabeamt on 27 October 1998, Grossmann Air Service applied for review of the decision of the contracting authority to award the air services to Lauda Air and claimed that the decision should be set aside. It submitted that the invitation to tender had from the beginning been `tailored' to one bidder, namely Lauda Air, and that the other candidates had had no chance of winning the contract from the outset.

13 By decision dated 4 January 1999 the Bundesvergabeamt dismissed that application under Paragraph 115(1) and Paragraph 113(2) and (3) of the BVergG.

14 The Bundesvergabeamt took the view that Grossmann Air Service had failed to demonstrate adequately its interest in respect of the totality of the contract. It did not have available to it the requisite larger types of aircraft and was therefore unable to provide all the services requested. Moreover, it had not submitted a bid in the second invitation to tender. Furthermore, once the contract had been awarded the Bundesvergabeamt was no longer competent to annul it.

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15 Grossmann Air Service subsequently brought a complaint against that decision before the Verfassungsgerichtshof (Constitutional Court). By decision of 10 December 2001 (B 405/99-9) the Verfassungsgerichtshof set aside the decision of the Bundesvergabeamt on grounds of a breach of the constitutionally guaranteed right to proceedings before the ordinary courts. The Verfassungsgerichtshof also ruled that the mere fact that the alleged unlawfulness of the invitation to tender was not raised by Grossmann Air Service at an earlier stage of the contract award procedure was not necessarily sufficient to find that there was no legal interest in the review procedure.

16 The Bundesvergabeamt subsequently submitted the following questions for a preliminary ruling.

Questions submitted for a preliminary ruling

`(1) Is Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure?

In the event that the answer to Question 1 is no:

(2) Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if - in addition to its participating in the public procurement procedure - it takes all steps available to it under national law to prevent the contract from being awarded to another bidder?

(3) Is Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, in conjunction with Article 2(1) thereof, to be interpreted as meaning that an undertaking must be afforded the opportunity in law to seek review of an award procedure regarded by it as unlawful or discriminatory even where it is not capable of performing the totality of the services for which bids were invited and, for that reason, did not submit a bid in that award procedure.'

Explanation of the questions submitted for a preliminary ruling

17 In respect of the first two questions submitted the national court has observed that Grossmann Air Service allowed a period of 14 days to elapse between notification of the decision concerning the award (9 October 1998) and lodgement of its application for review with the Bundesvergabeamt (23 October 1998) without requesting the B-VKK to take action and thus to make the four-week period laid down in Paragraph 109(8) of the BVergG start to run or, in the event that such action were unsuccessful, to request that the Bundesvergabeamt adopt interim measures and set aside the decision concerning the award. Therefore, the national court considers that it is important to establish whether the application requirements under Paragraph 115(1) of the BVergG, in conjunction with Paragraph 109(1)(1), 109(6) and 109(8) thereof, are, when interpreted in the light of Article 1(3) of Directive 89/665, to be understood as meaning that any bidder who wishes to be awarded a particular pending public contract has an interest in the conclusion of a contract falling within the scope of the BVergG simply by virtue of that fact or that the fact that not all remedies available in national law have been exhausted means that this interest has been lost.

18 In respect of the third question the Bundesvergabeamt observes that it is clear from the Verfassungsgerichtshof's decision of 10 December 2001 that it considers that discriminatory specifications may be removed in review procedures pursuant to Article 2(1)(b) of Directive 89/665. An interpretation whereby the availability of review procedures to challenge discriminatory tender specifications is subject to the applicant's ability to satisfy those specifications could run counter to the objective (of

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Community law) to ensure complete and effective protection in respect of invitations to tender. Therefore, an undertaking providing air services which credibly demonstrates an interest in the conclusion of a contract for air services and regards itself as discriminated against by the form in which those air services are put out to tender - as an all-in contract - has a legal interest within the meaning of Paragraph 115(1) of the BVergG and is thus entitled to seek review of the allegedly unlawful specifications because it would otherwise be unable to prove the unlawfulness - in its view - of the invitation to tender and any harm that it may have suffered as a result.

19 Against that background, the question arises as to whether review procedures within the meaning of Article 1(3) of Directive 89/665 are also available to a trader where it applies to the review body because of specifications which it considers to be discriminatory within the meaning of Article 2(1)(b) of Directive 89/665 and claims that it has been or risks being harmed as a result, even though it is unable to provide the service in the form set out in the invitation to tender and therefore did not submit a bid in that contract award procedure.

Procedure before the Court

20 The order for reference was lodged at the Registry of the Court on 20 June 2002. Written observations were submitted by Grossmann Air Service, the Austrian Government and the Commission. They provided further clarification of their view at the hearing on 10 September 2003.

IV - Appraisal

21 In view of the recent case-law of the Court the first two questions need not be dealt with in any great detail. These questions essentially seek to ascertain whether a trader having or having had an interest in obtaining a contract for the purposes of Article 1(3) of Directive 89/665 may therefore avail himself of the review procedures provided for in that directive to have a decision concerning an award declared unlawful, even though not all the remedies available under national law have been exhausted, in order to prevent the contract being awarded to a third party.

22 These question were raised recently inter alia in Hackermüller (3) and more particularly in Fritsch and Others. (4)

23 Both cases raised the question whether any trader who wishes to be considered for the award of a public contract may institute review procedures pursuant to Article 1(3) of Directive 89/665. It is evident from Hackermüller that this is not so and that a Member State may lay down the additional requirement that the person concerned has been or risks being harmed by the infringement he alleges.

24 The second question is answered explicitly in Fritsch. This case also raised the question whether the national legislature can make a tenderer's interest in obtaining a specific contract, and therefore its right to institute the review procedures established by that directive, subject to the condition that it has beforehand applied to a conciliation commission such as the B-VKK. The Court's answer to this question was in the negative. It held that such a condition is contrary to the directive's objective of speed and effectiveness. However, it acknowledged that Article 1(3) of Directive 89/665 expressly allows Member States to determine the detailed rules according to which they must make the review procedures available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement, but that did not mean that they may give the term `interest in obtaining a public contract' an interpretation which may limit the effectiveness of that directive. That is the case where a trader is considered as having lost its interest on the ground that it failed first to apply to a conciliation commission, such as the B-VKK.

25 In the abovementioned cases the candidates participated in the contract award procedure. It is evident from the order for reference that this is not so in the present case. However, I concur

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with the Commission's view that participation in the award procedure is in principle a precondition for demonstrating an interest in obtaining a contract and possible harm caused by the allegedly unlawful award. It is difficult for a person who has not participated in the award procedure to maintain that he has an interest in challenging an allegedly unlawful decision concerning an award.

26 The third question, however, relates to a somewhat different situation. In that case it does not make sense for potential candidates to tender for a contract because the specifications for the services to be provided are laid down in such a way that they are unable to satisfy them from the outset. The question is then whether, in such a situation, the opportunity must be left open to apply for review of discriminatory specifications.

27 In my view, the answer to the question should be in the affirmative. In its recent case-law the Court has placed a broad interpretation on the words `decisions taken by the contracting authorities' used in Article 1(1) of Directive 89/665. (5) Moreover, it is clear from the wording of Article 2(1)(b) of the directive that the courts' powers in review procedures must include inter alia the power to `set aside... decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications...'. Therefore, it appears to me to be beyond dispute that the remedies intended by Directive 89/665 also extend to the review of decisions specifying the services requested in a contract award procedure.

28 However, such a remedy would have little practical value if it were not open to undertakings which had been excluded from participating in the contract award procedure from the outset by the relevant discriminatory specifications. Furthermore, in such a situation it may be excessive to ask that the effort to bid be made and the associated costs be incurred merely in order to retain the right to apply for review of discriminatory tender conditions. Therefore, these undertakings too must in principle be regarded as having an interest in the award of a public contract and consequently as entitled to apply for review.

29 The specifications for the requested services are relevant to the main proceedings underlying this case. Since the various elements of the requested air transport services had been brought together to create a single package, the number of candidates that could provide the overall package was greatly reduced and potential candidates for one or more parts of that package were excluded from the outset. It follows from what was stated in the preceding paragraph that they too must be regarded as persons having an interest in the award of the contract and therefore as entitled to apply for review. However, this is subject to the condition that they would have been able to participate in this procedure had it not been for these allegedly discriminatory conditions.

30 Finally, I further note that the interest of legal certainty requires that this opportunity to apply for review be used at the earliest possible stage. The lodgement of an application for review after the contract has been awarded should be regarded as belated. However, this is a matter for the national court.

V - Conclusion

31 In the light of the foregoing, I would recommend that the Court answer the questions submitted as follows:

- Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, is to be interpreted as meaning that the review procedure referred to in the directive is open to any person who has submitted a bid or participated in the contract award procedure.

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- Article 1(3) of Directive 89/665/EEC precludes a trader which has participated in a procedure for the award of a contract from being regarded as having lost his interest in the award of that contract on the ground that he did not apply to a conciliation commission, such as the B-VKK established under the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997, before instituting a review procedure as referred to in that directive.

- Article 1(3) of Directive 89/665/EEC, in conjunction with Article 2(1)(b) thereof, is to be interpreted as meaning that a trader having an interest in the award of a contract must be afforded the opportunity in law directly to seek review of specifications in the tender conditions regarded by it as unlawful or discriminatory. This opportunity must also be open to those who can show that they would have bid for the contract had it not been for the discriminatory specification referred to.

(1) - OJ 1989 L 395, p. 33.

(2) - OJ 1992 L 209, p. 1.

(3) - Case C-249/01 Hackermüller and BIG v WED [2003] ECR I-6319.

(4) - Case C-410/01 Fritsch and Others v Asfinag [2003] ECR I-6413.

(5) - Case C-92/00 HI v Stadt Wien [2002] ECR I-5553.

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Opinion of Mr Advocate General Alber delivered on 9 September 2003. Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag). Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Carriage of goods by road - Tolls - Brenner motorway - Prohibition of discrimination - Discrimination on grounds of the nationality of the haulier or of the origin or destination of the vehicle. Case C-157/02.

I Introduction

1. The request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court) of the Republic of Austria concerns the interpretation of provisions of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures (hereinafter " Directive 93/89") (2) and of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (hereinafter " Directive 1999/62"). (3) By judgment of 5 July 1995 (4) the Court of Justice annulled the former directive on the grounds that it was adopted without due consultation of the Parliament. However, the Court preserved the effects of the directive until the adoption of a new directive. As is clear from the fourth recital in the preamble thereto, Directive 1999/62 replaces Directive 93/89 annulled by the Court.

2. This case concerns whether, and if so to what extent, the provisions of the two directives whose content is largely identical have direct effect in proceedings involving an Austrian transport undertaking which considers that it is subject to discrimination in breach of Community law as a result of the rates imposed for use of the full itinerary of the Brenner motorway and is therefore claiming from the motorway operator, before the court hearing the main proceedings, repayment of the toll amounts paid in the period from 1 January 1997 to 31 July 2000.

II Legal background

3. Under Article 2 of Directive 93/89, " toll" means payment of a specified amount for a vehicle travelling the distance between two points on the infrastructure referred to in Article 7(d); the amount is to be based on the distance travelled and on the category of the vehicle and " vehicle" means a motor vehicle or articulated vehicle combination intended exclusively for the carriage of goods by road and with a maximum permissible gross laden weight of not less than 12 tonnes.

4. Article 7 of Directive 93/89 provides:

" Member States may maintain or introduce tolls and/or introduce user charges in accordance with the following conditions:

...

(b) Without prejudice to Article 8(2)(e) and Article 9, tolls and user charges may not discriminate, directly or indirectly, on the grounds of the nationality of the haulier or of origin or destination of the vehicle;

...

(h) Toll rates shall be related to the costs of constructing, operating and developing the infrastructure network concerned.

"

5. Directive 1999/62, which replaces Directive 93/89 annulled by the Court, was adopted by the Council on 17 June 1999 and, pursuant to Article 13 thereof, entered into force on 20 July 1999. Under Article 12 thereof, it was to be implemented by 1 July 2000. Article 7(4), (9) and (10)

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of Directive 1999/62 the content of paragraphs 4 and 9 being identical to Article 7(b) and (h) of Directive 93/89 provides:

" 4. Tolls and user charges may not discriminate, directly or indirectly, on the grounds of the nationality of the haulier or the origin or destination of the vehicle.

...

9. The weighted average tolls shall be related to the costs of constructing, operating and developing the infrastructure network concerned.

10. Without prejudice to the weighted average tolls referred to in paragraph 9, Member States may vary the rates at which tolls are charged according to:

(a) vehicle emission classes, provided that no toll is more than 50% above the toll charged for equivalent vehicles meeting the strictest emission standards;

(b) time of day, provided that no toll is more than 100% above the toll charged during the cheapest period of the day.

Any variation in tolls charged with respect to vehicle emission classes or the time of day shall be proportionate to the objective pursued.

"

6. In its judgment of 26 September 2000 (5) the Court declared that, " by raising, on 1 July 1995 and 1 February 1996, the tolls for the full itinerary on the Brenner motorway, a transit route through Austria used predominantly by goods vehicles of a maximum permissible gross laden weight of not less than 12 tonnes registered in other Member States, but not for part itineraries on that motorway, the great majority of the users of which are vehicles of a maximum permissible gross laden weight of not less than 12 tonnes used for the same type of transport and registered in Austria" , the Republic of Austria had failed to fulfil its obligations under Article 7(b) of Directive 93/89. The Court also declared that, " by not applying the abovementioned tolls only in order to cover the costs linked with the construction, operation and development of the Brenner motorway" , the Republic of Austria had failed to fulfil its obligations under Article 7(h) of the Directive.

III Facts and questions referred for a preliminary ruling

7. The plaintiff in the main proceedings is Rieser Internationale Transporte GmbH (hereinafter " Rieser"), a transport undertaking established in Austria. It operates heavy goods vehicles with a maximum permissible gross laden weight of not less than 12 tonnes and with more than three axles in international road haulage and in doing so makes regular use inter alia of the Brenner motorway which is subject to tolls.

8. In the light of the judgment which the Court gave in the infringement proceedings in Commission v Austria , (6) Rieser is seeking from the operator of the Brenner motorway, the Autobahnen- und Schnellstraßen Finanzierungs-AG (hereinafter " Asfinag"), partial repayment of the tolls for the use of the full itinerary of the Brenner motorway which were paid during the period between 1 January 1997 and 31 July 2000, in its view in breach of Community law.

9. By a licence (Fruchtgenussvertrag) concluded in June 1997 with its sole shareholder, the Republic of Austria, Asfinag was given responsibility for the construction, planning, operation, maintenance and financing of Austria ' s motorways and expressways, including the A 13 (Brenner motorway), with retrospective effect from 1 January 1997. Asfinag was also authorised by that licence to levy tolls and charges, in its own name and on its own account, in order thus to cover its costs.

10. Firstly, the Oberster Gerichtshof, before which the case was brought by means of an appeal

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on a point of law, has doubts as to the direct effect of Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62. Secondly, the Oberster Gerichtshof also considers contrary to the view of the lower courts that the direct effect of the prohibition on discrimination laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 is also doubtful. Thirdly, it considers that clarification is necessary regarding the connection between annulled Directive 93/89 and the effects thereof, on the one hand, and Directive 1999/62, which it replaced on 17 June 1999 but which did not have to be implemented until 1 July 2000, on the other.

11. Accordingly, the Oberster Gerichtshof submitted the following questions for a preliminary ruling:

" (1) When concluding contracts with road users, is the defendant also required, in accordance with the Court of Justice ' s case-law on the functional concept of the State, to observe the directly applicable (" self-executing") provisions of Directive [93/89] and Directive [1999/62], with the result that the defendant cannot charge tolls higher than if those provisions had been complied with?

(2) If the answer to Question 1 should be " Yes" :

Are Article 7(b) and (h) of Directive 93/89 and Article 7(4) and (9) of Directive 1999/62 directly applicable, in accordance with the Court of Justice ' s case-law, so that they may be relied on in the calculating of a toll consistent with those Directives in respect of vehicles, with more than three axles, used for the carriage of goods for the full itinerary of the Austrian Brenner motorway, even if the Directives have not been transposed, or have been transposed imperfectly, into Austrian law?

(3) If the answer to Question 2 should be " Yes" :

(a) How and by reference to what parameters is the authorised toll for a single journey on the full itinerary to be calculated?

(b) May Austrian hauliers too rely on the fact that the (excessive) rate for the full itinerary discriminates against them in comparison with road users who use only part itineraries of that motorway?

(4) If the answer to both Questions 1 and 2 should be " Yes" :

(a) Is the judgment of the Court of Justice in Case C-21/94 Parliament v Council , cited above, in which it was held that the effects of Directive 93/89, which it annulled, were to be preserved until the Council should have adopted a new directive, to be interpreted as meaning that the effects are to be preserved until the Member States have transposed the new directive or until the period prescribed for transposition has expired?

(b) If the answer to Question 4(a) should be " No" : are the Member States under an obligation during the period from 17 June 1999 to 1 July 2000 to have regard to the new Directive: must they for example observe any effects in advance?

"

IV Submissions of the parties and legal assessment

A Preliminary remarks on the infringement, alleged by Rieser, of Article 82 EC, read in conjunction with Article 86 EC

12. At the hearing Rieser stated that Asfinag had abused its dominant market position by levying excessive tolls and had thereby infringed Article 82 EC, read in conjunction with Article 86 EC.

13. In this connection, it must be stated that, according to established case-law, it is for the national court, not the parties to the main action, to bring a matter before the Court of Justice.

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The right to determine the questions to be put to the Court thus devolves upon the national court alone and the parties may not change their tenor or add further questions. (7)

14. Since the national court has not submitted a question concerning the interpretation of Articles 82 EC and 86 EC, there is no need to examiner further the infringement of these provisions alleged by Rieser alone.

B The first question

15. By the first question the national court asks whether Rieser can rely directly on the abovementioned provisions of the two directives against a body such as Asfinag even though Asfinag is a legal person governed by private law which is nevertheless under State control.

1. Submissions of the parties

16. Rieser considers that Asfinag satisfies the criteria relating to the functional concept of the State since it is under the decisive influence of its sole shareholder, the Republic of Austria, and a task previously performed under State control has been transferred to it.

17. By contrast, Asfinag takes the view that, according to the Court ' s case-law, it is not required, when concluding contracts, to observe the directly effective provisions of directives since, as a joint stock company governed by private law, it levies the toll on the Brenner motorway on its own account, has legal personality of its own, does not exercise powers of a public authority, and its bodies are not bound by directions from bodies of the Republic of Austria.

18. In the view of the Commission, Asfinag must be ascribed, in functional terms, to the Austrian State and thus be regarded as a person to which Directive 93/89 and Directive 1999/62 are addressed. It is true that Asfinag is a joint stock company governed by private law which is bound to the Republic of Austria only contractually in such a way that its board is not subject to direction and that it levies the toll in its own name and on its own account and does not pass it on to the Republic of Austria. However, Asfinag is covered by the relevant provisions of the directives. The Republic of Austria is the defendant ' s sole shareholder and is entitled under the licence concluded with Asfinag to control all measures taken by Asfinag and its subsidiaries and to require at any time information on its activities. It has the right to set objectives. Asfinag has an obligation to it to draw up an annual maintenance plan and submit the relevant costs account to the federal government. Furthermore, it must each year and in good time submit to the federal government the planning invoices necessary for drawing up the federal budget, together with cost forecasts for the planning, construction, maintenance and administration of the federal motorways and federal expressways. Finally, Asfinag is not entitled to fix the relevant toll rate without authorisation. This is laid down by law in such a way that the rate of the remuneration must be fixed by the Federal Minister for Economic Affairs after consultation with the Federal Minister for Finance, by reference to the type of vehicle. Therefore, Asfinag is, whatever its legal form, included among the bodies against which the provisions of a directive capable of having direct effect may be relied on.

2. Legal assessment

19. As regards the first question referred for a preliminary ruling, it should first be noted that under the division of functions provided for by Article 234 EC, it is, according to established case-law, for the national court to apply the rules of Community law to an individual case. (8) Consequently, the Court cannot consider whether as is set out in the question " the defendant" , that is to say Asfinag, is required to observe the directly applicable provisions of directives in the light of the Court ' s case-law concerning the so-called " functional concept of the State".

20. However, it is for the Court to interpret the measures adopted by Community institutions and in particular to consider what effects they have and in particular whether those measures may be

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relied on against certain natural or legal persons or categories of persons. It is for the national court, on the other hand, to decide whether a party to proceedings before it falls within one of the categories so defined. (9)

21. Consequently, it is necessary to examine whether a body such as Asfinag may regardless of its legal personality as a legal person governed by private law be categorised, in functional terms, as a public authority against which the provisions of the abovementioned directives may be relied on directly.

22. In accordance with the Court ' s broad definition of the State, the direct effect of a directive can be relied on against any organs of public administration, including decentralised authorities such as municipalities. (10) The broad definition of the State also means that a directly effective provision of a directive can apply to the State even where it operates not as a public authority but in another form such as, for example, the owner of a public undertaking or as a majority or sole shareholder in a private undertaking.

23. According to established case-law, the starting point for this extension of the functional concept of the State is that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. (11) However, when applying national law, whether adopted before or after the directive, the national court having to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC). (12)

24. In the light of the foregoing, where an individual is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law. (13)

25. Accordingly, the Court has also ruled that a body or a State undertaking, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon. (14)

26. The problem could now be whether such (vertical) direct effect of a directive can exist also vis-à-vis a legal person governed by private law, which has been established by the State and operated by it as sole shareholder and which has had transferred to it without complete State supervision tasks to be performed on its own responsibility and on its own account which were previously carried out by the State itself as public tasks.

27. As regards this assessment, I would like to recall my Opinion in Collino and Chiappero , according to which the sanction of direct effect vis-à-vis the Member States only exercises its full impact if it affects the State in all instances, regardless of the specific legal form in which the State is acting. Whenever in fact the State, directly or indirectly, stands behind an institution or undertaking and controls it, then it is no longer a private individual. (15)

28. In this context it is necessary to assess below, on the one hand, the State ' s direct management, control and supervisory powers vis-à-vis an undertaking governed by private law and, on the other, the possibilities for indirectly intervening and exercising influence which arise from the structural link between the undertaking and the body governed by public law which stands behind it economically.

29. According to the principles set out above, the important factor as regards the State ' s direct

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management, control and supervisory powers is not necessarily whether an undertaking or other private body is formally subject to complete State supervision. Objectives laid down by law or individual powers of the State granted by agreement can also restrict the legal scope for manoeuvre available to the undertaking to the extent that they are, in terms of their effects, equivalent to complete supervision. Where, for example, the State is entitled to inspect any measures, including planning measures, taken by the undertaking and its subsidiaries, to set objectives and to require at any time information on its activities and its subsidiaries, the legal scope for manoeuvre of an undertaking is limited from the outset. This effect is reinforced where an undertaking is, within the economic field of activity transferred to it, bound absolutely to State objectives which are laid down by law and form part of the shareholders ' agreement and has to comply with statutory framework conditions, which, for example as in the case of Asfinag also cover fixing the rate of the tolls and charges to be levied by it, and the undertaking is limited, for its part, to putting forward proposals on their future structure.

30. As regards the possibilities of exercising indirect influence, account should be taken of whether the State, which stands behind the undertaking economically, is able, inside the company, to guide in accordance with its own will the areas of freedom which, in law, outwardly formally exist, as is probably the case where there is a sole shareholder.

31. All the possibilities for controlling and exercising influence directly and indirectly, as can be put into effect in respect of an undertaking such as Asfinag, justify regarding it as belonging, in practical terms, to the State.

32. Finally, the protective purpose of the directive also indicates that in a situation such as the present an undertaking which is, in terms of its form, governed by private law, must be regarded as a person to which one of its directly effective provisions is addressed. It is necessary not only to prevent the State from taking advantage of its own failure to comply with Community law, (16) but also from evading the effects of Community law by transferring the provision of public services to companies governed by private law.

33. The objective of the directives at issue in this case is to harmonise the levying of charges for the use of certain infrastructures in the Member States. This objective would be jeopardised if a Member State were able to evade the effects of the directives by organising under private law the relevant areas of responsibility conventionally assigned to the public administration. Accordingly, an undertaking governed by private law to which these tasks have been transferred through State act of organisation or legal agreement , and which satisfies the criteria of the broad definition of the State laid down by the Court, cannot be exempt from the direct effects of these directives.

34. Finally, it should be noted that, for the purposes of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, (17) Asfinag must be regarded as a contracting authority. (18) Under this provision, a contracting authority is, in addition to the State itself, any body governed by public law,

" established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

having legal personality, and

financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

"

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35. It is true that the term " contracting authority" does not necessarily have the same meaning as the term " State" in the functional sense against which an individual can rely on the direct effect of a directive. However, since in both cases the objective is to prevent the State evading the obligations upon it by transferring its tasks to a formally independent body, the fact that Asfinag satisfies the requirements for classification as a contracting authority provides an indication for the question to be answered in this case.

36. Therefore, I propose that the answer to the first question referred for a preliminary ruling should be that when concluding contracts with road users a legal person governed by private law is also required to observe the directly effective provisions of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures and of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, where the State has transferred to that legal person the task of levying tolls for the use of public infrastructures and it has direct or indirect control of that legal person.

C The second and third questions

37. The second and third questions concern the same problem, that is to say the direct effect of the abovementioned provisions of Directives 93/89 and 1999/62 on the application by Member States of tolls and charges for the use of certain infrastructures. It is therefore appropriate to examine the two questions together.

1. Submissions of the parties

38. Rieser takes the view that the provisions of the directives include the necessary criteria to be directly effective and grant an individual the right to reimbursement of sums paid in excess. The toll for the full itinerary per kilometre amounts on average to EUR 3.41. By contrast, use of comparable part itineraries costs only around EUR 1.25 per kilometre. Thus, the sums to be reimbursed can be determined precisely. Rieser claims that it can rely on these directives even as an Austrian undertaking since they prohibit variations on the basis of origin or destination.

39. By contrast, Asfinag takes the view that Article 7(b) and (h) of Directive 93/89 and Articles 7(4) and (9) of Directive 1999/62 do not satisfy the requirements for direct effect.

40. The provisions of Article 7(b) of Directive 93/89 and of Article 7(4) of Directive 1999/62 cannot have direct effect because their content is not sufficiently precise. They do not make it clear how, that is to say by comparing which part itineraries, the possibility of users of the full itinerary being placed at a disadvantage is to be assessed. The uncertainty in the choice made by the Court in Commission v Austria (19) of the part itineraries to be used for the comparison also demonstrates that the prohibition on discrimination on grounds of the origin or destination of the vehicle is not sufficiently clear and provides no " minimum guarantee". If the national courts were compelled to implement Directive 93/89, they would have to exercise a degree of latitude in laying down the criteria for choosing the itineraries to be compared and in fixing the correct rate of the toll tariffs. That, however, is a matter for the legislature alone.

41. Even if it is assumed that Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 are sufficiently precise, Austrian hauliers at least cannot rely on them since they are not placed at a disadvantage on grounds of their nationality and the directives on transport infrastructure costs are not intended to lay down provisions on competition between hauliers within the same Member State.

42. Nor does Article 7(h) of Directive 93/89 have direct effect. It provides merely that toll

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rates are to be related to the costs of constructing, operating and developing the infrastructure network concerned but contains no provisions regarding the calculation of such costs and the division thereof into individual vehicle categories, itineraries and periods. It is impossible, on the basis of these rules laying down only a vague objective, to put even an approximate figure on the permissible toll. Nor did the Court specify the method of calculating the costs of the infrastructure network in Commission v Austria . Finally, there are clearly several methods of calculation that are compatible with Article 7(h) of Directive 93/89. However, since there is a great degree of latitude in this case, Directive 93/89 cannot be directly effective.

43. These comments must also apply mutatis mutandis to Directive 1999/62 since the relevant provisions thereof (in particular Article 7(9)) have not been amended substantively in that respect and in particular are worded not in more precise but rather less clear terms than the rules contained in Directive 93/89. Article 7(9) of Directive 1999/62 takes as a basis " weighted average tolls" and not merely " tolls" . Article 7(10) of Directive 1999/62 provides for variations according to vehicle emission classes and time of day and Article 9(2) of Directive 1999/62 provides for the attribution of an (unspecified) percentage to environmental protection and the balanced development of transport networks. The calculation of the permissible rate of the toll for certain vehicles is thereby rendered even more difficult.

44. Directive 93/89 grants no individual rights even in accordance with its protective purpose. Its objective of eliminating distortions of competition is not adversely affected by the setting of different tariffs for the full itinerary and part itineraries. Neither Directive 93/89 itself nor the legal bases therefor in the EC Treaty reveal any legislative objective justifying the annulment of the toll contracts which it has concluded with the users of the Brenner motorway.

45. As regards Question 3(b), Asfinag takes the view that in any event Austrian hauliers cannot rely on the possible direct effects of the provisions of the directives since they are not placed at a disadvantage on grounds of their nationality and the directives on transport infrastructure costs are not intended to lay down provisions on competition between hauliers within the same Member State.

46. The Austrian Government also contends that the contested provisions of the directives do not have direct effect and argues in a manner similar to Asfinag that there is as little definition of the three cost items referred to therein constructing, operating and developing as there is of the term " infrastructure network concerned" . Consequently, it is completely unclear which costs are to be subsumed under these undefined terms and thus how they could enter into the corresponding calculation of the costs. Nor can the Member States ' already broad degree of latitude be restricted since the toll rate for the individual motorway user to be calculated pursuant to Article 7(h) of Directive 93/89 must merely be " related" to these cost items and does not have to correspond to them precisely. Furthermore, no provisions are laid down concerning the division of the costs into individual user categories. Finally, Article 7(h) contains no information on a method of calculation which is to be applied to produce a toll for the individual road user which is consistent with Directive 93/89.

47. On account of its largely identical wording, these uncertainties also exist in respect of Article 7(9) of Directive 1999/62. In the case of the new directive there are even additional elements which prevent the toll rate for the individual road user from being calculated directly. It makes it possible to organise different toll rates within a certain band according to vehicle emission classes and time of day (see Article 7(10)(a) and (b) of Directive 1999/62). According to the wording of the final sentence of Article 7(10) of Directive 1999/62, such variation in tolls charged with respect to vehicle emission classes or time of day must be proportionate to the objective pursued. However, Article 7(9) of Directive 1999/62 fails to provide any definition or detailed information

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on the possible variations.

48. In the absence of a mathematical result in accordance with Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62, a toll rate calculated accordingly cannot be examined in the light of the prohibition on discrimination laid down in Community law. The direct effect of Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 must be rejected on account of the lack of preciseness of Article 7(h) of Directive 93/89 and of Article 7(9) of Directive 1999/62.

49. The fact that the Member States also have a very large degree of latitude in fixing a non-discriminatory toll, for example as regards the choice of the part itineraries to be used in this regard, also militates against direct effect.

50. As regards Question 3(a), the Republic of Austria submits, in the alternative, that Article 7(h) of Directive 93/89 merely names three parameters which are not specified in detail, that is to say the costs of constructing, operating and developing the infrastructure network concerned, which are to be used as criteria for establishing the toll rate. However, there are no indications as to how these costs are to be calculated and which cost components the three abovementioned items actually include. In its judgment in Commission v Austria the Court itself also made no pronouncement, based on a calculation of infrastructure costs, as to the rate of the Brenner toll consistent with the Treaty.

51. As regards Question 3(b), the Republic of Austria like Asfinag takes the view that Directives 93/89 and 1999/62 pursue, in the light of their preambles, the objective of laying down rules on competition between the hauliers of various Member States without intending thereby to establish a subjective right of individual road users to use a particular itinerary at a particular tariff. In any event, an Austrian haulier cannot rely on the provisions relating to discrimination on grounds of nationality under Directives 93/89 and 1999/62 since the rules on competition between hauliers of the same Member State are not covered by the legislative objective of the relevant enabling provision of primary law.

52. By contrast, the Commission takes the view that the prohibition on discrimination laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 requires no further indications for it to be directly effective. The Court has already classified a prohibition on discrimination as unconditional and sufficiently precise in the case of HI. (20)

53. The objective of the provisions at issue lies in protecting traffic in transit via the Brenner motorway from a toll that is excessive in comparison with that charged to users of part itineraries. However, transit traffic naturally does not include any purely national operation. Furthermore, the wording both of Article 7(b) of Directive 93/89 and of Article 7(4) of Directive 1999/62 expresses the need to protect all transit traffic from discrimination, regardless of the nationality of the haulier. This is also consistent with the Court ' s conclusion in Commission v Austria. (21) If Rieser transits the full itinerary of the Brenner motorway, it can rely on Article 7(b) of Directive 93/89 or Article 7(4) of Directive 1999/62 in the same way as any other foreign or Austrian haulier.

54. On the other hand, Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 cannot be said to have direct effect. Although the requirement that the toll be related to costs laid down therein gives the Member States some guidance for calculating tolls, they have, provided that they comply with this requirement, such a broad degree of latitude that the specific means of calculation does not have the unconditional or sufficiently precise character necessary for direct effect. Consequently, there is likewise no need to answer Question 3(a).

2. Legal assessment

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(a) Preliminary remarks on the class of vehicles covered by the directive

55. In the second question referred for a preliminary ruling the national court takes as a basis vehicles with more than three axles. Under the fourth indent of Article 2 of Directive 93/89 and Article 2(d) of Directive 1999/62, for the purpose of the directive " vehicle" means a motor vehicle with a maximum permissible gross laden weight of not less than 12 tonnes. Accordingly, the number of axles is unimportant. Even though the two parameters will generally apply to the same class of vehicles, the following interpretation relates only to the vehicles defined in the directive. It is for the national court to determine whether the vehicles used by Rieser fall within that definition.

(b) The prohibition on discrimination under Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62

(i) Direct effect

56. As the Court has consistently held, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly. (22)

57.

In Commission v Austria (23) the Court ruled that the obligations arising from Article 7(b) and (h) of Directive 93/89 had not been fulfilled correctly.

58. There has been no such Court ruling regarding the implementation of the provisions of Article 7(4) and (9) of Directive 1999/62 in domestic law. However, since their content is largely identical to those of the abovementioned provisions of previous Directive 93/89, the same should apply to them, at least as regards the period relevant in this case, namely that up until 1 July 2000, (24) within which the directive had to be implemented.

59. It must be examined whether the other conditions for the direct effect of the prohibition on direct or indirect discrimination based on the origin or destination of the vehicle laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 are satisfied. The prohibition on discrimination based on nationality, which is also laid down in these provisions, is not relevant in the present case. It is true that in Commission v Austria (25) the Court held that the structure of the charges involves discrimination based on nationality contrary to Article 7(b) of Directive 93/89. However, as an Austrian undertaking, Rieser does not belong to the category of persons placed in a less favourable position. Therefore, the following examination concentrates on whether Rieser can rely directly on the prohibition on discrimination based on the origin or destination of the vehicle. For it to be able to do so, this rule must be unconditional and sufficiently precise.

60. In this regard it should be noted that in various fields of Community law the Court has regarded prohibitions on discrimination contained in directives as directly effective. Accordingly, it has consistently held that the prohibition on (direct or indirect) discrimination based on sex as regards access to employment and working conditions and social security is sufficiently precise and unconditional to allow individuals to rely upon it before the national courts in order to preclude the application of any national provision inconsistent with it. (26)

61. As regards the award of public service contracts, the Court has ruled that a service provider can rely on the provisions of a directive laying down a general prohibition on discrimination if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise. (27)

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62. Finally, the Court recently held that the prohibition laid down in Article 9(2) of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (28) is directly effective. (29)

63. In these circumstances there is in principle nothing to prevent direct effect being attributed also to the provisions of directives which prohibit discrimination based on the origin or destination of the vehicle, provided that they satisfy the minimum requirements of unconditionality and preciseness.

64. As regards whether or not Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 are sufficiently precise, it must be observed that these provisions preclude, generally and unequivocally, any discrimination based on the origin or destination of the vehicle. The supposed difficulties in establishing the itineraries to be compared, cited by the national court, Asfinag and the Austrian Government, do not prevent the prohibition on discrimination from being precise.

65. There can be discrimination if different rules are applied to comparable situations or the same rule is applied to different situations. In any event, the application of a prohibition on discrimination therefore requires a comparison of different factual situations and the rules which govern them. It is primarily for the body applying the law and not the legislature to make this comparison.

66. It is possible to lay down in rules the criteria to be taken into account, such as, for example, nationality or the origin or destination of the vehicle in the present case. However, in view of the variety of possible factual situations, it is impossible for the legislature to set out all the factors that may be relevant to the comparison. However, this in no way alters the clear statement of the prohibition on discrimination, namely that similar situations cannot be treated differently and different situations cannot be treated the same.

67.

In Commission v Austria (30) the Court compared the toll per kilometre for following the full itinerary and the toll per kilometre for following certain part itineraries. In doing so it took account only of those part itineraries that link localities which are of economic significance and thus took into consideration a further criterion for the comparability of the itineraries in addition to the origin and destination of the vehicle. It is only on the part itineraries selected by the Court that there is heavy goods traffic similar to that on the full itinerary. This criterion is consistent with the spirit and purpose of the directive, namely to eliminate distortions of competition between transport undertakings. (31)

68. It must also be considered whether the prohibition on discrimination can be regarded as unconditional in the light of the exceptions and reservations laid down in Article 7(b) of Directive 93/89 (" ... Without prejudice to Article 8(2)(e) and Article 9..."). (32)

69. The answer to this must also be in the affirmative. The reservation in favour of Article 8(2)(e) is a transitional provision which restricts the validity of the directive for a certain period but does not make the abovementioned principle subject to any condition as regards the scope thereof. The rule contained in Article 9 is also intended merely to leave open to the Member States the possibility of excluding border areas from the scope of the directive in accordance with the procedure laid down in the Council decision of 21 March 1962. However, it is clearly not intended to limit or make conditional the application of the principle of equal treatment within its scope ratione materiae and therefore it likewise does not prevent the conclusion being drawn that the prohibition on discrimination has direct effect. (33)

70. Therefore, if the criteria for the direct effect of Article 7(b) of Directive 93/89 and Article

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7(4) of Directive 1999/62 are satisfied where the provision is viewed in isolation, the question arises as to whether, in the light of the systematic link with the other provisions of the directive, the prohibition on discrimination can be regarded as sufficiently precise and unconditional to allow individuals to rely upon it against the State (in the broadest sense). Asfinag and the Austrian Government cast doubt on this, arguing that in view of the scope for differentiation and the latitude granted to the Member States by Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 as regards the structuring of toll rates it must be held that Article 7(b) of Directive 93/89 and Article 7(4) likewise have no direct effect.

71. However, this argument cannot be accepted. In this respect it should be noted that the granting of a margin of latitude and discretion and a power of assessment in transposing a directive does not preclude the direct effect thereof if the objective of the directive is set out in sufficiently precise terms. Even where a provision of a directive leaves the Member States a degree of latitude as regards the form and methods for achieving the result, it can still prescribe unconditionally the result to be achieved, for example the abolition of any provisions contrary to the principle of equal treatment. (34)

72. Accordingly, it can be argued in the present case that the fact that the Member States are left a considerable degree of discretion and variation in fixing a toll rate that complies with the directive a point on which all the parties concerned agree cannot deny direct effect to the sufficiently precise and unconditionally worded prohibition on discrimination.

73. Therefore, it is clear that the provisions of Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 have direct effect as regards the objective set out therein which is to be attained when fixing a toll that complies with the directive.

(ii) May Austrian undertakings also rely on the prohibition on discrimination? (Question 3(b))

74. According to the wording of the provision in question, discrimination on the grounds of the nationality of the haulier or of origin or destination of the vehicle is not permitted. Whereas the first alternative no discrimination on the grounds of nationality clearly has in mind the protection of foreign hauliers, the second no discrimination on the grounds of origin or destination of the vehicle reveals no such (limited) protective purpose.

75.

In Commission v Austria (35) the Court accordingly based its finding that there had been a failure to fulfil Treaty obligations on infringements of both alternatives of the prohibition on discrimination and stated that Article 7(b) of Directive 93/89 prohibits not only any discrimination based on the nationality of hauliers but also any based on the origin or destination of the vehicle in order to avoid any form of distortion of competition as between transport undertakings in the Member States. (36)

76. The Court based the infringement of the second alternative, irrespective of the nationality of the haulier, solely on the fact that vehicles carrying goods are subject to a tariff difference, depending on whether those vehicles follow the full itinerary on the Brenner motorway or certain part itineraries, which operates to the detriment of vehicles engaged in transit traffic. (37)

77. It therefore follows that Austrian hauliers who transit the full itinerary of the Brenner motorway and are thereby placed at a disadvantage compared with certain users of part itineraries can rely on the second alternative of the prohibition on discrimination laid down in Article 7(b) of Directive 93/89.

78. This subjective protective purpose of the provision of the directive is in no way altered by the fact that, according to the Court ' s findings, the great majority of the vehicles engaged

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in transit traffic are not registered in Austria (38) and therefore in actual fact discrimination based on nationality coincides with discrimination based on the origin and destination of the vehicle.

(iii) Consequences of the direct effect of the prohibition on discrimination

79. In so far as an individual can rely on directly effective provisions of the directive, contrary national provisions are ineffective. The absence of any further need to pay the excessive toll is not the only consequence. In order to ensure the practical effect of the prohibition on discrimination, the amounts already paid must also be reimbursed in so far as they exceed the amounts paid by the favoured group, that is to say in this case the users of comparable itineraries.

80. According to the Court ' s well-established case-law, the right to obtain a refund of charges levied in a Member State in breach of rules of Community law is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the Court. (39) Furthermore, only by reimbursing the discriminatory charges is the distortion of competition caused by them eliminated again. (40)

81. The Court has already ruled to this effect on several occasions in connection with charges that have been levied in breach of the prohibition on discrimination. (41) However, each of those cases concerned breaches of prohibitions on discrimination arising directly from the provisions of the Treaty. It is not possible to see any reason why a breach of a directly effective prohibition on discrimination laid down in a directive should be treated any differently in terms of its others consequences. Furthermore, the Court has recognised an entitlement to compensation also in the case of breaches against different kinds of directly effective provisions of directives. (42)

82. An entitlement to reimbursement of payments made but not due exists also where they have been levied in breach of Community law by a formally private, but State-controlled undertaking. (43) In particular, it is not possible to raise against such an entitlement the argument that the amounts are levied not by public authorities as charges but as remuneration pursuant to an agreement of private law and that the Court ' s case-law concerning the reimbursement of charges in breach of Community law cannot therefore be applied. (44)

83. In that respect it should be noted that it is the settled case-law of the Court that the nature of a tax, duty or charge must be determined by the Court, under Community law, according to the objective characteristics by which it is levied, irrespective of its classification under national law. (45)

84. The same must apply where the consideration for the use of a State service is levied in the form of a contractual user remuneration as a result of the privatisation of the area of administration concerned but must be classified as a public (toll) fee in terms of its function or replaces such a fee. The view set out in the answer to the first question referred for a preliminary ruling, namely that a Member State may not evade its obligations under Community law by privatising or farming out particular areas of public administration, must also apply to the reimbursement of charges.

85. According to the Court ' s case-law, where the Member States or the legal persons and bodies covered by the broad concept of the State are in principle required to reimburse charges levied in breach of directly effective Community law, in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions and do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law, in accordance with the principle of equivalence and effectiveness. (46)

86. It is also for the national court to establish the level of the amount to be reimbursed but

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in this regard it must be guided by the objective of offsetting discrimination between the users of the full itinerary and the users of the three part itineraries (InnsbruckSchönberg, InnsbruckMatrei/Steinach and Matrei/Steinachfrontier post) which the Court regarded as comparable in Commission v Austria. (47)

87. In that respect the question arises as to how account is to be taken of the possibility of the person paying the charge passing the costs on to a third party. This problem arises in the present case because according to the order for reference, Rieser claims that it was unable to pass the increase in the tolls on to its customers a claim that is disputed by Asfinag. (48)

88. According the Court ' s case-law, a person cannot demand repayment of taxes, charges and duties paid in breach of Community law where it is established that he has actually passed them on to other persons. (49)

89. In such circumstances, the burden of the charge levied but not due has been borne not by the payer of the charge, but by the customer to whom the cost has been passed on. Therefore, to repay the payer of the charge the amount of the charge already received from the customer would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the customer of the illegality of the charge. (50)

90. However, the question whether an indirect charge has or has not been passed on in each case is a question of fact to be determined by the national court. The actual passing-on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts. (51) According to the Court ' s case-law, in any event it may not be assumed that they have been passed on. In particular, it is not for the payer of the charge to prove the contrary. Accordingly, a Member State may resist repayment to the person who paid of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than that person and that reimbursement of the latter would constitute unjust enrichment. (52)

91. In addition, it should be borne in mind that even where it is established that the burden of the charge has been passed on in whole or in part to the customer, repayment to the payer of the charge of the amount thus passed on does not necessarily entail his unjust enrichment. The payer of the charge may also have suffered damage as a result of the very fact that he has passed on the charge levied in breach of Community law, because the increase in the price of the product brought about by passing on the charge has led to a decrease in sales. (53)

(c) The requirement that the toll be related to costs in accordance with Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62

92. As regards the direct effect of Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62, Asfinag, the Republic of Austria and the Commission essentially agree in their observations that these provisions do not have the unconditional or sufficiently precise character necessary for direct effect.

93. I concur with this view. The provisions merely give the Member States certain parameters (construction, operation and development of the road network or infrastructure network concerned) by which to establish the toll rate without defining these terms or otherwise limiting the degree of latitude left to the Member States in establishing the means of calculating the toll rate. The absence of preciseness in the rules is evident not least from the fact that the provisions of both directives require only that the toll rates be " related to" the abovementioned cost parameters and not that they strictly observe them or the like. Therefore apart from the abovementioned benchmarks Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 leave the Member States a choice as regards the organisation of the method of calculation used to calculate a toll that complies with the directive.

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(d) Intermediate conclusion

94. Therefore, the second and third questions referred for a preliminary ruling should be answered as follows:

The prohibition on discrimination on grounds of the origin or destination of the vehicle laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 is directly effective. Undertakings which have paid for following the full itinerary using vehicles with a maximum permissible gross laden weight of not less than 12 tonnes a higher tariff per kilometre than users of economically comparable part itineraries can rely on the prohibition on discrimination and demand reimbursement of the toll levied in excess.

Austrian hauliers too can rely on Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62.

Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 are not directly effective as regards calculating a toll that complies with the directives for vehicles with a maximum permissible gross laden weight of not less than 12 tonnes used for the carriage of goods on the full itinerary of the Austrian Brenner motorway.

D The fourth question

1. Submissions of the parties

95. Asfinag points out that although the Court annulled Directive 93/89 in Parliament v Council it preserved the effects of the annulled directive " until the Council has adopted a new directive" . (54)

96. Directive 1999/62 was adopted on 17 June 1999 and therefore, according to the clear wording of the abovementioned judgment, Directive 93/89 ceased to have effect on that date and consequently the rules on tolls could not have infringed this directive as from 17 June 1999. Directive 1999/62 could have effects in advance before the period prescribed for transposition had expired. However, in the period from 17 June 1999 to 1 July 2000 (the end of the period prescribed for transposition) the Republic of Austria took no measures which ran counter to the objectives of the new directive. Therefore, no legal void existed. However, Directive 1999/62 could not have direct effect before the period prescribed for transposition had expired.

97. The Austrian Government also refers to Parliament v Council and states that if, in connection with the continued effect of Directive 93/89, the Court had intended to take as a basis a date other than the date of the adoption of the directive, it would have expressed such intention clearly. Consequently, the continued effect of annulled Directive 93/89 pronounced in Parliament v Council could have existed only until the adoption of the new directive.

98. However, directives do not have binding effect merely when the period prescribed for transposition has expired. Since it recognised the effect of Directive 1999/62 in advance, the Republic of Austria adopted no measures at all that would have undermined the regulatory purpose of this directive.

99. On the other hand, it could not be concluded that there was direct effect before the period prescribed for transposition expired. Such an interpretation of the advance effect of a directive would ultimately lead to a circumvention of the fundamental notion underlying the two-tier nature of the directive, that is to say the need for a legislative measure of Community law and national law.

100. The Commission recalls that according to the fourth recital in the preamble to Directive 1999/62, which entered into force on 20 July 1999, it replaces Directive 93/89. Consequently, old Directive 93/89 ceased to have effect on that date. However, in the period from 20 July 1999

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to 1 July 2000, the Member States were required to take account of Directive 1999/62 in so far as according to case-law they must, during the period for transposition allowed therein, refrain from taking any measures liable seriously to compromise achievement of the result prescribed by this directive. This follows directly from the second paragraph of Article 10 EC and the third paragraph of Article 249 EC and from Directive 1999/62 itself.

2. Legal assessment

101. In the main proceedings Rieser asserts claims for reimbursement of tolls levied in excess in the period from 1 January 1997 to 31 July 2000. For there to be such claims during the entire period, there must have been a rule of Community law which the toll tariffs infringed and on which Rieser can rely.

102. In this context, the two parts of the fourth question referred for a preliminary ruling essentially seek to ascertain the time until which Directive 93/89 had direct effect in favour of Rieser and the time from which, if appropriate, Directive 1999/62 had similar effects.

(a) Preservation of the effects of Directive 93/89

103. All the parties correctly conclude in so far as they have submitted observations on the fourth question referred for a preliminary ruling that the direct effect of Directive 93/89 ceased at the time successor Directive 1999/62 was adopted and did not continue in force until the period prescribed for transposing the new directive had expired. In Parliament v Council the Court ordered that the effects of Directive 93/89 be preserved " until the Council has adopted new legislation in the matter". (55)

104. An order that the effects of Directive 93/89 be preserved until Directive 1999/62 had been transposed appears to be entirely impossible for various reasons. In that case both the directives would be in force during the period prescribed for transposing Directive 1999/62. Where the directives differed from one another, it would be unclear as to which requirements the Member States were to satisfy during this period. Furthermore, the end of the effect of Directive 93/89 would depend on action by the Member States and would occur on a different date depending on the Member State concerned.

105. However, the parties disagree as regards the exact time at which the direct effects of the old directive cease the adoption or the entry into force of the new directive. Directive 1999/62 was adopted by the Council on 17 June 1999 but under Article 13 thereof did not enter into force until it was published in the Official Journal of the European Communities on 20 July 1999. The wording of the order that the effects be preserved points more towards the first date. (56) The national court also takes this date as a basis in Question 4(b).

106. However, the spirit and purpose of maintaining the effects of an annulled act is to prevent a legal void arising before a new act has replaced the annulled act. This is ensured only where the annulled act continues to have effect until the new act can produce effects. Since Directive 1999/62 did not have effect until it entered into force, this order by the Court must be construed as meaning that Directive 93/89 continued in force until this time, that is to say until 24.00 hours on 19 July 1999. (57) If " adoption" of the new act within the meaning of Parliament v Council were to be construed as the approval thereof by the Council, there would be no effective rules between 17 June and 20 July 1999.

107. Therefore, in respect of the period up to and including 19 July 1999, Rieser can plead that the toll was levied in breach of Article 7(b) of Directive 93/89.

(b) The effects of Directive 1999/62 before the expiry of the period prescribed for transposition

108. It must be examined whether Directive 1999/62 produced effects in favour of Rieser in the

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period between 20 July 1999 the date on which it entered into force and 30 June 2000 the end of the period prescribed for transposition. (58)

109. During this period the Member States are required to transpose the directive into national law and also to refrain from taking any measures liable seriously to compromise the result prescribed. (59) However, the requirement that no measures jeopardising the achievement of the result sought by a directive be taken, which is based on Article 10 EC and the third paragraph of Article 249 EC and laid down in particular in the judgment in Inter-Environnement Wallonie , (60) is not so extensive that national rules incompatible with the directive must be adjusted before the prescribed period expires.

110. At most in exceptional cases can the advance effects of the directive preclude the introduction of national provisions, that is to say where they run completely counter to the spirit and letter of the directive and thereby compromise the adjustment of the national legal order within the prescribed period. (61)

111. There is no such exceptional case here since the tariff at issue, which was in breach of the prohibition on discrimination laid down in Directive 1999/62, was introduced before the adoption of Directive 1999/62. Furthermore, the structure of the charges does not render the subsequent transposition of the directive considerably more difficult since the tariff could have been changed again in the short term. A particular transitional rule may have been necessary only in respect of multiple-trip cards.

112. It is settled case-law that the public authorities in the Member States are furthermore required to interpret national law, whether adopted before or after the directive, in the light of the directive. (62) Since a directive produces its effects in respect of the persons to which it is addressed even before it enters into force, there are certain factors indicating that the duty to interpret national law in conformity with the directive exists even before the period for transposing the directive expires. (63)

113. However, the Austrian provisions on the tariffs for the Brenner toll leave no scope for an interpretation which precludes any discrimination.

114. Nevertheless, it is not clear to what extent an individual can rely on a directive during the period prescribed for transposition where a Member State has already transposed it into national law but has done so incorrectly.

115. Firstly, Directive 93/89 had to be transposed into national law. If it is accepted that the rules on tolls at issue constituted, in the view of the Republic of Austria, correct transposition of Directive 93/89, there was hardly any further need for rules to be laid down after the adoption of Directive 1999/62 since the rules of the two directives are largely identical. In any event as is evident from the file Austria did not adjust the rules on tolls until after the judgment in the infringement proceedings and with effect from 1 February 2001. The replacement of Directive 93/89 by Directive 1999/62 did not, however, prompt the Austrian legislature to take any action.

116. In his Opinion in Hansa Fleisch Ernst Mundt (64) Advocate General Jacobs considered in detail the question whether or not an individual may, where a decision addressed to a Member State has already been implemented but implemented incorrectly, rely directly on that decision during the period prescribed for implementation laid down therein. Although that case relates to a decision, his observations on direct effect are also applicable to directives.

117. He rightly concludes that reliance on an act before the expiry of the period prescribed for the transposition thereof is not possible since otherwise the Member States that had made an attempt albeit incorrectly to effect transposition would be placed in a less favourable position that

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those which had remained completely inactive. Furthermore, the doctrine of direct effect is based on the idea that the Member State cannot rely, as against an individual, on the fact that it has failed to fulfil an obligation under Community law. However, the obligation to implement provisions of Community law does not become effective until the end of the period prescribed for implementation. In its judgment in that case the Court also held that the individual cannot rely directly on the decision during the period prescribed for transposition. (65)

118. Consequently, Rieser cannot demand partial reimbursement of the toll in respect of the period from 20 July 1999 to 30 June 2000 by pleading that the toll tariff breached the prohibition on discrimination laid down in Directive 1999/62.

(c) Infringement of the directly effective provisions of the Treaty

119. However, the question arises as to whether Rieser can base its claim in respect of this period on an infringement by the rules on tolls of a directly effective provision of the Treaty. It is true that the national court has referred no question to the Court in this regard. However, since it is established case-law that, in the procedure laid down by Article 234 EC providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it, (66) this matter should be examined.

120. Firstly, the rules on tolls might infringe Article 72 EC which requires the Member States not to alter existing provisions governing transport to the detriment of undertakings of other Member States. However, since this is a mere prohibition on discrimination on grounds of nationality or place of establishment, Rieser cannot, as a domestic undertaking, rely on this provision.

121. Secondly, there may have been a breach of the freedom to provide services. Under Article 51(1) EC, freedom to provide services in the field of transport is governed by the provisions of the title relating to transport. That restriction means that the objective laid down in Article 49 EC of abolishing during the transitional period restrictions on freedom to provide services is to be attained in the framework of the common transport policy provided for in Articles 70 EC and 71 EC. The Court has held (67) that, even on expiry of the transitional period, Articles 49 EC and 50 EC are not of direct application in the transport sector. (68) However, this does not prevent these provisions from serving as a reference point when it is a question of the Council ' s implementing freedom to supply services in that sector.

122. Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States (69) introduced the freedom to provide services in the international carriage of goods by road. (70) Since Rieser followed the full itinerary of the Brenner motorway up to the Italian border, it must be concluded that it provided services in international carriage.

123. It is settled case-law that freedom to provide services within the meaning of Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services. (71) That freedom likewise precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State. (72)

124. In accordance with this principle, the freedom to provide services may be relied on also by

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an undertaking against the State in which it is established where the services are provided to recipients established in another Member State. (73)

125. Application of the freedom to provide services in connection with rules on the motorway toll is not precluded by the adoption of Directives 93/89 and 1999/62 which lay down special rules in this regard. The effects of the former directive ceased on 20 July 1999 and the provisions of Directive 1999/62 had no direct effect before the end of the period prescribed for transposition, as stated above.

126. In the present case the discriminatory motorway toll does not prevent hauliers transporting goods in transit from following the full itinerary of the Brenner motorway. However, since the charges for using the full itinerary are disproportionately high in relation to those for using individual part itineraries, they are liable to affect the economic attractiveness of using the full itinerary. Consequently, they constitute a restriction on the freedom to provide services to the detriment of hauliers transporting goods in transit, regardless of where they are established.

127. Since the discriminatory rules on tolls cannot be justified either by overriding reasons relating to the public interest or by other reasons, (74) they probably constitute an unlawful restriction on the freedom to provide services under Article 49 EC.

128. An Austrian road haulier such as Rieser may, in compensation proceedings, rely on this provision of primary Community law which is directly effective in the period between 20 July 1999 and 30 June 2000.

129. As regards the final period in respect of which Rieser demands reimbursement of the toll, that is to say from 1 to 31 July 2000, it should be mentioned, merely for the sake of completeness in particular since the national court submitted no question in this regard that the prohibition on discrimination laid down in Directive 1999/62 has been directly effective since the expiry of the period prescribed for transposition on 1 July 2000.

V Conclusion

130. On the basis of the foregoing considerations, I propose that the Court reply as follows to the questions submitted:

(1) When concluding contracts with road users a legal person governed by private law is required to observe the directly effective provisions of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures and of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, where the State has transferred to that legal person the task of levying tolls for the use of public infrastructures and it has direct or indirect control of that legal person.

(2) The prohibition on discrimination on grounds of the origin or destination of the vehicle laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 is directly effective. Undertakings which have paid for following the full itinerary using vehicles with a maximum permissible gross laden weight of not less than 12 tonnes a higher tariff per kilometre than users of economically comparable part itineraries can rely on the prohibition on discrimination and demand reimbursement of the toll levied in excess.

(3) Austrian hauliers too can rely on Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62.

(4) Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 are not directly effective as regards calculating a toll that complies with the directives for vehicles with a maximum permissible

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gross laden weight of not less than 12 tonnes used for the carriage of goods on the full itinerary of the Austrian Brenner motorway.

(5) Directive 93/89 ceased to have effect upon the entry into force of Directive 1999/62 on 20 July 1999.

(6) In the period from 20 July 1999 to 30 June 2000 Directive 1999/62 had no direct effects on which a haulier could rely in respect of a partial reimbursement of the toll for using the Brenner motorway (full itinerary). However, during this period a haulier can rely on the provisions of the Treaty on the freedom to provide services which apply in the field of the international carriage of goods by road under Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States.

(1) .

(2) OJ 1993 L 279, p. 32.

(3) OJ 1999 L 187, p. 42.

(4) Case C-21/94 Parliament v Council [1995] ECR I-1827.

(5) Case C-205/98 Commission v Austria [2000] ECR I-7367.

(6) Cited in footnote 5 above.

(7) Case 44/65 Singer [1965] ECR 965, at 970 and 971; Case C-412/96 Kainuun Liikenne Oy and Others [1998] ECR I-5141, paragraph 23; and Case C-402/98 ATB and Others [2000] ECR I-5501, paragraph 29.

(8) Case C-320/88 Shipping and Forwarding Enterprise Safe [1990] ECR I-285, paragraph 11, and Case C-40/01 Ansul [2003] ECR I-2439, paragraph 45.

(9) See Case C-188/89 Foster and Others [1990] ECR I-3313, paragraph 15 et seq.

(10) Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraph 31.

(11) See, inter alia, Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 20, and Case C-192/94 El Corte Inglés [1996] ECR I-1281, paragraph 15.

(12) See Faccini Dori , cited in footnote 11 above, paragraph 26, and Case C-63/97 BMW [1999] ECR I-905, paragraph 22.

(13) Case 152/84 Marshall [1986] ECR 723, paragraph 49.

(14) Foster and Others , cited in footnote 9 above, paragraph 20.

(15) Opinion in Case C-343/98 [2000] ECR I-6659, at I-6661, paragraph 23. See also the judgment in that case.

(16) See, to this effect, the cases cited in footnotes 13 and 14 above.

(17) OJ 1993 L 199, p. 54.

(18) See Case C-410/01 Fritsch, Chiari & Partner and Others [2003] ECR I-6413, and my Opinion in Case C-421/01 Traunfellner [2003] ECR I-11941.

(19) Cited in footnote 5 above.

(20) Case C-258/97 [1999] ECR I-1405, paragraphs 33 to 36.

(21) Cited in footnote 5 above, paragraph 16.

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(22) See, inter alia, Case 8/81 Becker [1982] ECR 53, paragraph 25; Fratelli Costanzo , cited in footnote 10 above, paragraph 29; Case C-319/97 Kortas [1999] ECR I-3143, paragraph 21; Case C-62/00 Marks & Spencer [2002] ECR I-6325, paragraph 25; and Case C-276/01 Steffensen [2003] ECR I-3735, paragraph 38.

(23) Cited in footnote 5 above. See, to that effect, point 6 above.

(24) Asfinag pointed out that the relevant national provisions relating to tolls were amended to the effect that discrimination on grounds of nationality or of the origin or destination of the vehicle no longer existed, as the Commission had also confirmed by letter of 17 April 2001. However, this amendment did not take effect until 1 February 2001.

(25) Cited in footnote 5 above, paragraph 101.

(26) See Marshall , cited in footnote 13 above, paragraph 52; Case 71/85 Federatie Nederlandse Vakbeweging [1986] ECR 3855, paragraph 21; Case 286/85 McDermott and Cotter [1987] ECR 1453, paragraph 14; Case C-102/88 Ruzius-Wilbrink [1989] ECR 4311, paragraph 19; Foster and Others , cited in footnote 9 above, paragraph 21; Case C-154/92 van Cant [1993] ECR I-3811, paragraph 17; Case C-337/91 van Gemert-Derks [1993] ECR I-5435, paragraph 31 et seq.; and Case C-139/95 Balestra [1997] ECR I-549, paragraph 32

(27) Case C-76/97 Tögel [1998] ECR I-5357, paragraph 42 et seq., and HI , cited in footnote 20 above, paragraph 34 et seq.

(28) OJ 1997 L 117, p. 15.

(29) Case C-462/99 Connect Austria [2003] ECR I-5197, paragraph 114.

(30) Cited in footnote 5 above, paragraphs 72 to 75.

(31) See first recital in the preamble to Directive 93/89 and to Directive 1999/62.

(32) See also Foster and Others , cited in footnote 9 above, paragraph 53 et seq.

(33) See also Federatie Nederlandse Vakbeweging , cited in footnote 26 above, paragraph 19.

(34) Federatie Nederlandse Vakbeweging , cited in footnote 26 above, paragraph 20 et seq.; see also Becker , cited in footnote 22 above, paragraph 28 et seq.

(35) See footnote 5. See, to that effect, also the Opinion of Advocate General Saggio in Commission v Austria , cited in footnote 5 above, point 47.

(36) Cited in footnote 5 above, paragraph 109.

(37) Cited in footnote 5 above, paragraph 111 et seq.

(38) Commission v Austria , cited in footnote 5 above, paragraph 107 et seq.

(39) Case 309/85 Barra [1988] ECR 355, paragraph 17; Case C-62/93 BP Supergas [1995] ECR I-1883, paragraph 40; Case C-343/96 Dilexport [1999] ECR I-579, paragraph 23; and Joined Cases C-397/98 and C-410/98 Metallgesellschaft and Others [2001] ECR I-1727, paragraph 84; and Marks & Spencer , cited in footnote 22 above, paragraph 30.

(40) See Opinion of Advocate General Geelhoed in Case C-129/00 Commission v Italy [2003] ECR I-14637, point 70.

(41) See, for example, Barra , cited in footnote 39 above. See also Case 199/82 San Giorgio [1983] ECR 3595, paragraph 12, and Case C-242/95 GT-Link [1997] ECR I-4449, paragraph 58.

(42) See, for example, BP Supergas , cited in footnote 39 above.

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(43) See, similarly, GT-Link , cited in footnote 41 above, paragraph 59, in respect of the duty of a public undertaking to reimburse charges.

(44) See, to this effect, the submissions of the Republic of Austria in parallel case C-257/02, reproduced in the order for reference made by the Oberster Gerichtshof (p. 10).

(45) See, inter alia, Joined Cases C-197/94 and C-252/94 Bautiaa and Société française maritime [1996] ECR I-505, paragraph 39, and Case C-294/99 Athinaïki Zythopoiïa [2001] ECR I-6797, paragraph 27.

(46) Case 33/76 Rewe [1976] ECR 1989, paragraph 5; Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12; Joined Cases C-279/96 to C-281/96 Ansaldo Energia and Others [1998] ECR I-5025, paragraph 16; and Joined Cases C-216/99 and C-222/99 Prisco and CASER [2002] ECR I-6761, paragraph 69 et seq.

(47) Cited in footnote 5 above, paragraphs 72 to 75.

(48) See pages 9 and 13 of the order for reference.

(49) Case 68/79 Just [1980] ECR 501; Case 61/79 Denkavit italiana [1980] ECR 1205; San Giorgio , cited in footnote 41 above, paragraph 13; Joined Cases C-192/95 to C-218/95 Comateb and Others [1997] ECR I-165, paragraph 21; and GT-Link , cited in footnote 41 above, paragraph 22.

(50) Comateb and Others , cited in footnote 49 above, paragraph 22.

(51) Advocate General Geelhoed examines in detail the complex economic issues involved in his Opinion in Commission v Italy , cited in footnote 40 above, points 72 to 79.

(52) Joined Cases 331/85, 376/85 and 378/85 Bianco and Girard [1988] ECR 1099, paragraph 17.

(53) As the Court stated in Comateb and Others , cited in footnote 49 above, paragraph 31, with reference to point 23 of the Opinion of Advocate General Tesauro in that case.

(54) Cited in footnote 4 above, paragraph 32.

(55) Cited in footnote 4 above, paragraph 2 of the operative part.

(56) See Parliament v Council , cited in footnote 4 above, paragraph 2 of the operative part.

(57) Under Article 4(2) of Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time-limits, entry into force of acts fixed at a given date is to occur at the beginning of the first hour of the day falling on that date. Consequently, Directive 1999/62 entered into force at 0.00 hours on 20 July 1999.

(58) Under Article 12(1), the Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 1 July 2000.

(59) Case C-316/93 Vaneetveld [1994] ECR I-763, paragraph 18, and Case C-129/96 Inter-Environnement Wallonie [1997] ECR I-7411, paragraph 45. See also Case C-491/01 British American Tobacco (Investments) and Imperial Tobacco [2002] ECR I-11453, paragraph 32 et seq., and Opinion of Advocate General Geelhoed in that case, point 43.

(60) Cited in footnote 59 above. See also Case C-14/02 ATRAL [2003] ECR I-4431, paragraph 58 et seq.

(61) See the Opinion of Advocate General Jacobs in Inter-Environnement Wallonie , cited in footnote 59 above, point 40 et seq. The Court found that such a case existed in ATRAL , cited in footnote 60 above.

(62) Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, Case C-334/92 Wagner Miret

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[1993] ECR I-6911, paragraph 20, Faccini Dori , cited in footnote 11 above, paragraph 26, and Joined Cases C-240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941, paragraph 30.

(63) Opinion of Advocate General Jacobs in Case C-156/91 Hansa Fleisch Ernst Mundt [1992] ECR I-5567, at I-5578, points 23 and 24.

(64) Cited in footnote 63 above, point 19 et seq.

(65) Hansa Fleisch Ernst Mundt , cited in footnote 63 above, paragraph 20.

(66) See, inter alia, Case C-334/95 Krüger [1997] ECR I-4517, paragraph 22, and Case C-88/99 Roquette Frères [2000] ECR I-10465, paragraph 18.

(67) Case 13/83 Parliament v Council [1985] ECR 1513, paragraph 63; see also Case 4/88 Lambregts Transportbedrijf [1989] ECR 2583, paragraph 14.

(68) See also my Opinion in Case C-70/99 Commission v Portugal [2001] ECR I-4845, at I-4847, point 27.

(69) OJ 1992 L 95, p. 1.

(70) See the second recital in the preamble to Regulation No 881/92.

(71) See, inter alia, Case C-266/96 Corsica Ferries France [1998] ECR I-3949, paragraph 56; Joined Cases C-369/96 and C-376/96 Arblade and Others [1999] ECR I-8453, paragraph 33; Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 21; and Joined Cases C-430/99 and C-431/99 Sea-Land Service and Nedlloyd Lijnen [2002] ECR I-5235, paragraph 32.

(72) Case C-381/93 Commission v France [1994] ECR I-5145, paragraph 17.

(73) See Commission v France , cited in footnote 72 above, paragraph 14; Case C-224/97 Ciola [1999] ECR I-2517, paragraph 11; and Sea-Land Service and Nedlloyd Lijnen , cited in footnote 71 above, paragraph 32.

(74) As regards justification for discriminatory measures based on nationality, see Case C-484/93 Svensson and Gustavsson [1995] ECR I-3955, paragraph 15, and, more recently, Case C-388/01 Commission v Italy [2003] ECR I-721, paragraph 19.

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SUB	Transport ; Taxation ; Principles, objectives and tasks of the Treaties
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PROCEDU	Reference for a preliminary ruling
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Opinion of Mr Advocate General Mischo delivered on 27 February 2003.
EVN AG et Wienstrom GmbH v Republik Osterreich.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Directive 93/36/EEC - Public supply contracts - Concept of the most economically advantageous tender - Award criterion giving preference to electricity produced from renewable energy sources - Directive 89/665/EEC - Public procurement review proceedings - Unlawful decisions - Possibility of annulment only in the case of material influence on the outcome of the tender procedure - Illegality of an award criterion - Obligation to cancel the invitation to tender.
Case C-448/01.

1 As a result of review proceedings initiated by a tenderer whose tender was rejected by the contracting authority and who contends that a criterion, relating to the supply of green electricity, for the award of a contract was unlawful, the Bundesvergabeamt (Federal Procurement Office) (Austria) has asked the Court to interpret Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (1) and Articles 1 and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. (2)

I - The legal context

A - The Community legislation

2 Article 26 of Directive 93/36 is headed `Criteria for the award of contracts' and reads as follows:

`1. The criteria on which the contracting authority shall base the award of contracts shall be:

...

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

2. In the case referred to in point (b) of paragraph 1, the contracting authority shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.'

3 Article 1(3) of Directive 89/665 provides as follows:

`3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

4 Article 2(1)(b) and Article 2(6) of Directive 89/665 provide as follows:

`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

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...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

5 Article 3(2) of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (3) reads as follows:

`Having full regard to the relevant provisions of the Treaty, in particular Article 90, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to reliability, including reliability of supply, regularity, quality and price of supplies and to environmental protection. Such obligations must be clearly defined, transparent, non-discriminatory and verifiable; they, and any revision thereof, shall be published and notified to the Commission by Member States without delay. As a means of carrying out the abovementioned public service obligations, Member States which so wish may introduce the implementation of long-term planning.'

6 The second recital of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (4) states that:

`The promotion of electricity produced from renewable energy sources is a high Community priority as outlined in the White Paper on Renewable Energy Sources... for reasons of reliability and diversification of energy supply, of environmental protection and of social and economic cohesion. That was endorsed by the Council in its resolution of 8 June 1998 on renewable sources of energy.'

7 The 12th recital of Directive 2001/77 states:

`The need for public support in favour of renewable energy sources is recognised in the Community guidelines for State aid for environmental protection, which, amongst other options, take account of the need to internalise external costs of electricity generation. However, the rules of the Treaty, and in particular Articles 87 and 88 thereof, will continue to apply to such public support.'

8 According to the 18th recital of the same directive:

`It is important to utilise the strength of the market forces and the internal market and make electricity produced from renewable energy sources competitive and attractive to European citizens.'

9 The purpose of Directive 2001/77 is, according to Article 1 thereof:

`to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof'.

10 Article 3(1) of the same directive provides as follows:

`Member States shall take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2. These steps must be in proportion to the objective to be attained.'

11 Article 3(2) of Directive 2001/77 provides that each Member State is to set national indicative targets.

12 Article 3(4) of the same directive provides that, on the basis of the Member States' reports,

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the Commission is to assess whether the national indicative targets are consistent with the global indicative target of 12% of gross national energy consumption by 2010 and in particular with the 22.1% indicative share of electricity produced from renewable energy sources in total Community electricity consumption by 2010.

13 Article 5(1) of Directive 2001/77, entitled `Guarantee of origin of electricity produced from renewable energy sources', provides that:

`Member States shall, not later than 27 October 2003, ensure that the origin of electricity produced from renewable energy sources can be guaranteed as such within the meaning of this Directive according to objective, transparent and non-discriminatory criteria laid down by each Member State. They shall ensure that a guarantee of origin is issued to this effect in response to a request.'

B - The national legislation

14 In Austria the conclusion of public contracts is governed by the Bundesvergabegesetz (Federal Procurement Law, Bundesgesetzblatt für die Republik Osterreich I, 1997/56, `the BVergG').

15 Paragraph 117 of the BVergG provides as follows:

`1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) significantly affects the outcome of the award procedure.

2. The setting aside of an unlawful decision may, in particular, take the form of the removal of discriminatory conditions for undertakings relating to technical, economic or financial specifications in the contract documents or in any other document relating to the contract award procedure.

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.'

II - The main proceedings

16 The Republic of Austria, as the contracting authority (`the defendant in the main proceedings'), invited tenders for the supply of electricity in an open procurement procedure. The subject of the award was the conclusion of a framework agreement, followed by individual contracts, for the supply of electricity to all the Federal Republic's administrative offices in the Land of Carinthia. The contract period was from 1 January 2002 to 31 December 2003. The invitation to tender, which was published in the Official Journal of the European Communities on 27 March 2001, included the following provision under the heading `Award criteria':

`The economically most advantageous tender according to the following criteria:

effect of the services on the environment in accordance with the contract documents.'

17 The tender had to state a price in ATS per kilowatt hour. This was to apply for the whole contract period and was not to be subject to escalation or adjustment. In addition to supplying electricity, the supplier was required to provide other services (in particular, to measure the electricity used by the Federal offices, to calculate the annual consumption, etc.). The supplier had to undertake to supply the Federal offices, so far as technically possible, with electricity from renewable energy sources and in any case not knowingly to supply electricity generated by nuclear fission. However, the supplier was not required to submit proof of his sources of supply. In the event of a breach of the undertaking to supply electricity from renewable energy sources or the undertaking not to supply electricity generated by nuclear fission, it would be open to the contracting

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authority to terminate the contract and to impose a penalty.

18 In the introduction to the tender documents it was stated that the contracting authority was aware that for technical reasons no supplier could guarantee that the electricity he supplied to a particular customer had actually been generated from renewable sources. Nevertheless the authority had decided to contract with tenderers who could supply at least 22.5 gigawatt hours per annum of electricity generated from renewable sources. The annual consumption of the Federal offices to which the contract related had been estimated at approximately 22.5 gigawatt hours. However, any differences between this tentative figure and the quantity actually supplied would not affect the agreed price per kilowatt hour.

19 It was specified as a particular ground for elimination that tenders would be eliminated if they did not contain proof that `in the past two years and/or in the next two years the tenderer has generated or purchased, and/or will generate or purchase, and has supplied and/or will supply to final customers, at least 22.5 gigawatt hours per annum of electricity generated from renewable sources'. The award criteria laid down were net price per kilowatt hour, which was given a weighting of 55%, and `electricity from renewable sources', which was given a weighting of 45%. As regards the latter criterion, it was stipulated that `only the amount of energy that can be supplied from renewable sources in excess of 22.5 gigawatt hours per annum will be taken into account'.

20 The tenders were opened on 10 May 2001. Four tenders had been submitted. That of the Kärntner Elektrizitäts-Aktiengesellschaft/Stadtwerke Klagenfurt (`KELAG') consortium stated a price of ATS 0.44 per kilowatt hour and, referring to a table showing the origin and the quantities of electricity generated or supplied by it, stated that it was able to supply an aggregate amount of renewable electricity of 3 406.2 gigawatt hours. Energie Oberösterreich AG also submitted a tender for a price of ATS 0.4191 per kilowatt hour if consumption exceeded 1 million gigawatt hours per annum and included a table for 1999 to 2002 showing the different amounts of electricity which could be supplied from renewable sources in each year in that period. The largest quantity shown was 5 280 gigawatt hours per annum. A tender was also submitted by BEWAG, showing a price of ATS 0.465 per kilowatt hour and including a table showing the proportion of the total electricity generated or supplied by it which was accounted for by renewable energy. The contracting authority concluded from the table that the quantity stated was 449.2 gigawatt hours.

21 The last tender was submitted by a consortium consisting of EVN AG and Wienstrom GmbH (`the applicants in the main proceedings'), which offered a price of ATS 0.52 per kilowatt hour. This tender gave no specific figures for the amount of electricity which could be supplied from renewable energy sources, but merely stated that the applicants in the main proceedings had their own electricity generation plants in which they generated electricity from renewable energy sources in a quantity of many times the annual consumption shown in the invitation to tender, which was 22.5 gigawatt hours. In addition, they had option rights in respect of the electricity generated by hydroelectric power stations of Osterreichische Elektrizitätswirtschafts-Aktiengesellschaft and other Austrian hydroelectric power stations, and other purchased energy derived mainly from long-term coordination contracts with the largest supplier of electricity certified as coming from renewable sources. In 1999 and 2000, only hydroelectric power from Switzerland was purchased and would continue to be purchased. In total, the quantity of electricity which would be supplied from renewable sources was many times greater than the amount which was the subject of the invitation to tender, and reference was made to the annual accounts for further information.

22 The defendant in the main proceedings considered that, of the four tenders submitted, the best was that of KELAG, which received the most points for each of the two award criteria. The applicants in the main proceedings received the fewest points in respect of both criteria.

23 After informing the contracting authority as early as 9 May and 30 May 2001 that they considered

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that various provisions of the invitation to tender, including the award criterion relating to `electricity generated from renewable energy sources', were unlawful, the applicants in the main proceedings applied on 12 June 2001 for conciliation proceedings before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission). The Commission refused to conduct conciliation proceedings on the ground that there was no prospect of success.

24 The applicants then lodged an application for review with the Bundesvergabeamt. They asked for the various decisions to be set aside, in particular the decision rejecting the tender for want of information on the generation and purchase of electricity from renewable energy sources during a certain period, the decision prescribing as an award criterion the provision of information on the generation and purchase of electricity from renewable energy sources in a certain quantity during a certain period, and the decision prescribing as an award criterion the availability of more than 22.5 gigawatt hours of electricity from renewable sources. In addition, the applicants applied for an interim order prohibiting the contracting authority from awarding the contract.

25 By decision of 16 July 2001 the Bundesvergabeamt granted the applicants' application and prohibited the award of the contract initially before 10 September 2001. On a further application by the applicants, the Bundesvergabeamt, by decision of 17 September 2001, made an interim order authorising the contracting authority to award the contract on condition that the award would be withdrawn and the contract rescinded if even only one of the applications to the Bundesvergabeamt by the applicants were granted or if the decision to award the contract in question to one of the applicants' co-tenderers were found to be unlawful as a result of any other finding of the Bundesvergabeamt.

26 On 24 October 2001 the framework agreement was awarded to KELAG, subject to the conditions subsequent set out in the aforementioned decision.

III - The questions referred

27 In order to determine the applications in the review proceedings for certain decisions of the contracting authority to be set aside, the Bundevergabeamt, by order of 13 November 2001, referred the following questions to the Court for a preliminary ruling:

`1. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates?

2. Do the provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Directive 89/665/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure?

3. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion?

4. Do the provisions of Community law relating to the award of public contracts, in particular

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Article 26 of Directive 93/36/EEC, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665/EEC that one of the award criteria it laid down is unlawful?'

IV - Discussion

A - The Court's jurisdiction to reply to the questions

28 In its written observations, the Commission is uncertain as to whether the Court of Justice has jurisdiction to reply to the questions referred to it, in view of the fact that, according to the Commission, decisions of the Bundesvergabeamt are not of the nature of judgments.

29 In this connection I refer to paragraphs 18 to 26 of my opinion in Case C-249/01 Hackermüller, (5) in which I took the view, after examining the same question, that the Bundesvergabeamt must be deemed a court or tribunal within the meaning Article 234 EC if it exercises its powers before the award of the contract, as in the present case.

30 Therefore I consider that the Court has jurisdiction to reply to the questions submitted by the Bundesvergabeamt.

B - The first question

31 The first question asked by the Bundesvergabeamt is whether the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates.

32 It appears from the observations in the order for reference that this question summarises a number of problems confronting the Bundesvergabeamt. Therefore I propose to deal with them in the order in which they arise.

1. Admissibility of criteria for obtaining advantages not susceptible of direct financial evaluation

33 First of all, the Bundesvergabeamt questions whether the Community law of public contracts permits the contracting authority to lay down criteria seeking to obtain advantages not susceptible of direct financial evaluation, such as respect for the environment. The Bundesvergabeamt has certain doubts on this point in view of the fact that, according to its findings, the Commission considers that an award criterion must procure a direct economic advantage to the contracting authority.

34 It must be observed that, since the Bundesvergabeamt formulated its question and the interveners submitted their written observations, the Court has stated its position on this point in the judgment of 17 September 2002 in Case C-513/99 Concordia Bus Finland. (6)

35 In paragraph 69 of that judgment the Court held that `where... the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria... provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination'.

36 In addition, in paragraph 55 of the same judgment, the Court expressly found that Article 36(1)(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for

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the award of public service contracts, (7) the text of which is in substance the same as that of Article 26(1)(b) of Directive 93/36, `cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature ...'.

37 Therefore, subject to the conditions formulated by the Court which are set out above, it is lawful for a contracting authority to include in an invitation to tender award criteria relating to the environment. There is no doubt that the supply of green electricity can be described as such a criterion, which is confirmed by the judgment in Case C-379/98 PreussenElektra, (8) according to which `the use of renewable energy sources for producing electricity... is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat'. (9)

2. Verification by the contracting authority of the question whether a tender meets the award criterion formulated in the invitation to tender

38 Secondly, according to the Bundesvergabeamt, a problem arises with regard to the way in which the contracting authority has specifically formulated the criterion of `renewable energy'. The Bundesvergabeamt observes that the authority itself admitted that it was unable to check technically whether the electricity supplied was actually generated from renewable energy sources. In those circumstances, the question had to be asked whether the contracting authority was permitted to lay down an award criterion where it was impossible to ascertain whether that criterion enabled the desired objective to be attained.

39 The Netherlands Government alone expressly discusses this problem raised by the Bundesvergabeamt. According to that government, the provisions of Community law applying to the procedures for the award of contracts require a contracting authority to use only award criteria which permit the accuracy of the information given by suppliers regarding the award criteria to be actually checked.

40 I concur with the Netherlands Government's position.

41 As the Netherlands Government points out, `[if] a contracting authority were permitted to prescribe award criteria while at the same time stating that it was neither willing nor able to verify whether the suppliers presented correct information on that subject in their tenders, the authority's decision-making process could not take place in an objective and transparent manner.... Such a method of awarding a contract would be contrary to the general principles of the law of public contracts, as recognised by the Court in its case law, in particular the principles of equality and transparency, and the prohibition of arbitrary decisions'.

42 On this point reference may be made to the judgment in Case C-243/89 Commission v Denmark, (10) where the Court observed that `observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers'. (11)

43 In the same way, in the judgment in Case C-19/00 SIAC Construction (12) the Court observed that `when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers'. (13)

44 It seems to me that there is no guarantee that an award criterion will be applied objectively and uniformly to all tenderers if the contracting authority indicates in the invitation to tender that it will not check whether the tenderers actually meet that criterion.

45 Certainly it is not easy to establish the source of the electricity supplied to consumers because they have no means of knowing whether the current from the socket is generated from renewable energy

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sources or not.

46 This difficulty was recognised by the Court in the PreussenElektra judgment cited above, at paragraph 79 of which the court observed that `the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced'.

47 However, the Court added, at paragraph 80 of the same judgment, that `in that respect, the Commission took the view, in its proposal for a Directive 2000/C 311 E/22 of the European Parliament and of the Council on the promotion of electricity from renewable energy sources in the internal electricity market (OJ 2000 C 311 E, p. 320), submitted on 31 May 2000 [which has in the meantime become Directive 2001/77] that the implementation in each Member State of a system of certificates of origin for electricity produced from renewable sources, capable of being the subject of mutual recognition, was essential in order to make trade in that type of electricity both reliable and possible in practice'.

48 It follows that, even though it is not easy to determine the source of the electricity supplied, there are means of doing so, for example, by requiring certificates or, as the Netherlands Government observes, `by requiring tenderers to prove the quantity of electricity which is generated or purchased by them and comes from renewable sources, as well as the quantity from renewable sources which is intended, in accordance with the contracts they have made, for customers other than the contracting authority'.

3. The causal connection between the award criterion and the contracting authority's purpose

49 Thirdly, according to the Bundesvergabeamt, `there is a further problem with regard to the award criterion laid down. Since all that is evaluated is the amount of electricity which can be supplied from renewable sources, whereas how far the actual recipient of the award, on the basis of his generation structure, in fact contributes to increasing the generation of electricity from renewable sources is not examined, it appears questionable whether the purpose pursued by the authority can be achieved at all by means of this award criterion. It is certainly conceivable that the amount of electricity generated from renewable sources is not influenced at all by this award criterion, since it is entirely up to the award recipient whether he generates such electricity himself or purchases it from other sources'. (14)

50 On this point, as the Netherlands Government, which is the only participant in these proceedings to state its position on this problem raised by the Bundesvergabeamt, rightly observes, given the nature of the service to be provided, namely the supply of electricity from renewable sources, it is immaterial whether the supplier generates it himself or purchases it from other suppliers of the same kind of electricity. Electricity from a renewable source is by nature comparable, whether it is generated by the supplier or by a third party.

51 I also consider that the fact that the award criterion does not, according to the findings of the Bundesvergabeamt, permit the purpose pursued by the contracting authority, namely increasing the generation of electricity from renewable energy sources, to be achieved, is not in itself evidence that that criterion is contrary to the Community legislation on public contracts.

52 Even if the aims relating to the protection of the environment pursued by the contracting authority by including that criterion are not achieved, it does not follow that an environmental criterion in an invitation to tender would be unlawful.

4. The connection between the award criterion and the subject-matter of the contract

53 Fourth, according to the Bundesvergabeamt, `since the criterion in question was concerned only with how much could be supplied, and not how much could be supplied to the authority - in this regard the authority committed itself exclusively to electricity from renewable sources in any case - it

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appears questionable whether there are any direct economic advantages for the authority linked to such an award criterion'.

54 The question of the connection between the award criterion and the subject-matter of the contract has been discussed at length by the participants in these proceedings.

55 The defendant in the main proceedings and the Austrian Government consider that, when determining the most economically advantageous tender in the award procedure in question, by taking into account, in addition to the price, the amount of green electricity which each tenderer was able to supply over and above 22.5 gigawatt hours, which had to be supplied in any case, the contracting authority gave the reliability of supply of electricity of a particular quality the status of an award criterion.

56 On this point the Austrian Government observes that, the greater the amount of power available to an undertaking, the greater the reliability of supply, thus guaranteeing supply of the amount required during periods of peak demand on the electricity network or when there is a large temporary rise in consumption by the electricity buyer.

57 According to the same Government, supported by the defendant in the main proceedings, the reliability of supply as such is certainly a criterion which has some bearing upon the contract, but rather an economic criterion: the more efficient a tenderer is, the smaller the risk that the contracting authority's demand for electricity will not be met and that it will have to find a costly alternative in the short term.

58 According to the Swedish Government, it does not appear from the actual wording of Directive 93/36 or from the case-law that the contracting entity must itself derive an economic advantage from the award criteria which it applies. The criteria laid down in the invitation to tender were, according to the same Government, likely to promote the generation of electricity from renewable energy sources, which results in advantages in the form of a smaller impact on the environment and thus to a better environment for everyone. This creates the conditions for lasting development, according to the same Government.

59 On the other hand, the applicants in the main proceedings, the Netherlands Government and the Commission consider that, in so far as the award criterion stipulates that only the amount of energy supplied from renewable sources in excess of 22.5 gigawatt hours per annum, which is the estimated annual consumption of the Federal offices covered by the contract, is to be taken into account, that criterion is contrary to Directive 93/36 because there is not a sufficient connection between that criterion and the subject-matter of the contract.

60 According to the applicants in the main proceedings, in fact the award criterion in question grades the tenderers' capacity to supply as much electricity as possible from renewable energy sources and, in that way, ultimately ranks the tenderers themselves. In fact, therefore, the criterion was a disguised criterion of selection.

61 How much weight should be attached to these arguments?

62 First of all, it is no doubt true, as the defendant in the main proceedings and the Austrian Government correctly observe, that in the judgment in Case C-324/93 Evans Medical and Macfarlan Smith, (15) the Court stated that `reliability of supplies is one of the criteria which may be taken into account... in order to determine the most economically advantageous tender...'.

63 However, the question whether the criterion in the present case aims to ensure the reliability of supply is a question of fact which must be settled by the national court.

64 The order of the Bundesvergabeamt makes no reference to the fact that this criterion should in reality be understood as seeking to ensure the reliability of supply. In the following discussion, therefore, I shall proceed on the assumption that the criterion in question does not have that

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purpose.

65 Consequently the question arises of whether Directive 93/36 requires a connection between the award criterion and the subject-matter of the contract.

66 In my opinion in the Concordia Bus Finland case, cited above, referring to the judgment in Case C-225/98 Commission v France, (16) in which the Court found that an award criterion relating to employment, connected with a local campaign against unemployment, was in principle valid, I said that such a requirement was not apparent. (17)

67 However, in the Concordia Bus Finland judgment, cited above, the Court expressed its clear opinion on that question when it observed, in paragraph 69, that `the contracting authority... may take into consideration ecological criteria... provided that they are linked to the subject-matter of the contract...'. (18)

68 As the applicants in the main proceedings, the Netherlands Government and the Commission rightly observe, an award criterion consisting in allotting points for the amount of electricity generated from renewable energy sources which the tenderer will be able to supply to a group of consumers not more closely defined, account being taken only of the supply volume exceeding the consumption to be expected in the context of the invitation to tender, is not connected with the subject-matter of the contract. It is clear from the very wording of this criterion that it does not relate specifically to the actual subject-matter of the contract.

69 In my opinion, therefore, such a criterion is contrary to the requirements arising from Directive 93/36.

70 In addition, in the present it seems to me that it may give rise to discrimination between suppliers, in particular between small suppliers and large suppliers.

71 Let us suppose there are two suppliers who are able to supply the amount of electricity which is the subject of the contract, namely approximately 22.5 gigawatt hours per annum of green electricity. One is a small supplier specialising in green electricity for whom the contract in question is an important one. The other is a very large supplier for which green electricity is only a small part of its business but which nevertheless, by virtue of its size, is capable of supplying more green electricity than the small supplier. By definition, the contract in question is only a small contract for the very large supplier.

72 This example, although hypothetical, shows that, of the two suppliers who are perfectly capable of fulfilling the contract conditions, in reality the criterion in question only favours the large supplier because of its size. However, the size of an undertaking is not in itself an objective reason justifying a difference in the treatment of two tenderers who are able to fulfil the conditions connected with the subject of a contract.

5. The contracting authority's omission to specify, in the invitation to tender, the period for which tenderers must state in their tenders the amount of electricity from renewable sources which they can supply

73 Fifth, the Bundesvergabeamt finds that `the contracting authority omitted to fix any specific supply period for which the amount that could be supplied was to be stated'. The Bundesvergabeamt concludes from this that `it appears that the criterion laid down was not at all open to exact examination and allowed the authority too wide a discretion, that is to say it was incompatible with the principle of comparability of tenders, which derives from the requirement of transparency'.

74 As the Netherlands Government, which is the only intervener to comment expressly on this point, correctly observes, the tenderers must be informed in advance of the award criteria chosen by the contracting authority and the criteria must be formulated in such a way that the different tenders

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can be compared fairly and objectively.

75 In this connection, reference may be made to the SIAC Construction judgment cited above, in paragraph 42 of which the Court observed that `the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way'.

76 It is for the national court to determine whether, having regard to all the documents submitted in the main proceedings, the award criteria of the contract in question meet that requirement.

6. The 45% weighting given to the award criterion

77 Finally, according to the Bundesvergabeamt, `it appears that giving the disputed criterion a weighting of 45% is problematic, since it could be objected that the authority must not permit considerations not open to monetary evaluation to influence the award decision to such a degree'.

78 On this point I consider that, provided that the authority applies valid criteria, it is free to decide on the weighting of those criteria, as the defendant in the main proceedings observes.

79 In paragraph 42 of the Evans Medical and Macfarlan Smith judgment, cited above, the Court stated that `in selecting the most economically advantageous tender, contracting authorities may choose the criteria which they intend to apply, but their choice may relate only to criteria designed to identify the most economically advantageous tender'.

80 If the contracting authority is free to choose the award criteria, I think it is also free to choose the weighting between them, provided that the weighting aims to identify the most economically advantageous tender.

7. Conclusion relating to the first question

81 Taking account of the foregoing, I propose that the reply to the first question from the Bundesvergabeamt should be that the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates.

C - The second question

82 The second question from the Bundesvergabeamt is whether the provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Directive 89/665, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665 dependent on proof that the unlawful decision was material to the outcome of the procurement procedure.

83 With regard to this question, the Bundesvergabeamt observes that the national provision which it must apply in the review proceedings `does not permit the Bundesvergabeamt to set aside a decision by the authority merely on the ground that it regards it as unlawful. Instead, the relevant provision, Paragraph 117(1)(2) of the BVergG, requires that the decision contested in review proceedings must also have been of material influence for the outcome of the procurement procedure'. The Bundesvergabeamt is uncertain whether such a condition is consistent with Community law.

84 On this point it must be observed, as the Austrian Government points out, that the national provision concerned relates to the question of under what conditions a decision by the contracting authority may be set aside, and not the question, governed by Article 1(3) of Directive 89/665,

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of the conditions under which a tenderer may seek a review.

85 Secondly, as the Austrian Government rightly notes, Directive 89/665, and in particular Article 2(1)(b), (19) does not lay down such conditions for setting aside a decision. Specifically, the directive does not state whether the setting aside of an unlawful decision in the context of review proceedings under Article 1 of the same directive may be subject to a requirement of proof that the unlawful decision materially affected the outcome of the award procedure.

86 It is clear from the judgments in Case C-92/00 Hospital Ingenieure (20) and Case C-470/99 Universale-Bau and Others (21) that Community law does not in principle prevent national law from regulating aspects of the review procedure which are not provided for by the directive, `provided that the relevant national rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness) (see, by analogy, Case C-390/98 Banks [2001] ECR I-6117, paragraph 121; Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraph 29)'. (22)

87 Consequently the national court must ascertain whether, taking account of the circumstances of the case, the abovementioned condition is less favourable than that concerning similar domestic actions and whether it makes it practically impossible or excessively difficult to exercise rights conferred by the Community legal order.

88 I therefore propose that the reply to the second question should be that the provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Directive 89/665, do not prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665 dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, provided that such condition is not less favourable than that applying to similar domestic actions (principle of equivalence) and that it does not make it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness).

D - The third question

89 The third question from the Bundesvergabeamt is whether the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665 dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion.

1. Comments of the Bundesvergabeamt

90 Regarding this question, the Bundesvergabeamt observes that `the legislative materials required to be taken account under the national approach to interpretation indicate that the question as to whether a contested decision of an authority was material for the outcome of the award procedure is to be examined by the review body by determining whether the award would have been made to a different tenderer had the authority proceeded lawfully'.

91 According to the Bundesvergabeamt, this means that `the review body ought to have ignored the award criterion held to be unlawful and examined the tenders actually submitted by reference to the remaining award criteria and decided whether this results in a different ranking from that following the examination carried out by the authority'.

92 However, the Bundesvergabeamt is uncertain as to whether that approach is compatible with Community

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law. It observes that `on the approach evidently required by domestic law, the award decision would be made in the review proceedings, and in that case the tenders would be evaluated on the basis of a weighting of criteria which had not been notified to the tenderers and which they accordingly could not take into account in drawing up their tenders. This result... appears to be incompatible with Article 26(2) of Directive 93/36, especially as a tenderer could legitimately argue that, if he had known that a different weighting of the criteria would be applied (in the present case 100% price instead of 55% price), he would accordingly have drawn up his tender in a different way'.

93 If this reasoning must be accepted, the only alternative, according to the Bundesvergabeamt, seems to be `cancellation of the invitation to tender, since otherwise the invitation to tender would be conducted on the basis of a weighting of criteria which was neither laid down by the authority nor notified to the tenderers'.

2. The parties' submissions

94 In their written observations, the defendant in the main proceedings and the Austrian Government do not share the doubts of the Bundesvergabeamt as to whether the approach described by it is compatible with Community law.

95 The defendant in the main proceedings maintains that a breach of the rules concerning the award of public contracts which does not result in a different ranking of tenders in no way affects the choice of the best tender. However, according to the Austrian Government, if the choice of the best tender is not affected, a tenderer who seeks a judicial review will obtain neither the contract nor compensation.

96 The same Government adds that disregarding the criterion in question would not have altered the award procedure in any way. The reason was that KELAG had also offered by far the lowest price.

97 The Austrian Government contends that it is impossible to see why review proceedings should take place at the request of a tenderer whose ranking gave no grounds for hope and where the alleged irregularity in the award procedure did not mean in any case that he or any other third parties concerned would have been given a higher ranking even if the award procedure had been properly conducted.

98 At the hearing, however, the Austrian Government asserted that the Bundesvergabeamt had raised the third question on the basis of an Austrian provision which had been repealed several years previously and that, in substance, the Government agreed with the view expressed by the Commission.

99 The Commission and the applicants in the main proceedings consider that the approach described by the Bundesvergabeamt is contrary to Community law.

100 The applicants contend that to ignore a prescribed award criterion, even if it is unlawful, is to disregard the central principles of Community law on the award of public contracts, such as publicity and transparency.

101 The Commission observes that the third question should not arise because neither the contracting authority nor the review body could change the award criteria after they had been notified.

102 The Swedish and the Netherlands Governments did not comment on this question.

3. Assessment

103 Let me begin by noting that the Austrian Government's remark that the Bundesvergabeamt had raised the third question on the basis of an Austrian provision which had been repealed several years previously should not prevent the Court from replying to the question.

104 It has consistently been held that it is solely for the national court to determine the relevance

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of the questions which it submits to the Court. (23)

105 Secondly, taking account of the Bundesvergabeamt's observations and my proposed reply to the second question, I consider that the third question must be understood as asking, in substance, whether a rule of domestic law, such as Paragraph 117 of the BVergG, which, in order for an unlawful decision in review proceedings to be set aside, requires proof that the decision materially affected the outcome of the award procedure, conflicts with the principle of effectiveness in so far as that rule requires the national court to ascertain whether the ranking of the tenders actually submitted would be different if they were re-evaluated without regard to the unlawful award criterion.

106 I think the reply to this question must be in the affirmative.

107 As the Commission rightly points out, the Court made the following observations in the SIAC Construction judgment cited above:

`41 ... [T]he principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31).

42 More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

43 This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure (see, along these lines, Case C-87/94 Commission v Belgium, cited above, paragraphs 88 and 89)'. (24)

108 It follows that, with all the more reason, the award criteria must be interpreted in the same way throughout the entire procedure in order to uphold the principle of equal treatment.

109 In so far as it is based on the principle of equal treatment, this reasoning cannot be called into question by the Austrian Government's reference, in its written observations, to the French and English versions of Article 26(2) of Directive 93/36, (25) from which it is said to follow that alteration of the award criteria in the course of the procedure cannot in principle be ruled out.

110 The provision that the award criteria are not to be altered in the course of the procedure will not be fulfilled if the review body which is required to establish whether the conditions for setting aside a decision are fulfilled, carries out a re-evaluation of the tenders without regard to one of the award criteria.

111 In reality, this approach amounts to altering the criteria as laid down by the adjudicating authority, and this cannot be presumed to have no effect on the situation of the different tenderers.

112 On this point, as the Bundesvergabeamt and the applicants in the main proceedings correctly observe, if the award criteria formulated in the invitation to tender had been other than those actually shown in it, a tenderer who requested a review and the other tenderers as well could have submitted a different tender. In the present case, as the Bundesvergabeamt rightly points out, it was entirely conceivable that a tenderer who wanted to score points on the basis of the renewable source criterion would have tendered a lower price if he had known that ultimately the price criterion alone would be applied.

113 I therefore propose that the reply to the third question should be that the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665 dependent on proof that the unlawful decision was material to the outcome of the procurement

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procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion.

E - The fourth question

114 The fourth question from the Bundesvergabeamt is whether the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that one of the award criteria it laid down is unlawful.

115 It is clear from the Bundesvergabeamt's observations concerning the third question that the third and the fourth questions are closely connected in that, in the Bundesvergabeamt's opinion, if the third question receives a reply in the affirmative, that would automatically lead to the same reply to the fourth.

116 The interveners who have commented on this question have also proposed that the reply be the same as that to the third question.

117 For my part, I think the fourth question must be reworded if it is to receive a helpful reply.

118 The mere fact that, in review proceedings under Article 1 of Directive 89/665, one of the award criteria is found to be unlawful cannot lead to the conclusion that the contracting authority must withdraw the invitation to tender.

119 As the defendant in the main proceedings and the Austrian Government correctly observed at the hearing, if a review is requested after the conclusion of the contract and if a Member State exercises its power under the second subparagraph of Article 2(6) of Directive 89/665, (26) a finding, in the course of the review proceedings, that an award criterion is unlawful will not lead to the withdrawal of the invitation to tender, but only to compensation for the rejected tenderer.

120 The question which arises is therefore whether the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that one of the award criteria it laid down is unlawful and is therefore set aside by the review body.

121 If worded in this way, I think the question must be answered in the affirmative.

122 As is clear from the discussion of the third question, the award criteria must remain the same throughout the entire tendering procedure. Therefore a contracting authority cannot continue the procedure if an award criterion is set aside by a review body.

123 Consequently I propose that the reply to the fourth question should be that the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, require a contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that one of the award criteria it laid down is unlawful and is therefore set aside by the review body.

V - Conclusion

124 Having regard to the foregoing observations, I propose that the following replies be given to the questions from the national court:

- First question

The provisions of Community law relating to the award of public contracts, in particular Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public

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supply contracts, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates.

- Second question

The provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts do not prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, provided that such condition is not less favourable than that applying to similar domestic actions (principle of equivalence) and that it does not make it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness).

- Third question

The provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion.

- Fourth question

The provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, require a contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665/EEC that one of the award criteria it laid down is unlawful and is therefore set aside by the review body.

(1) - OJ 1993 L 199, p. 1.

(2) - OJ 1989 L 395, p. 33.

(3) - OJ 1997 L 27, p. 20.

(4) - OJ 2001 L 283, p. 33.

(5) - Pending before the Court of Justice.

(6) - Not yet published in ECR.

(7) - OJ 1992 L 209, p. 1.

(8) - [2001] ECR I-2099.

(9) - Paragraph 73.

(10) - [1993] ECR I-3353, paragraph 37.

(11) - Emphasis added, See also the judgment in Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 70.

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(12) - [2001] ECR I-7725, paragraph 44.

(13) - Emphasis added.

(14) - Emphasis added.

(15) - [1995] ECR I-563, paragraph 44.

(16) - [2000] ECR I-7445.

(17) - Paragraphs 110 to 112 of my opinion. The subject of discussion was Directive 92/50, the relevant provisions of which are in essence the same as those of Directive 93/36. See paragraph 36 above.

(18) - Emphasis added.

(19) - `1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.'

(20) - [2002] ECR I-5553.

(21) - Not yet published in ECR.

(22) - Hospital Ingenieure judgment, cited above, paragraph 67.

(23) - See, in particular, the judgments in Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59; Case C-66/00 Bigi [2002] ECR I-5917, paragraph 18, and Case C-153/00 Der Weduwe, not yet published in ECR, paragraph 31.

(24) - Emphasis added.

(25) - `Dans le cas visé au paragraphe 1 point (b), le pouvoir adjudicateur mentionne, dans le cahier des charges ou dans l'avis de marché, tous les critères d'attribution dont il prévoit l'utilisation, si possible dans l'ordre décroissant de l'importance qui leur est attribuée' and `In the case referred to in point (b) of paragraph 1, the contracting authority shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance'. Emphasis added.

(26) - `A Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

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JUDGRAP Skouris

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Opinion of Mr Advocate General Alber delivered on 10April2003. Traunfellner GmbH v Osterreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag). Reference for a preliminary ruling: Bundesvergabeamt - Austria. Directive 93/37/EEC - Public works contracts - Concept of a variant - Conditions for consideration and assessment for the purpose of awarding a contract. Case C-421/01.

I Introduction

1. The reference for a preliminary ruling from the Bundesvergabeamt (Federal Procurement Office, Austria) concerns the treatment of variants in a procedure for the award of public works contracts. One tenderer which was unsuccessful in its bid for the road construction contract concerned had submitted a tender proposing a lower-priced but, in its view, equivalent asphalt design instead of the concrete surface dressing stipulated in the tender document. This action concerns, on the one hand, the conditions governing the submission and subsequent assessment of variants (Questions 1 to 3) and, on the other hand, the potential repercussions of any improper treatment of variants, as the case may be, on a tendering procedure.

II Relevant legislation

A Community law: Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (2)(hereinafter: "Directive 93/37/EEC")

2. Article 19

"Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting authorities.

The contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They shall indicate in the tender notice if variants are not permitted.

...

"

3. Article 30

"1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.

...

"

B National law: the Bundesgesetz über die Vergabe von Aufträgen or Bundesvergabegesetz 1997 (Federal Procurement Law 1997; hereinafter: "BVergG") (3)

4. Paragraph 42

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"1. In procedures other than the negotiated procedure, tenderers must ensure that their tenders meet the requirements of the tender notice. The wording prescribed by the contract documents may not be amended or supplemented.

...

4. An alternative tender [or "variant" , to adopt the terminology used in Directive 93/37/EEC (4)] is admissible only if it ensures the performance of qualitatively equivalent work. It shall be for the tenderer to prove equivalence. An alternative tender may relate to the work as a whole, to parts of the work or to the legal conditions underlying the performance of the work. Alternative tenders shall be designated as such and shall be submitted separately.

...

"

5. Paragraph 117

"1. The Bundesvergabeamt must declare void, by a decision adopted following the recommendation of the conciliation chamber in the case, any decision adopted by a contracting authority in the course of an award procedure which:

1. is contrary to the provisions of this federal law or its implementing regulations, and

2. has a substantial bearing on the outcome of the award procedure.

...

3. Following the award of the contract, the Bundesvergabeamt shall simply establish, in accordance with the requirements of paragraph 1 hereof, whether or not the law has been infringed as claimed.

"

III Facts

6. Acting for and on behalf of the Autobahnen- und Schnellstraßen Finanzierungs-AG (Austrian Motorway and Expressway Financing Company; hereinafter: "Asfinag"), the Land Government of Lower Austria launched an open procedure throughout the Community on 27 November 1997 inviting tenders for the repair of the section "between the 100.2 km and 108.6 km points of the carriageway from Neumarkt to Vienna" . The contract concerned bridge and road construction works.

7. With regard to resurfacing outside the motorway bridge areas, the tender document stated under the heading "Official Design" that a dual-layer concrete overlay of surface quality should be laid but did not describe those features as minimum requirements. Nor did the tender document contain any explicit statements regarding minimum technical specifications that would have to be met by variants that might be submitted. The tender document stated that variants were admissible. However, any variants submitted had to be accompanied by a comprehensive list of works as required by the tender document (main tender). No contract award criteria for assessing the economic and technical quality of tenders (whether tenders conforming to the tender document or variants) were laid down. Nor did the tender document stipulate that variants had to ensure the performance of work equivalent to that defined in the official design (nor was any reference made to Paragraph 42 of the BVergG which lays down that requirement), and there was no explanation of what was meant by "performance of equivalent work" either.

8. Traunfellner, the plaintiff in the main proceedings, submitted both a tender conforming to the tender document and a variant. Its variant was the cheapest of all the tenders submitted but, of all the tenders conforming to the tender document, its own tender came second behind that submitted by the Ilbau LSH Fischer Heilit & Woerner consortium, to which the contract was awarded.

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9. In its variant, Traunfellner proposed substituting an asphalt overlay made from bitumen material for the concrete surface dressing. Technical clarification was provided in the form of an expert opinion which stated that under the conditions assumed for the section of carriageway concerned, the asphalt design would provide adequate resistance to deformation for a period of 20 years.

10. The technical test report commissioned by the Land government stated that, while a study on the possibility of substituting asphalt designs had been compiled in 1989, earlier contracts had shown that, despite careful execution of an asphalt design of this kind in compliance with the contract, grooves of considerable depth had appeared after only a short time and additional repair work had been necessary. It also pointed out that ensuring that the work would be performed in accordance with the official requirements if Traunfellner's variant was accepted would necessitate additional work at a cost of some ATS 2.5 million, thus reducing the price advantage to ATS 6.9 million. The report went on to explain that if the overlay was made of concrete, the new technologies were such that the road surface could be expected to resist deformation for at least 30 years. The concrete surface specified in the official design would, therefore, have a 50% longer life and cost only 8.5% more. Moreover, the objective of using existing old concrete to obtain a high-quality aggregate for the new concrete overlay (recycling) was not taken into account in the variant since only some of the existing crushed concrete would be used on site for secondary filling-in purposes. Much of the existing concrete surface would be put to an otherwise unspecified use off site. Preference was therefore to be given to the general repair of the carriageway in concrete, in accordance with the official tender document, at least in view of the lifetime and resistance to deformation of concrete. These two factors would, after all, reduce the subsequent need for maintenance, which in turn would result in less disruption to traffic and was therefore in keeping with the objective of minimising adverse effects on ease of movement, road safety and traffic flows. Accordingly, the variant should not be regarded as meeting the requirements of the official design and should therefore be disqualified. On the basis of that test report, the award commission decided on 17 March 1998 to propose that the contract be awarded to the Ilbau LSH Fischer Heilit & Woerner consortium.

11. Traunfellner requested that the referring Bundesvergabeamt annul the decision to disqualify its variant. The request was rejected on 21 April 1998 on the ground that the technical equivalence of the variant was not pertinent. It differed from the prescriptions of the tender document to such an extent that it was no longer an admissible variant. Even if it had been admissible, the referring court explained that it would not have been technically equivalent, as the contracting authority had the right to choose from among different technical systems.

12. Following that decision, the contract was awarded to the cheapest tender conforming to the tender document. The works have since been carried out.

13. Adjudicating on an appeal lodged by Traunfellner, the Verfassungsgerichtshof (Austrian Constitutional Court) overruled the decision of the Bundesvergabeamt of 21 April 1998 for failure to fulfil the obligation to state reasons. Under Austrian law, once the Verfassungsgerichtshof has annulled an administrative act (in this case, after the referring court's decision of 21 April 1998 had been overruled), the matter at issue is restored to the state it was in prior to the contested decision. The referring court is now required to give a fresh ruling on Traunfellner's request of 17 April 1998 for the annulment of the decision to disqualify the variant. However, as the award has since been granted, it merely remains for the court to determine in accordance with Paragraph 117(3) of the BVergG whether the decision to disqualify was lawful.

IV The questions referred for a preliminary ruling

14. The Bundesvergabeamt seeks to determine the circumstances in which a "variant" within the meaning of Article 19 of Directive 93/37/EEC arises, whether the "equivalence" criterion,

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used to assess variants, must be indicated in the tender documents and how a contracting authority should conduct itself where it subsequently transpires that its invitation to tender is defective. It has therefore referred the following questions to the Court of Justice for a preliminary ruling:

"Question 1: Is an alternative tender that consists in proposing an asphalt surface instead of overlaying the carriageway with concrete as specified in the tender notice a "variant" within the meaning of the first paragraph of Article 19 of Directive 93/37/EEC?

Question 2: Can a criterion established in national legislation to determine the admissibility of the acceptance of a "variant" within the meaning of the first paragraph of Article 19 of Directive 93/37/EEC, whereby "the performance of qualitatively equivalent work is ensured" by the variant, properly be regarded as a "minimum specification" required and stated by the contracting authority in accordance with the first and second paragraphs of Article 19 of Directive 93/37/EEC, if the contract documents refer only to the national provision and do not specify the comparative parameters to be used to assess "equivalence" ?

Question 3: Do Article 30(1) and (2) of Directive 93/37/EEC in conjunction with the principles of transparency and equal treatment prohibit a contracting authority from making the acceptance of an alternative tender, which differs from a tender conforming to the tender document in that it proposes a different technical quality, conditional on a positive assessment based on a criterion in national legislation requiring that "the performance of qualitatively equivalent work is ensured" if the contract documents refer only to the national provision and does not specify the comparative parameters to be used to assess "equivalence" ?

Question 4a: If the answer to Question 3 is in the affirmative, may a contracting authority conclude a tendering procedure like that described in Question 3 by awarding the contract?

Question 4b: If the answers to Questions 3 and 4a are in the affirmative, must a contracting authority conducting a tendering procedure as described in Question 3 reject variants proposed by tenderers without examining their contents, at any rate if it has not defined contract award criteria for assessing the technical differences between the variant and the tender notice?

Question 5: If the answers to Questions 3 and 4a are in the affirmative and the answer to Question 4b is in the negative, must a contracting authority conducting a tendering procedure as described in Question 3 accept a variant whose technical differences from the tender document it is unable to assess on the basis of contract award criteria owing to the absence of appropriate statements in the tender document if this variant is the lowest tender and contract award criteria have not otherwise been defined?

"

15. In support of its reference for a preliminary ruling the Bundesvergabeamt explains that the first question is designed to ascertain whether a tender proposing an asphalt road surface dressing instead of the concrete dressing specified in the tender document is a variant for the purposes of the first paragraph of Article 19 of Directive 93/37/EEC and whether the provisions of the directive which apply to variants can therefore be applied to the tender at issue.

16. It explains with regard to the second question that under Paragraph 42(4) of the BVergG the admissibility of accepting a variant depends on whether the performance of qualitatively equivalent work is ensured. It adds that assessing "equivalence" plays an important role in the award of contracts. In this case too, the contracting authority examined the variant for equivalence and concluded that it had none. However, the criteria applied by the contracting authority were not defined in the tender document or in the tender notice, as is standard practice for the contracting authorities in Austria.

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17. The Bundesvergabeamt considers such an approach to be inconsistent with Article 30 of Directive 93/37/EEC and with the principles of transparency and equal treatment. Such inconsistency could be avoided only if the requirement applicable to variants that the performance of the work must be equivalent was regarded as a "minimum specification" for the purposes of the second paragraph of Article 19 of the directive. In that case, there would no longer be any need to mention the specific comparative parameters as contract award criteria. In its view, such an interpretation runs counter to the principles of the directive. The second paragraph of Article 19 of the directive clearly requires contracting authorities to state the minimum specifications in the contract documents. Merely applying a provision of national legislation which lays down the equivalence criterion could not be regarded as a specification required by the contracting authority in the contract document.

18. In addition, a mere reference to equivalence that was not further defined did not satisfy the requirements for transparency, nor was it compatible with the meaning of the word "state" [German: "erläutern"]. This word meant to explain and describe in greater detail, something which the contracting authority did not do.

19. The Bundesvergabeamt states with regard to the third question referred that the directive leaves contracting authorities a choice between only the lowest-price criterion and the system of awarding the contract to the most economically advantageous tender. In the former case, variants are precluded from the outset under the first paragraph of Article 19 of the directive. In the latter case, contracting authorities are required under Article 30(2) of the directive to indicate in the tender notice or contract documents the criteria established for assessing the tenders.

20. That comparison demonstrates that where different qualities may be proposed, they must be examined on the basis of the contract award criteria defined by the contracting authority. However, if the contracting authority has not defined any contract award criteria, it seems perfectly clear to the Bundesvergabeamt that variants must not be assessed or indeed accepted. The approach adopted by the contracting authorities in Austria is, in this respect, inconsistent with the scheme of the directive.

21. The Bundesvergabeamt also considers such an approach to be contrary to the principle of transparency. If, for the purpose of examining variants, a contracting authority had recourse to the "equivalence of the performance of the work" which it had not previously defined by indicating specific comparative parameters, it would be taking into account criteria which it had not published in advance. That is, in its view, incompatible with the consistent case-law of the Court of Justice (5) and makes it impossible for tenderers to judge in advance, on the basis of published criteria, whether the anticipated contract or the preparation of variants is of interest to them. (6) It adds that, in practice, the use of the indeterminate term "equivalence" , which the contracting authority only defines subsequently when it is assessing variants, leads to considerable uncertainty and protracted legal disputes. The contracting authority finds itself in dispute either with tenderers which have submitted variants that it does not regard as equivalent to its own requirements or with tenderers which have not proposed variants and question the equivalence of variants that the contracting authority intends to accept. Tenderers can only guess beforehand what the contracting authority will regard as equivalent. This results in considerable uncertainty among tenderers which prepare speculative variants, as it were, as well as among tenderers which do not propose variants but have to expect that their tenders will be beaten by a variant which the contracting authority considers to be equivalent after all the tenders have been opened.

22. In effect, the approach adopted leads to the introduction of a third, unlawful "mixed system" operating between the award of contracts on the basis of price alone and their award on the basis of the most economically advantageous tender. This system is, according to the Bundesvergabeamt, inconsistent with the case-law of the Court. (7) Furthermore, the application of a criterion which

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depends on a mere reference to national legislation is unlawful. (8)

23. By Questions 4 and 5 the Bundesvergabeamt seeks ultimately to ascertain the manner in which a contracting authority must proceed where it is established in the course of a procedure for the award of a contract that the award procedure adopted in Austria is unlawful. One possible course of action would be to decide against awarding the contract and to revoke the invitation to tender. That option is supported by the fact that the tendering procedure was initiated under conditions which have proved unlawful and must consequently cease to be applied. However, a second possible course of action would be to continue with the tendering procedure. It is however essential in this regard to bear in mind that the tendering procedure would have to be completed under restrictions which had not been notified previously to the tenderers. The tenderers had submitted variants on the assumption that it was permissible to propose variants that would be examined by the contracting authority for "equivalence", a criterion which was not defined further. If it is not possible to apply the equivalence criterion as permitted by the national legal order, then essential conditions governing the preparation of tenders are altered ex post facto. Such a departure from the conditions forming the basis of the tender document might be regarded as an infringement of the principle of equal treatment. (9)

24. A decision not to award the contract and to initiate a fresh tendering procedure may well be, therefore, the only proper alternative. In such circumstances, the decision actually taken by the contracting authority to reject the variant proposed by the plaintiff in the absence of equivalence and to award the contract to another tenderer would certainly be unlawful. On the other hand, to decide not to award the contract at all and to require the contracting authority to proceed with a fresh invitation to tender might be regarded as too extreme a consequence of an infringement of some provisions of Community law, especially as the Community requirements in question may also be met simply by refraining from the application, contrary to Community law, of an otherwise undefined "equivalence" criterion.

25. If, on the other hand, the tendering procedure is to be concluded, it is then necessary to determine the arrangements for the award of the contract. The referring court takes the view that there are two options to consider here; under the first, the contracting authority rejects the variant and awards the contract on the basis of lowest price or most economically advantageous tender, the only criteria that may be applied being those required by the contracting authority. That option would meet the objectives of the directive since, under the system referred to in Article 30 of the directive, the different qualities that may be offered were to be assessed precisely on the basis of contract award criteria. The fact that differences in quality cannot be assessed on the basis of those criteria make it impossible to compare the tender with those submitted by competitors. Where a comparison of this kind is impossible, however, the tender concerned would have to be disqualified in accordance with the principles of equal treatment.

26. It would also be possible, however, to require the contracting authority to accept the variant and to ignore the associated qualitative differences. However, it would not be advisable to adopt that approach as the contracting authority would then have to accept a tender which did not meet the qualitative requirements it had itself specified, the contracting authority having had no possibility of assessing the qualitative differences against some kind of yardstick. That would be contrary to the purpose of the directive, as defined by the Court, since the contracting authority would not be able in that case to compare tenders or to choose the tender which it considered the most advantageous on the basis of objective criteria. (10)

V Arguments of the parties and assessment

A Admissibility

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27. In its written observations the Commission disputes the admissibility of the reference for a preliminary ruling. It refers to the arguments it put forward in Case C-314/01, in which it called into question the capacity of the Bundesvergabeamt as a court or tribunal within the meaning of Article 234 EC on the ground that its decisions are non-binding. However, it retracted that objection at the hearing in view of the judgment which has since been delivered in the Swoboda case. (11) The reference for a preliminary ruling is admissible.

B The first question referred for a preliminary ruling

1. Arguments of the parties

28. Traunfellner, Asfinag, the Austrian and French Governments all take the view that the offering of an asphalt dressing as opposed to the concrete dressing specified in the tender document is a variant within the meaning of Article 19 of Directive 93/37.

29. Traunfellner considers that a variant comes into play where the tender proposed relates to a new execution method, a different design, different material or other alternatives which ensure that the work is performed on a more practical or cheaper basis. Asphalt, it argues, is a technical alternative to concrete. Assessment should therefore be aimed at the technical equivalence of the tender, the load-bearing capacity, the transverse flatness and the non-skid quality.

30. Asfinag keeps to a more general approach in its observations, taking the view that a variant comes into play where parts of the work specified in the tender document are substituted in a tender.

31. The Austrian Government points to the drafting history of the provision. In its proposed amendment to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts the Commission had stated that only an amendment to the design plan or to the prescribed construction materials might be proposed. (12)

32. The French Government considers that the concept of a variant should be given a broad interpretation. In the tender document, which forms the basis of the main proceedings, concrete had not been defined as an absolutely necessary technical specification. Accordingly, asphalt was to be regarded as a variant.

33. The Commission points out that the question referred to the Court involves a point of fact that is essentially inadmissible. It may be answered only after it has been reworded. In its view, the question has to be construed as seeking to ascertain the conditions under which an alternative tender proposal can be regarded as a variant. It answers the question reworded in that manner by explaining that a procedure must be in place where the contract is awarded on the basis of the most economically advantageous tender, where variants may not be precluded and the proposed tender must meet the minimum specifications stated.

2. Assessment

34. By the first question the Bundesvergabeamt is seeking to ascertain whether the tender proposing the overlaying of an asphalt surface dressing constitutes a variant to overlaying with concrete as stipulated in the tender document.

35. This question involves including a specific point of fact under the Community concept of the "variant" within the meaning of Article 19 of Directive 93/37/EEC. Under the division of functions provided for by Article 234 EC, however, it is for the national court to apply the rules of Community law to an individual case. No such application is possible without a comprehensive appraisal of the facts of the case. (13) Consequently, the first question as it is currently worded is inadmissible.

36. The Court of Justice may, however, supply the referring court with an interpretation of Community

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law that will enable that court to resolve the legal problem before it. (14) Alternatively, should the Court decide to reword the first question, the following observations should therefore be made.

37. In the light of the Verfassungsgerichtshof's annulment of the first decision issued by the referring court on 21 April 1998 in this case, the first question must be understood as seeking to determine where the boundaries lie for the acceptance of a "variant" within the meaning of Article 19 of the Directive. When can one still speak of "variants" , and from what point does the work proposed differ from the work specified in the tender document to such an extent that the proposed amendment becomes inadmissible?

38. Although, reworded in this way, Question 1 becomes a point of law which the Court of Justice can in principle answer, it must be borne in mind that the proceedings before the Bundesvergabeamt relate to the award stage, not to the stage at which variants are assessed for their admissibility. According to the account in the order for reference, the contracting authority disqualified the variant at issue on the ground that it was not equivalent, not on the ground of its inadmissibility. Strictly speaking, the answer to Question 1 is consequently irrelevant to the dispute in the main proceedings and could therefore be regarded as a hypothetical question, which is inadmissible under consistent case-law. (15) The same argument applies to Question 2.

39. The first two questions make sense only if there is support for the Bundesvergabeamt's argument that appeals against decisions adopted by a contracting authority are inadmissible where the tendering procedure already involves an error in law at an earlier stage (in this case, the indication of minimum specifications in the tender document and the assessment of the admissibility of variants) but against which error there has been no objection (in this case, legal proceedings were not instituted until the contract had been awarded). The extent to which this view of the law is compatible with Community law, in particular with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (16) is the subject-matter of the proceedings in Case C-315/01 Gesellschaft für Abfallentsorgungs-Technik (GAT) . In his Opinion of 10 October 2002, Advocate General Geelhoed considered that approach to be incompatible with the review directive. (17) A judgment has not so far been delivered in that case. The question must remain unanswered in this case as it has not been discussed in the proceedings.

40. It is therefore necessary to point out in the alternative that variants under the first paragraph of Article 19 of Directive 93/37/EEC are inadmissible where they fail to satisfy the minimum specifications defined by the contracting authority. The point at which a variant comes into play therefore depends on the minimum specifications which are defined in the individual case by the contracting authority and which must be indicated in the tender document.

41. The parties' observations on the first question support the argument that everything turns on the circumstances of the individual case. The Commission points above all to procedural considerations, such as the award of contracts on the basis of the most economically advantageous tender and the absence of a measure excluding variants. However, it additionally focuses on compliance with the stated minimum specifications. The other parties mention specific aspects of the work specified in the tender document, such as new (construction) execution methods or new materials.

42. Article 19 of the directive stems from a Commission initiative. Its proposal for a directive amending Directive 71/305/EEC provided that variants may involve a fundamental alteration to the design plan or to the required building materials, or an alteration to working methods or to the anticipated working techniques. (18) Operators had to be afforded the possibility of proposing more advanced technical solutions. (19) The Commission subsequently broadened the scope of that proposal during the legislative procedure so that a "variant" had only to meet the minimum specifications required by the contracting authority. (20) That amendment then became Article 20a of Council

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Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts. (21) It has the same wording as Article 19 of Directive 93/37/EEC. It is apparent from the legislative history that a variant can, in principle, relate to any part of the tender document. The aim of the provision in question, even as it currently stands, is to stimulate technical progress in the construction industry. It is drafted in a deliberately open manner and leaves it to the discretion of the contracting authorities to decide whether they wish to authorise or prohibit variants and to establish what type of variants they are prepared to consider. (22) The sole requirement imposed by Article 19 is that of the admissibility barrier governing the equivalence of the work proposed in the variant with the work specified in the tender document. Equivalence must be examined by reference to the minimum specifications that the contracting authority is required to impose.

43. It is clear from the foregoing considerations that assessing whether a variant does indeed come into play or whether the tender proposed must be disqualified on grounds of its inadmissibility is ultimately a matter for the contracting authority alone. Judicial review must be confined to examining whether the procedural requirements laid down in Directive 93/37/EEC and the minimum specifications defined by the contracting authority have been met and whether or not the contracting authority has blatantly exceeded the margin of discretion it enjoys in assessing the tenders, for example by entertaining unrelated considerations in examining equivalence. The factual assessment of whether the work proposed is consistent with the work specified in the tender document falls to the contracting authority, the only entity capable on account of its competence in the matter of assessing the equivalence of the work proposed with the work specified in the tender document.

44. I accordingly propose in the alternative that the answer to the first question referred should be that, in the context of an award decision on the basis of the most economically advantageous tender in an open procedure, a variant within the meaning of Article 19 of Directive 93/37/EEC comes into play where the submission of variants is permitted and where the relevant proposal replaces part of the work specified in the tender document yet at the same time meets the required minimum specifications.

C The second and third questions

45. Asfinag, the Austrian and French Governments all deal with Questions 2 and 3 jointly. The two questions essentially concern the obligation to publish the assessment criteria applied by the contracting authority. I will adopt the same approach in this respect.

1. Arguments of the parties

46. Traunfellner's view is that in so far as the tender document does not indicate any minimum specifications the equivalence condition laid down in Paragraph 42(4) of the BVergG must be regarded as a minimum specification for the purposes of Article 19 of the directive. The purpose of the work to be performed, which is specified in the tender document and thus known by all tenderers, constitutes the central connecting factor for examining equivalence.

47. Even where the tender document does not mention any criteria, it argues, variants have to be assessed. In such circumstances, the contracting authority simply seeks to ensure the performance of qualitatively equivalent work.

48. Asfinag and the Austrian Government highlight the difficulty in practice of imposing minimum specifications. Asfinag maintains that works contracts in particular are composed of a large number of elements. The contracting authority could not identify in advance the elements for which variants would be submitted. It was not necessary, however, to indicate specific criteria for all elements since the general criterion of equivalence of the work to be performed was sufficient. The principle of transparency was not infringed so long as it was guaranteed that all tenders would be assessed

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on the basis of the same award criteria. Article 30 of the directive, Asfinag maintains, did not prohibit an arrangement whereby acceptance of a variant was subject to the requirement that the performance of qualitatively equivalent work be ensured.

49. The Austrian Government points out first of all that, as far as it can see, the referring court is mixing the two aspects of minimum specifications within the meaning of Article 19 of the directive on the one hand and contract award criteria for the purposes of Article 30 of the directive on the other. It argues that the former aspect concerns the admissibility of a variant and the latter concerns the assessment of admissible tenders. The Commission concurs with that viewpoint.

50. The obligation to lay down minimum specifications existed, according to the Austrian Government, irrespective of whether or not variants were allowed. The minimum specifications had to be stated, meaning that the contracting authority was required to point out those specifications which it considered indispensable and which it would use as assessment criteria for examining the equivalence of a tender.

51. The Austrian Government also considers that where minimum specifications are defined, reference in the tender document to rules which are of general application and accessible to the public is permitted. Paragraph 35(2) of the BVergG expressly requires that it be stated in the tender documents that they are governed by the BVergG. Interested tenderers can find out about those rules for themselves. It adds that a reference to applicable provisions reduces the number of texts relating to the tender procedure that have to be published. Moreover, under Article 23 of the directive reference may be made to an authority from which information concerning the obligations to be fulfilled in terms of labour law can be obtained. It argues that the reference to a general, published provision can be compared to the above arrangement.

52. The French Government and the Commission take the contrasting view that a reference to applicable provisions does not as the Court has consistently held meet the requirements of transparency. (23)

53. The French Government considers that, in the main proceedings, the approach taken has resulted in discrimination against tenderers resident outside Austria. Furthermore, tenderers intending to submit variants were placed at a disadvantage as they did not know the criteria that would be used to assess their tenders.

54. The Commission adds that the reference to the equivalence of the work is insufficient where the use of specific materials is required. What is more, criteria such as durability and resistance to deformation must be mentioned.

55. In its view, variants may not be accepted where minimum specifications have not been mentioned. In such circumstances the tender document is contrary to Community law because there has been neither a prohibition on the submission of variants nor a reference to the minimum specifications that have to be met. Therefore, the tendering procedure may not be continued in those circumstances.

2. Assessment

56. The second question is focused on determining whether Paragraph 42 of the BVergG can be regarded, by virtue of a reference to that provision in the tender documents, as the establishment of minimum specifications within the meaning of Article 19 of the directive where there is a failure to specify the comparative parameters to be used to assess the equivalence of the work to be performed. This question can be broken down into two parts: first, the question whether the reference to a provision of national legislation meets the transparency requirement, and secondly, the question whether the rules under Paragraph 42(4) of the BVergG can be regarded as minimum specifications within the meaning of Article 19 of Directive 93/37.

57. The third question aims to determine whether Article 30 of the directive precludes a provision

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of national legislation which makes the acceptance of a variant conditional on the criterion requiring that a tender for equivalent work be submitted where, rather than being mentioned in the tender document, that criterion is apparent only from a provision to which the tender document refers. The issue of the compatibility of such an approach with the transparency requirement arises at this point too. In that respect this question overlaps with the second question. It is therefore necessary, first of all, to consider the aspects relating to the transparency requirement.

58.

In Beentjes and Commission v France the Court of Justice held that where the authorities awarding the contract have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents. A general reference to a provision of national legislation cannot satisfy the publicity requirement. (24)

59. Those decisions concerning Article 30 of Directive 93/37/EEC are based on the principles of transparency and equal treatment, both of which are dominant principles within the context of public procurement which also form the basis of Directive 93/37/EEC, as is clear from the 10th and 11th recitals in the preamble thereto. The two principles must therefore be observed in the interpretation of Article 19 of the directive. Consequently, a general reference to a provision of national legislation is not sufficient to meet the requirement to state the minimum specifications either.

60. I therefore propose that the second and third questions referred be answered as follows: A reference to a provision of national legislation meets neither the requirement to lay down minimum specifications as provided for in Article 19 of Directive 93/37/EEC nor the requirement to lay down criteria on which to base the award of the contract as provided for in Article 30 of the directive.

61. Strictly speaking, that response obviates the need to answer the second part of the second question concerning the extent to which the rules laid down in Paragraph 42(4) of the BVergG can be regarded as minimum specifications. I will comment on that matter merely in the alternative, in the event that the Court adopts a different view as regards the publicity requirement.

62. The concept of minimum specifications within the meaning of Article 19 is not defined in the directive. As I have already pointed out with regard to the first question, the contracting authority enjoys a margin of discretion in laying down minimum specifications. Those specifications relate to features or results which distinguish the work specified in the tender document and which must be satisfied by the work proposed in the tender.

63. As also discussed earlier with regard to the first question, the contracting authority is, in principle, at liberty to decide whether it wishes to authorise or prohibit variants. If it decides to prohibit them, its decision must be expressly stated in the tender notice in accordance with the second sentence of the second paragraph of Article 19 of Directive 93/37/EEC. Where variants are allowed, the contracting authority is not obliged to say so in the tender document. (25)

64. However, as can be seen from the first sentence of the second paragraph of Article 19 of the directive, where variants are allowed, the contracting authority must state in the tender notice the minimum requirements to be met by those variants. (26) That obligation arises from the use of the mandatory expression "shall state... the minimum specifications" . If the contracting authority had been at liberty to decide in this case whether or not to lay down minimum specifications, the expression "may state... the minimum specifications" would certainly have been used.

65. This reading based on the wording of the provision concerned is also consistent with its spirit. Where variants are permitted, tenderers have to know the criteria on which basis their proposed

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tenders are to be assessed by the contracting authority. The assessment is carried out by reference to the minimum specifications which define the contracting authority's expectations vis-à-vis the work for which it has invited tenders. Tenders submitted in the form of variants are allowed only if the variants meet those specifications, which have been laid down previously (principle of equal treatment) and notified in the tender document (principle of transparency). (27) A tender document which permits variants since it does not expressly prohibit them but does not impose any minimum specifications does not, therefore, meet the requirements of Directive 93/37.

66. The objection that it is impossible in practice to state all the criteria in advance because the aspects on which variants will be submitted are as yet unknown must therefore be dismissed. The contracting authority should be able to set out its expectations vis-à-vis the work for which it invites tenders and the specifications under the individual subheadings, such as the load-bearing capacity of a bridge or the load-carrying capacity and durability of a road surface. The document inviting tenders for a works contract should above all set out the result expected by the contracting authority. The assessment whether a tender guarantees that result must be carried out for proposals consistent with the tender document and variants alike on the basis of objective criteria which must be notified to the tenderers in the tender document. It is of no consequence here whether the criteria govern admissibility, as in the context of Article 19 of Directive 93/37/EEC, or the award of the contract, as provided for in Article 30 of the directive. The principle of equality of tenderers and the principle of transparency apply to both provisions.

67. The rules in Paragraph 42(4) of the BVergG require that the work proposed by the variant be equivalent to the work specified in the tender document. That criterion does not relate to the features or result which distinguish the work put out to tender. On the contrary, it concerns the assessment of the work proposed as compared with the work for which tenders have been invited.

68. The equivalence criterion is also contained in the first paragraph in fine of Article 19 which states that account may be taken of variants which "... meet the minimum specifications required by the contracting authorities" . The Commission's proposal of 1986 stated that account must be taken of variants where they at least met the prescribed specifications in terms of quality. (28) The wording of that proposal, which was amended as early as in the procedure for adopting Directive 89/440/EEC in favour of the version currently in force, largely corresponds to the wording of Paragraph 42(4) of the BVergG. That provision states that a variant is allowed only if it "... ensures the performance of qualitatively equivalent work" .

69. It is apparent from those different expressions that the equivalence criterion cannot be a "minimum specification" for the purposes of Article 19 of Directive 93/37/EEC. On the contrary, it is the result that a variant must achieve. The issue of whether that result is achieved must be determined by reference to the minimum specifications used by the contracting authority to define its expectations vis-à-vis the work for which it has invited tenders. Equivalence does not in itself constitute an assessment criterion but merely defines the level to be attained by the variant.

70. Should the Court still consider it necessary, I therefore propose that this part of the second question be answered as follows: The equivalence criterion established for the purpose of assessing the admissibility of a variant is not a minimum specification required by the contracting authority as provided for in Article 19 of Directive 93/37.

D The fourth and fifth questions

1. Arguments of the parties

71. Asfinag and the Austrian Government take the view that the fourth and fifth questions are inadmissible in that they are hypothetical. They point out that the contract forming the basis of the main proceedings has since been awarded and the works completed. It merely remains for the

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referring court to decide whether the disqualification of the variant was lawful.

72. In the alternative, they consider with regard to Question 4a that the procedure can be concluded. Asfinag relies on Article 2 of Directive 89/665/EEC (29) in support of that argument. The Austrian Government refers to the fact that there is no obligation to award the contract (30) yet infers from that a contrario that the contracting authority may none the less conclude the procedure.

73. With regard to Question 4a, Traunfellner and the Commission on the other hand consider that, where the tender document has not met the requirements of Community law, the contracting authority may not conclude the procedure and must initiate a new procedure. Variants may be prohibited, in their view, only subject to very strict conditions.

74. As to Question 4b, Traunfellner maintains that if the contracting authority has allowed the submission of variants, it must also allow an assessment of equivalence. In view of the broad possibility of submitting variants, it would be unreasonable for the contracting authority to reject them without examination. In the alternative, Asfinag also supports that conclusion.

75. As regards Questions 4b and 5, the Commission on the other hand considers that variants should be rejected if contract award criteria have not been defined for assessing technical differences.

76. As far as Question 5 is concerned, Traunfellner takes the view that an obligation to accept the cheapest tender is incompatible with the spirit of the directive. It was indeed possible in the main proceedings to assess the technical differences on account of the equivalence of the variant submitted. Furthermore, road construction was an area in which there was vast experience; thus, it was unnecessary to indicate award criteria for assessing function-related, technical equivalence.

2. Assessment

77. According to consistent case-law, it is, in principle, solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case whether a preliminary ruling is necessary to enable it to deliver judgment and whether the questions which it submits to the Court are relevant. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. (31)

78. Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may consequently refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual and legal material necessary to give a useful answer to the questions submitted to it. (32)

79. As Asfinag and the Austrian Government rightly point out, Questions 4a, 4b and 5 are no longer relevant in the main action. The referring court has itself observed that the contract for the bridge and road construction works has been awarded and the works completed. Thus, it only remains for the Bundesvergabeamt to rule on whether the disqualification of Traunfellner's variant from the tendering procedure was lawful. There is no longer any need in the main proceedings to resolve the issue of whether and, if so, how the tendering procedure is to be continued. Hence it is quite obvious that Questions 4 and 5 bear no relation to the purpose of the main proceedings and are hypothetical. According to settled case-law, such questions do not require an answer. (33)

80. In the alternative, should the Court consider the questions to be admissible, I propose that

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it answer them as follows:

81. Question 4a: A tendering procedure in the context of which the tender document does not specify the comparative parameters to be used to assess equivalence may not be concluded by awarding the contract. Under Article 30(2) of Directive 93/37/EEC all the criteria that the contracting authority intends to apply to the award are to be stated in the contract notice. As observed with regard to Questions 2 and 3, the principles of equal treatment and transparency form the basis of that provision. Using award criteria that have not been published in the tender document while continuing the tendering procedure would be contrary to those principles. Advocate General Mischo also reaches that conclusion in his Opinion of 27 February 2003 in the case of EVN and Wienstrom . (34)

82. Question 4b: This question is relevant only if the tendering procedure may be concluded. There is no need to give an answer in the light of the previous considerations. It should be stated, simply for the sake of completeness, that variants cannot be assessed if assessment criteria have not been published in the tender document. If they were assessed, however, that measure would offend against the principles of equal treatment and transparency.

83. Question 5: Where a contracting authority has decided to award the contract to the most economically advantageous tender, it cannot, in the course of the procedure, revert to awarding the contract on the basis of the lowest-price criterion. Changing the award criteria within a tendering procedure which is already under way is contrary to the transparency requirement. (35) Consequently, a variant whose technical differences from the tender document cannot be assessed on the basis of contract award criteria owing to the absence of appropriate statements in the tender document may not be accepted where it is the cheapest tender and contract award criteria have not otherwise been defined. Should the contract be awarded on the basis of the most economically advantageous tender, the criteria intended to be applied to the award of the contract must be stated, as prescribed by Article 30(2) of Directive 93/37/EEC. A tender document which does not meet that requirement is unlawful.

VI Conclusion

84. On the basis of the foregoing considerations I propose that the Court should:

(1) declare Questions 1, 4 and 5 inadmissible, and

(2) answer Questions 2 and 3 as follows:

The reference to a provision of national legislation does not meet the requirement to lay down minimum specifications within the meaning of Article 19 of Directive 93/37/EEC or the requirement to lay down contract award criteria for the purposes of Article 30 of the directive.

The equivalence criterion required to assess the admissibility of a variant is not a minimum specification required by the contracting authority for the purposes of Article 19 of Directive 93/37/EEC.

(1) .

(2) OJ 1993 L 199, p. 54.

(3) Bundesgesetzblatt für die Republik Osterreich I, 1997, No 56.

(4) According to the findings of the referring court, an "alternative tender" under Paragraph 15(14) of the BVergG is a tender based on an alternative tender proposal from the tenderer and should therefore be regarded as a "variant" within the meaning of Directive 93/37/EEC.

(5) The Bundesvergabeamt refers to Case 31/87 Beentjes [1988] ECR 4635, paragraph 35 et seq., and Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 57 et seq.

(6) The Bundesvergabeamt has regard to Beentjes (cited in footnote 5, at paragraph 21 et seq.) and to Case C-225/98 Commission v France [2000] ECR I-7445, paragraph 34 et seq.

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(7) The Bundesvergabeamt has regard to Case 274/83 Commission v Italy [1985] ECR 1077, paragraph 24 et seq., and Case C-272/91 Commission v Italy [1994] ECR I-1409.

(8) The Bundesvergabeamt has regard to Beentjes (cited in footnote 5, at paragraph 35 et seq.).

(9) The Bundesvergabeamt refers mutatis mutandis to Case C-243/89 Commission v Denmark [1993] ECR I-3353.

(10) The Bundesvergabeamt refers to Case C-27/98 Metalmeccanica Fracasso and Leitschutz Handels- und Montage [1999] ECR I-5697, paragraph 31.

(11) Case C-411/00 Felix Swoboda [2002] ECR I-10567, paragraph 27 et seq. Similarly, Opinion of Advocate General Mischo in Case C-410/01 Fritsch, Chiari & Partners and Others [2003] ECR I-6413, points 20 to 23. Cf. also Opinion of Advocate General Geelhoed in Case C-315/01 Gesellschaft für Abfallentsorgungs-Technik (GAT) [2003] ECR I-6351, point 22 et seq.

(12) COM (86) 679 final of 23 December 1986.

(13) Case C-320/88 Shipping and Forwarding Enterprise Safe [1990] ECR I-285, paragraph 11, and Case C-107/98 Teckal [1999] ECR I-8121, paragraph 31.

(14) Case C-17/92 Federacion de Distribuidores Cinematograficos [1993] ECR I-2239, paragraph 8; Teckal (cited in footnote 13, at paragraph 33).

(15) Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 39, and Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 19.

(16) OJ 1989 L 395, p. 33.

(17) Opinion in Case C-315/01 GAT , cited in footnote 11, point 45 et seq.

(18) COM (86) 679 final (cited in footnote 12), p. 43, new Article 20a(2).

(19) COM (86) 679 final (cited in footnote 12), p. 12.

(20) COM (88) 354 final of 21 June 1988, pp. 13 and 22, in Article 20a.

(21) OJ 1989 L 210, p. 1.

(22) Cf. Commission's "Guide to the Community Rules on Public Works Contracts" , p. 60, point 6.4.1, which can be consulted via the homepage of European Commission DG Internal Market at www.europa/comm/internal_market/en/.

(23) The parties refer to the judgments in Beentjes (cited in footnote 5) and Commission v France (cited in footnote 6).

(24) Beentjes (cited in footnote 5, at paragraph 35) and Commission v France (cited in footnote 6, at paragraph 73).

(25) See the explanations given in the Public Works Contracts Guide (cited in footnote 22, at p. 60, point 6.4.1).

(26) See the explanations given in the Public Works Contracts Guide (cited in footnote 22, at p. 60, point 6.4.1).

(27) Commission v Denmark (cited in footnote 9, at paragraphs 37 to 40), Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 40 et seq.

(28) COM (86) 679 final (cited in footnote 12), p. 43, Article 20a(3).

(29) Cited in footnote 16.

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(30) It invokes the Metalmeccanica judgment (cited in footnote 10).

(31) Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59; PreussenElektra , cited in footnote 15, at paragraph 38; Canal Satélite Digital , cited in footnote 15, at paragraph 18.

(32) Cf. the case-law cited in footnote 15.

(33) Case 244/80 Foglia v Novello [1981] ECR 3045, paragraphs 18 to 21; Case C-83/91 Meilicke [1992] ECR I-4871, paragraph 25; Case C-318/00 Bacardi-Martini and Cellier des Dauphins [2003] ECR I-905, paragraph 43.

(34) Opinion in Case C-448/01 [2003] ECR I-14527, point 122 et seq.

(35) SIAC Construction (cited in footnote 27) paragraph 43; Commission v Belgium (cited in footnote 5), paragraph 88 et seq.

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Opinion of Mr Advocate General Mischo delivered on 25 February 2003. Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others v Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag). Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Article 1(3) - Persons to whom review procedures must be available - Definition of interest in obtaining a public contract. Case C-410/01.

1. The Bundesvergabeamt (Federal Public Procurement Office) (Austria) is seeking an interpretation from the Court of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (2) as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (3) ("Directive 89/665").

2. In a case in which a trader has failed to avail itself of the conciliation procedure provided for under Austrian law, the Bundesvergabeamt is seeking to ascertain whether the abovementioned provision must be interpreted as meaning that a trader has no interest in obtaining a contract unless it has taken all steps available under national law to prevent the contract from being awarded to another tenderer and so to secure the award of the contract to itself.

I Legal background

A Community legislation

3. Article 1(1) and (3) of Directive 89/665 provides:

"1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

"

4. Article 2(1) and (6) of Directive 89/665 reads:

"1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take interim measures, at the earliest opportunity and by way of interlocutory procedures, with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the

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contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

...

"

B National legislation

5. Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz 1997) (1997 Federal Public Procurement Law, BGBl. I, 1997/56, "the BVergG"). The BVergG provides for the creation of a Bundes-Vergabekontrollkommission (Federal Public Procurement Control Commission, "the B-VKK") and of a Bundesvergabeamt (Federal Public Procurement Office).

6. Paragraph 109 of the BVergG sets out the powers of the B-VKK. It contains the following provisions:

"1. The B-VKK shall be competent:

(1) until such time as the contract is awarded, to reconcile any differences of opinion between the awarding body and one or more candidates or tenderers concerning the application of the present federal law or its implementing regulations.

...

6. A request for the B-VKK to take action made under paragraph 1(1) must be submitted to the directors of the Commission as soon as possible after the difference of opinion comes to light.

7. If the B-VKK does not take action following a request from the awarding body it must inform that body immediately it does take action.

8. The awarding body may not award the contract until four weeks after ... it has been informed in accordance with paragraph 7, failing which the tendering procedure shall be declared void...

"

7. Paragraph 113 of the BVergG lays down the powers of the Bundesvergabeamt. It provides:

"1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations

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issued under it, the contract has not been awarded to the best tenderer....

"

8. Paragraph 115(1) of the BVergG provides:

"Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement."

9. Under Paragraph 122(1) of the BVergG,

"[i]n the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure."

10. Under Paragraph 125(2), first sentence, of the BVergG a claim for damages to be brought before the civil courts is admissible only if the Bundesvergabeamt has previously made a declaration under Paragraph 113(3).

II The main proceedings

11. In the autumn of 1999 Autobahnen- und Schnellstraßen-Finanzierungs-AG ("Asfinag") invited tenders prior to the award of a public services contract for "site management in respect of the construction of principal and subsidiary toll barriers, including electrical, internal and technological work, and the introduction of a data-transmission facility as part of the "LKW Maut Osterreich" project

" . The tenders were opened on 18 November 1999.

12. Together with a number of partners, Fritsch, Chiari & Partner Ziviltechniker GmbH ("the applicant") submitted its tender as a consortium. By letter of 28 January 2000 the applicant was informed that its tender had been placed second in the evaluation of the tenders and was therefore unsuccessful. On 8 February 2001 it was told that the contract had been awarded to a competitor and was informed of the amount of the contract.

13. The applicant then instituted a procedure under Paragraph 113(3) of the BVergG for a review by the Bundesvergabeamt, seeking a declaration that the contract had not been awarded to the best tenderer because the award criteria laid down by the contracting authority infringed the requirement contained in Paragraph 53 of the BVergG that the best tenderer must be determined in a comprehensible manner.

14. Before the Bundesvergabeamt, Asfinag stated that, under Paragraph 115(1) of the BVergG, only an undertaking claiming an interest in obtaining a contract falling within the scope of the BVergG is entitled to apply for review of a decision of the contracting authority on the ground of unlawfulness, where the alleged unlawfulness has caused or risks causing it harm. According to Asfinag, the applicant clearly had no interest in obtaining the contract since it had not submitted an application for conciliation to the B-VKK, as it was entitled to do under Paragraph 109(1) of the BVergG.

15. In support of its view, Asfinag maintains that public procurement law does not exist for its own sake but rather serves to determine where pre-contractual liability lies amongst the various parties to public procurement procedures, including the tenderers. If a tenderer considers that the award criteria do not comply with the law, it is required, as provided in Paragraph 109(6)

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of the BVergG, to inform the B-VKK as soon as possible, even before the tenders are opened. The principle of competition prohibits allowing a tenderer who considers that the award criteria do not comply with the law, first to submit a tender in order to ascertain whether it is the best tenderer and then to decide on its actions according to how the contract is awarded: if it is the best tenderer it does not make an application, but if it fails to obtain the contract, or is not the best tenderer, it applies to the competent authorities in order to have "a second bite at the cherry" as a result of the invitation to tender being revoked.

16. According to Asfinag, Paragraph 109(6) of the BVergG therefore imposes a time-limit for claims, so that the submission of a tender without any preliminary application being made to the B-VKK means that no claim may be brought in respect of defects in the invitation to tender which, if it had exercised due care, the tenderer should have been aware of at the time it prepared its tender. If in the present case the applicant had applied to the B-VKK before preparing its tender bid and had drawn Asfinag's attention to the alleged errors, no costs would have been incurred in preparing the tender.

17. The applicant denied the allegation that it had no interest, stating that according to the consistent practice of the public procurement supervisory bodies, submission of a tender within the time-limit was sufficient to establish an interest in obtaining a contract.

III The questions referred for a preliminary ruling

18. Considering that the Austrian legislation applying to the case before it should be interpreted in the light of Article 1(3) of Directive 89/665 and that a decision in the case therefore required an interpretation of that provision, the Bundesvergabeamt, by order of 11 July 2001, decided to stay proceedings pending a preliminary ruling by the Court of Justice on the following questions:

"1. Is Article 1(3) of Directive 89/665 to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure?

(2) In the event that the answer to Question 1 is no:

Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if, in addition to its participating in the public procurement procedure, it takes or took all steps available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself?

"

19. In the order for reference the Bundesvergabeamt points out that in a judgment of 12 June 2001 (B 485/01-12, B 584/01-9, B 685/01-6) the Verfassungsgerichtshof (Austrian Constitutional Court) stated, referring to its judgment of 8 March 2001 (B 707/00), that according to the case-law of the Court of Justice, (4) the capacity to institute a review procedure under Article 1 of Directive 89/665 must be interpreted broadly and should therefore belong to any person seeking to obtain a specific public contract which is the subject of an invitation to tender. The question therefore arises whether that should be the case irrespective of whether that person has or has not availed himself of the opportunity afforded him by the contracting authority of exhausting all remedies available under domestic public procurement law (first question) or whether failure to exhaust all possible domestic remedies results in him forfeiting that interest (second question).

IV Analysis

A Whether the Court has jurisdiction to answer the questions referred by the Bundesvergabeamt

20. The Commission questions in its written observations whether the Court has jurisdiction to

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answer the questions referred for a preliminary ruling since it considers that decisions of the Bundesvergabeamt are not of a judicial nature.

21. It should be pointed out, however, that this issue has in the meantime been settled by the Court in Case C-411/00 Swoboda , (5) at least as regards questions referred by the Bundesbegabeamt in the exercise of its powers during the period after the award of the contract. The Court held in that context that it was a court or tribunal within the meaning of Article 234 EC. (6)

22. It is clear from the order for reference that in the main proceedings the Bundesvergabeamt is also exercising its powers during the period after the award of the contract. The case was brought on the basis of Paragraph 113(3) of the BVergG, (7) which provides: "[a]fter the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer." (8)

23. It must therefore be concluded that the Court has jurisdiction to answer the questions referred for a preliminary ruling by the Bundesvergabeamt.

B On the questions

24. Like the French Government, I propose to deal with both the questions together.

25. Each question corresponds to the view put forward by one of the parties in the main proceedings on the point at issue, namely, the meaning of "an interest in obtaining a contract" : the first question reflects the applicant's view that the submission of a tender during a contract procedure or the request to participate in such a procedure are sufficient in order to establish that a tenderer has, once and for all, an interest in obtaining the contract, whilst the second question refers to Asfinag's view that the fact that a tenderer does not take or has not taken all steps available to it under national law to prevent the contract from being awarded to another tenderer, namely in this case the fact that it did not make an application to the B-VVK, demonstrates that that tenderer has forfeited an interest in obtaining the contract.

26. The applicant and the Austrian Government confirmed at the hearing that at the material time there was no statutory obligation on the applicant to make an application to the B-VKK after being informed by letter of 28 January 2000 that its tender had been placed second in the evaluation of the tenders and was therefore unsuccessful.

27. The order for reference does not contain any information from which I may conclude that this view is incorrect.

28. In essence, the questions amount to the single question of whether Directive 89/665 must be understood as meaning that a tenderer has or had an interest in obtaining a public contract only if it made a preliminary application to an advisory committee although such application was optional.

29. In my view the answer to that question is no.

30. First, it is clear straight away that Directive 89/665 does not specify any circumstances in which a tenderer forfeits an interest in obtaining a contract.

31. Second, to answer yes would mean that one inferred from the directive that the tenderer was under an obligation to make an application to an advisory committee although such application is optional under national law, otherwise it would forfeit an interest in obtaining the public contract. Such an inference cannot be made.

32. It is true that the directive does not preclude certain obligations being imposed on traders under national law.

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33. This is clear, for example, from the last sentence of Article 1(3) of Directive 89/665, which provides "... the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review."

34. It is also clear from Case C-470/99 Universale-Bau and Others , (9) in which the Court held that extinctive time-limits at national level were compatible with Directive 89/665 provided they were reasonable.

35. However, the directive itself does not impose such obligations on traders, and moreover could never do so where it has no direct effect on individuals. (10)

36. I therefore suggest that the answer to the questions referred for a preliminary ruling should be that, in itself, Article 1(3) of Directive 89/665 does not mean that an undertaking has or had an interest in obtaining a particular public contract only if, in addition to its participation in the public procurement procedure, it takes or took all steps available to it under national law to prevent the contract from being awarded to another tenderer and so to secure the award of the contract to itself.

37. In the alternative I should like, however, to consider the questions again from another angle.

38. They could also be interpreted as meaning that the Bundesvergabeamt is seeking to ascertain whether Directive 89/665 precludes a rule of national law under which a tenderer forfeits its interest in obtaining the contract if it has not taken all steps available to it under national law to prevent the contract from being awarded to another tenderer.

39. I stress that I have not found in the order for reference any express reference to a rule of Austrian law which states that although an application to the B-VKK is optional, failure to make such application would cause a tenderer to forfeit an interest in obtaining the contract. However, since only the referring court has jurisdiction to interpret its national law, one cannot exclude a priori that such a rule does exist. Therefore, in an attempt to provide an answer to the Bundesvergabeamt which is as useful as possible, I suggest that an answer should also be given to the questions as I have reworded them in the alternative.

40. At the hearing the French and Austrian Governments and the Commission rightly submitted that the answer to the questions worded in that way should be based on the judgment in Universale-Bau and Others , cited above, which was delivered after they had submitted their written observations.

41. In that case, in which reference had likewise been made by the Bundesvergabeamt, the Court held as follows:

> "Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable." (11)

42. Like the abovementioned interveners, I take the view that that ruling may be transposed to the present case.

43.

As in Universale-Bau , cited above, in which the Court held that Directive 89/665 contains no provision specifically covering time-limits for the application for review which it sought to establish, (12) the directive in question does not either, as I stated above, (13) contain any provision concerning circumstances in which a tenderer might forfeit an interest in obtaining a

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contract.

44. Article 1(3) of Directive 89/665 indeed requires review procedures to be made available to "any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement" , although it does not define more fully either the concept of "interest" or any circumstances in which failure on the part of the tenderer to exercise due care may cause it to forfeit an interest in obtaining a contract since it is considered as not having or never having had such an interest. It is therefore for the national legal system of each Member State, where appropriate, to make such provision. (14)

45. Having reached this stage in the reasoning, I should like to quote in extenso paragraphs 72 to 76 of Universale-Bau and Others , cited above, which seem to me to apply mutatis mutandis to the question before us:

> "72. None the less, since there are detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, they must not compromise the effectiveness of Directive 89/665.
>
> 73. It is therefore appropriate to determine whether, in light of the purpose of that directive, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on individuals by Community law.
>
> 74. In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in its preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible.
>
> 75. The full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringement of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements.
>
> 76. Moreover, the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying, in principle, the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty (see, by analogy, in relation to the principle of the effectiveness of Community law, Case C-261/95 Palmisani [1997] ECR I-4025, paragraph 28, and Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 33).
>
> " (15)

46. As in the case of the time-limits which were at issue in Universale-Bau and Others , cited above, I am of the view that a national rule which requires a tenderer to take all steps reasonably available to it to prevent the contract from being awarded to another tenderer, or else it would risk forfeiting an interest in obtaining the contract, is contributing towards achieving the objective of Directive 89/665 of establishing effective review procedures that are as rapid as possible. (16) In addition, it also meets the requirement of effectiveness contained in Directive 89/665 in so far as it is in the interest of legal certainty.

47. I should like to stress, however, that such forfeiture of an interest in obtaining the contract, in my view, cannot arise except where the tenderer has failed to take all the steps which are reasonably available to it, in the same way as the time-limits must also be reasonable. (17)

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48. At the hearing the applicant stated that it had not had sufficient information to make a proper application to the B-VKK after being informed, by letter of 28 January 2000, that its tender had been placed second in the evaluation of the tenders and was therefore unsuccessful.

49. It is for the court making the reference to consider whether, in the light of such circumstances, the applicant had reasonably had available to it the step of making an application to the B-VKK. If that was not the case the applicant cannot be criticised for not having taken that step.

50. I therefore suggest that the answer to the questions referred for a preliminary ruling should, in the alternative, be that Article 1(3) of Directive 89/665 does not preclude a rule of national law under which an undertaking has or had an interest in obtaining a particular public contract only if, in addition to its participating in the public procurement procedure, it takes or took all steps reasonably available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself.

V Conclusion

51. In the light of the above considerations, I suggest that the answer to the questions referred by the Bundesvergabeamt should be as follows:

Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, does not mean that an undertaking has or had an interest in obtaining a particular public contract only if, in addition to its participation in the public procurement procedure, it takes or took all steps available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself;

Article 1(3) of Directive 89/665 does not, however, preclude a rule of national law under which an undertaking has or had an interest in obtaining a particular public contract only if, in addition to its participating in the public procurement procedure, it takes or took all steps reasonably available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself.

(1) .

(2) OJ 1989 L 395, p. 33.

(3) OJ 1992 L 209, p. 1.

(4) See Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraphs 34 and 35.

(5) [2002] ECR I-10567.

(6) See Swoboda , cited above, paragraphs 26 to 28.

(7) See point 13 above.

(8) Emphasis added.

(9) [2002] ECR I-11617.

(10) Case 152/84 Marshall [1986] ECR 723, paragraph 48; Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraphs 22 to 25; Case C-456/98 Centrosteel [2000] ECR I-6007, paragraph 15, and Case C-443/98 Unilever [2000] ECR I-7535, paragraphs 50 and 51.

(11) Universale-Bau , cited above, paragraph 79.

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(12) Universale-Bau , cited above, paragraph 71.

(13) See point 30 above.

(14) See, by analogy, Universale-Bau , cited above, paragraph 71 in fine .

(15) Emphasis added.

(16) See also Alcatel Austria and Others , cited above, paragraph 34, and Case C-92/00 HI [2002] ECR I-5553, paragraph 52.

(17) Universale-Bau , cited above, paragraph 79.

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 6May2003.
Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.
Reference for a preliminary ruling: Arbeitsgericht Lörrach - Germany.
Social policy - Protection of the health and safety of workers - Directive 93/104/EC - Scope - Emergency workers in attendance in ambulances in the framework of an emergency service run by the German Red Cross - Definition of 'road transport' - Maximum weekly working time - Principle - Direct effect - Derogation - Conditions.
Joined cases C-397/01 to C-403/01.

1. The Arbeitsgericht (Labour Court), Lörrach, Germany, which rules at first instance on employment matters, has referred to the Court of Justice for a preliminary ruling three questions regarding the interpretation of various provisions of Directive 93/104/EC concerning certain aspects of the organisation of working time. (2) The questions relate specifically to Article 1, which defines the scope of the directive; to Article 6, which establishes maximum weekly working time; and to Article 18(1)(b)(i), which provides for Article 6 to be disapplied in certain circumstances.

I - The facts of the main proceedings

2. The national court has submitted to the Court of Justice seven orders referring questions for preliminary rulings in seven separate disputes. In view of the fact that the questions in each dispute are identical and the facts similar, the seven cases were joined in the written stage of the procedure by Order of the President dated 7 November 2001.

3. All the plaintiffs are rescue workers who are qualified to provide emergency medical assistance and to operate patient transport, are employees or former employees of the German Red Cross (Deutsches Rotes Kreuz), and are seeking payment for overtime in two cases, and confirmation of their right not to work more than 48 hours per week in the other cases.

4. The defendant provides, inter alia, land-based emergency medical assistance services in part of the district of Waldshut, and operates several rescue posts which are open 24 hours and one which is only operational for 12 hours during the day. The service is effected using ambulances manned by two rescue workers or paramedics (Rettungtransportfahrzuegen), and by ambulances manned by a doctor accompanied by a rescue worker or a paramedic (Notarzt-Einsatzfahrzeugen).

When the alert is given, the rescue vehicles go to the place where the injured or sick person is to provide medical assistance. Usually, the vehicles then transport the patient to hospital.

5. In their employment contracts, it was agreed by the parties that the provisions of the Collective Agreement on Working Conditions for German Red Cross Employees, Workers and Trainees (Tarifvertrag über Arbeitsbedingungen für Angestellte, Arbeiter und Auszubildende des Deutschen Roten Kreuzes), hereinafter referred to as the Red Cross collective agreement', would be applicable.

6. In accordance with the provisions of that collective agreement, the average working time in the undertaking's emergency medical assistance service is 49 hours per week. It is common ground that the substantive requirements for extending the working hours, which are set out in Article 14(2)(b) of the collective agreement and entail the performance of stand-by duty (Arbeitsbereitschaft) of at least three hours per day, are met.

II - The applicable German legislation

7. In Germany, working time and rest periods are governed by the Law on working time (Arbeitszeitgesetz) of 6 June 1994, which was adopted in order to transpose Directive 93/104 into national law.

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8. Under Paragraph 2(1), working time is defined as the time between the beginning and the end of the working day, excluding breaks. Under Paragraph 3, working time must not exceed eight hours per working day, although it may be increased to 10 hours if the average period of working time over six calendar months, or 24 weeks, does not exceed eight hours per working day.

9. Under Paragraph 7(1)(1), by way of derogation from Article 3, under a collective or works agreement:

(a) the working day may be extended beyond 10 hours, even without compensation, where working time regularly includes a significant period of time spent on stand-by;

(b) the compensatory rest time may be postponed; and

(c) working hours may be extended, without compensation, to up to 10 hours per day for a maximum of 60 days per year.

10. Under Article 14(1) of the German Red Cross Collective Agreement, weekly working time, excluding breaks, must not exceed 39 hours (38ì hours with effect from 1 April 1990) per week. The average is usually calculated over a 26-week period.

In accordance with Article 14(2), normal working time may be increased to: (a) an average of 10 hours per day or 49 hours per week, if it includes a period of standby duty of at least two hours per day on average; (b) an average of 11 hours per day or 54 hours per week if the period of standby duty is three hours; and (c) an average of 12 hours per day or 60 hours per week if the employee remains in the workplace but only works when he is asked to do so.

Annex 2 contains special rules for staff in the emergency services. When the annex is applied to rescue workers attached to the ambulance service and to transport staff, account must be taken of the note on Article 14(2), pursuant to which the maximum working time of 54 hours per week, referred to in Article 14(2)(b), must be progressively reduced. From 1 January 1993, it was reduced to 49 hours.

III - The questions referred for a preliminary ruling

11. Before ruling on the disputes, the Arbeitsgericht Lörrach decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) (a) Is the reference in Article 1(3) of Council Directive 93/104/EC ... to Article 2(2) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, (3) under which the provisions of the directives are not applicable where characteristics peculiar to certain specific activities in the civil protection services inevitably conflict with their application, to be construed as meaning that the activity of the applicant, who is a qualified worker in the emergency medical assistance service, is caught by this exclusion?

(1) (b) Does the concept of road transport, for the purposes of Article 1(3) of Directive 93/104/EC, exclude from the scope of the directive only those driving activities in which, by their nature, great distances are covered and where working times cannot be fixed owing to the unforeseeability of any difficulties, or, alternatively, does it include rescue vehicle services, which comprise, at least in part, the driving of such vehicles and attendance on patients during the journey?

(2) In view of the judgment in Simap , (4) does Article 18(1)(b)(i) of Directive 93/104/EC require the express consent of an employee in order to extend the weekly working time to more than 48 hours, or, alternatively, does it suffice if it is agreed in the contract of employment that the working conditions are those established by collective agreements which allow weekly working time to be extended to more than 48 hours on average?

(3) Is the wording of Article 6 of Directive 93/104/EC sufficiently precise and unconditional

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to be capable of being relied upon by individuals before national courts where the State has not properly transposed the directive into national law?'

IV - The Community legislation

12. An interpretation of the following provisions is sought:

Directive 89/391

Article 2

...

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.'

Directive 93/104

Article 1

...

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training;

...'

Article 6

Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

Article 18(1)

...

(b) (i) However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it

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takes the necessary measures to ensure that:

- no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

- no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

- the employer keeps up-to-date records of all workers who carry out such work,

- the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

- the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

Before the expiry of a period of seven years from the date referred to in (a), the Council shall, on the basis of a Commission proposal accompanied by an appraisal report, re-examine the provisions of this point (i) and decide on what action to take.

...'

V - Proceedings before the Court of Justice

13. Written observations in these proceedings were submitted, within the period laid down in Article 20 of the EC Statute of the Court of Justice, by the plaintiffs in the main proceedings and the Commission.

In view of the fact that none of the parties applied to present oral argument, the Court decided not to hold a hearing, in accordance with Article 104(4) of the Rules of Procedure.

VI - The observations submitted

14. It is the view of the plaintiffs in the main proceedings that the German Red Cross Collective Agreement allows the employer to decide unilaterally the average weekly working time, without the agreement of the employee, in the event that it is necessary to organise stand-by services at work. German academic opinion and case-law have defined such periods of duty, which are regarded as working time, as periods of active wakefulness under relaxed conditions. A collective agreement of this nature is contrary to Directive 93/104, since it provides for weekly working time to exceed 48 hours, from which it follows that, since the collective agreement complies with Paragraph 7(1)(1)(a) of the Law on working time, the German legislature has failed to implement correctly the provisions of the directive.

15. The Commission maintains that time spent by rescue workers on standby duty in their posts amounts to working time, which means that the activity they carry out is not covered by the exclusion in Article 2(2) of Directive 89/391 and is, therefore, included in the scope of Directive 93/104. The Commission also asserts that employees whose employer's activity is not in the road transport sector are not covered by the exclusion in respect of such activities which is laid down in Article 1(3) of Directive 93/104, even where the undertaking's activity includes the transport of goods or people. In the Commission's view, in order for weekly working time to exceed 48 hours, all the conditions set out in Article 18(1)(b)(i) of Directive 93/104 must be satisfied, including the condition which calls for the worker's express agreement. For that purpose, it will not suffice if the worker is merely aware that the employment relationship is governed by a collective agreement which allows for the weekly working time to be extended. The Commission argues that the wording

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of Article 6 of Directive 93/104 is sufficiently precise and unconditional to enable individuals to rely on it before national courts where a Member State has failed to implement it correctly. In such cases, the court must interpret national law in the light of the wording and purpose of the directive in order to achieve the result pursued.

VII - Analysis of the questions referred for a preliminary ruling

16. By the first question, which is in two parts, the national court asks the Court of Justice to define the scope of Directive 93/104, with a view to clarifying whether it covers the activity carried out by the plaintiffs in the main proceedings.

A - The first part of the first question

17. The Arbeitsgericht wishes to ascertain, firstly, whether Article 1(3) of Directive 93/104 and Article 2 of Directive 89/391 exclude from the scope of the directives the activity of rescue workers who work in an emergency medical assistance service.

18. As the Court pointed out in Simap , (5) Article 1(3) of Directive 93/104 defines its scope first by referring expressly to Article 2 of Directive 89/391 and, second, by providing for a number of exceptions in relation to certain specified activities. Accordingly, in order to determine whether the work of rescue workers in an emergency medical assistance service falls within the scope of Directive 93/104, it is necessary first to consider whether it is covered by Directive 89/391.

19. In accordance with Article 2(1) of Directive 89/391, the directive applies to all sectors of activity, both public and private, and in particular to industrial, agricultural, commercial, administrative, service, educational, cultural and leisure activities. However, Article 2(2) provides that the directive is not applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to the civil protection services, inevitably conflict with it.

20. In Simap , (6) the Court found that the specific public service activities, referred to in the provision, are intended to uphold public order and security, which are essential for the proper functioning of society, and that, under normal circumstances, the activities of medical staff who carry out on-call duty cannot be assimilated to such activities.

21. In the case before the Court, it is necessary to confirm whether the emergency medical assistance service provided by the Red Cross rescue workers is part of the civil protection services. In the event that the answer to that question is in the affirmative, it will then be appropriate to examine whether the treatment is included among the specific activities whose characteristics would inevitably preclude the application to them of Directive 93/104 on the organisation of working time.

22. As the Court also noted in Simap , (7) it is clear both from the object of Directive 89/391, namely to encourage improvements in the safety and health of workers at work, and from the wording of Article 2(1) thereof, that it must necessarily be broad in scope. It follows that the exceptions, including that provided for in Article 2(2), must be interpreted restrictively.

23. Usually, civil protection is a public service whose principal aim is to ensure the safety of people and property in situations involving a serious risk to the public, disasters and major catastrophes, where the safety and the lives of individuals could be in danger.

24. The aim of an urgent medical assistance service provided by doctors and rescue workers in ambulances, such as that which is operated by the Red Cross in the main proceedings, is to provide first aid to patients and to transport them in the right conditions to receive the medical treatment they need. Civil protection is intended to deal with general emergencies and it does not, therefore, include the activity carried out by the above medical service under normal circumstances.

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25. In the event of a catastrophe or disaster, the public authorities supply the human and material resources available to them, while also relying on organisations and undertakings, and even on individuals, should the need arise. In such exceptional circumstances, there can be no doubt that any ambulance service would be under an obligation to contribute its manpower and equipment to civil protection duties.

26. To my mind, the exclusion of certain specific civil protection service activities from the scope of the directive can be attributed to a number of reasons. The first is the diversity and magnitude of emergency situations, of the needs they generate and of the human and material resources which must be mobilised in a short space of time. The second is that the activity of the civil protection services is performed using the organisation, planning, coordination and management systems of a number of public and private services, vis-à-vis the danger to be tackled. The third reason is that the civil protection services are entitled to call upon all the residents of a country to perform individual tasks, and they may also request the participation of the security services, the emergency medical assistance services, the public and private fire services, and even the media.

Those features highlight not only the unforeseeable nature of the activities of the civil protection services, but also the fact that the majority of people who are called upon to participate in the event of a disaster are employed in undertakings which rescue and assist people and recover property. When such people take part in a rescue operation, they perform the tasks for which they are qualified, in accordance with the measures for the protection against and prevention of risks which have been adopted in their undertaking pursuant to national legislation implementing Directive 89/391. Finally, since, in the majority of cases, the civil protection services do not operate in the same way as employee-based structures, it is logical that they should not fall within the scope of a directive designed to encourage improvements in the safety and health of workers.

27. As I have already pointed out, the scope ratione materiae of Directive 89/391 is very wide, and, under normal circumstances, includes the activity of the Red Cross, namely the provision of ambulance-based emergency medical assistance. Where, in the event of a national catastrophe or disaster, the Red Cross is called upon to assist by the civil protection services, Red Cross employees are required to perform the same, or similar, tasks as those which they normally carry out; accordingly, the obligations relating to the safety and health of workers, laid down in Directive 89/391, remain unchanged. Therefore, it cannot be claimed that characteristics peculiar to that activity inevitably conflict with the application of the directive to it.

Consequently, the disputed activity falls within the scope of Directive 89/391, both under normal circumstances and in cases where, in the event of a catastrophe, the Red Cross assists the civil protection services.

28. As concerns the material scope of Directive 93/104, I note that, apart from sectors which provide certain forms of transport, and carry out fishing and maritime activities, the only other exclusion applies to the work of doctors in training. (8)

Since the activity of rescue workers in an emergency medical assistance service is not included among the exclusions laid down, Article 1(3) of Directive 93/104 and Article 2 of Directive 89/391 must be construed as meaning that such activity falls within the scope of both directives.

B - The second part of the first question

29. The Arbeitsgericht goes on to consider the concept of road transport in Article 1(3) of Directive 93/104, in so far as it is excluded from the scope of the directive, in order to ascertain whether that sector includes the activity of an emergency rescue service which consists, at least in part, of driving vehicles and attending to patients during the journey.

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30. The Court ruled on the aim of Directive 93/104 in BECTU , (9) noting that it is clear both from Article 118a of the Treaty, (10) which is its legal basis, and from the first, fourth, seventh and eighth recitals in its preamble, as well as the wording of Article 1(1), that the purpose of the directive is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. The Court went on to say that harmonisation at Community level is intended to guarantee better protection of the health and safety of workers, so that they are entitled to minimum rest periods and adequate breaks.

31. Thus, Directive 93/104 sets out the minimum health and safety requirements for the organisation of working time, which apply to minimum periods of daily and weekly rest, annual leave, breaks, and maximum weekly working time, as well as to certain aspects of night work, shift work and patterns of work.

32. In my view, road transport is excluded from the scope of Directive 93/104 because, when the directive was adopted, there was already Community legislation in place containing more specific rules for the organisation of working time and working conditions in that sector.

I refer specifically to Regulation (EEC) No 3820/85 (11) which governs various social aspects of road transport, such as driving periods, breaks and rest periods, and which excludes carriage by vehicles used in emergency or rescue operations, which, to my mind, includes ambulances. (12)

33. The Court examined the extent of the exclusion of road transport activities from the scope of Directive 93/104 in Bowden and Others , (13) stating that, by referring to air, rail, road, sea, inland waterway and lake transport', the Community legislature indicated that it was taking account of those sectors of activity as a whole, whereas in the case of other work at sea' and the activities of doctors in training' it chose to refer precisely to those specific activities as such'. (14) Therefore, the exclusion of the road transport sector in particular extends to all workers in that sector.

As the Commission points out, in that judgment the Court took into account the activity of the employer but did not assess the activity carried out by the employees of the undertaking. If an undertaking belongs to one of the sectors in the list which the Court concluded were referred to as a whole', for example the road transport sector, then all the employees of that undertaking are excluded from the scope of Directive 93/104.

34. The activity carried out by the Red Cross, which employs rescue workers to provide medical assistance at the place where the patient is located and to transport the patient by ambulance to a hospital to receive the treatment he needs, is not included in the road transport sector, regardless of the fact that carriage is by land, in the same way that carriage by light aircraft or helicopter in the most critical cases cannot be classified as air transport.

35. However, the German court questions the treatment to be accorded to transport by ambulance in the light of the judgment delivered in Tögel , (15) in which the Court ruled that aspects of the transport of injured and sick persons with a nurse in attendance come within Annex I A, Category No 2, to Directive 92/50/EEC (16) relating to the coordination of procedures for the award of public service contracts.

36. I do not consider that ruling to be conclusive as regards the definition of the scope of Directive 93/104 on the organisation of working time.

37. Directive 92/50 provides for two-tier application, depending on whether the service is included in the list in Annex I A or in the list in Annex I B. The contracts listed in Annex I A are awarded in accordance with the provisions of Titles III to VI, while those in Annex I B must

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comply with the rules set out in Articles 14 and 16. Where the services feature in both lists the procedure is determined by reference to their value.

In Tögel , the disputed services were listed in both Annex I A, Category 2 (land transport services), and in Annex I B, Category 25 (health and social services), which was why the Court found that the contract could be governed by either procedure, depending upon whether the value of the services under Annex I A was higher or lower than the value of the services under Annex I B.

38. However, the case before the Court is not concerned with ascertaining the correct procedure to use in the award of a public service contract, and therefore Directive 92/50 and the case-law relating to its interpretation are not applicable.

39. For the reasons set out, it should be held that the concept of road transport in Article 1(3) of Directive 93/104 does not include the activity of an emergency rescue service which consists, at least in part, of driving vehicles and attending to patients during the journey.

C - The second question

40. Next, the Arbeitsgericht asks whether, under Article 18(1)(b)(i), first indent, of Directive 93/104, the extension of weekly working time to more than 48 hours requires the express agreement of the employee, or whether, alternatively, it will suffice if the employee has agreed to the working conditions laid down by collective agreements which, in turn, permit the extension of weekly working time to more than 48 hours on average.

41. Under the provision in question, Member States are entitled not to apply Article 6 of Directive 93/104, which refers to maximum weekly working time, provided that they respect the general principles of the protection of the safety and health of workers, and provided that they take the necessary measures to ensure that no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, without that worker's consent.

42. As the Court noted in Simap , (17) the wording of the first indent of Article 18(1)(b)(i) requires the consent of the worker. If the intention of the Community legislature had been to replace the worker's consent by that of a trade union in the context of a collective agreement, Article 6 of Directive 93/104 would have been included in the list in Article 17(3) of the directive of those articles from which derogations may be made by a collective agreement or agreement between the two sides of industry.

43. The Arbeitsgericht also wishes to clarify whether it is enough that the employee has given his consent to the application of a collective agreement which grants the employer the power, under certain circumstances, to extend the weekly working time beyond the maximum of 48 hours on average per seven-day period, including overtime, laid down in Article 6 of Directive 93/104.

44. In my opinion, the reply must be in the negative for a number of reasons. First, because, from an employee's point of view, there is an important difference between extending the weekly working time beyond the maximum laid down in Directive 93/104 and the duty to work overtime at the request of the employer, which is liable to prolong the normal working hours or working week.

45. As regards the second situation, the Court has ruled that Article 2(2)(i) of Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, (18) referring as it does to normal working hours, is not concerned with overtime, the characteristic feature of which is that it is performed outside normal working hours and is additional thereto. However, the employer must notify the employee of any term of the employment contract or employment relationship pursuant to which the employee is required to work overtime. That information must be notified under the same conditions as those laid down for the essential

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elements of the contract expressly mentioned in Article 2(2) of the directive. It may, where appropriate, by analogy with the provisions of Article 2(3) of the directive concerning normal working hours, take the form of a reference to the relevant laws, regulations and administrative or statutory provisions or collective agreements. (19)

46. That option does not arise, however, where the employer proposes to alter the normal working time for each week, so that the working hours consistently exceed the maximum period which Article 6 of Directive 93/104 prescribes with a view to protecting the safety and health of workers. Member States which opt not to apply that provision undertake to fulfil the obligations imposed on them by Article 18(1)(b)(i) of the same directive.

47. The second reason why the reply to the question should be in the negative is that the condition requiring a worker's agreement is not the only condition which must be fulfilled under Article 18(1)(b)(i) in order for Article 6 not to apply. It must be recalled that the primary aim of Directive 93/104 is to safeguard the health and safety of workers, who are the most vulnerable party in an employment relationship. Quite rightly, in order to prevent an employer from obtaining from an employee, through subterfuge or intimidation, a waiver of that employee's right not to have his weekly working time extended beyond the maximum laid down, a whole series of guarantees are attached to the employee's consent; namely that the employee concerned must not be subjected to any detriment because he does not agree to work in excess of 48 hours per week under the conditions set out, that the employer must keep up-to-date records of all workers who carry out such work and whose working hours exceed the weekly maximum, that the records must be placed at the disposal of the competent authorities, and that the employer must provide the competent authorities, at their request, with information on cases in which consent has been given by workers.

The mere reference to a collective agreement in the employment contract, in the circumstances described by the Arbeitsgericht, does not fulfil those conditions.

48. The final reason why the question must receive a negative reply is that it is clear from the wording of Article 18(1)(b)(i) that the option not to apply Article 6 is not a power which is granted to the two sides of industry or to the parties to an employment contract, but rather to the Member States, who must comply with the general principles of the protection of the safety and health of workers and take the necessary measures to guarantee the result pursued, namely that consent must be express, informed and free, that a refusal to give consent must not result in any detriment, that a written record of the agreement must be kept, and that the information must be made available to the competent authorities.

49. Therefore, it is my view that Article 18(1)(b)(i) of Directive 93/104 requires Member States who opt not to apply Article 6 to take all steps necessary to ensure the achievement of certain results, which include the guarantee that no employer may require an employee to work, without that employee's consent, for more than 48 hours on average over each seven-day period. Acceptance by an employee in his contract that the working conditions are those provided for in collective agreements, which, in turn, permit the weekly working time to be extended, on average, beyond the threshold, does not constitute validly given consent for those purposes.

D - The third question

50. By this question, the German court seeks to ascertain whether the wording of Article 6 of Directive 93/104 is sufficiently precise and unconditional to enable individuals to rely on it before national courts in the event that the provisions of the directive have not been transposed into national law.

51. The Court has consistently held that, (20) whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions

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may be relied on by individuals against the State where that State fails to implement the directive in national law within the prescribed period or where it fails to implement it correctly. A Community provision is unconditional where it is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States. (21) A Community provision is sufficiently precise to be relied upon by an individual and applied by a court where it imposes an obligation in unequivocal terms. (22)

52. Article 6 of Directive 93/104 requires the Member States to take the measures necessary to ensure that, in order to meet the need to protect the safety and health of workers, the period of weekly working time is limited so that it does not exceed 48 hours on average for each seven-day period, including overtime.

The provision is drafted clearly and precisely and it does not, in principle, allow the Member States any leeway when implementing the provision in national law.

53. It must be borne in mind, however, that for the purposes of calculating the average working time, Article 16(2) provides that the reference period must not exceed four months, although, under Article 17(4), it can extend to six or 12 months.

In that connection, the Court ruled in Simap (23) that even if those provisions of Directive 93/104 leave the Member States a degree of latitude regarding the reference period for the purposes of applying Article 6, that does not alter its precise and unconditional nature, since that degree of latitude does not make it impossible to determine minimum rights. The Court went on to say that it is clear from the terms of Article 17(4) of the directive that the reference period may not exceed 12 months and that it is therefore possible to determine the minimum protection which must be provided.

54. In the light of that interpretation by the Court, even in cases where Member States derogate from the reference period laid down in Article 16(2), Article 6(2) of Directive 93/104 is clear, precise and unconditional. In addition, Article 6(2) grants rights to individuals, and, accordingly, it may be relied upon before national courts where a Member State has not implemented it correctly within the prescribed period. (24)

55. Under Article 18(1)(b)(i) of Directive 93/104, Member States have the right not to apply Article 6, from which it follows that individuals are not always in a position to rely on the direct effect of the provision.

However, in order to exercise that option, the Member States must comply with the general principles of the protection of the safety and health of workers and must also take the measures necessary to achieve the specific results listed. It is for the national court to establish whether the Member State has exercised that power and whether the conditions laid down in Article 18(1)(b)(i) have been met. (25)

56. It is well-known that the Court has consistently refused to recognise that an individual may rely on a directive against another individual where that directive has not been correctly implemented by a State within the relevant period, ruling that, under Article 249 EC, the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to each Member State to which it is addressed', from which it follows that a directive may not of itself impose obligations on an individual and that it may not therefore be relied on against that individual. (26)

57. In accordance with that case-law, the fact that the main proceedings involve disputes between individuals means that the employees are not entitled to invoke the direct effect of Article 6(2) of Directive 93/104. (27)

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58. The Court has ruled, (28) in similar cases, that when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 249 EC. Where it is seised of a dispute falling within the scope of a directive and arising from facts postdating the expiry of the period for transposing that directive, the national court must interpret the provisions of national law in such a way that they are applied in conformity with the aims of the directive.

Where it is impossible to provide an interpretation which conforms to the directive concerned, the national court must ensure the full effectiveness of Community law by setting aside on its own authority, where appropriate, any conflicting provisions of national law. The national court is not obliged to request or await the actual setting aside by the legislative authorities or by means of any other constitutional process. (29)

59. It is clear from the matters set out above that, where a Member State has not exercised the option envisaged in Article 18(1)(b)(i) of Directive 93/104, Article 6(2) of that directive precludes a provision, such as Article 7(1)(1)(a) of the German Law on working time, which allows for the extension of working hours beyond 10 hours, in a collective agreement or works agreement, where working time includes regular, significant periods of stand-by duty.

Accordingly, Article 14 of the German Red Cross Collective Agreement must be construed as meaning that, in so far as it is based on Article 7 above, the workers to whom it applies are not obliged to work in excess of 48 hours per week on average, having regard to the provisions of Article 16(2) and Article 17(4) of Directive 93/104 on the setting of the reference period for calculation of the average.

VIII - Conclusion

60. In the light of the foregoing considerations, I propose that the Court should give the following replies to the questions referred by the Arbeitsgericht Lörrach:

(1) (a) Article 1(3) of Council Directive 93/104/EEC of 23 November 1993 concerning certain aspects of the organisation of working time and Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work must be construed as meaning that the activity of rescue workers working in an emergency medical assistance service falls within the scope of both directives.

(1) (b) The concept of road transport in Article 1(3) of Directive 93/104 does not include the activity of an emergency rescue service which consists, at least in part, of driving vehicles and attending to patients during the journey.

(2) Article 18(1)(b)(i) of Directive 93/104 requires Member States who opt not to apply Article 6 to take all steps necessary to ensure that no employer may require an employee to work, without that employee's consent, for more than 48 hours on average over each seven-day period. Acceptance by an employee in his contract that the working conditions are those provided for in collective agreements which, in turn, permit the weekly working time to be extended, on average, beyond that threshold, does not constitute validly given consent for those purposes.

(3) Even in cases where Member States derogate from the reference period laid down in Article 16(2), Article 6(2) of Directive 93/104 is clear, precise and unconditional. In addition, Article 6(2) grants rights to individuals, and, accordingly, it may be relied upon before national courts where a Member State has not implemented it correctly within the prescribed period. However, in view of the fact that the main proceedings involve disputes between individuals, the employees may not invoke the direct effect of the provision.

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Where a Member State has not exercised the option envisaged in Article 18(1)(b)(i) of Directive 93/104, Article 6(2) of that directive precludes a provision, such as Article 7(1)(1)(a) of the German Law on working time, which allows for the extension of working hours to more than 10 hours in a collective agreement or works agreement, where working time includes regular, significant periods of stand-by duty. Accordingly, Article 14 of the Collective Agreement on Working Conditions for German Red Cross Employees, Workers and Trainees must be construed as meaning that, in so far as it is based on Article 7 above, the workers to whom it applies are not obliged to work in excess of 48 hours per week on average, having regard to the provisions of Article 16(2) and Article 17(4) of Directive 93/104 on the setting of the reference period for calculation of the average.

(1) .

(2) - Council Directive of 23 November 1993 (OJ 1993 L 307, p. 18).

(3) - OJ 1989 L 183, p. 1.

(4) - Case C-303/98 [2000] ECR I-7963.

(5) - Paragraphs 30 and 31 of the judgment.

(6) - Paragraphs 36 and 37 of the judgment.

(7) - Paragraphs 34 and 35 of the judgment.

(8) - That exclusion ceased to exist following the adoption of Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC to cover sectors and activities excluded from that Directive (OJ 2000 L 195, p. 41).

(9) - Judgment in Case C-173/99 [2001] ECR I-4881, paragraphs 37 and 38.

(10) - Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC.

(11) - Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport (OJ 1985 L 370, p. 1). The provisions of that directive were supplemented by Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJ 2002 L 80, p. 35), which must be implemented by no later than 23 March 2005.

(12) - Mayer, U.R., The European Legal Forum , 2001, p. 280 et seq., in particular p. 285.

(13) - Judgment in Case C-133/00 [2001] ECR I-7031, paragraph 39.

(14) - In the judgment, the Court does not give any reasons explaining why it interprets differently the reference to some sectors when all are included, without distinction, in the list in Article 1(3) of Directive 93/104. Nor does the Court give a ruling in relation to another sector, namely sea fishing, which is also referred to in Article 1(3). I have confirmed that this omission is not an oversight' in the Spanish version, because no mention of the sector appears in the French and English versions either, and English was the language of procedure in the case concerned.

(15) - Case C-76/97 [1998] ECR I-5357.

(16) - Council Directive of 18 June 1992 (OJ 1992 L 209, p. 1).

(17) - Paragraph 73 of the judgment.

(18) - Council Directive of 14 October 1991 (OJ 1991 L 288, p. 32).

(19) - Judgment in Case C-350/99 Lange [2001] ECR I-1061, paragraphs 16 and 25.

(20) - Judgments in Case 8/81 Becker [1982] ECR 53, paragraph 25; Case 152/84 Marshall [1986]

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ECR 723, paragraph 46; Case 31/87 Beentjes [1988] ECR 4635, paragraph 40; Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraph 29; and Joined Cases C-6/90 and C9/90 Francovich and others [1991] ECR I-5357, paragraph 17.

(21) - Judgments in Case 28/67 Molkerei-Zentrale Westfalen [1968] ECR 211, and Case C-236/92 Comitato di coordinamento per la difesa della Cava and O thers [1994] ECR I-483, paragraph 9.

(22) - Judgment in Case 71/85 Federatie Nederlandse Vakbeweging [1986] ECR 3855, paragraph 18.

(23) - Paragraph 68 of the judgment.

(24) - Judgment in Case 148/78 Ratti [1979] ECR 1629, paragraph 22.

(25) - At the hearing in Case C-151/02 Jaeger , in which the Court has also been asked to interpret certain provisions of Directive 93/104, the German Government's agent confirmed, in reply to a question put by me, that Germany has not relied on that provision in order to extend the weekly working time in the health care sector. See the Opinion which I delivered in that case on 8 April 2003.

(26) - Judgments in Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 9, Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 24; and Case C-192/94 El Corte Inglés [1996] ECR I-1281, paragraphs 16 and 17. Academic opinion has been rather critical of that case-law. See, for example, Tridimas, T., Horizontal effect of directives: a missed opportunity', European Law Review , 1994, p. 621 et seq., particularly p. 635; Turnbull, E., The ECJ Rejects Horizontal Direct Effect of Directives', European Business Law Review , 1994, p. 230 et seq., particularly p. 233; Vilà Costa, B., Revista Jurídica de Catalunya , 1995, p. 264 et seq., particularly p. 269; Bernard, N., The Direct Effect of Directives: Retreating from Marshall', Industrial Law Journal , 1994, p. 97 et seq., particularly p. 99; Turner, S., Horizontal Direct Enforcement of Directives Rejected', Northern Ireland Legal Quarterly , 1995, p. 244 et seq., particularly p. 246; Emmert, F. and Pereira de Azevedo, M., Les jeux sont faits: rien ne va plus ou une nouvelle occasion perdue pour la CJCE', Revue trimestrielle de droit européen , p. 11 et seq., particularly p. 19; Betlem, G., Medium Hard Law - Still No Horizontal Direct Effect of European Community Directives After Faccini Dori', The Columbia Journal of European Law , 1995, p. 469 et seq., particularly p. 488; Regaldo, F., Il caso Faccini Dori: una occasione perduta?', Rivista di diritto civile , 1996, p. 65 et seq., particularly p. 110; and Antoniolli Deflorian, L., Il formante giurisprudenziale e la competizioni fra il sistema comunitario e gli ordinamenti interni: la svolta inefficiente di Faccini Dori', Rivista critica di diritto privato , 1995, p. 735 et seq., particularly p. 749.

(27) - It must be pointed out that Advocate General Lenz, in the Opinion he delivered in Faccini Dori , expressed his conviction that, for the future, it was necessary to recognise, in the context of the development of case-law based on the EC Treaty and in the interests of uniform, effective application of Community law, the general applicability of precise, unconditional provisions in directives in order to respond to the legitimate expectations nurtured by citizens of the Union following the achievement of the internal market and the entry into force of the Treaty on European Union. In paragraph 47 and footnote 36, the Advocate General named several members of the Court who had spoken out in favour of the horizontal effect of directives prior to 1994.

(28) - Judgments in Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; Faccini Dori , paragraph 26; Joined Cases C240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941, paragraph 30; and Case C-456/98 Centrosteel [2000] ECR I-6007, paragraphs 16 and 17.

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(29) - Judgment in Case 106/77 Simmenthal [1978] ECR 629, paragraph 25.

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Opinion of Mr Advocate General Geelhoed delivered on 10 October 2002 Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Osterreichische Autobahnen und Schnellstraßen AG (OSAG). Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Power of the body responsible for review procedures to consider infringements of its own motion - Directive 93/36/EEC- Procedures for the award of public supply contracts - Selection criteria - Award criteria. Case C-315/01.

I Introduction

1. This request for a preliminary ruling from the Austrian Bundesvergabeamt (Federal Procurement Office) concerns the interpretation of certain articles of Directive 89/665/EEC (2) and Directive 93/36/EEC. (3) More specifically, it concerns the question whether in proceedings concerning the award of public contracts the review body may take into account, of its own volition and independently of the submissions of the parties, facts and circumstances which it considers to be relevant to the assessment of the lawfulness of the contract award procedure. The requesting court also wishes to know whether a decision taken by the review body of its own volition in this way can have implications for the applicant's standing to submit a claim for damages because of irregularities in the award of the contract. Questions are also asked about the admissibility of a number of criteria applied during the contract award procedure in the main proceedings.

II Legislative background

A Community law

2. Article 1(1) of Directive 89/665 as amended by Article 41 of Directive 92/50 provides:

> "The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law."

3. Article 2(1), (6) and (8) of Directive 89/665 provides:

> "1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
>
> ...
>
> (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
>
> (c) award damages to persons harmed by an infringement.
>
> ...
>
> 6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.
>
> Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.
>
> ...

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8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty [now Article 234 EC] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

"

4. Article 15(1) of Directive 93/36, which forms part of Chapter 1 (Common rules on participation) of Title IV, provides:

"Contracts shall be awarded on the basis for the criteria laid down in Chapter 3 of this Title, taking into account Article 16, after the suitability of the suppliers not excluded under Article 20 has been checked by the contracting authorities in accordance with the criteria of economic and financial standing and of technical capacity referred to in Articles 22, 23 and 24."

5. Article 23(1) of Directive 93/36, which forms part of Chapter 2 (Criteria for qualitative selection) of Title IV, provides:

"Evidence of the supplier's technical capacity may be furnished by one or more of the following means according to the nature, quantity and purpose of the products to be supplied:

(a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:

where effected to public authorities, evidence to be in the form of certificates issued or countersigned by the competent authority;

where effected to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the supplier to have been effected;

...

(d) samples, descriptions and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;

...

"

6. Article 26(1) of Directive 93/36, which forms part of Chapter 3 (Criteria for the award of contracts) of Title IV, provides:

"The criteria on which the contracting authority shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: eg price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

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"

B National law

7. Both Directive 93/36 and Directive 89/665 were transposed into Austrian law by the Bundesvergabegesetz (4) (Federal Procurement Law; hereinafter "BVergG").

8. Paragraph 113 of this law provides:

"1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer.

...

"

9. Paragraph 115(1) and (5) provides:

"1. Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.

...

5. The application shall contain:

(1) an exact designation of the contract award procedure concerned and of the contested decision,

...

"

10. Pursuant to Paragraph II(2), C, point 40a, of the Einführungsgesetz zu den Verwaltungsverfahrensgesetzen (Introductory Law to the Laws on Administrative Procedure) 1991, the Allgemeines Verwaltungsverfahrensgesetz (General Law on Administrative Procedure; hereinafter "AVG") 1991 applies to the administrative procedure adopted by the Bundesvergabeamt.

11. Paragraph 39(1) and (2) of the Allgemeines Verwaltungsverfahrengesetz 1991 provides:

"1. The evaluation procedure shall be governed by the provisions of administrative law.

2. In so far as the administrative provisions do not cover a matter, the authority shall proceed ex proprio motu and shall determine the procedure for the evaluation subject to the provisions contained in this Part.

...

"

III Facts of the main action and proceedings

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12. On 2 March 2000 the Autobahnmeisterei (Motorway Authority) for St Michael/Lungau issued an invitation to tender on behalf of Osterreichische Autobahnen- und Schnellstraßen-Aktiengesellschaft (OSAG), as the issuing authority, for the supply of a "special motor vehicle: new, ready-to-use and officially approved road sweeper for the A9 Phyrn motorway, delivery to the Motorway Authority for Kalwang" in an open European procedure.

13. The tender period opened on 25 April 2000. The applicant in the main action, GAT Gesellschaft für Abfallentsorgungs-Technik GmbH (hereinafter "GAT"), submitted a tender as general agent for Austria of the German manufacturer Bucher-Schörling at a price of ATS 3 547 020 excluding value added tax, and there were four other tenderers. The tender submitted by the firm OAF & Steyr was ATS 4 174 290 net, while that of another tenderer came to ATS 4 168 690, excluding value added tax.

14. Point B.1.13 of the conditions in the invitation to tender, entitled "Tender Evaluation", provided:

"B.1.13 Tender Evaluation

The determination of which tender is technically and economically the most advantageous shall be made in accordance with the best tenderer principle. It is a fundamental condition that the vehicles tendered satisfy the conditions in the invitation to tender.

The evaluation shall be carried out as follows:

Tenders shall be evaluated in each case by reference to the best tenderer and points shall be calculated relative to the best tenderer.

...

(2) Other criteria

A maximum of 100 points shall be awarded for other criteria, and shall count for 20% of the overall evaluation.

2.1. Reference list of road sweeper vehicle customers in the geographical area comprising the part of the Alps within the European Union (references to be provided in German): weighting 20 points

Evaluation formula:

The highest number of customers divided by the next highest number and multiplied by 20 points.

"

15. On 16 May 2000 the contracting authority eliminated GAT's tender on the ground that that tender did not comply with the conditions in the invitation to tender inasmuch as the pavement cleaning machine tendered could be operated only down to temperatures of 0°C, whereas the invitation to tender had required a minimum operating temperature of -5°C. In addition, despite a request by the contracting authority, the applicant had not arranged for the machine to be inspected within a 300 kilometre radius of the authority issuing the invitation to tender, as required therein. Furthermore, the contracting authority doubted that the price in the applicant's tender was plausible. In addition, despite a request by the contracting authority, the applicant had not provided a sufficient explanation of the technical specifications concerning cleaning of the reflectors of the machine it had tendered.

16. In accordance with the award proposal of 31 July 2000, OAF & Steyr Nutzfahrzeuge OHG was awarded the contract by letter of 23 August 2000. By letters of 12 July 2000, the other tenderers were notified that a decision had been taken regarding the recipient of the award. GAT was informed by letter of 17 July 2000 that its tender had been eliminated, and by letter of 5 October 2000

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it was notified of the identity of the recipient of the award and the contract price.

17. On 17 November 2000 the applicant applied for a declaration that the award in the contract award procedure had not been made to the best tenderer and argued that its tender had been eliminated unlawfully. The technical description included in its tender of the reflector cleaning had been sufficient for an expert. In addition, the contracting authority had been invited to inspect the factory of the applicant's supplier. GAT also contended that the award condition imposed by the contracting authority consisting of "the opportunity to inspect the subject of the invitation to tender within a 300 kilometre radius of the authority issuing the invitation to tender" contravened Community law because it constituted indirect discrimination. The contracting authority was required to accept any products within Europe that could be used as a reference. In addition, that criterion could be used only as an award criterion and not as a selection criterion, which was how the contracting authority had subsequently wrongly used it. It also pointed out that, although it was true that the basic version of the road sweeper it had tendered could be used only at temperatures down to 0°C, the contracting authority had reserved the right to purchase an additional option. The additional option tendered by the applicant would operate at -5°C, as required in the invitation to tender. Finally, its tender was not at an implausible price. The applicant had been able to give an adequate explanation of its low price to the contracting authority.

IV Questions submitted for a preliminary ruling

18. As the Bundesvergabeamt considers a ruling by the Court to be necessary, by order of 11 July 2001, the Bundesvergabeamt referred the following questions to the Court for a preliminary ruling:

> "1a. Is Article 2(8) of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, or any other provision of that directive or any other provision of Community law to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from taking into account, of its own motion and independently of the submissions of the parties to the review procedure, those circumstances relevant under the law governing contract award procedures which the authority responsible for carrying out review procedures considers material to its decision in a review procedure?

1b. Is Article 2(1)(c) of Directive 89/665/EEC, if necessary considered in conjunction with other principles of Community law, to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from dismissing an application by a tenderer that is indirectly aimed at obtaining damages, where the contract award procedure is already tainted by a material legal infringement attributable to a decision taken by the contracting authority, other than the decision being contested by that tenderer, on the ground that if the contested decision had not been taken the tenderer would none the less have been harmed for other reasons?

2. If Question 1a is answered in the negative: Is Directive 93/36/EEC coordinating procedures for the award of public supply contracts, in particular Articles 15 to 26 thereof, to be interpreted as prohibiting a public contracting authority conducting contract award procedures from taking account of references relating to the products offered by tenderers not as proof of the tenderers' suitability but to satisfy an award criterion, such that the fact that those references are given a negative evaluation would not exclude the tenderer from the contract award procedure but would merely result in the tender receiving a lower evaluation, for example under a points system in which poor evaluation

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of references might be offset by a lower price?

3. If Questions 1a and 2 are answered in the negative: Is it compatible with the relevant provisions of Community law, including Article 26 of Directive 93/36/EEC, the principle of equal treatment and the obligations of the Communities under international law for an award criterion to provide that product references are to be evaluated on the basis of the number of references alone, there being no substantive examination as to whether contracting authorities' experiences of the product have been good or bad, and, moreover, that only references from the geographical area comprising the part of the Alps within the European Union are to be taken into account?

4. Is it compatible with Community law, in particular the principle of equal treatment, for an award criterion to permit opportunities to inspect examples of the subject of the invitation to tender to receive a positive evaluation only if available within a 300 kilometre radius of the authority issuing the invitation to tender?

5. If Question 2 is answered in the affirmative, or Question 3 or 4 in the negative: Is Article 2(1)(c) of Directive 89/665/EEC, if necessary considered in conjunction with other principles of Community law, to be interpreted as meaning that if the contracting authority's infringement consists in imposing an unlawful award criterion, the tenderer will be entitled to damages only if he can actually prove that, but for the unlawful award criterion, he would have submitted the best tender?

"

V Assessment

19. In this procedure written observations have been submitted to the Court by GAT, the Austrian Government and the Commission. Both the Commission and the Austrian Government have disputed the admissibility of the questions. This is the first aspect to be considered below.

A Jurisdiction of the Bundesvergabeamt to submit questions for a preliminary ruling

20. The Commission raises the question whether the questions are admissible, since the decisions of the Bundesvergabeamt have no legal force. It refers to the comments it has made in Case C-314/00 Siemens and Arge , which is pending before the Court. In that case the Commission observes that, although the Bundesvergabeamt satisfies the criteria of a court or tribunal within the meaning of Article 234 EC, as defined by the Court in its case-law, it doubts that the Bundesvergabeamt's rulings have any legal force. In this connection it refers to the case-law in which the Court has ruled that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. In particular, the Commission refers to Cases C-134/97 Victoria Film A/S (5) and C-178/99 Salzmann . (6) The Commission doubts that the rulings have legal force because the referring court in Case C-314/00 pointed out that the order made by the Bundesvergabeamt did not constitute an enforceable order to the contracting authority within the meaning of Paragraph 113(2), subparagraph 2, BVergG. In these circumstances the Commission does not exclude the possibility that the decisions of the Bundesvergabeamt are not of a judicial nature.

B Admissibility of the questions submitted for a preliminary ruling

21. The Austrian Government takes the view that Questions 1a and 5 are inadmissible. It believes that it can be inferred from the order of reference that these questions were raised in a procedure based on Paragraph 113(3) BVergG. According to the Austrian Government, this procedure is not a review procedure within the meaning of Directive 89/665 but an assessment procedure. In this connection the Austrian Government explains that the legislature had exercised the option offered by the second sentence of Article 2(6) of Directive 89/665 to stipulate that, after the conclusion

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of a contract following its award, only damages could be claimed. The Austrian Government explains that the Bundesvergabeamt is competent to conduct review procedures within the meaning of the directive. However, it had not been granted the powers referred to in Article 2(1)(c) of Directive 89/665. On the basis of Paragraph 113(3) the Bundesvergabeamt must confine itself, after the conclusion of the contract, to determining whether or not procurement law has been infringed (for a similar provision see Paragraph 117(3) BVergG). This task was assigned to the Bundesvergabeamt to simplify procedures. For one thing, the Bundesvergabeamt, being the competent authority in the field of public contracts, is best suited to this task. In addition, possible divergences in the administration of justice, unnecessary legal costs and lengthy legal proceedings can be avoided in this way. For the award of damages, however, a civil court is the competent body. The assessment procedure before the Bundesvergabeamt should precede any action for damages in a civil court, because the claim would otherwise be inadmissible pursuant to Paragraph 125(2) BVergG. This provision also stipulates that the parties and the civil courts are bound by the Bundesvergabeamt's assessment. According to the Austrian Government, it follows from the foregoing that the assessment procedure is not a procedure within the meaning of Directive 89/665 and that answers to Questions 1a and 5 are not therefore needed for a ruling in the main action.

C Opinion

22. The Commission does not deny that the Bundesvergabeamt meets the criteria of a court or tribunal developed by the Court in previous case-law. However, it raises the question whether the decisions of the Bundesvergabeamt lead to a decision of a judicial nature. The Austrian Government, on the other hand, limits the plea of inadmissibility to two of the questions submitted, Questions 1a and 5. It believes that the Bundesvergabeamt does not need answers to these questions to be able to reach a decision. Those questions concerned, after all, matters which did not fall within the responsibilities of this body.

23. In the following I will first consider the plea entered by the Commission. I can be brief in this respect. There is no disputing that a court or tribunal within the meaning of Article 234 EC is involved here. The Court has already accepted this (implicitly) on several occasions. (7) The question whether the decisions of the Bundesvergabeamt are often also of a judicial nature was recently considered in the Opinion delivered by Advocate General Mischo in Felix Swoboda . (8) He rightly says that a body may indeed issue decisions of a judicial nature even if it does not have the power to issue enforceable judicial directions. To illustrate this, he points out that the Court itself does not have such power, except in interlocutory proceedings. I agree with this view. As observed in that Opinion, although the Bundesvergabeamt does not have the capacity to issue enforceable directions to the contracting authorities, it has the power to annul their decisions and the measures it takes in this respect are binding. The case in which Advocate General Mischo delivered his Opinion similarly concerned a situation in which the Bundesvergabeamt was no longer able to set aside the decision of the contracting authority because the contract had already been concluded and under Austrian law the only course of action then remaining was to claim damages. In that situation the Bundesvergabeamt is left, pursuant to Paragraph 113(3) BVergG, with the power to determine whether the contract has been awarded to the best tenderer. A decision of this kind is not unimportant. Firstly, it is evident from Paragraph 125(2) BVergG that such a procedure before the Bundesvergabeamt is necessary since a subsequent action for damages in a civil court would otherwise be inadmissible. Secondly, the parties and the civil court are bound by the opinion of the Bundesvergabeamt. I therefore agree with Advocate General Mischo's conclusion that the Bundesvergabeamt, being a judicial body, has the authority to submit questions for a preliminary ruling.

24. It then needs to be considered whether all the questions submitted are admissible, as this is disputed by the Austrian Government. Austria states that the assessment procedures are not

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review procedures within the meaning of Directive 89/665. I cannot share this view.

25. It is evident from the structure of the Austrian legislation that the powers defined in Article 2(1)(a) and (b) of the directive have been assigned to the Bundesvergabeamt while the power defined in Article 2(1)(c) has been assigned to the civil courts. In this division of tasks the Austrian legislature has applied Article 2(2) of the directive. Austria then exercised the option offered by Article 2(6) of the directive. That provision permits the Member States to opt to restrict the powers of the body responsible for review procedures to awarding damages to anyone harmed by an infringement if the contract has already been concluded following its award.

26. The directive requires the Member States to provide for powers relating to interlocutory procedures, procedures for setting aside decisions and procedures for the award of damages. The fact that within the framework of procedures for the award of damages the Austrian legislature has provided in its national law for a two-stage procedure (what the Austrian Government calls the assessment procedure before the Bundesvergabeamt and the actual procedure for the award of damages in a civil court) does not preclude the Bundesvergabeamt's power to submit questions for a preliminary ruling, especially as the civil courts are bound by the Bundesvergabeamt's decisions. The procedures are thus closely linked. It would be contrary to the proper purpose of the directive for the Bundesvergabeamt to be unable to submit questions for a preliminary ruling in what the Austrian Government terms an assessment procedure.

27. It follows from the system of Austrian legislation, after all, that the Bundesvergabeamt determines whether the requirements arising from the directives on the award of public works and supply contracts have been satisfied. Its assessment, as already indicated above, has legal consequences since it forms the basis for determining whether an action for damages may be brought in a civil court. As the Bundesvergabeamt's decisions have legal consequences, questions may be duly submitted for a preliminary ruling within the framework of the assessment procedure, in which, it should be noted, it has to be considered whether Community law on public works and supply contracts or the national legislation transposing Community law has been infringed.

28. I cannot therefore share the Austrian Government's position that the first question submitted is irrelevant. It is this very body which is required to determine whether an infringement has occurred. It has an interest in knowing whether it may, ex proprio motu , include in the case aspects which have not been submitted by the parties. The situation is different where the fifth question is concerned. It asks when a tenderer is entitled to damages. Under Austrian law this is a matter for a civil court. Whether there is entitlement to damages in this particular case is therefore a question which should be answered by that court in accordance with its national law.

29. I therefore conclude that the Austrian Bundesvergabeamt has the authority to submit questions for a preliminary ruling and that, with the exception of Question 5, all the questions submitted by this body are admissible.

VI Merits

A Question 1a

30. By this question the requesting court is seeking to determine whether the consideration ex proprio motu of circumstances relevant to the contract award procedure is inconsistent with Article 2(8) of the directive or with any other provision of the directive or of Community law.

31. In the order for reference the Bundesvergabeamt explains that Paragraph 39(2) AVG requires it to take a decision ex proprio motu and therefore to examine whether award criteria other than those contested by the applicant are lawful. If it emerges that other criteria are also unlawful, the review may be rejected. The Bundesvergabeamt considers this inference from the wording of Paragraph

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113(3) BVergG in conjunction with the principle of ex proprio motu in administrative procedures to be consistent, generally, with Community law. In view of the spirit of Paragraph 113(3) BVergG, however, it may be open to question whether this inference is also consistent with the principle of effective legal protection.

32. The referring court also observes that it is generally unaware of any provisions of Community law precluding action ex proprio motu , whilst it accepts that there is something of a contradiction between action ex proprio motu in administrative procedures and the audi alteram partem principle.

33. None the less, the Bundesvergabeamt finds it necessary to submit questions on this pursuant to the third paragraph of Article 234 EC. This action is prompted specifically by the judgment of the Bundesverfassungsgericht (Federal Constitutional Court) of 8 March 2001, in which questions arose about the compatibility of action ex proprio motu with the principle set out in Article 2(8) of Directive 89/665 that both sides are to be heard in the review procedure. The Bundesverfassungsgericht has set aside a number of decisions taken by the Bundesvergabeamt on the ground that this body took unlawful aspects of the contract award procedure into account ex proprio motu

34. The Commission points out that the directive does not require review procedures before an independent body within the meaning of Article 2(8) of Directive 89/665 to be based solely on the submissions of the parties and that the possibility of that body including relevant circumstances in the assessment ex proprio motu cannot therefore be ruled out as long as they have the right to be heard. The Austrian Government, referring in this regard to the observations it submitted in the Primetzhofer case, (9) similarly takes the view that action taken ex proprio motu is not inconsistent with the first part of the last sentence of Article 2(8) of the directive.

35. In its observations, which focus particularly on the consequences of action ex proprio motu , GAT essentially argues that it is inconsistent with the directive for circumstances which have not been cited by the parties to be taken into account in the assessment ex proprio motu .

36. It must first be observed that the Bundesvergabeamt is a court or tribunal within the meaning of Article 234 EC. On a previous occasion, the Court explained that, under the first subparagraph of Article 2(8), the Member States may choose between two solutions in establishing arrangements for the review of public contracts. Either a body of a judicial character is given jurisdiction or a body which is not of such a character is given jurisdiction, in which case the decisions of that body must be capable of being the subject of judicial review or of review by another body which must satisfy the particular requirements of the second subparagraph of Article 2(8) of Directive 89/665. (10) As the Bundesvergabeamt is to be regarded as a body of a judicial character ("the first option"), this guarantee provision does not apply. The Austrian Government's and the Commission's contention that action taken ex proprio motu is not inconsistent with the first part of the last sentence of Article 2(8) of the directive is therefore irrelevant in this case. The question continues to be relevant, however, since the referring court also submits it in its capacity as a "body of a judicial character" . Furthermore, the fact that a ruling was delivered after a procedure in which both sides were heard is one of the factors which the Court takes into account when determining whether the body concerned is a court or tribunal within the meaning of Article 234 EC.

37. For the following reasons I take the view that a procedure in which both sides are heard does not rule out action by the competent court ex proprio motu in an administrative procedure. A procedure in which both sides are heard means in fact that the parties can react to each other's points of view before the body with jurisdiction delivers a ruling and they must also be able to react to any aspects which this body includes in the examination ex proprio motu . The directive also requires the Member States to make provision for accessible, effective and appropriate procedures.

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However, they are free to decide what form they should take. They may therefore stipulate that a court may take into account ex proprio motu circumstances which are relevant to its assessment. How far the Bundesvergabeamt is obliged to include in its assessment ex proprio motu all relevant circumstances, thus regardless of the submissions of the parties, is something that will be discussed in the context of the next question. It is my view, therefore, that it is not inconsistent with the directive for a court to take into account, of its own motion and independently of the submissions of the parties during the review procedure, circumstances relevant to the contract award procedure, provided that the intended aim of the directive, in other words, effective legal protection, is guaranteed.

B Question 1b

38. By Question 1b the Bundesvergabeamt seeks to establish whether Article 2(1)(c) of the directive, possibly in conjunction with other principles of Community law, precludes a decision by the review body dismissing an application by a tenderer that is indirectly aimed at obtaining damages where the contract award procedure was already unlawful on other grounds not cited by the tenderer.

39. In the order for reference the Bundesvergabeamt explains with regard to Questions 1a and 1b that Paragraphs 113(3) and 115(1) BVergG provide that, in a review procedure following the award of a contract, the Bundesvergabeamt must examine the decision of the contracting authority being contested by an applicant as to its lawfulness, but that the application is to be granted only if it is the unlawful decision being contested that has caused the contract not to be awarded to the best tenderer within the meaning of the law. Therefore, if the contract award procedure is already tainted by fundamental illegality because of a separate (and possibly earlier) decision by the contracting authority and the applicant has not contested that other decision by the contracting authority in the review procedure, an application for review cannot be granted. In that case, a tenderer who contests a decision by the contracting authority that is demonstrated to be unlawful may not make a claim for damages because a separate decision by the contracting authority which has not been challenged has already led to the conclusion that the contract award procedure concerned is unlawful. In such a case, the applicant will not have been "harmed" by the contested infringement within the meaning of Article 2(1)(c) of Directive 89/665, because the harm, for example wasted tender costs, will already have been caused by an (earlier) infringement by the contracting authority.

40. GAT takes the view that the judicial practice of the Bundesvergabeamt, as referred to above, is inconsistent with the effective legal protection required by Community procurement law. GAT refers in this context to the judgment of the Bundesverfassungsgericht which comes to the conclusion on the basis of the Court's case-law that the right to seek a review pursuant to Article 1(3) of Directive 89/665 must be interpreted broadly and that this right is enjoyed by anyone who has shown his interest in the award by submitting a tender. GAT explains that the Bundesverfassungsgericht concluded in that judgment that, in view of the extensive legal protection enjoyed by candidates and tenderers, it is doubtful that the Bundesvergabeamt's position that a review requested by a tenderer cannot succeed because the contract award procedure concerned is already tainted on another ground is compatible with Community law.

41. To illustrate this, GAT points out that, in the main action, the Bundesvergabeamt put forward its view that, if things had been done properly, the contract award procedure ought really to have been cancelled because the award criterion concerning a list of references is not permissible under either European or Austrian procurement law. GAT adds that the proceedings it has brought do not concern this criterion. In the Bundesvergabeamt's view the consequence is, however, that GAT is not entitled to damages. According to GAT, such legal practice, with the Bundesvergabeamt finding ex proprio motu that the procedure is unlawful, may be admissible if it occurs before the contract is awarded. In that event, a fresh invitation to tender from which the inadmissible

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criteria have been removed can be issued. The tenderer is not then harmed since he is able to compete again. After the contract has been awarded, on the other hand, reparation is not possible. Furthermore, tenderers have evaluated their legal position solely on the basis of what really happened in this specific case. It is on this, according to GAT, that the review procedure should therefore be based.

42. GAT maintains that the Bundesvergabeamt's legal practice in fact shifts the responsibility for a legally correct contract award procedure to the tenderers, whereas the contracting authority escapes all blame if the procedure is unlawful. It is not for the tenderer to bring to light all, or all potential, infringements during a contract award procedure. The right to seek a review is, after all, linked to his subjective rights, especially if he is harmed, or risks being harmed, by an infringement of the applicable law.

43. Both the Commission and the Austrian Government propose that this question should be answered in the affirmative. The Commission states that Article 1(3) of Directive 89/665 requires the review procedures to be available to any person who has or has had an interest in the award of the contract and who has been or risks being harmed by an alleged infringement. As regards the scope of the procedures for reviewing decisions of contracting authorities, the Commission refers to the Opinion of Advocate General Tizzano in Case C-92/00. (11) The considerations set out in that Opinion apply, according to the Commission, not only to procedures directed against a decision of the contracting authority but also to actions for damages under Article 2(1)(c), especially as the directive does not provide for the possibility of restricting an action for damages.

44. The Austrian Government points out that an answer in the negative would mean that, even if it were well founded, an appeal against the decision of the contracting authority would have to be dismissed because the harm suffered by the interested party had been caused by other irregularities in the contract award procedure not cited by him. An applicant in a contract award procedure would therefore be forced systematically to expose all irregularities in the procedure in order to assert his right. This view might be inconsistent with Directive 89/665, which requires effective action to be taken against any infringement alleged by the applicant. The dismissal of a substantively legitimate application might be seen as a denial of justice. On the other hand, the Austrian Government believes that, as the directive does not contain any explicit rules on this aspect, it can also be argued that the question should be answered solely by reference to national law.

45. The Court has recalled on several occasions that the aim of Directive 89/665 is to reinforce existing arrangements at both national and Community level for ensuring effective application of Community directives on the award of public contracts. For this reason, Article 1(1) of the directive requires the Member States to ensure that reviews can be conducted effectively and rapidly. The aim is thus to provide for the possibility of reviewing decisions taken by the contracting authorities, without any restriction as regards the nature and content of those decisions. (12) The scope of the directive thus precludes any interpretation and application that would result in the direct or indirect restriction of the options open to tenderers to seek a review. This, to my mind, is also true of actions for damages. Article 1(3) of the directive provides that the review procedures (including actions for damages) must be available to any person who has or has had an interest in the award of a certain public contract and who has been or risks being harmed by an alleged infringement. Nowhere in the directive is there anything to say that this may be restricted. On the contrary, the only option open to the Member States is to restrict procedures after the contract has been concluded to actions for damages, which should then still be available to "any person who has been harmed by an infringement" . Neither the wording of Article 1(3) nor that of Article 2(6) indicates that this power of the interested tenderer can be restricted.

46. The practice described by the referring court means that tenderers harmed by an infringement

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for which the contracting authority is responsible cannot claim damages. A tenderer who believes that he has wrongly been denied a contract need not, after all, be aware that, at the stage when the tenderers were being selected, an unlawful criterion had already been applied, quite apart from the fact that he himself satisfied this unlawful criterion and therefore suffered no disadvantage because of it. If he had been excluded at that stage because of an unlawful criterion, he could have acted at that stage.

47. It would be inconsistent with the purpose of Community law in this field if an examination carried out by the Bundesvergabeamt ex proprio motu were to preclude reliance on an unlawful act committed towards a tenderer as a ground for bringing an action for damages. This is particularly so since a contract can no longer be contested once it has been concluded.

C Question 2

48. The referring court's aim in putting this question is to establish whether Directive 93/36 precludes a list of references relating to the products offered by the tenderers from being regarded as an award criterion.

49. It is clear from the order for reference that the contracting authority awards points for such lists without considering the relevant customers' experience of the product. A further requirement is that the lists concern customers in the geographical area comprising the part of the Alps within the European Union, an aspect partly covered by the next question. The issue here is whether a list of this kind may play a part in the assessment of the award, rather than being a qualitative selection criterion.

50. In essence, both the Commission and the Austrian Government observe that this is in the nature of a selection criterion rather than an award criterion and that it is inconsistent with the structure of Directive 93/36 for a list of references relating to the product offered by the tenderer not to be assessed in the context of the tenderer's suitability but to be taken into account in the assessment of the award.

51. Hitherto the Court has made a very clear distinction between selection criteria ("choice of tenderers") and award criteria ("choice of tenders"). (13) These are separate arrangements forming part of a contract award procedure, and they are subject to separate rules. The tenderer is chosen by reference to his financial and economic standing and technical capacity. The references or evidence that may be furnished to demonstrate tenderers' standing and capacity are specified in Articles 22, 23 and 24 of Directive 93/36, although the list is not exhaustive. Technical capacity may be demonstrated, according to Article 23 of the directive, by a list of the principal deliveries. For the award of the contract, selection can be based either on the lowest price or on criteria identifying the economically most advantageous tender. Article 26(1)(b) of Directive 93/36 gives a number of examples of criteria. Although this is not an exhaustive list and the contracting authority is free to opt for other criteria, that choice is restricted to criteria identifying the economically most advantageous tender. (14) It is evident from the order for reference that the list of references is regarded as an award criterion. As both the Commission and the Austrian Government have said, a list of references to which a certain number of points is awarded without account being taken of the experience of earlier contracting authorities appearing on the list is undoubtedly suitable as a qualitative selection criterion, but not as an award criterion. I share that view. The list of references here in question may say something about the tenderer's experience and technical expertise, but a list of this kind is not suitable for determining the most advantageous offer. Such a list of references does not, after all, give any indication at all of the services provided, the running costs or other criteria capable of determining which tender will ultimately prove to be economically the most advantageous for the contracting authority.

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52. The above comments lead to the conclusion that the possibility of submitting a list of this kind as an award criterion is incompatible with Article 26 of Directive 93/36. I would add, unnecessarily no doubt, that it is not apparent from the order for reference what kind of references the tenderers concerned were required to submit as evidence of their technical capacity. The fact that this requirement cannot be an award criterion does not in itself mean that it was inappropriate as a selection criterion for the tenderer.

D Question 3

53. This question follows naturally from the previous one. Strictly speaking, it does not need to be answered since it has been referred only in the event that Questions 1a and 1b are answered in the negative. From the assessment of the previous question it is clear that the use of a list providing no information that is decisive for the assessment of the economic advantages of the tender cannot serve as an award criterion. In the following I shall therefore focus on the question whether taking account only of references from the geographical area comprising the part of the Alps within the European Union is compatible with Community law.

54. According to the Commission, it may be discriminatory to take into account only references from the geographical area comprising the part of the Alps within the European Union. The Austrian Government is also inclined to this view.

55. I am able to share this view. From the assessment of the previous question it is already apparent that the contracting authority may apply only award criteria to determine the economically most advantageous tender and that the use of a list of references is not suitable for this purpose. This is undoubtedly also true where it is required that such references from customers be restricted to references from the geographical area comprising the part of the Alps within the European Union. Leaving aside the question whether the list should be described as an award criterion or as a qualitative selection criterion, it is discriminatory in either case. As the Austrian Government has also pointed out, it is equally possible to make comparisons with experience in other mountainous areas where the climate and topology are similar. A tenderer may not therefore gain the necessary points because many of his clients are located in the Alpine area of Switzerland or, say, the French Pyrenees. It might be objected that this still applies regardless of whether tenderers are Austrian nationals or nationals of one of the EU or EEA countries or a country with which an international agreement has been concluded. In practice, however, a requirement that the list of customers relate only to the geographical area comprising the part of the Alps within the European Union, and thus de facto to the Alps situated in Austria and the relatively small parts of the Alps located in Italy and France, results in undertakings established in Austria being de facto in a privileged position.

56. I therefore conclude that the inclusion of criteria entailing geographical restrictions results in the number of tenderers being limited on the basis of geographical standards and that a criterion of this kind is therefore by its nature discriminatory with respect to potential applicants unable to satisfy this geographical criterion.

E Question 4

57. This question concerns the award criterion according to which a favourable assessment is possible only if the subject of the invitation to tender can be inspected within a 300 kilometre radius of the authority issuing the invitation to tender. The Commission has commented in this regard that, according to Article 23(1)(d) of Directive 93/36, the contracting authority may require samples, descriptions and/or photographs of the products to be supplied as proof of their suitability. The requirement that there be an opportunity for an inspection within a 300 kilometre radius is therefore a selection criterion. Austria too has argued that this is a selection criterion and not an award

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criterion. A criterion of this kind is, moreover, discriminatory, according to the Austrian Government, because it favours participants near the contracting authority, meaning, as a rule, participants from the Member State concerned or participants established very close to the border.

58. GAT has observed in this connection that Paragraph 60 BVergG indicates how evidence of technical capacity can be provided. As a rule, it consists of certificates, photographs and samples. Only in exceptional cases does the BVergG permit the product itself to be inspected, for example where it is of a complex nature (Paragraph 60(2) BvergG). It also follows from this provision that the inspection requirement may not be so worded that the reference object must be located near the contracting authority. Such a requirement would be inconsistent with the purpose of European procurement law because it would restrict the opportunities for manufacturers and suppliers from other Member States to participate in tender procedures. Consequently, Paragraph 60(2) BveregG provides that an on-the-spot inspection may be carried out either by the contracting authority itself or by an authorised body acting on its behalf in the tenderer's country of origin. According to the BVergG, where the complexity of the product to be supplied necessitates a personal inspection, a contracting authority must accept all products in Europe as a reference to assess technical capacity. GAT also explains that there is no analogous provision for the assessment of the economically most advantageous tender. None the less, the view prevailing in Austria was that, to enable the economically most advantageous tender to be assessed, the tender documents may provide for an opportunity to inspect the product or for similar evidence to be produced if the specific features of the object concerned require. GAT argues that there is no reason to make a distinction according to whether the opportunity for an inspection forms part of a selection criterion or an award criterion. A contracting authority's power to require an inspection near to where it was established amounted to hidden discrimination, since it was a requirement which only Austrian undertakings could as a rule satisfy. It would be different only if the products concerned were mass-produced or small in size, as the forwarding of a sample would then usually be sufficient. This case, however, concerned the manufacture of a specific model, which normally gave rise to very high transport costs. In such cases the manufacturer's interest prevailed and the contracting authority could not require that the inspection take place only in the vicinity of its establishment.

59. As discussed in the answers to the previous questions, the only award criteria that may be considered are those which might help to determine "the economically most favourable tender" . I fail to see how the criterion "opportunity for an inspection within a 300 kilometre radius" might contribute to this. It is thus a selection rather than an award criterion. Even then, however, it is inadmissible because a 300 kilometre radius imposes a real restriction. It is, after all, to the advantage of tenderers whose customers and/or establishment are located near the contracting authority and so usually have the same nationality as the contracting authority. It is therefore discriminatory in terms of the country of origin of the goods and/or services concerned and the nationality of the supplier. This aside, I do not see any need to restrict the possibility of an on-the-spot inspection of the object to a 300 kilometre radius of the authority issuing the invitation to tender. As GAT has also indicated, other options are possible if an on-the-spot inspection is required.

F Question 5

60. In point 29 I came to the conclusion that this question is inadmissible since, once the contract has been awarded, the Bundesvergabeamt is authorised only to determine whether the open contract award procedure has been carried out correctly and whether the contract has been awarded to the best tenderer: it is not authorised to award damages. In case the Court disagrees with me in this regard, I will consider this question further.

61. The premiss is that there has been an infringement and that this infringement consists in

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the adoption of an unlawful award criterion. The question then is whether the tenderer is entitled to damages only if it can actually be proved that, but for this unlawful award criterion, he would have been the best tenderer.

62. To clarify this question, the requesting court has stated that Community law does not expressly state under what conditions it must be held that a tenderer has actually been harmed by an infringement of the law committed by the contracting authority. It points out that it will often be difficult in practice to prove what the tenderer's tender would have been but for the unlawful criterion. On the other hand, it is in practice easier to carry out an investigation into infringements during contract award procedures if it is assumed that tenderers are harmed by any unlawful award criterion that is potentially relevant to the contents of their tenders.

63. Article 2(1)(c) of Directive 89/665 concerns the awarding of damages to persons harmed by an infringement. A similar provision can be found in Article 2(1)(d) of Directive 92/13. (15) The Commission rightly points out that, in contrast to the latter directive, which provides that, where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim is required only to prove an infringement of procurement law and that he would have had a real chance of winning the contract, (16) Directive 89/665 does not include a provision to this effect. I would add that this directive does not contain any provisions concerning claims for damages representing other costs.

64. There being no such provision in the directive, this aspect is governed, according to the Court's settled case-law, (17) by national law, with due regard for the general principles of Community law, including the principle of equivalence and the principle of effectiveness. From this it follows that claims for damages are governed by the material and formal conditions defined by Austrian legislation. According to settled case-law, these conditions may not, however, be less favourable than those governing the same right of action on an internal matter (a principle on which the directive itself is based) and they may not be such that the exercise of the rights granted by the Community system of law is made practically impossible.

65. I would add in this context that the granting of an entitlement to damages to the tenderer only on condition that he can actually prove that, but for the unlawful award criterion, he would have won the contract may mean that the exercise of these rights is impossible in practice or at least seriously restricted.

66. On that hypothesis, which amounts to ruling out any compensation for the costs incurred in vain by a tenderer through participating in an irregular contract award procedure, potential applicants may be deterred from participating in such procedures. I consider this to be inconsistent with the aim of the procurement directives and with the purpose of Directive 89/665, the very objective of which is to increase the opportunities for reviewing infringements of these procurement directives. I conclude from this that Article 2(1)(c) of the directive cannot be interpreted so narrowly as to give a tenderer the right to damages only if he can prove that, but for the unlawful award criterion, he would have won the contract. Although the scale of the entitlement to damages is in principle governed by national law, the application of that law must not result in the exercise of the rights granted by the system of Community law becoming de facto impossible or at least seriously restricted.

VII Conclusion

67. In view of the above, I propose to the Court that the questions submitted for a preliminary ruling should be answered as follows:

(1a) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts does not preclude an authority responsible for carrying out review

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procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, from taking relevant circumstances into account of its own motion and independently of the submissions of the parties to the review procedure.

(1b) Article 2(1)(c) of Directive 89/665 does not preclude an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, from dismissing an application by a tenderer that is indirectly aimed at obtaining damages, because the contract award procedure has allegedly already been tainted by deficiencies other than those cited by the tenderer.

(2) The provisions of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts prohibits a public contracting authority conducting a contract award procedure from taking account of references relating to the products offered by tenderers as an award criterion.

(3) A reference criterion whereby only the number of references is counted and no substantive examination is made of contracting authorities' experiences of the product is not an award criterion within the meaning of Article 26 of Directive 93/36. The consideration only of references from the geographical area comprising the part of the Alps within the European Union constitutes, moreover, discrimination prohibited by the Treaty on the ground of the origin of the goods or services concerned.

(4) A criterion under which applicants are considered only if the subject of the invitation to tender can be inspected within a 300 kilometre radius of the authority issuing the invitation to tender is not an award criterion. The criterion is, moreover, inadmissible because it is discriminatory.

(5) It does not follow from Article 2(1)(c) of Directive 89/665 that an entitlement to damages exists only if the tenderer can actually prove that, but for the unlawful award criterion, he would have been the best tenderer.

(1) .

(2) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

(3) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

(4) Bundesvergabegesetz 1997, BGBl. I, 56/1997.

(5) [1998] ECR I-7023, paragraph 14.

(6) [2001] ECR I-4421, paragraph 14.

(7) See, for example, the judgments in Case C-44/96Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, Case C-76/97 Tögel [1998] ECR I-5357, Case C-111/97 EvoBus Austria [1998] ECR I-5411, Case C-27/98 Fracasso and Leitschutz [1999] ECR I-5697, Case C-81/98 Alcatel Austria and Others [1998] ECR I-7671, Case C-324/98 Teleaustria and Telefonadress [2000] ECR I-10745 and Case C-94/99 ARGE [2000] ECR I-11037.

(8) [2002] ECR I-10567.

(9) This case has meanwhile been concluded; see the order of 11 July 2002 in Case C-464/00 (not published in the ECR).

(10) Case C-103/97 Köllensberger and Altzwanger [1999] ECR I-551, paragraphs 27 to 30. See also Case C-258/97 HI [1999] ECR I-1405, paragraphs 14 to 19.

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(11) See points 23 and 24 of the Opinion in Case C-92/00 HI [2002] ECR I-5553.

(12) Alcatel Austria (cited in footnote 7); see also Case C-92/00 HI , cited in footnote 11.

(13) Case 31/87 Beentjes [1988] ECR 4635. This case concerned Directive 71/305/EEC; Directive 93/36 is similarly structured.

(14) See, for example, Case C-19/00 SIAC Construction [2001] ECR I-7725 and Beentjes (cited in footnote 13).

(15) Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

(16) See Article 2(7) of Directive 92/13.

(17) See the recent judgment in Case C-62/00 Marks & Spencer [2002] ECR I-6325 and the case-law referred to therein.

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SUB Approximation of laws

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PROCEDU Reference for a preliminary ruling

ADVGEN Geelhoed

JUDGRAP Schintgen

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Opinion of Mr Advocate General Geelhoed delivered on 20 November 2003.
Siemens AG Osterreich and ARGE Telekom & Partner v Hauptverband der österreichischen Sozialversicherungsträger.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Effects of a decision by the body responsible for review procedures annulling the decision by the contracting authority not to revoke the procedure by which a contract was awarded - Restriction on the use of subcontracting.
Case C-314/01.

I - Introduction

1. In this case the Court has been asked to give a preliminary ruling on four questions concerning the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (2) as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (hereinafter Directive 89/665'). (3)

2. These questions have arisen in a dispute between Siemens AG Osterreich (Siemens') and ARGE Telekom & Partner (ARGE Telekom'), on the one hand, and the Hauptverband der österreichischen Sozialversicherungsträger (Central Association of Austrian Social Security Institutions), the contracting authority (the Hauptverband'), on the other.

3. The facts and proceedings relating to the dispute in which the questions submitted for a preliminary ruling have arisen are complex. They will be described below in Part III of this Opinion. It will be clear from this context that there may be reasonable doubt as to the admissibility of these questions, which, since the dispute in the main action has become devoid of any subject-matter, have become completely or partially hypothetical.

4. Although the wording of the questions is itself complex, it provides, in conjunction with the statement of reasons for the order for reference, a sufficient basis for a reply. The relevant aspects of that order will therefore be summarised in Part III of this Opinion. In essence, the Bundesvergabeamt, the body submitting the questions, asks whether, given its (limited) powers, the manner in which the Austrian legislature has implemented Directive 89/665 is appropriate.

II - Legislative background

A - Community law

5. Article 1(1) and (3) of Directive 89/665 reads as follows:

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement

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and of his intention to seek review.'

6. Article 2(1), (6), (7) and (8) of Directive 89/665 reads as follows:

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty (now Article 234 EC) and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

7. Article 25 of Directive 92/50 provides:

In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

This indication shall be without prejudice to the question of the principal service provider's liability.'

8. Article 32 of Directive 92/50 stipulates:

1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

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...

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

...

(h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

3. The contracting authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.

4. The extent of the information referred to in Article 31 and in paragraphs 1, 2 and 3 of this Article must be confined to the subject of the contract; contracting authorities shall take into consideration the legitimate interests of the service providers as regards the protection of their technical or trade secrets.'

B - National law

9. Directives 89/665 and 92/50 were transposed into Austrian law in the Bundesgesetz über die Vergabe von Aufträgen 1997 (Federal Procurement Law 1997, BGBl. I, 1997/56, in the version published in BGBl. I, 2000/125; hereinafter the BVergG').

10. Paragraph 31 of the BVergG concerns the services performed by subcontractors and reads as follows:

(1) The contract documents shall specify whether subcontracting is permitted. The subcontracting of the whole contract is not permitted except in the case of purchase agreements and subcontracting to undertakings associated with the contractor. In the case of building contracts the subcontracting of the majority of the services... is not permitted.... The contracting authority shall ensure that the contractor's subcontractors themselves perform the greater parts of contracts subcontracted to them. In exceptional cases the contracting authority may specify in the contract documents, stating its reasons, that it is permissible for the majority of the contract to be subcontracted. Subcontracting parts of the contract is, moreover, permitted only if the subcontractor is qualified to perform his share of the work.

(2) The contracting authority shall ask the tenderer in the contract documents to indicate in his tender the proportion of the contract which he may intend to subcontract to third parties. This information shall be without prejudice to the question of the contractor's liability.'

11. Paragraph 40 of the BVergG - on withdrawal of the invitation to tender during the tendering period - stipulates:

(1) During the tendering period the invitation to tender may be withdrawn for compelling reasons, especially if before the end of the tendering period circumstances become known which, had they been known earlier, would not have led to an invitation to tender or would have led to an invitation to tender essentially different in substance.

(2) The withdrawal should be made known in the same manner as the invitation to tender.

(3) Tenderers and applicants to whom the contract documents have already been forwarded should be notified without delay of the withdrawal and of the reasons therefor.'

12. Paragraphs 52, 53, 53a, 54, 55 and 56 of the BVergG - on the assessment of tenders - read as follows:

Elimination of tenders

Paragraph 52

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(1) Before the contracting authority proceeds to the selection of the tender qualifying for the award of the contract, it should immediately eliminate the following tenders on the basis of the results of the assessment:

1. tenders submitted by applicants who are unqualified or do not have the necessary financial, managerial or technical capability or are not reliable;

...

8. tenders which do not satisfy the tender requirements and faulty and incomplete tenders, if these shortcomings have not been or cannot be remedied, or partial tenders, if they are not admitted;

9. tenders received from applicants who, immorally or contrary to the principle of effective competition, have come to agreements with other applicants which are disadvantageous to the contracting authority;

...

Selection of the tender for the award of the contract; the best tender principle

Paragraph 53

From among the tenders remaining after elimination, the most favourable from a technical and economic standpoint shall be awarded the contract, in accordance with the standards laid down in the invitation to tender (the best tender principle). A written statement of reasons for the decision awarding the contract shall be drawn up

Announcement of the award of the contract

Paragraph 53a

(1) The contracting authority should inform the remaining tenderers without delay in writing or by fax... of the tenderer to which the contract is to be awarded. In connection with subparagraph 4, this communication may be used to give the unsuccessful tenderers all the reasons for the rejection of their tenders.

(2) On penalty of annulment, the contract shall not be awarded within a refraining period of two weeks from the announcement of the decision awarding the contract referred to in subparagraph 1.... If an accelerated procedure is adopted because of a need for urgency, the refraining period shall be shortened to one week.

(3) Unsuccessful tenderers may request in writing within a period of one week or, if because of a need for urgency an accelerated procedure is adopted pursuant to Paragraph 69, within a period of three days, after the announcement of the decision awarding the contract, to be informed of the grounds on which their tenders did not quality and of the features and advantages of the selected tender.

(4) The contracting authority should notify the unsuccessful tenderers of the name of the selected tenderer and the amount for which the contract has been awarded without delay on receipt of the request - provided that it has been made in time - and in any case three days before the end of the refraining period. The unsuccessful tenderers should also be informed of the features and advantages of the selected tender, provided that the disclosure of this information is not inconsistent with the public interest or with the legitimate commercial interests of undertakings or does not harm free and fair competition.

(5) If an unsuccessful tenderer takes the view that the decision taken by the contracting authority infringes the provisions of this Law and that he is consequently at risk of suffering a loss, he must inform the contracting authority without delay of his intention to open a review procedure, stating his reasons.

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Award and implementing agreement

Paragraph 54

(1) During the award period the contractual relationship shall come into being at the time when the tenderer receives written confirmation of the acceptance of his tender. If the award period is exceeded or if the contract departs from the tender, the contractual relationship shall come into being only on the tenderer's written declaration that he accepts the contract. The tenderer should be given an appropriate period within which to make this declaration.

(2) ...

Cancellation of the invitation to tender after the expiry of the tender period

Paragraph 55

(1) After the tender period has expired, the invitation to tender shall be cancelled where there are mandatory reasons for doing so.

(2) The invitation to tender may be cancelled if, following the elimination of tenders in accordance with Paragraph 52, only one tender remains.

(3) The invitation to tender shall be deemed to have been cancelled if no tenders are received or if only one tender is received.

(4) Tenderers shall be informed without delay if the invitation to tender is cancelled and shall be informed of the reason.

(5) The cancellation of an invitation to tender... shall be announced in the same way as the invitation to tender.

Termination of the award procedure

Paragraph 56

(1) The award procedure shall end with the establishment of the supply agreement or with the cancellation of the invitation to tender.

(2) Each unsuccessful tenderer should be notified in writing immediately after the termination of the procedure....'

13. Paragraph 113 of the BVergG defines the powers of the Bundesvergabeamt. It reads as follows:

(1) The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

(2) Until the award of the contract, and for the purposes of removing infringements of this Federal Law and of the regulations made hereunder, the Bundesvergabeamt may:

1. grant interim measures; and

2. declare void decisions of the awarding department of the contracting authority that have been taken unlawfully.

(3) Once the contract has been awarded or the contract award procedure has been ended, the Bundesvergabeamt may determine that, as a result of an infringement of this Federal Law or of any regulations made hereunder, the award was not made to the tenderer who submitted the best offer. In such proceedings, the Bundesvergabeamt may, on the application of the contracting authority, also determine whether an applicant or tenderer who has been eliminated would have had any serious chance of being awarded the contract even if this Federal Law and the regulations made hereunder

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had been complied with.'

14. Paragraph 117(1) and (3) of the BVergG stipulates:

(1) A decision taken by the contracting authority during a contract award procedure shall be declared void by administrative order of the Bundesvergabeamt, with due regard for the recommendation of the mediation committee in the case concerned, if it

1. is inconsistent with the provisions of this Federal Law or of the regulations made hereunder and

2. has a significant influence on the outcome of the contract award procedure.

...

(3) If the contract has already been awarded, the Bundesvergabeamt shall, with due regard for the conditions set out in subparagraph 1, determine only whether or not it is unlawful as alleged.'

15. Paragraph 122(1) of the BVergG stipulates that if this Federal Law or the regulations made hereunder are culpably infringed by the departments of a contracting authority, an unsuccessful tenderer shall be entitled to claim compensation for the cost of submitting the tender and the other costs associated with participation in the contract award procedure from the contracting authority to which the conduct of the bodies of the awarding department must be ascribed.'

16. Under Paragraph 125(2) of the BVergG a claim for damages, which must be lodged with a civil court, is admissible only if the Bundesvergabeamt has previously reached a conclusion within the meaning of Paragraph 113(3). This conclusion is binding on the court applied to and on the parties to the proceedings before the Bundesvergabeamt.

17. Paragraph 5 of the Verwaltungsvollstreckungsgesetz (Law on Enforcement of Administrative Measures) stipulates:

(1) Where, due to its particular features, an obligation to permit something to be done, not to do something, or to do something cannot be performed by a third party, it shall be enforced by the authority responsible for enforcement requiring the person subject to the obligation to perform it on pain of fines or imprisonment.

(2) Enforcement shall be initiated by threatening to impose the penalty for the prohibited act or omission. The penalty threatened shall be imposed immediately the first time the prohibited act is committed, or once the period allowed for the act required to be done has expired without that act having been done. At the same time, a penalty, on each occasion more severe than the previous, shall be threatened for repetition or for further delay. As soon as the obligation has been performed, a penalty that has been threatened shall not be imposed.

(3) In any individual case, the penalty shall not exceed ATS 10 000 or imprisonment for longer than four weeks.

(4) Imposition of a penalty by way of fines is also permissible against legal persons, partnerships governed by commercial law and registered associations, except for bodies governed by public law.'

18. Paragraph 879 of the Allgemein Bürgerliches Gesetzbuch (General Civil Code) (ABGB) reads as follows:

(1) A contract which is contrary to a statutory prohibition or is immoral shall be void.

(2) In particular, the following contracts shall be void:

... '

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III - Facts and procedural context

A - Facts of the case and proceedings before the national authorities

19. On 21 September 1999, in the Supplement to the Official Journal of the European Communities , the Hauptverband announced a two-stage contract award procedure which it intended to conduct for the award of a contract to design, plan and construct a smart-card-based electronic data-processing (EDP) system, including the Austria-wide delivery, initialisation, personalisation, distribution and disposal of cards, delivery, installation and full-service maintenance of terminals, and support for EDP system operations, a call centre, card management and other services necessary for the operation of the system.

20. On 22 February 2000, the Hauptverband decided to invite five consortia to submit tenders and to eliminate a sixth consortium. Point 1.9 of the tender documents of 21 September 1999 and Point 1.8 of the invitation to tender documents of 15 March 2000 entitled Invitation to Tender' provided the following as regards subcontracting: A maximum of 30% of the services may be subcontracted, provided that the characteristic parts of the service, namely, project management, system design, development, construction, delivery and operation of the central components of the system that are specific to the project, development, delivery and management of the life-cycle of the cards and development and delivery of the terminals remain with the tenderer or consortium.'

21. According to the contracting authority, as is evident from the order for reference, that condition was imposed as a criterion of reliability for the purpose of ensuring that the services supplied would be free of technical errors, because if the card suppliers were personally liable, they would have a greater incentive to supply a service free of errors and the contracting authority would have greater influence.

22. Austria Card, a card supply company, which was to supply the part of the service involving card delivery' in each case, was a member of three of the four consortia which actually submitted tenders (including Siemens and ARGE Telekom). The only consortium in which Austria Card was not involved was formed by the firms EDS/ORGA.

23. By letter of 18 December 2000, the Hauptverband, as the contracting authority, notified three consortia of tenderers pursuant to Paragraph 53a of the BVergG that it intended to award the contract to EDS/ORGA.

24. The consortia that were not to be awarded the contract thereupon requested the Bundesvergabekontrollkommission (Federal Procurement Review Commission) to carry out arbitration proceedings. The latter refused to carry out arbitration proceedings in one case and attempted, unsuccessfully, to reach an amicable settlement in the other two cases. The three unsuccessful consortia then lodged review applications with the Bundesvergabeamt. The applications sought, primarily, the setting aside of the contracting authority's decision to award the contract to the EDS/ORGA consortium. Alternatively, they requested that the Hauptverband be ordered to cancel the invitation to tender.

25. By notice of 19 March 2001, the Bundesvergabeamt (Eighth Chamber) dismissed all the applications as being inadmissible on the ground that they lacked substance. In support of its decision the Bundesvergabeamt stated that the applicants' tenders had had to be eliminated by the contracting authority in accordance with Paragraph 52(1)(9) of the BVergG because Austria Card was a member of the three consortia concerned. The exchange of information thereby made possible and the negotiations which Austria Card necessarily had to conduct with the three consortia on the form of the tenders were to be regarded as constituting agreements between tenderers inconsistent with the principle of fair competition.

26. The pleadings reveal that this decision by the Bundesvergabeamt was annulled by judgment of

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the Verfassungsgerichtshof (Constitutional Court) of 12 June 2001 on the ground that the constitutional right of the three consortia to proceedings in a court of law had been infringed. Before taking its decision, the Bundesvergabeamt had omitted to submit to the Court for a preliminary ruling a question on whether a tenderer whose tender had not been eliminated by the contracting authority could be refused his right to bring proceedings before the competent national authority.

27. On 28 and 29 March 2001, Debis, the third unsuccessful consortium, and ARGE Telekom again instituted, consecutively, review proceedings before the Bundesvergabeamt. They applied for annulment of the Hauptverband's decision not to cancel the invitation to tender and for interim measures to prohibit the contracting authority from awarding the contract either for a period of at least two months from submission of the application (Debis) or until the Bundesvergabeamt had reached its decision (ARGE Telekom).

28. In response to these applications the Bundesvergabeamt adopted an interim measure by notice of 5 April 2001 prohibiting the award of the contract until 20 April 2001.

29. In their applications Debis and ARGE Telekom presented arguments based on both national and Community law in support of their position that the invitation to tender was unlawful. They maintained that the invitation to tender should be cancelled because it followed from the Bundesvergabeamt's decision of 19 March 2001 that only one undertaking still qualified for the award of the contract. After all, if the tenders submitted by Siemens, ARGE Telekom and Debis could be eliminated under Paragraph 52(1) of the BVergG on the ground that they infringed the principle of fair competition, it followed from the provisions of Paragraph 55(2) and (3) of the BVergG that the invitation to tender had to be cancelled, since only one tenderer (EDS/ORGA) remained. The invitation to tender was, moreover, inconsistent with Community law, since an inadmissible standard of quality had been established in Point 1.8 of the invitation to tender of 15 March 2000. It excluded the possibility of the subcontracting of parts of the provision of services in excess of 30% of the total contract and, in all cases, of all typical contractual services, especially the delivery and management of the life-cycle of the cards. This had forced the applicants to include Austria Card as a member of the consortia which they had formed. Had it not been for the conditions laid down by Point 1.8 of the invitation to tender, the applicants could have relied on a subcontractor. In their opinion this requirement was inconsistent with Community law. They referred to the Court's judgment of 2 December 1999 in Holst Italia. (4) This showed that it must be possible to have the service which was the subject of the invitation to tender performed by suitable third parties.

30. By notice of 20 April 2001, the Bundesvergabeamt (Ninth Chamber) granted the applications of Debis and ARGE Telekom and, in accordance with Paragraph 113(2), No 2, of the BVergG declared void the Hauptverband's decision not to cancel the invitation to tender. In support of its decision, the Bundesvergabeamt stated that the invitation to tender had to be cancelled because it contained a substantially unlawful provision. Specifically, the Hauptverband's prohibition of subcontracting infringed the tenderer's right under Community law to rely on subcontractors' capacity in order to prove its own capacity, as interpreted by the Court in Holst Italia. (5)

31. Despite this notice, the Hauptverband decided on 23 April 2001 to award the contract to EDS/ORGA without delay, as a result of which the contract was concluded. The interim measures adopted by notice of 5 April 2001 had expired on 20 April 2001 and, notwithstanding an application to this effect, had not been extended. The Bundesvergabeamt's notice of 20 April 2001 merely made a statement about setting aside a failure to cancel', which is difficult to understand. From this the Hauptverband deduced that it had not been decided in a judicially compelling way that its own decision to award the contract to the lowest bidder was not valid or had been set aside.

32. The Hauptverband also decided to challenge the Bundesvergabeamt's decision of 20 April 2001 before the Verfassungsgerichtshof. The documents relating to the case show that the Verfassungsgerichtshof

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first dismissed, by order of 22 May 2001, the application to suspend the Bundesvergabeamt's decision and then, by judgment of 2 March 2002, annulled that decision.

33. On 30 April 2001 Siemens initiated a review procedure before the Bundesvergabeamt seeking the setting aside of various decisions taken by the Hauptverband relating to the decision to award the contract to EDS/ORGA. Siemens took the view that it followed from the annulment of the Hauptverband's decision not to cancel the contract award procedure announced in 1999 that its decision to award the contract was unlawful because it concerned a second, unpublicised contract award procedure. It also applied for interim measures. That application was dismissed by the Bundesvergabeamt on 11 May 2001, a decision on the other applications being reserved.

34. On 17 May 2001 ARGE Telekom similarly applied for interim measures and for the annulment of various decisions taken by the Hauptverband in connection with its decision not to cancel the contract award procedure.

35. On 18 May 2001 Siemens again applied for interim measures and for the annulment of the Hauptverband's decisions not to cancel the contract award procedure, to award the contract to EDS/ORGA, to issue a letter of award to EDS/ORGA and to conclude the contract with this consortium without first validly announcing the award decision.

36. By decision of 9 July 2001, the Bundesvergabeamt dismissed ARGE Telekom's and Siemens' applications for interim measures and otherwise reserved its decision.

37. The Bundesvergabeamt (Ninth Chamber) held that a decision on Siemens' applications of 30 April and 18 May 2001 and ARGE Telekom's application of 17 May 2001 required a more detailed interpretation of a number of provisions of Directive 89/665. By order of 27 July 2001, it therefore submitted the following questions for a preliminary ruling.

B - The questions submitted for a preliminary ruling and the related explanations

1. Is Council Directive 89/665, and in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7) thereof, to be interpreted as meaning that the legal effect of a decision taken by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contracting authority's decision not to cancel a contract award procedure is that if national law does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the contract award procedure is automatically terminated by the national review body's decision, without the need for any further act by the contracting authority?

2. Is Directive 89/665, in particular Article 2(7) thereof, if necessary in conjunction with Council Directive 92/50, in particular Articles 25 and 32(2)(c) thereof, or any other provisions of Community law, in particular having regard to the effet utile doctrine relating to the interpretation of Community law, to be construed as meaning that a provision in an invitation to tender which prohibits subcontracting material parts of the service concerned and, contrary to the case-law of the Court of Justice, in particular Case C-176/98 Holst Italia [1999] ECR I-8607, prevents the tenderer from using his contract with his subcontractor to prove that the services of a third party are actually available to him and which thus deprives him of his right to prove his own capability by relying on the services of a third party or to prove that he actually has available a third party's services, is so clearly contrary to Community law that a contract concluded on the basis of such an invitation to tender is to be regarded as invalid, in particular where national law in any case provides that illegal contracts are invalid?

3. Is Directive 89/665, in particular Article 2(7) thereof, or any other provision of Community law, in particular having regard to the effet utile doctrine relating to the interpretation of Community

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law, to be construed as meaning that a contract concluded contrary to a decision by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contract authority's decision not to cancel a contract award procedure is invalid, in particular where national law in any case provides that immoral or illegal contracts are void but does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority?

4a. Is Directive 89/665, in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7), to be interpreted as meaning that where national law does not otherwise provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the review body has, by virtue of the direct application of Article 2(1)(b) in conjunction with Article 2(7), the power to issue a compulsory, enforceable order to the contracting authority to ensure that the unlawful decision is set aside, even though national law authorises the review body to issue only non-compulsory, non-enforceable orders to set aside contracting authorities' decisions in tenderers' applications for review within the meaning of Article 1(1) of Directive 89/665?

4b. If Question 4a is answered in the affirmative: does Article 2(7) of Directive 89/665, if necessary in conjunction with other provisions of Community law, give the review body the power in such a case to threaten contracting authorities and the members of their executive organs with, and to impose on them, such fines or fines and imprisonment by way of coercive penalties as are necessary to enforce their orders and are calculated in accordance with judicial discretion, where the contracting authorities and the members of their executive organs do not comply with the orders issued by the review body?'

38. In its order for reference the Bundesvergabeamt gives a detailed explanation of the above questions. The main elements of this explanation can be summarised as follows:

39. To substantiate the first question, the Bundesvergabeamt points out inter alia that its decisions under Paragraph 113(2)(2) of the BVergG do not comprise any directions to the contracting authority that are enforceable at the instance of the successful applicant. In this respect the powers of the Bundesvergabeamt differ from those of similar national authorities in the areas of commercial law, construction law and the law on water resources, for example. Those authorities do have the power to issue enforceable instructions. This means that interested parties are in a far weaker legal position under public procurement law than parties in other areas of law. The Bundesvergabeamt wonders whether this outcome of national legislation is compatible with the requirements of Community law, as set out in particular in Article 2(7) of Directive 89/665.

40. In the case of Question 2 the Bundesvergabeamt points out that, in accordance with the Court's case-law, it proceeded in its decision of 20 April 2001 on the basis that every tenderer is entitled to rely on subcontractors to furnish evidence of technical capability if he can prove that their services are actually available to him. The Bundesvergabeamt therefore takes the view that it is entitled to assume that a provision relating to the tender requirements which largely excludes any such reliance on subcontractors from the outset is inconsistent with Community law and that the contract award procedure in which such a condition is imposed may not be carried through to its end, but must be cancelled.

As Community law relating to public procurement does not contain any provisions that give an explicit answer to the question as to the extent to which unlawful awards result in the invalidity of the contracts concluded on that basis, the question as to the validity of the contract can be regarded as one of national law.

Weighed against the principle of the effet utile of Community law, however, such a conclusion would

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be unsatisfactory. A contracting authority which did not abide by the provisions of Community law or comply with the review body's decisions might, after all, frustrate the achievement of the objectives of Community law without fear of any sanction where, as in the present case, national law could not guarantee compulsory enforcement of the review body's decisions.

In this context the Bundesvergabeamt considers it appropriate to determine whether a contract established on the basis of a contract award procedure in which provisions of Community law have been infringed must be considered invalid in civil law on the ground that it is unlawful or immoral.

41. In connection with the first two questions the Bundesvergabeamt also points out that, if the contracts concluded had to be considered invalid, it could still set aside decisions by the contracting authority (and, if necessary, take other measures if the Court were to answer Questions 4a and 4b in the affirmative) because, if the conclusion of the contract were invalid, the award must likewise be regarded as invalid. According to the Bundesvergabeamt, a more detailed interpretation of Community law is therefore needed to determine the powers of the national court or tribunal to decide on the validity of the award and of the contract concluded on that basis.

42. In the case of Question 3 the Bundesvergabeamt states that the Hauptverband, the contracting authority, not only disregarded the substantive provisions of Community public procurement law but also deliberately departed from the decision of the national review body within the meaning of Article 1(3) of Directive 89/665. Such an attitude should be regarded as immoral, with the associated implications for the validity of the contract.

43. In the case of Questions 4a and 4b the Bundesvergabeamt explains that national law does not ensure the effective enforcement of decisions made by review bodies because it does not provide for the compulsory enforcement of the setting aside of a contracting authority's decision. Although Article 2(1)(b) of Directive 89/665 gives the Member States considerable scope in determining the powers to be conferred on review bodies, if the result is that the provisions of Community public procurement law have insufficient effet utile , the Bundesvergabeamt regards the possibility of the review body directly exercising the powers provided for in the Directive as being worthy of consideration. The Bundesvergabeamt therefore wonders whether the administrative means of enforcement for which national law provides are equal to the task of ensuring effective compliance with Community law.

IV - Proceedings before the Court

44. In the order for reference the Bundesvergabeamt requests that the accelerated procedure for which Article 104a of the Rules of Procedure of the Court of Justice provides be applied to the questions referred. It argues that an accelerated procedure might prevent the contracting authority from frustrating the enforcement of Community law, as interpreted by the Court, by establishing a fait accompli. If the questions referred were answered in the affirmative, a rapid decision could prevent major losses since the performance of the contract between the Hauptverband and EDS/ORGA had not yet commenced at the time when the order for reference was issued.

45. By order of 13 September 2001 the President of the Court dismissed this request, on the ground that the circumstances described by the Bundesvergabeamt did not indicate any exceptionally urgent need for answers to the questions.

46. The request for a preliminary ruling was received at the Registry of the Court on 9 August 2001. ARGE Telekom, the Hauptverband, EDS/ORGA, the Austrian Government and the Commission submitted written observations pursuant to Article 20 of the EC Statute of the Court of Justice. At the hearing on 18 September 2003 the Hauptverband, the Austrian Government and the Commission explained their positions at greater length.

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V - Assessment

A - Preliminary observations

47. The background to the order for reference described in depth in points 19 to 37 above and the Bundesvergabeamt's comments on the questions it has submitted prompt a number of preliminary observations.

48. Once the Hauptverband, the contracting authority, had made it known to the remaining applicants in the contract award procedure pursuant to Paragraph 53 of the BVergG that it intended to award the contract to EDS/ORGA, three groups initiated proceedings before the Bundesvergabeamt:

(1) In a first set of proceedings the applicants in the main action sought the annulment of the Hauptverband's decision to award the contract to EDS/ORGA and the cancellation of the contract award procedure. They were unsuccessful in this, their application being declared inadmissible by order of 19 March 2001.

(2) In a second set of proceedings the unsuccessful applicants called on the Bundesvergabeamt inter alia to set aside the - notional - decision of the Hauptverband, the contracting authority, not to cancel the contract award procedure. They were forced to take this course because, as the Hauptverband and the Austrian Government have emphasised in their written and oral observations, the decision to award the contract itself could not be challenged before the Bundesvergabeamt a second time. The unsuccessful applicants succeeded with this second demand. By an interim measure of 5 April 2001 the Hauptverband was prohibited until 20 April 2001 from proceeding to award the contract. By order of 20 April 2001 the Bundesvergabeamt then set aside the notional decision not to cancel the contract award procedure. This order did not, however, prevent the conclusion of the contract between the contracting authority and EDS/ORGA a few days later.

(3) There then followed a third set of proceedings, in which the unsuccessful applicants in essence sought the annulment of the decisions taken by the Hauptverband after its decision to select EDS/ORGA as the best bidder', thus ignoring the Bundesvergabeamt's order of 20 April 2001 that the contract award procedure be cancelled. In the course of this third set of proceedings the Bundesvergabeamt raised the questions submitted for a preliminary ruling. From the order for reference it can be deduced that the applicants in these proceedings base their demands mainly on two arguments:

- the decision of 18 December 2000 to award the contract was invalid from the outset because the so-called Smart Card Committee had not yet given the approval required for the award of the contract;

- the decisions that led to the conclusion of the contract between the Hauptverband and EDS/ORGA were all void because they were taken in the context of an invalid contract award procedure.

49. There is no denying that a contract was concluded between the Hauptverband and EDS/ORGA, bringing to an end the second phase of the contract award procedure that had begun on 22 February 2000. Under Austrian law, only a civil court is competent to assess the validity of this contract and any claim for damages in connection therewith.

50. From the contents of the questions referred, read in conjunction with the detailed explanation relating thereto, it can be deduced that the Bundesvergabeamt doubts that the powers conferred on it are sufficient to ensure the effective application of Directive 89/665, since a contract award procedure which it considers contrary to Community law has none the less led to the award and conclusion of a significant contract.

51. To the extent to which this background to the questions has prompted the Bundesvergabeamt, implicitly on some occasions, more explicitly on others, to question the compatibility as such of the legal system underlying Austrian public procurement law with Directive 89/665, it exceeds the limits imposed by Article 234 EC on the preliminary ruling procedure, which restricts cooperation

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between the national courts and the Court of Justice to the interpretation of Community law for the benefit of a decision in the main action.

52. It is therefore necessary to examine whether the Court's answers to the questions referred to it for a preliminary ruling can be beneficial to a decision in the main action.

53. In the light of this and other factors the admissibility of the questions referred should first be appraised.

B - Admissibility

54. The Hauptverband, the Austrian Government and the Commission have contended in their written observations and their oral statements at the hearing, albeit for widely different reasons, that the questions are not admissible.

55. The Commission doubts that the Bundesvergabeamt is a court or tribunal, since it itself recognises in the order for reference that its decision does not contain any recommendations to the contracting authority that are capable of implementation'. It therefore asks whether the questions submitted by the Bundesvergabeamt are admissible, having regard to the Court's case-law and specifically to the judgments in Victoria Film (6) and Salzmann , (7) according to which a national court may refer a question to the Court under Article 234 EC only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

56. The Austrian Government takes the view that the questions are inadmissible because they are so worded as to be incomprehensible to those who are not familiar with Austrian formal and substantive public procurement law. It contends that a referring national court or tribunal must be expected to phrase complex and fundamental questions concerning the structure of the national legal order in such a way that they are also clear and comprehensible to those who are not familiar with the national legal order in question.

57. The Hauptverband considers the questions to be inadmissible because, in its view, the order for reference gives an incomplete description of the facts in the main action. In the present case the order concerns not one, but three different basic sets of proceedings. Furthermore, the Bundesvergabeamt omitted to refer in its order for reference to the proceedings pending before the Verfassungsgerichtshof and the Handelsgericht (Commercial Court) in Vienna.

58. Nor was the Bundesvergabeamt competent to submit questions for a preliminary ruling because after its decision of 19 March 2001 an appeal against the decision awarding the contract was no longer possible. The Bundesvergabeamt was therefore no longer entitled to assess the validity of that decision or the decisions which the Hauptverband had subsequently taken. Nor did the Bundesvergabeamt have any authority to assess the validity or invalidity of a contract governed by civil law which had been concluded after the expiry of the contract award procedure.

59. At the hearing the Austrian Government and the Hauptverband also referred to the implications of the Verfassungsgerichtshof's judgment of 2 March 2002 for the admissibility of the request for a preliminary ruling. That judgment annulled the Bundesvergabeamt's decision of 20 April 2001. The Verfassungsgerichtshof held that it was logically impossible for a decision to be set aside if that decision called for something not to be done. The application to that effect from the consortia of tenderers which had not qualified for the award of the contract had therefore had to be declared inadmissible. As the Bundesvergabeamt had assessed the case in question in response to an inadmissible application, it had arrogated a power to which it was not entitled. The Hauptverband's right to a hearing before a court of law had therefore been infringed.

60. The Austrian Government and the Hauptverband contend that, as a result of this judgment by

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the Verfassungsgerichtshof, the relevance to the main action of the questions referred to the Court is at least partly lost, namely to the extent that they explicitly or implicitly concern the Bundesvergabeamt's decision of 20 April 2001, the questions thus becoming hypothetical. According to the Court's case-law, this would make them inadmissible. This would certainly be true of Question 1 and perhaps of Questions 3, 4a and 4b too.

61. The answer with respect to the Commission's first objection to the admissibility of the questions can be brief. Very recently, in the judgment in GAT , (8) the Court explicitly ruled that the decisions of the Bundesvergabeamt are indeed of a judicial nature and that the Court is therefore competent to answer questions submitted by that body. The Court pointed out in this context that it is evident from Paragraph 125(2) of the BVergG that an assessment by the Bundesvergabeamt under Paragraph 113(3) of the BVergG is not only a requirement for the admissibility of any claim for damages made to a civil court for the culpable infringement of the aforementioned provisions, but is also binding both on the parties to the proceedings before the Bundesvergabeamt and on the civil court concerned. Consequently, the Court is competent to answer questions referred to it by the Bundesvergabeamt.

62. Nor, it seems to me, does the Austrian Government's second objection to admissibility serve any purpose. It can indeed be deduced from the detailed order for reference and the explanation it contains what the Bundesvergabeamt is seeking to achieve with the questions referred, although the wording of those questions is not prima facie always clear. In raising this objection, which refers primarily to national law, the Austrian Government appears, moreover, to be ignoring the fact that the procedure for which Article 234 EC provides concerns the interpretation and validity not of national law but of Community law and especially, in the present case, the interpretation of a number of provisions of Directives 89/665 and 92/50. (9)

63. The third objection, raised by the Hauptverband, to the admissibility of the questions is more persuasive, partly in the light of my preliminary comments in points 48 to 53 above. Although, according to settled case-law of the Court, it is for the national courts to determine whether the order for reference accords with national formal and substantive law (10) and it is left to them to identify (11) and assess (12) assess the relevant facts, this authority is not unrestricted. If it can be deduced from the order for reference, from the court documents forwarded and from written and oral observations that the answers to the questions referred can clearly have no influence on the outcome of the main action and that they are therefore of a hypothetical nature, they should, again according to settled case-law of the Court, (13) be dismissed without a ruling.

64. In the light of the foregoing, it must therefore be examined whether the questions which the Bundesvergabeamt has submitted are relevant to the settlement of the main action.

65. As I have already observed in points 48 to 51 above, the Hauptverband has concluded a contract with EDS/ORGA without abiding by the decision of the Bundesvergabeamt in which the Hauptverband's - notional - decision not to cancel the contract award procedure was set aside. In the main action the applicants now state inter alia that the decisions by the Hauptverband which ultimately resulted in the conclusions of the contract are all void because they were taken in the context of an invalid contract award procedure.

66. Now that it has been determined that under Austrian law it is not the Bundesvergabeamt but a civil court which is competent to assess the legal validity of the contract concluded on 23 April 2002 between the Hauptverband and EDS/ORGA, the answers to the questions referred cannot in principle make any contribution to the settlement of the main action.

67. Under Austrian law the civil courts are competent to assess contracts concluded after their award. In accordance with the last sentence of Article 2(6) of Directive 89/665, Austrian law

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limits the powers of those courts to awarding damages to any person harmed by an infringement of the contract award requirements.

68. Now that it appears to have been established that in the situation underlying the main action the decision awarding the contract taken by the contracting authority was not annulled by the Bundesvergabeamt and, to implement that decision, one or more contracts were concluded as a result of their award, it must be assumed that only a civil court is competent to assess the contracts which have emerged from the contract award procedure here at issue.

69. In the light of the foregoing I take the view that it must be assumed that the questions submitted by the Bundesvergabeamt, which essentially ask whether the powers conferred on it in the BVergG satisfy the minimum requirements set out in Article 2(7) of Directive 89/665, are purely hypothetical.

70. The hypothetical nature of the questions is, moreover, reflected in their content. Taken together, they contain, as I have already observed in point 51, an invitation to the Court to weigh, in a context far removed from the actual legal dispute in the main action, the general system of legal protection for which the national contract award procedure provides against the applicable Community law. The Bundesvergabeamt thereby overlooks the fact that the procedure set out in Article 234 EC charges the Court to contribute to the administration of justice in the Member States and not to give learned opinions on general or hypothetical questions. (14)

71. As the final element in the assessment of the admissibility of the questions referred, the consequences of the Verfassungsgerichtshof's ruling of 2 March 2002 should be considered.

72. As is evident from the order for reference, the Bundesvergabeamt has submitted its questions primarily because its decision of 20 April 2001 setting aside the contracting authority's - notional - decision not to cancel the contract award procedure was not enforceable under Austrian law. This is quite obvious from the wording of Questions 1, 3, 4a and 4b. Now that the Verfassungsgerichtshof has annulled the decision of 20 April 2001 on the ground that the Bundesvergabeamt was not competent to take such a decision, the questions directly concerning this decision have no basis. They have thus become of a purely hypothetical nature, even without the arguments advanced above in support of this view being considered.

73. Although Question 2 does not refer directly to the decision of 20 April 2001, it seems to me that this question too is affected by the ruling of the Verfassungsgerichtshof referred to above. In substance, the statement of reasons for the - annulled - decision of 20 April 2001 was, after all, based on the assumption that the contract award procedure was invalid because it contained a contract award requirement which was contrary to Community law, as construed by the Court in Holst Italia. (15) However, that assumption is pivotal in Question 2. However correct it may be, the Court does not need to consider it now that it forms part of a ruling by the Bundesvergabeamt which cannot play any further part in the main action.

74. In view of the foregoing I conclude that the questions referred to the Court by the Bundesvergabeamt in this case are not relevant to the resolution of the legal dispute in the main action and so, being purely hypothetical, must be declared inadmissible.

C - Substance

75. Merely in the alternative, if and in so far as the Court does not agree with my opinion that all the questions submitted are inadmissible and concludes that only those directly affected by the Verfassungsgerichtshof's ruling of 2 March 2002, that is to say, Questions 1, 3, 4a and 4b, are inadmissible, I will now consider Question 2.

76. In this regard the Commission has observed, for good reason to my mind, that the question is based on the false premiss that it follows from the Court's ruling in Holst Italia (16) that the

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condition imposed by Point 1.8 of the contract award requirements of 15 March 2000 for permitting subcontractors' services is contrary to Community law.

77. Indeed, Directive 92/50, the directive applicable to the contract award procedure here at issue, does not contain any provision prohibiting subcontracting as such. It is clear from Article 25 of that directive that the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties. Article 32(2)(h) stipulates that evidence of the service provider's technical capability may be furnished through an indication of the proportion of the contract which he may intend to subcontract, according to the nature, quantity and purpose of the services to be provided.

78. In the assessment of the admissibility of a prohibition of subcontracting a distinction must be made, as the Commission, the Austrian Government and the Hauptverband have rightly observed, between such a prohibition where the suitability of tenders is being assessed and a prohibition in the case of the performance of the contract once it has been awarded.

79. The ruling of the Court in Holst Italia , (17) to which the Bundesvergabeamt refers, concerned the assessment and selection phase of a contract award procedure.

In paragraph 26 of that judgment the Court ruled in this respect: From the object and wording of those provisions, it follows that a party cannot be eliminated from a procedure for the award of a public service contract solely on the ground that that party proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities.'

In paragraph 31 the Court rounds off its reasoning by stating... that Directive 92/50 is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract...'.

80. I interpret this ruling as follows: potential applicants for a public works contract may not be eliminated on the ground that they do not themselves have all the skills needed for the performance of the contract. Such a prohibition might result in the number of applicants being severely limited from the outset, especially in the case of large and technically complex contracts. This would mar the effect of Directive 92/50. However, to ensure that the contract, once awarded, is performed appropriately, the contracting authority may require that, where a tenderer relies on the skills of other entities, he vouch for the availability of their resources.

81. It is, however, evident from the wording of Point 1.8 of the contract award requirements, as referred to in point 20 of this Opinion, that this condition relates not to the tendering and selection phase of the contract award procedure but to the phase in which the contract for the performance of the works is concluded.

82. During that phase a prohibition or restriction of subcontracting, by which the contracting authority seeks to prevent the performance of essential parts of the contract from being left to entities whose capacities and qualities it has been unable to assess during the contract award procedure, is not inconsistent with Directive 92/50. It is evident from the wording of Article 25 of that directive that it applies explicitly to the tendering and assessment phase of the contract award procedure. Article 25 provides for the contracting authority to have an insight into the capacities of the entities concerned, which is necessary for a correct assessment of the tenders submitted. From this it is impossible to deduce an argument for prohibiting subcontracting in the phase in which the contract on the performance of the work is concluded with the selected tenderer after the contract has been awarded.

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83. It follows from this that the premiss on which the Bundesvergabeamt's decision of 20 April 2001 is based, namely that Point 1.8 of the contract award requirements is contrary to Community law and that, therefore, the contract award procedure should be cancelled in its entirety, is in itself incorrect.

84. Although the Bundesvergabeamt has not asked in its questions for an assessment of its interpretation of the Court's ruling in Holst Italia , (18) it is my view that the Court can hardly let an obviously incorrect interpretation of its case-law pass unchallenged. This is all the truer if it formed the basis of the decision of the Bundesvergabeamt to which its questions refer and which may, for that and other reasons, make those questions hypothetical.

85. Furthermore, leaving aside the substantive premiss of the decision of 20 April and assuming that the invitation to tender included a condition inconsistent with Community law or continued despite a notice issued in view of this inconsistency by a review body within the meaning of Article 2(8) of Directive 89/665, an assessment should be made in accordance with applicable national law of the validity and possibly the cancellation of the contracts already concluded.

86. This view is endorsed inter alia in the Court's judgment in Alcatel (19)and in the Opinion of Advocate General Alber in Commission v Austria . (20)

VI - Conclusion

87. In view of the foregoing I propose that the Court should:

- declare the questions referred to the Court in the Bundesvergabeamt's order for reference of 11 July 2001 inadmissible;

- in the alternative, declare Questions 1, 3, 4a and 4b inadmissible and answer Question 2 as follows:

If there has been a contract award procedure which included a tender requirement inconsistent with Community law, or if the contract has been awarded despite a decision issued in view of this inconsistency by a review body within the meaning of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, the validity and possible cancellation of the contracts already concluded should be assessed in accordance with applicable national law.

(1) .

(2) - OJ 1989 L 395, p. 33.

(3) - OJ 1992 L 209, p. 1.

(4) - Case C-176/98 [1999] ECR I-8607.

(5) - Cited in footnote 4.

(6) - Case C-134/97 [1998] ECR I-7023, paragraph 14.

(7) - Case C-178/99 [2001] ECR I-4421, paragraph 14.

(8) - Case C-315/01 [2003] ECR I-6351, paragraphs 25 to 29.

(9) - See, inter alia, Case 63/76 Inzirillo [1976] ECR 2057, paragraph 6.

(10) - See, inter alia, Case 104/77 Oehlschläger [1978] ECR 791, paragraph 4, and Case C-181/96 Wilkens [1999] ECR I-399, paragraph 33.

(11) - See, inter alia, Joined Cases C-175/98 and C-177/98 Lirussi and Bizzaro [1999] ECR I-6881, paragraphs 37 and 38, and Case C-390/99 Canal Satélite Digital [2002] ECR I-607,

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paragraph 18, and Case C-167/01 Inspire Art [2003] ECR I-0000, paragraph 43.

(12) - See, inter alia, Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 14, and Canal Satélite Digital , cited in footnote 11, paragraph 43.

(13) - See, inter alia, Case 244/80 Foglia v Novello [1981] ECR 3045, paragraph 21, Case C-451/99 Cura Anlagen [2002] ECR I-3193, paragraph 26, and Inspire Art , cited in footnote 11, paragraph 47.

(14) - Most recently, Inspire Art (cited in footnote 11), paragraph 45.

(15) - Cited in footnote 4.

(16) - Cited in footnote 4.

(17) - Cited in footnote 4.

(18) - Cited in footnote 4.

(19) - Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraph 49.

(20) - Case C-328/96 [1999] ECR I-7479, point 48.

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Opinion of Mr Advocate General Alber delivered on 3 April 2003.
Commission of the European Communities v Kingdom of Belgium.
Failure by a Member State to fulfil its obligations - Procedures for the award of public service contracts - Directive 92/50/EEC - Renewal of a contract for surveillance of the Belgian coast by aerial photography.
Case C-252/01.

I - Introduction

1 In these infringement proceedings, the Commission is claiming that the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (1) (hereinafter: `Directive 92/50' or `the Directive' - articles cited without further definition are articles of the Directive). In particular, Belgium has infringed Article 11(3) and Article 15(2) by unfairly awarding a contract to perform services involving coastal surveillance by means of aerial photography by negotiated procedure (without prior publication of a notice) and failing to give prior notice of its intention to select that procedure. Belgium considers that the Directive is inapplicable because the contract involves security interests.

II - Legislative framework

Directive 92/50

2 According to the following articles:

Article 4(2):

`This Directive shall not apply to services which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires.'

Article 8:

`Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.'

Article 9:

`Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.' (2)

Article 10:

`Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed

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in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

Article 11(3):

`Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

...

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider;

...'

Article 15(2):

`Contracting authorities who wish to award a public contract by open, restricted or, under the conditions laid down in Article 11, negotiated procedure, shall make known their intention by means of a notice.'

Article 30(1):

`In so far as candidates for a public contract or tenderers have to possess a particular authorisation or to be members of a particular organisation in their home country in order to be able to perform the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.'

Under Annex I A, Category 12:

Category No

Subject

CPC Reference No

12

Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services

867

Under Annex I B, Category 27:

Category No

Subject

CPC Reference No

27

Other services

3 CPC means the `Central Product Classification' of the United Nations.

III - Facts and procedure

4 On 7 April 1988, the - at that time state-run - Belgian Administration of Waterways and Maritime Affairs (3) issued a restricted invitation to tender for surveillance of the Belgian coast by means of aerial photography. The contract was awarded to the Belgian undertaking Eurosense Belfotop

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NV (hereinafter: Eurosense Belfotop), which was adjudged to be technically and financially the best candidate.

5 With a view to regionalisation, the then Ministerial Committee for Economic and Social Industrialisation decided to award the contract for one year only. On 29 June 1989, the Flemish Government of the day decided to extend the contract by six years on the basis of the 1988 tender. The main purpose of the contract was to provide regular surveillance by means of aerial photography of the chain of dunes and the beaches, both above and below the waterline, the length of the Belgian coast, as well as to process the data obtained.

6 From 1992, the Flemish authorities examined the possibility of amending the contract by means of an addendum. On 13 April 1995, following a negotiated procedure without prior notification, the Flemish Minister for public contracts signed an addendum to the contract with Eurosense Belfotop, in the amount of BEF 534 million (without value added tax), to run for nine years.

7 Following an appeal, the Commission sent the Belgian authorities a letter of formal notice, on 27 December 1995, claiming that the addendum to the contract of 13 April 1995 fell within the scope of Directive 92/50 and that, according to Article 15(1) and (2), an `indicative notice' and a notice of intention to award should have been published in the Official Journal of the European Communities. The failure to publish a notice constituted an infringement of Article 15(1) (4) and (2). In addition, the award of the contract by negotiated procedure without prior notification was not justified under Article 11(3) of the Directive.

8 By its reply of 2 February 1996, the Belgian Government rejected the criticisms. In the first place, according to Article 4(2), the Directive was not applicable to the contract at issue. Furthermore, the award of the contract by negotiated procedure was justified under Article 11(3)(b) of the Directive. Five criteria were set for the award of the contract:

(a) Possession of a military security certificate;

(b) Possession of a licence from the aviation authorities to engage in aviation activity;

(c) Possession of the necessary know-how, the technology and the requisite equipment;

(d) The above three elements to be in the possession of a single undertaking;

(e) Sufficient financial capacity to be able to provide services annually to the value of some BEF 80 million.

Finally, other factors justified awarding the contract by negotiated procedure, such as the existence of exclusive rights, in particular intellectual property rights, the availability of aircraft within two hours' flying time and command of the Dutch language.

9 None the less, on 10 March 1999, the Commission sent the Kingdom of Belgium a reasoned opinion in which it stood by its criticisms. The Belgian Government responded by a letter of 1 June 1999. In that letter, it claimed, in particular, that the main object of the contract was to provide aerial photography services, which fell not within Category 12 of Annex I A of the Directive but within Category 27 (`Other services') of Annex I B.

10 By an application of 29 June 2001, the Commission brought an action for failure to fulfil an obligation. The Commission is seeking a ruling that:

- pursuant to the first paragraph of Article 226 EC, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and Articles 11(3) and 15(2) thereof in particular,

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- by failing, in respect of a contract to perform services involving coastal surveillance by means of aerial photography, to place a notice in the Official Journal of the European Communities, as required under the Directive; and

- by unjustifiably awarding the contract in question by negotiated procedure without prior publication of a notice;

- the Kingdom of Belgium should be ordered to pay the costs.

11 Although the Belgian Government has not formally submitted that the application should be dismissed, it expressly maintains that there is no infringement of the obligations flowing from Directive 92/50.

IV - Submissions of the parties

12 The arguments of the parties revolve around the statements of defence already submitted by the defendant Member State in the pre-litigation procedure. The following account of the submissions of the parties focuses on the three issues raised.

A - Directive 92/50 is inapplicable on the basis of Article 4(2) thereof (special security measures)

13 The Commission contends that the derogation under Article 4(2), which has to be strictly interpreted, is not applicable to this case. The fact that the undertaking commissioned to provide and process aerial photography has to have military security clearance cannot be considered to be a `special security measure' within the meaning of that provision, but must in fact be deemed to be a licence or `particular authorisation' which candidates within the meaning of Article 30(1) have to possess.

14 The Belgian Government, however, maintains that Article 4(2) is applicable because one of the selection criteria was possession of military security clearance. Undertakings which, when executing a public contract, have access to data, sites or equipment classified by the national authorities or NATO can obtain a military security certificate after undergoing security checks. Only authorised undertakings receive a list of the classified items, allowing them to operate in accordance with the original objective and to conceal the classified objects in any publications or reports, that is to say make them unidentifiable. Those undertakings which do not possess security clearance have, before processing the data, to transmit them to the general intelligence services, (5) which check to see whether they contain classified items and, if necessary, make the latter unidentifiable. That process is unworkable because it results in delays incompatible with emergency measures, in the event of storms for example, and also because relevant information is lost, where the negatives had been rendered unidentifiable.

B - Directive 92/50 is inapplicable pursuant to Annex I B thereof

15 The Commission contends that the contract falls under Reference No 867 (architectural, engineering and other technical services) of the CPC and, consequently, Category 12 of Annex I A of the Directive, with the result that the provisions of the Directive have to apply without exception. Category No 867 embraces several subcategories, such as, for example No 8675 (Engineering related scientific and technical consulting services), which are also broken down into subcategories. The services under the contract in question fall under Category No 86753 (Surface surveying services) and Category No 86754 (Map making services).

16 Although the contract covers services for the provision of aerial photography, which could of themselves fall within subcategory 87404 CPC, the contract has a far wider remit, being closely connected with the coastal surveillance programme drawn up by the authorities with the aim of guaranteeing the security of the coastal area and its inhabitants.

17 Moreover, the value of the services for the provision of aerial photography does not account

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for the bulk of the total contract value. The Commission estimates that of a total contract value of BEF 527 194 225, aerial photography accounts for BEF 245 464 732, that is to say 46.56%.

18 The Belgian Government claims that the main element of the contract comprises services for the provision of aerial photography which fall not under Category 12 of Annex I A of the Directive, but under Category 27 (Other services) of Annex I B of the Directive. None of the 27 categories listed in Annexes I A and I B of the Directive include the item `services for the provision of aerial photography'. In addition to the categories listed, the Directive refers to the United Nations CPC Classification. That Classification lists aerial photography under No 87504.1. But that number is not to be found in the annexes to the Directive. However, Category 27 of Annex I B covers `Other services', and is thus an open category containing no reference to CPC numbers. Aerial photography must therefore be assigned to that category.

19 Aerial photography is the main element of the contract. It covers both the taking of aerial photographs and the related processes and operations. In addition, the criteria governing the award of the contract in question relate to aerial photography. Finally, aerial photography accounts for BEF 295 202 732 of a total of more than BEF 527 194 225, so that the bulk of the monies, that is to say 56%, is taken up by aerial photography. The contract for the provision of services at issue has therefore to be classified as a service for the provision of aerial photography and, consequently, as `another service'. It therefore follows that Directive 92/50 is not applicable.

C - Justification for awarding the contract by negotiated procedure without prior notification in accordance with Article 11(3)(b) of the Directive

20 The Commission considers the reference to Article 11(3)(b) to be incorrect. It first submits that the obligation to be in possession of military security clearance has nothing to do with `technical reasons' within the meaning of that provision, and relates only to the possession of certain licences or authorisations.

21 Furthermore, the Belgian Government has neither claimed nor demonstrated that Eurosense Belfotop is the only undertaking to possess the requisite know-how, technology and equipment. Since the rules on the publication of public tenders were not applied, other candidates were prevented from proving that they met the conditions laid down. It has also to be pointed out that the contract requires the undertaking in question to develop a new technology, called aerial laser hypsometry. (6) But that technology has already been used abroad, confirming that the technical specifications were drawn up with a view to the undertaking in question and not vice versa. Nor can it be ruled out that, given a certain period of time, several undertakings would have been in a position to develop computer programs identical or comparable to the specialised programs hitherto utilised solely by Eurosense Belfotop.

22 The exclusive rights or intellectual property rights relating to the processes and programs in question cannot be considered to be exclusive rights within the meaning of Article 11(3) of the Directive, since they are merely the consequence of developing certain processes in implementation of the 1989 contract and, therefore, cannot be considered essential for performance of the contact. Any other party to a contract would similarly have had the opportunity to acquire certain exclusive rights in the process of executing the contract.

23 It is also conceivable that the results of the filming have become the property of the Region of Flanders and that, consequently, Eurosense Belfotop has no exclusive rights within the meaning of Article 11(3)(b). Finally, given that derogations have to be strictly interpreted, it is highly questionable whether intellectual property rights can be considered to be exclusive rights within the meaning of Article 11(3)(b).

24 The Belgian Government contends, solely in the event that the contract at issue is covered

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by Annex I A of the Directive - which it specifically rejects - that the award of the contract by negotiated procedure without prior notification is justified pursuant to Article 11(3) of the Directive. Only Eurosense Belfotop could be awarded the contract to provide the services both for technical reasons and for reasons connected with the protection of exclusive rights.

25 The technical reasons are linked to the selection criteria the Region of Flanders adopted in the negotiations. Having military security clearance was thus a condition for performance of the contract. At the time of the negotiations, Eurosense Belfotop had that clearance, as, incidentally, did three other companies. The Region of Flanders could not have awarded that contract to an undertaking that did not yet have military security clearance. The procedure for obtaining the clearance was lengthy and costly. In addition, aerial filming required a licence for aerial photography within the field of specialist photography.

26 Furthermore, the results of the photography, that is to say the films containing the aerial and the multispectral scanner images, in execution of the contract, required very special treatment and had to be converted into numerical data, tables, graphs and maps, requiring the use of special techniques and specially developed computer programs. It was possible to record data using aerial filming, and to process and interpret that data, only by using highly technical equipment in the hands of specially trained technical staff.

27 It was also necessary for a single undertaking to possess the requisite know-how, technology and equipment, with no possibility of subcontracting. The military security certificate meant that the undertaking could be given a list of military secrets, which the undertaking itself could then make unidentifiable. Before that certificate could be obtained, thorough checks were carried out on both staff and installations. There was also a very strict procedure governing access to the photographic material. The archive and storage facilities, as well as those in which the basic documentation was to be used, had to meet many security requirements. One of the contractual obligations was that the contractor should store all the basic documentation in its own installations, which were approved under the military security certificate. That condition in fact precluded any temporary involvement of other contractors or the use of subcontractors.

28 In addition, the flight staff had to be available within two flying hours, and the Dutch language had to be used in order to be able to communicate with the Region of Flanders in this particularly complex area. The candidate had also to possess adequate financial guarantees to ensure that it was able to continue to provide its services during the lifetime of a contract of such long duration. Both the experience of Eurosense Belfotop and that of the Belgian Administration for Waterways and Maritime Affairs had led to the conclusion that no other company was in a position to execute the contract and ensure programme continuity.

29 As regards the exclusive rights, and indeed both intellectual property rights in the various programs and exclusive rights to the data obtained, the Region of Flanders had concluded that Eurosense Belfotop was the only undertaking with which it could negotiate. The undertaking had itself developed the programs and techniques for carrying out the measurements and drawing the maps for surveillance of the Belgian coast. They were unique. Eurosense Belfotop had intellectual property and patent rights over them. In addition, the original contact of 1989 had provided that the photographs were to remain the exclusive property of Eurosense Belfotop. That contract had also provided that the results of the photography filming could be utilised by the Region of Flanders for its `personal use' only. They could not be passed on to third parties without the permission of Eurosense Belfotop. That obligation was valid for the lifetime of the contract and a further three years. Consequently, another undertaking would not have been able to use the data obtained by Eurosense Belfotop, and would thus not have been in a position to reproduce the changes to the Belgian coastline.

V - Analysis

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A - Directive 92/50 is inapplicable pursuant to Article 4(2) thereof

30 It is first necessary to consider whether Directive 92/50 is in any way applicable to the contract at issue. Under Article 4(2), the Directive specifically does not apply to public service contracts the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of the Member State concerned. The Belgian Government takes the view that the contract at issue is a contract requiring special security measures of that nature.

31 It is true that the Belgian Government does not cite any laws, regulations or administrative provisions which, on the one hand, require the intelligence services to check all aerial photography - that requirement constituting, in the view of the Belgian Government, a `special security measure' within the meaning of the abovementioned provision - or, on the other, indicate that this automatic duty to conduct checks can be replaced by military security clearance. Even though the Belgian Government does not cite specific provisions, there is no reason to doubt their existence. At any event, the Commission has expressed no doubts as to the existence of that requirement or its legal basis, but has merely queried its classification as a `special security measure' within the meaning of Article 4(2).

32 The first question which arises is in fact how far the general requirement that the intelligence services check aerial photography can be cited for the purpose of classifying the contract at issue, since that requirement lapses immediately an undertaking has a security certificate, which was made a condition for the award of the contract in this case.

33 I consider it perfectly tenable for supervision by the intelligence services of all aerial photography to be considered to constitute `special security measures' for reasons of security policy. In that connection, the Belgian Government referred to possible acts of sabotage or terrorist attacks, requiring certain military installations or strategic locations to be kept secret. In the oral proceedings, the representative of the Belgian Government cited the example of the military base at Koksijde, on the Belgian coast. I therefore have no doubt that the adoption of certain security measures in relation to aerial photography and the classification of those measures as `special security measures' within the meaning of Article 4(2) of the Directive, is justified.

34 What is questionable, however, is whether it is possible to consider that special security measures are required for the `execution' (7) of the contract, if the undertaking awarded the contract has military security clearance, and the intelligence services therefore no longer have to carry out automatic checks on the aerial photography in the context of that contract.

35 The Commission contends that the military security certificate laid down as one of the selection criteria has to be considered to be a `particular authorisation' within the meaning of Article 30(1) of the Directive. It is one of the conditions governing the award of the contract. But if the contractor holds a military security certificate, no further `special security measures' are required when the contract is executed.

36 In my view, that argument does not take account of the fact that the issue or possession of a military security certificate does not obviate the need for any further security measures. Only the automatic checks by the intelligence services are no longer required. During the procedure before the Court, it was explained that an undertaking which holds a military security certificate is provided with lists of objects classified by the national authorities or NATO. It is the responsibility of the undertaking to take account of security requirements and, if appropriate, itself conceal militarily significant objects when aerial photographs are published. In my view, this amounts to transferring responsibility for the special security measures to the undertaking holding a military security certificate. That transfer of responsibility is probably also the reason why obtaining

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the military security certificate is such a time-consuming process. The security certificate does not just reflect the security status of an undertaking at a given point in time, it has also to provide a certain guarantee that security requirements will be met in relation to further activities.

37 I therefore consider that the requirement that the undertaking hold a military security certificate amounts to more than `particular authorisation' within the meaning of Article 30(1), which would preclude a contract executed by an undertaking with a military security certificate from being considered to be a contract requiring special security measures.

38 Complete documentation of the Belgian coast, including the port of Zeebrugge, using aerial photographs - taken over a long period of time - therefore seems to me entirely likely to impinge on the security interests of the Belgian State. I therefore consider it also plausible that execution of the contract requires special security measures, as the Belgian Government maintains.

39 I also consider that it is largely for the government of a Member State to evaluate and define that State's security interests. If, then, the Belgian Government maintains that execution of the contract requires special security measures, and that assertion is not patently questionable, the Court should consider this sufficient for Article 4(2) of the Directive to be relied upon. I therefore consider that the Kingdom of Belgium can properly invoke Article 4(2) of the Directive, with the result that the Directive is inapplicable. In those circumstances, the Belgian Government cannot be deemed to have infringed the Treaty.

40 Only if the Court does not agree with that analysis will it be necessary to consider the further submissions of the parties.

B - Directive 92/50 is inapplicable if the contract is classified under Annex I B of the Directive

41 If we assume that Directive 92/50 is in principle applicable to the contract for the provision of services at issue, the next question to arise is whether the services in question should be assigned to Annex I A or to Annex I B. The Directive provides for `two-tier application.' (8) According to the 21st recital of the Directive: `full application of this Directive must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for cross-frontier trade to be realised;... contracts for other services need to be monitored for a certain period before a decision is taken on the full application of this Directive...'.

42 According to the seventh recital: `the field of services is best described, for the purpose of application of procedural rules and for monitoring purposes, by subdividing it into categories corresponding to particular positions of a common classification; whereas Annexes I A and I B of this Directive refer to the CPC nomenclature (common product classification) of the United Nations;... that nomenclature is likely to be replaced in the future by [a] Community nomenclature ...'. (9)

43 Under Article 8 of the Directive, contracts which have as their object services listed in Annex I A are to be awarded in accordance with the provisions of Titles III to VI. Under Article 9 of the Directive, contracts which have as their object services listed in Annex I B are to be awarded in accordance with Articles 14 and 16. Only the common rules in the technical field under Article 14 and the obligation to publish the result of the tendering procedure under Article 16 then apply. It is therefore essential to determine to which category of Annex I the services underpinning the contract belong in order to meet the requirement under Community law to comply with the rules on awarding contracts.

44 The Commission contends that the contract at issue falls into category 12 of Annex I A, whereas the Belgian Government maintains that the contract is covered by category 27 of Annex I B. It seems to me to be indisputable that the contract in question contains elements of landscape architectural

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services and related scientific and technical consulting services. But, undeniably, the contract also has as its object aerial photography which does not a priori fall into category 12 of Annex I A. It is also undeniable that aerial photography is not specifically listed in either Annex I A or Annex I B.

45 The Belgian Government has pointed out that the CPC nomenclature specifically contains the item `aerial photography', in subcategory 87504. The Community nomenclature, the CPA, (10) in Regulation No 3696/93, contains a category 74.81.2 `photographic services' corresponding to CPC Reference No 875. Subcategory 74.81.25, designated `aerial photography', corresponds to CPC subcategory 87504.1. (11) Since it does not fit into any of the other categories in Annex I of the Directive, it is covered by category 27 `Other services'. This is a kind of catch-all category. It is the only category to which no CPC reference numbers are attached. Consequently, there can be no serious doubt that aerial photography falls into category 27. The Court also ruled in its judgment in Tögel (12) that the reference to the CPC nomenclature in Annexes I A and I B of Directive 92/50 is binding.

46 The sole question which arises concerns the rules according to which the contract must be awarded if parts of its object have to be assigned to Annex I A, while other parts are covered by Annex I B. Article 10 contains binding rules governing cases of that nature:

`Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

47 In its judgment in Swoboda, (13) the Court ruled that Article 10 `provides an unequivocal test for the determination of the regime applicable to a contract composed of several services, which is based on the comparison of the value of the services referred to in Annex I B.' (14)

48 In that judgment, the Court specifically rejected the view that the main object of a contract determines the regime applicable to it. (15) It left no doubt that though the services under a contract to be awarded might be different in nature, they served to achieve a single purpose, so that the contract should be awarded uniformly. (16)

49 It is therefore essential to determine the value of the individual services. In its judgment in Swoboda, which it delivered in the context of a reference for a preliminary ruling, the Court held that `the classification of services in Annexes I A and I B to Directive 92/50 is primarily a question of fact for the contracting authority to determine, subject to review by the national courts.' (17)

50 In this case, however, there is no question of a review by the national courts, since these are infringement proceedings. The question of fact will therefore have to be decided by the Court of Justice in this instance.

51 Both the Commission and the Belgian Government have calculated the proportion of the contract taken up by aerial photography. The Commission arrived at a figure of 46.56%, whereas the Belgian Government has drawn up various calculations, which I do not wish to discuss in detail here, but all of which indicate that, in financial terms also, aerial photography clearly accounts for more than 50% of the contract.

52 The Belgian Government countered the Commission's suggestion of 46.56% with another calculation. According to the Belgian Government, the Commission had taken into account in its calculation only services of category I, II and II of the contract to provide services, but had failed to suggest a percentage to cover services in category IV `sum in reserve' (18) in relation to aerial

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photography. The purpose of the `sum in reserve' is to cover all kinds of requirements that might prove necessary but could not be anticipated at the time the contract was entered into. The term `in particular' (19) indicates that the sum can be used for services other than those covered by Clause 7 of the contract to provide services, that is to say it may also be used for services comparable to services in categories I, II and III.

53 If the percentage the Commission suggests to cover aerial photography in relation to services in categories I, II and III, that is to say 61.80%, is taken as a basis, and that percentage is transferred to services in category IV, we have to assume that aerial photography accounts for a total of 61.80% of the contract. That figure seems appropriate based on the ex ante assessment, which had to be made when the contract was awarded. It is clear, if we look at the services actually provided in the context of an assessment ex post facto, that aerial photography accounts for 56% of category IV services. In any event, the percentage taken up by aerial photography clearly represents more than 50% of the contract.

54 I do not consider that there can be any fundamental objections to the submissions of the Belgian Government, as set out above. In addition, I consider that the wording of the Swoboda judgment, (20) according to which the classification of services in Annexes I A and I B of the Directive is for the contracting authority to determine, indicates that the Court accords the contracting authority a margin of discretion in classifying the contract.

55 I therefore see no reason to call into question the Belgian Government's assessment that aerial photography accounts for the predominant value of the contract. Accordingly, the contract falls under Annex I B, with the result that the tendering procedure under Community law, under Titles III to VI of Directive 92/50, does not have to be followed. From that point of view also, the action for failure to fulfil an obligation must, therefore, be dismissed.

56 The question whether the Belgian Government can successfully rely on Article 11(3)(b) can therefore be left aside.

VI - Costs

57 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be order to pay the costs. The Belgian Government has not, however, applied for costs. It follows that the parties must be order to bear their own costs.

VII - Conclusion

58 In the light of the foregoing, I therefore propose that the Court:

(1) Declare the action dismissed.

(2) Order each party to bear its own costs.

(1) - OJ 1992 L 209, p. 1.

(2) - Article 14 governs common rules in the technical field; and Article 16 lays down that the results of the tendering procedure are to be published.

(3) - De administratie Waterwegen en Zeewezen/l'Administration des Voies hydrauliques et de la marine.

(4) - Article 15(1) concerns the indicative notice of the anticipated total procurement for the budgetary year.

(5) - Algemene Dienst Inlichting en Veiligheit/Service de renseignements généraux, SRG.

(6) - Measuring altitude.

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(7) - See the wording of Article 4(2) of Directive 92/50.

(8) - See the heading of Title II of the Directive.

(9) - A Community classification of goods for statistical purposes was adopted in the form of Council Regulation (EEC) No 3696/93 of 29 October 1993 on the statistical classification of products by activity (CPA) in the European Economic Community (OJ 1993 L 342, p. 1).

(10) - See Article 2(1) of Regulation No 3696/93 (cited in footnote 10 above).

(11) - See Regulation No 3696/93 (cited in footnote 10 above), p. 113 et seq.

(12) - Case C-76/97 Tögel [1998] ECR I-5357, paragraph 37.

(13) - Case C-411/00 Felix Swoboda [2002] ECR I-10567.

(14) - Case C-411/00 (cited in footnote 14 above), paragraph 52. My emphasis.

(15) - Case C-411/00 (cited in footnote 14 above), paragraph 49.

(16) - Case C-411/00 (cited in footnote 14 above), paragraphs 56 and 59.

(17) - Case C-411/00 (cited in footnote 14 above), paragraph 62. My emphasis.

(18) - `Voorbehouden som/somme réservée'. The description of services in category IV in Clause 7 of the contract of 13 January 1995 reads as follows: `The sum in reserve (service category IV -...) amounts to BEF 15 million (except for contract years 1998/1999 when, for budgetary reasons, only BEF 12.5 million is provided for) and can in particular be used:

1. for the checks, after every photogrammetric flight, of the condition of the beach and dunes, as regards both the beach morphology and the dune construction, measured according to the standards and rules laid down in both the "Doindecreet" and the "Normstelling Kust 2000";

2. for supplying the survey results on a magnetic disk compatible with the equipment used by the authorities;

3. to allow the contracting parties to observe ISO standards for activities essential to the performance of this contract;

4. for new or revised techniques which emerge during the life of the contract and can be used qualitatively or quantitatively to improve the contract.'

(19) - See the wording of Clause 7 of the contract of 13 January 1995 (cited in footnote 19 above).

(20) - Case C-411/00 (cited in footnote 14 above), paragraph 62.

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Opinion of Mr Advocate General Mischo delivered on 25 February 2003 Werner Hackermüller v Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED). Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Article 1(3) - Persons to whom review procedures must be available. Case C-249/01.

1. The Bundesvergabeamt (Federal Public Procurement Office) (Austria) is seeking an interpretation from the Court of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (2) as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (3) ("Directive 89/665").

2. The Bundesvergabeamt is seeking in essence to ascertain whether the abovementioned provision should be understood as meaning that if a tenderer's bid is not eliminated by the contracting authority, but the review body finds in the course of the review procedure that the contracting authority would have been bound to eliminate it, the tenderer has been or risks being harmed by the infringement alleged by him.

I Legal background

A Community legislation

3. Article 1(1) and (3) of Directive 89/665 provides:

> "1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.
>
> ...
>
> 3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.
>
> "

4. Article 2(1), (4) and (6) of Directive 89/665 reads:

> "1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
>
> (a) take interim measures, at the earliest opportunity and by way of interlocutory procedures, with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
>
> (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

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(c) award damages to persons harmed by an infringement.

...

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

...

"

B National legislation

5. Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz 1997) (1997 Federal Public Procurement Law, BGBl. I, 1997/56, "the BVergG").

6. Paragraph 113 of the BVergG provides:

"1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....

"

7. Paragraph 115(1) of the BVergG provides:

"Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement."

8. Under Paragraph II(2)C, point 40a, of the Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991 (the 1991 introductory law to the laws relating to administrative procedures, BGBl. 1991/50), the Allgemeines Verwaltungsverfahrensgesetz 1991 (1991 General law on administrative procedure, BGBl. 1991/51, "the AVG") is applicable to the Bundesvergabeamt's administrative procedure.

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II The main proceedings

9. Bundesimmobiliengesellschaft mbH (BIG) together with Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED) ("the defendants") invited tenders for a procedure in several stages to select architectural designs and decision parameters in order to award general planning contracts for building the new Engineering Faculty for the Technical University in Vienna. The first stage of the procedure involved a competition designed to be an "open search for interested parties to identify ideas" .

10. Several interested parties, including the architect and qualified engineer, Werner Hackermüller, and the company, Dipl.-Ing. Hans Lechner-ZT GmbH ("Lechner"), replied to the invitation to tender and submitted projects. During the second stage of the procedure, the selection, the Beratungsgremium (the advisory panel) recommended pursuing the procedure in the short term with Lechner. By letter of 10 February 1999, the four other tenderers accepted for the negotiation procedure, including Mr Hackermüller, were informed that the Beratungsgremium had not recommended implementation of their projects in its decision of 8 February 1999.

11. On 29 March 1999 Mr Hackermüller applied to the Bundesvergabeamt for institution of a review procedure pursuant to Paragraph 113(2) of the BVergG and requested inter alia that the Bundesvergabeamt should set aside (1) the decision of 8 February 1999 in which the Beratungsgremium and/or the defendants accepted the bid of a rival tenderer as the best tender and recommended that the selection procedure should be pursued with the rival tenderer in the short term, and (2) the decision by which the selection was made without regard to the criteria laid down in the invitation to tender.

12. By decision of 31 May 1999 the Bundesvergabeamt dismissed both Mr Hackermüller's applications on the grounds that he did not have locus standi because his bid should have been eliminated in the first stage of the procedure, under Paragraph 52(1), subparagraph 8, of the BVergG.

13. In support of its decision, the Bundesvergabeamt explained first of all that under Paragraph 115(1) of the BVergG a trader may apply for review only if he risks harm or some other disadvantage. It also pointed out that under Paragraph 52(1), subparagraph 8, of the BVergG the awarding body must, before selecting the successful bid, eliminate immediately, on the basis of the results of its examination of the bids, those which do not comply with the conditions of the invitation to tender or are incomplete or incorrect, if those errors have not been, or cannot be, rectified.

14. The Bundesvergabeamt went on to point out that, in the present case, as regards elimination of a project from the award procedure, point 1.6.7 of the invitation to tender expressly refers to Paragraph 36(4) of the Wettbewerbsordnung der Architekten (Competition rules for architects, "the WOA"), which provides that, where there is a ground for exclusion under Paragraph 8 of the WOA, the project in question must be rejected, and that Paragraph 8(1)(d) eliminates from participation in architectural competitions, among others, persons who include in the portfolio information enabling the author to be identified.

15. Finally, having established that Mr Hackermüller had met the condition for elimination contained in Paragraph 8(1)(d) of the WOA by giving his name under the heading "proposed organisation of overall planning" , so that his project should have been eliminated under the provisions of Paragraph 52(1), subparagraph 8, of the BVergG in conjunction with Paragraph 36(4) of the WOA, the Bundesvergabeamt concluded that Mr Hackermüller's project could no longer be considered for the contract and that since he could not be harmed by any potential infringements of the principle of the lowest tenderer and the rules of the selection procedure Mr Hackermüller had no locus standi to claim the infringements alleged in his applications.

16. On 7 July 1999 Mr Hackermüller brought an action for annulment of the Bundesvergabeamt's decision of 31 May 1999 before the Verfassungsgerichtshof (Constitutional Court) (Austria). In

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its judgment of 14 March 2001 (B 1137/99-9) the Verfassungsgerichtshof, referring to an earlier judgment of 8 March 2001 (B 707/00), held that, in view of the broad interpretation that should be given, according to the Court's case-law, (4) to the concept of the capacity to instigate a review procedure under Article 1(3) of Directive 89/665, it was questionable to interpret the conditions for making an application under Article 115(1), in conjunction with Article 52(1), of the BVergG as meaning that a tenderer who was not in fact eliminated by the contracting authority may be eliminated from the review procedure by the review body refusing his application for review if that body assumes on a preliminary basis that there is a ground for elimination of the tenderer. It therefore annulled the Bundesvergabeamt's contested decision for breach of the constitutional right to a procedure before the appropriate court, since the Bundesvergabeamt had been required, under the third paragraph of Article 234 EC, to refer a question on that subject to the Court of Justice for a preliminary ruling.

III The questions

17. It was in those circumstances that the Bundesvergabeamt decided, by order of 25 June 2001, to refer the following questions to the Court:

"1. Is Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 to be interpreted as meaning that any person seeking the award of a specific public contract is entitled to institute a review procedure?

2. In the event that the answer given to Question 1 is no:

Is the abovementioned provision to be understood as meaning that, if a tenderer's bid is not eliminated by the contracting authority, but the review body finds in the course of the review procedure that the contracting authority would have been bound to eliminate it, the tenderer has been or risks being harmed by the infringement alleged by him in this case the finding by the contracting authority that a rival tenderer submitted the best bid and that he must therefore have the right to bring a review procedure?

"

IV Analysis

A Admissibility of the questions referred by the Bundesvergabeamt

18. As a preliminary, it is necessary to consider an issue which was addressed in a recent judgment, (5) which is whether the Bundesvergabeamt constitutes a court or tribunal within the meaning of Article 234 EC.

19. That issue was raised in particular by the Commission in Swoboda , cited above, following the order for reference from the Bundesvergabeamt of 11 July 2001 in Siemens and Arge Telekom & Partner , (6) in which the Bundesvergabeamt acknowledged that its decisions did not contain any "binding, enforceable directions addressed to the contracting authority" . (7)

20.

In Swoboda , cited above, a case in which the Bundesvergabeamt was exercising its powers during the period after the award of the contract, the Court held that it was a court within the meaning of Article 234 EC.

21. In paragraphs 27 and 28 of Swoboda the Court held that:

"... the main case relates to the period after the award of the contract. However, it is common ground that in Austrian law both the parties and the civil courts which are seised of a claim in damages during that time are bound in any case by the findings of the Bundesvergabeamt.

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In those circumstances, the binding nature of the decision of the Bundesvergabeamt in the main case cannot reasonably be called into question.

"

22. The issue now is whether that conclusion also applies in the present case, in which the Bundesvergabeamt is exercising its powers during the period before the award of the contract.

23. I am of the view that the answer is indisputably yes.

24. Unlike the period after the award of the contract, during which the Bundesvergabeamt has jurisdiction under Paragraph 113(3) of the BVergG to "determine whether... the contract had not been awarded to the best bidder..." , the period before the contract was awarded is different because the Bundesvergabeamt has jurisdiction under Paragraph 113(2) of the BVergG "... (1) to lay down interim measures and (2) to set aside unlawful decisions of the contracting authority"

25. If the power to "determine" is of a binding nature, all the more so, it seems to me, are the powers to lay down interim measures and to set aside unlawful decisions.

26. The Bundesvergabeamt is therefore a court within the meaning of Article 234 EC. In the light of the above, the questions referred by the Bundesvergabeamt for a preliminary ruling must be declared admissible.

B First question

27. In the first question the Bundesvergabeamt is seeking to ascertain whether Article 1(3) of Directive 89/665 is to be interpreted as meaning that any person seeking the award of a specific public contract is entitled to institute a review procedure.

28. Mr Hackermüller suggests that the answer to that question should be yes, because in his opinion, anyone eliminated from the tendering procedure is harmed.

29. However, the defendants, the Austrian and Italian Governments, and the Commission suggest that the answer to the first question should, in essence, be no.

30. I support their view.

31. It is clear from the wording of Article 1(3) of Directive 89/665 that review procedures must be "available... at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement" . (8)

32. Directive 89/665 therefore permits Member States to make access to review procedures subject to two cumulative conditions, namely, (1) the tenderer must have an interest in obtaining a public works contract and (2) the tenderer must have been or have risked being harmed.

33. The Commission is therefore right to consider that "mere interest in obtaining a contract is insufficient on its own" .

34. That interpretation is moreover corroborated, as the Austrian Government rightly points out, by the preparatory documents for Directive 89/665.

35. Although the Commission's original proposal for a Council Directive 87/C 230/05 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on procedures for the award of public supply and public works contracts, submitted by the Commission on 1 July 1987 (9) made no provision regarding the standing of a person entitled to institute a review procedure, Article 1 of the amended proposal submitted on 25 November 1988 (10) provided that the review procedure should be available to "any contractor or supplier taking part in a

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procedure for the award of a public supply or public works contract, or any third person entitled to tender for such an award..." .

36. As that wording was not adopted in Directive 89/665, it must be inferred that there was a deliberate choice on the part of the Council to enable Member States to make access to review procedures subject to the two conditions mentioned above.

37. I therefore suggest that the answer to the first question should be that Article 1(3) of Directive 89/665 must be interpreted as meaning that review procedures must be available to any person having or having had an interest in obtaining a public works contract provided that person has also been or risks being harmed by the alleged infringement.

C Second question

38. Since I propose that the answer to the first question should be no, I must now also consider the second question. In that question the Bundesvergabeamt is seeking to ascertain whether Article 1(3) of Directive 89/665 is to be understood as meaning that, if a tenderer's bid is not eliminated by the contracting authority, but the review body finds in the course of the review procedure that the contracting authority would have been bound to eliminate it, the tenderer has been or risks being harmed by the infringement alleged by him in this case the finding by the contracting authority that a rival tenderer submitted the best bid and that he must therefore have the right to bring a review procedure.

39. Mr Hackermüller considers that if the answer to the first question is no the answer to the second question should at any event be yes, otherwise the review procedure will be unavailable whenever a tenderer is eliminated by the contracting authority for any reason.

40. However, the defendants, the Austrian Government and the Commission propose that the answer should be no. The observations of the Italian Government may be interpreted as meaning that that government also proposes that the answer should be no if the Bundesvergabeamt may be regarded as a court.

41. Those interveners rely in that regard on the purpose of the review procedure, the effect of Directive 89/665 and the principle of equal treatment, which preclude an applicant from being awarded the contract or damages despite his own infringement of the invitation to tender or the provisions governing public works contracts.

42. It should be made clear first of all that in its decision of 31 May 1999 the Bundesvergabeamt held that Mr Hackermüller had no locus standi because his bid should have been eliminated in the first stage of the procedure, under Paragraph 52(1), subparagraph 8, of the BVergG. (11)

43. In its question the Bundesvergabeamt is therefore seeking, in substance, to ascertain whether Directive 89/665, and in particular Article 1(3) thereof, precludes such a rule of national law which it is applying.

44. As the Austrian Government rightly notes in its written observations, "... the review directive does not contain any provision concerning the assessment criteria which the review body should apply.... It therefore falls to Member States to adopt appropriate provisions, which must unquestionably comply with the general principles of public works contract law such as transparency and non-discrimination. Nor should such provisions conflict with the purpose of the review directive..." .

45. Similarly, the Court has held on a matter that was not specifically governed by Directive 89/665, namely determining the decisive moment for the purposes of assessing the legality of a decision withdrawing an invitation to tender, that it is for the domestic legal system of each Member State to determine that moment "... provided that the relevant national rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make

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it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness) (see, by analogy, Case C-390/98 Banks v Coal Authority and Secretary of State for Trade and Industry [2001] ECR I-6117, paragraph 121 and Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraph 29)" . (12)

46. The question which arises is therefore whether the abovementioned rule used by the Bundesvergabeamt in its decision of 31 May 1999 does or does not make it practically impossible or excessively difficult to exercise rights conferred by Community law. (13)

47. In that regard, I should like to refer to a point raised in the Verfassungsgerichtshof's judgment of 8 March 2001 (14) which, in the words of the Austrian Government, is as follows: "... there is some uncertainty as to whether it is permissible under Community law as stated in legal literature to "reduce" legal protection for the tenderer in the main case since he has no remedy against the decision to eliminate him taken by the Bundesvergabeamt instead of the contracting authority

" . (15)

48. If it were true that as a result of the criterion in question the tenderer did not have any remedy against a decision which proves to be a decision eliminating him, I should indeed take the view that that criterion makes it excessively difficult to assert the rights conferred under Community law and, in particular, Directive 89/665.

49. There is indeed no doubt that a decision excluding a tenderer constitutes a decision within the meaning of Article 1(1) of Directive 89/665 against which it should be possible to institute a review procedure.

50. The Court has consistently held that the provision in Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature and content of the decisions referred to therein. (16) In his Opinion of 7 February 2002 in Santex , (17) Advocate General Alber inferred from this that an elimination decision constitutes a decision against which review, within the meaning of Directive 89/665, should be possible. (18)

51. Is it correct to state, however, in a situation such as that in the main case that "the tenderer has no remedy against the decision to eliminate him taken by the Bundesvergabeamt instead of the contracting authority" ?

52. In my view everything hangs on whether the review body has come to the conclusion that the tenderer should have been eliminated following an adversarial procedure, that is to say, after the tenderer has been given the opportunity to express his views on the grounds for possible elimination.

53. It is clear from Article 2(8) of Directive 89/665, which states that "... the independent body [is to] take its decisions following a procedure in which both sides are heard..." , that such a procedure constitutes an essential feature of a review procedure within the meaning of Directive 89/665.

54. However, even if the review body reaches the abovementioned conclusion following a procedure in which both sides are heard, there remains the question whether the Bundesvergabeamt is entitled to raise of its own motion a plea of infringement of a requirement such as that of anonymity.

55. In that regard, it seems to me to be beyond dispute that if, hypothetically, the contracting authority had first accepted Mr Hackermüller's bid and if another tenderer, being aware that Mr Hackermüller may have infringed the requirement of anonymity, had then instituted proceedings for infringement by the contracting authority of the rules governing public procurement, the Bundesvergabeamt could have decided that Mr Hackermüller should have been eliminated from the tendering procedure even though the contracting authority had not decided to do so earlier.

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56. The only difference between that situation and the situation in the main proceedings therefore lies in the fact that in the first case the plea of infringement of the rule of anonymity is raised by one of the parties, whilst in the second case it is raised by the review body of its own motion.

57. In that regard I share the view expressed by Advocate General Geelhoed in his Opinion of 10 October 2002 in GAT (19) that "... Directive 89/665... does not preclude an authority responsible for carrying out review procedures... from taking relevant circumstances into account of its own motion and independently of the submissions of the parties." (20)

58. This approach seems to me moreover to be in accordance both with the purpose of Directive 89/665 and with the principle of equal treatment for all tenderers.

59. As regards that purpose, "... Article 1(1) of Directive 89/665 requires the Member States to establish effective review procedures that are as rapid as possible to ensure compliance with Community directives on public procurement" . (21)

60. It appears to me to be contrary to that objective of having effective and rapid review procedures if, in a situation such as that in the present case, the review body is required to wait until a problem regarding the legality of the contract, which it discovers itself, is referred to it by one of the parties.

61. Equal treatment of all tenderers, which is a principle relating to the very essence of the public procurement directives, (22) means that all tenderers are entitled to have their tender, together with those of the other tenderers, dealt with in accordance with the terms of the invitation to tender and the rules on public procurement.

62. A tenderer cannot, therefore, be awarded a contract if he himself has infringed the terms of the invitation to tender or the rules applying to public procurement. As Mr Hackermüller pointed out at the hearing, the fact that other tenderers may also have committed infringements makes no difference since a tenderer cannot rely on the fact that other tenderers have benefited from an infringement in order to argue that he is a victim of discrimination.

63. Moreover, the fact that the review body should be able to raise such a plea of infringement of its own motion seems all the more justified with regard to the principle of equal treatment since, as the Austrian Government rightly observes, the tenderers are usually unaware of grounds for excluding any of their competitors from the contract.

64. I am therefore of the view that a rule of national law under which an appellant has no locus standi on the ground that his bid should already have been eliminated by the contracting authority does not make it practically impossible or excessively difficult to exercise rights conferred by Community law since the appellant has had the opportunity beforehand to express his views on the alleged grounds for elimination.

65. However, if he has not been given an opportunity to express his views, the decision of the review body would in fact amount to a decision to eliminate him without the opportunity for review, which would be contrary to Directive 89/665.

66. I therefore suggest that the answer to the second question should be that Article 1(3) of Directive 89/665 does not preclude a tenderer being considered not to have been harmed by the infringement alleged by him in this case the finding by the contracting authority that a rival tenderer submitted the best bid if that tenderer's bid has not been eliminated by the contracting authority, but the review body finds in the course of the review procedure that the contracting authority would have been bound to eliminate it, provided the grounds for elimination relied upon as against the tenderer have been the subject of a procedure in which both sides were heard.

V Conclusion

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67. In the light of the foregoing I propose the following answers:

to the first question:

"Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as meaning that the review procedures must be available to any person having or having had an interest in obtaining a public works contract provided that person has also been or risks being harmed by the alleged infringement."

to the second question:

"Article 1(3) of Directive 89/665, as amended by Directive 92/50, does not preclude a tenderer being considered not to have been harmed by the infringement alleged by him in this case the finding by the contracting authority that a rival tenderer submitted the best bid if that tenderer's bid has not been eliminated by the contracting authority, but the review body finds in the course of the review procedure that the contracting authority would have been bound to eliminate it, provided the grounds for exclusion relied upon as against the tenderer have been the subject of a procedure in which both sides were heard."

(1) .

(2) OJ 1989 L 395, p. 33.

(3) OJ 1992 L 209, p. 1.

(4) See in particular Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 46, and Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraphs 34 and 35.

(5) See Case C-411/00 [2002] ECR I-10567, the Opinion of Advocate General Léger in Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, my Opinion in Swoboda , cited above, and the Opinion of Advocate General Geelhoed in Case C-315/01 pending before the Court of Justice.

(6) C-314/01, pending before the Court

(7) Swoboda , cited above, paragraph 25.

(8) Emphasis added.

(9) OJ 1987 C 230, p. 6.

(10) OJ 1989 C 15, p. 8.

(11) See point 12 above.

(12) Case C-92/00 HI [2002] ECR I-5553, paragraph 67. See, to the same effect, Case C-470/99 Universale-Bau [2002] ECR I-11617, paragraph 72.

(13) It is assumed that there is no difference in treatment between reviews within the meaning of Directive 89/665 on the one hand and similar domestic reviews on the other.

(14) See point 16 above.

(15) Emphasis added.

(16) See Alcatel Austria and Others , cited above, paragraph 35 and HI , cited above, paragraph 49.

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(17) Case C-327/00, pending before the Court.

(18) See points 80 to 86 of Advocate General Alber's Opinion, cited above.

(19) Case C-315/01, pending before the Court.

(20) Point 67, suggested answer 1(a), of the abovementioned Opinion of Advocate General Geelhoed.

(21) Alcatel Austria and Others , cited above, paragraph 34. See also HI , cited above, paragraph 52, and Universale-Bau , cited above, paragraph 74.

(22) Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, paragraph 81.

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Opinion of Advocate General Stix-Hackl delivered on 11 July 2002 Makedoniko Metro and Michaniki AE v Elliniko Dimosio. Reference for a preliminary ruling: Dioikitiko Efeteio Athinon - Greece. Public works contracts - Rules for participating - Group of contractors submitting a tender - Change in the composition of the group - Prohibition laid down in the contract documents - Compatibility with Community law - Review procedures. Case C-57/01.

I Introductory remarks

1. These proceedings concern the interpretation of a works coordination directive as well as of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (2) (hereinafter "the legal remedies directive"). In particular, the question in issue is whether a change in the composition of a consortium is permissible during procedures for award of a contract, and the effects of such a change on the legal protection available.

II Legal framework

A Community law

2. Of the directives material to the award process, Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, (3) as amended by Directive 89/440/EEC, (4) is relevant, and essentially corresponds to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (5) (hereinafter "the works procurement coordination directive") to which reference will also be made below.

3. Article 1 of the latter provides, inter alia :

"For the purpose of this Directive

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

...

(d) "public works concession" is a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely of the right to exploit the construction or in this right together with payment;

...

"

4. Article 21 states:

"Tenders may be submitted by groups of contractors. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract."

5. As regards legal protection, the provisions of the legal remedies directive are decisive.

6. Article 1(1) of the legal remedies directive, in the form applicable at the relevant time, provided:

"The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken

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by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law."

7. Article 2(1) of the said directive provides, inter alia ,

"The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

"

B National law

8. The award procedure at issue is governed principally by the provisions of Law No 1418/1984 entitled "Public Works and related matters" (23A) and of Presidential Decree No 609/1985 (223A).

9. In the present case, the contracting authority opted for a contract award procedure pursuant to Article 4(2)(b) of Law No 1418/1984. This type of procedure provides for the following stages:

10. Pre-selection of candidates, submission of tenders, assessment of tenders from a technical point of view, assessment of tenders from an economic and financial point of view and negotiations with the so-called provisional contractor or contractors.

11. Article 5(6) of Law No 1418/1984 states: "The substitution of a third party in the construction of part or all of the work (assignment of the work) is prohibited unless authorised by the developer. Whenever there is substitution, the contractor shall be fully liable together with the subcontractor to the contracting authority, the works personnel and any third party. By way of exception, substitution, together with exemption of the contractor from liability to the contracting authority, may be authorised if required in the interests of the work and the contractor is manifestly unable to complete the work. A presidential decree shall determine the qualifications of the substitute, the consequences for the contractor, the procedure for authorising substitution, issues arising on substitution of a member of a contracting group and particulars in connection therewith."

12. Article 51(1) of Presidential Decree No 609/1985, which was adopted on the basis, inter alia , of the foregoing provision, provides as follows:

"1. The substitution of another contracting undertaking in the construction of the work in accordance with Article 5(6) of Law No 1418/1984 shall be proposed by the department managing the project and shall be authorised by the responsible authority. In order that substitution may be authorised, the contracting undertaking which seeks to replace the contractor must have the same qualifications as those which were required for the award of the works to the contractor and must satisfy the responsible authority that it offers the appropriate guarantees for completion of the works."

13. The other provisions of this Article concern authorisation of substitution with exemption from liability for the original contractor (paragraph 2), substitution of a member of a contracting consortium, where substitution is sought by the said member (paragraph 3), termination of the contract if the contractor becomes insolvent (paragraph 5), and termination of the contract if the contractor

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is a sole operator and dies (paragraph 6).

14. Finally, Article 35 of the abovementioned presidential decree contains provisions concerning the obligations of the members of a contracting consortium as regards completion of the work which are borne by the consortium; paragraphs 6 and 7 of that article determine what happens to the consortium and the obligations of its members in the event of the death of the natural persons who, with their individual undertakings, participated in it, and in the event of the insolvency of a member of the consortium.

15. It is apparent from the combination of these provisions that the legislation relating to the tendering procedure for public works contracts provides, under certain conditions, for the substitution of a member of a consortium where such a contract has been awarded to the consortium in question. Such substitution, always after approval by the developer, is provided for only at the stage of execution of the works, that is to say the stage which follows signature of the contract between the contractor and the developer, and not prior to the award of the contract. (6)

16. In the supplementary notice in respect of the invitation to tender which is in issue in these proceedings (notice concerning the second stage of the award procedure), it was stated that those entitled to take part in that stage were the eight groups which declared their interest in the first stage of the award procedure and had been pre-selected. It was also stated that those groups were entitled to take part in the form that they had taken during the first stage of the award procedure, that the creation of groupings or other forms of cooperation between them was strictly precluded and, finally, that it was possible for a group to be enlarged by the addition of new members provided that the new members had not been included in any other groups pre-selected to take part in the second stage of the procedure.

17. In addition, Article 12 of that notice provided that each tenderer's file should include all the documents showing that the tenderer constituted, from a legal perspective, a consortium. Such documents included a certificate from a notary that a consortium had been formed by all the members of the pre-selected group, including any new members, in accordance with Article 6 of the supplementary notice. Each consortium had also to include certified minutes of the meetings of the boards of directors of all the members of the consortium, authorising their participation in the consortium in cooperation with the other members, which were to be mentioned by name, as well as copies of the articles of association of any new members of the consortium. Finally, it was provided that the file had to include all the items referred to in paragraphs 7.1, 7.2, 7.3 and 7.4 of the notice relating to the first stage of the tendering procedure.

18. Moreover, it was stated in the said notice that the consortia would be required to set out their intentions regarding the extent of their involvement in the financing of the project, and to submit a statement attesting to their willingness to invest the capital sums which were essential, in addition to any subsidies, to ensure completion, maintenance and operation of the work. Furthermore, any construction undertaking or consultancy was required to submit a certificate of registration in the commercial register of the country in which it was established and to submit evidence of its financial and economic resources and its technical capabilities. Finally, undertakings within the consortium which would have more specific responsibility for running the project, were required to submit appropriate certificates and to demonstrate their capability and their experience in the running of transportation projects and, in particular, of underground railways.

19. It is apparent from the abovementioned terms of the notice that provision is made during the second stage of the tendering procedure in question for a consortium which was pre-selected during the first stage to be enlarged by the addition of new members. However, such enlargement is permitted only within the time-frame set for submission of candidates' tenders. As the files show, that restriction was clearly dictated by the need for the competent adjudicating bodies under the award

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procedure to have available to them, initially on evaluating the technical bids, and subsequently when evaluating the financial studies and in calculating the corresponding public expenditure, all requisite information concerning each separate individual member's financial and economic resources, technical qualifications and capabilities, and aptitude for and experience in carrying out the works in question, for the purposes of appointing the provisional contractor. (7)

III Facts, main proceedings and questions referred for preliminary ruling

20. The Ministry for the Environment, Planning and Public Works issued a notice of an invitation to tender, approved by Decision D1d/2/207 of 18 June 1992 of the Minister, announcing the first stage (pre-selection stage) of an international tendering procedure for the appointment of a contractor for the "planning/construction, self-financing and operation of an underground railway for Thessaloniki" budgeted at GRD 65 000 000 000. At that stage, the awarding body selected eight groups of companies which had declared an interest, including the appellant consortium. Subsequently, by Decision D1/4/37 of the Minister for the Environment, Planning and Public Works on 1 February 1993, the bid documentation for the second stage of the tendering procedure was approved, including the supplementary notice and the contract specifications. At that stage technical proposals, financial studies and economic and financial proposals were submitted by, among others, the consortium Makedoniko Metro (hereinafter "Makedoniko") in its original form, and the consortium Thessaloniki Metro (Bouygues).

21. At the pre-selection stage, the members of the initial Makedoniko consortium were the undertakings Mikhaniki AE, Fidel SpA, Edi-Sta-Edilizia Stradale SpA and Teknocenter-Centro Servizi Administrativi-SRL.

22. In the second stage of the tendering procedure in question, that is, after the pre-selection stage and invitation to tender, the consortium was enlarged by the addition of the undertaking AEG Westinghouse Transport Systems GmbH (hereinafter "AEG"). Thus composed, the consortium submitted a bid.

23. As is apparent from the file, and not disputed by the parties, that was the composition of the consortium when it was nominated as provisional contractor (on 14 June 1994) and thus after the assessment of the bids.

24. After the negotiating committee had convened and negotiations commenced between the Hellenic Republic and the consortium as provisional contractor, the consortium, in a letter dated 29 March 1996, informed the Minister for the Environment, Planning and Public Works of the new composition of the consortium (the undertakings Mikhaniki AE, ABB Daimler-Benz Transportation (Deutschland) GmbH [Adtranz] and the Fidel Group, comprising the three Italian undertakings referred to above).

25. Responding to queries relating to rumours that the members of the abovementioned group of Italian companies had become insolvent and gone into liquidation, the consortium informed the Commission for Major Works, in a letter dated 14 June 1996, that the companies in the abovementioned group were no longer part of the consortium, and that the members of the consortium were, as at that time, the undertakings Mikhaniki AE, Adtranz and Transurb Consult. As the file shows, the agreement for the formation of the consortium in that composition was not submitted to the authorities. That notarial act was signed on 27 November 1996, barely two days before the decision of the Minister for the Environment, Planning and Public Works concerning the failure of negotiations, and almost two and a half years after the nomination of the appellant as the provisional contractor. It was also in that composition that the consortium later brought the action.

26. The Minister for the Environment, Planning and Public Works, acting for the awarding authority, found that the appellant had substantially departed from the provisions of the tender documentation, and considered that the negotiations had failed; further, he announced the termination of negotiations between the Greek State and the appellant, and called for negotiations with the second consortium, which was the next candidate for provisional contractor.

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27. As a result, the consortium appealed to the Greek Council of State and applied for the awarding authority's decision to break off negotiations to be set aside. The Council of State considered that a change in the composition of a consortium was only permissible prior to submission of bids. Thus, the consortium was not entitled, in its altered composition, to apply for the decision to be set aside.

28. In its action before the Administrative Court of First Instance, Athens, Makedoniko, together with the other undertakings in the consortium, sought a declaration that the State was liable to pay the sums specified in the statement of claim by way of damages and financial compensation for the non-material losses suffered by them as a result of the above unlawful act and omission.

29. That claim was dismissed by the Administrative Court of First Instance, Athens, on the ground that, in the new composition in which the consortium had brought the action, it was not entitled to claim compensation.

30. Makedoniko appealed against the judgment to the Administrative Court of Appeal, Athens, claiming misinterpretation and misapplication of the relevant provisions in the judgment under appeal and, in the alternative, it asked that a reference for a preliminary ruling be made to the Court of Justice of the European Communities on the interpretation of the relevant Community provisions.

31. By order of 14 June 2000, the Administrative Court of Appeal, Athens, referred the following question to the Court of Justice:

> "Must a change in the composition of a consortium participating in procedures for the award of a public-works contract which occurs after submission of tenders and selection of the group as the provisional contractor, and is tacitly accepted by the awarding authority be interpreted in such a way as to result in the loss of that consortium's right to participate in the procedure and, by extension, also of its right to, or interest in, the award of the contract for execution of the works? Is such an interpretation consistent with the provisions and spirit of Directives 93/37/EEC and 89/665/EEC?"

IV On the preliminary question

32. In order for the Court of Justice to provide the national court with an answer that is relevant to the main proceedings, both preliminary questions must, as the Commission and the Austrian Government rightly argue, be rephrased. (8)

33. Thus, in the context of Article 234 EC, the Court has no jurisdiction to rule either on the interpretation of the provisions of national law or regulations or on their conformity with Community law. It may, however, supply the national court with an interpretation of Community law that will enable that court to resolve the legal problem before it. (9)

34. "Finally, according to settled case-law,... where questions are formulated imprecisely, [the Court may extrapolate] from all the information provided by the national court and from the documents in the main proceedings, the points of Community law which require interpretation, having regard to the subject matter of those proceedings." (10)

35. On the basis of the information supplied in the order for reference, having regard in particular to the fact that the national court has made this reference in the light of the relevant specific procurement directive, namely the works procurement coordination directive, as well as the corresponding legal remedies directive, it seems appropriate to split up the question as follows.

Should the provisions of the works procurement coordination directive be interpreted as precluding rules which prohibit a change in the composition of a consortium after submission of tenders?

Does the legal remedies directive apply to decisions concerning a change in the composition of

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a consortium, such as that which is in issue in the main proceedings?

A Submissions of the parties

36. Makedoniko argues that the enlargement of the consortium by the addition of AEG before submission of tenders was consistent with the supplementary notice of invitation to tender. As regards the subsequent change in the composition of the consortium, namely the withdrawal of AEG and addition of Adtranz, Makedoniko points out that this company was created by the merger of AEG, which, in the meantime, had changed its name to AEG Schienenfahrzeuge GmbH, with AEG Nahverkehr und Wagen GmbH. As legal successor, this new company had assumed the rights and liabilities of AEG. It follows that there was no substantive change in the composition of the consortium.

37. The last alteration in the composition of the consortium was attributable to the fact that the companies in the Fidel group had been obliged, due to changes in their legal status, to leave the consortium. The companies in the Fidel group went into liquidation in 1995. This last alteration had led to the addition of the Transurb Consult company, which in any event held only a very small interest.

38. Makedoniko makes the point that such events are typical for a public works contract. Even if this were a case of a public works concession, the legal remedies directive would apply, because it is only a particular manifestation of the general principle of effective legal protection.

39. Makedoniko suggests that the answer to the questions referred for preliminary ruling should be that a change in the composition of a consortium which has participated in a public works contract award procedure or the issue of a public works concession, which occurs after submission of tenders and provisional selection of the contractor and which is tacitly accepted by the awarding authority, can neither result in such a consortium losing its status as tenderer as a result, nor in the consortium or its members being deprived of their interest in the award or of the possibility of bringing an action to enforce the rights to which they are entitled under Community law. The latter is all the more relevant as that change is neither referred to as a reason for the decision to terminate negotiations with the consortium, nor the decision to exclude it. Any contrary interpretation of the relevant national provisions would run counter to the spirit and letter of the works procurement coordination directive, the legal remedies directive and the general principle of effective legal protection. At the hearing, Makedoniko argued further that prohibiting a change in composition after submission of tenders would constitute an infringement of the freedom to provide services.

40. The Greek Government points out that neither the works procurement coordination directive nor the legal remedies directive refer to a change in the composition of a consortium. A change in composition is not permitted during negotiations with the tenderer which has provisionally been selected as contractor. This follows from the fact that the only subject of negotiations is the final terms of the contract to be awarded and not the identity of the contractor, which is not negotiable. Therefore the identity of a provisionally selected contractor may not change.

41. In the absence of a rule under Community law, the permissibility of a change in the composition of a consortium arises solely under national law, which does not provide for substitution of a member of a consortium during negotiations. The question referred for preliminary ruling must, therefore, be answered in the affirmative.

42. The Austrian Government suggests first of all that the question referred for a preliminary ruling should be rephrased.

43. The Austrian Government concludes from the case-law of the Court, according to which the public procurement directives have not established uniform and exhaustive Community law, that the national legislature may adopt rules in the context of these directives, as Greece has indeed done.

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Further, the contracting authorities also have a certain amount of flexibility, for example, in establishing rules relating to consortia. The parameters of this flexibility are set by primary legislation.

44. The purpose of the public procurement directives is to prevent preferential treatment being given to domestic tenderers, and to exclude the possibility of contracting authorities being guided by anything other than economic considerations.

45. The rephrased question should therefore be answered as follows.

> "The provisions of Directive 93/37/EEC do not preclude a change in the composition of a consortium after submission of tenders. The consortium does not, on the basis of the provisions of Directive 93/37/EEC, lose its right to participate in the tendering process, nor, consequently, does it lose its right to, or interest in, being awarded the contract for execution of the work."

46. In the opinion of the Commission , the first part of the question could be interpreted to mean that the Court should comment on national law, over which, however, it has no jurisdiction. Therefore, the Commission proposes that the question be rephrased, and divided into three parts.

47. First, it should be noted that the works procurement coordination directive contains no express provisions concerning a change in the composition of a consortium. Article 21 merely provides that groups of contractors which submit tenders may not be required to assume a specific legal form prior to the award. It is therefore, left to the national legislature or the individual contracting authority, to regulate the details. This applies also to public works concessions.

48. The answer to the first part of the rephrased question should, therefore, be that the works procurement coordination directive contains no provisions which preclude a provision of national legislation or of the contract documentation to the effect that a change in the composition of a consortium ceases to be permissible after a certain stage in the award procedure. This is particularly relevant after the submission of tenders.

49. Further, the Commission presumes that the principle of equal treatment of tenderers would be undermined if a contracting authority could, for the benefit of one tenderer, unilaterally change the terms which are fixed in the tender documentation as not being open to variation, without reopening the whole award procedure. This would otherwise prevent the other and also potential tenderers from benefiting from the change. The answer to the second part of the question should, therefore, be that Community law does not allow a public contracting authority to continue to negotiate with a bidder whose composition has changed, contrary to national law or to the terms of the contract documentation.

50. With regard to the third part of the question, the Commission points out that, under Article 1(1) of the legal remedies directive, only infringements of Community law and national rules implementing that law may be reviewed. This provision does not, therefore, require Member States to provide for procedures to allow review of decisions which have been taken in the context of an award procedure and which infringe rules that do not implement procurement directives.

51. In the Commission's view, therefore, the question referred to the Court should be answered as follows: a change in the composition of a consortium that is in breach of national law or the contract documentation does not affect the exercise of rights which the consortium could claim on the basis of the legal remedies directive, in particular, the right to claim damages.

B Assessment

52. In order to answer the question referred for preliminary ruling, it is first worth pointing out that legal protection in a review procedure under the legal remedies directive is afforded only if the conditions of its applicability are met. Since, however, its applicability is linked to the applicability of the specific procurement directives, and hence of the works procurement coordination

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directive, it is necessary to examine whether the procurement procedure in issue in this case falls within the scope of its applicability.

53. While that question is being examined, the question of whether the purpose of the procurement procedure in issue was to award a public works concession or a public works contract may remain open for the time being.

1. The applicability of the works procurement coordination directive

54. To begin with, we must consider the argument of the Greek Government according to which, under the case-law of the Court, (11) a contracting authority may refrain from awarding a contract. This aspect does not help us to answer the question referred for a preliminary ruling in so far as the relevant judgment concerned a set of circumstances different from those of the main proceedings. In that case, the award procedure ended without the contract being awarded, because the contracting authority had opted for a material other than that stipulated in the tender notice, which, however, meant a change in the subject-matter of the contract. By contrast with the judgment cited by the Greek Government, the contracting authority in this case did not only opt for another procedure, but had before it several tenders for consideration.

55. The Greek Government's view is also undermined by the fact that there may in principle also be cases in which the contracting authority has to award the contract in accordance with Community law; the question arises, therefore, whether there is such an obligation in the main proceedings as well. This presupposes, however, that Community law governs such a set of circumstances at all, namely the change in the composition of the consortium.

56. It is therefore now necessary to ascertain whether the works procurement coordination directive applies to rules on consortia such as those in the main proceedings, and whether that directive precludes the national rules in issue.

57. The starting point for this is the principle reflected in the case-law of the Court according to which the title of and recitals in the preamble to the works procurement coordination directive show that its aim is simply to coordinate national procedures for the award of public works contracts, so that it does not lay down a complete system of Community rules on the matter. (12)

58. Express rules on consortia are provided only in Article 21 of the works procurement coordination directive. However, that provision deals only with specific legal problems in connection with consortia. It thus affords them the right to submit tenders. Further, whilst it prohibits any requirement that consortia assume a particular legal form for the purpose of tendering, it does permit such requirement in the event of the award of a contract.

59. The view taken by the Austrian Government and the Commission that the public procurement directives do not expressly regulate changes in the composition of a consortium is, therefore, well-founded.

60. In view of these two factors, namely, incomplete harmonisation and the existence of only selective rules on consortia, one could draw the converse conclusion, that other aspects concerning consortia are not covered by the works procurement coordination directive. It could further be concluded that Member States and contracting authorities are free to regulate such matters that are otherwise not covered themselves. This includes rules as to the composition of a consortium, such as the legal consequences of changes in its composition.

61. In the present case, such national rules on changes in the composition of a consortium did exist. These became applicable with the change in the composition of the consortium which took place after the evaluation of its suitability. In this respect, the Commission rightly points out that one cannot infer from the public procurement directives any obligation for the contracting authority to check the suitability of the consortium in its new composition. If national legislation

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provides for a fresh evaluation of the consortium after a change in its composition, and this is not, however, carried out, then that is a legal issue to be determined according to national law.

62. To summarise, therefore: the works procurement coordination directive makes no provision for such circumstances, hence "only" national law applies. That is not to say that Member States, including their contracting authorities, are entirely free. Rather, they must observe the parameters of Community law, which will be considered in further detail below.

2. General principles of the public procurement directives

63. Certain principles can be inferred from the public procurement directives. The Greek Government rightly refers to the principles of transparency and competition. In that connection, the Court has declared that it is clear from the preamble to, and the second and tenth recitals of, the works procurement coordination directive, that it's aim is "to abolish restrictions on the freedom of establishment and the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States" . (13)

64. Added to this, according to the case-law of the Court, is the requirement that contracting authorities observe the principle of non-discrimination of tenderers, in respect of which the Court points to several provisions of the public procurement directives which expressly require equal treatment. (14)

65. The Court also states that the prohibition of discrimination implies an obligation of transparency, in order to allow the contracting authority to ensure that the prohibition has been complied with. (15) Even if the view were to be taken that the procurement directives did not imply an obligation of equal treatment, the principle of equality which is a general principle of law, obtains.

66. The equal treatment obligation in the public procurement directives, as well as the principle of equality, would be breached, however, if the contracting authority unilaterally departed from its own rules concerning changes in the composition of consortia, particularly if it were to negotiate with a tenderer whose tender did not match the terms advertised. To that extent, an infringement of Community law can flow from the infringement of a national prohibition.

67. The prohibition on discrimination under Article 1(2) of the legal remedies directive cited by Makedoniko is, on the other hand, not relevant. Whilst that provision contains requirements for establishing legal protection, it does not extend the applicability of the legal remedies directive to infringements of national law.

3. Primary law

68. Further, it must be recalled that the public procurement rules of Member States, as well as the specific public procurement rules of the State's contracting authority, are subject to primary Community law, in particular the fundamental freedoms and the competition provisions addressed to the State, including legislation on State aid. (16)

69. In this context, it must be generally noted that the fundamental freedoms do not prohibit only direct or indirect discrimination, but also rules applicable without distinction which disproportionately inhibit any of the fundamental freedoms. From the information available to the Court, there is no indication that Greek law infringes the freedom to provide services. In any event, interpretation of the freedom to provide services is not the subject of the question referred to the Court for a preliminary ruling, nor, therefore, of these proceedings for a preliminary ruling.

4. The principles of equivalence and effectiveness

70. Since, as expounded above, there are no specific Community provisions governing changes in

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the composition of consortia, these are, in principle, the responsibility of the Member States. They are subject generally to the principles of equivalence and effectiveness which have been developed in case-law. (17)

71. According to the principle of equivalence, the rules of national law, thus also of specific public procurement law, must not be less favourable than those of corresponding, that is to say comparable, domestic provisions.

72. The principle of effectiveness obliges Member States, including the State's contracting authority, not to make the exercise of rights conferred by the system of Community law virtually impossible or excessively difficult.

5. Legal protection in the review procedure

73. As stated at the outset, the legal remedies directive, and thus also the review procedures which it governs, apply only to those awards which also fall within the scope of one of the public procurement directives, such as the works procurement coordination directive.

74. The applicability of the legal remedies directive is supported by the argument that the review procedures thereunder, in the submission of the Commission, also cover decisions of the contracting authority which interrupt negotiations with tenderers. That follows from the broad terms of Article 1 and Article 2 of the legal remedies directive, which refer to "decisions" without further qualification. That broad interpretation not only may be inferred from the travaux préparatoires, but also corresponds to the purpose of the legal remedies directive; which is to improve legal protection and to make it effective.

As regards the applicability of the legal remedies directive, one could also point to the fact that Article 1 comprises measures which Member States are to take in relation to "procedures falling within the scope of [the] Directives..." . However, it is not disputed that the contract award procedure in issue falls, as such, within the scope of one of the public procurement directives.

75. One could argue against the applicability of the legal remedies directive to decisions relating to changes in the composition of a consortium, that the decision of the contracting authority concerns national law, thus, in the present case, the rules on changes in the composition of a consortium. Accordingly, the substantive legal basis for that decision lies in national law.

76. Such an interpretation is supported by Article 1 of the legal remedies directive. According to that provision, the legal remedies directive applies only to infringements of "Community law in the field of public procurement or national rules implementing that law"

77. Given the absence of such (that is to say, Community) legal rules on changes in the composition of a consortium, there cannot, logically, be any infringement of them or the rules implementing them. As rules of that type are purely a matter of national law, one of the preconditions for the applicability of the legal remedies directive has not, in this case, been satisfied.

78. The instruments of legal protection provided for in the legal remedies directive, such as the review procedure, only apply to decisions made by contracting authorities if such a decision infringes the rules referred to in Article 1 of the legal remedies directive. That may be the case where the contracting authority conducts negotiations with a tenderer whose tender does not meet the conditions of the tender, and thereby infringes the principle of equal treatment.

79. Where the decision of a contracting authority infringes both national law and Community law or rules implementing Community law, such a decision is subject to the legal remedies directive in so far as review of the decision according to the principles of Community law, or rules implementing Community law, is concerned. The provisions of the legal remedies directive, the right to a review procedure, apply only in that respect. Whether the contracting authority in the contract award

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procedure in issue has also taken decisions other than the decision to exclude the consortium because of a change in its composition, or whether the decision to exclude also incorporates other measures, such as the continuation of the contract award procedure with another tenderer, is not the issue in terms of the question which has been referred for preliminary ruling. That question is limited to the applicability of the legal remedies directive in relation to rules on changes in the composition of consortia.

80. The above finding certainly does not preclude Member States from providing, in their implementing rules, that the provisions of the legal remedies directive should also apply to infringements of national law, for example, of rules on changes in the composition of consortia.

6. Concluding remarks

81. Since the aspect in issue in these proceedings, namely the change in composition of a consortium, does not fall within the scope of the works procurement coordination directive, it is not necessary to determine whether the award procedure in issue concerned the award of a works concession or works contract.

82. The reply to the questions referred to the Court in this case should be that the provisions of the works procurement coordination directive are to be interpreted as not precluding rules which prohibit a change in the composition of a consortium after submission of a tender. The legal remedies directive does not apply to decisions concerning a change in the composition of a consortium such as that in issue in the main proceedings.

V Conclusion

83. Following the above it is proposed that the Court respond to the questions referred to it as follows:

The provisions of Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, as amended by Directive 89/440/EEC, and of Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts are to be interpreted as not precluding rules which prohibit a change in the composition of a consortium after submission of a tender.

Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts does not apply to decisions concerning a change in the composition of a consortium such as that in issue in the main proceedings.

(1) .

(2) OJ 1989 L 395, p. 33.

(3) OJ 1971 L 185, p. 5.

(4) OJ 1989 L 210, p. 1.

(5) OJ 1993 L 199, p. 54, since amended.

(6) Council of State 971/1998, plenary.

(7) Council of State 971/1998, plenary.

(8) Compare regarding public procurement, Case C-107/98 Teckal [1999] ECR I-8121.

(9) Case C-107/98, cited in footnote 8, paragraph 33; and Case 17/92 Distribuidores Cinematograficos [1993] ECR I-2239, paragraph 8.

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(10) Case 107/98, cited in footnote 8, paragraph 34; Case 251/83 Haug-Adrion [1984] ECR 4277, paragraph 9; and Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 21.

(11) Case C-27/98 Fracasso and Leitschutz [1999] ECR I-5697.

(12) Joined Cases C-285/99 and C-286/99 Impresa Lombardini and Others [2001] ECR I-9233, paragraph 33.

(13) Joined Cases C-285/99 and C-286/99 (cited above in footnote 12, paragraph 34); see also Case C-399/98 Ordine degli Architetti and Others [2001] ECR I-5409, paragraph 52.

(14) Impresa Lombardini and Others , cited in footnote 12, paragraph 37.

(15) Impresa Lombardini and Others , cited above in footnote 12, paragraph 38. Compare Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31.

(16) Case C-243/89 Commission v Denmark [1993] ECR I-3353, Case C-328/96 Commission v Austria [1999] ECR I-7479, and Case C-225/98 Commission v France [2000] ECR I-7445.

(17) As to these two principles, see, for instance, Cases C-261/95 Palmisani [1997] ECR I-4025, paragraph 27, and C-453/99 Courage [2001] ECR I-6297.

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Opinion of Mr Advocate General Geelhoed delivered on 28 November 2002. Commission of the European Communities v Federal Republic of Germany. Failure by a Member State to fulfil its obligations - Admissibility - Legal interest in bringing proceedings - Directive 92/50/EEC - Procedures for the award of public service contracts - Negotiated procedure without prior publication of a contract notice - Conditions. Joined cases C-20/01 and C-28/01.

I Introduction

1. In these two sets of infringement proceedings, the Commission seeks a declaration by the Court that Germany has failed to comply with certain obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (2) (hereinafter "the Directive"). It is alleged that the Municipality of Bockhorn and the City of Braunschweig awarded contracts for the treatment of waste water and refuse disposal without first having published a Community-wide notice.

2. The German Government does not dispute that Community law on the award of contracts ought to have been complied with in the two invitations to tender concerned, but contends that the actions brought by the Commission are inadmissible. It states that, when the time-limits laid down in the reasoned opinions expired, it had already admitted the infringements, which, moreover, no longer existed, since it had taken steps to bring them to an end. As against that view, the Commission argues that the consequences of the infringements are still appreciable. The contracts concluded are still being applied and the obligations entered into extend over a period of more than 30 years.

3. The main point at issue in both cases is therefore whether the Commission still has a legal interest in bringing proceedings. Another question which arises in this connection is whether the Treaty infringement procedure provided for in Article 226 EC must also be used to prevent systematic infringements of the procedural rules laid down in the Directive. Furthermore, Case C-28/01 is significant in terms of the application of environmental criteria in the interpretation of the directive.

II Legal framework

4. Article 8 of the Directive provides that contracts which have as their object services listed in Annex IA are to be awarded in accordance with the provisions of Titles III to VI.

5. Title V (Articles 15 to 22) contains common rules on advertising. Under Article 15(2) of the Directive, contracting authorities that wish to award a public service contract by open, restricted or, under conditions laid down in Article 11, negotiated procedure, are to make known their intention by means of a notice.

6. Article 11(3) of the Directive reads:

"Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

...

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider;

...

" .

7. Under Article 16(1) of the Directive, contracting authorities which have awarded a public contract are to send a notice of the results of the award procedure to the Office for Official Publications of the European Communities.

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III Facts and procedure

A Facts and pre-litigation procedure in Case C-20/01

8. The Municipality of Bockhorn, situated in the Land of Lower Saxony, concluded with the energy distribution undertaking Weser-Ems-Aktiengesellschaft (hereinafter "EWE") a contract for the treatment of waste water. The contract entered into force on 1 January 1997 and is to last for a period of at least 30 years.

9. On 30 April 1999, the Commission, in accordance with the procedure under Article 226 EC, sent the Federal Republic of Germany a letter of formal notice. It stated that the German authorities had failed to comply with the provisions of the Directive when awarding the aforementioned contract.

10. In its reply of 1 July 1999, the German Government conceded that the contract concluded by the Municipality of Bockhorn ought to have been awarded in accordance with the provisions of Community law. It pointed out that the authorities of the Land of Lower Saxony had once again expressly called on the district authorities to comply strictly with the relevant Community provisions.

11. In its reasoned opinion of 21 March 2000, the Commission stated that the provisions of the Directive ought to have been applied, and that it was irrelevant in law that the infringement of the provisions of Community law had been acknowledged by the German Government. In addition, it called on the German Government forthwith to remind the authorities concerned of the legal position, and to oblige them to comply with the relevant provisions on the award of public contracts in future.

12. In a communication of 12 May 2000, the German Government once again acknowledged the infringement. It pointed out that, on the basis of the letter of formal notice and the intervention of the federal Government, the Ministry of Internal Affairs of the Land of Lower Saxony, by decree of 21 June 1999, had urged all district authorities in the Land to ensure in an appropriate manner that contracting authorities complied strictly with the Community provisions on the award of public contracts.

13. The German Government also stated that, under German law, it was virtually impossible to put an end to the infringement itself, as a legally valid contract had existed between the Municipality of Bockhorn and EWE since 1 January 1997, which could not be terminated without substantial compensation's being payable to EWE. The costs of such a termination of the contract would be disproportionately high.

B Facts and pre-litigation procedure in Case C-28/01

14. In this case, the City of Braunschweig, in Lower Saxony, and Braunschweigische Kohlebergwerke (hereinafter "BKB") concluded a contract under which the City of Braunschweig entrusted to BKB the thermal treatment of refuse for a period of 30 years from June/July 1999.

15. The competent authorities of the City of Braunschweig have not denied that the Directive was applicable to that transaction, but have contended that the transaction fell within the scope of the derogation provided for in Article 11(3) of the Directive. In its letter of formal notice of 20 July 1998 the Commission rejected that interpretation.

16. By letters of 4 August, 19 October and 15 December 1998, the German Government submitted observations on the letter of formal notice, arguing in particular that, in accordance with Article 11(3) of the Directive, it had, for technical reasons, been possible to award the contract only to BKB. The geographical proximity of the treatment plant to the city was an essential criterion in the award of the contract in order to avoid shipment over longer distances.

17. By letter of 16 December 1998, the German Government nevertheless admitted to the Commission that the City of Braunschweig had infringed the Directive in this case by applying the negotiated procedure without official publication.

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18. The Commission responded by sending to the Federal Republic of Germany a reasoned opinion dated 6 March 2000 in which, in particular, it called upon the Federal Republic of Germany to remind the authorities concerned of the legal position without delay, and to urge them to comply with the relevant provisions on the award of public contracts in future.

19. In a communication of 17 May 2000, the purport of which was the same as that of the communication of 12 May 2000 referred to above in connection with Case C-20/01, the German Government acknowledged the infringement but pointed out that it was not possible in practice to terminate the contract concluded.

C Procedure before the Court and forms of order sought

20. The applications brought by the Commission in Case C-20/01 and C-28/01 were lodged at the Court Registry on 16 January and 23 January 2001 respectively. The cases were joined by order of the President of the Court on 15 May 2001.

21. In Case C-20/01, the Commission seeks a declaration by the Court that, by failing to invite tenders for the contract for the treatment of waste water in the Municipality of Bockhorn and to arrange for notice of the results of the procedure for the award of the contract to be published in the S Series of the Official Journal of the European Communities , the Federal Republic of Germany has failed to comply with its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of the Directive.

22. In Case C-28/01, it seeks a declaration that, by virtue of the fact that the City of Braunschweig awarded a contract for refuse disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in the Directive for an award by negotiated procedure without a Community-wide invitation to tender were not fulfilled, the Federal Republic of Germany has failed to comply with its obligations under Article 8 and Article 11(3)(b) of the Directive.

23. The Federal Republic of Germany contends that the actions should be dismissed as inadmissible or, in the alternative, as unfounded.

24. By order of the President of the Court of 18 May 2001, the United Kingdom was granted leave to intervene in support of the form of order sought by the German Government. The United Kingdom Government proposes first that Cases C-20/01 and C-28/01 be joined. Secondly, it contends that the actions brought by the Commission should be upheld in so far as they both seek a declaration that the Federal Republic of Germany has failed to fulfil its obligations under the Directive by failing to comply with Community law on the award of public contracts. Thirdly, it contends that the remainder of the applications should be dismissed.

25. A hearing was held on 10 October 2002.

IV Pleas in law and main arguments

26. In its application in Case C-20/01, the Commission claims that the Directive was applicable in this case. In its view, it is immaterial that the German Government conceded that, in accordance with the Directive, the contract concluded by the City of Bockhorn ought to have been the subject of a Community-wide invitation to tender. The fact that the Land government instructed the district authorities to comply strictly with the provisions of Community law when awarding public service contracts did not eliminate the Treaty infringement itself. The City of Bockhorn, it submits, is still infringing Community law by maintaining the contract for the treatment of waste water and continuing to apply it as before. Since the unlawful conduct persists, the defendant has not taken all the measures necessary to comply with the Directive within the period laid down in the reasoned opinion.

27. In Case C-28/01, the Commission claims that, by awarding the contract for refuse disposal

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to BKB without prior publication of a contract notice within the meaning of the Community provisions on the procedure for awarding public service contracts, the City of Braunschweig failed to comply with the Directive. The criteria laid down in Article 11(3)(b) of the Directive for an award by negotiated procedure are not fulfilled in this case. The City of Braunschweig is still infringing Community law in so far as it maintains and continues to apply the contract with BKB. Here too the unlawful conduct persists and the Federal Republic of Germany has not taken all the measures necessary to comply with the Directive within the period laid down in the reasoned opinion.

28. In both cases, the German Government starts by raising a plea of inadmissibility. Essentially, it takes the view that the actions brought by the Commission are inadmissible since there is no ongoing infringement of the Treaty which must be brought to an end by the Member State concerned. The purpose of the infringement procedure is to restore a situation which is in conformity with the Treaty. No such purpose is served where the Member State has put an end to the infringement before the period laid down by the Commission in the reasoned opinion expires. In this case, the infringements of the procedural rules in the Directive were exhausted on their commission.

29. In addition, the validity of the obligations entered into, in accordance with the principle pacta sunt servanda , is consistent with Community law and national law. According to the German Government, in the case of Community law, this may be inferred from Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. (3) According to that provision, the contracts concluded by the contracting authorities may remain valid. (4) Under German law and under the relevant clauses of the contracts in question, there is no possibility of terminating the obligations in these cases, or that possibility exists only at the cost of a disproportionately high risk of liability.

30. In the alternative, the German Government calls into question the substance of the two alleged infringements of the Treaty. It submits that, in both applications, for the same reasons as those given in connection with the question of admissibility, the Commission's claims are unfounded. The German Government refers in this respect to the adage principles impossibilium nulla est obligato (there is no obligation to perform the impossible) and the principle pacta sunt servanda . Moreover, in Case C-28/01, it contends that the City of Braunschweig's decision to opt for the thermal treatment of waste and, consequently, to award the contract to BKB the only undertaking in the Braunschweig area which had the necessary infrastructure to dispose of waste by thermal means was unavoidable, and was justified under Community law, having regard to the principle of proximity.

31. The United Kingdom Government points out in its statement in intervention that it calls into question not the admissibility of the actions but in part their merits. In the light also of Directive 89/665, it submits that the question whether it is possible to terminate a contract for which, wrongfully, no invitation to tender was issued, in breach of Community law, is always a matter which falls within the competence of the Member State concerned. There is no legal interest in continuing proceedings aimed exclusively at obtaining a court decision which would be impossible to enforce because it would be contrary to the domestic law concerned.

32. In its observations on the statement in intervention, the German Government contests the admissibility of the intervention of the United Kingdom Government.

V Assessment

33. The Commission's objectives in these infringement proceedings are not in themselves very ambitious. It claims that Germany has infringed Community law by failing to comply with the rules of the Directive when awarding two contracts. In Case C-20/01, it more specifically seeks a finding against

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the defendant for infringement of Article 8 in conjunction with Articles 15(2) and 16(1) of the Directive, and, in Case C-28/01, a finding against the defendant for infringement of Article 8 and Article 11(3)(b) of the Directive.

34. The German Government does not deny that the Directive was applicable in both cases, and that public tendering procedures were necessary. That acknowledgement forms part of the plea of inadmissibility. The discussion of admissibility must therefore proceed on the assumption that public invitations to tender ought to have been issued (Section B). As regards, next, the merits of the actions brought, I shall examine in particular the defence plea concerning the principle of proximity, which was raised in the alternative in Case C-28/01 (Section C). To begin with, however, consideration must be given to the admissibility of the intervention of the United Kingdom, a remarkable matter arising in these proceedings (Section A).

A Admissibility of the United Kingdom's intervention

35. The German Government was no doubt astonished by the written observations of the United Kingdom Government, which, as intervener, formally endorsed the form of order sought by the Federal Republic of Germany but, in substance, largely supported the form of order sought by the Commission and contested by Germany.

36. In its observations on the United Kingdom's statement in intervention, the defendant therefore called into question the admissibility of the intervention in so far as, in the second head of the form of order it sought, the United Kingdom contended that the Court should declare that the Federal Republic of Germany has failed to fulfil its obligations under the Treaty by failing in these cases to comply with the provisions of the Directive on the award of public service contracts. In the view of the German Government, while it is true that the intervener's submissions need only partly support the form of order sought by one of the parties, Article 93(5)(a) of the Rules of Procedure nevertheless precludes the intervener from also opposing the party it is supporting. The intervention must be unambiguous, and must therefore, because of its partiality, either support or oppose the position of only one of the parties. In this respect, intervention in infringement proceedings differs from intervention, under Article 20 of the Rules of Procedure, in preliminary ruling proceedings, where an intervening Member State takes on the role of amicus curiae .

37. In its observations on the statement in intervention, the Commission points out also that the form of order it sought by its actions is precisely the same as the second head of the form of order sought by the United Kingdom in its statement in intervention. The third head, that the remainder of the application should be dismissed, is incomprehensible in itself.

38. I share the amazement of the Federal Republic of Germany and the Commission. The United Kingdom sought and was granted leave to intervene in support of the form of order sought by the Federal Republic of Germany. However, a comparison of the respective forms of order sought shows that the second head of the form of order sought by the United Kingdom is the same as the orders sought by the Commission in both applications. Both the United Kingdom and the Commission seek a finding against the Federal Republic of Germany to the effect that it has failed to comply with the Directive. The fact that the intervener then contends that the remainder of the application be dismissed can perhaps be explained by the emphasis it lays in its submissions on the effects of a judgment finding that there has been a failure to comply with the rules on the procedure for awarding public service contracts. To that extent, its assessment concurs with the view of the German Government. Nevertheless, the German Government's submissions in this regard form part of its defence plea alleging inadmissibility, while the United Kingdom does not expressly call the admissibility of the action into question at all.

39. It is permissible for the form of order sought by one of the parties to be supported only

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in part, rather than in full. (5) The United Kingdom had the choice of supporting the German Government's contention that the action be dismissed either as regards both the admissibility and the merits of the action or as regards the merits alone. It decided to support the contention regarding the merits of the action.

40. However, the question is whether, as the German Government claims, the intervention must be declared inadmissible in so far as the United Kingdom's submissions on the substance contradicts the German Government's submissions concerning admissibility.

41. In my opinion, this question must be answered in the affirmative. After all, the wording of the Statute and the Rules of Procedure is clear. According to the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. That provision also forms the basis of Article 93(1)(e) of the Rules of Procedure, which states that the application to intervene must contain the form of order sought in support of which the intervener is applying for leave to intervene. On that basis, the President or the Court decides whether leave to intervene is to be granted. Article 37 of the EC Statute of the Court of Justice is developed further in Article 93(5) of the Rules of Procedure, which lays down requirements as to the content of the statement in intervention. According to Article 93(5)(a), inter alia, this must contain "a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties" . (6)

42. Clearly, the stipulation that an intervener in adversarial proceedings should take sides was quite deliberate and the purpose of the intervention is not that the intervener should support the Community judicature by submitting written statements of case or written or oral observations in the manner of an amicus curiae , as is the case under Article 20(2) of the EC Statute and Article 104(4) of the Rules of Procedure. The rules of procedure applicable to the preliminary ruling procedure under Article 234 EC do not contain any restrictions in this regard.

43. Even though the Court of Justice has not as yet expressly commented on this question, its case-law provides further support for the view that the form of order sought by the intervener must not be at odds with that sought by the party it is supporting. Although the Community judicature is willing to allow the intervener to introduce new submissions in the proceedings, those submissions must either support or oppose the form of order sought by one of the parties. (7) Adding new forms of order or requesting in the statement in intervention that the Court should rule on other issues renders the intervention inadmissible. (8) The same applies to submissions by the intervener which, although intended to support the form of order sought by one of the parties, are based on grounds entirely unconnected with those on which the form of order sought by the party supported is based. (9) It follows from this that the intervener is not at liberty to deviate at will from the form of order sought by the party it is formally supporting.

44. The intervener is certainly not at liberty to intervene in the dispute by opposing the form of order sought by the party it supports. In its application of 17 April 2001, the United Kingdom requested leave to intervene in support of the form of order sought by the Federal Republic of Germany, and by order of 18 May 2001, the President of the Court expressly granted leave to intervene in support of the form of order sought by the defendant. (10) The second head of the form of order sought in the statement in intervention, that a declaration be made to the effect that the Federal Republic of Germany has failed to comply with the procedural rules laid down in the Directive, is contrary to the order of the President of the Court.

45. In the light of the foregoing, I consider the second head of the form of order sought by the intervener to be inadmissible. (11)

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B Admissibility of the actions brought by the Commission

46. The German Government bases its view that both actions are inadmissible on the fact that the infringements of the Treaty had already ceased to exist when the time-limits laid down in the reasoned opinions expired. In its submission, the conclusion of the contracts with EWE and BKB respectively also ended the acknowledged infringements of the provisions of the Directive. According to the national law applicable, which is compatible with Community law Article 2(6) of Directive 89/665 , an infringement of the procedural rules contained in the directive does not affect the validity of the contracts in question, which can therefore remain in force. Consequently, the Commission no longer has an objective interest in continuing the proceedings, especially as the German Government has for its part taken the measures necessary to prevent any repetition of the infringements committed.

47. In my opinion, this view must be rejected. On the one hand, it fails to take into account the nature and scope of the legal obligations incumbent on Member States under the Directive, and, on the other, it disregards the possible legal consequences of infringements of the Directive, even if those infringements cannot as such affect the validity of the contracts in question.

48. The Directive imposes a threefold obligation on Member States. First, they must ensure that the Directive is transposed into national law in such a way that it can produce the legal effects it was intended to have. Secondly, the Member States must see to it that the public contracting authorities actually comply with the relevant provisions of the Directive. Thirdly, they must take action to prevent threatened infringements of those provisions.

49. If it appears, on the basis of actual circumstances, that a Member State has failed to fulfil or has not adequately fulfilled that threefold duty of care, the ensuing situation is incompatible with the result which the Directive seeks to achieve. Freedom to provide services is then no longer guaranteed. (12)

50. In that regard, the Commission has an objective legal interest in obtaining a judgment from the Court to the effect that, in the context of the relevant contracts awarded by the Municipality of Bockhorn and the City of Braunschweig, the Federal Republic of Germany has failed to fulfil its obligations. Such a finding against the defendant extends beyond those two individual cases, since it also shows that Germany, the addressee of the Directive, has not done everything necessary to ensure that it is enforced.

51. The implicit assertion by the German Government that, by reprimanding the district authorities, it has fulfilled its legal obligations at least for the future is in my view unsatisfactory. The Court has consistently held that the Member States remain fully responsible for ensuring compliance with the Directive in their spheres of territorial competence. They cannot evade responsibility for any future infringements of the Directive by taking the matter up with the local authorities.

52. The point made by the Commission at the hearing that it has received further complaints concerning infringements of the directive in question, some of which likewise relate to refuse, makes clear the ongoing nature of the duty of care incumbent on Member States in the transposition and application of the Directive. The purpose of the Directive means that the question whether the duty of care has been fulfilled usually has to be determined on the basis of individual breaches of that duty. In my opinion, that in itself renders untenable the German Government's view that the action brought by the Commission in this case is inadmissible.

53. However, the view adopted by the German Government is also clearly open to question from another angle. Ultimately, it would mean that proceedings under Article 226 EC against infringements of Community law which have ceased to exist and which are irreversible would be impossible in future. This would open the way to systematic infringements of the Directive committed by means of long-term contracts which are legally unassailable. In the case of certain types of economic activity carried

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on under the responsibility of the public authorities, such as refuse disposal or highway maintenance, the internal market for services would thus be geographically compartmentalised. It need hardly be said that such a consequence is contrary to the main aims of the Directive.

54. It must therefore by open to the Commission in individual cases, to obtain an order from the Court to the effect that a Member State is systematically failing to comply with its obligations under the Directive, or is in danger of failing to do so.

55. Seen against that background, a finding as to the existence of two actual infringements of the Directive goes further than the interest involved in obtaining such a finding. The purpose of the infringement procedure under Article 226 EC is not only to put an end to the infringement itself, but also to bring about a change in behaviour on the part of the recalcitrant State and prevent any repetition. (13) That result could no longer be achieved if the view of the German Government were accepted.

56. The German Government's view would have a similar effect on the power of the Court under Article 228(2) EC to impose a penalty payment on Member States which fail to comply with judgments. If, as the German Government considers, the Court were required to declare inadmissible actions brought by the Commission to obtain a declaration on infringements of the Directive which have become "definitive" , the Court of Justice would be left with no means of coercion under the aforementioned article in the event of repeated infringements of the Directive. The Community would then be powerless in the face of systematic infringements of the Directive, with no legal remedy at its disposal.

57. The continuation of the infringement proceedings, even if confined to the two cases pending, makes very good sense. The Commission has rightly pointed out that the alleged infringements will continue to produce legal effects, since they led to the conclusion of long-term contracts. The award of the contracts has therefore not yet produced all its legal effects. (14) Nor is there here a situation which is inherently unrectifiable.

58. The contracts in question came into existence as a result of unlawful conduct, a fact which has a bearing on the legal position of the parties to those contracts whose interests could have been adversely affected by those infringements of the law. An infringement of the procedural rules contained in the Directive can give rise to claims on the part of individuals, including claims for damages, which must be pursued in accordance with the relevant procedures under national law. (15) The assertion by the German Government that no third parties suffered any damage in these cases is irrelevant, since that fact cannot affect the admissibility of an action brought under Article 226 EC. (16) Moreover, that argument is open to question in so far as, according to the documents before the Court, the Commission investigated the alleged irregularities following complaints.

59. A finding of failure to fulfil obligations in these cases would clarify and strengthen the legal position of third parties and thus provide individuals with an effective legal remedy. (17) An effective action for damages in turn serves to safeguard the effectiveness of the Directive, since it urges the Member State to comply with the procedural rules in future. From that point of view, a finding by the Court that a Member State has failed to fulfil its obligations also serves the interests of ensuring that the Directive is effectively implemented in national law.

60. In view of the foregoing, the remainder of the German Government's submissions can be quickly dealt with.

61. The maxim pacta sunt servanda is not relevant here, since the Commission has not denied that the contracts concluded can, as such, continue to exist. However, that does not affect the aforementioned possibility of claims for damages as an alternative remedy. Nor is that possibility altered by the fact that, as the German Government argues, the national liability laws are adequate

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and an action for damages based on Community law would be unnecessary. For the purposes of deciding whether an action for failure to fulfil obligations under the Directive is admissible, the state of the national liability laws is not decisive in any event.

62. Moreover, it is of course for the Court to determine whether or not there has been an infringement of the Treaty, even if the Member State in question does not deny the infringement. (18) The argument which the defendant draws from Article 232 EC, to the effect that recognition of the fact that there has been an infringement of the Treaty makes a finding to that effect by the Court superfluous because there is no longer any objective interest in such a finding, is incorrect, since, in this case, there is most definitely an objective interest in so doing.

63. The German Government also contends that the action brought by the Commission breaches the principle ne ultra petita and is therefore inadmissible. This argument must be rejected for the simple reason that the forms of order sought in the applications are the same in substance as the complaints raised by the Commission in the pre-litigation procedure and, in particular, in the reasoned opinion. (19) In both cases, the Commission seeks a declaration that, in the invitations to tender in question, Germany has infringed the same procedural rules of the Directive.

64. In view of the foregoing, I consider that in both cases there is a legal interest in bringing proceedings and that the actions brought by the Commission are admissible.

C Substance

1. Case C-20/01

65. In Case C-20/01, the Commission is, in my view, right to state that all the conditions for application of the Directive were satisfied in this case. The treatment of waste water is a service within the meaning of Article 8 and Annex IA, category 16 ("sewage and refuse disposal services; sanitation and similar services"). Even though EWE gave the Municipality of Bockhorn an undertaking that, as well as actually disposing of the waste water, it would also install certain sewerage facilities, the execution of those works was without question incidental to the main object of the contract, namely the treatment of waste water. Despite the mixed character of the contract, works, in so far as they are incidental to, rather than the object of, the contract, do not justify treating the contract as a public works contract within the meaning of the Directive on the award of public works contracts. (20) Even if the contract is confined to the part relating to the treatment of waste water in the narrow sense, its value far exceeds the maximum value of EUR 200 000 for the entire contract laid down in Article 7 of the Directive.

66. The Municipality of Bockhorn was therefore required, under Articles 8 and 15(2) of the Directive, to award contracts for the treatment of waste water by means of an award procedure and, under Article 16(1), to send a notice of the results of the award procedure to the Office for Official Publications of the European Communities.

67. Moreover, the complaints raised by the Commission in Case C-20/01 are not in fact challenged by the German Government. In its reply, the German Government refers entirely, as regards the merits of the case, to its submissions on the plea of inadmissibility. Those, however, are clearly untenable.

2. Case C-28/01

68. In this case, it is common ground that, when awarding the contract in question to BKB, the City of Braunschweig clearly proceeded on the assumption that the Directive was applicable. The parties are in dispute as to whether the conditions for awarding a contract by negotiated procedure under Article 11(3) of the Directive were fulfilled. According to that provision, public service contracts may be awarded without prior publication of a contract notice, inter alia, in the case

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of services which, for technical reasons, may be entrusted only to a particular service provider.

69. The German Government justifies the failure to issue an invitation to tender on the ground that, in view of the circumstances of the case, the refuse disposal contract could be awarded only to BKB, which was already established in Braunschweig. The City of Braunschweig opted for a method of treating waste locally which made it possible to avoid the shipment of waste over longer distances. The proximity of the refuse disposal facility was therefore an essential condition for the performance of the contract in question. The criterion of the proximity of the processing facilities and the short shipping distance is thus consistent, according to the German Government, with the principle that environmental damage should as a priority be rectified at source. That principle is laid down in Article 174(2) EC (formerly Article 130r(2) of the EC Treaty), and has been clarified by the Court of Justice in its case-law. (21) In view of the facilities available at its headquarters, BKB was the only undertaking in a position to carry out the refuse treatment using the desired thermal procedure. At the time when the contract was concluded, no other undertaking had the waste disposal facilities required in the Braunschweig area, as was shown by a market analysis conducted by the City of Braunschweig. If new industrial plant had had to be built, the deadlines laid down for comprehensive refuse disposal could not have been met.

70. The Commission points out first of all that the derogation provided for in Article 11(3) of the Directive, being an exception to the general principle, must be interpreted restrictively. Only if the contract in question can indeed, for the reasons expressly stated in that provision, be performed by only one particular undertaking, may it be awarded by negotiated procedure. No evidence has been adduced, however, to show that the contract in this case could be performed only by BKB.

71. The Commission submits that, whatever significance is attached to environmental criteria in the award of public contracts, they may never be applied in a discriminatory manner. That is what, in its view, has happened here. Geographical proximity was the only criterion used, whilst other environmental issues were disregarded. For example, outside undertakings could have proposed the use of other procedures for disposing of non-hazardous refuse. Moreover, in the event of conflicting interests, the proximity principle laid down in Article 174(2) EC does not take precedence over other Community objectives, but is to be taken into account, as appropriate, only in the implementation of Community policy.

72. It must be pointed out first of all in this respect that the Commission has rightly stated that the scope of Article 11(3) of the Directive, as a derogation from the rule that contracts covered by the Directive are to be awarded in accordance with the Community procedure, must be interpreted restrictively. This means that the person seeking to rely on that derogation must prove that the exceptional circumstances justifying it actually exist. (22)

73. The option given by Article 11(3) of the Directive to contracting authorities to award public contracts without prior publication of a notice is justified by the fact that, in these cases, there is only one suitable source of procurement. In those circumstances, the obligation to issue a public invitation to tender would lead to an unnecessary procedure. In order for that provision to be successfully relied on, it must therefore be irrefutably established that there really is only one undertaking capable of performing the contract in question.

74. In a recent judgment in Concordia Bus Finland , the Court of Justice held that environmental protection criteria are also among the criteria for the award of contracts which may be taken into account by the contracting authority under Article 36(1)(a) of the Directive. (23) In the light of that case-law, it is in my opinion conceivable that principles relating to the environment should also be taken into account in the context of the application of Article 11(3) of the Directive, when determining whether there is only one source of procurement. However, the judgment in Concordia

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Bus Finland also shows that reliance on environmental criteria in the award procedure must be carefully examined and must not constitute a licence to circumvent the fundamental objective of the Community Directives on the award of public contracts, namely to achieve the internal market and eliminate unequal treatment. (24)

75. In particular, there is an intrinsic danger of indirect discrimination in the application of Article 11(3) of the Directive, since that derogating provision is, by definition, premissed on unequal treatment and preference for an individual contractor. The view taken by the German Government means that tenderers established in Braunschweig are given priority, and sources of procurement located elsewhere are excluded right from the start. That makes it all the more necessary to adduce convincing evidence where use is made of the derogation under Article 11(3).

76. In my opinion, the German Government has not succeeded in providing convincing evidence that BKB was indeed the only conceivable source of procurement which the City of Braunschweig could reasonably commission to provide (thermal) refuse disposal services. Leaving aside the question whether the report produced for the City of Braunschweig and cited by the German Government is reliable, it is inconceivable that a contract to be concluded for a term of no less than 30 years should not have attracted several serious contenders. After all, (thermal) refuse disposal is not such a unique and unusual economic activity that it can be carried on only by one undertaking.

77. Even though the City of Braunschweig has opted for a particular form of refuse disposal, the contracting authority can none the less be expected to provide convincing evidence, when relying on the derogation provided for in Article 11(3) of the Directive, that the same result refuse disposal could not have been achieved just as effectively from the point of view of environmental technology through the use of other techniques. That evidence can be supplied if the criteria on which the decision to use that form of refuse disposal was based are objective and transparent. In these proceedings, Germany has failed to substantiate, or has substantiated inadequately, its assertion that a solution which did not take account of shipping distances would be unwise from an ecological point of view. Moreover, it has not in any way been shown to be the case that shipment of the refuse in question over longer distances would in any event pose a threat to the environment or, as the case may be, to public health. (25)

78. In this case a public invitation to tender within the meaning of this Directive was essential. The action brought by the Commission must therefore be upheld.

VI Conclusion

79. In view of the foregoing, I propose that the Court should rule as follows:

in Case C-20/01:

(1) Declare that, by failing to invite tenders for the award of the contract for the treatment of waste water in the Municipality of Bockhorn and to arrange for notice of the results of the procedure for the award of the contract to be published in the S Series of the Official Journal of the European Communities , the Federal Republic of Germany has failed to comply with its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;

(2) Order the Federal Republic of Germany to pay the costs;

in Case C-28/01:

(1) Declare that, by virtue of the fact that the City of Braunschweig awarded a contract for refuse disposal by negotiated procedure without prior publication of a contract notice, notwithstanding that the criteria laid down in Directive 92/50 for an award by negotiated procedure without a Community-wide

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invitation to tender were not fulfilled, the Federal Republic of Germany has failed to comply with its obligations under Article 8 and Article 11(3)(b) of Council Directive 92/50/EEC;

(2) Order the Federal Republic of Germany to pay the costs.

(1) .

(2) OJ 1992 L 209, p. 1.

(3) OJ 1989 L 395, p. 33; amended by Directive 92/50.

(4) Article 2(6) of Directive 89/665 reads: "[t]he effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement" .

(5) See, for example, the judgment in Case C-156/93 Parliament v Commission [1995] ECR I-2019, paragraphs 14 and 15.

(6) My emphasis.

(7) According to the Court's case-law, the intervention procedure would otherwise be deprived of all meaning (see, for example, the judgment in Case 30/59 De gezamenlijke Steenkolenmijnen in Limburg [1961] ECR 18).

(8) See the judgment in Case C-377/98 Netherlands v Parliament and Council [2001] ECR I-7079, paragraph 9.

(9) Judgment in Case C-155/91 Commission v Council [1993] ECR I-939, paragraph 24.

(10) One of the consequences of leave to intervene is that the intervener must receive a copy of every document served on the parties, unless the President, on application by one of the parties, omits secret or confidential documents (see Article 93(3) of the Rules of Procedure).

(11) For the sake of completeness, it may be pointed out that the first head of the form of order sought in the statement in intervention of 17 September 2001, that Cases C-20/01 and C-28/01 be joined, had already been made redundant by the order of the President of 15 May 2001.

(12) The purpose of coordinating the procedures for awarding public contracts at Community level is to eliminate barriers, inter alia, to the freedom to provide services and therefore to protect the interests of traders established in a Member State who wish to offer services to contracting authorities established in another Member State (cf., for example, the judgment in Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 32. See also the 20th recital in the preamble to the directive.)

(13) Judgment in Case C-276/99 Germany v Commission [2001] ECR I-8055, paragraphs 24, 25 and 32.

(14) Judgment in Case C-362/90 Commission v Italy [1992] ECR I-2353, paragraphs 11 and 12. In that judgment, the Court deemed an action for failure to fulfil obligations to be inadmissible on the ground that, when the time-limit laid down in the reasoned opinion expired, the alleged infringement had produced all its legal effects and therefore no longer existed.

(15) See, for example, the judgment in Case C-92/00 HI [2002] ECR I-5553, paragraphs 26 and 27.

(16) See the judgment in Case C-328/96 Commission v Austria [1999] ECR I-7479, paragraph

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(17) In an action for damages before the national court, a finding that a Member State has failed to fulfil an obligation establishes the infringement of Community law as being legally effective (see, for example, the judgment in Case C-365/97 Commission v Italy [1999] ECR I-7773, paragraph 24).

(18) See, for example, the judgment in Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 30.

(19) See, for example, the judgment in Commission v Austria (cited in footnote 16, paragraph 40).

(20) See the 16th recital in the preamble to Directive 92/50. Cf. also the judgment in Case C-331/92 Gestion Hostelera Internacional [1994] ECR I-1329, paragraphs 26 and 27.

(21) The German Government refers, by way of example, to the judgment in Case C-2/90 Commission v Belgium [1992] ECR I-4431.

(22) Cf., to that effect, the judgment in Case C-318/94 Commission v Germany [1996] ECR I-1949, paragraph 13.

(23) Judgment in Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, paragraph 57.

(24) Judgment in Concordia Bus Finland (cited in footnote 23, paragraphs 59 to 64, with references to earlier decisions).

(25) In this connection, see also the judgment in Case C-203/96 Dusseldorp and Others [1998] ECR I-4075, paragraphs 46 and 47. That case concerned the question whether the recycling of oil filters in other Member States and their shipment over a greater distance for the purposes of being exported would pose a threat to the health and life of humans within the meaning of the present Article 30 EC. Not only did the documents before the Court show that the recycling of filters was comparable in the two Member States concerned, but it was not established before the Court that the shipment of oil filters posed a threat to the environment or to the life and health of humans.

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Opinion of Mr Advocate General Alber delivered on 11 July 2002.
Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa v Varkauden Taitotalo Oy.
Reference for a preliminary ruling: Kilpailuneuvosto - Finland.
Directive 92/50/EEC - Public service contracts - Definition of contracting authority - Body governed by public law - Company set up by a regional or local authority to promote the development of industrial or commercial activities on the territory of that authority.
Case C-18/01.

I - Introduction

1 In these proceedings the Kilpailuneuvosto (1) (Finnish Competition Council) seeks from the Court of Justice a preliminary ruling on a number of questions concerning the interpretation of the concept of contracting authority in the form of a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public contracts (2) (hereinafter `Directive 92/50').

2 Of particular concern in this context is the definition of needs in the general interest not having an industrial or commercial character and the question whether this definition covers the activity of a share company which is owned by a municipality and builds industrial or commercial premises for private undertakings with a view to creating more favourable conditions for business activities in the municipality.

II - Legislative background

1. Directive 92/50

3 The decisive provisions of Article 1 of Directive 92/50 read as follows:

`For the purposes of this Directive:

...

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive;

...'

2. Finnish transposing act

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4 Directive 92/50 was transposed into Finnish law by the Julkisista hankinnoista annettu laki (Law on public procurement) of 23 December 1992. The concept of bodies governed by public law is defined in Article 2 of that law on the basis of the wording of Article 1(b) of Directive 92/50.

5 In the Finnish law the term `contracting authority' is defined as a legal person `belonging to the public administration'. This requirement is deemed to be satisfied where the legal person

(1) was established to look after tasks in the general interest with no industrial or commercial character and

(2) is financed primarily by a public authority or is under its supervision, or has an administrative, managerial or supervisory board over half of whose members are appointed by a public authority.

III - Facts of the initial proceedings

6 The main action concerns the award by the defendant, Varkauden Taitotalo Oy (hereinafter `Taitotalo') of a contract concerning the design and construction services for a building project. The commercial complex to be constructed by Taitotalo in the town of Varkaus is to be subsequently leased to firms in the technology sector.

7 Taitotalo is a company wholly owned by the town of Varkaus. According to its statutes, its field of activity is the administration of properties and shares in property companies and their sale and lease and the organisation and supply of property maintenance services and other service activity necessary in the administration of properties. The board of the company comprises three ordinary members appointed by the general meeting. The town of Varkaus holds all the voting rights at the general meeting. All the board members are officials of the town of Varkaus. The company's foundation document was signed on 21 January 2000; the company was entered in the commercial register on 6 April 2000.

8 Taitotalo is arranging for the construction of the `Tyyskän osaamiskeskus' in district 1 of the town of Varkaus. The company intends to buy the land from the town when the site has been parcelled out. The building project comprises two or three office blocks and a multi-storey car park, which are to be leased to firms in the technology sector. Taitotalo is purchasing the project management service and marketing and coordination of the activity from Keski-Savon Teollisuuskylä Oy (hereinafter `Teollisuuskylä').

9 Teollisuuskylä was established to build office premises for undertakings. According to its statutes, the company's field of activity comprises the construction, acquisition and administration of buildings and land for commercial purposes on the basis of ownership and leasehold rights with a view to then ceding these properties at cost price primarily to undertakings. The company is a subsidiary of the development company Keski-Savon Kehittämisyhtiö Oy (hereinafter `Kehittämisyhtiö'), which has the task of promoting the development of industrial and commercial activities in the central Savo economic area. Nearly half of this company's shares are owned by the town of Varkaus. Most of the other shares in Kehittämisyhtiö are owned by other municipalities in the region.

10 Teollisuuskylä originally called for tenders for the design of the Tyyskän osaamiskeskus by letter of 6 July 1999. The first stage of the project was to comprise the construction of the Tyyskä 1 building for Honeywell-Measurex Oy and the Tyyskä 2 building for a number of smaller undertakings. After the period for the submission of tenders had expired at the end of August 1999, however, Teollisuuskylä informed the tenderers that, owing to a change in the ownership structure of the property company that was to be established, tenders for the design and project management works would have to be invited in an open procedure in the Official Journal of the European Communities.

11 Teollisuuskylä then again invited tenders for the design and project management works for the Tyyskän osaamiskeskus on 4 September 1999. The tender documents showed the town of Varkaus and

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Teollisuuskylä to be the contracting authorities. According to the request for a preliminary ruling, a reference to the call for tenders was also published in the Official Journal of the European Communities, Series S - Invitations to Tender, No 35 of 2 September 1999 under the heading `Design contest'. This showed the town of Varkaus to be the contracting authority for a property company to be established.

12 Taitotalo informed the tenderers on 6 April 2000 - the date on which it was entered in the commercial register - that the design and project management of the Honeywell-Measurex Oy building had been awarded to JP-Terasto Oy and the design and project management of Tyyskä 2 to a group headed by Arkkitehtitoimisto Pekka Paavola Oy.

13 The applicant in the main proceedings, Arkkitehtuuritoimisto Riitta Korhonen Oy, applied to the requesting court, the Kilpailuneuvosto, for the annulment of Taitotalo's decision awarding the contract or, in the alternative, for compensation. In addition, Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa, who are also parties to the main proceedings, applied for compensation from Taitotalo on 26 April 2000.

14 The applicants in the main proceedings maintain that Taitotalo has infringed legislation on the award of contracts.

15 On 15 May 2000 Taitotalo applied to the Kilpailuneuvosto for the applicants' application to be declared inadmissible on the ground that it is not a contracting authority within the meaning of Paragraph 2 of the Julkisista hankinnoista annettu laki. Although the requirements of the second and third subparagraphs of Paragraph 2(2) were satisfied, the company had not been founded to meet needs in the general interest not having an industrial or commercial character, and it was not therefore a legal person governed by public law. The public funds approved for the contract amounted to less than half the value of the contract. Taitotalo bases its reasoning on a ruling of the Korkein hallinto-oikeus (Finland's Supreme Administrative Court) of 1 December 1999.

IV - Questions submitted for a preliminary ruling

16 The Kilpailuneuvosto states in its decision to request a preliminary ruling that it has become the practice in Finland in recent years for the public authorities to carry out infrastructure measures such as those referred to in the main proceedings by employing share companies they own and manage as property owners and contracting authorities.

17 Given the frequency and significance of these cases, the Kilpailuneuvosto considers it very important to obtain an interpretation of the relevant provisions of Directive 92/50. It has therefore referred the following questions to the Court of Justice:

`Is a share company which a town owns and in which the town exercises control to be regarded as a contracting authority within the meaning of Article 1(b) of Council Directive 92/50/EEC relating to the coordination of procedures for the award of public contracts, where the company acquires design and construction services for a building lot comprising offices to be leased to undertakings?

As a supplementary question, the Kilpailuneuvosto enquires whether it affects the decision on the point that the town's building project endeavours to create the conditions for business activity to be carried on in the town.

As a second supplementary question, the Kilpailuneuvosto enquires whether it affects the decision on the point that the offices to be built are leased to one undertaking only.'

V - Comments by the parties and legal analysis

18 The defendant, the Finnish, French and Austrian Governments and the Commission took part in the written proceedings before the Court. Before the hearing the Finnish Government was requested

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in writing by the Court to describe in greater detail the conditions under which `development companies' operate and especially to explain whether these companies have a profit motive and bear their economic risk themselves. The Finnish Government and the Commission took part in the hearing.

1. Admissibility of the request for a preliminary ruling

19 In their written comments the French Government and the Commission express doubts about the admissibility of the request for a preliminary ruling on the ground that parts of the Kilpailuneuvosto's description of the facts in the initial proceedings are contradictory, incomplete and unclear.

20 The Commission's view is that it is not apparent what legislation in the main action formed the basis for the call for tenders and who formally acted as the contracting authority inviting the tenders. The request for a preliminary ruling did not reveal whether Taitotalo's activity amounted to no more than the activities described or whether the defendant had a further area of activity. Answering the abstract questions submitted for a preliminary ruling was also hampered by the fact that it was obviously a matter of subsuming to the scope of Directive 92/50 not one legal person but a group of legal persons. The Commission therefore wonders whether the Kilpailuneuvosto's explanation of the factual and legal context in which its questions arise is sufficiently clear within the meaning of the case-law of the Court of Justice.

21 The French Government points out that an organisation can be deemed to be a public body within the meaning of Directive 92/50 only if it has legal personality at the time of the publication of the call for tenders and throughout the procedure. Taitotalo might not yet have had legal personality at the time when the call for tenders was published in September 1999, since it had not been entered in the commercial register until 6 April 2000. Clearly, the municipality of Varkaus had been both the body inviting tenders and the contracting authority. This, however, invalidated the Kilpailuneuvosto's questions. The French Government therefore proposes that the Court should ask the national court for clarification pursuant to Article 104(5) of the Court's Rules of Procedure.

22 The Court takes the view in settled case-law that it is solely for the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision to determine, with due regard for the particular circumstances of the case, the need for a preliminary ruling to enable it to deliver judgment. (3) This principle is justified, according to the Court of Justice, by the national court's direct and accurate knowledge of the facts of the case, which places it in the best position to decide on this question. (4) Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. (5)

23 However, the Court of Justice also emphasises in settled case-law the need for the national court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the assumptions of fact on which those questions are based so that the Court of Justice may arrive at an interpretation of Community law which will be of use to the national court. (6) Article 234 EC does not assign to the Court of Justice the task of giving a ruling on a question referred to it by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (7)

24 Thus the Court of Justice refuses to give a ruling on questions referred to it if it finds that the provisions of Community law are not applicable to the action. (8) It also refuses to express an opinion when its answer would not have any bearing on the main proceedings (9) or the interpretation requested is not relevant to the outcome of the action. (10)

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25 In its request for a preliminary ruling (11) the Finnish Competition Council makes it abundantly clear that it considers the interpretation of Article 1(b) of the Directive to be important because this provision of Community law is linked to the award procedure in the main action. The parties cannot agree in the main action whether Taitotalo is a legal person within the meaning of the Finnish transposing act, Paragraph 2(2) of the Julkisista hankinnoista annettu laki, established for the purpose of looking after tasks in the general interest with no industrial or commercial character. If this company is to be regarded as part of the public administration, its award of contracts is, in the Kilpailuneuvosto's view, governed by the legislation on the award of public contracts.

26 Although the presentation of the facts pertinent to the interpretation to be undertaken could be more complete, the description of the activities of the defendant, Taitotalo, and its relations with the town of Varkaus is sufficiently comprehensible for a judicial appraisal of the questions submitted for a preliminary ruling to be possible.

27 As a useful answer is therefore by no means impossible, the request for a preliminary ruling is admissible.

2. Interpretation of Article 1(b) of Directive 92/50

28 In its main question the Kilpailuneuvosto asks whether companies limited by shares which are controlled by public authorities are engaging in an industrial or commercial activity if they construct industrial or commercial premises for private undertakings, with the result that they cannot be deemed to have been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character.

29 In agreement with the parties to the main proceedings, the parties who have submitted comments on the request for a preliminary ruling largely take the view that the defendant in the initial proceedings, Taitotalo, satisfies the third as well as the second requirement of the second subparagraph of Article 1(b) of Directive 92/50. In the French Government's view, these requirements have at least been met since the date on which Taitotalo was entered in the commercial register.

30 As the description of the facts in the request for a preliminary ruling reveals, Taitotalo is a company limited by shares with legal personality whose management is subject to the supervision of the town of Varkaus. The town appoints all the members of the management bodies since it holds all the shares in the company.

31 At the hearing the representative of the Finnish Government stated in response to a question from the Judge-Rapporteur that it was possible and normal practice under Finnish law for the founders of a company to act on its behalf even before it had been entered in the commercial register. The newly created legal person then subsequently assumed the liabilities thus accrued, which were treated as if they had existed as company liabilities from the outset. Until that time, however, the liability of the founders of the company was unlimited.

32 This leaves only one requirement attached to the concept of a body governed by public law in need of interpretation in the present case: has an undertaking such as the defendant been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character?

(a) Comments by the parties

33 The French Government shares the view of the defendant, Taitotalo, that the latter is not a contracting authority within the meaning of Directive 92/50. It maintains that Taitotalo was not established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character.

34 Taitotalo does not, in its opinion, create general conditions (infrastructure) for economic

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activities in the municipality, but carries out building projects for individual undertakings in accordance with their specific interests. It had a commercial purpose in that it operated at normal market prices.

35 In support of its arguments Taitotalo refers to the Court's judgments in Case C-44/96 Mannesmann Anlagenbau Austria and Others (12) and Case C-360/96 BFI Holding. (13) In the former judgment it had been found that an undertaking which carried out economic activities should not be classified as a public body within the meaning of the Directive solely because it had been established by a contracting authority or because the latter provided the undertaking with funds stemming from activities in the general interest not having an industrial or commercial character. In Taitotalo's view, the Court confirmed in this ruling that an undertaking belonging to the public authorities did not fall within the scope of the Directive if it had not been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character. The link that existed between a contracting authority and an undertaking because of the ownership structure and financing was not enough in itself to make the undertaking a public body.

36 The French Government similarly refers to the judgment in Case C-44/96 Mannesmann Anlagenbau Austria and Others. (14) It believes that the Court had considered in particular whether the activity of an entity was associated with sovereign powers with a view to determining whether that entity was meeting needs in the general interest not having an industrial or commercial character. In the French Government's view, the defendant's activity in the present case has nothing to do with sovereign powers. In this respect the defendant's activity clearly differed from the activities of other entities on whose classification as contracting authorities the Court had already been called upon to give a ruling. (15)

37 To make the distinction, the French Government also refers to the judgment in Case C-237/99 Commission v France, (16) in which it was ruled that the building and letting of low-rent housing meet needs in the general interest not having an industrial or commercial character. The building of low-rent housing was not, however, comparable in this respect to the construction and leasing of industrial or commercial premises.

38 The Finnish Government, on the other hand, takes the view that a company such as the defendant has been established for the specific purpose of meeting needs in the general interest of the citizens of the municipality within the meaning of Directive 92/50.

39 It refers to the objectives of Directive 92/50. The coordination of procedures for the award of public service contracts in the Community was meant to remove the obstacles to the freedom to provide services and so to protect the interests of economic operators established in one Member State wanting to offer goods or services to contracting authorities established in another Member State. A further objective was to preclude any disorder in public finances, there being no controls over public contracts as there was in the case of private financing. The practical effectiveness of Directive 92/50 was threatened if a company such as that involved in the main action should not be classified as a contracting authority. Local authorities might be inclined to establish in their areas of activity companies whose contract award procedures were not then subject to the rules of the Directive.

40 In its comments the Finnish Government refers in particular to the legal status and the tasks of the municipalities in Finland. Paragraph 121 of the Finnish Constitution stated that Finland was divided into municipalities whose administration must be based on self-government by their inhabitants. This provision guaranteed the local authorities a comprehensive right to govern themselves which was enshrined in law. On this legal basis the municipalities provided a large proportion of public services in Finland. Within the municipalities' area of activity a distinction should be made between `general' and `special' tasks. The `special' tasks included those performed by the municipalities

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on the basis of specific legal provisions, examples being education, health and medical care and also regional planning and the technical implementation of infrastructure measures. The `general' sphere, on the other hand, included the tasks which a municipality might perform on the basis of the right of self-government which it was guaranteed by the Constitution, although they must concern `common matters'. Such matters served the interests and the physical and spiritual needs of the inhabitants of a municipality and were of relevance to the whole community.

41 The policy of economic promotion, according to the Finnish Government, is one of the essential tasks for which the Finnish municipalities are generally responsible. Creating infrastructure for economic activities was regarded as a common matter which was in the interests of the municipality's inhabitants. Undertakings of the defendant's type were meant to create industrial and commercial infrastructure in the area of their local authority by constructing and leasing industrial and commercial premises and offering comparable services. Finnish local authorities set up `development companies' comparable to the defendant with a view to attracting new branches of industry and commerce and promoting the development of business activities, especially when no one in the private sector could be found to create such infrastructure.

42 At the hearing the representative of the Finnish Government stated in response to the Court's written question that, while a municipality might make profits through its own economic activity, this was not intended and was merely a secondary aim. The activity of companies owned by municipalities was committed to the common good. Furthermore, Finnish law prohibited the municipalities to undertake purely economic activities. As `development companies' in principle bore their economic risk themselves, bankruptcy was a possibility, but this was normally prevented by their owners, the municipalities, as long as there was a municipal interest in the continued existence of the company.

43 Services like those offered by the defendant might also be provided for purely private-sector purposes. The purpose for which a company was established could not therefore be inferred from its activity; in particular, the area of activity of a development company could not be unequivocally deduced even from the commercial register.

44 The Finnish Government maintains that it is the defendant's task to provide the inhabitants of the municipality of Varkaus with services in connection with economic activities and therefore in the general interest. It was for this that it had been established by the municipality. It made no difference whether the municipality provided the services itself, or through an interposed company belonging to it, or purchased the service from a third party.

45 In reply to the question when a need has an industrial or commercial character, the Finnish Government refers to the judgment in BFI Holding, (17) in which the Court ruled that the fact that an entity competed with private suppliers in the market concerned might indicate that the need had an industrial or commercial character. In the present case, there appeared to be no significant competition in the area in which the companies concerned operated.

46 Like the Finnish Government, the Austrian Government takes the view that the spirit and purpose of the legislation should be taken into account when determining the personal scope of the directives on the award of public contracts. In the context of the interpretation of the concept of general interest the Austrian Government refers to its written comments in Case C-373/00 Truley v Bestattung Wien. (18) The restriction of those benefiting from a given activity did not, in its view, mean that the activity itself did not serve the general interest. The promotion of the location of technology undertakings in the municipality benefited consumers and the local population since, for example, the range of products and services available became wider or tax revenue was increased. Taitotalo's activity should therefore be regarded as meeting a need in the general interest.

47 Having regard to the Court's ruling in Joined Cases C-223/99 and C-260/99, (19) the Commission

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shares the view that Taitotalo's activity can be deemed to be in the general interest if it `stimulates trade' which is in the general interest. The Commission's representative explicitly pointed out at the hearing, however, that this appraisal might be different and the stimulus was perhaps purely hypothetical.

48 Both the Commission and the Austrian Government believe that the absence of any profit motive is an indication of the existence of a need which does not have an industrial or commercial character. An industrial or commercial activity was, in the final analysis, characterised by the fact that the undertaking bore the economic risk of its activity, with the result that, if the worst came to the worst, the company in question might become insolvent.

49 At the hearing the Commission's representative also reaffirmed that the Kilpailuneuvosto's partly unclear statement of the facts of the case made it impossible to determine with certainty whether a company limited by shares, such as Taitotalo, was a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 92/50. The statutes of the Taitotalo company did not, at least, make formal provision for a mechanism to enable the public authorities to make good any financial losses. This did not in any way mean that the public authorities did not in fact provide securities or vouch for the defendant.

50 In the Austrian Government's view the Kilpailuneuvosto needs to make an overall assessment of the competitive situation in which Taitotalo operates. It should not, in any case, be automatically inferred from the industrial or commercial activity of the undertakings benefiting from the building projects that Taitotalo's activity was industrial or commercial.

(b) Analysis

51 What is first required is an interpretation of the term `need in the general interest' so that it may be decided whether a company such as Taitotalo is meeting needs of this nature. Account must be taken in this process of the special features of the specific case so that a useful interpretation may be given. Only then is it possible to comply with the Court's requirement that `contracting authorities' be defined in functional terms. (20)

52 The next step is to consider whether the satisfaction of the need concerned by a company such as Taitotalo is of an industrial or commercial character.

(i) Need in the general interest

53 None of the directives on the award of public contracts (21) contains a legal definition of this vague legal concept. Vague legal concepts usually make interpretation difficult, since specific legal entities cannot be unequivocally assigned to them in either positive or negative terms.

54 As regards the principle of legal certainty inherent in Community law, which requires a legal provision to be clear and its application to be predictable for all concerned, (22) this finding is problematical. An interpretation must therefore lead to objective and transparent criteria for the definition of a need as being in the general interest. But if the authors of the directive had specified needs in the general interest, a functional interpretation as to the purpose of the directive would have been far from easy. Given the objectives of the directives on the award of public contracts, however, the concept must be more accurately defined to ensure the practical effectiveness of the principles of the free movement of goods and the freedom to provide services, as the Court has ruled on several occasions in connection with the legal form of entities or the underlying provisions. (23)

55 Hitherto the Court has described needs in the general interest as being needs closely linked to the institutional operation of the State. (24) They are needs which the State itself chooses to provide or over which it wishes to retain a decisive influence. (25)

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56 As I pointed out in my Opinion in Case C-373/00 Truley v Bestattung Wien, (26) the Court has meanwhile classified a number of very different needs as being in the general interest. Like the list of bodies governed by public law contained in Annex I to Directive 71/305/EEC, (27) these examples from case-law may provide some indications for an interpretation.

57 In my Opinion on Case C-373/00 Truley v Bestattung Wien (28) I also explained why I consider an interpretation of needs in the general interest depending on how the Member State itself defines its area of activity to be incompatible with the purpose of the directives on the award of public contracts. Both the autonomy of Community law and the goal of its uniform application argue for the concept of needs in the general interest to be understood and interpreted as an autonomous concept in Community law. This view is endorsed by the purpose of the directives on the award of public contracts, which is to contribute to the completion and operation of the internal market. At the same time, however, I pointed out that an autonomous interpretation of the concept based on Community law must not result in national law becoming irrelevant.

58 The Finnish Government has emphasised that the services offered by a company such as Taitotalo, i.e. the acquisition, purchase and leasing of industrial and commercial premises, are intended to meet needs which are regarded as a matter for the local authorities in Finland. Seen through Finnish eyes, they are, then, needs which the local authorities and thus the State would themselves like to meet so that they may influence the location of industrial and commercial undertakings in the areas over which they have jurisdiction.

59 The Finnish Government has also explained what needs a municipality may seek to meet solely on the basis of its constitutional right of self-government, alongside its specific statutory duties: they must serve the interests and needs of the inhabitants of a municipality and be of relevance to the whole community.

60 National law thus requires that the municipalities' activities benefit their inhabitants. This suggests that the activities of municipal companies should always be classified as being in the general interest.

61 Taitotalo has emphasised, however, that its activities are guided primarily by the needs of its client undertakings. The question which then arises is whether this client orientation is inconsistent with an activity in the general interest. It should be remembered in this context that companies such as the defendant are likely to be at pains to offer suitable premises to any undertaking seeking them in the area under a municipality's jurisdiction, especially where, as in the main action, they are planning whole business centres.

62 In its judgment in Agorà and Excelsior (29) the Court found that the organiser of a trade fair acts not only in the immediate interest of the exhibitors and those visiting the fair but also in the interest of third parties, such as consumers. This analysis also provides indicators for the facts of the main action. Here too, as in the organisation of a trade fair, it does not seem justified to infer from the restriction of the group of client undertakings that the service offered by a company such as the defendant is not in the general interest.

63 The representative of the Finnish Government stated at the hearing that the municipalities establish development companies to attract business and so to promote economic activity in their area.

64 The first supplementary question, which reveals the background against which the construction projects in Varkaus are to be implemented, should also be considered at this juncture. I feel there is no doubt that, as a rule, the conditions for industrial or commercial activities are created not only for the sake of the undertakings themselves but primarily because the municipality hopes, among other things, that the location of industrial or commercial firms in its area will stimulate

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trade, generate employment opportunities for its inhabitants and increase its tax revenue. The activity of a company which succeeds in attracting business to the area is therefore helping to meet the needs of the inhabitants of the municipality and thus of the community at large.

65 The Commission argued at the hearing, on the other hand, that this stimulus might be hypothetical and the impact no more than indirect. The objection to this is that the location of undertakings in a municipality is indeed encouraged by the activities of `development companies'.

66 An intermediate conclusion to be drawn is that companies limited by shares which are controlled by the public authorities and build industrial or commercial premises for private undertakings to create more favourable conditions for business activities in a municipality can be regarded as having been established for the specific purpose of meeting needs in the general interest. The question is, however, whether the needs do not have an industrial or commercial character.

(ii) Meeting needs not having an industrial or commercial character

67 In its judgment in BFI Holding (30) the Court points out that it is clear from the second subparagraph of Article 1(b) of Directive 92/50, in its different language versions, that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term `needs in the general interest'. In the same judgment it also ruled that the second subparagraph of Article 1(b) of the directive draws a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character. (31)

68 However, these statements simply enable the relationship among the various requirements set out in the second subparagraph of Article 1(b) of Directive 92/50 to be understood. They do not make it possible to define `needs having an industrial or commercial character'. The question remains, then, how needs in the general interest having an industrial or commercial character can be distinguished from those not having an industrial or commercial character and whether the need met by Taitotalo for the acquisition and administration of industrial or commercial premises with a view to their being sold or leased to firms in the technology sector is or is not of an industrial or commercial character.

69 In its past case-law the Court has outlined the following guides for interpreting the term:

70 The existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the relevant market, may be indicative of the satisfaction of a need having an industrial or commercial character. (32) That a given need can also be met by private undertakings does not exclude the possibility of this need not having an industrial or commercial character within the meaning of the second subparagraph of Article 1(b) of Directive 92/50. (33) In the Court's view, needs not having an industrial or commercial character are generally, first, those which are met otherwise than by the availability of goods or services in the market and, second, those which, for reasons associated with the general interest, the State itself chooses to meet or over which it wishes to retain a decisive influence. (34)

71 Whether a company such as Taitotalo, which is in issue in the main proceedings, operates in a competitive environment is for the national court to verify, having regard to all its activities, as the Austrian Government has proposed. (35) This presupposes a definition both of the market for the services in question and its geographical extent. (36) This is a task for the requesting court to perform in full knowledge of the facts of the case.

72 The comments of the parties suggest that there is no significant competition in the area of activity of the company concerned. This is, however, an assumption. As the existence of competition is no more than an indication, a statement about it is not essential for an interpretation of the

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term `needs having an industrial or commercial character'.

73 All the parties agree that the activity of a company such as the defendant in the main action consists of the provision of services which may also be offered by a private undertaking. The views of the parties differ, on the other hand, when it comes to analysing the need which is satisfied.

74 Taitotalo's statutes are not available to the Court as an indication of the legal basis of its tasks. According to the statements made by the Kilpailuneuvosto and the Finnish Government, companies such as the defendant in the main action do not have a profit motive. The representative of the Finnish Government has submitted that Finnish local government law forbids the municipalities to establish companies on purely economic grounds to make profits. This argues against an economic activity, since business activity is, as a general rule, geared to the making of a corporate profit. If the municipalities are prevented by law from establishing companies with a profit motive, the conclusion must be that there is little or no room for the establishment of companies to meet needs having an industrial or commercial character.

75 Taitotalo, on the other hand, emphasises that it implements building projects for individual undertakings in accordance with their specific interests and that it does so at normal market prices. The French Government's view that what is decisive for the assessment of the task of companies such as Taitotalo is the activity of the entity concerned and not the activity of those for whom the buildings are constructed must be endorsed in this context.

76 It has already been pointed out during the discussion of needs in the general interest that limiting the direct beneficiaries or recipients of an activity or service does not argue against the activity being offered in the interest of the community at large. Nor can it be inferred from the fact that the beneficiaries or recipients of an activity or service are undertakings operating commercially that the entity offering them a certain activity or service is also doing so commercially. It is possible, after all, to conceive of many needs not having an industrial or commercial character which the State chooses, for reasons of public welfare, to meet itself or through entities forming part of it, in order to retain a decisive influence and which arise only in the case of undertakings operating commercially.

77 I have proposed, first in my Opinion in Agorà and Excelsior and latterly in my Opinion in Truley, that one of the relevant factors when considering whether an entity meets needs not having an industrial or commercial character is whether it bears the financial risk inherent in its decisions. If it must bear the financial consequences of its decisions itself, that is likely to indicate an industrial or commercial activity. (37)

78 This criterion enables the spirit and purpose of Directive 92/50 to be taken into account in its interpretation. According to its recitals, the aim of Directive 92/50 is to remove obstacles to the freedom to provide services and so to protect the interests of economic operators established in one Member State who wish to offer goods or services to contracting authorities established in another Member State. The risk of preference being given to domestic tenderers or certain applicants in the award of contracts by contracting authorities - possibly without due regard for the economic and financial consequences - is to be avoided. The Community legislature intended that the directives should be applied to entities which escape market forces in whole or in part. (38)

79 The determining factor in the examination of the requirements for the existence of a body governed by public law is therefore whether there is a danger of its being guided in its decisions on the award of contracts by other than economic considerations. (39) If this is the case, the achievement of the freedom to provide services is at risk, justifying the application of the directives on public contracts. (40) Where, however, an entity has to bear the economic risk of its activity itself, it is in principle compelled to allow itself to be guided by economic considerations and will choose

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its contractual partners accordingly.

80 In the case of undertakings which meet needs in the general interest not having an industrial or commercial character there are always likely to be means by which the public authorities can offset any losses so that it does not become impossible for such undertakings to perform the tasks entrusted to them. The public authorities will refuse to give their support only when they have no further interest in the needs being met because they have ceased to be in the general interest.

81 Applying this yardstick to the defendant in the main proceedings, the referring court should begin by considering the extent to which Taitotalo's statutes require the town of Varkaus to make good any deficits incurred by Taitotalo. An obligation of this nature might also ensue from the Member State's relevant legislation or from customary practice. What should be considered in this context is not only whether there is an explicit provision on the offsetting of deficits but also standard practice. If, for example, the town of Varkaus does in fact make good or stand surety for any deficits incurred by the defendant in the main proceedings, the referring court must take this into account.

82 The Finnish Government's comments at the hearing indicate that the municipalities usually prevent companies they own from becoming bankrupt.

83 If, however, Taitotalo does indeed bear its economic and financial risk itself, without any prospect of assistance from the public authorities, it is meeting a need which has an industrial or commercial character.

84 The conclusion is therefore that the answer to the Kilpailuneuvosto's question is that a company limited by shares which is owned and controlled by a town and which provides design and construction services for a building project that includes industrial or commercial premises which are leased to undertakings in the general interest should be regarded as a contracting authority within the meaning of Article 1(b) of Directive 92/50/EEC relating to the coordination of procedures for the award of public contracts if it is not required to bear the economic risk of its activity alone, because there is a possibility of any losses being offset by the town.

3. First supplementary question

(a) Comments by the parties

85 All parties who have submitted comments on this supplementary question believe that the fact that the town's building project is intended to create the conditions for industrial or commercial activities in a municipality is relevant to the assessment of the matter at issue.

86 Taitotalo emphasises, however, that this question has nothing to do with the case in which the Kilpailuneuvosto is in fact required to give a ruling, since it does not concern any building project of the town itself, as the supplementary question might indicate, but the improvement it - the defendant - achieves in the business activities of individual undertakings by implementing the project.

(b) Analysis

87 The supplementary question concerning the general interest has essentially been answered in the context of the interpretation of Article 1(b) of Directive 92/50.

88 The location of new industrial and commercial activities and the associated promotion of the economy are needs in the general interest and so form part of the requirement set out in the first indent of the second subparagraph of Article 1(b) of Directive 92/50, which must be satisfied if an entity is to be defined as a body governed by public law within the meaning of the legislation.

89 It is therefore relevant to the assessment of the matter at issue that a building project implemented by the town is meant to create the conditions for business activities in the municipality, because

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a need in the general interest is then satisfied.

4. Second supplementary question

(a) Comments by the parties

90 Taitotalo and the Commission take the view that the leasing of the premises to be built to only one undertaking means that Taitotalo is not meeting needs in the general interest.

91 The Finnish, French and Austrian Governments, on the other hand, believe that the leasing of the buildings to be constructed to only one undertaking is irrelevant to the matter at issue.

(b) Analysis

92 As has already been stated, the general interest in the meeting of a need cannot be determined from the number of those directly benefiting from an activity or service.

93 The answer to the second supplementary question must therefore be that the leasing of the buildings to be constructed to only one undertaking is irrelevant to the assessment of the matter at issue.

VI - Conclusion

94 In view of the above deliberations I propose that the questions submitted by the Kilpailuneuvosto should be answered as follows:

A company limited by shares which is owned and controlled by a town and which awards contracts for design and construction services for a building project that includes industrial and commercial premises leased to undertakings in the general interest must be regarded as a contracting authority within the meaning of Article 1(b) of Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts if it is not required to bear the economic risk of its activity alone, because there is a possibility of any losses being offset by the town.

It is relevant to the assessment of the matter at issue that a building project implemented by the town is meant to create the conditions for industrial or commercial activities in the municipality, because a need in the general interest is then met.

It is not relevant to the assessment of the matter at issue that the buildings to be constructed are leased to only one undertaking.

(1) - Known as `Markkinaoikeus' since 1 March 2002.

(2) - OJ 1992 L 209, p. 1.

(3) - See, for example, the judgment in Joined Cases C-223/99 and C-260/99 Agorà and Excelsior [2001] ECR I-3605, paragraph 18; judgment in Joined Cases C-332/92, C-333/92 and C-335/92 Eurico Italia and Others [1994] ECR I-711, paragraph 17.

(4) - See the judgment in Case C-83/91 Meilicke [1992] ECR I-4871, paragraph 23.

(5) - See, for example, the judgment in Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59.

(6) - See the judgment in Joined Cases C-320/90, C-321/90 and C-322/90 Telemarsicabruzzo [1993] ECR I-393, paragraph 6.

(7) - See the judgment in Joined Cases Agorà and Excelsior (cited in footnote 4, paragraph 20); judgment in Case 244/80 Foglia [1981] ECR 3045, paragraph 18.

(8) - See the judgments in Case 51/74 Hulst [1975] ECR 79, paragraphs 38 to 42, and Case 172/84 Celestri [1985] ECR 963, paragraphs 12 to 16.

(9) - Judgment in Case C-291/96 Grado and Bashir [1997] ECR I-5531, paragraphs 15 and 16.

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(10) - See the judgment in Case C-297/93 Grau-Hupka [1994] ECR I-5535, paragraph 18.

(11) - Order for reference, pp. 7 and 8.

(12) - [1998] ECR I-73.

(13) - [1998] I-6821.

(14) - Judgment cited in footnote 14.

(15) - Judgment in BFI Holding (cited in footnote 14).

(16) - [2001] ECR I-939.

(17) - Judgment in Case C-360/96 (cited in footnote 14).

(18) - See my Opinion in Case C-373/00 Adolf Truley v Bestattung Wien [2003] ECR I-0000.

(19) - Cited in footnote 4.

(20) - See the judgment in BFI Holding (cited in footnote 14, paragraph 62), with a reference to the judgment in Case 31/87 Beentjes [1988] ECR 4635, paragraph 11.

(21) - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199, p. 1; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ 1993 L 199, p. 54; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 L 199, p. 84; Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209, p. 1.

(22) - See the judgment in Case C-143/93 Van Es Douane Agenten [1996] ECR I-431, paragraph 27.

(23) - See the judgments in BFI Holding (cited in footnote 14, paragraph 62), Beentjes (cited in footnote 21, paragraph 11), and Case C-306/97 Connemara Machine Turf [1998] ECR I-8761, paragraph 31.

(24) - Judgment in Mannesmann Anlagenbau Austria and Others (cited in footnote 13, paragraph 24).

(25) - Judgment in BFI Holding (cited in footnote 14, paragraph 51).

(26) - Cited in footnote 19, paragraph 64.

(27) - Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, OJ 1971 L 185, p. 5.

(28) - Cited in footnote 19, paragraphs 42 to 45.

(29) - Cited in footnote 4, paragraph 34.

(30) - Cited in footnote 14, paragraph 32.

(31) - Cited in footnote 14, paragraph 36.

(32) - Judgment in BFI Holding (cited in footnote 14, paragraph 49).

(33) - BFI Holding (cited in footnote 14, paragraph 53).

(34) - See, for example, the judgment in Agorà and Excelsior (cited in footnote 4, paragraph 37), with a reference to the judgment in BFI Holding (cited in footnote 14, paragraphs 50 and 51).

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(35) - See, for example, the judgment in Agorà and Excelsior (cited in footnote 4, paragraph 42).

(36) - See the judgment in Case C-475/99 Ambulanz Glöckner [2001] ECR I-8089, paragraph 31, on a point of competition law.

(37) - Opinions in Joined Cases C-223/99 and C-260/99 Agorà and Excelsior [2001] ECR I-3607, paragraph 67, and in Adolf Truley v Bestattung Wien (cited in footnote 19, paragraph 95).

(38) - As already stated by Advocate General Léger in his Opinion in Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, paragraph 69.

(39) - Judgment in Case C-237/99 Commission v France (cited in footnote 17, paragraph 42); judgment in Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 17.

(40) - Judgment in Commission v France (cited in footnote 17, paragraph 41); judgment in University of Cambridge (cited in footnote 40, paragraph 16).

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61980J0244 : N 23
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61987J0031 : N 51
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61991J0083 : N 22
31992L0050-A01LB : N 1 3 17 25 84 87 88
31992L0050-A01LBL2 : N 67
31992L0050 : N 78
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31993L0037 : N 53
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61993J0297 : N 24
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61996J0044 : N 55
61996J0291 : N 24
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11997E234 : N 23
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61998J0380 : N 79
61999C0223 : N 77
61999C0237 : N 79
61999J0223 : N 22 23 62 70 71
61999J0475 : N 71
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SUB Freedom of establishment and services ; Right of establishment ; Free movement of services

AUTLANG German

NATIONA Finland

PROCEDU Reference for a preliminary ruling

ADVGEN Alber

JUDGRAP Timmermans

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Opinion of Mr Advocate General Mischo delivered on 2 May 2001.
Commission of the European Communities v French Republic.
Failure by Member State to fulfil its obligations - Directive 98/4/EC - Failure to transpose within the prescribed period.
Case C-439/00.

1. In these Treaty-infringement proceedings, which it brought on 28 November 2000, the Commission of the European Communities has asked the Court to declare that, by failing to adopt the laws, regulations and administrative measures necessary to comply with Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors or, at all events, by failing to communicate the same to the Commission, the French Republic has failed to comply with its obligations under that directive.

Facts and pre-litigation procedure

2. Article 2(1) of Directive 98/4/EC requires the Member States to enact the laws, regulations and administrative provisions necessary to comply with the directive by 16 February 1999 at the latest, and immediately to inform the Commission of them.

3. In the absence of any notification of the measures transposing the directive by the expiry of the time-limit, the Commission, by letter dated 10 May 1999, gave the French Government formal notice to submit its observations within two months.

4. By letter dated 6 January 2000, the French Government informed the Commission that the process of adopting the draft decree providing for the transposition of this directive, among others, was in hand, that the draft decree would shortly be submitted to the Conseil d'Etat (The Council of State) (France) and that the directive had already been partially transposed by an order dated 22 April 1998.

5. On 18 February 2000 the Commission sent a reasoned opinion to the French Republic requesting it to adopt the measures necessary to comply with the obligations resulting from the directive within two months from the date of notification of the opinion.

6. Having received no further information as to whether the legislative procedure had been brought to a conclusion and the decree enacted, the Commission brought the present action.

Analysis

7. Pointing out the obligations of the Member States under the third paragraph of Article 249 EC, the Commission submits that the French Republic was required to take the necessary measures to comply with the directive within the prescribed period.

8. In its defence the French Republic states that the transposition of the directive necessitates the amendment of the Code des marchés publics (Code of Public Procurement) as well as other legislative measures. A text amending the code has already been submitted to the Conseil d'Etat for consideration. The draft decree, which aims to transpose the directive so far as it concerns the contracting entities not subject to the Code des marchés publics, will also have to be submitted to the Conseil d'Etat, in the interest of consistency between the reform of the Code des marchés public and the whole body of legislation governing public procurement.

9. It is clear, however, that, at the date of commencement of the action, the legislation had not been amended to comply with Directive 98/4, which, moreover, the French Republic does not deny.

Conclusion

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10. In these circumstances, I can only suggest to the Court that it allow the Commission's application and, as a result:

(1) declare that, by not adopting all the necessary laws, regulations and administrative measures necessary to comply with Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the French Republic has failed to fulfil its obligations under that directive;

(2) order the French Republic to pay the costs.

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DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Mischo
JUDGRAP	von Bahr

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Opinion of Mr Advocate General Mischo delivered on 18 April 2002.
Felix Swoboda GmbH v Osterreichische Nationalbank.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public service contracts - Directive 92/50/EEC - Scope ratione materiae - Moving offices of a central bank - Contract relating to both services listed in Annex I A to Directive 92/50 and services listed in Annex I B to that directive - Predominance in value terms of services listed in Annex I B.
Case C-411/00.

1 By order of 29 September 2000, the Fourth Chamber of the Bundesvergabeamt (Austria) referred to the Court of Justice for a preliminary ruling four questions concerning the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts. (1)

2 Directive 92/50 distinguishes between `priority' public service contracts, to which the directive applies in full (Titles III to VI), and `non-priority' service contracts, to which only Articles 14 and 16 of the directive apply. Non-priority service contracts, which are considered to have little impact on cross-border trade, are thus covered only by the monitoring mechanism introduced by the directive. (2)

3 The priority services are listed in Annex I A to the directive, whilst the non-priority services are listed in Annex I B to the directive. The services are classified by reference to the United Nations Central (or Common) Product Classification (`CPC').

4 In the case of contracts relating both to services listed in Annex I A and to services listed in Annex I B, Article 10 of the directive provides:

`Contracts... shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

5 Directive 92/50 was transposed into Austrian law by the Bundesvergabegesetz (Austrian Federal Procurement Law). (3) Annex III to that federal law corresponds in essence to Annex I A to Directive 92/50, whilst Annex IV corresponds to Annex I B to the directive. The rule laid down in Article 10 of Directive 92/50 is transposed into Paragraph 3(4) of the Bundesvergabegesetz.

6 In the case in the main proceedings the applicant, Felix Swoboda GmbH (`Swoboda') is questioning precisely whether a procedure for the award of a public service contract was lawful as regards Paragraph 3(4) of the Bundesvergabegesetz. It is seeking a declaration from the national court that federal law was infringed because the contract was not awarded to the tenderer which submitted the most favourable bid. The observations of the contracting authority state that Swoboda did not take part in the tendering procedure in question.

7 The Osterreichische Nationalbank (the Austrian central bank, `the ONB'), the contracting authority, when moving to new offices located some 200 metres from its original address, awarded a contract `for removal and transport services'.

8 Apart from the physical removal (dismantling, packing, transporting and unpacking) which, according to the ONB, represented only 6.94% of the value of the contract, the main services to be provided were computer-aided logistics, coordination of all the removal activities, and the provision of a storage depot and organisation of the storage. The ONB therefore considered that the contract consisted mainly of `supporting and auxiliary transport services', which are listed in Annex IV to the Bundesvergabegesetz, and not `land transport services', which are listed in Annex III

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to the Bundesvergabegesetz and so are covered by the federal law in full. It therefore published only a notice of the contract awarded.

9 Swoboda considers that the contract should have been awarded in accordance with the Bundesvergabegesetz in full, since the value of the services listed in Annex III was in this case, it maintains, greater than the value of those listed in Annex IV.

10 The Bundesvergabeamt therefore considered it necessary, in order to resolve the dispute brought before it, to refer the following questions to the Court of Justice for a preliminary ruling under Article 234 EC:

`(1) Must a service which serves a single purpose, but which could be subdivided into part services, be classified as a single service consisting of a main service and accessory, supporting services in accordance with the scheme of Directive 92/50/EEC, and in particular the types of services contained in Annex I A and I B, and treated as a service listed in Annex I A or I B to the directive according to its main object, or must each part service instead be considered separately in order to establish whether the service is subject to the directive in full as a priority service or only to individual provisions thereof as a non-priority service?

(2) How far may a service which describes a specific type of service (eg transport services) be broken down into individual services in accordance with the scheme of Directive 92/50/EEC without infringing the provisions on the award of service contracts or undermining the effet utile of Directive 92/50/EEC?

(3) Must the services referred to in this case (having regard to Article 10 of Directive 92/50/EEC) be classified as services listed in Annex I A to Directive 92/50/EEC (Category 2, Land transport services) and contracts which have as their object such services are to be awarded in accordance with the provisions of Titles III to VI of the directive, or must they be classified as services listed in Annex I B to Directive 92/50/EEC (in particular Category 20, Supporting and auxiliary transport services, and Category 27, Other services) so that contracts which have as their object such services are to be awarded in accordance with Articles 14 and 16, and under which CPC reference number must they be subsumed?

(4) In the event that consideration of the part services leads to the conclusion that a part service listed in Annex I A to the directive which, in principle, is subject in full to the provisions of Directive 92/50/EEC is, by way of an exception, not subject in full to the provisions of the directive on account of the principle of predominance laid down in Article 10 thereof, is there an obligation on the contracting authority to split off non-priority part services and to award contracts for them separately in order to respect the priority nature of the service?'

Admissibility of the questions

11 Since both the Commission and the defendant in the main proceedings have raised objections as to the admissibility of the questions referred for a preliminary ruling, it is appropriate to address those objections first of all.

12 In a preliminary remark, the Commission questions whether the Bundesvergabeamt is actually a `court or tribunal' within the meaning of Article 234 EC, since that is one of the conditions for the admissibility of the questions.

13 In that regard, I should like to refer directly to Case C-44/96 Mannesmann Anlagenbau Austria and Others. (4) In that case the Court of Justice implicitly, but necessarily, recognised the Bundesvergabeamt as a court or tribunal since it agreed to answer the questions the latter had referred to it. There is even less reason to contest that recognition since Advocate General Léger had addressed the issue of whether the Bundesvergabeamt was a court or tribunal in his Opinion.

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At the end of his reasoning, with which I concur, he concluded that the Austrian Federal Procurement Office was to be regarded as a `court or tribunal' within the meaning of Article 234 EC. Subsequently, the Court of Justice has on several occasions when answering other questions referred for a preliminary ruling by the Bundesvergabeamt (5) confirmed that the latter is recognised as a `court or tribunal'.

14 The Commission refers to the case-law of the Court of Justice, which requires that the decisions issued by national courts referring questions to it under Article 234 EC be `of a judicial character'. The Bundesvergabeamt, as it acknowledges in its order for reference of 9 August 2001 in Siemens and ARGE Telekom, (6) currently pending before the Court of Justice, does not have the capacity to issue enforceable directions. The Commission concludes from this that its decisions do not have the necessary judicial character. (7)

15 In that connection, it is clear that an authority may issue decisions of a judicial character even if it does not have the power to issue enforceable directions. The clearest evidence of this is that the Court of Justice of the European Communities itself does not have such a power, except when it is giving a ruling in interlocutory proceedings. (8) No one, however, at least as yet, has ventured to challenge its capacity as a court or tribunal.

16 Although the Bundesvergabeamt does not have that capacity to issue enforceable directions to contracting authorities, it has, at least until the contract is awarded, the power to annul their decisions, which is sufficient to make it a court or tribunal within the meaning of Article 234 EC. Decisions of the Bundesvergabeamt `are binding as may be seen, inter alia, from the fact that it enjoys a power of annulment under the law'. (9)

17 Naturally, since the contract at issue in this case has already been awarded, the Bundesvergabeamt cannot be led to order an annulment in the main proceedings. This case in fact falls within Paragraph 113(3) of the Bundesvergabegesetz, which provides as follows:

`After the contract has been awarded, or after the procedure for awarding it is closed, the Federal Procurement Office shall have jurisdiction to determine whether a contract has not been awarded to the most favourable tenderer as a result of an infringement of this Federal Law or its implementing regulations. In proceedings of this nature the Federal Procurement Office shall also have jurisdiction to determine, at the request of the contracting authority, whether a potential tenderer or an unsuccessful tenderer has not had a genuine chance of being awarded the contract under a correct application of the provisions of the present Federal Law and its implementing regulations.'

18 This does not mean, however, that the Bundesvergabeamt will not issue a binding decision having the force of res judicata. Under Paragraph 125(2) of the Bundesvergabegesetz, an application for damages lodged by an unsuccessful tenderer is admissible only if the Bundesvergabeamt has found earlier that the contract has been awarded unlawfully under Paragraph 113(3). A civil court called upon to rule on that application for damages, and moreover the parties concerned, are bound by that finding.

19 It appears that the doubts expressed by the Commission originate from an unfortunate misunderstanding. From the fact that in the case which gave rise to the reference for a preliminary ruling in Siemens and ARGE Telekom, cited above, the Bundesvergabeamt was unsure whether it had sufficient powers with regard to Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts,(10) the Commission incorrectly concluded that the Bundesvergabeamt had doubts regarding its capacity as a court or tribunal.

20 I therefore consider that, at any event, in the proceedings instituted by Swoboda the Bundesvergabeamt has the capacity of a court or tribunal, within the meaning of Article 234 EC, enabling it to refer questions to the Court for a preliminary ruling.

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21 The ONB questions Swoboda's capacity to bring the case in the main proceedings, contending that it does not have the capacity of tenderer or unsuccessful candidate, which is required under national law in order to bring such an action. Since Swoboda cannot claim damages, the finding that there has been an infringement of Directive 92/50 would be purely declaratory and would have no substantive effect on the case in the main proceedings.

22 In that connection, may I state simply that the matter of the capacity of the defendant in the main proceedings is one which is governed by national procedural rules. It is not for the Court of Justice to rule on such matters. It is for the national court alone to decide on matters of purely national law and to assess the need for a reference for a preliminary ruling. The only questions of interpretation of Community law which the Court of Justice may refuse to answer despite a reference by a national court are those which are hypothetical or submitted to it under a procedural device. (11) The present case is clearly not such an exception.

23 The ONB also contends that the Court has already ruled in Tögel (cited above) on questions comparable to those which have been referred to it in this case, and that it could therefore simply answer the questions referred to it by a reasoned order containing a reference to that judgment.

24 It should be stressed that Article 104(3) of the Rules of Procedure of the Court of Justice merely enables the Court to answer questions referred for a preliminary ruling by means of a reasoned order. It is under no obligation to do so.

25 Moreover, the facts in the main proceedings and the questions referred to the Court in Tögel appear to be significantly different from those we are dealing with in this case. In particular, in Tögel the Court was not called upon to answer the main question currently referred by the Bundesvergabeamt, which is whether a contract serving a single purpose, but comprising a number of part services, should be subject to the arrangements for awarding contracts applying to its main object, or should be subject to the arrangements for part services, which represent the predominant part of the contract in terms of value.

26 Lastly, the ONB points to the fact that the contract concerned contains no cross-border aspect and is of no interest to a foreign undertaking. Consequently, Community law does not apply to the case at issue since the situation does not have any aspect linking it with a cross-border situation. The ONB refers in particular in support of this argument to Case C-108/98 RI. SAN., (12) in which, it maintains, the Court ruled that a tendering procedure was not subject to the application of Community law where it had no foreign aspect to it.

27 That is a manifestly incorrect interpretation of the Court's judgment. In RI. SAN. the Court ruled that Article 55 of the EC Treaty (now Article 45 EC) did not apply in a situation in the main proceedings in which all the facts were confined to within one Member State. However, it did not rule on the applicability of Directive 92/50 with regard to the requirement of a foreign aspect.

28 The purpose of the Community directives concerning the award of public contracts is to establish procedures that are coordinated at Community level, irrespective of whether or not there are any cross-border aspects to the contracts concerned. The fact that the contract to which the case relates is only of limited interest to a foreign tenderer does not constitute adequate grounds for not applying Directive 92/50. Furthermore, to stipulate that the departure and arrival points of the service to be provided should be situated either side of a border is a requirement which is excessive in relation to the directive's objective, which is the opening up of markets, even those located entirely within a single Member State, to potential tenderers established in other Member States.

29 I shall now consider the questions referred by the national court. In order to follow the logical course of my reasoning I shall answer the fourth question before tackling the third.

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First question

30 In order to make the answers given to the court making the reference more succinct and to give an appropriate interpretation of Directive 92/50, I consider that in its first question the Bundesvergabeamt is in essence asking the Court how the arrangements for awarding a public service contract are determined where that contract serves a single purpose but could be subdivided into part services. Should the contract be classed as falling within Annex I A or I B to Directive 92/50, that is to say, according to the main object of the contract or according to the part services representing the major share by value of the contract?

31 In its order for reference the Bundesvergabeamt refers to the judgment in Gestion Hotelera Internacional (13) and notes that that judgment laid down a principle of predominance, under which the main object of the contract absorbs the supporting services associated with it for the purpose of determining which of the directives on the award of public contracts is applicable to a particular contract.

32 It does not seem to me that the reference to that judgment is relevant to resolving the question referred to the Court in this case.

33 In Gestion Hotelera Internacional the Court was asked to give a ruling on the applicability of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (14) to a contract whose main object was the assignment of property. The Court held in that case that `... a mixed contract relating both to the performance of works and to the assignment of property does not fall within the scope of Directive 71/305 if the performance of the works is merely incidental to the assignment of property'. (15)

34 The ruling contained in that judgment is corroborated by the 16th recital in the preamble to Directive 92/50:

`... public service contracts, particularly in the field of property management, may from time to time include some works;... it results from Directive 71/305/EEC that, for a contract to be a public works contract, its object must be the achievement of a work;... in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract'.

35 The question referred to the Court appears to be significantly different in the present case. It is not a matter of which directive is applicable to the award of the contract concerned. All the written observations lodged with the Court recognise the applicability of Directive 92/50. It is rather a matter of determining which of the arrangements provided for under the directive apply to the contract. It is clear that nowhere does the directive provide that the main object of the contract can determine which of its annexes is applicable, and hence which arrangements relate to the present proceedings.

36 On the contrary, Article 10 of Directive 92/50 lays down a specific principle for determining which arrangements apply. The relevant arrangements are those described in the annex to which the services having a predominating value within the contract as a whole are assigned. Article 10 makes no reference to the main object of the contract. Directive 92/50 thus appears to be sufficiently clear on that point. There is therefore no need to introduce an additional criterion in respect of the main object of a contract in order to determine which arrangements will apply with regard to award of the contract.

37 The observations submitted by the Austrian Government in this connection do not, to my mind, call that view into question.

38 The Austrian Government considers that services are to be classified solely according to the

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CPC nomenclature. (16) The CPC introduced a classification based on types of activity, it maintains, and not on individual services described in detail. A service serving a single purpose should be classified as a single service, since all the public procurement directives operate on the basis of a single type of service, including the various supporting services. Article 10 of Directive 92/50 applies only by way of exception, in cases where the contract in question covers several types of service.

39 Although I agree with the Austrian Government that the CPC nomenclature alone determines how services are to be classified, it does seem to me that the CPC classification is sufficiently specific to enable Article 10 of Directive 92/50 to be applied in full without any need to refer to the main object of the contract. A contract may well serve a single purpose and be subdivided, for the purpose of determining the arrangements applying to it, into the various part services which comprise it, each of which corresponds to a different CPC code.

40 The claim that `all the public procurement directives operate on the basis of a single type of service' amounts to a denial that Article 10 of Directive 92/50 has any rationale or effet utile.

41 Article 10 applies wherever a contract serves a single purpose but combines several different services corresponding to various CPC codes, where some are listed in Annex I A and others in Annex I B to Directive 92/50.

42 In answer to the first question, I consider therefore that it is appropriate, in order to determine which arrangements apply to a service contract serving a single purpose, but which could be subdivided into part services, to ascertain which of the annexes to Directive 92/50 each part service is assigned to. Under Article 10 of that directive the contract is to be awarded in accordance with the provisions of Titles III to VI of the directive where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Conversely, if the value of the services listed in Annex I B is greater than the value of those listed in Annex I A, the contract will be awarded in accordance with Articles 14 and 16 only of Directive 92/50. Thus the main purpose of the contract will have no bearing on the choice of the relevant arrangements.

Second question

43 In the light of the explanations given by the Bundesvergabeamt in the grounds of its order for reference, it seems to me that the national court is seeking in its second question to ascertain, for the purpose of determining the arrangements applicable to a particular type of contract, to what extent Directive 92/50 permits the subdivision of that contract into various part services.

44 The Bundesvergabeamt considers that such subdivision would mean in the present case that a contract whose main object was transport would not be subject to the arrangements corresponding to the `Transport' classification, namely the arrangements for priority services. Subdivision of the contract into part services would result in the application of Article 10 of Directive 92/50 and, hence, in the relevant arrangements being those for supporting transport services, which are the predominant services in terms of value. `Supporting and auxiliary transport services' have their own classification in the CPC and are listed in Annex I B to Directive 92/50.

45 The national court states in this connection that the provision of those supporting services, although predominant in terms of value, is necessary only because of the existence of the service which it regards as being the main service, that is to say, transport. It also makes the point that the consequence of such subdivision is to make the distance covered by the transport the factor which determines the arrangements to which the overall contract is subject, since that distance directly influences the value of the transport element in the contract. This is detrimental to legal certainty for tenderers since the classification of the contract would depend on an external factor which it is difficult to determine.

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46 It seems to me that the answer to the second question is to be found in the considerations set out above in respect of the first question.

47 Whenever a contract is made up of several part services corresponding to different CPC classification codes it is necessary to subdivide the contract in order to determine which arrangements apply to it.

48 This is the direct result both of the binding nature of a CPC classification reference and of the very existence of Article 10 of Directive 92/50.

49 One cannot, on the pretext of seeking to apply the directive in full to a particular contract, disregard the fact that the contract is made up of services corresponding to several different codes in the CPC classification, especially as Directive 92/50, due to the existence of Article 10, offers a clear solution to such a situation.

50 Thus, as the ONB correctly states, in Tögel which concerned a service comprising the transport of patients, the Court did not consider that transport alone determined the arrangements applicable to the contract on the pretext that the health services were necessary only if the transport had actually taken place. On the contrary, it held in paragraphs 39 and 40 of the judgment that:

`... CPC reference number 93, appearing in Category No 25 (Health and social services) in Annex I B, clearly indicates that this category relates solely to the medical aspects of health services governed by a public contract such as the one at issue in the main proceedings, to the exclusion of the transport aspects, which come under Category No 2 (Land transport services), which have the CPC reference number 712.

... services consisting in the transport of injured and sick persons with a nurse in attendance come within both Annex I A, Category No 2, and Annex I B, Category No 25, to Directive 92/50, so that a contract for those services is covered by Article 10 of Directive 92/50'.

51 In my view, therefore, as regards services corresponding to different CPC references, it is necessary to separate them in order to determine which arrangements apply to the contract as a whole, even where the result of that subdivision will be to make a priority service subject only to a limited application of Directive 92/50. Far from depriving Directive 92/50 of any effet utile, this is in direct accordance with the wishes of the Community legislature expressed in Articles 9 and 10 of that directive.

52 Far from being detrimental to legal certainty for traders, the automatic application of that system and rigorous compliance with CPC references as classifications contained in Annexes I A and I B to the directive make for transparency and stability in the determination of which arrangements apply for the award of public service contracts.

Fourth question

53 In the fourth question, the Bundesvergabeamt is seeking to know whether Directive 92/50, in order to permit application thereof in full to priority part services, requires the contracting authority for a contract whose predominant value is represented by non-priority part services to divide the contract into two, that is to say, to award one contract for the priority services and another for the non-priority services.

54 In the light of the answers given to the preceding questions, I am of the view that Article 10 of Directive 92/50 precludes any obligation to divide up such contracts.

55 To require the separation of non-priority service contracts from a contract for priority services would in any event mean that Article 10 of Directive 92/50 had no scope at all. It is precisely the case of a contract combining both priority and non-priority services which the directive covers

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in Article 10. That article, far from requiring the contract to be divided up, introduces a system for determining arrangements that are common to all the services the contract comprises, both priority and non-priority.

56 I am, however, of the view that the contracting authority could be required to make such a division where the unity of the contract concerned appeared to be artificial or illogical and was indeed designed merely to avoid application in full of the directive to priority services.

57 Directive 92/50 does not cover such a situation directly. However, Article 7 of the directive restricts the applicability of the directive to contracts the estimated value of which is not less than ECU 200 000 and, in order to prevent any manipulation of that condition for the directive's applicability, Article 7(3) provides:

`The selection of the valuation method shall not be used with the intention of avoiding the application of this directive, nor shall any procurement requirement for a given amount of services be split up with the intention of avoiding the application of this article.'

58 Although that article refers to efforts to circumvent the directive by means of a dishonest assessment of the value of the contract, it seems to me that the scope of that prohibition on manipulation might be extended to cover a situation in which a contracting authority had, conversely, artificially grouped together various contracts, some priority, others not, with the aim of avoiding application of the directive in full to priority services.

59 That would be the case if the overall contract thus constituted did not serve a single purpose and clearly failed to meet the requirements of technical and economic unity.

60 In Commission v Italy, (17) the Court ruled that by not separating contracts for the purchase of data-processing equipment, on the one hand, and for the design and operation of a data-processing system, on the other, the Italian Republic had failed to fulfil its obligations. The two elements, the purchase of equipment, on the one hand, and the provision of computer services, on the other, clearly served to achieve a single purpose. However, the Court considered that they could be separated and that the Italian Government was in fact seeking to avoid the application of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts to the contract for the purchase of the equipment. (18)

61 It would, however, be adopting too broad an interpretation of that judgment to conclude from it that a contracting authority is always required to award separate contracts for priority part services and non-priority part services which all serve to achieve the same purpose.

62 That judgment in fact pre-dated the adoption of Directive 92/50. The rule laid down in Article 2 of the directive, which states that a contract that covers the supply of both services and products falls within the scope of the services directive if the value of the services in question is greater than that of the products, was not yet in force. Thus it was a case in which, by making such an artificial combination of contracts the Italian State was totally avoiding the application of Community law to the contract as a whole. Such a situation can no longer arise, because the contract, which exceeded the threshold of ECU 200 000, would necessarily fall within the scope of either Directive 77/62 or Directive 92/50.

63 With regard to the contract at issue in the main proceedings, and in the light of the information available to the Court, it does not appear to constitute an artificial combination of priority and non-priority services. Indeed, as the defendant and the Austrian Government have stated, with sound arguments, it would have been illogical, from both the technical and the economic viewpoint, to award two contracts in this case: one for the actual transport and the other for all the logistics relating to the move. That would have led to additional coordination costs. However, it is for

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the national court to assess the cohesion of the contract in the main proceedings as a whole.

64 I therefore suggest that the answer to the fourth question should be as follows:

Where a contract as a whole has a clear economic and technical unity, contracting authorities are by no means required to avoid the application of Article 10 of Directive 92/50 by awarding separate contracts for non-priority part services, on the one hand, and priority part services, on the other, which serve to achieve the same purpose.

Third question

65 By this third question the Bundesvergabeamt is seeking to ascertain which annex to the directive and which CPC reference the services that comprise the contract in the main proceedings should be assigned to.

66 As the Court stated in Tögel (19) the assignment of services to Annex I A or Annex I B to Directive 92/50 must be done by reference to the CPC nomenclature.

67 Although the assignment of each service in the main proceedings to a CPC reference constitutes a point of fact, which it is for the national court to assess, I am of the view that the Court could provide guidance in this connection which would help the referring court in exercising its own jurisdiction.

68 I would therefore draw the attention of the national court to some of the CPC reference numbers.

69 Storage, which according to the ONB represents 23.91% of the total value of the contract, falls within CPC Division 74 `Supporting and auxiliary transport services', under reference number 742 `Storage services'. In this case, subclass 74290 `Other storage and warehousing services', seems to me to be the relevant one. CPC Division 74 appears in Annex I B to Directive 92/50 (Category 20).

70 Moreover, the coordination and logistics activities, to which the contracting authority attributes 32.13% of the total value of the contract, are probably also to be classified in CPC Division 74, more precisely in subclass 74800 `Freight transport agency services', the explanatory note to which reads:

`Freight brokerage services, freight forwarding services (primarily transport organisation or arrangement services on behalf of the shipper or consignee), ship and aircraft space brokerage services, and freight consolidation and break-bulk services'.

71 Subclass 74900 `Other supporting and auxiliary transport services' seems to me to be the one which, apart from the transport itself, covers the actual activities of moving, to which the ONB attributes 5.55% of the value of the contract. That subclass corresponds to the following activities:

`Freight brokerage services; bill auditing and freight rate information services; transportation document preparation services; packing and crating and unpacking and de-crating services; freight inspection, weighing and sampling services; and freight receiving and acceptance services (including local pick-up and delivery)'.

72 In the Commission's view, all the services comprising the contract in the main proceedings, since they constitute a single homogeneous service provision, should be assigned to that subclass. The final note `including local pick-up and delivery' implies that all the services the ONB required of its co-contractor should be included in subclass 74900.

73 I do not share the Commission's view on this point. `Supporting and auxiliary transport services' cannot, for anyone who has read the rules for the interpretation of the CPC carefully, include the transport itself which, even if it only represents a tiny proportion of the contract, cannot

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be totally excluded. The rules for the interpretation of the CPC state that classification is to be determined according to the terms of the headings. `Land transport services', the title of Division 71, could not be more explicit, so that there is no doubt that transport services such as those at issue here cannot be assigned to any other category. Moreover, if there were any doubt, the rule that the more specific category must take priority over categories of a more general scope would apply. There is no doubt that subclass 71234 `Transportation of furniture', for example, corresponds more closely to the services of transport itself than the subclass `Other supporting and auxiliary transport services'. The words `local pick-up and delivery' on which the Commission's reasoning is based are added only as a clarification of `freight receiving and acceptance services'. It therefore refers only to the beginning and the end phases of the transport, namely the pick-up and delivery, which provide the framework for the transport itself, and that may, depending on the case, take place by air or sea rather than by land.

74 That interpretation is confirmed, moreover, by the explanatory note to CPC subclass 71234 `Transportation of furniture', which covers road transport services `Over any distance'. So, whether the distance covered by the transport is short or long, it is still a transport service that is involved, which has its own CPC reference and cannot come under `Supporting and auxiliary transport services'.

75 Road transport services under CPC reference number 712 are assigned to Annex I A of Directive 92/50 (Category 2). It is possible to include the transport services carried out in performance of the contract at issue in the main proceedings under subclass 71234 `Transportation of furniture' and subclass 71239 `Transportation of other freight'.

76 I would also draw the attention of the national court to two other CPC references which are relevant to some of the services mentioned in the order for reference:

- CPC Class 8129 `Non-life insurance services', subclasses 81294 `Freight insurance services', 81295 `Fire and other property damage insurance services' and 81299 `Other insurance services n.e.c.' appear to me to be relevant. Insurance services are listed in Annex I A to Directive 92/50 (Category 6);

- CPC Division 94, more particularly, subclass No 94020 `Refuse disposal services' which includes inter alia collection, transport and disposal of industrial or commercial waste. That CPC reference also comes under Annex I A to Directive 92/50 (Category 16).

77 Lastly, I am of the view that the wages of the staff of the service providers should be included in the services to which they correspond and of which they form an integral part. Indeed, it would be difficult to imagine dissociating, for example, the activity of packing from the wages of the packers without rendering the activity of packing meaningless. Thus, to take the example of the wages of packers, those wages, like the activity of packing itself, come under subclass 74900 `Other supporting and auxiliary transport services'.

78 In that connection, it seems to me generally that to over-subdivide services would, on the one hand, be likely to render some services meaningless and, on the other hand, to produce a theoretical description of the contract that was too complex and did not correspond to its actual nature.

79 In answer to the third question, I consider therefore that some of the services mentioned in the statement of facts come under Annex I A and others under Annex I B to Directive 92/50. In the light of the allocation of those services as described in the order for reference, it seems to me that the services covered by CPC reference number 74 `Supporting and auxiliary transport services' represent the greater share of the contract in terms of value. Since that reference appears in Annex I B to Directive 92/50 (Category 20), it would appear that the whole contract should, according to Article 10 of Directive 92/50, be awarded in accordance with Articles 14 and 16 of that directive, subject to the assessments to be made by the national court.

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Conclusion

80 In the light of the above considerations, I suggest that the Court should answer the questions referred for a preliminary ruling by the Bundesvergabeamt as follows:

(1) It is appropriate, in order to determine which arrangements apply to a service contract serving a single purpose, but which could be subdivided into part services, to ascertain to which of the annexes to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts each part service is to be assigned. Under Article 10 of that directive the contract is to be awarded in accordance with the provisions of Titles III to VI of the directive where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Conversely, if the value of the services listed in Annex I B is greater than the value of the services listed in Annex I A, the contract is to be awarded in accordance only with Articles 14 and 16 of the directive.

(2) As regards services corresponding to different CPC references, it is necessary to separate them in order to determine which arrangements apply to the contract as a whole, even where the consequence of such separation would be to make a priority service subject only to a limited application of Directive 92/50.

(3) Some of the services mentioned in the statement of facts come under Annex I A and others under Annex I B to Directive 92/50. In the light of the allocation of those services as described in the order for reference, the services assigned to CPC reference number 74 `Supporting and auxiliary transport services' appear to represent the greater share of the contract in terms of value. Since that reference number appears in Annex I B to Directive 92/50 (Category 20) the whole contract should, under Article 10 of the directive, be awarded in accordance with Articles 14 and 16 of that directive, subject to the assessments to be made by the national court.

(4) Where a contract as a whole has a clear economic and technical unity, contracting authorities are by no means required to avoid the application of Article 10 of Directive 92/50 by awarding separate contracts for non-priority part services, on the one hand, and priority part services, on the other, which serve to achieve the same purpose.

(1) - OJ 1992 L 209, p. 1, hereinafter also referred to as `the directive'.

(2) - See 21st recital in the preamble to Directive 92/50.

(3) - Bundesvergabegesetz 1997, BGBl. I 1997, No 56. Previous versions are in Bundesvergabegesetz 1993, BGBl. I 1993, No 462 and BGBl. I 1996, No 776.

(4) - [1998] ECR I-73. See also the Opinion of Advocate General Léger in that case.

(5) - See Case C-76/97 Tögel [1998] ECR I-5357; Case C-111/97 EvoBus [1998] ECR I-5411; Case C-27/98 Fracasso and Leitschutz [1999] ECR I-5697; Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671; Case C-94/99 ARGE [2000] ECR I-11037; and Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745.

(6) - Order for reference from the Bundesvergabeamt of 9 August 2001 (Case C-314/01, pp. 24 to 26 of the English translation).

(7) - See observations lodged by the Commission in Siemens and ARGE Telekom, cited above.

(8) - Order of 26 October 1995 in Joined Cases C-199/94 P and C-200/94 P Pevasa and Inpesca v Commission [1995] ECR I-3709, paragraph 24. See also Case C-21/94 European Parliament v Council [1995] ECR I-1827, paragraph 33.

(9) - See the Opinion of Advocate General Léger in Mannesmann Anlagenbau Austria, cited above,

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point 40.

(10) - OJ 1989 L 395, p. 33.

(11) - See Case 104/79 Foglia [1980] ECR 745 and Case 244/80 Foglia [1981] ECR 3045.

(12) - [1999] ECR I-5219.

(13) - Case C-331/92 [1994] ECR I-1329.

(14) - OJ, English Special Edition 1971 (II), p. 682.

(15) - Paragraph 29 of the judgment cited above.

(16) - Tögel, cited above, paragraph 35.

(17) - Case C-3/88 [1989] ECR 4035.

(18) - OJ 1977 L 13, p. 1.

(19) - Paragraphs 35 to 37. See also the Opinion of Advocate General Fennelly in that case, paragraphs 32 to 35.

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61994J0021 : N 15
61994O0199 : N 15
61996C0044 : N 13 16
61996J0044 : N 13
11997E234 : N 20
61997C0076 : N 66
61997J0076 : N 13 38 50 66
61997J0111 : N 13
61998J0027 : N 13
61998J0081 : N 13
61998J0108 : N 26 27
61998J0324 : N 13
61999J0094 : N 13

SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	French
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Opinion of Mr Advocate General Alber delivered on 21March2002. Adolf Truley GmbH v Bestattung Wien GmbH. Reference for a preliminary ruling: Vergabekontrollsenat des Landes Wien - Austria. Directive 93/36/EEC - Public supply contracts - Concept of 'contracting authority' - Public-law body - Funeral undertaking. Case C-373/00.

I Introduction

1. These proceedings concern the interpretation of the concept of contracting authority in the form of a "body governed by public law" within the meaning of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (2) (hereinafter "Directive 93/36"). Of particular concern are the definition of "needs in the general interest, not having an industrial or commercial character" and the question whether the activities of a funeral undertaking are covered by this concept.

II Legal framework

(1) Community legislation

2. Article 1(b) of Directive 93/36 defines the term "body governed by public law" as follows:

"For the purpose of this Directive:

(a)

...

(b) "contracting authorities " shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law " means any body:

established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

having legal personality, and

financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

the lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I to Directive 93/37/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35 of Directive 93/37/EEC

" .

(2) National legislation

3. The following legislation would appear to be particularly important in resolving the current issue:

(a) Gewerbeordnung 1994

4. The activity of funeral undertaker is governed by Paragraphs 130 to 134 of the Gewerbeordnung (Austrian Trade Regulations). (3)

5. That activity is not reserved to specific persons or, for example, to the State, the Länder

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or municipalities. However, the issue of a trading licence pursuant to Paragraph 131 of the Gewerbeordnung depends on there being a need for the intended exercise of that business. When this requirement is being considered, it is particularly important to establish whether the municipal authority has made adequate provision for funeral services.

6. According to the Vergabekontrollsenat (the Public-Procurement Review Chamber), a need for the exercise of the business is relevant only as regards the acquisition of a trading licence. An absence of subsequent need does not entitle the authorities to revoke a trading licence. Nor does the Gewerbeordnung provide for any territorial monopoly in such a way that the business may be exercised only in a certain territory.

7. Paragraph 132 of the Gewerbeordnung requires the Landeshauptmann (First Minister of the Land) to set maximum charges for funeral services. Such charges may be set for the whole Land , for individual administrative districts or even for individual municipalities.

(b) Wiener Leichen- und Bestattungsgesetz

8.

At Land level, funeral services are governed by the Wiener Leichen- und Bestattungsgesetz (Law of the Land of Vienna on the activity of funeral undertaker) ("the WLBG"). (4) Paragraph 10(1) of that Law reads:

> "Where no arrangements are made for the funeral of the deceased within five days of the death certification being issued, the Magistrat [of the City of Vienna] shall arrange the funeral (by burial or cremation) at a funeral facility of the City of Vienna. The City of Vienna shall bear the costs of the funeral only in so far as they are not to be met by third parties or covered by the deceased's estate."

9. Paragraph 22(1) of the WLBG requires the burial or cremation of all corpses. According to Paragraph 22(2) in conjunction with Paragraph 23 of this Law, burial or cremation may be effected only at cemeteries, cineraria and special funeral establishments.

(c) Wiener Landesvergabegesetz (5)

10. Article 1(b) of Directive 93/36 has been transposed by Paragraph 12 of the Wiener Landesvergabegesetz (Law on the Award of Public Contracts of the Land of Vienna) ("the WLVergG"). Paragraph 12 stipulates:

> "(1) This Law shall apply to the award of contracts by contracting authorities. Contracting authorities within the meaning of this Law shall be:
>
> 1. Vienna as a Land or municipality and
>
> 2. bodies established under the law of the Land provided that they have been founded for the purpose of meeting needs in the general interest, not being commercial in character, if they have at least some legal capacity, and
>
> (a) more than half of whose managers are appointed by bodies of the City of Vienna or of another entity within the meaning of points 1 to 4 or are persons appointed by bodies of the said entities for this purpose or
>
> (b) whose management is subject to supervision by the City of Vienna or other entities within the meaning of points 1 to 4 or
>
> (c) which are financed, for the most part, by the City of Vienna or other entities within the meaning of points 1 to 4,

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3. undertakings monitored by the Austrian Court of Auditors which are not governed by Article 126b(2) of the Federal Constitutional Law in the version published in BGBl. I No 148/1999, which were established for the purpose of meeting needs in the general interest, not having a commercial character, and in which the City of Vienna as a Land or municipality holds at least the relative majority of the shares held by public authorities,

...

"

(d) Wiener Stadtverfassung

11. Also of relevance is the Wiener Stadtverfassung (Vienna Municipal Constitution WStV), (6) Paragraph 73 of which governs the activities of the Kontrollamt (Monitoring Office). In terms of organisation the Kontrollamt forms part of the Magistrat (Municipal Corporation) (Paragraph 106(1) of the WStV), which in turn is a body of the Municipality (City) of Vienna (Paragraph 8(11) of the WStV).

"(1) The Kontrollamt shall examine the overall conduct of the municipality and of the funds and foundations having legal personality and administered by municipal authorities for proper accounting, regularity, economy, efficiency and expediency (review of conduct). The Kontrollamt shall also examine the performance required of municipal authorities of official tasks relating to public safety or health; it shall also determine whether adequate, appropriate and proper safety measures have been taken by the entities and facilities administered by municipal authorities which pose a potential threat to public safety or health (review of safety). Decisions taken by the appropriate collective authorities concerning conduct and safety shall, however, be excluded from the review. In the standing orders for the Municipal Corporation the Mayor shall provide for the setting up within the Kontrollamt of a group to review conduct and another to review safety, each headed by a responsible person.

(2) The Kontrollamt shall also examine the conduct of commercial undertakings in which the municipality has a majority interest. Where such a commercial undertaking has a majority interest in another undertaking, the examination shall extend to that other undertaking. The Kontrollamt's powers of examination shall be assured by suitable measures.

(3) The Kontrollamt may further examine the conduct of entities (commercial undertakings, associations, etc.) in which the municipality has an interest other than that referred to in paragraph 2 or on whose organs the municipality is represented, provided that the municipality has reserved the right to carry out such a review. This shall also apply to entities which receive financial support from municipal resources or for which the municipality accepts liability.

(4) ...

(5) ...

(6) Upon decision by the Municipal Council or the Monitoring Committee or at the request of the Mayor or, in respect of the area of responsibility of his unit, of an office-holding city councillor, the Kontrollamt shall carry out special reviews of conduct and safety and shall inform the requesting authority of its findings.

(7) ...

(8) ...

"

(e) The articles of association of Bestattung Wien

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12. The Kontrollamt's power to carry out reviews pursuant to Paragraph 73 of the WStV is reflected in Paragraph 10.3 of the articles of association of Bestattung Wien. According to this, the Kontrollamt of the City of Vienna is entitled to examine both Bestattung Wien's business management, in terms of proper accounting, regularity, economy, efficiency and expediency, and the annual accounts and situation report, including the recording of receipts and other documents, to inspect its business premises and facilities and to report the findings of such examinations to the competent authorities, the shareholders and the City of Vienna.

III Facts of the case

13. Until 1999 funeral services in Vienna were provided by Wiener Bestattung, a component undertaking of the Wiener Stadtwerke (Vienna Public Utilities). Neither entity had legal personality of its own. The Wiener Stadtwerke was an undertaking within the meaning of Paragraph 71 of the WStV and thus formed part of the Municipal Corporation (Paragraph 106(1) of the WStV). At that time calls for tenders similar to the one at issue in the main procedure were published on several occasions.

14. In 1999 the Wiener Stadtwerke was separated from the Municipal Corporation's administration and, as Wiener Stadtwerke Holding AG, was given its own legal personality. All of its shares are held by the City of Vienna.

15. One of the undertakings belonging to Wiener Stadtwerke Holding AG is Bestattung Wien GmbH (hereinafter "Bestattung Wien"), which similarly has legal personality of its own. Wiener Stadtwerke Holding AG is its sole shareholder. Bestattung Wien has provided funeral services in Vienna since 1999.

16. Although Bestattung Wien itself produces the coffins needed for funerals, it purchases the necessary coffin fittings and fixtures from other undertakings. In this connection, it invited tenders by open procedure in preparation for the award of a contract to supply coffin fittings and fixtures (shrouds, upholstery, coffin frames). The call for tenders was published throughout Austria in the official procurement gazette and also in the Amtsblatt der Stadt Wien (Official Journal of the City of Vienna). Adolf Truley GesmbH (hereinafter "Truley") submitted a tender in response to this invitation. By letter of 6 June 2000 it was informed by Bestattung Wien that it would not be awarded the contract.

17. According to Bestattung Wien, the reason for this rejection was the high price quoted by Truley in its tender. Truley asserts, on the other hand, that it was the only bidder to have complied with the call for tenders and ought therefore to have been considered. The part tenders submitted by the other bidders, it argues, did not comply with the call for tenders and should not therefore have been taken into consideration.

18. In the review proceedings brought against the rejection before the Vergabekontrollsenat, Bestattung Wien expressed the view that it should not be regarded as a body governed by public law within the meaning of Directive 93/36 and the Wiener Landesvergabegesetz, the Law passed to transpose that directive. It was, it claimed, a company with its own legal personality, which was run on purely commercial lines and was completely independent from the City of Vienna. It has therefore applied for the appeal to be dismissed. Truley challenges this view of the law, referring to the ownership structure of Bestattung Wien, and considers the latter to be under an obligation to observe the rules on public contracts. The Vergabekontrollsenat has therefore to decide to what extent Bestattung Wien should be regarded as a body governed by public law within the meaning of the legislation on the award of contracts.

IV Questions submitted for a preliminary ruling

19. In this context the Vienna Vergabekontrollsenat has referred the following three questions

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to the Court of Justice for a preliminary ruling:

1. Must the term "needs in the general interest" in Article 1(b) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts be interpreted as meaning that

(a) the definition of needs in the general interest must be derived from the national legal system of the Member State?

(b) the fact that a regional or local authority's obligation is subsidiary is in itself sufficient for the existence of a need in the general interest to be assumed?

2. In interpreting the requirement "meeting needs... not having an industrial or commercial character" laid down in Directive 93/36/EEC, is (a) the existence of significant competition an imperative condition or (b) are the factual or legal circumstances the determinant factors in that respect?

3. Is the requirement laid down in Article 1(b) of Directive 93/36/EEC that the management of the body governed by public law must be subject to supervision by the State or a regional or local authority also fulfilled by a mere review as provided for through the Kontrollamt (Monitoring Office) of the City of Vienna?

V Views of the parties and assessment

(1) Admissibility of the request for a preliminary ruling

(a) Court or tribunal within the meaning of Article 234 EC

20. The Court of Justice has not yet ruled that the Vienna Vergabekontrollsenat is a "court or tribunal" within the meaning of Article 234 EC. The question also arises in Cases C-470/99 and C-92/00 pending before the Court, in which judgments have yet to be delivered.

21. In my Opinion in Case C-470/99 delivered on 8 November 2001 I explained at some length why I believe the Vergabekontrollsenat should be regarded as a "court or tribunal" . I would therefore like to refer to those comments.

22. According to those comments, the Vergabekontrollsenat is, pursuant to Paragraph 94(2) of the WLVergG, responsible at first and last instance for reviewing decisions taken by a contracting authority in an award procedure. Its activity thus has a legal basis and represents compulsory jurisdiction. It is also a permanent body. The decisions of the contracting authorities are monitored in accordance with the rules laid down in the WLVergG and, where the latter does not contain any specific provisions, pursuant to Paragraph 94(3) of the WLVergG on the basis of the Allgemeines Verwaltungsverfahrensgesetz (General Law on Administrative Procedure) and the Verwaltungsvollstreckungsgesetz (Administration Enforcement Law). The Vergabekontrollsenat's independence vis-à-vis the administration is ensured by Paragraph 94(2) of the WLVergG, which stipulates that its decisions may not be altered or rescinded by administrative means. In addition, Paragraph 95(4) of the WLVergG guarantees the members of the Vergabekontrollsenat the independent exercise of office free from instructions. Paragraph 95(6) sets out the rules on partiality, a criterion on which the Court of Justice placed particular emphasis in Köllensperger and Atzwanger . (7) Paragraph 95(7) requires the administrative decisions of the Vergabekontrollsenat to be issued in writing. In view of these provisions, it must be assumed that the Vergabekontrollsenat meets the requirements of case-law to be satisfied by a court or tribunal within the meaning of Article 234 EC.

(b) Need for a preliminary ruling

23. Bestattung Wien disputes the admissibility of the request for a preliminary ruling, arguing that its capacity as a body governed by public law within the meaning of Article 1(b) of Directive

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93/36 is immaterial in the main proceedings since, pursuant to Paragraph 99 of the WLVergG, the Vergabekontrollsenat may decide only whether the contract was awarded to the lowest bidder. Truley's bid had come second from last in terms of price both as a whole and as regards the various items, for which the tender document allowed individual bids to be submitted. Consequently, it could never have been awarded the contract.

24. Furthermore, petitions for declaration attacking the absence of a call for tenders at European level and the absence of a notification of the weighting of the award criteria should be rejected by the Vienna Landesvergabesenat as inadmissible, since in those circumstances it is unable to judge whether the award was unlawful. In Bestattung Wien's view, this was an "artificial submission" that raised a purely hypothetical point of law.

25. It is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which a dispute has been brought to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. (8)

26. An exception to this rule is possible only if it is obvious that the interpretation of Community law sought by the national court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (9)

27. If it is assumed that Truley's submission is correct, the question referred to the Court for a preliminary ruling does not appear to be obviously irrelevant to the Vergabekontrollsenat's decision for, if Truley was the only bidder capable of submitting a tender that complied with the tender document, the award of the contract to a competitor would have been unlawful. In this respect Bestattung Wien's objection that, because of the estimated price, Truley's bid had come second from last is not the determinant factor.

28. These considerations are, however, significant only if Bestattung Wien was in any way obliged to call for tenders for the services concerned. This calls, first of all, for clarification whether it is a public body within the meaning of Article 1 of Directive 93/36 and Paragraph 12 of the WLVergG, the law passed to transpose the directive. It cannot therefore be stated that there is obviously no connection between the questions submitted and the main proceedings. Nor are the questions submitted by the Vergabekontrollsenat general and hypothetical.

29. The request for a preliminary ruling must therefore be considered admissible.

(2) First question: meeting needs in the general interest

30. In putting its first question, the Vergabekontrollsenat seeks to determine whether the activity of a funeral undertaker meets "needs in the general interest" . The first part of the question in this context is whether this term should be interpreted in accordance with Community law or national law. In the second part of the question the Vergabekontrollsenat asks whether Bestattung Wien perhaps meets a need in the general interest because of the provisions of Paragraph 10 of the WLBG.

(a) Point of reference for the interpretation of the term "needs in the general interest"

(i) Views of the parties

31. As regards the first part of the first question, the parties which have commented on the request for a preliminary ruling support all three conceivable solutions. Truley and the Austrian Government

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take the view that the term should be interpreted solely in accordance with Community law. Truley bases its view on the purpose of the directives on the award of public contracts, which, it argues, is to open the national markets to Community-wide competition. The bidders should not only be informed by the tender documents but should know in advance what agencies are required to invite tenders. In BFI Holding (10) the Court ruled that this term should be interpreted objectively. Moreover, a uniform interpretation is needed throughout the Community for reasons of legal certainty.

32. The Austrian Government refers to case-law according to which concepts in Community law must be given an independent interpretation where there is no explicit or implicit reference to the law of the Member States. (11) It also argues that this vague concept was chosen deliberately during the legislative procedure. Nor, it submits, is there any reference in the legal material to the need to consult national law in the interpretation of the concept.

33. Bestattung Wien, the French Government and the EFTA Surveillance Authority take the view that, although the concept should be interpreted in accordance with Community law, it must be applied in the light of national legislation.

34. Bestattung Wien's view is that the directives on the award of public contracts merely sought to approximate the national rules, not to harmonise legislation, and that the circumstances surrounding each case should therefore be considered in any assessment of the concept. An abstract and general definition would not reflect the functional nature of the concept of a contracting authority emphasised in the case-law. (12) The aim of Directive 93/36 was to open up the national public procurement markets, which were typically characterised by a general absence of competitive pressure to ensure that an open and economically appropriate award procedure free from discrimination was adopted. It should always be asked, therefore, whether the body concerned was subject to the possibility of State control and influence. Bodies whose conduct was not determined solely by general market mechanisms should be governed by the directives on the award of public contracts. Although needs in the general interest were needs of interest to society as a whole, the concept had to be defined with regard to the legal systems of the individual Member States, which were empowered to determine what they saw as needs in the general interest. To support this proposition, Bestattung Wien refers to Annex I to Directive 93/37. From this it followed that that directive itself was geared to the special features in the various Member States. The satisfaction of needs in the general interest did not pursue exclusively individual objectives, but was in the interest of society as a whole.

35. The French Government proposes that the concept of general interest should be given a Community-law definition, but that, when it is applied, the circumstances in the Member State concerned should be taken into account. It refers to the concepts of "services of general economic interest" in Articles 16 EC and 86 EC and to the Commission's communication on services of general interest. (13) In Mannesmann (14) and BFI Holding the Court also interpreted the concept in accordance with Community law. However, it should be added, according to the French Government, that in those judgments the Court had considered the reason for the establishment of the body concerned, the manner in which it performed its tasks and a possible link between the activity for which the body had been established and a fundamental sovereign right of the State. The particular situation obtaining in each case therefore justified differentiation in the application at national level of the criteria cited. The concept of needs in the general interest was vague and fluid and depended on the extent to which the State wanted to intervene.

36. The EFTA Surveillance Authority shares the view that the concept should be interpreted in accordance with Community law to ensure its uniform application. In support of its view it refers to the judgment in Linster . (15) It also points out that Article 1(b) of Directive 93/36 does not refer to the law of the Member States. However, it followed from the judgments in Mannesmann

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and BFI Holding that the provisions of national law should be considered in any assessment of the facts. Thus in those cases the circumstances in which a body had been established and the national legislation applicable to its establishment had been taken into account. In much the same way Paragraph 10 of the WLBG should be considered in the present case.

37. Finally, the Commission takes the view that the concept should be interpreted solely in accordance with national law. In its judgment in Mannesmann the Court of Justice, when classifying the State printing office, focused on the task it performed and its importance for the operation of the State as revealed by the national legislation. In its judgment in BFI Holding the Court, referring to the list in Annex I to Directive 93/37, had described the removal of household refuse as a need in the general interest. It had emphasised in this context that these were needs which the State reserved the right to meet itself or over which it wished to retain a determining influence. From these judgments the Commission infers that it is for the Member State concerned to determine what activities are undertaken in the general interest in each case. It also bases its view on the Opinion of Advocate General La Pergola in BFI Holding , where it was stressed that the directive refers to the legislation of the Member States. (16)

(ii) Appraisal

38. The first part of the first question concerns a rather theoretical problem in law, namely whether the concept of "needs in the general interest" should be interpreted in accordance with Community law or in accordance with the law of the Member State in question.

39. According to case-law, concepts of Community law must be given interpretations which are independent of the law of the Member States. The only exception occurs where Community law explicitly refers to national law. (17)

40. While Article 1 of Directive 93/36 does not refer explicitly to national law, the third subparagraph of Article 1(b) includes a reference to the list of bodies or of categories of such bodies governed by public law and fulfilling the criteria referred to in the second subparagraph of Article 1(b) which are set out in Annex I to Directive 93/37/EEC. This might implicitly constitute a reference. According to the case-law, tacit references to the law of the Member States may also have to be taken into account. (18)

41. It must be borne in mind, however, that the list contained in Directive 93/37 is not exhaustive. (19) Although it is intended to be as complete as possible, it contains, in the final analysis, only examples of entities which are public bodies within the meaning of Article 1(b). The legal definition given in Article 1(b) of Directive 93/37, which is identical to the definition in Article 1(b) of Directive 93/36 to be interpreted in the current proceedings, was inserted at the instigation of the European Parliament. To ensure the widest possible application of the directive, the Parliament inserted the term "organ governed by public law" , (20) which was subsequently changed to "body" . The inclusion of the legal definition was meant to replace the lists which were to be compiled pursuant to Article 1(b) of Directive 71/305/EEC and which identified contracting authorities. The intention was to ensure the application of the directive without exception (21) and to extend the scope of the directive to include construction work performed by third parties and financed completely or partly, directly or indirectly, from public resources. (22) The point of the general definition of the term "contracting authority" is specifically to ensure that, as far as possible, all entities physically belonging to the public sector are required to invite tenders whether or not they are included in the list. Thus the list is not exhaustive. To see in the reference to the list an implicit reference to national law does not therefore seem justified. Consequently, the position continues to be that the concept of needs in the general interest must be interpreted in accordance with Community law.

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42. An interpretation based solely on Community law is required not only because of the independence of Community law but also to ensure its uniform application. (23) The unity of the Community legal system would be threatened if the concept of "needs in the general interest" were interpreted differently from one Member State to another. One and the same activity cannot be deemed to be in the general interest in one Member State and not to be in the general interest in another, since an authority in one Member State might then be obliged to call for tenders, while an authority entrusted with the same tasks in another Member State was not. This might lead to distortions of competition, which would be precisely the opposite of the goal of the directive of creating competition in the area of public contracts (see the 14th recital in the preamble).

43. An interpretation that depends on how the Member State concerned itself defines its area of activity seems equally incompatible with the purpose of the directives on the award of public contracts. Directive 93/36, like the other directives on the award of public contracts, is based on Article 95 EC. It is therefore meant to contribute to the establishment and functioning of the internal market. In particular, it seeks to bring about the free movement of goods in the area of public supply contracts. It therefore coordinates national legislation, as the fifth recital in the preamble to the directive shows. This coordination can succeed, however, only if uniform criteria are also developed for the interpretation of such pivotal concepts as "contracting authorities" or, more accurately, "public bodies" . The approximation of laws does not mean forgoing the uniform interpretation of pivotal concepts. The transparency and predictability achieved with the directives on the award of public contracts would be destroyed again if the concept of "needs in the general interest" , which plays a crucial role in identifying contracting authorities required to call for tenders, might be interpreted differently from one Member State to another.

44. It should be pointed out, however, that, even if the concept of "needs in the general interest" is interpreted in accordance with Community law, national law is not irrelevant, since the legal and actual circumstances of the individual case must be considered when this abstract legal concept is applied to practical situations.

45. Thus, when categorising the Austrian State printing office, the Court of Justice took careful account of the fact that it was established by law and that, in printing passports, driving licences, identity cards and legislative and administrative documents, it performs a task which is in the general interest. (24) In Telaustria the Court based its views on the fact that Telaustria was established by law and that its purpose is to provide public telecommunications services. (25) And when classifying public development and construction entities ("offices d'aménagement et de construction") and low-rent housing corporations ("sociétés anonymes d'habitations à loyer modéré") in its judgment in Case C-237/99, it also referred to the national legislation relating to those entities. (26)

46. The conclusion to be drawn as regards the first part of the first question is therefore that the concept of needs in the general interest should be interpreted in accordance with Community law. Only when this abstract legal concept is applied to practical situations should particular importance be attached to the legal and actual situation of the body concerned and, in this context, to national law.

(b) Funeral services as needs in the general interest

47. By its second question the Vergabekontrollsenat asks whether it can perhaps be deduced from Paragraph 10 of the WLBG that Bestattung Wien meets "needs in the general interest" .

48. It must first be stated in this regard that, given the division of responsibilities defined in Article 234 EC, it is for the national courts to apply to specific cases the provisions of Community law as interpreted by the Court of Justice. (27) In this respect the question submitted

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for a preliminary ruling should be rephrased in such a way that the Vergabekontrollsenat is asking whether legal subsidiarity of a regional or local authority's obligation to ensure the burial or cremation of a deceased person and to meet the associated costs is sufficient for it to be assumed that burial or cremation meets a need in the general interest.

(i) Views of the parties

49. In line with its comments on the first part of the question, Truley takes the view that Paragraph 10 of the WLBG is immaterial when it comes to deciding whether Bestattung Wien meets a need in the general interest. It maintains that the concept should be interpreted solely on the basis of Community law. Truley relies for its view on the judgment in BFI Holding , in which the Court opted for a functional interpretation of that concept. (28)

50. As regards funeral services, however, Truley's position is that they satisfy a need in the general interest. First, it claims this follows from a comparison with the list which is attached as Annex I to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (29) and to which Article 1 of Directive 93/36 refers. Second, Truley regards funeral services to be one of the core general services which should, within the meaning of the judgment in BFI Holding , be provided by the State as the guardian of the interests of the public at large.

51. Bestattung Wien too attaches no importance to Paragraph 10 of the WLBG maintaining that it is no more than a rule laid down by the health authority to prevent epidemics. Nothing could be deduced from it for the classification of the funeral services in the wider sense which it provided.

52. As regards funeral services, it proposes that a distinction should be made between services in the narrower sense (cemetery management, opening and closing of the grave, lowering of the body or ashes, conduct of exhumations), which are provided by the City of Vienna, and services in the wider sense (laying out the body, funeral rites, transporting the body, washing and dressing the body and placing it in the coffin, taking care of the grave, obtaining certificates, placing death notices in newspapers), which are provided by Bestattung Wien. Only funeral services in the narrower sense satisfy needs in the general interest. Referring to the judgment in BFI Holding , it characterises these needs as being of the kind which either the State itself meets or over which it at least has a decisive influence. The business of undertaker is intended to produce a profit and is thus an economic activity, not the satisfaction of a need in the general interest. Apart from the possibility open to the First Ministers of the Länder of setting maximum charges, it is not subject to State supervision, unlike the management of cemeteries, for example. Nor is the examination of need required by the Gewerbeordnung an indication of the existence of a need in the general interest. At issue is a measure by which other trades, such as taxi firms, chimney sweeps and firms hiring out horse-drawn carriages, are affected. Bestattung Wien therefore believes that, in the absence of supervision by State bodies, it does not meet needs in the general interest but pursues a profit-oriented activity.

53. The Austrian Government shares Truley's and Bestattung Wien's views on Paragraph 10 of the WLBG. Besides referring to the health aspect, it emphasises that Paragraph 10 contains rules on the defrayment of costs. The satisfaction of a need in the general interest cannot be inferred from a subsidiary obligation of the City of Vienna to meet costs. It would be different if the City was under a subsidiary obligation to provide a funeral service itself.

54. In the context of the interpretation of the concept of general interest Austria refers to statements by the Commission on general services (30) and to the Opinion of Advocate General Van Gerven in Case C-179/90. (31) It takes the view that the concept of general interest means the interest of the community, of the public at large, of society as a whole or ensuring public

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welfare and should be contrasted with the interest of the individual. After all, this concept is evolving and cannot be accurately described. Austria argues for the task of funeral undertakings to be regarded as a task which is performed in the general interest.

55. The French Government and the EFTA Surveillance Authority, by contrast, consider Paragraph 10 of the WLBG to be an indication of the existence of a need in the general interest. The French Government emphasises that, in this case, the public purse meets the costs for Bestattung Wien. The EFTA Surveillance Authority infers from Paragraph 10 that the City of Vienna assumes the role of undertaker when no one else wants to become involved.

56. Finally, the Commission, following on from its opinion that the concept of needs in the general interest should be interpreted in accordance with national law, takes the view that Paragraph 10 of the WLBG is evidence of a need in the general interest.

(ii) Appraisal

57. In what follows the concept of needs in the general interest will be interpreted in accordance with Community law, and it will be decided whether Bestattung Wien satisfies such needs. The first step in this process is to consider whether a need in the general interest can already be deduced from the subsidiary obligation on the City of Vienna to instigate action and to meet costs pursuant to Paragraph 10 of the WLBG.

58. Paragraph 10 of the WLBG provides for the Municipal Corporation of the City of Vienna to arrange the funeral of a deceased person where no one makes arrangements for the funeral within five days of the death certification being issued. Provision is also made for the City of Vienna to bear the funeral costs in so far as they are not to be met by third parties or covered by the deceased's estate. This provision thus imposes a subsidiary obligation on the City of Vienna to arrange funerals and a subsidiary obligation to meet the attendant costs.

59. First of all, the wording of Paragraph 10 of the WLBG shows that the City of Vienna is responsible for concerning itself with the funeral of the deceased where no one else does so. This ensures that the obligation to bury or cremate the deceased enshrined in Paragraph 22 of the WLBG is fulfilled. Paragraph 22 in conjunction with Paragraph 23 also reveals that burial and cremation may not take place outside the cemeteries, cineraria and other facilities provided for the purpose. This provision is intended to afford protection against epidemics and other health hazards.

60. It should also be borne in mind that Paragraph 10 appears in Part I, Section 1, of the WLBG, which is headed "Coroner's activity" . This is a task performed by the police, the primary purpose being to determine the cause of death, as is evident from Paragraph 1(3) of the WLBG. Reference should also be made to Paragraph 8(1) of the WLBG, which stipulates that the death certificate must include information designed to give protection against hazards emanating from corpses. This provision too reveals that the protection of health is one of the reasons for requiring burial or cremation. These considerations support the assumption that burial or cremation should be seen as a need in the general interest.

61. In accordance with the above comments on the interpretation of Article 1(b) of Directive 93/36, all legal and factual circumstances of the individual case should be taken into account in the interpretation of the concept of "needs in the general interest" . In the following it will therefore be considered whether it can be inferred from the other statements in the decision on a preliminary ruling that funeral services are a need in the general interest.

62. Nearly all of the parties which have set out their views in these proceedings have attempted to define the concept of needs in the general interest by comparing them with needs which are satisfied in the interests of the individual. Truley and the Austrian Government in particular have tried

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to introduce into the discussion the ideas developed in the context of general services that benefit the public as a whole and not just individuals.

63. As already pointed out, Directive 93/36 does not define the concept of needs in the general interest. Nor do the other directives on the award of public contracts Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, (32) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (33) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (34) contain a definition of this term, which is also used in them.

64. Nor, so far as can be seen, has the Court of Justice yet adopted a generally applicable definition of what is meant by the concept of needs in the general interest as used in the directives on the award of public contracts. In the case-law, however, a number of needs of general interest have meanwhile been recognised: the production of such official printed documents as passports, driving licences and identity cards, (35) the removal and treatment of household refuse, (36) the management of national forests and woodland industries, (37) the management of a university, (38) the operation of public telecommunications networks and the provision of public telecommunications services, (39) the activities of the "Offices publics d'aménagement et de construction" and of a "Société anonyme d'habitations à loyer modéré" , which provide low-rent housing, (40) and, finally, the organisation of fairs and exhibitions. (41)

65. The examples given above concern circumstances which in principle benefit the general public. As stated earlier, burial or cremation is intended not least to afford protection against epidemics and other public health hazards. In this respect at least, funeral services should probably be deemed to satisfy a need in the general interest. If, then, they are seen as a single service, as all involved in the proceedings except Bestattung Wien consider them, it will be assumed that Bestattung Wien meets a need in the general interest.

66. Bestattung Wien proposes, however, that a distinction should be made between funeral services in the narrower sense (cemetery activities, burial and exhumation) and funeral services in the wider sense (taking care of the grave, laying out the body, obtaining certificates, placing death notices in newspapers). It argues that it undertakes only activities forming part of funeral services in the wider sense and does not therefore meet any needs in the general interest: its activities are purely commercial.

67. The activities listed by Bestattung Wien under the heading of funeral services in the wider sense correspond to the list in Paragraph 130(1), points 1 and 2, of the Gewerbeordnung. They are activities in which the emphasis is less on the general interest in health protection than on the interest of the individual in the observance of funeral rites. This might argue for the proposed distinction.

68. It should be borne in mind, however, that the provisions of the Gewerbeordnung and the WLBG to which the requesting court refers do not support the differentiation of the various areas of activity indicated by Bestattung Wien. The very fact that in the legislation of the Land of Vienna funeral services are governed by one and the same law, the Law on Undertaking (42) ("Wiener Leichen- und Bestattungsgesetz"), indicates that the two areas cannot be separated. Reference should also be made to Paragraph 34(4) of the WLBG, according to which "the employees of the legal entity or the employees of the undertaking appointed by the legal entity shall carry out the funeral ceremony in the mortuary and consecration rooms and transport the body or ashes to the grave... at one of the cemeteries of the City of Vienna. They shall also open and close all graves, lower the body or ashes and carry out exhumations...."

This provision covers all the various activities relating to the ceremony and burial differentiated by Bestattung Wien.

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This too argues against any distinction being made between the various areas of responsibility.

69. Similarly, Paragraph 130 of the Gewerbeordnung 1994 covers all the various services associated with funerals. In particular, Paragraph 130(1), point 1, refers to tasks connected with laying out the deceased and with the funeral ceremony, which are also the subject of Paragraph 33(4) of the WLBG. This too argues against the possibility of dividing the various activities into those undertaken in the general interest and those undertaken in the interest of an individual.

70. The following must also be considered. A factor to be taken into account in the examination of need pursuant to Paragraph 131 of the Gewerbeordnung is whether the municipality has made adequate provision for funerals. This implies that in principle it is the municipality which bears responsibility for funerals. As the example of the City of Vienna shows, it may perform this task itself, as the City did until 1999 through a dependent component undertaking of Wiener Stadtwerke, or entrust it to third parties. However, the fact that the municipality ensures the performance of this task, including the activities referred to in Paragraph 130(1) and (2) of the Gewerbeordnung, which Bestattung Wien classifies as funeral services in the wider sense, argues for a uniform view to be taken of the various aspects of funeral services and for them to be classified as a need in the general interest.

71. It must therefore be assumed from the above that the activity of undertaking meets a need in the general interest.

(3) Second question: meeting needs not having an industrial or commercial character

72. The purpose of the second question is to determine whether funeral services meet a need that does not have an industrial or commercial character. The Vergabekontrollsenat notes that some 550 undertakers are in operation throughout Austria. It also points out that the Landeshauptmann may impose a ceiling on charges for funeral services. It adds that in the main proceedings Truley advanced the view, which went unchallenged, that there was no significant competition in the local market in Vienna. According to the comments submitted by Truley during the preliminary ruling proceedings, Bestattung Wien is, under an agreement with the City of Vienna, the only provider of funeral services in Vienna. The Vergabekontrollsenat therefore asks whether the existence of significant competition is a condition for deciding that it is not a question of meeting needs not having an industrial or commercial character. In this context it would also like to know whether the factual or legal circumstances are the determinant factors in this respect and in which market, the local one or the national one, it is required to identify competition.

(a) Views of the parties

73. During its analysis of the second question Truley refers to the judgment in British Telecommunications , (43) from which it emerges, Truley claims, that there must be competition in both fact and in law. In particular, all the characteristics of the services concerned, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity's position on the market and any legal constraints must be taken into account. In Truley's view, even as a matter of law there is no competition in the market for funeral services. The WLBG imposed on the City of Vienna a subsidiary obligation in public law to ensure the burial or cremation of the dead. This is true regardless of whether it performs this function itself or entrusts it to a private undertaking. Furthermore, the granting of licences pursuant to the Gewerbeordnung is linked to an examination of need. It largely excludes the pressure of competition and might lead to an undertaking occupying a monopoly position in a given area. Competition is also restricted by the Landeshauptmann's option of imposing a ceiling on charges since this prevents the formation of prices by the free play of market forces. This option was meant not least to help prevent a monopoly position from being abused.

74. Nor, Truley maintains, is there any competition in fact. Under an "exclusive agreement"

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between itself and the City of Vienna Bestattung Wien is the only provider of these services in Vienna. However, even if the existence of significant competition is assumed, the non-industrial or non-commercial character of the need for funeral services stems from the fact that it is one of the core responsibilities of the State within the meaning of the judgment in BFI Holding . (44) Where these needs are concerned, the existence of private providers does not rule out the assumption of non-industrial or non-commercial character.

75. From the commentaries on the Bundesvergabegesetz (the Federal law governing the award of public contracts) it may, moreover, be deduced that classification as a contracting authority is not justified only where the entity concerned has to operate under the same conditions as its private competitors. This is not true of Bestattung Wien since even its act of establishment enjoyed preferential tax treatment. In addition, its employees, who were all taken over from Wiener Stadtwerke, have a special employment relationship with the City's Municipal Corporation. It must also be assumed that their remuneration and pension entitlements are safeguarded by the Municipal Corporation. In this respect Bestattung Wien is in a better position than other funeral undertakings.

76. Referring to the literature on the legislation concerning the award of public contracts, Truley advances the view that, in the event of purely formal privatisation as in the present instance, the resulting entity continues to be a contracting authority.

77. Bestattung Wien shares the view that the second question should be considered on the basis of the existence of competition. Its conclusion, however, differs from Truley's. The determinant legal framework is, in its view, the Gewerbeordnung, according to which the business of funeral undertaking is not reserved for the State or specific entities, but may in principle be carried on by any undertaking. The fact that there is only one provider in certain areas is not necessarily due to the examination of need, but may also be the outcome of an entrepreneurial decision freely taken. In Austria there is, moreover, competition in the form of some 550 undertakers, all of whom are permitted to operate throughout the country. In Bestattung Wien's opinion there is also price competition, since a ceiling is not imposed on the charges for all funeral services. The price levels in Vienna for services not covered by the ceiling correspond to the national average. It also believes that it is an undertaking which operates in accordance with purely economic principles and makes a profit. The municipal authorities do not exercise any influence over its entrepreneurial decisions. For this reason too, it should not be classified as a body governed by public law within the meaning of Directive 93/36.

78. The Austrian and French Governments, the Commission and the EFTA Surveillance Authority take the view that the existence of competition is merely an indication that a need of an industrial or commercial character is being met. In each and every case the legal and factual situation must be examined. They also advance the following arguments:

79. Like Bestattung Wien, the Austrian Government points out that an undertaking is not in competition with others if it is preferred to other undertakings by the State as a result of certain legal arrangements or as a matter of fact. It is enough, however, for competition to be possible in fact and in law. On the other hand, there is no need, in its view, for competition to exist in fact, since this also depends on entrepreneurial decisions.

80. Referring to the judgments in Mannesmann andBFI Holding , the French Government submits that the existence of private providers in the market concerned does not rule out the assumption of an activity not having an industrial or commercial character. The case-law, it submits, shows that three criteria should be examined: the purpose for which the entity was established; the manner in which it performs its tasks; and the connection between its activities and the prerogatives of State action. All three criteria are satisfied in the present case. Bestattung Wien was established to meet a need previously met by the City. The City's subsidiary obligation to meet the costs

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pursuant to Paragraph 10 of the WLBG has a direct influence on the manner in which Bestattung Wien performs its tasks, and the subsidiary obligation to arrange funerals means that a need relating to health protection and hygiene is satisfied. Consequently, Bestattung Wien was established for the special purpose of meeting needs in the general interest not having an industrial or commercial character.

81. The Commission is of the opinion that the existence of competition is not a condition sine qua non for deciding whether a need not have an industrial or commercial character is being satisfied. All factual and legal circumstances should be considered in answering that question.

82. The EFTA Surveillance Authority shares the view that, although Bestattung Wien is exposed to competition, it meets a need in the general interest not having an industrial or commercial character because of Paragraph 10 of the WLBG.

(b) Appraisal

83. In its judgment in BFI Holding the Court ruled that the existence of significant competition, and in particular the fact that the entity concerned is faced with competition from private service providers in the marketplace, may be indicative of the absence of a need in the general interest not having an industrial or commercial character. (45) However, the existence of competition in a sector is merely an indication that a given need has an industrial or commercial character. For, as the Court also stated in this judgment, the term "needs in the general interest, not having an industrial or commercial character" does not exclude needs which are or could be satisfied by private undertakings as well. (46) This case-law has been confirmed in the judgment in Agorà and Excelsior. (47)

84. In view of this case-law it should first be said with regard to the requesting court's second question that the existence of significant competition is not a condition sine qua non for designation of the need as not being of an industrial or commercial character. The existence of significant competition is rather no more than an indication of the satisfaction of an industrial or commercial need.

85. As regards the question whether in law and/or in fact competition must be no more than possible or must actually exist, it must first be said that according to the case-law cited above this can no longer be the decisive factor. If the existence of competition is merely an indication of the satisfaction of an industrial or commercial need, but this is not the only decisive issue, it cannot be decisive for the interpretation of the term "needs of an industrial or commercial character" whether competition is only possible in law or is also possible in fact or exists.

86. It should also be pointed out that in its judgment in BFI Holding the Court emphasised that the definition of a contracting authority is geared to the need and not to whether it may also be satisfied by private undertakings. (48) What is decisive, therefore, is the analysis of the need concerned.

87. Besides commenting on the indicative effect of competition in a given market, the Court stressed in its judgment in BFI Holding , with regard to the description of needs in the general interest not having an industrial or commercial character, that in general the needs in question are ones which are met otherwise than by the availability of goods or services in the marketplace and which, for reasons associated with the general interest, the State itself chooses to meet or over which it wishes to retain a decisive influence. (49) These statements were confirmed in the judgment in Agorà and Excelsior . (50)

88. From these comments it follows that all circumstances, both legal and factual, must be taken into account in determining whether competition exists. It should thus be considered whether funeral

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services are provided otherwise than through the relevant market or whether, for reasons associated with the general interest, the City of Vienna itself chooses to provide them or at least to retain a decisive influence over their provision.

89. To answer these questions, the relevant market must first be identified. This is a question of fact, which must be answered by the requesting court itself. (51) In this context it should be borne in mind, on the one hand, that more than 500 registered undertakers may in principle operate throughout Austria. This may be an indication of the existence of a national market. On the other hand, it should be remembered that the Gewerbeordnung requires a licence to be obtained and the need for funeral services to be examined in this context. This examination has to be made by the Landeshauptmann, which may be an indication of a market limited to the federal Land concerned.

90. The examination to be made of the need for funeral services is also important in another respect. For one thing, it limits competition, regardless of how the relevant market is defined in geographical terms. The public authorities retain a crucial influence at least as regards the number of providers operating in the market.

91. For another, a particularly important factor to be considered in the examination of the need for funeral services pursuant to Paragraph 131(2) of the Gewerbeordnung is whether the municipality has made adequate provision for funerals. As stated above in connection with the first question, this implies that the municipality is active in the field of funeral services and thus possibly reserves this sector for itself. These two aspects must be assessed by the requesting court in the light of the case-law cited above.

92. It does not necessarily follow from the last of the factors referred to that the municipality reserves this activity for itself. Even if it arranges funerals itself, there may be an additional need which it does not itself meet, and it might therefore permit other undertakings to operate despite its own activity. If it reserves this activity for itself, however, the fact that it does so is likely to be a circumstance which should be considered in the classification of funeral services, since the public authorities' deliberate reservation of an activity for themselves is a ground for applying the directives on the award of public contracts to the entity which benefits in this way.

93. The question whether or not a need has an industrial or commercial character arises when it comes to determining the scope ratione personae of the directives. If the authorities reserve a given activity for themselves, the danger is that the decisions taken in the context of the exercise of that activity will be influenced by factors other than purely economic considerations. There is thus cause to apply the directives on the award of public contracts and so to assume that the need which is satisfied does not have an industrial or commercial character. Truley's contention that under an agreement with the City of Vienna Bestattung Wien has an exclusive right to provide funeral services in Vienna should be examined more closely by the requesting court in this context.

94. From the legal point of view, the national court should also bear in mind that competition in the market for funeral services is restricted not only by the aforementioned examination of the need for funeral services pursuant to Paragraph 131 of the Gewerbeordnung but also by the fact that the Landeshauptmann is required by Paragraph 132 of the Gewerbeordnung to set maximum charges. Bestattung Wien's objection that this is not true of all services does not necessarily seem relevant. The wording of Paragraph 132 of the Gewerbeordnung does not, at least, provide for any objective restriction to be imposed on certain services. In any event, the competition that is possible in law as a result of the licensing of several undertakers is restricted in so far as charges are not determined by the free interaction of supply and demand. This might be an indication that the service within the meaning of the case-law cited above can be provided otherwise than by the provision of services in the market. The public authorities exercise some influence over the provision of funeral services, moreover, by setting maximum charges, which, according to the case-law cited

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above, should similarly be taken into account.

95. In my Opinions in Agorà and Excelsior and Universale Bau I proposed that, when it was being considered whether an entity met needs not having an industrial or commercial character, one of the questions that should be asked was whether the entity bore the financial risk of its decisions. If it had to bear the financial consequences of its decisions itself, an industrial or commercial activity was likely to be involved. (52) If this yardstick is applied to Bestattung Wien, the requesting court should first consider the extent to which the articles of association of Bestattung Wien impose an obligation on the City to offset any losses incurred by Bestattung Wien. Truley's comments on the legal position of Bestattung Wien's employees and the possible protection of their remuneration and pension entitlements should also be examined. The extent to which the shareholders, i.e. Wiener Stadtwerke, which is in turn owned by the City, are obliged to contribute more capital if losses are incurred may also play a part in this context.

96. The subsidiary rule on meeting costs in the second sentence of Paragraph 10(1) of the WLBG, however, does not seem capable on its own of supporting the assumption that Bestattung Wien does not bear any economic risk. The rule on costs applies only where funeral costs are not met in some other way. In principle, however, the costs would be reimbursed to any undertaker. If, then, Paragraph 10 of the WLBG was interpreted as having the meaning outlined, any funeral activity would of necessity not have an industrial or commercial character. This does not appear to be compatible with the rules on the business of undertaker in the Gewerbeordnung, which require that it also be possible for this activity to be undertaken commercially.

97. The answer to the second question is therefore that for the interpretation of the term "needs not having an industrial or commercial character"

(a) the existence of significant competition is not an imperative condition for assuming that a need has an industrial or commercial character, and

(b) both the factual and the legal circumstances are determinant factors in establishing the level of competition.

(4) Third question: supervision by the State or a regional or local authority

98. In the third question the Vergabekontrollsenat asks whether the powers of the Kontrollamt of the City of Vienna in relation to Bestattung Wien result in the undertaking being monitored by the regional or local authority within the meaning of the third condition of Article 1(b) of Directive 93/36.

(a) Views of the parties

99. Truley's view is that Bestattung Wien is subject to supervision by the City of Vienna within the meaning of Directive 93/36. It bases this view firstly on the ownership structure of Bestattung Wien: Bestattung Wien is a wholly-owned subsidiary of Wiener Stadtwerke Holding AG, whose sole shareholder is the City of Vienna. As a result of this ownership structure Bestattung Wien is also subject to supervision by the Austrian Court of Auditors. In addition, some members of Bestattung Wien's supervisory board are members of the management board of Wiener Stadtwerke Holding AG. The City's influence is also evident where the possibility of insolvency is concerned. Pursuant to Paragraph 10 of the WLBG, the City is always obliged to contribute appropriate capital if Bestattung Wien faces financial difficulty. Thus Bestattung Wien is not forced to take its decisions solely on the basis of economic criteria, since it does not bear the financial risk of its activities. Truley also refers to Paragraph 10.3 of the articles of association of Bestattung Wien, according to which Vienna's Kontrollamt examines Bestattung Wien's day-to-day business management and reports its findings to the City.

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100. Bestattung Wien, the Austrian Government and the Commission, on the other hand, take the view that a posteriori supervision, as carried out by the Kontrollamt of the City of Vienna in Bestattung Wien's case, does not meet the requirements to be satisfied by supervision within the meaning of Article 1 of Directive 93/36. Their various submissions are as follows:

101. Bestattung Wien maintains that supervision by the Kontrollamt has no influence on its day-to-day business or its business policy. It constitutes no more than a flow of information, which is permissible by the standards of competition law.

102. The Austrian Government adds that Article 1 of Directive 93/36 presupposes the possibility of exercising ex ante influence, enabling non-economic considerations to guide the decisions of the entity concerned.

103. The Commission refers to the Opinion of Advocate General Mischo in Case C-237/99 (53) and takes the view that supervision within the meaning of Article 1 of Directive 93/36 is characterised by the entity's heavy dependence on the public authorities. It believes this supervision must be reflected in the possibility of influencing day-to-day business, which is not true of the supervision of Bestattung Wien by the Kontrollamt of the City of Vienna.

104. The French Government focuses less on the timing of supervision than on its effect. Referring to Advocate General Mischo's comments in Case C-237/99, (54) it asks whether the supervision merely concerns proper accounting or causes the entity's business practices to follow a given course. As the Kontrollamt also examines the economy, efficiency and expediency of Bestattung Wien's business management, the possibility of exercising influence within the meaning of Article 1 of Directive 93/36 exists in this case.

105. The EFTA Surveillance Authority is of the opinion that the situation described in Article 1 of Directive 93/36 is characterised by a particularly close relationship of dependence. It suggests that the requesting court should consider whether Bestattung Wien has a similarly close relationship of dependence with the City.

(b) Appraisal

106. The third question seeks a determination as to whether, given the Kontrollamt's power to carry out investigations at Bestattung Wien, it can be assumed that there is a possibility of exercising influence within the meaning of the third criterion of Article 1(b) of Directive 93/36. As the Court ruled in its judgement in Case C-237/99, the object when examining this criterion is to determine whether supervision forges a link with the public authorities that enables the latter to influence the decisions of the entity concerned in relation to public contracts. This means that the link existing between the entity and the public authorities must be equivalent to that which exists where one of the other two alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of its managerial organs. (55)

107. Pursuant to Paragraph 10.3 of the articles of association of Bestattung Wien, the Kontrollamt is entitled to examine both Bestattung Wien's business management, in terms of proper accounting, regularity, economy, efficiency and expediency, and the annual accounts and situation report, including the recording of receipts and other documents, to inspect its business premises and facilities, and to report the findings of such examinations to the competent authorities, the shareholders and the City of Vienna. The question now is whether it may justifiably be assumed from this possibility of supervising Bestattung Wien that its day-to-day business and especially the award of contracts can be influenced. One important factor to be determined to this end is the time at which the supervision takes place.

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108. In the third of the questions referred to the Court for a preliminary ruling the Vergabekontrollsenat obviously assumes that the Kontrollamt's supervision is a posteriori. If this is the case, it would seem impossible in principle to infer influence equivalent to that referred to in the third criterion in Article 1(b) of Directive 93/36.

109. It seems doubtful, on the other hand, that the Kontrollamt's power relates to a posteriori supervision. According to Paragraph 10.3 of the articles of association of Bestattung Wien, the Kontrollamt of the City of Vienna is authorised to examine not only the annual accounts but also Bestattung Wien's "business management" . The first point to be made, therefore, is that the wording of this provision does not limit the Kontrollamt's power to a posteriori supervision. Bestattung Wien's annual accounts are reviewed a posteriori. Under the articles of association however, the Kontrollamt's supervisory power also extends to "business management" .

110. It should also be pointed out that the aforementioned provision empowers the Kontrollamt to examine not only Bestattung Wien's business management for proper accounting and regularity but also its transactions for economy, efficiency and expediency. The examination of expediency in particular indicates a very extensive supervisory power. It extends beyond the monitoring of proper accounting and monitoring confined to ensuring the lawfulness of the conduct of business and indicates a close relationship between supervisor and supervised. It does indeed correspond to the "review of conduct" required by Paragraph 73(1) of the WStV for entities forming part of the municipal administration.

111. This substantive equivalence is probably due to Paragraph 73(2) and (3) of the WStV, which requires the Kontrollamt to examine commercial undertakings in which the City has a holding. This too shows how close Bestattung Wien and the City of Vienna are.

112. An added factor is that the provision in question authorises the Kontrollamt not only to examine documents and receipts, i.e. to carry out an audit: it may also inspect Bestattung Wien's business premises and facilities. This too constitutes an extensive supervisory power, enabling the Kontrollamt to conduct independent examinations. Among other things, the provision is likely to ensure that the obligation pursuant to Paragraph 73(6) of the WStV to carry out specific acts in relation to the review of conduct is fulfilled. This again reflects a close link between the municipality and Bestattung Wien.

113. Finally, the Kontrollamt reports the findings of its examination pursuant to Paragraph 10.3 of the articles of association not only to the competent authorities and Bestattung Wien's shareholders but also to the City of Vienna. Apart from the fact that the City of Vienna holds all the shares in Bestattung Wien and so currently has to be informed in its capacity as shareholder, this provision enables the City to be informed even if it ceases to be a shareholder through Wiener Stadtwerke Holding AG. In this respect too, the public authorities exercise very wide-ranging control.

114. It should perhaps be added that the question raised by the requesting court seeks to determine how far Bestattung Wien fulfils the third criterion, which, according to Article 1(b) of Directive 93/36, must be satisfied for an entity to be deemed to be governed by public law and for the directives on the award of public contracts to become applicable. It should be pointed out in this connection that Bestattung Wien is wholly owned by Wiener Stadtwerke Holding AG, which is itself wholly owned by the City of Vienna. In its judgment in Mannesmann the Court of Justice inferred inter alia from the Austrian State's retention of the majority of the share capital of the State printing office that the latter was subject to State supervision. (56) In its judgment in Telaustria it confirmed this approach and similarly inferred from the State's shares in that company that it was able to exercise influence over it. (57) To this extent, it seems perfectly acceptable to agree that the regional or local authority has a decisive influence on Bestattung Wien.

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115. The answer to the third question is therefore that the requirement laid down in Article 1(b) of Directive 93/36 that the management of a body governed by public law be subject to supervision by the State or a regional or local authority is also fulfilled by a review of the business management and the expediency of the actions of the body examined which includes a separate inspection of its business premises and facilities and provides for an obligation to report to the municipal authority which holds all the shares in the body examined through another undertaking all of whose shares it holds.

VI Conclusion

116. In view of the foregoing considerations I propose that the questions submitted for a preliminary ruling should be answered as follows:

(1) The term "needs in the general interest" should be interpreted in accordance with Community law. Only when this abstract legal concept is applied to a practical set of circumstances do the legal and factual situation of the body concerned and, in this context, national law become relevant.

Funeral services constitute a need in the general interest.

(2) In the interpretation of the requirement "meeting needs... not having an industrial or commercial character"

(a) the existence of significant competition is not an imperative condition for assuming that a need has an industrial or commercial character, and

(b) both the factual and the legal circumstances are determinant factors in establishing the extent to which competition occurs.

(3) The requirement laid down in Article 1(b) of Directive 93/36 that the management of the body governed by public law must be subject to supervision by the State or a regional or local authority is also fulfilled by a review of the business management and the expediency of the actions of the body examined which includes a separate inspection of its business premises and facilities and provides for an obligation to report to the municipal authority that holds all the shares in the body examined through another undertaking all of whose shares it holds.

(1) .

(2) OJ 1993 L 199, p. 1.

(3) Published in BGBl. No 194/1999 and amended in BGBl. No 136/2001.

(4) LGBl. No 31/1970, in the version published in LGBl. No 25/1988.

(5) Wiener LGBl. No 36/1955, in the version published in LGBl. No 30/1999.

(6) LGBl. No 17/1999 of 18 March 1999.

(7) Judgment in Case C-103/97 Köllensperger and Atzwanger [1999] ECR I-551, paragraph 22.

(8) See the judgment in Joined Cases C-223/99 and C-260/99 Agorà and Excelsior [2001] ECR I-3605, paragraph 18, Case 5/77 Denkavit [1977] ECR 1555, paragraphs 17 to 19, and Case 244/80 Foglia [1981] ECR 3045, paragraph 15.

(9) Judgment in Joined Cases C-223/99 and C-260/99 (cited in footnote 8), paragraph 20; judgment in Case 244/80 Foglia (cited in footnote 8), paragraph 18; judgment in Case C-83/91 Meilicke [1992] ECR I-4871, paragraphs 22 to 26.

(10) Judgment in Case C-360/96 BFI Holding [1998] ECR I-6821.

(11) Judgment in Case 327/82 Ekro [1984] ECR 107; judgment in Case C-273/90 Meico-Fell

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[1991] ECR I-5569; judgment in Case 64/81 Corman v Hauptzollamt Gronau [1982] ECR 13.

(12) It is referring to the judgment in Case 31/87 Beentjes [1988] ECR 4635.

(13) Communication from the Commission, "Services of general interest in Europe" , 20 September 2000, OJ 2001 C 17 of 19 January 2001, p. 4.

(14) Judgment in Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73.

(15) Judgment in Case C-287/98 Linster [2000] ECR I-6917.

(16) Opinion of Advocate General La Pergola in Case C-360/96 BFI Holding [1998] ECR I-6821, I-6824, point 43.

(17) Judgments in Linster (cited in footnote 15), paragraph 43, Ekro (cited in footnote 11), paragraph 11, and Corman (cited in footnote 11), paragraph 8.

(18) Judgment in Ekro (cited in footnote 11), paragraph 14. See also the judgment in Meico-Fell (cited in footnote 11), paragraphs 9 to 12, which concerned a reference to national criminal law.

(19) See the judgments in BFI Holding (cited in footnote 10), paragraph 50, and in Agorà and Excelsior (cited in footnote 8), paragraph 36.

(20) Amendment No 4, Report of the Committee on Economic and Monetary Affairs and Industrial Policy, Session Documents of the European Parliament , 1988-89, Doc. A2-37/88, p. 6, and explanatory statement, p. 31. See, however, the proposal from the Commission for a Council directive amending Directive 71/305/EEC on the coordination of procedures for the award of public building contracts, COM(86) 679 final of 23 December 1986, pp. 6 and 22, in which the Commission proposed the term "legal persons" .

(21) See the aforementioned report, explanatory statement, p. 31.

(22) See the comments by the rapporteur, Beumer, at the European Parliament's sitting of 17 May 1988, Report of Proceedings of the European Parliament , 17 May 1988, No 2-365, p. 83.

(23) Judgment in Linster (cited in footnote 15), paragraph 43; judgment in Corman (cited in footnote 11), paragraph 8. This problem is also addressed in the judgment in Meico-Fell (cited in footnote 11), paragraphs 9 to 12. The divergence arising from the differences in national legislation was accepted in this judgment because, as Community law then stood, the classification of a certain kind of conduct for the purposes of criminal law was not harmonised and was therefore governed by national law.

(24) Judgment in Mannesmann Anlagenbau Austria and Others , cited in footnote 14, paragraphs 22 to 25.

(25) Judgment in Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 36.

(26) Judgment in Case C-237/99 Commission v France [2001] ECR I-939, paragraphs 45 and 51 et seq.

(27) See the judgments in Case C-320/88 Shipping and Forwarding Enterprise Safe [1990] ECR I-285, paragraph 11, Case C-107/98 Teckal [1999] ECR I-8121, paragraph 31, and Joined Cases Agorà and Excelsior (cited in footnote 8), paragraph 23.

(28) Truley is referring to the judgment in BFI Holding (cited in footnote 10), paragraph 62.

(29) OJ 1993 L 199, p. 54.

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(30) Communication from the Commission COM (96) 443, "Services of general interest in Europe" , OJ 1996 C 281, 26 September 1996, p. 3, and Communication from the Commission, "Services of general interest in Europe" , OJ 2001 C 17, 19 January 2001, p. 4.

(31) Opinion in Case C-179/90 Merci convenzionali porto di Genova [1991] ECR I-5889, I-5905, point 27.

(32) OJ 1993 L 199, p. 54.

(33) OJ 1993 L 199, p. 84.

(34) OJ 1992 L 209, p. 1.

(35) Judgment in Mannesmann Anlagenbau and Others (cited in footnote 14), paragraph 24.

(36) Judgment in BFI Holding (cited in footnote 10), paragraph 52.

(37) Judgments in Case C-353/96 Commission v Ireland [1998] ECR I-8565, paragraph 37, and Case C-306/97 Connemara Machine Turf [1998] ECR I-8761, paragraph 32.

(38) Judgment in Case C-380/98 The University of Cambridge [2000] ECR I-8035, paragraph 19.

(39) Judgment in Telaustria (cited in footnote 25), paragraphs 35 to 37.

(40) Judgment in Case C-237/99 Commission v France (cited in footnote 26), paragraphs 45 and 47.

(41) Judgment in Agorà and Excelsior (cited in footnote 8), paragraph 33.

(42) Law of 16 October 1970, LGBl. No 31/1970; subsequent amendments of 30 July 1974, LGBl. No 38/1974, 28 February 1986, LGBl. No 20/1986, and 25 April 1988, LGBI. No 25/1988.

(43) Judgment in Case C-392/93 British Telecommunications [1996] ECR I-1631.

(44) Truley refers to paragraph 52 of the judgment in BFI Holding (cited in footnote 10).

(45) Judgment in BFI Holding (cited in footnote 10), paragraph 49.

(46) Judgment in BFI Holding (cited in footnote 10), paragraph 53.

(47) Judgment in Agorà and Excelsior (cited in footnote 8), paragraph 38 et seq.

(48) Judgment in BFI Holding (cited in footnote 10), paragraph 40.

(49) Judgment in BFI Holding (cited in footnote 10), paragraphs 50 and 51.

(50) Judgment in Agorà and Excelsior (cited in footnote 8), paragraph 37.

(51) For the equivalent question in competition law, see the judgment in Case C-475/99 Ambulanz Glöckner [2001] ECR I-8089, paragraph 31 et seq.).

(52) See the comments in the Opinion in Joined Cases C-223/99 and C-260/99 Agorà and Excelsior [2001] ECR I-3605, I-3607, point 67, and the Opinion in Case C-470/99 Universale Bau [2002] ECR I-11617, points 27 and 45.

(53) Opinion in Case C-237/99 Commission v France [2001] ECR I-939.

(54) Opinion in Case C-237/99 Commission v France (cited in footnote 53), point 51.

(55) Judgment in Case C-237/99 Commission v France (cited in footnote 26), paragraph 48.

(56) Judgment in Mannesmann Anlagenbau Austria and Others (cited in footnote 14), paragraph

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28.

(57) Judgment in Telaustria and Telefonadress (cited in footnote 25), paragraph 35.

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Opinion of Mr Advocate General Alber delivered on 7 February 2002.
Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy.
Directive 93/36/EEC - Public supply contracts - Directive 89/665/EEC - Review procedures applicable to public contracts - Limitation period - Principle of effectiveness.
Case C-327/00.

I - Introduction

1 In the present proceedings for a preliminary ruling, the Tribunale Amministrativo Regionale per la Lombardia (Lombardy Regional Administrative Tribunal) (hereinafter `the national court') asks whether it can disregard the validity of an invitation to tender for a public supply contract which has not been challenged within the time-limit set by national law so that it can take into account the infringement of Community law by a clause in the invitation to tender in (subsequent) proceedings brought by a tenderer for review of his elimination when the award was made. The present case concerns proof of a tenderer's technical capacity under Article 22 of Directive 93/36/EEC coordinating procedures for the award of public supply contracts (1) (hereinafter `Directive 93/96'). The national court asks whether a national rule which provides for the disapplication of unlawful administrative acts (Article 5 of Law No 2248 of 20 March 1865) also applies to clauses in an invitation to tender which are contrary to Community law. It also asks whether that principle follows from Article 6 of the Treaty on European Union in conjunction with the right to a fair hearing and effective judicial protection under Articles 6 and 13 of the European Convention on Human Rights. Consideration of the reference for a preliminary ruling also necessitates interpreting Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (2) (hereinafter `Directive 89/665').

II - Facts and procedure

2 The main proceedings are at the instance of Santex S.p.A. (hereinafter `the claimant') against Unità Socio Sanitaria Locale n. 42 di Pavia (hereinafter `the defendant') on the ground that it was eliminated from a procurement procedure relating to a supply contract. It contests the decision as to the award of the contract as well as the invitation to tender which, in its opinion, contained a precondition for admission which was contrary to Community law.

3 According to the order for reference, the defendant published an invitation to tender for `direct supplies to people's homes of absorbent incontinence products' for a sum expected to amount to ITL 1 067 372 000 annually in the Official Journal of the European Communities on 23 October 1996. According to the order, the invitation to tender contained a clause to the effect that only undertakings which could prove aggregate turnover over the previous three-year period, for services identical to the one tendered for, of three times the basic estimated contract figure would be admitted to the tendering procedure.

4 The claimant stated in a letter dated 25 November 1996 addressed to the chairman of the defendant's special committee that that clause gave rise to an improper restriction on competition. Having regard to the very recent introduction of that kind of service by local health institutions (aziende sanitarie locale), the application of that clause would give rise to the exclusion of numerous tenderers, including the applicant, which had nevertheless in the last year achieved aggregate turnover amounting to double the estimated contract figure.

5 In view of those comments, the defendant's committee postponed the opening of the envelopes and requested the undertakings concerned to forward comprehensive documentation, taking the view that

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the clause in question could be interpreted as referring to the overall turnover of the participating undertakings and that the supply of products identical to those called for did not constitute a precondition for admission to the tendering procedure, but could be taken into consideration solely as a basis for awarding points for quality. (3)

6 That interpretation was objected to by Sca Mölnlycke S.p.A., which had the contract for the supply of identical products for the previous period. By a letter to the defendant, it called on the latter to comply strictly with the disputed clause of the invitation to tender.

7 Thereafter, the defendant called on the participating undertakings to supplement the documentation already submitted with a declaration as to the turnover achieved in respect of exactly the same products, with a list of the health institutions to which the products had been supplied.

8 The procurement procedure was terminated when the claimant and two other firms were excluded and the contract was awarded to Sca Mölnlycke.

9 The claimant observed that, had it been admitted, it would have been awarded the contract, and challenged both its exclusion from the procedure and the subsequent award of contract, and also contested the notice of invitation to tender on grounds of infringement of legal provisions and misuse of powers.

10 The defendant and Mölnlycke, which was joined to the proceedings, assert that the objection to the terms of the invitation to tender was out of time and should be rejected as unfounded.

11 The national court granted the application included in the action to suspend the operation of the contested measures, on the ground that there had been a breach of the Community competition principles. In so far as the invitation to tender set turnover as a parameter, it restricted participation by competing undertakings in an unlawful and excessive way. Even if the challenge to the notice of invitation to tender was out of time, the clause in the invitation to tender was none the less to be disapplied on the ground of infringement of Community law.

12 That order was set aside by the Fifth Chamber of the Consiglio di Stato (Council of State) by order of 29 August 1997, which did not contain a statement of the factual or legal grounds on which it was based.

13 After the proceedings for interim protective measures had been concluded, the defendant, which had in the meantime suspended the supply service previously provided by Sca Mölnlycke, entered into a definitive contract with that company for the subsequent period.

14 In the main proceedings, the national court has requested a preliminary ruling from this Court as to whether Article 22 of Directive 93/36 or Article 6(2) EC in conjunction with Articles 6 and 13 of the European Convention on Human Rights are to be interpreted as meaning that clauses of an invitation to tender which are contrary to Community law can be disapplied even if they have not been challenged within the time-limit laid down by national procedural law.

15 The Italian, French and Austrian Governments as well as the Commission participated in the written procedure before the Court.

III - The reference for a preliminary ruling

16 In the grounds of its order for reference, the national court states that the fact that the invitation to tender includes a clause which infringes Community law and the corresponding national transposition provisions is decisive. (4) In particular, the precondition for admission requiring turnover over the previous three-year period, for services identical to those in the invitation to tender, three times as high as the amount specified in the tender, infringes the principles of proportionality and of non-discrimination as between tenderers. However, national procedural law

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requires it first to adjudicate on the objection that the application was out of time.

17 The defence is founded on the fact that what prevented the claimant from taking part was the clause in the invitation to tender itself. Thus, it was immediately and directly harmful to the claimant's interest in taking part in the tender and should therefore have been challenged within 60 days from the date on which the claimant became aware of it, pursuant to Article 36 of Royal Decree No 1054 of 6 June 1924. (5)

18 However, the national court considers that it must guarantee effective protection of the rights and interests of applicants in procedures for the award of public contracts both when Community law applies and when national law applies. Therefore, it should disapply provisions in notices of invitation to tender that are unduly restrictive of the principle of maximum participation in public tendering procedures.

19 For that purpose a twofold criterion is consistently applied. First, the automatic inclusion of mandatory provisions in legislation governing tenders by analogous application of Article 1339 of the Civil Code, (6) which does not appear feasible in the present circumstances. Second, disapplication pursuant to Article 5 of Law No 2248 of 20 March 1865, Annex E, (7) which is still in force.

20 As regards the second principle, the Consiglio di Stato has indicated in general terms that, where a regulatory provision conflicts with legislation of higher order which has an impact on a personal right of an individual, the administrative courts may, in the same way as the ordinary judicial authorities under civil law, disapply it. However, there being no personal right involved, the Consiglio di Stato did not apply this rule to the present invitation to tender for the award of public contracts. It follows that the invitation to tender should have been challenged within 60 days, such that after that period expired the conditions in the invitation to tender were to be applied mandatorily.

21 Italian law distinguishes between legitimate interests (which always necessitate a timely challenge against the measure adversely affecting them) and subjective rights (which can be protected by disapplication). It appears that this distinction customarily drawn in national law is not justifiable under Community law.

22 The national court refers to the judgment in Simmenthal, (8) in which the Court of Justice held that a court called upon to apply provisions of Community law is under an obligation to guarantee the effectiveness of such provisions and, if necessary, to decline to apply any conflicting provisions of national legislation, without having to seek or await their prior repeal.

23 Moreover, on the basis of the decisions of the Court in Van Schijndel and van Veen (9) and Eco Swiss, (10) the national court considers that it is necessary first to verify whether in fact any rights had been seriously adversely affected or whether it had been made impossible to apply Community law as a result of the specific course of the administrative procedure laid down as a precondition for the award of the contract in question, which had had a negative impact on the effectiveness of judicial protection in relation to the application of the European provisions.

24 By the approach it had initially appeared to take, namely to interpret the contested clause restrictively, or to amend it, the defendant gave the claimant the impression that it was not necessary to challenge the invitation to tender. By its conduct, the defendant had created a situation of objective legal uncertainty for the claimant. For that reason, the principles this Court developed in Peterbroeck (11) must apply here.

25 In the present case there is a public interest finding the contested exclusion to be illegal, both having regard to the effective enforcement of Community law, on the one hand, and because of the interest of the public administration in opening the tendering procedure to wider competition,

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as a way of obtaining the best product at the most favourable price, on the other.

26 There are ample grounds for intervention by the national court of its own motion. Thus, the Court of Justice has held in Océano Grupo Editorial, (12) in relation to consumer contracts, that the national court is entitled to determine of its own motion whether a term of the contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed.

27 The conclusion to be drawn from Eco Swiss, (13) namely that, where certain rules of national procedural law are not observed, the application ex proprio motu of Community law is not called for, does not apply in the factual and legal circumstances of the present case.

28 The national court has referred the following questions to the Court for a preliminary ruling:

(1) May Article 22 of Directive 93/36/EEC of 14 June 1993 be interpreted as meaning that the competent national courts are required to protect citizens of the Union adversely affected by measures adopted in breach of Community law, by resorting, in particular, to disapplication as provided for in Article 5 of Law No 2248 of 20 March 1865 with respect to clauses of an invitation to tender which are contrary to Community law but were not challenged within the short limitation period laid down by national procedural law for the application of Community law by the court of its own motion, whenever it is found, first, that the application of Community law has been seriously impeded or rendered difficult in any way, and second, that there is a public interest, of Community or national origin, which justifies such application?

(2) Does Article 6(2) of the Treaty (14) which, by providing for respect of the fundamental rights safeguarded by the European Convention on Human Rights and Fundamental Freedoms, has adopted the principle of effective judicial protection provided for in Articles 6 and 13 of that Convention, lead to the same conclusion?

IV - Legal framework

A - Community law

29 Article 22 of Directive 93/36 provides:

`1. Evidence of the supplier's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) - (b) ...

(c) a statement of the supplier's overall turnover and its turnover in respect of the products to which the contract relates for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which references other than those mentioned under paragraph 1 are to be produced.

3. If, for any valid reason, the supplier is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

30 In the present case, Article 1(1) and (3) and Article 2(1)(b) and (6) of Directive 89/665 are also relevant. They provide:

Article 1

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`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

2. ...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

Article 2

`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. - 5. ...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

7. - 8. ...

Article 3

`1. The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.

2. - 5. ...'

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B - Italian Law

31 Article 13 of Legislative Decree No 358 of 24 July 1992, which is headed `Consolidated text of the provisions relating to public supply contracts implementing Directives 77/62/EEC, 80/767/EEC and 88/295/EEC', transposes Article 22 of Directive 93/36 and provides as follows:

Article 13

`1. Evidence of the competing undertakings' financial and economic standing may be furnished by one or other of the following documents:

(a) - (b) ...

(c) a statement of the undertaking's overall turnover and its turnover in respect of the products to which the contract relates for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which of the documents mentioned in paragraph 1 must be produced and any other references which are to be produced...

3. If, for any valid reason, the supplier is unable to provide the references requested, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

32 Article 36(1) of Royal Decree No 1054 of 26 June 1924 (hereinafter Article 36 of the Law of 26 June 1924), which consolidates the laws relating to the Consiglio di Stato and whose application was extended to the administrative courts by Article 19 of Law No 1034 of 6 December 1971, is also material in the present dispute. It provides:

`Article 36

1. Except where time-limits are prescribed by specific laws relating to applications for review, the time-limit for submitting an application for review to the Consiglio di Stato in its judicial capacity shall be 60 days from the date on which the administrative decision was notified in the form and manner laid down by regulation or from the date on which it is apparent that the person concerned became fully aware of it....'

33 Finally, it is necessary to cite Article 5 of Law No 2248 of 20 March 1865 in the present proceedings:

`Article 5

The judicial authorities shall apply general and local administrative acts and regulations in so far as they are in conformity with primary legislation.'

V - Submissions of the parties

34 The Italian Government submits that the national court is proceeding on the basis that the Community law provisions have direct effect and that the protection provided by the Community legal order thus requires the national judge to ensure the effective application of those provisions irrespective of whether national procedural law was observed.

35 However, the Italian Consiglio di Stato has recently confirmed its case-law on invitations to tender, stating in a judgment of 7 April 1998 that an act which adversely affects a tenderer's right to take part in a public procurement procedure must be challenged within the usual time-limit of 60 days. If that period has expired, it is no longer possible to disapply the administrative

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act. The administrative act becomes immune to challenge, every action against it becomes inadmissible, and every cause of action based on the act's illegality had to be rejected.

36 The validity of the administrative act is a sanction for the failure of the person who considered his rights to be affected to act, and strengthens faith in the legality of the authority's conduct. Legal certainty requires that the administrative act be valid, in the same way as it requires the legal institutions of prescription and finality of judgments. If the invitation to tender could still be challenged, competitors' legitimate expectations and economic interests would be infringed.

37 The main dispute depends not so much on the legal nature of Article 22 of Directive 93/36 as on whether the requirements in the invitation to tender as regards financial and economic standing are lawful. The Italian Government considers that to be beyond doubt. In any case, Article 22 of the directive does not have direct effect.

38 The question arises as to the relationship between the general obligation of Member States under Article 10 EC to cooperate in the implementation of Community law, which is incumbent on national courts as well, and the principles of national procedural law.

39 The Italian Government points out that the Court has consistently held that in the absence of Community rules governing this matter, it is for the domestic legal system of each Member State to lay down the detailed rules of procedure governing actions for safeguarding rights which individuals derive from the direct effect of Community law. According to that case-law, those procedural rules must not be less favourable than those governing similar rights conferred by national law, and must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

40 Italian law provides that administrative acts may be challenged within 60 days. Any infringement of either national or Community law may result in the administrative act being declared unlawful. Thus, there is no discrimination and there is nothing preventing the effective application of Community law. If judges were allowed to ignore national procedural law in cases of infringement of directly effective Community law there would be unjustified discrimination against national provisions of comparable content.

41 The principle of effective legal protection which derives from Articles 6 and 13 of the European Convention on Human Rights applies only in respect of Community acts and national acts giving effect to them; it cannot be applied in a way that is detrimental to national procedural rules.

42 Therefore, the Italian Government proposes that the questions referred should be answered as follows:

In the absence of any objective justification for applying different procedural rules to actions based on directly effective Community law, on the one hand, and actions based on national laws having the same content, on the other, it is not possible to disapply national procedural rules relating to the judicial enforcement of rights alleged to have been infringed.

43 The Austrian Government considers that the first question seeks to ascertain whether applicable Community law in the field of public procurement precludes the application of national limitation provisions. For that reason, the legal framework depends on the directive relating to review procedures in the field of public procurement, namely Directive 89/665.

44 The Republic of Austria submits that it is permissible to make applications to the competent review body for a procurement procedure subject to time-limits, provided this does not undermine the objectives of Directive 89/665 or infringe the principles of effectiveness and equal treatment that derive from the Treaty on European Union. The directive itself contains no exclusive rules as to the organisation of review bodies and the procedure to be followed in applications to them.

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For that reason, it is for each Member State to lay down the detailed procedural rules.

45 Nor is the legal protection given to other candidates and tenderers impaired by the 60-day time-limit for challenging administrative decisions at issue in the present case. Instead, its purpose is to ensure that unlawful decisions are declared as such and set aside as soon as possible once the person seeking legal protection has become aware of them, and this in the interest of the other candidates and tenderers, in the public interest of the proper functioning of the administration, and indeed in the interest of those taking the legal proceedings.

46 The Republic of Austria submits that the questions referred should therefore be answered as follows:

Directive 89/665 does not preclude national law under which, in the event of knowledge being acquired of the irregularities in the award, a time-limit is laid down for bringing review proceedings in respect of a specific decision of the contracting authority, with the effect that, if that time-limit is not complied with, that decision can no longer be challenged in subsequent stages of the procurement procedure. The time-limit laid down must not be such that the bringing or the pursuit of review proceedings is rendered virtually impossible or excessively difficult. In the event of knowledge being acquired of the irregularities in the award, it may be provided that every defect must be challenged within the time-limit laid down for that purpose, failing which any interests affected will be forfeited.

47 The French Government pleads the first question as asking whether a national court is required to verify the compatibility of a national act with Community law of its own motion where the act has not been challenged within the time-limit laid down by national procedural law. The French Government submits that this question should be answered in the negative.

48 The French Government, too, refers to the Court's judgment in Peterbroeck (15) and concludes that a time-limit of 60 days for bringing proceedings, such as is provided for in Italy in respect of challenges to administrative acts, does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

49 By providing a legal framework for challenges and fixing a time-limit for raising them, limitation provisions serve the principle of legal certainty for the benefit of all parties. Legal certainty is one of the fundamental principles of the Community legal order. Those principles are of a public-policy nature and must be observed by the parties and the Court.

50 As regards the national court's view that the contracting authority's conduct in the present case after the invitation to tender had been published contributed to the inadmissibility of the proceedings brought by the claimant, the French Government referred to the case of Edis. (16) Admittedly, it was recognised in this case that the conduct of a national authority, combined with a time-limit, could have the effect of depriving a claimant of any opportunity of asserting his rights before the national courts. However, an undertaking such as the claimant could not mistake the necessity of bringing legal proceedings within the applicable time limits in order to protect its position, even if it was negotiating with the contracting authority at the same time.

51 The French Government suggests that the questions referred for preliminary ruling should therefore be answered as follows:

Community law does not require a national court seised of a matter within its jurisdiction to verify the compatibility of a national legal act with Community law of its own motion where the person affected has not challenged that act within the time-limit laid down by national procedural law.

Article 6(2) of the Treaty on European Union, in so far as it refers to Articles 6 and 13 of the European Convention on Human Rights, does not create any additional obligations in this regard.

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52 In its observations, the Commission notes first that the criteria laid down in the case-law of the Court for the assessment of national systems of legal protection, such as the prohibition of discrimination and the requirement that they do not render virtually impossible or excessively difficult the exercise of rights, can be applied only where Community law does not, whether directly or by means of harmonised laws, contain the rules that must be applied in national law. Directive 89/665 applies in the field of public procurement and the reference for a preliminary ruling must be considered the light of that directive.

53 The Commission therefore suggests that the question referred for a preliminary ruling should be reformulated as follows:

Is Directive 89/665 to be interpreted as meaning that the competent national courts are required to protect citizens of the Union whose rights have been infringed by a measure taken in breach of Directive 93/36 by disapplying clauses in an invitation to tender which are incompatible with Community law but which have not been challenged within the time-limits laid down by national law, in order to apply of their own motion Community law at every stage of the procurement procedure, including the award decision?

54 Given that Directive 89/665 lays an obligation on the Member States to ensure that effective and rapid legal procedures are available against a contracting authority's decisions and allow unlawful decisions to be set aside irrespective of whether an earlier decision has been challenged within the applicable time-limits, the question whether the award and elimination decisions are `decisions' within the meaning of the directive must be considered.

55 The list in Article 2(1)(b) of Directive 89/665 of unlawful decisions that can be challenged is given by way of example only and is not exhaustive. As regards the award decision, the Commission refers to the case of Alcatel (17) in which it was held that the award decision was a decision within the meaning of Directive 89/665.

56 As regards the elimination decision, the Commission observes that this is the act by which the contracting authority responds to the undertaking's application to take part in the procurement procedure. In making this decision, the contracting authority refers to the general and special clauses in the invitation to tender and thereby takes a view as regards their interpretation. Therefore, this step constitutes a new, autonomous decision. If the invitation to tender infringes Community law, the contracting authority is actually obliged to give direct effect to Community law and make a lawful decision.

57 It followed that an elimination decision is a decision within the meaning of Directive 89/665 which must be capable of being challenged by rapid and effective legal remedies, and it is not necessary to have regard to an unlawful invitation to tender, which therefore is not to be given effect.

58 In the present case, moreover, the contracting authority initially gave the impression that the disputed clause in the invitation to tender could be regarded as an award criterion and not as a selection criterion and that it thus interpreted the invitation to tender in conformity with Community law or applied that law directly.

59 The preparatory acts to Directive 89/665 confirm the view expressed above. The Commission's original proposal provided: `Member States shall take the measures necessary to ensure, at all stages of the contract award procedure, effective administrative and/or judicial remedies ...' (18). In the Council, the phrase, `at all stages of the contract award procedure' was deleted without explanation, and the Italian delegation requested that the expression `decisions' should be replaced by `every decision'. This request was subsequently withdrawn as a result of the common position on Article 1, which was included in the minutes. The common position stated in substance that the Council and the Commission declared that for the purposes of that directive every person excluded

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from taking part in a procedure for the award of a public contract because of an alleged infringement was a person who had or had had an interest in the award of a public contract and whose rights had been or risked being infringed.

60 The Commission proposes that the request for a preliminary ruling should be answered as follows:

Directive 89/665 requires a competent national court to ensure the protection of citizens of the Union whose rights have been infringed by administrative acts taken in breach of Directive 93/36 by disapplying clauses in an invitation to tender which are incompatible with Community law but which have not been challenged within the time-limit laid down by national procedural law, in order to apply of its own motion Community law at every stage of the procurement procedure, including the award decision.

VI - Assessment

61 If one reads the questions referred in the context of the reference for preliminary ruling, it becomes clear that, contrary to the formulation of the first question the national court is in fact not seeking an interpretation of Article 22 of Directive 93/36. The national court appears to be convinced that the disputed clause in the invitation to tender is unlawful. It considers that the clause infringes both Article 22 of Directive 93/36 and Article 3(1)(c) of Legislative Decree No 358 of 24 July 1992, which was enacted in order to transpose the Community-law provision into national law.

62 Admittedly, the Italian Government has indicated that it considers the disputed clause to comply with the relevant provisions. However, if the disputed provision were not to be regarded as incompatible with Community law, the national court's further question as to whether and if so under what conditions the clause could be disapplied would have no purpose. Therefore, for the purposes of further examination of the questions referred for a preliminary ruling it must be assumed, as does the national court, that the disputed clause is unlawful under both Community law and the national transposition provisions.

63 As regards the decision in the proceedings before it, the national court finds itself confronted with the problem that it considers the clause that led to the elimination of the claimant from the procurement procedure to be unlawful but to have become unchallengeable by virtue of national procedural law. (19) It appears from the Italian Government's submissions that not only is a belated challenge to the administrative act inadmissible, but also any causes of action in other proceedings based on the alleged unlawfulness of the administrative act must be rejected as inadmissible. This means that even incidental examination of the administrative act in question is usually impossible in subsequent administrative proceedings.

64 As a result of questions posed by the Judge-Rapporteur, there was a discussion at the hearing which led to the following being acknowledged. It is, under Italian law, possible to consider the validity of an allegedly unlawful administrative act incidentally. In civil law proceedings, for example concerning a claim for damages founded on the unlawful administrative act, such incidental consideration is clearly possible. It is only in administrative proceedings, where the public interest in the validity of the administrative act must take precedence, that its unlawfulness cannot be founded on as a cause of action.

65 The national court pointed out in the order for reference that the Italian Consiglio di Stato has held that where a regulatory provision conflicts with legislation of a higher order, the administrative courts as well may, in the same way as the ordinary judicial authorities under civil law, disapply it, in order to protect subjective rights. The national court has no doubt that this applies also in respect of administrative acts which conflict with Community law.

66 Therefore, it appears that under national law, whether an incidental challenge to an unlawful

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administrative act is admissible depends on the classification of the potential claimant - whether he can claim subjective rights or `merely' legitimate interests.

67 Since the claimant's legal position following the infringement of Article 22 of Directive 93/36 and the accompanying infringement of the transposition provision is clearly not an infringement of `subjective rights' within the meaning of Italian law, it is not possible for the national court to take into account what it considers to be the illegality of the invitation to tender within the framework of the proceedings to challenge the elimination decision.

68 Against this background, and contrary to the views of the participants in the proceedings before the Court, the national court's first question may be understood as asking whether Article 22 of Directive 93/36 grants a tenderer subjective rights. Thus, it concerns the classification of the legal position of participants in a procurement procedure as delimited by Article 22 of Directive 93/36.

69 On this approach, the Italian Government's submissions as to the legal nature of Article 22 of Directive 93/36 and, potentially, its direct effect would also be relevant, since the Court's doctrine of the direct effect of the provisions of a directive is based on the premiss that legal rights granted to individuals by a directive merit protection. According to established case-law, an individual can rely on provisions of a directive against the State if, as far as their subject-matter is concerned, they are unconditional and sufficiently precise, provided that they define rights. (20)

70 Article 22 appears in Chapter 2 of Title IV of Directive 93/36, `Criteria for qualitative selection'. The provision states what references may be required by a contracting authority as to the potential suppliers' financial and economic standing. The directive provides three possibilities:

`(a) appropriate statements from bankers;

(b) the presentation of the supplier's balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the supplier is established;

(c) a statement of the supplier's overall turnover and its turnover in respect of the products to which the contract relates for the three previous financial years.'

71 It appears from paragraph 2 of this provision that the various types of reference can be required either alternatively or cumulatively, and that the list of types of reference is not exhaustive. Accordingly, the contracting authority must also state in the contract notice or in the invitation to tender which references other than those mentioned under paragraph 1 are to be produced. In addition, paragraph 3 gives a potential supplier the right to prove his economic and financial standing by any other document which the contracting authority considers appropriate, if for `any valid reason' he is unable to provide the references requested by the contracting authority.

72 In short, the provision clearly contains guarantees for the potential supplier as regards the opportunity to take part in the procurement procedure.

73 None the less, the present case does not concern the direct effect of provisions of a directive, since there is no doubt that the relevant provision was correctly (21) transposed into national law. The problems which arise in the main proceedings from the infringement of these provisions arise at the level of legal protection.

74 Legal protection against an unlawful clause in an invitation to tender can be relevant at different levels. On the one hand, it might concern a direct challenge to the invitation to tender which, under Italian law, must be made within 60 days, as has already been explained. On the other hand, however, the unlawfulness may also continue, become reinforced or indeed first come to light at

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later stages of the procedure, in which case the subject of the challenge is not the invitation to tender as such but the decision regulating or terminating the particular stage of the procedure. In the main proceedings, it is the elimination decision which directly affects the claimant and which is the subject of its challenge.

75 In those circumstances, the question is whether and, if so, in what circumstances the initial unlawfulness of a clause in an invitation to tender can lead to the subsequent decision being set aside.

76 In principle, it is for the Member States to regulate challengeability to administrative acts. However, as regards the transposition of Community law, the principles the Court has developed in its consistent case-law must be observed. These are the principles of equivalence and effectiveness. These principles, which were not described as such in the case-law of the Court until recently, (22) state that procedural rules governing actions for safeguarding rights which individuals derive from Community law must not be less favourable than those governing similar rights conferred by national law and must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. (23)

77 The Court has repeatedly stated in a consistent line of decisions (24) that, under the principle of cooperation, it is for the national courts to ensure the legal protection which individuals derive from the direct effect of Community law. `In the absence of Community rules governing a matter, it is for the domestic legal system to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law'. (25)

78 Therefore, one must first ascertain whether there are any Community rules governing the facts of the present case. Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts lays down minimum requirements for the legal protection to be conferred. Article 1(1) of the directive provides that the Member States are to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively, and, in particular, as rapidly as possible, on the grounds that such decisions have infringed Community law in the field of public procurement. Under Article 1(3), the Member States are to ensure that the review procedures are available at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement.

79 There is no question that under that provision a tenderer who has been eliminated comes therefore within the class of persons who can initiate a review procedure. However, what is not clear is what decisions may or must be the subject of the review. The directive does not contain an exhaustive list of decisions which may be challenged. Article 2(1)(b) simply states: `[T]he Member States shall ensure that the measures taken... include provision for the powers to either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure'.

80 Even if the main proceedings may concern discriminatory economic or financial specifications, it is not clear at what stage in the procurement procedure these must be challenged. Therefore, it depends on whether the elimination decision as such is, for the purposes of the directive, a decision which may be challenged and, if so, whether the discriminatory nature of the economic or financial specifications may be raised in these proceedings.

81 In Alcatel, (26) the Court had to take a view on the question whether the award decision was

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a decision for the purposes of Directive 89/665. The Court answered this question in the affirmative. In considering the question, the Court based itself on the various stages in the procurement procedure referred to in Directive 89/665. `Directive 89/665 thus draws a distinction between the stage prior to the conclusion of the contract, to which Article 2(1) applies, and the stage subsequent to its conclusion, in respect of which a Member State may, according to the second subparagraph of Article 2(6), provide that the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement'. (27)

82 An elimination decision is logically prior to the award decision, even if in practice this is sometimes only by a theoretical second. That being so, from the point of view of the course of the procedure, there appears to be no reason why an elimination decision should not be subject to full review.

83 Given the purpose of Directive 89/665, as defined in Article 1(3) thereof, namely that the review procedure must be available at least to any person having or having had an interest in obtaining a particular public contract, the decision relating directly to the further participation in or elimination from the contract award procedure must be capable of review. An elimination decision is also a decision in which the contracting authority interprets the clauses in the invitation to tender and applies them autonomously to a candidate. This individual application of conditions previously laid down has clearly an independent, regulatory content which must be amenable to review. (28)

84 This approach is confirmed by the directive's legislative history, to which the Commission expressly referred in the present proceedings. (29) The common position, which was ultimately taken into the Protocol, stated in substance that the Council and the Commission declared that for the purposes of the directive every person excluded from taking part in a procedure for the award of a public contract because of an alleged infringement was a person who had or had had an interest in the award of a public contract and whose rights had been or risked being infringed.

85 Having regard both to the person entitled to initiate review proceedings and to the nature of the challengeable decision, this declaration suggests that legal protection against decisions by a contracting authority should be comprehensive.

86 For these reasons, the elimination decision is to be regarded as a decision against which review proceedings must be available. Where a Member State has exercised its powers under Article 1 of Directive 89/665 in such a way that the national review proceedings take the form of a challenge before the administrative courts to have the decision set aside, such a challenge must be available against an elimination decision. A failure to challenge earlier actions in the procedure cannot itself preclude the admissibility of a challenge to an elimination decision.

87 What is none the less in doubt is what effects the validity of an administrative measure adopted at an earlier stage in the procurement procedure have on the question whether the challenge to the elimination decision is well founded. Specifically, the validity of the invitation to tender has in substance the same effect as a limitation provision since, as explained above, (30) causes of action founded on its unlawfulness must be rejected as inadmissible.

88 The Court has already had a number of opportunities to state its view on the validity of national limitation provisions as regards enforcing Community law. (31) In each case, the Court has examined the conditions and circumstances of the individual exclusion of the Community-law claim closely and has determined the validity or invalidity of the exclusion provisions in the light thereof. It follows that there is no standard answer to the question as to the validity of a limitation provision.

89 The case of Peterbroeck, (32) which has already been referred to a number of times, was between

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a company and the Belgian State and concerned the applicable rate of non-resident tax. In the main proceedings, the complaint of an infringement of Community law was raised for the first time before the Cour d'Appel (Court of Appeal). According to the relevant domestic law, a litigant could no longer raise a new plea based on Community law before the Cour d'Appel once the 60-day period with effect from the lodging by the Director of a certified true copy of the contested decision had elapsed. (33)

90 The Court considered that a period of 60 days so imposed on a litigant was not objectionable per se. (34) However, it stated that for the purposes of applying the principles of equivalence and effectiveness, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult has to be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In that connection, account is to be taken, where appropriate, of the basic principles underlying the national system of legal protection, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure. (35)

91 After having considered the particular features of the procedure in question, the Court came to the conclusion in that case that Community law precluded application of a domestic procedural rule whose effect was to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law was compatible with a provision of Community law when the latter provision had not been invoked by the litigant within a certain period. (36)

92 Joined Cases Van Schijndel and van Veen (37) concerned the applicability of the competition rules under the Treaty in a dispute concerning compulsory participation in an occupational pension scheme. In that case, the complaint of infringement of Community law was first raised in cassation proceedings before the Netherlands Hoge Raad (Supreme Court). The nature of cassation proceedings is that they exclude new submissions unless on points of law. In support of their complaint, the claimants relied on facts and circumstances which had not been relied on before the lower courts. (38) For the national court, the question arose as to whether it was none the less required to take Community law into account of its own motion.

93 On that point, the Court stated: `[W]here, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned... The position is the same if domestic law confers on courts and tribunals a discretion to apply of their own motion binding rules of law'. (39) In considering the principles of equivalence and effectiveness, the Court stated that each case `must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances'. (40)

94 The Court reached the conclusion that the national court had to take into account of its own motion mandatory rules of Community law in the same way as it had to take into account mandatory rules of national law. However, this applied only to the extent that the courts were not obliged `to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties'. (41)

95 The case of Edis (42) concerned the repayment of amounts paid, though not due, in respect of a registration charge in breach of Community law. The fact that the charge infringed Community law came to light only in a judgment of the Court. (43) In reliance on a three-year limitation period which applied in tax law, the authority rejected the franchise debtor's claim to recover the money. The Court held that Community law did not prohibit a Member State from resisting actions

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for repayment of charges levied in breach of Community law by relying on a time-limit under national law of three years, provided that that time-limit applied in the same way to actions based on Community law for repayment of such charges as to those based on national law.

96 The case of Eco Swiss (44) concerned, inter alia, the question whether a national court was required to disapply a national procedural rule under which a divorce decree became final on the fulfilment of certain conditions, in order to be able to apply the applicable Community law to the relevant facts. (45) The Court answered that question in the negative. The Court considered that the time-limit laid down in national law for raising an action to have the decree set aside did not render excessively difficult or virtually impossible the exercise of rights conferred by Community law. (46)

97 In order to decide what consequences this case-law has for the present case, it must be recalled that limitation provisions are not objectionable per se. As in the case of Peterbroeck, a limitation period of 60 days is not as such objectionable. Nor, so far as Community law is concerned, is the application of limitation periods in the context of procedures for the award of public contracts in itself open to criticism. I expressed this view in my Opinion in Case C-470/99 Universale-Bau as well. (47)

98 However, it appears from the judgments referred to above (48) that the principles of equivalence and effectiveness must be observed, and the specific circumstances and legislative context of the individual case must be taken into account, when considering whether limitation provisions are compatible with Community law. (49)

99 It has already been shown above (50) that the principles of equivalence and effectiveness apply in particular where there are no Community rules governing a matter. In that connection, Directive 89/665 fell to be considered as regards the possibility of challenging an elimination decision. However, there must now be considered the question of the validity of limitation provisions applicable within the framework of procedures for the award of public supply contracts. Directive 89/665 does not contain any express provision in that regard. (51) Thus, the decision as to the validity of limitation provisions depends on whether the principles of equivalence and effectiveness are observed.

100 As regards the principle of equivalence, in the absence of any information to the contrary it is to be assumed that the limitation period relates in the same way to claims to enforce rights under national law as it does to claims to enforce rights under Community law.

101 The principle of effectiveness requires in substance (52) that national procedural rules must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. If the fact that an earlier administrative act infringed Community law comes to light in the context of an invitation to tender, it must be assumed that the 60-day limitation period does not prevent the effective application of Community law. Considerations of legal certainty and the proper course of procedure favour this approach. These require that competing tenderers' reliance on the regularity of previous stages of the procedure be protected.

102 A priori, Directive 89/665, which requires there to be `effective' and `rapid' measures for the review of a contracting authority's decisions, (53) does not provide a basis for criticising a 60-day limitation period. On the other hand, it has already been pointed out in the consideration of whether an elimination decision may be challenged that a subsequent decision in a procurement procedure can amount to the practical application of an earlier decision, with its own independent regulatory content.

103 Therefore, a purely theoretical consideration of the limitation period is not appropriate in the context of the problems in the present case. Instead, what is crucial is the specific circumstances and course of the procedure prior to the challenge to the elimination decision. Admittedly, the

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clause which led to the dispute was published with the invitation to tender. It was thereby announced to the parties interested in the award. The claimant had doubts already at that stage as to the lawfulness of the condition and indeed informed the contracting authority thereof.

104 The contracting authority reacted to the doubts the claimant expressed by postponing the opening of the envelopes and requesting the undertakings affected by that problem to forward comprehensive documentation, `taking the view that the clause in question could be interpreted as referring to the overall turnover of the participating undertakings and that the supply of products identical to those called for ... could be taken into consideration, not as a precondition for admission to the tendering procedure but solely as a basis for awarding points for quality'. (54)

105 The contracting authority thereby gave it to be understood that it would take the claimant's objections into account and created an expectation that it would apply the clause in question in a way that conformed with Community law. Only in the shape of the elimination decision did it take a definitive view as regards the interpretation it puts forward of the terms of the invitation to tender. In doing so, the contracting authority put forward an interpretation of the terms of the invitation to tender which made them appear unlawful (under Community law), at least in the estimation of the national court, whose task it is to decide the dispute.

106 What is highly significant is the fact that a different interpretation of the terms of the invitation to tender could have prevented the clause from being unlawful and that the contracting authority initially created the impression that it would proceed accordingly. Only through the elimination decision did the claimant obtain final clarity concerning what it considered to be the unlawful interpretation of the clauses in the invitation to tender. It was only by means of that decision that an illegality, admittedly already latent in the terms of the invitation to tender, was made specific.

107 It is therefore also arguable that it was only through the elimination decision that it became absolutely clear to the claimant that the clauses in the invitation to tender were unlawful. That knowledge, in its turn, could have consequences for the time from which the 60-day limitation period started to run. Whether it starts to run on publication of the invitation to tender in every case, or, possibly, in the circumstances in point here, only once it became known that the particular clause was unlawful, is ultimately a question to be answered by reference to national procedural law.

108 On the present facts, one must in any case assume that the exercise of rights conferred on the claimant by Community law has been rendered excessively difficult. It would therefore be unjust if the claimant were no longer permitted to raise in proceedings challenging the elimination decision the infringement of Community law which was admittedly already imminent in the terms of the invitation to tender but which breached the claimant's rights only by means of the elimination decision.

109 However, the French Government has pointed out that the claimant could have raised a protective action against the terms of the invitation to tender even though it was in negotiations with the contracting authority as regards the particular clause in the invitation to tender which it considered to be unlawful. That might have been true if the contracting authority had not reacted to the doubts the claimant expressed. However, given the way in which the authority initially approached those doubts, the claimant was entitled to believe that its request would be considered and, if appropriate, even be acted upon. One must also remember that the claimant was waiting for the contract to be awarded and it would perhaps not have been opportune for it to endanger its future relationship with the contracting authority by raising an action. (55)

110 Nor does raising a purely protective action appear to conform to the spirit of Directive 89/665. Article 1(3)(2) of the directive provides: `[I]n particular, the Member States may require that

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the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.' That power granted to the Member States suggests that parties should not be hindered from seeking an amicable settlement before an action is raised. In any case, it is not in the interests of the participating parties to surprise the contracting authority by raising an action.

111 As regards the consequences of that situation, the question arises as to whether the 60-day period for challenging the invitation to tender had not already been stopped from running. It is also conceivable that the contracting authority's conduct interrupted the time-limit for bringing proceedings, since it was evident that it initially considered the claimant's doubts and requested supplementary information not only from the claimant but also from the other tenderers affected. Since the exercise of the rights conferred on it by Community law was rendered excessively difficult for the claimant in the specific circumstances of the present case, it is in any case inappropriate to apply the 60-day time-limit rigidly.

112 It is incumbent on the national court to exhaust all the avenues available under national law in order to render the Community provisions applicable to the case before it. If there are no less drastic means available, the national court may have to apply the doctrine of disapplication under Article 5 of Law No 2248 of 20 March 1865, as it has already suggested. Any further legal consequences if the elimination decision is set aside are a matter for national law.

113 The proposed approach means that the national court's second question need not be considered, since the interests of the eliminated tenderer in terms of legal protection in the correct application of Community law are taken into account by the exhaustion of remedies available under national law.

VII - Conclusion

In conclusion, I suggest on the basis of the above considerations that the reference for a preliminary ruling should be answered as follows:

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts is to be interpreted as meaning that the competent courts are obliged to grant an effective and rapid remedy against any decision of a contracting authority, including a decision eliminating an undertaking, irrespective of whether a previous decision has been challenged, if and to the extent that the contracting authority has by its conduct rendered it virtually impossible or excessively difficult for a citizen of the Union whose rights have been infringed by measures taken in breach of Community law to enforce the rights conferred on him by Community law before a court. It is for the national court to decide in the present proceedings whether this requires that the remedy of disapplication under Article 5 of Law No 2248 of 20 March 1865 be granted.

(1) - Council Directive of 14 June 1993, OJ 1993 L 199, p. 1.

(2) - Council Directive of 21 December 1989, OJ 1989 L 395, p. 33.

(3) - Protocol No 1 of the award committee of 12 December 1996.

(4) - The national court considers that there is an infringement of both Article 22 of Directive 93/36 and Article 3(1)(c) of Decree No 358 of 24 July 1992.

(5) - Royal Decree No 1054 of 6 June 1924 containing the consolidated version of the laws governing the Italian Consiglio di Stato, which also applies to the procedure to be followed before Regional Administrative Courts by virtue of Article 19 of Law No 1034 of 6 December 1971.

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(6) - Clauses and prices of goods or services that are imposed by law are de jure to be inserted in contract, if need be being substituted for unlawful clauses inserted by the parties.

(7) - The [judicial] authorities are to give effect to general and local administrative acts and regulations to the extent to which they are in conformity with primary legislation.

(8) - Case 106/77 Simmenthal [1978] ECR 629.

(9) - Joined Cases C-430/93 and C-431/93 Van Schijndel and van Veen [1995] ECR 1-4705.

(10) - Case C-126/96 Eco Swiss China Time [1999] ECR I-3055.

(11) - Case C-312/93 Peterbroeck [1995] ECR I-4599.

(12) - Joined Cases C-240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941.

(13) - Judgment in Eco Swiss (cited above, footnote 11).

(14) - The Treaty of European Union (footnote added).

(15) - Peterbroeck (cited above, footnote 12), paragraph 12.

(16) - Case C-231/96 Edis [1998] ECR I-4951, paragraph 48.

(17) - Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671.

(18) - OJ 1987 C 230, p. 6.

(19) - See Article 36 of Royal Decree No 1054 of 6 June 1924, according to which a person must challenge an administrative act within 60 days of becoming aware of it; otherwise the administrative act becomes unchallengeable.

(20) - In this regard, see the leading case, Case 8/81 Becker [1982] ECR 53, paragraph 25.

(21) - At least, there was no suggestion of any error in the transposition of the provision and no such error is otherwise apparent.

(22) - See Edis (cited above, footnote 17), paragraph 34.

(23) - See the judgments referred to in Peterbroeck (cited above, footnote 12), paragraph 12, and in the written observations of the Italian Government, p. 9.

(24) - See, inter alia, Case 33/76 Rewe [1976] ECR 1989, paragraph 5, Case 45/76 Comet [1976] ECR 2043, paragraphs 12 to 16, Case 68/79 Just [1980] ECR 501, paragraph 25, Case 199/82 San Giorgio [1983] ECR 3595, paragraph 14, Joined Cases 331/85, 376/85 and 378/85 Bianco and Girard [1988] ECR 1099, paragraph 12, Case 104/86 Commission v Italy [1988] ECR 1799, paragraph 7, Joined Cases 123/87 and 330/87 Jeunehomme and EGI [1988] ECR 4517, paragraph 17, Case C-96/91 Commission v Spain [1992] ECR I-3789, paragraph 12, Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 43 and Peterbroeck (cited above, footnote 12), paragraph 12.

(25) - See Peterbroeck (cited above, footnote 12), paragraph 12 (emphasis added).

(26) - Case C-81/98 (cited above, footnote 18).

(27) - See paragraph 37 of the judgment.

(28) - For a view in favour of extensive legal protection against all decisions made in a procurement procedure see the Opinion of Advocate General Tizzano in Case C-92/00 HI [2002] ECR I-5553, paragraph 21 et seq.; for the view, by implication, that decisions in a procurement procedure which follow from an earlier decision may be reviewed, see the Opinion of Advocate General Mischo

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in Case C-81/98 Alcatel Austria and Others (cited above, footnote 18), point 46.

(29) - See above, paragraph 59.

(30) - See above, paragraph 63.

(31) - See, for example, Case C-312/93 Peterbroeck (cited above, footnote 12); Joined Cases Van Schijndel and van Veen (cited above, footnote 10); Edis (cited above, footnote 17); and Eco Swiss (cited above, footnote 11).

(32) - Case C-312/93 (cited above, footnote 12).

(33) - See paragraph 15 of the judgment.

(34) - See paragraph 16 of the judgment.

(35) - See paragraph 14 of the judgment.

(36) - See paragraph 21 and the operative part of the judgment.

(37) - See Joined Cases C-430/93 and C-431/93 (cited above, footnote 10).

(38) - See paragraph 11 of the judgment.

(39) - See paragraph 13 et seq. of the judgment.

(40) - See paragraph 19 of the judgment.

(41) - See the operative part of the judgment.

(42) - See Case C-231/96 (cited above, footnote 17).

(43) - Joined Cases C-71/91 and C-178/91 Ponente Carni and Cispadana Costruzioni [1993] ECR I-1915; see paragraph 5 of the judgment in Edis (cited above, footnote 17).

(44) - See Case C-126/96 (cited above, footnote 11).

(45) - See paragraph 43 of the judgment.

(46) - See paragraph 45 of the judgment.

(47) - Universale-Bau [2002] ECR I-0000, paragraph 68.

(48) - See above, paragraphs 89 to 96.

(49) - See Peterbroeck (cited above, footnote 12), paragraphs 12 and 14; Van Schijndel and van Veen (cited above, footnote 10), paragraphs 17 and 19; and Edis (cited above, footnote 17), paragraph 19.

(50) - See point 77 et seq.

(51) - See my Opinion in Universale-Bau (cited above, footnote 48), paragraph 69.

(52) - See the settled case-law on this point (cited above, footnote 25).

(53) - See Article 1(1) of the directive.

(54) - Quoted from the order for reference, referring to document No 1 of 12 December 1996 of the awards committee.

(55) - See, concerning a comparable situation, the Opinion of Advocate General Mischo in Alcatel Austria and Others (cited above, footnote 29), point 38.

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Opinion of Mr Advocate General Alber delivered on 7November2002. Commission of the European Communities v Kingdom of Spain. Failure of a Member State to fulfil its obligations - Public procurement - Directive 93/37/EEC - Procedure for the award of public works contracts - State commercial company governed by private law - Company's object consisting of the implementation of a plan for repaying the costs of and establishing prisons - Concept of contracting authority. Case C-283/00.

I Introduction

1. The present action for infringement of the Treaties relates to the definition of the personal scope of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (2) ("Directive 93/37"). Spain takes the view that commercial undertakings whose capital involves public funding, but which are organised under private law, are not covered by the term "body governed by public law" within the meaning of the directive.

II Legal framework

2. According to Article 1(b) of Directive 93/37, " "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

having legal personality, and

financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

"

3. That provision was transposed into Spanish law by Ley 13/1995 de Contratos de las Administraciones Publicas (3) ("Law 13/1995"). Article 1(3) of that Law reads:

"This law shall also apply to the award of contracts by independent bodies in all cases and by other bodies governed by public law and possessing legal personality, connected to or controlled by a public authority, if they meet the following criteria:

(a) that they were established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,

(b) that they carry on activity which is financed, for the most part, by public authorities or other bodies governed by public law, or that their management is subject to supervision by those bodies, or that more than half the members of their administrative, managerial or supervisory board are appointed by the public authorities or by other bodies governed by public law.

"

4. The sixth provision supplementing Law 13/1995, entitled "Rules applicable to the award of contracts in the public sector" , reads:

"When awarding public procurement contracts, commercial companies in the capital of which public authorities or their independent bodies, or bodies governed by public law, have a majority holding, whether direct or indirect, shall comply with the rules on advertising and competition, unless

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the nature of the transaction to be effected is incompatible with those rules."

III Facts and pre-litigation procedure

5. Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios SA ("SIEPSA") was established by the Kingdom of Spain and started business on 7 April 1992. It was originally set up for a maximum period of eight years from start of business (Article 4 of its statutes). However, in 1998/99 the statutes were amended to the effect that the company now exists for an unlimited period.

6. According to Article 2 of its statutes, SIEPSA's remit is to implement programmes and measures provided for in the Plan de Amortizacion y Creacion de Centros Penitenciarios (Plan for the amortisation and establishment of penitentiary institutions) approved by the Council of Ministers. They involve on the one hand selecting and purchasing appropriate sites for the construction of new prisons either by SIEPSA itself or by third parties, including issuing invitations to tender for, implementing and financing the planning and construction work required to bring the institutions into operation, and on the other hand selling institutions which are surplus to requirements. The Spanish State is SIEPSA's sole shareholder. It is managed by an administrative board whose members are chosen by the Spanish Government. SIEPSA is subject only to Spanish private law, apart from public rules governing its budget, accounting and financial control.

7. In connection with the construction of the Centro Educativo Penitenciario Experimental de Segovia, SIEPSA issued an invitation to tender in which the public notice (Article 11), (4) the time-limit for receipt of tenders (Article 12), suitability criteria (Articles 24, 27 and 29(3)), award criteria (Articles 18 and 30) and treatment of abnormally low tenders (Article 30(4)) satisfied the requirements of Spain's Ley 13/1995, but it is not disputed that they did not satisfy the requirements of Directive 93/37.

8. Having carried out the pre-litigation procedure by sending a letter of formal notice on 6 November 1998 and a reasoned opinion on 25 August 1999, but without success, the Commission brought the present action.

IV Claims of the parties

9. The Commission claims that the Court of Justice should:

(1) declare that, by not complying with the provisions of Directive 93/37/EEC as a whole and more specifically with the provisions on public notices contained in Article 11(2), (6), (7) and (11) and those of Articles 12(1), 29(3), 18, 27 and 30(4), in connection with the tendering procedure for the execution of works for the Centro Educativo Penitenciario Experimental in Segovia issued by Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios SA, a company falling within the definition of contracting authority contained in Article 1(b) of Directive 93/37/EEC, for which the amount exceeds by a considerable margin the threshold for application of the directive, the Kingdom of Spain has failed to fulfil its obligations under Community law;

(2) order the Kingdom of Spain to pay the costs.

10. The Kingdom of Spain contends that the Court should:

(1) dismiss the action;

(2) order the Commission to pay the costs.

V Submissions of the parties

11. The Kingdom of Spain did not address the alleged infringements of the provisions of Directive 93/37 in detail in its pleadings, but specifically admitted in its letter of 16 July 2002 that

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the invitation to tender in question did not satisfy the requirements of Directive 93/37 to which the Commission referred. The dispute therefore concerns only the question of whether SIEPSA is to be regarded as a contracting authority within the meaning of the directive. The parties' submissions are therefore repeated below only in so far as they relate to this question.

12. The parties both agree that SIEPSA both has its own legal personality and is also publicly controlled. The only question in dispute is to what extent SIEPSA meets needs not having an industrial or commercial character.

A Commission

13. The Commission takes the view that SIEPSA meets needs of a non-commercial nature in the general interest. Its analysis is principally based on the purpose for which SIEPSA was set up, rather than on the activities which it actually carries out.

14. The Commission bases its opinion first of all on Article 2 of SIEPSA's statutes, according to which SIEPSA was set up to carry out projects approved by the Council of Ministers as part of the "Plan de Amortizacion y Creacion de Centros Penitenciarios" . It deals with the construction and equipment of prisons and with the sale of institutions that are no longer needed, and thereby helps to implement State policy on prisons. The Commission underlines, referring to the judgment in Mannesmann , (5) that meeting this need in the general interest is closely linked to the maintenance of public order and that the State has a monopoly on criminal prosecution and imprisonment.

15. Furthermore, in operational terms SIEPSA is dependent on ministerial administration. When carrying out its activities it follows the recommendations of the general management of the prison administration, and this too is evidence that SIEPSA belongs to the public sector.

16. In addition, however, the Commission takes the view that SIEPSA's activities are also of a non-commercial nature. The construction of prisons and the sale of those which are no longer needed is not an activity for which there is a general market. The only demand for the construction of prisons is from the State, as part of the implementation of its prison policy.

17. However, even if SIEPSA's activities were to be classified as commercial, that does not preclude the application of Directive 93/37, since any economic activity carried out is merely a means of meeting a general interest (of a non-commercial nature) in the form of the implementation of policy on prisons.

18. The Commission also refers to the judgment in BFI Holding , (6) which states that the fact that private undertakings may also meet the same needs as the undertaking whose definition is at issue does not mean that that body may not be regarded as a contracting authority, nor is the absence of corresponding competition a condition for assuming a body to be public.

19. Even the fact that the aim of SIEPSA's operations may be to make a profit does not preclude its classification as a contracting authority. First, the wording of Directive 93/37 does not justify the assumption that bodies which make a profit are not meeting needs of a non-commercial nature in the general interest. Therefore the fact that a profit is made is not a feature which determines whether or not a body is commercial. Second, it is entirely doubtful whether a State enterprise such as SIEPSA actually pursues the aim of making a profit. SIEPSA's funding is derived solely from the general State budget. It was set up for the purpose of implementing a plan relating to the prison system, an area in which Member States do not usually regard profit-making as a priority. The Commission points out that SIEPSA made considerable losses in 1997 and 1998.

20. The Commission considers that the Spanish Government's reference to SIEPSA's classification under Spanish law is inappropriate. First, the term "body governed by public law" is to be interpreted according to Community law, and domestic law is thus irrelevant. If Ley 13/1995 excludes

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SIEPSA from the scope of the rules of Community law on public contracts, then Directive 93/37 has not been correctly transposed.

21. Second, the fact that under Spanish law SIEPSA, in accordance with its legal form, is a private body governed by private law is irrelevant. Classification as a public law body does not depend on whether the rules governing the body's establishment and activity are those of public or private law, but on the purpose for which it is established.

22. Moreover, the wording of Directive 93/37 contradicts Spain's argument. Article 1 of the directive covers "any" body fulfilling the criteria listed, and so it cannot therefore matter whether a national regulation excludes certain bodies from the personal scope of the directive.

23. The reference to the distinction drawn in Directive 93/38/EEC (7) between bodies governed by public law on the one hand and public undertakings on the other also does not justify the assumption that public undertakings are excluded from the scope of Directive 93/37. The Commission takes the view, referring to Article 2 of Directive 93/38, that the purpose of specifically mentioning public undertakings is to include within the scope of Directive 93/38 undertakings with exclusive rights performing substantial activities in the sectors covered by that directive. That does not alter the meaning of the term "body governed by public law" , which is the same in all four directives on public procurement. In the opinion of the Commission, "public undertakings" are different from "bodies governed by public law" in so far as they are set up for commercial purposes.

B Spanish Government

24. The Spanish Government, on the other hand, takes the view that Directive 93/37 does not apply to SIEPSA. SIEPSA is, according to both the purpose for which it was set up and the tasks it performs, purely commercial in nature. It was set up to carry out all the activities required for the proper implementation of the programmes and measures contained in the plan for the amortisation and construction of prisons. The activities it performs are also of a purely commercial nature. Buying and selling property and planning and organising the execution of construction work are purely commercial activities, and the sums acquired thereby are used solely for the implementation of the plan. In that respect SIEPSA acts with the intention of making a profit, as is typical of a commercial approach.

25. The Spanish Government submits that the wording "body governed by public law" in Directive 93/37 refers to a public law body. Spanish public institutions, however, have traditionally made use of certain private law bodies in performing their duties. These are the "State business undertakings" ("Sociedades Mercantiles Estatales"). Their capital is held, at least for the most part, by the State or other public bodies. However, regardless of their legal form they are subject in their activity solely to private law, unless provisions of budget law or rules on accounting, financial control and public procurement provide otherwise. They do not exercise any public powers. SIEPSA is one such undertaking.

26. The Spanish legislation enacted to transpose Directive 93/37 excludes State business undertakings from the personal scope of the rules on public procurement. Where those undertakings award contracts, they are required only to make some advertisement of their invitations to tender and to comply with the competition rules. The SIEPSA invitation to tender at issue fulfilled both those requirements.

27. The Spanish Government also bases its argument on the fact that, unlike the other public procurement directives, only Directive 93/38 distinguishes between bodies governed by public law and public undertakings and declares that the rules on procurement also apply to public undertakings. This is not the case with Directive 93/37, however, which was adopted on the same day and is relevant in the present case, and that is why public undertakings like SIEPSA do not fall within its scope. If public undertakings are to be subsumed under the term "body governed by public law" , it

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then becomes difficult to understand why Directive 93/38 specifically distinguishes between those two categories.

28. The Spanish Government further considers that the Commission's interpretation does not take sufficient account of the independent significance of the requirement that the need should "not have an industrial or commercial character" . If it were sufficient that the body meets a need in the general interest, such as contributing to the prison system, then the requirement set out in the directive that that need must not have an industrial or commercial character would be redundant. However, the Court found in the judgment in BFI Holding (8) that this requirement has its own separate significance.

VI Assessment

29. Spain does not dispute that the invitation to tender issued by SIEPSA does not satisfy the requirements of Directive 93/37, but it considers that the directive does not apply to SIEPSA. The following discussion will therefore consider solely whether Directive 93/37 is applicable to SIEPSA.

30. The answer to that question depends on whether the company is to be regarded as a body governed by public law within the meaning of the directive. The parties both agree that SIEPSA has its own legal personality, is controlled by the State and was established for the specific purpose of meeting needs in the general interest. However, they dispute whether those needs have a commercial or non-commercial character.

31. Spain focuses more on the activities actually carried out, which are the buying and selling of property, and it therefore contends that SIEPSA meets commercial needs. The Commission, on the other hand, focuses more on the purpose of SIEPSA's operations, which is to set up prisons. It infers from this that the need met is not of a commercial character.

32. None of the public procurement directives (9) defines the concept of non-commercial needs in the general interest. Up to now the Court has, as far as can be seen, considered the interpretation of this criterion only in BFI Holding (10) and Agorà . (11)

33.

In BFI Holding it held that the absence of a commercial character is a criterion intended to clarify the meaning of the term "needs in the general interest" as used in the second subparagraph of Article 1(b) of Directive 92/50. (12) It based its findings primarily on the practical effect of the provision. (13)

34. In the judgment in Agorà , referring to the bodies listed in Annex I to Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (14) in the version of Directive 93/37, it held that "... the needs in question are generally, first, those which are met otherwise than by the availability of goods or services in the market place and, secondly, those which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence" . (15)

35. It also held in both judgments that the term needs in the general interest does not exclude needs which are or can be satisfied by private undertakings as well, but that the existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the marketplace, may be indicative of the absence of a need in the general interest, not having an industrial or commercial character. (16)

36. In my Opinions in Agorà , (17)Universale Bau , (18)Truley (19) and Korhonen (20) I also suggested that the nature of the need should be ascertained by examining whether the entity

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in question has to bear any losses itself, in other words whether it bears the economic responsibility for its decisions in awarding contracts. If so, it must be assumed that it is guided by economic considerations in reaching its decisions, and its activity must then be assumed to be commercial. If, on the other hand, a publicly funded body stands behind the entity to offset any losses it incurs, there is a risk that the entity could also be influenced by considerations other than purely economic ones when awarding a contract. In such a case there is a threat to the free movement of goods and services, which is why the meaning and purpose of the directives on public procurement demand that they should apply to the entity. The Court confirmed this approach in its judgment in Agorà . (21)

37. Against the background of this case-law we may conclude the following with regard to SIEPSA. We have to agree with the Spanish Government that the requirement for the needs to be of a non-commercial nature has its own independent significance. For the directive to apply to SIEPSA it is not sufficient that it meets a need in the general interest in constructing prisons.

38. On the other hand, the purpose for which SIEPSA was set up is entirely relevant in deciding whether it meets needs of a non-commercial nature. The wording of Directive 93/37 requires the body to have been established for the specific purpose of meeting needs of a non-commercial nature. It follows that the body is outside the scope of the directive if it was established in order to meet needs of a commercial nature. It is not sufficient that it meets needs of a commercial nature as well. Rather, it must be a body offering goods and services on the open market and thus competing with other private and public economic operators. On the other hand, the directive does apply to bodies which carry out commercial activities, but which were actually established in order to meet other needs in the general interest. (22)

39. There is no open market for the goods and services offered by SIEPSA in planning and constructing prisons. Because of the State's penal monopoly there is only one single taker for those services, the Spanish State, which is alone in needing prisons. This argues against the assumption that SIEPSA meets needs of a commercial nature.

40. SIEPSA also meets a need in connection with which the Spanish State ensures that it has considerable influence over the way in which SIEPSA meets that need. It implements the Plan de Amortizacion y Creacion de Centros Penitenciarios approved by the government and in doing so works under the instruction of the State administration. On the basis of the case-law referred to earlier, this circumstance too argues in favour of the assumption that it meets needs of a non-commercial nature.

41. The fact that SIEPSA has to buy property as part of its activities does not alter this conclusion. The acquisition of new property and the sale of redundant property is merely a means by which SIEPSA carries out its business of setting up prisons for the Spanish State. It is not its purpose to trade in real property.

42. From the parties' submissions it is not entirely clear whether SIEPSA has to bear any losses incurred itself, or whether they are offset from the national budget. The Spanish Government submits that it is SIEPSA's aim to make a profit from its activities. The Commission disputes this and provides evidence that SIEPSA made substantial losses in 1997 and 1998. However, its submissions do not indicate who was required to bear the losses incurred.

43. Whether or not SIEPSA operates with the intention of making a profit does not ultimately appear, on the basis of previous case-law, to be conclusive for its classification. In the view of the Court of Justice the aim of making a profit may at best be an indication of commercial activity. In Agorà it regarded Ente Fiera as a body meeting needs of a commercial nature, even though it was non-profit-making. (23)

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44. On the question of who is economically responsible for SIEPSA's decisions, too, account should be taken of the fact that it was established in order to implement the Spanish Government's decisions concerning the institutions required for its prison system. This concerns the practical requirements for implementing State prison policy, a need which the State has to meet somehow. The Spanish State established SIEPSA for this purpose and entrusted it with carrying out the tasks associated with it. In this respect it is to be assumed that the Spanish State also has an interest in SIEPSA's continued existence, since if it becomes insolvent, the State itself must once again directly meet the needs which SIEPSA was fulfilling. The State's interest in SIEPSA's continuation is evident from the extension of the period for which the undertaking was established. The company, originally set up for only eight years from the start of its activities, has since been converted into a company of unlimited duration (see point 5 above). That interest in SIEPSA's continuation provides grounds for assuming that the Spanish State as the sole shareholder will do everything to prevent SIEPSA from becoming insolvent. (24) So even if there is no official mechanism for offsetting any losses, SIEPSA will probably ultimately not have to bear sole responsibility for the economic consequences of its actions. There could therefore be a risk that, when awarding contracts, it might be influenced by considerations other than purely economic ones, which is sufficient for Directive 93/37 to be applied in order to ensure the free movement of goods and services.

45. As a preliminary finding, therefore, it must be concluded that, according to the criteria developed in earlier case-law, the needs met by SIEPSA are of a non-commercial nature.

46. The Spanish Government further bases its position on the fact that, under Spanish law, SIEPSA is subject only to private law. The legislation enacted to transpose the public procurement directives excludes all State business undertakings from the application of those directives.

47. It should be pointed out here that drawing a distinction according to the field of law to which the entity in question is subject is consistent with the wording of Article 1(b) of Directive 93/37. That provision talks about bodies governed by public law , which suggests that bodies governed by private law are in principle excluded from the scope of the directive.

48. However, such an interpretation does not take sufficient account of the indents following those words, which list the criteria to be used for deciding whether a body is governed by public law. Those criteria, which must all be satisfied, (25) require that the body be "financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law" . It follows from this that it is a body which is controlled and directed by the public authorities. In spite of the wording body governed by public law , it does not depend on which branch of law the body is subject to, public or private.

49. In my Opinions in Truley (26) and Korhonen (27) I explained why I consider that it is not compatible with the spirit and purpose of the public procurement directives to interpret needs in the general interest according to how the Member State concerned itself defines its sphere of activity. The independent nature of Community law and the aim of its uniform application argue in favour of understanding and interpreting the term as an autonomous concept of Community law. This view is supported by the spirit and purpose of the public procurement directives, which is to contribute to the establishment and functioning of the single market.

50. The following example may illustrate this line of thought. If the branch of law to which the body was subject under national provisions were the deciding factor, the authorities of a Member State could easily evade the application of the public procurement directives. It would be sufficient to set up a company, a "Procurement PLC" , say, to which only private law was applicable, and to establish as the purpose of its business the procurement of office furniture, paper etc. for

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the State authorities. Although the State would be the sole shareholder and could influence all the decisions taken by the company, it would not be required to issue invitations to tender for contracts because "Procurement PLC" was subject to private rather than public law. That is clearly not consistent with the spirit and purpose of the public procurement directives.

51. The determination of the personal scope of Directive 93/37 cannot therefore depend on whether the body is subject to public or private law under domestic law. It is therefore immaterial in the present proceedings that SIEPSA is subject only to private law in Spain.

52. Lastly, the Spanish Government compares the wording of the sectoral Directive 93/38 with the wording of the other public procurement directives, pointing out that the sectoral directive refers to "public undertakings" as well as to "public authorities" . The definition of "public authorities" is identical to that of "contracting authorities" in the other procurement directives. Since Directives 93/36, 93/37 and 93/38 were adopted on the same date, the terms "public authorities" and "contracting authorities" are, it argues, to be interpreted as meaning the same. The Spanish Government infers from this that "public undertakings" cannot be "contracting authorities" within the meaning of Directive 93/37. Because the term "public undertakings" is not used in Directive 93/37, it does not apply to them.

53. It is true that the wording of Directive 93/37 does not specifically determine whether it is applicable to "public undertakings" . However, such undertakings may be subsumed under the legal definition of "contracting authorities" . As the example of SIEPSA shows, they too may have been established for the specific purpose of meeting needs in the general interest (of a non-commercial nature), they too may have their own legal personality and as follows from the legal definition given in Article 1(2) of Directive 93/38 they too are characterised by the fact that "the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of [them], their financial participation therein, or the rules which govern [them]" . The question therefore arises whether it may be inferred from the absence of specific rules on "public undertakings" in Directive 93/37 that it does not apply to "public undertakings" .

54. The provision on "public undertakings" in Article 1 of Directive 93/38 indeed only makes sense if they do not come under "public authorities" within the meaning of that article. And since the definition of "public authorities" is identical to that of "contracting authorities" in the other procurement directives, it must also be assumed that these provisions are to be interpreted in the same way. Then, however, bodies covered by the term "public undertaking" could not be "contracting authorities" within the meaning of Directive 93/37. The wording of the provisions therefore initially supports the Spanish Government's position.

55. However, in schematic terms it should be pointed out that Directive 93/38 is a special set of rules applicable only to certain economic sectors: the water, energy, transport and telecommunications sectors. Directives 92/50, 93/36 and 93/37, on the other hand, apply to all public activities. Directive 93/38 is an exception in that respect. However, exceptional rules are in principle not an appropriate basis for interpreting general rules. This argues against the Spanish Government's restrictive interpretation of the term "contracting authorities" within the meaning of Directive 93/37 and in favour of the inclusion of "public undertakings" within the scope of that directive.

56. The historical development of the provisions on public procurement also argues against the Spanish Government's interpretation.

57. It is true that Directives 93/36, 93/37 and 93/38 were all adopted on 14 June 1993. It is therefore to be assumed that the legislature intended the terms to be used in the same way. However, the question then arises if we follow the Spanish Government's approach why it did not also use the term "public authorities" in Directives 93/36 and 93/37 if the definition of that term

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was the same as that of "contracting authorities" in the other two directives.

58. On the other hand, it should be pointed out that the terminology used in Directives 93/36 and 93/37 is consistent with that used in Directive 92/50 on public service contracts. That suggests that the terminology used in Directive 93/38 should be seen as a special set of rules compared with the other provisions on public procurement, and that no conclusions are to be drawn from it for the interpretation of the other directives.

59. The development of public procurement law as a whole also argues in favour of this approach. The field of public works contracts governed by Directive 93/37 was already covered by Directives 71/304/EEC (28) and 71/305/EEC and was adapted by Directive 89/440/EEC. (29) The public supply contracts regulated in Directive 93/36 were already covered by Directive 77/62/EEC, (30) as amended by Directives 80/767/EEC (31) and 88/295/EEC. (32) The field covered by Directive 93/38, on the other hand, was regulated for the first time considerably later, in Directive 90/531/EEC. (33) The chronology of these developments is another argument against referring to the rules contained in Directive 93/38 for the interpretation of Directive 93/37.

60. The legal definition given in Article 1(b) of Directive 93/37, including that of the term "contracting authorities" , goes back to an amendment proposed by the European Parliament during consultations on the Commission's proposed amendment of Directive 71/305. In its proposal the Commission had spoken only of "legal persons" . (34) In order to ensure that the directive on works contracts applied as extensively as possible, Parliament introduced the expression "organ governed by public law" , (35) later amended to "body" . The inclusion of the legal definition was intended to replace the lists to be drawn up under Article 1(b) of Directive 71/305 which defined the class of contracting authorities. It was designed to ensure the comprehensive application of the directive. (36) The intention was to extend the scope of the directive to construction work carried out by third parties which was funded wholly or in part and directly or indirectly from the public purse. (37)

61. It can thus be established that the term "contracting authorities" existed long before Directive 93/38 was adopted. If the legislature did not follow the terminology generally used in public procurement when it adopted the sectoral directive, no conclusions can be drawn from that special set of rules for the interpretation of terms used consistently in the other directives. In that respect the fact that the three 1993 directives were adopted at the same time does not prove that the legislature would have expressly referred to "public undertakings" in Directives 93/36 and 93/37 too if it had intended to include them in the personal scope of those directives.

62. The spirit and purpose of Directive 93/37 also argue against the interpretation which the Spanish Government draws from a comparison with Directive 93/38. As explained earlier, the legislature's intention was to replace the lists of contracting authorities by a generally valid definition in order to make it clear that the provisions apply to all bodies meeting certain criteria, even if they are not on the list of contracting authorities. It is contrary to this intention to try to exclude an entire area of public activity such as that of "public undertakings" solely because it is not specifically mentioned.

63. As explained earlier, the reason why Directive 93/37 is applicable is also valid for "public undertakings" within the meaning of Directive 93/38. They too are undertakings which, although organised as private companies, are controlled and directed by the public authorities. That influence on the part of the public authorities justifies their inclusion in the scope of the directive.

64. Unlike the other procurement directives, Directive 93/38 relates only to certain sectors. In 1990 when those areas were first regulated the bodies operating in the relevant market in those sectors were organised in many different ways. Water and electricity supplies and transport

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and telecommunications services were provided partly by public bodies and partly by private companies given exclusive rights by the Member States. The privatisation of broad areas of public services was only just beginning. In order to be able to cover the many different forms of organisation and structure in existence at that time, the legislature did not use the traditional term "contracting authorities" , but introduced the terms "public authorities" and "public undertakings" . This first of all made it clear that it did not depend on the form of organisation, and secondly it ensured that the sectoral directive applied to all bodies operating in those fields, provided that they fulfilled the criteria. This directive thus pursued exactly the same aim as with the definition of the term "contracting authorities" , including "bodies governed by public law" , in the other public procurement directives.

65. The fact that the fields regulated by Directive 93/38 are subject to considerable change is clear from two Commission communications. In 1998 it stated in its communication on "Public procurement in the European Union" : (38)

> "Following the liberalisation of some of the sectors covered by Directive 93/38/EEC, it is necessary to examine the degree of openness to competition of the liberalised sectors with a view to deciding whether the constraints the directive imposes on contracting entities are still justified. They were introduced because of the lack of competition resulting from the State's decision to grant a monopoly or a privileged position to an operator. In return for this preferential treatment by the State, the operators concerned had to comply with certain advertising and procedural requirements when awarding contracts. If a sector is found to be effectively open to competition, the constraints imposed by the directive should be removed.
>
> The Commission was the prime mover in the process of liberalisation in the sectors covered by Directive 93/38/EEC... It must now take account of the changes that have occurred and the new factors that are emerging on the market, by excluding from the scope of the Directive entities operating under real competitive conditions in the same way as private entities which base their decisions on purely economic criteria.
>
> "

66. In 1999 the Commission declared that Directive 93/38 was largely inapplicable to the telecommunications sector. (39) These considerations confirm that Directive 93/38 contains special rules taking account of particular circumstances on the market in the relevant sectors at the time. It therefore does not give a generally applicable definition of the operators concerned, but regulates a special case.

67. It consequently cannot be inferred from the fact that Directive 93/37 does not expressly include "public undertakings" in its scope that they do not come under the term "contracting authorities" . This plea by the Spanish Government must therefore also be dismissed.

68. It must therefore be concluded that SIEPSA is a body governed by public law within the meaning of Article 1(b) of Directive 93/37. As the Spanish Government has admitted the individual infringements of the tendering rules complained of by the Commission, the decision given should be in accordance with the form of order sought by the Commission.

VII Costs

69. In the light of the foregoing the application must be granted. Under Article 69 of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they are applied for by the successful party. As the Spanish Government has been unsuccessful in its application and the Commission has made such an application, Spain must be ordered to pay the costs of the proceedings.

VIII Conclusion

70. In the light of the foregoing I propose that the Court of Justice should give the following

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decision:

(1) The Kingdom of Spain has failed to fulfil its obligations under Community law by failing to comply with all the provisions of Directive 93/37/EEC, in particular the provisions on public notices contained in Article 11(2), (6), (7) and (11) and those of Articles 12(1), 29(3), 18, 27 and 30(4), in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental in Segovia issued by Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios SA.

(2) The Kingdom of Spain must pay the costs of the proceedings.

(1) .

(2) OJ 1993 L 199, p. 54.

(3) BOE No 119 of 19 May 1995, p. 14601. The Law was published on 16 June 2000 in a newly codified version (Texto Refundido de la Ley de Contratos de las Administraciones Publicas, BOE No 148 of 21 June 2000, p. 1775). The content of the provisions referred to was not amended.

(4) Articles without any further reference are those of Directive 93/37.

(5) Case C-44/96 Mannesmann Anlagenbau Austria [1998] ECR I-73, paragraph 24.

(6) Case C-360/96 BFI Holding [1998] ECR I-6821, paragraph 47.

(7) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 L 199, p. 84.

(8) BFI Holding , cited in footnote 6, paragraphs 32 to 36.

(9) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199, p. 1; Directive 93/37, cited in point 1; Directive 93/38, cited in footnote 7; Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209, p. 1.

(10) BFI Holding , cited in footnote 6.

(11) Joined Cases C-223/99 and C-260/99 Agorà and Excelsior [2001] ECR I-3605.

(12) BFI Holding , cited in footnote 6, paragraph 32.

(13) BFI Holding , cited in footnote 6, paragraph 35.

(14) OJ, English Special Edition 1971 (II), p. 682.

(15) Agorà , cited in footnote 11, paragraph 37, referring to BFI Holding , cited in footnote 6, paragraphs 50 and 51.

(16) Agorà , cited in footnote 11, paragraph 38; BFI Holding , cited in footnote 6, paragraph 49.

(17) Opinion in Joined Cases C-223/99 and C-260/99 Agorà and Excelsior [2001] ECR I-3605, point 67.

(18) Opinion in Case C-470/99 Universale Bau [2002] ECR I-11617, point 27.

(19) Opinion in Case C-373/00 Truley [2003] ECR I-1931, point 95.

(20) Opinion in Case C-18/01 Korhonen and Others [2003] ECR I-5321, point 77.

(21) Agorà , cited in footnote 11, paragraph 40.

(22) See the description given in the Commission's guide to the Community rules on the awarding

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of public works contracts, p. 10, published on the Commission's website at www.europa/internal_market under the heading "public procurement" .

(23) Agorà , cited in footnote 11, paragraphs 40 and 43.

(24) See, on similar facts, my Opinion in Korhonen , cited in footnote 20, points 80 and 81.

(25) On this point, see BFI Holding , cited in footnote 6, paragraph 29.

(26) Cited in footnote 19, points 42 to 44.

(27) Cited in footnote 20, point 57.

(28) Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJ, English Special Edition 1971 (II), p. 678.

(29) Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, OJ 1989 L 210, p. 1.

(30) Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ 1977 L 13, p. 1.

(31) Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts, OJ 1980 L 215, p. 1.

(32) Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC, OJ 1988 L 127, p. 1.

(33) Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1990 L 297, p. 1.

(34) Proposal for a Council Directive amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, COM(86) 679 final of 23 December 1986, pp. 6 and 22.

(35) Proposed amendment No 4, report by the Committee on Economic and Monetary Affairs and Industrial Policy, European Parliament session documents 1988/89, Document A2-37/88, p. 6, and the statement of reasons, p. 31.

(36) See the abovementioned report, statement of reasons, p. 31.

(37) See the statement by the rapporteur, Mr Beumer, at the European Parliament session on 17 May 1988, European Parliament Verbatim Report of Proceedings, No 2-365, p. 83.

(38) COM(98) 143 final of 11 March 1998, point 2.1.2.1, p. 7.

(39) Communication from the Commission pursuant to Article 8 of Directive 93/38/EEC: List of services regarded as excluded from the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, pursuant to Article 8 thereof, OJ 1999 C 156, p. 3.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
PUBREF	European Court reports 2003 Page I-11697
DOC	2002/11/07
LODGED	2000/07/18
JURCIT	31971L0304 : N 59 31971L0305 : N 34 59 60 31971L0305-A01LB : N 60 31977L0062 : N 59 31980L0767 : N 59 31988L0295 : N 59 31989L0440 : N 59 31992L0050 : N 55 31992L0050-A01LBL2 : N 33 31993L0036 : N 52 55 57 - 59 61 31993L0037 : N 1 38 51 - 55 57 - 59 61 - 63 67 31993L0037-A01LB : N 47 60 68 31993L0038 : N 52 55 57 - 59 61 - 66 31993L0038-A01 : N 54 31993L0038-A01PT2 : N 53 61996J0360 : N 32 33 61999J0223 : N 32 61999J0470 : N 36 48 62000J0373 : N 36 49 62001C0018 : N 36 44 49
SUB	Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	German
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PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Alber
JUDGRAP	Skouris
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Opinion of Mr Advocate General Léger delivered on 19 March 2002 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht. Reference for a preliminary ruling: Bundesverwaltungsgericht - Germany. Regulation (EEC) No 1191/69 - Operation of urban, suburban and regional scheduled transport services - Public subsidies - Concept of State aid - Compensation for discharging public service obligations. Case C-280/00.

1. The present reference for a preliminary ruling seeks to determine the conditions under which Member States may allocate grants to undertakings which provide local public transport services.

The Bundesverwaltungsgericht (Federal Administrative Court) (Germany) raises several questions relating to the interpretation of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC), Article 77 of the EC Treaty (now Article 73 EC) and Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, (2) as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (3) (hereinafter "Regulation No 1191/69" or "the Regulation").

I The relevant provisions

A The Community provisions

2. The relevant provisions for the consideration of the dispute are those governing State aid and transport by land.

3. Article 92(1) of the Treaty forbids State aids which distort or threaten to distort competition. It provides:

> "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market" .

4. In the transport sector, Article 74 of the EC Treaty (now Article 70 EC) provides that the objectives of the Treaty are to be pursued in the framework of a common transport policy. Article 75 of the EC Treaty (now, after amendment, Article 71 EC) requires the Council to adopt the necessary provisions in order to implement that policy.

5. Article 77 of the Treaty concerns State aids which may be granted in the transport sector. It provides:

> "Aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service."

6. Regulation No 1191/69 seeks to eliminate disparities arising from public service obligations which are imposed on transport undertakings by Member States. (4) It requires Member States to terminate public service obligations (5) and lays down common rules for the maintenance of those obligations and for the granting of compensation in respect of any financial burdens which may thereby devolve on undertakings. (6)

7. Article 1(1) of Regulation No 1191/69 provides as follows:

> "This Regulation shall apply to transport undertakings which operate services in transport by rail, road and inland waterway.
>
> Member States may exclude from the scope of this Regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services

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" .

8. According to Article 1(2) "urban and suburban" services means transport services meeting the needs of an urban centre or conurbation, and transport needs between it and surrounding areas. "Regional services" are defined as transport services operated to meet the transport needs of a region.

9. Article 1(3) of the Regulation lays down the principle whereby "[t]he competent authorities of the Member States shall terminate all obligations inherent in the concept of a public service... imposed on transport by rail, road and inland waterway" .

10. The provisions of Article 1(4) and (5) provide for a derogation from that principle in two situations.

On the one hand, the competent authorities may conclude public service contracts with an undertaking to ensure adequate transport services or offer particular fares to certain categories of passenger. In such cases, the public service contracts must comply with the procedures laid down in Section V of Regulation No 1191/69.

On the other hand, the competent authorities are authorised to maintain or impose public service obligations for urban, suburban and regional passenger transport services. In such cases, the administrative act must comply with the procedures laid down in Sections II to IV of Regulation No 1191/69.

11. Pursuant to Article 2 of the Regulation, "public service obligations" means "obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions" . Those obligations consist of the obligation to operate, the obligation to carry and tariff obligations. (7)

12. Article 6(2) of the Regulation stipulates that decisions to maintain a public service obligation are to provide for compensation to be granted in respect of the financial burdens resulting therefrom. The amount of such compensation is determined in accordance with "common compensation procedures" laid down in Articles 10 to 13 of Regulation No 1191/69.

13. At the procedural level, Article 17(2) of the Regulation provides that compensation paid pursuant to this Regulation is to be exempt from the preliminary information procedure laid down in Article 93(3) of the EC Treaty (now Article 88(3) EC).

B The national provisions

14. In Germany, the Personenbeförderungsgesetz (Law on Passenger Transport, hereinafter the "PBefG") requires that a licence be obtained for the purpose of transporting passengers by regular service vehicles. (8) Such licence is issued to an undertaking for the purpose of guaranteeing a specific transport service.

15. The licence imposes certain obligations on the transport operator, such as that of charging the authorised tariff only, complying with the approved timetable and complying with the operating and transport conditions imposed on it by operation of law. On the other hand, it confers on the beneficiary a status bordering on exclusivity since no authorisation will be granted for a transport operation on the same line while the licence is valid.

16. It is apparent from the file that, until 31 December 1995, the German legislature expressly availed itself of Article 1(1) of Regulation No 1191/69 as regards urban, suburban and regional transport. (9) The Regulations of the Federal Minister for Transport of 31 July 1992 (10) set aside the application of Regulation No 1191/69 for public transport.

17. As from 1 January 1996, the German legislature introduced a distinction between transport services operated "commercially" and transport services operated as a "public service" . (11)

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18. The PBefG lays down the principle that urban, suburban and regional transport services must be operated commercially. (12) That term denotes services the costs of which are covered by receipts from the carriage of passengers, moneys received pursuant to statutory provisions on compensation in respect of tariffs and the organisation of transport and from other revenue of the undertaking. (13)

Licences for commercial transport services are governed by Paragraph 13 of the PBefG. That provision lays down a number of conditions governing the granting of licences, such as the applicant's financial status and reliability, and requires that the application be rejected where the service applied for would affect the interests of the public. If there are several applicants for the same service, the competent authority must make its choice having regard to the interests of the public and, in particular, taking into account cost-effectiveness.

19. On the other hand, where an adequate transport service cannot be provided commercially, it may be operated as a social service. (14) In such cases, the third sentence of Paragraph 8(4) of the PBefG provides that "the provisions in force of Regulation (EEC) No 1191/69 must apply" .

Transport licences operated in accordance with the public service conditions are governed by Paragraph 13a of the PBefG. Under that provision, a licence is to be issued provided it is necessary for the operation of a transport service by virtue of an administrative act or a public service contract within the meaning of Regulation No 1191/69. Further, the option chosen should be that which entails the least cost to the public. For the purpose of establishing the lowest cost, German law provides for a public tendering procedure in accordance with public procurement rules.

II The facts and procedure

20. The case in the main proceedings concerns the granting of licences to operate regular bus services in the Landkreis (administrative district) of Stendal in Germany.

21. On 25 September 1990, the Regierungspräsidium Magdeburg (the competent local authority body) (15) issued 18 licences to the undertaking Altmark Trans GmbH ("Altmark") for passenger transport on regional lines. Those licences expired on 19 September 1994.

22. By decision of 27 October 1994, the Regierungspräsidium issued new licences to Altmark. On the same basis, it rejected the application for licences lodged by Nahverkehrsgesellschaft Altmark GmbH (hereinafter "NVGA").

23. NVGA lodged an appeal against that decision on the grounds that Altmark was not a financially sound undertaking. It contended that the award of licences was unlawful because Altmark could not survive financially without the public subsides it received.

24. By decision of 29 June 1995, the Regierungspräsidium rejected that claim. Further, on 30 July 1996, it extended the validity of the licences granted to Altmark until 31 October 2002.

25. Accordingly, NVGA appealed to the Verwaltungsgericht Magdeburg (Administrative Court of first instance, Magdeburg) (Germany). The latter ruled that Altmark was financially sound since the foreseeable operational deficit would be covered by the subsidies paid by the administrative district of Stendal.

26. By contrast, the Oberverwaltungsgericht (Higher Administrative Court) of Sachsen-Anhalt revoked the licences issued to Altmark. That court held that Altmark's financial soundness was no longer guaranteed since it required subsidies from the administrative district of Stendal to operate the contested licences and that those subsidies were incompatible with Community law.

The Oberverwaltungsgericht held that the German legislature had excluded the application of Regulation

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No 1191/69 to urban, suburban or regional transport only until 31 December 1995. After that date, therefore, the granting of subsidies had to comply with the conditions set out in Regulation No 1191/69 and, in particular, with the requirement that public service obligations should be imposed by an administrative act or public service agreement. However, that condition was not met in the instant case since the administrative district of Stendal had neither concluded any agreement with Altmark nor adopted any administrative act. The administrative district of Stendal was therefore no longer authorised to subsidise Altmark in respect of the licences issued to it.

The Oberverwaltungsgericht concluded therefore that Altmark was no longer able to operate commercially the transport services in dispute. Inasmuch as those services were dependent on public grants, they had to be operated in accordance with public service rules and, for that reason, must fall within the scope of Regulation No 1191/69.

27. Altmark lodged an appeal against that decision on a point of law to the Bundesverwaltungsgericht. In its order for reference, (16) that court points out that the court hearing the appeal had failed to interpret the provisions of national law. It stated that, in German law, the fact that an undertaking required subsidies to provide a public transport service was not sufficient to preclude its commercial status as provided for in Paragraph 8(4) of the PBefG.

On the other hand, the Bundesverwaltungsgericht expresses doubt as to the interpretation to be given to Community law. Having regard to Articles 77 and 92 of the Treaty, and to the provisions of Regulation No 1191/69, it is uncertain whether the fact that an undertaking needs subsidies in order to operate a local public passenger service means that it must necessarily be defined as a "social service" and that it must fall within the scope of application of Regulation No 1191/69.

III The questions referred for a preliminary ruling

28. In consequence, the Bundesverwaltungsgericht decided to stay the proceedings and refer the following question to the Court:

> "Do Articles 73 EC and 87 EC, read in conjunction with Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91, preclude the application of a provision of national law which permits licences to operate regular local public transport services to be granted in respect of services necessarily dependent on public subsidies without regard being had to Sections II, III and IV of the abovementioned regulation?"

29. In its order for reference, (17) the Bundesverwaltungsgericht states that its question is subdivided into three parts as follows:

> "1. Are grants to make up a deficit in respect of local public transport services subject at all to the prohibition on aid laid down in Article 87(1) EC or must they be considered, having regard to their regional scope not to be liable a priori to affect trade between Member States?

May the answer to that question depend on the specific location and importance of the relevant local transport area?

2. Does Article 73 EC generally enable the national legislature to authorise public grants to make up for deficits in respect of urban, suburban or regional public transport without regard being had to Regulation (EEC) No 1191/69?

3. Does Regulation (EEC) No 1191/69 enable the national legislature to authorise the operation of a regular urban, suburban or regional public passenger service which is completely dependent on public grants, without regard being had to Sections II, III and IV of the abovementioned regulation and to require application of these rules only where adequate transport provision is otherwise impossible?

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Does that freedom allowed to the national legislature stem in particular from the fact that under the second subparagraph of Article 1(1) of Regulation (EEC) No 1191/69, as amended in 1991, it has the right to exclude urban, suburban or regional public transport undertakings completely from the scope of the regulation?

"

IV Subject-matter of the questions referred for a preliminary ruling

30. The question referred by the Bundesverwaltungsgericht raises two sets of issues.

31. The first set of questions concerns the interpretation of Treaty provisions. It seeks to determine whether subsidies granted by the authorities of a Member State to offset the cost of public service obligations imposed on an undertaking operating a local passenger service constitute State aids caught by the prohibition laid down in Article 92(1) of the Treaty. (18) In addition, it is a matter of identifying the circumstances in which Article 77 of the Treaty may authorise the granting of such subsidies. (19)

32. The second set of questions concerns Regulation No 1191/69. They seek in essence to ascertain whether the authorities of a Member State may organise and finance a local public transport service without regard for the provisions of the Regulation regarding the maintenance of public service obligations and common compensation procedures. (20)

33. I think that the order of those questions must be reversed. Regulation No 1191/69 constitutes a lex specialis in relation to Articles 92 and 77 of the Treaty. It establishes a harmonised framework laying down the conditions under which the Member States may grant subsidies to offset the cost of pubic service obligations imposed on transport undertakings. Thus, the Regulation implements the Treaty rules governing State aid in the field of public transport services by land.

34. Accordingly, the first question which arises is to determine whether Regulation No 1191/69 applies to commercially operated transport services. If it does, the German authorities will be able to grant subsidies to those services only if they satisfy the conditions laid down by that Regulation. On the other hand, if the Regulation does not apply, it will be necessary to examine the Treaty provisions relating to State aid.

V The question of the application of Regulation No 1191/69

35. By its first question, the Bundesverwaltungsgericht asks whether, on a proper construction of the second subparagraph of Article 1(1) of Regulation No 1191/69, a Member State is permitted not to apply that Regulation to a limited category of local public passenger services, such as those services operated commercially within the meaning of Paragraph 8(4) and Paragraph 13 of the PBefG. (21)

36. Thus, the national court seeks to establish whether the German authorities may grant subsidies to those services without complying with the conditions laid down by Regulation No 1191/69.

37. It is apparent from the file (22) that the German legislature has made particular use of the second subparagraph of Article 1(1) of the Regulation.

As from 1 January 1996, the German authorities have partly excluded the Regulation. Contrary to the Regulations of 31 July 1992, (23) which quite simply excluded the application of the Regulation to public passenger transport, the current text of the PBefG precludes the application of the Regulation only in respect of commercial transport. Other transport, namely transport operated in accordance with public service rules, is subject to the provisions of Regulation No 1191/69.

38. The question which arises is, therefore, whether the second subparagraph of Article 1(1) permits the authorities of a Member State to exclude in part Regulation No 1191/69 for a limited category

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of local public transport services. (24)

39. The parties to the main proceedings consider that the German authorities were entitled to exclude commercial transport from the Regulation. Referring to the principle "in eo quod plus sit, semper inest et minus " , they contend that if the second subparagraph of Article 1(1) permits the application of the Regulation to be excluded for a complete category of transport (namely, urban, suburban and regional services), it must, a fortiori , permit a limited part of those services to be excluded.

Further, Altmark refers to the Commission's reply to Mr Jarzembowski's written question. (25) In that reply, it is alleged that the Commission expressly indicated that the exclusion of commercially operated transport was compatible with Community law and, in particular, with Regulation No 1191/69.

40. The Court has never had the opportunity to determine whether the Member States were able to provide for a part exemption from Regulation No 1191/69. In order to decide that question, I consider that the Court could draw a parallel with its case-law on the Sixth VAT Directive. (26) Two judgments appear to merit particular attention in that regard.

41. The first judgment (27) concerns the interpretation of Article 28(3)(b) of the Sixth Directive.

That provision, read in conjunction with point 16 of Annex F, enables Member States to continue to exempt from VAT, for a transitional period, the supply of buildings and building land under the conditions obtaining at the time of the adoption of the Sixth Directive.

At that time, property sales in the United Kingdom were exempt from VAT. Only the operations enumerated in Schedule 5 to the Finance Act 1972 were subject to VAT. Subsequent to the entry into force of the Sixth Directive, the United Kingdom amended its legislation so as to reduce the scope of the exemptions.

Norbury Developments Ltd considered that the contested amendment was contrary to the provisions of the Sixth Directive. It contended that the purpose of Article 28(3) was to "freeze" the exemptions in Annex F as at the date on which the Sixth Directive was adopted. The Court rejected that interpretation for the following reasons: (28)

> "[T]he amendments [made to the United Kingdom's legislation] have not widened the scope of the exemption; on the contrary, they have reduced it. Consequently, they were not adopted in disregard of the wording of Article 28(3)(b). Whilst that provision precludes the introduction of new exemptions or the extension of the scope of existing exemptions following the entry into force of the Sixth Directive, it does not prevent a reduction of those exemptions, since their abolition constitutes the objective pursued by Article 28(4) of the Sixth Directive.

It would be contrary to that objective to construe Article 28(3)(b) of the Sixth Directive narrowly, to the effect that a Member State may maintain an existing exemption but may not abolish it, even only partially, without thereby abolishing all the other exemptions. Moreover, ... such an interpretation would have adverse effects for the uniform application of the Sixth Directive. A Member State might find itself compelled to maintain all the exemptions existing at the date of adoption of the Sixth Directive, even if it regarded it as possible, appropriate and desirable progressively to implement the system laid down in the directive in the sphere under consideration

" . (29)

42. The Court expounded identical reasoning in Commission v France . (30) In that case, the Commission alleged that France had, subsequent to the entry into force of the Sixth Directive, amended its legislation by making the right to deduct VAT on private vehicles subject to the condition that the vehicle be used for driving instruction.

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The French Government contended that its legislation complied with Article 17(6) of the Sixth Directive which provides that "[u]ntil the above rules [adopted by the Council] come into force, Member States may retain all the exclusions provided for under their national laws when this directive comes into force" . The Court rejected the Commission's appeal for the following reasons:

> "The same reasoning [as that employed in Norbury Developments , cited above] can be applied in the interpretation of Article 17(6) of the Sixth Directive. Thus, where the legislation of a Member State, after the entry into force of the Sixth Directive, is amended so as to reduce the scope of existing exemptions and thereby brings itself into line with the objective of the Sixth Directive, that legislation must be considered to be covered by the derogation provided for by the second subparagraph of Article 17(6) of the Sixth Directive and is not in breach of Article 17(2).

In the present case, the national legislative amendment replaces a total exclusion of private cars from the right to deduct VAT with authorisation for partial deduction, that is to say in respect of vehicles and machines used exclusively for driving instruction.

It follows that the amendment so made to the French legislation has the effect of reducing the scope of existing exemptions and bringing that legislation into line with the general regime of deduction set out in Article 17(2) of the Sixth Directive

" . (31)

43. In my opinion, the following principle can be deduced from the foregoing case-law. Where a directive seeks to introduce a harmonised regime in a specific area and where it authorises Member States to provide for derogations therefrom, States availing themselves of that possibility may, following the entry into force of the directive, amend their legislation in order to reduce the scope of the exemptions and thereby comply with the objectives pursued by the directive. On the other hand, a Member State cannot, following the entry into force of the directive, extend the scope of the exemptions provided for by its national law (32) nor reintroduce a derogation which it had initially abolished. (33)

44. It seems to me that that principle can be applied in its entirety to the instant case.

45. First, we have seen that the objective of Regulation No 1191/69 is to introduce a harmonised framework into the sphere of the public service obligations imposed by Member States on undertakings which provide land transport services. It lays down the conditions under which Member States may impose public service obligations and grant subsidies to offset the charges arising from those obligations for undertakings.

46. Second, the Regulation authorises Member States to provide for derogations from the rules which it lays down. The second subparagraph of Article 1(1) provides that Member States may exclude urban, suburban or regional services from the scope of the Regulation.

47. Third, the German authorities, following the entry into force of the Regulation, (34) amended their legislation with a view to reducing the scope of the exemptions provided for by national law.

We have seen that, until 31 December 1995, the German legislature expressly excluded all local public passenger services from the scope of the Regulation. (35) However, as from 1 January 1996, the German authorities have limited that exclusion to commercial transport services. It follows that transport services operated as a public service now come within the scope of the Regulation.

48. Fourth, that legislative amendment contributes to the attainment of the objectives pursued by Regulation No 1191/69.

49. At this point, I would note that the Regulation seeks to eliminate the disparities resulting

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from the public service obligations which the Member States impose on undertakings providing transport services by land and which are capable of substantially distorting competition. However, for local and regional public transport services, the Community legislature has brought about gradual harmonisation and liberalisation.

Initially, it quite simply excluded local and regional transport from Regulation No 1191/69. The first version of the Regulation, adopted in 1969, provided that that Regulation "is at present to apply to ... undertakings not mainly providing transport services of a local or regional character" . (36)

Subsequently, in 1991, the Council introduced the principle whereby local and regional transport came within the scope of application of Regulation No 1191/69. However, that principle is not absolute since the second subparagraph of Article 1(1) of the Regulation permits Member States to continue to exclude urban, suburban or regional services. (37)

Lastly, on 26 July 2000, the Commission presented a proposal for Regulation 2000/C 365 E/10 to the Council and the Parliament. (38) The proposal lays down the conditions under which Member States may compensate transport operators for the costs incurred in fulfilling public service requirements and under which they may grant exclusive rights for the operation of public passenger transport. (39) Contrary to the current version of Regulation No 1191/69, that proposal no longer permits Member States to exclude local and regional passenger transport services.

50. It follows that Regulation No 1191/69 seeks gradually to liberalise local and regional passenger services by land.

51. The amendment made by the German legislature to the PBefG contributes to the attainment of those various objectives.

First, that amendment enables distortions of competition in the German local passenger sector to be reduced. Since part of those transport services are subject to the provisions of the Regulation regarding the maintenance of public service obligations and the methods of compensation, the contested amendment brings the German system in line with the objectives pursued by Regulation No 1191/69.

Second, it would seem that the contested amendment constitutes the first step towards complete liberalisation of local passenger transport services in the Federal Republic of Germany. At the hearing, the representative of Altmark stated that the Bundestag was in the process of examining proposals seeking to reduce or even abolish public authority involvement in the operation of local transport. If that information is correct, it would mean that the German authorities, like the Community legislature, are gradually making progress in the process of liberalising local passenger services.

52. Consequently, I consider that the German legislature was entitled to exclude commercial transport from the scope of Regulation No 1191/69. I therefore propose that the Court reply to the first question that the second subparagraph of Article 1(1) of Regulation No 1191/69 does not preclude, following its entry into force, a Member State from adopting a legislative measure for the purpose of limiting the exclusion of that Regulation to a specific category of local passenger services by land, such as those services operated commercially within the meaning of Paragraphs 8(4) and 13 of the PBefG.

53. In so far as Regulation No 1191/69 is not applicable to the transport services in question in the case in the main proceedings, the general provisions of the Treaty in respect of State aids must be examined.

VI Article 92(1) of the Treaty

54. The second question concerns Article 92(1) of the Treaty. The national court asks whether

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subsidies granted by the authorities of a Member State "to make up a deficit in respect of local public transport services" (40) come within the prohibition contained in the above provision.

55. Article 92(1) of the Treaty stipulates four cumulative conditions. To be caught by the prohibition contained in that provision, it is necessary that:

the measure should confer a selective advantage on certain undertakings or the production of certain goods;

the advantage should be granted directly or indirectly through State resources;

the advantage should distort or threaten to distort competition;

the measure should affect trade between Member States.

56. In the instant case, the question posed by the Bundesverwaltungsgericht is concerned exclusively with the last condition. The national court asks whether contested subsidies are subject to the prohibition contained in Article 92(1) of the Treaty or whether they are to be considered, "having regard to their regional scope, not to be liable a priori to affect trade between Member States" . (41)

57. In principle, the Court could therefore limit itself to examining the question of the effect of the contested subsidies on intra-Community trade.

58. However, after the hearing held in the present case, the Sixth Chamber of the Court delivered its judgment in the Ferring case. (42)

59. In that judgment, the question which arose was to determine whether financial advantages granted by the authorities of a Member State in order to compensate for the cost of public service obligations imposed by them on certain undertakings constitute State "aid" within the meaning of Article 92(1) of the Treaty.

On that point, the Sixth Chamber of the Court held that, where the value of the advantages granted by the public authorities does not exceed that of the costs incurred by the public service obligations, the contested measure cannot be regarded as aid within the meaning of Article 92(1). On the other hand, it ruled that, should the advantages exceed the cost of the public service obligations, those advantages do come within the scope of Article 92(1) of the Treaty in respect of the part which exceeds the stated cost of the public service obligations.

60. The Ferring judgment is of direct relevance to the reply that should be given to the question raised by the Bundesverwaltungsgericht.

If the reasoning expounded in that judgment is followed, the national court must first determine whether the subsidies paid by the administrative district of Stendal exceed the cost of the public service obligations arising out of the contested transport operations. The question of the effect of those subsidies on trade between Member States will arise only if and in so far as the value of those subsidies exceeds the cost of the public service obligations.

61. However, in the instant case, I propose that the Court should not apply Ferring . In my view, the interpretation given by the Sixth Chamber of the Court is such as to undermine the structure and logic of the Treaty provisions in respect of State aid.

62. Before explaining why I am inviting the Court to review the rule in Ferring , I shall briefly summarise the context of the case.

A The context of the Ferring judgment

63. The Commission's practice and the Community case-law provided different answers to the question

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at the centre of Ferring .

64. Initially, the Commission considered that subsidies designed to offset the cost of public service obligations did not constitute State aids within the meaning of Article 92(1) of the Treaty. (43)

65. The Court of First Instance of the European Communities rejected that interpretation in a judgment of 27 February 1997. (44) The case concerned tax concessions granted by the French authorities to La Poste to compensate for costs linked to its performance of public-interest tasks. Unlike the Commission, the Court of First Instance considered that the contested measures did constitute State aids within the meaning of Article 92(1) of the Treaty. (45) However, it added that those measures could be justified under Article 90(2) of the EC Treaty (now Article 86(2) EC). (46)

66. On 10 May 2000, the Court of First Instance confirmed its ruling in SIC v Commission (47) concerning the financing of Portuguese public television channels.

The Court of First Instance held that "the fact that a financial advantage is granted to an undertaking by the public authorities in order to offset the cost of public service obligations which that undertaking is claimed to have assumed has no bearing on the classification of that measure as aid within the meaning of Article 92(1) of the Treaty" . (48) The Court of First Instance pointed out that "Article 92(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects" . (49) Accordingly "the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings" . (50)

67. Ferring is the first judgment in which the Court of Justice has ruled on the matter.

68. That case concerned a tax contribution introduced by the French authorities on the sale of medicinal preparations by pharmaceutical laboratories.

The French system of distributing medicinal preparations to pharmacies consists of two distinct channels: the first is through "wholesale distributors" and the second is through pharmaceutical laboratories. French legislation imposes on wholesale distributors certain public service obligations which essentially require that they hold an adequate stock of medicinal preparations and are able to guarantee delivery within a given time-limit in a given territory. The contested operation was designed to restore balance to the conditions of competition between the two distribution channels in so far as the pharmaceutical laboratories were not subject to the same obligations as the wholesale distributors.

The Tribunal des affaires de sécurité sociale de Créteil (Social Security Court) (France) had requested the Court to rule whether the contested contribution constituted a State aid within the meaning of Article 92(1) and, if so, whether it was justified under the provisions of Article 90(2) of the Treaty.

69. The Sixth Chamber of the Court replied to the first question by separating it into two parts.

70. First, it examined "whether, leaving aside the public service obligations laid down by French law, exempting wholesale distributors from tax on direct sales may, in principle, amount to State aid for the purposes of Article 92(1) of the Treaty" . (51)

In that respect, the Court held that the contested tax "may" meet the four conditions contained in Article 92(1). (52) The French authorities had conferred an economic advantage capable of strengthening the competitive position of wholesale distributors since, in the years following the introduction of the tax, "not only did the growth of direct sales recorded [by pharmaceutical laboratories] in the immediately preceding years cease, but the trend even reversed, with wholesale

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distributors recovering market share" . (53) Further, "there [could] be no doubt that a measure such as the tax on direct sales will influence trade patterns between the Member States" . (54)

71. Second, the Court went on to examine "whether the specific public service obligations imposed on wholesale distributors by the French system for the supply of medicines to pharmacies precludes the tax from being State aid" . (55)

On that point, it held that, "provided that the tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article 92 of the Treaty. Moreover, provided there is the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purposes of Article 92(1) of the Treaty because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing" . (56)

72. The Sixth Chamber of the Court then replied to the question concerning Article 90(2) of the Treaty. It held that "if it is the case that the advantage for wholesale distributors in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law, that advantage, to the extent that it exceeds the additional costs mentioned, cannot, in any event, be regarded as necessary to enable them to carry out the particular tasks assigned to them" . (57)

Accordingly, Article 90(2) of the Treaty cannot cover the contested tax in so far as the advantage it confers on wholesale distributors exceeds the cost of the public service obligations. (58)

B Assessment of the rule in Ferring

73. I do not concur with the reasoning expounded by the Sixth Chamber of the Court in Ferring . In my opinion, that reasoning is liable to undermine the structure and logic of the Treaty provisions in respect of State aid.

74. The Treaty provisions in respect of State aid are laid down in accordance with a precise structure.

Article 92(1) lays down the principle of prohibiting State aid which is capable of distorting competition and affecting trade between Member States. However, the Treaty provides for several categories of exception to that principle. (59)

First, Article 77 of the Treaty provides, in the specific field of transport, that aid is to be compatible with the Treaty if it meets the needs of the coordination of transport or if it represents reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Second, the provisions of Article 92(2) and (3) set out the categories of aid which shall be or may be considered to be compatible with the common market. Such is, in particular, the case of aid the purpose of which is cultural.

Finally, Article 90(2) of the Treaty establishes an exception in respect of undertakings entrusted with the operation of services of general economic interest. It provides that "[such] undertakings... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community" .

75. That said, I consider that Ferring essentially poses three areas of difficulty with respect to the Treaty provisions.

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76. First, the grounds in Ferring confuse, in my opinion, two questions which are legally distinct: the question of characterising a measure as State aid and the question of justification for a State measure.

77. The objective of Article 92 of the Treaty is to prevent trade between Member States being affected by advantages granted by the public authorities which distort or threaten to distort competition. (60) Having regard to that objective, the Court has ruled that Article 92(1) does not distinguish between the measures of State intervention by reference to their causes or their aims but defines them in relation to their effects. (61) Accordingly, neither the fiscal character, (62) nor the social aim, (63) nor the general objectives (64) of a measure can enable it to avoid being characterised as aid within the meaning of Article 92(1) of the Treaty.

It follows that the concept of aid is an objective one. As the Court of First Instance pointed out in SIC v Commission , (65) the characterisation of a measure as aid depends solely on the question of whether or not it confers an advantage on one or more undertakings. In any event, State intervention cannot be assessed in terms of the objective pursued by the public authorities. (66) Those objectives may be taken into consideration only at a later stage in the analysis to determine whether the State measure is justified under the derogations provided for in the Treaty.

78. In the instant case, it appears that Ferring has created confusion between those two questions. The fact that the reasoning in the judgment was separated into two parts would appear to be significant in that respect. The Court first held that the contested exemption was capable of constituting a State aid caught by the prohibition provided for in Article 92(1). (67) Subsequently, it excluded the characterisation of aid "on account of the specific public service obligations imposed on wholesale distributors" . (68) Consequently, it was only in the light of Article 92(1) that the Court considered the question whether the contested measure was caught by the prohibition on aid and whether it could be justified with regard to the objectives pursued by the French authorities. (69)

79. Second, I consider that Ferring is liable to deprive Article 90(2) of the Treaty of a substantial part of its effect.

80. Article 90(2) of the Treaty constitutes the central Treaty provision for reconciling Community objectives. (70) As the Court has held, that provision seeks to reconcile the Member States' interest in using certain undertakings as an instrument of economic, fiscal or social policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market. (71)

81. Under the terms of the Ferring judgment, it must be considered that:

where an advantage granted by the authorities of a Member State is inferior or equal to the costs of public service obligations, the advantage does not constitute aid within the meaning of Article 92(1) of the Treaty; (72)

however, where the advantage granted by the authorities of a Member State is greater than the costs of the public service obligations, the portion which exceeds those costs "cannot, in any event, be regarded as necessary to enable them to carry out the particular tasks assigned to them" . (73)

82. That means that, in the first case, Article 90(2) of the Treaty will not apply because the contested measure is not caught by the prohibition provided for in Article 92(1). However, nor will Article 90(2) apply in the second case because the part of the aid which exceeds the costs of the public service obligations does not come within the scope of application of that derogation. Thus, the Ferring judgment would appear to have deprived Article 90(2) of the Treaty of its

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effect in the field of State aid.

83. The same considerations apply to the provisions of Article 77 of the Treaty and the regulations adopted for the application thereof.

84. Article 77 of the Treaty constitutes a provision derogating from Article 92(1) of the Treaty. (74) It permits Member States to grant aid by way of reimbursement for the discharge of certain obligations inherent in the concept of a public service in the field of transport by land. (75) Furthermore, Regulation No 1191/69 defines the conditions under which Member States may grant aids to provide compensation for such obligations. One of the objectives pursued by that regulation is to ensure that States do not "overcompensate" the charges arising out of public service obligations. That is why Articles 10 to 13 of the Regulation provide for common methods of compensation.

On 4 June 1970, the Council adopted Regulation (EEC) No 1107/70 on the granting of aids for transport by rail, road and inland waterway. (76) That regulation stipulates the conditions under which Member States may impose obligations inherent in the concept of a public service which involve the granting of aid under Article 77 of the Treaty not covered by Regulation No 1191/69. (77)

85. If the reasoning expounded in Ferring is followed, subsidies which are limited to offsetting the cost of public service obligations must be deemed not to constitute aids within the meaning of Article 92(1). That means that, in the field of transport by land, it becomes in practice pointless to apply the provisions provided for in Article 77 of the Treaty and in Regulations Nos 1191/69 and 1107/70. The criteria established by Ferring would appear to be sufficient to assess the compatibility of aid granted to undertakings entrusted with operating a public transport service by land. In other words, it would appear that Ferring has rendered the provisions laid down in Article 77 of the Treaty and in Regulations Nos 1191/69 and 1107/70 inoperative.

86. It follows from the above considerations that the interpretation given in Ferring is capable of depriving Articles 90(2) and 77 of the Treaty of a substantial part of their effect. (78) It may be questioned whether Ferring has not introduced a much more flexible system in place of those provisions. It may be useful, at this point, to compare briefly the conditions laid down in Article 90(2) with those established in Ferring .

87. Article 90(2) of the Treaty sets out six conditions for application. (79) Those conditions seek, in essence, to ensure that:

the undertaking concerned has actually been entrusted with the task of operating a service of general economic interest by an express act of the public authority; (80)

the activities carried out by the undertaking in fact constitute a public service task in the sense that it is "of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities" ; (81)

application of the Treaty rules frustrates the performance of the particular task of the undertaking; (82)

the specific task of the undertaking cannot be performed by measures which are less restrictive of competition; (83)

the contested measure has no substantial effect on intra-Community trade. (84)

88. It follows from Ferring that a State measure may not be caught by Article 92(1) of the Treaty where it fulfils two conditions. It is necessary that (1) national legislation should impose public service obligations on the recipient undertakings (85) and that (2) the amount of the aid should not exceed the costs incurred by the public service obligations. (86)

89. In those circumstances, the system introduced by Ferring is characterised by considerable

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flexibility compared to the control provided for in Article 90(2) of the Treaty. In particular, that system does not permit it to be determined, in accordance with the Court's case-law, (87) whether the obligations imposed on undertakings have a sufficient link with the subject-matter of the service of general interest and whether they are designed to make a direct contribution to satisfying that interest. Similarly, it does not permit it to be ascertained whether the obligations are specific to the undertaking concerned and defined in a sufficiently precise manner. (88)

Moreover, it is not certain that the "necessary equivalence" referred to in Ferring (89) is comparable to the requirement that the application of the Treaty rules must "frustrate" the performance of the undertaking's task and to the proportionality test provided for in Article 90(2). In any event, Ferring does not contain any condition relating to the effect on trade between Member States. However, that condition is important since it may lead to a refusal to apply the benefit of Article 90(2) on the ground that the contested measure affects intra-Community trade in a manner contrary to the Community interest. (90)

90. Consequently, I consider that the criteria set out in Ferring do not establish an adequate framework for controlling aid granted by the Member States to undertakings entrusted with a task of general public importance. That control must be carried out within the framework of the provisions established for that purpose by the Treaty, namely Articles 77, 90(2) and 92(3) of the Treaty.

91. The final difficulty relates to the fact that the reasoning expounded in Ferring effectively removes measures for financing public services from the Commission's control.

92. The Commission occupies a "central role" (91) in the implementation of the Treaty provisions concerning State aid. It carries out a preventive review of new aid and keeps existing aid under constant review. The Commission also enjoys exclusive competence for declaring aid compatible or incompatible with the common market with regard to Articles 92 and 93 of the Treaty. (92)

In Banco Exterior de España , (93) the Court held that the power of the Commission also covered aid granted to undertakings responsible for the management of services of general economic interest within the meaning of Article 90(2). Further, in Case C-332/98 France v Commission , (94) the Court held that aid intended for undertakings entrusted with a public service task were subject to the obligation of prior notification provided for in Article 93(3) of the Treaty. The Court thus rejected the idea that aid of that nature could be implemented by the Member States without waiting for the Commission's decision on compatibility. (95)

It should also be recalled that, by virtue of Article 90(3) of the Treaty, the Commission must fulfil a "duty of surveillance" over the Member States in their relations with public undertakings. (96) To that end, the Commission is empowered to adopt decisions and directives to specify the obligations arising from Article 90(1). (97) The Court held that the duty of surveillance was "essential" so as to allow the Commission "to ensure the application of the rules on competition and thus to contribute to the institution of a system of undistorted competition in the common market" . (98)

93. However, Ferring effectively removes measures for the financing of public services from the control exercised by the Commission by virtue of the abovementioned provisions.

Measures which offset the cost of public service obligations are no longer subject to the obligation of notification as provided for in Article 93(3) since they do not constitute aid within the meaning of Article 92(1). For the same reason, existing measures are no longer held under constant review by the Commission as provided for in Article 93(1) and (2). Further, those measures are not covered by the control established by Article 90(3) since they do not come within the scope of application of the Treaty rules in respect of competition. (99)

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94. If that is the effect of Ferring , I consider that it will have considerable repercussions for the Commission's policy on State aid.

95. It should be recalled that, in recent years, the Commission has undertaken an extremely wide-ranging review of the policy to be adopted with regard to services of general interest. (100) In that context, in December 2000 the Nice European Council requested the Commission to draw up a report in response to certain concerns.

According to the European Council, "[a]pplication of internal market and competition rules should allow services of general economic interest to perform their tasks under conditions of legal certainty and economic viability.... There is a need here especially for clarification of the relationship between methods of funding services of general interest and the application of the rules on State aid. In particular, the compatibility of aid designed to offset the extra costs incurred in performing tasks of general economic interest should be recognised, in full compliance with Article 86(2)" . (101)

96. The Commission presented its report to the Laeken European Council. (102) It stated that financial compensation granted to the provider of a service of general interest constitutes an economic advantage within the meaning of Article 87(1) EC. (103) However, such compensation may qualify for an exemption under Article 87(2) and (3) EC or it may qualify for a derogation under Articles 73 and 86(2) EC. (104) As regards the latter provision, the Commission considers that the measure is justified if the amount of aid does not exceed the additional costs incurred by public service obligations.

In addition, the Commission committed itself to exploring ways in which it could increase legal certainty in the sphere of services of public interest. (105) To that end, it has begun studying, in close cooperation with the Member States, the possibility of adopting a regulation for the block exemption of certain State aids in the area of services of general public importance. It also committed itself to adopting a number of other measures to increase transparency.

97. However, the reasoning expounded in Ferring is likely to call into question the measures which the Commission and Member States are seeking to implement in the sector. By ruling that aid intended to offset the cost of public service obligations does not come within the Treaty rules governing State aids, the Sixth Chamber of the Court would appear to have rendered pointless the efforts taken by the competent authorities to define Community policy in the area of public sector financing.

98. I would therefore ask the Court to review the interpretation given in Ferring . I would suggest that the Court follow the reasoning expounded by the Court of First Instance in SIC v Commission , cited above, and rule that financial compensation granted to an undertaking to offset the cost of public service obligations constitutes aid within the meaning of Article 92(1) of the Treaty, without prejudice to the possibility of that measure being exempted under the derogations provided in the Treaty and, particularly, under Articles 77 and 90(2).

C The facts of the case in the main proceedings

99. Since I am proposing that the interpretation given in Ferring should be set aside, it falls to consider whether the subsidies granted by the administrative district of Stendal are caught by the prohibition provided for in Article 92(1) of the Treaty. To that end, it must be determined whether the contested subsidies fulfil the four conditions laid down by that article.

100. First, I would point out that, in accordance with settled case-law, the concept of aid covers the advantages granted by public authorities which, in various forms, mitigate the charges normally included in the budget of an undertaking. (106) In order to determine whether a State measure

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constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions. (107)

101. In the instant case, it is apparent from the file (108) that the contested subsidies amount to DEM 0.75 per kilometre travelled on routes in the region of Stendal. It is also apparent from the file that Altmark receives those subsidies in addition to its revenue and receipts stemming from the statutory provisions on compensation in respect of tariffs and the organisation of transport. (109)

Accordingly, the contested subsidies constitute an advantage which Altmark would not have obtained under normal market conditions and which mitigate the charges included in its budget. Moreover, the parties to the main proceedings considered that: "[i]t is manifest that the subsidies granted by the administrative district of Stendal are aids within the meaning of Community law and there is no need to examine this aspect of the question in any depth" . (110)

Further, the contested subsidies constitute a "selective" advantage within the meaning of Article 92(1) of the Treaty (111) since only the holder of a licence to operate the services concerned receives such subsidies.

102. Second, the contested subsidies are granted through State resources within the meaning of Article 92(1) of the Treaty. (112) The Court has held that "aid granted by regional and local bodies of the Member States, whatever their status and description" was aid financed from public resources. (113) That is the situation in the present case since the administrative district of Stendal is a local authority of the Federal Republic of Germany.

103. Third, I consider that the subsidies are liable to distort competition in the market of local passenger services.

The concept of the distortion of competition is given an extremely broad interpretation in Article 92(1). (114) The Court considers that competition is distorted when financial aid granted by the State strengthens the competitive position of the recipient undertaking compared with other undertakings with which it is in competition. (115) As a general rule, it may be assumed that all public aid distorts or threatens to distort competition. (116)

In the instant case, the subsidies granted by the administrative district of Stendal strengthen the competitive position of Altmark compared with other undertakings which wish to offer passenger services in the region of Stendal. The facts giving rise to the case in the main proceedings indicate that, without public subsidies, Altmark would probably not be able to continue to operate the contested services. (117) Accordingly, the subsidies granted by the administrative district of Stendal effectively prevent competing undertakings from placing their services on the market.

104. The final condition in Article 92(1) is the subject of a specific question by the Bundesverwaltungsgericht. That court asks whether, in view of the regional character of the transport services concerned, the subsidies granted by the administrative district of Stendal are capable of affecting trade between Member States. (118) Further, it asks whether the reply to that question depends on the specific location and importance of the relevant local transport area. (119)

105. In their written observations, Altmark (120) and the Regierungspräsidium (121) maintained that the contested aid had no effect on trade between Member States. They explained that, in accordance with the provisions of German law, licensed undertakings are not authorised to offer transport services outside the territory covered by the licence. Consequently, subsidies granted to an undertaking operating services in the region of Stendal would not affect, in any way whatsoever, the position of undertakings located in neighbouring countries or regions. In any event, the parties to the main proceedings consider that the aid has no significant effect on trade between the Member States.

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106. It is apparent from the case-law that the requirement of an effect on trade between Member States is easily satisfied. (122) The Court considers that when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid. (123)

In that respect, the fact that the recipient undertaking is not involved in exporting services does not preclude an effect on trade. Where a State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State. (124) Further, the simple fact that no trade exists between Member States at the time the aid is granted does not mean that such aid is not covered by Article 92(1). Aid is liable to affect intra-Community trade if the prospect of such trade is foreseeable. (125)

107. However, in the instant case, it is apparent from the file that trade between Member States is not only foreseeable but also, to a certain extent, already exists.

In its written observations, (126) the Commission stated that, even though the sector of passenger transport by land was still not liberalised at the legal level, several Member States had begun, from 1995, to open their markets to undertakings established in other Member States. Such is the case in the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of Spain, the Republic of Finland, the French Republic, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Sweden. Such is also the case in the Federal Republic of Germany for transport operated as a public service given that, since 1996, those services have been covered by Regulation No 1191/69. Thus, the Commission cites several examples of undertakings which offer local or regional passenger transport services in Member States other than their country of origin. (127)

108. Accordingly, I consider that the local or regional character of the transport in question in the case in the main proceedings is not such as to exclude the contested subsidies from the field of application of Article 92(1).

109. The argument of the parties that the aid granted by the administrative district of Stendal has no significant effect on trade must also be rejected.

First, it should be recalled that, since Tubemeuse , (128) the Court has consistently held that "the relatively small amount of aid or the relatively small size of the undertaking which receives it does not ... exclude the possibility that intra-Community trade might be affected" . (129) Further, there does not exist in the Court's case-law any threshold or percentage below which it may be considered that trade between Member States is not affected. (130)

Second, it should be pointed out that Commission Notice 96/C 68/06 on the de minimis rule for State aids (131) does not apply to the transport sector. (132) That is also the case in the new regulation on de minimis aid. (133) The Commission considered that: "In view of the special rules which apply in the sectors of... transport, and of the risk that even small amounts of aid could fulfil the criteria of Article 87(1) of the Treaty in those sectors, it is appropriate that this Regulation should not apply to those sectors" . (134)

110. Accordingly, I propose that the Court should reply to the second question referred for a preliminary ruling that the subsidies granted by the authorities of a Member State to offset the cost of public service obligations imposed on an undertaking entrusted with operating a local or regional passenger service by land constitute State aid liable to be caught by the prohibition provided for in Article 92(1) of the Treaty.

VII Article 77 of the Treaty

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111. The final question referred for a preliminary ruling concerns the provisions of Article 77 of the Treaty. The national court asks whether that article permits the authorities of a Member State to grant subsidies to offset the cost of public service obligations imposed on an undertaking operating a regional road passenger service without having regard to the provisions of Regulation No 1191/69.

112. As we have seen, (135) Article 77 of the Treaty has been implemented by specific regulations, including Regulations Nos 1191/69 and 1107/70.

113. At the hearing, the Commission claimed that Article 77 of the Treaty was sufficiently precise for it to be applied independently. It considers that, like Article 95 of the ECSC Treaty, that provision permits Member States to grant aid outside of those cases expressly referred to in secondary Community legislation. In such a case, the Member States would be required to give notification as provided for in Article 93(3) of the Treaty. (136)

114. In my opinion, the Commission's argument cannot be accepted.

115. In the preamble to Regulation No 1107/70, the Council recalled that common rules for compensation payments arising from the normalisation of the accounts of railway undertakings, and compensation in respect of financial burdens resulting from public service obligations in transport by land had been adopted respectively by Regulation (EEC) No 1192/69 (137) and Regulation No 1191/69. (138)

It considered that "it is therefore necessary to specify the cases and the circumstances in which Member States may take coordination measures or impose obligations inherent in the concept of a public service which involve the granting of aids under Article 77 of the Treaty not covered by the aforesaid Regulation" . (139)

Moreover, Article 3 of Regulation No 1107/70 provides that: "[w]ithout prejudice to the provisions of Council Regulation (EEC) No 1192/69 ... and of Council Regulation (EEC) No 1191/69... , Member states shall neither take coordination measures nor impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 77 of the Treaty except in the following circumstances ..." . (140)

116. It follows that, contrary to the Commission's contention, Member States are no longer authorised to rely on Article 77 of the Treaty outside those cases referred to by secondary Community law. Regulation No 1107/70 sets out an exhaustive list of the conditions under which the authorities of the Member States may grant aid under Article 77 of the Treaty outside those situations provided for in Regulations Nos 1191/69 and 1192/69.

117. In those circumstances, I propose that the Court reply to the final question referred that Article 77 of the Treaty does not permit the authorities of a Member State to grant aid in order to offset the cost of public service obligations in the field of passenger transport by land without having regard to secondary Community legislation and, in particular, Regulations Nos 1191/69 and 1107/70.

118. It is apparent from the order for reference and the questions referred for a preliminary ruling that, in the instant case, the Bundesverwaltungsgericht wishes to know whether Community law permits the German authorities to grant aid to an undertaking operating a regional public passenger service without complying with the conditions laid down by Regulation No 1191/69. In order to give a helpful reply to the national court, it is therefore appropriate for me to continue my reasoning and examine whether Regulation No 1107/70 authorises the granting of such subsidies.

119. In that respect, the relevant provisions are those set out in Article 3(2) of Regulation No 1107/70. That article provides:

"Without prejudice to... Regulation (EEC) No 1191/69,... Member States shall... [not] impose

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obligations inherent in the concept of a public service which involve the funding of aids pursuant to Article 77 of the Treaty except... until the entry into force of relevant Community rules, where payments are made to rail, road or inland waterway transport undertakings as compensation for public service obligations imposed on them by the State or public authorities and covering either:

tariff obligations not falling within the definition given in Article 2(5) of Regulation (EEC) No 1191/69; or

transport undertakings or activities to which that Regulation does not apply.

"

120. Article 3(2) of Regulation No 1107/70 therefore authorises Member States to grant aid under Article 77 of the Treaty where, on the one hand, the recipient undertakings or the transport activities concerned are excluded from the scope of application of Regulation No 1191/69 and where, on the other hand, no Community regulation specifically concerning the sector in question yet exists.

121. In my opinion, both those conditions are satisfied in the instant case. On the one hand, it has been shown that in Germany regional passenger transport services operated commercially are excluded from the scope of Regulation No 1191/69. On the other hand, with the exception of that Regulation, there does not currently exist any Community regulation specifically concerning public road passenger services.

122. Accordingly, I consider that Regulation No 1107/70 permits the authorities of Member States to grant, under Article 77 of the Treaty, aid to offset the cost of public service obligations which they impose on undertakings operating a regional road passenger service.

123. However, the attention of the national court should be drawn to the requirements laid down in Article 5 of Regulation No 1107/70 and in the Court's case-law.

Article 5 of Regulation No 1107/70 provides that Member States, in accordance with Article 93(3) of the Treaty, are required to inform the Commission of any plans to grant or alter aid and shall forward to the Commission "all information necessary to [enable it to] establish that such aid complies with the provisions of this Regulation" .

Moreover, the Court has held that "the effect of Article 77 of the Treaty, which acknowledges that aid to transport is compatible with the Treaty only in well-defined cases which do not jeopardise the general interests of the Community, cannot be to exempt aid to transport from the general system of the Treaty concerning aid granted by the States and from the controls and procedures laid down therein" . (141)

124. It follows that the authorities of the Member States can grant aid under Regulation No 1107/70 only if they have given prior notification of their plan to the Commission and obtained from the Commission a decision declaring the aid to be compatible with the common market.

125. In the present case, it is for the Bundesverwaltungsgericht to establish whether the subsidies granted by the competent authorities fulfil the conditions of Article 92(1) of the Treaty. If so, the national court must also ensure that the aid has been notified to the Commission in accordance with Article 93(3) of the Treaty and has not been implemented without prior authorisation.

If that is not the case, the national court must, pursuant to the Court's case-law, (142) guarantee that all the appropriate inferences will be drawn from the infringement in accordance with its national law. (143) Those inferences imply that the national court will, where necessary;

order the recovery of the contested aid; (144)

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declare unlawful the act instituting the contested aid and the measures implementing it; (145)

order the competent public authorities to compensate for the damage that the payment of aid may possibly have caused (146) to its recipient (147) and to the recipient's competitors. (148)

126. In consequence, the reply to be given to the Bundesverwaltungsgericht must be that Article 77 of the Treaty does not permit the authorities of a Member State to grant subsidies to offset the cost of the public service obligations which they impose on an undertaking operating a regional road passenger service without complying with the conditions laid down by Regulation No 1191/69 or , failing that, the conditions laid down by Regulation No 1107/70.

VII Conclusion

127. In light of the preceding considerations, I therefore propose that the Court answer the three questions referred by the Bundesverwaltungsgericht as follows:

(1) Article 1(1) of Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by the Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 does not preclude, following its entry into force, a Member State adopting a legislative measure for the purpose of limiting the exclusion of that regulation to a specific category of regional passenger services by land, such as those services operated commercially within the meaning of Paragraphs 8(4) and 13 of the Personenbeförderungsgesetz (Law on Passenger Transport by land).

(2) Subsidies granted by the authorities of a Member State to offset the cost of public service obligations imposed on an undertaking entrusted with operating a local or regional passenger service by land constitute State aid liable to be caught by the prohibition provided for in Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC). In that respect, the relatively small amount of aid or the relatively small size of the undertaking which receives it does not, a priori, exclude the possibility that intra- Community trade might be affected within the meaning of that provision.

(3) Article 77 of the EC Treaty (now Article 73 EC) does not permit the authorities of a Member State to adopt measures authorising the granting of subsidies to offset the cost of the public service obligations which they impose on an undertaking operating a regional road passenger service without complying with the provisions of Regulation No 1191/69 or, failing that, the provisions of Council Regulation No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway.

(1) .

(2) OJ, English Special Edition 1969 (I), p. 276.

(3) OJ 1991 L 169, p. 1.

(4) First recital of Regulation No 1191/69.

(5) Ibid., second recital.

(6) Ibid., 10th and 13th recitals.

(7) These three categories of obligation are, in turn, defined in paragraphs 3 to 5 of Article 2 of Regulation No 1191/69.

(8) Paragraphs 1(1) and 2(1) of the PBefG.

(9) Order for reference, p. 10.

(10) BGBl. I, 1992, p. 1442.

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(11) Paragraph 6(116) of the Eisenbahnneuordnungsgesetz of 27 December 1993 (BGBl. I, 1993, p. 2378).

(12) First sentence of Paragraph 8(4) of the PBefG.

(13) Second sentence of Paragraph 8(4) of the PBefG.

(14) Third sentence of Paragraph 8(4) of the PBefG.

(15) "The Regierungspräsidium" .

(16) English translation (pp. 11 to 13).

(17) English translation (p. 15).

(18) First limb of the question for a preliminary ruling.

(19) Second limb of the question for a preliminary ruling.

(20) See the text of the question for a preliminary ruling and the third limb of that question.

(21) It should be noted that under the second subparagraph of Article 1(1) of the Regulation "Member States may exclude from the scope of this Regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services" .

(22) See, in particular, the reply of the German Government to the Court's written question. It should be noted that, with the exception of that reply, the German Government has not submitted any written or oral observations to the Court.

(23) Cited above.

(24) During the oral procedure, the Commission contended that Regulation No 1191/69 provided for "optional" harmonisation in the sector. Member States wishing to impose public service obligations were free to decide whether or not to apply the Regulation. The Commission did not state whether its contention was concerned solely with transport referred to in the second subparagraph of Article 1(1) of the Regulation or whether it covered all transport within the scope of application of the Regulation. In the latter case, I consider that the Commission's contention would be contrary to the objectives of Regulation No 1191/69. That Regulation seeks to eliminate the disparities arising out of public service obligations which the Member States impose on transport undertakings and which are capable of distorting competition (see the first recital of the Regulation and Council Decision 65/271/EEC of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway (OJ, English Special Edition 1965-1966, p. 67)). The attainment of those objectives would be seriously compromised if, for transport coming within the scope of the Regulation, Member States were able to impose public service obligations without regard to the provisions of the Regulation. If that were the case, they would reintroduce the distortions in competition which the Regulation specifically seeks to eliminate. Moreover, it would be difficult to reconcile the Commission's contention with the 15th recital of the Regulation which provides: "[w]hereas the provisions of this Regulation should be applied to any new public obligation as defined in this Regulation imposed on a transport undertaking" . Finally, the Commission's contention would be contrary to Article 189 of the EC Treaty (now Article 249 EC) as that provides that regulations are binding in their entirety and are directly applicable in all Member States.

(25) Written Question P-381/95 (OJ 1995 C 270, p. 2).

(26) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter the "Sixth Directive").

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(27) Case C-136/97 Norbury Developments [1999] ECR I-2491.

(28) Ibid., paragraphs 19 and 20.

(29) Accordingly, the Court upheld the reasoning proposed by Advocate General Gulmann in Case C-74/91 Commission v Germany [1992] ECR I-5437, paragraph 21 and by Advocate General Fennelly in Norbury Developments , cited above, paragraph 32.

(30) Case C-345/99 [2001] ECR I-4493.

(31) Ibid., paragraphs 22 to 24.

(32) Case C-40/00 Commission v France [2001] ECR I-4539, paragraph 17.

(33) Ibid., paragraphs 18 and 19.

(34) The second subparagraph of Article 1(1) of Regulation No 1191/69 entered into force on 1 July 1992, pursuant to Article 2 of Regulation No 1893/91.

(35) See paragraphs 16 to 19 of this Opinion.

(36) Twentieth recital of Regulation No 1191/69. It was envisaged that the Council would determine, within a time-limit of three years, the action to be taken in respect of public service obligations for local and regional transport services.

(37) The second subparagraph of Article 1(1) was inserted into Regulation No 1191/69 by Regulation No 1893/91, which entered into force on 1 July 1992.

(38) Proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (OJ 2000 C 365 E, p. 169).

(39) Ibid., Article 1.

(40) First limb of the question for a preliminary ruling.

(41) Ibid.

(42) Case C-53/00 Ferring [2001] ECR I-9067 (hereinafter "the Ferring judgment").

(43) See, in particular, Droit de la concurrence dans les Communautés européennes, Volume IIB, Explication des règles applicables aux aides d'Etat , 1997, p. 7, http:www.europa.eu.int/comm/competition/state_aid/legislation/vol2b_fr.pdf. See also the references cited by Advocate General Tizzano in his Opinion in the Ferring case, paragraph 56.

(44) Case T-106/95 FFSA and Others v Commission [1997] ECR II-229.

(45) Paragraphs 167, 168 and 172.

(46) Paragraphs 170 to 194.

(47) Case T-46/97 [2000] ECR II-2125.

(48) Paragraph 84.

(49) Paragraph 83.

(50) Ibid.

(51) Ferring judgment (paragraph 18).

(52) Ibid., paragraph 27.

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(53) Ibid., paragraph 19.

(54) Ibid., paragraph 21.

(55) Ibid., paragraph 23.

(56) Ibid., paragraph 27.

(57) Ibid., paragraph 32.

(58) Ibid., paragraph 33.

(59) Only those exceptions relevant to the present case are referred to here.

(60) See, inter alia , Case 173/73 Italy v Commission [1974] ECR 709, paragraph 26.

(61) See, in particular, Italy v Commission , cited above, paragraph 27; Case 310/85 Deufil vCommission [1987] ECR 901, paragraph 8; Case C-56/93 Belgium v Commission [1996] ECR I-723, paragraph 79 and Case C-241/94 France v Commission [1996] ECR I-4551, paragraph 20.

(62) See, in particular, Italy vCommission , cited above, paragraph 28.

(63) See, in particular, Case C-241/94 France v Commission , cited above, paragraph 21 and Case C-251/97 France v Commission [1999] ECR I-6639, paragraph 37.

(64) See, in particular, Deufil v Commission , cited above, paragraph 8.

(65) Cited above, paragraph 83.

(66) See, in that sense, Lehman, H., "Les aides accordées par les Etats" , Union européenne, Communauté européenne, Commentaire article par article des traités UE et CE, eds. Léger, P., Helbing & Lichtenhahn, Dalloz, Bruylant, Bâle, Paris, Bruxelles, 2000 (pp. 802 and 803).

(67) Ferring (paragraphs 18 to 22).

(68) Ibid., paragraphs 23 to 27.

(69) See also the Opinion of Advocate General Tizzano in Ferring , who examined "whether the contested measure is justified by the fact that it is intended to offset the inappropriate public service obligations imposed on wholesale distributors" (paragraph 50, emphasis added).

(70) Communication 2001/C 17/04 of the Commission on public interest service in Europe (OJ 2001 C 17, p. 4, paragraph 19).

(71) See, in particular, Cases C-202/88 France v Commission [1991] ECR I-1223, paragraph 12 and C-67/96 Albany [1999] ECR I-5751, paragraph 103.

(72) Ferring , paragraph 27.

(73) Ibid., paragraph 32.

(74) See also, in that sense, Aussant, J, Fornasier, R., Louis, J.-V., Séché, J.-C., Van Raepenbusch, S., Commentaire J. Megret, Le droit de la CEE, volume 3, Libre circulation des personnes, des services et des capitaux, Transports, éditions de l'université de Bruxelles, Bruxelles, 1990, 2nd ed. (p. 226), and Communication 2001/C 17/04, cited above, paragraph 26.

(75) Article 77 of the Treaty provides that "aids shall be compatible with this Treaty... if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service" . At this point, it may already be noted that the rule in Ferring is difficult to reconcile with the wording of that provision. Had the authors of the Treaty considered that the subsidies provided to offset the cost of public service obligations were not aid within the

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meaning of Article 92(1), they would probably not have deemed it appropriate to insert an express provision declaring them compatible with the Treaty. It therefore seems that, contrary to the principle raised in the Ferring judgment, the intention of the authors of the Treaty was to bring aid to offset the cost of public service obligations within the scope of the prohibition contained in Article 92(1) of the Treaty, even where that aid does not exceed the costs incurred by the performance of public service obligations.

(76) OJ, English Special Edition 1970 (II), p. 360.

(77) Fifth recital of Regulation No 1107/70.

(78) The same argument applies, mutatis mutandis , to the derogations provided for in Article 92(3) of the Treaty.

(79) For a more detailed description of the those conditions, see my Opinion in Case C-309/99 Wouters and Others [2002] ECR I-1582, paragraphs 157 to 166.

(80) Cases 127/73 BRT and SABAM ("BRT II") [1974] ECR 313, paragraph 20 and 66/86 Ahmed Saeed Flugreisen and Silver Line Reisebüro [1989] ECR 803, paragraph 55. See also, on this point, Communication 2001/C 17/04, cited above, paragraph 22.

(81) Cases C-179/90 Merci convenzionali porto di Genova [1991] ECR I-5889, paragraph 27; C-242/95 GT-Link [1997] ECR I-4449, paragraphs 52 and 53 and C-266/96 Corsica Ferries France [1998] ECR I-3949, paragraph 45.

(82) See my Opinion in Wouters and Others , cited above, paragraph 164.

(83) Cases C-320/91 Corbeau [1993] ECR I-2533, paragraph 14 and C-393/92 Almelo [1994] ECR I-1477, paragraph 49.

(84) See, in that sense, the Opinion of Advocate General Rozès in Case 78/82 Commission v Italy [1983] ECR 1955, point VI-C and of Advocate General Cosmas in Cases C-157/94 Commission v Netherlands [1997] ECR I-5699, C-158/94 Commission v Italy [1997] ECR I-5789; C-159/94 Commission v France [1997] ECR I-5815 and C-160/94 Commission v Spain [1997] ECR I-5851 (paragraph 126).

(85) Ferring , paragraph 23.

(86) Ibid., paragraph 27.

(87) Case C-159/94 Commission v France , cited above, paragraph 68.

(88) Ibid., paragraphs 69 and 70.

(89) Paragraph 27.

(90) See, for example, Commission Decision 2001/892/EC of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/36.915 Deutsche Post AG Interception of cross-border mail) (OJ 2001 L 331, p. 40, paragraph 186).

(91) Cases C-354/90 Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon [1991] ECR I-5505, paragraph 14 and C-44/93 Namur-Les assurances du crédit [1994] ECR I-3829, paragraph 17.

(92) Case 78/76 Steinike & Weinlig [1977] ECR 595, paragraph 9.

(93) Case C-387/92Banco Exterior de España [1994] ECR I-877, paragraph 17.

(94) Case C-332/98 France v Commission [2000] ECR I-4833.

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(95) Ibid., paragraphs 27 to 32.

(96) Joined Cases 188/80 to 190/80 France, Italy and United Kingdom v Commission [1982] ECR 2545, paragraphs 12 and 13.

(97) The "decisions" and "directives" referred to in Article 90(3) of the Treaty belong to the general category of decisions and directives provided for in Article 189 of the Treaty. They are therefore binding on the Member States (Case 226/87 Commission v Greece [1988] ECR 3611, paragraphs 11 and 12).

(98) Joined Cases C-48/90 and C-66/90 Netherlands and Others v Commission [1992] ECR I-565, paragraph 29.

(99) It is true that, by virtue of Ferring , measures which "overcompensate" the cost of public service obligations must be notified to the Commission. However, it seems that that obligation will rapidly become theoretical since, under the terms of the Ferring judgment (paragraph 32), the portion of aid which exceeds the cost of the public service obligations cannot, in any event, be justified with regard to Article 90(2) of the Treaty.

(100) See, for example, Commission Communication 96/C 281/03 on services of general interest in Europe (OJ 1996 C 281, p. 3) and Communication 2001/C 17/04, cited above.

(101) Report presented by the Commission to the Laeken European Council of 17 October 2001 on services of general interest [COM (2001) 598 final, paragraph 5]. It will be noted that, in the spirit of the Nice European Council, it is clear that State measures intended to offset the cost of public service obligations with regard to undertakings constitute State aids within the meaning of Article 92(1) of the Treaty, which may be justified under the provisions of Article 90(2) of the Treaty.

(102) Ibid.

(103) Ibid., paragraph 14.

(104) Ibid., paragraph 15.

(105) Ibid., paragraph 27.

(106) See, in particular, Cases 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority [1961] ECR 1, paragraph 39; Banco Exterior de España , cited above, paragraph 13; Case C-241/94 France v Commission , cited above, paragraph 34 and C-256/97 DM Transport [1999] ECR I-3913, paragraph 19.

(107) Cases C-39/94 SFEI and Others [1996] ECR I-3547, paragraph 60; C-342/96 Spain v Commission [1999] ECR I-2459, paragraph 41 and DM Transport , cited above, paragraph 22.

(108) Written observations of NVGA.

(109) Ibid.

(110) See the written observations of the Regierungspräsidium (p. 3) and the written observations of Altmark (paragraph 35).

(111) As regards that requirement, see in particular Case C-241/94 France v Commission , cited above, paragraph 24; Case C-200/97 Ecotrade [1998] ECR I-7907, paragraphs 40 and 41 and Case C-75/97 Belgium v Commission [1999] ECR I-3671, paragraph 26.

(112) On the concept of "State" aid, see in particular Case 82/77 Van Tiggele [1978] ECR 25, paragraphs 23 to 25; Joined Cases 213/81 to 215/81 Norddeutsches Vieh- und Fleischkontor

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Will and Others [1982] ECR 3583, paragraph 22; Joined Cases C-72/91 and C-73/91 Sloman Neptun [1993] ECR I-887, paragraphs 19 and 21; Case C-189/91 Kirsammer-Hack [1993] ECR I-6185, paragraph 16 and Joined Cases C-52/97 to C-54/97 Viscido and Others [1998] ECR I-2629, paragraph 13.

(113) Case 248/84 Germany v Commission [1987] ECR 4013, paragraph 17.

(114) Keppenne, J.-P., Guide des aides d'Etat en droit communautaire , Bruylant, Bruxelles, 1999, paragraph 150.

(115) Cases 730/79 Phillip Morris Holland v Commission [1980] ECR 2671, paragraph 11 and 295/85 France v Commission [1987] ECR 4393, paragraph 24.

(116) Opinion of Advocate General Capotorti in Phillip Morris Holland v Commission , cited above, p. 2698.

(117) See the order for reference (English translation pp. 4 and 5).

(118) First sentence of the first limb of the question for a preliminary ruling.

(119) Second sentence of the first limb of the question for a preliminary ruling.

(120) Paragraphs 36 and 37.

(121) Pp. 5 to 7.

(122) Opinion of Advocate General Jacobs in Joined Cases C-278/92 to C-280/92 Spain v Commission [1994] ECR I-4103, paragraph 33.

(123) Phillip Morris Holland v Commission , cited above, paragraph 11.

(124) Cases 102/87 France v Commission [1988] ECR 4067, paragraph 19; C-303/88 Italy v Commission [1991] ECR I-1433, paragraph 27, and Joined Cases C-278/92 to C-280/92 Spain v Commission , cited above, paragraph 40.

(125) Joined Cases T-447/93, T-448/93 and T-449/93 AITEC and Others vCommission [1995] ECR II-1971, paragraphs 139 to 141.

(126) Paragraphs 4 to 9.

(127) That aspect is confirmed by the preamble to the proposal for a Regulation 2000/C 365 E/10, cited above. Paragraph 5 of the statement of reasons given for that document states: "In light of ... the application of Community rules on the freedom of establishment, and the application of Community public procurement rules, significant progress had been made towards Community... -wide market access in public transport. As a result, trade between Member States has substantially developed and several public transport operators are now providing services in more than one Member State" .

(128) Case C-142/87 Belgium v Commission ("Tubemeuse ") [1990] ECR I-959, paragraph 43.

(129) See also, inter alia , Joined Cases C-278/92 to C-280/92 Spain v Commission , cited above, paragraph 42 and Case T-214/95 Vlaams Gewest v Commission [1998] ECR II-717, paragraph 48.

(130) Tubemeuse , cited above, paragraphs 42 and 43.

(131) OJ 1996 C 68, p. 9.

(132) Ibid., fourth paragraph.

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(133) Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid (OJ 2001 L 10, p. 30).

(134) Ibid., paragraph 3 of the explanatory memorandum.

(135) See paragraph 84 of the present Opinion.

(136) Conversely, the parties to the main proceedings consider that Article 77 of the Treaty is too vague to be applied outside those cases referred to in the secondary legislation. In that respect, they base their argument on the majority opinion obtaining in German legal theory (see the written observations of the Regierungspräsidium and the written observations of Altmark, paragraph 54).

(137) Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings (OJ, English Special Edition 1969 (I), p. 0283).

(138) Fourth recital of Regulation No 1107/70.

(139) Ibid., fifth recital.

(140) Emphasis added.

(141) Case 156/77 Commission v Belgium [1978] ECR 1881, paragraph 10.

(142) Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et tranformateurs de saumon , cited above, paragraph 12 and SFEI and Others , cited above, paragraph 40.

(143) For a more detailed description of those inferences, see my Opinion delivered on 6 December 2001 in Case C-197/99 P Belgium v Commission (case pending before the Court (paragraph 74)).

(144) Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et tranformateurs de saumon , cited above, paragraphs 12 and 13 and SFEI and Others , cited above, paragraphs 40 and 43.

(145) Ibid.

(146) See, in that sense, Keppenne, J.-P., cited above, paragraph 408, and Frignani, A., Commentaire J. Megret, Le droit de la CE, volume 4, Concurrence, éditions de l'université de Bruxelles, Bruxelles, 1997, 2nd ed., paragraph 319.

(147) See the Opinion of Advocate General Tesauro in Tubemeuse , cited above, ECR I-985.

(148) See the Opinion of Advocate General Jacobs in SFEI and Others , cited above, paragraph 77.

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SUB	Transport ; Competition ; State aids
AUTLANG	French
NATIONA	Federal Republic of Germany
PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Timmermans
DATES	of document: 19/03/2002 of application: 14/07/2000

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Opinion of Mr Advocate General Léger delivered on 13 June 2002 Commission of the European Communities v Kingdom of Spain. Failure of a State to fulfil obligations - Directive 89/665/EEC - Review procedures in the field of public procurement - Transposition - Definition of contracting authority - Body governed by public law - Reviewable measures - Interim measures. Case C-214/00.

1. By this action, the Commission of the European Communities seeks a declaration that the Kingdom of Spain has failed to fulfil its obligations under Articles 1 and 2 of Directive 89/665/EEC. (2) It claims, in essence, that Spain has failed to transpose those articles correctly and completely into national law, because the national implementing measures preclude:

a priori from their field of application public bodies governed by private law;

review of certain decisions adopted by the contracting authorities during the procedure for the award of public contracts, and

the possibility of all types of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, by requiring that an action must first be brought against the unlawful measure.

I Legal framework

Community legislation

2. The aim of Directive 89/665 is to ensure the effective application of the Directives on public procurement, (3) in particular of Directive 71/305/EEC, (4) repealed and replaced by Directive 93/37/EEC, (5) of Directive 77/62/EEC, (6) repealed and replaced by Directive 93/36/EEC, (7) and of Directive 92/50/EEC. (8) Directives 92/50, 93/36 and 93/37 are designed to coordinate procedures for the award of public contracts for works, supplies and services in the Member States.

3. Article 1(1) of Directive 89/665, as amended by Article 41 of Directive 92/50, provides:

> "The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions set out in the following Articles and, in particular, Article 2(7), [(9)] on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.
>
> "

4. Article 2(1) of the review directive states:

> "The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
>
> (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
>
> (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
>
> (c) award damages to persons harmed by an infringement.
>
> "

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5. Under Article 2(8) of Directive 89/665, "[w]here bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review...."

6. The term "contracting authorities" is defined in Directives 92/50, 93/36 and 93/37.

7. Article 1(b) of Directive 93/37, which is essentially identical in content to Article 1(b) of Directives 92/50 and 93/36, provides:

" "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

having legal personality, and

financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

"

National legislation

8. The scope ratione personae of the Spanish legislation on public procurement is established by Article 1 of Ley 13/1995 de Contratos de las Administraciones Publicas, (10) which covers all territorial public authorities, whether the State authorities or the authorities of the Autonomous Communities and regional or local authorities. Article 1(3) provides:

"This law shall also apply in every case to the awarding of contracts by autonomous bodies and by other bodies governed by public law having legal personality and connected with or under the control of a public authority, which fulfil the following criteria:

(a) they were established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they are financed, for the most part, by public authorities or other bodies governed by public law, or are subject to management supervision by those bodies, or have an administrative, managerial or supervisory board, more than half of whose members are appointed by public authority or by other bodies governed by public law.

"

9. The sixth additional provision of Law 13/1995, entitled "Rules applicable to the award of contracts in the public sector" , reads as follows:

"Commercial companies in which public administrations or their autonomous bodies, or bodies governed by public law, hold, directly or indirectly, a majority shareholding, shall, when awarding contracts, comply with the advertising and competition rules, unless the nature of the operation to be carried out is incompatible with those rules."

10. Since the present action was lodged, the Kingdom of Spain has adopted a new consolidated

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version of the aforementioned law, (11) which merely brings together and organises the previous provisions, without amending their substance.

11. As regards administrative appeals, Article 107 of Ley 30/1992 de Régimen Jurídico de las Administraciones Publicas y del Procedimiento Administrativo Comun, as amended by Ley 4/1999, (12) provides that the following measures are subject to direct appeal:

> "... procedural measures, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests."

12. So far as concerns administrative appeal proceedings, Article 25(1) of Ley 29/1998 Reguladora de la Jurisdiccion Contencioso-Administrativa (13) (Law governing contentious-administrative jurisdiction), using the same wording as Law 30/1992, provides:

> "Administrative appeal proceedings are admissible in respect of provisions of a general nature and express and implicit measures, whether definitive or procedural, adopted by the public authority which bring an end to the administrative procedure, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests."

13. Article 111 of Law 30/1992, provides, under the heading "Suspension of operation" :

> "1. Unless otherwise provided, the commencement of an action will not suspend the operation of the contested measure.
>
> 2. Notwithstanding the provisions of the previous paragraph, the body responsible for carrying out review may, having weighed up the harm which suspension would cause the public interest or third parties as against the harm caused to the applicant by the immediate implementation of the contested measure, and given adequate reasons, suspend operation of the contested measure, on its own initiative or at the request of the applicant, in one of the following circumstances:
>
> (a) Operation is likely to cause harm which is irreparable or reparable only with difficulty.
>
> (b) The dispute is based on one of the legal grounds for automatic nullity ... .
>
> 3. If the competent authority has not given an express decision on the application for suspension of operation of the contested measure within a period of 30 days from the date on which the application was entered in the case-list, suspension will be deemed to have been granted.
>
> "

14. Article 129 et seq. of Law 29/1998 establish a system for the expeditious adoption of protective measures. Under Article 129(1):

> "The parties concerned may request, at any stage of the proceedings, the adoption of any measures to ensure the effectiveness of the judgment to be given."

15. Article 136 of the law provides:

> "1. In the circumstances referred to in Articles 29 and 30, a protective measure shall be adopted, unless it is evident that the criteria laid down in those articles are not fulfilled or that the measure will seriously affect the general interest or the interests of third parties, which the court shall assess in detail.
>
> 2. In the circumstances mentioned in the previous paragraph, measures may also be applied for before the appeal is lodged, and the application shall be examined in accordance with the provisions of the previous article. In that event, the party concerned shall request confirmation of the

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measures when he lodges the appeal, which he is required to do within 10 days from the date of notification of the adoption of the protective measures....

If no appeal ensues, the measures granted will be automatically void, and the applicant will be required to pay compensation for the damage caused by the protective measure.

"

16. Articles 29 and 30 of Law 29/1998 apply to: (a) cases in which the authority is required, pursuant to a provision, a contract or a measure, to provide a particular service to one or more specific persons; (b) cases in which the authority does not implement its definitive measures, or (c) blatantly unlawful conduct.

II Procedure

A The pre-litigation stage

17. By letter of 18 December 1991, the Spanish Government notified the Commission of the legislation in force at the time which it considered transposed Directive 89/665 into national law, namely the Ley reguladora de la Jurisdiccion Contencioso-Administrativo (Law governing administrative courts) of 27 December 1956, the Ley de Procedimiento Administrativo (Law governing administrative procedure) of 18 July 1958, the Ley de Contratos del Estado (Law on public procurement) and the Spanish Constitution.

18. Following various exchanges during 1994 between the Commission's departments and the Spanish authorities regarding the compliance of the national legislation with the Community provisions, on 29 May 1996 the Commission, considering that the replies given by the Spanish authorities were unsatisfactory, sent the Spanish Government a letter of formal notice.

19. In that letter, the Commission makes the following complaints about the Spanish transposition measures:

their scope ratione personae is not the same as that of the review directive;

"procedural" measures are subject to direct appeal only in exceptional circumstances, and

an appeal on the merits must first be brought against an unlawful administrative measure before suspension can be granted.

20. On 9 October 1996, in reply to the letter of formal notice, the Spanish Government pointed out, with regard to the first point, that Law 13/1995 contained a literal transcription of the term "body governed by public law" referred to in Directives 92/50, 93/36 and 93/37. As regards the two other points, it reiterated the circumstances in which a procedural measure may be subject to direct appeal and stressed the legal requirement that an action must first be brought against the unlawful decision before that decision may be suspended.

21. In spite of the various exchanges which took place during 1998, the Spanish authorities and the Commission maintained their respective positions in respect of the first and third complaints relating to scope of application and to interim measures. With regard to the second complaint, which alleged that the notion of renewable measures had been incorrectly transposed, the authorities informed the Commission, on 14 January 1999, that the new law on administrative courts partly amended the rules applicable to procedural measures.

22. On 2 February 1999, the Spanish authorities sent the Commission official notification of Laws 29/1998 and 4/1999.

23. The Commission considered that the new legislation still did not enable it to conclude that the Kingdom of Spain had put an end to the infringements alleged in the letter of formal notice

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and, on 25 August 1999, sent it a reasoned opinion. In that opinion, the Commission repeated the content of the letter of formal notice and invited the Spanish Government to adopt the measures necessary to comply with it within two months of the date of its notification.

24. On 8 November 1999, in reply to the reasoned opinion, the Spanish Government denied the alleged infringements and disputed the Commission's assessment.

25. The Commission considered that the reply given did not enable it to conclude that the Kingdom of Spain had complied with its obligations under the review directive and decided to bring the present action.

B Forms of order sought by the parties

26. The Commission's action was lodged at the Registry of the Court of Justice on 30 May 2000.

27. The Commission claims that the Court should:

"1. Declare that, by failing to adopt the measures needed to comply with Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and in particular by failing to:

extend the system of review procedures provided for by that directive to decisions adopted by all contracting authorities, within the meaning of Article 1(1) of Directives 92/50/EEC, 93/36/EC and 93/37/EC, including companies governed by private law established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character, have legal personality, and are financed for the most part by public authorities or other entities governed by public law, or are subject to management supervision by the latter, or have an administrative, management or supervisory board more than half of whose members are appointed by the public authorities or other entities governed by public law;

allow review to be sought of all decisions adopted by the contracting authorities, including all procedural measures, during the procedure for the award of public contracts;

provide for the possibility of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, including measures aimed at enabling administrative decisions to be suspended, removing for that purpose difficulties and obstacles of any type and in particular the need first to bring an action against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under Community law;

2. Order the Kingdom of Spain to pay the costs.

"

28. The Kingdom of Spain contends that the Court should:

" Dismiss the action;

Order the Commission to pay the costs.

"

III The first plea, concerning the incorrect transposition of the scope ratione personae of the review directive (infringement of Article 1(1) of the directive)

A Arguments of the parties

1. The Commission's arguments

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29. The Commission alleges that the Kingdom of Spain was wrong to consider that entities governed by private law were excluded a priori from the scope ratione personae of the review directive.

30. The Commission points out that, when transposing Community directives into national law, the Member States are required to respect the meaning of the terms and definitions contained in them, in order to ensure uniform interpretation and implementation of the legislation in the different Member States.

31. Consequently, the Spanish authorities are required to give the term "body governed by public law" , used in the procedure directives, the meaning that it has in Community law. According to the Commission, Directives 92/50, 93/36 and 93/37 make no mention of the regime, public or private, under which the bodies governed by public law were set up, nor the legal form adopted, but focus rather on other criteria, including the purpose for which the bodies in question were created. That interpretation was confirmed in the judgment in Mannesmann Anlagenbau Austria and Others . (14) In that case, the Court of Justice held that the expression must be interpreted in functional terms. Therefore, the legal form of an entity is irrelevant.

32. The Commission maintains that the wording of Article 1 of Law 13/1995, which reproduces almost verbatim the content of the corresponding provisions of the procedure directives, nevertheless contains one essential difference. Under the provision, entities governed by private law are excluded from the field of application of that law. In that regard, the Commission states that, in the Spanish legal system, the term "body governed by public law" is linked to the method by which those entities are set up. It therefore infers that Law 13/1995, read in conjunction with its sixth additional provision, adds a prerequisite which is not provided for in the Community legislation, namely that the entity should be governed by public law. Consequently, entities governed by private law are, by definition, always excluded from the scope of application of that law, even if they otherwise comply with the provisions of Article 1(3) of the Law in every respect.

33. Since public bodies incorporated under private law are excluded from the scope of that Spanish legislation, they likewise fall outside the scope of the provisions governing the procedures for awarding public contracts and, therefore, of the review procedures relating to public contracts, whether they were set up to meet needs of general interest or purely industrial or commercial needs. That exclusion therefore infringes the provisions of Directives 92/50, 93/36 and 93/37 which define their scope, and also the provisions of Directive 89/665, since it precludes the application of the procedural safeguards provided by that directive.

34. As regards the Spanish Government's argument that the solution to the problems of interpretation regarding the term "needs in the general interest which are not of an industrial or commercial character" requires a detailed case-by-case assessment, in order to determine whether a body or an entity complies with the conditions for applicability of the directives, the Commission points out that those problems cannot provide a reason for excluding a priori, as that Government has done, a whole group of bodies entities governed by private law which fulfil the three conditions laid down by Directives 92/50, 93/36 and 93/37 from the scope of Directive 89/665, even if that exclusion is subject to a case-by-case review.

2. The arguments of the Kingdom of Spain

35. As its principal argument, the Spanish Government states that the Commission's action is ill-founded and therefore that it is wrong to maintain that the term "contracting authorities" contained in Article 1 of the review directive has been incorrectly transposed into the Spanish legal system.

36. According to the Spanish Government, the Commission, although formally complaining that it has infringed the provisions of Article 1 of the review directive, is in fact complaining that

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Article 1 of the procedure directives has been incorrectly transposed. However, since it has failed to bring the matter of the infringement of those provisions before the Court of Justice, the Commission has forfeited the possibility of obtaining a decision from the Court on that point. The Spanish Government maintains, therefore, that it is for the Commission to bring more suitable proceedings, and consequently to initiate a different form of procedure to establish the infringement of Directives 92/50, 93/36 and 93/37 if it intends to proceed against the Kingdom of Spain for incorrectly transposing their scope ratione personae .

37. In any event, the Spanish Government maintains that Article 1 of the procedure directives is irrelevant to an interpretation of the term "contracting authorities" contained in Article 1 of the review directive, for two reasons. First, the review and procedure directives do not have the same subject-matter. Secondly, they take effect at different stages in the procedure of awarding public contracts. Directive 89/665 provides expressly that Member States must introduce efficient and rapid review procedures in the event of infringement of the rules contained in the directives concerning public procurement procedures. Directive 89/665 therefore takes effect after the procedure directives. The term "contracting authorities" contained in Directive 89/665 cannot, therefore, be interpreted in the light of the term "body governed by public law" previously defined in the procedure directives.

38. In the alternative, the Spanish Government contends that the scope ratione personae of the procedure directives has been correctly transposed.

39. As regards, first of all, the interpretation of the applicable rules, the Spanish Government points out that the expression "body governed by public law" , which is used in the procedure directives, refers to an entity governed by public law and that, in Spain, the terms "entity governed by public law" and "body governed by public law" are used indiscriminately.

40. The term "body governed by public law" does not lend itself to a general autonomous definition.

41. The Spanish Government accordingly states that, in Directives 92/50, 93/36 and 93/37, the term "body governed by public law" does not include commercial companies under public control. It submits that the fact that Directive 93/38/EEC (15) concerning public procurement in particular sectors makes a distinction between the term "body governed by public law" , which is the same in the four directives, and the term "public undertaking" , the definition of which corresponds to that of "public commercial company" , shows that there are two distinct concepts. The Spanish Government considers that commercial companies with mostly publicly-held capital are covered by the term "public undertaking" to which only Directive 93/38 applies. Those companies can never fall within the scope of Directives 92/50, 93/36 and 93/37 since the term "public undertaking" appears only in Directive 93/38 although it could also have appeared in the other two directives adopted on the same day (namely Directives 93/36 and 93/37) if the legislature had so wished.

42. The Spanish Government also points out that, in order to define the term "body governed by public law" , it is first necessary to specify the commercial or industrial nature of the "need in the general interest" which it is designed to meet. It states that, in the Spanish legal system, public commercial companies have, in principle, the task of meeting needs in the general interest, which explains why they are under public control. However, those needs are of a commercial and industrial character, because, if that were not the case, they would not be the subject of a commercial company. In other words, in Spain, the legal form of the entity is crucial in determining the rules applicable to its activity. Thus, in Spain, a public entity, incorporated in public form, is governed by public law. On the other hand, a private entity, incorporated in private form, is governed by private law. It cannot be regarded as a body governed by public law and, in principle, is not covered by the rules governing public procurement.

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43. Since the interpretation of the term "body governed by public law" is not uniform in the various Member States, the Spanish Government considers that it is not possible to provide an overall definitive solution to determine the scope ratione personae of the procedure and review directives. It submits that, on the contrary, it is necessary to consider each specific case and, in particular, the context in which it evolves. The Spanish Government therefore concludes that, in order to determine whether or not a body or entity fulfils the conditions which would bring it within the scope ratione personae of the Community directives, each case must be examined separately.

B Assessment

44. It is apparent from Article 1 of Law 30/1992, read in conjunction with its sixth additional provision, that public bodies incorporated under private law are, in principle, excluded from the rules governing public procurement.

45. However, the wording of Article 1(1) of the review directive and also its objectives preclude a body's legal form and regime as a private entity being such as to exclude it from the scope ratione personae of the review directive.

46. Article 1(1) of the review directive expressly provides that the term "contracting authorities" is defined by reference to the scope of the procedure directives as established in Article 1(b) of those directives.

47. Article 1(1) of the review directive provides:

> "The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives [92/50, 93/36 and 93/37], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles... on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law."

48. That article thus states, in substance, that the decisions of the contracting authorities must be subject to effective and rapid review. It does not directly define the term "contracting authorities" but refers especially to the provisions relating to the scope of the directives governing public procurement procedures in the "traditional" sectors, as opposed to "special" sectors. (16) The procurement procedures for entities operating in special sectors are set out in Directive 90/531/EEC, (17) repealed and replaced by Directive 93/38. Directive 92/13/EEC (18) was especially (19) adopted in order to establish procedures for appeals against decisions taken by the contracting authorities pursuant to Directive 93/38. It adapts to the public utility sectors the appeal remedies provided for the traditional sectors by Directive 89/665 and also provides specific grounds of appeal. (20)

49. The scope of the review directive is therefore clearly restricted to the scope of the procedure directives operating in the "traditional" sectors. In consequence, the rules laid down in Directive 89/665 do not concern the appeal proceedings brought against decisions adopted by contracting authorities pursuant to Directive 93/38. The Spanish Government's argument that the distinction made in Directive 93/38 between the terms "contracting authorities" and "public undertaking" supports the conclusion that it is impossible to give the term "contracting authorities" contained in Article 1(1) of the review directive an independent definition is therefore irrelevant.

50. It follows from the above that the term "contracting authorities" contained in Article 1(1) of the review directive must be evaluated in the light of Article 1(b) of the procedure directives which define the scope ratione personae of those directives.

51. The objective of the review directive confirms the wording of Article 1(1), and thus the close

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link between that directive and the procedure directives.

52. It is clear, in fact, from the first, third and fourth recitals of the review directive, that the objective of Directive 89/665 is to establish grounds for effective and rapid review of decisions taken by contracting authorities pursuant to directives on public contracts for works, supplies and services, in order to ensure the effective application of the procedure directives.

53. The fact that the scope of the review directive and that of the procedure directives adopted previously are identical also justifies the use of a legislative technique which makes it possible to avoid needlessly overloading a provision, thereby rendering it easier to comprehend. A shared term for the same subject, such as public works, already defined in previous directives, may be explained by express reference to the relevant provisions of the directives adopted earlier, and that legislative technique cannot be criticised for not fulfilling the requirements of clarity and legal certainty.

54. It is apparent from the foregoing arguments that the term "contracting authorities" contained in Article 1 of the review directive is defined in Article 1(b) of the procedure directives. It remains to define what is meant by that term.

55. Under Article 1(b) of Directives 92/50, 93/36 and 93/37 contracting authorities are:

> "... the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

having legal personality and

financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law

> " .

56. In respect of that definition, the Court has consistently held (21) that "... "contracting authority" , including a body governed by public law, must be interpreted in functional terms.

> " (22)

57. The Court has also invariably held that "a body governed by public law" means a body which satisfies the three cumulative conditions set out in the second subparagraph of Article 1(b) of the procedure directives. (23)

58. Furthermore, according to the Court, the third condition set out in the third indent of the second subparagraph of Article 1(b) of the procedure directives lists the alternative conditions which each reflect the close dependency of a body on the State, regional or local authorities or other bodies governed by public law. (24)

59. It is in the light of that case-law that the Court assesses whether or not a body should be classified as a contracting authority within the meaning of Article 1(b) of the procedure directives.

60.

In Commission v France , cited above, the French Republic prevented "sociétés anonymes d'habitations à loyer modéré" (low-rent housing corporations), (25) falling within the scope of

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Article L. 411-1 et seq. of the French Construction and Housing Code, from being classified as bodies governed by public law, within the meaning of Directive 93/37. Although it accepted that SA HLMs definitely satisfied the first two conditions, it contended that they did not fulfil the third condition set out in the third indent of the second subparagraph of Article 1(b) of the Directive, since they did not have sufficiently close links with the public authorities to allow the latter to influence their decisions in relation to public contracts. Consequently, the French Government maintained that SA HLMs could not be regarded as contracting authorities and that, therefore, the procedures for awarding public works contracts were not applicable to them.

61. The Court did not focus on the legal form and regime of those bodies covered by private law, but assessed whether the three cumulative conditions set out in Article 1(b) of Directive 93/37 were fulfilled. In that regard, it considered, unlike the French Government, that the third condition was also fulfilled since the management of SA HLMs was subject to supervision by the public authorities which allowed the latter to influence the decisions of the SA HLMs in relation to public contracts. (26)

62. Similarly, in Mannesmann Anlagenbau Austria , cited above, the Court held that an entity such as the Osterreichische Staatsdruckerei (OS) should be classified as a body governed by public law and, consequently, as a contracting authority within the meaning of Article 1(b) of Directive 93/37. The Court noted, however, that under the law which had created it, that entity had the status of a trader within the meaning of the Commercial Code, was listed in the Register of Companies of the Commercial Court of Vienna, Austria and carried on its activities in accordance with the rules governing commerce.

63. In the same way, in BFI Holding , (27) the Court held that ARA, a limited company incorporated in accordance with private law, to which the Municipalities of Arnhem and Rheden (Netherlands) had decided to entrust tasks in the field of waste collection and cleaning of the municipal road network, could fall within the scope of the term "body governed by public law" and, in consequence, be regarded as a contracting authority within the meaning of Article 1(b) of Directive 92/50, if it fulfilled the conditions laid down in that provision. In that judgment, the Court stated that "the wording of the second subparagraph of Article 1(b) of Directive 92/50 makes no reference to the legal basis of the activities of the entity concerned" (28) and that, "with a view to giving full effect to the principle of freedom of movement, the term "contracting authority" must be interpreted in functional terms.... In view of that need, no distinction should be drawn by reference to the legal form of the provisions setting up the entity and specifying the needs which it is to meet.

" (29)

64. It is apparent from the above that bodies, entities and undertakings (30) which fall within the scope of the procedure directives are concerned by the review directive. In other words, those bodies must be regarded as contracting parties within the meaning of Article 1(1) of the review directive, if they fulfil the three cumulative conditions set out in Article 1(b) of the procedure directives. In that regard, it should be pointed out that, under Article 1(b) of the procedure directives, the legal form and regime of a body is not one of the criteria for classifying that body as a body governed by public law or as a contracting authority.

65. I therefore consider that the Spanish legislation transposing the review directive, by excluding a priori from the scope ratione personae of that directive bodies whose legal form and regime fall under by private law, is not complying with the meaning of "contracting authority" laid down in Article 1 of the review directive and defined in the directives on public procurement procedures, particularly in Directives 92/50, 93/36 and 93/37.

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66. From all the foregoing considerations I conclude that, by failing to extend the system of review procedures provided for by Directive 89/665 to decisions adopted by contracting authorities, within the meaning of Article 1(b) of Directives 92/50, 93/36 and 93/37, incorporated as private-law companies, which fulfil the conditions set out in that article, the Kingdom of Spain has failed to fulfil its obligations under Articles 1 and 2 of Directive 89/665.

IV The second plea, alleging that the term "measures against which appeals can be brought" has been incorrectly transposed (infringement of Article 1(1) and Article 2(1) of the review directive)

A Arguments of the parties

1. The Commission's arguments

67. The Commission complains that the Kingdom of Spain limits the possibility of challenging certain decisions taken by the contracting authorities, particularly certain procedural measures.

68. The Commission points out that Directive 89/665 does not provide for any derogation from the possibility of challenging an unlawful decision taken by contracting authorities. Accordingly, it argues that, since the Spanish review provisions preclude the possibility of challenging certain unlawful decisions taken by contracting authorities, the scope of Directive 89/665 has been improperly reduced. The Commission points out that the Court of Justice, in its judgment in Alcatel Austria and Others , (31) held that it is clear from Article 1(1) of Directive 89/665 that the subject-matter of those review procedures will be decisions taken by the contracting authorities, on the ground that they infringe Community law on public procurement or the national rules transposing it, and that the provision does not lay down any restriction with regard to the nature and content of those decisions.

69. The relevant Spanish provisions (namely, Article 107 of Law 30/1992 and Article 25(1) of Law 29/1998) limit the possibility of bringing actions challenging procedural measures, that is to say, administrative measures which do not bring an administrative procedure to an end.

70. In support of that view, the Commission refers to two types of procedural measure which, contrary to the provisions of the review directive, are not subject to appeal.

71. The first example refers to a decision given by the Tribunal Supremo (Supreme Court) (Spain) concerning the request for additional documentation. According to the Commission, the request for production of additional documents made to a company competing in a tender procedure can be challenged only if the undertaking concerned is excluded from the procedure because it has not produced the additional documents requested. The Commission argues that that undertaking, even if it is not excluded from the procedure, could still be put in a weak position in relation to the other undertakings competing. That is why the Commission considers that the request for production of additional documents should itself be subject to appeal.

72. The second example relates to proposals for awards from committees which are subject to the control of the contracting authority. According to the Commission, the proposals put forward by those committees entrusted by the contracting authority with the preparation of the award document cannot be challenged, in infringement of the review directive.

73. The Commission concludes that the Spanish transposition legislation excludes from any judicial review certain decisions taken by the contracting authority on account of their nature and content. By so doing, it infringes the provisions of Article 1 of the review directive.

2. The arguments of the Kingdom of Spain

74. The Kingdom of Spain disputes that plea on the ground that the Commission has not established

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the existence of an infringement. It submits that the measures to which the Commission refers cannot be regarded as open to appeal because they do not have an adverse effect or are not preparatory measures. It states that Articles 1 and 2 of the review directive expressly provide that only decisions which have an adverse effect may be subject to appeal. The case-law cited by the Commission does not contradict that. The judgment in Alcatel Austria and Others , cited above, is therefore irrelevant in the present case.

75. The Spanish Government claims that the Commission's position fails to take account of the meaning of the term "procedural measure" in Spanish law.

76. Under Spanish law, by definition, a procedural measure does not result in harm to the party concerned but, at the very most, prepares a definitive decision which will be favourable or unfavourable to him. Thus, a procedural measure does not involve adopting a position, but forms part of a procedure initiated in order to prepare a decision. The Spanish Government states that if a measure which is ostensibly a procedural measure in itself involved adopting a position, it would cease to be a procedural measure in the strict sense and would be open to appeal. Indeed, if that were not the case, the fundamental right to effective legal protection would be jeopardised.

77. The distinction which Spanish law draws between procedural or preparatory measures (32) and decisions is not unusual. In fact, according to the Spanish Government, the review systems in various Member States also acknowledge the rule that procedural measures designed to facilitate the adoption of a decision cannot be disputed in isolation, but only during an action for the annulment of that decision, unless the applicant can show that it is not merely a procedural measure but rather a measure which causes him definitive harm. The Spanish system is therefore no different from other review systems existing in the various Member States.

78. In any event, the Spanish Government does not understand what benefit it is to the party concerned to challenge a procedural measure which in itself does not cause him any harm. Similarly, it maintains that the aim of the review directive cannot be to paralyse the efficient conduct of the public procurement procedure by allowing dilatory and untimely appeals against every measure taken preparatory to a decision adopted by a contracting authority.

79. As regards the Commission's assertion that the Spanish system jeopardises the uniform implementation of Directive 89/665, the Spanish Government points out that the Commission has not shown in what respect that system jeopardises the objective of the review directive. It notes that, in accordance with the settled case-law of the Court of Justice, it is for the Commission to adduce proof of the alleged infringement. In the present case, the Commission has not provided any specific example showing that the Spanish legislation does not permit the parties concerned to enjoy adequate and effective legal protection against any procedural measure which adversely affects them.

80. With regard to the first example presented by the Commission, the Spanish Government points out that the Commission has not stated the reason why the criteria applied by the Tribunal Supremo in the judgment it has cited are contrary to the objective of Directive 89/665. In that judgment, the Tribunal Supremo stated that:

the contested measure represents both the final decision awarding the contract and an obligation imposed by the administration on the three successful undertakings to provide it with certain additional documentation (first ground of the judgment);

that obligation is a procedural measure since it does not bring an end to the tender procedure, but is only a stage in the process which will terminate in the award of the contract. It is not a decision subject to independent appeal but merely a preliminary to the decision. The validity of that request for additional documentation can be called in question only in proceedings to review the definitive measure (second ground of the judgment);

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the challenge to the request for information does not render the award decision invalid (fifth ground of the judgment);

the final award of the contract was challenged because the successful undertaking had not provided the documentation requested by the administration. According to the administration, the missing documentation was not essential and its absence was an irregularity which could quite easily be remedied (fourth ground of the judgment).

81. As regards the second example, the Spanish Government maintains that the committees in question cannot be regarded as contracting authorities, since they do not take decisions, but merely take part in the decision-making process.

82. In consequence, the Spanish Government considers that, since the Commission has not shown in what respect Directive 89/665 has not been correctly transposed into Spanish law and why it cannot take full effect until the general rule that a procedural measure, within the meaning of Spanish law, is not subject to appeal, is amended, the second plea must be rejected.

B Assessment

83. Under Article 1(1) of Directive 89/665, decisions taken by the contracting authorities are to bereviewed effectively and as rapidly as possible where Community law in the field of public procurement or national rules implementing that law have been infringed. Article 1(3) of the Directive specifies that the review procedures must be available at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been orrisks being harmed by an alleged infringement.

84. Article 2(1) of Directive 89/665 lists the measures to be taken concerning the review procedures which the Member States must make available in national law. According to Article 2(1)(a), they must include provision for the adoption of interim measures by way of interlocutory procedures. Article 2(1)(b) refers to the possibility of setting aside or ensuring the setting aside of decisions taken unlawfully, and Article 2(1)(c) concerns the award of damages.

85. Article 2(1)(b) of Directive 89/665 does not define the decisions taken unlawfully which a party may ask to have set aside. The provision confines itself, in fact, to stating that such decisions include those concerning discriminatory technical, economic or financial specifications in the documents relating to the contract award procedure in question. (33)

86. It is also clear from Articles 1 and 2 of Directive 89/665, read in conjunction with its aims, (34) that appeals against decisions taken by the contracting authorities are designed to ensure, at every stage of the award procedure, the effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified. (35) Appeals which are limited to the possibility of obtaining financial compensation for harm suffered as a result of non-compliance with the Community directives on public procurement are therefore insufficient to ensure the full effectiveness of those rules.

87. The Court has inferred from those factors that all the decisions taken by contracting authorities, whatever their nature and content, may be challenged. (36) Accordingly, the review directive has been interpreted as precluding national provisions from refusing an injured applicant the opportunity to seek annulment of the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract. It has also been held that the restriction of appeals against that decision to claims for damages (37) does not make it possible to ensure the effectiveness of the provisions of the procedure directives.

88. In view of the objectives of the review directive and of the wording of Articles 1 and 2, the Court thus intended to give a broad definition of the term "decision" , within the meaning

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of those provisions. "Decision" therefore means any act or measure, alleged to be unlawful in the light of the procedure directives, adopted during the procedure to award the contract in question, which produces effects or results which may be taken into account by the contracting authority in the final award decision.

89. That interpretation of the review directive is in accordance with its objective, which is to ensure the effective application of the Community directives on public procurement, at a stage when infringements may still be corrected or avoided. That objective cannot therefore be achieved by appeals only against the measures which cause harm and, a fortiori , only against the measures which bring an end to the award procedure in question. At that stage, it is difficult to see what measures could be taken with the aim of "correcting the alleged infringement or preventing further damage to the interests concerned" . (38)

90. In the present case, the Spanish Government acknowledges that, under Spanish law, including in connection with public procurement procedures, appeals may be brought only against measures which have an adverse affect. "A measure which has an adverse effect" must be construed, in particular, as meaning the measure which brings the tendering procedure to an end. That is made expressly clear in the grounds of the judgment cited. (39) The Spanish Government also concedes and it is expressly stated in the judgment delivered by the Tribunal Supremo (40) that the measure by which the contracting authority requests documentation additional to the initial contract documents cannot be subject to independent appeal. In other words, a decision which may have an adverse effect and infringe Community law on public procurement, cannot as such be challenged immediately by a bidder who considers that he has been harmed. In order to do so, he must wait until the end of the tender procedure, that is to say, the adoption by the contracting authority of the award decision.

91. In my view, by requiring the applicant to furnish proof of the harm he suffers, and by depriving him, as a consequence, of the possibility of challenging a measure which may adversely affect him, Spanish law does not correctly transpose the provisions of Articles 1 and 2 of the review directive. The national provisions do not allow a decision likely to have harmful effects, by reason of the infringement of Community law on public procurement, to be challenged at the most appropriate time. They therefore prevent an individual from obtaining the interim measures intended to correct the alleged infringement or to prevent future damage. The obligation to furnish proof of the harm suffered is therefore an additional condition not provided for by the review directive and contrary to it.

92. It is apparent from the above considerations that, by not allowing review to be sought of all acts or decisions alleged to be unlawful under the provisions of the procedure directives, adopted during the procedure for the award of public contracts, which produce effects or results which may be taken into account by the contracting authority in the final award decision, the Kingdom of Spain has failed to fulfil its obligations under Article 1 and 2 of Directive 89/665.

V The third plea, alleging the incorrect transposition of the provisions concerning the adoption of interim measures (infringement of Articles 1(1) and 2(1) of the review directive)

A Arguments of the parties

1. The Commission's arguments

93. The Commission argues that, in contrast to the provisions of Article 2(1)(a) of Directive 89/665, under the Spanish legislation transposing that provision, namely Article 111 of Law 30/1992 and Articles 129 to 136 of Law 29/1998, it is not possible to obtain preventive measures unless an action is brought simultaneously against the decision adopted unlawfully by the contracting authority. The Commission notes that only in exceptional circumstances, for example under Article 136(2)

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of Law 29/1998, may protective measures be sought if there is no action on the merits against the unlawful decision. It is apparent from the Spanish legislation transposing Article 2(1)(a) of the review directive, that the adoption of interim and protective measures is linked to the commencement of an action on the merits against the unlawful measure adopted by the contracting authority. Those measures are therefore necessarily ancillary to such an action and cannot in any event be sought separately.

94. The Commission points out that it is clear from the wording of Articles 1(1) and 2(1) of the review directive, from its general organisation, from its objective and from the case-law of the Court of Justice (41) that protective measures are not ancillary to a main action, but are wholly separate measures which may be sought irrespective of the commencement of an action on the merits against the unlawful decision.

2. The arguments of the Kingdom of Spain

95. The Spanish Government does not dispute that, in its legal system, with a few exceptions, (42) the adoption of a protective measure, like suspension of operation, is linked to the prior commencement of an action on the merits. The application for interim measures must, in any event, be lodged at the time an action is brought on the merits or after it has commenced. An application for interim or protective measures is therefore not designed to be a separate action, but is linked to an action for annulment of the unlawful decision.

96. However, according to the Spanish Government, the obligation to contest the legality of a measure adopted by the contracting authority at the same time as lodging an application for protective measures does not negate the effectiveness of the system established by the review directive, since, in its submission, any application for protective measures involves an examination of the substance of the case, if only a prima facie assessment of the problem. Furthermore, that requirement does not detract from the effectiveness of the system or from the achievement of the objectives of that directive, since the obligation to challenge the legality of a measure adopted by the contracting authority at the same time as lodging an application for protective measures does not require the observance of strict formalities. The applicant need only write a simple letter. He is not therefore required immediately to lodge the action in accordance with the formal rules established.

97. According to the Spanish Government, the scheme adopted in Spain is, on the contrary, fully effective. Since Law 29/1998 came into force, the administrative courts may adopt, under Article 29 of that law, any type of positive protective measure, not only mere suspension.

98. The Spanish Government also disputes the assertion that the obligation to bring an action before protective measures are adopted is incompatible with the provisions of Directive 89/665, or even prohibited by them.

99. It maintains that that interpretation is supported by the fact that Community law is itself governed by criteria similar to those which underlie the Spanish legislation. In that regard, it refers to the provisions of Articles 242 and 243 EC, Article 36 of the EC Statute of the Court of Justice, Articles 83 to 90 of the Rules of Procedure of the Court of Justice and Articles 104 to 110 of the Rules of Procedure of the Court of First Instance. Citing by way of example Article 83 of the Rules of Procedure of the Court of Justice, it points out that an application for interim measures is not a separate legal remedy but rather an application which is ancillary to the main application, namely the action for annulment.

100. As regards the conclusion drawn by the Commission from the judgment in Commission v Greece , cited above, the Spanish Government maintains that the Court did not give judgment on the substance of the case. The Hellenic Republic acknowledged that it had not transposed the provisions of the review directive into its legal system within the time-limit set in the reasoned

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opinion. The Court did not therefore have to give a ruling on the substance of the alleged infringement. It did not therefore rule that the fact of making the grant of protective measures, such as suspension of operation, conditional on commencement of an action on the merits against the unlawful measure, constituted incorrect transposition of the review directive.

101. It thereby concludes that it makes no sense to require, as the Commission demands, interim measures to be wholly independent, since any protective measure is by definition an ancillary measure. Therefore, it requests the Court to declare the third plea unfounded and to reject it.

B Assessment

102. Unlike the Spanish Government, I consider that it is apparent from the wording of Articles 1(1) and 2(1) of the review directive, from its general organisation, from its objective and from the case-law of the Court of Justice that protective measures cannot be regarded as ancillary to an action on the merits, but are measures which it must be possible to adopt separately.

103. As we have seen, the system established by the review directive is designed to ensure the effective application of the procedure directives. The review directive therefore requires appeal procedures against decisions taken unlawfully by the contracting authority to be effective and rapid. To that end, all decisions taken unlawfully by a contracting authority during the course of a public procurement procedure may be challenged in interlocutory proceedings by the injured parties. (43) Accordingly, it is a question of preventing, correcting or making good the illegalities committed.

104. It is clear from all the above that not only is any decision taken unlawfully by a contracting authority before the contract is concluded between the successful undertaking and the contracting authority open to challenge, but interim measures may also be obtained before an action on the merits is brought against the unlawful decision. In other words, it must be possible not only to lodge an application for interim measures, but also for the court to deal with that application before any action on the merits against the unlawful decision. Otherwise, the objective of the review directive, which is, in particular, to avoid or correct illegalities committed by the contracting authority, clearly could not be achieved. The need to adopt urgent and effective measures cannot easily be reconciled with a requirement that an action on the merits should be brought beforehand.

105. That interpretation was confirmed by the Court of Justice in Commission v Greece , cited above.

106. It was alleged that the Hellenic Republic had not correctly transposed the provisions of the review directive.

107. The Greek Government acknowledged that it had not taken the measures necessary to transpose the directive within the time-limit set in the reasoned opinion, but contended that a law had since been adopted which did meet the requirements of the review directive.

108. The Court did not, however, omit to point out that the provisions of that law did not correctly transpose the provisions of the review directive. It observed, in particular, that, as far as the suspension of contract award procedures referred to in Article 2(1)(a) of the review directive was concerned, the national legislation transposing the directive, since it made suspension of the measure conditional on the introduction of an action for annulment against the contested administrative measure, did not satisfy the requirements of the review directive.

109. Paragraph 11 of the judgment in Commission v Greece , cited above, stated specifically:

> "What is more, Article 52 of [Presidential Decree No 18/89] relates only to procedures for suspension of operation of measures and presupposes the existence of a main action seeking to have the contested administrative measure annulled, whereas, under Article 2 of [Directive 89/665],

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the Member States are under a duty more generally to empower their review bodies to take, independently of any prior action , (44) any interim measures "including measures to suspend or to ensure the suspension of the procedure for the award of a public contract"

" .

110. The Court also noted that the national legislation referred to contained no provision on damages, as provided for in Article 2(1)(c) of the review directive, for persons harmed in the event of an infringement of Community law in the field of public procurement or national rules implementing that law. (45)

111. It is clear from that judgment that, contrary to what the Kingdom of Spain contends, the Court of Justice did not merely state that the directive had not been transposed within the time-limit set in the reasoned opinion, but examined the Greek law which was to be adopted and gave the reasons why it did not correctly transpose the provisions of the review directive.

112. From the foregoing considerations, I conclude that Member States must introduce a scheme providing for the adoption of all types of urgent measures, including positive measures, intended both to avoid and correct and to make good any illegalities committed by the contracting authority throughout the contract award procedure in question. That requirement is incompatible with the requirement of a prior action on the merits against the unlawful decision.

113. The Spanish Government does not deny that, in its legal system, interim or protective measures cannot be adopted before an action on the merits is brought against the unlawful decision. However, it claims that the Spanish system is not restrictive since a mere letter giving no reasons, in which the applicant states that he intends to challenge the decision on the merits, fulfils that obligation. If that were indeed the case, I must admit that I cannot understand the reasons for that "mere formality" to which the Spanish legislature nevertheless attaches particular significance. It seems to me disproportionate to make the effective application of the directive on this point (46) conditional on the prior completion of a mere formality.

114. As regards the Spanish Government's argument that the Spanish scheme with regard to protective measures is the same as that followed by Community law in proceedings before the Court of Justice, it has to be pointed out that the provisions and judgments referred to by the Spanish Government do not relate to the special review system established by Directive 89/665 or to its transposition by the Member States. Under the principle lex specialis derogat generali , (47) the specific scheme provided for by Directive 89/665 must necessarily prevail.

115. It follows from the foregoing arguments that, by making the grant of protective measures conditional on the requirement to bring an action on the merits against the decision adopted unlawfully by the contracting authority, the Kingdom of Spain has failed to fulfil its obligations under Articles 1 and 2 of Directive 89/665.

VI Costs

116. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful in its defence, it must be ordered to pay the costs.

VII Conclusion

117. For the reasons stated above, I propose that the Court should:

(1) Declare that, by failing to adopt the measures needed to comply with Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative

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provisions relating to the application of review procedures to the award of public supply and public works contracts, and in particular by failing to:

extend the system of review procedures provided for by that directive to decisions adopted by all contracting authorities, within the meaning of Article 1(1) of Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Directive 93/36/EC of 14 June 1993 coordinating procedures for the award of public supply contracts, and Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, including companies governed by private law established for the specific purpose or meeting needs in the general interest which do not have an industrial or commercial character, have legal personality, and are financed, for the most part, by public authorities or other entities governed by public law, or are subject to supervision by the latter, or have an administrative, management or supervisory board more than one half of whose members are appointed by public authorities or other entities governed by public law;

allow review to be sought of all decisions adopted by the contracting authorities, including all procedural measures, during the procedure for the award of public contracts;

provide for the possibility of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, including measures aimed at enabling administrative decisions to be suspended, removing for that purpose difficulties and obstacles of any type and in particular the need first to bring an action against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under Community law;

(2) Order the Kingdom of Spain to pay the costs.

(1) .

(2) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33, hereinafter called "the review directive").

(3) See the first, third and fourth recitals.

(4) Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

(5) Council Directive 93/37/EEC of 14 June 1993 (OJ 1993 L 199, p. 54).

(6) Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1).

(7) Council Directive 93/36/EEC of 14 June 1993 (OJ 1993 L 199, p. 1).

(8) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). Directives 92/50, 93/36 and 93/37 will hereinafter be called "the procedure directives" or "the directives applicable in the "traditional" sectors

" (for the meaning of the latter expression, see point 48 of this Opinion).

(9) Under that provision, "[t]he Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced."

(10) BOE No 119, 19 May 1995, p. 14601, hereinafter "Law 13/1995"

(11) The Texto Refundido de la Ley de Contratos de las Administraciones Publicas (BOE No 148,

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21 June 2000, p. 21775).

(12) BOE No 12, 14 January 1999, p. 1739 (hereinafter "Law 30/1992").

(13) BOE No 167, 14 July 1998, p. 23516 (hereinafter "Law 29/1998").

(14) Case C-44/96 Mannesmann Anlagenbau and Others [1998] ECR I-73, paragraphs 17 to 35.

(15) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

(16) The "special sectors" are the public utility sectors, such as water, energy, transport and telecommunications.

(17) Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

(18) Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

(19) The fourth recital in the preamble to Directive 92/13 makes it clear that Directive 89/665 is limited to public procurement procedures in the so-called "traditional" sectors.

(20) See attestation procedure (Articles 3 to 7 of Directive 92/13), corrective mechanism (Article 8 of Directive 92/13) and conciliation procedure (Articles 9 to 11 of Directive 92/13).

(21) Since the judgment in Mannesmann Anlagenbau and Others , cited above, paragraphs 20 to 29.

(22) Case C-237/99 Commission v France [2001] ECR I-939, paragraph 43.

(23) Ibidem , paragraphs 39 and 40.

(24) Ibidem , paragraph 44.

(25) Hereinafter "SA HLMs" .

(26) Commission v France , cited above, paragraph 60.

(27) Case C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding [1998] ECR I-6821.

(28) Ibidem , paragraph 61.

(29) Ibidem , paragraph 62.

(30) The terminology used in the case is unimportant.

(31) Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraph 35.

(32) In that context, the terminology used is unimportant.

(33) Alcatel Austria and Others , cited above, paragraph 30.

(34) See, in particular, the first and second recitals in the preamble.

(35) Alcatel Austria and Others , cited above, paragraphs 33 and 34.

(36) Ibidem , paragraph 35.

(37) Ibidem , paragraph 43.

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(38) Article 2(1)(a) of the review directive.

(39) As stated by the Spanish Government (see the second indent of point 80 of this Opinion).

(40) Ibidem .

(41) In particular, Case C-236/95 Commission v Greece [1996] ECR I-4459.

(42) In particular, Article 136 of Law 29/1998.

(43) See, in that regard, the second plea raised by the Commission against the Kingdom of Spain.

(44) Emphasis added.

(45) Ibidem , paragraph 15.

(46) Namely, the adoption of interim and protective measures.

(47) See, in particular, Case C-469/93 Chiquita Italia [1995] ECR I-4533, paragraph 61, and Case C-372/99 Commission v Italy [2002] ECR I-819, paragraph 19.

DOCNUM	62000C0214
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
PUBREF	European Court reports 2003 Page I-04667
DOC	2002/06/13
LODGED	2000/05/30
JURCIT	31993L0036 : N 2 6 65 31993L0036-A01LB : N 7 46 50 54 55 59 64 66 31993L0037 : N 2 6 65 31993L0037-A01LB : N 7 46 50 54 55 59 61 62 64 66 31993L0037-A01LBT3 : N 60 31993L0038 : N 48 49 31989L0665 : N 2 49 53 89 113 31989L0665-A01 : N 1 54 65 66 86 88 91 92 115 31989L0665-A01P1 : N 3 45 - 48 50 51 64 83 102 31989L0665-A01P2 : N 102 31989L0665-A01P3 : N 83 31989L0665-A02 : N 1 66 86 88 91 92 115 31989L0665-A02P1 : N 4 84 102 31989L0665-A02P1LA : N 89 31989L0665-A02P1LB : N 85 31989L0665-A02P8 : N 5 31989L0665-C1 : N 2 52 86

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31989L0665-C2 : N 86
31989L0665-C3 : N 2 52
31989L0665-C4 : N 2 52
31992L0050 : N 2 6 65 66
31992L0050-A01LB : 7 46 50 54 55 59 63 64
31971L0305 : N 2
31977L0062 : N 2
31992L0013 : N 48
31990L0531 : N 48
61996J0044 : N 56 62
61995J0236 : N 105 109 - 111
61999J0237 : N 56 - 58 60 61
61996J0360 : N 63
61998J0081 : N 85 - 87
61993J0469 : N 114
61999J0372 : N 115

SUB	Approximation of laws
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	Spain ; Member States
NATIONA	Spain
PROCEDU	Action for failure to fulfil obligations - successful;Action for failure to fulfil obligations - unfounded
ADVGEN	Léger
JUDGRAP	Skouris
DATES	of document: 13/06/2002 of application: 30/05/2000

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Opinion of Mr Advocate General Mischo delivered on 14 December 2000.
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Failure to transpose Directive 97/52/EC.
Case C-97/00.

1. The Commission of the European Communities seeks a declaration from the Court that, by failing to communicate the laws, regulations and administrative provisions necessary to comply with all the provisions of European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (the Directive), or by failing to adopt the measures necessary to comply therewith, the French Republic has failed to fulfil its obligations under the Directive. It also asks for an order for costs against the French Republic.

2. Under the first subparagraph of Article 4(1) of the Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 13 October 1998 and forthwith to inform the Commission thereof.

3. The Commission alleges that the French authorities have transposed into national law only the provisions laid down in Articles 1(1)(a), 2(1)(a) and 3(1)(a) of the Directive, relating to the thresholds above which contract notices must be published in the Official Journal of the European Communities. It considers that, in those circumstances, it should be found that, notwithstanding expiry of the time-limit laid down, the French Republic has not yet adopted the national provisions for transposing the whole of the Directive and, in any event, has not communicated them.

4. In its defence the French Government does not deny the infringement pleaded. It points out that the Directive has been partly transposed by the Order of 22 April 1998 which sets the thresholds above which contract notices have to be published in the Official Journal of the European Communities, and it asks the Court to find that the process for transposition of the Directive is in the course of being completed given that a draft decree is undergoing interdepartmental examination and will be submitted shortly to the Conseil d'Etat.

5. It is common ground that, on the date of expiry of the time-limit set by the reasoned opinion (Commission letter of 3 September 1999 setting a time-limit of two months from its notification), the French Republic still had not adopted the measures necessary to transpose the Directive in full.

6. The Commission's action should therefore be considered well founded.

7. Pursuant to Article 69(2) of the Rules of Procedure, the French Republic should be ordered to pay the costs.

Conclusion

8. In view of the foregoing considerations, I propose that the Court should rule as follows:

(1) by failing to communicate the laws, regulations and administrative provisions necessary to comply with all the provisions of European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, or by failing to adopt the measures necessary to comply therewith, the French Republic has failed to fulfil its obligations under that directive;

(2) the French Republic is to pay the costs.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2000 ; C ; opinions
PUBREF	European Court reports 2001 Page I-02053
DOC	2000/12/14
LODGED	2000/03/13
JURCIT	31997L0052-A01P1LA : N 3 31997L0052-A02P1LA : N 3 31997L0052-A03P1LA : N 3 31997L0052-A04P1L1 : N 2 31997L0052 : N 1
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Mischo
JUDGRAP	von Bahr
DATES	of document: 14/12/2000 of application: 13/03/2000

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Opinion of Mr Advocate General Tizzano delivered on 28 June 2001.
Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien.
Reference for a preliminary ruling: Vergabekontrollsenat des Landes Wien - Austria.
Public service contracts - Directive 92/50/EEC - Procedure for the award of public service contracts - Directive 89/665/EEC - Scope - Decision to withdraw an invitation to tender - Judicial review - Scope.
Case C-92/00.

I - Introduction

1. By order of 17 February 2000, lodged at the Registry of the Court on 10 March 2000, the Vergabenkontrollsenat (Committee for the control of public service contracts) of the Land of Vienna (Austria) referred, under Article 234 EC, three questions for a preliminary ruling on the possible legal remedies applicable in respect of the procedures of a contracting authority which cancels an award procedure for a public contract. In particular, the national court asks this Court, first, whether Article 2(1)(b) of Directive 89/665 requires the Member States to initiate review proceedings in respect of such procedures in order to have them set aside. If that question is answered affirmatively, then the Vergabenkontrollsenat asks whether Directives 89/665 and 92/50 preclude the national court, before which review proceedings may be brought, from being necessarily limited to examining the arbitrary or sham nature of the contested cancellation of the award procedure (second question); and which is the relevant moment in time for assessing whether the decision to cancel the award procedure is lawful (third question).

II - Legal framework

A - Community law

2. Article 1(1) of Directive 89/665, as amended by Article 41 of Directive 92/50, provides:

The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

Article 2(1)(b) of Directive 89/665 provides:

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(a) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.

The second paragraph of Article 2(6) provides:

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

Article 12(2) of Directive 92/50, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC (OJ 1997 L 328,

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p. 1) concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, provides:

Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if required. They shall also inform the Office for Official Publications of the European Communities of such decisions.

B - National law

3. In Austria the relevant national law is the Wiener Landesvergabegesetz (Viennese law on public procurement; hereinafter the WLVerG). Paragraph 32 (entitled Correction and withdrawal of an award procedure) (2) (3) and (4) of that law provides that:

(2) An invitation to tender may be withdrawn during the period for submission of tenders where events occur which, had they been previously known, would have excluded an invitation to tender being made or led to an invitation to tender with a substantially different content.

(3) At the expiry of the period for submitting tenders, the invitation to tender must be withdrawn where compelling grounds exist. Compelling grounds exist in particular where:

(1) events described in subparagraph 2 are not known until after the expiry of the period for submitting tenders,

or

(2) where all the tenders had to be excluded.

(4) An invitation to tender may be withdrawn, for example, when:

(1) no tender acceptable from an economic point of view has been submitted,

or

(2) only one tender remains after the exclusion of other tenders.

4. As regards the jurisdiction of the Vergabekontrollsenat, that is to say the court which made the present reference, Paragraph 99 of the WLVerG provides that that court is to have jurisdiction to review decisions of the contracting authority taken in the context of procedures for the award of public contracts. In particular, until such time as a contract is awarded, the Vergabekontrollsenat may adopt interim measures or declare void decisions taken unlawfully by the contracting authority on the grounds laid down in Paragraph 101 of the WLVerG. In cases where the contract has already been awarded, the Vergabekontrollsenat may declare that the contract has not been awarded to the best bidder owing to a breach of the WLVerG and may confirm, at the request of the contracting authority, whether, had that breach not occurred, the contract would have been awarded to a bidder who had been passed over.

5. Paragraph 101 of the WLVerG provides:

The Vergabekontrollsenat must set aside decisions of the awarding authority adopted in the course of a contract awarding procedure:

(1) where discriminatory technical, economic or financial specifications appear in the tender notice inviting undertakings to participate in a closed procedure or a negotiated tender, or in the invitation to tender or tender specifications; or

(2) where a tenderer is passed over in breach of the criteria appearing in the tender notice in which undertakings are invited to participate in a closed procedure or a negotiated tender and

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the awarding authority might have come to a decision more favourable to the applicant if the infringed provisions had been complied with.

III - Facts and questions for a preliminary ruling

6. The City of Vienna, represented by the Magistrat der Stadt Wien - Wiener Krankenanstaltenverbund (hereinafter the City of Vienna or the respondent), in 1996 published an invitation to tender for the implementation of project management for realisation of the overall catering-supply concept in the premises of the Viennese associated hospitals.

7. Following submission of tenders, including one from the German company Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) (hereinafter HI or the tenderer) and one from the Austrian company Humanomed, the City of Vienna withdrew the invitation to tender within the period prescribed for awarding the contract for compelling reasons in accordance with the first subparagraph of Paragraph 32(3) of the WLVerG. In reply to a request for information submitted to it by HI, the City of Vienna stated that, in the light of the results of studies carried out by Humanomed in 1996, it had emerged that the project initially envisaged and put out to tender had to be developed in a decentralised manner and it had therefore been decided not to establish any central coordinating body; consequently, it was no longer necessary to allocate the contract covered by the invitation to tender. The same letter also stated that the withdrawal of the invitation to tender was clearly justified by supervening circumstances which, had they been known earlier, would have precluded the opening of the award procedure.

8. HI did not share that opinion, contending that the withdrawal was in fact due to the contracting authority's intention to favour the Austrian company Humanomed to the detriment of a company, like itself, from another Member State. Besides suspecting that the City of Vienna was, either directly or indirectly (through municipal undertakings), a shareholder in Humanomed, HI questioned the fact that Humanomed had been closely involved in the preparatory work for the invitation to tender, which had subsequently been withdrawn, and had thus influenced the drafting of the outline specifications of the project which was the subject of that invitation to tender. That being the case, Humanomed, according to HI, should have been excluded from the invitation to tender in compliance with the principle of equal treatment between different tenderers; thus, according to HI, the invitation to tender was withdrawn precisely in order to avoid the necessity of excluding Humanomed, whilst at the same time continuing to cooperate with that company. Accordingly, for all these reasons HI instituted proceedings before the Vergabekontrollsenat seeking, in particular, the commencement of review proceedings, an interim order, the annulment of certain tender documents and of the withdrawal of the invitation to tender on the ground that it was unlawful and discriminatory.

9. By decisions of 30 April and 10 June 1997, the Vergabekontrollsenat dismissed the action brought by HI. In particular, it declared the claim for the annulment of the withdrawal of the invitation to tender inadmissible on the grounds that, under Paragraph 101 of the WLVerG, such claims could be made only in respect of certain specific decisions, exhaustively listed, adopted in the course of an award procedure, and these did not include decisions to withdraw an invitation to tender.

10. However, on appeal brought by HI, the Verfassungsgerichtshof (Constitutional Court) set aside the decision of the Vergabekontrollsenat. In particular, it held that, for the purposes of such a ruling, it was first necessary to resolve whether a withdrawal of an invitation to tender came within the scope of application of Article 2(1)(b) of Directive 89/665 and, since the Court of Justice had not yet had an opportunity to give a ruling on the matter, the Vergabekontrollsenat should have referred to it the relevant question for a preliminary ruling. Since the Vergabekontrollsenat had not done so, it had infringed both Article 234 EC and HI's constitutionally guaranteed right to a hearing before the proper court.

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11. When the matter was referred back to it, the Vergabekontrollsenat then studied the action in light of the statements by the Verfassungsgerichtshof, and finally decided to refer the following questions to this Court for a preliminary ruling:

(1) Does Article 2(1)(b) of Directive 89/665/EEC (review directive) require the decision of a contracting authority to cancel the procedure for the award of a contract for services to be reviewable in review proceedings leading, if appropriate, to its being set aside?

(2) If Question 1 is answered affirmatively, is there any provision of Directive 89/665 or of Directive 92/50/EEC which precludes a review limited to examination of the issue whether cancellation of the award procedure was arbitrary or sham?

(3) If Question 1 is answered affirmatively, which is the relevant moment in time for assessing whether the decision of the contracting authority to cancel the award procedure is lawful?

IV - Legal analysis

A - On the first question for a preliminary ruling

1. Introduction

12. With the first question for a preliminary ruling, the national court is essentially asking this Court to clarify whether, within the meaning of Article 2(1)(b) of Directive 89/665, the obligation imposed on Member States to institute appropriate review procedures against the decisions taken by the competent authorities in the context of award procedures governed by Community directives relating to the award of public works contracts, public supply contracts and public service contracts (the so-called substantive directives) also extends to the procedures for cancelling a contract (in this case, a contract for services).

13. However, as the Commission pointed out, it would have perhaps been more appropriate to extend the question at least to Article 1(1) of Directive 89/665 according to which the Member States must ensure that decisions taken by the contracting authorities may be reviewed. In any case, in the following pages, as occurred in the discussion between the parties, it is inevitable that reference will be made to both provisions.

2. Arguments of the parties

14. Of the parties submitting observations in the present proceedings, only the applicant in the main proceedings has proposed that this question be answered in the affirmative. The other parties, namely the Commission and the Austrian Government, as well as the national court, have proposed a negative response on the basis of reasoning that I am now going to examine.

15. Whilst Article 1(1) of Directive 89/665 requires the Member States to take the necessary measures to ensure that decisions taken by the contracting authority may be reviewed rapidly and effectively, it is clearly to pursue the objective, enshrined in the directive, of guaranteeing that Community law in relation to public contracts is implemented effectively. It follows that the requirement to establish review procedures to set aside or ensure the setting aside of decisions taken unlawfully by the contracting authority, as laid down in Article 2(1)(b) of the review directive, can refer only to those measures of the contracting authority which come within the scope of application of the substantive directives, that is to say only to decisions which, being subject to specific rules under those directives, may entail an infringement thereof. As the Commission points out, the preparatory work on Directive 89/665 would also point to this conclusion. The first version of Article 1(1) provided, in the initial proposal, that the aforementioned obligation on Member States be extended to the setting aside of all decisions taken in breach of Community and/or national rules on public contracts. However, despite requests by the Commission and by certain Member States, the draft was subsequently amended to limit the requirement to the setting aside of decisions taken

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in breach of Community law relating to public contracts and national rules transposing that law.

16. Thus, to maintain that the withdrawal of the invitation to tender comes within the decisions taken unlawfully referred to in Article 2(1)(b) of Directive 89/665, it would need to be the subject of specific rules in the relevant substantive directive; in the present case, Directive 92/50. However, according to those who support this argument, that directive lays down no rules governing the conditions and form relating to the withdrawal of an invitation to tender for services, and thus does not even impose an obligation on the contracting authority to complete an award procedure. Article 12(2) of Directive 92/50 merely provides that, if so requested by a tenderer, the contracting authority is to inform candidates of the grounds of the withdrawal. Thus, it is contended that, unlike decisions to terminate the tendering procedure by awarding the contract, decisions to withdraw the invitation to tender do not constitute a decision within the meaning of Directive 89/665. Moreover, the Austrian Government asserts that that conclusion is confirmed by the fact that Article 2(1)(b) refers solely to decisions the contracting authority is obliged to take, under Directive 92/50, during an award procedure, while a decision of withdrawal constitutes an act that terminates such a procedure.

17. But that is not all. Community case-law also holds that the contracting authorities have wide discretion in how they choose to terminate an invitation to tender, either by deciding not to award the contract, or by withdrawing the invitation to tender; as already noted, the Community directives do not impose any particular limits or conditions in that respect and do not even require that there exist exceptional cases... based on serious grounds. However, those supporting that argument contend that if the contracting authority is not required to award a contract, that confirms that the decision to terminate an award procedure by withdrawing the relevant invitation to tender is not covered by the directive and thus does not constitute a decision within the meaning of Article 2(1)(b) of Directive 89/665.

18. Finally, the Austrian Government contends that, under Article 2(6) of Directive 89/665, where a contract has already been concluded between the contracting authority and the successful tenderer, the Member States may limit damages to the protection of the rights of any parties harmed, thereby precluding the possibility of having the decision to award the contract set aside. It therefore does not see why, as far as decisions to withdraw an invitation to tender are concerned, the interested parties should be offered any greater protection. It contends that the only obligation the national legislature must meet in such a case is to guarantee the right of the tenderers to seek damages should the contracting authority withdraw the invitation to tender in an abusive manner. In any event, as the Commission points out, tenderers harmed by an unlawful withdrawal are not without means of redress to safeguard their interests. On the one hand, there are the remedies provided for by national law in the event of a breach of national provisions; on the other hand, they may avail themselves of the remedies guaranteed by Directive 89/665 where the contracting authority has published a new invitation to tender without complying with Community directives.

3. Assessment

19. In assessing these arguments, I should initially like to reiterate, albeit very summarily, the aims of the Community directives on public contracts, which seem to me to have been somewhat obscured in the foregoing arguments. As is well known, these directives have established a body of rules designed to give effect, in this sector too, to the freedom of establishment and freedom to provide services by guaranteeing all Community traders the right to participate in public calls to tender under conditions of absolute equality and total transparency. As in other sectors, the necessity to achieve that goal also in relation to public contracts required legislation that went beyond a mere ban on discrimination on grounds of nationality to embrace every eventuality that might lead, in any way whatever, to differences in the conditions governing access to and participation

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in an activity. Thus, there has also been a gradual movement away from a more limited set of rules, such as those laid down by the first directives on public supply and public works contracts, towards a more specific, incisive and, above all, tendentially global set of rules, such as those which have come about by degrees and which, in their main outlines, may now be considered almost complete.

20. In particular, for our present purposes, I note that the directives in question have a specific aim which is expressly stated in the directives themselves and repeatedly stressed in Community case-law. That aim is to guarantee equal treatment between tenderers and transparency at every stage of the award procedure, whilst imposing an obligation on Member States, as in the case of the directive here in question, to provide appropriate remedies at national level in order to ensure effective compliance with those principles. Accordingly, I must point out that those principles apply in the present case in so far as they go beyond the wording of the directives, which neither refer to those principles nor provide the basis for them, but which are intended solely to facilitate and ensure their effective application. In that respect, the Court has held that although the directive [71/305/EEC] makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at very heart of the directive.

21. Accordingly, it follows not only that the contract directives must be interpreted in accordance with the traditional principles of Community case-law, and in particular with the principle requiring the provisions which implement the fundamental principles of freedom of movement to be interpreted in a way that does not restrict their scope or impair their effectiveness, but, above all, to be read in the light of their stated function of guaranteeing full and effective observance of the superior principles of equality of treatment and transparency. In particular, the review directive must be interpreted, in strict compliance with the aims of this directive and of the entire system, as meaning that its aim is to ensure at all levels effective observance of the substantive directives and of the principles underlying them so that, over and above the cases expressly provided for, it cannot be implicitly assumed or inferred, in relation to the procedures covered by those directives, that there are limits to the judicial safeguards which leave stages or phases of those procedures uncovered. It must also be interpreted in compliance with the principle of the justiciability of acts producing definite legal effects that reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In other words, it is necessary to follow a reasoning exactly opposite to that adopted by those who support the argument explained above.

22. Coming now to consider the specific question before us in the light of the preceding discussion, the negative reply proposed by the above argument seems highly debatable and, as far as the Commission is concerned, I would even say surprising when account is taken of its traditional approach in this matter. In any event, I do not think the argument in question stands up to critical analysis.

23. First, I note that the text of Directive 89/665 makes no mention of any restriction with regard to the nature and content of the decisions which Member States must ensure are open to review. On the contrary, Article 1(1) of the directive provides, without further specification, that it refers to award procedures governed by the relevant substantive directives and that in the context of those procedures the Member States must take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and rapidly: thus, that covers all decisions taken within the framework of those procedures, from start to finish, whether they result in the award of a contract, or in its termination on the basis of a decision to withdraw or cancel it. In any case, as the Court held in Alcatel Austria, the article does not provide for any restriction with regard to the nature and content of the decisions that have infringed Community law on public contracts or the relevant national implementing provisions (paragraph 35).

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24. On the other hand, the wording of the subsequent Article 2(1)(b) of the directive in question (setting aside of decisions taken unlawfully, including etc.) leads to the same conclusion, given that it gives no indication of limits or any other sign that provides any authorisation whatsoever to restrict the scope of the decisions taken in terms of their content, the stage in the award procedure at which they are taken or on any other grounds. Finally, that is also confirmed by the wording of Article 2(1)(a) which requires Member States to make provision for interlocutory procedures to deal with any decision taken by the contracting authorities; it is not clear why procedures for the setting aside of decisions referred to in the subsequent Article 2(1)(b) should be more limited.

25. Thus, on the basis of a textual analysis alone, the directive not only fails to provide support for the argument under consideration, but, if anything, does the opposite. However, what is important for me to point out is the fact that the interpretation proposed here is also more consistent with the stated aims of the substantive directives on contracts, particularly of Directive 89/665 which, as the Court held in Alcatel Austria, is specifically intended to strengthen the existing mechanisms. Yet even from the perspective of the logic of the system it is not clear why, as HI observes, of the two main methods of concluding a tendering procedure, namely awarding a contract and withdrawing it, only the first method should be subject to control, whilst the second is not. And that is so even if by chance the decision to award the contract were to be taken in a totally arbitrary fashion or for the sole purpose of favouring a certain tenderer, and even if the tendering procedure were repeated several times until the tenderer who was hypothetically favoured was successful. That would imply, on the one hand, creating manifest and unjustifiable differences with respect to decisions to award contracts; on the other hand, it would imply leaving the contracting authority free to allow considerations, other than economic considerations, to be given preference thereby opening the way to the very risks of discrimination and lack of transparency which the directives have sought to remove: in other words, it would imply depriving those directives of their effectiveness and thus negating their purpose.

26. However, as noted above, those who support the argument in question insist above all on the correspondence between the review directive and the substantive directives, stressing that the latter make no provision in respect of the withdrawal of a tendering procedure and therefore they contend that, by definition, the relevant procedures fall outside the scope of application of the former directive, irrespective of the scope of the phrase decisions taken unlawfully employed by that directive. I would observe, however, first of all, that the assumption on which that argument is based, according to which only procedures and decisions for which specific rules are laid down in the substantive directives should be subject to the review directive, remains to be substantiated. It is equally legitimate, and even more consistent with the principles and logic of the system, as I have pointed out several times, to argue that the first directive covers all the stages and phases of the award procedures which are covered by the substantive directives, including those which, on account of their particular nature, do not require specific rules or require only limited regulation, as in the specific case of the withdrawal of a tendering procedure.

27. However, apart from the foregoing considerations, I must point out that the substantive directive which is relevant here, namely Directive 92/50, does not ignore the measures withdrawing an invitation to tender, even if it is limited in that respect, as already noted, to providing that the contracting authority, if so requested, is to communicate in writing the grounds on which it decided not to award a contract (Article 12(2) of Directive 92/50). It seems obvious to me that such an obligation to provide reasons is not of little consequence for our present purposes because stating the reason for a measure and judicial review of that measure are two aspects that are closely linked. As the Court's case-law also demonstrates, the former serves as a direct basis for the latter because the logic adopted by the author of the measure must be clearly and unequivocally discernible so that those affected can comprehend the reasons for the measure and the competent court can exercise

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its own power of review. Accordingly, if the directives require that reasons must be given, that is all the more reason for assuming that there is an obligation to establish judicial protection.

28. Nor, for the purposes of the present argument, can the aforementioned objection be raised that, since the contracting authority has wide discretion to withdraw a tendering procedure, tenderers have no right to claim that the procedure be concluded with the award of a contract. If, apart from the aforementioned obligation to provide reasons, procedural and substantive conditions governing withdrawal are not laid down, that does not mean that the relevant measures fall outside the review directive or that the power vested in national authorities may be exercised without control or limitation. The undoubted discretion which such authorities enjoy in that respect may affect, as we shall see in examining the second question, the scope of judicial review, but it certainly does not imply absolute freedom and removal from all control. Those authorities must continue to act in compliance with the relevant Community and national provisions and, above all, respect the principles of equality of treatment and transparency which, as the Court has held, lie at the very heart of the rules governing the matter and therefore are to be applied absolutely and unconditionally.

29. Before concluding with this point, I must still give my opinion on certain arguments put forward respectively by the Austrian Government and the Commission in favour of a negative reply to the question under consideration.

30. The first argument, as noted above (point 18), relies on Article 2(6) of Directive 89/665, concluding from it that if, in the event of a contract already having been awarded, Member States may limit the protection afforded to individuals to a claim for damages, there is no reason to offer them greater judicial protection in the case of a measure of withdrawal. It must be objected, however, that there is no similarity between the two situations referred to, that is to say between the phase preceding the award of the contract (to which Article 2(1) refers and which is of interest here) and the phase following the award (to which Article 2(6) refers). As the Court held in Alcatel Austria, Directive 89/665 itself clearly distinguishes between those two stages by laying down different rules (paragraph 37). On the other hand, any analogous extension of the rules laid down in Article 2(6) not only would not be justified under any aspect of the structure of the system in question, but would be completely at odds with the aims of that system.

31. Nor can it be maintained, as the Austrian Government still appears to claim, that a claim for damages caused by an unlawful withdrawal is sufficient to meet the claims of tenderers harmed by that withdrawal. I merely note that the review directive authorises the Member States to make actions for damages conditional on the contested decision first being set aside (see Article 2(5) of Directive 89/665) so that, at least in the case of such an eventuality, this latter type of remedy could not be precluded. Moreover, that seems to me to provide a further reason for giving a positive reply to the first question submitted by the Vergabekontrollsenat, given that, otherwise, any individuals affected would not even be able to bring an action for damages where the Member State in question had taken advantage of the opportunity offered it by the aforementioned Article 2(5).

32. For its part, the Commission initially contends that any tenderer harmed by an unlawful decision to withdraw an invitation to tender would in any event have available the remedies provided for by the laws of the Member States where national provisions are infringed. I do not know if such a prospect is likely to console those affected. However, it certainly does not meet the stated requirements and frankly it sounds rather odd coming from an institution which for years has been insisting that the directives on contracts be effectively implemented and has proposed more than one directive (such as, for instance, Directive 89/665) aimed precisely at reinforcing that guarantee at Community level, removing it from the disparities and deficiencies of the national legislation.

33. Equally consoling, but just as inconclusive for our present purposes, it seems to me, is the

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Commission's other observation to the effect that participation in an invitation to tender which is subsequently withdrawn is in some way protected by the fact that, if the contracting authority decided to award the contract in question by recommencing the tendering procedure, it would in any event have to comply with the relevant Community directives and this could in an appropriate case be subject to judicial review in accordance with the provisions of Directive 89/665. On the other hand, I would observe that a contracting authority does not always decide to launch a new invitation to tender for a contract previously withdrawn. However, even if that were the case, that would not make the action to set aside a decision of withdrawal any less effective because, if such action were successful, apart from the consequences noted above (point 31), the contracting authority's discretion would inevitably be limited should a new invitation to tender be launched as it would have to comply with the principles laid down by the judgment setting aside the decision.

34. Accordingly, in light of the foregoing observations, I consider that the reply to the first question for a preliminary ruling should be that Article 2(1)(b) of Directive 89/655 requires that the decision by the contracting authority to withdraw the invitation to tender for a contract for services may be examined and possibly set aside under a review procedure.

B - On the second question for a preliminary ruling

35. By the second question for a preliminary ruling, the Vergabekontrollsenat asks, if the first question is answered affirmatively, whether there is any provision of Directive 89/665 or Directive 92/50 which precludes judicial review of the legality of a withdrawal of an invitation to tender from having to be limited to examination of the issue whether that measure was arbitrary or sham.

36. In effect, this is a somewhat convoluted question which not even the grounds of the order for reference help to clarify, probably also because this reflects problems and concerns specific to the Austrian legal system. However, as far as I understand it, the Vergabekontrollsenat is disposed to give a negative reply, in other words seeking to limit judicial review to the decision to withdraw an invitation to tender, whilst HI takes the opposite view, arguing that it cannot be inferred from Directive 89/665 that an action to set aside a decision of withdrawal must be limited solely to examination of whether the contested measure was arbitrary or sham. On the contrary, in its opinion, a decision of withdrawal should be subject to full judicial review. Finally, for its part, the Commission, after repeating that withdrawal measures are excluded from Directive 89/665, merely notes that, if an action is brought before a national court challenging the lawfulness of a withdrawal of a tender, that court can verify whether the grounds for such a withdrawal are compatible with the national and, possibly, the Community provisions.

37. In coming to a general assessment of the question and thus leaving aside any situations specific to Austrian law, I must say that I have great difficulty identifying in the Community directives in question any provisions that are relevant from the point of view of the question submitted to us: in other words, provisions which make it possible to infer or, on the contrary, exclude limits to the scope of judicial control over a measure withdrawing an invitation to tender. It will certainly be necessary to keep firmly in mind what I have said above concerning the discretion enjoyed by the contracting authority in the matter, and the limits resulting from it, in this and all like cases, on the level of judicial review. Community case-law has repeatedly stressed that, given the nature of the power enjoyed by those authorities, review by the courts must be limited to checking that the rules governing the procedure and statement of reasons are complied with, that the facts are correct and that there is no manifest error of assessment or misuse of powers. However, beyond that limitation, directly connected, I repeat, to the nature of the power exercised in the present case, remains the fact that the national authorities will still always be obliged to respect the relevant Community and national provisions and, above all, the principles of equality of treatment and transparency repeatedly referred to; therefore, judicial review must also be extended to those

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aspects.

38. Accordingly, I consider that the answer to the question concerned should be that no provision of Directives 89/665 and 92/50 allows judicial review of the legality of the decision to withdraw an invitation to tender to be solely limited to an examination of the arbitrary or sham nature of that decision.

C - On the third question for a preliminary ruling

39. By this question also, submitted in the alternative in the event of an affirmative reply to the first question, the Austrian court asks finally what is the relevant moment for assessing whether the decision of the contracting authority to withdraw the invitation to tender is lawful.

40. In stating its reasons for that question, the Vergabekontrollsenat notes that Directive 89/665 contains no indication on the matter and that in its opinion there are two possible solutions: the moment at which the decision is taken by the contracting authority or the moment at which the decision is taken by the review body. In favour of the first solution is the fact that the decision of withdrawal is the subject of the application for review, whilst in favour of the second interpretation is the principle of the directive's effectiveness, which is intended to guarantee the existence of effective and rapid remedies. However, HI contends that reference should be made to the moment when the decision is given on the contested act whilst the Commission contends that, since the withdrawal of an invitation to tender is governed not by Community law but by the applicable national law, it is on the basis of the latter that the solution to the third question for a preliminary ruling will depend.

41. For my part, I would observe that Directive 89/665 makes no provision concerning the determining moment for the purpose of considering the lawful nature of a decision of withdrawal. I believe that is due to the nature of the directive itself which is not intended to harmonise legislation, but merely to coordinate existing procedures. Thus, its aim is not to create a comprehensive legal framework on the subject, but merely to lay down the necessary rules to ensure that the substantive directives are fully and effectively applied. It is to the individual national legal systems that one must look for specification of the detailed rules and procedures, in compliance, of course, with the rules and principles laid down in the directive, for the exercise of the protection provided for in it. As the Court has recently held, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law.

42. Accordingly, in reply to the third question for a preliminary ruling, I consider that the Court should inform the national court that, without prejudice to the effectiveness and timeliness of the safeguards guaranteed by the principles and provisions of Community law, the relevant moment in time for the purpose of assessing the lawfulness of a decision taken by a contracting authority to withdraw an invitation to tender is to be determined on the basis of the applicable national law.

V - Conclusion

43. In light of the preceding considerations, I therefore propose that the Court rule as follows:

(1) Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts requires that the decision by the contracting authority to withdraw the invitation to tender for the award of a contract for services be examined and, possibly, set aside under a review procedure.

(2) No provision of Directive 89/665 or of Council Directive 92/50/EEC of 18 June 1992 relating

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to the coordination of procedures for the award of public service contracts allows for judicial review of the legality of the act withdrawing an invitation to tender to be limited solely to examination of whether that procedure was arbitrary or sham.

(3) Without prejudice to the effectiveness and timeliness of the safeguards guaranteed by the principles and provisions of Community law, the relevant moment in time for the purpose of assessing the lawfulness of a decision taken by a contracting authority to withdraw an invitation to tender is to be determined on the basis of the applicable national law.

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SUB	Approximation of laws
AUTLANG	Italian
NATIONA	Austria
PROCEDU	Reference for a preliminary ruling
ADVGEN	Tizzano
JUDGRAP	Skouris
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Order of the Court (Second Chamber)
of 3 December 2001
Bent Mousten Vestergaard v Spøttrup Boligselskab.
Reference for a preliminary ruling: Vestre Landsret - Denmark.
Article 104(3) of the Rules of Procedure - Public works contracts - Contracts with a value below the threshold values laid down in Directive 93/37/EEC - Clause requiring the use of a product of a specified make, without any possibility of using a similar product - Free movement of goods.
Case C-59/00.

1. Preliminary rulings - Answer capable of being clearly deduced from existing case-law - Application of Article 104(3) of the Rules of Procedure

(Rules of Procedure of the Court of Justice, Art. 104(3))

2. Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Scope - Works contract not exceeding the threshold value provided for in the directive - Excluded - Clause in the contract documents requiring the use for the contract of a product of a particular make, without any possibility of using an equivalent product - Free movement of goods - Not permissible

(EC Treaty, Art. 30 (now, after amendment, Art. 28 EC); Council Directive 93/37)

In Case C-59/00,

REFERENCE to the Court under Article 234 EC by the Vestre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Bent Mousten Vestergaard

and

Spøttrup Boligselskab,

on the interpretation of Articles 6 and 30 of the EC Treaty (now, after amendment, Articles 12 EC and 28 EC),

THE COURT (Second Chamber),

composed of: N. Colneric, President of the Chamber, R. Schintgen and V. Skouris (Rapporteur), Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

after informing the referring court of its intention to give its decision by reasoned order in accordance with Article 104(3) of the Rules of Procedure,

after inviting the parties referred to in Article 20 of the EC Statute of the Court of Justice to submit observations,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By order of 14 February 2000, received at the Court on 23 February 2000, the Vestre Landsret (Western Regional Court) referred for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 6 and 30 of the EC Treaty (now, after amendment, Articles 12 EC and 28 EC).

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2 The questions were raised in proceedings between Mr Vestergaard and Spøttrup Boligselskab concerning the compatibility with Community law of a clause in the general conditions of the contract documents of a public works contract relating to the construction of 20 housing units in Spøttrup, Denmark, specifying that windows of a particular make should be used for the contract.

The main proceedings and the questions referred for a preliminary ruling

3 Spøttrup Boligselskab is a Danish public housing body. In spring 1997 it called for tenders, in an open procedure, for the construction of 20 social housing units in the municipality of Spøttrup. The 20 units were to be built on four separate sites, which constituted separate legal entities.

4 As the total budget amount for the contract was DKK 9 643 000, below the threshold of EUR 5 000 000 laid down in Article 6 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), Spøttrup Boligselskab did not follow the procedure under Directive 93/37. However, the conditions of tender were sent to those artisans who so wished.

5 For the carpentry lot for each site, which included the outside doors and windows, the contract documents contained the following clause: PVC windows and doors. Outside doors and windows shall be supplied by: Hvidbjerg Vinduet, Ostergade 24, 7790 Hvidberg (Denmark)

6 Mr Vestergaard, a master carpenter, submitted tenders for all the carpentry lots. As his tenders for two of the sites were the lowest, they were accepted. However, in connection with the signature of the contract, Mr Vestergaard made a reservation concerning the provision of windows of the Hvidbjerg Vinduet make, since he had calculated his tenders on the basis of providing windows of the Trokal make, which are made in Germany. The additional price if windows of the Hvidbjerg Vinduet make were used was DKK 23 743 excluding VAT. When signing the contract on 31 July 1997, Spøttrup Boligselskab stated that it could not accept that reservation.

7 The work was carried out. Mr Vestergaard used Hvidbjerg Vinduet windows, as required by Spøttrup Boligselskab. However, he maintained his claim for payment of DKK 23 743. Spøttrup Boligselskab rejected that claim.

8 On 29 October 1997 Mr Vestergaard made an application to the Klagenævnet for Udbud (Procurement Review Board, the Review Board), asking it to find that, by requiring in the call for tenders the use of a specified product for the outside doors and windows, Spøttrup Boligselskab had infringed Articles 6 and 30 of the Treaty.

9 The Bolig- og Byministeriet (Ministry of Housing and Urban Affairs, the Ministry) intervened in support of Mr Vestergaard. According to the Ministry, the disputed clause in the contract documents was contrary to its recommendations to contracting authorities.

10 The Bygge- og Boligstyrelsen (Construction and Housing Authority, now the Ministry) had stated in a memorandum of 2 May 1995 that it followed from the EC Treaty that, even if a call for tenders for public works contracts is not covered by the public procurement directives, the tenderers must be chosen on the basis of objective criteria and contracts concluded in a non-discriminatory manner. In addition, in a letter of 4 June 1997, that authority had stated that no contract concerning inter alia public works should contain terms which amounted to discrimination against suppliers on grounds of nationality or of the origin of the goods within the European Union.

11 Before the Review Board, the Ministry referred inter alia to the judgment in Case 45/87 Commission v Ireland [1988] ECR 4929.

12 By decision of 11 November 1988, the Review Board dismissed Mr Vestergaard's application.

13 It considered that Commission v Ireland concerned a large-scale project whose value exceeded

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the threshold laid down in Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) - since repealed and replaced by Directive 93/37 -, so that that judgment was of no relevance for the application before it.

14 The Review Board decided that public works contracts of low value which, unlike that at issue in Commission v Ireland, do not exceed the threshold in Directive 93/37, are generally of no interest or importance in the Community context, and that for such contracts the cost to the contracting authorities of complying with the provisions of Directive 93/37 on technical specifications would be disproportionate. It therefore concluded that Articles 6 and 30 of the Treaty do not, at least generally, impose an obligation to have the indication of a specified make required by the contracting authority followed by the words or equivalent for contracts below the threshold laid down in Directive 93/37.

15 Mr Vestergaard brought the matter before the Vestre Landsret, which stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

1. Is a public body which invites tenders for works which are not covered by Council Directive 93/37/EEC, inasmuch as the threshold value is not exceeded, entitled to stipulate in the tender documents that a specified Danish make must be used, where that requirement in the tender documents is not accompanied by the words "or an equivalent make"?

2. Is a public body which invites tenders for works which are not covered by Council Directive 93/37/EEC, inasmuch as the threshold value is not exceeded, entitled to stipulate in the tender documents that a specified make must be used, where that requirement in the tender documents is not accompanied by the words "or an equivalent make"?

3. If Question 1 or Question 2 is answered in the negative, can such wording of tender documents as described in Questions 1 and 2 be regarded as constituting an infringement of Article 12 EC or Article 28 EC?

Findings of the Court

16 By its three questions, which should be examined together, the Vestre Landsret essentially asks whether the inclusion by a contracting authority in the contract documents for a public works contract not exceeding the threshold laid down in Directive 93/37 of a clause requiring the use of a product of a specified make is contrary to the fundamental rules of the Treaty, in particular Articles 6 and 30, where that requirement is not followed by the words or equivalent.

17 Since it considered that the answer to the questions, as reformulated, was clear from the case-law, in particular Case C-359/93 Commission v Netherlands [1995] ECR I-157, the Court, in accordance with Article 104(3) of the Rules of Procedure, informed the national court that it intended to give its decision by reasoned order and invited the parties referred to in Article 20 of the EC Statute of the Court of Justice to submit observations.

18 None of those parties raised any objection to the Court's intention to give its decision by reasoned order referring to the existing case-law.

19 To rule on the questions, it should be noted, to begin with, that the Community directives coordinating public procurement procedures apply only to contracts whose value exceeds a threshold laid down expressly in each directive. However, the mere fact that the Community legislature considered that the strict special procedures laid down in those directives are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law.

20 Although certain contracts are excluded from the scope of the Community directives in the field

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of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty (see, to that effect, Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraph 60).

21 Consequently, notwithstanding the fact that a works contract is below the threshold laid down in Directive 93/37 and thus not within the scope of that directive, the lawfulness of a clause in the contract documents for that contract must be assessed by reference to the fundamental rules of the Treaty, which include the free movement of goods set out in Article 30 of the Treaty.

22 In the light of that finding, it must be observed, next, that according to the case-law on public supply contracts the failure to add the words or equivalent after the designation in the contract documents of a particular product may not only deter economic operators using systems similar to that product from taking part in the tendering procedure, but may also impede the flow of imports in intra-Community trade, contrary to Article 30 of the Treaty, by reserving the contract exclusively to suppliers intending to use the product specifically indicated (see, to that effect, Commission v Netherlands, paragraph 27).

23 Moreover, in paragraph 22 of Commission v Ireland, which concerned a public works contract which did not fall within the scope of Directive 71/305, the Court considered, with reference to the conformity with Article 30 of the Treaty of a clause requiring asbestos cement pressure pipes to be certified as complying with Irish standard 188:1975, that by incorporating in the notice in question the words or equivalent after the reference to the Irish standard, the Irish authorities could have verified compliance with the technical conditions without from the outset restricting the contract solely to tenderers proposing to utilise Irish materials.

24 It is therefore clear from the case-law that, notwithstanding the fact that a public works contract does not exceed the threshold laid down in Directive 93/37 and does not thus fall within its scope, Article 30 of the Treaty precludes a contracting authority from including in the contract documents for that contract a clause requiring the use in carrying out the contract of a product of a specified make, without adding the words or equivalent.

25 In the light of the above considerations, there is no need to rule on the possible incompatibility of a clause such as that at issue in the main proceedings with Article 6 of the Treaty.

26 In those circumstances, the answer to the national court's questions must be that Article 30 of the Treaty precludes a contracting authority from including in the contract documents for a public works contract which does not exceed the threshold laid down in Directive 93/37 a clause requiring the use in carrying out the contract of a product of a specified make, where that clause does not include the words or equivalent.

Costs

27 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

hereby orders:

Article 30 of the EC Treaty (now, after amendment, Article 28 EC) precludes a contracting authority from including in the contract documents for a public works contract which does not exceed the threshold

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laid down in Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts a clause requiring the use in carrying out the contract of a product of a specified make, where that clause does not include the words or equivalent.

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Skouris
DATES	of document: 03/12/2001 of application: 23/02/2000

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Opinion of Mr Advocate General Geelhoed delivered on 27 September 2001.
Temco Service Industries SA v Samir Imzilyen and Others.
Reference for a preliminary ruling: Cour du travail de Bruxelles - Belgium.
Directive 77/187/EEC - Safeguarding of employees' rights in the event of transfers of undertakings.
Case C-51/00.

I - Introduction

1. In this case the Cour du travail de Bruxelles (Higher Labour Court, Brussels), asks the Court to clarify the scope of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (hereinafter: the directive).

2. At first sight, the facts appear to be rather complicated. The national court asks whether there is a transfer of an undertaking where undertaking A originally contracted with undertaking B for cleaning operations and undertaking B entrusts that work to undertaking C. Following the loss of the contract by undertaking B, undertaking C dismisses all its staff, except for four persons. Thereupon undertaking A awards that contract to undertaking D which employs a proportion of the staff of undertaking C under a collective labour agreement but takes over none of the assets of undertaking C, which continues to exist.

3. The Court has commented previously on the scope of the directive as regards the contracting out of services, in particular in the cleaning sector. The reference for a preliminary ruling from the Cour du Travail gives the Court an opportunity to clarify its case-law.

II - Legal background

A - Community law

4. The directive makes the necessary provision for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded. Article 1(1) states that the directive is to apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

5. Article 2(a) provides that transferor means, for the purposes of the directive, any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the business. Article 2(b) defines transferee, for the purposes of the directive, as any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business.

6. Under Article 3(1), the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) are, by reason of such transfer, to be transferred to the transferee.

7. Under the first paragraph of Article 4(1), the transfer of an undertaking, business or part of a business does not in itself constitute grounds for dismissal by the transferor or the transferee. This provision does not preclude dismissals on economic, technical or organisational grounds requiring changes in the workforce.

8. The directive has been amended twice. Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses codified certain terms in particular in the light of the case-law of the Court. In order to rationalise the wording, the Council repealed Directive 77/187 on 12 March 2001 and replaced it with Directive

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2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

9. Pursuant to Directive 98/50, Article 1(1) of the directive was renumbered Article 1(1)(a). Directive 98/50 introduced a new Article 1(1)(b) concerning the concept of transfer which reads as follows:

Subject to subparagraph (a)..., there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

This clarification was prompted by considerations of legal security and transparency but does not alter the scope of the directive as interpreted by the Court of Justice.

B - National law

10. The abovementioned provisions of the directive were transposed into Belgian law by Collective Labour Agreement No 32 bis of 7 June 1985 concerning the safeguarding of employees' rights in the event of a change of employer as a result of the legal transfer of an undertaking and regulating the rights of employees taken over in the event of a takeover of assets following liquidation or judicial composition with transfer of assets, made mandatory by Royal Decree of 25 July 1985.

11. Also relevant to the case is a collective labour agreement of 5 May 1993 concerning the taking over of staff on transfer of a daily-maintenance contract, which applies to the cleaning sector. This has no connection with the collective labour agreement of 7 June 1985.

12. Under Article 3 of the collective labour agreement of 5 May 1993, the undertaking which secures the contract must, within a week of securing it, enquire of the undertaking losing the contract as to members of staff and working conditions. Article 4 provides that the undertaking securing the contract must, within two weeks of securing it and in any event at least one week before resumption of works, offer in writing at least 75% of the jobs on the site after the transfer to workers chosen by it forming part of the staff of the undertaking losing the contract, provided that those workers have at least six month's experience on the site. The selection is to be made on the basis of functional criteria. Under Article 5, workers taken over in accordance with the arrangements set out in Article 4 are to obtain a new contract of employment without any trial period and without loss of seniority.

III - Facts in the main action and procedure

13. The facts and background to the case can be summarised as follows.

14. In the period from 2 May 1993 to 8 January 1995 Volkswagen awarded the contract to clean certain of its production plants to Buyle-Medros-Vaes Associates SA (hereinafter: BMV). From the outset, BMV entrusted to General Maintenance Contractors SPRL (hereinafter: GMC) performance of the contract. GMC stated that the performance of the contract with Volkswagen was its only business at that time. In December 1994 Volkswagen terminated the contract between itself and BMV and, by a contract, awarded the cleaning operations to Temco Service Industries SA (hereinafter: Temco) as of 9 January 1995. For Temco the Volkswagen contract was one of many.

15. Volkswagen's choice of Temco had an effect on the staff of GMC which carried out the cleaning work at Volkswagen.

16. Since the contract between Volkswagen and BMV expired on 8 January 1995, GMC lawfully dismissed its entire staff, with the exception of four people, that is to say Messrs S. Imzilyen, M. Belfarh, A. Afia-Aroussi and K. Lakhdar, who enjoy special protection owing to their status as trade-union

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delegates. GMC served the notices provided for under Belgium law and took the steps necessary for closure of an undertaking and collective dismissal, authorised on 30 November 1994 by the Brussels Regional Office of Employment.

17. Applying the collective labour agreement of 5 May 1993, Temco engaged 42 of a total of 80 former GMC employees. The four trade-union delegates were not amongst the members of staff taken over.

18. Since GMC had a contract only with Volkswagen at the time, it sought acceptance by the relevant joint committee that there were economic or technical grounds allowing it to dismiss the four trade-union delegates. That request was turned down on 28 February 1995. In appeal proceedings the Tribunal du travail declared by judgment dated 13 September 1995 that it did not have jurisdiction to determine the claim. By judgment dated 23 November 1995 the Cour du travail upheld this judgment.

19. The file shows that the four received payment from GMC until December 1995 despite the fact that GMC took the view, as is apparent from correspondence with Temco, that in law the four had already been taken over by Temco by virtue of the Collective Labour Agreement No 32 bis. On 12 December 1995 the trade-union delegates were dismissed by GMC.

20. Under those circumstances the four brought claims against GMC, BMV and Temco before the Tribunal du travail de Bruxelles.

21. By a judgment of 12 March 1998 the Tribunal du travail de Bruxelles, declared the claim by the four persons concerned admissible and well founded in part as regards Temco SA. The Tribunal du travail declared inter alia that, pursuant to Collective Labour Agreement No 32 bis, the claimants, Messrs Afia Aroussi and Lakhdar, were automatically taken over on 9 January 1995 by the defendant Temco.

22. Temco lodged an appeal with the national court. It states the following reasons for the questions referred for a preliminary ruling.

23. The facts of the case are unusual in that Volkswagen entrusted the cleaning of its industrial plants to BMV which, for its part, did not perform the cleaning itself, but instead subcontracted it to GMC which, on losing the contract as a result of termination of the contract between Volkswagen and BMV, dismissed its entire staff, except the four trade-union delegates, whilst continuing, as indicated in the minutes of general meetings held in 1996 and 1997, to carry on business and seek new customers. That confirms that the attainment of its objective, as provided in the articles of association, related to more than mere performance of the Volkswagen contract, even if that was its principal or sole activity in 1994.

24. On the other hand, until December 1995, the four trade-union delegates, who considered that they enjoyed special protection against dismissal, demonstrated by their conduct that they were still members of the staff of GMC. The national court also notes that they never claimed to have entered into the service of Temco under Collective Labour Agreement No 32 bis. In the proceedings before the labour courts, GMC also took the view, even whilst expressing reservations, that the four persons concerned were still in its service. There would otherwise have been no sense to the proceedings seeking a declaration that there were technical or other grounds justifying their dismissal. The fact that those proceedings were unsuccessful is irrelevant.

25. The national court also notes that there is no relationship between GMC and Volkswagen, and no assets of any kind whatever passed from GMC to Temco. It is evident from the files that Volkswagen provides the contracted cleaning companies with the means necessary for the industrial cleaning of its plants.

IV - Questions referred for a preliminary ruling

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26. The order for reference from the Cour du travail (Sixth Chamber), Brussels, dated 14 February 2000 was registered with the Court on 17 February 2000. The questions referred for a preliminary ruling are worded as follows:

1. Does Article 1(1) of Council Directive 77/187 of 14 February 1977 apply in a situation where undertaking A contracts with undertaking B for the cleaning of its industrial plants and undertaking B entrusts that work to undertaking C, which, following loss of the contract by undertaking B, dismisses its staff, except for four persons, whereupon undertaking D is awarded the contract by undertaking A, employs a proportion of the staff of undertaking C under a collective labour agreement but takes over none of the assets of undertaking C, which latter undertaking continues to exist and to pursue the objects for which it was incorporated?

2. In the event that undertaking C is held to be the transferor, even though it continues to exist, does the abovementioned directive preclude it from being able to retain certain workers in its service?

27. Written observations were submitted by Temco, Messrs S. Imzilyen and M. Belfarh, Messrs A. Afia-Aroussi and K. Lakhdar, SA Three S (formerly GMC) and BMV, and the Commission. On 17 May 2001 a hearing was held at which all the parties and the Commission set out their views.

V - Appraisal

A - The scope of the directive

Introduction

28. The first question referred by the Cour du Travail allows the Court to determine the scope of the directive on the basis of a situation in which an undertaking has terminated a contract with a business for the provision of services in order to carry on the contract thereafter with another business.

29. This is the fourth occasion on which the Court has been confronted, pursuant to the procedure laid down in Article 234 EC, with the question of the application of the directive to transactions in the cleaning sector. Each case turned on somewhat different facts. Schmidt concerned a case in which an undertaking entrusted by contract to another undertaking the responsibility for carrying out cleaning operations which it had previously performed itself directly. In Hernandez Vidal and Others the opposite situation arose and an undertaking which used to entrust the cleaning of its premises or part of them to another undertaking decided to terminate its contract with that other undertaking and in future to carry out the cleaning work itself.

30. The facts in Süzen are most closely related to those in the main proceedings. A person who had entrusted the cleaning of his premises to a first undertaking terminated his contract with the latter and, for the performance of similar work, entered into a new contract with a second undertaking. In Süzen the Court ruled that the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract.

31. On the basis of an extensive interpretation of the legal reasoning in Süzen the Commission and all the parties other than Temco conclude that in the present case there was a contractual transfer of an undertaking within the meaning of Article 1(1) of the directive.

32. However, I do not consider this approach to be satisfactory. In my view, such a finding takes insufficient account of the economic context in which services are contracted out. The particular economic conditions under which contracts for the provision of services are concluded, and also

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the purpose of the directive, the case-law of the Court, and the circumstances of the case set out by the national court, lead me to conclude that the directive does not apply in the present case.

Contracting out of services: the economic context

33. In support of my view I must first examine in greater depth the economic context in which contracts for the contracting out of services are concluded.

34. Volkswagen's conduct is characteristic of the present trend for companies to contract out tasks which do not form part of their core activities to companies specialised in providing ancillary services under contract. Obvious examples are companies engaged in cleaning operations, surveillance services, catering activities, customer service, education and training, hardware and software provision, and product development, etc. The service providers often operate on a local level and on a small scale, carrying on their activities on the premises of the company awarding the contract. In that respect the possibility cannot be ruled out that competing companies will be performing work for the same contracting company at the same time. Essentially, particular blocks of economic activities are engaged in on these service markets for a specific period. This period can range from one day for the provision of catering at a specific event, for example, to a number of years in the case of cleaning operations. Once the contract expires, the service provider competes again for the favour of the contract awarder who will select a competitor if it offers better conditions and services. Where, for example, the staff of an establishment complains about the catering, the awarder will seek a contract with a caterer which offers better service.

35. In the case of such economic activities labour generally constitutes a major cost item. Since the contracts between undertakings contracting out and service providers are usually concluded for a relatively limited period, staffing in this sector is characterised by an appreciable rate of turnover.

36. The markets for these categories of services are developing apace. There is a large and growing number of undertakings contracting out and the number of service providers is also increasing. This constitutes a significant difference from contracts offered on markets on which there are a relatively limited number of providers and customers such as, for example, the markets in rail transport and radio and television frequencies. On these markets the selection of a particular trader by the contract awarder has a significant influence on the market position of the competitors and the loss of a contract can in itself jeopardise the continued existence of the service provider. In the case of the contracting out of services such as in the present case, a service provider which loses a contract will, generally speaking, go in search of new customers.

37. Moreover, the markets in the contracting out of services are characterised by great diversity. This applies both to high-quality services with great added value, such as software and engineering activities, and services which are provided by persons with fewer skills, such as cleaning operations. Furthermore, sub-specialisations appear within sectors. The present case is illustrative of this diversity. At the hearing it was pointed out that the cleaning of industrial plants occupies a special position within the cleaning sector and is not comparable with more customary cleaning work in schools and offices.

38. On account of the heterogenous and dynamic nature of these markets, the Court must, in my view, be reticent in regard to the application of the directive in the case of changes of contract. The dynamics of the market might be disrupted if the existence of a transfer within the meaning of the directive were assumed too readily. The obligation to respect the rights of all the members of staff of a company solely on the basis of the takeover of a contract and the takeover of a proportion of existing staff will give a potential new contractor less incentive to pick up the contract. Undertakings might even be deterred from competing for the contract. All this could lead to the ossification

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of markets. The facts in the main proceedings again provide an example. The question is whether or not Temco would have been willing to enter into the contract for the cleaning operations at Volkswagen under the same conditions if the company had had to take over the entire staff of GMC instead of 42 employees.

39. It could be argued that in this connection the compulsory takeover of the entire staff forms part of the normal risk run by traders. This finding is correct where there is an actual takeover of the operation of a company within the meaning of company law. In that case the transferee makes a cost-benefit analysis of the undertaking to be taken over and the takeover price is determined inter alia by past performance and the compulsory takeover of the staff. The same occurs in the case of contracts which run for a long time and which are awarded through official invitations to tender. However, where services are contracted out, the award of a contract for a relatively short period is central and in that respect the compulsory takeover of the staff cannot, in my view, be regarded as a normal commercial risk.

40. The aim of Directive 77/187 is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The directive is based on Article 100 of the EC Treaty (now Article 94 EC) and for that reason considerations relating to the market and competition must be taken into consideration. In a market which is characterised by specialisms, short-term contracts between undertakings contracting out and service providers and considerable turnover of staff, employee protection is better served by conventional employment law than by employment protection relating to the takeover of undertakings. Furthermore, if the service provider is required too readily to take over the entire staff, the objective of the directive will become disproportionate in relation to the principle of freedom of contract and of freedom to engage in business activities.

The criteria for application of the directive and development of the Court's case-law

41. The fact that, in assessing a transaction, account must be taken of the economic context in which it takes place is also clear from the case-law of the Court. As has been seen, the Community legislature did not define the concepts transfer, undertaking, legal transfer or merger in Article 1(1) of the directive. For this reason it is for the Court to define these Community terms. In a series of decisions and in light of the social purpose of the directive those basic concepts must be interpreted flexibly. Instead of rigid, closely circumscribed definitions the Court has opted for criteria which must be applied by the national court in accordance with the circumstances of the case.

42. The criteria for application of the directive can be summarised as follows. Firstly, the transfer must relate to an undertaking which is defined as a stable economic entity. The undertaking must be transferred pursuant to a contract and in that respect the Court has stated that there must be a change, on the basis of a contract, in the legal or natural person responsible for operating this entity and who incurs the obligations of an employer vis-à-vis the employees of the undertaking.

43. Secondly, the decisive criterion for establishing whether there is a transfer for the purpose of the directive is whether the business in question retains its identity, as indicated by the fact that its operation is actually continued or resumed with the same or similar activities. That criterion has now been codified by Regulation 98/50 in Article 1(1)(b) of the amended directive.

44. In the specific case before it the national court must determine whether these conditions are met in the light of the interpretative criteria laid down by the Court. According to the Court, the national court must consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not its customers are transferred and the degree of similarity between the business carried

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on before and after the transfer and the period, if any, of any interruptions in that business. It should be noted, however, that all those circumstances are merely individual factors in the overall assessment to be made and cannot therefore be considered in isolation.

45. Since the national court must consider all the facts in assessing a transaction, the type and characteristics of the relevant markets for the provision of services must, in my view, also be taken into account where services are contracted out. This can be achieved by having regard to those characteristics in interpreting the concepts legal transfer and undertaking within the meaning of Article 1(1) of the directive.

46. The case-law of the Court in respect of the abovementioned concepts has undergone significant development.

47. Thus, the requirement that the transfer must take place pursuant to a contract is not limited to situations in which contractual relations exist between the transferor and transferee of the undertaking. On account of the differences between language versions and between the laws of the Member States, regard must also be had, in determining that concept, to the scheme and objective of the directive. For those reasons, the Court has extended the concept contract so that the directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and incurs the obligations of an employer towards employees of the undertaking. For example, it is irrelevant whether or not there is a transfer of ownership or that there is consensus as regards the transfer. The fact that termination of a lease of a restaurant is followed by a new lease with another operator does not preclude application of the directive. The reasoning of the Court is that in such a situation the transfer is effected in two stages, through the intermediary of a third party, in that the undertaking is first transferred by the original lessee to the owner and the latter then transfers it to the new lessee.

48. However, the Court has not gone so far as to accept that there may be no link at all between the transferor and the transferee. In Redmond, in which a public authority - the Municipality of Groningen - changed its subsidy policy and decided to withdraw the subsidy to a foundation seeking to assist drug addicts and to grant it to another foundation with the same aim, the Court, while considering that the directive could be applicable, attached importance to the fact that the old and the new foundation arranged for by mutual agreement the transfer of patients, accommodation, information and resources. In the case where a motor vehicle dealership concluded with one undertaking was terminated and a new dealership was awarded to another undertaking the Court ruled that the fact that an agreement and guarantee containing a provision relating to costs incurred in the transfer of the staff was concluded between the principal shareholder of the old undertaking and the new dealer confirmed that there was a legal transfer within the meaning of the directive.

49. In Süzen the Court considered that the lack of any direct contractual link between the two undertakings successively entrusted with the cleaning of a school can certainly not be conclusive as regards the application of the directive. However, at the same time the Court applied the requirement that, for the purposes of contractual relations, there must be a change in the operation of the undertaking.

50. Moreover, the complete abandonment of the requirement relating to contractual relations between transferee and transferor would be contra legem. The wording of the directive refers expressly to the contractual relationship in the form of a contract or merger.

51. Alongside the concept contract the concept of undertaking within the meaning of Article 1(1) of the directive has also been further elaborated in the case-law. The Court proceeds on the basis that the directive can be applied wherever the transfer relates to a stable economic entity whose activity is not limited to performing one specific works contract. The concept of entity refers

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to an organised grouping of persons and assets facilitating the exercise of an economic activity with a view to a specific objective. There can be a transfer only were the identity of such an economic entity is retained. However, an undertaking can retain its identity where, for example, its principal place of business moves to another municipality, the transferor terminates all its activities after the transfer and a large proportion of the staff are dismissed.

52. Such an extensive interpretation is also central to Süzen in which the concept economic entity is separated from the existence of assets. In sectors in which an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, the Court argues, be logically dependent on the transfer of such assets. In certain labour-intensive sectors, such as the cleaning sector, the Court acknowledges that a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity. Therefore, such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of numbers and skills, of the employees specifically assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis.

53. This reasoning determines the limits in regard to the situations to which the Court considered the directive could properly be applied. Other judgments are more restrictive. The driving of underground tunnels and the operation of bus routes are not labour-intensive activities. In Rygaard it was made clear that the taking over, with a view to completing, with the consent of the awarder of the main building contract, works started by another undertaking, of two apprentices and an employee, together with the materials assigned to those works, does not constitute a transfer within the meaning of the directive. In that case undertaking A had accepted a contract to complete joinery work for undertaking B. With the consent of undertaking B, undertaking A then had part of the work completed by undertaking C. The Court considered that there was no takeover as between undertakings A and C because the transfer of the work did not include the transfer of a body of assets enabling the activities or certain activities of the transferor undertaking to be carried on permanently.

54. Süzen states unequivocally that, in regard to the contracting out of services, the mere fact that the service provided by the old and the new contracting parties is similar does not therefore support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it. In the Court's view, the mere loss of a service contract to a competitor cannot by itself support the proposition that there has been a transfer within the meaning of the directive.

55. This case-law concerning the subject-matter of the takeover within the meaning of Article 1(1) of the directive shows that the Court interprets the retention of the identity of an economic entity broadly but that that identity must be reflected in a degree of organisation and permanence and cannot be constituted merely by the placing of a contract by one customer.

The application of the criteria in the present case

56. Returning to the case before the Court, I would point out that the national court has highlighted a number of specific circumstances. In the first instance Volkswagen had awarded the cleaning contract to BMV which subsequently entrusted the work to GMC. Therefore, there was no direct contractual link between GMC and Volkswagen or a fortiori between GMC and the new contracting party, Temco. Furthermore, no assets of any kind were transferred from GMC to Temco. A proportion of the staff were indeed taken over by Temco, but the takeover took place after the employees other than the four trade-union delegates had already been dismissed by GMC. The takeover of the staff is a consequence

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of the obligations on Temco arising from a collective labour agreement. Moreover, the national court states that GMC continued to exist even after BMV had lost the contract with Volkswagen.

57. Since the case concerns cleaning operations, consideration could be given, in keeping with Süzen, solely to whether or not Temco is carrying on the activities which BMV-GMC carried on at Volkswagen and has taken over a major part of the staff which GMC used for the cleaning operations in question. As I noted earlier, I take the view that such consideration is too limited. In assessing the facts characterising the transaction in question, it is also necessary, under the case-law referred to above, to consider the type of undertaking and the type of activity carried on. I propose that the Court should adopt a broader criterion in this regard by also taking account of the economic circumstances under which the transaction takes place.

58. In this respect I find it difficult, on the basis of the information provided by the national court and in view of the economic context, to conclude that the identity of the cleaning company was transferred to the new contracting party in the context of contractual relations. The sole inference that may be drawn is that Temco took over a proportion of the staff of GMC in order to perform the contract which it concluded with Volkswagen.

59. First of all, it is clear that the fact that Volkswagen awards a contract for industrial cleaning operations to a new contracting party does not constitute a takeover within the meaning of company law. There is merely a contract to perform certain economic activities. Moreover, in light of the abovementioned paragraphs of the judgment in Süzen, the fact that BMV lost the contract to provide cleaning services at Volkswagen to Temco does not support the proposition that there was a transfer of an undertaking for the purposes of the directive.

60. In my view, it is not logically possible to speak of a takeover of an undertaking as a result of legal transfer or merger merely on the basis of the fact that, where services are contracted out, the new contracting party takes over (a major part of) the staff of the previous contracting party. In this respect it is irrelevant whether or not this takeover of staff takes place voluntarily, for example because the new contracting party requires the know-how of the staff in order to perform the contract to provide services, or involuntarily, for example because a collective labour agreement compels it to do so.

61. In regard to the requirement concerning contractual relations, apart from the fact that one succeeded the other as service provider in respect of Volkswagen, there is no actual link between BMV-GMC and Temco. Temco took over a proportion of the staff after GMC had already lawfully dismissed its members of staff. GMC stated that, when dismissal of the 76 employees was requested, it was unaware of the identity of the new contracting party. It is evident from the facts set out by the national court that consent for the dismissal was granted on 30 November 1994 by the Employment Department for the Brussels region, whilst Volkswagen entered into the contract with Temco in December 1994. No artificial arrangement between GMC, BMV and Temco, for example to escape the application of the directive, is evident. In my view, there can therefore be no question of any contractual relationship, even an indirect one. The two-stage reasoning applied by the Court in its case-law, that is to say that no direct contractual link is necessary between the transferor and the transferee, also assumes a certain link and the mediation of an intermediary undertaking. However, it is not evident that Volkswagen, as the undertaking contracting out services, was actively involved in the relationship between the old and the new contracting party.

62. Furthermore, the business did not retain its identity. In the present case that identity cannot be constituted by the continuation of the same activities - in this case industrial cleaning operations - because this continuation is inherent in the change in contracting party where services are contracted out.

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63. Nor in my view does such an entity retain its identity where the new employer not only continues the activity in question but also takes over a major part, in terms of numbers and skills, of the employees specially assigned by his predecessor to that task. Since the employees dismissed by GMC clearly have specific knowledge of the operations at Volkswagen, it is entirely normal, from a market point of view, for Temco to have offered contracts to some of the staff who had been dismissed. In my view, the mere take-over of a major part of the staff by the new contracting party in a dynamic market has no connection with the identity of a business and therefore provides no conclusive argument. In that case the new contractor does not acquire the body of assets enabling the activities or certain activities of the transferor undertaking to be carried on a permanent basis. Even if activities carried out are essentially based on manpower, the identity of a business cannot be derived solely from the number and skills of the staff who are taken over. In determining identity, account must be taken of other factors relating to the staff, such as management, organisational structure, division of labour, and systems of training, pay and promotion. If, where services are contracted out, a proportion of the staff are taken over as a result of a change of contracts for the performance of a specific contract, it is not possible to regard that as permanent continuation of the activity in question on account of the nature of the contract, which is by definition of temporary duration.

64. In light of the foregoing, I am thus of the view that the directive is not applicable in the present case. The requirement that within the context of contractual relations the identity of the business be retained is not fulfilled.

65. That conclusion is in my opinion, also warranted.

66. Firstly, any other view would have the paradoxical result that the directive, which seeks to protect all employees where undertakings are taken over, would even apply to the contracting out of services if a proportion of the staff were taken over to carry out a block of similar work. It would be even less comprehensible if the takeover of the staff by the new contracting party did not occur voluntarily but took place on the basis of obligations arising from a collective labour agreement. For in such a case the transfer of an undertaking is dictated by the collective labour agreement.

67. Secondly, there is no reason why, where a service provider loses a contract as a result of commercial considerations, that is to say because another undertaking would offer better terms, the new contracting party should automatically have to retain the entire staff of the undertaking which lost the contract merely because its commercial activity happens to be essentially based on manpower. A significant consequence of this would be, for example, that if a caterer in a company canteen were changed on account of the poor service provided by the staff the new contracting party would have to deal with the staff with whom the party awarding the contract was not satisfied. In market terms, an excessively broad view would be unwarranted and could result in far-reaching and unforeseeable consequences in a dynamic economic situation. Further extension of the criteria for application of the directive would inevitably lead on those markets to arbitrariness and legal uncertainty.

68. Thirdly, the directive is aimed at protecting existing staff, but, as indicated above, the contracting out of services primarily involves, in my view, a change of contracts of a specific duration and not a permanent takeover of an undertaking together with its existing staff. In the present case the complete takeover of the staff, with the safeguarding of the employees' rights arising from the collective labour agreement with GMC, could result in discrimination against the employees of Temco. It cannot be ruled out that Temco has better motivated and qualified staff who would be excluded from the operations at Volkswagen as a result of the application of the directive. For Temco, Volkswagen was only one of many principals. Furthermore, Temco is deprived of an opportunity to seek other members of staff on the labour market. The protection afforded to sitting employees thereby results in clear discrimination against employees entering the market.

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B - The protection afforded by the directive

69. If the Court rules that there was no transfer of an undertaking in the present case, the second question need not be answered. In the event that the Court should take a different view, I will deal with this question in brief below.

70. By the second question the national court seeks to ascertain whether the directive nevertheless precludes GMC, in its capacity as the transferor in the event of takeover, from being able to retain workers in its service. In the main proceedings tensions arose because the dismissal by GMC of four trade-union delegates was not permitted on account of the protection from dismissal afforded by national law. As a result the four were able to exercise their rights under the directive with greater difficulty or not at all. In fact, this question comes down to whether the four employees could have relied on the protection afforded by Article 3(1) of the directive vis-à-vis Temco if they had not terminated their employment with GMC on account of their protection against dismissal and also if they had not been dismissed by the transferor.

71. Therefore, it is necessary to examine the significance of the national legislation concerned for the interpretation of the directive, in relation to the action of the employees concerned.

72. The directive is intended to protect workers in the event of takeover by making it possible for them to enter automatically into the service of the new employer under the same conditions as those agreed with the transferor. The rules of the directive are, in the view of the Court, mandatory in nature, so that it is not possible to derogate from them in a manner unfavourable to employees. Accordingly, the transfer of the contracts of employment cannot be dependent on the intention of the transferor or the transferee. Nor are they free to determine, by mutual agreement, the time at which the obligations arising in the employment relationship are transferred to the transferee because the obligations in question are transferred to the transferee as from the date of transfer.

73. Therefore, it follows that GMC, as the transferor, cannot infringe the rights of the employees concerned by retaining them in its service. In my view, the fact that GMC is compelled to do so by national law is not decisive. When the directive has been transposed, national law cannot be interpreted to the detriment of these employees. The abovementioned case-law precludes such an interpretation which, moreover, would undermine the practical effect of the directive.

74. However, the mandatory nature of Article 3(1) of the directive is limited by a worker's freedom to choose his occupation. The protection which the directive is intended to guarantee is redundant where the worker concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer. In that case, it is for the Member States to determine what is to happen concerning the contract of employment or employment relationship. National law may for example provide that the contract of employment should be maintained with the transferor.

75. In the present case there is disagreement as to whether or not the four trade-union delegates voluntarily decided not to transfer to Temco. In its order for reference the Cour du travail states that in the period leading up to their dismissal by GMC in December 1995 the four never claimed to have entered into the service of Temco. Since they considered that they enjoyed special protection against dismissal, they demonstrated by their conduct up to their dismissal that they were still members of the staff of GMC.

76. However, these matters are contested by GMC-BMV and the four trade-union delegates. They assert that in the period from 9 January 1995 to 11 December 1995 the four were indeed still on the payroll and continued to receive part of their pay from GMC without having to perform any work in return, but that this situation was created by Temco's refusal to take them over. Consequently, there could be no question of them deciding voluntarily not to transfer.

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77. The observations submitted and the explanations given by the parties at the hearing do not really make it possible to establish whether or not the four voluntarily by their conduct renounced their rights under the directive. Therefore, it must be left to the national court to make a final judgment in the light of the actual circumstances. In that regard, account must be taken of the fact that the trade-union delegates enjoyed special legal protection based on national law which could explain a certain reluctance on their part to transfer to Temco. Since the obligations legally devolve to the transferee at the time of the takeover, I consider that the national court must take as a basis the conduct of the employees concerned during the period in which the transfer took place, that is to say around 9 January 1995. The principle of legal certainty in respect of the transferee and the transferor also requires that this be the case.

VI - Conclusion

78. In light of the foregoing, I propose that the Court answer the questions referred by the Cour du Travail, Brussels, as follows:

(1) Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses does not apply in a situation where undertaking A contracts with undertaking B for the cleaning of its industrial plants and undertaking B entrusts that work to undertaking C, which, following loss of the contract by undertaking B, dismisses all its staff, except for four persons, whereupon undertaking D is awarded the contract by undertaking A, employs a proportion of the staff of undertaking C under a collective labour agreement but takes over none of the assets of undertaking C, which latter undertaking continues to exist and to pursue the objects for which it was incorporated.

(2) The second question need not be answered.

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SUB Social provisions

AUTLANG Dutch

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PROCEDU Reference for a preliminary ruling

ADVGEN Geelhoed

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Opinion of Mr Advocate General Alber delivered on 20 September 2001.
The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd (C-27/00) and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority (C-122/00).
References for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Crown Office) - United Kingdom and High Court - Ireland.
Regulation (EC) No 925/1999 - Noise emissions of aeroplanes - Prohibition of re-engined aeroplanes with engines with a by-pass ratio of less than 3 - Validity.
Joined cases C-27/00 and C-122/00.

I - Introduction

1. These two reference for preliminary rulings concern the validity of a provision of Regulation (EC) No 925/1999. That regulation restricts the use of aeroplanes at European airports, in the interests of protection against noise. The Court is asked whether it is lawful for the regulation to exclude aeroplanes which have been completely re-engined from those restrictions only if the engines have what is known as a by-pass ratio of three or more, while a lower by-pass ratio leads to the application of restrictions on use. Omega intends to equip Boeing 707s with new engines which have a by-pass ratio of 1.74. Omega claims that as a result of further technical measures these aeroplanes are not in fact noisier, and are moreover more economical and cleaner.

II - Legal background

A - Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993) (the Regulation)

2. The aim of the Regulation is to reduce aircraft noise at airports in the Community by laying down rules for the operation and registration of older aeroplanes which have been modified to reduce their noise. On its background in international and Community law, the report of José Valverde Lopez, Member of the European Parliament, states as follows:

The Chicago Convention on International Civil Aviation is one of the main documents where the regulation of noise emissions from aeroplanes is concerned. It divides aeroplanes into three categories or chapters:

Chapter 1 covers aeroplanes that were among the noisiest at the time and may now no longer be used.

Chapter 2 aeroplanes are, under Directive 92/14/EEC, [] to be phased out from April 1995 to April 2002. From 1 April 2002 they may no longer be used in the EU, even if exempted in the annex to the directive referred to above. These Chapter 2 aeroplanes may, however, be equipped with "hushkits" so that they produce less noise and can be included in Category 3.

However, "hushkitted" aeroplanes only just satisfy the standards for Chapter 3 and are not therefore really comparable with "proper" Chapter 3 aeroplanes. They are not only relatively noisy and so cause considerable noise pollution around airports, but also cause more pollution in the form of CO2 and other air pollutants than more recent Chapter 3 aeroplanes. Both fuel consumption and emissions of carbon monoxide and nitrogen oxide are far higher in hushkitted Chapter 2 aeroplanes than genuine Chapter 3 aeroplanes (by as much as 50% and 30% respectively).

3. The issue in the present proceedings is not, however, modification by means of hushkits, but complete re-engining. The Regulation prohibits the use of modified aeroplanes at airports in the Community, unless they have been modified by complete re-engining with engines having a by-pass ratio of three or more. Aeroplanes with new engines with a by-pass ratio of less than three may

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thus in principle not be used in the Community. Only aeroplanes which were already operated in the Community on the date of application of the Regulation could continue to be used.

4. To understand the importance of by-pass ratio, a brief description of how turbofan engines function is appropriate.

5. The engines of jet aircraft produce mainly two sorts of noise. Part of the noise comes from the mechanical parts of the engine, the other - traditionally no doubt the predominant - part is produced by the air expelled by the engine when it meets the surrounding air. This airflow produces the thrust of a jet engine. It is characterised by a high temperature and a high speed. The higher those are in relation to the surrounding air, the more noise is produced.

6. In a turbofan engine the noise from the exhaust is reduced because, in addition to the high-speed airflow through the core of the engine (the actual turbine) an airflow at lesser speed is directed through a duct surrounding the engine core (the by-pass airflow). This by-pass airflow is produced by a fan at the front of the engine. The fan contributes to the overall thrust of the engine. The by-pass airflow has the result that when the core airflow leaves the engine it meets the external air less turbulently. As a result, the noise of the exhaust is less than where there is no by-pass airflow. The higher the ratio of the by-pass airflow to the core airflow, the less noise is produced. The by-pass ratio of three used as the limit in the Regulation means that the by-pass airflow is three times greater than the core airflow. For the engines envisaged by Omega, however, the by-pass airflow is not even twice the core airflow.

7. Omega further states, without being contradicted, that increasing the by-pass airflow requires a larger fan at the front of the engine, however. The larger the fan, the more noise it produces. Fan noise is greater during landing because the slower speed of the fan blades produces a less aerodynamic and hence noisier flow of air.

8. The prohibition of re-engined aeroplanes whose engines have a by-pass ratio of less than three follows from Article 3 in conjunction with the definition in Article 2(1) and (2) of the Regulation.

9. Article 3, headed Non-complying aeroplanes, reads as follows:

1. Recertificated civil subsonic jet aeroplanes shall not be registered in the national register of a Member State as from the date of application of this Regulation.

2. Paragraph 1 shall not affect civil subsonic jet aeroplanes which were already on the register of any Member State on the date of application of this Regulation and have been registered in the Community ever since.

3. Notwithstanding the provisions of Directive 92/14/EEC and in particular Article 2(2) thereof, as from 1 April 2002 recertificated civil subsonic jet aeroplanes registered in a third country shall not be allowed to operate at airports in the territory of the Community unless the operator of such aeroplanes can prove that they were on the register of that third country on the date of application of this Regulation and prior to that date have been operated, between 1 April 1995 and the date of application of this Regulation, into the territory of the Community.

4. Recertificated civil subsonic jet aeroplanes which are on the registers of Member States may not be operated at airports in the territory of the Community as from 1 April 2002 unless they have been operated in that territory before the date of application of this Regulation.

10. Article 2(1) of the Regulation first defines a civil subsonic jet aeroplane covered by the Regulation as a civil subsonic jet aeroplane ... powered by engines with a by-pass ratio of less than three. Already in this definition a by-pass ratio of less than three is used as a limiting criterion. Civil subsonic jet aeroplanes powered by engines with a higher by-pass ratio do not fall within the scope of the Regulation at all.

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11. Article 2(2) of the Regulation defines a recertificated civil subsonic jet aeroplane as

a civil subsonic jet aeroplane initially certificated to Chapter 2 or equivalent standards, or initially not noise-certificated which has been modified to meet Chapter 3 standards either directly through technical measures or indirectly through operational restrictions; civil subsonic jet aeroplanes which initially could only be dual-certificated to the standards of Chapter 3 by means of weight restrictions, have to be considered as recertificated aeroplanes; civil subsonic jet aeroplanes which have been modified to meet Chapter 3 standards by being completely re-engined with engines having a by-pass ratio of three or more are not to be considered as recertificated aeroplanes (emphasis added).

12. The chapters referred to are, according to Article 2(3) of the Regulation, the noise standards as defined in Volume I, Part II, Chapter 2 and Chapter 3 respectively of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993).

13. Recitals 5 and 6 in the preamble to the Regulation give the following reasons for the prohibition laid down in the Regulation:

(5) Whereas older types of aeroplanes modified to improve their noise certification level have a noise performance which is significantly worse, mass for mass, than that of modern types of aeroplanes originally certificated to meet the standards of Volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993); whereas such modifications prolong the life of an aeroplane that would normally have been retired; whereas such modifications tend to worsen the gaseous emissions performance and fuel burn of earlier technology aero engines; whereas aeroplanes may be re-engined to achieve a noise performance comparable to that of those originally certificated to meet Chapter 3 requirements;

(6) Whereas a rule which prohibits the addition of those older modified types of aeroplanes to Member States' registers as from the date of application of this Regulation can be considered as a protective measure aimed at preventing a deterioration of the noise situation around Community airports as well as improving the situation regarding fuel burn and gaseous emissions.

14. The Common Position of the Council of 16 November 1998 justifies the introduction of the passage on re-engined aeroplanes as follows:

In addition, the Council explicitly excluded re-engined aeroplanes (i.e. aeroplanes whose engines have been completely replaced) as these aeroplanes have noise performance comparable to those originally certificated to meet Chapter 3 standards.

15. Why the Council requires a by-pass ratio of three or more is not explained.

B - WTO law

16. Article 2 of the Agreement on Technical Barriers to Trade states:

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade....

2.3 Technical regulations shall not be maintained... if the... objectives can be addressed in a less trade-restrictive manner.

2.4 Where technical regulations are required and relevant international standards exist... Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technical problems.

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...

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

III - Facts

17. The main proceedings are brought by Omega Air Ltd and several associated undertakings. They will be referred to below as Omega.

18. According to the order for reference in Case C-27/00, Omega is concerned with trading in aircraft, primarily Boeing 707s. It also carries on related activities, such as aircraft engine maintenance. Omega is developing a programme for the gradual replacement of the engines in Boeing 707s by newly manufactured engines with a by-pass ratio of 1.74. The modified aeroplanes will be referred to below as Omega 707s.

19. The aeroplanes to which this programme is directed are not currently operated in the Community, nor do they fly to Community airports. The transitional provisions in Article 3 of the Regulation would therefore not apply to them. They could not be operated in the Community in the form envisaged. For that reason the Omega 707 would not be commercially viable for potential customers.

20. Omega submits that its modified aeroplanes comply with the same noise and gaseous emission standards as those required of aeroplanes which are not excluded. Its plans to fit the Boeing 707s with new engines are effectively brought to a halt by the Regulation. As a result it is unable to secure further financing for its re-engining programme and will incur financial losses.

21. In the proceedings before the Court, Omega gave more information on the background to its project. It says that the re-engining programme was already made public in September 1996.

22. Before reaching a decision, Omega looked at the use of other engines with a higher by-pass ratio. Since the use of such engines would have necessitated extensive and cost-intensive modifications to the wings, the engine now to be used was chosen.

23. There have been only three programmes so far for the complete re-engining of civil aircraft. Omega's programme was the only one in existence during the drafting and adoption of the Regulation.

IV - The questions referred

24. The High Court of Justice of England and Wales states in its order for reference:

Omega advanced six grounds for the invalidity of the Regulation. The High Court, after inspection of the application and evidence, considers that three of these grounds merit reference to the Court of Justice. They are reflected in the three parts of the question referred to the Court of Justice. The High Court rejected as unarguable the other three grounds advanced by Omega, relating respectively to discrimination, legitimate expectations and breach of the Chicago Convention on International Civil Aviation, 7 December 1944.

25. It therefore refers the following question to the Court for a preliminary ruling:

Is Article 2(2) of Council Regulation (EC) No 925/1999 invalid in so far as it defines "recertificated civil subsonic jet aeroplanes" so that re-engined aeroplanes "with engines having a by-pass ratio of three or more" are not subject to prohibitions imposed by the Regulation but aeroplanes wholly re-engined with engines having a by-pass ratio of less than three are subject to prohibitions, having regard in particular to:

(i) the duty to give reasons under Article 253 EC;

(ii) the general principle of proportionality;

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(iii) such rights as private parties may derive from the General Agreement on Tariffs and Trade and/or the Agreement on Technical Barriers to Trade?

26. The High Court of Ireland states that the case before it raises the question of the validity of the Regulation. As it does not have jurisdiction to decide the point, it refers the following question to the Court:

Is Article 2(2) of Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993), invalid so far as it defines "recertificated civil subsonic jet aeroplanes" as including "civil subsonic jet aeroplanes" as defined at Article 2(1) thereof that have been modified to meet Chapter 3 standards by being completely re-engined with engines having a by-pass ratio of less than three, having regard in particular to:

I. the duty to give reasons under Article 253 EC,

II. the principle of equal treatment,

III. the principle of proportionality,

IV. the compatibility of that provision with the Agreement establishing the World Trade Organisation and in particular the Agreement on Technical Barriers to Trade annexed thereto?

27. With the order for reference, the High Court, Dublin, referred to the already pending Case C-27/00 and requested the Court to hear both cases together expeditiously.

V - Legal assessment

A - The duty to give reasons

Assessments of the referring courts and submissions of the parties

28. The order for reference from the High Court, London, criticises the absence of any statement of reasons for the provision at issue.

29. Omega regards the insertion of the provision at issue into the draft regulation in November 1998 as incomprehensible. It submits in detail that the statement of reasons makes no reference to the following aspects:

- why the Regulation covers re-engining at all;

- why it bases the limit on by-pass ratio;

- why the limit is a by-pass ratio of three;

- why, contrary to the usual practice of Community law, a standard is based not on actual performance but on design;

- why, contrary to the WTO Agreement on Technical Barriers to Trade, it replaces existing international standards - Chapter 3 of the annexes to the Chicago Convention - by a new criterion; and

- why the business of an undertaking is affected so radically in order to bring about so little advantage, or even a disadvantage, for the Community.

30. Omega states that it learnt in early September 1998 of the proposal to introduce a by-pass ratio criterion, and at once started to make its interests known to the Commission, Members of the European Parliament and representatives of the Member States.

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31. The other parties observe, referring to the case-law, that the statement of the reasons for a general measure may be confined to indicating the general situation which led to its adoption and the general objectives which it is intended to achieve. It is not necessary, on the other hand, to give reasons for every technical choice in the regulation. They take the view that the statement of reasons in the Regulation discloses its objectives and the starting situation sufficiently clearly, whereas the decision to set a by-pass ratio of three is a technical means for achieving those objectives. The reasons for that need not be stated in detail, in the case of a general measure.

32. The Commission, the Council and the United Kingdom Government point out that by-pass ratio was already used in other provisions at Community level and in the context of the International Civil Aviation Organisation (ICAO). Undertakings active in air transport were aware of this.

33. The United Kingdom Government considers, finally, that it is not permissible when assessing the statement of reasons in the Regulation to take account of alleged contradictions in the reasons of the Common Position of the Council for the introduction of the provision at issue. Nor is the Council obliged to state reasons for amending the Commission's proposal for a legal measure. Moreover, the Common Position did not express a view on the importance of by-pass ratio for reducing noise.

Opinion

34. The requirements which statements of reasons for measures of general application must comply with are limited, according to settled case-law. Thus the Court said in its judgment on the working time directive:

[W]hilst the reasoning required by Article 190 of the EC Treaty [now Article 253 EC] must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, the authority is not required to go into every relevant point of fact and law....

35. In Case C-122/94, cited in the judgment in Case C-84/94, the Court said: ... if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution.

36. The Court regularly points out that in the case of measures of general application, the statement of reasons may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other.

37. The preamble to the Regulation shows both the general situation which led to its adoption and the objectives pursued by the Community with the measure. The situation is characterised by environmental harm caused by air traffic at Community airports. The aim of the Regulation is to reduce aircraft noise, harmful emissions and fuel burn.

38. The recitals show further that the Regulation is intended to introduce stricter requirements than those which derive from Chapter 3 alone. Recital 5 states that meeting the standards of Chapter 3 by modifying aeroplanes leads to results which are worse than those of modern types of aeroplanes. That is the reason for departing from the standard of Chapter 3.

39. By introducing the criterion of modification, the Regulation already departs from the general regulatory practice alleged by Omega of basing standards on actual performance. Modification, like re-engining, is not an element of performance but of design.

40. Recital 5 at the same time states without reservation, finally, that re-engined aeroplanes may achieve the same results as modern aeroplanes. By-pass ratio is not mentioned.

41. Only the definitions of civil subsonic jet aeroplanes and recertificated civil subsonic jet

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aeroplanes in Article 2(1) and (2) of the Regulation use the by-pass ratio of three to delimit the types of aeroplane covered by the Regulation. No express reason is given for the use of that criterion.

42. It must be doubted, however, whether the lack of such a reason withholds from the addressees of the Regulation information which must be communicated in the context of the statement of reasons for a regulation. It may be concluded from the overall structure of the Regulation that the legislature assumed that new engines with a by-pass ratio of less than three would produce worse environmental results than engines with a higher by-pass ratio or completely newly developed aeroplanes. Since the addressees of the Regulation as a rule have expert knowledge in the field of aircraft technology, it must have been possible for them to draw that conclusion. A corresponding explanation would indeed have been desirable, but would in the present case have produced little more clarity. Detailed considerations of questions of engine technology may in any event, according to the case-law referred to above, not be required of the statement of reasons for a regulation of general application. Whether the implied view taken by the legislature is correct is not a question of the statement of reasons but a question of the assessment to be carried out by the legislature.

43. More extensive obligations to state reasons could arise if it is taken into account that the legislature - as will be discussed in detail - had a broad discretion in the present case. In this respect, the Court has held in connection with Commission decisions on agriculture:

... Where the Commission has such latitude [a wide power for the assessment of complex economic situations], it has a duty not only to identify the factors which influenced its decision but also to state their effect.

44. That requirement could be applied by analogy to all legislative measures which are adopted on the basis of a wide power of assessment. However, only in those few cases where the effect of the material factors is unclear, so that the relevant expectations of the legislature require explanation, does it have independent significance. In the present case it was surely clear to all concerned that engines with a high by-pass ratio are because of their design quieter in principle than engines with a lower by-pass ratio. An express reference in the context of the statement of reasons would certainly have been in the interests of clarity, but does not appear to be essential here. Even if this stricter requirement for the statement of reasons were applied, the lawfulness of the contested provision would not therefore be called into question.

45. As regards the alleged departure from international standards and from the WTO Agreement on Technical Barriers to Trade, the duty in Community law to state reasons cannot extend to showing that every provision is consistent with such international rules or giving reasons for any divergence. The latter would even contain an implied admission of a breach of international law.

46. The lawfulness of the use of the by-pass ratio of three as a limiting criterion is not therefore called into question by the Regulation's statement of reasons.

B - Proportionality

Submissions of the parties

47. It is common ground between the parties that in accordance with the principle of proportionality a measure must be appropriate and necessary for achieving its objective. They also agree in principle that the contested provision is intended for the protection of the environment, primarily by reducing noise, but also by reducing fuel burn and harmful emissions.

48. Omega takes the position, however, that the Court must examine strictly whether the principle of proportionality has been complied with, because the contested provision diverges from the Chicago Convention, the normal legislative approach of Community law, and the law of the WTO, and seriously affects Omega's business activity without producing a corresponding benefit for the Community.

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Omega also points out that the legislature did not have to make an urgent decision in this case and was able to rely on definite scientific knowledge when assessing the situation.

49. Omega disputes both the appropriateness and the necessity of the contested provision for achieving the objective. Defining a by-pass ratio takes no account at all of actual noise performance. Omega accepts that by-pass ratio is of importance for the noise profile of an engine, but asserts that the aeroplanes to be re-engined by it would, because of special technical measures, be comparable in all respects with modern aeroplanes under Chapter 3 whose engines have a considerably higher by-pass ratio.

50. Omega has submitted estimated figures for the Omega 707 and comparison values for the Airbus A300 B4-203 and the Boeing 767-200 JT90-7R4D, whose engines each have a by-pass ratio of three or more. According to those figures, the Omega 707 is said to be slightly noisier on take-off and laterally but slightly quieter on approach. It even appears that the comparison aeroplanes may be noisier on approach than the Omega 707 on sideline measurement.

51. Omega then observes that the emission figures of the engines envisaged, in terms of hydrocarbons, carbon monoxide and oxides of nitrogen, are below the figures for engines of a comparable Airbus A300-B4-200F, and in terms of hydrocarbons and oxides of nitrogen even below the figures for all comparable aeroplanes. For fuel burn too, a Boeing 707 re-engined by Omega is over 40% better than an Airbus A300-B4-200F.

52. Omega emphasises that the provision at issue is in any case not necessary. It is obviously less restrictive to determine limits for noise, gaseous emissions and fuel burn than to regulate the design of aeroplane engines. That method corresponds to the approach previously used in Community law, the Chicago Convention and the WTO.

53. The other parties - the United Kingdom Government, the Irish Aviation Authority, the Council and the Commission - regard the Regulation as proportionate, on the other hand.

54. They point out that because of the wide legislative discretion judicial review is limited to cases of manifest error of assessment, misuse of powers or exceeding the bounds of discretion. In the main proceedings the United Kingdom Department of the Environment referred to the case-law of the Court of Justice in matters of agriculture, according to which a regulation may be declared to be disproportionate only if it is manifestly inappropriate for achieving the objective pursued.

55. The other parties further stress that the Regulation is intended not only to reduce noise but also to limit other harm to the environment. They are of the opinion that the by-pass ratio of an engine is inextricably linked with noise generation, and also with fuel burn and gaseous emissions.

56. According to the United Kingdom Government, it appears from a report by the experts from the United Kingdom Department of the Environment in the main proceedings that the boundary between noisy and quiet engines is to be drawn at a by-pass ratio of three. The Commission observes that it is immaterial in practice whether the line is drawn at a by-pass ratio of three or a by-pass ratio of two. In practice no engines are used with a by-pass ratio between those two figures. The United Kingdom Government refutes in detail the comparisons made by Omega with other types of aeroplanes.

57. The expert from the United Kingdom Department of the Environment submitted in a report for the Commission that in addition to the subjective evaluation of measurements at specific points the influence of the noise measured there on the size of the noise footprint - the area affected by a specified noise level - should also be taken into account. The expert states that a reduction by 5 decibels leads to a reduction of that area on take-off by over 50%, and another 5 decibels would lead to a reduction by over 80%.

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58. The United Kingdom Government and the Irish Aviation Authority state that the definition of noise limits could not serve the more comprehensive aims of the Regulation in the field of environmental protection as well as the contested provision, which may be expected to produce improvements in fuel burn and gaseous emissions as well.

59. The Commission and the Council refer to the high degree of complexity of measuring aircraft noise. The Regulation is also not meant to anticipate the agreement of new standards within the ICAO. They point out, finally, that all those concerned could be aware of the forthcoming regulation from 1998.

60. On being specifically asked, the United Kingdom, the Commission and the Council expressly reiterated their view that reference to a by-pass ratio of three is a less restrictive means than the definition of new standards for noise, gaseous emissions and fuel burn. On the one hand, the number of re-engined aeroplanes is relatively small. On the other hand, the expense of defining new standards is very great, and it would in particular require the involvement of international institutions. The existing noise standards apply to whole aeroplanes, while the standards for certain emissions apply to engines. They are not appropriate for attaining the objectives of the Regulation.

Opinion

(1) The criterion of review to be applied

(a) The principle of proportionality

61. The Court defines the principle of proportionality as follows:

The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on economic operators are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued.

A measure is therefore proportionate only if it is appropriate and necessary and is not disproportionate to the aim pursued.

62. Those principles do not apply only where there is a financial charge, but to any assessment of a conflict between the aims of Community measures and the consequent effects on legally protected interests.

(b) Discretion of the legislature

63. The criterion of review to be applied is, however, relativised by the Court:

In a sphere in which the Community legislature is called on to undertake complex assessments based on technical and scientific information which is liable to change rapidly, judicial review of the exercise of its powers must be limited to examining whether it has been vitiated by a manifest error of assessment or a misuse of powers or whether the legislature has manifestly exceeded the limits of its discretion.

64. The provision at issue is based on such complex assessments based on technical and scientific information which is liable to change rapidly. The criterion of judicial review in the context of proportionality is therefore limited in the way described.

(c) No restriction of review for appropriateness

65. According to the formulations used in consistent case-law in the field of agriculture, review might even be restricted further. In that field the Court regularly states, when reviewing proportionality,

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that the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution intends to pursue. The stages of necessity and proportion between the contested measure and the aim pursued would then no longer have to be examined.

66. Closer consideration shows, however, that cases in which the Court addressed the question of appropriateness alone did not raise any points concerning necessity or reasonableness. Furthermore, there are judgments of the Court and the Court of First Instance and opinions in which that formulation is used even though questions of necessity and reasonableness were then discussed.

67. The conclusion must be that manifest errors of assessment with respect to necessity and the proportion between the contested measure and its aim may also lead to annulment of the contested provision.

(d) Review of manifest error of assessment

68. In its judgment in Nölle the Court defined the requirements for a manifest error in connection with the adoption of anti-dumping regulations. The finding of dumping necessary in such cases may be based on a comparison of the prices charged by the manufacturers of the product in question in a comparable country. The Court then verifies whether the institutions neglected to take account of essential factors for the purpose of establishing the appropriate nature of the country chosen and whether the information contained in the documents in the case were considered with all the care required for the view to be taken that the normal value was determined in an appropriate and not unreasonable manner.

69. In the context of that verification the Court held that a finding that there has been such a manifest error presupposes proof of the error. If such proof is not possible, that goes to the onus on the person who asserts that a regulation in unlawful.

70. If, moreover, already in the legislative procedure specific facts have been submitted which contradict the view taken by the legislature, then it may be obliged to take those facts into account.

71. It must be conceded that findings from anti-dumping cases may not be applied without further ado to other proceedings. Although regulations imposing anti-dumping duties by their nature and scope are of a legislative nature, they may be of direct and individual concern to producers, exporters or importers. They are therefore to be classified by their nature as between legislation and individual decision. However, the consequences of this particularity are limited essentially to procedural law, in particular the standing of the undertakings concerned to bring proceedings. The findings in the Nölle judgment on the criterion of review for manifest errors of assessment, on the other hand, raise no particular problems when transferred to legislative activity in the classic sense. If it can be proved beyond doubt, in the context of a reference for a preliminary ruling, that there was an error of assessment on the part of the legislature, the Court may not ignore that. That is all the more so if the basic facts must have already been known to the legislature during the legislative procedure.

(2) Application to the reference for a preliminary ruling

72. According to the above considerations, the contested provision is based on a manifest error of assessment if it is shown beyond doubt

- that it is not appropriate for reducing environmental damage by aeroplanes, especially noise,

- that it does not constitute the least restrictive means of achieving that objective equally effectively, or

- if the burden caused by it is not proportionate to that aim.

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(a) Legislative objective

73. The legislative objective of the reference to a by-pass ratio of three or more is the reduction of environmental harm caused by air traffic, with respect in particular to noise, fuel burn and harmful emissions. The basis of that determination was the view that engines with a by-pass ratio of three or more are not as noisy, consume less fuel and also emit less harmful substances than engines with a by-pass ratio of less than three.

(b) Appropriateness

74. There is a manifest error in the assessment of appropriateness if it is the case that aeroplanes under Chapter 2 which are equipped with new engines whose by-pass ratio is below three are at least comparable, as regards noise, fuel burn and emissions, with aeroplanes under Chapter 3.

75. As far as can be seen, the parties are not in dispute over fuel burn and harmful emissions. Only with respect to noise do the two sides disagree in their assessment of the noise to be expected from re-engined aeroplanes. The figures submitted by Omega do not, however, impose the conclusion that its re-engined aeroplanes would be just as quiet as aeroplanes constructed with the aim of complying with the noise standards of Chapter 3. The measurements on take-off and laterally at least are higher than for the comparison aeroplanes mentioned. If one accepts as true Omega's assertion that the human ear can perceive a difference only from noise differences of 3 decibels, then Omega's aeroplanes would be audibly noisier measured laterally, but on take-off there would be no perceivable difference, and their advantage on approach would be at the margin of what is audible. It would in principle be within the legislature's discretion in that situation to attach greater weight to the disadvantages of Omega's aeroplanes than to their advantages.

76. Moreover, Omega has not measured these figures in practice, but can only produce estimates. Omega has not therefore shown convincingly that the provision at issue was manifestly inappropriate for attaining the objective of improved protection of the environment.

77. The appropriateness of the by-pass ratio as a criterion for quieter aeroplanes is also supported, finally, by the fact that the Community legislature has already based other rules on the assessment that a greater by-pass airflow is likely to mean quieter engines. A by-pass ratio of two is used in Article 2(1) of Directive 92/14 and Article 4(e) of Directive 89/629/EEC as an alternative to compliance with noise limits. This alternative to compliance with noise limits is already suggested in Resolutions A31-11 and A32-8 of the ICAO Assembly, according to which the Member States, if anticipating the application of the limits in Chapter 3, are to provide for an exception for aeroplanes having engines with a high by-pass ratio.

78. It cannot therefore be said that the criterion of by-pass ratio is inappropriate for reducing aeroplane noise.

(c) Necessity

79. A manifest error in the assessment of necessity presupposes that other measures can be adopted which are just as appropriate for achieving the aim pursued, but are less burdensome for manufacturers in the position of Omega and at least no more burdensome for third parties.

80. A possibility here is the definition of specific standards for noise, fuel burn and emissions separately, which may even, depending on the legislative objective, go beyond the requirements of Chapter 3. That would be at least as suitable for achieving the legislative objective, since in would guarantee compliance with those standards in any event. The criterion of by-pass ratio alone, by contrast, does not guarantee any precise standards for the individual factors. That criterion allows only a presumption that the aeroplanes certificated will perform better than those not certificated. At least in theory, that criterion would, however, also permit the use of aeroplanes or engines

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with less good performance.

81. The definition of specific standards would at the same time be less burdensome, because it would not restrict the freedom of choice of designers and airlines as regards the technical solution to be used for attaining the regulatory objective. As Omega rightly submits, that view is confirmed in the law of public procurement both at Community level and at WTO level. Article 18(4) of Directive 93/38/EEC, Article 14(6) of Directive 92/50/EEC and Article VI(2)(a) of the Agreement on Government Procurement each provide that requirements as to the technology used are permitted only in exceptional cases and on objective grounds. The same approach may also be found in Article 2.8 of the Agreement on Technical Barriers to Trade.

82. The arguments put forward in the present case against such standards fail to convince. There is no apparent reason why those standards should be confined to noise without taking reasonable account of fuel consumption or harmful emissions. The Commission may be right in its view that ascertaining whether a type of aeroplane complies with such standards is more difficult than simply taking account of the by-pass ratio. However, it also submits that noise values at least are already ascertained in the context of certification, still necessary, of the aeroplane type for the purpose of compliance with Chapter 3. Stricter standards could link up with that examination. Moreover, there should be no objection to imposing the costs of additional examinations on the person seeking to have a type of aeroplane certificated.

83. The legislature's presumption, in principle not refuted by the submissions of the parties to the present proceedings, that re-engined aeroplanes whose engines have a by-pass ratio of three or more are quieter could even - depending on how strict such standards were - justify exempting those aeroplanes from the, possibly cost-intensive, additional demonstration of compliance with such standards.

84. As regards anticipation of stricter international standards, European rules may well prejudice them politically, but certainly not as a matter of law. Nor is it apparent why international bodies should be involved in setting new standards, while an additional criterion not used internationally may be determined unilaterally.

85. Further indications of the lack of necessity of a rule which fastens exclusively on by-pass ratio are the earlier references to by-pass ratio in Directives 92/14 and 85/629 and in ICAO Resolutions A31-11 and A32-8. They provide that aeroplanes may be certificated if they either comply with noise limits or have a by-pass ratio of two or more or a high by-pass ratio as the case may be. Those provisions manifestly proceed from the assessment that aeroplanes with lower by-pass ratios too may be able to comply with noise limits.

86. Finally, it was explained at the hearing that the draft of a new Chapter 4, to be decided on shortly, of the annexes to the Chicago Convention would determine the next generation of noise standards not by reference to by-pass ratio but solely on the basis of specific noise limits.

87. Consequently, the introduction of the by-pass ratio as the criterion for prohibiting the use of re-engined aeroplanes is based on a manifest error of assessment with respect to necessity. The provision is therefore invalid.

C - GATT 1994 and the Agreement on Technical Barriers to Trade

Submissions of the parties

88. In Case C-27/00, Omega stated that, subject to a change in the Court's case-law, it would not pursue this point further in view of the judgment in Case C-149/96. In Case C-122/00, however, Omega criticises that judgment, aiming at a ruling that the contested provision is void on the ground of breach of WTO law.

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89. The Court - according to Omega - distinguishes, when reviewing the compatibility of Community measures with international agreements, according to whether those measures are based on reciprocal and mutually advantageous arrangements. That distinction is not helpful, however, as all international agreements rest on that basis. Moreover, in that case the element of mutuality had been irrelevant, since it concerned the obligations under international law of subjects of international law. The Court should therefore abandon that line of case-law.

90. Even if the Court wishes to continue in principle to exclude direct effect of WTO law in the Community, it can still review whether individual provisions are sufficiently clear and unconditional to permit direct application. Unlike with other provisions of WTO law, in the case of the provisions of the Agreement on Technical Barriers to Trade that condition is satisfied. The provision at issue clearly infringes those provisions in several respects, which Omega describes in detail.

91. The United Kingdom Government, the Irish Aviation Authority, the Commission and the Council refer to the judgment in Case C-149/96, according to which a possible conflict with WTO law cannot affect the validity of a regulation. They submit in the alterative that the provisions of the Agreement on Technical Barriers to Trade are not infringed.

Opinion

92. Omega misunderstands the basis of the Court's case-law. The decisive point is that legal disputes on the content of WTO law are based on negotiations between the Governments. The withdrawal of unlawful measures is indeed the solution given preference in WTO law, but WTO law does also permit other solutions - for example, settlement, payment of compensation or suspension of concessions. The Court set this out in detail in its judgment in Case C-149/96.

93. The Community's position in those negotiations would be seriously affected if Community law recognised a unilateral direct effect of obligations under WTO law.

94. Direct reliance on rules of WTO law as against measures taken by WTO members appears inappropriate from the point of view of WTO law as well, however. Regardless of their wording, all provisions of WTO law are subject to a general reservation which accords the States concerned various possibilities of reacting to a breach.

95. It is therefore not for the Court but for the WTO, or the members of the WTO, to ensure that WTO law is observed in the legal systems concerned. Direct effect of WTO rules is clearly not part of their legislative content. Such content may not be ascribed, at Community level, to WTO law in its original form but at most in the form of transposition measures. In that context WTO law may be (indirectly) significant. Direct effect of WTO law in the legal systems of the WTO members cannot, on the other hand, sensibly be brought about unilaterally by individual legal systems, but only at WTO level.

96. The conclusion in the judgment in Case C-149/96, namely that having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions, must therefore be maintained. The exceptions mentioned there do not apply here. The fact that the provisions of the Agreement on Technical Barriers to Trade referred to above are perhaps sufficiently precise and unconditional in their wording to be amenable to direct application cannot lead to a different conclusion. They are subject to the general condition of WTO law that the members of the WTO are to comply with their obligations not by direct effect of WTO law in their legal systems but exclusively by specific transposition of those obligations.

D - Equal treatment

Submissions of the parties

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97. Omega considers that the contested provision unjustifiably differentiates between aeroplanes which have been re-engined with engines with a by-pass ratio below three and noisier aeroplanes which can continue to be used at European airports. Recital 5 in the preamble to the Regulation shows that re-engined aeroplanes can attain the same performance as modern Chapter 3 aeroplanes. Re-engining does not therefore justify the additional requirement of a by-pass ratio of three or more.

98. Omega points out that there are aeroplanes under Chapter 3 - MD 80s - which were fitted as new with the engines it intends to use. The engine envisaged also achieves similar results, as regards noise, fuel consumption and emissions, as engines with a by-pass ratio of three or more.

99. Omega also objects to the fact that re-engining with engines with a by-pass ratio below three is equated with modifying aeroplanes by the installation of hushkits.

100. Finally, Omega asserted in its pleadings in Case C-27/00 that the fixing of the by-pass ratio discriminates against United States manufacturers, since the prohibition of re-engined aeroplanes was justified by reference to engines of the American manufacturer Pratt &Whitney. At the hearing, however, the representative of Omega in Case C-122/00 stressed that he had not made that submission.

101. The United Kingdom Government submits, with respect to alleged discrimination against United States manufacturers, that US and European manufacturers offer engines with a by-pass ratio of three or more. The engine used by Omega is also not the only one with a by-pass ratio below three, as at least one Russian engine of that kind is probably still produced. Moreover, the idea of discrimination against American manufacturers is far-fetched in view of international interconnections. The United Kingdom Government further sets out in detail why the comparisons with individual types of aeroplanes by Omega are mistaken.

102. The Irish Aviation Authority takes the view that it is in any event justified to subject re-engined aeroplanes to stricter requirements than older aeroplanes. Since the by-pass ratio is moreover decisive for noise performance, engines with a higher by-pass ratio may be treated differently from engines with a low by-pass ratio. Finally, American and European undertakings are affected equally by the Regulation.

103. The Commission and the Council emphasise that no reasons are given for this question and therefore base their observations on assumptions. Differentiating according to by-pass ratio is justified by the consequences of the by-pass ratio for noise, fuel burn and gaseous emissions. The distinction as against aeroplanes equipped from the outset with the same engine is justified by the fact that the latter were also certificated originally under Chapter 3. Equal treatment with re-engined aeroplanes follows from the fact that in both cases the original construction is considerably modified. Any disadvantageous treatment of American manufacturers is to be dealt with, finally, only in the context of the questions referred concerning WTO law.

Opinion

104. It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and different situations not treated alike unless such treatment is objectively justified.

105. Its special importance alongside the principle of proportionality lies in the fact that it prohibits the introduction of measures which are proportionate in principle if they affect comparable situations differently without objective justification. For this element of review, it is thus irrelevant whether - as put forward here - the reference to a by-pass ratio of three is not necessary. What matters is whether like situations have been treated differently without objective justification.

106. Omega adduces three different comparison groups:

- European and United States engine manufacturers;

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- re-engined aeroplanes and Chapter 3 aeroplanes; and

- re-engined aeroplanes with engines with a by-pass ratio below three and aeroplanes merely modified with hushkits.

107. No sufficient indications have been submitted of direct or covert disadvantageous treatment of US undertakings by the reference to a by-pass ratio of three. The fact that no undertaking located in the European Community and only one remaining American undertaking manufactures engines with a by-pass ratio below three if anything confirms the Commission's view that such engines no longer correspond to the state of technology.

108. The distinction between re-engined or modified aeroplanes and aeroplanes originally designed for the requirements of Chapter 3 is justified above all by considerations of protecting the existing position. Manufacturers who have designed an aeroplane to meet Chapter 3 standards and airlines which have acquired those aeroplanes in principle enjoy greater protection of legitimate expectations with respect to the usability of those aeroplanes than manufacturers and owners of aeroplanes which as originally designed do not meet those standards. The latter must have reckoned with the fact that their aeroplanes would no longer be usable in their existing form when the standards of Chapter 3 were introduced.

109. Moreover, it must be presumed that newer aeroplanes which were already designed with a view to the standards of Chapter 3 will in principle perform better than older aeroplanes which meet the standards under Chapter 3 only as a result of being modified.

110. Re-engined aeroplanes are thus not comparable with aeroplanes which were originally designed in accordance with the requirements of Chapter 3.

111. As regards the comparison between re-engined aeroplanes with a by-pass ratio below three and aeroplanes which have merely been equipped with hushkits, Omega complains not of unequal treatment but of equal treatment of the two groups.

112. The two groups of aeroplanes are made subject by the Regulation to the same prohibition and the same exceptions. They differ, however, in that modification involves reduced engine performance together with increased fuel burn and emissions, whereas new engines already meet the corresponding noise limits in their normal operation. A side-effect of those circumstances is that modified aeroplanes often comply only marginally with the noise limits under Chapter 3, as any further improvement in noise emission will presumably cause loss of performance.

113. Not every difference between comparison groups, however, can preclude treating them in the same way, since otherwise any general rule would be impossible. Rather, it must be the case that the differences between the comparison groups actually require different treatment. As already stated, the legislature was entitled to assume that re-engining with engines with a by-pass ratio below three will lead to worse noise results than re-engining with engines with a higher by-pass ratio. That would also apply to a comparison with aeroplanes which were designed from the outset in accordance with Chapter 3. However, modification with hushkits would also lead to poorer noise results. From the point of view of the principle of equal treatment, the common points of the comparison groups adduced are preponderant, not the differences between them.

114. There is therefore no indication of a breach of the principle of equal treatment.

VI - Conclusion

115. I therefore propose the following ruling:

Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated

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as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993) is invalid, in so far as in Articles 2 and 3 it prohibits the operation in the Community of civil subsonic jet aeroplanes which have been modified to meet Chapter 3 standards by being completely re-engined with engines having a by-pass ratio below three.

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31999R0925-A03 : N 8 115
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61999J0056 : N 66
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SUB	Transport
AUTLANG	German
MISCINF	Joined case : 600J0122
NATIONA	United Kingdom
PROCEDU	Reference for a preliminary ruling
ADVGEN	Alber
JUDGRAP	Wathelet
DATES	of document: 20/09/2001 of application: 31/01/2000

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Opinion of Mr Advocate General Jacobs delivered on 10 May 2001.
SIAC Construction Ltd v County Council of the County of Mayo.
Reference for a preliminary ruling: Supreme Court - Ireland.
Public works contracts - Award to the most economically advantageous tender - Award criteria.
Case C-19/00.

1. Under Community rules, public works contracts must be awarded on the basis either of the lowest price or of the most economically advantageous tender; in the latter case all the criteria to be applied must be stated in the contract notice or documents.

2. Where in that context it is stated that the tender most advantageous in respect of cost and technical merit will be accepted, and where the lowest bidders are all of accepted competence, may the contract be awarded not to the bidder whose tender is formally the lowest but to the bidder whose tender is, in the opinion of the consulting engineer, likely to be lowest in ultimate cost? That is, in essence, the question raised in the present case by the Supreme Court of Ireland.

Legislation

3. The relevant Community legislation in force at the material time in the main proceedings was Council Directive 71/305 (the Directive).

4. Of its provisions, essentially only those of Article 29(1) and (2) are in issue in the present case:

1. The criteria on which the authorities awarding contracts shall base the award of contracts shall be:

- either the lowest price only;

- or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the latter instance, the authorities awarding contracts shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.

The main proceedings and the request for a preliminary ruling

5. The facts as they appear from the Supreme Court's order for reference and the documents annexed to it are as follows.

6. In February 1992 Mayo County Council (the County Council) advertised in the Official Journal of the European Communities for tenders for construction of a sewerage and sewage disposal improvement scheme, comprising sewers, storm water drains, rising mains and water supply pipes, all complete with various fittings, together with two pumping stations and a waste water treatment works.

7. The contract was to be of the measure-and-value type, in which the estimated quantities of each item are set out in a bill of quantities. The tenderer fills in a rate for each item and a total price for the estimated quantity. The price payable is determined by remeasuring the actual quantities on completion of the work and valuing them at the rates quoted in the tender. This type of contract is used in particular where it is not possible to establish precise quantities before work begins.

8. Under the heading Award criteria (other than price), the contract notice published in the Official Journal stated: the contract shall be awarded to the competent contractor submitting a tender which is judged to be the most advantageous to the council in respect of cost and technical merit...

9. Other contract documents included the instructions to tenderers, the specification, and the

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conditions of contract. The following relevant points emerge from those documents:

- among the terms defined were tender total (the total of the priced bill of quantities on the date of its acceptance) and contract price (the sum to be ascertained and paid on completion of the contract), although those terms do not appear to have been used systematically throughout the documents;

- the award would be made to the tenderer whose tender was adjudged the most economically advantageous to the County Council in respect of price and technical merit;

- the County Council none the less reserved the right not to accept the lowest or even any tender;

- the decision would be taken on the recommendation of a consulting engineer, who would check the three lowest tenders for errors in calculation and would compare prices with his own estimates of cost to ensure that items were adequately priced to meet the highest standard of workmanship without additional expenditure if the tender appeared underpriced;

- the revised tender price (that is to say, the price established after arithmetic correction) would form the basis for comparison of tenders;

- all items had to be priced, with rates stated in the appropriate places;

- however, where no price or rate was entered against an item, that item would be deemed to be covered by the other rates and prices. (This practice, known as zero-rating, is used by tenderers to submit fewer, inclusive prices for major items covering all related minor items, rather than pricing each individual item in detail.)

10. There were 24 tenderers. The three lowest were SIAC Construction Ltd (SIAC), Pat Mulcair (Mulcair) and Pierse Contracting Ltd (Pierse). Following arithmetic corrections, the tender totals were IEP 5 378 528 for SIAC, IEP 5 508 919 for Mulcair, and IEP 5 623 966 for Pierse.

11. In his extremely detailed report of 30 June 1992, the consulting engineer stated that those tenders were equal in technical merit.

12. However, he had serious reservations regarding SIAC's tender, as the pricing system used greatly reduces the freedom of the consulting engineer to properly and fully administer the contract in a way that, in his view, is the most economically advantageous to the Mayo County Council. In general, SIAC's approach greatly reduced control over all the items in the bill of quantities, which would in one way or another vary on final measurement. Specifically, it had zero-rated 27.5% of the items, whereas Mulcair had zero-rated only 18% and had priced all major items of measured work. SIAC had also deducted in its entirety a provisional sum of IEP 90 000 which had been included for certain materials. (It appears that SIAC considered this to mean that it had to supply such materials free of charge - the effect of which would seem to be similar to that of zero-rating, in that the price was deemed to be included in that of other items.) Mulcair had, in the engineer's opinion, submitted a better balanced tender than SIAC's, and one which might well give far better value for money and might even cost less.

13. In his recommendations, the consulting engineer stated that Pierse's tender had to be rejected simply on price. He then gave a number of reasons for - with the greatest reluctance - not recommending SIAC's tender, in particular the zero-rating practices described above, which caused distortion and rendered proper management and control extremely difficult if not impossible. He expressed his serious doubts that in fact [SIAC's] tender would prove at the end of the day to be the lowest. He therefore recommended that Mulcair's corrected tender be accepted. That was done and the contract has since been completed.

14. When making the award, however, the County Council informed SIAC of those reasons for not accepting its tender. SIAC challenged the County Council's decision before the High Court, which

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dismissed its action for judicial review and damages on 17 June 1997.

15. One issue was whether the term cost indicated a criterion other than price, in the sense of tender total, in the contract documents. The High Court found that the two terms were used interchangeably and were intended to have the same meaning. In choosing criteria which were stipulated in the contract notice and amplified in other contract documentation, the County Council had exercised a discretionary power of selection which was largely predicated on the exercise of professional judgement. The High Court confined itself to examining whether the County Council's decision was unreasonable, and concluded that it was not. SIAC appealed to the Supreme Court.

16. SIAC submitted in its appeal that the County Council was required to accept its tender as the lowest priced. Since all tenderers had the requisite technical merit, the only relevant criterion could be cost (which was synonymous with price). Cost/price could not mean ultimate cost; it could mean only tender price. By taking account of ultimate cost, the County Council had departed from the specified award criteria, contrary to the principles of transparency, foreseeability of the adjudication process and equality of tenderers.

17. The County Council contended that it was entitled to exercise a discretion and to award the contract on the basis of its consulting engineer's recommendation as to which tender was the most advantageous in respect of cost and technical merit. In a measure-and-value contract, cost must be understood as the ultimate cost to the awarding authority. Furthermore, the consulting engineer was entitled to make comparisons between prices quoted and his own estimates of cost. SIAC had understood that the criterion of cost referred to the probable cost of the contract to the County Council.

18. The Supreme Court has decided to stay the proceedings and submit the following question to the Court of Justice for a preliminary ruling:

In a situation where an authority is awarding a contract pursuant to the provisions of the second indent of Article 29(1) of Council Directive 71/305/EEC, Chapter 2, of 26 July 1971 as applied in the national law of a Member State, and where the authority shall have specified the "Award criteria (other than price)" as being that the contract would be awarded to "the competent contractor submitting a tender which is adjudged to be the most advantageous to the" (awarding authority) "in respect of cost and technical merit", and where the three lowest tenderers shall have been contractors of accepted competence and shall have submitted valid tenders of accepted technical merit, and where the tender prices of the three lowest tenderers shall not have diverged greatly, is the awarding authority obliged to award the contract to the contractor who shall have tendered the lowest price or is the awarding authority entitled to award the contract to the contractor with the second lowest price on the basis of the professional report of its consulting engineer that the ultimate cost of the contract to the awarding authority is likely to be less if the contract is awarded to the contractor who tendered the second lowest price than it would be if the contract were awarded to the contractor who tendered the lowest price?

Observations to the Court

19. Written observations have been submitted by SIAC, the County Council, the Irish Government, the Austrian Government and the Commission. SIAC, the County Council, the French Government, the Irish Government and the Commission presented oral submissions at the hearing.

20. SIAC argues that the criterion of cost or price stated in the tender documents must mean the total price of the tender as submitted; by adjudicating between SIAC and Mulcair on the basis of projected ultimate cost, the County Council departed from the award criteria it had itself stipulated. In doing so, it breached the principle of non-discrimination, failed to ensure transparency and foreseeability, and acted subjectively and arbitrarily, conferring on itself what amounted to total

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discretion.

21. The County Council contends that the references to cost and price can be only to the probable cost of the performed contract and that the question is simply whether it is permissible for an awarding authority to adopt that cost (as assessed by its consulting engineer) as an award criterion under the second indent of Article 29(1) of the Directive. It considers that it is permissible, since the case-law shows that an awarding authority must have some discretion in determining the most economically advantageous offer on the basis of objective criteria, which may include future consequences of the choice made.

22. The French, Irish and Austrian Governments support essentially the County Council's position. The Irish Government agrees in particular that, in the context of a measure-and-value contract where final costs and quantities cannot be accurately predicted, proper compliance with the tendering instructions ensures a fair sharing of the risk which is compromised by excessive use of zero-rating; moreover, the professional judgment of a consulting engineer is in principle not subjective but is in any event open to challenge in the national courts if any lack of objectivity can be established. The Austrian Government agrees with the County Council that to require an awarding authority to adjudicate on the basis of the lowest tender price when it had stipulated a different criterion would be contrary to the provisions and principles of the Directive.

23. The Commission, finally, adopts a position more favourable to SIAC. It considers that where the only relevant criterion is cost, corresponding to the price tendered, a contracting authority is not entitled to have regard to previously unmentioned criteria such as zero-rating, balanced tenders or pricing methodology. Where price is a criterion, it must mean the lowest tender price, whether the context is the first or the second indent of Article 29(1) of the Directive; to take ultimate cost as a criterion would give rise to problems of certainty and objectivity, such as the apparently subjective assessment made by the consulting engineer in the present case.

Analysis

The meaning of price and cost

24. A crucial point in the case is what is meant by cost or price in the tender documents. The High Court found that the words were used interchangeably and were intended to have the same meaning, but does not seem to have decided what that meaning was. The point apparently remains in issue before the Supreme Court, with SIAC arguing that it meant the arithmetically corrected price given in the tender (the tender total defined in the contract documents) and the County Council arguing that it meant the foreseeable final cost (the contract price).

25. SIAC wishes this Court to rule that the terms price and cost in the tender documents cannot, as a matter of Community law, be construed as meaning ultimate cost, and the County Council argues that the Supreme Court's question presupposes that they must have that meaning.

26. Although that is, I consider, a question of interpretation of the terms of a contract governed by Irish law and as such a matter for the Irish courts, this Court may none the less provide guidance as to the meaning of price in the Directive which may be of assistance in arriving at an interpretation.

27. The word price is used in both indents of Article 29(1) of the Directive.

28. In the first indent, the term lowest price only can, I consider, apply only to the price stated in the tender. Any alternative interpretation would detract from the clarity of that provision, which is obviously intended to enshrine an absolutely objective standard; nor, indeed, has any suggestion been made to the contrary.

29. The Commission considers that the word price must be given the same construction in the second indent.

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30. I agree, but do not regard that point as decisive. The second indent allows awarding authorities to assess the most economically advantageous tender on the basis of various criteria according to the contract and provides a non-exhaustive list of such criteria, including price. Other criteria may thus be used, provided that they are stated in the contract notice or contract documents in accordance with Article 29(2), and one such criterion might be probable ultimate cost. It can hardly be denied that the lowest ultimate cost to the awarding authority may qualify as the most economically advantageous.

31. For the reasons given above, I shall not express any opinion on whether cost (or price) in the tender documents means the total of the tender submitted or the foreseeable ultimate price of the contract but shall consider the competing hypotheses in turn.

32. First, however, it will be helpful to examine some general considerations concerning the interpretation and application of the Directive.

The application of award criteria

33. The main purpose of regulating the award of public contracts in general is to ensure that public funds are spent honestly and efficiently, on the basis of a serious assessment and without any kind of favouritism or quid pro quo whether financial or political. The main purpose of Community harmonisation is to ensure in addition abolition of barriers and a level playing-field by, inter alia, requirements of transparency and objectivity.

34. The way in which award criteria are to be applied under the Community rules has been clarified by the Court in a number of judgments, in particular Beentjes, Storebælt Bridge and Walloon Buses, all of which have been cited by the parties who have submitted observations.

35. Beentjes concerned the legality of certain criteria stipulated in the contract documents. Although those criteria were different from that in issue in the present case, some relevant points emerge from the judgment. A stipulation that the award is to be made to the tenderer whose tender appears the most acceptable is incompatible with Community law if, as interpreted in national law, it confers unrestricted freedom of choice on the awarding authority but not if its effect is to allow comparison between tenders on the basis of objective criteria such as those listed in the second indent of Article 29(1) and, where such criteria are used, they must be stated in the contract notice or documents.

36. The Storebælt Bridge case was an action brought by the Commission against Denmark on the ground of irregularities in a major tendering procedure. One tenderer had submitted a tender not in compliance with the tender conditions and the awarding authority entered into negotiations with that tenderer resulting in amendments to the conditions and the acceptance of its tender. The Court held in particular that the principle of equal treatment of tenderers lies at the heart of the Directive and requires that all tenders must comply with the tender conditions in order to ensure an objective comparison.

37. In Walloon Buses, an action brought by the Commission against Belgium (on the basis of another procurement directive), an awarding authority was held to be in breach of Community law because it took into account an amendment to the tender of only one tenderer, awarded the contract on the basis of figures which did not correspond to the requirements of the contract documents and took into account additional features suggested by one tenderer but not among the stipulated award criteria. The Court again stressed the need to respect the principles of equal treatment of tenderers and of transparency.

38. It thus appears clear from the wording of Article 29(1) and (2) and from the case-law that unless an awarding authority specifies the criteria of economic advantageousness which it intends

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to apply under the second indent of Article 29(1) it is bound to award the contract on the basis of the lowest price only; where it does specify such criteria it is bound by them and may not deviate from them in the course of the procedure. The requirements of transparency, objectivity and equality of opportunity are respected only if all tenderers know in advance on what criteria their tenders will be judged and those criteria are assessed objectively.

39. With those considerations in mind, I turn to the two alternative hypotheses on which the parties to the main proceedings base their submissions. It must also be remembered that the award procedure was governed by the second indent of Article 29(1) and by Article 29(2) of the Directive, not by the stricter requirements of the first indent of Article 29(1).

First hypothesis: The terms price and cost in the tender documents mean the arithmetically corrected total of the tender submitted

40. On this hypothesis, the outcome of the national proceedings seems straightforward. It is common ground that the award was made (at least at the final stage of adjudicating between the two lowest tenders) on the basis of likely ultimate cost and not on the basis of the tender total as defined in the contract documents. Thus, if likely ultimate cost was not one of the award criteria specified in accordance with Article 29(2), its use was contrary to the provisions of the Directive and the principles governing their application.

41. Such a situation would be akin to those in the Storebælt Bridge and Walloon Buses cases, even though in this case there do not appear to have been any formal amendments to the tender conditions or to the tender of the successful tenderer. The mere fact of awarding the contract on the basis of criteria of which tenderers were not informed prevents them from planning the structure of their tenders so as to achieve optimum competitivity and clearly fails to meet the requirements of transparency embodied in Article 29(2) - a fact which vitiates the procedure regardless of whether the criteria used were in fact objective and regardless of whether all tenderers were kept equally uninformed of the true basis on which the award would be made.

42. If those are the circumstances, therefore, the reply to the national court's question must be that the awarding authority was not entitled to award the contract on the basis of likely ultimate cost.

Second hypothesis: The terms price and cost in the tender documents mean the likely ultimate cost to the County Council

43. On this hypothesis, the above objections are in principle not relevant. It is assumed that the criterion of likely ultimate cost was chosen and was then applied. However, it is still necessary to examine whether the choice of criterion was permissible, whether it was stated clearly in accordance with Article 29(2), whether it was applied objectively and whether tenderers were treated equally.

44. I have taken the view that likely ultimate cost is in principle a permissible award criterion in the context of the second indent of Article 29(1), but I have not yet considered whether it was permissible in the form it took in the present case.

45. It is understandable that where, in a measure-and-value contract, the final quantities are likely to vary from the estimated quantities on the basis of which tenders are submitted, the way in which tenders are structured and in particular the approach to zero-rating may affect the ranking of tenders as between the estimate and the ultimate cost.

46. For example, x linear units of drain may be estimated, tenderers being asked to quote a figure per unit, together with separate figures for an estimated number of ancillary items such as manholes, overflows, connections, gullies, valves and ventilating columns, and for excavation in rock, clay, silt etc.

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47. If tenderer A submits an inclusive figure per linear unit of drain (zero-rating all the others) and tenderer B submits full itemised figures, their tenders may be compared satisfactorily on the basis of the estimated quantities. However, where the final length of drain laid is different, that comparison will not hold true unless the quantities of ancillary items and types of excavation remain proportionately the same. Among other things, it may be easier for the awarding authority (or its consulting engineer) to control expenditure in respect of variations by exercising technical choices in the case of tenderer B than in the case of tenderer A. Where tenders are very close in value, as was the case here, it does not seem unreasonable to suppose that tender B may prove the lower in ultimate cost.

48. Furthermore, since final quantities will deviate from those estimated but the deviations cannot be predicted with any formal accuracy, it seems reasonable that assessment of the probable effect of different pricing structures on final cost should be based on the professional judgment of an experienced consultant. On the one hand, such a person is in principle qualified to assess that effect with the greatest achievable accuracy and, on the other, he should be aware of the margin of uncertainty which his predictions must involve and will be able to take that factor into account when making his recommendation.

49. The criterion applied in the present case thus seems to me to be a permissible one.

50. The next question is whether the criterion was stated sufficiently clearly in the contract documents, but in a case such as the present that must be a matter for the national court. Obviously, on the present hypothesis, tenderers were informed that their tenders would be assessed on the basis of likely ultimate cost, but I consider it still necessary to examine whether the information given in the contract notice and contract documents was sufficient to allow them to plan their tenders to take account of the way in which that assessment would be made, in particular with regard to the effects of zero-rating. If it was not, there would be a failure to comply with Article 29(2) and the principle of transparency.

51. When examining that question, the national court should take into consideration not merely the literal terms of the contract documents but also the way in which they may be presumed to be understood by a normally experienced tenderer in the context of a measure-and-value contract. Bearing in mind that certainty as to the criteria to be applied is of paramount importance in drafting a tender, the national court should consider to what extent the distinction between tender total and contract price, and the respective role of each, was made clear, and whether the relevant indications were sufficiently prominent in the tender documents. I consider it relevant that, as I have stated above, the word price is normally to be understood as the price stated in the tender, even in the context of the second indent of Article 29(1).

52. In that regard, the County Council has pointed to the statement that the consulting engineer would compare prices with his own estimates of cost. However, that statement may not have any relevance here; it seems to have been confined to the situation in which particular items appeared to have been underpriced.

53. It is again for the national court to determine whether the criterion was applied objectively. That issue is related, but not identical, to the question of unreasonableness, which was addressed in some detail by the High Court by considering whether the award decision plainly and unambiguously flew in the face of fundamental reason and common sense. The test for objectivity should be, I consider, rather less extreme.

54. The essential question here is whether the factors taken into account are capable of supporting the conclusions drawn from them.

55. The consulting engineer's recommendation was based on his professional opinion as to likely

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ultimate cost. In my view such professional judgment should in principle be considered objective, even though it must of necessity involve some extrapolation from strictly verifiable facts, provided that it is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment to be made.

56. Finally, there is the question of equal treatment of tenderers. There is no suggestion in the present case that the successful tenderer benefited from special treatment of the kind seen in the Storebælt Bridge and Walloon Buses cases, where a single tenderer was allowed to make adjustments or negotiate on a different basis after all the tenders had been submitted. However, SIAC has laid great stress on the fact that, of the 24 tenderers, 22 were eliminated on the basis of the tender total alone and only two tenders were examined on the basis of likely ultimate cost.

57. I have stated above that I consider an examination of pricing structure a permissible method of assessing likely ultimate cost because variations in final quantities may affect the final contract price differently depending on the approach to pricing used in the tender.

58. However, since the effect of different pricing approaches on ultimate cost cannot extend beyond a certain range, it would serve no purpose to analyse all tenders in that way. The difference between tenders may be too great for such analysis to have any effect on their ranking. In that event, a higher bid may in my view be refused on the basis of the tender total alone. There is no contradiction between that approach and the scrutiny of pricing structures in order to adjudicate between closely competing tenders. That view is not affected by the fact that tenderers were informed that the arithmetically corrected tender total would form the basis for comparison, provided that the consulting engineer did indeed use the corrected figures when making that closer scrutiny.

59. The question might be raised on the present facts whether all the tenders apart from those of Mulcair and SIAC did in fact fall outside the range within which an examination of pricing structure might affect the ranking of tenders on the basis of likely ultimate cost. In particular, of the three lowest tenders to be examined in detail, Pierse's was not examined in that way, even though the difference between its corrected total and that of Mulcair's bid was no greater than that between the tender totals of Mulcair and SIAC. However, that fact cannot affect the validity of the adjudication as between Mulcair and SIAC, and no other tenderer appears to have challenged the outcome of the award procedure.

60. Subject to the qualifications I have mentioned, it seems to me that the notion of ultimate cost could properly be used as an award criterion on the present hypothesis. The approach which I am advocating should be sufficient, I consider, to allay the fears expressed by the Commission at the hearing, to the effect that the use of that criterion would lead to an unacceptable degree of uncertainty and lack of objectivity in procurement procedures. In my view it - like any other criterion - may be used only where the principles of transparency, objectivity and equality as between tenderers are clearly respected.

Conclusion

61. In the light of all the above considerations, I am of the opinion that the question referred by the Irish Supreme Court should be answered in the following way:

In a procedure governed by the second indent of Article 29(1) and Article 29(2) of Council Directive 71/305/EEC, an awarding authority is entitled to award the contract to the tenderer whose tender, although not the lowest, is likely in the professional opinion of the authority's consulting engineer to be lowest in ultimate cost, provided that transparency, objectivity and equal treatment of tenderers are ensured, and in particular that:

- the award criterion was clearly stated in the contract notice or contract documents; and

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- the professional opinion is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made.

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Opinion of Mr Advocate General Mischo delivered on 13 December 2001.
Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne.
Reference for a preliminary ruling: Korkein hallinto-oikeus - Finland.
Public service contracts in the transport sector - Directives 92/50/EEC and 93/38/EEC - Contracting municipality which organises bus transport services and an economically independent entity of which participates in the tender procedure as a tenderer - Taking into account of criteria relating to theprotection of the environment to determine the economically most advantageous tender - Whether permissible when the municipal entity which is tendering meets those criteria more easily.
Case C-513/99.

1. The Korkein hallinto-oikeus (Supreme Administrative Court), Finland (hereinafter the national court), refers three questions concerning the interpretation of Article 2(1), (2) and (4) and Article 34(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as also Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

I - Legal framework

Community law

Directive 92/50

2. Article 1 of the Directive provides that:

For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

...

(ii) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC or fulfilling the conditions in Article 6(2) of the same Directive;

...

3. Article 36 of Directive 92/50, which is headed Criteria for the award of contracts, is worded as follows:

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) the lowest price only.

2. When the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.

Directive 93/38

4. Article 2 of Directive 93/38 provides that:

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1. This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. Relevant activities for the purposes of this Directive shall be:

...

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

...

4. The provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the contracting entities.

...

5. Article 34 of Directive 93/38 states that:

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall be:

(a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

(b) the lowest price only.

2. In the case referred to in paragraph 1(a), contracting entities shall state in the contract documents or in the tender notice all the criteria which they intend to apply to the award, where possible in descending order of importance.

...

6. Article 45(3) and (4) of Directive 93/38 provides that:

3. Directive 90/531/EEC shall cease to have effect as from the date on which this Directive is applied by the Member States and this shall be without prejudice to the obligations of the Member States concerning the deadlines laid down in Article 37 of that Directive.

4. References to Directive 90/531/EEC shall be construed as referring to this Directive.

The national law

7. Directives 92/50 and 93/38 were transposed into Finnish law by the Laki julkisista hankinnoista 1505/1992 (Law on public procurement) as amended by Laws 1523/1994 and 725/1995 (hereinafter Law

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1505/1992) and by Regulations 243/1995 on supply, service and works contracts exceeding the threshold values and 567/1994 on contracts of entities operating in the water, energy, transport and telecommunications sectors exceeding the threshold value, as amended by Regulation 244/1995 (hereinafter Regulation 567/1994).

8. Under Paragraph 4(1) of Regulation 243/1995, that regulation does not concern contracts to which Regulation 567/1994 applies. Under Paragraph 1(10) of Regulation 567/1994, that regulation does not concern contracts to which Regulation 243/1995 applies.

9. Paragraph 43 of Regulation 243/1995 provides that:

1. The contracting entity must approve either the tender which is economically the most advantageous overall according to the assessment criteria for the contract or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, completion date, costs of use, quality, life cycle costs, aesthetic or functional characteristics, technical merit, maintenance service, reliability of delivery, technical assistance and environmental questions.

...

10. Paragraph 21(1) of Regulation 567/1994 correspondingly lays down that the contracting entity must approve the tender which is economically the most advantageous overall according to the assessment criteria for the supply, service or works, or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, costs of use, life cycle costs, quality, environmental effects, aesthetic and functional characteristics, technical merit, maintenance services and technical assistance.

II - The main proceedings

The organisation of bus transport within the city of Helsinki

11. The order for reference states that Helsinki City Council decided on 27 August 1997 that tendering would gradually be introduced for the entire bus transport network within the city of Helsinki, with the first route being put out to tender starting from the autumn 1998 timetable.

12. Under the regulations on public transport in the city of Helsinki, the Joukkoliikennelautakunta (public transport committee) and subordinate thereto the Helsingin kaupungin liikennelaitos (transport department of the city of Helsinki, hereinafter the transport department) are responsible for the planning, development, implementation and other organisation and supervision of public transport in the city of Helsinki, unless provided otherwise.

13. The same regulations provide that the commercial service committee of the city of Helsinki is responsible for decisions on awarding urban public transport services in accordance with the objectives adopted by the Helsinki city council and the public transport committee. In addition, the purchasing unit of the city of Helsinki is responsible for tasks relating to contracts for urban public transport services.

14. The transport department is a commercial undertaking of the municipality which is divided operationally and economically into production units for the different modes of transport (buses, trams, metro, and tracks and property). The production unit for buses is HKL-Bussiliikenne (hereinafter HKL). The transport department also comprises a head unit, consisting of a planning unit and an administrative and economic unit. The planning unit functions as an order-placing office which prepares proposals for the public transport committee as to which routes are to be tendered for and what level of service is to be required. The production units are economically distinct from the rest of that department and have separate accounting and balance sheets.

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The tender procedure

15. By a letter of 1 September 1997 and a tender notice published in the public procurement section of the Official Journal on 4 September 1997, the purchasing unit called for tenders for operating the urban bus network within the city of Helsinki, according to routes and timetables described in more detail in a document in seven lots. The main proceedings relate to lot 6 of the invitation to tender, relating to route 62.

16. The file shows that the tender notice stated that the tender would be awarded to the undertaking whose tender was most economically advantageous overall to the city. In assessing overall economic advantage account would be taken of three types of criteria, namely the overall price of operation, the quality of the (bus) fleet and the operator's quality and environment management.

17. As regards, first of all, the overall price of operation, the most favourable tender would receive 86 points and the number of points of the other tenders would be calculated as follows: Number of points = amount of the annual operating payment of the most favourable tender divided by the amount of the tender in question and multiplied by 86.

18. Next, as regards the quality of the vehicle fleet, additional points would be awarded, in particular for the use of buses having nitrogen oxide emissions below 4g/kWh (+2.5 points/bus) or below 2g/kWh (+3.5 points/bus) and external noise below 77 dB(A) (+ 1 point/bus).

19. Lastly, in relation to the operator's quality and environment programme, additional points would be awarded for a body of certified qualitative criteria and for a certified environment programme.

20. The purchasing unit received eight tenders for lot 6, among them tenders from HKL and Swebus Finland Oy Ab (later renamed Stagecoach Finland Oy Ab and then Concordia Bus Finland Oy Ab (hereinafter Concordia)). The tender from Swebus Finland Oy Ab contained two variants, tenders A and B.

21. The commercial service committee decided on 12 February 1998 to choose HKL as transport operator for lot 6, as its tender was considered to be economically most advantageous overall. The order for reference shows that Concordia had submitted the lowest price tender, receiving 81.44 points for its A tender and 86 points for its B tender. HKL had received 85.75 points. As regards vehicle fleet, HKL had obtained the most points, 2.94 points, with Concordia obtaining 0.77 points for its A tender and -1.44 points for its B tender. The 2.94 points obtained by HKL under this head included the maximum awards for nitrogen oxide emissions below 2g/kWh as well as for an external noise level below 77 dB. Concordia had obtained no additional points in respect of nitrogen oxide emissions or noise level. HKL and Concordia had both obtained maximum points for quality and environment certification. The greatest total number of points, 92.69 points, was thus obtained by HKL. Concordia was placed second, having obtained 86.21 points for its A tender and 88.56 points for its B tender.

The procedure before the national courts

22. Concordia applied to the Kilpailuneuvosto (Competition Council, Finland) for an order setting aside the decision of the commercial service committee, founding its claims in particular on the argument that the awarding of extra points for a fleet below a certain nitrogen oxide emission limit and below a certain noise level was unfair and discriminatory. According to Concordia, extra points were allotted for the use of a type of bus which only one tenderer, namely HKL, was able in practice to offer.

23. The Kilpailuneuvosto dismissed the application. It held that the contracting entity is entitled to determine what sort of fleet it wants. Setting the criteria and determining their weight must, however, take place objectively, with the needs of the contracting entity and the quality of service being taken into account. The contracting entity must be able if necessary to give reasons for

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the appropriateness of the choice and the application of the selection criteria.

24. The Kilpailuneuvosto held that the city of Helsinki's decision to favour low-emission buses was an environment policy decision aimed at reducing the harm caused to the environment by bus traffic. That did not fall to be regarded as a procedural error. If a tenderer had been treated unfairly with regard to that criterion, intervention was possible. It held, however, that all tenderers had had the opportunity, if they so wished, of acquiring gas-driven buses. It therefore found that it had not been shown that the criterion in question discriminated against the applicant.

25. Concordia brought appeal proceedings, seeking for the decision of the Kilpailuneuvosto to be quashed. It submitted that the extra points awarded for buses with low gas and noise emissions favoured HKL, which was the only tenderer able in practice to use a fleet which could obtain such extra points. It further submitted that environmental factors which were not directly linked to the object of the tender should not be taken into account in assessing the overall advantage.

26. In its order for reference the national court states first that in order to decide whether the provisions of Regulation 243/1995 or Regulation 567/1994 are applicable in the case, it is necessary to ask whether the contract at issue in the main proceedings falls within the scope of Directive 92/50 or Directive 93/38. It notes in that regard that Annex VII to Directive 93/38 mentions, for Finland, both the public or private entities which operate bus transport in accordance with the Laki luvanvaraisesta henkilöliikenteestä tiellä (Law on licensed public transport by road) and the transport department of the city of Helsinki which operates the metro and tram network.

27. The national court then states that consideration of the case also requires the interpretation of provisions of Community legislation in order to establish whether a city, when awarding a contract of the kind at issue in the main proceedings, may take into account environmental considerations connected with the bus fleet tendered. If the claims put forward by Concordia as regards points given for environmental elements and other points were accepted, this would mean that the number of points obtained by its B tender exceeded the number of points obtained by HKL.

28. The national court observes in that connection that Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 do not mention environmental questions in the list of criteria for establishing the economically most advantageous tender. It says that in its judgments in Beentjes and Evans Medical and Macfarlan Smith the Court ruled that in selecting the most economically advantageous tender it is for the contracting authorities to choose which criteria they wish to use in awarding the contract. However, this choice could only relate to criteria designed to identify the most economically advantageous tender.

29. Lastly, the national court refers to the Commission's communication of 11 March 1998 Public Procurement in the European Communities (COM(1998) 143 final), in which it states that environmental considerations may be taken into account for determining the economically most advantageous tender overall, if the contracting entity itself benefits directly from the ecological qualities of the product.

III - Questions submitted for a preliminary ruling

30. The national court accordingly decided to stay proceedings and to ask the Court for a preliminary ruling on the following questions:

(1) Are the provisions on the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), in particular Article 2(1)(a), (2)(c) and (4), to be interpreted as meaning that that directive applies to a procedure of a city which is a contracting entity for the award of a contract concerning the operation of bus transport within the city, if

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- the city is responsible for the planning, development, implementation and other organisation and supervision of public transport in its area,

- for the above functions the city has a pubic transport committee and a city transport department subordinate thereto,

- within the city transport department there is a planning unit which acts as an ordering unit which prepares proposals for the public transport committee on which routes should be put out to tender and what level of quality of services should be required, and

- within the city transport department there are production units, economically distinct from the rest of the transport department, including a unit which provides bus transport services and takes part in tender procedures relating thereto?

(2) Are the European Community provisions on public procurement, in particular Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) or the equivalent Article 34(1) of Directive 93/38/EEC, to be interpreted as meaning that, when organising a tender procedure concerning the operation of bus transport within the city, a city which is a contracting entity may, among the criteria for awarding the contract on the basis of the economically most advantageous tender, take into account, in addition to the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet, the low nitrogen oxide emissions and low noise level of the bus fleet offered by a tendering undertaking, in a manner announced beforehand in the tender notice, such that if the nitrogen oxide emissions or noise level of the individual buses are below a certain level, extra points for the fleet may be taken into account in the comparison?

(3) If the response to the above question is affirmative, are the Community provisions on public procurement to be interpreted as meaning that the awarding of extra points for the abovementioned characteristics relating to nitrogen oxide emissions and noise level of the fleet is, however, not permitted if it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity is able to offer a bus fleet possessing the above characteristics, which in the circumstances only a few undertakings in the sector are otherwise able to offer?

IV - Analysis

The first question

31. In the first question, the national court is essentially seeking to ascertain whether Directive 93/38 should be interpreted as applying to a factual matrix of the kind described in the order for reference. The answer to this question will enable the national court to decide whether Directive 93/38 or Directive 92/50 applies in the context of the main proceedings.

Preliminary observation

32. Without going so far as to claim that the first question is inadmissible, certain parties, including Concordia and the Netherlands Government, submit that it has no bearing on the answer to the second and third questions. They say that the provisions in relation to which issues are referred to the Court in the second and third questions are effectively identical in both directives. It follows that it is not necessary to determine in advance which of the two directives applies.

33. It should be remembered that in principle it is solely for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. A refusal to rule on a question referred for a preliminary ruling by a national court is possible only when it is quite obvious that the interpretation

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of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

34. Such exceptional circumstances do not exist in the present case. On the contrary, the national court clearly establishes the connection between its first question and the main action when it says that [i]n order to decide whether the provisions of Regulation 243/1995 or 567/1994 are applicable in the case, it is necessary also to seek a preliminary ruling on whether an award of the kind at issue here falls within the scope of Directive 92/50 or 93/38.... I therefore consider that the national court's first question should be answered.

Position of the parties

35. The city of Helsinki, the Finnish Government, the Greek Government and the Austrian Government consider that Directive 93/38 applies. In essence, their position is that the transport department is part of the system of the city of Helsinki. The city of Helsinki, including its transport department, being the public authority referred to in Article 2(1)(a) of Directive 93/38, which exercises an activity referred to in Article 2(2)(c), it is that directive which is applicable.

36. They add that the terms of Article 2(4) of Directive 93/38 are not inconsistent with this point of view. They submit that that provision does not apply, as it is not to be inferred from the order for reference that other entities could freely provide the bus transport service under the same conditions as the contracting entity.

37. Both Concordia and the Commission, on the other hand, consider that Directive 92/50 is applicable. The Commission states that it appears from the order for reference that neither the city of Helsinki, its committees nor its purchasing unit operated a network providing a transport service to the public, but that it was the production units of the transport department which operated networks providing a transport service to the public. These units, which are separate from the remainder of the transport department, are not contracting entities in the contract at issue in the main action.

38. The Netherlands Government and the Swedish Government express no views on the first question.

39. The United Kingdom Government considers that it is for the national court to decide which of the two directives is applicable, having regard to Article 2 of Directive 93/38.

Appraisal

40. To answer the first question it is necessary to consider the scope of Directive 93/38.

41. Article 2(1)(a) of Directive 93/38 provides that it applies to contracting entities which are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2.

42. In the present case, it is to be inferred from the order for reference that it is the commercial service committee of the city of Helsinki which was responsible for regulating the procurement of urban public transport services. The contracting entity in the main action is therefore unquestionably a public authority within the meaning of Article 2(1)(a) of Directive 93/38.

43. For Directive 93/38 to apply, it is also necessary that the public authority exercises one of the activities referred to in paragraph 2. The relevant activity in the present case is that referred to in Article 2(2)(c), namely the operation of networks providing a service to the public in the field of transport by... bus .... The second indent of that provision goes on to state that As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

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44. It follows in my opinion that Directive 93/38 applies to a public authority which operates a network and which intends to conclude a contract relevant to that network. On the other hand, I am of the view that Directive 93/38 does not apply where a contracting entity organises a tender procedure whose purpose is that the operation itself of the network is to be carried on by other parties.

45. The Austrian Government, in submitting that Directive 93/38 applies because [t]he operation of a public bus network is undoubtedly the provision of a service in the field of transport within the meaning of Article 2(2)(c) of Directive 93/38 and in stating that [a]ccording to the order for reference... it is the operation of such a network which was the purpose of the tender procedure, appears to me to be suggesting that Directive 93/38 applies because the operation of the network was the subject of the tender procedure at issue.

46. I am however of the view that such an interpretation of the scope of Directive 93/38 cannot be justified having regard to the text of the Directive.

47. It follows from Article 2(1) of the directive that it applies only where the contracting entity exercises an activity, in this case that of the operation of networks providing a service to the public in the field of transport by... bus.... It also follows from Article 2(4) that this activity is equivalent (in the present case) to [t]he provision of bus transport services to the public.

48. The terms operation and provision indicate that it is the contracting entity itself which should be making the bus service available. It is therefore not sufficient, for a contracting entity to be regarded as operating a network, that it lays down, for example, rules as to the route to be served or the frequency of the service. It follows from the second indent of Article 2(2)(c) that the laying down of conditions on the routes to be served etc. does not amount to the operation of a network, but only to constituting or defining it. In other words, to operate a network means to run it oneself, generally using one's own workforce and buses.

49. It therefore follows that the directive applies if the contracting entity itself operates a bus network and, in the course of exercising this activity, initiates a tender procedure, for example in relation to bus purchases. On the other hand, where a contracting entity initiates a tender procedure whose purpose is to pass responsibility for the operation of a network to a third party, it is not exercising an activity which consists in the operation of a network.

50. This interpretation is confirmed not just by Article 2 of Directive 93/38 but also by the list of services which may be the subject of a tender procedure under that directive. Articles 15 and 16 of the directive refer to Annexes XVI A and XVI B. The services which are specified there in a detailed manner are services which are clearly intended to provide support to the activity exercised by the contracting entity as defined by Article 2(2) of the directive. One would look there in vain for a service such as the service which is the object of the invitation to tender in the present case, namely the actual operation of a bus network.

51. Furthermore, it is not in my view correct to interpret Directive 93/38 in such a wide manner that its scope includes a tender procedure whose object is the activity described in Article 2(2)(c) of the directive.

52. Directive 93/38 is an exception to the general rules, which are laid down for service contracts by Directive 92/50. This is confirmed by the judgment in Telaustria and Telefonadress, where the Court held at paragraph 33 that where a contract is covered by Directive 93/38 governing a specific sector of services, the provisions of Directive 92/50, which are intended to apply to services in general, are not applicable.

53. The Court has consistently held that exceptions must be strictly interpreted. It follows in

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the present case that the scope of Directive 93/38 should not be widely interpreted.

54. A tender procedure whose object is the taking over by a third party of the operation of a bus network is therefore not covered by Directive 93/38. It is however covered by Directive 92/50 if all its conditions apply.

55. However, this conclusion does not yet provide the answer to the first question put by the national court. As indicated above, several parties refer not to the object of the tender procedure, but to the fact that the transport department (which includes HKL) is part of the system of the city of Helsinki. They take from that that, where a route is awarded to HKL, the city of Helsinki is exercising an activity comprising the operation of a bus network within the meaning of Article 2(2)(c) of Directive 93/38, so that that directive is applicable.

56. This argument is also incorrect.

57. It should first be recorded that the question asked by the national court relates to the directive applicable to a specific public service contract. The question therefore clearly assumes that a public service is in issue, and it would be inappropriate to question this assumption.

58. It is essential to the concept of a public service contract, whether it be regulated by Directive 92/50 or Directive 93/38, that it consists in a contract for pecuniary interest concluded in writing between a contracting entity (or a contracting authority), on the one hand, and a service provider, on the other.

59. It follows that unless this essential characteristic of a service contract is to be disregarded, HKL must be regarded as a separate entity from the city of Helsinki. It would be contrary to the notion of a public contract to treat the city of Helsinki as being at one and the same time the contracting entity and the service provider.

60. It follows from that that if the city of Helsinki is, through its commercial service committee, the contracting entity, HKL can by definition not be the contracting entity. Similarly, if HKL is the service provider operating the bus network, the city of Helsinki cannot by definition do the same. As the city of Helsinki is not exercising an activity which consists in the operation of a bus network, as Article 2(2)(c) of Directive 93/38 requires, the conclusion must be that that directive does not apply.

61. I therefore propose that the answer given to the first question be that the provisions concerning the scope of Directive 93/38, in particular Article 2(1)(a), (2)(c) and (4), are not to be interpreted as meaning that that directive applies to the procedure of a municipality which is a contracting entity for the award of a contract concerning the operation of an urban bus transport service, if

- the municipality is responsible for the planning, development, implementation and other organisation and supervision of public transport in its area,

- for the above functions the municipality has a public transport committee and a city transport department subordinate thereto,

- within the municipal transport department there is a planning unit which acts as an ordering unit which prepares proposals for the public transport committee on which routes should be put out to tender and what level of quality of services should be required, and

- within the municipal transport department there are production units, economically distinct from the rest of the transport department, including a unit which provides bus transport services and takes part in tender procedures relating thereto.

The second question

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62. By its second question the national court is essentially seeking to ascertain whether Article 36(1) of Directive 92/50 or Article 34(1) of Directive 93/38 allow there to be included among the criteria for awarding a contract on the basis of the economically most advantageous tender, the reduction of nitrogen oxide emissions or of noise levels in a manner such that if the nitrogen oxide emissions or noise level of certain buses are below a certain level, extra points may be taken into account in the comparison.

Position of the parties

63. Concordia submits that in a public contract tender procedure the criteria on which the award is based must always be economic in nature, in accordance with the text of Directive 92/50. If the aim of the contracting authority were to satisfy environmental or other considerations, it would be necessary to utilise other procedures than those relating to the public tender procedure.

64. By contrast, all the other parties submit that it is permissible to include environmental criteria in the criteria for the award of a contract. They refer in particular to the fact that Article 36(1) of Directive 92/50 and Article 34(1) of Directive 93/38 only list by way of example certain matters which the contracting entity may take into account when awarding a contract, to Article 6 EC which requires the integration of environmental protection policy into the other Community policies, and to the Court's judgments in Beentjes and Evans Medical and Macfarlan Smith referred to above, which allow a contracting entity to select the criteria to be taken into account when considering the tenders submitted to it.

65. The different submissions do not however all found on the same considerations.

66. The city of Helsinki, supported by the Finnish Government, maintains that it is in its interests and those of its inhabitants that noxious emissions are limited as much as possible. The city of Helsinki, which is responsible for the protection of the environment within its area, would benefit from direct savings, particularly in the medico-social sector, representing approximately 50% of its total budget. Factors which contribute, even in a minor way, to the improvement of the overall state of health of the population would allow a rapid reduction of costs to a significant extent.

67. The Greek Government adds that the discretion given to the national authorities in the choice of criteria for the award of public contracts presupposes that this choice is not arbitrary and that the criteria taken into account are not contrary to the provisions of the Treaty, in particular its fundamental principles such as the right of establishment, the freedom to provide services and the prohibition of discrimination on grounds of nationality.

68. The Netherlands Government maintains that the criteria for award operated by the contracting authority must always have an economic dimension. It considers however that this requirement is met in the present case, as the city of Helsinki is both the contracting authority and the organisation having financial responsibility for environmental policy.

69. The Austrian Government maintains that the directives relating to public procurement procedures impose two essential restrictions on the selection of award criteria. First, the criteria chosen by the contracting entity must relate to the contract to be tendered and allow the offer which is economically most advantageous for the contracting entity to be ascertained. Secondly, the identified criteria must be capable of providing an objective basis for the discretion given to the contracting entity and must not include matters which would result in any choice being arbitrary.

70. The Austrian Government also submits that the criteria for award must relate directly to the subject of the contract, have objectively measurable effects and be economically quantifiable.

71. Similarly, the Swedish Government maintains that the choice available to the contracting entity is limited to the extent that the criteria for award must relate to the contract to be awarded and

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be appropriate to identify the economically most advantageous tender. It adds that these criteria must also comply with the provisions of the Treaty on the free movement of goods and services.

72. According to the United Kingdom Government, the provisions of Article 36(1) of Directive 92/50 and Article 34(1) of Directive 93/38 should be interpreted to mean that in the conduct of a tender procedure for the operation of bus transport services, a contracting authority or a contracting entity may, among other criteria for the award of the contract, take into account environmental criteria in assessing the economically most advantageous tender, provided that those criteria permit a comparison to be made between all tenders, relate to the services required and have been published in advance.

73. Lastly, the Commission submits that the criteria for award that may be taken into account in identifying the economically most advantageous tender must meet four conditions. The criteria must

- be objective,

- be applicable to all tenders,

- relate strictly to the purpose of the contract, and

- entail an economic advantage to the direct benefit of the contracting authority.

Appraisal

74. In order to answer the second question, the text of Directive 92/50, which in my opinion is applicable in the present case, should first be considered.

75. Article 36(1)(a) of Directive 92/50 provides that... the criteria on which the contracting authority shall base the award of contracts may be... where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date or period of completion, price.

76. The city of Helsinki submits that the criteria relating to nitrogen oxide emissions and noise levels fall within the categories of quality and technical merit referred to expressly in the abovementioned provisions. In the text of its proposed answer to the second question, the Commission refers to certain characteristics of the fleet.

77. In my opinion, such an interpretation is entirely correct. The emissions criteria are irretrievably linked to the configuration of the fleet with which the city of Helsinki wishes to see the bus service operated. A contracting authority cannot be prohibited from requiring the use of a fleet having state of the art characteristics, even if it gives prime importance to one of the qualities of such a fleet, namely its characteristics in relation to gas emissions and engine noise.

78. More generally speaking, it may be observed that if the city of Helsinki had specifically stated in the call for tenders that the network should be operated exclusively by gas-driven buses, this would have been a technical specification relating to the characteristics of the services which are covered by the contract within the meaning of the Commission's Green Paper of 1996, referred to by the Commission in its submissions.

79. The Commission also refers to its Communication Public Procurement in the European Union, where it states that:

In general, any administration which so wishes can, in defining the goods or services which it intends to purchase, choose the products and services which correspond with its pre-occupations for the protection of the environment. The measures taken must, of course comply with the rules and principles of the Treaty, particularly that of non-discrimination.

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80. The greater includes the lesser. If the contracting authority may, in the context of award criteria, require on its own initiative that buses must be gas-driven, it may also give a certain number of points to undertakings able to operate the service using buses which meet particularly strict pollution requirements, and which only buses of this type are capable of complying with.

81. It is my opinion that the issue may be answered on the basis of the foregoing points alone.

82. If, however, the Court considers that the criteria at issue in the present case should be considered in an abstract manner, that is to say independently of their technical foundations, it is my opinion that it may be inferred from Article 36(1)(a) of Directive 92/50, and in particular from the list of examples provided in it, that the directives do not necessarily prohibit the use of an environmental criterion, such as the criterion in the present case, in awarding a public contract. In order to determine the extent to which it is permissible to take such a criterion into account, it is none the less useful to consider, as an alternative approach, the Court's case-law relating to these and similar provisions.

83. The two judgments most often referred to are those in Beentjes and Evans Medical and Macfarlan Smith referred to above.

84. In the Beentjes judgment, when analysing Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, the Court had to rule on the exclusion of a tenderer on the grounds that the tenderer was not in a position to employ long-term unemployed persons. It found first of all that such a condition has no relation to the checking of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability or to the criteria for the award of contracts referred to in Article 29 of the directive.

85. Nevertheless, the Court did not find the condition incompatible with Directive 71/305. It continued by saying that [i]t follows from the judgment of 9 July 1987 [CEI and Bellini] that in order to be compatible with the directive such a condition must comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services.

86. The Court further stated that [e]ven if the criteria considered above are not in themselves incompatible with the directive, they must be applied in conformity with all the procedural rules laid down in the directive, in particular the rules on advertising.

87. Next, in its judgment in the Evans Medical and Macfarlan Smith case, the Court, referring to the Beentjes judgment, held that in selecting the most economically advantageous tender contracting authorities may choose the criteria which they intend to apply, but their choice may relate only to criteria designed to identify the most economically advantageous tender. In the Court's opinion it followed that reliability of supplies is one of the criteria which may be taken into account under Article 25 of [Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Council Directive 88/295/EEC of 22 March 1988] in order to determine the most economically advantageous tender

88. As well as these two judgments, it is worth recalling in the context of this analysis the recent judgment of 26 September 2000 in the case of Commission v France. In this judgment, the Court held that:

Under Article 30(1) of Directive 93/37, the criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit.

None the less, that provision does not preclude all possibility for the contracting authorities

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to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, Beentjes, paragraph 29).

Furthermore, even if such a criterion is not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising (see, to that effect, on Directive 71/305, Beentjes, paragraph 31). It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence (see, to that effect, Beentjes, paragraph 36).

89. Even though these judgments concern the directives relating to public works contracts (Beentjes and Commission v France) and public supply contracts (Evans Medical and Macfarlan Smith), the Court's reasoning is undoubtedly applicable to the directives relating to public service contracts.

90. As the Court had already held in its judgment in Evans Medical and Macfarlan Smith, [the Beentjes judgment], which concerns public works contracts, also applies to public service contracts in so far as there is no difference in this respect between the two types of contract. The same absence of difference clearly exists for public service contracts.

91. As regards the application of this case-law to the present matter, I am of the view that it may unquestionably be inferred from the abovementioned judgments that an environmental criterion may be included in the criteria for the award of a public service contract. The point common to the Beentjes and Commission v France judgments is that the Court recognised in each that it was permissible to include a criterion whose purpose was to serve the public interest among the criteria for the award of a public contract. In the Beentjes judgment the criterion in question was the obligation of a tenderer to employ long-term unemployed persons, and in Commission v France a condition linked to a local campaign against unemployment.

92. It is beyond dispute that the protection of the environment is likewise a criterion in the public interest. Reference need only be had to Article 6 EC, which states [e]nvironmental protection must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.

93. The notion that criteria which exist for the public benefit may be included in the criteria for the award of a public contract also seems to be one that is logical, indeed clearly logical. As public authorities have by definition a duty to serve the public interest, that interest must be able to guide them when they enter into a public contract.

94. That said, there are of course limits on the extent to which a criterion of public interest, such as one relating to the environment, may be included in the criteria for the award of a contract.

95. I infer two limits from the Beentjes and Commission v France judgments.

96. First, the criterion must be consistent with all the fundamental principles of Community law, and in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services.

97. Secondly, the criterion must be applied in conformity with all the procedural rules laid down in the relevant directive, in particular the rules on advertising. It follows that, as the Court held in its judgments in the Beentjes and Commission v France cases, the award criterion must be expressly mentioned in the contract notice so that contractors may become aware of its existence.

98. In my opinion, these two requirements are equally as applicable to the inclusion of an environmental criterion among the criteria for the award of a contract. The necessity for these restrictions

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is unquestionable in that the first prevents there being any failure to comply with the fundamental principles of Community law in the guise of serving the public interest, and the second ensures equality of treatment between all tenderers, a matter which lies at the heart of the rules relating to public contracts. Subject to these two points, in my opinion there is nothing which prohibits the taking into account of a criterion which serves the general interest, such as an environmental criterion.

99. However, several parties have specified further conditions which they suggest require to be met in order for an environmental criterion to be included in the award criteria for a public contract.

100. Some parties have stressed that the environmental criterion must be economic in nature. The Netherlands Government submits that in order to be valid the criterion must have an economic aspect. The Austrian Government claims that the criterion must demonstrate economic benefits that can be measured objectively. The Commission submits that the criterion must have a direct economic benefit for the contracting authority.

101. While I can agree with the proposition supported by several parties that in the present case the environmental criterion offered an economic benefit for the city of Helsinki, it is my opinion that an environmental criterion may be included in the award criteria without it being necessary to prove that it is economic in nature or offers an economic benefit, direct or indirect, for the contracting authority.

102. Admittedly, in its judgment in the Evans Medical and Macfarlan Smith case, the Court held that in selecting the most economically advantageous tender contracting authorities may choose the criteria which they intend to apply, but their choice may relate only to criteria designed to identify the most economically advantageous tender.

103. In my opinion, it does not follow from the fact that the contracting entity requires to identify the most economically advantageous tender that every criterion must of necessity be economic in nature or have an economic aspect.

104. If one refers to Article 36(1) of Directive 92/50, it will be seen that the contracting authority may, for example, include criteria relating to the aesthetic characteristics of a product. Unless the word economic were to be interpreted extremely widely, I am of the view that it is difficult to treat an aesthetic criterion as being economic in nature. It is even harder to see how it could have an economic benefit for a contracting authority.

105. Furthermore, at the very latest since the discussions on the Kyoto protocol, everyone is aware that the protection of the environment is a matter of considerable importance which concerns all the planet. I therefore do not consider it justifiable to permit an environmental criterion only where it offers an economic benefit for the relevant contracting entity. A criterion of this kind may be equally justifiable if it offers a benefit to other parties than the contracting entity or to the environment in general.

106. Lastly, the inappropriateness of such a requirement, as proposed in particular by the Commission, is in my opinion also confirmed by an answer given by the latter at the hearing. When asked how the fact that, as in the present case, extra points had been given to tenderers who were able to offer a service using low-floor buses conferred a direct economic benefit on the city of Helsinki, the Commission answered that this would increase the contracting entity's receipts as disabled and elderly people would be able to use buses more easily.

107. Putting aside the point that such a benefit would be at best indirect, it appears to me to be to be more appropriate to consider the encouraging of the use of low-floor buses as representing a service provided to certain sections of society rather than as a means of increasing the contracting

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entity's receipts.

108. The Austrian and Swedish Governments, as well as the Commission, also submit that the criterion must be linked to the subject-matter of the contract. For the Austrian Government, that means that the criterion must relate to the service to be provided or the manner in which it is to be carried out. The Commission goes so far as to say that the criterion must be strictly linked to the subject-matter of the contract.

109. In the present case, this criterion is clearly met.

110. One may however question whether it is necessary to impose such a requirement. In its judgment in the Commission v France case referred to above, the Court held that an award criterion relating to employment, linked to a local campaign against unemployment, was a valid criterion, subject to the two limitations referred to above. The same applied in the Beentjes judgment, where the Court held that a condition relating to long-term unemployed was acceptable.

111. Both these cases involved a works contract. These works could equally well have been carried out by persons who were not unemployed. The relevant requirement was therefore not linked to the subject of the contract, that is to say to the nature of the works to be carried out.

112. I conclude from that that it cannot be required that an environmental criterion must, unlike an employment-related criterion, be linked, or strictly linked, to the subject of the contract.

113. Lastly, the Commission states that the criterion must be objective and apply to all tenders.

114. Although it may be questioned how a criterion which relates to the aesthetic characteristics of a tender, which Article 36 of Directive 92/50 permits, may be objectively defined, it is necessary only to observe that in the present case the criteria relating to nitrogen oxide emissions and to noise levels clearly meet this requirement.

115. They are quantifiable or measurable and leave no room for a subjective margin of appreciation on the part of the contracting authority.

116. As regards the requirement that the criterion must apply to all tenders, this is indissociable from the Court's first requirement, according to which the award criterion must be consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services.

117. It follows from all the above that a criterion linked to the protection of the environment may be included in the award criteria for a contract, provided that the criterion is consistent with the fundamental principles of Community law, in particular the principle of non-discrimination and the four freedoms, and that it is applied in conformity with all the procedural rules laid down in the directive, in particular the rules on advertising.

118. Before concluding my discussion of this question, it is worth briefly considering an analysis common to the Netherlands and Austrian Governments and the Commission which relates to the question of whether criteria touching on the quality and environment programmes of the contractors may be taken into account in the evaluation of the economically most advantageous tender.

119. In my opinion, this question goes beyond the terms of the reference for a preliminary ruling in this case.

120. Reference should be made in this regard to the question as put by the national court. It asks whether the city of Helsinki... may, among the criteria for awarding the contract on the basis of the economically most advantageous tender, take into account, in addition to the tender price and the quality and environment programme of the transport operator and various other characteristics

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of the bus fleet, [also] the low nitrogen oxide emissions and low noise level....

121. It is therefore clear that the national court is not asking the Court about the acceptability as award criteria of the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet but only about the acceptability of the criterion relating to the low nitrogen oxide emissions and low noise level.

122. Furthermore, the national court states that HKL and Concordia were awarded an equal number of points for the criterion relating to the quality and environment programme. Whether this requirement is permissible is thus not relevant to the outcome of the main action and I therefore do not propose to address it.

123. In light of these conclusions, I propose that the national court's question be answered by saying that the Community legislation on public procurement, in particular Article 36(1) of Directive 92/50, is to be interpreted as meaning that a municipality which organises, as the contracting entity, a tender procedure concerning the operation of an urban bus transport service may include, among the criteria for awarding the contract on the basis of the economically most advantageous tender, a criterion such as the one in the present case, relating to low nitrogen oxide emissions and low noise levels. That criterion must be applied in conformity with the fundamental principles of Community law, in particular the principle of non-discrimination and the four freedoms, and with all the procedural rules laid down in the relevant directive, in particular the rules on advertising.

The third question

124. By its third question the national court asks whether the criterion relating to the environment is none the less not permitted if it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity is able to offer a bus fleet possessing the required characteristics, which in the circumstances only a few undertakings in the sector are otherwise able to offer.

Position of the parties

125. Concordia submits that the possibility of using buses powered by natural gas, which were in practice the only ones capable of meeting the additional criteria relating to low nitrogen oxide emissions and low noise levels, was a very limited one. At the time of the tender procedure, there was in all Finland only one service station which supplied natural gas. The capacity of the service station, which was not permanently installed, allowed for the refuelling of approximately 15 gas-driven buses. Just before the tender procedure in this case, HKL had ordered 11 new gas-driven buses. This meant that the service station's capacity was fully utilised and that no other vehicles could be supplied. Furthermore, the only existing service station was not permanently installed. According to Concordia, it would have been absurd to suppose that operators would invest millions in purchasing new vehicles which they could not use, or at least whose use would have been very uncertain.

126. From that, Concordia concludes that HKL was the only tenderer able in practice to offer gas-driven buses. It suggests that in setting more rigorous standards than those laid down by Euro 2, the true purpose of the tender procedure was to favour the production unit belonging to the contracting entity. Concordia therefore proposes that the third question be answered by stating that the awarding of points for low nitrogen oxide emissions and a reduction in noise levels cannot be allowed, at least where not all operators in the sector in question are able, even in theory, to offer services capable of meeting this award criterion.

127. The city of Helsinki first observes that it was under no obligation to put its bus transport operations out to tender, either under Community or Finnish law. Given that a tender procedure inevitably generates additional work and costs, there would have been no reason for it to instigate

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this procedure if it had known that only one undertaking, owned by it, was able to offer a fleet which met the relevant conditions or if it had truly wished to retain the operation of these services for itself.

128. The city of Helsinki further submits that it is HKL which currently is the greatest loser of awards and that it is Concordia which has expanded its market share in Helsinki the most. The city of Helsinki also states that in spring 1999 Concordia won the tender relating to bus service number 15, which required the use of gas-driven buses. This was conformed by Concordia at the hearing. The latter by its own admission confirmed that all the tenderers were able at any time, should they wished, to acquire gas-driven buses.

129. The Finnish Government considers that the evaluation of the objectivity of the criteria laid down in the tender procedure in this case is ultimately a question for the national court.

130. The Greek Government submits that the third question should be answered in the affirmative.

131. The Netherlands Government states that it is clear from the Court's case-law that the award criteria must be objective and that there may be no discrimination between the tenderers.

132. However, at paragraphs 32 and 33 of its judgment in the Fracasso and Leitschutz case, the Court held that where at the conclusion of a tender procedure there is only one tender remaining, the contracting authority is not required to award the contract to the only tenderer judged to be suitable. It does not therefore follow that if the application of the award criteria results in there being only one remaining tenderer, those criteria are invalid.

133. According to the Netherlands Government, it is for the national court to determine whether effective competition was jeopardised in the main proceedings.

134. The Austrian Government submits that the use of the award criteria at issue in the main proceedings does not, in principle, give rise to any problem, even where, as in the present case, only a relatively limited number of tenderers are able to meet them.

135. However, the Austrian Government draws attention to the 10th recital of European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, in terms of which contracting authorities may seek or accept advice which may be used in the preparation of specifications for a specific procurement, provided that such advice does not have the effect of precluding competition.

136. According to the Austrian Government, it may be inferred from this recital, as also from the principles underlying the directives relating to public procurement, that undertakings which are directly or indirectly involved in the preparation of a tender procedure, and undertakings connected with them where there is a relationship of control between them, must be excluded from the process in so far as their participation would prevent competition.

137. The protection of the principle of free and fair competition and of equality of treatment for all applicants and tenderers within the meaning of the directives relating to public procurement could be compromised if there was an involvement, direct or indirect, of a competitor in the tender process in its preparation.

138. The Austrian Government concludes from that that in the main proceedings, if the organisational links between the city of Helsinki and HKL have the result that the latter might have an influence, in whatever form, on the definition of the project underlying the tender procedure and to the extent that the involvement of HKL in the development of the tender process would prevent competition, HKL should be excluded from participating.

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139. The Swedish Government submits that the taking into account of the emissions criterion in the manner in which this was done in the main proceedings had the result that the tenderer who had gas- or alcohol-driven buses available to it was rewarded. According to the Swedish Government, there was however nothing to prevent the other tenderers from acquiring such buses. These vehicles have been available in the market-place for a number of years.

140. The Swedish Government considers that the giving of extra points for low emissions of nitrogen oxide and low noise levels does not amount to direct discrimination, but applies without distinction. Furthermore, this enhancement does not appear indirectly discriminatory in the sense that it would necessarily have had the result of favouring HKL. The Swedish Government accordingly concludes that this enhancement is not an obstacle to the free movement of goods and services or to the freedom of establishment.

141. According to the United Kingdom Government, the directive does not prohibit the award of extra points in evaluating offers when it is known beforehand that there are potentially few undertakings able to obtain these extra points, where the contracting authority made it known at the tender notice stage that there was a possibility of obtaining these additional points.

142. The Commission notes that according to the Court's case-law, compliance with the principle of equality of treatment lies at the heart of the directives relating to public contracts. This means that the conditions of competition between the tenderers must not be distorted.

143. Bearing in mind, however, the differences of view between the parties to the main action, the Commission feels that it is unable to determine whether the criteria applying in the present case contravene the principle of equality of treatment. It would therefore be a matter for the national court to rule on this question and to establish on the basis of objective, relevant and consistent evidence whether the said criteria were included exclusively for the purpose of selecting the undertaking to whom the contract was awarded or were determined for that purpose.

Appraisal

144. The national court asks whether the awarding of points for the characteristics relating to nitrogen oxide emissions and noise levels of the fleet is not permitted if it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity is able to offer a bus fleet possessing the above characteristics, which in the circumstances only a few undertakings in the sector are otherwise able to offer.

145. This question effectively asks whether, in these circumstances, the principle of equality of treatment is contravened. I shall consider in turn whether this principle is contravened:

- where a single undertaking is able to meet the criterion in the case in question;

- where, in addition, the relevant undertaking belongs to the contracting authority.

146. As far as the first point is concerned, I agree with the Swedish Government that in circumstances such as those arising in the main action there is neither direct nor indirect discrimination between the various potential tenderers.

147. The relevant criterion applied without distinction to all tenders and, it appears, was advertised in accordance with the requirements of the directive.

148. In order to decide that the criterion in question had given rise to indirect discrimination towards Concordia, it would not be sufficient to find that that company had been treated differently from HKL, in the sense that the latter had been given points which had not been given to Concordia.

149. It follows from settled case-law that the principle of equality of treatment requires that comparable situations are not treated differently and that different situations are not treated

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similarly, unless such a difference in treatment can be justified objectively.

150. Without prejudice to the findings of the national court, it appears to me in the present case that the two undertakings were treated differently only because they were not in identical situations. One of them was able to offer the fleet requested and the other was not.

151. Finally, the specification of the criterion which gave rise to a difference in the awarding of points could only be considered to reveal the existence of discriminatory tactics if it were to appear that this criterion could not be justified objectively, having regard to the characteristics of the contract and the needs of the contracting authority.

152. As was seen above, a contracting authority cannot be prevented from requiring that the service in question be provided using a fleet which possesses the best available technical specifications.

153. To reach a contrary view would mean requiring the contracting authority to lay down the criteria having regard to the potential tenderers. As each call for tenders contains a whole series of criteria, the contracting authority would then require to establish those which could be provided by only one tenderer and remove them from his draft call for tenders. It could be that one tenderer was unable to meet one criterion, while another tenderer could not meet a different one.

154. Not only would such an approach result in a form of levelling down of the award criteria in eliminating all those which were truly selective, it would equally strip all content from the right recognised by the Court for the contracting authority to select the criteria for awarding the contract as it chooses. I would observe on further consideration that laying down criteria having regard to the potential tenderers would in my view result in a denial of the principle of equality of treatment. If a contracting authority were to remove a criterion from the tender notice on the basis that one or more tenderers were unable to meet it, the authority would in so doing disadvantage a tenderer who was able to comply, by neutralising the advantage he could have made use of.

155. My conclusion on the first point is therefore that the mere fact of including in a tender notice a criterion which can be met by only one tenderer does not contravene the principle of equality.

156. Is the position different when this tenderer is, like HKL, an undertaking which belongs to the contracting authority?

157. In this case there are two alternatives:

- either, HKL does not have any decision-making power or powers of economic and financial management of its own in relation to the contracting authority; in which case, one would find oneself in a situation to which the directive did not apply as HKL would not be a third party with whom the city of Helsinki was capable of contracting,

- or, HKL is in fact independent of the city of Helsinki, as I have assumed it to be in my answer to the first question; in which case the fact that HKL was the department operating bus transport belonging to the city which is the contracting entity would not in itself cause a difficulty in relation to the principle of equality of treatment, unless it could be shown that the inclusion of the criterion which is the subject of the dispute had no reason other than the favouring of HKL.

158. This is a question of pure fact, to be decided by the national court.

159. In this regard it is worth pausing to consider the arguments of the Austrian Government relating to the participation of a tenderer in the preparation of a tender notice.

160. I must agree entirely with that Government's opinion that a participation of this kind would be illegal as it would wholly negate the principle of the equality of treatment of all tenderers. In this context, one might refer to the judgment in the case of Ismeri Europa v Court of Auditors, where the Court treated the fact that a person who helps to evaluate and select bids for a public

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contract has this contract awarded to him as a confusion of interests, adding that such a fact was indicative of a serious malfunction of the institution or body concerned (paragraph 47).

161. From the point of view of the equality of treatment of all the tenderers, it seems to me that a real participation in the preparation of a tender notice by the tenderer to whom the contract is awarded is almost as serious as the contributing by that tenderer to the evaluation and selection of offers.

162. However, there is in the order for reference no indication that HKL had actually participated in the preparation of the tender notice in the case in question. The city of Helsinki stated at the hearing that such participation did not take place. Similarly, the national court asks no question in this regard. I am therefore of the view that it is not appropriate to give a formal answer on this point.

163. As a result, I propose answering the third question by saying that the right of a contracting entity to include in a tender notice, among the criteria for awarding a contract concerning the operation of an urban bus transport service, characteristics relating to nitrogen oxide emissions and noise levels of the fleet used, such as those at issue in the main proceedings, is not called into question by the fact that the entity's own transport undertaking is one of the few undertakings in the sector able to offer a bus fleet fulfilling those conditions, unless it is shown that this criterion was introduced with the sole aim of favouring that undertaking.

V - Conclusion

164. For the foregoing reasons, I suggest that the Court answer the questions submitted by the national court as follows:

(1) The provisions concerning the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, in particular Article 2(1)(a), (2)(c) and (4), are to be interpreted as meaning that that directive does not apply to a procedure such as that at issue in the main proceedings.

(2) The Community legislation on public procurement, in particular Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, is to be interpreted as meaning that a municipality which organises, as the contracting entity, a tender procedure concerning the operation of an urban bus transport service may include, among the criteria for awarding the contract on the basis of the economically most advantageous tender, a criterion such as the one in the present case relating to low nitrogen oxide emissions and low noise levels. That criterion must be applied in conformity with the fundamental principles of Community law, in particular the principle of non-discrimination and the four freedoms, and with all the procedural rules laid down in the relevant directive, in particular the rules on advertising.

(3) The right of a contracting entity to include in a tender notice, among the criteria for awarding a contract concerning the operation of an urban bus transport service, characteristics relating to nitrogen oxide emissions and noise levels of the fleet used, such as those at issue in the main proceedings, is not called into question by the fact that the entity's own transport undertaking is one of the few undertakings in the sector able to offer a bus fleet fulfilling these conditions, unless it is shown that this criterion was introduced with the sole aim of favouring that undertaking.

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Opinion of Mr Advocate General Alber delivered on 24 October 2002.
Commission of the European Communities v CAS Succhi di Frutta SpA.
Appeal.
Case C-496/99 P.

I - Introduction

1 In 1996, the Commission initiated a tendering procedure for the supply of fruit juice earmarked for consignment as aid to the Caucasus. As payment for such supply, the successful tenderer would, instead of money, receive apples held in intervention stocks following their withdrawal from the market; in that procedure, tenderers were required to state the quantity they would accept as payment. When the applicant's tender was rejected however, it did not challenge that outcome. Once the lots had been awarded to other firms, the Commission notified the intervention agency that peaches could be withdrawn instead of apples, a modification that was subsequently extended to other types of fruit, and for that purpose coefficients of equivalence by weight were established for the individual types of fruit. It was not until those coefficients of equivalence were amended by a further Commission decision that the applicant brought an action against the Commission. The Court of First Instance granted the annulment requested by the applicant. The Commission as defendant in that case has lodged the present appeal against that judgment.

2 The Commission bases its appeal on a total of five pleas in law. In terms of admissibility of the application, it claims that C.A.S. Succhi di Frutta SpA (hereinafter: the applicant) had neither a right of action nor a legitimate interest in invoking the protection of the courts, and in terms of substance, it criticises the conclusion of the Court of First Instance that a new invitation to tender should have been issued, and complains that errors were committed by the Court of First Instance as regards determining the quantity of apples available in the Community at the material time (for further detail in that context, see point 18).

II - Relevant legislation and facts

3 By Regulation (EC) No 228/96 of 7 February 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, (1) the Commission initiated a tendering procedure. In that connection, Article 1 of that regulation provides: `A tendering procedure is hereby initiated for the supply of a maximum of 1 000 tonnes of fruit juice, 1 000 tonnes of concentrated fruit juice and 1 000 tonnes of fruit jams as indicated in Annex I, in accordance with the provisions of Regulation (EC) No 2009/95, (2) and in particular Article 2(2) thereof and the specific provisions of the present Regulation.' Article 2(2) of Regulation No 2009/95 provides: `The invitation to tender may relate to the quantity of products to be removed physically from intervention stocks as payment for the supply of processed products from the same group of products to a delivery stage to be determined in the notice of invitation to tender.'

4 In Annex I, Regulation No 228/96 indicated, for each of the six lots in respect of which tenders were invited, first, the characteristics of the product to be supplied and, secondly, the product which the successful tenderers were to take from the intervention agencies in payment for the relevant supply. The product to be withdrawn as regards Lots 1 and 2 was apples.

5 Article 3(2) of Regulation No 228/96 provides: `The offer of the tenderer shall indicate, for each lot, the total quantity of fruit, withdrawn from the market in accordance with Articles 15 and 15A of Regulation (EEC) No 1035/72, which he undertakes:

(a) to take over from the producer organisations concerned, in payment of all supply costs to the delivery stage defined in Article 2; ...

...'.

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6 Following the submission of a number of tenders within the period prescribed in Regulation No 228/96, Trento Frutta SpA and Loma GmbH were awarded the lots in question.

7 The applicant had participated in the tendering procedure for Lots 1 and 2. It is apparent from the documents in the case-file that its tenders were not accepted since it had proposed to withdraw, in payment for the supply of its products, a quantity of apples much greater than the quantities proposed by the two successful tenderers in their respective offers. It is also apparent from the documents in the case-file that Trento Frutta SpA had stated in its tenders that it was prepared to take peaches should there be a shortage of apples, a possibility that had not been mentioned in the invitation to tender.

8 By letter of 6 March 1996, the Commission informed the Azienda di Stato per gli Interventi nel Mercato Agricolo (AIMA), the Italian intervention agency, that the tender submitted by Trento Frutta SpA had been accepted. The Commission pointed out that, depending on the lot in question, that successful tenderer would receive as payment a given quantity of apples or, alternatively, peaches, or of oranges or, alternatively, apples or peaches.

9 By decision of 14 June 1996, adopted after the award, the Commission allowed the successful tenderers to take delivery of - instead of apples or oranges - `other products withdrawn from the markets, in predetermined quantities reflecting the processing equivalence of the products in question'. According to the second recital, that decision was adopted because, since the award, the quantities of apples and oranges withdrawn from the market had been negligible in comparison with the quantities required, although the withdrawal season was virtually over. The substitute products referred to in the decision were peaches and apricots and the coefficient of equivalence between peaches and apples was fixed at 1 to 1. Moreover, by a further decision of 22 July 1996, the Commission allowed the substitution of nectarines for the apples to be withdrawn by the successful tenderers in payment for the supply of their products.

10 On 26 July 1996, at a meeting organised at its request with the staff of the Commission Directorate-General for Agriculture (DG VI), the applicant presented its objections to the substitution, authorised by the Commission, of other fruit for apples and oranges. On 2 August 1996, the applicant sent to the Commission Technical Report No 94, prepared by the Dipartimento Territorio e Sistemi Agro-Forestali (Department of Land and Forestry Management) of the University of Padua, on the coefficients of economic equivalence of certain fruit to be used for processing into juice. (The fact of the matter was that, irrespective of the particular circumstances of this case, the decision to fix the coefficient of equivalence between apples and peaches at 1 to 1 had on the whole led to distortions on the peach market caused by the associated reduction in the value of peaches.) In the course of those negotiations, the Commission reviewed the arrangements for substituting other fruits for apples and oranges. It its decision of 6 September 1996 amending the decision of 14 June 1996, the Commission fixed new coefficients of equivalence between peaches on the one hand and apples and oranges on the other, which were less favourable to the successful tenderers. Under that decision, which - like the previous decision of 14 June 1996 - was addressed to Italy, France, Greece and Spain, 0.914 tonne of peaches could be substituted for 1 tonne of apples and 0.372 tonne of peaches for 1 tonne of oranges. Those new coefficients could be applied only to products which, on 6 September 1996, had not yet been withdrawn by the successful tenderers as payment for supplies.

III - Proceedings before the Court of First Instance and judgment delivered by that Court

11 By application registered at the Court of First Instance on 25 November 1996, the applicant brought an action in which it claimed that the Court should:

- annul the Commission Decision of 6 September 1996 amending the Commission Decision of 14 June

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1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan;

- order the Commission to pay the costs.

12 The Commission contended that the Court should:

- dismiss the application as inadmissible or, in the alternative, unfounded;

- order the applicant to pay the costs.

13 By judgment of 14 October 1999 (C.A.S. Succhi di Frutta v Commission [1999] ECR II-3181), the Court of First Instance held the application in Case T-191/96 to be admissible and well founded. The Commission is challenging that judgment in its appeal.

(1) Admissibility

14 According to what is stated in the judgment under appeal, the Commission put forward the following arguments in that regard:

`41 The Commission contends that the application is inadmissible on two grounds: the applicant is not directly and individually concerned by the Decision of 6 September 1996, and it has no interest in obtaining its annulment.

42 The Commission points out first of all that the applicant does not dispute the award of the lots for which it submitted a tender. It contends that the act contested in this case did not provide for the replacement of apples and oranges by peaches, but merely amended the coefficients of equivalence between those fruits, that substitution having been authorised by the Decision of 14 June 1996.

43 The fact that those coefficients of equivalence may be more or less favourable to the successful tenderers can be of individual concern only to them. The applicant's situation, in relation to the Decision of 6 September 1996, is not in any way different from that of any operator in the sector concerned, other than the successful tenderers for the contract....

44 The case-law on challenging a tendering procedure... is not relevant. The Decision of 6 September 1996 is a measure independent of the notice of invitation to tender, adopted after the award of the contract, which it does not amend in any way. The successful tenderers are indeed those tenderers who offered to accept the smallest quantity of apples as payment. In those circumstances, the fact that the applicant took part in the tendering procedure in question does not confer on it any special attribute, as compared with any other third person, in relation to the Decision of 6 September 1996.

45 Furthermore, the mere fact that a measure may exert an influence on the competitive relationships existing on the market in question is not sufficient to enable any trader in any form of competitive relationship with the addressee of the measure to be regarded as directly and individually concerned by that measure....

46 Moreover, since the contested decision amended the coefficients of equivalence fixed in the decision of 14 June 1996 along the lines the applicant wished, it had no interest in requesting the annulment of that decision since the effect of that annulment would be to reinstate the previous coefficients....

47 The Commission states, finally, that the arguments put forward by the applicant could have been directed against the Decision of 14 June 1996, which was more unfavourable to it, but which it did not challenge within the prescribed time.'

15 Citing a number of judgments, the Court of First Instance made the following findings in that regard:

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`50 The fourth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC) confers on natural or legal persons the right to bring an action for annulment against decisions addressed to them and against decisions which, although in the form of a regulation or a decision addressed to another person, are of direct and individual concern to them.

51 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned, for the purpose of that provision, only if the decision at issue affects them by reason of certain attributes peculiar to them or by reason of factual circumstances in which they are distinguished from all other persons, and by virtue of those factors distinguishes them individually in the same way as the person addressed....

52 ...

53 Moreover, the Commission does not dispute the fact that its Memorandum No 10663 of 6 March 1996, cited above [at paragraph 8], contains elements which do not correspond to the conditions laid down in the notice of invitation to tender provided for by Regulation No 228/96, in so far as it provides, inter alia, for the substitution of peaches for apples and oranges as the means of payment for the supplies from Trento Frutta. That memorandum therefore amends the arrangements for payment prescribed for the different lots.

54 The amendment of the arrangements for payment prescribed for the different lots was confirmed by the Decision of 14 June 1996 with regard to all the successful tenderers. Subsequently, the applicant asked the Commission to reconsider that decision. For that purpose, a meeting between the staff of DG VI and the applicant took place on 26 July 1996, following which the applicant sent the Commission Technical Report No 94... , [to that effect, see also point 10 above].

55 In the light of the new information brought to its attention in this way and of a reconsideration of the situation as a whole, in particular of the level of the price of peaches on the Community market recorded by its staff in mid-August 1996... , the Commission adopted the contested Decision of 6 September 1996, laying down new coefficients of equivalence between peaches, on the one hand, and apples and oranges, on the other.

56 Consequently, the contested decision must be regarded as an independent decision, taken following a request from the applicant, on the basis of new information, and it amends the conditions of the invitation to tender in that it provides, with different coefficients of equivalence, for the substitution of peaches for apples and oranges as a means of payment to the successful tenderers in spite of the contacts which took place in the interim between the parties.

57 In those circumstances, it must be held that the applicant is individually concerned by the contested decision. It is concerned, first, in its capacity as unsuccessful tenderer in so far as one of the important conditions of the invitation to tender - that concerning the means of payment for the supplies at issue - was later amended by the Commission. Such a tenderer is not individually concerned merely by the Commission decision which determines the fate, be it favourable or unfavourable, of each of the tenders submitted in answer to the notice of invitation to tender (Simmenthal v Commission, paragraph 25). It also retains an individual interest in ensuring that the conditions of the notice of invitation to tender are complied with at the stage when the award itself is implemented. The fact that the Commission did not point out in the notice of invitation to tender the possibility for successful tenderers to obtain fruit other than those prescribed as payment for their supplies denied the applicant the chance of submitting a tender different from that which it had submitted, and of thus having the same opportunity as Trento Frutta.

58 Secondly, in the particular circumstances of the case, the applicant is individually concerned by the contested decision because it was adopted after a reconsideration of the situation as a whole, undertaken at the applicant's request and in the light, in particular, of the additional information

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which it presented to the Commission.

59 ...

60 Furthermore, the argument based on the fact that the applicant did not challenge the Decision of 14 June 1996 within the prescribed time-limit must be rejected, since the contested decision cannot be regarded as a measure which is merely confirmatory of that decision.

61 The argument according to which the applicant has no interest in bringing proceedings since the sole effect of annulling the contested decision would be to reinstate the coefficients laid down in the Decision of 14 June 1996, which are less favourable to the applicant, must also be rejected.

62 It should not be presumed, for the purpose of determining whether the present action is admissible, that a judgment annulling the Decision of 6 September 1996 would have the effect merely of reviving the coefficients of equivalence laid down by the Decision of 14 June 1996, having regard, in particular, to the Commission's obligation to take the necessary measures to comply with the present judgment in accordance with Article 176 of the EC Treaty (now Article 233 EC)...

63 In any event, it is clear from paragraph 32 of Simmenthal v Commission that, even where a decision to award a contract has been fully implemented for the benefit of other competitors, a tenderer retains an interest in the annulment of such a decision; such interest consists either in the tenderer's being properly restored by the Commission to his original position or in prompting the Commission to make suitable amendments in the future to the system of invitations to tender if that system is found to be incompatible with certain legal requirements....

64 It follows that the application is admissible.'

(2) Substance

16 According to what is stated in the judgment under appeal, the Commission put forward inter alia the following arguments as regards the plea that Regulation No 228/96 as well as the principles of transparency and equal treatment had been infringed:

`71 The replacement, after the award, of the fruits to be received as payment does not in any way constitute a breach of the principles of equal treatment and transparency in that it had no influence on the course of the tendering procedure. The tenderers all competed under the same conditions, namely those laid down by Regulation No 228/96 and Annex I thereto. Since the replacement of fruit took place after the award, it did not have the slightest influence on the course of the operation.'

17 The Court of First Instance made the following findings in that regard:

`72 In connection with Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), the Court of Justice held that, when a contracting entity had laid down prescriptive requirements in the contract documents, observance of the principle of equal treatment of tenderers required that all the tenders must comply with them so as to ensure objective comparison of the tenders (judgments in Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 37; and Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 70). In addition, it has been held that the procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders (Commission v Belgium, cited above, [at] paragraph 54).

73 That case-law can be applied to this case. It thus follows that the Commission was obliged to specify clearly in the notice of invitation to tender the subject-matter and the conditions of the tendering procedure, and to comply strictly with the conditions laid down, so as to afford equality

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of opportunity to all tenderers when formulating their tenders. In particular, the Commission could not subsequently amend the conditions of the tendering procedure, and in particular those relating to the tender to be submitted, in a manner not laid down by the notice of invitation to tender itself, without offending against the principle of transparency.

74 As stated above, the contested decision allows the successful tenderers, namely Trento Frutta and Loma, to take as payment for their supplies products other than those specified in the notice of invitation to tender and, in particular, peaches instead of apples and oranges.

75 Such a substitution is not provided for in the notice of invitation to tender as set out in Regulation No 228/96. It is clear from Annex I to that regulation... that only the products listed, namely, as regards Lots Nos 1, 2 and 5, apples, and, in respect of Lots Nos 3, 4 and 6, oranges, could be withdrawn by the successful tenderers as payment for the supplies.

76 Furthermore, it is clear from Article 6(1)(e)(1) of Regulation No 2009/95 ... that tenders were to be valid only where they indicated the quantity of product requested by the tenderer as payment for the supply of processed products under the conditions laid down in the notice of invitation to tender.

77 The substitution of peaches for apples or oranges as payment for the supplies concerned, and the fixing of the coefficients of equivalence between those fruits therefore constitute a significant amendment of an essential condition of the notice of invitation to tender, namely the arrangements for payment for the products to be supplied.

78 However, contrary to what the Commission contends, none of the provisions it cites, in particular, the first and second recitals in the preamble to Regulation No 228/96 and Article 2(2) of Regulation No 1975/95 ... , authorises such a substitution, even by implication. Neither is substitution provided for in the situation, put forward by the Commission, where the quantities of fruit in the intervention stocks are insufficient....

79 Furthermore, the contested decision not only provides for the substitution of peaches for apples and oranges, but also fixes coefficients of equivalence by reference to circumstances arising after the award, namely the level of the prices of the fruit concerned on the market in mid-August 1996 although the taking into consideration of such evidence, available after the award, in order to determine the arrangements for payment applicable to the supplies at issue, is not in any way provided for in the notice of invitation to tender.

80 In addition, the information supplied by the Commission in the course of the proceedings... does not show that, at the time when the contested decision was adopted, apples were not available in the intervention stocks, so as to prevent the performance of the operations specified in the notice of invitation to tender.

81 Even if there had been such a lack of availability, at the Community level, of apples which could be withdrawn, the fact remains that it was for the Commission to lay down, in the notice of invitation to tender, the precise conditions for any substitution of other fruit for that prescribed as payment for the supplies at issue, in order to comply with the principles of transparency and equal treatment. Failing that, it was for the Commission to initiate a new tendering procedure.

82 It follows from the foregoing that the contested decision infringes the notice of invitation to tender... and also the principles of transparency and equal treatment, and that it must therefore be annulled....'

IV - Grounds of appeal

18 The Commission bases its appeal, lodged by application of 21 December 1999, on five pleas in law, alleging that:

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(1) the applicant's situation is no different from that of any other third parties which, as such, are not entitled to challenge the decision on equivalence;

(2) the Court of First Instance asserted that the Commission may not alter the terms of payment, and yet at the same time stated that the Commission ought to have issued a new invitation to tender, which would have meant changing the terms of payment of the successful tenderers which had already fulfilled their contractual obligations;

(3) the Court of First Instance misinterpreted Community law relating to the concept of individual concern when it held that the applicant was individually concerned by the contested decision;

(4) the Court of First Instance misinterpreted the concept of an interest in bringing proceedings and in particular the scope of Article 176 of the Treaty (now Article 233 EC) and consequently found that the applicant had such an interest;

(5) the Court of First Instance misinterpreted the rules relating to the withdrawal of fruit provided for by the common organisation of the market in fruit and vegetables and as a result treated as available fruit withdrawn on dates prior to that on which payment was possible.

V - Assessment

19 It is clear from examining the first and third pleas that they concern the same issue. The third plea relates to the applicant's individual concern. (3) According to case-law, persons are individually concerned for the purposes of the fourth paragraph of Article 230 EC `if [the] decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed.' (4) That definition therefore focuses on ascertaining whether the situation of the applicant distinguishes it, by virtue of certain circumstances, from any other third parties and thus corresponds to the wording of the first plea. Since, moreover, similar consideration has been given to these two pleas in the respective submissions of the parties, they will be examined together below.

(1) The first and third pleas, alleging that the applicant has no right of action in the absence of individual concern

(a) Arguments of the parties

(i) The Commission

20 The Commission takes the view that the applicant had no right of action since it was not individually concerned by the contested decision.

21 The view of the law expressed by the Court of First Instance in the judgment under appeal extends to excess the scope of the principle of equal treatment of tenderers. Although all tenderers taking part in a public tendering procedure indeed must be afforded equal treatment before the award, the legal position of the successful tenderer differs from that of the unsuccessful tenderer once the contract has been awarded. The Commission's relationship with the successful tenderer is contractual and, therefore, defined by the rules governing impossibility of performance, force majeure, etc. By contrast, there is no longer any legal relationship with unsuccessful tenderers after the award. The public procurement directives are no longer applicable after the award.

22 The Commission submits that the decision contested by the applicant, which concerns only the internal relationship with the successful tenderer, was adopted in the light of exceptional circumstances quite some time after the award. It could not, therefore, affect the applicant in a manner different to any other third party. The logical consequence of the approach taken by the Court of First Instance would have been to grant Allione Industria Alimentare SpA leave to intervene, but the

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Court expressly dismissed an application to that effect.

23 The economic impact of a decision on equivalence between apples and peaches that was too liberal and was amended following a complaint by the applicant was, of course, felt by all producers of fruit juice and not just by the unsuccessful tenderers. The Commission adds that, by its line of reasoning the Court of First Instance turns the unsuccessful tenderers into the perfect embodiment of the principle of non-discrimination without, however, taking into account the distinction between general and individual concern provided for in the fourth paragraph of Article 230 EC as regards the right to institute proceedings.

24 The Court of First Instance attached undue importance to the memorandum sent on 6 March 1996 to AIMA, which the Commission regards as non-binding. The memorandum was drafted as a result of exceptional circumstances and contains nothing more than a suggestion, not an imperative requirement, that the successful tenderers who agree to the arrangement be paid in fruit other than those originally specified in the invitation to tender.

25 The Commission further submits that it is also apparent from the case-law (5) that the fact that a decision is adopted which originates from a person's request is not such as to differentiate that person from any other. That is all the more true where the relevant decision is addressed to various Member States and it has implications only for the successful tenderers.

(ii) C.A.S. Succhi di Frutta

26 The applicant takes the view that the first plea raised in appeal is inadmissible because the Commission is merely relying on an argument that it has already put forward at first instance. (6) The third plea raised in appeal is inadmissible because the Commission is raising it for the first time before the Court of Justice although it was aware of it even at first instance. (7)

27 As far as the applicant is concerned, the Court of First Instance delivered the correct judgment. The applicant is individually concerned by the contested decision and accordingly entitled to institute proceedings. This is true not simply because it suffered an economic loss and approached the Commission about the problem but precisely because it had taken part in the tendering procedure. The applicant submits that it retains its tenderer status after the award.

28 Denying a right of action in this case to C.A.S. Succhi di Frutta, a measure which would be in keeping with the Commission's view, would have intolerable consequences. During performance of the contract, the contracting authority would be able to make fundamental changes to the invitation to tender without having to incur the risk of legal proceedings. In the extreme case of negotiated procedures, only those tenderers negotiating with the Commission would have a right of action.

29 The Court of Justice (8) and the Commission, in its statements as well as in relation to the authorities of the Member States, have always upheld the principle of the equal treatment of tenderers in the context of tendering procedures. It follows that the authorities inviting tenders have to adhere strictly to the terms of the invitation to tender which they themselves laid down and which prompted the tenderers to take part in the tendering procedure and to submit a particular tender. The principles of equal treatment and transparency cannot, on account of their importance, be applied only at the stage prior to the award.

30 Freedom to enter into a contract under civil-law rules after the award procedure presupposes compliance with all rules governing transparency prior to the award. Freedom of contract is restricted by those public procurement rules, which apply to contracting authorities. By claiming that, on account of exceptional circumstances, contracts other than those originally offered for tender may be executed, the Commission is venturing so far as to infringe itself the obligations imposed by the public procurement directives on the Member States.

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(b) Assessment

(i) Admissibility

31 In paragraphs 50 to 58 of its judgment, the Court of First Instance addresses the issue of individual concern. Thus, the third ground of appeal is admissible because the subject-matter of the proceedings before the Court of First Instance is not changed in the appeal, for the purposes of Article 113(2) of the Rules of Procedure of the Court of Justice, as a result of reliance on that ground.

32 With regard to the abovementioned argument raised at first instance and put forward by C.A.S. Succhi di Frutta in these proceedings against the admissibility of the second and fourth pleas, I intend at this juncture to make the following general points which will not be repeated later when it comes to examining the other grounds of appeal.

33 The purpose of appeals is to obtain a review of judgments of the Court of First Instance, in view of that Court's assessment of points of law, in accordance with Article 225(1) EC. This, of course, means that points of law which have already been discussed at first instance are again raised before the Court of Justice. The case-law cited by the applicant, (9) however, dismisses those arguments submitted in appeal which challenge the assessment of the facts by the Court of First Instance and confine themselves to repeating or reproducing word for word the arguments previously submitted to the Court of First Instance, including those based on facts rejected by that Court, and which contain no legal argument in support of the forms of order sought in the appeal. In reality, those pleas seek to obtain merely a re-examination of the application submitted to the Court of First Instance, which is in fact outside the jurisdiction of the Court of Justice.

34 In this case, the Commission takes issue with the views of the law expressed by the Court of First Instance and takes its own divergent views as the basis for its appeal. In that respect, there is no question of a mere repetition of submissions based on facts; what is involved is, rather, a dispute concerning points of law, which typifies the appeal procedure.

35 The first four pleas raised by the Commission in the appeal are, in those circumstances, admissible.

(ii) Substance

36 The Commission considers that the applicant is not individually concerned by the contested decision on equivalence of 6 September 1996 and consequently has no right of action pursuant to the fourth paragraph of Article 230 EC.

37 Since the contested decision was not addressed to the applicant, what matters here, according to the definition set out above, (10) is whether the decision affects the applicant by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons, and by virtue of these factors distinguishes it individually just as in the case of the person addressed.

38 The connecting factor in the definition is, therefore, comparability with the person addressed. The manner in which the contested decision came to be created comprises several factors that present the applicant as though it were the person addressed. The applicant contacted the Commission staff responsible for such matters and subsequently held intensive negotiations with them. Following its complaint, the previously valid decision of 14 June 1996 was reviewed. It forwarded data and other documentation to the Commission, as a result of which further market analyses were carried out. Finally, a new decision - that contested in these proceedings - was adopted which met the applicant's request at least in part. It is by reason of those circumstances that the applicant is differentiated from all other persons.

39 Invoking the rule in Asocarne, (11) the Commission, on the other hand, takes the view that

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persons are not individually concerned by a decision merely by reason of their having been involved in the creation of that decision.

40 The Court of Justice held in Asocarne that, where an individual has participated in the preparation of a legislative measure, he may not, for that very reason, subsequently bring an action against that measure if, in the procedure for the adoption of that measure, no provision is made for any intervention by individuals. In that case it was taken as read that the possibility of instituting proceedings was restricted essentially because the subject-matter of the action was a directive, that is to say an abstract, general and normative measure. (12)

41 In the present case, however, no directives or regulations - comparable in this context with directives - have been contested. On the contrary, the subject-matter of the action is a Commission decision. Such a measure does not, in principle, have the general or normative quality expressly attributed to regulations under the first subparagraph of Article 249 EC and intrinsic to directives on account of the obligation they impose on Member States to legislate, as provided for in the second subparagraph of Article 249 EC. Under the third subparagraph of Article 249 EC, decisions, on the other hand, are to be binding only upon those to whom they are addressed. Therefore, the statement of the Court of Justice in Asocarne cannot readily be applied to the circumstances of this case.

42 The judgment in CIRFS, (13) one of the cases described by the Court of Justice in the order in Asocarne as different from the circumstances of that case, (14) is, on the contrary, the appropriate case-law for establishing individual concern in the circumstances of this case. The CIRFS case concerned an association's application for the annulment of a decision addressed to the French Republic in a competition procedure. The Court of Justice held that the applicant, which was the Commission's interlocutor with regard to the introduction and adaptation of the discipline and, during the procedure prior to those proceedings, actively pursued negotiations with it, in particular by submitting written observations to it and by keeping in close contact with the responsible departments, was individually concerned by the contested decision in its capacity as negotiator of the discipline. (15)

43 The Court also held in Van der Kooy (16) that a person is differentiated from all others as a result of his previous active participation in the procedure for granting aid involving his submission of written comments and his close contact with the Commission departments responsible for such matters.

44 Lastly, in a more recent judgment, (17) the Court again pointed to the significance of the part played by natural or legal persons in the administrative procedure as regards ascertaining whether those persons are individually concerned.

45 The applicant is, therefore, individually concerned by the contested decision on account of its position as negotiator in the administrative procedure.

46 In the Commission's view, that conclusion is incompatible with the judgment in Exporteurs in Levende Varkens. In that judgment, the Court of First Instance held that the fact that a person intervenes arbitrarily in the procedure leading to the adoption of a Community measure, particularly by sending to the competent Community institution letters criticising a measure which that institution has already adopted and seeking to influence its future action, is not such as to differentiate that person from any other. (18)

47 It is uncertain whether the applicant's intervention by means of a complaint can as such be described as arbitrary, because of the applicant's status as a tenderer in the previous tendering procedure. In that regard, the applicant is differentiated from Allione which did not submit any tender in the tendering procedure and which the Court of First Instance denied leave to intervene.

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(19)

48 As a tenderer in the tendering procedure, certain rights accrue to the applicant in respect of the contracting authority, in particular the right to equal treatment for all tenderers. That right is laid down, for example, in Article 3(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (20) and in Article 4(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. (21) It can be applied, in the form of a general principle, to the present proceedings.

49 The Court of Justice underlined the significance of that principle in a number of judgments. (22) In the cases of Commission v Belgium (23) and Embassy Limousines, (24) it also referred to the principle of transparency, which likewise determines the procedure.

50 In its capacity as the authority inviting tenders, the Commission has itself offended against those principles by virtue of the fact that the consideration, a fundamental component of a contract, in the form of apples or peaches, specified in the memorandum addressed to AIMA concerning the implementation of the award to the successful tenderer, did not correspond with the consideration mentioned in the notice of invitation to tender (apples alone). (25) Such considerations must hold true on account of the particular importance attached to the principles of the equal treatment of tenderers and of transparency, irrespective of whether the tenderer would have submitted a better tender had it been aware of the amended payment condition.

51 By its complaint, which gave rise to the contested decision, the applicant requested that the effects of that infringement of the principles of equal treatment and transparency at least be mitigated by the introduction of a more favourable decision on equivalence between apples and peaches which corresponds to the market conditions.

52 Therefore, rather than intervening in the proceedings arbitrarily, the applicant on the contrary asserted its original rights as a tenderer. This is a valid statement irrespective of the fact that it was additionally affected, as an ordinary economic operator, by the implications of the incorrect decision on equivalence for the market in peaches. As an unsuccessful tenderer, it cannot be compared with all other producers of fruit juice or fruit traders, which were affected by the decision merely by reason of their objective capacity as economic operators pursuing the same activity. All subsequent decisions continued to infringe the principle of the equal treatment of tenderers by granting to the successful tenderer the possibility - even though that possibility is not mentioned in the notice of invitation to tender - of substituting peaches for the apples to be supplied from intervention stocks as payment. That infringement was the basis both of the first and of the second - contested - decision on equivalence, both of which laid down the coefficient to be applied for the substitution of peaches for apples. In that context, it is irrelevant whether those decisions contained an express reference to that coefficient. After all, the substance of a decision on equivalence is the fundamental decision allowing different types of fruit to be treated as equivalent. Without a fundamental decision to allow the substitution of peaches for apples, there would have been no need to fix coefficients of equivalence between those two types of fruit because they would, in that case, have been pointless.

53 The Commission, on the other hand, considers that the applicant can no longer rely on its legal status as a tenderer and is not, therefore, individually concerned. The contested decision was adopted quite some time after the award, in the context of a contractual relationship under civil law between the Commission and the successful tenderer, in the light of an unforeseeable shortage of apples.

54 It should be examined first of all whether that argument is consistent with the findings of

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the Court of First Instance.

55 The decision allowing peaches to be substituted for apples, which, as explained, was the general basis for the subsequent decisions on equivalence, was adopted as early as 6 March 1996 in the memorandum to AIMA, immediately after the contract had been awarded to Trento Frutta SpA. The specific details of the arrangements for implementing the Commission's decision on the award were conveyed to the Italian intervention agency by that memorandum. Therefore, contrary to the view expressed by the Commission, the memorandum is not simply a non-binding proposal. However, when the memorandum was drafted, there was - according to other information supplied by the Commission - no discernible shortage of apples. It is apparent from the arguments raised in relation to the fifth plea that the period during which apples were withdrawn from the market and, by extension, could be made available to the intervention agencies did not end until 31 May 1996, that is to say three months later. The Commission submits that the original drafting of the conditions of the invitation to tender was itself contingent on there having been sufficient availability of apples in preceding years. The actual decision to allow substitution, which forms the basis and substance of the decision at issue in this case, was thus adopted not primarily in the light of unforeseeable circumstances arising after the award of the contract.

56 Furthermore, the contested decision was addressed to the Italian Republic, the French Republic, the Hellenic Republic and the Kingdom of Spain. It thus extended beyond the scope of a purely internal contractual relationship with the successful tenderer.

57 Those circumstances relating to the addressees of and the persons concerned by the decision illustrate a further point. By the contested decision addressed to certain Member States, the Commission laid down amended conditions governing the contract awarded to the successful tenderer, but instead of discussing those conditions with that successful tenderer, namely the other party to the contract, the Commission had held negotiations on the matter with the applicant. It was therefore acting largely independently, in some kind of position of superiority rather than as an equal partner in a relationship established purely under civil law. It thus maintained its contracting-authority status, even in the performance of the contract, along with the rights and obligations arising in that connection.

58 The legal status of unsuccessful tenderers is maintained in the same way, provided that a decision is adopted which concerns them in terms of their rights as tenderers.

59 However, the Commission's approach of dividing the procurement procedure rigidly into two sections subject to independent assessment does not meet the requirements of legal certainty. Such an approach would mean that although the Commission first and foremost, or any other contracting authority, would be bound by the rules governing procurement, in particular the principles of equal treatment and transparency, if they did not abide by those rules, action by unsuccessful tenderers against such non-compliance would be impossible in the majority of cases. In the absence of clarity, an infringement would not be detected and challenged immediately on the decision to award the contract. Were the Commission's approach adopted, it would escape subsequent scrutiny by the courts.

60 Just as this approach offends against the principles of equal treatment and transparency in the tendering procedure, it would likewise offend against the principle that where there are procedural rights and guarantees, there must be a procedure in place for their implementation. (26)

61 As the Commission's negotiating partner in the procedure prior to the [contested] decision and on account of its status as unsuccessful tenderer, the applicant was therefore individually concerned by the contested decision and consequently entitled to bring an action.

62 The first and third pleas raised must therefore be rejected.

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(2) The plea alleging a contradictory assertion made by the Court of First Instance to the effect that a new invitation to tender should have been issued

(a) Arguments of the parties

(i) The Commission

63 In asserting that a new invitation to tender should have been issued in the event of a shortage of apples, the Court of First Instance has erred in law and has contradicted itself because it at the same time takes the view that the Commission may not alter the terms of payment. Since, in those circumstances, the Commission would have to pay pecuniary damages to the successful tenderers who did, for their part, comply with the contract, this would also lead to an amendment of the terms of payment in that money would be substituted for the apples. Following the approach taken by the Court of First Instance, the unsuccessful tenderers could have submitted different tenders had they in fact known of that substitution possibility.

64 The Commission adds that since the public procurement directives do not apply beyond the period from the invitation to tender to the award, they cannot be relied on for asserting that a new tendering procedure should be initiated where there is a change in circumstances during the performance of a contract. The two stages comprising the tendering procedure and the performance of the contract with the successful tenderer must be regarded as absolutely separate stages. The first comprises the obligation to observe the principles of transparency and equal treatment of tenderers, that is to say absolute contractual provisions and comparable tenders. The second stage - that of performance - often calls for adjustment of the contract in response to unforeseen events. Although the principles of transparency and equal treatment come into play at this stage where there are fundamental changes to be made, (27) the contested decision on equivalence, however, does not comprise any such fundamental change.

65 The Court of First Instance has, according to the Commission, made the mistake of considering the two stages as one. The Commission was under an obligation to pay the other party to the contract, despite the unforeseeable shortage of apples. It fulfilled that obligation by making peaches available. That obligation to effect payment at all costs in some form or another arises from its status as a party to the contract and explicit reference to it as such in the invitation to tender was not essential.

66 It was not feasible to take all contingencies into account in the invitation to tender. Adopting a coefficient of equivalence between the different types of fruits or other abstract payment mechanism would have involved a contingency and thus led to uncertainty, which is incompatible with the principles of transparency, equal treatment and comparability of tenders. Moreover, when the invitation to tender was issued, the Commission did not know if any peaches at all would be withdrawn from the market. There is, therefore, no need to determine the coefficient of equivalence until the possibility of a payment arises. Only then is it possible to take account of market development without partiality or discrimination.

(ii) C.A.S. Succhi di Frutta

67 In the applicant's view, the second plea is likewise inadmissible because it has already been raised in the proceedings at first instance.

68 The Commission's arguments are substantially flawed. The subsequent amendment of the conditions resulted primarily in discrimination against the unsuccessful tenderers. Such an amendment should have been made only by initiating a new tendering procedure. The Commission's approach, which the applicant regards as arbitrary, constitutes an infringement of the principles of transparency, equal treatment of tenderers and, ultimately, lawfulness.

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(b) Assessment

69 According to the Commission, the assertion made by the Court of First Instance, that a new invitation to tender should be issued where the terms of payment are changed, is contradictory because even settlement of a claim for damages where it is impossible to effect payment with apples would amount to a change in the terms of payment, namely by satisfying the claim for damages with money.

70 That theory is precluded by the fact that the original right to payment and the right to damages, which does not accrue until later and is derived from the first paragraph of Article 288 EC in conjunction with the relevant provisions of civil law, are clearly distinguishable rights. The form taken by the right to payment as the original right to performance is determined by the conditions of the invitation to tender. The right to damages, however, arises under civil-law provisions in the event of impossibility of performance or a breach of obligations in the subsequent performance of the contract. The creation of that right and the form it takes are unconnected with the issue of whether the original right to payment was to be satisfied in money or in kind.

71 It is at this point that the distinction between the two stages of a procurement procedure, on which the Commission invariably dwells, becomes relevant. However, the right to damages, an ever-present possibility, will have no impact on the form of tender submitted by the individual tenderers. In that respect, the assertion by the Court of First Instance that a new tendering procedure should be initiated is not contradictory.

72 As regards the issue - again, in the Commission's view, suggesting inconsistency - of whether the terms of payment applying to the successful tenderers who have complied with the contractual provisions would have been amended had a new invitation to tender incorporating the possibility of substituting peaches been issued, I should first of all refer to the fact that the decision to allow substitution was taken as far back as 6 March 1996 in the memorandum to AIMA. The successful tenderers were awarded their respective contracts concurrent with that decision. Therefore, the successful tenderers for their part could not have already performed the respective contracts by that time.

73 Furthermore, a new tendering procedure meets the legal certainty requirement only if, as is the case here during the award procedure, an essential component of the conditions of the invitation to tender is altered. Those considerations remain unaffected by any rights to damages that may arise.

74 The fact that the alteration in the present case related to the form of the consideration given in return for the products to be supplied gives the lie to the Commission's view that the situation did not involve a fundamental alteration. It involved a substitution of the main benefits of the contract, thus amending fundamentally the conditions of the invitation to tender. Unlike in cases where a value payable in one currency is replaced by a sum expressed in a foreign yet freely convertible currency, the substitution of peaches for apples involved two entirely different things. In some cases there is greater demand for peaches than apples, whilst in others there is no demand at all. Apples and peaches are not products that can be naturally substituted for each other.

75 The Commission is also wrong to consider, as it does, that introducing the possibility of substitution by other fruit in the notice of the invitation to tender would have loaded the notice with uncertainty and in that respect offended against the principles of equal treatment and transparency. On the contrary, it is the fear that the contracting authority and other tenderers could circumvent the procurement rules and subsequently amend the conditions of the invitation to tender that leads to an element of uncertainty which does not satisfy the requirements for transparency or legal certainty.

76 The practical problems put forward could be tackled by setting out the notice of invitation to tender in the same way as the memorandum to AIMA which, as well as awarding the contract, in

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fact specified detailed arrangements for substitution. The notice could be drawn up in conjunction with a clause setting out - even at that early stage - the possibility of adjusting at a later stage the coefficient of equivalence in line with market fluctuations.

77 Overall, I therefore have to concur with the Court of First Instance that the Commission should have either specified in the notice of invitation to tender the precise conditions governing substitution of the fruit prescribed as payment for the supplies at issue or instituted a new tendering procedure when the conditions of the invitation to tender changed.

78 The second plea must therefore be rejected.

(3) The plea alleging that the Court of First Instance erred in law in finding that the applicant had an interest in bringing proceedings on the basis of Article 233 EC

(a) Arguments of the parties

(i) The Commission

79 The Commission's view is that the applicant has no interest in bringing an action for the annulment of the contested measure. The sole consequence of a judgment to that effect would be to reinstate the original decision on equivalence, which is less favourable to the applicant and which it did not contest.

80 According to the Commission, a judgment annulling a measure cannot apply beyond the confines of the measure contested in proceedings before the Court of Justice. A supposed obligation, extending beyond those confines, on the part of the Commission to repeal the earlier decision on equivalence which has not been contested has no basis in law and conflicts with legal certainty. The obligation to repeal the provisions declared unlawful in the judgment relates only to arrangements which have been laid down under the annulled measure.

81 It is no longer possible for the Commission to initiate a new tendering procedure since the dispatch of goods to the Caucasus has stopped.

82 The Commission submits that problems arise in the enforcement of the judgment delivered by the Court of First Instance in that the judgment did not mention any specific measures that would have to be implemented, nor did it limit the annulment. Even now, on account of the resulting retroactive effect, rights accruing to the successful tenderers under the earlier decisions still have to be satisfied, and the procedure has indeed been very protracted.

(ii) C.A.S. Succhi di Frutta

83 In the applicant's view, the fourth plea is likewise inadmissible because it has already been raised in the proceedings at first instance.

84 The applicant argues that it has a legitimate interest in obtaining the annulment of the contested decision. The Court of Justice has held that such an interest is maintained even where the contested decision has already been implemented because its annulment is capable of having further consequences and of serving to prevent repetitions of the unlawful measures in the future. (28) An interest in bringing proceedings arises even in the context of challenging a decision that has already been repealed since the annulment of that decision by the Court of First Instance cannot be equated with its repeal by the Commission and since it also has retroactive effect. (29)

85 Furthermore, there is an interest in obtaining the annulment of unlawful measures as the institution responsible for the unlawful act is required under Article 233 EC to take the necessary measures to comply with the judgment and accordingly remove the effects of that act. (30) Article 233 EC is deprived of its substance in the event of the Court of First Instance being required to define the specific measures to be taken in each case. Making the correct inferences from the operative

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part and the grounds in the light of all the decisions adopted on the matter is more in line with the principle of sound administration. In the contested judgment the Court of First Instance clearly finds that the possibility of substituting at a later stage peaches for the other fruit concerned constituted an error in law.

(b) Assessment

86 The Commission takes the view that the applicant has no interest in bringing the action since annulment of the contested decision means that the decision of 14 June 1996, which is less favourable to the applicant, will be reinstated.

87 The decision of 6 September 1996 contains a coefficient of equivalence between apples and peaches which corresponds to the market conditions. In that respect it is in fact more favourable to the applicant than the decision of 14 June 1996 which favoured the successful tenderers by laying down coefficients of equivalence which were not in line with market conditions.

88 It can be concluded from the foregoing that no such interest arises only if the decisive factor is the formation of the coefficients of equivalence and if the assumption that the less favourable decision would merely be reinstated is in fact correct.

89 As explained above, the possibility of substituting peaches for the apples to be supplied as payment, which was introduced at a later stage in the memorandum to AIMA concerning the implementation of the award but was not contained in the conditions of the invitation to tender, was the basis and substance of all the decisions on equivalence. That infringement of the principle of the equal treatment of tenderers and, by extension, of the procurement rules was, admittedly, mitigated to some extent by the decision of 6 September 1996, but even that more favourable decision comprises an infringement of a rule of law relating to the application of the Treaty in that it offends against the principle of equal treatment. That infringement may be asserted under the second and fourth paragraphs of Article 230 EC in the context of an action for annulment. The Court of Justice has held that there is an interest in bringing an action for the annulment of a decision entailing such an error in law for the sole purpose of preventing comparable unlawful measures. (31) The applicant achieved only partial success in terms of removing the effects of the infringement by obtaining a more favourable decision on equivalence in response to its complaint. The purpose of this action is the removal of the remaining elements of the infringement. In that connection, there remains, as before, an interest in bringing legal proceedings.

90 Moreover, it is impossible in practice to reinstate and actually implement the decision of 14 June 1996 because the operation for supplying fruit juice to the Caucasus has in fact ceased. It was carried out on the basis of the contested decision of 6 September 1996 since, in accordance with the first sentence of Article 242 EC, the action brought against that decision did not have suspensory effect and the President of the Court of First Instance had rejected the application lodged by the applicant for the suspension of the operation of the measure concerned. (32) As a result, the issue of damages alone remains to be addressed.

91 To assess whether the applicant is in any way entitled to damages, it is essential to establish whether responsibility for an infringement which resulted in a loss suffered by the applicant can be attributed to the Commission. The judgment by the Court of First Instance annulling the measure concerned can be relied on to establish that infringement. As provided for in the first paragraph of Article 231 EC in conjunction with the second and fourth paragraphs of Article 230 EC, it is apparent from the operative part of that judgment annulling the contested decision that there was an infringement and, from the grounds of the judgment, what precisely that infringement consisted in. Thus there is also an interest in obtaining the annulment of the contested decision on account of the possible consideration of the infringement in a subsequent action for damages.

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92 Furthermore, the Commission is required under the first paragraph of Article 233 EC to take all the necessary measures to comply with the judgment of the Court of Justice. Those measures include, inter alia, the removal of the effects of the illegal conduct found in the judgment annulling the act (33) with the result that the Commission may be required by the judgment to pay damages on its own initiative and without further legal action.

93 The problems additionally raised by the Commission as regards enforcement of the judgment delivered by the Court of First Instance do not arise. The annulment of the decision of 6 September 1996 requires no further enforcement. There is no reason for limiting the effects of the judgment to the past since there is no reasonable ground for restricting any right to damages that may arise.

94 In those circumstances, the applicant has an interest in bringing the action and, consequently, the fourth plea should also be rejected.

(4) The plea alleging a misinterpretation of the rules of the common organisation of the market in fruit and vegetables

(a) Arguments of the parties

(i) The Commission

95 The Commission regards the fifth plea as admissible since the substantive inaccuracy of the judgment by the Court of First Instance is apparent from the documents in the case and since the Court of First Instance has defined the legal nature of the facts it has found. (34)

96 In finding that apples were available in intervention stocks and that there was therefore no force majeure, the Court of First Instance committed an error in law. During the period from the point at which the successful tenderers could begin to withdraw fruit to the date of the first decision on equivalence on 14 June 1996, only 19 958.648 tonnes of apples were withdrawn from the market as intervention stocks, although the successful tenderers were entitled to the supply of a total of 39 500 tonnes of apples.

97 For their respective calculations to ascertain the quantity of apples available, both the Court of First Instance and the applicant relied - incorrectly - on dates inconsistent with the intervention mechanisms. Within the common organisation of the market in fruit and vegetables, intervention agencies do not have the option of buying in or storing stock, except in serious crisis situations. The fruit withdrawn from the market has to be destroyed or distributed free of charge among relief organisations.

98 The annex to the Commission's defence in the action before the Court of First Instance indicating that 200 000 tonnes had been available merely served to illustrate the fact that there had been sufficient availability of apples in the preceding years. It was therefore reasonable to assume, when the invitation to tender was issued, that there would be sufficient apples available for withdrawal from the market in order to pay for the fruit juice supplied.

99 The Court of First Instance failed to take account of those legal issues and misinterpreted the information provided. The substantive inaccuracy can clearly be seen from the documents handed over. The Court of First Instance erred in law when it regarded as available in intervention stocks apples withdrawn from the market prior to the date from which the successful tenderers could withdraw such stocks, and consequently its subsequent conclusions were also erroneous.

(ii) C.A.S. Succhi di Frutta

100 The applicant takes the view that the fifth plea is inadmissible as it involves a complaint concerning an incorrect appraisal of the facts, for which the Court of Justice has no jurisdiction in the appeal procedure. (35)

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101 It adds that the Court of First Instance appraised the documents made available by the Commission correctly and was right to assume that there was sufficient availability of apples for the successful tenderers.

(b) Assessment

102 Under Article 225(1) EC and Article 51 of the EC Statute of the Court of Justice, appeals are limited to points of law. Accordingly, appeals may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance has exclusive jurisdiction to establish and to assess the facts. (36) The availability of apples is an issue concerning a finding of fact, the re-examination of which therefore does not fall to the Court of Justice in the appeal procedure.

103 Although the Court of Justice has jurisdiction to review the legal characterisation of the facts established or assessed by the Court of First Instance and to review the legal conclusions it has drawn from those facts, (37) it has no jurisdiction to proceed with a new examination of the facts or to assess the evidence placed before it. (38) In taking the view that the Court of First Instance should have drawn different conclusions from the documents placed before it in terms of the availability of apples, the Commission is simply objecting to the assessment by the Court of First Instance of the facts and of the evidence. Since that assessment is precluded from a review by the Court of Justice, the corresponding plea is accordingly inadmissible.

104 In the Brazzelli case, the Court of Justice indeed did hold that `the Court of First Instance... has exclusive jurisdiction to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it'. (39) However, if every inaccurate finding of fact, while apparent only from the documents submitted to the Court, were sufficient for the Court of Justice to have jurisdiction to review the facts at the appeal stage, there would be a risk of turning the Court of Justice into a second court hearing and determining points of fact, contrary to the legal parameters defined in the first sentence of Article 225(1) EC.

105 Should the Court of Justice indeed regard itself as having jurisdiction to review the assessment by the Court of First Instance of the facts in this case, then, following the underlying line of reasoning, the dispute concerning the availability of apples when the decisions on equivalence were adopted is irrelevant. As repeatedly stated above, the crucial infringement of the principle of the equal treatment of tenderers lay in the fact that the memorandum to AIMA of 6 March 1996 concerning the implementation of the award to the successful tenderer provided for the possibility to substitute peaches for apples in payment for the supplies given. However, at that point in time, the Commission itself, by its own account, assumed on the basis of experiences from previous years that sufficient apples would be available. Consequently, at the time relevant in this case, there was no unforeseeable shortage of apples.

106 The fifth plea must in those circumstances be rejected as inadmissible and, in any event, unfounded.

107 As a result, it should be held that the judgment of the Court of First Instance in Case T-191/96 is not vitiated by any illegality. The appeal must therefore be dismissed.

VI - Costs

108 Under Article 122 in conjunction with Articles 118 and 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

VII - Conclusion

In the light of the foregoing considerations, I propose that the Court should:

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(1) dismiss the appeal;

(2) order the appellant to pay the costs.

(1) - OJ 1996 L 30, p. 18.

(2) - Commission Regulation (EC) No 2009/95 of 18 August 1995 laying down detailed rules for the free supply of agricultural products held in intervention stocks to Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan pursuant to Council Regulation (EC) No 1975/95, OJ 1995 L 196, p. 4.

(3) - The French term `concernée individuellement' [individually concerned], rendered as `unmittelbar betroffen' [directly concerned] in the translated notice contained in the Official Journal, should have been translated, for the sake of accuracy, as `individuell betroffen' [individually concerned]. In its pleadings, the Commission made no reference to any alleged absence of direct concern.

(4) - Case 25/62 Plaumann v Commission [1963] ECR 95.

(5) - Joined Cases T-481/93 and T-484/93 Exporteurs in Levende Varkens and Others v Commission [1995] ECR II-2941, paragraph 59, and order in Case C-10/95 P Asocarne v Council [1995] ECR I-4149, paragraph 39.

(6) - Order in Case C-244/92 P Kupka-Floridi v ESC [1993] ECR I-2041, paragraph 10, Case C-354/92 Eppe v Commission [1993] ECR I-7027, paragraph 8, and order in Case C-338/93 De Hoe v Commission [1994] ECR I-819, paragraph 19.

(7) - In that regard, C.A.S Succhi di Frutta relies inter alia on the judgment in Case C-7/95 P Deere v Commission [1998] ECR I-3111, paragraph 62.

(8) - Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 37, Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 54, Case T-203/96 Embassy Limousines & Services v Parliament [1998] ECR II-4239, paragraph 85, and Case T-145/98 ADT v Commission [2000] ECR II-387, paragraph 164.

(9) - Orders in Kupka-Floridi v ESC and De Hoe v Commission (cited in footnote 7) and judgment in Eppe v Commission (cited in footnote 7).

(10) - See point 19.

(11) - Order in Case C-10/95 P (cited in footnote 6).

(12) - Cited in footnote 6, at paragraphs 37, 39 and 40.

(13) - Case C-313/90 Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) and Others v Commission [1993] ECR I-1125.

(14) - Cited in footnote 6, at paragraph 36.

(15) - CIRFS and Others v Commission (cited in footnote 14, at paragraphs 29 to 31).

(16) - Joined Cases 67/85, 68/85 and 70/85 Van der Kooy and Others v Commission [1988] ECR 219, paragraph 22.

(17) - Joined Cases C-68/94 and C-30/95 France and Others v Commission [1998] ECR I-1375, paragraphs 53 to 55.

(18) - Joined Cases T-481/93 and T-484/93 (cited in footnote 6, at paragraph 59).

(19) - Order in Case T-191/96 C.A.S. Succhi di Frutta v Commission [1998] ECR II-573.

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(20) - OJ 1992 L 209, p. 1.

(21) - OJ 1993 L 199, p. 84.

(22) - Commission v Denmark (cited in footnote 9, at paragraph 37), Commission v Belgium (cited in footnote 9, at paragraph 54), ADT v Commission (cited in footnote 9, at paragraph 164) and Embassy Limousines & Services v Parliament (cited in footnote 9, at paragraph 85).

(23) - Cited in footnote 9, at paragraph 54.

(24) - Cited in footnote 9, at paragraph 85.

(25) - In that regard, see further the findings cited in this Opinion under heading III, section 2, from the judgment of the Court of First Instance, at paragraphs 72 to 79. The Commission does not appeal against the basic assumption that it committed such an infringement in the tendering procedure.

(26) - Case 169/84 Cofaz and Others v Commission [1986] ECR 391, paragraph 23.

(27) - Case C-337/98 Commission v France [2000] ECR I-8377, paragraph 44 et seq.

(28) - Case 53/85 AKZO Chemie v Commission [1986] ECR 1965, paragraph 21, and Case T-509/93 Glencore Grain v Commission [2000] ECR II-3697, paragraph 31.

(29) - Exporteurs in Levende Varkens and Others v Commission (cited in footnote 6, at paragraph 46).

(30) - Exporteurs in Levende Varkens and Others v Commission (cited in footnote 6, at paragraph 47).

(31) - AKZO Chemie v Commission (cited in footnote 29, at paragraph 21) and Glencore Grain v Commission (cited in footnote 29, at paragraph 31).

(32) - Order in Case T-191/96 R C.A.S. Succhi di Frutta v Commission [1997] ECR II-211.

(33) - See Exporteurs in Levende Varkens and Others v Commission (cited in footnote 6, at paragraph 47).

(34) - Case C-136/92 P Commission v Brazzelli and Others [1994] ECR I-1981, paragraph 49.

(35) - Deere v Commission (cited in footnote 8, at paragraph 21) and order in Case C-436/97 P Deutsche Bahn v Commission [1999] ECR I-2387, paragraph 19.

(36) - Case C-352/98 P Laboratoires Pharmaceutiques Bergaderm v Commission [2000] ECR I-5291, paragraph 49, and Deere v Commission (cited in footnote 8, at paragraph 21).

(37) - Deere v Commission (cited in footnote 8, at paragraph 21) and order of the Court of Justice in Case C-19/95 P San Marco v Commission [1996] ECR I-4435, paragraph 39.

(38) - Eppe v Commission (cited in footnote 7, at paragraph 29) and order in Deutsche Bahn v Commission (cited in footnote 36, at paragraph 19).

(39) - Case C-136/92 P (cited in footnote 35, at paragraph 49).

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FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1999 ; C ; opinions
PUBREF	European Court reports 2004 Page 00000
DOC	2002/10/24
LODGED	1999/12/21
JURCIT	61962J0025 : N 19 61984J0169 : N 60 61985J0053 : N 89 61985J0067 : N 43 61989J0243 : N 49 61990J0313 : N 42 31991A0704(02)-A113P2 : N 31 31992L0050-A03P2 : N 48 61992J0136 : N 104 61992J0354 : N 33 103 61992O0244 : N 33 31993L0038-A04P2 : N 48 61993A0481 : N 92 61993A0509 : N 89 61993O0338 : N 33 61994J0068 : N 44 61994J0087 : N 49 61995J0007 : N 102 103 61995O0019 : N 103 61996A0191 : N 1 - 109 61996A0203 : N 49 61996B0191 : N 47 90 11997E225-P1 : N 33 102 104 11997E230-L2 : N 89 91 11997E230-L4 : N 19 89 91 11997E231-L1 : N 91 11997E233-L1 : N 92 11997E242-L1 : N 90 11997E249-L1 : N 41 11997E249-L2 : N 41 11997E249-L3 : N 41 11997E288-L1 : N 70 61997O0436 : N 103 61998A0145 : N 49 61998J0352 : N 102 12001C/PRO/02-A51 : N 102
SUB	External relations ; Food aid ; Development cooperation
AUTLANG	German

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APPLICA	Commission ; Institutions
DEFENDA	Person
NATIONA	Italy
PROCEDU	Application for annulment ; Appeal - unfounded
ADVGEN	Alber
JUDGRAP	Schintgen
DATES	of document: 24/10/2002 of application: 21/12/1999

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Opinion of Mr Advocate General Jacobs delivered on 17 May 2001.
Firma Ambulanz Glöckner v Landkreis Südwestpfalz.
Reference for a preliminary ruling: Oberverwaltungsgericht Rheinland-Pfalz - Germany.
Articles 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC) - Transport of sick or injured persons by ambulance - Special or exclusive rights - Restriction of competition - Public interest task - Justification - Effect on trade between Member States.
Case C-475/99.

I - Introduction

1. The present case, referred by the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Higher Administrative Court), concerns the compatibility with Article 86 EC, read in conjunction with Article 82 EC, of a legislative provision under which private undertakings are to be refused authorisation to provide independent ambulance services where the grant of such an authorisation is likely to have adverse effects on the operation and profitability of the public ambulance service, which is entrusted for given geographical areas to private medical aid organisations such as the Red Cross.

II - The regional law at issue

2. In Germany ambulance services are governed by laws adopted at the level of the Länder. The relevant law in the Land of Rheinland-Pfalz (Rhineland-Palatinate) is the Rettungsdienstgesetz (Law on the public ambulance service) in its version of 22 April 1991 to which I will refer as RettDG 1991.

1. Basic concepts

3. The RettDG 1991 distinguishes in essence between two types of ambulance services, namely emergency transport (Notfalltransport) and patient transport (Krankentransport).

4. Emergency transport concerns emergency patients (Notfallpatienten), namely persons with life-threatening injuries or conditions. It consists of taking life-saving measures, preparing emergency patients for transport, and transporting them, with provision of appropriate care, to a hospital suitable for their further treatment.

5. Patient transport is the transport of persons ill, injured or otherwise in need of help who are not emergency patients. It consists of administering medically appropriate care and of transporting the patients at the same time as monitoring their condition.

6. Both emergency and patient transport services must be provided by ambulances (Krankenkraftwagen) of which there are essentially two types.

7. Emergency transport is normally to be provided by emergency ambulance (Rettungswagen). An emergency ambulance must be equipped with special apparatus. The person taking care of the emergency patient during the transport must be a qualified rescue service assistant (Rettungsassistent).

8. Patient transport is normally to be provided by a patient transport ambulance (Krankentransportwagen) which does not need to have the same technical equipment. It is moreover sufficient that the person taking care of the patient during the transport possesses the lesser qualification of an ambulance attendant (Rettungssanitäter).

9. The RettDG 1991 does not apply to the conveyance of patients not in need of qualified help or supervision, in vehicles other than ambulances (Krankenfahrten).

2. The public ambulance service (Rettungsdienst)

10. According to Paragraph 2(1) of the RettDG 1991 the public ambulance service (Rettungsdienst)

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consists in the provision to the population whenever necessary (bedarfsgerecht) and throughout the territory (flächendeckend) of both emergency and patient transport services. Contrary to what the referring court appears to assume it follows from documents submitted to the Court that patient transport (and not only emergency transport) was also covered by the rules in force before the RettDG 1991 as an integral part of the public ambulance service. The main feature of the public ambulance service is to guarantee ambulance services on a permanent basis and on similar quality conditions even in remote areas irrespective of the profitability of individual operations.

11. For the purposes of the organisation of the public ambulance service the Land is divided into operational areas (Rettungsdienstbereiche). Ambulance services within each operational area are to be coordinated by one central coordination unit (Rettungsleitstelle). The actual services are to be provided by ambulance stations (Rettungswachen) which are to be set up, staffed and equipped according to local requirements. It must be possible to reach any point on the public road network within 15 minutes after the central coordination unit is alerted.

12. Responsibility for the public ambulance service lies in principle with the Land, the administrative districts at provincial level (Landkreise) and the towns which are administrative districts in their own right (kreisfreie Städte).

13. However, according to Paragraph 5(1) of the RettDG 1991 the competent authority assigns (überträgt) the operation of the public ambulance service to recognised medical aid organisations (anerkannte Sanitätsorganisationen) if and in so far as those organisations are able and willing to guarantee a permanent public ambulance service. The public ambulance service may be assigned to other operators only if the organisations mentioned in Paragraph 5(1) are not willing or able to operate it.

14. The assignment of the public ambulance service to medical aid organisations relates only to the operation of the service. The ultimate responsibility of the delegating public authority for the service appears to remain intact, as is reflected in the fact that they retain the rights to exercise supervision and give directions and the obligation to bear the costs.

15. The referring court states that in almost all cases the competent districts and towns have assigned the public ambulance service to the recognised medical aid organisations, namely the Deutsches Rotes Kreuz (German Red Cross), the Arbeiter-Samariter Bund (Workers Samaritans' Federation), the Johanniter-Unfall-Hilfe (St. John's accident assistance) and the Malteser-Hilfsdienst (Maltese aid service). The town of Trier however - more precisely the town fire brigade - operates the public ambulance service itself.

16. The referring court states also that the operation of the service is assigned by means of a unilateral act of the competent authority (Beleihung). Paragraph 5(2) of the RettDG 1991 states however that assignment is effected by a public law contract (öffentlich rechtlicher Vertrag) between the competent authority and the medical aid organisation concerned. Two such contracts have been submitted to the Court.

17. The ambulance stations are set up, staffed and maintained by the medical aid organisation to which the public ambulance service in that geographical area has been assigned. Where the ambulance stations within a given operational area are assigned to more than one medical aid organisation, it is for the largest organisation to set up, staff and maintain the central control unit.

3. The financing of the public ambulance service

18. The public ambulance service is financed partly by the State, partly through user charges.

19. Infrastructure costs of the central control units and the ambulance stations (construction, maintenance, equipment, rents) are to a large extent financed directly by the Land or the districts and towns.

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20. Under Paragraph 12(1) of the RettDG 1991 the remaining costs - mostly operating costs (Betriebskosten) - are to be financed through user charges (Benutzungsentgelte). According to the principle of full cost coverage (Selbstkostendeckungsprinzip) the user charges must be calculated so as to cover all costs of the public ambulance service which are not financed from other sources.

21. Under Paragraph 12(2) of the RettDG 1991 the medical aid organisations entrusted with the public ambulance service and the associations representing the health insurance sector conclude agreements on the sums to be paid as user charges. Those agreements must be approved by the competent minister. The reason the associations representing the health insurance sector play such an important role in the determination of the user charges is that those charges are ultimately to be paid by public and private health insurers.

22. User charges must be fixed uniformly for the Land. They are thus identical for ambulance services provided in towns and in remote areas.

4. Authorisations for the provision of independent ambulance services

23. In parallel with the rules on the public ambulance service there are general rules governing authorisations for the provision of ambulance services.

24. Those rules were initially to be found in the Law on the conveyance of persons (Personenbeförderungsgesetz) which is a federal law applicable throughout Germany. That law regarded the provision of ambulance services as a mode of conveyance of persons by hired car. Providers of ambulance services needed an authorisation to engage in that occupation. The grant of authorisation was subject to guarantees as to the safety and efficiency of the operation and to assurances as to the reliability and professional qualifications of the operator. Authorisation to operate an ambulance service - unlike a taxi service, for example - did not however depend on an assessment of need. Within that legal framework the public ambulance service, with its obligation to be available throughout the territory 24 hours every day, coexisted with private independent operators who were mainly engaged in non-emergency transport of patients during day-time.

25. In 1989 - apparently at the request of the Länder - the federal law in question was amended in such a way as to remove the sector of ambulance services from its scope. The way was thus clear for legislation of the Länder - in Rheinland-Pfalz the RettDG 1991.

26. As a consequence the RettDG 1991 contains, unlike its predecessors, not only rules on the public ambulance service but also general rules on the provision of ambulance services and in particular on the authorisations necessary to provide such services.

27. As under the previous federal regime the grant of the authorisation is subject to guarantees as to the safety and efficiency of the operation and to assurances as to the reliability and professional qualifications of the operator.

28. Paragraph 18(3) of the RettDG 1991, which is the provision at the heart of the present case, imposes however a new requirement. It is worded as follows:

Authorisation shall be refused if it would be likely to have an adverse effect on the general interest in the operation of an effective public ambulance service as defined in Paragraph 2(1). In establishing the plan of the Land for the public ambulance service... regard shall be had in particular to the reserve capacity of the public ambulance service throughout the territory and the actual use made of the public ambulance service within the operational area concerned; planning should also be based on the number of operations, on arrival times and on the duration of operations, as well as on expenditure and revenue...

29. According to the national court that rule must be interpreted as granting the medical aid organisations a de facto monopoly over the markets for emergency and patient transport services. In its view,

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under the rule at issue authorisations for independent operators of ambulance services could be issued only if the public ambulance service were unable to cover the needs. That however can never be the case since the public ambulance service is obliged to ensure a comprehensive public ambulance service around the clock. The necessary capacities of the public ambulance service are determined, not by economic considerations, but by possible emergency cases and even catastrophes. In the public ambulance service periods of standby duty will therefore necessarily predominate over operating periods. Authorisations for private operators will therefore never be useful or necessary. They would on the contrary reduce utilisation of the public ambulance service and thus negatively affect its expenditure and revenues.

III - The main proceedings

30. The plaintiff Firma Ambulanz Glöckner (Ambulanz Glöckner) is a private undertaking established in Pirmasens which provides ambulance services outside the public ambulance service. It appears from the file that it owns and operates two patient transport ambulances and one emergency ambulance. Under a framework agreement which it has concluded with two major health insurers it may request a reimbursable remuneration for its services which appears to be considerably lower than the user charges for the public ambulance service.

31. As regards its emergency ambulance, it was granted in 1990 - thus before entry into force of the RettDG 1991 and still under the previous federal legislation - an authorisation to provide patient transport services which was due to expire in October 1994.

32. In July 1994 it applied to the authorities of the defendant Landkreis (administrative district) Südwestpfalz (the Landkreis) for a renewal of the authorisation for the provision of emergency and patient transport services.

33. The Landkreis invited the two medical aid organisations entrusted with the public ambulance service in the area, namely the Deutsches Rotes Kreuz Landesverband Rheinland-Pfalz (the DRK) and the Arbeiter Samariter-Bund Landesverband Rheinland-Pfalz (the ASB) to express their views on the effects which the requested authorisation would have.

34. Both organisations stated that the comprehensive provision of the public ambulance service was in any event not being operated in such a way as to cover costs, so that the addition of a further operator would either require user charges to go up or the basic availability of the public ambulance service to be reduced.

35. Thereupon the Landkreis refused the renewal of the authorisation on the basis of Paragraph 18(3) of the RettDG 1991. It stated that in the relevant area the public ambulance service was operating in 1993 at only 26% of its capacity.

36. Ambulanz Glöckner first lodged an unsuccessful objection against that decision and then brought proceedings before the courts.

37. By judgment of 28 January 1998 the Verwaltungsgericht (Administrative Court) Neustadt an der Weinstrasse ordered the defendant authorities to issue the applicant with the authorisation applied for. It held essentially that it was wrong to interpret Paragraph 18(3) of the RettDG 1991 as precluding in all cases the possibility to grant independent operators authorisations to provide ambulance services. On the contrary it followed from the system established by the law in issue that the legislature sought to enable private operators to provide ambulance services in parallel with the public ambulance service. The legislature therefore implicitly accepted that there may, to a certain extent, be concomitant increases in costs. Since the applicant had operated ambulance services for more than seven years, it was clear that its activity had not put at risk the operational capacity or the existence of the public ambulance service.

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38. The Landkreis lodged an appeal against that judgment before the referring court, which joined the medical organisations concerned, namely the ASB and the DRK, as parties to the proceedings. Under the applicable procedural rules the Vertreter des öffentlichen Interesses (representative of the public interest) also participates in those proceedings.

39. According to the referring court the case depends on the applicability of Paragraph 18(3) of the RettDG 1991. In its view, if that provision is to be applied, the authorities had to refuse the renewal of the authorisation since the organisations entrusted with the public ambulance service have spare capacity available, and the appeal would therefore succeed. If however Paragraph 18(3) were found to be incompatible with Community law and thus not applicable, the appeal would fail.

40. In that regard the referring court considers that the medical aid organisations are undertakings with special or exclusive rights within the meaning of Article 86(1) EC. Moreover, the adoption of Paragraph 18(3) of the RettDG 1991 by the legislature of the Land may be regarded as a measure prohibited by Article 86(1) EC. That is because the disputed provision creates monopolies on the market for ambulance services in violation of the general objectives of the Treaty and the prohibition under Article 81(1)(c) EC of sharing markets. In its view, the disputed provision cannot be justified under Article 86(2) EC. Since the pre-existing situation was entirely satisfactory it was unnecessary to create a service monopoly.

41. Referring to a number of judgments of the Court the national court is however in doubt about two issues, namely whether the grant of an exclusive right as such may be regarded as incompatible with the Treaty and whether the disputed measure may affect trade between Member States within the meaning of Articles 81 EC et seq.

42. In the light of those considerations it referred the following question for a preliminary ruling:

Is the creation of a monopoly for the provision of ambulance services over a defined geographical area compatible with Article 86(1) EC and Article 81 EC et seq.?

43. In the meantime the referring court has ordered the authorities provisionally and pending definitive determination in the main proceedings to issue the applicant with an authorisation to provide emergency and patient transport with the ambulance in question.

44. Ambulanz Glöckner, the Landkreis Südwestpfalz, the ASB, the Vertreter des öffentlichen Interesses, the Austrian Government and the Commission submitted written observations. They also submitted written answers to questions put by the Court. At the hearing Ambulanz Glöckner, the Landkreis Südwestpfalz, the Vertreter des öffentlichen Interesses and the Commission were represented.

IV - The scope of the present preliminary ruling procedure

45. One of the difficulties in the present case is that those submitting observations tend to disagree with the referring court and amongst themselves not only on the interpretation of the relevant provisions of the EC Treaty, but also on the interpretation of the national provisions at issue, on the factual background and on the scope of the question referred. Before starting the analysis it is thus necessary to clarify a number of preliminary points.

46. First, the referring court considers that the rules in force before 1991 entrusted only emergency transport to the medical aid organisations concerned and that the RettDG 1991 extended the scope of that assignment to comprise also patient transport. On the basis of that understanding the Commission's observations for example deal extensively with the issue whether the competition rules preclude a Member State from extending the scope of an existing monopoly for emergency transport to the new field of patient transport.

47. It is however evident from the observations of the parties to the main proceedings and in particular from the text of the Law in force before 1991 that the public ambulance service already comprised

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both emergency transport and patient transport before 1991. The pre-existing Law excluded from its scope (as does the RettDG 1991) only the conveyance of patients not in need of qualified help or supervision, in vehicles other than ambulances (Krankenfahrten).

48. Since that misunderstanding is manifest and concerns the pre-existing legal situation, which is not directly in issue in the present case, the Court should in my view proceed on the basis that the public ambulance service always comprised both emergency and patient transport. Where an issue manifestly does not arise, it would be unwise for the Court to try to resolve it.

49. Secondly, several of those submitting observations appear to assume that the present case also raises the question whether a provision such as Paragraph 5 of the RettDG 1991 under which the public ambulance service is to be assigned primarily to the recognised medical aid organisations is compatible with the competition rules.

50. It follows however from the facts giving rise to the main proceedings and from the order for reference that the provisions on the assignment of the public ambulance service as such are not at issue. Ambulanz Glöckner did not request to be entrusted with the public ambulance service in a given area. It asked only for an authorisation to provide independent ambulance services in parallel with and outside the public ambulance service. Nor does the referring court appear to be concerned with the fact that the public ambulance service is in principle reserved to a closed group of organisations. It merely considers that the provisions governing authorisations for the provision of independent ambulance services and in particular Paragraph 18(3) of the RettDG 1991 might be incompatible with Community law.

51. Thirdly - and this is perhaps the most difficult point - the referring court considers that Paragraph 18(3) of the RettDG 1991 must be interpreted as precluding in all cases the grant of authorisations to independent providers of ambulance services. That seems to be the reason why it refers in its question to the creation of a monopoly. A similar point is made by the Vertreter des öffentlichen Interesses who contends that the disputed provision must be applied strictly in order to preclude any adverse effects on the public ambulance service.

52. The defendant Landkreis and the ASB maintain by contrast that Paragraph 18(3) must be interpreted as precluding the grant of authorisations to independent providers only where it is likely to have considerable adverse effects on the public ambulance service. They rely on the judgment at first instance of the Verwaltungsgericht Neustadt an der Weinstrasse and a passage in the travaux préparatoires of the Law. The ASB therefore suggests reformulating the question referred accordingly.

53. It is true that the interpretation of Paragraph 18(3) of the RettDG 1991 suggested by the referring court is not easy to reconcile with the fact that the RettDG 1991 introduced in its Paragraphs 14 to 27 a comprehensive set of provisions governing not only the conditions for the grant of authorisations for the provision of ambulance services, but also the obligations of authorised operators and the remuneration for independent ambulance services. Many of those rules would appear to be without practical relevance if the referring court's interpretation of Paragraph 18(3) were to prevail.

54. None the less, since the correct interpretation of the national law is not a matter for this Court, I would not reformulate the question referred in the way that has been suggested. In any event, the disagreement about that interpretation may be resolved in the light of the ruling to be given by this Court.

V - The arguments of the parties in outline

55. Ambulanz Glöckner maintains that the disputed provision is incompatible with Article 86(1) EC read in conjunction with Articles 81 EC et seq. and 249 EC (by virtue of a breach of Council

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Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts).

56. In its view, the public authorities responsible for the public ambulance services and the medical aid organisations entrusted with those services must both be regarded as undertakings with special or exclusive rights within the meaning of Article 86(1).

57. Furthermore, the provisions of the RettDG 1991 infringe Article 86(1) EC read in conjunction with other Community law provisions for the following reasons:

- they lead to infringements of Article 81(1)(c) EC, since they enable the medical aid organisations to share out the national market for ambulance services through agreements between themselves and with the public authorities;

- they lead to infringements of Article 82 EC in that, first, the medical aid organisations are unable to satisfy consumer demand for qualified ambulance services at acceptable prices, and secondly, the public authorities and the medical aid organisations are enabled jointly to limit the access of competing operators to the market;

- Article 249 EC is infringed since the public authorities did not respect the Directive on procedures for the award of public service contracts when entrusting the medical aid organisations with the public ambulance service.

58. The Commission adopts in essence a similar line of reasoning. In its view however the Court is not sufficiently informed to decide whether the medical aid organisations' position on the market for ambulance services concerns a substantial part of the common market and whether the disputed measure might lead to behaviour which may affect trade between Member States within the meaning of Article 82 EC. With regard to those points the Commission suggests leaving the necessary assessments to the referring court and giving merely general guidance.

59. The defendant Landkreis, the ASB, the Vertreter des öffentlichen Interesses and the Austrian Government all consider that the disputed measure is compatible with Community law.

60. In the first place, Article 86(1) EC is, in their view, not applicable because the medical aid organisations concerned cannot be regarded as undertakings with special or exclusive rights. Article 81(1)(c) EC and the Directive on procedures for the award of public service contracts are also not applicable.

61. Furthermore, Article 86(1) EC in conjunction with Article 82 EC is not infringed because

- the operational area of each medical aid organisation does not correspond to a substantial part of the common market,

- trade between Member States is not affected to an appreciable extent,

- the mere creation of a dominant position is not caught by those rules,

- the medical aid organisations have always provided satisfactory services and the requested user charges were justified.

62. Finally and in any event the measure at issue is justified under Article 86(2) EC. The medical aid organisations operating the public ambulance service are entrusted with the operation of services of general interest. To repeal Paragraph 18(3) of the RettDG would obstruct the performance, in law and in fact, of the particular tasks assigned to them. That is inter alia because it is necessary to give the public ambulance service some measure of protection against cherry-picking by independent operators who wish to provide their services only at profitable peak hours in densely populated and therefore easily accessible areas.

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63. In the light of those arguments I will discuss successively

- the applicability of Article 86(1),

- the alleged infringement of Article 86(1) read in conjunction with other Treaty provisions, and

- the possible justification under Article 86(2).

VI - Applicability of Article 86(1): undertakings with special or exclusive rights

64. Article 86(1) applies to undertakings to which Member States grant special or exclusive rights.

1. The concept of undertaking

65. Ambulanz Glöckner maintains that both the medical aid organisations and the public authorities primarily responsible for the public ambulance service must be regarded as undertakings.

(a) Medical aid organisations as undertakings

66. As regards, first, the medical aid organisations in issue, none of the parties has argued that they should not be regarded as undertakings for the purposes of competition law. We are informed that

- in the Land concerned there are four recognised medical organisations, of which the DRK (German Red Cross) is apparently the most important one,

- they are organised as non-profit-making associations,

- they are engaged inter alia in the provision of both emergency transport and patient transport services,

- in the Land concerned they have been entrusted with the operation of the public ambulance service in almost all operational areas,

- within those operational areas they set up, staff and maintain the central control units and ambulance stations,

- the infrastructure costs of the public ambulance service are financed mainly through direct public funding and the operating costs mainly through user charges,

- under the principle of full cost coverage the user charges must be calculated so as to guarantee that they cover all the costs of the public ambulance service which are not financed through other sources of funding.

67. It will be recalled that for the purposes of Community competition law the concept of undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way it is financed. The basic test is whether the entity in question is engaged in an activity which consists in offering goods and services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits.

68. In the present case, it is clear from the facts of the main proceedings that non-emergency patient transport has in the past been carried out in Germany by private undertakings with a view to making profits. Moreover, it appears from the file that Ambulanz Glöckner has in the past also provided emergency transport services. Nothing therefore suggests that the nature of either emergency or patient transport is such that those services must necessarily be carried out by public entities. Whether emergency or patient transport generates profits will depend exclusively on the remuneration which the operator obtains for his services. Furthermore, the referring court states that under German civil law, too, the relationship between ambulance service provider and patient is viewed as an ordinary service contract. The provision of ambulance services therefore constitutes an economic

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activity within the meaning of the Court's case-law.

69. That conclusion is not affected by the legal status of the medical aid organisations as non-profit-making associations, the method of financing of their activities, or the fact that they have been entrusted with tasks in the public interest. In connection with the last two points it must be borne in mind that public service obligations may render the services provided by a given operator less competitive than comparable services rendered by other operators and thus justify under certain conditions the grant of special or exclusive rights or of State aid. It follows however from Articles 86(1) and (2) and 87 EC that public service obligations, special or exclusive rights, or State financing cannot prevent an operator's activities from being regarded as economic activities.

70. I conclude therefore that in respect of the provision of ambulance services the medical organisations in issue must be viewed as undertakings within the meaning of Article 86(1).

(b) Public authorities as undertakings

71. Ambulanz Glöckner argues, secondly, that the public authorities at issue and in particular the defendant Landkreis must also be regarded as undertakings. It recalls that the RettDG 1991 entrusts the task of operating the public ambulance service primarily to the authorities. Those authorities must therefore be regarded as potential competitors of independent operators such as Ambulanz Glöckner.

72. I consider that a differentiated approach is necessary. It is settled case-law that public bodies engaging in economic activities may be regarded as undertakings. On the other hand, activities in the exercise of official authority are sheltered from the application of the competition rules. Furthermore, the notion of undertaking is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules.

73. Within the regime established by the RettDG 1991 the public authorities perform three different functions: first, they are the entities primarily responsible for the public ambulance service and on that basis they operate that service themselves in some areas; secondly, in most areas they assign the public ambulance service to medical aid organisations; and finally, they decide on authorisations for independent operators.

74. Where the public authorities operate the public ambulance service themselves (as appears to be the case in the town of Trier) they are engaged in the economic activity provision of ambulance services. In those areas the authorities in question must be viewed as undertakings within the meaning of the competition rules.

75. Where the authorities assign the public ambulance service to the medical aid organisations, it is more difficult to classify the nature of that assignment. It might be argued that the transfer of responsibility for a given economic activity from one (public) entity to another (private) entity must itself also be considered as an economic activity. Conversely it might be argued that in such a situation an authority acts in its capacity as public authority and therefore not as an undertaking within the meaning of Articles 81 EC et seq. Since the present preliminary ruling procedure does not directly concern the assignment of the public ambulance service to the medical aid organisations it is not necessary for me to express a definitive view on that difficult question.

76. As regards the activity at issue in the main proceedings, namely the grant or refusal of authorisations for the provision of independent ambulance services, it will be recalled that an entity acts in the exercise of official authority where the activity in question is connected by its nature, its aim and the rules to which it is subject with the exercise of powers... which are typically those of a public authority. A decision to grant or to refuse an authorisation for the provision of ambulance

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services within the framework of the RettDG 1991 falls in my view clearly within that definition. Before granting the authorisation the authorities examine the safety and efficiency of the operation, the reliability and professional qualifications of the operator and - under the disputed provision - the possible effects of an authorisation on the public ambulance service. The grant or refusal of an authorisation is thus a typical administrative decision taken in the exercise of prerogatives conferred by law which are usually reserved for public authorities. I cannot see how that decision-making activity could be assimilated to the offering of goods or services on given markets.

77. The fact invoked by Ambulanz Glöckner that the public authorities are potential competitors on the market for ambulance services is in my view irrelevant for the classification of their decision-making activities.

78. First, I do not think that Article 81 EC et seq. apply to potential undertakings. Public authorities could theoretically engage in almost any economic activity and would thus permanently fall within the scope of the competition rules.

79. In any event, even where the authorities are actual competitors of independent providers (as appears to be the case in Trier), the operation of the ambulance service (economic activity) and the grant or refusal of authorisations for the provision of independent ambulance services (decision-making activity) must be analysed separately. Only with regard to the former activity do the authorities act as undertakings within the meaning of the competition rules.

80. It is true that the Court's case-law requires that a State body with regulatory powers over a given market should be independent from any undertaking operating on that market. That case-law does not however establish that the authorities' regulatory activities must be viewed as economic activities, but concerns only the compatibility with the Treaty of the resulting conflict of interest.

81. I conclude therefore that the authorities cannot be viewed as undertakings where they grant or refuse authorisations for the provision of independent ambulance services.

2. Special or exclusive rights

82. Ambulanz Glöckner and the Commission consider that the medical aid organisations must be viewed as undertakings to which special or exclusive rights have been granted. They refer on the one hand to the assignment of the public ambulance service under Paragraph 5 of the RettDG 1991 and on the other to the special protection afforded by Paragraph 18(3) thereof. The Landkreis and the ASB maintain that the medical aid organisations have never enjoyed special or exclusive rights, but have always been subject to competition from independent operators.

(a) The concept of special or exclusive rights

83. The concept of special or exclusive rights and in particular the concept of special rights is not easy to define.

84. In the area of telecommunications the Court partially annulled in 1991 and 1992 two Commission Directives which required the Member States to withdraw special or exclusive rights conferred on incumbent operators. As regards special rights, the Court held that the Commission failed to specify the types of rights which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty.

85. The Commission reacted and provided in a Directive of 1994 the following definition of special rights:

> "special rights" means the rights that are granted by a Member State to a limited number of undertakings... which, within a given geographical area,

- limits to two or more the number of such undertakings authorised to provide a service or undertake

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an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or

- designates, otherwise than according to such criteria, several competing undertakings as being authorised to provide a service or undertake an activity, or

- confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service or to undertake the same activity in the same geographical area under substantially equivalent conditions.

86. In 1996 the Court adopted, for the purposes of the interpretation of several other Directives in the telecommunications sector, a definition which covers both special and exclusive rights and which is clearly inspired by the Commission's definition:

... the exclusive or special rights in question must generally be taken to be rights which are granted by the authorities of a Member State to an undertaking or a limited number of undertakings otherwise than according to objective, proportional and non-discriminatory criteria, and which substantially affect the ability of other undertakings to provide or operate telecommunications networks or to provide telecommunications services in the same geographical area under substantially equivalent conditions.

87. The four essential elements of that definition are that the rights in question must

- be granted by the authorities of a Member State,

- be granted to one undertaking or to a limited number of undertakings,

- substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions, and

- be granted otherwise than according to objective, proportional and non-discriminatory criteria.

88. I consider that the first three elements of that definition can also be used to define the concept of special or exclusive rights in Article 86(1) EC, whilst the fourth element should not be transposed to that different context. That fourth element - namely that the rights in question must be granted otherwise than according to objective, proportional and non-discriminatory criteria - is designed to apply the liberalisation process in the telecommunications sector to only those rights the grant of which is not justified. It is therefore designed to distinguish between legitimate and illegitimate special or exclusive rights. In Article 86(1) EC, however, the concept of special or exclusive rights serves only the purpose of determining the scope of application of that provision. The separate and further question whether those rights are legitimate is to be determined according to the Treaty provisions to which Article 86(1) EC refers and according to Article 86(2) EC.

89. Special or exclusive rights within the meaning of Article 86(1) EC are thus in my view rights granted by the authorities of a Member State to one undertaking or to a limited number of undertakings which substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions.

(b) Medical aid organisations as undertakings with special or exclusive rights

90. In the light of the arguments of the parties three distinct State measures - two of a regulatory and one of a decisional nature - might potentially be viewed as the grant of special or exclusive rights, namely

- Paragraph 5 of the RettDG 1991 under which the public ambulance service must be assigned with priority to the recognised medical aid organisations,

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- the actual assignment to a medical aid organisation of the public ambulance service for a given geographical area, and

- the introduction of Paragraph 18(3) of the RettDG 1991 which, according to the referring court's interpretation, precludes authorisations for independent operators.

91. As regards, first, Paragraph 5 of the RettDG 1991 it must be recalled that Ambulanz Glöckner did not request to be entrusted with the public ambulance service and that neither the other parties nor the referring court criticised that provision. I do not therefore need to take a view on whether the special treatment of a closed group of organisations must be viewed as the grant of special or exclusive rights.

92. I consider, secondly, that the actual assignment of the public ambulance to a given medical aid organisation as such does not grant special or exclusive rights to that organisation since it does not in itself affect the ability of competing operators to offer ambulance services in the area in question. In that regard it must be borne in mind that before 1991 the assignment of the public ambulance service to certain recognised medical aid organisations had no influence whatsoever on the possibility for independent operators to apply for an authorisation to provide ambulance services.

93. That leads me, thirdly, to Paragraph 18(3) of the RettDG 1991. Before entry into force of that rule independent operators could obtain the necessary authorisations for the provision of ambulance services relatively easily. The grant of those authorisations was subject only to guarantees as to the safety and efficiency of the operation and the reliability and professional qualifications of the operator. Under the new Paragraph 18(3) of the RettDG 1991 authorisation must be refused where its use is likely to have adverse effects on the operation and profitability of the public ambulance service.

94. It is thus Paragraph 18(3) of the RettDG which grants special or exclusive rights to the medical aid organisations entrusted with the public ambulance service. Only Paragraph 18(3) and its application by the authorities affect the ability of other undertakings to exercise the economic activity in question in the same geographical area as the medical aid organisations.

95. I therefore conclude that the introduction of Paragraph 18(3) of the RettDG 1991 granted the medical aid organisations concerned special or exclusive rights within the meaning of Article 86(1) EC. They must consequently be viewed as undertakings falling within the scope of that provision.

VII - Infringement of Article 86(1) EC read in conjunction with other provisions of the Treaty

96. In the case of undertakings with special or exclusive rights Article 86(1) EC prohibits Member States from enacting or maintaining in force any measure contrary to the rules contained in [the] Treaty, in particular to those rules provided for in... Articles 81 to 89. Article 86(1) cannot therefore be applied in isolation, but must always be used in combination with another provision of the EC Treaty.

97. Ambulanz Glöckner maintains that the disputed provision infringes Article 86(1) EC read in conjunction with three different provisions, namely Articles 249(3), 81(1)(c), and 82 EC.

1. Articles 86(1) and 249(3) EC

98. Ambulanz Glöckner claims that the rule assigning the public ambulance service with priority to the recognised medical aid organisations is incompatible with Directive 92/50/EEC on the procedures for the award of public service contracts.

99. I have however already established that the question of the assignment of the public ambulance service lies outside the scope of the present preliminary ruling procedure. In the main proceedings

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Ambulanz Glöckner does not challenge the fact that the medical aid organisations were entrusted with the public ambulance service, but only that it did not obtain an authorisation to provide independent ambulance services outside the public ambulance service. The procedure for obtaining such an administrative authorisation is very different from the award of a public service contract and is therefore not covered by the rules on public procurement.

2. Articles 86(1) and 81(1)(c) EC

100. The referring court and Ambulanz Glöckner consider that the conduct of the authorities and the DRK and ASB when refusing the authorisation constituted prohibited market sharing. They also claim that the regime established by the RettDG 1991 leads inevitably to agreements between the authorities and medical aid organisations which are prohibited by Article 81(1)(c).

101. In my view Article 81 EC does not apply since the RettDG 1991 does not lead to agreements between undertakings within the meaning of that provision.

102. That is, in the first place, because the authorities act in the exercise of public authority when they grant or refuse authorisations. In that respect they are therefore not engaged in an economic activity and cannot be regarded as undertakings for the purposes of Article 81 EC.

103. In any event, there do not appear to be agreements or concerted practices between the authorities and the medical aid organisations. The medical aid organisations simply suggest a decision which is then taken unilaterally by the authorities. The authorities have sole power and responsibility for that decision and do not appear to be bound by the observations of the medical aid organisations.

3. Articles 86(1) and 82 EC

104. Article 86(1) EC prohibits Member States from adopting measures which are contrary to Article 82. The latter provision is however addressed only to undertakings, not to Member States. The two rules read in combination must thus be understood as prohibiting State measures which would deprive the prohibition in Article 82 EC of its effectiveness.

105. The problem to be analysed is therefore not whether concrete abuses of a dominant position have been committed (for which the undertaking concerned might be responsible under Article 82 EC read in isolation), but whether the Member State in question has adopted or maintained in force measures which are liable to create a situation in which the the undertakings concerned are led to commit such abuses.

106. In the light of the wording of both Article 86(1) and 82 EC I will therefore examine, first, whether the medical aid organisations in issue are in a dominant position within a substantial part of the common market; secondly, whether a provision such as Paragraph 18(3) of the RettDG 1991 is a State measure which is liable to create a situation in which the undertakings concerned are led to commit an abuse of that dominant position; and finally, whether the measure or the abusive behaviour may affect trade between Member States.

(a) Dominant position of one or more undertakings within a substantial part of the common market

- The relevant product market

107. The Commission argues that there are two different product markets, namely the market for emergency transport and the market for patient transport.

108. The Landkreis and the Vertreter des öffentlichen Interesses contend by contrast that there is one global market for ambulance services. They contend that an emergency ambulance may in practice often be used for non-emergency patient transport. Ambulanz Glöckner's emergency ambulance at issue in the main proceedings was for example also used for non-emergency patient transport. Conversely there are situations (e.g. major accidents, catastrophes) where patient transport ambulances can

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be used to provide emergency transport services. Moreover, a certain percentage (the Landkreis advances a figure of 8 to 10%) of non-emergency transports change their nature in the course of the transportation and become emergency transports.

109. I am not fully convinced by those arguments. Relevant product market may be defined as follows:

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

110. In the light of that definition I think that the Commission is right to regard the markets for emergency transport and non-emergency transport as distinct markets. First, patients do not normally regard non-emergency transport services as a valid substitute for emergency transport (except perhaps as a last resort in case of catastrophes or major accidents). Emergency transport will conversely not be regarded as a valid substitute for non-emergency transport because emergency transport is considerably more expensive. Furthermore, patients expect emergency transport to be provided as rapidly as possible, 24 hours a day and by highly qualified personnel. Non-emergency transport e.g. from hospital to hospital may be provided at more convenient hours during the week when the vehicle in question is free. Legal requirements as regards the medical equipment of the respective vehicles and the qualification of the aid personnel are also different. Because of its special nature, efficient planning of emergency transport is considerably more difficult than the planning of non-emergency transport. As a consequence of those fundamental differences the costs of emergency transport services are much higher.

111. There are thus, in my view, two relevant product markets, namely the market for emergency transport and the market for non-emergency patient transport.

- The relevant geographical market

112. The Commission contends that the relevant geographical market is the Land of Rheinland-Pfalz.

113. Relevant geographical market may be defined as follows:

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

114. It might be argued that the relevant geographical market for the provision of ambulance services is confined to one operational area (Rettungsdienstbereich) and thus in the main proceedings the Rettungsdienstbereich Pirmasens. It is at that level that the decisions on authorisations are taken, that medical aid organisations are heard and that the effects on the public ambulance service are assessed.

115. I tend however to agree with the Commission and consider that the Land of Rheinland-Pfalz must be seen as the relevant market. The legislative framework for the provision of independent ambulance services and the organisational structures of the public ambulance service are identical throughout the Land. The user charges for the public ambulance service are fixed uniformly at the level of the Land. Ambulanz Glöckner could therefore exercise its activities and apply for authorisations for its ambulances in other geographical areas of the Land under exactly the same conditions.

116. Ambulanz Glöckner states that the laws of the different Länder governing the provision of ambulance services are very similar and that Germany must therefore be seen as a homogeneous area with almost identical market conditions. The Vertreter des öffentlichen Interesses contests that statement and claims that there are considerable differences between the laws of the various Länder.

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117. It will be for the national court to decide whether the conditions of competition in the two markets for emergency transport and non-emergency patient transport are sufficiently homogeneous throughout Germany to consider the entire territory of that Member State as the relevant geographical market.

118. For the purposes of the present Opinion I will assume that Rheinland-Pfalz is the relevant geographical market.

- Dominant position on the relevant market

119. It follows from the referring court's interpretation of Paragraph 18(3) of the RettDG 1991 that a medical aid organisation entrusted with the public ambulance service for a given ambulance station enjoys a legally protected monopoly in the geographical area covered by that station.

120. In the operational area of Pirmasens the DRK has been assigned six ambulance stations and the operation of the central control unit, whilst the ASB operates only one ambulance station. Ambulanz Glöckner is the only independent provider of ambulance services. The DRK thus appears to be in a dominant position in that operational area.

121. As regards the relevant geographical market, namely the Land of Rheinland-Pfalz, it appears from the file that the DRK is the medical aid organisation which is entrusted with the public ambulance service in by far the greater part of the Land. The other three medical aid organisations seem to operate on a much smaller scale and there are apparently only two independent providers. It thus seems that the DRK holds in the Land of Rheinland-Pfalz a dominant position on the markets both for emergency transport and for non-emergency transport.

122. In the final analysis the question of dominance will also have to be resolved by the referring court. If that court were to find that the DRK alone is not in a dominant position it would have to examine the hypothesis of a collective dominant position held by the recognised medical aid organisations.

123. For the purposes of the Opinion I will assume that the DRK holds a dominant position in Rheinland-Pfalz.

- The relevant market as a substantial part of the common market

124. Ambulanz Glöckner claims that the relevant geographical market, namely Rheinland-Pfalz, constitutes a substantial part of the common market within the meaning of Article 82 EC. It relies, first, on Merci Convenzionali Porto di Genova, where the Court held that the Port of Genoa constituted a substantial part of the common market and, secondly, on Centre d'insémination de la Crespelle, where the Court held that by establishing a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, the national provisions in question created a dominant position in a substantial part of the common market.

125. The Landkreis and the ASB contend that there is no dominant position over a substantial part of the common market. That criterion is in their view intended to exclude from the scope of Community competition law undertakings in a dominant position on local or small regional markets since their dominance does not threaten effective competition in the common market. The medical aid organisations in issue do therefore not fall within Article 82 EC.

126. In Suiker Unie the Court established the following basic test:

For the purpose of determining whether a specific territory is large enough to amount to "a substantial part of the common market" within the meaning of Article [82 EC] the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.

127. That test emphasises the economic importance of a given territory. In some cases the Court

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has considered even geographically small areas to be a substantial part of the common market. The decisive element in those cases was the particular economic importance of the area in question. In Merci Convenzionali Porto di Genova for example the Court relied on the volume of traffic in the Port of Genoa and that port's importance in relation to maritime import and export operations as a whole in the Member State concerned. That reasoning cannot in my view be transposed to the present case. Ambulance services in Rheinland-Pfalz are neither particularly important nor particularly unimportant for the German economy.

128. I consider none the less that the Land of Rheinland-Pfalz must be regarded as a substantial part of the common market. In the absence of particular economic characteristics of a given area, geographical factors become more significant.

129. Rheinland-Pfalz covers a territory of almost 20 000 km2 and has around four million inhabitants. It is thus larger or has more inhabitants than some Member States.

130. The Court has already held that the southern part of Germany and thus an area falling short of the territory of a Member State could constitute a substantial part of the common market. A similar statement can be found in Bodson where the group of undertakings controlled by Pompes funèbres générales held an exclusive concession in less than 10% of communes in France, the population of which accounted however for more than one third of the total population. The Court ruled in that case which presents many features similar to the present one:

Article [82 EC] applies in a case in which a number of communal monopolies are granted to a single group of undertakings whose market strategy is determined by the parent company, in a situation in which those monopolies cover a certain part of the national territory... (emphasis added).

131. Advocate General Warner indicated in another case that one who had a monopoly or near monopoly of the Luxembourg market for a particular product should also be subject to Article 82 EC.

132. Furthermore, I consider that the reasoning of la Crespelle is of some assistance.

133. It is true that in la Crespelle the regional monopolies covered the entire territory of a Member State whilst in the present case the legal regime in issue covers only the territory of the Land of Rheinland-Pfalz (even if Ambulanz Glöckner claims that the situation is essentially the same throughout Germany). It is also true that in la Crespelle the monopolies were clearly conferred by national legislation. In the present case Paragraph 18(3) of the RettDG 1991 protects the undertakings entrusted with the public ambulance service only indirectly.

134. There is however another difference between the two cases which pleads in favour of applying Article 82 in the present case. It appears that in la Crespelle the regional monopolies in issue were held by different economic actors. On a national scale each of those actors was consequently relatively small. In the present case the DRK appears to be entrusted in most areas of Rheinland-Pfalz with the public ambulance service. If we accept the referring court's interpretation of Paragraph 18(3) of the RettDG there is thus a series of contiguous monopolies which are mostly held by one medical aid organisation. Contrary to what was stated by the Landkreis and the ASB, the medical aid organisation in issue therefore does not appear to be a minor actor active only on a local or small regional scale.

135. The above survey of the case-law suggests that there is no single formula for establishing whether a dominant position exists in a substantial part of the common market. It also shows why there is no such single formula: the range of possible cases is too diverse, and each case must therefore be analysed on its own facts. However, the survey also leads to the conclusion that, if the dominant position in the present case extends to the whole of the Rheinland-Pfalz (and of course a fortiori if it should be found that the situation is replicated across the whole of Germany),

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then the dominant position exists in a substantial part of the common market.

136. Accordingly, I will assume the following: the relevant markets are the markets for emergency and for patient transport in Rheinland-Pfalz. The DRK is dominant on both product markets. That dominant position exists in a substantial part of the common market.

(b) Paragraph 18(3) of the RettDG 1991 and potential abuses of a dominant position

137. Ambulanz Glöckner argues essentially that the provision at issue is contrary to Article 86(1) EC in that it leads to two types of infringements of Article 82 EC. In its view, the disputed provision favours a situation in which the medical aid organisations are unable to satisfy consumer demand for qualified ambulance services at acceptable prices and empowers the public authorities and the medical aid organisations jointly to limit access of competing operators to the market.

138. The other side argues essentially that the mere creation of a dominant position is not caught by Articles 86(1) and 82 EC and that the medical aid organisations have always provided satisfactory services at acceptable prices.

139. The Court has held that the mere creation of a dominant position by the granting of exclusive rights within the meaning of Article 86(1) EC is not as such contrary to the Treaty. But it has also held that even though Article 86(1) presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all the special or exclusive rights are necessarily compatible with the Treaty; that depends on different rules, to which Article 86(1) refers.

140. Recently the Court has restated its position on that issue as follows:

[T]he mere creation of a dominant position through the grant of exclusive rights within the meaning of Article [86(1) EC] is not in itself incompatible with Article [82 EC]. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses...

141. I will examine, first, whether Paragraph 18(3) of the RettDG 1991 creates a situation in which the medical aid organisations are manifestly not in a position to satisfy demand and, secondly, whether it creates a conflict of interest in which the medical aid organisations are led to abuse their dominant position by limiting the access of independent operators to the market.

- Situation in which dominant undertakings are manifestly not in a position to satisfy demand

142. It follows from Höfner that a Member State's decision to grant special or exclusive rights is contrary to the Treaty where the undertaking concerned is manifestly not in a position to satisfy demand and therefore cannot avoid abusing its dominant position by constantly limiting production, markets or technical development to the prejudice of consumers (Article 82(b) EC).

143. The parties strongly disagree on whether that is the case in the present proceedings.

144. Ambulanz Glöckner contends in substance that

- as regards emergency transport, the medical aid organisations were not always able to respect the arrival times prescribed by the RettDG;

- as regards non-emergency patient transport, delays of between one hour and two and a half hours occur which means for example that technical installations in hospitals waiting for patients are used inefficiently;

- the medical aid organisations charge for their services disproportionately high user charges which are the result of mismanagement, the absence of competitive pressure and the guarantee that ultimately

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all losses will be covered by the State; that is confirmed by the fact that services of independent and thus profit-oriented operators are much less expensive;

- since the introduction of rules such as Paragraph 18(3) of the RettDG 1991 the costs of the public ambulance service in Germany have risen disproportionately; the costs of patient transport in Germany rose from DEM 1.76 billion in 1991 to DEM 3.14 billion in 1997 (increase of 78.41%) and the costs in Rheinland-Pfalz rose from DEM 86 million in 1992 to DEM 128 million in 1999 (increase of 49.75%).

145. The Landkreis, the Vertreter des öffentlichen Interesses and the ASB contend by contrast that

- as regards emergency transport, the medical aid organisations have respected the prescribed arrival times in more than 90% of the cases; isolated cases of delay will always happen and do not as such prove a system failure;

- as regards delays in the field of non-emergency transport, Ambulanz Glöckner has not presented any evidence for its contention;

- the higher user charges of the public ambulance services can be explained by the costs of providing services 24 hours a day and throughout the territory of the Land; if for social reasons user charges are uniform throughout the Land then they will necessarily be higher than the remuneration requested by private undertakings which provide their lucrative services only in densely populated areas during peak times;

- the increase in the costs of patient transport in Germany and in Rheinland-Pfalz is mainly the result of structural improvements in the public ambulance service over the last 10 years: in Rheinland-Pfalz nine additional ambulance stations have been created, the requirements as regards the qualifications of ambulance personnel have been raised and a system of emergency doctors has been set up. Moreover the statistics provided by Ambulanz Glöckner include the costs of conveyance of patients not in need of help in vehicles other than ambulances, which contributed disproportionately to the increase in question.

146. In my view the Court is not in a position to decide who is right on that issue. To decide whether the DRK or other medical aid organisations are unable to satisfy demand requires difficult economic and factual assessments. In a preliminary reference procedure those assessments are for the referring court.

147. In making those assessments the national courts should in my view take into account the following factors.

148. First, the national courts must bear in mind the respective responsibilities of the national legislature and of the medical aid organisations within Articles 86(1) and 82 EC. A Member State is liable under Article 86(1) only where there is a failure in the system which it has set up, that is to say where an abuse is the consequence of its regulatory or decisional intervention, whereas undertakings enjoying special or exclusive rights are alone responsible for any infringement of the competition rules attributable exclusively to them. Articles 86(1) and 82 will therefore not be infringed where the only reason that a medical aid organisation is manifestly not able to satisfy demand is inefficient management.

149. Secondly, because the granting of special or exclusive rights involves difficult economic assessments and social choices, the Member States must enjoy a certain discretion in deciding whether a monopolist will or will not be able to satisfy demand. The Court has therefore limited its review, and that of the referring court, to national provisions which are manifestly inappropriate.

150. Thirdly, rapid and high quality ambulance services are - as the representative of the Landkreis

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rightly explained - a question of life and death and therefore of paramount importance for society as a whole.

151. The referring court should therefore analyse primarily whether authorisations for independent operators may contribute to shorter arrival times and to generally higher quality services, or whether on the contrary even without such authorisations the public ambulance service is perfectly able to provide the necessary services in all situations and at all times of the day. The decisive factor should in my view be the ability of the public ambulance service to provide rapid and high quality services even at peak hours. If the capacities of the public ambulance service are insufficient at those times (e.g. regular delays of non-emergency transport in towns), I would find it unacceptable systematically to refuse authorisations to independent operators.

152. I consider that the referring court may however attach less importance to the allegedly excessive prices of the public ambulance services. To assess whether prices are excessive is always a difficult exercise and such a finding has rarely, if ever, been made by the Court or the Commission under the competition rules. Price comparisons are also difficult because the public ambulance service with its special obligations has a different cost structure from private undertakings focusing on particularly profitable geographical areas.

153. I conclude therefore that it is for the national court to establish whether Paragraph 18(3) of the RettDG 1991 creates a situation in which the medical aid organisations are manifestly not in a position to satisfy demand. That court should attach particular importance to the capacity of the medical aid organisations to provide rapid and high quality services at peak hours.

- Creation of a conflict of interest

154. Ambulanz Glöckner refers to the judgment in Raso and contends that Paragraph 18(3) of the RettDG 1991 creates a conflict of interest in that the medical aid organisations and the public authorities are together enabled to limit the access of their potential competitors to the market. In its view the medical aid organisations and the authorities should not be allowed to take part in the decision-making as regards authorisations for the provision of independent ambulance services.

155. It is settled case-law that Articles 86(1) and 82 EC may be infringed where a State measure creates a conflict of interests between two commercial activities of an undertaking with special or exclusive rights or between a regulatory mission entrusted to such an undertaking and its economic interests.

156. In the present case Ambulanz Glöckner appears to complain more about the second type of conflict of interests, namely a conflict between regulatory powers and economic interests.

157. In that regard it will be recalled that the defendant Landkreis consulted the medical aid organisations entrusted with the public ambulance service in the operational area of Pirmasens before taking its decision to refuse the authorisation. We also know that both medical aid organisations had recommended that refusal.

158. That way of proceeding is in my view not prohibited by Articles 86(1) and 82 EC.

159. In the first place, as I have already stated, the national authorities do not act as undertakings when they grant or refuse authorisations. They act only in the exercise of public authority without an economic interest in the outcome of the procedure. They thus fall outside the scope of Articles 86(1) and 82 EC.

160. As regards the medical aid organisations, it is true that they fall within the scope of those Articles and that they have an economic interest in the outcome of the authorisation procedure. But they have a right only to be consulted in the course of the authorisation procedure and the final decision is taken by the public authorities alone. It has not been suggested that the Landkreis

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is bound by the factual statements or the recommendations of the medical aid organisations. The medical aid organisations are thus not entrusted with regulatory powers within the meaning of the Court's case-law.

161. Moreover, it appears from the RettDG 1991 that the Landkreis enjoys no discretion as regards its decision, but must grant the authorisation, if the ambulance operator concerned fulfils the legal requirements. The main proceedings show that a refusal is then subject to full judicial review. Those are two important further safeguards against biased decisions.

162. I conclude therefore that the mere consultation of the medical aid organisations entrusted with the public ambulance service in the course of the procedure for authorisation of independent ambulance services is not contrary to Articles 86(1) and 82 EC.

(c) Effect on trade between Member States

163. The Landkreis, the ASB, the Vertreter des öffentlichen Interesses and the Austrian Government all maintain that the measure in question does not have appreciable effects on trade between Member States and that therefore the Community competition rules do not apply. In their view, all the elements of the present case are confined not only within a single Member State, but within a territory which is only a part of a Member State. Emergency transport is by definition a locally confined activity, since the patient must be transported as rapidly as possible to the nearest suitable hospital. Cross-border ambulance services take place rarely and are not affected by the provision in issue.

164. Under the Treaty, for Articles 86(1) and 82 EC to apply either the effects of the abuse or the effects of the State measure must be liable to affect trade between Member States.

165. The Court has held in that regard:

The interpretation and application of the conditions relating to effects on trade between Member States contained in Articles [81] and [82 EC] must be based on the purpose of that condition which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market...

166. The Court has also explained that it is not necessary to prove an actual effect; a potential effect is sufficient. On the other hand the effect in issue must be appreciable and not just insignificant.

167. It follows also from the case-law that an undertaking may invoke Articles 86 and 82(1) EC against its own State in proceedings which do not involve a concrete cross-border element in its own situation. Perhaps the best example in that respect is Höfner in which the Court did not apply the rules on freedom to provide services because the activities at issue in the main proceedings were confined in all respects to one Member State. It did however apply the competition rules since the national provisions at issue potentially affected recruitment of nationals of other Member States.

168. The Commission - which maintains a neutral position on this issue - states in support of the applicability of Community competition law that the proximity of Rheinland-Pfalz to Belgium, France and Luxembourg makes cross-border transports more likely. It also mentions three situations in which patient transport might be provided over longer distances and across State borders, namely where a patient wishes to be transported for a particular operation to a specialised hospital situated in another Member State, where a migrant worker wishes to be treated in his home country, or in the case of holiday injuries (e.g. skiing accidents).

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169. I consider that if the rules at issue were to be interpreted as prohibiting those types of cross-border service then they would indeed have to be regarded as affecting trade in services between Member States.

170. However, if I understand the provision at issue correctly, occasional cross-border transports of patients do not seem to fall within its scope. Paragraph 18(3) of the RettDG 1991 seems to be mainly an obstacle for operators who wish to provide ambulance services in Rheinland-Pfalz on a more permanent basis. It is a rule which renders the access of operators from other Member States to the market in Rheinland-Pfalz more difficult.

171. Does such a rule affect trade between Member States? It might seem at first sight unlikely that ambulance operators from other Member States would ask for authorisations to operate their ambulances in Rheinland-Pfalz. Effects on trade would thus not be appreciable within the meaning of the Court's case-law.

172. Ambulanz Glöckner stated however at the hearing that one operator established in Luxembourg and two operators established in France had already tried to obtain authorisations to provide ambulance services in Rheinland-Pfalz and that those authorisations were refused on the basis of the RettDG 1991. It also stated that operators established in other Member States had lodged complaints with the Commission against the restrictive authorisation systems in place in Rheinland-Pfalz and other parts of Germany.

173. It will be for the referring court to verify whether those statements are correct. It will then also be for the referring court - taking into account the results of its verification - to determine whether in view of the economic characteristics of the two product markets for ambulance services in Rheinland-Pfalz there is a sufficient degree of likelihood that a rule such as Paragraph 18(3) of the RettDG 1991 prevents operators established in other Member States from either operating ambulances or even establishing themselves in Rheinland-Pfalz.

VIII - Justification under Article 86(2) EC

174. The Landkreis, the ASB, the Vertreter des öffentlichen Interesses and the Austrian Government argue that a rule such as Paragraph 18(3) of the RettDG 1991, even if there were a prima facie infringement of Articles 86(1) and 82 EC, would be in any event justified under Article 86(2) EC.

175. In my view there can be no doubt that the medical aid organisations are entrusted with the operation of a service of general economic interest within the meaning of Article 86(2) EC. Services of general economic interest have a special importance in the Community, as is now emphasised by Article 16 EC (formerly Article 7d, introduced by the Treaty of Amsterdam). There is an obvious and strong public interest that every citizen should have access to efficient and high-quality emergency transport and non-emergency patient transport services. The only issue is therefore whether a rule such as Paragraph 18(3) of the RettDG 1991 is necessary to protect the performance, in law or in fact, of the particular tasks assigned to the medical aid organisations.

176. The Landkreis, the ASB and the Vertreter des öffentlichen Interesses argue, first, that the presence of independent operators on the markets for emergency and non-emergency patient transport might cause confusion for accident victims and patients, with potentially fatal consequences. In particular in emergency situations persons who wish to alert emergency ambulances must not be confronted with a confusing choice between several ambulance service providers.

177. I am not convinced by that argument. It is obviously necessary to prevent such dangerous instances of confusion. However, it seems likely that there will not be many cases of conflict because independent operators will normally prefer to provide non-emergency transport services. In any event it should

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be feasible to coordinate the services provided by independent providers with those of the public ambulance service in a way which excludes confusion in the mind of the public. An important role might be played for example by the central control unit in each area which will have to distribute work in a non-discriminatory way, and which would be reached by a single telephone call.

178. The Landkreis, the ASB, the Vertreter des öffentlichen Interesses and the Austrian Government argue, secondly, that some measure of protection of the public ambulance service against competition from independent operators is necessary for the following economic reasons.

179. The presence of independent operators on the market reduces the revenue of the public ambulance service. Since there is only a finite number of transports to be provided, more transports provided by independent operators will entail a corresponding reduction of transports effectuated by the public ambulance service.

180. It is moreover to be expected that independent profit-oriented operators will prefer to provide their services mainly in densely populated areas where distances are short. It is also to be expected that they will prefer to operate mainly on the market of non-emergency transport. That is because emergency transport requires costly investments in equipment and qualified personnel and cost-efficient planning is difficult. Private operators therefore concentrate their activities on non-emergency transport in densely populated areas and thus engage in a form of cherry-picking.

181. The resulting reduction of revenue of the public ambulance service - which is left with non-emergency transport in remote areas and emergency transport - is not compensated for by a corresponding reduction of its costs. That is because the public ambulance service has a legal obligation to provide its services 24 hours a day and throughout the entire territory. The major part of its costs are fixed standby costs (Vorhaltekosten) which arise independently of whether concrete services are actually provided.

182. It must also be borne in mind that losses of the public ambulance service are not only losses for the medical aid organisations, but will generate costs for society as whole. The public ambulance service is financed ultimately either through taxes or through health insurance costs. In the words of the Austrian Government there is thus a serious risk that the inevitable losses of the public ambulance service are socialised, whilst its potential profits are privatised.

183. Subject to one important reservation, I find those arguments convincing.

184. Article 86(2) seeks to reconcile the Member States' interest in using certain undertakings as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the internal market.

185. Since it is a provision permitting derogation from the Treaty rules, it must be interpreted strictly. However, when Member States define the services of general economic interest which they entrust to certain undertakings, they cannot be precluded from taking account of national policy objectives. In that regard it must also be borne in mind that Member States retain competence to organise their public health systems.

186. The Court has also established that for the exception in Article 86(2) EC to apply it is not necessary that the survival of the undertakings entrusted with the service of general interest should be threatened. It is sufficient that, in the absence of the special or exclusive rights at issue, it would not be possible for the undertakings concerned to perform the particular tasks entrusted to them or that the maintenance of those rights is necessary to enable the undertakings concerned to perform their tasks under economically acceptable conditions.

187. It follows in my view from that case-law that a Member State is in principle entitled to reserve both emergency and non-emergency transport to the undertakings which provide the public

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ambulance service. It is true that such a system will involve cross-subsidisation, which in some circumstances might need scrutiny under the competition rules. Indeed two types of cross-subsidisation are involved here: revenues from densely populated areas contribute to the costs of providing ambulance services to patients from remote areas, and revenues from non-emergency transport contribute to the costs of providing emergency transport. I accept however that the system in issue may help to ensure that the public ambulance service works in acceptable economic conditions. Moreover that type of cross-subsidisation is not as dangerous for competition as transfers of resources from a lucrative reserved sector to a sector under competition (that danger exists for example in the postal sector).

188. I have however one important reservation. If authorisations for independent providers are refused even though medical aid organisations entrusted with the public ambulance service are manifestly unable to satisfy demand (for example at peak hours) the economic reasons which I have just discussed cannot in my view be invoked to justify a restrictive authorisation policy. In those situations a refusal to grant authorisations to independent operators might be financially advantageous for the medical aid organisations involved. That economic advantage would however be gained at the expense of the main objective of the national legislation at issue, namely to provide the population with efficient and high quality ambulance services. It would also be contrary to the objective of Article 86(2) EC which is the efficient provision of services of general economic interest.

189. I accordingly conclude that a provision such as Paragraph 18(3) of the RettDG 1991 is justified under Article 86(2) EC, in so far as it does not preclude authorisations for independent operators where the medical aid organisations operating the public ambulance service are manifestly not in a position to satisfy demand.

IX - Conclusion

190. For the above reasons the question referred should in my view be answered as follows:

On the assumption that the referring court finds that the DRK alone or several medical aid organisations collectively occupy a dominant position on the markets for emergency transport services and patient transport services in Rheinland-Pfalz, a rule under which private operators of ambulance services are to be refused authorisation to provide independent ambulance services where the grant of such an authorisation is likely to have adverse effects on the operation or the profitability of the public ambulance service infringes Article 86(1) EC read in conjunction with Article 82 EC and is not justified under Article 86(2) EC where

- that rule is liable to create a situation in which the medical aid organisation(s) entrusted with the public ambulance service are manifestly not in a position to satisfy demand in particular for rapid and high-quality patient transport services at peak hours, and

- in view of the economic characteristics of the markets in question there is a sufficient degree of likelihood that that rule prevents operators established in other Member States from operating ambulances or establishing themselves in Rheinland-Pfalz.

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Opinion of Mr Advocate General Alber delivered on 8 November 2001. Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) OSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH. Reference for a preliminary ruling: Vergabekontrollsenat des Landes Wien - Austria. Directive 93/37/EEC - Public works contracts - Definition of 'contracting authority' - Body governed by public law - Restricted procedure - Rules for weighting of criteria for selecting candidates invited to tender - Advertisement - Directive 89/665/EEC - Review procedures relating to public procurement - Time-limits for review. Case C-470/99.

I Introduction

1. In the course of a review of a restricted procedure for the award of a works contract, the Vergabekontrollsenat (Public-procurement review body), Vienna, referred four questions concerning the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (hereinafter "Directive 93/37"). (2) They concern the definitions of a contracting authority, in light particularly of a subsequent extension of the tasks of the body concerned, the concept of a public-works contract, the provision of limitation periods for bringing an action and whether the evaluation criteria must be stated in the invitation to tender.

II Applicable law

1. Directive 93/37/EEC

2. Article 1 of Directive 93/37 defines "public works contract" and "contracting authority" as follows:

Article 1

"For the purpose of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

having legal personality, and

financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

"

2. Directive 89/665/EEC

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3. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (hereinafter "Directive 89/665") (3) provides:

Article 1(1):

"The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law."

Article 2(7) and (8):

"7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

"

3. Wiener Landesvergabegesetz

4. The Wiener Landesvergabegesetz (Public-procurement law in the Land of Vienna, hereinafter "WLVergG"), (4) in the applicable version for the purposes of the present review procedure, contains the following provisions which are of particular significance in the consideration of the issue of the admissibility of the reference for a preliminary ruling, regard being had to the question whether the referring Vergabekontrollsenat is a court or tribunal within the meaning of Article 234 EC.

5. Under Paragraph 94(2), the Vergabekontrollsenat is responsible at first and last instance for deciding applications for review. Its decisions are not liable to be set aside or varied through administrative channels. Under subparagraph 3, the Allgemeines Verwaltungsverfahrensgesetz (General Law on Administrative Procedure) and the Verwaltungsvollstreckungsgesetz (Law on Administrative Enforcement) apply to the review procedure, unless otherwise provided for in the WLVergG.

6. Paragraph 95 of the WLVergG states:

"(1) The Vergabekontrollsenat shall consist of seven members. The members shall be appointed by the Land Government for a term of six years. Members shall be eligible for reappointment.

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Three members, who may also be experienced officials of the Magistrat (municipal office) of the city of Vienna, shall be appointed after hearing the Gemeinderat (city council), one each after a hearing before the Chamber of Commerce of Vienna, the Chamber of Workers and Employees for Vienna, and the Chamber of Architects and Consulting Engineers for Vienna, Lower Austria and Burgenland. The President shall be a member of the judiciary and shall be appointed after a hearing before the President of the Oberlandesgericht (Higher Regional Court), Vienna. For each member a first, second and third substitute shall be appointed in the same manner. Substitutes, in the order of their appointment, shall represent members in the event of their temporary indisposition or, on expiry of their term of office pending the appointment of a new member. In the event of the departure of a member or a substitute, fresh appointments shall be made without delay.

(2) Members and substitutes must possess special knowledge of public procurement, and in the case of members and substitutes appointed after a hearing before the Gemeinderat that knowledge must be specifically in the economic and technical fields.

(3) A person shall cease to be a member of the Vergabekontrollsenat:

1. on his death;

2. on resignation;

3. if he ceases to be eligible for election to the Nationalrat (national council) (Nationalrats-Wahlordnung (Elections to the National Council Order) 1992, Paragraph 41, BGBl. No 471, as amended by Federal Law BGBl. No 117/1996);

4. on expiry of his term of office;

5. in the case of the President and substitutes, on ceasing to be a member of the judiciary;

6. if he is removed by the Vergabekontrollsenat.

(3a) A member shall be removed from office by a decision of the Vergabekontrollsenat if he is permanently prevented from properly performing his duties owing to physical or mental injury or is guilty of gross dereliction of duty. The decision shall be made after hearing the member concerned. The member concerned shall not be entitled to vote.

(4) Members of the Vergabekontrollsenat shall be independent in the exercise of their office and shall not be bound by instructions.

(5) The members of the Vergabekontrollsenat shall be bound to secrecy under Article 20(3) of the B-VG (Bundesverfassungsgesetz, Federal Constitutional Law).

(6) Meetings of the Vergabekontrollsenat shall be called by the President. Where a member has an interest or is temporarily unable to carry out his duties, his substitute shall be called upon to sit. Members of the Vergabekontrollsenat shall not participate in any decision relating to any procurement procedure concerning the award of a contract in the field of activity of the institution (or, in the case of public servants in the municipal office of the city of Vienna, the department, division or office) to which they belong. If serious grounds exist for doubting a member's impartiality, he must decline to sit and arrange to be represented. Parties may reject members of the Vergabekontrollsenat on showing cause relating to impartiality. The Vergabekontrollsenat shall decide any question relating to the alleged impartiality of a member or any applications for rejection, and the member concerned shall not be entitled to vote thereon. The President shall cause the names of the members of the Vergabekontrollsenat and the institution (or in the case of public servants in the city of Vienna, the department, division or office) to which they belong to be published in the Amtsblatt der Stadt Wien (Official Journal of the City of Vienna) at the start of each calendar year.

(7) Applications shall be decided in the order determined by the President. Orders shall be made

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in the presence of at least five members by simple majority. Abstentions are not permissible. Sittings shall not be public. A minute shall be made of the proceedings of the sitting. Notices shall be issued in writing. They shall include the names of the members of the Vergabekontrollsenat who took part in the decision. The notice shall be signed by the President. Orders relating to the conduct of the procedure may also be made by any member in accordance with the Rules of Procedure.

(8) The members of the Vergabekontrollsenat shall not be remunerated for their services. They shall be sworn into office by the chief executive of the Land .

(9) Members of the Vergabekontrollsenat shall be reimbursed for any necessary travelling expenses and compensated for their time, for which a rate shall be fixed by the Land Government.

(10) The Vergabekontrollsenat shall adopt its own Rules of Procedure.

(11) The Amt der Wiener Landesregierung (Office of the Government of the Land of Vienna) shall, on a proposal from the Vergabekontrollsenat, place at its disposal the management staff required and, after hearing the President of the Vergabekontrollsenat, the necessary premises. Officials who carry out management tasks shall, in the course of their duties for the Vergabekontrollsenat, be bound only by instructions from the President and the rapporteur for the time being. They may be removed from those duties only after the President has been heard.

"

Pre-litigation procedure

"Paragraph 96.

(1) If a contractor considers that a decision taken by a contracting authority before the award of a contract infringes this Law and he has been or risks being harmed thereby, he shall formally communicate in writing to the contracting authority a statement of reasons and his intention to institute review proceedings.

(2) On receipt of the communication under subparagraph 1, the contracting authority shall either rectify the alleged infringement without delay and inform the contractor thereof or communicate in writing to the complainant why the alleged infringement does not exist.

"

Application for review

"Paragraph 97.

(1) An application for review prior to the award of a contract shall be admissible only if the contractor has formally notified the contracting authority of the alleged infringement and of his intention to apply for review (Paragraph 96(1)) and the contracting authority has not informed him within two weeks that the infringement has been rectified.

(2) Review may be applied for by:

1. a contractor who claims a business interest in the conclusion of a supply, works, works concession or service contract or a contract in the water, energy, transport or telecommunications sectors, in respect of a ground of nullity under Paragraph 101;

2. a tenderer who claims that the contract was not awarded to him in spite of the inapplicability of the grounds of elimination within the meaning of Paragraph 47 and contrary to Paragraph 48(2).

(3) The application under subparagraph 2 shall contain:

1. the precise designation of the award procedure concerned and of the decision challenged;

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2. the precise designation of the contracting authority;

3. a precise statement of the facts;

4. particulars of how the applicant risks being or already has been harmed;

5. the grounds on which the allegation of infringement is based;

6. a specific request for a declaration of nullity or amendment;

7. in cases under subparagraph 1, evidence that the contracting authority was notified in a pre-litigation procedure in accordance with Paragraph 96 of the alleged infringement and of the intention to apply for review, and reference to the contracting authority's failure to rectify the infringement within the specified time-limit.

(4) The review procedure does not have a suspensory effect on the contract award procedure to which it relates.

(5) The maximum penalty for abuse (Paragraph 35 of the AVG) which may be imposed in the review procedure shall be 1% of the estimated value of the contract, not exceeding ATS 800 000.

"

Time-limits

"Paragraph 98.

Applications for review on the ground of the following alleged infringements shall be lodged with the Vergabekontrollsenat within the following time-limits:

1. as regards applications which are refused, two weeks, and where Paragraph 52 applies, three days after notification of the refusal; (5)

2. as regards provisions in the notification by which contractors are invited to apply to take part in a restricted or negotiated procedure or as regards provisions of the invitation to tender, two weeks, and where Paragraph 52 applies, one week before expiry of the date for submitting applications or tenders;

3. as regards the award of a contract, two weeks after the publication of the award in the Official Journal of the European Communities or, where the award is not published, six months after the award of the contract.

"

III Facts

1. Main proceedings

7. In the Official Gazette of the City of Vienna, Entsorgungsbetriebe Simmering GesmbH (hereinafter "EBS") advertised its intention to award a works contract for the extension of the principal sewage plant in Vienna under a restricted procedure. (6) The intention was to invite the five best-ranked candidates to submit tenders and to award the contract to the most economically advantageous tender in accordance with the criteria set out in the invitation to tender. In the Explanatory Notes on Applications to Take Part, (7) the following appeared under the heading, "Criteria for ranking applications to take part" :

"For the ranking of the applications to take part, the technical operating capacity over the last five years of the candidate, of each member of the consortium of contractors and of the sub-contractors indicated will be taken into account.

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The five highest ranked candidates shall be invited to submit a tender.

The evaluation of the applications submitted shall be made according to a scoring procedure. (8)

The following works shall be analysed in the following order:

1. Sewage treatment plants

2. Pre-stressed components

3. Large-scale foundations supported by columns in gravel

4. Oscillating pressure compaction

5. High pressure soil consolidation

The candidate shall identify reference projects completed within the last five years comparable to the tasks to be undertaken.

Only such references as have been carried out by a candidate or a sub-contractor itself, as a leader of a consortium or as the person within a consortium who is responsible for and who carries out the technical aspects shall be evaluated (pro formas are included in the application to take part, point 3).

"

8. EBS lodged the details of the scoring procedure with a notary on 9 April 1999, that is to say before the first application to take part was submitted. The applicants in the main proceedings, Universale Bau GmbH (hereinafter "Universale") and the Hinterreger and OSTU-STETTIN consortium (hereinafter "the consortium"), were informed in the explanatory notes on applications to take part that they had been lodged with a notary. However, they were not informed of the result of the scoring procedure, or of the evaluation criteria, before the expiry of the time-limit for applications.

9. The applicants in the main proceedings gave notice of their interest in taking part in the restricted procedure. After EBS notified them that they were not among the five best-ranked undertakings and would therefore not be invited to tender, they challenged the procurement procedure before the referring Vergabekontrollsenat.

2. Legal nature and objects of EBS

10. EBS was established in 1976 by Wiener Allgemeine Beteiligungs- und Verwaltungsgesellschaft mbH and BIA Betriebsgesellschaft für Industrieabfall- und Altölbeseitigung GmbH. Each of the two shareholders subscribed for half the share capital. According to the findings of the referring Vergabekontrollsenat, Allgemeine Beteiligungs- und Verwaltungsgesellschaft mbH "was accountable to" the City of Vienna. At the time of the invitation to tender, the shareholdings in EBS were as follows:

Wiener Holding AG ATS 11 075 000

City of Vienna ATS 160 425 000

Wiener Stadtwerke ATS 178 500 000

11. According to the findings of the Vergabekontrollsenat, the objects of EBS were initially the design, construction and management of a special waste disposal and waste incineration facility. All its operations were carried out on a commercial basis and in competition with other waste disposal businesses, such as operators of private refuse dumps. EBS alone bore the risk of profit or loss. The deed of incorporation does not warrant any finding that EBS was to meet general-interest needs of a non-industrial or non-commercial nature.

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12. According to clause 10(2) of the relevant EBS' deed of incorporation of 12 September 1996, the Kontrollamt (Review Office) of the City of Vienna is entitled to check both the current account for numerical accuracy, regularity, economy, profitability and expediency and the annual accounts and the situation report including performance, records and other documents, to inspect the business premises and facilities and to report on the result of that inspection to the competent bodies, the shareholders and the City of Vienna.

3. Contracts with the City of Vienna

13. In 1985 EBS entered into a lease with the City of Vienna under which it took over management of the City of Vienna's principal sewage plant with effect from 1 January 1986. Under this agreement, the City of Vienna paid a "reasonable and uniform remuneration to cover the costs of management of the principal sewage plant and of existing waste disposal plants, together with a reasonable return on capital" . According to the findings of the Vergabekontrollsenat, which are confirmed by the parties to the main proceedings, EBS does not perform the task of sewage treatment with a view to profit. Rather, it is a public-service activity entrusted to EBS and carried out on a break-even basis. Thus, EBS' activity in this area is not managed on an industrial or commercial basis. The deed of incorporation was not amended when this task was transferred.

14. By a lease dated 8 July 1996, which replaced the 1985 agreement, the management of the City of Vienna's principal sewage plant was again entrusted to EBS. In addition, EBS undertook to extend the sewage works relating to the project and otherwise to enlarge the Vienna principal sewage plant and EBS' plants in its own name and on its own account (point I.2 of the contract). The City of Vienna was to continue to supply the personnel necessary for the management of the principal sewage plant (point I.3). The City of Vienna undertook to pay a "reasonable and uniform remuneration to ensure coverage by the business of its costs. All the expenses arising out of the extension and operation of the plants including the sewage works relating to the project, less any sums received by EBS, shall... be reimbursed..." (point IV.1).

15. No specific requirements were laid down as regards the structure of the plant. However, EBS is required in points II and III of the contract to ensure that the principal sewage plant operates in a specified way, though the City of Vienna does not have any influence over the actual organisation of the building work.

16. It is clear from the planning notice that EBS applied for planning permission. The owner of the land on which the work is to be executed is the City of Vienna. In a document of 8 September 1999, which was included as annex 8 to the order for reference, EBS stated: "We will retain ownership of the sewage plant extension... The sewage plant will be transferred in the event of termination of the lease and management contract which have been concluded for an indefinite period between the City of Vienna and ourselves. In that case the City of Vienna shall be obliged to take over, inter alia, our sewage plant. It must pay us the current market value of the sewage plant" . According to the Vergabekontrollsenat, such a provision is compatible with Austrian law.

17. The Vergabekontrollsenat excludes any intention on the part of the City of Vienna to circumvent the rules concerning public procurement by establishing EBS and transferring the management and extension of the sewage plant to EBS. EBS was established as early as 1976, but it was not until 1986 that operation of the principal sewage plant was entrusted to it.

IV Questions referred

18. The Vergabekontrollsenat has referred the following questions to the Court for a preliminary ruling:

1. Does a legal person constitute a "contracting authority" within the meaning of Article 1(b)

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of Directive 93/37/EEC even if it was not established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but now meets such needs?

2. If Entsorgungsbetriebe Simmering GesmbH is not a contracting authority, does the planned construction of the second biological treatment phase of the principal sewage plant, Vienna, constitute the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority, and thus a "public works contract" within the meaning of Article 1(a), read in conjunction with Article 1(c), of Directive 93/37/EEC?

3. If Question 1 or Question 2 is answered in the affirmative, does Directive 89/665/EEC preclude a national provision which fixes a time-limit for the review of an individual decision of the contracting authority so that on expiry of that time-limit the decision can no longer be challenged in the course of the ongoing contract award procedure? Is it necessary for the persons concerned to plead every defect, failure to do so entailing loss of their right to do so?

4. If Question 1 or Question 2 is answered in the affirmative, is it sufficient for the body inviting tenders to determine that the applications will be evaluated according to a method lodged with a notary, or is it necessary for the evaluation criteria already to have been communicated in the call for candidates (9) or the tender documents?

V Submissions of the parties and opinion

1. Admissibility of the reference for a preliminary ruling

19. Admittedly, none of the parties to the proceedings expressed any doubt as to the admissibility of the reference for a preliminary ruling. However, the Vergabekontrollsenat gave detailed reasons as to why it is entitled to make a reference and the Austrian Government made submissions in that regard. Referring to a judgment of the Court concerning the Tiroler Vergabesenat (Procurement Chamber for the Tyrol), both consider the reference for a preliminary ruling to be admissible. In that case, the Advocate General was of the opinion that the reference for a preliminary ruling was inadmissible, (10) whereas the Court held the question referred to be admissible. (11) The Court has not yet decided whether the referring Wiener Vergabekontrollsenat is entitled to make a reference. The question also arises in Case C-92/00. In his Opinion in that case, Advocate General Tizzano has by implication assumed that the Wiener Vergabekontrollsenat is entitled to make a reference. However, he did not expressly state his view on that question. The judgment in that case is still pending. It is therefore appropriate to express a view on this question in the present proceedings.

20. The Court has consistently held that whether a body making a reference is a court or tribunal within the meaning of Article 177 of the EC Treaty (now Article 234 EC) depends on whether it is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes , whether it applies rules of law and whether it is independent. (12)

21. Under Paragraph 94(2) of the WLVergG, the Vergabekontrollsenat is the body responsible at first and last instance for reviewing decisions by a contracting authority in a procurement procedure. Thus, its activity is established by law and its jurisdiction is compulsory. It is also a permanent body. Decisions of contracting authorities are reviewed in accordance with the WLVergG and, unless otherwise provided therein, under Paragraph 94(3) of the WLVergG, on the basis of the General Law on Administrative Procedure and the Law on Administrative Enforcement. Paragraph 94(2) of the WLVergG guarantees the independence of the Vergabekontrollsenat from the administration, by providing that its decisions are not liable to be varied or set aside through administrative channels. Moreover, Paragraph 95(4) of the WLVergG guarantees that members must be able to exercise their office independently and free from instructions. Subparagraph 6 makes provision in respect

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of partiality, a criterion on which the Court placed particular emphasis in Köllensperger and Atzwanger . (13) Under Paragraph 95(7), the Vergabekontrollsenat's notices are to be issued in writing. On the basis of these findings the Vergabekontrollsenat may be presumed to satisfy the criteria in the case-law governing definition of a court or tribunal for the purposes of Article 177 of the EC Treaty (now Article 234 EC). Accordingly, the reference for a preliminary ruling is admissible.

2. The first question

22. By its first question, the Vergabekontrollsenat asks whether a body which, whilst not established for the specific purpose of performing general-interest tasks, of a non-industrial and non-commercial nature, subsequently takes on and from then actually performs such a task, is to be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 93/37.

(a) Submissions of the parties

23. Universale, the consortium and the Austrian Government are of the view that EBS is a contracting authority for the purposes of the Directive. That issue is determined by the tasks actually performed by the body at the time of the invitation to tender and the award of the contract, rather than by the terms of its deed of incorporation. In support of its view, the consortium relies on existing case-law, from which it appeared that this term was to be interpreted functionally. The consortium and the Austrian Government do not relate the criterion "established for the specific purpose" to the time of establishment, but submit that subsequent changes actually made should be taken into account. This could be satisfied either by a change to the previous determination of objects or by making provision for the inclusion of an additional object. Otherwise, Directive 93/37 might easily be circumvented by assigning needs in the general interest not to a body having legal personality newly established to that end but to an existing body which previously served other purposes. The consortium suggests that the criterion should be read as "intended by the owners to fulfil the specific purpose" .

24. Conversely, EBS and the Commission are of the view that EBS is not a contracting authority for the purposes of the Directive. In the first place, EBS points out that it was established in 1976 in order to perform the task of incinerating specific waste on a commercial basis. It had to bear the associated economic risk. Only 10 years after it had been established was the general-interest task of sewage disposal transferred to EBS, which it carried out on a break-even basis. However, it had not been established for that purpose. Under the terms of Article 1 of the Directive and of existing case-law, the question whether it was a body governed by public law for the purposes of Directive 93/37 depended on the date of its establishment. The fact that subsequently it began to meet needs in the general interest did not change its status, since it also continued to meet commercial needs. The wording of the Directive precluded the interpretation of the concept of a contracting authority suggested by the applicants in the main proceedings. At most, it would be consistent with that wording to interpret it in such a way as to be regard that body as a contracting authority only to the extent that it performed general-interest tasks, not tasks to meet commercial needs. Thus, EBS suggests a distinction based on the task performed by the body in a given case. The Commission further points out that the alteration of the company's objects was effected neither by an alteration of the objects of the company as stated in the deed of incorporation nor by a statutory provision.

25. Like the consortium, the Netherlands Government points to the functional interpretation it considers to have been given to the concept of a contracting authority in the case-law. On this approach, it reaches the conclusion that a body governed by private law which performs general-interest tasks, though it was not established for that specific purpose, is to be regarded as a contracting authority for the purposes of Directive 93/37. However, like the Commission, it requires this fact to be capable of objective verification. It points out that the wording of Article 1(b), subparagraph

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2 of Directive 93/37 does not refer to the legal basis of the tasks performed by the body concerned. In the present case, it cannot be objectively ascertained that EBS performs tasks in the general interest, of a non-industrial or non-commercial nature. Rather, there was an agreement with the City of Vienna (contracting authority) to carry out a public contract or there was a grant of a concession. On this analysis, it must in any event be examined whether the procurement procedure was the appropriate type of procedure.

(b) Opinion

26. The first question concerns the definition of a body governed by public law under Article 1(b) of Directive 93/37. All the parties to the proceedings agree that EBS, as a GmbH (limited liability company), has legal personality and that the City of Vienna, a regional or local authority, has majority control of it.

27. The only matter in dispute is whether EBS also satisfies the third criterion of the statutory definition, that is to say whether EBS was established for the specific purpose of performing general-interest tasks, of a non-industrial and non-commercial nature. The parties to the proceedings all agree that in managing the principal sewage plant EBS actually performs a general-interest task. In view of the judgment in BFI Holding , in which the collection and treatment of domestic refuse was regarded as a task performed in the general interest, (14) one is compelled to agree. Since the costs incurred by EBS in this connection are reimbursed by the City of Vienna and to that extent EBS does not bear any cost risk, the task performed is non-commercial in nature, (15) and the referring Vergabekontrollsenat is also proceeding on that basis.

28. However, what is disputed is the extent to which EBS can be regarded as "established for the specific purpose" of performing general-interest tasks of a non-industrial and non-commercial nature. According to the findings of the referring Vergabekontrollsenat, EBS was established in 1976 to dispose of special waste on a commercial basis. In its original version, the deed of incorporation did not contain any indication that EBS was intended to be established for the purpose of performing general-interest tasks, of a non-industrial and non-commercial nature. Therefore, if reliance is placed solely on the deed of incorporation in force when EBS was established, EBS does not satisfy the conditions laid down in regard to a body governed by public law under Directive 93/37.

29. EBS only took on the management of the sewage plant in 1986. However, this extension of its business activity was not accompanied by any alteration to the objects clause in the deed of incorporation of EBS. Even subsequently, in particular in 1996 when EBS reached agreement with the City of Vienna for an extension to the sewage plant, concerning which the main proceedings arose, the objects clause in the deed of incorporation was not altered. Thus, if reliance were to be placed solely on the deed of incorporation as being determinative of the question raised here, EBS could not be regarded as a contracting authority for the purposes of Directive 93/37.

30. However, in light of the fact that EBS has in actual fact performed general-interest tasks, of a non-industrial and non-commercial nature, since 1986, the conclusion reached on the basis of an analysis of the deed of incorporation appears to be dubious. The applicants in the main proceedings and the Austrian Government therefore rely on a "functional" approach to the concept of a public body and suggest that the subsequent change in the scope of EBS' activities be taken into account and that, irrespective of its deed of incorporation EBS be regarded as a body governed by public law.

31. The criterion of establishment for the specific purpose of performing general-interest tasks has hitherto been considered by the Court in two cases in particular: Case C-44/96 Mannesmann , concerning the Austrian State printing office, and Case C-360/96 BFI Holding . In its

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judgment in Case C-44/96, the Court relied on the document founding the State printing office, the Bundesgesetz über die Osterreichische Staatsdruckerei (Federal Law on the Austrian State Printing Office). However, in addition to this analysis of the legal foundations of the State printing office, the Court also took account of the actual circumstances, namely that the State printing office subsequently assumed responsibility for other tasks of an industrial or commercial nature. In this respect it held that provided that it continued to perform the tasks which it was specifically obliged to perform, a body did not lose its status as one governed by public law by carrying out other activities. (16) In Case C-360/96, the Court, developing this case-law, held that the fact that meeting needs in the general interest constituted only a relatively small proportion of the activities the entity pursued was also irrelevant, provided that it continued to attend to such needs. (17)

32. On the basis of an analysis of this case-law two points immediately arise. First, under this case-law the focus is not only on the time of establishment, but also on the subsequent evolution of the entity. Second, not only legal but also factual changes in the tasks performed must be taken into account. Consequently, it is immaterial that the original 1976 deed of incorporation did not contain any provision under which EBS was established for the specific purpose of performing general-interest tasks. The time of establishment is not decisive: subsequent developments must also be taken into account. Even the fact that EBS' deed of incorporation was not subsequently amended does not preclude EBS from being classified, none the less, as a body governed by public law. In classifying EBS, the subsequent, actual commencement of the management and extension of the sewage plant must be taken into account.

33. Nor, on the basis of the judgments cited, does the fact that EBS continues to dispose of special waste on a commercial basis in addition to managing the sewage plant preclude its being classified as a body governed by public law for the purposes of Directive 93/37. EBS can at the same time perform tasks on a commercial basis and general-interest tasks of a non-industrial and non-commercial nature. EBS need not even perform predominantly general-interest tasks. The proportion of non-commercial activities to commercial activities is irrelevant to the classification of the body. (18)

34. Furthermore, the Court has held that classification as a body governed by public law extends to all the activities carried out by it. (19) That case-law should be upheld. There must be legal certainty concerning the classification of the body concerned. It would be inconsistent with this requirement for the classification to depend on the task performed in each case. Therefore, the submission made by EBS in the alternative, namely that it should be regarded as a contracting authority only in regard to the management of the sewage plant, is to be rejected as incompatible with the case-law.

35. However, it must be pointed out that Case C-44/96, in contrast to the present case, concerned an undertaking which, it was not disputed, had initially been established for the specific purpose of meeting needs in the general interest of a non-industrial and non-commercial nature. Only subsequently did it start to carry out activities on a commercial basis. In the case of EBS it was exactly the opposite. It was established for industrial and commercial purposes and only subsequently assumed tasks in the general interest, of a non-industrial and non-commercial nature. For that reason, it must be examined whether an undertaking can also subsequently acquire the status of a contracting authority.

36. First, the wording of Article 1(b) of Directive 93/37 militates against that possibility. It expressly requires that the body concerned must have been established for the specific purpose of meeting needs in the general interest. Thus, the material date is the date of establishment, or the matter must at least be determined by the deed of incorporation. However, it is not disputed

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that EBS was not established for the specific purpose of managing the city sewage plant; nor was that object in any way subsequently inserted into the company's statutes, at the time when EBS actually assumed this task.

37. In this regard, one cannot but concur with the view expressed by the Netherlands Government that on the wording of Article 1(b) of Directive 93/37 the legal analysis is not confined to the body's deed of incorporation. The purpose for which a body has been established can be deduced from other sources as well. (20)

38. As the Netherlands Government and the Commission submit, all that is required is that it may be objectively ascertained that the body exists for the specific purpose of meeting needs in the general interest of a non-industrial and non-commercial nature. Therefore, it is not a requirement that the body was established for that specific purpose since subsequent developments have to be taken into account.

39. General-interest tasks were transferred to EBS by the conclusion of the contract with the City of Vienna. A contract is an objective fact which is just as clearly discernible to an objective bystander as a deed of incorporation or a statute. Therefore, there does not appear to be any reason why this contract, or, to be exact, the two contracts concluded between EBS and the City of Vienna in 1986 and 1996, should not be taken into account for the purpose of determining the objects of EBS. For, as stated, the wording of Article 1(b) of Directive 93/37 does not confine the analysis to the body's deed of incorporation. On that interpretation of the wording of Article 1(b) of Directive 93/37, EBS could be said to be a body governed by public law within the meaning of that provision.

40. That the answer should not be determined solely by the deed of incorporation is also borne out by the following consideration. The application of the provisions concerning public procurement cannot be made to depend on instruments governed by company law, such as a deed of incorporation. Whether as a matter of company law it accurately reflects the company's purpose at the time of establishment or whether, as the case may be, it has been adapted to circumstances which have in actual fact changed, is purely a problem of company law. The interpretation of the public procurement provisions cannot depend on a matter of company law such as that. Otherwise, the application of those provisions would be at the discretion of the shareholders. For that reason, it is not only the deed of incorporation or the company statutes in force on incorporation which are to be taken into account in classifying the body, but also all objectively ascertainable circumstances, which can include a contract such as that concluded between EBS and the City of Vienna.

41. By way of interim conclusion it may be stated that the analysis of the wording of Article 1(b) of Directive 93/37 does not provide an unambiguous answer to the question raised.

42. Nor, moreover, do the scheme of Article 1 of Directive 93/37 and of the Directive as a whole provide any further guidance as regards the answer to the question raised in the present case.

43. The history of the provision suggests that EBS is to be regarded as a body governed by public law. The statutory definition in Article 1(b) of Directive 93/37 was inserted on the initiative of the European Parliament. In its proposal, the Commission had merely referred to "legal persons" instead of bodies governed by public law. (21) In order to ensure that the scope of the Directive concerning works contracts was as comprehensive as possible, the Parliament introduced the concept of "organ governed by public law" , (22) which was subsequently changed to "body" . The inclusion of the statutory definition was intended to replace the registers required to be established under Article 1(b) of Directive 71/305/EEC determining the list of contracting authorities. Its purpose was to ensure that no gaps were left in the application of the Directive. (23) The scope of the Directive was intended also to extend to works contracts performed by third parties and financed, wholly or partly, directly or indirectly, by public funds. (24)

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44. As EBS itself concedes, the costs of extending the sewage plant are reimbursed to EBS directly by the City of Vienna under point IV.2 of the contract of 8 July 1996. In light of the purpose pursued by the legislature in formulating the statutory definition, that is to say to make all projects financed out of public funds subject to the laws on public procurement, it is therefore appropriate to regard EBS as a body governed by public law within the meaning of Article 1 of Directive 93/37.

45. This result also accords with the purpose of Directive 93/37. According to its second recital, Directive 93/37 pursues the objective of attaining freedom of establishment at the same time as freedom to provide services in the field of public works contracts. The Directive is intended to counter the risk of preference being accorded to national tenderers or candidates in the award of contracts, thus assisting in the creation of an internal market for works contracts. The decisive factor in examining the criteria determining whether a body is governed by public law is whether there is a risk that the body will allow its decisions on contract awards to be guided by considerations other than economic ones. (25) If so, attainment of freedom of establishment and freedom to provide services is jeopardised, which justifies the application of the Directives on public procurement. (26) Ultimately, the question thus arises as to whether the body bears the economic risk of its activity. (27) If it does, attainment of freedom of establishment and free movement of services is not jeopardised, if it does not, that is a reason for applying the directives on public procurement and thereby protecting the fundamental freedoms.

46. Under the 1996 agreement with the City of Vienna, EBS does not bear the financial risk of the management of the sewage plant or of the agreed extension. Admittedly, EBS is to undertake the latter in its own name and on its own account (point I.2 of the contract of 8 July 1996). However, under point IV.1 of the contract "all of the expenses arising out of the construction and management of the plants including the sewage works related to the project, less any sums received by EBS,... shall be reimbursed..." by means of the remuneration to be paid by the City of Vienna. Because the City of Vienna finances the extension works in this way, there is a risk that EBS will allow its decision on the award of works contracts to be guided by factors other than economic ones. To that extent there is a requirement to protect freedom of establishment and freedom to provide services by means of the application of Directive 93/37.

47. It may be inferred from the meaning and purpose of the Directive that the situation of establishment for industrial or commercial purposes and subsequent commencement of activities of a non-industrial or non-commercial nature cannot be treated differently from the decided cases of Mannesmann and BFI Holding , in which the body concerned met needs in the general interest which were of a non-industrial or non-commercial nature from the time it commenced business, and the performance of tasks on a commercial basis came only later. For the time at which a danger to the fundamental freedoms arises is a matter of secondary importance. All that matters is the existence of a danger to those freedoms.

48. This approach is supported principally by the consideration that it is only in this way that it is generally possible to counter the risk of circumvention of the provisions on public procurement. If the question depended on which needs are met first, it would be easy to circumvent the application of the provisions on public procurement by entrusting a body first with needs of a non-industrial or non-commercial nature and only subsequently with needs not having an industrial or commercial character. It is a matter of countering any such circumvention, if it is endeavoured to give practical effect (effet utile) to the provisions on public procurement. Otherwise, the Directive would be devoid of purpose.

49. Admittedly, in the order for reference the referring court expressly rejected any intention on the part of the City of Vienna in the present case to circumvent the rules. However, the interpretation of Article 1 of Directive 93/37 cannot depend on whether on the facts giving rise to the order

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for reference a risk of circumvention actually subsists. In preliminary reference proceedings, the Court decides on the interpretation of Community law that has significance beyond the individual case.

50. On the basis of the foregoing considerations it must be stated that actually taking over the performance of general-interest tasks, on the basis of objectively ascertainable circumstances such as the conclusion of a contract, may be assimilated to its establishment for that specific purpose. Therefore, it is proposed that the reply to the first question should be as follows:

A legal person constitutes a "contracting authority" within the meaning of Article 1(b) of Directive 93/37 even if it was not established for the specific purpose of meeting needs in the general interest, but which later actually meets such needs, provided that the assumption of such tasks is founded on objectively ascertainable circumstances.

3. The second question

51. By its second question, the referring court asks whether the planned extension to the sewage plant is a public works contract. It raised this question only in the event that EBS could not be categorised as a body governed by public law for the purposes of Directive 93/37. However, since this question has already been answered affirmatively, consideration is given to the second question only in the alternative, in the event that the Court does not adopt the reply proposed in this connection to the first question and does not regard EBS as a body governed by public law within the meaning of Article 1(b) of Directive 93/37.

(a) Submissions of the parties

52. The consortium and the Austrian Government take the view that it is a public works contract. This was borne out first by the fact that the contract is for the construction of a municipal sewage plant on land belonging to the municipality. Moreover, if the lease is terminated the municipality would be required to take over the plant. The construction was undertaken according to requirements specified by the contracting authority (the City of Vienna) in so far as the extension of the sewage plant served to meet a need in the general interest, the City of Vienna having an interest in ensuring that that need was met. Furthermore, a specific mode of operation is prescribed for the sewage plant, the new construction having to be integrated with the existing plant.

53. By contrast, EBS is of the view that the contract at issue is not a public works contract. The extension works were to be awarded by EBS in its own name and on its own account. Moreover, the City of Vienna did not have any influence on the actual organisation of the extension works or on the procurement procedure itself. The decision as to the technical and structural execution of the works for the sewage plant was to be taken by EBS alone. Finally, it points out that the costs of the extension were to be reimbursed only indirectly, according to the agreements applicable generally to the operation of the sewage plant.

54. Nor does the Commission consider that EBS awards a public works contract. In the present case, there could at most be a contract between the City of Vienna and EBS. However, the Commission is of the opinion that the sewage treatment taken over by EBS, in the context of which the extension to the sewage plant must be viewed, is a contract for services and not a works contract, and for that reason suggests that the second question should be answered in the negative.

55. The Netherlands Government merely formulates general views. The decisive criterion for deciding the question whether the contract is a public works contract is whether the contracting authority has specified particular requirements and that the works must become the property of the contracting authority. Furthermore, in order to be a public works contract, a contract must be carried out on the basis of a specific award by a contracting authority.

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(b) Opinion

56. According to the statutory definition in Article 1(a) of Directive 93/37, "public works contracts" are "contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority" . For the purposes of the question referred, EBS should be presumed to be a contractor within the meaning of this provision and contrary to the submissions on the first question not a contracting authority. The relevant written contract is the contract with the City of Vienna, a regional or local authority and thus a contracting authority under Article 1(b) of Directive 93/37. Under that contract EBS assumed the obligation in 1996 to extend the sewage plant leased and managed by it. Under point IV of the agreement, the City of Vienna is obliged to pay EBS reasonable and uniform remuneration for the operation of the plant and to refund the costs arising out of the extension, and therefore the contract is for valuable consideration.

57. The question referred seeks to ascertain to what extent the contract at issue has as its object "... the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority..." . The parties to the main proceedings dispute both whether the object of the contract is the execution of a work and whether the execution of the work corresponds to requirements specified by the City of Vienna.

58. The Commission has doubts as to whether the contract is for the execution of a work and considers rather that it is a contract for services. In that connection it should be stated that under point I.2 of the contract, EBS is obliged to extend the City of Vienna's principal sewage plant. Under point II.1, it is also obliged to treat all waste water, to dispose of the resulting sludge and to dispose of all the special waste delivered by the City of Vienna. Under Annex I A, category 16, of Directive 92/50, (28) sewage and refuse disposal services are services for the purposes of Article 8 of Directive 92/50, for which there is a special procurement procedure. In regard to the obligations on EBS under point II.1, the 1996 agreement is not a contract for works.

59. It is therefore questionable whether, conversely, the obligation in point I.2 to extend the existing plant can be regarded as a works contract for the purposes of Directive 93/37. Admittedly, this obligation involves the execution of works. However, its execution would have to be in accordance with the requirements laid down by the City of Vienna. That is borne out by the fact that the extension is specified at least by reference to its function. The plant is required to be capable of treating all incoming waste water at the rate of up to 18 cubic metres per second (point II.1). In favour of the proposition that the agreement is for the execution of works corresponding to requirements specified by the City of Vienna, it may also be observed that it concerns the extension of a main municipal sewage plant, that is to say a facility for whose operation the City of Vienna is ultimately responsible as a matter of public-health provision. This responsibility is reflected in the assumption of responsibility for costs (point IV), the provision of the necessary personnel (point I.3) and in the obligation on the district to purchase the property on termination of the lease (see EBS' declaration of 8 September 1996, cited in the order for reference).

60. However, the 1996 agreement provides for only one aspect of the way in which the extended plant must function, namely by prescribing a capacity of 18 cubic metres per second. However, the agreement does not contain any provisions as to the actual construction, in particular as regards technical and structural execution. Whether this is sufficient for there to be the execution of works corresponding to the requirements specified by the contracting authority is not free from doubt. Moreover, the contracts for the requisite works are awarded by EBS in its own name and

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on its own account (point I.2 of the agreement). It is not apparent that the City of Vienna is in any way involved in the formulation of the detailed specifications or in the award of the individual contracts. That means that it is not able to make the general capacity requirement any more specific at a subsequent stage of the award procedure. In Case C-331/92, both the Advocate General in his Opinion and the Court in its judgment emphasised that for there to be a works contract, the works to be executed must be specified in detail. (29) However, the 1996 agreement does not contain any description of works to be executed, but states only the result to be achieved. It follows that the agreement cannot be held to be a public-works contract.

61. For the sake of completeness, it must also be noted that even if one were to regard the specification of the purposes of the works to be sufficient, there would be yet another point to examine. As established above, the 1996 agreement also contains elements of a contract for services. According to the 16th recital of Directive 92/50, it follows from Directive 71/305/EEC, "... that for a contract to be a public works contract, its object must be the achievement of a work; whereas, in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract." Under the terms of Case C-331/92 the referring court would therefore have to consider whether any obligation to execute a work is predominant in relation to the agreed obligation to supply services. (30)

62. Without anticipating the judgment of the national court, one can hardly imagine, on the basis of the circumstances of the present case as described, that the execution of work would be held to predominate. Instead, the agreement is the continuation of 10 years' cooperation, and the agreed works, if at all, are the adaptation of existing capacity to changed circumstances. Primarily, it must therefore involve the continuance of responsibility for sewage and waste water disposal which, as already explained above, constitutes a service.

63. In light of the foregoing, it is submitted in the alternative that the second question should be answered as follows:

A contractual provision which describes the work only by reference to the function to be fulfilled and at the same time is the continuation of an existing contract for services is not a public works contract within the meaning of Article 1(a) of Directive 93/37.

4. The third question

64. By its third question the Vergabekontrollsenat seeks to ascertain whether the limitation periods of two weeks provided for in Paragraph 98 of the WLVergG are compatible with Council Directive 89/665 of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. (31)

(a) Submissions of the parties

65. Universale and the consortium regard the time-limits for bringing proceedings provided for in the WLVergG as too short. According to Universale, foreign tenderers are usually unable to adhere to these time-limits. On the one hand, that defeats the objective of ensuring that public contracts are awarded without discrimination and, on the other, frustrates the objective of giving undertakings access to a large common market while strengthening the competitiveness of European undertakings. As evidence of the correctness of its view of the law it points to the fact that the time-limit has in the meantime been extended to four weeks. As a matter of fact, it again emphasises that it was in a position to notice the mistake in the conditions in the invitation to tender only when studying the evaluation of the application documents after EBS had already rejected it and after the two-week time-limit had expired. The consortium adds that in the short period for bringing proceedings candidates are not in a position to analyse the contracting authority's reasons for

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elimination and expose those which are without substance. Furthermore, the obligation in Paragraphs 96 and 97 of the WLVergG to give the contracting authority prior notice of a challenge means that the two-week time-limit for bringing proceedings, which runs from the date of notification of the rejection, has already expired by the time the contracting authority to whom notice has been given replies to the candidate.

66. In contrast, EBS points to the discretion granted to the Member States by Directive 89/665. The Community legislature required only that decisions taken by awarding departments could be reviewed as rapidly as possible (Article 1(1)), that the review procedures had to be available to any person who had an interest in a contract and who risked being harmed by the alleged infringement (Article 1(3)), that Member States could require prior notice to be given to the contracting authority (Article 1(3)) and finally that interim measures had to be available, unlawful decisions set aside and damages awarded to tenderers who were harmed (Article 2(1)). In EBS' view, short time-limits correspond to the objective in the fifth recital to the Directive of not causing disproportionate delay to the performance of public contracts. However, national procedural rules cannot render the enforcement of Community law impossible in practice. Finally, EBS points out that a time-limit of two weeks for bringing proceedings against State acts is in general usual and, as evidence thereof, refers to Paragraph 63(5) of the General Law on Administrative Procedure, under which every challenge to a decision by an authority must be made within two weeks, as well as to Paragraph 403(3) of the EO, (32) under which interim measures granted by civil courts are to be challenged within two weeks.

67. The Austrian and Netherlands Governments, as well as the Commission, point out first that Directive 89/665 itself does not fix any time-limits, but merely lays down minimum requirements. The Member States have a discretion as regards fixing time-limits for bringing proceedings. However, all three emphasise that the Directive requires that effective legal protection be provided. Moreover, the Austrian Government observes that time-limits for bringing proceedings have the effect of speeding up the procedure and of reducing the risk of any abusive resort to legal action. Both correspond to the objectives of Directive 89/665. The Commission also submits that the legal protection must not be less favourable than for similar actions concerning national law only.

(b) Opinion

68. As regards the time-limit fixed by the WLVergG for challenging provisions contained in a public contract notice, it should first of all be observed that Directive 89/665 merely lays down minimum requirements as to the legal protection to be secured. It contains no provisions either as to the period within which specific acts may be challenged or as to whether or not national implementing measures may contain limitation provisions.

69. In the context of actions for repayment of charges paid unduly, the Court has held that, in the absence of Community rules, it is for the Member States to lay down the procedural rules under which citizens of the Union can exercise the rights conferred on them by Community law. However, such procedural rules must not be less favourable than those in respect of similar rights conferred by national law (principle of equivalence) and must not render virtually impossible the exercise of rights conferred by Community law (principle of effectiveness). (33) In this context, the Court has also held that it is essentially compatible, in the interests of legal certainty, with the principle of effectiveness to lay down reasonable limitation periods for bringing proceedings. Such time-limits are not liable to render virtually impossible or excessively difficult the exercise of rights conferred by Community law. (34) In the absence of Community rules on limitation periods, no objection can be raised under the case-law cited to the enactment in the WLVergG of time-limits for bringing proceedings. In that connection, the national legislature has a margin of discretion.

70. However, the Directive specifies inter alia the following objectives to be achieved by implementation

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and whose realisation must not be defeated by the enactment of limitation provisions. Decisions of contracting authorities must be able to be reviewed effectively and as rapidly as possible (Article 1(1)); the Member States may provide that the contracting authority must be notified in advance of the intention to seek review (Article 1(3)); the national legislature must ensure the availability of interim measures and enable unlawful decisions to be set aside and damages to be awarded (Article 2(1)).

71. However, effective legal protection for the purposes of Directive 89/665 is guaranteed only if the time-limits do not render impossible enforcement of the legal protection granted. For that reason, the time-limits must not be so short as to prevent tenderers and candidates from exercising their rights. In view of the fact that Article 1(1) of Directive 89/665 requires a contracting authority's decisions to be reviewed as rapidly as possible, a time-limit of two weeks as provided for in the WLVergG appears not to be unreasonable. In particular, it should in principle be possible for foreign candidates to comply with it and to allow the candidates concerned time to clarify whether their rights have been infringed. The enactment of limitation periods in the procedural rules also promotes legal certainty. Candidates in whose favour a decision has been taken should be entitled to rely on the unchanged continuance of their legal position.

72. The extent to which this legal protection is equivalent to the legal protection granted for the enforcement of legal rights conferred by national provisions and the extent to which it follows that the principle of equivalence is complied with remains a question for the national court within the framework of its analysis of national law. The order for reference is silent in that regard. A priori, however, the submissions of the parties to the proceedings, in particular the time-limits under the General Law on Administrative Procedure referred to by EBS for bringing proceedings, indicate that there are no doubts. In undertaking its examination, the referring court must also consider whether the challenge may be lodged only by recorded delivery or, for example, by fax or by e-mail as well. The required form has consequences as regards the period of the time-limit allowed.

73. As regards the consortium's complaint, that the obligation in Paragraphs 96 and 97 of the WLVergG to notify the contracting authority in advance results in expiry of the period for bringing an action under Paragraph 98 of the WLVergG by the time the contracting authority replies to the candidate, it must be pointed out that the time-limits can hardly ever overlap. Paragraphs 96 and 97 of the WLVergG concern a time-limit prior to the award of the contract, whereas the time-limits in Paragraph 98(1) and (3) of the WLVergG refer to time-limits after the award of the contract. Nor, in relation to the time-limit in subparagraph 2 of that provision, is there ever likely to be a conflict. Admittedly, this provision is concerned with a period prior to expiry of the application period and thus also prior to the award of the contract. The time-limit provided for in Paragraph 98 relates to challenges to conditions in the public notice. On the other hand, the time-limit provided for in Paragraph 96 of the WLVergG concerns "a decision taken by a contracting authority before the award of a contract" . Whether conditions in the public notice can also constitute such a "decision" is a question to be decided by the referring Vergabekontrollsenat by reference to national law. Only if this question is answered affirmatively could there be overlaps resulting in a problem as regards the effectiveness of the legal protection ensured. However, that is not a necessary inference from the wording of the provisions of the WLVergG.

74. Therefore, it is proposed that the third question should be answered as follows: Directive 89/665 does not preclude a national provision which fixes a time-limit for the review of an individual decision of the contracting authority in such a way that, on expiry of that time-limit, the decision can no longer be challenged in the course of the ongoing contract award procedure, provided that it is ensured that the legal protection afforded is not less favourable than for comparable rights conferred by national law and the exercise of the rights conferred by Directive 89/665 is not rendered impossible in practice. In that connection, every defect in the procedure must be pleaded by the

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persons concerned, subject to loss of the right to object in the event of failure to do so.

5. The fourth question

75. The Vergabekontrollsenat's fourth question concerns the content of the contract notice to be published by the contracting authority. It concerns whether and to what extent the evaluation criteria by reference to which the candidates to be invited to tender are selected must be stated in the contract notice or in the tender documents.

(a) Submissions of the parties

76. As regards the scoring procedure, Universale and the consortium complain of an infringement of the principle of transparency and intelligibility. Universale believes that the weight attached to the individual selection criteria listed must be clearly stated in the invitation to tender so as to preclude arbitary decisions. For that reason, not only the order of importance of the criteria but also their relative weight, and thus an objectively intelligible evaluation scheme, must be indicated in the prior information or in the tender documents. This is not guaranteed where the evaluation scheme is lodged with a notary.

77. In the final analysis, the Netherlands Government shares that view. Applications must be evaluated transparently and objectively. Therefore, candidates must be able to find out in advance how and against what criteria the candidates will be evaluated.

78. In contrast, EBS points to Article 30(2) of Directive 93/37. This provides only that the award criteria are to be indicated and, where possible, though not necessarily, in order of the importance attributed to them. Nor is it possible to infer a requirement for complete transparency from primary Community law. Therefore, lodgement of the evaluation yardsticks with a notary is unobjectionable.

79. The Austrian Government and the Commission also point out that Directive 93/37 does not contain any detailed provisions concerning the evaluation of applications to take part within the framework of the public prospecting of candidates in a restricted procedure. The Austrian Government relies on Article 22 of Directive 93/37, which makes no provision as to the procedure for selecting candidates. On general principles, the procedure chosen must be objective and non-discriminatory. However, there is no obligation to advertise in advance in the tender documents the evaluation scheme for selecting the candidates to be invited to tender. The Commission points out that under Article 11(6) of the Directive, only specified documents may be requested. The selection must be based on these documents.

(b) Opinion

80. As regards the fourth question, it may first be observed that Directive 93/37 does not make any express provision concerning the extent to which the evaluation procedure adopted by the contracting authority is to be explained in detail in the notice of a restricted procedure or in the tender documents.

81. However, in a number of places the Directive contains statements concerning the publication of selection criteria. Under Article 7(2), a negotiated procedure may be carried out only if the candidates have been selected in accordance with published qualitative criteria. From this it follows that the qualitative criteria are to be advertised, but not that the mechanism to be applied in evaluating the individual criteria must also be advertised.

82. Article 11(6) states what information contracting authorities may request from candidates. As the Commission rightly inferred, the criteria which may be applied in selecting candidates may be discerned from this. However, this does not say whether the candidates must be told of the system applied in evaluating the individual details.

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83. Article 13(2) specifies the minimum information to be included in the invitation to tender in a restricted procedure. Under subparagraph 2(e), this also includes the criteria for the award of the contract. However, nor does this provision require publication of the evaluation system on which the contracting authority bases its selection.

84. Articles 18 and 22 provide that the candidates invited to tender in a restricted procedure are to be selected on the basis of the information given by the candidates relating to the contractor's position and on the basis of the information and formalities necessary for the evaluation of the minimum economic and technical requirements to be fulfilled by him. However, nor do these provisions say anything concerning the evaluation of the individual criteria.

85. Finally, Article 30(2) of the Directive requires that where the award is to be made to the most economically advantageous tender all the award criteria to be used are to be stated in the contract documents or in the contract notice. "Where possible" , they are to be stated in order of importance. Admittedly, it can be inferred from this that all the criteria on which the selection is to be based must be advertised. However, even Article 30 merely requires that the criteria on the basis of which the award is made should be indicated. Furthermore, the wording of the provision itself contains the qualification that "where possible" , this must be done in order of importance. It may be supposed that this means that the contracting authority is in principle under a duty to state the criteria in the order of the importance attached to them. The wording of the provision does not necessarily require such an interpretation. However, it accords with the purpose of Directive 93/37 to make the award of public works contracts more transparent (see the 10th to 12th recitals of the Directive). However, even this interpretation does not achieve the aim sought by the applicants in the main proceedings. For once the contracting authority gives equal weight to two criteria, the order in which they appear no longer corresponds to the weight attached to them. Moreover, "order" cannot be equated to "details of a scoring procedure" . Therefore, even a strict observance of Article 30(2) does not require the details of the "scoring procedure" applied by EBS to be indicated. Thus, it must be stated that the abovementioned provisions of Directive 93/37 do not support the legal argument of the plaintiffs in the main proceedings.

86. Nor is it possible to derive support for Universale's and the consortium's legal argument from the Directive's purpose of attaining freedom of establishment and freedom of movement for persons in respect of public works contracts (see the second recital). For this objective is intended to be achieved by the advertisement of the individual works contracts to be awarded. The fourth question does not concern the advertisement of a works contract for the purpose of giving domestic and foreign undertakings the same opportunity to submit their applications. Instead, it goes beyond that and concerns an insight into the evaluation scheme which the contracting authority intends to use when selecting candidates.

87. The procedure followed by EBS, namely to state in the contract notice the criteria for the ordering of the applications to participate (technical capacity and award to the most economically advantageous tender), as well as the statement in the tender documents that the bids submitted by the candidates would be evaluated according to a method lodged with a notary, precludes the possibility that national candidates are better placed than candidates from other Member States. The award criteria are known to all the candidates but not the details of the scoring procedure. In this way, the attainment of the objective of the transparency requirement in Directive 93/37 is secured. The text in force provides no warrant for more extensive requirements as regards publication of the evaluation procedure.

88. The restricted obligation here proposed of advertising the applicable award criteria, where possible, in the order of importance attached to them is not only consistent with the wording of Directive 93/37. It also meets the concern of determining the "best" tenderer in the course of

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a tender procedure. If the method of award is advertised in advance then it must be expected that candidates will base their tenders on it and provide evidence of their capability particularly as regards the points given a heavier weighting. Only in this way can they obtain admission to the category of those subsequently invited to submit a tender. However, tailoring the application to the selection method in this way creates a risk that the contracting authority may obtain a distorted impression of the candidates from the documents submitted. Yet the purpose of this part of the procedure is to give the contracting authority a comprehensive picture of the candidates' technical capability. This is best done if the candidates give as comprehensive a picture of themselves as possible, admittedly on the basis of the award criteria indicated, but without knowing the selection method, that is to say the details of the evaluation.

89. It is important to emphasise that under Article 8(3) of Directive 93/37 the contracting authority is obliged to draw up a written report. It includes the reasons for selecting a candidate and the reasons for rejecting the other candidates. That ensures the reviewability by the courts of the contracting authority's decision, and thus also the previously unpublished evaluation criteria. The solution here suggested takes into account the various interests of the participants in the selection procedure. It prevents any possible discrimination, does not impose any requirements in regard to transparency on the procurement procedure that are not justified by either the wording of the Directive or the general principles of Community law and are thus excessive, and ensures reviewability by the courts.

90. Accordingly, it is proposed that the fourth question should be answered as follows: It is sufficient for the purposes of Directive 93/37 for the body inviting tenders to determine that the applications will be evaluated according to a method lodged with a notary. The details of the weighting of the selection criteria need not be published either in the contract notice or in the tender documents, but must be capable of being reviewed by the courts.

VI Conclusion

91. For the foregoing reasons, it is proposed that the questions referred by the Vergabekontrollsenat Wien should be answered as follows:

(1) A legal person constitutes a "contracting authority" within the meaning of Article 1(b) of Directive 93/37/EEC even if it was not established for the specific purpose of meeting needs in the general interest, but which subsequently meets such needs, provided that the assumption of such tasks is founded on objectively ascertainable circumstances.

(2) A contractual provision which describes the work only by reference to the function to be fulfilled and at the same time is the continuation of an existing contract for services is not a public works contract within the meaning of Article 1(a) of Directive 93/37.

(3) Directive 89/665/EEC does not preclude a national provision which fixes a time-limit for the review of an individual decision of the contracting authority in such a way that, on expiry of that time-limit, the decision can no longer be challenged in the course of the ongoing contract award procedure, provided that it is ensured that the legal protection afforded is not less favourable than for comparable rights conferred by national law and the exercise of the rights conferred by Directive 89/665 is not rendered impossible in practice. In that connection every defect in the procedure must be pleaded by the persons concerned, subject to loss of the right to object in the event of failure to do so.

(4) It is sufficient for the purposes of Directive 93/37 for the body inviting tenders to determine that the applications will be evaluated according to a method lodged with a notary. The details of the weighting of the selection criteria need not be published either in the contract notice or in the tender documents, but must be capable of being reviewed by the courts.

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(1) .

(2) OJ 1993 L 199, p. 54.

(3) OJ 1989 L 395, p. 33.

(4) LGBl. No 36/1995; as amended, LGBl. No 30/1999.

(5) Paragraph 52 of the WLVergG applies to cases in which specified time-limits are shortened for reasons of urgency. This is not the case here.

(6) Under Article 1(f) of Directive 93/37, restricted procedures are procedures "whereby only those contractors invited by the contracting authority may submit tenders" .

(7) Annex 3 to the order for reference, p. 7.

(8) Scoring procedure usually means according to the number of points scored.

(9) In the terminology of Directive 93/37, "contract notice" .

(10) Opinion of Advocate General Saggio in Case C-103/97 Köllensperger and Atzwanger [1999] ECR I-553, paragraphs 25 to 30.

(11) Case C-103/97 Köllensperger and Atzwanger [1999] ECR I-551, paragraphs 22 to 25.

(12) See Köllensperger and Atzwanger (cited above, footnote 11), paragraph 17, with further references; Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 23.

(13) Köllensperger and Atzwanger (cited above, footnote 11), paragraph 22.

(14) Case C-360/96 BFI Holding [1998] ECR I-6821.

(15) On this criterion, see my Opinion in Joined Cases C-223/99 and C-260/99 Agorà and Excelsior [2001] ECR I-3605, paragraphs 57 et seq.

(16) Paragraphs 25 and 26.

(17) BFI Holding (cited above, footnote 14), paragraph 55.

(18) BFI Holding (cited above, footnote 14), paragraph 56.

(19) Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, paragraph 32.

(20) BFI Holding (cited above, footnote 14), paragraph 62.

(21) Proposal for a Council Directive amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, COM(86) 679 final of 23 December 1986, pp. 6 and 22.

(22) Fourth Proposed Amendment, report of the Committee on Economic and Monetary Affairs and Industrial Policy, Documents of the Sittings of the European Parliament, 1988/89, document A2-37/88, p. 6 and Reasons, p. 31.

(23) See the report cited, Reasons, p. 31.

(24) See the explanation given by the rapporteur Mr Beumer in the sitting of the European Parliament of 17 May 1988, Proceedings of the European Parliament, 17 May 1988, No 2-365, p. 83.

(25) Case C-237/99 Commission v France [2001] ECR I-939, paragraph 42; Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 17.

(26) Case C-237/99 Commission v France (cited above, footnote 25), paragraph 41; Case C-380/98 University of Cambridge (cited above, footnote 25), paragraph 16.

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(27) See the Opinion in Joined Cases Agorà and Excelsior (cited above, footnote 15), paragraph 71.

(28) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(29) Case C-331/92 Gestion Hotelera Internacional [1994] ECR I-1329, paragraph 24, and Opinion, paragraph 41.

(30) Gestion Hotelera Internacional (cited above, footnote 29), paragraph 28.

(31) Cited above, footnote 3.

(32) EO stands for Exekutionsordnung (Execution Regulations). However, the provision cited does not contain a time-limit.

(33) Case C-231/96 Edis [1998] ECR I-4951, paragraph 34.

(34) Edis (cited above, footnote 33), paragraph 35.

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Opinion of Mr Advocate General Geelhoed delivered on 13December2001.
Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG.
Reference for a preliminary ruling: Verwaltungsgerichtshof - Austria.
Telecommunications - Mobile telecommunications services - Article 5a(3) of Directive 90/387/EEC - Appeal to an independent body against a decision of the national regulatory authority - Articles 82 EC and 86(1) EC - Article 2(3) and (4) of Directive 96/2/EC - Articles 9(2) and 11(2) of Directive 97/13/EC - Allocation to a public undertaking in a dominant position which holds a licence to provide digital mobile telecommunications services according to the GSM 900 standard of additional frequencies in the frequency band reserved for the DCS 1800 standard without imposing a separate fee.
Case C-462/99.

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 5 June 2001.
Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente nazionale per le strade and Società Italiana per Condotte d'Acqua SpA (C-285/99) and Impresa Ing. Mantovani SpA v ANAS - Ente nazionale per le strade and Ditta Paolo Bregoli (C-286/99).
Reference for a preliminary ruling: Consiglio di Stato - Italy.
Directive 93/37/EEC - Public works contracts - Award of contracts - Abnormally low tenders - Detailed rules for explanation and rejection applied in a Member State - Obligations of the awarding authority under Community law.
Joined cases C-285/99 and C-286/99.

I - Introduction

1. Five questions for preliminary ruling on the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (hereinafter the Directive or Directive 93/37/EEC) have been referred to the Court of Justice by the Fourth Chamber of the Consiglio di Stato (Council of State) della Repubblica Italiana, sitting as a judicial body, ruling on appeals lodged respectively against two judgments of the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio).

2. The question referred by the Consiglio di Stato to the Court of Justice is based on essential principles of Community law on public contracts, principles that cannot be renounced, concerning the setting of objective criteria for participation in calls for tender and the award of public contracts, as part of a transparent procedure in which any measures and provisions which may have discriminatory effects are prohibited.

3. In cases of this kind, the emphasis is placed on abnormally low tenders in respect of a contract. Emphasis is placed, in particular, on the procedure for excluding such tenders, such a procedure being effected in order to clear the field prior to the award of contracts by rejecting proposals which do not display sufficient creditworthiness. One further principle of Community law on public contracts must be respected: the principle of efficiency.

4. As regards abnormally low tenders, the Consiglio di Stato raises doubts concerning the compatibility of the following with Article 30(4) of the Directive:

(1) the establishment of a mechanism for automatically setting a threshold on the basis of which a tender is considered abnormally low which prevents undertakings from ascertaining the threshold level before submitting their tenders.

(2) the exclusion from the outset of tenders not accompanied by an explanation in respect of the price for an amount equal to at least 75% of the figure specified in the tender conditions and the fact that only certain explanations are admissible, with those referring to minimum figures which can be inferred from official lists being ruled out.

(3) provision for a procedure in which, after the opening of the envelopes, and before the adoption of the measure excluding an undertaking, those undertakings which have submitted irregular tenders have no opportunity to state their reasons and clarify their position.

II - Law

1. Community law

5. Directive 71/305/EEC which constituted a first step towards the coordination of laws of the Member States in respect of public works contracts had as its main purpose the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts. That Directive took account of the possibility that abnormally low tenders might be submitted and

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Article 29(5) made provision for their possible exclusion.

6. Directive 71/305/EEC was amended substantially and on a number of occasions, for which reason its consolidation was appropriate, this being realised in Directive 93/37/EEC. In Article 30(4) the new text simply reproduced, with minor amendments, the text of Article 29(5) of Directive 71/305/EEC of the Directive as it stood following the 1989 amendment. Article 30(4) states that:

If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

...

2. Italian law

7. Article 30(4) of the Directive was transposed into Italian law in Article 21(1a) of Law No 109 of 11 February 1994, outline law on the subject of public works, appended to the original text in Article 7 of Law No 216 of 2 June 1995. That law states that:

In cases of awards of contracts for works of ECU 5 million or above on the basis of the lowest-bid criterion mentioned in paragraph 1, the authority concerned must assess the irregular nature of the tenders referred to in Article 30 of Council Directive 93/37/EEC of 14 June 1993 in relation to all tenders undercutting the indicative price by more than the percentage fixed by 1 January of each year by decree of the Minister of Public Works, after hearing the views of the Monitoring Authority, having regard to the tenders admitted to the procedures held in the previous year.

To that end the public administration may take account only of explanations based on the economy of the construction method or of the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer, but not of explanations relating to all those elements for which minimum values are laid down by legislation, regulations or administrative provisions or for which minimum values can be inferred from official data. Tenders must be accompanied, when submitted, by explanations concerning the most significant price components, indicated in the tender notices or the letters of invitation, which together add up to not less than 75% of the amount indicated in the tender notice.

...

8. By the Ministerial Decrees of 28 April 1997 and 18 December 1997 issued under the first subparagraph of Article 21(1a) of Law No 109/1994 for 1997 and 1998 respectively the Minister of Public Works determined the irregularity threshold beyond which there would be an obligation on the part of the contracting authority to verify the tender in question :... an extent equal to the arithmetical mean of the percentage discounts in all the tenders admitted, increased by the arithmetical mean of the difference in the percentage discounts which are in excess of the said mean.

III - Facts and the main proceedings

1. Case C-285/99

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9. The Italian National Highways Authority (hereinafter the ANAS) published a notice calling for tenders, under a restricted procedure, for works described as RM 87/97 - GRA Motorway - stretch 19 - widening to three lanes in both directions from km 43 + 280 to km 46 + 500.

10. The temporary association of undertakings constituted by Lombardini SpA - Impresa Generali di Costruzioni (hereinafter: Lombardini), Collini - Impresa di Costruzioni SpA and Trevi SpA was invited to participate in the tender procedure by letter No 1723 of 15 October 1997. In so far as is relevant and in accordance with the provisions of Article 21(1a) of Law No 109/1994, the letter of invitation contained the following information:

A. The requirement upon applicants to include with their bids explanations concerning the most significant price indications equivalent to 75% of the figure specified in the tender. The explanations were to be drafted in accordance with the format attached to the letter of invitation and were to be included in the envelope containing the administrative documentation to be submitted.

B. The requirement to attach, in a separate envelope, the necessary documentation for verification of the data in the explanatory breakdown accompanying the bid. The envelope would be opened and its contents examined only if the bid exceeded the arithmetical threshold indicative of irregularity.

C. A warning that failure to respect any of the above requirements would mean exclusion of the bids.

D. Criteria on the basis of which tenders suspected of being irregular would be verified.

11. The bid by Lombardini was qualified as abnormally low, by reason of which the envelopes containing the explanatory documentation were opened. After consideration, the bid was rejected and the contract awarded to Società Italiana per Condotte d'Acqua.

12. Lombardini immediately lodged a complaint with the Tribunale Administrativo Regionale per il Lazio regarding the contract notice, the letter of invitation, its own exclusion and the award of the contract. Its applications were dismissed by that court and Lombardini therefore lodged an appeal invoking amongst other arguments incorrect and inappropriate interpretation of Article 30 of Directive 93/37.

2. Case C-286/99

13. ANAS published a contract notice for the award, under restricted procedure, of a corresponding contract to complete the second stage of construction work of the Bergamo/Zanica stretch of provincial road No 115.

14. Mantovani SpA (hereinafter Mantovani), in temporary association with another undertaking, was invited to participate in the tender procedure by a letter stating that the award would be made in accordance with Article 21(1a) of Law No 109/1994 in the version in Article 7 of Law No 216/1995, and stating that irregularity of the tenders would be assessed in accordance with Article 30(4) of the Directive and the criteria outlined in the Ministerial Decree of 28 April 1997. The letter of invitation set out the requirements for contractors and warnings about exclusion similar to those mentioned above in the description of the facts of Case C-285/99.

15. Mantovani submitted a figure which exceeded the irregularity threshold, for which reason its application was considered irregular. After the bid had been examined in conjunction with the related explanations and the data submitted for analysis, it was declared inadmissible. The contract was awarded to the temporary association of undertakings Bregoli/Roda.

16. Contesting the inadmissibility of its bid, Mantovani lodged a complaint concerning the contract notice, the letter of invitation, the decision to exclude it from the awards procedure and the award itself. The Tribunale Amministrativo Regionale per il Lazio dismissed the action in Judgment

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No 1498 of 26 June 1998.

17. Mantovani appealed, alleging breach of Article 30(4) of the Directive in so far as the procedure for verifying admissibility of the bids ... is in breach of Community principles which prohibit any automatic exclusion and regarding... improper conduct of the oral proceedings after it had been ascertained that the bid indicated irregularities.

IV - Questions for preliminary ruling

18. The Consiglio di Stato believes that in order to resolve both appeals, the exact scope of Article 30(4) of the Directive must be established as regards the reference to the procedure for verification of abnormally low bids, and it therefore puts the following questions to the Court of Justice:

(1) Does recourse to a clause in calls for tenders for public works contracts which prevents the participation of undertakings which have not submitted with their tenders explanations in respect of the price indicated, being equal to at least 75% of the figure specified in the tender conditions, represent an obstacle to the application of Article 30(4) of Directive 93/37?

(2) Does the establishment of a mechanism for automatically identifying tenders which overstep a threshold indicative of irregularities and whose validity should therefore be checked, based on a case-by-case criterion and an arithmetical mean, which is such that undertakings are unable to ascertain that threshold in advance, represent an obstacle to the application of Article 30(4) of Directive 93/37?

(3) Does the fact that provision is made for a prior exchange of views, without the undertaking which has allegedly submitted an irregular tender having an opportunity to state its reasons, after the opening of the envelopes and before the adoption of the measure excluding it, represent an obstacle to the application of Article 30(4) of Directive 93/37?

(4) Does a provision under which the contracting authority may take account of explanations relating solely to the economy of the construction method or the technical solutions adopted or the exceptionally favourable conditions available to the tenderer represent an obstacle to the application of Article 30(4) of Directive 93/37?

(5) Does the exclusion of explanations relating to items for which minimum figures can be inferred from official lists represent an obstacle to the application of Article 30(4) of Directive 93/37?

V - Proceedings before the Court of Justice

19. By Order of 14 September 1999, the President of the Court decided to join the two sets of proceedings given that they were, in objective terms, interrelated.

20. The Commission, the Italian and Austrian Governments, the applicants in the main action, Lombardini and Mantovani, and Coopsette (intervener in the dispute initiated by Mantovani), submitted written observations before the relevant deadline established under Article 20 of the EC Statute of the Court of Justice.

21. At the hearing on 3 May 2001 all the parties, with the exception of the Austrian Government, appeared to put their submissions orally.

VI - Consideration of questions for preliminary ruling

22. The five questions referred by the Consiglio di Stato can be grouped, as indicated in paragraph 4 of this Opinion, into three categories:

(1) Automatic setting of the threshold indicative of irregularity. This refers to the second question.

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(2) Explanations of the price submitted and the nature of those explanations. This refers to the first, fourth and fifth questions.

(3) No system of hearings for undertakings whose tenders are abnormally low before they are excluded. This concerns the third question in the order for reference.

23. My arguments will follow the above outline; however, there should initially be some consideration, even if only superficial, of the principles in Community law which underlie the system of awarding public contracts, in order better to understand the rules in Article 30(4) of the Directive.

1. Principles underlying selection of a contractor

24. The Directives on public contracts, each one concerned with a specific field, aim to promote the development of effective competition in the sector of public contracts by realising three of the fundamental freedoms of European integration (free movement of goods, freedom of establishment and the freedom to provide services). Those directives aim to give effect to the requirements set out by the Community legislature in Articles 9, 52 and 59 of the EC Treaty (now, after amendment, Articles 23 EC, 43 EC and 49 EC).

25. Giving effect to those requirements and the pursuit of that objective can only be achieved if those who wish to be awarded public contracts can apply on an equal basis, without any discrimination whatsoever; to this end, a system based on objectivity at all levels, in terms of both substance and form, is indispensable. Firstly, by setting objective criteria for participation in the tender and award of contracts. Secondly, by making provision for open procedures in which transparency is the norm.

26. The criteria for participation or selection on the basis of quality refer to the suitability of applicants, to their skills and experience, both professional, economic and technical. To rule out any discriminatory effect, it is necessary in each case to predetermine, within the framework of the law, rules governing the procedure, as well as the levels of skill and experience required.

27. Once the tenderers qualifying for award of the contract have been selected upon application of the rules on participation, that award is also subject to objective parameters of assessment, whether the lowest bid or the most economically advantageous. If the second criterion is applied the awarding authority must set out in advance the selection criteria in the contract documents or contract notice, stating their respective importance.

28. As can be seen, the system is intended to ensure that nothing is left to chance or subject to any arbitrary decision on the part of the body awarding the contract. The system whereby tenderers apply on an equal footing, which must underlie the award of public contracts, means that any person who wishes to be awarded a contract of this kind must know beforehand what he must do to be awarded it, so that the awarding body is confined (given the discretion involved in the technical evaluation) to applying parameters set out in the rules, both those rules governing public contracts in a general sense, and those which involve in particular a specific contract, that is to say the contract documents or the contract notice.

29. To ensure that such a system is effective and that there is no discrimination in the award of public contracts, it is not sufficient to set objective criteria for participation and award of the contracts, but application of the criteria must be based on transparency. This must apply from the time of the contract notice, in the contract documents and, finally, in the selection stage itself, as well as in the open procedures and restricted procedures.

30. Those principles must be applied remembering that the award of public contracts is a way of managing public interests in which authorities invite persons - natural persons or legal persons - to collaborate in realising objectives asked of them which, in every instance, require an efficient

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response. On certain occasions, such efficiency is in conflict with the pace which a selection procedure, complete with guarantees, requires. For this reason the Directive excludes certain contracts from its field of application and, in particular cases, ordinary procedures for award of contracts and brings forward the time-limits in some instances.

2. Article 30(4) of the Directive

31. Article 30(4) is part of the rules on award of the contract and, for the purpose of speeding up the process, authorises the rejection of tenders considered abnormally low in relation to the works. However, a rejection may not be made automatically as Community law requires the awarding authority: (1) before adopting its decision to give the tenderer the chance to provide details of the constituent elements of the tender, asking for any details it considers relevant, and (2) to that end, to take into consideration explanations submitted to it, especially those relating to the economy of the construction method, the technical solution chosen, the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed.

32. There are three consequences deriving from the above:

1a. The concept of an abnormally low tender is not an abstract concept; on the contrary, it is defined by reference to the contract to be awarded and to the work involved.

2a. The awarding authority must examine the tenders which it considers to be abnormally low in order to be able to reject them.

3a. The decision to exclude may be adopted only after giving the tenderer the possibility of providing explanations regarding the tender, or after applying an oral verification procedure.

3. Automatic setting of the threshold indicative of irregularity

33. As we have seen, Italian law sets out a mathematical, and thus automatic, system for setting the irregularity threshold. It consists of a percentage set by the Ministry of Public Works on 1 January each year. For the years 1997 and 1998, recognising that it was impossible to set a single threshold for the whole country, the Ministry used a mathematical formula, which varied according to the contract, consisting ... of an extent equal to the arithmetical mean of the percentage discounts in all the tenders admitted, increased by the arithmetical mean of the difference in the percentage discounts which are in excess of the said mean. The contracting authority is required to verify all tenders exceeding that threshold.

34. A system such as that described above conforms to the requirements of Article 30(4) of the Directive and the principles underlying selection of the contractor.

35. I have stated that, according to Article 30(4), the concept of an abnormally low tender is very precise and must be determined for each contract according to the specific purpose it is intended to fulfil. In my view, an irregularity threshold based on a figure calculated using the bids submitted for a contract, bids which, by definition, are made in accordance with the purpose of the contract, is perfectly in line with the aims of the Directive. As the representative of Mantovani stated at the hearing, the system allows the market to establish the threshold, above which a tender may be considered irregular, for each contract. Moreover, given that the criterion represents an objective figure, all applicants are on an equal footing. No party has any advantage with respect to the others in submitting its bid.

36. However, this system suffers from an absence of transparency. Those parties wishing to participate in the award of the contract do not know when they submit their tender the threshold beyond which that tender may be considered as abnormally low. Furthermore, the awarding authority does not know that threshold either. This is the price which must be paid, however, if the legal concept of abnormally

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low tenders is to be a priori not pre-determined, but perfectly capable of being determined in relation to each contract, in particular as required by Article 30(4) of the Directive.

37. Admittedly, automatic setting of the irregularity threshold, together with the requirement to submit explanations of the price with the tender and during the exclusion stage, before the verification procedure and without a hearing, of those tenders which are abnormally low may be incompatible with the requirements of the Directive. However, that consequence cannot per se be put down to the system of setting the irregularity threshold, but to the enforcement of that requirement or to implementation of the exclusion system.

38. In Fratelli Costanzo the Court did rule that the Directive prohibits systems of automatic exclusion from procedures for the award of contracts, but the automatic exclusion procedure rejected by the Court is a procedure carried out without any oral verification procedure, not a procedure based on an irregularity threshold using mathematical criteria.

39. In view of the foregoing I propose that the Court of Justice should answer the second question put by the Consiglio di Stato stating that Article 30(4) does not exclude a mathematical mechanism for setting an irregularity threshold such as to prevent tenderers from ascertaining that threshold before submitting tenders.

4. Explanation of the price tendered

A. Explanations which must be submitted with the tender

40. It can be seen from the principles to which selection in public contracts must conform, and which I have outlined above simply in descriptive terms, that there is nothing in the Directive in general nor in Article 30(4) which specifically prohibits a requirement, under threat of exclusion from the tender procedure, that the tender should be accompanied by an explanation of at least 75% of the price specified in the tender conditions. This constitutes an objective requirement which all applicants must satisfy.

41. The Directive does not require those wishing to be awarded a contract to indicate in advance the component parts and the contents of their tender, but there is nothing to prevent such a condition. A provision of this kind does not breach the principle of equality of conditions for those participating in the application procedure. Without exception, all of them must attach explanations on the biggest constituent elements of the price, equivalent to 75% of the figure specified in the tender conditions and enclose, in a separate, sealed envelope, the documents needed to verify the data on which the explanations are based.

42. In this way, therefore, the selection procedure is speeded up and efficiency increased which, as I said earlier, is also a requirement deriving from Community law on public contracts. In the course of the procedure described above, when a bid is considered abnormally low, the awarding authority can proceed, without further delay, to verification of the details and assessment of the explanations submitted, without having to wait for the tenderer to produce them; the tenderer may provide further explanations at the hearing which must take place before the tender is rejected.

In fact, it may happen that on viewing the documentation submitted alongside the tender and the clarifications provided at that point, the awarding authority decides to admit the tender. The procedure for awarding the contract can be continued without the delay that would arise if no explanatory documentation had been submitted ab initio and it was necessary to hear the applicant in order for an explanation to be provided.

43. I therefore propose that the Court should answer the first question referred by the Consiglio di Stato stating that a provision in the contract notice according to which undertakings which have not submitted with their tenders explanations in respect of the price indicated, being equal

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to at least 75% of the figure specified in the tender conditions, does not represent an obstacle to the application of Article 30(4) of the Directive.

B. Nature of the explanations

44. The second indent of Article 30(4) provides that, to assess abnormally low tenders, the awarding authority may take into consideration explanations regarding the economy of the construction method or the technical solution chosen or the exceptionally favourable conditions available to the tenderer for the execution of the work or the originality of the work proposed by the tenderer.

45. The second indent does no more than enlarge upon the first indent of paragraph 4, according to which the awarding authority shall request from the tenderer details it considers relevant and, taking account of the explanations received, shall verify the constituent elements of the tender.

46. It appears from a joint interpretation of both indents that, before rejecting a tender by reason of the fact that it is abnormally low, the awarding authority must ask the applicant for any details and explanations it considers relevant. In response to this request, and to support his proposal, the tenderer must submit explanations he considers relevant, without any limitation, including those mentioned in the second indent.

All the explanations must be taken into consideration by the awarding authority when it makes its final decision on whether to accept or reject the tender, including the explanations outlined in the second indent. This provision is not a block rule, and does not set out a restrictive list of reasons and explanations which may be submitted, but, on the contrary, simply explains the general rules in the first indent.

47. Consequently, a provision limiting the category of explanations which the applicant in an abnormally low tender may provide to those categories listed in the second indent of Article 30(4) would be incompatible with the letter and the spirit of the Directive whose intention is that, before rejecting a tender because it is excessively low, the tenderer may provide explanations without any limitation. This rule, furthermore, is contained in Article 7 of Italian Law 216/1995.

48. An applicant submitting a tender which exceeds the irregularity threshold must have the opportunity to put forward his arguments and, in order to support the worth of his proposal, to present any explanations he considers relevant. However, it is possible to provide clarifications only if the tenderer has sufficient flexibility, in a situation of free competition, to provide lower prices than his competitors and, thus, to put forward plans for the most advantageous contract in the general interest. Therefore, where there is no such flexibility, any explanation is redundant.

49. In principle, this would be the case if prices were officially fixed. Where prices are controlled, no explanation is necessary, as such explanation is provided by the rules. If a tenderer has put forward different prices in that instance, the proposal cannot be justified. In that case, exclusion of the explanations would not be incompatible with the Directive.

50. In my view, however, the above does not take account of two key ideas: one, that controlled prices are not synonymous with immutable prices, and the other, that the purpose of the Directive is to facilitate free competition between contractors.

51. Nothing can prevent an undertaking from offering a different price - a lower price - than that indicated as the minimum in official lists for particular elements of the work. A proposal made by a tenderer is complex in its content, it is not monolithic, which means the various elements can be combined to reach a price and conditions of execution which make it the most attractive option in the general interest. To deprive a person wishing to be awarded a contract of the possibility of justifying the reasons why a lower price is being offered than that set in official lists means ruling out the beneficial effects deriving from fair competition and condemning the tenderer to

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automatic exclusion of his tender.

52. In view of the foregoing I propose that the Court should answer the fourth and fifth question put by the Consiglio di Stato by stating that Article 30(4) of the Directive prohibits a national law requiring the awarding authority, as part of its verification of abnormally low tenders, to take into consideration only particular explanations and to exclude those explanations referring to elements whose minimum values can be found on official lists.

5. Oral procedure for verification of tenders

53. In this Opinion I have repeatedly stated in different contexts that Article 30(4) of the Directive prohibits the automatic exclusion of tenders considered to be abnormally low. Before adopting a decision to exclude, the awarding authority must request, in writing, details of the constituent elements of the tender which it considers relevant. It was the intention of the Community legislature that no tender should be rejected without the applicant being able to provide ample explanation. The oral verification procedure is obligatory as the Court ruled in Transporoute, Fratelli Costanzo and Donà Alfonso.

54. Due hearing of the parties is synonymous with dialogue, discussion and debate. The picture is one-sided only when the party affected by the decision may not provide explanations. This is what happens in the system under Italian law in which the decision to exclude is adopted taking account only of explanations submitted at the same time as the tender, without the awarding authority being in a position to request clarification and without giving the tenderer concerned the possibility of supplementing the explanations provided at the outset.

55. Where a tender is considered abnormally low, after opening the envelope containing the documents with the supporting information for the explanations submitted at the outset, and before deciding on the outcome, the awarding authority is required to request any explanations it considers relevant. Taking into account the latter explanations, as well as those submitted initially and the supporting documents, it must make its decision on whether to exclude the tender or accept it.

56. To summarise, in response to the third question for preliminary ruling, any procedure of excluding abnormally low tenders where the applicant undertakings do not have the opportunity to provide explanations after the envelopes are opened, and before the decision to exclude is made, is in conflict with Article 30(4) of the Directive.

VII - Conclusion

57. On the basis of the foregoing I propose the following answers by the Court of Justice to the questions referred by the Consiglio di Stato della Repubblica Italiana of the Italian Republic with reference to Article 30(4) of the Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts:

(a) A mechanism for automatically identifying tenders which overstep a threshold indicative of irregularities which is such that undertakings are unable to ascertain that threshold in advance before submitting their tenders is not in conflict with Article 30(4) of the Directive;

(b) Article 30(4) of the Directive does not prohibit the call for tender containing a clause excluding undertakings who do not submit with their tenders explanations in respect of the price indicated, being equal to at least 75% of the figure specified in the tender conditions;

(c) Article 30(4) of the Directive prohibits a national law from requiring an awarding authority to verify abnormally low tenders by taking into account only certain explanations and from excluding those tenders referring to items for which minimum figures can be inferred from official lists; and

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(d) Article 30(4) of the Directive does not permit an exclusion procedure for abnormally low tenders where the tenderers do not have the chance to provide explanations following the opening of the envelopes and before the adoption of the decision to exclude.

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Opinion of Mr Advocate General Mischo delivered on 19 October 2000.
Commission of the European Communities v French Republic.
Failure by a Member State to fulfil obligations - Directive 93/37/EEC - Public works contracts - Concept of 'contracting authority'.
Case C-237/99.

1 Upon reading two French publications, the Bulletin officiel des annonces des marchés publics and the Moniteur des travaux publics et du bâtiment, the Commission found that three public works contract notices, two published by offices publics d'aménagement et de construction (public development and construction entities, or `OPACs'), and one by a société anonyme d'habitation à loyer modéré (low-rent housing corporation), or `SA HLM', had not been published in the Official Journal of the European Communities, S series. The Commission takes the view that Article 11 of Council Directive 93/37/EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts (`the Directive') (1) required that those notices be published in the S series, having regard to both the value of the contracts and the nature of the awarding body.

2 In the Commission's view, both OPACs and SA HLMs are to be regarded as contracting authorities within the meaning of Article 1(b) of the Directive.

3 The Commission was not satisfied with the French Republic's reply to the formal notice addressed to it. After having found, as it maintains, numerous other contracts awarded by bodies of the same type, notice of which had not been published in the Official Journal of the European Communities, so that the practice appeared to be persistent, the Commission issued a reasoned opinion. Finally, still not satisfied by the explanations of the French authorities, the Commission brought the action with which I am here concerned.

4 It should, however, be noted at the outset that the scope of the dispute has changed in the course of the written procedure.

5 The French Republic has accepted from the time of filing its defence that in the light of the Court's case-law, in particular the judgments of 15 January 1998 (2) and 10 November 1998 (3), OPACs are contracting authorities within the meaning of Article 1(b) of the Directive, thereby acknowledging that such bodies are required to publish notices of contracts in the Official Journal of the European Communities, S series. In so far as concerns the OPACs, the Court can thus only declare that the French Republic has failed to fulfil its obligations.

6 The dispute has also narrowed in respect of SA HLMs, inasmuch as the parties, whilst still in disagreement as to whether such bodies are to be regarded as contracting authorities for the purposes of the Directive, have established in the course of their written pleadings that their positions differ on only one very specific issue, the answer to which will determine the outcome of the dispute: namely whether the supervision which the public authorities exercise over SA HLMs corresponds exactly to the type of supervision referred to in the Directive when it sets out the criteria by which contracting authorities may be identified.

7 The Court has become familiar with the Directive, which it has interpreted in Mannesmann Anlagenbau Austria and BFI Holding, cited above. For that reason I do not consider that there is any need to decide the context in which it was adopted, its objectives and its general structure. I turn directly to Article 1, which, by means of a series of definitions, defines the scope of the Directive. Article 1 provides

`For the purpose of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the

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execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law [or] associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies;

...'

8 In its application, the Commission sets out to demonstrate, relying principally on the Code de la construction et de l'habitation (Construction and Housing Code, hereafter `the Code') published by the Journal officiel de la République française, that SA HLMs are to be regarded as public bodies and therefore as contracting authorities within the meaning of Article 1(b) of the Directive.

9 To this end, it points out, first, that the bodies in question were set up for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, namely to provide housing for persons and families of modest means, and that they have legal personality, so that the first two conditions of Article 1(b) necessary to meet the definition of a body governed by public law are fulfilled.

10 Turning to the third condition, the Commission points out, without being contradicted on that point, that of the three characteristics referred to in the Directive, namely that the body in question is financed for the most part by the public authorities, that it is subject to management supervision by the latter and that more than half of the members of the governing board are appointed by the public authorities, only one need be satisfied in order for a body to be deemed to fulfil that condition.

11 The Commission contends that a number of provisions of the Code, to which I shall in due course be turning my attention, make it clear that the supervision exercised by the State over SA HLMs matches precisely that which the Community legislature had in mind.

12 In its defence, the French Republic sets out to demonstrate that the supervision to which these corporations are subject does not in any way correspond to that referred to in the Directive. The various types of supervision described by the Commission do not allow the public authorities to intervene in decisions concerning the proper functioning of SA HLMs. Such supervision is of an administrative nature, and must be distinguished from the management or investment controls with which, in its view, Article 1(b) is concerned.

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13 In its reply, the Commission maintains that the distinction is irrelevant. It maintains that there is nothing in Article 1(b) to support the conclusion that only supervision which gives the public authorities power to intervene in the day-to-day management of the corporation is caught by that provision.

14 In its rejoinder, the French Republic, still arguing on the premiss that for there to be management supervision within the meaning of Article 1(b) there must be supervision involving an evaluation of the way in which funds are administered, endeavours to show that the various types of supervision highlighted by the Commission are administrative in nature and exclude any involvement with management.

15 In its statement in intervention, the United Kingdom supports the interpretation of the Directive on which the French Republic bases its defence.

16 It is therefore quite clear that the point at issue between the parties is when the management of a body is to be regarded as subject to supervision by another.

17 To my mind, the outcome depends not only on the meaning to be given to the term `supervision' but also on what is to be understood by `management', even if it is the interpretation of `supervision' which is the bone of contention.

18 I shall therefore consider each of these terms in turn.

What is management? What is supervision?

19 According to the dictionary Le Petit Robert, the term gestion (management), which describes the action of managing, is allied to administration, leadership and organisation, all of which connote the exercise of some form of power.

20 That inclines me to the view that supervision not linked to the way in which those who hold power in a body influence its activities cannot be described as management supervision of that body.

21 That interpretation of gestion does not conflict with the terms gestion, (4) gestione (5) and gestao (6) used in the Spanish, Italian and Portuguese versions of the Directive respectively, or with the term diakhirísi used in the Greek version. (7)

22 It is even supported by the use of the terms Leitung (8) and `management' (9) in the German and English versions, and by the joint use in Dutch of activiteiten and beheer. (10)

23 In the Danish version there is no equivalent of the term `management'. Reference is made solely to kontrol (11).

24 As for the term `supervision', semantic analysis unfortunately provides no means of deciding between the two opposing interpretations put forward by the Commission, on the one hand, and the French Republic and the United Kingdom, on the other.

25 Reference to Le Petit Robert shows that contrôle denotes a relationship of supervision and verification as much as one of domination and leadership.

26 Admittedly, the first meaning is stated there to have the advantage of long usage and the second to have emerged only in the twentieth century, so that the French term `contrôle' acquired the same meaning as the English word `control'. However, that semantic development certainly does not make it possible to determine without hesitation the meaning of `supervision' which the Community legislature had in mind in 1993.

27 Still on the semantic level, when describing a situation in which `supervision' means `domination', one speaks of an undertaking which controls another, and not of an undertaking which exercises supervision over another, but the opposite is not true, since the fact of being subject to supervision does not necessarily imply the existence of a power to intervene in decision-making.

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28 Since it is impossible to find a solution by analysing the French version of the Directive, upon which the Commission and the French Government base their reasoning, the rules of interpretation laid down by the Court require us to turn to the other linguistic versions.

29 The Spanish, Italian and Portuguese versions, which employ the terms control, controllo and controlo respectively, and the Greek version, which uses the term elenkho, are no more helpful than the French version.

30 At first sight, the use in the German version of the term Aufsicht, used in everyday language to mean `surveillance', where the French version uses contrôle, might give the impression that the Community legislature did not specifically intend `supervision' to imply a power of intervention.

31 It seems to me however to be difficult to draw definite conclusions from the use of the term Aufsicht, in so far as in German, in order to refer to the supervisory board of a company, that is to say the body which, together with the managerial board, holds power when the company does not follow the classic model of having a board of directors, the term used is Aufsichtsrat. In a company whose administration is structured along those lines, the Aufsichtsrat is by no means a mere supervisor of the managerial board, but is actively involved in the management of the company, since it participates in defining the company's objectives and determining its strategy.

32 The term toezicht in the Dutch version calls for the same observations, mutatis mutandis, as does Aufsicht in the German version.

33 The English version of the Directive sheds no more light on the topic, because `management supervision' conveys nothing of the scope of the powers of the supervising authority, whether simple surveillance of management or the possibility of intervening in management decisions.

34 Having concluded this rapid foray into the linguistic pluralism peculiar to Community law, what conclusion may we draw?

35 Certainly not any definite conclusion as to the type of supervision envisaged by the Community legislature, with which the supervision to which SA HLMs are subject might be compared.

36 To my mind, however, the exercise has not been fruitless since it has at least shown that it would not be contrary to the wording of the Directive to consider that control involving the exercise of supervision of the way in which the body in question is run, without involvement in its running, is enough for that body to be regarded as a body governed by public law within the meaning of Article 1(b) of the Directive.

37 The next step will therefore be to analyse the Court's case-law, not in the hope of finding a definition of supervision for the purposes of Article 1(b), since if such a definition existed the parties would clearly have referred to it and I should immediately have used it as the corner-stone of my reasoning, but in order to seek any factors which may clarify the approach to be adopted in identifying bodies governed by public law falling within the scope of the Directive.

38 The only judgment to date to deal with the problem of the meaning of `body governed by public law' for the purposes of Directive 93/37 is Mannesmann Anlagenbau Austria and Others, cited above. (12)

39 It is true that the same concept, which also appears in Article 1(b) of another directive in the field of public procurement, Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts, (13) was also considered in BFI Holding, cited above. The Court held in that judgment that, `with a view to giving full effect to the principle of freedom of movement, the term "contracting authority" must be interpreted in functional terms (see, to that effect, Case 31/87 Beentjes v Netherlands State [1988] ECR 4635, paragraph 11). In view of that need, no distinction should be drawn by reference to the legal form of the provisions

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setting up the entity and specifying the needs which it is to meet' (paragraph 62). Essentially, however, that judgment is concerned with the definition of a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. I shall therefore concentrate on Mannesmann Anlagenbau Austria and Others.

40 To my mind, and contrary to what the Commission suggests, the relevance of that decision to the present case does not lie in the following statements made by the Court at paragraph 28 to show that the third condition was thereby fulfilled:

- the Osterreichische Staatsdruckerei (Austrian State Printer, hereafter the OS) was established specifically for the purpose of meeting needs in the public interest, not having an industrial or commercial character, namely for the production of administrative documents subject in varying degrees to security measures, and has legal personality;

- the Director-General of the OS is appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries;

- furthermore, it is subject to scrutiny by the Court of Auditors and a State control service is responsible for monitoring the printed matter which is subject to security measures;

- finally, according to the statements made at the hearing by SRG, the majority of the shares in the OS are still held by the Austrian State.

41 This is because the finding as regards the appointment of the managing board was sufficient, in itself, to satisfy the third condition. Consequently, the finding as to supervision exercised by the Court of Auditors and by a State control body, which the Court took care to put after the phrase `furthermore', does not enable one to draw any conclusions as to the degree of supervision considered sufficient by the Court for the purposes of this condition.

42 To draw such conclusions in this case would be all the more hazardous in view of the fact, noted by Advocate General Léger in his Opinion in that case, that the definition of Austrian bodies coming within the scope of the Directive in Annex I, XI, E.1(b) of the Act of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the amendments to the Treaties founding the European Union (14) brought in the factor of budgetary supervision by the Court of Auditors.

43 What the Court said in respect of the supervision exercised over the OS therefore comes down, in one sense, to stating that the latter is clearly subject to supervision accepted by the Republic of Austria, at the time of its accession, as being such as to meet the criterion of supervision by the public authorities within the meaning of the Directive.

44 The real relevance of Mannesmann Anlagenbau Austria and Others for the issue here lies in the résumé of the conditions to be met for there to be a body governed by public law, highlighted in the process of establishing that those conditions were met in the case of the OS.

45 At paragraph 20 it reads:

`Under the second subparagraph of Article 1(b) of Directive 93/37, a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State (15), regional or local authorities or other bodies governed by public law.'

46 It will be observed straightaway that whilst the Court states the first two conditions in terms borrowed directly from the Directive it presents the third, without pausing to consider the three alternative criteria which must be applied, as referring to a certain type of relationship with the public authorities, namely close dependence. We may thus conclude that the three criteria for

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the third condition in Article 1(b) of the Directive constitute three alternative means of establishing the same fact, namely a situation of close dependence on the public authorities.

47 Since they are alternatives which enable the establishment of the same fact, these criteria may be regarded as equally sensitive tests. It cannot be the case that one of them can be read in such a way as to bring within the category of bodies governed by public law, bodies in a situation of dependence on the public authorities which differs markedly from that of bodies placed in the same category by one or other of the other two criteria.

48 In practice, this means that only bodies whose dependence on the public authorities is as close as that which arises from being financed, for the most part, by public authorities, or from the appointment of more than half of the members of the management board by the same public authorities, may be regarded as bodies governed by public law by reason of the supervision exercised over their management.

49 This pragmatic approach adopted by the Court does not, admittedly, enable us to decide between the two positions of principle advanced by the Commission, on the one hand, and the French Republic, on the other - that is, whether mere surveillance of management is sufficient or whether it is necessary to establish the existence of supervision entailing the power to intervene in management. In fact, it goes further, and transcends, so to speak, the conflict, inviting us to focus not so much on the nature of the supervision exercised as on the particular situation to which the existence of this supervision gives rise. That approach is, I think, in perfect harmony with the aims of the Community provisions on public procurement as stated by Advocate General Léger in paragraph 47 of his Opinion in Mannesmann Anlagenbau Austria and Others:

`The Community public procurement legislation was developed to ensure, at Community level, respect for the principles of free competition, freedom of establishment and freedom to provide services, which had long been [undermined] by the widespread tendency to act in that way. Its purpose is to ensure that traders, of whatever origin, have equal access to contracts put out to tender by public authorities for the execution of their projects, whatever form those authorities may take.'

50 In a footnote the Advocate General referred to Beentjes, cited above. Subsequently, the Court has made it clear, in paragraph 62 of BFI Holding, and paragraph 36 of Commission v Ireland that not only the meaning of `State' but also that of `contracting authority' must be given a functional interpretation.

51 In applying this approach of the Court one has to ask, not whether each of the controls weighing on the SA HLMs and pointed to by the Commission, taken separately, is such as to put those companies in a situation of dependence on the public authorities, but whether, having regard to the legislative and regulatory framework within which the SA HLMs operate, the various controls to which they are subject in fact give rise to close dependence on the public authorities. This is because it is apparent that the same type of supervision may give rise to different conclusions according to the context in which it applies. One type may give rise to different effects according to whether, by operation of the provisions which govern its application, the body subject to it enjoys considerable freedom of management or, on the contrary, the provisions strictly define its activity and determine the direction of management in advance.

52 For this reason I consider it necessary now to consider the status of SA HLMs and the legal context within which they operate.

The legal framework within which SA HLMs operate

53 SA HLMs are commercial companies and are therefore governed by the 1966 law on companies. They are, however, a specific type because their inclusion, by Article L. 411-2 of the Code, in

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the list of low-cost housing bodies has the effect of making them subject to a host of rules laid down by the Code. Some of these rules apply to all low-cost housing bodies, including in particular public ones and OPACs, whilst others apply specifically to SA HLMs.

54 Thus, under Article L. 422-2 of the Code their object is to perform, in the conditions determined by their statutes, principally with a view to leasing, the activities laid down by Article L. 411-1, which defines those activities in the following terms:

`The provisions of this chapter set out the rules applicable to the construction, purchase, development, rehabilitation, repair and management of individual or collective, urban or rural housing, meeting the technical characteristics and the cost price determined by administrative decision and intended to meet the needs of individuals or families of limited means...'.

55 It will be noted not only that the type of client to which SA HLMs offer their services is fixed by law, but that the technical characteristics and the cost price of the housing they may deal with is set by administrative decision.

56 When an SA HLM is constituted its statutes must comply with the model statutes annexed to Article R. 422-1 of the Code. These are extremely detailed. One finds there, as to the objects of the company, a distinction between the primary object, the letting of housing at a rent fixed in accordance with the rules laid down by the Code, and the construction of such housing, and the secondary object, for which 17 types of activity are listed, each precisely defined.

57 The model statutes specify that the transfer of shares must take place at a price not exceeding a maximum, the means of calculation of which is specified, and that such transfer, unless it occurs within a family context, requires the consent of the board of directors or supervisory board, which need not disclose the reasons for its consent or refusal.

58 Members of the board of directors or supervisory board of an SA HLM serve without remuneration, save that a fixed allowance calculated in accordance with the provisions of the Code may be given to members who are in paid employment.

59 If a profit is made, the dividend payable may not exceed a fixed maximum.

60 According to paragraph 11 of the model statutes:

`In the month after that in which the company meets in ordinary general meeting in accordance with Article 157 of the Law of 24 July 1966 cited above, the company shall file its accounts and reports to shareholders, together with the minutes of the general meeting, with the representative of the State in the département where its head office is situated, at the Deposit and Consignment Office, and with the Minister of Housing.

Where the shareholders' meeting is postponed, the judicial decision granting an extension of time must be similarly filed.'

61 Adopting the model statutes is not sufficient, however, to enable an SA HLM to commence business because Article L. 422-5 of the Code requires approval to be given, by means of administrative decision, to be issued in accordance with Article R. 422-16 by the Minister for Housing and Construction, on advice from the housing committee of the département, and the regulatory body for low-cost housing.

62 It will be noted that the previous version of the model statutes, (16) annexed in error to the Commission's application, provided for a government commissioner, whose powers were defined as follows:

`When the company receives approval in accordance with Article R. 422-4 of the Code de la construction et de l'habitation, a government commissioner, appointed by decision of the Minister of Housing, shall have full powers of documentary and on-site investigation.

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He shall be entitled to sit in on meetings of the board of directors, in an advisory capacity, and may, where necessary, call such a meeting. He shall receive, on the same terms as the members of the board of directors, notice of such meetings, agendas and any other documents prior to each meeting. He shall further be entitled to copies of the minutes of each meetings and of the decisions taken by the board.

He may also order, within 15 days of the date of adoption, a re-examination of all or part of any decision of the board of directors. This examination must take place within 15 days. Action on the decision in question shall be suspended pending the re-examination.

He shall file with the Minister for Housing an annual report on the activity of the company.

Remuneration of the government commissioner, which shall be borne by the company, shall be set by the decision appointing him in accordance with a scale fixed by interministerial decision.'

63 If that provision had not been revoked in 1993, even interpreting management supervision as including a power of intervention, as advocated by the French Republic and the United Kingdom, would lead to the conclusion that SA HLMs are public bodies within the meaning of Article 1(b) of the Directive.

64 However, the other provisions which I have just set out, and which their statutes must include, indicate that SA HLMs are very tightly constrained, in terms of both the activities which they may pursue and the means of pursuing them and the deployment of capital, and that the profile of a shareholder in such a company is clearly very different from that of a company which is governed only by the 1966 law.

65 This framework should not, of course, be confused with the supervision to which Article 1(b) of the Directive refers. The existence of rules, no matter how precise, which a body must observe is one thing, supervision over the management of that body is another. This follows from the fact that if monitoring compliance with such rules and sanctions for their breach could only be a matter for the courts one could not speak of supervision by the State, a public body or a body governed by public law.

66 Nonetheless this very strict framework cannot be ignored when it comes to considering whether SA HLMs are in a situation of close dependence on the public authorities.

67 This follows from the fact that if the rules of management are very detailed, the simple supervision of their observance will inevitably result in a degree of control by the public authorities which is hardly distinguishable from that arising from appointment by the latter of the majority of the members of the management body or from finance which is for the most part public, in the sense that management will be guided by the public authorities and supervision will be merely a means of furthering the domination provided for in the framework rules.

68 In other words, and to come back to the approach laid down in Mannesmann Anlagenbau Austria and Others, where there is a strict regulatory framework the type of supervision envisaged by the Commission in its interpretation of Article 1(b) of the Directive will, from the point of view of close dependence on the public authorities, have the same effect as would arise, in the absence of such a framework, from the type of supervision envisaged by the French Republic in its interpretation of that article.

The controls in question

69 I turn now to consider whether the different controls identified by the Commission are such as to place the SA HLMs in a situation of close dependence on the public authorities.

70 The first provision of the Code cited by the Commission to show that SA HLMs are subject

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to management supervision by the public authorities is Article L. 422-7. This provides as follows:

`In case of serious irregularity or serious fault of management or failure on the part of the board of directors or supervisory board of a low-cost housing company or crédit immobilier company, the Minister of Housing and Construction may, after hearing the company, or the latter having had the opportunity to be heard, order the winding up of the company and the appointment of a liquidator.'

71 This provision leads me to make three observations.

72 Firstly, I do not think that one can argue that the three situations envisaged all concern defects in accounting procedures, misappropriation of funds or corruption. These instances fall within the category of `serious irregularity'.

73 On the other hand, `serious fault of management' can only refer to decisions taken ill-advisedly by the body, such as non-observance of the company's objectives, or careless financial decisions.

74 Lastly, the question of `failure' refers to wrongful abstention from action or a general lack of activity.

75 Clearly the last two categories fall within management policy and not supervision of compliance with the rules.

76 Secondly, I fail to see how the Minister responsible for Housing and Construction (hereafter `the Minister') could find a `serious fault of management' or a `failure' without exercising management supervision, at least at regular intervals. This supervision is rendered possible by the obligation imposed on the company to file with the Minister, amongst others, its accounts and, above all, its reports to shareholders (see paragraph 11 of the model statutes, mentioned above).

77 Thirdly, it is undeniable that the powers conferred on the Minister by this article are far-reaching, since they allow the former to order the winding up of an SA HLM if it appears to him that its management is seriously wanting.

78 The following provision, Article L. 422-8, (17) also cited by the Commission, gives the Minister power to take action less drastic than winding up, namely to suspend the management bodies, but this comes with extensive powers over the management of the company, which can be placed in the hands of an interim administrator appointed by the Minister.

79 It is thus no longer even a question of being involved in management, but of the transfer of management powers to a person appointed by the public authorities.

80 Furthermore, the intervention of this person does not result in a return to the status quo ante, since the company must undergo a period of intensive supervision for two years. (18)

81 Still within the legislative ambit of the Code, the Commission refers to Articles L. 423-1 and L. 423-2, (19) which empower the Minister both to order the liquidation of an SA HLM whose activity falls below a minimum threshold and to order the transfer of a part of its estate to another low-cost housing body where its activity exceeds a certain upper limit.

82 Such measures undeniably enable the Minister to exercise a certain degree of management or, at least, either to inject a minimum of dynamism into the management or to prevent SA HLMs from becoming real property empires.

83 As the Commission points out, the Code does not confine ministerial intervention to remedying serious faults or deficiencies in management, or to ensuring compliance with the constraints within which SA HLMs must operate. Rather it establishes as a general principle, by Article L. 451-1, of `administrative supervision' of low-cost housing bodies, and therefore of SA HLMs. Article R. 451-1 states that all low-cost housing bodies, regardless of their legal form and method of

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finance, `are subject to the supervision of the Ministers of Finance and of Housing and Construction'. To ensure the effectiveness of this supervision, Article L. 451-2 (20) grants a power of scrutiny over documents held by architects and contractors who have dealt with low-cost housing bodies, with refusal to comply on the part of the latter punishable by heavy fines.

84 It will be noted that Article L. 451-1 in no way limits the extent of the supervision which the public authorities may exercise over SA HLMs, for example by stating that this is simply supervision of their compliance with the rules.

85 In fact the public authorities have at their disposal, in addition to the measures described above, a whole range of powers enabling them to direct the management of SA HLMs. The Commission cites two examples.

86 Firstly, Article R. 423-72 of the Code, which makes a decision manifestly concerning company management, namely the revaluation of assets, to the prior agreement of the Minister.

87 Secondly, Decree No 93-236 of 22 February 1993, on the establishment of an interministerial committee for the inspection of public housing. Article 3 of the decree states:

`The purpose of the committee is the supervision of legal or natural persons operating in the field of public housing.

The committee shall supervise the construction, acquisition and improvement of public housing carried out with financing subsidised or regulated by the State, or the subject of an agreement with the State, or backed by tax-exempt funding.

...

The committee may be empowered by the Ministers to whom it reports to carry out supervisory work and surveys, in addition to studies, audits and evaluations in the field of public housing.

The committee shall formulate proposals concerning the action to be taken in respect of its inspection reports and to ensure the implementation by the supervised bodies of the measures taken by the Ministers to whom it reports.

The committee shall, upon request, provide assistance to the decentralised services of the Ministers of the Economy, of Finance, of the Budget and of Industry.'

88 Plainly, this body is not a mere observer. It may put forward to the Minister proposals concerning the management of the various low-cost housing bodies and, if the Minister adopts them, it is responsible for their implementation.

89 The French Republic does not, of course, dispute the existence of these various forms of supervision.

90 In response to the various forms of intervention by the Minister identified by the Commission, the French Republic points to the fact that they are confined to strictly defined situations which occur only very rarely in practice.

91 As to the general power of supervision vested in the Minister, the French Republic contends that:

`It should be stressed that these are exceptional powers which may only be exercised in limited circumstances. They consist of a power to verify the accounting procedures of the bodies. Government officials can call for evidence of funds or securities, and can inspect all documents. They can call for any information, subject only to the requirement that they do not interfere in operations. The end result of this supervision is a report in which the government inspectors confine themselves to recording misuse or misappropriation of funds to the Minister. In sum, this programme of inspection constitutes more a persistent threat hanging over the bodies concerned than management supervision

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in the strict sense, that is, in terms of decisions involving strategic or investment choices.'

92 I consider, however, that I have shown, in relation to Article L. 422-7 of the Code and the model statutes with which SA HLMs must comply, that the supervision of them exercised by the public authorities is wider than that, embracing as it does all documents available to the general meeting and the reports of the latter.

93 As to the interministerial committee for the inspection of public housing [MILOS], the French Republic submits in its rejoinder that:

`... the MILOS is not in a position to give orders or instructions to the bodies which it supervises. The inspections result, after the body concerned has been heard, in a report incorporating the observations of the body as to the strengths and weaknesses brought to light as a result of the inspection, and may include proposals or recommendations addressed as much to the body itself as to the supervisory power. The report is then forwarded, as well as to the managing director of the supervised entity, to the local supervisory bodies (the Prefect and the Departmental Paymaster) and the national supervisory bodies (the Ministers of Finance and Housing respectively). By its nature, and in view of those to whom it is addressed, a MILOS report has the status of an act of administrative supervision with a diagnostic and advisory purpose. If the managing committee of the MILOS or its permanent commission oversees the action to be taken in the light of these observations, the MILOS does no more than make recommendations on a case by case basis resulting in negotiations with the body itself to cause it to move forward, particularly if its financial status becomes critical.'

94 Even there, however, the argument does not seem to me to be well founded, because these inspections are in addition to the other supervisory measures already described. It is interesting to note, however, that according to the French Republic itself, the said committee can enter into negotiations with the supervised body `to cause it to move forward'.

95 In my opinion, if the approach laid down in Mannesmann Anlagenbau Austria and Others is adopted one can only agree with the Commission, since everything leads to the conclusion that in fact SA HLMs are, by reason of the supervision which the public authorities exercise over their management, in a situation of close dependence on the public authorities.

96 There is one final matter which arises from the way in which the Commission arrives at a finding of a failure to fulfil obligations. In its application, it asks the Court to declare that the French Republic has, in making various awards of public contracts concerning the construction of housing by OPACs and SA HLMs, failed to fulfil its obligations under Directive 93/37, and in particular under Article 11(2) thereof. In my opinion it is difficult to find for the Commission on these terms.

97 As the Commission has not asked the Court to declare that the French Republic has failed to fulfil its obligations under Directive 93/37 by reason of a failure to take the necessary steps to ensure that OPACs and SA HLMs publish in the Official Journal of the European Communities, S series, notice of contracts the value of which exceeds the threshold laid down by the Directive, which would have presented no difficulty, given that it is this point which has been at issue throughout the proceedings, it seems to me that the Court ought to confine itself to declaring a failure to fulfil obligations in the three concrete cases referred to by the Commission.

Conclusion

98 In the light of the foregoing, I suggest that the Court:

- declare that, by failing to adopt the necessary measures to ensure that the Office public d'aménagement et de construction for the Val-de-Marne, the Logirel Société anonyme d'habitation à loyer modéré

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of Lyon, and the Paris Office public d'aménagement et de construction published notice in the Official Journal of the European Communities, S series, of the contracts notice of which was published in the Bulletin officiel des annonces des marchés publics of 7 February 1995, the Moniteur des travaux publics et du bâtiment of 16 February 1995, and the Bulletin officiel des annonces des marchés publics of 16 February 1995 respectively, the French Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts, and in particular Article 11(2) thereof;

- order the French Republic to pay the costs.

(1) - OJ 1993 L 199, p. 54.

(2) - Case C-44/96 Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck [1998] ECR I-73.

(3) - Case C-360/96 Arnhem and Reden v BFI Holding [1998] ECR I-6821.

(4) - `todo organismo... cuya gestion se halle sometida a un control por parte de estos ultimos...'

(5) - `organismo... oppure la cui gestione é soggetta al controllo di questi ...'

(6) - `qualquer organismo... cuja gestao esteja sujeita a um controlo por parte destes ultimos ou...'

(7) - `êÜèå ïñaaíéoiüo... åßôå ç äéa ßñéoç o=üêåéôaé oå ¡eåa a=ü ôï êñÜôïo « ôïoo ïñaaíéoiïuo aoôïuo...'

(8) - `jede Einrichtung... die hinsichtlich ihrer Leitung der Aufsicht durch letztere unterliegt...'

(9) - `any body... or subject to management supervision by those bodies ...'

(10) - `iedere instelling... waarvan of wel de activiteiten... of wel het beheer is onderworpen aan toezicht door deze laatsten...'

(11) - `organ... eller er underlagt disses kontrol...'

(12) - The judgment in Case C-353/96 Commission v Ireland [1998] ECR I-8565 concerns Council Directive 77/62/EEC of 21 December 1976 on the coordination of procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), which preceded the Directive in issue here.

(13) - OJ 1992 L 209, p. 1.

(14) - OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1.

(15) - Emphasis added.

(16) - Laid down by Decree No 91-385 of 23 April 1991, replaced by Decree No 93-749 of 27 March 1993.

(17) - In the circumstances referred to in Article L. 422-7, the Minister for Housing may suspend the board of directors or the supervisory body, or the latter only, by reasoned decision, and appoint an interim administrator to whom shall be transferred the full powers of the board of directors or the supervisory body for the continuation of current activities.

The role of the interim administrator ends either on the appointment of a new board of directors or supervisory board by the company in general meeting at the latest within one year, extendable once from the date of the ministerial decision, or, in the absence of such appointment, on the appointment of a liquidator by the Minister for Housing and Construction.

Within two years of the appointment of the interim administrator, he must be invited to and may attend all meetings of the board of directors or of the new supervisory board, and general shareholders'

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meetings.

If in the course of this period he determines that the necessary measures for the recovery of the company have not been adopted or implemented, he shall inform the Minister of Housing and Construction. The latter may, together with the Minister of the Economy and Finance, after having heard the company, either proceed to the winding up and liquidation of the body in question, or further suspend the board of directors or the supervisory board and appoint an interim administrator for a fixed term. This administrator must, before the expiry of his term, call a general meeting to appoint a new board of directors or supervisory board, failing which he will proceed to the winding up and liquidation of the body.

(18) - The Commission could also have referred to Article L. 422-6, which provides for the power to suspend individual members of the management bodies, and to Article L. 422-9, which provides that:

`Where a low-cost housing or crédit immobilier company fails to file the administrative and accounting documents listed by decree provided for by Article L. 423-3 with the relevant administrative authority for two years, or if it is unable to appoint a board of directors, or to call a general shareholders' meeting, the administrative authority may order its winding up and appoint a liquidator, on terms provided for by decree, either upon application of the members holding the majority of the capital, or upon application of a representative of the State in the département, or on its own initiative.'

(19) - Article L. 423-1:

`Any low-cost housing entity which manages less than 1 500 properties and which has built fewer than 500 properties or granted fewer than 300 loans in ten years may be wound up and a liquidator appointed by decision of the Minister of Housing and Construction and, in the case of public low-cost housing and construction bodies, by joint decision of the said Minister and the Minister for the Home Office.

Any low-cost housing body managing more than 50 000 properties may be called on, by decision of the Minister of Housing and Construction, to transfer all or some of the properties exceeding this number to one or more designated bodies.'

(20) - The government officials responsible for implementing the supervision provided for by the preceding article may, for the purposes of that implementation only, consult any accounts, correspondence, receipts or records of expenditure in the offices of architects and contractors who have dealt with bodies subject to this supervision.

Any refusal to enter into communication shall render the perpetrator liable to a fine of FRF 60 000.'

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Opinion of Mr Advocate General Alber delivered on 30 January 2001.
Agorà Srl and Excelsior Snc di Pedrotti Bruna & C. v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc. coop. arl.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy.
Public service contracts - Definition of contracting authorities - Body governed by public law.
Joined cases C-223/99 and C-260/99.

I - Introduction

1. The two references for a preliminary ruling from the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court) (Italy) concern - in connection with procurement procedures conducted by the Milanese fair company Ente Autonomo Fiera Internazionale di Milano (hereinafter the Ente Fiera) - the question of the interpretation of the concept of a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (hereinafter Directive 92/50). In particular, the parties disagree on the requirement of being established... for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

II - Legal framework

A - Directive 92/50

2. The relevant provisions of Article 1 of Directive 92/50 state:

For the purposes of this Directive:

...

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive;

...

B - Italian implementing legislation

3. Directive 92/50 was implemented in Italian law by Decree-Law No 157 of 17 March 1995 (hereinafter Decree-Law No 157/95). The concept of a body governed by public law was adopted from Directive 92/50 in Article 2 of the Decree-Law.

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C - Articles of association of the Ente Fiera

4. The Ente Fiera was established in the early part of the 20th century in the form of a committee under private law. Its capital was for the most part provided by private businessmen. By Royal Decree No 919 of 1 July 1922 the Ente Fiera was transformed into a private-law legal person.

5. The Ente Fiera is responsible for the organisation of the international fair in Milan. At the time of the reference for a preliminary ruling, the provisions of its articles of association relevant to these proceedings stated:

Article 1 - Object

1. The objects of the Ente Autonomo Fiera Internazionale di Milano (hereinafter "Ente") having its seat in Milan, Largo Domodossola Nr. 1, established by Royal Decree No 919 of 1 July 1922, declared Ente Fieristico Internazionale by Decree of the President of the Republic No 616 of 24 July 1977, are to carry on and facilitate any activity concerned with the organisation of fairs and conferences and any other initiative which, by fostering trade relations, promotes the presentation of the production of goods and services and if possible their sale. The Ente is a non-profit-making body and carries on activities in the public interest. Its operations are governed by the principles of the Civil Code.

2. Management of the Ente shall be based on the criteria of performance, efficiency and cost-effectiveness.

3. The Ente may effect any operations not prohibited to it by law or its articles of association, including financial operations, loans and the conclusion of commercial guarantees in respect of movable and immovable property in pursuance of its objects; furthermore, it may form companies or bodies whose objects are similar, related or linked to its own, or acquire stakes or shares in such companies or bodies.

...

Article 3 - Means of pursuing its objects

1. The Ente shall pursue the objects for which it was created using the proceeds arising from carrying on its activities, from administration (including special administration) and management of its assets and from contributions by legal or natural persons.

...

Under Article 5 of the articles of association, the President of the Ente Fiera is appointed by order of the President of the Republic and the Vice-Presidents and Secretary-General by order of the Minister for Industry (Article 10 of the articles of association).

Under Article 6, more than half of the Consiglio Generale, which is responsible for making the Ente Fiera's fundamental decisions (see Article 7 of the articles of association), are representatives of the central State, of the region of Lombardy, of the province of Milan and of the city of Milan, the other members being representatives of industry and of the employees.

Under Article 15 of the articles of association, the Ente Fiera is subject to the control of the Minister for Industry.

Under Article 16(1), the Minister for Industry can transfer the management of the Ente Fiera to a commissioner if general administration is no longer effective or serious irregularities are discovered. Under Article 16(2) the Minister for Industry can liquidate the Ente Fiera either because its objects can no longer be achieved or on public interest grounds.

III - Facts of the main proceedings

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A - Facts of Case C-223/99

6. On 24 December 1997, Agorà srl (hereinafter Agorà) sent an application in accordance with Article 25 of Italian Law No 241 of 7 August 1990 to the Ente Fiera. In it, Agorà requested the Ente Fiera to send it the documents concerning the award of a contract for the hire of fixtures and fittings for reception areas and information points, which had been referred to in an award notification of 2 August 1997.

7. By decision of 5 January 1998, the Ente Fiera refused to send the documents concerned. By way of justification, it stated that it was not a legal person under public law and was therefore not bound by the transparency requirements of the rules on public service contracts.

8. On 23 January 1998, Agorà challenged that decision in the national court. In its decision of 3 March 1998, the latter upheld its claim and held that the Ente Fiera must send Agorà all documents relating to the award procedure.

9. The Ente Fiera appealed against this decision to the Consiglio di Stato (Council of State). In its decision of 8 July 1998, its Sixth Chamber found a flaw affecting the entire proceedings at first instance and accordingly remitted the case to the court referring the question.

10. By a document of 19 October 1998, Agorà applied anew for its claim to be upheld. It argued that a reference to the Court for a preliminary ruling was appropriate in respect of the disputed question on the applicability of the rules on public service contracts.

11. The national court is of the opinion that the obligation which Agorà claims binds the Ente Fiera to observe the transparency requirements under Italian Law No 241 follows from its status as a contracting authority. In this connection it refers to the diverging interpretations of Article 2 of Decree-Law No 157/95 and Article 1(b) of Directive 92/50 by the Italian national courts. On the one hand, both the Consiglio di Stato in its judgment No 354 of 21 April 1995, and the referring court in its judgment No 1365 of 17 November 1995, held that the Ente Fiera meets the requirements for the definition of a body governed by public law within the meaning of Directive 92/50. On the other hand, the Consiglio di Stato in its judgment No 1267 of 16 September 1998 reversed the case-law. According to that judgment, the Ente Fiera pursued objects having commercial character and consequently could not be regarded as a body governed by public law within the meaning of Directive 92/50.

12. The Ente Fiera produced the latter decision of the Consiglio di Stato as appendix 3 to its memorandum of 5 November 1999. The Consiglio di Stato based its classification of the Ente Fiera on the fact that the indirect promotion of commerce, which followed from its activity as an organiser of fairs, was not sufficient for a finding of needs in the general interest not having an industrial or commercial character. Though the activity of the Ente Fiera promotes the general interest, in the same way as, for example, banking facilities and telecommunications services are provided in the general interest, the organisation of fairs is an essentially commercial activity connected with the marketing and distribution of goods and services which complements manufacturing by business.

13. Since then, the Corte suprema di cassazione (Supreme Court of Cassation) has confirmed the decision of the Consiglio di Stato in appeal proceedings. The Corte suprema di cassazione also takes the view that the Ente Fiera meets needs in the general interest of an industrial or commercial character. By organising fairs and exhibitions, it promotes the economic and business activities of the exhibitors. Over and above that, it competes with other fair organisers. The fact that the Ente is non-profit-making does not invalidate this classification. The Ente Fiera at least endeavours to cover its costs and any losses it may suffer from its receipts.

B - Facts of Case C-260/99

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14. By an announcement published in the Official Journal of the European Communities of 29 July 1997, the Ente Fiera issued a restricted invitation to tender. It concerned the award of cleaning services in respect of its exhibition premises for the period 1 January to 31 December 1998 with the possibility of a two-year extension.

15. Excelsior s.n.c. (hereinafter Excelsior) participated in the procurement procedure for areas 2 to 5. At the end of the procedure, the third area was awarded to Consorzio Miles. The latter was in third place on the award list; the first two applicant firms were rejected by the Ente Fiera. Excelsior was in fifth place on the list.

16. Thereafter, the Ente Fiera cancelled the award of the contract to Miles owing to a serious breach. For the period 13 February to 30 June 1998, the contract was temporarily awarded to C.I.F.T.A.T., which in the earlier procedure had been placed seventh on the list. On 7 March 1998, a new invitation to tender in respect of the area in question was published in the Official Journal of the European Communities for the period 1 July to 31 December 1998, with the possibility of an extension for a further two years.

17. By proceedings instituted on 10 and 11 April 1998, Excelsior challenged both the temporary award of the cleaning services concerned to C.I.F.T.A.T. and the renewed invitation to tender in the Official Journal of 7 March 1998 in respect of the same services before the national court.

18. The Ente Fiera raised as a defence to the action that the courts of administrative jurisdiction had no jurisdiction to decide the questions in issue. It stated as its reason that it was not a body governed by public law and therefore was not bound to observe Community or national rules on the award of public contracts.

19. The national court considers the question whether the Ente Fiera is to be deemed a body governed by public law within the meaning of Article 1(b) of Directive 92/50 to be decisive in order to determine which court is competent.

IV - Questions referred and proceedings before the Court

20. These are the facts which led the national court to refer the following question, which is the same in both main proceedings, to the Court:

May the definition of a body governed by public law contained in Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts be deemed applicable to the Ente Autonomo Fiera Internazionale di Milano?

21. By order of the President of 14 September 1999, the two cases C-223/99 and C-260/99 were joined pursuant to Article 43 of the Rules of Procedure of the Court of Justice both for the purposes of the written and oral procedure and for the purposes of judgment.

V - Arguments of the parties

22. The plaintiff in the main proceedings in Case C-223/99, Agorà, submits that the Ente Fiera meets needs in the general interest. This follows both from its articles of association, and from the national legislation, which regulate its tasks and activities. Organising fairs is of general interest and is of use to a group of persons so large that it may be equated to the entirety of the population.

23. Furthermore, the Ente Fiera was also established for the specific purpose of meeting needs in the general interest. For this it is enough that the Ente Fiera pursue these interests as an institution. The fact that it was originally established as a committee under private law is irrelevant.

24. Agorà also argues that the Ente Fiera meets needs in the general interest not having an industrial or commercial character. The industrial or commercial nature of an activity is to be understood

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as a synonym for a purely private activity on the part of the body concerned. For this it is in turn decisive that it be subject to an obligation to maximise profits.

25. However, under Article 1 of its articles of association, the Ente Fiera's activities are not directed to making profits. Therefore, its decisions cannot be said with certainty to be made solely by reference to economic criteria.

26. Moreover, the State's right of supervision over the Ente Fiera's activities prevent it from operating according to purely economic considerations on the market. The State's control of the organisation of fairs in general means that fair companies are moreover generally liable to be preferred in relation to competitors.

27. Agorà submits that the fact that the Ente Fiera is bound by the provisions of the Civil Code in no way precludes its classification as a body governed by public law.

28. Finally, Agorà submits that the Ente Fiera always observed the Community rules on the award of public contracts until the reversal in the case-law of the Consiglio di Stato in 1998.

29. The plaintiff in the main proceedings in case C-260/99, Excelsior, takes the view that the concept of a body governed by public law must be defined in a manner consistent with the purpose underlying the European public procurement rules. These are intended to prevent the relevant Member State from favouring national companies over companies from other Member States. In order not to undermine that purpose, the concept of a contracting authority, which determines the scope of application of the relevant provisions, is not defined restrictively; instead, the flexible notion of a body governed by public law was introduced.

30. Excelsior argues that it is the needs in the general interest which must not be industrial or commercial, not the body itself. The requirement is, first of all, fulfilled where bodies meet needs in the general interest not related to end-consumers' demand for goods and services. It is likewise fulfilled where bodies meet needs in the general interest that are not specifically for individual benefit and so admit of no discrimination on the basis of price. The Ente Fiera meets needs not having an industrial or commercial character, because it does not provide direct services to individual consumers, but promotes and coordinates the economic activities of third parties. Furthermore, it is not the purpose of the Ente Fiera's activities to make a profit.

31. The Ente Fiera first of all disputes the admissibility of the request for a preliminary ruling in Case C-223/99. The main dispute concerns the applicability of the Italian transparency rules only, not that of the Community rules on public procurement. Whether or not the Ente Fiera is classified as a body governed by public law for the purposes of Directive 92/50 is therefore immaterial to the question in issue in the main proceedings relating to the right of access to public documents.

32. As regards the answer to the question referred, the Ente Fiera advances the view that only one of the requirements for a body governed by public law is indisputably fulfilled, namely the possession of legal personality. On the other hand, it argues that it is not subject to State control. The State's very restricted rights of supervision over the Ente Fiera under national law correspond to those that also exist in respect of foundations and other, exclusively private, economic activities. The State merely has a residual general right of supervision and coordination in respect of the organisation of fairs. Beyond that, the organisation of fairs is entrusted to various bodies under public and private law without State collaboration. Moreover, the Ente Fiera is not subjected to any state audit of its accounts, nor does the State have any financial stake in it.

33. The Ente Fiera carries out activities of an exclusively economic nature. This appears from the fact that it does not operate for free but against payment on the part of the companies that wish to avail themselves of its services. The fact that the activity is not directed at making

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profits merely means that any surplus is not divided between the shareholders but is reinvested in the Ente Fiera. In this way it is able to finance its activities itself in a cost-effective way. The fact that the Ente Fiera meets needs in the general interest is therefore immaterial because those needs are in any event industrial or commercial in nature.

34. Moreover, the Ente Fiera operates in competition with an ever increasing number of other participants in the market. According to the case-law, this is a further indicator that we are not dealing with a need in the general interest, not having an industrial or commercial character. Given the competition, if the Ente Fiera did not operate on the basis of economic criteria, its business results would of necessity be negative. But the Ente Fiera's balance sheets show positive financial results.

35. The Commission interpretative communication concerning the application of the Single Market rules to the sector of fairs and exhibitions (hereinafter the Interpretative Communication) too confirms that the organisation of fairs is an economic activity.

36. Finally, the Ente Fiera also points out that no inference as to the general applicability of the Community rules on the award of public contracts may be drawn from the fact that it has voluntarily observed those rules.

37. The Commission in its observations expresses doubts as to whether the Ente Fiera does in fact meet needs in the general interest. Its specific object is to promote the interests of a defined group of persons, namely economic operators. The interests of this admittedly large, but none the less restricted, category can hardly be equated with the general interest.

38. The Commission is of the opinion that, according to its objects, the Ente Fiera pursues purely commercial interests. It follows from Article 1 of its articles of association that the interests that the Ente Fiera is specifically supposed to pursue are inextricably bound up with the presentation and possible sale of the goods or services offered by the economic operators at the fair. The view that the promotion and stimulation of particular economic and production sectors as well as the activity of other economic operators only represents an industrial or commercial interest if it leads to direct satisfaction of individual consumers' demand for goods and services is far too narrow and does not reflect the Directive.

39. Furthermore, the Ente Fiera was also established for the specific purpose of satisfying the industrial and commercial interests described above. It was founded in the early 20th century to meet traditional and spontaneous interests of economic operators.

40. The distinguishing features of the Ente Fiera's activities and the way in which it functions also lead the Commission to the conclusion that its activities are industrial or commercial in nature. It is true that the Ente Fiera is not profit-orientated, but this only means that profits are not distributed but retained by it. Furthermore, the Ente Fiera is managed according to the criteria of performance, efficiency and cost-effectiveness and it finances itself from the proceeds of exercising its activities. Therefore, the Ente Fiera does make profits and reinvests them so as to remain self-financing.

41. Apart from that, the Ente Fiera is in competition with other private organisers and bodies in the organisation and management of fairs, so in this respect, too, it enjoys no privileges. According to the case-law, this is an indicator of needs having an industrial or commercial character. The presence of competition is in itself admittedly not enough to exclude the possibility that the relevant body is guided by something other than economic considerations. However, according to Article 1 of its articles of association, the Ente Fiera is required to pursue its activities in a manner ensuring high performance, efficiency and cost-effectiveness. It follows from this, combined with the fact that there is competition on the relevant market, that we are here dealing with industrial and commercial needs.

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42. The Commission also refers to its Interpretative Communication already cited. It confirms that the Ente Fiera carries out a remunerative activity in a context characterised by competition.

VI - Opinion

A - Admissibility of the reference for a preliminary ruling in Case C-223/99

43. No concerns were raised as to the admissibility of the reference for a preliminary ruling in Case C-260/99. However, the Ente Fiera claims that the reference in Case C-223/99 is inadmissible, because the question referred concerns the interpretation not of Community law but of Italian law.

44. As explained under Applicable Provisions, the Community definition of a body governed by public law was adopted by Italian law when Directive 92/50 was implemented. According to the information from the national court, the interpretation of that definition is of decisive significance as regards the application of the rules on administrative transparency, Law No 241 of 7 August 1990. So, the question referred concerns the interpretation of the notion of a body governed by public law within the meaning of Directive 92/50. It follows that the question relates to the interpretation of secondary Community law and therefore a subject admissible under Article 234 EC.

45. The extent to which the question referred for a preliminary ruling is necessary for the decision in the main litigation is in principle a matter to be determined by the national court alone and is not examined by this Court. There is a possible exception to this principle where there is manifestly no connection between the question referred and the main proceedings or where the question is general or hypothetical in nature. However, the question referred in Case C-223/99 cannot be said to be inadmissible on those grounds. The national court stated in the order for reference that the question whether the Ente Fiera is bound by the Italian transparency rules at issue in the main proceedings depends on its possible classification as a body governed by public law within the meaning of Article 1(b) of Directive 92/50. The reference for a preliminary ruling in Case C-223/99 is therefore admissible.

B - Interpretation of Article 1 of Directive 92/50

46. In order for the Ente Fiera to be regarded as a contracting authority, the following three conditions must, according to Article 1(b) of Directive 92/50, be satisfied. The Ente Fiera must have legal personality, be subject to state control and have been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. According to the case-law, these conditions are cumulative.

1. Legal personality of the Ente Fiera

47. The Ente Fiera was transformed by Royal Decree of 1 July 1922 from an initiative (iniziativa) into a legal person (ente morale). It has legal personality by virtue of the rules in the third sentence of Article 1(1), Article 1(3), and Article 3 of its articles of association in conjunction with the Royal Decree. The condition in the second indent of Article 1(b) of Directive 92/50 is thereby fulfilled.

2. Influence of the State and of other regional or local authorities on the Ente Fiera

48. More than half of the Ente Fiera's administrative board are representatives of the ministries of the central State and of the regional and district administration (Article 6 of the articles of association), and the President is appointed by the President of the Republic (Article 5(1) of the articles of association). The Minister for Industry appoints the Vice-Presidents (Article 5(3) of the articles of association). The management of the Ente Fiera is therefore designated by the State and other regional or local authorities. Moreover, the Ente Fiera is, pursuant to Article 15 of its articles of association, subject to the control of the Minister for Industry and, under Article 16, can even be liquidated by him or her. To this extent its management too

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is subject to State supervision. In the light of the decision in Connemara Machine Turf in particular, according to which even the possibility of indirect control by the State is sufficient, there can be no doubt about this. The powers of central government in respect of the Ente Fiera were admittedly transferred by Decree of the Council of Ministers of 7 July 1999 to the government of the region of Lombardy. But the latter is also a regional authority, and the management organs of the Ente Fiera are thus still appointed by regional or local authorities and its activity controlled by them within the meaning of the third indent of Article 1(b) of Directive 92/50.

3. Establishment for the specific purpose of meeting needs of general interest, not having an industrial or commercial character

49. As the national court has observed, it follows from the foregoing that, as to the extent to which the Ente Fiera is a body governed by public law within the meaning of Article 1 of Directive 92/50, it is only necessary to examine whether it is a body established for the specific purpose of meetings needs in the general interest, not having an industrial or commercial character (first indent of Article 1(b) of Directive 92/50).

(a) Establishment for the specific purpose of meeting needs in the general interest

50. The first issue is whether the Ente Fiera was established for the specific purpose of meeting needs in the general interest within the meaning of Article 1(b) of Directive 92/50.

51. According to Article 1 of the articles of association, the objects of the Ente Fiera... are to carry on and facilitate any activity concerned with the organisation of fairs and conferences and any other initiative which, by fostering trade relations, promotes the presentation of the production of goods and services and if possible their sale. It follows that the Ente Fiera was founded for the purpose of organising fairs and conferences. What is in question is whether this is a need in the general interest.

52. The first point supporting the argument that we are dealing with needs in the general interest is the wording of the second sentence of Article 1(1) of the Ente Fiera's articles of association which provides that it is not its purpose to make profits and that its activities are pursued in the public interest.

53. The parties to the main proceedings do not dispute that the organisation of fairs and exhibitions is in the general interest. The Consiglio di Stato and the Corte suprema di cassazione, in their more recent case-law cited above, also conclude that the Ente Fiera meets needs in the general interest. Only the Commission disputes that this condition is satisfied. It bases that view on the limited category of persons whose interests the activity of the Ente Fiera serves.

54. The Court does not appear in its case-law on public procurement hitherto to have considered the extent to which the organisation of fairs is an activity in the general interest. The following duties have so far been recognised as being in the general interest: the issue of official documents such as passports, driving licences and identity cards, the collection and treatment of household refuse, the maintenance of national woods and of a forestry industry and the running of a university. In addition, Advocate General Fennelly has classified the operation of public telecommunications networks and the provision of public communications services as being in the general interest and Advocate General Mischo has assumed that Offices publics d'aménagement et de construction and a Société anonyme d'habitations à loyer modéré likewise operate in the general interest.

55. The examples cited in fact relate to situations where the general public in principle has access. However, there are certain services, such as for example attendance at university, that can only be taken up by certain persons, namely those who satisfy the conditions for admission. Similarly, flats in the social housing sector are only allocated to those in need. If one compares these activities

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to the organisation of fairs, it can be seen that fairs, too, are sometimes only open to a certain category of the public, as, for example, in the case of trade fairs. But anyone who satisfies the conditions laid down by the organiser - so, say, anyone who operates in the sector of the economy to which the fair relates - can exhibit. Contrary to the view of the Commission, it does not appear to be justified to deduce from the fact that direct users of fairs are a limited group that the organisation of fairs does not serve the general interest. Thus, just as the general public benefits from university research and its contribution to the level of knowledge in general, so also do fairs, by bringing together manufacturers and retailers, serve the interests of consumers who may, for example, obtain goods from individual retailers via wholesalers and retailers who have acquired information at the fair. As the Commission has stated in its Interpretative Communication on the sector of fairs, fairs and exhibitions represent a sales promotion instrument, which serves the growing need for communication and information in the economy and helps optimise consumer choice. The fact that the class of participants is restricted therefore does not undermine the view that fairs are organised in the general interest.

56. We may therefore assume by way of an initial conclusion that the Ente Fiera meets needs in the general interest.

(b) Type of needs met

57. Lastly, in order for the Ente Fiera to be classified as a body governed by public law, the needs met by it must not [have] an industrial or commercial character. The real dispute between the parties in the main proceedings revolves around the interpretation and application of this criterion. The plaintiffs think that the Ente Fiera does not carry on an industrial or commercial activity, whereas the Ente Fiera itself and the Commission are of the view that organising fairs is a purely industrial or commercial activity. The latter view is shared by the Consiglio di Stato and the Corte suprema di cassazione.

58. So far as can be seen, the only case in which the Court has made any finding on the criterion of needs not having an industrial or commercial character to date is BFI Holding. It stated that it is clear from the second subparagraph of Article 1(b) of Directive 92/50, in its different language versions, that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term "needs in the general interest" as used in that provision. As justification it relied primarily on the practical effectiveness of the provision. For [i]f the Community legislature had considered that all needs in the general interest were not of an industrial or commercial character it would not have said so because, in that context, the second component of the definition would serve no purpose.

59. One must therefore agree with the Commission that characterising needs not having an industrial or commercial character entails defining the concept of needs in the general interest more narrowly. However, it is not clear how industrial or commercial needs in the general interest may be distinguished from those that are not... industrial or commercial, and whether the need met by the Ente Fiera for fairs to be organised is industrial or commercial or not.

60. Agorà infers that the Ente Fiera's activity is not... industrial or commercial in character, principally from the second sentence of Article 1(1) of the articles of association, which state that the Ente Fiera is non-profit-making (L'Ente non ha fini di lucro ...). This argument must be accepted at least to the extent that an industrial or commercial activity in principle aims to produce a commercial profit.

61. The inference of this provision is supported by Article 16 of the Ente Fiera's articles of association. Article 16(1) provides that the Minister for Industry can transfer the management of the Ente Fiera to a commissioner if general administration is no longer effective or serious

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irregularities are found. Further, under Article 16(2), the Minister for Industry can even liquidate the Ente Fiera, either because its objects are no longer achievable or on public interest grounds. The possibility of liquidation on public interest grounds is, however, difficult to reconcile with the view that the Ente Fiera meets industrial or commercial needs. Where an undertaking meets needs having an industrial or commercial character, it may be liquidated either on grounds of insolvency or because the owner no longer has any interest in its continued existence. The first eventuality is dictated by economic considerations alone and the second reflects the private owner's right of disposal. Article 16(2) of the articles of association could therefore be an indication that the Ente primarily fulfils needs in the general interest not having an industrial or commercial character.

62. However, the Commission and the Ente Fiera, arguing that the needs met by the Ente Fiera are industrial or commercial in character, point first of all to the Commission's Interpretative Communication on the sector of fairs, which makes clear that the organisation of fairs is an industrial or commercial activity. The Consiglio di Stato argues, along the same lines, that the organisation of fairs is connected with the advertising and marketing of goods and services and therefore complements business manufacturing. The Corte suprema di cassazione views the organisation of fairs as supporting exhibitors' economic and business activities and, on this basis, classifies the organisation of fairs as an industrial or commercial activity.

63. In the Commission's Interpretative Communication, fairs are described as events with a commercial purpose. However, it must be emphasised that the fact that the exhibitors at a fair pursue activities having an industrial or commercial character does not necessarily mean that organising the fair itself is industrial or commercial in character. The organiser of a fair may well be pursuing non-commercial objects, such as a local policy to develop an area as a location for fairs or the promotion of sales of regional and local products, by creating a convenient opportunity to present them.

64. The Commission's Interpretative Communication describes the activity of fairs in general and states that they are a concrete expression of the market concept. Fairs are further described as a sales promotion instrument supplementary to advertising in that they bring together supply and demand in an environment favourable to operators. They offer participants an opportunity to find out more about the market, identify new trends, assess the competition and make new contacts. But nowhere is the organisation of fairs as such categorically stated to constitute an industrial or commercial activity. On the contrary, the communication expressly excepts measures of a purely private nature adopted by economic operators or groups of them involved in the fair sector. Therefore, it is doubtful whether and to what extent this communication is applicable to commercially organised fairs at all. It seems to be all the more doubtful as the communication is only intended to contribute to the compatibility of national measures governing the organising of fairs with the principles of Community law, in particular the freedom of establishment and the free movement of services and goods. If the communication expressly excepts measures of a purely private nature from its scope of application, this is rather an indication that there undoubtedly are fairs that are organised for reasons that are not purely industrial or commercial. Accordingly, no inference may be drawn from the communication to establish whether the Ente Fiera's activities are industrial or commercial in character.

65. The Consiglio di Stato further cites in support of its view that the Ente Fiera is not classifiable as a public body the fact that the Ente Fiera's objects are laid down by a founding document under private law and that its capital finance came from the investors on the committee. However, this argument is not persuasive either. It cannot be inferred from the fact that the Ente Fiera is founded on a private-law founding document that the needs it meets are industrial or commercial. According to the case-law, with a view to giving full effect to the principle of freedom of movement, the term "contracting authority" must be interpreted in functional terms.... In view of that need, no distinction should be drawn by reference to the legal form of the provisions setting up the entity

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and specifying the needs which it is to meet. The private-law act establishing the Ente Fiera does not therefore constitute grounds for assuming the existence of needs having an industrial or commercial character.

66. According to the Commission and the Ente Fiera, the non-profit-making rule referred to above merely means that profits are not paid out to the shareholders but are to be reinvested. Furthermore it must be observed in this connection that, under Article 1(2) of the articles of association, the Ente Fiera is managed according to the criteria of performance, efficiency and cost-effectiveness and, under Article 3(1) of the articles of association, the Ente Fiera is to pursue the objects for which it was created using the proceeds arising from carrying on its activities.

67. Finally, the fact that the profits that the Ente Fiera indisputably makes are not distributed but are reinvested in the company and that the Ente Fiera must, under Article 3 of its articles of association, finance its activities from its own income point to the existence of an industrial or commercial activity. The articles of association do not contain any provision whereby any losses incurred may be offset by the public authorities. The Ente Fiera thus bears the economic and financial consequences of its activities itself. But the fact that the articles of association do not provide for the possibility of losses being financed out of the public purse, suggests that it is an industrial or commercial activity that is being carried on. One of the characteristics of an industrial or commercial activity is that the undertaking bears the economic risk of its own transactions.

68. To this circumstance must be added the fact that the Ente Fiera stands in competition with other organisers of fairs, as the Commission and the Ente Fiera submit. The decision of the Corte suprema di cassazione also contains the same argument.

69. In this respect it must be found that, according to the case-law of the Court, the existence of competition in the area of the activity in question is an indicator of an industrial or commercial activity. This circumstance admittedly does not of itself preclude a finding of an activity not... having an industrial or commercial character. But, together with the fact that the Ente Fiera alone bears the financial risk of its operations, it supports the view that the activity of the Ente Fiera should be regarded as industrial or commercial. The pressure of competition makes it improbable that the Ente Fiera would be guided in its decisions by non-economic considerations.

70. Nor does it seem necessary from the spirit and purpose of Directive 92/50 to include the Ente Fiera in the category of bodies governed by public law bound by the public procurement rules to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities. The concept of a body governed by public law is to be understood in a functional way if this goal is to be effectively realised. Accordingly, in assessing whether a particular body satisfies the conditions of the second subparagraph of Article 1(b) of Directive 92/50 it must always be asked whether, in the contracts awarded by it, there is actually a risk of discrimination between tenderers on grounds of nationality.

71. On the basis of the financing rules in the articles of association, the Ente Fiera may in principle only be guided by economic considerations. This financial risk typically exists in the case of entrepreneurial activities. In the case of undertakings that meet community needs not having an industrial or commercial character, there are always possibilities for the public purse, to ensure that such needs are met, to make up any losses that may be suffered so that it does not become impossible for the allocated tasks not having industrial or commercial character to be performed.

72. Despite its non-profit-making status and the close state connection, the fact that the economic and financial risk is borne by Ente Fiera alone ensures that there is no danger of any inclination to favour national service providers in awarding contracts.

73. In conclusion, therefore, it must be found that, according to its articles of association,

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the Ente Fiera was established for the specific purpose of meeting needs in the general interest having an industrial or commercial character. It follows that the requirements for the definition of a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 92/50 are not fulfilled in the case of a body such as the Ente Fiera.

VII - Conclusion

74. On the basis of the foregoing considerations I propose that the question referred should be answered as follows:

The definition of a body governed by public law in Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 does not include bodies which, like the Ente Fiera, meet needs in the general interest, are non-profit-making, and are closely connected with public regional or local authorities, but which finance themselves exclusively from their assets and their own income, and bear the economic and financial risk of their activity themselves without there being any possibility of any losses being offset from the public purse.

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Opinion of Mr Advocate General Mischo delivered on 30 November 2000.
Asociacion Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administracion General del Estado.
Reference for a preliminary ruling: Tribunal Supremo - Spain.
Freedom to provide services - Maritime cabotage - Conditions for the grant and continuation of prior administrative authorisation - Concurrent application of the methods of imposing public service obligations and of concluding public service contracts.
Case C-205/99.

1 In this reference for a preliminary ruling, the Tribunal Supremo (Supreme Court) (Spain) has asked the Court to interpret Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (1) (hereinafter `the Regulation') in order to enable it to render judgment on the compatibility with that regulation of Spanish Royal Decree No 1466/1997 of 19 September 1997 on the legal rules governing regular maritime cabotage lines and public-interest shipping (BoE No 226 of 20 September 1997, p. 27712) (hereinafter `Royal Decree No 1466').

Legal framework

A - Community law

2 Article 1(1) of the Regulation provides that:

`As from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of, a Member State...'.

3 Article 2(3) of the Regulation specifies that:

`"a public service contract" shall mean a contract concluded between the competent authorities of a Member State and a Community shipowner in order to provide the public with adequate transport services.

A public service contract may cover notably:

- transport services satisfying fixed standards of continuity, regularity, capacity and quality,

- additional transport services,

- transport services at specified rates and subject to specified conditions, in particular for certain categories of passengers or on certain routes,

- adjustments of services to actual requirements'.

4 Article 2(4) states that `public service obligations' are to mean obligations which the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions.

5 Article 4 of the Regulation provides that:

`1. A Member State may conclude public service contracts with, or impose public service obligations as a condition for the provision of cabotage services on, shipping companies participating in regular services to, from and between islands.

...

2. In imposing public service obligations, Member States shall be limited to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to

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be charged and manning of the vessel.

Where applicable, any compensation for public service obligations must be available to all Community shipowners.'

B - National law

6 Royal Decree No 1466 declares all regular lines between the peninsula and the islands, those connecting the peninsula with Ceuta or Melilla and those linking the non-peninsular territories to one another to be public-interest shipping.

7 Royal Decree No 1466 lays down three different systems:

- a system of notification for peninsular cabotage (Article 3),

- a system of public-interest contracts (Article 4),

- a system of prior administrative authorisation (Articles 6 and 8).

8 The administrative authorisation provided for in Royal Decree No 1466 is subject to two types of condition:

- a requirement to have no outstanding tax or social security debts (Article 6),

- requirements concerning regularity, continuity, capacity to provide the service, manning and, where appropriate, the ports to be served, frequency and, where relevant, rates (Article 8).

The questions referred for a preliminary ruling

9 The Asociacion Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others (hereinafter `Analir and Others') brought an action for annulment of Royal Decree No 1466 on the grounds that it is incompatible with Community law, and the national court has referred the following questions for a preliminary ruling:

`(1) May Article 4, in conjunction with Article 1, of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) be interpreted as permitting the provision of island cabotage services by undertakings covering regular shipping lines to be made subject to prior administrative authorisation?

(2) If so, may the grant and continuation of such administrative authorisation be made subject to conditions, such as having no outstanding tax or social debts, other than those set out in Article 4(2) of the Regulation?

(3) May Article 4(1) of Regulation No 3577/92 be interpreted as permitting public service obligations to be imposed on some shipping companies and public service contracts within the meaning of Article 1(3) of the Regulation to be concluded with others at the same time for the same line or route, in order to ensure the same regular traffic to, from or between islands?'

10 The national court points out that, when Royal Decree No 1466, which the applicants in the main proceedings seek to annul, was adopted, the Kingdom of Spain enjoyed an exemption until 1 January 1999 from the obligation to liberalise maritime cabotage. That court adds, however, rightly in my view, that the questions raised have not become irrelevant ratione temporis. It notes in its order made on 12 May 1999, and therefore after the exemption had expired, that the national provisions whose validity it is called upon to adjudge were not amended when the exemption expired and were intended to be permanent provisions.

The first question

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11 It should be noted, as a preliminary point, that the question raised refers to the possibility of a Member State using a system of prior authorisation linked to the imposition of public service obligations. The measures which a Member State may take in the interests of safeguarding the safety of shipping or the operational requirements of port infrastructure (access to quays, for example) are not therefore at issue in the present case.

12 It is not disputed that the Regulation seeks to implement the principle of freedom to provide services in relation to maritime cabotage.

13 That is evident from both the title of the Regulation, set out above, and its preamble, which states that `the abolition of restrictions on the provision of maritime transport services within Member States is necessary for the establishment of the internal market', which comprises an area in which the free movement of goods, persons, services and capital is ensured. It follows that `freedom to provide services should be applied to maritime transport within Member States'. (2)

14 That principle is embodied in Article 1(1) of the Regulation, cited above.

15 Nor do the parties dispute that the requirement of prior authorisation, which by definition implies that the services may not be provided until the authorisation is granted, is a restriction on freedom to provide services.

16 The divergence of views between the various parties involved concerns whether, and where relevant to what extent, a restriction of that nature may be justified by the public service needs to which the Regulation relates.

17 The applicants in the main proceedings accept that Member States may consider it necessary to impose public service obligations on operators, but do not believe that a Member State is bound as a result to make the provision of services conditional upon prior authorisation. In the applicants' view, compliance with such obligations could be ensured by a system of licences granted by category of line and by declaration procedures.

18 The Kingdom of Spain and the Hellenic Republic adopt a diametrically opposed position and contend that, quite evidently, a system of prior authorisation is necessary in order to guarantee the performance of public service obligations.

19 The Spanish Government lays emphasis on the following arguments in support of its proposition that the requirement of administrative authorisation does not hinder the liberalisation of island cabotage.

20 It stresses, first, how significant it is, both in terms of the Spanish Constitution and of Community law, that the destinations in question are islands, citing in particular in this regard Article 227(2) of the EC Treaty (now, after amendment, Article 299 EC) and Declaration No 30 on island regions, annexed to the Final Act of the Treaty of Amsterdam.

21 The Spanish Government infers that `the existence of islands gives rise to characteristics and peculiarities which may, at the unfettered discretion of each State, warrant special systems of protection'.

22 Furthermore, Spanish law correctly considers that the cabotage in question is a public service. It satisfies the conditions set out by the case-law of the Court (3) in that it is universal, continuous, in the public interest and regulated by the public authorities.

23 The Commission points out, however, rightly in my view, that the question whether or not it is open to a Member State to classify certain cabotage services as public services is not raised in the present case. The dispute in fact concerns the consequences which a Member State is entitled to attribute to such a classification.

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24 According to the Spanish Government, a Member State may define all island cabotage as having the characteristics of a public service and thus having to be subject to public service obligations, compliance with which cannot be ensured other than by a system of prior authorisation.

25 The Commission, supported by the Norwegian Government, considers, on the contrary, that such a system may be used only in well-defined circumstances. I share that view.

26 Indeed, systematic analysis of the provisions of the Regulation leaves scant room for doubt as to the relationship between Article 1, which sets out the principle of freedom to provide services, and Article 4, which gives Member States power to conclude public service contracts or to impose public service obligations. This option is to be seen as the exception, and freedom to provide services as the rule.

27 Nor, moreover, do the various parties involved disagree on this point.

28 It follows that freedom to provide services can be restricted in the interests of public-service needs only if, and to the extent that, it is clearly imperative to do so in order to ensure adequate transport services.

29 That understanding is confirmed by the terms of the ninth recital in the preamble to the Regulation which states that `the introduction of public services entailing certain rights and obligations for the shipowners concerned may be justified in order to ensure the adequacy of regular transport services to, from and between islands'.

30 The proposition according to which public service obligations must be used only where market forces are insufficient to provide adequate services is also articulated in Article 2(4) of the Regulation, from which it can be seen that `public service obligations' are those which `the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions'.

31 The foregoing analysis of the provisions of the Regulation is furthermore confirmed by the case-law of the Court on freedom to provide services, from which it is discernible that this is one of the fundamental freedoms under Community law, and that any derogation from that freedom must be interpreted strictly and must comply with the principles of proportionality and non-discrimination. (4)

32 In the circumstances of the present case, the effect of those principles is that operators can be required to be in possession of prior authorisation only to the extent necessary to oblige them to provide services which they would not provide in an environment of free competition.

33 That can be established only by analysing each of the services in question, in order to identify which of them are liable to be inadequately provided under free market conditions.

34 Conversely, a Member State cannot stipulate, in advance and without analysis on a case by case basis, that an entire category of services, such as, in the present case, services with and between islands, if they are to be adequately provided, requires the adoption of measures which restrict freedom to provide services.

35 It is possible, admittedly, that the competent authorities of a Member State may reach the conclusion, on completion of such an analysis, that none of the services in that category can be adequately provided in an environment of free competition.

36 In the present case, however, the Spanish Government itself draws attention to the great diversity of lines operating between the peninsula and the islands and between islands. That statement suggests that some at least of those services could be adequately provided in an environment of free competition and that it is perhaps not necessary to impose public service obligations for all services with and between islands.

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37 Nor can I see why the diversity of the lines in question should be an obstacle to each of those lines being analysed individually, as the Spanish Government seems to suggest. On the contrary, it is that very diversity which calls for examination on a case by case basis, since it means that a decision which is valid for one crossing will not necessarily be so for another. I would also comment that the aforementioned lines are not so numerous that a case by case analysis of that nature would be unfeasible.

38 The Spanish Government draws an analogy between maritime cabotage and the telecommunications sector, which is in its view an example of another liberalised economic sector in which the provision of services remains subject to a system of authorisation.

39 The fact is, however, that such an analogy, confined as it is to the fact that both are economic sectors in the process of liberalisation, does not, in the light of what has been said above, constitute a ground for concluding that a system of prior authorisation is acceptable without restriction in relation to maritime cabotage.

40 The Spanish Government, supported by the Greek Government, further points out in support of its proposition that Article 4(1) of the Regulation provides that Member States may impose public service obligations as a condition for the provision of cabotage services to and between islands.

41 That argument undoubtedly carries considerable weight, but it does not follow as a matter of course that compliance with those conditions must necessarily be checked beforehand. It is no less conceivable that the competent authorities could make the necessary checks using a system of declaration. The case-law of the Court, furthermore, contains examples of solutions of that type relating to fundamental freedoms under Community law, such as the free movement of capital. (5)

42 Is it right to conclude, therefore, that it is permissible to require prior authorisation in relation to public service obligations provided it is confined to those services which would not be adequately provided in an environment of free competition and provided it is applied in a non-discriminatory manner?

43 The Commission makes a number of relevant observations in that regard.

44 It points out first of all that, even in such circumstances, the national authorities have a duty not to use a system of prior authorisation unless due performance of the public service cannot be supervised by other means.

45 It adds that the purpose of the system of prior authorisation must not be to restrict access to the market, but exclusively to safeguard the public service. I fully share that view. It is, therefore, public-service needs which constitute the only requirement which can justify such a system. That system must, accordingly, have no aim other than to maintain the public service, and competition must be impeded only in so far as is necessary for that end. Conversely, no restriction on access to the market can be justified which is not necessary in terms of the requirements of the public service.

46 It necessarily follows, as the Commission moreover states, that the conditions for the grant of the authorisation must not involve any discretion on the part of the competent authorities. Any undertaking which satisfies the public service obligations laid down, which obligations must, of course, fall within the scope of what is permitted under Article 4(2) of the Regulation, must be able automatically to obtain authorisation.

47 Furthermore, for access to the market in question to be genuine, the conditions for authorisation must be transparent and legal certainty must be ensured. The conditions for obtaining authorisation must therefore be known in advance, justified according to objective criteria and applicable in the same way to all operators entitled to access. Otherwise, an operator would be unable to predict

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the liabilities it will have to bear and would thus be deterred from applying for authorisation.

48 The Commission also refers to a letter of formal notice sent to the Spanish authorities on 22 October 1997, which stated, in any event, that Royal Decree No 1466 brings in new restrictions on freedom to provide services, in particular by setting up a system of prior authorisation for all services with and between islands. Accordingly, it constitutes an infringement of Article 7 of the Regulation which, by reference to Article 62 of the EC Treaty (repealed by the Treaty of Amsterdam), enacts a standstill clause in relation to restrictions on maritime cabotage.

49 It should be noted, however, that the national court has not asked the Court for a preliminary ruling on whether Article 7 is applicable to the present case.

50 Having regard to the foregoing, the reply to the first question must be as follows:

`Article 1 and Article 4(2) of the Regulation must be interpreted as not permitting the provision of island cabotage services by undertakings covering regular shipping lines to be made subject to prior administrative authorisation, unless the Member State can demonstrate that:

- in an environment of free competition the public service could not be ensured, in an adequate manner, on the lines subject to authorisation;

- operators' compliance with the public service obligations can be supervised only by means of a system of prior authorisation;

- the conditions for issue of the authorisation are defined, predictable, transparent and non-discriminatory;

- operators who satisfy the public service obligations set by the Member State are automatically granted authorisation.'

The second question

51 This question is clearly raised only for the eventuality that the reply to the first is in the affirmative. Since I have given a qualified response to the first question, I find it necessary to answer the second.

52 The national court seeks to ascertain whether the grant and continuation of the authorisation may be made subject to conditions, such as having no outstanding tax or social security debts, other than those listed in Article 4(2) of the Regulation and having no specific connection with the services which are the subject-matter of the authorisation.

53 The applicants in the main proceedings claim that the grant and continuation of the prior authorisation required under Royal Decree No 1466 for island cabotage cannot be made subject to the condition of having no outstanding tax or social security debts.

54 According to the applicants, the Treaty permits restrictions on the fundamental principle of freedom to provide services only where they are justified by non-economic public-interest requirements which are proportionate and non-discriminatory.

55 In their view, that is not so in the present case, since the obligation at issue has no direct connection with the maritime traffic subject to authorisation.

56 Furthermore, Article 5 of the EC Treaty (now Article 10 EC) prohibits Member States from introducing new restrictions on freedom to provide services, such as the conditions at issue.

57 The Norwegian Government shares the view of Analir and Others that Article 4(2) of the Regulation does not permit the obligations at issue to be imposed. Indeed, that provision makes no mention of them whereas it is evident from both the wording and the purpose of the Regulation that that text is exhaustive.

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58 The Spanish Government points out, however, that the conditions at issue are not `public service obligations', but are general conditions for the grant of administrative authorisation.

59 It follows that they would not infringe Article 4 of the Regulation, even if that provision were to be regarded as exhaustive.

60 The Spanish Government also contends, in line with the Commission's view, that an obligation to have no outstanding tax or social security debts is essential in order to ensure a degree of solvency on the part of the undertakings called upon to provide public services and is therefore such as to ensure that provision of that service will not be jeopardised by the provider's insolvency.

61 The Commission states, in that regard, that capacity to provide the service, within the meaning of Article 4(2) of the Regulation, must be understood to include economic and financial capacity.

62 It emerges both from the observations of the national court and from the arguments put forward by the Spanish Government that a distinction must be made here between two types of consideration.

63 First, the question arises whether, in general, Member States are entitled to make exercise of the activity in question subject to conditions relating to matters not referred to in Article 4(2).

64 It follows from the actual wording of the Regulation that this is so.

65 The Regulation states in Article 1(1), cited above, that `freedom to provide ... services... shall apply to Community shipowners who have their ships registered in, and flying the flag of, a Member State, provided that these ships comply with all conditions for carrying out cabotage in that Member State'. (6)

66 Similarly, Article 3(2) provides that `[f]or vessels carrying out island cabotage, all matters relating to manning shall be the responsibility of the State in which the vessel is performing a maritime transport service (host State)'. (7)

67 It necessarily follows that a Member State may, under those two provisions, impose conditions relating to matters not covered by Article 4(2).

68 It follows in particular from Article 1(1) cited above that, where a shipowner wished to provide cabotage services in Spain using ships registered in, and flying the flag of, that State, those ships would be bound to comply with the conditions required, under Spanish law, for carrying out cabotage in Spain. In such circumstances, there would be nothing to prevent those conditions from including, where appropriate, an obligation for the shipowner to have no outstanding tax or social security debts.

69 That consideration brings me to the second issue which it is my duty to examine in the context of this reference for a preliminary ruling.

70 Even if, as has been seen, the obligations relating to tax and social security debts, to which the national judge refers, can, in the circumstances described above, have their basis in provisions other than Article 4(2), this does not preclude those obligations from also being treated as public service obligations within the meaning of that provision, which may on that basis be imposed by the host Member State on shipowners, whether they are established in Spain or in another Member State.

71 As the Commission and the Spanish Government rightly point out, a shipowner's inability to pay its tax and social security debts may be an indication of serious financial difficulties liable to lead to insolvency and interruption of the public service.

72 Accordingly, inclusion amongst the conditions for authorisation of a criterion enabling the

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shipowner's solvency to be assessed does not amount to an unduly broad interpretation of the wording of Article 4(2) of the Regulation, even though, as has been seen, since that provision is an exception to the principle of freedom to provide services, it must be interpreted strictly.

73 Nor is that conclusion shaken by the fact, pointed out both by Analir and Others and by the national court, that the conditions at issue are not specifically connected with the services to be provided. They are in a more general way, as has been seen, an indication of the financial ability to perform services of that nature in the long-term.

74 Furthermore, a company should not obtain a competitive advantage over others which duly pay their taxes and social security contributions.

75 I would also comment in this regard that, as the Spanish Government points out, conditions of this sort are not unknown in Community law. They are in fact explicitly laid down by the public procurement directives. (8) These, however, relate primarily to more ad hoc relationships between economic operators and authorities.

76 There is all the more reason, therefore, to accept the imposition of such conditions in the present case, which concerns public services which must be provided over a certain length of time, and not merely episodically.

77 It should also be made clear, as the Commission does, that application of those conditions must be non-discriminatory.

78 As I have already had occasion to say on examining the first question, it emerges both from the case-law of the Court and from general principles of Community law that a restriction on an inherent freedom under that law can be justified only where it does not lead to discrimination.

79 The Commission is likewise well-founded in pointing out that the conditions at issue were already in existence, under other instruments, prior to Royal Decree No 1466, and are not therefore a new restriction and accordingly incompatible with the provisions of the Regulation.

80 In the light of the foregoing, I propose that the Court reply as follows to the second question referred for a preliminary ruling:

`Article 4(2) of the Regulation does not preclude the grant or continuation of the authorisation referred to in the first question from being made subject to the condition that the service provider have no outstanding tax or social security debts, provided that this condition is applied on a non-discriminatory basis.'

The third question

81 By this question, (9) the Tribunal Supremo asks the Court whether the Regulation permits public service obligations to be imposed on some companies and, at the same time, public service contracts to be concluded with others for the same line or route. It states that that is the situation in Spain, by virtue of Royal Decree No 1466.

82 The applicants in the main proceedings believe that the reply to the question should be in the negative. In their view, the authorities' intervention should be confined to ensuring that the services in question are provided adequately, continuously and satisfactorily. It follows from the case-law of the Court that those authorities should pursue that triple objective at the lowest possible cost to the public body.

83 Consequently, they assert, the adoption of measures such as concluding a public service contract or imposing public service obligations would be possible only if the services offered did not meet those three criteria.

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84 In such a situation, it would be appropriate to impose public service obligations if the inadequacy of the services offered affected only one of those criteria. If, on the other hand, none of those criteria was satisfied, it would be appropriate to conclude a public service contract.

85 Analir and Others also consider it to be contradictory for a Member State to make the same traffic subject simultaneously to the contract system and the system of public service obligations.

86 Furthermore, the existence of a contract entails the grant of special rights and, accordingly, the need to comply with Article 90 of the EC Treaty (now Article 86 EC). By granting such advantages to one company whilst at the same time imposing public service obligations on other service providers who might offer a competing service, a Member State is acting in a disproportionate manner and infringing Article 86 of the EC Treaty (now Article 82 EC), which should be applied in conjunction with Article 90.

87 The conditions for applying the derogation laid down in Article 90(2) are not satisfied, since that derogation presupposes that the measures adopted are proportionate to the objective relied on, and that is not so in the present case.

88 On that point, Analir and Others cite a study which, according to them, shows that regular services to the islands are adequate. There is therefore no justification for grouping all those services together to make them the subject-matter of a single public service contract.

89 The applicants in the main proceedings believe that, in reality, the sole purpose of Royal Decree No 1466, which permits the imposition of public service obligations concurrently with the conclusion of a public service contract, is to protect the company Transmed, which could not survive without the grant of public subsidies.

90 The Norwegian Government, which in its written observations had defended the view that the two means of ensuring public service provision set out in Article 4(2) of the Regulation are mutually exclusive, changed its position at the hearing.

91 It considers ultimately that both mechanisms can be used simultaneously in relation to a single line or route, but that the two in combination must not cause a distortion of competition which would not have occurred had only one of the mechanisms been used.

92 The French Government defends a diametrically opposed point of view. It distinguishes two possible situations.

93 First, it maintains that a Member State is entitled to conclude a public service contract in relation to traffic already covered by public service obligations.

94 According to that government, it might be found, despite the imposition of public service obligations by the authorities, that the service offered remains below the level which the State considers adequate. Such a situation would require the conclusion of a public service contract, and the principle of proportionality might dictate that the subject-matter of that contract be limited to what would be necessary to meet the unsatisfied needs of the public service.

95 In such a situation, on a single route, regular lines covered by public service obligations would therefore exist alongside an operator bound by a public service contract which would contain the same public service obligations (and, possibly, others).

96 Secondly, the French Government asserts that it is also possible to impose public service obligations where the route in question is already covered by a public service contract. Otherwise, it contends, the contract-holding operator might withdraw from the market as soon as it was faced with competition from other companies not subject to public service obligations. Accordingly, the adequacy of the service, supposedly guaranteed by conclusion of the contract, might be jeopardised.

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97 The Commission's analysis contains interesting similarities with that of the French Government, but also a number of significant refinements.

98 The Commission maintains that there is nothing, in principle, to prevent a Member State from deciding to impose public service obligations generally, either by means of a system of notification or by a system of authorisation, and from concluding a public service contract for one or more lines subject to those obligations in order to ensure an adequate level of service.

99 It points out that, just as public service obligations must be imposed in a transparent and non-discriminatory manner, with no exercise of discretion, public service contracts must be concluded on the basis of a public call for tenders ensuring equal treatment and an equal chance of success for all operators.

100 The Commission considers it necessary to invoke a further condition. Public service obligations imposed in the context of a general system must in any event be less onerous than those required by a public service contract, so as not to distort competition between operators.

101 The existence of a system of public service obligations alongside one of public service contracts thus ensures access to the market for all operators, whilst preventing competitors of the contract-holding company from damaging its interests by capturing the market during the tourist season. Conversely, according to the Commission, the presence of a number of different operators also enables a reduction in the level of financial compensation paid to the contract-holder.

102 Finally, the Commission reiterates that, in any event, a system of public service obligations existing alongside public service contracts is preferable to a system of exclusive contracts having the effect of closing the market for several years.

103 The Spanish Government, for its part, considers public service contracts and public service obligations to be two complementary mechanisms. There is nothing, therefore, to preclude using them concurrently, although contracts should remain exceptional, given the environment of liberalisation of which they form part.

104 In the view of the Spanish Government, a contract gives the authority greater security in terms of public service provision, particularly since it generates reciprocal rights and obligations, or enables the authority to include terms which, if the contract is terminated, ensure the provision of services until a new contract is granted.

105 It may therefore be necessary, in respect of particularly important services, to conclude contracts in order better to safeguard the continuity, regularity and quality of the service.

106 What should one make of those arguments?

107 At first sight, the wording of Article 4(1) of the Regulation suggests that it offers an alternative, since it provides that `a Member State may conclude public service contracts... or (10) impose public service obligations'. That said, it is true that the term `or' (`ou') can also be inclusive in meaning and there is still, therefore, room for doubt.

108 Nor is the definition of a `public service contract' in Article 2 of the Regulation such as to lend absolute certainty. That definition makes it clear that such a contract is concluded `in order to provide the public with adequate transport services'. The most one can infer from this, as the national court does, moreover, is that if, by means of concluding a contract, adequate services are provided, further intervention by the authorities, such as the imposition of public service obligations, is no longer necessary and is, therefore, an unjustified restriction on the freedom to provide services which the Regulation seeks to establish.

109 The definition referred to does not imply, however, that the adequacy of the services provided

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arises from existence of the contract alone. Of itself, the definition in no way precludes the contract from being additional to public service obligations, in such a way that use of both mechanisms concurrently enables adequate services to be guaranteed.

110 The list in Article 2(3) of the Regulation also, to an extent, supports that possibility, since the matters which may be covered by the contract include `additional transport services'. From that viewpoint, the contract is, as the French and Spanish Governments and the Commission maintain, with the qualifications already noted, a mechanism which is additional to public service obligations and intended to supplement the arrangements of which those obligations form the basis.

111 Lastly, one can also cite in support of the same argument the ninth recital in the preamble to the Regulation, which reads, let us recall, as follows:

`[w]hereas the introduction of public services (11) entailing certain rights and obligations for the shipowners concerned may be justified in order to ensure the adequacy of regular transport services (12) to, from and between islands, provided that there is no distinction on the grounds of nationality or residence'.

112 One can deduce from that wording that the aim pursued by the legislature, in permitting recourse to the public service concept, is to ensure the adequacy of services, and that the only condition which it imposes in that respect is that there be no discrimination.

113 The wording of Article 4 also seems to me to confirm the fact that non-discrimination is the only condition imposed. Article 4(1) states that `[w]henever a Member State concludes public service contracts ... it shall do so on a non-discriminatory basis in respect of all Community shipowners'. The second subparagraph of Article 4(2) provides, furthermore, that `[w]here applicable, any compensation for public service obligations must be available to all Community shipowners'.

114 I consider, accordingly, that it is possible to combine public service obligations and conclusion of a contract, provided that this does not give rise to either discrimination or distortion of competition between shipowners.

115 The foregoing means first of all that, from the time the Member State concludes with a shipowner a contract ensuring adequate services on a specific route and giving rise to a subsidy, public service obligations can no longer be imposed on maritime shipping companies serving the same line.

116 In other words, public service obligations relating to the continuity, regularity, capacity and quality of transport cannot be imposed on all companies, whilst only the company with which a contract has been or is being concluded is granted financial compensation in respect of the same obligations.

117 On the other hand, the issue would be different if the company with which a contract is concluded were granted financial compensation in respect of services which it provides in addition to those required, as public service obligations, of all companies, such as additional services during the winter season.

118 None the less, a contract concluded with one company alone in order to ensure certain additional services cannot give rise to subsidies giving that company a financial advantage such as to enable it to offer all its services at a price which would protect it from competition from other operators (cross-subsidies).

119 In other words, combined use of both mechanisms on a single maritime route is acceptable only if, first, the same public service obligations are imposed on all companies, including the contract-holder, and, second, the contract-holder assumes, additionally, supplementary liabilities for which it is remunerated in strict proportion to those liabilities. Such remuneration must not have the effect of giving it a competitive advantage in respect of all its activities.

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120 The Commission expressed the same view, stating that public service obligations imposed in the context of a general system must in any event be less onerous than those required by a public service contract, so as not to distort competition between operators. Public service obligations must also be imposed on the basis of transparency and non-discrimination, with no exercise of discretion. Public service contracts, for their part, must be concluded on the basis of a public call for tenders ensuring equal treatment and equal chances of success for all operators.

121 I propose, therefore, that the Court reply to the third question as follows:

`Article 4(1) of the Regulation must be interpreted as permitting public service obligations to be imposed on some shipping companies and, at the same time, a public service contract within the meaning of Article 2(3) of the Regulation to be concluded with another company for the same line or route, provided that the public service contract includes liabilities in addition to the public service obligations imposed on all companies, that the financial compensation granted is proportionate to those liabilities and that it is not, accordingly, such as to distort competition to the detriment of companies which are not parties to such a contract.'

Conclusion

122 I propose that the Court reply as follows to the questions referred by the Tribunal Supremo:

`(1) Article 1 and Article 4(2) of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) must be interpreted as not permitting the provision of island cabotage services by undertakings covering regular shipping lines to be made subject to prior administrative authorisation, unless the Member State can demonstrate that:

- in an environment of free competition the public service could not be ensured, in an adequate manner, on the lines subject to authorisation;

- operators' compliance with public service obligations can be supervised only by means of a system of prior authorisation;

- the conditions for issue of the authorisation are defined, predictable, transparent and non-discriminatory;

- operators who satisfy the public service obligations set by the Member State are automatically granted authorisation.

(2) Article 4(2) of Regulation No 3577/92 does not preclude the grant or continuation of the authorisation referred to in the first question being made subject to the condition that the service provider have no outstanding tax or social security debts, provided that this condition is applied on a non-discriminatory basis.

(3) Article 4(1) of Regulation No 3577/92 must be interpreted as permitting public service obligations to be imposed on some shipping companies and, at the same time, a public service contract within the meaning of Article 2(3) of that regulation to be concluded with another company for the same line or route, provided that the public service contract includes liabilities in addition to the public service obligations imposed on all companies, that the financial compensation granted is proportionate to those liabilities and that it is not, accordingly, such as to distort competition to the detriment of companies which are not parties to such a contract.'

(1) - OJ 1992 L 364, p. 7.

(2) - See the third and fourth recitals in the preamble to the Regulation.

(3) - Case C-266/96 Corsica Ferries France [1998] ECR I-3949, paragraph 60.

(4) - As an example of settled case-law, see Case C-55/94 Gebhard [1995] ECR I-4165.

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(5) - Joined Cases C-163/94, C-165/94 and C-250/94 Sanz de Lera and Others [1995] ECR I-4821.

(6) - Emphasis added.

(7) - Emphasis added.

(8) - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p.1), Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p.1).

(9) - As several of the parties involved have pointed out, this question contains a typing error by referring to Article 1(3) of the Regulation, whereas it sets out the terms of Article 2(3).

(10) - Emphasis added.

(11) - Emphasis added.

(12) - Emphasis added.

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SUB	Transport ; Freedom of establishment and services ; Free movement of services
AUTLANG	French
NATIONA	Spain
PROCEDU	Reference for a preliminary ruling
ADVGEN	Mischo
JUDGRAP	Timmermans
DATES	of document: 30/11/2000 of application: 31/05/1999

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Opinion of Mr Advocate General Léger delivered on 12 October 2000.
Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen.
Reference for a preliminary ruling: Korkein oikeus - Finland.
Directive 77/187/EEC - Safeguarding of employees' rights in the event of transfers of undertakings - Directive 92/50/EEC - Public service contracts - Non-maritime public transport services.
Case C-172/99.

1. The Korkein Oikeus (Finnish Supreme Court) seeks a preliminary ruling on the question whether the provisions of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, are applicable in the case of a takeover of the operation of seven regional bus lines by a legal person governed by private law, subsequent to a procedure for the award of a public service contract conducted in accordance with the procedures laid down by Directive 92/50/EEC.

I Legal background

2. According to Article 1(1), Directive 77/187 applies to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

3. Article 2 defines the principal terms used. It states at point (a) that transferor means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the business. Point (b) defines transferee as any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business.

4. As is stated in its twentieth recital, Directive 92/50 aims to improve the access of service providers to procedures for the award of contracts with a view to eliminating practices that restrict competition in general and participation in contracts by other Member States' nationals in particular.

5. Article 1(a) of that Directive defines public service contracts as contracts for pecuniary interest concluded in writing between a service provider and a contracting authority. Article 1(b) provides that contracting authorities means the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

6. Article 3(1) of Directive 92/50 states that In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive. Article 3(2) provides that Contracting authorities shall ensure that there is no discrimination between different service providers.

7. By virtue of Annex 1A, referred to in Article 8, Directive 92/50 applies inter alia to land transport services.

II Facts and procedure

8. Following a call for tenders, the Pääkaupunkiseudun Yhteistyövaltuuskunta (Greater Helsinki Joint Board, hereinafter YTV) awarded, for a period of three years, the operation of seven regional bus routes, previously operated by Hakunilan Liikenne Oy (hereinafter Hakunilan Liikenne), to Oy Liikenne Ab (hereinafter Liikenne).

9. Hakunilan Liikenne, which operated those routes with 26 buses, then dismissed 45 drivers. Liikenne reengaged 33 of them, who had applied to work with that company. They also employed 18 other drivers. The 33 former Hakunilan Liikenne drivers were reengaged on terms applying under the national collective agreement for the sector, which were as a whole less favourable than those which applied at Hakunilan

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Liikenne.

10. The passage of the operation from Hakunilan Liikenne to Liikenne did not involve any transfer of vehicles or other assets relating to the operation of the bus routes in question. While waiting for delivery of 22 new buses which it had ordered, Liikenne leased two buses from Hakunilan Liikenne for a period of two or three months, and purchased from the latter the uniforms of some of the drivers who had transferred to its employment.

11. Mr Liskojärvi and Mr Juntunen are two of the 33 drivers who were dismissed by Hakunilan Liikenne and reengaged by Liikenne. As they considered that there had been a transfer of a business between the two companies and that they were accordingly entitled to continue to enjoy the conditions of employment in force at their former employer, they brought proceedings against Liikenne in the Vantaan Käräjäoikeus (Vantaa District Court). Liikenne, for its part, denied that any transfer had taken place.

12. By judgment dated 17 June 1996, the Vantaan Käräjäoikeus held in favour of Mr Liskojärvi and Mr Juntunen. The Helsingen Hovoikeus (Helsinki Court of Appeal), by judgment of 23 October 1997, rejected Liikenne's appeal, and the latter then appealed to the Korkein Oikeus.

13. In its referral for a preliminary ruling the Korkein Oikeus observes that the concept of the transfer of a business remains unclear, particularly where, as in the present case, the transfer is not based on a contract between the parties and there is no transfer of significant assets. The court also points out that the case involves a tender procedure conducted in accordance with Directive 92/50. However, the application of Directive 77/187 in such a context, if it is to protect the rights of employees, may restrict competition between undertakings and prejudice the effectiveness of Directive 92/50. The Korkein Oikeus accordingly seeks guidance as to how the two directives should be reconciled.

14. As it considered that the resolution of the case depended on the interpretation of Article 1(1) of Directive 77/187, the Korkein Oikeus, by its order of 27 April 1999, decided to stay the proceedings and to refer the following question to the Court:

Is a situation in which the operation of bus routes passes from one bus undertaking to another as a consequence of a tender procedure under Directive 92/50/EEC on public service contracts to be regarded as a transfer of a business for the purposes of Article 1(1) of Directive 77/187/EEC?

III The question referred for a preliminary ruling

Introductory observations

15. By the question referred, the national court seeks to know if the provisions of Directive 77/187 are applicable in the context of Directive 92/50. It is also clear from the terms of the question referred that the doubts of the national court were sustained by two distinct but complementary problems.

16. The national court observes first of all that the aims of Directive 92/50 do not seem capable of being reconciled with those of Directive 77/187. It therefore asks the Court whether a transaction effected in the context of Directive 92/50 which leads to the transfer of a commercial activity previously carried out by one undertaking to another is in principle covered by Directive 77/187.

17. If the Court's answer to the first question is in the affirmative, the national court seeks an answer to a second question relating to the conditions in which Directive 77/187 applies. This second question can be subdivided into two points.

18. First, the Finnish court asks the Court to say whether the concept of legal transfer referred to in Article 1(1) of Directive 77/187 necessarily requires that there be a direct contractual

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relationship between the transferor and the transferee.

19. Secondly, the national court asks whether it should be held that there is a transfer of an undertaking in terms of the Directive when there has been no significant transfer of assets between the transferor and the transferee.

20. I shall examine the two questions posed by the national court in turn.

Answer to the first question

21. I am in agreement with the majority of the participants in the case, that the answer to the first question should be in the affirmative, as much by reason of the wording of the Directives in question as by their objectives.

22. According to Article 1(a) of Directive 92/50, public service contracts are defined as contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.

23. In terms of Annex 1A, referred to in Article 8, land transport services are covered by Directive 92/50.

24. It follows from the wording of those provisions that the taking over of land transport activities following a tender procedure for the award of a public service contract requires entry into a contract for pecuniary interest between a contracting authority and a service provider.

25. Under Article 1(1) of Directive 77/187, the transfer of the undertaking concerned must be the result of a legal transfer or merger. The directive does not expressly specify any other condition relating to the parties to the transaction. As I shall explain below, the absence of a direct contractual link between the transferor and transferee is not in principle a matter which will exclude the application of Directive 77/187.

26. Reading these provisions together allows one therefore to state that a transaction to which Directive 92/50 applies may be covered by Directive 77/187 if the other conditions laid down by the latter directive are fulfilled.

27. The national court observes, however, that the object of Directive 77/187 is to protect the rights of employees, whereas Directive 92/50 aims to guarantee the principle of freedom of competition in the context of the award of public service contracts. The national court considers that to apply Directive 77/187 may restrict competition between undertakings and prejudice the effectiveness of Directive 92/50. According to the national court, The making of an offer in a public contract procedure and the effectiveness of the procedure may be influenced by the fact that the amount of expenditure arising from employees who may transfer and other costs cannot be ascertained beforehand.

28. I do not consider that these two directives are incompatible by reason of their objectives.

29. Directive 92/50 aims to eliminate practices which are an obstacle to competition between service providers and to participation in the markets of other Member States.

30. In order to achieve this, the directives require the implementation of uniformly applicable rules throughout the Community by all economic entities.

31. In parallel, Directive 77/187 has the objective of ensuring the protection of the workforce in transfers of undertakings, by guaranteeing the continuity of the contractual relations which exist in the context of an economic entity independently of any change in its ownership.

32. The concern expressed by the national court that the application of Directive 77/187 in the context of a tender procedure would call into question the purpose of Directive 92/50 does not seem to me to be well-founded.

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33. The aim of Directive 92/50 is not to permit the takeover of economic entities to the detriment of the rights of their workforce but to place those service providers who wish to compete for the award of a contract in equal competitive conditions.

34. Once an offer is accepted, the successful tenderer is required to respect the rights of the workforce in the manner laid down by the Directive. The application of the same rules, whatever the status and nationality of the competing service providers, cannot thereby have the result that they are placed in unequal competitive conditions. On the contrary, it obliges them to observe those same rules. Consequently, it allows equal treatment of the latter.

35. I am not convinced by the argument which states that the principle of legal certainty is opposed to the application of the provisions of Directive 77/187 in the context of Directive 92/50. Before submitting an offer, tenderers know whether, in order to provide the service in respect of which they are competing, they need to acquire the tangible or intangible assets of the undertaking which has been operating the contract until then, or whether they require to take over the whole or a part of the workforce of that undertaking. Equally, they know that, if they proceed to take over the essential elements of the transferred entity which are necessary to the functioning of its activities, a transfer of an undertaking within the meaning of Article 1(1) of the Directive will arise. In such a case, they will build this information into their costing assumptions when fixing the level of their offer.

36. A reading of Directive 77/187 which allows for its application in the context of Directive 92/50 thus ensures not only the respect of the rules of equal competition for all the participants in the exercise, but also guarantees the rights of employees, who are not to be prejudiced by the change of employer by reason of the transfer of the undertaking. Such a reading will therefore fully reconcile the objectives of Directive 77/187 with those of Directive 92/50.

37. On the other hand, to hold that Directive 77/187 is inapplicable for the simple reason that Directive 92/50 applies would do harm to the objective of the protection of workers in the context of the transfer of an undertaking covered by Directive 77/187 and would not properly meet the objectives of Directive 92/50. The aim of this directive is, as I have mentioned, to guarantee the application of rules of equal competition among economic operators. It does not in any way require Member States to prejudice the rights of the workforce.

38. Accordingly, I am of the view that this interpretation cannot be accepted by the Court.

39. As the national court has described the facts of this case, the activity was transferred as a result of a contract for pecuniary interest entered into between a contracting authority and a tenderer and that activity consists in the provision of land transport services. Such an arrangement is covered in principle by Directive 77/187.

40. It follows from the foregoing that the provisions of Directive 77/187 may be applicable in the context of Directive 92/50 if the other conditions stipulated by Directive 77/187 apply, and I shall examine this point below.

Answer to the second question

41. The national court asks the Court of Justice to give further guidance as to the conditions in which Directive 77/187 applies. It asks first if there is a legal transfer, within the meaning of Article 1(1) of the Directive, where, by reason of the taking over of economic activities by a tenderer under Directive 92/50, no contract has been entered into between the tenderer and the former employer. It wishes next to know whether it should be held that there has been a transfer of an undertaking, again within the meaning of Article 1(1), where there has been no transfer of significant assets between the tenderer and the previous employer.

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(a) The concept of a legal transfer

42. I recently addressed this matter in another case before the Court. I took the view, in light of the aims of the Directive, that the concept should be given a sufficiently wide interpretation to meet the purpose for which the Directive was enacted.

43. I pointed out that the Court had consistently taken the view that the determining factor for establishing whether there had been a legal transfer for the purposes of the Directive was that there be a change of the person legal or natural, governed by private law or public law responsible for the operation of the undertaking which enters into the relationship of employer with the employees of the undertaking taken over. It was my view that the absence of any direct contractual link between the two undertakings successively having the character of employer towards the workforce could not in itself remove from the latter their rights under the Directive.

44. In the Mayeur case, the Court confirmed its previous approach. It held that While the lack of a contractual link between the transferor and the transferee may point to the absence of a transfer within the meaning of Directive 77/187, it cannot be conclusive in that regard. The Court also explained that Directive 77/187 is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and who thereby incurs the obligations of an employer towards the employees of the undertaking.

45. In the present case, it is an accepted fact that there was no direct contractual link between Hakunilan Liikenne and Liikenne, but that the latter took over in their entirety the operations previously undertaken by Hakunilan Liikenne. It is also accepted that this takeover was possible only through a contract for a pecuniary interest, in this case a concession, between Liikenne, a legal person governed by private law, and YTV, a legal person governed by public law.

46. This factual situation is similar to that which arose in the Hidalgo case. There, as in Mayeur, the Court held that While the absence of a contractual link î between the two undertakings which were successive beneficiaries of a concession [let by a municipality, being a legal person governed by public law] in relation to a home-help service or entrusted with the task of managing a sewage works, may serve to indicate that there has been no transfer in the sense of Directive 77/187, but is not determinative in this regard.

47. It follows from the above that the fact that no direct contractual link exists between two undertakings who were successive beneficiaries of a concession, granted following a public service contract award procedure under Directive 92/50, in relation to land transport (in this case the operation of regional bus routes) by a legal person governed by public law does not prevent Directive 77/187 from applying where the other conditions laid down by that directive are fulfilled.

(b) The concept of transfer of an undertaking

48. The Court has consistently held that The decisive test for establishing the existence of a transfer within the meaning of Directive 77/187 is whether the entity in question retains its identity [after the transfer has taken place].

49. In order to clarify this requirement, the Court explained that The mere fact î that the activity engaged in by the old and the new employer is similar does not justify the conclusion that an economic entity has been transferred. Its identity also emerges from other factors, such as its workforce, its managerial staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it. In the Court's opinion, the term economic entity refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.

50. Two conditions must therefore apply in order for the identity of the undertaking to have been

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maintained after the transfer.

51. First, the transferee must carry on the same economic activity as was carried on by the transferor before the transfer, or a similar activity. This first condition can be defined as identity of the activity.

52. Secondly, there must have been the transfer of the means necessary to undertake the activity in question, or of the means required to operate it, having regard to the nature of the entity transferred. This second condition can be defined as identity of the entity.

53. In order to establish whether these conditions have been met, regard must be had to the facts of the case. That is clearly a matter for the court adjudicating on the substance of the matter and not one for this Court. This has been stated on numerous occasions, notably in the recent case of Mayeur.

54. Nevertheless, with a view to assisting the national court in its task, the Court has specified a number of factual circumstances which may be taken into account by the national court in establishing whether the transaction in question is to be treated as the transfer of an undertaking.

55. These circumstances comprise in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its goodwill is transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities are suspended.

56. In order to provide further assistance to the national court in carrying out this task, the Court has given directions as to the line of enquiry to be followed by the national court.

57. The Court has stated that However, those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.

58. The Court has furthermore pointed out that in fulfilling its role, the national court must assess the degree of importance to be given to the various elements of the transaction, having regard to all the circumstances and must take into account the type of undertaking or business transferred, having regard in particular to the sector of activity in which it operates. The national court must therefore determine which are the essential and indispensable elements required in order for the economic entity to carry on operating and establish whether these elements have been taken over by the transferee.

59. Although the Court has held in principle that for an economic entity to exist there should be an identifiable group of workers and significant tangible or intangible assets, it has nonetheless accepted that such an entity may function even in the absence of any assets belonging to the undertaking which formerly carried on the business. In particular, the Court has found to this effect in the case of certain sectors such as cleaning and security.

60. If it is accepted that, in certain sectors, an economic entity may exist without having significant assets, tangible or intangible, the maintenance of its identity following the transfer affecting it cannot, logically, depend on the transfer of such assets. That point was made by the Court in the Süzen case.

61. It is clear, and this point was accepted by all parties participating in these proceedings, that the activity carried on by the successive undertakings in the present case represented the same economic activity. It consisted of the operation of seven regional bus routes. The first condition required by the Court's case law, namely that of identity of economic activity, is therefore met.

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62. The participants are, however, not in agreement as to whether the second condition, namely the identity of the entity, is met.

63. It is accepted that the majority of the workforce of the undertaking were taken over by Liikenne. It is also clear that Liikenne's succession to the activity carried on by Hakunilan Liikenne did not involve any transfer of the assets used in connection with the operation of the seven bus routes in question.

64. In order to answer this question it is necessary for the national court to proceed in accordance with the approach laid down by the Court of Justice.

65. First of all, it should consider all the circumstances which characterise the operation in question. To do this, it should have regard to the fact that the takeover of the activity did not involve any transfer of tangible assets, but that, on the other hand, the majority of the personnel engaged in carrying on the activity prior to the transfer were reengaged by the successful tenderer. It should also have regard to the specific nature of the undertaking involved in the transfer, that is to say to the fact that it consisted of an undertaking which operated regional bus routes. It may also take other matters into account. For example, it should decide whether the customer base as a whole was taken over by Liikenne and determine the economic value of this element of the immovable assets in the context of the activity transferred.

66. Secondly, the national court will have to assess the respective importance to be given to these separate elements. In order to do this, it should form a view as to what characterises, or what distinguishes, the economic entity which was the subject of the operation in question, in this case the bus operations carried on by Hakunilan Liikenne and then by Liikenne.

67. The Commission is of the view that the workforce is the key element of the service offered in this case, namely bus transport. The buses, which ultimately were not taken over by Liikenne, were accessory to the exercise. In the final analysis, the Commission considers that bus transport is an activity which is fundamentally based on manpower.

68. It is not appropriate for the Court of Justice to substitute its view for that of the national court, which is the sole judge of the question whether, in the present case, the economic entity has kept its identity following the transfer. Replying to that question necessarily involves a purely factual assessment of a particular situation. However, I consider that the national court's attention should be drawn to the following points.

69. Unlike the Commission, I do not think that the key element of an economic entity such as a transport undertaking which operates regional bus routes is its workforce. In my view, the essential element, without which such an economic entity is incapable of functioning normally, consists in principle in its fleet lorries, cars, buses ... and not in its workforce.

70. Furthermore, it is appropriate to point out to the national court that this Court has consistently held that in principle the concept of an economic entity presupposes the existence not only of a workforce but also of tangible and intangible assets. The Court has equally consistently taken the view that, in specific cases, the fact that an economic entity has no assets and is essentially characterised by its workforce does not prevent the Directive from applying even in the absence of any transfer of assets. The conclusion to be reached, therefore, is that where an undertaking comprises significant assets which are indispensable to its operation, the absence of any transfer of those assets means that it is in principle wrong to hold that the provisions of Article 1(1) of the Directive apply.

71. It follows from the above that, where the economic entity which transfers its activity possesses significant assets, the principle that the absence of any transfer of those assets by the transferor

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to the transferee would preclude application of the provisions of Directive 77/187 has been laid down by the Court.

72. In my view, to follow the reasoning of the Commission would render this principle devoid of any useful effect.

73. That is why I am of the view that the Commission's argument in its submissions to the Court is not in accordance with the interpretation which the Court has given to the Directive, nor with the economic reality of the entity in question in this case.

74. It follows from the above that the absence of a transfer of significant assets from a regional bus transport undertaking to another undertaking carrying on the same type of business does not support a conclusion that Directive 77/187 is applicable.

Conclusion

75. In view of the consideration set forth above, I propose that the Court answer the questions put by the Korkein Oikeus as follows:

(1) The takeover by an undertaking which is a legal person governed by private law of land transport activities, consisting in the present case of the operation of regional bus routes, previously carried on by another undertaking which was a legal person governed by private law, following a procedure for the award of a public service contract Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts may fall within the scope of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, as defined by Article 1(1) of that Directive.

(2) Article 1(1) of Directive 77/187 is to be interpreted to the effect that:

(a) it may apply in the absence of a direct contractual link between two undertakings to whom there has been successively granted, following a procedure for the award of a public service contract under Directive 92/50, a concession for the operation of a land transport service (in this case, the operation of regional bus routes) by a legal person governed by public law;

(b) it does not apply in the absence of a transfer of significant assets between the two undertakings.

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JURCIT	31977L0187-A01P1 : N 2 18 25 35 41 70 75 31977L0187-A02LA : N 3 31977L0187-A02LB : N 3 31977L0187 : N 1 15 - 17 25 - 27 31 32 35 - 37 39 - 41 44 46 47 71 74 75 61986J0324 : N 42 61991J0029 : N 42 31992L0050-A01LA : N 5 22 31992L0050-A01LB : N 5 31992L0050-A03P1 : N 6 31992L0050-A03P2 : N 6 31992L0050-NIA : N 7 23 31992L0050 : N 1 4 15 16 26 27 29 32 33 35 - 37 40 41 47 75 61995J0013 : N 42 49 58 60 70 61996J0173 : N 42 46 58 59 61998J0234 : N 58 61999J0175 : N 31 42 44 46 48 49 53 55 57 61 70
SUB	Social provisions ; Approximation of laws
AUTLANG	French
NATIONA	Finland
PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Puissochet
DATES	of document: 12/10/2000 of application: 07/05/1999

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Opinion of Mr Advocate General Léger delivered on 15 June 2000.
ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public service contracts - Directive 92/50/EEC - Procedure for the award of public procurement contracts - Equal treatment of tenderers - Discrimination on grounds of nationality - Freedom to provide services.
Case C-94/99.

1 In accordance with national legislation on water quality, a number of Austrian administrative authorities invited tenders for the award of service contracts for the taking and the analysis of water samples from Austrian lakes and rivers.

2 The fact that bodies benefiting from subsidies took part in the tender procedure alongside strictly private tenderers gave rise to a dispute which led the Austrian court in the main proceedings to refer to the Court of Justice a number of questions for a preliminary ruling.

Basically, those questions concern the legality, under Community law, of a public contract award procedure to which subsidised bodies were admitted, all of which have the nationality of the Member State of the contracting authority and are established in the territory of that Member State.

3 The questions raised by the invitation to tender at issue concern the principle of equality in two ways.

It is necessary to establish whether the fact that subsidised bodies were allowed to submit tenders is likely to infringe the principle of non-discrimination on the ground of nationality or, at the very least, to create an obstacle to the freedom to provide services, since all the bodies concerned are Austrian.

Even assuming that no restriction on trade can be identified, it is important to determine whether the advantage over the other tenderers which these bodies are able to enjoy as a result of the public funding they are accorded is compatible with the aim of securing effective competition pursued by Directive 92/50/EEC. (1)

I - The Directive

4 The aim of the Directive is to coordinate the procedures for the award of public service contracts. In so doing, it contributes to the gradual establishment of the internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. (2)

5 More particularly, the Directive is designed to meet the need to avoid obstacles to the free movement of services. (3) It is justified by the need to improve the access of service providers to procedures for the award of contracts in order to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular. (4)

6 According to Article 3(1) and (2):

`1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.

2. Contracting authorities shall ensure that there is no discrimination between different service providers.'

7 Article 6 sets out an exception to the application of the Directive. It states that:

`This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which

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it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

8 Article 37 of the Directive lays down certain obligations with which the contracting authority must comply if it intends to reject abnormally low tenders. The first paragraph of Article 37 is worded as follows:

`If, for a given contract, tenders appear to be abnormally low in relation to the service provided, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.'

II - The facts and the main proceedings

9 Acting on the basis of the powers they hold under the Austrian system of indirect federal administration, the Offices of the Governments of the Provinces of Salzburg, Lower Austria, Upper Austria, Styria, Carinthia, Tyrol and Burgenland, as well as the Landeswasserbauamt (Water Authority) of the Province of Vorarlberg held an open procedure for the award of contracts for the taking and analysis of samples for the observation years 1998/1999 and 1999/2000, in accordance with the Wassergüte-Erhebungsverordnung (5) (Water Quality Survey Regulations).

10 ARGE Gewässerschutz, (6) an association of companies and civil engineers, and other bodies, including the Osterreichische Forschungszentrum Seibersdorf GmbH (7) and the Osterreichische Forschungs- und Prüfungszentrum Arsenal GmbH, (8) submitted tenders in the course of that procedure.

11 ARGE considered that the subsidies enjoyed by the latter tenderers gave them competitive advantages and created an obstacle to trade between the Member States, and successfully applied for an arbitration procedure to be carried out before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission), in accordance with the Bundesvergabegesetz (Federal Law on Public Procurement Contracts).

12 The Bundes-Vergabekontrollkommission took the view that federal law did not preclude the participation of bodies supported by public funds or of bodies governed by public law, such as research institutes and university institutes, as tenderers in award procedures alongside other private tenderers.

13 ARGE then applied for a review by the Bundesvergabeamt.

III - The questions referred

14 Considering that an interpretation of Community law was required to settle the dispute, the Bundesvergabeamt decided to refer the following questions to the Court of Justice for a preliminary ruling:

`1. Does the decision of a contracting authority to admit to an award procedure bodies which receive subsidies of any kind, either from the authority itself or from other contracting authorities, which enable those bodies to tender in an award procedure at prices which are substantially below those of their commercially active competitors, infringe the principle of equal treatment of all tenderers and candidates in an award procedure?

2. Does the decision of the contracting body to admit such bodies to an award procedure constitute covert discrimination, if the bodies which receive such subsidies without exception have the nationality of, or are established in, the Member State in which the contracting authority is also established?

3. Does the decision of a contracting authority to admit such bodies to an award procedure, even on the assumption that it does not discriminate against the other tenderers and candidates, constitute a restriction of the freedom to provide services which is not compatible with the provisions of the EC Treaty, in particular Article 59 et seq. thereof?

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4. May the contracting authority conclude service contracts with bodies which are exclusively or at least predominantly in public ownership and provide their services exclusively or at least predominantly to the contracting authority or other State institutions, without making the service the subject of an award procedure in competition with commercially active tenderers in accordance with Directive 92/50/EEC?'

IV - Preliminary observations

15 The first three questions for a preliminary ruling relate, as I have said, to the principle of equality, in terms of both discrimination on grounds of nationality (the second and third questions) and discrimination between tenderers in receipt of subsidies and the other tenderers (the first question).

16 The fourth question concerns the scope of the Directive ratione personae. It is necessary to establish whether the Directive is applicable to contracts for the provision of services concluded between a contracting authority and a service provider which is in a relationship of close dependence with a public authority because that authority is both its principal owner and the main recipient of its services.

17 It is appropriate to begin by analysing the second and third questions together, given that they both relate to Treaty provisions, namely Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and the following articles, concerning the freedom to provide services.

18 I shall then discuss the fourth question, concerning the scope of the Directive, and thereafter consider the first question which deals with the principle of equal treatment of tenderers, as set out in the Directive.

V - Is the freedom to provide services restricted (second and third questions)?

19 By these questions, the Bundesvergabeamt is asking whether Articles 59 et seq. of the Treaty have to be interpreted as meaning that they preclude a decision by a contracting authority to admit to a public contract award procedure bodies in receipt of public subsidies which enable them to submit tenders at prices substantially below the prices submitted by the other tenderers, where those bodies all have the nationality of the Member State in which the contracting authority is established and are established in the territory of that same Member State. (9)

20 The first paragraph of Article 59 of the Treaty provides that: `... restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

21 According to Article 59, which establishes the freedom to provide services, all discrimination against a person by reason of his nationality (10) or the fact that he is established in a Member State other than that in which the service is provided must be abolished. (11)

22 That rule is confirmed in the third paragraph of Article 60 of the EC Treaty (now the third paragraph of Article 50 EC). Applying the principle of national treatment to the free movement of services, it provides that `... the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

23 At issue is the fact that bodies like the Seibersdorf centre and the Arsenal institute, which are said to enjoy an unwarranted competitive advantage because of the subsidies they receive, were allowed to take part in the tender procedure. Both have close links with the Member State of the contracting authority since both are established in Austrian territory and are subject to Austrian law. (12)

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24 To avoid any ambiguity in the interpretation of the questions referred, I should make it clear that the discriminatory factor mentioned in the second question does not relate to the circumstance that these subsidised bodies were allowed to take part in the award procedure. That issue is covered in the first question, which I shall consider later. As I have said, the problem is that the bodies benefiting from subsidy are all Austrian, and that might give the impression that subsidised operators from other Member States were not permitted to tender.

25 In that connection, the Bundesvergabeamt suggests that there may have been covert discrimination.

26 As we know, the principle of equal treatment, to which Article 59 gives specific expression, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. (13)

27 The national court's reference to the possibility of covert discrimination indicates that it appears to harbour no doubt that the measure at issue does not involve overt discrimination, in so far as it stipulates no condition in respect of nationality or place of establishment, regardless of whether or not the bodies concerned are subsidised.

In the absence of any condition relating to nationality or place of establishment determining the right to respond to the invitation to tender, Austrian bodies or bodies located in Austrian territory would, however, still be at an advantage if the disputed measure treated tenderers differently by applying a criterion according to which only bodies subsidised by the Austrian authorities were allowed to take part in the award procedure.

28 As the Austrian Government has correctly pointed out, (14) there is a significant risk that a national rule reserving solely for bodies subsidised by the Austrian authorities the right to take part in award procedures would constitute a restriction on the freedom to provide services. Were that the case, that criterion would be disguising a difference in treatment between undertakings established, even if only in the form of branch offices, in Austrian territory, as they alone would be able to obtain subsidies from the public authorities, and the other undertakings. Foreign operators benefiting from subsidies would not be able to exploit that advantage to compete with Austrian operators in the same situation and improve their chances of winning contracts from the Austrian contracting authority.

29 In any event, whether the measure at issue is viewed in terms of direct discrimination or simply covert discrimination, the answer must be the same.

30 I do not consider it justified to conclude from the fact that all the subsidised bodies taking part in the award procedure have the same nationality as the contracting authority that the legality of the procedure at issue is necessarily flawed as a result of the application of discriminatory criteria.

31 The principle of non-discrimination does not in fact require that various operators of different nationality should, in all circumstances, be represented. It merely requires that there should be no obstacle to the exercise of free movement by economic operators, regardless of their place of origin within the Community.

32 I therefore consider that the decision to allow subsidised bodies of Austrian nationality to take part is not sufficient to establish discrimination by reason of the nationality or place of establishment of the tenderers or the source of the subsidies they receive.

33 For discrimination of that kind to be established, it would be necessary to prove that, de jure or de facto, the award procedure includes a rule whereby the right of economic operators to take part in the procedure is subject to a criterion of nationality or the location of their registered

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office in Austrian territory.

34 Similarly, it would have to be established that admission to the tender procedure is dependent on the subsidised bodies obtaining their subsidies from the Austrian authorities.

35 However, even though there is no reference at any point to participation by a tenderer of a different nationality, established in the territory of another Member State and benefiting from subsidies accorded by authorities other than the Austrian authorities, it does not appear that the procedure at issue lays down criteria which permit such operators to be excluded from it.

36 More particularly, I have not identified any factor to suggest that the measure at issue includes a condition whereby the subsidies received may be accorded only by the Austrian authorities. Subject to confirmation of that point by the Bundesvergabeamt, (15) the fact that only subsidised Austrian bodies took part must be attributed to factors other than the applicable law and practice.

37 It is clear that if the national court were to determine the existence of a condition of that kind, it would have to draw the appropriate conclusions in terms of the legality of the procedure and set aside that condition as being incompatible with Community law.

38 I should add that, if the measure at issue is not discriminatory, it is hard to see how the decision to admit the subsidised bodies restricts the freedom to provide services, as a national of another Member State which is subsidised by that State is in any case entitled to tender in the same way as the other operators.

39 It must therefore be concluded that Articles 59 et seq. of the Treaty have to be interpreted as meaning that they do not preclude a measure such as the decision at issue in the main proceedings, whereby a contracting authority has admitted to an award procedure bodies in receipt of public subsidies which enable them to tender at prices which are substantially below those of the other tenderers, even if all of those bodies have the nationality of the Member State in which the contracting authority is established and are established in the territory of that same Member State, provided no condition has been laid down in respect of the nationality of the operators, their place of establishment or the origin of the subsidies they may receive.

VI - The scope of the Directive: the contracts for the provision of services concluded between a contracting authority and a service provider dependent on contracting authorities (fourth question)

40 By its fourth question, the national court is asking whether the Directive has to be interpreted as meaning that it covers a service contract concluded between a contracting authority and a service provider where the service provider is predominantly owned by a contracting authority and provides services predominantly to contracting authorities, including the authority that owns it.

41 The Bundesvergabeamt refers to the possibility of excluding from the requirements of the Directive contractual relations between a contracting authority and bodies wholly owned by it which provide their services exclusively to it. However, it considers that those conditions are too restrictive and that, in functional terms, a service provider and a contracting authority may be treated as the same, even if the contracting authority does not have exclusive ownership of the service provider and is not the exclusive recipient of its activity. In that case too, the close relationship between contracting authority and service provider would justify their contractual relationship falling outside the scope of the Directive.

A - Admissibility

42 As both ARGE and the Austrian Government indicated in their written observations, the admissibility of this question may be a matter of debate. It is not apparent from the reference for a preliminary ruling that the applicability of the Directive to the procedure for the award of the public contract was called in question before the Austrian court.

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43 However, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions it submits to the Court. A request from the national court may be refused by the Court of Justice only where it is obvious that the interpretation of a Community rule or assessment of its validity which is sought bears no relation to the facts or purpose of the main action or if the Court of Justice does not have before it the factual or legal material necessary to give a useful answer to the questions. (16)

44 It cannot be claimed here that the scope of the Directive has no bearing on the main proceedings. Were it to appear that, by their very nature, bodies such as the two subsidised tenderers fall outside the scope of the Directive, there would be nothing a priori to prevent the national court drawing from it, in accordance with and within the limits of the applicable national procedure, conclusions that might help resolve the dispute, for example, by replacing, of its own motion, the rule arising out of the Directive with other rules.

45 Moreover, as we shall see, the material in the file is sufficiently clear to allow us to establish the principles which the national court can apply in order to settle the dispute in the main proceedings.

46 That is why I consider it necessary to answer the question submitted, as that material stands, without taking into account the fact that, according to the case-file, there appears to be no argument likely to call into question the legal framework initially adopted for the selection by the contracting authority of a service provider.

47 It is therefore necessary to establish whether the Directive is applicable in this case.

B - The substance

48 According to the eighth recital of the Directive: `the provision of services is covered by this Directive only in so far as it is based on contracts...'. According to Article 1(a), for the purposes of the Directive, and with the exception of certain contracts, public service contracts are contracts for pecuniary interest, concluded in writing between a service provider and a contracting authority.

49 The legal relationship in the form of a contract between the service provider and the service recipient requires that they should be two legal persons possessing, as such, the capacity voluntarily to enter into an undertaking. Consequently, the service provider must possess certain attributes which demonstrate that, in the exercise of its economic activity, it is acting sufficiently independently of the public authority seeking its services.

In other words, as Advocate General Cosmas clearly pointed out in his Opinion in Teckal, (17) the co-contractor of a contracting authority ... must have real third-party status with respect to that authority, that is to say, it must be a separate person from the contracting authority. The Advocate General goes on to say that Community law, on public tenders, (18) `... does not require contracting authorities to observe the procedure ensuring effective competition between interested parties where the authorities concerned wish to assume responsibility themselves for the supply of the products they need.'

50 That is why services defined as `in-house' services, that is to say services supplied to a public authority by its own departments or departments which are dependent on - although organisationally separate from - it, do not fall within the scope of the Directive. (19)

51 In the abovementioned Teckal judgment, the Court of Justice was asked to decide whether the fact that a local authority has products supplied to it by a consortium of which it is a member must result in a tender procedure provided for under Directive 93/36/EEC.

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52 In addition to analysing some of the legal conditions governing the applicability of Directive 93/36/EEC, such as whether the local authority had the status of a contracting authority and whether there was a contract for pecuniary interest, the Court examined the relationship between the contracting authority and its co-contractor.

53 Like Directive 92/50/EEC, Directive 93/36/EEC applies where the contracting authority is intending to enter into an agreement with an economic operator. In determining whether there was an agreement between these two, in fact separate, persons, the Court ruled that `it is, in principle sufficient, if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority'. (20) However, the Court clarified this by pointing out that: `The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities'. (21)

54 The basic criteria thus established are founded on the notion that the entity with which the contracting authority is concluding the contract is in fact independent of it. According to the judgment in Teckal, for the Directive to be applicable, that entity must be formally distinct from the contracting authority and independent of it in regard to decision-making. (22)

55 It is regrettable that these criteria are not more clearly defined. It is easy to imagine and identify the existence of a separate entity, since it is sufficient to establish that the economic operator is set up in a legal form different from that of the contracting authority. But it is less straightforward to gauge the degree of independence the entity enjoys. The nature of the control a local authority exercises over a legally separate body or the level at which it may reasonably be assumed that the latter carries out the essential part of its activities with the public authority on which it depends, in particular, may be a source of real uncertainty.

56 It should, however, be borne in mind that there are many tests which make it possible to establish whether an entity is in fact independent. Since the national court alone is in possession of all the matters of fact and law relevant to the solution of the dispute before it and it is for that court to apply Community law to the dispute, the national court itself is best-placed to determine most accurately the freedom of action that operator enjoys in relation to the contracting authority.

57 At any event, the close links that exist between both the Seibersdorf centre and the Arsenal institute and the Austrian public authorities must be analysed in the light of these principles. That will enable us to determine whether those links reflect the kind of dependency which justifies them being given contracts to provide services involving the taking of samples and analysis of water quality, without having to comply with the provisions of the Directive.

1. Control by the contracting authority

58 As I have said, for a contract to fall outside the scope of the Directive, it is necessary to establish that the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments. (23)

59 If, in regard to an operator, the contracting authority exercises the same control as it exercises over its own departments, the tasks it is able to assign to that operator will be treated no differently than had they been simply delegated internally. The ability of the local authority to influence the way in which the service provider operates and the latter's consequent lack of autonomy mean that the contract concluded between the local authority and the service is not really a contract at all.

60 According to the Bundesvergabeamt, the research bodies at issue are predominantly owned by the

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Austrian State or a Province. Their decision-making organs are appointed by the regional or local authority which owns them, or they are subject to supervision by one of those authorities. (24) ARGE, however, did not mention ownership by a Province. It stated that the Republic of Austria holds 50.5% of share capital in the Seibersdorf centre, the remaining 49.5% being held by private undertakings. According to ARGE, the Republic of Austria wholly owns the Arsenal institute. (25)

It is for the national court to consider in detail the evidence available to it. I make the general assumption that in both cases, at the very least, the State has predominant economic ownership, bearing in mind also the additional information provided by ARGE.

61 As regards the Arsenal institute, I would cite and apply to this case the analysis made by Advocate General Alber in his Opinion in RI.SAN., cited above, in which he states that: `even without a full knowledge of the internal organisation of GEPI SpA, it may be... concluded from the fact that the Italian State holds 100% of its share capital that the company is part of the Italian State in that respect'. (26)

62 The position of the Seibersdorf centre is less clear-cut. It is important to assess the degree of autonomy the centre is able to retain in relation to the State, despite being in predominantly public ownership.

63 In order to do this, the national court will assess the validity of ARGE's contention that despite being in predominantly public ownership, the action of that operator is determined by its private shareholders. (27) It is in fact for the national court to ascertain the number and nature of the posts held by representatives of the private operators on the centre's decision-making bodies and determine the extent to which that distribution of powers influences, under the applicable national law, the economic objectives of the Seibersdorf centre.

64 However, that assessment is necessary only if, in accordance with its own national law, the national court considers that the fact that - in its own words - these `bodies... are exclusively or at least predominantly in public ownership' (28) is not sufficient to guarantee that the public entity exercises effective control over the bodies it owns.

65 In any event, it is not enough to show that the bodies are of public origin. In order to provide the Bundesvergabeamt with a helpful answer, it is essential to make sure that the public authority which exercises control over the research bodies in the main proceedings and the contracting authority are one and the same person.

66 The reservation expressed in the judgment in Teckal is based on the principle that if an economic entity is not independent of the local authority that owns it, the existence of a contract between the two is impossible or illusory, even though they are legally separate. For a legal relationship to fall outside the scope of the Directive, therefore, the contracting authority which is seeking the provision of various services from the operator must in fact be the very local authority that closely controls it, and not another authority.

67 On the other hand, a contractual relationship between a public authority and a service provider that is not in any way subordinate to it does fall within the scope of the Directive, even if that service provider is owned by another public authority.

68 It would appear from the case-file that the Republic of Austria is the majority shareholder in both research bodies, whereas the contracting authority is made up of the Federal Provinces and a specialist authority (the Landeswasserbauamt of Vorarlberg).

In those circumstances, it is for the Bundesvergabeamt to decide whether, although these public authorities are separate, the Seibersdorf centre and Arsenal institute may none the less be subject,

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under national law, to the same kind of control by the local authorities that make up the contracting authority as those authorities exercise over their own departments.

69 The Directive is applicable if, on the basis of its findings, the national court decides that the relationship between the research bodies and the contracting authority does not indicate the exercise of any control by the latter, within the meaning of the judgment in Teckal.

70 If it emerges that the contracting authority does in fact exercise control, other criteria will have to be considered. This is not the sole criterion according to which the activity of the bodies concerned may be defined as `in-house' services. Simply establishing the existence of structural dependence in relation to the local authority that is to award a public contract is not of itself sufficient to make the services provided by the bodies in question comparable to the services that would be available to the local authority were it to use its own internal resources.

71 For that reason, it is also necessary to take into account the recipient of the economic activity those bodies engage in, applying the judgment in Teckal.

2. The recipient of the activity of the service provider

72 It is clear from the judgment in Teckal that an agreement cannot be considered to have been concluded between persons who are legally distinct if the operator carries out the essential part of its activity with the controlling local authority or authorities. (29)

73 As I have said, the principle set out in that judgment is based on the criterion that the operator is independent. An entity is not necessarily deprived of freedom of action simply because the decisions affecting it are taken by the local authority that controls it, if it is able to carry out a substantial part of its economic activity for other operators.

74 However, the entity must be considered to be wholly linked to the controlling authority if, in addition, the organisational relationship between the authority and the entity in question is coupled with the fact that the latter provides its services more or less exclusively to the authority. Such circumstances show that the local authority intends to use the services not just for public purposes but also, and principally, for its own benefit.

75 Only in that situation can it be argued that, administratively, the entity in question is an extension of the local authority, which is not therefore required to comply with the rules on competition laid down by the Directive, since it is opting to carry out itself the economic activities it requires.

76 Where a body acts essentially for the controlling public authority, the proprietorial relationship between the two entities justifies the provision of services by one to the other, in the same way as where an in-house department acts on behalf of the institution to which it belongs. On that basis, it seems justified that it should be exempt from the constraints of the Directive, since they are dictated by the need to maintain the kind of competition that is no longer appropriate in those circumstances.

77 It is less understandable, however, that, being in receipt of State aid, that body should offer services to other operators or local authorities without being subject to the legislation on public contracts, even though it is acting in circumstances comparable to those of a traditional economic operator. Its public origin and nature are not sufficient to mark it out from other service providers if it is offering the same type of service for a similar commercial purpose.

78 Diversification of activities, in an economic operator of this kind, shows that it has a special position as compared with the in-house departments of its controlling local authority, and that this position amounts to more than just a special feature of the organisational structure.

79 Consequently, the considerations of safeguarding competition that justify the Community rules

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on the award of public contracts apply to that economic operator just as much as they apply to other service providers.

80 Similarly, a service provider which intends entering into a contract with a local authority other than its own is no different from any other operator, from the point of view of both its competitors and the public authority awarding the contract. Since that body is not, by definition, a part of the contracting authority, as far as that authority is concerned, the services it is offering are those of a third party.

81 Clearly, whilst control of the service provider by the public authority awarding the contract is a necessary condition for the former to be considered to be providing `in house' services, it is far from being a sufficient condition. The service provider must carry out the essential part of its activity for the controlling local authority. Consequently, if it engages in commercial activities, the Directive is once again applicable, unless those activities represent a marginal part of its overall activity.

82 In this case, according to ARGE, both the Seibersdorf centre and the Arsenal institute are engaged in a large number of commercial activities on the market. (30)

83 In order to decide whether the Directive is applicable, the national court will have to verify this, even if, in its view, it seems to be settled that the bodies in question carry on their activities exclusively, or at least predominantly, for public authorities, as the wording of the fourth question suggests. It will have, above all, to ascertain whether the bodies in question carry out the essential part of their activities with the contracting authority, to whose control I have assumed they are subject in this case. (31)

84 If the Directive were to be declared applicable to the main proceedings, it would still be necessary to establish whether, in accordance with Article 6 of the Directive, the contract at issue is among the contracts that can be exempt from it.

3. The application of Article 6 of the Directive

85 It should be recalled that Article 6 excludes from the scope of the Directive contracts awarded to an entity which is itself a contracting authority on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

86 That provision echoes the 18th recital of the Directive, according to which `... contracts with a designated single source of supply may, under certain conditions, be fully or partly exempted from this Directive.'

87 By making a reservation in regard to that type of contract, the Directive is taking account of services which may be supplied to the public authorities in certain Member States only by specific public bodies, to the exclusion of all other service providers. The other entities are excluded regardless of nationality. (32)

88 Application of the Directive therefore depends, first and foremost, on the nature of the service provider concerned. In this case, it is already clear that the subsidised bodies meet the three criteria laid down by the Directive in its definition of `bodies governed by public law', an expression used to describe contracting authorities other than the State, regional or local authorities and associations formed by one or more of such authorities. (33)

89 It is common ground that these bodies were established to meet needs in the general interest, not having an industrial or commercial character, that they have legal personality and are managed, controlled or financed for the most part by another contracting authority. (34)

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90 Since they are thus themselves contracting authorities, it remains to be shown that they both enjoy an exclusive right, within the meaning of Article 6 of the Directive, pursuant to a published law, regulation or administrative provision.

91 None of the evidence cited by the national court or the interveners indicates that, at the time of the invitation to tender, either of the research bodies enjoyed an exclusive right to provide services of the kind involved in the award procedure. Neither Article 6 nor the concept of exclusivity on which it is based are even mentioned in the order for reference, confirming the impression that neither of the two tenderers challenged by ARGE enjoyed an exclusive right.

92 Moreover, had they enjoyed such a right, it is not clear why an award procedure should have been organised in accordance with the Directive, given that Article 6 specifically provides that a contract of that kind can be exempt from the Directive.

93 I therefore conclude that the Directive is applicable where a contracting authority intends to enter into a contract with an entity that is formally distinct from it and belongs for the most part to local authorities other than those that make up the contracting authority.

If, although formally distinct from the contracting authority, the entity belongs for the most part to that authority, the Directive is applicable if that entity carries out the essential part of its activity with operators or local authorities other than those of which the contracting authority is made up.

In both cases, the Directive is not applicable if the contract falls within the scope of Article 6 of the Directive.

VII - The existence of discrimination during the procedure for the award of public service contracts (first question)

94 By its first question, the Bundesvergabeamt is asking whether Article 3(2) of the Directive must be interpreted as meaning that it precludes a decision whereby a contracting authority admits to a procedure for the award of public service contracts bodies which receive subsidies from contracting authorities that enable them to tender at prices which are substantially below those of the other tenderers.

95 The principle of equal treatment of tenderers laid down in Article 3(2) is not intended merely to prohibit discrimination that might be applied to economic operators who are nationals of other Member States. Like other provisions in the same Directive or in directives concerning other kinds of public contracts, (35) it contains no condition on nationality.

96 The infringement of the Directive is not therefore necessarily linked to a failure to accord equal treatment to tenderers from other Member States.

97 Moreover, that same philosophy underpins the relevant national legislation. Article 16(1) of the Bundesvergabegesetz accordingly provides that: `Contracts for services under a procedure provided for in this law are to be awarded, in accordance with the principles of free and fair competition and of equal treatment of all candidates and tenderers, to undertakings which - at the latest at the time of opening of tenders - are authorised, efficient and reliable, at reasonable prices.'

98 The fact that, in this case, the operators benefiting from subsidies are all Austrian entities is not therefore relevant for the purposes of answering the first question.

99 It must first be established whether the very principle of according subsidies to economic operators bars them from taking part in procedures for the award of public contracts, and, if it does not, we should then go on to consider whether that is so even if the subsidies in question are illegal.

100 According to the Bundesvergabeamt, the subsidies paid to the tenderers constitute aid within

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the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) or `special cost advantages.' (36) It explains that: `The competitive advantage in the form of lower costs...' that they enjoy `... derives from payments in the nature of aid, which may take the form either of the direct payment of money or of the provision of staff or premises or technical equipment or both.' The national court adds that the payment is made by the relevant regional or local authority, the State or a Province. (37)

101 It should be borne in mind that `the concept of aid... encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect.' (38) In so far as staff or goods are supplied by the Austrian public authorities for no consideration or on preferential terms, (39) there is reason to consider that the advantages thus conferred constitute State aid within the meaning of Article 92 of the Treaty.

102 However, as we know, the fundamental prohibition of State aid is neither absolute nor unconditional since not only is some State aid ipso jure compatible with the common market in accordance with the second paragraph of Article 92, but the third paragraph of Article 92 confers on the Commission a wide discretion to allow aid by way of derogation from the prohibition laid down in the first paragraph. (40)

103 If Community law accepts that some State aid is lawful, then, in my view, operators in receipt of that aid must have the right to carry on their activity in the same way as other operators. What point would there be in according undertakings aid lawfully if, at the same time, they were barred from engaging in normal economic activity or even merely from certain contracts on the pretext that the latter were regulated. Moreover, that interpretation would hardly be compatible with the concept of compensation which justifies some kinds of aid, because aid in the form of subsidy or logistical assistance would soon be eliminated as a result of the restrictions on an undertaking's activity.

104 The fact that State aid may be legal therefore implies that economic entities in receipt of lawful aid cannot be precluded from participating fully in the market. As the market is not restricted to unregulated contractual relations but also includes public contracts, there is no reason why such operators should be excluded from public contract award procedures.

105 According to the Commission, whose point of view must be endorsed here, aid that has been notified and declared compatible with the common market cannot affect the decision of the contracting authority to admit a tenderer or the assessment of its tender.

106 I should add that, as the Austrian and French Governments point out, (41) the exclusion from the scope of the Directive of certain contracts concluded between two contracting authorities in accordance with Article 6 thereof, where a public service contract is awarded on the basis of an exclusive right, confirms the view that the Directive may apply to bodies which benefit from State aid where they do not enjoy such a right. As we have seen, the definition of contracting authority in the Directive covers bodies governed by public law, defined as bodies able to be financed, for the most part, by regional or local authorities. (42) For the Directive to be applicable, it is therefore sufficient that a service provider should fulfil the definition of contracting authority, which usually indicates the existence of public financing, without being linked on the basis of an exclusive right to the contracting authority to which it is providing the services. The Directive does not therefore rule out participation by a subsidised body in a public contract award procedure.

107 In those circumstances, the Directive does not preclude entities such as the bodies concerned in the main proceedings from participating in the public service contract award procedure at issue.

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108 However, the answer to the question of the approach a contracting authority should take to a tenderer in receipt of illegal State aids is not quite so clear. (43)

109 It is perfectly natural that operators which have been rejected, or whose chances of winning a contract have diminished because of competition from entities which enjoy competitive advantages of this nature, should challenge the right of the contracting authority to allow those entities to tender without having to carry out a minimum of checks on the legality of the aid.

110 If an aid is illegal the effect should be to bar the subsidised operator from taking part in any public tender procedure. Even if not specifically earmarked for certain elements - such as the price offered in the tender procedure - which significantly influence the final decision of the contracting authority, aid illegally accorded to an economic operator is bound to mitigate the charges that reduce its level of economic competitiveness.

111 None the less, however well-founded it may be, that view does not resolve the - essentially legal and procedural - problem facing the national court in the main proceedings. That court has in fact to establish whether the principle of equal treatment of tenderers, as set out in Article 3(2) of the Directive, encompasses the right of the contracting authority to bar tenderers benefiting from illegal subsidies from taking part, or indeed to investigate whether the subsidies they receive may be declared to be illegal.

112 Title VI of the Directive sets out the attributes required of the tenderers, the content of their tenders, and the relevant documentary evidence, those factors determining the admission of the operators to the procedure and the final award of the contract.

113 Also set out there are the criteria that give the contracting authority the right to bar a particular service provider from taking part in an award procedure. A number of provisions concern the legal obligations that are binding on the service provider. They permit the contracting authority to preclude a tenderer in an illegal position from the point of view of tax or social requirements, for example. (44)

However, the Directive is silent as to the action the contracting authority could take were it to establish the existence of aid that had not been notified, was suspected of being illegal or was manifestly illegal.

114 The Commission has described the background to the Directive from that angle. It pointed out that its initial proposal for a directive (45) included a provision identical to the last paragraph of Article 34(5) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. (46) According to that provision: `Authorities may reject tenders which are abnormally low owing to the receipt of State aid only if they have consulted the tenderer and if the tenderer has not been able to show that the aid in question has been notified to the Commission pursuant to Article 93(3) of the Treaty and has received the Commission's approval. Authorities which reject a tender under these circumstances shall inform the Commission thereof.'

115 According to the Commission, the Council deleted that provision from its proposal for a directive in the course of the legislative procedure. (47) In response, the Commission made a declaration in its communication to the European Parliament to the effect that by amending the proposal for a directive in that way, the Council was expressing its concern to avoid any discrimination between private and public tenderers. In that same declaration, it observed that the Treaty gave it the power to prevent the improper use of State aid that could distort competition, and it could therefore accept the amendments.

116 The history of the Directive is instructive in two ways.

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117 It is first apparent that, at the time the Directive was adopted, the legislature was aware of the problem linked to the existence of economic operators enjoying an advantage in procedures for the award of public contracts because they were in receipt of State aid. Moreover, the Commission's decision to restrict the regulation of situations of this kind solely to aid that had not been notified or had not been approved confirms acceptance of the principle that entities in receipt of legally accorded State aids could participate in procedures for the award of service contracts. My earlier analysis of this point is therefore confirmed here, on the basis of the intention of the Community legislature. (48)

118 A further indication is provided by the fact that the Community legislature also adopted an unambiguous stance as regards the extent of the power to act accorded to the contracting authority in relation to public service contracts. In its final version, the first paragraph of Article 37 of the Directive deals in particular with the right of the contracting authority to reject tenders which are obviously low in relation to the service to be provided. It lays down that the contracting authority must request details of the constituent elements of the tender and verify them, taking account of the explanations received, before it may reject the tender.

However, since it lacks a specific provision akin to Article 34 of Directive 93/38/EEC, the Directive does not give the contracting authority the right to reject a tender submitted by a tenderer in receipt of illegal aid or benefiting from aid which has not been notified to the Commission. That is to be regretted, particularly since it is not clear why the legal system of Directive 93/38/EEC should be different from that of Directive 92/50/EEC.

119 The fact remains that the Directive is silent on this point for a reason which must be taken into account in interpreting the text.

120 The Council's amendment to the Commission's proposal for a directive, and indeed the Commission's declaration of approval, reveal the Community legislature's approach to the mechanism for monitoring illegal State aids, for which the Commission has prime responsibility.

121 According to the French Government and the Commission, the fact that the Directive is silent about the right of the contracting authority to reject the tender of an illegally subsidised tenderer does not necessarily mean that the contracting authority cannot draw the appropriate conclusions from the existence of that kind of aid.

122 The French Government considers that the Directive neither compels nor expressly permits the contracting authority to exclude a tender from a subsidised body. But it emphasises the risk it would run if it awarded a contract to a tenderer in receipt of illegal aid. The French Government asserts that if a contracting authority were to establish that an abnormally low tender was financed through illegal aid, it would be entitled to reject it. The risk of having to repay aid improperly granted would in fact adversely affect both the tenderer and the full performance of the contract.

123 The Commission considers that illegal aid may be taken into account at the stage at which undertakings are selected, that is to say at the point when the contracting authority assesses the financial and economic standing of the service provider. Like the French Government, the Commission bases its argument on the fact that, in accordance with the Court's case-law, State aid which is incompatible with the common market, or has simply not been notified, may be recovered. It points out that a contracting authority cannot be criticised for protecting itself against the risk of entering into a contract with an economic operator in receipt of aid of doubtful legality, by excluding the latter on the basis of checks on its financial and economic standing. The Commission therefore proposes that the Court should rule that Community law does not preclude a contracting authority from taking into consideration at the selection stage, in accordance with its national law, when determining a tenderer's financial standing, the fact that it has been in receipt of aid that is

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illegal and may therefore be subject to recovery.

124 Whatever the respective merits of these arguments, in my view, they should be considered only to the extent that they help resolve the dispute in the main proceedings. However, as I have said, as it is formulated and as it must be interpreted in the light of the request for a preliminary ruling, the first question concerns the legality of a decision whereby a contracting authority has admitted subsidised entities to a procedure for the award of contracts.

125 The issue here, therefore, is not to provide the national court with guidance as to whether the contracting authority has the power to exclude a tenderer or reject its tender for reasons linked to the legality of the aid. The national court has, instead, to be informed whether the contracting authority has an obligation to proceed in that way where the State aid is illegal.

As Community law now stands, I have to take the view that a contracting authority is entitled to draw no conclusions, as regards the admission of a subsidised body, from the existence of aid which has not been notified or is illegal. I should add that the position would have been no different had the original text of Article 37 not been amended. Article 37 actually accorded the contracting authority a mere power to reject a tender which was abnormally low because the tenderer was in receipt of aid that had been improperly paid or had not been notified.

126 The Austrian Government, finally, points to the binding provisions of the Treaty relating to competition and the application of Article 37 of the Directive, where a tender appears to be abnormally low in relation to the service provided. In accordance with that provision, it advocates a detailed consideration of the various cost elements that make up the tender at issue. If the cost breakdown shows that the tender is incompatible with the principles of competition, because of unauthorised subsidies, it suggests that it should be mandatorily rejected.

127 The argument by the Austrian Government is based on both the procedure currently provided for under the Directive if a tender is abnormally low and on Community competition law. Here again, it is not necessary to analyse the validity of the argument, and it is sufficient to point out that the Republic of Austria is assuming that, subsequent to the decision at issue to allow an entity to participate, the contracting authority establishes that the tender is abnormally low and makes clear its intention of rejecting it. In substance, it therefore goes beyond the subject-matter of the first question, which is confined to the admission procedure.

128 On the basis of the above considerations, I conclude that the principle of equal treatment of tenderers, provided for in Article 3(2) of the Directive, does not preclude a decision whereby a contracting authority admits to a procedure for the award of public contracts entities in receipt of aid from contracting authorities which enables them to submit tenders at prices substantially below those submitted by the other tenderers.

Conclusion

129 In view of the foregoing, I propose that the Court answer the questions submitted by the Bundesvergabeamt as follows:

(1) Article 59 of the EC Treaty (now, after amendment, Article 49 EC) et seq. must be interpreted as meaning that they do not preclude a measure such as the decision at issue in the main proceedings, whereby a contracting authority admits to a procedure for the award of public contracts entities in receipt of public subsidies which enable them to submit tenders at prices substantially below the prices submitted by the other tenderers, even if those entities all have the nationality of the Member State in which the contracting authority is established and are themselves established in the territory of that Member State, provided the decision is not subject to any condition relating to the nationality of the operators, their place of establishment or the origin of the

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subsidies they may receive.

(2) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts is applicable where a contracting authority intends to enter into a contract with an entity that is formally distinct from it and belongs for the most part to local authorities other than those which make up the contracting authority.

If, although formally distinct from the contracting authority, the entity belongs for the most part to that authority, Directive 92/50/EEC is applicable if that entity carries out the essential part of its activity with operators or local authorities other than those of which the contracting authority is made up.

In both cases, Directive 92/50/EEC is not applicable where the contract falls within the scope of Article 6 thereof.

(3) The principle of equal treatment of tenderers provided for in Article 3(2) of Directive 92/50/EEC does not preclude a decision whereby a contracting authority admits to a procedure for the award of public contracts entities in receipt of aid from contracting authorities which enable them to submit tenders at prices substantially below those submitted by the other tenderers.

(1) - Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, hereinafter the `Directive').

(2) - See the first and second recitals.

(3) - See the sixth recital.

(4) - See the twentieth recital.

(5) - BGBl. 1991, p. 338.

(6) - Hereinafter: `ARGE'.

(7) - Seibersdorf research centre, hereinafter: the `Seibersdorf centre'.

(8) - Arsenal research institute, hereinafter: the `Arsenal institute'.

(9) - Although the second question refers to bodies which have the nationality of the Member State or are established in the Member State in which the contracting authority is itself established, it is clear from the grounds for the request for a preliminary ruling that, in this case, these are cumulative and not alternative factors (p. 10 of the English translation of the order for reference).

(10) - The attribution of `nationality' to legal persons, which makes it possible for them to be discriminated against by reason of nationality, arises out of the Treaty. In accordance with the first paragraph of Article 58 of the EC Treaty (now the first paragraph of Article 48 EC), which is applicable to services pursuant to Article 66 of the EC Treaty (now Article 55 EC): `Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.' The location of their registered office, central administration or principal place of business serves as the factor connecting them with the legal system of a particular State in the same way as does nationality in the case of a natural person (see, in particular, Case C-212/97 Centros [1999] ECR I-1459, paragraph 20).

(11) - Joined Cases 110/78 and 111/78 Van Wesemael and Others [1979] ECR 35, paragraph 27.

(12) - See p. 10 of the English translation of the order for reference.

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(13) - See, for instance, Case C-360/89 Commission v Italy [1992] ECR I-3401, paragraph 11.

(14) - See p. 9 of its written observations.

(15) - I would point out that, according to the Bundesvergabeamt: `It is perfectly conceivable that in other Member States too there are bodies which are provided with comparable subsidies by their Member State and could take part in the award procedure...' (see p. 13 of the English translation of the order for reference). The possibility that foreign operators similarly subsidised by the relevant authorities of their own Member State could take part is not, however, sufficient, in the view of the national court, to rule out the possibility of discrimination by reason of nationality, the place of establishment of the tenderers or the origin of the subsidies they enjoy. Accordingly, it goes on to explain, in the same sentence, that `... commercial service providers from other Member States could or should not expect to encounter Austrian tenderers in the award procedure who have a significant cost advantage over them as a result of subsidies from Austrian regional or local authorities...'. In so doing, it appears that the Bundesvergabeamt is ruling out one argument that might establish the absence of any restriction on the free movement of services - the opportunity for subsidised foreign undertakings to respond to the invitation to tender in exactly the same way as the subsidised national undertakings - by raising other considerations - violation of the principle of equal treatment of operators, regardless of national origin, as a result of the participation of subsidised undertakings. I shall examine that argument as part of my analysis of the first question.

(16) - Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 18.

(17) - Case C-107/98 Teckal [1999] ECR I-8121, paragraphs 53 et seq.

(18) - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

(19) - See also the Opinion of Advocate General Alber in Case C-108/98 RI.SAN. [1999] ECR I-5219, points 46 et seq.

(20) - Case C-107/98, cited in footnote 17 above, paragraph 50.

(21) - Ibidem, my emphasis.

(22) - Ibidem, paragraph 51.

(23) - Ibidem, paragraph 50.

(24) - See p. 10 of the English translation of the order for reference.

(25) - See p. 8 of ARGE's written observations.

(26) - See the Opinion, at point 53.

(27) - ARGE in fact claims that because they hold a number of important posts on the board of directors and the executive committee, it is in any event the private company shareholders that are in control (see p. 8 of the written observations).

(28) - See the fourth question referred.

(29) - Paragraph 50.

(30) - See p. 8 of its written observations.

(31) - See point 70 above.

(32) - See Flamme P., Flamme M.-A., `Les marchés publics de services et la coordination de leurs procédures de passation', Revue du marché commun et de l'Union européenne, No 365, February

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1993, p. 150 et seq, paragraph 9, No 10.

(33) - According to Article 1(b) of the Directive, `contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Bodies governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.'

In Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, paragraph 21, the Court interpreted those conditions, as also provided for in the second subparagraph of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) as being cumulative. That same solution can be applied to Article 1(b) of the Directive, which is identical to the latter text.

(34) - See p. 10 of the English translation of the order for reference.

(35) - For instance, Article 3(1) of the Directive provides that, in awarding public service contracts or in organising design contests, contracting authorities are to apply procedures adapted to the provisions of the Directive. The Court clearly stated, in relation to a comparable piece of legislation - Article 4(1) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy and transport and telecommunications sectors (OJ 1990 L 297, p. 1), which provides that Directive 90/351/EEC is to apply when the contracting bodies are awarding their supply contracts, is identically worded - that there was no condition relating to the nationality or place of establishment of the tenderers (Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 32). Furthermore, it is clear from the 20th recital of the Directive that the elimination of practices that restrict competition is not confined to practices which impede the participation in award procedures of nationals of other Member States. Similarly, the Court held in Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 33, in relation to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) that although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to one of its recitals, to ensure the development of effective competition in the field of public contracts and the criteria for selection and the award of contracts, by means of which such competition is to be ensured. The Court was called upon to rule on a complaint based on an infringement of Directive 71/305/EEC which was linked to the nationality of the tenderer to whom the contract had been awarded. The objective of safeguarding competition pursued by the public contract directives must be achieved by applying the principle of equal treatment, which is not automatically confined to discrimination by reason of nationality. In my view, the principle of free competition is independent of the principle of the freedom to provide services, on which the Directive is founded, even though the two principles are closely related, with the former underpinning the effectiveness of the latter.

(36) - See p. 6 of the English translation of the order for reference.

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(37) - Ibidem, p. 14.

(38) - Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraph 58.

(39) - Ibidem, paragraph 59.

(40) - Ibidem, paragraph 36.

(41) - See p. 7 of the written observations of the Austrian Government and paragraphs 16 to 18 of the written observations of the French Government.

(42) - See footnote 33 above.

(43) - Although this issue was frequently raised, both in the written observations and at the hearing, the question of the regime applicable to illegal State aids is purely hypothetical in this case, as no one is claiming that the aid enjoyed by the research bodies can be termed illegal.

(44) - According to Article 29(f), for example, a service provider which has not fulfilled its obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority may be excluded from participating in a contract.

(45) - OJ 1991 C 23, p. 1.

(46) - OJ 1993 L 199, p. 84.

(47) - See paragraph 22 of the Commission's written observations.

(48) - See points 99 to 106 above.

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Opinion of Mr Advocate General Léger delivered on 7 December 2000.
Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti and Leopoldo Freyrie v Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy.
Public works contracts - Directive 93/37/EEC - National legislation under which the holder of a building permit or approved development plan may execute infrastructure works directly, by way of set-off against a contribution - National legislation permitting the public authorities to negotiate directly with an individual the terms of administrative measures concerning him.
Case C-399/98.

1. In the present case the Court is asked to rule on the substantive scope of Community law governing public works contracts in the context of national planning legislation.

2. Where public and private interests overlap in relation to a development project, questions necessarily arise where procedures under national legislation leave private operators the responsibility of providing basic facilities, and even public facilities for purely leisure purposes, associated with their project.

3. Such is the nature of the issue raised in the proceedings pending before the Italian court, which has submitted questions necessitating examination of the conditions governing the application of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for granting public works contracts.

I - Legal background

A - Community legislation

4. Article 1(a), (b) and (c) provide:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...

(c) a "work" means the outcome of building or civil engineering, works taken as a whole that is sufficient of itself to fulfil an economic and technical function.

5. The activities listed in Annex II referred to in Article 1(a) are the activities of building and civil engineering corresponding to Class 50 of the general industrial classification of economic activities within the European Communities nomenclature (NACE).

6. Under Article 2 of the Directive:

1. Member States shall take the necessary measures to ensure that the contracting authorities comply or ensure compliance with this Directive where they subsidise directly by more than 50% a works contract awarded by an entity other than themselves.

2. Paragraph 1 shall concern only contracts covered by Class 50, Group 502, of the general industrial classification of economic activities within the European Communities (NACE) nomenclature and

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contracts relating to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.

7. Articles 4 and 5 indicate the categories of contracts to which the Directive does not apply, such as contracts governed by Directive 90/531/EEC, works contracts declared secret or accompanied by special security measures or contracts governed by different procedural rules and awarded in pursuance of specific international agreements.

8. Article 6 sets the threshold for the application of the Directive at ECU 5 000 000 net of VAT.

9. Article 7(2) and (3) describe the circumstances in which the contracting authorities may use negotiated procedures which means, according to the definition given in Article 1(g), those national procedures whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them.

10. According to Article 7(4), in all cases other than those mentioned in Article 7(2) and (3), the contracting authorities are to award their public works contracts by the open procedure or by the restricted procedure

B - Italian Legislation

Legislation on town planning and community facilities

11. According to applicable national legislation, building activity is subject to public authority control. Pursuant to Article 1 of Law No 10/77 of 28 January 1977, any activity involving the urban development of municipal land and building works on such land entails liability to contribute to the related costs and the execution of such works is conditional upon a permit being granted by the mayor.

12. Pursuant to Article 3 of the same Law, the granting of the permit entails payment of a contribution commensurate with the costs of development and the cost of construction.

13. The infrastructure contribution is paid to the municipality when the permit is granted. However, pursuant to Article 11(1) of Law No. 10/77, by way of total or partial set-off against the amount payable, the permit holder may undertake to carry out direct execution of the infrastructure works, observing the procedures and safeguards laid down by the municipality.

14. As regards specifically the coordinated execution of a complex of works in accordance with a development plan the situation in the main proceedings Article 28(5) of Law No 1150/42 on urban development makes the requisite municipal permission subject to conclusion of an agreement, to be registered by or on behalf of the owner, which provides as follows:

(1) ... the land required for secondary infrastructure works shall be transferred free of charge, subject to the provisions of subparagraph (2) below;

(2) the owner shall undertake to bear the costs of the primary infrastructure works; the owner shall also undertake to meet part of the cost of the secondary infrastructure works involved in the development project or of the works necessary to link the area to the various public utilities; the amount payable shall be commensurate with the nature and extent of the project works;

(3) the works referred to in subparagraph (3) above must be completed within ten years.

Article 28 (7) of Planning Law No 1150/42 also sets a time-limit of ten years for the execution of infrastructure works for which the owner is to be responsible.

15. By virtue of Article 4 of Law No 847/64 of 29 September 1964, health and cultural facilities constitute secondary infrastructure works.

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16. Article 8 of Lombard Regional Law No 60 of 5 December 1977 provides for development works to be carried out by private persons by way of set-off against infrastructure contributions payable for an ordinary building permit. Applicants for a permission may request that they be authorised to carry out directly one or more primary or secondary development works, the permit being issued by the mayor where such direct execution is deemed conducive to the public interest.

17. The execution of infrastructure works provided for in a development plan, on the other hand, is governed by Article 12 of the abovementioned Regional Law, as amended by Article 3 of Regional Law No 31 of 30 July 1986. According to that article the agreement which must be concluded before a building permit can be issued for the operations provided for in the project plans must provide for carrying out by or on behalf of the owners of all the primary infrastructure works and a portion of the secondary infrastructure works or those necessary to link the area to the public services. Where execution of the works involves charges lower than those separately laid down for primary and secondary infrastructures, the difference must be paid. In any event it is open to the municipality to require, in lieu of the direct execution of the works, payment of a sum commensurate with the actual cost of the infrastructure works relating to the project and with the area and characteristics of the buildings, and in any event in an amount not lower than the charges laid down in the municipal resolution referred to in Article 3.

18. The regional legislation also gives a list of secondary infrastructure works, which includes cultural facilities.

Legislation on administrative procedure

19. The national court notes that the procedures in question in the case before it are not remote from certain forms of what is known in Italy as consensual administration. In other words, the public administration abandons or moderates its authoritative and unilateral stance and negotiates directly with the private operator to agree on the terms of administrative measures affecting the latter.

20. General Law No 241 of 7 August 1990 on procedure lays down new rules governing administrative procedure and the right of access to administrative documents.

21. Article 11 of that Law provides that the administration may conclude, without prejudice to the rights of third parties and in pursuit of the public interest, agreements with interested parties in order to determine the discretionary terms of the final measure or, in cases for which the law so provides, to replace the latter.

II - Facts and procedure before the national court

22. By Resolution No 82/96 of 12 September 1996, the municipal council of Milan approved a programme of works, comprising three separate parts, known as the Scala 2001 Project.

23. Essentially, those parts related to the execution of the following works:

- restoration of and alterations to the historical building of Teatro alla Scala;

- alterations to municipal buildings in a building complex, and

- construction, in the so-called Bicocca area, of a new theatre, with about 2,300 seats, having an area of around 25,000 m2 (plus 2,000 m2 parking) intended to accommodate, in the initial stage, the activities of the historic headquarters of the Piazza Scala for the period needed to carry out the restoration works and alterations. Subsequently, that facility would accommodate all activities relating to the performance of dramatic works and other cultural events.

24. In the Bicocca area a planning project was devised, catering for a large number of buildings with a view to developing the former industrial zone. Società Pirelli (Pirelli) acted, together

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with other private operators, as the owner-developer. That private initiative, which was a long-term commitment and had passed all the stages of the administrative procedure, was in the process of being carried out when the events leading to the case in the main proceedings occurred.

25. Among the town-planning measures envisaged in relation to the site, the municipality of Milan had already made provision for the construction of a general-purpose multi-communal structure. The theatre was to be part of that structure.

26. By Resolution No 82/96, the municipal council of Milan then gave a number of commitments concerning the execution of works, time-limits and financing for the Scala 2001 project approving a specific agreement between the municipality of Milan, on the one hand, and, on the other, Pirelli, Ente Autonomo Teatro alla Scala and Milano Centrale Servizi SpA, as agent for the promoters of Progetto Bicocca (Bicocca Project). That agreement, signed on 18 October 1996, incorporated the following terms concerning the Bicocca section of Scala 2001:

- MCS, as agent for the promoters of the development project, was to construct the new theatre (and the parking area) as secondary infrastructure works in the Bicocca area and on the land provided for that purpose, given free of charge by the promoters to the municipality of Milan. Construction of the theatre was in partial payment of the infrastructure contribution payable under national and regional legislation. The commitment undertaken was limited to the construction of the outer shell of the building. According to MCS, the municipality of Milan was responsible for completing the interior of the building and was obliged to organise a public tendering procedure for that purpose, and

- MCS was to hand over the building before the end of 1998.

27. The Ordine degli Architetti delle Province di Milano e Lodi (Order of Architects of the Provinces of Milan and Lodi) and the architect Piero de Amicis, in his own right, brought an action for the annulment of Resolution No 82/96 before the Tribunale Amministrativo Regionale per la Lombardia (Italy).

28. Following the adoption of new guidelines by the incoming municipal administration at the beginning of 1998, the municipal council of Milan adopted Resolution No 6/98 of 16 and 17 February 1998 whereby it:

- approved the preliminary plan for the construction of the theatre;

- confirmed that the work would be constructed in part directly by the developers in implementation of the contractual obligations relating to the development plan; it was also noted that the cost of the work in question amounted to ITL 25 billion, and

- amended the time-limits written into the agreement for the completion of certain measures. The completion date for the new theatre thus became 31 December 2000.

29. The Consiglio Nazionale degli Architetti (National Council of Architects) and the architect Leopoldo Freyrie, in his own right, brought proceedings for the annulment of Resolution No 6/98 before the Tribunale Amministrativo Regionale per la Lombardia.

30. In those two actions for annulment, the plaintiffs contend that the contested resolutions are invalid under both Italian town-planning and public contract law and under Community law. As regards the latter aspect, they maintain that the theatre works are in the nature of public works and therefore the municipal council should have complied with Community tendering procedures rather than granting a contract directly, thereby harming the interests represented by the OAML and those of the plaintiff architects.

III - Questions referred to the Court for a preliminary ruling

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31. In its order for reference, the Tribunale Amministrativo Regionale per la Lombardia states that the municipality of Milan correctly applied Italian (national and regional) legislation in respect of town planning. On the other hand, with regard to Community law, the national court raises certain doubts as to whether direct execution of infrastructure works by way of set-off against the contribution payable constitutes a public works contract as defined by Community law.

32. Accordingly, it decided to refer to the Court the following questions for a preliminary ruling:

1. Is national and regional legislation which allows a builder (who holds a building permit or approved development plan) to carry out infrastructure works directly, by way of total or partial set-off against the contribution payable (Article 11 of Law No 10/77, Articles 28 and 31 of Law No 1150 of 17 August 1942, Articles 8 and 12 of Law No 60 of the Lombardy Region of 5 December 1977), contrary to Directive 93/37/EEC, having regard to the strict tendering principles imposed on Member States by Community law in respect of all public works of a value of [EUR] 5 million or more?

2. Notwithstanding the principles concerning tendering referred to above, may agreements between the administrative authorities and a private person (generally permitted by Article 11 of Law No 241 of 7 August 1990) be regarded as compatible with Community law in areas where the procedure is that the administrative authorities choose a party with whom a contract for services is to be concluded, in cases where such services exceed the threshold laid down by the relevant directives?

IV - Admissibility of the first question

33. The municipality of Milan and the FTS doubt whether there is any connection between the first question and the subject-matter of the main proceedings.

34. They maintain that the national court limited the admissibility of the actions before it to aspects of the case concerned with the allocation of work relating to the design of the theatre, thereby excluding those aspects concerned with the execution of the works. That decision is based on the status of the plaintiffs, who are not contractors but architects, and their professional bodies.

Accordingly, the first question for a preliminary ruling, which is limited to interpreting the Directive, cannot help to resolve a dispute relating to the provision of services.

35. The municipality of Milan and the FTS further maintain that the work relating to the design of the theatre was simply provided free of charge to the municipal administration by Pirelli and MCS. Its cost cannot therefore be included in the cost of the works to be offset against the infrastructure contribution.

By arguing thus, the parties to the main proceedings appear to allege that since that part of the project at issue involved no payment, it falls outside the scope of the Directive, which is based on the assumption that the project in question should involve a pecuniary interest.

36. According to settled case-law of this Court, in the context of cooperation between the Court and the national courts enshrined in Article 177 of the EC Treaty (now Article 234 EC), it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give a judgment and the relevance of the questions which they refer to the Court. Accordingly, since the questions referred relate to the interpretation of Community law, the Court is, in principle, required to give a ruling.

37. A request from a national court for a preliminary ruling may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action.

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38. In the present case, it cannot be accepted that a dispute relating to the method of appointing an economic operator responsible for the construction of a theatre bears no relation to Community law on public works contracts since the project was undertaken at the request of a municipality and the building works in question are considered as community facilities under national legislation.

39. Furthermore, in the order for reference, the national court does not endorse the assertion that the admissibility of the actions is limited to aspects of the case concerned with the design of the theatre and not the works themselves. Such an assertion is actually demolished by the fact that the application is declared admissible by the court without mention of any such restriction. Furthermore, pursuant to Article 1(a) of the Directive, public works contracts include contracts which have as their object both the execution and the design of works.

40. Finally, as regards the fact that the design work was provided free of charge, the argument put forward is a matter of substance and does not affect admissibility. Accordingly, there is no reason for concluding on that basis that the question raised has no bearing on the main proceedings.

41. The first question must therefore be declared admissible.

V - The questions submitted for a preliminary ruling

42. By both its questions, the national court seeks a ruling on whether various provisions of Italian town planning law are compatible with Community law.

43. According to settled case-law, although the Court has no jurisdiction under Article 177 of the Treaty to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide a national court with an interpretation of Community law which may be useful to it in assessing the effects of that provision.

44. Accordingly, an interpretation of the Directive should be provided so as to enable the national court to rule on the propriety of rules which allow an operator to participate in the construction of public facilities without any tendering procedure being conducted.

45. It will be noted that the second question seeks to ascertain whether agreements between the administration and private persons may be regarded as compatible with Community law where the public administration chooses a party with whom a contract for services is to be concluded and the costs of such services exceeds the threshold laid down by the relevant directives.

46. If, as in the present case, the question asked may be construed as requesting an interpretation of Community law, but does not identify the provisions of Community law which are in issue, it is incumbent on the Court to extract from all the information provided by the national court the elements of Community law requiring an interpretation, having regard to the subject-matter of the dispute.

47. By this question, the national court seeks a ruling under Community law concerning a principle of Italian law which it refers to as consensual administration, that is to say where the Public Administration abandons or moderates its authoritative and unilateral stance and negotiates directly with the private operator to agree on the terms of administrative measures affecting the latter.

48. The Italian court has focused upon the situation where the services to which those agreements may apply exceed the threshold laid down by the relevant directives. It therefore appears that, in the absence of any more detailed information on the rule of Community law in question, the question is concerned only with the interpretation of Community law on public contracts.

49. The national court also notes that the present case may of course come within the framework

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of broader national legislation, intended to favour negotiated procedures, citing in that context Article 11 of Law No 241/90.

50. However, it does not provide any details on the specific nature of that law, such as how it might apply to the circumstances of the main proceedings, as compared with the town-planning legislation referred to in the first question.

Under those circumstances, it appears that an interpretation of the Community provisions relating to public contracts can provide the national court with the detailed reply it requires to assess the standing of both laws. Accordingly, there is no reason to make a distinction between the two questions referred to the Court for a preliminary ruling.

51. Consequently, it must be concluded that the national court is asking, in essence, whether the Directive precludes national legislation which provides that, when implementation of a development plan requires construction works in order to provide community facilities, the holder of the building permit is to be responsible for carrying out those works, at his expense, in return for exemption from payment of the amount due to the municipality in respect of the building permit, unless the municipality decides to collect the contribution instead of opting for direct execution of the works, without requiring any tendering procedure for the award of public works contracts provided for by the same directive.

52. Before examining the Directive, I shall consider for a moment the infrastructure works with which the main proceedings are concerned.

A - The legal nature of the theatre under national and Community law

53. According to the order for reference, under Italian law the theatre constitutes secondary infrastructure works.

Under national law, cultural facilities, to which category of infrastructure works this building belongs, are classified as secondary infrastructure works, there being 'no limitation to the local district in any purposive or functional sense. According to the national court, the deliberate omission of any such limitation clearly indicates that the legislature specifically wished, in respect of such works, to disregard the strict referential planning context.

54. The fact that a national cultural institution is considered an essential facility within a development project may appear somewhat surprising.

The lack of any legal distinction between a national theatre and infrastructure works linking the area to public services - classified under Italian law as primary infrastructure works - or facilities classified as secondary infrastructure works, such as kindergartens or green areas, means that the theatre is treated as an essential feature of the development under construction.

55. Accordingly, a theatre whose activities extend far beyond the locality in which it is situated is subject, by virtue of that legal status, to town-planning provisions which create specific obligations linked to the needs and amenities of that locality. For example, under Italian law, private developers have an obligation to meet any expenditure justified by the nature of the infrastructure which, in the present case, amounts to a particularly large sum.

56. It is not my task to evaluate the legal provision in question. That is a matter reserved exclusively to the legislature and its concept of what town planning involves.

57. However, the Court is responsible for ensuring that such an approach to town planning does not risk undermining the interests which the Community legislation on public contracts is designed to protect.

58. According to the national court, the construction of the theatre constitutes public works as

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defined in the Directive. Despite that, the legal status attributed by national law to this type of facility has specific implications which appear to derogate from the system established by the Directive. The developer is obliged to carry out the construction works or arrange to have them carried out, unless the municipality decides to collect the infrastructure contribution instead of opting for direct execution of the works. Moreover, the municipality can refuse direct execution and insist on payment only on grounds of public interest justified by the need to ensure proper and effective implementation of the development plan.

59. It might be feared that a burgeoning of similar laws in the Member States could render the Community rules on public contracts ineffectual. Member States might be tempted to include in their town-planning legislation whole categories of public works in order to remove them from the scope of Community law on public contracts which is considered both restrictive and costly in terms of time and money.

60. The importance of the debate concerning national legislation of this kind should not therefore be underestimated.

61. To determine whether public tendering procedures provided for by the Directive should be applied in circumstances such as those of the main proceedings, it is necessary to define the substantive scope of the Directive in the light of its objectives.

B - The definition of public works contracts

62. The definition of public works contracts, for the purposes of the Directive, is given in Article 1(a).

63. The six conditions laid down by that provision are as follows: contracts must be for pecuniary interest, concluded in writing between a contractor and a contracting authority which have as their object certain types of works.

64. It has been noted that the construction of the theatre is regarded as constituting public works or, at least, that the building is a work within the meaning of the Directive. The fact that the agreement is in writing is not contested. Finally, a municipality is a contracting authority as defined in Article 1(b) of the Directive since regional authorities are treated as such.

65. On the other hand, I take the view that legal relations such as those entered into by the City of Milan and the other defendants in the main proceedings, under the conditions laid down by national law, are not contractual in nature. Moreover, the condition relating to the status of contractor which the Directive requires the party dealing with the contracting authority to have is not necessarily met by legislation such as that in question. Finally, in my opinion, relationships of the type existing between the municipality and the developer are not for pecuniary interest as required by the Directive.

66. Those three conditions will be dealt with in turn.

The condition relating to the contractual nature of the legal relationship

67. A contract between the parties was indeed signed, but its content is limited to the arrangements for implementation of the project, such as the allocation of work as between the MCS, for the construction of the outer shell of the building, and the City of Milan, for the internal work, or the date of completion of the building.

68. However, there is something missing from the agreement which, in my opinion, is an essential element of a contractual relationship: the power to choose the contractor. According to the national court, a party called on to carry out development works is simply identified by law, in this case by Article 12 of Regional Law No 60 of 1977. The effect of that provision is that the works must

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be carried out by the owner of the land.

69. That non-contractual method of determining who is to be the subject to the obligation to carry out the infrastructure works is confirmed by its legal standing under national law. The FTS cites a judgment of the Corte Suprema Di Cassazione which states that the obligation on the owner to meet the cost of primary infrastructure works and a portion of the secondary infrastructure works... constitutes ... an obligation in rem. It follows that those works should be carried out by owners as soon as the building permit is issued. Owners may well be persons other than those who concluded the agreement by virtue of the fact that they have acquired part of the land which is to be divided into various lots or groups of lots.

70. The fact that there is no possibility of choosing the operator who is to carry out the infrastructure works considerably reduces, in my opinion, any risk of discrimination on the part of the contracting authority if it intends to favour national or local operators.

71. Let us consider for a moment the main purpose of the Directive: its precise aim is to eliminate discriminatory practices in the field of public contracts. It is clear that the wording of Article 1(a) reflects very accurately, as far as the requirement of a contractual relationship is concerned, the purpose assigned to it by the Community legislature.

72. The Directive seeks to avoid the risk of any preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities.

73. The expression of a national preference constitutes an obstacle to freedom of establishment and freedom to provide services, principles upon which the Directive is founded, and to the development of effective competition. There is no denying that, if an advantage is given to national operators over their competitors in other Member States, the latter will be dissuaded from establishing themselves in that territory or even from going there regularly to carry on business.

74. If a contracting authority is free to appoint a contractor to carry out public works, in return for payment, there is a real risk, often observed in the practices employed by public authorities of Member States, that those authorities may choose their contractors on the basis of criteria other than purely economic criteria.

75. Favouritism towards national operators runs counter to considerations concerned with the quality of work and price levels which ought to apply to the choice of undertakings. Such a situation adversely affects the interests both of excluded competitors, who suffer loss through being excluded, and of taxpayers, since the public authorities use of tax revenue has not been dictated by strictly economic considerations.

76. That is why Community rules on public contracts, and in particular the Directive, provide for contracts to be awarded by means of competitive tendering procedures.

77. That is also why the Directive requires, as one of the conditions determining its applicability, the establishment of a contractual relationship. Indeed, the procedural formalities of Community law on public contracts are justified only if the contracting authorities enjoy a degree of latitude in appointing economic operators. Otherwise, those constraints would be deprived of their justification, namely the risk that freedom of freedom of movement and freedom of competition might be undermined. It should not be forgotten that the freedom to choose is also the freedom to discriminate.

78. There is no freedom of choice here. It could re-emerge if the developer who, as will be seen, is not necessarily a contractor, were dictated to by the contracting authority, particularly as regards deciding who is to carry out the works. It is clear that any constraint imposed by the public authority in that respect would constitute an evasion of the law - if not of national law, at least of Community law - and should be reclassified as a contract between the contracting authority

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and the contractor.

79. In any event, the municipal administration has no freedom to intervene in the present case regarding either the choice of contractor or relations with that contractor during the performance of the contract, as almost all the parties recognise.

80. Under the national legislation at issue, the municipality may opt for payment of the infrastructure contribution or replace that obligation by direct execution of the works.

81. It is necessary to make certain that the reintroduction of an element of choice in the appointment of the contractor would not entail the risk of the contracting authority resorting once more to discriminatory practices.

82. That question would arise, of course, only if the municipality should decide to exercise its right to collect the infrastructure contribution rather than having the works carried out by way of set-off.

83. It is obvious that in those circumstances the procedures laid down by the Directive ought to apply since the contracting authority has decided to approach other contractors. But in doing so, it is exercising a choice, at least in the negative sense, by refusing the developer the right to execute the works himself.

84. I do not believe those fears are justified. First, it is not the case either that the developer is always a contractor or, if he were, that he would automatically wish to be granted the right to carry out the works. In either case, that right might well be regarded as involving an excessive burden and, from a personal point of view, one that was unjustified particularly since, if the developer himself undertakes to execute works and the resulting costs are less than envisaged, he is obliged to pay the difference to the municipality. Accordingly, execution of the works may constitute an obligation without any prospect of financial concessions in return for direct execution. Second, if the developer who is thus excluded wishes to carry out the works, he may still, if the Directive is properly applied, respond to the invitation to tender.

85. Accordingly, the condition relating to the contractual nature of the legal relationship cannot be regarded as satisfied.

The condition relating to the involvement of a contractor

86. The fact that the developer is not always a contractor is the second reason for rejecting the idea that national legislation which requires, without exception, direct execution of development works by way of set-off contravenes the Directive.

87. Such a condition presupposes a contract between a contracting authority and a contractor.

88. However, the national legislation at issue does not require that the developer be a contractor. Consequently, if the developer is not able to carry out the works himself, he must appoint a contractor to do so. It is with that contractor that he will enter into a contractual relationship, thus becoming the promoter, and not with the contracting authority. If, as already noted, the municipality is not involved in the relationship between the developer and the contractor, its potential influence is considerably reduced.

89. Such an arrangement cannot be considered to constitute a public contract, first because no contractor has a relationship with the municipality and, second, because the contracting authority has no involvement in the construction work assigned by the developer to the contractor.

90. The grounds for applying the Directive are once again absent. The dividing line between public contracts and relations of a strictly private nature has been crossed. The developer, a private operator responsible for paying for the works by way of set-off against the infrastructure contribution,

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is again adjusting to a purely economic reality which prompts him to make a choice that takes account of his own interests. The controlling of expenditure by a contracting authority which could easily come to believe itself to be free from any budgetary constraints gives way to the vigilance exercised by a private operator naturally concerned to limit his expenditure. Accordingly, effective competition is almost automatically guaranteed since, out of concern to save money, the private operator, who is free to choose any contractor and whose debt is limited to the amount he will have to pay to the latter, will endeavour to choose the best service at the best price.

The condition relating to the pecuniary nature of the legal relationship

91. It remains for me to set out the reasons why I consider that the relationship between the developer and the municipality, for the purpose of carrying out the works at issue, is devoid of any pecuniary interest as defined in Article 1(a) of the Directive.

92. The national court, on the other hand, considers that where the holder of a building permit undertakes infrastructure works, he is not providing anything free of charge. Rather, he is discharging a debt of the same value that arises in favour of the municipality as a result of his plan to carry out works which will give rise to the need for that infrastructure.

93. We have seen that the aim of the Directive is to eliminate discriminatory practices on the part of contracting authorities. However, there is a question as to whether freedom of movement and competition are still jeopardised where there is no pecuniary interest in carrying out the work.

94. Economic operators are motivated by the prospect of obtaining some economic benefit from contracts. Discrimination in awarding contracts is unacceptable because awards of contracts entail payment to the contractors who are selected. It would be difficult, where no finance was provided for a contract by the contracting authority, to imagine any kind of favouritism which could benefit the operator chosen. If anything done free of charge or financed by the party carrying out the work offends against the principle of competition, that is because it is damaging to that party's interests and not because it gives him any advantage over his competitors.

Under those circumstances, where there is discrimination in awarding to a contractor a contract for the performance of which he is not paid, there is no justification for following the procedures laid down by the Directive. It is sufficient, if it is assumed that circumstances might arise in which relations are of a contractual rather than a legal nature, for the economic operator to refuse to award the contract in order to eliminate the competitive disadvantage.

95. In that respect, what are the features of the national legislation at issue?

96. According to the documents before the Court, it appears that there are two possibilities.

97. Either the developer carries out the works or arranges for them to be carried out in lieu of payment of the infrastructure contribution, or else he pays the contribution to the municipality at its request and the latter then proceeds with the work in compliance with the rules on public works contracts. As we have seen, the latter case constitutes an exception to the principle of direct execution by way of set-off.

98. The national court considers that developers do not provide anything free of charge. That is correct in so far as works carried out by way of set-off discharge their obligation to pay the infrastructure contribution. Their action is then economic in nature on account of the existence of a payment. Even if the latter is made in kind rather than in money, the debt is discharged.

99. However, when the economic relationship - or rather the fiscal relationship in view of the nature of the contribution in lieu of which the works are executed - is examined more closely, it is clear that the risk of discrimination usually associated with the public financing of private activities is not present in this case.

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100. Indeed, the economic nature of the relationship between the developer and the municipality under the national legislation at issue is not the same as the pecuniary nature of the contract required by the Directive, which merely constitutes, in my opinion, a threat to the interests protected by that instrument.

101. In contrast to the position most frequently encountered when public contracts are awarded, it does not appear that the public authority provides any finance for direct execution of the works by way of set-off. For his part, the developer, who receives no payment, bears the costs. When the work is finally completed the assets of the municipality will have been increased by the value of the building, without its having incurred any expense, whilst the developers assets will have been reduced to the same extent, without his receiving any consideration other than the waiving of the infrastructure contribution.

102. Accordingly, only the relationship between the developer and the contractor is of a pecuniary nature, whilst that between the developer and the municipality is not. In fact, the contractual relationship which most closely resembles the one envisaged in the Directive is that between the developer and the contractor.

103. Consequently, the relationship between the municipality and the developer cannot be classified as a legal relationship for pecuniary interest within the meaning of the Directive. By not playing any part in financing the works, in the case of direct execution by way of set-off, the municipality cannot be regarded as favouring the operator to whom it awards a contract in a case where the Directive is not applied.

104. The argument that the Directive should be applied by virtue of Article 2 must be rejected for the same reasons.

105. It should be noted that that provision requires Member States to take the necessary measures to ensure that the contracting authorities comply or ensure compliance with the Directive where they subsidise directly by more than 50% a works contract awarded by an entity other than themselves.

106. That provision is intended to prevent practices aimed at evading the rules applicable to public contracts. Certain contracting authorities might be tempted to entrust to private bodies responsibility for carrying out works relating to public contracts. Since the latter are not themselves contracting authorities, it would be easy for them to find a way around the legal constraints to the detriment of interests protected by the Directive. On the other hand, that risk is diminished if public subsidies account for less than 50% of the contract since a private operator providing most of the finance for the project will be encouraged to be more discerning in the management of his own funds.

107. In the present case, Article 2 of the Directive cannot be interpreted as being applicable to works entrusted by the developer to a contractor if they are not financed by the municipality.

Conclusion

108. In view of the foregoing considerations, I propose that the Court reply as follows to the questions submitted by the Tribunale Amministrativo Regionale per la Lombardia:

Article 1(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts does not preclude national legislation which provides that, when the implementation of a development plan calls for construction works to provide community facilities, it is incumbent on the holder of the building permit to carry out those works, at his expense, in return for exemption from the requirement to pay the contribution due to the municipality in respect of the building permit, unless the municipality decides to collect the infrastructure contribution in lieu of direct execution of the works, without requiring observance of the procedures for the award of public works contracts provided for by that directive.

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Opinion of Mr Advocate General Alber delivered on 11 May 2000.
The Queen v H.M. Treasury, ex parte The University of Cambridge.
Reference for a preliminary ruling: High Court of Justice (England &Wales), Queen's Bench Division (Divisional Court) - United Kingdom.
Public contracts - Procedure for the award of public contracts for services, supplies and works - Contracting authority - Body governed by public law.
Case C-380/98.

I - Introduction

1. In these proceedings the High Court of Justice of England and Wales seeks a ruling from the Court of Justice on questions concerning the definition of a contracting authority. The main question is, under what conditions is a body financed for the most part by the State, regional or local authorities, or other bodies governed by public law with the result that it is to be regarded as a contracting authority for the purposes of the directives on public procurement?

2. The question has arisen in proceedings brought by the University of Cambridge (or the applicant) against the United Kingdom Treasury. The applicant challenges the Treasury's proposal to retain universities in the list for the United Kingdom of bodies governed by public law in Annex I to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, adding the phrase financed for the most part by other contracting authorities.

II - Law

(1) Community law

3. In Article 1 of Directive 93/37 contracting authorities are defined as follows:

For the purpose of this directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, [or] associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I....

(c) to (h)....

4. That provision is largely identical to Article 1(b) of Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts.

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5. As far as the United Kingdom is concerned, the list of bodies and categories of bodies governed by public law in Annex I includes universities and polytechnics, maintained schools and colleges.

6. The contents of Annex I may be changed in accordance with the procedure set out in Article 35 of Directive 93/37, according to which the Commission may amend the Annex in order to ensure as far as possible that it reflects the actual state of affairs.

(2) National legislation

7. The Community legislation was transposed into national law by the following measures:

- Directive 92/50 by the Public Services Contracts Regulations 1993 (S.I. 1993/3228)

- Directive 93/36 by the Public Supply Contracts Regulations 1995 (S.I. 1995/201)

- Directive 93/37 by the Public Works Contracts Regulations 1991 (S.I. 1991/2680).

8. Those regulations do not reproduce the annex to Directive 93/37 but contain a definition of the bodies governed by public law based on the Community law definition.

III - Facts

9. The Committee of Vice-Chancellors and Principals of the Universities in the United Kingdom communicated to the Treasury in 1995 and 1996 its view that the public procurement directives did not apply universally to universities, so that the reference to universities for the United Kingdom in Annex I to Directive 93/37, and to which Directives 92/50, 93/36 and 93/37 refer, should be abandoned.

10. On 17 January 1997, therefore, the Treasury suggested to the Commission that the following amendment be made with regard to universities: universities... financed for the most part by other contracting authorities, thus restricting the circumstances in which the public procurement directives were applicable in the case of universities. The proposal has not yet been implemented by the Commission.

11. The applicant was not satisfied by the amendment suggested by the Treasury, and therefore by application for judicial review dated 7 November 1996 it sought leave from the High Court to challenge the position adopted by the Treasury. Leave was granted on the basis that the application concerned the proper interpretation of the expression financed for the most part by one or more contracting authorities.

12. It was common ground in the main proceedings that most universities in the United Kingdom, in particular the University of Cambridge, were indeed established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and had legal personality; they were not, however, subject to management supervision by contracting authorities, and such bodies did not appoint more than half of the members of the administrative, managerial or supervisory boards of the universities. The only issue in this case, therefore, was whether the universities were financed, for the most part, by one or more contracting authorities.

13. In the order making the reference the national court states inter alia that universities in the United Kingdom are financed in different ways, not all of them receiving funds from contracting authorities. Funds are obtained from a variety of sources, and are provided for a variety of purposes and on various grounds; the way in which funds are obtained also varies.

14. The sources of financing for universities in the United Kingdom, including the applicant, mentioned by the national court include:

1.(a) Funds allocated by the Higher Education Funding Councils and the Teacher Training Agency, which are themselves recognised to be contracting authorities, for academic, research and related activities. More than 90% of the research funding is allocated on the basis of the quality of the

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research activities, which are periodically assessed. The university itself decides how the funds are to be used.

(b) Funds supplied by the Research Councils, which are likewise recognised to be contracting authorities, to the university on request by individual applicants wishing to conduct a research project in which the Research Councils themselves have no interest at stake, the monies going directly to the university. Grants are allocated to individual applicants on the basis of an appraisal of merit. If the applicant moves to another university, the funding will also move to the new university.

2. Payment for research and services commissioned by and for the benefit of charities, industry, commerce, government departments and other institutions.

3. Tuition fees, which are paid by local education authorities (recognised as contracting authorities) direct to the universities. These funds are in the form of grants to students in respect of the tuition fees payable by them. Many students are eligible for mandatory, or at least discretionary, grants from the paying authorities; others must find the means to pay themselves, or are funded from abroad.

4. Various other sources of financing, such as the provision of residential accommodation and catering, as well as gifts and endowments.

15. The High Court of Justice appended to the reference for a preliminary ruling the following summary of sources of income from the accounts of the university (of Cambridge) for 1997 by percentage of total income:

Funding Council and Teacher Training Agency Grants 30

Academic Fees and Support Grants 14

Of which:

Home and EU students (including some self-supporting) 9

Overseas (non EU) students 5

Research Grants and Contracts 33

Of which:

Research Councils 14

Grants and contracts from other public and

private bodies 19

Other operating income 12

Of which:

Catering 1

Transferred from Local Examinations Syndicate 3

Health and Hospital authorities 2

Valued Added Tax Rebate 1

Other 5

Endowment Income and Interest Receivable 11

TOTAL 100

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16. The national court considers that a proper understanding of the meaning of financed for the most part is decisive for determining whether a university is to be regarded as a contracting authority, and has therefore referred the following four questions to the Court of Justice for a preliminary ruling.

IV - The questions referred

1. Where Article 1 of Council Directive 92/50/EEC, Council Directive 93/37/EEC and Council Directive 93/36/EEC ("the Directives") refers to any body "financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law" what monies are to be included in the expression "financed... by [one or more contracting authorities]"? In particular, in relation to payments to an entity such as the University of Cambridge, does the expression include:

(a) awards or grants paid by one or more contracting authorities for the support of research work;

(b) consideration paid by one or more contracting authorities for the supply of services comprising research work;

(c) consideration paid by one or more contracting authorities for the supply of other services, such as consultancy or the organisation of conferences;

(d) student grants paid by local education authorities to universities in respect of tuition for named students.

2. What percentage or other meaning is to be given to the expression "for the most part" in Article 1 of the Directives?

3. If the expression "for the most part" is defined in terms of a percentage figure, is the calculation limited to considering sources of finance for academic and related purposes or should it include finance obtained in relation to commercial activities as well?

4. Over what period should any calculation be made for determining whether a university is a "contracting authority" in respect of any particular procurement, and how are foreseeable or future changes to be taken into account?

17. The applicant, the United Kingdom, Netherlands and Austrian Governments, and the Commission took part in the written procedure and the French Government took part in the oral procedure. I shall come back to their observations.

V - Assessment

(1) Preliminary remarks

18. The first point to consider is whether the present reference to universities in the list for the United Kingdom in Annex I to Directive 93/37 or the proposed amendment to it has legal effect as regards this case.

(a) Observations submitted to the Court

19. The view taken by the Netherlands Government, and by the United Kingdom in the oral procedure, is that Annex I is purely declaratory. That is indicated, according to the Netherlands Government, both by Article 35 of Directive 93/37, which provides for a procedure for amending the lists, and from the Commission's answer of 16 June 1992 to written question No 1443/92.

(b) Opinion

20. As the Netherlands Government rightly observes, the definition of a contracting authority is to be that set out in Article 1(b) of the directives. Whether an establishment falls within that definition must be determined solely on the basis of the criteria laid down therein. The fact

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that it is included in the list is not binding. Article 1(b), which provides that the list is to be as complete as possible, and Article 35 of Directive 93/37, which governs the procedure for changing the list, are sufficient to show that changes are possible and may be required if the bodies listed no longer fulfil the criteria set out in Article 1(b) of the directive. The list is also not exhaustive, but is to be expanded where necessary.

21. The interpretation of Article 1(b), third indent, of the directive is therefore not to be influenced by Annex I to Directive 93/37.

(2) The first question

(a) Observations submitted to the Court

22. The applicant considers that the purpose of Directives 93/36, 93/37 and 92/50 is to impose special requirements on bodies in relation to which the State is in a position to exercise actual or potential control in the procedure for the award of public contracts. It relies in that respect on the case-law of the Court of Justice. The directives serve to prevent distortion of the single market. Where a body is not subject to such control, or where it is merely theoretical, the directives ought not to apply.

23. Whether such control is exercised or not must be ascertained in the applicant's view on the basis of quantitative and qualitative criteria. A body will not be one governed by public law solely because another contracting authority supplies it with a number of financial payments, since not every payment by the contracting authority gives it such control. The purpose of the funding should also be taken into account. The only payment to be regarded as financing by a contracting authority is that which is provided to enable the establishment to fulfil its basic purpose - in the case of a university, teaching and research - and which therefore also enables the contracting authority making the payment to exercise direct or indirect control over public procurement. In this argument the applicant relied at the hearing also on the fact that were a different and broader interpretation to be adopted, churches or religious organisations, for instance, parties, State-funded charitable organisations or State-run lotteries might likewise be taken to be bodies governed by public law if they derived income from public resources. In any event financing denotes payments made in order to enable the university to fulfil its basic purposes. Accordingly, financing for specific research projects or other types of contribution, such as endowments, fall outside the definition. Since, in addition, the sources of funding mentioned in Question 1(a) to (d) of the reference for a preliminary ruling do not provide the contracting authority with any control over public procurement, they are not to be regarded as financing within the meaning of the provision.

24. The United Kingdom Government considers that all funds provided by contracting authorities which serve to fulfil tasks in the sphere of education and thus to meet a need in the general interest fall within the concept of financing by a contracting authority. That does not include commercial payments by a contracting authority, which must thus be left out of account. As to the question whether a payment serves educational or commercial purposes, the judgment in Case 263/86 Belgian State v Humbel is a useful reference.

25. In addition, the United Kingdom Government submitted at the hearing that what ultimately counts is whether a service is provided free, that is to say without any claim for consideration, or as a result of public law duties or, by contrast, under a particular contractual obligation. It relies on the criterion laid down in Mannesmann of close dependency between the body and the contracting authority; in the case of payments which the body has so to speak earned for itself that element is absent. Such payments cannot therefore fall within the concept of financing by a contracting authority.

26. For those reasons, the United Kingdom Government maintains, payments such as those mentioned

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in Question 1(b) and (c) are purely commercial and therefore to be excluded from the concept of financing by a contracting authority. Payments to the university such as those mentioned in Question 1(a) would fall within the definition, however, even if they were coupled to an application made by an individual applicant. They are ultimately intended to provide the universities with the means to achieve educational and academic aims. Payments by contracting authorities to a university towards tuition fees as described in Question 1(d) also constitute such financing, since they provide the body with the means of fulfilling the task it has in the general interest, even if they are made for specific named students.

27. The Netherlands Government observes that the three criteria set out in Article 1(b), third indent, of the directives, namely financing provided primarily by the State, State supervision and influence in staff appointments, are to be interpreted in the light of the judgment in Mannesmann as close dependency on the State or contracting authorities.

28. It follows that in order to answer the question whether financing by a contracting authority or some other form of contribution is present a distinction must be drawn between financial support and true consideration. Only in the case of the former is the criterion of close dependency fulfilled. The same criterion is used in Article 1(a)(ix) of Directive 92/50, according to which the directive applies only where the payment does not constitute consideration. In the case of Question 1(b) and (c), therefore, it must be ascertained whether what is involved is consideration earned in the marketplace or a financial subsidy. Consequently, payments made in connection with commercial activities will as a rule fall outside the concept of financing by a contracting authority.

29. The Austrian Government refers in suggesting an interpretation to the history of the concept of the contracting authority. The three criteria in Article 1(b), third indent, describe bodies which participate in economic life without being exposed to market forces. Accordingly, the expression financed for the most part by a contracting authority should be given a broad interpretation. It covers all forms of valuable payment containing an element of subsidy made to a body by a contracting authority. The only exception is if the body is obtaining consideration for services offered on the market in competition with other bodies or undertakings, the amount of the consideration being governed by the market itself.

30. Likewise, the French Government observed at the hearing that for the purposes of determining whether there is financing by a contracting authority it is necessary to distinguish between payments made in the general interest and those having the character of consideration for the provision of services. Consequently, of the payments listed in Question 1, those having the character of such consideration must be excluded from the concept of financing by a contracting authority.

31. The Commission also refers to the purpose of the directives, which is to prevent disturbance of the free movement of goods and services. The provision is intended to cover bodies which owing to their close dependency on the State or contracting authorities are not subject to market forces as are others. The decision in Mannesmann has made it clear that the alternative conditions referred to in Article 1(b), third indent, relate to close dependency on the contracting authority. There is such dependency, if only indirect, where financing comes for the most part from a contracting authority. At the hearing the Commission pointed out that even in commercial relationships there may be close dependency. That is taken entirely into account in the purpose of the directives, since even when a contracting authority is acting as a contractual partner it may have a very strong position of influence.

32. The Commission is therefore of the opinion that in the assessment, which must be based on the criterion of close dependency, in principle all payments made by a contracting authority must be taken into account. No distinction should be made according to the activities which form the purpose of the payment, since it is not the purpose of the directive to distinguish between activities in

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the general interest and other work. In the view of the Commission research awards to particular persons also constitute income for the university and are destined for the purposes of the university. Similarly, payments towards tuition fees for students are intended to provide funds for the university. Any distinction between the types of funding listed in Question 1(a) to (d) is not compatible with the purpose of the directives and would be most difficult in practice to apply.

(b) Opinion

33. The first question to be asked is, what considerations led to the adoption of Article 1(b), third indent, of the directives and what consequences do they have for the interpretation of the concept of financing by the State, or regional or local authorities, or other bodies governed by public law (which I will also call for the sake of simplicity public financing).

34. The purpose of the directives on the coordination of procedures for the award of public contracts is to remove the risk of considerations other than economic ones influencing the award of public contracts. Bodies which are not subject to the laws of the marketplace are prevented by the directives from giving preference in the award of such contracts to an applicant or tenderer favoured by them. That was what the Court of Justice decided with regard to the directives concerned in this case, Directive 92/50 in BFI Holding and Directive 93/37 in Mannesmann; see also the Opinion of Advocate General Léger in that case, and, with reference to an earlier directive, Directive 71/305/EEC, in Case 31/87.

35. That the notion of a contracting authority is thus to be given a broad meaning based on function, in order to ensure the effectiveness in practice of the principles of the free movement of goods and services, has been confirmed by the Court of Justice on a number of occasions regarding the legal form of the body or the provisions governing it.

36. As regards the determination whether the conditions for a body to be regarded as one governed by public law are satisfied, the Court of Justice described in Mannesmann the three alternative conditions laid down in Article 1(b), third indent, of the directives, which include that of being primarily public-financed, as representing close dependency of the body on the State, a local or regional authority, or other bodies governed by public law. The provision thus defines, according to the Court of Justice, the three manifestations of a body governed by public law as three variants of close dependency on another contracting authority.

37. It is true that in Connemara Machine Turf and Commission v Ireland the Court held that it was necessary, as regards the existence of a contracting authority in Ireland, for there to be control over the award of public supply contracts (and it was also regarded as sufficient for that control to be indirect, that is to say, not expressly provided for). That is what the applicant argues for in this case, too. Those principles, however, are not applicable to this case because the directive at issue in that case, Directive 77/62/EEC, itself imposed the requirement of State control over public supply contracts by means of a reference to the annex in respect of the relevant Member State, which in that case was Ireland.

38. It is also not possible, at least in this case, to apply the conclusions drawn by Advocate General Lenz in Portugal v Commission, which the applicant relies on in support of its argument, since Annex I to the relevant directive (Directive 77/62) requires in the case of Portugal that there be State control over public supply contracts.

39. It is clear that the directives are based on a functional approach, which requires a broad interpretation. In special cases, however, as the Netherlands and Austrian Governments accept, and the United Kingdom also essentially accepts, a teleological approach may be justified. If the funding provided by a contracting authority cannot give rise to, or reinforce, any particular dependency, the purpose of the directives no longer serves to justify the inclusion of such funding

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as public financing, a concept intended precisely to cover only cases where there is a special link between the body and the contracting authority.

40. It is therefore necessary also to clarify the meaning of financing in order to be able to conclude that there is close dependency between the recipient and the provider of the payment. As the Commission also rightly observes, such dependency exists in the case of public financing only indirectly. As a result, it is not possible to regard every payment from public sources automatically as public financing, which only covers funding which does not constitute payment for a particular consideration, that is to say, which amounts to a financial subsidy to fund or support the general activities of the establishment in question.

41. Funding such as that mentioned in Question 1(a), in the form of grants in support of research, must therefore be regarded as public financing. Even if the actual recipient is not the establishment itself, but a person supplying services as part of the university, it is nevertheless financing which benefits the establishment as a whole. Precisely in this case there is one of the relationships defined by the directive, there being close dependency between the university and the contracting authority providing the finance.

42. It is questionable, however, whether that extends, in accordance with the principles set out above, to the payments referred to Question 1(b) and (c). The purpose of the payment, the criterion suggested by the United Kingdom Government inter alia, is not sufficient to determine whether public financing includes consideration paid by a contracting authority for services provided by the university under contract. In Humbel the Court decided that teaching services did not fall within the scope of services for the purposes of Articles 59 and 60 of the EC Treaty (now Articles 49 EC and 50 EC). However, the Court distinguished between the case where there was economic consideration for a service and that where payment was made for the fulfilment by the State of an obligation incumbent upon it in the social, cultural and educational sphere. The reason for that given by the Court was that the protection which freedom to provide services was designed to afford did not extend to the latter sphere. The question whether a payment falls in this case under the heading of public financing cannot be answered on that basis, however, since the protection which the directives are designed to afford (described above) is one entirely different to that afforded by freedom to provide services. The fact is that the nature of the payment as consideration raises precisely the question whether it is possible for there to be close dependency even where the service provided by the establishment nevertheless serves purposes which are in the general interest. That criterion makes it more difficult, moreover, to draw the distinction, since activities which are in the general interest, that is to say, in the case of a university, education and research services, may overlap with activities of a commercial character, as Question 1(b) shows.

43. In the same way, it is not possible to apply by analogy the principles developed by the Court of Justice in BFI Holding. In that case the Court decided, with regard to Article 1(b), second subparagraph, first indent, of Directive 92/50, that the fact that services were also supplied by private undertakings or could be supplied by them did not prevent a task from being one that was in the general interest. At first sight, the judgment might be taken to indicate that a distinction between commercial and other services cannot be made in the case of public financing under the third indent, either. However, the three cumulative criteria for defining a body governed by public law raise quite different issues. The separate issue raised here is whether particular payments to a body which was undoubtedly established for the purpose of meeting needs in the general interest are to be regarded as public financing.

44. If one is to be guided by the purpose of the directives and by the question whether close dependency between university and contracting authority is created or reinforced, the answer must be that it is not public financing if the combined effect of the service and the consideration paid is that

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the contracting authority has an economic interest in obtaining the service which goes beyond support for the needs to be served in the general interest. There can only be close dependency if the purpose of the payment is to support the tasks of an establishment and to aid it for that purpose. That can only be the case if a service provided by the establishment under contract is at the same time an activity which is performed in the general interest or which serves academic purposes.

45. As a rule such dependency does not arise precisely where an establishment receives payment as consideration for an activity which it offers in the same way as an undertaking operating on the market independently in competition with private undertakings and on the basis of a specific agreement for the supply of services. That is because the establishment acquires its entitlement to payment on a reciprocal basis. The services are supplied on request in the interest of the establishment, as in the case of research for specific purposes, consultancy or the organisation of conferences. The right to obtain services is therefore not based on the decision of principle to support the establishment in its duties, but is rather a contractual entitlement.

46. A business relationship of that type can, of course, give rise to dependency, but that dependency is not of the same kind as that which arises from the mere provision of support. The dependency between business partners, even where one is technically a contracting authority, is not close dependency for the purposes of the directives, since in the case of freely negotiated contracts performance by both parties takes the form of do ut des. Any other approach to this question would lead to the paradoxical result that even a private undertaking conducting most of its business with contracting authorities would be a contracting authority for the purposes of the procurement directives.

47. Since the payments referred to in Question 1(b) and (c) are made in respect of a claim based on an autonomous contractual foundation and do not therefore create close dependency on a contracting authority within the meaning of the directive, they do not constitute public financing.

48. The last question to be discussed in this regard is whether tuition fees, as described in Question 1(d), paid by the contracting authority to a university for named students may be counted as public financing.

49. It is true that such payments also constitute a social measure for individual students, for whom it represents a grant towards the sometimes very high tuition fees. Nevertheless, it constitutes a reliable source of income for the establishment from public funds, which accrue to the university. The test for whether there is dependency is that the establishment obtains support from the contracting authority, for which, moreover, there is no contractual consideration. Accordingly, a contribution such as that referred to in Question 1(d) falls within the concept of public financing.

50. Naturally that excludes tuition fees paid by the student himself from private means, which do not involve any contribution from a contracting authority. Likewise excluded are funds provided from abroad by way of grants or other forms of support for students.

(3) The second question

51. The second question seeks to know how the expression for the most part in Article 1 of the directives is to be understood.

(a) Observations submitted to the Court

52. The applicant considers that in view of its position on the first question it is not necessary to answer the second. Solely in the alternative, it submits that the expression for the most part should be interpreted not on the basis of purely quantitative criteria but rather on the basis of qualitative criteria, with the result that only financing which confers on the payer control over procurement decisions is to be included. In any event, as regards the quantitative aspect, the test cannot be a purely mathematical one: there must be a predominant amount of such financing,

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which, in the applicant's view, can only be present where the financing amounts to at least three-quarters of the total.

53. The Netherlands, Austrian and United Kingdom Governments, together with the Commission, consider rather that for the most part must be taken to have its natural meaning of over 50%. The French Government supported that view at the hearing.

54. The United Kingdom Government argues that if the financing provided by the contracting authority exceeds 50%, there should be control over the use of those funds by the financing body. That is the approach taken in Article 2(1) of Directive 93/37, according to which the directive extends to contracting authorities who subsidise by more than 50% a contract awarded by a different body.

55. The Netherlands Government considers that that approach is also justified on systematic grounds, since there is another instance in Article 1(b), third indent, of the directives where a simple majority is determinative: where more than half the members of an administrative, managerial or supervisory board are appointed by the board there is assumed to be dependency. In addition, the definition of a public undertaking in Article 1(2) of Directive 93/38/EEC, and the definition of an affiliated undertaking in the third subparagraph of Article 3(4) of Directive 93/37 and in Article 1(3) of Directive 93/38 can also be referred to for comparison, each of them employing the criterion of more than half.

56. The Commission considers that taking the expression to mean more than 50% is a simple test to apply and also follows logically from the fact that the assessment is based on only two aspects, financing from contracting authorities and financing from other sources.

(b) Opinion

57. The ordinary meaning of the words for the most part suggests that they should be interpreted as referring to an arithmetical more, that is to say over half or more than 50%. Even if the words are not considered to be unequivocal in that respect, any interpretation such as that suggested by the applicant, for instance depending on funds of a particular sort, would not meet the purpose of the provision. It must be borne in mind that close dependency, with the corresponding possibility of influence, might arise in certain circumstances even where the financing is less than 50%, if it comes as a single contribution among a large number of smaller amounts. A qualitative approach is therefore not an appropriate one for determining the meaning of for the most part because of the many imponderables it raises. The possibility need not be discussed here, since all that is necessary is to establish the meaning of for the most part. What is required is a practical interpretation which satisfies the purpose of the provision.

58. We can also refer to the definition in Article 1(2) of Directive 93/38, in which public undertaking is defined inter alia as an undertaking in which the State owns, directly or indirectly, at least half of the capital. If that quantitative criterion is what makes an undertaking a public undertaking, it must certainly apply to a body governed by public law, when determining the conditions under which financing is to be regarded as for the most part public.

(4) The third question

59. The issue of what contributions fall within the concept of financing by a contracting authority has already been dealt with in connection with the first question. The third question posed by the national court, namely what funds are to be included in the calculation, should therefore not be understood as meaning what kind of funds should be taken into account in calculating the public financing, but as asking what is to be the basis for calculating the whole financing. In other words, it asks how to define the total income, of which the funds provided by public financing are to constitute the most part.

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(a) Observations submitted to the Court

60. The applicant and the United Kingdom Government argue that the calculation should cover all income. The French Government supported that view at the hearing.

(b) Opinion

61. In referring to financing for the most part from public funds, Article 1(b), third indent, implies that the institution can obtain funds at least partly from other sources without forfeiting its identity as a contracting authority. Any reliable assessment of the proportion of public financing when considering the economy of the institution as a whole must take account of all funding in the assessment of its income. Consequently, in order to calculate the total income (100%) of which over 50% is to be public financing, all resources accruing to the institution must be taken into account.

(5) The fourth question

62. Since universities' financing may vary from year to year, the national court seeks by means of the fourth question to know what period should be used as the basis for deciding whether an institution is to be classed as a body governed by public law, and how foreseeable or future changes in funding are to be taken into account.

(a) Observations submitted to the Court

63. The applicant suggests that the relevant time is the time of the contract award procedure.

64. The United Kingdom Government submits that for practical reasons it should occur a priori at the time of the award procedure. It refers to the possibility of taking interim measures under Directive 89/665/EEC, which would have no purpose if the status of an institution as being a body governed by public law were only to be made at a later date. At the hearing it suggested that the assessment could be a yearly one. Bodies wishing to award a contract must be able to determine the situation on the basis of the information available to them at that time, which would include figures from past years as well as a reasonable estimate of the duration of the contract and the funds already committed. The element of prognosis is one which is to be found in the three directives.

65. The Austrian Government considers that the assessment must be made for given periods, and suggests an annual approach, since contracting authorities draw up their budgets annually. Reference might be made to the calendar, accounting or budgetary year. That would also be appropriate in view of the fact that a yearly assessment is also made in other cases (Article 7(6) and the notification provisions in Article 15(1) of Directive 92/50).

66. The Commission takes the view that Article 15(1) of Directive 92/50 and Article 9(1) of Directive 93/36 indicate that contracting authorities retain their status for 12 months. Whether a body is a contracting authority or not may thus change from one budgetary year to another. Accordingly, it suggests that the determination be made annually on the basis of anticipated sources of finance for the coming budgetary year.

67. The Netherlands Government considers that the assessment should be made rather on structural lines, since any other approach would be incompatible with the principle of legal certainty.

68. The French Government supported that view at the hearing. The difficulties of application and the considerable uncertainty which would arise particularly in the case of more lengthy award procedures could only be overcome by adopting a structural approach. Any other approach might have the result of making the status of the body vary in the course of the award procedure purely as a result of temporary and short-term changes in funding.

(b) Opinion

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69. That the fundamental general principle of legal certainty in Community law applies when classifying financing was upheld by the Court of Justice in Mannesmann. The principle requires that provisions be clear and their application foreseeable by all those concerned. Accordingly, the application of objective and transparent criteria for determining the status of a body as being one governed by public law must be decisive.

70. Determining status on the basis of structural elements would admittedly have the advantage of legal certainty and clarity; it would not, however, enable actual or future variations in funding to be taken into account. Isolated instances of public funding, for example for building projects, would then be disregarded, contrary to the intention of the directive.

71. Taking the time of the procurement procedure as the time at which status is to be determined likewise does not necessarily reflect longer-term, and thus actual, financing. It would also open the way to manipulation.

72. Annual reassessment of their status, by contrast, might not offer the foreseeability required by the principle of legal certainty, since the status of the institution could change from year to year depending on the sources of its financing.

73. On the other hand, the basis for making the abovementioned calculations must be certain, correct and transparent. It ought therefore to be reasonable to do it on an annual basis in any event; not for a year in the past calculated from the time of the procurement procedure, however, but for the budgetary year in which the contract is awarded. For reasons of legal certainty and protection of tenderers that should be expanded, however, in order to ensure that in the course of the procurement procedure the establishment retains until completion of the contract the status it had at the time of the award procedure, even if the contract extends over a period of more than a budgetary year in the course of which the institution's financing changes.

74. The new assessment of the financing for the purposes of determining the establishment's status is only to be undertaken within a budgetary year (also to prevent manipulation) in the case of significant changes in funding which have already occurred or in the case of foreseeable future changes.

VI - Conclusion

75. In the light of those considerations I suggest the following answers to the questions which have been referred for a preliminary ruling:

(1) The expression financed for the most part by one or more contracting authorities in Article 1 of Council Directives 92/50/EEC, 93/37/EEC and 93/36/EEC covers in principle all funding provided by the State, regional or local authorities, or other bodies governed by public law to a body for the purpose of providing financial support for that body. Payments made by a contracting authority as consideration for services offered on competitive conditions by the body in the context of a reciprocal contract do not constitute public financing for the purpose of the directives.

(a) Research grants made by one or more contracting authorities to support research are covered by the expression financing by one or more contracting authorities.

(b) Payments made by one or more contracting authorities under a specific contract for the supply of services as consideration for the supply of services or for research work, and

(c) for the supply of other services, such as consultancy or the organisation of conferences, do not constitute financing by one or more contracting authorities.

(d) Student grants paid by local education authorities to universities in respect of tuition for named students constitute financing by one or more contracting authorities.

(2) For the most part means more than 50%.

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(3) Whether financing is for the most part is determined on the basis of all funds accruing to the body.

(4) Whether a body is to be regarded as one governed by public law is to be determined on the basis of the budgetary year of the procurement procedure. The status should be reviewed if there are significant changes in the way in which the body is financed during the budgetary year.

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Opinion of Mr Advocate General Jacobs delivered on 14 June 2001.
Kingdom of the Netherlands v European Parliament and Council of the European Union.
Annulment - Directive 98/44/EC - Legal protection of biotechnological inventions - Legal basis - Article 100a of the EC Treaty (now, after amendment, Article 95 EC), Article 235 of the EC Treaty (now Article 308 EC) or Articles 130 and 130f of the EC Treaty (now Articles 157 EC and 163 EC) - Subsidiarity - Legal certainty - Obligations of Member States under international law - Fundamental rights - Human dignity - Principle of collegiality for draft legislation of the Commission.
Case C-377/98.

1. In this case the Netherlands has brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) seeking annulment of Directive 98/44 on the legal protection of biotechnological inventions.

The Directive

2. Chapter I (Articles 1 to 7) of the Directive is entitled Patentability.

3. The Directive requires Member States to protect biotechnological inventions under national patent law. Although there is no definition of biotechnological inventions, it is clear that the concept essentially comprises inventions concerning a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used or inventions concerning a microbiological or other technical process or a product obtained by means of such a process. Microbiological process is defined as any process involving or performed upon or resulting in microbiological material. Biological material is defined as any material containing genetic information and capable of reproducing itself or being reproduced in a biological system. Biological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurred in nature; similarly an element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element.

4. The Directive provides that the following may not be patented: (i) plant and animal varieties; (ii) essentially biological processes for the production of plants or animals; (iii) the human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene; and (iv) inventions the commercial exploitation of which would be contrary to ordre public or morality. Examples of the latter are (a) processes for cloning human beings; (b) processes for modifying the germ line genetic identity of human beings; (c) uses of human embryos for industrial or commercial purposes; and (d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and animals resulting from such processes.

5. Chapter II of the Directive (Articles 8 to 11) concerns the scope of protection conferred by a patent. Chapter III (Article 12) concerns compulsory cross-licensing. Chapter IV (Articles 13 and 14) concerns the deposit and re-deposit of and access to a biological material. Chapter V (Articles 15 to 18) contains final provisions. The provisions of these chapters are referred to below as appropriate.

6. The Directive has a relatively long history, although the version finally adopted went through the legislative process with impressive speed.

7. In 1988 the Commission presented its first proposal for a Council Directive on the legal protection of biotechnological inventions. The proposed Directive started from the premiss that a subject

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matter of an invention shall not be considered unpatentable for the reason only that it is composed of living matter. That proposal ultimately foundered, principally because of the Parliament's resistance to an instrument which articulated no fundamental ethical principles governing the grant of patents in the context of animate matter.

8. In 1996 the Commission presented a fresh proposal. After substantial amendments proposed by the Parliament, it was adopted on 6 July 1998. The Netherlands voted against the Directive; Italy and Belgium abstained. The Directive required implementation by 30 July 2000.

9. There are 56 recitals in the preamble to the Directive as adopted, in contrast to a mere 18 articles, not all substantive. Many of the recitals are clearly designed to counter objections raised by the Parliament, both to the 1996 proposal and to the 1988 proposal. Not all the recitals are reflected in the articles of the Directive. The recitals and the substantive provisions of the Directive are considered further below in the context of the various heads of the Netherlands' claims.

The action for annulment

10. The Netherlands has challenged the validity of the Directive. It is clear from its application that its objection is in essence to the notion that plants, animals and parts of the human body may be patentable. The Netherlands considers that the right to a patent in the field of biotechnology should be limited to the biotechnological process and not extended to the products deriving therefrom: in other words, neither plants and animals as such, including genetically modified plants and animals, nor human biological material should be patentable.

11. The grounds invoked for the annulment of the Directive are that it (i) is incorrectly based on Article 100a of the Treaty; (ii) is contrary to the principle of subsidiarity; (iii) infringes the principle of legal certainty; (iv) is incompatible with international obligations; (v) breaches fundamental rights; and (vi) was not properly adopted since the definitive version of the proposal submitted to the Parliament and the Council was not decided on by the college of Commissioners.

12. As will be seen, some of the above grounds concern the interpretation and effect of the Directive in technical areas: thus for example the second head of the third ground questions the scope of the exclusion from patentability of plant and animal varieties. Other grounds raise substantive issues of broader import, such as the compatibility of the Directive with fundamental rights and with other international obligations. Finally, the first, second and sixth grounds concern more formal issues relating to the adoption of the Directive. Even those grounds, however, involve important issues of principle: one of the arguments in the context of the correct legal basis, for example, raises the question whether the Directive, by providing for a patent on life, creates a new intellectual property right. I propose to deal with the grounds for annulment in the order in which the Netherlands has presented them in its application, although other approaches can equally be envisaged.

13. The Netherlands is supported by Italy (whose written observations in intervention focus on the first and third grounds for annulment) and Norway (whose observations focus on the first, third and fourth grounds). The Parliament and Council are supported by the Commission (whose observations are limited to the sixth ground).

14. Two procedural matters should be mentioned at this point.

15. First, on 6 July 2000 the Netherlands lodged an application for interim measures, principally seeking suspension of operation of the Directive until the Court had ruled on the application for annulment. The European Parliament and the Council submitted written observations on the application for interim measures. A hearing was held on 18 July 2000 at which the Netherlands, the Parliament and the Council together with Italy and the Commission, which had both been granted leave to intervene,

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were present. The application for interim measures was dismissed by order of the President of the Court of 25 July 2000.

16. Second, the Council and the Parliament submit as a preliminary point that Norway's statement in intervention is inadmissible. Article 37 of the Statute of the Court of Justice requires an application to intervene by a State which is party to the Agreement on the European Economic Area to be limited to supporting the form of order sought by one of the parties. Article 93(5)(a) of the Rules of Procedure of the Court similarly requires that the statement in intervention contain a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties. In the present case, the Netherlands seeks the annulment of the Directive. In the introduction to its statement in intervention, Norway states that the Netherlands raises several questions which may have a bearing on whether or not the Directive falls within the area covered by the EEA Agreement, and on the implementation of the Directive into the EEA Agreement. It is nowhere stated that Norway is intervening in support of the form of order sought by the Netherlands. The conclusion of the statement in intervention is as follows:

Several of the questions presented by the Government of the Netherlands in its action for annulment of Directive 98/44/EC may have a bearing on whether or not the Directive falls within the EEA Agreement and on the implementation of the Directive into the EEA Agreement. Norway, therefore, respectfully requests that the Court take due account of the arguments set forth herein.

17. The Council adds that in any event Norway's observations in intervention have been largely overtaken by events, since Article 3(4) of Protocol 28 to the EEA Agreement requires the EFTA States to comply in their law with the substantive provisions of the European Patent Convention and since those provisions now include the provisions of the Directive (see further below).

18. I do not agree with the Council and the Parliament that Norway's statement in intervention is inadmissible. Norway explicitly stated in its application to intervene that it wished to intervene in support of the Netherlands. It is apparent from its statement in intervention, even if it is not explicitly stated, that Norway supports the Netherlands' arguments that Article 100a was the incorrect legal basis for the Directive, that the Directive infringes the principle of legal certainty and that it is incompatible with the Convention on Biological Diversity. It is also stated that the effect of such incompatibility is in the view of Norway that the Directive would have to be repealed, which may be taken to mean annulled, and that the consequence of the infringement of the principle of legal certainty is that the Directive should be annulled. I accordingly consider that Norway's statement in intervention is admissible.

The context of the Directive - patent law

19. A patent is a legal right conferred on an inventor in respect of a specific invention and entitling him to prevent others from making, using or selling the invention for the duration of the patent. Most developed legal systems have had a system of patent law for some time. The earliest known English patent, for example, was granted by Henry VI to Flemish-born John of Utynam in 1449. The patent conferred a 20-year monopoly for a method of making stained glass, required for the windows of Eton college, that had not been previously known in England.

20. Modern patent systems tend to impose more or less uniform requirements for the grant of a patent. Those requirements may be illustrated by the European Patent Convention, which came into force in 1978. Although not a Community instrument, since all Member States of the Union are parties to the Convention it in effect unifies the conditions for the grant of a patent throughout the Union.

21. The Convention establishes a system of law, common to the Contracting States, for the grant of patents for invention. A patent granted by virtue of the Convention is called a European patent

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and in each Contracting State for which it is granted has the effect of and is subject to the same conditions as a national patent granted by that State. Enforcement of a patent granted by virtue of the Convention is thus regulated not by the Convention but by national law and procedure.

22. A European patent is to be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step. A European patent is not however to be granted in respect of:

(a) inventions the publication or exploitation of which would be contrary to ordre public or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;

(b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.

23. The same criteria are used to define patentable subject-matter in the TRIPs Agreement, although the exclusions from patentability are there set out as options.

24. A further feature common to modern patent systems is a requirement that the patent application disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The description must include a detailed account of at least one way of carrying out the invention claimed and a statement of how the invention is capable of industrial application. Since patent applications are normally published, the sum of knowledge in the public domain is increased with each patent. Although that knowledge cannot of course be used by a third party for the duration of the patent to reproduce the invention, since that will normally constitute infringement, it can be built on and lead to further inventions.

25. Once conferred, a patent merely entitles the holder to prevent others from making, using or selling the patented invention in the territory in which the patent has effect. It confers no right of ownership as such, nor any absolute right to manufacture or otherwise exploit the invention. Thus the holder of a patent will still need to comply with national law when he makes, uses or sells his invention. He may for example need to obtain a licence or authorisation; he may even patent an invention (a type of weapon for example) the making, use or sale of which is prohibited by national law.

26. An example illustrates this point. Suppose that a superior type of copying machine were patented and that its enhanced performance meant that it could produce high quality counterfeit bank notes. The existence of a patent (which would be granted under most patent systems, including the European Patent Convention, on the basis that not all uses of the invention were contrary to ordre public or morality) would not of course legalise such use.

27. Normally, only exploitation for industrial and commercial purposes constitutes infringement of a patent, and patent laws specify that certain acts do not constitute infringement. Experimental use is one such exception: experiments aimed at perfecting, improving or further developing protected inventions do not infringe the patent.

The context of the Directive - biotechnology

28. Biotechnology is defined in the 1993 edition of the Shorter Oxford English Dictionary as the industrial application of biological processes. The Encyclopaedia Britannica defines it as the application to industry of advances made in the techniques and instruments of research in the biological sciences. For the purposes of the Convention on Biological Diversity it is defined as any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.

29. Biotechnology in that broad sense is as old as bread, wine, beer and cheese. Historically,

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biotechnological inventions such as processes using yeasts and fermentation were typically regarded as patentable: there was thus no general prohibition on patents involving such basic types of living matter although more sophisticated living matter was normally excluded from patentability by express provision or case-law.

30. Biotechnology in the modern sense of genetic manipulation was made possible by the remarkable advances in biochemistry, molecular biology and genetics in the latter half of the 20th century. The discovery in 1953 by Francis Crick and James Watson of the structure of DNA paved the way for further discoveries. Each DNA molecule is constructed as a double helix, or paired spirals, linked by bases of which there are four kinds. The nucleus of a cell contains several threads of DNA, called chromosomes. A gene is a segment of a chromosome, and hence a length of DNA, which contains the instructions to make a part of a protein. The sequence of the bases of the DNA contained in a cell makes up the genetic code of that cell. Cells need numerous different proteins in order to develop and function. Genes are responsible for particular proteins with their own function in living cells. When instructing a cell how to make a particular protein, part of the DNA helix is temporarily unzipped (the two strands separate) so that an imprint of its code may be copied into an RNA molecule (ribonucleic acid). That copy moves out of the nucleus and instructs the cell to assemble a protein or part of a protein.

31. DNA is present in all organisms (except for some viruses); it is accordingly possible to transfer a gene between unrelated species and even across genera and orders, for example between plants, bacteria, humans and other animals. Thus in principle any genetic characteristic of one organism can be transferred to another organism.

32. In the 1970s a method was discovered of extracting specific genes and parts of genes from chromosomes by restriction enzymes, which like biological scissors excise a fragment of DNA from a cell. The DNA can then be inserted into bacterial, viral or yeast cells by a laboratory procedure. A single gene (or several genes) can accordingly be transferred between organisms. The cells incorporating the foreign DNA can be grown in enormous numbers, cloning the imported fragment of DNA.

33. This type of recombinant DNA genetic engineering has made possible a number of processes of unquestionable benefit to mankind, such as the large-scale production of insulin for treating diabetes, interferon and other drugs for treating certain cancers, vaccines against diseases such as hepatitis B, the human growth hormone for the treatment of certain forms of dwarfism and the clotting factor missing in haemophilia.

34. Gene transfer is a different method of gene technology. Segments of DNA containing a specific gene or genes are first isolated as above and then incorporated into the DNA of a fertilised egg or, later, into embryonic cells. The new gene will be present in the adult organism and will be inherited by some descendants of that organism.

35. Cloning is a process whereby the nucleus of an unfertilised egg is removed and replaced with the nucleus of a somatic cell (namely a cell from an animal or plant other than the reproductive cells), which contains all the genetic material. If the treated egg survives and develops, the resulting animal will be a genetic clone of the animal which was the source of the somatic cell.

36. The biotechnological industry began to develop seriously after a decision by the US Supreme Court in 1980 that a live, human-made micro-organism is patentable subject matter. That case concerned an invention of a human-made, genetically engineered bacterium capable of breaking down crude oil. The Supreme Court held (by a 5:4 majority) that the micro-organism constituted a manufacture or composition of matter within the meaning of the Patent Act 1952. The Court noted that the Committee Reports accompanying the 1952 Act indicated that Congress intended statutory subject matter to include anything under the sun that is made by man.

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37. That ruling prompted the establishment of a number of commercial firms that manufacture quantities of gene-engineered substances for a variety of mostly medical and ecological uses.

38. In the 1980s Harvard University applied under the European Patent Convention for a patent for a mouse genetically engineered to contain a gene sequence making it more susceptible to cancer. In 1990 the Technical Board of Appeal of the European Patent Office ruled that the exception to patentability under Article 53(b) of the European Patent Convention applied to certain categories of animals but not to animals as such: it noted that Article 53(b), as an exception, must be narrowly construed. The patent was accordingly granted.

39. Developments in genetic engineering have caused concern in many quarters. Clearly technology which enables the genetic make-up of animals and humans to be modified and which has the potential to create human clones calls for careful regulation. Much of the understandable anxiety about the consequences of insufficiently regulated research in the field has been directed against legislation - such as the Directive - which governs the patentability of such inventions. Many commentators start from the assumption that such legislation means that any gene or gene sequence, or even the entire human genome, can now automatically be patented. That assumption is incorrect. The Directive leaves untouched the classic requirements for a patent of novelty, inventive step and industrial application. The mere discovery of a gene or gene sequence is no more patentable under the Directive than it was before.

The arguments as to legal basis

40. The Directive is based on Article 100a of the Treaty (now, after amendment, Article 95 EC), paragraph 1 of which requires the Council to adopt, by qualified majority and in accordance with the codecision procedure laid down in Article 189b (now Article 250 EC), measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

41. The Netherlands, supported by Italy, submits that Article 100a is not the correct legal basis for the Directive on several grounds and that, if it was considered necessary to regulate biotechnological inventions, Article 235 of the EC Treaty (now Article 308 EC), which requires unanimity, should have been used.

The relevant recitals and provisions of the Directive

42. The preamble to the Directive includes the following recitals:

(1) Whereas biotechnology and genetic engineering are playing an increasingly important role in a broad range of industries and the protection of biotechnological inventions will certainly be of fundamental importance for the Community's industrial development;

(2) Whereas, in particular in the field of genetic engineering, research and development require a considerable amount of high-risk investment and therefore only adequate legal protection can make them profitable;

(3) Whereas effective and harmonised protection throughout the Member States is essential in order to maintain and encourage investment in the field of biotechnology;

...

(5) Whereas differences exist in the legal protection of biotechnological inventions offered by the laws and practices of the different Member States; whereas such differences could create barriers to trade and hence impede the proper functioning of the internal market;

(6) Whereas such differences could well become greater as Member States adopt new and different legislation and administrative practices, or [as] national case-law interpreting such legislation

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develops differently;

(7) Whereas uncoordinated development of national laws on the legal protection of biotechnological inventions in the Community could lead to further disincentives to trade, to the detriment of the industrial development of such inventions and of the smooth operation of the internal market;

(8) Whereas legal protection of biotechnological inventions does not necessitate the creation of a separate body of law in place of the rules of national patent law; whereas the rules of national patent law remain the essential basis for the legal protection of biotechnological inventions given that they must be adapted or added to in certain specific respects in order to take adequate account of technological developments involving biological material which also fulfil the requirements for patentability;

(9) Whereas in certain cases, such as the exclusion from patentability of plant and animal varieties and of essentially biological processes for the production of plants and animals, certain concepts in national laws based upon international patent and plant variety conventions have created uncertainty regarding the protection of biotechnological and certain microbiological inventions; whereas harmonisation is necessary to clarify the said uncertainty;

...

(14) Whereas a patent for invention does not authorise the holder to implement that invention, but merely entitles him to prohibit third parties from exploiting it for industrial and commercial purposes; whereas, consequently, substantive patent law cannot serve to replace or render superfluous national, European or international law which may impose restrictions or prohibitions or which concerns the monitoring of research and of the use or commercialisation of its results, notably from the point of view of the requirements of public health, safety, environmental protection, animal welfare, the preservation of genetic diversity and compliance with certain ethical standards.

43. Article 1 of the Directive provides:

1. Member States shall protect biotechnological inventions under national patent law. They shall, if necessary, adjust their national patent law to take account of the provisions of the Directive.

2. This Directive shall be without prejudice to the obligations of the Member States pursuant to international agreements, and in particular the TRIPs Agreement and the Convention on Biological Diversity.

44. Article 11 of the Directive provides:

1. By way of derogation from Articles 8 and 9, the sale or other form of commercialisation of plant propagating material to a farmer by the holder of the patent or with his consent for agricultural use implies authorisation for the farmer to use the product of his harvest for propagation or multiplication by him on his own farm, the extent and conditions of this derogation corresponding to those under Article 14 of Regulation (EC) No 2100/94.

2. By way of derogation from Articles 8 and 9, the sale or any other form of commercialisation of breeding stock or other animal reproductive material to a farmer by the holder of the patent or with his consent implies authorisation for the farmer to use the protected livestock for an agricultural purpose. This includes making the animal or other animal reproductive material available for the purposes of pursuing his agricultural activity but not sale within the framework or for the purpose of a commercial reproduction activity.

3. The extent and the conditions of the derogation provided for in paragraph 2 shall be determined by national laws, regulations and practices.

The arguments that obstacles to trade have not been shown

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45. First, the Netherlands submits that, even if it is assumed that, as stated in recitals five and six in the preamble, there are actual or potential differences in national laws on the patenting of biotechnological inventions, it has not been proved that such differences in fact hinder or can hinder trade. Even if they did, the obstacles would be to trade with the United States and Japan, where the manufacture and patenting of biotechnological inventions is more advanced, and not within the internal market. In the absence of any evidence of differences in national laws or of effect on trade, harmonisation by way of a directive cannot be justified.

46. The Council and the Parliament refer to the Court's ruling in Spain v Council that recourse to Article 100a is justified where harmonising measures are necessary to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition [or] in so far as such disparities are liable to hinder the free movement of goods within the Community. In that case, the Court confirmed the validity of a regulation concerning the creation of a supplementary protection certificate for medicinal products adopted on the basis of Article 100a. The Court noted that, according to the Council, at the time the contested regulation was adopted provisions concerning the creation of a supplementary protection certificate for medicinal products existed in two Member States and were at the draft stage in another State. The regulation was intended to establish a uniform Community approach. It thus aimed to prevent the heterogeneous development of national laws leading to further disparities which would be likely to create obstacles to the free movement of medicinal products within the Community and thus directly affect the establishment and functioning of the internal market.

47. I would note that the above principles laid down in Spain v Council have more recently been refined by the Court in Germany v Parliament and Council. In that case the Court stated that, while recourse to Article 100a as a legal basis was possible if the aim was to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them. With regard to the measure's effect on competition, the Court stated that it was required to verify whether the distortion of competition which the measure purported to eliminate was appreciable and thus whether the measure actually contributed to eliminating appreciable distortions of competition. With regard to the measure's effect on the free movement of goods, the Court appears to have been less exacting: it is sufficient that obstacles to free movement may well arise. Although it had been demonstrated that no obstacle existed at the material time, the Court accepted that in view of the trend in national legislation... it is probable that obstacles to the free movement of... products will arise in the future and that in principle a harmonising measure could be adopted on the basis of Article 100a.

48. The Court has made it clear since an early stage that, in the absence of harmonisation, the national character of the protection of industrial property and the variations between the different legislative systems are capable of creating obstacles both to the free movement of patented products and to competition within the common market. It has moreover consistently recognised that the specific subject matter of a patent is the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, as well as the right to oppose infringements. Patents thus promote competition through innovation. Indeed the Netherlands implicitly recognises this, noting that the manufacture of biotechnological inventions is more advanced in the United States and Japan where, as mentioned above, biotechnological inventions have been readily patentable since 1980 and 1981 respectively. Heterogeneous and potentially or actually divergent national laws on legal protection, patentability, the extent of protection, derogations and limitations are clearly liable to distort competition within the Community and moreover to hinder the free movement of goods. Different levels of protection for an identical product would lead to fragmentation of

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the market into national markets where the product would be protected and others where it would not; the common market would not be a single environment for the economic activities of undertakings. The Court has explicitly recognised this in the context of intellectual property rights.

49. I accordingly conclude that the Council and Parliament were entitled to take the view that a harmonising measure was necessary to deal with disparities between the laws of the Member States concerning the patent protection of biotechnological inventions.

50. With regard to the Netherlands' argument that the Directive seeks in particular to make European industry more competitive vis-à-vis the United States and Japan, I agree with the Parliament that it is consistent with Article 100a that the harmonisation sought should improve the competitive position of European undertakings on the world market. Although that objective could be seen as an industrial policy objective, I have no doubt that it can lawfully guide the Community's action. Some would argue that similar considerations underlie the entire internal market programme, as it was conceived in 1985, and competition in world markets has often been said to motivate that programme. I would also point out that the EC Treaty now contains a title on industry, according to which the action of the Community and of the Member States shall also be aimed at fostering better exploitation of the industrial potential of policies of innovation, research and technological development (Article 130(1), now Article 157(1) EC). In Article 130(3) of the EC Treaty (now Article 157(3) EC) it is further stated that the Community shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of this Treaty.

The argument that Community harmonisation is inappropriate and ineffective

51. The Netherlands' second argument is based on the fact that recital 9 in the preamble refers to uncertainty deriving from international patent and plant variety conventions as a justification for harmonisation. The Netherlands submits that it is not for the European Union to undertake such harmonisation. It would have been preferable on several grounds to harmonise by amending the European Patent Convention, which would have effected more extensive harmonisation since States other than the Member States of the European Union are Contracting Parties. As it is, that convention now incorporates the Directive (by way of implementing regulations made by the Administrative Council of the European Patent Office), which is thus imposed on those Contracting Parties who are not Member States. Such a procedure has no place in the external relations of the Union with other European States.

52. That argument is to my mind misconceived, although as the Council suggests it appears implicitly to recognise that harmonisation in the area is necessary. In the context of the internal market, however, it is evident that Community legislation alone can guarantee harmonisation and uniform interpretation. Harmonisation at Community level not infrequently takes place against a background of international conventions the parties to which include both the Member States of the Union and third countries: in the area of intellectual property, for example, the Trade Marks Directive has some overlap with earlier agreements such as the Paris Convention for the protection of industrial property and the Madrid Agreement concerning the international registration of marks. The existence of that context does not however deprive the Community institutions of the competence in the area conferred upon them by the Treaty.

53. Moreover I agree with the Parliament that in any event amendment of the Convention, even if feasible given the cumbersome procedure and the involvement of third countries, would not guarantee harmonisation for two reasons in particular. First, in proceedings at national level to annul a European patent divergences of interpretation would develop, in contrast to the position under the Directive where national courts can refer questions of interpretation to the Court of Justice. Second, the Convention does not concern the extent of protection conferred by a patent, which is

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essential with regard to biotechnology and which is governed by national law. Furthermore those points themselves provide further support for the view that the Convention not merely would not guarantee harmonisation but is simply irrelevant for this aspect of the Directive, since important areas of patent law governed by the Directive are outside its scope.

54. As for the fact - criticised by the Netherlands - that the European Patent Convention now incorporates certain provisions of the Directive by means of a decision of the Administrative Council amending the Implementing Regulations, which are thus imposed on those contracting parties who are not Member States, it is not for the Court to rule on the manner in which the European Patent Office has chosen to reflect the Directive in its law and practice. It may however be thought that that choice suggests that the Patent Office, which has considerable experience in handling applications for patents for biotechnological inventions, does not anticipate major problems in the interpretation or application of the provisions of the Directive concerning the grant of such patents.

55. Italy adds that the fact that the Directive leaves scope for non-harmonised national rules regulating in particular public health, safety and environmental protection militates against the Directive's contributing to the free movement of the products concerned. That argument is in my view similarly based on a misconception of the function of patent law. As has been discussed above, a patent is a right merely to prevent others from infringing the patent and does not confer any absolute entitlement on the proprietor to exploit the patent: exploitation is always subject to national regulation. Many of the Court's rulings to the effect that an exercise of national patent rights which restricts the free movement of goods is contrary to Article 28 EC and hence unlawful concern patented pharmaceutical products: the fact that the marketing and use of such products is rigorously regulated in all Member States at the national level does not diminish the importance of the principle of the free movement of goods in limiting the exercise of national patent rights. Nor indeed does it mean that Community legislation for the harmonisation of national laws relating to supplementary protection certificates, which confer protection akin to patent protection, is misconceived, ineffective or unlawful.

56. I accordingly do not accept the argument that Community harmonisation is inappropriate and ineffective.

The argument that Articles 130 and 130f, together with Article 235, were the correct legal basis

57. Italy submits first that the aims of the Directive go beyond harmonisation, including objectives linked to support for industrial development in the Community and for scientific research in the genetic engineering sector. In support of that argument it refers to recitals one to three in the preamble to the Directive. Other provisions of the Treaty (Articles 130 and 130f (now Articles 157 and 163 EC)) are appropriate for legislation in the sectors of industry and research respectively, in conjunction with Article 235. The functioning of the internal market is a secondary objective of the Directive, which should therefore not have been based on Article 100a.

58. The Court has made it clear that the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review, including in particular the aim and content of the measure as they appear from its actual wording. Where moreover a measure pursues more than one objective, its principal objective is decisive for determining the correct legal basis.

59. The first three recitals in the preamble to the Directive do indeed refer to the importance of the protection of biotechnological inventions for the Community's industrial development, research and development in the field of genetic engineering and investment in the field of biotechnology. Recitals 5 to 7 however stress the need for the elimination of differences in national law on the protection of biotechnological inventions which could create barriers to trade and hence impede

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the proper functioning of the internal market. Recital 7 in particular states that disincentives to trade flowing from the uncoordinated development of national law would be to the detriment of the industrial development of such inventions and of the smooth operation of the internal market, thus linking the two aims. Recitals 8 and 9 make further reference to the harmonising aim of the Directive.

60. More fundamentally, it appears that, although the laws of all Member States concerning the conditions for the grant of a patent and the exceptions to patentability broadly reflect the European Patent Convention and are thus to some extent already aligned, there are none the less significant differences in some areas of national law and practice. It appears for example that some Member States already grant patents for biotechnological inventions involving animals: in France, for example, a patent was granted in 1991 for a process for producing a transgenic mouse and in Italy the first patent concerning a transgenic mammal was granted in 1996. The Parliament gives other examples of divergences in national law and practice the existence of which is not disputed by the Netherlands.

61. That harmonisation is the principal aim of the Directive is moreover borne out by its content: indeed Article 1(1) unequivocally requires Member States to adjust their national patent law to take account of its provisions. The extent to which the provisions of the Directive will affect industrial development in the Community and scientific research in the genetic engineering sector is more difficult to assess. What seems clear however is that the impact of the Directive on those areas is indissociably linked with its harmonising effect.

62. Although Articles 130 and 130f confer powers on the Community to undertake specific action in the fields they cover, they do not confer any legislative power and they leave intact the powers held by the Community under other provisions of the Treaty, even if the measures to be taken under the latter provisions pursue at the same time any of the objectives falling within Articles 130 and 130f.

63. In the present case, I consider that harmonisation is not an incidental or ancillary aim or effect of the Directive but is its essence and that Article 100a was accordingly the correct legal basis. Article 235 could not therefore have been used as the legal basis of the Directive, whether alone or in conjunction with other provisions, since it applies only where the Treaty has not elsewhere provided the necessary powers to legislate.

The argument that the Directive infringes Article 100a(3)

64. Italy refers also to Article 100a(3) of the Treaty, which requires the Commission to take as a base a high level of protection in its proposals based on Article 100a concerning health, safety, environmental protection and consumer protection. Italy submits that Article 100a cannot be the legal basis for a harmonising measure in a field involving fundamental interests such as health and the environment unless the contents of the proposal conform to Article 100a(3). It is clear from recital 14 in the preamble to the Directive that the Community legislature recognised the impact on health and the environment of the exploitation of biotechnological inventions but did not regulate those matters on the basis that it was for Member States to do so. The conditions for Article 100a are accordingly not met.

65. In my view the Directive does not fall within the scope of Article 100a(3). That paragraph applies to proposals... concerning health, safety, environmental protection and consumer protection. A proposal for a directive on the legal protection of biotechnological inventions is not covered by that paragraph. While it is indisputable that both the conduct of research culminating in biotechnological inventions and the use to which such inventions are put may have significant implications for health, safety and environmental protection in particular, the proposed measure did not seek to regulate such research or use from the standpoint of health, safety or environmental or consumer protection

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(in contrast to, for example, the Community legislation on the release into the environment of genetically modified organisms): indeed recital 14 expressly states that substantive patent law cannot serve to replace or render superfluous national, European or international law which may impose restrictions or prohibitions or which concerns the monitoring of research and of the use or commercialisation of its results, notably from the point of view of the requirements of public health, safety, environmental protection....

The argument that the Directive creates a new intellectual property right

66. The Netherlands submits that the Directive creates a specific right so that it cannot be said simply to harmonise national principles of patent law. The Directive requires Member States to protect biotechnological inventions under national patent law. A patent for biotechnological inventions is a patent on life. Biological matter, in particular living animals or plants, cannot be compared to dead matter which until a few years ago could alone be patented. The fact that biological matter can reproduce without human intervention means that protecting it by way of patents is different in kind from so protecting dead matter.

67. It seems to me, however, as submitted by the Parliament, that the patentability of living material is not an innovation introduced by the Directive but the recognition of what is actually happening in conformity with national law: the Member States have long recognised the patentability of certain inventions concerning a living material.

68. The Parliament refers to patents granted for yeast in Belgium and Finland in 1833 and 1843 respectively. More recently, in Germany the Bundesgerichtshof held in 1975 that new micro-organisms per se were susceptible to patent protection and in 1993 acknowledged the patentability of plants. Patents for biotechnological inventions involving transgenic animals have, as already mentioned, been granted in France and Italy in 1991 and 1996 respectively. Numerous European patents for biotechnological inventions have been granted since the early 1980s and recognised in the Member States to which they extend.

69. Moreover the Budapest Treaty on the international recognition of the deposit of micro-organisms for the purposes of patent procedure, which was signed in 1977 and which came into force in 1980, sought to address the problem of providing, with regard to applications for patents for living organisms such as yeasts and other self-replicating organisms, a written description in sufficient detail to satisfy the requirement in most patent law systems for sufficiency of disclosure. That Treaty permitted a specification in a patent application to be supplemented by the deposit of a sample of the organism at an authorised depositary. Applications for such patents have thus for more than 20 years been recognised and regulated at international level.

70. The notion of a patent on life furthermore appears to me to be unhelpful and unclear. As discussed above, a patent does not give rights of ownership or unfettered rights to exploit. It merely entitles the patent-holder to prevent others manufacturing, using or selling the invention without his consent. The patent-holder however is not absolved from compliance with national regulatory requirements in areas such as public health, safety, animal welfare and compliance with ethical standards. The Directive explicitly recognises this in recital 14. The Directive also explicitly recognises numerous limits to patentability in line with national laws and international conventions, as will be discussed in some detail in the context of the third ground for annulment.

71. The Netherlands adds that in addition to creating a new right consisting of a patent over the living products of biotechnological processes, the Directive also creates a new right, so-called farmers' privilege. That privilege, namely the right of a farmer to use for agricultural purposes products protected by patents, is well known in the field of plant protection but not in patent law.

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72. The farmers' privilege enshrined in Article 11 of the Directive has two aspects.

73. First, Article 11(1) permits a farmer to use the seed saved from a crop he has grown from patented seed sold to him for agricultural use in order to grow another crop. That derogation is similar in kind to that in Article 14(1) of Council Regulation No 2100/94 on Community plant variety rights (in turn based on provisions of the UPOV Convention 1961 and 1991), although it is more extensive since Article 14(1) of the Regulation is limited to specified plant species of fodder plants, cereals, potatoes and oil and fibre plants. The extent and conditions of the derogation are to correspond to those under Article 14 of the Regulation, which provides in particular that farmers other than small farmers are to pay an equitable remuneration to the holder.

74. Second, Article 11(2) provides an analogous privilege for breeding livestock. In other words, a farmer may use for an agricultural purpose (but not for commercial reproduction) patented breeding stock or other animal reproductive material which he has bought. According to the explanatory memorandum in the Commission's proposal for the Directive, the derogation authorises farmers to use the protected livestock for breeding purposes on their own farms, in order to replenish their numbers. Article 11(3) provides that the extent and the conditions of the derogation are to be determined at national level.

75. In my view it is clear that Article 11 does not create a new right since it is solely concerned with limiting the scope of protection conferred by a patent granted pursuant to the Directive. For further discussion of the protection from which Article 11 derogates, and the rationale for that protection, see the discussion of Articles 8 and 9 in paragraph 121 et seq. below.

76. I accordingly conclude that the argument that the Directive was incorrectly based on Article 100a and should therefore be annulled must be rejected.

The argument as to subsidiarity

77. Article 3b of the EC Treaty (now Article 5 EC) provides:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

78. Article 190 of the EC Treaty (now Article 253 EC) provides:

Regulations, directives and decisions adopted jointly by the European Parliament and the Council... shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.

79. The Netherlands' principal submission is that the Directive infringes the second paragraph of Article 3b. It refers to the points it made in the context of the first head (legal basis), which in its view refute any argument that the objectives of the Directive could not be sufficiently achieved by the Member States or that those objectives could be better achieved by the Community by reason of the scale or effects of the proposed action. The recitals in the preamble simply state that the legal protection of biotechnological inventions requires clarification (recitals 4 and 9) and that differences exist in the laws and practices of the Member States which could create barriers to trade and hence impede the proper functioning of the internal market (recitals 5 and

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7). Since however national patent law has been almost entirely harmonised by the European Patent Convention, the required clarification should be effected by amending that convention. The Member States are thus perfectly able to achieve that objective.

80. In the alternative, the Netherlands submits that it is not clear from the recitals that the second paragraph of Article 3b was taken into account as required by Article 190 and Germany v Parliament and Council.

81. In my view and for the reasons discussed in the context of the first head of argument (as to legal basis), it can properly be considered that the Directive was necessary in order to harmonise Member States' legislation on the patent protection of biotechnological inventions. Since - again for the reasons discussed above - such harmonisation could be effected only by the Community, and since the Community has exclusive competence in the approximation of national rules concerning the establishment and functioning of the internal market, the case for Community action has been adequately made out and the principle of subsidiarity is accordingly not infringed.

82. That the principle was respected is moreover apparent from, in particular, recitals 3, 5, 6, 7 and 9, which show that the Council and the Parliament considered the inadequacy of action at national level in the field of the legal protection of biotechnological inventions and recognised the necessity of harmonising certain principles. It is clear from the case-law of the Court that in such circumstances it is not necessary for the legislation to make express reference to the principle of subsidiarity.

83. Finally, clarification of the law by way of amendment of the European Patent Convention would, as the defendants point out, be inappropriate, ineffective and possibly not feasible.

84. I accordingly conclude that the Directive does not infringe the principle of subsidiarity. The argument that it should be annulled on that basis must therefore be rejected.

The argument as to legal certainty

85. The Netherlands, supported by Italy and Norway, submits that, notwithstanding the statement in its preamble that harmonisation is necessary to clarify the uncertainty regarding the protection of biotechnological inventions, the Directive does not wholly resolve uncertainties concerning the patentability of biotechnological inventions; moreover it creates further uncertainty since the precise meaning and scope of Articles 4, 6, 8 and 9 are not clear. The Directive accordingly infringes the principle of legal certainty.

86. Before looking more closely at the substance of those arguments, the effect of uncertainty in a Community act such as a directive must be considered. The Netherlands has cited no authority for its apparent view that, if the meaning of one or two provisions of the Directive is not entirely and exhaustively clear, the Directive should be annulled; nor has Italy or Norway. Nor indeed has the Court ever to my knowledge endorsed such a principle

87. Article 249 EC (formerly Article 189 of the EC Treaty) states that a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Directives are thus inherently liable not to deal exhaustively with the detail of matters within their scope. While that does not of course mean that unclear drafting is appropriate, it does suggest that the mere fact that a directive confers some discretion on the Member States is not in itself a ground for invalidating it.

88. Even where a provision of a directive is open to different interpretations, as the Netherlands alleges in the present case, I do not consider that that in itself is grounds for annulment. In recent cases in which the Court has held that a Member State, in incorrectly implementing an imprecisely

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drafted provision of a directive, gave the provision a meaning which it was reasonably capable of bearing, there has been no suggestion that the directive (or even the provision) should be regarded as invalid merely because it was imprecise and hence open to more than one interpretation. Similarly the Court in formulating the principle that only those provisions of directives which are clear and unambiguous may have direct effect has not to my knowledge suggested that all provisions not so precise and unconditional are thereby invalid.

89. I would on the other hand regard it as at least arguable that a provision in a directive which was wholly devoid of meaning, or manifestly irreconcilable with another provision thereof, may be invalid on that ground, although it does not necessarily follow in my view that the directive as a whole should thereby be annulled.

90. Against that background I will consider whether the provisions of the Directive alleged to infringe the principle of legal certainty are meaningless or contradictory to that extent. The arguments focus principally on the meaning and scope of, first, Article 6 and, second, Articles 8 and 9.

The arguments as to Article 6

The relevant recitals and provisions of the Directive

91. Recitals 36, 38 and 39 in the preamble read as follows:

(36) Whereas the TRIPs Agreement provides for the possibility that members of the World Trade Organisation may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law;

...

(38) Whereas the operative part of this Directive should also include an illustrative list of inventions excluded from patentability so as to provide national courts and patent offices with a general guide to interpreting the reference to ordre public and morality; whereas this list obviously cannot presume to be exhaustive; whereas processes, the use of which offend against human dignity, such as processes to produce chimeras from germ cells or [from] totipotent cells of humans and animals, are obviously also excluded from patentability;

(39) Whereas ordre public and morality correspond in particular to ethical and moral principles recognised in a Member State, respect for which is particularly important in the field of biotechnology in view of the potential scope of inventions in this field and their inherent relationship to living matter; whereas such ethical or moral principles supplement the standard legal examinations under patent law regardless of the technical field of the invention.

92. Article 6 of the Directive provides:

(1) Inventions shall be considered unpatentable where their commercial exploitation would be contrary to ordre public or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation.

(2) On the basis of paragraph 1, the following, in particular, shall be considered unpatentable:

(a) processes for cloning human beings;

(b) processes for modifying the germ line genetic identity of human beings;

(c) uses of human embryos for industrial or commercial purposes;

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(d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

93. The Netherlands and Italy put forward four arguments to the effect that Article 6 infringes the principle of legal certainty. I propose to deal separately with each of those arguments.

Are ordre public and morality sufficiently clear concepts?

94. First, it is argued that Article 6 gives insufficient guidance and the principles mentioned in the recitals for determining whether there is an infringement of ordre public or morality are general and equivocal. According to recital 39, the patent offices and courts must turn to the ethical and moral principles recognised in a Member State to supplement the standard legal examinations under patent law. It is therefore inevitable that Article 6 will be interpreted and applied divergently.

95. I would note at the outset that the concepts of ordre public and morality have a long and distinguished history as criteria for the lawfulness of the grant or exercise of intellectual property rights. In relation to trade marks, for example, Article 6 quinquies (A)(3) of the Paris Convention, dating from the 1911 Washington revision, provides for an exception to the general prohibition on denying registration or invalidating a trade mark where it is contrary to morality or public order. In relation to patents, Article 6(1) of the Directive is, as indicated above, to essentially similar effect as Article 53(a) of the European Patent Convention, although the Convention also prohibits the patenting of inventions the publication of which would be contrary to ordre public or morality. Article 53 itself reproduces almost verbatim Article 2 of the Strasbourg Convention of 1963, although that provision is optional (The Contracting States shall not be bound to provide for the grant of patents in respect of...). Article 27(2) of the TRIPs Agreement is also in similar terms, although again it is permissive rather than mandatory. Provisions such as Article 6(1) have been described as a well-known feature of patent law.

96. Community intellectual property legislation continues this pattern. The Community Trade Mark Regulation and the Trade Marks Directive both provide for the refusal of registration or invalidity of a mark which is contrary to public policy or to accepted principles of morality (contraire à l'ordre public ou aux bonnes moeurs). The Community Plant Variety Rights Regulation provides that there is an impediment to the designation of a variety denomination where it is liable to give offence in one of the Member States or is contrary to public policy (est susceptible de contrevenir aux bonnes moeurs dans un des Etats membres ou est contraire à l'ordre public). Directive 98/71 on the legal protection of designs provides that a design right shall not subsist in a design which is contrary to public policy or to accepted principles of morality (contraire à l'ordre public ou à la moralité publique). The amended proposal for a European Parliament and Council Directive approximating the legal arrangements for the protection of inventions by utility model provides that utility models shall not be granted in respect of inventions the exploitation of which would be contrary to public policy or morality (contraire à l'ordre public ou aux bonnes moeurs).

97. The concept of ordre public in particular also has wider significance in Community law. It is for example used in the French text of the Treaty, although it is usually rendered public policy in English. Articles 30, 39(3), 46(1) and 58(1)(b) (formerly Articles 36, 48(3), 56(1) and 73d(1)(b)) all refer (as grounds for permitted restrictions of the free movement of goods, the freedom of movement of workers, the freedom of establishment and the free movement of capital respectively) to ordre public (public policy in the English). The Court has recognised that the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another and that it is therefore necessary to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.

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98. The Community legislature has also resorted to the concept of ordre public in numerous harmonising measures, thus apparently seeing no contradiction in conferring a degree of discretion on national authorities in an area subject to harmonisation.

99. The concept of bonnes moeurs seems not to feature significantly in Community law apart from the measures of Community intellectual property legislation mentioned above. However it appears to be used interchangeably with moralité publique in those measures so can perhaps be regarded as synonymous. Article 30 of the Treaty includes moralité publique (public morality) among the permitted grounds for derogating from the free movement of goods. The Court considered the phrase in Henn and Darby and Conegate. In the former, the Court ruled that it was for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory. The Court confirmed that principle in Conegate, although ruling that on the facts the derogation was not applicable.

100. Thus the statement in recital 39 of the Directive that ordre public and morality correspond in particular to ethical or moral principles recognised in a Member State closely reflects the Court's interpretation and application of those concepts in the context of the Treaty. It cannot therefore in my view be argued that the approach of the Directive infringes the principle of legal certainty.

101. The application by national authorities of the concepts of ordre public and morality, however, will always be subject to review by the Court: Member States do not have an unlimited discretion to determine their scope. The Court has stated that recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society. That statement clearly demonstrates that the Court's approach is essentially similar to that of the European Patent Office, whose guidelines for substantive examination state that the purpose of the ordre public and morality provision is to exclude from protection inventions likely to induce riot or public disorder, or to lead to criminal or other generally offensive behaviour.... National patent authorities which have been acting in the light of those guidelines since the European Patent Convention came into force in their Member State should accordingly experience no conflict once the Directive is in force.

102. It may be added that the discretion of a Member State to determine the scope of the concept of public morality in accordance with its own scale of values, so defined by the Court more than 20 years ago, should perhaps now be read with some caution. In this area, as in many others, common standards evolve over the years. It may be that the ethical dimension of some of the basic issues within the scope of the Directive is now more appropriately regarded as governed by common standards. That was clearly the view of Technical Board of Appeal 3.3.4 of the European Patent Office in 1995, when it stated in Plant Genetic Systems that the concept of morality is related to the belief that some behaviour is right and acceptable whereas other behaviour is wrong, this belief being founded on the totality of the accepted norms which are deeply rooted in a particular culture. For the purposes of the EPC, the culture in question is the culture inherent in European society and civilisation. The fact that some ethical issues may be more appropriately evaluated in the context of the culture of a particular Member State and others are susceptible to a common standard does not however in my view preclude - either here or elsewhere - a degree of harmonisation.

What is the meaning and purpose of the proviso in Article 6(1)?

103. Second, the Netherlands and Italy submit that the meaning and purpose of the proviso in Article 6(1), which states that exploitation of an invention shall not be deemed to be contrary to ordre public or morality merely because it is prohibited by law or regulation, are not clear. Moreover,

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the statement in recital 14 that a patent for invention does not authorise the holder to implement that invention is contrary to the fundamental principles of national and international patent law according to which the grant of a patent confers on the holder the exclusive right commercially to exploit the invention; furthermore, if it were correct, it would be unnecessary to exclude the patentability of inventions whose commercial exploitation was contrary to ordre public and morality.

104. The proviso appears in both Article 53(a) of the European Patent Convention and Article 2 of the 1963 Strasbourg Convention. It pre-dates both those instruments, however, being drawn from Article 4 quater of the Paris Convention. That provision, which was added by the 1958 Conference of Revision at Lisbon, states:

The grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law.

105. The Bureau international de la propriété intellectuelle (the predecessor of the World Intellectual Property Organisation) has explained in a publication that the reason for that provision is that restrictions or limitations may be temporary in nature so that the patent will acquire value once they have been removed. Moreover the patented invention so restricted may be the basis for further patents which do not fall within the restrictions: there is in that case no reason to deprive the holder of the first patent of licence-fees etc. to which the link between the two inventions might entitle him.

106. It is moreover not correct to assert that it would be purposeless to grant a patent for an invention the exploitation of which is prohibited. As suggested above, the inventor may wish to obtain protection in anticipation of a change in the regulatory structure enabling him to exploit his invention in the future. A good topical example is genetically modified organisms - there is a general moratorium on the use of these in the European Union at the moment, but it will not necessarily be indefinite. Similarly at national level an inventor may anticipate a change of government. Alternatively, an inventor may wish to manufacture an invention in a Member State where the exploitation (but not the manufacture) of the invention is prohibited, with a view to exporting it to States in which its exploitation is not prohibited.

107. Accordingly I do not accept that the proviso in Article 6(1) is either unclear in itself or incompatible with the statement in recital 14. Nor do I accept that that statement is contrary to the general principles of patent law: although it is correct that the grant of a patent confers the exclusive right to exploit the invention, that right is, as discussed above, to be exercised in accordance with the applicable national laws and regulations. The grant of the patent thus in itself confers no absolute, positive right to exploit, but merely the right to prevent others from exploiting the invention in the territory where the patent is recognised.

Does ordre public encompass prejudice to the environment?

108. Third, the Netherlands and Italy refer to recital 36, which notes that the TRIPs Agreement recognises in the context of ordre public and morality the grounds of protection of human, animal or plant life or health and the avoidance of serious prejudice to the environment. That raises the question whether, for the purpose of Article 6(1), serious prejudice to the environment, or the risk thereof, may fall within the concept of ordre public.

109. I have already discussed in general terms the scope of the ordre public exception. Preservation of the environment must be regarded in the present state of Community law as one of the fundamental interests of society. That was recognised by the Court as long ago as 1988 in Commission v Denmark and is now enshrined in Article 2 of the Treaty which includes the promotion of a high level of protection and improvement of the quality of the environment among the Community's tasks. The fundamental

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interests of society referred to by the Court in Bouchereau must to my mind now be understood as extending to the environment. A genuine and sufficiently serious threat to the environment would thus fall squarely within the concept of ordre public; there is accordingly no incompatibility between recital 36 and Article 6(1).

What is the status of recital 38?

110. Finally, the Netherlands states that, although Article 6(2) lists examples of inventions to be considered unpatentable in accordance with Article 6(1), that list does not include (and the Directive does not otherwise provide for) the important exception to patentability spelt out in the last phrase of recital 38: processes, the use of which offend against human dignity, such as processes to produce chimeras from germ cells or [from] totipotent cells of humans and animals, are obviously also excluded from patentability. The Netherlands thus appears to object to the fact that an exception mentioned in a recital is not reflected in the body of the Directive.

111. It appears to me, however, as indicated by the Parliament, that that exception falls within the exclusion from patentability of processes for modifying the germ line genetic identity of human beings in Article 6(2)(b). A chimera is an organism or recombinant DNA molecule created by joining DNA fragments from two or more different organisms. A germ cell is a cell destined to become a sperm or an egg. A totipotent cell is a cell having unlimited capability. The production of chimeras from germ cells or from totipotent cells of humans and animals will inevitably modify the germ line genetic identity of human beings.

112. Even if that were not so, I cannot see that a legislative measure should be annulled for lack of legal certainty merely because an example of conduct excluded from the scope of that measure appears in its preamble but not in its substantive provisions. It is not moreover an unprecedented legislative technique to give an illustrative, non-exhaustive list of examples of situations where an ordre public exception will apply: see for example Article 9(7) of Directive 98/34 laying down a procedure for the provision of information in the field of technical standards and regulations as amended by Directive 98/48 and Article 3(4)(a)(i) of the Directive on electronic commerce.

The argument as to plant and animal varieties

The relevant recitals and provisions of the Directive

113. Recitals 31 and 32 in the preamble read as follows:

(31) Whereas a plant grouping which is characterised by a particular gene (and not its whole genome) is not covered by the protection of new varieties and is therefore not excluded from patentability even if it comprises new varieties of plants;

(32) Whereas if an invention consists only in genetically modifying a particular plant variety, and if a new plant variety is bred, it will still be excluded from patentability even if the genetic modification is the result not of an essentially biological process but of a biotechnological process.

114. Article 4(1) and (2) provides:

1. The following shall not be patentable:

(a) plant and animal varieties;

(b) essentially biological processes for the production of plants or animals.

2. Inventions which concern plants or animals shall be patentable if the technical feasibility of the invention is not confined to a particular plant or animal variety.

115. Plant variety is defined for the purpose of the Directive by reference to the definition in

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Article 5 of Regulation No 2100/94.

116. Article 8 provides:

1. The protection conferred by a patent on a biological material possessing specific characteristics as a result of the invention shall extend to any biological material derived from that biological material through propagation or multiplication in an identical or divergent form and possessing those same characteristics.

2. The protection conferred by a patent on a process that enables a biological material to be produced possessing specific characteristics as a result of the invention shall extend to biological material directly obtained through that process and to any other biological material derived from the directly obtained biological material through propagation or multiplication in an identical or divergent form and possessing those same characteristics.

117. Article 9 provides:

The protection conferred by a patent on a product containing or consisting of genetic information shall extend to all material, save as provided in Article 5(1), in which the product is incorporated and in which the genetic information is contained and performs its function.

118. In the second argument as to legal certainty, the Netherlands, Italy and Norway refer to several aspects of the provisions of the Directive concerning plant and animal varieties whose meaning and effect are allegedly unclear. I propose to deal separately with each of those points.

The argument as to Articles 8 and 9

119. First, the Netherlands and Norway submit that it is not clear whether plant varieties are in all circumstances excluded from patentability. Article 4(1)(a) provides that plant and animal varieties are not patentable. However, according to Articles 8 and 9 a patent may be obtained for a biotechnological process and its products, even plants and animals. If that process creates a new variety, the protection conferred by the patent will apparently extend to that variety. Moreover, if such a process leads to a new plant variety covered by a plant variety right there may be a conflict between the holders of the patent and of the plant variety right which cannot be wholly resolved by the system of cross-licences under Article 12.

120. In my view there is no conflict between Article 4(1)(a) on the one hand and Articles 8 and 9 on the other.

121. A patent for a product normally gives the holder the exclusive right to manufacture that product (subject to compliance with applicable laws and regulations). In the case of patented material which is capable of reproducing itself, the value of the patent would clearly be eroded if it did not extend to future generations of such material. For example, if the purchaser of patented seeds were able to use the seeds produced by the crop grown from the purchased seeds, the value of that patent would be much reduced. Article 8(1) accordingly states that in such cases the protection conferred by the original patent extends to future generations of biological material derived through propagation or multiplication. Recital 46 expresses that principle in terms of the patent-holder's entitlement to prohibit the use of patented self-reproducing material in situations analogous to those where it would be permitted to prohibit the use of patented, non-self-reproducing products, that is to say the production of the patented product itself. (With regard to seeds, as discussed above Article 11(1) derogates from that protection in prescribed circumstances and for a fee.)

122. Article 8(2) similarly adapts a well-known principle of traditional patent law to the exigencies of biotechnological inventions. Where the subject-matter of a patent is a process, the protection conferred by the patent extends to the products directly obtained by such a process. That principle has been incorporated in international patent legislation since at least 1958, when Article 5 quater

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was inserted into the Paris Convention. It finds expression in Article 64(2) of the European Patent Convention, which provides:

If the subject-matter of a European patent is a process, the protection conferred by the patent shall extend to products directly obtained by such process.

123. If the products so obtained are themselves capable of replication, the problem discussed in paragraph 121 will arise. For example, a patented process may result in the production of a micro-organism which can be cloned. If such material could be freely propagated by a purchaser, the value of the process patent would be nullified. Article 8(2) accordingly makes it clear that the protection conferred on biological material directly obtained by a patented process extends to future generations of that material.

124. Article 9 caters for the situation where a patent confers protection on a product containing or consisting of genetic information, such as a particular DNA sequence, or a particular gene. It extends the protection conferred by such a patent to all material, subject to the exception in Article 5(1), in which the product is incorporated and in which the genetic information is contained and performs its function. Thus where the DNA sequence or gene is incorporated into a host micro-organism which may be multiplied, the patent protection enjoyed by it will extend to that micro-organism.

125. The Netherlands and Norway argue that, notwithstanding the exclusion from patentability of plant varieties in Article 4(1)(a), a plant variety may benefit from patent protection by virtue of Articles 8 and 9.

126. That proposition is to my mind based on an incorrect analysis of the position: it fails to distinguish the concept of patentability from the concept of the protection conferred by a patent. Both concepts may of course be relevant to a single situation: thus where, for example, a patented gene which confers resistance to herbicides is incorporated into a plant variety other than by or with the consent of the patent-holder, that use of the gene will infringe the patent. If the original patent for the gene did not protect against such use, it would clearly be of very little value. That does not mean, however, that the plant variety will itself be patentable. An example from the field of traditional technology may help to make this clear. Historically, many countries prohibited the patenting of pharmaceutical products. If an unpatentable pharmaceutical product were manufactured which incorporated a specific chemical compound which had been patented, clearly that patent would be infringed by the manufacture of the pharmaceutical product, notwithstanding that the latter product could not itself benefit from patent protection.

127. Articles 8 and 9 thus do not mean that plant varieties will be patentable per se. A direct conflict between the holder of a patent for a given plant variety and the holder of a plant variety right for that variety cannot therefore arise. What may frequently happen however is that a plant breeder will wish to purchase or use a plant variety right in circumstances where that purchase or use will infringe an existing patent, for example on a gene incorporated into that plant variety. Article 12 of the Directive provides for a system of compulsory cross-licences on reasonable terms where in such circumstances the holder of the plant variety right has applied unsuccessfully to the patent-holder for a licence and where the plant variety constitutes significant technical progress of considerable economic interest compared with the invention claimed in the patent.

128. There is thus no conflict between Article 4(1)(a) on the one hand and Articles 8 and 9 on the other.

The argument that animal varieties is not defined

129. The Netherlands objects that the Directive nowhere defines the term animal varieties, used in Article 4(1)(a). The term plant varieties, also used in that article, is by contrast defined

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in Article 2(3). The scope of the exception for animals is accordingly unclear.

130. The exclusions from patentability in Article 4(1)(a) of the Directive echo those in Article 53(b) of the European Patent Convention which are in turn based on Article 2(b) of the Strasbourg Convention. That context does not in this case help with the interpretation of the terms used; one must turn therefore to the terms themselves.

131. Admittedly, there is no generally recognised taxonomic definition for variety as there is for species or genus, although it may be noted that the Shorter Oxford English Dictionary gives as the biological definition of variety:

A taxonomical grouping ranking next below a sub-species (where present) or species, whose members differ from others of the same species or sub-species in minor but permanent or heritable characters: the organisms which compose such a grouping.

All the other language versions of the Directive use a word meaning breed, which is consistent with the above definition. Understood in that way, the concept of animal variety is in my view not ambiguous.

The arguments as to recitals 31 and 32 and Article 4(1)(a) and 4(2)

132. The Netherlands, supported by Norway, puts forward two arguments to the effect that the above provisions are contradictory and hence infringe the principle of legal certainty.

133. First, recital 31 states that a plant grouping which is characterised by a particular gene is not covered by the protection of new varieties and is therefore not excluded from patentability even if it comprises new varieties of plants. In the text of the Directive however exclusion from patentability is not linked to the possibility of obtaining a plant variety right. Moreover recital 32 states that an invention which genetically modifies a plant variety and by which a new plant variety is obtained will still be excluded from patentability, which contradicts recital 31. However, recital 32 is not logical, since the appearance of a new plant variety must be irrelevant from the point of view of patentability: no patent may be obtained for a plant variety as such.

134. Second, Article 4 is also illogical: Article 4(1)(a) excludes from patentability plant and animal varieties in the plural while under Article 4(2) only inventions concerning one single variety are unpatentable. It is unthinkable in scientific terms that an invention should be technically applicable to one plant or animal variety alone: any invention linked to a genetic modification of a plant or animal will be applicable to several varieties. Article 4(2) is thus meaningless.

135. As a preliminary point, it is useful to mention the reasons underlying the exclusion of plant and animal varieties from patentability in the Directive, which is in the same terms as exclusions in the European Patent Convention and the Strasbourg Convention (although in the Strasbourg Convention the exclusion is expressed as an option).

136. In 1961, and hence even before the Strasbourg Convention was signed, the majority of the States which would subsequently sign the two later conventions signed the UPOV Convention. The UPOV Convention in its original version provided that members could confer either special plant variety protection or patent protection (in either case under national law) on plant varieties within the scope of the Convention, but not both types of protection. Article 2(b) of the Strasbourg Convention and Article 53(b) of the later European Patent Convention exclude patent protection for plant varieties in recognition of this internationally accepted approach.

137. It is helpful to bear in mind that, at the time the Directive was being drafted and going through the legislative process, the scope of the exception for plant varieties in Article 53(b) was unclear.

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138. In February 1995 Technical Board of Appeal 3.3.4 of the European Patent Office had delivered a decision widely interpreted as holding - contrary to earlier case-law - that a claim embracing plant varieties within its subject-matter was not allowable. In November 1995 the Enlarged Board of Appeal stated that, correctly interpreted, that decision had held that plants grown from cells into which a gene sequence conferring resistance to herbicides had been inserted were as a result of that genetic modification a plant variety within the meaning of Article 53(b).

139. Clearly that ruling, the effect of which was that any genetically modified plant was regarded as a plant variety and hence unpatentable, would have seriously undermined one of the principal objectives of the Directive. The Council and the Parliament have confirmed in their written observations to the Court that that case-law of the European Patent Office explains the wording of the relevant provisions of the Directive, which were drafted so as to ensure that they did not lead to the same result. Recital 31 states that a plant grouping characterised by a particular gene is not covered by the protection of new varieties even if it comprises new varieties. That situation however must be distinguished from an invention which consists only in genetically modifying a particular plant variety which itself results in a new variety: in such a case, recital 32 states that the exception to patentability will apply. Article 4(2) in effect reverses the decision in Plant Genetic Systems: an invention - such as the genetic modification of a plant so as to increase its resistance to a herbicide - may be patented if its technical feasibility is not confined to a particular variety, or to put it another way, it will not be excluded from patentability solely because the claim encompasses plant groupings which embrace more than one variety.

140. It may be noted that the above interpretation of recitals 31 and 32 and Article 4(2) is in accordance with the current case-law of the European Patent Office following the decision in December 1999 of the Enlarged Board of Appeal in the Novartis case.

141. I accordingly conclude that all the arguments to the effect that the Directive should be annulled on the ground that it infringes the principle of legal certainty should be rejected.

The argument as to the infringement of international obligations

142. The Netherlands submits that, in adopting the Directive, the Parliament and Council infringed Article 228(7) of the EC Treaty (now Article 300(7) EC) since the Directive is incompatible with various international obligations.

143. Article 228 is concerned with agreements concluded between the Community and one or more States or international organisations. Article 228(7) provides:

Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.

144. The international obligations invoked by the Netherlands arise under the TRIPs Agreement, the Agreement on Technical Barriers to Trade, the European Patent Convention and the Convention on Biological Diversity.

145. The Council submits as a preliminary point that the question whether a Community act is unlawful because it infringes provisions of an international agreement to which the Community is a party arises only if those provisions have direct effect. The Council considers that the provisions of the TRIPs Agreement, the Agreement on Technical Barriers to Trade and the Convention on Biological Diversity by their nature do not have direct effect. Their alleged infringement cannot therefore be invoked as a ground for reviewing the legality of the Directive.

146. I do not however consider that, on the assumption that the provisions of the international agreements referred to do not have direct effect, that necessarily supports the conclusion which the Council draws. In Germany v Council, relied on by the Council as authority for its submission,

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the Court stated that it could review the lawfulness of a Community act from the point of view of international obligations (the GATT rules) which did not have direct effect if the Community intended to implement a particular obligation entered into within the framework of those rules or if the Community act expressly referred to specific provisions thereof. It is that criterion rather than direct effect which seems appropriate in this context.

147. More generally, it might be thought that it is in any event desirable as a matter of policy for the Court to be able to review the legality of Community legislation in the light of treaties binding the Community. There is no other court which is in a position to review Community legislation; thus if this Court is denied competence, Member States may be subject to conflicting obligations with no means of resolving them.

148. I accordingly propose to consider the substance of the Netherlands' arguments concerning the alleged infringement by the Directive of various international obligations of the Member States notwithstanding the Council's submission.

Infringement of the TRIPs Agreement

149. Recitals 12 and 36 in the preamble to the Directive read as follows:

(12) Whereas the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)... signed by the European Community and the Member States, has entered into force and provides that patent protection must be guaranteed for products and processes in all areas of technology;

...

(36) Whereas the TRIPs Agreement provides for the possibility that members of the World Trade Organisation may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

150. Article 1(2) of the Directive provides:

This Directive shall be without prejudice to the obligations of the Member States pursuant to international agreements, and in particular the TRIPs Agreement and the Convention on Biological Diversity.

151. Article 27(3)(b) of the TRIPs Agreement permits members to exclude from patentability:

plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes....

152. The Netherlands submits that the Directive prevents Member States from choosing whether to use that option since it provides for a system of patentability which extends to plants and animals other than plant and animal varieties. The Directive is accordingly incompatible with the TRIPs Agreement.

153. It seems to me that that argument can be met without needing to discuss further whether Recitals 12 and 36 and Article 1(2) of the Directive are sufficient to confer competence on the Court to review the legality of the Directive in the light of the TRIPs Agreement.

154. The option in Article 27(3)(b) of the TRIPs Agreement allows WTO Members to exclude a wide range of subject-matter from patentability. The Community, a Member, has chosen, in Article 4(1) of the Directive, to exclude only part of that range from patentability. The Community was thereby exercising the option in accordance with Article 27(3). The fact that that option is no

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longer available to the Netherlands is a consequence not of any infringement of the TRIPs Agreement but of the harmonising effect of the Directive.

155. Moreover the Netherlands cannot rely on Article 1(2) of the Directive. That provision states that the Directive is to be without prejudice to Member States' obligations pursuant to the TRIPs Agreement. The Netherlands' obligations under that Agreement are however not affected by Article 4(1) of the Directive, which simply exercises a right (of option) and does not affect such obligations.

Incompatibility with the Agreement on Technical Barriers to Trade

156. The Netherlands submits that the Directive contains technical regulations within the meaning of the Agreement on Technical Barriers to Trade, Article 2 of which regulates the adoption of such regulations. Moreover notice of draft technical regulations must be published and notified to the Secretariat of the World Trade Organisation in accordance with Article 2.9 of the Agreement. The Netherlands is not aware that the prescribed procedure has been followed; in any event, it is not apparent from the Directive itself so that the Court cannot monitor compliance.

157. The Agreement on Technical Barriers to Trade aims to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade. Article 1.3 provides that all products, including industrial and agricultural products, are to be subject to the Agreement. The Agreement requires Members to ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade and imposes certain requirements of publication and notification with regard to technical regulations which may have a significant effect on trade of other Members. Technical regulation is defined as follows:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

158. The Agreement on Technical Barriers to Trade is, like the TRIPs Agreement, a WTO Agreement. The Directive makes no reference to it, nor is there any suggestion that the Directive is intended to implement it, within the meaning of the Court's case-law. The Agreement cannot therefore in my view be invoked in proceedings for the annulment of a directive.

159. I cannot in any event see any argument to support the assertion that the Directive is a technical regulation as defined by the Agreement and hence within the scope of the Agreement. It does not lay down product characteristics within the meaning of the Agreement, nor does it create obstacles to international trade. I accordingly consider that the Netherlands' submission on this head should be dismissed.

Incompatibility with the European Patent Convention

160. Article 53(a) of the European Patent Convention provides that a European patent may not be granted in respect of inventions the publication or exploitation of which would be contrary to ordre public or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States.

161. Article 6(1) of the Directive provides that inventions shall be considered unpatentable where their commercial exploitation would be contrary to ordre public or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation. Article 6(2) specifies several processes and one use which are in particular to be considered unpatentable.

162. The Netherlands notes that the criterion of unpatentability under the Directive is thus whether

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the commercial exploitation of an invention is contrary to ordre public or morality. The criterion under the Convention however is whether the publication or exploitation of an invention is contrary to ordre public or morality. Moreover a national patent will have to be refused on the specific grounds mentioned in Article 6(2) of the Directive, whereas the Convention provides a more general ground. An invention which has been considered unpatentable under the Directive may thus none the less be lawful in a Member State as a European patent. The Directive and the Convention are accordingly incompatible, and Article 1(2) of the Directive is thus negated.

163. However, it is clear to me that Article 228(7) of the EC Treaty does not apply to the European Patent Convention since that Convention is not an agreement concluded by the Community. The Community is accordingly not bound by the Convention and the Directive cannot infringe it. The alleged incompatibility between the Convention and the Directive cannot therefore, even if substantiated, be a ground for annulment of the Directive.

164. In any event, any differences between the substantive requirements of the two instruments are to my mind marginal. As demonstrated in the context of the Netherlands' third ground of annulment, and in particular in discussing the scope of the ordre public exception, there is no reason to consider that the concept of ordre public falls to be interpreted differently in the Convention and in the Directive. Any risk that national courts will, when applying national law implementing the Directive, interpret the concept differently from the European Patent Office when applying the Convention is now moreover even further reduced since the entire text of the Directive has (since the present case was lodged) been incorporated in the Implementing Regulations to the Convention, which state that the Directive shall be used as a supplementary means of interpretation.

165. Admittedly there remains the point that the prohibition on patentability in the Convention extends to inventions whose publication would be contrary to ordre public and morality whereas the prohibition in the Directive does not, referring solely to commercial exploitation. That difference however to my mind has no practical impact, since an invention whose publication but not whose commercialisation would be so contrary seems scarcely conceivable.

166. I accordingly consider that the Netherlands' submission on this head should be dismissed.

Incompatibility with the Convention on Biological Diversity

167. Recitals 55 and 56 in the preamble to the Directive state:

(55) Whereas following Decision 93/626/EEC the Community is party to the Convention on Biological Diversity of 5 June 1992; whereas, in this regard, Member States must give particular weight to Article 3 and Article 8(j), the second sentence of Article 16(2) and Article 16(5) of the Convention when bringing into force the laws, regulations and administrative provisions necessary to comply with this Directive;

(56) Whereas the Third Conference of the Parties to the Biodiversity Convention, which took place in November 1996, noted in Decision III/17 that "further work is required to help develop a common appreciation of the relationship between intellectual property rights and the relevant provisions of the TRIPs Agreement and the Convention on Biological Diversity, in particular on issues relating to technology transfer and conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising out of the use of genetic resources, including the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".

168. Article 1(2) of the Directive provides:

This Directive shall be without prejudice to the obligations of the Member States pursuant to

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international agreements, and in particular the TRIPs Agreement and the Convention on Biological Diversity.

169. The Convention on Biological Diversity, signed by the Community and all the Member States on 5 June 1992 and approved by the Community on 25 October 1993, seeks to ensure the sustainable conservation and use of biological diversity. An important aspect is the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies. Norway, as a member of the European Economic Area, is also a party to the Convention.

170. Genetic resources are defined as genetic material of actual or potential value. Genetic material is defined as any material of plant, animal, microbial or other origin containing functional units of heredity. Technology includes biotechnology.

171. Article 3 of the Convention provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

172. Article 8 of the Convention lays down certain measures to be taken to encourage biological diversity in natural habitats. Paragraph (j) requires the Contracting Parties to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

173. Article 16(2) of the Convention requires the provision and/or facilitation of access to and transfer of technology, including biotechnology, to developing countries under fair and most favourable terms. The second sentence of Article 16(2) states that, in the case of biotechnology subject to patents, such access and transfer are to be provided on terms which recognise and are consistent with the adequate and effective protection of intellectual property rights. Article 16(5) states that patents may have an influence on implementation of the Convention and requires the Contracting Parties to ensure that such rights are supportive of and do not run counter to its objectives.

174. The Netherlands submits that the relationship between the patentability of biotechnological inventions and the obligations flowing from the Convention on Biological Diversity is unclear. In particular it is not clear to what extent the grant of a patent for a biotechnological invention obtained from, or consisting of, a biological material which is to be found exclusively in developing countries or developed by traditional methods is compatible with the obligation equitably to share the knowledge and benefits of genetic resources. Where a patent has been granted, the rights of the holder cover not only the protected biotechnological invention or material but also the products of that material. Farmers in developing countries will therefore be able to profit from that invention only after payment of dues to the patent-holder. Implementation of the Directive may accordingly involve infringing the Convention.

175. Moreover, although the Directive draws a clear distinction between inventions, which are patentable, and discoveries, which are not, there is a risk that traditional products and processes originating in developing countries may be mistakenly granted a patent even though they are discoveries rather than inventions: it is in practice difficult to determine whether living material is a discovery or an invention, precisely because not all traditional products and processes are known. In that case, the income from such patents would benefit not the developing country concerned but the (Western) patent-holder. The developing country would have to launch lengthy and costly legal proceedings to challenge a patent once granted, which would conflict with the requirement in the Convention

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that knowledge and the benefit of genetic resources in the developing countries should be justly shared.

176. Norway submits that several aspects of the Directive are incompatible with the object and purpose of the Convention. Implementation of the Directive may thus force States to disregard provisions of the Convention. Moreover adoption of the Directive in the EEA Joint Committee will create serious problems for Norway, which will be subject to conflicting Treaty obligations. The Directive should accordingly be annulled.

177. In my view, the arguments that the Directive is incompatible with the Convention on Biological Diversity betray a failure to appreciate the respective objectives and spheres of application of the two instruments.

178. The Directive, as is clear from the analysis in the context of the earlier grounds for annulment, requires the Member States of the European Union to ensure that their national law provides patent protection for biotechnological inventions as there defined. To that effect it imposes a few highly specific obligations on the Member States in that narrow context. Patents conferred in accordance with the Directive will of course, as with all patents, be territorial in effect.

179. The Convention, in contrast, is more in the nature of a framework agreement. Having set out its objectives in Article 1, the Convention proposes a series of approaches which Contracting Parties (which as at 5 June 2001 numbered 180 States worldwide) are to adopt, in many cases only as far as possible and as appropriate. The scope of the Convention is rather wide; the suggested measures are rather varied and in most cases couched in general terms.

180. It is axiomatic that nothing in the Directive could require States which are not Member States of the European Union (or Contracting Parties to the Agreement on the European Economic Area) to confer patent protection on biotechnological inventions (although of course other international instruments, including the TRIPs Agreement, may have precisely that effect). Thus the approach of developing countries - where, as the Netherlands and Norway suggest, much genetic richness is concentrated - to the patent protection of biotechnological inventions remains unaffected by the Directive.

181. The Directive, being concerned with patents, does not seek to regulate matters outside the realm of industrial property. Again as discussed both above and below, it is not for patent legislation to provide for broader matters such as monitoring the source of biological material in respect of which patent protection is sought. The Directive does not - nor can it - affect the ability of developing countries to establish controls over their genetic resources in order to prevent the unregulated plundering of such resources. At least a dozen countries have already taken such steps, in accordance with the Convention on Biological Diversity, and a similar number are currently developing controls.

182. I do not understand how, as the Netherlands submits, traditional products and processes originating in developing countries may be patented in accordance with the Directive even though they are discoveries not inventions. As the Directive makes explicit, in order to be patentable an invention must be new, must involve an inventive step and must be susceptible of industrial application. Those requirements, which have been part of patent legislation in one form or another since the Venetian law of 1474, are not mere formalities, but are the essential conditions of patentability which must each be satisfied before a patent can be granted. Natural resources as such cannot therefore be the object of a patent.

183. In any event, nowhere does the Convention prohibit or restrict the patentability of biotechnological materials, or even of genetic resources; on the contrary, Article 16(2) of the Convention requires that access to and transfer of biotechnology subject to patents shall be provided on terms which recognise and are consistent with the adequate and effective protection of intellectual property rights.

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184. I accordingly reject the arguments that the Directive and the Convention on Biological Diversity are incompatible, without therefore needing to consider what the implications of any such incompatibility would be.

The argument as to fundamental rights

185. Article F(2) of the Treaty on European Union states:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

186. Recitals 16, 20, 21, 26 and 43 in the preamble to the Directive state:

(16) Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person; whereas it is important to assert the principle that the human body, at any stage in its formation or development, including germ cells, and the simple discovery of one of its elements or one of its products, including the sequence or partial sequence of a human gene, cannot be patented; whereas these principles are in line with the criteria of patentability proper to patent law, whereby a mere discovery cannot be patented;

...

(20) Whereas, therefore, it should be made clear that an invention based on an element isolated from the human body or otherwise produced by means of a technical process, which is susceptible of industrial application, is not excluded from patentability, even where the structure of that element is identical to that of a natural element, given that the rights conferred by the patent do not extend to the human body and its elements in their natural environment;

(21) Whereas such an element isolated from the human body or otherwise produced is not excluded from patentability since it is, for example, the result of technical processes used to identify, purify and classify it and to reproduce it outside the human body, techniques which human beings alone are capable of putting into practice and which nature is incapable of accomplishing by itself;

...

(26) Whereas if an invention is based on biological material of human origin or if it uses such material, where a patent application is filed, the person from whose body the material is taken must have an opportunity of expressing free and informed consent thereto, in accordance with national law;

...

(43) Whereas pursuant to Article F(2) of the Treaty on European Union, the Union is to respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

187. Article 3(1) of the Directive provides:

For the purposes of this Directive, inventions which are new, which involve an inventive step and which are susceptible of industrial application shall be patentable even if they concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used.

188. Article 5 provides:

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1. The human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions.

2. An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element.

3. The industrial application of a sequence or a partial sequence of a gene must be disclosed in the patent application.

189. The Netherlands, citing X v Commission, submits that any Community act which infringes any fundamental right is unlawful. In its view, the Directive infringes fundamental rights both by commission and by omission.

190. The Netherlands submits first that Article 5(2) of the Directive provides that elements isolated from the human body are patentable. The right to human dignity is recognised by the Court as a fundamental right. The human body is the vehicle for human dignity. Making living human matter an instrument is not acceptable from the point of view of human dignity.

191. The Netherlands submits second that the Directive fails to provide for careful management of human material and for the consent of the persons concerned in two contexts.

192. First, the donor of elements isolated from the human body which are patented must at the very least have some control over the fate of his body, or a part thereof. Only in recital 26 however does the Directive mention the donor's right. Recitals have no binding legal force. The fact that there is nothing in the body of the Directive ensuring that human matter is managed carefully must be considered to be contrary to fundamental rights.

193. Second, there is no provision in the Directive for the protection of the recipient of material which has been processed or obtained by biotechnological means. A patient may thus without knowledge or consent receive such treatment. The Netherlands submits that the obligation to respect private life, medical confidence, the right to physical integrity and the protection of the right to personal information, as recognised in the case-law of the Court, may be grouped together as personal rights. In the context of medical treatment, the right of patients to self-determination is in the same category. The Directive seriously and without justification infringes that right.

194. Italy supports the submissions of the Netherlands, adding that a directive which regulates a matter such as biotechnology whose effect on fundamental rights is unquestionable but which fails to provide the necessary guarantees that its application will protect those rights cannot be valid.

195. Thus the Netherlands considers that the Directive violates fundamental rights in two ways: it contains a provision (Article 5(2)) which is contrary to human dignity and it fails to provide for the respect of donors' right of control over donated matter and of medical patients' right of consent to treatment. It is helpful in my view to deal with these arguments separately.

196. I would note that the arguments presented to the Court on the compatibility of the Directive with fundamental rights focus on the abovementioned specific issues alone. I must therefore restrict my analysis of the alleged incompatibility of the Directive with fundamental rights to those issues.

197. There can be no doubt in my view that the rights invoked by the Netherlands are indeed fundamental rights, respect for which must be ensured in the Community legal order. The right to human dignity is perhaps the most fundamental right of all, and is now expressed in Article 1 of the Charter of Fundamental Rights of the European Union, which states that human dignity is inviolable and must be respected and protected. The right to free and informed consent both of donors of elements of the human body and of recipients of medical treatment can also properly be regarded as fundamental;

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it is also now reflected in Article 3(2) of the EU Charter which requires in the fields of medicine and biology respect for the free and informed consent of the person concerned, according to procedures laid down by law. It must be accepted that any Community instrument infringing those rights would be unlawful.

198. In my view, however, the Directive does not infringe fundamental rights as alleged by the Netherlands and Italy.

Does Article 5(2) infringe fundamental rights?

199. In the first place, I cannot accept the Netherlands' assertion in absolute terms that a patent for an element isolated from the human body is contrary to human dignity. That submission appears to be based on the premiss that patent protection of such an element amounts to an appropriation of part of the human body concerned. A patent however confers no rights of ownership. Moreover, the Directive provides that neither the human body itself nor the simple discovery of one of its elements may be patented. As a matter of general patent law, which is made explicit in Article 3(1) of the Directive, only inventions which are new, which involve an inventive step and which are susceptible of industrial application are patentable. The discovery of an element of the human body, such as a gene, thus cannot be patented; only when the gene has been isolated from its natural state by, for example, processing through purifying steps that separate it from other molecules naturally associated with it, can it be patented, and then only if its industrial application, for example the production of new drugs, is disclosed in the patent application in accordance with Article 5(3) of the Directive. The patent will therefore not cover the gene as it occurs in the human body, since genes in the body are not in the isolated and purified form which is the subject of the patent.

200. Thus the maxim no patent on life is something of an over-simplification.

201. None the less, circumstances in which the grant of a patent for an element isolated from the human body offends against human dignity may perhaps be imagined; moreover future developments in biotechnology may make feasible products or processes which are unimaginable now but which would similarly offend against human dignity. Such inventions would however unquestionably be unpatentable under the Directive by virtue of the exclusion from patentability in Article 6(1) of inventions whose commercial exploitation would be contrary to morality. The Directive thus provides an essential safeguard against the issue of such a patent. That safeguard is moreover so framed as to accommodate future developments: the generality of the standard ensures that it can be applied to inventions in this fast evolving field the detail of which cannot at present be foreseen. It is no doubt for that reason also that the legislature chose not to lay down in Article 6(2) an exhaustive list of examples of inventions which are to be considered unpatentable by virtue of Article 6(1). A case-by-case evaluation of patent applications in the light of moral consensus is the surest guarantee that the right to human dignity will be respected, and that is the framework established by the Directive.

202. It thus seems to me that Articles 5 and 6 of the Directive draw a careful line between cases where elements of human origin should not be regarded as patentable and those where they can properly be regarded as patentable.

203. The Directive also reflects the conclusions of the Group of Advisers to the European Commission on the ethical implications of biotechnology. In its report on the ethical aspects of patenting inventions involving elements of human origin, the Group of Advisers does not recommend excluding the patentability of such inventions as a matter of principle, but considers that it should be subject to certain ethical principles, with the result that fundamental human rights are respected. Thus it says: Whatever is the nature of the biotechnological invention involving elements of human origin, the Directive must give sufficient guarantee so that refusal to grant a patent on an invention

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in so far as it infringes the rights of the person and the respect of human dignity should be legally founded. That guarantee is to be found in the exclusion from patentability on the ground of morality in Article 6(1) of the Directive.

204. I do not therefore consider that the Directive infringes human dignity by providing that elements isolated from the human body may be patented.

Does the failure to provide for consent infringe fundamental rights?

205. It is not however sufficient to say that the provisions of the Directive do not in themselves infringe fundamental rights. The complaint of the Netherlands and Italy is also that the Directive fails to contain certain provisions necessary to protect such rights and thereby infringes those rights. In particular it fails to ensure that such rights are respected when patents are initially granted for biotechnological products and processes and when such patented products and processes are subsequently exploited and used.

206. The Netherlands submits first that the Directive should provide for the donor of elements isolated from the human body which are patented to have control over the fate of his body or a part thereof.

207. Recital 26 states that, where a patent application is filed for an invention based on or using biological material of human origin, the donor of that material must have had an opportunity of expressing free and informed consent thereto, in accordance with national law.

208. That recital has its origins in an amendment proposed by the Parliament which would have inserted a new Article 8a(2) in the Directive, requiring inter alia that an applicant for such a patent must provide evidence to the patent authorities that the material has been used and the patent applied for with the voluntary and informed agreement of the person of origin.... That amendment was not accepted.

209. It is not clear from the wording of recital 26 in the various language versions whether the consent must relate to the filing of the patent application or to the taking of the material from the donor. Recital 26 therefore may not go as far as recommended by the Group of Advisers to the Commission, which stated:

The ethical principle of informed and free consent of the person from whom retrievals are performed, must be respected. This principle includes that the information of this person is complete and specific, in particular on the potential patent application on the invention which could be made from the use of this element. An invention based on the use of elements of human origin, having been retrieved without respecting the principle of consent will not fulfil the ethical requirements.

210. It is of course clearly desirable that no element of human origin should be taken from a person without their consent. That principle is expressed at the forefront of the EU Charter of Fundamental Rights; it is also enshrined in Chapter II of the Council of Europe Convention on human rights and biomedicine, which provides that an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

211. In my view, however, although the requirement of consent to all potential uses of human material may be regarded as fundamental, patent law is not the appropriate framework for the imposition and monitoring of such a requirement. A patent, as discussed above, simply confers the right to prevent others from using or otherwise exploiting the patented invention; how the grantee of the patent uses or exploits that invention is regulated not by patent law but by national law and practice governing the field concerned.

212. Moreover to make evidence of such consent a condition of granting a biotechnological patent - presumably by way of the morality principle - to my mind risks being unworkable. Biotechnological

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inventions may derive from research on possibly thousands of blood or tissue samples, possibly pooled and almost certainly anonymous at the time of analysis. I do not consider that it is reasonable to expect patent examiners to satisfy themselves that the chain of consent with regard to each sample is unbroken and evidenced. It is rather the responsibility of the medical or research staff taking the samples to ensure that consent is given; that responsibility, together with the form and scope of the consent, will be imposed by national regulations, codes of practice etc outside the patent arena. That approach is not inconsistent with recital 26, which refers to national law. Patentability on the other hand is to be assessed only on the basis of the nature of the product or process itself, or on the ground that any commercial or industrial application would be objectionable.

213. Thus in my view the Directive is not the proper place for rules governing the consent of the donor or of the recipient of elements of human origin. Indeed such questions of consent arise more generally with regard to any use of human substances, such as transplants, organ donation, etc. That supports the view that the issues are not to be resolved by patent law, and in particular by patent law as it applies in this specific sector.

214. The Netherlands also submits that the Directive, by failing to require that a patient must consent to receiving medical treatment involving material which has been processed or obtained by biotechnological means, infringes fundamental rights. That argument is in my view misconceived. The conditions of exploitation or use of patented inventions are, as discussed above, outside the scope of patent legislation, falling to be controlled by other means. That is clearly spelt out by recital 14: it is not for substantive patent law, which merely entitles the holder to prohibit third parties from exploiting his inventions for industrial and commercial purposes, to replace ethical monitoring of research or the commercial use of its results. Similarly, as the Council points out, the Directive contains no provision requiring that the recipient of biotechnologically processed matter must be informed simply because it does not and cannot seek to regulate the use or commercialisation of such matter.

215. I therefore reach the conclusion that the Directive does not, either by what it provides or by what it fails to provide, infringe, in itself, fundamental rights recognised in Community law. The possibility cannot of course be excluded that a particular application of the Directive within a Member State may infringe fundamental rights, although it contains provisions designed to avoid that consequence. But the conclusion is clear in my view that the Directive does not in itself infringe fundamental rights.

The argument that the correct procedure was not followed

216. The Netherlands submits that the Directive was not properly adopted since it is based on an unlawful proposal by the Commission. It accordingly infringes the combined provisions of Articles 100a and 189b(2) of the EC Treaty or, at least, those provisions combined with Article 190 of the EC Treaty.

217. Article 189b(2) (now, after amendment, Article 251(2) EC) provides, with regard to legislation governed by that article, that the Commission is to submit a proposal to the European Parliament and the Council.

218. Article 190 (now Article 253 EC) provides:

Regulations, directives and decisions adopted jointly by the European Parliament and the Council... shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.

219. The Netherlands submits that the Commission's operations are governed by the principle of collegiality. That principle is based on the equal participation of the Commissioners in the adoption

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of decisions, from which it follows in particular that decisions should be the subject of collective deliberations and that all the members of the college of Commissioners should bear collective responsibility at political level for all decisions adopted. The formal requirements for effective compliance with the principle of collegiality vary according to the nature and legal effects of the acts adopted by that institution. The Commission's proposal, which was indispensable to adoption of the Directive, should have been adopted by the college in its definitive version as presented to the Parliament and Council; its text should also have been made available to all the members of the college in all the official languages when it was adopted by the Commission. Nothing in the Directive suggests that this essential procedural requirement was observed.

220. With regard to the argument as to the principle of collegiality, it appears from its reply that the Netherlands is not alleging that that principle was in fact infringed, but merely that the Commission did not verify compliance therewith, or at least that there is no trace of such verification in the preamble to the Directive.

221. As for the submission that the Commission did not verify compliance with the principle, the Commission states (and the Netherlands does not dispute) that the proposal was adopted by the Commission at its meeting of 13 December 1995; the adoption was hence unquestionably lawful.

222. As for the submission that the preamble to the Directive is silent, I would note that there is nothing in the Treaty provisions invoked by the Netherlands which supports its apparent contention that it must be stated in Community legislation that the principle of collegiality has been respected.

223. With regard to the argument that the proposal should have been made available to all the members of the college in all the official languages when it was adopted by the Commission, it must be borne in mind that a Commission proposal is not a decision taking the form of one of the acts referred to in Article 189 of the EC Treaty and is not therefore required by the Treaty to be adopted in authentic versions in all languages. I accept the Commission's submission that it would be inappropriate, and is not necessary in order to respect the principle of collegiality, to require a proposal to be adopted by the college in all languages.

224. In support of that submission, the Commission refers to Article 6 of Regulation No 1 of the Council determining the languages to be used by the European Economic Community, which states that the institutions of the Community may stipulate in their rules of procedure which of the official and working languages are to be used in specific cases. In implementation of that provision, Article 4 of the Rules of Procedure of the Commission states that The agenda and the necessary working documents shall be circulated to the Members of the Commission within the time-limit and in the working languages prescribed by the Commission in accordance with Article 24, which latter provision requires the Commission to determine rules to give effect to the Rules of Procedure. Those implementing rules provide that the working documents relating to an agenda are to be sent to the Members of the Commission in the languages fixed by the President taking account of the minimum needs of the members. The proposal for the Directive was presented to the Members of the Commission in English, French and German and - as is customary - sent to the other institutions in all the official languages.

225. I would accordingly reject the argument that the Directive was not properly adopted since it was based on an unlawful proposal by the Commission.

Conclusion

226. It follows, for the reasons I have given, that this action must, in my opinion, fail. But the action may not have been fruitless. It is clear, I think, that it was prompted by understandable concerns, reflecting a general awareness that the irresponsible pursuit of biotechnological research may have consequences which are ethically unacceptable. Although some of the grounds of challenge were of a purely technical character, those concerns were central. The action may not have been

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fruitless in that it may have shown that those concerns can and should be allayed.

227. Thus the Directive is concerned in particular with the patentability of biotechnological inventions and not with their use. Within that framework, there are adequate moral safeguards going in some respects beyond mere application of the existing criteria for patentability. The fact that the ethical criteria for patentability are not exhaustively defined, far from undermining the moral safeguard, enhances it since future developments will continue to be governed by those criteria even if not currently foreseeable. Biotechnological inventions which are contrary to human dignity consequently neither are now nor can in the future be patentable in accordance with the Directive.

228. The action moreover highlights the importance of regulating at national level the use of biotechnological material, precisely because such use, since it falls outside the parameters of patentability, is not - indeed cannot be - regulated by the Directive. In particular, adequate provision must be made for ensuring that the principle of informed consent is respected whenever material is taken from human beings which might be used for scientific or technological purposes.

229. It is not therefore the Directive itself which is objectionable as a result of what it contains or what it omits. It is of course crucial that its implementation be carefully controlled to ensure especially that the moral safeguard is fully transposed and assiduously observed. I am satisfied however that the Community legislative framework itself is not illegal.

230. In the result I am of the opinion that:

(1) The action should be dismissed;

(2) The Kingdom of the Netherlands should be ordered to pay the costs of the European Parliament and of the Council;

(3) The interveners should bear their own costs.

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Opinion of Mr Advocate General Jacobs delivered on 23 March 2000.
Commission of the European Communities v French Republic.
Failure to fulfil obligations - Public procurement contracts in the transport sector - Directive 93/38/EEC - Applicability ratione temporis - Rennes urban district light railway project - Contract awarded by negotiated procedure without a prior call for competition.
Case C-337/98.

1. In this case, the Commission alleges a failure by the French authorities to comply with the Community rules governing the use of negotiated procedures for the conclusion of procurement contracts by entities operating in the water, energy, transport and telecommunications sectors, in a specific instance where a negotiated procedure was followed without a prior call for competition. The main issue is whether those rules applied to the procedure in question; the French Government disputes the Commission's contention that they were in force at the material stage of that procedure. If the rules were applicable, it must be determined whether the conditions were met for a derogation from the obligation to issue a call for competition.

The relevant Community legislation

2. Council Directive 93/38 applies to contracting entities operating, inter alia, public transport networks either in their capacity as public authorities or public undertakings or on the basis of special or exclusive rights granted by a competent authority of a Member State (Article 2(1) and (2)(c)).

3. It provides for three types of procedure whereby such entities may award contracts in the fields covered: open, restricted and negotiated procedures. These are defined in Article 1(7) as follows:

(a) in the case of open procedures, all interested suppliers, contractors or service providers may submit tenders;

(b) in the case of... restricted procedures, only candidates invited by the contracting entity may submit tenders;

(c) in the case of negotiated procedures, the contracting entity consults suppliers, contractors or service providers of its choice and negotiates the terms of the contract with one or more of them.

4. Under Article 4(2): Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.

5. Article 20(1) provides: Contracting entities may choose any of the procedures described in Article 1(7), provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21 (which indicates the forms to be used in notices of calls for competition and prescribes that they are to be published in the Official Journal of the European Communities).

6. However, under Article 20(2): Contracting entities may use a procedure without prior call for competition in the following cases:

...

(c) when, for technical or artistic reasons or for reasons connected with protection of exclusive rights, the contract may be executed only by a particular supplier, contractor or service provider;

...

7. In accordance with Article 45, Member States were to adopt the measures necessary to comply with the provisions of Directive 93/38 and to apply them by 1 July 1994.

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8. Article 45 also provided that Directive 90/531 - which contained provisions identical for present purposes to those of Directive 93/38 cited above - should cease to have effect as from the date on which the latter was applied by the Member States. Member States had been required to comply with Directive 90/531 by 1 January 1993. Prior to that directive, procurement procedures in the utilities sectors had not been subject to Community regulation.

The relevant French legislation

9. The rules governing public procurement in France are contained principally in the Code des Marchés Publics (Public Procurement Code, hereinafter also the Code).

10. Article 104(I) of the Code requires negotiated contracts to be preceded by a call for competition. Article 104(II) concerns exceptions for which no call for competition is needed. The text applicable at the material times in the present case provides, in so far as is relevant:

Negotiated contracts may be entered into without a prior call for competition when only one specific contractor or supplier is capable of carrying them out.

This applies in the following cases:

(1) when requirements can be met only by [work or supplies] which necessitate recourse to a patent, a licence or exclusive rights held by a single contractor or supplier;

(2) when requirements can be met only by [work or supplies] which, by reason of technical necessity, substantial preliminary investment, special plant or equipment or know-how, can be contracted out only to a specific contractor or supplier;

...

11. During the relevant period, France had not transposed Directive 93/38. However, Directive 90/531 appears to have been transposed by Law No 92-1282 of 11 December 1992 and Decree No 93-990 of 3 August 1993. Article 2 of the latter contains an exhaustive list of cases where a procedure may be used without a prior call for competition, and item 4 on that list reproduces the terms of Article 15(2)(c) of Directive 90/531, which were identical, as regards contractors and suppliers, to those of Article 20(2)(c) of Directive 93/38.

Factual background

12. Briefly stated, this case concerns a lengthy process to award a contract for the construction of an urban light railway line. The relevance of the different stages in that process lies essentially in determining whether it comprised a single, uninterrupted award procedure or whether a second procedure was commenced at a relatively late stage of the overall process. That issue is relevant in turn when determining the applicability of the Community rules to one of the initial steps in the procedure leading to the final award.

13. Public transport in the conurbation of Rennes in France is the responsibility of a joint grouping of all the constituent municipalities, the Syndicat intercommunal des transports collectifs de l'agglomération rennaise (Sitcar), which apparently comes under the authority of the District Council for the conurbation (the District Council). Decisions are taken by the District Council or by Sitcar's committee, composed of delegates from the various municipalities. The transport service is actually managed by the semi-public company Semtcar.

14. From 1984 onwards, Sitcar investigated ways of improving the service by creating a reserved-track system, that is to say a tram or light railway network. On 26 October 1989, its committee voted, inter alia, to confirm previous decisions to provide a reserved-track network, to opt for the VAL automatic light railway system, to seek government funding and to authorise consultations with a view to awarding a contract for drawing up preliminary specifications. The report on which that

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vote was taken stated that the VAL system was produced by the two companies Matra (Matra Transport, now apparently known as Matra Transport International) and Alsthom (GEC Alsthom Transport). The contract for drawing up preliminary specifications was, it was stated at the hearing, later awarded to and performed by Matra.

15. From the minutes of its committee meeting of 19 July 1990 it appears that Sitcar, having previously issued an invitation to tender for civil engineering work and equipment not linked to the system and selected the successful tenderer, agreed on that date that the contrat d'ensemblier (turnkey contract, that is to say a contract for the complete work to the point of readiness for operation) for the system and equipment linked to the system would be awarded to Matra once a guaranteed guide price had been determined.

16. In a report read to the committee at its meeting on 12 July 1991, concerning the contract for civil engineering and equipment not linked to the system, the chairman of Sitcar stated that negotiations with Matra were not yet complete but would lead to the conclusion of a turnkey contract.

17. In response to a request from the Court, the French Government has produced a letter from Matra to Sitcar, dated 9 July 1991 and apparently received on 12 July 1991 (though perhaps too late to be mentioned in the report delivered on that date). That letter appears to accompany a file containing Matra's proposal for the system portion of the work on the first VAL line in Rennes. It confirms a guaranteed price of FRF 987 000 000 or, with certain possible modifications to the programme, of FRF 953 200 000, both excluding tax and at January 1991 prices.

18. On 15 February 1993, the Prefect of Ille-et-Vilaine, the département in which Rennes is situated, issued a declaration of public interest in respect of the first line of the VAL light railway network. That declaration was a precondition for proceeding with the project, in particular for making expropriations.

19. On 30 March 1993, the District Council approved the turnkey contract negotiated by Semtcar with Matra for FRF 966 420 000, excluding tax, at January 1993 prices, and authorised its signature. The contract was for the supply of a complete system, including not only track, control post and train sets, but also security, workshop, power-supply and track equipment, together with spare parts and staff training.

20. However, that stage had not been reached without political opposition. A Comité pour une alternative au VAL had been set up in 1991 and most of the relevant resolutions had been opposed by a minority. In addition, the ecological movement Rennes Verte had applied to the Tribunal Administratif (Administrative Court), Rennes, to have the Prefect's declaration of public interest set aside. On 16 February 1994, that court annulled the declaration on the ground that the preliminary inquiry was incomplete as regards analysis of certain required criteria.

21. As a result, by letter of 30 March 1994, the Minister for Infrastructure, Transport and Tourism informed the Chairman of the District Council that government funding, although still in principle available, could not be provided until the administrative procedure had been recommenced and completed as required by that judgment.

22. On 22 September 1995, the District Council passed two linked resolutions. First, it voted to withdraw its previous resolution of 30 March 1993 approving the contract with Matra and authorising its signature by Semtcar, that resolution not having been implemented even inchoately and having become redundant. The report on the basis of which the vote was taken stated that government authorisation had not been granted within the necessary time, thus affecting the terms of performance of the contract, in particular as regards deadlines.

23. Second, the District Council requested Semtcar to resume detailed negotiation/finalisation

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["reprendre la mise au point"] of the contract with Matra within the framework of the provisional budget for the operation and to submit it anew to the District Council for approval.

24. In a letter dated 29 July 1996 to two councillors hostile to the project, who had challenged an alleged refusal to communicate the 1993 turnkey contract for the system portion of the VAL line, the Chairman of the District Council stated, inter alia, that the contract could not be communicated because it had never existed, having been neither signed by the competent authority nor forwarded to the Prefect, and that the withdrawal of the resolution approving it called into question the very existence of the project. The decision embodied in that letter was, however, subsequently set aside by a judgment of the Tribunal Administratif of 16 July 1997, which held, inter alia, that the existence of the contract was attested by the terms of the resolution of 30 March 1993 and it could not be deemed inexistent on the ground that it was neither signed nor notified; it was a completed document, having been the subject of negotiation and having been approved by the District Council.

25. On 4 October 1996, the Prefect issued a new declaration of public interest and government funding consequently became available. As a result, the District Council voted on 22 November 1996 to approve the terms of the draft negotiated contract to be concluded with the company Matra Transport International for the work on the system and equipment linked to the system and authorised Semtcar to sign the contract.

Procedure

26. Following a complaint submitted to it in late 1996 - apparently by councillors hostile to the VAL project - the Commission requested clarification from the French Republic, which replied, essentially, that the contract had been awarded in 1989, before the entry into force of Directives 90/531 or 93/38, and that Matra was the only company able to meet the requirements and had already made substantial investments. The Commission sent the French authorities a letter of formal notice in June 1997. Considering the reply to that letter unsatisfactory, it then sent a reasoned opinion under Article 169 of the EC Treaty (now Article 226 EC) concluding that the provisions of Directive 93/38 had been infringed and requiring the French Government to comply with the opinion within two months. In its reply dated 12 June 1998, the French Government maintained its position.

27. The Commission brought the present action on 14 September 1998. It seeks a declaration that, as a result of the resolution of 22 November 1996 awarding Matra the turnkey contract for the Rennes District light railway project, the French Republic failed to fulfil its obligations under Directive 93/38, and in particular Articles 4(2) and 20(2)(c) thereof. The specific infringement to which the Commission refers is a failure to issue a prior call for competition in order to avoid discrimination between undertakings.

Analysis

28. The Commission's case is, essentially, that the procedure in issue was initiated on 22 September 1995, that at that date the conditions for the application of the derogation contained in Article 20(2)(c) of Directive 93/38 were not met and that by failing to issue a call for competition the French authorities thus infringed that directive. The French Government maintains that the procedure was commenced (and indeed concluded) at a much earlier date, and that it is the date of commencement which must be decisive when determining whether the Community rules were applicable. In response to the latter point, the Commission argues that, although the date of commencement may be taken into consideration, an unreasonable length of time must not elapse, as it did here, before the actual award of the contract. The French Government submits in the alternative that, if the Commission's main contention is accepted, the conditions for application of the derogation were in any event met.

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29. In those circumstances, although the main issue to be decided is whether a new procedure was commenced on 22 September 1995, it is helpful to clarify the context first by considering the more general issue of the applicability of newly-introduced Community rules to procedures already under way. I shall then examine the main issue of the date of commencement of the procedure. Finally, I shall consider whether the conditions for application of the derogation may have been met.

Directive 90/531 and Directive 93/38

30. In so far as they are relevant to the present case, the rules contained in Directive 90/531 and in Directive 93/38 are identical; the changes introduced by the latter merely extend them to cover contracts for services, as well as for works and supplies. The Commission, however, seeks a declaration of failure to fulfil obligations in respect of Directive 93/38 alone.

31. Consequently, any finding that the provisions of Directive 90/531 were breached during the period when they were applicable but Directive 93/38 was not applicable would be ultra petita. None the less, I consider it useful to bear both directives in mind when analysing the situation in this case.

Applicability of the directives to a procedure already commenced

32. The general principle is that, in the absence of a clear provision and unless the purpose to be achieved so demands, legislation is not to be interpreted as having a retroactive effect. In this case, neither of the directives contains any such provision - or indeed any transitional provisions - nor is there any reason to conclude that their purpose requires any form of retroactive effect.

33. The Court has also recognised the principle that amending legislation applies, unless otherwise provided, to the future consequences of situations which arose under the previous legislation.

34. Those principles, however, do not directly resolve the question of the immediate application of new rules to a procedure already under way at the date by which they were to be transposed. The measures necessary to comply with the provisions of Directive 90/531 should have been applied from 1 January 1993 and those of Directive 93/38 from 1 July 1994 at the latest.

35. Although in a different legislative context, a similar question of application of new Community rules to procedures already under way has been examined by the Court in several cases involving Directive 85/337 on environmental impact assessments, which also contains no transitional provisions. The Court has held that obligations imposed by that directive must apply to a consent procedure commenced after the deadline for their transposition into national law but before that transposition was actually effected. In order to determine whether the directive rules apply, for reasons of legal certainty the sole criterion must be whether the application for consent was formally lodged before or after the deadline for transposition. The directive was designed to cover projects likely to require a long time to complete, so that complex procedures already initiated under national law and situations already established should not be affected by it.

36. If that reasoning is transposed to the present case, the result is that the rules contained in Directives 90/531 or 93/38 cannot apply to procurement procedures commenced before the dates from which they should have been applied.

37. However, I would not necessarily exclude, as a general rule, the possibility that certain provisions of a directive may be applicable to subsequent stages of procedures already under way at the date of the deadline for their transposition into national law. The Court's approach in the environmental impact assessment cases cited above may have been influenced by the consideration that it could not be determined with certainty at what stage in a procedure the assessment required by the directive should take place, whereas the commencement of the procedure by the lodging of a formal application was a clearly ascertainable event.

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38. Such a consideration need not apply where new rules come into effect at an identifiable stage in a sequence of steps making up a complete procedure. What can be excluded, however - in line with the requirement of legal certainty to which the Court has referred - is any application of such rules to stages of a procedure which have already been completed. Indeed, unless such stages were already in compliance with the new rules, the only way in which they could be brought into compliance would be by repeating them, requiring a recommencement of the whole procedure in cases where the initial stages are in issue - and that intention cannot be attributed to the Community legislature in the absence of a clear indication.

39. In either event, whether the rules in the directives can apply to subsequent stages of procedures already under way or not, I conclude that they cannot have any effect on stages completed before the dates on which they were to be applied.

40. In the specific context of a Community procurement directive not transposed within the period prescribed, that conclusion is consistent with the Court's ruling in Tögel, that Community law does not require an awarding authority in a Member State to intervene... in existing legal situations... where those situations came into being before expiry of the period for transposition. Although that ruling concerned a situation in which the contract itself had been concluded before, but for a period extending beyond, that date, the principle is in my view of general application: it applies to whatever and however many stages of a procurement procedure have been completed before expiry of the period for transposition.

Applicability of the directives in the present case

41. It is clear from the evidence before the Court that the stage at which a call for competition might have been issued in the original procedure was completed well before 1 July 1994, when the period for transposition of Directive 93/38 expired, and even before 1 January 1993, by which date the provisions implementing Directive 90/531 were to be brought into force.

42. The issuing of a call for competition must be prior to the commencement of negotiations. Here, it is clear that negotiations had already commenced by 19 July 1990 at the latest - prior to even the adoption of Directive 90/531 - and had been substantially completed by 9 July 1991. Agreement was reached by 30 March 1993. Indeed, at the hearing, the Commission appeared to accept that if the contract had been carried out as approved on the latter date the Community procurement rules would not have been infringed.

43. However, the Commission's case is based on the premiss that the original procedure outlined above came to an end on 22 September 1995 and that a new procedure was then commenced. France, on the other hand, contends that there was no such conclusion and recommencement but a single continuing procedure delayed at one stage by an administrative hitch.

44. The question to be answered is thus: what were the effects of the withdrawal of the resolution approving the 1993 contract and of the decision to resume detailed negotiations with Matra?

45. The contract approved on 30 March 1993 was, it appears, never signed. The Court has been presented with various arguments as to whether a binding award was none the less made at that date or at an earlier stage when agreement was reached on terms. The Commission considers that the award was made on 30 March 1993, there having been no final, unconditional agreement prior to that date. The French Government argues that Matra had acquired a right to the contract by its firm commitment as to price on 9 July 1991.

46. We have also heard conflicting views on whether, assuming there was such an award, the contract was rendered void by the withdrawal of the resolution approving it. The Commission argues that the withdrawal meant, in French administrative law, that the resolution was deemed never to have

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existed. The French Government asserts that the position was simply that, until a new declaration of public interest was issued and the funding conditional thereupon released, it was impossible to sign the contract with Matra; a binding decision to award the contract to that company had none the less been taken and remained in existence unless and until a competent court should decide otherwise.

47. As for the significance of the resolution requesting Semtcar to reprendre la mise au point of the contract, the Commission sees it as clear evidence of the commencement of a new procedure, the French Government as a resumption and continuation of the original procedure. The contract approved on 22 November 1996 is invoked by both parties in support of their positions: the Commission claims it diverges in substantial respects from the 1993 contract, whereas the French Government asserts that it was substantially the same, the only differences being the choice of a marginally different model as a result of technical developments in the intervening period and an updating of the price.

48. The Commission's action is brought in respect of the procedure leading to the award of the contract approved for signature on 22 November 1996. What is at issue is whether that award was the outcome of the original procedure or whether the latter had come to a close on or before 22 September 1995.

49. Directive 93/38 lays down certain requirements to be observed before, during and following the award stage of a procedure but does not specify how it is to be determined when that award has taken place. This is understandable. The Community procurement directives do not effect a complete harmonisation of procedures but lay down requirements to be observed where specified criteria are met, in particular as regards the value of the contract. All other applicable rules, including those which determine the stage at which a contract is awarded or concluded, takes effect or becomes binding, will be found in national law. Since the Court is not competent to rule on matters of French law, a number of hypotheses will have to be considered.

50. When considering those hypotheses, however, it must be borne in mind that in proceedings against a Member State for a declaration of failure to fulfil an obligation, it is incumbent on the Commission to prove that the obligation has not been fulfilled and to place before the Court the information necessary to enable it to determine whether that is so.

51. Three possibilities may be envisaged when considering when the original procedure was brought to an end: it may have been concluded by the approval of the contract by the District Council on 30 March 1993, by an award at some earlier stage, perhaps when firm agreement had been reached, or by some later event.

52. If approval by an elected body is necessary and a procedure is concluded by the decision approving the contract and authorising its signature, then the resolution of 30 March 1993 would appear to have brought the original procedure to an end. However, on the Commission's own argument, the withdrawal of that resolution means that it is deemed never to have existed. Thus, it seems inevitable, the original procedure must be deemed not to have been terminated. In those circumstances, the negotiations in 1995 and 1996 could qualify as a continuation of that procedure.

53. If a procedure is concluded by a separate award and that award is made when, say, firm agreement is reached between the contracting entity and the future contractor, so that approval by the elected body, whilst essential for other reasons, does not affect the existence of that award, then it would seem to follow that withdrawal of that approval can likewise not affect the existence of the award, although presumably there must be some new approval before the contract can take effect. In those circumstances the award, if made before 30 March 1993, would have remained in existence after 22 September 1995, since the only measure withdrawn on that date was the resolution approving the contract and authorising its signature, and could have been subsequently approved anew by the resolution

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of 22 November 1996.

54. If the original procedure was not concluded either on or before 30 March 1993, then it must have been concluded by some later event. The withdrawal of the resolution of 30 March 1993 could not, in that hypothesis, have been that event. If the procedure were to have been terminated by the withdrawal of a decision, it would have had to be one actually constituting the procedure - such as the decision to carry out the project, to seek a supplier for a light railway system or to negotiate with Matra. No such decision was withdrawn. In that case, the contract approved on 22 November 1996 would appear to be the outcome of the original procedure, to the initial stages of which the Community rules could not apply.

55. However, the conclusions I have set out in those three hypotheses are all dependent on a further element: it must be established whether the negotiations conducted in 1995 and 1996 were in fact a continuation of those which took place prior to 1993 and/or concerned merely a permissible refinement of the agreement reached at the earlier stage or whether, on the contrary, they represented a new departure.

56. In that regard, the language used in the second resolution of 22 September 1995 - "reprendre la mise au point" - is highly indicative of both a resumption and a refinement of negotiations. Moreover, the French Government has produced a letter from Matra to Semtcar dated 30 November 1995, stating that Matra had examined the impact of readjusting the timetable for the project and, taking account of an agreed updating of the administrative specifications, confirmed that its tender negotiated in early 1993 would be maintained until 30 September 1996. Those two documents are strong evidence, not refuted by the Commission, that negotiations were in fact resumed shortly after 22 September 1995 on the basis of everything that had gone before. In that context, the contracting entity could hardly be expected to remain irrevocably burdened with an outdated model as a result of forced delays, whatever their cause, and both the change of model and the updating of the price seem wholly legitimate adjustments. The Commission having provided no evidence of any greater substantial difference between the two, I consider that the contract approved on 22 November 1996 may legitimately be regarded as the outcome of a continuation of the earlier negotiations and/or a permissible refinement of the agreement reached at the earlier stage.

57. I thus reach the view that it has not been established that the original procedure was concluded at an earlier stage in any of the three possible hypotheses, so that the contract approved on 22 November 1996 may be regarded as the conclusion of that procedure, at the commencement of which Community procurement rules did not apply to contracts awarded by entities operating public transport networks. Consequently, the fact that no prior call for competition was issued cannot constitute an infringement of those rules.

The derogation in Article 20(2)(c) of Directive 93/38

58. I shall nevertheless consider in the alternative the hypothesis that a new procedure was commenced after the expiry of the period allowed for transposition of Directive 93/38. In that event, the question would arise whether, as the French Government argues, the criteria in Article 20(2)(c) were met.

59. It may be noted here that, although critical of Article 104(II) of the French Public Procurement Code, the Commission does not seek any declaration of failure to fulfil obligations with regard to the inclusion in that provision of a derogation on the basis of substantial prior investment. Nor, in its defence, does France seek to rely on that article; it argues, rather, that the Community derogation applied. That aspect may thus be ignored, and it is also irrelevant for present purposes whether there may be any contradiction between Article 104(II) of the Code and Article 2(4) of Decree 93-990, implementing Directive 90/531. The question to be answered is: was there a breach

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of Article 20(2)(c) of Directive 93/38 as a result of conduct after 1 July 1994?

60. The Commission submits that there should have been a call for competition because more than one undertaking could have provided a VAL system or equivalent. It produces letters from Alsthom and another undertaking - ANF Industrie, of the Bombardier Eurorail group - to the opponents of the VAL system, dating from 1995, 1996 and 1997, which it claims indicate that those undertakings would have been able at that time to submit bids in conformity with the specifications. The derogation could therefore not apply at the time of the resolution of 22 November 1996. At the hearing, the Commission argued that it was not required to prove that other undertakings could have provided equivalent systems but merely that a call for competition was required in order to establish whether that was so.

61. The French Government considers that the conditions for the derogation were met as regards both technical reasons and reasons connected with protection of exclusive rights. The basic elements and certain essential parts of the VAL system were protected by 11 patents and one design registered by Matra in France between 1975 and 1993, each with a validity of 20 years, the majority of them being extended to other Member States. Only two of them expired during the relevant period, in 1995. The name VAL was registered by Matra as a trade mark in 1987. In 1996, Alsthom stated to Semtcar that it could not meet the terms specified as regards deadlines and previous constructions. A system proposed by Alsthom for Toulouse would not receive type certification until the year 2006, whereas the Rennes system was to start operating in November 2001. No other undertakings were in a position to provide a system meeting the specific requirements of the Rennes project, nor has the Commission produced any evidence that they were.

62. The evidence before the Court is thus not unequivocal, and its assessment depends largely on the burden and standard of proof.

63. As I have pointed out, it is for the Commission to prove its case and to place the necessary evidence before the Court.

64. However, where a Member State relies on a derogation from a general rule, the Court has regularly held the burden of proof to be reversed. It has taken that approach in a number of cases concerning provisions of procurement directives either identical in substance or closely comparable to Article 20(2)(c) of Directive 93/38. It has held that such provisions, which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in relation to public works contracts, must be interpreted strictly and that the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.

65. This means, I consider, that where a Member State seeks to rely on a derogation, it is for the Member State to justify its claim and not for the Commission to prove that the conditions for the derogation were not met. However, the overall burden of proof remains with the Commission; where evidence has been put forward to justify the derogation, it is up to the Commission to refute that evidence. On the totality of the evidence presented to it, the Court must be satisfied that the Commission has established its case.

66. In the present case, the French Government has produced two documents indicating that Alsthom would not have been able to provide a light railway system to specification. One is a brief letter from Alsthom to Semtcar dated 30 October 1996 (more than a year after the decision was taken to resume negotiations with Matra and less than a month before the contract with that company was finally approved) showing that Alsthom had in fact been consulted but was unable to offer a system compatible with the infrastructure already planned within the strict timetable required or to provide as a reference an identical system already in operation. The other is an extract from the minutes

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of Sitcar's equivalent body in Toulouse, dated 2 March 1998, from which it appears that for the second line of the light railway network in that city Alsthom proposed a system which would be operational in 2006, whereas the Rennes line was to start operating in November 2001.

67. The Commission has produced a letter from Alsthom to one of the councillors opposed to the VAL project, dated 23 November 1995 (two months after the decision to resume negotiations with Matra and one year before the final approval of the contract). It is clear from that letter that at that date Alsthom, having supplied similar though not identical systems in the past, considered itself perfectly capable of providing a fully automatic reserved-track system in Rennes in accordance with the specifications and wished to submit a tender if given the opportunity. In addition, Alsthom stated that several industrial undertakings were in a position to supply a system and that a failure to allow them to compete with Matra would be anomalous under the current legislation. The Commission has also produced technical descriptions by ANF Industrie of automatic urban light railway systems supplied by it in the USA and Canada prior to 1995.

68. Those documents, I consider, adequately refute the evidence produced by the French Government and establish that at least one other contractor could and would have responded had a call for competition been issued in September 1995.

69. In those circumstances, I take the view that, if the procedure leading to the final award is held to have commenced in September 1995, it cannot be concluded from the totality of the evidence before the Court that for technical reasons or reasons connected with the protection of exclusive rights the contract could be executed only by a particular contractor; the derogation in Article 20(2)(c) of Directive 93/38 thus did not apply and, by not publishing a call for competition in the Official Journal of the European Communities, the French Republic failed to fulfil its obligations under that provision and consequently also under Article 4(2) of the same directive.

Conclusion

70. Nevertheless, on the basis of the view I have reached as to the applicability of the Community rules to the initial stages of the procedure in issue, I conclude that the Court should:

(1) dismiss the application; and

(2) order the Commission to pay the costs.

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SUB	Approximation of laws
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - unfounded
ADVGEN	Jacobs
JUDGRAP	Skouris
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Opinion of Mr Advocate General Fennelly delivered on 18 May 2000.
Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public service contracts - Directive 92/50/EEC - Public service contracts in the telecommunications sector - Directive 93/38/EEC - Public service concession.
Case C-324/98.

1. The essential question raised in this preliminary reference from the Bundesvergabeamt (Federal Procurement Office, hereinafter the BVA), Austria is whether public service concession contracts are excluded from the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. If they are excluded, the further question of the determination of the scope of that exclusion arises. A number of other issues, such as whether those parts of a contract that fall within the scope of Directive 93/38/EEC may be severed from those which do not and the distinction between contracts for the supply of services and supply contracts, are also raised.

I The legal and factual background

A Community law

2. The eighth recital in the preamble to Directive 92/50/EEC states:

Whereas the provision of services is covered by this Directive only in so far as it is based on contracts; whereas the provision of services on other bases, such as law or regulations, or employment contracts, is not covered....

Article 1 of that Directive provides that:

For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

...

(v) contracts for voice telephony, telex, radiotelephony, paging and satellite services....

3. The 24th recital in the preamble to Directive 93/38/EEC states:

Whereas the provision of services is covered by this Directive only in so far as it is based on contracts; whereas the provision of services on other bases, such as law, regulations or administrative provisions or employment contracts, is not covered.

Article 1(4) of that Directive provides that:

"supply, works and service contracts" shall mean contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider, having as their object:

...

(c) in the case of service contracts, any object other than those referred to in (a) and (b) and to the exclusion of:

...

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(iii) contracts for arbitration and conciliation services;

(iv) contracts for the issue, sale, purchase or transfer of securities or other financial instruments;

...

(vi) ... Contracts which include the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract ....

Under Article 2(1), it is stated that the Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2....

Article 2(2) provides, in so far as is material, that [r]elevant activities for the purposes of this Directive include:

...

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services...

B Austrian law and the facts of the main proceedings

4. The Post & Telekom Austria AG (hereinafter the PTA) is the successor in law, with effect from 1 January 1997, of the former Post & Telegraphenverwaltung (Post and Telegraph Administration). The Post & Telegraphenverwaltung was entrusted with operating the Austrian postal and telecommunications monopoly, which included the legal obligation to provide telephone directories. It had, however, for economic reasons, decided in 1992 to seek a partner to assist it in the preparation of the Amtliches Telephonbuch (Official Telephone Directory, now known as the White Pages). A contract (though seemingly not in the form of a concession) was concluded in 1992, which expired at the end of 1997. In view of the pending expiry of that contract, the PTA proposed, by advertisement published on 15 May 1997 in the Amtsblatt zur Wiener Zeitung (bulletin annexed to the Austrian Official Journal), as well as in certain newspapers, to grant a concession to produce directories and electronic databases of its subscribers. The concessionaire would, in return for undertaking this obligation, be permitted profitably to exploit the concession, while the PTA would take a 40% stake in the company to be set up by the concessionaire for that purpose. The concession was shortly afterwards awarded to Herold Business Data AG (HBD), which would appear to be a corporate successor in law of the company which had been awarded the initial 1992 contract. The concession was later concluded on 15 December 1997.

5. On 1 August 1997, the Telekommunikationsgesetz (Telecommunications Law, hereinafter the TKA) entered into force. Article 19 of the TKA requires each provider of a public oral-telephone service to maintain, inter alia, an up-to-date telephone list of subscribers, information about its subscribers' numbers and a directory, available at least weekly, in a readable electronic form on request to the regulatory authority established under that Law. Users are to have access to this information, which must be available at a reasonable charge, as part of the universal telephone service in Austria under Article 24(1) and (2) of the TKA. The regulatory authority is required, under Article 26(1) of the TKA, to ensure that a global telephone directory, combining the information contained in the various individual directories, is made available. Individual operators are, moreover, required, under Article 96(1), to produce a telephone book, which may, inter alia, be in printed and/or electronic form.

6. The applicants in the main proceedings, Telaustria and Telefonadress, took the view that the procurement procedures prescribed by the Community and Austrian legal provisions on public service

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contracts should have been applied to the contract in question. Following separate but subsequently joined applications made by the applicants for an arbitration procedure under Article 109 of the Bundesvergabegesetz (Federal Procurement Law, hereinafter the BVerG), an advisory opinion in their favour was issued by the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission), which concluded, on 20 June 1997, that the BVerG rules were applicable.

7. The PTA chose not to comply with this recommendation but continued negotiations in respect of the contract as advertised. In its view, the contract at issue was covered by the express exclusion of concessions of services from the scope of the BVerG pursuant to Article 3(1)(8) of that Law. On 24 June 1997 Telaustria, later joined by Telefonadress, applied to the BVA for a re-examination procedure as well as for interim relief. Having initially granted an interim order in favour of the applicants, the BVA later, on 10 July 1997, decided provisionally to permit the proposed contract between the PTA and HBD to be concluded, on condition that it could be rescinded if the Community procurement rules were later found to be applicable to it.

8. The order for reference states that the TKA applies to the contract concluded between the PTA and HBD. On its establishment as a corporation, the PTA became a 100% publicly owned company. It is under the control of the Austrian authorities and, in the BVA's view, constitutes a public undertaking for the purposes of Article 2(1)(a) of Directive 93/38/EEC and, therefore, also a contracting entity for the purpose of that Directive.

9. The BVA describes the impugned contract as involving... several partly interlocking contracts of differing content but between the same parties. It states that the subject-matter of the printing contract is the production of printed telephone directories.

The BVA points out that HBD must provide services involving, first: collection, processing and arrangement of subscriber data, and making the data technically accessible, in other words services within CPC No 841b, [] "development of software packages", No 8431, "data processing and tabulation services", No 8432, "data gathering services", and No 8439, "other data processing services", possibly also No 844, "services of data banks". It describes these services as falling within category 7, "Computer and related services", of Annex XVI A of Directive 93/38/EEC.

10. The second part of the contract concerns the production of printed telephone directories, which are described as being services in category 15, "Publishing and printing services on a fee or contract basis", for the purpose of Annex XVI A of Directive 93/38/EEC. The final part of the contract described by the BVA comprises services within CPC No 871, "Advertising services", which are thus services within the meaning of category 13 of Annex XVI A of Directive 93/38/EEC. In the BVA's opinion, the proportion of services listed in Annex XVI A of Directive 93/38/EEC outweighs those in Annex XVI B, so that that Directive may be regarded as being applicable to the contract as a whole.

11. Taking the view that the exclusion of public service concessions from the scope of Directive 92/50/EEC does not necessarily support the PTA's assertion that such contracts are also excluded from the scope of Directive 93/38/EEC and having regard to the uncertain scope of what should be understood as such concessions, the BVA has referred the seven questions quoted below to the Court:

Principal question:

Can it be inferred from the legislative history of Directive 92/50/EEC, in particular the proposal of the Commission (COM (90) 372 final, OJ 1991 C 23, p. 1), or from the definition of the term "public service contract" in Article 1(a) of Directive 92/50/EEC, that certain categories of contracts concluded by contracting authorities subject to that directive with undertakings which provide services are to be excluded a priori from the scope of the directive, solely on the basis

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of certain common characteristics as specified in that proposal of the Commission, without the need to rely on Article 1(a)(i) to (viii) or Articles 4 to 6 of Directive 92/50/EEC?;

If the principal question is answered in the affirmative:

Do such categories of contracts also exist, having regard in particular to the 24th recital in the preamble to Directive 93/38/EEC, within the scope of Directive 93/38/EEC?;

If the second question is answered in the affirmative:

May those categories of contracts excluded from the scope of Directive 93/38/EEC be adequately described, by analogy with Commission proposal COM (90) 372, as having as their essential feature that a contracting entity which falls within the scope ratione personae of Directive 93/38/EEC cedes a service for which it is responsible to an undertaking of its choice in return for the right to operate the service concerned for financial gain?;

Supplementary to the first three questions:

Is a contracting entity which falls within the scope ratione personae of Directive 93/38/EEC obliged, where a contract concluded by it contains elements of a service contract within the meaning of Article 1(4)(a) of Directive 93/38/EEC together with elements of a different contractual nature which are not within the scope of that directive, to sever the part of the overall contract which is subject to Directive 93/38/EEC, in so far as that is technically possible and economically reasonable, and make that part the subject of a procurement procedure under Article 1(7) of that directive, as the Court of Justice held in Case C-3/88 before the entry into force of Directive 92/50/EEC with respect to a contract which was not subject as a whole to Directive 77/62/EEC?;

If that question is answered in the affirmative,

Is the contractual concession of the exclusive right to operate a service for financial gain, which will give the service provider an income which cannot be determined but which in the light of general experience will not be inconsiderable and may be expected to exceed the costs of providing the service, to be regarded as payment for the provision of the service, as the Court of Justice held in Case C-272/91 [] in connection with a supply contract and a right ceded by the public authorities in lieu of payment?;

Supplementary to the above questions:

Are the provisions of Article 1(4)(a) and (c) of Directive 93/38/EEC to be interpreted as meaning that a contract which provides for the provision of services within the meaning of Annex XVI A, category 15, loses the nature of a service contract and becomes a supply contract if the result of the service is the production of a large number of identical tangible objects which have an economic value and thus constitute goods within the meaning of Articles 9 and 30 of the EC Treaty?;

If that question is answered in the affirmative:

Is the judgment of the Court of Justice in Case C-3/88 to be interpreted as meaning that such a supply contract is to be severed from the other components of the service contract and made the subject of a procurement procedure under Article 1(7) of Directive 93/38/EEC, in so far as this is technically possible and economically reasonable?

II Observations

12. Written observations have been submitted by Telaustria, the PTA, the Kingdom of Denmark, the Kingdom of the Netherlands, the French Republic, the Republic of Austria and the Commission. All of these, save Denmark and the Netherlands, also presented oral observations.

III Analysis

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13. In my view, the issues raised by the various questions referred by the national court may be summarised as follows:

(i) Is the contract in the present case, assuming that Community public-procurement rules apply, governed by Directive 93/38/EEC?;

(ii) Are public service concessions excluded from the scope of Directive 93/38/EEC?;

(iii) What is the scope of a public service concession contract in Community law and how are such concessions to be defined?;

(iv) If the relevant advertising rules of the Community procurement directives are not applicable, what, if any, publicity requirements would flow from the application of general Treaty principles?;

(v) In the event of Directive 93/38/EEC being inapplicable, does the fact that the concession is intended to lead to the production of a large number of (physical) telephone directories mean that it should be regarded, in whole or in part, as a supply contract and, thus, subject to the procurement rules of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts?

Although there are certain overlaps between these issues, I propose, for convenience, to deal with them in turn.

A Directive 92/50/EEC or Directive 93/38/EEC

14. If Directive 93/38/EEC were applicable to a contract such as that between the PTA and HBD it would be unnecessary to provide any specific answer to the first question referred by the BVA. It is therefore appropriate, in my view, to consider first the possible applicability of the sectoral directive before examining other more general directives. However, even if Directive 93/38/EEC were alone applicable in the present case, it would preclude consideration of other Community public procurement rules for the purposes of assisting in the interpretation of that Directive.

15. It is clear from the order for reference that the PTA, as a publicly owned telecommunications-services provider, falls, in principle, to be considered as a contracting entity for the purpose of Article 2(1) of Directive 93/38/EEC. Support for this view may also be derived from the 13th recital in the preamble to that Directive, which states that its scope should not extend to activities of those entities ... which fall outside the telecommunications sector. Directive 93/38/EEC only applies, in accordance with its Article 2(1), where a contracting entity exercises one of the activities referred to in paragraph 2, which include the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.... While it may no longer be the only provider of such services active on the Austrian market, the BVA has itself described the PTA's tasks as including the provision and operation of public telecommunications networks and the offering of public telecommunications services. It is, as the Commission submits, clearly a sectoral contracting entity. It is common case that the production of both physical and electronic telephone directories is directly related to the provision of those services.

16. The BVA has itself provisionally taken the view that the services involved in the contract between the PTA and HBD, viewed as a whole, fall within the scope of Directive 93/38/EEC, and, more particularly, that it should be regarded as being a supply contract for the purpose of Article 15 thereof. In order to determine whether the contract at issue comes within the material scope of Directive 93/38/EEC, there is nothing in the information available to the Court that would call into question the BVA's assessment that, but for the fact that it may be excluded by reason of constituting a concession, the contract should be considered to fall within the scope of that Directive. In my opinion, it is unnecessary, for the purpose of answering the questions referred, to take a view on whether it would constitute a supply or service contract. This is because, if

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a contract like that at issue in the main proceedings may be considered to be a supply or a service contract within the meaning of Article 1(4) of Directive 93/38/EEC, then the publicity rules prescribed by either Article 15 or 16 of that Directive would apply.

17. I do not agree with the PTA that the services which fall within the scope of Directive 93/38/EEC are only those which occur at the end of a long chain of services and which, in so far as the present case is concerned, relate directly to the actual provision of voice-telephony services. It emerges clearly from the 17th recital in the preamble to Directive 92/50/EEC that the provisions of that Directive were not intended to affect the predecessor to Directive 93/38/EEC; in other words, where a contract falls within the scope of the sectoral Directive, the more general provisions of Directive 92/50/EEC are inapplicable. While the services included within the scope of the latter are listed, inter alia, in Annex I A to the Directive and include telecommunications services (category 5), it is clear from the footnote accompanying that category that voice-telephony services are excluded. Only a very narrow interpretation of the scope of Directive 93/38/EEC would justify the PTA's view that a contract concerning the production of telephone directories is insufficiently related to the provision of voice-telephony services for that Directive to be applicable. In my view, such a narrow construction is misconceived. It is particularly relevant, as noted in the order for reference, that category 15 of Annex XVI to Directive 93/38/EEC expressly includes publishing or printing services as being among the services covered by the publicity procedures required under Article 15.

18. Moreover, Article 1(4) of Directive 93/38/EEC describes, inter alia, the service contracts covered by that Directive as being contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider, and which have as their object (see Article 1(4)(ii)) voice telephony... services. Accordingly, I am satisfied that the BVA has correctly assumed that Directive 93/38/EEC is, in principle, the applicable directive in the present case. The issue raised by the second, third and fifth questions (as well as indirectly by the first question) should therefore be interpreted as being whether the concession nature of the contract between the PTA and HBD precludes the application of Directive 93/38/EEC. In reality, this is the core issue in this case.

B The exclusion of public service concessions

19. The applicants submit that public service concessions should not be viewed as falling outside the Community procurement rules because such an interpretation would subject those rules to the variation in the activities that are considered to be public activities in the various national laws. The need to interpret exceptions from the scope of the public procurement rules narrowly precludes such an exception. Alternatively, if concessions are excluded, there must be a genuine transfer of an activity that is in the public interest for it to comprise a public service concession. This, they allege, is not the case as regards the production of telephone directories. They point to the fact that there was no express Commission proposal to include public service concessions within the scope of Directive 93/38/EEC and conclude that it would be unjustified to deduce an exclusion of such contracts from the silence of the Directive on the matter.

20. The PTA, supported by the intervening Member States and the Commission, essentially submits that it is clear from the legislative history of Directive 92/50/EEC, as well as from consideration of the overall scope of the Community procurement directives, that the Council did not wish to include concessions within the scope of either that Directive or Directive 93/38/EEC. The material scope of the latter Directive is limited to the types of contract therein included, of which concessions are not an example.

21. In my view, it is perfectly clear that the Council rejected the Commission's proposal to include concessions within the scope of Directive 92/50/EEC. In its initial proposal, submitted on 13

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December 1990, public service concessions were distinguished from public service contracts in Article 1(a)(vi), defined in Article 1(a)(h) and subjected to the publicity rules of the proposed directive by Article 2. Apart from a more developed definition of a public service concession, essentially similar provisions were included in the amended proposal submitted on 28 August 1991. The initial rationale given by the Commission for their inclusion appeared in the 10th recital of the proposal, where the Commission stated that in order to ensure coherent award procedures, public service concessions should be covered by this Directive in the same way as Directive 71/305/EEC applies to public works concessions. The reference to the latter directive was dropped in the 10th recital of the amended proposal, which simply stated that the inclusion of public service concessions was necessary to ensure coherent award procedures. During the legislative process, the Council decided to eliminate all references to public service concession from the proposal. Its reasoning appears in the document setting out the reasons for its common position and cited by France in its written observations. The Council's decision can only, as France submits, be construed as an express refusal to include such concessions within the scope of Directive 92/50/EEC.

22. It is in this light that I interpret the failure of the Commission even to propose the inclusion of public service concessions in its proposal, submitted on 27 September 1991, for what became Council Directive 93/38/EEC to be significant. More significant still, however, is the fact that in its amended proposal for what became the predecessor directive to Directive 93/38/EEC namely, Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the first sectoral public procurement directive the Commission had proposed certain provisions to regulate public service concessions. This proposal was not accepted by the Council because such concessions occurred in only one Member State and the Council deemed it inappropriate to proceed with their regulation in the absence of a detailed study of the diverse forms of public service concessions accorded in the Member States in respect of the water, gas and electricity sectors. This assessment of the legislative history clearly demonstrates that the silence of Directive 93/38/EEC in respect of concessions was intentional and clearly designed to exclude them. In the present case, it therefore provides a clear aid to construing the text of the Directive as finally adopted by the Council.

23. I would draw additional support for this view from the directives dealing with public works contracts. In the first public procurement directive, Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, Article 3(1) expressly excluded concession contracts from the scope of the public works contracts defined in Article 1(a) as contracts for pecuniary consideration concluded in writing between a contractor... and an awarding authority which were subject to it. In 1989, Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts adopted a definition of public works concession (see the new Article 1(d) inserted by Article 1(1) of Directive 89/440/EEC) and included advertising rules to be applied to the award of such concessions (see the new Article 1b inserted by Article 1(2) of Directive 89/440/EEC). This is highly significant because, for the first time, the Community public procurement rules expressly addressed the phenomenon of concessions. At the time of the award of the contract at issue in the main proceedings, the relevant provisions were those contained in the consolidated directive which replaced Directive 71/305/EEC, namely Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. This Directive was adopted on the same day as Directive 93/38/EEC. It is, therefore, to my mind obvious that if the Council had wished to include public service concession within the scope of Directive 93/38/EEC it would have done so expressly, as it did when adopting Directive 93/37/EEC. The only reasonable inference to be drawn from its omission to do so is that which has already been drawn by Advocate General La Pergola in his Opinion in Arnhem and Rheden, namely that Directive 93/38/EEC covers only service contracts.

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24. It is, consequently, clear that the Community public procurement law notion of contracts for pecuniary interest concluded in writing (my emphasis), which appears in all directives from Directive 71/305/EEC, the first directive, up to and including Directive 93/38/EEC, has never encompassed concessions. It is not possible to argue, as the applicants implicitly do, that a literal interpretation of that notion, as it now appears in Article 1(4) of Directive 93/38/EEC, would permit written concession-type agreements, where the consideration is obtainable whether wholly by exploitation or partly by both exploitation and payment from the awarding entity, to fall within its scope. In other words, even if the legislative history were to be overlooked, a contextual construction of the notion of pecuniary interest, which would be necessary given that it is not defined in Directive 93/38/EEC, would exclude concessions.

25. It follows, in my opinion, that the Court should rule that public service concessions do not fall within the scope of Directive 93/38/EEC.

C The scope of the notion of public service concessions

26. Since I take the view that public service concessions are excluded from the scope of Directive 93/38/EEC, it is necessary, in order to answer the third and fifth questions referred by the national court, to consider the type of arrangement that may be viewed as such a concession and, thus, excluded from the publicity rules of that Directive. In doing so, I am conscious that the Community legislature, except where concessions have explicitly been included, has not found it necessary to define the notion of public service concessions. In those circumstances, I agree both with the Member States who have intervened in this case and with the Commission that, in the absence of a legislative definition, criteria for identifying what constitutes a concession need to be identified by the Court so as to assist the BVA to make its final decision in the present case.

27. The applicants submit that the essence of a concession resides in the fact that no remuneration is paid by the granting entity to the concessionaire. The latter must therefore simply be given the right economically to exploit the concession, although this right may, in their view, be accompanied by a requirement to pay consideration to the grantor. They also contend that the subject-matter of the concession must concern a public interest service related to the exercise of public power. This is not the case here, in their view, since each telecommunications-service provider is obliged by Article 96(1) of the TKA to publish a directory.

28. The observations of the other parties and interveners who have submitted observations are largely ad idem as regards the main distinctive features of a concession. They would classify a concession by reference to three essential characteristics. First, the beneficiary of the service provided must be third parties rather than the awarding entity itself. Second, the subject of the service ceded must concern a matter which is in the public interest. Finally, the concessionaire must assume the economic risk related to the performance of the service at issue.

29. In the first place, it is important to bear in mind that public service concessions are not covered by Directive 93/38/EEC. I do not therefore accept, as the applicants have submitted, that it is necessary to interpret their scope narrowly. They do not constitute derogations from the publicity rules of the Directive but rather a type of arrangement that is not covered by the Directive and thus beyond the remit of those rules.

30. It seems to me that an appropriate starting point would be the definition contained in the public works directives, since this is the only definition which has been approved to date by the Community legislature. Article 1(d) of Directive 89/440/EEC initially defined a public works concession as a contract of the same type as ["public works contracts"] except for the fact that consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment. The justification for including such concessions

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within the scope of the Directive was set out in the 11th recital in its preamble and was cited as being the increasing importance of concession contracts in the public works area and of their specific nature.... An identical definition of a public works concession along with an identical justification for the inclusion of such concessions was later retained in Directive 93/37/EEC. In my view, the Community legislature has viewed the absence of, at least full, consideration passing from the granting entity to the concessionaire as constituting the essence of a concession. I agree that this represents a fundamental feature of a concession whose importance is not limited to those which are concerned with public works. This feature, to my mind, finds expression in the fact that the concessionaire itself must bear the principal, or at least the substantive, economic risk attaching to the performance of the service involved. If the national court is satisfied that the economic burden or risk has effectively been passed to the concessionaire by the grantor of the concession, then there must be a very strong presumption that the arrangement concluded between them amounts to a concession rather than a contract.

31. To my mind, the single most important indication of whether economic risk is to be borne by the concessionaire will emerge from examining the nature of the exploitation in which the supposed concession requires it to engage. Arnhem and Rheden provides a strong indication that the Court views the requirement to exploit the right ceded in order to obtain remuneration as the core of what constitutes a genuine concession. In response to an argument raised by France in its observations that the contracts at issue in that case (which concerned a joint venture between two Dutch municipalities to provide municipal refuse-collection and road-cleaning services through ARA, a company set up expressly for that purpose) could be regarded as a public service concession, the Court declared, without finding it necessary to interpret that term, that it was clear from the underlying agreement that the remuneration paid to ARA comprises only a price and not the right to operate a service.

32. Reference was made at the hearing to a draft communication from the Commission on the interpretation in Community law of public procurement concessions. In that communication, to which various references were made at the hearing, the Commission sets out a number of illustrations of circumstances which had come to its attention but which, in its view, did not satisfy the requirement that the risk be borne by the concessionaire. Thus, where, for example, the public authorities effectively guarantee to indemnify the concessionaire against future losses, or where there is no effective exploitation by the concessionaire of the service whose performance is ceded, the Commission submits that the arrangement at issue could not amount to a concession.

33. I would, however, agree with the observations of France to the effect that there is no overriding definition of a public services concession. All that is clear, as Lottomatica and Arnhem and Rheden reveal, is that where the remuneration is fixed or determinable the arrangement should be viewed as contractual and falling, prima facie, within the scope of the relevant procurement directive. In Lottomatica, the Italian State had published a contract notice for the purported concession of the computerisation of the Italian Lotto. Italy alleged that as a concession to carry out a public service it was not covered by Directive 77/62/EEC. The Court rejected this plea. It held that the introduction of the computerised system in question does not involve any transfer of responsibilities to the concessionaire in respect of the various operations inherent in the lottery and that it was common ground that the contract at issue relate[d] to the supply of an integrated computerised system including in particular the supply of certain foods to the administration. The fact that the system was only to become the property of the administration at the end of the contractual relationship with the tenderer was irrelevant, because the "price" for the supply [took] the form of an annual payment in proportion to revenue. It is, therefore, necessary in each case to look at a number of factors which will indicate whether in reality the arrangement between the parties amounts to a written contract for a pecuniary interest in respect of the provision of services. There is a general consensus in the observations as to the relevance of the other criteria cited by Advocate

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General La Pergola in his Opinion in Arnhem and Rheden, to wit that in the case of a concession, the beneficiary of the service is a third party unconnected with the contractual relationship. Although I would not reject entirely the potential assistance which may be derived from this factor in certain borderline cases, it would seem to me to add little to the requirement that the concessionaire effectively obtain at least a significant proportion of its remuneration not from the granting entity but from the exploitation of the service. If, in reality, its only customer were from the outset to be the awarding entity, as opposed to third parties, it is difficult to see how the arrangement between them could escape classification as a contract for pecuniary interest. Indeed, such a situation would approximate to the facts of Lottomatica, where the only customer of the purported concessionaire was clearly the public administration responsible for conducting lotteries in Italy.

34. There is less consensus in the observations submitted regarding the relevance of the public interest nature of the service ceded. In his Opinion in Arnhem and Rheden, Advocate General La Pergola expressed the view that [u]nder Community law, the service that is the subject of a service concession must also be in the general interest, so that a public authority is institutionally responsible for providing it. He went on to say that [t]he fact that a third party provides the service means that the concessionaire replaces the authority granting the concession in respect of its obligations to ensure that the service is provided for the community. Contrary to the applicants' submission, I would not read the judgment in Data-processing as supporting this view. The reference to public service in that case was related to the Court's rejection of Italy's plea in that case that the development of the data-processing systems for the performance of certain public activities was in itself a public service activity which was excluded from the scope of Directive 77/62/EEC. The Court held that neither the supply of the equipment required nor the design of the system itself, although enabl[ing] the authorities to carry out their duties [,]... in themselves constitute[d] a public service.

35. It would appear that the supposed relevance of the general interest nature of the service that is the subject of the concession derives from the definition proposed by the Commission in both its initial and amended proposals for a procurement directive concerning public service contracts, where it referred, at Article 1(h) in both cases, to the transfer by an awarding authority of the execution of a service to the public lying within its responsibility. I doubt whether the notion of a service to the public should, save in the broadest sense of the word, be construed as requiring that it be one that is in the general interest. On the contrary, it seems to me that it should merely refer to the fact that the typical intended beneficiaries of a genuine public service concession will be third-party members of the general public or a particular category of that general public. I certainly do not consider that it is necessary for the service at issue to be capable of being regarded as a service of general economic interest in the sense in which that notion has been interpreted for the purposes of applying Article 90 of the EC Treaty (now Article 86 EC). In other words, there should, in my opinion, be no qualitative bar to the sorts of service that a contracting entity may legitimately seek to award by way of concession, although it is likely that there will be a public interest in most of the services that are awarded in that manner.

36. In any event, I do not see how the Court could devise criteria for determining what may or may not properly be viewed as being in the public interest. To my mind, the adoption of the view that only public interest services are proper matters for public service concessions and of the concomitant required definition of such interests are plainly matters for the Community legislature if it opts to harmonise, in the interests of the internal market, the rules regarding such concessions. This is borne out by the fact that, at the hearing, the Commission accepted that there was no clear definition of public interest in Austrian law and that it must be left to the national courts to determine its scope. Acceptance of such a principle would, of course, be a recipe for the non-uniform application of Directive 92/50/EEC, with certain national courts taking the view that the Directive

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applied to concessions because the subject-matter of the service ceded was not capable of being regarded as falling within the public interest of the relevant Member State. It should be avoided. In any event, it is unnecessary to adopt any final view on this matter in the present case because I agree with the submission made by the PTA at the hearing that, once the performance of an obligation has been imposed by public law as that at issue in the present case has by virtue of Articles 26(1) and 96(1) of the TKA , its performance may be deemed to be in the public interest of the Member State concerned. It should also be irrelevant whether the awarding entity is the only entity or merely one of a number of entities which is subject to the obligation in question and whether overall responsibility for ensuring the performance of the obligation is imposed upon a regulatory authority.

37. In summary, therefore, a case-by-case approach should be adopted to the question of whether a contract amounts to a concession or a service contract which takes account of all indicative factors, the most important of which is whether the supposed concession amounts to a conferral of a right to exploit a particular service as well as the simultaneous transfer of a significant proportion of the risk associated with that transfer to the concessionaire.

38. In their observations the applicants have advanced various arguments which seek to demonstrate that, in reality, the PTA is providing consideration to HBD. In the context of a preliminary reference, it is not for this Court to make any findings in this respect which remain exclusively a matter for the court or tribunal which has referred the case. However, as it emerges clearly particularly from the BVA's fifth question that it entertains doubts as to the degree of economic risk that must be borne by a concessionaire, it may be of assistance to it to consider briefly some of the allegations made by the applicants. They assert that the grant to HBD of the right to use the PTA logo is of considerable economic value. This coupled with the facts that all of the cost factors involved for HBD are relatively easy to determine in advance and that the possibility of selling advertising space in the directories amounts, as was asserted at the hearing, to a real gold-mine gives the lie, in the applicants' view, to the claim that HBD undertook any real economic risk.

39. Naturally, this assessment is hotly contested by the PTA. It points out that paragraph 16 of the contract expressly confers the responsibility of producing the directory on HBD. It submits that it has licensed HBD, in return for payment, to use its data for the purpose of producing that directory. However, this licence is not different from that which it would be willing to grant to any other economic operator who wished to exploit that information. As regards the logo, it has not authorised HBD to use its trade mark but has in fact obliged it to do so. This is an arrangement which is for its benefit because it profits from certain free and advantageously placed advertising in the directory. Moreover, the fact that the PTA has paid for the acquisition of a shareholding in HBD, which transaction is wholly independent of the concession, cannot be regarded as consideration paid to the latter in respect of that concession.

40. In my view, the mere fact that there is a likelihood that the concessionaire will be able beneficially to exploit the concession would not suffice to permit a national court or tribunal to conclude that there is no economic risk. To my mind, a national court or tribunal would need to be satisfied to a high degree of probability that the possibility of loss was minimal or even non-existent. Although it is for the BVA in the present case to make that determination, I am unconvinced that assertions such as those made by the applicants satisfy the test of no real or effective risk. HBD has to pay for the use of the data, which data could be obtained on the same terms by other economic operators. The requirement imposed on HBD to use the PTA's logo is clearly of economic benefit to the PTA. The mere fact that it might also benefit HBD does not render the concession into a contract since the extent of that benefit is not quantifiable in advance.

D General Treaty requirements

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41. It is common case in the observations submitted to the Court that, even if the grant of public service concessions falls outside the scope of Directives 92/50/EEC and 93/38/EEC, the awarding authorities are, none the less, bound to respect the Treaty. It is also accepted that Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) would, in particular, preclude all direct and indirect discrimination based on nationality. In other words, awarding authorities must respect the principle of equal treatment between tenderers. They must also ensure that no conditions are imposed on the tenderer that would, in themselves, amount to an infringement of, for example, Article 30 of the EC Treaty (now, after amendment, Article 28 EC). It is not submitted in this case that any of those Treaty provisions have, at least directly, been infringed.

42. The Commission, however, asserts that entities awarding public service concessions are also under a more general obligation, which it appears to derive from the objectives underlying Articles 30, 52 and 59 of the EC Treaty, to ensure the transparency of the award procedures. At the hearing the Commission referred to Unitrans Scandinavia and Others v Ministeriet for Fødevarer, Landbrug og Fiskeri in support of this view. That case concerned the obligations affecting a body other than a contracting authority, but upon which special or exclusive rights to engage in a public service activity have been granted by such an authority, when that body awards public supply contracts to third parties. The Court held that the principle of non-discrimination on grounds of nationality cannot be interpreted restrictively [and that] it implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that it has been complied with. In answer to questions at the hearing regarding the scope of this obligation, the Commission was unwilling to suggest that it would extend to requiring publication of proposed public service concessions.

43. I consider that substantive compliance with the principle of non-discrimination on grounds of nationality requires that the award of concessions respect a minimum degree of publicity and transparency. I agree with the Commission that what must at all costs be avoided is that their grant be shrouded in secrecy or opacity. I also accept the point made by the agent for Austria that publicity should not necessarily be equated with publication. Thus, if the awarding entity addresses itself directly to a number of potential tenderers, and assuming the latter are not all or nearly all undertakings having the same nationality as that entity, the requirement of transparency would, in my view, be respected. Transparency, in this context, is therefore concerned with ensuring the fundamental fairness and openness of the award procedures, particularly as regards potential tenderers who are not established in the Member State of the awarding authority. It does not, however, in my opinion require the awarding entity to apply by analogy the provisions of the most relevant of the Community procurement directives.

44. In any event, in the present case, there can be little doubt that a sufficient degree of transparency was respected. The offer was published in the Austrian Official Journal, in some of the Austrian newspapers and in certain leading international newspapers. Moreover, it is not suggested that the information published in the latter differed from that published in the former. I would conclude that this degree of publicity prima facie satisfied the requirement of transparency. The applicants, however, submit that, in the absence of publication of the results of the pilot programme run under the earlier contract with HBD's predecessor between 1992 and 1997, it was impossible for any tenderer other than HBD effectively to tender for the proposed concession. The accuracy of this assertion cannot be verified by this Court. In my opinion, unless the BVA is satisfied that such publication, or the making available of the information concerned to serious potential interested tenderers, was crucial for ensuring the effectiveness of their tenders, it must conclude that the procedure adopted and followed by the PTA was not incompatible with Community law.

E Severance of the contract

45. The question of the distinction between service and supply contracts, which is raised by the

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BVA's fourth, sixth and seventh questions, would arise only in the event that the Court were to find that, notwithstanding the concession aspects of a contract such as that at issue in the main proceedings, Directive 93/38/EEC was in principle applicable. Since I take the view that a concession like that at issue in the main proceedings should be considered to fall outside the scope of that Directive, provided the substantive burden of the economic risk involved in the exploitation of the service in question is transferred to the concessionaire, I address this issue very much in the alternative.

46. In reality, the BVA wishes to know whether a contract which could be classified as containing a supply element, to wit the production of telephone directories for or on behalf of the PTA, would fall to be considered within the scope of the temporally material supplies directive, namely Directive 93/36/EEC. It seems to me that the answer to this question is provided clearly by Article 1(4) of Directive 93/38/EEC (quoted in paragraph 3 above). Thus, contracts which include both the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract. The Court too has recognised, especially in Gestion Hotelera Internacional, the importance of determining the predominant element of a contract where its component elements may fall within the scope of two discrete Community procurement directives. However, [i]t is for the national court to determine whether the works are incidental to the main object of the award. It is therefore for the national court, in applying Article 1(4) of Directive 93/38/EEC, to determine whether, in fact, the value of what may be regarded as supplies exceeds that which may only be classified as services. If this were the case, and assuming the contract at issue is not found to constitute a public service concession, the procurement rules of Directive 93/36/EEC would alone be applicable to it.

IV Conclusion

47. In the light of the foregoing, I propose that the questions referred by the Bundesvergabeamt be answered as follows:

(1) The provision or operation of public telecommunications networks or the provision of one or more public telecommunications services for the purposes of Article 2(2)(d) of Council Directive 93/38/EEC includes contracts concerned with the production of telephone directories;

(2) Public service concessions do not fall within the scope of Directive 93/38/EEC;

(3) In the absence of a definition adopted by the Community legislature of the notion of public service concessions, it is necessary in each case for the national court or tribunal to look at all the factors which are capable of indicating whether, in reality, the arrangement between the parties amounts to a written contract for a pecuniary interest in respect of the provision of services. The predominant and characteristic feature of such a concession is the grant of a right to exploit a particular service together with the associated economic risk;

(4) Substantive compliance with the Treaty-based principle of non-discrimination on grounds of nationality requires that the award of public service concessions respect a minimum degree of publicity and transparency, the purpose of which should be to ensure fundamental fairness in the awarding procedures and a reasonable opportunity for tenderers who are not established in the Member State of the awarding entity to submit tenders;

(5) Contracts falling within the scope of Directive 93/38/EEC which include components concerned with the provision of services and supplies shall by virtue of Article 1(4) of that Directive be regarded as supply contracts, for the purpose of the Community-procurement rules, if the total value of supplies is greater than the value of the services covered by the contract.

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Opinion of Mr Advocate General Alber delivered on 8 July 1999.
Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri.
Reference for a preliminary ruling: Klagenævnet for Udbud - Denmark.
Public supply contracts - Directive 93/36/EEC - Award of public supply contracts by a body other than a contracting authority.
Case C-275/98.

A - Introduction

1 The present reference for a preliminary ruling concerns two questions in connection with public procurement. On the one hand it concerns the question as to what legal significance is to be attributed to a non-discrimination clause (prohibition against discrimination on the ground of nationality) contained in a directive on procedures for the award of public supply contracts, and on the other hand whether such a non-discrimination provision contains an obligation for bodies which are not contracting authorities to carry out a (tendering) procedure in accordance with the directive when awarding (public) supply contracts.

2 The disputed provision is to be found in Article 2(2) of Directive 93/36/EEC (1) and reads as follows:

`When a contracting authority within the meaning of Article 1(b) (2) grants to a body other than a contracting authority - regardless of its legal status - special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties.'

B - Facts

3 The dispute in the main proceedings concerns a tendering procedure with regard to eartags for pigs. The complainants, Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab (hereinafter `the complainants') wished to supply those eartags. The respondent, Ministeriet for Fødevarer, Landbrug og Fiskeri (Ministry of Foodstuffs, Agriculture and Fisheries; hereinafter `the respondent' or `the Ministry') bears the `overall responsibility' for the Danish scheme involving eartags for pigs. The award procedure, which is the subject of the complainants' grievance, was carried out by the Veterinærdirektoratet (Veterinary Department), a subordinate institution of the respondent, as well as Danske Slagterier (Danish Abattoirs), a private body.

4 In Council Directive 92/102/EEC (3) on the identification and registration of animals, rules were introduced, with a view to combating disease, concerning the marking of animals. For that purpose the Member States were to set up a central authority with the power to carry out veterinary controls. The authority was to be required to register the holdings which kept animals within the meaning of the directive. In regard to keeping pigs, the directive provides that before they leave the holding on which they are born, they are to be identified by an eartag or tattoo which will identify the holding which the animal comes from. The Danish regulation (4) provides that eartags for pigs are to be approved by the Veterinary Department, which is itself subject to the respondent. Those eartags are then sold to the individual producers via Danske Slagterier, a private body connected to the Danish agricultural organisations. The Veterinary Department fixes the price for the eartags and the supply of eartags is registered in the Ministry of Agriculture's Central Livestock Register.

5 According to the statements made in the order for reference, two kinds of eartags are in use in Denmark, those employed for slaughtered animals and those used for live animals. Eartags for

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the latter are ordered by pig producers from Danske Slagterier, who transmit the order to the relevant eartag supplier, who, for his part, supplies the ordered eartags directly to pig producers. Payment for the eartags is made by pig producers to Danske Slagterier. The eartags for slaughtered animals, on the other hand, are ordered directly by pig producers from the eartag supplier, who dispatches them to pig producers whilst informing Danske Slagterier. Here also, payment for the eartags is made by pig producers to Danske Slagterier. The price for both kinds of eartags is composed of the amount charged by the eartag suppliers plus DKK 0.5 per eartag. Registration of pigs in the Central Livestock Register is carried out by Danske Slagterier, for which it receives an annual fee from the Veterinary Department of DKK 400 000.

6 In 1993/94 the supply of eartags was first put out to tender. The tender specifications were drawn up by the Veterinary Department in collaboration with Danske Slagterier, whilst the latter was entrusted with the tendering procedure. The tendering procedure took place in conformity with Danish legal provisions. At the end of 1996 an additional tendering procedure was carried out at the respondent's request. An undertaking which had previously been entrusted with the supply of eartags was again awarded the supply contract. A second undertaking was also selected to supply eartags, which had not previously been awarded such a contract. Agreements were entered into with both undertakings for a duration of three years, starting on 1 April 1997. That procedure was also carried out in accordance with Danish law. A third tendering procedure, the first to be carried out in accordance with the procedure laid down in Directive 93/36, took place between October 1997 and April 1998.

7 On the grounds that they had not been considered within the 1996/97 tendering procedure, the complainants lodged an administrative complaint against the respondent with the Klagenævnet for Udbud (hereinafter `the Procurement Review Board'). They claimed that, in relation to their purchase of eartags, Danske Slagterier were to be considered a contracting authority within the meaning of Article 1 of Directive 93/36 and that consequently the directive should have been applied. They argued that Danske Slagterier had carried out the administration of the eartag scheme in the public interest and had, in reality, been acting in the respondent's stead. The contracts should thus have been awarded in a tendering procedure pursuant to Directive 93/36. In the alternative, the complainants claimed that Article 2(2) of Directive 93/36 should have been applied and Danske Slagterier should have been instructed by the respondent that differential treatment on the basis of nationality was not permitted, which consequently would have resulted in the tendering procedure being published throughout the entire European Union.

8 The Ministry contended that no public supply contract was involved and that Directive 93/36 was therefore inapplicable. In reality, suppliers sold the eartags to pig producers. Danske Slagterier had only been required to administer the scheme and the respondent had simply approved the eartags and paid a certain amount for the scheme's administration. The purchase of eartags had thus not taken place at public expense.

9 The Procurement Review Board assumes that Danske Slagterier were the purchasers of the eartags in question. That was due to the fact that Danske Slagterier had carried out the tendering procedure and that pig producers had paid Danske Slagterier for both types of eartags. The Procurement Review Board also assumes that Danske Slagterier are not to be considered a contracting authority within the meaning of Article 1(b) of Directive 93/36, because no more than fifty per cent of their activities are financed by public funds.

10 The Procurement Review Board further states that, since the Ministry delegated the administration of the eartag scheme including the purchasing of the eartags to a private undertaking or a private organisation - Danske Slagterier - that service as such should have been awarded by means of a public tendering procedure. The awarding of that contract should have taken place pursuant to Directive

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93/36 on the award of public supply contracts and not pursuant to Directive 92/50/EEC (5) on the award of public service contracts. That was due to the fact that, according to the information available to the Procurement Review Board, the value of the purchased eartags exceeded the value of the service in question.

11 In the matter presently at issue, the referring Procurement Review Board raises the question, first, whether the provision contained in Article 2(2) of Directive 93/36 has an independent meaning. The Procurement Review Board considers it possible that this provision (6) has lost its independent meaning due to the fact that a directive on the award of public service contracts has already been adopted, namely Directive 92/50 relating to the coordination of procedures for the award of public service contracts. The Procurement Review Board also considers it possible that this independent meaning remains in effect, due to the fact that, in spite of amendments made to Directive 93/36, Article 2(2) remained the same.

12 Secondly, the Procurement Review Board considers what such an independent meaning might entail, given that the interests, which in this case were to be protected under Article 2(2) of Directive 93/36 (supply contracts), were, in effect, those which fell under Directive 92/50 (public service contracts). In this context, the Procurement Review Board therefore wishes to know to what extent the principle of non-discrimination is to be taken into consideration when awarding public supply contracts, as well as whether Article 2(2) requires a body which does not constitute a contracting authority to carry out a tendering procedure for the award of public contracts if the value of the contracts exceeds the threshold value laid out in Directive 93/36. The question here is therefore not whether the respondent itself is required to carry out the procedure pursuant to the Directive, but rather whether Danske Slagterier were required to apply that procedure.

13 The Procurement Review Board therefore refers the following questions to the Court of Justice for a preliminary ruling:

`1. Does Article 2(2) of Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts still have an independent meaning after the adoption of Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts (as both amended by European Parliament and Council Directive 97/52/EEC)?

2. If Question 1 is answered in the affirmative, does the provision accordingly mean that, where a contracting authority entrusts the administration of an eartagging scheme to a private undertaking which is not a contracting authority, the contracting authority should stipulate, on the one hand, that the undertaking should comply with the prohibition against discrimination on the ground of nationality in public supply contracts which the undertaking awards to third parties and, on the other hand, that the procurement of goods linked to the scheme should be put out to public tender if the value of the goods to be procured exceeds the threshold value in Council Directive 93/36?'

14 The respondent - which considers the reference for a preliminary ruling inadmissible - and the Commission have taken part in the procedure before the Court. Both have submitted written statements and declined to participate in the oral hearings. I shall refer to their arguments as far as may be necessary in the course of my analysis.

C - Opinion

1. Admissibility of the reference for a preliminary ruling

(a) Whether the Procurement Review Board constitutes a court or tribunal within the meaning of Article 117 of the EC Treaty (now Article 234 EC)

15 Firstly the question arises as to whether the Procurement Review Board is to be considered a `court or tribunal' within the meaning of Article 177 of the EC Treaty; that is to say, whether

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the reference is admissible.

16 Both the respondent and the Commission answer this question in the affirmative. With reference to the established case-law of the Court they invoke the statutory footing upon which the Procurement Review Board rests, its permanent character, the contentious nature of proceedings before it, the fact that it applies the law, and its independence. They thus conclude that the Procurement Review Board constitutes a court or tribunal within the meaning of Article 177 of the EC Treaty.

17 The Procurement Review Board was - according to information which it has itself provided - established by Law No 344 of 6 June 1991. It was set up in implementation of Council Directive 89/665/EEC (7) on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. Proceedings before the Procurement Review Board are like those in civil disputes. They are adversarial in nature and in nearly all cases an oral hearing takes place. Proceedings are concluded by the Procurement Review Board handing down a decision in the form of an order. Such orders are formulated in the same terms as judgments in civil cases. The Procurement Review Board is not bound by the instructions of any other body and operates as a completely independent institution. The Procurement Review Board is composed of a presiding judge as well as a panel of experts. The rulings of the Procurement Review Board concern the interpretation of Community law in regard to public supply contracts and can thus be said to be of a judicial nature. The Procurement Review Board is also empowered to ascertain the nullity of administrative measures. Furthermore, it also has jurisdiction at last instance in Denmark with regard to the interpretation and application of Community provisions on tendering procedures. The Procurement Review Board therefore concludes that it falls under the term `court or tribunal' within the meaning of Article 177 of the EC Treaty.

18 That conclusion is to be endorsed. The Court has repeatedly held that in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether it applies rules of law, whether its rulings are binding, whether it is independent and whether its procedure is inter partes. (8) Since it fulfils the requirements set out by the Court in its case-law, the Procurement Review Board may be considered a `court or tribunal' within the meaning of Article 177 of the Treaty. A reference for a preliminary ruling is, at least from that perspective, admissible.

(b) The importance of the questions referred

19 The respondent nevertheless still considers the reference inadmissible on the ground that a ruling on the questions submitted is not indispensable in order for the Procurement Review Board to hand down its decision. An answer would not contribute to resolving the dispute in the main proceedings. The respondent holds that, although it may be within the purview of the national court to decide whether or not a reference pursuant to Article 177 of the Treaty is necessary and indispensable for its ruling, the reference is inadmissible because any answer in the present case would only be of hypothetical value. The respondent further argues that an interpretation of Article 2(2) of Directive 93/36 as requested by the Procurement Review Board would not have any impact on the complainants' legal situation. The respondent holds that there is no legal interest worth protecting and that, in reality, questions are concerned that might arise in some later legal dispute. It would, in any event, be of no help to undertakings if the Court were to answer the questions, because in the meantime, a possible procedural error had been cured by the award of the disputed contract. The last tendering procedure which was carried out in 1997/98 had, the respondent argues, taken place in conformity with Directive 93/36 (supply contracts). Thus the complainants could only claim damages, a matter for which the Procurement Review Board does not have jurisdiction and which

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was not the subject-matter of the initial proceedings.

20 Article 177 of the Treaty provides that it is up to the national court to decide whether a preliminary ruling from the Court of Justice is necessary. Article 177 does not provide that the Court may reject such a reference. The Court has thus consistently held that it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine, in the light of the special features of each case, both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. (9) One factor particularly in favour of this solution is the fact that it is solely the national court which has direct and exact knowledge of the facts and is in the best position to decide the issue. Where the questions referred by a national court concern the interpretation of Community law, the Court of Justice is, as a rule, required to hand down a ruling.

21 The Court has, however, occasionally allowed exceptions to that rule and refused to rule upon some or all of the questions referred to it. Such cases are, on the one hand, where the national court has not provided the Court of Justice with enough information for the latter to be able to hand down a ruling that might be of some use to the former in the main dispute. On the other hand, the Court has, on a number of occasions, refused to answer the questions referred to it where it was obvious that they bore no relation to the main dispute. Also worth mentioning are those cases where the Court of Justice has rejected a reference for a preliminary ruling because it was of the opinion that the national court had made improper use of the procedure set out in Article 177 of the Treaty. In cases such as these the Court held the view that the questions referred to it were of a general or hypothetical nature.

22 The Ministry's line of argument refers to those last two categories.

23 The order for reference nevertheless shows that the Procurement Review Board considered itself obliged to submit a reference for a preliminary ruling due to the assertions made by the complainants. The Procurement Review Board considers it a possibility that the tendering procedure could have been subject to procedural errors which would invalidate it. If the provisions mentioned by the Procurement Review Board were found to provide that a tendering procedure pursuant to Directive 93/36 should have been carried out, then the Procurement Review Board would most certainly be required to declare the procedure which had already taken place null and void. However, because it is unsure as to the interpretation of Article 2(2) of Directive 93/36 in particular, the Procurement Review Board has referred two questions to the Court of Justice for a preliminary ruling.

24 Thus it may be ascertained that the Procurement Review Board considered the referral of these two questions as necessary in order for it to be able to rule on the matter in dispute. Contrary to the view held by the respondent, the order for reference does not allow one to conclude that hypothetical questions are involved here that could only be of relevance in an eventual, future dispute. Because the referring Procurement Review Board has affirmed and justified the relevance of the questions referred to the Court, the reference for a preliminary ruling is admissible.

2. The first question

25 In its first question the Procurement Review Board asks whether Article 2(2) of Directive 93/36 (supply contracts) has an independent meaning. In its opinion this question could be answered in the negative. In this vein it argues that this provision was taken over from Article 2(3) of Directive 77/62 and could, under certain circumstances, be understood in connection with the fact that, at the time of its adoption, no Community-wide rules existed as to awarding public service contracts. The contested provision could thus have lost its meaning when Directive 92/50 (service contracts) was adopted. However, the Procurement Review Board holds the view that the fact that

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the contested provision was maintained when adopting Directive 93/36 could, on the other hand, speak in favour of its having an independent meaning.

26 The respondent, which expresses its opinion on the questions referred to the Court only in the alternative, also affirms the independent character of Article 2(2) of Directive 93/36. It holds that comparisons with the original Directive 77/62 on the coordination of procedures for the award of public supply contracts demonstrate that this provision has constantly been retained despite several amendments. The respondent further holds that an analysis of the preparatory documents and drafts of Directive 93/36 does not reveal that Article 2(2) was to have lost any of its independent character upon the adoption of Directive 92/50. The respondent argues that this provision is not only to be understood in terms of `reminiscing about old times'.

27 In its submission the Commission begins by stating that, on the basis of the facts as presented by the Procurement Review Board, both Directive 93/36 (supply contracts) and Directive 92/50 (service contracts) could be applicable. According to the Commission the preparatory documents and drafts of Directive 93/36 show that this Directive was not meant fundamentally to change the previous Directive. Its adoption was necessary particularly in order to carry out amendments to Directive 92/50, which were also introduced in Directive 93/37/EEC. (10) That did not however affect Article 2(2). Despite those modifications, it is still to be found in Directive 93/36 and guarantees the principle of non-discrimination, even where Directive 92/50 is not applicable. This would particularly be so in cases involving concession contracts. One must thus, in the Commission's opinion, assume that Article 2(2) has its own independent meaning.

28 I essentially concur with the comments made by the respondent and the Commission. The provision contained in Article 2(2) of Directive 93/36 is to be found in a similar wording as early as in Directive 77/62, which was the first Directive on the coordination of procedures for the award of public supply contracts to be adopted. The contested provision is still to be found in Article 2(3) of Directive 77/62. The only amendment this provision has been subject to over the years merely concerns the definition of what constitutes a contracting authority. In its essence, the provision has none the less remained unchanged. Thus, pursuant to both provisions, the legal instrument by which a contracting authority grants special rights to a body other than a contracting authority must stipulate that the body in question is to observe the principle of non-discrimination on grounds of nationality when awarding public supply contracts. It may be true that Article 3(2) of Directive 92/50 (service contracts) contains a non-discrimination clause; however this clause only provides that contracting authorities must ensure `that there is no discrimination between different service providers'. As can be deduced from its title, this Directive is, however, applicable particularly to public service contracts, whereas Directive 93/36 governs the procedures applicable for the award of public supply contracts.

29 It is nevertheless quite conceivable that cases might exist where, in addition to Directive 93/36 (supply contracts), Directive 92/50 (service contracts) could be applicable. That could apply in particular where a contract that is to be awarded contains service as well as supply components. Should, however, the contract's emphasis be on the supply of goods, then Directive 92/50 would no longer be applicable in such a case. The ban on discrimination contained in Article 3(2) of Directive 92/50 would not apply. It is, however, in such a case that the independent meaning of Article 2(2) of Directive 93/36 becomes apparent. Another type of case is, however, conceivable, in which, although the award of public service contracts is involved, these could be awarded within the framework of a concession contract. Here also Directive 92/50 and the ban on discrimination contained therein would not be applicable; however such a case would still fall under the scope of Directive 93/36. Under circumstances such as these, the ban on discrimination contained in Article 2(2) would again apply.

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30 Due to the fact, however, that neither the preparatory documents nor the various drafts of Directive 93/36 indicate that the provision contained in Article 2(2) was to be deprived of an independent meaning, one must assume that this provision is meant to remain in force alongside Directive 92/50.

3. The second question

31 In its second question, the Procurement Review Board requests an interpretation of Article 2(2) of Directive 93/36 in the event that it should have an independent meaning. It enquires in particular as to the content of that provision and whether, first, a contracting authority must, when granting special rights to a private undertaking which is not a contracting authority, require that private undertaking to observe the principle of non-discrimination, and, second, whether Article 2(2) provides that the said private undertaking must apply the procedure for the award of public contracts.

32 The respondent is of the opinion that a contract granting special rights must contain the non-discrimination provision contained in Article 2(2). This would ensure the application of the principle of non-discrimination even where a tendering procedure pursuant to the directive was not required. That would make it clear that individuals are also required to comply with the principle of non-discrimination within the framework of tendering procedures. The respondent further argues that Article 2(2) nevertheless does not require an undertaking which has been granted special rights to carry out a public tendering procedure without fail.

33 According to the Commission, Article 2(2) requires a contracting authority which grants special rights to a body to inform that body of the existence of the prohibition against discrimination and ensure that it is complied with. An additional requirement for that body to carry out a tendering procedure is, in the Commission's view, not contained in Article 2(2).

34 The first point I would make is that the provision in Directive 93/36 concerning tendering procedures is not applicable in the matter at issue here, in so far as Danske Slagterier are concerned. Nevertheless it is true that the threshold value contained in Article 5 of Directive 93/36 has been exceeded, so that, from the point of view of contract volumes, it would normally be applicable. However Danske Slagterier do not constitute a contracting authority. Nor are the eartags in question sold on behalf of, or for the benefit of, the Danish authorities. No financial ties exist in this context between the eartag suppliers and the authorities. Consequently, in so far as the tendering procedure for the award of public supply contracts is concerned, the directive is not applicable in a case such as this.

35 However in order to guarantee the application, beyond the Directive's actual scope, of the prohibition against discrimination so central to Community law, Article 2(2) requires that a contracting authority enforce this prohibition when granting special rights to other bodies. Article 2(2) does not, however, contain a broader obligation to observe the procedural provisions in respect of the award of public contracts. Nor does a comparison with the other two directives on the award of public contracts allow one to read more into the contested provision. Both Directive 93/37 and Directive 92/50 (merely) require the Member States to introduce the necessary measures in order to ensure that contracting authorities respect the provisions contained in these directives. This also includes any prohibition against discrimination contained in the directives.

36 In the present case, the wording alone of Article 2(2) demonstrates that the contracting authority is only required, when granting special rights to a body, to ensure that the prohibition against discrimination is not breached. This is intended to avoid unequal treatment on the basis of nationality in cases involving numerous tenderers. The directive's purpose is to achieve the free movement of goods in the area of public supply contracts which are awarded in the Member States at the expense of the State, local or regional authorities, and other public bodies. It is to that end that the

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directive makes the award of public supply contracts by contracting authorities subject to a special procedure. The individual procedural conditions are set out in the individual provisions of the Directives. On its own, however, Article 2(2) does not provide that bodies which have been granted special rights, but which do not constitute contracting authorities, must carry out a procedure for the award of public supply contracts as laid out in Directive 93/36, but rather that they must merely observe the principle of non-discrimination on the ground of nationality.

37 Thus it may be concluded that Article 2(2) of Directive 93/36 only places an obligation on the contracting authority, when granting special rights to a body, to ensure compliance with the prohibition against discrimination.

D - Conclusion

38 In light of the foregoing considerations, I suggest the following answers to the questions referred to the Court for a preliminary ruling:

(1) Article 2(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts has retained its independent meaning, regardless of the entry into force of Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts.

(2) Where a contracting authority within the meaning of Directive 93/36/EEC grants special or exclusive rights to carry out public service activities to a body which is not a contracting authority, regardless of its legal status, then the legal instrument granting those rights shall provide that that body, when awarding public service contracts to third parties, must comply with the principle of non-discrimination on the basis of nationality. Article 2(2) does not place any further obligation on the contracting authority to ensure that that body, which is not a contracting authority, applies the procedure for awarding public supply contracts.

(1) - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

(2) - Article 1(b) of Directive 93/36 provides:

`For the purpose of this Directive:... "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

...'.

(3) - Council Directive 92/102/EEC of 27 November 1992 on the identification and registration of animals (OJ 1992 L 355, p. 32).

(4) - Directive 92/102 was initially implemented in Denmark by Regulation No 80 of 18 February 1993, and subsequently superseded by Regulation No 1073 of 15 December 1995 on the marking and registration of cattle, pigs, sheep and goats.

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(5) - Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts (OJ 1992 L 13, p. 1).

(6) - This provision had already been worded almost identically in Article 2(3) of Council Directive 77/62/EEC of 21 December 1976 on the coordination of procedures for the award of public supply contracts (OJ 1977 L 13, p. 1).

(7) - Council Directive 89/665/EEC of 21 December 1989 (OJ 1989 L 395, p. 33).

(8) - See Case 61/65 Vaassen-Göbbels v Vorstand des Beambtenfonds voor het Mijnbedrijf [1966] ECR 261; Case C-393/92 Almelo and Others v Energiebedrijf IJsselmij [1994] ECR I-1477; Case C-54/96 Dorsch Consult v Bundesbaugesellschaft Berlin [1997] ECR I-4961, paragraph 23.

(9) - See, for example, Joined Cases C-332/92, C-333/92 and C-335/92 Eurico Italia and Others v Ente Nazionale Risi [1994] ECR I-711, paragraph 17.

(10) - Council Directive 93/37/EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

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SUB	Approximation of laws
AUTLANG	German
NATIONA	Denmark
PROCEDU	Reference for a preliminary ruling
ADVGEN	Alber
JUDGRAP	Jann
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Opinion of Mr Advocate General Alber delivered on 14 March 2000.
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Public works contracts - Directives 71/305/EEC, as amended by Directive 89/440/EEC, and 93/37/EEC - Construction and maintenance of school buildings by the Nord-Pas-de-Calais Region and the Département du Nord.
Case C-225/98.

I - Introduction

1 In the present infringement proceedings the Commission alleges that the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Directive 71/305/EEC, as amended by Directive 89/440/EEC, in particular Articles 12, 26 and 29 thereof, and under Directive 93/37/EEC, in particular Articles 8, 11, 22 and 30 thereof, concerning the award of public works contracts, in that it failed duly to carry out various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord. The Commission objects specifically to infringements of the advertising rules - in particular those concerning prior information notices and the number of tenderers - and complains of the use of an inadmissible criterion for the award of contracts. It further objects to discriminatory technical specifications used to describe lots and discriminatory proof of professional experience and capability and also complains of a lack of information on the award of contracts and a failure to communicate the written reports.

II - Legal background

A - Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, (1) as amended by Council Directive 89/440/EEC of 18 July 1989, (2) and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (3)

2 The provisions of Directive 71/305, which had been amended substantially and on a number of occasions, were consolidated by Directive 93/37 `for reasons of clarity and better understanding', according to the first recital in the preamble thereto. Apart from a number of changes in wording, the provisions of Directive 71/305 which are of relevance to the present case are identical to those of Directive 93/37. Since Directive 93/37 did not enter into force until 14 June 1993, but the Commission objects to certain infringements which were committed in part before that time, both directives apply in this case. Moreover, Article 36 of Directive 93/37, by which Directive 71/305 is repealed, states that references to the repealed Directive are to be construed as references to the new Directive.

The articles cited below without reference to a specific directive are those of Directive 93/37.

(a) Award procedure

3 Article 8 - which corresponds to Article 5a of Directive 71/305 - states:

`...

3. For each contract awarded, the contracting authorities shall draw up a written report which shall include at least the following:

- the name and address of the contracting authority, the subject and value of the contract,

- the names of the candidates or tenderers admitted and the reasons for their selection,

- the names of the candidates or tenderers rejected and the reasons for their rejection,

- the name of the successful tenderer and the reasons for his tender having been selected and, if

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known, any share of the contract the successful tenderer may intend to subcontract to a third party,

- for negotiated procedures, the circumstances referred to in Article 7 which justify the use of these procedures.

This report, or the main features of it, shall be communicated to the Commission at its request.'

(b) Prior and subsequent information

4 Article 11 - which corresponds to Article 12 of Directive 71/305 - states:

`1. Contracting authorities shall make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold laid down in Article 6(1). (4)

...

5. Contracting authorities who have awarded a contract shall make known the result by means of a notice....

...

7. The contracting authorities shall send the notices referred to in paragraphs 1 to 5 as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities....

...'

(c) Effect of the prior information notice on the time-limit for submitting tenders

5 Article 12 - which corresponds to Article 13 of Directive 71/305 - states:

`1. In open procedures the time-limit for the receipt of tenders fixed by the contracting authorities shall be not less than 52 days from the date of dispatch of the notice.

2. The time-limit for the receipt of tenders laid down in paragraph 1 may be reduced to 36 days where the contracting authorities have published the notice [provided] for in Article 11(1), drafted in accordance with the specimen in Annex IV A, in the Official Journal of the European Communities.

...'

6 Article 13 - which corresponds to Article 14 of Directive 71/305 - provides as follows:

`...

3. In restricted procedures, the time-limit for receipt of tenders fixed by the contracting authorities may not be less than 40 days from the date of dispatch of the written invitation.

4. The time-limit for the receipt of tenders laid down in paragraph 3 may be reduced to 26 days where the contracting authorities have published the notice provided for in Article 11(1), drafted in accordance with the model in Annex IV A, in the Official Journal of the European Communities.

...'

(d) Number of tenderers

7 Article 22 - which corresponds to Article 22 of Directive 71/305, as amended by Directive 89/440 - provides that:

`...

2. Where the contracting authorities award a contract by restricted procedure, they may prescribe the range within which the number of undertakings which they intend to invite will fall. In this

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case the range shall be indicated in the contract notice. The range shall be determined in the light of the [nature] of the work to be carried out. ... The range must number at least 5 undertakings and may be up to 20.

In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition.

...'

(e) Evidence of capability

8 Article 27 - which corresponds to Article 26 of Directive 71/305 - states:

`1. Evidence of the contractor's technical capability may be furnished by:

(a) the contractor's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for carrying out the works;

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where necessary, the competent authority shall submit these certificates to the contracting authority direct;

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;

(d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the technicians or technical bodies which the contractor can call upon for carrying out the work, whether or not they belong to the firm.

2. The contracting authorities shall specify [in the notice or] in the invitation to tender which of these references are to be produced.'

(f) Criteria for the award of contracts

9 Article 30 - which corresponds to Article 29 of Directive 71/305 - provides as follows:

`1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e. g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.

...'

III - Pre-litigation procedure and facts

10 The subject-matter of the present infringement proceedings is the result of two separate pre-litigation procedures.

11 In the first case, at the beginning of 1993, an unsuccessful tenderer drew the Commission's attention to the tendering procedure for a public works contract issued by open procedure. That

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procedure related to the construction of a multipurpose secondary school in Wingles (Nord-Pas-de-Calais Region). The contract notice was published in the Official Journal of the European Communities of 21 January 1993. The Commission had a number of criticisms of that contract notice. In a formal letter of notice of 27 September 1993, it alleged that the French authorities had set too short a time-limit for the receipt of tenders, that the classification of the lots by reference only to technical specifications used in France was inadequate, and that it was unlawful to require evidence of the contractors' technical capability by means of certificates which were used only in France and to refer to a national law in respect of the award criteria. Finally, the Commission complained about the refusal of the French authorities to communicate to it the records of the contested procedure. In the view of the Commission, the French authorities' reply of 20 December 1993 was not satisfactory. Consequently, on 8 September 1995, it sent a reasoned opinion to the French Republic. That letter went unanswered.

12 In the second case, meanwhile, the Nord-Pas-de-Calais Region published 14 contract notices in the Official Journal of 18 February 1995 as part of the `Plan Lycées' programme. The aggregate value of the contracts amounted to approximately FRF 1.4 thousand million. It was a restricted procedure relating to modernisation and maintenance works over a period of 10 years. The notices set out the award criteria. In that respect an `additional criterion' relating to the promotion of employment was laid down. That was based on a ministerial circular of 29 December 1993.

13 By letter of 21 November 1995, the Commission gave the French authorities formal notice to submit their observations on certain complaints about the calls for tenders relating to, for example, the failure to publish a prior information notice, the use of the additional award criterion relating to the promotion of employment, the failure to admit an adequate number of potential tenderers and the use of qualification criteria having discriminatory effect.

14 The Commission investigated the award procedure practised by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years. On 8 May 1996, it sent a supplementary letter of formal notice to the French authorities. They replied by letter of 9 August 1996 stating that they intended to improve the award procedures in respect of new contracts.

15 On 7 April 1997, the Commission sent a reasoned opinion summarising the complaints, to which the French authorities did not reply. On 18 June 1998, the Commission thus brought the present action which was registered at the Court of Justice on 22 June 1998.

16 The Commission claims that the Court should:

- declare that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Directive 71/305/EEC, as amended by Directive 89/440/EEC, in particular Articles 12, 26 and 29 thereof, and under Directive 93/37/EEC, in particular under Articles under 8, 11, 22 and 30 thereof.

In the reply it further claims that the Court should:

- order the French Republic to pay the costs.

17 The French Republic contends that the Court should dismiss the action.

18 I will return to the arguments of the parties and the further details of the case in my consideration of the individual complaints.

19 The same applies to the questions which the Court of Justice referred to the Commission as regards the legal consequences of a failure to publish a prior information notice and the practice

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of the contracting authorities in the Community in publishing prior information notices, and in respect of the French Government's observations on the Commission's replies.

IV - The individual complaints

20 The Commission bases its action on several complaints which can be grouped as follows. The order corresponds to that used in the application.

A - Infringement of Article 12 of Directive 71/305 or Article 11 of Directive 93/37 by failing to observe the prior information procedure (see points 4 to 6 above for the wording of the article)

Arguments of the parties

21 The Commission considers that the French authorities infringed Article 12 of Directive 71/305 or Article 11 of Directive 93/37 in that they only rarely adhered to the prior information procedure. It follows from those articles that the prior information procedure constitutes a compulsory preliminary for any tendering procedure to be organised pursuant to the Directive. In essence, the French authorities have not denied that allegation.

22 However, on 18 February 1995, the Nord-Pas-de-Calais Region published 14 contract notices without having recourse to a preliminary prior information procedure within the meaning of the provision. Furthermore, the prior information procedure was only rarely followed between 1993 and 1995. As regards the Département du Nord, no prior information notices were published in the Official Journal of the European Communities during the period under investigation. A prior information notice was published only in respect of Wingles secondary school and a training centre for apprentices.

23 The French Government does not deny that Article 11(1) of the Directive imposes an obligation. However, it claims that the duty to publish prior information notices must be qualified in the light of Articles 12 and 13 of that directive. Articles 12(1) and 13(3) of the Directive provide that the time-limit for the receipt of tenders is, in principle, 52 or 40 days. The contracting authority may, under Articles 12(2) and 13(4), reduce that time-limit where it has published in the Official Journal of the European Communities the notice provided for in Article 11(1). According to the French Government, if the publication of a prior information notice were always compulsory, the precondition for reducing the time-limit would be satisfied in every award procedure. As a result, Article 11 is incompatible with Articles 12 and 13. Consequently, several interpretations are possible depending on whether the prior information procedure is regarded as compulsory, in accordance with Article 11(1), or as optional, in accordance with Articles 12 and 13. The French authorities have opted for the second interpretation. Furthermore, the Nord-Pas-de-Calais Region republished the contract notices in question, this time complying with the prior information requirement.

24 The Commission considers that the French authorities' argument that the prior information procedure is optional is incorrect. It is irrelevant that the contracting authorities did not intend to benefit from the reductions in the time- limit for the receipt of tenders provided for in Articles 12 and 13.

Analysis

25 Since the Nord-Pas-de-Calais Region responded to the Commission's criticisms in the formal notice within the period laid down in the reasoned opinion - albeit without informing the Commission thereof - the action could have become inadmissible on that point.

26 The aim of infringement proceedings is to establish whether the State concerned has failed to fulfil its obligations and has not rectified that failure within the time-limit laid down in the reasoned opinion. As the Court of Justice has consistently held, in infringement proceedings the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned

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opinion. By that time the French authorities had retrospectively published prior information notices in so far as that was still possible. Thus, the French authorities complied with the Commission's demands within the time-limit laid down in the reasoned opinion. An essential precondition for the admissibility of the action for failure to fulfil obligations is therefore not satisfied.

27 However, in the proceedings before the Court of Justice, the French Government contended that the prior information notice provided for in Article 11 of the Directive is not compulsory. To that extent it did not acknowledge, as a matter of fact, the alleged failure to fulfil its obligations. Therefore, there continues to be an interest in ruling on the disparity in the interpretation of Article 11, read in conjunction with Articles 12 and 13, and consequently the action is admissible in that respect. Furthermore, the changes were not communicated to the Commission.

28 In the context of a substantive analysis, the parties agree that Article 11(1), viewed in isolation, requires a contracting authority to publish beforehand the essential characteristics of works contracts. However, it is uncertain whether that interpretation must be qualified in the light of Articles 12(2) and 13(4). The expression `where the contracting authorities have published the notice' contained in Articles 12(2) and 13(4) may indicate that it does. However, the opposite is indicated firstly by the fact that Article 11, on the one hand, and Articles 12 and 13, on the other, govern two fundamentally different matters. Article 11 requires a contracting authority to make known its works contracts, whereas Articles 12 and 13 lay down the time-limits for the receipt of tenders. It would be contrary to the system to conclude that Articles 12(2) and 13(4) were intended, in addition, to lay down rules on the publication of prior information notices even though those rules had already been laid down in unequivocal terms.

29 Moreover, the spirit and purpose of the Directive indicate that there is a general duty to publish prior information notices. The aim of the Directive is to create effective competition in the field of public contracts. Therefore, it is necessary for an unlimited range of tenderers from all the Member States to have an opportunity to obtain timely and comprehensive information on forthcoming award procedures. However, that necessary broad effect is not achieved if a contracting authority is able to decide about publication - even if only a prior information notice is involved.

30 The French Government's argument that that interpretation regularly results in the time-limits' being reduced from 52 to 36 or from 37 to 26 days respectively cannot be accepted. Even though there is a general duty to publish a prior information notice, the rules in Articles 12(1) and (2) and 13(1) and (4) are not deprived of their purpose. The time-limit may be reduced only where a prior information notice has been duly published. Consequently, the facility to reduce the time-limit is merely an optional provision which the contracting authority need not invoke. The different time-limits are an exception which, where it consists of a reduction in time-limits, is subject to a condition in the form of the due publication of a prior information notice.

31 It may indeed be concluded from the statement that time-limits may be reduced only where a prior information notice has been published that, in spite of the general duty to publish such notices, it is possible to conceive of cases where such publication has not taken place. Furthermore, at the hearing the Commission pointed out that it is not always possible to publish a prior information notice for objective reasons. For example, budgetary reasons might be responsible for a prior information notice's not being published in due time where the award of contracts is subject to existing funds whose availability may vary at different times.

32 At the hearing the Commission pointed out that that problem was identified when Article 12 of Directive 71/305 was amended. At the time it was proposed that a qualification along the lines of `except where that is not possible' be incorporated into the text of the legislation. However, neither that nor any similar expression was incorporated into the text of the Directive.

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33 Therefore, as a rule, a prior information notice is compulsory. Where no such prior information notice is published, the contracting authority must be in a position to state the reasons why that is so. Compliance with the longer time-limit for the receipt of tenders is then an inevitable consequence of the failure to publish a prior information notice. However, there is no automatic effect in the sense that where longer time-limits, which are the norm, are set, there is no need to publish a prior information notice provided for in Article 11 of the Directive, but the opposite does apply, that is to say that a time-limit may be reduced exceptionally only after a prior information notice has been published.

34 The first complaint is consequently admissible and founded.

B - Infringement of Article 30 of Directive 93/97 - which corresponds to Article 29 of Directive 71/305 - by using an inadmissible award criterion (see point 9 above for the wording of the article)

35 As is evidenced by the annexes attached to the documents before the Court, in their contract notices the French contracting authorities specifically referred at several junctures in the section entitled `Criteria for award of contracts' to the employment criterion as an `additional criterion' over and above the price, time-limit for completion, and so on.

Arguments of the parties

36 The Commission considers that the French Republic has infringed Article 30 by making the promotion of employment an award criterion. In the view of the Commission, that aspect can be used only as a condition of performance. In that respect the Commission relies on the judgment of the Court of Justice in Beentjes. (5)

37 The Commission points out that in the present case the additional criterion relating to the promotion of employment is based on a ministerial circular of 29 December 1993. In accordance therewith, it is possible to take local measures to combat unemployment and promote employment in connection with the award of public contracts.

38 However, Article 30 of Directive 93/37 provides for only two possible award criteria, firstly, the criterion of the lowest price and, secondly, the most economically advantageous tender. Consequently, the French authorities infringed Article 30 in that they specifically took account of the employment criterion when they adopted their decision on the award of contracts.

39 The French Government, on the other hand, considers that Beentjes specifically allows an additional award criterion. In that respect it cites paragraphs 28 and 37(iii) of the judgment which read as follows:

`As regards the exclusion of a tenderer on the ground that it is not in a position to employ long-term unemployed persons, it should be noted in the first place that such a condition has no relation to the checking of contractors' suitability... or to the criteria for the award of contracts referred to in Article 29 of the Directive.'

`[T]he condition relating to the employment of long-term unemployed persons is compatible with the Directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.'

40 However, the French Government argues that whereas, according to Beentjes, the employment criterion must be referred to expressly in the contract notice, there is no evidence to support that in the model contract notices in Annex IV to Directive 93/37. They contain no heading relating to such indications. (6)

41 Moreover, even if the employment criterion were regarded as a performance criterion, it would

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be on the basis of national legislation, not the Directive. In that case Article 30 of the Directive would not be relevant and the Commission's allegation would be incorrect. Finally, the French Government points out that it instructed the contracting authorities to act in accordance with the circular of 29 December 1993. The circular states quite clearly that the additional criterion relating to employment must not be treated in the same way as the criteria referred to specifically in Article 30 of the Directive. Instead, it is a secondary criterion for the award of contracts.

42 However, even if the Court concurs with the Commission's view, the French Government considers that its actions comply with the Directive also in that respect.

Analysis

43 In Beentjes the Court ruled that an employment criterion (in that case a condition relating to the employment of long-term unemployed persons) had no relation to the criteria for the award of contracts referred to in Article 29 of Directive 71/305. (7)

44 Therefore, it is necessary to clarify whether criteria relating to the promotion of employment are precluded not only as award criteria for the purpose of Article 30(1)(b) of Directive 93/37, but also as secondary criteria.

45 In the view of the French Government employment is admissible as a secondary criterion where several tenders of equal value have been submitted. However, in such cases that would result in the employment criterion ultimately being granted the status of the sole, decisive award criterion, a possibility which is specifically ruled out in the light of Beentjes. The employment criterion does not serve directly to determine the most economically advantageous tender. Otherwise, in certain circumstances, it would have even greater importance than the criteria referred to in Article 30(1)(b) of the Directive, since the employment aspect alone could be decisive.

46 Article 30 of the Directive has been infringed in so far as the French authorities made the employment criterion an additional award criterion. Consequently, it is irrelevant whether the employment criterion is laid down at national level by the ministerial circular of 29 December 1993 since Article 30 of the Directive takes precedence.

47 It should be borne in mind that the employment aspect is now probably perceived differently in terms of social policy from when the Directive was adopted: from today's perspective, the Directive focuses more on microeconomic, and less on macroeconomic, factors. However, any change would be for the legislature.

48 The Directive would not be infringed if the requirement to promote employment were expressed as a condition - as in Beentjes - and in that respect assumed the character of a performance criterion, as was stated by the Commission.

49 However, since the French authorities regarded the employment criterion as a separate award criterion, Article 30 of the Directive was infringed.

C - Infringement of Article 22 of Directive 93/37 by limiting the number of candidates selected (see point 7 above for the wording of the article)

50 Where a contracting authority awards a contract by restricted procedure, it may, under Article 22(2) of the Directive, prescribe the range within which the number of undertakings which it intends to invite will fall. The range must number at least five undertakings, as the fourth sentence of Article 22(2) expressly stipulates.

51 Under heading 13 in the contract notice published in the Official Journal of 18 February 1995 the French contracting authorities stated: `Maximum number of candidates which may be invited to submit a tender: 5'.

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Arguments of the parties

52 The Commission takes the view that that indication gives the impression that the number of tenderers might also be less than five. That would constitute an infringement of the fourth sentence of Article 22(2) of the Directive.

53 The French Government does not share that view. It contends that limiting the number of tenderers to five fulfils the preconditions laid down in the fourth sentence of Article 22(2) of the Directive. There is nothing in Article 22 to indicate that the number of tenderers may not be limited to five. Effective competition is ensured. The Commission has been unable to adduce any evidence to the contrary.

Analysis

54 The indication chosen by the French contracting authorities poses problems in two respects. Firstly, Article 22(2) refers to a `range'. No range is clear from the wording of the notice in question. There could be such a range at most if the number five implied a range of one to five, but that would be incompatible with Article 22(2).

55 However, if the indication of five for the number of tenderers to be invited is regarded as an absolute requirement in the sense that at least five tenderers are to be invited, it could be compatible with the requirements of the Directive. However, the French Government interpreted the indication at issue as meaning that `a maximum' of five tenderers may be admitted. It takes the view that effective competition is ensured under those conditions. However, that view is incompatible with the requirements of the Directive which expressly lays down a minimum number of five tenderers. Therefore the objective wording of that indication, in conjunction with the interpretation placed on it in the contract notices, renders it incompatible with Article 22(2) of the Directive.

D - Infringement of Article 29(2) of Directive 71/305 or of Article 30(2) of Directive 93/37 as a result of the method known as award by reference to the legislation of a Member State (see point 9 above for the wording of the article)

Arguments of the parties

56 In its application the Commission also maintains that Article 29(2) of Directive 71/305 and Article 30(2) of Directive 93/37 have been infringed. It claims they have been infringed since, in most of the contract notices, the contracting authorities employed the method known as `award by reference to the Code des Marchés Publics' in order to indicate the award criteria.

57 In support of that view the Commission refers to the case-law of the Court. In paragraph 35 of its judgment in Beentjes the Court held that Article 29(1) and (2) of the Directive requires that the criteria be stated in the contract notice or the contract documents. A general reference to a provision of national legislation cannot satisfy the publicity requirement.

58 However, the French Government claims first of all that the Commission's complaint was made too late and is thus inadmissible. The Commission made that complaint for the first time in the reasoned opinion. As the Court has held, (8) enlargement, in the reasoned opinion, of the scope of the complaint made in the initial letter constitutes an irregularity which cannot be cured.

59 However, in the event that the Court considers that the complaint is admissible, the French Government points out that Article 30(2) of Directive 93/37 does not require the contracting authority to state the award criteria in the contract notice but gives it the choice of including them in the contract documents or in the contract notice. The French Government concludes that the Commission was wrong to make the complaint since the criteria are contained in the contract documents and the national provisions applicable in accordance with the Code des Marchés Publics are largely identical in content to Directive 93/37.

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60 As regards the admissibility of the abovementioned complaint, the Commission contends that the letter of formal notice of 8 May 1996 has drawn attention to the problem in a sufficiently precise manner. In that letter the Commission had pointed out that, under the 10th recital in the preamble to Directive 93/37, the information contained in contract notices must enable contractors to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the works to be undertaken and the conditions attached thereto. Furthermore, in the letter of formal notice the Commission had already referred to the case-law of the Court, in particular Beentjes.

61 Consequently, the action taken is in conformity with the case-law of the Court, as is evident from the judgment in Case 274/83 Commission v Italy. (9) Moreover, at no time have the French authorities allowed the Commission to view the contract documents on which the French Government bases its arguments.

Analysis

62 Firstly, it is necessary to consider whether the Commission's complaint is admissible in the context of the present infringement proceedings. In Case 51/83 Commission v Italy the Court did rule that enlargement, in the reasoned opinion, of the scope of the complaint made in the initial letter constitutes an irregularity which cannot be cured. (10) The action should therefore be dismissed as inadmissible to the extent that it goes beyond the complaints made in the letter of formal notice. However, in Case 274/83 Commission v Italy the Court of Justice subsequently clarified its case-law to the effect that the Commission may set out in detail in the reasoned opinion the complaints which it has already made more generally in its initial letter. (11)

63 In the present case the Commission initially complained generally in the letter of formal notice about the contract notices in question. It also made specific complaints. It commented on the award criteria. It pointed out that the notices must enable contractors to determine whether the proposed contracts are of interest to them. That requires the provision of adequate information. Furthermore, the Commission referred to the case-law of the Court, in particular Beentjes, in which the Court ruled specifically on the criteria for the award of contracts. The Commission's subsequent criticism in the reasoned opinion of the award criteria constitutes a lawful clarification of the complaints raised in the letter of formal notice. Since the Commission made no fundamentally new complaints, the complaint about the method of award by reference to the legislation of a Member State does not constitute an inadmissible enlargement of the scope of the complaints. On the contrary, the Commission narrowed down its complaint. It thus enabled the French authorities to rectify the irregularity in the award procedure. In doing so the Commission took adequate account of the spirit and purpose of the pre-litigation stage of infringement proceedings. The subject-matter of the dispute was set out in the letter of formal notice in such a way that the French authorities could have taken action.

64 Consequently, the complaint made by the Commission must be regarded as admissible.

65 The wording of Article 30(2) of Directive 93/37 states that `the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award'. (12) In addition, in Beentjes the Court expressly held in respect of the award criteria that a general reference to a provision of national legislation cannot satisfy the publicity requirement. (13) Therefore, the possibility can be ruled out that certain award criteria can be laid down in national legislation to which the contract notice refers.

66 The French Government's objection that the national rules laid down in the Code des Marchés Publics are frequently identical in content to the rules in Directive 93/37 is irrelevant. The publicity principle is infringed by the general reference and cannot be remedied by the fact that

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the national legislation displays similarities to the Directive since a potential tenderer is unable to detect possible substantive similarities from the contract notice.

67 Consequently, it must be found that the complaint relating to the inadmissible reference to the legislation of a Member State in order to fix the award criteria is admissible and well founded.

E - Infringement of Article 59 of the Treaty by using discriminatory technical specifications in the mode of designating the lots and the evidence requested as to the undertakings' capability

Arguments of the parties

68 In its application the Commission claims that the French Government infringed the provisions on the freedom to provide services contained in Article 59 of the Treaty. When the contracting authorities designate the lots they use the same technical specifications in respect of the requirements on tenderers as those used by French professional organisations. For example, the notices refer to qualifications such as `Mandataire EFF6 CA11...'. The Commission considers that the technical specifications adopted by the contracting authorities might result in French undertakings being favoured. They are familiar with that system of quality certification and are accustomed to submitting documents or services in accordance with the references required in the contract notice. Undertakings established in other Member States, on the other hand, might be deterred from submitting tenders. They have no means of determining beforehand whether their qualifications comply with the technical specifications in the absence of any reference to equivalent qualifications. The fact that the French authorities merely wish that those technical qualifications were in conformity with those national references does not alter that assessment in any way.

69 The French Government, on the other hand, takes the view that the technical specifications of the French professional organisations adopted by the contracting authorities are merely indications and have no discriminatory effect. It is not a question of specifying, in the notice, information relating to the selection criteria or the criteria for the award of contracts, since that is done in the contract documents. Instead, only indications as to the nature of the lots have to be provided.

70 Furthermore, the French Government points out that the new notices in respect of the award of public works contracts published in January 1996 and January 1997 no longer contain any references to the technical specifications of the French professional organisations.

71 As regards this final objection, the Commission points out that when the time-limit laid down in the reasoned opinion expired there was nothing to indicate that the grounds for the complaint had ceased to exist.

Analysis

72 It is first necessary to consider the admissibility of this complaint. Since the French authorities discontinued use of the contested specifications in contract notices published after the expiry of the time-limit laid down in the reasoned opinion, the infringement could be regarded as remedied and there might be no interest in ruling on the matter.

73 However, in the proceedings before the Court the French Government still claims that the contested specifications are not liable to have a discriminatory effect.

74 Therefore, there is still a need for legal clarification.

75 Furthermore, the present complaint could be inadmissible from a different point of view. In respect of this complaint the Commission relies solely on Article 59 of the Treaty, whereas Article 26 of Directive 71/305 contains specific rules on proof of undertaking's technical capability. Therefore, the question arises as to the extent to which it is possible to have recourse to the primary law provisions of the Treaty where the situation is governed by the Directive.

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76 Article 26 of Directive 71/305 contains a list of the documents which may be used to prove technical capability. It consists of a series of documents which are intended to adduce proof of an undertaking's capabilities. The contracting authority is entitled to choose which of those documents are to be submitted. In the words of the Directive:

`The authorities awarding contracts shall specify in the notice or in the invitation to tender which of these references are to be produced.'

The way in which certain technical capabilities are to be indicated is governed at most indirectly by Article 26 of Directive 71/305 which, moreover, must be interpreted in the light of the Treaty, like any provision of a directive. Therefore, there is certainly scope for Article 59 of the Treaty to be applied to technical specifications having discriminatory effect.

77 In substantive terms it must be concluded that the technical specifications adopted are so specific and abstruse that, as a rule, only French candidates are able to detect their significance immediately. Consequently, it is easier for French undertakings to submit documents or services which comply with the coded references contained in the contract notice. Candidates from other Member States, on the other hand, find it considerably more difficult to submit tenders within the brief period prescribed since they must first obtain information from the contracting authority on the relevant specifications and qualifications. That may involve considerably more work and expenditure than for French competitors. The French authorities failed to set out the basic requirements in a clear and generally intelligible form or with reference to Community rules. Consequently, the contested designation of the lots constitutes covert discrimination.

78 In that context the French Government's objection that the technical specifications adopted are merely indications, even though in practice only French candidates are able to understand the specifications without outside help, is irrelevant. To candidates from other Member States they are not indications, but a dissuasive description of the necessary preconditions for qualification. If the contracting authorities wish merely to provide indications, they can do so in a non-discriminatory manner.

79 It must be noted that the Commission's complaint that the French Government has infringed Article 59 of the Treaty is, in substantive terms, well founded.

F - Infringement of Article 59 of the Treaty by requiring registration with the French Ordre des Architectes as one of the `minimum standards for participation'

80 The Commission contends that the Département du Nord has also failed to fulfil its obligations under Article 59 of the Treaty in that it imposed in a certain number of notices restrictions on the freedom of Community architects to provide services, for example by requiring proof of registration with the French Ordre des Architectes.

81 The French Government does not dispute the Commission's claim. It simply refers to the contracting authorities' inexperience in applying Community law in relation to the award of public contracts.

82 There is no need to consider this complaint in substantive terms since it has been expressly accepted by the French Government. The French authorities have infringed Article 59 of the Treaty in that they unlawfully restricted the freedom of architects from other Member States to provide services. That infringement of Community law cannot be justified by the inexperience of the contracting authorities. The Commission's application must be allowed also in respect of this complaint.

G - Further complaints in respect of the failure to communicate the written reports to the Commission as provided for in Article 8(3) of Directive 93/37 and failure to provide subsequent information on contract awards as provided for in Article 11(5) of Directive 93/37 (see points 3 and 4 above for the wording of the articles)

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83 The French Government does not in principle dispute the Commission's other complaints regarding the failure to provide the necessary information after the contracts were awarded and gives the reason for them as inexperience on the part of the contracting authorities. Since it expressly accepts these complaints, the failure to fulfil obligations under the Treaty can be determined without further substantive consideration.

V - Costs

84 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful it must pay the costs.

VI - Conclusion

85 In the light of the foregoing I propose that the Court should:

(1) Declare that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Directive 71/305/EEC, as amended by Directive 89/440/EEC, in particular Articles 12, 26 and 29 thereof, and under Directive 93/37/EEC, in particular Articles 8, 11, 22 and 30 thereof;

(2) Order the French Republic to pay the costs.

(1) - OJ, English Special Edition 1971 (II), p. 682.

(2) - OJ 1989 L 210, p. 1.

(3) - OJ 1993 L 199, p. 54.

(4) - The threshold referred to in Article 6(1) is ECU 5 million.

(5) - Case 31/87 Beentjes v Netherlands State [1988] ECR 4635.

(6) - Annex IV lists between 7 and 18 headings to be included in the call for tenders, depending on the type of award procedure.

(7) - See paragraph 28 of the judgment in Beentjes (cited in footnote 6).

(8) - Case 51/83 Commission v Italy [1984] ECR 2793.

(9) - Case 274/83 Commission v Italy [1985] ECR 1077.

(10) - Judgment cited in footnote 9, paragraphs 6 and 7.

(11) - Judgment cited in footnote 10, paragraph 21.

(12) - Emphasis added.

(13) - Judgment cited in footnote 6, paragraph 35.

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FORM Conclusions

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SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful ; Proceedings concerning failure by Member State - unfounded
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Opinion of Mr Advocate General Léger delivered on 23 September 1999.
Holst Italia SpA v Comune di Cagliari, intervener: Ruhrwasser AG International Water Management.
Reference for a preliminary ruling: Tribunale amministrativo regionale per la Sardegna - Italy.
Directive 92/50/EEC - Public service contracts - Proof of standing of the service provider - Possibility of relying on the standing of another company.
Case C-176/98.

1 This reference for a preliminary ruling concerns the right of a company which participates in a tender procedure, in accordance with Directive 92/50/EEC (1) of 18 June 1992 on the co-ordination of procedures for the award of public service contracts (hereinafter `the Directive'), to rely on the technical and financial qualifications of another company, to which the first-mentioned company is linked as a subsidiary to the parent company.

I - The Community legislation

2 Under Article 3(1) of the Directive, in awarding public service contracts contracting authorities are to apply procedures adapted to the provisions of the directive.

3 Article 26 of the Directive provides:

`1. Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.

2. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity, shall not be rejected solely on the grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be either natural or legal persons.

3. Legal persons may be required to indicate in the tender or request for participation the names and relevant professional qualifications of the staff to be responsible for the performance of the service.'

4 Article 31 of the Directive provides:

`1. Proof of the service provider's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance;

(b) the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established;

(c) a statement of the undertaking's overall turnover and its turnover in respect of the service to which the contract relates for the previous three financial years.

2. The contracting authorities shall specify in the contract notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which other references are to be produced.

3. If, for any valid reason, the service provider is unable to provide the reference requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

5 Article 32 of the Directive provides:

`1. The ability of the service providers to perform services may be evaluated in particular with

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regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

(a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the service;

(b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided;

- where provided to contracting authorities, evidence is to be in the form of certificates issued or countersigned by the competent authority,

- where provided to private purchasers, delivery is to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected;

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

(d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the tool, plant or technical equipment available to the service provider for carrying out the services;

(f) a description of the service provider's measures for ensuring quality and his study and research facilities;

(g) where the services to be provided are complex, or, exceptionally, are required for a specific purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country within which the service provider is established, subject to that body's agreement, on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;

(h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

3. The contracting authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.

4. The extent of the information referred to in Article 31 and in paragraphs 1, 2 and 3 of this Article must be confined to the subject of the contract; contracting authorities shall take into consideration the legitimate interests of the service providers as regards the protection of their technical or trade secrets.'

II - Facts and the main proceedings

6 For the purposes of the award of a three-year contract for the management of the waste water purification plant of `Is Arenas' and the water collection stations situated at `Is Arenas', `San Bartolomeo' and `Borgo Sant'Elia', the Municipality of Cagliari issued an invitation to tender. This was published in the Official Journal of the European Communities on 3 January 1997. In order to tender, interested undertakings had to provide proof of an average annual turnover of not less than ITL 5 000 million, in the field of management of water purification and sewage disposal plants, and also actual management of at least one domestic water purification plant for a period of two consecutive years during the previous three years.

7 The companies Holst Italia AG (Holst Italia) and Ruhrwasser AG International Water Management

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SpA (Ruhrwasser) were permitted to participate in the call for tenders. By a decision of the contract-awarding committee of 13 June 1997, approved by a decision of the town council on 17 August 1997, the contract was awarded to Ruhrwasser, which provided the most advantageous offer for the contracting authority.

8 Ruhrwasser is a German limited liability company whose share capital is held by a consortium of six German companies, each owning one sixth of the company shares. The object of Ruhrwasser is to enable the consortium to win contracts, particularly abroad, in the field of water supply and waste water purification. One of the companies forming part of the consortium, RWG Ruhr-Wasserwirtschafts-Gesellschaft mbh (RWG), has as its only shareholder Ruhrverband, a public-law body responsible in Germany for public service tasks in the field of the management of waste water. It is established that this body has references which would have been sufficient to qualify it for the call for tenders by the Municipality of Cagliari.

9 It is also established, however, that Ruhrwasser did not directly possess the required qualifications to tender properly, being a newly constituted company which was entered on the register of companies only on 9 July 1996. For this reason, Ruhrwasser relied on the technical and financial qualifications of Ruhrverband which, through its subsidiary RWG, participated in the joint venture from the outset of the creation of Ruhrwasser. The contracting authority accepted the validity of these indirect references.

10 Holst Italia commenced proceedings before the Tribunale Amministrativo Regionale (Regional Administrative Court) per la Sardegna (Italy) for annulment of the award of the contract to its competitor, principally on the ground that the contested decision infringed the rule in the invitation to tender according to which only the qualifications of companies interested in the contract could be taken into account to assess their eligibility to participate in the procedure. Ruhrwasser lodged an interlocutory application disputing the content of the invitation to tender, on the ground that it did not permit a service provider to rely on, by any appropriate document, the qualifications which it did not possess directly but which it nevertheless had at its disposal.

III - The question referred for a preliminary ruling

11 Considering that, in order to rule on this point it was necessary to determine whether Directive 92/50 permits a candidate participating in a tender procedure to rely on the technical and financial qualifications of another legal person to which it is linked, the national court stayed proceedings in the main action and referred the following question to the Court:

`Does Council Directive 92/50/EEC of 18 June 1992, relating to the coordination of procedures for the award of public service contracts, permit a company to prove that it possesses the technical and financial qualifications laid down for participation in a procedure for the award of a public service contract by relying on the references of another company, which is the sole shareholder of one of the companies having a holding in the first-mentioned company?'

IV - Answer to the question referred for a preliminary ruling

12 The national court is asking essentially whether an undertaking which submits a tender to secure a public service contract must itself fulfil the technical and financial conditions required by the contracting authority, or whether it may rely indirectly on compliance with those conditions by another company to which it belongs in part.

13 In order to answer the question referred, it is necessary to examine the rules and provisions of Community law, as they are contained in Directive 92/50 and as they have been supplemented by the case-law of the Court.

Aims and relevant provisions of Directive 92/50

14 Directive 92/50 has two main objectives, the free movement of services (2) and free competition

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(3) in this sector. Economic operators should be able to move and supply services without any restriction on the basis of their nationality or their place of residence, thus contributing, by the multiplicity and the comparison of services offered, to the improvement in the quality of services offered and the economic conditions under which they are performed in the Community.

15 In order to establish an internal market comprising an area without internal frontiers within which the free movement of services is ensured, (4) Directive 92/50 lays down rules designed to remove obstacles to this freedom. (5)

16 According to Article 3(2) of Directive 92/50: `Contracting authorities shall ensure that there is no discrimination between different service providers.' It is necessary to determine whether the non-admission of a tenderer on the ground that he does not personally fulfil the technical and financial capacity conditions set by the contracting authority constitutes such discrimination.

17 Directive 92/50 cites a certain number of criteria which could identify discriminatory conduct. It states that `... services providers may be either natural or legal persons', (6) which suggests that the legal form of undertakings should not constitute an obstacle to their freedom to tender. This factor is referred to in Article 26(2), which prohibits the rejection of a tender on the sole ground that it was submitted by a natural person or by a legal person.

18 The requirement for a specific legal structure in order for a contract to be awarded could therefore be perceived as an unjustified restriction on the right of economic operators to compete under the same conditions.

19 Article 26(1) of Directive 92/50 confirms this point in relation to the case where several undertakings intend to respond jointly to an invitation to tender. Under this provision, groups of service providers are expressly permitted to tender and the contracting authority may not require these groups `to assume a specific legal form in order to submit the tender'.

20 These various provisions make it clear that the Community legislature is less concerned with the legal form which service providers assume than with their ability to carry out the tasks entrusted to them upon the award of public contracts, or to gather together the resources for the performance of the contract regardless of their own organisation. The elimination of obstacles linked to the legal status of operators constitutes a means of increasing tenders, particularly those from undertakings from Member States of the Community other than the State in which the contract awarding procedure takes place, without compromising the substantive requirements for proper performance of services.

21 Therefore, the approach to adopt in interpreting Directive 92/50 should be more functional than strict. Accordingly, although they seem to reflect a certain formalism, some of the obligations laid down by Directive 92/50 are specifically intended to promote the proper performance of public contracts, limiting the risks to which contracting authorities are exposed.

22 A significant example of this type of requirement is provided by Article 26(3), which permits the contracting authority to require legal persons to `... indicate... the names and the relevant professional qualifications of the staff to be responsible for the performance of the service'. If it cannot be prohibited to award a contract to a legal person on the sole pretext of its legal form, it is just as important not to deprive the contracting authority of information which will enable it to evaluate the capability of a service provider to carry out the contract under the conditions laid down.

23 The Community legislature has therefore ensured that the full exercise of the freedom of movement does not compromise the proper performance of the services, an element without which the Community legislation loses all its meaning. Directive 92/50, like the interpretation to be applied to it, pivots between the two essential requirements of providing for a sufficient liberalisation of contract-awarding

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procedures and of setting standards which assure contracting authorities that they receive quality services.

24 Contracting authorities should be in a position to assess the capability of tenderers to carry out the contracts in the required manner.

25 This is the objective of Articles 31 and 32 of Directive 92/50. The first article lists the financial and economic proof which can be required from service providers, states how it can be provided and gives an alternative solution in the event that a service provider is unable to produce the requested references. The second article lays down a number of criteria for determining the capability of service providers to supply the services requested, draws up a list of the means of evidence of their technical capacity and indicates how the contracting authority may request them.

26 It is not necessary to discuss the reasons for these provisions at any length, the object of these articles evidently being to protect the interests of the contracting authority against applications from economic operators more concerned about securing lucrative contracts than about the main task, that is to say, performing them scrupulously.

27 Nevertheless, from their terms we can draw two indications also relevant in the analysis of the question referred in this case.

28 First, although an abundance of tenders is in itself in the interests of the contracting authority, this should not be achieved at the cost of mediocre services. Such a requirement legitimates those safeguards and justifies that the interpretation given to the provisions establishing them should take account of the risks of fraud liable to stifle their protective effect. The consequences of accepting that the legal conditions laid down by Directive 92/50 can be fulfilled by persons other than the tendering undertaking should, therefore, be carefully assessed.

29 Secondly, although the reference made by those two articles to the service provider could prompt an interpretation to the effect that the production of proof is limited to the service provider himself, (7) other passages militate in favour of a less strict reading.

30 Thus, Article 31(3) allows the service provider to prove, under certain conditions, his economic and financial standing `... by any other document which the contracting authority considers appropriate', which, by giving the contracting authority a certain degree of discretion, allows it to accept proof produced by persons other than the service provider as long as they offer the same guarantees. Likewise, Article 32(2)(c) expressly refers to the case where the technicians or the technical bodies on which the service provider relies do not belong directly to the service provider. Still other provisions go in this direction, such as Article 32(2)(h), which accepts the possibility of the service provider using a sub-contractor, or Article 32(2)(e), which provides for `a statement of the tool, plant or technical equipment available to the service provider for carrying out the services', (8) thus not limiting the statement to the undertaking's own equipment.

31 `Personalisation' of the capacities required by the contracting authority from the tenderer is therefore called into question by the very wording of Directive 92/50, as it makes several references to availability of means external to the undertaking. This circumstance, confirming what is suggested by the aims pursued by Directive 92/50, prompts a flexible interpretation of the provisions regarding proof of tenderers' standing.

The Ballast Nedam Groep cases

32 The Court's judgments of 14 April 1994 (9) and 18 December 1997 (10) in the Ballast Nedam Groep cases confirm this approach.

33 In Ballast Nedam Groep I, the question was whether a holding company could be excluded from participating in the procedures for public works contracts because it did not carry out the work

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itself - in that case by the refusal to renew the approval which it had been awarded until then - and, if not, under which conditions it could prove the necessary standing for such participation. (11)

34 The Court held that the directives applicable in this case (12) `... must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works' and that `[it] is for the national court to assess whether such proof has been produced in the main proceedings'. (13)

35 The Court therefore accepted that an economic operator not in a position to carry out the contract himself because he does not fulfil the qualitative selection criteria required by the provisions may rely on the resources of other companies, provided that those resources are actually available to him for his use.

36 Two points enabling the exact effect of this ruling to be ascertained, and therefore also enabling its application to the present case to be determined, must now be examined.

37 First of all, in Ballast Nedam Groep I, the Court ruled on the interpretation of the Community legislation regulating public works contracts, whilst the present reference for a preliminary ruling concerns Community law governing public service contracts. It is therefore quite legitimate to examine whether that which applies to one sector is also applicable to the other.

38 The differences between the two bodies of legislation result in more explicit references, in the area of public works contracts, (14) to the right for contractors to entrust performance of contracts to other operators. If they are added to the arguments in favour of this right in the works sector, these differences do, in my view, detract from the factors advanced above (15) supporting the possibility of tenderers in the area of services having the same right.

39 In order to refuse to transpose Ballast Nedam Groep I to the area of public service contracts, on the ground that the subject-matter of the contract is not the same, it would be necessary to show that, by their nature, provisions of services do not lend themselves to the use of external resources as much as works contracts.

40 However, there is no evidence of this. Moreover, I have difficulty accepting the reasons which would dictate that the technical and financial conditions required by the tenderers should be fulfilled by the operator himself in the area of services when they cannot be so fulfilled in the area of works contracts. Those reasons are all the less evident in relation to the proof of an undertaking's economic and financial standing since the strictly financial and quantitative guarantee which they seek to establish bears no relation to the subject-matter of the contract. As regards evidence of the technical capability of the service provider, it is sufficient to recall the terms of Article 32(2)(c) of Directive 92/50, under which the contracting authority may be informed of the involvement of any technicians or technical bodies external to the service provider. This provision explicitly confirms that, in the area of public service contracts, external support can be relied upon by tenderers in support of their bids.

41 The ruling in Ballast Nedam Groep I is, therefore, in my view, fully applicable in this respect.

42 The second point concerns the position of the tendering company in relation to the companies upon whose standing and capability it wishes to rely. As the Italian Government and Holst Italia have observed, the tenderer, Ruhrwasser, does not have any dominant influence over the undertaking holding the required qualifications in the present case, Ruhrverband. In Ballast Nedam Groep

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I, on the other hand, the Court took the point that the holding company claiming the right to tender was the dominant legal person in the group.

43 One could conclude that the dominant position of an undertaking is a necessary condition for recognition of a company's right to rely on standing and capabilities which are not its own. It is clear, in fact, that the wider the power of decision conferred on the tenderer in relation to other companies, the more it guarantees the contracting body that those companies' resources will be at the contractor's disposal for the needs of the contract.

44 However, I do not think that the making available of resources needed for the proper performance of the contract, but external to the service provider, necessarily supposes a position of subordination, with regard to the tenderer, of the undertakings having the capacities or some of the capacities claimed by the tenderer. As we have seen, the objective of Directive 92/50 dictates an interpretation favourable to the general access of undertakings to public contracts, provided that their selection is made on the basis of proof of the competence actually available to the undertaking and on the solidity of the guarantees which they offer.

45 It is in that sense that the principles contained in Ballast Nedam Groep I should be read and applied to the present case.

46 The Court stated that the performance of works by legal persons separate from the holding company to which they are awarded does not warrant the latter's exclusion from the procedures for participating in the award of public contracts. The Court added that the nature of the legal link between a company and its subsidiaries did not matter (16) and that it was for the national court to assess, in the light of the factual and legal circumstances before it, whether proof, by the company, of the actual availability of resources of its subsidiaries had been adduced in the main proceedings. (17)

47 It is striking that no account was taken in that judgment of the relevance, as regards the question of being certain that the resources sought by the competent authority are actually available, of the decision-making power held by the holding company by virtue of its position as parent company. On the contrary, the emphasis is placed on the irrelevance, for the purposes in view, of its legal organisation and on the real importance of direct review by the court of the effectiveness of that making available of resources.

48 That finding and the factors explained above, which can be derived from the objectives pursued by Directive 92/50 and its tenor, suggest that the ruling in Ballast Nedam Groep I should be applied to the relationships between Ruhrwasser and Ruhrverband, although these connections of ownership are reversed in comparison with that decided case and, instead of being `dominant', the company in question is in a subordinate position.

49 Of course, it is not a question of drawing from such two different legal situations the conclusion that the contracting authority will have, in both cases, the same guarantee that resources external to the tenderer undertaking will actually be made available.

50 I am only pointing out that the nature of the legal link between two undertakings should not be allowed to prejudge the question whether the making available of resources, for which Directive 92/50 permits contracting authorities to require proof, is certain to take place. In other words, if the national court is at liberty to consider that, in view of the characteristics of that link or of other factual and legal circumstances specific to the case, the contracting authority has no certainty of being able to call on the skills needed for the performance of the contract, it appears to me excessive to hold that, as a matter of principle, the fact that an undertaking, in responding to an invitation to tender, relies on the technical, financial and economic resources of a company to which it belongs wholly or in part should prevent it from tendering. The method

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used to ensure the actual availability of the resources and guarantees required by the contracting authority does not matter, as long as that availability can be verified.

51 There are, in fact, no considerations on the basis of which it could be argued that the nature of the legal relations between Ruhrwasser and Ruhrverband necessarily and a priori exclude the existence of obligations, of a statutory or contractual nature, incumbent on the latter party, of which the binding force would provide the Municipality of Cagliari with the certainty that resources necessary for the performance of the contract would actually be available. The answer to this question depends on consideration of the facts reported in the file and on the elements of national law applicable, on which only the national court can carry out an assessment.

Appraisal by the national court of certain elements of fact and of law

52 In order to satisfy itself that the tenderer actually has available to it the external resources which it claims to have, the referring court is asked to carry out an assessment of elements of fact and of law which concern the content of the agreements possibly concluded between Ruhrwasser, RWG and Ruhrverband - or between the two companies concerned by the contract in question - or the relations statutorily established between them, and also the binding nature of the legal link binding these two companies together.

53 Ascertaining the content of the obligation binding the parent company to its subsidiary should make it certain that the technical abilities and financial guarantees relied upon by the latter will properly contribute to the achievement of the operations envisaged for the performance of the public contract.

54 In the present case, the economic and financial proof required by the contracting authority relates to the level of annual average turnover in the area of management of sewage treatment plants and water collection. That requirement, which falls under Article 31(1)(c) of Directive 92/50, cannot, in my view, be satisfied unless it is proven that the tenderer is in a position to rely, in a significant manner, on the services of the company to which it refers.

55 That reference guarantees, in the present case, the contracting authority the benefit of minimal professional experience, which, in order to be really useful, must be directly employed in the performance of the contract. Therefore, it is essential to ascertain that the company whose experience is relied upon will be the one which, whilst not carrying out the entire range of activities described by the contracting authority, will at least provide the management, thus making its technical ability available. (18)

56 This reasoning is capable of being applied to the second guarantee sought by the contracting authority, which concerns experience of actual management of a domestic sewage treatment plant for two consecutive years during the previous three years. Likewise, laying down such a criterion does not make sense unless the tenderer who wins the contract relying on the experience of another company is in a position to prove that the latter company will be involved in performance of the contract to a significant degree.

57 Secondly, in assessing whether the resources relied upon will actually be available, it is appropriate to ascertain whether the legal instrument used for this purpose is not only in order but also ensures the intended effects by conferring a binding force on them. (19)

58 It will be legitimate for the national court to investigate, for example, whether an agreement has been concluded under which the parent company undertakes to make available to its subsidiary a certain number of technical resources and financial guarantees, whether this agreement is truly binding on the parent company and whether, in the case of non-performance, the parent company could be sued before the competent courts.

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59 Let me make it clear that the relationship between the two companies can be more or less close and the economic autonomy of the subsidiary in relation to its parent company more or less wide, according to the level of participation of one company in the share capital of the other, which is not without effect on the guarantees and resources which will be available to the contracting authority.

60 Indeed, if the parent company was behind the decision to respond to the invitation to tender - although this decision is formally attributed to the subsidiary - it is unlikely that it will refuse to make available the resources at its disposal.

61 However, it cannot be totally excluded that the subsidiary tenderer, being the only party legally bound to the contracting authority, encounters a change of policy by the decision-making parent company.

62 It is to be feared that the contracting authority, which stands to suffer most from the unforeseen effects of a poorly performed or non-performed contract and faced with the impossibility of obtaining from its co-contractor prompt and satisfactory performance of the contract or financial compensation for the latter's default, would have no right of action against the parent company.

63 Without prejudging the position in national law, I would say that it is likely that the contractual non-performance could not be declared or compensated if the parent company, owing but not performing the obligation to make resources available, entirely controls the decision making within its subsidiary. Alone disposing of the power to secure performance of the obligations in question through the courts, it thus holds the power to undo its own commitments. The guarantees provided to the contracting authority then risk being no more than a veil masking the tenderer's inability to fulfil the obligations of the contract.

64 The disadvantage for the contracting authority is, therefore, that the company which holds the power to decide to make available the resources and guarantees necessary for the contract and the company which assumes responsibility as co-contractor are two separate legal persons. Nor must it be overlooked that any proceedings brought against the subsidiary will not be without consequences for the parent company.

65 In the present case, however, Ruhrwasser appears to have relative autonomy in relation to Ruhrverband since, as we have seen, its capital is divided in equal parts between six companies of which only one, RWG, is wholly owned by Ruhrverband.

66 Before determining that Ruhrwasser actually has the power to assert its rights against the parent company, the national court will have to satisfy itself that the legal means exist on the basis of which the tenderer can properly claim to have the standing relied upon.

67 What is important therefore, in this case, is that the legal instruments which bind Ruhrwasser to Ruhrverband must have a binding legal force enabling the tenderer to be certain of the parent company's assistance.

Conclusion

68 In the light of these considerations, I propose that the Court answer the question referred for a preliminary ruling by the Tribunale Amministrativo Regionale per la Sardegna as follows:

Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts is to be interpreted as not precluding a contracting authority from taking account, for the assessment of the selection criteria of the financial and technical standing which a company must satisfy upon examination of a bid made during a tendering procedure for the award of a public service contract, of the standing of another company which is the sole shareholder of one of the companies having a shareholding in the first-mentioned company, provided

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that the latter company proves that it actually has available the resources of the company on which it relies.

It is for the national court to assess whether the requisite proof in that regard has been adduced in the main proceedings.

For that purpose, the national court must, in particular, make sure that the company whose standing is taken into account is obliged to take an appropriate part in the performance of the contract, having regard to the purpose of the references relied upon.

(1) - Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(2) - Sixth recital.

(3) - Twentieth recital.

(4) - Second recital.

(5) - Sixth recital.

(6) - Ibid.

(7) - Articles 31 and 32 refer to the service provider's financial, economic and technical capacity, thus referring only to the tenderer himself. Similarly, Article 32 states: `The ability of service providers may be evaluated in particular with regard to their skills, efficiency, experience and reliability.' It mentions `the service provider's educational and professional qualification and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services' and `... the service provider's average annual manpower and the number of managerial staff for the last three years.' The provision appears to set out only factors specific to the undertaking.

(8) - My emphasis.

(9) - Case C-389/92 [1994] ECR I-1289, hereinafter `Ballast Nedam Groep I'.

(10) - Case C-5/97 [1997] ECR I-7549, hereinafter `Ballast Nedam Groep II'.

(11) - Ballast Nedam Groep II interprets the first ruling on the question of the obligatory or discretionary character of taking into account references of third party companies by the authority responsible for deciding on the application for registration. The Court stated `... the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take account of the references of those companies in assessing the suitability of the legal person concerned...' (point 14, my emphasis). This judgment is of less direct interest to the current case than Ballast Nedam Groep I since, in the main case which gave rise to the question in the present case, the very existence of a right - and not its obligatory or discretionary character - to have account taken of references external to the tenderer which the contracting authority has recognised is in issue.

(12) - Directive 71/304/EEC of 26 July 1971 concerning abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (OJ, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

(13) - Paragraph 18, my emphasis.

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(14) - According to the wording of Directive 71/304, `... public works contracts may be awarded to persons covered by that directive who carry out the work through agencies or branches' (Ballast Nedam Groep I, paragraph 10). Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305 (OJ 1989 L 210, p. 1), provides, moreover, that public works contracts `... have as their object either the execution, or both the execution and design, of works or a work, or "the execution by whatever means of a work corresponding to the requirements specified by the contracting authority"' (Ballast Nedam Groep I, paragraph 14).

(15) - Paragraphs 14 to 31 of this Opinion.

(16) - Ballast Nedam Groep I, paragraph 17.

(17) - Ibid.

(18) - For the sake of completeness, it should be observed that the referring court cannot always confer the same meaning on the proofs required by Directive 92/50, when they concern an external operator. So the information concerning the financial soundness of a company, when relied upon by the tenderer undertaking before the contracting authority, can hardly be considered to be a real guarantee when the company which has won the contract is not itself viable. In the absence of a direct contractual relation between the contracting authority and the third party, the financial standing of the latter party might be inadequate to safeguard the interests of the entity awarding the contract. The idea of `actually making available' does not have therefore the same virtues, as far as financial and economic standing is concerned, and it is not certain that, in that circumstance, the contracting authority would be well advised to satisfy itself with proof external to the tenderer. This difference cannot be without effect on the freedom of contracting authorities to rely on this type of guarantee or on the interpretation which can be made of applicable Community law. Furthermore, it is important to know the content of commitments which link the tenderer undertaking to the third-party undertaking and which can bind the latter to the contracting authority.

(19) - It follows from the information in the file that Ruhrverband carries out a public service task in Germany and does not have the right to carry out its task outside Germany. The delimitation of its objects, on which its freedom of action depends, can thus assist the assessment by the national court of its ability actually to make available to the contracting authority the resources on which Ruhrwasser is counting.

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SUB	Approximation of laws
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Opinion of Mr Advocate General Alber delivered on 18 March 1999.
RI.SAN. Srl v Comune di Ischia, Italia Lavoro SpA and Ischia Ambiente SpA.
Reference for a preliminary ruling: Tribunale amministrativo regionale della Campania - Italy.
Freedom of establishment - Freedom to provide services - Organisation of urban waste collection service.
Case C-108/98.

A - Introduction

1 The present reference for a preliminary ruling concerns the applicability of provisions in the fields of freedom to provide services, freedom of establishment, competition law and of Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts. (1)

2 The applicant in the main proceedings, RI.SAN. Srl, which brought two actions before the national court for the annulment of the two municipal council resolutions mentioned below, was entrusted with the collection of solid urban waste in the Municipality of Ischia up to 4 January 1997. By municipal council resolution of 7 November 1996, the urban waste removal service was entrusted to Ischia Ambiente SpA - without a public tendering procedure.

3 The company Ischia Ambiente SpA was set up by the Municipality of Ischia and GEPI SpA, a State-owned financing company, (2) on the basis of the municipal council resolution of 6 July 1966.

4 Under Italian law, in order to promote employment, the municipalities are entitled to set up public limited companies with GEPI SpA, inter alia for the purpose of operating local public services. Italian law allows local authorities to select GEPI SpA directly as partner for operating a local public service, without any form of selection procedure or public tendering. GEPI SpA is required to transfer its shareholding in such mixed capital companies within five years by public tender.

5 In that regard, RI.SAN Srl claims that the municipal council resolutions infringe Community law. The referring court considers, therefore, that the present case raises questions on the interpretation of Article 59 et seq. of the EC Treaty and of the provisions of competition law.

B - The facts and the questions referred for a preliminary ruling

6 The first resolution challenged, namely Municipal Council Resolution No 25 of 19 March 1996, concerns the constitution with GEPI SpA of a public limited company, Ischia Ambiente SpA, with a majority public shareholding, for the removal of solid urban waste in the Municipality of Ischia. That resolution also approved the statutes of the company to be formed and the corresponding technical, economic and financial plans. The Municipality of Ischia subscribed 51% and GEPI SpA 49% of the share capital of Ischia Ambiente SpA.

7 In its action for annulment relating to these matters, RI.SAN Srl pleads infringement of several Italian laws and also procedural infringement in the absence of any public procedure for the selection of the co-shareholder.

8 Municipal Council Resolution No 99 of 7 November 1996 entrusted Ischia Ambiente SpA with the removal of solid urban waste in the Municipality of Ischia. In that regard, apart from the infringement of several Italian laws, RI.SAN Srl alleges in particular that the contract for operating the public service was awarded without any tendering procedure either for the selection of the second shareholder of the mixed-capital company or for the award of the contract and that that constitutes - in its opinion - a manifest breach of Community law.

9 Municipal Council Resolution No 25 on the constitution of a mixed-capital public limited company

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with a mainly public shareholding was expressly adopted on the basis of Article 4(6) of Law No 95 of 29 March 1995. Under that provision, the municipalities and provinces are allowed, in order to promote employment or the re-employment of workers, to set up public limited companies with GEPI SpA inter alia for the purpose of operating local public services. Article 4(8) of that law requires GEPI SpA to transfer its shareholdings in the aforesaid companies within five years by means of a public tendering procedure in accordance with the provisions governing GEPI SpA's activities.

10 According to the explanations given by the national court, the relevant provisions of national law are designed to allow the local authorities to choose directly and without any form of selection procedure GEPI SpA as partner for the operation of local public services, provided that this serves the purpose of promoting the employment or re-employment of workers. In this case that requirement is satisfied, since in all the contested measures it is, inter alia, declared that the objective is to ensure that employment levels in the sector are maintained.

11 For the national court, therefore, that raises the question whether Article 4(6) of Law No 95 is compatible with Community law. The main proceedings involve the `direct selection of a private party - without any competition - for the operation of a local public service in accordance with a special procedure expressly provided for by the national Law on the administrative autonomy of local authorities (legge nationale sur le autonomi locali), Law No 142 of 8 June 1990, Article 22(3)(e), namely the creation of a limited company whose capital is constituted mainly by public funds from the local authority and which will automatically be entrusted with the operation of this public utility'. That therefore rules out any competition, even at the stage of selecting the partner. For the national court those provisions are in direct conflict with the provisions on freedom to provide services and on free competition set out in the EC Treaty.

12 The national court therefore essentially seeks to ascertain whether a presumed breach of the principles of freedom to provide services and effective competition arising from the direct choice of GEPI SpA as partner by the Municipality of Ischia `can be justified by virtue of the derogations provided for and allowed by the Treaty (Articles 55, 66 and 90(2))'. The fact that `in the initial stage of constitution of the mixed management company for operation of the local public utilities, and for the first five years of its existence, normal recourse to non-discriminatory competitive selection procedures for the choice of the operator of the public utility' is excluded could be considered as constituting such a breach. According to the provisions referred to by the national court and to the basic concepts underlying the Treaty, it is as a rule necessary to conduct a public tendering procedure or a restricted public selection procedure in order to guarantee effective competition and transparency in the selection of the partner. Since no such procedure was conducted, (3) it must be determined whether the action taken by the municipality was `justified'.

13 For the national court, therefore, the issue is not the applicability of Directive 92/50 but the general applicability of Articles 55, 60 and 90(2) of the EC Treaty. The national court moreover regards the Directive as not applicable, since the services in question are not provided to a contracting authority for consideration on the basis of a contract for pecuniary interest.

14 The Tribunale Amministrativo Regionale della Campania (Naples) therefore referred the following questions to the Court for a preliminary ruling:

`(1) Must Article 55 of the Treaty (which is applicable inter alia to the services sector by virtue of the reference in Article 66 of the Treaty), pursuant to which "[t]he provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority", must be interpreted so widely as to include the activities of GEPI SpA (later Itainvest SpA) as a participant in local authorities' mixed companies for the operation of local public utilities, within the meaning of 4(6) of Law No 95 of 29 March 1995 (converting into a statute, with amendments, Decree-law

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No 26 of 31 January 1995), even where that participation purports to be for the purpose of "promoting employment or the reemployment of workers" already assigned to the service the management of which is at issue, having regard to Article 5 of Law No 184 of 22 March 1971 establishing GEPI SpA, which gives GEPI SpA the same task of "contributing to the maintenance and growth of employment levels facing temporary difficulties, such as to demonstrate the specific possibility of reorganising the undertakings concerned", in the manner set out therein?

(2) In view of the abovementioned legislation governing GEPI SpA (later Itainvest SpA), may there be applicable to this case the derogation provided for in Article 90(2) of the Treaty according to which "[u]ndertakings entrusted with the operation of services of general economic interest... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of those rules does not obstruct the performance in law or in fact, of the particular tasks assigned to them"?'

C - The relevant legislation

Community law

15 Directive 92/50, which finds its legal basis in Article 57(2), last sentence, and Article 66 of the EC Treaty, contains the provisions concerning the procedure for awarding public service contracts. It defines, inter alia, the terms `public service contract' and `contracting authority'. Contracting authorities are required to award contracts which have as their object the services listed in Annex IA and IB of the directive in accordance with the provisions of the directive, and thus inter alia by way of public tendering procedure. To that end the various award procedures are also laid down in the directive.

16 Article 1 of the Directive defines the scope of application as follows:

`For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority,...

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

...'

17 Article 6 of Directive 92/50 provides for the following derogation:

`This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1 (b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

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National law

18 GEPI SpA was constituted on the basis of Article 5 of Law No 184/71 of 22 March 1971. (4) GEPI SpA was established with the express purpose of maintaining and increasing employment levels.

19 Article 22(3)(a) to (e) of Law No 142/90 of 8 June 1990 (5) on local autonomy provides that municipalities and provinces may operate the public service undertakings which fall within their spheres of competence in different ways. So far as is relevant to the present case, this can be done by direct management (a), by award of a concession to third parties (b), or by means of a public limited company (e) the share capital of which is constituted mainly by public funds and, where necessary, with public or private partners. The decisive factors in this respect are the appropriateness of the procedure and the nature of the services to be provided.

20 Article 4(6) of Law No 95/95 of 29 March 1995 concerning mixed capital companies of a public-service nature (6) allows the municipalities and provinces to set up public limited companies directly with GEPI SpA inter alia for the purpose of operating local public services, with a view to promoting employment and re-employment of workers. Article 4(8) requires GEPI SpA to transfer its shareholdings in such companies within five years by means of a public tendering procedure.

D - Arguments of the parties

21 RI.SAN Srl takes the view that Directive 92/50 is applicable in this case. As its structure as a limited company governed by private law shows, Ischia Ambiente SpA is not a contracting authority and consequently the directive applies. Article 6 precludes application of the directive only in the specific case where a public service contract is awarded to an entity which is itself a contracting authority and is not, therefore, active commercially. Nor - so RI.SAN Srl claims - is there an award of a concession in this case. As Ischia Ambiente SpA is also not part of the public administration, the services provided are not so-called in-house services, namely services performed by way of direct management. It follows that the contract for the removal of solid urban waste in the Municipality of Ischia should have been awarded by public tender in compliance with Directive 92/50.

22 GEPI SpA and Ischia Ambiente SpA take the view that the primary-law provisions of the Treaty do not apply in this case since a purely domestic (Italian) situation is concerned. As regards Directive 92/50, both of those companies claim that the task entrusted to Ischia Ambiente SpA, namely the removal of solid urban waste in the Municipality of Ischia, constitutes an in-house service. Both GEPI SpA and Ischia Ambiente SpA form an integral part of the administration and the discharge of the task was simply the subject of internal delegation between organs. Directive 92/50, however, applies only to contracts awarded to third parties which are not part of the administration. In the case of GEPI SpA, moreover, there is an award of a concession, which also falls outside the scope of Directive 92/50, since that directive applies only to services provided under public service contracts. Were Directive 92/50 nevertheless to apply, the derogation allowed under Article 6 would be relevant since both GEPI SpA and Ischia Ambiente SpA are contracting authorities. As a result, this case falls outside the scope of the Directive. The majority - at least - of both companies' share-capital was paid up with public funds and over half the members of the Board of Directors of Ischia Ambiente SpA represent the Municipality: therefore, all the parties concerned are contracting authorities.

23 The Municipality of Ischia first queries the relevance to the decision in the main proceedings of the questions referred for a preliminary ruling. Since the Municipality is the majority shareholder of Ischia Ambiente SpA and GEPI SpA is part of the public administration, Community law does not apply. In the event of infringement of the provisions of Directive 92/50, `Article 55 of the EC treaty would apply'. In any event, what it concerned in this case was in-house services

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of the local authority undertaken in the public interest. Furthermore, the objectives pursued justify the procedure adopted. The procedure chosen enables the local authorities to cope with economic and financial difficulties, thereby securing the supply of public services to their citizens. Moreover, such a procedure maintains existing jobs and can even create new jobs. The fact that the urban waste removal service was entrusted to Ischia Ambiente SpA for a limited period of five years also shows that the Italian legislation is not incompatible with Community law.

24 The Italian Government, too, maintains that the provisions of the Treaty do not apply in this case since a purely domestic situation is concerned. Moreover, both GEPI SpA and Ischia Ambiente SpA are part of the public administration and are not undertakings pursuing economic activities. The situation in point does not fall within the scope of the provisions on freedom to provide services or freedom of establishment. Since those companies do not compete in operating the waste removal service, there cannot be any breach of the competition provision of the Treaty in this respect. The fact that this case involves in-house services precludes the applicability of Directive 92/50. Ischia Ambiente SpA is, as a part of the public administration. There is thus no contract for the provision of services for pecuniary interest.

25 The Commission also maintains that the context is purely domestic and that, therefore, the provisions of the Treaty cited by the national court do not apply here. As regards the applicability of Directive 92/50, the Commission submits that this case concerns either a concession or in-house services. In view of the explanations provided by the national court, the Commission believes either hypothesis is possible, but the facts cannot be precisely classified on the basis of the individual indications provided. If either of these hypotheses were true, Directive 92/50 would not apply to the facts at issue in the main proceedings. The Commission is not in a position to provide a definitive answer in absence of more complete information. For want of that information, the Commission thinks that it is also possible that the task of removing urban waste in the Municipality of Ischia was entrusted to Ischia Ambiente SpA on the basis of an agreement or public contract for pecuniary interest. In that case, Directive 92/50 would in principle apply. However, the information provided by the national court is in this respect also too scant for the Commission to answer that question definitively. It is therefore for the national court itself to determine whether Directive 92/50 applies in the light of the provisions of that directive and the criteria developed by the case-law of the Court.

26 Where necessary, I shall come back in the course of the following analysis to the other arguments put forward by the parties in their written pleadings or at the hearing.

C - Analysis

The first question

27 By its first question the referring court wishes to establish whether the activity of GEPI SpA falls within the scope of Article 55 of the EC Treaty, read in conjunction with Article 66 according to which the rules concerning freedom to provide services do not apply to activities which in a Member State are connected, even occasionally, with the exercise of official authority.

28 Although - as may be seen from the order for reference - that question ultimately seeks to establish whether or not an open tendering procedure for the selection of the partner, in this case GEPI SpA, would have been required under the general principles laid down in the Treaty, it would seem appropriate to ascertain first whether, in accordance with Articles 55 and 66 of the EC Treaty, the rules concerning freedom to provide services and freedom of establishment apply at all in this case. Whether or not this is a general obligation to initiate a public tendering procedure is a question which can be left aside for the time being.

29 GEPI SpA set up a company with the Municipality of Ischia for the management of a local public

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service. In that regard, however, the Commission correctly suggests that as a result the rules applicable under the Treaty are not the rules governing the services sector but rather those concerning freedom of establishment.

30 According to case-law of the Court, the provisions of the chapter on services are subordinate to those of the chapter on the right of establishment. (7)

31 Services within the meaning of Article 60 of the EC Treaty are characterised by their temporary nature. That criterion is met where a service is provided only occasionally (8) or for a limited duration. (9) Moreover, for the rules on freedom of services to apply, there must be a transfrontier element. That is the case where the person providing the service goes to the Member State where the person for whom it is provided is established, (10) or vice versa, (11) or where the service is provided for remuneration. (12)

32 Freedom of establishment is characterised by a longer duration of the service provided: the frequency, regularity and continuity of the service are further criteria distinguishing freedom of establishment from the freedom to provide services.

33 Managing a local public service is an activity of long duration. Such activity is exercised continuously at set intervals. In view of its importance, that activity must be carried out on a regular basis. The proper performance of the service in question requires more than the merely occasional removal of urban waste.

34 As the service provider must be on the spot and the service must be repeated frequently, the rules concerning freedom of establishment must be taken into consideration in appraising the facts at issue here.

35 The scope of the right to establishment ratione personae must also be taken into account in this case since, in accordance with Article 58 of the EC Treaty, companies are also entitled to that right.

36 For the rules on freedom of establishment to apply, there must, however, also be some element relevant to Community law. That is the case only if the factual context involves a transfrontier element, namely if the freedom of movement of a company of another Member State is restricted.

37 However, there is no such transfrontier element here: GEPI SpA and RI.SAN Srl are both Italian companies established in Italy. The same is true of Ischia Ambiente SpA. The only other party involved is the Italian Municipality of Ischia. Therefore, the transfrontier element is lacking in this case.

38 In the result, in view of this purely domestic context, the Community rules on freedom of establishment do not apply and there is, therefore, no need to examine whether the derogation provided for in Article 55 of the EC Treaty is relevant. Nor is it necessary to consider the question raised implicitly by the national court whether, by virtue of the principles underlying the Treaty, there is a general obligation to initiate public tendering procedures - which, moreover, is not evident. Whether a specific obligation to initiate a procedure is a matter which will fail to be addressed is only in the context of the applicability of Directive 92/50.

The second question

39 By its second question, the national court wishes to know whether Article 90(2) of the Treaty applies to the activities of GEPI SpA.

40 Article 90(1) of the EC Treaty requires Member States, with regard to public undertakings, inter alia neither to enact nor maintain in force any measure contrary to the rules contained in the EC Treaty. By virtue of Article 90(2), undertakings entrusted with the operation of services

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of general economic interest are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

41 The Italian Government, the Commission and GEPI SpA maintain that, in view of the purely domestic factual context, Article 90 of the EC Treaty does not apply either. The Commission argues, moreover, that the undertakings to which the restriction set out in Article 90(2) applies must be undertakings within the meaning of Article 90(1). However, GEPI SpA is not, it maintains, such an undertaking.

42 By virtue of its wording, Article 90(2) of the EC Treaty covers both public and private undertakings. However, Article 90(2) by no means applies only to undertakings within the meaning of Article 90(1) of the Treaty, (13) so that there is no need to determine whether or not GEPI SpA is an undertaking within the meaning of Article 90(1).

43 GEPI SpA must, however, be an undertaking within the meaning of Article 90(2) of the Treaty. To qualify as such, GEPI SpA must be `entrusted with the operation of services of general economic interest'. The concept of services within the meaning of Article 90(2) differs from that within the meaning of Article 60. For the purposes of Article 90(2) of the Treaty, services encompass services of all kinds. That includes the making available, providing and distribution of services in kind and covers, in particular, the provision of services for the public. At this point already, it is clear that the activities of GEPI SpA cannot attract the application of Article 90(2). GEPI SpA was constituted with the objectives to establishing and increasing employment. However, GEPI SpA does not, unlike Ischia Ambiente SpA, offer any services in the form, for example, of itself being active in the context of services for the public. It is purely a state-owned financing company participating in companies together with the public authorities. That does not qualify as a supply of services for the purposes of Article 90(2) of the Treaty since the financing of and participating in companies are not public services. The fact that the companies of which GEPI SpA is a joint founder might well provide services within the meaning of Article 90(2) of the Treaty is irrelevant here since only the activities of GEPI SpA are material and these, specifically, do not consist in providing services.

44 Contrary to the view, set out above, put forward by the Italian Government, the Commission and GEPI SpA, the application of the provisions of Article 90 of the Treaty is not precluded merely because a purely domestic situation is in point. Both Article 90(1) and Article 90(2) refer to all provisions of the Treaty. These include the rules on freedom of establishment but these rules, here, as I have shown above, do not, in fact apply on account of the domestic context. That non-applicability clearly extends also to the sphere of Article 90 of the Treaty. If, however, as an undertaking entrusted with the operation of services, GEPI SpA were to fall within the scope of Article 90(2) of the Treaty, the other rules contained in the Treaty would also have to be taken into account. The rules on competition are particularly significant in the context of Article 90(2): those rules can apply to situations which are to begin with purely domestic if adverse effects on the common market are possible. Consequently, it is not possible to refuse to regard Article 90(2) of the Treaty as applicable merely on the ground that a purely domestic situation is concerned.

45 In the final analysis, however, Article 90(2) of the EC Treaty does not apply in this case since GEPI SpA is not an undertaking entrusted with the operation of services within the meaning of that provision.

The applicability of Directive 92/50

46 Although in the questions referred for a preliminary ruling the national court has not asked

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this Court to take a view on the applicability of Directive 92/50, that point must be examined in the interests of a thorough analysis of the facts at issue. The applicability of the directive must be examined, in particular, in order to provide the national court with all the necessary material for resolving the dispute, especially since the national court proceeds on the assumption that free competition is impeded and that Directive 92/50 is designed to eliminate practices restricting competition. (14)

47 In its order for reference the national court takes the view, relying on the eighth recital of the directive, (15) that the directive does not apply since the court does not regard assignment of the task of waste removal to Ischia Ambiente SpA as a public-service contract within the meaning of the directive, but rather as the grant of a concession falling outside the scope of the directive.

48 Unlike RI.SAN Srl, GEPI SpA, Ischia Ambiente SpA and the Italian Government also argue that Directive 92/50 does not apply, but the Commission does not wish to express a definitive opinion in that regard in view of the - in its opinion - insufficient information available.

49 Directive 92/50 only applies if the legal relationship between the Municipality of Ischia and Ischia Ambiente SpA is based on a public-service contract within the meaning of Article 1(a) of the Directive. In accordance with the eighth recital, the Directive does not apply to the provision of services which is not based on contracts. The directive does not cover concessions. (16) Even in-house services provided by part of the public administration fall outside the scope of Directive 92/50 if only because there is no a public contract in the sense that a third party is entrusted with providing the service.

50 There is no uniform definition of a concession under Community law; however, for there to be a concession, a number of factors must be present. (17) Thus the recipient of the services to be provided must be third, non-contracting, parties. The service to be provided must, moreover, correspond to a task in the general interest, a task as a rule incumbent on a public authority. The remuneration of the concessionaire must be commensurate with the services provided and, lastly, the concessionaire must bear the economic risk connected with the performance of the service.

51 Whether or not there is in this case a concession for the purposes of Community law is a matter for the national court to decide. However, it seems clear that the beneficiaries of the waste disposal service are the residents of the municipality, namely persons who are not parties to the contract. Moreover, it can be said that the necessary general interest in the removal of urban waste also does exist. The regular removal of urban waste is necessary if only on grounds of public health and safety. For this reason, the public authority must either discharge this task itself or have it performed in a manner which enables it to retain a decisive influence. (18) In Italy, according to the written observations of the Italian Government, that task is assigned to the municipalities in implementation of Directive 75/442/EEC. (19) How the remuneration arrangements are governed and the economic risk is shared between the Municipality of Ischia and Ischia Ambiente SpA cannot be conclusively determined on the basis of the information supplied by the national court. It is therefore for the national court to establish whether the various requirements for there to be a grant of a concession are satisfied, in which case Directive 92/50 would not apply.

52 Whether the Municipality and Ischia Ambiente SpA are part of the same public administration - and whether an in-house service is therefore involved - must be established by examining the facts. Contrary to RI.SAN Srl's contention, the fact that Ischia Ambiente SpA is a public limited company does not per se preclude it from being part of the public administration. Ischia Ambiente SpA must instead be classified following functional criteria. (20) In that regard, the degree of influence exerted by the public administration over the company is decisive.

53 The final appreciation of that aspect falls once again to the national court. It is clear from

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the explanations it has supplied that the Municipality of Ischia holds 51% of the share capital of Ischia Ambiente SpA. The remaining 49% is held by GEPI SpA for a period of five years. GEPI SpA is in its turn wholly owned by the Italian State and acts as a finance company for the purpose, inter alia, of setting up companies with municipalities with a view to performing the tasks incumbent on the latter. GEPI SpA must also be classified by means of a functional appraisal. Even without a full knowledge of the internal organisation of GEPI SpA, it may properly be concluded from the fact that the Italian State holds 100% of its share capital that the company is part of the Italian State in that respect. The Italian State, therefore, through GEPI SpA, has a holding in Ischia Ambiente SpA. It follows that Ischia Ambiente SpA is controlled by public authorities. It would be unduly formalistic to seek to distinguish between the public authorities `Municipality of Ischia' and `Italian State'. In the result, the situation differs in no respect from that which would exist if the Italian State had directly provided the Municipality of Ischia with the funds required to form the company on its own. In the final analysis, the fact that the Municipality of Ischia chose that particular, organisational structure cannot lead to any other classification of Ischia Ambiente SpA.

54 However, in addition to financial interconnections, a delegation of tasks between the public bodies is necessary for it to be possible to say that there is a service `in-house'. In that respect, depending on the circumstances, it might be necessary that the Municipality should control Ischia Ambiente SpA's further activity, for example, by making available further municipal funding and perhaps by setting tariffs for the disposal of urban waste. However, the explanations provided by the national court do not show with absolute certainty whether or not such an allocation of tasks exists. But if the national court were to establish that both the financial and organisational interconnections between the Municipality and Ischia Ambiente SpA correspond to those requirements, then the services would indeed qualify as in-house services and Directive 92/50 would not apply in this case either.

55 Applicability of the directive would come into question, if at all, only if Ischia Ambiente SpA were not part of the public administration, or if the services provided were not in-house services or if there were not a concession within the meaning of Community law. In that case, the directive would become applicable since the Municipality of Ischia, as a local authority, would be a contracting authority within the meaning of Article 1(b) of Directive 92/50. There could also be a contract within the meaning of Article 1(a) of the directive if there were an exchange of services between two distinct legal entities. However, it would have to be a contract for pecuniary interest concluded in writing, (21) which is not the case according to the indications contained in the order of reference.

56 GEPI SpA and the Italian Government argue, moreover, that even if Directive 92/50 were applicable, the derogation provided in Article 6 of the directive would apply.

57 However, the derogating provision in Article 6 of the directive, quoted in paragraph 17 above, would be applicable only under certain conditions. Ischia Ambiente SpA would indeed be a contracting authority within the meaning of Article 1(b) of the directive. The three conditions specified in Article 1(b) of the directive, which must be satisfied concurrently, are fulfilled by (22) Ischia Ambiente SpA. (23) Nevertheless, the public contract should - as expressly required by Article 6 - have been awarded to Ischia Ambiente SpA on the basis of an exclusive right enjoyed by it. Whether or not Ischia Ambiente SpA has such an exclusive right cannot be established from the indications provided in the order for reference. On this matter too the final determination must be made by the national court.

58 To summarise, it may thus be said, that what could be on the basis of the facts in the main proceedings, concerned is either an award of a concession or an `in-house' delegation of tasks. It is ultimately the task of the national court to determine, in the light of the relevant legislation

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and the criteria laid down by the case-law of the Court, whether one of these situations is concerned. As regards the derogation contained in Article 6 of Directive 92/50, it is also for the national court to establish whether the conditions set out in that article are satisfied.

F - Conclusion

59 In view of the foregoing, I propose that the Court answer the questions referred by the Tribunale Amministrativo Regionale della Campania, Naples, as follows:

(1) Article 52 et seq. (or, as the case may be, Article 59 et seq.) of the EC Treaty do not apply to purely domestic situations which lack any specific Community connection where, as in the case at issue, the legality of a provision of national law - pursuant to which municipalities are authorised, freely and without a public tendering procedure, to choose a particular and specifically-named company as partner for constituting a joint undertaking - is challenged before a national court by another undertaking established in the same Member State.

(2) Article 90(2) of the EC Treaty - and, consequently, the provisions of the Treaty and, in particular the rules on competition - are not applicable to an undertaking such as GEPI SpA which was constituted for the sole purpose of forming companies with the municipalities, since that undertaking does not provide services within the meaning of Article 90(2) of the EC Treaty.

(1) - Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(2) - GEPI SpA later became Itainvest SpA and then Italialavoro SpA: for the purposes of this Opinion, the company will nevertheless be referred to as GEPI SpA.

(3) - Moreover, Italian law generally also requires such competitive procedures. However, Article 4(6) of Law No 95 deviates from that rule.

(4) - Law No 184/71 of 22 March 1971 (GURI No 105 of 28 April 1971).

(5) - Law No 142/90 of 8 June 1990 (GURI No 105 of 28 April 1971).

(6) - Law No 95/95 of 29 March 1995 (GURI No 77 of 1 April 1995) amending Decree Law No 26/95 of 31 January 1995 (GURI No 26 of 31 January 1995).

(7) - Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, at paragraph 22.

(8) - Case 252/83 Commission v Denmark [1986] ECR 3713.

(9) - Case C-180/89 Commission v Italy `Tourist guides' [1991] ECR I-709.

(10) - Case 33/74 Van Binsbergen [1974] ECR 1299, paragraphs 10 to 12.

(11) - Joined Cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377, paragraph 10.

(12) - Case 352/85 Bond van Adverteers v Netherlands [1988] ECR 2085, paragraph 15.

(13) - Case 52/76 Benedetti v Munari [1977] ECR 163, at paragraphs 20 to 22.

(14) - See the 20th recital of Directive 92/50.

(15) - The eighth recital reads: `whereas the provision of services is covered by this Directive only in so far as it is based on contracts; whereas the provision of services on other bases, such as law or regulations, or employment contracts, is not covered'.

(16) - See in this respect the Opinion of Advocate General La Pergola in Case C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding [1998] ECR I-6821, at paragraph 26.

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(17) - See the Opinion of Advocate General La Pergola in Case C-360/96 (cited in footnote 16) at paragraph 26.

(18) - See the judgment in Case C-360/96 (cited in footnote 16), at paragraph 52.

(19) - Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 47).

(20) - To ensure a more equitable appraisal of the facts and specificities of each case, the Court has favoured a functional rather than a formal method of analysis. The Court has followed such a method with regard to the notion of `contracting party' since its judgment in Case 31/87 (Beentjes v Netherlands [1988] ECR 4635).

(21) - See Article 1(a) of Directive 92/50.

(22) - The Court ruled to that effect in Case C-44/96 (Mannesmann Anlagebau Austria and Others v Strohal Rotationsdruck [1998] ECR I-73, at paragraphs 20 and 21) with regard to a `body governed by public law' within the meaning of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which has the same wording as Article 1(b) of Directive 92/50.

(23) - Those conditions are as follows:

Body governed by public law means any body

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

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Opinion of Mr Advocate General Cosmas delivered on 1 July 1999.
Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia.
Reference for a preliminary ruling: Tribunale amministrativo regionale per l'Emilia-Romagna - Italy.
Public service and public supply contracts - Directives 92/50/EEC and 93/36/EEC - Award by a local authority of a contract for the supply of products and provision of specified services to a consortium of which it is a member.
Case C-107/98.

I - Introduction

1 In this case the Tribunale Amministrativo Regionale per l'Emilia-Romagna, Sezione di Parma (Regional Administrative Court for Emilia-Romagna, Parma Division) has referred to the Court of Justice for a preliminary ruling a question on the interpretation of a provision of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts. (1)

II - Community legal context

2 Article 1(a) of Directive 92/50 provides that, for the purposes of that directive, `public service contracts' are `contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'. Article 1(b) provides that the term `contracting authorities' means `the State, regional or local authorities, bodies governed by public law, [and] associations formed by one or more of such authorities or bodies governed by public law'.

3 Article 2 of Directive 92/50 states that `if a public contract is intended to cover both products within the meaning of Directive 77/62/EEC and services within the meaning of Annexes I A and I B to this Directive, it shall fall within the scope of this Directive if the value of the services in question exceeds that of the products covered by the contract'.

4 Article 6 of Directive 92/50 provides that the directive `shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty'.

5 Article 7 of Directive 92/50 provides that the directive is to apply to public service contracts the estimated value of which, net of VAT, is not less than ECU 200 000 and sets out the basis on which, in the case of contracts which do not specify a total price, the estimated contract value is to be estimated. (2)

6 As indicated by its title, Council Directive 93/36/EEC of 14 June 1993 concerns the coordination of procedures for the award of public supply contracts. (3) This directive repealed the previously applicable Council Directive 77/62/EEC of 21 December 1976. (4) However, Article 33 of Directive 93/36 states: `Reference to the repealed [directive] shall be construed as reference to this Directive and should be read in accordance with the correlation table set out in Annex VI'.

7 Article 1(a) of Directive 93/36 provides that, for the purposes of that directive, `public supply contracts' are `contracts for pecuniary interest concluded in writing involving the purchase, lease[,] rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations'.

8 Article 1(b) provides that `contracting authorities' are `the State, regional or local authorities, bodies governed by public law, [and] associations formed by one or several of such authorities or bodies governed by public law'. (5)

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9 Article 5(1)(a) of Directive 93/36 states, so far as is relevant to the point at issue here, that its provisions (6) apply to public supply contracts `awarded by the contracting authorities referred to in Article 1(b)... in so far as the products not covered by Annex II are concerned, provided that the estimated value net of VAT is not less than ECU 200 000'.

10 Article 5(2), (3) and (5) specifies the method for calculating the estimated contract value. (7)

III - National legal context

A - Italian Law No 142/90

11 Under Article 22(1) of Italian Law No 142 of 8 June 1990 on the organisation of local authorities, (8) municipalities are to provide for the management of public services involving the production of goods and the performance of activities designed to achieve social purposes and promote economic and civil development of local communities. In accordance with Article 22(3), municipalities may ensure the provision of such local public services in various ways: on a work-and-materials basis, by way of concession to third parties, or using special undertakings, institutions or semi-public companies in which they hold shares.

12 Article 23 of Law No 142/90, which defines special undertakings and non-profit-making institutions, provides (in Article 23(1)) that a special undertaking is a body (ente strumentale) established by a regional or local authority, having legal personality, commercial autonomy and its own statutes as approved by the municipal or provincial council. Article 23(3) provides that the organs of such undertakings and institutions are to be a board of management, a chairman and a director who assumes managerial responsibility, detailed arrangements for appointment and removal of members of the board of management being laid down by the statutes of the regional or local authority. In addition, in performing their activities such undertakings and institutions must, under Article 23(4), meet criteria of effectiveness, efficiency and profitability; they must achieve a balanced budget by balancing costs and receipts, including transfers. Lastly, in accordance with Article 23(6) the local administration is to provide the start-up capital, define objectives and policy, approve the documents of constitution, exercise supervision, monitor management results and cover any social costs which may arise.

13 Article 25 of Law No 142/90 makes express provision for the joint management of one or more services through the creation of consortia, in accordance with the provisions on special undertakings laid down in Article 23. For that purpose, each municipal council must approve, by absolute majority, a consortium agreement and at the same time the statutes of the consortium (consorzio). The general meeting of the consortium is to be composed of the representatives of its member entities (the mayor, the council chairman or their deputies). The general meeting elects the board of management and approves the documents of constitution prescribed by the statutes.

B - AGAC

14 Azienda Gas-Acqua Consorziale (`AGAC') is a consortium set up by a number of municipalities in the province of Reggio Emilia to manage energy and environmental services, pursuant to Article 25 of Law No 142/90. Under Article 1 of its statutes (`the Statutes'), it has legal personality and operational autonomy.

15 Article 3(1) of the Statutes states that the object of AGAC is to assume direct responsibility for, and manage, the public services listed, which include the production and distribution of methane gas and heating for civil and industrial purposes. Article 3(2) provides that AGAC may extend its activities to other related or ancillary services. Under Article 3(3) it may create, or hold shares or have interests in, public or private companies or public bodies (enti) for the management

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of related or ancillary activities. Under Article 3(4) the consortium may provide the abovementioned services to municipalities, private persons or public bodies which do not belong to the consortium.

16 Articles 9, 10 and 11 of the Statutes specify, among other things, the percentage participation of each member municipality in the general meeting of the consortium, and in the consortium's profits and losses. In accordance with Article 10(3), the percentage participation of the Municipality of Viano is set at 0.9%.

17 Under Articles 12 and 13 of the Statutes, the most important managerial acts, which include preparation of budgets and accounts, must be approved by the general meeting of the consortium, which is composed of representatives of the member municipalities. (9)

18 Article 25 of the Statutes, entitled `Management criteria', provides that AGAC must achieve a balanced budget and operational profitability.

19 In accordance with Article 27, the municipalities provide AGAC with funds and assets, in respect of which it pays them annual interest.

20 Pursuant to Article 28, any profits in a given financial year may be allocated to various purposes as decided by the general meeting: in particular, they may be distributed between the member municipalities of the consortium, retained by the consortium to establish or increase reserve funds or reinvested in other AGAC activities.

21 Under Article 29, where a loss occurs the financial deficit may be corrected through, in particular, the injection of new capital by the municipalities.

IV - The facts and the question referred for a preliminary ruling

22 By its Decision No 18 of 24 May 1997 (`the Decision'), the Municipal Council of Viano entrusted to AGAC management of the heating installations of a number of municipal buildings and the supply of the necessary fuel. It also made the consortium responsible for carrying out improvements to heating installations located in the buildings in question. (10) It did not, however, issue any invitation to tender to interested businesses.

23 AGAC's remuneration was fixed at ITL 122 million for the period from 1 June 1997 to 31 May 1998. The value of the fuels to be supplied represented ITL 86 million while that of management and maintenance of the installations represented ITL 36 million.

24 Article 2 of the Decision provides that, on the expiry of the (one-year) period of management, AGAC undertakes to continue providing the service for a further period of three years, at the request of the municipality and following modification of the conditions set out in the Decision. Provision is also made for subsequent extension. (11)

25 Teckal Srl (`Teckal') is a private company operating in the heating services sector. It supplies private persons and public bodies in particular with heating oil which it purchases beforehand from producers. It also services oil-operated and gas-operated heating installations. Before those services were entrusted to AGAC, Teckal had provided them under a contract with the Municipality of Viano.

26 Teckal brought proceedings against the Municipality of Viano and AGAC before the Tribunale Amministrativo Regionale per l'Emilia-Romagna, Sezione di Parma, seeking the annulment of the Decision of the Municipal Council of Viano. It contended that the municipality should have followed the procedures for the award of contracts required under Community legislation.

27 The national court first posed the question as to which of Directive 92/50 and Directive 93/36 was applicable in the action pending before it. It was of the opinion that the threshold of ECU 200 000 laid down in both directives was, in any event, exceeded.

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28 In view of the fact that AGAC was entrusted, first, with providing various services and, second, with supplying fuel, the national court formed the view that it could not rule out that Article 6 of Directive 92/50 applied. More specifically, it considered that the composite nature of the management operation entrusted to AGAC and the strictly complementary nature of the activities of (a) operation and maintenance, which fell under the heading of services, and (b) supplying fuel made it impossible to say that one was ancillary to the other and to hold that Article 6 of Directive 92/50 was not relevant, or to interpret that article precisely.

29 The national court concluded that, in order for the action pending before it to be decided, it was necessary to interpret Article 6 of Directive 92/50 by way of a preliminary ruling and to settle in that way the question whether, in directly placing the contract with AGAC, the municipality was released from the obligation to observe the award procedure laid down by the directive, on the basis of the derogation contained in that article.

30 In addition, the national court raised the question of the compatibility with the provisions of the Treaty of the exclusive right to provide the `heating service' granted to AGAC by Article 3 of the Statutes in the light of Articles 22 to 25 of Law No 142/90, given that Article 6 of Directive 92/50 provides, among other conditions for its applicability, that national provisions granting an exclusive right must be compatible with the Treaty.

31 In those circumstances, the national court stayed proceedings and referred to the Court of Justice for a preliminary ruling a question on the interpretation of Article 6 of Directive 92/50 from the points of view set out in the grounds of its order for reference.

V - My views on the case

A - Admissibility

32 AGAC considers that an issue of admissibility arises because the question referred by the national court essentially concerns the interpretation of provisions of national law. (12) It further contends that Article 6 of Directive 92/50 cannot be applicable since its applicability presupposes the existence of a public service contract. That is not the case here, because the reason for entrusting the provision of the services to AGAC lies in the relationship of subordination between that consortium and one of its member municipalities. The municipality concerned did not entrust to a third party the service consisting in the management of heating installations, but chose a different way of organising the direct management of that service.

33 The Austrian Government also raises the issue of admissibility on the ground that the order for reference does not contain a question referred for a preliminary ruling. It maintains that in the field of public procurement law it is particularly important that questions should be formulated precisely, because otherwise it is impossible to adopt a view on the particular problem of interpretation confronting the national court.

34 First of all, it must be borne in mind that it is for the national court, which has a better and fuller knowledge of the facts of the case, to decide whether it is necessary to make a reference to the Court of Justice for a preliminary ruling and to determine which provisions of Community legislation need to be interpreted so as to enable it to give judgment in the action pending before it. (13)

35 However, in the context of Article 177 of the EC Treaty (now Article 234 EC) the Court of Justice has no jurisdiction to rule either on the interpretation of national laws or regulations or on their conformity with Community law. (14) It can only supply the national court with a ruling on the interpretation of Community law to enable that court to resolve the legal problem before it. (15)

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36 In my view, the basic problem posed by this case is the vagueness with which the national court's question is formulated. That vagueness does not, however, render the question inadmissible. The Court has held that, in the context of the procedure provided for in Article 177, where questions are formulated imprecisely it may extract from all the information provided by the national court and from the documents concerning the main proceedings the provisions of Community law which require interpretation, having regard to the subject-matter of those proceedings. (16)

37 In addition the Court, on each occasion for the purpose of giving the national court a useful answer, has interpreted provisions whose interpretation was not requested by the national court (17) or has reformulated the questions referred and thus deduced the provisions which it is for the Court to interpret. (18)

38 However, before establishing the issue whose consideration will be helpful to the national court, it is necessary to examine a further issue raised by AGAC regarding the admissibility of the reference for a preliminary ruling. AGAC contends that the value of the contract is below the threshold of ECU 200 000 laid down in the Community provisions and that the Community legislation on the matter therefore cannot apply. (19)

39 The national court took the view that the subject-matter of the dispute before it, whether from the point of view of a contract for the provision of services (heating) or from that of a contract for the supply of goods (fuel), exceeded the threshold of ECU 200 000 laid down in the Community legislation in order for public service and public supply contracts to be caught by Directives 95/20 and 93/36 respectively. More specifically, it considered that this was so because the contract was, in the first case, a contract for services of indefinite duration (20) and, in the second, a supply contract with an express option clause. (21)

40 In my opinion, the Court of Justice has jurisdiction to indicate to the national court the method to be used for calculating the value of the contract in accordance with Community legislation. That method is laid down in Article 7 of Directive 92/50 and Article 5 of Directive 93/36. The application of those provisions to a specific case is a matter for the national court, (22) which is aware both of the content of the contractual terms and of the conditions under which the contract may be extended beyond expiry of the one-year period of management.

41 It follows from the above that the Court of Justice is not empowered to substitute its own appraisal for that of the national court as regards the question whether the threshold fixed by the Community legislature is actually exceeded, but must restrict itself to the factual situation as described by the national court and the assessments made by it. To do otherwise would entail the Court itself determining the value of the contract at issue, a step alien to the role assigned to it under Article 177, which does not involve review of the content of an order for reference but cooperation and dialogue with the national court.

B - Reformulation of the question referred for a preliminary ruling

42 In order, therefore, to provide the national court with a useful answer, it is in my view necessary to reformulate its question in the light of the subject-matter of the dispute and the information contained in the order for reference.

43 One point needs to be established clearly at the outset. Article 2 of Directive 92/50 (23) provides that, if a public contract is intended to cover both products within the meaning of Directive 77/62 (now Directive 93/36) and services within the meaning of Directive 92/50, it will fall within the scope of the latter if the value of the services in question exceeds that of the products also covered by the contract. This provision is designed to prevent mixed contracts (covering both services and supplies) from being subject to two different sets of rules and therefore means that the contract as a whole is awarded in accordance with only one of them. That is to say, it makes

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financial value the determining factor as regards which legislation is applicable. Thus, the award of a mixed contract falls within the scope of Directive 92/50 if the value of the services exceeds that of the goods supplied. (24) If, on the other hand, the value of the goods exceeds that of the services involved, Directive 93/36 must be applied to the award of the entire contract. (25)

44 In other words, it is clear from the above analysis that it is important to settle the question as to what constitutes the object of the contract. If the contract concerned is a mixed contract, that is to say one relating both to products and to services, it is important to establish whether the value of the goods supplied is greater than that of the services, in accordance with the criterion of financial value laid down for determining which legislation is applicable.

45 In the case in point, it is apparent from the order for reference that, by a single measure, AGAC was entrusted both with the provision of certain services and with the supply of certain products. (26) It is also apparent that the value of the products to be supplied is manifestly greater than that of the services. I am therefore of the view that the Community provisions whose interpretation would assist the national court are those of Directive 93/36, not Article 6 of Directive 92/50 as mentioned in the order for reference. Consequently, an answer to the question as drafted would not, in my opinion, be helpful in disposing of the case pending before the national court.

46 Bearing in mind the subject-matter of the dispute and the analysis contained in the order for reference, the national court is asking essentially, whether, in directly entrusting the heating service and the supply of fuel to AGAC, the Municipality of Viano is subject to an obligation to observe the procedure provided for under Directive 93/36. In other words, the question to be answered is whether Directive 93/36 precludes a local authority from entrusting the supply of products directly to a consortium of which it is a member, in circumstances such as those of the main proceedings, without having observed the tendering procedure provided for under that directive.

47 The national court may, nevertheless, possibly consider that an interpretation of Treaty provisions is also necessary, in order to establish whether they preclude the exclusive right to provide heating services which, it asserts, is conferred on AGAC by Article 3 of the Statutes, viewed in the light of Articles 22 and 25 of Italian Law No 142/90. However, it is not clear from the order for reference whether the relevant national provisions, principally Articles 22 and 25 of Law No 142/90 and Article 3 of the Statutes, permit the acts which constitute the subject-matter of the Viano Municipal Council's decision to be entrusted directly to AGAC. (27) It is for the national court to decide that issue and, if it considers it necessary, to make a reference for a preliminary ruling on the subject.

C - Substance

48 Directive 93/36 is essentially intended to ensure development of effective competition in the field of public supply contracts. (28) That is to say, in selecting the person with which it is to conclude in writing a contract for pecuniary interest involving the supply, in whatever form, of a certain product, a contracting authority is required to apply the procedure guaranteeing effective/free competition which is established by Directive 93/36.

49 Also, it should be made clear from the outset that Directive 93/36 does not contain a provision analogous to Article 6 of Directive 92/50, that is to say it makes no provision for an exemption from the obligation to apply the tendering procedure where a public supply contract is awarded to an entity which is itself a contracting authority, on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision compatible with the Treaty. Since no such exemption is provided for, (29) it makes no difference for the purpose of applying the directive whether or not it is a private person who, as a supplier, enters into a contract with a contracting authority. That conclusion is, in my view, to be inferred from the system laid down

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by the directive. (30)

50 Under Article 1(a), for the purpose of Directive 93/36 `public supply contracts' are `contracts for pecuniary interest concluded in writing involving the purchase, lease[,] rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below'. The conditions which must be met in order for Directive 93/36 to apply follow from this provision.

51 First, the contractual relationship must concern the supply of products. The element of the supply of certain products is a basic condition for application of the directive.

52 Second, a contract must be drawn up (31) and, in particular, must be concluded in writing. The contract is synallagmatic and for pecuniary interest. This means that the directive is applicable where, first, there is a concordance of wills between two different persons, the contracting authority and the supplier, and, second, the commercial relationship that is created consists in the supply of a product for pecuniary remuneration. (32) In other words, there are mutual acts of performance, the creation of rights and obligations for the parties to the contract and interdependence of their respective acts of performance. (33)

53 Third - an element directly linked to the preceding one - the party entering into the contract with the contracting authority, namely the supplier, must have real third-party status vis-à-vis that authority, that is to say the supplier must be a separate person from the contracting authority. This element, likewise, is an essential characteristic for the conclusion of supply contracts falling within the scope of Directive 93/36.

54 It follows from the above that the directive does not apply where the contracting authority has recourse to its own resources for the supply of the products it wants. (34) Community law does not require contracting authorities to observe the procedure ensuring effective competition between interested parties where those authorities wish to take on themselves the supply of the products they need. (35)

55 AGAC maintains that the Municipality of Viano did not entrust the service of managing heating installations to a third party but merely decided to organise the direct management of that service in a different manner, by having recourse to the structure and staff of a special entity established for that purpose rather than its own structure and staff.

56 First, it is in my view beyond doubt, according to the information supplied by the national court, that the case in point (also) involves the supply of certain products.

57 Second, in order for it to be possible for the directive to apply there must be a written contract which lays down the rights and obligations of the parties and, more particularly, regulates the matter of remuneration. In other words, the national court must establish whether a contract was concluded, in writing, regulating the relationship between the contracting authority and the supplier and specifying the rights and obligations of the parties, in addition to the decision of the Viano Municipal Council entrusting the task concerned to AGAC. (36)

58 Also, if a written contract was concluded it is for the national court to establish whether the possibility of renewing the contract afforded to the Municipality of Viano was the result of negotiations between the latter and AGAC. It is likewise for the national court to establish whether the remuneration fixed for the supply of goods and the provision of services to the municipality was determined on the basis of prevailing commercial practice. (37) Whether or not there actually is a contract governed by Community legislation depends on the answers given by the national court to the foregoing questions.

59 In addition, as is made clear by the national court, the situation is one which involves two

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formally separate persons operating in the market. This element is important because a situation where a municipality, in the interests of improved internal organisation of its services, entrusted supply to one of its units would constitute a form of internal delegation that remained within its own administrative ambit. (38) In those circumstances, the relationship between the Municipality of Viano and AGAC could not be regarded as a public contract within the meaning of Directive 93/36.

60 More specifically, under the national legislation AGAC, which has legal personality and enjoys operational autonomy, is a consortium (consorzio) of municipalities which was set up on the basis of Article 25 of Italian Law No 142/90. That article makes express provision for the joint management of one or more services through the creation of consortia in accordance with the provisions governing special undertakings referred to in Article 23 of the same Law, as stated above in point 13. In addition, AGAC must perform the functions entrusted to it by the municipalities belonging to the consortium and is subject to control by them.

61 Under Article 10(3) of the Statutes, the Municipality of Viano's percentage participation in the general meeting of AGAC and hence, in reality, both in the administration and in the profits and losses of the consortium, stands at 0.9%. In my view it is therefore unlikely (and the same also appears to be the case from the facts as presented by the national court) that, in the case of AGAC, a consortium set up by 45 municipalities in the province of Reggio Emilia and having separate legal personality, it could be maintained that the Municipality of Viano exercises over that consortium the kind of control which an entity exercises over an internal body.

62 Furthermore, under Article 3(4) of the Statutes AGAC may provide certain services (39) to municipalities, private persons or public bodies (enti) which do not belong to the consortium.

63 Consequently, despite the possibility for the Municipality of Viano, under the Decision, to extend the contract at its request, I do not consider it proven that the municipality exercises hierarchical control over AGAC or that the relationship between it and AGAC does not entail the award of a contract on the ground that the two contracting parties do not in reality have third-party status with respect to each other. (40)

64 If, on the basis of the findings which it must make, the national court concludes that the relationship between the municipality and AGAC is the outcome of the concordance of two autonomous wills representing separate legal interests in a manner consistent with the customary form of relationship that characterises the contractual relationship of two separate persons, (41) a conclusion which can also be inferred from a study of the contractual conditions, (42) the entrusting of the supply which constitutes the subject-matter of this case falls within the scope of Directive 93/36.

65 To accept that is possible for contracting authorities to have recourse, for the supply of goods, to separate entities over which they maintain either absolute or relative control, in breach of the relevant Community legislation, would open the floodgates for forms of evasion contrary to the objective of ensuring free and undistorted competition which the Community legislature seeks to achieve through the coordination of procedures for the award of public supply contracts.

66 Subject to the abovementioned reservations concerning the points to be clarified by the national court, the procedure laid down in Directive 93/36 should, consequently, be observed. This means that in selecting its contractual partner the municipality should comply with the provisions aimed at safeguarding competition, with no exception permitted even if it regards AGAC as a body governed by public law within the meaning of Article 1(b) of Directive 93/36, because, as I stated earlier in this Opinion, that directive makes no provision, as regards the conclusion of public supply contracts with other contracting authorities, for a derogation comparable to that contained in Article 6 of Directive 92/50.

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67 In my view, therefore, it follows from the foregoing considerations that Directive 93/36 permits no exception to the procedure it lays down where a public supply contract is concluded, irrespective of whether the contract is concluded between a contracting authority and an entity which is also a contracting authority. Accordingly, subject to the points which the national court must establish, the entrusting of the contested supply to the consortium is in breach of the directive in question if the relationship between the local authority and the consortium to which it belongs constitutes the outcome of a concordance of wills of two different, essentially autonomous, persons representing separate legal interests.

VI - Conclusion

68 In the light of the foregoing analysis, I propose that the Court should give the following answer to the question referred to it by the Tribunale Amministrativo Regionale per l'Emilia-Romagna, Sezione di Parma:

Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts requires the procedure which it lays down to be observed where a contract for pecuniary interest is concluded in writing for the supply of products, irrespective of whether the contract is concluded between entities which are contracting authorities.

(1) - OJ 1992 L 209, p. 1.

(2) - Specifically, Article 7(5) provides that the basis for calculation shall be, in the case of fixed-term contracts of 48 months or less, the total contract value for its duration and, in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48.

(3) - OJ 1993 L 199, p. 1.

(4) - OJ 1977 L 13, p. 1.

(5) - The same provision goes on to explain that `a body governed by public law' means any body (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, (b) having legal personality, and (c) financed, for the most part, by the State, regional or local authorities or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

(6) - More specifically, Titles II, III and IV and Articles 6 and 7.

(7) - Article 5(2) provides that, in the case of contracts for the lease, rental or hire purchase of products, the basis for calculating the estimated contract value is to be: (a) in the case of fixed-term contracts, where their term is 12 months or less the total contract value for its duration or, where their term exceeds 12 months, its total value including the estimated residual value, and (b) in the case of contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts, the monthly value multiplied by 48. Also, Article 5(3) provides that, in the case of regular contracts or of contracts which are to be renewed within a given time, the estimated contract value is to be established on the basis of either (a) the actual aggregate value of similar contracts concluded over the previous fiscal year or 12 months, adjusted, where possible, for anticipated changes in quantity or value over the 12 months following the initial contract, or (b) the estimated aggregate value during the 12 months following the first delivery or during the term of the contract, where this is greater than 12 months. Lastly, Article 5(5) provides that, in the case where a proposed procurement specifies option clauses, the basis for calculating the estimated contract value is to be the highest possible total of

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the purchase, lease, rental or hire purchase permissible, inclusive of the option clauses.

(8) - Ordinamento delle Autonomie Locali (GURI No 135 of 12 June 1990).

(9) - In accordance with Article 8, apart from the general meeting the other organs of the consortium are the board of management, the chairman of the board of management and the general manager. They are not answerable to the consortium's member municipalities for their managerial acts. The natural persons who constitute these organs do not exercise any functions within the member municipalities.

(10) - Article 1 of the Decision, entitled `Matters for management', enumerates the tasks entrusted to AGAC.

(11) - This is possible subject to a request being communicated to AGAC at least three months before the expiry of the period concerned.

(12) - More specifically, AGAC considers that the national court is asking the Court of Justice to decide whether the management of a municipality's heating installations can be classed as a public service of a local nature within the meaning of Article 22 of Law No 142/90, so as to enable it to determine whether or not Article 6 of Directive 92/50 is applicable. According to AGAC, the national court is essentially asking whether or not provisions of national law (Articles 23 and 25 of Law No 142/90) involve the award of a public service contract to a body which is itself a contracting authority.

(13) - See, for example, Case 83/78 Pigs Marketing Board v Redmond [1978] ECR 2347, paragraph 25, and Case C-343/90 Lourenço Dias v Director da Alfândega do Porto [1992] ECR I-4673, paragraph 15.

(14) - See, for example, Case 77/72 Capolongo v Maya [1973] ECR 611, paragraph 8, and Lourenço Dias, cited above, paragraph 19.

(15) - See, for example, Case C-17/92 Distribuidores Cinematograficos v Spanish State [1993] ECR I-2239, paragraph 8, and, less recently, Case 9/74 Casagrande v Landeshauptstadt München [1974] ECR 773, paragraph 4.

(16) - See, for example, Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 20 and, in particular, paragraph 21, and Case 251/83 Haug-Adrion v Frankfurter Versicherungs-AG [1984] ECR 4277, paragraph 9.

(17) - See, for example, Case 70/77 Simmenthal v Amministrazione delle Finanze dello Stato [1978] ECR 1453, paragraph 57, Case C-114/91 Claeys [1992] ECR I-6559, paragraphs 10 and 11, and Case C-280/91 Viessmann [1993] ECR I-971, paragraph 17.

(18) - See, for example, Case C-381/89 Sindesmos Melon tis Eleftheras Evangelikis Ekklisias and Others [1992] ECR I-2111, paragraph 19 et seq., and Case 38/77 Enka v Inspecteur der Invoerrechten en Accijnzen [1977] ECR 2203.

(19) - More specifically, it submits that the price of the fuel should be deducted from the amount corresponding to the services, inasmuch as AGAC, which is a contracting authority, acquires its fuel through public tendering procedures. It further contends that the contract in question is not one of indefinite duration. This is because renewal of the contract upon expiry of the initial period is at the absolute discretion of the municipality, subject to an obligation to specify the financial terms and conditions. Lastly, an aggregate value was fixed for the period from 1 June 1997 to 31 May 1998, and that, it contends, also precludes classifying the contract as one of indefinite duration. The latter conclusion is also confirmed by the fact that the contract at issue terminated definitively on 31 May 1998, since the Municipality of Viano decided

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to provide for the operation of the service by other means.

(20) - The national court explains in the order for reference that, according to Article 2 of the Decision of the Municipal Council of Viano, upon expiry of its (one-year) management period AGAC undertook to continue to provide the service concerned for a period of three further years, if so requested by the authority, after updating of the conditions laid down in the Decision. The national court also pointed out that the same applied to subsequent periods, provided that any such request was notified to AGAC at least three months before the expiry of the relevant period.

(21) - The national court explains that, if on the other hand supplies are the main component, the updating of the conditions provided for would mean that AGAC was entitled to adjustment of the consideration in line with the market price of the fuel to be supplied, an operation which, being automatic, did not exclude the possibility that the municipality had a genuine option. Consequently, the national court concludes, such a case falls within the scope of Article 5(5) of Directive 93/36, in accordance with which, where a proposed procurement specifies option clauses, the basis for calculating the estimated value must be the highest possible total of the purchase permissible, inclusive of the option clauses.

(22) - There is no reason, in theory, why the national court should not refer a question for a preliminary ruling on this if it encounters difficulties of interpretation.

(23) - Interpreted in the light of Article 33 of Directive 93/36.

(24) - See also M. Mensi, `L'ouverture à la concurrence des marchés publics de services', No 3/1993 Revue du Marché Unique Européen, pp. 59-86, paragraph 8.

(25) - In its judgment in Case C-331/92 Gestion Hotelera Internacional [1994] ECR I-1329 the Court, basing its reasoning on the 16th recital in the preamble to Directive 92/50, according to which `it follows from Directive 71/305 that, for a contract to be a public works contract, its object must be the achievement of a work', held (paragraph 29) that `a mixed contract relating both to the performance of works and to the assignment of property does not fall within the scope of Directive 71/305 if the performance of the works is merely incidental to the assignment of property'. Council Directive 71/305/EEC of 26 July 1971 concerned the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682). Furthermore, the 16th recital in the preamble to Directive 92/50, which refers expressly to the object of the contract, states that `in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract'. Lastly, in Gestion Hotelera Internacional the Court pointed out (paragraph 28 of its judgment): `It is for the national court to determine whether the works are incidental to the main object of the award'.

(26) - This is clear from Article 1 of the Decision of the Municipal Council of Viano, which the referring court quotes in full.

(27) - Teckal denies that these provisions can be interpreted to that effect and points out that, during the five years preceding the grant of the contract to AGAC, it had itself been a contractual partner of the Municipality of Viano.

(28) - See the 14th recital in the preamble to Directive 93/36.

(29) - This difference reflects a special feature of the field regulated by Directive 92/50, in the sense that due account has to be taken of the fact that services may be provided in the context of stable legal relations and ties between separate bodies (collectivités) in accordance with a system of cooperation where one body is subordinate to the other. Furthermore, Council Directive

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93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), in addition to containing a provision (Article 11) analogous to Article 6 of Directive 92/50, includes another similar provision on this question which takes account of the particular case of entities which are undertakings classed as contracting authorities only in connection with service contracts in specific sectors. The provision in question is Article 13, concerning service contracts awarded by a contracting authority to an `affiliated undertaking', which is defined by reference to a relationship of control and to dominant influence between a contracting entity and the undertaking or (in certain circumstances) between undertakings (Article 1(3)); in other words, this relates to legal entities which belong to the same economic unit (see also M. Mensi, op. cit., paragraph 18, p. 81 et seq.).

(30) - It may be noted that the Court found that a Member State failed to fulfil its obligations under the directives coordinating procedures for the award of both public works contracts (Directive 71/305) and public supply contracts (Directive 77/62) when it excluded from the scope of national rules on public procurement transactions effected by the administrative authorities with private persons in cases where those directives did not authorise such exemption. See the judgment in Case C-71/92 Commission v Spain [1993] ECR I-5923, paragraphs 10, 11 and 22. In particular, the Court stated (paragraph 10) that `the only permitted exceptions to the application of Directive 77/62 are those which are exhaustively and expressly mentioned therein'.

(31) - It is significant that the eighth recital in the preamble to Directive 92/50 states that the `provision of services is covered by this Directive only in so far as it is based on contracts;... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered'. In other words, Directive 92/50 applies only if the legal relationship between the contracting parties is a service contract for the purposes of Article 1(a) of the directive and does not apply where the provision of services is not based on a contract; see also point 26 of the Opinion of Advocate General La Pergola in Case C-360/96 Arnhem and Reden v BFI Holding [1998] ECR I-6821 and point 49 of the Opinion of Advocate General Alber in Case C-108/98 R.I.SAN. v Comune di Ischia and Others [1999] ECR I-5219.

(32) - This element of fixing the remuneration in abstract terms in the case of the award of a public supply contract is highlighted in the judgment in Case C-272/91 Commission v Italy [1994] ECR I-1409, at paragraph 25; the case concerned the concession for the computerisation system for the Italian lottery, that is to say the supply of an integrated computerisation system for the lottery which involved, in particular, the supply of certain goods to the State. The same element involving payment of a specified consideration to remunerate the service provider is also highlighted in paragraph 25 of the judgment in BFI Holding, cited above.

(33) - On this important element of the concept of a contract, see A. de Laubadère, F. Moderne and P. Delvolvé, Traité des contrats administratifs, volume 1 (1983, 2nd ed., 808 pp.), paragraph 14 et seq., p. 29 et seq.

(34) - A form of supply referred to as `in-house'. On this question in connection with Directive 92/50, see P. Flamme and M.-A. Flamme, `Les marchés publics de services et la coordination de leurs procédures de passation (Directive 92/50/ECC du 18 juin 1992)', Revue du Marché commun et de l'Union européenne (1993) No 365, pp. 150-170, paragraphs 15 and 16. See also M. Mensi, op. cit., paragraph 5.

(35) - A similar question has already been raised before the Court in connection with the interpretation of Directive 92/50. In the BFI Holding case (cited in footnote 31 above), concerning a dispute between two Dutch municipalities and a private undertaking (BFI) which was claiming that the award of a contract involving refuse collection to a public limited company (ARA) established

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for that purpose by the municipalities in question was subject to the procedure laid down by the directive, the national court took the view that ARA fell within the exception provided for in Article 6 of Directive 92/50 in so far as it was to be regarded as a body governed by public law within the meaning of Article 1(b) of that directive.

In point 38 of his Opinion in BFI Holding, Advocate General La Pergola reached the conclusion that `there is no "third party" element, that is to say no essential distinction between ARA and the two municipalities, in the present case. What is involved here is a form of inter-departmental delegation that remains within the administrative ambit of the municipalities. In assigning the activities in question to ARA, the municipalities had absolutely no intention of privatising the functions they themselves had previously performed in this sector'. Furthermore, this issue of whether public services are provided by a part of the public administration, in which case there is no public contract within the meaning of Directive 92/50, was also highlighted by Advocate General Alber in his Opinion in RI.SAN., cited in footnote 31 above; see point 49 of that Opinion.

Advocate General La Pergola concluded that `in short,... the relationship between the municipalities and ARA cannot be regarded as a contract within the meaning of the Directive' (the directive in question being Directive 92/50). However, Advocate General La Pergola was of the opinion that an entity of this type (such as ARA) constitutes a body governed by public law within the meaning of Directive 92/50. The Court examined the issue of when a body can be classed as having the status of a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 92/50 and supplied the national court with the ruling that it needed on the interpretation of that provision.

(36) - It is apparent from the order for reference that AGAC is required to manage the heating service mainly on the basis of the instructions contained in the Decision, which were issued unilaterally by the Municipality of Viano.

(37) - I do not consider that there can be any question of the award of a contract and procurement for the purposes of the directive if, first, the remuneration mentioned in the Decision was not freely fixed on the basis of an offer tendered by AGAC within the context of its operational autonomy and, second, that offer lacks any profit-making character, as indeed the Commission maintains.

(38) - It should be noted that, as Teckal points out, the services in question were previously provided by it for five years under a contract with the Municipality of Viano.

(39) - Including, it may be recalled, the production and distribution of methane gas and heating for civil and industrial purposes.

(40) - The Commission considers (paragraph 34 of its written observations) that the case in point involves a special mode of organisation whereby the municipality, in order to obtain a particular supply of goods or provision of services, does not turn to the market but has recourse to a body that can be described as emanating from itself (it constitutes a longa manus) in the specific sector concerned.

(41) - In other words, it must be established whether the contractual conditions laid down were the subject of prior negotiations.

(42) - Such as the inclusion of penalty clauses operative in the event of defective performance by AGAC of its obligations, or an arbitration clause, and so forth.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
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SUB	Approximation of laws
AUTLANG	Greek
NATIONA	Italy
PROCEDU	Reference for a preliminary ruling
ADVGEN	Cosmas
JUDGRAP	Jann
DATES	of document: 01/07/1999 of application: 15/04/1998

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Opinion of Mr Advocate General Cosmas delivered on 23 November 1999.
French Republic v Ladbroke Racing Ltd and Commission of the European Communities.
Appeal - Competition - State aid.
Case C-83/98 P.

I - Introduction

1. In the present appeal, the French Republic seeks the setting aside of the judgment of the Court of First Instance of 27 January 1998 in Case T-67/94. The contested judgment was given following an application by Ladbroke Racing Ltd for the annulment of Commission Decision 93/625/EEC. That decision was concerned with the classification of a number of measures adopted by the French authorities which Ladbroke Racing Ltd had complained of to the Commission, claiming that they fell within Article 92(1) of the EC Treaty. The following two issues are among those raised by the present appeal: first, there is the question of the breadth of the judicial review conducted by the Court of First Instance when it assesses a determination by the Commission as to whether or not a national measure amounts to (unlawful) State aid; second, the Court of Justice is asked to rule on the conditions under which the principle of the protection of legitimate expectations may be relied on and applied so as to limit the obligation to recover unlawfully granted aid.

II - Facts and procedure

2. The facts of the case are set out in detail in paragraphs 1 to 36 of the contested judgment.

3. It is common ground that on 7 April 1989 Ladbroke Racing Ltd (a company incorporated under English law whose activities include organising and providing betting services in connection with horse-races in the United Kingdom and elsewhere in the European Union; hereinafter Ladbroke), jointly with six other companies in the Ladbroke Group, submitted a complaint to the Commission in respect of a number of measures which had been adopted by the French Government in favour of the Pari Mutuel Urbain (hereinafter the PMU). The PMU is an economic interest group (groupement d'intérêt économique) consisting of the principal racecourse undertakings, with exclusive rights in relation to racecourse organisation and to management of the totalisator betting rights of the racecourse undertakings in France.

4. On 22 September 1993 the Commission adopted Decision 93/625, in which it found that three of the seven measures adopted by the French Government for the benefit of the PMU constituted State aid under Article 92(1) of the Treaty but qualified for exemption under Article 92(3)(c) thereof. In the case of the other four measures, the Commission decided that the conditions for applying Article 92(1) were not met.

5. Ladbroke brought an action before the Court of First Instance for the annulment of Decision 93/625. The French Republic applied for leave to intervene in support of the Commission, which was granted by order of the President of the Second Chamber of the Court of First Instance of 30 August 1994.

6. The Court of First Instance found errors of law and of fact in certain points of the Commission decision challenged before it, of which the following five present particular interest:

- first, the point where it was found that, in so far as the amounts resulting from winnings which are not claimed by bettors have always been regarded as normal resources, those amounts form part of the non-public levies, and that their use to finance social security expenditure together with monitoring and supervision costs, horse-breeding incentives and investment connected with the organisation of horse-racing and totalisator betting cannot be regarded as State aid, since the State resources criterion is not met (Parts IV and V, point 1, of the decision);

- second, the Court of First Instance focused criticism on the point in the Commission decision

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relating to the legal classification of the national measures which changed the allocation of the public levies. The Commission had found that the tax arrangements applicable to horse-races were the responsibility of the Member States; increases or reductions in the rate of tax did not constitute fiscal aid provided that they applied uniformly to all the undertakings concerned. There was State aid, therefore, only where a significant reduction in the rate of taxation strengthened the financial situation of an undertaking in a monopoly position. According to the Commission, that was not the case here in so far as the reduction in 1984 in the public levy on bets was limited (some 1.6%) and was subsequently maintained; it was therefore not designed to finance a specific ad hoc operation. The French authorities had acted with the aim of increasing the resources of the recipients of the non-public levies on a permanent basis. The Commission accordingly concluded that, taking account of the special nature of the recipients' situation, the measure in question did not constitute State aid, but a reform in the form of a "tax" adjustment that [was] justified by the nature and economy [sic] of the system in question (Parts IV and V, point 3, of the decision);

- third, the Court of First Instance did not accept that Decision 93/625 was correct at the point where the Commission found that the national measures which granted the PMU cash-flow benefits, consisting in authorisation to defer payment of the public levies, did not constitute a temporary waiving of resources by the public authorities or a specific ad hoc measure, and accordingly could not be classified as State aid (Parts IV and V, point 5, of the decision);

- fourth, the Court of First Instance did not follow the Commission in its reasoning that the one-month delay in the deduction of VAT constituted aid from 1 January 1989 onwards but was offset by a permanent deposit lodged with the Treasury;

- finally, the Court of First Instance considered that the Commission was mistaken in its view that, although the aid consisting in the exemption from the contribution for social housing (hereinafter the housing levy) had been incompatible with the common market from 1989 onwards, it did not have to be refunded as unduly paid because its recipient (the PMU) had entertained legitimate expectations at the time of obtaining it.

7. In view of the foregoing matters the Court of First Instance, by its judgment of 27 January 1998, annulled Commission Decision 93/625 ... in so far as it found that various advantages granted to the PMU, through (a) the amendment in 1985 and 1986 of the allocation of the levies, (b) cash-flow benefits granted to it by the authorisation to defer payment of certain levies on betting, (c) access to unclaimed winnings, and (d) exemption from the one-month delay rule for the deduction of value added tax, after 1 January 1989, do not constitute State aid for the purposes of Article 92(1) of the EC Treaty, and also in so far as it decided that the obligation on the French State to require repayment of the aid deriving from the PMU's exemption from the housing levy applies not as from 1989, but as from 11 January 1991.

8. By application lodged on 26 March 1998, the French Government contests the judgment of the Court of First Instance, claiming that it should be set aside. More specifically, it seeks the annulment of the first paragraph of its operative part; in addition, it claims that the form of order sought by the Commission at first instance should be granted and that Ladbroke's application at first instance should be dismissed.

9. On 27 July 1998 Ladbroke brought a cross-appeal contesting the judgment of the Court of First Instance, but withdrew it by document dated 18 January 1999 addressed to the Court of Justice.

III - Grounds of appeal

10. The French Government puts forward two grounds of appeal. The first ground of appeal concerns those points in the contested judgment which resulted in the partial annulment of the Commission decision on the basis that it had incorrectly found that certain of the measures adopted by the

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French Government in favour of the PMU fell outside the scope of Article 92(1) of the EC Treaty. The second ground of appeal relates to the point in the contested judgment where it is found that it was not open to the Commission to rely on the legitimate expectations which may have arisen on the part of the PMU in order to restrict the temporal scope of the obligation on the French authorities to recover one of the items of aid unlawfully granted to it.

A - First ground of appeal

11. This ground, by which it is alleged that Article 92(1) of the EC Treaty was misinterpreted and misapplied, comprises four separate parts which are examined below.

(a) First part of the first ground of appeal (national measure reducing the public levy by 1.6%)

12. The appellant challenges paragraphs 42 to 62 of the contested judgment, where the Court of First Instance found that, contrary to the Commission's assessment, the reduction from 1985 onwards in the share of the revenue from horse-race betting levied by the French State constituted State aid. According to the French Government, the Court of First Instance made a number of errors in law concerning the nature of its review, its understanding of the Commission's decision, the legal classification of the facts and the obligation to give a statement of reasons for judicial decisions.

(i) Scope of the judicial review

13. The Court of First Instance held in the contested judgment (paragraph 52) that the concept of State aid under Article 92(1) of the EC Treaty is objective; therefore, the question as to whether a national measure is to be characterised as State aid is subject to a comprehensive judicial review. In the absence of particular circumstances, which may be due to the complex nature of the State intervention in the economy, it is not, in principle, justified to attribute a broad discretion to the Commission when it determines whether a measure should be characterised as State aid or to restrict the judicial review conducted by the Court of First Instance so that it merely ascertains whether there has been a manifest error of assessment.

14. The appellant submits that the Court of First Instance misdefined the nature and extent of the judicial review which it had been called on to carry out. Ladbroke, on the other hand, maintains that the Court of First Instance was right not to restrict itself to ascertaining whether the Commission had manifestly erred in its assessment but to carry out a comprehensive review of the substance as regards the Commission's views on whether the French measures at issue in favour of the PMU fell within the scope of Article 92(1) of the Treaty.

15. In my view, the Court of First Instance did not err in law in relation to the scope of its review of the relevant determinations by the Commission. It correctly points out in the contested judgment (paragraph 52) that the concept of State aid, as formulated in the Treaty, is purely one of law and is interpreted on the basis of objective factors. Thus, when the Court of Justice, the Court of First Instance and national courts are called on to consider whether or not it is correct to classify a national measure as State aid for the purpose of Article 92(1) of the EC Treaty, they must carry out - in principle to the fullest possible extent - a comprehensive review of the substance. That rule is reversed only where the court establishes that there are particular circumstances which prevent an extensive judicial review from being carried out. Those circumstances may consist in the complicated and technical nature of certain assessments which are directly connected with answering the question of law, namely the classification of a measure as State aid. It cannot be maintained that such special circumstances, restricting the opportunity for judicial intervention in the substance of the case, are automatically present whenever the interpretation and application of Article 92(1) of the EC Treaty are at issue.

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16. It should be noted that the breadth of a court's jurisdiction when it reviews the legality of an administrative measure - such as the measure challenged at first instance - cannot be defined in an absolute and static manner. Apart from the need to adjust the breadth to the facts of each case, a need which exists beyond all doubt, a tendency may be observed in the case-law of the Court of Justice towards a dynamic broadening of judicial review and a strengthening of jurisdiction even in instances where it is necessary to solve complex legal problems with a strong economic flavour such as problems related to competition law. That tendency reflects the basic endeavour of every judicial body - such as the Court of Justice - to ensure that judicial review is carried out as comprehensively as possible in the interests of observing the principle of legality and protecting the rights of the litigants. In conclusion, a comprehensive review as to the substance in cases such as the present one does not, of course, supplant the administrative work of the Commission but constitutes a correct exercise of judicial tasks in a legal order - like the Community legal order - governed by the principle of legality and the rule of law.

(ii) Particular nature of the system of levies on horse-racing as a basis for not categorising the national measure as State aid

17. The French Government considers that the Court of First Instance erred in its assessment of the legality and correctness of the Commission's arguments forming the basis of the latter's decision not to categorise the national measure at issue as (unlawful) State aid. It centres its argument on the failure by the Court of First Instance to take into account that the Commission had based its reasoning on the particular nature and general scheme of the system of levies on horse-racing in France. The particular nature of the system was directly related to three separate criteria which the Commission relied on in order to substantiate its view that the measure was not State aid. The appellant considers that the Court of First Instance entirely ignored the significance of the argument derived from the particular nature of the system at issue, an argument which had been clearly analysed in the pleadings submitted to it by the Commission and the French Government. It adds that the same argument had been taken into account by the Court of Justice in an earlier judgment where it had rejected Ladbroke's claims that the PMU was benefiting from State aid granted by the French Government. In short, the appellant considers that the Court of First Instance misunderstood the grounds of the measure which was being contested before it, failed to assess a material submission which had been duly put before it, or in any event misconstrued the critical issue of the nature and general scheme of the system.

18. The above criticisms by the appellant, which Ladbroke seeks to rebut in its pleadings, call for a number of comments, which I now set out below.

19. First of all, as the appellant acknowledges there are very few express references in the case-law to the nature and general scheme of the system as a criterion for categorising a measure as State aid. In Italy v Commission, which concerned the Italian textile industry, the Court found that the measure before it partially exempted the eligible undertakings from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system. The Court did not go on to analyse in greater detail what is or may be included within the concept of the nature and general scheme of a system. In fact, the Court founded its reasoning in Italy v Commission not on that criterion but on the exceptional nature of the national provision at issue in relation to the system which constituted the natural legal situation in some way, while acknowledging at the same time that the particular characteristics of the system, had they been proved, might have justified the relevant divergences from the general rules.

20. The same conclusion is, moreover, reached by Advocate General Darmon in his Opinion in Sloman Neptun. Contrary to the appellant's submissions, the analysis of the Advocate General in that

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case is centred on what is meant by the exceptional nature of a measure vis-à-vis the general scheme of the overall system in which it is set, as a criterion for finding that there is State aid within the meaning of Article 92(1) of the EC Treaty, and not on the nature and general scheme of the system themselves. In other words, neither that Opinion nor the judgment in Italy v Commission contains sufficient guidance as to the significance of the particular characteristics of a system when applying Article 92(1) of the Treaty.

21. The judgment in Tiercé Ladbroke v Commission is of greater interest for the present case. In that judgment, the Court, after describing the logic of the system of levies on totalisator betting (paragraph 34), notes that the system of statutory and fiscal retentions on bets on French horse-races was adopted in the light of the specific regulatory and economic conditions prevailing with regard to horse-racing and totalisator betting in France. There can be no requirement to transpose that system to totalisator betting on Belgian horse-races, which are organised under different regulatory and economic conditions. Moreover, since the levy rates in France and Belgium differ and the application of Belgian rates to bets placed in France is justified for reasons relating to the logic of the totalisator betting system referred to in paragraph 34 of this judgment, that levy cannot, in any event, be shared out between the various recipients on exactly the same basis in the two cases.

22. In that judgment, the Court took account of the particular nature and the general scheme of the system of retentions on totalisator horse-race betting in order to substantiate its position that (i) the differences in the retentions on bets in France and Belgium and (ii) the application of the Belgian rates to bets placed in France on Belgian horse-races were compatible with Community law. It follows, therefore, from that reasoning of the Court that the nature and general scheme of the particular framework within which the national measure at issue is set should be examined. The above view of the Court is all the more important for deciding the present case inasmuch as it was expressed in a judgment which concerned precisely the same legal and factual context as the one at issue here, namely the issue of levies on totalisator horse-race betting in France.

23. I will now examine the individual criticisms made by the appellant of the judgment at first instance. I consider that the Court of First Instance neither ignored nor misconstrued the need to assess the nature and general scheme of the system within which the national measure was set before it concluded that the measure constituted State aid.

24. An initial indication that the Court of First Instance neither failed nor refused to consider the criterion of the nature and general scheme of the system when examining the facts of the case with regard to Article 92(1) of the Treaty is provided by paragraph 76 of the contested judgment. After stating that the tax arrangements applicable to the PMU took into account not only the particular way in which totalisator betting was organised in France but all the characteristic features of French horse-racing, the Court of First Instance held that the Commission was entitled to take the view that the special system of levies, which determines the proportion of betting revenue allocated to the State, the bettors, the PMU and the racecourse undertakings, respectively, did not constitute a derogation from the tax arrangements generally applied to other activities, and that, consequently, the measure concerned had to be evaluated solely in the context of the special tax arrangements applicable to the horse-racing sector. That finding of the Court of First Instance is, of course, not concerned with the specific measure, reducing the public levy by 1.6%, referred to by the French Government in the part of the first ground of appeal now under consideration; it demonstrates, however, that the Court of First Instance is at least aware of the particular features of the legal framework governing public levies on totalisator horse-race betting in France and is willing to take them into account.

25. So far as concerns the specific criticisms of the French Government now under consideration,

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it is to be noted that its reasoning is founded on an incorrect understanding of the Commission's decision. The Commission did not assess the particular nature of the French system of levies on totalisator horse-race betting in an automatic and vague manner when it decided that the measure reducing the public levies was not State aid; on the contrary, it first applied three criteria from which it derived three propositions - (i) that the measure at issue amounted merely to a limited reduction in the levy rates which does not strengthen the financial situation of an undertaking in a monopoly position; (ii) that the measure was permanent in nature; and (iii) that the measure was not designed to finance a specific ad hoc operation - in order to reach the conclusion that the measure amounted not to State aid but to a reform in the form of a "tax" adjustment that is justified by the nature and economy [sic] of the system in question. Consequently, since the Court of First Instance disputed the interpretative value and correctness of those three criteria in paragraphs 56 to 62 of the contested judgment, it was also correct in disputing the conclusion reached by the Commission that the French measure at issue amounted to a reform in the form of a "tax" adjustment that is justified by the nature and economy [sic] of the system in question.

26. Nor could it have been found that the criterion of the nature and general scheme of the system was separable from the three other abovementioned criteria and capable of independently constituting the legal foundation for the contested finding by the Commission. First, that approach is in direct conflict with the wording of the Commission decision. Second, justification of action by a Member State consisting of vague reliance on the particular character and the nature and general scheme of a system is not in any way a sufficient basis for that action to be taken outside the scope of Article 92(1) of the Treaty. If general arguments of that kind are to be used, there must be a substantive and thorough analysis of the facts of the case which supports the conclusion that those arguments are correct. In other words, if the particular nature and general scheme of the system of levies on totalisator horse-race betting in France could in fact justify, from the point of view of Community competition law, the adoption of a measure such as that at issue, the Commission was obliged to explain with detailed arguments the causal relationship linking the argument as to the particular character of the system and its conclusion that the national measure was not to be categorised as State aid. Since the matters which had been put before the Court of First Instance for its consideration, as set out in the contested judgment, did not include specific and thorough arguments from which it could be clearly demonstrated that the national measure was justified by the nature and general scheme of the system of levies on horse-race betting in France, the decision of that Court, adjudicating on the substance, to regard the reduction in the levy as State aid does not display any error in law.

27. In that regard, there is no foundation in the submission that the Court of First Instance erred because it did not consider the three abovementioned Commission criteria in the light of the particular nature and general scheme of the system of levies on totalisator horse-race betting in France. First, the Court of First Instance did not examine whether those criteria were correct in the abstract but sought to ascertain their practical utility and legal correctness in the specific context of the dispute before it, that is to say in the context of the particular system of public levies on horse-race betting in France; it therefore took account of the nature and particular character of the system. Second, even if it were accepted that additional arguments could have been drawn from the parameter of the nature and general scheme of the system which might have led the Court of First Instance to accept the Commission's reasoning so far as concerns the three criteria adopted by it, again, as indicated above, those arguments had not been placed before the Court of First Instance for its consideration.

28. The French Government considers, furthermore, that even if it were accepted that the Court of First Instance took account of the nature and the general scheme of the system when it assessed whether the views taken by the Commission were lawful, the contested judgment should again be set

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aside in that regard because the legal classification of the relevant facts was incorrect. The French Government levels criticism at paragraph 58 of the contested judgment, where the Court of First Instance overturned the Commission's reasoning - that the change in the levy rates was not intended to finance a specific operation - and concluded that that change, irrespective of its objective, in fact enabled the PMU to finance operations, and in particular to deal with the costs of computerisation and restructuring necessary for the organisation of its management responsibilities. It also criticises paragraph 59 of the judgment, contending that the Court of First Instance was wrong in its view that the reduction in the rate of the public levy decided on by the French authorities by the adoption of the national measure at issue was not limited in nature.

29. By those submissions the French Government is in reality seeking to contest the findings of the Court of First Instance on the facts. Since the criticisms of the contested judgment are directed at factual appraisals of the court adjudicating on the substance, they must be rejected as inadmissible.

(iii) Contradictory reasoning of the Court of First Instance

30. The appellant contends that the grounds of the contested judgment are contradictory. It refers in particular to paragraph 154 thereof, where the Court of First Instance states that it is apparent from the contested decision that before the PMI was set up in January 1989 there was no trade between France and the other Member States, which means that before that date there was not even competition between the PMU and the other economic operators active on the Community market in bet-taking. The French Government maintains that, since the Court of First Instance made that finding, it also had to hold that no measure which was adopted for the benefit of the PMU before 1989, and in particular the measure waiving part of the public levy in 1985 and 1986, could constitute State aid.

31. That appellant's argument is not correct. As Ladbroke rightly observes, a finding that there was no competition at the time when a national measure favouring certain undertakings was adopted does not necessarily mean that it is not State aid. The requirements for establishing the existence of State aid, which relate to conditions of trade and of the market, must be examined in a dynamic fashion. In other words, it is necessary to take account of likely prospects and developments with regard to inter-State commerce, trade and the conduct of undertakings or consumers and to show the dynamic character of the effects of the conduct under consideration on conditions of competition.

32. That obvious aspect of reviewing whether the requirements of Article 92(1) of the Treaty are met is also recognised by Advocate General Tesauro in his Opinion in Belgium v Commission when he refers to the need to assess, in a dynamic perspective, whether the condition of hindrance to trade (and also that of distortion of competition) exists and to appraise the foreseeable development of the pattern of trade. In the same case, the Court justified its finding as to the existence of State aid within the meaning of Article 92(1) of the EC Treaty by stating more specifically that it [was] possible that aid might distort competition within the Community inasmuch as it was... reasonably foreseeable that Tubemeuse [the recipient of the aid] would redirect its activities towards the internal Community market.

33. Having regard to the above, the view of the Court of First Instance concerning State aid as a result of the reduction in the public levy on totalisator horse-race betting in France is entirely correct; its correctness in law is not undermined by the finding in paragraph 154 of the contested judgment that before 1989 there was no competition between the PMU and the other economic operators active on the Community market in bet-taking, nor is it contradictory with that finding.

(b) Second part of the first ground of appeal (cash-flow benefits in favour of the PMU)

34. This part of the first ground of appeal concerns paragraphs 63 to 82 of the contested judgment, where the Court of First Instance held that the Commission had misapplied Article 92(1) of the

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Treaty in finding that the cash-flow benefits granted by France, which enabled the PMU to defer the payment of certain betting levies, did not constitute (unlawful) State aid. The appellant essentially repeats its complaints connected with the first part of this ground of appeal concerning the scope of judicial review and the failure of the Court of First Instance to assess the particular nature and general scheme of the system of levies on totalisator horse-race betting in France. Those complaints should, however, be rejected for the reasons set out above.

35. In addition, the French Government criticises paragraphs 79 and 81 of the contested judgment. Those submissions must, however, be rejected.

36. As regards paragraph 79, the French Government maintains that the Court of First Instance was wrong in finding that the contested Commission decision did not contain evidence supporting the conclusion that the change in the rules concerning payment to the Treasury of the public levies did not constitute an ad hoc derogation, but was a general amendment to the tax regime for the entire horse-racing sector and not only for the PMU.

37. The appellant is in reality attempting to induce the Court of Justice to reassess the facts of the case, in order to reverse the position of the Court of First Instance that the national measure at issue constituted an ad hoc provision for the exclusive benefit of the PMU. Its submissions must therefore be rejected as inadmissible in that they fall outside the scope of appellate review. Even if they were interpreted as pleas that the Court of First Instance distorted the content of the Commission decision or did not consider a material submission, they should still be rejected as unfounded. The Court of First Instance was aware of the passages in that decision referred to by the appellant (as is clear from paragraph 31 of the contested judgment), carried out a correct legal assessment of its entire content and concluded that it contained nothing to support the view that the provision in question amounted not to an ad hoc measure but to tax reform of a general nature.

38. In addition, as regards paragraph 81 of the contested judgment, the appellant challenges the view of the Court of First Instance that the Commission had advanced inadequate evidence in support of its position that the State measure at issue was made in the context of the exceptionally heavy taxation of the horse-racing sector, which was considerably higher than in other sectors.

39. The above submission relates to the assessment of matters which are for the Court of First Instance when it adjudicates on the substance and it cannot be examined on appellate review. Thus, this part of the first ground of appeal should be rejected in part as inadmissible and in part as unfounded.

(c) Third part of the first ground of appeal (making unclaimed winnings available to the PMU)

40. In paragraphs 96 to 112 of the contested judgment, the Court of First Instance overturned the Commission's conclusion that the French decree which placed unclaimed horse-race winnings at the disposal of the PMU did not amount to State aid because those sums constituted normal resources and not State resources within the meaning of Article 92(1) of the Treaty.

41. The French Government submits that the contested judgment should be set aside to that extent. The sums in question have always been made available to the racecourse undertakings and the national measure merely altered (widened) the spectrum of possible uses to which they could be put, without there being any question of a transfer of State resources to the PMU. The French Government maintains that, having regard to the particular nature and the general scheme of the horse-race betting system, the revenue which remains available to the racecourse undertakings after the payment of winnings to bettors and deduction of the public levies necessarily constitutes normal resources. The fact that at a given moment the public authorities restrict the use of part of those resources to particular objectives does not convert them from normal resources into State resources. Furthermore,

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the appellant points out, an undertaking's private funds are not converted into State aid by making their use subject to State regulation.

42. I am unable to accept the above reasoning of the appellant. The latter relies in an unclear and speculative fashion on the particular features and special characteristics which are, in its view, exhibited by the system for allocating the revenue from totalisator horse-race betting in France, in an attempt to overturn the finding of the Court of First Instance that the relevant resources, irrespective of how they are described, were subject to State control and therefore constituted State resources. In paragraphs 105 to 111 of the contested judgment the Court of First Instance sets out in a legally correct manner the justification for its view that the national measure at issue is to be characterised as State aid.

43. More specifically, the Court of First Instance, after noting that the measure at issue enables the racecourse undertakings to cover certain social security costs of the PMU, finds, on the basis of certain criteria, that in France the amount which is collected from the winnings left unclaimed by bettors is under the control of the competent national authorities. Inasmuch as the relevant national provision extended the range of possible uses for those sums to activities of the racecourse undertakings other than those originally envisaged, it follows that all the national legislature did by means of that extension was in effect to waive revenue which would otherwise have been paid to the Treasury, so that, for the same reason, the condition for applying Article 92(1) of the Treaty, namely that State funds are transferred to the recipient, is satisfied in the present case.

44. It should also be noted that the path followed by the Court of First Instance when interpreting the concept of State aid is entirely consistent with the route traced by the Court of Justice in its case-law. It is sufficient to refer to its recent judgment in Piaggio, which demonstrates the breadth of the concept of State aid for the purposes of Article 92(1) of the EC Treaty. That concept necessarily implies advantages granted directly or indirectly through State resources or constituting an additional charge for the State or for bodies designated or established by the State for that purpose. It was held in Piaggio that the application of a national rule for placing undertakings under special administration, which allows the undertakings concerned to continue trading, may amount to the grant of State aid where it confers on those undertakings certain advantages which burden the public authorities in the form of a State guarantee, a de facto waiver of public debts, exemption from the obligation to pay fines or other pecuniary penalties, or a reduced rate of tax.

45. In addition, it is stated in Air France, a case relied on by the appellant, that Article 92(1) of the Treaty applies to all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Accordingly, the fact that the sums in question, while not held by the State throughout, are continuously subject to its control and therefore to the power of disposal of the competent national authorities is sufficient for them to be characterised as State resources and for the French provision at issue to be brought within the scope of Article 92(1) of the EC Treaty.

46. In conclusion, the submissions put forward by the appellant in the third part of the first ground of appeal are unfounded.

(d) Fourth part of the first ground of appeal

47. This part of the ground of appeal concerns paragraphs 113 to 122 of the contested judgment, where the Court of First Instance finds an error of fact on the part of the Commission. More particularly, when the Commission assessed, from the point of view of Community law, a national measure exempting the racecourse undertakings from the one-month delay rule for the deduction of VAT, it manifestly erred as to the facts in thinking that the system under which a permanent deposit

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is lodged with the Treasury in order to offset the exemption had existed since 1989 when it had in fact first applied in 1969.

48. The appellant maintains that it was not open to the Court of First Instance to rely on facts relating to the period before 1 January 1989 in deciding whether the Commission's assessment as to the legality of the exemption after 1 January 1989 was correct. In its view, the approach of the Court of First Instance is wrong in law or, in any event, its reasoning at this point is inadequate.

49. As Ladbroke correctly points out, the appellant's objections do not undermine the relevant findings of the Court of First Instance. They relate to the assessment of facts by the latter adjudicating on the substance and are therefore inadmissible. In any event, however, the French Government's criticisms are based on a misunderstanding of the contested judgment. The Court of First Instance did not find that after 1989 the exemption from the one-month delay rule for the deduction of VAT in fact constituted State aid; it merely stated that, by reason of the manifest errors of fact upon which the Commission's reasoning as a whole was based, it was impossible to assess whether those particular arguments were correct in law since they were based on a mistaken factual position. In other words, the Court of First Instance considered that the errors of fact in the Commission decision contested before it made it impossible to examine whether that decision was correct in law. The Court of Justice cannot interfere with that substantive finding by the Court of First Instance, which falls outside the scope of appellate review. Consequently, the final part of the first ground of appeal should be dismissed as inadmissible.

B - Second ground of appeal

(a) Arguments of the parties

50. The appellant challenges paragraphs 179 to 185 of the contested judgment, in particular the finding of the Court of First Instance that, in giving reasons for its decision to limit the temporal scope of the French authorities' obligation to recover the aid unlawfully granted to the PMU, it was not sufficient for the Commission merely to rely on the position adopted by the French authorities regarding the legitimate expectations purportedly entertained by the PMU. More specifically, the Commission had found in its decision that the aid consisting of PMU's exemption from the housing levy as from 1 January 1989 had to be recovered not from that date but from 1 November 1991, the date upon which the procedure under Article 93(2) of the EC Treaty was initiated. It based that finding on the legitimate expectation which the PMU had entertained by reason of a judgment of the French Conseil d'Etat (Council of State) in accordance with which the activities of the racecourse undertakings appeared to be agricultural in nature, thus justifying their exemption from the housing levy. The Commission considered that that judgment could give rise to legitimate expectations on the part of the racecourse undertakings that the exemption was lawful. The Court of First Instance did not follow the above reasoning of the Commission, finding that it is not for the Member State concerned, but for the recipient undertaking, in the context of proceedings before the public authorities or before the national courts to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid.

51. The French Government submits that the view of the Court of First Instance that legitimate expectations cannot be invoked when the Commission exercises its supervisory functions under Article 92 et seq. of the EC Treaty is not consistent with Community law. It relies, first of all, on the wide discretion accorded to the Commission when it assesses national measures from the standpoint of Community law on State aid. It also disputes the correctness of paragraph 182 of the contested judgment in so far as, contrary to the case-law of the Court of Justice, its effect is that observance of the procedure laid down in Article 93 of the Treaty is an absolute requirement in order for legitimate expectations to be invoked. The French Government meets the settled case-law of the

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Court of Justice that a Member State cannot invoke the expectations of a recipient of aid in order to escape its duty to take the necessary measures to enforce a Commission decision requiring it to recover aid, by relying on Case C-169/95 Spain v Commission, whose effect, in its view, is that a Member State may raise the legitimate expectations of the recipient undertaking in order to challenge the legality of such a Commission decision in judicial proceedings. It seeks to reconcile its interpretation of the judgment in Spain v Commission with the previous case-law in the following way: while the classic prohibition is preserved, preventing a Member State from resorting to the argument as to legitimate expectations in order to refuse to enforce a Commission decision requiring it to recover aid which has been paid unlawfully, that State may nevertheless raise the issue before the Commission; if the latter is not persuaded and adopts a decision requiring repayment of the aid, the Member State must then seek its recovery but at the same time retains the possibility of taking legal proceedings against the Commission decision. Thus - still following the French Government's reasoning - the Court of First Instance wrongly denied the Commission the possibility of examining the submission of a Member State that a recipient of aid entertained a legitimate expectation that the aid was lawful. The French Government adds that the Court of First Instance's position is over-formalistic since it does not allow a timely argument directly related to the question of the recovery of the aid to be examined at the stage when the Commission exercises its supervisory functions.

52. Ladbroke agrees with the reasoning of the Court of First Instance, considering that it alone is compatible with Community law on State aid and the objectives of that law. Ladbroke observes that Spain v Commission, upon which the appellant's line of argument is founded, is fundamentally different from the present case. In that case, the Court of Justice had been called on to decide whether the conduct of Community institutions, in particular the Commission, could be considered to create legitimate expectations on the part of the recipient of unlawfully granted aid; here, however, the conduct which may have given rise to the expectation took place purely at national level. It would thus be wrong to allow the Commission to intervene in a national matter of that kind and to regard such a matter as capable of hindering the application of Community rules on State aid. That would render the procedure under Article 93 of the EC Treaty redundant, in particular the obligation to notify aid. Finally, Ladbroke states that paragraph 182 of the contested judgment is legally correct.

(b) Consideration of the ground of appeal

53. In my view, the question under consideration may be dealt with from two different angles which do not necessarily lead to the same result. The focal point of the analysis which follows is the defining of the (national and/or Community) factors used to determine the scope, and the conditions for application, of the principle of the protection of legitimate expectations.

(i) Legitimate expectations, a dual-natured concept

54. The concept of legitimate expectations in the particular context of the refund of aid which has been paid unlawfully appears to be dual-natured: first, its scope and application are laid down by national law subject to the conditions, and within the framework, specified by Community law; second, the recipient's belief as to the legality of the unlawful aid may be created both by conduct of the national authorities and by that of the Commission.

55. The duality of legitimate expectations is shown by the Court's judgment in Deutsche Milchkontor, which concerned the repayment of unlawful Community aid. In that judgment it is stated:

The first point to be made... is that the principles of the protection of legitimate expectation and assurance of legal certainty are part of the legal order of the Community. The fact that national legislation provides for the same principles to be observed in a matter such as the recovery of

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unduly paid Community aids cannot, therefore, be considered contrary to that same legal order. Moreover, it is clear from a study of the national laws of the Member States regarding the revocation of administrative decisions and the recovery of financial benefits which have been unduly paid by public authorities that the concern to strike a balance, albeit in different ways, between the principle of legality on the one hand and the principles of legal certainty and the protection of legitimate expectation on the other is common [to] the laws of the Member States.

56. That judgment goes on to state that the legitimate expectations recognised by national law may be relied upon only to the extent that such reliance is consistent with the like-named principle forming part of the Community legal order, account having to be taken of the interests of the Community and the need not to affect the scope and effectiveness of Community law. The above reasoning has also been employed by the Court in relation to the question of the repayment of State aid which is unlawful because it contravenes Articles 92 and 93 of the EC Treaty.

57. There is, however, a fundamental difference between the repayment of Community aid and the recovery of unlawful State aid. State aid is adjudged contrary to Community law because it confers a competitive advantage on the undertaking receiving it and distorts the conditions of free trade. For that reason, its recovery constitutes an imperative need in order to repair the damage to Community law. Community aid, on the other hand, has different objectives (support of a particular economic activity, in the interests of the Community). A finding that aid of that kind is unlawful merely means that the aid did not meet the preconditions for its grant, without the infringement also prejudicing the provisions governing competition. Significant conclusions with direct consequences for the scope of the protection afforded to legitimate expectations may be drawn from the difference set out above. For example, a claim by a recipient of State aid that he is no longer enriched because the benefit has been passed on to the consumer is not a sufficient basis for setting aside the obligation to repay the aid; the same submission may, on the other hand, meet with a favourable response in the case of unlawful Community aid.

58. It follows, therefore, that the Community interest requiring State aid to be recovered is clearly greater than the interest in the repayment of Community aid - indeed it appears to be difficult to set the former aside in favour of the protection of legitimate expectations. It may be observed in summary that, even where the refund of State aid is at issue, the Court follows, in principle, the reasoning adopted in Deutsche Milchkontor, namely: (i) the principle of the protection of legitimate expectations constitutes a general principle of Community law which is derived from the legal traditions common to the Member States; (ii) the scope of legitimate expectations and the conditions under which they apply are determined by the domestic law of the Member States; and (iii) the body applying the principle at national level must observe the principles of equal treatment and of effectiveness of Community law and respect the Community interest. However, precisely because of the particular nature of State aid and the need to safeguard the imperative Community interest in rectifying the conditions of competition, the Court has the tendency to restrict the legal autonomy of the national legal orders, by laying down itself the substantive requirements for recognising that legitimate expectations are entertained or even by directly prohibiting the application of national provisions.

59. More specifically, the Court has preferred to define the concept of a diligent businessman itself, restricting the opportunities for recipients of aid to invoke legitimate expectations. In addition, it has completely taken away the ability of the Member States to resort to the principle of the protection of legitimate expectations in order to avoid recovering unlawful aid. It has indeed gone as far as to reshape, if not overturn, national law on legitimate expectations with regard to the specific instances where it is applied in the context of the recovery of unlawful State aid. It is, I believe, essential to dwell on that last issue.

60. A characteristic example of the tendency to reduce the autonomy of the Member States is provided

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by the judgment in Land Rheinland-Pfalz v Alcan Deutschland (cited in footnote 28 above; hereinafter Alcan II), where the Court overrode Paragraph 48 of the German Verwaltungsverfahrensgesetz (Law on Administrative Procedure). More specifically, it ruled:

Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, [(i)] even if the authority has allowed the time-limit laid down for that purpose under national law in the interest of legal certainty to elapse..., [(ii)] even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient, where the latter could not have had a legitimate expectation that the aid was lawful because the procedure laid down in Article 93 of the Treaty had not been followed... [and (iii)] even where such recovery is excluded by national law because the gain no longer exists, in the absence of bad faith on the part of the recipient of the aid.

61. It is to be noted that in that case the Court followed the Opinion of the Advocate General and found that the national authorities do not... have any discretion as regards revocation of a decision granting aid, overturning in that way the fundamental rule of German administrative law that it is in principle for the administration, acting in its discretion, to decide on the revocation of an advantageous administrative measure which is contrary to the law.

62. There is a further interesting aspect of the Community case-law on the repayment of unlawful State aid, from which it appears that the Court of Justice prefers to entrust the national courts with the issue of assessing the legitimate expectations of recipients of aid, the latter being expected to take action before those courts if they are to avoid returning the benefit which they have reaped.

63. It is not by accident that the possibility of relying on legitimate expectations is tied to the jurisdiction of the national courts. The latter are the national authorities before which legal disputes concerned with the enforcement of Commission decisions requiring unlawfully paid aid to be refunded are considered likely to end up. Furthermore, they provide greater guarantees of independence and neutrality than the national administrative departments which might also have played a part in the grant of the unlawful aid; it is therefore to be anticipated that national courts will weigh up the Community interest better than some other State authority. They are also the most suited to taking account of the parameter of the effectiveness of Community law. Finally, if a problem of interpretation arises with regard to the above issues and the way in which they affect the application of national rules concerning legitimate expectations, the national courts are in the privileged position of being able to refer a question to the Court of Justice for a preliminary ruling.

64. The national administrative authorities are of course allowed to reject submissions as to legitimate expectations, whereupon the recipient of the aid will in all probability bring proceedings in the national courts. By contrast, it is not open to those authorities not to seek recovery of the unlawful aid by accepting (whether acting of their own accord or following the submission of a request) that legitimate expectations are entertained. In that case they would be acting contrary to the direction of the Court of Justice as set out in Case C-5/89, cited in footnote 27 above. Moreover, that decision by the authorities would probably never be brought before the national courts for review, resulting in a risk that the Community interest would remain unprotected.

65. Consequently, always assuming that the above indications in the case-law are borne out by future judgments, it appears that the Court has laid down a further procedural and formal rule concerning the application of the principle of the protection of legitimate expectations where the recovery of unlawful State aid is at issue. Under the above rule, that general principle is not protected by the national administrative bodies, acting of their own accord or following a request, but by the courts. In other words, the national courts are converted into special authorities for assessing

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an issue which in principle falls within the competence of the administrative authorities, while the latter are relegated to bodies which merely implement Commission decisions.

66. In short, certain fundamental rules of national administrative law relating to the application of the principle of legality and to the division of powers between judicial and administrative authorities are undermined, if not entirely set aside, by the above case-law. Not only is the autonomy of national law shrunk to almost nothing when it is applied to cases with Community interest; more significantly, rather, through the safeguarding of the Community interest the constituent elements of the national legal order are prejudiced, possibly resulting in inexpert or even arbitrary legal structures.

67. The chief reason for the creation of the above - in my view regrettable - situation must be sought in the starting point from which the logic of the present case-law proceeds, that is to say in the acceptance of the duality of legitimate expectations. It is not clear that the endeavour to combine Community and national elements in order to fashion a dual-based concept of legitimate expectations results in conclusions which are acceptable for the legal system or in a satisfactory reconciliation of the need to protect the trader acting in good faith and the need to safeguard the conditions of competition.

68. Nor is it obvious that, by entrusting this issue to the national courts for decision by them, their role is enhanced, preserving the balance between the national and Community legal orders at the present stage of European integration. The national courts are in a difficult position. First, they do not feel secure when they rely on the specific provisions of national law, in particular following the stringent position adopted by the Court in Alcan II. Second, the Court of Justice, by its abovementioned case-law, is giving them strong encouragement to refer questions to it for a preliminary ruling on a systematic basis, especially when they are called on to weigh up the Community interest in that particular category of disputes. From the moment, however, that definition of the Community interest determines entirely whether, and in what manner, the national provisions will be applied, the whole legal problem passes in reality to the high inspectorate of the Court. Finally, it is not clear that legal certainty is served by the fact that the national rules regarding legitimate expectations remain in force but may be overturned at any moment if they are considered to be incompatible with the objectives of Community law.

69. Following the above general observations, I will now consider the ground of appeal before the Court in the light of its case-law referred to above. On the basis of that case-law, I consider that the Court of First Instance was correct in finding that it was not open to the French Government to submit that the racecourse undertakings entertained legitimate expectations as a result of the abovementioned judgment of the Conseil d'Etat as regards the lawfulness of the national measure at issue and, consequently, that the Commission should not have relied on that submission to restrict the temporal scope of the obligation to recover the unlawfully granted aid.

70. The principal argument in favour of the position adopted by the Court of First Instance must, prima facie, be sought in the settled case-law of the Court, according to which a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 92 and 93 of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness. Moreover, the Court of First Instance expressly refers to that case-law in paragraph 181 of the contested judgment.

71. That prohibition laid down by the Court of Justice appears to be founded, first of all, on the general principle under which nobody may obtain benefit from his own violation of the law (nemo

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potens propriam turpitudinem allegans). In other words, it has been adjudged unacceptable for the effectiveness of the Community rule - which is safeguarded by the imposition of a strict obligation to notify proposed aid and by the systematic repayment of aid which has been given unlawfully - to be undermined by the very transgressor, namely the Member State, relying on conduct contrary to the Community interest. To allow such reliance could give rise to the absurd result that a Member State is vindicated where, apart from infringing the express obligation to inform the Commission laid down by Article 93(3) of the EC Treaty, it has succeeded in shaping the legal and factual context within which a sum of aid is granted in such a way as to mislead even the diligent businessman, thereby rendering practically inapplicable the decision declaring the aid contrary to Community competition law.

72. In addition, a second argument can be advanced in favour of preventing the Member States from resorting to the principle of the protection of legitimate expectations in order to avoid the recovery of unlawful aid; the concept of legitimate expectations is subjective in nature and must therefore be assessed in concreto, taking account not only of the conduct of the public (Community and national) authorities which is the underlying reason for the expectations but also of the features particular to the person who entertains them. Thus, when the question is raised as to whether the recipient of the aid entertained legitimate expectations that the aid was lawful (in which case it might not have to be recovered) it is preferable for the authority which will decide that question to have a direct connection with the trader allegedly persuaded that the conduct at national level was lawful; it is then possible to carry out the fullest assessment of those aspects of the concept of legitimate expectations which relate to the subjective situation and to the conduct of the person holding the expectations, for example the diligence which he displayed and/or his good faith. This point also appears to be implicit in the Court's preference in favour of entrusting the issue to the national courts and in principle not examining it within the framework of disputes between Member States and the Community, when the recipient of the aid is not present.

73. As Advocate General Tesauro observes in his Opinion in Spain v Commission, when the Member State which is the applicant in the case refers to the expectations of the undertaking in receipt of the aid, in actual fact it is contesting the obligation imposed on it by the decision to recover the aids at issue, by invoking a legal situation which is not its own, but that of another, the beneficiary undertaking, which is not a party to [those] proceedings, even as an intervener; it is doing that at best in the absence of any specific provision of law conferring on it any such rights of subrogation.

74. The weight of the above arguments is undermined, however, by the solution reached by the Court in the same case. In its judgment, the Court did not adopt the absolute position proposed by the Advocate General but examined the merits of the submission which had been advanced by Spain relating to the expectations of the recipient undertaking. The Court did not rule fully on the question as to whether or not the undertaking which had benefited from the aid entertained legitimate expectations when it received it, but restricted itself to one aspect of the issue, stating that the fact that the Commission initially decided not to raise any objections to the aid in issue cannot be regarded as capable of having caused the recipient undertaking to entertain any legitimate expectation since that decision was challenged in due time before the Court....

75. Even after that explanation, however, it is clear that this development in the case-law calls into question, if not conclusions, at least the reasoning of the case-law cited above. From the moment that the Court considered the merits of the submission put forward by Spain, that is to say by a State which had not notified proposed aid, it set aside the argument that national authorities are unable to invoke legitimate expectations in order that they do not benefit from their own unlawful conduct. Similarly, the argument that, when the person entertaining the legitimate expectations is absent from the Community proceedings, the legal issue relating thereto cannot be fully dealt

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with loses much of its value; in Spain v Commission the undertakings which had received the aid did not appear before the Court.

76. In my view, the judgment in Spain v Commission reveals the basic criterion for deciding whether or not the issue of legitimate expectations must be considered by the Court when it is put forward by a Member State. The criterion is none other than the duality of legitimate expectations which is acknowledged by the case-law in the context of the repayment of unlawful State aid. When the underlying reason for the creation of expectations that the national measure is lawful is attributed to the conduct of national authorities, the Court refuses to intervene; only as an exception does it agree to rule on whether legitimate expectations formed at national level should be protected or are contrary to the Community interest. By contrast, in cases where it is contended that the mistaken belief as to the legality of the State measure was created by conduct of the Community authorities, usually the Commission, the Court appears to cast its qualms aside and examines that particular dimension of the issue of legitimate expectations.

77. Spain v Commission was such an instance. In its judgment in that case, the Court exceptionally agreed to examine whether particular conduct on the part of the Commission - its adoption of a decision stating that it wished to raise no objections to the grant of the aid at issue - could be regarded as the underlying reason for a legitimate belief on the part of the recipient of the aid that the latter was consistent with Community law. The choice made by the Court to go into the substance of the issue was directly connected with the Community nature of the conduct at issue, that is to say with the fact that the conduct was attributable to a Community institution.

78. Transposing the above reasoning to the present case, I note that there is no mention in Decision 93/625 of the extent to which the Commission itself or another Community institution had, by its conduct, caused the PMU to believe that there were no problems as regards the compatibility of the State aid with Community law; nevertheless, the Commission agrees to examine whether a national judicial decision created, on the basis of national legal rules, expectations on the part of the recipients of the aid which deserved protection. In that way, the Commission involves itself with the assessment of conduct to be attributed to a national authority, an assessment which is carried out in accordance with the national provisions governing the protection of legitimate expectations and the revocation of unlawful administrative measures. In accordance with the case-law as analysed above, the option taken by the Commission of examining the issue in question is therefore not justified. It constitutes an intervention into the purely national dimension of a legal problem which not only exceeds its institutional competence but also offends against the duality of prior expectations in the particular context of the repayment of State aid contrary to Article 92 et seq. of the EC Treaty.

79. In view of the above reasoning, no error of law is apparent in the position of the Court of First Instance that the Commission was wrong to restrict in time the recovery of the unlawful State aid in question on the basis of the French Government's submissions as to legitimate expectations entertained by the PMU.

(ii) Legitimate expectations as a purely Community concept

80. The starting point for the following analysis is a different definition of legitimate expectations, for instances where that concept arises in the particular context of the recovery of unlawful State aid. This definition deviates from the Deutsche Milchkontor case-law inasmuch as it gives the concept of legitimate expectations a purely Community content, that is to say its application is not, under this definition, a matter for the rules of national law. The definition is founded on the idea that, in the legal context at issue, the protection of legitimate expectations is a concern of the Community legal order, being a parameter connected with the exercise of an exclusively Community competence; that competence consists in remedying the severe damage caused to the conditions of

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competition in inter-State trade by the payment of unlawful State aid. The administrative measure which gives rise to an issue of protection of legitimate expectations is the Commission decision requiring the aid granted contrary to the Community interests to be recovered. The national measures giving effect to that decision are in reality implementing measures which the national administration is under a mandatory duty to take.

81. The transfer of such a matter to the exclusive regulatory power of Community law is, of course, a further blow to the autonomy of national law, inasmuch as it takes away a particular area of jurisdiction. However, that need not appear strange from a legal point of view or be considered to constitute an impermissible intervention by the Community legal order in the national legal orders which is contrary to the current status quo and not justified at the present stage of European integration.

82. The need to safeguard the effectiveness of Community law when it is implemented at national level has led not only, from the negative point of view, to the shrinking of national legal autonomy - a characteristic example being Alcan II - but also, positively, to the restriction of the scope of national law by express formulation of the rules to be applied. Examples are Directives 89/665/EEC and 92/13/EC which contain the procedural rules for ensuring that Community law on public works is duly observed.

83. It is also important to refer to a less well-known passage from the judgment in Deutsche Milchkontor, where it is held that the need of Community law to intervene in relation to the rules governing the repayment of unlawful aid, that is to say an area of law still open to the Member States, cannot be ruled out. More specifically, while the Court stated that in the absence of provisions of Community law disputes concerning the recovery of amounts unduly paid under Community law must be decided by national courts pursuant to their own national law subject to the limits imposed by Community law, it then observed that if disparities in the legislation of Member States proved to be such as to compromise... equal treatment... or distort or impair the functioning of the common market, it would be for the competent Community institutions to adopt the provisions needed to remedy such disparities. It is therefore expressly foreseen that Community measures might be adopted on issues relating to the repayment of unlawful aid and the safeguarding of the conditions of competition even though they currently fall within national competence. Such measures would consist in the harmonisation of national provisions or assimilation of the way in which a particular legal issue is dealt with by the national authorities.

84. That pronouncement by the Court is entirely correct and reinforces the comments made above regarding the Community character of the issue of repayment of aid. In particular, the fact that national rules governing the recovery of unlawful aid, which include the parameter of the protection of legitimate expectations, are applied does not mean that that issue is brought within the scope of the national legal order; their application is justified, however, by the fact that, as Community law currently stands, detailed Community provisions have not yet been enacted. The Community institutions therefore retain the power of regulatory intervention if they judge that the Community interest is not met by application of the national rules.

85. The very same reasoning provides the context for the proposition under consideration, whereby legitimate expectations become a Community concept; however, the need for Community law to intervene with regard to the meaning and practical application of the principle of the protection of legitimate expectations as entertained by recipients of State aid is not justified solely in order to protect the Community interest more fully but also in order to avoid the adverse effects on national administrative law which result from the prevailing case-law, as set out above.

86. The intervention by Community law could be achieved by drafting Community legislation which would include the basic procedural and substantive rules governing the recovery of unlawful aid and, of course, also broach the issue of safeguards for traders who have in good faith received

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such State assistance. Furthermore, I am of the view that the absence, until now at least, of Community legislation governing the repayment of aid may be made good, in particular so far as concerns the protection of legitimate expectations, by the work of the Court in shaping the law. It is feasible for the Community judicature to engage in a venture of that kind for two reasons. First, in accordance with the theoretical traditions common to national administrative law, the protection of legitimate expectations constitutes a general principle of law and there is thus scope for filling the gaps in the legislation by means of case-law. Second, the concept at issue already exists as a general principle with a purely Community content, applying principally to the revocation of unlawful administrative measures which create rights.

87. I can therefore see no practical obstacle to accepting that the question of the protection of a trader acting in good faith who has benefited from a national measure contrary to Articles 92 and 93 of the EC Treaty be judged on the basis of the Community principle of legitimate expectations, as applied in the particular context of the recovery of unlawful State aid. In other words, the body applying Community law - and ultimately the Court - will seek to ascertain whether certainty was created in the trader's mind that the aid was compatible with Community law, before balancing the private interest in not repaying the aid against the Community interest.

88. Two observations are called for at this point. First, the national provisions which operate to protect legitimate expectations under domestic law are not immaterial when assessing whether recipients of aid have expectations which are protected at Community level. It is logical for the particular circumstances under which that issue is judged in national law to influence a trader acting in good faith, and they may be sufficient to persuade him that the State aid from which he has benefited is not only lawful but also irreversible. In that case, it is necessary to determine - of course from the standpoint of Community law - the extent to which the national provisions contribute to the creation of legitimate expectations under Community law. Both the conduct of the national authorities which is presented as the underlying reason for the belief that the aid is lawful and the particular provisions concerning legitimate expectations are substantive issues for Community law and as such are taken into account by the body implementing it.

89. Second, when the private interest of a trader acting in good faith is balanced against the general Community interest in rectifying the conditions of competition and ensuring that the Community rules are observed, it is expected that the outcome will be unfavourable to the trader. Moreover, we are not faced with a classic relationship between a benefits authority and an individual, as is usually the case in national law. In the category of disputes under consideration, the unlawful act of the national authorities does not prove detrimental solely to their own interests, when it could be maintained that they themselves are to blame for the financial loss which they will suffer if aid is not repaid; that unlawful act adversely affects both a superior legal order, that of the Community, and a category of persons, namely competitors and all those who suffer the adverse consequences of the distortion of competition and the prejudice to inter-State trade. I therefore believe that, in practice, the cases where the protection of the legitimate expectations of a recipient of aid prevails over the abovementioned interests will prove to be entirely exceptional. In order for there to be such an exception, the particular position in which the trader acting in good faith has been placed must be deserving of special protection, a situation which in principle arises only when he is misled into believing that the aid is lawful not only by the conduct or measures of the national authorities but also by inappropriate or misleading acts on the part of the Community institutions. Only then is the need to safeguard the Community interest weakened and the need to protect the trader acting in good faith correspondingly strengthened.

90. Having regard to the foregoing, I will now examine the question which occupied the Court of First Instance in the present case. If the above analysis is accepted, the Commission was correct to consider the issue of the legitimate expectations entertained by the PMU, and the Court of

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First Instance was wrong to find that it was not open to the Commission to assess the ground put forward by the French Government. That view is imposed precisely by the Community character of the protection of legitimate expectations entertained by recipients of aid acting in good faith. Since the investigation as to whether those expectations exist flows from the general principles of Community law, the Commission, when adopting the relevant measures regarding repayment of the unlawful aid, is not merely entitled, but obliged, to consider that parameter.

91. A number of objections contesting the above view may be put forward. First of all, acceptance that the Commission is able, or even required, to consider the issue in question in the course of the Community procedure at issue means that the Member States are indirectly given the opportunity to derive benefit from their own unlawful acts and that the legitimate expectations end up being assessed in the absence of the person alleged to hold them, without his even having made a request in that regard. I have already explained that the value of those arguments is only relative and that the Court puts them to one side when faced with a case where it is contended that a measure or conduct of a Community institution has given rise to the trader's belief that the aid is lawful. I consider that the same arguments lose force if it is accepted that the issue of legitimate expectations of a recipient of aid falls in the domain of Community law. In accordance with a commonly held view in administrative law, the protection of legitimate expectations, as a fundamental principle which governs the action of administrative bodies under every legal system, must be taken into account by those bodies of their own accord. Since the Commission must therefore examine that parameter in any event, it is entirely within the Commission's power to rely on it in its decisions even if they are adopted in the absence of the person immediately concerned - that is to say the person entertaining the expectations - or even without a request by him in that regard. It is immaterial that the Member States may benefit if the aid is not repaid. The decision that it need not be repaid will have been adopted irrespective of the appraisal of their interests, and that decision does not remove their liability arising from the unlawful acts which have been committed, a liability which may have various unfavourable legal consequences for them.

92. Nor would there be any foundation to the argument that acknowledgment of that competence to the Commission prejudices the national courts, which are the natural adjudicators of the legitimate expectations of recipients of State aid. Irrespective of the Commission's assessment, the national courts, as the ordinary courts of Community law, may examine the issue in question if an application is made to them. Indeed, if they consider that the Commission has misinterpreted and misapplied the Community principle of the protection of legitimate expectations, they can refer a question to the Court for a preliminary ruling.

93. I consider that greater attention should be paid to another criticism which may be made of the view which I am now putting forward, a criticism which relates to the limits of the Community legal order. Does the suggested transfer to Community law alone of jurisdiction to apply legitimate expectations constitute an excessive and impermissible challenge to the Community legal order? As I have explained above, the solution of making the protection of legitimate expectations a Community matter, even solely in relation to the particular issue of the repayment of unlawful State aid, is at first sight a significant blow to the autonomy of national law, in that it takes away a portion of national jurisdiction. Nevertheless, I take the view that that blow is preferable to the blow inflicted by the case-law of the Court of Justice to date, on the grounds that the Community interest is better protected, legal clarity and certainty are enhanced and the specific elements which make up the national legal order are safeguarded. As I have stated at a previous point in my analysis, it proves more prejudicial to national law, and is uncertain from a systemic and theoretical viewpoint, for national law to be legally autonomous in circumstances where fundamental rules of the national legal order might be overturned or even distorted when they are applied in cases of interest to the Community.

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94. The answer to this ground of appeal remains to be given. Having regard to the above analysis, must the solution adopted by the Court of First Instance be set aside? I think not. Despite the mistaken reasoning adopted by it when assessing the relevant part of the Commission decision, the conclusion which it reached is correct, irrespective of its grounds. As is clear from the contested judgment, the Commission decided to restrict recovery of the unlawful aid, finding that a judgment of the French Conseil d'Etat gave rise to legitimate expectations on the part of the racecourse undertakings. However, it failed to explain the specific reasons why the protection of those expectations - assuming that they were in fact legitimate - prevailed over the mandatory Community interest in restoring free competition and inter-State trade following the very heavy damage caused by unlawful State aid, especially when, as stated above, the need to protect the interests of the person who has received the aid in good faith may prevail only in wholly exceptional cases over the need to safeguard the Community interest at issue. Accordingly, Commission Decision 93/625 manifestly suffered from a defective statement of grounds and was correctly annulled by the Court of First Instance.

(iii) Failure to notify State aid as a ground which precludes legitimate expectations

95. A final point requires explanation. The appellant criticises in particular paragraph 182 of the contested judgment, where it is, in its view, held that an undertaking in receipt of aid may rely on exceptional circumstances establishing that the aid is lawful only where the procedure under Article 93 of the Treaty has been observed. It is not in fact clear that such an absolute position, under which the formal requirements of Article 93 of the EC Treaty must always be satisfied in order for prior expectations to be recognised, is in line with the conclusions of the case-law to date.

96. It follows from a review of the case-law that the reasoning of the Court may be condensed into the following two propositions. On the one hand, the Court observes that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed. On the other hand, the Court nevertheless finds that it is true that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid. If such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice. Thus, while in principle a failure to comply with the obligation of notification laid down by Article 93 of the Treaty prevents legitimate expectations from being created, a recipient of aid nevertheless has a narrow leeway for proving that there may be exceptional circumstances which enable the presumption against him that there are no legitimate expectations to be rebutted.

97. There is, of course, also the precedent of Alcan II, where the Court refers to the general position set out above, but appears in the end to consider that legitimate expectations were not entertained in the case before it solely because the State aid at issue had not been notified. However, I do not consider that that judgment is sufficient to overturn the previous case-law and to establish an irrebuttable presumption that failure to notify national measures is sufficient to preclude the creation of legitimation expectations on the part of the recipient of the aid.

98. In any event, however, the error detected in paragraph 182 of the contested judgment is not sufficient to undermine its correctness, since the position of the Court of First Instance with regard to the relevant point of the disputed Commission decision is entirely correct for the reasons previously set out.

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IV - Conclusion

99. In view of the foregoing, I propose that the Court should:

- dismiss the appeal in its entirety;

- order the appellant to pay the costs.

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61995J0353-N34-35 : N 17
61995J0353-N35 : N 21
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SUB Competition ; State aids

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APPLICA France ; Member States

DEFENDA Commission ; Person ; Institutions

NATIONA GB F

PROCEDU Application for annulment ; Appeal - unfounded

ADVGEN Cosmas

JUDGRAP Kapteyn

DATES of document: 23/11/1999
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Opinion of Mr Advocate General Mischo delivered on 10 June 1999.
Alcatel Austria AG and Others, Siemens AG Osterreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public procurement - Procedure for the award of public supply and works contracts - Review procedure.
Case C-81/98.

1 In proceedings before the Bundesvergabeamt (Federal Procurement Office) concerning the award of a public supply and works contract, certain questions have been raised, in the view of that court, as to the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (1) (hereinafter `the review directive').

2 In May 1996 the Austrian Federal Ministry of Science and Transport, the contracting authority, published an invitation to tender for the installation on the Austrian motorway network of an electronic system for the automatic transmission of certain data.

3 On 5 September 1996 the contract was awarded to the chosen tenderer and signed on the same day. According to the national court, the other tenderers learned of the contract through the press.

4 On 18 September 1996 the Bundesvergabeamt dismissed applications for interim measures to suspend performance of the concluded contract; then, in its decision in the main proceedings on 4 April 1997, it held that there had been various breaches of the Bundesvergabegesetz (Federal Procurement Law).

5 The decision of the Bundesvergabeamt of 18 September 1996 was set aside by the Verfassungsgerichtshof (Constitutional Court), as a result of which the Bundesvergabeamt quashed its decision of 4 April 1997 and made an interim order prohibiting further performance of the contract. That interim order was made provisionally inoperative by a decision of the Verfassungsgerichtshof of 10 October 1997.

6 By order of 3 March 1998 the Bundesvergabeamt referred certain questions concerning the review directive to the Court of Justice for a preliminary ruling.

7 Article 1 of Directive 89/665 provides:

`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement...'

8 Article 2(1) of the review directive provides as follows:

`The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests

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concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

9 Article 2(6) of the review directive states:

`The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

10 The national provisions applicable to the main proceedings are contained in the Bundesvergabegesetz (Federal Procurement Law, BGBl. No 462/1993) in the version prior to the 1997 amendments (hereinafter `the BVergG').

11 Paragraph 9, point 14, of the BVergG defines `award' as follows:

`The award of the contract is the declaration made to the tenderer accepting his offer.'

12 Paragraph 41(1) of the BVergG states:

`The contractual relationship between the contracting authority and the tenderer comes into being, within the period allowed for making the award, when the tenderer receives notification of the acceptance of his offer. If the period allowed for making the award has expired or the terms of the contract differ from those of the offer, the contractual relationship comes into being only when the tenderer gives written notification of its acceptance of the contract. The tenderer is to be allowed a reasonable period of time to give this notification.'

13 Paragraph 91 of the BVergG sets out the jurisdiction of the national court which has made the reference, the Bundesvergabeamt, as follows :

`1. The Bundesvergabeamt has jurisdiction to determine applications for review in accordance with the provisions of this chapter.

2. The Bundesvergabeamt has jurisdiction up until the award of the contract, upon application

1. to make orders for interim measures, and

2. to set aside unlawful decisions of the awarding department of the contracting authority

in order to eliminate infringements of the present law or regulations made thereunder.

3. Once the contract has been awarded the Bundesvergabeamt has jurisdiction to determine whether, as a result of an infringement of this law or of regulations made thereunder, the contract was not awarded to the tenderer making the best offer. In such a procedure the Bundesvergabeamt also has jurisdiction, even where there has been no infringement of this law or regulations thereunder, to determine, on application by the contracting authority, whether the contract ought not to have been awarded to a particular tenderer or candidate who has been passed over.'

14 Finally, Paragraph 94 of the BVergG provides, inter alia, as follows:

`1. The Bundesvergabeamt must set aside by way of a decision, taking into account the opinion of

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the Conciliation Committee in the case, any decision of the contracting authority in an award procedure which

1. is contrary to the provisions of this Federal Law or its implementing regulations and

2. significantly affects the outcome of the award procedure....

3. Once the contract has been awarded the Bundesvergabeamt may rule only on the question whether, in the circumstances set out in paragraph 1, the alleged infringement has occurred or not.'

15 By order dated 3 March 1998, the Bundesvergabeamt (Fourth Chamber) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) the following questions:

`(1) When implementing Directive 89/665/EEC are Member States required by Article 2(6) thereof to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which, in the light of the procedure's results, it will conclude the contract (i.e. the award decision) is, in any event, open to a procedure whereby an applicant may have that decision annulled if the relevant conditions are met, notwithstanding the possibility once the contract has been concluded of restricting the legal effects of the review procedure to an award of damages?

(2) If Question 1 is answered in the affirmative:

Is the obligation described in Question 1 sufficiently clear and precise to confer on individuals the right to a review corresponding to the requirements of Article 1 of Directive 89/665/EEC, in which the national court must in any event be able to adopt interim measures within the meaning of Article 2(1)(a) and (b) of that directive and to annul the contracting authority's award decision, and the right to rely in proceedings on that obligation as against the Member State?

(3) If Question 2 is answered in the affirmative:

Is the obligation described under Question 1 also sufficiently clear and precise to mean that in such a procedure the national court must disregard contrary provisions of national law which would prevent the court from fulfilling that obligation, and must fulfil that obligation directly as part of Community law even if national law lacks any basis on which to act?'

Preliminary remark

16 The Austrian Ministry of Science and Transport, which is the respondent in the main proceedings, contends, in common with the Austrian Government, that in fact the dispute in the main proceedings is now closed and the contract has already been performed in its entirety. That being the case, the answer to the questions raised will be irrelevant in the context of this dispute since the applicants can now obtain only damages, the award of which is, in any case, provided for under national law.

17 The Commission also has doubts as to the admissibility of the questions referred to the Court. These are based on the fact that, whilst citing Article 2(6) of the review directive, the questions are in reality seeking an interpretation of Article 2(1) of that directive which is concerned with the period prior to the conclusion of the award contract. In the present case that contract has already been concluded.

18 The national court states, first, that it is the court of last resort in the matter by reason of national procedural rules, application to the Verfassungsgerichtshof being an extraordinary legal remedy which is not in the nature of an appeal. In those circumstances the Bundesvergabeamt considers itself obliged, pursuant to the third paragraph of Article 177 of the EC Treaty, to refer to the Court of Justice questions of Community law arising in these proceedings.

19 It must nevertheless be noted that the fact that the national court is a court of last resort

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does not exclude the possibility that the questions referred are hypothetical in nature.

20 The national court adds, however, that under national law it remains relevant to establish if it was entitled, or even required, as a matter of Community law, to set aside its decision of 4 April 1997, by which, in determining that the awards procedure did not result in the contract being awarded to the tenderer who had made the best offer, it brought an end to the first set of proceedings. The questions referred will affect the outcome of that issue in the main proceedings, which will in any event have to be resolved, regardless of the awards procedure which underlies it, even if the awards procedure in question is completely settled in the meantime.

21 The national court further emphasises that at this stage it is not yet possible to determine whether this is the case. Account must be taken of the fact that the warranty period for the performance of the contract in question has not yet expired and it therefore theoretically remains open to the awarding authority to rescind the contract which cannot yet therefore be considered definitively executed.

22 The Commission also takes the view that the questions referred to the Court may be of importance for the subsequent development of the dispute in the main proceedings.

23 The Commission notes first that criminal proceedings are pending to ascertain whether any offence was committed when the contract was awarded. If that was the case then the contracting authority would be entitled to rescind the contract and, the Commission considers, depending on the interpretation to be given in this case to the requirements of Community law, there might even be an obligation to rescind the contract.

24 The Commission further emphasises that the answers to the questions raised may affect the level of any damages payable to the applicants.

25 Lastly the Commission states that the Court's answer to the first question could result in the contract or award decision being void, which would then render it necessary to deal with the second and third questions.

26 In my opinion the considerations raised by the Commission are such as to justify the conclusion that the answers to the questions raised may affect the subsequent course of the main proceedings. The reference by the national court should not, therefore, be regarded as inadmissible on the ground that the questions raised are hypothetical.

Question 1

27 The Bundesvergabeamt asks essentially whether the Member States are required by the review directive to ensure that the decision to award a public contract is in all cases subject to a review procedure whereby an unsuccessful tenderer can have that decision set aside.

28 Article 2(1) of the review directive sets out the review procedures which the Member States are obliged to put in place. They must provide for the powers to adopt `interim measures' by way of `interlocutory procedures' with the aim of eliminating the alleged infringement or preventing further damage to the interests concerned (point (a)), the setting aside of decisions taken unlawfully (point (b)), and the award of damages (point (c)).

29 The provision does not define exhaustively what is meant by `decisions taken unlawfully' which may be required to be set aside, instead referring by way of example to discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents, or in any other document relating to the contract award procedure in question.

30 This category must, however, include an unlawful decision awarding the contract. The purpose of the review directive as it appears, in particular, from Article 1(1) and the third and fourth

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recitals in the preamble, is the establishment of the most effective review procedures possible so as to ensure compliance with the Community directives concerning public procurement, the object of which is to open the latter up to Community competition.

31 This purpose would be compromised if paradoxically the most important decision in the procedure, namely the award of the contract itself, could not be treated as one of the unlawful decisions capable of being set aside, as the applicants in the main proceedings rightly point out.

32 The Court (2) has already stated the importance of this objective of effectiveness in the context of the directive, emphasising that the directive's purpose is that of `reinforcing existing arrangements at both national and Community levels for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified.'

33 The Ministry of Science and Transport contends, however, that Article 2(6) of the review directive allows a Member State to provide that, once the contract following the award decision has been concluded, the powers of the national court responsible for review procedures are confined to awarding damages to any person affected by a breach of the rules.

34 In the present case the Austrian legislature merely took advantage of that possibility and therefore complied with the review directive, even if the situation could arise where, because notification of the award decision and the conclusion of the contract might take place at the same time, it would be impossible to have the decision awarding the contract set aside.

35 Such an interpretation takes no account of the chronological sequence in which the review procedures provided for by Article 2(1) and (6) are to apply.

36 The limitation on remedies provided for by Article 2(6) relates to the contract following the award decision. That provision therefore implies that, in the eyes of the Community legislature, the conclusion of the contract and the decision awarding the contract cannot coincide in time.

37 As the Commission submits, the review directive thus clearly envisages two distinct phases in the review procedure: before the conclusion of the contract Article 2(1) applies and requires Member States to ensure complete judicial protection; after the contract is concluded, the limitation provided for in Article 2(6) applies and the sole remedy available is an award of damages.

38 The extent of the contrast between those two phases should not be underestimated. The setting aside of a decision means that tenderers seeking review retain their chances of winning the contract. Conversely, damages alone are often unsatisfactory compensation for a company passed over, having regard to the difficulties it might face, in particular, in quantifying its loss and proving a causal link with the infringement of Community law. It would in any event be easy for the contracting authority to minimise the chances of success of the complainant. Moreover, a potential complainant is likely to be reticent about instituting proceedings for fear of compromising its future relations with the contracting authority, when in any event the contracting authority is unlikely to put it back into a position where it could win the contract. (3)

39 The effectiveness of the review directive, and in particular its objective, set out in Article 1(1), of establishing rapid and effective review procedures, would be compromised if it were open to a Member State to widen the limitation provided for in Article 2(6) to such an extent that the most important decision of the contracting authority, namely the award of the contract, would systematically be covered by the limitation, and would thus be removed from the full protection established by Article 2(1).

40 The objective of reinforcing remedies which is laid down by the review directive requires that the possibility left open to the Member States to limit them should be regarded as an exception and so be interpreted restrictively.

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41 The purpose of such a limitation is to ensure legal certainty in protecting the contract, thus recognising the contract's specific status in the award procedure in theoretically bringing it to an end.

42 By contrast there is no justification for inferring from this the possibility of restricting the review procedures applicable to those administrative decisions which precede the conclusion of the contract.

43 National legislation cannot therefore invoke Article 2(6) for the purpose of excluding a procedure for having the decision awarding the contract set aside.

44 It should, moreover, be emphasised that that solution is perfectly compatible with the view that the review directive does not undermine the private law systems in the Member States because it is the national legal system alone which determines the effects of the remedies envisaged by the directive in respect of the contract which follows the award decision.

45 I would add lastly that there would be a number of paradoxical consequences were it accepted that national legislation could define the time of conclusion of the contract, at which point the legal protection of the unsuccessful tenderers becomes limited, in such a way that the decision awarding the contract was also affected by that limitation.

46 As I have already stated, that would mean that the most important decision could not be set aside whilst other, lesser ones could be, simply because they were reached earlier.

47 Furthermore, irregularities in the decision awarding the contract would then be highly unlikely to have any consequences for the award of the contract. The only means of challenging the award decision would be by seeking to set aside the contract, although the problem does not intrinsically arise from the contract but from the failure to observe the necessary conditions for the legality of an administrative act, which is not the same as the contract. Procedural effectiveness and economy therefore require that there should be a separate procedure for reviewing, in sufficient time, the validity of the decision awarding the contract.

48 I turn now to consider the application of those principles to the present case.

49 As the national court has explained, as a matter of Austrian law the contract is considered to be concluded when the decision awarding the contract is notified to the successful tenderer. That notification is treated in civil law as the acceptance of the tenderer's offer.

50 The sole exception to that situation is if the period allowed for making the award has expired or the terms of the contract differ from those of the offer. In that case, the contractual relationship only comes into being when the tenderer gives written notification of his acceptance of the contract.

51 According to the Bundesvergabeamt, whilst it is strictly true that the decision awarding the contract precedes the conclusion of the contract, it takes place within the internal organisation of the contracting authority and is not communicated to the interested parties before being notified to the chosen tenderer. That notification, as well as being the first external manifestation of the decision, seals the contract and thus renders the decision immune from proceedings to set it aside.

52 The national court considers that it follows from this that the award decision as such, by which the contracting authority chooses the tenderer with which it will contract, is not open to challenge. The unsuccessful tenderers are, furthermore, not generally aware of the decision, nor can they become so.

53 It must therefore be concluded that the effect of the relevant national legislation is, as a general rule, to exclude the possibility of a review procedure to set aside the decision awarding

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the contract.

54 It follows from the foregoing that such a situation does not comply with the requirements of the review directive.

55 The respondent in the main proceedings, meanwhile, disputes the national court's presentation of the relevant national law.

56 That is, however, a matter for the national court, whose task is to apply the principles handed down by the Court to the present case. The respondent cannot substitute its own analysis of the relevant national law for that of the national court.

57 The Ministry of Science and Transport specifically denies that the unsuccessful tenderers are unable to learn of the decision awarding the contract before the conclusion of the contract. It claims that those tenderers can avail themselves of the legislation relating to access to administrative documents and request the administration to inform them of its decision.

58 It must be pointed out, however, that such a possibility cannot be regarded as adequate compensation for the lack of any obligation on the part of the administration to inform the unsuccessful tenderers of the decision awarding the contract before the conclusion of the contract, thereby giving them a genuine opportunity to commence review proceedings.

59 This is a fortiori the case in respect of tendering procedures where, as noted by the review directive, award procedures are of particularly short duration whereas, as was stated at the oral hearing, the national legislation on access to administrative documents grants the administration a period of two months within which to reply to requests.

60 The Austrian Government argues that, if the review directive was to be interpreted as requiring a separation between the decision awarding the contract and the conclusion of the contract, then nowhere does the directive define the necessary delay between the two. This period could be reduced to one second of `thinking time'.

61 It is appropriate however in this case to take into account what is required for the effectiveness of the review directive. This means, as we have seen, that a procedure for having the decision awarding the contract set aside must be possible. It necessarily follows that, having regard to the short duration of procedures for the award of public contracts, a reasonable time must elapse between the time when the decision awarding the contract is notified to the unsuccessful tenderers, so that they may challenge the decision, and the conclusion of the contract, after which time Article 2(6) applies.

62 The United Kingdom Government submits that since there are different types of award procedures it is not possible to fix a single period of time. Therefore it should be for the legislature to take the initiative in the matter.

63 In my view, however, the fact that the review directive does not mention any specific period of time does not prevent the Court from construing it in a way that complies with the requirements of effectiveness. Since, as we have seen, effectiveness will be maintained only if the award decision is open to challenge, it therefore follows that there must be a reasonable time-limit for any challenge. That limit is, of course, likely to vary according to the circumstances of the case, and in particular, according to the type of award procedure in question.

64 The Austrian Government, supported by the German Government, points out that the review directive is a coordinating rather than a harmonising directive. Accordingly, it must be assumed that the Council did not intend to constrain those Member States such as the Republic of Austria, the Federal Republic of Germany and, to a certain extent, the United Kingdom, in which it is possible for notification of the decision awarding the contract to coincide in time with the conclusion of

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the contract, to change their public procurement procedures.

65 The fact remains, however, that that argument is not supported by the travaux préparatoires of the review directive.

66 On the contrary, in its presentation of the reasoning behind the draft amended directive, the Commission expressly lists, amongst the shortcomings in the national systems concerning review procedures, the fact that it is not possible in all the Member States to have the award decision set aside by administrative or judicial means. (4)

67 It is therefore clear that in the view of the Commission, at least, the review directive is intended to put in place such a possibility.

68 In any event, it is the actual wording of the review directive, as enacted by the legislature, which is determinant. Even if the wording is not of sufficient clarity for it to require no effort in interpretation, it is nevertheless the case, as we have just seen, that it is not so obscure as to require reference to external factors in order to determine the intention expressed by the legislature.

69 The Government of the United Kingdom further claims that the interpretation of the review directive put forward by the Commission and the applicants directly contradicts the system established by the Community legislature in Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts. (5) As evidenced in particular by Articles 7, 9 and 10, that directive is detailed and exhaustive. It does not provide for any time to elapse between the decision awarding the contract and its conclusion.

70 It must be noted, however, that, corresponding to the provisions cited by the United Kingdom, are equivalent provisions in earlier directives, in particular Directives 89/440/EEC (6) and 88/295/EEC. (7)

71 It appears clearly from the review directive that it is intended to supplement the system established by the abovementioned two directives. Thus the first recital in the preamble to the review directive notes that the earlier directives `do not contain any specific provisions ensuring their effective application.'

72 The inevitable conclusion therefore is that Directive 93/96, cited above, is not so exhaustive in nature that the review directive can add nothing to its provisions.

73 Thus Article 7(1) of Directive 93/36 is cited by the United Kingdom because it provides only as follows: `The contracting authority shall within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer who so requests of the reasons of the rejection of his application or his tender, and, in the case of a tender, the name of the successful tenderer' without mentioning any review procedure in respect of the award decision.

74 That provision is, however, identical to Article 5a(1) of Directive 89/440, cited above, which, as we have just seen, in the Council's view did not contain any specific provisions on remedies.

75 I would add, moreover, that one could ask oneself why the Council would impose such a short time-limit for the administration to reply to the queries of unsuccessful tenderers, namely 15 days, if the purpose was not that the latter should be informed within sufficient time to enable them it to have the decision set aside before it was too late and the contract was awarded.

76 For the above reasons, I would propose the following reply to the first question.

77 The combined provisions of Article 2(6) and (1)(a) and (b) of the review directive are to be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder with which, in the light of the

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procedure's results, it will conclude the contract (i.e. the award decision) is in all cases open to a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of limiting the legal effects of the review procedure to an award of damages.

Question 2

78 By the second question the Bundesvergabeamt in effect asks whether the provisions of Article 2(1)(a) and (b) of the review directive as interpreted above are capable of having direct effect.

79 The respondent in the main proceedings and the Austrian Government consider that the review directive leaves a margin of discretion to the Member States to determine the bodies competent to perform the review procedures required by the review directive.

80 That obligation is not therefore sufficiently precise and unconditional so as to give rise to direct effect.

81 The applicants in the main proceedings state that, to the contrary, the content of the obligation on the Member States is clear and precise and that the Member States therefore have no discretion in the matter. Their margin for manoeuvre is confined to the choice of competent body.

82 The Commission refers, first of all, to the settled case law of the Court on the subject of direct effect. This establishes that: (8)

` ... wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State.'

83 In particular, `... the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone.'

84 It is undeniable in the present case that the content of the Member States' obligation is clearly determined. They are required to ensure that unsuccessful tenderers are able to initiate proceedings to have the decision awarding the contract set aside.

85 It is also clear that this obligation necessarily gives rise to rights for individuals since it is they who must be able initiate the review procedures required by the review directive. (9)

86 Consequently the only question which remains to be decided is whether the fact that the Member States have a margin of discretion when establishing suitable bodies means that the provision in question cannot have direct effect.

87 The Commission rightly points out in this context that this question has already been raised in Dorsch Consult (10) and HI (11) as well as in a number of other cases. (12) It follows from that case-law that the Member States' margin for manoeuvre when organising the review system prevents the review directive from having direct effect.

88 The Commission submits however that the present case differs fundamentally from the cases cited above. This is because the Austrian authorities have already used their margin for manoeuvre and definitively established the bodies and procedures intended to implement the provisions of the review directive, whilst in all of the abovementioned cases the national legislation in question did not include the necessary attributions of competence and therefore further action on the part of the national authorities was required.

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89 In this case, the situation is quite different, because Paragraph 91 of the BVergG expressly provides that the Bundesvergabeamt is competent to examine the legality of award procedures and decisions within the ambit of the BVergG. For an award of damages the matter would be referred to the ordinary courts.

90 The system of competence would therefore appear to be definitively established, all the more so since the national law sets out all of the review procedures laid down in Article 2(1) of the review directive. The national legislature has therefore already implemented the obligation to set up a system of review and it is open to individuals to select the competent forum to adjudicate on their complaint.

91 I accept that analysis.

92 The argument derived from the existence of a margin of discretion can, by its very nature, only be raised while that discretion has not been exercised. As soon as it has been exercised that discretion necessarily disappears and can no longer prevent recognition of direct effect.

93 The fact that this discretionary power may not have been exercised in compliance with the review directive is irrelevant in this respect.

94 I consider that a distinction should be drawn between the situation in which a Member State has set up the necessary body, and has only to vest that body with the necessary powers, and that in which no provision has been made to implement the obligation to establish a system of review.

95 The second situation is effectively an insurmountable obstacle to recognition of direct effect. Conversely, in the first case such effect cannot be excluded because the body which will implement the obligation imposed by the review directive already exists.

96 I would add that I also share the Commission's view when it suggests that in the present case it is by no means certain that the applicants need to avail themselves of direct effect. As we have already seen, all of the problems stem from the fact that in practice the decision awarding the contract is announced at the same time as the contract is concluded.

97 That fact does not seem to me to be a necessary consequence of the national provisions because they do not prevent the contracting authority from publishing the award decision a certain time before concluding the contract, nor do they prevent the Bundesvergabeamt from acceding to an application to set that decision aside and ordering, where appropriate, interim measures.

98 That was furthermore confirmed at the oral hearing at which the applicants emphasised, without being contradicted on the point, that certain Austrian public bodies in practice allow a period of time to elapse between the date on which the award decision is notified to the unsuccessful tenderers and the conclusion of the contract.

99 The national provisions in question are capable of being applied so as to comply with the requirements of the review directive. Recourse to the concept of direct effect is therefore unnecessary.

100 It should be noted in passing that that finding clearly does not imply that those provisions constitute a proper implementation of the review directive, that question not being directly in issue in the present case.

101 In the light of the foregoing I would propose that the second question referred to the Court by the Bundesvergabeamt be answered to the effect that the combined provisions of Article 2(6) and (1)(a) and (b) of the review directive are to be interpreted as meaning that the obligations set out therein are sufficiently clear and precise, so that individuals can rely upon them in procedures against the Member State where the Member State in question has adopted definitive rules as to the jurisdiction of review bodies charged with implementing the various phases of the review procedures

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and has already adopted the necessary procedural rules for each step in the procedure.

Question 3

102 By this question the Bundesvergabeamt asks whether it is required to apply the provisions of Article 2(1)(a) and (b) of the review directive, even if the BVergG contains no provisions to that effect, or conflicting provisions.

103 It should first be noted that this question is closely linked to the preceding question. This is because, like Question 2, it only arises where the issue is one of direct effect and not of the interpretation or application of a national law so as to comply with the review directive.

104 Having said that, I am of the opinion that the Court's case-law provides a ready answer: if a Community law text recognises a right of individuals against the Member State, the national court seised of the matter must give full application to the Community law right and must disapply, so far as may be necessary, any inconsistent provisions of national law.

105 This principal has already been established by judgment in the Simmenthal case (13), in which the Court held that

`a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation , even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means...' (paragraph 24)

` ... national courts must protect rights conferred by provisions of the Community legal order and... it is not necessary for such courts to request or await the actual setting aside by the national authorities empowered so to act of any national measures which might impede the direct and immediate application of Community rules.' (paragraph 26)

106 I would therefore suggest that the reply to the Bundesvergabeamt's third question should be that the national court which, within the limits of its jurisdiction, must apply the provisions of Community law, is required to guarantee the protection of the rights provided by the Community legal order and to ensure the full effectiveness of those rules by disapplying, of its own initiative where necessary, any conflicting national provision without having to request or await the setting aside by the competent national bodies of any national measures impeding the direct and immediate effect of the Community rules.

Conclusion

107 For the reasons set out above, I propose that the Court should reply as follows to the questions referred to it by the Bundesvergabeamt:

(1) The combined provisions of Article 2(6) and (1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts must be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which, in the light of the procedure's results it will conclude the contract (i.e. the award decision), is in all cases open to a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of limiting the legal effects of the review procedure to an award of damages.

(2) The combined provisions of Article 2(6) and (1)(a) and (b) of Directive 89/665 are to be interpreted

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as meaning that the obligations set out therein are sufficiently clear and precise so that individuals can rely upon them in procedures against the Member State where the Member State in question has adopted definitive rules as to the jurisdiction of review bodies charged with implementing the various phases of the review procedures and has already adopted the necessary procedural rules for each step in the procedure.

(3) The national court which, within the limits of its jurisdiction, must apply the provisions of Community law, is required to guarantee the protection of the rights provided by the Community legal order and to ensure the full effectiveness of those rules by disapplying, of its own initiative where necessary, any conflicting national provision without having to request or await the setting aside by the competent national bodies national measures impeding the direct and immediate effect of the Community rules.

(1) - OJ 1989 L 395, p. 33.

(2) - Case C-433/93 Commission v Germany [1995] ECR I-2303, paragraph 23.

(3) - As to these factors, see the explanatory statement in Commission proposal (Com(87) 134 final), and the amended proposal (Com(88) 733 final).

(4) - Amended proposal for a Council Directive coordinating the laws, regulations and administrative provisions relating to the application of Community rules procedures for the award of public supply and public works contracts (submitted by the Commission pursuant to Article 149(3) of the EEC Treaty), Document (88) 733 final.

(5) - OJ 1993 L 199, p. 1.

(6) - Council Direct 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1)

(7) - Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 217, p. 1).

(8) - Joined Cases C-6/90 and C-9/90 Francovich and Bonifaci and Others v Italy [1991] ECR I-5357, paragraphs 11 and 17.

(9) - See Article 1(1) and (3), first sentence, of the review directive.

(10) - Case C-54/96 Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin [1997] ECR I-4961.

(11) - Case C-258/97 HI v Landeskrankenanstalten-Betriebsgesellschaft [1999] ECR I-1405.

(12) - Case C-76/97 Tögel v Niederösterreichische Gebietskrankenkasse [1998] ECR I-5357; Case C-111/97 EvoBus Austria v Növog [1998] ECR I-5411.

(13) - Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions

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TREATY	European Economic Community
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JURCIT	61977J0106 : N 105 31988L0295 : N 70 31989L0440-A05AP1 : N 74 31989L0440 : N 70 31989L0665-A01P1 : N 30 85 31989L0665-A01P3 : N 85 31989L0665-A02P1 : N 8 28 37 39 90 31989L0665-A02P1LA : N 77 101 102 31989L0665-A02P1LB : N 77 101 102 31989L0665-A02P6 : N 9 36 37 39 43 61 77 101 31989L0665-A02P7 : N 7 31989L0665-C3 : N 30 31989L0665-C4 : N 30 31989L0665 : N 1 31993L0036-A07P1 : N 73 31993L0036 : N 69 72 61993J0433-N23 : N 32 61996J0054 : N 87 61997J0076 : N 87 61997J0111 : N 87 61997J0258 : N 87
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Opinion of Mr Advocate General Saggio delivered on 25 March 1999.
Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH v Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public works contract - Contract awarded to sole tenderer judged to be suitable.
Case C-27/98.

1 By order of 27 January 1998 the Bundesvergabeamt, Republic of Austria, sought from the Court of Justice a preliminary ruling on two questions concerning the interpretation of Article 18 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (hereinafter `the Directive'). (1)

2 The questions are concerned essentially with the compatibility of the Federal Austrian rules on contracts (Bundesgesetz über die Vergabe von Aufträgen, hereinafter `the BVergG') with Article 18 of the Directive, which contains the general principles concerning arrangements for awarding contracts, in view of the fact that Article 55(2) of the abovementioned Austrian rules provides that the administration may withdraw a tender notice where, after exclusion of tenders not meeting the legal requirements, only one tender remains. The issue is therefore whether the Directive requires the administration, after examining the suitability of the tenderers, to award the contract even if only one tender has been admitted as valid.

The Community and national provisions

3 The Directive coordinates the national provisions on the award of public works contracts. The preamble indicates that `the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts' (second recital). The next recital adds that `such coordination should take into account as far as possible the procedures and administrative practices in force in each Member State'. The first sentence of the 10th recital makes it clear that `to ensure the development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community'.

4 Title I of the Directive is `General provisions'. Of relevance to this case is Article 8(2), according to which: `The contracting authority shall inform candidates or tenderers who so request of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure. It shall also inform the Office for Official Publications of the European Communities of that decision.'

Title IV contains the `Common rules on participation'. Under Article 18: `Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this title, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by the contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29.'

5 The Austrian rules on public works contracts are contained in the BVergG, which has been in force since 1 January 1994. (2) That Law provides that contracts for works and services must, after accomplishment of the prescribed procedure, be awarded in conformity with the principles of free and fair competition and equal treatment for all bidders and tenderers to authorised, efficient and reliable undertakings at appropriate prices (Article 16(1)). The same Law provides, however, that tendering procedures are required to be concluded only where there is an express provision to that effect (Article 16(5)). Consistently therewith, Article 56(1) of the BVergG provides

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that the procedure for awarding a public contract terminates upon conclusion of the contract or cancellation of the competition.

The last relevant provision is Article 55(2) of the Austrian Law, whose compatibility with the Directive is at issue in the proceedings before the national court and according to which the contract notice may be withdrawn where, after exclusion of tenders under Article 52, only one tender remains. I would point out for the sake of completeness that Article 52(1) of the BVergG provides that, before the successful tenderer is chosen, the contracting authority, relying on the results of the preliminary inquiries, is required immediately to eliminate tenders submitted by undertakings which fail to fulfil any of the requirements. This involves the exclusion, for example, of tenders submitted without the necessary authorisations, or those which are defective as regards economic, financial or technical capacity or the requisite credibility of the undertaking (paragraph 1), and tenders for which the total price has not been determined plausibly (paragraph 3).

The facts and the questions referred

6 The proceedings before the national court derive from a decision of the Amt der Salzburger Landesregierung (Office of the Federal Government, Salzburg) to publish in spring 1996 a contract notice for the execution of construction works on the A1 Westautobahn. On completion of the requisite procedures, the contract was awarded to the company ARGE Betondecke-Salzburg West. In November of the same year, the same contracting authority, after a further technical evaluation of the works involved, announced a competition for a contract for works along `the carriageway of the Salzburg Westautobahn from km 292.7 to km 297.7, final extension; supply and installation of a steel guard rail'. By tender notice of 24 April 1997, it formally opened the procedure for final award of the contract for the work in question. Following verification of the eligibility of the four competing undertakings, only one was left in contention, namely the consortium comprising Bietergemeinschaft Metalmeccanica Fracasso SpA-Leitschutz Handels- und Montage GmbH. The contracting authority therefore decided to avail itself of the power to terminate the tendering procedure under the abovementioned Article 55(2) of the BVergG. Following an amicable agreement reached in conciliation proceedings before a special federal supervisory commission (Bundes-Vergabekontrollkommission), (3) the consortium applied for review under Article 113 of the BVergG. The Third Chamber of the Bundesvergabeamt, to which the matter was assigned, decided to seek a preliminary ruling from the Court of Justice on the following question:

`Is Article 18(1) of Directive 93/37/EEC, according to which contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29, to be interpreted as requiring contracting authorities to accept a tender even if it is the only tender still remaining in the tendering procedure? Is Article 18(1) sufficiently specific and precise for it to be relied on by individuals in proceedings under national law and, as part of Community law, to be used to oppose provisions of national law?'

The first preliminary question

7 Albeit in the form of a single question, the national court has in fact requested a ruling on two separate points. In the first part of the question, the Austrian judge seeks to ascertain whether Article 18 of the Directive may have an impact on the outcome of the main proceedings. The latter, I repeat, concern the legality of the contracting authority's decision not to complete a tendering procedure in view of the fact that only one tender has been admitted as valid.

8 The Community Directive at issue, like all the directives on contract procedures, which constitute a consistent body of legislation as regards the principles and purposes which they embody and the

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manner in which their text is drafted, does not give specific guidance on this point. That fact is not surprising, moreover, since the Directive merely seeks to coordinate national procedures and does not purport to lay down exhaustive rules intended to supplant entirely the various national legal systems for the award of contracts. That conclusion follows from the Directive itself: the third recital states that such coordination must `take into account as far as possible the procedures and administrative practices in force in each Member State'.

In the light of that fact, it is reasonable to entertain doubts as to whether the circumstances of this case might not fall outside the scope of the Directive, with the result that the answer to the question should remain within the purview of the Member State, by virtue of the principle just referred to whereby, `[a]s far as possible', national procedures and practices should be respected.

9 That view, attractive though it may be, is not convincing: the Commission, like the governments which have intervened in these proceedings, although considering that the Member States remain free to grant the contracting authorities the power to cancel a competitive procedure, lays emphasis on the risks which might arise if that power were abused.

I consider it reasonable for the Community rules, and in particular, so far as is relevant here, the Public Works Directive, not to be dissociated from the procedures governing cases of that kind in the various national laws. In that regard, it is appropriate to set out briefly the arguments of the parties to these proceedings.

10 The plaintiff in the main proceedings, in expounding its view that the contract must be awarded to the sole remaining tenderer, maintains that a systematic reading of the provisions of the Directive, in particular Articles 7, 8, 18 and 30 - as interpreted, in its view, by the Court (4) - shows that the right of the contracting authority to decline to award a contract or to recommence the procedure must be limited to exceptional and particularly serious cases (death, insolvency and so forth).

The Commission, on the contrary, submits that specifically by virtue of Article 8(2) of the Works Directive, according to which `The contracting authority shall inform candidates or tenderers who so request of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made or to recommence the procedure', the opposite conclusion should be drawn. In its view, that provision shows indisputably that the Directive gives the contracting authority the right to terminate a tendering procedure by cancelling it. Furthermore, the Commission argues, it can clearly be inferred from the rationale of the Directive that it is based on the fundamental requirement of subjecting public works contracts to effective competition (10th recital) or real competition (see Article 22 regarding negotiated procedures), a requirement which would be frustrated by the alleged obligation on the contracting authority to conclude a contract even where there was only one tenderer.

The Amt der Salzburger Landesregierung, the defendant in the main proceedings, also stresses that the fundamental rationale of the Community Directive is to open the public contracts sector to competition and the fact that all the provisions of that Directive, starting with the criteria for awarding contracts in Article 30(1)(a) and (b) of the Directive, presuppose the possibility of comparing a number of tenders.

In addition, the Austrian Government, on the basis of similar arguments, states that Article 18 of the Directive merely lays down a common rule on participation, simply indicating what types of undertaking may be taken into account by the contracting authority for the award of contract.

Finally, the French Government, intervening in the oral procedure, emphasised that under French law also (in particular, under Article 95 ter of the Public Contracts Code) the contracting authority may, in the public interest, decide not to bring a tendering procedure to its conclusion.

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11 Then, in the oral procedure, certain parties pointed out that the Court of First Instance recently disposed of a similar question, albeit with reference to the `Services Directive', (5) holding that the contracting authority is not required to bring a public tendering procedure to a conclusion by making an award of contract. (6)

12 I do not consider that the plaintiff's view can be upheld. First, there can be no question of disregarding a requirement such as that contained in Article 8(2), which expressly provides that a decision may be taken not to award a contract. Secondly, I consider that Article 18 is a procedural provision which binds the contracting authority as regards the criteria for awarding contracts (or those in Chapter 3 of the same Title), at the same time laying down common rules for the qualification of tenderers, which is in the nature of a precondition for participation in the procedure. No other conclusion can thus be drawn from Article 18 but that the criteria for the selection of candidates and the grounds for their exclusion from the procedure must be specifically those listed in that provision: to adopt any other interpretation - and particularly one which purports to perceive in the provision an obligation to award a contract even if only one undertaking has presented itself and been found eligible - would simply amount to stretching the legislative provision beyond its proper bounds.

13 Indeed, I think there can be no doubt but that the power to withdraw the administrative notice announcing a tendering procedure is the manifestation of a power vested in the contracting authorities by the laws of the Member States and that, until such time as a final decision awarding a contract is adopted, the contracting authority is essentially free to decline to award a contract on supervening grounds of public interest or because of a reappraisal of the feasibility of the planned works (lack of adequate resources, changes in the state of the art in a particular technological sector, and so forth). (7)

14 The considerations outlined so far do not imply that that power to adopt self-protective measures of that kind is absolute and not amenable to any judicial review. In principle, the comparison of several tenders is not an objective complete in itself, being rather the idea underlying the rules whereby administrative action is rationalised. Consequently, the possibility cannot be excluded that, in certain cases, dealing with a single candidate seeking a contract may produce even better results than recourse to a competition. In fact, whilst it is true that the provisions of the Directive all presuppose a comparison of several tenders, it is also true that, by virtue of Article 18, the administration is required to notify candidates and tenderers of the reasons for which it has decided not to award a contract or to recommence the procedure.

15 In other words, if it cannot be inferred from the Directive that the contracting authority is required in every case to award a contract even where there is only one tender, it must conversely be conceded that that authority may sometimes award a contract, once the procedure has been conducted in accordance with the requirements of publicity and equal treatment contained in the Directive, even if it does so to the only tenderer who presented himself or remained in the procedure, and there can be no possible recourse to a non-existent principle of competition at any cost. In my opinion, the provisions of Article 8(2) of the Directive must be appraised in that light. They are without doubt intended to prevent the contracting authority from freeing itself of a potential contracting party in an entirely arbitrary manner or in disregard of fundamental principles of Community law.

16 As indicated earlier, the conclusion that the Directive does not exclude the possibility of the administration being entitled to withdraw a competition notice was recently upheld by the Court of First Instance with reference to a tendering procedure for a contract for transport services to be provided by chauffeur-driven vehicles, issued by the European Parliament. (8) In a context different from that of the present case (there were several tenders, not just one), the Court of

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First Instance stated that `the contracting authority is not bound to follow through to its end a procedure for awarding a contract' (paragraph 54 of the judgment), observing that in that respect the contracting authority enjoys a broad discretion provided that its decision is in no way arbitrary (paragraph 60).

I am of the opinion that, although that case concerned the Services Directive, the principle is certainly sound and may be extended to the Public Works Directive, and also to all the other directives concerning contracts, the principle being a general one which is to be found in the legal traditions of the Member States, which those directives purport to respect.

17 It should be added, however, that the obligation to state the reasons for which the contracting authority decided not to award the contract or to recommence the procedure, referred to in Article 8(2) of the Directive, must be seen for what it is. It allows the legality of the administrative decision to be reviewed, at least in cases where the decision cancelling the procedure appears inappropriate or contrary to other provisions of Community law. That would be the case where, for example, the contracting authority adopted measures solely in order to waste time and purposely create urgency, which it then disingenuously invoked in order to award the contract under a negotiated procedure, doing so in breach of the Community rule that the urgency must not in any event be attributable to the contracting authorities (see Article 7(3)(c) of the Directive).

As far as this case is concerned, the withdrawal of the tender notice could in theory be seen as arbitrary if the contracting authority were to cancel the procedure not with a view to arriving at a less onerous technical solution than that originally envisaged, as in fact occurred in this case, but rather on the basis of alleged inappropriateness of the tender, which in fact had previously been considered abnormally low but had been found to be in order after the examination procedure referred to in Article 30(4) of the Directive was completed.

18 In short, therefore, it seems to me to be indisputable that the contracting authority may on occasion, on grounds of public interest, cancel a public tendering procedure and decline to award a contract where only one tender has been submitted or survived the preliminary stage, provided that the action taken is not arbitrary or unfair and does not involve any infringement of the Directive or of other provisions or principles of Community law.

19 I therefore propose that the Court rule in reply to the first preliminary question that Article 18 of Directive 93/37 does not preclude national legislation which allows a contracting authority to cancel a tendering procedure where, following the lawful exclusion of tenders not accepted as valid, only one tenderer remains in the procedure.

The second question

20 By its second question, the national court asks whether Article 18(1) of the Directive may be relied on in the national courts.

21 It should be pointed out that this question is relevant - in the national court's view - only if Article 18 is interpreted in the manner proposed by the plaintiff in the main proceedings. In the light of the answer given to the first question, the second has become academic.

Nevertheless, I shall answer the question, merely stating that the answer must be in the affirmative. Article 18 imposes on the contracting authority unconditional and sufficiently precise obligations for it to be relied on by individuals before national courts. I would add that the same view has already been taken by the Court on previous occasions, albeit in relation to the equivalent provision of the previous version of the Directive. (9)

22 I therefore propose that the Court rule in response to the second question that Article 18 of Directive 93/37 is sufficiently clear and precise to be relied on before a national court.

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23 For the foregoing reasons, I suggest that the Court answer the questions submitted by the Bundesvergabeamt as follows:

(1) Article 18 of Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts does not preclude national legislation which allows the contracting authority to cancel the tendering procedure where, following lawful exclusion of tenders not accepted as valid, only one tenderer remains in the procedure.

(2) Article 18 of Directive 93/37/EEC is sufficiently clear and precise to be relied on before a national court.

(1) - OJ 1993 L 199, p. 54, recently amended by European Parliament and Council Directive 97/52/EEC of 13 October 1997 (OJ 1997 L 328, p. 1).

(2) - The Law was republished following codification of the provisions on public works contracts by the Law of 27 May 1997, in BGBl. No 56/1997.

(3) - Articles 109 and 110 of the BVergG.

(4) - The applicant in the main proceedings refers in particular to Case 76/81 Transporoute [1982] ECR 417, Joined Cases 27/86, 28/86 and 29/86 CEI [1987] ECR 3347, Case 31/87 Beentjes [1988] ECR 4635, and Case C-304/96 Hera [1997] ECR I-5685.

(5) - Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(6) - Case T-203/96 Embassy Limousines [1998] ECR I-4239.

(7) - Once again with reference to the case of a single tenderer, it may be noted that in Italy the rules on State accounts - which have been extended by the case-law to all public authorities - even provides that a public tendering procedure must be declared void if it does not attract at least two tenderers, `except where the administration has indicated, in the contract notice, that since the procedure will be based on sealed tenders, a contract will be awarded even if only one tender is submitted' (Article 69 of Royal Decree No 827 of 23 May 1924). For a recent application of that provision, see the decision of the Corte dei Conti of 27 February 1997, No 33, in Riv. Corte dei Conti, volume 1, p. 36.

(8) - Case T-203/96 Embassy Limousines, cited above.

(9) - Beentjes, cited above, paragraph 44.

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Opinion of Mr Advocate General Jacobs delivered on 24 February 2000.
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Directive 93/38/EEC - Public works contracts in the water, energy, transport and telecommunications sectors - Electrification and street lighting works in the département of the Vendée - Definition of work.
Case C-16/98.

1. The issue in this case concerns the basis for calculating the value of a works contract in order to determine whether the Community provisions on procurement procedures apply. Specifically, where contracts for work on electricity supply and street lighting networks are to be carried out in a number of localities within the same overall administrative area, are all or any of them to be aggregated for the purposes of Council Directive 93/38 (the Directive) when, although awarded by separate local authorities, they are supervised and coordinated by a single agency set up by those authorities to provide technical and administrative support, when the content of the contracts is largely identical for each type of network and similar as between them, when the work is to be carried out over the same period and when the invitations to tender are all published simultaneously?

The relevant provisions of the Directive

2. The Commission alleges a failure to fulfil the obligations laid down by Article 4(2), Article 14(1), (10) and (13) and Articles 21, 24 and 25 of the Directive. A number of the definitions given in Articles 1 and 2 are also relevant.

3. Article 1(1) defines, inter alia, public authorities as the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law. Under Article 2(1), the Directive is to apply to contracting entities which: (a) are public authorities... and exercise one of the activities referred to in paragraph 2;.... Those activities include the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity, or the supply of electricity to such networks.

4. Article 4(2) provides: Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.

5. Article 14 provides:

1. This Directive shall apply to contracts the estimated value, [net] of VAT, for which is not less than:

...

(c) ECU 5 000 000 in the case of works contracts.

...

10. The basis for calculating the value of a works contract for the purposes of paragraph 1 shall be the total value of the work. "Work" shall mean the result of building and civil engineering activities, taken as a whole, which are intended to fulfil an economic and technical function by themselves.

In particular, where a supply, work or service is the subject of several lots, the value of each lot shall be taken into account when assessing the value referred to in paragraph 1. Where the aggregate value of the lots equals or exceeds the value laid down in paragraph 1, that paragraph shall apply to all the lots. However, in the case of works contracts, contracting entities may derogate from paragraph 1 in respect of lots the estimated value net of VAT for which is less than ECU 1 million, provided that the aggregate value of those lots does not exceed 20% of the

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overall value of the lots.

...

13. Contracting entities may not circumvent this Directive by splitting contracts or using special methods of calculating the value of contracts.

6. Articles 21, 24 and 25 of the Directive fall within Title IV, Procedures for the award of contracts. Article 21(1) provides that calls for competition are to be made by means of a notice drawn up in accordance with one of the annexes to the Directive, which is to be published in the Official Journal of the European Communities (the OJEC) in accordance with Article 21(5). The relevant annex in the present case is Annex XII, which lists in detail the information to be provided. Under Article 24(1), contracting entities which have awarded a contract are to communicate the results of the awarding procedure to the Commission within two months of the award, again by means of a notice drawn up in accordance with one of the annexes (in the present case Annex XV), to be published in the OJEC in accordance with Article 24(2). Under Article 25(1), contracting entities must be able to supply proof of the date of dispatch of both of the above types of notice. Article 25(5) prohibits publication in any other way before notices are dispatched to the Office for Official Publications of the European Communities.

Facts

7. In the French département of Vendée, various municipal authorities have formed syndicats intercommunaux (joint municipal groupings) for the purpose of administering their electricity supply networks. In 1950, all of those syndicats intercommunaux and two individual municipalities (hereinafter all referred to together as the local entities) set up a syndicat départemental, now known as the Syndicat Départemental d'Electrification de la Vendée or by its acronym SYDEV. The local entities did not thereby cease to exist, but SYDEV took over responsibility for certain of their tasks. It appears from documents produced by the French Government that SYDEV's competences were governed at the material time (1994-95) by an arrêté préfectoral (prefectoral order) of 3 October 1960, although the relevant provisions were subsequently modified (in 1997).

8. Under Article 1 of the 1960 arrêté préfectoral, SYDEV's objects were to include:

(1) joint exercise of the rights conferred on local authorities by statute or regulation as regards the production, transport, distribution and use of electrical energy, in particular under the Law of 8 April 1946 on the nationalisation of electricity and gas, and of all the responsibilities conferred on the member syndicats and municipalities;

(2) joint organisation of the services which they are to provide in order to ensure the proper operation and best possible exploitation of their distribution of electricity;

(3) in general, interest and participation, where appropriate, in all activities pertaining to electricity and its use within the framework of the laws and regulations in force.

9. Article 2 gives a non-exhaustive list of the activities in which SYDEV was to engage in pursuit of those objects. They include: representing the member authorities; organising administrative, legal and technical planning and research services; drawing up the general inventory of the requirements of the département and promoting the general and periodic programmes of works relating to electricity infrastructure in the communes; harmonising the rates charged for electricity; entering into agreements with electricity operators holding a concession; and implementing technical and financial measures.

10. Under SYDEV's 1997 statutes, but not under the 1960 arrêté préfectoral, it is to act both as maitre d'oeuvre (supervisor/manager) and as maitre d'ouvrage (contracting authority) on behalf of its members.

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11. On 21 December 1994, SYDEV sent for publication in the Bulletin Officiel des Annonces des Marchés Publics (the official French bulletin of notices concerning public works and service contracts, the BOAMP) invitations to tender for a number of works contracts, 37 of which are in issue in the present case. The contracts in question related to extension and maintenance work to be carried out, over a period of three years, on existing electricity supply and/or street lighting networks under the responsibility of the members of SYDEV. All the invitations to tender were published in the BOAMP on 12 January 1995.

12. The notices to which this case relates involve 20 of SYDEV's 23 members and, in all but three cases, there are notices for both electrification and street lighting works for each member. In numerical terms, they thus cover some 80% of all the electricity supply and street lighting networks in the département.

13. In all the notices published in the BOAMP for the 37 contracts in question, the awarding body was stated to be SYDEV and tenders were to be sent to the Works Department of SYDEV at its address, although the name of the local entity concerned was to be added in each case. The description of the work to be carried out on the electricity supply networks was the same in all cases: electrification work and associated generated work such as, for example, civil engineering on the telephone network, civil engineering on the cable television network, the public address system. The work on the lighting networks was described in all cases as: street lighting work and associated generated work such as, for example, the public address system.

14. In most of the notices published in the BOAMP, the estimated value of each individual contract over three years was below the threshold of ECU 5 000 000 (equivalent, at the material time, to FRF 33 966 540) for the application of the Directive to works contracts. Their aggregate value was, however, FRF 609 000 000 (FRF 483 000 000 for the electrification contracts and FRF 126 000 000 for the lighting contracts). For one of the electrification contracts and 13 of the lighting contracts, the estimated value was below the threshold of ECU 1 000 000 (equivalent to FRF 6 793 308 at the material time) for the derogation in the second half of the second subparagraph of Article 14(10) of the Directive, subject to their aggregate estimated value being also less than 20% of the relevant total.

15. Five of the electrification contracts were nevertheless for an estimated value in excess of the ECU 5 000 000 threshold, and notices regarding those contracts and one other slightly below the threshold (for FRF 30 000 000) were sent by SYDEV for publication in the OJEC. Although the requests for publication were sent on SYDEV's headed paper, the notices bore, first, the name of the local entity in question, followed by an indication that the work was to be supervised by SYDEV. Again, tenders were to be sent to SYDEV at its address, with the name of the local entity to be added in each case. The six notices were published in the OJEC on 6 January 1995, although the information provided (identical to that published in the BOAMP) was insufficient to enable all the headings set out in Annex XII to the Directive to be completed. In each case, the name of the contracting entity was published as SYDEV, followed in all but one case by the name of the relevant local entity.

16. The award procedure was of a type comprising three stages. First, a short list of tenderers was drawn up on the basis, it appears from the records of the award procedures produced by the French Government, of whether tenderers had produced all the required certificates as to compliance with administrative requirements and capacity to perform the work in question. Second, one of those tenderers was selected, apparently on the basis of the best offer made. Offers were in the form of a percentage difference from the proposed list of prices, the offer representing the lowest price being accepted in all the cases in respect of which documents have been produced. Finally, the successful tenderer was to be given orders to carry out specific items of work over the three-year

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period.

17. Notices concerning the award of the 37 contracts with which this case is concerned, including the six published in the OJEC, were published in the BOAMP on 29 September 1995, the body which awarded the contract being identified in each case as SYDEV. No notice concerning the award of any of them was ever sent for publication in the OJEC. In all cases, the notices show that a firm with a local address was awarded the contract. However, at least some of the successful tenderers were in fact large undertakings with branches throughout France; four of the same names were also successful tenderers for similar contracts in Dordogne cited by the Commission in its application. In 10 of the 17 cases where both electrification and lighting work was to be carried out for the same local entity, the same tenderer was awarded both contracts, in three cases one of the contracts was shared with another tenderer and in the remaining four separate contracts were awarded to different tenderers. Overall, there were 10 successful tenderers for the 37 contracts, their success rate ranging from a single shared contract to eight full contracts and two shared contracts, and from FRF 6 000 000 to FRF 114 000 000 plus a share of FRF 48 000 000.

18. The French Government has produced records of the award procedure for the electrification and lighting contracts for three of the local entities on whose behalf an invitation to tender (for the electrification contract) was published in the OJEC. They do not indicate whether any non-local firms submitted tenders (no addresses are given), but it is possible to see that: (i) all the records are presented in an identical format and bear SYDEV's name at the top; (ii) the general terms of the invitations to tender state that the work will be carried out on the territory of the Syndicat, the exact specification of the works to be constructed ["des ouvrages à construire"] being communicated in due course by SYDEV to the contractor chosen; (iii) the members of the boards which opened and decided on the tenders were different for the different local entities (a representative of SYDEV being present on some, though not all, occasions) and tenders were opened on different days or at different times; (iv) the lists of tenderers are similar, though not identical, for the three local entities and for the two types of contract for each of them; and (v) the offers of each individual tenderer for the same type of work in different localities were not always identical.

Procedure

19. On 17 January 1996, its attention having been drawn to the possibility that the above procedures infringed Community law, the Commission sent the French Republic a letter of formal notice alleging that separate lots had been treated as separate contracts, that two-thirds of those contracts had not been notified in the OJEC and that an inappropriate procedure had been used. On 7 April 1997, following the French Government's denials, the Commission sent a reasoned opinion under Article 169 of the EC Treaty (now Article 226 EC) alleging that: (i) inaccurate information of the volume of work had been given, thus discriminating against tenderers from other Member States; (ii) a single programme of works had been split on geographical and technical pretexts in order to avoid publication of a number of lots in the OJEC; (iii) the concepts of contracting entity, association of contracting entities, lots and contracts had been misapplied; and (iv) the procedure used was not provided for in the Directive.

20. On 22 January 1998, the Commission brought the present action, in which it seeks a declaration that in the procurement procedure issued by the Syndicat Départemental d'Electrification de la Vendée in December 1994 for the award of contracts for electrification and street lighting work, the French Republic failed to fulfil its obligations under Articles 4(2), 14(1), (10) and (13), and also under Articles 21, 24 and 25, of Directive 93/38/EEC. The Commission and the French Republic presented oral argument at the hearing on 16 November 1999.

Analysis

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Applicability of the directive

21. The contracts in issue were advertised and awarded in early 1995. From the Court's judgment in Case C-311/96 Commission v France, it is clear that the Directive had not been transposed in France at that time, but it is not disputed that the relevant authorities should have complied with it or that the Commission is entitled to bring an action concerning an individual instance of failure to comply with a directive which has not yet been implemented.

The alleged infringements

22. The Commission makes two basic claims. First and foremost, it claims that SYDEV separated on both technical and geographical pretexts what was for the purposes of the directive a single works contract into a number of smaller contracts, thereby avoiding for the most part the requirement of publication in the OJEC, misleading potential tenderers as to the true scope of the work and making it appear considerably less attractive for other than local firms to submit a tender, to the disadvantage in particular of tenderers from other Member States. Secondly, it asserts that the notices of invitation to tender sent for publication in the OJEC were incomplete and no notices of the awards were ever sent.

Failure to provide certain details and to send notices of awards

23. The French Government does not, essentially, dispute the second claim, which relates to failure to comply with Articles 21 (as regards the missing information which should have been provided in the notices which were sent to the OJEC), 24 and 25 of the Directive. It admits that the information sent was incomplete and that no notices of the awards were sent. It is thus undisputed that, by failing to provide full details in accordance with Annex XII in respect of the six calls for competition published in the OJEC and by failing to communicate details of the award of those contracts, the French Republic failed to fulfil its obligations under Articles 21(1) and 24(1) and (2) of the Directive.

24. However, in view of the admission that no notices were sent other than in respect of the six calls for competition which were published, I do not consider it necessary or appropriate for the Court to make a declaration as regards failure to supply proof of the date of dispatch in accordance with Article 25(1) of the Directive. Nor was there any infringement of Article 25(5) in respect of the notices which were sent, since the documents produced to the Court establish that they were dispatched on the same day to the OJEC and the BOAMP.

Scope of the allegation relating to separate treatment of the contracts

25. The main issue is whether the contracts should have been aggregated for the purposes of Article 14(10) and/or whether their separation constituted illegitimate splitting, contrary to Article 14(13), leading in either case specifically to a failure to publish notices in the OJEC where such notices should have been published under Article 21.

26. In the French Government's view it was correct to treat them all as separate contracts for separate works.

27. The Commission considers that for the purposes of the Directive they should have been treated as lots of the same overall works contract and not separately, whether on a geographical basis (separate contracts for each local entity) or on a technical basis (separate contracts for electrification and lighting).

28. There are three possible configurations in the Commission's allegation: that the electrification and lighting work should have been treated as a whole for each local entity but not for the département, that all the electrification work and all the lighting work should have been treated as two separate wholes for the whole département, or that all the work of both types should have been treated as

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a single whole for the whole département. The remaining possibility is, of course, that argued for by the French Government.

29. Of the 37 notices with which this case is concerned, five were for an estimated value of over ECU 5 000 000, those five and one more (all for electrification contracts) were in fact published in the OJEC and 14 (all but one of which were for lighting contracts) were for amounts below ECU 1 000 000.

30. If the electrification and lighting contracts had been aggregated for each local entity separately (if separation were justified on geographical but not technical grounds) the value would have risen above the ECU 5 000 000 threshold in only one case - in which a notice was in fact published in the OJEC for the electrification contract (FRF 30 000 000) and the lighting contract was for less than ECU 1 000 000 and 20% of the total for the local entity. Thus, if it were to be found that there were justifiably separate contracts for each local entity, but that the separation between electrification and lighting was not justified, the infringement would be confined to the failure to publish calls for competition for lighting work for the five remaining local entities where notices of the electrification contracts were published and where the lighting contracts were worth more than ECU 1 000 000.

31. If, on the other hand, all the contracts for the département were aggregated in each category (if separation were justified on technical but not on geographical grounds), both categories would be well above the ECU 5 000 000 threshold. One electrification contract (for FRF 6 000 000) would then have been exempt from the need for publication by being under the threshold of ECU 1 000 000 and 20% of the total for electrification. Those of the lighting contracts which fall below the threshold total more than 20% of the total for lighting, but up to six of them could be exempted before that percentage (some FRF 25 000 000) was reached. Thus, if separation were justified on technical but not geographical grounds, the infringement would concern 12 electrification contracts and 12 lighting contracts.

32. Finally, if all the contracts in both categories were aggregated together for the département (if separation were unjustified on either technical or geographical grounds), then all 14 under the ECU 1 000 000 threshold would be exempt from the need for publication because they would amount to less than 20% of the aggregate total. The infringement would thus concern 12 electrification contracts but only 5 lighting contracts.

33. It is therefore necessary to look at both types of separation because the effects of the three possible approaches to aggregation would be different.

Article 14(10) and Article 14(13): aggregation and splitting

34. It will be recalled that Article 14(1) provides that the Directive is to apply to works contracts for an estimated value of at least ECU 5 000 000. Under Article 14(10), where work is the subject of several lots, it is the aggregate value of all the lots which is to be taken for the purposes of Article 14(1). Article 14(13) provides that contracting entities may not circumvent the Directive by splitting contracts.

35. It might be thought that those provisions of Article 14(10) and Article 14(13) express the same rule in different terms. I consider, however, that they should be distinguished.

36. Article 14(10) sets out purely objective criteria on the basis of which it may be determined whether the Directive applies. The term work is defined and it is the total value of that work, arrived at where necessary by aggregating the values of any lots into which it may be divided, which determines the need to comply with the provisions of the Directive.

37. Article 14(13), on the other hand, introduces a subjective element. It speaks of circumventing

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the Directive by specific types of conduct, namely splitting contracts or using special methods of calculating value. That wording implies a degree of intent in the conduct adopted. Circumvention, like the equivalent concepts used in other language versions, involves deliberate conduct rather than a fortuitous escape. Both the splitting of contracts and the use of special methods of calculation require some intention on the part of the splitter or calculator.

38. It is also true, however, that Article 14(13) of Directive 93/38 appears to contrast with the equivalent provision (Article 6(4)) of Directive 93/37, adopted on the same day, which provides: No work or contract may be split up with the intention of avoiding the application of this Directive (my emphasis). Nevertheless, I consider that the difference is not significant; the import is the same and there is no indication of any will on the part of the legislature to remove the element of intent from the prohibition. Had that been the case, a more neutral wording would certainly have been chosen. It may be noted in this connection that the Commission's Guide to the Community rules on public works contracts, produced in response to a request by the Court, states of the prohibition in Directive 93/37 that it catches any splitting which is not justified on objective grounds and is thus solely designed to circumvent the rules laid down in the Directive.

39. I thus take the view that a breach of Article 14(13) cannot be established in the absence of intent.

40. Article 14(13), moreover, prohibits the splitting of contracts. That concept, in addition to emphasising the element of intent, presupposes the existence of a contract which would, in the normal course of events, have been treated as a single whole but which has been - abnormally - divided into separate contracts.

41. Has the Commission established that the contracts in issue would normally have been treated as a whole by the relevant entities but were deliberately separated to circumvent the application of the Directive?

42. I consider that it has not.

43. On the contrary, no evidence has been put forward that the practice of SYDEV or the various local entities was any different in relation to the contracts in issue in the present case from what it would otherwise have been. The documents produced by the French Government are consistent with its contention that the course followed was the normal one in Vendée and no evidence to the contrary has been submitted by the Commission. At the hearing, the French Government made the point that, had there been any intention to circumvent the Directive, an effort would have been made to do so more discreetly.

44. The Commission's references to practices followed in two other départements are of no particular relevance in that regard, in the absence of evidence of any consistent practice systematically applied throughout France. Nor is it relevant whether, as the Commission alleges, common sense may dictate that electricity supply and street lighting work should be dealt with together - a matter which I shall examine more fully in the context of Article 14(10) - unless it is established that they were deliberately separated in defiance of such an approach. And common sense is often an elusive guide.

45. For an allegation of breach of Article 14(13) to be successful, it would be necessary to establish an intent to circumvent the provisions of the Directive, possibly on the basis of a departure from what would otherwise have been the practice. No specific evidence of either has been produced by the Commission, nor in my view can they be inferred from the circumstances as a whole, which I shall analyse in greater detail below. I thus consider that the Court should not find that in this instance the French Republic has failed to fulfil its obligations under Article 14(13) of the Directive.

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46. None of the foregoing, however, detracts from the possibility that the provisions of the Directive should have applied on objective grounds in accordance with Article 14(10) thereof and that the French Republic may have failed to fulfil its obligations thereunder. The examination of that provision will, therefore, be crucial in my analysis.

Identity of the contracting entity

47. First, however, it is necessary to consider a matter debated at some length between the parties: is it significant whether there was, for the purposes of Community law, a single contracting entity (SYDEV) or a number of separate contracting entities (SYDEV's members, the local entities)?

48. The French Government's point of view is, essentially, that it is impossible to separate the question of the unity of the work involved from that of the unity of the contracting entity; there cannot be a single work where there are separate contracting entities. It has thus argued, vigorously, that each local entity was a separate contracting entity (a maitre d'ouvrage in French law) whereas SYDEV was legally incapable at the material time of acting other than as a technical supervisor, manager and coordinator of the different works (as maitre d'oeuvre).

49. The Commission, after appearing to seek to refute that argument, asserting that the true contracting entity was SYDEV in all cases, stated in response to a question at the hearing that the identity of the contracting entity was not in its view an essential factor in the application of Article 14(10) of the Directive, the aggregation requirement in which could apply also to contracts awarded by a number of different contracting entities, provided that they were for a single work within the meaning of that provision.

50. I agree with that latter view.

51. The definition of work in Article 14(10) makes no reference to the identity of the contracting entity and it is logical that it should not. The aim of the Directive, as is clear from its preamble, its provisions and the surrounding context of other Community public procurement legislation, is to open up the market to Community-wide competition in the areas to which it relates. The principal means which it employs for that purpose are the requirements that standard procedures must be used, that calls for competition must be published at Community level and that there must be no discrimination between tenderers. However, no purpose would be served, and a great deal of unnecessary administrative work would be generated, if those requirements were to apply to all contracts, regardless of their value and of the likelihood that they would interest potential tenderers from other Member States. The thresholds (of ECU 5 000 000 and ECU 1 000 000 for works contracts) are clearly designed to deal with that concern. In order to ensure, though, that those thresholds are effectively observed, there are provisions to prohibit deliberate circumvention (Article 14(13)) and to avert a possible failure to apply them if a single overall works project is subdivided on other - and possibly otherwise legitimate - grounds (in Article 14(10)).

52. The aim is thus to ensure that undertakings in other Member States have the opportunity to tender for contracts or bundles of contracts which, on objective grounds of estimated value, are likely to interest them. Whether such contracts are to be awarded by one contracting entity or by several is not a significant factor in that context. There may well be legitimate reasons, administrative or other, for contracts for portions of a single works project to be awarded separately by different entities, but that will not seriously reduce the interest which the whole project is likely to represent for an appropriately qualified undertaking in another Member State. One might imagine, for example, work to be carried out on a road passing through the territories of different local authorities each having administrative responsibility for a section of highway. The aim of the Directive would not be achieved if its application were to be excluded on the ground that the estimated value of each section was only ECU 3 000 000.

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53. It is true that the definition of a works contract in Article 1(4) of the Directive specifies that it is a contract concluded by one of the contracting entities referred to in Article 2 (my emphasis), which might suggest that for the purposes of Article 14 each works contract must be concluded with a separate entity. However, Article 2 refers to contracting entities in the plural, classifying them in two basic categories, those which are public authorities or undertakings and those which are not. It thus seems more probable that the definition in Article 1(4) is intended to refer to contracting entities of one of the types referred to in Article 2. Moreover, as the Commission has pointed out, the definition of public authorities includes associations formed by one or more of such authorities, which means that a contracting entity need not be a single public authority and need not be the body which actually concludes the contract. It is clear also that the criterion of the total value of the work in Article 14(10) is not the value of a single contract, or the provision would be self-defeating. On the basis of those considerations, I suggest that too much significance should not be attached, for the purposes of Article 14, to the use of the singular in Article 1(4).

54. I therefore take the view that, as regards a possible infringement of Article 14(10) of the Directive in the present case, it is not necessary to decide whether there were a number of separate contracting entities or a single contracting entity in the form of SYDEV.

Article 14(10): a single work or several?

55. The crucial point to be decided is whether the contracts awarded separately for electrification and street lighting work by each of the local entities formed a single work - or a number of larger works aggregated either geographically or technically - for the purposes of the Directive and should thus have been treated together.

56. A work is defined in Article 14(10) as the result of building and civil engineering activities, taken as a whole, which are intended to fulfil an economic and technical function by themselves. This is not a particularly precise definition, nor is any specific help to be found in the guidelines produced by the Commission. As one commentator has put it, identifying a single work should be like defining the proverbial elephant: awarding authorities will know one when they see it. In the present case, however, the Court is called upon to provide some guidance on how to recognise an elephant.

57. One possibility is to start from the purpose of the rules laid down in the Directive. As I have stated, that aim is essentially to ensure that undertakings throughout the Community enjoy the opportunity to compete for contracts exceeding a certain fixed threshold value above which it is likely to be economically profitable to do so. Since in several instances contracts for both electrification and street lighting work were awarded to the same tenderer in different localities - from which it may be deduced that, in theory, a single contractor could have performed all the work of both kinds throughout the département - and since seven of the ten successful tenderers were awarded contracts totalling considerably more than ECU 5 000 000, it would seem logical that tenderers from other Member States should have been given an opportunity to compete. At the hearing, the Commission argued that the requirement to treat a number of contracts as forming a single work and to publish them in the OJEC arises when the contracts are so linked that a Community undertaking is likely to regard them as a single economic operation and to wish to tender for the whole, as it claims was the case here.

58. However, I do not consider that to be the correct approach. Article 14(10) refers to the economic and technical function which the contracted activities are intended to fulfil by themselves and not to the interest which a potential tenderer may have in being fully informed, even though one of the overall aims of the Directive is to protect and further that interest. Although the provisions of the Directive should be interpreted in the light of its aims, the criterion here is specific.

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It is to the intended economic and technical function that we must look, rather than to the way in which the work may be seen by potential tenderers.

59. I take the criterion set out in Article 14(10) to mean that the boundary between work which must be aggregated for the purposes of the Directive and work which may legitimately be treated separately lies between bundles of contracts which, as regards their intended objective, share a common economic and technical function and those which do not.

60. The Commission's position is, essentially, that the work to be done in the present case formed a multiannual electrification programme covering the whole of Vendée and thus had a single economic and technical function. It stresses that the work descriptions are identical within each category and similar as between categories, with all the work to be carried out over the same period within the same geographical and administrative area. The concept of a work cannot be confined in a case such as the present to that of a specific structure or construction.

61. The French Government contends that separate improvement and extension operations on a number of independent networks cannot be regarded as forming a single work intended to fulfil a single economic and technical function. It considers that, in the absence of a specific structure or construction, it is for the contracting entity to define its needs and thus determine the identity of the work. In the present case, each local entity defined its own needs in respect of its own networks, independently of any hypothetical overall work.

62. Neither of the parties has provided the Court with a very full description of the networks involved. However, it appears from what has been said by the French Government, and not denied by the Commission, that the local entities are responsible for individual low-voltage electricity supply networks radiating from transformer substations and serving consumers within their areas; that those networks are interconnectable; and that the street lighting networks, controlled by the individual local entities, are powered from those electricity supply networks.

- Electrification and street lighting: technical considerations

63. The Commission stresses that the description of both types of work (electrification and street lighting) includes work on the public address system and that both types of work were included in the same invitation to tender published by the bodies equivalent to SYDEV in two other French départements (Calvados and Dordogne) in 1995. The French Government emphasises that the work on the electricity supply network is essentially underground, whereas the street lighting work is essentially above ground, and that the two types of work fall under different headings (civil engineering and installation respectively) in the NACE classification as set out in Annex XI to the Directive. At the hearing, it suggested that work on the street lighting networks might not fall within the scope of the Directive at all, since those networks do not involve the production, supply, transport or distribution of electricity but rather its consumption for the benefit of the public.

64. Of those considerations, I consider only the last to be significant. It highlights - even without there being any need to consider that street lighting falls entirely outside the scope of the directive - the distinction which may legitimately be drawn, in terms of intended economic and technical function, between the two types of network. An electricity supply network is intended, technically, to transport electricity from a supplier to individual end-consumers who, economically, must pay that supplier for what they consume. A street lighting network provides lighting in public places. It is itself an end-consumer of the electricity delivered to it by the electricity supply network. The authority providing the service must itself assume the cost - recovering it, presumably, from the population served through some such means as local taxation rather than on the basis of any individual benefit derived.

65. It is thus clear, in my view, that an electricity supply network and a street lighting network

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are intended to fulfil different economic and technical functions. That being so, I do not consider that work to maintain, improve and/or extend networks of the two different types, whether in the same area or not, can be treated together as a single work for the purposes of Article 14(10) of the Directive.

66. That conclusion is not outweighed by the other considerations put forward by the Commission. The fact that a public address system is mentioned in both types of invitation to tender, as associated generated work, does not imply a single economic or technical function. Different parts of a public address system may be carried by electricity supply ducts and by street lighting masts, so that work on either network may generate work on that system, without affecting the economic or technical functions of the networks themselves. Nor does the fact that some other contracting entities may have chosen to offer a single contract for work on both types of network determine whether, in principle, such civil engineering activities, taken as a whole, are intended to fulfil a single economic and technical function.

67. It is thus unnecessary to decide for the purposes of this case whether street lighting falls within the scope of the Directive or not, an issue which has in any event not been properly debated before the Court. If it does not, however, then clearly there can be no question of aggregating such work with electrification work for the purposes of the Directive.

68. I conclude that it was not necessary to aggregate the values of the electrification and lighting contracts for the purposes of the Directive, whether for the département as a whole or for each local entity. The question remains, however, whether the contracts should have been aggregated for the whole département for either category individually.

- Electrification: technical and geographical considerations

69. It appears that each local entity is responsible for the electricity supply network in its area, although the networks are interconnected and the electricity is supplied by the national corporation EDF. The Commission stresses the geographical contiguity of the networks, the simultaneity of the work programmes, the identical nature of the work descriptions and the overall coordination by SYDEV. The French Government emphasises above all that each local entity entered into a separate contract for its own network.

70. That latter consideration, I have concluded, is not relevant to the question of determining whether there was a single work for the purposes of the Directive. Indeed, the present situation would appear comparable to the example which I have cited of a public highway passing through the territories of several local authorities. Although, for administrative reasons, the different local entities have responsibility for the low-voltage supply networks within their areas, those interconnectable networks taken as a whole are intended to fulfil a single economic and technical function: the conveyance and sale to consumers of electricity produced and supplied by EDF.

71. It is true that, as the French Government has pointed out, that reasoning would apply to the whole of the national electricity supply system. However, I agree with the Commission that the work in the present case is clearly circumscribed by what one might call the three unities - of place, time and action. All the electrification contracts in issue were for work to be done within the same département over the same period, bearing the same general description and subject to the same technical control. There is no suggestion that there was work of the same nature to be carried out at the same time over any wider area - covering neighbouring départements or regions, or even the whole national network. In particular, it is implausible that any such work would have come under the supervision of SYDEV. Had that been the case, however, then it could indeed have been argued that all such work constituted a single work for the purposes of the Directive. And in that case, I consider, the conclusion would be not the reductio ad absurdum which the French Government

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seeks to establish but rather that all the invitations to tender would have had to be notified in the OJEC.

72. The fact that the contracts are for a series of separate operations to be carried out at different points in time and space (within the same period of time and the same geographical area) does not mean that they should not be regarded as a single work. If that reasoning were followed, each operation would be a separate work, and not even the French Government has suggested that such should be the case. On the contrary, a series of operations to be carried out within a specified period on a group of networks having a shared economic and technical function must itself be regarded as intended to fulfil a shared economic and technical function. In that connection, it may be recalled that the terms of the 1960 arrêté préfectoral refer to the general inventory of the requirements of the département - a wording which tends to confirm that conclusion.

73. I thus reach the view that all the electrification contracts in issue formed a single work within the meaning of Article 14(10) of the Directive. Their values should have been aggregated for the purpose of determining whether calls for competition should have been published in the OJEC. Six such calls were in fact published, and one other contract was for an estimated value lower than ECU 1 000 000 and 20% of the total, thus qualifying for a derogation in accordance with the second subparagraph of Article 14(10). The failure to publish notices of the remaining 12 contracts, however, all for estimated values above that threshold and totalling somewhat over ECU 26 000 000, constituted an infringement of the Directive.

74. That infringement involved a failure to comply with not only Article 14(1) and (10) of the Directive, as regards the calculation of the value of the work, but also Article 21(1) and (5), because notices were not drawn up and sent for publication in the OJEC, and Article 25(5), because notices were published in the BOAMP.

- Street lighting: technical and geographical considerations

75. I find it more difficult to apply the same reasoning to the work to be carried out on the street lighting networks. It is certainly true that the economic and technical function of each individual network is the same as that of all the others, but I do not consider that they thereby share a common function.

76. Whilst we have not been given any specific account of how street lighting is organised in Vendée, I think it not unreasonable to assume that the networks are independent of each other, as the French Government says. Since street lighting is an activity which consumes electricity, for which each local entity responsible must pay, there would not appear to be any purpose in interconnection, in contrast to the situation as regards the electricity network, which is a supply system with a single supplier. Each network is likely to be supplied from a separate point on the electricity supply system, enabling the consumption of each local entity to be determined. Lighting is, moreover, generally confined to built-up areas. Where such areas are separated by open countryside, as may well be predominantly the case in a largely rural département such as Vendée, the different networks are unlikely to be contiguous. Different local entities may, furthermore, take quite different approaches to street lighting: some may seek to provide as generous a service as possible, whereas others may wish to save ratepayers' money by providing a strict minimum.

77. It is true that the above considerations are largely conjectural with regard to the specific circumstances of the present case. However, the French Government has stressed the mutual independence of the individual networks, and the Commission has produced no evidence to the contrary. In particular, there is no evidence of any unifying economic factor such as might be provided by, for example, a uniform system of local taxation throughout the département to pay for the cost of the lighting.

78. I thus consider that the Commission has not established the existence of a shared economic

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and technical function within the meaning of Article 14(10) of the Directive and that it was not necessary to aggregate the values of all the street lighting contracts in order to determine whether the Directive was applicable, even assuming that street lighting falls within the scope of the Directive.

Article 4(2): discrimination between contractors

79. The Commission's argument here is essentially that, by wrongly publishing only a selection of the invitations to tender in the OJEC, the French authorities placed tenderers from other Member States at a disadvantage since such tenderers, being unaware of the total value of the work and the extent to which it might interest them, would either decide not to compete or allow for proportionately higher fixed costs and thus submit less attractive bids than undertakings having gleaned fuller knowledge of the scope of the work from the BOAMP. The French Government, although it relies principally on its denial of any artificial splitting, asserts that there was no discrimination between tenderers, who were all required to bid a percentage difference from the estimated value of different categories of work with a view to carrying out specific items of work to be determined in the future.

80. Since Article 4(2) prohibits discrimination specifically between suppliers, contractors or service providers, it might be wondered whether it extends also to discrimination between tenderers or, a fortiori, potential tenderers (since we have not been informed that any undertaking from another Member State in fact submitted any tender in this case).

81. I consider that it does. For one thing, the terms supplier, contractor and service provider are not defined in the Directive, whereas tenderer is defined in Article 1(6) as a supplier, contractor or service provider who submits a tender. The term contractor is thus not used in the Directive in the sense of one who has been awarded a contract but in the wider sense of one who aspires to be awarded a contract.

82. Indeed Article 4(1) - and it is worth noting that Article 4 is the first substantive provision in the Directive, defining to a certain extent the scope of what follows - requires contracting entities to comply with the Directive when awarding... contracts, or organising design contests. The juxtaposition of awarding and organising suggests that the term awarding too must be taken as embracing the whole procedure rather than just its final stages, and I consider that Article 4(2) must have the same scope.

83. The Court has, moreover, held the principle of equal treatment to be inherent in the original Community directive on public works contracts and embodied in Article 4(2) of Directive 90/531, the direct and almost identically-worded predecessor of Article 4(2) of the present Directive. Although the Court described the principle as that of equal treatment between tenderers, I consider that, by its very nature, it must apply also to those who may be discouraged from tendering because they have been placed at a disadvantage.

84. That being so, and in view of the conclusion I have reached regarding the failure to aggregate the electrification contracts, I consider that the Commission has established a breach of Article 4(2) of the Directive. Regardless of whether in this case tenderers from other Member States would in fact have been attracted - given the obvious desirability of a local establishment and the risk that they might be awarded only a portion of the total work, thus possibly compromising their calculations as to fixed costs - they were prevented from taking a decision on a proper basis because full information of the whole work was not published in the OJEC as it should have been. Tenderers consulting the BOAMP, however, who will have been predominantly French, had fuller information at their disposal.

85. However, with regard to the six calls for competition actually published in the OJEC, the

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information published in the OJEC was the same as that published in the BOAMP, so that the failure to communicate all the information required by Article 21(1) of the Directive read in conjunction with Annex XII thereto did not entail any discrimination.

Costs

86. Since, in my view, the Commission has established breaches of the Directive in respect of the failure to publish all the required details of the electrification contracts in the OJEC but has failed to establish a breach of Article 14(13) or any breach in respect of the lighting contracts in issue, I consider that, in accordance with Article 69(3) of the Rules of Procedure, the parties should each be ordered to pay their own costs.

Conclusion

87. In view of all the foregoing considerations, I consider that the Court should:

(1) declare that, by failing, in the course of the procurement procedure issued by the Syndicat Départemental d'Electrification de la Vendée in December 1994 for the award of contracts for electrification work:

- to publish a call for competition in the Official Journal of the European Communities for 12 contracts each with an estimated value exceeding ECU 1 000 000 and forming part of a single work within the meaning of Article 14(10) of Council Directive 93/38/EEC, the French Republic failed to fulfil its obligations under Article 4(2), Article 14(1) and (10), Article 21(1) and (5) and Article 25(5) of that directive;

- to provide full details in accordance with Annex XII to Directive 93/38/EEC in respect of six calls for competition published in the Official Journal of the European Communities, the French Republic failed to fulfil its obligations under Article 21(1) of that directive;

- to communicate details of the award of all the contracts, the French Republic failed to fulfil its obligations under Article 24(1) and (2) of Directive 93/38/EEC;

(2) dismiss the remainder of the application;

(3) order the parties to bear their own costs.

DOCNUM	61998C0016
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1998 ; C ; opinions
PUBREF	European Court reports 2000 Page I-08315
DOC	2000/02/24
LODGED	1998/01/22

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JURCIT	31971L0305 : N 83 61989J0243-N33 : N 83 31990L0531-A04P2 : N 83 87 61992J0431-N19-23 : N 21 31993L0037-A06P4 : N 38 31993L0038-A01PT1 : N 3 31993L0038-A01PT4 : N 53 31993L0038-A01PT6 : N 81 31993L0038-A02P1 : N 3 31993L0038-A02P2 : N 63 31993L0038-A04 : N 82 31993L0038-A04P1 : N 82 31993L0038-A04P2 : N 2 4 80 84 31993L0038-A14 : N 5 31993L0038-A14P10 : N 2 25 34 - 36 44 46 51 53 54 56 58 59 65 73 74 87 31993L0038-A14P1 : N 2 34 74 87 31993L0038-A14P13 : N 2 25 34 35 37 - 40 45 51 86 31993L0038-A21 : N 2 6 25 31993L0038-A21P1 : N 6 85 87 31993L0038-A21P5 : N 6 87 31993L0038-A24 : N 2 6 31993L0038-A24P2 : N 6 31993L0038-A25 : N 2 6 31993L0038-A25P1 : N 6 24 31993L0038-A25P5 : N 6 24 74 87 31993L0038 : N 1 61994J0087-N51-52 : N 83 61996J0311 : N 21
SUB	Approximation of laws
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Jacobs
JUDGRAP	Skouris
DATES	of document: 24/02/2000 of application: 22/01/1998

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Opinion of Mr Advocate General Léger delivered on 21February2002.
Kingdom of Spain v Commission of the European Communities.
EAGGF - Clearance of accounts - Financial year 1993.
Case C-349/97.

DOCNUM	61997C0349
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FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1997 ; C ; opinions
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DOC	2002/02/21
LODGED	1997/10/13
JURCIT	31966R0136-A20QUATER : N 64 66 31966R0136-A20QUATERP1LB : N 58 31966R0136-A20QUATERP2LB : N 59 31970R0729-A02 : N 87 260 31970R0729-A03 : N 260 31970R0729-A03P1 : N 87 31970R0729-A08P1 : N 359 31970R0729 : N 92 31972R1723-A01P3 : N 209 31975R0154-A01P1 : N 147 31975R0154-A03P1 : N 259 31975R0154-A03P3 : N 259 260 31975R0154-A03P5 : N 240 243 264 269 - 271 31975R3788-A01P2LB : N 147 31977L0062-A06 : N 253 31977L0062-A06P1LG : N 252 31977L0062 : N 250 256 31978R3089-A07L1 : N 288 31979R1794 : N 259 31982R1413 : N 57 64 66 31984R2261-A02P1 : N 190 31984R2261-A05P3 : N 60 67 31984R2261-A11P3 : N 86 31984R2261-A13 : N 175 31984R2261-A16 : N 157

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31984R2261 : N 86
31984R3061-A01P2 : N 190
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31985R2677-A12P1L1 : N 289
31985R2677-A12P6 : N 301 - 303
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61988J0003 : N 255
61988J0008 : N 334
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61997J0045 : N 282
61997J0059 : N 209
61997J0356 : N 90
61998J0107 : N 250
61998J0263 : N 87 116 117 203
61998J0278 : N 87
61999J0094 : N 250
61999J0374 : N 104 334
62000J0063 : N 363

SUB Agriculture ; EAGGF ; Oils and fats

AUTLANG French

APPLICA Spain ; Member States

DEFENDA Commission ; Institutions

NATIONA Spain

PROCEDU Application for annulment - successful ; Application for annulment - unfounded

ADVGEN LA¬ger

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JUDGRAP Colneric

DATES of document: 21/02/2002
of application: 13/10/1997

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Opinion of Mr Advocate General Alber delivered on 16 July 1998.
Connemara Machine Turf Co. Ltd v Coillte Teoranta.
Reference for a preliminary ruling: High Court - Ireland.
Public supply contracts - Definition of contracting authority.
Case C-306/97.

A - Introduction

1 The present request for a preliminary ruling by the High Court of Ireland concerns the question whether, for the purposes of Directives 77/62 (1) and 93/36, (2) Coillte Teoranta can be regarded as a contracting authority. (3)

2 Connemara Machine Turf Company Ltd, the plaintiff in the main proceedings, is engaged in the production of machine cut turf and the sale of chemical fertilisers. The defendant in the main proceedings, the Irish Forestry Board (Coillte Teoranta), was established in December 1988 pursuant to the Forestry Act. The greater part of land dedicated to forestry and formerly owned by the State and the Department of Energy was transferred to Coillte Teoranta. In return, the company shares were transferred to the Minister for Energy, the Minister for Finance, two Government civil servants in trust for the Minister for Finance, and to the Government.

3 On 12 March 1993 Coillte Teoranta invited tenders for the supply of certain fertilisers to the value of IR £165 947. Connemara submitted a tender but was unsuccessful. On 10 March 1994 Coillte Teoranta again invited tenders for the supply of certain fertilisers to the value of IR £232 016. Connemara was again unsuccessful with its tender.

4 Coillte Teoranta failed to comply with the Community-law provisions governing the award of public contracts when it invited the tenders; in particular, no notices were published in the Official Journal of the European Communities.

5 Connemara argues in its action that those provisions were infringed; Coillte Teoranta, on the other hand, submits that it is not a contracting authority and is therefore not under any obligation to comply with those provisions of Community law.

6 The High Court of Ireland has accordingly referred the following questions to the Court for a preliminary ruling:

`(1) Is the defendant a "contracting authority" within the definition of the term "contracting authorities" contained in Article 1(b) of Council Directive 77/62/EEC of 21 December 1976?

(2) Is the defendant a "contracting authority" within the definition of the term "contracting authorities" contained in Article 1(b) of Council Directive 93/36/EEC of 14 June 1993?'

B - Relevant legal provisions

Community law

7 Article 1 of Directive 77/62 provides the following definition of a contracting authority:

`For the purpose of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I;

...'

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8 Annex I to Directive 77/62, as amended by Directive 88/295, contains a list of the legal persons governed by public law and bodies corresponding thereto mentioned in Article 1(b). Point VI refers to these as being, in the case of Ireland:

`other public authorities whose public supply contracts are subject to control by the State'.

9 Directive 77/62 was repealed by Directive 93/36. This new directive required to be transposed in national law by 14 June 1994. It had not been transposed in Ireland by that date. It should once more be borne in mind that the tendering procedures had been completed before that date.

10 The concept of a contracting authority is henceforth defined as follows in Article 1:

`For the purpose of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

...'

11 The relations between the Department of Agriculture, Food and Forestry, the Department of Finance and the shareholders of Coillte Teoranta are defined by the Forestry Act 1988 and by the Memorandum and Articles of Association of the company itself. For reasons of clarity, it will be necessary to return to the individual provisions of those rules during the examination of what constitutes a contracting authority.

C - Analysis

12 The question first arises as to which provisions of Community law are applicable. The national court making the reference seeks an interpretation of Directives 77/62 and 93/36.

13 It is common ground that Directive 77/62, as amended by Directive 88/295, is relevant. In the view of Coillte Teoranta, the Irish, United Kingdom and French Governments, however, Directive 93/36 or its underlying premisses should also be enlisted for the purpose of reaching a decision in the case.

14 It should, however, be pointed out that the latter directive did not require to be transposed until 14 June 1994 and that Ireland had not yet done so by 22 July 1994. (4) The invitations to tender, however, were made in March 1993 and 1994, and thus at a time when Directive 93/36 had not yet been transposed in Irish law and also did not yet require to be so transposed.

15 It is extremely doubtful to what extent the directive which is later in time can be used for the purpose of interpreting the earlier directive. The above parties, which submit that the Court should proceed in such a manner, rely in this regard on the recitals in the preamble to Directive 93/36, according to which that directive was adopted primarily for reasons of clarity. For that

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reason, they claim, there should be no problem in construing the earlier provisions in the light of the new version or in assessing the facts of the case on the basis of the new definition.

16 First, it should be noted in this regard that the wording of the definition of a contracting authority in Directive 93/36 has been substantially extended and now contains individual features which were nowhere mentioned in the earlier version.

17 The first recital in the preamble to Directive 93/36 does admittedly mention that a new version is required for reasons of clarity. This, it is stated, is necessary since Directive 77/62 had in the past been amended on a number of occasions and further amendments were subsequently to be made. In this way, it was intended to achieve an alignment with the provisions on the award of contracts for public works and service contracts. (5) According to the third recital, however, this alignment relates also to the introduction of a functional definition of contracting authorities. On an a contrario reading, however, this means that the definition which has now been given need not necessarily be identical with that which previously applied, and extreme caution should therefore be taken in using it as an aid to interpretation. The new directive, which has also repealed and replaced Annex I to the old version, contains in its definition of a contracting authority additional matters which do not merely amplify the previous definition or general thinking on the topic but also constitute modifications which go further and cannot be applied retroactively. Furthermore, in interpreting a provision of Community law it is necessary to consider its wording, its context and its aims. (6) For the present case, therefore, it follows that the facts may be assessed solely on the basis of Directive 77/62.

18 In the view of Connemara, the United Kingdom and French Governments, as well as the Commission, Coillte Teoranta is a contracting authority within the meaning of Directive 77/62, with the result that notice of the supply contracts required under Article 9 of the directive to be published in the Official Journal of the European Communities, something which, however, was not done in this case.

19 In support of this contention, it is submitted that Coillte Teoranta fulfils important public functions, such as the conservation of national forests and the support of forestry development in Ireland. Coillte Teoranta owns 12 national parks and makes leisure facilities available at more than 180 locations throughout Ireland. In order to meet those objectives, the company was established by statute and financially provided for by the Irish Government. It also follows from its Memorandum and Articles of Association that the Government appoints the Board and its Chairman and that the company's finances are controlled by the Government.

20 Against this, Coillte Teoranta and the Irish Government argue that it is simply a State-owned private undertaking. Although the State has a majority shareholding, it does not exercise any influence over the day-to-day running of the company. Coillte Teoranta is required under the Forestry Act to carry on its business in a commercial manner. State influence is limited to general commercial policy, in the same way as that which any majority shareholder in any other company might exercise. The objectives and tasks of the company, however, are exclusively commercial in nature. Coillte Teoranta is thus in competition with other undertakings and is in no different position whatever compared with those undertakings. If Coillte Teoranta makes its facilities and property available to the public for leisure and recreational purposes, this is done on commercial grounds, since the benefit derived from these activities exceeds the costs. In short, neither Coillte Teoranta itself nor the conclusion by Coillte Teoranta of contracts with other undertakings is subject to influence by the State in excess of that which majority shareholders in other companies would be recognised as having.

21 As already mentioned, the State, regional or local authorities, and - in the case of Ireland - other public authorities under Point VI of Annex I whose public supply contracts are subject

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to control by the State constitute contracting authorities for the purposes of Article 1(b) of Directive 77/62.

22 This means that in the present case it is first necessary to examine whether Coillte Teoranta can be subsumed within the concept of the `State'.

23 In connection with such an examination, the Court was called on in the Beentjes case (7) to determine the status of a body which did not have any separate legal personality, the functions and composition of which were regulated by statute and whose members were appointed by a committee of the Province in question. It was required to apply rules laid down by a central committee established by a State decree and the members of which were appointed by the Government. The State ensured compliance with the obligations arising from the body's legal transactions and financed the public works contracts which it awarded.

24 The legislation applicable at that time was Directive 71/305; (8) however, the definition of a contracting authority contained therein also corresponds to that found in Directive 77/62.

25 In Beentjes, the Court concluded that the concept of the State, as used in the directive, fell to be interpreted in functional terms. (9) The aim of the directive was, for the Court, to ensure `... the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts...'. (10) The Court accordingly concluded that the body at issue in that case had to be regarded as coming within the notion of the State, since its composition and functions were laid down by legislation and it was dependent on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it was its task to award. That, the Court ruled, was the case even though the body was not part of the State administration in formal terms. (11)

26 A similar approach should be taken in the present case. The objective of the directive here relevant does not differ in any essential respects from that at issue in Beentjes. According to the first and second recitals in its preamble, Directive 77/62 is designed to ensure better supervision of the prohibition of restrictions on the free movement of goods in regard to public supply contracts. In addition, the directive - according to the 12th recital in its preamble - set itself the task of developing effective competition in the field of public contracts. In order, however, to guarantee competition free from any discrimination, those to whom the directive is addressed - namely, the contracting authorities - must be determined in a functional and not exclusively a formal perspective.

27 In functional terms, Coillte Teoranta cannot be regarded as part of the State. Admittedly, the company was established by statute and provided with financial means by the public authorities, it must consult with the Minister for Finance in regard to issues of forestry development in areas of economic interest, its directors are Government appointees, and the annual plan for the sale of land and timber must be agreed with the Government.

28 Coillte Teoranta does, however, have a separate legal personality. The public contracts which it awards are financed out of the company's capital, which, although originally provided by the State, has in the meantime also been guaranteed through private commercial activities. No public contracts are awarded at the expense of the State. All things considered, State influence on the business activities of Coillte Teoranta must be regarded as being appreciably less than was the case with regard to the facts underlying Beentjes. The functional approach thus does not point to the company's being dependent on the State in such a way as to justify the conclusion that it constitutes part of the State.

29 Once it is held that Coillte Teoranta, in accordance with the view here expressed, cannot be subsumed within the notion of the State under Article 1(b) of Directive 77/62, it remains to be examined whether it may be a public authority whose public supply contracts are subject to control

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by the State within the meaning of Annex I. The decisive factor in this, apart from looking after public interests, is the degree of influence which the State may exercise over the award of public contracts.

30 Connemara, the United Kingdom and French Governments, and the Commission take a similar viewpoint to that on the issue previously discussed. They argue that, particularly in view of the fact that the company was established by statute, that its Board is appointed by the Government, and that its initial capital was provided by the State, which continues to control its finances, it follows that Coillte Teoranta is an authority whose public contracts are controlled by the State.

31 Against this, Coillte Teoranta and the Irish Government again point to the commercial character of the company, which finds itself in competition with other private undertakings on the market in question. It does not enjoy any preferential rights such as would give it an advantageous position in relation to others. State influence is limited to that which other shareholders are recognised, or may be recognised, as having. In legal terms, the State has no possibility of influencing day-to-day business, nor has it ever attempted to exercise such influence. Coillte Teoranta is treated under company law in the same way as any other company. Its activities are directed at making profits and are independent of ministerial instruction.

32 The crucial question is therefore the following: were the public supply contracts which Coillte Teoranta awarded subject to control by the State, in the terms used for Ireland by Annex I to Directive 77/62?

33 Here, too, an approach should be adopted which does not consider the matter merely from the formal aspect. All public undertakings are subject to some form of State control; that, however, is not tantamount to their also being contracting authorities within the meaning of the directive.

34 The concept of public undertakings is to be found in Article 90(1) of the EC Treaty. That provision prohibits Member States from enacting or maintaining in force, in relation to such undertakings, measures that are contrary to Community competition policy. The characteristic feature of public undertakings is that public authorities can influence the course of business. For that purpose, it suffices if there is a possibility of influence being exerted, and such a possibility will always exist if the State holds the greater part of the company capital. (12)

35 Its status as a public undertaking, however, still provides no indication as to whether the public supply contracts which Coillte Teoranta awards are subject to control by the State. Since Annex I to Directive 77/62 refers expressly to State control over public supply contracts, this point requires to be considered in concrete terms. (13) Accordingly, the supply contract in question would, under the relevant provisions, have to be open to State control in such a way that public authorities are able to exert influence on the manner in which the contract is concluded.

36 The State initially provided Coillte Teoranta with its entire company capital. In return, the State received corresponding shares in the company. The annual land and timber sale plan must be agreed with the Department. The company directors are appointed by the competent ministers; investments exceeding a total amount of IR £250 000 require the approval and consent of the competent ministers. The Minister for Energy can set out financial objectives. The company also carries out functions in the public interest, such as the provision of leisure, recreation, sporting, educational, scientific, cultural and holiday facilities on its property. The Board of Directors looks after the day-to-day business of the company, which includes decisions on the award of contracts.

37 There is, however, no provision under which it would be possible for the Minister or any civil servant to instruct the company or its directors to award contracts (possibly on the basis of non-commercial criteria). The company is under an obligation to conduct its business in a cost-effective and economic manner. Its directors are under an obligation to exercise their powers, in accordance

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with their duty of loyalty to the company, in a manner independent of their own interests. Although the company is required to abide by the principles of national forestry policy, this applies in equal measure to every owner of forest land in Ireland. The directors must submit annually a five-year development plan, indicating in detail the plans regarding management and development of the company and its assets, as well as acquisition and sale of property, forestry objectives and profit forecasts. Here too, the relevant provisions do not grant any powers to the State authorities to intervene for the purpose of regulating the company's day-to-day activities.

38 Therefore, although the criteria mentioned make it possible to point to a general State influence on the company, that influence does not, under the provisions material to the present case, suffice to exercise specific control over the award of public supply contracts. The conclusion of contracts relating to public supplies is not dependent on action by State authorities. Coillte Teoranta is for that reason not a contracting authority within the meaning of Directive 77/62.

39 It follows from the foregoing considerations that Coillte Teoranta does not come within the scope of Directive 77/62.

40 Even though Directive 93/36 is not applicable to the present case, given that the contracts were concluded before that directive entered into force, and since that directive also modifies and does not simply clarify, the following may, in the alternative, be noted with regard to the national court's second question. In view of the definition of a contracting authority in Article 1(b), as extended by amendments, it would be necessary to examine whether Coillte Teoranta is a body governed by public law. It would first have to have been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. This would probably have to be answered in the affirmative, since Coillte Teoranta also - or primarily - has the function of providing leisure and recreational facilities for the public on its property. Even though these do not represent the company's only functions, this does not affect the outcome, so long as it attends to needs which it is specifically required to meet. (14) In addition, Coillte Teoranta has its own legal personality. If the company's board consists in the majority of State appointees, Coillte Teoranta may well be a contracting authority within the meaning of the new Directive 93/36. As stated above, however, that directive is not applicable to the present case. The second question submitted by the national court does not therefore require to be answered.

D - Conclusion

41 In light of the foregoing considerations, I propose that the questions submitted by the High Court of Ireland be answered as follows:

A company such as that described in the order for reference is not a contracting authority within the meaning of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts.

(1) - Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Directive 88/295/EEC (OJ 1988 L 127, p. 1).

(2) - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

(3) - In Case C-353/96, Treaty-infringement proceedings have been brought by the Commission against Ireland, the Commission arguing that Coillte Teoranta failed to publish notice of its invitations to tender. See Advocate General Alber's Opinion of 16 July 1998 in that case ([1998] ECR I-8565, I-8567).

(4) - This becomes apparent from the Irish Government's reply of 22 July 1994 to the Commission's

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letter of formal notice.

(5) - Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(6) - Case C-84/95 Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General [1996] ECR I-3953, paragraph 11 and the references contained therein.

(7) - Case 31/87 Beentjes v Netherlands State [1988] ECR 4635.

(8) - Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

(9) - Beentjes, cited above in footnote 7, paragraph 11.

(10) - Beentjes, cited above in footnote 7, paragraph 11.

(11) - Beentjes, cited above in footnote 7, paragraph 12.

(12) - Joined Cases 6/73 and 7/73 Commercial Solvents v Commission [1974] ECR 223, paragraph 41, and Joined Cases 188/80 to 190/80 France, Italy and United Kingdom v Commission [1982] ECR 2545, paragraph 26.

(13) - See in this connection the Opinion of Advocate General Lenz in Case C-247/89 Commission v Portugal [1991] ECR I-3659, 3670, point 59.

(14) - See in this connection the judgment in Case C-44/96 Mannesmann Anlagebau Austria and Others v Strohal Rotationsdruck [1998] ECR I-73, in particular paragraphs 25 and 26, and the Opinion delivered on 19 February 1998 by Advocate General La Pergola in Case C-360/96 BFI Holding v Gemeente Arnhem and Gemeente Rheden [1998] ECR I-6821, I-6824.

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ADVGEN Alber

JUDGRAP Jann

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Opinion of Mr Advocate General Saggio delivered on 1 October 1998.
Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Landeskrankenanstalten-Betriebsgesellschaft.
Reference for a preliminary ruling: Unabhängiger Verwaltungssenat für Kärnten - Austria.
Public service contracts - Effect of a directive not transposed into national law.
Case C-258/97.

1 By order of 8 July 1997, the Unabhängiger Verwaltungssenat für Kärnten (Independent Administrative Senate for Carinthia) referred to the Court for a preliminary ruling five questions concerning the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (`the Review Directive') (1) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (`the Services Directive'). (2)

Legislative context

2 Article 1(1) of the Review Directive, as amended by Article 41 of the Services Directive, requires the Member States to take the measures necessary to ensure that decisions taken by contracting authorities may be reviewed effectively and rapidly on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

3 Article 2(7) requires the Member States to ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

4 The following paragraph of that article has particular relevance in this case. It will therefore be helpful to reproduce it in full:

`Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

5 A number of provisions of the Services Directive are also relevant to the present case. That directive contains rules for the award of public service contracts, which must be observed within the Community for all public service contracts with a value exceeding the minimum threshold provided for in Article 7. Article 8 requires contracts which have as their object services listed in Annex I A to be awarded in accordance with the provisions of Titles III, IV, V and VI, whereas those listed in Annex I B are to be awarded in accordance only with Articles 14 and 16. If the contract has as its object services listed in both annexes, the choice of the applicable rules is to be determined by the service with the greater value. The services listed in Annex I A include, in Category No 12, architectural services; engineering services and integrated engineering services; related scientific and technical consulting services; technical testing and analysis services.

6 Under Article 168 of the Act of Accession, (3) both directives should have been transposed into Austrian law by the date of accession, that is, 1 January 1995. The Review Directive was transposed

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at Federal level by the Bundesgesetz über die Vergabe von Aufträgen (Federal Law on the Award of Public Contracts), (4) which entered into force on 1 July 1994. At the regional level, each of the nine Länder has adopted its own law on the award of public contracts. In the case of Carinthia, the law in question is the Carinthian Auftragsvergabegesetz, which entered into force on 1 January 1994, (5) Section VIII of which governs the procedures for reviewing award decisions.

Under Paragraph 59 of that Law, the body responsible for review procedures is the Unabhängiger Verwaltungssenat für Kärnten, an independent administrative authority charged with reviewing the legality of acts of the Land administration (hereinafter: `the UVK'). The Law of 20 November 1990 (the Carinthian Verwaltungssenatsgesetz) (6) governs the powers, composition and operation of the UVK. The provisions of the Austrian Constitution relating to the structure and operation of the independent administrative senates of the Länder are also applicable. (7)

7 The law implementing the Services Directive, (8) which was adopted by the Carinthian Landtag (Parliament of the Land of Carinthia) on 22 April 1997, entered into force on 1 July 1997, that is, after the end of the period provided for in the Act of Accession. That law expressly excludes from its scope procurement procedures already completed and is therefore not applicable to the facts of the main proceedings, which date back to 1996.

Facts and main proceedings

8 The main proceedings concern the award to the company CMT Medizintechnik Gesellschaft mbH, of Vienna, of a service contract relating to the construction of a children's hospital in Klagenfurt. The contract, which was awarded by the Landeskrankenanstalten-Betriebsgesellschaft (the company responsible for the management of regional hospitals), related to a number of engineering services, including planning and consultancy in connection with the installation and operation of various medical facilities.

9 HI Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH, of Munich, was a competing tenderer for the same contract. Following its exclusion, it brought review proceedings before the UVK, claiming that the award should be set aside as being in breach of the Community legislation on public service contracts. In particular, it alleged that the conditions included in the contract notice and the rules applied in carrying out the procedure for the award of the contract did not conform with the provisions of the Services Directive.

10 The UVK considered it necessary, in order to resolve the dispute, to refer to the Court of Justice for a preliminary ruling five questions worded as follows:

`1. Is Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts to be interpreted as meaning that the Unabhängiger Verwaltungssenat für Kärnten fulfils the conditions for a body responsible for review procedures with respect to services?

2. Are these or other provisions of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, from which there derives an individual right to have review proceedings conducted before authorities or courts which comply with the provisions of Article 2(8) of Directive 89/665/EEC, to be interpreted as being sufficiently precise and specific that, in the event of non-transposition of the directive in question by the Member State, an individual may successfully assert that legal right against the Member State in legal proceedings?

3. Are the provisions of Article 41 of Directive 92/50/EEC in conjunction with Directive 89/665/EEC, which are the basis of an individual's right to have review proceedings conducted, to be interpreted

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as meaning that a national court with the characteristics of the Unabhängiger Verwaltungssenat für Kärnten may, when conducting review proceedings on the basis of national provisions such as Paragraph 59 et seq. of the Carinthian Auftragsvergabegesetz and the regulations relating thereto, disregard those provisions if they prevent the carrying out of review proceedings under the Carinthian Auftragsvergabegesetz for the award of service contracts, and therefore nevertheless conduct review proceedings in accordance with Section 8 of the Carinthian Auftragsvergabegesetz?

4. Are the services mentioned in the facts of the case, with reference to Article 10 of Directive 92/50/EEC, to be classified as services coming under Annex I A, Category No 12, of Directive 92/50/EEC (architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services)?

5. Are the provisions of Directive 92/50/EEC to be interpreted as satisfying the conditions laid down in the judgment in Case 41/74 Van Duyn (paragraph 12) for the direct applicability of a Community directive, with the result that services coming under Annex I A of the directive are to be awarded under the procedure therein mentioned, or are the relevant provisions of the directive in connection with the services mentioned in Annex I A capable of fulfilling the conditions laid down in the said case?'

Admissibility and the first question

11 Before considering the questions, it is necessary to determine whether the UVK is competent to make a reference to the Court of Justice under the preliminary ruling procedure. It should be pointed out in that regard that, in these proceedings, as in the Köllensperger case, (9) both the order for reference and the observations of the parties display some confusion between the conditions which apply in general in relation to the concept of `court or tribunal' in Article 177 and the special conditions laid down in Article 2(8) of the Review Directive. For ease of reference, I would reiterate that the latter conditions concern the composition and operation of the independent body responsible for reviewing, at second instance, the legality of awards of public contracts.

12 That said, I should like to make it clear at the outset that I do not share the doubts - which in fact were expressed only by the defendant in the main proceedings - concerning the competence of the UVK to submit questions to the Court for a preliminary ruling. I am of the opinion that that body fulfils all the requirements, in the light of the case-law, (10) for recognition as a court or tribunal within the meaning of Article 177. (11)

13 The UVK, which is an independent administrative senate within the meaning of Article 129 of the Austrian constitution, (12) was established by the Carinthian Verwaltungssenatsgesetz. That Law, in conjunction with the Carinthian Auftragsvergabegesetz, confers on the UVK exclusive competence to assess, upon application by a party, the legality of administrative measures, including those relating to the award of public contracts. The UVK has the power to set aside awards and to order interim measures (Article 61 of the Carinthian Auftragsvergabegesetz). It is apparent from those provisions that the UVK is established by law and that its jurisdiction is compulsory. Moreover, its enduring nature cannot be disputed since it sits permanently, notwithstanding the fact that its members, including those from the administration, remain in office for a limited number of years. Nor is there any doubt that the body in question applies rules of law, since its composition and operation are governed by the Law on independent administrative senates (Carinthian Verwaltungssenatsgesetze) and the Law on the award of public contracts (Carinthian Auftragsvergabegesetz).

The requirement that its procedure must be inter partes, as that criterion is understood by the Court, is also satisfied. (13) The Law on procedure before the administrative courts, (14) which makes observance of the inter partes principle mandatory, is in fact applicable in the present case

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by virtue of the reference to it in Article 59(2) of the Carinthian Verwaltungssenatsgesetz. Moreover, that conclusion is indirectly confirmed by the Law establishing the UVK, which, in Article 13(5), provides for an oral procedure, under the direction of the President, in which the parties have the right to be heard.

14 Doubts have been expressed, in the course of the written procedure, concerning the conformity of the rules governing the composition and operation of the UVK with the requirement of independence of the judicial body. However, in contrast to my observations in the Köllensperger case, (15) I consider that such doubts are not founded in this case. From an analysis of the applicable rules, it is clear that the UVK has fully independent status which enables it to exercise its judicial function without being subject to undue pressure and interference, especially on the part of the executive.

The UVK's independence and third-party status are guaranteed, first and foremost, by the relevant constitutional provisions. Article 129b(2) of the Bundes-Verfassungsgesetz (B-VG, Federal Constitutional Law) clearly confirms that, in the execution of the tasks entrusted to them by the Constitution itself and by the laws of the Länder, the members of the independent administrative senates may not receive any instructions. The same provision states that cases are to be distributed amongst the members of the Senate in advance for a period fixed by the laws of the Länder. Once a case has been thus assigned to a member of the Senate, it may not then be withdrawn from him except by decision of the President on grounds of serious impediment. Article 129b(3) further provides that, before the expiry of their term of office, the members of the Senate may be removed only in the circumstances expressly provided for by law and that a collective decision of the Senate itself is required for that purpose. Under the next paragraph, the members of the Senate may not engage in any activity which might give rise to doubts as to their independence in the exercise of their functions. It should be added that, by providing that the members of the UVK are to exercise their functions with complete independence and that they are not to be bound by any instructions, Article 5 of the Carinthian Verwaltungssenatsgesetz confirms the guarantees already provided for by the Constitution.

In the light of all those considerations, I am of the opinion that the rules applicable to the UVK fully satisfy the requirements of independence and third-party status which are necessary for proper exercise of the judicial function.

15 Since there are no grounds for doubting the status of the UVK as a court or tribunal, the questions submitted to the Court by that body, which is responsible under the legislation of the Land of Carinthia for reviewing the legality of procedures for the award of public contracts, must be considered admissible.

16 That conclusion also has decisive significance with regard to the answer to be given to the first question. In fact, it supports the view that no useful purpose would be served by the assessment requested by the UVK of whether the rules governing the latter's own composition and operation satisfy the conditions referred to in Article 2(8) of the Review Directive. My reasons for taking that view are the same as those set out in my Opinion in the Köllensperger case: (16) Austrian law entrusts responsibility for review procedures at first and sole instance to a body which is a `court or tribunal' within the meaning of Article 177, whereas Article 2(8) as a whole applies exclusively to cases where Member States prefer, as is their right, to adopt a two-tier system of review comprising determination at first instance by a review body which is not a `court or tribunal' and at second instance by a `judicial' body which is independent both of the contracting authority and of the first-instance review body. It is only when a Member State adopts such a `two-tier' system that the second subparagraph of Article 2(8) of the Review Directive applies, and only in that case, therefore, must the conditions relating to the composition and operation of the independent

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body be observed. It follows that the rules governing the structure and activity of the UVK are not to be assessed in the light of the special conditions set out in Article 2(8) of the Review Directive. (17)

17 I therefore propose that the first question be answered as follows: Article 2(8) of the Review Directive is to be interpreted as meaning that the conditions set out therein concern only the composition and operation of independent bodies responsible for reviewing decisions taken by another body which is competent at first instance to hear review proceedings against the award of public contracts and is not a court or tribunal within the meaning of Article 177 of the Treaty. The provision in question is therefore not relevant as far as the composition and operation of the independent administrative senate of the Land of Carinthia are concerned since the latter is a judicial body which is competent to review, at first and sole instance, measures awarding public contracts.

The second and third questions

18 The second and third questions, which can be examined together, concern the competence of the UVK to hear review proceedings relating to procedures for the award of service contracts even in the absence of specific national provisions implementing Directive 92/50/EEC. I would point out that Article 41 of that directive amended the Review Directive to include within its scope procedures for the award of public service contracts.

19 The Austrian Law implementing the Services Directive entered into force on 1 July 1997, that is, more than two years after the end of the prescribed period. Because of that delay, the award of the contract at issue in the main proceedings took place in conformity with national provisions incompatible with those of the Services Directive. The applicant undertaking in the national proceedings therefore brought review proceedings before the UVK, a body on which, at the material time, domestic law conferred competence to hear only review proceedings concerning awards of supply and works contracts.

20 The national court therefore seeks to ascertain whether, notwithstanding the non-transposition of the directive, an individual is also entitled to use the procedures provided for by Article 2(8) of the Review Directive in relation to the award of a service contract. If the answer is in the affirmative, the court making the reference asks the Court whether such a right may be exercised before a body on which, at the material time, national legislation conferred exclusive competence to hear review proceedings against awards of works and supply contracts.

21 The circumstances of this case display obvious similarities to those of the Dorsch Consult case, cited above, and the Tögel case. (18) In particular, the second and third questions submitted to the Court by the UVK are completely identical to the first and second questions submitted by the Bundesvergabeamt in the Tögel case.

22 In those judgments, the Court reached conclusions to which I can subscribe. It held that `it does not follow from Article 41 of Directive 92/50 that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts'; (19) that is so because, in principle, it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. (20)

Starting from those premisses, the Court held that, although Article 41 of the Services Directive requires the Member States to adopt the measures necessary to ensure effective review in the field of public service contracts, it does not indicate which national bodies are to be the competent bodies for this purpose or whether those bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts. (21)

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The Court added, however, that it is for the national court, in compliance with the requirement that domestic law must be interpreted in conformity with the Services Directive and the requirement that the fullest possible protection of the rights of individuals must be ensured, to determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring review proceedings in relation to awards of public service contracts. The substantive provisions of the Services Directive could then, in so far as they are capable of direct effect, (22) be relied on in proceedings against a State which had failed to transpose it. The national court must determine whether such a right of appeal may be exercised before the same bodies as those which are competent to hear appeals concerning the award of public supply contracts and public works contracts. (23) I would, however, add that in this case it is questionable whether a similar conclusion can be reached: as has been observed previously, the text of the Austrian law, which has been in force since 1 July 1997, expressly excludes application of the Services Directive to proceedings which are already pending.

The Court went on to state that, if the relevant domestic provisions cannot be interpreted in conformity with the Services Directive, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed. (24)

23 The conclusion reached by the Court in the cases cited is entirely appropriate to the circumstances of this case, in which the issue is precisely whether the body responsible under Austrian legislation for determining review proceedings concerning the award of public supply and public works contracts is also competent to hear review proceedings in relation to services. I therefore propose that the second and third questions referred by the UVK be answered as follows: neither Article 2(8) nor other provisions of Directive 89/665/EEC are to be interpreted as meaning that, in the absence of national measures to implement the directive within the period laid down for that purpose, the review bodies of the Member States which are competent in relation to procedures for the award of public works contracts and public supply contracts are also entitled to review procedures for the award of public service contracts. However, the requirement that domestic law must be interpreted in conformity with Directive 92/50/EEC and the requirement that the rights of individuals must be protected effectively mean that the national court must determine whether the relevant provisions of domestic law allow recognition of a right for individuals to bring review proceedings in relation to the award of public service contracts.

The fourth and fifth questions

24 The fourth and fifth questions concern the interpretation of certain provisions of the Review Directive. By its fourth question, the referring court seeks to ascertain whether the service which was the subject of the contract notice published by the Landeskrankenanstalten-Betriebsgesellschaft falls within Category No 12 of Annex I A to the Services Directive. If so, the implication of such a classification would be that the contract should have been awarded in conformity with the procedures referred to in Titles III, IV, V and VI of the Services Directive.

It will be recalled that Category No 12 covers the following: architectural services; engineering services and integrated engineering; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services. That category corresponds to Reference No 867 of the common product classification (CPC) nomenclature of the United Nations.

25 I share the view expressed by all the parties to the proceedings that the services at issue in the main proceedings are to be regarded as `engineering services' of the kind referred to in Category No 12. In fact, the notice of the contract with which the main proceedings are concerned referred to planning and processing works, to be entrusted to firms of consulting engineers, in

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connection with the construction of a children's hospital at the Landeskrankenhaus Klagenfurt, with the corresponding outpatient facilities, operating theatre and X-ray laboratory as well as five children's wards and a children's surgical ward; it also included planning services for the sanitary, heating and ventilation installations with air conditioning and high- and low-voltage installations, `structural and constructional engineering' services and planning services for the medical installations. All those services can clearly be regarded as `engineering services' and `related scientific and technical consulting services' as referred to in Category No 12. They therefore come fully within the scope of the Services Directive, so that the contracts for those services must be awarded in conformity with the provisions of Titles III to VI of the Services Directive.

26 Finally, by its fifth question, the UVK asks the Court to rule on the direct applicability of the provisions of the Services Directive. Although in the text of the question the UVK refers to the directive generally, in the grounds of the order for reference it expressly refers only to Articles 1 to 7.

27 As the Court has consistently held, (25) for individuals to be able to rely, in proceedings against the State, on provisions of a directive which has not been transposed, or correctly transposed, into national law, those provisions must as far as their subject-matter is concerned be unconditional and sufficiently clear and precise.

28 The fifth question corresponds to the second part of the third question referred to the Court in the Tögel case. In the judgment in that case, the Court held that the provisions of the Services Directive may be relied on directly by individuals before national courts. (26) I see no reason to dispute that conclusion, which is based on an analysis of the wording of the directive. Although the provisions of Title I, relating to the persons and matters covered by the directive (Articles 1 to 7), are not inherently capable of creating rights for individuals, they are nevertheless essential for the purpose of identifying the persons enjoying rights and having obligations under the directive, so that, in combination with the substantive provisions, they may be relied on directly before a court.

As regards the provisions of Title II (Articles 8 to 10), concerning the procedures applicable to the services listed in Annexes I A and I B, they require contracting authorities to comply with the procedures referred to in Titles III to VI so far as the services listed in Annexe I A are concerned, and with those referred to in Articles 14 to 16 so far as the services listed in Annex I B are concerned. Those rules are not made subject to any conditions and are sufficiently clear and precise to create rights for individuals which may be relied on before a court.

The same conclusion applies, in principle, to the provisions contained in the subsequent titles. Those provisions relate to the `choice of award procedures and rules governing design contests' (Title III), the `common rules in the technical field' (Title IV), the `common advertising rules' (Title V) and the `common rules on participation' (Title VI). They specify in detail the obligations imposed on contracting authorities in the preparation and conduct of invitations to tender. Observance of the rules set out therein may therefore be called for directly by an individual before the competent courts. (27)

It should, however, be added that, in its judgment in the Tögel case, the Court, in adopting the view taken by the Advocate General, held that the part of the directive under consideration here contains provisions - not specified - which are not clear, precise and unconditional and may therefore not be relied on directly before a court. (28) The conclusion that the provisions of the abovementioned titles, which by their wording are not clear, precise and unconditional, are not capable of direct effect was supported by the circumstance that a comprehensive analysis of all the provisions of the titles in question was not warranted by the specific facts of the case. Consideration of whether particular provisions of those titles are capable of direct effect must await a reference for a

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preliminary ruling in which such an examination is specifically required. (29)

Such a conclusion is all the more justifiable in the present case. Firstly, the facts of the case do not require specific interpretations of all the provisions contained in the abovementioned titles of the directive (twenty-seven articles in all). Secondly, it can be deduced from the grounds of the order for reference, although it gives very little information, that the interest of the court appears limited to the articles contained in the first part of the directive. For those reasons, even though I have doubts as to whether it is actually necessary to give an answer to the fifth question in view of its lack of precision with regard to Titles III to VI of the Services Directive, I propose that the Court give the same answer as it gave in the Tögel judgment.

29 In the light of the foregoing, I propose that the Court answer the questions submitted by the Unabhängiger Verwaltungssenat für Kärnten for a preliminary ruling as follows:

(1) Article 2(8) of the Review Directive is to be interpreted as meaning that the conditions contained therein concern exclusively the composition and operation of independent bodies responsible for reviewing decisions taken by another body which is competent, at first instance, to hear review proceedings against the award of public contracts and which is not a court or tribunal as referred to in Article 177 of the Treaty. The provision in question is therefore not relevant for the purpose of assessing the composition and operation of the independent administrative senate of the Land of Carinthia, since the latter is a judicial body which is competent, at first and sole instance, to review measures awarding public contracts.

(2) Neither Article 2(8) nor any other provision of Directive 89/665/EEC is to be interpreted as meaning that, in the absence of national implementing measures adopted within the period laid down for that purpose, the review bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear review proceedings relating to the award of public service contracts. However, in order to fulfil the requirement that domestic law must be interpreted in conformity with Directive 92/50/EEC and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring review proceedings in relation to the award of public service contracts.

(3) The services covered by the contract notice published by the Landeskrankenanstalten-Betriebsgesellschaft for the construction project relating to the Klagenfurt hospital are engineering services falling within Category No 12 of Annex I A to the Services Directive. Consequently, a contract concerned with such services must be awarded in conformity with the procedures referred to in Titles III, IV, V and VI of that directive.

(4) The provisions of Titles I and II of the Services Directive are unconditional and sufficiently clear and precise to be relied on directly before national courts. As regards the provisions of Titles III, IV, V and VI, they may be relied on by an individual before a national court to the extent to which it is clear from an individual examination of them that they are unconditional and sufficiently clear and precise.

(1) - OJ 1989 L 395, p. 33.

(2) - OJ 1992 L 209, p. 1. The Services Directive was last amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ L 328, p. 1).

(3) - Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria,

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the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21).

(4) - The Federal law, which was originally published in BGBl. No 639/1993, was subsequently republished following the codification of public procurement legislation by the Law of 27 May 1997 (BGBl. 1997, No 56).

(5) - LGBl. 1994, No 55.

(6) - LGBl. 1990, No 104.

(7) - See point 14 below.

(8) - LGBl. 1997, No 58.

(9) - Case C-103/97, in which I delivered my Opinion at the hearing of 24 September.

(10) - See, in particular, the judgments in Case 61/65 Vaassen Göbbels [1966] ECR 261; Case 14/86 Pretore di Salo [1987] ECR 2545; Case 109/88 Danfoss [1989] ECR 3199; Case C-393/92 Almelo and Others [1994] ECR I-1477; Case C-54/96 Dorsch Consult [1997] ECR I-4961.

(11) - In the light of the Court's case-law, it is necessary to take account of many different factors and specifically of whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is impartial and independent.

(12) - Under that provision, the independent administrative senates of the Länder and the Administrative Court, Vienna, are responsible for ensuring the legality of administrative acts. The following provision, Article 129a(1), lists the various powers of the senates, which are to be exercised after the administrative remedies have been exhausted. They include jurisdiction to determine appeals by private individuals claiming that their rights have been infringed by the exercise of administrative power of command and coercion (paragraph 1), and jurisdiction to determine all other matters assigned to them under the Federal or Land laws governing the individual spheres of administration (paragraph 3).

(13) - Having first stated that `the requirement that the procedure ... must be inter partes is not an absolute criterion', the Court held, in paragraph 31 of the Dorsch Consult judgment, that it is sufficient that the parties to the procedure before the procurement review body must be heard before any determination is made by the chamber concerned.

(14) - See Part II, Paragraph 37 et seq., of the Verwaltungsverfahrensgesetz (Law on procedure before the administrative courts, BGBl. 1991, No 51).

(15) - See points 22 to 31 of my Opinion.

(16) - Points 34 to 43 of the Opinion cited, to which I refer for a more detailed analysis.

(17) - In my Opinion in the Köllensperger case, at the points cited in the previous footnote, I indicated what I consider to be the rationale of a provision which is certainly not distinguished by its clarity of presentation.

(18) - Judgment in Case C-76/97 [1998] ECR I-5357.

(19) - Judgment in Dorsch Consult, at paragraph 46; judgment in Tögel, at paragraph 28.

(20) - See the judgment in Dorsch Consult, at paragraph 40, and the Opinion of Advocate General Tesauro, at point 47. See also the judgment in Tögel, at paragraph 22.

(21) - Judgment in Dorsch Consult, at paragraph 41; judgment in Tögel, at paragraph 23.

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(22) - For a more detailed discussion of this aspect, see below, at point 28 et seq.

(23) - Judgment in Dorsch Consult, at paragraph 46; judgment in Tögel, at paragraph 28.

(24) - Judgment in Dorsch Consult, at paragraph 45; judgment in Tögel, at paragraph 27.

(25) - See, among others, the judgments in Case 41/74 Van Duyn [1974] ECR 1337, at paragraph 12; Case 8/81 Becker [1982] ECR 53, at paragraph 25; and Case 31/87 Beentjes [1988] ECR 4635, at paragraph 50.

(26) - Judgment cited above, at paragraphs 41 to 47. See also the Opinion of Advocate General Fennelly, at points 49 to 57.

(27) - See paragraph 46 of the judgment in Tögel and the Opinion of Advocate General Fennelly, at point 57.

(28) - Judgment in Tögel, at paragraph 46, and Opinion of Advocate General Fennelly, at point 57. Article 21 of the directive can be cited as an example. It confers on contracting authorities the right to arrange for the publication in the Official Journal of the European Communities of notices announcing public service contracts which are not subject to the publication requirement referred to in Article 15 et seq. of the Services Directive. Such a provision is clearly not capable of having direct effect since it cannot, by its very nature, be relied on directly before a court by an individual.

(29) - Opinion of Advocate General Fennelly, at point 57.

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Opinion of Mr Advocate General La Pergola delivered on 19 January 1999.
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil obligations - Freedom to provide services - Public procurement procedures - Water, energy, transport and telecommunications sectors.
Case C-225/97.

1 In the present case, the Commission is seeking a declaration that the French Republic has only partly - and, in any event, incorrectly - transposed into national law Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (hereinafter `the Directive'). (1)

The Directive

2 The Directive is designed to ensure that swift and effective review procedures are available at national law so that infringements of the Community public procurement rules can be prevented or remedied (2) and specifies the `powers' to be conferred on review bodies. Article 2(1) allows Member States to choose between two - different but equivalent in terms of their practical effect - courses of action: (3) first, the `suspension-annulment' option provided for in Article 2(1)(a) and (b); alternatively, the adoption (with maximum care) of other measures designed to attain the same result, such as `making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented'. (4) The French legislature chose the latter option, envisaged by Article 2(1)(c), when transposing the Directive into national law.

3 Chapter II of the Directive governs the attestation system which is also relevant to the present case. Essentially, the Member States are to give contracting entities the possibility of `having recourse to an attestation system', (5) the salient features of which are described in Articles 4 to 7. This system permits the entities in question to `have their contract award procedures and practices which fall within the scope of Directive 90/531/EEC examined periodically with a view to obtaining an attestation that, at that time, those procedures and practices are in conformity with Community law concerning the award of contracts and the national rules implementing the law'. (6)

4 Chapter IV of the Directive introduces a conciliation system, available upon request. Pursuant to Article 9, application of this procedure may be requested by `any person having or having had an interest in obtaining a particular contract falling within the scope of Directive 90/531/EEC and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of Community law in the field of procurement or national rules implementing that law'. (7) The task of the conciliators - provided, of course, that the contracting entity consents to initiation of the procedure in question - is to endeavour `as quickly as possible to reach an agreement between the parties which is in accordance with Community law' (8) and to report to the Commission `on their findings and on any result achieved'. (9)

5 The deadline set by the Directive for its implementation expired on 1 January 1993.

The French implementing legislation

6 The Directive was transposed into French law by Law No 93-1416 of 29 December 1993 on review procedures relating to the award of certain supply and works contracts in the water, energy, transport and telecommunications sectors. (10) A copy of that Law was notified to the Commission under cover of a letter of 14 January 1994.

In order to implement Article 2 of the Directive, the French legislature chose the option provided for in Article 2(1)(c), under which the courts may be empowered `[to make] an order for the payment

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of a particular sum, in cases where the infringement has not been corrected or prevented'. (11)

To that end, Article 1 of Law No 93-1416 provides that on application by any person with an interest in concluding the contract and likely to be harmed by non-compliance on the part of the contracting entity, the President of the appropriate court may order the defaulting party to comply with its obligations and may prescribe the period within which it must do so. Where non-compliance persists, he may also order a periodic penalty payment (astreinte provisoire) to be made as from the expiry of the period prescribed. However, he may `take into account the probable consequences of such a measure for all interests likely to be harmed, as well as the public interest, and may decide not to order such a measure where its negative consequences could exceed its benefits'. (12) The fourth paragraph of Article 1 provides that `in setting the amount of the periodic penalty payment, regard shall be had to the conduct of the party against which the order has been made and to the difficulties which it has encountered in order to comply therewith'.

Subsequently, provision is made in the sixth paragraph of Article 1 for payment of a fixed sum by way of penalty (astreinte définitive): `if, on settlement of the periodic penalty payment, the infringement in question has not been corrected, the court may order payment of a fixed sum'.

The penalty payment, whether periodic or fixed, is wholly distinct from damages and orders to make such payments may be cancelled, wholly or in part, if it is established that the default or delay in implementing the court's order has been caused, wholly or in part, by external factors. (13)

Article 4 of Law No 93-1416 confers similar powers on the President of an administrative court.

7 The French legislation in issue contains no provision specifically intended to implement Chapters II and III of the Directive, which concern, respectively, the attestation system and the conciliation procedure.

The pre-litigation procedure

8 By formal letter of notice of 8 September 1995, the Commission informed the French authorities that the penalty payment system introduced by Law No 93-1416 did not constitute a correct transposition of Chapter I of the Directive into national law. It also pointed out that the Law in question makes no provision for the implementation of the attestation system or the conciliation procedure envisaged by the Directive.

Not satisfied with the French authorities' reply, the Commission delivered a reasoned opinion to the French Government on 8 November 1996.

However, not even the reply to the reasoned opinion was found to be satisfactory and the Commission therefore brought the present proceedings under Article 169 of the Treaty.

Substance

9 The Commission put forward a number of grounds in support of its position that the Directive had not been correctly transposed into French national law: (i) the penalty payment system introduced by Law No 93-1416 did not correctly implement Article 2 of the Directive; (ii) the French legislature had made no attempt to implement the provisions of the Directive concerning the attestation system and the conciliation procedure.

The penalty payment system

10 With a view to transposing the Directive into national law, France chose option (c), that is to say, the `financial deterrent' approach, rather than the suspension-annulment option. (14) Law No 93-1416 confers on the President of the competent judicial body power to order the defaulting party to comply. At the same time, he may impose penalty payments - initially in the form of a payment per diem, but which can later be converted to a fixed amount. (15)

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11 The Commission does not in principle take issue with the French authorities' choice of option (c), but it maintains that Law No 93-1416 has not given full effect to the relevant provisions of the Directive. The penalty payment system introduced by the French legislature is not a sufficient deterrent as expressly required by Article 2(5) of the Directive. To be more exact, the Commission argues that Article 2(5) must be given full effect by a specific provision of national law, whereas under the French legislation the fixing of penalties at a level guaranteed to deter lies entirely within the discretion of the courts. In the Commission's view, it is no defence to argue that the national courts are required nevertheless to interpret national law in the light of the aims of the Directive, hence to set the penalty payment at a level sufficiently high to ensure that it acts as a deterrent. On that point, the Commission refers to the case-law of the Court to the effect that the fact that the national courts can be presumed consistently to adopt an approach consonant with the spirit and wording of a directive is not enough to meet the requirements entailed by correct transposition into national law. (16)

What, according to the Commission, would have been the proper course of action? The Commission maintains that the special deterrent character of the penalty payment system should have been guaranteed directly by the legislature. That is to say, the amounts should have been fixed by statute rather than left to the discretion of the courts. In any event, the implementing legislation should have expressly stated that penalty payments must be fixed at a level high enough to have the necessary deterrent effect, or it should have laid down rules limiting the discretion of the courts in that regard, by prescribing a minimum amount or other suitable parameters.

12 In response, the French Government contends essentially that the penalty payment constitutes by definition an adequate deterrent. Moreover, nowhere in the Directive is there provision for minimum levels to be set for amounts payable under Article 2(1)(c); nor, a fortiori, for such levels to be set by statute. That approach was indeed suggested by the Commission in its proposal for a directive, but was not incorporated in the text finally adopted. (17)

13 The Commission's argument leaves me somewhat confused. Above all, I am not convinced by the theory that the French legislature should have specified that the penalty payment should act as a deterrent. To my mind, that would have been wholly gratuitous. By its very nature, the penalty payment is designed precisely to undermine resistance on the part of the defaulting party, quite simply because he is thereby compelled to pay a certain sum of money for every single day of delay in complying. The penalty payment is therefore a typical means of enforcing court orders; its deterrent effect stems from its particular mode of operation. That is why an express legislative provision baldly stating that the penalty payment must act as a deterrent does absolutely nothing to enhance the dissuasive character which already distinguishes that mechanism, being as it is a means - and a particularly effective one at that - of enforcing compliance with court rulings.

14 An altogether separate matter, and a more delicate one, is the question whether the French legislature should have made certain of the deterrent effect by specifying the relevant amounts in the implementing legislation, or by laying down specific criteria or other rules on the basis of which the amounts should be calculated so as to limit the discretion of the courts on that point. That, in my view, is the main thrust of the Commission's complaint. Article 2(5) provides, in fact, that `[t]he sum to be paid in accordance with paragraph 1(c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement'. (18) The difficulty, however, lies in determining by whom the amount is to `be set': by the courts in the exercise of their discretion, as the French Government maintains; or indirectly by statute, through the setting of parameters within which the courts may do this.

To my mind, the correct approach is the former, which was adopted by the French legislature. The contrary view, sustained by the Commission, finds no support in the wording of the Directive:

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Article 2(5) does not specify that the legislature, rather than the courts, must fix the amount of the penalties payable. Moreover, the Commission acknowledges that this is not a requirement imposed directly by the Directive. On the contrary, the initial proposal made specific provision to that effect, but that formed no part of the text adopted. Admittedly, that is not in itself conclusive. It seems to me, however, that upon a proper construction of the Directive the only absolute obligation incumbent on Member States is to make the system effective; that is to say, to introduce a mechanism which enables infringements to be remedied and which also has a deterrent effect vis-à-vis future infringements. In other words, in order to give proper effect to the option provided for by the Directive at (c), the Member States must introduce a measure whereby, as a manner of speaking, a `financial deterrent' is brought to bear, powerful enough to be effective in terms of attaining the objectives referred to above.

If that is indeed the position, the French legislature has correctly implemented Article 2 of the Directive through recourse to the penalty payment mechanism, which plays a special role in French law as one of the most efficient traditional methods of securing compliance with judicial rulings. (19) Moreover, I do not accept that the dissuasive force of penalty payments - which the Commission, rightly, insists on - necessarily depends on the amount being fixed by statute in the legislation implementing the Directive. (20) On the contrary, I think that assumption is belied by the experience of those legal systems in which recourse to the penalty payment system is common: there is no doubt as to its deterrent effect, even though in many cases determination of the amount is a matter for the courts, at their discretion, rather than for the legislature. (21)

15 Certainly, the correct operation of `option (c)' - and, particularly, the true deterrent effect of the penalty payments - depends on the prudent exercise of discretion by the courts called upon to set the amount payable. However, in my view, if the material provisions of this directive are to be correctly implemented, the courts must be allowed to apply them with an appropriate measure of discretion. Infringements may take various forms. The conduct of contracting entities, too, may vary - according to whether or not they act in good faith, whether they are concerned to remedy infringements or to prevent them, and so on. It seems clear that such factors must be borne in mind when it comes to setting a figure to be paid under Article 2(1)(c) and there can be no body better placed to make such appraisals than the courts in the exercise of their discretion. Statutory determination of the amounts is a very blunt instrument to wield in this context. Admittedly, legislation under which the courts were able to set the figure between a minimum and a maximum amount would satisfy the requirement that penalty payments be set at an amount appropriate to the individual case. However, that approach would in no way displace the discretion of the courts when it came to quantifying the amounts in practice, albeit within the parameters set by statute. On the other hand, such parameters would have to be sufficiently wide to enable the courts to take into account the various situations which may arise. Moreover, it would not be appropriate for this Court to monitor the national legislature's exercise of discretion in fixing such thresholds when implementing the Directive.

It is significant, on the other hand, that the Directive itself conferred on review bodies a broad discretion in the exercise of their powers under Article 2. Under Article 2(4), `[t]he Member States may provide that, when considering whether to order interim measures, the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits....' (22) That provision would be wholly frustrated if Member States were required to adopt a system under which the competent national bodies could do no more than mechanically apply the remedies prescribed by statute.

16 The Commission argues, however, that Law No 93-1416 - in so far as it provides that the courts,

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in the exercise of their discretion, are to set the amount of the penalty payments, unshackled by any statutory provision in that regard - in effect delegates to the courts responsibility for the correct implementation of the Directive. The Commission maintains, therefore, that, according to the case-law of the Court, even if it is assumed that the French courts make proper use of their discretion and construe the provisions of national law in a manner consistent with the aims of the Directive, the requirements entailed by correct transposition of the Directive into national law are not satisfied. It cites on that point the Opinion of Advocate General Léger in Commission v Greece: (23) `[n]ational case-law interpreting provisions of domestic law in a manner regarded as being in conformity with the requirements of a directive is not sufficient to make those provisions into measures transposing the directive in question'.

There are two points to be made here. In the first place, the courts - in common with all other State bodies - are required to construe provisions of national law in the light of the aims of a directive. (24) Thus, the French courts are also addressees of the Directive in issue. Arguably, indeed, Article 2(5) - in so far as it lays down that the amount payable must be fixed at a level sufficient to ensure that it acts as an effective deterrent - is directed primarily at the national courts, since it also specifies the nature of the powers to be conferred on them.

Secondly, I do not think that the precedent relied upon by the Commission is relevant here. In Commission v Greece, no implementing measure existed, and by way of defence the Greek Government merely contended that the case-law of the Council of State already afforded `sufficient judicial protection to meet the requirements of the directive'. (25) Quite properly, therefore, the Advocate General and the Court decided in that case that the situation did not meet the fundamental requirements demanded of implementing measures, namely, `those of legal certainty and adequate publicity'. (26) The present case, however, is different. The Directive was transposed into national law by means of a specific legislative instrument and the French authorities can scarcely be criticised for not incorporating therein a provision that is neither required by the Directive nor essential for the attainment of its aims. As regards the requirements of legal certainty, to my mind these are fully satisfied - as the Court has consistently held (27) - as soon as individuals are in a position to ascertain the existence and scope of their rights under the Directive. In the present case, this means that that fundamental requirement is satisfied if the undertakings concerned are in a position to realise that remedies are available in respect of failure to comply with the Community rules on public procurement, and if the courts are able to make penalty payment orders in cases where the contracting entity fails to comply with court rulings. Prior knowledge of the level of penalty payments is not required under the Directive; nor, when considered more closely, would it satisfy any of the requirements of legal certainty. Such knowledge would in any event be merely indicative and incomplete since determination of the amount - for the reasons set out above - depends on a number of factors which are not predictable.

17 A further ground of complaint raised by the Commission against Law No 93-1416 is that the penalty payment system provided for derogates from the rules which ordinarily govern penalty payments in French law, particularly with respect to the Law of 1991 on the reform of civil enforcement procedures. (28) Thus the French authorities have infringed Article 1(2) of the Directive, which provides that `Member States shall ensure that there is no discrimination between undertakings likely to make a claim for injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules'.

However, this ground of complaint should be dismissed, too. As the French Government correctly pointed out, the area governed by Law No 93-1416 falls outside the scope of Law No 91-650. The latter concerns the performance of obligations which have already been defined and enables the courts, inter alia, to make penalty payment orders. Accordingly, Law No 91-650 could not be appropriated

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sic et simpliciter as the basis for transposing the Directive into French law. It does not enable either the ordinary courts or the administrative courts to intervene in public procurement procedures. Accordingly, the adoption of Law No 93-1416 cannot be said to indicate an intention on the part of the French legislature to set up a special and less coercive procedure distinct from the rules of civil law in force. The only feature shared by the two bodies of rules is that they both provide for recourse to the penalty payment system. Otherwise, they are wholly dissimilar. Consequently, I fail to detect any infringement of Article 1(2) since, given the inapplicability of the rules laid down in Law No 91-650, the national legislature laid down special implementing rules to accommodate the particular needs which arise in disputes governed by the Directive in question.

18 Lastly, the Commission's final complaint against Law No 93-1416 remains to be examined. This concerns the distinction between periodic penalty payment orders and fixed penalty payment orders. Specifically, the Commission maintains that it is incompatible with the Directive to allow - as does Law No 93-1416 - the courts first to make a periodic penalty payment order and then, when a definitive figure is arrived at, a fixed penalty payment order. That, according to the Commission, is neither provided for nor permitted under the Directive: the Community legislature merely provided that the payment `may be made to depend upon a final decision that the infringement has in fact taken place'. (29) Secondly, by contrast with Law No 93-1416, nowhere in the Directive is power conferred on the courts to adjust the amount payable or, in determining the amount, to take into account the conduct of the party against whom the order is made. According to the Commission, this weakens the deterrent effect of the French system.

I cannot agree. Admittedly, the Directive does not expressly draw any distinction between periodic and fixed penalty payment orders; on the other hand, neither does it expressly preclude such a distinction. The only test that can be applied in order to ascertain whether the implementing legislation correctly transposes the Directive into national law is whether or not the mechanism introduced is effective. It does not seem to me that the interplay between periodic and fixed penalty payment orders impairs its deterrent effect. Rather, to my mind, the reverse is true. (30) Indeed, the fact that, when the amount has been set, the court makes a fixed penalty payment order, taking into account the conduct of the defaulting contracting entity, means that the latter remains sub judice, so to speak. Where non-compliance persists, the conduct of the defaulting party may lead the court to increase the amount initially decided upon when the level of the periodic penalty payment was fixed. As for the possibility that, when quantifying the fixed penalty payment, the court may reduce the amount in order to take account of the defaulting party's conduct, it seems to me that that represents a proper application of the principle of proportionality. (31) It would be contrary to that fundamental principle if the courts were compelled to determine definitively the amount payable by the contracting entity without being able to take into consideration its willingness to comply, its attempts to remedy the infringement, or any other particular features characterising the individual case.

The attestation system

19 The Commission alleges that France failed to adopt any measure implementing Chapter II of the Directive concerning the attestation system. The French Government, for its part, acknowledges that Law No 93-1416 does not contain any specific provisions on that subject, but maintains that these were not necessary in the circumstances. Proper effect is given to Chapter II of the Directive simply if contracting entities are made aware that they may submit their procurement procedures for attestation in accordance with its provisions. This the French authorities achieved by publishing Directive 92/13/EEC in a review which specialises in the public procurement sector and which has a particularly wide circulation. (32) So far no attestator has been designated, for the simple reason that no contracting entity has as yet requested attestation.

To my mind, the Commission's complaint in this respect must be upheld. As the Commission points

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out, the provisions of Chapter II of the Directive require adoption of specific provisions in the implementing legislation designed to set out in detail the attestation system decided upon, the rules governing the designation of attestators, the professional qualifications required, and so on. There is no such provision in Law No 93-1416. Furthermore, according to established case-law, the provisions of a directive must be implemented `with unquestionable binding force, [and] with the specificity, precision and clarity required... to satisfy the requirement of legal certainty'. (33) Consequently, `in order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question'. (34) The mere act of publishing the Directive in a review, albeit a review with a particularly wide circulation in the public procurement sector, is not enough to satisfy the stringent requirements laid down by that case-law.

The conciliation procedure

20 Lastly, the Commission maintains that the French authorities failed to transpose into national law the provisions of Chapter IV of the Directive concerning the conciliation procedure. The French Government does not contest this, but contends that, in the present case, there was no need for any express implementing provision. Under the Directive, Member States are obliged solely to notify to the Commission requests for conciliation from interested parties; (35) moreover, the latter are sufficiently aware that recourse to such a procedure is possible under the Directive, thanks to its publication in Marchés Publics, the review mentioned above.

To my mind, the defence offered by the French Government is untenable. Indeed, the restricted role assigned to Member States under Chapter IV of the Directive in the context of conciliation procedures does not relieve the national authorities of their obligation to adopt measures designed to ensure that those provisions are implemented - all the more since, as the French Government acknowledges, their transposition into national law is intended to enable interested parties to learn of the existence of such a procedure, as well as the fact that they may have recourse to it. This fundamental requirement of publicity - for reasons similar to those cited in connection with the attestation system - cannot be considered satisfied by mere publication of the Directive in the edition of Marchés Publics referred to, which does not quite meet the requirements laid down by the case-law of the Court.

Conclusion

21 In the light of the above considerations, I propose that the Court:

(1) declare that, by failing to adopt within the period prescribed the laws, regulations and administrative provisions necessary to comply with Chapters II and IV of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the French Republic has failed to fulfil its obligations under that Directive;

(2) order the French Republic to pay the costs.

(1) - OJ 1992 L 76, p. 14.

(2) - See the fifth recital in the preamble thereto. Article 1 provides: `1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field of procurement or national rules implementing that law as regards: (a) contract award procedures falling within the scope of Council Directive

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90/531/EEC; and (b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies....'

(3) - The so-called `suspension-annulment' option is provided for in Article 2 as follows:

`The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;

and

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

... .'

(4) - My emphasis.

(5) - See Article 3.

(6) - See Article 4.

(7) - See Article 10(1).

(8) - See Article 10(4).

(9) - See Article 10(5).

(10) - JORF of 1 January 1994, p. 10.

(11) - My emphasis.

(12) - See Article 1, third paragraph. (Translated freely.)

(13) - See Article 1, seventh paragraph.

(14) - See above, point 2.

(15) - See above, point 6.

(16) - See the judgment in Case C-236/95 Commission v Greece [1996] ECR I-4459 and the case-law cited in paragraph 13 thereof.

(17) - See Article 11(2) of the Commission's proposal: `The review body responsible for fixing the sum of money payable in accordance with paragraph 1 shall fix any such sum at a level designed to dissuade the contracting entity from committing or continuing the infringement. The amount shall at least cover any costs of preparing a bid or participating in the award procedure of the person seeking review. The amount of such costs shall be deemed to be one per cent of the value of the contract unless the person seeking review proves that his costs were greater. An order for payment of a sum of money in accordance with this provision shall bar any further claim by the person concerned to the recovery of the costs taken into account by the review body when fixing the order' (OJ 1990 C 216, p. 8; my emphasis).

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(18) - My emphasis.

(19) - See, by way of example, G. Couchez, Voies d'Exécution, Paris, 1994, p. 5, which emphasises the coercive nature - indirect, but particularly effective - of the penalty payment mechanism.

(20) - Of course, there are many cases where the legislature has laid down detailed rules for determining the amount of the astreinte. For example, Article 16 of Council Regulation No 17/62/EEC of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (English Special Edition, 1959-62 I, p. 87) confers on the Commission power to impose `periodic penalty payments of from 50 to 1000 units of account per day [of delay]'; in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), the method adopted by the Community legislature was to fix a ceiling for the periodic penalty payment (Article 15). This does not mean, however, that the astreinte is effective only when the legislature has fixed minimum and/or maximum amounts.

(21) - See, on the subject of the rules introduced into Belgian law by the uniform Benelux legislation on the astreinte (Agreement signed on 26 November 1973, Tractatenblad, 1974, 6), the comments of J. van Compernolle, L'Astreinte, Brussels, 1992, p. 47. With regard to the determination of amounts, the author points out that `the courts enjoy the broadest possible discretion as regards determination of the amount. ... Taking into account all the circumstances of the case, including the conduct of the defaulting party and his financial position, the courts are free to fix the amount considered sufficient to compel the defaulting party to comply with the main order. ... In this area, the power of assessment of the courts is absolute' (my emphasis).

(22) - My emphasis.

(23) - Case C-236/95, cited above: point 26 of the Opinion.

(24) - See Case 14/83 Von Colson and Kamann [1984] ECR 1891 and Case 31/87 Beentjes [1988] ECR 4635.

(25) - See Commission v Greece, cited above, paragraph 8.

(26) - See the Opinion of the Advocate General, point 24. The Court referred, in paragraph 13 of the judgment, to a consistent line of case-law according to which `it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts' (see Case 29/84 Commission v Germany [1985] ECR 1661, paragraph 23; Case 363/85 Commission v Italy [1987] ECR 1733, paragraph 7; and Case C-59/89 Commission v Germany [1991] ECR 2607, paragraph 18).

(27) - See the judgments cited in footnote 26.

(28) - Law No 91-650 of 9 July 1991 (JORF of 14 July 1991, p. 9228).

(29) - See Article 2(5).

(30) - See, to that effect, A. Frignani, `Le Penalità di Mora e le Astreintes nei Diritti che si Ispirano al Modello Francese', in Riv. Dir. Civ., 1981, I, p. 511: `[t]he option of increasing the level of the astreinte is specifically designed to enable any resistance on the part of the defaulting party to be overcome more easily. That also makes it necessary to determine definitively the amount payable'.

(31) - In my view, it is no accident that Article 15(3) of the Regulation on the control of concentrations, cited in footnote 20, provides that `Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may set the total amount of the periodic

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penalty payments at a lower figure than that which would arise under the original decision' (my emphasis). Nor does it seem to me that that provision, which is entirely consonant with the principle of proportionality, diminishes the deterrent effect of the penalty payment.

(32) - The French Government refers to the April-May 1992 edition of the review entitled Marchés Publics.

(33) - See Case C-59/89 Commission v Germany, cited above, paragraph 24.

(34) - See Case C-59/89, cited above, paragraph 28.

(35) - See Article 9(2).

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SUB	Approximation of laws
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DEFENDA	France ; Member States
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Opinion of Mr Advocate General Fennelly delivered on 2 April 1998.
EvoBus Austria GmbH v Niederösterreichische Verkehrsorganisations GmbH (Növog).
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public procurement in the water, energy, transport and telecommunications sectors - Effect of a directive which has not been transposed.
Case C-111/97.

I - Introduction

1 This case relates to the award of a contract for the supply of buses for a regular inter-urban express bus service in Austria. It raises, in particular, questions regarding the bodies competent to review such contracts, the availability of remedies and the application of national time-limits for bringing proceedings where the relevant Community directive has not been implemented in time.

II - Legal and factual context

A - Community law

2 Article 1 of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (1) (hereinafter referred to as `the Utilities Review Directive'), as amended, provides as follows:

`(1) The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field of (2) procurement or national rules implementing that law as regards:

(a) contract award procedures falling within the scope of Council Directive 93/38/EEC; (3) and

(b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies.

(2) Member States shall ensure that there is no discrimination between undertakings likely to make a claim for injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

(3) The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting entity of the alleged infringement and of his intention to seek review.'

Article 2 of the Utilities Review Directive provides, in relevant part, as follows:

`(1) The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement of preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal

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of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both of the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

(2) The powers referred to in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

...

(8) The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

(9) Where (4) bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the Treaty and independent of both the contracting entity and the review body.

The members of the independent body referred to in the first paragraph shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

3 Article 2 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (5) (hereinafter `the Utilities Directive') provides, in relevant part, as follows:

`(1) This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

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(2) Relevant activities for the purposes of this Directive shall be:

...

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service; ....'

B - Implementation in national law

4 By virtue of Article 65 of and Annex XVI to the Agreement on the European Economic Area signed at Oporto on 2 May 1992, the Republic of Austria was obliged to transpose into national law, by 1 January 1994 at the latest, (6) a number of Community acts in the field of public procurement, including Council Directive 90/531/EEC (7) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (8) (hereinafter `the Review Directive'). These directives were transposed at federal level by the Bundesgesetz über die Vergabe von Aufträgen or Bundesvergabegesetz (Federal Procurement Law, hereinafter `the BVergG'), (9) which entered into force on 1 January 1994. Part 4 of the BVergG, on legal protection (Rechtsschutz), establishes a review procedure before the Bundesvergabeamt (Federal Procurement Office). Paragraph 92(3) provides that proceedings against the award of a contract must be introduced by an aggrieved tenderer before the Bundesvergabeamt within two weeks of his being informed of the award. The second sentence of Paragraph 7(2) of the BVergG expressly excluded the application of the provisions of Part 4 to the water, energy, transport and telecommunications sectors.

5 By virtue of Article 168 of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, of 24 June 1994, (10) the Utilities Directive and the Utilities Review Directive were required to be transposed into Austrian law by the date of accession, viz. 1 January 1995. (11) Transposition of the Utilities Review Directive at federal level took place by means of an amendment of the BVergG by a law of 30 December 1996, (12) which extended the review competence of the Bundesvergabeamt to awards of public contracts for the utilities in question and which entered into force on 1 January 1997, without altering the rules applicable to proceedings already commenced before the Bundesvergabeamt.

C - Facts and proceedings

6 The Niederösterreichische Verkehrsorganisations Gesellschaft m.b.H. (hereinafter `NOVOG') is a body governed by private law. It operates bus routes on the basis of a licence granted by the Amt der Niederösterreichischen Landesregierung (Office of the Provincial Government of Lower Austria). It enjoys, according to the Bundesvergabeamt, special rights, thus bringing it within the scope of the Utilities Directive. (13) Since NOVOG operates a network for the provision of public bus transport services, the Bundesvergabeamt deems it to be a contracting entity. (14)

7 By a letter of 26 April 1996 to the Office for Official Publications of the European Communities, NOVOG solicited, by way of open invitation, tenders for the supply of 36 to 46 buses for the regular inter-urban express bus service in the Bundesland Niederösterreich (Federal Province of Lower Austria). The opening of the tenders took place on 27 June 1995. Unsuccessful tenderers were informed to that effect by registered letter recorded as having been sent on 16 November 1995. EvoBus Austria GmbH (hereinafter `EvoBus') applied to the Bundesvergabeamt on 19 July 1996 for a review of the contract award procedure to be conducted. EvoBus complained of a subsequent

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amendment of the successful tender, through the alteration of the repurchase price of the buses in question from the initial rate of 34% to 55%.

8 The Bundesvergabeamt referred the following questions for a preliminary ruling in accordance with Article 177 of the Treaty establishing the European Community:

`1. May an individual derive, from Article 1(1) to (3), Article 2(1), (7) to (9) or any other provisions of Directive 92/13/EEC, a specific right to have review proceedings conducted before authorities or courts or tribunals complying with Article 2(9) of Directive 92/13/EEC which is so sufficiently precise and specific that, in the event of non-transposition by a Member State of the provisions of the directive in question, an individual may rely on that provision?

If Question 1 is answered in the affirmative:

2. In conducting a review procedure, must a national court having the attributes of the Bundesvergabeamt disregard provisions of national law such as Paragraph 7(2) in conjunction with Paragraph 67(1) of the Bundesvergabegesetz which preclude it from conducting a review procedure even where such review procedure is intended by the national legislature solely to serve the purpose of transposing Directive 89/665/EEC?

If Question 1 is answered in the affirmative:

3. Must the adjudicating court disregard those or any comparable procedural provisions of national law in such circumstances, if they impede or prevent a review procedure from being effectively conducted?'

9 Written and oral observations were submitted by the Republic of Austria and the Commission of the European Communities. Oral observations were also submitted by NOVOG.

III - Analysis

A - Jurisdiction

10 For the reasons stated in my Opinion in Walter Tögel v Niederösterreichische Gebietskrankenkasse, (15) which draw upon the Opinion of Advocate General Léger and the judgment of the Court in Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH, (16) I would first observe that the Bundesvergabeamt is, in my view, `a court or tribunal of a Member State' for the purposes of Article 177 of the Treaty.

B - The first and second questions

11 It is common ground that the Utilities Review Directive should have been, but had not been, implemented in Austria on the date that the contract was awarded and on that on which EvoBus sought to initiate review proceedings pursuant to that directive, viz. 19 July 1996. In the first and second questions, the national court asks whether an individual has a directly effective right to bring review proceedings of the type provided for in Article 2 of the Utilities Review Directive, similar to those enacted into national law by Part 4 of the BVergG, before the Bundesvergabeamt in respect of an award of a public contract in the transport sector. In Tögel, (17) the Court has been asked to address an almost identically worded question referred by the Bundesvergabeamt regarding Article 1(1) of the Review Directive (the equivalent of Article 1(1) of the Utilities Review Directive), in so far as it had been extended to public service contracts by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (18) (hereinafter `the Services Directive'). The two cases differ in so far as the BVergG is silent as to the jurisdiction of the Bundesvergabeamt in respect of services, whereas the application of Part 4 of the BVergG is expressly excluded in respect of utilities. For reasons outlined below, this makes it necessary in the present case to address more fully the second question regarding the obligations and restrictions imposed by Community

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law when interpreting national law which is within the scope of an unimplemented directive.

12 In essentially similar circumstances to those of Tögel, in Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH (19) the German Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board) referred a question as to whether bodies set up by Member States under the Review Directive to review the procedures for the award of public contracts for works and supplies were competent, by virtue of Article 41 of the Services Directive, also to review the procedures for the award of public service contracts. The Court answered that such a result did not follow from Article 41. (20) It observed that it was for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. Member States must ensure that those rights are effectively protected in each case. Otherwise, the Court does not involve itself in the resolution of questions of national jurisdiction. (21) Although Article 41 of the Services Directive requires the Member States to ensure effective review in the field of public service contracts, `it does not indicate which national bodies are to be the competent bodies for this purpose or whether these bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts'. (22) This conclusion excluded the possibility of Article 41 of the Services Directive giving rise to a directly effective right to have review proceedings conducted before the Vergabeüberwachungsausschuß des Bundes, because one of the essential elements was missing, that is, an identifiable person or body under a duty to conduct the review proceedings in question. (23)

13 The Court referred in Dorsch Consult to the duty of `all the authorities of Member States, including, for matters within their jurisdiction, the courts', to take all appropriate measures to achieve the result envisaged by a directive, which gives rise to the judicial obligation to interpret national law `as far as possible, in the light of the wording and purpose of the directive so as to achieve the result it has in view'. (24) This requires the national court to `determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts... [and] in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts'. (25)

14 I refer to my Opinion, also pronounced today, in Tögel, (26) in which I address certain additional arguments regarding the possible direct effect of Article 41 of the Services Directive and the effectiveness of judicial protection, and propose that the Court should respond to the Bundesvergabeamt's first two questions in that case in the same terms as the operative part of the judgment in Dorsch Consult.

15 The same reasoning applies, in principle, to Article 1(1) of the Utilities Review Directive, although its application by a national court may be complicated by the fact that Article 2(1) contains alternatives regarding the remedies to be made available which are not contained in Article 2(1) of the Review Directive. However, the conclusion proposed in Tögel must be modified in the light of the issue expressly raised by the Bundesvergabeamt in the second question, that is, the permissibility in Community law of disregarding national legal provisions such as Paragraph 7(2) of the BVergG which expressly exclude it from conducting review proceedings in respect of contract awards in the sectors governed by the Utilities Review Directive. (27)

16 The interpretative obligation of national courts, to which the Court referred in Dorsch Consult, was first identified by the Court in Von Colson and Kamann v Land Nordrhein-Westfalen, (28) in which the Court also remarked that it was for the national court alone to rule on a question concerning the interpretation of its national law (29) and that it must comply with the obligation to interpret national law in conformity with the requirements of Community law, `in so far as it

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is given discretion to do so under national law'. (30)

17 In Kolpinghuis Nijmegen, (31) the Court introduced a significant qualification to the interpretative obligation of national courts first outlined in Von Colson and continued:

`However, that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity.' (32)

The Court stated that its ruling concerned `the limits which Community law might impose on the obligation or power of the national court to interpret the rules of its national law in the light of the Directive'. (33) Although that case concerned the liability in criminal law of persons who act in contravention of the provisions of a directive, those principles are also of application in situations where Community law has purely civil consequences.

18 The limits imposed on the national court's interpretative obligation, having regard to the degree of discretion accorded by national law and to the general principles of Community law, are summed up, in my view, by the vital qualification of that obligation in Marleasing and subsequent cases as one of interpreting national law, `as far as possible, in the light of the wording and the purpose of the directive'. (34) The Court acknowledged in both Wagner Miret (35) and Faccini Dori v Recreb (36) that national courts may sometimes be unable to interpret national provisions in a way which conforms to a directive and that, in such cases, following Francovich and Others, (37) the Member State concerned may be obliged to make good the loss and damage sustained as a result of the failure to implement the directive.

19 The limits imposed by the Court on national courts' interpretative obligation in Von Colson and in Kolpinghuis Nijmegen are not of the same character. The judgment in Von Colson refers to the extent of the national court's interpretative discretion as a matter of national law. In Kolpinghuis Nijmegen, on the other hand, the Court identified a negative restriction on the national court's obligation and power arising from Community law itself, a restriction which, therefore, is applicable irrespective of the discretion accorded by the national canons of construction. Advocate General Van Gerven, in his Opinion in Marleasing, drew attention to the way in which the interpretative obligation was `restricted by Community law itself'. (38) This can be explained by the fact that national authorities, including national courts, are subject to the general principles of Community law when implementing Community law or interpreting national provisions implementing such law. (39)

20 The agent for Austria suggested at the oral hearing that the principle of attributed competence in Austrian law made it unlikely that the BVergG could be construed in order to extend the competence of the Bundesvergabeamt to types of contract which were not expressly referred to in the relevant provisions, and that this argument applied a fortiori in the case of expressly excluded sectors. (40) It is, therefore, merely in order to furnish the fullest possible answer to the second question from the point of Community law that I express my view that, quite independently of the level of interpretative discretion accorded by national law, it would be contrary to the Community-law principle of legal certainty for a directive to be deemed to be implemented in national law by legislation which, on its face, as in Paragraph 7(2) of the BVergG, expressly excludes the application of the relevant legislative provisions to the fields governed by the directive. Such an interpretation would leave individuals in a state of uncertainty as to their rights. As well as being contrary to the general principles of Community law, that uncertainty would endanger the achievement of the result envisaged by the directive. Such an interpretation could not, therefore, deprive individuals of a right to compensation in respect of injury suffered due to the non-implementation of the directive in question, pursuant to the Court's judgment in Francovich and Others. (41)

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21 To conclude my analysis in this section, I propose that the Court respond to the first and second questions referred by the Bundesvergabeamt by reiterating the first two sentences of the operative part of its judgment in Dorsch Consult, appropriately amended to refer to Article 1(1) of the Utilities Review Directive, and supplemented by the following statement:

It would, however, be contrary to the principle of legal certainty for Article 1(1) of the Utilities Review Directive to be deemed to be implemented by national legislation establishing bodies to hear appeals concerning the award of public supply contracts and public works contracts which, on its face, expressly excludes the application of the relevant legislative provisions to the fields governed by that Directive.

C - The third question

22 The third question essentially relates to the applicability of the time-limit established by Paragraph 92(3) of the BVergG for the commencement of review proceedings before the Bundesvergabeamt. The Bundesvergabeamt made the question conditional upon an affirmative answer to the first question. In the light of my recommendation to the Court that Community law precludes the competence of the Bundesvergabeamt in the present case, the time-limit for the introduction of an action before that body is irrelevant. It is not, therefore, necessary to propose a formal response to the third question. For the sake of completeness, however, I will address briefly the possibility raised by the Court's case-law of the exceptional non-application of national time-limits for the commencement of proceedings in respect of rights contained in an unimplemented directive.

23 This possibility was first raised in Emmott. (42) In that case, the Court observed (43) that the laying down of reasonable time-limits which, if unobserved, bar proceedings, in principle satisfies the conditions laid down for the application of national procedural rules in Rewe v Landwirtschaftskammer Saarland (44) and in Amministrazione delle Finanze dello Stato v San Giorgio, (45) that they are not less favourable than those governing similar domestic actions and that they do not render impossible or excessively difficult the exercise of rights conferred by Community law. The Court also held in Emmott, however, that `until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive, and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time'. (46)

24 However, the Court has held in a number of subsequent cases, most recent of which is Fantask and Others v Industriministeriet (Erhvervsministeriet), (47) that `the solution adopted in Emmott was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive'.

25 For the purposes of the present case, it is necessary to note that the rules on the award of contracts by entities operating in the water, energy, transport and telecommunications sectors, set out in the Utilities Directive, appear to have been implemented in Austrian law at the material time through the BVergG. The agent for Austria observed at the oral hearing that, in the absence of an express attribution of competence to the Bundesvergabeamt, the ordinary civil courts would hear cases regarding alleged breaches of the BVergG. If that is the case, and if those courts dispose of a satisfactory range of potential remedies, it cannot be said, despite the statement in the second recital in the preamble to the Utilities Review Directive that `existing arrangements at... national level... for ensuring... application [of the Utilities Directive] are not always adequate', that EvoBus has been deprived of any opportunity whatever to rely on its rights under the Utilities Directive. The situation would be different, of course, if, pending the implementation of the Utilities Review Directive, no national court had competence to enforce the provisions

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of the Utilities Directive, whether as transposed by the BVergG or by virtue of the principle of the direct effect of directives, or if a competent national court did not provide adequate remedies to ensure the protection of rights under the Utilities Directive, despite its Community-law obligation to do so. In that case, however, the most appropriate response might be the initiation of proceedings for State liability in accordance with the Court's judgment in Francovich and Others. (48)

26 In the circumstances of the case, it is not necessary for me to address the separate issue of whether the time-limit imposed by Paragraph 92(3) of the BVergG is a reasonable one.

IV - Conclusion

27 In the light of the foregoing, I recommend that the Court respond as follows to the questions referred by the Bundesvergabeamt:

It does not follow from Article 1(1) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of contracts in those sectors. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/13/EEC and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of contracts in the relevant sectors. It would, however, be contrary to the principle of legal certainty for Article 1(1) of Directive 92/13/EEC to be deemed to be implemented by national legislation establishing bodies to hear appeals concerning the award of public supply contracts and public works contracts which, on its face, expressly excludes the application of the relevant legislative provisions to the fields governed by that Directive.

(1) - OJ 1992 L 76, p. 14.

(2) - The word `or' appears here in the Official Journal but is clearly a typographical error.

(3) - This provision originally referred to Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1990 L 297, p. 1. Article 45(3) and (4) of Council Directive 93/38/EEC, cited below, provides that Directive 90/531/EEC shall cease to have effect from the date the former Directive is applied by the Member States and that references to Directive 90/531/EEC shall be construed as referring to that Directive.

(4) - The word `whereas' appears here in the Official Journal but is clearly a typographical error.

(5) - OJ 1993 L 199, p. 84.

(6) - The date when the Agreement on the European Economic Area came into force. This was one year later than the date initially foreseen by Article 129(3) of that Agreement.

(7) - Cited in footnote 2.

(8) - OJ 1989 L 395, p. 33.

(9) - Bundesgesetzblatt für die Republik Osterreich No 462/1993.

(10) - OJ 1994 C 241, p. 21.

(11) - Austria was already under an obligation to transpose the Utilities Directive, replacing Directive 90/531/EEC, into its law from 1 July 1994 at the earliest, and to transpose the Utilities

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Review Directive by 1 July 1994, by virtue of Articles 1 and 3 of, and Annex 14(b)(4) and (5a) to, Decision of the EEA Joint Committee No 7/94 of 21 March 1994 amending Protocol 47 and certain annexes to the EEA Agreement, OJ 1994 L 160, p. 1. However, the present case does not relate to the period between 1 July 1994 and 1 January 1995.

(12) - Bundesgesetzblatt für die Republik Osterreich No 776/1996.

(13) - See Article 2(1)(b) of the Utilities Directive.

(14) - See Article 2(2)(c) of the Utilities Directive.

(15) - Case C-76/97, Opinion of even date, hereinafter `Tögel'.

(16) - Case C-44/96, Opinion of 16 September 1997, paragraphs 34 to 45; judgment of 15 January 1998.

(17) - Cited above.

(18) - OJ 1992 L 209, p. 1.

(19) - Case C-54/96, judgment of 17 September 1997, hereinafter `Dorsch Consult'.

(20) - Paragraph 46.

(21) - Paragraph 40. The Court cited Case C-446/93 SEIM v Subdirector-Geral das Alfândegas [1996] ECR I-73, paragraph 32. See also Case 13/68 Salgoil v Italy [1968] ECR 453, p. 463, and Case 179/84 Bozzetti v Invernizzi [1985] ECR 2301, paragraph 17.

(22) - Paragraph 41.

(23) - See Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraphs 12 and 23 to 27; see also paragraph 48 of the Opinion of Advocate General Tesauro of 15 May 1997 in Dorsch Consult.

(24) - Paragraph 43, emphasis added. The Court cited Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; and Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325, paragraph 26.

(25) - Paragraph 46, emphasis added.

(26) - Cited above.

(27) - This situation may also be contrasted with the situation in Dorsch Consult, cited above, paragraphs 18 and 42, where the relevant German regulation referred only to the competence of the Federal Public Procurement Awards Supervisory Board in respect of supply contracts and works contracts and the Court remarked that it was common ground that the German Federal Government intended to extend its competence to public service contracts.

(28) - Case 14/83 [1984] ECR 1891, hereinafter `Von Colson', paragraph 26.

(29) - Ibid., paragraph 25.

(30) - Ibid., paragraph 28.

(31) - Case 80/86 [1987] ECR 3969, paragraph 12.

(32) - Ibid., paragraph 13.

(33) - Ibid., paragraph 15, emphasis added.

(34) - Marleasing, cited above, paragraph 8, emphasis added; see also Wagner Miret, cited above, paragraph 20; and Faccini Dori v Recreb, cited above, paragraph 26.

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(35) - Cited above, paragraph 22.

(36) - Cited above, paragraph 27.

(37) - Joined Cases C-6/90 and C-9/90, cited above.

(38) - Paragraph 8 of the Opinion. The Advocate General repeated the formula used in paragraph 13 of the Court's judgment in Kolpinghuis Nijmegen but added that legal certainty precluded an unimplemented directive from introducing a civil penalty, such as nullity.

(39) - Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, paragraphs 17, 19 and 22.

(40) - See also Decision B 3067/95-9 of the Verfassungsgerichtshof (Austrian Constitutional Court) of 11 December 1995, discussed at paragraph 27 of my Opinion in Tögel.

(41) - Cited above.

(42) - Case C-208/90 [1991] ECR I-4269.

(43) - Ibid., paragraph 17.

(44) - Case 33/76 [1976] ECR 1989, paragraph 5.

(45) - Case 199/82 [1983] ECR 3595, paragraph 12.

(46) - Cited above, paragraph 23.

(47) - Case C-188/95 [1997] ECR I-0000, paragraph 51. See also Case C-338/91 Steenhorst-Neerings [1993] ECR I-5475, paragraph 20; Case C-410/92 Johnson [1994] ECR I-5483, paragraph 26; Case C-90/94 Haahr Petroleum v benrå Havn and Others [1997] ECR I-4085, paragraph 52; and Joined Cases C-114/95 and C-115/95 Texaco and Olieselskabet Danmark [1997] ECR I-4263, paragraph 48.

(48) - Cited above. See paragraph 48 of the Opinion of Advocate General Tesauro of 15 May 1997 in Dorsch Consult.

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Opinion of Mr Advocate General Saggio delivered on 24 September 1998.
Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz.
Reference for a preliminary ruling: Tiroler Landesvergabeamt - Austria.
National 'court or tribunal' within the meaning of Article 177 of the EC Treaty - Procedures for the award of public supply contracts and public works contracts - Body responsible for review procedures.
Case C-103/97.

1 By order of 17 February 1997, the Tiroler Landesvergabeamt (Procurement Office of the Land of Tyrol) submitted to the Court two questions for a preliminary ruling concerning the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (1) (hereinafter `the Review Directive').

Community and national legislation

2 Article 1(1) of the Review Directive, as amended by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, (2) requires the Member States to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and in particular as rapidly as possible on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

3 Article 2(7) requires the Member States to ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

4 The next paragraph of that article has particular relevance in this case. It will therefore be helpful to reproduce it in full:

`Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

5 Article 5 of the directive requires Member States to bring into force the measures necessary to comply with the directive before 21 December 1991. Under Article 168 of the Act of Accession, (3) the time-limit laid down for the Republic of Austria was 1 January 1995.

6 The Review Directive was transposed into Austrian law at Federal level by the Bundesgesetz über die Vergabe von Aufträgen (Federal Law on the Award of Public Contracts). (4) Each of the nine Länder then adopted its own law relating to the award of public contracts; in the case of the Land of Tyrol, the law in question is the Tyrolean Vergabegesetz (hereinafter `the TVerG') of 6 July 1994. (5)

7 The second part of that law (Paragraphs 5 to 14) governs the procedures for the review of decisions awarding public contracts. Paragraph 6 entrusts the conduct of review procedures to the Landesvergabeamt

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(Land Public Procurement Office; hereinafter `the Office'). Under Paragraph 6(1), that body consists of seven members: a president, who must be familiar with the business of public procurement; a public servant of the Office of the Tyrolean Land Government with a knowledge of law, acting as rapporteur; a member drawn from the judiciary; and four other members, one each proposed by the Tyrolean Chamber of Commerce, the Chamber of Architects and Consulting Engineers for Tyrol and Vorarlberg, the Tyrolean Chamber of Workers and Employees and the Tyrolean Association of Municipalities.

8 Paragraph 6(3) provides that the members of the Office are appointed by the Tyrolean Government and remain in office for five years. They leave office early by resignation or if they are removed. In that regard, Paragraph 6(4) provides that an appointment must be revoked if the conditions for appointment are no longer fulfilled or if factors arise which prevent proper performance of the duties and `are likely to do so for a long time'.

9 Under Paragraph 6(6), the Office may take decisions when it has been properly convened and when the president, the rapporteur, the member drawn from the judiciary and at least one other member are present. Decisions are taken by a simple majority of the votes cast. In the event of a tie, the president's vote is decisive. Abstention is not allowed.

10 In accordance with Paragraph 6(7), the members of the Office are not to be bound by instructions in the performance of their duties. Their decisions are not liable to be set aside through administrative channels.

11 Paragraph 7(1) provides that it is for the Tyrolean Land Government to adopt the Office's rules of procedure. Those rules must, in particular, contain detailed provisions on the organisation and conduct of hearings, the discussion and voting processes, the drawing up of minutes and the preparation and drawing up of decisions. According to Paragraph 4 of the rules, (6) the hearing begins with the report by the rapporteur who is also responsible for gathering evidence and conducting other preparatory inquiries. All decisions adopted by the Office must be in written form and state reasons.

12 Paragraph 10 of the law specifies the powers conferred on the Office. Upon application, it may review the legality of decisions taken by contracting authorities and, in particular, may set aside such decisions prior to the award of the contract (Paragraph 12(1)); moreover, after the contract has been awarded, it may examine whether the fact that it was not awarded to the best bidder was due to a breach of the law (Paragraph 12(2)). In the course of that procedure, the Office must assess whether the contract would not in any case have been awarded to the successful bidder even if there had been no breach of the law as alleged in the application. If the contracting authorities' decision is set aside, the competitor whose bid was rejected in breach of the provisions in force may claim damages in the civil courts.

Facts and the questions submitted

13 The main proceedings arose from the award by the Gemeindeverband Bezirkskrankenhaus Schwaz (association of municipalities for the Schwaz district hospital) of a contract for works in connection with the extension to the said hospital. The undertakings Josef Köllensperger GmbH & Co. and Atzwanger AG brought review proceedings against that decision on 6 April 1995, claiming that the award should be set aside on the ground that it was in breach of the relevant provisions on the award of public contracts.

14 By decision of 27 June 1995, the Office rejected the application on the ground that the contract had in any case been awarded to the firm which had submitted the best bid, with the consequence that, even if the provisions of the law had been complied with, the contract would not in any event have been awarded to the applicants. The latter then challenged that decision before the Constitutional Court which, by judgment of 12 June 1996, set it aside on the ground that it had infringed the

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right, guaranteed by the Austrian constitution, to proceedings before the court specified by law. The Constitutional Court observed that the composition of the Office was not in accordance with the requirements of the review directive since its president did not have the necessary legal and professional qualifications for judicial office.

15 The composition of the Office was therefore modified. The president previously in office was replaced by an official of the administrative authority, who was qualified to practise law. Following resumption of the proceedings, the Office, which had reservations as to whether its composition (in particular as regards the members proposed by the organisations) satisfied the requirements of the directive, decided to submit the following two questions to the Court for a preliminary ruling:

`(1) Is Article 2 of Council Directive 89/665/EEC of 21 December 1989 to be interpreted as meaning that the Procurement Office of the Land of Tyrol, established by the Law of the Land of Tyrol on the award of contracts of 6 June 1994 (LGBl. No 87/1994), is a review body within the meaning of Article 2(8) of the Directive?

(2) Does the abovementioned law on the award of contracts adequately provide for the transposition into national law of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, in relation to the review procedures mentioned in Article 1 thereof?'

Admissibility

16 It is necessary, first of all, to establish whether the Office has the power, by virtue of the provisions governing its structure and forms of procedure, to make a reference to the Court under the preliminary ruling procedure. In its written observations, the Commission expresses reservations as to the admissibility of the questions in so far as they were submitted by a body which, for a number of reasons, could not be regarded as a `court or tribunal' within the meaning of Article 177 of the EC Treaty. (7)

17 It is well known that, for reasons connected with the uniform application of Community law, the concept of a `court or tribunal' which is competent to submit questions for a preliminary ruling has a meaning independent of the definitions to be found in the national legal systems. (8) As the Court has consistently held, (9) in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it acts as a third party and is independent. It is therefore appropriate at this stage to determine whether the conditions to which I have just referred are fulfilled by the body which has requested the Court's intervention in this case.

18 It should be pointed out in this connection that the Austrian law assigns the task of reviewing the legality of decisions concerning the award of contracts exclusively to the Public Procurement Office (Paragraphs 5 and 10 of the TVerG). That law also provides that its decisions are binding by operation of law (Paragraph 12 of the TVerG); in addition, since the Office constitutes a `collegiate body with a judicial element' as referred to in Article 133 of the Austrian Constitution, its decisions are not liable to be set aside or varied through administrative channels (Paragraph 6(7) of the TVerG). It therefore follows that the Office is established by law and that its jurisdiction is compulsory. A similar positive assessment is also called for with regard to its permanence, since the Office sits permanently. The fact that its members remain in office for a limited number of years (five) is irrelevant in that regard since it is well known that the term

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of office of the members of a court can be limited to a specified period, provided only that the period in question is predetermined by law and not left to the discretionary choice of the person who has the power of appointment. Finally, there is no doubt that the Office applies rules of law when it reviews the legality of decisions relating to the award of contracts (Paragraph 8 of the TVerG).

19 With regard to the principle that its procedure must be inter partes, it is clear from the relevant legislation that the Office is also required to observe that principle in connection with its activity.

In this regard, it should be borne in mind that, in its judgment in the Dorsch Consult case, the Court observed, first of all, that the requirement in question is not an `absolute criterion', (10) and that it also considered it sufficient for the parties to the procedure before the procurement review body to be heard before any determination is made by the chamber concerned. It therefore held that a procedure in which the authority required to settle a dispute is obliged to hear the parties before making its determination is `inter partes'.

I am of the opinion that the same conclusion can be reached in this case, given that the Tyrolean law provides, in Paragraph 7(1), that hearings with the participation of the parties must be conducted before the Office and that more specific rules on the organisation and conduct of those hearings must be inserted, as has in fact been the case, in the internal rules of procedure. (11)

20 In accordance with those rules, the parties in the main proceedings were heard and had the opportunity to submit observations before the Office made its determination on the substance of the application. There can therefore be no doubt that, in this case, the proceedings were conducted in observance of the inter partes principle, as the Court understands that principle.

21 Finally, it remains to be established whether the structure and operation of the Office satisfy the conditions concerning the third-party status and independence of the judicial body.

It is well known that any body which purports to exercise judicial functions must, in principle, guarantee a high degree of imperviousness to any outside influence which could, if only potentially, compromise its independence of judgment in relation to the disputes which it is called upon to determine. That requirement is even more evident in cases such as this, where, on the one hand, the administrative authority has the power to appoint and remove the members of the Office and, on the other, it is also a party in the cases brought before the latter. (12)

22 In accordance with the shared legal traditions of the Member States, the Community concept of a court or tribunal implies that the provisions governing the composition and activities of any judicial body must guarantee, in strict terms, the independence and third-party status of its members. (13) That applies, in particular, to provisions conferring on the administrative authority the power to remove members of the body. Clearly, a power of that kind must be exercised only in exceptional cases, and the provisions conferring it on the executive must therefore specify, as transparently and exhaustively as possible, the grounds on which the members of the body may be removed.

23 That having been said in general terms, coming now to the case in point, it should be noted that, in its written observations, when it contested the admissibility of the questions, the Commission cast doubt, from several points of view, on whether the condition of independence was fulfilled by the rules governing the composition and operation of the Office. At the hearing, however, the Commission indicated that it had modified its position, which it justified by a (general) reference to the judgment in the Dorsch Consult case.

24 In the written procedure, the Commission relied, firstly, on the fact that the member of the Office who acts as rapporteur is an official of the administrative authority who is on leave of absence, arguing that, in view of the importance of the role played by the rapporteur within the Office, such a situation was not compatible with the position of the judicial body as a third party.

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I do not consider that criticism well founded. The fact that a member of the Office is drawn from the administrative authority is not, by itself, sufficient to compromise his freedom of judgment, which must be guaranteed by the set of rules governing the operation of the body. It should be added that the Austrian legislature itself has taken account of that requirement by providing in the law establishing the Office that, irrespective of their background, its members are not to be subject to instructions in the exercise of their functions (Paragraph 6(7)).

25 Secondly, the Commission observes that the fact that the Tyrolean law contains no provision for members of the Office to be challenged or to withdraw is not compatible with the condition of independence. Such provisions should, for example, be applied when members have participated, as officials of the administrative authority, in the award of the contract in question. According to the Commission, that gap in the law is all the more serious in view of the `structural' proximity of the Office to the administrative authority whose actions it is required to review.

The absence of any rules governing challenges to and withdrawals by members of the judicial body compromises that body's independence, as the Commission concluded in its written observations. Moreover, that gap cannot be remedied by applying by analogy the corresponding provisions relating to members of the judiciary, since that subject is bound up with the principle of the court specified by law and therefore needs an explicit and exhaustive set of rules.

26 Finally, the Commission disputes the compatibility of the rules governing removal from office of members of the body with the principle of the independence of the judicial body. It points out that the provisions on removal contained in Paragraph 6(4) of the law establishing the Office are worded too vaguely. In addition to a reference to circumstances in which the conditions required for appointment are no longer fulfilled, which obviously does not give rise to any problems of interpretation, Paragraph 6(4) also provides that the administrative authority may annul the appointment if factors arise which prevent proper performance of the duties and `are likely to do so for a long time'. It is this latter provision which, according to the Commission, appears difficult to reconcile with the principle of the independence of the judicial body.

The Commission's position seems reasonable. The provision cited above actually renders identification of the judge uncertain because the power of the government authority to remove members of the judicial body is not contingent upon clearly defined situations, and that is manifestly contrary to the principle of the court specified by law. Nor does it seem to me to be possible to compensate for that by the application by analogy of rules relating to the removal of members of the judiciary, since the provision as it stands shows the intention to confer an extremely wide power on the government authority. The vagueness of the provision and the consequent broad discretion conferred on the executive also make it very difficult, if not impossible, to institute a judicial review of any steps taken to remove a member of the Office.

In conclusion, the provision of the law establishing the Office which governs the sensitive matter of the removal of its members uses a formula which appears too vague to serve as a guarantee against undue interference or pressure on the part of the executive. (14)

27 That conclusion is not contradicted, but rather confirmed, by the judgment given recently by the Court in the Dorsch Consult case. In that case, the judicial nature of the German body responsible for reviewing public procurement awards (the Vergabeüberwachungsausschuss des Bundes) had been called into question precisely on the ground that it did not satisfy the criteria of independence and third-party status in relation to the executive. However, that precedent does not seem to me to be relevant. The Court considered that the doubts expressed by both the Commission and the Advocate General (15) were unfounded, on the ground that the German legal system expressly provides that the provisions on the removal of judges apply to the members of the Federal body competent to review public procurement awards and that they also govern directly the questions of challenge

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and withdrawal. The Court gave the following reasons for its position: (16) `Under Paragraph 57c(3) of the HGrG, the main provisions of the Richtergesetz concerning annulment or withdrawal of their appointments and concerning their independence and removal from office apply by analogy to official members of the chambers. In general, the provisions of the Richtergesetz concerning annulment and withdrawal of judges' appointments apply also to lay members. Furthermore, the impartiality of lay members is ensured by Paragraph 57c(2) of the HGrG, which provides that they must not hear cases in which they themselves were involved through participation in the decision-making process regarding the award of a contract or in which they are, or were, tenderers or representatives of tenderers'.

28 It is clear from that passage that the Court considers it essential, in order to ensure the independence and third-party status of judges, that the exceptional circumstances justifying challenges to members of the body should in any event be specified in the provisions regulating its operation or, as in the case of removal, that an express reference should be made to the legislation applicable to judges. While it is true that, in its judgment in the Dorsch Consult case, the Court referred to the application by analogy of the German legislation concerning the removal from office of judges, that must be more correctly understood as a reference to particular provisions relating to the circumstances of a different case, in so far as applicable. There is no such reference in the Tyrolean law, which is why the passage of the judgment which I have just cited may not be relied on to support the opposite conclusion to that proposed here.

29 Nor is there any contradiction between the conclusions which I have reached and the fact that the Court has recently answered some questions submitted to it by the Federal Austrian authority responsible for review procedures in relation to the award of public contracts. In its judgment in the Mannesmann Anlagenbau Austria AG and Others case, (17) the Court examined the substance of the questions raised by the Bundesvergabeamt (Federal Procurement Office) without examining the judicial nature of the body making the reference, whereas such an examination had been carried out by the parties and the Advocate General. Consequently, even if it is accepted that the Court had implicitly intended to recognise that body's competence to submit questions for a preliminary ruling, (18) the differences which can be found between the law establishing the Bundesvergabeamt and the law establishing the Tiroler Vergabeamt suggest that no importance should be attached to the circumstance to which I have just referred. Although it is true that the bodies are structured virtually identically and operate on the basis of similar rules, it is also true that the Federal rules are much more precise as regards the guarantees of independence and irremovability enjoyed by the members of the Bundesvergabeamt. In particular, unlike the Tyrolean law, the grounds for termination of the appointment of a member of the Federal Office are expressly and exhaustively set out in Paragraph 100 of the BVergG (Paragraph 79 of the previous version of the same law). (19) The same can be said with regard to the grounds on which parties may challenge members of the Office, which are expressly laid down in the Federal law but not, as shown above, in the Tyrolean law.

30 In the light of all those considerations, I propose that the Court declare that the questions raised by the Tiroler Vergabeamt are inadmissible since they have been submitted by a body lacking the status of a court or tribunal within the meaning of Article 177 of the Treaty.

The first and second questions submitted

31 Should the Court see fit, contrary to what I have suggested above, to regard the Office as a `court or tribunal' within the meaning of Article 177, thus overcoming all the uncertainties with regard to the position as third parties and independence of the members of the body, the problem would then arise of assessing the substance of the questions raised by the Office. The following observations will therefore be devoted to that assessment.

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32 As will be recalled, the Office seeks essentially to ascertain whether the rules governing its composition and operation comply with the requirements contained in the first subparagraph of Article 2(8) of the Review Directive.

In their written observations and during the oral procedure before the Court, the attention of the parties focused, in particular, on the profile of the president of the body in question, with a view to clarifying whether or not it satisfies the conditions set out in Article 2(8) of the Review Directive.

33 I would say at the outset that an analysis of that provision shows that the discussion referred to above is neither relevant nor necessary in this case. In order to substantiate that conclusion, it is essential to undertake a precise reading of Article 2(8) of the Review Directive.

34 The provision in question deals, it will be recalled, with the bodies responsible for review proceedings brought against decisions taken by the first-level authorities competent to award public contracts falling within the scope of the directive.

35 Article 2(8), and in particular the first sentence thereof, contemplates two different scenarios. Member States have the right to choose between two options when organising the system for reviewing decisions taken by the contracting authorities. The first option, which I shall describe as the `single-tier system', is to confer competence to hear review proceedings on `judicial bodies'. The second, which I shall call the `two-tier system' and which reflects the legislative position in several Member States at the time of the adoption of the directive, is to confer competence, in the first place, on first-instance review bodies which are not judicial bodies. The subsequent text of Article 2(8) applies exclusively to this second scenario. In such a case, the provision states that `provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body'.

36 The two-tier system is therefore characterised by the intervention, in the first place, of a non-judicial body which is required to give written reasons for its decisions concerning measures taken by the contracting authorities. In addition, those decisions must themselves be able to be the subject of judicial review or review before a body which is a `court or tribunal' within the meaning of Article 177 and is independent both of the contracting authority and of the first-instance review body. The subsequent text of Article 2(8) of the directive refers to that independent body as a court or tribunal as referred to in Article 177, which must satisfy certain `special' requirements relating to the conditions under which its members are appointed and leave office, the qualifications of its president, the procedure to be followed by it, and the binding nature of its decisions.

37 The task of assessing accurately the legislative purport of the provision in question is by no means a simple one. What is crucial for our purposes is to clarify what the directive meant by the phrase `bodies ... judicial in character' in the first sentence of Article 2(8). It must be ascertained whether that phrase is to be construed as a reference to the Community concept of `court or tribunal' or as a reference to national law.

38 I take the view that the former interpretation is the correct one, so that account is taken of the whole of Article 2(8) of the Review Directive only if the body responsible for review procedures is not a $court or tribunal$ as referred to in Article 177 of the Treaty and is therefore not a body entitled to submit questions to the Court of Justice for a preliminary ruling. In such a case, the provision in question requires Member States which adopt the two-tier system to allow a re-examination, in any event, of the decisions taken by the first-instance review body in the

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form of a judicial review or a review by another body which is a `court or tribunal' as referred to in Article 177.

39 The rationale of the system as a whole, as the Austrian Government and the Commission acknowledged at the hearing, is to ensure that, whenever decisions taken by the contracting authorities are reviewed, there can be intervention by a body which, by virtue of its `judicial' nature, is entitled to submit questions for a preliminary ruling to the Court of Justice, even if that body is not formally part of the judicial system of the Member State in question. Thus, bodies responsible for review procedures can obtain from the Court, when they find it necessary to do so, a ruling on the interpretation of the provisions of the Community directives in the field of public procurement (including, clearly, the Review Directive).

40 However, if the Office is considered to be a body entitled to submit questions to the Court of Justice - and is therefore a court or tribunal as referred to in Article 177 -, it follows that the requirements of supervision which underlie the `two-tier' option are irrelevant in this case since the body which deals, at first (and sole) instance, with review procedures is itself entitled to make references to the Court. It would therefore make no sense, from that point of view, to require decisions taken by a `court or tribunal' within the meaning of Article 177 to be subject to review by another body in turn entitled to make references to the Court. I reiterate: the requirement to provide in any event for the intervention of a body which is a `court or tribunal' within the meaning of Article 177 is clearly redundant in cases such as this, where the body responsible for review procedures is, by definition, regarded as a `court or tribunal'; it is relevant only if, in a two-tier system, the first tier is represented by a `purely' administrative body which, as such, falls outside the definition of a court or tribunal as referred to in Article 177.

41 The conclusion which I have reached makes it unnecessary for me to consider the substance of the two questions submitted by the Office, concerning the interpretation of the second subparagraph of Article 2(8) of the Review Directive. As will be recalled, that provision concerns the specific conditions to be satisfied by the independent body which deals with cases at second instance in the $two-tier$ system. It is therefore clear that the clarifications sought by the national authority are not relevant in this case since that part of the provision is not applicable to the Public Procurement Office established by the Tyrolean law. The issue raised by the referring authority therefore boils down to that of the admissibility of the questions submitted, which has already been examined. It is only within that framework, and not as part of the interpretation of Article 2(8) of the Review Directive, that any assessment can be made of the status of the members of the body, their independence in relation to the executive power and to the parties, the conditions governing their appointment and removal, and so on. It is therefore not crucial, for example, to assess whether the president of the Office has the same personal and professional qualifications as a member of the judiciary and whether those qualifications must be determined by reference to a `national' or `Community' concept of a court. That condition is peculiar to the `two-tier' system which the directive conceives of as a possible alternative available to Member States when establishing a national system of review procedures. However, it is not in itself a decisive criterion for regarding a body as a `court or tribunal' for the purposes of Article 177.

42 It should be added that, always assuming that the body in question is to be regarded as a court or tribunal within the meaning of Article 177, the conclusion which I have reached is the only one which allows the Tyrolean system of reviewing awards of public contracts to be included within the scope of the Review Directive. Indeed, if the Landesvergabeamt were to be regarded as a `court or tribunal within the meaning of Article 177' as referred to in the last sentence of the first part of Article 2(8), and therefore as a `second tier' in the determination of review proceedings against the award of public contracts, the interpreter would be faced with the problem of identifying the first-tier review body which is not a `body... judicial in character' and whose decisions would

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have to be the subject of review by the Office. It will be noted that no such first-instance review body exists within the Austrian system since review proceedings against decisions taken by contracting authorities are brought at first and sole instance before the Landesvergabeamt.

43 In the light of the foregoing, I propose that the Court declare the questions referred by the Tiroler Landesvergabeamt inadmissible since that body is not a court or tribunal within the meaning of Article 177 of the Treaty.

In the alternative, I propose that the Court reply as follows:

The second part of Article 2(8) of the review directive must be interpreted as meaning that the conditions set out therein apply exclusively to the composition of independent bodies responsible for the review of decisions taken by another body which is competent at first instance to hear and determine review proceedings against the award of public contracts and is not a court or tribunal as referred to in Article 177 of the EC Treaty. The provision in question is therefore not relevant for the purpose of assessing the composition and operation of the Tiroler Landesvergabeamt.

(1) - OJ 1989 L 395, p 33.

(2) - OJ 1992 L 209, p. 1.

(3) - OJ C 241, p. 21.

(4) - The Federal law, which was originally published in BGBl. No 639/1993, was subsequently republished following the codification of public contracts legislation by the Law of 27 May 1997 (BGBl. No 56/1997).

(5) - In LBGl. No 87/1994.

(6) - Rules published in the Tiroler LGBl., 1995, No 47.

(7) - It should, however, be pointed out that the Commission stated at the hearing that it had changed its view in the light of the position adopted by the Court in its judgment in Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraphs 22 to 38.

(8) - The independence of the Community concept of `court or tribunal' has been maintained by the Court since the judgment in Case 61/65 Vaassen-Göbbels [1966] ECR 377.

(9) - See, in particular, the judgments in the Vaassen-Göbbels case, cited above; in Case 14/86 Pretore di Salo [1987] ECR 2545; in Case 109/88 Danfoss [1989] ECR 3199; in Case C-393/92 Almelo and Others [1994] ECR I-1477; and, most recently, the judgment in the Dorsch Consult case, cited above, paragraph 23.

(10) - Judgment cited above, at paragraph 31.

(11) - See Paragraph 4 of the Tyrol Land Government Regulation of 24 April 1995, Tiroler LGBl. 1995, No 47.

(12) - This is, of course, the situation which normally arises in the field of public contracts. It is precisely in order to avoid any adverse consequences stemming from the `structural' proximity between the `reviewer' and the $reviewed$ that the Review Directive lays down additional conditions to be satisfied by the body, a court or tribunal within the meaning of Article 177 of the Treaty, called upon to resolve disputes concerning public contracts in the two-tier system. In particular, at least the president of the body is required to have the same legal and professional qualifications as a member of the judiciary. This system will be discussed below, at point 32 et seq.

(13) - The judgments which stress the importance of the conditions of independence and third-party status include those in the Pretore di Salo case, cited above, paragraph 7, Case C-24/92 Corbiau

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[1993] ECR I-1277, paragraph 15, and the Almelo case [1994], cited above, paragraph 21.

(14) - It is significant that the Austrian legal system itself contains different approaches to the operation even of bodies called upon to review, at sole instance, the legality of awards of public contracts. As is apparent from the circumstances of Case C-258/97 Hospital Ingenieure, in which I shall deliver my Opinion on 1 October 1998, the law on public contracts in force in Carinthia confers the abovementioned powers on the Unabhängiger Verwaltungssenat für Kärnten, a judicial body which derives the guarantees of its independence from the law establishing it, the power of removal being conferred on the senate itself and exercisable only in the circumstances expressly provided for by the law (Article 129b of the Austrian Federal Constitution).

(15) - See points 33 to 37 of the Opinion of Advocate General Tesauro [1997] ECR I-4976 et seq.

(16) - Judgment cited above, paragraph 36.

(17) - Judgment in Case C-44/96 [1998] ECR I-73.

(18) - In his Opinion delivered on 16 September 1997, at points 37 to 44, Advocate General Léger concluded in the affirmative. However, it is significant, for the purposes of this case, that at point 41 of his Opinion, in stating the grounds for his affirmative conclusion as regards the criterion of independence of the body, the Advocate General pointed out that an exhaustive list of the grounds for revocation is given in Article 79 of the BVergG (now Article 100 of the BVergG), which correspond to objective situations or, in the case of serious negligence, to omissions required by the Law to be so serious as to reduce the risk of arbitrary action or interference on the part of the administrative authorities.

(19) - Under Paragraph 100 of the BVergG, the appointment of a member of the Bundesvergabeamt is terminated for any of the following reasons: death or resignation from office; becoming ineligible to stand for election to Parliament; a finding by the body, meeting in plenary session, that he is incapable of performing his duties on account of serious physical or mental deficiencies; expiry of his term of office; a finding by the body, meeting in plenary session, that he has committed a serious breach of duty; resignation from the judiciary or other appointing body.

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Opinion of Mr Advocate General Fennelly delivered on 2 April 1998.
Walter Tögel v Niederösterreichische Gebietskrankenkasse.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public service contracts - Direct effect of a directive not transposed into national law - Classification of services for the transport of patients.
Case C-76/97.

I - Introduction

1 This case relates to the award of a public service contract for the transport of persons, with or without medical attendance, to and from hospitals and medical centres. It raises, in particular, questions regarding the bodies competent to review such contracts and the availability of remedies where the relevant Community directives have not been implemented in time, the categorisation of the services in question and the contract award procedures which should, accordingly, be followed, the direct effect of the legislative provisions concerning these procedures, and the effect of the implementation of the applicable directive on pre-existing contracts.

II - Legal and factual context

A - Community law

2 Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (1) (hereinafter referred to as `the Review Directive'), as amended, provides as follows:

`(1) The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national (2) rules implementing that law. (3)

(2) Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.'

Article 2 of the Review Directive provides, in relevant part, as follows:

`(1) The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

(2) The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

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(6) The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

(7) The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

(8) Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

3 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (4) (hereinafter referred to as `the Services Directive') establishes procurement procedures for certain types of public service contracts. The seventh recital in the preamble to the Services Directive provides as follows:

`Whereas the field of services is best described, for the purpose of application of procedural rules and for monitoring purposes, by subdividing it into categories corresponding to particular positions of a common classification; whereas Annexes I A and I B of this Directive refer to the CPC nomenclature (common product classification) of the United Nations; whereas that nomenclature is likely to be replaced in the future by Community nomenclature; whereas provision should be made for adapting the CPC nomenclature in Annexes I A and I B in consequence.'

4 The twenty-first recital in the preamble to the Services Directive reads, in relevant part, as follows:

`Whereas full application of this Directive must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realised; whereas contracts for other services need to be monitored for a certain period before a decision is taken on the full application of this Directive.'

5 Article 1 of the Services Directive defines a number of terms employed in the Directive. Article 2 governs the scope of the Directive relative to that of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts. (5) Article 3 of the Services Directive provides for the application, without discrimination, of the provisions of the Directive to the award of public service contracts, to design contests and to service contracts publicly subsidised by more than 50% which are awarded in connection with works contracts within the meaning of Article 1a(2) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. (6) In particular, Article 3(1) provides as follows:

`In awarding public service contracts or in organising design contests contracting authorities

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shall apply procedures adapted to the provisions of this Directive.'

Articles 4 to 6 of the Services Directive provide for the non-application of that Directive in a variety of specified exceptional situations. Article 7 of the Services Directive provides for the application of the Directive to public service contracts with an estimated value, net of VAT, which is not less than ECU 200 000, and identifies the methods by which contracts are to be valued.

6 Article 8 of the Services Directive provides for the observance of the detailed award procedures in Titles III to VI in the case of contracts which have as their object services listed in Annex I A to the Services Directive. Article 9 states that contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16 of the Services Directive, which relate only to technical specifications and the notification of the results of award procedures. The procedure applicable to contracts whose subject-matter falls within both Annexes is dealt with as follows by Article 10 of the Services Directive:

`Contracts which have as their object services listed in both Annex I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

7 Title III of the Services Directive regulates the choice of award procedures and the rules governing design contests. Title IV relates to technical specifications for public service contracts. Title V establishes common advertising rules. Title VI is divided into three chapters, which set out, respectively, common rules on participation by service providers in the contract award process, criteria for qualitative selection and criteria for the award of contracts.

8 Annex I A to the Services Directive lists services within the meaning of Article 8. It includes, in Category No 2, the subject `Land transport services, including armoured car services, and courier services, except transport of mail', with the CPC reference numbers 712 (except 71235), 7512, 87304. Annex I B lists services within the meaning of Article 9 of the Services Directive, and includes Category No 25, whose subject is `Health and Social Services'. Its CPC reference number, 93, is provided in the third column of the Annex.

9 CPC reference number 712 is a subdivision of Division 71 (`Land transport services') and is entitled `Other land transport services'. (7) Subdivision 712 includes `Non-scheduled passenger transportation' (7122), which is further subdivided into `Taxi services' (71221), `Rental services of passenger cars with operator' (71222), `Rental services of buses and coaches with operator' (71223), `Passenger transportation by man- or animal-drawn vehicles' (71224) and `Other non-scheduled passenger transportation n.e.c.' (71229). (8) In Division 93 of the CPC (`Health and Social Services'), subdivision 931 on `Human health services' includes `Other human health services' (9319), one of the elements of which is headed `Ambulance services' (93192), followed by the fuller description: `[g]eneral and specialised medical services delivered in the ambulance'.

10 The fifth recital in the preamble to Council Regulation (EEC) No 3696/93 of 29 October 1993 on the statistical classification of products by activity (CPA) in the European Economic Community (9) (hereinafter `the CPA Regulation') reads as follows:

`Whereas the international compatibility of economic statistics requires that the Member States and the Community institutions use product classifications by activity which are directly linked to the United Nations Central Product Classification (CPC).'

Article 1(1) of the CPA Regulation states that `[t]he purpose of this Regulation is to establish a classification of products by activity within the Community in order to ensure comparability between national and Community classifications and hence national and Community statistics'. (10)

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Article 1(3) states: `This Regulation shall apply only to the use of this classification for statistical purposes'. Article 3(1) of the CPA Regulation states, in relevant part, that `[t]he CPA shall be used by the Commission and the Member States as a classification'.

11 The CPA comprises a Division 60, `Land Transport...' and a Division 85, `Health and Social Work Services'. Although the component groups, classes and categories are not divided in precisely the same way as is done in the CPC, (11) their order and content are essentially similar. The CPA subcategories 60.23.14, `Other non-scheduled passenger transportation n.e.c.', and 85.14.14, `Ambulance services', are stated to correspond, respectively, to CPC reference numbers 71229 and 93192.

12 The Commission adopted a Common Procurement Vocabulary (CPV) in 1996. (12) The preface states that the main CPV is `a detailed adaptation, tailored to the needs of public procurement, of the CPA ... nomenclature.... The CPV will ultimately become a harmonised nomenclature that will replace the different ones referred to in the public procurement directives'. In Division 60 of the CPV, reference number 60231400-0 relates to `Other non-scheduled passenger transport n.e.c.', while in Division 85, reference number 85141400-3 relates to `Ambulance services'.

13 The fifth and sixth recitals in the preamble to Commission Recommendation 96/527/EC of 30 July 1996 on the use of the Common Procurement Vocabulary (CPV) for describing the subject-matter of public contracts (13) (hereinafter `the CPV Recommendation') state that the CPV is an adaptation of the CPA and that the CPA, in turn, `offers a fixed correspondence with the CPC nomenclature of the United Nations'. It is recommended that the CPV be used by contracting authorities and contracting entities covered by the various public procurement directives (14) in notices of public contracts submitted to the Office for Official Publications of the European Communities, and by suppliers of goods, works and services and their agents to describe contracts of interest to them.

B - Implementation in national law

14 By virtue of Article 65 of and Annex XVI to the Agreement on the European Economic Area signed at Oporto on 2 May 1992, the Republic of Austria was obliged to transpose into national law, by 1 January 1994 at the latest, (15) a number of Community acts in the field of public procurement, including the Review Directive in its original version. The Review Directive was transposed at federal level by the Bundesgesetz über die Vergabe von Aufträgen or Bundesvergabegesetz (Federal Procurement Law, hereinafter `the BVergG'), (16) which entered into force on 1 January 1994. The BVergG established a conciliation procedure before the Bundesvergabekontrollkommission (Federal Procurement Review Commission) and a review procedure before the Bundesvergabeamt (Federal Procurement Office). The review competence of the Bundesvergabeamt was established by the BVergG only in respect of awards of public supply and works contracts.

15 By virtue of Article 168 of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, of 24 June 1994, (17) the Services Directive, including Article 41 amending the Review Directive, was required to be transposed into Austrian law by the date of accession, viz. 1 January 1995. (18) Transposition at federal level took place by means of an amendment to the BVergG, (19) which extended the review competence of the Bundesvergabeamt to awards of public service contracts and which entered into force on 1 January 1997.

16 Austrian social security institutions are legally obliged to reimburse transport costs to insured persons in the event that those persons or members of their families need medical assistance. Such reimbursement covers the costs of transport within national territory, on the one hand, for hospitalisation, to the nearest suitable clinic or from there to the patient's residence and, on the other hand,

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for out-patient treatment, to the nearest suitable doctor or health centre, at contractually agreed rates. In practice, a broad distinction is drawn between transport of patients by emergency-doctor vehicle (accompanied by the doctor on emergency call and a paramedic), rescue and patient transport (accompanied by a paramedic) and ambulance journeys (without medical attendance). Relationships between the social security institutions and the transport operators are governed by private-law contracts. It appears that doctors are provided and paid separately in the case of transport by an emergency-doctor vehicle, so that their presence and activities in the ambulance do not form the subject-matter of such contracts.

C - Facts and proceedings

17 In 1984, the Gebietskrankenkasse Niederösterreich (Sickness Insurance Fund for Lower Austria, hereinafter `the defendant') entered into framework agreements of unlimited duration with the Austrian Red Cross, regional section for Lower Austria, and the Austrian federation of Samaritan workers, for the provision of patient transport of all three types. The framework agreement provides for tariffs to be fixed by a related agreement and for annual tariff negotiations to be concluded within two months. The framework agreement can be terminated by either party, subject to three months' notice in writing, at the end of any calendar year.

18 On 1 December 1992, the Bezirkshauptmannschaft Wien Umgebung (Chief Local Government Office for Vienna and District) granted Walter Tögel (hereinafter `the applicant') a licence to carry on a hire-car business, limited to rescue and patient transport. However, the defendant refused the applicant's repeated requests for a direct charging contract for rescue and patient transport, on the ground that care was adequately provided through the two existing agreements. The applicant applied to the Bundesvergabeamt to commence review proceedings under Paragraph 91(2) of the BVergG on 22 August 1996, that is, before the amendment of that law which transposed the Services Directive. He sought the remedy set out in Article 2(1)(b) of the Review Directive, arguing that the dispute concerned a service within the meaning of Annex I A to the Services Directive and that a public tender procedure should, therefore, be carried out.

19 The Bundesvergabeamt stayed the proceedings and referred the following questions for a preliminary ruling in accordance with Article 177 of the Treaty establishing the European Community:

`1. May an individual derive, from Article 1(1) and (2), Article 2(1) or any other provisions of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, a specific right to have review proceedings conducted before authorities or courts which comply with the provisions of Article 2(8) of Directive 89/665/EEC, which right is so sufficiently precise and specific that, in the event of non-transposition of the Directive in question by the Member State, an individual may successfully assert that legal right against that Member State in legal proceedings?

2. In conducting a review procedure on the basis of an individual's right, founded on Article 41 of Directive 92/50/EEC in conjunction with Directive 89/665/EEC, to the conduct of a review procedure, must a national court having the attributes of the Bundesvergabeamt disregard provisions of national law such as Paragraph 91(2) and (3) of the Bundesvergabegesetz, which confer on the Bundesvergabeamt powers of review only in the case of infringements of the Bundesvergabegesetz and regulations adopted thereunder, on the ground that those provisions preclude a review procedure from being conducted under the Bundesvergabegesetz for awards of contracts for services, and must such a national court conduct a review procedure in accordance with the fourth part of the Bundesvergabegesetz?

3.(a) Are the services mentioned in the facts of the case (with reference to Article 10 of Directive 92/50/EEC) to be classified as services coming under Annex I A, Category No 2 (Land transport

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services) and contracts for such services thus to be awarded in accordance with the provisions of Titles III and IV of the Directive, or are they to be classified as services coming under Annex I B to Directive 92/50/EEC (Health services) with the result that contracts for such services are to be awarded in accordance with the provisions of Articles 13 and 14, or do those services fall entirely outside the sphere of application of Directive 92/50/EEC?

(b) Do the provisions of Articles 1 to 7 satisfy the preconditions laid down in paragraph 12 of the judgment in Case 41/74 Van Duyn v Home Office on the direct applicability of a Community Directive, with the result that services coming under Annex I B to the Directive are to be awarded under the procedure therein mentioned or are the relevant provisions of the Directive for the services mentioned in Annex I A capable of fulfilling the preconditions laid down in the abovementioned case?

4. Is there under Article 5 or other provisions of the EC Treaty, or under Directive 92/50/EEC, an obligation on the State to interfere in existing legal situations concluded for an indefinite period or for several years but which were not entered into in accordance with the abovementioned directive?'

20 Written and oral observations were submitted by the defendant, the Republic of Austria and the Commission of the European Communities. Oral observations were also submitted by the applicant and the French Republic.

III - Analysis

A - Jurisdiction

21 I would first observe that the Bundesvergabeamt is, in my view, `a court or tribunal of a Member State' for the purposes of Article 177 of the Treaty. To this end, I adopt fully the reasoning of Advocate General Léger in Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH. (20) Furthermore, this reasoning appears to have been implicitly accepted by the Court, whose judgment examined the questions referred by the Bundesvergabeamt in that case without a preliminary analysis of their admissibility. (21)

B - The first and second questions

22 The Services Directive contains the substantive provisions on the award of public contracts for services as well as providing for the extension to the field of services of the review procedures set out in the Review Directive. It is common ground that the Services Directive should have been, but had not been, implemented, in Austria on the date the applicant sought to initiate review proceedings in accordance with Article 2(1)(b) of the Review Directive, viz. 22 August 1996. In the first and second questions, the national court asks whether there is a directly effective right to have review proceedings conducted before authorities or courts which comply with the provisions of Article 2(8) of the Review Directive, which an individual can assert in order to have such proceedings conducted before the Bundesvergabeamt in respect of an award of a contract for services, despite the attribution of competence by the BVergG to that body only in respect of contracts for works or for supplies.

23 In essentially similar circumstances, the German Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board) referred a question in Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH (22) as to whether bodies set up by Member States under the Review Directive to review only the procedures for the award of public contracts for works and supplies were competent, by virtue of Article 41 of the Services Directive, to review also the procedures for the award of public service contracts. The Court answered that such a result did not follow from Article 41 of the Services Directive. (23) It observed that it was for the

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legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. Member States must ensure that those rights are effectively protected in each case. Otherwise, the Court does not involve itself in the resolution of questions of jurisdiction. (24) Although Article 41 of the Services Directive requires the Member States to ensure effective review in the field of public service contracts, `it does not indicate which national bodies are to be the competent bodies for this purpose or whether these bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts'. (25)

24 This conclusion excluded the possibility of Article 41 of the Services Directive giving rise to a directly effective right to have review proceedings conducted before the Vergabeüberwachungsausschuß des Bundes, because one of the essential elements was missing, that is, an identifiable person or body under a duty to conduct the review proceedings in question. (26) It implicitly rejects the argument initially submitted by Austria (but, in light of Dorsch Consult, not pursued at the oral hearing) that in the case of partial implementation of the Review Directive through the establishment in respect of works and supplies of a review body such as the Bundesvergabeamt, that body is sufficiently closely related to the omitted field of services for its competence, as a matter of Community law, to be extended to that field. In response to Austria's contention that the Bundesvergabeamt has jurisdiction `proximate' to that in the Directive, the defendant disputed the existence of such a notion in Austrian law and, in my view, correctly observed that the degree of clarity of a directive cannot be assessed, for the purposes of determining whether it is directly effective in the absence of adequate transposition, by reference to the existing content of national rules, which will vary between Member States.

25 The present case is quite different, in my view, from the situation in a case such as Factortame and Others, (27) which was mentioned by the Bundesvergabeamt in its order for reference. In that case, the Court required the national court to set aside a national rule precluding, in certain circumstances, the grant of interim relief, which was deemed essential for Community-law rights to have full force and effect. However, it was clear that the national court, the House of Lords, had jurisdiction over the subject-matter of the dispute and was properly seised of it. (28) I do not accept the applicant's argument that, as a matter of Community law, all national courts and tribunals have jurisdiction to apply all directly effective provisions of Community law in the absence of a domestic-law provision expressly excluding such jurisdiction. (29) As Advocate General Tesauro said in his Opinion in Dorsch Consult, `this would encroach on the domain of the national legislator'. (30)

26 The Court referred, however, in Dorsch Consult to the duty of `all the authorities of Member States, including, for matters within their jurisdiction, the courts', to take all appropriate measures to achieve the result envisaged by a directive, which gives rise to the judicial obligation to interpret national law, as far as possible, in the light of the wording and purpose of the directive. (31) This requires the national court to `determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts ... [and] in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts'. (32)

27 The Bundesvergabeamt refers in its order for reference to a decision of the Verfassungsgerichtshof (Austrian Constitutional Court) of 11 December 1995. (33) The Verfassungsgerichtshof doubted, on similar grounds to those outlined above, whether Article 1(1) of the Review Directive, as amended by Article 41 of the Services Directive, gave rise to a directly effective right for individuals to bring review proceedings before the Bundesvergabeamt in respect of public service contracts. This would, it said, prejudge a decision reserved for the national legislature on whether to frame

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review proceedings in the field of services in the same way as for works or supply contracts, or to make other arrangements for legal protection in this area consistently with the requirements of Community law. That, of course, is a matter to be resolved exclusively by the national legal system.

28 If the Bundesvergabeamt is ultimately found not to enjoy the claimed jurisdiction, two principal options remain open to individuals who seek a remedy for an alleged breach of the terms of the Services Directive.

29 The Court observed in Dorsch Consult that where a Member State has failed to take the implementing measures required, individuals might be able to rely, as against that Member State, on the substantive provisions of the Services Directive. (34) The possible direct effect of certain of those provisions is considered below, in response to the third question. Were any of those substantive provisions to have direct effect, it would be a clear violation of Community law if an individual had no actual possibility of relying upon it for want of a court, whether specialised or of general jurisdiction, to hear his case. (35) Austria stated at the oral hearing that disputes regarding public procurement awards which are outside the competence of the Bundesvergabeamt are deemed to be contractual disputes within the jurisdiction of the ordinary civil courts. (36) Only the national courts can resolve this issue.

30 Alternatively, the persons concerned may use the appropriate domestic-law procedures to claim compensation for damage incurred owing to the failure to transpose the Services Directive within the time prescribed. (37) The existence of these potential remedies does not, however, affect my conclusion regarding the issue raised by the first and second questions, which I would answer in the same terms as the operative part of the judgment in Dorsch Consult.

C - The third question, part (a)

31 By this question the Bundesvergabeamt is seeking guidance as to the classification as between Annexes I A and I B, respectively, for the purpose of applying Article 10 of the Services Directive to the services `mentioned in the facts of the case'. As I have already mentioned, a practical distinction is drawn in the transport of patients between transport by emergency-doctor vehicle (accompanied by the doctor on emergency call, whose presence is not the responsibility of the service provider), rescue and patient transport (accompanied by a paramedic) and ambulance journeys (without medical attendance). It appears that the applicant is only licensed to provide services of the second type, and it was in respect of such rescue and patient transport that he applied to the defendant for a contract. The defendant relies on the prior existence of the framework agreements, which provide for patient transport of all three types. In the light of the defendant's existing practice, I will address this question as if it related to the content of those framework contracts, although the response I propose should also assist in determining the appropriate procedure for the award of a contract of more limited scope.

32 In responding to this question, I can state at once that I share France's view that the CPC provides the only binding guide to the interpretation of the service categories set out in Annexes I A and I B to the Services Directive. The seventh recital in the preamble to the Services Directive, quoted at paragraph 3 above, shows clearly that the references in the Annexes to the CPC are not merely indicative, but rather that the categories used `correspond... to particular positions of a common classification', the CPC. This intention appears unambiguously, not only from the terms of the recital but also from the material terms of the Annexes. Public authorities and affected undertakings and individuals are entitled to as much clarity as possible in dealing with technical rules which govern the action they are required to take.

33 Although the CPA nomenclature has been established by a binding act, the CPA Regulation, it is clearly intended for purposes other than the interpretation of the Services Directive, that

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is, as its Article 1(3) states, `for statistical purposes'. The more general statement in Article 3(1) of the CPA Regulation that `[t]he CPA shall be used by the Commission and the Member States as a classification' cannot, in my view, in the absence of a further legislative act, override the earlier description of its objectives in Article 1(3). The fact that the CPA is employed for classification purposes under Directive 93/36/EEC coordinating the procedures for the award of public supply contracts (38) does not indicate that its normal scope of application should be extended to fields other than that governed by that Directive.

34 On the other hand, the CPV, although expressly intended for use in the field of procurement, is the subject only of a Commission recommendation which, by virtue of Article 189 of the Treaty, has no binding effect. It cannot, therefore, be deemed to be the eventual replacement of the CPC, for the purposes of Annexes I A and I B, that is envisaged in the seventh recital in the preamble to the Services Directive. Although the preface to the CPV suggests that it will ultimately serve that intended function, the CPV Recommendation confines itself to urging the use of that nomenclature in preparing notices and other communications in the procurement field. Given that neither the CPV nor the CPV Recommendation refers to the use of the Annexes to the Services Directive to determine the appropriate contract-award procedure, it cannot be deemed, for present purposes, to have the interpretative value of a recommendation `designed to supplement binding Community provisions'. (39)

35 I do not accept the Commission's argument that the CPC-based lists in Annexes I A and I B should be interpreted with the aid of the CPA or the CPV. The fifth recital in the preamble to the CPA Regulation indicates that the CPA is `directly linked' to the CPC, for the purposes of `the international compatibility of economic statistics', whereas the sixth recital in the preamble to the CPV Recommendation states that the CPA `offers a fixed correspondence with the CPC nomenclature'. The fifth recital describes the CPV, for its part, as `an adaptation of the CPA'. In the circumstances, it seems to me more logical to construe the CPA and CPV by reference to the temporally prior CPC than to do the opposite. (40) I should add, for the sake of completeness, that I can detect nothing in the CPA and CPV nomenclatures which would affect in any way my interpretation of the CPC-based lists in the Services Directive's Annexes, read on their own.

36 Although it might be initially tempting, given the simple title `Ambulance services' of CPC reference number 93192, to allocate the contractual services at issue in this case in their entirety, or at least those which involve some level of medical attendance, to Category No 25 `Health and Social Services' (CPC reference number 93) in Annex I B, closer examination shows that this would not be justified. In the first place, the explanatory note to this category reads: `General and specialised medical services delivered in the ambulance'. Secondly, this reference number must be read in its context. `Human health services' (931) includes `Hospital services' (9311), `Medical and dental services' (9312), and `Other human health services' (9319), which is further subdivided into `Deliveries and related services, nursing services, physiotherapeutic and paramedical services' (93191), `Ambulance services' (93192), `Residential health facilities services other than hospital services' (93193) and `Other human health services n.e.c.' (93199). These simple service titles, amplified by the more detailed descriptions which accompany them, show that this Division of the CPC focuses only on the medical aspects of health services, to the exclusion of non-medical aspects. (41)

37 `General and specialised medical services delivered in the ambulance' (93192) would cover the attendance of a nurse or paramedic. This category should not, however, cover the simple transport costs of fuel, driver and acquisition of a vehicle of the requisite size and power, just as general hospital catering services, for example, should not be included, in my view, under CPC reference number 93110 `Hospital services'. The excluded transport elements should, instead, be classified in Category No 2 of Annex I A to the Services Directive, `Land transport services...', corresponding

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to CPC reference number 71229 `Other non-scheduled passenger transportation n.e.c.'.

38 I do not accept the applicant's argument that the fact that the Services Directive divides the services within its material scope into two classes, which are subject to different award procedures, affects this conclusion. The twenty-first recital in the preamble to the Services Directive indicates that the application of the full award procedure set out in Titles III to VI is limited, for a transitional period, `to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realised'. The defendant argued that the contractual services at issue should, thus, be classified in Annex I B, as no non-Austrian service provider had sought a contract and it would be impossible to provide the services in question from outside Austria. The nationality or place of establishment of the actual or potential tenderers in any given case does not appear to me to be relevant. Furthermore, the term `services' in the Services Directive should not be understood as relating only to economic activities within Chapter 3, `Services', of Title III of the Treaty. The Services Directive was adopted on the basis not only of Article 66 but also of Article 57(2) of the Treaty, which relates to establishment. Thus, service providers established in Austria from other Member States would also satisfy the criterion in the twenty-first recital.

39 The disputed public service contract, therefore, concerns three types of contractual service the common element of which - non-scheduled transport of passengers - would, taken on its own, come under Annex I A to the Services Directive, and the variable element of which - general and specialised medical services delivered in the ambulance - would, in the same circumstances, come under Annex I B. The Bundesvergabeamt and some of the parties who have submitted observations have suggested that the appropriate contract award procedure must, thus, be determined in accordance with Article 10 of the Services Directive. Articles 8, 9 and 10 provide for the application of the provisions of Titles III to VI or of Articles 14 and 16, respectively, by reference to the content of the `contracts' to be awarded. Where a contract has as its object exclusively `services listed' in either Annex I A or I B, either Article 8 or 9 applies. When it covers `services listed in both Annexes I A and I B', the applicable award procedure depends, pursuant to Article 10, on the relative values of the services covered by the contract.

40 I would first state that, in my view, the specific terms of Article 10 of the Services Directive prevail, in cases of conflict, over the interpretative rules of the CPC itself, as the CPC is simply used as a point of reference rather than to dictate the rules by which the appropriate award procedure is chosen. I have in mind, in particular, CPC interpretative rule B, which states, in relevant part:

`1. When services are, prima facie, classifiable under two or more categories, classification shall be effected as follows, on the understanding that only categories at the same level (sections, divisions, groups, classes or subclasses) are comparable:

(a) The category which provides the most specific description shall be preferred to categories providing a more general description.

(b) Composite services consisting of a combination of different services which cannot be classified by reference to 1(a) shall be classified as if they consisted of the service which gives them their essential character, in so far as this criterion is applicable.'

In the light of the foregoing analysis, `ambulance services' does not describe the services at issue more specifically than does `non-scheduled passenger transportation'. Furthermore, Article 10 clearly sets out a rule regarding contracts for multiple or composite services which is at variance with that in rule B 1(b) of the CPC. However, different means of applying Article 10 have been proposed.

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41 France argued that a service could not come, simultaneously, under Annexes I A and I B to the Services Directive, and that the three distinct types of contractual service should be assessed in the light of the general nature of each service, according to the presence or absence of medical personnel, rather than by trying to assess the relative cost of the transport and medical elements of the three contractual services taken together. It concluded that ambulance journeys without medical attendance in ordinary vehicles came under Annex I A to the Services Directive, whereas patient transport accompanied by either a doctor or a paramedic in a specially-equipped vehicle should be deemed to come under Annex I B. It would then be necessary to assess whether the transport services involving medical attention or the simple ambulance transport service were greater in value, in order to determine, in accordance with Article 10, which of the award procedures referred to in Articles 8 and 9 of the Services Directive was applicable to the contract as a whole. This approach favours a priori the medical as opposed to the transport element of the contractual services in question when determining the applicable contract-award procedure.

42 On the other hand, the Commission, supported by the applicant, examined the transport of patients in the broadest sense, that is, without distinguishing between the three different contractual types of service. It argued that the transport of patients comprised certain services governed by Article 8 of the Services Directive and others governed by Article 9. Article 10 could, therefore, be applied in the light of the relative value of these two elements of the overall contract. The applicant contended that the transport element of the services provided was the greater.

43 Despite the ambiguous reference in Article 10 of the Services Directive to `services listed in both Annexes I A and I B', which could be read as establishing that certain service activities can be placed, simultaneously, in categories from both lists, France is correct, in my view, to suggest that this is not possible. It is necessary, in the light of the two-tier scheme of award procedures established by Articles 8 and 9, which is applied by reference to the ascription of a given service to one or other of the annexed lists, that the Annexes be deemed to be mutually exclusive.

44 However, I also take the view that the Commission's approach represents the better interpretation of Article 10 of the Services Directive. France's argument for a global approach, allocating each service in its entirety to either Annex I A or I B depending on the presence or absence of medical assistance, does not reflect the clear distinction in the Annexes between transport and `medical services delivered in the ambulance'. The notion in Article 10 of `services listed' in either Annex I A or I B is a Community-law notion. Accordingly, Community-law criteria - those used to subdivide the annexed lists into a number of categories by reference, in particular, to the CPC - should be used to identify and distinguish the various services which are the object of a single public service contract. This process would be distorted if it were forced to conform to a prior contractual subdivision of the relevant services into classes different from the categories set out in the Annexes to the Services Directive. The three types of contractual service provided for in the disputed contract cut across the categories of service employed in the Annexes, so that it would be impossible accurately to reflect the relative value of the services listed in Annexes I A and I B which are the object of the contract if the contract rather than the Annexes were used as the framework for analysis.

45 Article 10 requires, instead, that the value of each of the services which are the object of the contract, categorised in accordance with the scheme laid down in the Services Directive, be estimated separately, and then compared. In the present case, this would involve assessing the total value of the passenger-transport element of the three contractual service types, and comparing it with that of the medical services element which, of course, varies markedly between those three contractual service types.

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46 I recognise, none the less, the validity of the submissions by France and Austria regarding the difficulty of conducting a valuation in accordance with service categories other than those employed by the contracting authority or parties themselves. The calculation of the relative value of a number of categories of service which are the object of a single public service contract also gives rise to difficulties of a more general kind. The tendering process is founded on the premiss that different service providers will have different cost structures, some more competitive than others. This may result in differing relative values, as between service providers, for the service categories which are taken into account in the total prices they quote for the services tendered or contracted for. Furthermore, it cannot be expected that a contracting authority will know in advance the exact relative cost for each potential service provider of the different service categories which constitute the object of an envisaged contract.

47 I do not wish to exaggerate the significance of these problems. In many, perhaps most cases, the obvious preponderance in relative value of one of the listed service categories will place the matter beyond dispute. Furthermore, although paragraphs (2) to (7) of Article 7 of the Services Directive appear to be chiefly concerned with the calculation of the total estimated value of a contract, for the purposes of satisfying the threshold for application of the Directive set out in Article 7(1), they furnish some guidance on how contracting authorities should estimate the value of the individual service categories which comprise a contract.

48 In cases where the contracting authority's estimate of the relative value of the service categories which are the object of a public service contract is disputed, recognition of the problems involved in preparing such an estimate in advance dictates that the burden of proving the contrary should be borne by the complaining party and that the authority be permitted a certain margin of appreciation. The complainant should have to demonstrate, on the basis of the information which was or should have been considered by the contracting authority, from previous contracts, commercial and accounting practice, past levels of demand and so on, and taking into account its margin of appreciation, that the values placed on the services were clearly incorrect. In the present case, it is for the competent national court to find the facts necessary for such a determination.

D - The third question, part (b)

49 In part (b) of the third question, the Bundesvergabeamt asks whether Articles 1 to 7 of the Services Directive, in the event that the limited award procedure for Annex I B services is applicable, and the provisions of its Titles III to VI, in the event of the full award procedure prescribed for Annex I A services being applicable, are capable of direct effect where that Directive has not been transposed in time in national law. Titles IV and V include, respectively, Articles 14 and 16 of the Services Directive, which are also applicable to the award of contracts for Annex I B services.

50 In paragraph 12 of its judgment in Van Duyn v Home Office, (42) the Court established the principle of the possible direct effect of unimplemented directives. The Court has consistently held that `wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State'. (43)

51 In Francovich and Others, the Court stated that it was `necessary to see whether the provisions of [the directive in question] which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the persons liable to provide the guarantee'. (44) Similarly, in the present case, it is necessary to determine which, if any,

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of the relevant provisions of the Services Directive are unconditional and sufficiently precise regarding the creation of rights for individuals, the identity of the individuals who are to benefit from those rights, and the identity of the public bodies under a duty to respect those rights.

52 For the purpose of such an inquiry, I would first observe that the application of the Review Directive to services strongly indicates that the Services Directive was intended to involve specific justiciable rights for individuals. I would add, secondly, that, although provisions of a directive which define its personal and material scope may not as such create rights for individuals, they are essential to the identification of the bearers of rights and duties and of the extent of rights and duties under the directive and may, read with substantive rights-creating provisions, be capable of direct effect. Thirdly, provisions of a directive whose application entails the exercise by Member State authorities of administrative discretion in accordance with prescribed criteria, as distinct from substantive discretion regarding the means of their transposition into national law, may be directly effective in the case of non-implementation. This is borne out by the decision in Van Duyn v Home Office regarding the criteria in accordance with which Member States were to take measures on grounds of public policy or public security, which were set out in Article 3(1) of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. (45)

53 On the other hand, in the light of the broadly similar content of the other public procurement directives, (46) the following statement by the Court regarding Directive 71/305 in CEI v Association Intercommunale pour les Autoroutes des Ardennes (47) should be borne in mind:

`The directive... does not lay down a uniform and exhaustive body of Community rules. Within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law....'

54 Areas not exhaustively regulated by the procurement directives include the determination of a contractor's financial standing, the fixing of a maximum value for works (48) and the imposition of conditions regarding the employment of unemployed persons. (49) By way of contrast, the Court found in Transporoute v Minister of Public Works (50) that Articles 23 to 26 of Directive 71/305, the equivalents of Articles 29, 30(2) and (3), 31 and 32(2) and (3) of the Services Directive, set out exhaustively the possible means of proof of a tenderer's good standing and qualifications (as distinct from his financial and economic standing).

55 The non-exhaustive character of the common rules established by the public procurement directives regarding certain aspects of the contract award procedure does not preclude the direct effect of those rules, in so far as they satisfy the test outlined above. Even if the non-exhaustive character of the procurement directives means that full compliance with them will not guarantee a remedy to an aggrieved service provider if he has not also complied with any applicable and compatible national requirements, those directives still afford, as Austria put it, certain minimum guarantees. In Beentjes v Netherlands State, (51) the Court found that no specific implementing measure was necessary for compliance with the requirements set out in Articles 20, 26 and 29 of Directive 71/305, the broad equivalents of Articles 23, 32 and 37 of the Services Directive, and that these could, therefore, be relied upon by an individual before the national courts. (52)

56 Turning now to the general provisions of the Services Directive, I am of the view that the bearers of rights and the public bodies bound by obligations under that Directive are sufficiently clearly identified by Article 1, as are the types of public service contracts to which the Directive applies by Articles 2 to 7. (53) Of particular importance is Article 3(1) of the Services Directive, which establishes an unconditional and precise right to the award of public service contracts in

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accordance with procedures adapted to the provisions of that Directive. I would add that the same is true of Articles 8 to 10 of the Services Directive, whereby the applicable contract award procedure is determined. These provisions, taken together, establish, in my view, the directly enforceable right of service providers to participate in the award of public service contracts in accordance with the provisions of the Services Directive, in so far as those detailed provisions themselves create rights for individuals, are unconditional and are sufficiently clear and precise to be enforceable in the absence of national implementing measures.

57 I am also of the view that the detailed provisions of Titles III to VI on the choice of award procedures, common technical and advertising rules, participation, and selection and award criteria are, subject to exceptions and qualifications which are apparent from their terms, unconditional, sufficiently precise and designed to create rights for individuals. These provisions specify in detail the obligations imposed on contracting authorities in order to secure access for service providers to the award procedures for public service contracts and are, for the most part, analogous to Articles 20, 26 and 29 of Directive 71/305, in that no specific implementing measure is necessary for compliance with them. (54) However, a comprehensive analysis of those provisions of Titles III to VI of the Services Directive which are or are not capable of direct effect is not warranted by the facts of the case as it now stands. Consideration of the quality of a particular provision should, in my view, await a concrete factual situation. It is, therefore, appropriate to limit the answer to Question 3(b) to Titles I and II of the Services Directive.

E - The fourth question

58 The fourth question referred by the Bundesvergabeamt seeks to establish whether a contracting authority is obliged to terminate or otherwise interfere with the operation of an existing contract which was concluded for an indefinite period but which was awarded prior to the date for transposition of, and otherwise than in accordance with, the provisions of the Services Directive. (55) In the absence of transposition of the Services Directive at the material time, this question is hypothetical. The Court stated in Faccini Dori v Recreb (56) that, in the absence of transposition of Council Directive 85/577/EEC of 20 December 1985 concerning protection of the consumer in respect of contracts negotiated away from business premises, (57) consumers could not derive from the directive itself an enforceable right of cancellation as against traders with whom they had concluded a contract. Despite the public or public-law character of contracting authorities, the same principle precludes, in my view, the existence of a Community-law right for a service provider, under the Services Directive, to require the cancellation of an existing contract between a contracting authority and another private party. The related principle that the State cannot rely upon an unimplemented directive so as to affect detrimentally the rights of individuals would also prevent a contracting authority from justifying its otherwise unlawful cancellation of such a contract by reference to the Services Directive. (58)

59 The question referred by the Bundesvergabeamt raises, none the less, the real possibility that, if the Services Directive were deemed to be capable, upon implementation, of affecting existing contracts, the aggrieved service provider could seek a remedy in respect of the contracting authority's non-observance, or the State's non-implementation, of the provisions of Titles III to VI of that Directive, in particular regarding services listed in Annex I A. The grant of a remedy in such circumstances is contingent on a determination of the requirements of the Services Directive upon full transposition.

60 In the context of the present case, this question raises three related issues, which I will address in the following order: first, whether the Services Directive applies retroactively to existing contracts; secondly, whether that Directive affects in any way national rules regarding the continued existence of a contract; and, thirdly, whether public authorities are obliged to

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use any power of termination granted by an existing contract. (59)

61 The principle of legal certainty normally precludes a Community measure from taking effect from a point in time before its publication, although it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. (60) Furthermore, Community law presumes that, in the absence of a clear provision, legislation is not to be interpreted as having retroactive effect. (61) The Services Directive does not expressly state that it has retroactive effect. Article 44 merely requires the Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before a specified date after its adoption. In addition, there is nothing either in the terms or the general scheme and objectives of the Services Directive which would suggest that it should have a general retroactive effect. Its title, the third recital in the preamble, Articles 3(1), 8 to 10 and 23, and Chapter 3 of Title VI all speak of procedures or criteria for the award of public service contracts, which implies that existing contracts, already awarded and concluded, are not, in principle, to be disturbed.

62 The Court has already observed that the procurement directives do not establish exhaustive sets of common rules regarding the award of public contracts. The directives lay down rules intended to ensure the openness and non-discriminatory nature of public procurement procedures but do not affect substantive national rules about the means of conclusion, validity, terms and duration of contracts which result from these procedures. (62) Indeed, the proper functioning of the Services Directive presupposes the continuing application of national rules to the conclusion of contracts subsequent to an award in accordance with its terms. This is borne out by the emphasis placed in the Services Directive on procedures which bind contracting authorities regarding the award of contracts, rather than binding both parties regarding the conclusion of contracts. Article 2(6) of the Review Directive illustrates the effects of this distinction, which preserves the role of national contract rules in the field of public procurement. It stipulates that the effects of the remedies provided for in that Directive, which are all directed against contracting authorities, on a contract concluded subsequent to its award by such an authority shall be determined by national law. The prospect that such a concluded contract would continue to be binding in national law appears to underlie the licence granted to the Member States by the Community legislator to limit the remedies available to an award of damages to any person harmed by an infringement by the contracting authority. It is ultimately for national law to determine whether the full effects of a contract are to be preserved in such circumstances.

63 In principle, therefore, national rules regarding the duration of contracts apply to contracts concluded before the date for transposition of the Services Directive. If the relationship between contracting parties is firm and binding in national law, so that even variations in price and other terms occur against the background of a continuing single binding contract, then it is not affected by the Services Directive. If, on the other hand, it amounts, in national law, merely to a long-standing relationship providing a framework for periodic renegotiation of terms, then, in my view, the procedures envisaged in the Services Directive must be followed at the first opportunity. Into which category a relationship falls is, in any event, a matter to be determined by national courts in accordance with their own law. Thus, where a framework contract concluded before the date for transposition of the Services Directive provides for the periodic renegotiation of certain of its terms, it is national contract law and the national courts which will determine whether the parties' relationship remains, at all times and in all circumstances (even if, for example, the renegotiation fails), subject to an existing binding contract. If, by virtue of national contract law, the renegotiation is deemed to give rise to a new contract, or the failure of the renegotiation is deemed to put an end to the contract, the new public service contract must be awarded in accordance with the terms of the Services Directive.

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64 It may be argued that, irrespective of the outcome of the application of national rules, the objectives of the Services Directive dictate certain minimum criteria, applicable throughout the Community, for the determination of the continued existence of a contract. Such an argument could be based on the anticipated prejudice to the achievement of the objectives of the Services Directive if a considerable part of the public market for services, and, in particular, that for Annex I A services, were removed from its effective scope of application through contracts which were awarded before the date for transposition and which national law deemed to exist without interruption despite the renegotiation of certain key terms, such as those relating to price, (63) within the framework of the contract.

65 Although this argument correctly identifies the broad objectives of the Community's action in the field of public services procurement, it is not, in my view, consistent with the terms and scheme of the Services Directive. That Directive does not determine the conditions for the validity of contracts concluded subsequent to an award, nor, a fortiori, is there anything in its terms which would suggest that, for the purpose of determining the need for an award procedure, national rules on the validity or continued existence of contracts concluded before its date for transposition should be overridden. Furthermore, the principle of legal certainty requires that the rights of service providers under an otherwise valid subsisting contract be taken into account in the interpretation of the Services Directive. Article 2(6) of the Review Directive permits the preservation, by national law, of the effects of unlawfully awarded contracts, with the contracting authority being liable in damages to persons harmed by the infringement. If the argument outlined above were accepted, it would entail the grant of the remedies provided for in the Review Directive to interested service providers in the event of non-compliance with the terms of Titles III to VI of the Services Directive. This could leave a contracting authority in the invidious position of being bound, in national law, to continue to observe the terms, including those regarding price reviews, of what is regarded as a validly subsisting contract, while at the same time being bound in Community law, without having acted in any way unlawfully in awarding and concluding the contract, to compensate persons harmed by its failure, upon such a price review, to initiate a new contract award procedure. Such an arbitrary outcome is not warranted by the terms and scheme of the Services Directive.

66 Finally, it appears that at least one of the framework agreements at issue in the present case is terminable at the end of any calendar year upon three months' notice by either side. If that amounts, in national law, to a mere option to give notice of termination, without which a binding contractual relationship continues, then, in the light of my conclusion that the Services Directive does not have retroactive effect on such relationships, Community law does not require that a pre-existing option be transformed into an obligation. Therefore, on its own, such a right of termination does not, as a matter of Community law, attract the application of the award procedures laid down in that Directive.

IV - Conclusion

67 In the light of the foregoing, I recommend that the Court respond as follows to the questions referred by the Bundesvergabeamt:

(1) It does not follow from Article 41 of the Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant

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provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

(2) The contractual services at issue comprise services some of which are to be classified as services coming under Annex I B, Category No 25 to Directive 92/50 (`Health and Social Services') and the remainder of which are to be classified under Annex I A, Category No 2 (`Land transport services, including armoured car services, and courier services, except transport of mail'). The award procedure is, therefore, to be determined in accordance with Article 10 of Directive 92/50, on the basis of the relative values of those two service categories under the contract as a whole. Where it is alleged, in a case governed by Article 10 of Directive 92/50, that a contract should have been awarded in accordance with the provisions of Titles III to VI of that Directive, it must be demonstrated to the national court, on the basis of the information which was or should have been considered by the contracting authority, and taking into account that authority's margin of appreciation, that the value of the service listed in Annex I A to that Directive which constitutes part of the services contracted for in the disputed contract should have been estimated by the contracting authority to be greater than that of the constituent service listed in Annex I B.

(3) Subject to an assessment, in an appropriate concrete case, of whether the relevant provisions of Titles III to VI of Directive 92/50 create rights for individuals which are unconditional and sufficiently precise to be enforceable in the absence of national implementing measures, the right of service providers under Articles 1 to 10 of Directive 92/50, taken together, to participate in the award of public service contracts in accordance with the provisions of that Directive is capable of direct effect.

(4) Directive 92/50 does not apply retroactively to existing public service contracts concluded before the date for transposition of that Directive. It is a question of national law whether the renegotiation of terms agreed under an existing public service contract results in a break in the continuity of that contract, leading to the application of the relevant provisions of Directive 92/50 to the award of the subsequent contract. Community law does not require a contracting authority to use a right of termination provided for in a pre-existing public service contract after the date for transposition of Directive 92/50.

(1) - OJ 1989 L 395, p. 33.

(2) - The word `nation' appears in the Official Journal but is clearly a typographical error.

(3) - This amended version was introduced by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, cited below. The original version referred only to contract award procedures within the scope of Council Directives 71/305/EEC and 77/62/EEC, cited below.

(4) - OJ 1992 L 209, p. 1.

(5) - OJ 1977 L 13, p. 1.

(6) - OJ, English Special Edition, First Series 1971 (II), p. 682.

(7) - CPC reference numbers 7512 and 87304 relate to armoured car services and courier services.

(8) - It appears from the explanatory notes to the CPC issued by the Statistical Office of the United Nations that the acronym `n.e.c.' means `not elsewhere classified'.

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(9) - OJ 1993 L 342, p. 1.

(10) - Article 1(1) of the CPA Regulation.

(11) - For example, CPA classes 85.12 `Medical practice services' and 85.13 `Dental practice services' appear to correspond to the single CPC reference number 9312 `Medical and dental services', which is then subdivided into `General medical services' (93121), `Specialised medical services' (93122) and `Dental services' (93123).

(12) - OJ 1996 S 169, p. 2.

(13) - OJ 1996 L 222, p. 10. Both the CPV Recommendation and the CPV itself were published on 3 September 1996.

(14) - The Services Directive, Council Directive 93/36/EEC of 14 June 1993 concerning the coordinating procedures for the award of public supply contracts, OJ 1993 L 199, p. 1; Council Directive 93/37/EEC of 14 June 1993 coordinating procedures for the award of public works contracts, OJ 1993 L 199, p. 54; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors, OJ 1993 L 199, p. 84.

(15) - The date when the Agreement on the European Economic Area came into force. This was one year later than the date initially foreseen by Article 129(3) of that Agreement.

(16) - Bundesgesetzblatt für die Republik Osterreich No 462/1993.

(17) - OJ 1994 C 241, p. 21.

(18) - Austria was already under an obligation to transpose the Services Directive into its law by 1 July 1994, by virtue of Articles 1 and 3 of and Annex 14(b)(5b) to Decision of the EEA Joint Committee No 7/94 of 21 March 1994 amending Protocol 47 and certain annexes to the EEA Agreement, OJ 1994 L 160, p. 1. It has not been suggested that the present case relates to the period between 1 July 1994 and 1 January 1995.

(19) - Bundesgesetzblatt für die Republik Osterreich No 776/1996.

(20) - Case C-44/96 [1998] ECR I-0000, Opinion of 16 September 1997, paragraphs 34 to 45.

(21) - Judgment of 15 January 1998.

(22) - Case C-54/96 [1997] ECR I-4961, judgment of 17 September 1997, hereinafter `Dorsch Consult'.

(23) - Paragraph 46. Article 41, as appears from footnote 2, extends the scope of Member States' obligation to establish review mechanisms to the field of services.

(24) - Paragraph 40. The Court cited Case C-446/93 SEIM v Subdirector-Geral das Alfândegas [1996] ECR I-73, paragraph 32. See also Case 13/68 Salgoil v Italy [1968] ECR 453, p. 463, and Case 179/84 Bozzetti v Invernizzi [1985] ECR 2301, paragraph 17.

(25) - Paragraph 41.

(26) - See Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraphs 12 and 23 to 27.

(27) - Case C-213/89 [1990] ECR I-2433.

(28) - See paragraph 21.

(29) - It appears that Paragraph 7(2) of the BVergG expressly excludes the jurisdiction of the Bundesvergabeamt over disputes in the water, energy, transport and telecommunications sectors,

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which are governed by the review provisions of Council Directive 92/13 of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1992 L 76, p. 14, whereas it is merely silent regarding disputes arising under the Services Directive. See further my Opinion of even date in Case C-111/97 EvoBus Austria GmbH v Niederösterreichische Verkehrsorganisations Gesellschaft mbH (NOVOG).

(30) - Opinion of 15 May 1997, paragraph 48.

(31) - Paragraph 43, emphasis added. The Court cited Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; and Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325, paragraph 26.

(32) - Paragraph 46, emphasis added.

(33) - Decision B 3067/95-9.

(34) - Paragraph 44. The Court's reference to Case C-253/95 Commission v Germany [1996] ECR I-2423, paragraph 13, indicates that it had in mind the principle of direct effect, rather than that of compensation for damage, which it raised in the immediately following paragraph of its judgment in Dorsch Consult.

(35) - See paragraph 48 of the Opinion of Advocate General Tesauro in Dorsch Consult.

(36) - It appears to me that the remedies prescribed in Article 2(1) of the Review Directive - interim measures, the setting aside of unlawful awards, and damages for loss - would, as a matter of Community law, have to be made available in the competent ordinary courts if the substantive provisions of the Services Directive were directly effective; see J.M. Fernandez Martín, The EC Public Procurement Rules: A Critical Analysis (Clarendon, Oxford, 1996), pp. 200-202, 227.

(37) - Paragraph 45. The Court cited Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others v Germany [1996] ECR I-4845.

(38) - Cited above.

(39) - See Case C-322/88 Grimaldi v Fonds des Maladies Professionnelles [1989] ECR 4407, paragraph 18.

(40) - In addition, it seems likely that the CPV was adopted after the contested refusal to award a contract to the applicant. He applied to the Bundesvergabeamt on 22 August 1996, whereas the CPV Recommendation had been adopted only on 30 July 1996. The CPV itself is undated, but the fact that the CPV Recommendation makes reference to it suggests simultaneous adoption. Furthermore, the CPV and the CPV Recommendation were published on the same date, 3 September 1996. The fact that this publication postdated the commencement of review proceedings before the Bundesvergabeamt weakens further the case for its application in this case.

(41) - The sole possible exception is `Residential health facilities services other than hospital services' (93193), which is described as concerning `[c]ombined lodging and medical services'. It may have been felt to be necessary to refer expressly to the combination of lodging and medical services in order to prevent the exclusion of the former.

(42) - Case 41/74 [1974] ECR 1337.

(43) - Case 8/81 Becker v Finanzamt Münster-Innenstadt [1982] ECR 53, paragraph 25; Joined Cases C-6/90 and C-9/90 Francovich and Others, cited above, paragraph 11.

(44) - Cited immediately above, paragraph 12.

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(45) - OJ, English Special Edition 1963-64 Series (I), p. 117.

(46) - The twenty-second recital in the preamble to the Services Directive states that `the rules for the award of public service contracts should be as close as possible to those concerning public supply contracts and public works contracts'; the twenty-third recital states that `the procurement rules contained in Directives 71/305/EEC and 77/62/EEC can be appropriate, with necessary adaptations ...'.

(47) - Joined Cases 27/86 to 29/86 [1987] ECR 3347, paragraph 15; see also Case 31/87 Beentjes v Netherlands State [1988] ECR 4635, paragraph 20.

(48) - Ibid., paragraphs 10 and 18.

(49) - Beentjes v Netherlands State, cited above, paragraphs 30 and 31.

(50) - Case 76/81 [1982] ECR 417, paragraph 15.

(51) - Ibid., paragraphs 42 to 44.

(52) - Regarding the direct effect of Article 29(5) of Directive 71/305, corresponding approximately to the second sentence of the first indent of Article 37 of the Services Directive, see also Case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR 1839, paragraph 32.

(53) - Article 7(2)(8) of the Services Directive is not material to the direct effect of the Directive, as it does not concern the rights of individuals or the duties of the Member States.

(54) - See the finding of direct effect, discussed in the immediately foregoing paragraph, in Beentjes v Netherlands State, cited above.

(55) - It may be argued, on the basis of the judgment of the Court in Case C-129/96 Inter-Environnement Wallonie [1997] ECR I-0000, that Member States were under an obligation not to obstruct the future operation of the Services Directive in the period between its adoption and its date for transposition. Such an argument is not material in the present case, however, as the framework contracts in question were concluded before the adoption of the Services Directive. It is, therefore, more useful, for the purposes of the present discussion, to refer to the date for transposition of the Services Directive, when full effect was required to be given to its provisions.

(56) - Cited above, paragraph 25.

(57) - OJ 1985 L 372, p. 31.

(58) - See Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 9. In paragraph 8 of his Opinion in Marleasing, cited above, Advocate General Van Gerven referred to the Court's judgment in Kolpinghuis Nijmegen and added that legal certainty precluded an unimplemented directive from introducing a civil penalty, such as nullity.

(59) - Such an obligation, being based on the terms of the contract itself, would, if found to exist, bind the contracting authority even in the absence of transposition of the Services Directive.

(60) - Case 98/78 Racke v Hauptzollamt Mainz [1979] ECR 69, paragraph 20; Case C-368/89 Crispoltoni [1991] ECR I-3695, paragraph 17.

(61) - Case 100/63 Kalsbeek v Sociale Verzekeringsbank [1964] ECR 565, at p. 575; Case 88/76 Société pour l'Exportation des Sucres v Commission [1977] ECR 709; see also Crispoltoni, cited immediately above, paragraph 20.

(62) - Furthermore, Article 7(2)(5) clearly envisages the possibility of public service contracts which are concluded, in accordance with its terms, for an indefinite duration.

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(63) - See the contract-award criteria in Article 36(a) and (b) of the Services Directive.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1997 ; C ; opinions
PUBREF	European Court reports 1998 Page I-05357
DOC	1998/04/02
LODGED	1997/02/20
JURCIT	61963J0100 : N 61 61968J0013 : N 23 61974J0041-N12 : N 50 52 61976J0088 : N 61 61978J0098-N20 : N 61 61981J0008-N25 : N 50 61981J0076-N15 : N 54 61984J0179 : N 17 61986J0027-N10 : N 54 61986J0027-N15 : N 53 61986J0027-N18 : N 53 61986J0080-N09 : N 58 61987J0031-N20 : N 53 61987J0031-N30 : N 54 61987J0031-N31 : N 54 61987J0031-N42 : N 55 61987J0031-N43 : N 55 61987J0031-N44 : N 55 61988J0103-N32 : N 55 61988J0322-N18 : N 34 31989L0665-A02P1LB : N 22 29 61989J0106-N08 : N 26 61989J0213-N21 : N 25 61989J0213 : N 25 61989J0368-N17 : N 61 61989J0368-N20 : N 61 61990J0006-N11 : N 42 61990J0006-N12 : N 24 51

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61990J0006-N26 : N 24
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11992E066 : N 38
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31992L0050-A01 : N 56
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31992L0050-A06 : N 56
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31992L0050-A14 : N 39 49
31992L0050-A16 : N 39 49
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31992L0050-A44 : N 61
31992L0050-NIA : N 32 34 35 37 39 43 44 59 64 67
31992L0050-NIB : N 32 34 - 36 38 39 43 44 67
61992J0091-N25 : N 58
61992J0091-N26 : N 26
61992J0334-N20 : N 26
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61993J0446-N32 : N 23
61994J0178 : N 30
61995J0253-N13 : N 29
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61996J0054-N40 : N 23
61996J0054-N41 : N 23
61996J0054-N43 : N 26
61996J0054-N44 : N 29
61996J0054-N45 : N 30
61996J0054-N46 : N 23 26
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SUB Approximation of laws

AUTLANG English

NATIONA Austria

PROCEDU Reference for a preliminary ruling

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ADVGEN Fennelly

JUDGRAP Kapteyn

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Opinion of Mr Advocate General Lenz delivered on 12 June 1997.
Commission of the European Communities v Italian Republic.
Failure to fulfil obligations - Directive 93/36/EEC - Failure to transpose within the prescribed period.
Case C-43/97.

1 In the present Treaty infringement proceedings, the Commission claims that the Italian Republic has failed to fulfil its obligations under Article 34(1) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, (1) in that it has failed to adopt within the prescribed period or, as the case may be, to give notification of the laws, regulations and administrative provisions necessary to comply with that directive.

2 Article 34(1) of Directive 93/36 requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the directive before 14 June 1994 and immediately to inform the Commission thereof.

3 The defendant does not deny the failure of which the Commission complains. It submits, however, that such failure is of minor importance, since the basic Community provisions concerning procedures for the award of public supply contracts, laid down by Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (2) and by Directives 80/767/EEC of 22 July 1980 (3) and 88/295/EEC of 22 March 1988 (4) amending it, have been transposed into internal law. (5) That, however, does not invalidate the Commission's complaint that Directive 93/36 has not been transposed.

4 The defendant further submits that under a draft law currently being debated by the Italian Parliament the Government will be empowered to transpose Directive 93/36 into internal law.

5 As the defendant does not thereby contest that the directive in issue has not been transposed into internal law within the prescribed period, the Court does not have to consider the Commission's complaint concerning failure to give notification of the measures taken to transpose the directive.

6 I therefore propose that the Court should declare that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, the Italian Republic has failed to fulfil its obligations under Article 34(1) of that directive. I further propose that the Italian Republic should be ordered to pay the costs of the case.

(1) - OJ 1993 L 199, p. 1.

(2) - OJ 1977 L 13, p. 1.

(3) - OJ 1980 L 215, p. 1.

(4) - OJ 1988 L 127, p. 1.

(5) - In order to understand this submission, it must be pointed out that the aim of Directive 93/36 is to recast Directive 77/62 and its amending directives (see the first recital in the preamble to Directive 93/36). Article 33 of Directive 93/36 consequently provides that Directive 77/62 is repealed.

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AUTHOR Court of Justice of the European Communities

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FORM	Conclusions
TREATY	European Economic Community
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JURCIT	31977L0062 : N 3 31980L0767 : N 3 31988L0295 : N 3 31993L0036-A34P1L1 : N 1 - 6 31993L0036 : N 1 - 6
SUB	Approximation of laws
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APPLICA	Commission ; Institutions
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NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Ragnemalm
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Opinion of Mr Advocate General La Pergola delivered on 19 February 1998.
Gemeente Arnhem and Gemeente Rheden v BFI Holding BV.
Reference for a preliminary ruling: Gerechtshof Arnhem - Netherlands.
Public service contracts - Meaning of contracting authority - Body governed by public law.
Case C-360/96.

I - Introduction

1 The purpose of the questions referred to the Court for a preliminary ruling in the present case is to clarify the concept of a body governed by public law within the meaning of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (1) (hereinafter the `Directive') and in particular to ascertain the precise meaning of the expression `body... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'.

II - Facts

2 In July 1994, the two municipalities that are the appellants in the main proceedings (Gemeente Arnhem and Gemeente Rheden, hereinafter the `municipalities') entrusted the tasks of refuse collection and disposal to a new legal entity, ARA Holding BV (hereinafter `ARA'), established expressly by them for that purpose. Those tasks had previously been carried out by the relevant municipal services. The two municipalities decided to hive off the work and entrust it to ARA, since, in view of the scale of the service and the cost of providing it, it was considered advisable (2) for the sake of economy to combine the management of those tasks and place it in the hands of a separate body established for that purpose.

3 In particular, the Arnhem Municipal Council's proposal of 25 May 1994 stated at point 10 that: `The municipalities participating in NV ARA shall grant concessions to ARA in respect of operations in any way connected with their legal obligations regarding refuse disposal and municipal cleansing. Those operations concern the collection of all household refuse and related activities, as well as the cleansing of public highways and marketplaces, gritting, weeding of paved areas, cleaning of street drains and elimination of vermin. In granting those concessions, the Municipality of Arnhem is not bound by the European rules concerning public service tendering with regard to those activities. The public services directive does not therefore apply. A "framework agreement" will be entered into between the Municipality of Arnhem and NV ARA, under which both parties will give an informal commitment to renew the concession.'

4 The Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem) states that, on the basis of that proposal, the Municipal Council of Arnhem decided on 6 June 1994 to establish ARA and in the general interest to grant it `concessions and impose [on it] obligations concerning certain duties imposed by law with regard to refuse disposal and municipal cleansing... to be further specified in the contract to be entered into between the Municipality and NV ARA'. On 28 June 1994, the Municipal Council of Rheden passed a resolution in similar terms, except that municipal cleansing was not covered.

5 On 4 July 1994, the Municipality of Arnhem amended Article 2 of its Regulation on Waste as follows:

`The Environment and Public Works Department has hitherto been responsible for the refuse collection service pursuant to the applicable legislation and this regulation. As from 1 July 1994, that responsibility shall be transferred to NV ARA, the independent municipal cleansing agency.'

6 ARA had been established in the meantime on 1 July 1994 and Article 2 of its statutes states that the object of the company is to perform the following operations:

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`(a) the performance of all economic operations aimed at collecting (or having collected and, so far as possible, recycling or having recycled), in an efficient, effective and environmentally responsible manner, waste such as household refuse, industrial waste and separable parts thereof, together with performance of activities relating to the cleaning of highways, the elimination of vermin and disinfection;

(b) the (joint) setting up, cooperation with, participation in, the (joint) provision of management and supervision for, as well as the taking over and financing of, other undertakings whose activities have any connection with the objects set out under (a);

(c) the performance of all economic operations which are connected with the foregoing or may be conducive to the operations, activities and action defined above (provided that needs in the general interest are thereby met).'

7 On 21 October 1994, the Municipality of Arnhem and ARA entered into a framework agreement covering the tasks to be performed. The Municipality of Rheden subsequently entered into a similar agreement with ARA.

Article 8 of those agreements, covering remuneration for the services in question, reads as follows:

`Rheden shall pay ARA remuneration for services rendered, at a rate to be specified.

The remuneration for services referred to in the preceding paragraph shall be defined in a financial clause to be added to the specifications and quality standards for each operation contained in the partial contracts.

The actual remuneration for services rendered will be fixed:

(a) either on the basis of the unit prices agreed beforehand for each operation, result or batch of work;

(b) or on the basis of a fixed price agreed beforehand for a particular task;

(c) or on the basis of an invoice for costs actually incurred.

Once a year, having due regard to the municipal annual planning schedule, ARA will submit in advance:

- in the circumstances described in Article 8(3)(a): a bid stating the cost for each operation, result or batch of work to be performed to the specifications and quality standards laid down for each activity;

- in the circumstances described in Article 8(3)(b): a bid stating the price for the particular task;

- in the circumstances described in Article 8(3)(c): an estimate of expected costs.

The amount of the remuneration to be paid pursuant to the financial clauses referred to in paragraph 2 shall thereafter be fixed annually in agreement with the authorities responsible for the budget. Should agreement not be reached with those authorities, an independent expert appointed by the most appropriate trade organisation for the operation in question will deliver a binding opinion on the actual amount of remuneration to be paid.'

8 In the event, it appears from statements made by the municipalities in the course of the proceedings that the procedure by which ARA is in fact paid for services rendered is as follows:

`1. ARA informs the municipal authorities in general terms of developments in the refuse collection sector and the effects they are expected to have on costs and income;

2. the municipal authorities prepare a provisional budget;

3. the municipalities pay ARA quarterly advances based on that budget;

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4. ARA submits to the municipalities a monthly statement of costs incurred and income received;

5. a statement for tax purposes is prepared at the end of each financial year, showing costs incurred and income received in connection with the service, together with deductions in respect of the advances paid.'

9 It appears from the municipalities' pleadings that the work plan prepared for ARA by the municipal councils also specified that the remuneration paid to ARA should `cover the costs of the operations at socially and commercially acceptable rates.'

10 BFI Holding BV (hereinafter `BFI') is a private undertaking whose activities include the collection and treatment of household refuse and industrial waste. BFI brought an action before the Rechtbank te Arnhem (District Court, Arnhem), contesting the municipalities' decision to entrust the refuse collection and disposal service to ARA. BFI contended that the public services Directive applied to the relationship between the municipalities and ARA, and that the municipalities in question had failed to follow the procedure for the award of contracts laid down in the Directive.

In the proceedings at first instance, the municipalities took issue with BFI's view, contending that their relationship with ARA was in the nature of a concession and the Directive consequently did not apply. They also contended, in the alternative, that in any event the exception provided for in Article 6 of the public services Directive applied in the present case.

11 By judgment of 18 June 1995, the Rechtbank rejected the municipalities' contention that the arrangements at issue were concessions which did not fall within the ambit of the Directive. The court of first instance consequently ruled that the relationship in question constituted a service contract and that the exception referred to in Article 6 of the Directive did not apply in this case.

The municipalities brought an appeal against the decision at first instance before the Gerechtshof te Arnhem claiming that, on the contrary, the exception referred to in Article 6 of the public services Directive ought to apply in the case in question.

The court of appeal considered it necessary, for the purpose of resolving the dispute, to ascertain whether or not ARA was a body governed by public law within the meaning of the public services Directive and whether, in consequence, the municipalities were justified in claiming that Article 6 of the public services Directive exempted them from the obligation to follow the procedure for the award of contracts laid down in the Directive in so far as the task of providing the service at issue had been entrusted to ARA as a `body governed by public law' within the meaning of the Directive.

12 In order to determine whether ARA fulfils the requirements laid down in the Directive to qualify as a body governed by public law and to enable it thereby to give judgment, the Gerechtshof te Arnhem sought from the Court a preliminary ruling on the following questions:

`1. For the purposes of interpreting Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, hereinafter referred to as "the Directive"), is the first indent of the second subparagraph of Article 1(b) of the Directive, which specifies that "body governed by public law means any body... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character", to be interpreted as distinguishing

(i) between needs in the general interest and needs having an industrial or commercial character, or

(ii) between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character?

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2. If the answer to the first question is that the distinction to be drawn is that set out in (i),

(a) is the phrase "needs in the general interest" to be understood as meaning that there can be no question of meeting needs in the general interest where private undertakings meet such needs?

and

(b) if so, is the phrase "needs having an industrial or commercial character" to be understood as meaning that needs having an industrial or commercial character are met whenever private undertakings meet such needs?

3. If the answer to the first question is that the distinction to be drawn is that set out in (ii), is the difference between "needs in the general interest not having an industrial or commercial character" and "needs in the general interest having an industrial or commercial character" to be determined according to whether (competing) private undertakings meet such needs or not?

4. Is the requirement that the body must be established "for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character" to be interpreted as meaning that such a "specific purpose" can exist only where the body was established exclusively to meet such needs?

5. If not, must a body meet needs in the general interest, not having an industrial or commercial character, almost exclusively, substantially, preponderantly or to some other degree in order to be or remain able to meet the requirement that it must be established for the specific purpose of meeting such needs?

6. Does it make any difference to the answers to Questions 1 to 5 whether the needs in the general interest, not having an industrial or commercial character, which the body was set up to meet, derive from legislation in the formal sense, from administrative provisions, from acts of the administration or otherwise?

7. Does it make any difference to the answer to Question 4 if responsibility for the commercial activities is entrusted to a separate legal entity forming part of a single group or concern within which activities meeting needs in the general interest are also carried out?'

III - The relevant Community provisions

13 The eighth recital in the preamble to the Directive reads as follows:

`Whereas the provision of services is covered by this Directive only in so far as it is based on contracts; whereas the provision of services on other bases, such as laws or regulations, or employment contracts, is not covered;'.

14 Article 1 of the Directive provides:

`(a) "public service contracts" shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority...

(b) "contracting authorities" shall mean the State, regional or local authorities, bodies governed by public law...

"Body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

- financed, for the most part by the State, or regional or local authorities, or other bodies governed

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by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive.'

15 Article 6 of the Directive provides:

`This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

16 Article 8 of the Directive provides:

`Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.'

17 Article 9 of the Directive provides:

`Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

18 Article 10 of the Directive provides:

`Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

19 Annex I A, Services within the meaning of Article 8, lists under item 16:

`Subject: Sewage and refuse disposal services; sanitation and similar services. CPC Reference No: 94'

20 Annex I B, Services within the meaning of Article 9, lists under item 27:

`Subject: Other services. CPC Reference No: -.'

IV - Examination of the issues

A - Matters covered by the Directive

(a) The concept of service

21 The first matter to be considered in connection with the present dispute is the concept of `service' within the meaning of the Directive and it must be determined first of all whether the services that are the subject of the relationship at issue fall into the category for which the Directive requires the open competitive tendering procedure to be used.

It is scarcely necessary to point out, in this connection, that under Article 8 of the Directive the award of contracts for services listed in Annex I A is subject to all the procedural rules laid down in the Directive, whereas under Article 9 the award of contracts for the services listed in Annex I B is merely subject to the principle of non-discrimination and the rules on technical specifications laid down in the Directive. (3) In short, the Directive requires competition notices to be published and the other procedural rules for the award of public service contracts to be followed

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only in the case of services listed in Annex I A. (4)

The categories of services listed in Annex I A include, under item 16, `sewage and refuse disposal services; sanitation and similar services.' For details of those services, the Annex refers to the CPC (United Nations common product classification) number quoted in the adjoining column for the category of services in question. The reasons that prompted the Community legislature to adopt this method of identifying the services falling within the ambit of the Directive are given in the seventh recital in the preamble to the Directive. In drafting the Directive, it was considered that `the field of services is best described, for the purpose of application of procedural rules and for monitoring purposes, by subdividing it into categories corresponding to particular positions of a common classification;... Annexes I A and I B of this Directive refer to the CPC nomenclature (common product classification) of the United Nations.'

22 Academic writers have already had occasion to draw attention to the various legal limitations and complications caused by this reference to rules originating outside the Community. (5) I should add, in this connection, that the CPC is not available in all the Community languages. This certainly does not help to put Member States' citizens on an equal linguistic footing and it clearly presents a problem for national authorities and national bodies required to apply the Directive when their working language is not the language in which the CPC is framed.

23 Writers on the subject (6) take the view that the list of services given in Annex I A is an exhaustive and restrictive list of the services required to comply fully with the Directive. The list of services in Annex I B also refers to the CPC nomenclature but ends with the generic residual category, `Other services'. This suggests, first, that the reference to the CPC nomenclature is to be interpreted literally and, second, that the categories listed in Annex I A are not to be interpreted broadly.

It must therefore be determined, first of all, whether the service in question is among those listed in Annex I A. (7) If that is not the case, it will of necessity be among those subject to the rules laid down in the Directive for services listed in Annex I B.

24 As regards the services at issue in the present proceedings, another aspect of the wording used in item 16 of Annex I A requires clarification: refuse collection, which represents no small part of the work the municipalities entrusted to ARA, does not at first sight appear to be among the services listed under item 16, which relate on the contrary - to use the term employed in that item - to refuse disposal. However, in the text supplied to the Court by the Commission, CPC Reference No 94, quoted for the category in question, cites the following services under sub-heading `94020 Refuse disposal services': `Collection service of garbage, trash, rubbish and waste, whether from households or from industrial and commercial establishments, transport services and disposal services by incinerators or by any other means. Waste reduction services are also included.'

From the foregoing considerations, it therefore appears clear that refuse collection and disposal services are among those listed in Annex I A to the Directive and are therefore required to comply fully with its provisions.

(b) The concept of service contract

25 The second point to be considered in connection with the scope of the Directive ratione materiae is the nature of the relationship between the municipalities and ARA.

The eighth recital in the preamble to the Directive (8) states in that connection that the Directive covers contracts only. The provision of services on other legal bases `is not covered'. We also know from Article 1(a) that, for the purposes of the Directive, service contracts mean `contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.'

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26 It should also be noted in this connection that the reason for the restriction mentioned in the twelfth recital in the preamble to the Directive is to be found in the origins of the public services Directive. In the version originally proposed by the Commission, (9) the Directive was intended to cover both service contracts and service concessions. In the course of the legislative procedure, the Council subsequently decided that concessions should not come within the scope of the Directive, (10) which consequently - in the version that entered into force - covers only service contracts.

The view commonly taken, (11) in the absence of a specific Community definition embodied in legislation, (12) is that the distinction in Community law between service contracts and service concessions is based on a number of criteria. The first concerns the recipient or beneficiary of the service provided. In the case of a contract the beneficiary of the service is deemed to be the contracting authority, whereas in the case of a concession the beneficiary of the service is a third party unconnected with the contractual relationship, usually the community, which receives the service and pays an appropriate sum for the service rendered. Under Community law, the service that is the subject of a service concession must also be in the general interest, so that a public authority is institutionally responsible for providing it. The fact that a third party provides the service means that the concessionaire replaces the authority granting the concession in respect of its obligations to ensure that the service is provided for the community. Another characteristic feature of concessions is the remuneration of the concessionaire, which derives wholly or in part from the provision of the service to the beneficiary. This is connected with another important feature of service concessions in the Community context, namely that the concessionaire automatically assumes the economic risk associated with the provision and management of the services that are the subject of the concession.

Those criteria, partly borrowed from the sphere of build-and-manage concessions or to be precise from the Directive on public works contracts, (13) were also mentioned by the Court in its judgment in Case C-272/91 concerning the concession for the lottery computerisation system. (14)

27 Although, as I have just remarked, the definition of the term `contract' is somewhat defective in respect of the subject of the contract and the purpose of the service, (15) the subject of the contract can nevertheless be identified, purely by deduction, as the activity of providing a service for consideration. On the other hand, the definition the legislature gives in the Directive lays considerable emphasis on the nature of the consideration as an aspect of the legal relationship. Therefore, by virtue of the term used by the Community legislature (`for pecuniary interest'), it must in any event take a pecuniary form: the pretium.

28 I shall now consider whether those conditions are fulfilled in the present case. The relationship between the municipalities and ARA is characterised by the fact that ARA is under an obligation to provide certain services. The first point to be settled is the identity of the beneficiaries of those services. In that connection, the Gerechtshof te Arnhem mentions the municipalities' decisions to transfer to ARA the activities in question, which they had previously performed, and the contracts concluded between the municipalities and ARA as a result. It is clear from the details given that the beneficiaries of the refuse collection and disposal services, provided initially by the municipalities and subsequently by ARA, remained the same. They continued to be, as they had been in the past, the private individuals and firms living and working within the two municipal districts.

While these considerations as to the identity of the potential beneficiaries of the service in question are not, on the basis of the criteria specified earlier, sufficient to allow it to be determined whether the relationship between the municipalities and ARA can be described as a contract, they do nevertheless cast light on some aspects in which that relationship differs from a genuine service contract.

29 I should also mention in this connection the opinion expressed by the French Government that

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the relationship in question should, on the contrary, be classified as a service concession.

As we know, if that view were to be upheld, the system established by the Directive could not apply to the dealings between the municipalities and ARA in any case. Having regard to the French Government's viewpoint, the Court asked the parties to define the precise terms of the relationship in question.

30 The United Kingdom Government, in particular, stated its position on this aspect of the case, to the effect that the relationship between the municipalities and ARA cannot be regarded as a contract. In the UK Government's view, that relationship amounts on the contrary to a service concession because a public authority has delegated to a distinct legal entity the performance of certain functions which the authority granting the concession originally performed itself. According to the UK Government, this is one way among many in which the authority may arrange and organise its administrative functions. The relationship between the authority granting the concession and the concessionaire therefore falls outside the normal scope of contracts as such because it is essentially an administrative relationship not a contractual relationship.

31 Incidentally, it should also be noted in this connection that, according to the Gerechtshof te Arnhem, the question whether the relationship is in the nature of a concession is bound up with the procedural question of the stage reached in the proceedings pending before that court. The Gerechtshof te Arnhem states in the order for reference that the question whether the relationship at issue was in the nature of a concession had been decided by the court of first instance, which had held that it was not. That decision was not contested on appeal and the point now under consideration could not therefore be amended by the Gerechtshof te Arnhem, even if the Court itself were to rule against the judgment delivered by the court of first instance.

It is claimed that that view, maintained by BFI Holding and partly adopted by the Commission, (16) is also supported by recent judgments of the Court, notably in Van Schijndel. (17) The Court held on that occasion that `Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.'

In short, according to BFI, in view of the procedural situation described by the Gerechtshof te Arnhem, that court would be unable to make use of the ruling given by the Court of Justice if the latter were to rule that the relationship in question is in the nature of a concession. The Gerechtshof te Arnhem would be precluded from modifying the uncontested part of the judgment, to the effect that the relationship in question is not in the nature of a concession, as that issue has already been decided and is res judicata.

32 I am not, however, convinced by the defendant's arguments in that connection. The Court is required to give a full interpretation of Community provisions, placing them in their legislative context and explaining their connection with the actual situation to which they refer or to which they are to apply. To give an interpretation out of context would be extremely difficult because of its abstract nature and could also mislead the court that had requested it, in that such an interpretation might not take due account of the particular problem to be solved. This view of the matter is supported by a substantial number of judgments delivered by the Court, declaring questions referred by national courts for preliminary ruling to be inadmissible in the absence of an exhaustive statement of the relevant facts and national provisions. (18) Of course, compliance with national rules of procedure sets a limit, which is to some extent inviolable and which the national court and the Community court are required to respect. That point was fully recognised and accepted as a matter of law by the Court in its judgment in Van Schijndel, cited above. However, that does not mean that the Court is released from its initial obligation to characterise the legal relationship to

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which the rules it has been asked to interpret are subsequently to apply. That obligation must, in my view, be fulfilled irrespective of whether the Court subsequently concludes that the rules at issue have no bearing on the case. Indeed, if the national court appeared to have committed an error in judicando for which there was no longer any judicial remedy, the Court's role would be precisely to state the limits to which interpretation of the rule in question was subject and to point out, if necessary, that the problem raised by the national court had no bearing, from the point of view of Community law, on the facts of the case. (19)

33 However, it seems to me that the situation in the present case is very different from the one I have just been considering. The problem raised by the defendant is not the same. To my way of thinking, the court of first instance was in fact right about the nature of the relationship at issue when it ruled that it was not a service concession. I have come to the same conclusion despite the fact that the municipalities and ARA frequently employed those terms in their decisions, in the statutes of ARA and in the contracts giving effect to their relationship.$

The key factor, which would allow the relationship at issue to be classified as a concession and which is missing in this case, is the assumption of the risk associated with the management of the service. It is absolutely and undeniably clear from the documents before the Court that the remuneration for the work done by ARA was not `fixed in abstract terms'. (20) Those documents in fact provide for payment of a consideration but the actual amount to be paid is not a function of certain factors decided in advance, such as the unit cost of each operation, nor is it a flat-rate payment. In either of the latter hypotheses, the economic responsibility for the management of the service would rest with the body providing the service. But in this case, on the contrary, the consideration paid for the work performed by ARA is a direct function of the total cost incurred by that company in providing the service required of it. It appears from the documents before the Court that that consideration is paid on the basis of regular statements of account designed simply to show the total income and expenditure associated with the management of the service and thus enable the municipalities to balance ARA's budget. Nor do the rates paid by the community for the services rendered give any indication of the criterion on the basis of which ARA's operations are paid for: the rates are altered as and when necessary to achieve a substantial balance between income and expenditure having due regard also to the important requirement that the service provided must not cost the beneficiaries too much.

In my opinion, the situation I have just described precludes the relationship at issue in this case from being qualified as a service concession within the meaning of Community law. However, that does not necessarily mean that it can be qualified as a service contract.

34 As I have already explained, the definition of that concept contained in the Directive turns on the fact that the relevant services are performed for pecuniary interest. For the relationship to be defined as a contract, the consideration to which the contractor is entitled must therefore be decided in advance and in abstract terms. The Court, as we have seen, clearly described this defining characteristic of contracts in its judgment in Case C-272/91, Commission v Italy, cited above. (21)

In the present case, as I have said, the consideration to be paid for the services was not in the Court's phrase `fixed in abstract terms' (22) by the municipalities, precisely because, as I have explained, their financial dealings with ARA are determined by the particular needs that arise from time to time in the course of its activities. In the present case, there is consequently no actual or potential set `price' that could be used as a reference. Nor is there any element of profit in the remuneration received by ARA. What is involved here is therefore remuneration for the service in question based solely on an economic approach to management, without any element of risk. These characteristics mean that, in view of the manner in which they are paid for, the

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tasks performed by ARA cannot be classified as activities of an industrial or commercial character and cannot therefore be the subject of a genuine call for tenders.

35 But that is not all. If we look at the financial arrangements on which the relationship between the municipalities and ARA is based, the key economic factor in the relationship is the municipalities' own budget. ARA's economic survival essentially depends not on the volume of its refuse collection and disposal operations or the efficiency with which it manages them but is based solely on the municipalities' willingness to provide it with the necessary resources by transferring funds from their budgets and setting acceptable rates for the services it provides. In short, the terms in the contract that concern ARA's remuneration are based on an `entirely potestative' condition whereby the municipalities have absolute authority to decide whether funds are to be transferred to ARA and in what amount, thus exercising an effective power of life and death over that body.

36 As regards the connection between the municipalities and ARA, it is therefore clear that the relationship between them arose from the need to merge municipal refuse collection and disposal services in order to deal with a demand which, in terms of scale and quality, the existing structures of the two municipalities could no longer handle on their own.

The intention in establishing ARA and entrusting it with the tasks previously performed by the municipalities was thus to consolidate the services in question, not to transfer them to an outside body and so remove them from the ambit of municipal responsibility. The solution adopted by the municipalities, namely to combine their respective refuse collection and disposal services and entrust them to the entity they had agreed to establish, is also reflected in the structure of the company established for that purpose. The two municipalities are the sole shareholders of ARA. Consequently, despite the fact that it was established as a company with share capital, ARA is not in my opinion essentially separate from the municipalities' administrative structure. The form of the company is such that it may be regarded as an organ (23) of the public authority, albeit in a broad and indirect sense. (24) This view is clearly confirmed by all that I have just said about the characteristics of ARA, the manner in which it is remunerated and the fact that it is completely dependent on the municipalities, as regards not only its economic resources but also the membership of its governing body (a majority, at least, of the members of its supervisory board are municipal nominees).

37 The question of a public authority's freedom to organise itself in the way best suited to meet the community's requirements need not, I think, detain us. The organisational arrangements chosen by a public authority must not allow the application of provisions designed to govern the quite different and well-defined situation in which a private individual provides a service for a public authority in return for remuneration. This is clear from the wording of the Directive. The Community legislature not only refused to allow forms of administrative organisation such as the one at issue in this case and other similar or comparable forms of organisation such as concessions to be included in the scope of the Directive: it also took the further step of exempting even genuine contracts concluded between two contracting authorities from the obligation to follow the procedures laid down in the Directive.

38 To sum up, I consider that there is no `third party' element, that is to say no essential distinction between ARA and the two municipalities, in the present case. What is involved here is a form of inter-departmental delegation that remains within the administrative ambit of the municipalities. In assigning the activities in question to ARA, the municipalities had absolutely no intention of privatising the functions they themselves had previously performed in this sector. In short, I take the view that the relationship between the municipalities and ARA cannot be regarded as a contract within the meaning of the Directive.

B - Persons covered by the Directive

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39 It automatically follows from that conclusion that the Directive does not apply to the relationship between the municipalities and ARA. To complete my examination of the case referred to the Court, I shall now consider whether ARA can be included among the persons required to comply with the Directive.

In the light of what has already been said, it now falls to be determined in particular which of the categories mentioned in the Directive as contracting authorities for the purposes of the Directive might include the body in question.

40 The French Government has argued that ARA is not so much a public body as simply an association between municipalities within the meaning of Article 1(b) of the Directive. This view is based on the fact, mentioned above, that the municipalities are the only two shareholders of ARA.

The French Government's opinion must be accorded due consideration. In particular, it must be considered in this connection whether, for the purposes of the definition of `contracting authority' referred to in Article 1 of the Directive, the terms `body governed by public law' and `association' refer to two separate and mutually exclusive concepts or whether on the contrary the Directive may include in that definition entities that fall into both categories at once.

The answer to that question is, in my view, that the abovementioned categories cannot overlap. The Community legislature intended the rules on contracts to apply also to those forms of public association that give rise to entities which, even if not possessing legal personality of their own, are nevertheless quite clearly among the forms of public authority cooperation or organisation falling within the ambit of the Directive. I refer, for example, precisely to forms of association such as groups of local authorities or similar kinds of group, which, although lacking legal personality, nevertheless perform tasks of a public nature and to which the Community legislature intended the Directive to apply for typically functional reasons. I should add that, to be included in that category, such entities must also in my view be non-profit-making.

41 According to that approach, the category comprising associations has a residual function. In other words, it covers all those forms of public cooperation which, as I have said, give rise to entities that have no legal personality but are also not local authorities and cannot be regarded as bodies governed by public law.

The conclusion I have reached presupposes that the Community legislature intended the concept of a contracting authority to have a very broad meaning, including all the various embodiments through which the public authorities might exercise their powers. Nor do I think they could possibly have used meaningless or misleadingly overlapping concepts that could give rise to difficulties of interpretation in classifying the entities required to comply with the Directive.

This view is lent considerable weight by the judgment in Beentjes, (25) in which the Court held that, for the purposes of the public works directive, a body which has no legal personality of its own but depends in many respects on the public authorities `must be regarded as falling within the notion of the State... even though it is not part of the State administration in formal terms'. It should be noted however that the Community provision that was being interpreted in that case was Article 1 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. (26) The interpretation was therefore concerned with the Community definition in the Directive of the measures taken by `contracting authorities', which at that time did not yet include `associations', a category inserted later in the amended versions of the `contracts directives.' I also think the Court wished to fill a gap in the legislation by bringing within the personal scope of the Directive, to quote Advocate General Darmon, `organs outside the traditional structures of the administration which have no legal personality of their own but carry out functions which normally fall within the competence of the State or local authorities'.

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In amending and reformulating the concept of contracting authority, the Community legislature specifically decided to include associations, on the one hand, and bodies governed by public law, on the other. Thus, it expressly brought within the ambit of the `public contracts' directives not only bodies with no legal personality of their own, often forms of association between public authorities of various kinds whose characteristics and legal nature are hard to define a priori, but also bodies governed by public law which on the contrary are specifically required to have their own legal personality. The fact that ARA has its own legal personality therefore means that it cannot be classified as an `association.'

42 As regards the concept of `needs in the general interest, not having an industrial or commercial character', the answer to be given to the national court cannot in my view leave the particular features of each individual situation out of account. Thus, in the present case, I do not think the Court can establish general criteria for interpreting the provision at issue that do not take this particular case into account. We have here a provision that does not really lend itself to general and abstract interpretation precisely because, as I mentioned earlier, the Community legislature intended it to have a distinctly functional character. This principle of interpretation was stated, adopted and applied by the Court, first in its judgment in Beentjes (27) and more recently in Mannesmann. (28) I believe I should abide by that criterion in the present case too.

43 However, the concept in question should certainly be interpreted in the light of the earlier case-law of the Court, (29) which has attached considerable importance to the absence of risk which must be a feature of the management of the activities of the body in question if it is to be included among the public authorities covered by the Directive. This interpretation may perhaps place more emphasis on the commercial or industrial character of the activity than on the fact that it must meet needs in the general interest. The latter is a concept that varies appreciably from one Member State to another and also depends on the historical context in which it is considered. Needs in the general interest, once identified, have in their turn a commercial or industrial character closely connected with the way in which the State is organised. The commercial or industrial connotation of such needs differs considerably, for example, depending on the priority accorded at national level to privatisation of the public services designed to meet those needs. Moreover, the Directive was not intended to cover uniform Community-wide categories. Remember that it confines itself to coordinating - not harmonising - the various national provisions relating to contracts. I do not think, therefore, that the Directive established a Community category by means of the definition in question. It was simply referring to the provisions on the subject contained in the legislation of the Member States.

44 Within the framework I have described, it is very difficult - if not impossible - to define the needs that are relevant for the purposes of the Directive. For the purposes of interpretation, therefore, the only general criterion that can properly apply in this area is the link between the satisfaction of the needs and the structure of the State (understood in the broad sense, of course) and especially the factor of economic dependence on the State.

A clear sign of dependence on the State sector is precisely that the absence of any risk associated with the activities the body in question is required to perform. If, on the other hand, the activities of such a body involve even a remote prospect of profit or if the management of the activities is based on principles of economy and financial autonomy, then in my view the activities fall outside the framework I have described and there will be no reason to include the body in question among the bodies covered by the Directive. I should just like to say that this interpretation of the provisions at issue is also fully in line with the Court's judgments on the subject of public undertakings (30) and with the relevant Community legislation. (31)

I therefore take the view that the concept of a body governed by public law within the meaning

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of the Directive includes bodies that meet general needs `independently of the rules of normal commercial management', (32) so long as the other requirements of the definition are also met.

45 In the light of what I have said, the problem of whether or not ARA is to be regarded as a body governed by public law now appears to have been settled. There is no doubt that the functions that body was established to fulfil (33) and does fulfil institutionally, together with the manner in which it performs its tasks, are among those defined in the Directive as meeting `needs in the general interest, not having an industrial or commercial character.'

46 It should also be pointed out, incidentally, that it is irrelevant for the purposes of the present case that, as the order for reference mentions in passing, ARA - directly or through a company entirely owned by it - not only performs the tasks entrusted to it by the municipalities but also provides similar services for third parties in return for appropriate remuneration. In my opinion, those activities, which, it appears, account for a small proportion of all the functions that body performs (34) and, from an economic point of view, have no appreciable effect on its financial structure, are not, however, such as to cause me to alter the conclusion I reached earlier. Moreover, the Court has already ruled on this point in its recent judgment in Mannesmann, (35) in which it recognised that the fact that a body performs other activities in addition to the main activity it was established to perform is not in itself such as to change the nature of the body in question for the purposes of applying the public contracts directives. From an economic and financial point of view, the existence of ARA effectively depends, as we have seen, on the contribution the municipalities make to its budget. This completely rules out the possibility that any other activity it performs might actually be run on specifically commercial lines: the municipalities' financial contribution radically alters the element that forms the basis of all commercial relationships, namely the endeavour to achieve the best and most effective ratio between costs and remuneration. The fact that in any event the body succeeds in balancing its books as a result of the assistance it receives from the municipalities, and that there is consequently no element of risk, means that its activities cannot be regarded as being competitive in any real sense.

The service provided by ARA meets a public need that has to be met, namely the collection and treatment of refuse. That task is not performed for profit and is not part of a system in which the rules of the market apply. Both the conditions the Community legislature laid down in the first part of the definition of a body governed by public law are therefore fully satisfied: namely that it must be established for the specific purpose of meeting needs in the general interest and that those needs must not have a commercial or industrial character.

Conclusion

In the light of the foregoing considerations, I propose that the Court give the following answers to the questions referred to it by the Gerechtshof te Arnhem:

(1) The relationship between two municipalities and a body established by them, to which they have entrusted the refuse collection and treatment service within their areas and whose remuneration comes inter alia from the municipal budget, ensuring that in any event that body's activities remain financially balanced, does not constitute a service contract within the meaning of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;

(2) An entity of the type described above is also a body governed by public law within the meaning of Directive 92/50/EEC.

(1) - OJ 1992 L 209, p. 1.

(2) - The decision to combine their municipal cleansing services and entrust them to a body established

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for the purpose was also based on the study commissioned by the municipalities from a firm of consultants. The consultants made a number of suggestions, which the municipalities accepted and put into effect.

(3) - The obligation under Article 9 in conjunction with Article 16, to publish a notice of the results of the award procedure after the award has been made, does not apply in the case of the services listed in Annex I B, where publication is purely optional. See Flamme and Flamme, `Les marchés publics de services et la coordination de leurs procédures de passation', Revue du Marché Commun et de l'Union Européenne, 1993, p. 150; Greco, `Gli appalti pubblici di servizi', Rivista Italiana di Diritto Pubblico Comunitario, 1995, p. 1285; La Marca, `Gli appalti pubblici di servizi e l'attività bancaria', Rivista di diritto europeo, 1996, p. 13; Mensi, `L'ouverture à la concurrence des marchés publics de services', Revue du Marché Unique Européen, 1993, p. 59.

(4) - Academic writers are unanimous on this point. See Flamme and Flamme, op. cit., La Marca, op. cit.

(5) - See La Marca, op. cit., notably p. 42.

(6) - See La Marca, op. cit., p. 28; Flamme and Flamme, op. cit., p. 152.

(7) - Or whether the service falls entirely outside the scope of the Directive, as defined in Article 1 thereof.

(8) - See point 13 above.

(9) - OJ 1991 C 23, p. 1.

(10) - See the statement of reasons in the Council's common position on the Directive, in Doc. 4444/92 ADD1 of 25 February 1992.

(11) - See Flamme and Flamme, op. cit., Greco, op. cit.

(12) - To be precise, a service concession is defined in the Commission Proposal for a Directive as `a contract other than a public works concession within the meaning of Article 1(d) of Directive 71/305/EEC, concluded between an authority and another entity of its choice whereby the former transfers the execution of a service to the public lying within its responsibility to the latter and the latter accepts to execute the activity in return for the right to exploit the service or this right together with payment'.

(13) - Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).

(14) - Case C-272/91 Commission v Italy [1994] ECR I-1409, paragraphs 22 to 25 and 32.

(15) - See the remarks on this subject in Flamme and Flamme, op. cit., and La Marca, op. cit.

(16) - However, the Commission's view is based on the fact that the parties agree that the arrangement in question is not to be regarded as a concession.

(17) - Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen v SPF [1995] ECR I-4705.

(18) - See, in that connection, the Court document of October 1996: `Note for guidance on references by the national courts for preliminary rulings' and the case-law cited in the note. For a brief commentary on that notice, see Manzella, `Giudice nazionale e diritto comunitario', Giornale di Diritto Amministrativo, 1996, p. 1084; Condinanzi, `Istruzioni per l'uso dell'art. 177: la nota informativa della Corte di Giustizia sulla proposizione delle domande di pronuncia pregiudiziale da parte dei giudici nazionali', Il Diritto dell'Unione Europea, 1996, p. 883.

(19) - See, for example, the judgment of 16 December 1997 in Case C-104/96 Rabobank v Minderhoud

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[1997] ECR I-7211.

(20) - Case C-272/91 Commission v Italy, cited above.

(21) - Judgment in Case C-272/91 Commission v Italy, cited above, paragraph 26.

(22) - Judgment in Case C-272/91 Commission v Italy, cited above.

(23) - For further observations on this concept, see Greco, op. cit., id., `Appalti di lavori affidati da SpA in mano pubblica: un revirement giurisprudenziale non privo di qualche paradosso', Rivista Italiana di Diritto Pubblico Comunitario, 1995, p. 1062.

(24) - On this point, see Greco, op. cit., Righi, `La nozione di organismo di diritto pubblico nella disciplina comunitaria degli appalti: società in mano pubblica e appalti di servizi', Rivista Italiana di Diritto Pubblico Comunitario, 1996, p. 347.

(25) - Judgment in Case 31/87 Beentjes v Netherlands [1988] ECR 4635.

(26) - OJ, English Special Edition 1971 (II), p. 682.

(27) - Judgment in Case 31/87 Beentjes v Netherlands, cited above.

(28) - Case C-44/96 Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck [1998] ECR I-73.

(29) - Judgments in Beentjes, Commission v Italy and Mannesmann, cited above.

(30) - Case 118/85 Commission v Italy [1987] ECR 2599 and, more recently, Case C-343/95 Diego Cali & Figli v SEPG [1997] ECR I-1547.

(31) - Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35).

(32) - Judgment in Case 118/85 Commission v Italy, cited above.

(33) - The expression `established for the specific purpose of meeting needs etc...' in the definition given in the Directive must of course be interpreted in the light of changing circumstances. The aims originally set out in the body's instrument of incorporation must be compared with the present situation and the aims it is actually pursuing, as stated, for example, in the objects of the company in the case of bodies incorporated as companies.

(34) - It appears from the documents before the Court that ARA's turnover for 1995 was NLG 39 392 000, comprising NLG 32 791 000 for the collection and disposal of household refuse and NLG 6 601 000 for the collection and disposal of industrial waste.

(35) - Judgment in Case C-44/96 Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck, cited above. In that judgment, the Court held that in any case the activity performed by the Austrian body in addition to its principal activity was covered by the public works directive. The Court came to that conclusion by distinguishing between institutional activities that are specifically intended to meet needs in the general interest, not having an industrial or commercial character, and activities that do not meet those criteria. However, the answer given by the Court, which I think was essentially correct in the conclusion it reached, needs some amplification. In fact, I must observe in this connection that, to my mind, it is impossible to distinguish between activities that do not have an industrial or commercial character and those that do, when the body in question is one of those classified as contracting authorities within the meaning of the public works or public services directive. The absence of risk that is characteristic of the way in which the body in question operates means that any activity it performs, even if it may in theory be a profit-making activity, is ultimately indistinguishable

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in financial terms from its institutional activity, which consequently absorbs other activities and radically alters their commercial or industrial character.

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Opinion of Mr Advocate General Alber delivered on 16 July 1998.
Commission of the European Communities v Ireland.
Failure of a Member State to fulfil obligations - Public supply contracts - Review procedures - Definition of contracting authority.
Case C-353/96.

A - Introduction

1 In the present Treaty-infringement proceedings brought against Ireland, the Commission claims that a call by the Irish Forestry Board (Coillte Teoranta) for tenders for the supply of fertiliser was not published in the Official Journal of the European Communities. The essential issue in this regard is whether Coillte Teoranta is a contracting authority within the meaning of Directive 77/62 (1) and therefore under an obligation to publish a notice of the call for tenders in question.

2 On 10 March 1994 Coillte Teoranta issued a call for tenders in respect of a contract to supply fertiliser but did not publish a corresponding notice in the Official Journal of the European Communities. The matter was brought to the Commission's attention on 18 May 1994. A contract for the supply of fertiliser, to the value of approximately IR £280 000, was concluded pursuant to the tendering procedure on 30 May 1994. On 21 June 1994, an undertaking which had unsuccessfully tendered brought proceedings before the Irish High Court challenging the failure to publish a notice of the call for tenders. (2)

3 The Commission sent a letter to the Irish Government on 30 June 1994 highlighting the failure to publish a notice of the call for tenders. That letter was based on Article 3(1) of Directive 89/665/EEC (3) and was also expressly stated to constitute a letter of formal notice within the meaning of Article 169 of the EC Treaty. A letter of the same tenor was sent to Coillte Teoranta. In its reply, the Irish Government challenged the view taken by the Commission. The Commission subsequently sent a reasoned opinion to the Irish Government on 23 February 1996. The Irish Government, however, took issue with the complaints raised, in part on the ground that the procedure under Article 169 of the EC Treaty was not applicable to the present case because national judicial proceedings were already pending and Coillte Teoranta was in any event not a contracting authority, with the result that publication in the Official Journal would have been unnecessary.

4 The Commission claims that the Court should:

- declare that, in failing to comply with the provisions of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Directive 88/295/EEC, and, in particular, in failing to publish its call for tender for the supply of fertilisers on behalf of the Irish Forestry Board (Coillte Teoranta) in the Official Journal of the European Communities, Ireland has failed to fulfil its obligations under the Treaty;

- order Ireland to pay the costs.

5 Ireland contends that the Court should:

- dismiss the application;

- order the Commission to pay the costs.

B - Relevant legal provisions

Community law

6 Article 1 of Directive 77/62 defines a contracting authority as follows:

`For the purpose of this Directive:

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...

(b) "contracting authorities" shall be the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I;

...'

7 Annex I to Directive 77/62, as amended by Directive 88/295, contains a list of the legal persons governed by public law and bodies corresponding thereto referred to in Article 1(b). Point VI refers to these as being, in the case of Ireland:

`other public authorities whose public supply contracts are subject to control by the State'.

8 Directive 77/62 was repealed by Directive 93/36. (4) This new directive required to be transposed in national law by 14 June 1994, something which did not happen in Ireland. It should once again be remembered that the supply contract had already been concluded on 30 May 1994.

9 The concept of a contracting authority is henceforth defined as follows in Article 1:

`For the purpose of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

...'

10 So far as review of compliance with the provisions for awarding contracts is concerned, the Commission is empowered under Article 3 of Directive 89/665 to:

`invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of... [Directive 77/62]'.

This procedure is regulated by Article 3(2), which provides that the Commission

`... shall notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction'.

As grounds for not correcting an infringement, Article 3(4) provides that reliance may be placed

`among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings...'.

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National provisions

11 The provisions of Community law were transposed in national law by the following:

- Directive 77/62 was transposed by the European Communities (Award of Public Supply Contracts) Regulations 1992 (SI No 37 of 1992);

- Directive 89/665 was transposed by the European Communities (Review Procedures for the Award of Public Supply and Public Works Contracts) Regulations 1992 (SI No 38 of 1992); and

- Directive 93/36 was transposed by the European Communities (Award of Public Supply Contracts) (Amendment) Regulations 1994 (SI No 292 of 1994).

12 The relations between the Department of Agriculture, Food and Forestry, the Department of Finance and the shareholders of Coillte Teoranta are defined by the Forestry Act 1988 and by the Memorandum and Articles of Association of the company itself. It will be necessary to return to the individual provisions of those rules for purposes of clarity when examining whether the action is well founded.

C - Analysis

Admissibility

13 The Irish Government first submits that infringement proceedings under Article 169 of the EC Treaty are not the correct form of action in this case. The Commission ought, it claims, to have used the procedure set out in Article 3 of Directive 89/665. (5) By reason of the action brought before the Irish High Court, the alleged infringement is already the subject of judicial or other review proceedings. The Commission was also notified of those proceedings; to that extent, it is bound by the procedure under Article 3 of Directive 89/665 and cannot bring any action under Article 169 of the EC Treaty.

14 Under Article 3(1) of Directive 89/665, (6) the procedure for which that article provides can be applied only if the Commission is satisfied that there has been a clear and unequivocal infringement of Directive 77/62 before the contract has been concluded.

15 The Commission points out that it did not send its letter of formal notice to the Irish Government until 30 June 1994, whereas the contract in question had already been concluded on 30 May 1994.

16 In regard to the temporal aspects, the Court held in Commission v Netherlands (7) that it is clear from the letter and spirit of Directive 89/665 that it is very much to be preferred, in the interest of all parties concerned, that the Commission should give notice of its objections to the Member State and the contracting authority as soon as possible before the contract is concluded, thereby giving the Member State and the contracting authority time to answer the complaint and if necessary to correct the alleged infringement before the contract is awarded.

17 In the present case, however, the Commission did not send its letter of formal notice to Ireland and Coillte Teoranta until one month after the contract for the supply of fertiliser had been concluded. The procedure under Article 3 of Directive 89/665 can therefore no longer be applicable.

18 It should also be noted that the special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the Commission's powers under Article 169 of the Treaty. That article gives the Commission discretionary power to bring an action before the Court where it considers that a Member State has failed to fulfil one of its obligations under the Treaty and has not complied with the Commission's reasoned opinion. (8)

19 The Commission's action brought under Article 169 of the EC Treaty is therefore admissible.

The question whether the action is well founded

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20 The question first arises as to which provisions of Community law are applicable.

21 It is common ground that Directive 77/62, as amended by Directive 88/295, is relevant. In the Irish Government's view, however, Directive 93/36 or its underlying premisses should also be enlisted for the purpose of assessing the case.

22 It should, however, be pointed out that Directive 93/36 did not require to be transposed until 14 June 1994 and that Ireland had not yet done so by 22 July 1994. (9) The events of which the Commission complains occurred in May 1994 and thus at a time when Directive 93/36 had not yet been transposed in Irish law and also did not yet require to be so transposed. Directive 93/36 cannot therefore be directly applicable.

23 It is also extremely doubtful to what extent the directive which is later in time can be used for the purpose of interpreting the earlier directive. The Irish Government, which submits that the Court should proceed in such a manner, relies in this connection on the recitals in the preamble to Directive 93/36, according to which that directive was adopted primarily for reasons of clarity. Consequently, it claims, there should be no problem in construing the earlier provisions in the light of the new version.

24 It must first be noted in this regard that the wording of the definition of a contracting authority in Directive 93/36 has been substantially extended and now contains individual features which were nowhere mentioned in the earlier version. To that extent, the new version might well indeed lead to a restriction in the directive's scope; the Commission also made a reference in this connection during the oral procedure.

25 Second, the first recital in the preamble to Directive 93/36 does admittedly mention that a new version is required for reasons of clarity. However, this was also because amendments were to be made. (10) Likewise, it was intended to achieve an alignment with the provisions on the award of contracts for public works and service contracts. (11) According to the third recital, however, this alignment relates also to the introduction of a functional definition of contracting authorities. On an a contrario reading, however, this means that the definition now given need not necessarily be identical with that which previously applied, and extreme caution should therefore be exercised in using it as an aid to interpretation. The new directive, which has also repealed and replaced Annex I to the old version, contains in its definition of a contracting authority additional matters which do not merely amplify the previous definition or general thinking on the topic, but also constitute modifications which go further and cannot be applied retroactively. Furthermore, in interpreting a provision of Community law it is always necessary to consider its wording, its context and its aims. (12) For the present case, therefore, it follows that the facts fall to be assessed on the basis of Directive 77/62.

26 In the Commission's view, Coillte Teoranta is a contracting authority within the meaning of Directive 77/62, with the result that notice of supply contracts requires to be published in the Official Journal of the European Communities pursuant to Article 9 of the directive, something which was, however, not done in this case.

27 In support of its contention, the Commission submits that Coillte Teoranta fulfils important public functions, such as the conservation of national forests and the support of forestry development in Ireland. Coillte Teoranta owns 12 national parks and provides leisure facilities at more than 180 locations throughout Ireland. In order to meet those objectives, the company was established by statute and financially provided for by the Irish Government. It also follows from the Memorandum and Articles of Association that the Government appoints the Board and its Chairman and that the company's finances are controlled by the Government.

28 The Irish Government counters by arguing that Coillte Teoranta is simply a State-owned private

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undertaking. Although the State has a majority shareholding, it does not exercise any influence over the day-to-day running of the company. Coillte Teoranta is required under the Forestry Act to carry out its business in a commercial manner. State influence is limited to general commercial policy, in the same way as any majority shareholder in any other company. The objectives and tasks of the company, however, are exclusively commercial in nature. Coillte Teoranta is thus in competition with other undertakings and is in no different position whatever compared with those other undertakings. If Coillte Teoranta makes its facilities and property available to the public for leisure and recreational purposes, this is done on commercial grounds, since the benefit derived from these activities exceeds the costs. In short, neither Coillte Teoranta itself nor the conclusion by Coillte Teoranta of contracts with other undertakings is subject to influence by the State in excess of that which majority shareholders in other companies would be recognised as having.

29 As already mentioned, the State, regional or local authorities, and - in the case of Ireland - other public authorities under Point VI of Annex I whose public supply contracts are subject to control by the State constitute contracting authorities for the purposes of Article 1(b) of Directive 77/62.

30 With regard to the present case, this means that it is first necessary to consider whether Coillte Teoranta can be subsumed within the concept of the `State'.

31 In connection with such an examination, the Court was called on in the Beentjes case (13) to determine the status of a body which did not have any separate legal personality, the functions and composition of which were regulated by statute and whose members were appointed by a committee of the Province in question. It was required to apply rules laid down by a central committee established by a State decree and the members of which were appointed by the Government. The State ensured compliance with the obligations arising from the body's legal transactions and financed the public works contracts which it awarded.

32 The provisions applicable at that time were contained in Directive 71/305; (14) however, the definition of a contracting authority contained therein corresponds to that in Directive 77/62.

33 In Beentjes, the Court concluded that the concept of the State, as used in the directive, fell to be interpreted in functional terms. (15) The aim of the directive was, for the Court, to ensure `... the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts...'. (16) The Court accordingly concluded that the body at issue in that case had to be regarded as falling within the notion of the State, since its composition and functions were laid down by legislation and it was dependent on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it was its task to award. That, the Court ruled, was the case even though the body was not part of the State administration in formal terms. (17)

34 A similar approach should be adopted in the present case. The objective of the directive which is here relevant does not differ in any essential respects from that at issue in Beentjes. According to the first and second recitals in its preamble, Directive 77/62 is designed to ensure better supervision of the prohibition of restrictions on the free movement of goods in regard to public supply contracts. In addition, the directive - according to the 12th recital in its preamble - set itself the task of developing effective competition in the field of public contracts. In order, however, to guarantee competition free from any discrimination, those to whom the directive is addressed - namely, the contracting authorities - must be determined on the basis of a functional and not exclusively formal approach.

35 In functional terms, Coillte Teoranta cannot be regarded as part of the State. Admittedly, the company was established by statute and provided with financial means by public authorities,

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it must consult with the Minister for Finance in regard to issues of forestry development in areas of economic interest, its directors are Government appointees, and the annual plan for the sale of land and timber must be agreed with the Government.

36 Coillte Teoranta does, however, have separate legal personality. The public contracts which it awards are financed out of the company's capital, which, although originally provided by the Government, has in the meantime also been guaranteed through private commercial activities. No public contracts are awarded at the expense of the State. All things considered, State influence on the business activities of Coillte Teoranta must be regarded as being appreciably less than was the case with regard to the facts underlying Beentjes. The functional approach thus does not point to the company's being dependent on the State in such a way as to justify the conclusion that it constitutes part of the State.

37 Once it is held that Coillte Teoranta, in accordance with the view here expressed, cannot be subsumed within the notion of the State under Article 1(b) of Directive 77/62, it remains to be examined whether it may be a public authority whose public supply contracts are subject to control by the State within the meaning of Annex I. The decisive factor in this, apart from the fact of looking after public interests, is the degree of influence which the State may exercise on the award of public contracts.

38 The Commission takes a similar viewpoint to that on the question just discussed. It argues that, particularly in view of the fact that the company was established by statute, that its Board is appointed by the Government, and its initial capital was provided by the State, which continues to control its finances, Coillte Teoranta is an authority whose public contracts are controlled by the State.

39 Against this, the Irish Government points again to the commercial character of the company, which finds itself in competition with other private undertakings on the market in question. It does not enjoy any preferential rights such as would give it an advantageous position in relation to others. State influence is limited to that which other shareholders are recognised, or may be recognised, as having. From the legal point of view, the State has no possibility of influencing day-to-day business, nor has it ever attempted to exercise such influence. Coillte Teoranta is treated under company law in the same way as any other company. Its activities are directed at making profits and are independent of ministerial instruction.

40 The crucial question is therefore the following: were the public supply contracts which Coillte Teoranta awarded subject to control by the State, in the terms used for Ireland by Annex I to Directive 77/62?

41 Here, too, an approach should be adopted which does not consider the matter merely from the formal aspect. All public undertakings are subject to some form of State control; that, however, is not tantamount to their also being contracting authorities within the meaning of the directive.

42 The concept of public undertakings is to be found in Article 90(1) of the EC Treaty. That provision prohibits Member States from enacting or maintaining in force, in relation to such undertakings, measures that are contrary to Community competition policy. The characteristic feature of public undertakings is that public authorities can influence the conduct of their business. For that purpose, it suffices if there is a possibility of influence being exerted, and this possibility will always exist if the State holds the greater part of the company capital. (18)

43 Its status as a public undertaking, however, still provides no indication as to whether the public supply contracts which Coillte Teoranta awards are subject to control by the State. Since Annex I to Directive 77/62 refers expressly to State control over public supply contracts, this point requires to be considered in concrete terms. (19) Accordingly, the supply contract in question

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would, under the relevant provisions, have to be open to State control in such a way that public authorities are able to exert influence on the manner in which the contract is concluded.

44 The State initially provided Coillte Teoranta with its entire company capital. In return, the State received corresponding shares in the company. The annual land and timber sale plan must be agreed with the Department. The company directors are appointed by the competent ministers; investments exceeding a total amount of IR £250 000 require the approval and consent of the competent ministers. The Minister for Energy can set out financial objectives. The company also carries out functions in the public interest, such as the provision of leisure, recreation, sporting, educational, scientific, cultural and holiday facilities on its property. The Board of Directors looks after the day-to-day business of the company, which includes decisions on awarding contracts.

45 There is, however, no provision under which it would be possible for the Minister or for any civil servant to instruct the company or its directors to award contracts (possibly on the basis of non-commercial criteria). The company is under an obligation to carry out its business in a cost-effective and economic manner. Its directors are under an obligation to exercise their powers, in accordance with their duty of loyalty to the company, in a manner independent of their own interests. Although the company is required to abide by the principles of national forestry policy, this applies equally to every owner of forest land in Ireland. The directors must submit annually a five-year development plan, indicating in detail the plans regarding management and development of the company and its assets, as well as acquisition and sale of property, forestry objectives and profit forecasts. Here too, the relevant provisions do not grant any powers to the State authorities to intervene for the purpose of regulating the company's day-to-day activities.

46 Therefore, although the criteria mentioned make it possible to point to a general State influence on the company, that influence does not, under the provisions material to the present case, suffice to exercise specific control over the award of public supply contracts. The conclusion of contracts relating to public supplies is not dependent on the action of State authorities. Coillte Teoranta is for that reason not a contracting authority within the meaning of Directive 77/62.

47 It follows from the foregoing considerations that Coillte Teoranta does not come within the scope of Directive 77/62 and that the action alleging failure to fulfil Treaty obligations is therefore unfounded.

48 Even though Directive 93/36 is not applicable to the present case, given that the contracts were concluded before that directive entered into force, and since that directive also modifies and does not simply clarify, the following may, in the alternative, be pointed out in light of the parties' extensive submissions. In view of the definition of a contracting authority in Article 1(b), as extended by amendments, it would be necessary to examine whether Coillte Teoranta is a body governed by public law. It would first have to have been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial nature. This would probably have to be answered in the affirmative, since Coillte Teoranta also - or predominantly - has the function of providing leisure and recreational facilities for the public on its property. Even though these do not represent the company's only functions, this does not affect the outcome, so long as it attends to needs which it is specifically required to meet. (20) In addition, Coillte Teoranta has its own legal personality. If the company's Board consists in the majority of State appointees, Coillte Teoranta may well be a contracting authority within the meaning of the new Directive 93/36. As stated above, however, that directive is not applicable to the present case.

D - Costs

49 Under the first subparagraph of Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

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Since the Commission has been unsuccessful under the solution here proposed, it should be ordered to pay the costs.

E - Conclusion

50 In light of the above considerations, I propose that the Court should:

(1) dismiss the action;

(2) order the Commission to pay the costs of the proceedings.

(1) - Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Directive 88/295/EEC (OJ 1988 L 127, p. 1).

(2) - The High Court has itself requested an interpretation by the Court of the term `contracting authority' within the meaning of Directive 77/62 (Case C-306/97 Connemara Machine Turf v Coillte Teoranta): see the Opinion in that case delivered by Advocate General Alber on 16 July 1998 (ECR [1998] I-8761, I-8763).

(3) - Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

(4) - Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

(5) - Cited above in point 10.

(6) - Cited above in point 10.

(7) - Case C-359/93 Commission v Netherlands [1995] ECR I-157, paragraph 12.

(8) - Commission v Netherlands, cited above in footnote 7, paragraph 13.

(9) - This becomes apparent from the Irish Government's reply of 22 July 1994 to the Commission's letter of formal notice.

(10) - The first recital in the preamble to Directive 93/36 states that: `... Directive 77/62/EEC... has been amended on a number of occasions; ... on the occasion of further amendments, the said Directive should, for reasons of clarity, be recast'.

(11) - Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(12) - Case C-84/95 Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General [1996] ECR I-3953, paragraph 11 and the references contained therein.

(13) - Case 31/87 Beentjes v Netherlands State [1988] ECR 4635.

(14) - Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

(15) - Beentjes, cited above in footnote 13, paragraph 11.

(16) - Beentjes, cited above in footnote 13, paragraph 11.

(17) - Beentjes, cited above in footnote 13, paragraph 12.

(18) - Joined Cases 6/73 and 7/73 Commercial Solvents v Commission [1974] ECR 223, paragraph

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41, and Joined Cases 188/80 to 190/80 France, Italy and United Kingdom v Commission [1982] ECR 2545, paragraph 26.

(19) - See in this connection the Opinion of Advocate General Lenz in Case C-247/89 Commission v Portugal [1991] ECR I-3659, 3670, point 59.

(20) - See in this connection the judgment in Case C-44/96 Mannesmann Anlagebau Austria and Others v Strohal Rotationsdruck [1998] ECR I-73, in particular paragraphs 25 and 26, and the Opinion delivered on 19 February 1998 by Advocate General La Pergola in Case C-360/96 BFI Holding v Gemeente Arnhem and Gemeente Rheden [1998] ECR I-6821, I-6824.

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61996J0044-N26 : N 48
61996J0360 : N 48

SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Ireland ; Member States
NATIONA	Ireland
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Alber
JUDGRAP	Jann
DATES	of document: 16/07/1998 of application: 29/10/1996

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Opinion of Mr Advocate General Fennelly delivered on 23 October 1997.
Commission of the European Communities v Federal Republic of Germany.
Failure of a Member State to fulfil its obligations - Directive 93/36/EEC - Failure to transpose within the prescribed period.
Case C-341/96.

1 The present infringement action concerns the alleged (and partially admitted) failure by the Federal Republic of Germany fully to transpose Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (1) (hereinafter `the Directive'), or to inform the Commission of its implementing measures.

I - Pre-litigation proceedings

2 The Directive has as one of its objectives the establishment of an updated text of the much-amended Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (2) (hereinafter `the 1976 Directive'), incorporating a number of drafting changes aimed at improving the clarity of existing provisions. (3) It also introduces a number of substantive changes, regarding the definition of the contracting authority, (4) the imposition of requirements that reasons be given for the rejection of an application or tender and that a written report be drawn up by contracting authorities in respect of each contract awarded, (5) and the rules on participation in and the award of contracts. (6) Article 34(1) of the Directive requires the Member States to bring into force the laws, regulations and administrative provisions necessary to comply with it before 14 June 1994, and immediately to inform the Commission thereof.

3 Having recei

(1) - OJ 1993 L 199, p. 1.

(2) - OJ 1977 L 13, p. 1. This Directive was amended by Council Directives 80/767/EEC of 22 July 1980, OJ 1980 L 215, p. 1, 88/295/EEC of 22 March 1988, OJ 1988 L 127, p. 1, and 92/50/EEC of 18 June 1992, OJ 1992 L 209, p. 1.

(3) - See the first and fourth recitals in the preamble to the Directive.

(4) - Article 1(b) of the Directive.

(5) - Article 7 of the Directive.

(6) - Title IV of the Directive.

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FORM	Conclusions
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LODGED	1996/10/15
JURCIT	31977L0062 : N 2 31991X0704(02)-A44BIS : N 5 31993L0036-A34P1 : N 2 31993L0036 : N 1 - 7
SUB	Approximation of laws
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	Federal Republic of Germany ; Member States
NATIONA	Federal Republic of Germany
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Fennelly
JUDGRAP	Ragnemalm
DATES	of document: 23/10/1997 of application: 15/10/1996

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Opinion of Mr Advocate General Alber delivered on 19 January 1999.
Commission of the European Communities v Republic of Austria.
Failure of a Member State to fulfil its obligations - Public works contracts - Admissibility - Compatibility with Community law of conditions governing invitations to tender - Failure to publish a contract notice in the Official Journal of the European Communities.
Case C-328/96.

A - Introduction

1 The present proceedings for failure to fulfil obligations under the Treaty concern the assessment under Community law of the award of a series of works contracts in connection with a large project to construct government and administrative buildings and a cultural centre forming part of a plan to base the government of the Land of Lower Austria at St Pölten.

2 The following events underlie the proceedings for failure to fulfil obligations under the Treaty. Work on this large project started in 1992 in the case of the administrative centre and in 1994 in the case of the cultural centre. At the beginning of February 1995, a complaint drew the Commission's attention to the invitation to tender for a supply contract in connection with the project, which was published only in the Niederösterreichisches Amtsblatt (Lower Austrian Official Gazette). The Commission considered that the Allgemeine Angebots- und Vertragsbedingungen (General Tendering and Contract Conditions, `AAVB'), on which the invitation to tender was based, were contrary to Community law since they infringed, inter alia, the advertising rules, the obligation to inform unsuccessful tenderers and the rules on specifications, and drew the Austrian Government's attention to those findings by letter of 12 April 1995. Some time later, as a response to that letter, the Commission received notification of a Vergabegesetz (Law on the Award of Contracts) published by the Land of Lower Austria on 31 May 1995, which itself gave cause for objection since it contained an exemption clause for the `St Pölten Land Administrative and Cultural Centre' project (the so-called `Lex St Pölten') and thereby, in practice, excluded the project from the application of the law.

3 All the issues involved were discussed at a bilateral meeting between the Commission and the Austrian authorities on 27 and 28 November 1995. The Commission alleged infringements of Council Directive 93/37/EEC of 14 June 1993 (1) and Council Directive 89/665/EEC of 21 December 1989 (2) and of Article 30 of the EC Treaty. Having been informed of the objections, the Austrian authorities gave an undertaking that the AAVB would be amended, that the exemption clause in the Vergabegesetz would be repealed and that the contracting authority, the Niederösterreichische Landeshauptstadt-Planungsgesellschaft mbH (hereinafter `Nöplan'), would modify its practices relating to the award of contracts.

4 The Commission hoped that, as a result of the discussions, the Austrian authorities would take immediate action by ensuring that

- the award procedures still to be initiated would be carried out correctly,

- the procedures already initiated but not yet concluded by the award of contracts would be corrected, and

- contracts awarded in contravention of Community law but not yet performed would, as far as possible, be cancelled.

5 The Austrian authorities agreed in principle but pointed out that they would require a sufficient transitional period in order to amend the relevant legal provisions (Vergabegesetz and AAVB).

6 The Austrian authorities' willingness to adapt their award practices did not go far enough for the Commission, with the result that, by letter of formal notice of 15 December 1995, it initiated proceedings for failure to fulfil obligations under the Treaty. In that letter of formal notice,

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the Commission argued that the Austrian authorities had undertaken to intercede with the responsible decision-making bodies in order to ensure compliance with Community law from the end of January 1996 onwards. (3) In the letter of formal notice the Commission stated, inter alia, that it was extending its complaints `specifically to include those lots for which the contract has already been awarded but where the tendering procedure was not in conformity with Community law'. It requested the Republic of Austria `to ensure that Community law is complied with in the contracting procedures still outstanding' and `to suspend the legal effects or prevent the completion of contracts already awarded in contravention of Community law, to defer pending award decisions until such time as compliance with Community law is secured, and to ensure that the Lower Austrian Vergabegesetz and the AAVB are amended without delay'. (4) In the letter of formal notice of 15 December 1995, the Commission laid down a period of one week for the submission of observations.

7 The Austrian Government replied by letter of 22 December 1995. In that letter it stated that, notwithstanding the `scheduling difficulties made known at the bilateral meeting', Nöplan's bodies were `looking into the subject of contract awards' and had decided `that Nöplan must apply the EU directives with immediate effect'. (5) Finally, it is again stressed `that, notwithstanding additional costs and scheduling disruptions, the EC directives must be applied with immediate effect to all invitations to tender'. (6)

8 In its reasoned opinion of 21 February 1996, the Commission pointed out that the contracting authorities of the Land of Lower Austria were `under an obligation resulting directly from the directly applicable Community legislation to comply with the requirements thereof in the absence of transposition in conformity with Community law'. (7) The Commission also considered that the Austrian Government's reply to the letter of formal notice was inadequate. In that reply it could find no acknowledgement of an obligation to act in respect of pending procedures, `since the observations concerning the obligation to advertise... relate only to the future'. The Commission pointed out that it had asked the Austrian Government `to send it a list of the contracts for which an award procedure has already been initiated or will be advertised in the future, and to give it details of the values of those orders'. It stressed: `To date no satisfactory list has been sent'. Finally, it requested the Austrian authorities `to take all appropriate steps to put an end to the infringements described'. (8) For that purpose it prescribed a period of two weeks from notification of the opinion.

9 In the meantime, the Nöplan award committee had decided, at a meeting on 6 February 1996, to suspend all pending procedures and to invite tenders for and award, in conformity with Community law, the contracts still to be awarded. Subsequently, the defects complained of in regard to the Vergabegesetz were remedied and the AAVB were brought into conformity with Community law. Since then, the contracting practices followed have been manifestly in accordance with Community law.

10 Nevertheless, on 3 October 1996, the Commission brought an action for failure to fulfil obligations under the Treaty, which was registered at the Court on 7 October 1996, seeking a declaration that the Republic of Austria had failed to fulfil its obligations under Community law in awarding contracts, which were concluded before 6 February 1996 but which, on 7 March 1996, that is, at the time of expiry of the period laid down in the reasoned opinion of 21 February 1996, had not yet been performed or could reasonably have been cancelled. In essence, the Commission alleges that the Republic of Austria made no effort to cancel the contracts awarded after the bilateral meeting of 28 November 1995, that is, when it was aware of the problems with respect to Community law.

11 The Republic of Austria puts forward several objections to the admissibility of the action which it also considers to be substantively unfounded.

12 The Commission claims that the Court should:

1. Declare that the Republic of Austria has failed to fulfil its obligations under Council Directives

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93/37/EEC of 14 June 1993 (9) and 89/665/EEC of 21 December 1989 (10) and under Article 30 of the EC Treaty in connection with the construction of a new administrative and cultural centre for the Land of Lower Austria at St Pölten in awarding contracts which were concluded before 6 February 1996 but which, on 7 March 1996, had not yet been performed or could reasonably have been cancelled;

2. Order the Republic of Austria to pay the costs.

13 The Republic of Austria claims that the Court should:

1. Dismiss as inadmissible (if appropriate, as unfounded) the European Commission's action of 7 October 1996 for a declaration that the Republic of Austria has failed to fulfil its obligations under Council Directives 93/37/EEC of 14 June 1993 and 89/665/EEC of 21 December 1989 and under Article 30 of the EC Treaty in connection with the construction of a new administrative and cultural centre for the Land of Lower Austria at St Pölten in awarding contracts, which were concluded before 6 February 1996 but which, on 7 March 1996, had not yet been performed or could reasonably have been cancelled;

2. Order the European Commission to pay the costs.

14 I will come back to the arguments of the parties in the course of the legal assessment.

B - Opinion

I. Admissibility

15 The Austrian Government considers the action inadmissible on a number of grounds.

1. Inadmissibility of the subject-matter of the proceedings

The Austrian Government asserts that the subject-matter of the proceedings, as indicated by the form of order sought by the action, renders the action inadmissible. It argues that the Court has consistently held that the subject-matter of proceedings for failure to fulfil obligations under the Treaty is delimited by the pre-litigation procedure. It is determined by the Commission's reasoned opinion. The action may therefore not be founded on complaints other than those referred to in the reasoned opinion. The demand that contracts awarded in contravention of Community law but not yet performed should, as far as possible, be cancelled is not found in the Commission's reasoned opinion of 21 February 1996. It is at most touched upon in the letter of formal notice of 15 December 1995. The complaint referred to in the action, namely, of failure to cancel contracts which could still be cancelled, on which the form of order sought is decisively based, is therefore inadmissible.

16 It must be conceded to the Austrian Government that the Court has consistently held that the subject-matter of proceedings for failure to fulfil obligations is defined by the pre-litigation procedure and the form of order sought by the action. At the same time, the application may not contain any complaints which are fundamentally different or new as compared with those discussed in the pre-litigation procedure. That approach can be explained by reference to the structure of proceedings for failure to fulfil obligations under the Treaty, which gives the parties an opportunity to reach an amicable settlement in the course of the pre-litigation procedure, before the matter is referred to the Court. Moreover, the Member State's rights of defence must be safeguarded, so that it may not be confronted with new complaints in the application.

17 The question is therefore whether the complaint of failure to cancel contracts awarded before 6 February 1996 constitutes a new and thus inadmissible plea. In this regard, the pre-litigation procedure and the form of order sought by the action must be examined in the light of the actual course of events.

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18 The Commission's letter of formal notice of 15 December 1995, which was addressed to the Austrian Government following the bilateral meeting of 27 and 28 November 1995, objects, on the one hand, to a legal situation which is contrary to Community law and, on the other, to award practices contrary to Community law which are based on that situation. The request for the immediate bringing of the award practices into conformity with Community law (11) is to be found in the letter of formal notice. Elsewhere, the Commission extends its complaints `specifically to include those lots for which the contract has already been awarded but the tendering procedure was not in conformity with Community law'. (12) Finally, the Commission requests the Republic of Austria `to ensure that Community law is complied with in the award procedures still outstanding. It further requests the Republic of Austria to suspend the legal effects or prevent the completion of contracts already awarded in contravention of Community law [and] to defer pending award decisions until such time as compliance with Community law is secured, ...'. (13)

19 Those words clearly express not only the Commission's requirement that further conduct contrary to Community law be prevented with immediate effect, but also the demand that award decisions taken in contravention of Community law be denied operative effect. However, the latter demand can only imply retaking such decisions subsequently in a manner consistent with Community law. An obligation to cancel award decisions already taken must therefore be inferred from the Commission's request as formulated in the letter of formal notice.

20 A request to intervene in award procedures already subject to implementation cannot be inferred with equal certainty from the Commission's reasoned opinion of 21 February 1996. Nevertheless, it may be inferred from the reasoned opinion that pending procedures are included in the general complaint that award practices were contrary to Community law. When the Commission takes the view that the undertakings given by the Austrian Government concerning the obligation to advertise in the future expressly do not go far enough, and when it complains that they do not cover `those cases of awards where contracts are, for example, advertised nationally', (14) there can be no doubt that the Commission is identifying breaches of Community law in respect of past award practices and is demanding that they be remedied. Thus the Commission emphasises `that it is incumbent on the Austrian authorities to take all appropriate steps to put an end to the infringements described'. (15)

21 Moreover, neither the reasoned opinion nor the actual course of events suggested that the request to intervene in award procedures already being implemented, which had already been made in the letter of formal notice, had been complied with. It may be assumed from this that the Austrian Government understood the Commission's request in the sense described here. In its reply of 22 March 1996, it devoted over three-and-a-half pages to commenting on these issues, under the heading `The contracts already awarded'. (16) Any allegation of a breach of the principle of a fair hearing, which could be inferred from the objection to admissibility, is therefore also without foundation.

22 The Austrian Government is of the opinion that an express request to cancel contracts already awarded should have been included in the reasoned opinion. The steps to be taken should have been specified. Once a number of points, such as amendment of the Lower Austrian Vergabegesetz and the AAVB, had been mentioned, it was entitled to expect that no further measures would be required.

23 That view cannot be accepted. The Court has held (17) that the Commission is not required to specify what steps are to be taken to remedy a situation which is contrary to the Treaty. That allocation of tasks is also sensible since it is a Member State's responsibility to decide how and by what means it will comply with the requirements of Community law. If the Commission were required to specify the steps to be taken, jurisdictional conflicts would arise whenever the Member State has discretion as to the manner in which it creates a situation which is in conformity with Community law.

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24 Nor, in this case, did the Commission create a legitimate expectation which would have entitled the Austrian authorities to assume that, by amending the legal situation, they had done everything necessary to remedy the Treaty infringement. On the contrary, as already explained, the Commission included the pending procedures in the letter of formal notice. In the reasoned opinion it expressly drew attention to the obligations resulting `directly from the directly applicable Community legislation' for the contracting authorities of the Land of Lower Austria in the `absence of transposition in conformity with Community law' (18) and emphasised that it was incumbent on the Austrian authorities to take all appropriate steps to put an end to the infringements.

25 Against that background, the complaint of failure to cancel contracts concluded in contravention of Community law can be regarded as falling within the subject-matter of the proceedings properly defined in the form of order sought by the action.

2. Putting an end to the infringements before the expiry of the period laid down in the reasoned opinion

26 The Austrian Government points out that under the second paragraph of Article 169 of the Treaty and the case-law relating thereto the material time for the existence of a Treaty infringement is the end of the period laid down in the reasoned opinion. However, on that date, 7 March 1996, Austria had put an end to all the infringements complained of in the reasoned opinion.

27 The AAVB, it submits, have been amended along the lines required by the Commission and, in their new version, have formed the basis for all invitations to tender published in accordance with Community provisions since as long ago as 12 December 1995. Moreover, the award practices have also been modified since 6 February 1996. Since that date, the working committee on awards has no longer approved award recommendations submitted to it for a decision, and has decided to terminate immediately all pending award procedures not conducted in conformity with Community law and to hold a new invitation to tender in conformity with Community law. Award decisions in respect of contracts with a total value of ATS 217 000 000 were deferred, and by 7 March 1996 contracts with a total value of approximately ATS 470 000 000 had been put up for tender and awarded in conformity with Community law. Since the Austrian authorities had complied with the requests on 7 March 1996, the action is claimed to be inadmissible.

28 The Commission replies that the situation was not completely regularised on 7 March 1996. The contracts already awarded but not yet performed on 6 February 1996, and the contracts already awarded and (partly) performed but which could still reasonably have been cancelled on 6 February 1996, remained in place.

29 It is in fact the case that, by its action for failure to fulfil obligations under the Treaty, the Commission is no longer bringing the charge that the legal situation is contrary to Community law, any more than it is criticising the award practices followed after 6 February 1996. It nevertheless considers that the failure to cancel, within the bounds of possibility, contracts concluded in contravention of Community law constitutes a continuing infringement of the Treaty. As already observed above, it has admissibly made that plea the subject-matter of the action.

30 Since the Commission considers and alleges that there existed, at the time of expiry of the period laid down in the reasoned opinion, a situation which it regards as contrary to Community law and which continues to produce legal effects, the requirements as to the admissibility of the action should be met. Whether an infringement of the Treaty actually existed at the material time is a question concerning the substance of the action. Thus, although on 7 March 1996 the Austrian authorities had already complied with the Commission's requests in substantial respects, the action is admissible in respect of the complaints still subsisting.

3. The determination of periods in the pre-litigation procedure

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31 The Austrian Government further claims that the periods prescribed in the pre-litigation procedure were too short, with the result that, for that reason also, the action for failure to fulfil obligations under the Treaty is inadmissible. It refers to Austria's federal structure in which certain decision-making processes are bound to take certain time. The period of one week laid down in the letter of formal notice and that of two weeks laid down in the reasoned opinion were extremely short. As early as 25 January 1996, the Commission informed the international press that it had decided to address a reasoned opinion to Austria, but that opinion was not notified until 21 February 1996.

32 The Commission should also have taken into consideration, when setting the periods, the fact that its complaints referred exclusively to the past since, as notified to the Commission on 7 February 1996, the Austrian authorities had adapted their award practices since 6 February 1996. Finally, it submits that the period of 21 days provided for in Article 3(3) of Directive 89/665 is an indication of what constitutes a reasonable period.

33 The Commission, on the other hand, takes the view that the shortness of the periods was reasonable under the circumstances. According to the information provided by the Austrian authorities, contracts of substantial value were still outstanding at the beginning of December. An assurance that those contracts would be awarded with due regard for Community law and that pre-existing infringements would be remedied therefore had to be obtained from the Austrian Government as quickly as possible.

34 The Austrian Government's reply to the letter of formal notice allowed doubts to subsist as to its willingness to correct all the infringements complained of. Nor did it send the promised list with the calculation of the value of contracts still to be awarded. The Commission had to assume that, even at the beginning of 1996, a significant volume of contracts was still due to be awarded and had to prevent the creation of a fait accompli. Nor did the complaints in the reasoned opinion refer only to the past. The Commission definitely had in view the situation existing at the time of expiry of the period laid down in the reasoned opinion. Finally, the Austrian Government had learned prematurely of the Commission's intentions through the press, so that it may not rely on the unreasonableness of the periods.

35 It is appropriate to begin the examination of the objection to the admissibility of the action by considering this last point. It must be assumed that the procedure preceding the Treaty infringement action is subject to a certain stringency of form. This is borne out by the requirements governing the designation of the subject-matter of proceedings and the reasonableness of periods to be complied with, which, if not observed, result in inadmissibility of the action. Matters which are of importance to the Member State concerned must be unambiguously apparent from the Commission's documents marking the individual stages of the procedure. Consequently, only the periods prescribed in the documents served on the Member State can be binding. A Member State cannot act on `hearsay' in the context of a formal pre-litigation procedure. There can therefore be no question of regarding the period between learning of the Commission's intentions through the press and formal service of the opinion as preparation time.

36 Beyond the purely legal assessment, I also consider it bad form to publish a press release about the imminent dispatch of a reasoned opinion in Treaty infringement proceedings against a Member State when the document in question is not served on the Member State concerned until almost four weeks later. The Commission could have allowed a longer period by dispatching the reasoned opinion at an earlier date. Earlier dispatch would have been possible under the circumstances.

37 For the remainder of the examination, therefore, it must be assumed that only the periods prescribed in the pre-litigation documents are relevant.

38 In order to be able to assess the reasonableness of a period, it is first important to ascertain what response it is hoped to elicit within the prescribed period. Alteration of a legal situation

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can certainly not be expected to take place within a period measured in weeks. Thus, the pre-litigation procedure was certainly concerned in part with a clause in the Lower Austrian Vergabegesetz which was contrary to Community law. There is no dispute that amendment of the law had not yet been carried out when the period laid down in the reasoned opinion expired on 7 March 1996. The procedure was not concluded until May 1996. Nevertheless, in that respect the Commission refrained from bringing the action for failure to fulfil obligations under the Treaty, since the amendment of the law entered into force without significant delay.

39 What mattered to the Commission, however, was that the Austrian Government should realise and formally acknowledge that the situation was contrary to Community law so that, on the one hand, further awards of contracts could be prevented and, on the other, the contracts awarded in contravention of Community law could, as far as possible, be cancelled.

40 In response to the letter of formal notice of 15 December 1995 the Austrian Government also gave an assurance, within the period of one week, that it would, `with immediate effect', (19) apply the Community directives to the contracts still to be awarded. In reality, however, the authorities continued to award the contracts still outstanding. The award committee's decision to suspend the current procedures, which had been expected earlier, was not taken until 6 February 1996.

41 In view of the urgency of stopping further awards of contracts, at least for the time being, the period of one week was reasonable in this case. Indeed, the Austrian Government complied with the request by means of the statements in its reply of 22 December 1995. The discrepancy between words and actions must be examined separately.

42 With regard to the circumstances at the time of the adoption of the reasoned opinion, it is striking that it was only after the formal decision to dispatch the reasoned opinion had become known in the press that the award committee, on 6 February 1996, took the decision, inter alia, to suspend current award procedures. The Commission therefore had reason to suppose that the Austrian authorities were creating a fait accompli and that urgency was required. Viewed in that way, the short period of two weeks laid down in the reasoned opinion also seems reasonable.

43 The possibility of applying for interim legal protection, to which attention was drawn in both pre-litigation documents and which was also raised at the hearing, must also be viewed in this context. Under Article 186 of the Treaty, the Court may prescribe necessary interim measures only in cases already pending before it. However, an action under Article 169 of the Treaty may be brought only after the pre-litigation procedure has been concluded. Where there is increased danger in any delay, the Commission must therefore bring the pre-litigation procedure to a rapid conclusion in order, as far as possible, to prevent irreparable infringements.

44 That situation may be regarded as a weakness of the system, but it can be remedied only by amendment of the relevant legal bases. Nor do the possibilities provided for by Directive 89/665 (20) offer a satisfactory solution as a way out of the dilemma. The directive applies primarily to the relationship between the tenderer and the contracting authority. Moreover, the possibilities afforded to the Commission in Article 3 of the directive are not suited to all situations and in any case do not limit the Commission's authority to initiate proceedings for failure to fulfil obligations under the Treaty.

45 In the light of all the foregoing considerations, the periods prescribed by the Commission in the pre-litigation procedure must be regarded as reasonable under the circumstances.

4. The clear and precise nature of the form of order sought by the action

46 The Austrian Government expresses legal reservations about the phrase `contracts, which were concluded before 6 February 1996 but which, on 7 March 1996, had not yet been performed or could

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reasonably have been cancelled' in the form of order sought by the action. By using the expression `could reasonably have been cancelled', the Commission shows that it, too, does not think that there is an unlimited obligation to cancel contracts, but it fails to provide a definition of reasonableness. The form of order sought is therefore too imprecise to form the basis of an obligation to act resulting from Article 171 of the Treaty, thus rendering the action as such inadmissible.

47 The Commission takes the view that the Court is not required to rule on what is and what is not to be regarded, in specific terms, as reasonable in a Member State. That is the task of the national courts applying national law. Observations on the question of reasonableness are therefore irrelevant from the outset in the context of these proceedings before the Court.

48 On this point, the Commission's view must be endorsed without qualification. It is neither the task of the Commission nor that of the Court to investigate the possibilities for cancelling contracts concluded in the field of public procurement. On the contrary, an instruction - whether from the Commission or the Court - to cancel a contract under a Member State's legal rule to be specified would constitute an ultra vires act by the Community institutions vis-à-vis that Member State's authorities. That freedom of the Member State to choose the form and the means must necessarily also find expression in a request by the Commission to put an end to a situation contrary to the Treaty. This relative lack of precision as regards the steps to be taken is therefore, in the final analysis, a manifestation of the division of powers between the Community and the Member State. The wording at issue defines the objective of unwinding contracts awarded in contravention of Community law within the limits of what is legally possible. The form of order sought is therefore not open to objection.

5. Legal interest in bringing proceedings

49 The question concerning the legal interest in bringing the present action represents an objection to admissibility which, while not expressly raised by the Austrian Government, nevertheless follows implicitly from the objections to admissibility which are raised by it. When the Austrian Government asserts that the infringements concerned are by their very nature irreparable, it is indeed questionable whether any interest is served by an abstract finding of failure to fulfil obligations under the Treaty. The Austrian Government's view, that the denunciation of a Member State is neither the subject-matter nor the purpose of Treaty infringement proceedings, must be endorsed.

50 In order to assess the legal interest in bringing proceedings, it is important to ascertain whether the Commission's request is directed towards an objectively impossible act or whether there are ways and means of complying with the Commission's requirements, on the basis that the material time is the end of the period laid down in the reasoned opinion. The issue thus identified is ultimately a question to be answered in the examination of the merits of the action. The answer to the question concerning the legal interest in bringing proceedings must therefore await an examination of the merits of the action.

II. Merits

51 The Commission points out, firstly, that Austria has been required to comply with the provisions of Community law, including the legislation on the award of contracts, since its accession to the EEA Agreement with effect from 1 January 1994 and, a fortiori, since the date of its accession to the European Union, that is 1 January 1995.

52 It alleges that, in the case of the contracts awarded in the period from 27 November 1995 to 6 February 1996, which had a total value of more than ATS 360 000 000, Austria infringed several provisions of Community law. Thus, Articles 8, 10(6), 11(6) and (11), 12 and 30 of Directive 93/37, Article 30 of the Treaty and Articles 1(1) and (3) and 2(1)(c) of Directive 89/665 were infringed. The Commission sets out the alleged infringements in detail. There is, it argues, no justification

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under Community law for the conduct engaged in during the period in question, which was aimed at `getting the contracts home and dry'.

53 As evidenced by the Austrian Government's reply to the reasoned opinion, the Austrian authorities consciously acted `at their own risk'. Modification of the award practices would not, unlike amendment of the Vergabegesetz, have necessitated any time-consuming procedures, a fact proved by the award committee's decision adopted subsequently. Finally, the award of some of the contracts in question (21) could have been delayed without harm to the project as a whole.

54 The Austrian Government takes the view that the cancellation of contracts concluded in contravention of Community law cannot be required in the context of Treaty infringement proceedings. The second paragraph of Article 2(6) of Directive 89/665 leaves a Member State free to limit itself to awarding damages to any person harmed by an infringement. In principle, the Commission cannot require more in proceedings under Article 169 of the Treaty.

55 Moreover, it submits, the Commission shows that even it does not assume that there is an absolute obligation to cancel contracts. In any case, the principle of the protection of legitimate expectations precludes such an obligation. The legitimate expectations of parties to a contract are worthy of protection and take precedence over the Commission's application. Finally, the practical effect of Directive 93/37, in the form of equal conditions of competition, can no longer be ensured even by the cancellation of contracts. The initially successful tenderers had made arrangements giving them clear advantages over their competitors. Cancelling the contracts concerned would have entailed stopping the construction work and therefore, in the final analysis, have been impossible for that reason also.

56 In conclusion, the Austrian Government raises two points of law of a fundamental nature. Firstly, it brings up the legal status of Nöplan, and links to that the question of how far individuals are entitled to rely on a directive as against that institution. Secondly, it considers that it has not been made clear why the large St Pölten project should have been made subject to the directives on the award of contracts since as long ago as Austria's accession to the European Economic Area. The project, which must be viewed as a whole and therefore cannot be divided up, was started even before the entry into force of the EEA Agreement and before Austria's accession to the Community.

57 The Commission replies that its powers under Article 169 of the Treaty are separate from the procedure under Directive 89/665. The Court has already found to that effect elsewhere. (22) With regard to Nöplan's role, it observes that it has indisputably been unanimously assumed that Nöplan is to be regarded as the extension of the Land of Lower Austria in its function as a contracting authority.

58 For reasons of methodology, it is appropriate to begin the examination with the last-mentioned legal reservations expressed by the Austrian Government.

59 The question as to the applicability of the Community legislation on the award of contracts at the time of the Republic of Austria's accession to the EEA can be left aside here since that legislation in any case became binding on the acceding Member State by virtue of its membership of the European Community on 1 January 1995 and did so - unless transitional periods had been expressly negotiated - immediately upon accession.

60 The Commission has already expressed the view in the pre-litigation procedure that Directive 93/37 concerning the coordination of procedures for the award of public works contracts is applicable, pursuant to Article 6 thereof, to the construction project. (23)

Article 6(1) and (3) provide:

`1. The provisions of this Directive shall apply to public works contracts whose estimated value

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net of VAT is not less than ECU 5 000 000. (24)

...

3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to in paragraph 1. Where the aggregate value of the lots is not less than the amount referred to in paragraph 1, the provisions of that paragraph shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than ECU 1 000 000, provided that the total estimated value of all the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.'

61 With regard solely to the value of the contract for the building services control system, which was the original cause of the dispute, the Commission stated in the reasoned opinion:

`... Although the value of the contract for the building services control system, for which tenders were invited only on a regional basis, is approximately ATS 26 million, that is, below the threshold value laid down in the directive, the provisions of the directive are applicable to such a contract pursuant to the second sentence of Article 6(3) (threshold value exceeded when lots are aggregated)'. (25)

62 That legal assessment, that is to say the finding that the contract is subject to Community law, is correct and also applies to other contracts forming part of the project as a whole. Apart from its reference to the legal status of Nöplan, the Austrian Government has not otherwise adduced before the Court any facts which might preclude the applicability of the relevant directives.

63 The reference to the legal status of Nöplan should now be examined. That body has already been the subject of discussions in the preliminary stage of these proceedings, including with regard to its status. The annexes to the application include a letter of 12 May 1995 from the Austrian Government to the Commission, setting out the control structure of Nöplan, which states:

`... The Nö Landeshauptstadt Planungsgesellschaft mbH (Nöplan) was established as a private-law partnership for the purpose of carrying out all planning measures necessary in connection with the construction of the capital of the Land of Lower Austria, St. Pölten. Its ownership is 51% in the hands of the Land of Lower Austria, 10% in the hands of the city of St Pölten and 39% in the hands of the NO HYPO Leasinggesellschaft mbH. The award of contracts with a value exceeding ATS 2 million requires the approval of the award committee. The award committee is appointed by the Land Government of Lower Austria. The members of the other organs of Nöplan (supervisory board, general meeting and finance committee) are appointed by the owners...'. (26)

64 Throughout the procedure before the Court the parties have assumed that Nöplan is an `extension' (`verlängerter Arm', lit. `extended arm') of the Land Government of Lower Austria. That term, although non-technical, graphically describes the dependency of the legal person on the politically responsible Land authorities. The basic decision of 6 February 1996 to suspend the current procedures, which fundamentally changed the course of the proceedings, was taken by the `Vergabeausschuß' (Award Committee).

65 Article 1(b) of Directive 93/37 defines contracting authorities as: `the State, regional or local authorities, bodies governed by public law, associations...'. It goes on to state:

`A "body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

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- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I....'

66 The Land of Lower Austria, as a local or regional authority, is indisputably a contracting authority. Even if one does not wish to limit oneself to the assessment that Nöplan is an `extension' of the Land, which simply means that responsibility rests ultimately with the Land, viewing Nöplan in isolation also leads to a similar result. According to the account (27) of the purpose, legal personality and economic control structure of Nöplan given by the Austrian Government in its letter of 12 May 1995, the company fulfils the criteria (28) laid down in the second subparagraph of Article 1(b) of Directive 93/37 for classification as a `body governed by public law'. Such a body is to be regarded as a contracting authority within the meaning of the directive. (29)

67 The question as to which body is liable, in the final analysis, to meet any claims for compensation made by tenderers is one which must be assessed according to the law of the Member State concerned. In any event, it is the Member State which is liable in relation to the Community. (30) Since there is thus no doubt about where liability in principle lies under Community law governing the award of contracts, the issue to be resolved by the Court boils down to the legal and factual preconditions for the existence of an obligation to cancel contracts already concluded.

68 It is first necessary to examine the technical point that the powers in Treaty infringement proceedings should not go beyond the possibility, expressly granted to a Member State by the secondary legislation, of limiting the consequences of a contract award made in contravention of Community law to the award of damages to the tenderer harmed. The submission that both the procedure under Article 3 of Directive 89/665 and Treaty infringement proceedings have the same objective must be endorsed in so far as the objective is defined as compliance with the Community rules on the award of public contracts. However, it must also be borne in mind that the review procedures required by the directive are primarily concerned with the relationship between the tenderer and the contracting authority. The procedure under Article 3 of the directive, which gives the Commission power to act, is, as the Court has expressly held, (31) a preventive measure. The Commission's powers under Article 169 of the Treaty are neither altered nor replaced by the special procedure under the directive. (32) It can thus be assumed that the powers conferred on the Commission by Directive 89/665 do not restrict, either in form or in substance, its powers in Treaty infringement proceedings, which in principle are wide-ranging.

69 A particular problem arises in this case from the fact that the contracts still outstanding as part of the overall project at the time of expiry of the period laid down in the reasoned opinion were awarded in conformity with Community law. It must therefore first be established to what extent an infringement still existed at that time. The alleged infringement can be summed up in a short formula: by the conclusion of contracts awarded in contravention of Community law, the infringement was complete but not yet at an end. The contracts had still to be performed.

70 The following should be said with regard to the contracts which were awarded. There is no doubt that the award of those contracts was objectively contrary to Community law. A divergence between the legal situation in the Member State concerned at that time and the requirements of Community law is now indisputable. The Austrian Government came to share that assessment in due course and saw to it that both the criticised AAVB and the legal situation were adapted. It can also be assumed that the legislative bodies acted on the basis that the general legislation on the award of contracts was applicable to the large St Pölten project when they included the disputed exemption

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provision in the Lower Austrian Vergabegesetz.

71 However, the latter point is not of decisive importance. It is established that the award procedures carried out in 1995 were objectively contrary to Community law. There is no need here to examine in detail the incompatibility of the legislation on the award of contracts which was then in force, since it has been acknowledged by the Austrian authorities and rectified by amending the law to bring it into conformity with the requirements of Community law and the Commission no longer raises this issue in these proceedings.

72 It is however questionable to what extent, after 27 and 28 November 1995, the objective breach of Community law assumed a different quality to which an obligation to cancel contracts concluded after that date could, if appropriate, be attached.

73 The Commission takes the view that the Austrian authorities were already aware of the problem with respect to Community law as a result of the exchange of correspondence which took place in the course of 1995. However, the whole issue was discussed in detail at the bilateral meeting on 27 and 28 November 1995, so that, in awarding contracts after that date, the Austrian authorities acted against their better knowledge.

74 The Austrian Government's response is to say, as the Austrian Government's representative expressly pointed out at the hearing, that the discussions during the meetings took place in a non-binding context: those discussions could have no legally binding effects. Moreover, initially the Austrian authorities had, with good reason, taken a different view and only later deferred to the Commission's views.

75 It is indeed questionable how far the Austrian Government should have assumed that the view expressed by the Commission at the bilateral meeting was binding. An informal meeting of that kind is not capable of producing direct legal effects. However, it must not be forgotten that, objectively speaking, an infringement existed and there was a danger that continuation of the practices contrary to Community law could have serious and, in part, irreparable economic consequences. Once Treaty infringement proceedings had been officially initiated by the letter of formal notice of 15 December 1995, the Austrian authorities were obliged to prevent further damage. As already intimated, that did not require a lengthy procedure to amend the law; provisional suspension pending investigation of the situation would have sufficed. The subsequent decision adopted by the award committee on 6 February 1996 shows that such an approach was also possible in practice.

76 I am therefore of the opinion that the awarding of contracts from the time of the official initiation of Treaty infringement proceedings until the decision of 6 February 1996 constituted a serious infringement of Community law, to which an obligation to cancel the contracts in question could undoubtedly also be attached. These were, after all, contracts with a total value considerably in excess of ATS 300 000 000, which were awarded over a period of over six weeks. In so far as the contracts concluded during that period were valid and not yet performed on 3 March 1996, the infringement subsisted and the Commission was entitled to require cancellation of the contracts. That demand does not seem unreasonable, moreover, since the Austrian authorities expressly acted `at their own risk'. (33) Acting `at one's own risk' can hardly mean creating a fait accompli to which no penalty can be attached.

77 When the Austrian Government argues before the Court that it is impossible to cancel contracts at issue, the nature of that impossibility, whether it is original or subsequent, in law or in fact, matters. In so far as it is subsequent impossibility on factual grounds, because the construction project has in the meantime been carried out, that circumstance cannot in any way alter the situation with regard to obligations as at 7 March 1996. Moreover, the Court has held that a Member State may not rely on a fait accompli which it itself created so as to escape Treaty infringement proceedings.

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(34)

78 The argument based on the initial impossibility of cancelling the contracts concerned because of the urgency of continuing with the construction work must also be assessed against that background. The Commission's demand that the contracts be cancelled was made only with regard to those contracts which were concluded at the contracting authority's own risk in the knowledge that they were possibly contrary to Community law. The Member State could have avoided such a demand if it had, without delay, taken steps, in the form of a decision such as that adopted on 6 February 1996, in order to prevent a fait accompli.

79 This approach is supported by a consideration underlying Directive 93/37. Article 7(3)(c) of the directive entitles the contracting authorities to award their public works contracts by negotiated procedure when, for reasons of extreme urgency, the time-limit laid down cannot be kept. However, the reasons invoked must be attributable to events unforeseen by the contracting authorities in question.

80 Although the foregoing considerations are valid with respect to alleged cases of de facto impossibility, the consequences of de jure impossibility are still uncertain. The assessment under Community law comes up against a limitation here. As the Commission rightly states, and as has already been touched upon in the examination of admissibility, any cancellation of contracts falls within the competence of the Member State. The legal bases and extent of any cancellations are governed by national law and therefore cannot be established bindingly here.

81 The Austrian Government's submissions are therefore of vital importance. They contain a series of reasons explaining why contract cancellation after the event is impossible, yet at no stage is it maintained that this was a case of absolute initial impossibility on legal grounds. Since the Austrian Government has also consistently expressed the view before the Court that the Commission's demand for contracts to be cancelled was unjustified, it can be assumed that it certainly made no attempt to comply with the demand at the time.

82 For the remainder of this examination it must be assumed that the impossibility of cancelling contracts was in any case not absolute. Even if there had been only one possibility, the Commission's demand would not have sought something which was impossible. It must therefore be assumed that the Commission's demand entailed a legal obligation to act.

83 The Austrian Government then contends before the Court that contract cancellation was unreasonable because of the legitimate expectations of the parties to those contracts, which takes precedence over the Commission's demand. That argument is mistaken. The Austrian Government is relying on third parties' legal positions which were illegally created by the contracting authority. As far as the fundamental situation regarding a Member State's obligations towards the Community is concerned, a Member State may not successfully rely on the consequences of its illegal conduct in order to call into question the legal obligation as such. To what extent contract cancellation was reasonable in this particular case is not, as has already been shown, a matter for the Court to assess.

84 Finally, it is necessary to examine the Austrian Government's argument that the practical effect of the directives could no longer be ensured once the contracts had been awarded. It is submitted that competitive positions had been affected in such a way that the situation which existed before the contracts were awarded could no longer be restored. The tenderers who had originally participated would always have retained a competitive advantage over any subsequent tenderers. That line of argument may be relevant in point of fact. However, it cannot invalidate any attempt to put an end to illegal conduct. If necessary, a new invitation to tender issued on a Community-wide basis, for example, would have enabled undertakings to participate which, under the circumstances, simply had no knowledge of the original invitation to tender. Those potential tenderers cannot - after

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the event - be individually identified, so that they will never be able to make any claims for damages.

85 It must therefore be concluded that, on 7 March 1996, the Commission's demand entailed an obligation to take action, the objective initial impossibility of which it has not been possible to establish.

86 Finally, it is necessary to return once again to the question concerning the legal interest in bringing proceedings, which could not be answered in the context of the examination of admissibility. Since it may be assumed that an abstract obligation to act existed but that the Austrian Government has consistently disputed it, a legal interest in bringing proceedings must, for that reason alone, be acknowledged. Moreover, a declaratory judgment in the present proceedings may play a part in any litigation concerning any claims for damages, so that for that reason also a legal interest in bringing these proceedings must be acknowledged.

Costs

87 In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Austrian Government has been unsuccessful in its arguments and submissions, it must be ordered to pay the costs.

C - Conclusion

88 In the light of the foregoing I propose that the Court:

(1) Declare that, in connection with the construction of a new administrative and cultural centre for the Land of Lower Austria at St Pölten, the Republic of Austria has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 and Council Directive 89/665/EEC of 21 December 1989 and under Article 30 of the EC Treaty in awarding contracts which were awarded after the initiation of proceedings for failure to fulfil obligations under the Treaty and before 6 February 1996 but which, on 7 March 1996, had not yet been performed or could reasonably have been cancelled.

(2) Order the Republic of Austria to pay the costs.

(1) - Directive concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

(2) - Directive on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

(3) - See point 6 of the letter of formal notice.

(4) - See point 10, first and fifth paragraphs, of the letter of formal notice.

(5) - See point 1 of the reply of 22 December 1995; emphasis added.

(6) - See `With regard to point 8' in the reply of 22 December 1995; emphasis added.

(7) - See point 15 of the reasoned opinion of 21 February 1996.

(8) - For the citations in this paragraph, see point 16 of the reasoned opinion of 21 February 1996.

(9) - Directive concerning the coordination of procedures for the award of public works contracts (cited in footnote 1).

(10) - Directive on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (cited in footnote 2).

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(11) - See the letter of formal notice, at point 7, paragraph 1.

(12) - See the letter of formal notice, at point 10, paragraph 1.

(13) - Letter of formal notice, point 10, paragraph 5.

(14) - See the reasoned opinion, at point 16, paragraph 4.

(15) - See the reasoned opinion, at point 16, paragraph 6; emphasis added.

(16) - See the Austrian Government's reply of 22 March 1996, at Chapter IV.

(17) - Judgment in Case C-247/89 Commission v Portugal [1991] ECR I-3659.

(18) - See the reasoned opinion, at point 15, paragraph 2.

(19) - The Austrian Government's reply of 22 December 1995, pp. 2 and 7.

(20) - See the Directive on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (cited in footnote 2).

(21) - Final cleaning of the Lower Austrian Land government building, public-address system for the shopping centre, planting in the grove, etc.

(22) - Judgment in Case C-359/93 Commission v Netherlands [1995] ECR I-157, at paragraphs 13 and 14.

(23) - See the reasoned opinion, at point 13.

(24) - ECU 1 is equivalent to ATS 13.7789 (as at 1.12.1998).

(25) - See the reasoned opinion, at point 13.

(26) - See the letter of 12 May 1995 from the Austrian Government to the Commission, at Annex 3 to the application. The Austrian Government's reply of 22 December 1995 to the Commission's letter of formal notice states:

`With regard to point 8

Nöplan is not only a partnership established for the exclusive purpose of carrying out all the planning measures necessary in connection with establishing St Pölten as the Land capital of Lower Austria. On the contrary, its activities also include, in addition to the construction schemes involved in that, a multitude of other schemes, including private residential and industrial and commercial construction projects, for which Nöplan has to compete commercially.'

The purpose of the partnership has not been raised further as an issue before the Court.

(27) - Cited above, at point 63.

(28) - See the judgment in Case C-44/96 Mannesmann Anlagenbau Austria [1998] ECR I-73, at paragraph 21.

(29) - See the judgment in Case C-44/96, cited in footnote 28, at paragraph 29.

(30) - See most recently to that effect the judgment in Case C-353/96 Commission v Ireland [1998] ECR I-8565, at paragraph 23.

(31) - Judgment in Case C-359/93 Commission v Netherlands, cited in footnote 22, paragraph 13. See, most recently, the judgment in Case C-353/96 Commission v Ireland, cited in footnote 30, paragraph 22.

(32) - See the judgment in Case C-359/93 Commission v Netherlands, cited in footnote 22, at paragraph

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14, and the judgment in Case C-353/96 Commission v Ireland, cited in footnote 30, at paragraph 22.

(33) - See order of the President of the Court of Justice in Case C-87/94 R Commission v Belgium [1994] ECR I-1395, at paragraph 34, on which the Austrian Government expressly relies.

(34) - See the judgment in Case 39/72 Commission v Italy [1973] ECR 101, at paragraph 10; see also the Advocate General's Opinion in Case C-247/89 Commission v Portugal [1991] ECR I-3670, at point 36; see also the order in Case C-87/94 R, cited in footnote 33, at paragraph 40.

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SUB	Approximation of laws
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APPLICA	Commission ; Institutions
DEFENDA	Austria ; Member States
NATIONA	Austria
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Alber
JUDGRAP	Gulmann
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Opinion of Mr Advocate General Alber delivered on 19 March 1998.
Commission of the European Communities v Kingdom of Belgium.
Failure by a Member State to fulfil obligations - Public works contracts - Directives 89/440/EEC and 93/37/EEC - Failure to publish a contract notice - Application of negotiated procedure without justification.
Case C-323/96.

A - Introduction

1 These proceedings for failure of a Member State to fulfil its obligations under the Treaty relate to the interpretation of Directives 89/440/EEC and 93/37/EEC (1) concerning the coordination of procedures for the award of public works contracts for the construction of a building for the Vlaamse Raad. Most of the contracts for the regional parliament building were awarded by a negotiated procedure and Lot 4 was awarded by a restricted procedure. The Commission considers that such conduct constitutes failure to comply with the requirements on tendering and publication established by the directives.

2 The Belgian Government, on the other hand, is of the opinion that the regional parliament, as a legislative body, cannot be bound by decisions of the minister responsible under the legal system of a Member State for the award of public contracts. It maintains that the Vlaamse Raad was therefore entitled to refrain from complying with the provisions of Community law relating to the publication of notices for public works contracts.

3 The Commission claims that the Court should:

- declare that the Kingdom of Belgium has failed to fulfil its obligations under Directives 89/440/EEC and 93/37/EEC, and in particular Articles 7 and 11 of Directive 93/37/EEC, in so far as it did not place a notice in the Official Journal of the European Communities, either for the overall project or for the individual lots, for the construction of a building for the Vlaamse Raad and it did not apply the award procedures in accordance with those directives;

- order the defendant to pay the costs.

4 The Belgian Government does not seek a specific form of order in its defence.

5 I shall refer to the submissions of the parties in the course of the opinion.

B - Opinion

6 The Commission takes the view that the Vlaamse Raad is undoubtedly a `contracting authority' within the meaning of the Directive. It maintains that the Directive was therefore applicable to the construction project in question. In awarding the contract by a negotiated procedure, the Vlaamse Raad failed to fulfil its obligations under the Directive.

7 The Belgian Government formulates its defence on various levels. However, there is a substantive element common to the various grounds of defence in that they all have recourse to the argument relating to the independence of the contracting authority by virtue of its nature as a legislative body.

The national legislation applicable to the award procedure carried out at the turn of the year 1996/97 was the Law of 14 July 1976 (2) on public contracts, including the provisions adopted for its implementation. That Law assumes that only the executive is bound by the award provisions. Although a new law was adopted on 24 December 1993, (3) its entry into force was delayed by the fact that the decrees (4) necessary for its implementation had not been adopted. In that context, the considerable problems connected with the special constitutional position of legislative bodies, which are relevant in this case, were discussed both at national level and in contacts with the

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Commission, but no solution which was satisfactory for all the parties concerned could be reached. The Belgian Government is of the opinion that the Commission did not provide it with the necessary assistance in the search for a solution and that, consequently, the bringing of the action giving rise to the present proceedings was unreasonable. It contends that the timing of the action taken against the Belgian Government was also particularly unfavourable since the events in question fall within the temporal context of the achievement of constitutional autonomy by the regions, a period of radical change which was accompanied by legal uncertainties.

According to the Belgian Government, allowance should in any case be made for the fact that the Vlaamse Raad - or the Flemish Parliament, as it has since become known - is a legislative body which is independent in accordance with the understanding of democracy prevailing in the Member States and underlying the Treaty of Maastricht. It is clear from the Directive itself that there are fields to which it does not apply, as Article 4 of the Directive shows.

8 In reply to those arguments, the Commission asserts that internal problems in the legal system of a Member State cannot release it from the duty to comply with Community law. Moreover, a parliament is also obliged to observe Community law.

9 Article 7 of Directive 93/37 lays down the criteria for determining whether an `open procedure', (5) a `restricted procedure' (6) or a `negotiated procedure' (7) must be held. Thus, Article 7(2) defines the conditions for holding a negotiated procedure with prior publication of a contract notice and Article 7(3) defines those for holding a negotiated procedure without prior publication. Article 7(4) states: `In all other cases, the contracting authorities shall award their public works contracts by the open procedure or by the restricted procedure'.

10 Since the construction project in question does not fulfil any of the criteria justifying a negotiated procedure without prior publication, the provisions of Article 11 of the Directive relating to publication of a notice must be complied with in so far as the Vlaamse Raad is to be regarded as a contracting authority within the meaning of the Directive. Article 1(b) of the Directive defines contracting authorities as `the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law'.

11 The State, according to the classical understanding of that concept in public law, comprises three powers: the legislature, the executive and the judiciary. At an abstract level, the organs of the three powers are bound by Community law. The Court held that to be a general principle in its judgment in Von Colson and Kamann which states: `However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.' (8) In that respect, the binding effect on the courts of a directive has been positively established.

12 The question concerning the binding effect on the administration of the provisions of Community law relating to public contracts was the subject-matter of the Costanzo case. (9) In that case, the Court held that the obligations arising under the provisions of a directive `are binding upon all the authorities of the Member States'. (10) The Court goes on to state that in all the defined circumstances in which individuals may rely on the provisions of a directive `all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply those provisions'. (11) In that respect, the binding effect on State authorities must also be regarded as positively established.

13 The only question therefore is whether the legislature is also bound by Community directives.

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In principle, that question must be answered in the affirmative since the obligation to legislate contained in a directive is always addressed directly to the legislative bodies. Beyond that abstract approach, in the field of public contracts, the Court held in its judgment in the Beentjes (12) case that the term `the State' must be `interpreted in functional terms'. (13) In the previous case-law on public contracts, the question whether a body awarding a works contract is a contracting authority within the meaning of the Directive arose as a rule in terms different from those in question in this case. The issue has been principally whether subsidiary bodies and institutions had failed to comply with the award provisions. (14)$

14 A parliament, on the other hand, as an organ of State power, is certainly part of the State in functional terms. The same is obviously true of the parliaments of the constituent States in a federal structure.

15 What is exceptional in this case is that the Vlaamse Raad was confronted with Directive 93/37, not in its original capacity as a legislature, but in the course of its administrative activities in the form of fiscal acts. However, that circumstance is no reason for exempting it from the procedural requirements of Community law relating to transparency and publicity in the field of public contracts. On the contrary, there is all the more reason to assume that the Vlaamse Raad is bound by the Directive when it is not entitled, since it is not acting in a legislative capacity, to rely on its original independence vis-à-vis the administration.

16 Moreover, at the hearing the Belgian Government's representative conceded that in reality the Vlaamse Raad did not act in its capacity as a legislature when it awarded the contract. According to the Belgian Government, the freedom invoked is founded on the exceptional nature of the constitutional situation. Thus, it justifies the use of the procedure at issue by reference to its own domestic legal situation. It maintains that the Law of 14 July 1976 expressly rendered only the executive subject to the award provisions.

17 As the Commission correctly argues, it is settled case-law of the Court of Justice that a Member State may not rely on its own legal system or an interpretation thereof in order to justify conduct which is contrary to Community law. (15) Doubts as to whether the Belgian legal situation was in conformity with Community law had certainly been raised at the time in question. The Belgian Government itself states that it intended to remedy defects in the Law of 14 July 1976 by means of the Law of 24 December 1993. According to it, there were still disagreements with regard to the role of legislative bodies. In that context, it contends that the Commission failed to provide it with the necessary assistance.

18 It may be unfortunate that the Commission did not provide the assistance hoped for from it during the legislative procedure. However, from the time of the institution of the Treaty infringement proceedings at the latest, there could be no doubt about the Commission's attitude. The letter of formal notice instituting the Treaty infringement procedure dates from 28 July 1994 and the Belgian Government replied to it on 31 August of that year. Over a year later, on 16 November 1995, the Commission addressed its reasoned opinion to the defendant government, which replied by letter of 15 December 1995. The Commission finally brought its action on 2 October 1996.

19 While it is true that the communication problems between the Vlaamse Raad, the Permanent Representation of Belgium and the Commission, which are mentioned by the Belgian Government, may explain the attitude of the Vlaamse Raad, they cannot justify its conduct in a legal sense. The obligations relating to publication contained in the Directive are directly applicable and in that respect were also binding on the Vlaamse Raad.

20 At the hearing, the Belgian Government's representative expressly referred once again to the provisions of the Directive authorising derogation, and in particular to Article 4, in order to

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show that there are indeed fields which a State could legitimately regard as falling outside the scope of the provisions on the award of public contracts.

21 Against that it must be stated that, in this particular case, Article 4 offers no grounds for disregarding the obligations which arise from the Directive. Article 4(1) merely provides for derogation in respect of certain fields, referring to certain provisions of Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. (16) Article 4(2) excludes from the scope of the Directive those works contracts `which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of the Member State's security so requires'. The Belgian Government has not put forward any facts which justify application of the provision authorising derogation, whether by mentioning specific laws, regulations or administrative provisions declaring the works contract secret or by pleading special security measures or the protection of essential interests of the State.

22 It is settled case-law that provisions authorising derogations from directives in the field of public works contracts must be interpreted strictly. (17) A general reliance, unsupported by more specific factors, on the principle of the separation of powers cannot therefore be construed as pleading the protection of essential interests of the State.

23 In view of the independence of the Vlaamse Raad as a legislative body, the question still arises, in any event, of the liability of the Member State in the context of proceedings under Article 169 of the Treaty. In this respect also, reference may be made to settled case-law of the Court which states that the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution. (18)

24 I therefore conclude that the form of order sought by the Commission should be granted.

Costs

In accordance with the first paragraph of Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs.

C - Conclusion

25 In the light of the foregoing I propose that the Court:

(1) declare that, by failing to comply with the requirements in the field of tendering procedures and publication in respect of the award of both the overall project and the various lots concerning the construction of a building for the Vlaamse Raad, the Kingdom of Belgium has failed to fulfil its obligations under Directives 89/440/EEC and 93/37/EEC, in particular Articles 7 and 11 of Directive 93/37;

(2) order the Kingdom of Belgium to pay the costs.

(1) - See Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5) as amended by Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC (OJ 1989 L 210, p. 1), consolidated by Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) (hereinafter: `the directive').

(2) - Law of 14 July 1976 relating to public works, supply and services contracts.

(3) - Law of 24 December 1993 relating to public contracts and to certain contracts for works,

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supplies and services, Moniteur belge, 22 January 1994, p. 1308.

(4) - Implementing decrees.

(5) - See Article 1(e) of the Directive.

(6) - See Article 1(f) of the Directive.

(7) - See Article 1(g) of the Directive.

(8) - Case 14/83 Von Colson and Kamann [1984] ECR 1891, paragraph 26.

(9) - Case 103/88 Fratelli Costanzo [1989] ECR 1839.

(10) - Case 103/88, cited in footnote 9, paragraph 30.

(11) - Case 103/88, cited in footnote 9, paragraph 31.

(12) - Case 31/87 Beentjes [1988] ECR 4635.

(13) - Case 31/87, cited in footnote 12, paragraph 11.

(14) - Case 31/87 Beentjes, cited in footnote 12, paragraphs 8 and 12 - concerning a local land consolidation committee; Case 103/88 Fratelli Costanzo, cited in footnote 9, paragraph 30 et seq. - concerning the Municipality of Milan; Case C-24/91 Commission v Spain [1992] ECR I-1989 - concerning Universidad Complutense, Madrid; see also Opinion of Advocate General Lenz in that case, ECR I-1995, at point 9 et seq.

(15) - Case C-265/95 Commission v France [1997] ECR I-6959, paragraph 55 et seq.; Case 310/86 Commission v Italy [1988] ECR 3987, paragraph 6; and Case 326/87 Commission v Italy [1988] ECR 4009, paragraph 6.

(16) - Council Directive of 17 September 1990 (OJ 1990 L 297, p. 1)

(17) - Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 14; Case C-57/94 Commission v Italy [1995] ECR I-1249, paragraph 23; and Case C-318/94 Commission v Germany [1996] ECR I-1949, paragraph 13; on the temporal effect of a provision authorising derogation, Case C-143/94 Furlanis [1995] ECR I-3633.

(18) - Case 77/69 Commission v Belgium [1970] ECR 237, paragraph 15; Case 8/70 Commission v Italy [1970] ECR 961, paragraph 9; and Case 52/75 Commission v Italy [1976] ECR 277, paragraph 14.

DOCNUM 61996C0323

AUTHOR Court of Justice of the European Communities

FORM Conclusions

TREATY European Economic Community

TYPDOC 6 ; CJUS ; cases ; 1996 ; C ; opinions

PUBREF European Court reports 1998 Page I-05063

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DOC	1998/03/19
LODGED	1996/10/02
JURCIT	61970J0008-N09 : N 23 61975J0052-N14 : N 23 61977J0069-N15 : N 23 61983J0083-N26 : N 11 61985J0199-N14 : N 22 61987J0031-N08 : N 13 61987J0031-N11 : N 13 61987J0031-N12 : N 13 61987J0031 : N 13 61988J0103-N30 : N 12 13 61988J0103-N31 : N 12 61988J0103 : N 12 31990L0531 : N 21 61991C0024-N09 : N 13 61991J0024 : N 13 11992E005 : N 11 11992E169 : N 23 31993L0037-A01 : N 10 31993L0037-A04 : N 20 21 31993L0037-A04LB : N 21 31993L0037-A07 : N 9 31993L0037-A07P2 : N 9 31993L0037-A07P3 : N 9 31993L0037-A07P4 : N 9 31993L0037-A11 : N 10 31993L0037 : N 15 61994J0057-N23 : N 22 61994J0143 : N 22 61994J0318-N13 : N 22 61995J0265-N55 : N 17
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Belgium ; Member States
NATIONA	Belgium
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Alber
JUDGRAP	Ioannou
DATES	of document: 19/03/1998 of application: 02/10/1996

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Opinion of Mr Advocate General Lenz delivered on 6 March 1997.
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Directive 93/36/EEC - Failure to transpose within the prescribed period.
Case C-312/96.

1 In these proceedings, the Commission alleges that the French Republic has failed to fulfil its obligations under Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, (1) and in particular under Article 34 thereof, by failing to adopt the laws, regulations and administrative provisions necessary to implement the directive. In the alternative, the Commission seeks a declaration that the French Republic has failed to fulfil its obligations under the above provisions by not immediately informing the Commission of such measures.

2 Article 34 of the directive requires the Member States to bring into force the laws, regulations and administrative measures necessary to comply with the directive before 14 June 1994 and immediately inform the Commission thereof.

3 The French Republic does not deny that it has not transposed the directive within the prescribed period. It merely states that the relevant draft legislation has been entered on the parliamentary agenda for the year 1996/97.

4 As it is clear, therefore, that the directive in question has not been transposed within the prescribed period, there is no need to examine the Commission's alternative plea.

5 I therefore propose that the Court declare that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to transpose Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, the French Republic has failed to fulfil its obligations under that directive and in particular under Article 34 thereof. I also propose that the French Republic be ordered to pay the costs.

(1) - OJ 1993 L 199, p. 1.

DOCNUM	61996C0312
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; C ; opinions
PUBREF	European Court reports 1997 Page I-02947
DOC	1997/03/06
LODGED	1996/09/24
JURCIT	31993L0036-A34 : N 1 2 5

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	31993L0036 : N 1 - 5
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Ragnemalm
DATES	of document: 06/03/1997 of application: 24/09/1996

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Opinion of Mr Advocate General Lenz delivered on 6 March 1997.
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Directive 93/38/EEC - Failure to transpose within the prescribeb period.
Case C-311/96.

1 In these proceedings, the Commission alleges that the French Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, (1) and in particular Article 45, by failing to adopt the laws, regulations and administrative provisions necessary to implement the directive. In the alternative, the Commission seeks a declaration that the French Republic has failed to fulfil its obligations under the above provisions by not immediately informing the Commission of such measures.

2 Article 45 requires Member States to adopt the measures necessary to transpose the directive, apply them by 1 July 1994 (2) and inform the Commission thereof immediately.

3 The French Republic does not deny that it has not transposed the directive within the prescribed period. It merely states that the relevant draft legislation has been entered on the parliamentary agenda for the year 1996/97.

4 As it is clear, therefore, that the directive in question has not been transposed within the prescribed period, there is no need to examine the Commission's alternative plea.

5 I therefore propose that the Court declare that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to transpose Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the French Republic has failed to fulfil its obligations under that directive and in particular under Article 45 thereof. I also propose that the French Republic be ordered to pay the costs.

(1) - OJ 1993 L 199, p. 84.

(2) - Under Article 45(2), however, other periods apply to Spain, Portugal and Greece.

DOCNUM	61996C0311
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; C ; opinions
PUBREF	European Court reports 1997 Page I-02939
DOC	1997/03/06
LODGED	1996/09/24

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JURCIT	31993L0038-A45 : N 1 2 5 31993L0038 : N 1 - 5
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Ragnemalm
DATES	of document: 06/03/1997 of application: 24/09/1996

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Opinion of Mr Advocate General Lenz delivered on 29 May 1997.
Hera SpA v Unità sanitaria locale no 3 - genovese (USL) and Impresa Romagnoli SpA.
Reference for a preliminary ruling: Tribunale amministrativo regionale della Liguria - Italy.
Directive 93/37/EEC - Public procurement - Abnormally low tenders.
Case C-304/96.

A - Introduction

1 This reference for a preliminary ruling from the Tribunale Amministrativo Regionale (Regional Administrative Court), Liguria, concerns the Community legislation governing the award of public works contracts.

2 On 19 December 1995 the Unità Sanitaria Locale No 3, Liguria (the local health authority), published an invitation to tender for works relating to the internal reorganization and technological adaptation of the `Vecchio Istituto del Presidio Socio Sanitario' in Genoa. (1) According to the invitation to tender, the contract was to be awarded to the tenderer offering the maximum discount against the base price of LIT 16 463 000 000.

3 Hera SpA submitted the best tender, offering a discount of 17.3%. However, that bid was excluded from the tendering procedure on the ground that it was abnormally low, with the result that the contract was awarded to Impresa Romagnoli SpA.

4 The contracting authority based its decision on Law No 109 (`Legge quadro in materia de lavori pubblici'), (2) in the version resulting from Decree-Law No 101 of 3 April 1995, (3) and Law No 216 of 2 June 1995. (4) Article 21(1a) of Law No 109 provides that `until 1 January 1997, (5) tenders in which the percentage discount exceeds by more than one-fifth the average of the discounts in all the tenders admitted shall be excluded from public works contracts for amounts above or below the Community threshold'.

5 Hera brought an action contesting the decision to exclude it from the tendering procedure, relying in particular on the relevant provisions of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. (6) Article 30 of that Directive concerns the criteria on which awards are to be based. Article 30(4) provides as follows:

`If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

However, until the end of 1992, (7) if current national law so permits, the contracting authority may exceptionally, without any discrimination on grounds of nationality, reject tenders which are abnormally low in relation to the works, without being obliged to comply with the procedure provided for in the first subparagraph if the number of such tenders for a particular contract is so high that implementation of this procedure would lead to a considerable delay and jeopardize the public [interest] attaching to the execution of the contract in question. Recourse to this exceptional procedure shall be mentioned in the notice referred to in Article 11(5).'

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6 The national court concluded that, in the case before it, the contracting authority had correctly applied the Italian legislation providing for the exclusion of abnormally low tenders. It held, however, that there was a `clear discrepancy' between that legislation and Article 30(4) of Directive 93/37.

7 The national court accordingly concluded that, in order to arrive at a decision in the dispute before it, it was necessary to seek a preliminary ruling from the Court of Justice under Article 177 of the EC Treaty. It therefore referred to the Court the question whether the Community rules allow - and if so in what cases - a Member State to make temporary exceptions regarding the entry into force of directives where the latter set an express time-limit. (8)

B - Analysis

Admissibility

8 It appears from the facts described that the question here is whether, after 31 December 1992, the Italian authorities were entitled to allow derogations from a provision of Directive 93/37, which was to be transposed into domestic law by 19 July 1990 at the latest. As the Commission has rightly observed, the question referred by the national court has further implications. The real question before the Court is, very generally speaking, whether a Member State may unilaterally postpone the date of entry into force of a directive and, if so, subject to what conditions. It is not, however, the Court's role in exercising its jurisdiction under Article 177 of the Treaty to deliver advisory opinions on general or hypothetical questions. (9)

9 The Commission's proposal that the wording of the question be adjusted ought therefore to be upheld. It is clear from the order for reference that the national court is asking whether provisions such as Article 21(1a) of Law No 109 are compatible with Article 30(4) of Directive 93/37 regarding the treatment of abnormally low tenders.

10 The Italian Government takes the view that there is no need to give a ruling on this question. It maintains that Directive 93/37 does not authorize the Member States to derogate from its provisions. Besides, in Costanzo, (10) the Court has already ruled that the provisions applying at the time of that judgment - which corresponded to Article 30(4) of Directive 93/37 - have direct effect. Thus the judgment in Costanzo gave the national court all the information needed to adjudicate in the dispute before it. That court should therefore refuse to apply the relevant part of Article 21(1a) of Law No 109 on the ground that it is contrary to Directive 93/37.

11 I agree that the reply to the question referred may be deduced from Costanzo, as well as from the judgment in Furlanis. (11) It should nevertheless be emphasized that in principle it is for the national court to assess whether or not it is necessary to seek a preliminary ruling, having regard to the circumstances of the individual case. The fact that it is relatively simple, on the basis of existing case-law, to answer a particular question referred for a preliminary ruling does not in itself mean that the question is inadmissible.

12 By way of an aside, I would point out that the Italian Government refers in its observations to the fact that the Minister responsible called on the authorities concerned, by circular of 7 October 1996, (12) to interpret and apply Article 21(1a) of Law No 109 consistently with Directive 93/37. Any inferences to be drawn from that circular - which was published after the main proceedings were initiated - are a matter for the national court.

The question

13 As the Commission has pointed out, the rule set out in Article 30(4) of Directive 93/37 corresponds in this case to that previously contained in Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts.

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(13) That provision had been introduced by Council Directive 89/440/EEC of 18 July 1989. (14) The measures implementing Directive 89/440, which was notified to the Member States on 19 July 1989, were to be adopted by the Member States in the year following its publication at the latest. (15) That deadline expired on 19 July 1990. The aim of Directive 93/37 was to consolidate Directive 71/305 together with the provisions amending it since the date of its adoption. (16) That is why - as the Commission has rightly pointed out - that Directive did not set the Member States a time-limit for its implementation. On the contrary, the applicable time-limits are those that were fixed for the various amending directives.

14 However, Article 29(5), fourth subparagraph, of Directive 71/305 (corresponding to Article 30(4), fourth subparagraph, of Directive 93/37) authorized, subject to strict conditions, and until the end of 1992, the rejection of abnormally low tenders without the need to follow the verification procedure laid down in the first subparagraph. The Court has already ruled (in Furlanis) that that provision must be narrowly construed and is available only for procedures in which the definitive award was made by 31 December 1992 at the latest. (17) A provision of domestic law under which the verification procedure referred to above may continue to be waived after that date is therefore manifestly incompatible with Directive 93/37.

15 The Court has already ruled in Costanzo that Article 29(5) of Directive 71/305 is unconditional and sufficiently precise to have direct effect and be relied upon by an individual against the State. (18) The same must be true of Article 30(4) of Directive 93/37, which is to a large extent identical to that provision.

C - Conclusion

16 I therefore propose that the Court reply as follows to the question referred by the Tribunale Amministrativo Regionale della Liguria:

Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts precludes domestic legislation authorizing, after the end of the year 1992, waiver of the procedure laid down therein for the verification of abnormally low tenders.

(1) - See the original text in Italian.

(2) - Published in Supplement No 29 to the Gazzetta Ufficiale della Repubblica Italiana (GURI) No 41 of 19 February 1994.

(3) - GURI No 78 of 3 April 1995, p. 8.

(4) - GURI No 127 of 2 June 1995, p. 3. This amended Decree-Law No 101 and converted it into a law.

(5) - Emphasis added.

(6) - OJ 1993 L 199, p. 54.

(7) - Emphasis added.

(8) - Emphasis added.

(9) - See Case C-83/91 Meilicke v ADV/ORGA [1992] ECR I-4871, paragraph 25.

(10) - Case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR 1839.

(11) - Case C-143/94 Furlanis v ANAS [1995] ECR I-3633.

(12) - Published in Supplement No 179 to GURI No 251 of 25 October 1996.

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(13) - OJ, English Special Edition 1971 (II), p. 682.

(14) - OJ 1989 L 210. p. 1.

(15) - Article 3 of Directive 89/440.

(16) - See the first recital in the preamble to Directive 93/37.

(17) - Cited above (footnote 11), paragraphs 17 to 22.

(18) - Cited above (footnote 10), paragraph 32.

DOCNUM	61996C0304
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; C ; opinions
PUBREF	European Court reports 1997 Page I-05685
DOC	1997/05/29
LODGED	1996/09/19
JURCIT	31971L0305-A29P5 : N 13 14 31971L0305 : N 13 61988J0103 : N 10 11 31989L0440 : N 13 61991J0083-N25 : N 8 11992E177 : N 8 - 12 31993L0037-A30P4 : N 13 - 16 31993L0037 : N 13 61994J0143-N17 : N 14 61994J0143-N18 : N 14 61994J0143-N19 : N 14 61994J0143-N20 : N 14 61994J0143-N21 : N 14 61994J0143-N22 : N 14 61994J0143 : N 11
SUB	Approximation of laws
AUTLANG	German
NATIONA	Italy

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Lenz
JUDGRAP	Ragnemalm
DATES	of document: 29/05/1997 of application: 19/09/1996

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Opinion of Mr Advocate General Tesauro delivered on 15 May 1997.
Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH.
Reference for a preliminary ruling: Vergabeüberwachungsausschuß des Bundes - Germany.
Meaning of 'national court or tribunal' for the purposes of Article 177 of the Treaty - Procedures for the award of public service contracts - Directive 92/50/EEC - National review body.
Case C-54/96.

1 The question referred to the Court for a preliminary ruling in this case has been submitted by the Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board, hereinafter `the Federal Supervisory Board') and concerns the interpretation of Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (hereinafter `the services directive'). (1)

The Federal Supervisory Board has asked the Court to determine whether that article means that the bodies set up by the Member States for the purposes of Council Directive 89/665/EEC of 21 December 1989 governing review procedures (hereinafter `the review directive'), (2) are competent, as from the final date for transposition stipulated in the services directive (and where no national implementing measures have been taken), also to review procedures for the award of public service contracts where infringements of the relevant provisions of Community law are alleged.

Relevant Community and national legislation

2 In order better to understand the point of this question, it is first necessary to place it in its proper legal context, by briefly looking at the relevant provisions of both Community and national law.

- Community legislation

3 Article 36 of the services directive lays down the criteria which a contracting authority is required to follow in awarding a contract. In particular, Article 36(1)(a) provides that, where the award is made to the economically most advantageous tender, the contracting authority must take into account `various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price'. In other cases, subparagraph (b) provides that `the lowest price only' is to be taken into account.

Article 44 of the services directive sets 1 July 1993 as the date by which Member States are required to adopt and communicate the necessary transposition measures.

4 The review directive requires Member States to take the measures necessary to ensure that award procedures for public works contracts and public supply contracts governed by the relevant Community directives (3) may be reviewed rapidly and effectively where the grounds of alleged illegality involve (directly or indirectly) Community law (Article 1(1)).

Following the entry into force of the services directive, the review directive also applies to procedures for the award of service contracts; Article 41 of the services directive, which the referring body is now asking the Court to interpret, amended the wording of Article 1 of the review directive to extend its scope to include the review of service contract awards.

5 Article 2(8) of the review directive provides that, where bodies responsible for review procedures are not judicial in character, written reasons for their decisions must be given. In such a case, the Member States must also guarantee that `any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body'.

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In order to ensure the independence of such bodies, the second subparagraph of Article 2(8) further requires that their members be subject to the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office and their removal; and that at least the President shall have the same legal and professional qualifications as members of the judiciary. Finally, the subparagraph provides that the body in question is to adopt its decisions following a procedure in which both sides are heard and that its decisions are to be legally binding.

- The national legislation

6 The Community public procurement directives were transposed into German domestic law by means of an amendment of the Haushaltsgrundsätzegesetz (Budget Principles Law, hereinafter `the HGrG'). In particular, the Second Law Amending the HGrG, which came into effect in 1993, (4) inserted new Paragraphs 57a to 57c, which were intended by the German legislature to give effect to the directives on the award of public works contracts and public supply contracts, and to the review directive. (5)

The services directive, however, has not been transposed into German law, and this is confirmed by the order for reference.

7 Paragraph 57a of the HGrG constitutes the general legal basis for the adoption of the measures implementing the Community directives on public procurement. It confers power on the Federal government to issue regulations, with the assent of the Bundesrat, governing the award of public supply contracts, public works contracts and public services contracts, which are put out to tender by the bodies listed in the said Paragraph.

The ensuing provisions (Paragraphs 57b and 57c), which deal with the remedies available in the case of infringement of rules of Community law (or of national provisions transposing them), set up a two-tier review procedure for this purpose. Initial recourse lies to the award review bodies (Vergabeprüfstellen) whilst their decisions may in turn be challenged before the supervisory boards (Vergabeüberwachungsausschüsse) set up by each of the Länder, or, in cases where the impugned contract-award procedure falls within a Federal authority's province, before the Federal Supervisory Board.

8 Paragraph 57b of the HGrG regulates, in particular, the operation of the review bodies. According to subparagraph (2) thereof, the terms of reference of these bodies are to be determined by the Federal Government by means of regulations and with the prior assent of the Bundesrat. Subparagraphs (3), (4) and (5) contain a series of provisions concerning the commencement of the review procedure, the suspension of award procedures adjudged suspect and the information which applicants are required to provide to the review bodies.

Subparagraph (6) provides that the lodging of an application with a review body does not preclude the right of the individual concerned to bring an action in the ordinary courts for damages for loss suffered as a result of an award procedure.

9 Paragraph 57c of the HGrG lays down a series of rules applicable to the supervisory boards; (6) the members of such boards, the composition of which is regulated in detail in subparagraphs (2), (3) and (4) of this provision, perform their functions independently and on their own responsibility. In particular, Paragraph 57c(3) provides that certain provisions of the Deutsches Richtergesetz (Law on the Judiciary, hereinafter `the DRiG') are to apply by analogy to the official members of the supervisory boards as regards annulment or withdrawal of their appointment and their independence and dismissal. (7)

The supervisory boards review only the legality of the award procedures and do not examine the findings of fact on which the determinations of review bodies are based; they may, where appropriate, set aside the determinations of review bodies and direct them to make fresh determinations (Paragraph

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57c(5)). Any person claiming that provisions governing the award of contracts have been infringed may make an application to a supervisory board (subparagraph (6)).

10 Finally, Paragraph 57c(7) lays down specific rules applicable to the Federal Supervisory Board. Its official members are selected from the chairmen and assessors serving in the decision-making departments of the Bundeskartellamt. (8) The chairmen of the chambers of the supervisory board are appointed from the chairmen of the Bundeskartellamt decision-making departments. The president of the Bundeskartellamt appoints lay assessors (9) on a proposal from the top public-law trade boards, decides on the formation and composition of chambers and exercises administrative supervisory control on behalf of the Federal Government.

This subparagraph also provides that the Federal Supervisory Board is to adopt its own internal rules of procedure to regulate the allocation and conduct of cases.

11 On the basis of the provisions described above, the Federal Government adopted two implementing regulations on 22 February 1994, after having obtained the assent of the Bundesrat. The first regulation, governing the award of public procurement contracts, expressly applies only to public works contracts and public supply contracts and does not therefore apply to public service contracts. (10)

The second regulation, however, is of general application and contains provisions fulfilling the obligation to provide for appropriate review procedures in the field of public procurement (hereinafter `the review regulation'). (11) Paragraph 1 of this regulation designates the bodies competent to conduct reviews in respect of each of the awarding authorities listed in Paragraph 57a of the HGrG. Under Paragraph 2, the review body has power to suspend the award procedure; its determinations are to be given in writing, contain a statement of reasons and be notified to the awarding authority and to the person claiming an infringement of the procurement rules; the review body must draw the latter's attention to the possibility of challenging the determination before a supervisory board and specify the supervisory board competent to hear such a challenge.

12 Finally, Paragraph 3 of the review regulation deals with the operation of the supervisory boards. It provides that the supervisory boards must make a reference to the Court of Justice under Article 177 when they consider that a ruling on the interpretation of the Treaty or on the validity or interpretation of legal acts adopted on the basis of the Treaty is necessary.

It also provides that the supervisory boards are to adopt internal rules of procedure in the light of the principles set out in the Law amending the HGrG. They must issue reasoned determinations in writing after having heard the parties. Finally, Paragraph 3(4) provides that the supervisory boards, unlike the review bodies, shall not be empowered to suspend a procedure for the award of a contract.

13 The rules of procedure of the Federal Supervisory Board came into effect on 1 August 1995 and have not been published. The version produced by the German Government in these proceedings consists of five sections regulating the organization and allocation of cases within the Board, the conduct of procedure, which includes a written stage and an oral hearing, and its decisions and other technical matters, including formalities relating to final determinations.

This version of the internal rules of procedure seems to be an amended version of rules which came into effect in June 1994 and was likewise not published. According to the Commission, which supplied this information without challenge at the hearing, there are a number of differences between the original version and the one now in force, in particular as regards the openness and necessity of hearings and procedural time-limits. (12)

14 To complete this survey of the legal background it should be noted that the transposition of

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the Community public procurement directives has been the subject of two recent judgments of this Court, in which it found that the German Government had failed to comply with its obligations under the Treaty. The first judgment concerned the incorrect transposition of the directives on the award of public works contracts and public supply contracts (13) and the second concerned the failure to transpose the services directive. (14)

As regards transposition of the review directive, the Commission has commenced enforcement proceedings which are still pending. (15) The Commission contends, essentially, that in the national measures transposing the directive the German Government has provided individuals with less judicial protection than the corresponding directive.

Facts

15 Unlike the legislative background, the facts which led to the main proceedings are straightforward and may be summarized as follows.

In 1995, the Bundesbaugesellschaft Berlin mbH (hereinafter `the contracting authority') issued an invitation to tender for the award of a general planning services contract relating to new government buildings in Berlin. (16) As the services in question were of an intellectual nature, the contracting authority opted to use a negotiated procedure with prior publication of the contract notice, as permitted by Article 11(2)(c) of the services directive.

16 Dorsch Consult Ingenieurgesellschaft mbH (hereinafter `the applicant') took part in the tendering procedure and submitted its tender on 25 August 1995.

The contracting authority examined the 18 tenders received and drew up a short list of seven. It then decided to award the contract to two of the other firms which had submitted a tender, which were required to form a working party to provide the services in question. The contract was signed on 12 January 1996, after the working party had already commenced its work.

17 The applicant took the view that the elimination of its tender constituted a breach of the services directive and of the relevant national legislation and applied to the Federal Ministry for Regional Planning, Building and Urban Planning (in its capacity as the competent review body) seeking, by way of interim relief, to have the contract-awarding procedure suspended and, by way of primary relief, to be awarded the contract. In support of its claim, the applicant contended that it had been repeatedly informed by the contracting authority that it was technically competent to perform the contract and that its tender was the most attractive in terms of price.

By letter of 20 December 1995, the review body declined jurisdiction and dismissed the application without consideration of the merits of the claim. The decision was based on the grounds that the federal regulation provided for under the legislation, by which the Federal Government was to have extended the jurisdiction of the review bodies to include the hearing and determination of disputes concerning service contracts, had still not been enacted.

18 In its notification to the applicant of the outcome of its application, the review body also informed it of its right to challenge the legality of the decision before the Federal Supervisory Board. The applicant thereupon made an application to that Board for the setting aside of the review body's decision to decline jurisdiction, the suspension of the contract-awarding procedure and the award of the contract to the applicant; alternatively, it asked for a reference to be made to the Court of Justice for a preliminary ruling on the point in issue.

The Federal Supervisory Board decided to stay the proceedings and to refer to the Court of Justice the question whether Article 41 of the services directive is to be interpreted as meaning that the bodies set up by the Member States for the purposes of the review directive are also competent, from the date by which the services directive ought to have been transposed into national law, to

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review procedures for the award of public service contracts.

Admissibility

19 Before considering the substance of the question referred, it is necessary to determine whether the Court has jurisdiction to entertain the reference made by the Federal Supervisory Board. From the foregoing survey of the legislation establishing the Board and of the rules governing its procedure serious doubts arise as to whether that body can be regarded as a `court or tribunal' within the meaning of Article 177 of the Treaty and, accordingly, whether the reference is admissible. (17)

The issue was the subject of lively argument between the parties, both in their written observations and at the hearing. It is noteworthy that the applicant itself, which had expressly requested (albeit as an alternative relief) a reference to be made to the Court of Justice for a preliminary ruling on the point in issue, accepted that the Federal Supervisory Board does not constitute a court or tribunal within the meaning of Article 177; it submitted none the less that the Court should in any case answer the question referred to it, but - not without self-contradiction - on grounds relating to the effective protection of individual rights by the courts.

The Commission considered that the question was so clearly inadmissible that it felt it unnecessary to address its substance. The German Government, for its part, argued that the body in question does constitute a court or tribunal within the meaning of Article 177. But it explicitly conceded in the course of the hearing that it had begun the process of amending the relevant provisions to allow, inter alia, determinations of the supervisory boards to be challenged in the ordinary courts in order to ensure the effective protection by the courts of the rights of the persons concerned. (18)

20 My first observation in considering this issue is that, in German domestic law itself, the Federal Supervisory Board (as well as the supervisory boards of the Länder) are described as `quasi-judicial bodies' (gerichtsähnliche Einrichtungen) and not as courts or tribunals strictu sensu. (19)

This fact, whilst not being conclusive on its own since the concept of court or tribunal within the meaning of Article 177 is a term of Community law (20) within the audit of which the Court of Justice has seen fit (on occasion) to include bodies which were not so regarded in the eyes of their own national law, (21) none the less calls for a detailed analysis of the nature of the body in question and the manner in which it is required to carry out its functions, in order to ascertain whether it possesses those organizational and functional characteristics which the Court has in previous cases held to be necessary in order for a body which is not a court to still be able to fall within the scope of Article 177.

21 I shall therefore begin by briefly reviewing those leading decisions of the Court in this area which are relevant here, but it should be borne in mind that the case-law developed by reference to the individual cases that have come before the Court has not led to a general, exhaustive definition of the concept of court or tribunal within the meaning of Article 177.

22 The first case concerned a Dutch industrial arbitration tribunal (Scheidsgericht) which made a reference to the Court of Justice for a preliminary ruling even though it stated that it did not consider itself to be a judicial body under Dutch law. In the now landmark judgment of Vaassen-Göbbels, (22) the Court decided that it had jurisdiction to rule on the questions submitted to it, having found that the referring body in question possessed the characteristics of a court or tribunal within the meaning of Article 177.

The Court expressly took the following factors into account: the Scheidsgericht was a body duly established under Dutch law; it was permanent; it was charged with the settlement of disputes and

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had to follow rules of inter partes procedure similar to those applying in the ordinary courts of law; it was required to apply rules of law; furthermore, all those belonging to the relevant industry had to bring any dispute with their insurer before the Scheidsgericht; finally, the members of the body in question were appointed by the Minister responsible, who also designated its chairman and laid down its rules of procedure. (23)

23 By adopting this approach, the Court thus made it clear from the outset that in deciding whether a referring body is a court or tribunal for the purposes of the Treaty it does not attach importance to its formal designation but considers its substantive characteristics (establishment by law, permanence, compulsory jurisdiction, transparent rules of procedure and the application of rules of law). This approach was entirely justified, especially in view of the historical context in which it evolved. For at the time of the Vaassen-Göbbels case the mechanism of cooperation between national courts and the Court of Justice had only just begun to operate and the Court of Justice was very mindful of the need to encourage the use of the mechanism in order to ensure the spread and uniform application of Community law, with the aid - if necessary - of a broad interpretation of the category of bodies entitled to make references to it.

24 A number of subsequent judgments should also be read in this light, like that in, for example, Broekmeulen, (24) in which the Court held to be admissible a question submitted to it by a (Netherlands) appeals committee which heard appeals from medical practitioners who had been refused authorization to practise or enrolment on the medical register. In this case, too, the Court found that the appeals committee possessed a number of organizational and functional characteristics which warranted it being treated as having a judicial function. The Court took into account the fact that the appeals committee concerned was permanent, that the public authorities were involved in deciding its composition, that it had internal rules of procedure providing for inter partes procedure, that its jurisdiction was exclusive and that its determinations were final. Given also the fact that it was called upon to apply Community law, which had been pleaded by the applicants in the main proceedings, the Court held that it was necessary, in the interest of the practical effect of Community law, to answer the question submitted.

25 The line of judgments beginning with Simmenthal (25) is to be viewed in the same light. In that case, a reference was made to the Court by the Preture di Alessandria in proceedings for an interlocutory order. The Italian Government contested the jurisdiction of the Court to reply to the questions submitted by the Preture on the grounds that the procedure was not inter partes, pointing out that the judge in question had power in the course of it to make a determination based solely on the plaintiff's submissions. Having found that the Preture was `exercising the functions of a court or tribunal within the meaning of Article 177', the Court held that the Preture's capacity to make a reference for a preliminary ruling could not depend on whether or not the proceedings in which the reference was made were defended; it did, however, add that `it may where necessary prove to be in the interests of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard'. (26) In other words, the Court established that, whenever a referring body is unquestionably a court or tribunal, the fact that a reference is made before any inter partes hearing does not render it inadmissible.

26 While adopting this broad interpretation, the Court has none the less set clear limits to the concept of court or tribunal within the meaning of the Treaty. In its order in Borker, (27) subsequently confirmed in Regina Greis Unterweger, (28) the Court held that it had jurisdiction to give preliminary rulings only on questions submitted by a court or tribunal called upon to give judgment `in proceedings intended to lead to a decision of a judicial nature'. (29) The referring bodies in question in those cases were, respectively, the Paris Bar Council (which had been requested by a lawyer on its register to issue a declaration to be produced as evidence in legal proceedings pending before the courts of another Member State) and the Italian Consultative Committee for Currency Offences

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(whose function was to give reasoned, non-binding opinions to the Italian Treasury), and in both cases the Court found that this condition was not satisfied. (30)

27 In addition, the Court subsequently held that, in order to qualify as a court or tribunal within the meaning of Article 177, the body making the reference must be independent. This criterion, perhaps because it goes to the very essence of the judicial function, was explicitly identified for the first time only in Corbiau, in which the Court declined jurisdiction on the ground that the body making the reference, although a court under national law, did not, in the Court's view, offer the necessary guarantees of impartiality between parties to disputes which it was called upon to resolve. (31) That case involved Luxembourg's Director of Taxation and Excise who had jurisdiction under the law to hear at first instance disputes between taxpayers and the departments (of which he was Director) which had charged them to tax.

The criterion of independence also appears to have been a key factor, albeit with the opposite result, in Asociacion Española de Banca Privada. (32) In that case the body making the reference was Spain's Tribunal de Defensa de la Competencia, which Advocate General Jacobs, in his Opinion, found to present a number of characteristics constitutive of a court or tribunal within the meaning of Article 177; these included the adversarial nature of the procedure which was clearly laid down by law, the independent exercise by its members of their functions and the fact that its members could not be removed from office. (33) In its judgment the Court did not specifically address the issue; but the fact that it replied to the questions submitted indicates that the Court implicitly endorsed the view of the Advocate General.

28 These decisions therefore clearly show that, even in the absence of a general definition of the concept of court or tribunal within the meaning of Article 177, the Court has developed a number of tests which must be satisfied in order for a body to be entitled to make a reference for a preliminary ruling.

These tests concern the manner of establishment of the body, which must have been established by law and not by agreement between the parties; its connection to the exercise of public authority; its permanent nature, in the sense that it must not exercise a judicial function only on an occasional basis; its competence to resolve a dispute by a decision of a judicial nature; the conduct, before it, of a procedure analogous to that which is followed in ordinary courts of law, involving (within the limits discussed above) exchange of argument inter partes; the application by the body in question of rules of law (rather than principles of fairness); compulsory jurisdiction, which means that alternative remedies are not available; and finally independence, in the sense that it acts as a third party in relation to the parties to the dispute and that its members may not be removed from office.

29 To return to the case in hand, it is now therefore necessary to establish whether the Federal Supervisory Board possesses the characteristics allowing it to be regarded as performing a judicial function, as required by the Court for the purposes of Article 177 of the Treaty.

As already mentioned, the Commission takes the view that the Federal Supervisory Board does not satisfy any of the tests laid down by the Court in the cases referred to above. Its main argument is that the Federal Supervisory Board was established by a `framework' Law (the Second Law amending the HGrG), which does not impose obligations or confer rights on individuals and which must be supplemented by regulations; moreover, the body in question could easily be `deprived' of its legal basis - and thereby of its capacity to give judgment - in cases such as the present case where there is no competent review body at first instance. The Commission also makes these points: that the referring body does not make its determinations following an inter partes procedure, as is confirmed in the grounds of its first decision; (34) that its proceedings are governed by internal rules of procedure which have not been published and which may be amended autonomously at any time; that

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there is no legislative provision for its determinations to have binding legal effect; that it is not an independent body, since it is linked to the staff and organizational structure of the Bundeskartellamt, which is itself an administrative rather than a judicial body; and that the minimum term of office of its `official' members and of its chairman is not fixed by law.

30 In view of the nature of the Federal Supervisory Board, the legislative technique by which it was established and, above all, the provisions governing the way in which it functions, I must confess that I agree with at least some of the Commission's observations, which I also consider to be particularly important.

To begin with, I do not believe that the rules governing the review procedure before the supervisory boards can be regarded as comparable to the rules governing procedure before ordinary courts of law. On the contrary, the fact that, under the legislation, rules of procedure are to be adopted autonomously by each supervisory board, which may subsequently amend them autonomously, and that in addition there is no requirement that they be published, leads me to conclude that the degree of transparency and legal certainty required in any judicial process is not guaranteed here.

31 I am not only referring here to the absence of any inter partes procedure, which has now been proved in practice: of far greater significance, to my mind, is the absence of the minimal `functional' requirements which characterize judicial proceedings, as found in Vaassen-Göbbels. (35) In that case, as I have explained, the rules of procedure governing proceedings before the referring body were subject to the approval of the Minister responsible, so that there could be no doubt as to the certainty, transparency and ascertainability of the procedural rules applicable. That fact, which was indeed expressly mentioned was taken into consideration both by the Advocate General and by the Court in arriving at the conclusion that the body in question in that case was `bound by rules of adversary procedure similar to those used by the ordinary courts of law'. (36)

32 In the present case, however, I find it difficult to see similar procedural safeguards; if they do exist, they are subject to `opaque' autonomous amendment by the decision-making body and this seems to me to run counter to the most basic requirements of legal certainty. The point is borne out, indeed, by the Commission's doubts, referred to above, as to the version of the rules of procedure now in force due to the discrepancies between the version provided by the German Government in the course of the enforcement proceedings and the version produced in this case.

In these circumstances, I do not consider that the review proceedings conducted before the Federal Supervisory Board can be regarded as having the character of judicial proceedings as required by the Court. In this regard, the present case falls clearly outside even the generously broad parameters laid down in Vaassen-Göbbels.

33 There are also serious doubts, in my opinion, regarding the independence of the Federal Supervisory Board, at least as regards the question of unremoveability of its members from office.

Of significance in this regard is Paragraph 57c(7) of the HGrG, which I shall recapitulate for the sake of convenience: the `official' members of the Federal Supervisory Board are Bundeskartellamt department chairmen and assessors, with the former acting as chairmen of the chambers of the Board. The president of the Bundeskartellamt appoints the lay assessors, decides on the formation and composition of chambers and exercises administrative supervisory control by delegation from the Government. (37) The Federal Supervisory Board also uses the Bundeskartellamt's facilities and services.

34 In other words the `official' members of the Board are also members of the Bundeskartellamt and formally remain on its staff. In practice, this means that they simultaneously perform the functions of Federal Supervisory Board members and those of Bundeskartellamt members. Moreover, the legislation establishing the body in question does not include any provision as to the term

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of office of its `official' members, and the fact that the term of office of the lay members is fixed (at five years) (38) suggests that the omission was not inadvertent.

What all this amounts to, in effect, is that not only do the members of the Federal Supervisory Board enjoy no guarantee against dismissal, but neither do they have the assurance of a fixed term of office, which is an essential prerequisite of independence. On the contrary, they can be relieved of their `additional' duties and re-assigned to their `ordinary' duties at any moment and by means of purely internal organizational measures. While it is true, as we have seen, that some of the provisions of the DRiG regarding the permanence and independence of members of the judiciary apply by analogy to the members of the Board when acting in that capacity, (39) it is also the case that the latter are not covered by the DRiG provisions which give members of the judiciary the right to challenge their removal from office or re-assignment, with the result that they may be freely `dismissed' at any time by the president of the Bundeskartellamt.

35 Nor do I believe that the petitio principii contained in Paragraph 57c(3), which provides that the members of the Board are to be independent and unremovable, is sufficient to justify taking a different view, since it is contradicted by the fact that the Board members belong to the administrative authority and continue to belong to it, even from a functional point of view. Such a system, under which a limited number of administrative officials are, temporarily and for the performance of specific functions, given the title of judge and then made subject to an equally limited number of provisions applicable to members of the judiciary, but excluding the safeguards which ordinarily apply to the judiciary in relation to removal from office and re-assignment, appears to me to be too complicated and too intransparent to guarantee in practice the stability required to ensure the independence of those performing judicial functions.

36 One can have further doubts about the specific question of the impartiality of the Federal Supervisory Board in relation to disputes falling within its area of jurisdiction. This body is, as we have seen, part of the Bundeskartellamt, which is part of the public administration, but it is given power, in spite of this, to adjudicate in disputes involving public procurement awards, that is to say in disputes between the public administration itself and citizens. This fact alone would make it impossible to regard the Federal Supervisory Board as acting as a third party, thus independently. Unless, of course, one regards judicial independence as a moral quality of the actual persons who sit on the bench. (40)

37 Lastly, the Commission put forward a further telling argument with which I would agree. The legislation establishing the Federal Supervisory Board makes no provision concerning the legal effects of its determinations, especially their binding force. Since the body in question is one which, under national law, is not a court, the general principle that all judicial determinations are binding does not apply. So, in the absence of express provisions, the fact that the body in question was established using the so-called `budget solution', with the declared aim of not creating individual rights for those taking part in public tendering procedures, (41) gives rise to doubts as to the binding nature of its decisions. (42)

This is a factor which produces further doubts as to the judicial nature of the decisions which the Board is called upon to take and thus as to whether it can be regarded as having the attributes of a court or tribunal within the meaning of Article 177.

38 So, in view of all of the points I have made, I consider that the Federal Supervisory Board does not satisfy the requirements, certainly as far as procedural safeguards and guarantees of independence are concerned, for it to qualify as a court or tribunal within the meaning of Article 177 and therefore that its reference is inadmissible.

39 It could be argued, on the other hand, that when a reference is made by a body which offers

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the only legal remedy available to an individual relying on Community law, the Court should accept the reference in any event, in order to prevent the applicant from being deprived of an effective remedy and to ensure the uniform application of Community law.

This is, in substance, the argument put forward by the applicant. As mentioned above, even though the applicant submits that the Federal Supervisory Board is not a court or tribunal within the meaning of Article 177, it suggests that the Court should turn a blind eye to this and nevertheless answer the question submitted by the Board on the ground that not to do so would be detrimental to the applicant. This proposal might be supported, it claims, by the judgment in Broekmeulen in which, as explained above, the Court accepted a reference from a professional body having the power to hear appeals concerning the registration of members of the profession and held, inter alia: `in the absence, in practice, of any right of appeal to the ordinary courts, the appeals committee, which operates with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivers decisions which are in fact recognized as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State within the meaning of Article 177 of the Treaty'. (43)

40 I cannot subscribe to the applicant's argument; the ratio of Broekmeulen should not be stretched too far. The subjective and objective conditions for the functioning of the system of cooperation between national courts and the Court of Justice, which was created by Article 177 of the Treaty, cannot vary in accordance with the particular circumstances of each case. If a body is not a judicial body, it does not become one simply because there is no better solution. To hold otherwise and interpret Broekmeulen to that effect would mean conferring crucial importance on an aspect of the procedural system of which the body in question is part rather than on features of the body itself, so that it would no longer matter whether the requirements expressly laid down by the Court were satisfied or not.

41 In any event, even with the best of will to make concessions, the circumstances of the present case are altogether different in this respect. The decisive factor in Broekmeulen was, as quoted above, that `in practice' there was no right of appeal to the ordinary courts for a citizen relying on a point of Community law.

In the present case, however, a person who considers himself to have been unlawfully excluded from a contract-award procedure is expressly given the possibility of bringing an action in damages for any loss suffered, which in itself could well provide, at least in principle, a satisfactory remedy.

42 Moreover, even in the absence of any express legislative provision and despite the doubts expressed by legal writers, ordinary German courts seem to have come round to the view that they have jurisdiction to hear cases brought by participants in contract-award procedures for alleged infringements of the relevant provisions, including those of Community law. This is borne out by two recent decisions in which the Kammergericht (Appeal Court) of Berlin ruled admissible - before dismissing them on the merits - applications for interlocutory relief by tenderers who had been excluded from public tendering procedures and were seeking the suspension of the award procedures. (44)

Furthermore, as I have already mentioned, the German Government has notified the Commission that it has commenced the process of amending its legislation to bring it into conformity with the review directive; the new rules will make express provision for, inter alia, review by the ordinary courts of the determinations of the supervisory boards. (45)

43 So, as matters stand, it would not only be entirely in line with the case-law of the Court but also pose no problem for the effective judicial protection of individual rights, in the sense explained above, if the Federal Supervisory Board were held not to be a court or tribunal within the meaning of Article 177.

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On the contrary, I hold the view that the solution which I have advocated, that is to say that the Court should declare that it has no jurisdiction to rule on this reference, offers a wider perspective going beyond the present case and affords a greater safeguard of individual rights, for which only a court of law can provide effective protection. Underlying this conclusion is, quite clearly, the conviction that only those bodies which are able to provide all the safeguards of individual rights developed by the Court can be treated as courts or tribunals for the purposes of Article 177, and no others.

44 Lastly, one final consideration, based on the underlying purpose of the review directive, should not go unmentioned. As is well known, this directive was adopted to meet a strongly-felt need to raise and make uniform the level of judicial protection of individual rights in the field of public procurement. In some Member States, neither the award itself nor the other related administrative acts were capable of being challenged in a court of law, or if they were, then with unsatisfactory implications for subsequent contract-award procedures. It was in order to remedy these very defects that the review directive introduced the obligation for Member States to put in place a system capable of effectively ensuring the vindication of the substantive rights conferred by the relevant Community instruments (the directives on public works contracts, public supply contracts and public service contracts) on those taking part in public procurement procedures. This is the light in which the provisions of the directive should be read and, according to the Commission at least, in which the other Member States have implemented them until now. At the hearing the Commission produced a document providing an overview of the bodies to which the individual Member States have given jurisdiction in the matter of public procurement awards in order to transpose the review directive: the majority of Member States have designated the ordinary courts or, in those Member States where they exist, the administrative courts, subject to the appellate jurisdiction of the Council of State. (46)

This is a significant factor which, in my view, should be given due weight, whilst observing the distinction between this case and the enforcement action brought by the Commission under Article 169 of the Treaty.

45 Having regard to all the considerations set forth above, I propose, in conclusion, that the reference for a preliminary ruling should be declared inadmissible on the ground that the body which made it is not a court or tribunal within the meaning of Article 177 of the Treaty.

Substance

46 On the substance of the reference, which I shall consider solely for the sake of completeness, a few remarks will suffice.

The question is, as I have stated, whether, after expiry of the period for transposition of the services directive, the review bodies are also competent to review procedures for the award of public service contracts in the absence of any express measure conferring such jurisdiction upon them (in this case, a Federal regulation, although this is provided for by statute).

47 Both the applicant and the German Government argue that, since the relevant provisions of the services directive must be regarded as having direct effect, (47) the bodies set up for the purposes of the review directive should also be able to adjudicate in disputes in relation to public service contracts.

Clearly, however, this is an issue which cannot be determined by the Court in these proceedings. For the Court may not take the place of the national legislature, to which the relevant power has been expressly reserved by law, and decide whether the review bodies should also review procedures for the award of public service contracts.

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48 Relying on the direct effect of the provisions of the services directive does not change matters. Even if the Court were to find that the relevant provisions are indeed directly effective, this would merely mean that an individual had the right to rely on those provisions before a court; under no circumstances could it go so far as to indicate before which court that should be, for this would encroach on the domain of the national legislature. (48)

If an individual had no actual possibility of relying on a directly effective provision of Community law for want of a court competent to hear his case, this would, of course, indicate the existence of a clear violation of Community law. (49) Such a violation could, of course, be pursued by the competent authorities using the procedures provided for in such cases and could also bring into play the remedies which the Court has established in the area of State liability towards individuals who have suffered material loss as a result of the failure of the State in question to fulfil its obligations under Community law. But, to repeat, these are remedies which, both in form and in substance, are distinct from the procedure now in point and therefore have no bearing on the solution which I have proposed in this case.

49 In view of the considerations set out above, I therefore propose that the Court should declare the reference for a preliminary ruling inadmissible, on the ground that the Federal Public Procurement Awards Supervisory Board, which made the reference, is not a court or tribunal within the meaning of Article 177 of the Treaty.

(1) - OJ 1992 L 209, p. 1.

(2) - Council Directive 89/665/EEC of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

(3) - These are, of course, contracts covered by Directives 71/305/EEC (OJ 1971 L 185, p. 5) and 77/62/EEC (OJ 1977 L 13, p. 1), now Directive 93/37/EEC (OJ 1993 L 199, p. 54) and Directive 93/36/EEC (OJ 1993 L 199, p. 1) respectively.

(4) - BGBl. 1993, I, p. 1928 et seq.

(5) - This legislative technique is commonly referred to as the `budget solution' by German academic writers.

(6) - These rules also apply to the Federal Supervisory Board, save for the specific provisions contained in Paragraph 57c(7) (see infra).

(7) - The relevant Paragraphs of the DRiG are: - Paragraph 18(1) and (2), which specifies the circumstances in which the appointment of a judge is void (appointment by an authority acting outside its powers, appointment of a person who is not a German national or is not qualified to hold public office); however, Paragraph 18(3) (which provides that the nullity of an appointment may not be relied upon until declared in a court decision having the force of res judicata) is not applicable and in its place Paragraph 57c(3) provides that the nullity of an appointment may not be relied upon until it has been declared by the authority which made the appointment and that decision has become final; - Paragraph 19(1) and (2), which deal with the cases in which appointments can be withdrawn. Paragraph 19(3), which makes withdrawal of an appointment subject to the consent of the party concerned or a court decision having the force of res judicata, does not apply, however; - Paragraph 26(1) and (2), which provides that administrative supervisory control over members of the judiciary may not limit their independence; - Paragraph 27(1), (judges are assigned to a particular court); - Paragraph 30(1) and (3), Paragraphs 31 to 33, and Paragraph 37, which lay down the conditions for removing a judge from his office or for transferring him; in general, this may happen pursuant to formal disciplinary proceedings or on the grounds of

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court restructuring. It is to be noted that Paragraph 30(2), which provides that removal from office or transfer other than for organizational reasons shall require a court order having the force of res judicata, does not apply.

(8) - The national administrative authority responsible for competition matters.

(9) - As well as the "official" members (Bundeskartellamt personnel), the Federal Supervisory Board also has outside or lay assessors. At present it is composed of a single chamber, presided over by a Bundeskartellamt department chairman, and has four official members, five lay members and five alternate lay members (see Stockmann, Die Vergabeüberwachung des Bundes, WUW 1995, p. 572 et seq.; the author is the president of the Federal Supervisory Board).

(10) - BGBl. 1994, I, p. 321 et seq.

(11) - BGBl. 1994, I, p. 324 et seq.

(12) - The Commission indicated in fact that it had doubts as to which version of the rules of procedure was to be regarded as in force. It explains that the only version officially submitted by the German Government which has not been followed by any official revision or amendment is that of June 1994, which was produced as an official document in the course of an enforcement action brought by the Commission against Germany under Article 169 (regarding which, see infra).

(13) - Case C-433/93 Commission v Germany [1995] ECR I-2303; the directives applicable at the time of the relevant facts were Council Directive 88/295/EEC of 22 March 1988 in respect of public supply contracts (OJ 1988 L 127, p. 1) and Council Directive 89/440/EEC of 18 July 1989 in respect of public works contracts (OJ 1989 L 210, p. 1). In line with its established case-law, the Court confirmed the breach of obligations by reference to the legal position existing at the expiry of the period set by the Commission in its reasoned opinion (in this case, 3 February 1993).

(14) - Case C-253/95 Commission v Germany [1996] ECR I-2423.

(15) - The letter of formal notice dated 31 December 1995 has been published, in German, in Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis, N. 23/95, p. 1940 et seq. The reasoned opinion in the case was delivered on 29 July 1996 (see Commission press release No IP/96/614).

(16) - Published in the Amtsblatt Berlin of 23 June 1995 and in OJ 1995 S 120, p. 166.

(17) - The sole purpose of this examination is, incidentally, to determine whether the subjective conditions for acceptance of the reference are satisfied and not to establish whether the review directive was properly transposed, which may eventually be the subject of separate proceedings. Of course, the enforcement action brought by the Commission against the German Government for failure correctly to transpose the review directive, which I mentioned earlier, has points in common with the present case; but there are also many dissimilarities, so that a rigorous distinction between the two cases should be maintained, with regard to both form and substance.

(18) - This point was raised at the hearing by the Commission, which saw it as further proof that the supervisory boards as presently constituted are not courts; this was disputed by the German Government, which at the hearing argued that the amendments in question were aimed solely at making a number of improvements to a system already providing satisfactory legal protection, and it pointed out that this information had been supplied in the course of other, separate proceedings.

(19) - See the preamble to the Second Law Amending the HGrG, which inserted new Paragraphs 57a to 57c, discussed above (BT-Drucksache 12/4636, p. 12). The designation is not surprising if one has regard to the particularities of German Constitutional law. Were a fully-fledged Federal "court" to have been established by means of an ordinary law (such as the HGrG) this would have

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been in breach of the relevant Constitutional provisions (at least as regards the Federal Supervisory Board); this is because the German Basic Law (Articles 95 and 96) contains an exhaustive list of all Federal courts, any addition to which would require a constitutional amendment.

(20) - The definition of which, in the obvious interests of the uniform application of Community law, cannot be left to the discretion of the courts of the Member States (see in general Case 49/71 Hagen [1972] ECR 23).

(21) - See, for example, Case 61/65 Vaassen (neé Göbbels) [1966] ECR 261

(22) - Loc. cit., footnote 21.

(23) - In more recent decisions the Court also confirmed that employment arbitration tribunals which satisfy the aforementioned criteria are courts or tribunals within the meaning of Article 177. See, for example, Case 109/88 Danfoss [1989] ECR 3199, in which the Court found that the body making the reference, a Danish industrial arbitration board, had been established by law (which laid down detailed rules governing its composition, the number of members to be nominated by the parties and the manner of appointment of the umpire), had exclusive and final jurisdiction over the relevant disputes and could hear a case brought by either party irrespective of the objections of the other. Advocate General Lenz also pointed out that the board was also required to apply rules of law, such as the provisions of the relevant collective agreements.

(24) - Case 246/80 [1981] ECR 2311, discussed in greater detail in paragraphs 39 and 40 infra.

(25) - Case 70/77 [1978] ECR 1453, paragraph 10.

(26) - Simmenthal, paragraph 10.

(27) - Case 138/80 [1980] ECR 1975.

(28) - Case 318/85 [1986] ECR 955.

(29) - Borker (loc.cit. footnote 27), paragraph 4.

(30) - See also, on this point, the recent judgment in Case C-111/94 Job Centre [1995] ECR I-3361, which concerned voluntary proceedings involving an application for approval of a company's memorandum of association with a view to its registration. The Court held that the Tribunale di Milano, which made the reference, was in this instance performing the functions of an administrative authority rather than those of a judicial body.

(31) - Case C-24/92 [1993] ECR I-1277. There had, in fact, already been some fairly explicit references to the criterion of independence in previous decisions: see, for example, the judgment in Pretore di Salo, in which the Court had regard, among other factors, to the referring court's independence in reaching the conclusion that it constituted a court or tribunal within the meaning of Article 177 (Case 14/86 [1987] ECR 2545, paragraph 7).

(32) - Case C-67/91 [1992] ECR I-4785.

(33) - Opinion of Advocate General Jacobs, delivered on 10 June 1992, [1992] ECR I-4806, paragraph 11.

(34) - Decision of 2 August 1994 (published in EU Public Contract Law, No 3/94, p. 47 et seq.), in which the Federal Supervisory Board stated that it did not conduct an inter partes procedure and that the parties' applications were only requests for a particular determination.

(35) - Of course, in attaching less importance, in Simmenthal (within the limits referred to above), to the specific requirement of inter partes procedure, the Court certainly did not intend to dispense with the more general requirement for the procedure to be of a judicial nature. It is

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in fact a fundamental requirement which played a decisive role not only in Vaassen-Göbbels, where it was expressly addressed, but also, as we have seen, in the reasoning underlying the other decisions of the Court on this issue.

(36) - See Vaassen-Göbbels (loc. cit. footnote 21), paragraph 1 (emphasis added), and the Opinion of Advocate General Gand in the same case, where he states: `The procedure which is followed (...) is of a judicial nature'.

(37) - This control is limited to reproach (Vorhalt) and reprimand (Ermahnung) and consequently, according to legal writers, should in no case concern the content of judicial determinations. The case-law appears to confirm this view, although there are exceptions in cases of purportedly manifest error. See also, in this regard, Paragraph 26(1) and Paragraph 26(2) of the DRiG, which are applicable to the body in issue and which provide that administrative supervisory control over the actions of members of the judiciary cannot limit their independence. Paragraph 26(3), which gives judges the right to challenge administrative supervisory measures addressed to them, does not, however, apply to `official' board members (Paragraph 57c(3)).

(38) - HGrG, Paragraph 57c(2).

(39) - See supra note 7.

(40) - See the judgment in Corbiau (loc. cit. footnote 31). It is true that in that case the referring body was linked to the very departments which had made the disputed tax assessment: however, the rationale of the Court's judgment (and of the Advocate General's Opinion) is not unlike the approach which should prevail in the present case, since the Federal Supervisory Board is, after all, an integral part of the public administration and thus is not a third party in relation to disputes between the administration and citizens.

(41) - See the explanatory memorandum to the Draft Amending Law to the HGrG (BT-Drucksache 12/4636, p. 12).

(42) - See the doubts expressed by legal writers, in particular by Boesen, EuZW 1996, p. 586, who points out that the decisions of the Federal Supervisory Board are not enforceable; see also, on the same point, the letter of formal notice and the reasoned opinion sent by the Commission to the German Government in the enforcement proceedings referred to above.

(43) - Broekmeulen (loc. cit. footnote 24), paragraph 17.

(44) - Kammergericht Berlin, decisions of 10 April 1995 (KartU 7605/94, EuZW 1995, p. 645 et seq.) and of 31 May 1995 (KartU 3259/95, NVwZ 1996, p. 415 et seq.).

(45) - I would point out that the legislative changes which are being enacted could mean that the ruling which the Court is now called upon to give will have only `historical' significance, in relation, that is, to the issue of admissibility, concerning the question whether or not the existing supervisory boards are entitled to make a reference for a preliminary ruling.

(46) - The Commission has thus declared itself satisfied with the transposition measures adopted by all the Member States (with the exception, of course, of the Federal Republic of Germany, against which it has commenced Article 169 proceedings).

(47) - Such direct effect, besides deriving from the sufficiently precise and unconditional character of the provisions in issue, was, it is argued, confirmed by the Court, albeit indirectly, in the judgment in Case C-253/95 Commission v Germany, where it was held that the German Government had failed in its obligation to transpose the services directive (see footnote 14).

(48) - See, on this very point, Case 179/84 Bozetti v Invernizzi [1985] ECR 2301, at paragraph 17, and the more recent judgment in Case C-446/93 SEIM [1996] ECR I-73, where it was held

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that `... it is for the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to intervene in order to resolve questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system' (at paragraph 32).

(49) - And, in all likelihood, a breach of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, which enshrines the right of access to a court of law.

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Opinion of Mr Advocate General Léger delivered on 16 September 1997.
Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public procurement - Procedure for the award of public works contracts - State printing office - Subsidiary pursuing commercial activities.
Case C-44/96.

1 In this case, the Court is asked to give a preliminary ruling on the interpretation of the term `body governed by public law' used by the Community legislature to define the scope of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (1) (hereinafter `the Directive').

2 According to the Directive, a `body governed by public law' constitutes a `contracting authority'; when a `contracting authority' enters into a works contract, the rules in the Directive apply to that contract.

I - The relevant Community legislation

Directive 93/37/EEC

3 Directive 93/37, which consolidates Council Directive 71/305/EEC, (2) constitutes the basic Community legislation in the field of public works contracts.

4 The Directive sets out the common rules applicable to the Member States in respect of technical matters, the publicity to be given to contracts which contracting authorities intend to award and the participation of contractors in the procedure. It lays down the types of procedure which must be followed by the contracting authorities when awarding contracts, and the information which must be provided by them to candidates, tenderers and the Commission, or by the Member States to the Commission.

5 Article 1 defines the main terms delimiting the scope of the Directive.

6 Article 1(a) thus provides that:

`"public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority'. (3)

7 The first subparagraph of Article 1(b) provides as follows:

`"contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law'.

8 `Bodies governed by public law', which are thus contracting authorities in the same way as traditional public authorities, are defined by the second subparagraph of Article 1(b) as follows:

`A "body governed by public law" means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative,

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managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law'.

9 The last subparagraph of Article 1(b) indicates:

`The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies'.

Directive 89/665/EEC

10 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (4) required Member States to take `the measures necessary to ensure that... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible... on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law'. (5) Under Article 5, the measures necessary to comply with that directive were to be brought into force by the Member States before 21 December 1991.

Regulation (EEC) No 2052/88

11 The amended version of Article 7(1), entitled `compatibility and checks', of Council Regulation (EEC) No 2052/88 of 24 June 1988 (6) (hereinafter `the Regulation') states that:

`Measures financed by the Structural Funds or receiving assistance from the EIB or from another existing financial instrument shall be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning the rules on competition, the award of public contracts and environmental protection and the application of the principle of equal opportunities for men and women'.

II - The national legislation

12 In its order for reference, the Bundesvergabeamt explains that when the Agreement on the European Economic Area entered into force on 1 January 1994 the Republic of Austria was required to transpose into national law the European Community acts specified in Annex XVI to that Agreement. The acts involved at that time were, in particular, Directives 71/305 and 89/665, cited above. (7)

13 It appears from the order for reference that those directives were implemented at federal level by the Bundesvergabegesetz (Federal Procurement Law, hereinafter the `BVergG'), (8) which entered into force on 1 January 1994. For reasons relating to the division of powers between the Länder and the federal State, other implementing laws were also adopted by the Länder.

14 A number of directives not mentioned in Annex XVI have since been adopted in the field of public procurement. The national court notes that they have not been transposed into Austrian law but `assumes, however, that the relevant provisions of the BVergG must now be measured against the provisions of the relevant European directives'. (9) The main provisions of the BVergG are as follows.

15 Paragraph 1(2)(3) provides that:

`This Federal Law shall apply to works contracts for pecuniary interest relating to

...

(3) the execution by third parties, by whatever means, of a work corresponding to the requirements

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specified by the contracting authority'.

16 Paragraph 3 provides as follows:

`(1) This Federal Law shall apply to the award of works contracts and works concessions whose estimated value net of VAT is not less than ECU 5 million.

...

(3) No works contract... may be split up with the intention of avoiding the application of this Federal Law'.

17 Paragraph 6(1)(3) provides that:

`This Federal Law shall apply to contracts awarded by contracting authorities which are:

...

(3) (Constitutional provision) undertakings within the meaning of Article 126(b)(2) of the B-VG, (10) in so far as they were established for the purpose of meeting needs in the general interest, not having an industrial or commercial character, and the Federation holds a majority shareholding in those undertakings - as regards other undertakings subject to scrutiny by the Rechnungshof (audit authority), in so far as they were established for the aforementioned purpose, it is for the Länder to lay down the rules concerning the award of contracts and to ensure that they are applied'. (11)

18 The BVergG introduced two types of action: a conciliation procedure before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission) and a review procedure before the Bundesvergabeamt (Federal Procurement Office). An application for review by the Bundesvergabeamt must be preceded by the conciliation procedure. Only if it is not possible to resolve the dispute between the contracting authority and the candidates or tenderers by means of the conciliation procedure may the matter be referred to the Bundesvergabeamt.

III - The facts and the national proceedings

The Osterreichische Staatsdruckerei

19 The Austrian State printing office (Osterreichische Staatsdruckerei, hereinafter `the OStDr') was founded in 1804 and was originally a State undertaking. Since 1981, the OStDr has had a different status, pursuant to the Bundesgesetz über die Osterreichische Staatsdruckerei (Staatsdruckereigesetz) of 1 July 1981 (Federal Law on the Austrian State Printing Office, hereinafter the `StDrG'). Paragraph 1 of the StDrG reads as follows:

`(1) An independent economic entity is established with the name "Osterreichische Staatsdruckerei" (hereinafter "the Staatsdruckerei"). It has its registered office in Vienna and has legal personality.

(2) The Staatsdruckerei is a trader for the purposes of the Commercial Code. It must be registered in Part A of the Commercial Register of the Vienna Commercial Court.

(3) The activities of the Staatsdruckerei are to be pursued in accordance with the rules governing trade.'

20 The tasks to be carried out by the OStDr are laid down in Paragraph 2 of the StDrG. According to Paragraph 2(1), they involve sole responsibility for the production, for the federal administration, of printed matter requiring secrecy or security measures, such as passports, driving licences, identity cards, the federal official journal, the federal reports of laws and decisions, forms and the Wiener Zeitung. Those activities are collectively referred to as `public service obligations' and are monitored by a State control service. (12) Prices are fixed, at the request of the Director-General

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of the OStDr, by the economic council, (13) which is composed of 12 members, eight of whom are appointed by the Federal Chancellery or various ministries and four by the works council, in accordance with the rules governing trade. (14)

21 According to Paragraph 2(2), the OStDr may also pursue other activities, such as the production of other printed matter or the publication and distribution of books or newspapers.

22 According to Paragraph 3, `within the framework of its objects, the Staatsdruckerei may acquire holdings in undertakings'.

Strohal Gesellschaft and Strohal Rotationsdruck

23 In February 1995, the OStDr acquired the entire share capital of Strohal Gesellschaft (hereinafter `SG'), which set up Strohal Rotationsdruck (hereinafter `SRG' or `the defendant') in October that year, retaining OS 999 000 of its share capital of OS 1 000 000. (15)

24 It appears from the defendant's written observations that OStDr's acquisition of SG was based on the latter's experience in a printing technique not used by OStDr and on the existence of a client base situated abroad. (16)

25 SRG adds that it was registered as a company with the Landgericht (Regional Court), Eisenstadt, on 4 November 1995, its registered object being the production of printed matter using the process in question. (17)

The `Druckzentrum Müllendorf' project

26 In order to reduce the waiting period prior to the `Druckzentrum Müllendorf' printing works, for which SRG was to be responsible, becoming operational, OStDr entered into various contracts on behalf of SRG, which was then still in the process of being set up. (18)

27 On 18 October 1995 OStDr issued a call for tenders relating to the non-production technical installations of the `Druckzentrum Müllendorf', but subsequently withdrew it following a conciliation procedure initiated by the Wirtschaftskammer Osterreich (Austrian Chamber of Commerce).

28 A restricted call for tenders was then issued, and OStDr informed tenderers that SRG was the firm inviting tenders and awarding the contracts. (19)

29 A conciliation procedure was initiated at the request, lodged on 15 November 1995, of the Verband der Industriellen Gebäudetechnikunternehmen Osterreichs (Association of Industrial Construction Undertakings in Austria), on the ground that the project was a public works contract within the meaning of the BVergG, and thus fell within the scope of that Law. (20)

30 The Bundes-Vergabekontrollkommission concluded that, in the absence of a contracting authority within the meaning of the BVergG, there was no public works contract and that the question therefore did not fall within its jurisdiction. It did not, however, exclude the possibility of the need to comply with the Directive if the entity awarding the contract was in receipt of Community funds, in accordance with Article 7(1), cited above. (21)

31 No amicable settlement having been reached, Mannesmann Anlagenbau Austria AG, J.L. Bacon GesmbH, Haustechnische Gesellschaft für Sanitär-, Wärme- und Luft-Technische Anlagen GesmbH and Sulzer Infra Anlagen- und Gebäudetechnik GesmbH (hereinafter `the applicants') initiated a review procedure before the Bundesvergabeamt on 7 December 1995 in accordance with Paragraph 92 of the BVergG. (22)

IV - The questions referred for a preliminary ruling

32 The Bundesvergabeamt notes that the relevant provisions of the BVergG were adopted in order to transpose Directive 71/305, as amended, and that, in order to interpret those provisions, it

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is now necessary to refer to Directive 93/37. It has consequently referred the following questions to the Court for a preliminary ruling:

`1. Can a provision of a national law, such as Paragraph 3 of the Staatsdruckereigesetz in the present case, which confers special and exclusive rights on an undertaking, establish that undertaking as meeting needs in the general interest not having an industrial or commercial character within the meaning of Article 1(b) of Directive 93/37/EEC and make such an undertaking as a whole fall within the scope of that directive, even if those activities form only part of the undertaking's activity and the undertaking in addition participates in the market as a commercial undertaking?

2. In the event that such an undertaking falls within the scope of Directive 93/37/EEC only with respect to the special and exclusive rights conferred on it, is such an undertaking obliged to take organisational measures to prevent financial means obtained from earnings from those special and exclusive rights being switched to other sectors of activity?

3. If a contracting authority starts a project and that project is therefore to be classified as a public works contract within the meaning of Directive 93/37/EEC, may the intervention of a third party who prima facie does not fall within the personal scope of the Directive have the effect of altering the classification of a project as a public works contract, or should such a proceeding be regarded as an evasion of the personal scope of the Directive and incompatible with the aim and purpose of the Directive?

4. If a contracting authority establishes undertakings for carrying on commercial activities and holds majority holdings in them which enable it to exercise economic control over those undertakings, does the classification as a contracting authority then also apply to those associated undertakings?

5. If a contracting authority transfers funds which it has earned from special and exclusive rights conferred on it to purely commercial undertakings in which it owns a majority holding, does that have the effect that, regardless of the legal position of the associated undertaking, that undertaking as a whole must let itself be treated and behave as a contracting authority within the meaning of Directive 93/37/EEC?

6. If a contracting authority which both meets needs in the general interest not having an industrial or commercial character and also carries on commercial activities establishes operating installations which are capable of serving both purposes, is the award of the contract for constructing such operating installations to be classified as a public works contract within the meaning of Directive 93/37/EEC, or does Community law contain criteria according to which such an operating installation can be classified either as serving public needs or as serving commercial activities, and if so, which criteria?

7. Does Article 7(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments make the recipients of the Community subsidies subject to the review procedures within the meaning of Directive 89/665/EEC, even if they themselves are not contracting authorities within the meaning of Article 1 of Directive 93/37/EEC?'

33 Before dealing with those questions, it is necessary to consider whether the Bundesvergabeamt has capacity to refer questions for a preliminary ruling.

V - The admissibility of the reference for a preliminary ruling

34 The Bundesvergabeamt has described the characteristics which in its view justify its classification as a `court or tribunal' within the meaning of Article 177 of the Treaty and, consequently, the admissibility of the reference.

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35 Nor is that classification contested by the parties, the intervening Member States or the Commission.

36 Let me recall the criteria to which the Court has referred in its case-law for the purpose of recognising a judicial body: it must be established by law and have a permanent existence, there must be compulsory reference to the body in the event of a dispute, it must apply rules of law and have competence to resolve disputes by adopting a binding decision, its members must be independent and it must be bound by rules of adversary procedure. (23)

37 The Bundesvergabeamt was established under the first sentence of Paragraph 78(1) of the BVergG. According to Paragraph 91 et seq., defining its jurisdiction, it hears disputes concerning the procedures for the award of public contracts under the BVergG. There is no doubt that it was established by law, nor that it exercises binding jurisdiction.

38 There is nothing in the BVergG to suggest that the Bundesvergabeamt is in any way temporary. The fact that it was established by the law is evidence of the Republic of Austria's intention to create a lasting body responsible for hearing public procurement disputes with no temporal limits on its powers.

39 Furthermore, it is apparent from Paragraph 78(2), which recalls that the Bundesvergabeamt is to exercise the powers granted to it by the BVergG, and from Paragraph 91 et seq., concerning its jurisdiction, that it applies rules of law in adopting its decisions since it resolves disputes arising as a result of infringement of the BVergG.

40 Under Paragraphs 91 and 92(2) of the BVergG, proceedings may be initiated before the Bundesvergabeamt if the conciliation procedure, which is a compulsory preliminary stage, has been unsuccessful. However, in contrast to the decisions of the Bundes-Vergabekontrollkommission, those of the Bundesvergabeamt are binding as may be seen, inter alia, from the fact that it enjoys a power of annulment under the law. (24)

41 The independence of the Bundesvergabeamt and of its members seems indisputable. Its president and deputy president are professional judges, (25) the appointing authority must ensure that its other members represent a fair balance between contracting authorities and tenderers, (26) an exhaustive list is given of the grounds for revocation, which correspond to objective situations or, in the case of serious negligence, to omissions required by the Law to be so serious as to reduce the risk of arbitrary action or interference on the part of the administrative authorities. (27) I would add that the Law states that the members of the Bundesvergabeamt must be independent and may not receive instructions, (28) and that the administration may not vary or annul its decisions. (29)

42 The condition that it must be bound by rules of adversary procedure seems to be less certain, since the Law contains no specific provisions in that respect.

43 The fact that reference to the Bundesvergabeamt must be preceded by a conciliation stage before the Bundes-Vergabekontrollkommission, which must hear the parties, (30) ensures only that the rules of adversary procedure are observed before that authority and not before the Bundesvergabeamt itself. Furthermore, as drafted, the rule under which the Bundesvergabeamt may obtain any information from the contracting authorities and the contractors (31) does not in any way guarantee the right of each party systematically to be informed of the pleas in law and claims submitted by the other party since, according to its wording, information requested by the Bundesvergabeamt is sent only to that body. Yet in order to be effective, the rules of adversary procedure require the parties to be able to respond to their opponents' arguments.

44 However, in the present case, the order for reference demonstrates that these proceedings are the result of an inter partes hearing similar to that before a court or tribunal, since written

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pleadings were submitted by the parties and, although no mention is made of the exchange of those documents between the parties, a hearing at least took place before the Bundesvergabeamt. (32) Consequently, it seems clear that, in practice, the Bundesvergabeamt acted in every respect as a court or tribunal within the meaning of Article 177 of the Treaty.

45 For those reasons, I conclude that the reference is admissible.

VI - The questions

46 Public authorities have a natural tendency, which is difficult to reconcile with the objective of completing the internal market, to favour national undertakings in order to maintain employment and to support economic development in their own Member State.

47 The Community public procurement legislation was developed to ensure, at Community level, respect for the principles of free competition, freedom of establishment and freedom to provide services, which had long been disparaged by the widespread tendency to act in that way. (33) Its purpose is to ensure that traders, of whatever origin, have equal access to contracts put out to tender by public authorities for the execution of their projects, whatever form those authorities may take. (34)

48 The Directive must be interpreted in the light of that objective.

49 In order for a works contract to be a public works contract and, thus, for the Directive to apply, one of the contracting parties must satisfy the definition of `contracting authority' within the meaning of the Directive.

50 The scope of the Directive ratione personae is defined by reference not only to the bodies traditionally considered to be public authorities, such as the State, regional or local authorities and public sector undertakings but also to public or private bodies pursuing an objective in the general interest, not having an industrial or commercial character, which are described as `bodies governed by public law'.

51 The questions referred to the Court for a preliminary ruling relate to the meaning of that expression. Most of the questions can be grouped together by subject-matter since they are closely related.

The first, second and sixth questions

52 By these questions the national court essentially seeks to ascertain whether an undertaking which devotes part of its activity to meeting needs in the general interest, not having an industrial or commercial character, and the remainder to a commercial activity must apply the provisions of the Directive to all works contracts entered into by it or only to those relating to installations for use exclusively for the purposes of the former.

53 The question is not only whether an undertaking such as OStDr exhibits such characteristics as to justify its treatment as a `body governed by public law' and thus a `contracting authority' but also, if that is the case, whether all works contracts entered into by it, of whatever nature, are public works contracts and as such subject to the Directive.

54 None of the parties contends that the legislation applies selectively, depending on the activity carried out by the contracting authority. The applicants, the Commission and, in its oral observations on the sixth question, the French Government all consider that if an entity such as OStDr pursues commercial activities in addition to those activities for the purposes of which it was established - in the present case, meeting needs in the general interest, not having an industrial or commercial character - the commercial part of its activities also falls within the scope of the Directive, since only the purpose for which the entity was established is relevant. (35) In the submission of the defendant, the Austrian Government and the Netherlands Government, the criteria referred

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to in the second subparagraph of Article 1(b) of the Directive do not make it possible to treat OStDr as a `body governed by public law' and to subject any of its activities to the Directive.

The concept of `body governed by public law': concurrent legislative conditions

55 It must be borne in mind that the Directive applies to public works contracts which it defines as contracts one of the parties to which is a `contracting authority'; that term includes `bodies governed by public law'.

56 In its first question the national court uses the concept of `special and exclusive rights' to describe the special status of OStDr.

57 The concept of `special or exclusive rights', which appears in Article 90(1) of the Treaty, applies to undertakings which have a monopoly or enjoy a privileged situation recognised by, and in exchange for a situation of dependence vis-à-vis, the State. That article requires Member States to withdraw or to refrain from enacting measures contrary to the Community competition rules in respect of such undertakings.

58 Even though, as the Austrian Government states, `the production and publication of printed matter... takes place under "privileged" conditions ...' (36) which might justify use of the concept of `special or exclusive rights' to describe the tasks of OStDr, that expression does not determine whether the public works legislation applies, and is therefore not helpful for the purposes of interpreting the Directive.

59 The central concept here is that of a `body governed by public law' in the sense of a body `established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'. (37)

60 There are two further conditions: a `body governed by public law' must have legal personality and it must be closely dependent on the State, regional or local authorities or other bodies governed by public law. (38)

61 It is clear from the wording of the second subparagraph of Article 1(b) of the Directive that the three conditions set out therein are cumulative.

62 The lists referred to in the third subparagraph of Article 1(b) set out the entities which satisfy the criteria in question.

63 The definition of the relevant Austrian entities refers to `all bodies subject to budgetary supervision by the "Rechnungshof" (audit authority) not having an industrial or commercial character'. (39) Article 15(6) of the StDrG provides that OStDr is subject to supervision by the audit authority. However, the other criterion laid down in that text, which is similar to the first criterion in the second subparagraph of Article 1(b), also needs to be defined.

Meeting needs in the general interest, not having an industrial or commercial character

64 The expression `needs in the general interest, not having an industrial or commercial character' is not easy to understand.

65 The concept of `general interest' can be approached in the same way as Advocate General Van Gerven approached that of `general economic interest', in Article 90(2) of the Treaty, from the point of view of `... activities of direct benefit to the public', rather than the interests of individuals or groups. (40) From that point of view, it is logical to consider that the part of OStDr's activity devoted to printing official administrative documents such as passports, identity cards and law reports is intended to meet needs in the general interest.

66 In the present case, the greatest difficulty arises in drawing a line between the activities

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in the general interest which have an industrial or commercial character and those which do not.

67 In a different, although related, legal context (since it concerned relations between the State and public undertakings) the Court has laid down a number of criteria which make an attempt at delineation possible.

68 It has held that `... the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market'. (41) In another judgment it noted that `... private undertakings determine their industrial and commercial strategy by taking into account in particular requirements of profitability. Decisions of public undertakings, on the other hand, may be affected by factors of a different kind within the framework of the pursuit of objectives of public interest by public authorities which may exercise an influence over those decisions'. (42)

69 That description of public and private activities makes it easier to understand the type of area covered by the `bodies governed by public law' referred to by the Directive. The Community legislature intended it to apply to entities meeting needs in the general interest whose activities escape market forces, in whole or in part. Certain activities which by their nature fall within the fundamental tasks of the public authorities cannot be subject to a requirement of profitability and therefore are not intended to generate a profit. (43) It is possible that the reason why, in drawing a distinction between bodies whose activity is subject to the public procurement legislation and other bodies, the legislature used the criterion of `needs in the general interest, not having an industrial or commercial character' is that those of the second type are subject to competition from other traders which discourages them from selecting their contractual partners on the basis of discriminatory criteria. For that reason, the constraints imposed by the legislation therefore prove to be less useful.

70 In this case, the activity for which OStDr is responsible under the StDrG comprises the production of official administrative documents, some of which serve to identify persons and others to disseminate State legislation, regulations and administrative material; such documents are thus closely linked to matters of public order and to the institutional operation of the Republic of Austria. The specific nature of the needs which OStDr is responsible for meeting, which are thus linked to the exercise of prerogatives of public authority, explains the fact that its activities take place under conditions which largely escape competition since, on the one hand, it is in the form of a monopoly (44) and, on the other, even though they are fixed according to the rules governing trade, its prices are set by an authority which essentially forms part of the public authority. (45) The State must be able to enjoy both guaranteed supply and production conditions which ensure that standards of confidentiality and security are observed and which avert the risk of illegal reproduction of the printed documents.

71 I therefore consider that OStDr meets `needs in the general interest, not having an industrial or commercial character', within the meaning of the Directive.

The criterion of the purpose for which the body was established

72 Next it is necessary to determine whether the OStDr was established `for the specific purpose of meeting' the needs which it is responsible for fulfilling.

73 According to the wording, only the purpose for which the body was established is relevant in determining whether it should be considered to be a `body governed by public law', within the meaning of the Directive. What counts is, naturally, the objective actually pursued. A stated aim of meeting industrial or commercial needs, concealing activities in the general interest in order to avoid the restrictive rules of the law, could not be accepted by the national court.

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74 That condition means that the pursuit of such an activity must have been the reason behind the establishment of the body.

75 It is true that `specific' does not mean `exclusive', so that the body can carry out other activities without escaping classification as `a body governed by public law'. However, it seems necessary to establish that the body does indeed owe its existence to the pursuit of that specific objective.

76 If that is so, there will be evidence of the specific nature of its task, which justifies subjecting the contracts entered into by it to Community law.

77 Apart from the fact that it is not stated in the Directive, a criterion based on the relative proportion of the entity's activities devoted to meeting needs not having an industrial or commercial nature, as advocated by the Austrian and Netherlands Governments, (46) would appear to facilitate circumvention of the law. A body may very well have been established for the purpose of meeting public needs but in fact pursue activities of a purely industrial or commercial nature. If they are dominant in its activity, the suggested interpretation would mean that the body as a whole would no longer be subject to the rules of the Directive. It would therefore suffice for public authorities systematically to resort to such a practice to avoid application of the Community legislation to any public works contracts.

78 One must certainly not neglect the argument that extension of the application of that legislation to activities of a purely industrial or commercial nature is an onerous constraint and may seem unjustified since it does not apply to bodies established in order to carry out identical activities.

79 That disadvantage can be avoided by selecting the appropriate legal instrument for the objectives pursued by the public authorities. Since the reason given for the creation of the body determines the legal rules which apply to contracts entered into by it, those responsible for setting it up must restrict its objects if they wish to avoid the undesirable effects of those rules on activities outside their scope. They must also ensure that it evolves if, as in the present case, application of the public procurement legislation to those activities of the undertaking which are purely industrial or commercial in nature is considered too restrictive.

The legal nature of OStDr and the applicable rules

80 OStDr was created in order to satisfy the State's requirements for printed matter. (47) It has legal personality. (48) Furthermore, it is monitored by a State control service (49) and is subject to scrutiny by the audit authority (50) which, according to the statements made by the defendant at the hearing, can be accounted for by the fact that the majority of shares are still held by the Austrian State. Consequently, I consider that OStDr should be considered to be `a body governed by public law'.

81 Since the undertaking falls within that definition, all works contracts entered into by it are subject to the provisions of the Directive. Article 1(a) does not define public works contracts, and therefore does not determine the scope of the Directive according to the activity in respect of which contracts are awarded but rather by reference to the characteristics of the body entering into the contract with the contractor. I consider that this should form the basis for the answer to the first and sixth questions.

82 Consequently, the second question, which was raised in the event that OStDr was subject to the Directive only as regards its activities of a public nature, requires no answer.

The third, fourth and fifth questions

83 These questions relate essentially to the conditions to be satisfied by subsidiaries of a `contracting authority' in order to be considered to be `contracting authorities' in their own right and to the relevance of the involvement of a subsidiary which does not satisfy those conditions for the classification

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of a proposed public works contract commenced by a `contracting authority'.

84 More specifically, the national court wishes to ascertain, first, whether Article 1(b) of the Directive can be interpreted as meaning that entities falling within one of the following categories can be considered to be `bodies governed by public law':

- undertakings established by a `body governed by public law' for the purpose of meeting needs of an industrial or commercial nature, and in which that body holds more than half of the share capital;

- undertakings carrying out commercial activities, in which a `body governed by public law' holds more than half of the share capital and which receive from it financial resources derived from activities meeting needs in the general interest, not having an industrial or commercial character.

85 In defining `bodies governed by public law' the wording of the Directive already takes into account a situation in which a legal person is financed, for the most part, by a public authority or by a `body governed by public law'. However, as we have seen, the three conditions set out in the second subparagraph of Article 1(b) are cumulative and it is therefore not sufficient that an undertaking has legal personality and is financed, for the most part, by `a body governed by public law' for it to be regarded as a `body governed by public law'. It must also have been established for the purpose of meeting needs in the general interest, not having an industrial or commercial character.

86 The concept of `contracting authority' acquired a broader meaning in 1989 in order that the Community rules should not be restricted to legal persons governed by public law, (51) when numerous legal entities with powers traditionally forming part of the tasks of the public authorities in fact failed to satisfy that formal criterion. The Community legislature thus confirmed the approach in the case-law of the Court, which inclines towards a functional interpretation of the concept of `contracting authority'. (52) On the same basis, it does not include bodies which, although dependent on such an authority, carry out purely private activities. (53)

87 Consequently, neither the fact that the `contracting authority' contributes financial resources to an undertaking, nor economic control of the undertaking by a `contracting authority' renders it subject to the public procurement legislation, provided that its activities remain purely commercial. As the Austrian Government rightly points out, such a contribution falls rather within the field of the Community law on State aids. (54)

88 The Austrian court also asks whether the classification of a works project as a public works contract can be changed as a result of the intervention of a third party which is not a `contracting authority' within the meaning of the Directive, with the risk that such an approach might provide a means of avoiding application of the Directive.

89 The answer to that question requires the precise circumstances of the third party's `appearance' (`Eintritt') - the word used by the national court - in the execution of the project to be made clear.

90 It appears from the order for reference that the call for tenders at the origin of this case was initiated by the defendant, following OStDr's withdrawal of the previous call for tenders.

91 SRG is thus the contracting entity responsible for awarding the works contract in question. According to the national court, however, it does not exhibit the characteristics of a `contracting authority', which means that the Directive cannot apply.

92 As already stated, the fact that OStDr had already entered into previous contracts in the context of the same project was based on the desire to reduce the waiting period prior to SRG's printing works becoming operational, while SRG was still in the process of being set up. Furthermore, OStDr required the incorporation `into each works contract of a clause reserving the right... to assign

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all its rights and obligations under those contracts for services to a third party of its choice at any time'. (55)

93 The foregoing suggests that the project in question fell within the scope of SRG's activities from the outset, which casts a different light on OStDr's conduct since it was probably participating in the realisation of a project which fell entirely within the objects of its subsidiary.

94 It therefore appears that the works contract was not entered into for OStDr itself but, on the contrary, on behalf of SRG, which would justify such a contract falling outside the scope of the Directive.

95 The Bundesvergabeamt suggests that there is a risk that recourse may be had to a third party in order to avoid the Community public procurement rules, thus circumventing the law.

96 In so far as the scope of the Community legislation on public works contracts is defined with reference, in particular, to the status of the contracting parties, such a risk cannot entirely be excluded.

97 As already pointed out, however, it is for the court before which the dispute is brought to ascertain the truth of the reasons given for the creation of the body entering into the contract in question. Its assessment of the facts will determine the relevant legal classification. (56)

98 It is thus for that court to establish in concreto whether an undertaking was formed by a `contracting authority' in order to enter into works contracts for the sole purpose of avoiding application of the Community rules. The actual purpose for which the undertaking was established - in this case to enter into public works contracts - can thus lead the court to decide that the contract in question was entered into on behalf of the `contracting authority', which would justify application of the Directive.

99 The `contracting authority' may also opt to approach an existing undertaking. In this case, it appears to be more difficult to identify the illegal conduct if, as is likely, the undertaking selected is one not set up to pursue an activity designed to meet needs in the general interest not having an industrial or commercial nature, since contracts entered into by such an undertaking are traditionally not covered by the Community rules.

100 The court will verify that there is indeed a connection between the works envisaged and the undertaking's objects. It is clear that an undertaking which enters into a contract for the realisation of works which do not contribute to its own activities must be presumed to be acting on behalf of another. If a `contracting authority' can be identified as the beneficiary, the Community rules on public procurement will logically apply.

The seventh question

101 By this question, the national court is seeking to ascertain whether Community funding of a works project is conditional upon the recipient undertaking complying with the Community public procurement legislation even if that undertaking, in the present case SRG, is not a `body governed by public law' and is therefore not a `contracting authority'.

102 The wording of Article 7(1) of the Regulation might be interpreted in two ways. Either the Community must ensure that recipients of aid comply with the relevant Community legislation when it provides funding, or the Community legislation referred to in that paragraph becomes applicable to operators receiving those funds even though, in different circumstances, they would not be covered by it.

103 I consider only the first interpretation to be possible.

104 As worded, it does not state that the Community provisions relating to public procurement are

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to apply to all operators wishing to receive Community funding for the implementation of measures falling within the scope of the Regulation.

105 It refers to the `compatibility' and `conformity' with Community procurement legislation of measures in respect of which Community funding is sought. The requirement that the measures must be in conformity with Community law presupposes that they fall within the scope of each of the relevant Community acts. Measures taken by a body which does not exhibit the legal characteristics of a `body governed by public law' within the meaning of the Directive are clearly compatible with it since they are not subject to the rules contained therein.

106 The extremely general nature of the reference also supports that view. There is a risk that extension of the legislation to apply without distinction to all operators acting within the framework of action financed by the Community could result in difficulties in interpreting the texts which would be inconsistent with the principle of legal certainty.

107 Above all, application of the public procurement directives to bodies whose activities are purely industrial or commercial would be difficult to justify in the light of the purpose of that legislation which, it must be remembered, is to give economic operators equal access to contracts offered by public authorities or by bodies carrying out activities of a public nature.

108 The legislature's intention seems to be, rather, to ensure that expenditure incurred by the Community in the context of structural policies is strictly limited to operators who comply with the rules of Community law and does not sanction conduct contrary thereto.

109 Therefore, a body in receipt of Community funding which is not a `body governed by public law', within the meaning of Directive 93/37, is not bound by the provisions of the Directive relating to review procedures in public procurement.

Conclusion

110 In view of the foregoing I propose that the following answer be given to the national court's questions:

(1) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is to be interpreted as meaning that:

- a printing works having legal personality and established in order to have sole responsibility for the production of official administrative documents for the State, which controls it in particular by holding more than half of its share capital and which sets the prices for printing those documents, constitutes `a body governed by public law' within the meaning of Article 1(b) of that directive, even if those activities have come to form only a small part of its overall activity;

- it applies to all works contracts entered into by a `body governed by public law' within the meaning of Article 1(b) of that directive.

(2) Article 1(b) of Directive 93/37 is to be interpreted as meaning that an undertaking established by a `body governed by public law', which holds more than half of its share capital, for the sole purpose of meeting needs of an industrial or commercial character does not itself constitute a `body governed by public law' even if it receives from that body financial resources derived from activities meeting needs in the general interest, not having an industrial or commercial character. The fact that such an undertaking enters into a works contract within the framework of a larger project originally led by a `body governed by public law' does not mean that that contract is subject to the requirements of Directive 93/37 unless the contract was entered into on behalf of the `body governed by public law'.

(3) Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1998 on the tasks of the

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Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Article 1 of Council Regulation (EEC) No 2081/93 of 20 July 1993 is to be interpreted as meaning that undertakings in receipt of Community funding are not subject to the review procedures laid down by Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts if they are not themselves `bodies governed by public law' within the meaning of Article 1(b) of Directive 93/37.

(1) - OJ 1993 L 199, p. 54. The terms `contracting authorities' and `body governed by public law' also appear in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, Article 1(b)) and Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1, Article 1(b)), which means that the interpretation of those terms has implications beyond the legislation on public works contracts.

(2) - Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as last amended by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

(3) - Annex II lists the professional activities in the field of construction and civil engineering. Point (c) defines a `work' as `the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function'.

(4) - OJ 1989 L 395, p. 33.

(5) - Article 1.

(6) - Regulation on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9). Article 7(1) was amended to its current form by Article 1 of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation No 2052/88 (OJ 1993 L 193, p. 5).

(7) - Page 2, point 1.1 of the English translation.

(8) - BGBl No 462/1993.

(9) - Page 4 of the English translation.

(10) - Bundesverfassungsgesetz (Austrian Federal Constitutional Law).

(11) - The national court states that that law `speaks of undertakings in accordance with Article 126b(2) of B-VG. Those are undertakings in which the Federation, alone or together with other legal entities subject to the jurisdiction of the Rechnungshof holds at least 50% of the ordinary or share capital or which the Federation operates alone or together with such legal entities. The control of undertakings by other financial or other economic or organisational measures is to be equated to such a financial holding. The jurisdiction of the Rechnungshof also extends to undertakings at any other level for which the conditions of that provision are fulfilled' (pp. 11 and 12 of the English translation).

(12) - Paragraph 13(1) of the StDrG.

(13) - Ibid., Paragraph 12. More precisely, the prices are fixed on behalf of that council by a committee composed of three of its members: the President of the economic council, one of the members appointed by the Federal Chancellery and one of the members appointed by the Ministry

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responsible for finance.

(14) - Ibid., Paragraph 12(2).

(15) - OS: Austrian schilling.

(16) - Point 16.

(17) - Ibid., point 17.

(18) - Ibid., points 21 to 23. Page 7 of the English translation of the order for reference.

(19) - Page 8 of the English translation of the order for reference.

(20) - Ibid.

(21) - Pages 8 and 9 of the English translation of the order for reference.

(22) - Ibid., p. 9. The national court states that `[o]n 21 December 1995 the applicants submitted a supplementary pleading in which they alleged that they had been informed by the contracting body on 7 December 1995 that the restricted invitation to tender at issue had been revoked'. It adds that `[a]t the same time the applicants were told that an "accelerated open procedure" would be carried out'. The applicants confirm the facts as set out in the order for reference. However, the defendant states that it initiated a call for tenders using the accelerated open procedure, which was published in the Austrian Official Gazette of 7 - 10 December 1995 and that it was in respect of that call for tenders that the applicants brought the proceedings before the Bundesvergabeamt which gave rise to the current reference for a preliminary ruling [p. 15 of the French translation of its observations]. Although there thus appeared to be discrepancies between the descriptions of the national proceedings giving rise to the present case, they do not appear to be such as to impede the Court's task in so far as, on the basis of the information available, the characteristics of the two types of procedure for calls for tenders referred to do not affect the nature of the question referred to the Court by the national court.

(23) - See, in particular, Case 61/65 Vaassen-Göbbels [1966] ECR 377, Case C-393/92 Almelo and Others [1994] ECR I-1477 and Joined Cases C-74/95 and C-129/95 Criminal Proceedings against X [1996] ECR I-6609.

(24) - Paragraph 94(1) of the BVergG.

(25) - Paragraph 78(4).

(26) - Ibid., Paragraph 78(5).

(27) - Ibid., Paragraph 79.

(28) - Ibid., Paragraph 80(1).

(29) - Ibid., Paragraph 78(1).

(30) - Ibid., Paragraph 88(1).

(31) - Ibid., Paragraph 84(1).

(32) - Page 10 of the English translation of the order for reference.

(33) - Second recital in the preamble to the directive. See also, on the objectives of the directive - at that time Directive 701/305 - Case 31/87 Beentjes [1988] ECR 4635, paragraph 11, and Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraph 18.

(34) - See, as regards the reasons justifying the adoption of public procurement rules, Brunelli, P.: Marchés Publics et Union Européenne - Nouvelles Règles Communautaires, 1995, p. 9 et

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seq. As regards the priority given to matters of fact over matters of form, this Court has held, in a case in which the outcome depended on the meaning of the term State, that the term `[had to] be interpreted in functional terms' and that `[t]he aim of the directive... would be jeopardised if the provisions of the directive were held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration' (Beentjes, cited above, paragraph 11).

(35) - See, in particular, p. 16 of the Commission's written observations.

(36) - Page [6 of the French translation of its written observations].

(37) - Article 1(a) and (b).

(38) - The nature of that dependency may vary: financial subordination of the body, supervision of its management or appointment of the members of its administrative, managerial or supervisory board (see the third indent of the second subparagraph of Article 1(b), cited above).

(39) - Annex I, XI, E.1(b) of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21).

(40) - Point 27 of his Opinion in Case C-179/90 [1991] Merci Convenzionali Porto di Genova [1991] ECR I-5889. In his article `La notion de "pouvoir adjudicateur" en matière de marchés de travaux' (the concept of `contracting authority' in works contracts), P. Valadou gives the following definition: `Le besoin d'intérêt général peut donc être défini comme l'exigence manifestée par la société (locale ou nationale) dans son intérêt collectif'. (Needs in the general interest may thus be defined as the requirements of a community (local or national) in the interests of its members as a whole.) He adds that `il y a intérêt général dès l'instant que l'intérêt en cause ne se confond pas avec l'intérêt propre et exclusif d'une personne ou d'un groupement de personnes bien déterminé.' (There is a general interest whenever the interest at issue does not overlap with the specific and exclusive interest of a clearly determined person or group of persons.) Semaine Juridique, Ed. E, No 3, 1991, p. 33.

(41) - Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7. The distinction between activities which relate to public authority and those which, although carried out by public persons, fall within the private domain results is drawn most clearly from the judgments of the Court concerning the applicability of the competition rules of the Treaty to certain activities. See, for example, Case C-364/92 SAT Fluggesellschaft [1994] ECR I-43 and Case C-343/95 Diego Cali and Figli [1997] ECR I-1547.

(42) - Joined Cases 188/80, 189/80 and 190/80 France, Italy and United Kingdom v Commission [1982] ECR 2545, paragraph 21.

(43) - On this point, see in particular the article by P. Valadou, cited at point 12 above; M.-A. Flamme, P. Flamme, `Enfin l'Europe des Marchés Publics', Actualité Juridique - Droit Administratif, 20 November 1989, p. 653; P. Lee, Public Procurement, 1992, pp. 56 and 57.

(44) - Page 6 of the French translation of the Austrian Government's written observations.

(45) - See point 20 above. The setting of prices is therefore an administrative measure and prices cannot be modified without a formal decision by the public authority. Furthermore, it appears that the decision fixing the prices must take account of factors relating to the specific task of OStDr. Thus, somewhat enigmatically, the StDrG states that prices take account of `necessary availability of capacity', which suggests that their level includes the costs incurred as a result

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of maintaining a sufficiently high production capacity to meet the State's needs, even if those production facilities sometimes remain underused.

(46) - In support of its contention that OStDr is not a `body governed by public law' the Austrian Government states, in particular, that `the proportion of "privileged" activities of OStDr represents no more than 15-20% of its overall activity' (p. 7 of the French translation of its written observations).

(47) - Point 2 et seq. of the defendant's written observations.

(48) - See point 19 above.

(49) - See point 20 above.

(50) - See point 63 above.

(51) - Directive 71/305 defined as `authorities awarding contracts', the State, regional or local authorities and certain legal persons governed by public law. Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC (OJ 1989 L 210, p. 1) substituted, in particular, the concept of `bodies governed by public law', as referred to in Directive 93/37, for that of `legal persons governed by public law'.

(52) - Beentjes, cited above.

(53) - See point 64 et seq. above.

(54) - Page 11 of the French translation of the written observations. I would add, however, for the sake of completeness, that, pursuant to Article 2 of the Directive, bodies which are not `contracting authorities' may be subject to the provisions of the Directive if the contracts awarded by them are more than 50% subsidised by a `contracting authority'. The contract at issue must also be `covered by class 50, group 502, of the general industrial classification of economic activities within the European Communities (NACE) nomenclature' or `relat[e] to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes' (Article 2(2)). That amounts to a derogation from the principle that the Directive applies to works contracts awarded by a `contracting authority'. If it intends to rule on the application of that provision to the case before it, the national court must consider whether the works contract at issue which clearly does not relate to the construction of buildings of the type listed in Article 2(2) falls within group 502 of the NACE, which includes, in particular, civil engineering undertakings. It must also establish the level of any subsidies paid by OStDr to SRG.

(55) - Page 7 of the English translation of the order for reference.

(56) - See points 72 and 73 above.

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AUTHOR Court of Justice of the European Communities

FORM Conclusions

TREATY European Economic Community

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TYPDOC	6 ; CJUS ; cases ; 1996 ; C ; opinions
PUBREF	European Court reports 1998 Page I-00073
DOC	1997/09/16
LODGED	1996/02/14
JURCIT	61965J0061 : N 23 61980J0188-N21 : N 68 61985J0118-N7 : N 68 61987J0031-N11 : N 47 31988R2052-A07P1 : N 11 61988J0103-N18 : N 47 31989L0665 : N 10 102 - 109 61990J0179-N27 : N 65 11992E090-P2 : N 65 11992E177 : N 36 - 45 61992J0364 : N 68 31993L0037-A01 : N 5 - 9 31993L0037-A01LB : N 52 - 109 31993L0037 : N 3 4 46 - 51 31993R2081-A07P1 : N 102 - 109 61995J0074 : N 23 61995J0343 : N 68
SUB	Approximation of laws
AUTLANG	French
NATIONA	Austria
PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Kapteyn
DATES	of document: 16/09/1997 of application: 14/02/1996

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Opinion of Mr Advocate General Lenz delivered on 14 March 1996.
Commission of the European Communities v Hellenic Republic.
Failure to fulfil obligations - Directive 92/50/EEC.
Case C-311/95.

DOCNUM	61995C0311
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; C ; opinions
PUBREF	European Court reports 1996 Page I-02433
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LODGED	1995/09/29
JURCIT	31992L0050-A44 : N 2 31992L0050 : N 1 6 61992J0381-N07 : N 5
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Greece ; Member States
NATIONA	Greece
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Jann
DATES	of document: 14/03/1996 of application: 29/09/1995

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 11 November 1997.
Federal Republic of Germany v Commission of the European Communities.
Approximation of laws - Construction products - Standing Committee on Construction.
Case C-263/95.

1 On 7 August 1995, the Federal Republic of Germany brought an action before the Court of Justice seeking annulment of Commission Decision 95/204/EC of 31 May 1995 implementing Article 20(2) of Council Directive 89/106/EEC on construction products (1) (hereinafter `the contested decision'), and requesting that the Commission be ordered to pay the costs.

The contested decision contained measures concerning the procedure for attesting the conformity of various product families. The applicant claims that the measures infringe Directive 89/106/EEC on construction products, (2) as amended by Directive 93/68/EEC (3) (hereinafter `Directive 89/106'), inasmuch as the decision by the Commission specifying the procedure for attesting the conformity of products fails to take account of a number of criteria laid down in Article 13(4) of Directive 89/106. The contested decision is therefore unlawful. It is further alleged that essential procedural requirements were infringed inasmuch as the Commission failed to comply with the time-limits for communicating the preparatory documents to the addressees, the contested decision was adopted in the absence of a favourable opinion from the Standing Committee on Construction (hereinafter `the Committee') and the statement of reasons was inadequate.

Relevant legislation

2 Directive 89/106, also referred to as the `construction products' directive, which was adopted by the Council in December 1988 and amended in 1993, seeks to remove barriers to the free movement of these products in the Community. The preamble to the directive states that there are requirements in the Member States relating, inter alia, to building safety, health, energy economy and protection of the environment that have a direct influence on the nature of construction products employed and are reflected in national product standards, technical approvals and other technical specifications and provisions which, by their disparity, hinder trade within the Community. The removal of technical barriers by means of essential requirements on safety and other aspects which are important for the general well-being must be achieved, without, however, reducing the existing and justified levels of protection in the Member States. (4)

Under the provisions of the directive, construction products may be placed on the market in Member States only if they are fit for their intended use, that is to say they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed can, if properly designed and built, satisfy the essential requirements set out as objectives in Annex I thereto. These essential requirements - which must be satisfied during an economically reasonable working life and which generally concern foreseeable reactions - are grouped under the following six headings: mechanical resistance and stability, safety in case of fire, hygiene, health and the environment, safety in use, protection against noise, energy economy and heat retention. To take account of differences inter alia in levels of protection that may prevail at national level, classes of performance may be established for each essential requirement in the interpretative documents and in the technical specifications.

`Harmonised standards' refers to the technical specifications adopted by the European Committee for Standardisation (CEN) or by the European Committee for Electrotechnical Standardisation (Cenelec), or by both jointly, on the basis of a mandate from the Commission and pursuant to Directive 83/189/EEC. (5)

The conformity of a product with the harmonised standards is checked by means of a procedure for attestation of conformity laid down in Article 13(3). Under Article 13(4), it is for the Commission

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to specify, after consulting the Committee, the procedure to be used for a given product or family of products on the basis of certain criteria set out in that paragraph.

Article 20(2) states that the provisions necessary for establishing the procedure for attesting conformity in mandates for standards are to be adopted in accordance with paragraphs 3 and 4 thereof: the representative of the Commission must submit to the Committee a draft of the measures to be adopted and the latter is to deliver an opinion within a time-limit laid down by the Chairman according to the urgency of the matter, by the majority laid down in Article 148(2) of the EC Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The measures can be adopted if they are in accordance with the opinion. If they are not, the Commission must submit a proposal to the Council, which will act by qualified majority. If the Council has not acted within three months, the Commission can adopt the proposed measures.

3 The Committee adopted its rules of procedure in October 1989. Article 2 of the rules of procedure covers both the convening of meetings and the time-limits within which the working documents for each meeting should be received by the Permanent Representations of the Member States and their representatives on the Committee. Article 6 sets out the conditions to be met for a meeting of the Committee to be validly held and Article 9 contains rules relating to voting rights.

4 The decision contested by Germany was adopted by the Commission in May 1995 in order to determine the procedure for conformity attestation for certain products and product families: thermal insulating materials, doors, windows, shutters, gates and related products, membranes and precast normal, lightweight or autoclaved aerated concrete products. After determining the procedure, the European standards committees were asked to specify the system of attestation of conformity in the relevant harmonised standards. The contested decision contains three articles and three annexes, the contents of which are examined in more detail later.

Admissibility of the application

5 As a preliminary observation, I would like to say that the application is admissible. Under the first paragraph of Article 173 of the Treaty, Member States may challenge in the courts the legality of any measure adopted by the Commission. (6) The Court has held that such an action is not affected by the positions taken by representatives of the applicant State in the body responsible for the adoption of the contested decision. (7)

Pleas

6 Germany claims that the contested decision is contrary to Directive 89/106 because essential procedural requirements were infringed and because it violates Article 13(4) of the directive. I shall examine the applicant's pleas in that order.

A - Infringement of essential procedural requirements: delay in communicating documents, absence of an opinion by the Committee and failure to state reasons

On the delay in communicating documents

7 The applicant claims that the contested decision was adopted by the Commission in breach of the rules of procedure of the Committee, in particular paragraphs 6 and 7 of Article 2 thereof. The vote on the draft decision was on the agenda for the Committee meeting of 30 November 1994. However, not only were the documents to be discussed and voted on not received by the German Permanent Representation but the German version of the draft decision was sent by fax to the German members of the Committee on 11 November, a day late. The Commission's attention was drawn to this fact by letter of 29 November, in which the Head of the German Delegation on the Committee requested postponement of the vote for that reason. The applicant argues that those are infringements of essential procedural requirements which had a decisive influence on the attitude of the Federal Republic of Germany

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throughout the negotiations.

8 In its statement of defence, the Commission acknowledges the slight delay in sending the documents to the applicant, having sent them between 14.09 hrs and 14.23 hrs on 11 November. However, it argues that the English version of the documents was sent to all representatives on 10 November, that the latter had furthermore been in possession of the original draft decision since September 1994 and that the latter had been discussed at the twenty-seventh meeting of the Committee. It added that on 21 October 1994 the applicant had presented a counter-proposal drafted in German and English, which proved that it had detailed knowledge of the draft. The Commission argues that, in any event, the changes to the draft were small and of minor importance and therefore not sufficient to justify the applicant's claim that a half-day delay was capable of affecting its attitude at the time of the discussion and vote in the Committee.

With regard to the letter of 29 November 1994, the defendant argues that it was unreasonable for Germany to request postponement of a vote the day before the meeting, even though that is permitted under the Committee's rules of procedure. Moreover, if the delay really had caused the applicant such harm, it should have repeated its request at the meeting instead of approving the agenda without reservation, taking part in the discussions and voting, which led the Chairman of the Committee to believe that Germany had withdrawn its request. The defendant concludes with regard to the first plea that if there were procedural defects they were minor and in no way sufficient to justify annulment of the decision.

9 In the rejoinder, the applicant argues that the draft sent to it should have been in German and that the fact that the English text was sent to all representatives on 10 November is entirely irrelevant, especially in a case such as this where precise terminology was very important. It was only when the Commission had sent it the German text of the draft that was to be discussed that it was able to form a final opinion on the content, even though it had had relatively similar texts in that language before.

As for its request for postponement of the vote on the draft, the applicant maintains that it was made in due form as the Committee's rules of procedure do not specify a time-limit for exercising such a right. The request was repeated orally at the meeting on 30 November 1994, as evidenced by the sentence added to point 22 of the minutes of the twenty-eighth meeting when they were adopted; similarly, it did not approve the agenda either, and took part in the discussions with the other delegations because of its interest in the draft, not because it had withdrawn its request.

10 With regard to the sentence inserted into the minutes when they were adopted, the Commission states in the rejoinder that `the fact that this sentence appears in the minutes does not necessarily mean that the German delegation... refused to vote. In practice, subsequent additions of that kind which a delegation wishes to have included in the minutes are made by the Commission without examining their content since it would otherwise be impossible for the Commission and Member States to co-operate in a climate of trust.'

11 It has been established that the Commission did not send the Permanent Representation of Germany the text of the draft that was to be discussed and voted on, but that it did send the English version of the draft to the representatives of Member States on the Committee within the twenty-day time-limit. It has also been established that the German version was sent to the German representatives late and that the Commission did not postpone this agenda item to a later meeting, or postpone the date of the meeting in order to comply with the time-limit, despite the fact that Germany had duly requested it to do so.

The Commission's conduct was clearly in breach of the provisions of Article 2(6) and (7) of the rules of procedure of the Committee, which state that the draft provisions referred to in Article

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20(2) of Directive 89/106 to be voted on must be sent to the Permanent Representatives of the Member States as well as to their representatives on the Committee not later than twenty days before the meeting is due to take place. If that time-limit is not met, the item on the agenda must be postponed to a later meeting unless, at the request of a representative of a Member State, the meeting is postponed to a date within the time-limit.

12 It remains to be established whether those breaches of the Committee's rules of procedure are sufficiently serious to be regarded as infringements of essential procedural requirements within the meaning of the second paragraph of Article 173 of the Treaty, justifying annulment of the contested decision. To do so, it will be necessary to examine the purpose of the rules alleged to have been infringed and the possible impact of the infringement on the substance of the decision. (8)

13 Comparing the provisions in paragraphs 5 and 6 of Article 2 of the Committee's rules of procedure, I note that paragraph 5 imposes a time-limit of twenty days for the preparatory documents for a meeting and any other working documents to be sent to the Member States' representatives or alternates, with a copy to the Permanent Representation. In urgent cases, the Chairman may shorten this time-limit to a minimum of ten clear working days. However, the procedure laid down in paragraph 6 stipulates that draft provisions to be voted on by the Committee must be sent to the Permanent Representations of the Member States as well as to their representatives on the Committee not later than twenty days before the meeting is due to take place, no exceptions being permitted.

14 In my view, the difference between the two procedures is justified, as they fulfil different purposes. Paragraph 5 lays down the rules for sending preparatory documents for a meeting and working documents in general, while paragraph 6 establishes a stricter procedure for cases where the Committee has to vote on the adoption of certain provisions. Paragraph 7 sets out the consequences of failure to comply with the procedure in paragraph 6.

Paragraph 6 of Article 2 of the Committee's rules of procedure thus ensures that when a draft provision is to be discussed with a view to issuing an opinion the representations of Member States on the Committee have sufficient time to study it. If this were not so, there would be a risk - especially in instances involving standards such as those in the present case, which are highly complex and may affect different national sectors of administration - that the members of the Committee would not be able to assemble all the information required to vote in full knowledge of the facts. The fact that paragraph 7 provides for two solutions where the twenty-day time-limit is not met (the item may be placed on the agenda of a meeting at a later date or, if requested by a representative of a Member State, the date of the meeting may be postponed) confirms my opinion as to the importance of compliance with the time-limit in shaping the intentions of the Member States.

15 I would also state that this is not simply a case of there being a formal distinction between notices convening meetings in general and those convening meetings where there will be a vote on the adoption of certain provisions. There is another important difference, namely that where provisions such as those in issue, whose purpose is to define the conformity attestation procedure, are to be adopted the procedure that the Commission must follow to approve the draft depends on whether the Committee has delivered a favourable opinion.

16 When assessing the impact that this breach of procedure might have had on the content of the contested decision, I believe that it is irrelevant that the Commission sent the English version of the draft to the representatives of Germany on the Commission within the twenty-day time-limit. Article 3 of Council Regulation No 1 (9) requires that documents which the institutions send to a Member State be drafted in the language of that State. Compliance with that obligation assumes special importance in this case because under Article 19(2) of Directive 89/106 the two representatives of each Member State may be accompanied by experts. While the Commission may assume that officials from the Permanent Representation of Germany have good knowledge of English, I think that it

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would be going too far to presume the same for the two representatives of that country on the Committee, or indeed for the experts.

17 I also consider that it is irrelevant in this context that, as alleged by the Commission, the applicant had taken part in previous meetings during which the original draft decision had been discussed and that the changes made to the draft as a result of those discussions were small and of minor importance. In fact, the number and, above all, the extent of the changes could only be appreciated by the representatives on the Committee and by the experts once they had received the German version of the text to be discussed and voted on on 30 November 1994 and, as I said, this was received late. Even though the delay was minor, I believe that the applicant's claim that it was capable of affecting its attitude at the time of the discussion and vote in the Committee is well founded.

18 The applicant is also right in claiming that its request to have the meeting postponed was made in due form and that the Commission ought to have granted it. The rules of procedure do not specify a time-limit within which Member States must exercise this option. Moreover, the fact that Germany requested postponement on the day before the meeting is, in my view, sufficient indication that the delay in sending the text in German was clearly at that time making it difficult to prepare adequately for the meeting on the date it was due to take place. It is therefore unnecessary to ascertain whether Germany orally repeated its request for postponement of the meeting or vote on 30 November 1994, especially since the only way to do so would be to consult the minutes of the meeting, in respect of which the Commission has stated that the sentence confirming this was added at Germany's request and that in practice subsequent additions of that kind which a delegation wishes to have included in the minutes are made without examining their content.

19 For the reasons I have given, I consider that the Commission's breach of the procedure laid down in Article 2(6) and (7) of the rules of procedure of the Committee must be considered to be an infringement of an essential procedural requirement within the meaning of the second paragraph of Article 173 of the Treaty.

On the absence of an opinion by the Committee

20 Germany claims that the contested decision was adopted in breach of Article 20(2) to (4) of Directive 89/106 inasmuch as the vote on the draft at the meeting on 30 November did not have the majority required by the third sentence of Article 20(3), which states that the opinion must be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. As no opinion was delivered, the Commission ought to have immediately submitted a proposal to the Council. Contrary to what is stated in the minutes, the Committee did not adopt any decision on the draft in question at the meeting on 30 November 1994. Some delegations did not give it their final approval and expressed reservations concerning the possibility of contracting authorities imposing a stricter procedure. The Netherlands Delegation expressed a reservation concerning the inclusion in the mandates of requirements relating to environmental protection. The Commission read out two declarations on those points and the Chairman gave the delegations time to review those issues before giving a final response. Point 41 of the minutes of the meeting states that the positive votes were to be confirmed within fourteen days of receipt of the text of the two declarations. Since the vote at the meeting did not have the required majority and the Committee's rules of procedure do not specify a written procedure for making decisions, the applicant considers that the contested decision was not validly adopted.

21 The view of the Commission on this subject, based on the minutes of the meeting, is that the required majority did vote in favour of adopting the draft and that, while it is true that four delegations expressed a `reservation pending examination', this has no effect on the agreement that

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they expressed on 30 November 1994. It explains that, as some delegations had voiced their doubts on that day as to the relationship between Directive 89/106, the directive on public contracts (10) and the directive on dangerous substances, (11) in order to provide an immediate response the Commission, represented by Directorate-General III, read out two declarations, with the proviso that the final texts still had to be discussed with Directorate-General XV and with the Legal Service before they were notified to Member States. Six States approved the draft unreservedly and a further four also voted for it, but subject to the reservation that they would confirm their vote after receiving the final version of the declarations, which they did.

The Commission further states that although a written procedure for adopting deliberations is not expressly provided for in the Committee's rules of procedure they do not prohibit it, and such a procedure, which is now part of the range of procedures used by the Commission (12) and by the Council, (13) has been systematically incorporated into the rules of procedure adopted by recently-created committees in accordance with the `Comitology Decision'. (14) In any case, those present at the meeting agreed to proceed thus; the applicant's disagreement was only expressed in the letters of 22 December 1994 and 19 January 1995 and, while it is true that there is a reference to that effect in point 41 of the minutes, the sentence was apparently added at the time of adoption of the minutes without Germany having made any reference to it or request in that respect on the day of the meeting.

Finally, the Commission argues that even if no decision was adopted on 30 November 1994 or under the subsequent written procedure the failure was remedied on 29 May 1995 by the adoption of the minutes, to which were annexed the final versions of the Commission's declarations, and that it was irrelevant in that respect that the adoption of the contested decision was not mentioned in the agenda for the twenty-ninth meeting because it was the definitive record of the result of a vote that had commenced on 30 November, when that item was on the agenda.

22 I agree with the applicant that when the draft decision was put to the vote on 30 November 1994, it did not achieve the majority required under Article 20(3) of Directive 89/106. In fact, according to the minutes - and none of the parties contests this - the Chairman recorded the following result regarding the delegations' views on giving an opinion on the draft decision:

`I Yes, and would later give opinion on the content of the two declarations: I, E, DK, P, UK, L.

II Yes, subject to a reservation on the examination of the two declarations to be made by the Commission: F, GR, IRL, NL.

III No: D, B (with certain nuances).

For the new Member States, AU was towards group III with SWE and FIN in group I.'

23 The Commission argues that the voting was valid, primarily because it was simply a case of confirming the positive vote a posteriori, and alternatively because the procedure followed was partially written, a method not prohibited by the Committee's rules of procedure and often used by the Council and Commission.

24 In November 1994, the majority required to adopt the decision was 54 votes. According to my calculations, there were 15 votes against and 38 for. There were also 23 votes in favour subject to the outcome of examination of the two declarations to be made by the Commission. It is clear that whether there was a majority in favour of adopting the draft decision and, consequently, whether the draft was in fact approved depends on how those latter votes are to be counted.

25 Unlike the Commission, I do not think that it is possible to consider as final the favourable vote by the four Member States who reserved the right to confirm their vote after having examined the two declarations read out by the Commission at the meeting, the final content of which still

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had to be discussed with Directorate-General XV and with the Legal Service. This was not simply a case of making the vote conditional upon receiving the text of the declarations; the reservation clearly referred to examining the content, which would very probably have to be amended. It was therefore possible that at least one of these delegations would no longer be willing to confirm its vote once the final text had been examined. On that basis, it is my view that the required majority of votes in favour of adopting the draft was not achieved at the meeting called for that purpose on 30 November 1994.

26 Should the procedure followed after the meeting, described by the Commission as `partially written', nevertheless be regarded as valid because the four Member States ultimately confirmed their initial vote?

27 I believe that the reply must still be no, for various reasons that I will explain below.

First, the provisions governing voting within the Committee seem to indicate that the vote should be held at the meeting, and not after or outside it. Article 6 of the Committee's rules of procedure, which deals with the quorum required at meetings, states that at least seven Member States must be represented. (15) However, in the case of opinions, it refers to Article 9, under which the quorum is to be calculated using the weighting laid down in Article 148 of the Treaty; only the representatives or alternates designated by Member States are entitled to vote and a Member State may, where necessary, represent only one other Member State. In my view, all those provisions point to the interpretation that I propose. (16)

Second, the Committee's rules of procedure do not provide for voting by the so-called written procedure. Admittedly, the rules of procedure of the Council and Commission provide for a procedure of this type for the adoption of agreements by those collegiate bodies, and the procedure laid down in Article 20(3) and (4) of the directive is the same as Procedure III, variant a), of the Comitology Decision. However, neither the Comitology Decision adopted in 1987 nor Directive 89/106 mentions the written procedure as a method of adopting agreements by the committees set up under those texts, and the Committee's rules of procedure, adopted in 1989, do not refer to any other internal rules which might also be applicable, specifying a procedure of this type.

28 I also consider it irrelevant whether or not the delegations agreed to follow such a procedure on this occasion. As the Committee's rules of procedure were adopted at the time by the Member States, I consider that they are all bound by them to the same degree and that no exceptions to those provisions can be made in the absence of a formal amendment thereto. That interpretation is based on the one given by the Court in respect of the Council's obligation to comply with its own rules of procedure, in a case concerning the possible infringement of an essential procedural requirement where a directive was adopted by the written procedure despite the opposition of two States to that method, and the Council's rules of procedure required the consent of all members before such a procedure could be used. The Court held that `the Council is... under a duty to comply with the procedural rule which it itself laid down in Article 6(1) of its Rules of Procedure. It cannot depart from that rule, even on the basis of a larger majority than is laid down for the adoption or amendment of the Rules of Procedure, unless it formally amends those rules'. (17)

29 That ruling removes the need for me to examine whether all the delegations agreed to proceed in such a manner or whether the German Delegation expressed its opposition on the actual day of the meeting; there is in fact a difference of opinion between the parties on this point that it is impossible to settle by referring to the minutes of the meeting, the obstacle being again the Commission's statement that the relevant sentence was added to the minutes at the request of Germany and that it did not correspond to the facts.

30 Finally, I will examine the Commission's argument that even if the decision was not adopted

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on 30 November 1994 or under a written procedure the unanimous adoption on 29 May 1995 of the minutes of the meeting held on 30 November of the previous year must have dispelled any uncertainty about the vote on the draft.

I must say that I consider this argument less likely to succeed than the previous ones, given the low credibility that can be attached to the minutes of these meetings in the light of the Commission's explanations about their drafting and approval. In any event, there are two reasons for rejecting the Commission's argument on this point. First, if the opinion was not adopted on 30 November 1994 and it was not possible to use the written procedure, the vote ought to have taken place at the meeting where it appeared on the agenda, which was not the case at the meeting held on 29 May 1995; second, if the Commission claims that the final adoption of the draft occurred on the latter date, then it should state how and when the three Member States that acceded in the meantime voted.

31 For those reasons, I consider that the plea of absence of an opinion by the Committee is also well founded.

On the failure to state reasons

32 The applicant claims that the contested decision is void for breach of the duty to state reasons laid down in Article 190 of the Treaty. The applicant considers that despite being an addressee of the decision and having participated in its preparation, it is unable to ascertain how the Commission took into consideration each of the essential characteristics of the products. Its claim is based on the following grounds: first, as the contested decision was the first to be adopted in its field, no comparisons with previous decisions can be made to clarify the reasons for the decision; second, as a statement of reasons for the decision the Commission merely reproduced the text of Directive 89/106, which was not sufficient to meet the requirements laid down by Article 190 of the Treaty; third, the Commission did not explain to Member States why it had not included some of the essential requirements listed in Annex I of Directive 89/106. Finally, the Commission also failed to explain why the initial type-testing of the product had to be limited to checking certain properties.

33 The Commission contends that, although brief, the reasoning is adequate given the nature of the measure and the context in which it was adopted, and that any attempt to provide a more detailed statement of reasons would have been swamped by technical details concerning products and product families. The essential element of the decision lay in the choice between the two procedures for attesting the conformity of a product and was contained in Articles 1 and 2 of the decision, combined with Annexes 1 and 2, while Article 3 played only a secondary role. The Commission also states that the Member States were closely involved in the drafting of the measure and were aware of the considerations on which it was based, which was a further justification for the brevity of the reasons.

34 Article 190 of the Treaty provides that the regulations, directives and decisions of the Council and Commission must state the reasons on which they are based and refer to any proposals or opinions that were required to be obtained under the Treaty. However, it does not indicate the scope or limits of the duty to state reasons; these are to be found in the decisions of the Court.

35 It is settled case-law that `the statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning of the institution which enacted the measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review. It is not necessary, however, for details of all relevant factual and legal aspects to be given, in so far as the question whether the statement of the grounds for a decision meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question'. (18) The Court has also observed that `the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact or of law

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dealt with in the regulations, provided that the latter fall within the general scheme of the body of measures of which they form part. Consequently, if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution.' (19)

36 The fact that the applicant Member State was involved in drawing up the contested decision has sometimes been considered by the Court to be sufficient reason to reject the plea of failure to state reasons. This can be illustrated by various judgments in which the Court held that `... it is not necessary... for details of all relevant factual and legal aspects to be given, in so far as the question whether the statement of the grounds for a decision meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question... This is a fortiori the case where the Member States have been closely associated with the process of drafting the contested measure and are thus aware of the reasons underlying that measure'. (20)

The opposing viewpoint can be illustrated by an example drawn from a 1983 judgment in which the Court held that `... by imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its power of review, and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty. Thus it is not sufficient that the Member States, as addressees of the decision, are aware of the reasons as a result of their participation in the preliminary procedure and that the applicant, the person directly and individually concerned, is able to deduce these reasons by comparing the decision in question with similar earlier decisions. It is further necessary that the applicant should be enabled in practice to defend its rights and the Court should be able effectively to exercise its power of review on the basis of the statement of reasons.' (21)

37 It is true, as the Commission concedes, that the statement of reasons for the contested decision is brief. It is therefore necessary to see whether, having regard to the context and to the legal rules governing the matter in question, the reasons clearly and unequivocally reflect the reasoning of the Commission, which enacted the contested decision, and enable the persons concerned to know the justification for the measure and the Court to exercise its power of review.

38 Two procedures for attestation of conformity are laid down in Article 13(3) of Directive 89/106. In one, the manufacturer ensures that its products conform to the relevant technical specifications, while in the other an approved certification body is also involved. The procedure to be applied is chosen by the Commission on the basis of certain criteria listed in Article 13(4), which include the importance of the part played by the product with respect to the essential requirements, in particular those relating to health and safety. The essential requirements are described in Annex I. The Commission also specifies the procedure for attestation of conformity of construction products in the mandates that it gives to the European standardisation bodies.

39 The contested decision is in fact the first to have been adopted by the Commission for the purpose of specifying the conformity attestation procedure applicable to certain families of construction products. (22) Leaving aside the preamble, which simply cites the texts of certain articles of Directive 89/106, the decision contains three articles and three annexes. Article 1 states that the attestation of conformity of the products set out in Annex 1 is by means of a procedure whereby the manufacturer alone is responsible for a factory production control system ensuring that the product is in conformity with the relevant technical specifications, whilst Article 2 states that the attestation of conformity of the products set out in Annex 2 is by means of a procedure whereby, in addition to a factory production control system operated by the manufacturer, an approved certification body is involved in assessment and surveillance of production control or of the product itself.

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Annexes 1 and 2 essentially contain lists of the products concerned.

Article 3 states that the conformity attestation procedure set out in Annex 3 is given in the mandates for standards. Annex 3 defines a total of eleven product families, devoting two sections to each. In the first section, CEN and Cenelec are requested to specify, for each product and use indicated, the system of attestation of conformity that is assigned to it in the relevant harmonised standards. The second section contains two paragraphs. The first (2.1) lays down certain conditions to be applied by CEN in the specifications of the conformity attestation system. The second (2.2) contains instructions addressed to the approved body whereby that body must, in the case of certain systems, restrict itself in the initial type-testing of the product to checking certain characteristics, these being different for each product family.

40 I believe that in the light of the context and the relevant legal rules the statement of reasons in the preamble to the contested decision may be regarded as adequate in respect of both its provisions and Annexes 1, 2 and 3, points 1 and 2.1. However, in the case of point 2.2 of Annex 3, the contested decision gives no reasons and no indication at all why the Commission decided that, when performing the initial type-testing of the product, which is a method of checking compliance common to all certification systems, the approved body must restrict itself to checking certain characteristics of the product only, to the exclusion of others.

41 I am quite ready to agree that it would be unreasonable to require specific reasons for each of the decisions of a technical nature adopted in the contested measure. However, I consider that the absence of even the slightest indication of the reasons which led the Commission to impose this restriction prevents those concerned from knowing the justification for the measure and leaves the Court unable to exercise its power of review.

42 For those reasons I consider that the plea of failure to state reasons is also well founded.

43 The fact that the contested decision is flawed by these substantive procedural defects is sufficient to justify its annulment. However, for the sake of completeness, and in case the Court does not endorse my assessment, I will now examine the plea of breach of Community law.

B - Infringement of Article 13(4) of Directive 89/106

44 The applicant argues that when the Commission chooses the procedure for attestation of conformity it must also indicate the characteristics of the product that must be checked during the initial type-testing carried out by an approved body. When the procedure to be followed is specified, the relevant essential requirements must be set out in the Commission's decision, according to their importance for the procedure. The contested decision contains only an incomplete list of the relevant characteristics of the product, however. The Commission did not specify what other procedure would be used to examine the essential requirements excluded from the decision, as well as the important characteristics of the product. To sum up, the allegations by the German Government against the Commission are, first, that when specifying the initial type-testing conditions, only some aspects of health protection were included in the decision, whereas they appear in Article 13(4)(a) of Directive 89/106, and, second, that the essential requirement concerning health and protection of the environment was not taken into account at all for some product families and only selectively and incompletely for others.

45 The Commission argues that the applicant has misunderstood the relationship between the mandates for standards and the procedures for attestation of conformity, as well as the factors to be taken into account when implementing these procedures. The mandates that the Commission has to give to European standards bodies specify the characteristics of the product for which harmonised standards are to be developed in order to ensure that it is fit for its intended purpose, such fitness having to be measured against the yardstick of the essential requirements. In contrast, the procedures

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for attestation of conformity focus on the importance of the part played by the product in relation to the essential requirements and hence the choice between various control procedures. The defendant claims that it would be impossible in practice to subject each of a product's properties to a complicated control procedure, especially since paragraph 2 of Article 13(4) of Directive 89/106 requires the principle of proportionality to be applied, by stating that in each case the least onerous procedure consistent with safety is to be chosen.

46 In the reply, the applicant argues that the principle of proportionality only applies to the choice of procedure, but not to the content, that is to say, the characteristics to be checked and the implementation of the procedures as such.

47 The Commission reiterated in the rejoinder that it had taken into account all the essential requirements as well as the importance of the part played by the product with respect to meeting those requirements. The proof of this was that, as the products were thermal insulating materials, the least dangerous materials were subject to the least onerous conformity attestation procedure while the materials that could pose a fire hazard were subject to the procedure involving additional checks by a certification body. As for the principle of proportionality, the Commission argues that it applies throughout Community law, and consequently also applies as regards the organisation of the control procedure.

48 Under Article 13(4) of Directive 89/106, it is for the Commission to choose the procedure for attesting the conformity of a product, in other words to decide whether the manufacturer alone will ensure that products conform to the relevant technical specifications or whether an approved certification body should also be involved. This it does after consulting the Committee and on the basis of the following criteria: the importance of the part played by the product with respect to the essential requirements, in particular those relating to health and safety; the nature of the product; the effect of the variability of the product's characteristics on its serviceability; the susceptibility to defects in the product manufacture. On all these points, the Commission must take account of the provisions set out in Annex III.

49 In the contested decision, the Commission drew up two lists of products and product families in fact (Annexes 1 and 2), indicating which of the aforementioned procedures was to be used for the attestation of conformity. In Annex 3 it then requests CEN/Cenelec to specify, for the product and intended use in each case, the system of attestation of conformity in the relevant harmonised standards.

50 To better illustrate the way in which the contested decision is structured, I will take the example of thermal insulating materials. Those that belong to class A, B or C, (23) for which the reaction to fire performance (24) is not susceptible to change during the production process, (25) as well as those that belong to class D, E or F, appear in the list in Annex 1, meaning that, for the attestation of conformity, the manufacturer alone is responsible for the factory production control system ensuring that the product conforms to the technical specifications. In contrast, products in class A, B or C, for which the reaction to fire performance is susceptible to change during the production process, appear in Annex 2; consequently, the attestation of conformity of these products will, in addition to a factory production control system operated by the manufacturer, involve an approved certification body to assist in assessment and surveillance of production control or of the product itself.

51 In point 1 of Annex 3 of the contested decision, CEN and/or Cenelec are requested to specify the system of attestation of conformity in the relevant harmonised standards for all factory-made and in situ formed thermal insulating products, whatever their intended use. The thermal insulating materials mentioned in Annex 2, those for which the reaction to fire performance may change during the production process, remain subject to conformity attestation system No 1, which is the most

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complex and which corresponds to the system laid down in Annex III, point 2(i), of Directive 89/106, without the further testing of samples taken at the factory. In practice, this means that the attestation of conformity of the product in this case is specified by an approved body on the following basis:

(a) Tasks for the manufacturer:

(1) factory production control;

(2) and further testing of samples taken at the factory by the manufacturer in accordance with a prescribed test plan.

(b) Tasks for the approved body:

(3) initial type-testing of the product;

(4) initial inspection of factory and of factory production control;

(5) continuous surveillance, assessment and approval of factory production control.

52 For the purposes of specifying the conformity attestation system, the thermal insulating products appearing in Annex 1 are in turn divided into two classes according to their reaction to fire.

Thus, those that belong to class A, B or C are subject to conformity attestation system No 3, which is the one laid down in Annex III, point 2(ii), second possibility, in other words the declaration of conformity of the product by the manufacturer is made on the basis of:

(1) initial type-testing of the product by an approved laboratory,

(2) and factory production control,

whilst the products in classes D, E and F are subject to conformity attestation system No 4, which is the least complex and corresponds to the one in Annex III, point 2(ii), third possibility. In this system, the declaration of conformity of the product by the manufacturer is made on the basis of:

(1) initial type-testing by the manufacturer;

(2) and factory production control.

53 In point 2.1, the Commission lays down the conditions to be applied by CEN in specifying the system of attestation of conformity: the specification for the system should be such that it can be implemented even where performance does not need to be determined for a certain characteristic because at least one Member State has no legal requirement at all for such characteristics. In those cases, the checking of such a characteristic must not be imposed on the manufacturer if he does not wish to declare the performance of the product in that respect.

54 In point 2.2, it is stated that for products coming under system 1 and system 3 the task of the approved body as regards the initial type-testing of the product is limited to the following characteristics:

Euroclasses characteristics for reaction to fire, as set out in Decision 94/611. (26)

55 In its application, the German Government provides a list for thermal insulating materials setting out, on the basis of data appearing in the document Construct 94/125, the other essential requirements that appear in Annex I of Directive 89/106 and the characteristics of the product which it considers are necessary but which have not been taken into account by the Commission for the initial type-testing, namely:

(a) regarding the essential requirement `energy economy and heat retention': temperature resistance;

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water vapour permeability; compressive strength; resistance to bending and corrodent emission level;

(b) regarding the essential requirement `protection against noise': sound absorption index and soundproofing index;

(c) regarding the essential requirement `hygiene, health and the environment': water permeability and dangerous substances emission level.

56 I partly agree with the Commission when it argues that a clear distinction should be made between, on the one hand, the choice of the procedure for attestation of conformity of a product, for which account should be taken of the criteria laid down in Article 13(4) of the Directive - and this in my view is what it did, by classifying the products and product families in Annexes 1 and 2 of the contested decision - and, on the other hand, something as different as the request to European standards bodies to specify the systems of attestation of conformity in the relevant harmonised standards for certain products and uses, as the Commission did in Annex 3 of the contested decision.

57 To return to my example of thermal insulating products, I see that whether the attestation of conformity is to be issued by the manufacturer alone or with the involvement of an approved certification body depends in the case of products in classes A, B and C (27) on whether the reaction to fire may change during the production process; in the first case, the products appear in Annex 2; in the second case, they are included in Annex 1; in contrast, classes D, E and F (28) only appear in Annex 1, in other words the attestation of conformity is the sole responsibility of the manufacturer.

Moreover, although class A, B and C products, whose reaction to fire is not liable to vary during production, and class D, E and F products all appear in Annex 1, the request by the Commission to the European standards bodies to specify the systems of attestation of conformity requires that the first group be subject to system 3, involving more stringent testing of products than for products in the second group, to which system 4 is applied.

58 These findings lead me to infer that, both for the family of products that I have given as an example and for the other product families subject to the provisions of the contested decision, the Commission has specified the procedure for attestation of conformity, in the provisions of Articles 1 and 2, combined with Annexes 1 and 2, taking account of the importance of the part played by the product with respect to the essential requirements, in particular those relating to health and safety, the nature of the product, the effect of the variability of the product's characteristics on its serviceability and the susceptibility to defects in the product manufacture.

59 However, as regards Annex 3, I have to agree with the German Government when it claims that there are other characteristics of the products that have not been taken into account for the initial type-testing, and that it is not possible to discover from the text of the decision, nor to deduce from the context in which it was adopted, why the Commission decided to limit the checking by the approved body to certain characteristics, to the exclusion of other properties of the product.

60 In view of the fact that the initial type-testing of the product constitutes a method of control of conformity under Annex III of Directive 89/106 for all the conformity attestation systems, I consider that once the Commission had determined the procedure for attestation of conformity for these product families - at which time I consider it took into account the criteria laid down in Article 13(4) - it could not, without infringing that article, abandon some of those criteria when it came to lay down the requirements to be met by the CEN when specifying the systems of conformity attestation, by stipulating that, during the initial type-testing, the approved body had to restrict itself to checking only some of the product characteristics.

61 This being so, and without there being any need in my view to consider the relevance of the principle of proportionality, I consider that the plea of breach of Article 13(4) is, in respect

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of Annex 3 of the contested decision, also well founded.

Conclusion

On those grounds, I propose that the Court of Justice:

(1) annul Commission Decision 95/204/EC of 31 May 1995 implementing Article 20(2) of Council Directive 89/106/EEC on construction products;

(2) order the Commission to pay the costs, pursuant to Article 69(2), first paragraph, of the Rules of Procedure, since the applicant has succeeded in its submissions.

(1) - OJ 1995 L 129, p. 23.

(2) - Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12).

(3) - Council Directive 93/68/EEC of 22 July 1993 amending Directives 87/404/EEC (simple pressure vessels), 88/378/EEC (safety of toys), 89/106/EEC (construction products), 89/336/EEC (electromagnetic compatibility), 89/392/EEC (machinery), 89/686/EEC (personal protective equipment), 90/384/EEC (non-automatic weighing instruments), 90/385/EEC (active implantable medicinal devices), 90/396/EEC (appliances burning gaseous fuels), 91/263/EEC (telecommunications terminal equipment), 92/42/EEC (new hot-water boilers fired with liquid or gaseous fuels) and 73/23/EEC (electrical equipment designed for use within certain voltage limits) (OJ 1993 L 220, p.1), my italics.

(4) - Second, third and fourth recitals in the preamble.

(5) - Council Directive of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8).

(6) - Case 41/83 Italy v Commission [1985] ECR 873, paragraph 30. In that case the Court held that any Member State may, in support of an application for annulment, plead infringement by the Commission of Article 90(2) of the Treaty, even if the undertaking concerned is subject to the legislation of another Member State.

(7) - Case 166/78 Italy v Council [1979] ECR 2575, paragraphs 5 and 6. In that case the Court held that the application by the Italian Republic for annulment of certain provisions of two Council regulations was admissible, regardless of the unqualified affirmative vote cast by the Italian representative when the texts were adopted by the Council and even though the Italian representative on the Management Committee for Cereals had done the same when certain implementing measures were subsequently considered.

(8) - Case T-123/95 B. v Parliament [1997] ECR-SC II-697, paragraph 32.

(9) - Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59).

(10) - I assume that it is referring to Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

(11) - I assume that it is referring to Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967, p. 234), as amended at various times and adapted over the years in line with technical progress.

(12) - Article 10 of the Rules of Procedure of the Commission of 17 February 1993 (OJ 1993 L

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230, p. 15) permits the Commission to make decisions by written procedure, provided that certain conditions are met. The text of the fourth paragraph of that article was amended by the Commission Decision of 8 March 1995 amending the rules of procedure (OJ 1995 L 97, p. 82).

(13) - Article 8 of the Rules of Procedure of the Council of 6 December 1993 (OJ 1993 L 304, p. 1) lays down the circumstances and conditions in which the Council can take decisions by a written vote.

(14) - Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33).

(15) - This is laid down in the version of the rules of procedure in force in November 1994.

(16) - My italics.

(17) - Case 68/86 United Kingdom v Council [1988] ECR 855, paragraph 48.

(18) - Case C-350/88 Delacre and Others v Commission [1990] ECR I-395, paragraphs 15 and 16, Case C-478/93 Netherlands v Commission [1995] ECR I-3081, paragraphs 48 and 49, and Case C-285/94 Italy v Commission [1997] ECR I-3519, paragraph 48.

(19) - Case 250/84 Eridania [1986] ECR 117, paragraph 38.

(20) - Case C-54/91 Germany v Commission [1993] ECR I-3399, paragraphs 11 and 12, and Case C-478/93, cited in footnote 18, paragraphs 49 and 50.

(21) - Case 294/81 Control Data Belgium v Commission [1983] ECR 911, paragraphs 14 and 15.

(22) - It is far from being the last: since then, the Commission has published to date no less than 18 other decisions, all concerning the procedure for attesting the conformity of construction products pursuant to Article 20(2) of Directive 89/106. These are Decisions 95/467/EC on chimney stacks, gypsum products and structural bearings (OJ 1995 L 268, p. 29); 96/577/EC on fixed fire-fighting systems (OJ 1996 L 254, p. 44); 96/578/EC on sanitary appliances (OJ 1996 L 254, p. 49); 96/579/EC on circulation fixtures (OJ 1996 L 254, p. 52); 96/580/EC on curtain walling (OJ 1996 L 254, p. 56); 96/581/EC on geotextiles (OJ 1996 L 254, p. 59); 96/582/EC on structural sealant glazing systems and metal anchors for concrete (OJ 1996 L 254, p. 62); 97/161/EC on metal anchors for use in concrete for fixing lightweight systems (OJ 1997 L 62, p. 41); 97/176/EC on structural timber products (OJ 1997 L 73, p. 19); 97/177/EC on metal injection anchors for use in masonry (OJ 1997 L 73, p. 24); 97/462/EC on wood-based panels (OJ 1997 L 198, p. 27); 97/463/EC on plastic anchors for use in concrete and masonry (OJ 1997 L 198, p. 31); 97/464/EC on waste water engineering products (OJ 1997 L 198, p. 33); 97/555/EC on cements, building limes and other hydraulic binders (OJ 1997 L 229, p. 9); 97/556/EC on external thermal insulation composite systems/kits with rendering (OJ 1997 L 229, p. 14); 97/597/EC on reinforcing and prestressing steel for concrete (OJ 1997 L 240, p. 4); 97/638/EC on fasteners for structural timber (OJ 1997 L 268, p. 36); and 97/740/EC on masonry and related products (OJ 1997 L 299, p. 42).

(23) - Commission Decision 94/611/EEC of 9 September 1994 (OJ 1994 L 241, p. 25) sets out in the annex thereto the following classes of reaction to fire performance for building products: A, no contribution to fire; B, very limited contribution to fire; C, limited contribution to fire; D, acceptable contribution to fire; E, acceptable contribution to fire, and F, no performance determined.

(24) - Both Annex 1 and Annex 2 state in a footnote that the reaction to fire is assessed with regard to classes and levels fixed by Commission Decision 94/611/EEC, cited in the foregoing footnote, and according to the terms expressed in Annex 3.

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(25) - My italics.

(26) - Cited in footnote 23.

(27) - Corresponding respectively to the product classes `no contribution to fire', `very limited contribution to fire' and `limited contribution to fire'.

(28) - Corresponding respectively to products with an `acceptable contribution to fire', `acceptable reaction to fire' and `no performance determined'.

DOCNUM	61995C0263
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; C ; opinions
PUBREF	European Court reports 1998 Page I-00441
DOC	1997/11/11
LODGED	1995/08/07
JURCIT	31958R0001-A03 : N 16 31967L0548 : N 21 31971L0305 : N 21 61978J0166-N05 : N 5 61978J0166-N06 : N 5 61981J0294-N14 : N 36 61983J0041-N30 : N 5 61984J0250-N38 : N 35 61986J0068-N48 : N 28 31987D0272 : N 21 27 61988J0350-N15 : N 35 31989L0106-A10P6 : N 16 31989L0106-A13P3 : N 2 38 31989L0106-A13P4 : N 1 2 6 38 45 48 56 60 61 31989L0106-A13P4LA : N 44 31989L0106-A20P2 : N 2 11 20 61 31989L0106-A20P3 : N 22 22 27 31989L0106-A20P4 : N 20 27 31989L0106-N1 : N 55 31989L0106-N3 : N 48 51 52 60 31989L0106 : N 1 2 27 32 39 61991J0054-N11 : N 36

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11992E148-P2 : N 20 27
11992E173-P1 : N 5
11992E173-P2 : N 12 19
11992E190 : N 34 35
31993D0662-A08 : N 21
31993Q0492-A10 : N 21
61993J0478-N48 : N 35
61993J0478-N49 : N 36
31994D0611 : N 50 54
61994J0285-N48 : N 35
31995D0204 : N 11 - 61
61995A0123-N32 : N 12

SUB	Approximation of laws
AUTLANG	Spanish
APPLICA	Federal Republic of Germany ; Member States
DEFENDA	Commission ; Institutions
NATIONA	Federal Republic of Germany
PROCEDU	Application for annulment - successful
ADVGEN	Ruiz-Jarabo Colomer
JUDGRAP	SevA3n
DATES	of document: 11/11/1997 of application: 07/08/1995

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Opinion of Mr Advocate General La Pergola delivered on 14 March 1996. Commission of the European Communities v Federal Republic of Germany. Failure of a Member State to fulfil its obligations - Directive 92/50/EEC. Case C-253/95.

DOCNUM	61995C0253
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; C ; opinions
PUBREF	European Court reports 1996 Page I-02423
DOC	1996/03/14
LODGED	1995/07/20
JURCIT	31992L0050-A44P1 : N 2 31992L0050 : N 1 61994J0147 : N 3
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Federal Republic of Germany ; Member States
NATIONA	Federal Republic of Germany
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	La Pergola
JUDGRAP	Jann
DATES	of document: 14/03/1996 of application: 20/07/1995

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Opinion of Mr Advocate General Léger delivered on 20 June 1996.
Commission of the European Communities v Hellenic Republic.
Failure by a Member State to fulfil its obligations - Failure to implement Directive 89/665/EEC within the prescribed period - Review procedures relating to public supply and public works contracts.
Case C-236/95.

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1. By this action the Commission seeks a declaration that, by failing to adopt or failing to notify to it within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (hereinafter `the directive'), (1) the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty and that directive. It also claims that the Hellenic Republic should be ordered to pay the costs.

2. Under Article 5 of the directive, the Member States had to bring into force, before 21 December 1991, the measures necessary to comply with the directive. The Member States also had to communicate to the Commission `the texts of the main national laws, regulations and administrative provisions which they adopt in the field governed by this Directive'.

3. Since it had received no communication to this effect from the Greek Government, the Commission put it on notice by letter dated 20 May 1992, pursuant to the procedure laid down by Article 169 of the Treaty, to submit its observations within two months.

4. In its reply dated 17 June 1993, the Greek Government informed the Commission that measures partially implementing the directive in its domestic legal system had been adopted as regards public works contracts - by Presidential Decree No 23 of 15 January 1993 -, but that in contrast no measure had been adopted in the sphere of public supply contracts.

5. Since it received no further information concerning the implementation of the directive in the latter field, on 4 July 1994 the Commission sent the Hellenic Republic a reasoned opinion asking it to take the necessary measures within two months.

6. On 18 August 1994 the Greek Government informed the Commission that a presidential decree was in preparation with a view to implementing the directive in the field of public supply contracts.

7. However, since the Hellenic Republic did not comply with its obligations under the directive in that field, the Commission brought this action for failure to fulfil obligations, which was received at the Court Registry on 6 July 1995.

8. As the Commission stated at the hearing, the infringement in question relates only to review procedures relating to the award of public supply contracts. The wording of the application proper differs slightly from that of the reasoned opinion (in the reasoned opinion, the infringement is stated to be `as regards supplies', whereas in the application the Hellenic Republic is charged with failing to comply `fully' with the directive, `... in particular... in the field of public supply contracts...', but, to my mind, that aspect cannot be construed as a change in the subject-matter of the action. Moreover, the parties have not raised this point.

9. The defendant does not deny that it did not take the necessary measures formally to implement the directive in the field of public supply contracts within the prescribed period. It nevertheless claims that the action should be dismissed.

10. It considers in the first place that the Greek legislation in force on public works and supply contracts, considered in conjunction with the provisions of the Code of Civil and Administrative Procedure and the Statute of the Council of State, (2) already affords sufficient judicial protection

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having regard to the requirements of the directive, bearing in mind that that protection has been further reinforced by recent case-law of the Council of State.

11. It further states that it has adopted supplementary measures in order fully to comply with the directive. An ad hoc statutory drafting committee was convened by Ministerial Decision P1/481 of 15 March 1993 with a view to proposing any supplementary measures. It adds that a draft presidential decree, drafted in August 1993 and notified to the Commission on 22 July 1994, is at the stage of obtaining the final signatures.

12. The Hellenic Republic justifies the delays in adopting those provisions on formal and procedural grounds, such as the fact that they had to be jointly considered by the competent authorities (Ministry of Industry and Ministry of Public Works), but above all on the grounds of recent changes in the case-law of the judicial division of the Council of State. It also points out that the supreme court has recently delivered a number of judgments on invitations to tender for public procurement and public works contracts (3) expressly referring to the directive. In view of those recent developments, the Hellenic Republic states that it is reconsidering the judicial protection available overall and whether or not it is necessary to press forward with the adoption of the relevant presidential decree. It further points out that the draft presidential decree has been amended in the light of observations received from the Commission.

13. That argument is not convincing.

14. In the first place, it is impossible effectively to argue that Article 52 of Presidential Decree No 18/89, a general text on the procedure for the stay of execution of an administrative measure contested by an action for annulment, can already secure the complete, correct transposition of the directive. (4)

15. Without making a detailed comparative study of the content of that provision and that of the directive, it is sufficient to observe - as the Commission pointed out at the hearing - that all the measures provided for by the directive do not appear in the relevant national legislation. For example, Article 52 relates only to procedures for a stay of execution, whereas the directive refers more broadly in Article 2(a) to any `interim measures', `including measures to suspend or to ensure the suspension of the procedure for the award of a public contract'. Furthermore, reliance can be made on Article 52 in Greek law only if there is a main action (action for annulment of an administrative measure). In contrast, the interim measures envisaged by the directive are to be capable of being sought independently of any prior action. It may also be mentioned that, according to Article 1(3), the directive calls upon the Member States to make the review procedures available `... at least to any person having or having had an interest in obtaining a particular supply or public works contract and who has been or risks being harmed by an alleged infringement', whereas under the Greek provision the procedure is available only to an applicant for the annulment of a measure.

16. I would further observe that, in so far as it itself states that the measures required for the full implementation of the directive in its national law are in preparation and that the draft presidential decree in question has been amended to take account of observations from the Commission, the Greek Government has admitted, impliedly but necessarily, that the national legislation in force does not fully satisfy the requirements of the directive and that the directive was not implemented within the prescribed period.

17. The justifications put forward for the delays in adopting these measures, in particular the draft presidential decree mentioned, cannot be accepted either.

18. In the first place, the formal and procedural difficulties experienced in the course of the procedure, such as the joint examination by the competent ministries, are completely irrelevant:

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the Court has consistently held that an argument based on internal legal constraints is inadmissible. The Court takes the view that `... a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in Community directives'. (5)

19. Next, as far as concerns the case-law of the Council of State referred to by the defendant, which, it maintains, by interpreting the national provisions in force in conformity with the directive, secures, if not formal, at least substantive implementation of the directive, it must be observed first that most of the judgments cited were given in 1995 and, as such, cannot be effectively relied upon by the Hellenic Republic, since `... whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes'. (6) Consequently, to my mind, there is no need to dwell on the content of those judgments, irrespective of their importance in the arguments of the parties in the course of the proceedings.

20. Only judgment No 39/1991, which was given before the end of the pre-litigation procedure, might possibly be relevant. In that judgment, the Commission of the Council of State responsible for granting stays of execution provisionally suspended the execution of decisions relating to a procedure for the award of public works contracts in accordance with the aforementioned Article 52 on the application of a nature-protection association.

21. However, in my view no effects should attach to the reliance placed on that decision. In the first place, it relates to the field of public works contracts, whereas this action is confined to public supply contracts.

22. Above all, however, without even checking whether the Council of State's interpretation of the national legislation is consistent with the requirements of the directive, it is sufficient to recall that the Court has held that `... the fact that a practice is in conformity with the requirements of a directive may not constitute a reason for not transposing that directive into national law by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations. As the Court held..., in order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question.' (7)

23. I would further observe - even if the Hellenic Republic does not support this argument (8) - that to allow that the case-law in question is capable of justifying delays in the adoption of implementation measures would be liable to mean that case-law could be capable of securing due implementation of the directive.

24. This would run counter to the fundamental requirements underlying any transposition: those of legal certainty and adequate publicity. (9) The Court has stated on many occasions that the provisions of a directive must be implemented `with unquestionable binding force... with the specificity, precision and clarity required ... in order to satisfy the requirement of legal certainty' (10) and so that `... where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts'. (11)

25. It is, moreover, in view of those requirements of legal certainty and adequate publicity that, in mentioning the `measures necessary to comply with this Directive' which the Member States are to take, Article 5 expressly refers to `the texts of the main national laws, regulations and administrative provisions'. (12)

26. National case-law interpreting provisions of domestic law in a manner regarded as being in conformity with the requirements of a directive is not sufficient to make those provisions into

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measures transposing the directive in question.

27. Since the directive was not transposed within the prescribed period, the Commission's action must be held to be well founded.

28. Consequently, I propose that the Court declare that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, the Hellenic Republic has failed to fulfil its obligations under Article 5 of that directive. I further propose that the Hellenic Republic should be ordered to pay the costs in accordance with Article 69(2) of the Rules of Procedure.

(1) - OJ 1989 L 395, p. 33.

(2) - Specifically, Article 52 of Presidential Decree No 18/89 entitled `Codification of legislative provisions relating to the Council of State', which is concerned more particularly with the `procedure for the stay of execution of an administrative measure contested in an action for annulment'.

(3) - Judgments Nos 39/1991, 355/1995, 470/1995, 471/1995, 473/1995 and 559/1995.

(4) - In any event, even if it were to be held that that provision was capable of constituting a measure duly transposing the directive, there would none the less be an infringement for failure to notify the Commission in the prescribed period, since the provision in question was not relied upon by the Hellenic Republic until after the end of the pre-litigation procedure, for the first time in the rejoinder.

(5) - See, for example, Case C-253/95 Commission v Germany [1996] ECR I-0000, paragraph 12.

(6) - Case C-133/94 Commission v Belgium [1996] ECR I-0000, paragraph 17.

(7) - Case C-59/89 Commission v Germany [1991] ECR I-2607, paragraph 28.

(8) - First paragraph of point 1 of the rejoinder.

(9) - See to this effect the Opinion of Advocate General Tesauro in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others [1996] ECR I-0000, section 24.

(10) - Case C-59/89 Commission v Germany, cited above, paragraph 24.

(11) - Case 363/85 Commission v Italy [1987] ECR 1733, paragraph 7.

(12) - My emphasis.

DOCNUM	61995C0236
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; C ; opinions

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PUBREF	European Court reports 1996 Page I-04459
DOC	1996/06/20
LODGED	1995/07/06
JURCIT	61985J0363 : N 24 31989L0665-A01P3 : N 15 31989L0665-A02P1LA : N 15 31989L0665-A05 : N 2 25 28 31989L0665 : N 1 61989J0059 : N 22 24 31991X0704(02)-A69P2 : N 28 11992E169 : N 3 61994J0133 : N 19 61994J0178 : N 24 61995J0253 : N 18
SUB	Approximation of laws
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	Greece ; Member States
NATIONA	Greece
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Léger
JUDGRAP	Moitinho de Almeida
DATES	of document: 20/06/1996 of application: 06/07/1995

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Opinion of Mr Advocate General La Pergola delivered on 14 March 1996.
Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations - Directive 92/50/EEC.
Case C-234/95.

DOCNUM	61995C0234
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; C ; opinions
PUBREF	European Court reports 1996 Page I-02415
DOC	1996/03/14
LODGED	1995/07/05
JURCIT	31992L0050-A44P1 : N 2 31992L0050 : N 1 61994J0147 : N 3
SUB	Approximation of laws
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	France ; Member States
NATIONA	France
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	La Pergola
JUDGRAP	Jann
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Opinion of Mr Advocate General Elmer delivered on 8 February 1996.
Commission of the European Communities v Federal Republic of Germany.
Failure to fulfil obligations - Public works contracts - Failure to publish a tender notice.
Case C-318/94.

DOCNUM	61994C0318
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; C ; opinions
PUBREF	European Court reports 1996 Page I-01949
DOC	1996/02/08
LODGED	1994/12/06
JURCIT	31971L0305-A09LD : N 16 - 31 31989L0440-A05P3LC : N 16 - 31 31989L0440-A15P1 : N 28 - 30
SUB	Approximation of laws
AUTLANG	Danish
APPLICA	Commission ; Institutions
DEFENDA	Federal Republic of Germany ; Member States
NATIONA	Federal Republic of Germany
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Elmer
JUDGRAP	Jann
DATES	of document: 08/02/1996 of application: 06/12/1994

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Opinion of Mr Advocate General Lenz delivered on 29 June 1995.
Furlanis Costruzioni Generali SpA v Azienda Nazionale Autonoma Strade (ANAS).
Reference for a preliminary ruling: Tribunale amministrativo regionale del Lazio - Italy.
Council Directives 71/305/EEC and 89/440/EEC - Public contracts - Abnormally low tenders in relation to the transaction.
Case C-143/94.

DOCNUM	61994C0143
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; C ; opinions
PUBREF	European Court reports 1995 Page I-03633
DOC	1995/06/29
LODGED	1994/05/24
JURCIT	31971L0305-A29BIS : N 16 31971L0305-A29P5L1 : N 18 19 22 31971L0305-A29P5L4 : N 1 - 26 61981J0076 : N 14 18 31985L0337 : N 20 61985J0199 : N 14 16 61988J0103 : N 14 18 31989L0440-A01PT20 : N 1 - 26 61992C0396 : N 20 61992J0396 : N 20 31993L0037-A30P4 : N 1 31993L0037-A31 : N 16
SUB	Approximation of laws
AUTLANG	German
NATIONA	Italy
PROCEDU	Reference for a preliminary ruling
ADVGEN	Lenz

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JUDGRAP Kakouris

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Opinion of Mr Advocate General Lenz delivered on 12 September 1995.
Commission of the European Communities v Kingdom of Belgium.
Public contracts - Transport sector - Directive 90/531/EEC.
Case C-87/94.

DOCNUM	61994C0087
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; C ; opinions
PUBREF	European Court reports 1996 Page I-02043
DOC	1995/09/12
LODGED	1994/03/11
JURCIT	61989J0243-N39 : N 29 31990L0531-A01P6 : N 26 31990L0531-A02P1 : N 19 20 31990L0531-A02P2 : N 19 31990L0531-A02P6 : N 22 31990L0531-A04 : N 91 31990L0531-A04P2 : N 29 30 31990L0531-A15P1 : N 26 31990L0531-A16 : N 27 31990L0531-A17 : N 27 31990L0531-A27P1 : N 57 88 31990L0531-A27P2 : N 57 31990L0531-A27P3 : N 65 76 87 91 31990L0531-A32 : N 22 31990L0531 : N 1 27 30 76 88 91 31991X0704(02)-A42P2 : N 84 31991X0704(02)-A69P3 : N 103
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Belgium ; Member States

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NATIONA	Belgium
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Edward
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Opinion of Mr Advocate General Lenz delivered on 16 February 1995.
Commission of the European Communities v Hellenic Republic.
Failure of a Member State to fulfil its obligations - Directive 77/62/EEC - Framework agreement for the exclusive supply of dressing material for use in Greek hospitals and by the Greek army.
Case C-79/94.

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A - Introduction

1 On 11 July 1991 the Greek Ministry for Industry, Energy and Technology concluded an agreement with six Greek manufacturers of dressing materials. This `framework agreement' provided that the hospitals listed in Annex A of the agreement should purchase certain types of dressing material exclusively from those manufacturers. At the same time the six manufacturers undertook to produce these goods and supply them to those hospitals (Article 1 of the framework agreement). If in the future more hospitals were to be opened or other institutions made subject to the framework agreement, it was provided that such hospitals and institutions should also cover their requirements for the goods concerned exclusively from the said manufacturers (Article 8 of the framework agreement).

2 The framework agreement was to take effect for three years after it came into force. Entry into force was conditional on ratification by the Greek Minister for Industry, Energy and Technology, which was given by ministerial decree of 19 July 1991. The agreement also provided that its period of validity could be extended by one or two years (Article 14).

3 In a letter of 9 September 1991 the Commission asked the Greek Government to state its opinion on whether this procedure was compatible with Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts. (1)

4 As no reply was received to this letter, the Commission initiated the procedure laid down by Article 169 of the EC Treaty by giving the Greek Government, in a letter of 14 November 1991, an opportunity to submit its observations. In this letter the Commission stated its opinion that Directive 77/62 was applicable to the framework agreement concluded by the Greek Government and that the agreement ought therefore to have been the subject of a notice in the Official Journal of the European Communities pursuant to Article 9 of the directive. It is not disputed that no such notice was ever published.

5 The Greek Government contested these allegations. Accordingly, on 21 September 1992, the Commission delivered a reasoned opinion substantiating its allegations and examining the Greek Government's objections.

6 The Greek Government, in a letter of 10 December 1992, subsequently accepted that the Commission's view regarding the applicability of Directive 77/62 was correct. However, it claimed that the disputed agreement had not adversely affected competition in the Community and that there would be considerable difficulty in cancelling the framework agreement unilaterally, particularly as this would expose the Greek State to claims for damages by the manufacturers concerned. Furthermore, the Greek authorities had already complied with the Commission's recommendations. Thus, a provision in the framework agreement stipulating that only Greek primary products should be used in the manufacture of the dressing materials in question had been deleted. Consideration was also being given to refraining from exercising the option of extending the framework agreement beyond the proposed term of three years.

7 After the Commission had indicated that, in its opinion, the Treaty infringement of which it complained had not been remedied by these measures, the Greek Government sent a further letter on 13 February 1993 which described once again the measures which the Greek Government had taken

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or proposed to take and which had already been set out in the letter of 10 December 1992. The letter added that the Greek Government had informed the parties to the framework agreement that it was considering terminating that agreement unilaterally before the expiry date. The Greek Government also stated its intention to organize, before the end of 1993, an invitation to tender for the supply of dressing materials which would comply with all the requirements of Community law.

8 As the stated intentions of the Greek Government were not followed by concrete action, the Commission finally brought the matter before the Court of Justice pursuant to Article 169 of the EC Treaty. The Commission asks the Court:

(1) to declare that, by concluding a framework agreement for the exclusive supply by six Greek textile manufacturers of dressing materials for use by hospitals and the Greek army and by not publishing a notice to that effect in the Official Journal of the European Communities, the Hellenic Republic has failed to fulfil its obligations under Directive 77/62/EEC;

(2) to order the Hellenic Republic to pay the costs of the action.

9 The Hellenic Republic considers the action brought by the Commission to be inadmissible, but also raises objections on its merits. The defendant accordingly requests the Court to dismiss the action and order the Commission to pay the costs.

B - Analysis

Admissibility

10 The defendant considers the action inadmissible in two respects. First, it points out that it acknowledged, in its reply to the Commission's reasoned opinion, its failure to fulfil its obligations under the EC Treaty. At the same time, it explained in its reply that the framework agreement would not be extended beyond the planned term of three years and that the provisions of Community law would in future be complied with. In the defendant's opinion, the action brought by the Commission is abusive and in breach of the obligation to treat Member States equally. The Hellenic Republic refers in this connection to the procedure followed by the Commission in an action brought against Italy for failure to fulfil Treaty obligations. (2) In that case, it claims, the Commission treated as sufficient a written declaration that the provisions of Community law would be observed in the future.

Second, the defendant considers the action inadmissible because the Commission intervened only at the stage when the contested agreement was to be implemented. Under Article 3(1) of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (3) the Commission must take steps before the contract in question is concluded if it considers that the Community provisions concerning the award of public contracts have been infringed.

11 The second submission of the Greek Government must be dismissed immediately. If, in pursuing an infringement of the Community provisions in the field of public procurement, the Commission does not act as diligently as might have been expected in view of the circumstances of the case, this may be relevant to a decision on an application by the Commission for interim measures in the context of an action for failure to comply with Treaty obligations. (4) However, it in no way affects the admissibility of the action as such. In any event, the Commission has rightly pointed out that it informed the Greek Government of its objections as early as 9 September 1991, that is to say, less than two months after the framework agreement had entered into effect.

12 The purpose of Article 3(1) of Directive 89/665 was to enable the Commission to intervene with the Member States if, `prior to a contract being concluded', it considered that a clear and manifest infringement of Community provisions in the field of public procurement had been committed. The

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power in question is thus aimed at prevention. As the Commission rightly points out, this cannot affect the Commission's powers under Article 169 of the EC Treaty. This is confirmed by the Court's judgment of 24 January 1995 in an action for failure to fulfil Treaty obligations brought by the Commission against the Netherlands. (5) In that judgment the Court pointed out that `that special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty'. (6)

13 That question is in any case irrelevant here. If the Commission is to take steps `prior to a contract being concluded', this presupposes that it is aware of the contract before its conclusion. However, the defendant has not alleged (let alone proved) that the Commission was already aware of the framework agreement before 19 July 1991.

14 The defendant's first argument in support of the inadmissibility of the action likewise lacks conviction. The Hellenic Republic pleads that it has acknowledged and discontinued the failure in respect of Treaty obligations alleged by the Commission. This submission is particularly surprising in view of the fact that the defendant here also challenges the merits of the action brought by the Commission, that is to say, it specifically denies any failure to fulfil its obligations. However, the Greek Government's argument is untenable even if this inconsistency is overlooked. The argument is based primarily on the fact that the defendant gave the Commission a written undertaking to observe the relevant provisions of Community law in the future (that is to say, after the expiry of the framework agreement). In other words, the Greek Government takes the view that it rectified its alleged infringement of the Treaty by promising to comply with its Treaty obligations in the future.

15 There can be no serious doubt that this argument must be rejected. Member States would otherwise have a simple and convenient defence against actions under Article 169 of the Treaty for failure to fulfil their obligations. The present case offers a particularly good example of this. As already mentioned, the contested framework agreement was concluded in July 1991 for a period of three years. In its letter of 10 December 1992, thus at a time when not even half of the period had elapsed, the Greek Government informed the Commission that it was considering not extending the period of validity of the framework agreement. In its letter of 13 February 1993 it indicated that it might terminate the agreement before its expiry date. However, this was not done, as the statement of defence confirms. The Greek Government has not referred to any circumstances which would suggest that it was impossible for it to terminate the agreement prematurely. The general and unquantified reference to claims for damages which might possibly be brought by the manufacturers concerned against the Greek State in the event of termination is not sufficient for this purpose. The mere promise to adhere to Community law in the future could not remedy the infringement of the Treaty.

16 Contrary to the Greek Government's opinion, the action brought by the Commission against Italy for failure to fulfil Treaty obligations, which was the subject of the Court's judgment in Case 199/85, (7) does not support an argument to the contrary. That case concerned the construction of a solid-waste recycling plant by the Municipality of Milan, in relation to which the provisions of Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts were disregarded. The Commission's reasoned opinion in that case complained of this infringement and requested Italy to take `the necessary measures'. The reasoned opinion added that the necessary measures were to be understood as including in particular a written undertaking by the Municipality of Milan to observe all the provisions of Directive 71/305 in the future.

17 However, the Hellenic Republic's reliance on the procedure followed by the Commission in the above case is mistaken in at least two respects. First, it must be observed that the Commission brought an action for infringement of the Treaty before the Court in that case even though the Mayor of Milan had made a written declaration in the abovementioned terms, and the Court upheld

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the Commission's application. It should be noted that, in connection with the question of admissibility, the Court pointed out in its judgment that the Italian authorities had adopted no `practical measure' to give effect to that declaration. (8) Second, it is significant that the original situation in that case was quite different from the present situation. The Commission delivered its reasoned opinion in the earlier case on the assumption that the construction work in question was as good as finished and therefore the contracts which had been awarded could no longer be suspended or cancelled. (9) In that context it is clear why the Commission was inclined to accept an undertaking with regard to the future. In the present case, by contrast, the Greek Government was perfectly able to remedy the infringement of the Treaty - at least, with regard to the remaining term of the framework agreement - on receipt of the Commission's reasoned opinion because the effects of the framework agreement were far from exhausted at that date.

18 In its statement of defence the Greek Government also seeks to rely on the fact that one of the provisions of the framework agreement was cancelled in response to the Commission's remonstrations. As already mentioned, this was a clause to the effect that only Greek primary products should be used in the production of the dressing materials in question. While the cancellation of this condition was undoubtedly a step in the right direction, this amendment was of course not sufficient to remedy the Treaty infringement alleged by the Commission as it did not affect the substance of the framework agreement, that is to say, the obligation on the hospitals and other institutions to obtain their supplies solely from the six Greek manufacturers named in the agreement.

19 For the sake simply of completeness, it may be mentioned that the fact that the Commission's reasoned opinion (and the application in this action itself) complains of the exclusive purchasing obligation for `hospitals and the army', whereas the letter of 14 November 1991 requesting the Greek Government's observations referred only to `hospitals', has no bearing on the question of admissibility. As the representative of the Greek Government explained during the hearing, the exclusive purchasing obligation applied from the beginning also to army hospitals. The wording chosen by the Commission in its letter therefore corresponds to the terms of the application. This, in my opinion, is sufficient. (10) The Greek Government has in any event raised no objection on this point.

Substance

20 In the course of time Directive 77/62 has undergone many amendments (11) and was finally recast by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts. (12) According to the Court's case-law, the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion. (13) In the present case, therefore, regard must be had to the factual and legal situation towards the end of 1992. The version of the provisions applicable at that time, which must therefore be examined here, appears in Council Directive 88/295/EEC of 22 March 1988. (14) In its application the Commission refers to the provisions of the original version of the directive. As the subsequent amendments do not entail any material alterations so far as the present case is concerned, the position is not affected. I shall refer below to the provisions applying at the end of 1992.

21 According to Article 9(2) of Directive 77/62, contracting authorities who wish to award a public supply contract must make known their intention by means of a notice. However, pursuant to Article 5(1)(a), first indent - overlooking the supply contracts referred to in Article 5(1)(a), second indent, which are not at issue in the present case - this obligation applies only to public supply contracts concluded by contracting authorities within the meaning of Article 1(b) of the directive and the estimated value of which is not less than ECU 200 000. Under Article 1(a) of the directive, `public supply contracts' are `contracts for pecuniary interest concluded in writing' between a

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supplier and one of the contracting authorities defined in Article 1(b) for `the purchase, lease, rental or hire purchase, with or without option to buy, of products'.

22 The Commission contends that the Greek Ministry for Industry, Energy and Technology and the hospitals and other institutions covered by the disputed agreement must be regarded as `contracting authorities' within the meaning of the directive. This seems to me correct and the Greek Government does not disagree. However, the latter has raised the objection that the framework agreement does not come within the scope of the directive because it is only a `structure' within which a large number of supply contracts are concluded, none of which exceeds ECU 200 000 in value.

23 The Greek Government thus takes the view that the supply contracts concluded by the hospitals and other institutions concerned should be considered on an individual basis. As none of them has a value of more than ECU 200 000, it argues, the directive does not apply at all. This submission may imply a further argument, concerning the question whether the disputed framework agreement is a `supply contract' at all within the meaning of the directive. It is not entirely clear from the submissions of the Greek Government's representative at the hearing whether the Greek Government opposes the Commission's application on this point also. I shall therefore deal briefly with it just in case this is so.

24 The first argument strikes me as unsound. By concluding the framework agreement the Greek Government (or the responsible Ministry) itself amalgamated the separate supply contracts into a single unit. That being so, the only consistent course to follow is to consider the whole, rather than individual supply contracts, as a basis for calculating the value. This is supported by the Commission's observation that otherwise it would be possible to circumvent the provisions of Directive 77/62. It is common ground that the value calculated on the basis of all the supply contracts covered by the framework agreement exceeds the threshold of ECU 200 000.

25 It may of course be more important to determine whether the framework agreement is a `supply contract' at all within the meaning of the directive. In order to fill out the framework created by the framework agreement it is of course necessary for the hospitals and other institutions concerned to place specific supply contracts. Furthermore, `pecuniary interest' is payable only on the basis of individual contracts. However, these considerations are rather theoretical. All the principal contractual elements, in particular the exclusive purchasing obligation and the price calculation, are already laid down in the framework agreement, with the result that the individual supply contracts do little more than specify the quantity to be supplied. In those circumstances there should hardly be any doubt that, having regard to the interpretation required here, which must be guided by the aims of the directive, a framework agreement of this kind must be treated as a supply contract within the meaning of the directive. (15) If this were not accepted, the present action would have to be dismissed (because there would be no breach of Directive 77/62). However, the framework agreement would then quite certainly have to be classified as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the EC Treaty in so far as it prevents tenderers from other Member States from supplying specific customers in Greece.

26 The Greek Government also claims that in the present case it refrained from publishing the notice required by Article 9 of the directive because no tenderers from other Member States have so far shown any interest in such supply contracts. A notice would for that reason have been a meaningless formality. This contention must be categorically rejected. Clearly, it is perfectly possible that the situation described by the Greek Government is attributable precisely to the fact that no information was available to potential tenderers from other Member States.

27 Finally, the Greek Government contends that such notice was unnecessary by reason of one of the derogations provided for by Article 6 (16) of the Directive. This provision relates to cases where `for technical or artistic reasons, or for reasons connected with protection of exclusive

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rights, the goods supplied may be manufactured or delivered only by a particular supplier'. At the hearing before the Court the representative of the Greek Government was unable to explain how this provision could apply to the present case, which concerns the supply of dressing materials. As the Court has recently reconfirmed (and precisely with reference to this provision of Directive 77/62), the burden of proof in this connection is borne by the party which seeks to rely on the derogation. (17) The claim made by the Greek Government during the hearing that the dressing materials in question could have been supplied in any case only by the six Greek manufacturers is of no significance - quite apart from the fact that the representative of the Greek Government was unable, in response to a question from the Court, to produce proof of this - because the directive does not provide for an exception in this respect.

C - Conclusion

I propose accordingly that the Court uphold the Commission's application and order the Hellenic Republic to pay the costs of the action.

(1) - OJ 1977 L 13, p. 1.

(2) - Judgment in Case 199/85 Commission v Italy [1987] ECR 1039.

(3) - OJ 1989 L 395, p. 33.

(4) - See the order of the Court of Justice in Case C-87/94 R Commission v Belgium [1994] ECR I-1395, in particular paragraph 42.

(5) - Case C-359/93 Commission v Netherlands [1995] ECR I-0000.

(6) - Paragraph 13.

(7) - See footnote 2 above.

(8) - Paragraph 8.

(9) - See my Opinion in Case 199/85 [1987] ECR 1047, at p. 1049, point 8.

(10) - See also the judgment in Case 274/83 Commission v Italy [1985] ECR 1077, paragraph 21, which states that `such strict requirements' cannot be imposed with regard to the initial letter as can be imposed with regard to the reasoned opinion.

(11) - Most recently by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(12) - OJ 1993 L 199, p. 1.

(13) - See the judgment in Case C-200/88 Commission v Greece [1990] ECR I-4299, paragraph 13.

(14) - Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 127, p. 1). The later amendments of Directive 77/62 by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1) are not relevant to the present case.

(15) - See the similar view expressed by the Commission in its Guide to the Community Rules on Open Government Procurement (OJ 1987 C 358, pp. 1, 16).

(16) - The Greek Government refers to Article 6(1)(b) of the directive. In the version of the directive which is applicable here, this provision appears in Article 6(4)(c).

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(17) - Judgment in Case C-328/92 Commission v Spain [1994] ECR I-1569, paragraph 16.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; C ; opinions
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DOC	1995/02/16
LODGED	1994/03/01
JURCIT	31971L0305 : N 16 31977L0062-A01LA : N 21 31977L0062-A01LB : N 21 31977L0062-A05P1LA : N 21 31977L0062-A06 : N 27 31977L0062-A09 : N 4 26 31977L0062-A09P2 : N 21 31977L0062 : N 3 8 20 61983J0274 : N 19 61985C0199 : N 17 61985J0199 : N 10 16 17 31988L0295 : N 20 61988J0200 : N 20 31989L0665-A03P1 : N 10 12 11992E030 : N 25 11992E169 : N 12 15 31992L0050 : N 20 61992J0328 : N 27 31993L0036 : N 20 61993J0359 : N 12 61994O0087 : N 11
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions

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DEFENDA	Greece ; Member States
NATIONA	Greece
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Moitinho de Almeida
DATES	of document: 16/02/1995 of application: 01/03/1994

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Opinion of Mr Advocate General Elmer delivered on 28 March 1995.
Commission of the European Communities v Italian Republic.
Action for failure to fulfil obligations - Public works contracts - Failure to publish a notice of invitation to tender.
Case C-57/94.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; C ; opinions
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LODGED	1994/02/09
JURCIT	31971L0305-A02 : N 8 31971L0305-A09LB : N 3 8 9 12 17 - 24 31971L0305-A09LD : N 8 9 12 31971L0305-A12 : N 8 31971L0305-A26 : N 22 31971L0305 : N 1 - 28 61983J0051 : N 11 61985J0199 : N 20 61991J0234 : N 11 11992E169 : N 3 4 9 - 11 61992J0296 : N 5 9 10
SUB	Approximation of laws
AUTLANG	Danish
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful

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ADVGEN Elmer

JUDGRAP Schockweiler

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Opinion of Mr Advocate General Elmer delivered on 11 May 1995.
Commission of the European Communities v Federal Republic of Germany.
Actions against Member States for failure to fulfil obligations - Public works and public supply contracts.
Case C-433/93.

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AUTHOR	COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
FORM	CONCLUSIONS
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; CASES ; 1993 ; C ; OPINIONS
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LODGED	1993/11/03
JURCIT	31988L0295 : N 2 16 31988L0295-A20 : N 2 31989L0440 : N 3 16 31989L0440-A03 : N 3 61984J0029 : N 6 61985J0363 : N 6 11 61988J0361 : N 6 31980L0779 : N 6 31989L0665 : N 6 10 31989L0665-A02P8 : N 7 61987J0031 : N 9 61988J0103 : N 9 31989L0665-C2 : N 10 11957E189-L3 : N 11 12 61979J0102 : N 12
SUB	APPROXIMATION OF LAWS
AUTLANG	DANISH
APPLICA	Commission
DEFENDA	Federal Republic of Germany
NATIONA	FEDERAL REPUBLIC OF GERMANY
PROCEDU	PROCEEDINGS CONCERNING FAILURE BY MEMBER STATES-SUCCESSFUL
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JUDGRAP	Kapteyn

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Opinion of Mr Advocate General Léger delivered on 14 February 1995.
European Parliament v Council of the European Union.
Technical assistance to the independent States of the former Soviet Union and to Mongolia - Consultation of the Parliament.
Case C-417/93.

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1. By application lodged on 12 October 1993, the European Parliament (hereinafter "the Parliament") seeks the annulment of Council Regulation (Euratom, EEC) No 2053/93 of 19 July 1993 concerning the provision of technical assistance to economic reform and recovery in the independent States of the former Soviet Union and Mongolia. (1)

2. The case seeks a ruling from the Court on two key questions in the relationship between the Parliament and the Council. Is the requirement for genuine consultation of Parliament satisfied where the Council deliberates on a proposal for a Commission regulation before the Parliament delivers its opinion, and adopts that regulation four days after the latter' s opinion? Can the Council study the proposal and suggest amendments before the matter has even been referred to the Parliament for its opinion?

3. Regulation No 2053/93 was adopted in the following circumstances.

4. The TACIS assistance programme was established for 1991 and 1992 by Council Regulation (EEC, Euratom) No 2157/91 of 15 July 1991. (2)

5. On 25 November 1992, the Commission adopted a proposal for a regulation [COM (92) 475 final] (3) enabling the technical assistance programme to the new independent States to be continued on the basis of indicative programmes for a three-year period. (4) The legal basis of that proposal, like that of Regulation No 2157/91, was Article 235 of the EEC Treaty and Article 203 of the EAEC Treaty.

6. That proposal was sent by the Commission to the Council on 15 January 1993 and communicated to the Parliament for information on the same day.

7. Following study by a Council working party called "former USSR", a document was submitted to COREPER on 4 March 1993. (5) The Council considered the proposal for a regulation on 5 April 1993 and noted "a wide convergence of views". (6) It was agreed to reconsider the proposal when the Parliament had delivered its opinion.

8. On 5 March 1993, the Council sent the Commission' s proposal to the Parliament for its opinion. It requested that the opinion be delivered at the April sitting. (7)

9. On 12 March 1993, the President of the Parliament referred the proposal to the relevant committees for consideration.

10. On 23 March 1993, the Council confirmed the step it had taken and sought to implement the urgent procedure provided for in Article 75 of the Rules of Procedure of the Parliament. (8) That request was rejected on 20 April 1993. (9)

11. A draft report (10) was considered on 26 April 1993 by the "External Economic Relations" committee (hereinafter "the REX committee") which unanimously adopted a draft legislative resolution on 5 May 1993.

12. On 27 May 1993, the Parliament adopted almost all the amendments proposed by the REX committee. (11) The rapporteur however had the vote on the draft legislative resolution postponed pursuant to Article 40(2) (12) of the Parliament' s Rules of Procedure, (13) "In view of the Council' s position...". (14)

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13. On 16 June 1993, the Council again requested that the urgent procedure be used, if necessary by convening an extraordinary session, so that the opinion could be delivered in June.

14. On 22 June 1993, the Parliament agreed to that request.

15. After a final referral back to committee on 24 June 1993, the legislative resolution concluding the consultation procedure was adopted on 14 July 1993: the Commission' s proposal was rejected. (15)

16. The Council finally adopted Regulation No 2053/93 on 19 July 1993.

17. The application for annulment is based on three pleas in law:

° the circumstances of the procedure for consulting the Parliament were unlawful. The consultation procedure was fictitious and took place in breach of Article 5 of the EEC Treaty;

° the Parliament should have been reconsulted;

° Regulation No 2053/93 is unlawful in that it provides that it may be amended at the Council' s discretion, without the involvement of the Parliament.

18. I will consider those three pleas in turn.

I ° The unlawfulness of the consultation procedure

19. It has been stated that "the Parliament is the only one of the institutional participants in the consultation procedure (political institutions (16) and Member States) not to be present at Council meetings". (17)

20. That indicates the importance for inter-institutional balance of respecting the Parliament' s prerogatives in the consultation procedure, even if that procedure is no longer, since the Single European Act, the only means by which the Parliament can make its voice heard in the legislative process.

21. The case-law of the Court of Justice has established three principles:

° consultation is an essential formality;

° consultation must be genuine;

° the legislative process is not discretionary.

22. The application for annulment which culminated in the judgment in Roquette Frères v Council (18) concerned a regulation adopted by the Council without following the consultation procedure.

23. The Court made the following succinct statement:

> "The consultation provided for in the third subparagraph of Article 43(2), as in other similar provisions of the Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned in void". (19)

24. The Court has applied that principle not only where there had been no consultation but also where there had been insufficient consultation. (20)

25. Even though in practice the Commission normally sends a copy of its proposals for regulations

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to the Parliament for information, (21) the latter may be formally requested to give an opinion by the Council alone. The requirement for consultation is not satisfied simply by submitting such a request. "... observance of that requirement implies that the Parliament has expressed its opinion." (22) The pure and simple rejection by the Parliament of the proposal is an opinion within the meaning of the Treaty. (23)

26. The consultation must be genuine. It must be such as "... to affect the substance of the measure adopted". (24) The Parliament must be able to influence the content of legislative measures adopted by the Council. It follows that the Council must await the Parliament' s opinion before adopting the measure.

27. Even though the adoption of an opinion by the Parliament is not subject to any time constraints, I consider that its powers are not unlimited: in my view it follows from paragraph 36 of the judgment in Roquette Frères v Council, cited above, that the Council may act notwithstanding the absence of the Parliament' s opinion if it establishes that it has "... exhausted all the possibilities of obtaining the preliminary opinion of the Parliament", if the latter is not to be given a right of veto. (25)

28. It can be seen that consultation, where it is required, gives rise to obligations both on the Council and on the Parliament. (26)

29. Finally, the legislative process is not discretionary. It is not left to the discretion of the Member States or the institutions: (27)

> "In accordance with the balance of powers between the institutions provided for by the Treaties, the practice of the European Parliament cannot deprive the other institutions of a prerogative granted to them by the Treaties themselves". (28)

30. The Court held in United Kingdom v Council (29) that:

> "... the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves". (30)

31. Those three principles illustrate the application of a general principle of cooperation in good faith between institutions, based on the fact that the latter are united in the attainment of the common objectives set by the Treaty (31) and interlinked in the decision-making process.

32. That principle is present in Article 5 of the EEC Treaty which applies to the Member States ° but which also imposes on the Community institutions reciprocal duties of cooperation in good faith with the Member States (32) ° and in Article 162 of the Treaty (33) which governs the relations between the Council and the Commission.

33. The Court has applied it to the relations between the Council, the Commission and the Parliament in the context of the budgetary procedure, based essentially, according to the judgment in Greece v Council, (34) on "inter-institutional dialogue". (35)

34. Even though the powers of the Parliament are not as extensive for the purposes of the consultation procedure as they are for the purposes of the budgetary procedure, that dialogue is equally indispensable. That is particularly so in the context of Article 235 of the EEC Treaty which provides for the Council to legislate in areas in which the Treaty has not conferred on it the power to act. The parameters within which the legislature may act are not as clearly laid down there as they are, for example, in relation to the common agricultural policy to which the consultation procedure also applies (Article 43(2) of the EEC Treaty).

35. Has there been such a dialogue in this case?

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36. It has not been denied that the Parliament was consulted on the Commission' s proposal for the regulation. The only issue is the circumstances of that consultation. They give rise to three questions which I will consider in turn.

A ° May the Council deliberate on the proposal for the regulation before receiving the Parliament' s opinion but after sending the request for the opinion to the latter?

B ° May the Council deliberate on the proposal for the regulation before even sending the request for the opinion to the Parliament?

C ° Has the Council in this case cooperated in good faith with the Parliament?

° A °

37. May the Council deliberate on the Commission' s proposal before the Parliament has given its opinion? What are the Council' s powers while awaiting the Parliament' s opinion?

38. It is clear from Article 235 of the Treaty that the Council acts after consulting the Parliament on a proposal from the Commission. May it discuss the document before that consultation?

39. With the passage of time and the increase in the Community' s legislative activities, the practice of the legislative process requiring consultation of the Parliament has developed significantly.

40. As early as 16 October 1973, in a communication addressed to the Parliament, the Council undertook to facilitate the consultation procedure:

> "The Council has adopted internal measures designed to ensure that the decision to consult the European Parliament on a proposal from the Commission can be made within the shortest possible time (in principle one week after receipt of the Commission proposal)... In addition, the Council has adopted internal measures designed to ensure that the opinions of the European Parliament can be considered in the best conditions". (36)

41. From 1986, two trends were reflected in questions to the President by several Members of the European Parliament. (37) On the one hand, it seems that the various Commission proposals are discussed simultaneously in the Council and the Parliamentary committees. It seems that such a practice is not exceptional: "In practice, work on a Commission proposal begins immediately within Council bodies, without waiting for the Parliament' s Opinion, but the final decision cannot be taken until the Opinion has been received and considered by the Council". (38) The effect is that the Parliament' s discussions are based on Commission texts which have been superseded. On the other hand, it is said that the Council increasingly adopts provisional decisions, "pending the Parliament' s opinion". The figures quoted in the replies by the President of the Parliament to Mr de Vries' s questions (39) show that that practice has unquestionably become widespread. (40)

42. By a resolution of 10 October 1990, (41) the Parliament "1. Call[ed] on the Council to adhere to the procedures laid down in the Treaties and to refrain from conducting political agreements before having considered Parliament' s opinions".

43. On 21 November 1990, the Parliament adopted a resolution on the obligation for the Council to await Parliament' s opinion (42) in which it noted that "in numerous cases" the Council had begun work on a Commission proposal before the Parliament had delivered its opinion and that it had even concluded political agreements in advance.

44. Is this practice compatible with the Parliament' s rights under the consultation procedure?

45. It would be futile to wish to constrain the Council to await the Parliament' s opinion on a Commission proposal before starting any study, discussion or consideration of the proposal in question. (43) In my view, the practice is justified for legal reasons and for reasons of legislative

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policy.

46. I have the following points in relation to the latter:

° the inevitable delays in the procedure for consulting the Parliament;

° the latter' s limited acceptance of the urgent procedure in Article 97 of its Rules of Procedure (formerly Article 75);

° the necessity for prompt legislation in all the areas where regulations are laid down for a limited period or must be periodically renewed;

° the time needed, in areas where unanimity is required, to work towards a compromise within the Council;

° enrichment of the discussions within the Parliament' s committees before which the Council representative will, if relevant, have to be in a position to describe his institution' s position.

47. Such a practice is more fundamentally justified by legal reasons.

48. First, nothing requires the Council to abstain from acting until the Parliament' s opinion has been delivered. (44)

49. Secondly, and above all, the consultation procedure does not confer on the Parliament the right to give an opinion on the latest version of the text prepared by the Council. In essence, that text is flexible and changing until the adoption of the definitive regulation. Although it precludes the Council from finally adopting an act before receiving the Parliament' s opinion, that procedure at no time requires that the text on which the Parliament gives its opinion and the text as it is after the Council has worked on it should correspond exactly. The Parliament gives its opinion on the Commission' s proposal. It is precisely that which distinguishes the consultation procedure from the legislative co-decision procedure where "agreement on a joint text" (45) is sought or from the cooperation procedure where the Parliament is consulted not only on the Commission' s proposal but also on the "common position" adopted by the Council. (46) Finally, and in contrast to the assent procedure under which the Council may not adopt a measure different from that on which the opinion was given, the consultation procedure permits it to depart from the text submitted to the Parliament.

50. In order to ensure that the Parliament is genuinely consulted, guarantees have been established both by the Treaty and by the case-law of the Court of Justice and parliamentary practice.

51. Before adopting the opinion, the Commission in principle keeps the relevant committee of the Parliament regularly informed of the principal trends of the Council' s discussions, in particular where those discussions are moving away from its initial proposal, in accordance with the code of conduct which it presented to the Parliament in February 1990. (47)

52. If the Parliament approves the proposal for a regulation without amendment and if there are no substantial amendments in the final version of the regulation as a result of the preliminary discussions within the Council, the Court has held, in Tunnel Refineries v Council, (48) that that regulation may be adopted without reconsulting Parliament once the latter has delivered its opinion.

53. The Parliament must be reconsulted if the Council retains substantial amendments in the version of the document which is finally adopted, as the Court has consistently held in relation to reconsultation. (49) There is no reconsultation for minor amendments to the text.

54. If the Council makes amendments to the proposal in the course of the preliminary discussions, the Commission may use its prerogative to submit an amended proposal to the Council which forwards

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it to the Parliament, thus enabling the latter to debate on the basis of an up-to-date document and to have some influence on the Council' s deliberations. As long as the proposal has not been decided upon by the Council, the Commission may amend it throughout the process leading up to the adoption of a Community act, pursuant to Article 189a(2) of the EC Treaty, (50) but neither the Council nor the Parliament may force it do so. That possibility was seen by Wyatt and Dashwood: "... the Commission may alter its proposal in order to facilitate decision-making within the Council". (51)

55. In that event, the Parliament therefore need not, strictly speaking, be "reconsulted" (not having yet issued its opinion) but is consulted on an amended proposal. That is exactly what the Parliament proposed in its resolution of 21 November 1990 (52) on the obligation to await the Parliament' s opinion in the cooperation procedure:

> "[The Parliament] Stresses... that practices introduced for the completion without delay of the internal market on 1 January 1993 frequently require almost simultaneous consideration of legislative proposals by the European Parliament and the Council and therefore requests the Commission to take advantage of the opportunity given to it by Article 149(3) of the Treaty and to formally submit a modified proposal before first reading by the European Parliament to take account of the work done by the Council if the latter leads to the Commission deciding to modify substantially the initial proposal, thereby permitting the European Parliament to deliver an opinion on a legislative proposal without being overtaken by events".

56. To that effect the Parliament, at its sitting on 15 September 1993, (53) adopted a new Rule 56 of its Rules of Procedure which provides:

> "Modification of a proposal by the Commission
>
> 1. If the committee responsible, during its examination of a Commission proposal, becomes aware that the Council intends to amend substantially this proposal, it shall formally ask the Commission whether it intends to modify its proposal.
>
> 2. If the Commission declares that it intends to modify its proposal, the committee responsible shall postpone its examination of this proposal until it has been informed about the new proposal or amendments by the Commission.
>
> 3. During the examination of a Commission proposal in the committee responsible, the Commission may also on its own initiative table amendments to its proposal directly in the committee.
>
> 4. If the Commission declares, following a request under paragraph 1, that it does not intend to modify its proposal, the committee responsible shall proceed with its examination of the proposal. The declaration of the Commission shall be annexed to the report and shall be considered by Parliament as binding on the Commission even after the completion of the first reading.
>
> 5. If, following a Commission declaration under paragraph 4, the Council, notwithstanding the position of the Commission, proceeds to a decision which substantially modifies the original Commission proposal, the President of Parliament shall remind the Council of its obligation to consult Parliament again."

57. Note that by the wording of that rule the Parliament implicitly accepts that the Council may, before receiving the Parliament' s opinion, debate a Commission proposal.

58. The procedure laid down by that article in my view serves to safeguard the Parliament' s prerogatives. Because the Commission presents an amended proposal, the Parliament will be consulted on a document which takes account of any changes arising from negotiations within the Council and it may exert a real influence on the latter' s deliberations.

59. The Parliament is not however dependent on the Commission. The fact that the latter, if it

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does not see fit to present an amended proposal, takes no action does not obviate the need for the Parliament to be reconsulted where there has been substantial amendment.

60. But to confer on the Parliament the right, in the name of genuine consultation, to be consulted on the latest draft after the Council has worked on it, whatever the importance of the latter' s amendments to the proposal, in my view undermines the consultation procedure and turns it into a type of cooperation procedure.

61. Let me repeat, it is on the Commission' s proposal that the opinion must be given, on the understanding that the Parliament will be informed of any substantial amendments to that proposal which the Council may initiate, whether by a new Commission proposal or by way of reconsultation.

62. On the other hand, the Council' s position cannot be definitive and is necessarily subject to amendment for so long as the opinion of the Parliament has not been delivered. (54)

63. I consider that the constitutional principle of cooperation in good faith between institutions is respected by the "inter-institutional dialogue" to which the Court referred in Greece v Commission, cited above.

64. To conclude, on that first point I consider that the Council and the Parliament can consider the proposal simultaneously, on the understanding that reconsultation is required if the preliminary discussions and political agreements within the Council have culminated in substantial amendments in the regulation finally adopted.

65. It may be seen that the reply to the first plea in law depends on whether there has been substantial amendment. That plea is thus linked to the second, concerning reconsultation by the question common to both: did the Council substantially amend the Commission' s initial proposal?

° B °

66. What is the position when the Council deliberates on the Commission' s proposal and amends it even before referring it to the Parliament? May it send the Parliament a request for consultation based on a text which does not reflect its own most recent deliberations?

67. The constitutional principle of cooperation in good faith between institutions requires that the text of the proposal submitted to the Parliament for its opinion and that considered by the Council be identical.

68. What is the position, in the light of that principle, when the Council and the Parliament have received an identical text but, when the Parliament receives the Commission' s initial proposal from the Council, that text has already been amended within the Council?

69. I have three comments on this.

70. First, such a question would not arise if the Council sent the request for an opinion to the Parliament as soon as it received the Commission' s proposal or before starting to consider it. (55)

71. Secondly, since as I have shown the opinion of the Parliament concerns the Commission proposal and not the latest version of the text being deliberated within the Council, the Community rules of legislative procedure do not mean that the Council cannot start discussing the proposal before the request for the opinion has even been sent, provided that it always keeps open the option of modifying its provisional stance in the light of the Parliament' s opinion. It cannot therefore at that stage adopt a definitive text.

72. In this case,

° before the request for the Parliament' s opinion was sent on 5 March 1993, the proposal had been

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considered neither by COREPER (which considered it for the first time on 24 March 1993) nor by the Council (which was to consider it first on 5 April 1993). As at 5 March 1993, there was a working draft drawn up by the "former USSR" group which was called a provisional report and the text of the regulation "reflecting the group' s work to date";

° the text prepared by the "former USSR" group on 4 March 1993, that is to say on the day before referral to the Parliament, was not a final version: the question of applying the TACIS regulation to Mongolia had not been settled. (56) The list in Annex II of the areas to be given priority in technical assistance had not been definitively decided and was subject to numerous qualifications. The proposed committee was a management committee and four Member States expressed a wish for a type III procedure. (57) The final regulation followed that formula.

73. It accordingly seems exaggerated to claim that on 5 March 1993 the proposal "... was no longer current..." (58) or "... that before referral to the Parliament, discussions within the Council had made that text obsolete". (59)

74. Thirdly, the amendments to the proposal considered within the Council before the request for an opinion was sent do not affect the lawfulness of the procedure since, like amendments made after sending the request, they will give rise to reconsultation if they are substantial and if they are included in the final regulation.

75. The limits to the Council' s power to deliberate on the proposal even before the Parliament examines it are to be found in the abuse of the law which would be committed if it were to leave the latter in total ignorance of the changes made to the text by the Council. It is that issue which I must now consider.

° C °

76. I consider that there was cooperation in good faith between institutions which gave the Parliament the means of knowing the Council' s position on the principal points of disagreement, given that:

° it seems that the Council never had any intention of dispensing with the opinion of the European Parliament; (60)

° the REX committee was aware that the Council intended to add an Annex II listing the sectors to be given priority in assistance and even incorporated it as part of amendment no 20 which it moved. It also knew that the Council was considering establishing a regulatory committee; (61)

° the Parliament was informed of the Council' s intended amendment on the question of comitology by the Commission' s representative at the debate. (62) It was moreover the Council' s position on that question (63) which led the Parliament to deliver a negative opinion; (64)

° the Council was represented at the discussion before the Parliament on 26 and 27 May 1993.

77. I will make one final point. It is not certain that the Parliament did everything in its power to influence the Council' s decision:

° the Council would of necessity have redebated the text if amendments had been submitted to it. The Commission would also have been able to accept any amendments by submitting an amended proposal. (65) The Council could not have departed from it except unanimously. (66) The Parliament preferred to deliver an opinion which simply rejected the Commission' s proposal outright;

° the Parliament would also, in delivering its opinion, have been able to initiate the conciliation procedure provided for by the joint declaration of 4 March 1975, (67) which was moreover recommended in the draft legislative resolution drawn up by the REX committee, at paragraph 4. The principal point of friction between the Council and the Parliament here is known to have concerned comitology. In a resolution of 23 October 1986, the European Parliament had specifically expressed the wish

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to be able to "... demand the opening of the conciliation procedure with the Council if the Council wishes to provide for a committee procedure in a legal act". (68)

78. I accordingly consider that the consultation of the Parliament was not fictitious and that its prerogatives were not infringed, provided that the amendments decided on by the Council were not substantial, in which case reconsultation was required. That is precisely the subject matter of the second plea in law.

II ° The obligation to reconsult

79. The obligation to reconsult the Parliament is not laid down by the Treaty. The Court however has held:

> "... the duty to consult the European Parliament in the course of the legislative procedure, in the cases provided for by the Treaty, includes a requirement that the Parliament be reconsulted on each occasion when the text finally adopted, viewed as a whole, departs substantially from the text on which the Parliament has already been consulted, except where the amendments essentially correspond to the wish of the Parliament itself". (69)

80. According to the Parliament, four substantial amendments were made to the Commission' s proposal:

° concerning the beneficiaries of TACIS assistance (Article 2);

° concerning the material scope of the regulation with the addition of an Annex II;

° by adding a new condition of reciprocity (Article 7(4));

° as to comitology (Article 7). The Council replaced the management committee by a regulatory committee.

81. The first point is a technical provision intended to prevent Mongolia from falling simultaneously within the scope of financial and technical aid under Regulation (EEC) No 443/92 (70) and TACIS assistance. That provision simply enabled Mongolia, which already benefited from assistance programmes, to be maintained in the TACIS programme. (71) Mongolia is included in the beneficiaries of the TACIS programme both in the proposal for a regulation and in the regulation itself. The addition of the new Article 2 in the latter text simply enabled overlapping aid to be avoided. In its opinion of 20 April 1993, the budget committee "... considers it important that Mongolia is among the beneficiaries, in the light of its situation and its need for aid, comparable to that of several independent States, and of that State' s wish to put in place a democratic political system". (72) In paragraph 4 of its explanatory memorandum, the report of the REX committee suggests quite directly that Mongolia should not be able to aggregate the aid to developing countries in Asia under Regulation No 443/92 and that under the TACIS programme. (73)

82. The new Article 2 alters the arrangements for the assistance to Mongolia. It does not affect the substance of the regulation.

83. On the second point, the addition of Annex II did not require a fresh consultation of the Parliament. Annex II lists "in particular" the "indicative" (74) areas which are priority subjects for technical assistance. That list is by way of example and is not exhaustive. It replaces Article 3(3) of the Commission proposal which provided:

> "Technical assistance shall give priority to the fields of human resources development; support for enterprises, including financial services; food production, distribution and marketing; energy and transport".

84. That provision, which is not exhaustive either, excludes none of the areas referred to in Annex II.

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85. Moreover, that annex is practically identical to amendment no 24 creating an Annex Ia, adopted by the Parliament on 27 May 1993. (75)

86. Replacing Article 3(3) of the proposal by Article 4(3) of and Annex II to the regulation amounts to altering the method of defining the material scope of the regulation. Even though Annex II cites by way of example more areas, it does not substantially modify the scope. It is a "change of method rather than of substance", within the meaning of paragraph 23 of the judgment in Buyl and Others v Commission, cited above.

87. On the third point, it will be noted that the introduction of a condition of reciprocity simply reflects settled practice in the matter and conflicts with neither the principles nor the scheme of the TACIS programme.

88. Let me dwell on the much more delicate question of comitology. Article 7 of the Commission proposal provided for a type II(b) (76) management committee: the Commission is to adopt measures which are to apply immediately. If they are not in accordance with the opinion of the committee, the Commission is to defer their application for six weeks, during which period the Council, acting by a qualified majority, may take a different decision which will replace that of the Commission.

89. Article 8 of Regulation No 2053/93 provides for a type III(a) regulatory committee: if the committee gives no opinion or a negative opinion, the Commission is obliged to transform its draft into a proposal to the Council. If the latter takes no decision, the Commission becomes competent again and transforms its proposal into a decision.

90. There is, in my view, a substantial difference between the committee of an advisory nature in Procedure I and the committees provided for by Procedures II and III, since the first excludes any decision-making power of the Council.

91. There is also a substantial difference between committees of type II(a), II(b) and III(a) on the one hand and type III(b) on the other. The latter procedure alone can lead to a deadlock, since the Council can block any decision by simple majority.

92. On the other hand, the type II(a), II(b) and III(a) procedures differ from one another only on minor points, such as time-limits, and by virtue of the fact that, in the latter case, the Council' s decision is taken on the Commission' s proposal, which strengthens the Commission' s position since the Council may depart from that proposal only by acting unanimously. (77) They have in common the fact that in the absence of a decision by the Council, executive power returns to the Commission which is to act.

93. I conclude that there are no differences between the type II(b) management committee and the type III(a) regulatory committee which could be described as substantial amendments of the regulation reaching "... the very heart of the rules enacted...". (78)

94. I accordingly consider that there was no substantial amendment of the Commission' s proposal in the regulation finally adopted.

95. There was no other reason requiring the Parliament to be reconsulted. It is essential to note at this point that the Council' s proposal to introduce a type III committee was known to the Parliament (79) and that the question of comitology was absolutely central to the debates before the Parliament, (80) since several members of the Parliament attributed delays in making finance available and in taking decisions to the existence of a management committee in the 1991-1992 TACIS programme. (81) It was the point of contention between the Council and the Parliament which was ultimately to lead the latter to reject the proposal.

96. The Council representative at the debate was questioned on that issue. (82)

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97. But at the end of the debate, the Parliament, which was not unaware of the Council' s intentions, chose to reject in toto the proposal for a regulation. Nothing therefore came of the adoption of the amendment providing for an advisory committee proposed by the REX committee.

98. The two first pleas in law must therefore be rejected.

III ° The inherent illegality of Regulation No 2053/93

99. For the Parliament, "... it is quite simply unlawful for an instrument adopted with the mandatory consultation of the Parliament to provide that it may be modified in the course of its application without that formality being respected afresh". (83)

100. The second subparagraph of Article 7(2) of the disputed regulation provides:

> "Services contracts shall, as a general rule, be awarded by restricted invitations to tender and by private treaty for operations up to ECU 300 000. This amount may be revised by the Council on the basis of a Commission proposal, account being taken on experience gained in similar cases."

101. The Parliament submits that respect for its prerogatives requires that it be consulted before such a revision is adopted, since it is a regulation based on Article 235 of the Treaty.

102. There is a certain hierarchy within Community legislation. Basic regulations adopted directly pursuant to procedures laid down by the Treaty must be contrasted with regulations for implementation or execution adopted either by the Commission with the authorization of the Council by virtue of the third indent of Article 155 of the EEC Treaty or by the Council itself by virtue of the third indent of Article 145 thereof. The procedure for the adoption of such regulations is laid down by the basic regulation.

103. The hierarchical relationship between those two categories of instrument means that the implementing regulation may neither modify nor disregard the principles laid down by the basic regulation. The first may not go beyond the bounds of implementing the principles of the second. (84) "The delegated power is... only a power of implementation and not a power of primary application of a Treaty provision". (85)

104. The Court has confirmed the Council' s power of delegation in numerous decisions concerning the common agricultural policy:

> "Both the legislative scheme of the Treaty, reflected in particular by the last indent of Article 155, and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognized in all the Member States, between the measures directly based on the Treaty itself and derived law intended to ensure their implementation. It cannot therefore be a requirement that all the details of the regulations concerning the common agricultural policy be drawn up by the Council according to the procedure in Article 43. It is sufficient for the purposes of that provision that the basic elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision. On the other hand, the provisions implementing the basic regulations may be adopted according to a procedure different from that in Article 43, either by the Council itself or by the Commission by virtue of an authorization complying with Article 155". (86)

105. The Court has held, in relation to that article, that it follows from the context of the Treaty in which it must be placed and also from practical requirements that the concept of implementation must be given a wide interpretation. (87)

106. The delegation to the Commission of the power to adopt implementing regulations is also common in the field of public contracts. (88)

107. The Single European Act, by amending Article 145 of the Treaty, limited the Council' s

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power to confer implementing powers on itself:

> "... the Council may reserve the right to exercise implementing powers directly only in specific cases, and it must state in detail the grounds for such a decision". (89)

108. The Parliament is represented neither on the committees which are involved within the Commission (90) nor in certain procedures by which the Council reserves implementing powers, such as that provided for in Article 7 of Regulation No 2053/93. That system is not without logic. While it is normal for the Parliament to be "... consulted each time that a political option is defined, it is also obvious that it has no role where a simple management measure is taken". (91) The ancillary or subordinate character of the implementing procedure justifies less formality in deciding on it. The possibility of delegating is thus one element in the balance of power between the Parliament and the other institutions which may find in it a way of excluding the Parliament from the legislative process. (92) Thus from as early as 1967 (93) the Parliament sought to be consulted on all instruments made pursuant to basic regulations which significantly affect the political, economic or legal effects of those regulations. In a resolution relating to the Community procedures for implementing secondary Community legislation, (94) the Parliament called for a strict limitation of the powers of committees, "bodies not provided for by the Treaty".

109. None the less, by virtue of Article 145 of the Treaty it is unquestionably lawful for the Council to delegate implementing powers to itself even though the procedure for adopting implementing regulations is not governed by the same rules as that concerning the basic regulation.

110. But, specifically, does Article 7 of the regulation at issue concern procedures for implementing or applying the basic regulation or does it affect the fundamental principles underlying that instrument?

111. Is setting the threshold above which service contracts cannot be awarded by restricted invitations to tender or by private treaty a procedure for implementing or applying Regulation No 2053/93?

112. I have two points to make on this.

113. The second subparagraph of Article 7(2) of Regulation No 2053/93 was included in the former Regulation No 2157/91 which provided for the same method of revision of the threshold of 300 000 ECU. (95)

114. In both cases, the procedure for revising the threshold excluding the Parliament did not feature in the Commission proposal and was added by the Council.

115. The power delegated to the Council affects only the procedures for awarding service contracts. Admittedly, the choice of the procedure comprising direct agreement and restricted invitations to tender enables the decision-making progress to be speeded up and the reduction of the threshold below which the Commission may deal by direct agreement makes the system more efficient. However, the second subparagraph of Article 7(2) calls in question neither the principles nor the scheme of the regulation and does not go beyond "implementing powers", (96) which alone may be delegated.

116. The third plea in law must therefore also be rejected.

117. I accordingly conclude that the application should be dismissed in whole.

(*) Original language: French.

(1) ° OJ 1993 L 187, p. 1.

(2) ° Regulation concerning the provision of technical assistance to economic reform and recovery in the Union of Soviet Socialist Republics (OJ 1991 L 201, p. 2).

(3) ° OJ 1993 C 48, p. 13.

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(4) ° Article 5(1).

(5) ° See the Council' s replies to the written questions of the Court.

(6) ° Ibidem.

(7) ° Annex 2 to the application.

(8) ° Annex 3 to the application.

(9) ° OJ 1993 C 150, p. 26.

(10) ° Drawn up by the MEP Henry Chabert.

(11) ° OJ 1993 C 176, p. 178.

(12) ° Now Article 105(1) of the Rules of Procedure of the Parliament as amended by the Treaty on European Union (OJ 1993 C 268, p. 51).

(13) ° See OJ, Annex, No 3-431, Debates of the European Parliament, 1993-1994 Session, p. 344, and OJ 1993 C 255, p. 81.

(14) ° OJ 1993 C 176, p. 152.

(15) ° See OJ, Annex, No 3-433, Debates of the European Parliament, 1993-1994 Session, p. 191 and OJ 1993 C 255, p. 81.

(16) ° Even though it does not have a right as such, the Commission is invited to attend sessions of the Council (Article 4(2) of the Rules of Procedure of the Council). That occurred in this case.

(17) ° Paragraph 16 of the Parliament' s observations on the United Kingdom' s statement of intervention in Case C-65/93 Parliament v Council, pending.

(18) ° Case 138/79 [1980] ECR 3333.

(19) ° Paragraph 33.

(20) ° Judgments in Case C-65/90 Parliament v Council [1992] ECR I-4593 and Case C-388/92 Parliament v Council [1994] ECR I-2067.

(21) ° The Commission undertook to do this by a communication of 30 May 1973 cited by R. Bieber: Article 137 in Kommentar zum EWG-Vertrag, Groeben, Thiesing, Ehlermann, 4th edition, p. 4132. That was done in the case being considered.

(22) ° Paragraph 34 of the judgment in Roquette Frères v Council, cited above.

(23) ° See R. Bieber: Legislative Procedure for the Establishment of the Single Market 25 Common Market Law Review (1988) 711, 716.

(24) ° Paragraph 20 of the judgment in Case 165/87 Commission v Council [1988] ECR 5545.

(25) ° See on this point Case C-65/93 Parliament v Council, cited in note 17 above.

(26) ° See as to this points 28 and 29 of the Opinion of Advocate General Jacobs in Case C-316/91 Parliament v Council [1994] ECR I-625: The Parliament' s participation in the legislative process is not to be seen only as a prerogative but also as a responsibility with which the Parliament is entrusted and which it cannot waive (point 28).

(27) ° On this point see point 48 of the Opinion of Advocate General Darmon in Case C-388/92 Parliament v Council, cited in note 20 above.

(28) ° Judgment in Case 149/85 Wybot v Faure [1986] ECR 2391, paragraph 23.

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(29) ° Case 68/86 [1988] ECR 855.

(30) ° Paragraph 38 of the judgment.

(31) ° Article 4.

(32) ° Judgment in Case 230/81 Luxembourg v Parliament [1983] ECR 255, paragraph 37, and order in Case C-2/88 Imm. Zwartveld and Others [1990] ECR I-3365, paragraph 17. See also the Opinion of Advocate General Mancini in Case 204/86 Greece v Council [1988] ECR 5323, 5349 and point 56 of the Opinion of Advocate General Jacobs in Case C-284/90 Council v Parliament [1992] ECR I-2277.

(33) ° Article 15 of the Merger Treaty. It may be thought that, if the Parliament had had in 1965 the powers which it has today, the need for collaboration between the Parliament and the other institutions would have been mentioned.

(34) ° Cited in note 32 above, at paragraph 16.

(35) ° See also, on the collaboration between the Commission and the Council in the context of Article 58 of the ECSC Treaty, the judgment in Case 244/81 Kloeckner-Werke v Commission [1983] ECR 1451.

(36) ° European Parliament Bulletin, No 34/73 of 19 October 1973, pp. 4 and 5.

(37) ° See Annex 5 to the application.

(38) ° Wyatt and Dashwood, European Community Law, 1993, p. 37.

(39) ° Annex 5 to the application.

(40) ° See also Jacobs and Corbett: The European Parliament, 1990, p. 166: The most serious difficulty for Parliament, however, arises where Council takes a decision in principle or subject to Parliament' s opinion before this opinion has been delivered (11 times in 1986, eight in 1987, 12 in 1988, seven in 1989).

(41) ° Resolution on relations between the European Parliament and the Council (OJ 1990 C 284, p. 58).

(42) ° OJ 1990 C 324, p. 125.

(43) ° See, on this point, the statements of the then President of the Council before the European Parliament on 9 October 1990 (OJ, Annex, No 3-394, Debates of the European Parliament, Session 90-91, p. 79).

(44) ° The phenomenon also occurs at the first reading stage in the cooperation procedure: the Council bodies on the one hand and the Parliamentary committees on the other consider legislative proposals at the same time.

(45) ° Article 189b of the EC Treaty.

(46) ° Article 189c of the EC Treaty.

(47) ° See OJ, Annex, No 3-386, Debates of the European Parliament, 1990-1991 Session, p. 32; EC Bulletin, 1/2-1990, point 1.6.6, and EC Bulletin, 4-1990, point 1.6.1.

(48) ° Case 114/81 [1982] ECR 3189.

(49) ° See, for example, Case C-388/92 Parliament v Council, cited in note 20 above.

(50) ° Which replaced Article 149(3) of the EEC Treaty, repealed by the Treaty on European Union. The Commission may also withdraw its proposal for a regulation. See point 6 of the resolution

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on the proposal for a Council Regulation on the termination of service of officials of 10 October 1985 (OJ 1985 C 288, p. 103).

(51) ° Op. cit., p. 47.

(52) ° Cited in note 42 above, p. 127.

(53) ° OJ 1993 C 268, p. 66 (Rule 36G).

(54) ° See on this point the Council' s reply of 1 April 1985 to Written Question No 1907/84 of Mr de Vries (OJ 1985 C 118, p. 12).

(55) ° The Council undertook, in its communication of 16 October 1973, cited above, to do this within one week. The legal value and binding nature of that undertaking would be questionable even if its terms were not so vague. On that point, see J.-P. Jacqué: La pratique des institutions communautaires et le développement de la structure institutionelle communautaire , in Die Dynamik des Europaeischen Gemeinschaftsrechts ° The dynamics of EC-law, R. Bieber and G. Ress, editors, 1987.

(56) ° See point 6 of the provisional report.

(57) ° Note 19 of the text of the regulation (version of 4 March 1993).

(58) ° Paragraph 15 of the application.

(59) ° Paragraph 4 of the reply.

(60) ° See the COREPER document of 1 April 1993, submitted to the Court: Pending the Opinion of the European Parliament, COREPER has examined the Commission proposal, with the following results. COREPER suggests that Council confirm these results, with the proviso that it will be requested to give its final views once Parliament has delivered its Opinion (emphasis added).

(61) ° See paragraph 5 of the explanatory memorandum in the Chabert report, annexed to the Council' s defence. See also the Rapporteur' s statement during the debate on 24 June 1993 (OJ 1993, Annex, No 3-432, Debates of the European Parliament, 1993-1994 Session, p. 323).

(62) ° Sir Leon Brittan stated at the debate on 26 May 1993: Finally I turn to the question of comitology. I want to make it quite clear that as far as the Commission is concerned we originally put forward the suggestion of a management committee. The Council has sought to insist on a regulatory committee (OJ 1993, Annex, No 3-431, p. 151).

(63) ° Which was the only really contentious issue: see the statement of 26 May 1993 of Rapporteur Chabert (OJ 1993, Annex, No 3-431, Debates of the European Parliament, 1993-1994 Session, p. 177).

(64) ° See the statement of Rapporteur Chabert at the debate on 14 July 1993 (OJ 1993, Annex, No 3-433, pp. 190 and 191).

(65) ° The Commission' s representative had moreover announced, during the parliamentary debates, that he was prepared to incorporate most of the Parliament' s amendments (OJ 1993, Annex, No 3-431, Debates of the European Parliament, 1993-1994 Session, p. 175). On the crucial role of Parliament' s advocate which the Commission may play in the consultation procedure, see P. Raworth: A Timid Step Forwards: Maastricht and the Democratisation of the European Community 19 European Law Review (1994) 16, 20.

(66) ° Article 189a(1) of the Treaty.

(67) ° Joint Declaration of the European Parliament, the Council and the Commission (OJ 1975 C 89, p. 1). See also Article 63 of the Rules of Procedure of the Parliament.

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(68) ° Resolution closing the procedure for consultation of the European Parliament on the proposal from the Commission of the European Communities to the Council for a Regulation laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1986 C 297, p. 94, paragraph 4).

(69) ° Paragraph 16 of the judgment in Case C-388/92 Parliament v Council, cited in note 20 above. See also the judgments in Case 41/69 ACF Chemiefarma v Commission [1970] ECR 661, paragraph 178, and Case 817/79 Buyl and Others v Commission [1982] ECR 245, paragraphs 16 and 23.

(70) ° Council Regulation of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America (OJ 1992 L 52, p. 1).

(71) ° See the Council' s defence, paragraph 21.

(72) ° Annex to the Council' s defence. See the letter from the president of the Budget Committee to the president of the REX committee dated 20 April 1993 and its proposed amendment no 7.

(73) ° Ibidem.

(74) ° Article 4(3) of Regulation No 2053/93.

(75) ° OJ 1993 C 176, p. 184.

(76) ° Variant II(b) of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33) (the comitology decision).

(77) ° See on this point C. Blumann: Dictionnaire juridique des Communautés européennes, A. Barav and C. Philip, editors, Comitology, p. 197.

(78) ° Case C-388/92 Parliament v Council, cited in note 20 above, at paragraph 19.

(79) ° See OJ 1993, Annex, No 3-433, p. 191, and point 72 above.

(80) ° See the drafts of amendment no 18 of the REX committee report and no 7 of the opinion of the committee for budgetary control and points 4 and 5 of the explanatory memorandum of the REX committee report.

(81) ° See the statement by Mr Nielsen, MEP: As for the management committee, it is far too bureaucratic and impenetrable. Let us get a consultative committee going which will be able to speed and streamline the decision-making process as well as the practical implementation of the projects (OJ 1993, Annex, No 3-431, Debates of the European Parliament, 1993-1994 session, p. 160). See also the statement by Rapporteur Chabert during the debate (OJ 1993, Annex, No 3-431, Debates of the European Parliament, 1993-1994 Session, p. 169).

(82) ° Ibidem, p. 177.

(83) ° Paragraph 36 of the application.

(84) ° See the judgment in Case 230/78 Eridania [1979] ECR 2749, paragraph 9 et seq.

(85) ° Jozeau-Marigné report on the legal problems of consultation with the European Parliament, 8 August 1967, document 110, paragraph 24.

(86) ° Judgment in Case 30/70 Scheer v Einfuhr- und Vorratsstelle Getreide [1970] ECR 1197, paragraph 15. See also the judgments in Case 25/70 Einfuhr- und Vorratsstelle Getreide v Koester, Berodt & Co. [1970] ECR 1161, Case 46/86 Romkes [1987] ECR 2671, Case 203/86 Spain v Council [1988] ECR 4563 and Case C-240/90 Germany v Commission [1992] ECR I-5383.

(87) ° Paragraph 10 of the judgment in Case 23/75 Rey Soda v Cassa Conguaglio Zucchero [1975]

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ECR 1279.

(88) ° See, for example, Article 31 of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1) and Article 30b of Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1).

(89) ° Judgment in Case 16/88 Commission v Council [1989] ECR 3457, paragraph 10.

(90) ° See Decision 87/373, cited in note 75 above, and Ch. Reich: Le Parlement européen et la comitologie , Revue du marché commun, No 336, 1990, p. 319.

(91) ° Jozeau-Marigné report, cited in note 84 above, p. 5.

(92) ° See the Haensch report, European Parliament, Session documents, 7 July 1986, doc. A2-78/86.

(93) ° See the resolution of 17 October 1967 (OJ 1967, 268, p. 7).

(94) ° Resolution published in the OJ 1968, C 108, p. 37.

(95) ° Second subparagraph of Article 6(2).

(96) ° Article 145 of the EC Treaty.

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AUTLANG	French
APPLICA	European Parliament ; Institutions
DEFENDA	Council ; Institutions
PROCEDU	Application for annulment - unfounded
ADVGEN	LA¬ger
JUDGRAP	Kakouris
DATES	of document: 14/02/1995 of application: 12/10/1993

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Opinion of Mr Advocate General Tesauro delivered on 28 November 1995.
The Queen v H. M. Treasury, ex parte British Telecommunications plc.
Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom.
Reference for a preliminary ruling - Interpretation of Directive 90/531/EEC - Telecommunications - Transposition into national law - Obligation to pay compensation in the event of incorrect implementation.
Case C-392/93.

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JURCIT	31990L0531-A02 : N 3 20 31990L0531-A08P1 : N 2 - 4 9 - 26 37 - 39 31990L0531-A08P2 : N 4 11 15 31990L0531-A33 : N 3 12 31992L0013-A01 : N 16 31992L0013 : N 16
SUB	Approximation of laws
AUTLANG	Italian
NATIONA	United Kingdom
PROCEDU	Reference for a preliminary ruling
ADVGEN	Tesauro
JUDGRAP	Moitinho de Almeida
DATES	of document: 28/11/1995 of application: 23/08/1993

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Opinion of Mr Advocate General Tesauro delivered on 23 November 1995.
European Parliament v Council of the European Union.
Common commercial policy - Services - Government procurement.
Case C-360/93.

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1 By this action, the European Parliament is seeking the annulment of Council Decision 93/323/EEC concerning the conclusion of an Agreement in the form of a Memorandum of Understanding between the European Economic Community and the United States of America on government procurement (1) and Council Decision 93/324/EEC concerning the extension of the benefit of the provisions of Directive 90/531/EEC in respect of the United States of America, (2) both of 10 May 1993.

The Parliament argues that Article 113 of the EC Treaty alone cannot constitute an appropriate legal basis for the measures in question, which in essence generally extended to US undertakings the benefit of the Community rules governing public procurement, in particular as regards the provision of services. The Parliament takes the view that the two decisions should also have been based on the last sentence of Article 57(2), Article 66 and Article 100a, that is to say, they should have been adopted using the cooperation procedure.

2 The matter therefore turns essentially on whether the common commercial policy includes international trade in services. The Court's Opinions 1/94 on the WTO Agreement (3) and 2/92 on Community participation in the Third Revised Decision of the OECD on national treatment (4) have clarified to a large extent how the concept employed in Article 113 is to be understood, what its scope should be and whether, and to what extent, trade in services is covered. In deciding the case before the Court, it will therefore be necessary to apply the principles set forth in that case-law.

3 For the sake of a proper understanding of the arguments put forward in support of the positions taken up by the parties, it will be necessary briefly to call to mind the purpose and content of the decisions contested by the Parliament.

As part of the progressive establishment of the internal market, the Council adopted on 17 September 1990 Directive 90/531/EEC on the procurement procedure of entities operating in the water, energy, transport and telecommunications sectors (5) (`the exclusive sectors directive'). That directive, as we know, is intended to eliminate restrictions on the free movement of goods and on freedom to provide services in respect of supply contracts awarded in the sectors in question, which, owing to their specific economic features and the special legal regime applying to them in many Member States, had remained outside the scope of preceding liberalization measures.

Pursuant to the principle of Community preference, Article 29(2) of that directive provides that any tender made for the award of a supply contract may be rejected where the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender and Article 29(3) that, in any event, where two or more tenders are equivalent, preference is to be given to the tender of Community origin. Those rules, however, are not applicable to products originating in countries with which the Community has concluded agreements ensuring comparable and effective access for Community undertakings to procurement markets in those countries (Article 29(1)).

Next Article 29(5) and (6) provide that:

`5. For the purposes, in this Article, of determining the proportion referred to in paragraph 2 of products originating in third countries, those third countries to which the benefit of the provisions of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account.

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6. The Commission shall submit an annual report to the Council (for the first time in the second half of 1991) on progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the markets of third countries in the fields covered by this Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

The Council, acting by a qualified majority on a proposal from the Commission, may amend the provisions of this Article in the light of such developments.'

4 Pursuant to the GATT and the commitment given under Article 29 of Directive 90/531/EEC to ensure effective access for Community undertakings to the procurement markets of third countries, the Community concluded an agreement with the United States in 1993 in the form of a Memorandum of Understanding, approved by Council Decision 93/323/EEC, which is challenged in these proceedings. Under Article 1 of that agreement, it is to apply to contracts for goods, works and other services, which are awarded by administrative authorities and other entities governed by public law in the two Contracting Parties, including supplies and works relating to the sector of the production, transportation and distribution of electricity.

Article 2(1) commits the Council to affording to suppliers, contractors and service-providers the award procedures of Directives 77/62/EEC, (6) 92/50/EEC (7) and 71/305/EEC (8) as regards procedures for the award of public contracts whose value exceeds the thresholds indicated in that provision. The United States assumed a similar commitment consisting of applying to European undertakings the provisions of the Buy America Act (Article 2(2)). Article 2(3) excepts derogations from measures liberalizing procurement procedures which were specified by each party at the time when the Multilateral Agreement on Government Procurement of 1979 was concluded in the context of the GATT. (9)

Under Article 3(1), the Community undertakes to extend to US products and undertakings its own legislation on the award of contracts in the sectors covered by Directive 90/531/EEC, with the exclusion of telecommunications - which Article 5 defers for a subsequent specific agreement -, as well as the machinery provided for in order to secure the effective application of that legislation, that is to say, the remedies laid down to that effect by Directive 92/13/EEC. (10) A substantively similar obligation is laid down for the United States (Article 3(2)).

Next, the Community and the United States undertake to carry out a joint study of the economic importance of the public procurement procedures for goods and services covered by the liberalization measures with a view to defining their respective positions in the GATT negotiations on the revision of the 1979 Multilateral Agreement to which I have already adverted (Article 4).

Lastly, Article 7(1) lays down a separate date for the entry into force of the provisions of the Agreement which relate to the procurement of services.

5 It is also worth mentioning that, under Article 7(3), the Agreement is to terminate on 30 May 1995 or upon the entry into force of the new Code on Government Procurement which is being negotiated under the auspices of the GATT. Since, as we know, the Multilateral Agreement on Government Procurement annexed to the Agreement establishing the World Trade Organization (11) will enter into force on 1 January 1996 (Article XXIV), the Community and the United States concluded in May this year a new agreement extending the validity of the previous Memorandum until that date.

Council Decision 95/215/EC approving that agreement (12) is based on the last sentence of Article 57(2) and Articles 66, 100a and 113, precisely the provisions on which, in the Parliament's view, the decisions challenged in these proceedings should have been based. It is worth setting forth in this connection the third and fourth recitals in the preamble to Decision 95/215/EC:

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`Whereas part of the commitments in the Agreement negotiated by the European Community with the United States on government procurement fall within the exclusive jurisdiction of the Community under Article 113 of the Treaty;

Whereas, moreover, some of the other commitments affect Community rules adopted on the basis of Articles 57(2), 66 and 100a of the Treaty'.

6 As for the other decision challenged, Decision 93/324/EEC, it sets out to extend the benefit of the provisions of Directive 90/531/EEC to tenders comprising products originating in the United States made for the award of a supply contract in the electric power sector (Article 1) on the ground that, following the agreement concluded with that country, comparable and effective access to government procurement procedures is thus ensured for Community undertakings. In particular, this results in the principle of Community preference laid down by Article 29 of Directive 90/531/EEC being inapplicable to US products. (13)

7 I would first state that it is undisputed that in this case the two conditions are satisfied in order for the Parliament to be entitled to bring an action for annulment before the Court: the action should seek only to safeguard its prerogatives and should be founded only on submissions alleging their infringement. (14)

8 Having said that, I do not consider that the submissions put forward by the parties, in particular as regards Decision 93/324/EEC, in arguing or disputing that the extension of the benefits of Directive 90/531/EEC to traders in third countries constitute an amendment of that directive are of any great use for the purposes of resolving the dispute which gave rise to this case.

In that regard, the Parliament stresses the fact that Decision 93/324/EEC was not adopted in accordance with the ad hoc procedure laid down by Article 29(6) of the directive for the amendment of Article 29 alone, so as to take account of progress made in negotiations designed to secure access for Community undertakings to public procurement markets in third countries. In its view, this shows that the agreement concluded with the United States committed the Community to amending the exclusive sectors directive in its entirety, and such an amendment could have been carried out only pursuant to the same legal bases as the instrument to be amended. In addition, it argues that its claim that the aim of Decision 93/324/EEC was not only to render the principle of Community preference inapplicable to US products is borne out by the fact that Article 1 of the decision refers to all the benefits of Directive 90/531/EEC.

9 For its part, the Council contends that a distinction must be made between amending a Community measure and extending its benefits to subjects other than those initially contemplated. Where, as in the case of Decision 93/324/EEC, the latter hypothesis applies, the measure extending the scope of application of particular rules, in particular to traders in third countries, is normally a separate measure with aims and content different from those of the measure whose benefits it extends. It may therefore quite well have a different legal basis.

The Council acknowledges that the application of that distinction is fraught with considerable difficulties in this case in so far as the provisions of the exclusive sectors directive refer both to possible amendment, for which a derived legal basis is laid down (in Article 29(6)), and to the possible extension of its benefits, for which, since no derived legal basis is laid down, any measures can be based only on the relevant provisions of the Treaty (Article 29(1) and (5)). Having said this, it considers that the answer to the question as to whether Decision 93/324/EEC `amends' or `extends' has no bearing on its validity. Since its aim is essentially to render inapplicable to US products the principle of Community preference laid down by Article 29 of Directive 90/531/EEC, in the event that the decision is considered to be an amendment of the directive, it should be based on the derived legal basis of Article 29(6), whereas if it is construed as extending its benefits,

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it should be based on Article 113. In both cases, the adoption procedure would be the same: the Council would act by a qualified majority on a proposal from the Commission.

10 I do not consider that the solution to the dispute turns on accepting one or the other of the two opposing arguments, which, in truth, seem instead to create a species of smokescreen camouflaging the real issue raised by the Parliament's action. The derived legal basis laid down by Article 29(6) was not utilized in order to adopt Decision 93/324/EEC and could not have been so utilized, since it is intended to serve as the basis only for amendments of Article 29 itself: that is manifestly not the aim of the contested decision. Furthermore, a decision by which the Council, acting under Article 29(5), extends the benefits of the exclusive sectors directive to a third country following the conclusion of an agreement which, within the meaning of Article 29(1), ensures in the country concerned comparable and effective access for Community undertakings to public procurement markets, constitutes a separate measure having to be adopted on the basis of the relevant provisions of the Treaty.

11 In the final analysis, the real issue is whether the two decisions could be validly based on Article 113 alone or whether the Community competence should be based (also) on other provisions of the Treaty.

In fact, the very conflict between the different institutions with regard to extending the sphere of application of Article 113 explains the singular game on the part of the parties which characterizes this dispute, which previously emerged in the request for an opinion on the WTO Agreement, to which I have already referred. As we know, the Parliament and the Council, respectively the applicant and the defendant in these proceedings, share the view that it is not possible to bring all international economic relations under the common commercial policy. Whilst that policy should certainly be construed in a broad perspective, Article 113, on this view, cannot constitute the legal basis for the conclusion of international agreements on, for instance, the free movement of services, at least in so far as the services in question are not connected with the supply of goods.

Consequently, the Council seeks to show that recourse to Article 113 alone is justified in this case inasmuch as the main aim of the Memorandum of Understanding concluded with the United States is to render the principle of Community preference laid down in Article 29(2) and (3) inapplicable to tenders comprising US products. In its view, that is the only provision of the exclusive sectors directive underlying the conflict with the US authorities which was sought to be settled. In contrast, the provisions on trade in services contained in that directive are merely ancillary, whilst the reference to all the Community directives on public procurement is designed solely to specify the policy framework within which the Agreement is located.

12 As for the Commission, which has intervened in the proceedings in support of the form of order sought by the Council, it argues that Article 113 is the correct legal basis for the contested decisions, but starts from opposing premises. It argues that the evolution of international trade and the present close connection between trade in goods and trade in services makes it necessary to include services within the ambit of the common commercial policy in order not to impair the Community's ability to act vis-à-vis its trading partners. Since therefore the provisions of the agreement with the United States on the liberalization of access to procurement procedures for services are autonomous in nature, the Commission concludes that its interpretation of Article 113 is consistent with the Court's case-law, which tends to confer a dynamic content on the concept of the common commercial policy.

13 This explains why the Parliament - albeit to a large degree using in support of its position the same arguments as the Commission, in particular in order to confirm the correctness of its interpretation of the content of the contested measures - asks, pursuant to the third paragraph of Article 37 of the Statute of the Court, that the Commission's intervention should be declared

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inadmissible in so far as it is based on grounds differing from those asserted by the Council. This also explains why the Parliament has not taken a view on the Commission's arguments, considering them unrelated to the object of the application, and merely refers to the inconvenient `conjunction' in that it signed, at the time when the contested decisions were adopted, a joint declaration with the Council, which was annexed to the minutes of the session. In that declaration, the two institutions agreed, first, that the parts of the memorandum concluded with the United States relating to services and public works were ancillary and, secondly, that recourse to Article 113 was without prejudice to their respective positions as to the possibility of utilizing that provision in future as the legal basis for the conclusion of agreements on trade in services.

14 The objection of inadmissibility raised by the Parliament should be rejected. Whilst there is no doubt that the arguments put forward by the Commission to the effect that the contested decisions were lawfully adopted on the basis of Article 113 alone are different to or actually at odds with the defendant's, it cannot be denied that the form of order sought by the Commission in its statement in intervention are `limited to supporting the submissions of one of the parties', as is required by Article 37 of the Statute of the Court. It does not seem to me to be relevant to refer in this connection to the precedent of Case C-155/91 Commission v Council: (15) in that case, the Parliament's intervention was declared inadmissible only in so far as it sought an alternative form of order with respect to the claims of the applicant which it was supporting. This is clearly not the case.

15 Turning to the merits, in the first place I consider it to be hard to argue that Article 113 constitutes the correct legal basis for the agreement in question in as much as its `main aim' is claimed to be to render inapplicable the principle of Community preference to US products comprising a tender in a public procurement procedure. In this connection, it is worth recalling that, as the Court has held on several occasions, (16) the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. The aim and content of the measure are particularly relevant in this connection.

16 The preamble to the Memorandum of Understanding concluded between the Community and the United States (17) makes it clear that it aims, in the light of the commitments already entered into by the parties in the context of the abovementioned GATT Multilateral Agreement on Government Procurement and of the further progress made in the negotiations, to anticipate, bilaterally and on a reciprocal basis, further steps on the road towards achieving the objective of eliminating every form of discrimination between domestic and foreign products and suppliers.

To that end, Article 1 opens the Contracting Parties' public procurement markets in a way which is no longer limited to the mere acquisition of products and any services ancillary to their supply, as was laid down by the 1979 Agreement - which for that very reason was concluded on the basis of Article 113 only, without this having given risen to particular difficulties. In contrast, the commitment to ensuring the other party's undertakings access to public contracts on the same terms as one's own undertakings - subject to the derogations mentioned at the beginning of these observations - is also extended to the performance of public works and the supply of services.

17 As a result of the reference made by Article 2(1) to the provisions of the directives on public works and services and as the annexes to the Memorandum make clear, (18) the measures for the liberalization of procurement relate to the performance and design of buildings and civil engineering works, computer, accounting and advertising services, a number of financial services and so on, where their value exceeds the thresholds laid down.

Consequently, the provisions on services have a measure of independence within the context of the agreement and it is impossible to assert the (purely economic and, moreover, unproven) argument, so as to reduce the scope of the commitments undertaken by the Community, that, in view of the

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nature of the activities covered by the liberalization measures, it would be difficult to imagine US undertakings making tenders in response to an invitation to tender or a tender notice unless they were established in the Community. If they were, freedom to provide services would be already guaranteed to them by the Community directives, which apply irrespective of the origin of the capital of companies incorporated under the law of one of the Member States.

18 Since it is therefore clear that the agreement at issue is also aimed at the provision of services - where, of course, the provision is based on a public contract - it follows that it could not properly have been concluded on the basis of Article 113 alone; for the same reasons, neither was Decision 93/324/EEC, which, following that agreement, extends to US undertakings the benefit of the exclusive sectors directive, entitled to have been based on that legal basis alone.

Lastly, what the Court stated in Opinion 1/94 should be called to mind: only cross-frontier services may be brought within the concept of the common commercial policy. Whilst the situation in which the service is rendered by a supplier in one country to a consumer residing in another is not unlike trade in goods, the same cannot be said of other modes of supply of services. In particular, the provision of services by a service-provider from one country by virtue of his having a commercial presence on the territory of another country or through the presence of natural persons is different. (19)

Moreover, it was also explained in Opinion 1/94 that `it is clear from Article 3 of the Treaty, which distinguishes between "a common commercial policy" in paragraph (b) and "measures concerning the entry and movement of persons" in paragraph (d), that the treatment of nationals of non-member countries on crossing the external frontiers of Member States cannot be regarded as falling within the common commercial policy. More generally, the existence in the Treaty of specific chapters on the free movement of natural and legal persons shows that those matters do not fall within the common commercial policy.' (20)

19 It is clear that the modes of provision of services to which the agreement concluded between the Community and the United States on procurement refers (I would merely mention the case of the performance of civil engineering works) certainly cannot be classed as cross-frontier provision of services. It follows that the Parliament's application must be upheld.

20 The Council has requested that, in the event that the Court should decide to annul the contested decisions, it should conserve the effects which they have already had, by applying the principles laid down in the judgment in the `right of residence' case. (21)

In that case, the possibility afforded by Article 174 of the Treaty to limit the effects of a judgment declaring a regulation void was extended to the case of the annulment of a directive. In that regard, the Court essentially considered that, since Article 174 is an expression of the more general principle of legal certainty, it must be able to be applied beyond the cases which it expressly contemplates.

It seems to me that reasons of legal certainty justify accepting the Council's request. In view of the fact that certain undertakings may already have exercised the rights conferred on them pursuant to the contested agreement and the decisions implementing it, that the agreement expired in any event on 30 May 1995 and that the Parliament has not opposed the Council's request, I consider that the effects produced to date by the two decisions should not be called in question.

21 In the light of the foregoing observations, I therefore propose that the Court should:

- annul Council Decision 93/323/EEC of 10 May 1993 concerning the conclusion of an Agreement in the form of a Memorandum of Understanding between the European Economic Community and the United States of America on government procurement and Council Decision 93/324/EEC of 10 May

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1993 concerning the extension of the benefit of the provisions of Directive 90/531/EEC in respect of the United States of America;

- preserve the effects of the decisions in question;

- order the Council to pay the costs, saving those of the Commission, which should bear its own costs.

(1) - OJ 1993 L 125, p. 1.

(2) - OJ 1993 L 125, p. 54.

(3) - [1994] ECR I-5267.

(4) - [1995] ECR I-521.

(5) - OJ 1990 L 297, p. 1.

(6) - Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1). This directive has been replaced, after the agreement was concluded, by Council Directive 93/36/EEC of 14 June 1993 (OJ 1993 L 199, p. 1), which recast, without effecting any amendments, the whole of the provisions of Directive 77/62/EEC.

(7) - Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1)

(8) - Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682). As part of the general reorganization of this area, this directive has been replaced by Council Directive 93/37/EEC of 14 June 1993 (OJ 1993 L 199, p. 54).

(9) - This is the GATT `Code' on public procurement. The text of the Agreement, which entered into force on 1 January 1981 is set out in OJ 1980 L 71, p. 44. The list of services to which the EEC will not apply the provisions of the GATT Code is set out in Annex 5 to the Memorandum of Understanding.

(10) - Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

(11) - OJ 1994 L 336, p. 273.

(12) - Council Decision 95/215/EC of 29 May 1995 concerning the conclusion of an Agreement in the form of exchange of letters between the European Community and the United States of America on government procurement (OJ 1995 L 134, p. 25).

(13) - See the preamble to the decision.

(14) - Case C-70/88 Parliament v Council (the Chernobyl case) [1990] ECR I-2041, paragraph 27. Those conditions are now expressly enshrined in the third paragraph of Article 173(3) as amended by the Maastricht Treaty, which entered into force after the present action was brought.

(15) - Case C-155/91 Commission v Council (case of the directive on waste) [1993] ECR I-939, paragraphs 22, 23 and 24. In that case, the Parliament, in addition to supporting the Commission's application for the annulment of a directive on the ground that it was based on the wrong legal basis, also argued that an article of the directive in question was incompatible with the Treaty and sought its annulment, even though that question had not been raised in the Commission's application.

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(16) - See, in particular, Case C-300/89 Commission v Council (the titanium dioxide case) [1991] ECR I-2867, paragraph 10. For a recent case reaffirming this principle, see also Case C-187/93 Parliament v Council [1994] ECR I-2857, paragraph 17.

(17) - The first, second and sixth recitals in the preamble state as follows:<"NOTE", Font = F2, Left Margin = 0.721 inches, Tab Origin = Column>- Whereas the USA and the EEC are parties to the GATT Agreement on Government Procurement (the Code), which entered into force on 1 January 1981;<"NOTE", Font = F2, Left Margin = 0.721 inches, Tab Origin = Column>- Whereas Article 6 of the Code states that the parties to the Code shall undertake further negotiations with a view to broadening and improving the Code on the basis of mutual reciprocity;<"NOTE", Font = F2, Left Margin = 0.721 inches, Tab Origin = Column>- Whereas the USA and the EEC have decided to make certain reciprocal commitments to open their respective procurement markets as a downpayment towards an expanded Code.

(18) - See in particular Annexes 5 and 6.

(19) - Opinion 1/94, cited above, in particular paragraphs 36 to 47.

(20) - Ibid., paragraph 46.

(21) - Case C-295/90 Parliament v Council [1992] ECR I-4193, paragraphs 22 to 27.

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APPLICA	European Parliament ; Institutions
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Opinion of Mr Advocate General Tesauro delivered on 17 November 1994.
Commission of the European Communities v Kingdom of the Netherlands.
Tender notices for public supply contracts - Review procedure - Notification - Technical specifications.
Case C-359/93.

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Mr President,

Members of the Court,

1. In this action the Commission seeks a declaration that the Kingdom of the Netherlands has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, (1) as subsequently amended by Directives 80/767/EEC of 22 July 1980 (2) and 88/295/EEC of 22 March 1988, (3) and also under Article 30 of the Treaty.

To be more specific, the Commission considers that the tender notice for a public supply contract published by the Nederlands Inkoopcentrum NV (hereinafter "the NIC") in the Official Journal of the European Communities of 10 December 1991 concerning the supply and maintenance of a meteorological station (4) does not comply with Community requirements. The Commission relies on two grounds: failure to indicate the persons authorized to be present at the opening of tenders as well as the date, time and place of opening; and inclusion in the general terms and conditions of a technical specification defined by reference to a product of a specific make, namely the UNIX data-processing system developed by Bell Laboratories of ITT, without mentioning that it is open to the supplier to use an equivalent system.

It should be borne in mind that the Commission gave the Netherlands and the contracting authority notice of those criticisms, in accordance with the procedure laid down in Article 3(1) and (2) of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. (5) The Commission stated that notification was to be treated as formal notice for the purposes of Article 169 of the Treaty and that the subsequent communication from the Netherlands Government would be treated as the observations provided for in that article.

2. It would be helpful to recall the relevant provisions of the directive in question in order to arrive at a proper understanding of the allegations made against the defendant and of the latter' s arguments.

Article 9(5) of the directive requires the contracting authorities to draw up the notices in accordance with the models set out in Annex III. If the contract is to be awarded by "open" procedure, as it was in the case under consideration, the notice must contain, in particular, the following information (Point 7 of the Annex):

> "(a) Persons authorized to be present at the opening of tenders"

and

> "(b) the date, time and place of this opening."

Article 7(6), added to Title II of that directive, provides that:

> "Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention goods of a specific make or source or of a particular process and which have the effect of favouring or eliminating certain undertakings or products. In particular, the indication of trade marks, patents, types or specific origin or production shall be prohibited;

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however, such an indication accompanied by the words 'or equivalent' shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned."

Finally, Article 3 of Directive 89/665/EEC introduces a "swift" procedure for taking action against the competent authorities of the Member States and the contracting authorities, which may be invoked by the Commission when, prior to a contract being concluded, it considers that "a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure". In such cases, therefore, the Commission is to notify the abovementioned authorities of the infringements found and request their correction; from that moment, the Member State has 21 days in which to communicate to the Commission confirmation that the infringement has been corrected or the reasons why no correction has been made or else notice that the contract award procedure has been suspended.

3. Before turning to the substance of the case, I must consider the objection put forward by the Netherlands Government that the action is inadmissible in two respects.

The Netherlands maintains that the Commission' s conduct did not comply with the requirements of Article 3(1) and (2) of Directive 89/665/EEC. As mentioned above, the purpose of the procedure provided for therein is to inform the Member State and the contracting authority concerned in good time, and in any event before a contract is awarded, of the fact that a clear and manifest infringement of Community law has been committed. The Commission' s complaints were communicated to the Netherlands six months after the notice in question was published, on the day before the contract was entered into. The contracting authority, for its part, did not receive notification until some days later, which the Commission acknowledges, (6) when the contract had already been awarded. As a result, in the defendant' s view, there was a breach of the duty of cooperation between Member States and Community institutions under Article 5 of the Treaty, in that it is unreasonable to expect an award procedure begun some months previously to be suspended within the space of one working day, taking into account above all the delay in transmitting the request concerned to the contracting authority.

The basis of the second plea of inadmissibility put forward by the Netherlands Government is that even the Commission had used the same technical specification, namely the UNIX system, in a contract notice published after the one at issue in these proceedings. (7) This shows that NIC was quite justified in believing that the use of that specification would not give rise to objections from the point of view of Community law, since the Commission itself regarded the UNIX system as a generally accepted technical specification in current use.

4. The Netherlands Government' s criticisms of the Commission' s conduct are understandable. However, since it seems to me that it is from the legal point of view alone that it is necessary to ascertain whether they have any substance, there is no doubt that they are incapable of justifying a ruling of inadmissibility. At least, I am unable to propose to the Court that it should make such a ruling.

To start with, the fact that it was late in initiating the special procedure provided for by Article 3 of Directive 89/665 for the correction of infringements of Community provisions in the field of public procurement can certainly not preclude the Commission from bringing an action against the State concerned under Article 169 of the Treaty for a declaration that such infringement has been committed. As we know, that right of action is not subject to any time-limit, because it represents a means of exercising the permanent duty entrusted to the Commission by Article 155 of the Treaty to ensure compliance with Community law; (8) accordingly, any doubt on that head is removed by plain considerations of priority between rules.

Moreover, while the declared aim of the Article 3 procedure is, as is clear from a reading of the

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preamble to the directive, (9) to establish a mechanism by means of which the Commission may swiftly take action vis-à-vis the competent authorities of the Member States before a procurement contract is concluded, in order to prevent the irreparable damage that can occur as a result of the unlawful award of such a contract, in actual fact the means provided neither enhances nor detracts from the powers available to the Commission under Article 169. It is the procedure under Article 169 to which the Commission must in any event have recourse where there is no reply, or an inadequate reply, to the notification given under Article 3, if it intends to seek a declaration that the State concerned has failed to fulfil its obligations under Community rules on procurement contracts.

5. In the light of those considerations, the fact that proceedings were initiated simultaneously under Article 3 of Directive 89/665 and under Article 169 of the Treaty is in keeping with requirements of procedural economy which I have no difficulty in endorsing. The sole consequence of the Commission' s delay in taking action, and from this point of view I cannot but support the complaints against it, is the risk that its action may not be as effective as the special procedure in question was intended to ensure.

Moreover, once the vigorous powers initially conferred on the Commission to take action (10) had been removed from the final version of the directive adopted by the Council, the speeding-up of procedural time-limits under Article 169 by setting a maximum period of 21 days for replying to the Commission' s letter of notification is, in essence, the only factor which fulfils one of the aims of the directive, namely to strengthen at Community level as well the effectiveness of the means of monitoring the application of legislation concerning public procurement contracts.

The article in question merely specifies the period to be considered "reasonable" in this area, under the Article 169 procedure, to enable the Member State concerned to reply to the letter of notification and, if appropriate, prepare a defence to the charges levelled against it. (11) But it was certainly not intended to set a time-limit for the lapse of the Commission' s right of action.

6. The basis of the second plea of inadmissibility put forward by the defendant is the need to safeguard the legitimate expectations as to the compatibility with Community law of the technical specification at issue, aroused in the Netherlands authorities as a result of the use of that specification by the Commission itself in a public contract notice.

On this point, I shall confine myself to observing that there are two possibilities. The first is that the use of the specification at issue is not incompatible with the rules on tenders and, therefore, both the Community institutions and the national authorities were and are entitled to make use of it in describing the subject-matter of a contract. If this is the case, the action brought by the Commission must be dismissed on its merits, at least with regard to this point.

If, instead, there is a conflict, I fail to see how the fact that the Commission too has infringed the rules of the directive can remedy any infringement by the Netherlands authorities. Community institutions are also bound to observe the rules on procurement contracts; if they do not, there is no principle of law authorizing Member States not to do so. Nor is an institution prevented from bringing an action for a declaration that a Member State has committed an infringement merely because it has committed a breach of the same kind.

This objection of inadmissibility must consequently be rejected as well.

7. Since it is not disputed that the directive is applicable in this case, (12) I shall go on to examine the substance of the allegations against the defendant.

First of all, the Commission claims that the contracting authority, as already stated, infringed Article 9(5) of the directive in that when it drew up the tender notice it failed to comply with the conditions contained in Annex III to the directive, referred to in Article 9(5), which at

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point 7 requires the notice to indicate the persons authorized to be present at the opening of tenders and also the date, time and place of opening. The Netherlands Government shares the Commission' s view as to the existence of a duty on the part of the contracting authorities to draw up notices in accordance with the model set out in Annex III and as to the unconditional nature of the requirement referred to in point 7 of the Annex. It contends, however, that the information in question is necessary only where the contracting authority intends to restrict the opportunity to be present at the opening of tenders by, for example, allowing only the suppliers who have submitted them to attend. If, as in this case, they are opened in public and anyone interested may attend, such information is unnecessary.

Furthermore, because the tenders are usually complex and bulky, which precludes their being read out in full when they are opened, the opportunity for suppliers at this stage of the procedure to check the conduct of the contracting authority and, if appropriate, to take action in time to protect their rights, is wholly unrealistic.

8. I cannot support the Netherlands Government' s arguments on that point either. In the first place they have no basis in the wording of the directive. In specifying what information must appear in contract notices where the open procedure is used, Annex III to the directive draws a clear distinction between mandatory and optional information. The second category includes information concerning any time-limit for delivery of the goods to be supplied (point 4), the amount and terms of payment of any sum payable in order to obtain documents relevant to the contract from the administrative service concerned (point 5(c)) or the legal form to be taken by the grouping of suppliers to whom the contract is awarded (point 10).

There is, on the other hand, no possibility of derogating from the requirements contained in point 7, especially with regard to the procedure followed when the tenders are opened. That is perfectly in keeping with the spirit of the rules in question, which treat transparency in all the operations and procedures for supplying the contracting authorities as one of the most effective means of opening up the market in public supply contracts. It should also be borne in mind that in many cases proper application of Community legislation can be ensured only if infringements of the latter are met with a timely response. It is therefore understandable that it may be important for suppliers participating in an award procedure to be present when the tenders are opened, if only, as the Commission observes, to discover the identity of their competitors and to be able to check, even at that stage, whether they meet the criteria for qualitative selection contained in Article 20 et seq. of the directive. It is clear, therefore, that their opportunity to do so would be completely thwarted if the practical conditions attached to opening (in public as well) were not disclosed.

9. As to the alleged infringement of Article 7(6) of the directive and Article 30 of the Treaty, as a result of introducing into the general terms and conditions of the disputed contract a technical specification mentioning a particular product, the Netherlands Government contends that those terms and conditions actually refer to a class of products, in so far as the UNIX system is to be regarded, in the field of information technology, as a technical specification generally recognized by traders in that sector. Accordingly, the fact that it deliberately failed to include the words "or equivalent" alongside UNIX was intended to convey to the suppliers concerned that NIC meant to refer not to a particular product but to a product with well-defined characteristics. In support of its argument, the Netherlands Government refers to the fact that in the end the contract was awarded to a supplier who does not use the UNIX system but a similar one.

I would point out, in this connection, that the defendant acknowledges that the UNIX system is not a standardized system, that is to say a technical specification approved by an international standards institution recognized in the field of information technology. The system was produced within one of the unofficial bodies set up by producers and consumers for the purpose of speeding

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up the standardization process, to be precise, X/OPEN, which undertakes the standardization of operational systems based on AT&T' s UNIX. (13) It is only when the results of the work carried out by those bodies have been adopted by the administrative authorities that the technical specifications thus drawn up become standards. Consequently, it seems to me to be difficult to claim, as the Netherlands Government does, that the conduct of the contracting authority is in accordance with Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications, (14) which requires the Member States to make reference to European and international standards in public procurement orders relating to such technology, in that, as the defendant itself acknowledges, the UNIX system does not fall within that category.

Since, therefore, UNIX is the trade mark of a particular product, the insertion into the contract notice of a clause referring to it, without adding the words "or equivalent", constitutes an infringement of Article 7(6) of the directive. Furthermore, since such a clause reserves the contract, at least at first, solely to those suppliers who propose to use the system specifically indicated, its effect is to impede the flow of imports in intra-Community trade and it is therefore also in breach of Article 30 of the Treaty. (15)

10. Nor does it seem to me that that conclusion can be altered by the fact that the contract in question was subsequently awarded to a supplier using a system equivalent to the one specifically mentioned in the notice, since to include such a clause in the general terms and conditions may in any case cause traders who use systems similar to the one requested to refrain from tendering, precisely on account of that clause.

11. In the light of the foregoing considerations, therefore, I propose that the Court:

Declare that, by failing to indicate in the tender notice at issue the persons authorized to be present at the opening of tenders as well as the date, time and place of opening, and by including in the general terms and conditions a technical specification defined by reference to a product of a specific make, the Kingdom of the Netherlands has failed to fulfil its obligations under Council Directive 77/62/EEC, as amended by Directives 80/767/EEC and 88/295/EEC, and also under Article 30 of the Treaty;

Order the Kingdom of the Netherlands to pay the costs.

(*) Original language: Italian.

(1) ° OJ 1977 L 13, p. 1.

(2) ° OJ 1980 L 215, p. 1.

(3) ° OJ 1988 L 127, p. 1.

(4) ° The notice in question was published in OJ S 233 of 10. 12. 1991, p. 25, under No. 91/S233-37730/NL.

(5) ° OJ 1989 L 395, p. 33.

(6) ° In its reply, the Commission admits that the registered letter containing the complaints was sent on 25 June 1992 but only to the Netherlands Government, not to NIC, which did not, therefore, receive a copy until 29 June when the competent department in the Commission sent a fax.

(7) ° Namely the contract notice published under No 92/S116-223439/FR, in OJ S 116 of 17 June 1992, p. 77.

(8) ° See the judgment in Case 324/82 Commission v Belgium [1984] ECR 1861, paras 11 and 12.

(9) ° See, in particular, recitals 2, 7 and 8.

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(10) ° Especially the possibility of suspending, in urgent cases, the course of the contract award procedure where there have been particularly serious infringements of Community rules: see Articles 4 and 5 of the proposal for a directive (OJ 1989 C 15, p. 8).

(11) ° See the judgment in Case 293/85 Commission v Belgium [1988] ECR 305, paras 13 and 14.

(12) ° In this respect, while denying that the NIC may be regarded as a contracting authority for the purposes of the directive, the Netherlands Government subsequently acknowledges that the directive applies to the award procedure at issue, inasmuch as in the case in point the NIC acted in the name and on behalf of the Koninklijk Nederlands Meteorologisch Instituut (Royal Meteorological Institute of the Netherlands) which, conversely, is to be regarded as a contracting authority in accordance with the directive.

(13) ° See, on that point, the document Standardization - Fact Sheet 4 , drafted in October 1990 by the Commission' s Directorate-General XIII, to which both the parties in the case refer.

(14) ° OJ 1987 L 36, p. 31.

(15) ° See the judgment in Case 45/87 Commission v Ireland [1988] ECR 4929, in particular paras 12 to 27.

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Opinion of Mr Advocate General Lenz delivered on 4 October 1994.
The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd.
Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom.
Free movement of goods - Importation of a narcotic drug (diamorphine).
Case C-324/93.

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Mr President,

Members of the Court,

A ° Introduction

1. The present case raises the question whether the Treaty provisions on the free movement of goods (Article 30 et seq. of the EC Treaty) apply to trade in heroin (and other narcotic drugs).

2. Diamorphine (heroin) is an opium derivative obtained from the processing of morphine. Its use is prohibited in most countries because of the danger of abuse. In the United Kingdom, however, it is the preferred treatment for the relief of pain in the terminally or seriously ill. According to the information supplied by the national court making the reference, 238 kg of the 241 kg of heroin used for medical purposes world-wide in 1990 were employed in the United Kingdom.

3. Diamorphine is a narcotic drug within the meaning of the Single Convention on Narcotic Drugs concluded in New York on 30 March 1961 ("the Convention"). (1) The Convention terminates and replaces a number of hitherto existing agreements in this area (beginning with the International Opium Convention of 1912).

4. The preamble to the Convention recognizes "that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes". (2) At the same time, it states that addiction to narcotic drugs constitutes an evil which the Contracting Parties are under a duty to combat. (3) In the view of the Contracting Parties, measures against abuse of narcotic drugs can be effective only if they are coordinated and universal. Such universal measures, in their opinion, require international cooperation "guided by the same principles and aimed at common objectives". (4)

5. Article 2(1) provides that all the measures of control provided for under the Convention apply to the narcotic drugs listed in Schedule I. Under Article 19 of the Convention these measures of control include, in the first instance, the duty of the Contracting Parties to furnish to the International Narcotics Control Board in Vienna annual estimates "for each of their territories". Those estimates must include the quantities of drugs to be consumed the following year for medical or scientific purposes or utilized for the manufacture of other drugs or preparations. Stocks of drugs to be held as at 31 December of the year to which the estimates relate must also be indicated.

Diamorphine is listed in both Schedule I and Schedule IV to the Convention.

6. Article 21(1) of the Convention provides as follows:

> "The total of the quantities of each drug manufactured and imported by any country or territory in any one year shall not exceed the sum of the following:

(a) The quantity consumed, within the limit of the relevant estimate, for medical and scientific purposes;

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(b) The quantity used, within the limit of the relevant estimate, for the manufacture of other drugs, of preparations in Schedule III, and of substances not covered by this Convention;

(c) The quantity exported;

(d) The quantity added to the stock for the purpose of bringing that stock up to the level specified in the relevant estimate; and

(e) The quantity acquired within the limit of the relevant estimate for special purposes."

7. Articles 29 to 31 of the Convention require the Contracting Parties to make the manufacture, trade, distribution, import and export of drugs "to any country or territory" subject to a licence.

8. Article 43(2) should be mentioned in this connection. Under that provision, two or more Contracting Parties may notify the Secretary-General of the United Nations that "as the result of the establishment of a customs union between them, those Parties constitute a single territory for the purposes of Articles 19, 20, 21 and 31."

9. Article 2(5) of the Convention provides the following additional measures of control for the particularly dangerous drugs listed in Schedule IV:

"(a) A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included; and

(b) A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party."

10. The Contracting Parties, which number more than 130, include all the Member States of the Communities. The United Kingdom ratified the Convention on 2 September 1964 (thus prior to its accession to the European Communities).

11. In the United Kingdom the Secretary of State for the Home Department ("the Secretary of State") has primary responsibility for complying with the duties arising under the Convention. The Misuse of Drugs Act 1971 prohibits the importation of diamorphine unless permitted by the Secretary of State.

12. Until August 1992 the United Kingdom did not permit any imports of narcotic drugs that were manufactured in that country and readily available there. This policy, which had been followed for a long time, was justified by reference to the requirements arising under the Convention and ° particularly in the case of diamorphine ° to the need to counter the danger of the substance being diverted into unlawful trade and to guarantee reliability of supplies. A similar policy has been and continues to be followed in a number of other Member States.

13. Until 1992 requirements for diamorphine in the United Kingdom were met exclusively by Evans Medical Limited ("Evans"). Evans continues to be the principal manufacturer of the finished product for the United Kingdom and world markets.

Macfarlan Smith Limited ("MSL") is at present the only licensed manufacturer in the United Kingdom of raw diamorphine in powder form, which forms the basis for the manufacture of the finished product. As the product is used in only a limited number of other countries, MSL is also the principal manufacturer world-wide. Evans is MSL' s most important customer for this product.

14. In two letters of 17 August 1992 the Secretary of State informed the solicitors of MSL and Evans that after thorough consideration he had concluded that there were no proper grounds on which

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he could refuse an application by Generics (UK) Limited ("Generics") to import a consignment of diamorphine from the Netherlands. Generics specializes in the manufacture and marketing of generic pharmaceutical preparations and has subsidiaries in a number of European countries, including the Netherlands.

The Secretary of State explained in those letters that he had taken account both of the need to guarantee continuity of supplies and the need to prevent the products being diverted to unlawful trade. The application by Generics had, he stated, been examined in the light of national law, Community law and international law. In that connection, the Secretary of State wrote inter alia that:

> "It is considered that there is no incompatibility between the... Convention ... and Articles 30 and 36 of the Treaty of Rome. Article 2(5) of the 1961 Convention permits, but does not require, Parties to restrict imports. Parties are given powers under Article 2(5) to prohibit importation where in their opinion the prevailing conditions in their countries render it the most appropriate means of protecting the public health and welfare. Article 36 [of the EC Treaty] provides that prohibition or restrictions on imports may be justified on grounds of the protection of health and life of humans....
>
> The issue of security in transit has accordingly been carefully considered ...
>
> On the question of reliability of supply, Ministers are, of course, very concerned to ensure that diamorphine remains readily available for medical use in the future. However, they are satisfied that the proper means of ensuring supply is through a tendering scheme... Our Department of Health colleagues have informed us that the [National Health Service Supplies Authority] are looking into the feasibility of a new tendering scheme for diamorphine to operate from early 1993." (5)

15. Evans and MSL thereupon brought an action before the Queen' s Bench Division of the High Court in which they contested both the import licence granted to Generics and the general decision expressed by that licence to reverse the policy previously followed with regard to imports of narcotic drugs. The applicants argued that the Secretary of State had, in his decision, incorrectly proceeded on the assumption that the previous policy had been in breach of Community law and in particular that the import ban had been unlawful under Article 30 of the EC Treaty and could not be justified under Article 36. They take the view that, pursuant to Article 234 of the EC Treaty, Article 30 does not apply to trade in narcotic drugs within the meaning of the Convention. Even if the Secretary of State had none the less been correct to base his decision on the view that Articles 30 and 36 of the EC Treaty were applicable, they argue, he should not have taken that decision without first determining whether the proposed tendering scheme was feasible and compatible with the Convention, as well as whether and, if so, how that scheme could ensure that the health authorities would have regular supplies of diamorphine.

16. The High Court has stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling:

> "1. Upon the true construction of Articles 30, 36 and 234 of the EEC Treaty, is a Member State entitled to refuse to issue a licence, required by the law of that Member State, to import from another Member State narcotic drugs either originating in or in free circulation in the second Member State on the ground that

(a) the provisions of Articles 30 to 36 are inapplicable to trade in narcotic drugs within the meaning or ambit of the Single Convention on Narcotic Drugs concluded at New York on 30 March 1961; and/or

(b) compliance with the Convention would in practice require the arbitrary allocation of quotas

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between imports and local manufacturers; and/or that the system of controls laid down by the Convention would otherwise be less effective; and/or

(c) (in the circumstances that the Community has failed to adopt any directive or other regime on trade in narcotic drugs such as would enable it to declare itself a 'single territory' under Article 43 of the Single Convention and several Member States that manufacture narcotic drugs prohibit their importation) the importation of narcotic drugs from another Member State would threaten the viability of a sole licensed manufacturer of those drugs in the Member State, and that the reliability of supply of those drugs for essential medical purposes in that Member State would be jeopardized?

2. On the proper interpretation of Council Directive 77/62 of 21 December 1976, OJ 1977 L 13, p. 1, as amended, is a public authority, when charged with the task of purchasing essential pain-relieving drugs for medical use, entitled to take into account the need for reliability and continuity of supply when awarding contracts for the supply of such drugs?"

B ° Opinion

Admissibility of the request for a preliminary ruling

17. The Commission takes the view that the Court of Justice ought not to reply to the questions referred by the High Court on the ground that those questions are "hypothetical". It points out that, in its Questions 1(a) to 1(c), the national court seeks to ascertain whether a Member State is entitled generally or in specific circumstances to refuse a licence to import narcotic drugs from other Member States. However, as the Commission points out, the issue in the proceedings before the High Court relates to the grant of a licence, not to its refusal. So far as the Commission is concerned, it is established that under Article 36 restrictions are permissible in intra-Community trade in narcotic drugs and that there may in certain circumstances even be justification for refusing import or export licences. However, in view of the variety of the circumstances in question and the importance of the interests involved, the Commission argues that it is undesirable that the Court should express a view on the problem in the present case. Question 2 in the reference, it goes on to submit, is even more hypothetical since it concerns the purchase of diamorphine by the competent health authorities, whereas the actual case relates to a decision by the Secretary of State to allow the importation of that narcotic substance. For that reason, the Commission argues, the Court should also not reply to that question.

Generics also takes the view that Questions 1(b), 1(c) and 2 ° but not Question 1(a) ° are hypothetical since they relate to assumptions which have not yet been proved. Counsel for Generics, however, submitted at the hearing that the Court ought none the less to reply to those questions.

18. The Court of Justice has consistently held that the procedure for preliminary rulings under Article 177 of the EC Treaty is an instrument for cooperation between the Court of Justice and national courts. In the context of this cooperation, it is for the national court to decide whether it requires a preliminary ruling by the Court of Justice in order to reach its own decision. If the national court decides to make a reference and the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling. However, the task assigned to the Court in the context of this procedure ° as the Commission has also pointed out in its observations ° is not that of "delivering opinions on general or hypothetical questions". (6)

19. In Question 1(a) of its reference the national court wishes to determine whether Articles 30 to 36 of the EC Treaty are applicable to trade in narcotic drugs. As has been pointed out by MSL in its observations and as is also apparent from the order for reference of the High Court, MSL and Evans are relying in the main proceedings on the argument that they are entitled under national law to ensure that the Secretary of State should take his decision regarding the application

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by Generics on a proper legal and factual basis. In taking his decision, the Secretary of State proceeded on the basis that Articles 30 to 36 of the EC Treaty are applicable in the present case. If this assumption is incorrect, his decision will have been taken on an incorrect legal basis and may, if necessary, be set aside by the national court. For the purposes of the decision to be taken by the High Court, therefore, direct significance attaches to the answer to the first question in the reference. In my opinion, there are for that reason no grounds on which to argue that this question is hypothetical in nature.

20. It is, moreover, worth noting that the Commission also proposes to the Court replies to the High Court' s questions even though it takes the view that those questions are hypothetical and for that reason need not be answered. The Commission proposes that the Court' s reply to the questions should be that neither Articles 30 to 36 of the EC Treaty nor Article 234 prevent a national authority from authorizing imports of narcotic drugs from another Member State. Counsel for MSL correctly pointed out at the hearing that this neither answers the question submitted nor enables the national court to answer it. Counsel for the United Kingdom expressed the same view very succinctly when he stated that the Commission was proposing that the Court be of assistance to the national court by replying to a question which no-one had asked with an answer to which no-one could take exception.

21. The Commission is, admittedly, correct to point out that the legal assessment of intra-Community trade in narcotic drugs raises very difficult problems. The Community legislature has clearly not yet found any satisfactory solution for these problems. Such difficulties, however, should not prevent the Court from performing the duty imposed on it by Article 177 of the EC Treaty to support national courts in the resolution of legal proceedings pending before them by interpreting provisions of Community law. These difficulties consequently do not affect the duty of the Court to reply to the questions submitted to the extent to which it is possible for it to do so and cannot also affect the admissibility of the particular question submitted.

22. As the High Court explains in its order for reference, Questions 1(b) and 1(c) contain assumptions of fact by MSL and Evans that are as yet unsubstantiated. Those questions do not, however, request the Court to rule on the existence of the facts assumed. As counsel for MSL has pointed out, the High Court is, on the contrary, seeking in this regard an answer to the question whether the legal aspects contained in those questions are at all relevant from the perspective of Community law. Counsel for the United Kingdom expressed a similar view. If the two questions were to be answered in the negative, it would not be necessary for the High Court to examine in any further detail the assumptions of fact set out in them. If, on the other hand, the Court were to decide that a Member State is in certain cases entitled to prohibit imports of narcotic drugs from other Member States, the High Court would have to examine whether that was the position in the proceedings before it.

23. There is, in my view, little in principle to object to in the course adopted by the High Court. It serves the interests of procedural economy to postpone the taking of evidence so long as it is not clear whether the subject-matter of that evidence is material to the proceedings. Given the significance of the fundamental question raised in Question 1(a) regarding the applicability of Articles 30 to 36 to the lawful trade in narcotic drugs, an issue on which the Court of Justice has not hitherto had occasion to rule, the decision of the High Court to seek a preliminary ruling from the Court of Justice at what is still an early stage in the proceedings is also perfectly understandable. As the Court has recognized, it is for the national court to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. (7) On those grounds I take the view that Question 1(c) is admissible even if the assumptions of fact on which it is based (that the granting of an import licence would threaten the viability

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of the domestic manufacturer and thereby jeopardize security of supplies) are not yet substantiated.

The same, however, does not in my view apply to Question 1(b), which consists of two parts. In the first place it asks whether a Member State can prohibit the importation of narcotic drugs from another Member State if compliance with the Convention would result in the arbitrary allocation of quotas between importers and domestic manufacturers. Secondly, the question asks whether the prohibition of imports is permissible if the system of controls laid down by the Convention would otherwise be less effective. Question 1(b) thus raises the issue of the (practical) compatibility of the application of Articles 30 to 36 of the EC Treaty with the provisions of the Convention. In my opinion this question should be considered together with Question 1(a) given their close connection. In view of the solution which I propose for the reply to this question it does not appear to me necessary that the Court should give a separate answer to Question 1(b).

24. Question 2 in the reference concerns the interpretation of Community-law provisions on the award of public-supply contracts. It is evident that this has its basis in the view expressed by the Secretary of State in his letters of 17 August 1992, to the effect that the importance of ensuring that the United Kingdom would have secure supplies of diamorphine could be taken into account in the context of an invitation to tender. However, it is common ground that this invitation to tender ultimately proved not to be feasible. It may for that reason be quite properly asked what purpose Question 2 serves. The High Court has provided no clarification on this point in its order for reference. Moreover, no further information is to be gleaned from the statements of the parties involved in the procedure before the Court. In those circumstances I share the Commission' s view that the Court should not examine this question. In case the Court might decide otherwise, however, I shall of course also examine the problem raised by this question.

25. Suffice it to mention that the questions submitted refer in general to "narcotic drugs" (within the meaning of the Convention), whereas the present case concerns only one single narcotic drug, namely diamorphine. The Court' s answers to the questions submitted by the High Court will, however, naturally be of significance not only for that product but also generally for the drugs covered by the Convention. For that reason I too shall speak in what follows of narcotic drugs in general, in so far as the discussion does not centre on the special Convention provisions applicable to diamorphine (and other particularly dangerous drugs).

Applicability of Articles 30 to 36

General

26. It is appropriate at the outset of this examination to bear in mind that the question of the applicability of Articles 30 to 36 of the EC Treaty concerns only the lawful trade in narcotic drugs, that is to say trade in products derived from those substances which are intended for medical and scientific use. There can be no doubt as to the need to combat unlawful trade in narcotic drugs and the associated dangers. This applies both to the Member States and to the Community. (8)

27. The Court has not hitherto been called on to decide whether Articles 30 to 36 are applicable to the lawful trade in narcotic drugs within the meaning of the Convention. However, it has already on several occasions been faced with the question whether customs duties (9) or import turnover tax (10) may be levied in respect of the illegal importation of such substances and whether illegal trade in those substances is subject to value added tax. (11) In each case the Court replied to those questions in the negative.

28. Of particular interest to the present case are those decisions involving the question whether duty could be levied on illegal imports of narcotic drugs. In its 1982 judgments in Wolf and Einberger, the Court pointed out that the import and sale of the drugs in question (heroin and cocaine in the first case, morphine in the second) are prohibited in all the Member States, "except in trade

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which is strictly controlled and limited to authorized use for pharmaceutical and medical purposes." (12) The Court stated that this legal position is in conformity with the provisions of the Convention. (13) The Court accordingly reached the conclusion that no customs debt could arise upon the importation of drugs "otherwise than through economic channels strictly controlled by the competent authorities for use for medical and scientific purposes." (14)

It follows from these decisions that duty is payable on lawful imports of narcotic drugs. As the Court was called on in those cases to interpret Articles 9 and 12 to 29 of the EC Treaty, that is to say, provisions of Title I on the free movement of goods, there can scarcely be any doubt in my opinion (contrary to the view expressed by MSL) that the same also applies with regard to the interpretation of Articles 30 to 36, which also belong to Title I. Lawful trade in narcotic drugs, within the meaning of the Convention, therefore comes within the scope of those provisions.

Article 234 and the Convention

29. However, it is still necessary to consider what consequences for the application of Articles 30 to 36 follow from the first paragraph of Article 234 of the EC Treaty. That paragraph provides that the "rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other" are not to be affected by the provisions of the Treaty. Article 5 of the Act concerning the Accession of Denmark, Ireland and the United Kingdom provides that Article 234 of the EC Treaty applies for those Member States to agreements or conventions concluded before accession. (15) So far as the United Kingdom is concerned, therefore, the 1961 Single Convention on Narcotic Drugs, which it ratified in 1964, is an agreement within the meaning of Article 234. (16)

30. As the Court has already held on several occasions, the purpose of the first paragraph of Article 234 is to lay down, in accordance with the principles of international law, (17) that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder. (18) Applied to the present case, this means that the United Kingdom is entitled to meet its obligations towards non-member countries arising under the Convention and to respect the rights which the Convention confers on non-member countries. In so far as the application of Articles 30 to 36 would make it impossible for the United Kingdom to do so, those provisions would have to give way.

However, it must be borne in mind that under the second paragraph of Article 234 the United Kingdom would in that case have to take "all appropriate steps" to eliminate the incompatibility between the Convention and the EC Treaty. The United Kingdom might even be under an obligation to denounce the Convention. Of course, this question has no bearing on the outcome of the present case and for that reason I need not examine it any further.

31. Generics, however, argues that Article 234 is immaterial to this case since only trade between two Member States is affected. The case concerns importation of diamorphine from the Netherlands into the United Kingdom; non-member countries are not affected by this transaction. Ireland has expressed similar views. The French Government, too, argues in its observations that the first paragraph of Article 234 does not allow a Member State to depart from the provisions of the EC Treaty in intra-Community trade. The existence of the Convention, so the argument runs, thus does not stand in the way of the application of Articles 30 to 36.

32. In this regard, both Generics and the French Government rely on the judgment of the Court of Justice in the Conegate case. (19) Indeed, the Court there held that "agreements concluded prior to the entry into force of the Treaty may not... be relied upon in relations between Member States in order to justify restrictions on trade within the Community." (20)

However, MSL correctly points out that this applies only if the rights of non-member countries

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are not affected. That point is confirmed by the case-law of the Court. Thus, in a decision delivered in 1988, the precedence of the EC Treaty over an agreement concluded prior to its entry into force was made subject to the proviso that, "as in the present case, the rights of non-member countries are not involved". (21) As early as its first decision on Article 234 the Court stated that the manner in which customs duties were regulated between the Member States could not be criticized by third countries if this "does not interfere with the rights held by third countries under agreements still in force." (22) No particular significance should therefore be attached to the absence of a corresponding proviso in the Conegate judgment; this may well be explicable on the ground that the Court was satisfied in that case that the relevant conventions did not confer on non-member countries any rights which could have been infringed through the application of Community law in relations between the Member States. (23)

The United Kingdom has also correctly pointed out that the view expressed by Generics runs contrary to the principle laid down in Article 41 of the Vienna Convention on the Law of Treaties. (24)

33. It is thus first necessary to consider whether the Convention forms the basis of obligations imposed on the Member States vis-à-vis non-member countries or creates rights which non-member countries may enforce against Member States. To put it another way, the question is whether the Convention merely creates bilateral obligations as between the particular Contracting Parties or multilateral obligations between all Parties which are signatories to it. (25) This, of course, requires an interpretation of the Convention, which ° as I shall explain in greater detail ° is a matter for the national court making the reference. However, I believe that the Court of Justice can itself decide this question without further ado. In the first place, it has already carried out such an examination in previous cases. (26) Secondly, there can be no reasonable doubt that the fulfilment of the obligations which the Convention imposes on the Contracting Parties is a duty resting on all Contracting Parties, as the Portuguese Government and MSL have correctly pointed out.

The preamble itself, which speaks of the need for coordinated and universal measures against the abuse of narcotic drugs, indicates that this interpretation alone has regard to the objectives of the Convention. The view that the duties to monitor the trade in narcotic drugs laid down by the Convention are intended not only to protect the Contracting Parties directly concerned is confirmed also by the simple consideration that the dangers resulting from breach of the Convention may affect all Contracting Parties: for instance, if a consignment of narcotics from the territory of one Contracting State intended for a recipient in another Contracting State ends up in illegal trade because both Contracting Parties have omitted to apply the control measures imposed by the Convention on trade with each other, this will jeopardize not only people living in each of those States but also the other Contracting Parties. Finally, it should be pointed out that Article 43(2) of the Convention makes it possible for members of a customs union to reduce the inconveniences and obstacles to international trade associated with the application of the Convention' s control system by submitting the notification provided for in that provision. (27) This provision would make no sense if the question of compliance with the provisions of the Convention in the mutual relations between two Contracting Parties did not affect the interests of the other Contracting Parties.

34. The first paragraph of Article 234, however, will be relevant only if there is an inconsistency between such an agreement with non-member countries and Community law. The agreement in question must therefore require a particular course of action which Community law prohibits or prohibit a course of action which Community law requires to be taken. If one wishes to ascertain whether there is such a conflict, it will first be necessary to determine the content of the particular convention, on the one hand, and that of Community law, on the other.

35. The Court is of course in a position to interpret the relevant provisions of Community law

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and determine their content. On the other hand, however, it is unclear whether the Court is empowered, in the context of a reference for a preliminary ruling, to interpret an international convention such as that in the present case.

36. In its judgment in Henn and Darby, (28) the Court appears by implication to have answered that question in the affirmative. That case, which was also a request for a preliminary ruling under Article 177, involved the question whether a Member State can prohibit the importation of goods (in that case, pornographic films and magazines) from another Member State in order to comply with its obligations under an international convention. The Court ruled:

> "It appears from a comparison of the foregoing considerations with the provisions of the Conventions to which the House of Lords refers that the observance by the United Kingdom of those international Conventions is not likely to result in a conflict with the provisions relating to the free movement of goods if account is taken of the exception made by Article 36 in regard to any prohibitions on imports based on grounds of public morality." (29)

37. The German version of this passage ("dass... keine Widersprueche... entstehen koennen") would suggest that the Court had conclusively decided that the obligations arising under the conventions in question were compatible with Community law. However, if one considers the version of the passage in English, which was the language of the case, (30) this is shown to be far from certain. Rather, the impression is that the Court subjected the conventions in question to a merely cursory examination and concluded that this brief examination indicated nothing to suggest a potential conflict between those conventions and Articles 30 to 36 of the Treaty. However, the possibility thereby remained that the national court, on closer examination of the conventions, might reach the conclusion that compliance with the obligations arising under those conventions was in one or more respects incompatible with the application of Article 30 et seq.

This interpretation strikes me as the most appropriate to fit the conclusion drawn by the Court from the above paragraph of this judgment. The Court held that "in so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 of the Treaty", (31) the provisions of Article 234 did not preclude a Member State from fulfilling the obligations arising from the relevant international agreements. During the oral procedure before the Court, counsel for MSL not inappropriately compared this passage to an oracular utterance ("a thoroughly Delphic ruling"). Since the first paragraph of Article 234 itself allows a Member State to fulfil its obligations under an earlier convention, this statement by the Court would seem to make no proper sense. The apparent contradiction disappears if one applies the interpretation which I have developed: according to that interpretation, the passage states merely that there will be no contradiction between international agreements and Community law if the obligations under those agreements can be reconciled with the Treaty by means of the derogation provided for under Article 36. Where this is not possible, one might add, the first paragraph of Article 234 will apply if appropriate.

38. The Court has expressed itself with considerably more clarity in a number of recent decisions on the question of competence regarding the interpretation of such agreements. The Levy (32) and Minne (33) cases both involved the question whether specific national provisions governing night-work for women were contrary to the principle of equal treatment of men and women laid down in Article 5 of Directive 76/207/EEC. The question arose in both cases as to whether the national provisions could be justified on the ground that they had been adopted in order to comply with obligations imposed on the Member States under an agreement within the meaning of the first paragraph of Article 234 (a convention of the International Labour Organization). The Court first held that courts of the Member States were not entitled to apply national law at variance with Community law in so far as the application of that law was not necessary under the first paragraph of Article 234

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in order to ensure compliance with obligations arising under a convention concluded with non-member countries prior to the entry into force of the EC Treaty. In its judgment in the Minne case, the Court continued as follows:

> "However, it falls to the national court, and not to the Court of Justice in the context of a preliminary ruling, to ascertain, with a view to determining the extent to which those obligations constitute an obstacle to the application of Article 5 of the directive, what are the obligations thus imposed on the Member States concerned by an earlier international agreement and whether the national provisions in question are designed to implement those obligations." (34)

The Court expressed itself in similar terms in its judgment in the Levy case. (35)

39. It follows clearly from these decisions that in the view of the Court of Justice the interpretation of international agreements at issue in preliminary ruling proceedings under Article 177 is a matter for national courts. This is also in accordance with the Treaty, since Article 177 empowers the Court to interpret only Community law. Article 177 does not confer any power to interpret international-law agreements which Member States concluded with non-member countries before the entry into force of the Treaty or prior to their own accession.

40. In its written observations, MSL argues that the need to ensure the uniform application of Community law makes it necessary that the Court should interpret the Convention. That argument should not be accepted. Admittedly, the Court has already decided on the basis of a similar argument that it is empowered, in the context of Article 177 proceedings, to interpret the GATT ° an agreement concluded by the Member States with non-member countries prior to the entry into force of the EC Treaty. (36) Apart from the fact that this judgment has been the subject of criticism (37) ° in my opinion, justifiably so ° it should be pointed out that the legal principles of that case are not applicable by analogy to the present case. It is common knowledge that the Community has taken the place of the Member States for the purpose of fulfilling obligations under the GATT. That assertion cannot be made with regard to the convention under consideration in the present case. True, MSL correctly points out that the Community and all the Member States have signed the United Nations Convention against Illicit Trade in Narcotic Drugs and Psychotropic Substances which was concluded on 19 December 1988. (38) In the thirteenth recital in the preamble to this Convention the Contracting Parties recognize the need to reinforce and supplement the measures provided in the 1961 Convention. MSL and Ireland are therefore certainly correct in arguing that, by acceding to the 1988 Convention, the Community has recognized the objectives and system of control of the 1961 Convention. The duty to comply with the obligations under that Convention, however, continues, as before, to rest with the Member States.

41. MSL also suggests in its written observations that it may now be possible to treat the Convention as part of Community law and thus capable of interpretation by the Court. During the oral procedure before the Court, however, counsel for MSL modified this suggestion. In my opinion, this argument need not be considered any further. While it has acceded to the 1988 Convention, the Community has not done so with regard to the 1961 Convention, which is the one under consideration here. The fact that the Community accepts and supports the objectives of that Convention does not in itself make that Convention part of Community law and therefore does not empower the Court to interpret it in the context of Article 177 proceedings.

42. It probably goes without saying that jurisdiction for the Court to interpret the Convention in the context of Article 177 proceedings also cannot be established by taking the view that the Court is here required to interpret Article 234, which is a provision of Community law; since the Court is undoubtedly entitled to carry out that interpretation, so the argument goes, the interpretation of the Convention is no more than a preliminary issue which the Court is entitled to discuss. Advocate General Capotorti, it is true, once expressed a similar line of reasoning. (39) In that case,

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however, he was considering whether a Community-law regulation might possibly have infringed Article 234. The Court would in such a case indeed have to interpret the international-law agreement itself since it alone can determine the invalidity of the rule of Community law at issue. The present case, however, is not of such a kind. (40)

The reference by counsel for the United Kingdom to the Court' s judgment in Hurd v Jones (41) does not affect this. That case involved the interpretation of a rule of Community law which referred to specific international agreements.

43. In my opinion, however, there might possibly be a case for the Court to assess such an agreement if its contents were beyond dispute. If all the parties and the national court making the reference are in accord as to the substantive obligations arising under the particular agreement, the Court will of course be able to examine whether the application of Community law constitutes an obstacle to compliance with those obligations. It may be that the explanation for the fact that the Court, in the Henn and Darby case, itself undertook an examination of the relevant international conventions is to be sought in this consideration.

In the present case, in my opinion, there can scarcely be any doubt that compliance with the obligations imposed on Member States under the Convention cannot result in a conflict with Community law. I shall set this out in detail below in an alternative submission. However, it should be pointed out that there is no full agreement between the parties involved in this case as to the interpretation of the Convention. MSL contends that it follows from Article 21(1) of the Convention that a Member State may not allow imports if requirements can be met by domestic manufacturers. The Portuguese Government takes a similar view. Generics, along with Ireland and the United Kingdom, does not accept that argument. In its order for reference the High Court has not set out clearly its own interpretation of the Convention, with the result that it cannot be ruled out that it may go along with the stance taken by Portugal and MSL. In the light of this the view should stand that, in the context of Article 177 proceedings, the interpretation of the Convention is a matter for the national court.

44. It should be stressed that this is not likely to give rise to any serious dangers for the preservation of the uniform interpretation of Community law. The fear expressed by MSL that the granting of an import licence by the United Kingdom could have serious consequences for the company if other Member States continue to insist on restricting or prohibiting imports from other Member States is perfectly understandable. It ought none the less to be pointed out that although the Court cannot, in the context of Article 177 proceedings, give a ruling on the interpretation of agreements entered into by the Member States with non-member countries, it does, of course, have the task of interpreting Community law. National courts may for that reason request the Court of Justice, under Article 177, to give a ruling on whether compliance by a Member State with obligations which those national courts have found to exist under a particular agreement constitutes an obstacle to the application of Community law.

Moreover, Treaty-infringement proceedings can be brought under Article 169 or Article 170 in cases where a Member State fails to comply with Community law without being entitled to do so by the first paragraph of Article 234. In proceedings of this kind, the Court would have to consider whether the conduct of the Member State is justified under Article 234 and, if necessary, to determine whether the Member State' s interpretation of the particular agreement in question is correct. It was thus scarcely coincidental that the Court of Justice, in its judgments in the Levy and Minne cases, discussed above, stated that it is not its function to interpret international agreements "in the context of a preliminary ruling".

45. I therefore propose that the Court reply as follows to Question 1(a) of the High Court: Articles 30 to 36 of the EC Treaty apply to lawful trade in narcotic drugs within the meaning of the 1961

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Single Convention on Narcotic Drugs. However, in so far as this would make it impossible for the Member State concerned, even in the light of the possibilities opened up under Article 36 of the EC Treaty, to comply with the obligations imposed on it by the Single Convention, the first paragraph of Article 234 allows that Member State to comply with its obligations under that Convention if it acceded to the Convention before the entry into force of the EC Treaty or prior to its own accession to the Community.

46. This also represents an appropriate answer to Question 1(b) in the reference. So far as the question of the effectiveness of the system of control established by the Convention is concerned, it should be pointed out that, in my view, this cannot be a case in which a State has any great leeway: the Member State in question is obliged to implement the measures of control prescribed by the Convention. If that is made impossible by the application of Articles 30 to 36 of the EC Treaty, those articles would have to give way to that extent. If this is not the case, the Community provisions will be applicable.

I take the view that the same must apply with regard to the other assumption set out in this question, according to which compliance with the Convention would in practice require the arbitrary allocation of quotas between importers and domestic manufacturers. The High Court will be required to examine whether such an obligation follows from the Convention and whether compliance with that obligation would be rendered impossible through the application of Articles 30 to 36. The Community provisions will be required to give way only if this proves to be the case.

Alternative submission with regard to Question 1

47. If the Court should, however, conclude that it can itself address the question in the present case as to whether compliance with obligations under the Convention is compatible with the application of Articles 30 to 36 of the EC Treaty, the following considerations, which I add here in the form of an alternative submission, ought in my view to be taken into account.

48. The Convention makes lawful trade in narcotic drugs subject to strict controls. Contracting Parties are required to submit annual estimates of their consumption of narcotic drugs (Article 19 of the Convention). In simple terms, quantities manufactured and imported may not exceed the amount consumed in the particular State or territory or exported therefrom (Article 21). The manufacture, export and import of narcotic drugs require official licences (Articles 29 to 31). Article 2(5) provides that additional measures, including a general ban, may be adopted with regard to particularly dangerous drugs. MSL is not entirely wrong when it speaks of "a planned economy on a world scale" having been created by the Convention. It will be immediately evident that this system is at variance with Article 30 of the EC Treaty, which seeks to remove all quantitative restrictions on imports and barriers having equivalent effect in trade between Member States.

49. It would, however, be a mistake to focus exclusively on Article 30 in the examination to be carried out here. That provision is inseparably linked to Article 36, which permits certain derogations from the prohibition under Article 30. In its judgment in Henn and Darby, (42) the Court made it clear that an overall view is here required: as mentioned above, the Court held in that judgment that there was not likely to be any conflict between the relevant international conventions and the provisions relating to the free movement of goods "if account is taken of the exception made by Article 36 in regard to any prohibitions on imports based on grounds of public morality." (43) Thus, if the restrictions or prohibitions of imports resulting from the Convention in the present case could also be justified on the basis of Article 36, there would be no inconsistency between the Convention and Articles 30 to 36.

50. The systematic or, rather, dogmatic objections of MSL to this approach are unconvincing. Admittedly, derogations under Article 36 must indeed be justified. This means that measures to secure the objectives

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there set out must be appropriate and proportionate in order to be covered by Article 36. (44) It is also true that Article 36, as a derogating provision, must be interpreted strictly. (45) However, the argument of MSL, to the effect that the rights of non-member countries cannot be made subject to justification under Article 36, misses the point of the problem. The decisive factor is that the Member State is in a position to comply with the obligations imposed on it by the Convention. From the point of view of the non-member countries affected, it is immaterial whether this is possible by virtue of that State' s own sovereignty or is permitted by Article 36.

51. Under Article 36 of the EC Treaty restrictions and bans on imports can be justified on grounds of, inter alia, the protection of health. With the exception of MSL, all the parties involved in the proceedings before the Court take the view that the measures required under the Convention can also be based on Article 36 of the EC Treaty. That is a view which I share. The measures for control of the lawful trade in narcotic drugs provided for in Articles 19, 21 and 29 to 31 of the Convention appear appropriate to prevent (or to minimize) the dangers to health which abuse of these substances may occasion. In view of the danger posed by these products, there is no obvious alternative method for attaining this object which is less restrictive of the free movement of goods.

52. It should be borne in mind in this connection that the Community adopted the objectives of the Convention here under examination at the latest when it acceded to the 1988 Convention. (46) Both the EC Treaty and the Convention attach particular importance to the protection of health. It would for that reason be remarkable if measures dictated by the Convention for the purpose of attaining that objective were to encounter the disapproval of the EC Treaty.

53. In any event, a contradiction could arise only where the limits set in Article 36 are exceeded. It is common knowledge that under the second sentence of Article 36 prohibitions of trade are not permitted if they constitute a "means of arbitrary discrimination" or a "disguised restriction" on trade between Member States. In my opinion, however, such a situation cannot arise in the present case.

54. As the United Kingdom, for instance, has correctly pointed out, the Convention in no way compels the Contracting Parties to ban imports of narcotic drugs. The Commentary on the Convention published by the United Nations ("the Commentary") (47) does admittedly state that imports of narcotic drugs (and the international trade as such) have to be considered to constitute particularly dangerous situations in which drugs can be diverted into illicit channels. (48) However, the Convention contains numerous references to international trade which make clear that it is none the less based on the fundamental premiss that imports are permissible. Suffice it at this point to bear in mind the wording of Article 21(1), which provides that the total quantity of each drug "manufactured and imported" in any one year may not exceed specified amounts.

55. MSL and the Portuguese Government argue that it follows from Article 21(1) of the Convention that a State is obliged to prohibit imports if the output of domestic manufacturers is sufficient to meet requirements. To my way of thinking, such an obligation can no longer be based on Article 36 of the EC Treaty, with the result that a conflict would arise in that regard between the Convention and the provisions of Community law. The question, however, is academic, since in my opinion the Convention does not impose any such duty. Article 21(1) refers to both domestic production and imports, without requiring any preference to be shown for the former. An obligation to ban imports also does not arise from any actual necessity, (49) since domestic production and imports must both be authorized by licence. So far as I can ascertain, the only clue in this direction is to be found in a decision adopted by the Consultative Committee of the League of Nations in 1934 (50) which recommended to producer countries that they should not grant any further licences for manufacture if existing production capacity in the countries in question was sufficient to meet requirements. The Convention here under examination, however, does not contain any provision to that effect or

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any provision which in such a case would require a ban on imports.

56. MSL takes the view that the grant of a licence for imports would have the result that specific quotas would have to be allocated to domestic manufacturers and importers. Such a quota system, it argues, would, however, be incompatible with Articles 30 to 36, particularly since it would lead to an arbitrary allocation of the quantities in question.

It would indeed be very difficult, if not completely impossible, for a State to keep within the maxima laid down in Article 21 and not to exceed the estimates requiring to be made under Article 19 unless it were to allocate specific quotas of required total needs to the commercial operators concerned. For that reason the Contracting Parties are recommended in the Commentary to grant quotas to "manufacturers or importers, or both". (51) However, in my view such a procedure may also be justified under Article 36 of the EC Treaty. Ireland has very properly pointed out that a ban on imports in the present case would have the result of consolidating one company' s monopoly on the United Kingdom market. Such a position would be much less compatible with the free movement of goods than would the allocation of quotas to domestic manufacturers and importers.

Furthermore, such allocation of quotas need not ° contrary to MSL' s contention ° take place in a manner which is arbitrary and for that reason contrary to Article 36. There is nothing to argue against the application, when these quotas are being allocated, of objective criteria relating to factors such as price or guarantee of regular supplies by the company in question.

57. Nor will the effectiveness of the Convention' s system of control be jeopardized through the granting of a licence for imports. Admittedly, the Commentary does mention that it may be advisable or even essential for the purposes of effective control to keep to a minimum the number of licences issued to manufacturers and international traders (importers as well as exporters). (52) It should nevertheless be noted in this regard that the Commentary is a means for interpreting the Convention but cannot form the basis for any obligation not already set out in the Convention itself. The Convention, however, does not prescribe that Contracting Parties must ban imports. This is implicitly confirmed by the passage in the Commentary just referred to. If the granting of an import licence in an individual case thus does not breach the Convention, the argument (discussed in connection with Question 1(b)) that conferring on one single domestic producer the right to supply is particularly conducive to safety will be unable to stand in the way of the application of Articles 30 to 36 of the EC Treaty.

In my view it is not necessary to examine in any greater detail the question whether the granting of an import licence makes it difficult for a Contracting Party to furnish accurate estimates under Article 19. Suffice it to note that the Convention does not prohibit imports. If such imports did in fact make the submission of estimates more difficult, those difficulties would result from the Convention itself.

58. Compliance with the obligations arising under Article 2(5) of the Convention can also be reconciled with the application of the rules on the free movement of goods. Under Article 2(5) each Contracting Party must adopt any special measures of control for drugs listed in Schedule IV to the Convention which in its opinion are "necessary" (Article 2(5)(a)) and may ban a drug outright if it considers this to be the "most appropriate means" of protecting the public health and welfare (Article 2(5)(b)). This presents Contracting Parties with a possible course of action. A duty to act arises only where a Contracting Party considers special measures to be appropriate. In this connection, however, it must be borne in mind that the Contracting Parties are required to act "in good faith" when interpreting these provisions. (53) Thus, although the Convention does not require Contracting Parties to adopt special measures if they do not consider such measures to be necessary, if a Contracting Party forms the opinion that special measures of control are "necessary" or that prohibition of the drug in question represents "the most appropriate means" of countering the dangers to which

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that drug gives rise, it must also act. This interpretation is consonant with the wording of the provision as well as with the meaning and purpose of the Convention.

59. As the matter is thus one for the assessment of individual Contracting Parties, differences may naturally arise as between individual Member States with regard to the application of this provision. The present case is a clear example of this, since according to the available information the use of diamorphine is permitted only in the United Kingdom and is banned in all the other Member States.

In any event, it is scarcely surprising that there should be such differences in an area as sensitive as that of lawful trade in narcotic drugs. As several of the parties involved in these proceedings have correctly pointed out, trade in narcotic drugs not only creates dangers for health but can also adversely affect other legal rights. Restrictions on intra-Community trade in these goods may thus also be justified on grounds of public policy or public security, which are also mentioned in Article 36.

60. As the French Government has correctly argued, such differences are also compatible with Community law so long as there has not been any harmonization at Community level of protective provisions in this area. It should, however, be pointed out that Community law imposes limits on such national measures. Those limits are set out in the second sentence of Article 36. The views expressed by the Portuguese and French Governments fail, in my view, to take sufficient account of that fact.

A case of disguised discrimination (and thus no longer covered by Article 36) would, for instance, exist where a Member State allowed domestic operators to manufacture or trade in a drug listed in Schedule IV to the Convention but imposed a general ban on imports from other Member States. Such a course of action is also not prescribed under Article 2(5) of the Convention. That provision does not require Contracting Parties to treat domestic producers more favourably than importers. A fortiori, it does not force Contracting Parties to maintain in place national monopolies. Ireland makes the point succinctly: Article 2(5) permits a total ban on the production, manufacture, export, import, possession and use of such a drug. This can be reconciled with Article 36 of the EC Treaty. However, if a Contracting Party does not impose a general ban but introduces only specific restrictions, the Convention does not oblige it to treat importers less favourably than domestic producers.

To that extent also there is no contradiction between the provisions of the Convention and the rules on the free movement of goods.

61. MSL has argued that the granting of an import licence infringes the general obligations of the Contracting Parties, set out in Article 4 of the Convention, to give effect to the Convention and, in accordance with its terms, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs. MSL has, however, failed to demonstrate what actually constitutes this infringement.

62. It seems to me that considerably more weight attaches to the argument that the Treaty rules on the free movement of goods will not be able to apply ° at least with regard to the United Kingdom ° so long as the Member States have not made the notification provided for under Article 43(2) of the Convention.

It is clearly the object of Article 43(2) to provide members of a customs union (as represented by the Community) with the means to reduce the inconveniences and obstacles to international trade occasioned by the application of the system of controls. (54) Since no such notification for the Member States of the Community has as yet been made, they cannot be treated as a single "territory" within the meaning of Articles 19, 20, 21 and 31 and therefore cannot benefit from the resulting facilities. (55) This means, for instance, that the importation into one Member State of narcotic drugs from another Member State continues to require a licence under Article 31.

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63. The present case, however, concerns a separate question, namely whether the provisions of the Convention are compatible with the application of the Treaty rules on the free movement of goods. In the light of the above examination, this question ought to be answered in the affirmative. It is for that reason immaterial that submission of the notification provided for under Article 43(2) would provide additional facilities. If the Convention and the Treaty are mutually compatible without its being necessary to submit that notification, absence of such notification cannot release the Member States from their obligations under Articles 30 to 36 of the EC Treaty.

64. If the Court should go along with the views outlined in this alternative submission, Questions 1(a) and 1(b) should in my opinion be answered as follows: Articles 30 to 36 of the EC Treaty apply to lawful trade in narcotic drugs within the meaning of the 1961 Single Convention on Narcotic Drugs.

Question 1(c)

65. In Question 1(c) of its reference the High Court seeks to ascertain whether a Member State can refuse to issue a licence for the importation of narcotic drugs from another Member State if such importation would threaten the viability of the sole licensed manufacturer in the Member State concerned and jeopardize the reliability of supplies of those drugs for essential medical purposes in that Member State. By that question the High Court appears to be seeking an interpretation of Article 36 and thus proceeding on the assumption that Articles 30 to 36 are applicable. It is on this basis that the question should also be answered.

66. The question is founded on the claim by the applicants in the main proceedings that the grant of an import licence would threaten the viability of the British manufacturer and consequently security of supplies in the United Kingdom. Although this claim has not yet been proved, it may be assumed to be correct for the purpose of answering the question submitted.

67. The other circumstances mentioned in the question are irrelevant. The fact that other Member States which manufacture narcotic drugs prohibit their importation has no bearing on the interpretation of Community law. Likewise, the fact that the Member States have not as yet submitted the notification provided for under Article 43(2) of the Convention is immaterial for the purposes of interpreting Article 36 of the EC Treaty. (56)

68. There can in my view be no question but that the continuity of supplies of drugs essential for medical purposes is a matter of great importance. A Member State is for that reason entitled to take account of that point when deciding whether to grant a licence for the importation of narcotic drugs. It cannot be ruled out that this consideration may exceptionally allow a Member State, within the context of Article 36, to accord domestic production a certain degree of preference over imports from other Member States. This, in my view, follows from the judgment of the Court in the Campus Oil case. (57) The Court there held that a Member State which is dependent on imports of petroleum products can require importers to cover a certain proportion of their needs by purchases from a domestic refinery, if the production of that refinery cannot otherwise be disposed of competitively on the market. (58) Article 36 will also not be rendered inapplicable in such cases on the ground that the measure in question also serves purely economic ends. (59) Generic' s objection in that regard cannot therefore be accepted.

69. It cannot be ruled out that a Member State may even be entitled on the basis of the above consideration to prohibit the importation of a narcotic drug in individual cases. However, the United Kingdom correctly points out that such cases will be very much the exception. Article 36 allows restrictions on trade only if there are no other less restrictive ways in which to secure the desired objective. For that reason it is necessary to point to these limits when answering the questions submitted in the reference. In this regard, it goes without saying that Article 36

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merely allows a Member State to impose restrictions on the free movement of goods but does not oblige it to do so.

70. I therefore propose the following answer to Question 1(c): Article 36 of the EC Treaty allows a Member State exceptionally to give preference to domestic production over imports from other Member States if that is the only way in which reliable supplies of narcotic drugs for essential medical purposes can be guaranteed in that Member State.

Question 2

71. By its final question the High Court seeks to ascertain whether the public authority responsible for purchasing essential pain-relieving drugs for medical use is entitled to take into account the need for reliability and continuity of supply when awarding the corresponding contracts within the framework of a tendering procedure for public-supply contracts. The order for reference mentions in this connection Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, (60) "as amended". This directive (which was amended on several occasions) was repealed by Article 33 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (61) and was replaced by Directive 93/36. This directive was adopted after the issue by the High Court of its order for reference. If it were necessary to reply to the question of the High Court, that answer would therefore have to take account of the present legal position. However, as I have already pointed out, it is not necessary for the Court to consider this question. (62) In what follows I shall discuss it only in case the Court should form a different opinion.

72. With the exception of MSL and the French Government, all the parties involved in the present proceedings take the view that the criterion of reliability and continuity of supply may be considered within the context of Directive 77/62. According to MSL, this is not one of the criteria for the award of contracts within the meaning of Article 25 of the directive. That provision applies to all "open" and "restricted" procedures within the meaning of Article 4(1) and (2) of the directive. It is for that reason first necessary to consider whether those procedures may be applicable in the present case.

73. The Portuguese Government has its doubts on this point and refers to Article 6(1)(b) of Directive 77/62. (63) This provision states that the procedures referred to in Article 4(1) and (2) need not be applied "when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier".

In contrast to the view taken by the Portuguese Government, however, it seems to me beyond doubt that the supply of narcotic drugs is not covered by that provision. The facts of this case demonstrate that the manufacture of diamorphine is not the subject of exclusive rights.

74. The French Government argues that the supply of narcotic drugs need not be made the subject of a tendering procedure by reason of Article 6(1)(g) of Directive 77/62. Article 6(1)(g) provides that the procedures referred to in Article 4(1) and (2) need not be applied if the supplies in question "are declared secret or when their delivery must be accompanied by special security measures in accordance with the provisions laid down by law, regulation or administrative action in force in the Member State concerned, or when the protection of the basic interests of that State' s security so requires". As the result of a subsequent amendment (64) to Directive 77/62, this passage became Article 2(2)(c), which provides that the directive does not apply to such cases. (65)

The possibility cannot be ruled out that the supply of narcotic drugs is covered by this provision. Although the exceptional cases, in which the tendering procedures set out in Directives 77/62 or 93/36 are not applicable, must in those directives be "expressly limited", (66) (67) the fact that the supply of narcotic drugs must be accompanied by special security measures suggests that such

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supply might come within the scope of this derogating provision. If this were so, the problem addressed by Question 2 would, of course, not arise.

75. If, on the other hand, it is assumed that the directive is applicable, the question will arise as to whether the criterion of reliability and continuity of supplies can be taken into consideration under Article 25 of Directive 77/62. As MSL correctly points out, the directive draws a distinction between the requirements as to technical suitability of relevant operators (Articles 21 to 24) and the criteria for the award of contracts (Article 25). This is already clear from Article 17(1) of Directive 77/62.

76. According to Article 25(1) of Directive 77/62 (68) the contracting authority, when awarding contracts, must apply either the criterion of the lowest price only (Article 25(1)(a)) "or, when the award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance" (Article 25(1)(b)).

As the Court has already held with regard to a similar provision in Directive 71/305/EEC, this means that the permissible criteria must be confined to identifying "the offer which is economically the most advantageous". (69) From this MSL infers that the criterion of reliability and continuity of supplies cannot be applied under Article 25(1)(b) of Directive 77/62 on the ground that it is a consideration which is general in nature.

77. That argument cannot be accepted. Admittedly, it seems to me doubtful whether one can claim that this criterion is actually contained within one of the criteria expressly mentioned in Article 25, as has been argued by the United Kingdom (which takes the view that this criterion is contained in "technical merit") and by Ireland (which considers that the criterion in question may be included under the notions of "delivery date" or "quality"). In any event, this criterion also determines the "most economically advantageous tender", since even an apparently attractive offer will ultimately not be advantageous if future supplies cannot be guaranteed. Even though this is an approach which also takes into account the future consequences of the award of a contract for a specific offer, the fact that such an approach is not alien to the directive is demonstrated, in my opinion, by the inclusion of the criteria "running costs" and "after-sales service". The Commission has also expressed a similar view.

Generics, Ireland and the United Kingdom have also correctly pointed out that the enumeration given in Article 25(1)(b) is not exhaustive, as the wording itself indicates. It is, of course, necessary that the criterion be specified in the invitation to tender.

78. Finally, it should be pointed out that the criterion of security of supply is a legitimate consideration which may be taken into account within the context of Article 36. The United Kingdom is right to point out that a directive must not be interpreted in such a way that it prohibits something which Article 36 allows. The French Government also refers in this connection to the fifth recital in the preamble to Directive 77/62, which states that the directive does not prevent the application of Article 36.

C ° Conclusion

79. I accordingly propose that the questions submitted by the High Court should be answered as follows:

1. Articles 30 to 36 of the EC Treaty apply to lawful trade in narcotic drugs within the meaning of the 1961 Single Convention on Narcotic Drugs. However, in so far as this would make it impossible for the Member State concerned, even in the light of the possibilities opened up by Article 36

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of the EC Treaty, to comply with the obligations imposed on it by the Single Convention, the first paragraph of Article 234 of the EC Treaty allows that Member State to comply with its obligations under that Convention if it acceded to the Convention before the entry into force of the EC Treaty or prior to its own accession to the Community.

2. Article 36 of the EC Treaty allows a Member State exceptionally to give preference to domestic production over imports from other Member States if that is the only way in which reliable supplies of narcotic drugs for essential medical purposes can be guaranteed in that Member State.

(*) Original language: German.

(1) ° 520 UNTS 204. A German translation of the Convention, as amended by the Protocol of 25 March 1972, is printed in the Bundesgesetzblatt (Federal Official Journal) 1977 II, p. 111.

(2) ° Second recital in the preamble to the Convention.

(3) ° Third and fourth recitals in the preamble.

(4) ° See the fifth and sixth recitals in the preamble.

(5) ° The quotations are from the Secretary of State' s letter to the solicitors of Evans. The wording of the letter sent to the solicitors of MSL differs in a number of slight (and substantively insignificant) respects.

(6) ° Judgment in Case C-83/91 Meilicke [1992] ECR I-4871, paragraphs 22 to 25.

(7) ° See in particular the judgment in Case C-127/92 Enderby [1993] ECR I-5535, paragraph 10.

(8) ° See, for instance, Article K.1(9) of the Treaty on European Union, which declares police cooperation for the purposes of preventing and combatting unlawful drug trafficking to be a matter of common interest.

(9) ° Judgments in Case 50/80 Horvath [1981] ECR 385, Case 221/81 Wolf [1982] ECR 3681 and Case 240/81 Einberger [1982] ECR 3699.

(10) ° Judgment in Case 294/82 Einberger [1984] ECR 1177.

(11) ° Judgments in Case 269/86 Mol [1988] ECR 3627 and Case 289/86 Happy Family [1988] ECR 3655.

(12) ° Paragraph 8 of each judgment (cited above in footnote 9).

(13) ° Paragraph 9 of each judgment (cited above in footnote 9).

(14) ° Paragraph 16 of each judgment (cited above in footnote 9).

(15) ° Corresponding provisions are to be found in Article 5 of the Act concerning the Accession of Greece and in Article 5 of the Act concerning the Accession of Spain and Portugal.

(16) ° The same applies to Denmark, Greece, Portugal and Spain, which also ratified the Convention prior to their accession to the Communities.

(17) ° See Article 30 of the Vienna Convention on the Law of Treaties.

(18) ° Judgment in Case 10/61 Commission v Italy [1962] ECR 1, at page 11; judgment in Case 812/79 Burgoa [1980] ECR 2787, paragraph 8.

(19) ° Judgment in Case 121/85 Conegate [1986] ECR 1007.

(20) ° Judgment in Conegate (cited above in footnote 19), paragraph 25.

(21) ° Judgment in Case 286/86 Deserbais [1988] ECR 4907, paragraph 18.

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(22) ° Judgment in Case 10/61 Commission v Italy, cited above in footnote 18, at page 11.

(23) ° The relevant conventions in that case were the Geneva Convention of 1923 for the Suppression of Traffic in Obscene Publications and the Universal Postal Conventions, which the Court had already considered in its judgment in Case 34/79 Henn and Darby [1979] ECR 3795. The Court had ruled in that case that the application of Article 30 et seq. was compatible with those conventions (paragraph 26).

(24) ° Under that provision two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone. However, one of the conditions for this is that such modification does not affect the enjoyment by the other parties of their rights under the treaty.

(25) ° See, with regard to this distinction, the Opinion of Advocate General Warner in Case 34/79 Henn and Darby, cited above, at page 3833.

(26) ° See in particular the judgment in the Deserbais case (cited above in footnote 21), in the passage referred to.

(27) ° The International Narcotics Control Board in Vienna expressed this in the following terms in a letter of 11 August 1981 to the United Kingdom which has been submitted by MSL: If, for economic reasons, States wish to reduce the inconveniences and obstacles which a control system, applied in conformity with the universal treaties, causes in international trade, they might seek to unify their systems. The universal treaties themselves point in this direction since Article 43 of the 1961 Single Convention envisages the case of a customs union....

(28) ° See footnote 23 above.

(29) ° Judgment in Henn and Darby (cited above in footnote 23), paragraph 26.

(30) ° It appears... that the observance... of those international Conventions is not likely to result in a conflict.... See also the French version, according to which the observance of the international conventions n' est pas susceptible de créer un conflit... (emphasis added in each case).

(31) ° Judgment in Henn and Darby (cited above in footnote 23), paragraph 27.

(32) ° Judgment in Case C-158/91 Levy [1993] ECR I-4287.

(33) ° Judgment in Case C-13/93 Minne [1994] ECR I-371.

(34) ° Paragraph 18 of the judgment in Minne, cited above in footnote 33.

(35) ° Paragraph 21 of the judgment in Case C-158/91 Levy (cited above in footnote 32): However, it is not for the Court of Justice in the context of a preliminary ruling to determine the obligations imposed on the Member State in question by an earlier international agreement and to specify its parameters in such a way as to determine the extent to which those obligations constitute an obstacle to the application of Article 5 of the directive.

(36) ° Judgment in Joined Cases 267 to 269/81 SPI and SAMI [1983] ECR 801, paragraphs 14 to 19.

(37) ° See, for example, T.C. Hartley, The Foundations of European Community Law, 2nd edition, 1988, p. 252 et seq.

(38) ° See Council Decision 90/611/EEC of 22 October 1990 concerning the conclusion of this Convention (OJ 1990 L 326, p. 56).

(39) ° Opinion in Case 812/79 Burgoa, cited above in footnote 18, at p. 2817.

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(40) ° An example of such a situation is, however, provided by the facts which gave rise to the judgment in Case 181/80 Arbelaiz-Emazabel [1981] ECR 2961 (see paragraph 11 of the judgment).

(41) ° Judgment in Case 44/84 Hurd v Jones [1986] ECR 29.

(42) ° Cited above in footnote 23.

(43) ° See the quotation in point 36 above.

(44) ° See, for instance, the judgment of the Court in Case 382/87 Buet [1989] ECR 1235, paragraphs 10 and 11.

(45) ° Judgment of the Court in Case 103/84 Commission v Italy [1986] ECR 1759, paragraph 22.

(46) ° See point 40 above.

(47) ° United Nations (Publisher), Commentary on the Single Convention on Narcotic Drugs, 1961, New York, 1973.

(48) ° Note 2 on Article 1(1)(y) in the Commentary (cited above in footnote 47).

(49) ° For example, in the following sense: if one assumes that there is domestic production, the quantity of imports which might be authorized will at most amount to the difference between consumption (plus exports) and domestic production. If no such difference exists (because of a correspondingly high domestic production), no imports will be authorized.

(50) ° Cited in the Commentary (see footnote 47), Note 10 on Article 29(1).

(51) ° Commentary (cited in footnote 47), General Comment 3 on Article 21.

(52) ° Commentary (cited in footnote 47), General Comment 4 on Article 21; Note 4 on Article 31(3).

(53) ° Commentary (cited above in footnote 47), Note 4 on Article 2(5). This is a general principle for the interpretation of international agreements (see Article 31 of the Vienna Convention on the Law of Treaties), the binding nature of which has also been recognized by the Court of Justice (see, for example, the judgment in Case C-312/91 Metalsa [1993] ECR I-3751, paragraph 12).

(54) ° See point 33 above and the letter quoted from in footnote 27.

(55) ° The Commentary makes it clear that, despite the wording (may), notification is necessary under Article 43(2) in order to secure the desired results (Commentary (cited above in footnote 47), Note 13 on Article 1(1)(y)).

(56) ° See points 62 and 63 above.

(57) ° Judgment in Case 72/83 Campus Oil Limited and Others v Minister for Industry and Energy and Others [1984] ECR 2727.

(58) ° Judgment in Campus Oil, cited above in footnote 57, paragraph 51.

(59) ° See, for instance, the judgment in Case 118/86 Openbaar Ministerie v Nertsvoederfabriek Nederland [1987] ECR 3883, paragraph 15.

(60) ° OJ 1977 L 13, p. 1.

(61) ° OJ 1993 L 199, p. 1.

(62) ° See point 24 above.

(63) ° This provision corresponds to Article 6(3)(c) of Directive 93/36.

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(64) ° See Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1).

(65) ° According to the similar provision in Article 2(1)(b) of Directive 93/36, the directive does not apply in such cases.

(66) ° Ninth recital in the preamble to Directive 77/62.

(67) ° Eleventh recital in the preamble to Directive 93/36.

(68) ° See also Article 26(1) of Directive 93/36 to the same effect.

(69) ° Judgment in Case 31/87 Beentjes [1988] ECR 4635, paragraph 19.

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SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect
AUTLANG	German
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PROCEDU	Reference for a preliminary ruling
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Opinion of Mr Advocate General Tesauro delivered on 28 November 1995.
Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others.
References for a preliminary ruling: Bundesgerichtshof - Germany and High Court of Justice, Queen's Bench Division, Divisional Court - United Kingdom.
Principle of Member State liability for damage caused to individuals by breaches of Community law attributable to the State - Breaches attributable to the national legislature - Conditions for State liability - Extent of reparation.
Joined cases C-46/93 and C-48/93.

1 State liability for infringements of Community law and the resultant obligation to make reparation to individuals, which is the subject of inter alia the well-known judgment in Francovich, (1) continues to arouse great interest. That judgment, however, has not cleared up every aspect; many question marks remain, some relating to important issues.

The questions from the Bundesgerichtshof (Federal Court of Justice, Case C-46/93) and the High Court of Justice (Case C-48/93), which raise the issue once again of infringements of the Treaty already found in preceding judgments of this Court, consequently afford an opportunity, if not of resolving all the remaining difficulties associated with this complex subject, at least of providing further clarification, in particular about the existence of State liability in cases other than failure to implement a directive and about the Community preconditions for an individual's right to reparation.

As a result, the Court will have to consider a number of important institutional aspects, in particular the relationship between Community law and the national legal systems. Consequently, this is an area in which the correct operation of the Community legal system as a whole has to be assessed.

I Facts, national legislation, questions referred for a preliminary ruling

2 Whilst referring to the Report for the Hearing for a detailed account of the relevant legislation and the facts which have given rise to these proceedings, I shall confine myself to those aspects which are most relevant for present purposes.

(a) Case C-46/93 (Brasserie du Pêcheur)

3 Brasserie du Pêcheur SA, a French brewery the seat of which is at Schiltigheim (Alsace), claims that it was forced to discontinue exports of beer to Germany in late 1981 because the beer produced by it did not comply with the `purity' requirements laid down in Paragraphs 9 and 10 of the Biersteuergesetz (2) (Law on Beer Duty, hereinafter `the BiStG'). More specifically, as emerged at the hearing, the persistent checks carried out by the German authorities at retailers' premises and the resultant claims that the beer in question did not satisfy the requirements laid down caused the brewery's German sole importer to refuse to renew the distribution contract.

Following the judgment of 12 March 1987 (3) in which the Court held that the prohibition against the marketing of beers imported from other Member States which did not comply with the BiStG was incompatible with Article 30 of the Treaty, Brasserie du Pêcheur brought an action against the Federal Republic of Germany for compensation for the loss suffered by it as a result of that import restriction between 1981 and 1987, in the sum of DM 1 800 000, which is presumably a fraction of the loss actually incurred. That action was dismissed by the lower courts. Brasserie du Pêcheur is pursuing the same claim in its appeal on a point of law before the Bundesgerichtshof.

4 Given that the infringement in question must be regarded as an omission on the part of the legislature, since it had not amended the BiStG to accord with Community law, the Bundesgerichtshof points out that compensation for damage is governed in Germany by Paragraph 839 of the Bürgerliches Gesetzbuch

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(German Civil Code) in conjunction with Article 34 of the Grundgesetz (Basic Law). According to the first paragraph of the latter provision, `If a person infringes, in the exercise of a public office entrusted to him, the obligations incumbent upon him as against a third party, liability therefor shall attach in principle to the State or to the body in whose service he is engaged'. The first subparagraph of Paragraph 839 of the Bürgerliches Gesetzbuch provides, in contrast, that if an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom. In the event that he acted negligently, he will be answerable for the damage only if the injured party has no other possibility of obtaining compensation.

Apart from the exercise of a public office and a breach of official duty, therefore, the applicability of the rules in question depends on the further requirement that the official duty breached should be `referrable to the third party' (Drittbezogenheit), which means that the State is responsible only for breaches of official duties the exercise of which is expressly directed at a third party and therefore has the aim of protecting a right of the third party. However, it is precisely that requirement which is normally absent in the case of a legislative wrong, including the illegality in point in this case. (4) As the national court has pointed out, in fact, in the BiStG the legislature imposed burdens concerning the community which do not relate in particular to any individual or class of individual capable of being regarded as third parties for the purposes of the provisions adverted to. (5)

Secondly, the national court observes that neither in this case can there be State liability on account of an unlawful act of the public authority which is capable of being equated with expropriation, a principle developed by the case-law of the Bundesgerichtshof (Federal Court of Justice). (6) The national court considers this to be inevitable in that the principle in question, according to that case-law, does not permit compensation to be granted for loss or damage arising out of laws infringing the Grundgesetz, which is equatable to compensation for loss or damage resulting from infringement of a Community obligation. Moreover and in any event, in this case there was no interference with the appellant's legal interest which may be protected under the law of property.

5 The Bundesgerichtshof, taking the view that German law affords no basis for upholding the appellant's damages claim, has therefore made a reference for a preliminary ruling to the Court in order to establish whether the principle of State liability for loss or damage caused to individuals by infringements of Community law attributable to it, as may be inferred from the judgment in Francovich, is applicable to the case pending before it. More specifically, it has asked the Court:

`1. Does the principle of Community law according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of breaches of Community law attributable to those States also apply where such a breach consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law (this case concerning a failure to adapt Paragraphs 9 and 10 of the German Biersteuergesetz to Article 30 of the EEC Treaty)?

2. May the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

3. May the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence) on the part of the organs of the State responsible for the failure to adapt the legislation?

4. If Question 1 is to be answered in the affirmative and Question 2 in the negative:

(a) May liability to pay compensation under the national legal system be limited to the reparation

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of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

(b) Does the obligation to pay compensation also require reparation of the damage already incurred before it was held in the judgment of the European Court of Justice of 12 March 1987 in Case 178/84 Commission v Germany [1987] ECR 1227 that Paragraph 10 of the German Biersteuergesetz infringed higher-ranking Community law?'

(b) Case C-48/93 (Factortame III)

6 The action for damages arising out of the application of the Merchant Shipping Act 1988 brought by the 97 applicants in the main proceedings is the sequel to the well-known Factortame affair, of which I shall merely set out the gist.

The law in question provided for a new register for all British fishing vessels and hence also for vessels already registered on the former register. In particular, the new registration system, which became compulsory on 1 April 1989, imposed stricter conditions relating to the nationality, residence and domicile of the natural and legal persons who were the true owners of the vessels. If those requirements were not met, fishing vessels were ineligible to be entered on the new register and consequently were not allowed to fish under the British flag.

The new registration system was challenged in the Divisional Court, which by order of 10 March 1989 suspended the application of the new registration system by interim injunction, which was subsequently overturned by the Court of Appeal. (7) Concurrently, the Divisional Court requested the Court of Justice to give a preliminary ruling on the questions of Community law raised by the applicants, which it did by judgment of 25 July 1991. (8) In that judgment, the Court held that it was contrary to Community law and, in particular, to Article 52 of the EEC Treaty, for a Member State to impose conditions as to the nationality, residence and domicile of owners of fishing vessels such as those laid down by the new registration system in the United Kingdom.

In the meantime, the Commission brought an action against the United Kingdom under Article 169 on the ground of the alleged incompatibility with Community law of the British statute, but only as regards the nationality aspect. The Commission also applied for interim measures requiring the United Kingdom to suspend the application of the statute, which the Court granted by order of 10 October 1989. (9) Following that order, the United Kingdom partially amended the Merchant Shipping Act with effect from 2 November 1989. Subsequently, by judgment of 4 October 1991, (10) the Court of Justice held that, by imposing the conditions as to the nationality of the vessel owners, the United Kingdom had failed to fulfil its obligations under Articles 7, 52 and 221 of the EEC Treaty.

As long ago as 2 October 1991, the Divisional Court made an order giving effect to the judgment of the Court of Justice in Case C-221/89 Factortame II in respect of the registration of the fishing vessels of 79 of the applicants, in which it directed that the applicants should give detailed particulars of their claims for damages against the Secretary of State for Transport. Then, by order of 18 November 1992, it gave leave to a number of companies and various other persons to be joined as parties to the proceedings and/or to claim damages and further gave Rawlings (Trawling) Limited, the 37th claimant, leave to amend its statement of claim to include a claim for exemplary damages for unconstitutional behaviour.

The applicants seek damages under various heads, including, in particular, expenses and losses of profits and income incurred from the entry into force of the new legislation (1 April 1989) until the time at which they were able to resume fishing. (11)

7 In English law, State liability in damages is a creature of case-law. In particular, the same

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wrongs (individual torts) leading to civil liability have been used in so far as they lend themselves to cover conduct of the public authorities.

First, damages may be awarded where loss or damage is due to a negligent breach committed in the exercise of administrative or legislative activity (tort of negligence). (12) Since, however, there must be a `duty of care' on the part of the public authority and the relevant case-law holds that there can be no such duty in the case of pure economic loss, (13) which makes it impossible for damages to be awarded for that type of harm, it would be hard for an infringement of Community law to give rise to liability. The concept and scope of the duty of care are presently being developed in the case-law of the courts of the United Kingdom. (14)

Secondly, liability on the part of the public authorities may be claimed in the event of a breach of statutory duty. In such case, however, the actual chances of obtaining damages are considerably reduced in so far as the prevalent view is that the possibility of obtaining administrative remedies designed to ensure that the law is complied with precludes bringing an action for damages. (15) Admittedly, the existence of liability in damages for infringements of Community law was affirmed in that very context, but only in the case of `ordinary civil actions'. (16)

In contrast, where the breach falls solely within the ambit of public law, liability may be claimed only for misfeasance in public office. This is the only tort which does not cover relations between private persons but specifically the public authorities. However, the requirement for intentional unlawful conduct makes the possibility of obtaining damages a remote one, even where the loss or damage arises out of infringements of Community law. Thus, as the Divisional Court points out in the order for reference, in Bourgoin (17) the Court of Appeal held that the State was not required as a matter of English or Community law to compensate the victims of acts which had been found to be contrary to Community law, unless the Minister acted in the knowledge that the act in question was unlawful and with the intention of injuring the claimants. Following the judgment in Francovich, however, the House of Lords itself has questioned whether Bourgoin was correctly decided. (18)

8 The Divisional Court considers that if English case-law were to be applied, the claimants would have no remedy in damages. Since, in addition, it is uncertain whether the principle of State liability for loss or damage caused to individuals by infringements of Community law attributable to the State, as may be inferred from Francovich, applies also to the facts of the case pending before it, it has requested the Court to give a preliminary ruling. Its questions are as follows:

`1. In all the circumstances of this case, where:

(a) a Member State's legislation laid down conditions relating to the nationality, domicile and residence of the owners and managers of fishing vessels, and of the shareholders and directors in vessel-owning and managing companies, and

(b) such conditions were held by the Court of Justice in Cases C-221/89 and C-246/89 to infringe Articles 5, 7, 52 and 221 of the EEC Treaty,

are those persons who were owners or managers of such vessels, or directors and/or shareholders in vessel-owning and managing companies, entitled as a matter of Community law to compensation by that Member State for losses which they have suffered as a result of all or any of the above infringements of the EEC Treaty?

2. If Question 1 is answered in the affirmative, what considerations, if any, does Community law require the national court to apply in determining claims for damages and interest relating to:

(a) expenses and/or loss of profit and/or loss of income during the period subsequent to the entry into force of the said conditions, during which the vessels were forced to lay up, to make alternative arrangements for fishing and/or to seek registration elsewhere;

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(b) losses consequent on sales at an undervalue of the vessels, or of shares therein, or of shares in vessel-owning companies;

(c) losses consequent on the need to provide bonds, fines and legal expenses for alleged offences connected with the exclusion of vessels from the national register;

(d) losses consequent on the inability of such persons to own and operate further vessels;

(e) loss of management fees;

(f) expenses incurred in an attempt to mitigate the above losses;

(g) exemplary damages as claimed?'

Terms of the problem and structure of the Opinion

9 The question of State liability for infringements of Community law, which is of considerable importance in terms of both the principles involved and the potential consequences for the Member States were such liability to be affirmed broadly and generally, is complex and by no means free of snares, as witness moreover the substantial debate which has taken place in recent years in academic writings.

In these proceedings, the Court has to establish whether, on what terms and with regard to which classes of injury, there exists an obligation for the State to compensate individuals who have suffered loss or damage as a result of the application of national laws conflicting with Community law. (19)

10 In the first place, it will accordingly be necessary to establish whether liability in damages should be confined to the case, which has already been assessed in Francovich, of failure to implement a directive whose provisions, albeit satisfying a number of conditions relating to their special nature, may not be relied on directly by individuals in order to obtain the benefit provided for them by the directive, or whether it should be extended to circumstances, such as those of the cases now before the Court, in which the loss or damage suffered by the individuals arises out of the application of a national law conflicting with Community provisions which may be relied on by individuals directly in the national courts. In order to do so, I consider it useful to set out the terms in which the obligation for Member States to make reparation for infringements of Community law has been affirmed to date, in order, partly by this means, to trace the basis of liability in Community law. In addition, I consider it worthwhile dwelling on the alleged non-liability of the State for acts or omissions of the legislature, which has also been raised (albeit somewhat cautiously) in these proceedings in order to deny, on an abstract level and in principle, the existence of State liability in the circumstances at issue.

Secondly, it will have to be established whether the conditions of liability are those specific to each national legal system - albeit subject to the well-known limits identified in several of the Court's decided cases - or whether, by contrast, it is Community law itself which determines at least the substantive conditions which are sufficient in order for the State in breach of its obligations to be required to make reparation for the resulting loss or damage. If the second branch of this alternative prevails, it should obviously be clarified whether any infringement whatsoever which injures an individual is enough or whether something more is needed, as most of the Member States have argued in these proceedings. Then again, can that something more be taken to be the need for fault or are other conditions necessary, for example the very ones which the Court has identified in regard to non-contractual liability on the part of the Community institutions (case-law on Article 215)? In addition, from the point of view of the causal link, it will have to be assessed, for example, whether it is important that the nature of the Community provision infringed was such as to enable the individual to protect his own rights directly so as to eliminate the substantive

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illegality; furthermore, the time at which the obligation to make reparation arises will have to be assessed in any event. Lastly, there will be a need to dwell on the procedural requirements governing the right to reparation and on the criteria for quantifying the damage.

11 These, therefore, are the aspects which I shall be considering and the questions which I shall be seeking to answer. Accordingly, the analysis set out below will be subdivided into three parts. The first part will deal with the principle of State liability under Community law with a view to identifying its basis and scope, inter alia with respect to unlawful acts or omissions on the part of the legislature, and to assessing in particular whether an action for damages is a residual remedy only, in the sense that such an action may be brought only where the individual has no other means of asserting the rights conferred on him by Community law, or whether its ambit is wider.

As for the conditions of liability, I shall say forthwith that the minimum substantive - unlike the procedural - conditions must be common and hence Community conditions. To my mind, this is the only way of avoiding a situation in which the actual possibility of obtaining reparation for a given infringement is not secured equally in the several Member States and in which discrimination consequently arises as between individuals, which a Community based on the rule of law should not tolerate. Accordingly, the second part of my Opinion will deal with the conditions enabling individuals to obtain reparation, that is to say, the Community preconditions for liability, and the limits imposed by Community law on the procedural conditions. In my view, the latter conditions continue - in common with the criteria for determining the quantum of the damages - to be governed by national law.

Lastly, I shall consider the two cases before the Court and reply to the questions which gave rise to these proceedings.

I - The principle of State liability in Community law: basis and scope

12 The idea of State liability for loss or damage caused by legislative activity does not seem at all surprising. The basic principle of most of the civil rules on non-contractual liability is neminem laedere, as variously interpreted and limited, under which everyone is bound to make good loss or damage arising as a result of his conduct in breach of a legal duty. (20) It is undeniable that reference is made to that principle by the various rules, mostly created by the courts, governing liability on the part of the public authorities, even though that liability has special features peculiar to itself in view of the activities carried out by those authorities, in particular in the case of legislative activity. Liability of the public authorities is also closely, if not indeed necessarily, connected to wrongful damage by the fact of its having to have been caused by the unlawful conduct; in a manner of speaking, this is the other side of the coin.

Admittedly, in the case of the public authorities, precisely because of the nature of the activity which they perform and of the consequences which would ensue were there held to be liability and an obligation to compensate generally, the tendency has invariably been to limit the scope of liability in various ways. The extent of that limitation, which may be encapsulated, by way of initial approximation, in the well-known formula according to which the liability in question is `neither general, nor absolute', (21) is consequently related to the need to balance the opposing, competing interests at stake: on the one hand, the injured party's interest in obtaining at least financial restitution for the loss or damage he sustained as the result of an activity - in particular legislative activity - of the State; on the other, the State's interest in not having to answer invariably and in any event for loss or damage caused by the activities of its organs in performing the institutional tasks entrusted to them.

Manifestly, over time significant changes have taken place with regard to the limitation of the scope of responsibility, varying according to the legal system considered. In particular, the

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emergence of the State governed by the rule of law has resulted in an increasing shift of emphasis, at least in the more advanced legal systems, from the conduct of the perpetrator of the damage to the rights of the injured party, as in the case of liability generally. From this point of view, State liability and the resulting obligation to make reparation have ended up by becoming a means of penalizing unlawful and/or, in any event, harmful conduct and thereby of achieving effective protection for individuals' rights.

13 This reasoning prompts an initial, straightforward observation with regard to the principle of State liability for infringements of Community law. The fact that the Member States, even though subject to conditions limiting the scope of liability in different ways, may be called upon to answer for loss or damage caused by legislative activity of the public authorities suggests in itself that it is unreasonable that they should invariably and in any event not be liable for infringements of Community law which have an effect on the financial situation of individuals affected by those infringements.

Consequently, in so far as at least the principle of State liability is part of the tradition of all the legal systems, (22) it must be able to be applied also where the unlawful conduct consists of an infringement of a Community provision.

14 Furthermore, it should be observed straight away that, whilst it is essentially for the State, and hence its institutions, to ensure that Community law is duly implemented and, in particular, to guarantee individuals that the rights conferred on them are effective, it is also unquestionable that, where rights claimed by individuals pursuant to Community provisions are concerned, it falls to the Court to review the degree of adequacy of the protection afforded by the national legal systems. That review has on several occasions extended even so far as to require the Member State concerned to adopt a judicial remedy not available under its legal system. (23)

It would therefore be at odds with the relevant case-law and with the characteristics of the legal system as a whole, in particular the division of tasks between the Community and the Member States, for Community law to disinterest itself completely of compensation for loss or damage, by leaving it, without any review, to each national system.

(a) The obligation on Member States to make reparation for failures to fulfil obligations as affirmed in the Court's case-law: the Francovich judgment and its precursors

15 The judgment in Francovich, which is bound to be the starting point for any discussion of State liability in damages for infringements of Community law, still constitutes the Court's most precise response in this area. The case turned on the non-implementation of the directive on the protection of employees in the event of the insolvency of the employer, which required Member States to set up machinery affording a minimum guarantee in respect of unpaid wage claims. Italian magistrates asked the Court whether, faced with the failure of a Member State to implement that directive, individuals were entitled to rely directly on the Community measure before the national courts in order to obtain its benefits and, in any event, claim damages from the Member State where the directive lacked direct effect. Consequently, the Court was asked, not only about the direct effect of a number of provisions of a directive, but also about compensation for loss or damage resulting from its non-implementation. (24)

Although it found that the relevant provisions of the directive were unconditional and sufficiently precise as regards the determination of the persons entitled to the guarantee and the content of the guarantee itself, the Court held that those provisions could not be relied upon directly before the national court in order to seek the benefit provided for them by the directive. In particular, those provisions did not identify the person liable to provide the guarantee, and the State could not be considered liable on the sole ground that it had failed to take transposition measures within

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the prescribed period.

16 Turning to whether it was possible for an individual to claim and obtain compensation for any loss or damage sustained, the Court first called to mind the fundamental characteristics of the Community system and, in particular, the tasks conferred on the national courts. It drew the lapidary but incontestable conclusion that `the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty' (paragraph 35).

More specifically, the Court inferred that principle from two fundamental elements of the Community legal order. First, it pointed out that `the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible' (paragraph 33). The Court also stressed that the possibility of obtaining redress from the Member State is `particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law' (paragraph 34).

Secondly, as it had already done in the judgment in Humblet, (25) it derived and inferred that obligation to make reparation from Article 5 of the EC Treaty, `under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law', which include precisely `the obligation to nullify the unlawful consequences of a breach of Community law' (paragraph 36).

17 What was contemplated, therefore, was the means made available in order to reinforce the effectiveness of Community provisions through the effectiveness of the judicial supervision of the legal interests created by those provisions and likewise in order not to leave Member States' failures to fulfil obligations without - inter alia, tangible - consequences.

Consequently, it is precisely in the light of those objectives that the position of the individual has been used and given its proper importance. The State's financial liability vis-à-vis individuals for loss or damage caused by legislative inaction has been created by the Court in the final analysis as an instrument for securing protection for individuals and thereby also the proper implementation of Community law. From this point of view, it has remote roots, both in terms of specific precedents for the liability and obligation to compensate of the Member States (26) and in the more general setting of the effective protection of rights asserted by individuals under Community provisions. (27)

18 It should not be overlooked that statements relating to the obligation to provide compensation for breaches of Community law of various kinds are to be found in the Court's case-law, if only incidentally, since the early 1960s. I would refer in the first place to the judgment in Humblet, which I have already mentioned, where the Court held in particular that if it `rules in a judgment that a legislative or administrative procedure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued'. (28)

19 In addition, it is on the very assumption that the Member State's failure to fulfil obligations may give rise to a right on the part of an individual to compensation that the Court has, on several occasions, rejected an objection of inadmissibility, despite the fact that the Member State against which infringement proceedings have been brought has fulfilled the relevant obligation in the period between the reasoned opinion and delivery of judgment by the Court. (29)

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20 The affirmation of the obligation on Member States to compensate individuals is even more direct and explicit in Russo v AIMA, (30) where the Court held that `If such damage has been caused through an infringement of Community law the State is liable to the injured party for the consequences in the context of the provisions of national law on the liability of the State'.

21 It is unquestionably clear from the above dicta, therefore, that a Member State may indeed be called upon to compensate for the damage sustained by individuals consisting in or resulting from an infringement of Community provisions.

However, the case-law makes it clear that liability has to be made out by the national court `in the context of the provisions of national law on the liability of the State'. (31) Consequently, it is to the legislation of each Member State that reference is made in principle in order to determine whether the State is obliged to compensate for damage caused by failure to comply with a Community provision. (32)

22 That case-law seems to have been overtaken from this particular point of view by the judgment in Francovich, in which the obligation on Member States in breach of their obligations to make reparation is rooted in Community law, even as regards the preconditions for the obligation to make reparation.

Essentially, in Francovich the Court did not confine itself to leaving it to national law to draw all the legal inferences from the infringement of provisions of Community law, but held that Community law itself imposed on the State an obligation to make reparation vis-à-vis individuals by defining, at least as regards the case of liability at issue in that case, the `Community' conditions determining liability.

(b) The `Community' principle of liability: merely a means of closing a lacuna in the protection of rights or a principle of broader scope?

23 What must now be considered is precisely whether the approach which can be discerned from the pre-Francovich case-law (still) has any basis or whether an obligation based on Community law of the Member States to make reparation may and must exist even in cases other than that of failure to implement a directive.

In particular, it has to be determined whether Community law requires a guarantee in terms of compensation even where provisions having direct effect are infringed or whether the fact that in that event an individual may rely directly on the provision in question and therefore ensure that the right claimed is guaranteed by that means rules out that possibility.

24 The German, Netherlands and Irish Governments have argued to that effect in these proceedings. They reason that the Community legislature did not intend to establish a general system of Member State liability for infringements of Community law. This, they maintain, is borne out in particular by the fact that the Member States did not incorporate any provision on this matter in the Maastricht Treaty. The German Government has further argued that it would not be compatible with the system of division of powers between the Community institutions and the Member States as laid down by the Treaty or with the principle of institutional balance for the case-law to flesh out Community law above and beyond cases in which this is justified by a lacuna in the legislation.

In the final analysis, those governments consider that the right to reparation plays merely a residual protective role, in the sense that it comes to the fore only in regard to provisions which could not otherwise be relied on before the national courts. Essentially, the Court used the Francovich judgment in order to bridge a lacuna in the system for the protection of rights by imposing a sanction on the Member State in breach in the shape of an obligation to make reparation. Conversely, where an individual is already able to take action directly in order to enforce the provisions of Community

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law, as in the cases which gave rise to these proceedings, there is no need for the Community system to require damages to be awarded and there is no basis for imposing this. Individuals may be held to have a right to reparation only if and in so far as this is permitted by national law.

25 I do not consider that that view can be accepted. First, it is clear from the Court's case-law itself, which has contemplated on several occasions financial liability on the part of the State for infringements of provisions with direct effect, that the possibility of substantive protection does not indeed preclude financial protection. (33) Whilst it is true that in those cases the Court merely held that it was for the Member State to make reparation, under the rules of national law, for the damage caused by it, it is also true that the questions raised by the national courts in those cases were not concerned with the specific subject of the right to compensation.

When the subject was specifically tackled in Francovich, the Court deliberately specified that the principle of liability is an inherent principle of Community law by a general affirmation of principle which holds good for any situation in which Community law is infringed and not merely where there has been a failure to implement a directive. (34) As far as failure to implement a directive is concerned, the Court merely stated that the right to redress is `particularly indispensable', precisely because otherwise the individual would be deprived of any protection, contrary to the rights conferred on him by the directive. However, this affirmation does not preclude liability in damages for injury caused by breaches of other types, particularly since the Court itself went on to hold that the conditions under which ... liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage (paragraph 38).

26 Neither does it seem to me that affirmation of the principle of State liability for breaches of Community provisions having direct effect conflicts in any way with the division of powers, as laid down by the Treaty, between Community institutions and Member States. I would merely observe in this connection that it is the infringement of Community law itself which creates an imbalance in the division of powers freely accepted and subscribed to by the States. Any requirement which may be imposed by Community law to make reparation for loss or damage caused by such an infringement constitutes merely a means of restoring the upset equilibrium.

The State's responsibility for legislative activity (on the part of the legislature proper or of the administrative authorities) constitutes also from that point of view a natural and necessary part of the Community legal system created by the Treaty and by the Member States themselves. I cannot but remind myself that it was the Member States which, completely freely, agreed the contractual rules underlying the system as a whole; and the Member States are still the decisive protagonists in the process for the formulation of Community measures. Consequently, to hold that liability exists for failure to fulfil obligations is tantamount simply to increasing the effectiveness of the system and does not involve any activity supplementing - let alone supplanting - the legislature.

27 This is all the more true when it is borne in mind that the State's financial liability vis-à-vis individuals for loss or damage caused by legislative action or inaction has been constructed by the Court, I repeat, as an instrument for ensuring protection of individuals and, thereby, also for the purposes of the proper implementation of Community law in all the Member States.

In sum, what is contemplated is the same as that contemplated by the - now consolidated - case-law which established direct effect, in the sense that provisions of the Treaty and secondary legislation may be relied upon by individuals directly before national courts, provided of course that they are sufficiently clear and precise and unconditional.

28 By identifying the direct effect of a Treaty provision addressed to the Member States and containing an obligation on them, for instance to remove certain barriers and not to reintroduce them, the individual's right to the elimination of those barriers which is derived therefrom is identified

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and made relevant, with the further consequence that that right becomes capable of being asserted before the national court with a view to its being duly protected. In this way, therefore, the right arising out of the State's obligation by which the individual would have benefited if the obligation had been implemented properly and precisely is identified and enhanced.

This applies, not only on the substantive, but also on the procedural, level. Suffice it to mention what the Court itself has held: `all direct protection of the individual rights of individuals would be removed' if it were to be held that the guarantees against an infringement of Treaty provisions imposing obligations on the Member States were confined to those afforded under Article 169. (35) In the final analysis, the individual's legal position, which is directly dependent on the Treaty provision, is utilized, even in the absence of an incorrect application of that provision, in order to guarantee full, effective protection of the rights which compliance with the provision in question by the State should secure.

29 The same viewpoint appears - even more clearly - from the case-law which, from a given time, has imposed a sanction for the non-implementation or late implementation of a directive by attributing direct effect to it, obviously where defined preconditions were fulfilled. (36) This confirms the observation that, even in the case of directives, the Community system has found in the position of the individual an effective lever for securing their implementation where they have not been duly transposed into national law.

30 It is further significant that the Court has reaffirmed the State's obligation to make reparation in the same terms already laid down in Francovich in a case involving precisely the possibility of relying, in relations between private individuals, on the direct effect of provisions of a directive which was not implemented within the prescribed period. (37)

Holding that there is an obligation to make reparation where a directive cannot be relied on directly before the national court, either because of the absence of direct effect of all the provisions needed to secure the benefit of the right which it confers on the individual or because of the absence of `horizontal' direct effect of precise and unconditional directives, therefore also constitutes a means of reinforcing the position of the individual by making it possible to offset, at least from the financial point of view, the imbalance created by the State's failure to fulfil its obligations.

31 In the final analysis, the individual's position directly created by a provision with direct effect binding on the State is used in order to guarantee full, effective protection to the rights conferred by that provision. In the same way, the individual's right to compensation is used to guarantee protection of the rights conferred by a provision which does not have direct effect in the sense that it cannot be invoked directly before the national court, yet also places an obligation on the State, in the case of a failure to fulfil an obligation on the part of the State.

Consequently, the concept remains the same: in order to implement a provision putting the State under an obligation, the individual's legal position is used, on the one hand, in terms of its full, substantive content, on the other, in terms of its financial content. Even the result is the same: on the one hand, the failure of the Member State concerned to fulfil its obligations is remedied; on the other, the individual is guaranteed effective protection of rights claimed under Community provisions. The upshot is that the effectiveness of the provision is reinforced and hence that of the system as a whole.

32 The foregoing remarks show sufficiently clearly that, far from being a moment of eccentricity in the case-law of the Court, Francovich was completely consistent with and a logical extension of a value which has been upheld on several occasions without question in Luxembourg: effectiveness of Community provisions and hence complete judicial protection. (38)

It is undeniable that this is a fundamental value of any legal system, whether Community or national.

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It is also undeniable that respecting that value may require guaranteeing individuals, where necessary, the right to compensation for loss or damage sustained by reason of the legislative action or inaction of the public authorities, irrespective of whether or not the individual has other means, in addition to a remedy in damages, of asserting an infringement of the legal position bestowed on him by Community law.

33 Furthermore, the - now uncontested - affirmation of the State's obligation to compensate the individual in cases of failure to implement a directive, hence in cases in which the infringement of the State's obligation (infringement of Articles 189 and 5 of the Treaty) can be linked only indirectly to a breach of a correlative right of the individual, implies - a fortiori - that the same protection should be available where provisions are directly infringed which guarantee the individual a legal position appertaining to himself and can therefore be relied on directly before the national courts.

In this sense, the argument that it is not possible to `go beyond' liability for failure to implement directives cannot be accepted, not only on the grounds set out above, but also because it ignores that it is the Francovich situation itself which represents possibly the furthest which the case-law of the Court can go (and not the nearest port of call). On close inspection, the Francovich judgment conferred a remedy (at least a financial one) where the remedy provided for was that laid down in Article 169, which does not afford direct protection for individuals. On the contrary, in cases of infringement of provisions having direct effect, the protection already exists and a remedy may be asserted directly by the individual, with the result that it is necessary only to accompany it by that something less, which is financial protection. Consequently, in this case not even that `small' logical leap has to be made which, in contrast, has to be made in order to move from infringement of Article 189 to a breach of the right potentially conferred on the individual by the directive.

Nor should it be overlooked that, as far as provisions having direct effect are concerned, the Court has consistently held that they `must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force' (39) and that `this consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law'. (40) Consequently, it is quite clear that a Community provision with direct effect confers a legal position appertaining to an individual on the individual as from its entry into force and for as long as it continues in force, irrespective of and even despite any pre-existing or subsequent national provision which may negate that legal position. It therefore follows that the national court is under a duty to provide full, effective judicial protection of the rights conferred on the individual by the relevant Community provision.

34 It is unquestionable that the infringement of a provision gives rise to an imbalance consisting in the reduction or annulment of the legal situation affected, in this case that of an individual; it is also unquestionable that every legal situation appertaining to an individual, every `right', if you prefer, has a substantive content and a financial content, which can generally be quantified. Guaranteeing the effectiveness of judicial protection in the case of an infringement of a provision conferring a legal position on an individual means securing the reinstatement of the content of the right impaired by the infringement of the provision. If that which unlawfully adversely affects the individual's right is an act of a public authority - an administrative measure or a law - it is whoever brought it into being who must reinstate the individual's right or at least its financial content.

In the final analysis, reinstating its financial content is something less, a minimum remedy compared with full substantive reinstatement, which remains the optimum means of protection. Annulment of an unlawful measure or setting aside a law which is inconsistent with a superior parameter of legality

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is necessary in a State governed by the rule of law. At times, however, this is not enough and it may be necessary, in order to render the protection real and effective, to bring back into balance also the financial content of the right which has been impaired and hence to ensure that the damage is made good. Consequently, reinstating financial balance in respect of the right which has been infringed is not something different or something more, even less something novel. Neither does it constitute something optional which is sophisticated and remote in a legal system which seeks and needs to be effective.

To sum up, the principle of the State's financial liability must be applied as a remedy which is both alternative and additional to substantive protection; consequently, it must be applied in the event of infringements both of provisions without direct effect, in the sense of provisions which may not be directly relied on before the national courts, and of provisions which may be so relied on.

(c) The obligation of the State to compensate for acts or omissions of the legislature

35 It does not seem to me that that conclusion may be invalidated by the fact that occasionally or often infringements of Community law are attributable to the legislature.

I would point out in this connection that Francovich, with which not even any of the States which have submitted observations in these proceedings have taken issue, makes no distinction depending on whether the loss or damage ensues from an infringement attributable to omissions of the legislature or of the executive. Certainly, that is no reason for considering that a different conclusion should be reached as regards the circumstances under consideration here.

However, as the national courts have shown in their respective orders for reference, they are debarred from awarding damages by their national law, precisely because the infringements at issue of Community law are attributable to the legislature, either because it failed to amend a national law so as to bring it into conformity with Community law (Case C-46/93 Brasserie du Pêcheur) or because it passed a national law inconsistent with Community law (Case C-48/93 Factortame III). Essentially, therefore, given that it is impossible to bring an action for damages in the event of action or inaction on the part of the legislature, in such cases national law leads to the negation of the very principle of liability.

36 Admittedly, in the past the idea that the State was not liable for acts or omissions of the legislature was a widespread one. Its rationale was that the sovereign could do no wrong or, according to a more modern, democratic version, parliamentary sovereignty. In other words, in so far as it was the highest expression of the sovereign power, the legislature fell in principle outside the general rules governing liability in view, inter alia, of its democratic legitimacy.

That view, which took root above all in legal systems in which the law was not reviewed in the light of some higher parameter, should take on a different complexion where there is a higher norm which can be used to verify and, in an appropriate case, deny the legality of the legislature's activity. Yet, also in those legal systems in which there is not only a clear, formal hierarchy as between constitutional rules and legislative rules, but also a mechanism of ad hoc supervision as to constant compliance with that hierarchy (Austria, Italy, Germany and Spain, for example), the question as to whether compensation can be awarded for loss or damage ensuing from an unconstitutional law is far from having been incontestably resolved. (41) The fact remains, however, that in such a case it cannot be ruled out that the State will be called upon to answer for the loss or damage caused by laws declared unconstitutional.

37 It is true that when the legislature is bound in carrying out its legislative tasks to comply with particular limits imposed by superior rules, there is no reason in general legal theory for denying that the State may be bound to compensate for the damage caused by laws which exceed those

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limits. In those circumstances, liability for acts or omissions of the legislature is not conceptually very remote or different from responsibility of the administrative authorities for legislative activity, which is upheld more or less everywhere today without difficulty.

And that is not all. It is well known that, in most legal systems, compensation is awarded in certain cases for the diminution of assets sustained by individuals on account of a perfectly lawful activity of the legislature, in that it was brought into being without any infringement of any enabling law: take, for instance, cases of nationalization and expropriation for purposes of public utility. If, therefore, it is conceded that the sacrifice lawfully imposed on the legal and financial situation of individuals for the sake of the public interest must be accompanied by fair compensation, it would be curious, to say the least, not to consider that if such loss or damage is produced by a legislative act which is unlawful because it conflicts with a superior rule (constitutional, Community or in any event prevailing over the act) there is no room for compensation.

38 It is scarcely necessary to point out that, in relationships governed by international law, State responsibility for acts or omissions of the legislature is universally and unquestionably acknowledged. (42) Of the many instances, it is worth recalling the principle laid down by the Permanent Court of International Justice to the effect that the obligation to make reparation is the direct consequence of a harmful act contrary to international law which is attributable to a State. More specifically, `It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.' (43)

39 Certainly, I am aware that, in international law, the State's obligation to make reparation for damage arises even where in practice the compensation is aimed at restoring the financial position of individuals vis-à-vis one or more States and not, as is sought in the cases now before the Court, directly vis-à-vis individuals.

However, it does not seem possible to me to ignore the specific, peculiar features of the Community legal order. That system is based, as far as is relevant for present purposes, on a contractual foundation. The Treaty, in common also with other agreements establishing international organizations, contains a series of obligations on Member States with regard to the achievement of the aims set out therein, which have been freely subscribed to, and to the operation of an institutional structure whose powers are very largely, but not wholly, predefined. However, the peculiar, ultimate aim of the contractual basis in the case of the Community is integration and more specifically `lay[ing] the foundations of an ever closer union among the peoples of Europe', (44) inter alia through the achievement of the common market. It follows that traditional instruments, those of international law in fact, prepared in order to promote the due, precise fulfilment of obligations on the part of the Member States have resulted and continue to result to a very great extent in giving maximum, direct relevance to the legal position of individuals. The reason for this is that the obligations of the Member States and Community institutions are directed above all, in the system which the Community system has sought and sets out to be, to the creation of rights of individuals. This is the picture drawn by the authors of the Treaty and consolidated by the Community legislature.

40 In case-law, which is only too well known, the Court has simply taken note of that specific intention of the authors of the Treaty and subsequently of the legislature, observing that the EC Treaty set up its own legal order `for the benefit of which the States have limited their sovereign rights, albeit within limited fields'. (45) The subjects of that legal order comprise not only the States but also individuals, upon whom Community law confers rights which become part of their legal heritage: these rights arise not only where they are expressly granted by the Treaty, but also by reason of the obligations which the Treaty imposes upon individuals, the Member States

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and the Community institutions.

41 It must therefore be acknowledged that, in relation to the - Community - rules governing the situation of individuals which are recognized as prevailing over domestic rules, a claim that there was a general absence of liability on the part of the national legislature would be without justification. Instead, the very idea of liability of the State qua legislator in relation to the obligations imposed by Community law, and hence entered into contractually by the States themselves or brought into being subsequently by procedures laid down for the purpose, is perfectly consistent with - and hence inherent in - the fundamental and typical characteristics of the Community legal order.

42 In the final analysis, even in the light of Francovich, but if only in view of the specific nature of the Community legal system considered as a whole, it is completely irrelevant whether the unlawful act or omission is attributable to the legislature or to the executive.

Next, in any event the problem of the liability of the State qua legislator is surpassed where the unlawful act or omission is connected with rules having direct effect. The Court's dictum to the effect that `it would be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them' (46) implies in fact that even the administrative authorities are under an obligation to guarantee protection of rights claimed by individuals under Community provisions with direct effect. It follows accordingly that in such a case it is quite possible to enforce the liability of administrative authorities for having adopted prejudicial measures pursuant to a law which is alleged to be incompatible with Community law or, in any event, for having applied such a law.

The French Conseil d'Etat (State Council), for example, seems to have taken that approach in inferring State liability from the breach (faute (47)) of the administrative authorities, at least where they exercised a discretion conferred on them by a domestic law contrary to Community law. (48) Admittedly, in cases of this type the origin of liability is invariably to be found in unlawful conduct attributable to the legislature, that is, in a law incompatible with Community law. However, it is obviously for national law to determine whether attributability to the administrative authorities is an `indispensable' procedural and/or substantive expedient in order to get the legislature to answer or the correct mode of proceeding.

43 What is required by Community law for present purposes is that, in any event, the necessary instruments be made available in order for individuals to be able to seek, and possibly obtain, compensation for loss or damage sustained as a result of infringements of Community law. In this connection, moreover, it should be made very clear that the problem of determining a judicial remedy which is not already known to or permitted by the judicial systems of the Member States is not insuperable or a new problem: this is so on account of the specific factors under consideration in these proceedings, and also because the problem has already been dealt with by the Court in a number of historic, uncontested passages in its case-law.

This is testified to, in particular, by cases such as Simmenthal (49) and Factortame I, (50) in both of which the Court was asked whether a particular judicial remedy, which the national court held was not available under the national judicial system, could or had to be conferred and implemented by virtue of Community law.

44 What was in question in Simmenthal was the Italian court's power itself forthwith to disapply a national provision conflicting with Community law without having first to obtain a prior ruling from the Constitutional Court that it was unconstitutional. By basing on Community law the national

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court's power/duty to disregard the provision conflicting with Community law, a power/duty unknown to the national system - indeed there was express, repeated case-law of the Constitutional Court to the contrary -, the Court introduced a derogation from the Member States' autonomy in relation to means for the judicial protection of rights conferred on individuals by Community law. Moreover, it is remarkable - also for the present proceedings - that in Simmenthal the Court considered intolerable, not the absence of protection, but even a mere delay in protection, thereby giving pre-eminence to that aspect over the advantages in terms of certainty and finality which the system based on the assessment of constitutionality as hitherto operated undoubtedly possessed.

In Factortame I, the question arose yet again, just as in Simmenthal, as to whether where the national court lacked a power under its national judicial system - namely the power to suspend by interim measure a law suspected but not yet found to be incompatible with Community law - such a power could be based on Community law. As in Simmenthal, the Court ruled that an obstacle to the effective judicial protection of a right claimed under Community provisions by an individual had to be removed by the national court and that hence any measure providing for that obstacle had to be set aside.

45 In the final analysis, the Member States' autonomy in relation to judicial remedies for the infringement of rights conferred by the Community system, albeit affirmed by the Court, (51) is subject to considerable derogations: in particular, whenever it is essential to derogate in order to ensure the proper implementation of Community law and correct, effective protection of the rights claimed by individuals under Community law.

Accordingly, for example, whereas in Salgoil the Court emphasized the obligation on the national courts to ensure direct and immediate protection of individuals' interests, but went on to specify that `it is for the national legal system to determine which court or tribunal has jurisdiction to give this protection and, for this purpose, to decide how the individual position thus protected is to be classified', (52) that ambiguity disappears in Bozzetti v Invernizzi. In that judgment, the Court reaffirmed the obligation to ensure that individual's rights are effectively protected `in each case' and that, within those precise limits only (`subject to that reservation') `it is not for the Court to intervene in order to resolve any questions of jurisdiction which may arise, within the national judicial system, as regards the definition of certain legal situations based on Community law'. (53) The qualification `subject to that reservation' is manifestly the most relevant key to the interpretation of this passage inasmuch as it marks out the limits to the autonomy of the national systems, and it is no accident, to my mind, that the same qualification is set out in paragraph 42 of Francovich.

46 It should not be overlooked that the Community legislature, too, has introduced exceptions to the Member States' autonomy, for example in the field of public contracts governed by Community law, precisely as regards compensation for damage. I refer, obviously, to Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (54) and to the corresponding Directive 92/13/EEC of 25 February 1992 on remedies in relation to the so-called excluded sectors. (55)

Faced with a large variety of solutions in the Member States' legal systems, the Community legislature acted, not only with regard to aspects relating to substantive, hence real, protection, but also by providing for a system - which was certainly novel to a good many national systems - of damages to compensate for the injury caused by unlawfulness of contract award procedures in the event of the absence or insufficiency of real protection. (56)

47 In the final analysis, it can certainly be said that the Member States' autonomy with regard to judicial remedies for the infringement of rights conferred by Community provisions is firmly

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tied to the result sought by Community law. (57)

Where Community provisions are infringed by Member States, the result which should be attained, as far as is relevant for present purposes, for the proper operation of the Community legal system as a whole is that of ensuring, assuming that specific preconditions are satisfied, that the same legal situation is restored, at least in terms of its financial implications, as would have obtained if the Member State had not failed to fulfil the obligation imposed upon it by Community law.

II - Conditions for the State's obligation to pay compensation

48 Consequently, liability attaches to any case in which Community law is infringed, including that in which the loss or damage results from infringements of Treaty provisions having direct effect, regardless of the organ of the State (including the legislature) to which the loss or damage is attributable. It now remains to consider the conditions in which liability exists and, in parallel, the individual's right to compensation.

In the absence of specific Community provisions governing the area, the problem lies in defining the conditions determining State liability and in actually being able to ascertain when they are present. In addition, careful consideration should be given to the practicality of the possible solutions.

49 Certainly, Community law could very well, as some States have proposed in these proceedings, confine itself to affirming that liability exists in principle and that there is an obligation to compensate, whilst leaving it to national law to determine the preconditions and lay down the detailed substantive and procedural rules.

Such a solution, as I mentioned at the beginning, would however have considerable drawbacks, the first among them being that it would not ensure the result sought by Community law through an affirmation of the principle of liability, that is to say, full, effective protection of the rights claimed by individuals under the Community provision which is assumed to have been infringed. That this is a real risk is shown by the very questions referred by the national courts, which arose precisely because the applicable national law did not allow any compensation to be granted in the cases before them. Again, in any event, it is only too obvious that a mere reference to national law would be in danger of endorsing a discriminatory system, in so far as for a given infringement Community citizens would receive different protection, some none at all.

50 In order for protection in damages to be assured in all the Member States in at least a homogeneous - if not exactly uniform - manner, it is vital that it should be Community law itself which lays down at least the minimum conditions determining the right to compensation, in particular the criteria by which those conditions are established, and the `Community' limits imposed on the `national' conditions relating to compensation, be they procedural or otherwise.

This, moreover, was the solution adopted by the Court in Francovich, albeit with some particular features connected with the case at issue. There is no ground for considering that that solution should apply only in the event of failure to implement a directive and not to the infringement of provisions with direct effect.

51 In Francovich, I recall, while specifying that it is in the context of the rules of national law that the State is bound to make reparation for the consequences of the damage caused, the Court itself identified and defined the conditions `sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law' (paragraph 41). The Member State to which the failure to implement a directive is attributable is therefore bound in every case to make reparation for the loss or damage sustained by the individual, provided that the conditions laid down by the Court are fulfilled.

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However, this must not be taken as meaning that the presence of those conditions is sufficient for the purposes of compensation with respect to any infringement of Community law whatsoever. As the Court itself explained, `Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage' (paragraph 38).

52 Consequently, the necessary requirements in order for Member States to be liable are likely to vary from case to case. However, as in Francovich, the requirements must be identified and defined by Community law itself.

In other words, it is true that, in the case of infringements of Treaty provisions having direct effect, the conditions set out in Francovich may not be necessary and/or sufficient to give rise to a right to reparation. Nevertheless, in such cases too, it will be necessary to identify what conditions are sufficient in order to enable an individual to obtain reparation. It is scarcely necessary to point out that the sufficient conditions, as is clear from the Francovich judgment itself, relate to the substantive preconditions for liability.

53 A rapid appraisal of the rules in force in the national legal systems on liability on the part of public authorities shows that it is commonly accepted at least that the principle should be that the entity to which the event which gave rise to the loss or damage is attributable is answerable for that event, provided that there is causal link between the event and the loss or damage.

The substantive preconditions for liability are more or less the same everywhere: actual damage, a causal link between the damage and conduct on the part of the perpetrator of the damage, and the fact that the conduct was unlawful. In contrast, the differences - which in some cases are important in so far as they affect, for example, even the nature of the individual interests protected (58) - relate to the manner in which those preconditions are defined and the criteria for ascertaining whether they are met.

54 For present purposes, therefore, it is necessary, not so much to identify the general conditions for liability, which in point of fact are practically the same in the various legal systems, but to establish the criteria for determining whether they are met or, if you prefer, those criteria which will enable a common definition to be found of the conditions in question.

To that end, I consider that I should dwell initially on the conditions which the Court considers sufficient in cases of failure to implement a directive in order to give rise to a right on the part of individuals to compensation.

1. The Francovich solution

55 The obligation on the State to make reparation for legislative omissions was recognized by the Court in cases of failure to implement a directive within the prescribed period, subject to finding that the following three conditions were met: `First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State's obligation and the damage suffered.' (59)

A first question needs to be asked: are those conditions necessary and sufficient also in a case where the loss or damage was caused by infringement of a Treaty provision having direct effect?

56 Leaving aside for the moment the question of the causal link, which is compulsory for tortious liability, I would observe initially that the first condition, to the effect that the result prescribed by the directive should entail the grant of rights to individuals, is concerned with identifying the legal position of the individuals whose infringement may give rise to compensation. Having regard to the relevant case-law, it must be considered that the Court intended by those words to

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refer generally to all individual legal positions protected by Community law; hence - by definition - this condition is always met in the case of provisions having direct effect.

The second condition, which at first blush seems merely to specify the first, emphasizes the need for the right resulting from the directive to have a precise content, that is to say, its subject-matter must be capable of determination, with the result that this condition should again be regarded, in principle, as being satisfied by Treaty provisions with direct effect. (60) It is worth stressing at this juncture that in Francovich, as in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others, on which I am also delivering an Opinion today, the content of the right conferred on the individuals coincides exactly and precisely with their pecuniary claims asserted by virtue of that same right under the relevant Community provisions and hence with the loss for which damages may be payable. (61) Of course, this does not mean that the condition in question has to be interpreted as meaning that whether damages may be awarded in respect of the damage sustained by the individual is dependent on whether the exact content of the pecuniary loss sustained by the individual is capable of being identified on the basis of the actual provision infringed. In contrast, it is enough for the infringement of the provision in question, which confers on the individual a right whose subject-matter can be precisely identified, to have affected the injured party's financial interests. If this were not so, in fact, only claims in cases in which the aim of the provision infringed was precisely to confer a `pecuniary' right on the individual would sound in damages.

57 The above observations lead me to an initial conclusion: in so far as they relate to the legal position which an individual must occupy in order to be able to claim a right to reparation, the conditions laid down by the Court in Francovich are manifestly necessary and satisfied even in the case of Treaty provisions having direct effect. What has to be clarified here is whether those conditions are sufficient in every case.

To that end, it is worth examining the reasons which prompted the Court to confine itself to those conditions and not also to specify, for instance, the criteria for holding that the relevant infringement of Community law involves unlawful conduct such as to cause the State to incur liability. In Francovich, as I have already said, the Court referred expressly to only one of the classic preconditions for liability: the causal link. In contrast, it provided no further clarification about the unlawfulness of the conduct of the perpetrator of the loss or damage and the actual existence of the loss or damage, the national court not having been asked to carry out any review in that regard.

58 In my view, the choice made by the Court in Francovich was due, very simply, to the fact that in that case the existence of the aforementioned two preconditions was obvious at first sight. There could be no doubt as to whether the omission on the part of the State was unlawful: the result sought by the directive - in respect of which the State had no margin of discretion, at any rate not in relation to the time within which the directive had to be implemented - was not attained; neither was there any doubt as to whether loss or damage had actually occurred, since it essentially coincided with the amount to which the applicants would have been entitled had the directive been implemented within the prescribed period.

Accordingly, in those circumstances, since the Court had first found that the directive could not be relied on directly by individuals before the national courts, it merely indicated that, for the purposes of the obligation to make reparation of the Member State in breach of its obligations, it must be possible to identify a precise, exact right on the part of the individuals.

59 In sum, it is undeniable that, from the point of view of State liability and the obligation to make reparation, Francovich was virtually a textbook case. The fact that the Court did not feel the need to specify the limits of State liability, in particular in so far as it omitted expressly to indicate the Community criteria for judging whether the conduct of the State was unlawful, should

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be seen solely in the light of the particular features of the case before it. It is significant in this regard that different, even opposite, reactions are to be encountered in academic writings: according to some commentators, the Court intended only to target serious infringements or infringements involving fault; (62) others, in contrast, take the view that it appears from Francovich that any infringement of Community law gives rise to liability and an obligation to make reparation. (63)

In the final analysis, the fact that the criteria required by Community law in order for the State to incur liability are not clearly defined in Francovich is closely connected with the particularly straightforward nature of that case. The Court's very statement that the conditions under which State liability gives rise to a right to reparation depend `on the nature of the breach of Community law giving rise to the damage' should therefore be construed as meaning not only that the general conditions for liability to be incurred vary according to the type of breach, but also that the particular characteristics of a specific type of breach, such as failure to implement a directive within the prescribed period, may be such as not to require detailed consideration as to whether one or more of the conditions in question are present.

60 To interpret Francovich differently would mean that every infringement of Community law affecting the financial interests of an individual occupying a legal position claimed under the provision infringed entailed per se and automatically a right to reparation.

It does not seem to me that this was the result intended by the Court or by Community law. Moreover, it would not actually be reasonable, given that, as I have already mentioned, in all the legal traditions liability for legislative activity on the part of the public authorities is limited in various ways. What is more, the Court's own case-law on the non-contractual liability of the Community institutions on account of their legislative activities takes a different line.

2. The case-law on the second paragraph of Article 215

61 Although this is not the proper place in which to analyse and discuss this case-law, I consider it necessary at least to point to the need for calm, profound reflection thereon. In these proceedings, the Member States have constantly referred to the case-law in question and asked for the same criteria set forth in that case-law also to be applied in respect of liability for infringements of Community law attributable to them.

That point of view does not seem completely baseless, bearing in mind, first, that the second paragraph of Article 215 refers, for the purposes of the reparation of damage caused by Community institutions in the performance of their duties, to the general principles common to the laws of the Member States and, secondly, that consequently that case-law could and should constitute, regard being had to the absence of uniform rules in this field, a useful frame of reference for common rules on State liability.

62 The Court does not seem - or at least not at first sight and unlike that which Advocate General Mischo proposed in his Opinion in Francovich - to have intended to make State liability hinge on the same restrictive conditions required by the case-law in order for the Community to incur liability.

Nevertheless, I consider it worth preceding my consideration of each of the general conditions for liability by a few observations designed to assess whether, and to what extent, an infringement of Community law attributable to the State is comparable to an infringement on the part of the Community institutions, and whether, in the final analysis, the criteria set forth in the relevant case-law may or may not constitute a useful frame of reference, at least given similar situations.

63 To that end, I would call to mind as a preliminary point that the Court has consistently held that `the liability of the Community on account of its legislative powers depends on the coincidence

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of a set of conditions as regards the unlawfulness of the act of the institution, the fact of damage and the existence of a direct link in the chain of causality between the act and the damage complained of'. (64) As can be seen, the substantive preconditions are the same - indeed could not be different - also in the case of liability on the part of the Community institutions.

However, the case-law has identified - in particular with regard to the unlawfulness of the conduct imputable to the institutions - conditions which are so restrictive as to make it extremely difficult actually to obtain damages against a Community institution. (65)

64 The limits laid down by the case-law in regard to actions brought under Article 215 of the Treaty are in fact based on the widespread view that, as a matter of principle, compensation may not be recovered for injury caused by the legislature. Moreover, the Court itself has explained its restrictive approach as follows: `the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals'. (66)

The application of that approach, however, in a good few cases has made for perplexity.

65 The limits of Community liability are relied upon and applied not only in relation to legislative measures which presuppose the existence of a broad discretion on the part of the relevant institution, but also in relation to measures which fall within the ambit of implementing legislation (typically Commission implementing regulations). (67) Essentially, the Court has applied the restrictive criteria formulated in assessing the Community's liability on account of legislative measures of a general nature even where the damage arose out of an individual measure not in fact involving economic policy choices of such scope as to necessitate the fullest possible protection of the institutions' discretionary powers.

Unquestionably, it would be more correct to apply different rules on liability depending on whether the activity in question was more particularly legislative or in the nature of executive activity, given that, in principle, the discretion available to the Community institutions differs significantly in the two cases. (68) More generally, the requirement for virtually arbitrary conduct in order for non-contractual liability on the part of the Commission to arise is justified where the Community has a broad discretion - as in the field of agricultural policy -, but is not justified where, in contrast, the conditions for the exercise of the discretion conferred on the institution are clearly and precisely defined. (69) In the latter case, the infringement of the relevant provision should in any event be regarded as such as to cause the Community to incur liability. (70)

66 In sum, whilst, according to Francovich, loss or damage caused by a provision of national law incompatible with a Community provision must be held to be amenable to an action for damages, it is not easy to understand why damages should be recoverable for the loss or damage ensuing from a Community measure which is incompatible with the same Community provision only if the restrictive conditions laid down by the Court (until now) are satisfied. (71) Moreover, in a Community governed by the rule of law, which aims to pay increasing attention and to be increasingly sensitive to the protection of individuals, also from the point of view of compensation, at least equal attention should be paid - as a number of parties have argued - to cases in which the loss or damage suffered by the citizen arises out of an unlawful act or omission attributable to the Community institutions themselves. (72)

From that point of view, it does not seem to me either that it can be validly argued that to transpose to national actions in tort the conditions attaching to actions brought under Article 215 would potentially constitute a step back from the situation existing in some legal systems. From the point of view of the requirements of the protection of the rights conferred on individuals by the

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Community legal system, it is not acceptable for the judicial protection achievable at Community level to be based on more restrictive and, in the final analysis, less liberal conditions than those obtaining in at least some Member States. (73)

67 In the light of the foregoing, I consider that there is no reason for applying different criteria - naturally in like situations - depending on whether the infringement of Community law in question is attributable to a State or a Community institution. Conversely, different situations can and must lead to different conclusions as regards the criteria employed to find whether the preconditions for liability are satisfied, whether the alleged liability be on the part of the Member States or the Community institutions.

In particular, by way of a first approximation, I take the view that it is absolutely reasonable that State liability - let us be quite clear about this, irrespective of whether or not the provision `breached' has direct effect - should be subject to the same restrictive conditions applying to the Community institutions whenever they have a margin of discretion or the limits imposed on their action by Community provisions, perhaps in sectors falling (partly) within their sphere of competence, are not clear.

Conversely, Member States should be more readily held liable, as in the case of the Community institutions, wherever the infringement is not coupled with the exercise of a broad discretion.

68 In the final analysis, what should be attained is a system of differentiated liability depending on whether or not the Community institutions (and the national authorities) have a broad discretion. To my mind, this is the most correct and consistent manner of bringing about the essential harmonization of the preconditions for liability, in so far as it would be strange, to say the least, to hold Member States liable, on equivalent facts, for infringements of Community law on different (less strict) conditions than those which the Court applies to liability on the part of the Community institutions.

In a Community governed by the rule of law, in which it is the aim that the acts and conduct of all participants in the system should be amenable to judicial review without privileges for anyone, the requirement for effective protection of the rights claimed by individuals under Community law may not vary - given equal situations - depending on whether a Member State or the Community caused the loss or damage.

69 The appraisal set out below will therefore take into consideration, as the point of reference for determining the obligation on Member States to make reparation, inter alia the conditions identified by the Court in its case-law on Article 215. Of course, this will not involve a `blind' transposition of those (restrictive) conditions to the sector under consideration here. I am not overlooking that, in applying Community law, the Member States generally have very limited discretion, with the result that the conditions in question relating to this situation are likely to cause liability more readily to be incurred. At the same time, I consider that it cannot be ruled out that any lack of precision of the obligation on the Member State may be such as to necessitate the application of those same restrictive criteria, even though it does not have a significant margin of discretion in the sector in question.

3. The `Community' criteria relating to the general conditions for liability

70 Having said all this, I shall now turn to consider the individual substantive preconditions for incurring liability, starting with the event which gave rise to the damage, that is to say in this case, infringement of Community provisions with direct effect.

(a) The event which gave rise to the damage: infringement of Community provisions

71 Defining the limits of liability is primarily and essentially linked with the definition of

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the unlawful conduct. It is undisputed that the harmful conduct - here the legislative measure - must conflict with the rules of the system. In order, however, for such unlawfulness to give rise to liability, and at the same time damages, the individual States employ differing concepts, (74) whose meaning does not always correspond exactly and whose practical application may therefore result in different solutions being applied in respect of the infringement of a given provision. This confirms, if confirmation was needed, that it is necessary - particularly as regards the event which gave rise to the damage - to establish the criteria which will enable a common definition to be achieved.

As regards legislative activity of the public authorities, a first attempt has been made by the Council of Europe in a recommendation, Principle I of which states as follows: `Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in the case of transgression of an established legal rule.' (75) Consequently, mere unlawfulness of the measure is not sufficient under that recommendation in order for the State to incur liability: except where the provision alleged to have been breached is clear, the conduct attributed to the public authorities must also have been `unreasonable'.

72 In the Court's case-law on non-contractual liability it has been consistently held that if the damage complained of results from a legislative measure involving choices of economic policy, the fact that the measure in question is invalid is not sufficient to cause the Community to incur liability. In the case of measures of this kind, (76) Community liability cannot arise unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. (77)

Whilst it is true therefore that the prejudicial measure must at least be unlawful in order for non-contractual liability to be incurred, there is the immediate addition of two conditions on which liability for damage caused by measures involving a choice of economic policy depends: the provision infringed must be `a superior rule of law for the protection of the individual' and the breach must be `sufficiently serious' (`grave', `suffisamment caractérisée', `hinreichend qualifiziert').

73 Having said that, I would point out that all the States which submitted observations in these proceedings ruled out an exact match between the reasons for the invalidity of the measure and the preconditions for liability, arguing that not every breach of Community law is capable of causing the State to incur liability and, as a result, of giving rise to an obligation in damages in favour of individuals.

Consequently, for the purposes of holding that there is an obligation in damages on the Member State in breach, the emphasis has been placed, on the one hand, on the same criteria formulated by the case-law on Article 215 - hence essentially on the concept of a manifest and serious breach - and, on the other, on fault as the element necessary to `characterize' (as serious) the breach of the provision or, in any case, as an indispensable, inherent ingredient of liability.

- Manifest and serious nature of the breach

74 Whilst entering all the caveats and making all the distinctions required as regards Community liability, it must therefore be assessed whether, also for the purposes of liability on the part of the Member States, the breach in question must be manifest and serious and, of course, what is to be understood by the breach having to be manifest and serious.

As I have mentioned, in the relevant case-law that criterion is defined in the following terms: `In the context of Community provisions in which one of the chief features is the exercise of a wide discretion indispensable for the implementation of the common agricultural policy, the Community can incur liability only in exceptional cases, namely where the institution concerned manifestly

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and gravely disregarded the limits on the exercise of its powers', (78) provided of course that the breach in question was of a superior rule of law for the protection of the individual.

75 The latter requirement seems, for present purposes, to be the least controversial. It is obvious that, in order for an individual to be able to claim a right to compensation, the provision breached must be capable of conferring a legal position upon him as an individual. Moreover, this is the sense in which the first two conditions set out in Francovich must be read, conditions which, as I have already stated, are both necessary and satisfied in the case of provisions having direct effect.

In my view, when it comes to Treaty provisions with direct effect, which is what we are concerned with here, some additional specification is needed. In particular, it must be made clear that the fact that such provisions are occasionally or often designed to protect other - ex hypothesi general - interests as well cannot be regarded in itself as preventing them from being for the protection of individuals.

76 Next, as regards the requirement that the provision infringed should be a superior rule, it is scarcely necessary to point out that if a legislative measure is unlawful, this means - by definition - that it conflicts with a higher-ranking provision. Admittedly, that expression is used in the case-law on Article 215, not to penalize every breach of limits imposed by superior rules, albeit for the protection of individuals, but solely breaches of general principles of the legal system and hence, in the final analysis, to categorize the breach in question as serious.

In this connection, I shall say forthwith that I do not consider it appropriate to propose the same solution also for State liability for infringements of Community law. If it is true that the Member States' obligation in damages is imposed in order to guarantee individuals effective protection of rights claimed under Community provisions, it follows it would not be easy to identify reasons justifying limiting that obligation to the breach of a particular class of rule, albeit one fundamental to the Community system.

77 Indeed, if the standpoint of the injured party is taken, it is only too obvious that any infringement of a Community provision which confers a legal position on him as an individual must be capable of giving rise to compensation. Consequently, infringement of a provision of a regulation cannot result for the individual in consequences differing from those arising out of an infringement of a Treaty provision; it seems to me even less appropriate to draw distinctions between actual provisions of the Treaty by deciding, for example, that only breaches of some of them, that is to say, the fundamental provisions and not the others, are capable of causing the Member State in question to incur liability. (79)

In the final analysis, I consider it sufficient, from the point of view of the aspect considered so far, that the provision infringed should confer on the individual a right whose content is capable of determination and precise. It is hardly necessary to add that the same should be true of liability on the part of the Community institutions.

78 This having been clarified, it now falls to me to specify the concept of manifest and serious breach as it arises in this context.

It seems to me that, in order to identify the limits of the possibilities for translating unlawfulness into liability, the discretion factor can and must be the decisive element, irrespective of the rank of the provision infringed (Treaty or secondary legislation, at any rate a provision which takes precedence over national law) and of the measure (legislative or executive) which infringes it. The greater or lesser degree of discretion available to the State coincides, moreover, - at least in most cases - with the greater or lesser degree of clarity and precision of the obligation to which it is subject. In fact, it is quite possible to conceive of obligations which are not

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at all clear - or better, which are imprecisely demarcated-, even in cases where the States' discretion is small or unimportant. The upshot is that in such cases the limits set to the action of the States are not clearly defined for that very reason, with the result that the situation is not very different substantively from that in which the States have a significant margin of discretion.

79 This means that, even in the case of provisions with direct effect, the State may be guilty of breaches which, not by reason only of their having direct effect, must be categorized as manifest and serious. I shall explain what I mean using an example based on two provisions having direct effect. The prohibition of discrimination on grounds of nationality (Article 6) identifies precisely and exactly the individual's right, which is - very simply and without any possible alternative - the right not to be discriminated against. The same cannot be said of the provision prohibiting quantitative restrictions and measures having equivalent effect (Article 30) in view of the variety of fact situations conceivable in that area. In that case, the individual's right - which in itself is only too clear - not to be obstructed in his activity by measures contrary to the provision in question may be limited by the provisions of Article 36 or also, in the case of measures applicable without distinction, by imperative requirements relied on by the State with a view to pursuing an objective deemed worthy of protection by Community law itself. The upshot is that the State measure in question, which is in principle incompatible with Community law, may well be taken outside the scope of Article 30 or fall within the exceptions provided for in Article 36. To this end - and it is scarcely necessary to stress this - it may be necessary to obtain a prior determination from the national court and/or from the Community Court.

Furthermore, it is worth pointing out that, for present purposes, it is not decisive in itself whether or not the States have a wide discretion in a given sector, but rather what is decisive is the breadth of the margin of discretion available to them in regard to the individual provision which confers a right on individuals. (80) It is in precisely that way that the discretion ends up by corresponding to the greater or lesser precision of the obligation which it imposes on the States themselves.

80 If the question is seen in those terms, it has to be acknowledged that there will be State liability in principle whenever the State is constrained under Community law to achieve a precise result. This is precisely the case, as already held by the Court in Francovich, where there is a failure to implement a directive within the prescribed period, provided, of course, that the other conditions set out by the Court are fulfilled. But this is also the case with all other provisions, including those of the Treaty, that are confined to imposing on the Member States precise, clearly identified obligations to refrain from some conduct (suffice it to mention the prohibition on the introduction of new customs duties laid down by Article 12 and, more generally, all the standstill clauses) which concurrently give rise to a right for individuals.

So, in all those sectors and with regard to all those provisions which do not give Member States a significant margin of discretion, in the sense described above, there must be held to be liability and an obligation in damages simply on account of the infringement of a Community provision which confers on individuals a right which is precise and whose subject-matter is determinable; no other factors may be taken into account.

81 Where, in contrast, Member States have a more or less wide discretion or the Community obligations imposed on them are not clearly and precisely defined, the same solution will have to be adopted only where the limits set to their action have been manifestly and gravely disregarded. Obviously, this will be the case where the provision assumedly infringed is clear, perhaps in the way described in CILFIT (81) or because it has already been interpreted by the Court with regard to identical or, in any event, similar facts (82) no matter whether the interpretation was given in a preliminary ruling or in a judgment pursuant to Article 169.

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As far as the last-mentioned aspect is concerned, it is scarcely necessary to show that, unlike some Member States have argued in these proceedings, there is no reason for making an action for damages dependent upon the Court's having made a prior declaration that the State in question has failed to fulfil its obligations. In this connection, regard must be had to the Commission's discretion in deciding whether or not to initiate infringement proceedings, which would reduce, without any review, the ability of individuals to obtain compensation. Moreover, as the Court itself has held `the rights accruing to individuals derive, not from that judgment [declaring that the Member State failed to fulfil its obligations], but from the actual provisions of Community law having direct effect in the internal legal order.' (83)

82 In contrast, where the Member States have a broad margin of discretion and/or the relevant law is doubtful and has not yet been considered by the Court, even in regard to similar facts, it is impossible for the approach to be different. Simply on an abstract level, it must in fact be considered that in such cases it will be very difficult to find that the limits set to the States' action have been manifestly and gravely disregarded, all the less where this is equated, as in the Article 215 case-law, with virtually arbitrary conduct. (84)

Consequently, in such cases the individual continues to have the possibility of relying on the substantive protection of the legal position which may be conferred upon him by the provision in question. Of course, in the event that the Member State does not remedy reasonably quickly the infringement which has been found in the meantime, the injured party may indeed bring an action for damages.

83 Having said that, it certainly cannot be ruled out that the interpretation of the Community rules in question, as made by the national authorities in their legislative activity (or lack of activity), may prove to be manifestly wrong, with the result that the Member State in breach of its obligations should be held liable in damages also in such cases.

I would next observe that, from the same perspective, as regards the timely, but incorrect, implementation of a provision of a directive, State liability will exist only where the application of the provision by the Member State in question is manifestly wrong. (85)

84 In the final analysis, I consider that, for our purposes, there can be considered to have been a manifest and serious breach where:

(a) obligations whose content is clear and precise in every respect have not been complied with;

(b) the Court's case-law has provided sufficient clarification, either by an interpretation given in a preliminary ruling or by means of a judgment pursuant to Article 169, of doubtful legal situations which are identical or, in any event, similar to that at issue;

(c) the national authorities' interpretation of the relevant Community provisions in their legislative activity (or inactivity) is manifestly wrong.

- Fault: an essential ingredient?

85 It remains now to assess whether fault is an essential ingredient in order to hold Member States liable. In this connection, it is appropriate first to clarify that by fault I mean a subjective factor, or, if you prefer, a mental or psychological factor, which characterizes - as being at fault or negligent or in any sense traditionally attributed to the expression fault - the conduct of the entity to which the infringement and, with it, liability is attributed. From this angle, fault is therefore a factor which is added to the infringement of the enabling provision as a subjective element, by categorizing the conduct which results in the breach, but not directly the breach as such or the legislative measure giving rise to the damage.

Seeking fault in the subjective sense - and, a fortiori, wrongful intent - as regards legislative

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activity raises some considerable difficulties even at the conceptual level, especially since fault as a condition of State liability has always been the subject of profound reflection and conflicting assessments. In particular, attention has been drawn to the difficulties of identifying conduct displaying fault on the part of the public authorities on the basis of the same criteria used for the purposes of civil law, especially since the mechanisms devised for explaining the actions of legal persons by attributing to them the same manner of acting as natural persons are said to prove completely useless or at least inadequate from this point of view. Indeed, even viewed in the abstract, it appears difficult to identify conduct involving fault in the rule-making activity of the legislator or even to conceive of its possibly being aware of the breach. In contrast, it cannot be presumed that the legislator pursues a general interest invariably and in any event.

86 Despite this, it must be acknowledged that most national legal systems still refer to fault as the basis for liability, (86) even where, essentially, it is equated precisely with the unlawfulness of the measure. I am thinking, in particular, of the French system, in which the ruling principle is that `toute illégalité constitue par elle-même une faute' (any illegality constitutes fault per se) (87) and of the approach of the Italian Corte di Cassazione (Court of Cassation), according to which `as far as unlawful measures are concerned, fault may be found in the infringement per se of the provisions which was brought about by the adoption and implementation of the measure'. (88)

In other words, fault, which is at least presumed every time an unlawful legislative act is brought into being, either in view of the unquestionably voluntary nature of measures adopted by the public authorities or on account of infringement of the principles of legality which those authorities are bound to observe, has ended up by losing every subjective connotation. (89)

87 To put it another way, the search for fault has shifted from the perspective of a person to that of the `organization', with the result that even where it does not coincide simply with the unlawfulness of the measure, it is in any event connected with the content of the provision infringed, inasmuch as it attributes relevance to those rules of conduct with which the administration is bound to comply in performing its institutional tasks. In particular, importance attaches to the fact that the action of the administration is constrained by the limits of legality imposed on it.

Whilst, therefore, it is indeed true that liability is still fault-based in most national legal systems, it is also true that the existence of fault is determined, subject to some exceptions, (90) by objective criteria. (91) In sum, in the Member States themselves fault liability ends up being allowed in only by virtue of a series of devices; in any event, it is becoming increasingly objectified, that is to say, it is decreasingly or not at all coupled with a subjective component.

88 I consider that that solution, which is prevalent in the national legal systems and has been adopted by the Court itself in relation to non-contractual liability on the part of the Community institutions, (92) results in liability of Member States for infringements of Community law being strict, no-fault liability.

On the other hand, even if it were to be sought to base such liability on fault, it seems to me, at least as a first approximation, that it could not, for present purposes, not be linked to the provision allegedly infringed or simply identified with its content.

89 To my mind, it is obvious that if the enabling provision in question is one intended to achieve a particular result, there is no room for making the emergence of a situation of liability depend on the existence of a subjective connotation of the conduct of the State which may be described as fault in the sense defined earlier. The infringement - the unlawful act - crystallizes at the time at which the State failed to achieve the result sought by the provision. There will then be liability on the part of the State, that is to say, strict or no-fault liability or whatever

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term one wishes to employ.

Conversely, if the enabling provision is a provision relating to conduct, in the sense that it essentially prescribes a duty of care, fault will be an essential component. If so, however, fault is no longer a subjective component characterizing the conduct of the State which brought about the infringement and with it the wrongful damage, but precisely the subject-matter of the infringement. Breach of a duty of care consists precisely in negligent conduct, hence conduct exhibiting fault, with the upshot that fault is the subject-matter of the unlawful act and no longer a subjective component of the conduct.

90 In the final analysis, in order for there to be liability on the part of a Member State which has breached Community obligations to which it is subject, I consider that there is no relevance in inquiring into the existence of fault as a subjective component of the unlawful conduct.

I would therefore reiterate my conviction, as described earlier, that the conduct of the State in breach of Community law must be assessed in the light of objective factors for the purposes of the obligation to make reparation.

(b) Existence of the damage

91 The damage must be real, that is to say, certain and actual. Moreover, those are the requirements generally insisted upon by the national legal systems, and it will be for the national court to find whether they are satisfied in the actual case.

92 Nevertheless, I am minded to dwell, if only briefly, on a number of conditions relating to the nature of the damage which have been prayed in aid or, at any rate, raised during these proceedings, in particular by the French Government, as a criterion for limiting the area of Member State liability following infringements of Community law. I refer, in particular, to the seriousness of the damage, in the sense that the damage should be considerable, and to its special nature, in so far as it should affect a small number of persons.

In my view, those conditions should be regarded as irrelevant for present purposes, even though they have often been applied in the Court's case-law on non-contractual liability. (93)

93 Whilst it is true that under the law of some Member States there are cases in which the right to reparation depends, among other things, on the seriousness of the damage, on its abnormally serious nature and on the special nature of the damage in regard to the injured parties, it is also true and worth stressing that that approach is employed for compensation for damage caused by lawful acts. (94) Accordingly, the terms of the problem are not, and could not be, the same as those arising in this case.

It would indeed be excessive to require of individuals injured by unlawful acts that the damage sustained by them should be abnormal and special, with the result that they would be left to bear, not only consequences of a modest scale, but also those common to a class of individuals which was not of limited size. I consider therefore that the idea of exempting liability for minor loss or damage in this case would be a bad one.

94 In this connection, I would first observe that the argument against accepting the criterion of the seriousness of the financial damage is that an unlawful measure involving a manifest and serious breach contrary to a provision of the system and with the rights of the individual guaranteed thereby, must give rise to compensation in order to restore the balance altered by the unlawful act or omission, irrespective of the scale of the damage. Moreover, if a common approach to liability for unlawful acts or omissions of the public authorities emerges from the laws of the Member States, that approach consists in not making compensation depend on the scale of the damage.

On top of this, State liability does not seem to be able to be confined to cases in which there

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are specifically determined persons, or groups of persons, and precluded where the legislative act concerns a broad class of persons. Whilst it is true that it could be justifiably argued that public-interest requirements militate in favour of ruling out compensation for damage affecting large classes of persons, inter alia in order to avoid heavy financial burdens, it is also true that that approach is based merely on reasons of expediency. It still leaves the question open, given that liability is dependent on a manifest and serious breach of a higher norm which creates rights of the individual, as to the reasons for which the person with the right to compensation should be given satisfaction on the basis of the number of other persons with the same right which has been breached. (95)

95 In short, it does not seem possible to me to ignore the fact that liability for unlawful measures and compensation for lawful measures are two radically different creatures. It is certainly not without significance that the condition regarding the seriousness and the special nature of the damage was laid down in the French case-law only for damage arising out of lawful legislative measures.

Moreover, when in the judgment in Alivar it depicted State liability for infringements of Community law as responsabilité sans faute, seeing that the national measures were justified by the public interest, the Conseil d'Etat itself took the abnormal and special nature of the damage as established; (96) so much so that this has been referred to as responsabilité sans faute adjusted by the fact that it is not necessary for the damage to be abnormal and special. (97)

96 In the final analysis, I consider it to be only too obvious that conditions relating to the nature of the damage, which may, moreover, even result in the negation of the actual right to compensation, have no basis and no raison d'être where the damage complained of is connected, not with lawful activities, but with unlawful ones. (98) Naturally, this conclusion should also apply to cases of non-contractual liability on the part of the Community. (99)

(c) The causal link

97 The third condition for liability expressly mentioned in Francovich relates to the causal link - an obligatory requirement for liability in tort - according to which the damage complained of must be the direct consequence of the harmful event imputed to its perpetrator, hence, in this case, the unlawful legislative measure.

Obviously, it will be for the national court to establish whether this condition is fulfilled. For present purposes, however, I am minded to make a few observations with regard to a break in the chain of causation from two points of view. First, it is worth examining whether it is possible to consider that under Community law the causal chain may be broken by contributory causes or by negligent conduct on the part of the injured party; secondly, this matter raises, albeit under various guises, the question of the ancillary nature of a damages claim in relation to other national judicial remedies.

- Conduct of the injured party

98 In this connection, it should first be recalled that the Court itself has held that there is `a general principle common to the legal systems of the Member States to the effect that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself'. (100)

Consequently, the injured party is under a duty to act diligently, a duty which consists in taking steps so as to avoid the damage or, at any rate, to reduce its scale. (101)

99 Moreover, this is the purport of the Council of Europe's aforementioned recommendation of 18 September 1984, Principle III of which reads as follows: `If the victim has, by his own fault or by his failure to use legal remedies, contributed to the damage, the reparation of the damage

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may be reduced accordingly or disallowed'.

It appears from the wording of that principle that a break in the chain of causation may depend on conduct exhibiting fault on the part of the injured party and that such conduct, in turn, might also consist in his not having made use of the legal remedies available to him.

- Remedies in damages and administrative remedies: independent or ancillary?

100 If the damage could be avoided by the injured party by means of domestic judicial remedies (for example, by contesting the prejudicial measure incompatible with Community law by invoking vis-à-vis the public authorities a right conferred by a provision having direct effect embodied in a directive), it is permissible to ask whether failure to have recourse to such remedies does not break the necessary chain of causation between the breach and the damage.

In other words, the question arises as to whether or not failure to use in time remedies challenging the contested measure precludes the possibility of claiming that the State `in breach of its obligations' is liable. In this sense, apart from being a condition for liability, the prior initiation of substantive remedies could well - equally properly - constitute a requirement for the admissibility of the action for damages.

101 That problem is resolved in different ways in the various Member States, on the basis of three discernible different approaches. The first consists in making the various possible actions completely autonomous and hence in leaving it to the interested party to choose the one which he deems most appropriate in order to protect his interests. (102) The second makes an action for damages dependent on bringing an action for annulment. (103) The third is more closely connected with the causal link, in so far as it allows the administration not to answer for such damage as the person concerned could have avoided by employing substantive remedies, in particular an action for annulment. (104)

As we know, after initially taking the view that the action for damages was ancillary, (105) subsequently the Court's case-law on non-contractual liability firmly adopted the stance that such actions were autonomous and could be brought irrespective of the availability to the applicant of other judicial remedies. In particular, the Court has held that `the action for damages under Article 178 and the second paragraph of Article 215 of the Treaty was established as an autonomous form of action with a particular purpose to fulfil within the system of actions and the exercise of it is subject to conditions imposed in view of the specific objective thereof'. (106)

102 Those dicta show, in particular, that the autonomous nature of the action for damages satisfies needs by way of guarantee, which needs are connected with the various requirements relating to locus standi for bringing an action for annulment as opposed to an action for damages. Under the system of protection provided for in the Treaties, individuals may not challenge acts of a general nature and it is very difficult for them to obtain a ruling that the Community institutions have failed to act. The fact that the action for damages has been held to be autonomous therefore enables that to be obtained by means of damages which is not obtainable or, in any event, has not been able to be obtained by means of an action for annulment.

That this is the rationale of holding that the action for damages is autonomous is borne out by the fact that it is not available in those few cases in which private persons can actually rely on administrative remedies, (107) in particular in the context of Community staff cases. (108)

103 Essentially, the criterion underlying the case-law laying down the rules on actions for non-contractual liability has remained consistent, apart from the formulas adopted from time to time with regard to domestic remedies (preliminary reference on validity in connection with a challenge to the domestic implementing measure) or direct challenges (action for annulment or for failure to act). The aim is to prevent actions for damages from being utilized in order to pursue the same result which could

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- effectively, of course - have been attained by means of a different action. Hence, an action for damages cannot be the means of neutralizing the effects of a harmful measure where that objective could also be achieved through a normal action for annulment, whether direct or national via a reference for preliminary ruling on validity to the Court. This is subject to the sole reservation that the (in particular, national) judicial remedy must in any case be capable of securing effective protection.

In the final analysis, the fact that actions for non-contractual liability are autonomous favours private individuals, to whom substantive judicial remedies are normally not available, but not also persons who can effectively invoke such remedies.

104 This means, as far as it is relevant to these proceedings, that the Member States cannot reasonably be debarred from making actions for damages dependent on a previous action for annulment having been brought, if and in so far as the aforementioned condition is also prescribed for similar domestic claims.

Moreover, the idea that the action for damages is ancillary in the case of loss or damage caused by infringements of Community law seems - at least at first sight - to have already received the Court's seal of approval. In Wagner Miret, the action for damages was portrayed as the individual's last resort, that is to say, the route to take when it is impossible otherwise to attain a worthwhile result, not even through the interpretation of the national provisions in question by the national court in conformity with the relevant Community provisions. (109)

4. The other conditions

105 As for the other conditions relating to compensation for damage, it should first be recalled that, in Francovich, after identifying and defining the conditions `sufficient to give rise to a right on the part of individuals to obtain reparation', the Court went on to state that `subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the damage caused' (paragraph 42).

The interpolation `subject to that reservation' manifestly means that, in relation to the rules on the reparation which is due under Community law itself and arises on the conditions laid down by Community law, the relevant rules of national law are applicable only in so far as they are necessary in order to govern the other conditions relating to the reparation. It is therefore the detailed rules for effectuating the individual's right to reparation which are governed by national law, in particular the procedural conditions. (110)

106 As regards those conditions, the Court also held in Francovich that `In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law' (paragraph 42).

In truth, this is no new formula in the Court's case-law, having in fact usually been associated with the Member States' autonomy in procedural matters, an autonomy which, even in that sector, is not however without limits.

107 In that connection, the Court in Francovich emphasized a principle which it had already repeatedly expressed in general terms, (111) namely that `the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States concerning reparation of damage must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation' (paragraph 43).

Consequently, also with regard to reparation of damage, Community law confines the Member States'

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freedom to laying down procedural and substantive rules on the other conditions relating thereto; here again, this is dependent on the requirement to secure individuals real, effective protection. (112)

108 More specifically, the limit to national treatment, in the sense that judicial protection must at least be equal to that available for similar legal positions created by national provisions, may at times turn out to be completely worthless. It is sufficient to mention the very cases under consideration in these proceedings, in which national law lays down no relevant provision, since the remedy sought is not available in the national legal systems in question. What is doubtless more relevant and determinative, on account of its potential, is the limit consisting in the fact that the national legal system must not be such as to make it virtually impossible to exercise the rights which the national courts are bound to protect by virtue of Community law.

At least two consequences flow from that principle: first, judicial protection, in the case of rights claimed by individuals under Community law, must in any event attain a degree of adequacy; secondly, checking that that level has been attained is a matter for the Court. (113) Whilst it is true, therefore, that it is for the Member States to ensure that Community law is implemented properly, also from the point of view of protection in damages, the Court thereby reserves the right to check the level of adequacy of the protection afforded by the national judicial systems.

109 Lastly, and still with regard to the other conditions of the rules on reparation, there was a discussion in these proceedings in particular of the types of damage or loss for which compensation could be granted and of the quantum of damages. In this connection, given that those questions should in principle be left to the law of the Member States, I shall confine myself to some brief observations.

First, it is all too obvious that reparation of damage may not be merely symbolic, but must correspond to the damage suffered. This requirement, which is linked to the very raison d'être of the action for damages, consists precisely in ensuring that the financial situation of the injured party is restored. Moreover, the relevant national case-law, the Community case-law on Article 215 (114) and the case-law on international relations (115) support this view.

110 Useful indications in this connection may also be found in a number of judgments in which the Court has checked the level of adequacy of the protection afforded by the national legal systems in relation to rights claimed by individuals under Community law. Thus, for example, with regard to the freedom allowed to Member States as respects sanctions for infringements of the prohibition of sex discrimination, the Court stressed that the sanctions in question have to be `such as to guarantee real and effective judicial protection. ... It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained'. (116)

Further, in Marshall II, the Court held that, where a Member State elects to impose a sanction for discrimination in the form of compensation, `such compensation must be full and may not be limited a priori in terms of its amount'. (117)

111 Next, it is scarcely necessary to add that identifying the types of damage for which compensation may be granted is certainly not likely to involve major difficulties, not even from the point of view of the uniformity of the compensation payable in different Member States for given damage. Despite variations in terminology, all the national systems hold that compensation may be granted in respect of financial damage suffered by the injured party, which damage certainly covers consequential damage and loss of profits and earnings, together with interest thereon. As far, more specifically, as the actual quantification of the damage is concerned, it is only too obvious that this is bound to depend on the different economic and social situations peculiar to each Member State and that

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it will be up to each State to deal with this in accordance with the criteria laid down in this regard in its own national law.

In the final analysis, what is important for Community law is that compensation must be real and effective and hence that the situation which would have obtained if the infringement had not taken place should be restored, at least in terms of its financial content.

5. The time from which the obligation to make reparation starts to run

112 As I have already said, the obligation on Member States to pay compensation cannot be made dependent upon the existence of a judgment of the Court finding that there has been a failure to fulfil the relevant obligation. Consequently, such a judgment, even if one has been given, has no major importance for the purposes of determining the time as from which the State is bound to make reparation for the damage caused by an infringement attributable to it.

Moreover, the conditions suggested in regard to the characteristics of a `manifest and serious' breach make it clear that, if the provision infringed confers identifiable, precise rights on individuals, the obligation in damages on the Member State in breach is bound to arise at the time when the harmful event occurred. The same solution must be adopted where the provision infringed had already been clarified by the case-law at the time when the harmful event occurred. In other cases, where a doubtful legal situation is involved, it will not be until after the national court and/or the Community Court has clarified the matter that the State `in breach' can be obliged to make reparation for the damage, naturally in so far as it does not repair the breach reasonably quickly and only in respect of damage arising after the courts have clarified the situation.

113 Lastly, these proposed solutions lead to the conclusion that there is no reason for limiting the right to reparation to injured parties who have already brought a judicial action or lodged an equivalent claim with the national courts.

I consider that the imperative reasons of legal certainty referred to by the German Government are already sufficiently protected by the fact that the right to compensation may be made subject to the condition - if it is already laid down for similar domestic claims - that the injured party should have taken every step available to him in order to avoid the damage or at least reduce its scale. Apart from this, only the limitation and prescription periods laid down by national law, as in the case of actions for damages based on national law, may determine the time within which individuals may rely on the right to reparation for the damage sustained.

III - Replies to the national courts' questions

114 Before making more specific observations on the cases presently before the Court, I think it is worth recalling the conclusions which I have reached so far:

- in order to secure real, effective protection of rights claimed by individuals under Community law, that law requires that reparation be guaranteed to individuals for the loss or damage sustained by them as a result of infringements of Community law attributable to the State;

- it is completely irrelevant that the infringement in question is attributable to the legislature, as a result of which the restrictive conditions imposed by the national legal system for cases of unlawful action or inaction on the part of the legislature are not applicable;

- in order for the right to reparation to arise it is sufficient that the provision assumedly infringed is precise in all respects and unambiguous, which will be the case, for example, where a Member State fails to fulfil a precise obligation to achieve a result or where it fails to take account of established case-law;

- the criteria relating to the quantification of the damage continue to be governed by national

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law, provided that they are not less favourable than those applying to similar domestic claims and are not such as to make it excessively difficult or virtually impossible to obtain full compensation for the loss or damage arising as a result of the infringement in question;

- the obligation to make reparation arises at the time when the event which gave rise to the damage occurred in the case of a manifest and serious breach as defined above; otherwise it will not arise until there has been a determination by the national court or the Community Court, in the latter case by means of a preliminary ruling or a judgment given pursuant to Article 169.

(a) Case C-46/93 (Brasserie du Pêcheur)

115 What is at issue here is an infringement of a Treaty provision having direct effect, namely Article 30, which is attributable to the legislature in so far as it failed to amend the BiStG to accord with that provision. The appellant in the main proceedings is seeking compensation for damage sustained by it between 1981 and 1987, that is to say, from the time at which it was no longer able to export beer of its manufacture to Germany because, it alleges, that beer did not satisfy the requirements of the BiStG, until the date of the judgment in which the Court held, by judgment pursuant to Article 169, that that law was incompatible with Article 30.

Having regard to my observations so far, it is only too clear that, in order to decide the case pending before it, the national court has to establish whether the obligation conferred on the States by Article 30 - whose content, as I have already mentioned, can certainly not be regarded as precise and determinable in every respect - had already been clarified by the relevant case-law at the time when the damage occurred with respect to facts such as those of the case pending before it. In other words, it has to be ascertained whether it was clear already in late 1981 that a law such as the BiStG embodied an unjustified obstacle to activities of traders in the sector and was hence incompatible with Community law.

116 To that end, it should first be recalled that, ever since the well-known `Cassis de Dijon' judgment, (118) hence since February 1979, it has been clear that Article 30 prohibits, not only discriminatory measures, but also measures which are applicable without distinction and unjustified by imperative requirements. On top of this, by judgment of 9 September 1981, (119) which therefore was delivered more or less at the same time as the appellant in the main proceedings was obliged to stop exporting beer to Germany, the Court found that national legislation restricting the designation `vinegar' to wine vinegar was incompatible with Community law. Certainly, there is no ground for considering that a different view had to be taken with regard to the BiStG in so far as it restricted the description `beer' to beer produced using the ingredients mandatorily prescribed by that law.

However, it also transpires from the order for reference that the beer produced by the appellant contained additives, whereas the German law in question laid down an absolute prohibition on marketing beer containing additives in Germany. Whilst it is true that by the judgment of 12 March 1987 in Commission v Germany the Court held that the legislation in question was unlawful also from that point of view in so far as it was not justified by the requirement of protecting human health, it is also true that that conclusion could not be regarded as automatic, having regard to the relevant case-law. (120) If the damage complained of by the appellant is connected rather with this second aspect of the national legislation in question, a different solution cannot therefore be ruled out.

117 One final observation. I have already mentioned that a Member State is entitled - for the purposes of the right to reparation and provided that it lays down the same conditions for similar domestic claims - to require the injured party to show diligence and hence to set in train such mechanisms as may obviate or at least reduce the damage.

It appears from the documents in the case that it does not seem that the appellant has taken any such steps. Admittedly, as the appellant showed in these proceedings, it stopped exporting because

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of failure to renew the distribution contract with its (German) sole importer, which meant that it was substantively impossible for it to challenge any measure. Consequently, it is manifestly for the national court to ascertain whether the appellant was actually precluded from being able in any way to rely on Article 30 directly before the national courts.

(b) Case C-48/93 (Factortame III)

118 In contrast, in the Factortame case the national court has to ascertain whether the infringement which has been found of Articles 7, 52 and 221 of the Treaty and is attributable to the legislature for having passed a national law incompatible with those articles, may be regarded as a manifest and serious breach in the sense defined above.

In other words, it is a question of establishing whether the infringement of provisions conferring clear, precise rights on individuals, such as the right not to be discriminated against on grounds of nationality, is such, despite the discretion available to the Member States in adopting measures relating to the common fisheries policy, as to cause the State to incur liability. In this respect, I consider that a few observations will suffice.

119 Whilst it is true, as the United Kingdom has shown, that the Member States have a certain margin of discretion in adopting measures relating to the common fisheries policy, it is also true that that discretion is normally exercised under the constant supervision of the Commission, to which the Member States are obliged to communicate measures adopted by them. In this case, as transpires from the documents in the case, the Commission informed the United Kingdom in good time that the nationality, residence and domicile conditions laid down by the Merchant Shipping Act 1988 for the registration of fishing vessels in the new shipping register had to be regarded as incompatible with Community law.

What is more, the Court's case-law on the right of establishment is consistent in holding that national measures involving discrimination on grounds of nationality are incompatible with national law; likewise, the Court has held incompatible with Community law the very residence condition imposed on fishing vessels' crews. (121) Lastly, in so far as the legislation in question related to the registration of fishing vessels, its purpose was not to lay down detailed rules on the exploitation of the national fishing quotas and hence could not even be regarded as being justified on that ground.

120 In the final analysis, I do not consider that there can be any doubts as to the manifest and serious nature of the breach in question and hence as to the right to compensation of individuals who suffered damage as a result of it.

Finally, I would observe that, as the Court is well aware, the applicants in the main proceedings have done everything possible in order to avert the damage which eventually occurred. They took steps to that end even before the national provisions subsequently declared incompatible with Community law entered into force, by seeking and obtaining an interlocutory injunction suspending the application of the provisions at issue, the injunction which was set aside by the Court of Appeal and subsequently confirmed by the House of Lords following this Court's judgment of 19 June 1990 in Factortame I.

121 As far as the national court's second question is concerned, it is scarcely necessary to recall in the light of my earlier observations that the determination of the types of loss or damage for which damages may be awarded and the quantification of the damages continue to be governed by national law, but must, in any event, be such as to make full reparation for the loss or damage suffered by the injured parties.

However, the applicants also claim exemplary damages, as provided for by national law for unconstitutional conduct on the part of the administrative authorities, and this warrants separate consideration.

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Suffice it to observe in this connection that, in accordance with the principle that the conditions imposed by national rules in order to protect legal situations created by Community law may not be less favourable than those applying to similar domestic claims, a Member State is bound to grant that type of damages to the individuals concerned where the preconditions laid down by the relevant national rules are satisfied; this is so, therefore, even where the head of damages in question is completely unknown to the legal systems of the other Member States.

Conclusion

122 In the light of the foregoing considerations, I therefore propose that the Court should reply as follows to the questions raised in the respective cases by the Bundesgerichtshof and the High Court of Justice, Queen's Bench Division, Divisional Court:

(a) In Case C-46/93 (Brasserie du Pêcheur):

`1. A Member State is bound to make reparation for the loss or damage occasioned to individuals as a result of infringements of Community law attributable to that State, even where the infringement consists in the fact that the legislature omitted to amend a national law so as to bring it into conformity with Community law, provided that the obligation imposed on the State from which the individual's right is derived is precise in every respect or has been clearly specified by the relevant case-law.

2. A Member State is not entitled to make the right to reparation for infringements of Community law subject to the same restrictions laid down for infringements of national constitutional provisions by the legislature where those restrictions have the effect of making the right to reparation virtually impossible.

3. The obligation on the part of the State to make reparation may not be made to depend on finding a subjective component (fault or intention) accompanying the infringement of the provision, if the breach was manifest and serious in the sense explained above.

4.(a) It is for the national legal system to determine the types of injury for which reparation may be awarded and the criteria for quantifying the loss or damage, provided that the requirements laid down to that end are not less favourable than those applying to similar domestic claims and are not such as to make it excessively difficult or virtually impossible for the individual to obtain full reparation for the loss or damage suffered; this would be the case where national law limited the scope of the obligation to legal interests, such as property, yet excluded any possibility of obtaining reparation for lost profits.

(b) The obligation on the Member State to make reparation for loss or damage occasioned to individuals arises at the time when the event which caused the damage occurred if the provision infringed is clear in the sense specified above or, where the legal situation is doubtful, at the time when it was clarified by Community case-law, either by a preliminary ruling or by a judgment pursuant to Article 169.'

(b) Case C-48/93 (Factortame III):

`1. A Member State is bound to make reparation for the loss or damage occasioned to individuals as a result of infringements of Community law attributable to that State, even where the infringement consists in the fact that the legislature passed a national law incompatible with Community law, provided that the obligation imposed on the State from which the individual's right is derived is, as in the case at issue, precise in every respect or has been clearly specified by the relevant case-law.

2. It is for the national legal system to determine the types of injury for which reparation may be awarded and the criteria for quantifying the loss or damage, provided that the requirements laid

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down to that end are not less favourable than those applying to similar domestic claims and are not such as to make it excessively difficult or virtually impossible for the individual to obtain full reparation for the loss or damage suffered. Where the national legal system also provides for the award of exemplary damages, the relevant rules must therefore be applied, without any discrimination, even where rights asserted by individuals under Community law were infringed.'

(1) - Judgment in Joined Cases C-6/90 and C-9/90 Francovich and Bonifaci [1991] ECR I-5357.

(2) - Law of 14 March 1952 (BGBl I, p. 148) as amended by the Law of 14 December 1976 (BGBl I, p. 3341). Needless to say, Paragraph 10 restricts the use of the description `beer' to beer produced in accordance with the purity requirements compulsorily laid down by Paragraph 9 of the Law.

(3) - Case 178/84 Commission v Germany [1987] ECR 1227.

(4) - A legislative wrong (legislatives Unrecht) is governed by the same rules as liability of the public authorities (Amtshaftung). It is precisely because of this that the amenability to compensation of damage arising out of a legislative wrong - still a very controversial subject in Germany - is unquestionably allowed where individual-case laws (Einzelfallgesetze) are involved or a legislative measure such as a land development plan (Bebauungsplan).

(5) - The picture which emerges does not differ much from that which is allegedly peculiar to the Italian system - the distinction between diritti soggettivi (individual rights) and interessi legittimi (protected interests).

(6) - See BGHZ (Reports of Decisions of the Bundesgerichtshof in Civil Matters), 90, p. 17, in particular at p. 29 et seq.

(7) - In order to give the full picture, it is recalled that following the claimants' appeal to the House of Lords, that court made a reference to the Court of Justice, by judgment of 18 May 1989, for a preliminary ruling on two questions concerning the existence and scope of the jurisdiction of a national court to grant interim relief where rights conferred by Community law were at issue. In its judgment in Case C-213/89 The Queen v Secretary of State for Transport, ex parte Factortame and Others (Factortame I) [1990] ECR I-2433, the Court of Justice ruled that `Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule'. On 11 October 1990, the House of Lords affirmed the interlocutory injunction granted by the Divisional Court pending the determination of the substantive case.

(8) - Case C-221/89 Factortame II [1991] ECR I-3905.

(9) - Case 246/89 R Commission v United Kingdom [1989] ECR 3125.

(10) - Case C-246/89 Commission v United Kingdom [1991] ECR I-4585.

(11) - Although the national court refers solely to 2 November 1989, the date on which the relevant law was partially repealed, it is pointed out that that repeal related, in accordance with the Court's order in Case 246/86 R Commission v United Kingdom, only to those provisions which were discriminatory on grounds of nationality. This means, as the applicants point out in their written observations in these proceedings, that the statute in question ceased to have harmful effects as regards the other conditions held to be discriminatory (residence, domicile) which were the subject of the proceedings in Case C-221/89 Factortame II only on 11 October 1990, when the House of Lords, following the Court's judgment in Factortame I, affirmed the interlocutory injunction requested. In this connection, see footnote 7.

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(12) - See, for example, Rowling v Takaro Properties [1988] A.C. 473.

(13) - The duty of care is confined to typical sets of circumstances, the upshot being that liability does not attach to every harmful negligent act. However, there are decisions to be found in the less recent case-law in which the duty of care has been identified with the neighbourhood principle, which is essentially equivalent to neminem laedere, since liability may be incurred under that principle for harm done to anyone where it was reasonably foreseeable that the victim might be harmed (see, for example, Donoghue v Stevenson [1932] A.C. 562).

(14) - See, for example, Lonhro v Tebbit [1992] 4 All ER 280.

(15) - See, for example, Thornton v Kirklees MBC [1979] Q.B. 626.

(16) - See Garden Cottage Foods v Milk Marketing Board [1984] 1 A.C. 130 HL., in which the House of Lords essentially accepted, albeit in an obiter dictum (the proceedings were concerned with an application for interim measures), the existence of liability in damages to a person who had suffered loss as a result of conduct in breach of Articles 85 and 86 of the Treaty by a private citizen or also by a public authority, but in the event that it acted as a private citizen.

(17) - Bourgoin v Minister of Agriculture, Fisheries and Food [1986] 1 Q.B. 716 A.C.

(18) - Kirklees Metropolitan Borough Council v Wickes Building Supplies [1992] 3 W.L.R. 170, in particular at 188.

(19) - For a different case in which the State is claimed to be liable for damage caused by conduct of the administrative authorities contrary to Community law, see pending Case C-5/94 Lomas; Advocate General Léger's Opinion of 20 June 1995 in that case also considers some aspects relevant to these proceedings.

(20) - Albeit that principle does not have the same general scope in all the legal systems - suffice it to cite the British system, in which there is a limit in terms of the (restricted) scope of the duty of care, - it none the less remains that, inasmuch as it refers to the idea of wrongful damage, it may be regarded as the starting point for any discussion of liability.

(21) - Judgment of the French Tribunal des Conflits of 8 February 1873 in Blanco, D. 1873, II, 20.

(22) - For an essential understanding of the relevant rules in the various Member States, see Schockweiler-Wivenes-Godart: `Le régime de la responsabilité extra-contractuelle du fait d'actes juridiques dans la Communauté européenne', in Revue trimestrielle de droit européen, 1990, p. 27 et seq., in particular at p. 54.

(23) - See sections 43 to 47 below.

(24) - I would recall that, as long ago as Case 380/87 Enichem Base and Others v Comune di Cinisello Balsamo [1989] ECR 2491, an Italian court asked the Court whether `the administration [is] required under Community law to pay compensation where an unlawful administrative measure taken by it [unlawfully] infringes a right under Community law (diritto soggettivo comunitario) which upon its incorporation in the Italian legal system, while retaining its Community character, takes the form of a protected interest (interesse legittimo)' (Report for the hearing, loc. cit., at 2494 et seq.). Neither the Advocate General nor the Court answered that question, since it was absorbed into the answers given to other questions. I note, however, that in their observations both the United Kingdom and Italy argued that any right to compensation should be based solely on the substantive and procedural possibilities afforded by national law.

(25) - Case 6/60 Humblet v Belgium [1960] ECR 559, in particular at 569. In that case, the

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reference was to Article 86 of the ECSC Treaty, which corresponds to Article 5 of the EC Treaty.

(26) - Suggestions to that effect were also to be found in academic writings: Pescatore, `Responsabilité des Etats membres en cas de manquement aux règles communautaires', in Foro Padano, 1972, p. 10 et seq.; Kovar, `Voies de droit ouvertes aux individus devant les instances nationales en cas de violation des normes et décisions du droit communautaire', in Les recours des individus devant les instances nationales en cas de violation du droit européen, Brussels, 1978, p. 245 et seq., in particular at p. 272 et seq.; Barav, `Damages in the domestic courts for breaches of Community law by national public authorities', in Non-contractual Liability of the European Communities, Europa Instituut, University of Leiden, 1988, p. 149 et seq.

(27) - For this aspect, see sections 27 to 32 below.

(28) - Humblet v Belgium, cited in footnote 25. That case was concerned more specifically with securing the annulment of a measure by the Belgian State and the restitution of sums unduly levied; but the general wording used by the Court - `make reparation for any unlawful consequences' - can sufficiently clearly cover also cases of compensation for any loss or damage sustained.

(29) - There is a very clear dictum to this effect that `a judgment by the Court under Articles 169 and 171 of the Treaty may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties' (judgment in Case 39/72 Commission v Italy [1973] ECR 101, paragraph 11). The statement that the interest in continuing the proceedings even after the breach at issue has been remedied may consist in `establishing a basis for the liability which a Member State may incur, in particular, towards individuals as a result of the breach of its obligations' is to the same effect (judgment in Case 309/84 Commission v Italy [1986] ECR 599, paragraph 18). That dictum appears quite frequently: Case 103/84 Commission v Italy [1986] ECR 1759, paragraph 9; Case 154/85 Commission v Italy [1987] ECR 2717, paragraph 6; Case C-287/87 Commission v Greece [1990] ECR I-125 (summary publication only). The Court has further held that the interest in pursuing the action `may consist [in particular] in establishing the basis for a liability which a Member State may incur, by reason of its failure to fulfil its obligations, towards those to whom rights accrue as a result of that failure': see the judgments in Case 240/86 Commission v Greece [1988] ECR 1835, paragraph 14, Case C-361/88 Commission v Germany [1991] ECR I-2567, paragraph 31, and Case C-249/88 Commission v Belgium [1991] ECR I-1275, paragraph 41. It is clear that the conferral on individuals of a right to compensation for damage sustained owing to an infringement of the Treaty cannot be inferred from dicta of this type, but only the possibility that, within the limits laid down by national law, the individual may assert his right to compensation in relation to such an infringement.

(30) - Judgment in Case 60/75 Russo v AIMA [1976] ECR 45, paragraph 9.

(31) - Judgment in Russo v AIMA, cited in the preceding footnote, paragraph 9.

(32) - This stance was further emphasized in the judgment in Granaria, where the Court held that `the question of compensation by a national agency for damage caused to private individuals by the agencies and servants of Member States, either by reason of an infringement of Community law or by an act or omission contrary to national law, in the application of Community law does not fall within the second paragraph of Article 215 of the Treaty and must be determined by the national courts in accordance with the national law of the Member State concerned' (judgment in Case 101/78 Granaria v Hoofdproduktschap voor Akkerbouwprodukten [1979] ECR 623, paragraph 14).

(33) - I refer to the judgment in Russo v AIMA, which I have already mentioned, relating to a regulation on the common organization of the agricultural markets, and to the judgment in Case

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C-188/89 Foster [1990] ECR I-3313, paragraph 22, in which the Court held that Article 5(1) of Directive 76/207/EEC on equal treatment for men and women `may be relied upon in a claim for damages against a body' responsible for providing a public service. See also, as regards an infringement of Article 30, the judgment in Case 103/84 Commission v Italy, cited in footnote 29, paragraph 9.

(34) - See, in particular, paragraphs 33, 35 and 37 of the judgment.

(35) - Case 26/62 Van Gend & Loos [1963] ECR 1, in particular at 13.

(36) - So much so that direct effect has been from the outset, and continues to be, what is termed vertical, almost, as it were, in order to reinforce the idea that, rather than an intrinsic quality of the provision, it is a remedy for preventing the States from taking advantage of a failure to fulfil their obligations. It is also significant that the Court's assessment of directives has been progressively refined and broadened. For example, the class of public agencies against which directives can be relied on has widened (see the judgments in Case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR 1839 and Case C-188/89 Foster, cited in footnote 33); likewise stress has been placed on the need for courts and administrative authorities in the Member States to interpret national provisions in conformity with the wording and purpose of the directive (see the judgments in Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891 and Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8). It is sufficient to observe that the criterion of interpretation in conformity with the wording and purpose of a directive relates to directives as such, irrespective of their possible direct effect and regardless of the entity against which the national provisions are asserted, so much so that, in the ultimate analysis, one is not so far removed from the practical effects which would be achieved by the horizontal effect, pure and simple, of precise and unconditional directives.

(37) - Judgment in Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325, paragraph 27. After stating that interested parties can enforce an unimplemented directive by relying directly on its provisions having direct effect before a national court or, where that is not possible, by interpreting the relevant provisions of national law, as far as possible, in conformity with the directive, the Court observed that `if the result prescribed by the directive cannot be achieved by way of interpretation,... Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive'. See, to this effect, also the judgment in Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 23. In that case, even though a directive (the same as that at issue in Francovich) was involved which had already been transposed into national law, the problem arose on account of the failure to take into account in the relevant national provisions a particular category of workers, with respect to whom the directive had not been implemented.

(38) - In the sense that `the decision in Francovich is undoubtedly consistent with, and a natural and logical extension of, the Court's case-law'; and that, after recognizing direct effect and the obligation upon the Member States to give full effect to Community provisions, `it was but a small step to guarantee their full effect by holding States liable in damages for infringements of those rights for which they were responsible', see Steiner: `From direct effects to Francovich: shifting means of enforcement of Community Law', in European Law Review, 1993, p. 3 et seq., in particular at p. 9. Notoriously, there is now a substantial body of literature on the judgment in Francovich. The most recent contributions include Zenner: `Die Haftung der EG-Mitgliedstaaten für die Anwendung europarechtswidriger Rechtsnormen', Munich, 1995.

(39) - See, inter alia, the judgments in Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 14, and Case 811/79 Amministrazione delle Finanze dello Stato v Ariete [1980] ECR 2545, paragraph 5.

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(40) - Judgment in Simmenthal, cited in the preceding footnote, paragraph 16.

(41) - For instance, in Germany such a possibility is not ruled out per se, but only to the extent to which the official duty infringed is not referable to a particular third party, which, as I have already mentioned, is true in most cases involving an unlawful act or omission attributable to the legislature; for those very reasons, the possibility in question is unquestionably available in relation to individual-case laws (Einzelfallgesetze). However, the prevalent view among academic writers is that an individual should have the right to compensation at least in the event of breaches of fundamental rights (see, for instance, in this connection, Haverkate: `Amtshaftung bei legislativem Unrecht und die Grundrechtsbildung des Gesetzgebers', in NJW, 1973, p. 441). In Italy, in which the question is still the subject of debate, such a possibility has been allowed, for example, in the specific case of presidential expropriating decrees issued pursuant to the agrarian reform which have been declared unconstitutional, where the agrarian reform agency was held liable in damages even though it was not guilty of any unlawful conduct; hence the conviction that in such case the compensation is more in the nature of restitution of undue payments, relating solely to the value of the asset lost (for some more general observations in this connection, see Zagrebelsky in `Processo costituzionale' in Enciclopedia del Diritto XXXVI, 1987, p. 639).

(42) - In fact, international law contemplates only State liability viewed in the round, that is to say, as a whole: consequently, there is no difference depending on whether the infringement which gave rise to the damage is attributable to the legislature, the judiciary or the executive. Moreover, the same approach can be seen in the Court's case-law on Article 169: the infringement of a Community obligation is imputed to the State in any event, regardless of the entity which was actually responsible for fulfilling the obligation (see, for example, the judgments in Case 77/69 Commission v Belgium [1970] ECR 237, paragraph 15, Case 8/70 Commission v Italy [1970] ECR 961, paragraph 9, and Case 52/75 Commission v Italy [1976] ECR 277, paragraph 14).

(43) - Judgment No 8 of 26 July 1927 Case concerning the Factory at Chorzow, CPGI, Series A, p. 21; my emphasis. The same principle was subsequently reaffirmed by the International Court of Justice in the Advisory Opinion of 30 March 1950 on the interpretation of peace treaties with Bulgaria, Hungary and Romania, CGI, 1950, p. 228.

(44) - The reference is to the preamble to the EC Treaty.

(45) - See, in particular, the judgments in Case 26/62 Van Gend &Loos, cited in footnote 35, and in Case 6/64 Costa v ENEL [1964] ECR 585.

(46) - Judgment in Case 103/88 Fratelli Costanzo v Comune di Milano, cited in footnote 36, paragraph 31.

(47) - It is scarcely necessary to point out that, in relation to legislative activity of the administrative authorities, the term faute is used by academic writers and by French administrative case-law (where the concept was evolved) to denote maladministration and hence, even though this may seem odd, does not require fault. Indeed, the rule often referred to is that `toute décision illégale est en principe fautive'. In short, in the French system the difference between responsabilité pour faute and responsabilité sans faute does not correspond so much to that between fault-based liability and strict liability, but, albeit only fairly roughly, to the distinction between liability for unlawful acts and liability for lawful acts.

(48) - Judgment of 28 February 1992 in Arizona Tobacco Products, in AJDA, 1992, p. 210. On the other hand, the Cour Administrative d'Appel, Paris, in holding that there was an obligation to pay compensation in respect of an unlawful situation created by the legislature, regard being had to Community law, referred generally to the responsibility of the State in the judgment

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of 1 July 1992 in Société Dangeville, in AJDA, 1992, p. 768, including a critical note by Prétot.

(49) - Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629.

(50) - Case C-213/89 The Queen v Secretary of State for Transport, ex parte Factortame and Others [1990] ECR I-2433.

(51) - See the judgment in Case 158/80 Rewe v Hauptzollamt Kiel [1981] ECR 1805, paragraph 44, in which the Court held that the Treaty was not intended to create new remedies in the national courts other than those already laid down by national law or to reduce the choice of the courts as to the most effective means of protection. In actual fact, that ruling is much less absolute in scope than would appear at first sight.

(52) - Judgment in Case 13/68 Salgoil v Italy [1968] ECR 453, in particular at 462 and 463.

(53) - Judgment in Case 179/84 Bozzetti v Invernizzi [1985] ECR 2301, paragraph 17.

(54) - OJ 1989 L 395, p. 33.

(55) - OJ 1992 L 76, p. 14.

(56) - That provision introduced a significant innovation into many Member States' legal systems. For instance, in the Italian system, which, even though it was among those affording the greatest protection and, in any event, one of the few in which it was possible, following the annulment of the unlawful administrative measure, even to have the ensuing contractual situation set aside, provision for compensation for infringement of situations which had traditionally been classed as interessi legittimi (protected interests) and not as diritti soggettivi (individual rights) constitutes nothing less than a cultural revolution (see judgment No 2667 of the Corte di Cassazione of 5 March 1993, in Il Foro It., 1993, I, 3062), albeit confined solely to relationships governed by Community law.

(57) - For a somewhat different approach, see Advocate General Jacobs' Opinion of 15 June 1995 in Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen, still pending.

(58) - Suffice it to recall the particularities (but see footnote 5) of the Italian system as regards the lack of a remedy in damages for breaches of interessi legittimi (protected interests). For the `tormented chapter of the protection in tort of interessi legittimi' in Italy, see Ponzanelli: `L'Europa e la responsabilità civile', in Il Foro It., 1992, IV, col. 150. The question raised by the national court in Enichem Base, cited in footnote 24, indeed related to the breach of an interesse legittimo.

(59) - However, the three conditions in question, which the Court identified in Francovich (paragraph 40), are set out here verbatim in the form in which they were stressed and summarized by the Court in Faccini Dori v Recreb, cited in footnote 37, paragraph 27.

(60) - For this aspect, see sections 75 and 76 below.

(61) - In Francovich, I recall, this was the amount owing to the employees following the employer's insolvency; in Dillenkofer and Others it is sums paid by purchasers of package holidays for trips never made.

(62) - It shows, among other things, that failure to implement a directive constitutes a conscious breach, consequently a deliberate one and for that very reason one involving fault, Temple Lang: `New Legal Effects Resulting from the Failure of States to Fulfil Obligations under European Community Law: The Francovich Judgment', in Fordham International Law Journal, 1992-1993, p. 1 et seq.

(63) - In the sense that strict liability is involved in which fault plays no part, see, for example,

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Caranta: `Governmental Liability after Francovich', in Cambridge Law Journal, 1993, p. 272 et seq.; see also Tatham: `Les recours contre les atteintes portées aux normes communautaires par les pouvoirs publics en Angleterre', in Cahiers de droit européen, 1993, p. 597 et seq.

(64) - See, for example, the judgment in Case 50/86 Grands Moulins de Paris v Council and Commission [1987] ECR 4833, paragraph 7.

(65) - Indeed, to date the number of awards of damages made against Community institutions comes to just eight.

(66) - Judgment in Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 HNL v Council and Commission [1978] ECR 1209, paragraph 5.

(67) - See, for example, the judgment in Joined Cases 194/83 to 206/83 Asteris v Commission [1985] ECR 2815, paragraphs 21 and 22, in which the Court held that the Community had incurred no liability for the erroneous fixing by the Commission pursuant to a Council regulation of aid for tomato concentrates. See also the judgment in Case C-152/88 Sofrimport v Commission [1990] ECR I-2477, in which the Community was held liable on account of an essentially individual Commission regulation implementing another Commission regulation which in turn implemented a Council regulation, and the rigid criteria used for legislative measures involving choices of economic policy were applied.

(68) - See Advocate General Biancarelli's Opinion in Case T-120/89 Stahlwerke Peine-Salzgitter v Commission [1991] ECR II-279, at II-340, in which he stated that, as far as liability was concerned, what was important was `- essentially - the margin of appreciation available to the Commission when it adopts its decision and the more or less complex economic context in which the decision is adopted'.

(69) - This issue was recently raised and discussed before the Court of First Instance in an anti-dumping case in which the applicant argued that the question of Community liability should be assessed differently depending on whether the infringement imputed to the institution was attributable to a breach of the rules inherent in the assessment of complex economic facts or, as in that case, to a breach of procedural rules binding on the institutions. The Court, however, disagreed, confining itself to the lapidary statement that anti-dumping measures constitute legislative action involving choices of economic policy (judgment of 18 September 1995 in Case T-167/94 Nölle v Council and Commission [1995] ECR II-0000, paragraphs 44 to 52).

(70) - To this effect, see also Advocate General Darmon's Opinion in Case C-55/90 Cato v Commission [1992] ECR I-2561.

(71) - This was the issue raised, inter alia, in Bourgoin before the Court of Appeal, Civil Division, Common Market Law Reports [1986] QB 716, considered in Simon-Barav, `La responsabilité de l'administration nationale en cas de violation du droit communautaire', in RMC, 1987, p. 165, in particular at p. 170 et seq.; Oliver, `Enforcing Community Rights in the English Courts', in Modern Law Review, 1987, p. 881, in particular at p. 899 et seq.

(72) - To this effect, see, for example, Cartabia: `Omissioni del legislatore, diritti sociali e risarcimento dei danni', in Giurisprudenza Costituzionale, 1992, p. 505 et seq.

(73) - See, in this connection, the proceedings of the 1992 FIDE Congress: FIDE, `La sanction des infractions au droit communautaire', Volume II, Lisbon, 1992.

(74) - To take just a few systems, suffice it to mention illecito in Italian law, the French faute, the German Verschulden and the English concepts of breach of a duty of care or misfeasance in public office.

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(75) - Recommendation R (84) 15 of 18 September 1984.

(76) - But, as I have already said, under the case-law in question it is as if all Community legislative measures involved choices of economic policy.

(77) - See, in particular, the judgments in HNL v Council and Commission, cited in footnote 66, paragraph 4, and in Joined Cases C-104/89 and C-37/90 Mulder and Others v Council and Commission [1992] ECR I-3061, paragraph 12.

(78) - Grands Moulins de Paris v Council and Commission, cited in footnote 64, paragraph 8. See, in addition, the judgment in Case C-63/89 Assurances du Crédit [1991] ECR I-1799, paragraph 12, and, most recently, the judgement of 14 September 1995 in Case T-571/93 Lefebvre and Others v Commission [1995] ECR II-0000, paragraph 32.

(79) - It would still be necessary to specify which provisions also warrant protection in damages on the ground of their scope and in order to secure their effectiveness: is the prohibition of discrimination on grounds of residence, which is indubitably fundamental for the purposes of ensuring effective freedom to supply services, as fundamental as or less fundamental than the prohibition of discrimination on grounds of nationality?

(80) - I would observe, for example, reiterating what I have already mentioned, that, although Article 30 of the Treaty is certainly not associated with the exercise of a broad discretion on the part of the Member States, it must nevertheless be considered that the limits which it imposes on action by the Member States are not always clear and precise, as clearly emerges, moreover, from the way in which the case-law has evolved. By contrast, the discretion available to the Member States, for instance, under Article 129a of the Treaty (consumer protection), could not in any event be regarded as capable of resulting in the application of more restrictive conditions for liability if, for example, a national provision excluded citizens of other Member States from the benefit of the national provisions.

(81) - Judgment in Case 283/81 CILFIT v Ministry of Health [1982] ECR 3415, paragraphs 16 and 17.

(82) - See, for a remark to similar effect but regarding the obligation to make a reference pursuant to the third paragraph of Article 177 of the Treaty, the judgment in Joined Cases 28/62, 29/62 and 30/62 Da Costa en Schaake v Nederlands Belastingsadministratie [1963] ECR 31.

(83) - Judgment in Joined Cases 314/81 to 316/81 and 83/82 Procureur de la République v Waterkeyn [1982] ECR 4337, paragraph 16.

(84) - See, for a statement of that concept, the judgment in Joined Cases 116/77 and 124/77 Amylum v Council and Commission [1979] ECR 3497, paragraph 19, in which the Court held that, in that case, `these were not errors of such gravity that it may be said that the conduct of the defendant institutions (...) was verging on the arbitrary and was thus of such a kind as to involve the Community in non-contractual liability'. To the same effect, see, most recently, the judgment in Nölle v Council and Commission, cited in footnote 69.

(85) - For a more exact appraisal of this aspect, see the Opinion in Case C-392/93 British Telecommunications plc, also delivered today, in particular paragraphs 33, 34 and 35.

(86) - One exception is certainly the Spanish system, in which liability for legislative measures is strict (see Articles 9(3) and 106(2) of the Constitution and Article 139(1) of the Law of 26 November 1992 on the legal system for the public administration and administrative procedure).

(87) - See, for instance, Paillet: `La faute du service public en droit administratif français', 1980, p. 176.

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(88) - Cassazione Civile, Sezioni Unite, judgment No 5361 of 22 October 1984 (in Giustizia Civile, 1985, p. 1419), in which it is also stated that `It cannot be seen... how the voluntary enforcement of an administrative measure which is unlawful for contravening the law and which affected an individual right may not embody per se the elements of fault, even, possibly, slight fault, especially when referred directly to a public structure, organized and competent to act, which is bound to carry out its activities in accordance with the law'. It is also worth citing judgment No 5883 of 24 May 1991 (in Resp. Civ. Prev., 1992, p. 247 et seq.), in which the Corte di Cassazione held that proof of fault on the part of the public administration may consist `either of breach of the rules of common prudence, resulting in negligent or imprudent regulatory activity, or of the infringement of laws and regulations with which the public administration itself is bound to comply, in so far as it has to observe the principles of legality, impartiality and proper procedure laid down by Article 97 of the Constitution'.

(89) - This is also the case in Belgium, Luxembourg, Greece, Portugal and Denmark.

(90) - In the English system, the administrative authorities' liability for legislative activity seems still to be based (and solidly based) on fault as the subjective element of the conduct in question. Thus, an error on the part of the Minister in interpreting the extent of the powers conferred on him may not in itself be regarded as constituting fault (see, for example, Rowling v Takaro Properties [1988] 2 W.L.R., 418 et seq.); likewise, fault, and with it liability, is precluded where the authority in question sought legal advice on the field in which it was called on to act (see Dunlop v Woollahra Municipal Council [1981] 2 W.L.R., 693). Given in addition that damages may not be awarded in the tort of negligence for pure economic loss, it follows that only, or almost only, the unlawful adoption of measures characterized by wrongful intent, namely the tort of misfeasance in public office, constitutes an unlawful act capable of giving rise to liability.

(91) - Such a trend can be seen also in the Netherlands and Germany, where fault is equated to conduct in breach of the duties of normal care. In this context, German commentators themselves now refer to the `Objektivierung des Verschuldens' (see Ossenbühl: `Staatshaftungsrecht', 4th ed., Munich, 1991, p. 61).

(92) - After some initial wavering, even in the Court's case-law fault is of importance only as a synonym of unlawful conduct.

(93) - See in particular, the judgments in HNL v Council and Commission, cited in footnote 66, paragraph 7, Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 Dumortier Frères v Council [1979] ECR 3091, paragraph 11, and Case 59/83 Biovilac v EEC [1984] ECR 4057, paragraphs 27 to 30.

(94) - See, for example, the judgment of the Conseil d'Etat of 14 January 1938 in La Fleurette, Recueil Lebon, 1938, p. 25 et seq. The German `Sonderopfer' (special sacrifice) theory in the field of expropriation, which always relates to financial loss arising out of lawful measures adopted in the public interest, should also be subsumed under this head.

(95) - See Advocate General Capotorti's Opinion in Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 HNL v Council and Commission [1978] ECR 1226 et seq., especially at 1234 et seq.

(96) - Judgment of 23 March 1984 in Alivar, AJDA, 1984, p. 396, including a note by Genevois. This case was concerned with a claim for damages for failure to grant an export licence for potatoes introduced by a general administrative measure, which the Court of Justice subsequently held to be contrary to the prohibition of quantitative restrictions on exports set out in Article 34 of the Treaty. The Conseil d'Etat held that all that there could be in that case was responsabilité sans faute, upholding the judgment at first instance, which accepted the damages claim without

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even inquiring whether the damage was abnormal or special, but found that there was liability on account of an unlawful act (pour faute). See, in addition, the Opinion of Commissaire du Gouvernement Laroque in the judgment of the Conseil d'Etat of 28 February 1992 in Arizona Tobacco Products, cited in footnote 48, in which it is considered that infringements of Community - and international - provisions give rise to a third system of liability which, unlike responsabilité sans faute, does not require the damage to be exceptional in order for a right to compensation to arise.

(97) - See on this subject Simon, `Le Conseil d'Etat et les directives communautaires: du gallicanisme à l'orthodoxie?', in Revue trimestrielle de droit européen, 1992, p. 265 et seq.

(98) - This conclusion is also borne out by the Council of Europe's recommendation of 18 September 1984, to which I have already referred. Principle II(1) of that recommendation expressly covers reparation of damage caused by lawful acts by stating that `reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act'. For a different view, see Advocate General Léger's Opinion, cited earlier, of 20 June 1995 in Case C-5/94 Lomas, still pending before the Court.

(99) - Indeed, it would appear from the judgment in Mulder and Others, cited in footnote 77, that the Court has already revised, albeit impliedly, its case-law on this point.

(100) - Judgment in Mulder and Others, cited in footnote 77, paragraph 33.

(101) - For an application of that principle in the case-law on Article 215, see, inter alia, the judgment in Joined Cases 5/66, 7/66 and 13/66 to 24/66 Kampffmeyer v Commission [1967] ECR 245, in particular at 265 et seq.; see also the judgment in Case 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, paragraph 14.

(102) - This is, for example, the solution adopted in the French system.

(103) - This is the solution in force, for example, in the Italian and British systems.

(104) - This intermediary solution is employed in the German system under the third subparagraph of Paragraph 839 of the Civil Code.

(105) - I refer to the judgment in Case 25/62 Plaumann v Commission [1963] ECR 95.

(106) - Judgment in Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 Ludwigshafener Walzmühle Erling and Others v Council and Commission [1981] ECR 3211, paragraph 4. In the same judgment, the Court held that that action (for damages) is `different from an action for annulment in that it does not seek the cancellation of a specified measure but compensation for damage caused by the institutions in the exercise of their functions; the conditions for actions for damages are laid down with that objective in mind and accordingly are different from those for an action for annulment'.

(107) - See the judgment in Case 175/84 Krohn v Commission [1986] ECR 753, in which the Court held that an application is inadmissible `where an application for compensation is brought for the payment of an amount precisely equal to the duty which the applicant was required to pay under an individual decision, so that the application seeks in fact the withdrawal of that individual decision' (paragraph 33).

(108) - See, for instance, the judgments in Case 346/87 Bossi v Commission [1989] ECR 303 and in Case T-27/90 Latham v Commission [1991] ECR II-35.

(109) - Judgment cited in footnote 37, paragraph 23.

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(110) - Thus, for example, in Italy an ad hoc measure was adopted by Legislative Decree No 80 of 27 January 1992 (GURI, 13 February 1992, p. 246) in order to give effect to the Francovich judgment; that measure lays down the rules and the limits as regards reparation for failure to implement the directive on insolvency of employers. The rules provide in particular that the action for damages should be brought against the INPS (Istituto Nazionale di Previdenza Sociale), that the magistrate acting as an employment court is to have jurisdiction and that the limitation period for bringing the action is one year.

(111) - See in particular the judgment in Case 33/76 Rewe v Landwirtschaftskammer Saarland [1976] ECR 1989 and, most recently, that in Case C-410/92 Johnson [1994] ECR I-5483, paragraph 21.

(112) - On this point, see, for example, to cite just one of the authorities, Barav, `Sanction de la non-transposition de la directive CEE relative à l'insolvabilité de l'employeur', in La Semaine Juridique, 1992, Nos 2-3, p. 12; see also Kovar, `Voies de droits ouvertes aux individus devant les instances nationales en cas de violation de normes et décisions du droit communautaire', in Les recours des individus devant les instances nationales en cas de violation du droit européen, Brussels, 1978, p. 245 et seq.

(113) - This emerges, for example, from the judgment in Case 199/82 Amministrazione delle Finanze v San Giorgio [1983] ECR 3595, paragraph 14, where the Court held that `any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law'. In addition, the adequacy of judicial protection has been linked with providing a statement of reasons on which administrative measures are based, in the sense that the individual must be enabled to decide whether or not to initiate judicial proceedings to protect his rights; hence the need that the choice should be made in full knowledge of the facts (judgment in Case 222/86 UNECTEF v Heylens [1987] ECR 4097, paragraph 15). There is also the judgment in Dekker, in which the Court stated that, where the sanction chosen by the Member State for infringement of the principle of equal treatment laid down by a directive is contained within the rules governing an employer's civil liability, any breach of the prohibition of discrimination determines the employer's overall liability, `without there being any possibility of invoking the grounds of exemption provided by national law' (Case C-177/88 Dekker [1990] ECR I-3941, paragraph 25). Then again, there is the judgment in Emmott, in which the Court held that time-limits for bringing proceedings laid down by the national system do not start to run until such time as the directive conferring the rights in question has been properly transposed (Case C-208/90 Emmott v Minister for Social Welfare and Attorney General [1991] ECR I-4269, paragraph 24). However, Emmott has been attenuated, from the point of view of relevance to these proceedings, by the judgment in Johnson, cited in footnote 111.

(114) - See the judgment in Mulder and Others, cited in footnote 77, in which the Court expressly held that `the amount of compensation payable by the Community should correspond to the damage which it caused' (paragraph 34).

(115) - In this connection, it is worth calling to mind judgment No 17 of the Permanent Court of International Justice of 13 September 1928 also in the Case concerning the Factory at Chorzow, in which it was held that `reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' (CPGI, Series A, p. 47).

(116) - Judgment in Von Colson and Kamann, cited in footnote 36, paragraph 23.

(117) - Judgment in Case C-271/91 Marshall v Southampton and South West Hampshire Area Health

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Authority (Marshall II) [1993] ECR I-4367, paragraph 34.

(118) - Judgment of 20 February 1979 in Case 120/78 Rewe-Zentral v Bundesmonopol für Branntwein [1979] ECR 649.

(119) - Case 193/80 Commission v Italy [1981] ECR 3019, paragraphs 24 to 28.

(120) - For example, in the judgment of 6 May 1986 in Case 304/84 Ministère Public v Muller [1986] ECR 1511, the Court held that it was for the Member States to `consider, in the context of factual assessments which they must undertake in that regard, whether the marketing of foodstuffs containing additives may present a risk to public health and whether there is a real need for the additives in the particular foodstuffs. In applying those criteria they must take account of the results of international scientific research and in particular of the work of the Community's Scientific Committee for Food viewed in the light of the eating habits prevailing in the importing Member State' (paragraph 24, my emphasis). In that judgment, which was delivered a good five years after the harmful event complained of by the appellant in the main proceedings, the Court therefore held that Articles 30 and 36 did not preclude national legislation prohibiting the marketing of foodstuffs imported from other Member States, in which they were lawfully sold, which contained particular additives.

(121) - Judgment in Case C-3/87 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate [1989] ECR I-4459, paragraphs 22 to 26. Whilst, admittedly, that judgment was delivered after the Merchant Shipping Act entered into force, equally it antedated the judgment in Factortame II, following which the House of Lords upheld the interim measures requested by the applicants. Moreover, in that case what was involved was a condition imposed so that fishing vessels could count their catches against the national fishing quotas, whereas in the instant case that which is at issue is a measure simply preventing the registration of fishing boats and hence the actual exercise of freedom of establishment.

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61979J0811-N5 : N 33
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61980J0193-N24 : N 116
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61981J0314 : N 81
61984J0178 : N 115 - 117
61984J0179-N17 : N 45
61986J0050-N8 : N 74
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Opinion of Mr Advocate General Gulmann delivered on 24 February 1994.
Ballast Nedam Groep NV v Belgian State.
Reference for a preliminary ruling: Raad van State - Belgium.
Freedom to provide services - Public works contracts - Registration of contractors - Relevant entity.
Case C-389/92.

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Mr President,

Members of the Court,

1. The Raad van State, Belgium, has requested the Court to interpret the Community' s directives concerning public works contracts for the purpose of deciding whether it is compatible with those directives to take into account, when examining an application for inclusion on the Belgian list of registered contractors submitted by the dominant legal person in a Netherlands group, only the qualifications of that company itself and not the qualifications of the other companies in the group.

Background to the question referred to the Court

2. The Netherlands company, Ballast Nedam Groep NV (hereinafter referred to as "BNG") was, until 1987, registered as a contractor under the Belgian legal provisions on the registration of contractors. The relevant provisions are laid down in a Decree-Law of 3 February 1947 (1) and in two implementing pieces of legislation, a Royal Decree of 9 August 1982 and a Ministerial Notice of 13 August 1982.

3. In 1989 the Ministry of Public Works decided not to renew BNG' s registration. The decision was taken on the basis of an adverse opinion of the Committee for the Registration of Contractors which was worded as follows:

> "The Committee finds that... the legal entity known as 'Ballast Nedam Groep N.V.' cannot be regarded as a works contractor for the purposes of the rules on registration. Your undertaking appears to be a holding company, whose major assets consist of shareholdings in subsidiaries (operating companies). It is apparent from the references submitted regarding works carried out that the latter were in fact executed by various subsidiaries. Furthermore, it is not apparent from the file that the legal person applying for registration employs workers itself."

4. Referring to that opinion, the Ministry decided that BNG "as an individual legal person, does not satisfy the legal criteria, as laid down in Article 2 of the Decree-Law of 3 February 1947 and Article 2 of the Ministerial Order of 13 August 1982, for the purposes of registration." The Ministry continued: "Nevertheless, it should be pointed out, to all intents and purposes, that since it is apparent from the examination of the file that works in respect of which references were provided were executed by legally independent subsidiaries, those subsidiaries are in a position to submit an application for registration, if they so wish."

5. BNG took the case to the Raad van State, requesting that the opinion of the Committee for the Registration of Contractors and the decision of the Ministry of Public Works be annulled. The Raad van State referred the following question to the Court.

> "Do Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (2) and Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (3), in particular Articles 1, 6, 21, 23 and 26, permit, in the event of the Belgian rules on the registration of contractors being applied to the dominant legal person within a 'group' governed by Netherlands

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law, in connection with the assessment of the criteria relating inter alia to technical competence which a contractor must satisfy, account to be taken only of that dominant legal person as a legal entity and not of the 'companies within the group' each of which, having its own legal personality, belongs to that 'group' ?"

The Community rules concerning official lists of recognized contractors

6. In a number of Member States there are official lists of recognized contractors. Those lists enable a prior assessment to be made as to whether the contractors have the qualifications regarded as necessary with regard to carrying out a specific type of work of a particular scale. Contractors who wish to take part in a tendering procedure are thus enabled to establish their qualifications simply by submitting a certificate of enrolment in a particular category,.

7. Member States' official lists of recognized undertakings are dealt with in Article 28 of Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts.

8. Article 28(1) requires Member States who have official lists of recognized contractors to adapt them to the provisions of Articles 23 to 26 of the Directive.

9. Article 23 lists various situations involving insolvency and forms of misconduct which can justify a contractor being excluded from participation in a tendering procedure. Article 24 concerns enrolment in a Member State' s trade register. Article 25 lays down the way in which a contractor can furnish proof of its financial and economic standing.

Article 26 lays down the means by which a contractor can furnish proof of its technical knowledge or ability. It appears that submission is required of inter alia evidence of qualifications of the managerial staff (Article 26(a)), a list of the works carried out over the past five years and certificates of satisfactory execution thereof (Article 26(b)), a statement of the tools, plant and technical equipment available to the contractor for carrying out the work (Article 26(c)), a statement of the firm' s average annual manpower and the number of managerial staff for the last three years (Article 26(d)) and a statement of the technicians or technical divisions which the contractor can call upon for carrying out the work, whether or not they belong to the firm (Article 26(e)). (4)

10. It is apparent from the foregoing that the prescribed harmonization of the official lists is of limited scope since it only concerns references attesting to the contractors' economic and financial standing and their technical knowledge and ability but not the criteria for their classification.(5)

11. Article 28(3) lays down the extent to which a contractor registered in a list in one Member State is entitled , in relation to the authority awarding contracts in another Member State, to use that enrolment as an alternative means of proof that it satisfies the qualitative criteria of suitability in Articles 23 to 26 of the directive.(6)

12. It cannot be inferred from Article 28 that registration in the official list in the State where the public works contract is being awarded can be required of contractors established in other Member States. (7)

13. Conversely, Article 28(4) gives contractors a right to apply for registration in the official lists in other Member States. The provision states:

"For the registration of contractors of other Member States in such a list, no further proofs and statements may be required other than those requested of nationals and, in any event, only those provided for under Articles 23 to 26." (my emphasis).

Conclusion

14. The opinion of the Committee for the Registration of Contracts quoted above must be understood

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as a refusal to register BNG on the Belgian list of registered contractors because the company, as a holding company, does not itself fulfil the prescribed technical requirements. The opinion thus refers to the fact that the company' s major assets consist of shareholdings in subsidiaries and that the references submitted concerning works carried out relate to work which was not carried out by the company but by its subsidiaries and that no manpower is employed by the company. That gives rise to two remarks by way of introduction.

15. First, BNG and Commission expressed the view that BNG was refused registration on the Belgian list of approved contractors simply because the company is a holding company in a Netherlands group. On that basis BNG claims that the Belgian authority' s interpretation of the relevant legal rules lead to BNG' s exclusion for a reason that is not mentioned among the grounds for exclusion which are enumerated exhaustively in Article 23 of Directive 71/305/EEC.(8) BNG and the Commission' s view must, however, be rejected because it appears from the opinion quoted that BNG was not refused registration because it is a holding company in a Netherlands group, but because, as a holding company, it does not itself have the necessary technical qualifications. It is, moreover, expressly mentioned in the order for reference that the respondent in the main proceedings denies that BNG was refused registration in the list simply because the company is a holding company in a Netherlands group.

16. Secondly, as mentioned, it is apparent from the opinion cited that it was BNG' s inability, as an independent legal person, to produce evidence of its technical ability that was the reason for the refusal to register it on the list. That means that it is specifically Article 26 of Directive 71/305 which is relevant for the purposes of forming an opinion in this case. In the question referred to the Court a ruling is, however, required concerning "assessment of the criteria relating 'inter alia' to technical competence" (my emphasis). Since the issue is basically the same whether the contractor' s technical ability under Article 26 or its economic and financial standing under Article 25 is concerned, no difficulty will arise if the latter provision too is taken into account when replying to the question. With regard to Article 23, from which it follows that an applicant can be excluded from registration in an official list if he is insolvent or has been guilty of various forms of misconduct, it must be the case that the dominant legal person in a group at all events will not be able to obtain registration in an official list of approved contractors on the basis of the qualifications of a subsidiary which finds itself in one of the situations enumerated in that provision. A parent company must therefore, if necessary, produce proof to show that that is not the case.

17. Since Article 28 gives contractors a right to be registered in other Member States' official lists which may only be made conditional on the submission of the proof and declarations laid down in Articles 23 to 26, the reply to the question referred to the Court will depend on whether those provisions are to be interpreted to the effect that they permit a requirement that the proof in question must concern the applicant company as an independent legal entity.

18. As the Commission and BNG, who alone have submitted observations, maintain, grounds can be adduced for interpreting Articles 23 to 26 to the effect that, in examining whether a company has the qualifications required for registration in an official list in another Member State, the authorities have a duty to take account of whether the company, through the other companies in a given legal structure, actually has available to it the necessary qualifications.

19. The Commission and, to a certain extent BNG, maintain that:

(a) it follows from the directive that groups of contractors which do not have a specific legal form and legal persons who do not themselves intend or are not able themselves to carry out the work are entitled to take part in tendering procedures;

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(b) such tenderers must therefore also be able to take part in other award or registration procedures which take place before a contract is awarded; and

(c) a fortiori that result must apply to companies which form part of a particular legal structure in accordance with the company law of a Member State and where, accordingly, it is possible beforehand to identify the companies who are to carry out the work as a whole or in part.

20. That groups of contractors are entitled to submit tenders is clear from Article 21 of the directive, which provides: "Tenders may be submitted by groups of contractors. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract."

21. That legal persons who are not themselves able to carry out the work and who are therefore not necessarily contractors in the strict sense of the term but guarantee the undertakings which are to carry out the work can take part in the tendering procedure can be supported on various grounds.

22. First, it follows from the express wording of Article 26(e) that it cannot be required that technicians or technical divisions belong to the undertaking itself, since it is sufficient to produce a statement that "the contractor can call upon [them] for carrying out the work".

23. Secondly, the Commission maintains that the directive allows for the possibility of work being carried out by agents or branches. That view would appear to be supported by Article 1 of the directive, which defines a public works contract and in this connection refers to Directive 71/304. It is true that Article 1 of Directive 71/304 obliges the Member States to abolish restrictions on the performance of public works contracts in respect of natural persons and companies or firms which provide services or act through agencies or branches. Directive 71/305, however, refers solely to Article 2 of Directive 71/304 and it does so for the purpose of restricting the forms of activity which can be the object of a public works contract within the meaning of Directive 71/305. It is hard to conclude with sufficient certainty from that reference who, under the directive, is entitled to take part in tendering procedures.

24. As indicated by the Commission it would, however, appear that at all events under Directive 89/440 (9) which alters the wording of Article 1 in Directive 71/305, a construction can be deduced to the effect that the legal person to whom the contract is awarded does not necessarily have be the one who carries out the work. Public works contracts are defined here as contracts which have as their object either the execution, or both the execution and design, of works related to particular forms of activity "or the execution by whatever means of a work corresponding to the requirements specified by the contracting authority" (my emphasis). Since it appears from the eighth recital in Directive 89/440 that the directive aims to define more precisely what is meant by public works contracts and thus hardly to broaden the concept, it must be justified to take that definition into account in examining the present case, even though the directive was adopted after the time relevant to the main proceedings.

25. However, I do not consider that the provisions in Articles 1(c) (10) and 6 (11) of the directive provide any further aid to construction in support of the foregoing arguments, as BNG asserts.

26. It must be correct, as maintained by the Commission and to a certain extent by BNG, that on the basis of the foregoing it can be concluded that the criteria which result from Articles 23 to 26 of the directive must, in the circumstances, be interpreted as meaning that they can be fulfilled by groups of undertakings and legal persons who cannot themselves carry out the work in question. In other words a company must be able to produce evidence that it has the necessary economic, financial and technical qualifications by proving that it has the qualifications available, even though they are not integrated in the company as an independent legal entity.

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27. It follows that the relevant authorities in a Member State are not entitled to refuse registration in the official list of recognized contractors solely on the ground that the applicant company cannot produce proof to the effect that, as an independent legal person it has the necessary qualifications. It must suffice, in order to obtain registration, that the applicant company can show that the relationship between the companies in a given legal structure is such that the company must be said actually to have available the required qualifications with the result that it will be in a position to ensure satisfactory execution of the works contract in question.

28. Such a result also seems to accord best with the purpose of the directive, which is to implement freedom of establishment and freedom to provide services in connection with public works contracts and thus seeks to ensure that unnecessary hindrances are not created.

29. It is hardly sufficient to reply to the question referred to the Court to the effect that a requirement can be inferred from the directive that in the assessment of an application for registration in an official list of recognized contractors a specific decision should be reached as to whether the applicant company, through the companies linked to it, actually has available the necessary qualifications. The court of reference formulated its question so that it concerns the assessment of an application submitted by the dominant company in a Netherlands group.

30. BNG has advanced a number of facts intended to establish that, as the dominant legal person in the particular structure which corresponds to the legal definition of a group in Netherlands company law, it does actually have available to it the qualifications of its subsidiaries in the group.

31. BNG has in particular explained that the company owns the entire capital of the other companies in the group and accordingly has a decisive influence on those companies, which inter alia is reflected in the fact that BNG can appoint and remove the managers of those companies and thereby determine the companies' policy. Under Article 3 of its statutes BNG also has as one of its objects to act as a contractor, an activity which also forms part of the objects of a number of companies in the group and which is the most important object for the group. BNG thus ensures the central control of the financing, managerial, building and other capital goods requirements of the group of companies. BNG has explained the way the group enters into works contracts as follows:

> "The execution of contracting work - takes place - according to the factual circumstances, including the preferences of the authorities awarding contracts - sometimes through BNG itself and sometimes through one of the companies in the group amongst whose objects is the execution of contract work. The execution of such work takes place by means of a combination of management staff and capital goods in the group which is most suited to carry out work of the type in question. In the administration of the group, expenses and income on the contract are allotted, under guidelines prepared for the purpose by Ballast Nedam Group NV' s management for the entire group, to the company in the group which is regarded as having the works within its sphere of competence, as determined by the NV' s management, on the basis of the type of works involved and their location. When the works are executed by the NV itself or by group company X, but fall within the sphere of group company Y, the management of Company Y is internally responsible for its execution by an organization of the group' s manpower and capital goods which are available to that company or put at its disposal, and the expenses and income are allotted to that company.

In the above case the work is not, therefore, carried by the company in group Y under a sub-contracting agreement, but under guidelines laid down by the NV' s management in its capacity as the group' s main management.

The legal authority of such a decision is based upon the fact that Ballast Nedam Groep NV together with its group companies constitutes a 'group' recognized by Netherlands law and regulated in detail

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by legislation."

32. It seems to me indisputable that a parent company which, like BNG, has 100% ownership of its subsidiaries and has power to take decisions that imply, with sufficient certainty, that the subsidiaries' qualifications are available for the purpose of carrying out specific works satisfies a requirement that it should actually have available the qualifications of its subsidiaries.

33. The question arises whether it is possible for the Court to give a more abstract reply to the question referred to it, in other words to lay down general criteria governing when a company can be said to have available to a sufficient degree another company' s qualifications for the purpose of registration as a contractor.

34. The natural starting point would seem to be a company' s dominant influence in another company. It must be established when the dominance of the company in question is sufficient in the present connection, that is to say when it is sufficiently certain that its decisions for the purpose of carrying out works can be implemented in relation to the other company.

In that regard it is not possible simply to apply a pre-determined and generally accepted definition. No such definition is to be found either in Community law or in the law of the Member States. It is certain that the definition of dominant influence depends on the actual legal context in which it is to be applied.

35. It could perhaps be considered whether in the present connection there is sufficient dominance when the conditions laid down in Article 24a in the second Company Directive are satisfied (12), that is to say when a "public limited-liability company directly or indirectly holds a majority of the voting rights" in another company or can exercise decisive influence, which is the case when it "has the right to appoint or dismiss a majority of the members of the administrative organ, of the management organ or of the supervisory organ, and is at the same time a shareholder or member of the other company" or when it "is a shareholder or member of the other company and has sole control of a majority of the voting rights of its shareholders or members under an agreement concluded with other shareholders or members of that company."

36. The conditions in the Second Directive were drawn up for the purpose of laying down when a company must be regarded as acquiring its own shares. However, prima facie it would seem reasonable to assume that a company which has the majority of voting rights or otherwise in the ways specified in the directive has a decisive influence on a second company is also, to a sufficient degree, effectively in a position to have available that company' s qualifications.

37. I would, nevertheless, not wish to suggest that the Court apply those criteria in this case, not only because it cannot be excluded than there might be a sufficiently decisive influence by means other than those set out above, but also because there might be grounds for not regarding a company as actually having another company' s qualifications available to it even though it is dominant in the way stated. It cannot, for example, be excluded that in relation to the legislation of a Member State other shareholders or creditors of the subsidiary company might have to be taken into account with the result that the dominant company does not actually have available to it the resources necessary in the present connection, nor can it be excluded that there are rules applicable in national law which could prevent the dominant company from putting its decisions into effect with sufficient certainty and speed for the purpose of ensuring the availability of its subsidiary company' s qualifications. Not least because the Belgian Government has not submitted observations in the case, it is not possible to evaluate the extent to which the Belgian rules might be based on such factors.

38. I would accordingly suggest that the Court confine itself to ruling that in any event a legal person whose dominant influence is founded on the factors set out in paragraph 32 should be able

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to obtain registration in an official list of recognized contractors on the basis of the qualifications of its subsidiary companies.

39. With regard to the court of reference' s question whether it is incompatible with Directive 71/304 to refuse registration in an official list on the ground that the applicant does not, as an independent legal person, have the necessary qualifications, it is my view that that directive, the purpose of which was to liberalize freedom to provide services in respect of public works contracts, has lost its independent meaning in view of the direct applicability of Article 59 of the EEC Treaty. It would, therefore, if need be, be more correct to examine the issue on the basis of Article 59, which does not simply prohibit direct and indirect discrimination as is the case in Directive 71/304, but also other restrictions on freedom to provide services. Since a reply to the question referred to the court can be derived from Directive 71/305, I see no reason in this case to examine the application of the Treaty' s general prohibition of restrictions on freedom to provide services.

Conclusion

In the light of the foregoing considerations, I suggest that the Court should reply as follows to the question referred to it:

When an application for inclusion on a Member State' s list of registered contractors submitted by the dominant legal person in a group formed in accordance with the legislation of another Member State is being assessed, Articles 23 to 26 and 28 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts preclude the taking into account only of the qualifications of the dominant legal person alone, where that legal person is in a position to establish that it actually has available to it the qualifications of the other companies in the group and that requirement should in any event be regarded as satisfied where the dominant company has 100% ownership of its subsidiaries and can take decisions that imply with sufficient certainty that the subsidiaries' qualifications are available for the purpose of carrying out specific works.

(*) Original language: Danish.

(1) - Article 1.A of the Decree-law lays down the general conditions which a contractor which is to carry out public works must fulfil. In Article 1.B it is specified that special prior registration is required for works exceeding a particular value laid down by Royal Decree. Article 2, setting up a committee which is to give opinions on applications for registration, states in the third paragraph that the committee is to take into account the applicant' s technical and economic standing, its performance ability in the form of plant and qualified manpower, the scale and importance of the work it has carried out previously, the quality of the work carried out and its business probity.

(2) - Official Journal, English Special Edition 1971(II), p. 678.

(3) - Official Journal, English Special Edition 1971(II), p. 682. The Directive was amended after the date in question in the main proceedings by Council Directive 89/440/EEC of 18 July 1989 (Official Journal 1989 L 210, p. 1) and now appears in a codified version in Council Directive 93/37/EEC of 14 June 1993, Official Journal 1993 L 199, p. 54.

(4) - The Court of Justice has stated that the directive' s enumeration of the proof that may be required to be submitted to show that the tenderer fulfils the conditions of probity and so forth and technical ability is exhaustive, but on the other hand there is nothing the prevent the authority awarding contracts from requesting references other than those mentioned in the directive for the purpose of assessing financial and economic standing: see the judgment in Case 76/81 Transporoute [1982] ECR 417, paragraphs 9 and 10, and the judgment in Joined Cases 27/86

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to 29/86 Bellini [1987] ECR 3347, paragraph 10.

(5) - See the judgment in Joined Cases 27 to 29/86 Bellini [1987] ECR 3347, paragraphs 21-22.

(6) - See the judgment in Joined Cases 27 to 29/86 Bellini [1987] ECR 3347, at paragraphs 23-27, where the Court inter alia stated that registration in an official list can replace the references referred to in Articles 25 and 26 in so far as such registration is based upon equivalent information. Consequently, the authorities awarding contracts are required to accept that a contractor' s economic and financial standing and technical knowledge and ability are sufficient for works corresponding to his classification only in so far as that classification is based on equivalent criteria in regard to the capacities required.

(7) - See the judgments in Case 76/81 Transporoute [1982] ECR 417, paragraphs 12 and 13, and Case C-71/92 Commission v Spain [1993] ECR , paragraphs 45 and 56.

(8) - See footnote 4.

(9) - See footnote 3.

(10) - Article 1(c) defines a tenderer as a contractor who has submitted a tender and a candidate as one who has sought an invitation to take part in a restricted procedure. The provision does not, as BNG maintains, define the term contractor.

(11) - Article 6 enables a special procedure to be adopted in the case of the award of contracts relating to the design and construction of a public housing schemes whose size and complexity, and the estimated duration of the work involved, require that planning be based from the outset on close collaboration within a team comprising representatives of the authorities awarding contracts, experts and the contractor to be responsible for carrying out the works. It is not clear to me how BNG find that provision to be relevant to this particular case.

(12) - See the Council' s Second Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1), as amended by Council Directive 92/101/EEC of 23 November 1992 (OJ 1992 L 347, p. 64).

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Opinion of Mr Advocate General Lenz delivered on 9 December 1993.
Gestion Hotelera Internacional SA v Comunidad Autonoma de Canarias, Ayuntamiento de Las Palmas de Gran Canaria and Gran Casino de Las Palmas SA.
Reference for a preliminary ruling: Tribunal Superior de Justicia de Canarias - Spain.
Directive 71/305/CEE - Definition of "public works contracts".
Case C-331/92.

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Mr President,

Members of the Court,

A Introduction

1. This request for a preliminary ruling relates in substance to the classification of a mixed contract for the purpose of determining whether Directive 71/305/EEC (1) concerning the coordination of procedures for the award of public works contracts is applicable.

2. The main action concerns the invitation to tender for and the award of a project originating in a cooperation agreement (of 14 July 1989) between the Government of the Canary Islands and the municipality of Las Palmas de Gran Canaria (hereinafter referred to as "Las Palmas"). It was intended to open and operate a casino and to continue a hotel business in the premises of the Hotel Santa Catalina, which is owned by the municipality of Las Palmas and is regarded as its emblem. The invitation to tender was arranged by the Government of the Canary Islands, the competent authority for awarding the concession for operating a casino. The agreements between the authorities are to the effect that, so far as the operation of the hotel was concerned, the Government of the Canary Islands would arrange the invitation to tender on behalf of the municipality.

3. By order of 17 July 1989 of the Presidential Counsellor to the Government of the Canary Islands, published in the Boletín Oficial de Canarias of 19 July 1989, an open invitation to tender was issued concerning, first, the award of the final concession for the installation and opening of a casino in Las Palmas, the conditions of tender being set out in Annex I, and, secondly, participation in an open invitation to tender, to be launched on behalf of the municipality of Las Palmas, concerning the use of the building owned by the municipality and the operation of the Hotel Santa Catalina, the conditions of tender being set out in Annex II.

4. The conditions of tender in Annexes I and II refer to each other. Prospective tenderers must submit their tender simultaneously for both parts of the invitation to tender (inter alia, Article 2(i) of Annex I, and Article 2, paragraphs 1 and 3, of Annex II). Article 2 of Annex I, containing the conditions which must be fulfilled by tendering undertakings, states that the sole object of the undertaking must consist in operating casinos. A derogation from this condition is allowed in so far as additional services may be provided. The list of examples of such additional services expressly mentions the operation of the Hotel Santa Catalina, which is ensured by means of an obligation on the part of the prospective successful tenderer.

5. The conditions of tender in Annex II to the invitation to tender for the award of the operation of the Hotel Santa Catalina, which is intended to house the casino as well as the hotel business, lay down minimum requirements for the award of the contract with regard to the installation and operation of the casino, the use of the buildings and the hotel business (Article 1, Annex II). Article 2, paragraph 2, of Annex II stipulates that the successful tenderer must invest at least 1 000 million pesetas in fitting out the hotel and in its surroundings, excluding the installation of the casino, for the purpose of renovation and conversion so that the hotel can retain its five-star status. Furthermore, Article 2, paragraph 2, of Annex II contains an obligation to pay 1 000

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million pesetas as consideration for the use of the entire architectural complex for a term corresponding to the initial 10-year term of the contract. The consideration is then divided into two equal parts for the use of the premises for the hotel on the one hand and the casino on the other, with different conditions of payment for the two establishments.

6. By order of 10 January 1990 the Government of the Canary Islands awarded the contract for the entire project to the commercial company Gran Casino Las Palmas, SA.

7. The lessee of the hotel at the time, and plaintiff in the main action, Gestion Hotelera Internacional, SA, brought proceedings under administrative law against the invitation to tender and against the award of the contract. It contended, inter alia, that the contract which is the subject of the invitation to tender is a public works contract within the meaning of Directive 71/305/EEC and therefore the invitation to tender ought to have been published in the Official Journal of the European Communities. This was not done.

8. To clarify this point of law, the national court has referred the following questions to the Court of Justice:

1. Is a mixed contract for the performance of works and the assignment of property to be regarded as included in the concept of "public works contracts" set out in Article 1(a) of Council Directive 71/305/EEC of 26 July 1971?

2. Are, therefore, "authorities awarding contracts" which wish to award a contract having those characteristics obliged to publish a notice of that contract in the Official Journal of the European Communities?

9. The first defendant, the Government of the Canary Islands, and the second defendant, the municipality of Las Palmas, both take the view that there is no reason for requesting a preliminary ruling from the Court of Justice. They contend that Directive 71/305/EEC has been transposed into national law, so that it is only necessary to interpret the law of a Member State.

10. On the substantive question of classifying the contract concerned, all the parties to the proceedings before the Court, the Spanish Government, the first and second defendants and the Commission, take the view, on different grounds, that the contract is not a public works contract within the meaning of the directive.

11. As none of the parties has made an application for an oral procedure, the Court will give its ruling on the basis of the written procedure.

B Analysis

12. I. First it is necessary to consider the objections concerning admissibility which the two defendants in the main action have raised against the request for a preliminary ruling. Both the first defendant, the Government of the Canary Islands, and the second defendant, the municipality of Las Palmas, claim that as Directive 71/305/EEC has already been transposed into national law, all that remains is a matter of interpretation of the law of a Member State. Since the directive has been transposed, its provisions are not directly applicable. According to the defendants, direct applicability comes into question only if a directive has either not been transposed at all or has been transposed incorrectly. This is not so in the present case. The second defendant, referring to the judgment in CILFIT, (2) contends that there is no reasonable doubt as to the interpretation of Community law. The defendants also take the view that the answer to the question is irrelevant to the decision in the case because the plaintiff has no right to bring proceedings.

13. To take the last argument first, it should be observed that the question of the plaintiff' s right to bring proceedings is a question of the procedural law of a Member State which the Court is not competent to answer. According to the Court' s settled case-law, problems of domestic law

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fall within the exclusive jurisdiction of the courts of the Member States. (3) The Court can only provide an interpretation of Community law. (4) The Court may not, under the preliminary rulings procedure, give a ruling on the application of provisions of national law or on the relevance of the request for a preliminary ruling. (5) It is solely for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court. (6)

14. Where the national court' s request concerns the interpretation of a provision of Community law, the Court is in principle bound to reply to it. (7) It can be otherwise only if the questions are purely hypothetical (8) or if a purely fictitious dispute is taken as an occasion for requesting a preliminary ruling from the Court. (9) There is clearly no such exceptional situation in the present case. On the contrary, the national court has made a detailed examination of the facts and the legal problems of the case, (10) so that there can be no grounds for doubting the admissibility of the reference for a preliminary ruling.

15. The fact that a directive has been transposed into national law does not preclude a reference for a preliminary ruling concerning its interpretation. After a directive has been transposed into national law, individuals are primarily affected by that law. (11) However, the Court has consistently held that "the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement the directive... , national courts are required to interpret their national law in the light of the wording and the purpose of the directive...". (12) It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law. (13)

16. Consequently, if a national court "is required to interpret its national law in the light of the wording and the purpose of that directive", (14) it is of course also permissible to request a preliminary ruling from the Court of Justice where there is any doubt as to the interpretation of the directive.

II.(a) First question

17. The first question put by the national court asks in effect whether the invitation to tender and the award of the contract in question fall within the directive concerning the award of public works contracts.

18. With regard to the interpretation needed for classifying the contract in question, it is necessary in the first place to proceed on the basis that Directive 71/305/EEC in its original version, i.e. before it was amended by Directive 89/440/EEC, is the relevant text. (15) Directive 89/440/EEC was notified to the Member States on 10 July 1989, (16) the same day as that on which the notice of the invitation to tender for the project at issue was published in the regional Official Journal. Article 3 of Directive 89/440/EEC gives the Member States one year in which to adopt the measures necessary to comply with the directive. Consequently at the relevant date, that of the invitation to tender, the provisions of Directive 89/440/EEC were not yet to be taken into account.

19. It is common ground that the contract at issue is of a mixed character. The findings of the national court and the submissions of all the parties to the proceedings before this Court agree on this point. The formulation of the question on which a preliminary ruling is sought is therefore ambiguous in that the contract to be appraised is placed in a legal category, and the emphasis is

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laid on the contract for works that is to be performed. Whether the obligation to carry out building works characterizes the contract is, however, precisely the subject of the question. I therefore propose to take the question in wider terms, in the light of the request for a preliminary ruling, as asking whether an open invitation to tender and the award of a concession to open and operate a casino, and a concession to operate a hotel in conjunction with a lease of the premises necessary for that purpose, in the framework of which an obligation must be entered into for carrying out conversion work, must be regarded as a public works contract within the meaning of Directive 71/305/EEC.

20. In the final analysis, the answer to the question turns solely on whether the project at issue is to be regarded as a works contract within the meaning of Directive 71/305/EEC, and not on positive classification in another category of legal transactions, in particular service contracts. (17) Considerations falling within that perspective are purely hypothetical and can only serve as criteria for demarcation.

21. Regarding the classification of the contract, the participants in the proceedings before the Court have reached the same conclusions on differing grounds.

22. The Commission considers that the contract is mixed in nature and consists, firstly, of a service concession involving permission to use buildings and installations owned by the municipality for opening and operating a casino, and also for a hotel and restaurant business, for a consideration of 1 000 million pesetas. Secondly, there is an assignment of works to be carried out by the tenderer, at his expense, to the value of 1 000 million pesetas. According to the Commission, the services in question are services within the meaning of Directive 92/50/EEC, (18) in accordance with Annex I B, Nos 17 and 26. Directives 92/50/EEC and 71/305/EEC are mutually exclusive. There can only be a works contract if it forms an essential part of a contract, but not if it is incidental to the service contract. The Commission refers to the 16th recital of Directive 92/50/EEC, which reads as follows:

> "Whereas public service contracts, particularly in the field of property management, may from time to time include some works; whereas it results from Directive 71/305/EEC that, for a contract to be a public works contract, its object must be the achievement of a work; whereas, in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract."

23. Consequently it is necessary to ascertain whether the works contract is the main object of the contract or whether it is only incidental and is therefore severable from the other part of the contract. The Commission takes the view that the works contract cannot be severed from the remainder of the contract. This follows, according to the Commission, from the object of the contract. The works are a necessary prerequisite for the opening of the casino, but they are secondary in comparison with the service. From the economic viewpoint the works are also secondary. Alternatively, if the objects are found to be severable, the Commission submits that the works are the consideration for the concession, so that Article 3 of the original version of Directive 71/305/EEC is applicable, which means that the directive does not apply to this concession contract. Finally, the Commission expresses reservations with regard to its classification of the contract as a public service contract within the meaning of Directive 92/50/EEC. It is indeed a service concession which would, according to the proposal for Directive 92/50/EEC, have fallen within its ambit, but the Council did not accept this wording when adopting the directive.

24. The Municipality of Las Palmas states that the licence to operate a casino was issued on 10 January 1990. It proves this by citing at length the text of the order. It contends that the contract is not a works contract but a concession for the operation of a casino and a hotel. The tenderer was given the responsibility for the works and the municipality merely retained rights of supervision and inspection.

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25. The Regional Government first entertains doubts as to the initial classification of the contract by the national court when formulating the question referred to this Court for a preliminary ruling. The true nature of the contract consists in the use and management of a building owned by the municipality and in the award of the operation of the hotel business. The fact that the invitation to tender requires a secondary, incidental, service does not alter its object. The building works are inseparable from the licence for the opening and operation of the casino, not only because of the voluntary agreement of the authorities concerned, but also because of the special circumstances. The grant of the concession is characterized by the special feature that the premises do not belong to the tenderer but to the municipality. The agreement that the work is to be carried out at the expense of the lessee does not alter the fact that the contract is in the nature of a lease. According to the specifications in Annex II, the works could be influenced by the licensing authority for gaming. The works entail adapting the premises for the proposed use. Furthermore, the building works are not extensive. The lessee can certainly provide for additional structural alterations.

26. With regard to the classification of public-law contracts, the Regional Government observes that, in the case of mixed contracts, sometimes the absorption theory is propounded, which means that the preponderant part of the contract determines the legal classification of the entire contract, and sometimes the combination theory, which means that each part of the contract is governed by the special rules for the type of contract in question. Practice has decided in favour of the absorption theory, which must be applied in this instance also. In any case it is for the Spanish court to classify the contract.

27. In its written observations the Spanish Government reproduces the relevant parts of the conditions of tender to illustrate the mutual dependence of the various objects of the contract and their ranking with respect to each other. It takes the view that the part of the contract relating to the building works has a supplementary, instrumental character. The works are an indispensable condition for attaining the main object of the contract. The fact that they are secondary to the other parts of the contract is shown by the provision that the execution of the works can be assigned to a third party. The definition of the objects of the tenderer undertaking precludes that undertaking from the outset from carrying out the building works. The main object of the contract, the opening and operation of a casino, cannot be assigned.

28. The Spanish Government adds that the contract constitutes a lease, the obligation to carry out a minimum volume of building works representing part of the consideration for the use of the premises and the licence for the businesses established there. The tenderer is responsible for carrying out the works and must also pay for them. However, he is certainly not an awarding authority. The public authorities did not offer the tenderer a price for the works. The extent of the works was not specified either. Prior specification was not possible because of the object of the invitation to tender. In this connection the Spanish Government refers to the derogation laid down in Article 9(h) of the directive, which states that the directive need not be applied to cases where the nature of the works does not permit prior overall pricing.

29. The project in question, for the classification of which the Court of Justice must provide the national court with the necessary guidance on interpretation, is characterized by the fact that the administrations of various regional and local authorities had to cooperate in implementing the proposed plan. Neither the Regional Government nor the municipality could have carried out the project on their own account. The Regional Government alone has power to grant a concession to operate the casino business. As the idea of the responsible authorities was to establish the casino in the Hotel Santa Catalina which has symbolic status, the cooperation of the municipality was indisputable. Up to then, the municipality, as owner of the building, was also actively involved as the lessor of the hotel.

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30. The award of a single contract for the operation of the casino and the hotel businesses is an obvious course of action as they were to be housed in the same group of buildings. Therefore it was open to the municipality not to award a contract independently for the hotel and the conversion works necessary for that purpose, but to do so in collaboration with the Regional Government. It appears from the observations submitted to the Court that the structural alterations are necessary both for installing the casino and for renovating and converting the hotel premises. The execution of the works, which in the final analysis are also for the owner' s benefit, in a single operation is therefore something that obviously suggests itself.

31. However, it was not the primary concern either of the municipality or the Regional Government to carry out the building alterations. The specifications annexed to the invitation to tender indicate that, on the contrary, the intention was to find an operator for the casino and the hotel. It is questionable whether the obligation to carry out building alterations is nevertheless a public works contract within the meaning of Directive 71/305/EEC.

32. The starting point is the definition given in Article 1(a) of the directive. According to that provision, "' public works contracts' are contracts for pecuniary consideration concluded in writing between a contractor (a natural or legal person) and an authority awarding contracts as defined under (b), which have as their object one of the activities referred to in Article 2 of the Council Directive of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts...". Article 2 of Directive 71/304/EEC, (19) to which reference is made, is worded as follows:

> "1. The provisions of this Directive shall apply to activities of self-employed persons which are covered by Major Group 40 in Annex I to the General Programme for the abolition of restrictions on freedom of establishment. Such activities correspond to those which fall within Major Group 40 of the 'Nomenclature of Industries in the European Communities' (NICE); they are given in the Annex to this Directive.
>
> 2. The Directive shall not apply to...".

33. The Annex to the directive lists a number of activities which are classified under the heading "construction".

34. In the final analysis it is impossible to ascertain whether the conversion works to be carried out fall within those fields of activity because the specifications manifestly give no details of the nature and extent of the works. In my opinion, the decisive factor in this connection is not an appraisal of the individual activities, but the fact that the authorities inviting tenders did not specify precisely the volume of the works to be carried out. An obligation was merely imposed on the tenderer to have conversion works carried out up to a certain financial minimum. The architectural planning and development of the project were to take place at a later date in partial coordination with the authority.

35. In so far as the tenderer, and future tenant and concessionaire for the commercial activities, was to act as the promoter, the contract would not have been placed by an "authority awarding a contract", which is the characteristic of a public works contract. Article 1(b) of Directive 71/305/EEC defines "authorities awarding contracts" as "the State, regional or local authorities and the legal persons governed by public law specified in Annex 1".

36. No other criteria for demarcation can be derived directly from Directive 71/305/EEC or Directive 71/304/EEC. On the other hand, the 16th recital in the preamble to Directive 92/50/EEC contains a clear statement to the effect that a contract is a public works contract only if the building works are the main object of the contract.

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37. As already stated, the aim of the project for which, by the joint action of the two authorities, tenders were invited was to find a suitable operator for the casino and the hotel. The fact that this primary obligation is non-assignable also shows that it is the main object of the contract. In contrast, when drafting the conditions of tender, the authorities proceeded on the assumption that the conversion works were to be carried out by another undertaking on behalf and at the expense of the potential tenderer.

38. The conclusion is the same if the matter is approached from the economic point of view. It is true that the cash consideration for an initial 10-year term is the same as the stipulated minimum volume of the future works. However, it must be borne in mind that the specifications contain rent-review clauses and an option to renew the contract for a further 10 years, so that the framework of the investment to be made is considerably extended.

39. The final question to be considered is whether the contract could have been severed, so that the building works could be regarded as an independent contract. Firstly it should be noted that the parties concerned are almost unanimous in claiming that the conversion works were a necessary prerequisite for the award of the concession. The obligation to be undertaken is, in substance and by reference to its position in the structure of the conditions of tender, to be understood as constituting partial consideration for the lease and the concession for commercial use.

40. However, in my opinion the decisive factor is that the contract could not have been severed without altering its legal structure. It was precisely not the authority' s intention to award a works contract on its own account, but to find a company which would have the building works carried out in the framework of its obligations to the authority.

41. Even if the obligation to carry out conversion works is considered in isolation, there can, in my view, be no question of a public works contract. This is due to the following decisive factors: there are no specifications for the work to be carried out. The authorities offer no prospect of payment for the work. The prospective tenderer cannot by definition (20) be a building contractor. The tenderer is under only an indirect obligation to have building works carried out to a certain minimum volume (1 000 million pesetas) and of a certain minimum quality (five-star hotel). According to the conditions of tender, in the future planning of the conversion works the authority stipulated for itself merely a right of participation, either as owner or as building supervision authority.

42. As, in my opinion, this is not a public works contract within the meaning of the directive, the following considerations are put forward only in the alternative. The Commission contends that, if the contract were found to be a public works contract, Article 3 of the original version of Directive 71/305/EEC would apply. Article 3(1) was worded as follows:

> "In the event of the authorities awarding contracts concluding a contract of the same type as that indicated in Article 1(a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment, the provisions of the Directive shall not apply to this so-called 'concession' contract...".

43. This provision was deleted as a result of amendment by Directive 89/440/EEC. Nevertheless, it applied at the material time.

44. In my opinion, the obligation to carry out building works is not a concession contract within the meaning of Article 3. Apart from the fact that, according to the definition of the contract in Article 3, the public authority awards the concession and possibly makes a payment by way of consideration for the building works, although in the present case the building works form only part of what the concessionaire undertakes to do, it seems to me that the decisive factor is that the concessionaire has no direct obligation to carry out the building works.

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II.(b) Second question

45. In so far as an open invitation to tender cannot be classified as a public works contract within the meaning of Directive 71/305/EEC, it is unnecessary to comply with the publication requirements of the directive.

C Conclusion

46. In the result, I propose that the questions referred to the Court for a preliminary ruling be answered as follows:

1. An obligation to have building works carried out by third parties, which is agreed within the framework of a public contract concerning the award of a concession for a casino and a hotel business in conjunction with a lease of the premises necessary for those purposes, does not constitute a public works contract within the meaning of Directive 71/305/EEC.

2. Consequently there is no requirement for publication of the invitation to tender in accordance with Directive 71/305/EEC.

(*) Original language: German.

(1) - Council Directive of 26 July 1971 (OJ, English Special Edition 1971(II), p. 682), as last amended by Directive 93/4/EEC (OJ 1993 L 38, p. 31).

(2) - Judgment in Case 203/81 CILFIT v Ministry of Health [1982] ECR 3415, paragraph 16.

(3) - See judgment in Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 19; judgment in Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ECR I-3763, paragraphs 39-42.

(4) - Judgment in Case 295/82 GIE Rhône Alpes Huiles v Syndicat National des Fabricants Raffineurs d' Huile de Graissage [1984] ECR 575, paragraph 12.

(5) - Judgment in Case 232/82 Baccini v ONEM [1983] ECR 583, paragraph 11.

(6) - See judgment of 27 October 1993 in Case C-127/92 Enderby v Frenchay Health Authority [1993] ECR I-5535, paragraphs 10 and 12.

(7) - Judgment in Case C-83/91 Meilicke [1992] ECR I-4871, paragraph 24.

(8) - Judgment in Case C-83/91 Meilicke, cited above, paragraph 25.

(9) - Judgment in Case C-231/89 Gmurzynska-Bscher [1990] ECR I-4003, paragraphs 22 to 24.

(10) - See judgment in Case C-83/91 Meilicke, cited above, paragraph 26, and judgment in Joined Cases C-320-322/90 Telemarsicabruzzo [1993] ECR I-393.

(11) - See judgment in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 51.

(12) - My emphasis. Judgment in Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, paragraph 26; also judgment in Case 79/83 Harz [1984] ECR 1921, paragraph 26; and, to the same effect, judgment in Case 222/84 Johnston, cited above, paragraph 53; judgment in Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 12; judgment in Case 31/87 Bentjees v Netherlands [1988] ECR 4635, paragraph 39.

(13) - See Cases 14/83 and 79/83, cited above.

(14) - See judgment in Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 13 and operative part.

(15) - Council Directive of 18 July 1989 amending Directive 71/305/EEC (OJ 1989 L 210, p. 1).

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(16) - See footnote to the first sentence of Article 3(1) of Directive 89/440/EEC.

(17) - Within the meaning of Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

(18) - See footnote 17.

(19) - Council Directive of 26 July 1971 (OJ, English Special Edition 1971(II), p. 678).

(20) - See the definition of the prospective tenderer' s objects in the tender documents.

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Opinion of Mr Advocate General Lenz delivered on 8 March 1994.
Commission of the European Communities v Kingdom of Spain.
Failure to fulfil obligations - Public supply contracts - Pharmaceutical products and specialities.
Case C-328/92.

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Mr President,

Members of the Court,

A ° Introduction

1. In these proceedings for infringement of the Treaty, the Commission is seeking a declaration from the Court that, by requiring in the legislation concerning social security that the administration award public contracts for the supply of pharmaceutical products and specialities to social security institutions by a direct procedure, and with the social security administration deciding to award nearly all supply contracts directly, the Kingdom of Spain has failed to fulfil its obligations under Directive 77/62/EEC (1) coordinating procedures for the award of public supply contracts. Thus the public supply contracts to be awarded were not published in the Official Journal as required by Article 9 of Directive 77/62.

2. The award of public contracts in Spain is governed by the Ley de Contratos del Estado (Law on State Contracts, hereinafter referred to as "the LCE") and the Reglamento General de Contratacion del Estado (2) (General Regulations concerning State contracts), an implementing regulation. According to the first final provision of the decrees aligning the LCE and the implementing regulation with Community law, (3) those provisions also apply to public contracts awarded by the administrative social security bodies.

3. Article 2, points 3 and 8 of the LCE, which were already the subject of the judgment in Case C-71/92, (4) read as follows:

> "Notwithstanding the provisions of the previous article, this Law shall not apply to the following contracts and legal acts of the administration:
>
> ...
>
> 3. transactions which the administration effects with private individuals with respect to goods or rights, dealings in which are regulated (' mediatizado') by law, or controlled products (' intervenidos') which are the subject of a monopoly (' estancados') or prohibited (' prohibidos');
>
> ...
>
> 8. contracts expressly excluded by a Law."

4. The purchase of pharmaceutical products and specialities by hospitals within the social security system is governed by Article 107 of the Ley General de la Seguridad Social (5) (General Law on Social Security, hereinafter referred to as "the LGSS"). That provision, entitled "Purchase and distribution of pharmaceutical products and specialities" provides as follows:

> "...
>
> 2. The social security authority shall purchase directly from the centres of production those pharmaceutical products which are to be used in its institutions, whether open or closed, and for that purpose shall select, according to rigorous scientific criteria, the pharmaceutical products necessary for the care provided in those institutions....
>
> 3. In all cases, the distribution of pharmaceutical products intended for use outside the institutions

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referred to in the previous paragraph shall be carried out through legally established pharmacies, which shall be obliged to carry out such distribution...".

5. There was in force until the end of 1990 an agreement concluded between the State administration and Farmaindustria, the national association of the pharmaceutical industry, under Article 107(4) of the LGSS fixing prices and laying down other financial conditions applying to the purchase and distribution of the pharmaceutical products and specialities in question. While the agreement was in force, and even afterwards, the social security institutions did not normally, with few exceptions, as in the case of vaccines, publish the supply contracts in the Official Journal of the European Communities.

6. The Commission considers the abovementioned provisions and the practice of awarding supply contracts on that basis to be contrary to Community law.

7. The Spanish Government, on the other hand, takes the view that the relevant provisions are compatible with Community law. It contends that the market in pharmaceutical products and specialities constitutes, likewise in accordance with Community law, a highly regulated market in respect of production, the fixing of prices and the observance of industrial property rights. Furthermore, neither the relevant provisions nor the agreement made on the basis thereof preclude observance of the provisions of Community law on publication.

8. The Commission claims that the Court should:

(i) declare that:

° by requiring in the legislation on social security that the administration award public contracts for the supply of pharmaceutical products and specialities to social security institutions by a direct procedure; and

° by awarding nearly all of those supply contracts directly, so that no contract notices were published in the Official Journal of the European Communities,

the Kingdom of Spain has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976;

(ii) order the Kingdom of Spain to pay the costs.

The Kingdom of Spain contends that the Court should:

(i) dismiss the action;

(ii) order the Commission to pay the costs.

9. I shall consider in detail the facts of the case and the submissions of the parties when I come to assess the legal position.

B ° Analysis

1. Definition of the dispute

10. The Commission submits that its attention was first drawn to the problem by a reference for a preliminary ruling (6) from the Audiencia Territorial de Sevilla. (7) The main proceedings were between the Farmaindustria and the Ministry for Health of the Junta de Andalucía concerning an invitation to tender issued by the Ministry in relation to the purchase of medicinal products in disregard of the said agreement.

11. In the preliminary ruling proceedings, the Commission had proposed that the answer to the questions put by the national court should be that Article 30 of the EEC Treaty (8) and Directive 77/62 must be interpreted as precluding a system for awarding public contracts for the supply of pharmaceutical

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products of the kind introduced by the agreement and the legal provisions serving as the basis for it.

12. The reference for a preliminary ruling did not proceed to judgment since the plaintiff in the main proceedings withdrew the action. (9) Nevertheless the Commission pursued the question of the legal position which it considered to be contrary to Community law.

13. On 6 July 1990 the Commission sent a letter of formal notice to the Spanish Government pursuant to Article 169 of the EEC Treaty. On 18 March 1991 it sent a reasoned opinion setting a time-limit of one month for adopting remedial measures, which was extended to 18 June 1991. Finally, on 27 July 1992, it brought the present action for infringement of the Treaty, which was received at the Court on 30 July 1992.

14. The pre-litigation procedure was largely occupied with discussions concerning the legal nature and consequences of the contested agreement. Even in the proceedings before the Court, there was further argument concerning its classification. The agreement however expired on 31 December 1990, that is before the issue of the reasoned opinion of 18 March 1991 and thus before the expiry of the time-limit set therein for adopting the remedial measures. The agreement cannot therefore be the subject of the present proceedings. (10)

15. Since the agreement represented a substantial part of the subject-matter of the dispute in the pre-litigation procedure, the question arises as to how far the subject-matter of the proceedings for infringement of the Treaty, (11) already defined in the pre-litigation procedure, agreed with that of the application. If the subject -matter of the application were even partially new, that could render the application inadmissible. (12)

16. The legal basis of the agreement in Article 107(4) and (5) of the LGSS, the agreement itself and its alleged incompatibility with Directive 77/62 and Article 30 of the EEC Treaty were essential elements of the letter of formal notice. Those aspects are also to be encountered in the reasoned opinion. It is true that the reasoned opinion also objects to Article 107(2) and (3) of the LGSS which, as interpreted by the Commission, lays down that supply contracts are to be awarded directly. On page 9 of that opinion there is a general complaint that the system of supplying pharmaceutical products to social security institutions in Spain is provided for in Article 107 of the LGSS, which is concerned with the award of contracts by the direct procedure. Whatever form of contract is adopted by the social security institution for the award of contracts, the provisions of the directive must be observed.

17. Finally in the reasoned opinion the alleged infringement of the Treaty is also worded in general terms: by requiring in the legislation on social security that the administration award public contracts for the supply of pharmaceutical specialities to social security institutions by a direct procedure, and with the social security administration deciding to award all such supplies to the National Association of Pharmaceutical Undertakings directly, and by failing to publish the contract notices in the Official Journal of the European Communities, the Kingdom of Spain has failed to fulfil its obligations under Directive 77/62 and Article 30 of the EEC Treaty. That wording is basically the same as that of the application.

18. The Commission did not make the agreement a central issue in its application and failed to mention it at all in the form of order sought. There is no reference to Article 30 of the EEC Treaty in the application, which in that respect causes no problem since the omission constitutes a restriction of the subject-matter. In its reply, (13) the Commission expressly states that Article 30 is not an issue in the proceedings.

19. In the result, the subject-matter of the dispute, limited by the reasoned opinion and substantiated by the application, must be regarded as the objection to the rules in Article 107 of the LGSS

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governing the award of contracts for the supply of pharmaceutical products and specialities to social security institutions, as well as to the direct procedure.

2. Applicability of Directive 77/62

20. It is necessary to start from the premise that since 1 January 1991, that is the period after the expiry of the agreement which gave rise to the proceedings, all public contracts for the supply of pharmaceutical products and specialities were awarded (with few exceptions (14)) to social security institutions by the direct procedure. As a rule the supply contracts were not published in the Official Journal of the European Communities. The period monitored by the Commission covers more than one and a half years, namely from 1 January 1991 to the end of July 1992 when the action was brought.

21. Public supply contracts, that is contracts for the supply of goods, (15) in writing and for consideration, concluded between a supplier and a contracting authority within the meaning of Article 1(b) of the directive, come within the scope of Directive 77/62 only if the estimated value is not less than ECU 200 000. (16) Under Directive 88/295, the time-limit for the implementation of which expired in the case of the Kingdom of Spain on 1 March, (17) a lower value of ECU 130 000 applies for certain contracting authorities. (18)

22. Even if, in the absence of concrete evidence of individual contracts, the volume of contracts for the supply of pharmaceutical products and specialities to social security institutions can only be estimated, it must be assumed that in view of the spread of social security institutions in Spain the volume of contracts is considerable. In view of the systematic failure to publish the contract notices in accordance with Article 9 of Directive 77/62, it must be assumed a contrario that supply contracts, which by reason of their value fall within the scope of the directive, were also awarded by the direct procedure.

23. Furthermore, Article 5(2) and (3) of the directive must be observed in estimating the value of the contract. In the case of regular or renewable supply contracts, a type of contract which in the nature of things is most likely to be concluded in the case of supplies to social security institutions, Article 5(2) provides that "the aggregate cost during the 12 months following first delivery or during the term of the contract where this is greater than 12 months must be taken as the basis". For supplies of the same kind Article 5(3) provides:

> "If a proposed purchase of supplies of the same type may lead to contracts being awarded at the same time in separate parts, the estimated value of the sum total of these parts must be taken as the basis ...".

24. It follows that contracts for the supply of pharmaceutical products and specialities to social security institutions in principle fall within the scope of the directive.

25. The Spanish Government contended that the pharmaceutical market was highly regulated and that price controls were acceptable, if not mandatory, in the interests of public health care. The Spanish Government refers to the Community legislation on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products. (19) Furthermore it cites Directive 89/105/EEC (20) relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion in the scope of national health insurance systems, the object of which is "to obtain an overall view of national pricing arrangements...". (21) The Spanish Government therefore considers that agreements fixing prices are unobjectionable from the point of view of Community law. In its view, the Spanish legislation is compatible with all the relevant Community legislation.

26. Those arguments obviously constitute the basis for the Spanish Government' s contention that

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Directive 77/62 does not apply.

27. Provisions regulating products, market transparency and the fixing of prices have a different object from those governing the procedure for the award of public contracts. Even if all those provisions are intended to encourage the free movement of goods in the broadest sense, that does not mean that observance of the one exonerates from compliance with the other. The aim of the rules and their addressees are different. It is precisely because those different rules ultimately serve the same purpose that they are not mutually exclusive.

28. The rules on the marketing of products cannot therefore displace the rules governing the procedure for the award of public contracts. (22) The present case, however, is concerned only with observance of the latter. The obligations imposed by Directive 77/62 regarding publication are therefore applicable to the pharmaceutical products sector as well in so far as no exceptions apply.

3. Exceptions to Directive 77/62

29. In considering possible exceptions, it is necessary as a rule to start from the premise that they are granted only within the scope allowed by the directive, (23) since otherwise the object of the directive, namely to coordinate procedures for the award of supply contracts by introducing equal conditions of competition and ensuring transparency, (24) would be jeopardized.

30. The ninth recital in the preamble to Directive 77/62 reads as follows:

> "Provision must be made for exceptional cases where measures concerning the coordination of procedures may not necessarily be applied, but such cases must be expressly limited".

31. Accordingly it is necessary to consider whether the award of contracts for the supply of pharmaceutical products by a direct procedure falls within the exceptions provided for in the directive.

32. Article 2(2) of Directive 77/62 provides that the directive is not to apply to certain awarding bodies, namely bodies which administer transport services, (25) and bodies which administer water, energy and telecommunications services. (26) Moreover, Article 2(2)(c) of Directive 77/62, as amended by Directive 88/295, provides for an exception in respect of supplies which are declared secret or when their delivery must be accompanied by special security measures. The exceptions in Article 2 of the directive are certainly not applicable in the present case. Nor is Article 3 which excludes from the scope of the directive public contracts governed by procedural rules which are different and are awarded pursuant to an international agreement (27) or to the specific procedures of an international organization. (28)

33. Article 6 of Directive 77/62 lists the circumstances in which a contracting authority may award a supply contract without observing an "open procedure" (29) or a "restricted procedure". (30) Thus, in those circumstances which are described in detail, the award of a supply contract by the direct procedure is possible with the result that publication of the invitation to tender pursuant to Article 9(1) of the directive may be dispensed with.

34. The Spanish Government considers that Article 6(1)(b) and (d) are both relevant. According to Article 6(1)(b) supply contracts may be awarded by the direct procedure "when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier".

35. The Spanish Government takes the view that exclusive rights often have to be observed in the pharmaceutical products sector, which excludes a choice between various manufacturers from the outset. A doctor' s freedom of prescription, which, moreover, is consistent with Community law, (31) entails that certain pharmaceutical products should be obtainable from the manufacturers who hold exclusive rights to them. (32)

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36. It is undisputed that exclusive rights are to be encountered on the market in medicinal products, even if they are not so common. However, the protection of exclusive rights, such as registered trade marks or marketing licences, may justify the award of a contract by the direct procedure only if the product "may be manufactured or delivered only by a particular supplier (33)". (34) The protection of exclusive rights in the market in medicinal products can in no way go so far as to exclude competition in practically all products. The Spanish Government gives that impression when it seeks to justify the systematic failure to publish public supply contract notices in the Official Journal of the European Communities by reference to the protection of exclusive rights. That is not in keeping with the actual facts, since the market in pharmaceutical products is very much a competitive market.

37. The extent to which medicinal products may, on account of the protection of exclusive rights, be obtained only from one manufacturer in relation to the total needs of the social security institutions cannot be determined here in the absence of specific data. It is clear, however, that it cannot cover all pharmaceutical products and specialities and that it is for the Member State which relies on the exception to adduce grounds.

38. In the result, Article 6(1)(b) may be relied on for at most only a part of the supply contracts for pharmaceutical products, to be specified by the Member State concerned.

39. So far as concerns freedom to prescribe, it may not in any way be called into question. However, that principle, as the Commission has rightly argued, must be viewed separately from meeting in broad terms the needs of a hospital pharmacy. If in particular cases a medicinal product is prescribed which is not in stock, there are usually reasons of extreme urgency within the meaning of Article 6(1)(d) of the directive.

40. Article 6(1)(d) of the directive allows the award of contracts by the direct procedure "in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities, the time-limit laid down in the procedures covered by Article 4(1) and (2) (35) cannot be kept".

41. All the conditions laid down in the provision must be met cumulatively in order to justify an exception. That was decided by the Court in relation to the corresponding provision in Directive 71/305/EEC (36) on the coordination of procedures for the award for public works contracts. (37)

42. In cases in which a medical prescription cannot be satisfied at once because the prescribed medicinal product is not in stock in the pharmacy concerned, the contracting authority can no doubt rely on Article 6(1)(d). In the case of such individual orders, the value of the supply contract is generally so small that it will not fall within the scope of the directive. Article 6(1)(d) cannot therefore normally be relied upon to justify the procedure for the award of public contracts for the supply of pharmaceutical products, to which the Commission has objected.

4. The legal position in Spain in relation to the award of public supply contracts for pharmaceutical products and specialities by social security institutions

43. The legal basis for breach of the duty regarding publication pursuant to Directive 77/62 is Article 107 of the LGSS in conjunction with Article 2(3) and (8) of the LCE and the corresponding implementing provisions. Article 2(3) of the LCE expressly excludes from the scope of the Law transactions in relation to goods or rights, dealings in which are regulated by law, or to products which are controlled, subject to a monopoly or prohibited. Article 2(8), on the other hand, refers to further exceptions from the general provisions which may be laid down by law. Article 107 of the LGSS extends the possibility of exemption in the case of supply contracts for social security institutions.

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44. Article 2(3) and (8) of the LCE and Article 2(3) and (8) of the corresponding implementing regulation have already been discussed in Case C-71/92. In its judgment of 17 November 1993, the Court held that by maintaining those provisions in force the Kingdom of Spain had failed to fulfil its obligations under Directive 77/62, which is at issue in this case, and under Directive 71/305. In the grounds of the judgment, the Court refers to the fact that Articles 2(2) and 3 of Directive 77/62, which list the public supply contracts exempted from the directive, did not define the exceptions with regard to the legal nature of the products in question, as the Spanish Government has done. (38)

45. The technique of providing for exceptions (39) in relation to products and by reference to legislation (40) is not compatible with the provisions of Community law in Directive 77/62. In so far as Article 2(3) and (8) of the LCE (41) are incompatible with Community law, the same must be true of Article 107 of the LGSS as a supplement to the statutory reference in Article 2(8).

46. Admittedly, the Spanish Government pleads in its defence that that provision does not preclude the application of Directive 77/62. In its observations in Case C-71/92, (42) however, it had already conceded that the basic provisions on public supply contracts exclude from their scope the market for medicinal products.

47. Finally it need not be decided whether the statutory rules of the Member State mandatorily exclude the general provisions on the publication of invitations to tender and, consequently, Directive 77/62, or whether they offer only the possibility of a divergent procedure beyond the exceptions provided for in Directive 77/62, since any exceptions, including those of an optional nature, which are not covered by the directive are incompatible with it.

48. Article 107(2) of the LGSS, which lays down that "the social security authority shall purchase directly from the centres of production those pharmaceutical products which are to be used in its institutions, whether open or closed,...", is contrary to Community law even if it imposes no obligation, but merely makes it possible, to award a contract by the direct procedure.

Costs

49. Pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for.

C ° Conclusion

50. In the light of the foregoing considerations, I propose that the Court:

(1) Declare that,

° by requiring in the legislation on social security that the administration award public contracts for the supply of pharmaceutical products and specialities to social security institutions by a direct procedure; and

° by awarding nearly all supply contracts directly, so that no contract notice was published in the Official Journal of the European Communities,

the Kingdom of Spain has failed to fulfil its obligations under Directive 77/62/EEC;

(2) Order the Kingdom of Spain to pay the costs.

(*) Original language: German.

(1) - Council Directive 77/62/EEC of 21 December 1976 (OJ 1977 L 13, p. 1), as most recently amended by Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1), which pursuant to Article 20 thereof applies to Spain only from 1 March 1992; the whole of the pre-litigation procedure prior to the present proceedings for infringement of the Treaty took place before that

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date.

(2) - As amended by the Real Decreto Legislativo No 931/86 of 2 May 1986 (BOE No 114 of 13 May 1986, p. 16920) and the Real Decreto No 2528/86 of 28 November 1986 (BOE No 297 of 12 December 1986, p. 40546) for the purpose of complying with the directives of the European Economic Community.

(3) - Real Decreto Legislativo No 931/86 and Real Decreto No 2528/86.

(4) - Judgment in Case C-71/92 Commission v Spain [1993] ECR I-0000.

(5) - As amended by Decree No 2065/74 of 30 May 1974 on the approval of the consolidated text of the general law on social security (BOE No 174 of 20 July 1974, p. 1482).

(6) - Reference for a preliminary ruling of 8 May 1989 in Case C-179/89 (OJ 1989 C 160, p. 10).

(7) - Since 23 May 1989, the Tribunal Superior de Justicia de Andalucía (BOE No 119 of 19 May 1989, p. 14896).

(8) - Since 1 November 1993, the EC Treaty pursuant to the Treaty on European Union of 7 February 1992 (OJ 1993 C 191, p. 1).

(9) - Removed from the Register of the Court (see OJ 1989 C 301, p. 7).

(10) - For the consequences of termination of the infringement of the Treaty before the expiry of the period laid down in the reasoned opinion, see my Opinion of 26 February 1992 in Case C-362/90 Commission v Italy [1992] ECR I-2353, paragraph 10 et seq.

(11) - See the judgment in Case C-296/92 Commission v Italy [1994] ECR I-0000, paragraph 11.

(12) - See Case C-296/92 Commission v Italy, cited above.

(13) - P. 2 of the reply.

(14) - Mainly vaccines.

(15) - See Article 1(a) of Directive 77/62.

(16) - See Article 5(1)(a) of Directive 77/62.

(17) - See Article 20(2) of Directive 88/295.

(18) - See the second subparagraph of Article 5(1)(a) of Directive 77/62, as amended by Directive 88/295.

(19) - See p. 5 of the defence; Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965-1966, p. 20); Council Directive 75/318/EEC of 20 May 1975 on the approximation of the laws of Member States relating to analytical, pharmaco-toxicological and clinical standards and protocols in respect of the testing of proprietary medicinal products (OJ 1975 L 147, p. 1); Second Council Directive 75/319/EEC of 20 May 1975 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ 1975 L 147, p. 13) and the later amending directives: Directive 87/19/EEC (OJ 1987 L 15, p. 31), Directive 87/21/EEC (OJ 1987 L 15, p. 36) and Directive 89/341/EEC (OJ 1989 L 142, p. 11).

(20) - Council Directive of 21 December 1988 (OJ 1989 L 40, p. 8).

(21) - See the fifth recital in the preamble to Directive 89/105.

(22) - Case C-71/92, ibid., paragraph 15.

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(23) - Case C-71/92, ibid., paragraphs 10, 22 and 36.

(24) - See the second recital in the preamble to Directive 77/62.

(25) - Article 2(2)(a) of Directive 77/62.

(26) - Article 2(2)(b) of Directive 77/62.

(27) - See Article 3(a) and (b) of Directive 77/62.

(28) - See Article 3(c) of Directive 77/62.

(29) - See Article 4(1) of Directive 77/62.

(30) - See Article 4(2) of Directive 77/62.

(31) - With reference to the judgment in Joined Cases 266 and 267/87 The Queen v Royal Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers [1989] ECR 1295.

(32) - With reference to the judgments in Case 102/77 Hoffmann La Roche v Centrafarm [1978] ECR 1139 and in Case 3/78 Centrafarm v American Home Products Corporation [1978] ECR 1823.

(33) - Emphasis added.

(34) - See Article 6(1)(b).

(35) - Open procedures and restricted procedures.

(36) - Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

(37) - See my Opinion of 13 January 1987 in Case 199/85 Commission v Italy [1987] ECR 1039, at p. 1047, paragraph 36; judgment in Case C-24/91 Commission v Spain [1992] ECR I-1989, paragraph 13; judgment in Case C-107/92 Commission v Italy [1993] ECR I-4655, paragraph 12.

(38) - See paragraph 11 of the judgment in Case C-71/92.

(39) - See paragraph 18 of the judgment in Case C-71/92.

(40) - See paragraph 26 of the judgment in Case C-71/92.

(41) - Likewise the corresponding provisions of the implementing regulation.

(42) - See paragraph 12 of the judgment in Case C-71/92.

DOCNUM	61992C0328
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1992 ; C ; opinions
PUBREF	European Court reports 1994 Page I-01569

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DOC 1994/03/08

LODGED 1992/07/30

JURCIT
11957E030 : N 11 17 18
31965L0065 : N 25
31971L0305 : N 41 44
31975L0318 : N 25
31975L0319 : N 25
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31977L0062-A01LB : N 21
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31977L0062-A05P2 : N 23
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31977L0062-A06P1LB : N 34 36 38
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31977L0062-A09 : N 1 22
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61990C0362 : N 14
61991J0024 : N 41
61992J0071 : N 3 28 29 44 - 46
61992J0107 : N 41
61992J0296 : N 15

SUB Approximation of laws

AUTLANG German

APPLICA Commission ; Institutions

DEFENDA Spain ; Member States

NATIONA Spain

PROCEDU Proceedings concerning failure by Member State - successful

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ADVGEN Lenz

JUDGRAP Schockweiler

DATES of document: 08/03/1994
of application: 30/07/1992

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Opinion of Mr Advocate General Gulmann delivered on 18 November 1993.
Commission of the European Communities v Italian Republic.
Action for failure to fulfil obligations - Public works contracts - Inadmissibility.
Case C-296/92.

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Mr President,

Members of the Court,

1. In bringing these proceedings the Commission is seeking a declaration that the Italian Republic has failed to comply with its obligations under Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts. (1) It claims that Italy breached its obligations by allowing the provincial administration of Ascoli Piceno to conclude a contract concerning the construction of a section of rapid transit highway without putting the work out to public tender and without publishing a notice of invitation to tender in the Official Journal of the European Communities and "by not taking steps to preclude at the outset the legal effects thereof which infringe Community law".

2. The section of road in question was part of the "Ascoli - Mare" highway which was to link the town of Ascoli Piceno, which is the capital of the province of the same name and lies some 25 km from the Adriatic coast, with the A14 motorway and the national highway No 16, which runs along the coast, and with the coastal town of San Benedetto del Tronto.

The first sections of the highway, stages I, II and III, and the first part of stage IV were the subject of a restricted tendering procedure and were completed at the beginning of the 1970s. The work for stage IV was awarded to the undertaking Rozzi Costantino. Stage IV, which covered inter alia the link with the A14 motorway and national highway No 16, was subsequently extended by so-called supplementary projects entailing inter alia an extension of the original highway.

3. These proceedings concern the "11th and 12th supplementary projects" which were ultimately treated as a joint project. The project related to an extension of the highway. The object was to overcome the physical barriers represented by national highway No 16 and the railway line between Bologna and Lecce and thus to create a good connection between the port of San Benedetto on the one hand and the main traffic arteries and Ascoli Piceno' s industrial area on the other. The works included the construction of a viaduct over the railway line between Bologna and Lecce. The section of road was only a few kilometres and was to join up the section covered by the 10th supplementary project and a road towards San Benedetto which was being built at the same time by the Commune of Ascoli Piceno.

4. It has been established in these proceedings that the execution of the first ten supplementary projects in stage IV was allocated to the same undertaking which had carried out the original stage IV, that is to say the undertaking Rozzi Costantino.

The 11th and 12th supplementary projects had been approved by the Agenzia per la Promozione dello Sviluppo del Mezzogiorno, which transferred responsibility for the implementation of the project to the provincial administration of Ascoli Piceno. On 21 May 1990, without publishing a contract notice in the Official Journal of the European Communities, the latter concluded a private contract with Rozzi Costantino to carry out the project for a contract amount of some LIT 36 000 million.

The Italian Government has stated, moreover, that the construction of the further extension to San Benedetto of the highway in question here, which, as mentioned above, was the responsibility of the Commune of Ascoli Piceno and not the provincial administration, was also awarded to Rozzi Costantino.

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5. The circumstances surrounding the construction of the highway "Ascoli -Mare" came to the attention of the Commission which decided to open Article 169 proceedings against Italy which it confined to the 11th and 12th supplementary projects. The Commission sent its letter of formal notice to the Italian Government on 17 January 1991.

6. It is not disputed in these proceedings that the project at issue is covered by Directive 71/305.

It is also common ground that the procedure applied in awarding the contracts is objectively in breach of the directive unless the derogation under Article 9(b) of the directive applies, that is to say unless the project relates to works which "for technical... reasons ... may only be carried out by a particular contractor".

7. It would have been fairly simple to take a position on the case if the only issue had been whether or not the conditions under Article 9(b) were met.

However, the Italian Government contends that the Commission has formulated its claims in such a way as to seek judgment against the Italian Republic not for the provincial administration' s conduct contrary to the directive but for failing to take steps against that conduct, that is to say for breach of its supervisory obligation.

The Italian Government denies that it failed to fulfil its supervisory obligation with regard to the provincial administration and that is the fundamental basis of its case. Only in the alternative does it contend that the conditions under Article 9(b) were met.

8. It must be observed straightaway that the formulation of the Commission' s claims has given rise to certain procedural problems in this case.

In its defence the Italian Government concentrated on demonstrating that it had not failed to comply with its supervisory obligations. It did indeed mention that non-compliance with obligations under the directive might be justified under Article 9(b) but its treatment of that provision showed that it primarily believed that it could rely on that provision to show that it was far from obvious in the present situation that there had been a breach of the directive. The Italian Government did not submit detailed argument on whether the conditions under Article 9(b) were met.

In its reply the Commission concentrated on the one hand on asserting that according to the consistent case-law of the Court, Member States may be held liable on an objective basis for conduct contrary to directives of State, regional and local bodies, and on the other on showing that the Italian Republic had not merely allowed the conduct of the provisional administration which was contrary to the directive but had also failed to take steps subsequently in order to remove the unlawful legal effects of that conduct.

It was not until its rejoinder that the Italian Government developed substantive arguments concerning the issue whether the conditions under Article 9(b) were met, submitting in that connection working drawings and the like.

9. The Commission sought leave from the Court to submit a new document in order to comment on the working drawings and the like that had been submitted. Leave was granted and the Commission submitted a document, accompanied by a declaration from an expert it had consulted, which disputed that the conditions under Article 9(b) were met.

In that document the Commission further contended that the working drawings and the like which had been submitted should be regarded as new pleas in law which pursuant to Article 42 of the Rules of Procedure could not be introduced.

10. I do not consider that the Court should refrain on the basis of Article 42 of the Rules of Procedure from taking account of the views and information submitted by the Italian Government

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in its rejoinder concerning the application of Article 9(b).

Article 9(b) was invoked by the Italian Government both in its responses to the Commission' s letters in the administrative procedure and in its defence.

It is certainly in principle questionable for substantive argument concerning the issue of the application of Article 9(b) to be submitted for the first time in the rejoinder but that is at least in part attributable to the content of the form of order sought by the Commission. Moreover, the Commission has had a full opportunity to submit its views in the light of the new views and information in the rejoinder and its procedural rights have therefore not actually been prejudiced.

11. I consider it appropriate to go on to consider first whether the provincial administration could refrain on the basis of Article 9(b) of the directive from putting the contract out to tender and publishing a notice in the Official Journal of the European Communities.

The fundamental precondition for any judgment being given against the Italian Republic is that the provincial administration acted in breach of the directive.

12. The question is whether the construction of the section of highway in question, and in particular the viaduct over the railway line, involved works which "for technical... reasons... may only be carried out by a particular contractor", that is to say in the present case the contractor responsible for construction of the section of motorway that was to be extended by the project at issue here (the section covered by the 10th supplementary project).

13. In that connection the Italian Government has stated that is apparent from the working drawings submitted that there were such "technical reasons" in the present case in so far as it was impossible:

- to complete the work covered by the 10th supplementary project before certain of the structures covered by the project at issue were put in place,

- to begin work at two different places because of the very cramped nature of the site of the works, and

- to carry out the work in progress separately from the work at issue here because of the close structural connection of the foundations.

14. The Commission denies that those circumstances in themselves reveal technical reasons making it possible to award the work only to the contractor for the section of road covered by the 10th supplementary project.

15. It is apparent from the report of the expert consulted by the Commission - a French engineer - that it was certainly necessary on the basis of the factors referred to by the Italian Government to coordinate the timing and placing of the works at issue in this case with the work in progress but that such coordination would also have to be carried out even if all those works were allocated to the same undertaking and that accordingly there are no "technical reasons" to justify the choice made by the Italian awarding authority in this instance.

16. It does not seem to me that the Italian Government has shifted the burden of proof which, according to the consistent case-law of the Court, (2) is incumbent on it in order for the derogation to apply.

The arguments put forward by the Italian Government were confined to a fairly abstract level. Notwithstanding the production of the working drawings, it has failed to produce cogent evidence of the alleged serious difficulties involved in leaving the construction of the section of highway at issue to an undertaking other than that responsible for the construction of the section of road covered by the 10th supplementary project. It also seems implausible that such serious difficulties exist in the light of the views expressed in the report submitted on behalf of the Commission.

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Nor may the fact be altogether overlooked, in my view, that the Italian Government itself in its defence expressed certain doubts as to whether the conditions for the application of Article 9(b) were met.

17. I therefore consider that it may be presumed that, as the Commission has alleged, the provincial administration of Ascoli Piceno acted in breach of Directive 71/305.

18. The question is, however, whether judgment may be given against the Italian Republic in respect of that conduct in view of the fact that in the terms of the form of order sought the Italian Republic is charged with having acted in breach of the directive "by allowing" the conduct of the provincial administration which is contrary to the directive "by not taking steps to preclude at the outset the legal effects thereof which infringe Community law".

19. It is not quite clear to me why the Commission formulated its claims in those terms. The formulation is surprising in view of the fact that it is established under the Court' s case-law that a Member State may be found guilty on the basis of objective factors of infringement of the directive irrespective of what State, regional or local body has failed to comply with the rules in the directive. (3)

20. The Court may of course consider that it would be appropriate to hold that a general duty applies for individual Member States as such to ensure in all cases that State, regional and local authorities comply with the directive in connection with their public works and that a Member State may be held to have breached the Treaty whenever it is objectively found that it has failed to comply with its supervisory obligation because action has been taken which is contrary to the directive.

However, that would entail a legal position corresponding to that whereby the Commission reduces the form of order sought by it to a claim that the Member State has breached its obligations under Community law in so far as one of its authorities has acted in breach of the directive.

On that basis, whether the Commission formulated its claim in one manner or another would be immaterial.

21. Quite apart from the fact that claims must naturally be construed on the basis of their terms, the procedural problems which have arisen in this case point up the importance of the Court requiring the Commission' s claims to be precise.

22. For those reasons and in view of the pleadings exchanged and the oral procedure, I consider that the claims must necessarily be construed as seeking judgment against the Italian Government not for the fact that the provincial administration had acted in breach of the directive but for the fact that that was allowed by the Italian Government and that the latter did not take any steps to stop it.

No consideration has been given in these proceedings to the question what authorities in this instance allowed the provincial administration' s conduct and failed to take steps to stop it. It is unnecessary to examine that question further. The form of order sought by the Commission necessarily presupposes that there exist authorities which have such supervisory obligations and which, by the nature of the case, must be State authorities.

23. Judgment against the Member State is therefore conditional on it being established that there were State authorities which allowed the conduct of the provincial administration and failed to take steps to stop it.

The Commission must demonstrate that that was the case.

As mentioned above, the Italian Government denies that State authorities accepted that conduct and that there was in fact any possibility of taking steps against it. It points out that its attention was first drawn to that conduct by the Commission in January 1991, eight months after the contract had been awarded to the undertaking in question, and it had no possibility under Italian law to

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take appropriate steps in that regard.

24. On that basis I consider that I must propose that the Court dismiss the case against the Italian Republic.

The Commission has failed to demonstrate that the Italian Government or other State authorities expressly or tacitly allowed the conduct of the provincial administration and it has not produced cogent evidence that the Italian Government or other State authorities had any real possibility of subsequently taking steps to remedy the situation.

Conclusion

25. On those grounds I propose that the Court dismiss the case against the Italian Republic and order the Commission to pay the costs.

(*) Original language: Danish.

(1) - Directive of 26 July 1971, OJ, English Special Edition 1971 (II), p. 682.

(2) - Judgment in Case 199/85 Commission v Italy [1987] ECR 1039.

(3) - See inter alia judgment in Case 77/69 Commission v Belgium [1970] ECR 237 and the judgment referred to in footnote 2 in which it was held that the Italian Republic was liable for a local authority' s infringement of Directive 71/305.

DOCNUM	61992C0296
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1992 ; C ; opinions
PUBREF	European Court reports 1994 Page I-00001
DOC	1993/11/18
LODGED	1992/07/06
JURCIT	61969J0077 : N 19 31971L0305-A09LB : N 6 - 11 16 31971L0305 : N 1 6 17 61985J0199 : N 16 19 31991X0704(02)-A42 : N 9 10
SUB	Approximation of laws
AUTLANG	Danish

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APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - inadmissible
ADVGEN	Gulmann
JUDGRAP	Schockweiler
DATES	of document: 18/11/1993 of application: 06/07/1992

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Opinion of Mr Advocate General Gulmann delivered on 12 May 1993.
Commission of the European Communities v Italian Republic.
Failure of a Member State to fulfil its obligations - Procedures for the award of public works contracts - Derogation.
Case C-107/92.

DOCNUM	61992C0107
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1992 ; C ; opinions
PUBREF	European Court reports 1993 Page I-04655
DOC	1993/05/12
LODGED	1992/04/01
JURCIT	31971L0305-A09LD : N 3 - 7 11 13 31971L0305-A12 : N 2 31971L0305-A15 : N 6 - 10 31971L0305 : N 1 15 61985J0199 : N 4 61991J0024 : N 4 6 10
SUB	Approximation of laws
AUTLANG	Danish
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Gulmann
JUDGRAP	Edward
DATES	of document: 12/05/1993

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of application: 01/04/1992

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Opinion of Mr Advocate General Gulmann delivered on 30 June 1993.
Commission of the European Communities v Kingdom of Spain.
Actions against Member States for failure to fulfil obligations - Public works and supply contracts.
Case C-71/92.

DOCNUM	61992C0071
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1992 ; C ; opinions
PUBREF	European Court reports 1993 Page I-05923
DOC	1993/06/30
LODGED	1992/03/06
JURCIT	11957E005 : N 100 101 11957E030 : N 1 90 108 11957E036 : N 8 15 11957E056 : N 74 11957E059 : N 1 26 27 72 - 76 79 82 84 88 93 96 97 108 11957E090-P2 : N 8 15 11957E223 : N 8 15 31971L0304-A02 : N 24 31971L0304-A02P1 : N 26 28 31971L0304-A02P2 : N 26 27 31971L0304-A02P2LA : N 25 27 29 31971L0304-A02P2LC : N 25 27 29 31971L0305-A01LA : N 24 26 27 28 31971L0305-A09LA : N 51 52 31971L0305-A09LB : N 36 39 40 41 31971L0305-A09LD : N 36 44 46 51 31971L0305-A12 : N 22 31971L0305-A16L1 : N 94 95 31971L0305-A20 : N 63 31971L0305-A23 : N 64 69 31971L0305-A23P1LD : N 93 95 31971L0305-A23P1LG : N 93 95 31971L0305-A24 : N 64 71 31971L0305-A25 : N 64 31971L0305-A26 : N 64 85 86

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31971L0305-A28 : N 64 77 86 89
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31977L0062-A06P1LB : N 8 16 39 41
31977L0062-A06P1LD : N 44 51
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31988L0295 : N 1
61988J0303 : N 100
31989L0440 : N 1
61989J0106 : N 34
61989J0119 : N 5
61989J0288 : N 74
61989J0360 : N 66 87
61991J0024 : N 46
61992J0017 : N 74

SUB Approximation of laws ; Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Freedom of establishment and services

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	; Free movement of services
AUTLANG	Danish
APPLICA	Commission ; Institutions
DEFENDA	Spain ; Member States
NATIONA	Spain
PROCEDU	Proceedings concerning failure by Member State - successful ; Proceedings concerning failure by Member State - unfounded
ADVGEN	Gulmann
JUDGRAP	Schockweiler
DATES	of document: 30/06/1993 of application: 06/03/1992

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Opinion of Mr Advocate General Gulmann delivered on 14 July 1993.
Commission of the European Communities v Italian Republic.
Concession for the lottery computerization system.
Case C-272/91.

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Mr President,

Members of the Court,

1. In Italy only the State may conduct lotteries. (1) In November 1990 the Italian Finance Ministry published a contract notice for the concession for the computerization of the Italian Lotto. The right to tender was reserved to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, was held by the public sector. In these proceedings the Commission has claimed that Italy thereby failed to comply with its obligations under Articles 30, 52 and 59 of the EEC Treaty and Articles 17 to 25 of Council Directive 77/62/EEC coordinating procedures for the award of public-supply contracts, (2) as amended by Council Directive 88/295/EEC. (3)

The contract notice was published only in the Italian press. On that basis the Commission has also claimed that Italy has failed to comply with its obligations under Article 9(1), (2) and (4) of Directive 77/62 by failing to publish the contract notice in the Official Journal of the European Communities and by failing to make known at the beginning of 1990 by means of an indicative notice the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 and which the Finance Ministry envisaged awarding in 1990.

2. The concession was awarded to the Lottomatica consortium by a decree of the Finance Minister of 14 June 1991 and the contract with Lottomatica was concluded on 22 November 1991. On 31 January 1992 the President of the Court of Justice made an order for interim measures under Article 186 of the Treaty requiring Italy to suspend the legal effect of the decree and performance of the contract. (4) The Italian Government has stated that in November 1992 the Finance Minister issued a decree suspending the implementation of the concession.

The Italian Lotto and the key features of the concession

3. In his Order of 31 January 1992 the President of the Court of Justice gave the following description of the Lotto and the key features of the concession. (5)

4. "It is apparent from the documents before the Court that the lottery is a game of chance operated by the Autonomous State Monopolies Administration (' the Administration'), an administrative body attached to the Ministry of Finance. The system involves players betting on one or more numbers with a view to weekly draws. The stakes are taken at authorized collection points (in particular, tobacconists) and there is a draw every Saturday in each of the ten lottery areas (ruote) into which Italy is subdivided. A bet may be entered either in the draw for the area in which the relevant collection point is situated or in the draw for all the areas. The amount of the winnings is determined, by reference in particular to the stake, in accordance with a formula laid down by Italian legislation, and winnings are payable at the collection point or, if they exceed a certain sum, at the local offices of the Ministry of Finance.

The lottery computerization system which was the subject of the contract comprised, according to the invitation to tender, premises, supplies, equipment, maintenance, operation, transmission of data and everything else necessary for running the lottery.

The invitation to tender provided that the concession was for nine years only and that when it expired the entire computerized system, including premises, apparatus, terminals at collection points,

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equipment, structures, programs, records and everything else necessary for operating and managing the system was to be handed over without charge for the exclusive use of the Administration.

It specified that the concession comprised three phases: in the first phase the equipment was to be supplied, installed and tested in parallel with the manual system, at the end of which the computerized system was to become operational in one lottery area; in the second phase the system was to be extended to all the lottery areas; and finally in the third, fully operational, phase the number of collection points was to be progressively increased. Tenders had to indicate the time within which each phase would be completed.

The computerization system concessionaire would receive no remuneration during the first phase, but during the second and third phases would receive a percentage of the gross receipts from automatically recorded bets. That percentage was to be indicated in the tender.

The invitation to tender also specified economic and technical criteria for the selection of bodies or undertakings wishing to submit tenders.

The invitation reserved the right to tender to bodies, companies or consortia and groups the majority of whose capital, considered individually or in aggregate, was held by the public sector. The Ministry of Finance was to take into account the particular nature and importance of the computerized operation of the lottery which, as a State monopoly operated for maximum returns, required special guarantees and absolute reliability and security for the setting-up and operation of the system."

The infringement of Articles 52 and 59 of the Treaty

5. The Commission claims that the condition in the invitation to tender that only companies, consortia or groupings the majority of whose capital is owned by the public sector can take part in the procedure corresponds to the condition which was held to be contrary to the Treaty in the judgment of the Court of Justice of 5 December 1989 in Case C-3/88 Commission v Italy. (6)

6. In that judgment the Court ruled on the compatibility with Community law of a number of Italian legislative provisions on the introduction of electronic data-processing systems in the public administration in the fields of taxation, health, agriculture and property registers. Under those provisions, only companies in which either the whole or a majority of the shares were held directly or indirectly by the State or the public sector could conclude agreements with the Italian State for the computerization of the administration. Those provisions covered both the development of the data-processing systems, their programming and operation and the provision of the necessary equipment and supplies. The Court held that those provisions were incompatible with Articles 52 and 59 of the Treaty and stated:

> "... the principle of equal treatment, of which Articles 52 and 59 of the Treaty embody specific instances, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by application of other criteria of differentiation, lead in fact to the same result...", and
>
> "... Although the laws and decree-laws in issue apply without distinction to all companies, whether of Italian or foreign nationality, they essentially favour Italian companies. As the Commission has pointed out, without being contradicted by the Italian Government, there are at present no data-processing companies from other Member States all or the majority of whose shares are in Italian public ownership". (7)

7. The Italian Government does not deny that the content of the condition at issue in the invitation to tender corresponds to the legislative provisions which the Court held to be contrary to the Treaty in its judgment in Case C-3/88. (8) But it contends that there is a decisive difference between the invitation to tender in question and those in Case C-3/88. It points out that these proceedings relate to a concession in which public authority is conferred on the concessionaire,

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namely part of the power to conduct the lottery which by statute is conferred on the Amministrazione Autonoma dei Monopoli di Stato (Autonomous State Monopolies Administration ° AAMS).

Does the concession relate to the power to conduct the lottery?

8. The Italian Government claims that the invitation to tender in question concerns:

° a concession under which a concessionaire is entrusted with providing a service on behalf of the public administration, namely part of the lottery (that is to say that the concessionaire acts as the provider of services in the public administration' s stead,

and that accordingly, contrary to what the Commission contends, it did not relate to:

° an agreement for the provision of services for the public administration, namely the development of software and the introduction and operation of a computerized system (that is to say that the public administration is the recipient of a service) and the supply of goods to the public administration, namely the hardware and any basic software necessary for the computerization of the lottery.

9. In support of its claims the Italian Government has stated that the legal relationship envisaged by the invitation to tender is characterized by a number of features typical of a concession, namely:

° the concessionaire is to be responsible for the operation of the computerized system for a period of nine years;

° the remuneration is fixed as a percentage of the gross revenue from the lottery stakes, and

° Article 7 of the special conditions for the tender provides that everything necessary for operating the computerized system is to be handed over without charge to the State on the expiry of the nine-year concession. (9)

On that basis the Italian Government claims that the agreement in question does not relate to the transfer of goods to the public administration in return for a price corresponding to their value, nor does it relate to the carrying out of services for the public administration or for payment therefor.

10. The Italian Government is probably right in saying that the fact that the consideration is linked to the revenue from exploiting the construction or carrying out the services in question is to be regarded as a typical and possibly necessary component of a concession. (10) In other words, the decisive criterion for the existence of a concession for a public service is whether the concessionaire is given the right to exploit the computerized system to conduct lotteries and to obtain therefrom the consideration for his work. On the other hand, if it is found that the power to conduct lotteries is retained by the Italian State, the setting up and operation of the computerized system must be regarded as services provided to the Italian State in return for consideration which, irrespective of the precise way in which it is calculated, is provided by the State.

11. However the parties' differing views of how the legal relationship in question is to be characterized is not conclusive for deciding whether there has been a breach of Articles 52 and 59 of the Treaty. As far as can be seen, the Italian Government is not claiming that the invitation to tender falls outside the scope of those provisions. The explanation for that is that it regards the concession in question as a concession for provision of a public service. Whether the legal relationship is to be characterized as a concession for the provision of a public service, namely the conduct of a lottery, or as an agreement for the performance of services for the public administration, namely the setting up and operation of a computerized system, the condition contained in the invitation to tender will be incompatible with the rules of the Treaty unless that invitation is to be construed as entailing the transfer of public authority.

12. To my mind, however, a correct analysis of the legal relationship between the Italian authorities

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and the concessionaire shows that the view that the invitation relates to the transfer of the power to conduct a lottery is untenable. (11) Even after the introduction of the computerized system it will be the Italian State which conducts the lottery. In my view it is still the public administration which takes all the major decisions concerning the conduct of the lottery and which receives the revenue therefrom, out of which it pays the agreed consideration to the concessionaire. The invitation to tender therefore concerns not a concession of the power to conduct the lottery but an agreement to carry out services for and the supply of goods to the public administration for the purposes of the administration' s conduct of the lottery. The correctness of this view is borne out by the following analysis of the Italian Government' s arguments concerning the question whether there is a transfer of the power to exercise official authority.

Is there a transfer of the power to exercise official authority?

13. The Italian Government claims that the invitation to tender relates to the transfer of public authority and thus falls under Articles 55 and 66 of the Treaty under which the Treaty provisions on the right of establishment and free movement of services do not apply to activities which are connected, even occasionally, with the exercise of official authority.

14. In Case C-3/88 the Italian Government also maintained that the activities in connection with the operation of the data-processing systems in question were, in view of their confidential nature, connected with the exercise of official authority and thus, pursuant to Articles 55 and 66 of the Treaty, could fall outside the scope of the Treaty rules on the right of establishment and the free movement of services.

The Court rejected that argument stating that the exceptions set out in the Treaty must be restricted to activities "which in themselves involve a direct and specific connection with the exercise of official authority" and that that did not apply in that instance since the activities in question, which concerned the design, programming and operation of data-processing systems, were of a technical nature and thus unrelated to the exercise of official authority. (12)

15. The invitation to tender at issue in these proceedings concerns, as mentioned above, the setting up and operation of a system for computerizing the Italian lottery. Computerization undoubtedly entails fundamental changes to the manner in which the lottery has hitherto been conducted. According to point 1 of the technical programme forming part of the special specifications, the invitation covers: "the premises to house the processing centre in each lottery area, the area committee, the Central Processing Office, the technical and administrative management of the company; transmission lines; the terminals which are to be installed at the collection centres; the apparatus for the processing and transmission of data; software which must be developed by the company; the operation of the whole system for nine years; support in the form of materials and services for the public administration which grants the concession for everything relating to the lottery; everything else that is necessary for the conduct of the lottery".

16. The Italian Government has claimed that exercise of official authority is being entrusted to the concessionaire for all stages of the lottery and in support of that view it has pointed in particular to a number of components of the technical programme.

17. I do not consider that the Italian Government' s arguments are cogent. It is important to bear in mind that the fact that there is a transfer to private persons of duties which are by statute reserved to the public administration is not synonymous with the transfer of activities relating to the exercise of official authority. I consider that the tasks which are to be carried out by the concessionaire in connection with the computerization of the lottery are of a technical nature in the same way as was found in Case C-3/88.

Even if the Court were to hold that the tasks in question go further than mere activities of a

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technical nature, I consider that they do not in any event constitute tasks which can reasonably be described as being connected with the exercise of official authority within the meaning of the Treaty. It is appropriate to point out in this connection that the Court has held that Articles 55 and 66 are derogations from the fundamental principle in the Treaty that there should be no discrimination on grounds of nationality and they must therefore be interpreted in a manner which limits their scope to what is strictly necessary in order to safeguard the interests which they allow the Member States to protect. (13)

18. The Italian Government states first that in connection with the receipt of stake money it is the computerized system for which the concessionaire is responsible which is to receive stakes and register them. It maintains that in this stage the concessionaire has certain official supervisory powers. On the one hand the concessionaire must take steps in order to "prevent a collector from removing a certain number of registrations concerning stakes that have been accepted but not sent to the processing centres" in each lottery area (Centri di elaborazione di zona) which are centres set up and administered by the concessionaire. On the other the concessionaire must monitor, prevent and refuse stakes that would give entitlement to prizes that cannot be paid.

But it is apparent from the technical programme, in my view, that even after the installation of the computerized system it will be the individual lottery collectors (14) and not the concessionaire who are responsible for receiving stakes. The concessionaire is responsible for installing terminals for the agents and developing and installing the necessary software. On the other hand it is the lottery agents who are to operate those terminals. It is apparent from point 4.1 of the technical programme that lottery agents, by means of the data-processing equipment placed at their disposal, are to be able to monitor, correct, authorize and register stakes received and finally to issue the receipt which the machines will then produce. If the receipt is defective or the lottery agent has otherwise made a mistake, the system must be devised in such a way that the agent can cancel the stake registered and begin again from the beginning.

The concessionaire must also take steps to ensure that the system is set up and programmed in such a way that the agents cannot remove registrations of stakes that have been received before they are transmitted to the processing centres in each area (see point 4.1 of the technical programme) and that stakes that will give entitlement to prizes which cannot be paid are refused (see Article 5(3) in the implementing regulation). It is difficult to construe those provisions as giving the concessionaire the task of actually exercising supervision over the lottery agents in order to ensure that those points are carried out.

19. Secondly the Italian Government has stated that in connection with the draws and decisions on the winning coupons the concessionaire has on the one hand a public monitoring role since the Central Processing Office (Ufficio centrale di elaborazione) in Rome, which is under the authority of the concessionaire, must carry out controls on the result of the draws at the request of the Area Committees (Commissioni di zona), which are State bodies, (15) and on the other hand has a public task of verification since the concessionaire determines which are the winning coupons and in that respect is subject only to the control of the Area Committees.

I consider that the following details are apparent from closer examination of the relevant sections of the technical programme: the registrations of the stakes effected by the lottery agents are notified to the processing centres in each area. These processing centres check that the registrations received are correct and inform the Area Committee in question of the stakes that cannot be accepted. (16) The draws are carried out by the Draw Committees (Commissioni di estrazione) which are State bodies (17) and are notified to the Central Processing Office in Rome which draws up a comprehensive list of the draws in each area which it transmits to the Area Committees through the processing centres in each area which also send the list to the individual lottery agents. On the basis of

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the registrations of the stakes deposited and the registrations of the draws carried out the processing centres in question determine which coupons have won prizes (see point 4.6 of the technical programme). The list of the winning coupons is transmitted to the Area Commission for approval. (18) Pursuant to point 4.4 of the technical programme the Area Committee is to retain the "data-processing diskettes concerning the stakes" and on that basis, if it considers it necessary, it may request inter alia the Central Processing Office to carry out a check.

Accordingly it can be seen that it is the Area Committee in question and not the concessionaire which is primarily responsible for carrying out checks on the result of the draws and to ensure that the list of winning coupons is correct. The task of the concessionaire is to operate the computerized system on the basis of the data received and thus to provide technical assistance to the Area Committees.

20. Thirdly the Italian Government maintains that the concessionaire has a number of public powers in connection with the payment of winnings since the concessionaire must ensure that the winning coupons are genuine and certify that they are winning coupons and that the winnings have not yet been paid out. The Italian Government has stated that it is only after the concessionaire has exercised those powers to determine, confirm and certify the winning coupons that the State bodies intervene to approve payment of the winnings.

It is true that point 4.10, section 5, of the technical programme concerning winnings to be paid out by the Direzione Generale Monopoli di Stato (19) provides that "the company shall ensure that the coupons which are handed in for payment are genuine and certify that those coupons have won prizes and that the prizes have not yet been paid out. In this connection the Central Processing Office must be in possession of data concerning all the winning coupons and the corresponding payments".

But I consider that these requirements too merely relate to the functions that the computerized system must be capable of carrying out and which are intended to enable the concessionaire to offer assistance which is essentially of a technical nature. As the Italian Government itself has pointed out, ultimately it is still the public administration which sanctions and pays out the prizes.

21. The Italian Government has further observed that point 1 of the technical programme states that the tender also covers "everything else that is necessary for the conduct of the lottery" which in its view, indicates that the concessionaire is to be given independent powers to undertake anything he considers necessary in order to operate the concession. But I do not believe that that provision by itself can give the concessionaire the right to exercise official authority. That provision precisely just gives the concessionaire the right and obligation to undertake everything that is necessary in order to operate the concession and must therefore lie within the framework of that concession.

22. The Italian Government has further pointed out that Article 2(2) of Law No 528 regarding the various stages of the lottery refers to a "unitary system", which, it maintains, signifies that separate legal operations cannot be carried out and accordingly there must be a transfer of part of public powers. I find it difficult to see why the fact that the lottery is a unitary system in itself should show that there is a transfer of official authority. The Italian Government itself maintains precisely that the concession only entails the transfer of part of the powers to hold the lottery which are conferred by law on the AAMS and that partial transfer may, notwithstanding the unitary nature of the system, very well be confined to solely tasks of a technical nature.

23. Finally the Italian Government has stated that the purpose of the concession is to increase and maximise tax revenue from the lottery and that the transfer of a public power to conduct the lottery also relates to the levying of tax.

It should be noted in this respect that voluntary payments made by individuals in order to take part in the lottery are not the levying of tax even if the revenue from the lottery is entered in

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the State budget under the heading of tax revenue. No weight therefore attaches to the Italian Government' s assertion that there is on this basis exercise of official authority.

24. In the light of the foregoing I believe I may conclude that even after the computerization of the lottery it will be the public administration which conducts the lottery and thereby exploits the computerized system since the key tasks and actual responsibility for the lottery will continue to be a matter for public bodies and that the tasks that are assigned to the concessionaire are of a technical nature and appear, moreover, in all essential respects to correspond to those in Case C-3/88, namely activities "which concern the design, programming and operation of data-processing systems". Hence I conclude that the tender for the computerization of the lottery does not involve the transfer of official authority within the meaning of Articles 55 and 66 of the Treaty.

25. Against that background I would propose that the Court hold that the facts at issue constitute an infringement of Articles 52 and 59 of the Treaty.

The question of the infringement of Article 30 of the Treaty

26. The Commission has stated that the tender covers the supply of various goods that are necessary to implement the computerization of the lottery, in particular hardware and pre-existing software. (20) On that basis it claimed that the situation at issue entails serious interference in trade in those goods and therefore constitutes a measure having equivalent effect to a quantitative restriction which is prohibited under Article 30 of the Treaty.

The Commission claims in particular that the condition in dispute is a measure that confines public purchasing to national undertakings alone and it points inter alia to the fact that in each of the three consortia which met the condition at issue and were invited to tender there were member companies that themselves produced data-processing systems. The Commission considers that it may therefore be assumed that the consortium that was awarded the concession would solely use goods produced by companies within that consortium. In its view, therefore, there is also covert discrimination on grounds of nationality within the meaning of Article 30 of the Treaty. (21)

The Commission believes that its views are borne out by the judgment of the Court in Case C-21/88 Du Pont de Nemours (22) according to which Article 30 of the Treaty precludes national rules which reserve a proportion of public-supply contracts to undertakings which have production units in certain parts of national territory. (23)

27. The Italian Government denies that the condition in dispute constitutes a breach of Article 30 of the Treaty. It claims that the tender does entail the transfer of powers to a concessionaire who acts within his own autonomous area in order to achieve the result which is the object of the concession and that consequently there is no State measure within the meaning of Article 30, and that the concessionaire is at liberty to buy national or imported goods and that consequently there is no barrier to trade. It asserts that no reliance can be placed on the Commission' s arguments as to the composition of the consortium selected by the contracting authority. Finally it contends that the judgment of the Court in Du Pont de Nemours is not relevant since that case related to reserving purchases to certain national undertakings while this case relates to a condition affecting the choice of concessionaire.

28. It is not altogether easy to take a position on the Commission' s claims on this point.

29. The Commission is justified in referring to the judgment in Du Pont de Nemours in so far as it may be inferred therefrom that Article 30 applies even when the measures in question only limit the right to supply public authorities to certain ° but not all ° national undertakings. But that judgment cannot serve as a basis, as the Commission claims, for a solution of the actual problem in this case, that is whether the condition at issue entails the reservation of the supply of the

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necessary goods to national undertakings.

30. It may be appropriate to illustrate the problem by the following hypothetical example: the authorities in a Member State issue an invitation to tender for the construction of a bridge. Under the tendering conditions, only consortia of undertakings the majority of whose capital is owned by the State in question may submit tenders. The tendering conditions do not contain any requirement that the consortium should include cement and steel producers or that cement and steel produced in the State in question must be used. Three consortia submit tenders. They all meet the condition as to majority State ownership. The contract is awarded to the only one of the tendering consortia which includes national undertakings producing cement and steel.

It is possible that it might be held in that situation that there was not merely an infringement of Article 59 of the Treaty but also an infringement of Article 30. But in that case that infringement would not be a consequence of the aforesaid restriction in the tendering conditions. On the other hand an infringement might exist if it can be established that the contracting authorities, in awarding the contract to the consortium in question, were influenced by the fact that that consortium included companies which could and perhaps even would be obliged to supply nationally produced cement and steel for the production of the bridge. A finding of such an infringement would hinge on an actual assessment of the evidence which would certainly not be altogether easy.

31. Prompted by a question from the Italian Government which found the Commission' s arguments unclear, the Commission stressed in its reply that it is claiming that the infringement of Article 30 is a consequence of the condition at issue. But as is apparent from my hypothetical example, there is no causal connection between a condition that the companies taking part must be owned by the public sector and the factual circumstance that the contract is awarded to companies which themselves produce the necessary products.

In my view, the Commission' s claim can be dismissed for that reason alone.

32. Even if the Court were to choose to rule on whether there is an infringement of Article 30 as a result of the fact that the Italian authorities were influenced by the fact that the companies taking part were themselves in a position to produce the necessary hardware and software I do not consider that the Commission' s claims can be upheld.

That is because I consider that the Commission has not established that the Italian authorities did in fact attach importance to that circumstance. As the Commission itself has pointed out, there is no requirement in the tendering documents that the tenderers should themselves be in a position to produce the products in question. The Commission was only able to state that the three consortia or groupings that were invited to tender in fact included companies which themselves produced data-processing systems. (24) But that is not in itself sufficient in order to assess the weight that might have been attached to that circumstance by the contracting authorities. We do not have comprehensive information about the consortia or groupings which applied to take part in the tendering procedure or about their ownership and inter-relationships.

33. Even if the Court were to find that the Commission has adduced sufficient proof that the Italian authorities attached importance to the companies taking part themselves being able to produce the necessary products, it is not wholly certain that those circumstances constitute an infringement of Article 30. I would merely point out in this connection that in any event the tendering conditions do not lay down any requirement that the company or companies which are awarded the contract must supply their own products. If the companies in question choose to buy in hardware and software there is nothing in the tendering documents which requires them to buy national products.

34. The Commission has further claimed that there is an infringement of Article 30 even if the consortium which was awarded the concession did not include companies which themselves produced

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data-processing systems. Its reasoning is that producers of data-processing systems which in those circumstances would have to supply goods for the computerization of the lottery would have to use the concessionaire as an intermediary for supplies to the public administration. That would, according to the Commission, entail a significant restriction on the producers' freedom of contract and in that situation too there would therefore be a serious disruption of trade.

The fundamental premise of the Commission' s reasoning, so far as I have understood it, is that by putting the computerization of the lottery out to tender as an overall package, the Italian authorities preclude the possibility of supply agreements being concluded directly with companies from other Member States and that that is contrary to Article 30. If my understanding is correct, that view has very wide implications. The ultimate consequence would be that it would be contrary to Article 30 for contracting authorities to conclude contracts with publicly-owned companies which could be implemented by those companies only by concluding agreements for the supply of goods from other companies. It is perhaps not altogether impossible that an in-depth analysis of the question as a whole might show that the Commission' s view is correct but on the present basis I do not consider that it is under any circumstances justifiable to follow it.

35. I therefore consider that the Court should not accept the Commission' s contention that the fact that participation in the tendering procedure for automation of the Italian lottery was confined to companies, consortia or groupings the majority of whose capital was publicly owned constitutes an infringement of Article 30 of the Treaty.

The alleged infringement of Directive 77/62

36. The Commission has stated that the invitation to tender concerns an integrated computerized system which becomes the property of the administration on the expiry of the contract and the price for which is an annual fee calculated on the basis of turnover by a process reminiscent of leasing contracts. The Commission has claimed that one of the aspects of that computerized system is the supply of hardware and pre-existing software and that Directive 77/62 on public procurement is applicable thereto. In support of that view the Commission refers to the judgment in Case C-3/88 in which the Court held that Directive 77/62 applied even though the contracts concerned largely related to the provision of services. The Court stated:

> "The purchase of the equipment required for the establishment of a data-processing system can be separated from the activities involved in its design and operation. The Italian Government could have approached companies specializing in software development for the design of the data-processing systems in question and, in compliance with the directive, could have purchased hardware meeting the technical specifications laid down by such companies". (25)

37. The Italian Government has claimed that Directive 77/62 is not applicable to the invitation to tender in question. In support of that view it contends first that the invitation does not relate to a public supply contract within the meaning of the directive and second that the contract in question is not being concluded by an authority whose contracts are covered by the directive.

38. It has stated that in its view the invitation to tender concerns a concession to carry out a public service and thus not the supply of goods to the Italian contracting authorities.

As I have explained above, I do not believe that the invitation to tender at issue concerns the concession for the provision of a public service since the company or companies which are awarded the contract in question are not assigned the power to conduct the lottery but are only given the task of carrying out the activities of a technical nature relating to the establishment and operation of the computerized system. Accordingly, even after the introduction of the computerized system it will still be the public administration which is in fact responsible for the provision of the public service constituted in the Italian Government' s view by the conduct of the lottery. I

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therefore consider that it may be presumed that the invitation to tender concerns on the one hand the provision of services for the public administration and on the other the supply of certain goods for the latter.

39. But, as the Italian Government rightly points out, the characteristic of this tendering procedure is that ownership of the goods in question passes to the public administration only after the expiry of the nine-year operating period and that the consideration for those goods is part of the percentage of the revenue from the lottery which constitutes the consideration for the contract as a whole. It must therefore be examined whether a contract having such a content meets the conditions to be a public supply contract within the meaning of Directive 77/62.

40. Article 1 of Directive 77/62 was amended by Directive 88/295 with the result that public-supply contracts no longer cover only contracts "for delivery of the products" but are contracts "involving the purchase, lease, rental or hire purchase with or without option to buy, of products".

The effect of the amendment is that a number of contracts whereby products are provided for the public administration fall within the scope of the directive whether or not they involve a purchase in the narrow sense. According to the preamble to the amending directive it is necessary to make possible stricter enforcement of the prohibition of restrictions on the free movement of goods and to develop the conditions of effective competition for public-supply contracts. It may be presumed that the object of the aforesaid extension of the scope of the directive is inter alia to ensure that the contracting authorities cannot avoid the duty to comply with the rules under the directive by making the content of contracts giving the public administration the right to make use of certain products such that they cannot be defined as supply contracts in the traditional sense.

Clearly, following the amendment of the directive the question whether the public administration acquires the right of ownership of the goods in question is no longer conclusive for the existence of a supply contract within the meaning of the directive. Thus agreements for rental of goods, with or without option to buy, will fall within the scope of the directive. The fact that ownership of the products covered by the invitation to tender in question does not pass to the public administration until after the nine-year operating period is not of conclusive significance.

It is also plain that the question whether there is a close connection between the consideration and the value of the products in question is not conclusive for the existence of a supply contract. Thus even in the case of contracts involving leasing or rental, with or without an option to buy, it will be necessary to determine an abstract consideration and, for the purposes of appraising whether the threshold values set out in the directive are reached, it will be necessary to make an assessment of the total consideration. (26) I therefore consider that conclusive significance cannot attach to the fact that the consideration for the use of the products necessary for computerizing the lottery was fixed in the aforesaid manner.

The actual situation under the invitation to tender at issue is, in my view, that the public administration has placed at its disposal the necessary hardware and any basic software for the purposes of computerization with a view to the conduct of the lottery. I consider that a contract of that nature does fall within the scope of Directive 77/62 as that scope is defined following the adoption of Directive 88/295. That result is not affected, in my view, by the fact that the award relates at the same time to the service of developing special software and commissioning and operating over a nine-year period the whole computerized system, including the servicing and operation of the aforesaid products.

I would finally point out in this connection that the practical significance of the present issues has diminished somewhat as from 1 July 1993 which was the time-limit for the implementation by the Member States of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts. (27) Article 2 thereof provides that the

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directive applies to public contracts covering both products and services "if the value of the services in question exceeds that of the products covered by the contract".

41. In the alternative the Italian Government claims that in any event it is only Article 2(3) of Directive 77/62 which applies to the invitation to tender in question. Article 2(3) provides:

> "When the State... grants to a body other than the contracting body ... special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public-supply contracts to third parties".

In support of its view the Italian Government further states that the invitation to tender concerns the grant to a concessionaire of a special right to provide services, namely part of the power to conduct a lottery. That view is untenable. The provisions of Directive 77/62 to which the Commission' s claim relates are applicable to this invitation to tender for the computerization of the lottery because the legal relationship between the contracting authorities and the concessionaire does not involve the transfer of the power to conduct a lottery but ° in addition to the provision of services ° the supply of products to the public authority which does conduct the lottery.

42. The Italian Government has further claimed that pursuant to the decree on the award of the concession for the computerization of the lottery the contract is to be concluded by the AAMS and that contracts concluded by that authority are not covered by the directive. In this connection it points out that:

° AAMS is not included in the list of contracting authorities referred to in Article 1(1) of Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62, (28) and

° Footnote 2 to the aforesaid list, which shows that the Italian Finance Ministry is included amongst the purchasing institutions except as regards purchases made by the tobacco and salt monopolies, is intended to exclude all contracts concluded by the AAMS since the only reason why the lottery is not expressly mentioned is that at the time when that directive was adopted the lottery was not administered by the AAMS.

43. I do not believe that we can be swayed by those arguments. The Commission has claimed, and this has apparently not been disputed by the Italian Government, that the AAMS is merely an administrative body under the authority of the Finance Ministry and acts that are formally attributable to the AAMS are therefore in reality within the ambit of that Ministry. Moreover, Article 4(4) of the Law on the lottery itself designates the Finance Ministry as the contracting authority. (29)

The derogation in Footnote 2 as regards the tobacco and salt monopoly cannot be extended to the lottery. There is nothing to suggest that the intention of the Community legislature was that all areas administered by the AAMS should be excluded from the scope of the directive. On the contrary, as the Commission has emphasized, there are grounds for assuming that that footnote serves a particular purpose linked to the special circumstances of the tobacco and salt sector. To hold the contrary would moreover signify that activities could be kept outside the scope of the directive merely by entrusting the administration thereof to the AAMS. Furthermore, Italy itself mentioned the AAMS on the lists sent to the Commission and GATT of public institutions which are referred to in the directives.

44. On the basis of the foregoing I consider that Directive 77/62 is applicable to the invitation to tender in question. The condition at issue whereby participation in the tendering procedure is actually confined to Italian undertakings is undoubtedly contrary to Articles 17 to 25 of the directive which lay down rules on participation and criteria for qualitative selection. (30) However,

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I consider it questionable whether it serves any reasonable purpose to find that the condition entailing discrimination on grounds of nationality at issue, apart from being contrary to Articles 52 and 59 of the Treaty, is also contrary to Articles 17 to 25 of the directive.

The Italian Government has also not disputed that it failed to publish in the Official Journal of the European Communities on the one hand an indicative notice concerning the total procurement of a certain value within each product area which the Finance Ministry intended awarding during 1990 and on the other the actual notice of invitation to tender.

45. I shall therefore propose that the Court hold that Italy has failed to fulfil its obligations under Article 9(1), (2) and (4) and Articles 17 to 25 of Directive 77/62.

Conclusion

46. In the light of the foregoing I propose that the Court:

(1) declare that the Italian Republic has failed to fulfil the obligations incumbent upon it pursuant to Articles 52 and 59 of the EEC Treaty and Articles 17 to 25 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public-supply contracts, as amended by Council Directive 88/295/EEC, by providing, in connection with a tendering procedure for a system for computerizing the Italian lottery, that only bodies, companies, consortia and groupings the majority of whose capital, considered individually or collectively, was publicly owned, could take part in the tendering procedure;

(2) declare that the Italian Republic has failed to comply with the obligations incumbent upon it pursuant to Article 9 of Directive 77/62, as amended by Directive 88/295, by failing, at the beginning of 1990, to make known, by means of an indicative notice, the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 and which the Finance Ministry envisaged awarding during 1990 and by failing to publish in November 1990 a notice of invitation to tender in the Supplement to the Official Journal of the European Communities for a system for computerizing the lottery;

(3) for the rest, dismiss the proceedings against the Italian Republic; and

(4) order the Italian Republic to bear the costs.

(*) Original language: Danish.

(1) - The game of Lotto in Italy is regulated by Law No 528 of 2 August 1982, Ordinamento del gioco del lotto e misure per il personale del lotto, as amended by Law No 85 of 19 April 1990, and by implementing regulations adopted in Decree No 303 of the President of the Italian Republic of 7 August 1990.

(2) - Council Directive of 21 December 1976, OJ 1977 L 13, p. 1.

(3) - Council Directive of 22 March 1988, OJ 1988 L 127, p. 1.

(4) - Order in Case C-272/91R Commission v Italy 1992 ECR I-457.

(5) - See paragraphs 7 to 13.

(6) - Case C-3/88 Commission v Italy [1989] ECR 4035.

(7) - See paragraphs 8 and 9.

(8) - By application lodged at the Court on 2 December 1991 the Commission brought proceedings against Italy for the latter' s failure to implement the judgment of the Court in Case C-3/88. The Italian Government subsequently stated that the legislative provisions that were contrary to Community law were abrogated by Article 15 of Law No 142 of 19 February 1992 whereupon the

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Commission withdrew its application.

(9) - The Italian Government has pointed out that the invitation to tender, the decree regarding the award of the concession and the special conditions for the tender all refer to a concession and that the Tribunale Amministrativo Regionale of Lazio has recognized in a decision of 8 July 1991 that the agreement in question relates to a concession for the provision of a public service and has stated in that connection inter alia that the key component of the agreement is the operation of the computerized system while the provision of supplies is of only secondary importance.

(10) - See in this context Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1), Article 1(d) of which provides public works concession is a contract of the same type as [public works contracts] except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment.

(11) - This view signifies inter alia that it is not necessary in these proceedings for the Court to rule on whether the conduct of a lottery can be characterized as the provision of services within the meaning of Article 59 of the Treaty. That question is the subject of proceedings currently pending for a preliminary ruling in Case C-275/92 Schindler in which the Court has been asked to rule whether a lottery is to be defined as trade in goods within the meaning of Article 30 of the Treaty or provision of services within the meaning of Articles 59 and 60 of the Treaty.

(12) - See paragraph 13.

(13) - See judgment in Case 147/86 Commission v Greece [1988] ECR 1637, paragraph 7, and judgment in Case 2/74 Reyners [1974] ECR 631, paragraph 43.

(14) - The Commission has stated that at the moment the registration points for the lottery... are located at certain selling points under a form of monopoly (tobacconists) and at the offices of approved lottery collectors which... are operated by private concessionaires (emphasis added).

(15) - Under Article 5(2) of Law No 528, the Area Committee is appointed by the intendente di finanza (director of the office of the Finance Ministry in the province in question) and consists of a representative of the Amministrazione finanziaria, who acts as president, and two officials from the Ministero del Tesoro and from the Amministrazione autonoma dei monopoli di stato....

(16) - Under Article 6(3) of Law No 528, the Area Commission shall decide on the coupons to be excluded from the draw by decisions that are published in the Bollettino ufficiale in the area in question. Stakes made against coupons which are excluded from participation in the draw shall be forfeit unless reimbursement is sought within one month of such publication.

(17) - Under Article 7 of Law No 528, as amended by Law No 85, draws are to be carried out once a week by the department of the Finance Ministry in each of the provincial capitals which are designated as places for draws in Article 2(1) by a committee consisting of the intendente di finanza or his representative, who shall preside, an official from the Ministero di Tesoro and an official from the Amministrazione autonoma dei monopoli di Stato.

(18) - Under Article 11 of Law No 528, the Area Committee referred to in Article 5 carries out a check of the coupons and confirms the winning coupons in accordance with the lists supplied by the processing centre...

Any player in possession of a coupon taking part in the draw in the area in question may submit a complaint against the decision of the Area Committee...

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The Committee shall take decisions concerning complaints....

Proceedings against decisions of the Area Committees may be brought ... before the Central Lottery Committee....

The Central Committee shall be designated by a decree of the Minister of Finance and shall consist of the Director-General of the Direzione generale delle entrate speciali (Director-General for Special Revenue), who shall preside, two officials from the same directorate-general, one official from the Ministero de Tesoro and one official from the Amministrazione Autonoma dei Monopoli di Stato....

(19) - Winnings of less than LIT 1 250 000 are to be paid by the lottery agent who received the stake. Point 4.8 of the technical programme sets out a number of circumstances which that agent must check before paying out winnings and in this connection also details certain functions that must be carried out by the automated system. For winnings in excess of that amount, requests for payment are to be submitted to the Intendenza di Finanza, which is the representative of the Finance Ministry in the various provinces or the Ispettorato Compartimentale dei Monopoli di Stato, which is a local body under the authority of the AAMS and are subsequently forwarded to the Direzione Generale Monopoli di Stato, which is also subject to the AAMS.

(20) - The Commission is probably right in pointing out that the development of new software must be regarded as the provision of services.

(21) - In this connection the Commission has stated that it is clear from the Court' s case-law that measures which are potentially such as to hinder trade between Member States are incompatible with Article 30 of the Treaty and it is not necessary for the measures to have an appreciable effect on trade between the Member States. In support of that view it referred inter alia to the judgments in Case 8/74 Dassonville [1974] ECR 837, Case 16/83 Prantl [1984] ECR 1299 and Case 124/85 Commission v Greece [1986] ECR 3935.

(22) - Case C-21/88 Du Pont de Nemours [1990] ECR I-889.

(23) - The Commission states that the reason why it did not assert an infringement of Article 30 of the Treaty in Case C-3/88 was that the judgment in Du Pont de Nemours was not given until after it had initiated the proceedings in Case C-3/88.

(24) - It has been stated in these proceedings that two of the three tenderers selected were Italian subsidiaries of foreign producers of data-processing systems while the Lottomatica consortium includes on the one hand Ing. C. Olivetti & C. SpA which produces both hardware and software, and on the other Sogei SpA which develops software specifically designed for computerization within the public sector.

(25) - Paragraph 19.

(26) - For the sake of completeness it should be noted that the Italian Government has not claimed that the threshold values set out in the directive were not reached. It seems to me clear, therefore, that they were reached.

(27) - OJ 1992 L 209, p. 1.

(28) - OJ 1980 L 215, p. 1.

(29) - Article 4(4) of Law No 528 of 2 August 1982, as amended by Law No 85 of 19 April 1990, provides: The Finance Ministry shall establish ... after hearing the Amministrazione Autonoma dei Monopoli di Stato, by means of an invitation to tender (appalto-concorso), a system for computerizing the lottery....

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(30) - For a more detailed consideration of those provisions see my Opinion of 30 June 1993 in Case C-71/92 Commission v Spain, points 63 to 67 (not yet published in the ECR).

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1991 ; C ; opinions
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JURCIT	11957E030 : N 26 - 35 11957E052 : N 5 - 25 11957E055 : N 13 - 24 11957E059 : N 5 - 25 11957E066 : N 13 - 24 31971L0305 : N 10 31977L0062-A01 : N 40 31977L0062-A02P3 : N 41 31977L0062-A09P1 : N 45 31977L0062-A09P2 : N 45 31977L0062-A09P4 : N 45 31977L0062-A17 : N 44 45 31977L0062-A25 : N 44 45 31977L0062 : N 36 - 45 31988L0295 : N 40 61988J0003 : N 5 - 24 36 61988J0021 : N 26 29 31989L0440-A01LD : N 10 31989L0440 : N 10 31992L0050-A02 : N 40 31992L0050 : N 40
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws
AUTLANG	Danish

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APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Gulmann
JUDGRAP	Moitinho de Almeida
DATES	of document: 14/07/1993 of application: 18/10/1991

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Opinion of Mr Advocate General Lenz delivered on 6 February 1992.
Commission of the European Communities v Kingdom of Spain.
Directive 71/305/CEE - Awarding of public contracts - Advertising of contracts - Derogation in urgent cases.
Case C-24/91.

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Mr President,

Members of the Court,

A - Introduction

1. In the present action for a declaration that the Kingdom of Spain has failed to fulfil its obligations under the Treaty, the Commission complains that the relevant provisions of Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts (1) were disregarded in the award of a building contract for extending the capacity of the Universidad Complutense, Madrid.

2. In early 1989, the university' s governing council awarded a contract for the extension and renovation of the Faculty of Political Science and Sociology and the School of Social Work by a private contract procedure.

3. The Spanish Government defends the course of action taken by the university authorities on the ground that the urgent nature of the work to be carried out meant that it was impossible to comply with the time-limits laid down in the directive. The funds necessary to initiate a tendering procedure were made available in January 1989. The architect in charge estimated the time required for the work at seven and a half months. Since the work had to be completed by the beginning of the 1989-1990 academic year on 1 October 1989, there was no time to lose. The factual circumstances met the conditions for the operation of the derogating provision in Article 9(d) of the directive, which allows authorities awarding contracts not to comply with the provisions of the directive "in so far as is strictly necessary when, for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time limit laid down in other procedures cannot be kept".

4. The Commission takes the view that the conditions for the application of that derogating rule are not met. Even if it were accepted that there was an urgent need to award the contract, it would still have been possible to comply with the shorter form of the award procedure laid down in Article 15 of the directive.

5. The Commission, the applicant, claims that the Court should:

Declare that, inasmuch as the governing council of the Universidad Complutense, Madrid, decided to award contracts for works connected with the extension and renovation of the university' s Faculty of Political Science and Sociology and the School of Social Work by private contract, omitting thus to publish a notice of invitation to tender in the Official Journal of the European Communities, the Kingdom of Spain has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, especially Article 9 and Articles 12 to 19 thereof; and

Order the Kingdom of Spain to pay the costs.

6. The Kingdom of Spain, the defendant, contends that the Court should:

dismiss the Commission' s application; and

order the Commission to pay the costs.

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7. Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the legal background and the submissions and arguments of the parties.

B - Opinion

1. Admissibility

8. Although the Spanish Government has not raised an objection of inadmissibility, a few preliminary considerations concerning the admissibility of the application are indicated.

9. In an action for failure to fulfil Treaty obligations, it is essential to establish whether the defendant State may be held responsible for the offending conduct. The problem arises in particular when the State uses the machinery of private law in carrying out its functions. In such cases the possibility of State influence must be established positively. (2)

10. The situation is different where the conduct of a primary State authority is concerned. The Member State is thus responsible, vis-à-vis the Community, for independent bodies even where there is no provision for direct Government intervention in specific areas of conduct.

11. A State university, even if independent from an organizational point of view, is as a rule a State institution. The type of "legal person governed by public law" chosen by the Member State when setting up the university is therefore not so very important. The State may therefore be held responsible, in the context of an action for failure to comply with Treaty obligations, for legal acts of the university.

12. That view is supported by the definition of the persons covered by Directive 71/305, in Article 1(b). Under that provision, "authorities awarding contracts" are to include "the State, regional or local authorities and the legal persons governed by public law specified in Annex I", which are, in Spain, "other corporate bodies subject to public rules for the award of contracts". (3) The fact of being subject to public contract award rules is in itself evidence that the awarding authority is a "public institution".

13. No doubts have been raised in the course of the action either as to the status of the university as a legal person governed by public law or as to the applicability of the directive, so we may proceed on the assumption that responsibility for the conduct complained of may be ascribed to the defendant Member State.

Merits of the application

14. The works contract in issue, with a value of PTA 430 256 250, falls in principle, under Article 7, within the scope of the directive. The fact that the threshold value for the applicability of the directive was increased by Directive 89/440 from ECU 1 000 000 to ECU 5 000 000 is of no consequence in the present action, since that increase did not take effect until after the events in issue.

15. Since it may be assumed that the directive is in principle applicable, the question arises whether there are sufficient grounds to justify a derogation from the provisions governing the award of contracts. Because the directive itself not only sets out, in Article 9, the circumstances in which a derogation is possible but also offers, with the accelerated procedure, a course of action for exceptional circumstances, any departure from the general rules on publication must be confined within the limits laid down by the directive for derogations.

16. The Commission takes the view that, since the funds were made available without difficulty in January 1989, the university could have initiated the tendering procedure earlier. The Spanish Government denies that view, and points out that a tendering procedure cannot be initiated until the relevant budget heading has been definitively confirmed in the Budget Law. The parties differ

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strongly in their views concerning the measures which would, depending on the circumstances, have at least cleared the way for an earlier award of the contract.

17. From this point on, I wish to base my consideration on the most favourable version of the facts for the defendant Member State, so I shall assume here that the tendering procedure could not have been initiated until the funds had been definitively made available.

18. It has not been possible conclusively to ascertain the exact date on which the funds were made available. The earliest point of reference is 9 February 1989, when the governing council of the Universidad Complutense gave its approval for the building work in issue to be carried out. The question whether any delay occurred between the date on which the funds were definitively made available and the meeting of the governing council on 9 February 1989 must remain open.

19. Since the derogating provision of Article 9(d) of the directive, which may be relevant, is applicable only when, for the reasons specified therein, "the time limit laid down in other procedures cannot be kept", it must first be determined whether the directive makes provision for an appropriate response.

20. The Commission has pointed out that the accelerated procedure under Article 15 of the directive could have been used. Under the restricted procedure, the time limits for the invitation to tender would then have been as follows: the notice in the Official Journal of the European Communities would have had to be published, in accordance with Article 12 of the directive, not later than five days after the date of dispatch. The time limit for the receipt of requests to participate would then have been twelve days under Article 15 of the directive, again calculated from the date of dispatch of the notice, so that it would not have been necessary to add the five-day time limit for publication to those twelve days. Under the restricted accelerated procedure, there is a further time limit for the receipt of tenders of ten days from the date of the invitation to tender. At least 22 days must therefore be allowed from the date of dispatch of the notice to the Official Journal of the European Communities to the final date for the receipt of tenders. A slight delay may occur because the request to submit a tender is dispatched after the period allowed for the submission of a request to participate.

21. The question whether the procedure thus described really enables outside tenderers to participate may be left undecided. In any event, from a purely arithmetical point of view, the accelerated procedure could have been applied in the present case.

22. The governing council of the university decided on 9 February 1989, a Thursday, to have the work carried out. The principal' s office could then without difficulty on the following Friday, 10 February 1989, have initiated the measures necessary for the publication of the invitation to tender and if necessary complied with any further administrative requirements.

23. In fact, it was not until 27 February, two and a half weeks after the governing council' s decision, that the principal' s office took its decision and ordered publication. The Spanish Government has not been able to give any convincing explanation for that two-and-a-half-week delay. Mention has been made of administrative technicalities, but no more detailed explanation has been forthcoming.

24. In a case where speed is of the essence it must be possible to make advance allowance for administrative technicalities in such a way that they do not engender further delay. Thus, if it could be confidently expected that the funds would shortly be made available in the Budget Law - and even the date on which the Budget Law would be adopted was foreseeable - then administrative preparations for the tender procedure could have been made, even though it could not yet formally be initiated.

25. The report of the head of the design office, to be found in Annex IV to the reply, concerning the urgent nature of the work could quite clearly have been obtained before the governing council

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reached its decision - it was not necessary to wait until 12 February 1989.

26. If we now assume that there was no further delay in dealing with matters after the decision of 9 February 1989, and even if 10, 11 and 12 February are also disregarded, the 22-day period necessary for the completion of the accelerated procedure would have expired on 6 March 1989, the very day on which the actual time-limit for the receipt of tenders pursuant to the announcement of 27 February 1989 did expire. It cannot therefore be claimed that compliance with the procedure laid down in the directive would have led to any delay in carrying out the work.

27. Consideration of the conditions for the application of the derogation under Article 9(d) is therefore only of academic interest. Article 9(d) of the directive makes it a condition that "for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time limit laid down in other procedures cannot be kept". In my Opinion in Case 199/85 I took the view that a strict interpretation is in principle necessary, and that the conditions of that paragraph must all be satisfied. (4) Therefore, if any one of the material criteria is not met, then the derogating provision cannot apply. Even though in Case 199/85 the situation as regards the urgent nature of the work was different from that in the present case, that makes no difference to the validity of the abstract interpretation of the provision.

28. In its judgment in that case, the Court ruled on the interpretation of Article 9(d), holding that the derogation was to be interpreted strictly. (5)

29. It may well be that at the beginning of 1989 the increase in the number of students compared to the limited space available was seen as an urgent and compelling reason to take steps to expand capacity. But the number of new enrolments was not a sudden and unforeseeable occurrence which took the university by surprise and obliged it to take immediate steps. It may be accepted that a steady increase in student numbers will lead at a given moment to an untenable situation. Such developments are, however, in no way unpredictable. Nor can the precise number of new enrolments be the determining factor, since slight fluctuations are unlikely either to improve or significantly to aggravate the overall situation. In February 1989, moreover, the new enrolments for the 1989-1990 academic year had not yet been registered. That would not be done until July 1989, so that at the beginning of the calendar year any calculations concerning new entries could be made only on the basis of estimates. As far as the increasing gravity of the situation is concerned, therefore, there can be no question of events unforeseen by the authority awarding the contract.

30. As regards the appropriation of the funds, it should be stressed that a tendering procedure cannot be implemented until the funds have been definitively made available. Nevertheless, the funds allocated to the contract in the supplementary budget by the Budget Law did not constitute an unforeseeable event either, so that the university authorities - faced with a difficult situation - were under a clear duty to make careful preparation and deal with the matter without undue delay.

31. In that connection, the Spanish Government has claimed that the allocation of the funds need not necessarily be classed as an unforeseeable event, but in the present case as unforeseen. Only when the event actually took place was it possible to attach any consequences thereto.

32. It must first be pointed out in that regard that such an interpretation of Article 9(d) of the directive is contradicted by the wording of the provision. It also runs contrary to the aim of the measure, which is to establish an objective standard for the applicability of the derogation. The criterion of foreseeability is a standard measure for the degree of care incumbent on an authority awarding a contract in the event of aggravating circumstances. The authority is therefore released from its duty to ensure compliance with the provisions of the directive only if the events in question are objectively unforeseeable.

33. It follows from all the foregoing that the university authorities' misconduct as regards their

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obligations under Directive 71/305 has been established. Judgment must therefore be given against the defendant Member State in accordance with the application.

C - Conclusion

34. I propose that the Court should:

1. Declare that, inasmuch as the governing council of the Universidad Complutense, Madrid, decided to award contracts for works connected with the extension and renovation of the university' s Faculty of Political Science and Sociology and the School of Social Work by private contract, the Kingdom of Spain has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts; and

2. Order the Kingdom of Spain to pay the costs of the proceedings.

(*) Original language: German.

(1) - Council Directive of 26 July 1971 (OJ, English Special Edition 1971 (II), p. 682), amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1) which in particular raised the threshold value from which contracts are subject to the directive from ECU 1 000 000 to ECU 5 000 000.

(2) - See Case 249/81 Commission v Ireland [1982] ECR 4005, Case 222/82 Apple and Pear Development Council v Lewis [1983] ECR 4083 and the judgment of 11 July 1991 in Case C-247/89 Commission v Portugal, not yet published, especially point 15 et seq. of the Opinion.

(3) - Directive 71/305 as completed by the Act of Accession of Spain.

(4) - Case 199/85 Commission v Italy [1987] ECR 1039, point 36 of the Opinion at p. 1054.

(5) - Case 199/85, cited above, paragraph 14.

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FORM	Conclusions
TREATY	European Economic Community
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DOC	1992/02/06
LODGED	1991/01/23
JURCIT	31971L0305-A01LB : N 12 31971L0305-A07 : N 14 31971L0305-A09 : N 15 31971L0305-A09LD : N 3 19 27 28 32

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31971L0305-A12 : N 20
31971L0305-A15 : N 4 19
31971L0305 : N 1
61981J0249 : N 9
61982J0222 : N 9
61985C0199 : N 27
61985J0199 : N 27 28
31989L0440 : N 14
61989J0247 : N 9

SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Spain ; Member States
NATIONA	Spain
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Kapteyn
DATES	of document: 06/02/1992 of application: 23/01/1991

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Opinion of Mr Advocate General Lenz delivered on 26 February 1992.
Commission of the European Communities v Italian Republic.
Failure of a Member State to fulfil obligations - Public supply contracts - Admissibility.
Case C-362/90.

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Mr President,

Members of the Court,

A - Introduction

1. In the present Treaty infringement proceedings the Commission claims that the Unità Sanitaria Locale (Local Health Authority, hereinafter referred to as "the USL") XI, Genoa 2, has infringed Directive 77/62/EEC coordinating procedures for the award of public supply contracts. (1) The USL published on 10 October 1988 an invitation to tender for the supply of several products in the course of 1989, including beef valued at LIT 5 800 000 000. The invitation laid down a minimum condition for admittance to participate in the invitation to tender, namely that the potential tenderer should have supplied identical products to the value of six times the value of each supply requested, 50% of that amount to be made up of supplies to public administrative authorities. The Commission considered that condition to be contrary to Community law. The invitation to tender lapsed on 31 December 1989.

2. The Italian Government responded to the application to the Court by defending itself on a number of levels. First, in the defence, it suggested that the application be withdrawn because the contested clause produced no effects, after the expiry, at the end of 1989, of the invitation to tender and subsequent invitations to tender did not include it. In the further course of the written procedure the defendant Government formally raised an objection of inadmissibility on the ground that when the reasoned opinion was delivered in March 1990, and thus necessarily before the expiry of the period set therein, there was no longer any infringement.

3. The Italian Government also took the view that a Member State could not be charged with infringement of a directive by a public body where the directive had been duly transposed into domestic law. That State thus complied with its obligations under Article 189 of the EEC Treaty. Furthermore national implementing provisions have precedence over a directive with the result that legal protection against any infringements can be granted only within the framework of national law.

4. As regards the substantive content of the action, the Italian Government contends that the contested clause is not an unlawful criterion for exclusion but merely one factor in assessing the evidence, in accordance with the directive, of the technical capacity of the potential tenderer.

5. The Commission claims that the Court should:

- declare that, since the USL imposed a requirement that 50% of the minimum quantity of goods required to have been supplied over the last three years to enable tenderers to participate in a tendering procedure had been supplied to public administrations, the Italian Republic has failed to fulfil its obligations under EEC Council Directive 77/62 of 21 December 1976 coordinating procedures for the award of public supply contracts;

- order the Italian Republic to pay the costs.

6. The Italian Government contends that the Court should:

- dismiss the action;

- order the Commission to pay the costs.

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In its rejoinder it contends that the Court should:

- declare the action inadmissible.

7. Reference is made to the Report for the Hearing for the facts of the case, the legal background and the arguments of the parties.

B - Observations

1. Admissibility

8. Only in the rejoinder did the Italian Government formally apply for the action to be dismissed as inadmissible, so that the question arises whether this was sufficient for that application by the defendant to be considered as a proper one made in due time.

9. First, the defendant Government has already put forward in the defence all the arguments which in its view lead to the inadmissibility of the action. Secondly, in the defence to the application it contended the action should be dismissed. That contention also contains the request that the action should be dismissed as inadmissible. The applicant had an opportunity in its reply to deal with the defendant' s arguments. Finally, the admissibility of an action is a matter which it is for the Court to examine of its own motion. On those grounds there is no reason not to consider objections of inadmissibility because they are pleaded belatedly.

10. The application could be inadmissible in the present case because, as the Commission admitted at the hearing, the reasoned opinion in the preliminary procedure was delivered only in March 1990 and therefore, on the expiry of the period stipulated in the reasoned opinion for putting an end to the infringement of the Treaty, the alleged infringement, through the invitation to tender for 1989, could no longer have existed. Furthermore the contested clause was no longer included in the invitations to tender for 1990 and 1991.

11. Pursuant to the second paragraph of Article 169 of the EEC Treaty it is a condition for bringing an action that an infringement of the Treaty should exist after the period laid down in the reasoned opinion. According to the case-law, (2) which has to be read as being to that effect, there is no legal interest in a declaration by the Court of an infringement of the Treaty if the infringement has been terminated before the expiry of that period. That case-law is consistent with the ratio of the preliminary procedure, which is aimed at bringing about the termination of the Treaty infringement before the proceedings before the Court. Accordingly there is in principle no interest in obtaining a declaration of infringement of the Treaty if the infringement had already ceased on the expiry of the period laid down in the reasoned opinion.

12. The case-law relating to the positive finding of an interest in bringing proceedings in the context of the action for failure to fulfil Treaty obligations (3) (such as possible obligations to compensate on the part of the defendant Member State vis-à-vis other Member States of the Community or individuals who are affected) applies only where the alleged infringement of the Treaty was terminated after the expiry of the period laid down in the reasoned opinion. Accordingly, where the infringements were terminated before that period there is in principle no ground for considering that there is an interest in pursuing the action.

13. The only exceptions to that rule are in cases of seasonal infringements (4) where, because of its purpose and legal nature, the infringement of the Treaty is confined to a limited period (as for example in the case of the import and export restrictions introduced on a seasonal basis for the protection of national traders) and where, because of this, the conduct of the procedure prior to the actions for failure fulfil obligations is made, purely in terms of time, more difficult, if not altogether impossible.

14. In my opinion in the present case there is no reason for considering whether it is possible

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to apply such an exception, even though the contested clause in the invitation to tender was from the outset limited in time, because that period was so calculated that the proper conduct of the Treaty infringement procedure was possible without any difficulty in relation to time: the invitation to tender was published on 10 October 1988 and ceased to have effect at the end of 1989. A period of almost 15 months was therefore available for action to be taken against the irregularities in the context of a pre-litigation procedure.

15. If it is borne in mind that the Commission gave the defendant Member State only 14 days to answer each of its letters in the pre-litigation procedure (the warning letter of 10 September 1989 and the reasoned opinion of 27 March 1990), it cannot be said that work on the case demanded exceptionally long periods, for example, on account of enquiries which had to be made or the complexity of the problem.

16. Since it was objectively possible, without any difficulty, to conduct the procedure prior to the bringing of an action for the infringement of the Treaty during the 15 months in which the invitation to tender was valid, there is no discernible reason to depart from the rule that there must be an infringement of the Treaty after the period laid down in the reasoned opinion has expired. The action must therefore be regarded as inadmissible.

17. At the hearing on 16 January 1992 the Commission submitted that the reasoned opinion of 27 March 1990 was actually a second opinion. The first reasoned opinion had been delivered on 17 August 1989. Since the defendant Government replied to the warning letter, after considerable delay, only on 30 June 1989, a reply received by the Commission on 6 July 1989, and since the content of that reply could not be taken into account in the drafting of the reasoned opinion of 17 August 1989, the Commission considered it expedient to draft a second opinion to take account of all the objections of the Italian Government. The delay in the preliminary procedure was therefore attributable to the defendant Government.

18. The first question which arises in considering those arguments is whether the factual matters put forward for the first time at the hearing can at all be taken into account.

19. Article 42 of the Rules of Procedure provides:

> "1. In reply or rejoinder a party may offer further evidence. The party must, however, give reasons for the delay in offering it.
>
> 2. No new plea may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.
>
> ...
>
> The decision on the admissibility of the plea shall be reserved for the final judgment."

20. The reasoned opinion directed to the defendant Member State on 17 August 1989 is certainly not a fact which first came to light in the course of the written procedure. The proper conduct of the preliminary procedure is a prior condition for the admissibility of an action for failure to fulfil Treaty obligations under Article 169 of the EEC Treaty and the burden of proving this lies on the Commission. From the outset the Commission relied only on the reasoned opinion of 27 March 1990. Only when the Court enquired about the subject-matter of its action against the background of the reasoned opinion issued on 27 March 1990 and the commencement of the action on 11 December 1990 did the Commission find itself compelled to mention the previous reasoned opinion. The Court' s question can scarcely be regarded as a "matter of law" within the meaning of Article 42(2) of the Rules of Procedure, establishing the relevance of the plea.

21. I am therefore of the opinion that all the submissions on the alleged first reasoned opinion should be dismissed as out of time, and thus inadmissible, so that the inadmissibility of the action

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as already found remains.

22. Assuming however, for the sake of argument, that the Commission' s arguments are to be regarded a relevant defence, it is difficult to imagine why no account of the objections of the Italian Government in its letter of 30 June 1989, which was received by the Commission on 6 July 1989, could be taken in the opinion of 17 August 1989, although there was a period of six weeks for consideration, while the Italian Government was in each case given only 14 days to reply to the warning letter and the reasoned opinion. I cannot understand why in those circumstances the delivery of a second opinion in March 1990 was the fault of the Italian Government. In my view the Commission alone is responsible for the delay in dealing with the matter in general and, in particular, for the reasoned opinion of 27 March 1990, so that there was no interest in bringing the action because the alleged infringement was terminated before the expiry of the period prescribed in the reasoned opinion.

23. Since the action must thus be dismissed as inadmissible, the following considerations concerning its merits are set out only in the alternative.

2. The merits

(a) The scope of the obligations of a Member State in transposing and applying directives

24. The Italian Government argues, as against the infringement with which it is charged, that once a directive has been properly transposed into domestic law the domestic rules prevail both as regards substantive provisions and as regards legal protection.

25. In the preliminary procedure the defendant Government put forward the defence, in its reply of 30 June 1989, that the contested clause was consistent with the measure implementing Directive 77/62. In the course of the subsequent procedure its premise has always been that the directive had been correctly transposed.

26. The objections of the Italian Government call for a discussion of the extent of the duties of a Member State in transposing and applying directives. The defendant Government is certainly wrong in its view that a Member State, on duly transposing a directive into domestic law, has performed all its duties under Article 189 in implementing Community law. Formal transposition is only one of the obligations of Member State under Community law. In addition, Member States are required to give effect, in their national legal systems, to the objectives of the directive, not only in the abstract by means of legislative measures, but also in a concrete manner. This duty to ensure that a directive is "fully effective" (5) concerns first and foremost all State authorities. It follows, on the one hand, directly from Article 189 of the EEC Treaty and, on the other hand, from Article 5, which requires Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Community.

27. It is against the background of those obligations that it is necessary to respond to the Italian Government' s objection that only in the reply did the Commission submit that the Italian Government had not only to transpose Directive 77/62 into Italian law but also to ensure that it was fully effective. That, according to the Italian Government, is a different plea from those put forward in the reasoned opinion and the application and is therefore one which should be rejected as being out of time.

28. According to the Commission, it was the specific infringement by USL - Genoa' s invitation to tender which was from the outset the subject of the proceedings. It was only in response to the Italian Government' s plea in defence in the proceedings before the Court, namely that after transposing the directive correctly it had no further direct obligations, that the Commission referred to the continuing wider obligation which in its view lay on the Member State.

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29. This amounts to no more than an exposition of the Commission' s preliminary view of the law which prompted it to pursue the suspected infringement in the first place. There can therefore be no question of an extension of the subject-matter of the action or a new issue.

30. In principle directives partake of the primacy (6) of Community law. Where, therefore, after correct transposition, doubts arise in the interpretation of the national legal measure, the directive is always the decisive factor. In the event of belated or defective transposition, the Court has even, within the limits which it has set, (7) recognized that the provisions of a directive are directly applicable. (8)

31. If therefore, a discrepancy between the measure transposing the directive and the directive itself were to give rise to a question of infringement of the Treaty, as was suggested in the preliminary procedure, the sole criterion for the purpose would be the directive. In such a case the infringement of Community law would, irrespective of whether it led to specific proceedings for infringement of the Treaty, consist both in the defective transposition of the directive and in the application of the law in a manner contrary to the directive.

32. If, on the other hand the directive were correctly transposed, it would still be necessary, for the purpose of deciding whether there was an infringement of the Treaty, to take the directive as the criterion for interpretation. In any event, therefore, the question is whether, in the case of the USL' s contested invitation to tender, the provisions of Directive 77/62 were correctly applied.

33. A completely different question, which does not arise in the present case, is the legal consequences of a simple infringement of the national implementing provisions by independent persons. In so far as the acts of a State body are in question, the formal responsibility for the measure in the context of Treaty infringement proceedings must be held to lie with the Member State (9) and the authorities and institutions of the Member State must be considered to have a substantive obligation to ensure that effect is given to Community law. (10)

34. If in Treaty infringement proceedings the conduct of State bodies is generally a matter for review because the Member State is responsible vis-à-vis the Community also for those institutions which are organized on an independent basis, that is so a fortiori within the sphere of application of the directive concerning the coordination of procedures for the award of public works contracts. (11)

35. Article 1(b) of Directive 77/62 provides expressly that '" contracting authorities' shall be the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I".

36. The USL - Genoa 2, which issued the invitation to tender, is a municipal authority and it is not in dispute that it is a "contracting authority" within the meaning of the directive.

37. The judgment in Case 31/87, (12) on which both parties in the present proceedings rely, was concerned with the question whether the relevant authority in that case was to be regarded as a State authority in order to come within the ambit ratione personae of Directive 71/305/EEC on the coordination of procedures for the award of public works contracts. I have to agree with the Italian Government that the judgment in Case 31/87 was by way of a preliminary ruling, so that no decision was given on the responsibility of a Member State in the context of Treaty infringement proceedings in which it was alleged that there was an infringement of the provisions of Community law on invitations to tender. However, in view of the obligation, which I have already mentioned, of the Member State vis-à-vis the Community in the matter of implementing directives, it is necessary in principle to start from the premise that the acts of a State authority for the purposes of the directive fall within the area of responsibility of the Member State as regards the application

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of Community law. That consequence follows from the definition of the sphere of application ratione personae of the directive on the award of public contracts.

38. The defendant Government' s objections to the applicability of the directive as a criterion for determining whether there is an infringement of the Treaty are accordingly to be rejected.

(b) The relationship between the legal remedies in the Community and in the Member State

39. It is, finally necessary to consider he Italian Government' s argument that the legal remedies for a possible infringement of the provisions of Community law on invitations to tender are to be sought before the courts of the Member State and that in that case, the system of remedies provided by Community law play only an ancillary role.

40. In that respect it must be observed that there is no national legal remedy which could take precedence over Treaty infringement proceedings. In an action for failure to fulfil Treaty obligations the issue is always one of the relationship between the duties of the Member States and the Community. Nor is it possible to set up any general rule according to which the legal remedy afforded by Community law in principle takes second place. At most, it is in the context of actions for damages that situations are conceivable in which a subsidiary role might be accepted. It is also quite possible that a judgment declaratory of an infringement of the Treaty, given in the abstract, may have an effect in an action for damages by an injured party. (13)

41. There is therefore nothing to stand in the way of a substantive examination of the question whether the clause complained of is contrary to Community law. The question comes down to determining whether the condition that proof must be adduced that 50% of supplies have been made to public authorities represents an unlawful condition of participation.

(c) The infringement of Directive 77/62

42. Article 14 of Directive 77/62 provides:

"In restricted procedures, the notice shall include at least the following information:

...

(d) ... the information and formalities necessary for an appraisal of the minimum economic and technical standards which the contracting authorities require of suppliers for their selections; those requirements may not be other than those referred to in Article 20, 22 and 23."

43. According to Article 23 of the directive, evidence of the supplier' s technical capacity may be furnished by :

"...

(a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:

- where to public authorities awarding contracts, evidenced to be in the form of certificates issued or countersigned by the competent authorities;

- were to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the supplier to have been effected".

44. The provision lists the forms of evidence which may serve to prove the volume of contracts of an undertaking during a particular period in order that the necessary conclusions about technical capacity may be drawn. The wording of Article 14 of the directive in conjunction with Article 23 leads to the inference that the enumeration of the forms of proof of technical capacity is exclusive. The situation is different as regards the proof of the financial and economic capacity of the undertaking,

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but that is not relevant in the present case.

45. Article 23(1)(a) of the directive is concerned primarily with the volume of deliveries. The distinction between public authorities awarding contracts and private purchasers thus seems to have been made because different forms of proof are prescribed with respect to supplies to them.

46. Every minimum amount of deliveries to public authorities awarding contracts or private purchasers laid down in advance in an additional criterion and thus an extension of the requirements of proof laid down in the directive. This is so as regards both a minimum volume of supplies to a class of purchasers and evidence of an absolute minimum amount of supplies as proof of technical capacity, even if the latter is in certain circumstances permissible in connection with proof of financial and economic capacity pursuant to Article 22(1)(a), which, however, is something that need not be considered here.

47. The fixing of a particular percentage of the volume of supplies to public authorities is not, as the Italian Government contends, a question of assessment of the evidence, since from the outset all tenderers are excluded who have not provided the requisite minimum volume of supplies to public authorities. Assessment of the evidence takes place only at a later stage, that is, when the authorized tenderers have adduced evidence of supplies, and then in the selection procedure an assessment is made of the purchasers who have been supplied.

48. In the result, the clause complained of must therefore be regarded as an exclusionary criterion which is not provided for in the directive.

C - Proposal

49. I propose that the Court:

1. dismiss the application;

2. order the Commission to pay the costs.

(*) Original language: German.

(1) - Council Directive 77/62/EEC of 21 December 1976 (OJ 1977 L 13 p. 1).

(2) - Judgment in Case 52/84 Commission v Belgium [1986] ECR 89; judgment in Case 103/84 Commission v Italy [1986] ECR 1759, paragraph 6 et seq.: see also my Opinion in Case 103/84, Point B. 1. a.; judgment in Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 7 et seq.; judgment in Case 240/86 Commission v Hellenic Republic [1988] ECR 1835, paragraphs 15 and 16; see also my Opinion in Case 240/86, paragraph 7 et seq..

(3) - Judgment in Case 26/69 Commission v France [1970] ECR 565; see also the judgment in Case C-361/88 Commission v Germany, judgment in Case C-59/89 Commission v Germany, judgment in Case C-353/89 Commission v Netherlands [1991] ECR I-4069, and in Case 103/84, cited above.

(4) - Judgments in Case 240/86, cited above and in Case C-110/89, cited above.

(5) - Judgment in Case 14/83 von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, paragraph 15.

(6) - See the Opinion of Mr Advocate General van Gerven in Case C-106/89, point 9.

(7) - In the case of unconditional and sufficiently precise provisions, see the judgments in Case 148 Pubblico Ministero v Ratti [1979] ECR 1629 and in Case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53.

(8) - As regards the legal effects of a directive in domestic law, see the judgment of the Bundesverfassungsgericht (Federal Constitutional Court) of 28 January 1992 on the prohibition of night work for women

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- 1 BvR 1025/82 - 1 BvL 16/83 - 1 BvL 10/91.

(9) - See the Opinion in Case C-247/89 Commission v Portuguese Republic [1991] ECR I-3659, I-3670, paragraph 10 et seq. and in Case C-24/91 Commission v Kingdom of Spain [1992] ECR I-1989, I-1995, paragraph 9 et seq..

(10) - See judgment in Case 103/88 Costanzo v Commune di Milano [1989] ECR 1839.

(11) - Council Directive 71/305/EEC of 26 July 1971, OJ, English Special Edition 1971 (II), p. 682.

(12) - Case 31/87 Beentjes v Netherlands State [1988] ECR 4635.

(13) - See the judgment in Joined Cases C-60/90 and C-9/90 Francovich and Bonifaci v Italian Republic [1991] ECR in relation to a claim for damages by individuals against a Member State for failure to transpose a directive.

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AUTHOR Court of Justice of the European Communities

FORM Conclusions

TREATY European Economic Community

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JURCIT
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61969J0026 : N 12
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SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - inadmissible
ADVGEN	Lenz
JUDGRAP	Schockweiler
DATES	of document: 26/02/1992 of application: 11/12/1990

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Opinion of Mr Advocate General Lenz delivered on 26 February 1992.
Commission of the European Communities v Italian Republic.
Freedom to provide services - Award of public works contracts.
Case C-360/89.

DOCNUM	61989C0360
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1989 ; C ; opinions
PUBREF	European Court reports 1992 Page I-03401
DOC	1992/02/26
LODGED	1989/11/28
JURCIT	11957E056 : N 18 23 11957E059 : N 1 4 9 15 18 21 22 11957E066 : N 18 31971L0305-A17LD : N 26 31971L0305-A20 : N 26 31971L0305-A22 : N 24 - 28 31971L0305-A22L1 : N 6 27 31971L0305-A22L2 : N 27 31971L0305 : N 1 4 61977J0030-N35 : N 18 61985J0352-N32 : N 18 61987J0031-N28 : N 26 61987J0031-N29 : N 26 61987J0031-N30 : N 26 61987J0031-N36 : N 26 61988J0003-N8 : N 21 61988J0021-N12 : N 15 61988J0021-N13 : N 15 61988J0351 : N 15 61989J0353-N25 : N 15
SUB	Approximation of laws ; Freedom of establishment and services ; Free movement of services
AUTLANG	German

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APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
JUDGRAP	Kapteyn
DATES	of document: 26/02/1992 of application: 28/11/1989

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Opinion of Mr Advocate General Lenz delivered on 30 April 1991.
Impresa Donà Alfonso di Donà Alfonso & Figli v Consorzio per lo sviluppo industriale del comune di Monfalcone, Regione Friuli-Venezia Giulia, Impresa Luigi Tacchino SpA and Impresa Carlutti Costruttori SRL.
Reference for a preliminary ruling: Tribunale amministrativo regionale del Friuli-Venezia Giulia - Italy.
Public works contracts - Abnormally low tenders.
Case C-295/89.

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Mr Advocate General Carl Otto Lenz delivered his Opinion on 30 April 1991. He proposed that the Court rule as follows:

"(1) Article 29(5) of Council Directive 71/305/EEC prohibits Member States from introducing provisions which require the automatic disqualification from the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations.

(2) When implementing Council Directive 71/305, Member States may not depart, to any material extent, from the provisions of Article 29(5) thereof.

(3) Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low."

(*) Original language: German.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1989 ; C ; opinions
PUBREF	European Court reports 1991 Page I-02967 Pub.RJ Page Pub somm
DOC	1991/04/30
LODGED	1989/09/26
JURCIT	31971L0305-A29P5 : N 1 5 61988J0103 : N 2 - 5 31989L0440 : N 3

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SUB	Approximation of laws
AUTLANG	German
NATIONA	Italy
PROCEDU	Reference for a preliminary ruling
ADVGEN	Lenz
JUDGRAP	Joliet
DATES	of document: 30/04/1991 of application: 26/09/1989

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Opinion of Mr Advocate General Lenz delivered on 23 January 1991.
Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others.
Reference for a preliminary ruling: Monomeles Protodikeio Thessalonikis - Greece.
Exclusive rights in the matter of radio and television broadcasting - Free movement of goods - Freedom to provide services - Rules on competition - Freedom of expression.
Case C-260/89.

++++

Mr President,

Members of the Court,

A - Facts

1. The case in which I am giving my opinion today is concerned with a television monopoly which the plaintiff in the main proceedings, a public undertaking under State control in accordance with Greek Law No 1730/1987 (the rigour of which, let me say so immediately, was, however, mitigated by Law No 1866/1989 according to which television stations of a local character may be approved by ministerial decision).

2. In view of the fact that in December 1988 the defendants in the main proceedings (a legal person governed by private law and the Mayor of Thessaloniki) set up a television station and began to transmit television broadcasts, proceedings were brought before a judge sitting alone (who has referred the matter to the Court) for protective measures with a view to obtaining, on the basis of the prohibition in Article 16 of Law No 1730/1987, an injunction restraining the transmission of broadcasts and an order for the seizure of the technical equipment and its sequestration.

3. The defendants relied mainly on Community law and the European Convention on Human Rights. Since, in the view of the national judge, serious problems of Community law arose (in particular in relation to the principle of the free movement of goods and the corresponding exception in Article 36 of the EEC Treaty; to Article 90 of the EEC Treaty, applicable, in conjunction with Articles 3(f), 85 and 86, to public undertakings; and to the general provision of Article 2 of the EEC Treaty) and since also problems were seen in relation to Article 10 of the Convention on Human Rights, an order was made on 2 April 1989 to stay the proceedings and refer 10 questions to the Court for a preliminary ruling which I shall not now repeat but which were received by the Court only on 16 August 1989.

4. Having regard to everything that the parties to the main proceedings, the French Government and the Commission of the European Communities have said, my Opinion is as follows.

B - Opinion

5.1. In view of the critical observations of the plaintiff to the effect that a reference under Article 177 of the EEC Treaty is not possible in proceedings for protective measures (since in Greece proceedings must be begun by an action) and that it is also not appropriate to refer questions to the Court of Justice which have already been settled (an obvious reference to the judgment in Case C-155/73(1)), it must straight away be said that that is no ground for finding that the reference is inadmissible.

6. There is well-established authority as regards the first point (Cases C-29/69(2) and C-78/70(3)).

7. As regards, on the other hand, the preliminary ruling in Case

C-155/73, it is significant for the purposes of the present proceedings that in the questions which are now referred to the Court it is obvious that additional aspects are mentioned. In principle

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however it must be said that even after certain legal questions have been clarified, a national court remains at liberty to refer to the Court once again a question which has been dealt with if in its view it has not been sufficiently clarified.

8.2. As far as concerns the first question, namely whether a law which allows a single television broadcaster to have a television monopoly for the entire territory of a Member State and to make television broadcasts of any kind is consistent with Community law, it must first be observed that in proceedings under Article 177 of the EEC Treaty, as has been repeatedly stressed in the case-law, the Court cannot judge the compatibility of national laws with Community law. It can only - and the question must be reframed accordingly - interpret Community law in relation to the facts at issue in the main proceedings and thus put the national court in a position to form a judgment on the applicability of national law (which, moreover, contrary to the view of the plaintiff in the main proceedings, also applies in regard to constitutional law, which has no precedence over Community law).

9. It may then be said, with regard to the first question, that there is nothing in Community law to suggest that monopolies are in principle illegal. That follows already from Article 37 of the Treaty which only requires monopolies of a commercial character to be adjusted in order to ensure that there is no discrimination between nationals of Member States. The same may also be inferred from Article 90 of the Treaty under which on the one hand it is possible to grant undertakings exclusive rights (admittedly with the proviso that no measures are adopted which are incompatible with the Treaty and in particular with Articles 7 and 85 to 94 thereof) and in which, on the other hand, in relation to financial monopolies, there is reference only to a limited application of the provisions of the Treaty. This was made clear in the abovementioned judgment in Case C-155/73, in which it is stressed that the Treaty does not prevent Member States from removing television broadcasts from competition by granting one or more institutions the exclusive right to broadcast and that such a monopoly is not incompatible with Article 86.

10. As regards moreover the reference in that judgment, in connection with State television monopolies, to "considerations of the public interest" no doubt it is possible to agree with the Commission that in the plaintiff' s case that condition is fulfilled. In that respect the definition of the applicant' s tasks in Article 2 of Law No 1730/1987 and in Article 15 of the Greek Constitution may be cited and also the fact that it is not a question of the protection of an activity of an economic character against competitors (since the plaintiff' s activity is not, under Article 2 of Law No 1730/1987, of a profit-making nature).

11. If it is not desired to let those observations suffice with respect to the first question (and there is reason for this in view of the broad terms of the questions and the observations of the parties), then the following considerations may be borne in mind.

12. As you know, the Commission has put forward observations in relation to the principle of freedom to provide services which assume that for the works of authors from other Member States, contracts for licences can be concluded only with the television monopoly and that this may lead to a limitation of the corresponding demand. It did however rightly add that this does not in itself amount to a restriction for the purposes of the Treaty. That could be said only if State measures resulted in discrimination in favour of national works (nothing, however, was said about that); if there were on the other hand independent conduct by the television monopoly in that regard, it would fall to be judged only under Article 86 of the Treaty.

13. I can be just as brief with regard to the observations - also made by the Commission - in respect of the right of establishment which are to the effect that the existence of the television monopoly involves the exclusion of the establishment of other undertakings in the same field.

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14. What matters here is that the restrictions affect domestic and foreign undertakings in the same way so that there can be no question of disregard of the principle of national treatment which is to be inferred from Article 52 of the Treaty.

15. On the other hand, another observation, also emanating from the Commission, deserves greater attention. It is based on the one hand on the fact that television broadcasts, according to the case-law (see the judgments in Cases C-155/73 and C-352/85(4)), are to be regarded as services for the purposes of the Treaty. On the other hand, it is based on the assumption that the plaintiff in the main proceedings has, according to Law No 1730/1987, a monopoly as regards the retransmission of broadcasts from other Member States. (The national court must ultimately decide whether this is actually the case and, as you know, it was vigorously contested at the hearing. In any event, in view of what was said, one may well have the impression that in Greek case-law there are strong indications that the Commission' s view is correct and that in consequence it may be accepted that the 1989 Law was concerned in that respect only to clarify the law by an unambiguous provision).

16. Assuming that programmes from other Member States none the less to a certain extent compete with national programmes (since any linguistic problems do not apply to the whole population or to every kind of broadcast), the Commission thinks that the concentrations of the monopoly to broadcast its own programmes and of the monopoly to retransmit foreign programmes in the same hands must, from the point of view of Community law, appear just as questionable as the facts in Case C-59/75(5) (as we know, that case was concerned with a tobacco monopoly which had its own production activity and an exclusive right to import; the Court held that the latter right constituted discrimination within the meaning of Article 37 of the Treaty) and should be abolished.

17. That in my opinion must be accepted. It is of no consequence that the case cited was concerned with Article 37, which comes under Chapter 2 of the Treaty relating to quantitative restrictions. The prohibition of discrimination - and discrimination is to be regarded as a restriction within the meaning of Article 59 - also applies to the provision of services (see Case C-352/85(6)). It is, however, in fact easy to imagine the danger of discrimination against foreign broadcasts where a monopoly undertaking has its own production company and is entrusted (as is apparent from the preamble to Law No 1730/1987) with the special task of furthering and maintaining the national identity. It may moreover be accepted that the best means to "ensure" (this expression is used in the judgment in Case C-59/75) that there is no such danger is to separate the areas covered by the monopoly, that is to say, to abolish the retransmission monopoly. It cannot therefore be accepted as sufficient that since October 1988 the plaintiff in the main proceedings has in fact retransmitted 10 European programmes broadcast via satellite, since that is obviously a mere practice which may be changed at any time and is not founded on requirements laid down by statute. It is likewise not sufficient to cite the obligation (laid down, moreover, only in the 1989 Law) to plan the plaintiff' s programme in such a way as to ensure that one half of it is composed of European programmes, for this still leaves considerable room for choice, in the exercise of which serious competitors may easily be placed at a disadvantage, since the domestic production also comes within the European programmes section.

18. Whilst therefore there can be no denying that the organization of the plaintiff' s television monopoly, at least under Law No 1730/1987, gives rise to serious reservations from the point of view of Community law, it is of no avail, and let me say this also, for the purpose of dispelling them, that the restrictions must be regarded as acceptable in this sphere on grounds of public policy (which is also mentioned in Article 56) or the general interest. Although it was mentioned in the judgment in Case

C-52/79(7) in relation to the broadcasting of advertisements, it must not be overlooked that in the main proceedings the issue is clearly not one of preventing advertisements (which, moreover,

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as the Commission rightly observed, could be achieved by less severe measures). Nor does there seem to be any attempt to avert dangers to public policy on other grounds which could arise from foreign television broadcasts. Finally, there is also no question of justification on technical grounds (avoidance of disturbances in view of a limited number of available channels). In that respect the observation that the plaintiff was a long way from using all the 49 available channels (but, evidently, only five) was not challenged and in that respect it is certainly worthy of note that now, according to the 1989 Law, local transmitters can be authorized.

19. It could thus be held with regard to the first question that an organization of a television monopoly whereby the body holding the monopoly has both the exclusive right to broadcast domestic programmes and to retransmit foreign broadcasts is scarcely compatible with Community law.

20. To this it is certainly necessary to add that, in view of what we have heard, it seems highly questionable whether that finding is relevant to the case which is the subject of the main proceedings, since what is at issue is apparently only the broadcasting of local programmes which are produced by the defendants themselves. If that is in fact so (and this is something which ultimately the national judge must decide), the fact that the grant to the plaintiff of the retransmission monopoly must be regarded as unlawful (on the basis of the judgment in Case C-59/75) would scarcely be of assistance. It would then be a matter of purely internal nature for which Community law offers no basis for a solution.

21. It must, moreover, also be borne in mind that now (since the 1989 Law) there is a possibility of authorizing local television stations (of which the defendants have made use by lodging an application); if, however, after the necessary administrative structure has been set up, authorization is in fact granted, it is impossible to see how the applications in the main proceedings can succeed.(8)

22.3. The second and third questions, to which I shall now turn and which I shall deal with together since they are concerned with problems of the free movement of goods, relate firstly to the problem as to whether there is an infringement of Article 9 of the EEC Treaty (because technical material, films and other products which can be used for the broadcasting of television programmes can be intended only for the holder of the monopoly who is at liberty to choose domestic material); the second problem is whether the grant of an exclusive television franchise to an operator may be regarded as a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty.

23.(a) I can again deal with the first part of those questions very briefly. The French Government rightly observes that Article 9, which relates to the customs union, has no bearing on quantitative restrictions on imports but, as the relevant case-law shows, concerns only obstacles to imports by means of charges. Since however there is nothing to show that the problems arising from the Greek television monopoly have anything to do with charges levied on imports it can certainly be said that arguments based on Article 9 of the Treaty have no relevance to the main proceedings.

24.(b) On the other hand, as far as concerns Article 30, it is necessary to point out, as the Commission has done, that the existence of a monopoly, as such, and the fact that it has a right of selection in acquiring the necessary material do not appear to be open to objection from the point of view of Article 30.

25. Objections would arise only if there were discrimination, that is if domestic products were unjustifiably favoured when the right of selection was exercised. In that respect reference may be made to the above mentioned judgment in Case C-155/73 which in paragraphs 7 and 8 describes such conduct as unlawful and also stresses that the exclusive right should not be used to favour, within the Community, particular trade channels or particular commercial operators in relation to others. Similarly, in the judgments in Cases C-271/81(9) and C-30/87(10) relating to monopolies in the provisions of services which may indirectly affect trade between Member States, it is held

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that such monopolies would infringe the principle of the free movement of goods if there were discrimination against imported products as compared with domestic products.

26. It must also be added, however, that Article 30 applies only if the discriminatory conduct may be attributed to the State; if, on the other hand, what is in point is an independent decision of the monopoly, this can at most be considered from the angle of Article 86 of the Treaty. The national judge must decide what the position in the present case is in that respect. It is also relevant in that regard whether products from other Member States are in fact not considered or whether in acquiring material an objective choice is ensured, because the plaintiff, as it has emphasized, has to adhere to the provisions of Directive 77/62(11) and Decree No 105/89 of the President issued in relation to that directive.

27.4. The fourth question (which is concerned with whether a television monopoly may be justified under Article 36 of the EEC Treaty) likewise calls for few observations.

28. In that respect it is important to note that exclusive television rights are not in principle incompatible with the Treaty and that, in any event, they are, as such, not covered by Article 30 (because they are concerned with the provision of services). This makes it clear that there can also be no question of justification under Article 36, which applies to the free movement of goods.

29. In so far, however, as an obstacle arises to the free movement of goods in the sense of the observations on the previous question (discriminatory conduct by the monopoly attributable to the State), it should be said in that respect (that is, in relation to a phenomenon to which the fourth question almost certainly does not refer) that justification under Article 36 can scarcely be imagined, since it is expressly stated in the last sentence thereof that any restrictions falling for consideration by virtue of Article 36 are not to constitute a means of arbitrary discrimination.

30.5. The next question with which we must now deal relates to Articles 3(f) and 85 of the EEC Treaty. That question requires it to be determined whether the grant of exclusive television rights by the State and their exercise are compatible with the said provisions on competition.

31. So far as Article 3(f) is concerned (it states that the activities of the Community shall include "the institution of a system ensuring that competition in the common market is not distorted"), it is obvious that it is no more than the enunciation of a general principle which had to be given concrete form in other provisions of the Treaty. In itself it cannot therefore constitute a criterion for judging measures taken by undertakings and the State; it can at most do so only if recourse is had at the same time to the other provisions which give it concrete form.

32. In so far as the national court regards Article 85 as such a provision, it is important to note that Article 85 presupposes agreements between undertakings, decisions by associations of undertakings and concerted practices. Since however nothing whatsoever of that nature was mentioned in the order making the reference (the reference at the hearing to the merger - by statute - of two former Greek television undertakings is obviously of no importance), there is no point, in my opinion, of expending more effort on the interpretation of that provision in the present case.

33. For that reason it is probably also superfluous to refer to the fact that according to our case-law (Case C-66/86)(12)Member States are required not to adopt measures which could deprive the competition rules of their "effectiveness". In connection with Article 85 that can at most mean that State measures may not, for example, encourage or bring about the conclusion of agreements between various undertakings.

34. To this it may furthermore be added (with reference to the sixth question which involves Article 90(2)) that, even assuming that the plaintiff is to be regarded as an undertaking entrusted, within

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the meaning of Article 90(2), with the operation of services of general economic interest, that provision, in conjunction with Articles 3(f) and 85, supplies nothing of relevance to the main proceedings because in the present case the latter provisions are of no significance.

35.6. I come then to questions seven and eight which apparently refer to Article 86 of the EEC Treaty. They seek to ascertain whether an undertaking which has been granted a monopoly on television broadcasting of any kind throughout the national territory of a Member State holds a dominant position in a substantial part of the common market and whether in certain respects there may be said to be an abuse of that position (mention is made of the fixing by the undertaking of monopoly prices for television advertisements and of preferential prices and reference is made to activities which exclude competition because the broadcast of advertisements is possible only through the monopoly and only the monopoly can broadcast films and television programmes).

36. In that respect it is appropriate also to refer to a factor deriving from the sixth question (in which, as we know, mention is made of an undertaking entrusted with services of general economic interest within the meaning of Article 90). It is quite clear that the main proceedings are concerned not with any specific conduct of the plaintiff in the market (which moreover the national court would have to appraise - see paragraph 18 of the judgment in Case C-155/73) but with the question whether a monopoly, created by the State, of the kind held by the plaintiff is compatible with Community law.

37.(a) Assuming that the plaintiff is an undertaking within the meaning of Article 90 (I said at the outset that it was a public undertaking under State control), it follows from that provision that the Hellenic Republic may not adopt with respect to that undertaking any measures incompatible with Articles 85 to 94 (including Article 86, which is here particularly in point).

38. That does not mean that it is unlawful to create a monopoly and to establish a dominant position, which the plaintiff undoubtedly holds (not least because it alone has a network of television transmitters and is financed by fees). That emerges clearly from paragraph 17 of the judgment in Case C-311/84.(13)

39. The State however cannot create a structure which, if it were created by an undertaking holding a dominant position on the market, would be regarded as an abuse within the meaning of Article 86. In that respect reference should be made to the judgment in Case C-6/72(14) in which it was held that Article 3(f) requires that competition should not be eliminated and that it is to be regarded as an abuse within Article 86 if an undertaking in a dominant position strengthens that position in such a way that competition is substantially fettered. It is also appropriate in that regard to recall to mind the judgment in Case C-311/84 in which it was held that it was an abuse within the meaning of Article 86 for an undertaking in a dominant position (or an undertaking belonging to the same group) to reserve for itself an ancillary task which could be carried out by a third undertaking.

40. In the light of that case-law one may in fact, as the Commission has done, express reservations regarding the fact that the applicant has been granted a comprehensive monopoly in areas with divergent interests (the broadcasting of its own programmes and the retransmission of foreign broadcasts). An undertaking in a dominant position could clearly not, in conformity with Article 86, itself create such a situation because, as I have already mentioned in another connection, inherent therein is the danger of discrimination against foreign products and because this - as it must be assumed that the undertaking favours its own products - must be regarded as a kind of limitation of production contrary to Article 86(b).

41. Since it must also be accepted that the other conditions specified in Article 86 are satisfied (where foreign products are placed at a disadvantage it is certain that trade between Member States is affected and it is likewise certain that Greece must be regarded as a substantial part of the

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common market), it must therefore be concluded that in so far as the plaintiff has been granted a dual monopoly there is an abuse within the meaning of Article 86 which under Article 90(2) the Member State is prohibited from encouraging.

42. On the other hand, no more need now be said about the other possible abuses expressly mentioned in the order for reference (for example, in relation to the plaintiff' s pricing practices), since there is no evidence to suggest that the State exerts any influence on these matters (which, as has already been said, it would be for the national court to determine).

43. Similarly, it is probably not necessary now to discuss further the abuse mentioned at the hearing, constituted by the plaintiff' s refusal to allow local broadcasts. Even if the plaintiff had in that respect in fact a power of decision under the statute applicable in the present case (grant or refusal of authorization), the determining factor for the purposes of the present case would be that such conduct vis-à-vis the defendants does not fall under Article 86 because, as we also heard at the hearing, it is concerned only with the broadcasting of local programmes and so there can be no question of affecting trade between Member States.

44.(b) I must on the other hand still say a few words about an aspect referred to in the sixth question which is relevant in the present context, that is to say, about the problem of what is to be gleaned from Article 90(2) (which, with respect to undertakings entrusted with services of general economic interest, provides that the competition rules of the Treaty apply in so far as they do not obstruct the performance of the particular tasks assigned to such undertakings).

45. In my opinion it can at once be said that it seems wholly impossible to maintain that Article 86 is not at all applicable to the plaintiff by reason of Article 90(2). Article 90(2) must be strictly interpreted and that is why the criterion must be what is indispensible for the performance of the particular tasks assigned to such undertakings. It was however rightly pointed out that the particular tasks assigned to the plaintiff under the Greek Constitution were to be regarded above all in connection with its own productions and that on the other hand they are not of any consequence with respect to the retransmission of foreign broadcasts. It may also be noted on this point that the relaxation of the monopoly under the 1989 Law (according to which local transmitters can also be authorized) permits the conclusion that the performance of the tasks assigned to the plaintiff certainly does not depend on its having a dual monopoly. Should, however, there exist other objections with respect to the retransmission of foreign broadcasts (for example in the field of advertisements), it would be necessary to agree with the Commission that the aim could be achieved by less restrictive means than the grant to the plaintiff of a monopoly in the matter of retransmission.

46.7. All that now remains is to consider the problem, raised in questions nine and ten, as to whether the plaintiff' s television monopoly is compatible with the objective (expressed in the preamble to the EEC Treaty and in Article 2 thereof) of the constant improvement of the living conditions of the peoples of Europe and with Article 10 of the European Convention for the Protection of Human Rights.

47.(a) On the first point, the Commission has, in my view rightly, contended that the abovementioned texts delineate only the aims of the EEC Treaty and the objectives pursued by the creation of the Community. At most they enunciate general obligations of the Member States and the Community institutions and their main function is thus to furnish criteria of interpretation which may be of use in applying specific provisions relating to concrete measures. Indeed it is scarcely conceivable that anything could be derived from those texts, and especially from the part of Article 2 which is expressly mentioned in question 9, which could serve as a criterion for judging a national television monopoly and would be capable of establishing precise obligations on the part of the Member States. If anything, it would be the reference not so much to the "accelerated raising of their standard of living" that would fall for consideration as the reference to the elimination of "the barriers

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which divide Europe" and the encouragement of "closer relations between the States belonging" to the Community.

48.(b) On the other hand, as regards Article 10 of the Convention on Human Rights (there is mention in it inter alia of the freedom to receive information or ideas regardless of frontiers, albeit evidently subject to certain reservations), it is probably not necessary to consider further the plaintiff' s view that the main function of that provision is to ensure unbiased information and that it says nothing about the lawfulness of television monopolies, which were in fact common when the Convention was signed.

49. The rules of the Convention are to be regarded as part of the Community legal order. In the "television directive"(15) it is stated that Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms which has been ratified by all the Member States is, as applied to the broadcasting and distribution of television services, a specific manifestation in Community law of a more general principle, namely freedom of expression. That right must therefore be respected by the Community institutions.

50. It is however also clear that it is not primarily the Court of Justice which is called upon to judge alleged or actual infringements by the Member States of the human rights protected by that Convention (that is a matter for the institutions designated by the Convention on Human Rights); in particular, it does not fall to the Court to examine the compatibility of the rules of the Member States with the Convention on Human Rights (this has been clearly established in the case-law; see the judgment in Joined Cases C-60 and C-61/84(16)).

51. If, however, one adheres to the Court' s statement in its judgment in Case C-4/73(17) to the effect that the Convention on Human Rights can supply guidelines which should be followed within the framework of Community law, and if one is minded to apply this in respect of Article 90(2) - in connection with the assessment of the general interest which is relevant in regard to exclusive television rights - it still has to be acknowledged that, in the light of what we have learned from the practice of the Commission on Human Rights and the Court of Human Rights on the subject of Article 10 of the Convention with respect to television monopolies, it almost certainly yields nothing, for the purpose of judging television monopolies, which goes beyond what has already been said in connection with the principle of the freedom to provide services and with Article 90(1) in conjunction with Article 86.

C - Conclusion

52. In conclusion, my summary is as follows. In my view the questions from the Thessaloniki court should be answered as follows:

"(a) A Law authorizing a single television company to exercise a monopoly throughout the territory of a Member State and to transmit television broadcasts of all kinds calls for reservations in the light of Article 59 of the EEC Treaty (which requires the abolition of restrictions on the freedom to provide services), since the combination of a monopoly on domestic broadcasting and a monopoly for the retransmission of foreign broadcasts may give rise to discrimination against the latter.

(b) If the television industry is organized in that way, the provisions on the free movement of goods will be infringed only if the monopoly discriminates against foreign products and that result is attributable to the State which controls the monopoly. Such conduct cannot be justified on the basis of Article 36 of the Treaty.

(c) Article 90 of the Treaty does not prohibit the creation of a monopoly over television broadcasts. However, if one undertaking is vested with both exclusive broadcasting rights and retransmission

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rights, that must be regarded as an ostensibly illegal measure by virtue of the combined provisions of Articles 90 and 86, which cannot be justified by virtue of Article 90(2).

(d) The preamble to the Treaty and Article 2 thereof do not in themselves provide any criterion for the appraisal of national television monopolies.

(e) The right to freedom of expression applied to broadcasting and the distribution of television services, embodied in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, also represents a specific manifestation, in Community law, of a more general principle, namely freedom of expression. For the purpose of appraising television monopolies, it is not possible to derive from that principle anything that goes beyond the foregoing conclusions."

(*) Original language: German.

(1) Case C-155/73 Giuseppe Sacchi [1974] ECR 409.

(2) Judgment in Case C-29-69 Erich Stauder v Ville d' Ulm [1969] ECR 419.

(3) Judgment in Case C-78/70 Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmaerkte GmbH & Co. KG [1971] ECR 487.

(4) Case C-352/85 Bond van Adverteerders and Others v The Netherlands [1988] ECR 2085.

(5) Judgment in Case C-59/75 Pubblico Ministero v Flavia Manghera and Others [1976] ECR 91.

(6) Ibid.

(7) Case C-52/79 Procureur du Roi v Marc J.V.C. Debauve and Others [1980] ECR 833.

(8) See paragraph 2 above.

(9) Case C-271/81 Société Coopérative d' Amélioration de l' Elevage et d' Insémination Artificielle du Béarn v Lucien Jean Marie Mialocq and Others [1983] ECR 2057.

(10) Case C-30/87 Corinne Bodson v Pompes Funèbres des Régions Libérées SA [1988] ECR 2479.

(11) Council Directive of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1).

(12) Case C-66/86 Ahmed Saeed Flugreisen and Others v Zentrale zur Bekaempfung unlauteren Wettbewerbs [1989] ECR 803.

(13) Case C-311/84 CBEM v CLT AND IBP [1985] ECR 3261.

(14) Case C-6/72 Europemballage Corporation and Continental Can Company v Commission of the European Communities [1973] ECR 215.

(15) See the eighth recital in the preamble to Council Directive 89/552/EEC of 3 October 1989 (OJ 1989 L 298, p. 23).

(16) Joined Cases C-60 and C-61/84 Cinéthèque SA v Fédération Nationale des Cinémas Français [1985] ECR 2605.

(17) Case C-4/73 Nold, Kohlen-und Baustoffgrosshandlung v Commission of the European Communities [1974] ECR 491.

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AUTLANG	German
NATIONA	Greece
PROCEDU	Reference for a preliminary ruling
ADVGEN	Lenz
JUDGRAP	Kapteyn
DATES	of document: 23/01/1991 of application: 16/08/1989

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Opinion of Mr Advocate General Lenz delivered on 13 March 1991.
Commission of the European Communities v Portuguese Republic.
Failure to publish notice of a supply contract.
Case C-247/89.

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Mr President,

Members of the Court,

A - Facts

1. In these proceedings the Commission seeks a declaration that the Portuguese Republic has failed to fulfil its obligations under the Treaty. It asserts that, pursuant to the provisions of Directive 77/62/EEC, (1) the tendering procedure organized by the firm Aeroportos e Navigaçao Aérea ("ANA-EP") on 29 August 1987 for the supply and assembly of a telephone exchange for Lisbon airport should have been published in the Official Journal of the European Communities.

2. Portugal maintains that the application is inadmissible: since ANA-EP is a legal person governed by public law empowered to act autonomously in administrative and financial matters and in regard to its assets, its conduct cannot be attributed to the State; failure to transpose the directive was an infringement of the general obligation imposed by the directive, which should be distinguished from the specific requirement in Article 9 that certain tendering procedures be published in the Official Journal of the European Communities.

3. Portugal claims that the reasoned opinion delivered in the pre-litigation procedure was inadequate. A reasoned opinion, it contends, must contain a clear position on all the arguments put forward by the defendant Member State. Moreover, there was a contradiction between the reasoned opinion and the application: the latter extended the subject-matter of the dispute, which was not permitted.

4. The Portuguese Government was misled: it was able to assume that the legislative change which it had proposed in regard to the State' s supervisory powers over supply contracts for public undertakings would cure the Treaty infringement at least for the future. It was only in the application that the Commission first contended that the proposed change was incapable of curing the infringement.

5. Portugal argues finally that the reasoned opinion gave no indication of what action the Commission believed should have been taken in order to cure the infringement.

6. The Portuguese Government further maintains that ANA-EP is excluded from the scope of the directive, since, as a body which administers transport services, it is covered by the exception contained in Article 2(2) of the directive. Accordingly the supply contract in question was not a supply contract within the meaning of the directive since it was awarded under private law. Nor should the firm be regarded as a contracting authority within the meaning of the directive, since the tendering procedure in question was not subject to control by the State.

7. The Commission claims that the Court should:

1. Declare that, by failing to send to the Official Publications Office of the European Communities for publication in the Official Journal of the European Communities a notice of the open tendering procedure for the supply and assembly of a telephone exchange for Lisbon airport, the Portuguese Republic has failed to fulfil its obligations under Title III, in particular Article 9, of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts;

and

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2. Order the Portuguese Republic to pay the costs of the proceedings.

8. The Portuguese Government contends that the Court should:

1. Declare its objection of inadmissibility well founded, and accordingly dismiss the application;

in the alternative,

hold that it has not failed to fulfil its obligations under the Treaty, and dismiss the application accordingly;

2. Order the applicant to pay the costs of the proceedings.

9. For the parties' factual and legal submissions I refer to the Report for the Hearing. I shall advert to them below only where the reasoning so requires.

B - Opinion

1. Admissibility

10. In considering whether the application is admissible it is necessary to examine whether ANA-EP' s failure to publish a notice of the tendering procedure in the Official Journal of the European Communities can be attributed to the Portuguese State. At the material time, 29 August 1987, Directive 77/62 had still not been implemented in Portuguese law, and there was accordingly no national implementing measure obliging ANA-EP to act in accordance with the requirements of the directive.

11. Since Portugal was not a Member State of the European Communities at the time Directive 77/62 was adopted, a duty to implement the directive could only arise subsequently, on Portuguese accession.

12. Article 392 of the Act of Accession provides:

> "Upon accession, the new Member States shall be considered as being addressees of and as having received notification of Directives and Decisions within the meaning of Article 189 of the EEC Treaty..., provided that those directives, recommendations and decisions have been notified to all present Member States."

Article 395 of the Act of Accession reads:

> "The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of Directives and Decisions within the meaning of Article 189 of the EEC Treaty ..., unless a time limit is provided for in the list of Annex XXXVI or in any other provisions of this Act."

13. The aforementioned transitional provisions in the Act of Accession are construed by the Commission as meaning, in relation to the present case, that the directive should have been implemented at the date of accession, 1 January 1986.

14. However, even assuming that the duty to act to implement the directive only arose on 1 January 1986, and that the Portuguese Republic should be allowed as much time to transpose it as were the other Member States - eighteen months, pursuant to Article 30 - it would have had to be implemented in national law by the end of June 1987 at the latest.

15. At the time of the tendering procedure, on 29 August 1987, the defendant Member State was unquestionably in default. Failure to act on the part of a Member State is a precondition for a directive being directly applicable, always providing that it contains a clear and unambiguous obligation. The obligation contained in Article 9 of the directive requiring publication in the Official Journal is indeed clear and unambiguous.

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16. However, a distinction must be made between the situation of a directive being directly applicable in favour of an individual on whom it confers subjective rights the assertion of which cannot be eluded by a Member State pleading its own infringement of Community law, and the question of whether the conduct of independent legal persons may be attributed to a Member State and hence deemed to constitute an infringement of the Treaty. In the former case an individual may rely on the directive against organizations which are subject to control by the State, or which possess special powers by comparison with the rules which are applicable to relations between individuals. (2) Accordingly a body falls to be regarded as a State body, regardless of its legal form, if it has been entrusted, by legislation, with the provision of a public service under the authority of the State and if, to that end, special powers have been conferred on it. (3)

17. It is consequently quite possible for an organization to be deemed to be "the State", even if, in formal terms, it does not constitute part of the State. (4) Thus if a formally independent authority is dependent on the public authorities in personnel, material or financial terms, it may be appropriate to deem it to be a State body within the meaning of the provision.

18. The above abstract description of a State body in the broadest sense of the term is not sufficient, in Treaty infringement proceedings, to justify attributing the specific conduct complained of to the Member State concerned. The latter must be in some way legally responsible for the conduct. Such responsibility may arise at a number of levels. A Member State might create or support a body in order to promote commercial practices incompatible with Community law; (5) or initiate a financial benefit which infringes Community law and which moreover only became definitive when approved by the State concerned. (6) The essential feature is thus dependence on the State: that is the criterion whereby legally significant actions on the part of the body concerned may be attributed to the Member State.

19. ANA-EP is a legal person governed by public law, empowered to act autonomously in regard to its administration, finances and assets. The mere fact that ANA-EP can be classified as a public undertaking as a result of the State' s dominant influence over appointments to its organs does not suffice for actions on the part of the undertaking to be automatically attributed to the State. For that, public authorities would need to be able to influence matters related to the directive - i.e., the award of supply contracts, as contemplated by the directive.

20. A consideration of whether State control existed in a manner such as to permit the State to influence the award of supply contracts presupposes an examination of Portuguese law, in particular the general provisions applicable to all public undertakings, and the specific rules setting up ANA-EP and establishing its constitution.

21. The parties disagree on how those provisions should be interpreted. That question merges moreover with the question of ANA-EP' s status as a contracting authority within the meaning of the Directive. According to the definition of a contracting authority in Portugal contained in Annex 1 to the directive and common to all language versions, the essential characteristic is that the award of public supply contracts should be subject to State control.

22. I shall therefore leave the question of State control and influence open at present, and address questions of Community law.

23. The Portuguese Government finds further objections to the admissibility of the application in the form and content of the reasoned opinion and in the Commission' s conduct in the pre-litigation procedure. In point of fact all the objections relate to the legislative change proposed by the Portuguese Government in the pre-litigation procedure, whereby restrictions on the control of public undertakings were to be introduced in the general legislation governing all public undertakings. The Government maintains that as a result of the Commission' s conduct it was allowed to believe

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that the proposed amendment to the law would cure the Treaty infringement at least as to the future. In the reasoned opinion the Commission did not advert to that proposal, nor did it indicate any action which the Portuguese Government ought to take. In the application, however, the Commission stated that an amendment to the law such as that described could not cure the infringement of the Treaty.

24. I shall deal with these objections together, considering first the charge that the reasoned opinion was not supported by an adequate statement of reasons, and that it should contain an unambiguous response to all the arguments put forward by the defendant Member State.

25. Certainly the reasoned opinion in the pre-litigation procedure, like the whole preliminary procedure in proceedings under Article 169, is intended to permit a dispute to be settled amicably. The Member State in question must therefore be given an opportunity to justify its position, (7) and, where appropriate, to amend its conduct. To that end the form of the reasoned opinion must be such as to "contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty". (8)

26. In a reasoned opinion the Commission may specify the extent of the Member State' s obligations. (9) It may also, in the course of the dialogue which the pre-litigation procedure is intended to facilitate, indicate to the Member State what action would be appropriate in order to cure the infringement.

27. However, the Commission is not under a duty to indicate all the measures which it regards as being capable of eliminating the infringement in question. That is particularly clear where there are a number of possible solutions, the Member State being free to select which means to use.

28. On the other hand, if a Member State is clearly working to eliminate a problem, but the Commission believes that the measures contemplated are inappropriate, the latter would be guilty of bad faith if it failed to make that view known. In such circumstances the pre-litigation procedure cannot fulfil its role of enabling a dispute to be settled amicably.

29. The Commission' s reasoned opinion which preceded these Treaty infringement proceedings is a document of several pages that sets out the facts and the points at issue in a coherent and comprehensible way. The Commission relates the facts to the relevant provisions of the directive, leaving no doubt as what it is that the Member State in question stands accused of: failure to publish notice of the tendering procedure throughout the Community. The parties' differences of opinion on the law as it relates to the case likewise emerge clearly from the reasoning.

30. It is true that no way of remedying the infringement is mentioned in the reasoned opinion. It is, however, clear that at an early stage there was disagreement over the legal appraisal of the facts. The Portuguese Government did not endorse the Commission' s view of the law; it considered that the Treaty had not been infringed.

31. While the Court' s case-law requires the obligations which a Member State must fulfil to be indicated precisely in the reasoned opinion, (10) that does not necessarily include the measures needed to eliminate the infringement. The obligation which, the Commission believes, the defendant Member State should have fulfilled was publication of the tendering procedure in the Official Journal of the European Communities. That is conveyed unmistakeably in the reasoned opinion; that opinion was therefore adequately reasoned.

32. If, in the pre-litigation procedure, the Portuguese Government did indeed intimate its desire to preclude any infringement of the Treaty in the future by amending the law, and if the Commission was indeed convinced that such a course of action would fail to achieve the desired end, then it

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was unhelpful to refrain from informing the Portuguese Government of that view, thereby obstructing a constructive resolution of the dispute. Yet even if such conduct does run counter to the purpose of the pre-litigation procedure, it cannot make the Treaty infringement action inadmissible since the defendant Member State has refused to admit that any infringement occurred.

33. There is no conflict between the reasoned opinion and the application, since the issue remains the failure to publish a notice of the tendering procedure in the Official Journal of the European Communities. The Commission' s contention in the application that the legislative amendment proposed by the Portuguese Government was not capable of curing the infringement does not represent a broadening of the subject-matter of the proceedings. The substantive charge remained the same in the pre-litigation procedure and in the application; only the legal arguments were amplified.

34. A separate issue is whether there is a legal interest in bringing Treaty infringement proceedings in the case of a past Treaty infringement which has been terminated. Whether an interest in bringing the present action exists would appear to be questionable inasmuch as the contract was awarded on the basis of the tendering procedure of 29 August 1987 without that tendering procedure having been published in conformity with the directive. The award of the contract cannot now be undone; consequently, there is no longer any possibility of influencing a situation which was conclusively determined by events in the past.

35. Initially it might well have been possible to repeat the tendering procedure while complying with the publication provisions laid down in Community law. However, that would have presupposed an admission of wrongful conduct. At no time has the Portuguese Government accepted that its conduct was contrary to the Treaty. Its defence before this Court continues to be that the tendering procedure concerned was not covered by Directive 77/62. Similar conduct in the future cannot be ruled out in the absence of an acknowledgement that it was at fault.

36. The mere fact that there is still a dispute about whether or not a Treaty infringement occurred constitutes a reason for concluding that there is a legal interest in bringing proceedings, in order to obviate similar cases in the future. (11) It is also appropriate to point out that a Member State may not rely on a fait accompli for which it is responsible in order to elude an application against it. (12)

37. The Commission' s application should be ruled admissible, subject to a review of the degree of State control over supply contracts of the type described above.

2. Merits

38. The Portuguese Government argues that the supply contract awarded by ANA-EP does not fall within the ambit of Directive 77/62. First, ANA-EP is covered by the sectoral exception for transport operators contained in Article 2 of the Directive. Secondly, the directive was not applicable to the supply contract in question, since the contract had to be concluded according to the formal requirements of private law, whereas the Directive only covers supply contracts awarded under public law. Lastly, ANA-EP cannot be regarded as a contracting authority within the meaning of the directive.

39. (a) Article 2 of Directive 77/62 contains a sectoral exception in respect of public supply contracts awarded by bodies which administer transport services. The Commission argues that ANA-EP cannot be regarded as a body which administers transport services within the meaning of the Directive. In support of its case it refers to the Commission' s Guide to the Community Rules on Open Government Procurement, (13) a manual on the application and interpretation of the public procurement directives. It contains the following passage:

> "In the transport sector the exception covers organizations actually undertaking the carriage of passengers or goods, but not, for example, those running ports or airports, which are covered

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by the directive."

40. In support of its views the Commission also refers to the amendment to the exception effected by Directive 88/295. Since that reformulation in 1988 the exception relating to the transport sector has read as follows:-

"This directive shall not apply to:

(a) public supply contracts awarded by carriers by land, air, sea or inland waterway;..."

41. The Commission' s view is that this is no more than a clarification involving no substantive change to the scope of the exception.

42. The first point to bear in mind is that it is immaterial to the question before the Court whether the reformulation actually changed the substance of the exception, since at the time of the tendering procedure, August 1987, the original version of Article 2(2)(a) of Directive 77/62 was still in force. As to the reformulation of the exception by Directive 88/295, I shall merely point out that the recitals refer - at least in the German version - to a new definition of the sectoral exceptions, which suggests that the scope of the rules on exceptions was indeed changed.

43. Whether ANA-EP comes within the scope of the directive in its original version can only be determined after an examination of the exception in its legislative context. The words "body which administers transport services" suggest that the whole sector was covered. ANA-EP' s task, consisting in the administration of several Portuguese airports, is indissolubly linked to the pure transport function - the carriage by air of passengers and goods. Air transport is inconceivable without the provision of the requisite infrastructure and airport organization.

44. Directive 90/531, which has since been adopted, concerns the public procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, (14) and affords some insight into the legislative methodology of the directives on the award of public contracts (supply contracts and building contracts), and on the sectors excluded from their scope. The sectors now covered by Directive 90/531 were excluded ab initio from the scope of the directive on the award of public contracts. The underlying idea was to avoid impairing the competitive position of the undertakings concerned vis-à-vis private undertakings, and to prevent unequal treatment ensuing from the variety of legal forms of the bodies providing public services in Member States. The new directive placed the sectors which had initially been excluded under significantly less stringent rules for tendering procedures for public contracts.

45. The foregoing view of the legislative context is underpinned by the preamble to Directive 90/531. These state, for example:

"... the White Paper on the completion of the internal market... contains ... sectors which are currently excluded from... Directive 77/62...

... among such excluded sectors are those concerning the provision of water, energy and transport services...

... the main reason for their exclusion was that entities providing such services are in some cases governed by public law, in others by private law".

46. ANA-EP is unquestionably covered by the new directive on the excluded sectors. This is apparent from Article 2, which states:

"(1) This directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

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...

(2) Relevant activities for the purposes of this directive shall be:

...

(b) the exploitation of a geographical area for the purpose of:

...

(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

...

(6) The contracting entities listed in Annexes I to X shall fulfil the criteria set out above...."

In Annex VIII of the new Directive, ANA-EP is expressly mentioned under Portugal.

47. The fact that ANA-EP is covered by Directive 90/531 prompts the logical inference that it was previously excluded from the scope of Directive 77/62. That conclusion is not negated by the Commission' s claim that transport undertakings such as ANA-EP were originally covered by the more stringent provisions of Directive 77/62, and only subsequently made subject to the less stringent rules of the new directive. That line of argument runs counter to the scheme and purpose of the directives on the award of public supply contracts.

48. Indeed, the amendment to Directive 77/62 introduced by Directive 90/531 confirms that view. Its purpose is to enable a clear line to be drawn between the fields covered by the two directives. Article 35 of Directive 90/531 provides that:

"(1) Article 2(2) of Directive 77/62/EEC is hereby replaced by the following:

' (2) This directive shall not apply to:

(a) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Council Directive 90/531/EEC... or fulfilling the conditions in Article 6(2) of the said directive;' ".

49. Thus the sectoral exception in Directive 77/62 is defined as covering the contracting authorities covered by the new Directive and the bodies still not covered even by the new Directive.

50. It follows from the foregoing considerations that at the material time ANA-EP did not fall within the scope of the Directive and that the present action is unfounded.

51. (b) I now turn to the Portuguese Government' s argument that ANA-EP' s supply contract for the supply and assembly of a telephone exchange for Lisbon Airport was not covered by the directive on account of the legal form of the contract concerned. In support of that argument the Portuguese Government relies on the Portuguese version of the text of Annex I to the directive coordinating procedures for the award of public supply contracts. That version defines contracting authorities as

"Legal persons governed by public law whose supply contracts governed by public law are subject to State control". (15)

52. The parties are in dispute over the question of which language version was binding. Precisely which form of words in which language the parties regarded as decisive in the pre-litigation procedure is not a question on which the outcome of these proceedings will turn. The question to settle is an objective one: which is the binding form of words on the basis of which the legal question falls to be decided?

53. Of course, Directive 77/62 was adopted before Portugal became a Member of the European Communities;

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obligations under the directive could only arise on the occasion of Portuguese accession. Accordingly the Act of Accession contains adjustments to Directive 77/62 and transitional provisions relating thereto; thus "contracting authority" is defined as follows in Annex I to the Directive:

"XIII. In Portugal:

legal persons governed by public law whose public supply contracts are subject to State control". (16)

54. The content of Point XIII of Annex I to the directive is the same in all Community languages. The form of words relied on by the Portuguese Government was first incorporated in the directive by Directive 88/295/EEC. It is noteworthy that the linguistic variation is only to be found in the Portuguese text. Whatever the reasons for it - whether it was a mere oversight or a translator' s error - an attempt must be made to construe the provision concerned in a uniform way. The Court has consistently held that the necessity for uniform application and accordingly interpretation make it impossible to consider one version of a text in isolation, but require it to be interpreted on the basis of the intention of its author and the aim pursued, in the light of all language versions. (17)

55. Accordingly the Portuguese Government' s view that only the Portuguese text is binding must be firmly rejected. Nor is it likely that the particular form of words in Portuguese was included in the directive intentionally: were that indeed the case, a contracting authority covered by the directive might elude the rules contained therein simply by selecting a particular legal form for its contract with the prospective supplier. Moreover, the supply contracts covered by the directive are defined at Article 1(a), whereas Annex I specifies the "contracting authorities" defined in Article 1(b): that militates against the view that characteristics of the supply contracts dealt with by the directive may be inferred from Annex I.

56. The question whether the words "contracts governed by public law" may be disregarded need not be finally resolved, since at the time of the tendering procedure for the telephone exchange contract, the version of Annex I to Directive 77/62 that was in force was none other than that resulting from the Act of Accession.

57. The Portuguese Government' s objection that the contract could not have come within the scope of the directive because it had to be concluded under private law must therefore be rejected.

58. (c) The Portuguese Government finally raises the objection that ANA-EP is not a contracting authority within the meaning of the directive. Apart from the fact that ANA-EP is in any case excluded from the scope of the directive because it belongs to the transport sector, the question of whether or not it is a "contracting authority" falls to be determined by Article 1 in conjunction with Annex I to Directive 77/62. Article 1(b) states: "' contracting authorities' shall be the State, regional or local authorities and the legal persons governed by public law or... bodies corresponding thereto as specified in Annex I". Once again Point XIII of Annex I is of relevance. The version which, for the reasons set out above, is relevant to the present proceedings reads "other corporate bodies governed by public law subject to a procedure for the award of contracts".

59. In my view, in determining whether an undertaking is covered by the above definition one must look at the facts of the situation. Thus the issue is not whether an undertaking is subject to some form of State control since, as the Portuguese Government rightly points out, all public undertakings are subject to some form of State control. Even the theoretical possibility of State control in the case of supply contracts is not sufficient. What is required is that, under the terms of the relevant legislation, the contract in question be open to State control in such a way as to enable the public authorities to influence the conclusion of the contract.

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60. Whether or not ANA-EP is a legal person governed by public law whose awards of public supply contracts are subject to State control is a question to be determined under the relevant provisions of Portuguese law. ANA-EP was set up under Decree-Law No 246/79 of 20 July 1979, to which its constitution is annexed. No direct control on the part of State bodies over the award of supply contracts of the order of magnitude in question can be inferred from those provisions; however, the general rules governing all public undertakings might well be applicable. These are set out in Decree-Law No 260/76 of 6 April 1976, amended by Decree-Law No 29/84 of 20 January 1984. Article 13 of the Decree-Law states that transactions the value of which exceeds ESC 50 000 000 require approval by the Minister responsible. The possibility of amending that provision was also discussed in the pre-litigation exchanges.

61. The Portuguese Government has submitted that the aforesaid general legislation does not apply to ANA-EP' s transactions since the Decree-Laws in question rank equally in the hierarchy of legislation, with Decree-Law No 246/79, which set up ANA-EP, taking precedence as the more specific enactment. Moreover, Decree-Law No 29/84 had provided that the constitutions of public undertakings were to be brought into line with the general rules within a given period. Since no such adjustments had been made, Decree-Law 246/79 and the constitution of ANA-EP remained in force unchanged.

62. I do not wish to embark here on a detailed examination of Portuguese law. However, it seems to me, on the basis of the general theory of laws, that the mere passing of a deadline by which legislation was due to have been amended cannot itself effect a change in the law. However, that would mean that the supply contract for the Lisbon Airport telephone exchange which fell to be awarded in August 1987 was not subject to State control; ANA-EP would then not be a contracting authority within the meaning of the directive; and the application would have to be dismissed on the basis of that - secondary - consideration.

Costs

63. The decision on costs is governed by Article 69 of the Rules of Procedure of the Court. Article 69(2) states that the unsuccessful party shall be ordered to pay the costs where these have been applied for.

C - Conclusion

64. For the reasons set out above I propose that the Court rule as follows:

1. The application is dismissed;

2. The Commission shall bear the costs of the proceedings.

(*) Original language: German.

(1) Council Directive of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ 1977 L 13, p. 1, amended by Directive 88/295/EEC, OJ 1988 L 127, p. 1.

(2) Judgment in Case C-188/89 Foster v British Gas [1990] ECR I-3313, paragraphs 16 and 18.

(3) Judgment in Foster, above.

(4) Judgment in Case 31/87 Beentjes v Netherlands State [1988] ECR 4635, at paragraph 11.

(5) Judgment in Case 249/81 Commission v Ireland [1982] ECR 4005, and judgment in Case 222/82 Apple and Pear Development Council v Lewis [1983] ECR 4083.

(6) Judgment in Case 290/83 Commission v France [1985] ECR 439 and judgment in Case 78/76 Steinike and Weinlig v Federal Republic of Germany [1977] ECR 595.

(7) Judgment of 18 March 1986, Case 85/85 Commission v Belgium [1986] ECR 1149, at paragraph

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11.

(8) Judgment in Case 274/83 Commission v Italy [1985] ECR 1077, at paragraph 21; likewise, previously, the judgment in Case 7/61 [1961] ECR 699.

(9) Judgment in Case 70/72 Commission v Germany [1973] ECR 813, at paragraph 13.

(10) Case 85/85 [1986] ECR 1149, at paragraph 11.

(11) Opinion of Advocate General Lenz in Case 199/85 Commission v Italy [1987] ECR 1047; see also paragraphs 7 to 9 of the judgment in the same case, at p. 1039.

(12) Judgment of 7 February 1973 in Case 31/72 Commission v Italy [1973] ECR 101; Opinion of Advocate General Mancini in Case 303/84 Commission v Federal Republic of Germany [1986] ECR 1171 at pp. 1172 and 1173.

(13) OJ 1987 C 358, p. 1.

(14) Council Directive of 17 September 1990, OJ 1990 L 297, p. 1.

(15) My emphasis.

(16) OJ 1985 L 302, p. 217.

(17) Judgment in Case 29/69 Erich Stauder v City of Ulm [1969] ECR 419; judgment in Case 30/77 Pierre Bouchereau [1977] ECR 1999; judgment in Case 9/79 Marianne Koschniske v Raad van Arbeid [1979] ECR 2717; and judgment in Case 55/87 Alexander Moksel v Bundesanstalt fuer landwirtschaftliche Marktordnung [1988] ECR 3845.

Translation

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SUB Approximation of laws ; Free movement of goods

AUTLANG German

APPLICA Commission ; Institutions

DEFENDA Portugal ; Member States

NATIONA Portugal

PROCEDU Proceedings concerning failure by Member State - unfounded

ADVGEN Lenz

JUDGRAP Kapteyn

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Opinion of Mr Advocate General Tesauro delivered on 17 November 1992.
Commission of the European Communities v Kingdom of Denmark.
Award of a works contract - Bridge over the "Storebaelt".
Case C-243/89.

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Mr President,

Members of the Court,

1. In the present case the Commission seeks a declaration from the Court that, in the procedure for inviting tenders for the construction of a bridge across the western channel of the Storebaelt (Great Belt), the Kingdom of Denmark has failed to fulfil its obligations under Articles 30, 48 and 59 of the EEC Treaty and under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. (1) The Commission challenges two aspects of the procedure for awarding the contract: a) the inclusion in the general tender conditions of a clause which invited tenders on condition that the greatest possible use was made of Danish materials and consumer goods and of Danish labour and equipment (hereinafter the "Danish content clause"); b) the fact that the negotiations with the selected consortium were conducted on the basis of a tender which did not comply with the general tender conditions.

2. The facts and the pre-litigation procedure are described in detail in the Report for the Hearing, to which reference is made. Here I shall therefore merely recapitulate, so far as is necessary to make the subsequent observations easier to follow, the essential aspects of the matter.

The contract for the construction of a bridge over the western channel of the Storebaelt was awarded to the European Storebaelt Group (hereinafter "ESG"), one of the five international consortia which were invited to submit tenders under a restricted invitation to tender put out by Aktieselskabet Storebaeltsforbindelsen (hereinafter "Storebaelt"), a company wholly controlled by the Danish State and the contracting authority for the work in question. Storebaelt, which had drawn up three different projects as a basis for tenders, opened talks with the preselected consortia and then pursued negotiations with ESG, which had exercised the option provided for in Condition 3, Clause 3, of the general tender conditions, of submitting an alternative tender; those negotiations ended in the signature of the contract on 26 June 1989.

3. On 18 May 1989, the Commission had contacted the Danish authorities to express its doubts about the compatibility with Community law of both the Danish content clause and the fact that the negotiations with ESG had been conducted on the basis of a tender which did not comply with Condition 3, Clause 3, of the general tender conditions. Not satisfied with the explanations offered by the Danish Government, the Commission sent a letter of formal notice on 21 June 1989 requesting inter alia postponement of the signature of the contract. In reply to that letter the Danish authorities informed the Commission that they did not consider it appropriate to postpone the signing of the contract, but that, by letter of 21 June, they had requested Storebaelt to remove the Danish content clause, so that it no longer appeared in the final contract.

Considering that an infringement had been committed and that removal of the clause in question after the contract had been awarded did not expunge the failure to fulfil obligations, the Commission, by telex message of 14 July 1989, delivered a reasoned opinion addressed to Denmark in which inter alia it stated that, since the contract had already been signed, the only way for the situation to be remedied was to ask Storebaelt to cancel the contract with ESG and to reopen the tendering procedure.

When the Kingdom of Denmark failed to comply with the reasoned opinion, the Commission brought

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proceedings under Article 169 and also applied for interim measures pursuant to Article 186 of the Treaty, but only in respect of its objection to the Danish content clause.

4. At the hearing of the application for interim measures on 22 September 1989, the Danish Government stated that it recognized that the Danish content clause constituted a breach of the fundamental principle of non-discrimination enshrined in the EEC Treaty and undertook (a) to avoid any discriminatory clause or practice in relation to future contracts for public works or supplies, (b) to ensure that compensation would be paid for the damage incurred by the tenderers provided that they were able to demonstrate that their claims for damages were well founded in Danish law, and (c) in any event to ensure that bidding costs were recovered through arbitration, without the undertakings concerned having to establish that their failure to be awarded the contract was caused by the discriminatory effect of the Danish content clause.

Following that statement, the Commission withdrew its application for interim measures but continued proceedings under Article 169, retaining as one of its grounds of complaint that on which the application for interim measures had been based. Subsequently, however, the Commission, which in its application initiating proceedings had reserved the right at a later date to supplement and develop the grounds of its application, requested ° and for the most part obtained ° from the Danish Government various documents relating to the tendering procedure and to the final version of the contract, on the basis of which it then adduced, in the form of a reply, new reasons in support of its application. That step prompted the Danish Government to raise, in its rejoinder, a series of preliminary objections of inadmissibility directed at both the ground of application concerning the Danish content clause and that concerning the negotiations which took place between Storebaelt and ESG. Those objections of the Danish Government will now be considered together with the two grounds of application relied on by the Commission.

(a) The Danish content clause

5. The Danish Government objects that the Commission is widening the dispute to include clauses in the general tender conditions other than those referred to in the letter of formal notice or the reasoned opinion since, in substance, new pleas in law are thereby introduced, which are contained and developed only in the reply.

Indeed, in the course of the pre-litigation procedure, the Commission referred to only the Danish content clause as laid down in Condition 6, Clause 2, of the general tender conditions; in its application, however, and especially in its reply, it objected to various other clauses, which were either contained in the same tender conditions or introduced for the first time in the final version of the contract with the result that the Danish content condition still features in the contract, particularly in the form of requirements concerning materials.

The Commission seeks to justify that step by claiming that in the pre-litigation procedure its purpose was to challenge the Danish content clause in general and that, therefore, the submissions contained in the reply should be understood as simply amplifying this more general ground of application and do not constitute new separate pleas in law. Indeed, it cannot be denied that the clauses referred to by the Commission both in the originating application and in the reply are in essence no more than particular instances of the Danish content condition as expressed in Condition 6, Clause 2, of the general tender conditions.

6. That said, it should be pointed out that, according to settled case-law, (2) the scope of an application under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for in that article as well as by the forms of order sought, and both the reasoned opinion and the application must be based on the same grounds and pleas in law. Although the Court allows new matters of fact to be raised in the course of an action if they are "of the same kind as those to which

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the reasoned opinion referred and constituted the same conduct", (3) those facts must nevertheless, according to Article 42(2) of the Rules of Procedure, have occurred after delivery of the reasoned opinion or, in any event, the applicant must have been unaware of them at the time of lodging the application.

In so far, then, as the objections raised for the first time by the Commission in the application and the reply concern clauses in the general tender conditions, and therefore clauses which already existed when the letter of formal notice was sent, the inescapable conclusion according to settled case-law is that the Commission should have, or at least could have, known of them.

It follows that those "discriminatory" clauses may not be taken into consideration in these proceedings: the preliminary objection of inadmissibility raised by the Danish Government must therefore be upheld.

Nevertheless, I must add that, put in those terms, the question is a purely formal one. By that I mean that, if the Danish content clause is incompatible with Community law ° a fact not in dispute ° it seems to me that the defaulting State has a duty in any case to accept the obvious consequences, that is to say, to remove all those provisions which embody the Danish content condition. That the Danish Government was well aware of this is evident both from its reply to the reasoned opinion, in which it gave assurances that the final version of the contract contained no clause analogous to the Danish content condition, and from its statement to the effect that, since it had to remove the Danish content condition before the contract was signed, and therefore had little time in which to act, some specific instructions regarding the use of Danish materials had escaped its notice, simply because it was acting in haste. (4)

7. Next, with regard to those clauses which were included for the first time in the final version of the contract and which, according to the Commission, also formed Danish content specifications, it should first of all be observed that the form of order sought by the Commission in respect of the plea in law in question concerns only the unlawfulness of the procedure for awarding the contract. Therefore, unlike the "discriminatory" clauses in the general and specific tender conditions, those which were added to the final version of the contract cannot have had any influence on the conduct of that procedure. (5) Strictly speaking, therefore, those clauses could serve as the basis for a separate action because, if they are unlawful, they would clearly constitute an infringement of Community law in the course of being committed, since the construction of the bridge is still in progress.

Of course, it could also be argued that to take into consideration, for the purposes of these proceedings, requirements in those clauses which are possibly unlawful, is unlikely to lead to any significant change in the subject-matter of the action, since the grounds of objection are of the same nature as those raised in the reasoned opinion and relate to the same conduct. Besides, if the final version of the contract was in fact drawn up before the reasoned opinion was delivered, it follows that the applicant institution ° which, moreover, cannot be accused of either delay or negligence given the extreme rapidity with which it brought the present proceedings (less than one month elapsed between the commencement of the pre-litigation procedure and the lodging of the application) ° only gained actual knowledge of it after the action had been brought.

However, in view of the Court' s restrictive approach to the question of the widening of the subject-matter of the action to include facts of which the applicant was unaware at the time of the delivery of the reasoned opinion, I propose, having regard to the principles of procedure which govern actions under Article 169, that the preliminary objection of inadmissibility raised by the Danish Government should be allowed on this point, too.

8. Now that it has been established that the subject-matter of the plea under examination is confined

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to the Danish content clause, as expressed in Condition 6, Clause 2, of the general tender conditions, and bearing in mind that the incompatibility of that clause with Articles 30, 48 and 59 of the Treaty is not in dispute, the first point to be examined is whether or not the Danish Government, in removing the clause in question, complied with the reasoned opinion. Indeed, as will be recalled, that clause was removed before the contract was signed (26 June) and thus before the Commission delivered its reasoned opinion to the Danish Government (14 July). And it is precisely in view of this circumstance that the Danish Government submits that the application should be declared inadmissible or at the very least dismissed, by analogy with the Court' s decision in Case C-362/90 Commission v Italy. (6) In that connection I must point out immediately that in my opinion the case under examination is not comparable with the case just mentioned.

In Case C-362/90 the infringement complained of had already produced all its effects by the time the reasoned opinion was delivered. Furthermore, the Court specifically criticized the Commission for its failure to "act in good time in order to prevent, by means of procedures available to it, the infringement complained of from producing effects and did not even invoke the existence of circumstances preventing it from concluding the pre-litigation procedure laid down in Article 169 of the Treaty before the infringement ceased to exist". (7)

9. The situation in the case now before us is quite different. As I have already mentioned, in its letter of formal notice the Commission not only requested the explanations sought within seven days but also postponement, during that interval, of the signature of the contract. By meeting the Commission' s requests, the Danish Government could therefore have avoided "consummating" its failure to fulfil obligations; instead of doing that, it announced, in the course of the Treaty infringement proceedings, in its reply to the letter of formal notice, that Storebaelt had already signed the contract. The taking of that step precluded the reopening of the procedure for awarding the contract, which is why, in its reasoned opinion, the applicant requested, as the only way to secure compliance with Community law, that the contract be rescinded and the tendering procedure be reopened. Consequently, in so far as the contract was concluded on the basis of an irregular tendering procedure, it seems to me that ° given the undisputed unlawfulness of the Danish content condition ° the existence of an infringement cannot be denied.

It is obvious that the infringement could have been eliminated only by means of a fresh tendering procedure, since the procedure followed was conducted in flagrant breach of Community law. In other words, it unquestionably follows from the fact that the Danish content clause had influenced the submission of the tenders that its subsequent removal, even before signature of the contract, could not in any circumstances have made good such a serious defect in the tendering procedure.

What is more, I think it unlikely that the Danish Government can rely on the Commission' s statement to the effect that it is no longer possible at this stage to secure full compliance with Community law in contending that the form of order sought by the Commission regarding its objection to the Danish content clause is no longer relevant. Indeed, it would be at the very least unusual if a Member State, which had been in a position to prevent the infringement from producing definitive effects, could later rely on the fact that the breach of obligations had already been consummated in order to avoid a declaration, pursuant to Article 171, that it had taken place. The purpose of a ruling by the Court to that effect is not to declare that Storebaelt should have reopened the tendering procedure but, more simply, to declare that the procedure in question was conducted in breach of the applicable provisions of Community law.

In conclusion, to accept the defendant' s contention that the Danish content clause had already been removed before the reasoned opinion was issued and that, consequently, the formal objection to that clause is no longer relevant following the signature of the contract, would be tantamount to rewarding the fact that, even though infringement proceedings were already in progress, the breach

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of obligations had been "consummated".

One final observation on this point. In my view, it is all too clear that, if the Court were to accept the argument of the Danish Government, the whole raison d' être of the infringement proceedings would be rendered nugatory where there is a quite specific failure to fulfil obligations, that is to say where there is a risk that the failure will be already "consummated" during the pre-litigation procedure and possibly before delivery of the reasoned opinion. Moreover, that is obviously a risk which arises almost as a matter of course in a sector such as public works contracts. Consequently, unless the procedure under Article 169 regarding breaches of obligations of the kind in question is to be deprived of meaning and devalued, there is little point in relying on the Court' s finding that "a matter may be brought before the Court of Justice only if the State concerned has not complied with the reasoned opinion", (8) nor can one contend, as in Case C-362/90 to which I referred earlier, that "at the date of expiry of the period laid down in the Commission' s reasoned opinion... , the infringement complained of no longer existed" as it had produced all its effects. In the present case, the Commission initiated infringement proceedings in good time to prevent the infringement complained of from producing effects inasmuch as, since the final contract had not yet been signed, the State concerned was in a position to reopen the tendering procedure.

10. That said, it must now be established whether, and if so, to what extent, the Danish Government' s statement of 22 September 1989 made in the proceedings for interim measures has any bearing on these proceedings. In that connection, the Danish Government contends that by that statement it not only recognized the existence of the infringement but also acknowledged its own financial liability towards the tenderers, so that the statement was equivalent in effect to a Court ruling definitively finding that an infringement had been committed.

Although the Danish Government recognized the infringement and gave assurances that compensation would be provided for the damage suffered by the tenderers, the fact is that this does not remove the interest in pursuing proceedings. The fact that the statement caused the applicant institution to withdraw its application for interim measures is merely the result of an agreement between the parties concerning only the proceedings for interim measures so as to settle those proceedings specifically. However, it does not seem to me correct to deduce from that conduct of the Commission that the action is inadmissible or unfounded. Otherwise, the principle would be established that the Commission must abandon an action whenever, in the course of proceedings, the breach of obligations is no longer contested and at the same time it is acknowledged that compensation should be paid for any damage suffered by individuals on account of the breach.

11. Moreover, it appears from the settled case-law on this point, in which the Court has from time to time expressly pointed out that the interest in pursuing an action may reside in establishing the basis of liability which a Member State may incur as a result of its default, (9) that there must in any case be a presumption that the Commission has an interest in pursuing an action which it has initiated under Article 169, even where the breach of obligations is not contested. (10)

In short, as the Court has recognized, (11) the Commission does not have to demonstrate an interest in taking action in order to pursue an action which it has initiated. As "guardian" of the Treaties, the Commission has in any case an interest in obtaining a declaration from the Court that a Member State has failed to fulfil its obligations: for that purpose, the only relevant factor is that the State in question did not bring the infringement complained of to an end within the period laid down in the reasoned opinion. On the other hand, the fact that the infringement in question was acknowledged before delivery of the reasoned opinion is, contrary to the Danish Government' s contention, totally irrelevant.

In the light of the foregoing I am therefore of the opinion that, since Storebaelt awarded a public works contract on the basis of a clause which invited tenders subject to the condition that the

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greatest possible use was made of Danish materials and labour, the Kingdom of Denmark has failed to fulfil its obligations under Articles 30, 48 and 59 of the Treaty.

(b) The negotiations conducted on the basis of a tender which did not comply with the general tender conditions

12. In relation to this ground of application, the Danish Government has again raised a number of objections of inadmissibility, concerning both the additional matters of fact which the Commission added in its reply in support of the ground in question and ° above all ° an alleged change to the form of order sought, widening its scope.

With regard to the facts mentioned by the Commission for the first time in its reply, that is to say, the "presumed" negotiations between Storebaelt and ESG, which supposedly resulted in a final contract which contained provisions incompatible with the tender conditions, (12) the same considerations apply as have already been made in relation to the ground concerning the Danish content condition. It clearly follows from the settled case-law, already referred to, that the Commission may not base the ground in question on facts which were not challenged in the course of the pre-litigation procedure.

However, the matter of the re-wording of the form of order sought is more delicate. Originally, the Commission took objection to the fact that Storebaelt had held negotiations with ESG on the basis of a tender which did not comply with Condition 3, Clause 3, of the general tender conditions. In its reply the Commission then re-worded the form of order sought, claiming that, on the basis of a tender which did not comply with the general tender conditions, Storebaelt had held negotiations with ESG with the result that the final contract contained amendments to the conditions of the invitation to tender favouring exclusively that individual tenderer and relating in particular to price factors. Furthermore, the Commission added an express reference to the principle of equal treatment as the basis of Directive 71/305, whereas the form of order sought in the original application refers, in particular, to Title IV of that directive.

The Danish Government contends that, by re-wording the form of order sought in that respect, its scope has been widened; it cites settled case-law to the effect that a party may not change the subject-matter of a dispute in the course of proceedings and contends that, consequently, the merits of the action must be assessed with regard only to the form of order sought in the application originating proceedings. (13) The defendant further contends that the form of order sought, as now re-worded, has a new legal basis, namely, the principle of equal treatment which underlies the directive. Such a step is unacceptable in so far as it amounts to a breach of the rights of the defence, since the defendant has had no opportunity to submit its observations on those points in good time and in the prescribed manner.

13. I cannot accept that argument. In the first place, as the Danish Government itself has acknowledged, a reframing of the form of order sought is permissible if it delimits, in the sense of "restricts", the formal claim. In my opinion, that is precisely the position in the present case, in so far as the Commission ° by no longer relying in general on the fact that the negotiations were conducted on the basis of a tender which did not comply with the general tender conditions, but rather on the fact that the subject-matter of those negotiations was a clause in the general tender conditions which was not open to derogation and that they led to results manifestly contrary to the principle underlying Directive 71/305, which is, namely, the equal treatment of tenderers ° in the end essentially delimited and restricted the scope of its charge as expressed in the reasoned opinion.

With regard to the argument that the principle of equal treatment constitutes a new legal basis, I would first of all observe that, although such a principle was actually included in the form of order sought for the first time in the reply, the Commission had already taken issue with the

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Danish Government during the pre-litigation procedure for breach of that principle. In particular, I would remind the Court that the Commission expressly stated in its reasoned opinion that the fact of having held negotiations on the basis of a tender which did not comply with the general tender conditions "infringed the principle of equal treatment of all contractors which lies at the heart just as much of national laws in the field of procurement as of Council Directive 71/305". It follows, therefore ° as is clear moreover from both the reply to the reasoned opinion and from the defence ° that the Danish Government had an opportunity to submit its observations in that regard.

14. That said, let me move on to consider the substance of the ground of application. It is appropriate first of all to examine Condition 3, Clause 3, of the general tender conditions, that is to say, the wording of the clause with which ESG failed to comply when submitting its tender.

According to that provision, the price for an alternative tender must include the costs of the detailed design of the project submitted by the tenderer for acceptance by the contracting authority; in addition, the tenderer must itself assume full liability for the project and for its execution, including the risk of variations in the quantities on which the alternative tender is based. Condition 3, Clause 3, also provides that the tenderer must quote a reduced price for the project in the event that the contracting authority decides itself to undertake the detailed design directly. In that case, liability for the planning of the project and the risk of variations in quantities, in so far as they result from the detailed design of the project, is to be borne by the contracting authority.

The alternative tender submitted by ESG for a bridge in reinforced concrete provided, at paragraph 6.1 (actual tender), that the contracting authority was to undertake the detailed design of the project and to assume full liability for its execution, and for the risk of variations in the quantities. At paragraph 6.2 of the tender, ESG proposed a further option whereby it would undertake the design of the project itself for an additional cost of DKR 42 million; even under that arrangement, however, the tenderer considered that it should be for the contracting authority to assume liability for execution of the project and for the risk of variations in the quantities, a risk involving an estimated DKR 5 million.

15. In my opinion, it clearly follows from the wording of paragraph 6.2 that a tender framed in those terms does not comply with Condition 3, Clause 3, of the general tender conditions. The argument put forward by the Danish Government ° according to which the contracting authority is only to assume liability for execution of the project and for the risks of variations in the quantities in the event that it undertakes the design of the project ° is moreover contradicted by Storebaelt itself, as is clear from the note of 21 June 1989 annexed to the Danish Government' s reply to the Commission' s request for clarification. (14)

The Commission originally claimed that, since the tender did not comply with the general tender conditions, the very fact that Storebaelt had given it consideration, and entered into negotiations on that basis, constituted a breach of the principle of equal treatment to which Title IV of Directive 71/305 gives expression.

In particular, although the Commission acknowledges that tenderers may make reservations in their tenders, it believes that the availability of that option had its limit in the fundamental requirements contained in the general tender conditions, of which Condition 3, Clause 3, is certainly an example. It follows that Storebaelt failed to undertake an objective comparison of the tenders submitted under identical conditions, which in turn means that the last stage of the tendering procedure was not conducted in a proper manner so far as the other tenderers were concerned. As I have already mentioned, the Commission then amplified this complaint in its reply, stating that the negotiations between ESG and Storebaelt were incompatible with Community law in so far as they had an effect

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on prices.

16. Indeed, as I have just explained, ESG had undertaken to take on the detailed design of the project for a fixed sum of DKR 42 million, but did not undertake to assume liability for the project or for the risks involved. Those conditions must, therefore, have been the subject of negotiation, as must the risk relating to quantity variations.

Given the Danish Government' s refusal to provide the Commission with the documents concerning the negotiations in question, (15) it is not possible to say in what way Storebaelt took into account the reservations in question and fixed the corresponding prices. The fact remains, however, that some of the conditions contained in the general tender conditions were amended in the course of the negotiations, with the result that ° given the nature of those conditions ° the contract price, as quoted in the tender, was changed.

Furthermore, it appears from the documents submitted by the Commission that the contract concluded with ESG provides that its liability is to be limited to DKR 300 million and to last no longer than six years, which is clearly contrary not only to Condition 3, Clause 3, of the general tender conditions, under which the contractor must assume full liability in respect of the project and its execution, but also, and above all, to the principle of equal treatment: it is in fact clear that the other tenderers, in establishing a price for the contract, took into account the fact that they would have to assume full liability for the work. As regards the risk of variations in the quantities, the contract provides for a fixed sum of DKR 5 million, which corresponds to the estimate made by ESG in the variation on its tender: it is thus clear that the negotiations in question did indeed affect prices.

Given all those facts, it is impossible to avoid the conclusion that the tender conditions, as laid down in the contract documents (and as far as here relevant, in Condition 3, Clause 3) were amended in order to favour a particular tenderer. It follows that the conditions of competition between the tenderers were thereby distorted and that, consequently, the principle of equal treatment between tenderers was breached.

17. The Danish Government contends nevertheless that the increase in the price was quite proportional to the total cost of the work in question and that, in any case, the facts complained of by the Commission are not governed by Community law; in particular, the possibility of accepting offers which contain reservations and the contracting authority' s right to hold negotiations with tenderers are both matters governed by national law. The Danish Government therefore maintains that Directive 71/305 does not govern the limits within which negotiations may take place and that the relevant national law was applied without discrimination of any kind between the different tenderers.

On that point, I would say straightaway that I do not think that the Danish Government' s statement that "on ne peut inférer de la directive 71/305 une règle imposant aux Etats membres des obligations supérieures aux exigences du droit danois en matière de marchés publics en ce qui concerne le fait de ne pas prendre en considération une offre comportant une réserve ou de s' abstenir absolument de toute négociation" ("one cannot deduce from Directive 71/305 the existence of a rule subjecting Member States to obligations which override the requirements of Danish law on public works contracts on the question of not taking into consideration a tender containing a reservation or wholly avoiding negotiation") merits any particular comment. (16) It is self-evident that in so far as Danish rules are shown to be incompatible with Community law, the latter prevails.

Secondly, I do not see the point of the Danish Government' s complaint that the Commission interpreted the directive as having been based on the principle of equal treatment. It would be strange, to say the least, to take the view that, since the principle in question is not expressly codified in any of the provisions of the directive in question, it is extraneous to the directive, when the

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directive' s very purpose is first and foremost to secure equality for all those who take part in a tendering procedure.

18. It is true that Directive 71/305 does not contain any specific rule regarding reservations; nor does it expressly codify the principle of equal treatment. That does not mean, however, that all matters related to public contracts may be governed by national law without taking into account such a fundamental principle. And quite frankly, I find it astonishing that the parties have expended so much energy in demonstrating, or denying, that the principle of equal treatment lies at the heart of Directive 71/305. On that point, it is hardly necessary to point out that, where a public contract falls to be awarded, it is precisely because the procedure is a competition that it must be ensured that all those who take part have an equal chance: otherwise, it would no longer be a public tendering procedure but private bargaining. In sum, equal treatment underlies any set of rules governing procedures for the award of public contracts since it is the very essence of such procedures.

Furthermore, both the preamble to Directive 71/305 and its provisions, taken as a whole, are more than indicative in this respect. Suffice it to say that it is expressly stated that the fixing of objective criteria for participation constitutes one of the fundamental principles, observation of which must be ensured throughout procedures for the award of public works contracts (third recital); that tenders must be submitted in accordance with the conditions contained in the contract notice, in order to ensure "development of effective competition", and all the more so in the context of restricted procedures (penultimate recital).

19. As regards the joint statement of July 1989, (17) attached to Council Directive 89/440/EEC (18) ° which in open or restricted procedures rules out all negotiation with tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices ° it does not seem to me possible to accept the Danish Government' s view that the statement in question has no legal consequences and that, in any case, since it postdates the events in issue, it is of no significance in these proceedings.

Nor do I believe, given the observations set out above, that the Danish Government may rely on the Court' s statement in the judgment in Antonissen, (19) according to which the relevance of a declaration depends on its content and on whether reference is made to it in the wording of the provision in question. In my opinion, it is indisputable that the statement referred to is purely declaratory, since the principle of equal treatment of tenderers ° whose purpose in this particular context is, in particular, to ensure that competition between those taking part in the tendering procedure is not distorted ° lies at the very heart of the rules under consideration in this case.

One last point. The defendant Government' s contention that the national law governing the award of public contracts was applied without any discrimination to all those taking part in the tendering procedure raises the question whether, that being the case, it may be concluded that the prohibition of discrimination laid down in Directive 71/305 was infringed. I have no hesitation in replying that if, as in this case, the Danish rules governing the award of public contracts are such that ° even if applied without discrimination ° they conflict with the principle of equal treatment as apparent in Directive 71/305 and as restated in the common statement of July 1989, then that national law must be considered incompatible with Community law.

20. In the light of the foregoing I therefore propose that the Court uphold the application and order the defendant State to pay the costs.

(*) Original language: Italian.

(1) ° OJ, English Special Edition 1971 (II), p. 682.

(2) ° See, most recently, the judgment in Case C-52/90 Commission v Denmark [1992] ECR

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I-2187, paragraph 23.

(3) ° See the judgment in Case 42/82 Commission v France [1983] ECR 1013 and in Case 113/86 Commission v Italy [1988] ECR 607.

(4) ° See page 44 of the rejoinder. In fact, the Danish Government expressly recognized that some provisions of the contract, described as being of secondary importance, still contain Danish content specifications.

(5) ° Of course, the observations which I have just made hold true in this case, too: it would at the very least be illogical if the Danish Government, having recognized the incompatibility of the Danish content clause with Community law and therefore requested its removal, were then to allow unlawful requirements of the same kind to be included in the final version of the contract.

(6) ° See the judgment in Commission v Italy [1992] ECR I-2353.

(7) ° See the judgment in Case C-362/90, cited above, at paragraph 12.

(8) ° See the judgment in Case 121/84 Commission v Italy [1986] ECR 107, paragraph 10.

(9) ° See, most recently, the judgment in Case C-29/90 Commission v Greece [1992] ECR I-1971, paragraph 12.

(10) ° On that point, it is sufficient to note that the Court has never questioned the Commission' s interest in obtaining a declaration that a Member State has failed to fulfil its obligations, even when the default in question was fully acknowledged by the Member State and where there was obviously no problem regarding compensation for damage.

(11) ° See judgment in Case 167/73 Commission v France [1974] ECR 359, paragraph 15.

(12) ° In its reply the Commission no longer referred exclusively to the negotiations concerning the reservation made by ESG with respect to Condition 3, Clause 3, of the general tender conditions, but also referred to negotiations allegedly conducted on the unit price of embankment sand, penalties and making up of delays, the contribution of support for the employment market, the price-adjustment formula and so on.

(13) ° See, for instance, the judgment in Case 278/85 Commission v Denmark [1987] ECR 4069.

(14) ° In order to show that the tender submitted by ESG, in the form described at paragraph 6.2, in no way influenced the result of the negotiations, Storebaelt states in that note that it had not accepted the proposal put forward by ESG in terms of which the contracting authority would have borne le risque lié à la conception du projet et aux quantités, même si l' entrepreneur effectuait cette conception (the risks linked to the design of the project and the quantities involved, even if the tendering company undertook the design).

(15) ° The grounds for the refusal being (a) the documents concerned were confidential, and (b) Storebaelt was under no obligation, in any case, to determine the price of the reservations in question.

(16) ° See page 54 of the Danish Government' s rejoinder.

(17) ° OJ 1989 L 210, p. 22.

(18) ° Directive of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1).

(19) ° Judgment in Case C-292/89 Antonissen [1991] ECR I-745.

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Opinion of Mr Advocate General Van Gerven delivered on 8 May 1990.
A. Foster and others v British Gas plc.
Reference for a preliminary ruling: House of Lords - United Kingdom.
Social policy - Equal treatment for men and women workers - Direct effect of a directive with regard to a nationalized company.
Case C-188/89.

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Mr President,

Members of the Court ,

1 . The House of Lords has submitted the following question to the Court for a preliminary ruling under Article 177 of the Treaty :

> "Was the British Gas Corporation (at the material time) a body of such a type that the appellants are entitled in English courts and tribunals to rely directly upon the equal treatment directive (Council Directive 76/207/EEC of 9 February 1976) so as to be entitled to a claim for damages on the ground that the retirement policy of the British Gas Corporation was contrary to the directive ?". (1)

Mrs Foster and the other appellants in the main proceedings are women who were employed by the British Gas Corporation (" the BGC "); on reaching the age of 60 on various dates between 27 December 1985 and 22 July 1986 they were required to retire, in accordance with the general policy of the BGC. During the same period male employees of the BGC were required to retire only at the age of 65.

In its judgments in Defrenne III, (2) Burton, (3) Roberts, (4) Marshall (5) and Beets-Proper (6) the Court ruled that an age-limit applied for the purpose of terminating an employment relationship constitutes a working condition and more particularly a condition governing dismissal whose validity must be examined in the light of Directive 76/207/EEC on equal treatment. (7)

Article 5(1) of that directive provides that :

> "Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex."

The House of Lords points out that during the material period the United Kingdom had not yet brought its national law into conformity with the equal treatment directive. Section 6(4) of the Sex Discrimination Act 1975, which was then in force, provided that the prohibition laid down in Section 6(1)(b) and (2) of the Act of discrimination against women in respect of conditions of recruitment or dismissal applied by employers or any other unfavourable treatment did not apply to provisions regarding death or retirement. (8) (9)

2 . The parties in the main proceedings are agreed that the distinction between men and women in the BGC' s pension policy is unlawful notwithstanding Section 6(4) of the Sex Discrimination Act 1975 if Article 5(1) of Directive 76/207 is directly applicable to the conditions of dismissal of the appellants in the main proceedings, but that otherwise the BGC' s policy is valid.

In paragraph 49 of the judgment in Marshall (10) the Court stated that persons may only rely on provisions such as Article 5(1) of Directive 76/207 in their relations with "the State", in its capacity as "employer or public authority", since "it is necessary to prevent the State from taking advantage of its own failure to comply with Community law ". (11) In paragraph 48, on the other hand, the possibility of relying upon such a provision against an individual is excluded,

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inasmuch as a directive may not of itself impose obligations on an individual. In academic terminology, that means that where the period for their implementation has expired, provisions of directives which from the point of view of their content are unconditional and sufficiently precise (12) have "vertical direct effect" but no "horizontal direct effect ".

The reference for a preliminary ruling thus concerns the issue whether at the material time the BGC was "the State" or "an individual ". In the first hypothesis the appellants in the main proceedings can rely on Article 5(1) of Directive 76/207 but in the second they cannot .

3 . At the material time the BGC was a nationalized gas undertaking; since then it has been privatized by the Gas Act 1986, under which British Gas plc (the respondent in the main proceedings) was established and on 24 August 1986 succeeded to the rights and liabilities of the BGC. (13)

The status of the BGC, the employer of the appellants in the main proceedings at the relevant time, must be viewed in the context of the nationalization of gas production and supply by the Gas Act 1948, which was later replaced by the Gas Act 1972. Under the Gas Act 1948 property, rights and liabilities were allocated to "area boards" or to the "Gas Council ". Under the Gas Act 1972 the Gas Council became the BGC and the property, rights and liabilites were vested in it. The BGC was a body with legal personality operating under the supervision of the authorities and having a monopoly on the supply of gas to homes and businesses in Great Britain. The members of the BGC were appointed by the Secretary of State, and he also determined their remuneration (Section 1(2)(3)). The task of the BGC was to develop and maintain an efficient, coordinated and economical system of gas supply for Great Britain and to satisfy, so far as it was economical to do so, all reasonable demands for gas in Great Britain (Section 2(1)). It was its duty to settle from time to time, in consultation with the Secretary of State, a general programme of research into matters affecting gas supply (Section 3(3)).

The Secretary of State was empowered to require the BGC to report on its activities and, after laying that report before both Houses of Parliament, to give the BGC such directions as he considered appropriate on the basis of that report for the most efficient management of the undertaking (Section 4). The BGC was obliged to give effect to any such directions (Section 4(3)). The Secretary of State could also, after consultation with the BGC, give the BGC general directions for the exercise and performance of its functions, including the exercise of its rights as a shareholder, where in his view the national interest so required, and the BGC was obliged to give effect to any such directions (Section 7). The BGC was obliged, as soon as possible after the end of each financial year, to submit a report to the Minister on the exercise and performance of its functions during that year and on its policy and programmes (Section 8).

The BGC was obliged so to perform its functions and so to exercise its control over its subsidiaries as to ensure that, taking one year with another, the combined revenues of the BGC and its subsidiaries were at least sufficient to meet total operating costs and constitute the necessary reserves in order to be able to comply with any directions given by the Secretary of State (Section 14). The Secretary of State could from time to time, after consultation with the BGC and with the approval of the Treasury, require the BGC to allocate certain amounts to reserves, whether or not for a specific purpose, and the BGC was obliged to comply with any such directions (Section 15). If in any financial year there was a significant excess of income over total costs, the Minister, with the approval of the Treasury, could require the BGC to pay over to him the portion of that income which was surplus to the BGC' s requirements, and the BGC was required to comply.

Under the Gas Act 1972, the BGC was not an agent of the Secretary of State . The employees of the BGC were not in Crown employment for the purpose of United Kingdom employment law. The BGC had no legislative functions .

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The basis of the judgment in Marshall : nemo auditur

4 . For the sake of convenience let me begin by quoting the central passage of the Marshall judgment. It is to be found in paragraphs 47 to 49 of the judgment and the second paragraph of its operative part.

Paragraph 47 :

> "That view is based on the consideration that it would be incompatible with the binding nature which Article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails."

Paragraph 48 :

> "With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual."

Paragraph 49 :

> "In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law."

The Court therefore held that :

> "Article 5(1) of Council Directive No 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5(1)."

5 . In Marshall the possibility of relying on an unconditional and sufficiently precise provision of a directive against a Member State was thus clearly linked to the failure of the Member State to implement the directive in national law correctly and at the proper time . (14) Accordingly, the principle "the State cannot plead its own wrong" (15) or the principle nemo auditur propriam turpitudinem allegans were held to constitute the basis for vertical direct effect . At the same time, however, the principle was interpreted broadly : the failure to act can be relied on by individuals against the Member State regardless of the capacity in which the State acts - as "employer or public authority"; moreover, as also appears from later judgments which will be discussed below, the failure to act can be relied on by individuals against independent and/or local authorities which are not themselves responsible for the failure to implement the directive in national law.

As I have already had the opportunity to explain in my Opinion in Barber, (16) the relevant provision of the directive was thus given some restricted effect with regard to third parties, that is to say against authorities other than the defaulting authority. The rationale is (and remains (17)) the desire to prevent the Member State in question from deriving any advantage whatsoever from its failure to comply with Community law.

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6 . By giving the term "State" so wide a meaning the Court followed the Opinion of Advocate General Sir Gordon Slynn, in which he stated that

> "(even if contrary to the trend of decisions in cases involving sovereign immunity where the exercise of imperium is distinguished from commercial and similar activities) as a matter of Community law, ... the 'State' must be taken broadly, as including all the organs of the State . In matters of employment... this means all the employees of such organs and not just the central civil service ". (18)

That the Court did in fact wish to give the term "State" a sense going beyond the "personal default" of the authority concerned is clear from the actual circumstances. That is to say, the issue was the possibility of relying on Article 5(1) of Directive 76/207 against a local health authority which was certainly an "agent for the Ministry of Health" (while its employees, including hospital doctors and nurses and administrative staff, were "Crown servants" (19)) but was in no way concerned in or could be responsible for the failure of the legislature in the relevant Member State to implement the directive in national law.

Indeed, such a broad interpretation is also suggested by the choice of words in the judgment : in the language of the case - and also in the other languages (20) - expressions such as "emanation of the State", "organ of the State", "public authority" and "State authority" are used as overlapping and synonymous terms.

Later cases

7 . A few months after the Marshall judgment the Court gave judgment in the Johnston case, (21) concerning the possibility for an employee of relying on Article 3(1) and 4 of Directive 207/76 against the Chief Constable of the Royal Ulster Constabulary. The British Government, arguing that those provisions could not be relied on, referred to the fact that the Chief Constable is constitutionally independent of the State. (22) That did not prevent the Court, referring to the Marshall judgment, from stating that :

> "The Court also held in the aforesaid judgment that individuals may rely on the directive as against an organ of the State whether it acts qua employer or qua public authority. As regards an authority like the Chief Constable, it must be observed that, according to the Industrial Tribunal' s decision, the Chief Constable is an official responsible for the direction of the police service. Whatever its relations may be with other organs of the State, such a public authority, charged by the State with the maintenance of public order and safety, does not act as a private individual. It may not take advantage of the failure of the State, of which it is an emanation, to comply with Community law ". (23)

In that quotation it is striking to see the manner in which the relations between the head of a local police force and "other organs of the State" are considered irrelevant, which again shows that autonomous authorities which are independent of other organs of the State, regardless of the level at which they operate, be it central or local, do indeed fall under the broad expression "the State ". It is also striking that the judgment states that the Chief Constable is "charged by the State with the maintenance of public order" and infers from that that he "does not act as private individual ". I assume that in that judgment, unlike in Marshall, the Court referred to the specific public duties of the Chief Constable because the maintenance of public order is regarded as a public function in all the Member States, which is not so clear in respect of health care. That may suggest that although the nature of the duty is not conclusive in determining the public nature of an authority, that is to say in distinguishing it from a private individual, it may nevertheless be a useful pointer.

Finally, the last sentence of the quoted paragraph is also worthy of attention, since it takes up the theme of the "advantage" that the State must not derive from its default and expressly relates

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it to a constitutionally independent local authority, the Chief Constable of Northern Ireland.

8 . The point of view expressed by the Court in Marshall was applied again in its judgment in Case 103/88 Costanzo v Comune di Milano. (24) That case concerned a directive on public works contracts. The Court was asked whether a municipal authority was obliged, in examining individual tenders, to refrain from applying national rules incompatible with the directive concerned, the period for whose implementation had expired.

The Court held that :

> "when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions ". (25)

Even outside the area of fundamental rights (equal treatment for men and women), then, the Court has a very broad conception of the "State ": (26) all administrative authorities, at every level of the territorial division of a Member State, form part of "the State" for the purposes of the Marshall judgment.

It is also clear that the "State" does not cover only authorities whose powers are "delegated" from the central authority. The criterion of delegation of powers is not always compatible with the legal situation of municipal authorities in different Member States and is in any event completely inappropriate to the situation in Member States which have a federal structure.

A twofold or a threefold classification?

9 . In what I have said up to now I have tacitly assumed that what the Court must do is draw a dividing line in Community law which will assist national courts in distinguishing the concept of "the State" from the concept of "individual ". That point of departure is implicit in the cases discussed above, although in Marshall and Johnston the Court could rely to some extent on findings in that respect made by the national court itself. In the present case that is clearly not so : the House of Lords has made no assessment of the nature of the BGC, that is to say whether or not it formed part of "the State"; on the contrary, in the questions which it has submitted to the Court it assumes that it is for the Court to set out a Community framework within which the national courts may determine whether the direct effect of provisions of a directive may be relied upon against this or that body .

I would subscribe to that point of view, which indeed has not been disputed by any of the parties that have submitted observations. If the Court itself did not lay down a basis in Community law, the result would be a complete lack of uniformity among the Member States with regard to the direct effect of provisions of directives.

10 . In outlying a Community framework for defining the "State" a fundamental question arises. Are the concepts "State" and "individual" together exhaustive or is there, in between them, a third category of persons or bodies? Such an intermediate category might include bodies such as public undertakings (for instance, the BGC in this case), State universities or even private universities that are financed wholly or virtually wholly by the State, and the like. If the existence of such a category is accepted, the question arises whether with regard to the possible direct effect of provisions of directives it must be put on the same footing as the category "State" or the category "individuals ".

As the appellants in the main proceedings have stated, no support can be found in the judgments of the Court referred to above for the existence of an intermediate category. Paragraph 48 of the judgment in Marshall assumes a twofold and not a threefold classification when it states in its

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last sentence : "It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual ". Similarly, in the passage of his Opinion in that case quoted above, Sir Gordon Slynn appears to bring both "the exercise of imperium" and "commercial and similar activities" under the concept of "the State" in Community law. That point of view is also supported in later judgments of the Court, in the Kolpinghuis Nijmegen judgment of 8 October 1987 (27) and the Busseni judgment of 22 February 1990. (28)

The advantage of a twofold classification is that the problem of definition can be approached from two sides. We may ask on the one hand who is the State and on the other who must be regarded as an individual . It seems easier to decide who is an individual and who is not, on the basis of the prevailing conceptions : thus public undertakings are not private parties in the sense in which that is understood in everyday language, which leads to the conclusion, in the hypothesis of a twofold classification, that they are part of the "State ".

Although it is my view that there is no basis in the Court' s case-law in this regard for a threefold classification, I shall not use such complementary and mutually supporting definitions of "individuals" and "State ". The point is not who is the State or an individual in the abstract but against whom the failure of a Member State to implement a directive correctly and in good time in its own legal system can be pleaded, having regard to the underlying reasons. According to Marshall and Johnston the basic thinking is that a Member State, and any public body charged with functions by the State, regardless of the capacity in which it acts or its relations with other public bodies, may in no event derive advantage from the failure of the Member State to comply with Community law.

It must now be considered whether, having regard to that reasoning, a public undertaking such as the BGC must not benefit from the default of its Member State and in that sense must be brought under the concept of "the State ".

Analogies from other areas of Community law

11 . Before discussing the positions of the parties and giving my own views, I should like by way of comparison to discuss briefly a few areas of Community law in which some notion of public authority plays a role . The most important general conclusion to be drawn from this comparison is that an interpretation is sought of each measure which is most in keeping with its place in the Treaty and thus with the purpose of the concept of public authority which is used. That conclusion suggests that in the present context too an approach should be chosen which will give the concept of "the State" the meaning that corresponds most closely to the underlying reasoning, discussed above, of the Marshall judgment. The comparison also elicits a number of criteria which may be useful in the present context.

12 . Reference may be made first of all to the concept of an aid measure under Article 92 of the EEC Treaty. As the Court has consistently held, no distinction may be drawn "between cases where aid is granted directly by the State and cases where it is granted by public or private bodies established or appointed by the State to administer the aid ". (29) As concrete indications of the public nature of the aid measure reference has been made for example to the fact that a Member State held directly or indirectly 50% of the shares in the undertaking granting the aid and appointed half the members of the supervisory board, and that the tariffs applied by the undertaking granting the aid had to be approved by a government minister. (30) That was sufficient to show that in determining its tariffs the undertaking in no way enjoyed full autonomy, but acted under the control and on the instructions of the public authorities. (31) It could therefore be concluded that the fixing of the contested tariff was the result of action by the Member State and thus fell within the concept "aid granted by a Member State" for the purposes of Article 92 . (32)

That definition of the State as the author of aid measures reflects a broad interpretation which

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corresponds to the purpose of Article 92(1) of the Treaty, that of encompassing all aid measures : "any aid granted by a Member State or through State resources in any form whatsoever ". (33)

A somewhat different intention lies behind Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings. (34) It appears from the sixth recital in the preamble to the directive that its purpose is to "enable a clear distinction to be made between the role of the State as public authority and its role as proprietor ". Accordingly, Article 2 defines first "public authorities" (the State and regional or local authorities) and then "public undertakings" (any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it). (35)

13 . A second area of Community law that may offer an analogy is that of public works contracts. In Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (36) "the State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or bodies governed by public law" are described as "contracting authorities ".

A "body governed by public law" means any body : (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, (b) having legal personality, and (c) financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law (see Article 1 of the directive). Article 1a of the directive goes on to provide that contracting authorities which subsidize directly by more than 50% a works contract awarded by an entity other than themselves must ensure compliance with the directive. This concept of the State, too, is interpreted by the Court in a flexible manner in accordance with the aim of the measure. (37)

14 . A third possible point of departure is the exceptional provision in the first subparagraph of Article 4(5) of the Sixth Council Directive on VAT. (38) As its wording indicates, that provision is restricted to the activities or transactions in which States, regional and local authorities and other bodies governed by public law engage "as public authorities ". That is also apparent from the case-law of the Court. (39) The important distinction here is thus the capacity in which the public authority acts : as an authority or as a normal taxable person.

15 . A final point of comparison (40) can be found in the case-law of the Court on Article 30 of the EEC Treaty, in which it is determined whether a particular restrictive practice can be ascribed to the authorities. In the Buy Irish judgment it was demonstrated that the restrictive practice in question (a promotional campaign for the purchase and sale of Irish products) could be ascribed to the government and that Ireland had therefore failed to comply with its obligations under Article 30. (41) Proof that the campaign in question was a "measure" for the purposes of Article 30 was inferred from the carefully thought out and coherent set of initiatives emanating from the government, although the actual implementation of those initiatives was left to an association governed by private law.

Again in connection with the free movement of goods, reference may be made to the meaning given by the Court to the concept of State monopolies of a commercial character within the meaning of Article 37 : that article applies to all "situations in which the national authorities are in a position to supervise, determine or even appreciably influence trade between Member States through a body established for that purpose or a monopoly delegated to others ". That includes "a situation in which the monopoly in question is operated by an undertaking or a group of undertakings, or by

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the territorial units of a State such as communes ". (42) Every means at the disposal of national authorities for influencing trade in goods, regardless of whether the body "used" is governed by private or public law, thus falls under Article 37.

16 . As I have said, all these examples illustrate the desire to ensure that the concept of "the State" is given full and proper effect, that is to say a meaning which achieves the goals of the measure in question. Depending on the aim of the measure the term "State" may be interpreted broadly (for example in connection with aid measures governed by Article 92, supra, point 12, in connection with public works contracts, supra, point 13, or in connection with State monopolies governed by Article 37, supra, point 15), or a distinction may be drawn according to the role played by the State (for example, in connection with the transparency of relations between Member States and public undertakings, by distinguishing between the State qua authority and qua owner : supra, paragraph 12, and in connection with the levying of VAT, by distinguishing between its activities as an authority and its activities as a taxable individual : supra, paragraph 14).

A further point should be emphasized : whenever, in the light of the underlying purpose of the measure, the concept of "the State" is given a broad interpretation, reference is made to the criterion of actual control, dominating influence and the possibility on the part of the authorities to give binding directions, regardless of the manner in which such control is exercised (by means of ownership, financial participation, dependence for purposes of management or finance, or through legislative provisions : supra, points 12, 13 and 15). Somewhat different but nevertheless parallel reasoning lies behind the criterion used in the Buy Irish judgment (supra, point 15) of whether a particular practice can be attributed to the government. In each case the assumption is thus that there is a "core" of authority (broadly defined to include all central, regional and local authorities) which, for the purpose of the measure concerned, imparts a public character by its control and influence to other bodies or transactions, even where these are governed by private law.

The positions of the parties

17 . In the light of the foregoing I should now like briefly to discuss and comment upon the observations submitted to the Court.

The appellants in the main proceedings support a broad interpretation of the concept of "the State ". They rely on the opinion of Advocate General Sir Gordon Slynn in Marshall, cited above, and on the judgment in Costanzo. They reject a criterion of public authority based strictly on "the classic duties of the State" since an evaluation of what constitute "duties of the State" would give rise to differences between Member States and uncertainty in application. They also reject the suggestion that State authorities should be limited to Crown bodies or bodies of a non-commercial character.

Although the appellants in the main proceedings do not in their observations put it in such extreme terms, they do in fact proceed on the basis that every undertaking which is actually controlled by the political authorities, such as the BGC at the material time, must be brought under the concept of "the State ". Stated in such extreme terms that view seems to me to go too far, in so far as it encompasses every type of public control, even where it has nothing to do with the matter to which the Member State' s failure to implement a particular provision of a directive in national law relates.

18 . The respondent in the main proceedings takes a restrictive view . Basing itself on the principle that the State cannot take advantage of its own wrong, it proposes that the concept of "the State" should be understood as comprising the three elements of the State as analysed by Montesquieu, including bodies which exercise the authority of those three elements of the State by way of delegation. In all the Member States the maintenance of public order falls within such authority .

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I do not think that the criterion of delegation (with which, if I have understood correctly, the status of "Crown servant" is connected) is an appropriate one for the problem with which we are concerned here . First of all, that criterion depends closely on the State structure : it is difficult to use in countries with a federal structure, in which various authorities have autonomous powers, so that it is not a suitable basis for a Community framework of assessment . Similarly, the distinction made in that connection between classical and non-classical duties of the State is in my view of no service (infra, point 19). Finally and above all, a criterion based on delegation seems to me to be incompatible with the broad view taken by the Court in, for example, the Johnston and Constanzo judgments (supra, points 7 and 8), which give the principle nemo auditur a broad scope so that the failure to act of the public authorities actually in default can be relied on also against the entirely independent public authorities referred to above. It is significant that the respondent in the main proceedings does not mention the Costanzo judgment.

19 . The remarks of the United Kingdom take the same approach as those of the respondent. At the hearing its representative explained that there are two groups of bodies which may come under the concept of "the State" as defined in Marshall : bodies which exercise directly or as agents the classical legislative, judicial and executive functions of the State and bodies which carry out other functions (such as the supply of gas) where the State has taken on the responsibility of carrying out those functions itself or delegating them to others. The fact that in the case of the BGC a degree of supervision is exercised by organs of the State is not, however, sufficient to bring the BGC within the concept of "the State"; in any event the existence of a power of control is not a determining criterion .

Here again we encounter the same difficulties as before : what, precisely, constitute the classical functions of the State, in particular of the executive. According to the United Kingdom, public security is included (although even that function can be "privatized" to a certain extent by contracting out to approved security services), but not the supply of water, gas and electricity, although in a modern welfare State such supplies are of essential importance for the population and for industry. What, then, of public health, which was assumed in Marshall to fall within the tasks of the State although, as the Commission mentions in its written observations, in some Member States health care is "privatized" to a large extent? The United Kingdom nevertheless brings the health authority at issue in Marshall within the concept of "the State" by referring inter alia to the fact that its employees are "Crown servants ". We thus come back to the notion of delegation, the unsuitability of which as a basis for a Community framework has already been emphasized (supra, point 18).

However, the main objection to the proposed view is again the fact that it is not explained why the default of the Member State should not equally be relied on against other public bodies which do not fall within the (classic) concept of the State or exercise authority delegated by it, having regard to the cases already dealt with in Marshall and later judgments.

20 . According to the Commission, finally, there are various criteria which may bring a public body within the concept of "the State" for the purposes of Marshall. First of all there is the criterion of "carrying out a public function on behalf of the State ". That criterion covers public corporations established to run nationalized industries, such as the BGC, public bodies which exercise regulatory powers and universities which award degrees recognized by the Member States. If this criterion alone is used, a problem arises with regard to undertakings in which the State holds 100% or a majority of the shares. According to the Commission, there is no good reason to treat an undertaking in which the State holds a controlling shareholding any differently from a nationalized undertaking. It therefore asks whether a criterion of "State control over the body in question in relation to the matter at issue" may be used, and seeks to determine what is to be understood by control. Substantial funding by the State is not sufficient, and neither is the possibility

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of compulsion by any means (since the State can equally compel any individual to do something by means of general legislation). Similarly, control on the basis of a legal right is not a conclusive answer; all the circumstances from which control appears possible (in other words the "economic reality ") must be taken into account.

After those helpful remarks, which I think take us a considerable way in the right direction, the Commission nevertheless concludes that even such a criterion of control would exclude the Royal Ulster Constabulary from the concept of "the State" since it carries out its functions independently. It therefore comes to the conclusion that it does not appear possible to formulate one test to cover all possible situations but that both the criterion "exercise of a public function" and that of "real control" can bring a person, in this case an employer, within the concept of "the State" for the purposes of Marshall . In the present case the BGC is in any event a public body and the answer to be given to the House of Lords can accordingly be restricted to that category of entities.

Proposed solution

21 . The observations submitted to the Court contain a number of factors which may assist in giving an appropriate answer to the question referred by the House of Lords.

As I have already repeatedly emphasized, the point of departure must be the reasoning lying behind the Marshall and Johnston cases : a Member State, but also any other public body charged with a particular duty by the Member State from which it derives its authority, should not be allowed to benefit from the failure of the Member State to implement the relevant provision of a directive in national law. That, however, raises the question how far the expressions "public body", "charged with a particular duty" and "from which it derives its authority" precisely extend. Moreover, it is not entirely possible to give those expressions a precise Community meaning : whether someone forms part of the government, whether a particular duty is a public duty and whether someone derives his authority from the State (whether or not in the sense that he exercises authority delegated by the State) are difficult matters to define, and their meaning differs significantly not just from one Member State to another and within each Member State from one period to another but also in Community law, in so far as they are used there, according to the matter in issue .

In the cases I have referred to, the Court did not attempt to define those concepts in the abstract, and I think it was right not to do so . Nevertheless it appears from those cases that the concept of a public body must be understood very broadly and that all bodies which pursuant to the constitutional structure of a Member State can exercise any authority over individuals fall within the concept of "the State ". In that respect it is immaterial how that authority (which I shall call public authority) is organized and how the various bodies which exercise that authority are related. In the light of the Marshall, Johnston and Costanzo judgments (and the judgment in Auer (43) which preceded them) there can be no doubt that they all fall under the concept of "the State", and there is no need for any criterion of delegation or control by other public authorities . That much is certain.

The question in the case now before us is how much further the application of those judgments can extend, in particular with regard to undertakings, in this case public undertakings, which as such exercise no authority in the strict sense over individuals. I think the answer is this : it may extend as far as "the State" (in the broad sense described in the preceding paragraph) has given itself powers which place it in a position to decisively influence the conduct of persons - whatever their nature, public or private, or their sphere of activity - with regard to the subject-matter of the directive which has not been correctly implemented. It is immaterial in that regard in what manner "the State" can influence the conduct of those persons : de jure or de facto, for example because the organ of authority has a general or specific power (or is simply able as a matter of

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fact) to give that person binding directions, whether or not by the exercise of rights as a shareholder, to approve its decisions in advance or suspend or annul them after the fact, to appoint or dismiss (the majority of) its directors, or to interrupt its funding wholly or in part so as to threaten its continued existence, with, however, the provisos that : (1) the possibility of exercising influence must stem from something other than a general legislative power (since otherwise all individuals subject to such general legislative power would be brought within the scope of Marshall and related judgments, which would go beyond their purpose), and (2) as I have already said, the possibility of exercising influence must exist inter alia (or in particular) in connection with the matter to which the provision of a directive which has not yet been implemented relates or can relate.

Once the State (in the broad sense) has retained such a power to exercise influence over a person (in this case the BGC) with regard inter alia to the subject-matter of the relevant provision of a directive, from the point of view of individuals it has brought that person within its sphere of authority. For that reason individuals may then rely against that person on the Member State' s failure to implement a directive. The reasoning lying behind Marshall and the related cases implies that the State may not benefit from its default in respect of anything that lies within the sphere of responsibility which by its own free choice it has taken upon itself, irrespective of the person through whom that responsibility is exercised.

22 . On the basis of the foregoing I propose that the following answer should be given to the House of Lords. Individuals may rely on an unconditional and sufficiently precise provision such as Article 5(1) of Directive 76/207 against a person or body, in this case a public undertaking, in respect of which the State (understood as any body endowed with public authority, regardless of its relationship with other public bodies or the nature of the duties entrusted to it) has assumed responsibilities which put it in a position to decisively influence the conduct of that person or body in any manner whatsoever (other than by means of general legislation) with regard to the matter in respect of which the relevant provision of a directive imposes an obligation which the Member State has failed to implement in national law.

It is for the national courts to apply that criterion in specific cases . I may, however, be permitted to point out that in the case of the BGC the competent Secretary of State had the power at the material time to give the BGC binding directions with regard both to the most efficient management of its activities and to the exercise and performance of its functions in general if the national interest so required (supra, point 3). It seems to me that compliance with the law, including Community law binding on the Member State, is an objective of national interest, so that binding instructions could have been given to the BGC to comply with the provisions of Directive 76/207, which at the material time had not yet been formally implemented in national law. It was also the Secretary of State who appointed the members of the BGC and, I assume, could compel them to resign, and he could also exercise pressure on the management of the corporation by appropriate financial arrangements.

In that connection I should also point out that the answer suggested above is in accordance, mutatis mutandis, that is to say having regard to the difference in the objectives of the various measures, with the legislation and case-law in other areas of Community law where the concept of "the State", as in the present situation, must be given a broad scope : in those areas too bodies other than those endowed with public authority are brought under the measure in question when their conduct can be influenced by the authorities (supra, point 16).

The question of damages

23 . In the second part of its question the House of Lords seeks to determine whether the appellants, if they can rely on the equal treatment directive against the BGC, have "a claim for damages on the ground that the retirement policy of the BGC was contrary to the directive ".

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In the absence of any specific rule in Community law that is in principle a question which must be answered in accordance with the national law of the Member State. Even so, there are restrictions in Community law on the liberty left to the Member States to determine the substantive and procedural aspects of the sanctions associated with the obligations which result for a Member State from a directive

More specifically, with regard to the sanctions on the obligation arising from Article 5(1) of Directive 76/207, which is in issue in this case, the Court held in paragraph 28 of the judgment of 10 April 1984 in Von Colson (44) that

> "although Directive 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation...".

It is for the national court to find a means, within its own legal system, of meeting that requirement under Community law.

Decision

24 . I propose that the question referred by the House of Lords should be answered as follows :

> "Individuals may rely on an unconditional and sufficiently precise provision such as Article 5(1) of Directive 76/207/EEC against an undertaking in respect of which the State (understood as any body endowed with public authority, regardless of its relationship with other public bodies or the nature of the duties entrusted to it) has assumed responsibilities which put it in a position to decisively influence the conduct of that undertaking in any manner whatsoever (other than by means of general legislation) with regard to the matter in respect of which the relevant provision of a directive imposes an obligation which the Member State has failed to implement in national law.
>
> Although Directive 76/207/EEC, for the purpose of imposing a sanction for breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained. It is for the national court to find a means within its own legal system of meeting that requirement under Community law."

(*) Original language : Dutch.

(1) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

(2) Judgment in Case 149/77 Defrenne v Sabena [1978] ECR 1365.

(3) Judgment in Case 19/81 Burton v British Railways Board [1982] ECR 555 .

(4) Judgment in Case 151/84 Roberts v Tate and Lyle [1986] ECR 703

(5) Judgment in Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECR 723.

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(6) Judgment in Case 262/84 Beets-Proper v Van Lanschot [1986] ECR 773 .

(7) See also my Opinion in Case C-262/88 Barber v Guardian Royal Exchange Assurance [1990] ECR I-1889, at point 26 in fine and also points 32 and 33.

(8) Amended by Section 2(1) of the Sex Discrimination Act 1986 with effect from 7 November 1987.

(9) I shall not here discuss the duty of national courts to interpret provisions of national law in accordance with Community law (see the judgments in Case 14/88 Von Colson v Land Nordrhein - Westfalen [1984] ECR 1891 and in Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969) since the House of Lords has not submitted any question in that respect. See also my Opinion in Barber (supra, footnote 7), at point 50.

(10) [1986] ECR 737.

(11) Paragraph 49.

(12) Paragraphs 55 and 52.

(13) Following the abolition of the monopoly on the supply of gas through pipes, British Gas plc is one of the "public gas suppliers" (Sections 3 and 7 of the Gas Act 1986).

(14) See also the judgment in Case 148/78 Ratti [1979] ECR 1629, paragraph 22 (and the Opinion of Advocate General Reischl at p. 1653), and the judgment in Case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53, paragraph 24.

(15) Relied on by the Health Authority at the hearing in Marshall.

(16) Supra, footnote 7, at point 52.

(17) In its judgment in Case 190/87 Moormann [1988] ECR 4689, paragraphs 22 and 24, the Court indicated the provisions of the Treaty which provide a basis for that conclusion (namely Article 189, third paragraph, and Article 5 of the EEC Treaty).

(18) [1986] ECR 735.

(19) Ibid.

(20) In paragraphs 12, 49, 50, 51 and 56 of the judgment and in the second paragraph of the operative part four synonyms are used in English, French, German, Danish and Italian, and five in Dutch. The manner in which those four or five terms are distributed among the six passages cited, in which expressions are repeated differently in different languages, confirms the broad meaning that must be given to the concept of "the State" and also demonstrates that it is not correct to conclude from the use of words in any one language that a basis for the definition of the "State" can be sought in the legal terminology of any one Member State.

(21) Judgment in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651.

(22) Paragraph 49.

(23) Paragraph 56.

(24) [1989] ECR 1839.

(25) Paragraph 31.

(26) A similar broad interpretation may be seen in a judgment prior to the Marshall case, the judgment in Case 271/82 Auer [1983] ECR 2727, and in particular the Opinion of Advocate General

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Mancini, in which he stated that a directive may be pleaded against institutions which, although they are not organs of the State in the true sense of the term, in one way or another implement the policy of the State (at p . 2751). The case concerned professional organizations of veterinary surgeons which were responsible for the exercise of public authority, namely the recognition of professional qualifications obtained in other Member States.

(27) Supra, footnote 9. The case concerned a Member State which sought to rely in proceedings against an individual on a directive which had not yet been implemented in national law; the Court naturally refused to permit it to do so, in the light of the judgment in Marshall . There is no indication in this judgment that the Court proceeded on the basis of anything but a twofold classification.

(28) Judgment in Case C-221/88 ECSC v Busseni [1990] ECR I-495, paragraphs 22 to 24. This concerned recommendations under the ECSC Treaty; in paragraph 21 the Court stated that these are measures of the same nature as directives under the EEC Treaty.

(29) See for example the judgment in Joined Cases 67, 68 and 70/85 Van der Kooy v Commission [1988] ECR 219, paragraph 35.

(30) Paragraph 36.

(31) Paragraph 37.

(32) Paragraph 38.

(33) My emphasis.

(34) Commission Directive 80/723/EEC (OJ 1980 L 195, p. 35) was extended by Directive 85/413/EEC of 24 July 1985 (OJ 1985 L 229, p. 20).

(35) As Advocate General Mischo stated in his Opinion in Case 118/85, in applying that definition of "public undertakings", "greater importance must... be attached to function than to form" - judgment of 16 June 1987 Commission v Italy [1987] ECR 2599, Opinion at p. 2617; see also paragraphs 7 to 15 of the judgment.

(36) OJ, English Special Edition 1971 (II), p. 682, most recently amended by Directive 89/440/EEC (OJ 1989 L 210, p. 1).

(37) Judgment in Case 31/87 Beentjes v Netherlands [1988] ECR 4635, paragraphs 11 and 40; see also the Opinion of Advocate General Darmon, paragraphs 10 to 20.

(38) Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax : uniform basis of assessment (OJ 1977 L 145, p. 1).

(39) In its judgment in Joined Cases 231/87 and 129/88 Carpaneto Piacentino and Rivergaro [1989] ECR 3233, the Court emphasized in paragraph 15 that the provision in question seeks to draw a distinction between the activities of the bodies concerned which are governed by public law and those which are governed by private law.

(40) I shall not discuss the expression "employment in the public service" in Article 48(4) of the Treaty; as an exception from a fundamental principle of the Treaty it must be interpreted narrowly and thus has little relevance to the concept of "the State : at issue here .

(41) Judgment in Case 249/81 Commission v Ireland [1982] ECR 4005, paragraphs 29 and 30.

(42) Judgment in Case 30/87 Bodson [1988] ECR 2479, paragraph 13.

(43) Judgment in Case 271/82 Auer [1983] ECR 2727, paragraph 19, and the Opinion of Advocate

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General Mancini, at p. 2751.

(44) Supra, footnote 9; see also paragraphs 26 and 23.

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61984J0152 : N 1 - 11 19 20 21
61984J0222 : N 7 9 10 18 21
61984J0262 : N 1
61985C0118 : N 12
61985J0067 : N 12
61985J0118 : N 12
61986J0080 : N 1 10
61987C0031 : N 13
61987J0030 : N 15
61987J0031 : N 13
61987J0190 : N 5
61987J0231 : N 14
61988C0262 : N 1 5
61988J0014 : N 1 23
61988J0103 : N 8 17 18 21
61988J0221 : N 10

SUB Social provisions

AUTLANG Dutch

NATIONA United Kingdom

PROCEDU Reference for a preliminary ruling

ADVGEN Van Gerven

JUDGRAP Mancini

DATES of document: 08/05/1990
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Opinion of Mr Advocate General Lenz delivered on 26 June 1991.
Laboratori Bruneau Srl v Unità sanitaria locale RM/24 di Monterotondo.
Reference for a preliminary ruling: Tribunale amministrativo regionale del Lazio - Italy.
Public supply contracts - Reservation
Public supply contracts - Reservation Public supply contracts - Reservationundertakings located in the Mezzogiorno.
Case C-351/88.

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Mr President,

Members of the Court,

1. The case in which I am called to give my opinion today is one of four references for a preliminary ruling concerning the same subject matter.(1) It is concerned with a requirement laid down in Italian legislation that at least 30% of all public supply contracts are to be given to undertakings established in the Mezzogiorno.

2. In Case C-21/88 the Court had occasion to rule on a legal situation identical to the present, Case C-351/88. In particular, the way in which intra-Community trade is affected in the present case is similar to Case C-21/88. In Case C-21/88 the plaintiff claimed that it obtained 80% of its X-ray material from Germany. In the present case, the plaintiff in the main proceedings obtain a significant proportion of the equipment it distributes from France.

3. In Case C-21/88 I delivered my opinion on 28 November 1989 and it was broadly followed by the Court in its judgment of 20 March 1990.

4. The similarity to Case C-21/88 of the reference for a preliminary ruling in this case was drawn to the attention of the national court. However, the reference for a preliminary ruling has not yet been withdrawn - probably for reasons connected with the national rules of procedure. For that reason, the procedure in the present case must be taken to its formal conclusion.

5. In order to answer the questions referred for a preliminary ruling, I refer to my Opinion of 28 November 1989 and the judgment of 2 March 1990 in Case C-21/88.

6. Even though the legal problems correspond to those in Case C-21/88 - as, moreover, the parties to the proceedings agree - and the question referred for a preliminary ruling must therefore be regarded as answered by the judgment, in view of the observations made by the plaintiff' s representative at the hearing on 5 June 1991 some remarks on the duties arising from a judgment of the Court of Justice are called for.

7. The plaintiff' s representative emphasized that, more than a year after the Court' s judgment in Case C-21/88, no measures had been adopted to bring the Italian legislation into conformity with Community law. He stated that no steps had been taken, whether by legislative measures or administrative directions or the latest annual law on the Community, to give effect to the consequences of the judgment. Efforts to make the Commission bring proceedings for breach of Treaty obligations had been fruitless.

8. It must first be stated that a judgment in proceedings for a preliminary ruling is a judgment on interpretation and binds only the parties to the proceedings and the courts charged with ruling on the case. Nonetheless, Member States are required to rectify a provision in their internal legal order which is contrary to Community law, when such a situation can be deduced from a judgment in proceedings for a preliminary ruling. If a Member State fails to take the necessary measures and thereby maintains in force the legal situation that is contrary to the Treaty, it commits a breach of the Treaty, which the Commission, in the first place, is required to pursue.

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9. The practice of the Commission has therefore been to react to judgments delivered by the Court of Justice in proceedings for a preliminary ruling by bringing proceedings against the Member States concerned. As examples of where such an approach has been taken, one can cite proceedings for a breach of a Treaty obligation(2) brought against the Federal Republic of Germany regarding "butter ships"(3) and proceedings for breach of a Treaty obligation(4) brought against Belgium in connection with the levying of a registration fee for students known under the name of "minerval".(5)

10. In order to provide legal protection to individual persons, it is, admittedly, not absolutely essential to amend national law as individuals can rely on Community law before the courts even in the absence of legislative measures to that effect. In this way individuals can, as in the main proceedings, achieve the implementation of Community law through courts prepared to apply it - which is, moreover, a duty of each of the courts of the Member States.

11. However, the situation becomes particularly critical if - as in the period following the judgment in Case C-21/88, according to the assertions made by the plaintiff' s representative at the hearing - courts in the Member States maintain that the legal situation contrary to Community law is lawful, in spite of the clear wording to the contrary of a judgment of the Court of Justice, and fail to apply Community law. Such a denial of legal protection in itself constitutes a fresh breach of the Treaty.

12. Action by the Member State concerned is necessary both to clarify the legal situation and to avoid further breaches of the Treaty. In the event that the Member State fails to take any action, the Commission, whose task it is to monitor the application of the Treaty (Article 155 of the EEC Treaty), may and ought to remind it of its obligations under Community law by means of the procedures for breach of Treaty obligations and urge it to bring its internal legal order into conformity.

13. In so doing, the Commission must act on its own initiative, because it cannot be obliged by individual persons to intervene. Natural or legal persons may bring proceedings under Article 175 of the EEC Treaty for failure to take action only if a Community institution has failed to address to them a binding legal act (third paragraph of Article 175 of the EEC Treaty). As regards the bringing of proceedings for breach of Treaty obligations individuals are restricted to making informal complaints and observations.

14. Lastly, it should be stated again, in order to make the legal position absolutely clear, that Article 30 of the EEC Treaty prohibits the contested rules from reserving part of the public supply market, and the rules cannot be justified by the provisions of the Directive coordinating procedures for the award of public supply contracts.(6) I have already discussed that point in paragraph 49 et seq. of my Opinion in Case C-21/88. Paragraph 17 of the judgment in that case expressly states that Article 26 of the directive cannot impede the application of Article 30 of the EEC Treaty.

15. In its original version Article 26 of the Directive stated:

> "This Directive shall not prevent the implementation of provisions contained in Italian Law No 835 of 6 October 1950 (Official Gazette No 245 of 24 October 1950 of the Italian Republic) and in modifications thereto in force on the date on which this Directive is adopted; this is without prejudice to the compatibility of these provisions with the Treaty."(7)

16. That rule is comparable to a provision of a directive which was referred to in the two cases on milk substitutes,(8) in order to justify legal provisions which were incompatible with Article 30 of the EEC Treaty. The Court of Justice also stated in those two cases that:

> "Without its even being necessary to rule on whether Article 5 of Regulation No 1898/87 is

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retroactive it is sufficient to observe that that article provides that national regulations may be maintained only on condition that the general provisions of the EEC Treaty are complied with. However, as the Court has held above, the provision at issue in this case is contrary to Article 30 of the EEC Treaty and therefore does not satisfy the conditions laid down by Article 5 of Regulation No 1898/87."(9)

17. The subsequent amendment of Article 26 of Directive 77/62(10) is equally incapable of justifying rules of the kind referred to. The wording of the amended Article is as follows:

"(1) This Directive shall not prevent, until 31 December 1992, the application of existing national provisions on the award of public supply contracts which have as their objective the reduction of regional disparities and the promotion of job creation in the most disadvantaged regions and in declining industrial regions, on condition that the provisions concerned are compatible with the Treaty and with the Community' s international obligations." (11)

18. In particular, the amended version cannot - as was argued at the hearing - excuse the Commission' s inactivity as regards bringing proceedings for breach of a Treaty obligation. The time-limit of 31 December 1992 laid down in Article 26 for the exceptions cannot remove the incompatibility of the system of preferences with the Treaty.

Costs

19. The proceedings for a preliminary ruling are in the nature of a step in the proceedings pending before the national court. For that reason, it is for the national court to rule on the costs as between the parties to the main proceedings. The costs incurred by the Italian Government and the Commission are not recoverable.

20. Having regard to the fact that it is not for the Court of Justice in preliminary-ruling proceedings to rule on whether or not a provision of a national law is in conformity with Community law, I suggest that, in reply to the request for an assessment under Community law of the rules reserving the award of contracts to certain undertakings, the Court should adopt the formulation contained in its judgment in Case C-21/88 and rule as follows:

"(1) Article 30 of the EEC Treaty must be interpreted as precluding national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts.

(2) The fact that national rules might be regarded as aid within the meaning of Article 92 of the Treaty cannot exempt them from the prohibition set out in Article 30 of the Treaty."

(*) Original language: German.

(1) See Case C-21/88 Du Pont de Nemours v Unità sanitaria locale No 2 di Carrara [1990] ECR I-889, Case C-310/88 Istituto Behring v USSL pending, and Case C-311/88 Hoechst Italia v USSL pending.

(2) Case 325/82 Commission v Germany [1984] ECR 777.

(3) Case 158/80 Rewe v Hauptzollamt [1981] ECR 1805, and Case 278/82 Rewe v Hauptzollaemter Flensburg, Itzehoe and Luebeck-West [1984] ECR 721.

(4) Case 293/85 Commission v Belgium [1988] ECR 305.

(5) Case 293/83 Gravier v City of Liège [1985] ECR 593, and Case 152/82 Forcheri v Belgium [1983] ECR 2323.

(6) Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), last amended by Council Directive 90/531/EEC

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of 17 September 1990 (OJ 1990 L 297, p. 1).

(7) My emphasis.

(8) Case 216/84 Commission v France [1988] ECR 793 and Case 76/86 Commission v Germany [1989] ECR 1021.

(9) See paragraph 22 of the judgment in Case 216/84 and paragraph 23 of the judgment in Case 76/86, referred to above.

(10) By Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1).

(11) My emphasis.

Translation

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FORM	Conclusions
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SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Competition ; State aids
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NATIONA	Italy
PROCEDU	Reference for a preliminary ruling

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ADVGEN Lenz

JUDGRAP Diez de Velasco

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Opinion of Mr Advocate General Lenz delivered on 25 April 1989.
Fratelli Costanzo SpA v Comune di Milano.
Reference for a preliminary ruling: Tribunale amministrativo regionale della Lombardia - Italy.
Public works contracts - Abnormally low tenders - Direct effect of directives in relation to administrative authorities.
Case 103/88.

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Mr President,

Members of the Court,

A - Facts of the case

1 . The proceedings for a preliminary ruling on which I shall give my views today are concerned with the interpretation and effect of Council Directive 71/305 of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. (1) The court submitting the questions, the Tribunale amministrativo regionale per la Lombardia, wishes essentially to establish the content and scope of Article 29(5) of Directive 71/305, and to ascertain whether it is directly applicable and whether national administrative authorities are entitled - or indeed obliged - to apply Article 29(5) even in the face of conflicting national law.

2 . The questions submitted to this court are relevant to the decision on a dispute between Fratelli Costanzo SpA and the Comune di Milano (Municipality of Milan) in which the plaintiff contests the procedure for the award of the contract for the modernization of the "G . Meazza Stadium" in preparation for the 1990 World Cup for football . In accordance with Article 24(a)(2) of Law No 584 of 8 August 1977, implementing Directive 71/305, the criterion for the award was that of the lowest priced bid, subject to the admission of supplementary bids. Under a transitional arrangement introduced by decree law, intended to accelerate procedures for the award of public works contracts during a two-year period, (2) the invitation to tender allowed for the automatic exclusion of abnormally low tenders, determined on a purely arithmetical basis. Through the application of that temporary special rule the plaintiff was excluded from the tendering procedure. The plaintiff was the only tenderer whose bid was less than the basic amount of LIT 82 043 643 386. The contract was won by a consortium (Ing. Lodigiani S.p.A.) whose tender exceeded the set figure by 9.85 %.

3 . Subsequently the validity of Article 4 of the Decree Law - the legal basis for the accelerated procedure - was disputed and it was not converted into statute. However, administrative measures adopted under the Decree Law were declared definitive.

4 . The plaintiff argues inter alia that the criteria whose application led to its elimination are incompatible with Article 29(5) of Directive 71/305. The national court has put a series of questions to this court concerning the interpretation of that Directive . It also wishes to know whether the defendant municipal authority was "empowered, or obliged, to disregard the domestic provisions which conflicted with the... Community provision...".

5 . Reference is made to the Report for the Hearing for a fuller account of the facts of the case and the submissions of the parties.

B - Opinion

6 . Although the questions submitted by the national court were considered in the written procedure to be inadmissible in part, it must be accepted that the request addressed to the Court was legitimate . At most, there may be some doubt as to the admissibility of the questions in so far as they ask whether national law is compatible with Community law. The Court has consistently held that it is not its duty to examine whether national law is compatible with Community law. In such cases

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the Court regularly reformulates the questions and lays down the guiding criteria on the basis of which the national court may resolve for itself the issue of compatibility.

7 . Whenever questions on the interpretation of Community law are unclear the Court has taken upon itself the task of establishing the relevant issue of Community law and answering the national court accordingly .

8 . The questions referred to the Court should be arranged in a logical order as follows : first, the criteria for the interpretation of Article 29(5) of Directive 71/305 must be defined, on the basis of which the compatibility of national legal measures with Community law can be assessed by the national court. Only in the event of their being found to be incompatible does the question arise whether the provision in the Directive is directly applicable. If it is, consideration must be given to the extent to which State bodies - specifically, the administrative authorities of the Member States - are entitled and obliged to give effect to Community law.

9 . Question A of the reference for a preliminary ruling asks, in effect, to what extent the legislative content of Article 29(5) of Directive 71/305 must be incorporated in the national provision implementing it. The terms used are somewhat confused, inasmuch as they distinguish between the "provisions as to results" and the "provisions as to form and methods" of a directive. That distinction is an oblique reference to the definition of a directive contained in Article 189 of the EEC Treaty, according to which a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. The formulation itself shows that it is inappropriate to distinguish within a directive between provisions as to results and provisions as to form and methods, since by definition a directive is silent as to the form and methods of transposition.

10 . The extent to which a Member State is obliged to incorporate the provisions of a directive without amendments or, conversely, is permitted to depart from them must be determined by the interpretation of the provision at issue. The basis must be the wording of the provision, and the purpose and objectives of the Directive must be ascertained . Article 29(5) of Directive 71/305, which is at issue here, is worded as follows :

> "If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.

For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.

If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low."

11 . Article 29 of Directive 71/305 enumerates the criteria for the award of a contract and lays down the procedure to be followed in each case . The enumeration of the criteria governing the award and the establishment of the procedure to be observed give transparency to what is done and at the same time represent an element of legal certainty . It is precisely the standardization of procedure which that article seeks to achieve that gives potential tenderers a clearer view of the conditions to which they submit when taking part in the tendering procedure. Thus Article 29(5) not only requires the awarding authority to examine tenders which are obviously abnormally low in relation to the transaction, and states how that must be done, but also provides a procedural guarantee for the tenderer concerned. He cannot be disqualified on account of an obviously abnormally low tender until an official procedure to examine it has been conducted. (3)

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12 . A similar procedural guarantee is contained in the obligation, set out in the last sentence of Article 29(5), to state the reasons for the rejection of a tender considered to be too low if the criterion chosen for the award of the contract is that of the lowest price tendered. The commencement, conduct and conclusion of the examination procedure are laid down in binding terms. They constitute a kind of a common minimum standard.

13 . As a rule it is not possible to depart from such "binding" provisions of directives on account of exceptional circumstances or particular urgency unless the directive itself recognizes exceptions of that kind.

14 . By contrast, Article 29(5) does not indicate precisely what is to be understood by an "obviously abnormally low tender"; no specific procedure is laid down for determining such a tender. Here there is undoubtedly room for specific provisions in the implementing measures of the Member States. For the same reason it is not absolutely essential for the terms to be reproduced verbatim in the implementing measure . It is more important to emphasize the exceptional nature of the low tender, such that it raises doubts whether the tender is a genuine one . The investigation and, where appropriate, elimination of those doubts is the purpose of the examination procedure. The imbalance between the transaction and the tender is what characterizes the situation envisaged, and this must be reflected in the implementing measure.

15 . Whilst the procedure for designating a tender as being obviously abnormally low is left open, once its abnormality has been affirmed the examination procedure must be initiated. Automatic disqualification would be incompatible with that rule. If an implementing measure meets the criteria set out above, discrepancies in the terms used, such as "abnormally low tenders" instead of "obviously abnormally low tenders" do not make the measure inconsistent with Community law (Question C(a) and (b)).

16 . It remains to be determined (Question B - 1) whether a national measure enacted for the implementation of a directive may subsequently be amended by the legislature of the Member State concerned . The first point is that in formal terms a national implementing measure is entirely the same as the autonomous legislation of a Member State. A priori, therefore, it may be amended in just the same way as any other national legal measure. However, in so far as the national legislature was bound by the substance of a directive when adopting the implementing provisions in the first place, the same must necessarily apply to subsequent amendments.

17 . In areas in which the national legislature enjoys some discretion it may certainly introduce subsequent amendments. It is, indeed, in accordance with Community law to introduce improvements by reference to Community provisions where the need arises. Provisions which run counter to the provisions and objectives of a directive are not permitted.

18 . The form to be taken by amendments which are acceptable in substance is determined by national law alone (Question B - 2). Since in formal terms this is autonomous national legislation, procedural principles governing the Community legislative process cannot be transposed to the legal system of a Member State as a supplementary condition of validity. The requirement under Article 190 of the EEC Treaty to state the reasons on which Community acts are based therefore has no bearing on the adoption of national legal provisions

19 . In Question D of the reference to the Court the Tribunale amministrativo asks whether the municipal authority was bound by Community provisions, in the event that the Court should find the Italian legislation in question to be inconsistent with Article 29(5) of Directive 71/305. Since, as I have already pointed out, it is not for the Court of Justice but for the national court to resolve this point, on the basis of the criteria set out by the Court of Justice, any further discussion must proceed on the assumption that the national implementing measures are incompatible

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with the Directive.

20 . In determining whether and to what extent the national administrative authorities are bound by Community provisions in the event of inconsistency between Community and national law, a distinction must first be drawn according to the legal nature of the relevant Community measures.

21 . Community regulations, which have general application and are binding in their entirety and directly applicable in all Member States(second paragraph of Article 189 of the EEC Treaty), partake without qualification of the primacy of Community law and thus have priority over conflicting national law. This is a hierarchy of legal rules established a priori. The application of a regulation must reflect the primacy of Community law.

22 . The effect of a directive calls for a more modulated approach. Since a directive, containing instructions to adopt certain measures, is addressed to the Member State, it does not, in the first instance, give rise to rights or obligations on the part of individuals. The Court has held that exceptions from that rule are possible only where the Member State has failed to comply, or has complied incorrectly, with its obligation under Community law to implement the directive. (4)

23 . The judgments of the Court do not seek to put in question the legal nature of directives but amount to sanctioning the unlawful conduct of a Member State, in the interests of Community citizens. The case-law on the direct applicability of directives is not intended to secure comprehensive observance of the directive otherwise than through its implementation in national law, as is clear from the fact that the provisions of a directive which impose obligations on individuals cannot be directly applicable.

24 . Before a provision of a directive can be directly applicable it must therefore meet specific requirements. In the absence of implementing measures adopted within the prescribed period, individuals may rely upon "the provisions of a directive ((which)) appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise... as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State ". (4) Where the Community legislature seeks to vest rights in the individual through national law and the obligation of the Member State to grant those rights has become definitive - following the expiry of the prescribed period, for example - the Member State' s failure to act can no longer work to the detriment of the individual.

25 . The situation must be viewed differently if the Member State has already adopted an implementing provision. A distinction must be drawn here between correct and incorrect implementation. If the implementation is correct, the individual will be governed solely by the national measure, (5) with the result that there will be no possibility of relying upon the directive. (6) It is therefore not possible to invoke the directive even if the national measure departs, within the permitted limits, from the content of the directive. Incorrect implementation may consist in a legal measure incompatible with the directive ab initio or a subsequent change in the legal situation which only later causes it to be incompatible. In such circumstances the Member States' obligation under Articles 189 and 5 of the EEC Treaty to implement directives fully and accurately continues to subsist or is revived, as the case may be. In such cases, too, the Court of Justice has allowed individuals to rely on the directive. (7) It should be noted in this connection that the subsequent amendment of the legal situation constitutes a separate act contrary to Community law. For their part, State authorities may not rely against individuals on action by the Member State which is contrary to Community law. (8)

26 . On the assumption that the relevant Italian legal provisions are incompatible with Article 29(5) of Directive 71/305, the question arises whether that article is directly applicable. The question whether the administrative authorities are required to take account of it has already received

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an affirmative answer. The Court has ruled, in its judgment in Case 31/87, (9) that Article 29 of Directive 71/305 may in principle have direct effect. Although the Court did not give that ruling with express reference to Article 29(5) of Directive 71/305, it must be equally valid in respect of that provision : the examination procedure to be commenced in the event of an imbalance between a transaction and a tender which is obviously abnormally low is not subject to any other condition and is laid down in detail . The provision is therefore unconditional and sufficiently precise . Its application does not necessarily presuppose the adoption of further legal measures.

27 . Lastly, Article 29(5) of Directive 71/305 is of such a nature as to create rights for individuals. As the Court ruled in the Transporoute (10) judgment, and confirmed in Case 31/87, (11) "the aim of the provision... is to protect tenderers against arbitrariness on the part of the authority awarding contracts ". That aim could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations. The obligation to examine the tender, which has the effect of a procedural guarantee, may be construed as a right vesting in the tenderer who submits an obviously abnormally low tender.

28 . In order to answer the question whether administrative authorities may be entitled, or indeed obliged, to refrain from applying national law which contravenes Community law (inasmuch as it is incompatible with a directive), it must first be recalled that :

(i) Community law forms part of the national legal system; (12)

(ii) Community law takes precedence over the law of the Member States; and

(iii) all State authorities are, as a matter of principle, obliged to conduct themselves in accordance with Community law.

29 . The obligation to apply Community law thus also concerns State authorities . When the State as a whole is prohibited from relying against individuals on provisions derogating from the directive which were introduced or maintained in disregard of obligations under Community law, the State authorities are also materially affected. (13) This comprehensive duty to act in accordance with Community law finds expression in Article 5 of the EEC Treaty.

30 . In previous cases where a national of a Member State has pleaded the direct applicability of the provisions of a directive, the Court has always proceeded on the assumption that he does so in proceedings before the national courts, and that those courts must observe the directly applicable measures as valid Community law. (14)

31 . However that may be, the individual must also have the right to rely on a directly applicable directive in dealings with State administrative authorities. If he succeeds, then the authorities of the Member State have acted in accordance with Community law. From the point of view of Community law there is then no need to bring proceedings before a court of law. Thus the matter does not necessarily have to come before a court. Applied to the present case, this means that if the Comune di Milano had adhered to the procedure under Article 29(5) and had taken account of the outcome when making its decision, from the point of view of Community law there would have been no need for proceedings before a court of law.

32 . Such proceedings are required only if the individual has invoked the directly applicable directive unsuccessfully in his dealings with the authorities. In such a case it is the duty of the courts to safeguard the individual' s position with regard to Community law.

33 . From the point of view of the individual it is essential that he should be able to rely on the directly applicable measures. If need be he must take the matter to court, and in doing so may avail himself of the full range of national legal remedies, as if he were basing his case on national law alone. However, the possibilities for relying on a directly applicable provision of

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a directive do not go so far as to create new procedures for the protection of legal interests . (15)

34 . Since the Court has held in another context that the system of legal protection established by the Treaty, as set out in particular in Article 177, implies "that it must be possible for every type of action provided for by national law to be available before the national courts for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning admissibility and procedure as would apply were it a question of ensuring observance of national law", (16) it may legitimately be said to represent a form of guarantee of legal redress serving to give effect to directly applicable Community law.

35 . From the point of view of the administrative authorities, on the other hand, a distinction should be drawn according to whether the authorities are in doubt as to the consistency of the national provision with Community law or the dispute has already been the subject of a judicial ruling. In that regard we must base ourselves on established case-law, whereby an individual may rely on such provisions in court proceedings. If he may do so before the courts he must also be accorded the right to do so in dealings with the administrative authorities, so as to ensure that those authorities are fully informed of the individual' s basic position in the matter to be resolved . If, however, the individual has the right to present his arguments to the administrative authorities, then those authorities must be given the right to agree with them. It would indeed be absurd to prevent the authorities from making a decision consistent with Community law, as they are ultimately obliged to do.

36 . The sole question is whether it is possible to oblige them under Community law to do so. In my view it is not possible, because it is not open to the administrative authorities to refer the matter to the Court of Justice and obtain a ruling on the direct applicability of the relevant provision of the directive. If it applies the directly applicable provisions of a directive and disregards conflicting national law, it does so at its own risk and without the endorsement of the Court. In my opinion they are entitled to act in this manner but are not obliged to do so, because the Treaty does not afford it the requisite legal protection for doing so.

37 . That conclusion also resolves the problem raised during the oral procedure by the representative of the Commission, namely whether the Commission has two opportunities to bring an action against a Member State which has not given effect to a directive - first on account of failure to implement it and secondly for failure to apply it . In so far as the administrative authorities are not, I submit, obliged to apply directly a provision in a directive, there is no possibility of bringing an action against a Member State. This is where it differs from a regulation. The administrative authorities of the Member States are not merely entitled but positively obliged to apply a regulation, even in the face of conflicting national law. In doing so they enjoy the protection of Article 189 of the EEC Treaty : the binding nature and direct applicability of a regulation are beyond doubt . The application of provisions of that kind falls within the normal duties of all administrative authorities.

38 . The counter-arguments, which basically rely on the thesis that the differences between a directive and a regulation have been effaced, do not refute my view, in so far as administrative authorities are not also obliged to observe directly applicable directives . In that regard, the fact that an authority has no legal means of referring the matter to the Court directly for a preliminary ruling does not represent a problem. It will apply the directly applicable provision of the directive only if it is convinced that its applicability is, in the specific circumstances of the case, beyond doubt . In that event it acts as a body giving effect to Community law . For the rest, the duty of the legislature to amend national law is unaffected, since only proper implementation can create the obligation for the administrative authority to give effect to a legal situation consistent with

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the directive.

39 . The circumstances are similar in the event of a prior judicial ruling . Once the conflict of rules has been resolved in abstracto the administrative authorities cannot be prevented from applying the directly applicable measures in concreto, especially since they are no longer entitled to rely against an individual on the measures contrary to Community law. (17) The matter need not necessarily have been resolved by a national court but may instead have been settled by the Court of Justice in previous proceedings for a preliminary ruling. Although preliminary rulings do not formally have effect erga omnes, the Court has held in respect of rulings concerning the validity of Community provisions in proceedings under Article 177 of the EEC Treaty that a judgment, although addressed only to the national court which has requested it, is sufficient reason for any other national court to regard the act in question as void for the purposes of a judgment which it has to give. The Court of Justice bases its decision on the requirements of a uniform application of Community law and the need for legal certainty. (18) An individual must also have the right to rely on a directive in dealings with administrative authorities, and those authorities must be entitled to comply with his request .

40 . Subject to those stringent conditions, a directly applicable provision of a directive may be given the same effect as other provisions of Community law having general application. Since, in those circumstances, the conflict of rules is settled by their abstract hierarchical relationship no further judicial proceedings are needed .

41 . In view of the fact that Article 29(5) of Directive 71/305 has been held in a preliminary ruling to be directly applicable, (19) it may be inferred for the purpose of answering the questions now before the Court that the administrative authorities were entitled to apply Article 29(5) of Directive 71/305 directly. It is true that the judgment referred to was not delivered until after the authority had made its decision. (20)

42 . Nevertheless, the illegality of a procedure for the automatic exclusion of an "obviously abnormally low tender" had already been established by the Court. (21) In substantive law there were therefore cogent grounds for the authority concerned to refrain from applying a legal measure requiring exclusion on a purely arithmetical basis .

43 . Although it is therefore possible to infer justification under Community law for refraining to apply the national legal measures in question, no obligation to do so can be derived from the above considerations. Whenever serious doubts remain as to the applicability of Community law, the administrative authorities must have the opportunity of seeking guidance. Even the courts are at liberty to submit further questions to the Court of Justice for clarification following an earlier preliminary ruling. Indeed, they are entitled to do so whether the earlier ruling relates to another legal dispute or even to the same legal proceedings.

Costs

44 . In so far as the parties to the main action are concerned, the proceedings are in the nature of a step in the proceedings before the national court. The decision on costs is therefore a matter for that court . The costs incurred by the Spanish and Italian Governments and by the Commission are not recoverable.

C - Conclusion

45 . (1) The examination procedure required by Article 29(5) of Regulation No 71/305/EEC when tenders are "obviously abnormally low" is indispensable and must therefore be incorporated in national implementing measures (Question A). The precise definition of an "obviously abnormally low" tender, on the other hand, is for the national legislature to determine (Question C).

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(2) In principle, every Member State is entitled to amend the measures adopted to give effect to a directive, provided that the provisions remain, in substance, within the limits laid down by the directive . The form and methods by which amendments are made are governed by national law alone (Question B).

(3) In the event that national implementing provisions are incompatible with the directive, the administrative authorities are entitled - and, once the content and scope of the measures have been clarified in judicial proceedings, obliged - to refrain from applying national law. However, if the authority is in doubt as to the legal position it is quite at liberty to seek clarification from the courts, and in doing so may use any means available under national law (Question D).

(*) Original language : German.

(1)1 OJ, English Special Edition 1971 (II), p. 682.

(2) Article 4 of Decree Laws Nos 206 of 25 May 1987, 302 of 27 July 1987 and 393 of 25 September 1987.

(3) See the judgment of 10 February 1982 in Case 76/81 Transporoute v Minister for Public Works ((1982)) ECR 417, at paragraph 18.

(4) See, for example, the judgment of 6 May 1980 in Case 102/79 Commission v Belgium ((1980)) ECR 1473, at paragraph 12; and the judgment of 20 September 1988 in Case 31/87 Beentjes v Netherlands ((1988)) ECR 4635, at paragraph 40.

(4)5 Judgment of 19 January 1982 in Case 8/81 Becker v Finanzamt Muenster-Innenstadt ((1982)) ECR 53, at paragraph 25.

(5)6 Judgment of 15 July 1982 in Case 270/81 Felicitas Rickmers-Linie v Finanzamt fuer Verkehrssteuern ((1982)) ECR 2771, at paragraph 14, and Case 8/81, supra, at paragraph 19.

(6)7 This does not affect the possibility of interpreting an implementing provision on the basis of the directive.

(7)8 See the judgment in Case 102/79, supra, at paragraph 12.

(8)9 See the judgment of 13 February 1985 in Case 5/84 Direct Cosmetics v Commissioners of Customs and Excise ((1985)) ECR 617, at paragraph 37 et seq.

(9)10 Cited above, at paragraph 44.

(10)11 Judgment in Case 76/81, cited above, at paragraph 17.

(11)12 Cited above, at paragraph 42.

(12)13 See the judgment in Case 8/81, cited above, at paragraph 23.

(13)14 See the judgment in Case 5/84, cited above, at paragraphs 37 and 38 .

(14)15 See for example the judgment in Case 8/81, cited above, at paragraph23 .

(15)16 See the judgment of 7 July 1981 in Case 150/80 Rewe v Hauptzollamt Kiel ((1981)) ECR 1805, at paragraph 31 et seq.

(16)17 See judgment in Case 158/80, cited above, at paragraph 46.

(17)18 See the judgment in Case 5/84, cited above, at paragraphs 37 and 38 .

(18)19 Judgment of 13 May 1981 in Case 66/80 International Chemical Corporation v Amministrazione delle Finanze dello Stato ((1981)) ECR 1191 .

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(19)20 See judgment in Case 31/87, cited above.

(20)21 The judgment in Case 31/87 was given on 20 September 1988, the contested decision on 24 July 1987 (reference to the Court dated 16 December 1987; first paragraph under heading "Facts of the case ").

(21)22 Judgment in Case 76/81, cited above.

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ADVGEN Lenz

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Opinion of Mr Advocate General Lenz delivered on 28 November 1989.
Du Pont de Nemours Italiana SpA v Unità sanitaria locale No 2 di Carrara.
Reference for a preliminary ruling: Tribunale amministrativo regionale della Toscana - Italia.
Public supply contracts - Reservation
Public supply contracts - Reservation Public supply contracts - Reservationundertakings located in a particular region.
Case C-21/88.

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Mr President,

Members of the Court,

A - Facts

1 . The case in which I am to give my Opinion today involves an assessment in the light of Community law of the preferential system established in Italy for the benefit of the Mezzogiorno (Southern Italy). This case is only one of the several references for preliminary rulings with similar facts which are at present pending before the Court. (1) The reference was made by the tribunale amministrativo regionale della Toscana, which seeks a ruling on the interpretation of Articles 30, 92 and 93 of the EEC Treaty.

2 . The plaintiff in the main proceedings, Du Pont de Nemours SpA, brought two separate actions, which were joined by the national court, against decisions of Unità sanitaria locale No 2 di Carrara (" the defendant ").

3 . The plaintiff was invited to take part in a restricted tendering procedure organized by the defendant and published in a notice dated 15 February 1986.

4 . On 1 March 1986, Law No 64/86 came into force; that law extended the scope ratione materiae and ratione personae of the existing preferential system designed to assist Southern Italy. Under that law, the defendant, as a local health authority, was required to procure at least 30% of the supplies it needed from undertakings with establishments and fixed plant located within the area covered by the preferential system in which the products must have undergone at least partial processing.

5 . The defendant accordingly laid down, by decision of 3 June 1986, the conditions governing the award of contracts for the supply of radiological films and liquids and, according to the terms and conditions set out in the annex, divided the supplies into two lots, one of which - equal to 30% of the total amount - was reserved to undertakings established in Southern Italy. That decision forms the subject of the main proceedings, together with a decision adopted by the defendant on 15 June 1986 awarding a contract for the lot amounting to 70% of the total amount. The plaintiff was prevented from participating in the tendering procedure for the remaining lot of 30% on the ground that it had no establishments in Southern Italy.

6 . The national court has raised a number of questions on the interpretation of Community law with a view to the assessment of the compatibility of Law No 64/86 with Community law.

7 . The first question seeks to ascertain whether Article 30, which prohibits quantitative restrictions on imports and any measures having equivalent effect, precludes the contested national rules. Next, the national court asks whether the national rules may be regarded as "aid" within the meaning of Article 92 of the EEC Treaty and, if so, whether the Commission alone is entitled to determine the compatibility of aid with the common market or whether this can also be determined by the national court.

8 . Du Pont de Nemours Deutschland GmbH has intervened in the case in support of the plaintiff; 3M Italia SpA has intervened in support of the defendant. The interveners have also submitted

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observations to the Court .

9 . For an account of the facts, the applicable legal provisions and the submissions of the parties, reference is made to the Report for the Hearing .

B - Opinion

1 . The competitive relationship between Article 30 and Article 92 of the EEC Treaty

10 . It is appropriate to consider the competitive relationship between Article 30 and Article 92, because the applicability of one of those provisions may preclude the applicability of the other. The question arises as to whether a measure adopted by a Member State, which is to be regarded as a measure having an effect equivalent to a quantitative restriction on imports, may at the same time constitute an aid within the meaning of Article 92. The question may also be relevant if put the other way round : can a measure which is to be regarded as a State aid also be assessed in the light of the provisions on the free movement of goods, in particular Article 30.

11 . In principle, the starting point must be that both the prohibition of quantitative restrictions on imports and of measures having equivalent effect and the prohibition laid down by Article 92 of aid granted by the State or through State sources pursue a common purpose, which is to ensure the free movement of goods between Member States under normal conditions of competition. (2)

12 . It follows from the prohibition in Article 30 of measures having an effect equivalent to quantitative restrictions on imports, and from the prohibition in Article 92(1) of aid which distorts or threatens to distort competition in so far as it affects trade between Member States, that a national measure which falls foul of those prohibitions is unlawful. Concurrent application of those two provisions would thus lead to the same result in terms of substantive law, in so far as the legal consequence of the two prohibitions is that the national measure in question is incompatible with Community law .

13 . However, it is necessary to draw a distinction on procedural grounds, since Article 30 incontestably has direct effect and any Community national may rely, in an appropriate case, upon that provision before the courts of the Member States. In contrast, Article 92(1) does not have direct effect, since the prohibition which it lays down is neither absolute nor unconditional, (3) as is clear both from Article 92(1) and (2) and from Article 93. In addition, pursuant to the review of systems of aid provided for in Article 93, the assessment of whether an aid is prohibited under Article 92(1), permitted under Article 92(2) or to be regarded as compatible with the common market under Article 92(3), comes within the jurisdiction of the Commission.

14 . With the exception of the last sentence of Article 93(3), Articles 92 and 93 may be relied upon before the courts of the Member States only "where they have been put in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93(2)". (4)

15 . Those differing procedural consequences constitute in themselves an indication that the provisions in question have in principle different fields of application. The Court of Justice stated as follows with regard to this question of demarcation in the judgment in Iannelli & Volpi : (5)

> "however wide the field of application of Article 30 may be, it nevertheless does not include obstacles to trade covered by other provisions of the Treaty"
>
> "similarly the fact that a system of aids provided by the State or by means of State resources may, simply because it benefits certain national undertakings or products, hinder, at least indirectly, the importation of similar or competing products coming from other Member States is not in itself sufficient to put an aid as such on the same footing as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 ".

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The Court went on to state that :

> "the effect of an interpretation of Article 30 which is so wide as to treat an aid as such within the meaning of Article 92 as being similar to a quantitative restriction referred to in Article 30 would be to alter the scope of Articles 92 and 93 of the Treaty and to interfere with the system adopted... for the division of powers...". 3

16 . Although that reasoning provides some support for the proposition that Articles 92 and 93 are in a special position in relation to Article 30, regard should nevertheless be had to the wording used by the Court, which speaks of an aid "as such ". According to the Court, moreover, it is necessary to distinguish between the respective fields of application of the provisions in question "except in those cases which may fall simultaneously within the field of application of two or more provisions of Community law ". 5

17 . In the same judgment, the Court acknowledges the possibility, when analysing a system of aid, of separating those factors which are not necessary for the attainment of its object.

> "In the latter case there are no reasons based on the division of powers under Articles 92 and 93 which permit the conclusion to be drawn that, if other provisions of the Treaty which have direct effect are infringed, those provisions may not be invoked before national courts simply because the factor in question is an aspect of aid ". (6)

18 . The Court has followed that case-law and confirmed that Articles 92 and 93 of the EEC Treaty cannot hinder the application of Article 30, provided that the contested measures constitute an aspect of an aid scheme which is not necessary for the attainment of the object or the proper functioning of the scheme. (7)

19 . Accordingly, if the Court considers that it is possible to invoke Article 30 and therefore proceeds on the assumption that Article 30 may be applied even though on the whole the legal categorization of the measure in question as aid is uncontested, there is all the more reason for taking this to be the case where a national system cannot be classified in one or other of those categories clearly and unequivocally.

20 . In the judgment relating to the "Buy Irish" promotion campaign, the Court did not follow the Irish Government' s argument to the effect that Articles 92 and 93 take precedence over Article 30. (8) Instead, the Court held that the fact that a substantial part of the campaign was financed by the Irish Government and that Articles 92 and 93 of the Treaty might be applicable to financing of that kind, did not mean that the campaign itself might escape the prohibitions laid down in Article 30. (9)

21 . If that reasoning is applied to this case of a system of regional preference, whose nature as aid is complicated in particular by the question of its financing out of State resources and of the calculation of the amount of aid, it follows that the reserved quota system must be assessed in the light of Article 30 and cannot a priori be exempted from such an assessment because it may be in the nature of aid .

22 . In the same vein, the Court has stated in another connection that Articles 92 and 94 cannot be used to frustrate the rules of the Treaty on the free movement of goods : (10)

> "the mere fact that a national measure may possibly be defined as aid within the meaning of Article 92 is therefore not an adequate reason for exempting it from the prohibition contained in Article 30 ". (11)

23 . Accordingly, it is necessary to assess the compatibility of the Italian reserved quota system with the principle of the free movement of goods and, in particular, with Article 30 of the Treaty. The order in which that assessment is carried out is justified inter alia by the possible far-reaching

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consequences of the direct applicability of Article 30 . (12)

2 . The compatibility of the reserved quota system with Article 30 of the EEC Treaty

24 . Article 30 of the EEC Treaty imposes an unconditional and absolute prohibition on quantitative restrictions on imports between Member States and on all measures having equivalent effect. Since the judgment in Dassonville, (13) which the Court has consistently reaffirmed, "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" are to be considered as measures having an effect equivalent to quantitative restrictions on imports.

25 . Even provisions applicable to domestic and imported goods without distinction may constitute measures having equivalent effect in so far as they specifically affect the imported goods and make it more difficult, if not impossible, to market them. However, there is no need in the present case to have recourse to that broad definition in order to establish that, in view of its effects, the reserved quota system is in the nature of a measure having equivalent effect within the meaning of Article 30.

26 . The obligation imposed on all public authorities, regions, provinces, municipalities, local health authorities, upland communities, companies and bodies in the State holding sector, universities and independent hospitals to procure at least 30% of the material they need from undertakings with establishments and fixed plant within the area covered by the preferential system certainly causes a substantial reduction in demand for imported goods. The impact of the system is aggravated by the fact that the figure of 30% of supplies and services must be attained at the end of the financial year, which means that, in order to compensate for the fact that some products are not manufactured in the areas covered by the preferential system, the reserved quota is liable considerably to exceed the prescribed figure of 30% in the case of other orders. Provision is even made for the unused portion of reserved quotas to be carried forward to the next financial year. (14)

27 . The economic dimension of the reserved quota system has become clearer in the course of the proceedings. Referring to the Commission' s communication of 24 July 1989, (15) public procurement, regional and social aspects, the plaintiff estimated at the hearing that the volume of public procurement subject to the regional preference scheme was ECU 16 to 17 000 million a year. In the radiography sector, some LIT 210 000 million was spent every year, 85% of that sum being accounted for by public supply contracts.

28 . The French Government pointed out that Southern Italy was 140 000 square kilometres in area, that is to say approximately one half of Italy' s national territory, and was inhabited by 40% of Italy' s population .

29 . It is plain the system at issue is not only an abstract threat to intra-Community trade simply from the facts of the main proceedings : the amount of the contract which was to be awarded was subsequently reduced by 30%, contrary to the initial notice. In the written procedure, the plaintiff stated, unchallenged, that its German sister company, which has intervened in the proceedings, manufactured photographic products for radiographical applications on behalf of the plaintiff . An estimated 12% of its company' s production capacity was given over to the manufacture of goods for the Italian market. The Italian market was fairly important, since it accounted for 18% of the European market for radiographical products. All such products, excluding the products manufactured by the 3M company, were imported.

30 . It can be inferred from those economic data that the reserved quota system provided for in Article 17 of Law No 64/86 has definitely impeded trade.

31 . The fact that approximately 85% of radiographical material is purchased by health authorities,

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which are bound to comply with the reserved quota system, casts light on the extent of the trade restrictions.

32 . The preferential system at issue is also clearly discriminatory . The obligation on the part of the undertakings concerned to procure 30% of their needs from suppliers with an establishment in Southern Italy totally excludes foreign-manufactured goods from possible supply contracts . Because the reserved quota system is binding, its discriminatory effect is more far-reaching than national measures designed to promote the purchase of domestic products through advertising campaigns supported by the State, (16) subsidies, (17) tax relief, (18) more favourable credit terms (19) or the mere requirement that goods from abroad should be stamped with the indication "foreign ". (20)

33 . The preferential system is more than a financial inducement to obtain supplies on the domestic market. The reserved quota system does not leave economic operators any alternative. Such an alternative existed in the examples referred to above, albeit on condition that certain financial sacrifices were accepted. Accordingly the problem lies not in the existence or otherwise of discrimination against foreign goods, but in the fact that even Italian manufacturers without an establishment in the areas covered by the preferential system suffer discrimination, since they are excluded from the supply contracts in the same way as foreign manufacturers. The Court has not had to consider such a situation before.

34 . In assessing the national measure in the light of Community law, pride of place should be given to its effect on international trade . The fact that the Italian undertakings which suffered discrimination may possibly be indirectly affected by the consequences of an assessment of the measure in question in the light of Community law is merely a side-effect.

35 . The impact of the reserved quota system - albeit restricted to certain regions - is significantly greater in economic terms, in particular on intra-Community trade, than many other measures having equivalent effect within the meaning of Article 30 which apply throughout the territory of a Member State (for instance, the requirement that certain souvenirs manufactured abroad must bear an indication of their foreign origin (21) or the grant of aid to municipal transport undertakings for the purchase of electric vehicles, a case in which two applications for aid were pending at the time of the hearing (22)). Even though not all Italian manufacturers benefit by the reserved quota system, nevertheless the fact remains that the undertakings which do benefit are almost invariably domestic undertakings.

36 . The extent of the impediments to trade arising from the reserved quota system therefore suggests that it should be regarded as a measure having equivalent effect within the meaning of Article 30. The decisive criteria for the purposes of that assessment are, on the one hand, the size of the area covered by the preferential system and, on the other, the large number of institutions bound by the system. (23) Finally, the share of the potential volume of procurement contracts of economic operators subject to the system is considerable

3 . The compatibility of the reserved quota system with Directive 70/50/EEC (24)

37 . In the written procedure it was argued that the contested statutory system should be regarded as a measure having an effect equivalent to a quantitative restriction on imports, and consequently prohibited, also on the ground that it falls within Article 2(3)(k) of Directive 70/50.

38 . The first point in that regard is that recourse to the directive is unnecessary if the contested system must be regarded as a measure having equivalent effect within the meaning of Article 30 on the basis of the criteria set out in the case-law. The directive, which is based on Article 33(7) of the EEC Treaty, contains merely a series of particularly noteworthy examples of measures covered by Article 30 and does not seek to provide a complete list. (25)

39 . Whether it is possible in this case to derive from the provisions of the directive an autonomous

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prohibition distinct from that laid down in Article 30 is questionable for two reasons. In the first place, the directive, in view of its legal nature, is addressed to the Member States and hence direct effect cannot be attributed to it as a matter of course. Furthermore, the general prohibition of measures having an effect equivalent to quantitative restrictions on imports follows directly from the Treaty. Secondly, it is expressly stated in the preamble to the directive that it does not apply to the aids mentioned in Article 92, (26) with the result that there would be a barrier to its application if the contested provision were in the nature of aid, even if only to some extent.

40 . Nevertheless, some provisions of the directive may serve as an aid for interpretation for the purpose of assessing whether a national measure is a measure having equivalent effect. According to Article 2(2) of the directive, the latter covers, in particular, measures which favour domestic products or grant them a preference. Article 2(3) lists examples of the kind of measures covered by this provision . According to Article 2(3)(k), those measures must be taken to include measures which "hinder the purchase by private individuals of imported products only, or encourage, require or give preference to the purchase of domestic products only ". (27) There are therefore four possibilities, of which the last two are relevant here, since the preferential system gives preference to a substantial number of domestic products and at the same time requires such products to be purchased .

41 . Consideration of the provisions of the directive therefore lends weight to the view that the disputed national system is a measure having equivalent effect to a quantitative restriction. Moreover, for the reasons referred to earlier, the fact that not all domestic goods of a specified kind are accorded preferential treatment does not preclude that classification. The preferential system applies only to goods which are at least in part domestically produced

4 . Possible exceptions to the prohibition of measures having equivalent effect within the meaning of Article 30 of the EEC Treaty

42 . (a) The interests protected by Article 36 of the EEC Treaty in respect of which derogations may be made from the prohibitions of quantitative restrictions on imports and exports and of measures having equivalent effect laid down by Articles 30 and 34 of the EEC Treaty are expressly enumerated in Article 36. Since that is a derogating provision, it must be interpreted restrictively, as regards both the scope of each exception and the applicability of Article 36 to any "unnamed exceptions ". The grounds on which derogations may be made which are listed in Article 36 cannot be applied either to the substance or to the aims of the reserved quota system. Moreover, the Court has decided in a consistent line of cases that measures with an economic aim cannot be justified by Article 36. (28)

43 . (b) Nevertheless, the preferential system might be justified by "mandatory requirements ". (29) Mandatory requirements may relate, for instance, to the effectiveness of fiscal supervision, the fairness of commercial transactions and consumer or environmental protection.

44 . The reserved quota system does not fall within any of those categories . Whether the measure in question may be justified on the ground of some other mandatory requirement depends on its aim and purpose . In so far as it cannot be assumed that the preferential system pursues exclusively protectionistic aims, it must be regarded as a regional support measure. Regional support is an objective recognized by the Treaty, as may be inferred from Article 92(3)(a) and Article 130(a) of the EEC Treaty.

45 . However, the legal basis for the implementation of an objective authorized or even laid down by the Treaty must be derived from the provisions of the Treaty in so far as express provisions are to be found there . Recourse to an unwritten legal basis is, therefore, precluded in so far as the machinery provided for in the Treaty affords a sufficient guarantee of the achievement of

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the objective pursued . Accordingly, regional support measures cannot be regarded as mandatory requirements. Furthermore, it is a well-established principle that a Member State may not rely on mandatory requirements in order to protect its domestic economy.

5 . Assessment of the reserved quota system in the context of Directives 77/62/EEC (30) and 70/32/EEC (31)

46 . According to the plaintiff, the reserved quota system is contrary to Community law also because it infringes Council Directive 77/62 coordinating procedures for the award of public supply contracts . In its view, that directive applies the principles laid down in the EEC Treaty and therefore prohibits all discrimination, irrespective as to whether it is based on the origin of the products to be supplied or on the place at which the supplier is established.

47 . It is true that restrictions on the free movement of goods within the meaning of Article 30 are also prohibited in the case of supplies of goods to the State and to bodies governed by public law and in the case of the award of public supply contracts. The legislative authorities of the Community have therefore adopted coordination directives with a view to ensuring the free movement of goods also in the case of supply contracts awarded in the public sector . The preamble to Commission Directive 70/32 on provision of goods to the State, to local authorities and other official bodies states as follows :

> "... such provisions, by reserving outlets for domestic products... hinder imports which might take place in the absence of such provisions and therefore have an effect equivalent to quantitative restrictions on imports ".

The scope of the directive is defined in Article 3(1)(b) as applying to provisions "which restrict supplies, either wholly or in part, to domestic products or give them preference other than by way of aid within the meaning of Article 92 of the Treaty, whether conditionally or otherwise ".

48 . Directive 77/62 pursues comparable objectives with regard to procedures for the award of public supply contracts. As is clear from the preamble to the directive, it is also designed to ensure a degree of transparency in the award of public contracts in order to permit supervision to take place of the prohibition of restrictions on the free movement of goods.

49 . The question arises, however, whether Article 26, which is included amongst the final provisions, provides for an exception for the contested preferential system. It reads as follows :

> "This directive shall not prevent the implementation of provisions contained in Italian Law No 835 of 6 October 1950 (Official Gazette No 245 of 24.10.1950 of the Italian Republic) and in modifications thereto in force on the date on which this directive is adopted; this is without prejudice to the compatibility of these provisions with the Treaty ."

50 . In support of the view that that provision may constitute a derogation from the principles of the free movement of goods, it is argued that the predecessors of the reserved quota system are stated to be unaffected by the directive. Although, on account of its publication date, the amendment of that provision by Directive 88/295/EEC of 22 March 1988 (32) cannot be decisive for the purposes of the dispute in the main proceedings, it also supports the view that the provision in question is still a derogating provision. The amended version of Article 26(1) reads as follows :

> "This directive shall not prevent, until 31 December 1992, the application of existing national provisions on the award of public supply contracts which have as their objective the reduction of regional disparities and promotion of job creation in the most disadvantaged regions and in declining industrial regions, on condition that the provisions concerned are compatible with the Treaty and with the Community' s international obligations."

51 . The Italian preferential system is no longer expressly mentioned in that provision. It could

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at most be regarded, for the purposes of the new version, as a national provision whose aim is to reduce regional disparities.

52 . The decisive factor, in my view, is that the phrase "without prejudice to the compatibility of these provisions with the Treaty" was already to be found in the original version, and has now been incorporated in an equivalent formula in the new version. Those forms of words make it clear that, notwithstanding possible derogations from the directive, the fundamental principles of the Treaty, particularly those relating to the free movement of goods, remain valid without any limitation . The incompatibility of the reserved quota system established by Article 17 of Law No 64/86 with Article 30 cannot therefore be cured by the derogating provision in the directive.

53 . In Cases 216/84 (33) and 76/86 (34) a number of similar legal issues had to be resolved. The defendant Member States relied on a derogating provision in a directive in order to justify national legislation which had the effect of hindering intra-Community trade. The Court rejected that argument put forward in those cases. It pointed out that the derogating provision justified the maintenance of national provisions only on condition that the general provisions of the EEC Treaty were complied with.

54 . If, therefore, the preferential system cannot find justification for the purposes of Community law in the derogating provisions of Directive 77/62 either, it still remains to be considered what bearing it might have on the validity of the system if it could be regarded as aid.

55 . As is already apparent from the discussion of the competitive relationship between Articles 30 and 92, it is not possible for an infringement of Community law by a national measure on account of its incompatibility with the provisions of Article 30 to be cured by the fact that it exhibits aid-like features.

6 . Whether the reserved quota system may be regarded as aid and the consequences resulting therefrom

56 . The following considerations militate against the proposition that the contested system is in the nature of aid.

The essential feature of aid is that it is State assistance or assistance given through State resources. Admittedly, the Italian Government stated that in the case of supply contracts concluded under the reserved quota system the prices paid are higher than the prices which would be paid under an unrestricted tendering procedure. The additional amount is borne by the State, since the contracting authorities are public bodies or at least entities in which the State has a shareholding.

57 . The plaintiff stated, however, at the hearing that the local health authorities are autonomous bodies which, as far as their expenditure is concerned, are not dependent on the State. Nor can it be assumed that costs incurred by companies operating in accordance with the market economy which are only partly in public ownership are borne by the State.

58 . In addition, in order for aid within the meaning of Article 92 to be involved, the amount of aid must at least be capable of being determined in each case. That is also untrue in this instance, since in many cases the extra amount paid can be calculated only by making a hypothetical comparison between a contract awarded under conditions in which there is freedom of competition and supply contracts awarded under the reserved quota system. Furthermore, there is no conclusive evidence that any extra amount is actually payable. Nor is the payment of a price supplement the sole object of the reserved quota system, which is also aimed at the maintenance of production plant and, consequently, of employment, solely by means of the obligation to purchase goods which have been, at least partially, processed in areas covered by the preferential system. Moreover, a preferential system which has been in force for a decade may also have had, as its purpose and effect, the setting-up of new industries, which in no way implies that they operate uneconomically; as a result, it is possible that goods

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manufactured in the areas in question come onto the market at wholly competitive prices.

59 . Let me add a final remark concerning the nature of the reserved quota system as aid and its relationship with Article 30. According to the case-law, some elements of aid may - as stated earlier - be impermissible on account of their incompatibility with Article 30 where the aim pursued by the aid is attainable by less radical means. It would certainly be possible to promote regional development through measures less restrictive of the movement of goods within the Community, (35) since the promotion of regional development as such is permissible in accordance with the criteria and within the limits laid down by the EEC Treaty. Thus, aid within the meaning of Article 92(3)(a) of the EEC Treaty may be regarded as being compatible with the common market. However, development measures based on those provisions must be situated in a Community-law context and may not conflict with the aims and objectives of the Community. In order to permit coordination between regional aid schemes, the Commission has worked out principles in the light of which the permissibility of regional aid is to be assessed. Those principles have been published in a Commission communication. (36)

60 . Furthermore, regional development measures may also be adopted on the basis of Article 130a of the EEC Treaty. However, that provision is expressly concerned with the achievement of a Community objective, with the result that only Community development programmes, or development programmes authorized by the Community, may be taken into account.

61 . It is irrelevant to the outcome of the assessment of the legality under Community law of the reserved quota system and especially to the consequences to be drawn therefrom by the national court whether or not the measure in question is in the nature of aid. The contested system could at most constitute an unauthorized aid. In view of the content and aim of the system, it could only be aid capable of being approved under Article 92(3)(a) of the EEC Treaty.

62 . Assessment of the compatibility of a national aid measure with the common market does not fall within the jurisdiction of the national courts. Nor has the Commission, in its capacity as the authority responsible for supervising aid, authorized the system as aid . (37) Although the Italian Government notified it in due time of the draft law which was enacted as Law No 64/86, the Commission, according to the assurances which it gave in the course of the proceedings, never initiated the aid-review procedure in relation to the preferential system. Accordingly, on those facts the last sentence of Article 93(3) of the EEC Treaty, which prohibits the Member State concerned from putting its proposed measure into effect until the Commission has taken a final decision, does not apply in this case . Considered from this angle only, the reserved quota system is not invalid as a measure adopted contrary to Article 93(3); if it had been invalid for that reason that invalidity would have had to be taken into account by the national courts and authorities.

Costs

63 . The costs incurred by the Italian Government and the Commission are not recoverable. These proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court. The decision on costs is a matter for that court.

C - Conclusion

64 . In the light of the foregoing considerations, I suggest that the questions submitted by the national court should be answered as follows :

> "(1) The reserved quota system established by Law No 64/86 must be regarded as a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the EEC Treaty. The resultant illegality of that system under Community law must be taken into account

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by the national courts and authorities.

(2) The exception provided for in Article 26 of Directive 77/62/EEC does not have the effect of making the reserved quota system compatible with Community law.

(3) The reserved quota system is not in the nature of aid. Even if it were regarded as aid, that would not have any direct repercussions on the dispute in the main proceedings."

(*) Original language : German.

(1) Case 310/88 Istituto Behring v USSL N.; Case 311/88 Hoechst Italia v USSL No 56; Case 351/88 Laboratori Bruneau v USL R.

(2) See the judgment in Case 74/76 Iannelli & Volpi v Paolo Meroni delivered as long ago as 22 March 1977 (((1977)) ECR 557); the judgments of 10 July 1985 in Case 17/84 Commission v Ireland ((1985)) ECR 2375, and of 5 June 1986 in Case 103/84 Commission v Italy ((1986)) ECR 1759.

(3) See the judgment in Iannelli & Volpi, cited above in footnote 2, paragraphs 11 and 12.

(4) See the judgment of 19 June 1973 in Case 77/72 Capolongo ((1973)) ECR 611, paragraph 6.

(5) See the judgment in Iannelli & Volpi, cited above in footnote 2, paragraphs 9 and 10.

(6) Iannelli & Volpi, cited above, paragraph 14.

(7) Judgment of 7 May 1985 in Case 18/84 Commission v France ((1985)) ECR 1339, paragraph 6.

(8) Judgment of 24 November 1982 in Case 249/81 Commission v Ireland ((1982)) ECR 4005, paragraph 16.

(9) Case 249/81 Commission v Ireland, cited above in footnote 8, paragraph 18.

(10) Case 18/84 Commission v France, cited above in footnote 7, paragraph 13, and Case 103/84 Commission v Italy, cited above in footnote 2, paragraph 19.

(11) Commission v France, cited above, paragraph 13, and Commission v Italy, cited above.

(12) The Court has clearly stated that individuals may rely on directly applicable provisions not only before the courts but also before all organs of the administration, including municipalities, which are obliged to apply those provisions. Judgment of 22 June 1989 in Case 103/88 Costanzo v Commune di Milano ((1989)) ECR 1839.

(13) Judgment of 11 July 1974 in Case 8/74 Dassonville ((1974)) ECR 837 .

(14) See Commission Communication COM(89) 400 final, paragraph 38

(15) COM(89) 400 final.

(16) Case 249/81 Commission v Ireland, cited above in footnote 8.

(17) Judgments of 22 March 1977 in Case 78/76 Steinike und Weinlig v Federal Republic of Germany ((1977)) ECR 595, and in Commission v Italy, cited above in footnote 2.

(18) Judgment of 10 July 1985 in Case 17/84 Commission v Ireland ((1985)) ECR 2375.

(19) Judgment of 11 December 1985 in Case 192/84 Commission v Hellenic Republic ((1985)) ECR 3973.

(20) Judgment of 17 June 1981 in Case 113/80 Commission v Ireland ((1981)) ECR 1627.

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(21) Judgment in Case 113/80 Commission v Ireland, cited above in footnote 20 .

(22) Judgment in Case 103/84 Commission v Italy, cited above in footnote 2 .

(23) See paragraph 26 above.

(24) Of 22 December 1969, OJ, English Special Edition 1970 (I), p . 17 .

(25) See the Opinion of Mr Advocate General Lenz in Case 103/84 Commission v Italy ((1986)) ECR 1761, at p. 1764.

(26) See the penultimate (15th) recital in the preamble to the directive (OJ L 13, 19.1.1979, p. 30).

(27) Emphasis added.

(28) See, for instance, the judgment of 7 February 1984 in Case 238/82 Duphar BV and Others v Netherlands ((1984)) ECR 523.

(29) Judgment of 20 February 1979 in Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung fuer Branntwein (" Cassis de Dijon ") ((1979)) ECR 649 .

(30) OJ L 13, 15.1.1976, p. 1.

(31) JO L 13, 19.1.1970, p. 1.

(32) OJ L 127, 20.5.1988, p. 1.

(33) Judgment of 23 February 1988 in Case 216/84 Commission v France ((1988)) ECR 793, paragraph 22.

(34) Judgment of 11 May 1989 in Case 76/87 Commission v Germany ((1989)) ECR 1021, paragraph 23.

(35) See, for example, the aid measures provided for in Law No 64/86, which the Commission declared to be compatible with Community law by decision of 2 March 1988, OJ L 143, 10.6.1988, p. 37.

(36) Communication of the Commission on regional aid systems, OJ C 31, 3.2.1979, p. 9.

(37) See the Commission decision of 2 March 1988, OJ L 143, 10.6.1988, p. 37, point II.3, and the Commission' s earlier reservation in its notice on Law No 64/86, OJ C 259, 29.9.1987, p. 2

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SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Competition ; State aids ; Approximation of laws

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NATIONA	Italy
PROCEDU	Reference for a preliminary ruling
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Opinion of Mr Advocate General Mischo delivered on 4 October 1989.
Commission of the European Communities v Italian Republic.
Failure of a Member State to fulfil its obligations - Public supply contracts in the data-processing sector - Undertakings partly or wholly in public ownership - National legislatrion not in compliance with obligations under Community law.
Case C-3/88.

++++

Mr President,

Members of the Court,

1 . In the Article 169 action in Case C-3/88, the Commission seeks a declaration from the Court that by adopting or maintaining in force legislation under which only companies in which all or a majority of the shares are directly or indirectly in public or State ownership may conclude agreements with the Italian State for the development of data-processing systems on behalf of the public authorities, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal L 13, 15.1.1977, p. 1).

2 . For a description of the Italian laws and decree-laws in issue, reference may be made to Part II of the Report for the Hearing. Those enactments all concern the establishment of complete data-processing systems, from the design of the system and the definition of the software (programs) to their technical operation, including the purchase of the equipment required for their operation.

3 . The allegation of infringement of Articles 52 and 59 of the EEC Treaty is directed at that aspect of the Italian legislation which relates to the design, programming and operation of the data-processing systems (hereinafter referred to collectively as "software "), while that of infringement of Directive 77/62/EEC is directed at the legislation in so far as it relates to the supply of equipment (hereinafter referred to as "hardware ").

I - Articles 52 and 59 of the EEC Treaty

4 . In its judgment of 14 January 1988 in Case 63/86 Commission v Italy ((1988)) ECR 29, the Court pointed out that

> "Articles 52 and 59 of the Treaty are essentially intended to give effect, in the field of activities as self-employed persons, to the principle of equal treatment enshrined in Article 7 according to which 'within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

Those two articles are thus intended to secure the benefit of national treatment for a national of a Member State who wishes to pursue an activity as a self-employed person in another Member State and they prohibit all discrimination on grounds of nationality resulting from national or regional legislation and preventing the taking up or pursuit of such an activity" (paragraphs 12 and 13).

5 . In the present case, the Italian Government claims primarily that the laws and decree-laws in issue do not make any reference to the nationality of companies entitled to conclude the contracts and agreements in question with the Italian State.

6 . At a formal level, the Italian Government is undoubtedly right - the Italian legislation in issue applies without distinction to both Italian and non-Italian companies. The criterion of distinction is not the "nationality" of the companies, but rather whether all or a majority of the shares are in public ownership. It is not disputed that "public ownership" here means Italian public

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ownership.

7 . The Commission, in its reply (point 3.2.2), counters by asserting that

> "provisions which, while making no explicit reference to nationality, in fact affect solely or overwhelmingly nationals (or corporations) of the other Member States... are also covered by the prohibition of discrimination ".

8 . That claim of indirect (or disguised) discrimination on the basis of nationality had already been raised by the Commission in Case 221/85 Commission v Belgium ((1987)) ECR 719, to which it refers. In its judgment of 12 February 1987 in that case, the Court found that the Belgian law in issue did not prevent nationals of other Member States from establishing themselves in Belgium and carrying out the activities in question and that it thus applied without distinction to Belgian nationals and those of other Member States, and added that

> "its provisions and objectives do not permit the conclusion that it was adopted for discriminatory purposes or that it produces discriminatory effects" (paragraph 11).

9 . In other, more recent, cases, the Court has also indicated that the criterion of indirect discrimination on the basis of nationality may indeed be applied to rules applicable without distinction.

10 . In its judgments of 7 July 1988 in Case 143/87 Stanton v Inasti and in Joined Cases 154 and 155/87 Inasti v Wolf and Others and Inasti v RSVZ (1) the Court found as follows :

> "the national legislation which gave rise to the main proceedings is applicable without distinction to all self-employed persons working in Belgium and does not discriminate according to the nationality of those persons. Although it is true that self-employed persons whose principal occupation is employment in a Member State other than Belgium are thereby placed at a disadvantage, nothing has been submitted to the Court to show that the persons disadvantaged are exclusively or mainly foreign nationals ".

The Court concluded that

> "nor, therefore, can the national legislation at issue be considered to result in indirect discrimination on grounds of nationality"

and that

> "consequently, Article 7 of the Treaty may be dismissed from consideration" (paragraph 9).

11 . In its judgment of 20 September 1988 in Case 31/87 Gebroeders Beentjes v Netherlands, (2) the Court declared that

> "the obligation to employ long-term unemployed persons could inter alia infringe the prohibition of discrimination on grounds of nationality laid down in the second paragraph of Article 7 of the Treaty if it became apparent that such a condition could be satisfied only by tenderers from the State concerned or indeed that tenderers from other Member States would have difficulty in complying with it ".

As the case was a reference for a preliminary ruling, it added that

> "it is for the national court to determine, in the light of all the circumstances of the case, whether the imposition of such a condition is directly or indirectly discriminatory" (paragraph 30).

12 . Furthermore, in its judgment of 7 June 1988 in Case 20/85 Roviello v Landesversicherungsanstalt Schwaben, (3) the Court applied the same reasoning, this time not to national legislation but to a provision of Community law in the field of social security, and confirmed that

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"the principle of equal treatment prohibits not merely overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result" (paragraph 14). (4)

13 . Those various recent judgments confirm the validity of the Commission' s claim that provisions of national law which, while applicable without distinction to nationals of all the Member States, in fact hinder or disadvantage primarily nationals of other Member States may also be covered by the prohibition in Articles 52 and 59 of the Treaty . It is, moreover, significant that the General Programmes for the abolition of restrictions on freedom to provide services and on freedom of establishment laid down by the Council on 18 December 1961 (Official Journal, English Special Edition, Second Series IX, pp . 3 and 7), which, as the Court has noted on several occasions, (5) provide useful guidance with a view to the implementation of the relevant provisions of the Treaty, both consider that the restrictions prohibited include

"any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, in respect of the provision of services ((or the taking up or pursuit of an activity as a self-employed person)) ... where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the provision of services ((or the taking up or pursuit of such activity)) by foreign nationals ".

14 . Moreover, in its judgments of 7 July 1988 in the Inasti cases, cited above, the Court declared very generally that

"the provisions of the Treaty relating to the free movement of persons are thus intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State" (paragraph 13).

15 . Applied to the present case, that approach implies that the Italian legislation in issue, while not preventing companies from other Member States from establishing themselves in Italy or engaging in the activities in question, is incompatible with Articles 52 and 59 of the Treaty in so far as its effect is to prevent non-Italian companies from concluding the contracts in question.

16 . In its rejoinder (p. 5), however, the Italian Government objects that the disputed rules treat Italian private undertakings and foreign private undertakings in exactly the same way, both in fact and in law, and that they merely draw a distinction between private undertakings and public undertakings, with no reference to nationality

17 . In the present case, however, it is not appropriate to make any differentiation in reasoning between private undertakings and public undertakings. First, the Commission is not alleging any discrimination by Italy against foreign private undertakings in relation to Italian private undertakings. Secondly, the discriminatory criterion is not that of public ownership, but that of Italian public ownership, the effect of which is that only undertakings controlled by the Italian public sector can be considered for the work in question. Those companies are, in fact, all companies which are incorporated or have their registered offices in Italy, that is to say they are Italian companies.

18 . Not all Italian companies are treated more favourably than foreign companies, but all the companies receiving favourable treatment under the legislation are Italian.

19 . The defendant claims, however, that the Italian State or public sector has acquired majority holdings in a number of foreign companies, including an American company specialized in data processing .

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20 . In that connection, it must be acknowledged that a company having the nationality of another Member State, provided that all or a majority of its shares were in Italian public ownership, would meet the conditions laid down by the laws in question. But even if some such company were to exist, the Italian legislation, while not affording favourable treatment exclusively to Italian companies, would still afford such treatment mainly to those companies, and would still be incompatible with the Treaty.

21 . The Commission has nevertheless pointed out, without being contradicted, that there are at present no data-processing companies having the nationality of another Member State all or a majority of whose shares are in Italian public ownership, and that the agreements concluded under the contested rules have in fact been concluded with Italian companies.

22 . In its rejoinder (pp. 5 and 6), the Italian Government also maintains that the criterion of Italian public ownership is justified by the type of services which the companies in question are called upon to provide, and in particular by the fact that their task may involve the operation of data-processing systems in strategic sectors such as taxation, organized crime, public health, etc.

23 . In that connection, it must be noted that a number of the laws in question provide only that the task of operating the data-processing systems may, if appropriate, be temporarily entrusted to the companies which developed those systems. Those provisions refer, moreover, to the technical operation of the systems, and that operation is to remain under the direction and supervision of the administrative authorities, so that it does not necessarily involve access to "strategic" data by the operators.

24 . Finally, the State can undoubtedly guard against any unwelcome use of the data in question by having recourse to other measures which are less restrictive of freedom of establishment and freedom to provide services, such as a duty of official secrecy laid on the staff of the companies concerned. Furthermore, Decree-Law No 688 of 30 September 1982, providing for emergency measures to counteract tax evasion, extends the general duty of official secrecy, which applies under the Italian Penal Code to public officials and those responsible for public services, to "employees and staff of companies awarded contracts who are involved in any manner in the operations provided for in the contracts ". There is no reason to suppose that compliance with that duty would necessarily be less strict or less complete in the case of staff of companies none of whose shares were in Italian State ownership than in the case of staff of those some of whose shares were in Italian State ownership.

25 . Similar considerations may be advanced in relation to the Italian Government' s alternative argument that Articles 52 and 59 cannot be applied in any event because of the exceptions provided for in Articles 55, 56(1) and 66 of the Treaty.

26 . With regard to the exception for activities involving the exercise of official authority provided for in Article 55, it must first be emphasized, as the Court reiterated in its judgment of 15 March 1988 in Case 147/86 Commission v Greece (6) that

> "since it derogates from the fundamental rule of freedom of establishment ((and, through Article 66, from that of freedom to provide services)) Article 55 of the Treaty must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect" (paragraph 7).

The Court added, moreover, that

> "the possible application of restrictions on freedom of establishment provided for by Article 55(1) must be appraised separately in respect of each Member State. However, that appraisal

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must take account of the Community character of the limits set by Article 55 to the exceptions which are permitted to the principle of freedom of establishment, in order to prevent the effectiveness of the Treaty in this area from being undermined by unilateral provisions adopted by the Member States" (paragraph 8).

27 . However, the Court has never, in its decisions, given a definition in general and abstract terms of what is meant by "activities which... are connected, even occasionally, with the exercise of official authority ".

28 . In its judgment of 21 June 1974 in Case 2/74 Reyners v Belgium ((1974)) ECR 631, it did, however, declare that the most typical activities of the profession of avocat cannot be considered to be connected with the exercise of that authority, and ruled that

"the exception to freedom of establishment provided for by the first paragraph of Article 55 must be restricted to those of the activities referred to in Article 52 which in themselves involve a direct and specific connection with the exercise of official authority ".

It follows from that judgment that even if certain activities are performed by virtue of a legal duty or monopoly, they are not necessarily connected with the exercise of official authority.

29 . Furthermore, in its judgment of 15 March 1988 in Commission v Greece, cited above, concerning activities which although engaged in by private individuals fell within the field of education, where it is for each Member State to determine the role and responsibilities of the official authorities, the Court held that the exception in Article 55 was not applicable because those activities remained subject to supervision by the official authorities, which had at their disposal appropriate means for ensuring in all circumstances the protection of the interests entrusted to them, and there was no need to restrict freedom of establishment for that purpose.

30 . In my view, the Court has thus given the concept of "connection with the exercise of official authority" a narrower interpretation than that which it has given to the concept of "employment in the public service" contained in Article 48(4) of the Treaty, which, according to the Court' s decisions, includes not only those posts which involve direct participation but also those which involve indirect participation in the exercise of powers conferred by public law and even in the discharge of functions whose purpose is to safeguard merely the general interests of the State or of other public authorities . (7)

31 . In view of the foregoing, I do not feel that it is possible to consider that companies awarded contracts for the development and technical operation of data-processing systems on behalf of the public authorities are "directly and specifically" involved in the exercise of official authority. As we have seen, moreover, the services to be provided by those companies are to remain under the direction and supervision of the public authorities, which thereby retain control.

32 . Finally, in so far as the development and technical operation of data-processing systems may unavoidably involve access to data of a confidential nature and of public importance, Member States have, in the duty of official secrecy, a sufficiently effective means of guarding against disclosure without there being any need to restrict freedom of establishment or freedom to provide services for that purpose .

33 . With regard to the exception contained in Article 56(1), to which Article 66 also refers, and which makes it permissible to maintain national rules providing for special treatment for foreign nationals on grounds of public policy, public security or public health, it should first be pointed out that the grounds on which the exercise of certain activities may be exempted from the prohibitions contained in Articles 52 and 59 are to be found not in the aims specific to the relevant rules themselves but in the reasons for which they impose restrictions on foreign nationals. The Italian

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Government' s argument that it is, in establishing these data-processing systems, pursuing aims which are not solely economic but also involve the public interest, including counteracting tax evasion, fighting organized crime, providing therapeutic measures for drug-addiction and counteracting fraud in the pharmaceutical and agricultural sectors, is therefore not relevant for the purpose of justifying the restrictions imposed on foreign companies. To give an example, the mere fact that one of the data-processing systems in question is intended to meet the requirements of national health planning and supervision of the national health fund does not mean that any participation of foreign companies in its establishment and operation would endanger public health in Italy. (8)

34 . The only reasons of public policy or public security which might justify the exclusion of foreign companies therefore lie in the protection of the data processed by the systems in question. According to the Italian Government,

> "that information has undeniable public implication; it cannot be allowed to fall into unauthorized hands and must not be used in any manner which is improper or actually contrary to the interests of the State" (end of point II, 2.(b) of the rejoinder).

35 . What is true for measures adopted under Article 56 is also true for any measure providing for special treatment for foreign nationals, whether based on objective criteria of general interest or on Article 55; that is to say, they must not be disproportionate to the aim they seek to achieve. As the Court pointed out in its judgment of 26 April 1988 in Case 352/85 Bond van Averteeders and Others v Netherlands ((1988)) ECR 2085,

> "as an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard" (paragraph 36).

36 . It is also impossible, for the reasons outlined in those contexts, to justify the exclusion of companies other than those in which all or a majority of the shares are in Italian public ownership on grounds of public policy or public security within the meaning of Article 56 of the Treaty.

37 . In conclusion, the Commission' s application should be upheld in so far as it is based on an infringement of Articles 52 and 59 of the EEC Treaty.

II - Council Directive 77/62/EEC

38 . In its second head of claim, the Commission seeks a declaration that the Italian legislation in issue authorizes, with regard to the purchase of the hardware required for the establishment of the data-processing systems in question, procedures for the award of public supply contracts which are incompatible with the principles of Council Directive 77/62/EEC, and in particular that the advertising rules contained in Article 9 of that directive, which require appropriate notices to be published in the Official Journal of the European Communities, have never been observed.

39 . The Italian Government argues primarily that the directive does not apply to the contracts and agreements in issue. A data-processing system forms a whole from which the hardware cannot be separated and of which it is merely a secondary, ancillary constituent. As complex assemblages comprising, in addition to the hardware, software-related operations and services (design, maintenance, commissioning and sometimes operation), data-processing systems such as those defined in the legislation in question cannot be regarded as constituting "products" within the meaning of Article 1(a) of the directive.

40 . That argument advanced by the Italian government cannot, in my opinion, be accepted.

41 . It is true that there can be no doubt, and the Commission is in full agreement with the Italian Government on this point, that

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"following the necessary design state, hardware and software are the indispensable and inseparable elements acquired for the establishment of a data-processing system" (reply, p. 2).

42 . But that does not mean that they cannot be purchased separately

43 . The Italian Government could first have approached a company specializing in software for the design of the system. Such a company could have produced a very detailed description of the technical requirements for the most appropriate machines. The government could then have purchased those machines by following a procedure complying with the rules laid down in Directive 77/62/EEC. It was in fact confirmed at the hearing that the Italian Government has finally become the owner of the equipment chosen and purchased on its behalf by the companies with which the contracts were concluded.

44 . The question whether the hardware and software, taken together, constitute a "product" within the meaning of Article 1 of the directive does not, therefore, arise.

45 . In any event, the directive does not contain any provision which would allow certain deliveries of products to be excluded from its scope of application on the ground that they were merely ancillary to more extensive operations or services. It does, however, to a limited extent, provide the opposite : Article 1(a) provides that the delivery of products covered by public supply contracts within the meaning of the directive "may in addition include siting and installation operations ". It is obviously out of the question to conclude that in the field of data-processing software is secondary to hardware and must be treated in the same way. I feel, however, that it may justifiably be considered that if the Council had intended to allow hardware not to be made subject to the directive on the ground that it is ancillary to software, then it would have said so explicitly .

46 . It is, moreover, significant to note that although the Council, in Article 6(1)(h), authorized Member States not to apply the prescribed procedures "for equipment supply contracts in the field of data-processing", that exception was available only until 1 January 1981, in the absence of any decision to modify that date, and was subject to the Council' s right to exclude certain categories of material from its scope. That explicit exception shows, by contrary inference, that data-processing hardware is, in principle, a product within the meaning of the directive. It cannot be deduced from the scope or wording of either Council Decision 79/783/EEC of 11 September 1979 adopting a multiannual programme (1979-83) in the field of data processing (Official Journal L 231, 13.9.1979, p. 23) or Council Decision 84/559/EEC of 22 November 1984 amending that decision in respect of general measures in the field of data processing (Official Journal L 308, 27.11.1984, p. 49) that those decisions may have extended, even implicitly, the period of validity of that exception. The directive has therefore been applicable to equipment supply contracts in the field of data processing since 1 January 1981. (It may be pointed out, in passing, that the current text of the directive, as amended by Council Directive 88/295/EEC of 22 March 1988, (9) no longer contains the exception in question.)

47 . That conclusion cannot be impugned by the observation that the value of the software is generally greater than that of the hardware in the establishment of data-processing systems. The directive merely fixes a lower limit below which the prescribed procedures need not be applied to public supply contracts, and that limit is expressed in absolute terms : Article 5(1)(a) sets it at 200 000 European units of account, now ECU 200 000. The Italian Government' s answer to the question put by the Court shows that in the present case that limit was exceeded with respect to the hardware - indeed, the Italian Government has never claimed otherwise.

48 . It should also be pointed out that the purpose of Directive 77/62/EEC, as stated in the first two recitals in its preamble, is merely to supplement, by the coordination of the procedures relating to public supply contracts, the prohibition of restrictions on the free movement of goods

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in that field already contained in Articles 30 et seq . of the EEC Treaty. None of those provisions envisages any exemption from that prohibition in cases where the goods involved are to be delivered within the wider framework of operations which also, or principally, comprise the performance of work or the provision of services .

49 . Furthermore, in its judgment of 22 September 1988 in Case 45/87 Commission v Ireland ((1988)) ECR 4929, the Court relied on the general character of the prohibitions laid down by Article 30 in dismissing the Irish Government' s argument that they should not apply to imports of materials ancillary to a public works contract. The Court held that the provisions of the Treaty relating to the freedom to provide services did not lay down any specific rule relating to particular barriers to the free movement of goods, and explicitly declared that

> "the fact that a public works contract relates to the provision of services cannot remove a clause in an invitation to tender restricting the materials that may be used from the scope of the prohibitions set out in Article 30" (see paragraphs 14 to 17).

50 . That reasoning is also applicable in the present case, inasmuch as the fact that a delivery of goods falls within the framework of activities carried out under either Article 52 or Article 59 of the Treaty does not exempt those goods from the prohibitions contained in Article 30 .

51 . It was therefore wrong not to provide, in the three Italian enactments in issue, for the application of the procedures prescribed in Directive 77/62/EEC in relation to the purchase of the hardware required for the establishment of the data-processing systems in question .

52 . With regard to the Italian Government' s alternative submission that the public supply contracts in issue are covered by one or more of the derogations provided for in the directive, I agree with the Commission in considering that none of those derogations is applicable in this case. Since I am in full agreement with the arguments advanced by the Commission in that regard, as they are set out in Part IV.2 of the Report for the Hearing, I shall merely refer to that document .

Conclusion

53 . For all the above reasons, I propose that the Commission' s application should be allowed in its entirety, and that the Italian Republic should be ordered to pay the costs.

(*) Original language : French.

(1) ((1988)) ECR 3877 and 3897.

(2) ((1988)) ECR 4635.

(3) ((1988)) ECR 2805.

(4) See also the judgment of 15 January 1986 in Case 41/84 Pinna v Caisse d' allocations familiales de la Savoie ((1986)) ECR 1, paragraphs 23 and 24.

(5) See, in particular, the judgment of 14 January 1988 in Case 63/86 Commission v Italy, cited above, paragraph 14, and the judgment of 10 July 1986 in Case 79/85 Segers v Bestuur van de Bedrijfsvereniging voor Bank - en Verzekeringswezen, Groothandel en Vrije Beroepen ((1986)) ECR 2375, paragraph 15.

(6) ((1988)) ECR 1637.

(7) For a definition of "employment in the public service", see in particular the judgment of 3 July 1986 in Case 66/85 Lawrie-Blum v Land Baden-Wuerttemberg ((1986)) ECR 2121, paragraph 27.

(8) In that context, see the Court' s judgment of 7 May 1986 in Case 131/85 Guel v Regierungspraesident

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Duesseldorf ((1986)) ECR 1573, paragraph 17 :

"The right to restrict freedom of movement on grounds of public health is intended not to exclude the public health sector, as a sector of economic activity and from the point of view of access to employment, from the application of the principles of freedom of movement but to permit Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public health."

(9) Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ L 127, 20.5.1988, p. 1).

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Opinion of Mr Advocate General Darmon delivered on 21 June 1988.
Commission of the European Communities v Ireland.
Public works contract - Community tender procedure - Applicability of Article 30 of the EEC Treaty.
Case 45/87.

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Mr President,

Members of the Court,

1 . In this action the Commission is asking the Court for a declaration that by allowing the inclusion in the invitation to tender for a public works contract concerning the supply of water for Dundalk of a clause providing that the pipes to be used are to be certified as complying with an Irish standard and by refusing to consider a tender providing for the use of pipes not certified as complying with that standard, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (hereinafter referred to as "the directive "). (1)

2 . The promoter of the project, called the "Dundalk Water Supply Augmentation Scheme", is the Dundalk Urban District Council. Within that project, the contract in question is contract No 4. It concerns the construction of a water-main to transport water from the River Fane source to a treatment plant and thence into the existing supply system . In the contract specifications, Clause 4.29 provides that : "Asbestos cement pressure pipes shall be certified as complying with Irish Standard Specification 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards. All asbestos cement water-mains are to have a bituminous coating internally and externally. Such coatings shall be applied at the factory by dipping ". Following a complaint by an Irish public works undertaking, Walls, one of whose very competitively priced tenders was rejected because it envisaged the use of Spanish Uralita pipes that did not have the certification required, the Commission commenced the procedure provided for in Article 169 of the EEC Treaty .

3 . It is necessary first of all to describe the legal background to the arguments which will enable the Court to determine whether Ireland has failed to fulfil certain of its obligations under Community law.

4 . The Commission considers that the infringement must be considered in the light, in particular, of the obligations arising under Article 10 of the directive. Noting that, according to Article 3 (5) of the directive, its provisions do not apply in particular to public works contracts awarded by the production, distribution, transmission or transportation services for water, the Commission points out that, since Ireland referred to the compulsory notice provided for in the directive in order to publish a notice of the contract in question in the Official Journal of the European Communities, it is obliged to comply with all of the provisions of the directive, in particular Article 10 (2). That provision prohibits in principle, in clauses of contracts governed by the directive, "the indication of trade marks, patents, types, or of a specific origin or production"; however, it authorizes such an indication subject to certain conditions if it is accompanied by the words "or equivalent ".

5 . There is no doubt that the contract in question, which was one of a number of contracts for works designed to augment the Dundalk water supply, thus belonged to a category of contracts outside the scope of the directive and that, from that point of view, Ireland was not a priori obliged to comply with its provisions. It is contended, however, that Ireland voluntarily submitted itself

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to its application

6 . Apparently, the publication of the notice of the contract in question in accordance with the conditions laid down in the directive was initially linked to Ireland' s plan to seek Community finance for the project . Its plan came to nothing but the Commission wishes the Court to declare that once a Member State publishes, on its own initiative, a notice of an invitation to tender in the form provided for in the directive, it must subsequently apply all the provisions of the directive, so that the apparent situation is complied with, as it were .

7 . With regard to that argument, which has been supported by Spain, I share the view of Ireland that the perfectly clear wording of the provisions excluding contracts relating to the production, distribution, transmission or transportation of water from the scope of the directive must prevail. To those provisions the Community legislature has added no qualification to the effect that authorities awarding contracts may voluntarily make their invitations to tender subject to a set of rules which is a priori inapplicable to them. I do not believe that in its judgment the Court may infer, from the form of the publication of a notice of invitation to tender, consequences which the Community legislature, which laid down those formal requirements, did not envisage.

8 . Neither the Commission nor Spain has truly explained how, as a matter of law, the Member States could unilaterally, in the absence of any supporting legal provision, override the effect of Article 3 (5) of the directive and no previous judgments of the Court have been cited in support of this view.

9 . Certainly, one cannot ignore the need to protect the interests of contractors who might draw certain conclusions from publication of the notice in the Official Journal of the European Communities. However, it seems to me that, given the Community legislature' s very clear position as regards the exclusion of certain contracts from the scope of the directive, a qualification added by a decision of the Court to the effect that a Member State may voluntarily submit itself to the application of the provisions of the directive would have the disadvantage of introducing ambiguity into the interpretation of the provisions of a directive where there is none at present. In several of its judgments the Court has emphasized in this regard the necessity for Member States not to place economic operators in a position of uncertainty through contradictions in legislation or regulations. (2) In my view, that principle applies a fortiori to strictly Community provisions and in the present circumstances prohibits the perfectly clear meaning of Article 3 (5) of the directive from being obscured.

10 . For that reason I consider that in the present case the directive could not apply to the contract in question and consequently that it is unnecessary to consider how Ireland failed in this case to fulfil the obligations laid down therein.

11 . It would therefore appear that Ireland' s conduct may be assessed only in the light of the obligations arising under Article 30 of the Treaty.

12 . Here again, Ireland considers that the provisions of Article 30 cannot apply to the facts referred to by the Commission and that its reliance on Article 30 has no sound basis.

13 . That view is based on an apparently simple line of argument. Ireland is being challenged on an issue concerning the non-conformity with Community law of one aspect of the invitation to tender for a public works contract. Invitations to tender are governed by provisions which implement the articles of the Treaty relating to the freedom to provide services. Therefore, Ireland' s conduct cannot, according to the case-law of the Court, be assessed with reference to the provisions of the Treaty relating to the free movement of goods. Ireland relies in this connection on the judgment of the Court of 22 March 1977 in Ianelli v Meroni in which the Court stated that :

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"however wide the field of application of Article 30 may be, it nevertheless does not include obstacles to trade covered by other provisions of the Treaty ". (3)

14 . Before assessing the merits of Ireland' s point of view, it must be set out in somewhat greater detail. Invitations to tender for public works contract are governed by Directive 71/305. That directive is based in particular on Article 59 (2) and Article 66 of the Treaty . A public works contract should therefore be regarded as a provision of services and any challenge to a clause in such a contract should be examined with reference to the requirements of the freedom to provide services. Each clause, whatever its subject-matter, is merely ancillary to the provision of the services. Therefore, in the case of obstacles covered by specific provisions of the Treaty, as referred to in the judgment in Ianelli, Article 30 cannot be relied upon .

15 . For the sake of completeness it must be noted that ultimately that line of argument would necessarily lead to the conclusion that any attempt to find an infringement of obligations arising under the Treaty would be futile in the present case. Besides the fundamental impossibility of relying on the obligations laid down in Article 30, there is the effect of the special provision of the directive, (4) which excludes from the scope of the directive in particular public works contracts relating to the supply of water. Such contracts, being governed ratione materiae by the rules of the Treaty relating to the freedom to provide services, fall outside the provisions of the directive implementing those Treaty rules by virtue of an exception provided for in the directive.

16 . Like the Commission and Spain, I am not convinced by that line of argument .

17 . First of all, it is necesary to recall how, according to the case-law of the Court, the scope of Article 30 is delimited in relation to that of other provisions of the Treaty. In its judgment of 3 March 1988 in Bergandi the Court stated that Article 30

"covers generally all measures impeding imports which are not already specifically covered by other provisions of the Treaty ". (5)

This clearly shows that Article 30 must give way only to provisions specifically covering "measures impeding imports" in a given case. As Advocate General Sir Gordon Slynn observed in his Opinion in the case of Cinéthèque SA, the provisions of the Treaty relating to the freedom to provide services are all aimed at

"eliminating measures which impose on the national of one Member State more rigorous rules, or put him in law or in fact in an unfavourable position compared with the national of the Member State imposing the measure ". (6)

They do not therefore specifically cover measures impeding imports. From that point of view, there are consequently already grounds for doubting whether the fact that a service is provided means in principle that Article 30 is inapplicable to measures which, in the context of the provision of that service, would impede imports.

18 . In actual fact, an examination of the case-law of the Court leads to the conclusion that in general the clear desire is for the maximum number of obstacles to the importation of goods to be caught through Article 30.

19 . One illustration is to be found in the judgments in cases concerning processes for the manufacture of physical articles where the Court relies on Article 60 of the Treaty so as to let classification as the provision of a service operate only in subordination to classification as supply of goods. (7)

20 . An even more convincing illustration of the "attractive effect" of Article 30 is afforded by the case-law of the Court concerning the applicability of Article 30 to operations covered by the provisions on State aids . In its judgment in Ianelli, cited above, the Court ruled

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"the aids referred to in Articles 92 and 93 of the Treaty do not as such fall within the field of application of the prohibition of quantitative restrictions on imports and measures having equivalent effect laid down by Article 30 but the aspects of aid which are not necessary for the attainment of its object or for its proper functioning and which contravene this prohibition may for that reason be held to be incompatible with this provision ". (8)

21 . The possibility of applying Article 30 to certain aspects of aid is expressed even more clearly in recent judgments. In the aforementioned judgment of 7 May 1985 in Commission v France the Court pointed out that

"Articles 92 and 94 cannot... be used to frustrate the rules of the Treaty on the free movement of goods"

and that

"the mere fact that a national measure may possibly be defined as aid within the meaning of Article 92 is therefore not an adequate reason for exempting it from the prohibition contained in Article 30 ". (9)

Similar words are to be found in the Court' s judgment of 5 June 1986 in Commission v Italy. (10)

22 . In fact, the only cases in which the Court has in the past considered that the application of certain provisions of the Treaty precludes reliance on Article 30 are those concerning "obstacles which are of a fiscal nature or have equivalent effect", (11) which corresponds closely to the abovementioned passage from the Bergandi judgment . (12)

23 . It may therefore be deduced from the case-law of the Court that the fact that a given situation is, as a whole, governed by certain provisions of the Treaty does not in all cases prevent a particular aspect of that situation from giving rise to the application of Article 30 . More precisely, the fact that a service is provided would not appear to exclude an assessment of the compatibility of certain aspects of the provision of that service with Article 30.

24 . That impression can only be reinforced by a reading of the judgment of 30 April 1974 in Sacchi in which the Court ruled that, although

"the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services",

"trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals is subject to the rules relating to freedom of movement for goods ". (13)

25 . The case-law of the Court, in the light of that judgment, therefore gives grounds for considering that, although a public works contract constitutes a provision of services, the materials used to perform it are covered by the provisions of Article 30.

26 . In support of that view, which, I believe, simply takes account of the principles laid down in the judgments of the Court, I would like to put forward a consideration prompted by the particular legal factors of this case. In my opinion, Ireland' s argument leads to a considerable weakening of the effectiveness of certain fundamental rules of the Treaty, those relating to the free movement of goods. To say that all the aspects of a public works contract are covered exclusively by the provisions of the Treaty concerning the freedom to provide services when the directive implementing those provisions in the field of public works contracts excludes from its scope contracts relating to energy and water would ultimately render the principle of free movement ineffective as regards materials of considerable importance . I do not believe that such a situation could have been envisaged

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by the authors of the Treaty. Nor can I imagine that the Community legislature, which drafted the directive, had the intention or even the power to frustrate to some extent the application of the fundamental provisions of the Treaty on freedom of movement in that way .

27 . I therefore consider that the interpretation of the rules of the Treaty relating to the free movement of goods and the freedom to provide services, as regards the relation between their respective fields of application, must not entail the ineffectiveness, with regard to major areas of trade, of a fundamental provision which has been recognized by the Court as having direct effect (14) or the invalidity of a set of Community rules.

28 . Incidentally, it may also be noted that certain provisions of the directive, for example Article 10, essentially implement the principle of the free movement of goods. This well illustrates that not all the aspects of a public works contract are covered exclusively by the rules relating to the freedom to provide services.

29 . I am therefore satisfied that there are no grounds for accepting Ireland' s argument and that it is now necessary to consider the conduct which the Commission regards as a breach of Ireland' s obligations under Article 30 of the EEC Treaty. In other words, the question is whether Ireland' s conduct in this case meets the classic definition of a measure having equivalent effect given in the judgment in Dassonville. (15)

30 . At the centre of the argument is the inclusion in the contract specification in question of Clause 4.29 in so far as it provides that the pipes are to be certified as complying with Irish Standard Specification 188:1975. The standard in question, IS 188, was adopted in 1975 by the Institute for Industrial Research and Standards (IIRS), a multi-disciplinary technical body created in Ireland by an Act of 1961 in order, in particular, to lay down and publish standards and apply certification schemes. From 1 January 1985 the latter two activities were taken over by another body acting on behalf of the IIRS, the National Standards Authority of Ireland (NSAI). Compliance with a standard is usually certified by a mark called the "Irish Standard Mark" and it is the issue by the NSAI of an "Irish Standard Mark Licence" that authorizes a manufacturer to attach the mark to his products .

31 . According to a document dated 27 October 1986 originating from the NSAI and annexed to Ireland' s defence, the geometrical characteristics of IS 188 distinguish pipes manufactured according to that standard from other pipes which, like those of Uralita, comply with the specifications of the international standard, ISO 160; the physical and mechanical characteristics are not therefore in question . More precisely, IS 188 refers to the "outside" diameter, including the wall of the pipes, whereas ISO 160 refers to the "internal" diameter, not including the wall of the pipes.

32 . It is necessary to add that ISO 160, with which the pipes manufactured by Uralita comply, was adopted by the International Organization for Standardization, which is a world-wide federation of national standards institutes. It was approved, within that organization, by the member committees of nine countries now belonging to the EEC : Denmark, France, the Federal Republic of Germany, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom. As regards the United Kingdom, however, it must be noted that it applies standard BS 486 which the Irish authorities, and in particular the NSAI, regard as equivalent to IS 188.

33 . Conformity with IS 188 was stipulated in the clause in question and if that requirement was not met tenders were inadmissible, as is quite clear from the answer given by Ireland to the first question addressed to it by the Court. Ireland stated that, in accordance with "standard practice", Dundalk Urban District Council' s consulting engineer had rejected Walls' tender based on the use of Uralita pipes at the end of a meeting from which it emerged that "the proposed pipes were not in conformity with Clause 4.29 of the specifications" and those pipes "were not examined at

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that stage ". Ireland explained to the Court that the "standard practice" consisted in "specifying the standards according to which the materials must be made,... those conditions ((being)) set out in specifications before the invitation to tender is made. When the tenders are then examined, the consulting engineer requires proof that the conditions are satisfied ".

34 . The content of IS 188 and the part which it plays through its insertion in public works contracts show quite clearly that the insertion of such a clause is likely to impede imports of pipes into Ireland . If, as the Commission and Spain rightly point out, account is taken of the fact that public works contracts are the main, if not exclusive, outlet for pipes of the type in question in this case, it becomes clear that the requirement of conformity with a national standard laid down in a Member State which, if not complied with, entails the inadmissibility of tenders, is likely to obstruct the importation into that State of pipes manufactured in other Member States . That assessment is reinforced by the fact that the approval procedure in Ireland for pipes manufactured in another Member State is not a mere procedural requirement. A manufacturer of pipes cannot obtain the licence authorizing him to attach the Irish Standard Mark certifying conformity with IS 188 unless he manufactures his products in accordance with the specifications of that standard, as is shown by the NSAI' s refusal to grant Uralita approval in December 1986. Consequently, pipes lawfully manufactured and marketed in a Member State and also complying with an international standard cannot be marketed in Ireland. In order to have access to the Irish market, manufacturers must modify their products.

35 . Consequently, in my view, the insertion in an invitation to tender for a public works contract of a clause requiring pipes to conform with a national standard such as IS 188 indirectly, but undoubtedly, impedes imports of pipes manufactured in other Member States .

36 . Ireland puts forward a number of arguments in order to show that the requirement of compliance with IS 188 specified in the invitation to tender for a public works contract cannot be a barrier to imports of pipes. It states that that requirement does not constitute a "trading rule" within the meaning of the Court' s judgment in Dassonville (supra), and that pipe manufacturers in other Member States had every opportunity to obtain a licence from the NSAI to apply the Irish Standard Mark to their products to show that they complied with IS 188.

37 . It may be countered, first, that according to the Court' s judgment of 20 May 1976 in de Peijper (16) a practice may also be covered by the prohibition laid down in Article 30. But in reality Ireland' s argument is that clauses in invitations to tender for public works contracts cannot, by definition, be regarded as relating to imports, and that a manufacturer' s right to import its products into a Member State cannot be affected by the content of such clauses . However, it is clear that there is practically no opening for the sale of products such as pipes other than for use in works, and essentially public works. Accordingly, the requirement of compliance with IS 188, which deters contractors from providing in their tenders for the use of materials not complying with that standard, impedes the importation of such materials, indirectly admittedly, yet virtually absolutely .

38 . With regard to the possibility for manufacturers from other Member States to comply with IS 188, as I have already pointed out, that in fact amounts to an obligation to modify their products and hence to forgo selling in Ireland pipes lawfully produced and marketed in their country of origin. Consequently, that possibility is the proof rather than the negation of the existence of the barrier to imports, and the situation seems, when analysed in this way, to be completely comparable to the situations which, according to the Court' s "Cassis de Dijon" case-law, are covered by Article 30.

39 . The subsidiary argument that compliance with IS 188 is required irrespective of the geographical origin of the materials can be dismissed in the light of that same case-law, according to which

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measures applicable without distinction to national and imported products may be prohibited under Article 30. Consequently, as Sir Gordon Slynn stated in his Opinion in the Cinéthèque case (cited above), a measure is in breach of Article 30 if,

> "although not directed to importation as such but covering both national goods and imports, it requires a producer or distributor to take steps additional to those which he would normally and lawfully take in the marketing of his goods, which thereby render importation more difficult, so that imports may be restricted and national producers be given protection in practice ".

40 . The words used there seem to fit the facts in this case precisely .

41 . Lastly in this first limb of its defence, Ireland claims that public works contracts are characterized by a sort of indivisibility which precludes the assessment of the compatibility of a particular clause with Article 30 in so far as this could affect the internal consistency of all the clauses of the contract in question. In fact, that reasoning overlaps with the argument that Article 30 does not apply to an aspect of the provision of services, which I have already considered, and it does not seem necessary to return to that point.

42 . At this juncture it is necessary to consider whether the requirement to comply with standard IS 188 is justified by "mandatory requirements" within the meaning of the "Cassis de Dijon" case-law.

43 . Ireland argues essentially that "the interest or value" which the standard serves to protect is "a high standard and uniformity of design in such piping and a capacity to cope efficiently with Irish conditions and pre-existing services ". (17)

44 . Does that constitute grounds for considering that the measure in question is justified because it serves a purpose which is in the general interest?

45 . Due regard being had to the technical problems of compatibility between the water supply systems to be built and existing systems or between the piping used and accessories (fittings for example) it seems to me that such problems - assuming that they satisfy the test of the general interest laid down in the Court' s case-law - do not warrant a measure which is as restrictive of imports as the requirement that the pipe must comply with IS 188.

46 . Indeed, and this observation seems to me to hold good for most of the technical objections raised in this case, the actual award procedure itself, with its detailed perusal of tenders, is sufficient to enable any technical shortcomings of particular aspects of a tender and their economic ramifications to be assessed, and to identify incompatibilities in materials. I would observe that in this case the Dundalk Urban District Council made use of a procedure which enabled the advantages and shortcomings of the tenders to be assessed from various points of view. The notice of invitation to tender published in the Official Journal of the European Communities stated that the contract would be awarded to the contractor who submitted the tender "adjudged to be the most economically advantageous... in respect of price, period of completion, technical merit and running costs ". This clearly shows that use of an award procedure which enables tenders to be assessed from various points of view is enough to protect the interests invoked by Ireland.

47 . Accordingly, the requirement for the pipe to comply with IS 188 goes far beyond what is necessary in order to protect interests which could be safeguarded without taking a measure impeding imports, in the normal course of an award procedure of the type to which I have just adverted, and which was indeed applicable in the case at issue.

48 . In the alternative, Ireland raises reasons which, in its view, justify, under Article 36 of the EEC Treaty, the restriction on imports resulting from the measure in question. More specifically, Ireland claims in the first place that it was imperative for the protection of the health of the people of Dundalk and the surrounding area that there be no delay in improving their water supply.

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49 . In order to assess that argument it must be observed that according to the case-law of the Court,

> "National rules or practices do not fall within the exception specified in Article 36 if the health and life of humans can as effectively be protected by measures which do not restrict intra-Community trade so much ". (18)

50 . Here again, it is clear that in the course of the award procedure Dundalk Urban District Council could perfectly well have taken account, in choosing the "most economically advantageous tender", of requirements of protection of public health connected with the period of completion of the work and not taken up tenders which, for one reason or another, would not have allowed work to be completed in good time. Consequently, the desire to avoid delay in the completion of the work did not warrant a measure as restrictive on imports as the requirement of compliance with IS 188, and the derogation set out in Article 36 may not therefore be validly invoked with regard thereto.

51 . Ireland also contends that the requirements of standard IS 188 relative to bitumen coating are based upon the need to ensure the health and safety of persons using drinking water flowing through the pipes in question, since the bitumen coating ensures that there is no contact between the water and the asbestos fibres of the concrete piping .

52 . The Commission stated that only white asbestos fibres were used in the manufacture of the pipes and that, in contrast to blue asbestos, white asbestos does not pose any health risk. It added that the bitumen coating was separately specified in the contract specification and Uralita quoted for pipes on that basis.

53 . In that connection, I would observe that in the standard in question the specification of bitumen coating is optional. According to Specification 2.3 of IS 188 (Annex II to the Commission' s application) pipes are to be coated with a solution of bitumen "if required by the purchaser at the time of ordering ". It also provides that "alternative coatings as agreed between the purchaser and the manufacturer may be used ". Clause 4.29 of the contract specification itself is made up of three parts. It stipulates first that asbestos cement pipes must comply with IS 188, secondly that all the pipes are to have a "bituminous coating internally and externally", and thirdly that such coatings are to be applied at the factory by dipping.

54 . Without entering into a discussion of the comparative merits of white and blue asbestos, I consider that Ireland' s argument cannot be accepted . In the first place, I would point out that the Commission criticized Clause 4.29 only in so far as it required the pipes to comply with IS 188 and not because it specified the need for a bituminous coating. Secondly, the Irish Government' s answer to the first question put by the Court in the written procedure, as seen in the light of the minutes - unofficial but not contested by Ireland - of the meeting held on Tuesday 24 June 1986 (19) at which Dundalk Urban District Council' s consulting engineers rejected Walls' s tender, establishes that the question whether or not the Uralita pipes were coated with bitumen was not at issue in the discussions on compliance with the standard. The tender providing for the use of Uralita pipes was plainly rejected on the basis of the purely formal finding that the manufacturer was not among those authorized to use the Irish Standard Mark and that hence its products did not comply with IS 188, irrespective of the question of the coating. Lastly, I would observe that according to the NSAI the differences between pipes complying with IS 188 and those complying with ISO 160 are purely geometrical . Consequently, I consider that, as conceived and put into effect by Ireland, the requirement of compliance with standard IS 188 as criticized by the Commission is distinct from the nature of the coating of the pipes, and it is therefore unnecessary to take into consideration justifications relating to the importance of that coating for public health.

55 . It follows from the foregoing that the obligation to comply with IS 188 is not based on mandatory

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requirements within the meaning of the Court' s "Cassis de Dijon" case-law and cannot be justified under Article 36. But before it can be held that Ireland has failed to fulfil its obligations under Article 30 two points raised at the hearing have to be resolved.

56 . The first point relates to whether the measure is a "State" measure .

57 . The case-law of the Court affords a number of illustrations of instances where Member States have been held to have failed to fulfil their obligations on account of acts or omissions attributable to local authorities. For example, Italy was held to have failed to fulfil its obligations because the region of Sicily adopted legislation incompatible with a Community regulation (20) and also because the municipality of Milan failed to publish a contract notice in the Official Journal of the European Communities, contrary to Directive 71/305/EEC. (21) Likewise, Belgium was held to have failed to fulfil its obligations because the municipalities of Brussels and Auderghem made Belgian nationality a condition of entry for certain municipal posts contrary to Article 48 of the EEC Treaty, (22) and because several municipalities adopted tax by-laws contrary to the Protocol on the Privileges and Immunities of the European Communities . (23)

58 . However, I have found no trace in the case-law of instances where Member States have been held to have failed to fulfil their obligations under Article 30 on account of the conduct of a local authority . On the other hand, in one case the Court did find that Ireland was in breach of its obligations under Article 30 owing to the activity of a body governed by private law acting on behalf of the Government . (24) Moreover, in a preliminary ruling the Court has held in connection with the definition of the kindred concept of charges having equivalent effect to customs duties that the fact that a duty was levied by an independent institution governed by public law rather than the State did not affect the definition of that duty as such a charge "since the prohibition under Article 13 (2) ((of the EEC Treaty)) attaches solely to the effect of such charges and not to the manner in which they are imposed ". (25)

59 . Despite the lack of a precedent in the case-law I can see no reason in principle why a Member State should not be answerable, in proceedings for failure to fulfil obligations under Article 30, for measures implemented by one of its local authorities. The classic principle set out in the Court' s judgment of 5 May 1970 in Commission v Belgium (26) according to which "the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations" should, it seems, be interpreted as being of general application.

60 . Moreover, the State' s involvement has not really been challenged in these proceedings. The Commission' s claim that the Irish Minister for the Environment has to approve the award of contracts was confirmed at the hearing by the Irish Government' s representative, who added that, from that point of view, there was State "involvement ". But perhaps the best illustration of the active role played by the State in the situation at issue is provided by the uncontested information given at the hearing by the representative of the Kingdom of Spain to the effect that the Irish Minister for the Environment sent a circular to local authorities on 1 July 1987 setting out instructions on the drafting of invitations to tender for public works contracts. The existence of such a circular - the content of which is doubtless not unrelated to these proceedings - clearly establishes the power of initiative preserved by the State.

61 . The second point to be clarified relates to some of the characteristics which a State practice must exhibit in order to be caught by Article 30. In the judgment of 9 May 1985 in Commission v France the Court emphasized that

> "for an administrative practice to constitute a measure prohibited under Article 30 that practice must show a certain degree of consistency and generality ". (27)

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62 . It may be asked whether the inclusion in a given contract specification of a clause requiring pipes to comply with IS 188 exhibits the characteristics required according to that judgment in order for it to constitute a measure prohibited by Article 30. On the face of it, by referring in its application to Clause 4.29 of the contract specification for the Dundalk Water Supply Augmentation Scheme : Contract No 4, the Commission has asked the Court to rule on a specific measure rather than on a practice showing a sufficient measure of consistency and generality. Consequently, on a very strict interpretation of some of the conditions laid down by the Court' s case-law, there might be a temptation to hold that the application should be dismissed.

63 . However, in my view such a conclusion would amount to a formal, but incorrect, application of those conditions. The Court' s requirement that a practice must show a degree of consistency and generality for it to be caught by Article 30 means that a Member State must not have to answer for an isolated measure. This may, moreover, explain the absence of decisions in which the Court has declared that there has been a failure to fulfil obligations under Article 30 on account of activities of local authorities. It is not usually within the powers of local authorities to adopt rules or practices affecting imports . At the most, local authorities are capable of isolated acts, which, as a general rule, cannot constitute failures to fulfil obligations under Article 30.

64 . In this case, however, the Court is confronted with a very different situation. The requirement of compliance with IS 188 does indeed show the characteristics of consistency and generality in Ireland, as the Irish Government admitted when it stated that this was "in accordance with the usual practice followed in relation to public works contracts in Ireland ". (28) Hence the inclusion of the contested clause was not an isolated act, but constituted a specific manifestation of a general practice and, in addition, brought that practice to the attention of the Community institutions.

65 . It is for that reason that I consider that it is possible to hold that there has been a failure to fulfil obligations in this case, moreover, without really straining the terms of the Court' s case-law

66 . Indeed, after setting out the requirement for "a certain degree of consistency and generality", the Court' s abovementioned judgment of 9 May 1985 goes on to say that that generality must be

> "assessed differently according to whether the market concerned is one on which there are numerous traders or whether it is a market... on which only a few undertakings are active",

in which case

> "a national administration' s treatment of a single undertaking may constitute a measure incompatible with Article 30 ". (29)

67 . It appears to me to be possible to take a lead in this case from that relaxation of the requirements of consistency and generality . As I have already stated, it can be considered that public works contracts of the type at issue afford the main commercial outlet for asbestos cement pipes. It is not an everyday occurrence for sizeable contracts to be put out to tender, and each such contract has major commercial consequences in two respects. Each contract represents in itself a commercial project for manufacturers and, depending on the size of the contract, a barrier to imports erected with respect to a given contract may have significant consequences immediately. But it must be borne in mind that a barrier set up with respect to a particular contract also has implications for later contracts, and hence future commercial projects, in so far as in the light of their first experience public works contractors will tend not to provide for the use of imported material in their tenders.

68 . Accordingly, in view of the magnitude of the potential short - and medium-term effects on imports of a single public works contract, I consider that a barrier to imports in connection with

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such a contract is capable of constituting a failure to fulfil obligations under Article 30. The particulars of the case before the Court seem to me to fit perfectly within this analytical framework and justify the Court' s granting the Commission' s application.

69 . This would establish an infringement in respect of a situation which seems, in very tangible terms, to be completely alien to the principles underlying the EEC. For as there are only two firms which have been granted the Irish Standard Mark Licence in respect of IS 188, namely an Irish firm, for all sizes of pipe, and a German firm, for a particular size of pipe, in most cases the Irish firm is predestined to be the supplier of the pipes before the tenders are even considered.

70 . In its application the Commission asks the Court to declare that Ireland has failed to fulfil its obligations by allowing the inclusion of the contested clause in the Dundalk contract "and consequently refusing to consider (or rejecting without adequate justification)" a tender providing for the use of asbestos cement pipes manufactured to an alternative standard affording equivalent guarantees . It has not been possible to determine as clearly as could be wished from the Commission' s answers to the questions put by the Court both during the written procedure and at the hearing the nature of the claim relating to the refusal to consider the offer or its rejection without adequate justification.

71 . If that limb of the claim is separate from and subsidiary to the claim concerning the inclusion of the contested clause, the Court should rule on it only if it holds that there has been no failure to fulfil obligations with respect to the first limb. In that regard, the failure to fulfil obligations appears to me to be sufficiently clear-cut as to make it unnecessary to consider that alternative limb of the claim, and I further take the view that if the Court were to hold that there has been no failure to fulfil obligations in respect of the first limb, it would have to reach the same conclusion for the same reasons as regards the second, since the same Community rules are alleged to have been infringed in each case.

72 . If the second part of the Commission' s claim is in fact directed at the mere implementation of the measure complained of in the first part, the Court may refer to the solution adopted in its aforementioned judgment of 18 March 1986 in Commission v Belgium, (30) and hold that separate complaints are not involved and that therefore a separate decision is not called for.

73 . I therefore propose that the Court should

(1) Declare that, by including in the contract specification for the Dundalk Water Supply Augmentation Scheme : Contract No 4, Clause 4.29 requiring asbestos cement pressure pipes to be certified as complying with Irish Standard Specification IS 188:1975, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty;

(2) Order Ireland to pay the costs.

(+) Translated from the French.

(1) OJ, English Special Edition 1971 (II), p. 682.

(2) See in particular the judgment of 4 April 1974 in Case 167/73 Commission v France ((1974)) ECR 359, and the judgment of 25 October 1979 in Case 159/78 Commission v Italy ((1979)) ECR 3247.

(3) Case 74/76 Ianelli v Meroni ((1977)) ECR 557, paragraph 9.

(4) Article 3 (5), cited above.

(5) Case 252/86 Bergandi ((1988)) ECR , paragraph 33.

(6) Judgment of 11 July 1985 in Joined Cases 60 and 61/84 Cinéthèque SA and Others v Fédération

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nationale des cinémas français ((1985)) ECR 2605, at p. 2615.

(7) Judgement of 7 May 1985 in Case 18/84 Commission v France ((1985)) ECR 1339, paragraph 12, and Joined Cases 60 and 61/84, cited above, paragraph 10.

(8) Case 74/76 Ianelli v Meroni, cited above, paragraph 2 of the operative part.

(9) Case 18/84 Commission v France, cited above, paragraph 13.

(10) Case 103/84 Commission v Italy ((1986)) ECR 1759, paragraph 19 .

(11) Case 74/76 Ianelli v Meroni, cited above, paragraph 9.

(12) Case 252/86 Bergandi, cited above, paragraph 33.

(13) Case 155/73 Sacchi ((1974)) ECR 409, paragraph 1 of the operative part.

(14) Case 74/76 Ianelli v Meroni, cited above, paragraph 1 of the operative part.

(15) Judgment of 11 July 1974 in Case 8/74 Procureur du Roi v Dassonville ((1974)) ECR 837, at p. 852, paragraph 5.

(16) Case 104/75 ((1976)) ECR 613.

(17) Defence, pp. 22 and 23.

(18) Case 104/75 de Peijper, cited above, paragraph 17.

(19) Annex III to the Commission' s application.

(20) Judgment of 27 March 1984 in Case 169/82 Commission v Italy ((1984)) ECR 1603.

(21) Judgment of 10 March 1987 in Case 199/85 Italy v Commission ((1987)) ECR 1039.

(22) Judgment of 26 May 1982 in Case 149/79 Commission v Belgium ((1982)) ECR 1845.

(23) Judgment of 18 March 1986 in Case 85/85 Commission v Belgium ((1986)) ECR 1149.

(24) Judgment of 24 November 1982 in Case 249/81 Commission v Ireland ((1982)) ECR 4005.

(25) Judgment of 18 June 1975 in Case 94/74 IGAV v ENCC ((1975)) ECR 699 .

(26) Judgment of 5 May 1970 in Case 77/69 ((1970)) ECR 237.

(27) Case 21/84 ((1985)) ECR 1355.

(28) Defence, p. 16.

(29) Case 21/84, cited above, paragraph 13.

(30) Case 85/85, cited above, paragraph 28.

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Opinion of Mr Advocate General Darmon delivered on 4 May 1988.
Gebroeders Beentjes BV v State of the Netherlands.
Reference for a preliminary ruling: Arrondissementsrechtbank 's-Gravenhage - Netherlands.
Procedure for the award of public works contracts.
Case 31/87.

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Mr President,

Members of the Court,

1 . The questions referred to the Court by a judgment of 28 January 1987 of the Arrondissementsrechtbank, The Hague, relate to the interpretation of certain provisions of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. (1)

2 . They arose in proceedings in which Beentjes BV claimed damages from the Netherlands State in respect of the loss arising from the fact that although it had submitted the lowest tender under an invitation to tender for a public works contract issued by the Waterland Local Land Consolidation Committee (hereinafter referred to as "the local committee "), did not obtain the contract, which was awarded to the tenderer with the next lowest price. The local committee justified its rejection of Beentjes' tender on the ground that it was less well qualified. Since Beentjes' claim was based directly on the alleged failure of the local committee to comply with provisions of the directive, the national court took the view that it was necessary to obtain clarification from the Court of certain conditions for its application.

3 . The first question concerns the scope of the directive. It seeks to establish whether the directive governs the award of public works contracts by a body such as a local land consolidation committee in the Netherlands.

4 . According to the preamble to the directive, the coordination of national procedures for the award of public works contracts is, together with the abolition of restrictions, one of the means necessary for "the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State or regional or local authorities or other legal persons governed by public law ". (2) As regards the substantive rules, Article 1 (b) of the directive defines the "authorities awarding contracts" governed by its provisions as "the State, regional or local authorities and the legal persons governed by public law specified in Annex I ". Annex I refers to the local authorities in all the Member States; in the Netherlands specifically, it mentions various categories of bodies, in particular university bodies.

5 . According to the information provided by the national court, the local land consolidation committee is a body which "has no legal personality of its own" and is responsible for carrying out land consolidation. It is appointed by the Provincial Executive of the province concerned and must comply with rules laid down by a Central Committee set up by Royal Decree, whose members are appointed by the Crown .

6 . In view of the fact that the local committee does not have legal personality, a fact to which the national court expressly drew attention, it is in my view unnecessary to attribute any other significance to the expression "body" used in its first question than that of "organ" or "authority ".

7 . The argument put forward in the main proceedings by the Netherlands Government that the directive does not apply to the award of contracts by bodies such as the local committee is based on a simple

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comparison of the characteristics of this committee with the abovementioned provisions of the Community measure. Since the local committee is not a department of the State administration, an administrative department of a local authority or one of the "legal persons governed by public law specified in Annex I" of the directive, in the Government' s view public works contracts awarded by the body in question are not covered by the directive.

8 . In this regard one should not ignore the paradoxical position of the local land consolidation committee inasmuch as, according to the information expressly provided by the judgment of the national court, Article 35 of the rules drawn up by the Central Committee required the local committee to apply the directive when awarding works contracts. It may therefore be asked whether the applicability of the directive, which is the subject of the first question, can genuinely be in doubt, since the Netherlands public authorities - and here I refer to the express terms of paragraph 5.4 of the national court' s judgment - have decided that it is necessary for the local committee to implement its provisions.

9 . Nevertheless, for reasons of legal precision, the Court must reply in terms of principle to the question referred by the national court . The mere finding that a rule in fact applies can be explained by the use of discretionary power, and is therefore not sufficient to establish the existence of a legal obligation.

10 . In fact, the Court is faced with a phenomenon which is common in the administrative life of developed societies : the "fragmentation of the administration ". With increasing frequency, the laws of States entrust functions which are by definition public to organs which are not attached to the traditional administrative organization, but nevertheless have no legal personality of their own. This fragmentation reflects a desire to associate closely with the functions concerned persons from outside the administration - this being reflected in the composition of the organs - or to reinforce the independence of such organs in the eyes of the public, by means of the fact that the traditional administrative authorities may not give them instructions. Indeed, it may also correspond to a mixture of the two concerns . Thus, for example, we have witnessed for a number of years the appearance in certain States of "independent administrative authorities" endowed with important powers, in particular that of laying down rules. But even leaving aside these recent creations, the everyday organization of the administration has for a long time given rise to organs such as examining boards whose activity is in substance administrative but is carried out separately and independently from the traditional structures of the administration, which, because it has no hierarchical authority, is in functional terms held at arm' s length .

11 . In so far as local land consolidation committees in the Netherlands are in my view an expression of this phenomenon of fragmentation of the administration, the fundamental question put to the Court amounts to whether or not it is possible for organs outside the traditional structures of the administration which have no legal personality of their own but carry out functions which normally fall within the competence of the State or local authorities to evade the effect of Community rules binding on the latter.

12 . In this respect it is important not to confuse functional independence and autonomy. While such organs are not subordinate in hierarchical terms to the "traditional" administration, whether central or local, their activities are carried out in the pursuit of interests which are not distinct from those of the State or a local authority . Their objectives fall within the normal competence of the State or a local authority. When an examining board issues diplomas it does so in the name of the State or, depending on the relevant legislation, a local authority, and not in the name of undefinable separate interests. The fact that the interests of the general public are taken into account, either in the composition of the organs or by their functional independence, is not sufficient to transform their purpose, which, since they have no legal personality of their own,

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is merely to represent, in an innovative way, the State or a local authority . It follows that in the absence of specific provisions the Community rules applicable to the State or to local authorities must automatically govern the activities of organs of the type considered here .

13 . In examining the application of the Community rules in question, however, it is necessary to determine the criteria for deciding whether certain organs are in fact inseparable from the State or local authorities.

14 . In my view, where an organ which has no legal personality of its own and whose members are appointed by the State or a local authority has a function which falls within the ordinary competence of such authorities or the State and is endowed by them with the means enabling it to carry out such functions, the award of works contracts relating to the exercise of those functions is governed by the provisions of the directive.

15 . This approach which I propose, that of not keeping strictly to the letter of expressions such as the "State" or "regional or local authorities" is not new to the Court.

16 . Thus, in an action aganst a Member State for failure to fulfil its obligations, in the judgment of 24 November 1982 in Commission v Ireland, (3) the Court considered that where a government "appoints the members of the Management Committee" of an organ, "grants it public subsidies which cover the greater part of its expenses and, finally, defines the aims and the broad outline of the campaign conducted by that institution to promote the sale and purchase of ((national)) products...", it cannot "rely on the fact that the campaign was conducted by a private company in order to escape any liability it may have under the provisions of the Treaty ". (4)

17 . Moreover, in a reference for a preliminary ruling, in the judgment of 6 October 1981 in Broekmeulen, (5) the Court held that the "Appeals Committee for General Medicine" established by the Royal Netherlands Society for the Promotion of Medicine, an association governed by private law, was to be regarded, "in the absence, in practice, of any right of appeal to the ordinary courts... in a matter involving the application of Community law", as a court or tribunal within the meaning of Article 177 of the Treaty since it operates with the consent and cooperation of the public authorities and its decisions, taken after contentious proceedings, are as a matter of fact recognized as final.

18 . It therefore seems to me to be consistent with the realistic approach adopted by the Court in its decisions to regard the Community provisions governing the award of public works contracts by the State and regional and local authorities as applying to the award of works contracts by an organ whose constitutive documents, while establishing its functional independence, show that it acts on behalf of the State or a regional or local authority.

19 . In this instance, the committee in question is responsible under legislation for carrying out land consolidation at local level. In view of the fact that its activity in this respect must comply with the instructions of a central committee whose members are appointed by the Crown and that under the Netherlands law concerning appeals against administrative decisions it is regarded as an administrative organ of the central authorities, it is clear that the local committee, which has no legal personality of its own, performs an administrative function on behalf of the State. In addition, its members are appointed by the Provincial Executive, a public authority, and the expenses which it incurs are financed by the public authorities .

20 . If the Court accepts this analysis, it must find that the public works contracts awarded by organs such as a local land consolidation committee in the Netherlands are awarded on behalf of the State and, accordingly, are governed by the provisions of the directive .

21 . The second question relates to the substance of the directive and seeks to establish whether, under its provisions, it is possible to exclude a tenderer on the basis of various qualitative criteria

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not expressly specified in the contract notice.

22 . Article 20 of the directive lays down, as a matter of principle, a distinction between criteria for checking the suitability of contractors and criteria for awarding the contract :

> "Contracts shall be awarded on the basis of the criteria laid down in Chapter 2... after the suitability of contractors... has been checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28."

23 . The directive deals with the assessment of whether contractors are qualified under two heads : financial and economic standing on the one hand (Article 25), and technical knowledge and ability on the other (Article 26).

24 . With regard to economic and financial standing, which has not been disputed in the main proceedings but is mentioned in the national provisions cited by the Netherlands State and referred to in the wording of the question, it may be seen that, pursuant to Article 25 of the directive, proof may be furnished "as a general rule" by one or more of three "references" described in the three indents (a) to (c) of that article; the awarding authorities must specify in the contract notice which reference or references they have chosen and "what references other than those mentioned under (a), (b) and (c) are to be produced ".

25 . Article 26 provides that proof of technical knowledge or ability "may be furnished by" references described under the five indents (a) to (e) of that article and that the awarding authorities must specify in the notice which of these references are to be produced .

26 . This brief summary of the provisions of the directive concerning the assessment of the suitability of contractors calls for three comments.

27 . In the first place, contrary to the affirmations of the Netherlands State referred to at paragraph 6.2 in the national court' s judgment, it appears that the purpose of Articles 25 and 26 of the directive is not solely to standardize the documents which may be required in applying criteria of qualitative selection. They also fix these criteria, as is shown by Article 20. In so far as Articles 25 and 26 set out the various references which may be demanded by the awarding authorities, it must be concluded that the qualitative criteria to which these references relate constitute the criteria referred to in Article 20.

28 . Clearly these criteria are to some extent incomplete, because, as Mr Advocate General Mischo noted in his Opinion delivered on 11 June 1987 in cases concerning questions referred to the Court for a preliminary ruling by the Belgian Conseil d' Etat, (6) the references set out in Article 25 and 26 designate qualitative aspects - for instance work carried out previously, tools, plant and technical equipment, average manpower - without laying down any requirement as to the standard. It follows that with regard to such requirements the awarding authorities are left a certain leeway. However, those requirements must apply to the qualitative criteria concerned by the references set out in Articles 25 and 26, under the conditions which I now propose to specify.

29 . My second comment is drawn from a comparison of the wording of Article 25 and Article 26 and is that the criteria derived from the technical references described under indents (a) to (e) of Article 26 are exhaustive in character since the awarding authorities are not empowered to seek "other references", as they may do under Article 25 with regard to financial and economic standing. They are therefore not entitled to apply criteria concerning additional qualitative aspects not referred to in the indents in question. In the Transporoute judgment of 10 February 1982 (7) the Court has already emphasized the exhaustive nature of the references other than those concerning economic and financial standing.

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30 . My third comment concerns the legal effects of statements in the contract notice. Articles 25 and 26 provide that the awarding authorities must specify, in the notice, "the references... ((which)) are to be produced ". In view of the importance of the references described in these articles, which in the light of Article 20 must be interpreted as both listing the qualitative factors for assessment and describing the documents to be used for that assessment, it seems to me that by requiring the awarding authorities to specify in the notice the references which are to be produced the directive imposes upon them inter alia a duty to inform contractors of the qualitative aspects, in other words the criteria, on the basis of which their suitability will be checked. Accordingly, in my view, the provisions in question prohibit an awarding authority from excluding a contractor on the basis of qualitative aspects in respect of which references were not required in the contract notice. To decide otherwise would, I believe, create a risk of destabilizing the structure erected by the directive and of deliberately disregarding the obligations which it lays down concerning the exchange of information between awarding authorities and contractors.

31 . In accordance with the model contract notice set out in Annex I to Council Directive 72/277/EEC concerning the details of publication of notices of public works contracts and concessions in the Official Journal of the European Communities, (8) the notice must state, under heading 11, "the minimum economic and technical conditions required of the contractors ". Without wishing to underestimate the value, in particular in budgetary terms, of standardizing the publication of contract notices in the Official Journal of the European Communities, I think it would be excessive to consider that the references concerning economic and financial standing and technical knowledge and ability required by awarding authorities must appear exclusively, if the notice is to be valid, under heading 11 and that a reference concerning the qualitative aspects provided for in Articles 25 and 26 but appearing under another heading in the notice would be void. This approach cannot in my view be reconciled with the intention behind the adoption of Directive 72/277/EEC or with the concerns addressed by the Community legislature in the basic measure, Directive 71/305/EEC.

32 . In the case which is the subject of the national proceedings, the contract notice, section 11 of which was blank, stated in fine that

> "the work-force must be made up of at least 70% long-term unemployed persons employed through the regional employment office ".

This gives rise to the observation that, although qualitative aspects may properly be mentioned in the contract notice without being formally included under section 11, they must nevertheless fall within the compass of Articles 25 and 26, as, moreover, is required under Article 16 (l) of Directive 71/305/EEC. A statement such as that referred to above cannot by definition be a reference capable of proving economic and financial standing in accordance with Article 25, and does not appear to have any relation to one of the indents of Article 26, which, as I have stressed, are exhaustive. This situation may seem paradoxical in so far as the absence in the invitation to tender of any valid statement of criteria regarding economic and financial standing means that there is no condition whatsoever as to the suitability of contractors and thus that in principle any undertaking is suitable. However, it must be stressed that it is the awarding authority which, by wrongly applying the directive, has placed itself in this situation. The paradox is therefore the result not of the directive but of a failure to comply with it.

33 . For the sake of completeness in the discussion of the second question, I think it is also necessary to clarify, having regard to the situation which gave rise to this reference for a preliminary ruling, the conditions of application of the provisions of the directive concerning the criteria for awarding the contract.

34 . Under Article 20 contracts must be awarded on the basis of the criteria laid down in Chapter 2. In that chapter, Article 29 (1) provides that :

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"the criteria on which the authorities awarding contracts shall base the award of contracts shall be :

either the lowest price only;

or, when the award is made to the most economically advantageous tender, various criteria according to the contract : e.g. price, period for completion, running costs, profitability, technical merit ".

Article 29 (2) states that in the event of an award on the basis of the most economically advantageous offer,

"the awarding authorities shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance ".

35 . It may be noted that although Article 29 contains no exhaustive list of the criteria for awarding the contract when the lowest price is not the sole criterion, it does draw attention to a common factor to be shared by such criteria : they must, like those expressly cited, concern the nature of the work to be carried out or the manner in which it is to be done, to the exclusion of any considerations relating to the contractor. In simpler terms, it may be said that the criteria for the award "to the most economically advantageous tender" concern the "product" and not the "producer", the quality of the "work" and not that of the contractor.

36 . The directive thus draws a clear distinction between the criteria for checking the suitability of a contractor, which concern the qualities of the contractor as such, and those for awarding the contract, which relate to the qualities of the service which he offers, of the work which he proposes to carry out.

37 . In those circumstances, compliance with the provisions of the directive requires that the criteria should not be confused and that criteria relating to the contractor' s suitability should not be taken into account in connection with the award of the contract. In this respect I agree with the Italian Republic' s analysis. I do not however feel able to endorse its suggestion of a rigid chronological division between the two stages, that of the checking of the contractor' s suitability and that of the award of the contract. A criterion of suitability cannot be used as a criterion for making the award, but I do not think that the directive places a time-limit on the assessment of suitability. An awarding authority belatedly informed of a reason for a contractor' s unsuitability must be able to rely on it up to the last moment, so long as there is no misuse of powers and it is not a disguised refusal to allow the criteria for awarding the contract to operate in the normal way.

38 . The contract notice did not include any statement under section 13, which pursuant to Directive 72/277/EEC is reserved for "criteria for the award of the contract ". The sole "criterion" appearing in the notice was that referred to above, concerning the employment of a certain quota of unemployed persons to carry out the work. This criterion, which has no relation to the intrinsic qualities of the work to be carried out, of the service to be provided, of the "product", could not be regarded as one of the criteria for the award of the contract within the meaning of the directive, and consequently constitute a ground for excluding a tenderer. In such a situation, in which no criterion for awarding the contract has been validly specified in the contract notice or the contract documents, it appears that under the actual terms of Article 29 only the criterion of the lowest price may be applied.

39 . Accordingly, in my view the Court should reply to the second question by stating that under the directive it is permissible to exclude a contractor only on the basis of one or more of the suitability criteria concerning the factors set out in Articles 25 and 26 and specified in the

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contract notice, or on the basis of one or more of the criteria for the award of contracts laid down in Article 29 and specified in the contract notice or the contract documents, in which case the criterion of the lowest price is not applied.

40 . The third question may be considered more briefly. As the Commission pointed out, the direct effect of the provisions concerned appears already to have been confirmed, at least by implication, in the Court' s judgment in the abovementioned Transporoute case.

41 . In the present case, the national court asks whether the provisions of the directive, whose substance I have just discussed, may be relied upon by an individual

> "if in the incorporation of those provisions... in national legislation the contracting authority is given wider powers to refuse to award a contract than are permitted under the directive ".

In the Transporoute judgment, with regard to national provisions which, in the words of Mr Advocate General Reischl, did not reproduce exactly the terms of Article 29 of the directive, the Court held that the provisions of the article should be applied by the awarding authority, which clearly implies that the provisions in question are directly applicable. The Court held that

> "the aim of the provision, which is to protect tenderers against arbitrariness on the part of the authority awarding contracts, could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations ".

42 . In this case we are asked to consider several provisions of the directive, including Article 29, whose purpose, which is identical, may be frustrated by a national implementing provision leaving a general discretion to the awarding authority. In my view the same reply must be given as in the 1982 judgment. It is clear that the legal structure defined in Articles 20, 25, 26 and 29 of the directive is intended, through the fixing of criteria of suitability and criteria for the award of the contract, to protect the tenderer from arbitrariness on the part of the awarding authority. It is equally clear that this structure would be undermined by a provision such as Article 21 (2) of the Uniform Rules, the national measure implementing the directive, whose effect is to release the awarding authority from the duty to comply with the criteria laid down in the directive . Accordingly it is my view that the tenderer must be given the protection intended by the directive, whose relevant provisions must override the national implementing provision.

43 . Consequently, I propose that the reply to the questions submitted by the Arrondissementsrechtbank, The Hague, should be as follows :

> "(1) The provisions of Council Directive 71/305/EEC apply to works contracts awarded by a body which has no legal personality of its own where its composition, its function and the means it has for carrying out that function show that it acts on behalf of the State or a regional or local authority.
>
> (2)Under these provisions a contractor may be excluded only on the basis of one or more of the criteria of suitability concerning the aspects set out in Articles 25 or 26 and specified in the contract notice, or on the basis of one or more of the criteria for the award of contracts contained in Article 29 and specified in the contract notice or the contract documents, where the lowest price is not taken as the exclusive criterion for awarding the contract.
>
> (3) A public awarding authority is bound to comply with those provisions, and may not rely on a national implementing provision which confers on it a general discretion concerning assessment of the contractor and his tender."

(+) Translated from the French.

(1) OJ, English Special Edition 1971 (II), p. 682.

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(2) First recital in the preamble.

(3) Case 249/81 ((1982)) ECR 4005.

(4) Case 249/81, cited above, at paragraph 15.

(5) Case 246/80 ((1981)) ECR 2311.

(6) Judgment of 9 July 1987 in Joined Cases 27 to 29/86 ((1987)) ECR 3347 .

(7) Case 76/81 ((1982)) ECR 417.

(8) OJ, English Special Edition 1972 (III), p. 823.

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AUTLANG	French
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PROCEDU	Reference for a preliminary ruling
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Opinion of Mr Advocate General Mischo delivered on 11 June 1987.
SA Constructions et entreprises industrielles (CEI) and others v Société coopérative "Association intercommunale pour les autoroutes des Ardennes" and others.
References for a preliminary ruling: Conseil d'Etat - Belgium.
Procedure for the award of public works contracts - Determination of the constructor's financial and economic standing.
Joined cases 27/86, 28/86 and 29/86.

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Mr President,

Members of the Court,

In Joined Cases 27, 28 and 29/86, the Conseil d' Etat of the Kingdom of Belgium has submitted to the Court three questions on the interpretation of Council Directive 71/305/EEC of 26 July 1971 (1 concerning the coordination of procedures for the award of public works contracts.

That directive was adopted on the same day as Council Directive 71/304/EEC (2) concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches . Directive 71/304 requires Member States to abolish in particular restrictions which prevent persons covered by the Community provision (" beneficiaries ") from providing services under the same conditions and with the same rights as nationals, those existing by reason of administrative practices which result in treatment being applied to beneficiaries which is discriminatory by comparison with that applied to nationals, and those existing by reason of practices which, although applicable irrespective of nationality, none the less hinder exclusively or principally the professional or trade activities of nationals of other Member States (see Article 3 of Directive 71/304). I cite those provisions because they circumscribe the underlying objectives of the Council' s legislation in this field.

Directive 71/305/EEC, to which these proceedings relate, provides both for the abolition of restrictions and the coordination of national procedures for the award of public works contracts.

According to the second recital in the preamble to the directive, that coordination must take into account as far as possible the procedures and administrative practices in force in each Member State

Accordingly, Article 2 provides that : "In awarding public works contracts, the authorities awarding contracts shall apply their national procedures adapted to the provisions of this directive ".

It should therefore be borne in mind from the outset that any matters not dealt with by Directive 71/305 fall to be determined under the national law of each Member State (provided, of course, that there is no discrimination between Community nationals).

The questions submitted by the Conseil d' Etat relate to Title IV of the directive, entitled "Common rules on participation", and in particular Chapter I thereof relating to criteria for qualitative selection . The text of Articles 25, 26 and 28, to which those questions relate, is set out in the Report for the Hearing.

Article 25 enumerates the documents which may be submitted in order to establish a contractor' s financial and economic standing. Those documents are termed "references ".

Article 26 sets out the documents which may be used to establish a contractor' s technical knowledge or ability, while Article 28 stipulates the effect which must be given to the official lists of recognized contractors which exist in certain Member States.

In the Commission proposal (3) those provisions were followed by an article with the following

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wording :

"The authorities awarding contracts shall determine the standard of the references to be submitted by contractors pursuant to the last subparagraph of Article 20 and Articles 22 to 25 on the basis of the nature, scale and value of the works to be carried out and having regard to the financing and payment rules laid down under Articles 14 and 16" (Article 26 of the proposal; emphasis added).

At that time evidence of financial and technical standing was to be governed by Article 23 and evidence of technical knowledge and ability by Article 24, both of which therefore came under the terms of the provision just cited.

That provision, however, was not incorporated in the final text of the directive adopted by the Council.

On the other hand the concept of the "standard of references" is now to be found in another form in Article 16, which reads as follows :

"In open procedures, the notice shall include at least the following information :

...

(l) the minimum economic and technical standards which the authorities awarding contracts require of contractors for their selection; these requirements may not be other than those specified in Articles 25 and 26;

...".

The corresponding wording in the Commission proposal for the directive (Article 14) was as follows :

"In open procedures, the notice shall include at least the following information :

(i) the documentation which must be enclosed with the tender in order to establish the contractor' s technical qualifications and economic standing as provided for in Articles 20 to 26."

It therefore seems to me that the Council probably took the view that the Commission proposal left a lacuna in not requiring the notice of call for tender to specify the minimum standards or the standard of the references required of contractors in order to be able to submit tenders for a specific contract. Accordingly, the Council supplemented the article relating to notices of tender with a provision requiring publication of minimum standards and omitted the proposed Article 26 as unnecessary. Unfortunately, in drawing up the new Article 16 (l), which provides that those requirements may not be other than those specified in Articles 25 and 26, the Council forgot that the remainder of the provisions no longer refers to the standard but merely to the types of references. Logically the Council should therefore have used a form of wording such as "fulfilment of those requirements may not be established otherwise than as provided for in Articles 25 and 26 ".

Even if my speculation as to what happened at the time of the drawing up of the directive is not altogether accurate, the fact remains in any event that Article 16 (l) does require publication of the "minimum economic and technical standards which the authorities awarding contracts require of contractors ". Yet the simple presentation of a bank statement or balance sheet or a statement of turnover can never be regarded as meeting a minimum standard; otherwise, to take an extreme case, it would suffice for a contractor to prove that he had 1*000 ECU in the bank in order to establish that he was suitable for the execution of works of whatever magnitude.

It may therefore be inferred that Articles 25 and 26 enumerate only methods of proof and that it is for the authority awarding contracts to determine in each call for tender what needs to be established,

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namely the standard of references required. That interpretation is in keeping with the general scheme of the directive, which is solely intended to coordinate the procedures for the award of public works contracts and even for that purpose seeks as far as possible to take account of national procedures. It follows a*fortiori that the standard of economic and technical qualification required of contractors must be laid down by the national authorities.

The answers to the questions submitted by the Conseil d' Etat follow in large measure from that conclusion.

I - Question 1 in Case 27/86

Question 1 is worded as follows :

> "Are the references enabling a contractor' s financial and economic standing to be determined exhaustively enumerated in Article 25 of Directive 71/305/EEC?"

It is no longer in serious dispute between the parties to the main action that that question must be answered in the negative, and that is my view as well.

The first paragraph of Article 25 provides that "proof of the contractor' s financial and economic standing may, as a general rule, be furnished by... the following references ".

The second paragraph provides that the authorities awarding contracts must specify "what references other than those mentioned under (a), (b)

or (c) are to be produced ".

Finally, the third paragraph of Article 25 provides that "if, for any valid reason, the contractor is unable to supply the references requested by the authorities awarding contracts, he may prove his economic and financial standing by any other document which the authorities awarding contracts consider appropriate ".

The clear and unambiguous meaning of those provisions was confirmed by the Court in its judgment in Transporoute (4) at paragraph 9 of the decision :

> "Thus Article 27 states that the authority awarding contracts may invite the contractor to supplement the certificates and documents submitted only within the limits of Articles 23 to 26 (5 of the directive, according to which Member States may request references other than those expressly mentioned in the directive only for the purpose of assessing the financial and economic standing of the contractors as provided for in Article 25 of the directive."

I therefore propose that the Court answer Question 1 as follows :

The references enabling a contractor' s financial and economic standing to be determined are not exhaustively enumerated in Article 25 of Directive 71/305/EEC.

Nevertheless, authorities awarding contracts which wish to have submitted to them references other than those mentioned in Article 25 (a), (b) and (c) must specify them in the notice or the invitation to tender .

II - Question 2 in Case 27/86

In Question 2 the Conseil d' Etat asks :

> "can the value of the works which may be carried out at one time be regarded as a reference enabling a contractor' s financial and economic standing to be determined within the meaning of Article 25 of the directive?"

I should point out immediately that "the value of the works which may be carried out at one time"

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cannot in any event constitute a reference within the meaning of Article 25. It is quite clearly a criterion of evaluation, and the question which needs to be examined is whether it can legitimately be applied having regard to the provisions of the directive.

On the other hand, the list and the value of the works which a contractor will have in hand at a particular time do constitute references . For that reason in Case 27/86 the awarding authority was in fact asking for a reference when it requested the contractors who submitted tenders to "forward the list and corresponding values of both public and private works which you have or will have to carry out at the same time having regard to the state of progress of the contracts in the course of completion in the event of the contract (for works on the Chênée-Grosses Battes link) being awarded to you ". (6) The information requested related to facts which a contractor had to submit in the form of a written document.

It remains to be considered whether such a reference may be regarded as being of the type provided for by Article 25, namely references enabling a contractor' s economic and financial standing to be evidenced or proved.

Under the terms of Article 20 of the directive, an awarding authority must check "the suitability of contractors... in accordance with the

criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28 ".

We have seen that (like Article 26) Article 25 does not actually lay down criteria but rather enumerates the appropriate methods of proof . Article 16 (l), however, requires the publication of the "minimum economic and technical standards which the authorities awarding contracts require of contractors for their selection ".

It is clear from that provision that of all those contractors not excluded automatically under Article 23 (bankruptcy, etc.) only those who meet the prescribed minimum standards are eligible to have contracts awarded to them.

Those minimum standards obviously relate primarily to the size of the undertaking as defined by its turnover in the three previous financial years, its balance sheet, and the sums held in its bank accounts or the credit which banks are willing to extend to it.

Nevertheless, the significance of the fact that an undertaking has had a high turnover in the past or that its financial reserves are at a particular level is not the same when it has undertaken five large-scale projects at one time as when it has undertaken fifty.

Whatever the nature of the undertaking, a contractor' s financial standing cannot be determined in the abstract; it must be examined in the light of its debts and short-term liabilities (wage-bills, supplies, equipment purchased on credit, etc).

The total value of the works to be carried out by a contractor at a given time is a factor which must logically enter into the evaluation of his suitability to take on an additional project of some size.

It is therefore consonant with the spirit of Articles 20 and 25 for an awarding authority to wish to be informed of that total value and it is legitimate for such an authority to take the view that an undertaking of a given size in economic and financial terms cannot safely undertake works above a certain total value.

The plaintiff in the main action argues, however, that the criterion of the total value of the public and private works which may be carried out at one time serves a number of additional objects which have nothing to do with a contractor' s intrinsic merits. As the Conseil d' Etat itself

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has stated, its aim "is to avoid any monopoly and to permit a rational allocation of work and to avoid any unbridled competition or speculation on the part of contractors resulting in their incurring commitments beyond their means ". (7)

In order for that criterion to comply with Article 25, however, it is enough in my view if the aim of preventing contractors from undertaking commitments beyond their means was one of the objectives which prompted the Belgian legislature to adopt it. That aim is in fact a legitimate and plausible one and, if applied without discrimination, does not constitute an obstacle to the freedom of undertakings in other Member States to provide services.

Moreover, it must be acknowledged that the other objectives pursued by reference to that criterion are not contrary to the provisions of the EEC Treaty and that they fall within spheres of competence which Directive 71/305 was not intended to affect.

CEI further argues that the total value of the works which may be carried out at one time constitutes a "criterion external to the contractor" and bears no relation to the contractor' s intrinsic economic and financial strength. In fact the criterion constitutes a disqualification rule comparable to those laid down in Article 23.

However, it is clear from what I have already said that the situation in this regard is no different from that regarding the other references provided for by Article 25. Accordingly that argument cannot be accepted.

Banking statements, balance sheets, statements of turnover, and the total value of works in progress are references which give an indication of a contractor' s intrinsic circumstances. On the other hand the thresholds laid down by the awarding authority, namely a minimum amount of own funds or assets, minimum balance-sheet figures, minimum turnover and the maximum value of the works which may be carried out at one time, constitute criteria external to the contractors which are determined in the light of the nature and scale of the works to be awarded. We have seen that the adoption of such criteria is not only legitimate but indispensable.

They must enable the competent authorities to reject tenders which may be low, but are from contractors who lack the economic and financial standing necessary for the proper performance of the works in question or who have taken on so many large-scale works that their ability to complete them satisfactorily is questionable despite their considerable resources.

I therefore propose that Question 2 be answered as follows :

The total value of the works which a contractor would be carrying out at one time if the works put out to tender were awarded to him constitutes a reference which, taken together with the other references required, enables his financial and economic standing to be determined . An authority awarding contracts is entitled to take the view that if that total value exceeds a particular level which it has determined on the basis of objective criteria, the contractor' s financial and economic standing is insufficient.

Clearly, by virtue of Article 25, the awarding authority must specify in the notice that that reference is to be produced.

It will be for the Belgian Conseil d' Etat to establish whether that requirement was fulfilled in this instance.

It seems to me that it may have been. The notice of call for tender specified the class in which contractors had to be recognized in order to be eligible to tender. In Belgium that class automatically determines the maximum value of the works which may be carried out at one time . A notice requiring contractors to be recognized in a particular class may therefore be taken to imply that a reference relating to the total value of works in progress must be produced and that the criterion of the

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maximum value corresponding to that class will be applied.

The plaintiff in the main action further argues that three of the four requirements which must be satisfied in order for the competent Belgian authorities to ask the Recognition Committee for an exemption from the maximum total value of works themselves constitute criteria external to the tenderer or his undertaking (see part B, paragraph 10, of the plaintiffs' observations).

That is certainly true. In my view, however, it is of no concern to the Court in what circumstances a Member State will grant exemptions from its own legislation in regard to the value of the works which may be carried out at one time provided that the relevant rules do not create any discrimination between nationals of different Member States

For the present the Conseil d' Etat has merely asked the Court whether, in principle, a criterion based on the total value of works may be applied. I have proposed that the Court answer that question in the affirmative.

III - The question submitted in Cases 28 and 29/86

In the two actions brought by Bellini, the Belgian Conseil d' Etat has submitted to the Court two identical questions, which are worded as follows :

> "Does Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, and in particular Article 25 and Article 26 (d) thereof, permit a Belgian awarding authority to reject a tender submitted by an Italian contractor on the grounds that the undertaking has not shown that it possesses the minimum amount of own funds required by Belgian legislation and that it does not have in its employ on average the minimum number of workers and managerial staff required by that legislation, when the contractor is recognized in Italy in a class equivalent to that required in Belgium by virtue of the value of the contract to be awarded?"

I have already made it clear that an awarding authority is entitled to lay down minimum standards as regards both the amount of own funds and the manpower of tenderers, including both managerial staff and workers .

This third question asks in substance if those standards may no longer be required where a contractor is recognized in his own country in a class which enables him to carry out works in that country on the same scale as those put out to tender.

In other words, where a contractor may carry out works in Belgium for

a value of BFR*130 million only if his undertaking has own resources of BFR*30 million and a workforce of 100 workers and 4 managerial staff, must he be regarded, by virtue of Article 28 of the directive, as being suitable to carry out such works because the legislation of his own country authorizes him to carry out works up to BFR*142 million even if his undertaking' s own resources and manpower are less than those required in Belgium for that kind of contract?

The question is therefore what is covered by the presumption of suitability referred to in Article 28 (3) of the directive.

As the Court stated at paragraph 13 of its decision in Transporoute, cited above, registration in such a list constitutes an alternative means of proof.

Like the Belgian Régie des bâtiments, the Confédération nationale de la construction, the Belgian State, the Kingdom of Spain and the Commission, I take the view that the effect of the presumption of suitability established by Article 28 of the directive is that a certificate of registration in a list of recognized contractors in a Member State replaces, for the purposes of another Member State, the presentation of a balance sheet and a statement of turnover (Article 25 (b) and (c

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)*) and also a statement of manpower (Article 26 (d)*).

However, the fact that this is a mere presumption of suitability means that it is rebuttable. Only "information which can be deduced from registration in official lists may not be questioned" (second subparagraph of Article 28 (3)*). It is protected by an irrebuttable presumption .

The alternative means of proof constituted by the certificate of recognition does not in my view limit the awarding authority' s discretion with regard to the requirement of detailed references or the determination of the contractor' s financial and economic standing and technical ability for the purposes of Articles 25 and 26 of the directive (for example, the minimum number of workers and managerial staff).

This, I think, is proved by the second sentence of Article 28 (2), which provides that "this certificate shall state the references which enabled them to be registered in the list and the classification given in this list ".

The inclusion of those references in the certificate of recognition cannot have any practical value unless the awarding authority is able to deduce from it objective information on the evidence provided by the certificate of recognition. The corollary of the competent authority' s freedom to determine the level of financial and economic standing and technical ability which it requires is its power not to award a public works contract to tenderers who cannot establish that they are of that minimum standing. The "references which enabled them to be registered" are the basis on which an awarding authority in Member State "A" must decide, without calling them into question, whether the recognition granted in Member State "B" proves that the contractor has the standing and ability required for the contract in question .

It may therefore evaluate the information deducible from a certificate of recognition which is covered by the presumption of suitability and decide at its own discretion that the contractor' s own funds and average manpower do not satisfy the minimum requirements of standing and ability thought necessary for the public works contract in question. In that way it rebuts the presumption. Since the same minimum standing and ability is required of Belgian contractors, there is no discrimination.

For all those reasons I propose that the Court answer the Conseil d' Etat' s third question in the terms suggested by the Commission, namely :

The second subparagraph of Article 28 (3) of Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts prohibits a Member State from questioning the information deducible from a contractor' s registration in an official list of recognized contractors but does not affect its power to ascertain whether the criteria for registration in an official list are equivalent in number and severity to the criteria required for the recognition of contractors established within its own territory. The first subparagraph of Article 28 (3) defines the limits of the presumption of suitability created by registration in such lists and an awarding authority continues to enjoy a discretion outside those limits.

Articles 25, 26 (d) and 28 of the directive do not preclude an awarding authority from requiring a contractor from another Member State to furnish proof that he has at his disposal the minimum amount of own funds and number of workers and managerial staff which its national legislation requires of all tenderers for a public works contract, provided that there is no discrimination even if the contractor established in another Member State is recognized in that State in a class corresponding to the class required by the said national legislation having regard to the value of the works to be awarded .

(*) Translated from the French.

(1) Official Journal, English Special Edition 1971 (II), p.*682.

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(2) Official Journal, English Special Edition 1971 (II), p.678.

(3) Published by the Economic and Social Committee in the preamble to its Opinion 65/187/EEC, Journal Officiel No 63, 13 April 1965, p.*929 (no official English version).

(4) Judgment of 10 February 1982 in Case 76/81 Transporoute v Minister for Public Works ((1982)) ECR 417.

(5) The French text of the judgment wrongly uses the word for "and ". Article 27 reads "23 to 26 ".

(6) Extract from a letter cited by the Conseil d' Etat in its order of 15 January 1986 in the CEI case, at p.*2.

(7) In attributing that purpose to the criterion, the Conseil d' Etat had in mind the commentary in the preparatory report on the Decree-Law of 3 February 1947 published in Pasinomie, 1947, p. 72, and cited by the Fonds des routes at p.*9 of its observations.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1986 ; C ; opinions
PUBREF	European Court reports 1987 Page 03347
DOC	1987/06/11
LODGED	1986/02/03
JURCIT	31971L0304-A03 : P 3359 31971L0304 : P 3359 31971L0305-A02 : P 3359 31971L0305-A16 : P 3360 31971L0305-A16LL : P 3360 3361 3363 31971L0305-A20 : P 3362 3363 31971L0305-A23 : P 3360 3363 3364 31971L0305-A24 : P 3360 31971L0305-A25 : P 3359 - 3367 31971L0305-A25L1 : P 3361 31971L0305-A25L2 : P 3361 31971L0305-A25L3 : P 3361 31971L0305-A25LA : P 3362 31971L0305-A25LB : P 3362 3366 31971L0305-A25LC : P 3362 3366 31971L0305-A26 : P 3359 - 3361 3363 3366

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31971L0305-A26LD : P 3366 3367
31971L0305-A28 : P 3359 3360 3366 3367
31971L0305-A28P2 : P 3366
31971L0305-A28P3 : P 3366
31971L0305-A28P3L1 : P 3367
31971L0305-A28P3L2 : P 3366 3367
31971L0305-C2 : P 3359
31971L0305 : P 3359 3364
61981J0076 : P 3361 3366

SUB	Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	French
MISCINF	Joined cases : 686J0028 686J0029
NATIONA	Belgium
PROCEDU	Reference for a preliminary ruling
ADVGEN	Mischo
JUDGRAP	Rodriguez Iglesias
DATES	of document: 11/06/1987 of application: 03/02/1986

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Opinion of Mr Advocate General Lenz delivered on 26 February 1991.
Commission of the European Communities v Italian Republic.
Failure of a Member State to fulfil its obligations - Measure having equivalent effect - Aid for the purchase of motor vehicles of domestic manufacture.
Case C-263/85.

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Advocate General Carl Otto Lenz delivered his Opinion on 26 February 1991. (*) He concluded as follows:

"The only possible conclusion (which, at the hearing, the defendant, too, accepted as being correct) is that the view taken by the Commission must be upheld. It should accordingly be declared, following the terms of the claim, that by requiring public bodies to buy vehicles of domestic manufacture in order to benefit from the aid provided for by Law No 151 of 10 April 1981, the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty. Since that is the result of the proceedings, the defendant must also be ordered to pay the costs."

(*) Original Language: German.

DOCNUM	61985C0263
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1985 ; C ; opinions
PUBREF	European Court reports 1991 Page I-02457 Pub.RJ Page Pub somm
DOC	1991/02/26
LODGED	1985/08/27
JURCIT	11957E030 : N 1 5 - 16 11957E092-P3 : N 3 11957E092 : N 3 14 31970L0050-A02P3LK : N 10 61974J0008 : N 5 61976J0074 : N 14 31977L0062-A02 : N 13 31977L0062-A26 : N 12 13 61978J0120 : N 9 61979J0788 : N 9 61981J0249 : N 7 61984C0103 : N 14

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61984J0018 : N 15
61984J0018 : N 7
61984J0103 : N 11
61988J0021 : N 7 9 13 15

SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Competition ; State aids

AUTLANG German

APPLICA Commission ; Institutions

DEFENDA Italy ; Member States

NATIONA Italy

PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Lenz

JUDGRAP O'Higgins

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Opinion of Mr Advocate General Lenz delivered on 13 January 1987.
Commission of the European Communities v Italian Republic.
Failure to publish a notice of a public works contract.
Case 199/85.

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Mr President,

Members of the Court,

A - 1 . In the case to be considered today the Italian Republic is charged with having failed to comply with the Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p . 682), which was incorporated into Italian law by Law No 584 of 8 August 1977.

2 . The directive provides that, where public works contracts above a specific value are to be awarded by the State or regional or local authorities, notice thereof must be published in the Official Journal of the European Communities (Article 12). The purpose of that provision is to ensure that all interested undertakings in the Community are able to participate in the procedure. However, under Article 9, public works contracts may be awarded without applying the provisions of the directive, inter alia,

> "(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;
>
> ...
>
> (d) in so far as is strictly necessary when, for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time-limit laid down in other procedures cannot be kept;
>
> ...".

3 . The following facts must be known about the present proceedings

4 . In the Municipality of Milan during the 1970s the Azienda Municipale Nettezza Urbana di Milano, that is to say the Municipal Refuse Disposal Corporation, operated two refuse incinerators built by it . It was decided to build two more plants. It was considered that these plants, together with additional refuse dumps, would be sufficient for the disposal of waste.

5 . After the notorious accident at Seveso in which dioxin played a significant part, the Azienda was (according to the Municipality of Milan) forced to close one of the incinerators and to limit the operation of the other in view of the fact that the existing incinerators emitted dioxin into the air. It also had to abandon the plan to construct two additional incinerators because the Regional Pollution Committee advised against their construction. In addition, local citizens had blockaded the existing refuse dumps. It thus became necessary to construct another plant for the recycling of solid waste . To that end, the board of the Azienda established an advisory technical commission in September 1978 which considered the tenders of a number of undertakings - including non-Italian undertakings - which might carry out the work. Some months later it concluded in favour of awarding the contract to three Italian undertakings. After that preliminary work had been studied by a group of experts appointed in April 1979, the board of the Azienda decided, in July 1979, to award the aforementioned building contract by private contract to a consortium of three Italian undertakings. On 5 November 1979 the Municipal Council of Milan adopted a resolution approving that decision .

6 . After the Commission became aware of those facts and the fact that no contract notice had been

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published in the Official Journal, letters were sent to the Italian Government between 1980 and 1983 in which the Commission expressed misgivings about the application of the aforementioned directive and requested information. Since the views expressed by the Municipality of Milan appeared unsatisfactory, the Commission formally instituted the procedure provided for by Article 169 of the EEC Treaty in August 1983. In a letter dated 1 August 1983 the Commission raised the matter of an infringement of Article 12 of the directive - on the ground of the failure to publish a notice - and stated that reliance on Article 9 (b) and (d) was unjustified. With regard to Article 9 (b), the Commission did not accept that the only suitable candidate was a consortium of three Italian undertakings on account of their special technical skills and existing exclusive rights; it took the view, after examining the documents in the case, that other undertakings in the Community were also capable of carrying out the proposed works. With regard to Article 9 (d), the Commission did not accept the argument that this case was extremely urgent (put forward on the basis that, in view of the adverse opinion of the Regional Pollution Committee, the additional incinerators which had orginally been planned could no longer be constructed after the Seveso accident). In that connection the Commission stated that Article 9 (d) had to be interpreted strictly and according to such an interpretation it laid down three requirements, each of which had to be satisfied. In relation to the events of 1979 they were, however, not satisfied since the need for a new plant was not unforeseen and secondly the works were not limited to what was strictly necessary (namely the replacement of existing plant) but were intended to increase capacity.

7 . The Mayor of Milan gave his views in a letter of November 1983 which was forwarded to the Commission. With regard to Article 9 (b), it was stated that the plant proposed by the three Italian undertakings to whom the contract had been awarded would guarantee the greatest degree of efficiency and that it involved the use of exclusive rights belonging to those undertakings. With regard to Article 9 (d), reference was again made to the need to change the earlier plans as a result of the Seveso accident.

8 . Not convinced by those arguments, the Commission delivered a reasoned opinion under Article 169 of the EEC Treaty in March 1984. In that opinion the Commission, after pointing out that other undertakings in the Community were capable of carrying out the works, objected that the Municipality of Milan had given no details of the alleged exclusive rights of the three Italian undertakings to whom the contract had been awarded (patent number, entries in the register of patents). It also objected with regard to Article 9 (d) that the necessary technical evidence had not been produced and, in addition, pointed out that Article 15 of the directive provides for an accelerated procedure. At the end of the opinion, which is based on an assumed infringement of Community law by the Municipality of Milan, the Italian Republic is again called upon "to adopt the measures necessary to comply with this reasoned opinion within 30 days" (" ad adottare le misure necessarie per conformarsi al presente parere motivato ")) and, since the Commission presumed that the allegedly urgent works had virtually been completed and that the contracts which had been awarded could no longer be suspended or rescinded, it added "by necessary measures is meant above all a written undertaking by the Municipality of Milan that it will comply with all the provisions of Directive 71/305/EEC in future" (" per misure necessarie, deve essere inteso soprattutto un impegno scritto del Comune di Milano di rispettare in futuro tutte le disposizioni della direttiva 71/305/EEC ")).

9 . Thereupon the Italian Minister for the Interior instructed the Prefect of Milan to enjoin the Municipality of Milan to comply with the directive in future and to provide a written undertaking to that effect . In April 1984 the Mayor of Milan complied with that request by issuing a declaration in which he declared - after an examination of the Commission' s reasoned opinion and in the conviction that the municipal administration had acted lawfully - that "the Municipality of Milan will ensure that, in the future, too, its administrative action is in conformity with the provisions of primary and secondary legislation, including all the provisions of Directive 71/305/EEC, by according

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them full respect, in both form and substance" ((" il Comune di Milano uniformerà anche per il futuro la sua azione amministrativa alle norme di legge e di regolamento, ivi comprese le disposizioni tutte della direttiva 71/305/EEC, assicurandone il pieno rispetto, sia nella forma, che nella sostanza ")).

10 . As the Court is aware, the Italian Government considers that the Municipality of Milan has thereby complied with the Commission' s reasoned opinion in good time and that there are no grounds for instituting proceedings before the Court for a declaration that it has failed to fulfil its obligations.

11 . Nevertheless, in June 1985 the Commission instituted proceedings before the Court seeking a declaration that the Italian Republic, and in particular the Municipality of Milan, as a regional or local authority, by deciding to award by private contract a contract for the construction of a plant for the recycling of solid urban waste and failing to publish notice thereof in the Official Journal of the European Communities, had failed to fulfil its obligations under Directive 71/305.

12 . The Commission takes the view that the declaration by the Mayor of Milan is ambiguous and that it does not provide any guarantee for the future of proper compliance with the reasoned opinion. In addition, in 1984 the Commission discovered - as a result of an application for finance submitted to the European Investment Bank on which the Commission had to give an opinion - what it considered to be a further infringement of the directive in the award by the same authority of a contract for the same works (namely a plant at Muggiano for the processing of solid urban waste with thermal energy recuperation and the salvage of various substances). By a telex message in December 1984 the Commission drew attention to that fact and stated that since the conduct of which it had complained had continued it could not accept the Mayor of Milan' s declaration. The Commision states that subsequently (after the statement in defence had been lodged) it also discovered that the works which had been decided upon in 1979 had never been commenced - a fact which strengthened its position . During the proceedings before the Court and in answer to a question posed by the Court it was learnt that the project decided upon in 1979 has not in fact been realized (namely because in 1982 new rules for the disposal of waste were introduced which necessitated considerable alterations), that apart from those alterations the plant intended to be built at Muggiano corresponds to the plant decided upon in 1979, that the task of constructing the plant had also been entrusted to the three aforementioned Italian undertakings and that (in August 1986) only the preliminary work had been carried out (whereas according to the Commission' s submissions at the hearing work on the plant had not been begun at all).

B - 13 . In the light of all the written and oral submissions presented to the Court, the issues before the Court call for the following observations.

I - Admissibility

14 . The Italian Government takes the view that the application is inadmissible and restricts its written submissions to that contention . A precondition for instituting proceedings under Article 169 of the EEC Treaty is that the Member State in question must have failed to comply with the Commission' s reasoned opinion, within the period laid down . In the Italian Government' s opinion, no such failure has occurred in this case since the reasoned opinion required above all (" suprattutto ") a written declaration by the Municipality of Milan that it would comply with the provisions of the directive in future and that requirement was satisfied by the delivery of the declaration by the Mayor of Milan dated 19 April 1984. In so far as the Commission also refers to events in 1984 (contract for the construction of a plant at Muggiano), it is clear, in the Italian Government' s view, that they cannot fall within the scope of these proceedings since the Italian Government has still not had the opportunity to submit its observations in the preliminary procedure provided for by Article 169 of the EEC Treaty.

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1 . 15 . As far as that argument is concerned, it must be admitted in the light of the sparse facts with which the Court has been acquainted that the second part thereof appears to be justified. According to the strict interpretation given to Article 169 in the Court' s case-law, it is in fact impossible to deal in these proceedings with events which occurred in 1984 and which were not mentioned in the communication commencing the procedure or in the Commission' s reasoned opinion. In particular, those events cannot be considered in view of the fact that the Italian Government stated in answer to a question asked by the Court that the original plans underwent significant changes in 1982 and that therefore the new plans did not simply amount to a postponement of the original project and the fact that this was not disputed by the Commission.

16 . Consequently, where the application lodged by the Commission, which is worded in very broad terms, refers to the award of a contract for the construction of a plant for the recycling of solid urban waste by the City of Milan, that can only mean the aforementioned events of 1979 and the question whether or not the directive has been observed is to be examined only in relation to those events.

2 . 17 . However, I am inclined to the view that once the subject-matter of the proceedings is so defined there can be no question of inadmissibility.

(a) 18 . With regard to the defendant' s main objection, it is in fact difficult to accept - if my understanding of the general tenor of the Commission' s reasoned opinion is correct - that the requirement at the end thereof, to give a written undertaking to comply with the directive in the future, was satisfactorily met by the Mayor of Milan' s aforementioned declaration.

19 . If one tries to find a logical explanation for that requirement (whether or not it was expressed correctly in the Italian Minister for the Interior' s letter of 29 March 1984 cannot be decisive), one finds that it entails - and here I agree with the Commission - an implied recognition of the fact that the conduct of the Municipality of Milan in 1979 was unlawful. That interpretation arises from the fact that such a requirement is to be regarded as altogether unusual (for compliance with the requirement involves no legal changes since the duty to comply with the directive arises directly from the directive itself in conjunction with the national measures implementing it; moreover, it involves no change in the factual situation since as far as the legal position was concerned the matter had already been pointed out to the Municipality of Milan by the Commission' s letter of August 1983). As far as the addressees of the requirement were concerned, the undertaking sought could only be taken to mean that the Commission was acting on the assumption that the contract which had been awarded had been completed and could not therefore be rescinded and that its only concern was to ensure that such conduct was not repeated, which, however, undoubtedly implies that the conduct was unlawful.

20 . However, there is absolutely no recognition in the Mayor of Milan' s declaration that the award of the contract in 1979 did not conform to the directive; on the contrary, it begins with the express statement that the Mayor is convinced that the Municipal Administration had acted in a lawful manner (" abbia agito legittimamente ").

21 . The Mayor then goes on to state in the declaration - and this is another important point - that the Municipality of Milan will ensure that, in the future, too, its administrative action is in conformity with the directive. Apparently, he is saying that in the future the Municipality will, if the situation arises, act as it had done in 1979.

22 . Viewed in that light and contrary to the view of the Italian Government the aforementioned declaration cannot in fact be regarded as a categorical guarantee that the provisions of the directive will be observed . The Commission was right to complain that the declaration was incomplete and that, because of the reservation in the first sentence, it was not clear. Consequently, it cannot

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be said that, by giving his declaration, the Mayor of Milan did everything that was necessary to comply with the Commission' s reasoned opinion.

(b) 23 . There is also a further reason why it cannot be said that the reasoned opinion was complied with in full.

24 . Although it is stated in the final paragraph of the reasoned opinion that the necessary measures mean above all a written undertaking by the Municipality of Milan that it will comply with the directive in the future, the preceding paragraph refers quite generally to the measures which must be adopted to comply with the reasoned opinion. That could only mean that, if the Commission' s assumption that the contract had been performed was to prove incorrect (and the addressee of the reasoned opinion knew or should have known that was in fact the position since at that time not even a site for the proposed plant had been found), the Commission' s concern was that the conduct of the Municipality of Milan should be brought into conformity with the reasoned opinion.

Viewed in that light, the reasoned opinion therefore also required the award of the contract to be rescinded (which appeared quite feasible on the assumption that it was unlawful) and a proper procedure for the award of a contract to be instituted. The defendant should therefore have given directions to that effect or (if it is correct that in serious cases the government has only limited influence on independent municipalities which are essentially subject to the regional supervisory committees) it should at least have given clear indications about the need for efforts at the municipal level to rescind the contract and recommence the procedure for the award of contracts .

25 . At least in so far as nothing of the kind was done and in his letter to the Prefect of Milan the Minister for the Interior merely requested that the Municipality of Milan should produce the written declaration, it certainly cannot be said that everything necessary was done to comply with the reasoned opinion within the period laid down and that therefore there were no grounds for instituting proceedings before the Court.

(c) 26 . Finally, it is necessary to consider, with regard to the facts known to the Court and in connection with the question of admissibility, whether the Commission has any interest at all in proceedings which are limited to events that occurred in 1979 when it is now clear that the original decision was never put into effect.

27 . I am inclined to think that, if indeed such an interest matters in proceedings under Article 169 of the EEC Treaty, the Commission has such an interest in this case and it is a sufficient interest. The important point in this regard is that in 1979 in Milan a procedure for the award of a contract was commenced and brought to a formal conclusion in contravention of the basic rules of the directive. However, as has been made clear in a different context, it is perfectly possible for proceedings under Article 169 to be instituted in relation to matters which have occurred entirely in the past. Also of relevance is the fact that in relation to the form of the procedure the Municipality of Milan relies upon provisions of the directive whose clarification is of fundamental importance since they may become relevant again and again (at the hearing the Commission referred to a number of other cases where local authorities had failed to comply with the directive). Not least, it is also of interest that the events of 1979 clearly formed a sort of basis and starting point for subsequent actions involving a further failure to follow the correct procedure under the directive. In fact the contract to construct the plant which was subsequently decided upon was awarded to the same three undertakings which had been awarded the contract for the original project in 1979, which suggests that there was no new procedure for awarding the contract but that the contracts concluded in 1979 were simply amended.

(d) 28 . Consequently, there are really no decisive reasons why the application should not be admissible. Nothing should therefore prevent the Court of Justice from interpreting the Council

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directive in the light of the circumstances of this case in order to clarify the obligations which arise therefrom for the Member States.

II - Substance

29 . It is not disputed that in 1979 the Municipality of Milan awarded a public works contract without following the procedure laid down in Article 12 of Directive 71/305 which provides as follows :

"Authorities awarding contracts who wish to award a public works contract by open or restricted procedure shall make known their intention by means of a notice.

Such notice shall be sent to the Office for Official Publications of the European Communities and shall be published in full in the Official Journal of the European Communities in the official languages of the Communities...".

30 . However, its action constitutes an infringement of Community law only if Article 9 is not applicable (paragraphs (b) and (d) of that provision are relied upon by the Municipality of Milan). Article 9 provides as follows :

"Authorities awarding contracts may award their works contracts without applying the provisions of this directive, except those of Article 10, in the following cases :

...

(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;

...

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time limit laid down in other procedures cannot be kept;

...".

31 . The crucial question is therefore the meaning to be given to the provisions just cited and whether it has been shown that the conditions for their application were satisfied in 1979. In that connection we can only rely - as far as the Italian side is concerned - on the not very detailed statements made by the Municipality of Milan in the preliminary procedure since the Italian Government has restricted itself during the proceedings before the Court almost entirely to the question of admissibility.

(1) 32 . With regard, first, to Article 9 (b), it is certainly necessary to agree with the Commission that the provision is a derogation which in principle must be strictly construed and that the awarding authority which relies on it must prove that the conditions for its application are satisfied.

33 . It also appears that the Commission' s conclusion that, according to its investigations, undertakings in the Community other than those to whom the contract was awarded were also in a position to construct such a plant is not disputed. In that connection the Municipality of Milan merely contended (see its letter of 11 October 1983) that the advisory technical commission appointed to consider the matter came to the conclusion that the plant proposed by the three Italian undertakings to whom the contract was awarded guaranteed the greatest efficiency (" garanzie di migliore funzionalità "). However, that is hardly sufficient, in connection with the application of Article 9 (b), to show that "for technical... reasons..., the works may only be carried out by a particular contractor", especially since further and more detailed particulars were not provided.

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34 . In so far as the Municipality of Milan also relies, in relation to Article 9 (b), on the alleged exclusive rights of the Italian undertakings to whom the contract was awarded, which rights were necessary for a proper realization of the project, it is sufficient to refer to the Commission' s observation that since more detailed information has not been provided at any stage (for example regarding the patent number or entries in the patent register) the necessary supporting evidence is lacking.

35 . Consequently, it is not possible to find that the Municipality of Milan was right to rely on Article 9 (b) of the directive, thereby justifying the failure to apply Article 12 thereof.

(2) 36 . With regard, secondly, to Article 9 (d), the position is the same as it was with Article 9 (b), namely that the provision must in principle be interpreted strictly and that according to its wording there is no doubt that the conditions contained therein must all be satisfied .

37 . In the present case, it is not, however, necessary to consider them all . According to the Commission' s statements at the hearing, the total extra time needed to comply with the directive (period of notice, allowing time for the receipt of tenders and time for examining the tenders) would be a few months. In fact, merely what is known of the course of the procedure up to November 1979 shows that this was not a case of extreme urgency, for the board of Azienda was aware of the situation since September 1978; only a few months after the establishment of an advisory technical commission, the three Italian undertakings to whom the contract was subsequently awarded were designated; in April 1979 those undertakings were then evaluated by a group of experts and finally they were awarded the contract by a decision taken in July 1979 which the Municipality approved in November 1979. Reference may also be made to the fact that until 1984 it was not known where the plant was to be constructed (because a suitable site had not been found), the fact that it was decided in 1984 to build it at Muggiano, the further fact that it was stated in the application for finance made to the European Investment Bank that the work had been begun in 1984 and would be completed by 1987 and finally to the fact that it was stated in August 1986 in response to a question asked by the Court that by that date the preliminary work (" interventi preliminari ") had been completed (which was in fact emphatically disputed by the Commission at the hearing).

38 . In those circumstances, it is difficult to see how it could be said that compliance with the periods laid down by the directive in relation to the publication of notices would be greatly prejudicial. Consequently, the Municipality of Milan cannot rely on Article 9 (d) of the directive either.

C - 39 . In view of all the foregoing I can only propose that the Court should allow the Commission' s application, which in my view is admissible, and that it should make the declaration sought therein. The defendant should also be ordered to pay the costs.

(*) Translated from the German.

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AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
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TYPDOC	6 ; CJUS ; cases ; 1985 ; C ; opinions

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PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Lenz
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Opinion of Mr Advocate General Mischo delivered on 4 November 1986.
Commission of the European Communities v Italian Republic.
Transparency of financial relations between Member States and public undertakings.
Case 118/85.

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Mr President,

Members of the Court,

This Opinion concerns an application for a declaration that by refusing to supply information concerning the manufactured tobacco sector, the Italian Republic has failed to fulfil its obligations under Article 5 (2) of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (Official Journal, L 195, p. 35).

That provision requires the Member States to supply to the Commission, at its request, information concerning the financial relations between "public authorities" and "public undertakings ".

The Italian Government refused to supply such information on the ground that the Amministrazione Autonoma dei Monopoli di Stato (AAMS), which operates in the sector in question, cannot be regarded as a "public undertaking" within the meaning of Article 2 of the said directive but is a "public authority" within the meaning of the same article .

In reality, the dispute thus concerns the interpretation of those two expressions.

According to Article 2 of Directive 80/723/EEC, "public authorities" means "the State and regional or local authorities" and "public undertaking" means "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it."

In concrete terms, the question is whether the AAMS, as a State body without a legal personality separate from that of the State, something which the Commission does not contest, is for that reason one of the "public authorities" or, on the contrary, whether the fact that in the manufactured tobacco sector it offers goods and services on the market and participates in economic activity, something which the Italian Government admits, is sufficient to place it in the category of "public undertakings ".

Since, at the time it was adopted, Directive 80/723 was the subject of an application for annulment brought by France, Italy and the United Kingdom (Joined Cases 188 to 190/80), let me refer, for details of the directive and comments upon it, to the judgment of the Court of 6 July 1982 (((1982)) ECR 2545).

1 . Can a State body constitute a "public undertaking"?

The Italian Government states that "in the Italian legal order, the production and marketing of manufactured tobacco is one of the public and institutional responsibilities of the State" and that "if the monopoly administration, being a State body, is a 'public authority' , it cannot at the same time be a 'public undertaking' within the meaning of the directive ".

The Italian State obviously cannot be denied the right to consider that it is in the public interest that it should itself assume the activities in question and that it therefore also assumes a "public service" duty in that regard.

However, I am of opinion that "public service" and "public undertaking" are not mutually exclusive concepts so that a public authority, including the State itself, may in certain cases also be regarded as a "public undertaking ".

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In my opinion, the criteria for distinguishing between "public authorities" and "public undertakings" are not to be sought in the concept of public service but in the industrial and commercial nature of the activity of public bodies.

Italian legal writers have in fact coined a term for this type of activity - "imprese-organo", meaning an unincorporated State enterprise . (1)

In Case 78/82, (2) the Italian Government itself relied on Article 90 (2) of the EEC Treaty in favour of the AAMS in order to justify a measure contested by the Commission. However, that provision presupposes the existence of an undertaking and I find it difficult to accept that a body which constitutes an undertaking within the meaning of Article 90 (2) may no longer be regarded as such for the purposes of Directive 80/723, which is based on the third paragraph of the same article and whose purpose is to facilitate its implementation.

Furthermore, the fact that it is possible to draw a distinction, among the activities of the State, between its activities as an authority and its activities as an undertaking is confirmed by the case-law of the Court.

For example, in its judgment of 11 July 1985 in Case 107/84, (3) the Court held that only a part of the postal activities carried on by a body governed by public law may be regarded as the activities of a public authority in the strict sense of the term.

It has also been established in a line of decisions (4) that only "posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities" come within the scope of the exception provided for in Article 48 (4) of the Treaty concerning freedom of movement for workers.

The Court expressly wished to exclude posts which, whilst coming under the State or other bodies governed by public law, involve responsibilities of an economic and social character which the public authorities assume in the various Member States or other activities which cannot be assimilated to the functions which are typical of the public administration (see, in particular, paragraphs 10 and 11 of the judgment of 17 December 1980, ((1980)) ECR 3900).

The applicability of one or other of those provisions is thus not established by the mere existence of a public administration or a public body . The decisive factor is the activities carried on.

In the few rare cases in which the Court has been called upon to assess whether or not a body governed by public law is an "undertaking", it has also been led to draw a distinction according to the nature of those activities.

In its judgment of 30 April 1974 in Case 155/73 (Sacchi, ((1974)) ECR 409), it expressly rejected the argument put forward by the Italian and German Governments to the effect that television undertakings are not "undertakings" within the meaning of the provisions of the Treaty and decided that, even if a Member State, for considerations of public interest, of a non-economic nature, has conferred an exclusive right to conduct radio and television transmissions on one or more establishments, for the performance of their tasks, these establishments "to the extent that this performance comprises activities of an economic nature, fall under the provisions referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special or exclusive rights" (paragraph 14).

Similarly, in its judgment of 18 June 1975 in Case 94/74 IGAV v ENCC ((1975)) ECR 699, the Court stated that "the activities of an institution of a public nature, even if autonomous, fall under the provisions referred to ((concerning interference by the Member States with the normal functioning of competition)) and not under Articles 85 and 86, even if its interventions

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take place in the public interest and are devoid of a commercial character" (paragraph 35). It may legitimately be concluded that the commercial activities of a public body, whether autonomous or not, fall under Articles 85 and 86, specifically referred to in Article 90.

Finally, in its judgment of 20 March 1985 in Case 41/83 Italy v Commission ((1985)) ECR 873, the Court expressly rejected the Italian Government' s argument to the effect that "the rule-making activities of a body governed by public law may not be regarded as the activities of an undertaking for the purposes of Article 86" (paragraph 13) on the ground that "the schemes ((adopted by British Telecom under rule-making powers conferred on it by law))... must be regarded as an integral part of BT' s business activity" (paragraph 20). It thus confirmed that the activities of a statutory corporation, (which the Court described as a "nationalized undertaking", see paragraph 2) are subject to the Community competition rules once it engages in industrial or commercial activities.

Returning to Directive 80/723, I would point out that in the abovementioned judgment in Joined Cases 188 to 190/80, the Court decided that the directive was valid.

The purpose of that directive, according to the sixth recital in the preamble thereto, is to "enable a clear distinction to be made between the role of the State as public authority and its role as proprietor ".

I do not therefore see on the basis of what line of reasoning it is possible to arrive at the conclusion that "the directive does not make it possible to distinguish, in regard to public authorities, between public authority activities and entrepreneurial activities" (defence, first paragraph on page 8).

On the contrary, it seems to me that the directive is based precisely on the acknowledged fact that States frequently have such a "split personality ".

The reasons which led the Commission to regard it as necessary to make a distinction between the rôle of the State as public authority and the role of the State as proprietor are, in my view, a fortiori relevant when the State is not only proprietor but also directly manages the activity in question.

Furthermore, Article 2 of the directive states that "public undertakings" means "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of ... the rules which govern it ". However, in this case, the rules governing the AAMS, namely the fact that it is integrated into the administration of the State, make possible the exercise of influence which is not merely dominant but also direct and exclusive.

It does not therefore seem excessive to conclude that, having regard to the criteria laid down in the second paragraph of that article, the "imprese-organo directly managed by the State" (reply to the letter requesting observations, page 4) constitute the highest form of public undertakings referred to by the directive in question.

2 . Must a public undertaking necessarily have legal personality distinct from that of the State?

According to the Italian Government, "in order for the public authorities to be able to exercise their influence over a public undertaking, the two entities should be legally separate ".

However, it seems to me that that influence may be exercised even more effectively when the State as a public authority and the State as an undertaking are one and the same legal person. (It could in fact be asked whether it is not precisely for that reason that certain public bodies are not granted a separate legal personality.)

In such situations, the establishment of transparency is even more necessary .

In fact, the whole purpose of the directive is to ensure "a fair and effective application of the

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aid rules in the Treaty to both public and private undertakings" (fifth recital).

Moreover, it can be seen from the Court' s case-law that, in the context of the competition rules laid down in the EEC Treaty, an economic or functional approach, rather than a merely legal one, must prevail in defining the term "undertaking ".

It is certainly true that in the context of the ECSC Treaty the Court began by defining the term "undertaking" in relation to the concept of legal personality (5) and it is that definition which is traditionally cited by legal writers. (6) However, the Court has increasingly qualified that position. (7)

In the context of the EEC Treaty, the Court has only recently deemed it necessary to define the term "undertaking", namely in its judgment of 12 July 1984 in Case 170/83 Hydrotherm v Compact ((1984)) ECR 2999, in which it decided that "in competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal" (paragraph 11).

I note that the Court has thus merely drawn the logical conclusions, in regard to the definition of the term "undertaking", from its previous case-law regarding competition. Thus, in particular (8) in its judgment of 25 November 1971 in Case 22/71 Béguelin Import v G.L. Import and Export ((1971)) ECR 949, it held that "an exclusive dealing agreement does not fall under the prohibition imposed by Article 85 (1) of the Treaty merely because the concession granted under that agreement has been transferred from a parent company to its subsidiary, which, although having a separate legal personality, enjoys no economic independence" (summary, paragraph 1).

Similarly, in its judgment of 14 July 1972 in Case 48/69 ICI v Commission ((1972)) ECR 619, it rejected the applicants' argument to the effect that possible infringements of Article 85 (1) could only be imputed to their subsidiaries on the ground that "the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to theparent company", which is the case "where a subsidiary does not enjoy real autonomy in determining its course of action in the market" (paragraphs 132 and 134).

Although it is true that those judgments were based essentially on the consideration that competition between companies economically dependent on each other is impossible and, rather than providing a definition of the term "undertaking", accept the principle that the acts of subsidiaries may be imputed to the parent company, it is clear from them that in competition law legal personality is not the decisive factor for the purposes of the application of Articles 85 to 90 of the Treaty to undertakings. The judgment in Case 170/83 confirms this by identifying an undertaking as an economic unit, even if it is composed of several legal persons.

Since, like Articles 85 and 86, Article 90 is contained in Part 3, Title I, Chapter 1, Section 1 of the Treaty, entitled "Rules applying to undertakings", and since, subject to paragraph 2 thereof, it makes public undertakings subject to all the rules laid down in the Treaty which apply also to private undertakings (judgment of 6 July 1982 in Joined Cases 188 to 190/80, cited above, paragraph 12), it may logically be concluded that the term "undertaking" has the same meaning, independently of whether the undertaking concerned is private or public . (9)

I have stated that in the judgments concerning Article 90, cited in Section 1 above, the Court in fact adopted the same economic and functional approach, even if the question of legal personality was not directly at issue in those cases.

3 . Are financial relations possible only between separate legal persons?

The Italian Government states that "it can be seen from the very nature of the financial relations

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whose transparency must be ensured (Article 3 of the directive) that such relations exist and must exist between separate legal persons" or that "financial relations cannot exist within the same legal person ". In that regard, I would like to make the following observations.

It cannot be denied that it is not possible to speak of "financial relations" unless a sufficiently clear distinction can be drawn between the source of the finance and the recipient.

In this instance, that seems to me to be the case. Although the existence of a separate budget must not necessarily be regarded as an essential condition for the existence of "financial relations", it is certain that in the instant case, an "autonomous administration" with a separate and distinct budget does exist.

As was stated in the defence and as can be seen from Article 9 of Decree-Law No 2258 of 8 December 1927 later converted into Law No*3474 of 6 December 1928, which set up the AAMS, the draft budget of the income and expenditure of the AAMS must be submitted to parliament for approval as an annex to the estimate of expenditure of the Ministry of Finance and the balance sheet is annexed to the general accounts of the State .

Joined to it is a separate balance sheet (" conto consuntivo ") and an "economic account" (" conto economico ") for each of the "aziende" (tobacco, salt, quinine) and a general statement of account (" riassunto ") for the whole administration.

The industrial and commercial receipts of the AAMS are entered in the budget of the autonomous administration (Article 4). Only the fiscal receipts are entered directly in the budget of the State.

Finally and most importantly, the budget of the autonomous administration also provides for a series of transfers between that administration and the State Treasury. (10)

Thus, Item No 169 of the budget concerns the "sums paid by the Treasury for the repayment of advances made by the deposit and loan bank to cover administrative deficits ".

That item could possibly constitute one of the "financial relations" referred to by Article 3 of Directive 80/723, namely "the setting-off of operating losses ".

Then there is Item No 510, "Sums paid by the Treasury for the construction of the new tobacco factory at Lucca"; it could be asked whether this constitutes "the provision of capital" or "non-refundable grants ".

On the expenditure side, Item No 128 covers the "reimbursement to the Treasury of expenditure corresponding to the emoluments of employees of the State' s general accounting service working at the AAMS", Item No 129 the "reimbursement to the Treasury of the AAMS share of the funding of the 'Guardia di Finanza' and Item No 137 "taxes and other charges payable on immovable property owned by the AAMS ".

It thus seems to me that it may be concluded that "financial relations" do exist between the autonomous administration on the one hand and the Italian State as such (through the Treasury) on the other . Directive 80/723 must therefore apply to those relations since I have found in another connection that the AAMS may be regarded as a "public undertaking ".

The final objection raised by the Italian Government must now be considered .

It contends that it follows from Annex I to Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts (Official Journal, L 215, p . 1) that "the tobacco monopoly is an organ of the Italian Ministry of Finance" (page 4 of the defence).

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Annex I to Directive 80/767/EEC lays down the list of "purchasing entities" or "contracting authorities" which are required, when they conclude a public supply contract, to comply with the rules laid down by the directive and, in particular, the prohibition of discrimination on the ground of nationality.

The Italian Ministry of Finance is included in that list. A footnote relating to that Ministry states : "Not including purchases made by the tobacco and salt monopolies ".

It seems to me that two conclusions may be drawn from Annex I.

The first is that the AAMS is an adjunct of the Ministry of Finance, as the Italian Government rightly points out. However, it has also been seen that the AAMS, as its name indicates, enjoys a large measure of autonomy and has a budget separate from that of the Ministry.

The second conclusion which may be drawn from that list is that contracts entered into by the AAMS are not of the same type as those entered into by the Ministry of Finance itself because if they were, they would not be excluded. That tends to prove that the AAMS pursues activities which differ in nature from the traditional activities of the Ministries. Having regard to what is known above on the status and activities of the AAMS, it may be concluded that the contracts it enters into are of the same type as those awarded by a private industrial or commercial undertaking.

4 . Consequences of the proposition that the directive is inapplicable

Finally, the issue may usefully be clarified by considering the implications of a judgment of the Court in which it was held that a body such as the AAMS did not come within the scope of Directive 80/723 .

(a)*If it were to decide that a body which offers goods or services on the market can never be regarded as an undertaking if it does not itself have legal personality, the Court would be abandoning first of all the economic or functional interpretation which it has given to the term "undertaking" in the context of the EEC Treaty.

Secondly, it would call into question the uniform application of Directive 80/723 in all the Member States.

It can be seen from a comparative analysis of the actual situation in the various Member States that the legal forms in which the public authorities, that is to say, the State or local authorities, carry out economic activities are very varied. They vary from one Member State to another and within each Member State, and also vary in time, in accordance with prevailing national legislation and policies. The choice of one form or another does not necessarily reflect objective criteria but is often a function of political or historical considerations or even of simple expediency or convenience of management .

By making possession of a separate legal personality a necessary criterion for the existence of a public undertaking, the AAMS would be excluded from the scope of Directive 80/723 but the "Service d' exploitation industrielle des tabacs et des allumettes" (Seita), which exercises a similar activity in France, would continue to come within the scope of that directive.

The Danish railways, which constitute a Directorate-General of a Ministry, would be subject to the directive whereas the Deutsche Bundesbahn (German Federal Railways), established in the form of a "special fund" "Sondervermoegen" and enjoying a certain autonomy of management without having legal personality, would not be affected.(11)

For the same reason, the Deutsche Bundespost (German Federal Post Office) would not be subject to the directive whereas the Régie des postes and the Régie des télégraphes et des téléphones in Belgium, established as State bodies with legal personality but subject to the supervision of the Ministry concerned, would come within the scope of the directive. Furthermore, it is interesting

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to note in this connection that, until the beginning of the 1970s, the Belgian postal administration was regarded as a State undertaking and, for that reason, although carrying out exactly the same activities and also coming under the authority of the Minister concerned, did not have its own legal personality.

It is also interesting to note that in Belgium, gas and electricity are sometimes distributed at the municipal level through municipal bodies established under local government law and managed separately from the general services of the municipality without, however, having separate legal personality. At the intermunicipal level, the same services are provided by public law associations which do have legal personality .

In Italy, differences appear to exist even within the category of "Amministrazioni autonome" of the State. Certain have legal personality while others, such as the AAMS do not. One writer (12) also indicates that the latter could be transformed into a "ente pubblico di gestione", a category having legal personality.

Those examples clearly emphasize that at the Community level the expression "public undertaking", which must necessarily have a uniform meaning, cannot be defined by reference to the different legal concepts of the national legal systems. For the purposes of defining the concept of an "undertaking" within the meaning of Community competition law and the expression "public undertaking" within the meaning of Directive 80/723, greater importance must therefore be attached to function than to form.

(b)*If the Court were to decide that Directive 80/723, as presently drafted, does not cover State bodies which do not have legal personality and that therefore the AAMS does not come within the scope of the directive, the Commission would probably consider itself compelled to amend it.

Such an amendment would undoubtedly take the form of a provision such as the following :

> '" Public undertakings' within the meaning of this directive includes State bodies which offer, for consideration, goods or services on the market, even if those bodies do not have a legal personality separate from that of the State."

However, as we have seen, the Italian Government states that "in order for the public authorities to be able to exercise influence over a public undertaking, both must have a distinct legal personality" and that "it can be seen from the very nature of the financial relations the transparency of which must be ensured that such relations exist and must exist between separate legal persons ".

That government would therefore probably raise the same objections to the new version of the directive as it raised to the previous one and we would be back where we started.

(c)*Faced with such a situation, some might ask whether it is really necessary that the directive should apply to "imprese-organo ". Don' t Articles 92 and 93 of the Treaty already permit the Commission to supervise aid granted by the Member States?

That objection has already been raised in Joined Cases 188 to 190/80, in which it was claimed that "in the sphere of State aids Article 93 (1) empowers the Commission to keep under constant review all systems of aid in the Member States. The requirement of cooperation, read together with Article 5, would enable the Commission to ask for information if it suspected that aid had been granted but not notified : if the information was provided, the Commission could examine the measure in question; if not, it could proceed under Article 169" (France, Italy and United Kingdom v Commission ((1982)) ECR 2545 at p. 2569).

However, in its judgment in that case the Court rejected that argument and stated, in particular, that :

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"In view of the diverse forms of public undertakings in the various Member States and the ramifications of their activities, it is inevitable that their financial relations with public authorities should themselves be very diverse, often complex and therefore difficult to supervise, even with the assistance of the sources of published information to which the applicant governments have referred . In those circumstances there is an undeniable need for the Commission to seek additional information on those relations by establishing common criteria for all the Member States and for all the undertakings in question" (paragraph 18).

For the reasons explained above, I am of the opinion that the expression "all the undertakings in question" also includes public undertakings which are State bodies and which do not have legal personality .

Conclusion

I therefore propose that the Commission' s application should be granted and that the Court should :

Declare that by refusing to supply the information requested by the Commission concerning the Amministrazione Autonoma dei Monopoli di Stato, the Italian Republic has failed to fulfil its obligations under Article 5 (2) of Commission Directive 80/723 of 25 June 1980 on the transparency of financial relations between Member States and public undertakings;

Order the Italian Republic to pay the costs.

(*) Translated from the French.

(1) See in particular B. Sibilio Parri, Motivazioni e forme di intervento dello Stato nell' economia delle aziende, Padova, Cedam, 1983, p . 61.

(2) Judgment of 7 June 1983 in Case 78/82 Commission v Italy ((1983)) ECR 1955.

(3) Judgment of the Court of 11 July 1985 in Case 107/84 Commission v Federal Republic of Germany ((1985)) ECR 2655, in particular paragraphs 14 and 15.

(4) See, in particular, the judgments of 17 December 1980 and 26 May 1982 in Case 149/79 Commission v Belgium ((1980)) ECR 3881 and ((1982)) ECR 1845; the judgment of 3 June 1986 in Case 307/84 Commission v France ((1986)) ECR 1725; the judgment of 3 July 1986 in Case 66/85 Lawrie-Blum v Land Baden Wuerttemberg ((1986)) ECR 2121 .

(5) Judgment of 22 March 1961 in Joined Cases 42 and 49/59 Snupat v High Authority ((1961)) ECR 53 (in particular, pp. 80 and 81); judgment of 13 July 1962 in Joined Cases 17 and 20/61 Kloeckner and Hoesch v High Authority ((1962)) ECR 325 (in particular p. 341); judgment of 13 July 1962 in Case 19/61 Mannesmann v High Authority ((1962)) ECR 357 (in particular pp. 371 and 372).

(6) See H. Schroeter, in Groeben, Boeckh, Thiesing, Ehlermann : Kommentar zum EWG-Vertrag, Third Edition, p. 885; R. Franceschelli, R . Plaisant, J. Lassier : Droit européen de la concurrence, 1978, p . 219; J . Schapira, G. Le Tallec, J.-B. Blaise : Droit européen des affaires, 1984, p. 231; J.A. Van Damme : La politique de la concurrence dans le CEE, 1979, p. 113 et seq.

(7) Judgment of 16 December 1963 in Case 36/62 Société des aciéries du Temple v High Authority ((1963)) ECR 289; judgment of 16 June 1966 in Case 50/65 Acciaierie e ferriere di Solbiate v High Authority ((1966)) ECR 147.

(8) For other references to the case-law, see the Opinion of Mr Advocate General Lenz in Case 170/83, cited above ((1984)) ECR 3024 at p . 3024 and 3025.

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(9) Gleiss and Hirsch : Kommentar zum EWG-Kartellrecht, Third Edition, 1978, p. 396; R. Franceschelli, R. Plaisant, J. Lassier, op . cit ., p. 219; A. Deringer : The competition law of the EEC, 1968, p . 228; idem, in FIDE, Eighth Congress (Copenhagen), 1978, p. 22 .

(10) See, for example, Law No 42 of 28 February 1986 on the budget of the State for the 1986 financial year, Gazzetta Ufficiale of 28 February 1986, p. 322 et seq.

(11) Directive 85/413 of 24 July 1985 amending Directive 80/723 (Official Journal, L 229, p. 20) extended the scope of the latter, in particular, to the sectors of transport, posts and telecommunications, water and energy.

(12) Ruju, in the section "Monopoli Fiscale" in Enciclopedia del diritto, Milan, 1976, p. 853.

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PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Mischo

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Directive - Coordination of procedures for the award of public works contracts.
Case 274/83.

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TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1983 ; C ; opinions
PUBREF	European Court reports 1985 Page 01077
DOC	1985/02/13
LODGED	1983/12/16
JURCIT	11957E005-L1 : P 1084 11957E169 : P 1080 1081 31971L0305-A29P1 : P 1080 - 1084 31971L0305-A29P1T1 : P 1082 1083 31971L0305-A29P1T2 : P 1082 1083 31971L0305-A29P2 : P 1082 31971L0305-A29P3 : P 1080 1081 31971L0305-A32 : P 1078 31971L0305-A33 : P 1079 1080 1083 1084 61976J0010 : P 1078 61981J0096 : P 1084 61983J0254 : P 1081
SUB	Approximation of laws ; Freedom of establishment and services ; Free movement of services ; Right of establishment
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful

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ADVGEN Lenz

JUDGRAP Mackenzie Stuart

DATES of document: 13/02/1985
of application: 16/12/1983

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Opinion of Mr Advocate General VerLoren van Themaat delivered on 14 May 1985. CMC Cooperativa muratori e cementisti and others v Commission of the European Communities. European Development Fund - Amarti River diversion project. Case 118/83.

DOCNUM	61983C0118
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
PUBREF	European Court reports 1985 Page 02325
DOC	1985/05/14
LODGED	1983/06/28
JURCIT	11957E173 : P 2326 21979A1031(01)-A120 : P 2326 2327 11957E175 : P 2326 11957E178 : P 2326 11957E215 : P 2326 21979A1031(01) : P 2327 31980R3225 : P 2327 21979A1031(01)-A108P2 : P 2327 21979A1031(01)-A122 : P 2327 21979A1031(01)-A108P5 : P 2327 21979A1031(01)-A121 : P 2327 21979A1031(01)-A123 : P 2327 21979A1031(01)-A123P2LC : P 2327 2330 2332 21979A1031(01)-A130 : P 2328 2333 21979A1031(01)-A131 : P 2328 21979A1031(01)-N12 : P 2328 21979A1031(01)-N13 : P 2328 61983J0126 : P 2330 2331 21979A1031(01)-A123P3LB : P 2330 11957E215-L2 : P 2331 31959Q0301-A38P1 : P 2331 21979A1031(01)-A121P2 : P 2331 2335 31959Q0301-A91 : P 2335 31959Q0301-A91P1 : P 2335
SUB	Public contracts of the European Communities ; European Development Fund ; External relations ; African Caribbean and Pacific States
APPLICA	Person

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DEFENDA	Commission ; Institutions
NATIONA	Italy
PROCEDU	Action for annulment - inadmissible;Action for failure to act - inadmissible;Action for damages - unfounded
ADVGEN	VerLoren van Themaat
JUDGRAP	Pescatore
DATES	of document: 14/05/1985 of application: 28/06/1983

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Opinion of Mr Advocate General Reischl delivered on 13 January 1982.
SA Transporoute et travaux v Minister of Public Works.
Reference for a preliminary ruling: Conseil d'Etat - Grand Duchy of Luxembourg.
Freedom to provide services - Directives on public works contracts.
Case 76/81.

DOCNUM	61981C0076
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1981 ; C ; opinions
PUBREF	European Court reports 1982 Page 00417 Swedish special edition VI Page 00319 Finnish special edition VI Page 00333
DOC	1982/01/13
LODGED	1981/04/07
JURCIT	11957E059 : P 435 31971L0304-A01 : P 435 31971L0304-A03 : P 435 31971L0304-A03LA : P 435 31971L0304-A03LC : P 435 31971L0304 : P 432 435 31971L0305-A02 : P 434 31971L0305-A20 : P 433 31971L0305-A23 : P 433 434 436 31971L0305-A24 : P 431 432 433 31971L0305-A25 : P 433 31971L0305-A26 : P 433 434 31971L0305-A27 : P 433 31971L0305-A28 : P 433 434 436 31971L0305-A28P2 : P 434 436 31971L0305-A28P3 : P 434 436 31971L0305-A28P4 : P 433 31971L0305-A28P5 : P 434 31971L0305-A29 : P 438 31971L0305-A29P5 : P 431 432 436 31971L0305-C : P 434 31971L0305 : P 430 432

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61974J0033 : P 435

SUB	Freedom of establishment and services ; Free movement of services ; Approximation of laws
AUTLANG	German
NATIONA	Luxembourg
PROCEDU	Reference for a preliminary ruling
ADVGEN	Reischl
JUDGRAP	Mackenzie Stuart
DATES	of document: 13/01/1982 of application: 07/04/1981

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Opinion of Mr Advocate General Rozès delivered on 29 October 1981.
H.P. Gauff Ingenieure GmbH & Co. KG v Commission of the European Communities.
Public works contracts financed by the European Development Fund - Eligibility.
Case 182/80.

DOCNUM	61980C0182
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1980 ; C ; opinions
PUBREF	European Court reports 1982 Page 00799
DOC	1981/10/29
LODGED	1980/08/25
JURCIT	21963A0720(01) : P 819 21969A0729(01) : P 819 61970J0047 : P 821 31971L0305-A23 : P 823 31971L0305 : P 823 31972R0282-TIT1A22P2LD : P 822 21975A0228(01)-PR2A22 : P 821 21975A0228(01)-PR2A24 : P 822 21975A0228(01)-PR2A25 : P 822 21975A0228(01)-PR2A26 : P 821 21975A0228(01)-PR2A27 : P 822 21975A0228(01) : P 819 31977L0062-A20 : P 823 31977L0062 : P 823 61977J0056-N20 : P 821 21979A1031(01)-A131 : P 822 21979A1031(01) : P 819
SUB	External relations ; Associated African States and Madagascar ; African Caribbean and Pacific States ; European Development Fund ; Financial provisions ; Public contracts of the European Communities
AUTLANG	French
APPLICA	Person

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DEFENDA	Commission ; Institutions
NATIONA	Federal Republic of Germany
PROCEDU	Application for annulment - inadmissible ; Action in respect of failure to act - unfounded ; Action for damages - unfounded
ADVGEN	Rozès
JUDGRAP	Chloros
DATES	of document: 29/10/1981 of application: 25/08/1980

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Opinion of Mr Advocate General Reischl delivered on 28 January 1981.
Commission of the European Communities v Italian Republic.
Non-implementation of a directive / Public supply contracts.
Case 133/80.

DOCNUM	61980C0133
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1980 ; C ; opinions
PUBREF	European Court reports 1981 Page 00457
DOC	1981/01/28
LODGED	1980/06/02
JURCIT	31977L0062-A30 : P 464 31977L0062 : P 464 31980L0767 : P 464
SUB	Approximation of laws
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Reischl
JUDGRAP	Mertens de Wilmars
DATES	of document: 28/01/1981 of application: 02/06/1980

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Opinion of Mr Advocate General Reischl delivered on 24 January 1979.
SpA Simmenthal v Commission of the European Communities.
Common organization of the market in beef and veal.
Case 92/78.

DOCNUM	61978C0092
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1978 ; C ; opinions
PUBREF	European Court reports 1979 Page 00777 Greek special edition 1979:I Page 00407 Portuguese special edition 1979:I Page 00407 Spanish special edition 1979 Page 00441
DOC	1979/01/24
LODGED	1978/04/13
JURCIT	61956J0009 : P 820 11957E173-L2 : P 818 819 11957E177 : P 819 821 11957E184 : P 819 820 821 11957E190 : P 828 829 61957J0015 : P 820 61962J0018 : P 820 61965J0032 : P 820 31968R0805-A07 : P 823 824 31968R0805-A13 : P 823 31968R0805-A14 : P 821 823 829 31968R0805 : P 828 31969R0098 : P 823 31969R0216 : P 829 61970J0041 : P 818 820 31971L0305 : P 827 31973R1896-A09 : P 828 31977R0425 : P 823 31977R0429 : P 823 31977R0585-A09 : P 824 31977R0585-A11 : P 823 824 31977R0585-A11BIS : P 824

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31977R0597-A02 : P 829
31977R0597 : P 828
31977R1384 : P 823
31977R2900-A03 : P 827
31977R2900-C : P 829
31977R2900 : P 823
31977R2901-N : P 828
31977R2901 : P 824
31977R2902 : P 823
31978D0258-A03 : P 818
31978D0258 : P 817 818
61978J0087 : P 828

SUB	Agriculture ; Beef and veal
AUTLANG	German
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Italy
PROCEDU	Application for annulment - successful
ADVGEN	Reischl
JUDGRAP	Pescatore
DATES	of document: 24/01/1979 of application: 13/04/1978

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Opinion of Mr Advocate General Reischl delivered on 13 July 1976.
Commission of the European Communities v Italian Republic.
Public works contracts.
Case 10-76.

DOCNUM	61976C0010
AUTHOR	Court of Justice of the European Communities
FORM	Conclusions
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1976 ; C ; opinions
PUBREF	European Court reports 1976 Page 01359 Greek special edition 1976 Page 00519 Portuguese special edition 1976 Page 00559
DOC	1976/07/13
LODGED	1976/02/05
JURCIT	11957E189 : P 1368 61969J0077 : P 1369 31971D0306 : P 1366 31971L0304 : P 1366 31971L0305-A05 : P 1367 31971L0305-A12 : P 1367 31971L0305-A14 : P 1368 31971L0305-A15 : P 1368 31971L0305-A16LD : P 1367 31971L0305-A17LA : P 1367 31971L0305-A20 : P 1367 31971L0305-A24 : P 1367 31971L0305-A25 : P 1367 31971L0305-A26 : P 1367 31971L0305-A29 : P 1367 31971L0305-A29P5 : P 1368 31971L0305-A32 : P 1367 31971L0305 : P 1366 1368 1369 61972J0079 : P 1368 61975J0052 : P 1368
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services

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AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Reischl
JUDGRAP	Mertens de Wilmars
DATES	of document: 13/07/1976 of application: 05/02/1976

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Klagenævnet for Udbud

RESUMÉER AF AFGØRELSER OM UDBUD FRA EU-DOMSTOLEN (tidligere EF-domstolen) OG RETTEN I FØRSTE INSTANS FRA OG MED 2009

NB! Resuméernes henvisninger til retsregler m.m. vil/kan efterhånden blive forældede, da resuméerne principielt er udarbejdet kort efter afgørelserne

Dette hæfte indeholder resuméer af de afgørelser, der er truffet af EU-domstolen (til 31. december 2009 benævnt EF-domstolen) og Retten i Første Instans inden for udbudsområdet fra og med 2009, og som er optaget på De Europæiske Fællesskabers Domstols websted på Internettet http://curia.eu.int/.

Resuméerne er udarbejdet af Klagenævnet for Udbud, der har ansvaret for dem alene.

Den dato, der angives ved begyndelsen af hvert resumé, er datoen for den pågældende afgørelse. Den betegnelse for sagen, der angives ved hvert resumé, er afgørelsens officielle betegnelse, sådan som den er angivet på Internettet.

Særligt om afgørelserne fra *Retten i Første Instans* bemærkes:

Afgørelserne om udbud fra Retten i Første Instans angår udbud foretaget af EU-organerne, dvs. Kommissionen, Rådet og Parlamentet mfl., idet Retten i Første Instans er klageorgan vedrørende sådanne udbud.

For EU-organernes udbud gælder nogle regler, der er indeholdt i to forordninger, dels »Finansforordningen«, dvs. Rådets forordning nr. 1605/2002 med senere ændringer, dels »Gennemførelsesforordningen«, dvs. Kommissionens forordning nr. 2342/2002 med senere ændringer.

De pågældende regler svarer i det væsentlige til de udbudsregler, der gælder for de ordregivende myndigheder i medlemsstaterne. Afgørelserne om udbud fra Retten i Første Instans kan derfor have en vis almen interesse, for så vidt som de (reelt) kan bidrage til fortolkningen af de udbudsregler, der gælder for de ordregivende myndigheder i medlemsstaterne, dvs. Udbudsdirektivet og Forsyningsvirksomhedsdirektivet m.m.

I resuméerne af afgørelser fra Retten i Første Instans er som almindelig regel kun medtaget de dele af afgørelserne, der belyser forståelsen af almindelige udbudsretlige principper. Resuméerne omfatter således principielt ikke dele af afgørelserne, der angår specifikke reguleringer af EU-organernes optræden eller formelle spørgsmål om Rettens kompetence.

NB! Resuméernes henvisninger til retsregler m.m. vil/kan efterhånden blive forældede, da resuméerne principielt er udarbejdet kort efter afgørelserne.

Indholdsfortegnelse vedrørende afgørelsernes dato og betegnelse

Retten i Første Instans' dom af 28. januar 2009, sag T-125/06, Centro Studio Manieri mod Rådet 7

EF-domstolens dom af 19. marts 2009, sag C-489/06, Kommissionen mod Grækenland 8

EF-domstolens dom af 23. april 2009, sag C-292/07, Kommissionen mod Belgien 9

EF-domstolens dom af 19. maj 2009, sag C-538/07, Assitur 9

Retten i Første Instans' dom af 20. maj 2009, sag T-89/07, VIP Car Solutions mod Parlamentet 10

Retten i Første Instans' kendelse af 2. juni 2009, sag T-254/08, AVLUX mod Parlamentet 12

EF-domstolens dom af 4. juni 2009, sag C-250/07, Kommissionen mod Grækenland 13

EF-domstolens dom af 9. juni 2009, sag C-480/06, Kommissionen mod Tyskland 14

EF-domstolens dom af 11. juni 2009, sag C-327/08, Kommissionen mod Frankrig 16

Retten i Første Instans' kendelse af 2. juli 2009 i sag T-279/06, Evropaïki Dynamiki mod ECB 18

Retten i Første Instans' dom af 9. september 2009, sag T-437/05, Brink's Security Luxembourg mod Kommissionen 20

EF-domstolens dom af 10. september 2009, sag C-206/08, Eurawasser 22

EF-domstolens dom af 10. september 2009, sag C-573/07, Sea 24

EF-domstolens dom af 15. oktober 2009, sag C-196/08, Acoset 26

EF-domstolens dom af 15. oktober 2009, sag C-275/08, Kommissionen mod Tyskland 28

EF-domstolens dom af 29. oktober 2009, sag C-536/07, Kommissionen mod Tyskland 29

EF-domstolens dom af 12. november 2009, sag C-199/07, Kommissionen mod Grækenland 30

EF-domstolens dom af 10. december 2009, sag C-299/08, Kommissionen mod Frankrig 31

Retten i Første Instans' dom af 10. december 2009, sag T-195/08, Antwerpse Bouwwerken mod Kommissionen 32

EF-domstolens dom af 23. december 2009, sag C-376/08, Serrantoni og Consorzio stabile edili 34

EF-domstolens dom af 23. december 2009, sag C-305/08, CoNISMa 36

EU-domstolens dom af 28. januar 2010 i sag C-406/08, Uniplex 37

EU-domstolens dom af 28. januar 2010, sag C-456/08, Kommissionen mod Irland 38

Retten i Første Instans' dom af 2. marts 2010, sag T-70/05, Evropaïki Dynamiki mod EMSA 39

Retten i Første Instans' dom af 19. marts 2010 i sag T-50/05, Evropaïki Dynamiki mod Kommissionen 42

EU-domstolens dom af 25. marts 2010 i sag C-451/08, Helmut Müller 43

Indholdsfortegnelse vedrørende afgørelsernes emner

Udbyderen har en vid skønsmargen, og Rettens kontrol med en udbyder er derfor begrænset til, om reglerne er overholdt, og om udbyderens skøn er åbenbart urigtigt. Ligebehandlingsprincippet betyder, at ensartede situationer ikke må behandles forskelligt, og at uensartede situationer ikke må behandles ens, medmindre dette er objektivt begrundet. Gennemsigtighedsprincippet har til formål at sikre ligebehandlingsprincippets overholdelse og at beskytte tilbudsgiverne mod unødvendige tab, og ingen af disse formål var tilsidesat 7

Indkøbsdirektivet og direktivet om medicinsk udstyr overtrådt ved nogle græske sygehuses afvisning af EF-mærket medicinsk udstyr 8

Belgien havde ikke implementeret Udbudsdirektivet fyldestgørende 9

En medlemsstat kan fastsætte andre udelukkelsesgrunde end dem, der er angivet i Tjenesteydelsesdirektivet, med det formål at sikre overholdelsen af principperne om ligebehandling og gennemsigtighed, under forudsætning af, at de nationalt fastsatte udelukkelsesgrunde er i overensstemmelse med proportionalitetsprincippet. En italiensk lovbestemmelse, hvorefter virksomheder med et indbyrdes kontrolforhold ubetinget skulle udelukkes, var i strid med proportionalitetsprincippet 9

Udbyderens oplysning om de samlede pointtal, der ved tilbudsvurderingen var tildelt sagsøgerens tilbud og den valgte tilbudsgivers tilbud, var ikke tilstrækkelig oplysning om det valgte tilbuds karakteristika og relative fordele. Tilbudsprisen i den valgte tilbudsgivers tilbud var blandt dette tilbuds karakteristika og relative fordele, hvorfor udbyderen havde været uberettiget til at nægte at oplyse den 10

Om en udbyders ret til at annullere et udbud og om retsvirkningerne af en sådan annullation 12

En undtagelsesbestemmelse i det tidligere forsyningsvirksomhedsdirektiv om fritagelse for udbudspligten, hvis alle tilbud er uantagelige, skulle fortolkes snævert, og bevisbyrden påhviler den, der påberåber sig en sådan undtagelsesbestemmelse. Bestemmelsens betingelser var imidlertid opfyldt i det foreliggende tilfælde. Ordregiverens meddelelse af begrundelsen for afvisning af et tilbud efter ca. to måneder opfyldte ikke et krav i direktivet om, at begrundelsen skulle gives hurtigst muligt 13

Nogle offentlige myndigheder kunne uden EU-udbud indgå en aftale om forbrænding af renovation. Et samarbejde mellem offentlige myndigheder er ikke i strid med udbudsreglerne, når samarbejdet kun varetager offentlige formål under overholdelse af ligebehandlingsprincippet, således at ingen privat virksomhed får en konkurrencefordel 14

En national regel om, at en 10-dages frist mellem ordregiverens meddelelse om tildelingsbeslutningen og kontraktsindgåelsen i hastetilfælde kan forkortes i forhold til situationens krav, var ikke i strid med kontroldirektiverne som affattet før ændringerne ved direktiv 2007/66. En national regel om, at klage først kan indgives på et nærmere angivet tidspunkt efter forhåndsorientering til ordregiveren om, at der vil blive klaget, var derimod i strid med kontroldirektiverne 16

Retten i Første Instans har ikke kompetence til at tage stilling til, om en national regel strider mod EU-retten. En forbigået tilbudsgiver havde ikke retlig interesse i at klage over tildelingsbeslutningen, da tilbudsgiverens tilbud ikke kunne komme i betragtning, fordi det ikke opfyldte et krav i udbudsbetingelserne 18

Klage over, at den valgte tilbudsgiver ikke overholdt udbudsbetingelsernes krav, ikke taget til følge, da klagen angik den valgte tilbudsgivers overholdelse af kontrakten med udbyderen og ikke udbyderens tildelingsbeslutning. Om betingelserne for, at der foreligger virksomhedsoverdragelse ved udbud af tjenesteydelser. Ligebehandlingsprincippet har til formål at sikre en sund konkurrence, og gennemsigtighedsprincippet har til formål at undgå favorisering, Udbyderens oplysning til en forbigået tilbudsgiver om hvem, der var valgt som tilbudsgiver, og om de points, som den forbigåede tilbudsgiver og den valgte tilbudsgiver havde fået ved tilbudsvurderingen, var tilstrækkelig begrundelse for tildelingsbeslutningen. En tilbudsgiver behøver ikke have de nødvendige medarbejdere ved tilbuddets afgivelse. Udbyderen havde pligt til efter anmodning at give en forbigået tilbudsgiver oplysning om hvem, der havde foretaget tilbudsvurderingen. Om betingelserne for erstatning 20

Begrebet tjenesteydelseskoncession er det samme i Udbudsdirektivet og Forsyningsvirksomhedsdirektivet. Det er tilstrækkeligt for at anse en kontrakt for en tjenesteydelseskoncession i henhold til Forsyningsvirksomhedsdirektivet, at ordregiveren ikke betaler vederlag til tjenesteyderen, og at tjenesteyderen får vederlaget fra tredjemand, under forudsætning af, at ordregiverens driftsrisiko eller en væsentlig del af den overføres til tjenesteyderen, også selvom denne risiko er meget begrænset som følge af offentlig regulering 22

Om betingelserne for at anse et selskab for in house i forhold til en ordregivende myndighed. Kontrolkriteriet er opfyldt, når selskabets aktiviteter er begrænset til de ejende ordregivende myndigheders område, og når de ejende ordregivende myndigheder udøver en bestemmende indflydelse på selskabets strategiske målsætninger og vigtige beslutninger. Den blotte mulighed for privat deltagelse i selskabet er ikke til hinder for at anse kontrolkriteriet for opfyldt 24

Nogle ordregivende myndigheder kunne uden forudgående offentliggørelse give et selskab koncession på udførelse af en tjenesteydelse, selvom selskabet havde privat deltagelse og derfor ikke kunne være in house, idet den private deltager i selskabet var fundet gennem et EU-udbud 26

Der kunne ikke uden udbud indgås kontrakt om et it-system til registrering af motorkøretøjer, selvom det hidtidige it-system var brudt sammen, da betingelserne i de påberåbte undtagelser fra udbudspligten (at det nye it-system kun kunne leveres af én leverandør, streng nødvendighed) ikke var opfyldt. Undtagelser fra udbudspligten skal fortolkes snævert, og den, der påberåber sig en sådan undtagelse, har bevisbyrden for, at betingelserne er opfyldt 28

En lejekontrakt om en ordregivende myndigheds leje af nogle bygninger, der ifølge lejekontrakten skulle opføres af udlejeren i overensstemmelse med den ordregivende myndigheds anvisninger, var en udbudspligtig bygge- og anlægskontrakt 29

Principperne om ligebehandling og gennemsigtighed betyder, at tilbudsgivere og potentielle tilbudsgivere skal have ens chancer. Det var i strid med ligebehandlingsprincippet, at udbudsbekendtgørelsen besværliggjorde visse potentielle udenlandske tilbudsgiveres mulighed for at dokumentere deres kvalifikationer. Kriterier, der i det væsentlige angår tilbudsgivernes evne til at udføre den udbudte opgave, kan ikke anvendes som underkriterier 30

En særlig fransk fremgangsmåde ved ordregivende myndigheders tildeling af kontrakter var i strid med Udbudsdirektivet 31

Udbyderens indhentning af supplerende oplysninger fra nogle tilbudsgivere om deres tilbuds prismæssige sammensætning var ikke i strid med forhandlingsforbuddet eller ligebehandlingsprincippet. Indhentningen af de supplerende oplysninger kunne ske efter, at en forbigået tilbudsgiver i standstill-perioden havde protesteret mod udbyderens tildelingsbeslutning, idet standstill-reglerne ellers ville være uden indhold, ligesom udbyderen kunne ændre tildelingsbeslutningen på grundlag af de supplerende oplysninger. Almindelige fællesskabsretlige principper, herunder proportionalitetsprincippet, kan føre til en

pligt for en udbyder til at indhente supplerende oplysninger fra tilbudsgiverne i visse tilfælde 32

Nogle italienske lovregler om, at et konsortium og et medlem af konsortiet ikke kan afgive tilbud under samme udbud, var i strid med fællesskabsrettens grundlæggende principper, herunder proportionalitetsprincippet. Traktatens grundlæggende principper, navnlig ligebehandlingsprincippet, gælder for udbud under tærskelværdien under forudsætning af, at der foreligger en grænseoverskridende interesse. Medlemsstaterne har en vis skønsmargin med hensyn til, hvorledes overholdelsen af principperne om ligebehandling og gennemsigtighed skal sikres, men proportionalitetsprincippet skal overholdes..... 34

At et organ modtager offentlig finansiering eller statsstøtte, er ikke i sig selv til hinder for, at organet afgiver tilbud under et EU-udbud. National ret må ikke udelukke universiteter o.l., der ikke driver virksomhed med gevinst for øje, og som har ret til at tilbyde udførelse af tjenesteydelser, fra at afgive tilbud under EU-udbud vedrørende de pågældende tjenesteydelser..... 36

En national klagefrist skal først løbe fra det tidspunkt, hvor klageren kendte eller burde kende den påberåbte overtrædelse af udbudsreglerne..... 37

Det var i strid med 1. kontroldirektiv, at en udbyder ikke gav tilbudsgiver E underretning om udbyderens beslutning om at indgå kontrakt med tilbudsgiver C, men kun havde givet E underretning om udbyderens forudgående beslutning om at indlede forhandlinger med C. Det var desuden i strid med 1. kontroldirektiv, at en national regel om klagefrist blev anvendt på andre beslutninger end dem, som reglen udtrykkeligt angik, ligesom det var i strid med 1. kontroldirektiv, at reglen var formuleret på en måde, der gav anledning til retsusikkerhed..... 38

Der må ikke anvendes delkriterier, som ikke er oplyst på forhånd, men en udbyder kan under visse betingelser uden forudgående oplysning anvende »vægtningskoofficienter« vedrørende underkriterierne. Det var beklageligt, at udbyderen ikke havde sikret sig bevis for tidspunktet for afsendelsen af en uddybende begrundelse for tildelingsbeslutningen, som en tilbudsgiver havde anmodet om, men forholdet havde ikke påvirket tilbudsgiverens retsstilling. Udbyderen havde uberettiget taget et tilbud i betragtning, selvom tilbuddet ikke som krævet i udbudsbetingelserne var afsendt med anbefalet brev senest på dagen for tilbudsfristens udløb, idet en postkvittering og en erklæring fra en postfunktionær af nærmere angivne grunde ikke kunne sidestilles med dokumentation for et anbefalet brev. Udbyderen var ikke forpligtet til at indgå kontrakt med den eneste konditionsmæssige tilbudsgiver, men kunne i stedet annullere udbuddet..... 39

En deltager i konsortium, der ikke var en juridisk person, kunne anlægge sag vedrørende et udbud, som konsortiet havde afgivet tilbud under. Diverse klagepunkter ikke taget til følge..... 42

Udbudsdirektivet omfatter ikke salg af fast ejendom og omfatter kun gensidigt bebyrdende aftaler. For at en aftale kan anses for gensidigt bebyrdende, skal den give den ordregivende myndighed en økonomisk fordel. Opfyldelsen af en generel byplanmæssig interesse er ikke en sådan økonomisk fordel, og direktivet omfatter ikke, at en ordregivende myndighed udøver sine beføjelser som planmyndighed. Begrebet koncession forudsætter, at der overføres råderet fra koncessionsgiveren til koncessionshaveren, og at koncessionshaveren har i hvert fald en væsentlig del af risikoen. Denne risiko skal være forbundet med driften, hvilket ikke er tilfældet med hensyn til den risiko, der følger af planmyndighedens dispositioner. Tidsubegrænsede koncessioner er formentlig i strid med EU-retten..... 43

Resuméer

Retten i Første Instans' dom af 28. januar 2009, sag T-125/06, Centro Studio Manieri mod Rådet

Udbyderen har en vid skønsmargen, og Rettens kontrol med en udbyder er derfor begrænset til, om reglerne er overholdt, og om udbyderens skøn er åbenbart urigtigt. Ligebehandlingsprincippet betyder, at ensartede situationer ikke må behandles forskelligt, og at uensartede situationer ikke må behandles ens, medmindre dette er objektivt begrundet. Gennemsigtighedsprincippet har til formål at sikre ligebehandlingsprincippets overholdelse og at beskytte tilbudsgiverne mod unødvendige tab, og ingen af disse formål var tilsidesat

Rådet iværksatte et begrænset udbud vedrørende drift af en vuggestue, og der indkom tilbud fra flere prækvalificerede virksomheder. Efter tilbuddenes modtagelse indledte Rådet forhandlinger om den udbudte opgaves udførelse med OIB, dvs. en institution, der hører under Kommissionen, og som har til funktion at sørge for visse velfærdsydelser til medarbejdere. OIB havde ikke afgivet tilbud i henhold til udbuddet. Rådet orienterede ikke tilbudsgiverne om forhandlingerne med OIB, men ca. et år efter tilbuddenes modtagelse annullerede Rådet udbuddet med henvisning til, at Rådet havde besluttet at tildele den udbudte opgave til OIB. I forbindelse hermed indgik Rådet en aftale med OIB om opgavens udførelse.

En af tilbudsgiverne anlagde sag mod Rådet ved Retten i Første Instans med påstand om annullation af Rådets annullation af udbuddet og af Rådets beslutning om at tildele opgaven til OIB.

Sagsøgeren gjorde en række forskellige anbringender gældende, herunder at Rådet havde overtrådt princippерne om ligebehandling og gennemsigtighed m.m.

Rådet blev imidlertid frifundet. Fra dommens præmisser kan nævnes følgende udtalelser af almen interesse:

Rådet kunne tildele OIB opgaven uden forudgående udbud, da aftalen mellem Rådet og OIB var en aftale mellem to af fællesskabsinstitutionernes tjenestegrene, og da sådanne aftaler ifølge en bestemmelse i Gennemførelsesforordningen er undtaget fra udbudspligten (præmis 53, jf. præmis 45).

Rådets henvisning ved annullationen af udbuddet til, at Rådet havde besluttet at tildele OIB opgaven, opfyldte et almindeligt princip om, at EU-organernes afgørelser skal begrundes (præmis 60-61).

Et anbringende fra sagsøgeren om, at Rådets beslutning om at tildele OIB opgaven byggede på et urigtigt skøn, kunne ikke tages til følge. Retten henviste til, at en institution, der har iværksat et udbud, har en vid skønsmargen, og at Rettens kontrol derfor er begrænset til, om reglerne er overholdt og om udbyderens skøn er åbenbart urigtigt. Det var imidlertid ikke godtgjort, at Rådets beslutning om at tildele OIB opgaven byggede på et åbenbart urigtigt skøn (præmis 62). I samme præmis yderligere henvist til, at Rådet ikke over for en tilbudsgiver havde pligt til at bevise fordelene ved at gennemføre de omhandlede tjenesteydelser ved anvendelse af egne ressourcer.

Rådet havde ikke overtrådt ligebehandlingsprincippet ved at tildele OIB opgaven, selvom OIB ikke havde afgivet tilbud i henhold til udbuddet. Ligebehandlingsprincippet betyder, at ensartede situationer ikke må behandles forskelligt, og at uensartede situationer ikke må behandles ens, medmindre dette er objektivt begrundet. Da OIB var en tjenestegren under en af fællesskabsinstitutionerne, kunne OIB imidlertid ikke sammenlignes med en tilbudsgiver. (Præmis 82-83).

Gennemsigtighedsprincippet medfører pligt for en ordregivende myndigheder til at offentliggøre præcise oplysninger om hele udbudsprocedurens forløb, og sagsøgeren fik ikke før ved Rådets annullation af udbuddet underretning om forhandlingerne mellem Rådet og OIB (præmis 87-88). Gennemsigtighedsprincippet har imidlertid til formål dels at sikre, at alle tilbudsgivere får lige chancer, dels at beskytte tilbudsgiverne mod tab som følge af tilbudsafgivningen, og sagsøgeren havde ikke godtgjort, at Rådet havde tilsidesat nogen af disse formål. Dels var tilbudsgiverne blevet behandlet lige, idet ingen af dem havde fået underretning om forhandlingerne mellem Rådet og OIB, dels havde sagsøgeren ikke haft udgifter ud over de risici, der er forbundet med at deltage i en udbudsprocedure (præmis 89-90).

EF-domstolens dom af 19. marts 2009, sag C-489/06, Kommissionen mod Grækenland

Indkøbsdirektivet og direktivet om medicinsk udstyr overtrådt ved nogle græske sygehuses afvisning af EF-mærket medicinsk udstyr

Direktiv 93/42 om medicinsk udstyr går i hovedtræk ud på at etablere en EF-mærkning, således at medlemsstaterne ikke må hindre markedsføring og ibrugtagning af medicinsk udstyr, der er forsynet med EF-mærkningen. En medlemsstat kan dog under visse betingelser forbyde markedsføring og brug af EF-mærket medicinsk udstyr. Medlemsstaten skal i så fald følge en nærmere fastsat fremgangsmåde.

Sagen angik forskellige EU-udbud, der var iværksat af et antal græske sygehuse i henhold til det dagældende Indkøbsdirektiv 93/36, vedrørende indkøb af medicinsk udstyr. I udbuddene henvistes i overensstemmelse med Indkøbsdirektivets regler om tekniske specifikationer til ordningen om EF-mærkning af medicinsk udstyr. Ikke desto mindre afviste udbyderne tilbud om forskelligt EF-mærket udstyr under henvisning til den offentlige sundhed, uden at fremgangsmåden i henhold til direktivet om medicinsk udstyr blev fulgt. Det fremgår, at den græske stat flere gange over for sygehusene havde indskærpet reglerne om EF-mærkning, uden at dette havde ført til, at reglerne altid blev overholdt, ligesom den græske stat havde overvejelser om at indføre sanktioner mod sygehuse, der ikke overholdt reglerne.

EF-domstolen konstaterede ved dommen, at sygehusenes omtalte afvisning af tilbud om EF-mærket medicinsk udstyr, uden at fremgangsmåden i henhold til direktivet om medicinsk udstyr var blevet fulgt, var i strid med Indkøbsdirektivet og med direktivet om medicinsk udstyr.

Sagen minder om sagen C-6/05, Medipac-Kazantzkis, der blev afgjort ved EF-domstolens dom af 14. juni 2007, og som angik EF-mærkede suturartikler.

EF-domstolens dom af 23. april 2009, sag C-292/07, Kommissionen mod Belgien

Belgien havde ikke implementeret Udbudsdirektivet fyldestgørende

Ved denne dom fastslog EF-domstolen, at Belgien ikke havde foretaget en fyldestgørende implementering af forskellige bestemmelser i Udbudsdirektivet.

Refereres ikke, da dommen ikke skønnes at have almen interesse.

EF-domstolens dom af 19. maj 2009, sag C-538/07, Assitur

En medlemsstat kan fastsætte andre udelukkelsesgrunde end dem, der er angivet i Tjenesteydelsesdirektivet, med det formål at sikre overholdelsen af principperne om ligebehandling og gennemsigtighed, under forudsætning af, at de nationalt fastsatte udelukkelsesgrunde er i overensstemmelse med proportionalitetsprincippet. En italiensk lovbestemmelse, hvorefter virksomheder med et indbyrdes kontrolforhold ubetinget skulle udelukkes, var i strid med proportionalitetsprincippet

En bestemmelse i den italienske lov om offentlige kontrakter angik virksomheder med et indbyrdes »kontrolforhold«, dvs. et indbyrdes forhold gående ud på, at den ene virksomhed udøvede en dominerende indflydelse på den anden virksomhed, fx ved at besidde flertallet af de stemmeberettigede aktier i den m.m. Ifølge bestemmelsen skulle virksomheder med et sådant indbyrdes kontrolforhold udelukkes fra deltagelse i samme udbudsprocedure. Bestemmelsen havde til formål at sikre konkurrencen ved at undgå aftaler mellem tilbudsgivere.

Sagen angik en italiensk ordregivende myndigheds udbud af postbefordring. Der indkom tilbud fra tre tilbudsgivere. En af tilbudsgiverne, A, gjorde over for ordregiveren gældende, at der bestod et kontrolforhold mellem de to andre tilbudsgivere, og at de derfor skulle udelukkes. Ordregiveren gav ikke A medhold heri bl.a. med henvisning til, at den omtalte lovbestemmelse efter ordregiverens opfattelse ikke var gældende for udbuddet, og ordregiveren besluttede at indgå kontrakt med en af de to andre tilbudsgivere. A anlagde derefter sag ved en forvaltningsdomstol med påstand om annullation af tildelingsbeslutningen.

Forvaltningsdomstolen lagde til grund, at den omtalte lovbestemmelse var gældende for udbuddet, men var i tvivl med hensyn til, om bestemmelsen var i overensstemmelse med reglen om udelukkelsesgrunde i Tjenesteydelsesdirektivets artikel 29 (den tilsvarende regel i Udbudsdirektivet er artikel 45). Forvaltningsdomstolen forelagde derfor sagen for EF-domstolen med et spørgsmål, der kan gengives således:

Er angivelsen af udelukkelsesgrunde i Tjenesteydelsesdirektivets artikel 29 udtømmende, således at den italienske lovbestemmelse om udelukkelse af virksomheder med et indbyrdes kontrolforhold er i strid med artikel 29?

EF-domstolens udtalelser kan kort gengives således:

Tjenesteydelsesdirektivets artikel 29 er ikke til hinder for, at en medlemsstat fastsætter andre udelukkelsesgrunde end dem, der er angivet i bestemmelsen med det formål at sikre overholdelsen af principperne om ligebehandling og gennemsigtighed. Det er imidlertid en forudsætning, at sådanne nationalt fastsatte udelukkelsesgrunde ikke går videre end nødvendigt for at opfylde dette formål. Det afgørende var derfor, om den ita-

lienske lovbestemmelse var i overensstemmelse med proportionalitetsprincippet (præmis 23-24).

Den italienske lovbestemmelse gik imidlertid videre end nødvendigt for at opfylde formålet om at sikre overholdelsen af principperne om ligebehandling og gennemsigtighed, idet lovbestemmelsen også omfattede tilfælde, hvor et indbyrdes kontrolforhold ikke har nogen indflydelse på de pågældende virksomheders adfærd, og idet lovbestemmelsen ikke gav virksomhederne mulighed for at godtgøre, at der ikke forelå reel risiko for krænkelse af principperne om ligebehandling og gennemsigtighed. Dette var i strid med proportionalitetsprincippet (præmis 29-30).

EF-domstolen besvarede herefter spørgsmålet i overensstemmelse med det anførte.

Afgørelsen svarer reelt ganske til EF-domstolens dom af 16. december 2008, Michaniki, om udelukkelsesgrundene i Bygge- og anlægsdirektivet, og dommen henviser også til bl.a. Michaniki-dommen.

Retten i Første Instans' dom af 20. maj 2009, sag T-89/07, VIP Car Solutions mod Parlamentet

Udbyderens oplysning om de samlede pointtal, der ved tilbudsvurderingen var tildelt sagsøgerens tilbud og den valgte tilbudsgivers tilbud, var ikke tilstrækkelig oplysning om det valgte tilbuds karakteristika og relative fordele. Tilbudsprisen i den valgte tilbudsgivers tilbud var blandt dette tilbuds karakteristika og relative fordele, hvorfor udbyderen havde været uberettiget til at nægte at oplyse den

Finansforordningen og Gennemførelsesforordningen indeholder nogle regler om EU-organernes underretning til tilbudsgivere om tildelingsbeslutninger m.m. Disse regler svarer i det væsentlige til de tilsvarende regler i Udbudsdirektivets artikel 41. Bl.a. skal EU-organerne på begæring give forbigåede tilbudsgivere oplysning om det antagne tilbuds karakteristika og relative fordele (tilsvarende Udbudsdirektivets artikel 41, stk. 2, 3. afsnit).

Sagen angik et udbud iværksat af Parlamentet vedrørende persontransport. Tildelingskriteriet var det økonomisk mest fordelagtige bud på grundlag af følgende underkriterier, der vægtedes som angivet: 1. pris (55 %), 2. køretøjer stillet til rådighed, kvantitativt og kvalitativt (30 %), 3. køretøjernes miljøforhold (7 %), 4. social politik over for de anvendte medarbejdere (6 %) og 5. præsentation af tilbuddet (2 %).

Efter tilbuddenes modtagelse besluttede Parlamentet at indgå kontrakt med en af tilbudsgiverne og gav de andre tilbudsgivere underretning herom alene med den begrundelse, at deres tilbud ikke var det økonomisk mest fordelagtige.

En af de forbigåede tilbudsgivere, V, anmodede Parlamentet om oplysning om det valgte tilbuds karakteristika og relative fordele. Efter ar V havde rykket for svar, besvarede Parlamentet anmodningen ved et brev, i hvilket Parlamentet oplyste den valgte tilbudsgivers identitet og desuden blot angav, at det valgte tilbud ved tilbudsvurderingen havde opnået 566 points, hvorimod V's tilbud trods en lidt lavere pris havde opnået 504 points og derved var blevet placeret som nr. 2.

V anmodede derefter Parlamentet om en kopi af den valgte tilbudsgivers tilbud. V begrundede anmodningen med, at V ønskede at få oplysning om den valgte tilbudsgivers tilbudspris. V henviste herved til, at V's tilbudspris var særdeles lav.

Parlamentet afslog denne anmodning med henvisning til en regel i Finansforordningen, hvorefter bl.a. oplysninger, der vil skade offentlige eller private interesser, kan undlades (reglen svarer til Udbudsdirektivets artikel 41, stk. 3). Parlamentet henviste yderligere bl.a. til, at der efter indgåelse af kontrakten med den valgte tilbudsgiver ville blive optaget oplysning om kontrakten i EF-Tidende med angivelse af kontraktprisen.

V anlagde derefter sag ved Retten i Første Instans med påstand om annullation af tildelingsbeslutningen og om erstatning m.m.

V gjorde under retssagen to anbringender gældende, dels at Parlamentets begrundelse for tildelingsbeslutningen ikke var fyldestgørende, dels at Parlamentet havde været uberettiget til at nægte at oplyse den valgte tilbudsgivers tilbudspris.

Efter sagsanlægget redegjorde Parlamentet udførligt over for Retten for tilbudsvurderingen, herunder for, hvorledes der var blevet givet tilbuddene points i relation til de enkelte underkriterier. Fra disse oplysninger, der er gengivet i dommen, kan nævnes:

V's tilbudspris var 31,70 Euro pr. time, og at den valgte tilbudsgivers tilbudspris var 37,50 Euro pr. time. Dette havde ført til, at V's tilbud var blevet tildelt 343,5 points vedrørende underkriterium 1. pris, mens den valgte tilbudsgivers tilbud havde fået tildelt 290,4 points vedrørende dette underkriterium.

Med hensyn til underkriterium 2. køretøjer stillet til rådighed, kvalitativt og kvantitativt, havde Parlamentet foretaget særskilte vurderinger af det kvantitative og det kvalitative, dvs. af de tilbudte køretøjers antal henholdsvis kvalitet. Med hensyn til det kvantitative fik den valgte tilbudsgivers tilbud 120 points og V's tilbud 70 points. Dette skyldtes, at V i modsætning til den valgte tilbudsgiver ikke selv ejede de fleste af de køretøjer, der ville blive stillet til rådighed, men ville leje dem hos et andet selskab. Med hensyn til det kvalitative fik V's tilbud og den valgte tilbudsgivernes tilbud begge 60 points.

Med hensyn til resten af underkriterierne fik V's tilbud med forskellige begrundelser et lavere pointtal end den valgte tilbudsgivers tilbud.

Den anvendte evalueringsmodel forekommer noget kompliceret, og ovenstående refereret har langt fra medtaget enkelthederne i evalueringsmodellen. Til illustration kan nævnes, at pointtildelingen vedrørende underkriterium 1. pris skete ud fra følgende princip:

Der blev givet points efter en skala fra 0 til 10. En pris på 33 Euro pr. time blev anset for rimelig og udløste 6 points. Fx V's tilbud fik herefter tildelt points efter følgende formel: (33/31,7) x 6 x 55 =343,5.

Fra Rettens præmisser kan nævnes:

Ad V's anbringende om, at Parlamentets begrundelse for tildelingsbeslutningen ikke var fyldestgørende:

Parlamentets oplysning over for V om de samlede pointtal, der var blevet tildelt V's tilbud og den valgte tilbudsgivers tilbud, var ikke en oplysning om det antagne tilbuds karakteristika og relative fordele og havde ikke givet V klare og utvetydige oplysninger om Parlamentets begrundelse for tildelingsbeslutningen. Sådanne oplysninger havde ikke mindst været nødvendige som følge af, at prisen vægtede med 55 %. (Præmis 69-71). Parlamentets begrundelse for tildelingsbeslutningen havde således ikke været fyldestgørende (præmis 78).

Ad V's anbringende om, at Parlamentet havde været uberettiget til at nægte at oplyse den valgte tilbudsgivers tilbudspris over for V:

Tilbudsprisen i det valgte tilbud var et af dette tilbuds karakteristika og relative fordele. Parlamentet havde derfor haft pligt til at give V oplysning om den valgte tilbudsgivers tilbudspris, ikke mindst fordi tilbudsprisen vægtede med 55 % (præmis 88). Parlamentet havde endvidere ikke nærmere begrundet et synspunkt om, at oplysningen ville være til skade for den valgte tilbudsgiver, og Parlamentet havde da også henvist til, at tilbudsprisen var blevet offentliggjort i angivelsen i EF-Tidende om kontraktsindgåelsen (præmis 91). Parlamentet havde således været uberettiget til at nægte at oplyse den valgte tilbudsgivers tilbudspris over for V (præmis 93).

Retten annullerede Parlamentets beslutning om at indgå kontrakt med den valgte tilbudsgiver (præmis 94). V's øvrige påstande blev derimod ikke taget til følge (præmis 95-112).

Følgende bemærkes:

En identisk sag for Klagenævnet for Udbud ville formentlig være blevet koncentreret om eller i hvert fald have medinddraget spørgsmålet, om udbyderen havde overtrådt principperne om ligebehandling og gennemsigtighed ved tilbudsvurderingen. Fx forekommer det umiddelbart noget tvivlsomt, om udbyderen var berettiget til at lægge vægt på, at de fleste af V's køretøjer var lejede.

At dommen ikke forholder sig til disse spørgsmål, hænger formentlig sammen med Rettens procesform.

Retten i Første Instans' kendelse af 2. juni 2009, sag T-254/08, AVLUX mod Parlamentet

Om en udbyders ret til at annullere et udbud og om retsvirkningerne af en sådan annullation

Parlamentet iværksatte et udbud vedrørende en tjenesteydelse. Efter tilbuddenes modtagelse besluttede Parlamentet at indgå kontrakt med en af tilbudsgiverne. En anden tilbudsgiver, A, protesterede over for Parlamentet mod tildelingsbeslutningen, og der var herefter en korrespondance mellem A og Parlamentet. Under korrespondancen anlagde A sag mod Parlamentet med påstand om annullation af tildelingsbeslutningen.

Parlamentet annullerede derefter udbuddet tilsyneladende med begrundelse, at ingen af tilbuddene opfyldte udbudsbetingelsernes krav. I forbindelse hermed nedlagde Parlamentet for Retten påstand om, at Retten traf afgørelse om ikke at tage stilling[1] til A's påstand.

A overlod det til Rettens afgørelse, om Retten skulle følge Parlamentets påstand, men påstod sig tillagt sagsomkostninger og nedlagde desuden en påstand om, at Retten skulle forbeholde A enhver rettighed i sagens anledning.

Retten henviste til en regel i Finansforordningen, hvorefter en ordregivende myndighed kan undlade at indgå kontrakt i henhold til et udbud eller kan annullere et udbud, uden at tilbudsgivere eller ansøgere om prækvalifikation kan fremsætte erstatningskrav i den anledning (præmis 23).

[1] Dvs. at Retten afsagde en »non-lieu à statuer«, dvs. »afgørelse om ikke at statuere«. Der er tale om en særlig afgørelsesform, der synes overtaget fra fransk procesret, og som ikke er det samme som afvisning. Klagenævnet for Udbud bruger efter omstændighederne reelt en tilsvarende afgørelsesform, for så vidt som Klagenævnet i en del kendelser har udtalt, at Klagenævnet ikke tog stilling til den eller den påstand.

Retten henviste desuden til forskellige tidligere afgørelser, herunder EF-domstolens kendelse af 16. oktober 2003 i sag C-244/02, Kauppatalo Hansel, hvor EF-domstolen i overensstemmelse med nogle tidligere afgørelser bl.a. udtalte, at det ikke er en betingelse for en udbyders annullation af et udbud, at der er tale om et undtagelsestilfælde, eller at der foreligger vægtige grunde (samme præmis). Retten henviste videre bl.a. til, at en annullation af Parlamentets tildelingsbeslutning ville være uden retsvirkning som følge af Parlamentets annullation af udbuddet (præmis 25).

Retten traf herefter afgørelse om ikke at tage stilling til A's påstand (præmis 29), men pålagde Parlamentet at betale sagens omkostninger (præmis 33). Retten afviste A's påstand om at forbeholde A enhver rettighed i sagens anledning (præmis 27-28).

EF-domstolens dom af 4. juni 2009, sag C-250/07, Kommissionen mod Grækenland

En undtagelsesbestemmelse i det tidligere forsyningsvirksomhedsdirektiv om fritagelse for udbudspligten, hvis alle tilbud er uantagelige, skulle fortolkes snævert, og bevisbyrden påhviler den, der påberåber sig en sådan undtagelsesbestemmelse. Bestemmelsens betingelser var imidlertid opfyldt i det foreliggende tilfælde. Ordregiverens meddelelse af begrundelsen for afvisning af et tilbud efter ca. to måneder opfyldte ikke et krav i direktivet om, at begrundelsen skulle gives hurtigst muligt

Efter artikel 20, stk. 2, a, i det tidligere forsyningsvirksomhedsdirektiv 93/38 kunne en ordregiver undlade at foretage udbud, herunder hvis der under et udbud ikke var afgivet noget antageligt bud, under forudsætning af, at de oprindelige kontraktsbetingelser ikke ændredes væsentligt. (Artikel 20, stk. 2, indeholdt også forskellige andre undtagelsesbestemmelser om tilfælde, hvor udbud kunne undlades. Den tilsvarende regel i det nugældende forsyningsvirksomhedsdirektiv er artikel 40, stk. 3).

Efter artikel 41, stk. 4, i forsyningsvirksomhedsdirektivet 93/38 skulle ordregiverne hurtigst muligt efter skriftlig anmodning give en begrundelse for forkastelse af et tilbud m.m. (Den tilsvarende bestemmelse i det nugældende forsyningsvirksomhedsdirektiv er artikel 49, stk. 2, der er noget anderledes udformet, og som fastsætter en frist på 15 dage fra den skriftlige anmodning).

Sagen angik en græsk ordregivende myndigheds EU-udbud i henhold til det tidligere forsyningsvirksomhedsdirektiv 93/38 vedrørende etablering af to elektricitetsværker. Der indkom tilbud fra 5 tilbudsgivere. Ordregiveren anså alle tilbud som uantagelige, da ingen af dem var i overensstemmelse med kravene i udbudsbetingelserne. Ordregiveren iværksatte derfor en ny tilbudsindhentning, der ikke havde karakter af tilbudsindhentning under et EU-udbud.

På et tidspunkt derefter meddelte ordregiveren uden begrundelse en af tilbudsgiverne, at dennes tilbud var blevet afvist. Knap to måneder senere og efter flere henvendelser fra tilbudsgiveren sendte ordregiveren tilbudsgiveren en skriftlig begrundelse for afvisningen.

Den omtalte tilbudsgiver indbragte sagen for en domstol, men fik ikke medhold, hvorefter ordregiveren indgik kontrakt med en anden af tilbudsgiverne.

Den først omtalte tilbudsgiver klagede til Kommissionen, der anlagde sag mod Grækenland ved EF-domstolen. Kommissionen gjorde gælden-

de, at følgende forhold var en overtrædelse af det tidligere forsyningsvirksomhedsdirektiv 93/38:

1) De indkomne tilbud i henhold til EU-udbuddet kunne ikke karakteriseres som uantagelige, og ordregiveren havde derfor ved at indhente nye tilbud overtrådt direktivets artikel 20, stk. 2, a.

2) De oprindelige kontraktsbetingelser var blevet ændret væsentligt, hvilket var en yderligere overtrædelse af den nævnte bestemmelse i direktivet.

3) Ordregiveren havde yderligere overtrådt en anden af undtagelsesbestemmelserne i artikel 20, stk. 2.

4) Ordregiverens meddelelse af begrundelsen for afvisningen af den omtalte tilbudsgivers tilbud var ikke blevet sendt hurtigst muligt, hvorved ordregiveren havde overtrådt direktivets artikel 41, stk. 4.

EF-domstolens udtalelser er yderst udførlige, men kan kort gengives således:

Ad 1: Artikel 20, stk. 2, i det tidligere forsyningsvirksomhed 93/38 skal som en undtagelsesbestemmelse fortolkes snævert, og bevisbyrden påhviler den part, der påberåber sig bestemmelsen (præmis 34-39). Af nærmere angivne grunde havde ordregiveren imidlertid været berettiget til at anse tilbuddene i henhold til EU-udbuddet for uantagelige (præmis 41-50).

Ad 2: Af nærmere angivne grunde var de oprindelige kontraktsbetingelser ikke blevet ændret væsentligt (præmis 51-58), og Kommissionen havde herefter ikke godtgjort, at artikel 20, stk. 2, a var blevet overtrådt (præmis 59).

Ad 3: Grækenland havde ikke påberåbt sig den pågældende undtagelsesbestemmelse, hvorfor Kommissionen ikke kunne påberåbe sig, at den var overtrådt (præmis 60-62).

Ad 4: Da forsyningsvirksomhedsdirektivet 93/38 ikke angav en bestemt frist for ordregiverens oplysning om begrundelse m.m., afhang det af en konkret vurdering, om en oplysning var sendt »hurtigst muligt«. Der var imidlertid ikke fremkommet konkrete oplysninger, der kunne begrunde, at ordregiveren først havde givet begrundelsen efter 2 måneder. (Præmis 64-72).

Kommissionen fik således medhold i punkt 4, men fik ikke medhold i punkt 1-3.

Det fremgår ikke ganske, hvordan udtalelsen i præmis 59, der synes at forudsætte en bevisbyrde hos Kommissionen, skal forstås i forhold til udtalelsen i præmis 34 om, at bevisbyrden ligger hos den, der påberåber sig undtagelsesbestemmelsen i artikel 20, stk. 2.

Den danske udgave af dommen er på visse punkter inkonsistent, hvorfor referatet til dels bygger på den franske udgave.

EF-domstolens dom af 9. juni 2009, sag C-480/06, Kommissionen mod Tyskland

Nogle offentlige myndigheder kunne uden EU-udbud indgå en aftale om forbrænding af renovation. Et samarbejde mellem offentlige myndigheder er ikke i strid med udbudsreglerne, når samarbejdet kun varetager offentlige formål under overholdelse af ligebehandlingsprincippet, således at ingen privat virksomhed får en konkurrencefordel

Dommens fremstilling af sagens faktum forekommer noget lapidarisk, men faktum kan tilsyneladende gengives således:

I sidste halvdel af 1990'erne blev der projekteret og opført et nyt fjernvarmeværk i Hamburg-distriktet Rugenberger Damm. Fjernvarmeværket er et selvstændigt selskab, der ifølge dets websted på Internettet har navnet »MVR Müllvervaltung Rugenberger Damm Gmbh & Co.KG«.

(www.mvr-hh.de/Muellverbrennung-in-Hamburg.53.0.html).

Projekteringen og opførelsen blev tilsyneladende foretaget af Hamburg Kommune sammen med nogle private selskaber. I hvert fald ejes fjernvarmeværket af Hamburg Kommune sammen med nogle selskaber. I dommens præmis 36 er således angivet, at fjernvarmeværkets kapital delvis er privat, og ifølge fjenvarmeværkets websted ejes det af Hamburg Kommune med 25 %, Vattenfall Europe med 55 % og EWE Aktiengesellschaft (et tysk aktieselskab) med 20 %.

(www.mvr-hh.de/Organisation-und-Beteiligungen.51.0.html).

Fjernvarmeværkets virksomhed består i produktion af fjervarme ved forbrænding af renovation m.m.

(www.mvr-hh.de/Unsere-Aufgaben.50.0.html).

Fjernvarmeværket blev projekteret med henblik på, at det ikke alene skal aftage og forbrænde renovation fra Hamburg Kommune, men at det også skal også skal aftage og forbrænde renovation fra 4 nærmere angivne tilstødende »Landkreise« (dvs. landkredse, svarer formentlig nogenlunde til de tidligere danske amter). Som følge heraf blev der i forbindelse med projekteringen indgået en aftale mellem Hamburg Kommune og de 4 Landkreise. Denne aftale går tilsyneladende i hovedtræk ud på følgende:

Fjernvarmeværket aftager renovation fra de 4 Landkreise, der betaler for forbrændingen af renovationen efter fastsatte takster. De 4 Landkreise aftager slagger fra fjernvarmeværket til egen deponering i forhold til den renovationsmængde, som de har leveret til fjernvarmeværket. Tilsyneladende har de 4 Landkreise alene kontraktsforhold til Hamburg Kommune, der repræsenterer dem over for fjernvarmeværket, således at de ikke har noget kontraktsforhold til fjernvarmeværket. Bl.a. sker de 4 Landkreises betaling for forbrændingen af deres renovation til Hamburg Kommune, der står for viderebetaling til fjernvarmeværket. De 4 Landkreise stiller endvidere renovationsmateriel til rådighed for Hamburg Kommune i et vist omfang.

Hamburg Kommune har (naturligvis) en aftale med fjernvarmeværket, og ovenstående kan formentlig derfor udtrykkes således: Det er kun Hamburg Kommune, der er kontraktspart i forhold til fjernvarmeværket. De 4 Landkreise er derimod alene kontraktsparter i forhold til Hamburg Kommune.

Sagen var anlagt af Kommissionen, idet det efter Kommissionens opfattelse var en overtrædelse af det dagældende tjenesteydelsesdirektiv 92/50, at aftalen mellem de 4 Landkreise og Hamburg Kommune var indgået uden forudgående EU-udbud foretaget af de 4 Landkreise.

Kommissionen fik ikke medhold.

EF-domstolens udtalelser kan ikke gengives kort. Fra udtalelserne kan nævnes:

Kommissionens sagsanlæg angik alene aftalen mellem Hamburg Kommune og de 4 Landkreise og ikke aftalen mellem Hamburg Kommune og fjernvarmeværket (præmis 31). Der er tale om et samarbejde mellem offentlige myndigheder til varetagelse af en public service opgave, der er knyttet til overholdelsen af et direktiv om affaldshåndtering (præ-

mis 37). Aftalen mellem Hamburg Kommune og de 4 Landkreise blev udelukkende indgået af offentlige myndigheder uden at foregribe udbudspligtige ydelser i forbindelse med fjernvarmeværkets opførelse og drift, og offentlige myndigheder kan udføre deres public service-opgaver i samarbejde med andre offentlige myndigheder (præmis 44-45). Det var uden betydning, at Hamburg Kommune og de 4 Landkreise ikke havde etableret et særligt offentligretligt organ til udførelsen af de omhandlede public service-opgaver, hvilket efter Kommissionens opfattelse havde været tilstrækkeligt, da fællesskabsretten ikke forpligter de offentlige myndigheder til at anvende en særlig retlig form ved udførelsen af deres public service-opgaver (præmis 46-47). Et samarbejde mellem offentlige myndigheder er endvidere ikke i strid med udbudsreglerne, når samarbejdet kun varetager offentlige formål under overholdelse af ligebehandlingsprincippet, således at ingen privat virksomhed får en konkurrencefordel, og aftalen mellem Hamburg Kommune og de 4 Landkreise har ikke til formål at omgå udbudsreglerne (præmis 47-48). Ud fra en samlet vurdering skulle Tyskland herefter frifindes (præmis 49).

Hvis man skal sætte aftalen mellem Hamburg Kommune og de 4 Landkreise i relation til de nugældende udbudsregler, forekommer det nærliggende at karakterisere Hamburg Kommune som en »indkøbscentral« i forhold til de 4 Landkreise, jf. herved definitionen af indkøbscentraler i Udbudsdirektivets artikel 1, stk. 10. Klagenævnet er dog ikke bekendt med, om Tyskland har implementeret Udbudsdirektivets regler om indkøbscentraler.

Under alle omstændigheder er afgørelsen tydeligvis udtryk for den velvilje over for fælleskommunale samarbejder og andre samarbejder mellem offentlige myndigheder, der har fundet udtryk i EF-domstolens dom af 13. november 2008, Coditel Brabrant, til hvilken der også henvises flere steder i dommen.

Forholdet mellem udbudsreglerne og Hamburg Kommunes kontrakt med fjernvarmeværket er et spørgsmål for sig. Som nævnt henviste EF-domstolen udtrykkeligt til, at dette spørgsmål ikke var omfattet af sagen.

Den danske udgave af dommen er på flere punkter vanskeligt forståelig, hvorfor referatet af dommen til dels har bygget på de franske og tyske udgaver.

EF-domstolens dom af 11. juni 2009, sag C-327/08, Kommissionen mod Frankrig

En national regel om, at en 10-dages frist mellem ordregiverens meddelelse om tildelingsbeslutningen og kontraktsindgåelsen i hastetilfælde kan forkortes i forhold til situationens krav, var ikke i strid med kontroldirektiverne som affattet før ændringerne ved direktiv 2007/66. En national regel om, at klage først kan indgives på et nærmere angivet tidspunkt efter forhåndsorientering til ordregiveren om, at der vil blive klaget, var derimod i strid med kontroldirektiverne

Den franske lovgivning om offentlige kontrakter indeholder bl.a. følgende bestemmelser:

1) Efter en ordregivende myndigheds underretning til tilbudsgiverne om tildelingsbeslutningen skal der gå mindst 10 dage før ordregiverens indgåelse af kontrakt med den valgte tilbudsgiver. I hastetilfælde kan 10-dages fristen dog forkortes i forhold til situationens krav.

2) En virksomhed, der vil klage til et klageorgan over en ordregivende myndighed, skal forhåndsorientere den ordregivende myndighed om, at der vil blive indgivet klage. Den ordregivende myndighed har herefter 10 dage til at afgive et svar, og klage kan først indgives, når den ordregivende myndighed har svaret, eller efter udløbet af 10 dages-fristen, hvis den ordregivende myndighed ikke har svaret forinden.

Sagen var anlagt af Kommissionen, der gjorde gældende, at muligheden for i hastetilfælde at forkorte 10-dages fristen for kontraktsindgåelsen, jf. punkt 1, samt den under punkt 2 nævnte regel er i strid med kontroldirektiverne, således som de er affattet før ændringerne ved direktiv 2007/66.

Frankrig gjorde gældende, at sagsanlægget var uden mening, da direktiv 2007/66 netop tager sigte på at regulere spørgsmål som de foreliggende, og da dette direktiv er under implementering i Frankrig. Frankrig fik imidlertid ikke medhold heri, idet EF-domstolen henviste til sin faste praksis, hvorefter en medlemsstats manglende overholdelse af EU-retten skal bedømmes efter forholdene på tidspunktet for udløbet af fristen i Kommissionens begrundede udtalelse (præmis 22-23). Frankrig gjorde desuden gældende, at selvom Kommissionen fik medhold, ville sagsanlægget være uden praktisk betydning som følge af, at Frankrigs efterkommelse af dommen kun kunne ske som et led i implementeringen af direktiv 2007/66. Frankrig fik heller ikke medhold heri, idet EF-domstolen henviste til sin faste praksis, hvorefter det tilkommer Kommissionen at vurdere hensigtsmæssigheden af et sagsanlæg mod en medlemsstat (præmis 26).

EF-domstolen udtalte endvidere (noget sammentrængt gengivet):

Ad den franske regel om, at 10-dages fristen for kontraktsindgåelsen kan forkortes i hastetilfælde:

Kontroldirektiverne som affattet før ændringen ved direktiv 2007/66 stiller ikke krav om, at der skal gå et bestemt tidsrum mellem ordregiverens meddelelse om tildelingsbeslutningen og kontraktsindgåelsen, og der kan således ikke af kontroldirektiverne udledes en regel om, at der skal gå 10 dage. En regel om, at der skal gå et bestemt tidsrum, er først indført ved direktiv 2007/66. (Præmis 36-38). Derimod har EF-domstolen i sin praksis fastlagt, at der skal gå en rimelig tid mellem meddelelsen om tildelingsbeslutningen og kontraktsindgåelsen (præmis 41). Den omhandlede franske regel går imidlertid kun ud på, at fristen i hastetilfælde kan forkortes i forhold til situationens krav. Dette er ensbetydende med, at forkortelsen af fristen skal ske i overensstemmelse med proportionalitetsprincippet, og tilbudsgiverne skal stadig have en rimelig frist til at indgive klage (præmis 42-44). Kommissionen havde herefter ikke påvist, at den omhandlede franske regel var i strid med kontroldirektiverne, hvorfor Kommissionen ikke fik medhold på det omhandlede punkt.

EF-domstolene henviste yderligere til, at kontroldirektiverne som affattet før direktiv 2007/66 er ikke til hinder for, at fristen forkortes i hastetilfælde, hvilket bestyrkes af, at direktiv 2007/66 i visse tilfælde ikke stiller krav om, at der skal gå et bestemt tidsrum, jf. punkt 8 i præamblen til dette direktiv (præmis 39-40).

Ad reglen om, at klage først kan indgives efter, at ordregiveren har besvaret en forhåndsorientering om, at der vil blive klaget, eller efter 10 dage efter forhåndsorienteringen:

Denne regel gør det umuligt for en klager at klage til et klageorgan før kontraktsindgåelsen med begæring om opsættende virkning (»référé précontractuel«) i tilfælde, hvor den ordregivende myndighed først har svaret på forhåndsorienteringen efter 10 dage, og hvor kontrakten er indgået i mellemtiden (præmis 55). Reglen bevirker således, at der i visse tilfælde ikke reelt ikke er nogen frist mellem meddelelsen om tildelingsbeslutningen og kontraktsindgåelsen med deraf følgende afskæring af muligheden for at klage med begæring om opsættende virkning før kontraktsindgåelsen (præmis 57). Reglen var derfor i strid med kontroldirektiverne (præmis 59-60).

Følgende bemærkes:

EF-domstolens begrundelse for, at den omtalte franske regel er i strid med kontroldirektiverne, kan måske umiddelbart virke lidt svært at forstå. Det centrale i sammenhængen er imidlertid, at ordregiverens 10-dages frist til at svare på en forhåndsorientering om, at der vil blive klaget, ikke medfører nogen udsættelse af 10-dages fristen for ordregiverens indgåelse af kontrakt med den valgte tilbudsgiver, hvilket også blev påpeget af Kommissionen.

Forholdet kan illustreres med et eksempel: Ordregiveren giver den 1. maj tilbudsgiverne underretning om tildelingsbeslutningen. En forbigået tilbudsgiver orienterer den 3. maj ordregiveren om, at tilbudsgiveren vil klage til et klageorgan. Ordregiveren svarer ikke på forhåndsorienteringen, og den forbigåede tilbudsgiver kan derfor først klage til klageorganet den 13. maj. Fristen for ordregiverens indgåelse af kontrakt med den valgte tilbudsgiver udløber imidlertid den 11. maj, og ved at indgå kontrakten på denne dag afskærer ordregiveren den forbigåede tilbudsgiver fra at klage før kontraktsindgåelsen, idet den forbigåede tilbudsgiver som nævnt først kan klage den 13. maj.

Retten i Første Instans' kendelse af 2. juli 2009 i sag T-279/06, Evropaïki Dynamiki mod ECB

Retten i Første Instans har ikke kompetence til at tage stilling til, om en national regel strider mod EU-retten. En forbigået tilbudsgiver havde ikke retlig interesse i at klage over tildelingsbeslutningen, da tilbudsgiverens tilbud ikke kunne komme i betragtning, fordi det ikke opfyldte et krav i udbudsbetingelserne

Referatet omfatter kun de dele af kendelsen, der skønnes at have almen udbudsretlig interesse.

Den Europæiske Centralbank (ECB), der er en EU-institution beliggende i Frankfurt, iværksatte et begrænset EU-udbud vedrørende indgåelse af rammeaftaler om en it-ydelse. Tildelingskriteriet var tilsyneladende det økonomisk mest fordelagtige tilbud. I udbudsbetingelserne var angivet, at tilbudsgiverne senest ved kontraktindgåelse skulle have en tysk autorisation til midlertidig beskæftigelse af arbejdskraft i henhold til et tysk lovkrav herom.

Der indkom tilbud fra nogle prækvalificerede virksomheder, herunder et græsk konsortium, E. Efter at udbyderen havde besluttet at indgå kontrakter med to andre tilbudsgivere, anlagde E sag mod udbyderen ved Retten i Første Instans med påstand om annullation af tildelingsbeslutningen.

I mellemtiden havde E konstateret, at E ikke kunne opnå den omtalte tyske autorisation, hvilket E gav oplysning om i skriftvekslingen for Ret-

ten. Dette skyldtes efter det foreliggende, at det var en betingelse for at få den tyske autorisation, at E havde en tilsvarende autorisation i Grækenland, hvilket E som følge af den græske lovgivning ikke kunne opnå.

Udbyderen påstod sagen afvist med henvisning til, at E, som følge af, at E ikke kunne opnå den tyske autorisation, ikke havde mulighed for at få tildelt en kontrakt og derfor ikke havde retlig interesse i sagsanlægget. Retten gav imidlertid ikke udbyderen medhold i, at sagen som sådan skulle afvises med denne begrundelse og henviste herved bl.a. til artikel 1, stk. 3, i første kontroldirektiv, hvorefter der skal kunne klages af enhver, der har lidt eller vil kunne lide skade som følge af en påstået overtrædelse (præmis 41 og 44).

E gjorde bl.a. gældende at det tyske lovkrav om autorisation var i strid med Traktatens artikel 49 EF om fri udveksling af tjenesteydelser. Retten afviste imidlertid at tage stilling til dette anbringende med henvisning til, at Retten ikke har kompetence til at tage stilling til, om en national regel strider mod fællesskabsretten, og at spørgsmål herom i givet fald må afgøres ved sagsanlæg ved en national domstol med eventuel forelæggelse for EF-domstolen (præmis 82).

E gjorde desuden bl.a. gældende, at udbudsbetingelsernes krav om tysk autorisation stred mod udbudsreglerne på forskellige punkter, men fik ikke medhold heri. Retten udtalte således bl.a., at kravet ikke som hævdet af E stred mod gennemsigtighedsprincippet, da det var gældende for alle ansøgere om prækvalifikation (præmis 92).

E gjorde endvidere gældende, at udbyderens *tildelingsbeslutning* stred mod udbudsreglerne på en længere række forskellige punkter. Retten afviste imidlertid at tage stilling til E's anbringender herom med henvisning til, at E ikke havde retlig interesse i annullation af tildelingsbeslutningen som følge af, at E på grund af den manglende tyske autorisation ikke havde mulighed for at få tildelt en kontrakt (præmis 98-99).

Sagen blev herefter afgjort dels ved afvisning, dels ved frifindelse (»le recours doit être rejeté en partie comme…irrecevable et en partie comme…non fondé«, præmis 101).

Retten i Første Instans' dom af 9. september 2009, sag T-437/05, Brink's Security Luxembourg mod Kommissionen

Klage over, at den valgte tilbudsgiver ikke overholdt udbudsbetingelsernes krav, ikke taget til følge, da klagen angik den valgte tilbudsgivers overholdelse af kontrakten med udbyderen og ikke udbyderens tildelingsbeslutning. Om betingelserne for, at der foreligger virksomhedsoverdragelse ved udbud af tjenesteydelser. Ligebehandlingsprincippet har til formål at sikre en sund konkurrence, og gennemsigtighedsprincippet har til formål at undgå favorisering, Udbyderens oplysning til en forbigået tilbudsgiver om hvem, der var valgt som tilbudsgiver, og om de points, som den forbigåede tilbudsgiver og den valgte tilbudsgiver havde fået ved tilbudsvurderingen, var tilstrækkelig begrundelse for tildelingsbeslutningen. En tilbudsgiver behøver ikke have de nødvendige medarbejdere ved tilbuddets afgivelse. Udbyderen havde pligt til efter anmodning at give en forbigået tilbudsgiver oplysning om hvem, der havde foretaget tilbudsvurderingen. Om betingelserne for erstatning

Denne dom er omfattende og beskæftiger sig med en lang række forskellige spørgsmål. Den refereres kun, i det omfang den skønnes at have nogenlunde almen udbudsretlig interesse.

Sagen drejede sig om et udbud, der var iværksat af Kommissionen vedrørende udførelse af vagttjeneste. Sagsøgeren var en virksomhed, der hidtil havde udført ydelsen, men som ikke havde fået tildelt kontrakten i henhold til udbuddet. Sagsøgeren fremsatte en række forskellige anbringender. Af disse anbringender og Rettens stillingtagen til dem kan refereres (Klagenævnets litrering):

Anbringende 1: Den valgte tilbudsgiver havde ikke overholdt et krav i udbudsbetingelserne vedrørende medarbejdernes kvalifikationer:

Ikke taget til følge, da lovligheden af en retsakt skal bedømmes på grundlag af forholdene på tidspunktet for retsakten, og da anbringendet angik gennemførelsen af kontrakten med den valgte tilbudsgiver (præmis 42-43).

Anbringende 2: Kommissionen kunne ikke tage den valgte tilbudsgivers tilbud i betragtning, da sagen var omfattet af direktivet om virksomhedsoverdragelse og den luxembourgske lov, der har implementeret direktivet, og da den valgte tilbudsgiver havde tilkendegivet, at tilbudsgiveren kun ville overtage en del af de medarbejdere, som sagsøgeren havde anvendt ved udførelsen af den udbudte ydelse:

Ikke taget til følge, da der ikke forelå virksomhedsoverdragelse (præmis 89-99). Bl.a. udtalt: At den tjenesteydelse, som udføres af den gamle og den nye tjenesteyder, er den samme, er ikke i sig selv tilstrækkeligt til, at der er tale om virksomhedsoverdragelse (»overførsel af en økonomisk enhed«, præmis 92), og Kommissionen kunne ikke på tidspunkterne for udbuddet og tildelingsbeslutningen vide, om betingelserne for, at der var tale om virksomhedsoverdragelse, var opfyldt (præmis 94).

Anbringende 3: Udbudsbetingelserne skulle have indeholdt en fortegnelse over de medarbejdere, som sagsøgeren brugte ved udførelsen af den udbudte ydelse, af hensyn til den valgte tilbudsgivers forpligtelse til at overtage disse medarbejdere efter reglerne om virksomhedsoverdragelse:

Ikke taget til følge, da det ikke lå fast, at reglerne om virksomhedsoverdragelse skulle anvendes, og da det i udbudsbetingelserne var bestemt, at den valgte tilbudsgiver skulle overholde lovgivningen i Luxembourg (præmis 104-105).

Anbringende 4: Kommissionen havde overtrådt ligebehandlingsprincippet til fordel for de andre tilbudsgivere ved at fastsætte i udbudsbetingelserne, at de medarbejdere, der udførte visse dele af den udbudte opgave, skulle have mindst et års erhvervserfaring, idet de tilsvarende medarbejdere hos sagsøgeren havde længere erhvervserfaring:

Ikke taget til følge. Bl.a. udtalt: Ligebehandlingsprincippet har til formål at fremme en sund og effektiv konkurrence ved at give alle bydende lige chancer ved udformningen af deres tilbud (præmis 114). Gennemsigtighedsprincippet, der følger af ligebehandlingsprincippet, har i det væsentlige til formål at sikre, at der ikke er risiko for favorisering og vilkårlighed (præmis 115). Kravet om et års erhvervserfaring var gældende for alle tilbudsgivere, og kravet var formuleret klart, præcist og utvetydigt og var passende (præmis 118-121). Kommissionen ville have begrænset udviklingen af en effektiv konkurrence, hvis den havde krævet mere end et års erhvervserfaring (præmis 122). Da der ikke var tale om virksomhedsoverdragelse, havde Kommissionen endvidere ikke haft pligt til at foreskrive, at sagsøgerens medarbejdere skulle overtages, og Kommissionen kan ikke pålægge en virksomhed at ansætte personer, som virksomheden ikke selv har valgt (præmis 123).

Anbringende 5: Som følge af forløbet i en forudgående fusionssag for Kommissionen var den valgte tilbudsgiver i besiddelse af forskellige oplysninger om sagsøgerens forhold, hvilket var i strid med ligebehandlingsprincippet:

Ikke taget til følge, da forholdet ikke var bevist (præmis 136).

Anbringende 6: Kommissionen havde ikke givet sagsøgeren tilstrækkelig begrundelse for ikke at antage sagsøgerens tilbud:

Ikke taget til følge. Bl.a. henvist til følgende: En begrundelse skal klart og utvetydigt angive de betragtninger, der er lagt til grund, således at den kompetente ret kan udøve sin prøvelsesret (præmis 158). Kommissionen havde imidlertid opfyldt sin begrundelsespligt ved at give sagsøgeren oplysning om den valgte tilbudsgiver og om de points, der ved tilbudsvurderingen var blevet tildelt sagsøgerens tilbud og den valgte tilbudsgivers tilbud (præmis 162-175).

Anbringende 7: Kommissionen kunne ikke tage den valgte tilbudsgivers tilbud i betragtning, da den valgte tilbudsgiver ikke ved afgivelsen af sit tilbud tidspunkt havde dokumenteret, at tilbudsgiveren havde de nødvendige medarbejdere:

Ikke taget til følge med en udførlig begrundelse (præmis 193-206). Bl.a. udtalt, at et krav om, at tilbudsgiverne ved tilbuddets afgivelse råder over de nødvendige medarbejdere, ville give den hidtidige tjenesteyder en fordel (præmis 198).

Anbringende 8: Kommissionen havde overtrådt reglerne om aktindsigt ved at nægte at give sagsøgeren oplysning om medlemmerne af det bedømmelsesudvalg, der havde foretaget tilbudsvurderingen:

Taget til følge med henvisning til, oplysningen ikke ville have krænket de pågældendes privatliv (præmis 217).

Anbringende 9: Der var familieforbindelse mellem et medlem af bedømmelsesudvalget og en ansat hos den valgte tilbudsgiver:

Ikke taget til følge, da anbringendet ikke var understøttet af det mindste bevis (præmis 223).

Retten frifandt Kommissionen for en erstatningspåstand og udtalte som begrundelse herfor bl.a.: Betingelserne for at pålægge en fællesskabsinstitution at betale erstatning, er, at institutionen har handlet retsstridigt, at der foreligger et virkeligt tab, og at der er årsagssammenhæng (præmis 240). Disse betingelser var ikke opfyldt, da Kommissionen kun havde handlet retsstridigt ved nægtelsen af oplysning om bedømmelsesudvalgets medlemmer, og da der ikke var årsagsforbindelse mellem denne overtrædelse og sagsøgerens hævdede tab (præmis 243-244).

EF-domstolens dom af 10. september 2009, sag C-206/08, Eurawasser
Begrebet tjenesteydelseskoncession er det samme i Udbudsdirektivet og Forsyningsvirksomhedsdirektivet. Det er tilstrækkeligt for at anse en kontrakt for en tjenesteydelseskoncession i henhold til Forsyningsvirksomhedsdirektivet, at ordregiveren ikke betaler vederlag til tjenesteyderen, og at tjenesteyderen får vederlaget fra tredjemand, under forudsætning af, at ordregiverens driftsrisiko eller en væsentlig del af den overføres til tjenesteyderen, også selvom denne risiko er meget begrænset som følge af offentlig regulering

Ifølge Udbudsdirektivets artikel 17 og Forsyningsvirksomhedsdirektivets artikel 18 gælder (kort gengivet) udbudspligten ikke for tildeling af tjenesteydelseskoncessioner. Sådanne koncessioner er i Udbudsdirektivets artikel 1, stk. 4, og Forsyningsvirksomhedsdirektivets artikel 1, stk. 3, litra b, defineret som kontrakter om tjenesteydelser, hvor vederlaget består i retten til at udnytte tjenesteydelsen eller af denne ret sammen med en pris. Ifølge flere tilkendegivelser fra EF-domstolen er det centrale i begrebet tjenesteydelseskoncession, at det er tjenesteyderen og ikke ordregiveren, der har den økonomiske risiko vedrørende den tjenesteydelse, der er tale om. Se domstolens domme af 18. oktober 2005 i sag C-458/03, Parking Brixen, og 18. juli 2007 i sag C-382/05, Kommissionen mod Italien.

Den her refererede dom angik spørgsmålet, om en tjenesteyder havde den økonomiske risiko i et sådant omfang, at der var tale om en tjenesteydelseskoncession. Sagen drejede sig nærmere om følgende:

En tysk ordregivende myndighed, der stod for vand- og kloakforsyningen i et område, iværksatte et EU-udbud vedrørende en tjenesteydelseskoncession bestående i driften af vand- og kloakforsyningen i en 20-årig periode. Af udbudsbekendtgørelsen og/eller udbudsbetingelserne fremgik: Koncessionshaveren skulle levere ydelserne til forbrugerne i henhold til kontrakter mellem koncessionshaveren og forbrugerne. Forbrugerne havde principielt pligt til at tilslutte sig den vand- og kloakforsyning, der var tale om, og koncessionshaveren skulle opkræve vederlaget hos forbrugerne i henhold til nogle takster, der var fastsat af det offentlige. Koncessionshaveren skulle leje de tekniske installationer af ordregiveren.

En virksomhed klagede til en klageorgan og gjorde gældende, at der ikke var tale om en tjenesteydelseskoncession, og at udbuddet derfor skulle gennemføres som et almindeligt udbud vedrørende en udbudspligtig tjenesteydelse. Klageorganet gav klageren medhold. Udbyderen indbragte sagen for en ankeinstans, der forelagde sagen for EF-domstolen med nogle spørgsmål. Disse spørgsmål sigtede i deres kerne til, om tjenesteyderen skulle anses for at have en sådan økonomisk risiko, at der var tale om en tjenesteydelseskoncession, også selvom tjenesteyderens økonomiske risiko ville blive meget begrænset som følge af forbrugernes tilslutningspligt og de faste takster.

Fra EF-domstolens udtalelser kan nævnes (af overskuelighedsgrunde omformuleret i mindre omfang):

Begrebet tjenesteydelseskoncession skal forstås på samme måde i Udbudsdirektivet og Forsyningsvirksomhedsdirektivet (præmis 43).

EF-domstolen foretog i præmis 49-59 en gennemgang af begrebet tjenesteydelseskoncession og af sin egen praksis med hensyn til, hvornår der foreligger en tjenesteydelseskoncession.

EF-domstolen tog i præmis 70 afstand fra et synspunkt fra Kommissionen, hvorefter den risiko, der overføres fra ordregiveren til tjenesteyderen, skal være væsentlig, for at der er tale om en tjenesteydelseskoncession. EF-domstolen udtalte videre:

Visse sektorer, navnlig sektorer vedrørende almennyttige aktiviteter som vand- og kloakforsyning, er reguleret i et omfang, der kan indebære en begrænsning af den økonomiske risiko, og den offentlige regulering letter kontrollen med udførelsen af en tjenesteydelse inden for sådanne områder og reducerer de faktorer, der kan skade gennemsigtigheden og fordreje konkurrencen (præmis 72-73). Ordregivende myndigheder, der handler i god tro, skal kunne sikre levering af [sådanne] tjenesteydelser ved brug af en koncession, hvis de anser dette for den bedste måde at sikre leveringen på. Dette gælder, selvom driftsrisikoen er meget begrænset, og det ville ikke være rimeligt at kræve, at de ordregivende myndigheder skulle foranledige en højere risiko end den begrænsede risiko, der følger af den offentlige regulering. I situationer som de omtalte, hvor den ordregivende myndighed ikke har nogen indflydelse på tjenesteydelsens retlige udformning, er det umuligt for den ordregivende myndighed at etablere og dermed overføre risikofaktorer. (Præmis 74-76).

Selvom der [i disse tilfælde] således er tale om en meget begrænset risiko, er det imidlertid nødvendigt for at anse en kontrakt for en tjenesteydelseskoncession, at hele eller i det mindste en væsentlig del af driftsrisikoen overføres til tjenesteyderen. Det tilkom den nationale domstol at vurdere, om der var sket en overførelse af hele eller en væsentlig del af den ordregivende myndigheds risiko. Der skulle ikke herved tages hensyn til risici som følge af lovændringer i kontraktens løbetid. (Præmis 77-79).

EF-domstolen besvarede herefter de stillede spørgsmål således: Det er tilstrækkeligt for at anse en kontrakt for en tjenesteydelseskoncession i henhold til Forsyningsvirksomhedsdirektivet, at den ordregivende myndighed ikke umiddelbart skal betale et vederlag til tjenesteyderen, og at tjenesteyderen kan opkræve vederlag fra tredjemand, under forudsætning af, at tjenesteyderen påtager sig hele eller i det mindste en væsentlig del af den ordregivende myndigheds driftsrisiko, også selvom denne risiko er meget begrænset som følge af tjenesteydelsens offentligretlige karakter.

EF-domstolens dom af 10. september 2009, sag C-573/07, Sea
Om betingelserne for at anse et selskab for in house i forhold til en ordregivende myndighed. Kontrolkriteriet er opfyldt, når selskabets aktiviteter er begrænset til de ejende ordregivende myndigheders område, og når de ejende ordregivende myndigheder udøver en bestemmende indflydelse på selskabets strategiske målsætninger og vigtige beslutninger. Den blotte mulighed for privat deltagelse i selskabet er ikke til hinder for at anse kontrolkriteriet for opfyldt

En italiensk kommune, P, overlod uden forudgående udbud affaldshåndteringen i kommunen til et fælleskommunalt aktieselskab, som kommunen ejede aktierne i sammen med nogle andre kommuner. Aktieselskabet havde til formål at udføre affaldshåndtering og forskellig forsyningsvirksomhed for de ejende kommuner.

En virksomhed, der hidtil havde udført affaldshåndteringen for P, klagede til en forvaltningsdomstol. Klageren gjorde gældende, at P ikke udførte samme kontrol med aktieselskabet som med sine egne tjenestegrene, og at P's overladelse af affaldshåndteringen til selskabet derfor ikke kunne ske uden forudgående udbud.

Klagen sigtede umiddelbart til en bestemmelse i den italienske kommunallovgivning, hvorefter en kommune uden udbud kan tildele en tjenesteydelseskontrakt til et selskab, der er 100 % offentligt ejet, såfremt den eller de offentlige myndigheder, der ejer selskabet, udøver en kontrol med selskabet svarende til kontrollen med egne tjenestegrene, og såfremt selskabet udøver hovedparten af sin virksomhed sammen med den eller de offentlige myndigheder, den ejes af. Den nævnte bestemmelse i den italienske kommunallovgivning er imidlertid blot en implementering af to betingelser, som EF-domstolen i en række domme har opstillet for at anse et selskab for »in house« i forhold til en ordregivende myndighed med den konsekvens, at den ordregivende myndighed kan overlade udbudspligtige ydelser til selskabet uden udbud. Disse to betingelser er 1) kontrolkriteriet, dvs. at den ordregivende myndighed skal udøve samme kontrol med selskabet som med sine egne tjenestegrene, og 2) virksomhedskriteriet, dvs. at virksomheden skal udføre hovedparten af sine opgaver sammen med den eller de ordregivende myndigheder, den ejes af.

Den italienske forvaltningsdomstol var i tvivl med hensyn til, om kontrolkriteriet var opfyldt. Dette skyldtes for det første, at der efter aktieselskabets vedtægter var mulighed for at udstede aktier til lokale borgere og/eller erhvervsdrivende. EF-domstolen har imidlertid i flere afgørelser tilkendegivet, at kontrolkriteriet ikke er opfyldt, hvis der er privat deltagelse i det selskab, der er tale om, eller er mulighed herfor, således i dom af 21. juli 2005 i sag C-231/03, Coname, se også dom af 18. november 2008 i sag C-324/07, Coditel Brabrant. For det andet skyldtes forvaltningsdomstolens tvivl nogle vedtægtsbestemmelser, der efter forvaltningsdomstolens opfattelse kunne bevirke, at de deltagende kommuner reelt ikke udøvede en kontrol med selskabet svarende til kontrollen med egne tjenestegrene. Forvaltningsdomstolen forelagde derfor sagen for EF-domstolen.

EF-domstolens udtalelser er yderst omfattende og kan ikke gengives kort. Fra udtalelserne kan nævnes:

Det var uden betydning, om der var tale om en tjenesteydelseskontrakt eller en tjenesteydelseskoncession (præmis 35 ff.). Det fremgår, at dette sigter til, at in house spørgsmålet er det samme i relation til udbudspligti-

ge anskaffelser og i relation til en slags begrænset udbudspligt, som EF-domstolen bl.a. i Coname-dommen har opstillet med hensyn til visse anskaffelser, der ikke er omfattet af udbudspligten efter udbudsdirektiverne, bl.a. tjenesteydelseskoncessioner.

Hvis flere offentlige myndigheder ejer et selskab, til hvilket de overlader udførelsen af deres public service-opgaver, kan de offentlige myndigheder kontrol med selskabet føres i fællesskab (præmis 59). Denne udtalelse svarer til en tilsvarende udtalelse i Coditel Brabrant-dommen.

Ad spørgsmålet om privat deltagelse i det selskab, der er tale om: Privat deltagelse udelukker under alle omstændigheder, at en ordregivende myndighed kan føre samme kontrol med selskabet som med sine egne tjenestegrene (præmis 46). Den blotte mulighed for privat deltagelse udelukker imidlertid ikke en sådan kontrol (præmis 51), men hvis der i en kontrakts løbetid indtræder privat kapital i selskabet, kan dette gøre det nødvendigt at foretage udbud (præmis 53).

Ad spørgsmålet, om selskabets vedtægter kunne medføre, at kontrol svarende til kontrollen med egne tjenestegrene ikke var reel: Det tilkom den nationale domstol at tage stilling til dette spørgsmål (præmis 88). Vedtægtsbestemmelserne for selskabet skulle imidlertid anses for at gøre det muligt for de deltagende myndigheder at udøve en bestemmende indflydelse i forhold til selskabets strategiske målsætninger og vigtige beslutninger (præmis 86). Dette sigtede efter det foreliggende til, at der i selskabets ledende organer indgik en tilsynsmyndighed og nogle udvalg med repræsentanter for alle ejere.

EF-domstolen besvarede herefter forvaltningsdomstolens spørgsmål således (præmis 90):

En tjenesteydelseskontrakt kan tildeles et 100 % offentligt ejet selskab uden udbud, når den ordregivende myndighed fører samme kontrol med selskabet som med sine egne tjenestegrene, og når selskabet udfører hovedparten af sin virksomhed sammen med den eller de offentlige myndigheder, som det ejes af.

En kontrol svarende til kontrollen med egne tjenestegrene skal anses for at foreligge, når selskabets aktiviteter er begrænset til de ejende ordregivende myndigheders område og i det væsentlige udføres til fordel for disse, og når kontrollen udøves gennem vedtægtsmæssige organer, der består af repræsentanter for de ejende ordregivende myndigheder, og når disse udøver en bestemmende indflydelse i forhold til selskabets strategiske målsætninger og vigtige beslutninger.

Følgende bemærkes:

Det væsentligste nye i forhold til EF-domstolens hidtil seneste afgørelse om in house-spørgsmålet, dvs. Coditel Brabrant-dommen af 18. november 2008, er formentlig dels angivelsen af, at den blotte mulighed for privat deltagelse ikke udelukker, at et selskab kan være in house, dels angivelsen af, at kontrolkriteriet er opfyldt, når de ejende ordregivende myndigheder (i fælleskab) udøver bestemmende indflydelse på selskabets strategi og vigtige beslutninger. I det sidste må ligge, at kontrolkriteriet er opfyldt, selvom de ordregivende myndigheder *kun* udøver indflydelse på selskabets strategi og vigtige beslutninger, dvs. ikke har indflydelse på selskabets daglige ledelse.

Det kan ligesom efter Coditel Brabrant-dommen konstateres, at kontrolkriteriets reelle indhold ikke længere svarer til kriteriets ordlyd.

Spændet mellem kriteriets indhold og ordlyd øges tilsyneladende en smule ved hver ny afgørelse fra EF-domstolen om emnet.

EF-domstolens dom af 15. oktober 2009, sag C-196/08, Acoset
Nogle ordregivende myndigheder kunne uden forudgående offentliggørelse give et selskab koncession på udførelse af en tjenesteydelse, selvom selskabet havde privat deltagelse og derfor ikke kunne være in house, idet den private deltager i selskabet var fundet gennem et EU-udbud

En italiensk region besluttede sammen med regionens kommuner at stifte et selskab til at stå for vandforsyningen i regionen. Selskabet skulle stiftes som et »halvoffentligt selskab med overvejende offentlig deltagelse«. Heri lå, at 49 % af aktiekapitalen skulle ejes af en privat virksomhed, medens 51 % af aktiekapitalen skulle ejes af de stiftende myndigheder. Det fremgår, at regionen og kommunerne ville give aktieselskabet koncession på driften af vandforsyningen, således at den private deltager i selskabet skulle stå for den praktiske drift. Det fremgår ikke, hvorledes den private deltager skulle honoreres herfor, og hvorledes den private deltagers aktieandel skulle etableres.

Regionen og kommunerne iværksatte herefter et EU-udbud med henblik på at finde den omtalte private virksomhed. Det synes at fremgå, at dette udbud blev foretaget med hjemmel i en bestemmelse i den italienske lovgivning om offentlige kontrakter. Der indkom tilbud fra nogle virksomheder, men det konstateredes, at kun en af tilbudsgiverne, en virksomhed A, ønskede at indgå kontrakt.

Regionen og kommunerne annullerede imidlertid EU-udbuddet og besluttede tilsyneladende at drive vandforsyningen uden privat deltagelse. Dette skyldtes en frygt for, at oprindeligt påtænkte konstruktion med privat deltagelse var i strid med fællesskabsretten.

A anlagde herefter sag mod regionen og kommunerne ved en italiensk forvaltningsdomstol og gjorde gældende, at den omtalte italienske lovbestemmelse var i overensstemmelse med fællesskabsretten. Dette foranledigede forvaltningsdomstolen til at forelægge sagen for EF-domstolen med et spørgsmål, der sigtede til, om den oprindeligt påtænkte konstruktion med et »halvoffentligt« selskab var i overensstemmelse med fællesskabsretten.

Fra EF-domstolens udtalelser kan nævnes (noget sammentrængt gengivet):

Der var tale om at give det omhandlede aktieselskab en koncession vedrørende udførelse af tjenesteydelser (præmis 42 og 45), hvilket ikke er omfattet af udbudspligten efter Udbudsdirektivet og Forsyningsvirksomhedsdirektivet (præmis 44). Traktatens grundlæggende principper m.m. finder imidlertid anvendelse på koncessioner om tjenesteydelser, og der er derfor pligt til at sikre en passende offentlighed til fordel for enhver potentiel tilbudsgiver (præmis 46-50). Disse udtalelser svarer til, hvad EF-domstolen har udtalt i flere tidligere domme, senest i dom af 13. november 2008 i sag C-324/07, Coditel Brabrant.

Traktatens grundlæggende principper m.m. med deraf følgende pligt til en passende offentlighed finder imidlertid ikke anvendelse, hvis den kontrol, som den ordregivende myndighed fører med koncessionshaveren, svarer til den kontrol, den fører med sine egne tjenestegrene, og hvis koncessionshaveren udfører hovedparten af sin virksomhed sammen med den

virksomhed, den ejes af (præmis 51).[2] Privat medejerskab for koncessionshaveren udelukker, at den ordregivende myndighed kan føre samme kontrol med koncessionshaveren som med sine egne tjenestegrene, og dette var tilfældet med hensyn til den koncession, som sagen angik (præmis 53-54).

Det udbud, som regionen og kommunerne havde iværksat med henblik på at finde den private deltager i aktieselskabet, opfyldte imidlertid traktatens grundlæggende principper m.m., da de private virksomheder, der ønskede at komme i betragtning, skulle dokumentere deres tekniske forudsætninger og de fordele, som antagelsen af deres tilbud ville medføre (præmis 59). Det ville endvidere være uhensigtsmæssigt at skulle gennemføre en dobbelt procedure, dvs. først en indledende udvælgelse af den private deltager og derefter tildeling af koncessionen (præmis 61). EF-domstolen henviste også til, at udvælgelsen af den private deltager bl.a. var baseret på dennes tekniske færdigheder, hvorfor udvælgelsen af koncessionshaveren var en følge af valget af den private deltager (præmis 60). EF-domstolen udtalte, at et selskab med en blandet offentlig og privat kapital som det omhandlede skal bevare det samme samfundsmæssige formål gennem hele koncessionens varighed, og at enhver væsentlig ændring medfører pligt til at foretage konkurrenceudsættelse[3] (præmis 62).

EF-domstolen besvarede herefter forvaltningsdomstolens spørgsmål med (stærkt sammentrængt gengivet), at forskellige nærmere angivne traktatbestemmelser ikke var til hinder for en selskabskonstruktion som den omhandlede.

Følgende bemærkes:

Denne dom kan måske ses som (endnu) et eksempel på, at EF-domstolen er på vej bort fra sine tidligere gentagne tilkendegivelser om, at et selskab ikke kan være in house, hvis der er privat deltagelse i selskabet eller mulighed for privat deltagelse. I Sea-dommen af 10. september 2009 i sag C-573/07 accepterede EF-domstolen, at et selskab var in house, selvom der var mulighed for privat deltagelse. I Acoset-dommen accepterer EF-domstolen tilsyneladende reelt, at et selskab med privat deltagelse er in house, hvis den private deltager er fundet gennem en procedure med forudgående offentliggørelse.

[2] Dvs. hvis koncessionshaveren er »in house«, se om dette begreb fx Klagenævnets resumé af EF-domstolens dom af 10. september 2009 i sag C-573/07, Sea.

[3] Ifølge den danske udgave af dommen »pligt til at afholde udbud«. Dette er formentlig udtryk for en uheldig oversættelse, da der næppe kan være pligt til at afholde et egentligt EU-udbud som følge af, at tjenesteydelseskoncessioner som også nævnt i dommen ikke er omfattet af udbudspligten efter udbudsdirektiverne. Den franske version af dommen bruger formuleringen »obligation de mise en concurrence«.

EF-domstolens dom af 15. oktober 2009, sag C-275/08, Kommissionen mod Tyskland

Der kunne ikke uden udbud indgås kontrakt om et it-system til registrering af motorkøretøjer, selvom det hidtidige it-system var brudt sammen, da betingelserne i de påberåbte undtagelser fra udbudspligten (at det nye it-system kun kunne leveres af én leverandør, streng nødvendighed) ikke var opfyldt. Undtagelser fra udbudspligten skal fortolkes snævert, og den, der påberåber sig en sådan undtagelse, har bevisbyrden for, at betingelserne er opfyldt

Dommen er ikke oversat til dansk, og referatet er udformet på grundlag af den franske version af dommen.

En tysk ordregivende myndighed, der stod for registreringen af motorkøretøjer i en tysk delstat, administrerede registreringen ved brug af et it-system. I januar 2005 begyndte it-systemet at udvise fejlfunktioner, og i maj 2005 brød it-systemet sammen. Den ordregivende myndighed iværksatte herefter uden forudgående udbud forhandlinger med en tysk virksomhed om virksomhedens levering af et nyt it-system, og i december 2005 indgik den ordregivende myndighed kontrakt med virksomheden herom, stadig uden udbud.

Sagen var anlagt af Kommissionen, der gjorde gældende, at den ordregivende myndighed skulle have foretaget [offentligt eller begrænset] udbud i medfør af det dagældende indkøbsdirektiv 93/36. Tyskland gjorde heroverfor gældende, at kontrakten var omfattet af Indkøbsdirektivets artikel 6, stk. 3, litra c-d, hvorefter der kunne iværksættes udbud med forhandling uden forudgående udbudsbekendtgørelse med hensyn til varer, hvis fremstilling eller levering af bl.a. tekniske årsager kun kunne overdrages til en bestemt leverandør, samt i visse begrænsede tilfælde, når det var strengt nødvendigt af årsager, der ikke kunne tilskrives ordregiveren selv (tilsvarende bestemmelser er indeholdt i Udbudsdirektivets artikel 31, litra 1, b-c).

EF-domstolen gav Kommissionen medhold. Fra dommens præmisser kan nævnes:

Undtagelser fra udbudspligten skal fortolkes snævert, og den, der påberåber sig sådanne undtagelser, har bevisbyrden for, at betingelserne for undtagelsen er opfyldt (præmis 55-56). Tyskland kunne ikke påberåbe sig undtagelsen med hensyn til varer, hvis fremstilling eller levering kun kan overdrages til en bestemt leverandør, idet det ikke var tilstrækkeligt blot at hævde, at betingelserne for denne undtagelse var opfyldt, og idet det fremgik, at den ordregivende myndighed før kontraktens indgåelse kun havde undersøgt muligheden for at finde leverandører på det nationale plan og ikke på det europæiske plan (præmis 61-64). Betingelserne for undtagelsen med hensyn til strengt nødvendige tilfælde var heller ikke opfyldt. EF-domstolen henviste herved til, at der var gået adskillige måneder mellem den ordregivende myndigheds beslutning om at anskaffe et nyt it-system og kontraktens indgåelse, og til, at den ordregivende myndighed kunne have iværksat et udbud efter konstateringen af problemerne i januar 2005, således at det i mindste ville have været muligt at gennemføre et udbud i form af en hasteprocedure. Den påberåbte nødvendighed måtte derfor i hvert fald til dels tilskrives den ordregivende myndighed selv. (Præmis 70-76).

Tyskland havde påstået sagen afvist med henvisning til, at de tyske klagemyndigheder havde taget endelig stilling til en klage over kontrakten, men fik ikke medhold heri (præmis 42).

EF-domstolens dom af 29. oktober 2009, sag C-536/07, Kommissionen mod Tyskland

En lejekontrakt om en ordregivende myndigheds leje af nogle bygninger, der ifølge lejekontrakten skulle opføres af udlejeren i overensstemmelse med den ordregivende myndigheds anvisninger, var en udbudspligtig bygge- og anlægskontrakt

Den danske version af dommen indeholder en meningsforstyrrende oversættelsesfejl i præmis 10, hvorfor referatet til dels er udformet på grundlag af den franske version af dommen.

Köln Kommune ejer sammen med en tysk delstat og nogle brancheorganisationer m.m. et selskab K, der har til formål at organisere messer og udstillinger.

K solgte et grundareal til et privat firma G med henblik på at G skulle bygge nogle messehaller på arealet til en værdi af ca. 235 mio. €. I forbindelse hermed blev der mellem Köln Kommune og G indgået en lejekontrakt, hvorefter kommunen af G lejede arealet med de kommende bygninger for 30 år mod en nærmere angivet leje, tilsammen over lejekontraktens løbetid ca. 600 mio. €. Lejekontrakten indeholdt nærmere angivelser om, hvorledes de kommende bygninger skulle opføres og indrettes. Ved en anden lejekontrakt, der blev indgået nogenlunde samtidig, fremlejede kommunen de kommende bygninger til K. Af sagsfremstillingen i generaladvokatens forslag til afgørelse fremgår, at K til kommunen skulle betale en leje, der svarede til den leje, som kommunen skulle betale til G, og at K's salg af grundarealet til G og de to lejekontrakter udgjorde et samlet arrangement, der havde til formål at gennemføre og finansiere en fornyelse af messefaciliteterne i Köln. (Set under ét synes transaktionerne at minde om finansieringsformen »sale and lease back«).

Kommissionen gjorde gældende, at det nævnte forløb var udtryk for, at kommunen havde iværksat et bygge- og anlægsarbejde, der skulle have været udbudt efter det dagældende bygge- og anlægsdirektiv 93/37. Kommissionen fik medhold, idet EF-domstolen fastslog, at det var en overtrædelse af bygge- og anlægsdirektivet, at lejekontrakten mellem kommunen og G var indgået uden forudgående udbud i henhold til direktivet.

Fra EF-domstolens udtalelser kan nævnes:

Ad et anbringende fra Tyskland, om, at det var K, der var G's egentlige kontraktpart, hvorfor der ikke skulle gennemføres udbud, da K ikke var en ordregivende myndighed i henhold til bygge- og anlægsdirektivet: Ikke taget til følge med henvisning til, at det var kommunen, der indgik lejekontrakten med G, og til, at denne lejekontrakt indeholdt detaljerede krav fra kommunen vedrørende byggeriet (præmis 45). Også bl.a. udtalt, at det var irrelevant, at byggeriet var bestemt for K (præmis 50).

I øvrigt bl.a. udtalt:

Bygge- og anlægsdirektivet omfatter kontrakter mellem en ordregivende myndighed og en entreprenør med det formål, at entreprenøren udfører et bygge- og anlægsarbejde, uanset hvordan en sådan kontrakt formelt kvalificeres (præmis 55). Hovedformålet med lejekontrakten mellem

kommunen og G var opførelsen af messehallerne i overensstemmelse med de af kommunen fastlagte behov, og lejekontrakten var derfor en bygge- og anlægskontrakt, der skulle have været udbudt efter bygge- og anlægsdirektivet (præmis 63). Selvom den samlede leje oversteg byggeriets værdi, skulle lejekontrakten ikke som hævdet af Tyskland anses for en tjenesteydelseskontrakt om udlejning eller finansiering (præmis 60-61).

EF-domstolens dom af 12. november 2009, sag C-199/07, Kommissionen mod Grækenland

Principperne om ligebehandling og gennemsigtighed betyder, at tilbudsgivere og potentielle tilbudsgivere skal have ens chancer. Det var i strid med ligebehandlingsprincippet, at udbudsbekendtgørelsen besværliggjorde visse potentielle udenlandske tilbudsgiveres mulighed for at dokumentere deres kvalifikationer. Kriterier, der i det væsentlige angår tilbudsgivernes evne til at udføre den udbudte opgave, kan ikke anvendes som underkriterier

En græsk ordregivende myndighed iværksatte et offentligt udbud efter det tidligere forsyningsvirksomhedsdirektiv vedrørende udførelse af et analysearbejde ved opførelsen af en jernbanestation.

Udbudsbekendtgørelsen indeholdt forskellige angivelser om de kvalifikationer, som tilbudsgivere skulle være i besiddelse af.

Udbudsbekendtgørelsen indeholdt endvidere en særlig klausul om udenlandske virksomheder gående ud på, at følgende udenlandske virksomheder ikke kunne komme i betragtning som tilbudsgivere: Udenlandske virksomheder, der inden for det sidste halve år havde udtrykt interesse i at deltage i udbud fra samme ordregiver, og som i forbindelse hermed havde oplyst kvalifikationer, der adskilte sig fra dem, der nu blev stillet krav om.

Denne klausul var tilsyneladende en græsk standardklausul. Klausulens formål og nærmere rækkevidde fremgår ikke af dommen. Grækenland gjorde imidlertid gældende, at klausulen altid var blevet anvendt på den måde, at en virksomhed, der var i tvivl om klausulens rækkevidde, kunne henvende sig til udbyderen og få afklaret, hvorledes virksomhedens kvalifikationer skulle dokumenteres.

Tildelingskriteriet var det økonomisk mest fordelagtige tilbud på grundlag af følgende underkriterier (kort gengivet): 1. Erfaring med tilsvarende opgaver og 2. Kapacitet til at udføre den udbudte opgave.

Sagen var anlagt af Kommissionen, der gjorde gældende, at både den omtalte særlige klausul om udenlandske virksomheder og underkriterierne til tildelingskriteriet var i strid med EU-udbudsretten.

Grækenland påstod søgsmålet afvist bl.a. med henvisning til, at den græske lov, som udbuddet var foretaget efter, er afløst af en ny lov, der er i overensstemmelse med Kommissionens synspunkter, og til, at ophævelse af en indgået kontrakt efter græsk ret ikke kan finde sted.

EF-domstolen tog stilling til sagen således:

Ad afvisningspåstanden:

Ikke taget til følge, da de påberåbte forhold ikke medførte, at Kommissionens søgsmål var blevet uden genstand (præmis 23 og 25), og da udførelsen af den udbudte kontrakt ikke var afsluttet ved afgivelsen af Kommissionens begrundede udtalelse (præmis 26-27).

Ad den særlige klausul om udenlandske virksomheder:

Bl.a. udtalt: Ligebehandlingsprincippet omfatter princippet om gennemsigtighed, og de to principper betyder, at tilbudsgivere og potentielle tilbudsgivere skal have samme muligheder (præmis 37). Det er ikke i overensstemmelse med de to principper, at en særlig kategori af potentielle tilbudsgivere skal henvende sig til ordregiveren for at få supplerende og afklarende oplysninger (præmis 38), og den omhandlede klausul kan have en afskrækkende virkning på udenlandske potentielle tilbudsgivere, hvilket i øvrigt også havde været tilfældet i sagen (præmis 40).

EF-domstolen konkluderede herefter, at den omtalte klausul var i strid med ligebehandlingsprincippet.

Ad underkriterierne til tildelingskriteriet:

Bl.a. udtalt: Vurderingen af tilbudsgivernes kvalifikationer og tilbudsvurderingen kan finde sted samtidig, men er særskilte processer, der er omfattet forskellige regler (præmis 51). Kriterier, der ikke har til formål at identificere det økonomisk mest fordelagtige bud, men i det væsentlige er forbundet med tilbudsgivernes evne til at udføre den udbudte opgave, kan ikke være tildelingskriterier (præmis 55). Dette var tilfældet for de underkriterier, der var anvendt ved udbuddet, og disse underkriterier kunne derfor ikke udgøre tildelingskriterier (præmis 56).

EF-domstolen konstaterede herefter, at de anvendte underkriterier var i strid med reglen om tildelingskriterier i det tidligere forsyningsvirksomhedsdirektiv.

EF-domstolens dom af 10. december 2009, sag C-299/08, Kommissionen mod Frankrig

En særlig fransk fremgangsmåde ved ordregivende myndigheders tildeling af kontrakter var i strid med Udbudsdirektivet

Denne dom angår en særlig fransk fremgangsmåde ved ordregivende myndigheders tildeling af kontrakter. Dommen indeholder ikke en beskrivelse af denne fremgangsmåde, men indskrænker sig til at gengive de franske lovregler om den. Disse regler er imidlertid ikke umiddelbart let forståelige, hverken i den danske oversættelse eller i den franske original.

Den omtalte fremgangsmåde synes i hvert fald til dels at kunne gå ud på følgende: Hvis en ordregivende myndighed ikke kan definere sit behov, kan ordregiveren indgå »definitionsaftaler« (marchés de définition) med et antal virksomheder. Efterfølgende kan ordregiveren indgå en eller flere »udførelsesaftaler« (marchés d'execution) med en eller flere af de virksomheder, som ordregiveren har indgået definitionsaftaler med.

Som et eksempel kan formentlig nævnes (med det forbehold, at de franske regler som omtalt ikke er lette at forstå): En kommune ønsker et nyt it-system, men er usikker på, hvilke krav der skal stilles til systemet. Kommunen iværksætter derfor et EU-udbud om indgåelse af definitionsaftaler, dvs. aftaler om at opstille kravspecifikationer til det nye it-system. På grundlag af udbuddet indgår kommunen definitionsaftaler med et antal it-virksomheder. Senere indhenter kommunen tilbud fra de pågældende it-virksomheder om levering af et nyt it-system, og på grundlag af denne tilbudsindhentning indgår kommunen udførelsesaftale med en eller flere af disse virksomheder, dvs. aftale(r) om levering af et eller flere nye it-systemer.

Fremgangsmåden minder om udbudsformen konkurrencepræget dialog, og Frankrig gjorde da også under sagen gældende, at fremgangsmå-

den om ikke andet havde hjemmel i Udbudsdirektivets regler om konkurrencepræget dialog. Frankrig fik imidlertid ikke medhold heri, jf. nedenfor.

EF-domstolen konstaterede i dommen af 10. december 2009, at den omtalte fremgangsmåde er i strid med Udbudsdirektivet. EF-domstolen udtalte bl.a.: Medlemsstaterne kan ikke fastsætte andre fremgangsmåder for indgåelse af ordregivende myndigheders kontrakter end dem, der er fastsat i Udbudsdirektivet (præmis 33). Den omtalte fremgangsmåde adskiller sig grundlæggende fra udbudsformen konkurrencepræget dialog, idet denne udbudsform er en fremgangsmåde for tildeling af en enkelt kontrakt, hvorimod den omhandlede franske fremgangsmåde angår tildeling af adskillige kontrakter af forskellig art, dvs. dels definitionsaftalerne, dels udførelsesaftalen eller -aftalerne (præmis 37). Det er i strid med ligebehandlingsprincippet, at kun virksomheder, med hvem der er indgået definitionsaftaler, kan afgive tilbud på udførelsesaftaler (præmis 40).

Retten i Første Instans' dom af 10. december 2009, sag T-195/08, Antwerpse Bouwwerken mod Kommissionen

Udbyderens indhentning af supplerende oplysninger fra nogle tilbudsgivere om deres tilbuds prismæssige sammensætning var ikke i strid med forhandlingsforbuddet eller ligebehandlingsprincippet. Indhentningen af de supplerende oplysninger kunne ske efter, at en forbigået tilbudsgiver i standstill-perioden havde protesteret mod udbyderens tildelingsbeslutning, idet standstill-reglerne ellers ville være uden indhold, ligesom udbyderen kunne ændre tildelingsbeslutningen på grundlag af de supplerende oplysninger. Almindelige fællesskabsretlige principper, herunder proportionalitetsprincippet, kan føre til en pligt for en udbyder til at indhente supplerende oplysninger fra tilbudsgiverne i visse tilfælde

Dommens fremstilling af sagens faktum virker noget kortfattet, men faktum kan tilsyneladende gengives således:

Kommissionen iværksatte et udbud vedrørende et byggearbejde. Tildelingskriteriet var laveste pris. Udbudsbetingelserne indeholdt en klausul om, at tilbud skulle angive alle delpriser, idet de ellers ville blive afvist.

Der indkom tilbud fra 4 tilbudsgivere, herunder fra en tilbudsgiver A og en tilbudsgiver C. A's tilbudspris, ca. 10,3 mio. €, var højere end bl.a. C's tilbudspris. Kommissionen konstaterede, at der i alle tilbud bortset fra A's tilbud manglede angivelse af en enkelt mindre delpris. Øjensynlig som følge af den omtalte klausul i udbudsbetingelserne anså Kommissionen herefter alle tilbud bortset fra A's tilbud som ukonditionsmæssige. Kommissionen meddelte derfor tilbudsgiverne, at den var indstillet på at indgå kontrakt med A.

Kommissionen tog dog samtidig over for A forbehold om at suspendere underskrivelsen af kontrakten med henblik på en supplerende undersøgelse, hvis der fremkom bemærkninger fra andre tilbudsgivere m.m. Dette forbehold var tydeligvis udformet på grundlag af Gennemførelsesforordningen artikel 158 a om standstill-periode. Efter denne bestemmelse kan udbyderen suspendere underskrivelsen af kontrakten og iværksætte supplerende undersøgelser, hvis der i standstill-perioden fremkommer kommentarer fra forbigåede tilbudsgivere eller andre oplysninger, der taler herfor.

C protesterede i standstill-perioden over for Kommissionen og gjorde gældende, at C's tilbud omfattede alle delpriser. Som følge af C's protest

suspenderede Kommissionen kontraktunderskrivelsen med henvisning til Gennemførelsesforordningens artikel 158 a, ligesom Kommissionen indhentede supplerende oplysninger fra alle tilbudsgiverne bortset fra A om deres tilbuds prismæssige sammensætning.

Det fremgår ikke ganske klart, hvad de nævnte supplerende oplysninger gik ud på, men følgende synes at fremgå: Konklusionen af oplysningerne var, at den omtalte delpris reelt var indeholdt i de pågældende tilbud, men at den ved en fejl ikke var blevet medtaget i tilbudsgivernes opgørelser af den samlede tilbudspris. På baggrund af oplysningerne foretog Kommissionen derfor mindre justeringer af de samlede tilbudspriser i alle de pågældende tilbud, gående ud på en forhøjelse af hver tilbudspris med ca. 900 €. Kommissionen foretog også en mindre justering af tilbudsprisen i A's tilbud. Det fremgår ikke, hvad denne justering byggede på.

Kommissionen foretog derefter en vurdering af de justerede tilbud og konstaterede herved, at C's tilbud havde laveste tilbudspris, og at A's tilbud havde tredje laveste tilbudspris. Kommissionen besluttede herefter at indgå kontrakt med C.

A anlagde derefter sagen ved Retten i Første Instans og gjorde i det væsentligste gældende, at Kommissionen havde overtrådt ligebehandlingsprincippet og forhandlingsforbuddet ved den omtalte indhentning af supplerende oplysninger fra de andre tilbudsgivere om deres tilbuds prismæssige sammensætning.

Følgende bemærkes i sammenhængen:

Det forhandlingsforbud, der var tale om, følger af Gennemførelsesforordningens artikel 148, hvorefter kontakt mellem en ordregiver og tilbudsgiverne under en udbudsprocedure kun må finde sted undtagelsesvis. Som en specifik undtagelse nævnes i artikel 148, stk. 3, at ordregiveren kan kontakte en tilbudsgiver, hvis tilbuddet gør det nødvendigt at indhente yderligere oplysninger, eller hvis åbenlyse skrivefejl i tilbuddet skal rettes, under forudsætning af, at kontakten ikke fører til ændring af vilkårene i tilbuddet.

Forhandlingsforbuddet i Gennemførelsesforordningens artikel 148 må antages at svare ganske til det almindelige EU-retlige forhandlingsforbud. Den omtalte undtagelse i artikel 148, stk. 3, må antages at svare til, hvad der i den generelle udbudsretlige terminologi kaldes en tilladelig afklaring.

Rettens præmisser om sagens realitet (præmis 49-85) er udførlige. Sagens hovedproblem bestod imidlertid tilsyneladende blot af to ret enkle spørgsmål, dvs.:

1) Var Kommissionens indhentning af supplerende prisoplysninger i strid med forhandlingsforbuddet, eller var den blot en tilladelig afklaring som hjemlet i Gennemførelsesforordningens artikel 148, stk. 3?

2) Hvis Kommissionens indhentning af supplerende prisoplysninger ikke var i strid med forhandlingsforbuddet, kunne den så alligevel ikke finde sted som følge af udbudsbetingelsernes klausul om, at tilbud, der ikke indeholdt angivelse af alle delpriser, ville blive afvist?

Fra Rettens præmisser kan nævnes:

Gennemførelsesforordningens artikel 148, stk. 3, pålægger ikke ordregiverne pligt til at tage kontakt med tilbudsgiverne i de undtagelsestilfælde, som bestemmelsen angår. En sådan pligt kan dog følge af almindelige fællesskabsretlige principper, hvilket vil være tilfældet, hvis en tve-

tydighed i et tilbud sandsynligvis kan forklares på en enkel måde og let kan fjernes. En sådan pligt kan endvidere følge af proportionalitetsprincippet. (Præmis 54-57).

Den delpris, der tilsyneladende manglede i C's tilbud, var reelt indeholdt i tilbuddet og var blot ved en fejl ikke angivet i C's sammenfatning af tilbudsprisen. Der var således tale om en simpel fejl i tilbuddet eller i det mindste en tvetydighed, der kunne forklares på en enkel måde, og som nemt kunne fjernes (præmis 74). Kommissionen havde derfor kunnet indhente oplysninger fra C uden at overtræde udbudsbetingelsernes klausul om, at tilbuddene skulle omfatte alle delpriser (præmis 75).

Det var uden betydning, at Kommissionens anmodning til C om supplerende oplysninger var fremsat, efter at C havde protesteret mod Kommissionens meddelelse om, at Kommissionen var indstillet på at indgå kontrakt med A, idet den ovenfor refererede regel i Gennemførelsesforordningens artikel 158 a om suspension af kontraktunderskrivelsen m.m. i modsat fald ville være uden indhold (præmis 76). Denne udtalelse sigtede efter det foreliggende til et anbringende fra A om, at Kommissionen var bundet af sin oprindelige beslutning om at indgå kontrakt med A (præmis 45, anbringendet kan formentlig gengives således).

Kommissionen havde efter modtagelsen af de supplerende oplysninger modtagelse med rette anset C's tilbudspris som den laveste (præmis 77). Kommissionen havde endvidere ikke overtrådt forhandlingsforbuddet, men havde alene benyttet sig af sin adgang til at indhente yderligere oplysninger i henhold til Gennemførelsesforordningens artikel 148, stk. 3 (præmis 78). Kommissionen havde desuden overholdt ligebehandlingsprincippet, idet den havde anmodet alle de tilbudsgivere, hvis tilbud havde samme fejl som C's tilbud, om yderligere oplysninger (præmis 80).

Kommissionen blev herefter frifundet og blev også frifundet for en erstatningspåstand fra C.

Som det fremgår, besvarede Retten reelt de to spørgsmål, der er opstillet ovenfor, således:

Ad spørgsmål 1: Kommissionens indhentelse af supplerende prisoplysninger var ikke i strid med forhandlingsforbuddet, men var en tilladelig afklaring med hjemmel i Gennemførelsesforordningens artikel 148, stk. 3.

Ad spørgsmål 2: Kommissionens indhentelse af yderligere prisoplysninger fra C var ikke i strid med udbudsbetingelsernes klausul om, at tilbud, der ikke angav alle delpriser, ville blive afvist, idet alle delpriserne reelt var indeholdt i C's tilbud.

(Det fremgår forudsætningsvist, at heller ikke Kommissionens indhentelse af yderligere prisoplysninger fra de øvrige tilbudsgivere bortset fra A og C var i strid med den omtalte klausul i udbudsbetingelserne).

Nogle enkelte yderligere spørgsmål, der ikke skønnes at have almen udbudsretlig interesse, er ikke omtalt i ovenstående referat.

EF-domstolens dom af 23. december 2009, sag C-376/08, Serrantoni og Consorzio stabile edili

Nogle italienske lovregler om, at et konsortium og et medlem af konsortiet ikke kan afgive tilbud under samme udbud, var i strid med fællesskabsrettens grundlæggende principper, herunder proportionalitetsprincippet. Traktatens grundlæggende principper, navnlig ligebehandlingsprincippet, gælder for udbud under tærskelværdien under forudsætning af, at der foreligger en grænseoverskridende interesse. Medlemsstaterne har en vis

skønsmargin med hensyn til, hvorledes overholdelsen af principperne om ligebehandling og gennemsigtighed skal sikres, men proportionalitetsprincippet skal overholdes

Den italienske lovgivning om offentlige kontrakter indeholder nogle regler om konsortiers adgang til at afgive tilbud. Disse regler omfatter bl.a. »stabile konsortier«, dvs. konsortier, der er indgået for en varighed af mindst 5 år.

Ifølge den italienske lovgivning kan et stabilt konsortium og et medlem af konsortiet ikke begge afgive tilbud under samme udbud. Hvis det alligevel sker, skal både konsortiet og det pågældende medlem af konsortiet udelukkes fra at afgive tilbud, ligesom kan der blive tale om strafansvar. Formålet med disse regler og baggrunden for dem fremgår ikke af dommen.

Sagen angik et udbud iværksat af en italiensk ordregivende myndighed vedrørende en tjenesteydelse. Der blev afgivet tilbud af et stabilt konsortium og af en virksomhed, der var medlem af det stabile konsortium. Som følge af de ovennævnte regler udelukkede udbyderen både konsortiet og den pågældende virksomhed fra at afgive tilbud, ligesom udbyderen indgav politianmeldelse.

Sagen blev indbragt for en italiensk forvaltningsdomstol, der tilsyneladende navnlig var i tvivl med hensyn til, om de omtalte italienske regler var i strid med det EU-retlige ligebehandlingsprincip, fordi de kun gælder for stabile konsortier og ikke for andre konsortier. Forvaltningsdomstolen forelagde sagen for EF-domstolen med nogle spørgsmål, der sigtede til, om de omtalte italienske regler er i strid med Udbudsdirektivet og forskellige traktatbestemmelser.

Fra EF-domstolens udtalelser kan nævnes:

Udbuddets værdi var under Udbudsdirektivets tærskelværdi, hvorfor det var ufornødent at tage stilling til, om de italienske regler var i strid med Udbudsdirektivet (præmis 21 og 28). Traktatens grundlæggende principper, navnlig ligebehandlingsprincippet, gælder imidlertid også for udbud under tærskelværdien (præmis 22), hvilket dog forudsætter (»présuppose«) en grænseoverskridende interesse (præmis 24).

Spørgsmålet i sagen var, om de italienske regler var i strid med principperne om ligebehandling og gennemsigtighed (præmis 29). Medlemsstaterne har en vis skønsmargin med hensyn til, hvordan disse princippers overholdelse skal sikres (præmis 31-32), men proportionalitetsprincippet skal overholdes (præmis 33).

EF-domstolen udtalte sig herefter udførligt i præmis 34-45, om hvorvidt regler, der udelukker et konsortium og et medlem af konsortiet fra at afgive tilbud under samme udbud, er i strid med fællesskabsretten. Udtalelserne kan ikke gengives kort, men kan formentlig sammenfattes således: Sådanne regler har grænseoverskridende interesse. De kan eventuelt være begrundet i legitime formål vedrørende bekæmpelse af konkurrencebegrænsende aftaler (»collusions potentielles«) mellem et konsortium og dets medlemmer. Regler som de omhandlede italienske regler er imidlertid i strid med proportionalitetsprincippet, idet de opstiller en uafkræftelig formodning for konkurrencefordrejning, hvorved de går videre, end hvad der er nødvendigt for at opnå de nævnte formål.

EF-domstolen besvarede herefter forvaltningsdomstolens spørgsmål med, at regler som de omhandlede italienske regler er i strid med fællesskabsretten.

EF-domstolens dom af 23. december 2009, sag C-305/08, CoNISMa

At et organ modtager offentlig finansiering eller statsstøtte, er ikke i sig selv til hinder for, at organet afgiver tilbud under et EU-udbud. National ret må ikke udelukke universiteter o.l., der ikke driver virksomhed med gevinst for øje, og som har ret til at tilbyde udførelse af tjenesteydelser, fra at afgive tilbud under EU-udbud vedrørende de pågældende tjenesteydelser

Den italienske lovgivning om offentlige kontrakter indeholder en opregning af, hvem der kan afgive tilbud.

En italiensk ordregivende myndighed iværksatte et udbud vedrørende en tjenesteydelse. Blandt tilbudsgiverne var et konsortium C, der består af nogle italienske universiteter og ministerier. Udbyderen udelukkede imidlertid C fra at afgive tilbud, efter det foreliggende fordi lovgivningens opregning af, hvem der kan afgive tilbud, efter udbyderens opfattelse skulle fortolkes således, at et konsortium som C ikke var omfattet af opregningen.

C klagede til den italienske regering, der indhentede en udtalelse fra et rådgivende organ, Consiglio di stato, der på sin side forelagde sagen for EF-domstolen.

Følgende synes at fremgå: Den fortolkning af den italienske lovgivning, der lå bag udbyderens udelukkelse af C, gik i sin kerne ud på, at kun virksomheder, der arbejder med gevinst for øje, kan afgive tilbud. Denne fortolkning var nogenlunde gængs, men Consiglio di stato var i tvivl om fortolkningens overensstemmelse med Udbudsdirektivet. Det, som navnlig voldte tvivl hos Consiglio di stato, var Udbudsdirektivets begreb »økonomisk aktør«, jf. Udbudsdirektivets artikel 1, stk. 2, litra a, og stk. 8. Consiglio di stato stillede EF-domstolen to spørgsmål, der kort kan gengives således:

1) Skal Udbudsdirektivet forstås således, at et konsortium, der udelukkende består af universiteter og offentlige myndigheder, er udelukket fra at afgive tilbud under et udbud om en tjenesteydelse?

2) Er den italienske lovgivning om offentlige kontrakter i strid med Udbudsdirektivet, hvis denne lovgivning skal fortolkes således, at organer, der ikke driver virksomhed med gevinst for øje, ikke kan afgive tilbud?

Fra EF-domstolens udtalelser kan nævnes (af overskuelighedsgrunde til dels stærkt sammentrængt og omformuleret gengivet):

Consiglio di stato er en ret, der kan forelægge præjudicielle spørgsmål for EF-domstolen (præmis 25).

Ad spørgsmål 1:

Udbudsdirektivet definerer ikke begrebet økonomisk aktør, og direktivet åbner mulighed for, at offentligretlige organer afgiver tilbud (præmis 28-29). At en økonomisk aktør har en fordelagtig stilling som følge af offentlig finansiering eller statsstøtte, udelukker ikke i sig selv (»a priori«) fra deltagelse i et udbud. En anden fortolkning af Udbudsdirektivet ville medføre, at ordregivende myndigheder uden udbud kunne indgå kontrakter med organer, der ikke i det væsentlige handler med gevinst for øje (præmis 43).

EF-domstolen besvarede herefter spørgsmål 1 således: Organer, der ikke hovedsageligt driver virksomhed med gevinst for øje, som ikke organisatorisk er opbygget som en virksomhed, og som ikke er fast til stede på markedet, såsom universiteter og konsortier bestående af universiteter og ministerier, kan deltage i EU-udbud vedrørende tjenesteydelser.

Ad spørgsmål 2:

Det følger af Udbudsdirektivets artikel 4, stk. 1 (om økonomiske aktører, der har ret til at udøve virksomhed i deres egen medlemsstat), at medlemsstaterne kan tillade universiteter mfl. at virke på markedet og tilbyde udførelse af visse tjenesteydelser, og national lovgivning om implementering af Udbudsdirektivet kan ikke forbyde universiteter mfl., der har en sådan tilladelse, at afgive tilbud under EU-udbud vedrørende de pågældende tjenesteydelser (præmis 47-49). Det påhvilede endvidere den forelæggende ret i videst muligt omfang at fortolke national ret i overensstemmelse med Udbudsdirektivet og om fornødent at undlade at anvende en modstridende bestemmelse i national ret (præmis 50).

EF-domstolen besvarede herefter spørgsmål 2 med, at Udbudsdirektivet er til hinder for fortolkning af national lovgivning således, at national lovgivning forbyder enheder som universiteter mfl., der ikke hovedsageligt forfølger et formål med gevinst for øje, at give tilbud vedrørende en tjenesteydelse, som de i henhold til national ret er berettiget til at tilbyde.

EU-domstolens dom af 28. januar 2010 i sag C-406/08, Uniplex

En national klagefrist skal først løbe fra det tidspunkt, hvor klageren kendte eller burde kende den påberåbte overtrædelse af udbudsreglerne

Den engelske lov om offentlige kontrakter indeholder en regel om, at retssager skal anlægges ufortøvet og under alle omstændigheder (»promptly and in any event«) senest tre måneder efter, at grundene til sagsanlægget opstod, medmindre retten finder, at der foreligger en god grund til at forlænge fristen.

For en engelsk domstol verserede en sag, der var anlagt af en forbigået tilbudsgiver mod en ordregivende myndighed vedrørende overtrædelse af udbudsreglerne. Det var under sagen et stridspunkt, om den ovenfor nævnte frist på tre måneder skulle regnes fra ordregiverens meddelelse til tilbudsgiveren om tildelingsbeslutningen eller fra ordregiverens senere uddybende begrundelse for tildelingsbeslutningen. Dette foranledigede den engelske domstol til at forelægge sagen for EU-domstolen med to spørgsmål. EU-domstolen omformulerede reelt spørgsmålene til tre spørgsmål, der stærkt sammentrængt kan gengives således (i gengivelsen bruges ordet klage som synonymt for sagsanlæg og ordet klager som synonymt for sagsøger):

1) Skal en national klagefrist løbe fra tidspunktet for den påståede overtrædelse af udbudsreglerne eller fra det tidspunkt, hvor klageren kendte eller burde kende overtrædelsen?

2) Er 1. kontroldirektiv til hinder for en national lovbestemmelse om, at klager skal indgives ufortøvet?

3) Hvorledes forholder den engelske lovbestemmelse om, at retten kan forlænge klagefristen, sig til 1. kontroldirektiv?

Fra EU-domstolens udtalelser kan nævnes:

Ad spørgsmål 1: Der kan fastsættes en national klagefrist, men formålet med 1. kontroldirektiv kan kun opfyldes, hvis en sådan frist først løber

fra det tidspunkt, hvor klageren kendte eller burde kende den påberåbte overtrædelse (præmis 26 og 32).

Ad spørgsmål 2: En national bestemmelse om, at klage skal indgives ufortøvet og under alle omstændigheder inden for tre måneder, indebærer usikkerhed og medfører, at klagefristens længde ikke kan forudsiges. En national lovbestemmelse, der giver klageinstansen beføjelse til en skønsmæssig anvendelse af en regel om, at klage skal indgives ufortøvet, er derfor i strid med 1. kontroldirektiv (præmis 41-43).

Ad spørgsmål 3: Den nationale domstol havde pligt til at anvende sin beføjelse til at forlænge fristen således, at det blev sikret, at fristen først løb fra det tidspunkt, hvor klageren kendte eller burde kende den påberåbte overtrædelse af udbudsreglerne (præmis 47). Hvis en sådan fortolkning ikke var mulig, havde den nationale domstol pligt til at undlade at anvende reglen om klagefrist (præmis 49).

EU-domstolens dom af 28. januar 2010, sag C-456/08, Kommissionen mod Irland

Det var i strid med 1. kontroldirektiv, at en udbyder ikke gav tilbudsgiver E underretning om udbyderens beslutning om at indgå kontrakt med tilbudsgiver C, men kun havde givet E underretning om udbyderens forudgående beslutning om at indlede forhandlinger med C. Det var desuden i strid med 1. kontroldirektiv, at en national regel om klagefrist blev anvendt på andre beslutninger end dem, som reglen udtrykkeligt angik, ligesom det var i strid med 1. kontroldirektiv, at reglen var formuleret på en måde, der gav anledning til retsusikkerhed

En irsk vejmyndighed iværksatte et EU-udbud med forhandling vedrørende anlæg og drift af en vejstrækning. Der indkom tilbud fra to konsortier C og E. På et tidspunkt meddelte udbyderen E, at udbyderen ville indlede forhandlinger med C, og at forhandlingerne kunne føre til, at C fik tildelt kontrakten. Udbyderen tog dog forbehold om at indlede forhandlinger med E, hvis forhandlingerne med C endte uden resultat.

Nogle måneder senere besluttede udbyderen at indgå kontrakt med C, og en sådan kontrakt blev indgået. Udbyderen gav ikke E underretning om beslutningen om at indgå kontrakt med C eller om indgåelsen af kontrakten.

En virksomhed, der havde deltaget i E, anlagde retssag mod udbyderen ved en irsk domstol og gjorde gældende, at udbyderen havde overtrådt udbudsreglerne på forskellige punkter.

Den irske domstol afviste imidlertid sagen. Dette skyldtes en irsk lovbestemmelse, der går ud på følgende: En retssag vedrørende en ordregivende myndigheds tildeling af en kontrakt eller kontraktindgåelse skal anlægges så hurtigt som muligt og under alle omstændigheder inden for tre måneder efter, at grunden til sagsanlægget er indtrådt, medmindre retten finder det rimeligt at forlænge fristen. Den irske domstol anså tremåneders fristen for at løbe fra udbyderens meddelelse om, at udbyderen ville indlede forhandlinger med C. Denne meddelelse var givet mere end tre måneder før sagsanlægget, og domstolen konkluderede derfor, at sagen var anlagt for sent.

Sagsøgeren klagede til Kommissionen, der anlagde sagen mod Irland ved EU-domstolen under påberåbelse af, at Irland havde overtrådt 1. kontroldirektiv m.m. på forskellige punkter i sammenhængen.

EU-domstolen gav Kommissionen medhold. Fra EU-domstolens udtalelser kan nævnes (Klagenævnets litrering, til dels lidt omformuleret gengivet):

1) Det var en overtrædelse af artikel 8, stk. 2, i 1. kontroldirektiv, at udbyderen ikke havde givet E underretning om beslutningen om at indgå kontrakt med C (præmis 34).

2) Det var en overtrædelse af 1. kontroldirektiv, at den irske lovbestemmelse gør det muligt for de irske domstole at anvende tre-måneders fristen på beslutninger, som en ordregivende myndighed træffer under et udbud før tildelingsbeslutningen, selvom det ikke fremgår udtrykkeligt af lovbestemmelsen, at fristen finder anvendelse på sådanne beslutninger (præmis 66).

3) Den irske lovbestemmelse medfører retsusikkerhed som følge af, at det efter bestemmelsens formulering ikke kan udelukkes, at en domstol afviser et sagsanlæg, selvom sagsanlægget er sket før udløbet af tre-måneders fristen. Denne retsusikkerhed er i strid med 1. kontroldirektiv (præmis 74-75). Det var uden betydning, at ingen irsk domstol efter det oplyste har afvist en sag, der var anlagt før udløbet af tre-måneders fristen (præmis 77), ligesom det ikke var afgørende, at retten efter lovbestemmelsen kan forlænge fristen for sagsanlæg (præmis 81).

Sagsøgeren havde for den irske domstol gjort gældende, at tre-måneders fristen skulle regnes fra udbyderens indgåelse af kontrakten med C, og at sagen derfor var anlagt rettidigt, idet den var anlagt mindre end tre måneder senere. EU-domstolen havde ikke anledning til at tage stilling til dette spørgsmål.

Retten i Første Instans' dom af 2. marts 2010, sag T-70/05, Evropaïki Dynamiki mod EMSA

Der må ikke anvendes delkriterier, som ikke er oplyst på forhånd, men en udbyder kan under visse betingelser uden forudgående oplysning anvende »vægtningskoofficienter« vedrørende underkriterierne. Det var beklageligt, at udbyderen ikke havde sikret sig bevis for tidspunktet for afsendelsen af en uddybende begrundelse for tildelingsbeslutningen, som en tilbudsgiver havde anmodet om, men forholdet havde ikke påvirket tilbudsgiverens retsstilling. Udbyderen havde uberettiget taget et tilbud i betragtning, selvom tilbuddet ikke som krævet i udbudsbetingelserne var afsendt med anbefalet brev senest på dagen for tilbudsfristens udløb, idet en postkvittering og en erklæring fra en postfunktionær af nærmere angivne grunde ikke kunne sidestilles med dokumentation for et anbefalet brev. Udbyderen var ikke forpligtet til at indgå kontrakt med den eneste konditionsmæssige tilbudsgiver, men kunne i stedet annullere udbuddet

Denne dom, der er meget lang (217 præmisser), refereres kun i det omfang den skønnes at have nogenlunde almen udbudsretlig interesse. Dommen er ikke oversat til dansk, og referatet er udformet på grundlag af den franske version af dommen.

Det europæiske maritime sikkerhedsagentur (EMSA), der er en fællesskabsinstitution, iværksatte to udbud vedrørende henholdsvis evaluering og fremtidig udvikling af et sikkerhedssystem (udbud 1) og etablering af et informationssystem (udbud 2). I begge udbud var tildelingskriteriet det økonomisk mest fordelagtige tilbud. Sagen var anlagt af en virksomhed,

der havde afgivet tilbud vedrørende begge udbud, men som ikke havde fået tildelt kontrakten i henhold til nogen af dem.

Vedrørende udbud 1:

Sagsøgerens anbringender og Rettens stillingtagen til dem kan gengives således:

Anbringende 1: Udbyderen havde overtrådt udbudsreglerne ved ikke at besvare nogle spørgsmål fra sagsøgeren med henvisning til, at spørgsmålene var fremkommet for sent.

Dette anbringende sigtede efter det foreliggende til følgende: Tilbudsfristen udløb den 9. august, og ifølge udbudsbetingelserne skulle spørgsmål være modtaget af udbyderen 10 dage forinden. Udbyderen havde imidlertid først modtaget de pågældende spørgsmål fra sagsøgeren med telefax den 2. august. Sagsøgeren gjorde bl.a. gældende, at sagsøgeren havde søgt at sende spørgsmålene pr. telefax den 31. juli, men at dette var mislykkedes, tilsyneladende på grund af fejlfunktioner ved udbyderens telefax.

Anbringendet blev ikke taget til følge bl.a. med henvisning til, at 10 dage før 9. august er 30. juli, og at fristen for at stille spørgsmål derfor var udløbet den 30. juli (præmis 117).

Anbringende 2: Underkriterierne var uklare:

Ikke taget til følge. Retten fremsatte i præmis 129-132 nogle udtalelser om udformningen af underkriterier til tildelingskriteriet det økonomisk mest fordelagtige tilbud. Udtalelserne refereres ikke, da de ikke skønnes at indeholde nydannelser. Retten fandt endvidere, at det fremgik tilstrækkeligt af udbudsbetingelserne, hvad der sigtedes til med underkriterierne (præmis 136) og konkluderede, at underkriterierne ikke var uklare (præmis 138).

Anbringende 3: Det var i strid med udbudsreglerne, at udbyderen i forbindelse med tilbudsvurderingen havde opstillet en række delkriterier til et af underkriterierne og havde vurderet tilbuddene på grundlag af disse delkriterier:

Ikke taget til følge. Udtalt, at en udbyder ikke må anvende delkriterier, som tilbudsgiverne ikke har fået oplysning om på forhånd (præmis 147). En udbyder må imidlertid uden forudgående oplysning herom anvende vægtningskoofficienter (»coefficients de pondération«) for underkriterierne under forudsætning af, at sådanne vægtningskoofficenter 1) ikke ændrer underkriterierne, 2) ikke indeholder elementer, der kunne have påvirket tilbuddenes indhold, hvis de havde været kendt på forhånd, og 3) ikke virker diskriminerende (præmis 148). Sagsøgeren havde ikke påvist, at udbyderen havde overtrådt disse betingelser ved tilbudsvurderingen i relation til det underkriterium, der var tale om (præmis 155).

Anbringende 4: Udbyderen havde ikke givet sagsøgeren fyldestgørende begrundelse for tildelingsbeslutningen og beslutningen om ikke at antage sagsøgerens tilbud.

Anbringendet sigtede bl.a. til, at udbyderen efter sagsøgerens opfattelse ikke havde givet sagsøgeren en klar forklaring på tildelingsbeslutningen, og til, at sagsøgeren ifølge sin angivelse først modtog en uddybende begrundelse for tildelingsbeslutningen, som sagsøgeren havde anmodet om, efter at sagsøgeren rykket for den. Udbyderen gjorde på det sidstnævnte punkt gældende, at den uddybende begrundelse var blevet sendt tidligere ved et almindeligt brev.

Anbringendet blev ikke taget til følge (præmis 181). Bl.a. henvist til, at udbyderen havde opfyldt sine forpligtelser med hensyn til underretning om tildelingsbeslutningen og uddybende begrundelse efter anmodning (præmis 174-179). Udtalt, at det var beklageligt, at udbyderen ikke havde sikret sig bevis for, at sagsøgeren havde modtaget den oprindelige uddybende begrundelse, men at forholdet ikke havde påvirket sagsøgerens retsstilling (præmis 175).

Anbringende 5: Udbyderens tilbudsvurdering var forkert:

Ikke taget til følge med henvisning til forskellige forhold, herunder udbyderens skønsbeføjelse (præmis 196). Det var uden betydning, at udbyderens evalueringsrapport nævnede visse mindre fejl i den valgte tilbudsgivers tilbud (præmis 202).

Sagsøgeren fik således ikke medhold på noget punkt vedrørende udbud nr. 1.

Vedrørende udbud 2:

Sagsøgeren fremsatte forskellige anbringender, men Retten fandt kun anledning til at tage stilling til et af disse anbringender, nemlig et anbringende om, at udbyderen havde været uberettiget til at tage den valgte tilbudsgivers tilbud i betragtning som følge af, at dette tilbud var indgivet for sent.

Dette anbringende sigtede til følgende:

Ifølge udbudsbetingelserne udløb fristen for at afgive tilbud den 9. august, således at tilbuddene enten skulle være afleveret til udbyderen inden kl. 16 på denne dag eller være afsendt med anbefalet brev senest på denne dag.

Udbyderen åbnede tilbuddene den 25. august og konstaterede i forbindelse hermed, at tilbuddet fra den tilbudsgiver, der senere blev valgt, var modtaget hos udbyderen den 10. august, og at den konvolut, som tilbuddet lå i, ikke havde noget poststempel. I et brev af 26. august bad udbyderen tilbudsgiveren om dokumentation for, at tilbuddet var afsendt rettidigt i overensstemmelse med udbudsbetingelserne. Tilbudsgiveren sendte derefter udbyderen en postkvittering dateret 6. august og en erklæring af 2. september fra en postfunktionær, hvorefter det pågældende postkontor havde ekspederet et brev fra tilbudsgiveren til udbyderen den 6. august. Udbyderen anså herefter tilbudsgiverens tilbud for rettidigt afsendt og besluttede at indgå kontrakt med tilbudsgiveren.

Retten fandt, at postkvitteringen ikke kunne sidestilles med sædvanlig dokumentation for afsendelse af et anbefalet brev. Retten henviste herved til, at postkvitteringen ikke indeholdt angivelse af afsender og modtager og til, at det efter sagens oplysninger da også var erklæringen fra postfunktionæren, der havde bevirket, at udbyderen anså tilbuddet for rettidigt afsendt. Retten henviste videre til, at erklæringen fra postfunktionæren ikke gav nogen forklaring på, at der ikke var poststempel på konvolutten, og til, at erklæringen ikke gik ud på, at brevet var sendt anbefalet. (Præmis 94-96). Udbyderen havde endvidere ingen skønsbeføjelse med hensyn til sin konstatering af, om et tilbud var rettidigt (præmis 100), og udbyderen havde herefter ikke været berettiget til at tage den valgte tilbudsgivers tilbud i betragtning (præmis 102). Det var uden betydning, at der kun var én anden tilbudsgiver, dvs. sagsøgeren, idet udbyderen ikke var forpligtet til at indgå kontrakt med sagsøgeren, men kunne have annulleret udbuddet (præmis 105).

Retten annullerede herefter udbyderens beslutning om at indgå kontrakt med den valgte tilbudsgiver.

Retten i Første Instans' dom af 19. marts 2010 i sag T-50/05, Evropaïki Dynamiki mod Kommissionen

En deltager i konsortium, der ikke var en juridisk person, kunne anlægge sag vedrørende et udbud, som konsortiet havde afgivet tilbud under. Diverse klagepunkter ikke taget til følge

Denne dom er meget omfattende, men refereres stærkt sammentrængt, da dommen ikke skønnes at have den store almene udbudsretlige interesse.

Kommissionen iværksatte et udbud vedrørende en it-ydelse. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud på grundlag af forskellige underkriterier om kvalitet og pris m.m. Af udbudsbetingelserne fremgik, at kun tilbud, der opnåede nogle nærmere angivne points ved tilbudsvurderingen, ville blive taget i betragtning.

Der indkom et antal tilbud, hvoraf tre blev taget i betragtning, og Kommissionen besluttede at tildele kontrakten til en af de tre tilbudsgivere. En af de tre andre tilbudsgivere var et konsortium, og en virksomhed, som var indgået i dette konsortium, anlagde derefter sagen ved Retten i Første instans.

Retten henviste til, at det tilbudsgivende konsortium, som sagsøgeren havde deltaget i, ikke var en juridisk person, og at sagsøgeren derfor kunne anlægge sagen (præmis 40). Retten tog i øvrigt stilling til sagen således (Klagenævnets litrering):

Anbringende 1: Kommissionen havde overtrådt ligebehandlingsprincippet som følge af, at kun den valgte tilbudsgiver havde haft nogle nærmere angivne tekniske oplysninger:

Ikke taget til følge, da anbringendets rigtighed med hensyn til nogle af de pågældende oplysninger ikke var godtgjort, og da sagsøgeren ikke havde godtgjort, at de øvrige oplysninger havde haft betydning (præmis 74 og præmis 100-101). Herved fremsat forskellige generelle udtalelser om principperne om ligebehandling og gennemsigtighed (præmis 55-59).

Anbringende 2: Underkriterierne var uegnede:

Ikke taget til følge, da anbringendets rigtighed ikke var bevist m.m. (præmis 111-115).

Anbringende 3: Kommissionen havde ikke udvist tilstrækkelig omhu og havde derved tilsidesat princippet om god forvaltningsskik:

Ikke taget til følge, da der ikke var grundlag herfor (præmis 127).

Anbringende 4: Kommissionen havde ikke givet tilstrækkelig begrundelse for tildelingsbeslutningen:

Ikke taget til følge, da Kommissionen havde givet tilstrækkelig begrundelse, således at sagsøgeren kunne forsvare sine rettigheder og Retten kunne udøve sin prøvelsesret (præmis 142). En mindre overskridelse af 15-dages fristen for uddybende begrundelse efter anmodning var beklagelig, men var uden betydning (præmis 141).

Anbringende 5: Kommissionens tildelingsbeslutning var forkert:

Ikke taget til følge, da det ikke var godtgjort, at Kommissionen havde udøvet et åbenbart urigtigt skøn ved tilbudsvurderingen (præmis 178).

Kommissionen blev herefter frifundet.

EU-domstolens dom af 25. marts 2010 i sag C-451/08, Helmut Müller
Udbudsdirektivet omfatter ikke salg af fast ejendom og omfatter kun gensidigt bebyrdende aftaler. For at en aftale kan anses for gensidigt bebyrdende, skal den give den ordregivende myndighed en økonomisk fordel. Opfyldelsen af en generel byplanmæssig interesse er ikke en sådan økonomisk fordel, og direktivet omfatter ikke, at en ordregivende myndighed udøver sine beføjelser som planmyndighed. Begrebet koncession forudsætter, at der overføres råderet fra koncessionsgiveren til koncessionshaveren, og at koncessionshaveren har i hvert fald en væsentlig del af risikoen. Denne risiko skal være forbundet med driften, hvilket ikke er tilfældet med hensyn til den risiko, der følger af planmyndighedens dispositioner. Tidsubegrænsede koncessioner er formentlig i strid med EU-retten

Denne dom angår Udbudsdirektivets regler om koncessioner vedrørende bygge- og anlægskontrakter (artikel 56-65). Disse regler kan ikke gengives kort, men går i deres kerne ud på, at koncessioner om bygge- og anlægsarbejder er omfattet af udbudspligten.

Dommen forekommer umiddelbart vanskeligt tilgængelig, hvilket tilsyneladende i hvert fald delvis hænger sammen med følgende: Den forelæggende tyske domstols spørgsmål havde reference dels til nogle bestemmelser i den tyske lovgivning, som efter den tyske domstols opfattelse var i strid med EU-retten, dels til en bestemmelse, der er affattet anderledes i den tyske version af Udbudsdirektivet end i de øvrige sprogversioner af dette direktiv. Hertil kommer, at EU-domstolens udtalelser reelt kun var udtryk for svar på nogle af den tyske domstols spørgsmål.

Dommens resultat synes imidlertid at være relativt enkelt, jf. resuméets tre afsluttende afsnit. Dommen kan gengives således:

En tysk forbundsmyndighed, der var ejer af en nedlagt kaserne, satte kasernen til salg i form af et udbud og solgte kasernen til den højstbydende. Samtidig foregik der overvejelser i den kommune, hvor kasernen lå, om etablering af en byplan for kaserneområdet. Det fremgår, at en sådan byplan efter den tyske lovgivning kan kombineres med en aftale mellem planmyndigheden og en privat virksomhed om, at den private virksomhed får eneret og pligt til at bebygge planområdet i overensstemmelse med byplanen. Der var tilsyneladende i kommunen overvejelser om at indgå en sådan aftale med den virksomhed, der havde købt den tidligere kaserne.

En anden af de virksomheder, der havde givet tilbud på køb af kasernen, klagede til et klageorgan og gjorde gældende, at salget af kasernen skulle have været udbudt efter Udbudsdirektivet. Klageorganet tog ikke klagen til følge. Sagen blev indbragt for en tysk domstol, der umiddelbart var af den opfattelse, at der var tale om en koncession vedrørende et bygge- og anlægsarbejde som følge af, at køberen af kaserneområdet formentlig ville få eneret til at bebygge området. Den tyske domstol forelagde sagen for EU-domstolen med en længere række spørgsmål.

EU-domstolens udtalelser kan gengives således (Klagenævnets litrering):

1) Salg af fast ejendom er ikke omfattet af udbudspligten efter Udbudsdirektivet (præmis 41). Direktivet omfatter endvidere kun gensidigt bebyrdende aftaler (præmis 47). Heri ligger, at den ordregivende myndighed skal modtage en ydelse mod vederlag, og en sådan ydelse skal give den ordregivende myndighed en økonomisk fordel (præmis 48-49). En

sådan økonomisk fordel foreligger, hvis den ordregivende myndighed bliver ejer af eller får rådighed over bygge- og anlægsarbejderne m.m. (præmis 50-52). Opfyldelsen af en offentlig byplanmæssig interesse er derimod ikke en økonomisk fordel som omtalt (præmis 57).

2) Da Udbudsdirektivet kun omfatter gensidigt bebyrdende aftaler, forudsætter begrebet bygge- og anlægskontrakt, at den ordregivende myndighed efter national har en retligt bindende forpligtelse til direkte eller indirekte at gennemføre de arbejder, der er genstand for kontrakten. (Præmis 60 og 63. Ikke mindst disse udtalelser forekommer vanskeligt forståelige, bl.a. fordi de umiddelbart synes at referere til noget helt andet end det, som den tyske domstol havde spurgt om på det pågældende punkt. Udtalelserne sigter tilsyneladende til, at den ordregivende myndighed skal have en eller anden form for privatretlig forpligtelse i sammenhængen).

3) Angivelsen i Udbudsdirektivets artikel 1, stk. 2, litra b) om, at der ved offentlige bygge- og anlægskontrakter bl.a. forstås »udførelse ved et hvilket som helst middel af et bygge- og anlægsarbejde, der svarer til behov præciseret af den ordregivende myndighed«, omfatter ikke, at en ordregivende myndighed undersøger et byggeprojekt eller udøver sine beføjelser som planmyndighed (præmis 69).

4) En koncession forudsætter, at den ordregivende myndighed har retten til at råde over det, som koncessionen angår. Ved koncessionen overfører den ordregivende myndighed denne ret til koncessionshaveren. (Præmis 72). En sådan overførelse sker imidlertid normalt ikke, når den anden part har ejendomsretten og dermed råderetten i forvejen (Præmis 73). Kernen i begrebet koncession består endvidere af, at koncessionshaveren har den væsentligste eller i hvert fald en væsentlig del af den økonomiske risiko. Denne risiko skal være forbundet med driften (præmis 75), hvilket ikke var tilfældet i den foreliggende sag, idet risikoen for køberen af kasernen bestod i kommunens dispositioner som byplanmyndighed og ikke lå i et kontraktforhold om en koncession (præmis 78). Tungtvejende grunde taler i øvrigt for at anse en tidsubegrænset koncession som værende i strid med EU-retten (præmis 79).

5) Udbudsdirektivet finder ikke anvendelse på en situation som den foreliggende, hvor en offentlig myndighed sælger en grund til en virksomhed, mens en anden offentlig myndighed har til hensigt at indgå en bygge- og anlægskontrakt vedrørende grunden (præmis 89).

EU-domstolen besvarede herefter de stillede spørgsmål i overensstemmelse med det anførte.

Afgørelsen kan formentlig sammenfattes således:

At en ordregivende myndighed i sin egenskab af planmyndighed giver ejeren af et areal eneret til at bebygge arealet i overensstemmelse den offentlige planlægning, er ikke en udbudspligtig koncession om et bygge- og anlægsarbejde.

Dette skyldes følgende: Der ikke er tale om en gensidigt bebyrdende aftale, hvilket udbudspligten forudsætter, da den ordregivende myndighed ikke får nogen modydelse, men blot får opfyldt sin planlægning. Den ordregivende myndighed overfører endvidere ikke nogen råderet over arealet fra sig selv til arealets ejer, men overførelse af råderet er en betingelse for, at der foreligger koncession. Hertil kommer, at der ikke ved tildelingen af eneretten påføres arealets ejer nogen økonomisk driftsrisiko, men det er en betingelse for, at der foreligger koncession, at koncessionshave-

ren får en væsentlig del af en økonomisk driftsrisiko. Desuden vil eneretten for arealets ejer til at udnytte arealet efter sin natur være tidsubegrænset, og dette taler i sig selv mod at anse tildelingen af eneretten for en koncession, da EU-retten formentlig ikke tillader tidsubegrænsede koncessioner.

Klagenævnet for Udbud

RESUMÉER AF AFGØRELSER OM UDBUD FRA EF-DOMSTOLEN OG RETTEN I FØRSTE INSTANS 2006-2008

NB! Resuméernes henvisninger til retsregler m.m. vil/kan efterhånden blive forældede, da resuméerne principielt er udarbejdet kort efter afgørelserne

Dette hæfte indeholder resuméer af afgørelser inden for udbudsområdet truffet af EF-domstolen og Retten i Første Instans 2006-2008, og som er optaget på EF-domstolens websted http://curia.eu.int/.

Resuméerne er udarbejdet af Klagenævnet for Udbud, der har ansvar for dem alene.

Den dato, der angives ved begyndelsen af hvert resumé, er datoen for den pågældende afgørelse. Den betegnelse for sagen, der angives ved hvert resumé, er EF-domstolens officielle betegnelse, sådan som den er angivet på Internettet.

Særligt om afgørelserne fra *Retten i Første Instans* bemærkes:

Afgørelserne om udbud fra Retten i Første Instans angår udbud foretaget af EU-organerne, dvs. Kommissionen, Rådet og Parlamentet mfl., idet Retten i Første Instans er klageorgan vedrørende sådanne udbud.

For EU-organernes udbud gælder nogle regler, der er indeholdt i to forordninger, dels »Finansforordningen«, dvs. Rådets forordning nr. 1605/2002 med senere ændringer, dels »Gennemførelsesforordningen«, dvs. Kommissionens forordning nr. 2342/2002 med senere ændringer.

De pågældende regler svarer i det væsentlige til de udbudsregler, der gælder for de ordregivende myndigheder i medlemsstaterne. Afgørelserne om udbud fra Retten i Første Instans kan derfor have en vis almen interesse, for så vidt som de (reelt) kan bidrage til fortolkningen af de udbudsregler, der gælder for de ordregivende myndigheder i medlemsstaterne, dvs. Udbudsdirektivet og Forsyningsvirksomhedsdirektivet m.m.

I resuméerne af afgørelser fra Retten i Første Instans er som almindelig regel kun medtaget de dele af afgørelserne, der belyser forståelsen af almindelige udbudsretlige principper. Resuméerne omfatter således principielt ikke dele af afgørelserne, der angår specifikke reguleringer af EU-organernes optræden eller formelle spørgsmål om Rettens kompetence.

NB! Resuméernes henvisninger til retsregler m.m. vil/kan efterhånden blive forældede, da resuméerne principielt er udarbejdet kort efter afgørelserne.

Indholdsfortegnelse vedrørende afgørelsernes dato og betegnelse

EF-domstolens dom af 9. februar 2006, sager C-226/04 og C-228/04, Cascina og Zilch 8

Retten i Første Instans' dom af 14. februar 2006 i sager T-376/05 og T-383/05, TEA-CEGOS og STG mod Kommissionen 9

EF-domstolens dom af 11. maj 2006, sag C-340/04, Cabotermo og Consorzio Alisei 10

Retten i Første Instans' kendelse af 20. juli 2006 i sag T-114/06 R, Globe mod Kommissionen 12

EF-domstolens dom af 18. januar 2007, sag C-220/05, Auroux mfl. 13

Retten i Første Instans dom af 18. april 2007 i sag T-195/05, Deloitte mod Kommissionen 15

EF-domstolens dom 19. april 2007, sag C-295/05, Asociaión Nacional de Empresas Forestales (kaldet Asemfo eller Tragsa) 17

EF-domstolens dom af 14. juni 2007, sag C-6/05, Medipac-Kazantzkis 18

EF-domstolens dom af 18. juli 2007, sag C-382/05, Kommissionen mod Italien 19

EF-domstolens dom af 18. juli 2007, sag C-399/05, Kommissionen mod Grækenland 20

EF-domstolens dom af 18. juli 2007, sag C-503/04, Kommissionen mod Tyskland 21

EF-domstolens kendelse 4. oktober 2007, sag C-492/06, Conzorzio Elisoccorso San Raffaele 23

EF-domstolens dom af 11. oktober 2007, sag C-237/05, Kommissionen mod Grækenland 23

EF-domstolens dom af 11. oktober 2007, sag C-241/06, Lämmerzahl 24

EF-domstolens dom af 13. november 2007, sag C-507/03, Kommissionen mod Irland 25

EF-domstolens dom af 13. december 2007, sag C-337/06, Bayerische Rundfunk mfl. 26

EF-domstolens dom af 18. december 2007, sag C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia 28

EF-domstolens dom af 18. december 2007, sag C-357/06, Frigerio Luigi & C 29

EF-domstolens dom af 24. januar 2008, sag C-532/06, Lianakis mfl. 30

EF-domstolens dom af 14. februar 2008, sag C-450/06, Varec 32

Retten i Første Instans' dom af 12. marts 2008 i sag T-332/03, European Service Network mod Kommissionen 32

Retten i Første Instans' dom af 12. marts 2008 i sag T-345/03, Evropaïki Dynamiki mod Kommissionen (er set benævnt Cordis) 34

EF-domstolens dom af 3. april 2008 i sag C-346/06, Rüffert 35

EF-domstolens dom af 3. april 2008, sag C-444/06, Kommissionen mod Spanien 37

EF-domstolens dom af 8. april 2008, sag C-337/05, Kommissionen mod Italien 37

EF-domstolens dom af 10. april 2008, sag C-393/06, Ing. Aigner 38

EF-domstolens dom af 15. maj 2008, sager C-147/06 og C-148/06, Secap 39

Retten i Første Instans' dom af 21. maj 2008 i sag T-495/04, Belfass mod Rådet 41

EF-domstolens dom af 19. juni 2008 i sag C-454/06, Pressetext Nachrichtenagentur GmbH 43

Retten i Første Instans' dom af 10. september 2008 i sag T-59/05, Evropaïki Dynamiki mod Kommissionen 44

Retten i Første Instans' dom af 10. september 2008 i sag T-272/06, Evropaïki Dynamiki mod EF-domstolen 45

EF-domstolens dom af 2. oktober 2008, sag C-157/06, Kommissionen mod Italien 46

Retten i Første Instans' dom af 8. oktober 2008 i sag T-411/06, Sogelma mod Det Europæiske Genopbygningsagentur 46

EF-domstolens dom af 13. november 2008, sag C-324/07, Coditel Brabrant 47

EF-domstolens dom af 16. december 2008, sag C-213/07, Michaniki 49

Indholdsfortegnelse vedrørende afgørelsernes emner

Tjenesteydelsesdirektivets artikel 29 danner grænsen for, hvornår tjenesteydere kan udelukkes fra en udbudsprocedure, og medlemsstaterne kan fastsætte lempeligere regler. Det afhænger af national ret, hvornår tjenesteydere skal have opfyldt deres pligt til at betale socialt bidrag og skat, og om tjenesteydere kan opfylde denne pligt ved at indgå en afdragsordning eller ved at klage. National ret må dog ikke fuldstændig undlade at tillægge klage betydning 8

Kommissionen havde med rette afvist tilbud fra to tilbudsgivere, der tilhørte samme »juridiske gruppe«, da forholdet medførte risiko for konkurrencefordrejning og interessekonflikt 9

En ordregiver udøvede ikke samme kontrol med en virksomhed som med sine egne tjenestegrene, da virksomhedens og et mellemliggende holdingselskabs bestyrelser havde meget vidtgående beføjelser, og da holdingselskabets eksistens kunne svække kontrollen. En virksomhed udøver kun hovedparten af sine aktiviteter sammen den ordregiver, den ejes af, hvis andre aktiviteter har marginal betydning. Hvis virksomheden ejes af flere ordregivere, skal hovedparten af aktiviteterne udøves sammen med dem. Artikel 13 i det tidligere Forsyningsvirksomhedsdirektiv finder ikke anvendelse på Indkøbsdirektivet 10

Et sagsanlæg fra en forbigået tilbudsgiver tillagt opsættende virkning, da der forelå »fumus boni juris« og uopsættelighed, og da en interesseafvejning ikke kunne føre til andet resultat 12

En kommunes indgåelse af kontrakt med en virksomhed om gennemførelse af et byplanprojekt var omfattet af Bygge- og anlægsdirektivet, da projektets hovedformål var at gennemføre bygge- og anlægsopgaver. Det var uden betydning, at virksomheden skulle lade bygge- og anlægsarbejderne udføre af entreprenører, og at virksomheden selv var omfattet af direktivets udbudspligt. Virksomheden var ikke in house, da den var et halvoffentligt selskab med private kapitalinteresser. Projektets værdi var dets samlede værdi. Udtrykket entreprenør i Bygge- og anlægsdirektivets artikel 1, a) sigter ikke til, at den ordregivende myndigheds kontraktspart selv skal være entreprenør 13

Tilbud fra et konsortium vedrørende en evalueringsopgave afvist med rette, da konsortiets hoveddeltagere til dels selv udførte de opgaver, der skulle evalueres, og derfor befandt sig i en interessekonflikt. Udbyderens begrundelse for

afvisningen havde klart og utvetydigt angivet grunden til afvisningen. Udbyderen havde ikke haft pligt til at indhente supplerende oplysninger fra konsortiet..... 15

Et selskab, der ejes af den spanske stat med 96 % og af nogle spanske regioner med 4 %, er in house i forhold til både staten og de pågældende regioner. En virksomhed, der ejes af flere offentlige myndigheder, er in house i forhold til alle disse, hvis virksomheden udøver hovedparten af sine opgaver for dem, og det kræves ikke, at virksomheden udøver hovedparten af opgaverne for en enkelt af dem 17

Indkøbsdirektivet gælder ikke for udbud under tærskelværdien, men principperne om ligebehandling og gennemsigtighed gælder for sådanne udbud. Det var i strid med disse principper, at en fremgangsmåde i henhold til direktivet om medicinsk udstyr ikke var blevet fulgt 18

Om en aftale om tjenesteydelser skal anses for en tjenesteydelseskoncession, således at der ikke er pligt til EU-udbud, er et fællesskabsretligt spørgsmål, og national rets forståelse af koncessionsbegrebet er uden betydning. Definition af tjenesteydelseskoncessioner. Nogle aftaler om tjenesteydelser var ikke tjenesteydelseskoncessioner og skulle derfor have været udbudt 19

Antagelse af tilbud i strid med udvælgelseskriterier angår ligebehandlingsprincippet, ikke gennemsigtighedsprincippet. Det generelle ligebehandlingsprincip ikke har selvstændig betydning ved siden af en direktivregel, der udmønter princippet. I øvrigt konkret afgørelse 20

Ved ikke at foranledige ophævelse af en 30-årig kontrakt indgået i strid med Tjenesteydelsesdirektivet havde Tyskland tilsidesat sin forpligtelse efter traktatens artikel 228 til at efterkomme en tidligere dom fra EF-domstolen, ved hvilken kontraktens strid med direktivet var konstateret 21

Første kontroldirektiv er ikke er til hinder for, at national ret tillægger deltagere i tilbudsgivende konsortier klageadgang..... 23

Sag om hævdet traktatbrud som følge af manglende EU-udbud afvist, da de pågældende kontrakter havde udtømt deres virkninger før udløbet af fristen i Kommissionens begrundede udtalelse, og da det ikke lå tilstrækkelig klart, at der senere var indgået nye tilsvarende aftaler 23

En national regel om klagefrist må ikke anvendes sådan, at den i det konkrete tilfælde gør en klage praktisk umulig eller uforholdsmæssig vanskelig. National ret skal fortolkes i overensstemmelse med første kontroldirektivs formål, og er en sådan fortolkning ikke mulig, skal den nationale domstol forkaste nationale bestemmelser i strid med direktivet 24

Den irske stat kunne overlade udførelse af en bilag I B-tjenesteydelse til det irske postvæsen uden forudgående offentliggørelse, da der ikke var ført bevis for noget grænseoverskridende element 25

Licensfinansiering af nogle public service tv- og radiostationer var udtryk for, at stationerne var finansieret af staten. Stationerne skulle herefter foretage EU-udbud af rengøring, da de var offentligretlige organer, og da det var uden betydning, at staten ikke kunne udøve bestemmende indflydelse på kontraktstildelingen. En undtagelse fra udbudspligten i Tjenesteydelsesdirektivet og Udbudsdirektivet vedrørende radio- og tv-stationer angår ikke kontrakter om rengøring..... 26

En offentlig myndigheds aftale med en virksomhed om postbefordring, der ikke er omfattet af en eneret for virksomheden i overensstemmelse med Postdirektivet, skal udbydes, hvis aftalens værdi når op på tærskelværdien for tjenesteydelser. Hvis aftalens værdi er under tærskelværdien, skal der ske en passende offentliggørelse. Et statsligt postvæsen var ikke in house i forhold til staten, da virksomhedskriteriet ikke var opfyldt 28

En italiensk lovbestemmelse om, at ordregivende myndigheder kun kan indgå kontrakter om tjenesteydelser med kapitalselskaber, var i strid med Tjenesteydelsesdirektivets artikel 26 29

Nogle underkriterier angik tilbudsgivernes egnethed og var derfor i strid med Tjenesteydelsesdirektivet. Underkriterier til underkriterier skal som almindelig regel være oplyst på forhånd 30

Fortrolige oplysninger kan unddrages fra en klagers aktindsigt, men klageorganet skal selv have de nødvendige oplysninger, og der skal før udlevering af muligt fortrolige oplysninger indhentes en udtalelse fra den berørte virksomhed 32

Ligebehandlingsprincippet har til formål at sikre konkurrencen og give tilbudsgiverne ens chancer. Gennemsigtighedsprincippet er et supplement til ligebehandlingsprincippet og skal sikre mod favorisering og vilkårlighed. Ved udbud af kontrakter om tjenesteydelser er visse fordele for den hidtidige tjenesteyder uundgåelige. Udbyderens forsømmelser med hensyn til at give tilbudsgiverne oplysninger havde ikke haft indflydelse på tilbudsvurderingen. 32

Udbyderen tilsidesatte ligebehandlingsprincippet ved ikke at give tilbudsgiverne alle nødvendige oplysninger med den konsekvens, at kun den valgte tilbudsgiver som følge af sit samarbejde med den aktuelle tjenesteyder havde alle oplysningerne. Tildelingsbeslutningen annulleret..... 34

Udstationeringsdirektivet og traktatens artikel 49 er til hinder for en national lovbestemmelse, hvorefter offentlige byggekontrakter kun må indgås på vilkår om betaling af overenskomstmæssig mindsteløn..... 35

Spanien havde overtrådt 1. kontroldirektiv som følge af, at der i visse tilfælde ikke er mulighed for at klage over en tildelingsbeslutning før kontraktsindgåelsen. Spanien havde derimod ikke overtrådt direktivet ved en regel om, at ugyldige kontrakter kan opretholdes midlertidigt under visse betingelser..... 37

Italien havde overtrådt de tidligere indkøbsdirektiver ved en fast praksis om indkøb af helikoptere uden EU-udbud. En virksomhed, der er delvis privatejet, er aldrig in house i forhold til en offentlig ordregiver, heller ikke selvom den private ejerandel er en minoritetsandel 37

En ordregiver, der driver virksomhed under Forsyningsvirksomhedsdirektivet, er ikke omfattet af dette direktiv med hensyn til anden virksomhed. Et fjernvarmeselskab var et offentligretligt organ. Alle kontrakter, der indgås af et offentligretligt organ, er omfattet af udbudsdirektiverne, også kontrakter, der angår rent erhvervsmæssige aktiviteter..... 38

Traktatens grundlæggende regler gælder kun for kontrakter under tærskelværdien, hvis kontrakterne har en klar grænseoverskridende interesse. Der kan i den nationale lovgivning fastsættes kriterier herom 39

Udbyderens afvisning af et tilbud, fordi tilbuddet ikke opfyldte et krav i udbudsbetingelserne om et bestemt timetal, skulle ske under overholdelse af reglerne om unormalt lave bud, da disse regler omfatter alle underkriterier. Udbyderen frifundet for krav fra tilbudsgiver om erstatning til dækning af positiv opfyldelsesinteresse, da det ikke var bevist, at tilbudsgiveren ville have fået kontrakten, hvis udbyderen ikke havde overtrådt udbudsreglerne, og da det tværtimod kunne lægges til grund, at tilbudsgiveren ikke ville have fået kontrakten 41

Væsentlige ændringer af en udbudspligtig aftale bevirker, at der foreligger en ny aftale med deraf følgende ny udbudspligt. En intern omstrukturering hos ordregiverens medkontrahent er ikke en væsentlig ændring, og det er i princippet heller ikke en væsentlig ændring, at en medkontrahent, der er en juridisk person, skifter ejerkreds. EU-retten indeholder på sit nuværende udviklingstrin ikke et forbud mod tidsubegrænsede aftaler om tjenesteydelser. En aftaleklausul om uopsigelighed i en kortere periode medfører ikke risiko for konkurrencefordrejning under forudsætning af, at den ikke systematisk genindsættes..... 43

Når en forbigået tilbudsgiver har anmodet om en begrundelse for tildelingsbeslutningen, er det ønskeligt, at udbyderen sender tilbudsgiveren evalueringsdokumentet, om nødvendigt med udeladelse af fortrolige oplysninger..... 44

Annullation af beslutning om ikke at prækvalificere en tilbudsgiver som følge af, at udbyderen havde givet en urigtig og vildledende begrundelse for beslutningen 45

Italien havde overtrådt Indkøbsdirektivet ved at tillade offentlige ordregivere at indkøbe helikoptere til politi og brandvæsen uden EU-udbud..... 46

Begrundelsen for udbyderens annullation af et udbud skal i en klar og relevant form angive de væsentlige faktiske og retlige omstændigheder, der ligger til grund for annullationen, men begrundelsen kan være kortfattet og behøver ikke angive samtlige omstændigheder. Det var ikke i strid med udbudsreglerne, at udbyderens beslutning om annullation af udbuddet først blev truffet efter godt ½ år 46

In house-begrebets kontrolkriterium er opfyldt, hvis der ikke er privat deltagelse i den virksomhed, der er tale om, og hvis virksomhedens formål er at udøve opgaver af offentlig interesse. Dette gælder, selvom virksomhedens ledelse har selvstændige beføjelser, og beslutninger i virksomheden træffes ved stemmeflerhed blandt de offentlige myndigheder, der ejer virksomheden 47

Bygge- og anlægsdirektivets regler om udelukkelse er udtømmende, men er ikke til hinder for fastsættelse af yderligere nationale udelukkelsesgrunde til sikring af ligebehandling og gennemsigtighed under forudsætning af, at sådanne nationale regler ikke går ud over, hvad der er nødvendigt for at opnå dette formål. Nationale regler, der afskærer ejere mfl. af visse virksomheder fra at levere til det offentlige, går ud over det nødvendige, hvis reglerne ikke giver mulighed for i det enkelte tilfælde at godtgøre, at der ikke foreligger reel risiko for konkurrencefordrejning..... 49

Resuméer

EF-domstolens dom af 9. februar 2006, sager C-226/04 og C-228/04, Cascina og Zilch

Tjenesteydelsesdirektivets artikel 29 danner grænsen for, hvornår tjenesteydere kan udelukkes fra en udbudsprocedure, og medlemsstaterne kan fastsætte lempeligere regler. Det afhænger af national ret, hvornår tjenesteydere skal have opfyldt deres pligt til at betale socialt bidrag og skat, og om tjenesteydere kan opfylde denne pligt ved at indgå en afdragsordning eller ved at klage. National ret må dog ikke fuldstændig undlade at tillægge klage betydning

Det italienske forsvarsministerium iværksatte et begrænset udbud i henhold til Tjenesteydelsesdirektivet vedrørende kantinedrift. Efter at tilbuddene var indkommet, besluttede udbyderen at udelukke tre tilbudsgivere, alle italienske virksomheder, fordi disse tilbudsgivere var i restance med hensyn til betaling af pligtige sociale bidrag henholdsvis i skatterestance.

Efter Tjenesteydelsesdirektivets artikel 29 kan en tjenesteyder udelukkes fra en udbudsprocedure, hvis tjenesteyderen er under konkurs m.m., herunder hvis tjenesteyderen ikke har opfyldt sine forpligtelser til at betale sociale bidrag eller skatter, bestemmelsens litra e) og f).

Udelukkelsen af de tre tilbudsgivere skete med hjemmel i en italiensk lovbestemmelse. Denne lovbestemmelse svarer til Tjenesteydelsesdirektivets artikel 29 e) og f), dog således, at ordene »ikke har opfyldt sine forpligtelser« i den italienske lovbestemmelse er blevet til »ikke behørigt har opfyldt sine forpligtelser.«

De tre tilbudsgivere klagede til en italiensk forvaltningsdomstol og henviste over for forvaltningsdomstolen til, at de efterfølgende havde betalt de skyldige sociale bidrag henholdsvis havde fået skattenedsættelse og en afdragsordning for skat.

Den italienske forvaltningsdomstol stillede nogle spørgsmål til EF-domstolen, der udtalte (noget ombrudt og omformuleret, Klagenævnets litrering):

1) Ad et spørgsmål, der sigtede til, om den italienske lovbestemmelse var en rigtig gennemførelse af Tjenesteydelsesdirektivets artikel 29 under hensyn til. at udtrykket »behørigt« i den italienske lovbestemmelse synes at lempe kravene til tjenesteyderne i forhold til artikel 29, litra e) og f):

Tjenesteydelsesdirektivets artikel 29 udgør grænsen for medlemsstaternes muligheder, således at medlemsstaterne ikke kan fastsætte andre udelukkelsesgrunde end dem, der er anført i artikel 29. Dette følger også af principperne om ligebehandling og gennemsigtighed. Medlemsstaterne kan imidlertid undlade at fastsætte udelukkelsesgrunde som i artikel 29 og har således kompetence til at lempe kriterierne i artikel 29 eller gøre dem mere fleksible. Under alle omstændigheder er der ingen indholdsmæssig forskel mellem de to formuleringer. (Præmis 22-23 og 27.)

2) Ad spørgsmål, der sigtede til, hvornår forpligtelserne til at betale sociale bidrag og skatter skal være opfyldt:

Forholdet afhænger af national ret. Det beror således på national ret, om betalingerne skal være sket ved anmodningen om prækvalifikation,

ved tilbudsfristens udløb eller ved tildelingen af kontrakten. Som følge af principperne om ligebehandling og gennemsigtighed skal det imidlertid på forhånd være gjort klart, hvad der gælder på dette punkt, enten i den nationale lovgivning eller af udbyderen i henhold til hjemmel i den nationale lovgivning. (Præmis 29-33.)

3) Ad spørgsmål, der sigtede til, om det er foreneligt med artikel 29 at give tjenesteydere i restance mulighed for at komme ud af restancen ved indgåelse af en afdragsordning ol.:

Forholdet afhænger af national ret. Det er således ikke uforeneligt med artikel 29 at anse tjenesteydere for at have opfyldt deres forpligtelser til betaling af sociale bidrag og skat ved indgåelse af en afdragsordning ol. (præmis 36).

4) Ad spørgsmål, der sigtede til, om det har betydning, at tjenesteyderen har klaget til de relevante klagemyndigheder over det pålæg af socialt bidrag eller skat, der er tale om:

Det afhænger af national ret, om en tjenesteyder skal anses for at have opfyldt sin forpligtelse til at betale et socialt bidrag eller en skat ved at klage til en relevant klagemyndighed (præmis 39). Det kan dog være i strid med tjenesteyderens grundlæggende rettigheder, hvis national ret slet ikke tillægger det betydning, at der er klaget (præmis 38).

Retten i Første Instans' dom af 14. februar 2006 i sager T-376/05 og T-383/05, TEA-CEGOS og STG mod Kommissionen

Kommissionen havde med rette afvist tilbud fra to tilbudsgivere, der tilhørte samme »juridiske gruppe«, da forholdet medførte risiko for konkurrencefordrejning og interessekonflikt

Dommen refereres kun i det omfang, den skønnes at have almen udbudsretlig interesse.

Dansk Center for Internationale Studier og Menneskerettigheder (DCISM) spiller en central rolle i denne sag. Dette center omfatter to institutter, dels Dansk Institut for Internationale Studier (DIIS), dels Institut for menneskerettigheder (IMR).

Sagen angik et udbud iværksat af Kommissionen vedrørende ydelse af teknisk bistand til udviklingslande.

I udbudsbekendtgørelsen var angivet, at virksomheder, der tilhørte samme juridiske gruppe[1], kun kunne indgive ét tilbud, og at tilbud fra flere virksomheder, der tilhørte samme juridiske gruppe, ikke ville blive taget i betragtning. Denne angivelse var en udmøntning af en regel i Finansforordningen, hvorefter tilbud fra tilbudsgivere, der befinder sig i en interessekonflikt, ikke må tages i betragtning.

Der indkom bl.a. tilbud fra et konsortium, der havde deltagelse af DIIS, og fra et andet konsortium, der havde deltagelse af IMR. Kommissionen afviste begge tilbud med henvisning til, at DIIS og IMR tilhørte samme juridiske gruppe. Sagen var anlagt af de to konsortier mod Kommissionen, og de to konsortier gjorde bl.a. gældende, at DIIS og IMR ikke tilhørte samme juridiske gruppe.

Fra Rettens udtalelser kan nævnes:

[1] I den franske version af dommen groupement juridique, i den engelske version legal group.

Begrebet samme juridiske gruppe er ikke defineret eller fastlagt i retspraksis (præmis 52). Ved sin vurdering af, om DIIS og IMR tilhørte samme juridiske gruppe, skulle Kommissionen derfor foretage en vurdering af, om DIIS og IMR var organisatorisk forbundet med DCISM, eller om der forelå andre forhold, der medførte risiko for interessekonflikter eller konkurrencefordrejning (præmis 53, der må skulle forstås således).

DIIS og IMR bliver begge administreret af DCISM, og nogle bestyrelsesmedlemmer i DCISM udpeges af DIIS og IMR. Der kunne således på højt niveau ske en udveksling af synspunkter mellem DIIS og IMR (præmis 57). DIIS og IMR tilhørte derfor samme juridiske gruppe, hvorfor der var risiko for konkurrencefordrejning og interessekonflikt mellem tilbudsgiverne, og hvorfor Kommissionen ikke havde udøvet et åbenbart urigtigt skøn ved at anse DIIS og IMR for at tilhøre samme juridiske gruppe (præmis 58).

Kommissionen blev herefter frifundet.

EF-domstolens dom af 11. maj 2006, sag C-340/04, Cabotermo og Consorzio Alisei

En ordregiver udøvede ikke samme kontrol med en virksomhed som med sine egne tjenestegrene, da virksomhedens og et mellemliggende holdingselskabs bestyrelser havde meget vidtgående beføjelser, og da holdingselskabets eksistens kunne svække kontrollen. En virksomhed udøver kun hovedparten af sine aktiviteter sammen den ordregiver, den ejes af, hvis andre aktiviteter har marginal betydning. Hvis virksomheden ejes af flere ordregivere, skal hovedparten af aktiviteterne udøves sammen med dem. Artikel 13 i det tidligere Forsyningsvirksomhedsdirektiv finder ikke anvendelse på Indkøbsdirektivet

En italiensk kommune, BA, stiftede i 1997 et holding-aktieselskab, AH. BA ejer 99,98 % af aktierne i AH, mens de øvrige aktier ejes af nogle andre kommuner. Af AH's vedtægter fremgår:

AH's formål er at udføre tjenesteydelser for det offentlige inden for forskellige områder, bl.a. vedrørende gas, vand, parkering og varmeforsyning. Andre kommuner og private virksomheder m.m. kan erhverve aktier, men BA skal have aktiemajoriteten, og private aktionærer kan ikke eje mere end 10 % af aktiekapitalen hver. Bestyrelsen har »de mest vidtgående beføjelser…, herunder mulighed for at udføre alle de handlinger, som den finder nødvendige for at gennemføre og opnå selskabets formål, alene med undtagelse af de handlinger, som loven eller vedtægterne udtrykkeligt forholder generalforsamlingen«.

I 2000 stiftede AH et andet aktieselskab, A, i hvilket AH ejer alle aktier. Af A's vedtægter fremgår:

A's formål svarer til AH's formål, dog tilsyneladende sådan, at A kan operere inden for flere områder end omfattet af AH's formål (bl.a. fx vedrørende geoteknik og edb). Ingen aktionær med undtagelse af AH må eje mere end 10 % af aktierne i A. A's bestyrelse har »de mest vidtgående beføjelser, uden begrænsning, til at varetage selskabets ordinære og ekstraordinære drift«.

I september 2003 iværksatte BA et udbud, tilsyneladende i henhold til Indkøbsdirektivet 93/36, af leverance af brændsel og tjenesteydelser vedrørende varmeinstallationer.

EF-domstolen har i flere domme opstillet følgende betingelser for offentlige ordregiveres indgåelse af kontrakt uden EU-udbud med en eks-

tern juridisk person, således fx i domme af 18. november 1999, Teckal, og 11. januar 2005, Stadt Halle mfl.:

a. Ordregiveren skal føre samme kontrol med leverandøren som med sin egne tjenestegrene, og
b. Leverandøren skal udføre hovedparten af sin virksomhed sammen med den eller de myndigheder, den ejes af.

Få dage før BA's iværksættelse af det omtalte udbud havde den højeste italienske forvaltningsdomstol (?), Consiglio di Stato, ved en dom statueret, at en myndighed kan indgå en aftale med en leverandør uden udbud, hvis myndigheden udøver en kontrol med leverandøren, som svarer til den kontrol, som den fører med sine egne tjenestegrene, og hvis leverandøren udfører hovedparten af sine aktiviteter sammen med den myndighed, som kontrollerer leverandøren. Dette var tydeligvis en udmøntning af EF-domstolens to omtalte betingelser. Det fremgår ikke, om der var tilsigtet nogen realitetsforskel med, at »ejes« i betingelse b. var blevet til »kontrollerer«.

På et tidspunkt blev BA øjensynlig opmærksom på Consiglio di Stato's dom. BA annullerede det igangværende EU-udbud og indgik i stedet kontrakt med A om de pågældende leverancer. Denne kontrakt blev således indgået uden udbud.

To virksomheder klagede til en forvaltningsdomstol herover, og forvaltningsdomstolen stillede følgende spørgsmål til EF-domstolen (Klagenævnets litrering, af forståelsesgrunde omformuleret og stærkt sammentrængt):

1) Kan der indgås kontrakt uden EU-udbud i en situation som den foreliggende?

2) Er EF-domstolens betingelse b. opfyldt, når den pågældende virksomhed har hovedparten af sin omsætning inden for området for den myndighed, som virksomheden ejes af?

3) Fandt artikel 13 i Forsyningsvirksomhedsdirektivet 93/38 anvendelse? (Denne bestemmelse gik ud på, at offentlige ordregivere under visse betingelser kunne indgå tjenesteydelsesaftaler uden udbud bl.a. med »tilknyttede« virksomheder.)

EF-domstolen udtalte (af forståelsesgrunde noget sammentrængt og omformuleret):

Ad 1): Ved bedømmelsen af, om en ordregivende myndighed udøver en kontrol med en leverandør svarende til kontrollen med sine egne tjenestegrene (betingelse a.) skal alle relevante omstændigheder tages i betragtning. Kontrollen skal gøre det muligt for ordregiveren at påvirke leverandørens beslutninger, og indflydelsen skal være bestemmende, præmis 36. AH's og A's bestyrelser har de mest vidtgående beføjelser, og BA's kontrol med de to selskaber svarer i det væsentlige til det råderum, som selskabsretten giver en flertalsaktionær, hvilket betydeligt begrænser BA's mulighed for at få indflydelse på selskabernes beslutninger, præmis 38. Hertil kommer, at BA's eventuelle indflydelse på A udøves gennem et holdingselskab, hvilket kan svække kontrollen, præmis 39. Under sådanne omstændigheder udøver ordregiveren ikke en kontrol svarende til kontrollen med ordregiverens egne tjenestegrene, præmis 40.

Ad 2):

Kravet om, at leverandøren skal udføre hovedparten af sin virksomhed sammen med den myndighed, den ejes af (betingelse b.), har til navnlig til formål at undgå konkurrencefordrejning, præmis 59. En virksomhed berøves nemlig ikke nødvendigvis sin handlefrihed, selvom den kontrolleres af den myndighed, den ejes af, hvis den stadig kan udøve en væsentlig del af sin aktivitet med andre aktører, præmis 61. En virksomhed udøver herefter kun hovedparten af sin virksomhed sammen med den ordregivende myndighed, den ejes af, hvis virksomhedens aktivitet hovedsagelig er bestemt for denne myndighed, således at enhver anden aktivitet kun har marginal karakter, præmis 63. Ved vurderingen af, om dette er tilfældet, skal der tages hensyn til alle omstændigheder. Den afgørende omsætning er den, som virksomheden opnår i kraft af tildelingsbeslutninger truffet af den ordregivende myndighed, og det er uden betydning, hvem der betaler til virksomheden, dvs. om det er den ordregivende myndighed eller de enkelte brugere, præmis 65-67.

Hvis virksomheden ejes af flere ordregivere, er den omhandlede betingelse opfyldt, hvis hovedparten af virksomhedens aktivitet udøves sammen med disse myndigheder (»samtlige disse myndigheder«), og det kræves ikke, at hovedparten af aktiviteten udøves sammen med en enkelt af dem (»ikke nødvendigvis sammen med den ene eller den anden af disse myndigheder«), præmis 71-72.

Ad 3): Artikel 13 i Forsyningsvirksomhedsdirektivet 93/38 er en undtagelsesbestemmelse, der skal fortolkes indskrænkende, og som ikke finder anvendelse på Indkøbsdirektivet 93/36. Dette resultat bestyrkes af, at det nugældende Forsyningsvirksomhedsdirektiv 2004/17 i artikel 23 indeholder en tilsvarende bestemmelse, men at det nugældende Udbudsdirektiv 2004/18 ikke gør det. (Præmis 55-56.)

EF-domstolen besvarede herefter de stillede spørgsmål i overensstemmelse med det anførte.

Retten i Første Instans' kendelse af 20. juli 2006 i sag T-114/06 R, Globe mod Kommissionen

Et sagsanlæg fra en forbigået tilbudsgiver tillagt opsættende virkning, da der forelå »fumus boni juris« og uopsættelighed, og da en interesseafvejning ikke kunne føre til andet resultat

Kommissionen iværksatte et offentligt udbud vedrørende en it-ydelse, der omfattede leverance af nogle printere og blækpatroner til printerne. Ved et rettelsesblad, der blev offentliggjort på Internettet 14 dage før tilbudsfristens udløb, blev antallet af de blækpatroner, der skulle leveres, nedskåret væsentligt i forhold til antalsangivelsen i de oprindelige udbudsbetingelser.

Tildelingskriteriet var laveste pris, Der indkom tilbud fra nogle tilbudsgivere. Tilbuddet fra en tilbudsgiver G havde laveste tilbudspris, medens tilbuddet fra en tilbudsgiver I havde næstlaveste tilbudspris.

Det fremgik af I's tilbud, at I havde beregnet tilbudsprisen på grundlag af angivelsen af antal blækpatroner i de oprindelige udbudsbetingelser, og at I øjensynligt ikke var opmærksom på, at antallet af blækpatroner var nedskåret i det omtalte rettelsesblad. Kommissionen gav derfor I lejlighed til at ændre sit tilbud til at angå antallet af blækpatroner i henhold til rettelsesbladet. I's tilbudspris var herefter den laveste, hvorfor Kommissionen besluttede at indgå kontrakt med I.

G anlagde derefter sagen ved Retten i Første Instans og påstod sagsanlægget tillagt opsættende virkning. Rettens kendelse af 20. juli 2006 angår alene spørgsmålet om opsættende virkning.

G gjorde forskellige anbringender gældende. Kendelsen beskæftigede sig kun med et enkelt af disse anbringender, nemlig at Kommissionen havde overtrådt udbudsreglerne 1) ved at give I lejlighed til at ændre sit tilbud som nævnt ovenfor og 2) ved at have taget I's tilbud i betragtning, selvom de af I tilbudte printere ikke kunne udskrive i det format og med den hastighed, der var krævet i udbudsbetingelserne.

Retten henviste til forskellige omstændigheder i sagen i relation til det nævnte anbringende fra G og udtalte herefter, at der var meget alvorlig tvivl med hensyn til, om Kommissionens tildelingsbeslutning var lovlig. Der forelå derfor »fumus boni juris[2]« (præmis 87). Der forelå endvidere uopsættelighed (præmis 140-141), ligesom en interesseafvejning ikke kunne falde ud til fordel for I eller Kommissionen (præmis 152 og 156).

G's sagsanlæg blev herefter tillagt opsættende virkning.

Retten synes ikke at have truffet realitetsafgørelse i sagen, hvilket vel kunne tyde på, at sagen er blevet forligt på grundlag af kendelsen af 20. juli 2006.

EF-domstolens dom af 18. januar 2007, sag C-220/05, Auroux mfl.

En kommunes indgåelse af kontrakt med en virksomhed om gennemførelse af et byplanprojekt var omfattet af Bygge- og anlægsdirektivet, da projektets hovedformål var at gennemføre bygge- og anlægsopgaver. Det var uden betydning, at virksomheden skulle lade bygge- og anlægsarbejderne udføre af entreprenører, og at virksomheden selv var omfattet af direktivets udbudspligt. Virksomheden var ikke in house, da den var et halvoffentligt selskab med private kapitalinteresser. Projektets værdi var dets samlede værdi. Udtrykket entreprenør i Bygge- og anlægsdirektivets artikel 1, a) sigter ikke til, at den ordregivende myndigheds kontraktspart selv skal være entreprenør

En fransk bykommune (Roanne kommune, beliggende ved Loire ca. 100 km NV for Lyon) ønskede at omdanne sit banegårdskvarter til turistområde. I henhold til den franske byplanlovgivning indgik kommunen i den anledning aftale med et selskab ved navn SEDL om, at SEDL skulle forestå etablering af et fritidscenter med biograf, hotel, butikslokaler og parkeringsplads m.m. i banegårdskvarteret. SEDL beskrives i dommen som et »halvoffentligt selskab«, og SEDL ejes tilsyneladende af nogle offentlige myndigheder og private virksomheder.

I henhold til aftalen mellem kommunen og SEDL skulle SEDL gennemføre projektet ved erhvervelse af ejendomme, tilsyneladende eventuelt ved ekspropriation, opførelse af nye ejendomme og anlæg af parkeringsplads og adgangsveje m.m. SEDL skulle sælge de nye ejendomme til tredjemand, medens parkeringspladsen og adgangsvejene m.m. skulle overgå til kommunen. SEDL skulle ikke selv udføre bygge- og anlægsarbejderne under projektet, men skulle lade udførelsen ske gennem entreprenører, og det fremgår, at SEDL's funktioner ved projektets gennemførelse skulle være af administrativ og planlægningsmæssig karakter. Den samlede udgift ved projektet var anslået til godt 14 mio. €. Heraf skulle

[2] Dvs. »en røg af god ret«, altså sandsynlighed for, at sagsanlægget var berettiget.

SEDL oppebære ca. 8 mio. € ved salgene af de nyopførte ejendomme til tredjemand, medens kommunen skulle betale resten til SEDL, dels som betaling for parkeringspladsen og adgangsvejene, dels som vederlag for SEDL's gennemførelse af projektet.

Kommunens aftale med SEDL blev indgået uden forudgående EU-udbud, men det var i aftalen fastsat, at SEDL skulle følge reglerne om udbud i den franske lov om offentlige aftaler. Det fremgår, at dette medførte pligt for SEDL til at foretage EU-udbud af bygge- og anlægsarbejder, der oversteg Bygge- og anlægsdirektivets tærskelværdi.

Nogle virksomheder anlagde sag mod kommunen ved en fransk forvaltningsdomstol og gjorde gældende, at kommunen skulle have foretaget EU-udbud af den aftale, som kommunen havde indgået med SEDL. Forvaltningsdomstolen stillede følgende spørgsmål til EF-domstolen (omformuleret af forståelsesgrunde):

Spørgsmål 1: Skal en aftale som aftalen mellem kommunen og SEDL anses for en offentlig bygge- og anlægskontrakt i henhold til Bygge- og anlægsdirektivets artikel 1, a)?

Dette spørgsmål sigtede til følgende: SEDL's funktioner ved projektet havde karakter af tjenesteydelser, der ikke er omfattet af Bygge- og anlægsdirektivet. Som følge af, at de nyopførte ejendomme skulle sælges til tredjemand, var det endvidere opfattelsen hos den franske regering, at der ikke var tale om et bygge- og anlægsarbejde til opfyldelse af kommunens behov, hvilket efter direktivets artikel 1, a) ville være en betingelse for udbudspligt.

Den polske regering, der afgav et indlæg i sagen, gjorde desuden gældende, at SEDL ikke var entreprenør, fordi bygge- og anlægsarbejderne under projektet skulle udføres af entreprenører antaget af SEDL, således at kommunens aftale med SEDL ikke var en aftale mellem en ordregivende myndighed og en entreprenør som krævet i artikel 1, a).

Spørgsmål 2: Hvorledes skal værdien af et sådant projekt i forhold til Bygge- og anlægsdirektivets tærskelværdi i givet fald beregnes?

Forvaltningsdomstolen nævnede herved følgende muligheder for beregningen af værdien: 1) som svarende til kommunens betaling for parkeringspladsen og adgangsvejene, 2) som svarende til hele det beløb, som kommunen skulle betale til SEDL, 3) som svarende til projektets samlede værdi, dvs. hele det beløb, som kommunen skulle betale til SEDL, med tillæg af det beløb, som SEDL skulle oppebære ved salget af de nyopførte ejendomme.

Spørgsmål 3 (generelt formuleret): Fritog det under alle omstændigheder kommunen for udbudspligt i henhold til Bygge- og anlægsdirektivet, at SEDL selv skulle gennemføre udbud af de bygge- og anlægskontrakter, som SEDL indgik med entreprenører?

EF-domstolen udtalte (af forståelsesgrunde stærkt sammentrængt og til dels omformuleret):

Ad spørgsmål 1:

Når en kontrakt både angår bygge- og anlægsopgaver og andre opgaver, er kontraktens hovedformål afgørende (præmis 37). Hovedformålet med aftalen mellem kommunen og SEDL var gennemførelse af et bygge- og anlægsarbejde, og tjenesteydelseselementerne i aftalen sigtede til at gennemføre hovedformålet (præmis 46). Endvidere var formålet med projektet at opfylde et behov hos kommunen (præmis 42). Det var uden betydning, at SEDL skulle lade bygge- og anlægsarbejderne udføre af un-

derentreprenører, da ordet »entreprenør« i Bygge- og anlægsdirektivets artikel 1, a) ikke sigter til, at den, som den ordregivende myndighed indgår kontrakt med, selv skal gennemføre den aftalte ydelse direkte (præmis 38).

EF-domstolen besvarede herefter spørgsmål 1 med, at aftalen mellem kommunen og SEDL var en offentlig bygge- og anlægskontrakt som omhandlet i Bygge- og anlægsdirektivets artikel 1, a).

Ad spørgsmål 2:

Projektets værdi i relation til Bygge- og anlægsdirektivets tærskelværdi var projektets samlede værdi, dvs. hele det beløb, som kommunen skulle betale til SEDL, med tillæg af det beløb, som SEDL ville få ved salg af de nyopførte ejendomme (præmis 54). Noget andet ville undergrave Bygge- og anlægsdirektivets formål (præmis 55), og tærskelværdien for koncessionskontrakter i direktivets artikel 3 omfatter netop også beløb, der indkommer fra tredjemand (præmis 56).

EF-domstolen besvarede herefter spørgsmål 2 med, at værdien af et projekt som det pågældende i relation til direktivets tærskelværdi er projektets samlede værdi.

Ad spørgsmål 3:

I modsætning til Tjenesteydelsesdirektivet indeholder Bygge- og anlægsdirektivet ikke en regel om, at kontrakter, som en ordregivende myndighed indgår med en anden ordregivende myndighed, er fritaget for udbudspligt (præmis 59-60). SEDL var ikke en »in house«- virksomhed i forhold til kommunen, da SEDL er et halvoffentligt selskab med private kapitalandele (præmis 64). Selvom SEDL havde udbudspligt i henhold til aftalen med kommunen, ville det endvidere åbne mulighed for omgåelse, hvis der ikke var udbudspligt for kommunen selv, idet værdien af de enkelte bygge- og anlægskontrakter, som SEDL skulle indgå med underentreprenører, kunne blive mindre end Bygge- og anlægsdirektivets tærskelværdi, således at disse bygge- og anlægskontrakter kunne indgås uden EU-udbud (præmis 67).

EF-domstolen besvarede herefter spørgsmål 3 med (generelt formuleret), at det ikke fritog kommunen for udbudspligt, at SEDL selv havde udbudspligt.

Det bemærkes, at sagen muligvis havde fået et andet udfald, hvis den havde været omfattet af det nugældende udbudsdirektiv 2004/18, idet dette direktiv åbner mulighed for fritagelse for udbudspligt med hensyn til kontrakter, som ordregivende myndigheder indgår med indkøbscentraler, jf. artikel 1, stk. 10, og artikel 11. Hvis sagen skulle have været afgjort efter udbudsdirektivet 2004/18, og SEDL kunne karakteriseres som en indkøbscentral, skulle spørgsmål 3 derfor muligvis have været besvaret anderledes.

EF-domstolen kom ikke nærmere ind på disse spørgsmål, men konstaterede blot, at udbudsdirektivet 2004/18 ikke fandt anvendelse (præmis 61).

Retten i Første Instans dom af 18. april 2007 i sag T-195/05, Deloitte mod Kommissionen

Tilbud fra et konsortium vedrørende en evalueringsopgave afvist med rette, da konsortiets hoveddeltagere til dels selv udførte de opgaver, der skulle evalueres, og derfor befandt sig i en interessekonflikt. Udbyderens begrun-

delse for afvisningen havde klart og utvetydigt angivet grunden til afvisningen. Udbyderen havde ikke haft pligt til at indhente supplerende oplysninger fra konsortiet

Kommissionen iværksatte et udbud om en tjenesteydelse, der gik ud på evaluering af Fællesskabets indsats vedrørende folkesundhed. Udbudsbetingelserne indeholdt nogle angivelser om, at tilbud fra tilbudsgivere, der befandt sig i en interessekonflikt, ikke ville blive taget i betragtning. Disse angivelser var en udmøntning af en bestemmelse i Finansforordningen om obligatorisk udelukkelse af tilbudsgivere m.m., der befinder sig i en interessekonflikt.

Kommissionen afviste tilbuddet fra et konsortium med den begrundelse, at konsortiets hoveddeltagere befandt sig i en interessekonflikt. Dette sigtede til, at konsortiets hoveddeltagere udførte opgaver for Fællesskabet vedrørende folkesundhed, således at der var risiko for, at konsortiets hoveddeltagere ville komme til at evaluere deres egen indsats, hvis konsortiet fik tildelt den udbudte kontrakt.

Konsortiet anlagde herefter sagen ved Retten i Første Instans under påberåbelse af forskellige anbringender. Af disse anbringender skønnes følgende at have almen udbudsretlig interesse:

1) Kommissionen havde ikke givet en fyldestgørende begrundelse for afvisningen af konsortiets tilbud,

2) Konsortiets deltagere befandt sig ikke i en interessekonflikt, og konsortiets tilbud var netop udformet med henblik på at undgå interessekonflikter,

3) Kommissionen burde før afvisningen af konsortiets tilbud have henvendt sig til konsortiet og anmodet om uddybende oplysninger.

Konsortiet fik ikke medhold, idet Retten tog stilling til anbringenderne således:

Ad 1: Kommissionens meddelelse om afvisning af konsortiets tilbud havde klart og utvetydigt angivet de betragtninger, som Kommissionen havde lagt til grund for afvisningsbeslutningen, således at konsortiet kunne forsvare sine rettigheder og Retten kunne udøve sin prøvelsesret (præmis 47).

Ad 2: Rettens udtalelser vedrørende dette anbringende kan ikke gengives kort. Fra udtalelserne kan nævnes:

For at et tilbud kan afvises med den begrundelse, at der foreligger en interessekonflikt, skal der foreligge en reel risiko for, at der vil opstå en interessekonflikt, og der skal foretages en konkret risikovurdering (præmis 67). Kommissionen havde imidlertid med rette fundet, at der forelå en interessekonflikt, der kunne skade konsortiets upartiske gennemførelse af opgaven (præmis 77).

Ad 3: Retten henviste til ordlyden af Gennemførelsesforordningens artikel 146, stk. 3, hvorefter en udbyder kan anmode tilbudsgiverne om supplerende dokumentation vedrørende udelukkelses- og udvælgelseskriterier (en tilsvarende regel er indeholdt i Udbudsdirektivets artikel 51), og udtalte, at bestemmelsen ikke kan forstås som en forpligtelse for udbyderen til at fremsætte en sådan anmodning (præmis 102).

Herefter, og da konsortiet heller ikke fik medhold i de anbringender, der ikke er refereret ovenfor, blev Kommissionen frifundet.

Retten havde i en kendelse af 20. september 2005 under sagsnummer T-195/05 R afslået en begæring fra konsortiet om opsættende virkning.

EF-domstolens dom 19. april 2007, sag C-295/05, Asociaión Nacional de Empresas Forestales (kaldet Asemfo eller Tragsa)

Et selskab, der ejes af den spanske stat med 96 % og af nogle spanske regioner med 4 %, er in house i forhold til både staten og de pågældende regioner. En virksomhed, der ejes af flere offentlige myndigheder, er in house i forhold til alle disse, hvis virksomheden udøver hovedparten af sine opgaver for dem, og det kræves ikke, at virksomheden udøver hovedparten af opgaverne for en enkelt af dem

Denne dom angår spørgsmålet, om den spanske stats og nogle spanske regioners overladelse af opgaver til en virksomhed ved navn Tragsa er i overensstemmelse med EU-retten.

Tragsa er et aktieselskab, der er oprettet ved lov. Den spanske stat ejer 96 % af aktierne. De selvstyrende spanske regioner kan med statens godkendelse erhverve aktier i Tragsa, og 4 regioner ejer i henhold hertil hver 1 % af aktierne. Tragsa's formål er at udøve rådgivnings- og anlægsvirksomhed vedrørende landbrug og skovdrift og at medvirke til udvikling af landdistrikter og at udføre katastrofebekæmpelse m.m. Opgaverne udføres efter rekvisition fra staten eller regionerne, og Tragsa har pligt til at udføre de rekvirerede opgaver. Tragsa får betaling for udførelsen af opgaverne i henhold til takster, der er fastsat af staten.

EF-domstolen beskæftigede sig med Tragsa i en dom af 8. maj 2003 i sag C-349/97. Den pågældende sag angik spørgsmålet, om Spanien havde foretaget en korrekt afregning af landbrugsstøtte, og det fremgik, at Tragsa havde udført tjenesteydelser i forbindelse afregningen. I præmisserne 204-206 i dommen af 8. maj 2003 udtalte EF-domstolen med henvisning til sin praksis vedrørende »in house«-spørgsmålet, at Tragsa var et instrument for staten og regionerne, og at de spanske myndigheder derfor havde været berettiget til at tildele Tragsa de pågældende opgaver uden forudgående udbud.

Den her resumerede dom angik en klage fra en spansk virksomhed til et spansk klageorgan. Klageren gjorde gældende, at Tragsa misbrugte sin dominerende stilling på det spanske marked, og at den retlige ordning for Tragsa var uforenelig med fællesskabsrettens regler om udbud.

Efter at sagen havde passeret forskellige retsinstanser, stillede den øverste instans, Tribunal Supremo, følgende spørgsmål til EF-domstolen (af overskuelighedsgrunde gengivet sammentrængt og omformuleret):

Spørgsmål 1): Er Tragsa's virksomhed i strid med i Traktatens artikel 86, stk. 1 EF?

(Denne regel går kort gengivet ud på et forbud mod, at offentlige virksomheder m.m. misbruger en dominerende stilling eller udøver national diskrimination).

Spørgsmål 2): Er de spanske myndigheders overladelse af opgaver til Tragsa uden forudgående udbud i strid med udbudsdirektiverne?

Spørgsmål 3): Står EF-domstolens udtalelser om Tragsa i dommen af 8. maj 2003 ved magt?

EF-domstolen besvarede spørgsmålene således (noget omformuleret):

Ad spørgsmål 1:

EF-domstolen havde ikke tilstrækkelige oplysninger til at kunne besvare dette spørgsmål, præmis 44.

Ad spørgsmål 2:

EF-domstolen henviste til sin praksis, hvorefter følgende to betingelser skal være opfyldt, for at en virksomhed kan anses for »in house« i forhold til en ordregivende myndighed med den konsekvens, at den ordregivende myndighed kan overlade virksomheden opgaver uden forudgående EU-udbud: a. Den ordregivende myndighed skal udøve samme kontrol med virksomheden som med sine egne tjenestegrene, og b. virksomheden skal udføre hovedparten af sine opgaver sammen med den eller de myndigheder, den ejes af (præmis 55). De to betingelser benævnes i det følgende henholdsvis *kontrolkriteriet* og *virksomhedskriteriet*.

Vedrørende kontrolkriteriet henviste EF-domstolen til, at når en ordregivende myndighed ejer en virksomhed alene eller sammen med andre offentlige myndigheder, peger dette i retning af, at den ordregivende myndighed udøver samme kontrol med virksomheden som med sine egne tjenestegrene. EF-domstolen henviste endvidere til, at Tragsa havde pligt til at udføre rekvirerede opgaver og ikke frit kunne fastsætte takster herfor, således at Tragsa's forhold til regionerne ikke var af kontraktmæssig karakter. (Præmis 57-60).

Vedrørende virksomhedskriteriet henviste EF-domstolen til, at Tragsa efter sagens oplysninger udfører over 55 % af sin virksomhed for regionerne og ca. 35 % for staten. EF-domstolen henviste videre til, at i tilfælde, hvor en virksomhed ejes af flere myndigheder, er virksomhedskriteriet efter domstolens praksis opfyldt, hvis virksomheden udfører hovedparten af sine opgaver for disse myndigheder, således at det ikke kræves, at hovedparten af opgaverne udføres for en enkelt af dem. (Præmis 62-65).

De spanske myndigheders overladelse af opgaver til Tragsa uden forudgående EU-udbud var herefter ikke i strid med udbudsdirektiverne (præmis 65).

Ad spørgsmål 3:

Som følge af besvarelsen af spørgsmål 2 var det ufornødent at besvare spørgsmål 3 (præmis 66).

Henvisningen ad spørgsmål 2 til, at Tragsa's forhold til regionerne ikke var af kontraktmæssig karakter, synes at sigte til det almindelige princip, hvorefter udbudsdirektiverne kun omfatter gensidigt bebyrdende aftaler, se fx artikel 1, stk. 2, a, i udbudsdirektivet af 2004. Forholdet synes dog ikke at have spillet nogen selvstændig rolle for afgørelsen.

Det fremgår ikke, hvem de sidste ca. 10 % af Tragsa's opgaver udføres for.

EF-domstolens dom af 14. juni 2007, sag C-6/05, Medipac-Kazantzkis

Indkøbsdirektivet gælder ikke for udbud under tærskelværdien, men principperne om ligebehandling og gennemsigtighed gælder for sådanne udbud. Det var i strid med disse principper, at en fremgangsmåde i henhold til direktivet om medicinsk udstyr ikke var blevet fulgt

Sagen angik et offentligt udbud af indkøb af kirurgiske suturartikler, iværksat af et græsk sygehus, der var offentlig ordregiver. Udbuddets værdi var under tærskelværdien i det dagældende indkøbsdirektiv (direktiv 93/36), men det synes at fremgå, at udbuddet desuagtet blev foretaget i henhold til dette direktiv. Tildelingskriteriet var tilsyneladende laveste bud.

De udbudte suturartikler var omfattet af direktiv 93/42 om medicinsk udstyr. Dette direktiv går i hovedtræk ud på at etablere en EF-mærkning,

således at medlemsstaterne ikke må hindre markedsføring og ibrugtagning af medicinsk udstyr, der er forsynet med EF-mærkningen. En medlemsstat kan dog under visse betingelser forbyde markedsføring og brug af sådant udstyr, men skal i så fald følge en nærmere angivet fremgangsmåde.

Der indkom tilbud fra et antal tilbudsgivere. Udbyderen afviste tilbuddet fra en af tilbudsgiverne, M, med den begrundelse, at de tilbudte suturartikler ikke var i overensstemmelse med udbuddets tekniske specifikationer. Dette sigtede til, at M's suturartikler efter udbyderens opfattelse ikke havde tilstrækkelig kvalitet, uanset at de var EF-mærkede.

M klagede til den øverste græske forvaltningsdomstol, og forvaltningsdomstolen stillede EF-domstolen nogle spørgsmål, der sigtede til, om udbyderens fremgangsmåde havde været berettiget. I det første spørgsmål, der var det centrale, henvistes til Indkøbsdirektivet.

Østrig gjorde for EF-domstolen gældende, at sagen skulle afvises, fordi forvaltningsdomstolens spørgsmål angik Indkøbsdirektivet, selvom udbuddet ikke var omfattet af dette direktiv.

EF-domstolen udtalte:

Indkøbsdirektivet gælder udelukkende for udbud, hvis værdi mindst svarer til direktivets tærskelværdi. Ordregivende myndigheder skal imidlertid overholde fællesskabsrettens almindelige principper, såsom principperne om ligebehandling og gennemsigtighed, og EF-domstolen kan i sit svar på præjudicielle spørgsmål inddrage fællesskabsretlige regler, som den nationale domstol ikke har henvist til. Sagen skulle derfor antages til realitetsbehandling. (Præmis 30, 33-34 og 36.)

EF-domstolen tog herefter stilling til forvaltningsdomstolens spørgsmål og udtalte herunder bl.a., det var i strid med principperne om ligebehandling og gennemsigtighed, at fremgangsmåden i henhold til direktivet om medicinsk udstyr ikke var blevet fulgt (præmis 55).

EF-domstolens dom af 18. juli 2007, sag C-382/05, Kommissionen mod Italien

Om en aftale om tjenesteydelser skal anses for en tjenesteydelseskoncession, således at der ikke er pligt til EU-udbud, er et fællesskabsretligt spørgsmål, og national rets forståelse af koncessionsbegrebet er uden betydning. Definition af tjenesteydelseskoncessioner. Nogle aftaler om tjenesteydelser var ikke tjenesteydelseskoncessioner og skulle derfor have været udbudt

En italiensk offentlig ordregiver indgik aftaler med nogle virksomheder om genanvendelse af affald. Der var foretaget annoncering i EF-Tidende i form af en forhåndsmeddelelse, ligesom der havde været annonceret i en regional publikation, men der var ikke gennemført EU-udbud. Sagen var anlagt af Kommissionen mod Italien med påstand om, at EF-domstolen skulle konstatere, at undladelsen af at iværksætte EU-udbud var en overtrædelse af Tjenesteydelsesdirektivet, dvs. direktiv 92/50, der var gældende ved aftalernes indgåelse.

Italien påstod frifindelse under anbringende af, at der var tale om koncessioner, der ikke var omfattet af Tjenesteydelsesdirektivet.

(Det ligger fast, at Tjenesteydelsesdirektivet ikke omfattede koncessioner. Koncessioner vedrørende tjenesteydelser er heller ikke omfattet af det nugældende Udbudsdirektiv 2004/18, jf. artikel 17 i dette direktiv.)

Som begrundelse for anbringendet om, at der var tale om koncessioner, henviste Italien til følgende, der tilsyneladende havde sammenhæng med koncessionsbegrebets forståelse i italiensk ret: a) der var tale om tjenesteydelser af almindelig interesse, hvis kontinuitet tjenesteyderne havde pligt til at sikre, b) tjenesteydelserne præsteredes direkte til de pågældende indbyggere, som betalte for dem i form af betaling til vedkommende kommune, der derefter formidlede betalingen til tjenesteyderne, c) tjenesteyderne havde indtægt ved salg af energi produceret ved genanvendelsen af affaldet, d) tjenesteydernes fortjeneste var usikker som følge af aftalernes lange løbetid (20 år) og som følge af, at en del af fortjenesten hidrørte fra salget af den producerede energi, og e) organiseringen og driften af affaldsgenanvendelsen påhvilede alene tjenesteyderne, således at myndighederne kun havde en kontrolfunktion.

Kommissionen fik medhold. EF-domstolen udtalte (temmelig sammentrængt):

Spørgsmålet, om de omhandlede aftaler skulle anses for koncessioner, således at de ikke var omfattet af Tjenesteydelsesdirektivet, skulle udelukkende vurderes efter fællesskabsretten, og det var uden betydning, hvorledes aftalerne skulle karakteriseres efter italiensk ret (præmis 30-31).

En tjenesteydelsesaftale i Tjenesteydelsesdirektivets forstand indebærer en modydelse, der betales direkte af den ordregivende myndighed (præmis 33).

Der er derimod tale om en tjenesteydelseskoncession, når den aftalte godtgørelsesform består i tjenesteyderens ret til at udnytte sin egen ydelse, således at tjenesteyderen har risikoen ved driften af tjenesteydelserne. Disse betingelser var ikke opfyldt med hensyn til de tjenesteydelser, som sagen angik, idet tjenesteydernes godtgørelse i det væsentlige bestod i betaling fra det offentlige og ikke i retten til at udnytte tjenesteydelserne, og idet aftalerne om tjenesteydelserne indeholdt nærmere angivne bestemmelser med henblik på at sikre tjenesteyderne økonomisk. De pågældende aftaler var derfor tjenesteydelsesaftaler omfattet af Tjenesteydelsesdirektivet og var ikke koncessioner. Der skulle således have været iværksat EU-udbud (præmis 34-37).

EF-domstolen tog i præmis 38-44 afstand fra Italiens begrundelse for anbringendet om, at der var tale om koncessioner.

EF-domstolen henviste til flere af sine tidligere domme, bl.a. dom af 18. oktober 2005 i sag C-458/03, Parking Brixen, der indeholder en definition af begrebet tjenesteydelseskoncessioner svarende til definitionen i den her resumerede dom.

EF-domstolens dom af 18. juli 2007, sag C-399/05, Kommissionen mod Grækenland

Antagelse af tilbud i strid med udvælgelseskriterier angår ligebehandlingsprincippet, ikke gennemsigtighedsprincippet. Det generelle ligebehandlingsprincip ikke har selvstændig betydning ved siden af en direktivregel, der udmønter princippet. I øvrigt konkret afgørelse

Sagen angik et udbud i henhold til Forsyningsvirksomhedsdirektivet 93/38 vedrørende projektering, opførelse, idriftsættelse og vedligeholdelse af et kraftvarmeværk. Udbuddet var foretaget af en græsk offentlig ordregiver, øjensynligt som udbud efter forhandling. Der indkom tilbud fra

nogle tilbudsgivere, hvorefter udbyderen besluttede at indgå kontrakt med en af tilbudsgiverne.

Sagen var anlagt af Kommissionen mod Grækenland på baggrund af en klage fra en virksomhed, der havde afstået fra at give tilbud. Kommissionens påstand gik ud på, at der var sket overtrædelse af forbuddet mod forskelsbehandling i direktivets artikel 4, stk. 2, samt af principperne om ligebehandling og gennemsigtighed, fordi

1) et af tilbuddene var taget i betragtning, selvom tilbudsgiveren ikke opfyldte de fastsatte udvælgelseskriterier, og fordi

2) et andet tilbud var taget i betragtning, selvom vedligeholdelsen af en gasturbine, der var et led i projektet, ifølge tilbuddet skulle udføres af tilbudsgiveren selv, hvorimod det efter Kommissionens opfattelse fulgte af udvælgelseskriterierne, at den pågældende vedligeholdelse skulle udføres af leverandøren af gasturbinen.

Kommissionen fik ikke medhold.

Vedrørende punkt 1) fastslog EF-domstolen ud fra en fortolkning af udvælgelseskriterierne, at tilbudsgiveren opfyldte udvælgelseskriterierne.

Vedrørende punkt 2) henviste EF-domstolen bl.a. til, at udvælgelseskriterierne måtte forstås sådan, at vedligeholdelsen af gasturbinen ikke nødvendigvis skulle udføres af leverandøren af turbinen.

EF-domstolen udtalte endvidere, at en udbyders antagelse af et tilbud i strid med de fastsatte udvælgelseskriterier vedrører ligebehandlingsprincippet og ikke gennemsigtighedsprincippet, og (noget omformuleret) at det generelle ligebehandlingsprincip ikke har selvstændig betydning inden for et direktivs område, hvis en regel i direktivet er en udmøntning af princippet.

EF-domstolens dom af 18. juli 2007, sag C-503/04, Kommissionen mod Tyskland

Ved ikke at foranledige ophævelse af en 30-årig kontrakt indgået i strid med Tjenesteydelsesdirektivet havde Tyskland tilsidesat sin forpligtelse efter traktatens artikel 228 til at efterkomme en tidligere dom fra EF-domstolen, ved hvilken kontraktens strid med direktivet var konstateret

Ved dom af 10. april 2003 i sagerne C-20/01 og C-28/01, Kommissionen mod Tyskland, fastslog EF-domstolen, at Tyskland havde overtrådt Tjenesteydelsesdirektivet ved, at to kommuner i delstaten Niedersachsen havde foretaget følgende:

1) Bockhorn Kommune havde indgået en kontrakt om bortledning af spildevand uden forudgående EU-udbud.

2) Braunschweig Kommune havde indgået en kontrakt om bortskaffelse af dagrenovation på grundlag af et udbud efter forhandling uden forudgående udbudsbekendtgørelse.

Efter dommen spurgte Kommissionen Tyskland, hvilke foranstaltninger Tyskland havde iværksat for at efterkomme dommen. Tyskland svarede, at den tyske forbundsregering i et brev af 23. december 2003 havde indskærpet over for delstaten, at udbudsreglerne skulle overholdes nøje. Tyskland henviste desuden til, at fællesskabsretten efter Tysklands opfattelse ikke førte til krav om ophævelse af de omtalte kontrakter. I en begrundet udtalelse fastsatte Kommissionen herefter en frist med udløb den 1. juni 2004 til Tysklands opfyldelse af dommen.

Da Tyskland efter Kommissionens opfattelse ikke havde opfyldt dommen ved fristens udløb, anlagde Kommissionen en ny sag mod Tyskland ved EF-domstolen med påstand om, at det skulle fastslås, at Tyskland havde overtrådt traktatens artikel 228 EF ved ikke at have truffet de foranstaltninger, der fulgte af dommen af 10. april 2003, og med påstand om, at der skulle pålægges Tyskland tvangsbøder.

(Artikel 228 EF går ud på, at hvis EF-domstolen fastslår, at en medlemsstat ikke har opfyldt en forpligtelse, skal medlemsstaten træffe de nødvendige foranstaltninger til forpligtelsens opfyldelse, og EF-domstolen kan pålægge medlemsstaten tvangsbøder.)

Under sagens forberedelse oplyste Tyskland, at Bockhorn Kommunes kontrakt om bortledning af spildevand ville blive ophævet. Kommissionen frafaldt påstanden vedrørende Bockhorn Kommune, og Bockhorn Kommunes kontrakt blev ophævet.

Sagen angik herefter kun Braunschweig Kommunes kontrakt om bortskaffelse af dagrenovation. Denne kontrakt var indgået for 30 år. Også denne kontrakt blev ophævet under sagens forberedelse. Kommissionen frafaldt herefter påstanden om tvangsbøder, men fastholdt påstanden om, at det skulle fastslås, at Tyskland ikke havde truffet de nødvendige foranstaltninger til opfyldelse af dommen af 10. april 2003 med hensyn til Braunschweig Kommune. Sagen drejede sig herefter alene om dette spørgsmål.

Tyskland fremsatte nogle formelle indsigelser, herunder at sagsgenstanden var bortfaldet som følge af ophævelsen af Braunschweig Kommunes kontrakt, men fik ikke medhold i disse indsigelser (præmis 13-24).

Med hensyn til sagens realitet gjorde Tyskland følgende indsigelser gældende (til dels sammentrængt gengivet):

a. Tysklands indskærpelse over for delstaten i brevet af 23. december 2003 af, at udbudsreglerne skulle overholdes nøje, var tilstrækkelige foranstaltninger til opfyldelse af dommen af 10. april 2003.

b., støttet af Finland, Frankrig og Holland: Artikel 2, stk. 6, 2. pkt., i 1. kontroldirektiv medfører, at der ikke er pligt til at ophæve en indgået kontrakt. Til støtte herfor henviste Tyskland til principperne om retssikkerhed, beskyttelse af berettigede forventninger og aftalers bindende virkning. Tyskland henviste desuden til traktatens artikel 295 EF, hvorefter medlemsstaternes ejendomsretlige ordninger ikke berøres af traktaten, samt til EF-domstolens praksis om en doms tidsmæssige virkninger.

(Artikel 2, stk. 6, 2. pkt., i 1. kontroldirektiv går kort gengivet ud på, at medlemsstaterne kan begrænse klageorganernes beføjelser til at pålægge ordregiverne at betale erstatning.)

Tyskland fik heller ikke medhold vedrørende sagens realitet.

Ad indsigelse a. henviste EF-domstolen til følgende: Tysklands indskærpelse over for delstaten havde alene til formål at forhindre nye overtrædelser, men havde ikke forhindret virkningen af Braunschweig Kommunes kontrakt. Endvidere kunne traktatbruddet i henhold til denne kontrakt være fortsat i årtier, da kontrakten var indgået for 30 år. I en situation som den foreliggende havde Tyskland herefter ikke foretaget de nødvendige foranstaltninger til opfyldelse af dommen af 10. april 2003 (præmis 28-31).

Ad indsigelse b. udtalte EF-domstolen (noget sammentrængt):

Artikel 2, stk. 6, 2. pkt., i 1. kontroldirektiv har ikke betydning for anvendelsen af traktatens artikel 228 EF og ville i modsat fald indskrænke rækkevidden af traktatbestemmelserne om det indre marked (præmis 34). Som følge af sin særegne beskaffenhed regulerer bestemmelsen endvidere ikke forholdet mellem en medlemsstat og fællesskabet (præmis 35).

Selvom en ordregivende myndigheds medkontrahent muligvis kan påberåbe sig principperne om retssikkerhed etc., kan en medlemsstat ikke påberåbe sig dem som begrundelse for ikke at opfylde en dom, der har fastslået et traktatbrud (præmis 36).

Traktatens artikel 295 EF fører ikke til, at medlemsstaternes ejendomsretlige ordninger ikke er omfattet af traktatens grundlæggende principper. Særegenheder i en medlemsstats ejendomsretlige ordning kan ikke begrunde en krænkelse af den frie udveksling af tjenesteydelser, og en medlemsstat kan ikke påberåbe sig sin nationale retsorden til støtte for ikke at overholde fællesskabsretlige forpligtelser (præmis 37-38).

Domstolens praksis om en doms tidsmæssige virkninger kan ikke begrunde manglende opfyldelse af en dom, der har fastslået et traktatbrud (præmis 39).

EF-domstolen fastslog herefter, at Tyskland ikke ved udløbet af fristen i Kommissionens begrundede udtalelse havde truffet de nødvendige foranstaltninger til opfyldelse af dommen af 10. april 2003 med hensyn til Braunschweig Kommunes kontrakt om bortskaffelse af dagrenovation.

EF-domstolens kendelse 4. oktober 2007, sag C-492/06, Conzorzio Elisoccorso San Raffaele

Første kontroldirektiv er ikke er til hinder for, at national ret tillægger deltagere i tilbudsgivende konsortier klageadgang

Ved denne kendelse blev følgende fastslået: Første kontroldirektiv er ikke er til hinder for, at national ret tillægger deltagere i tilbudsgivende konsortier klageadgang.

Refereres i øvrigt ikke, da resultatet forekommer oplagt. Også EF-domstolen anså resultatet for oplagt og afgjorde derfor sagen ved kendelse, jf. præmis 18.

EF-domstolens dom af 11. oktober 2007, sag C-237/05, Kommissionen mod Grækenland

Sag om hævdet traktatbrud som følge af manglende EU-udbud afvist, da de pågældende kontrakter havde udtømt deres virkninger før udløbet af fristen i Kommissionens begrundede udtalelse, og da det ikke lå tilstrækkelig klart, at der senere var indgået nye tilsvarende aftaler

I 2001 indgik det græske landbrugsministerium en aftale med de græske landboforeningers forbund om administrationen af EU's landbrugsstøtteordning for året 2001. Aftalen gik ud på, de lokale landboforeninger skulle yde landmændene bistand ved udfyldelse af ansøgningsskemaer m.m., og at der skulle indgås aftaler herom mellem de enkelte lokale landboforeninger og den stedlige præfekt. Sådanne lokale aftaler blev indgået, og landboforeningernes forbunds rolle i sammenhængen var at koordinere deres indgåelse.

Sagen var anlagt af Kommissionen mod Grækenland med påstand om, at det skulle konstateres, at Grækenland havde overtrådt Tjenesteydelses-

direktivet ved, at aftalerne mellem de lokale landboforeninger og præfekterne var indgået uden forudgående EU-udbud.

EF-domstolen afviste sagen med henvisning til følgende (stærkt sammentrængt):

Aftalen mellem landbrugsministeriet og landboforeningernes forbund og aftalerne mellem de lokale landboforeninger og præfekterne angik kun 2001 og havde udtømt deres virkninger før udløbet af den frist, der var fastsat i Kommissionens begrundede udtalelse, dvs. 19. februar 2004. Det fulgte heraf af EF-domstolens praksis, at sagen skulle afvises. Således som sagen var oplyst, havde Kommissionen endvidere ikke med tilstrækkelig klarhed kunnet vise rigtigheden af et anbringende om, at det hævdede traktatbrud var fortsat i årene efter 2001.

EF-domstolens dom af 11. oktober 2007, sag C-241/06, Lämmerzahl

En national regel om klagefrist må ikke anvendes sådan, at den i det konkrete tilfælde gør en klage praktisk umulig eller uforholdsmæssig vanskelig. National ret skal fortolkes i overensstemmelse med første kontroldirektivs formål, og er en sådan fortolkning ikke mulig, skal den nationale domstol forkaste nationale bestemmelser i strid med direktivet

En tysk kommune iværksatte et offentligt udbud af anskaffelse af standardsoftware til brug for socialrådgivning m.m. Udbuddet blev ikke foretaget som EU-udbud. Det blev ikke ved udbuddet oplyst, hvor mange softwarelicenser udbuddet omfattede, og udbyderen svarede undvigende og uklart på et spørgsmål herom fra en potentiel tilbudsgiver, L. Det fremgår imidlertid, at udbuddets værdi oversteg tærskelværdierne både for indkøb og tjenesteydelser.

L afgav tilbud, men udbyderen besluttede at tildele en anden tilbudsgiver kontrakten med den begrundelse, at den anden tilbudsgivers tilbud var det økonomisk mest fordelagtige.

L klagede derefter til et klageorgan, Vergabekammer, og gjorde gældende dels, at der skulle have været foretaget EU-udbud som følge af, at udbuddets værdi oversteg tærskelværdien, dels at kommunen havde begået fejl ved tilbudsvurderingen.

Vergabekammer afviste klagen med den begrundelse, at den var indgivet for sent. Dette sigtede til en bestemmelse i den tyske lovgivning om offentlige kontrakter, hvorefter en klage over et forhold, der fremgår af en udbudsbekendtgørelse, skal indgives til den ordregivende myndighed inden udløbet af fristen for afgivelse af tilbud eller indgivelse af ansøgning om prækvalifikation. Da L ikke havde klaget til kommunen inden tilbudsfristens udløb, medførte denne bestemmelse efter Vergabekammers opfattelse, at L var afskåret fra at klage både over, at der ikke var foretaget EU-udbud, og over kommunens tilbudsvurdering.

L indbragte sagen for en højere instans, Oberlandesgericht, og begærede opsættende virkning, men Oberlandesgericht afslog at tillægge klagen opsættende virkning. Som begrundelse herfor tilsluttede Oberlandesgericht sig Vergabekammers synspunkt om, at L som følge af den omhandlede bestemmelse i den tyske lovgivning var afskåret fra at klage både over det manglende EU-udbud og over tilbudsvurderingen.

Senere kom Oberlandesgericht øjensynlig i tvivl med hensyn til, om afskæringen af L's klageadgang var i overensstemmelse med første kontroldirektiv, og Oberlandesgericht forelagde derfor sagen for EF-domstolen, der udtalte (stærkt sammentrængt, Klagenævnets litrering):

1) Sagen var omfattet af det dagældende indkøbsdirektiv, direktiv 93/36, og ifølge § 9, stk. 4, i dette direktiv skulle kontraktens samlede mængde og omfang angives i udbudsbekendtgørelsen. Undladelse af en sådan angivelse skal i medfør af første kontroldirektiv kunne gøres til genstand for en klage. (Præmis 38-44. Den tilsvarende bestemmelse er i dag Udbudsdirektivets artikel 36, stk. 1).

2) Første kontroldirektiv er ikke til hinder for, at der i national ret fastsættes klagefrister, men sådanne klagefrister må ikke gøre det praktisk umuligt eller uforholdsmæssigt vanskeligt at udøve de rettigheder, der kan udledes af fællesskabsretten (præmis 50-52). Hvis en udbudsbekendtgørelse mangler oplysning om kontraktens samlede værdi, og udbyderen svarer undvigende på en potentiel tilbudsgivers spørgsmål herom, vil en regel som den omhandlede tyske regel gøre det uforholdsmæssigt vanskeligt for den potentielle tilbudsgiver at udøve sine rettigheder i henhold til fællesskabsretten. Selvom den tyske regel i princippet er forenelig med fællesskabsretten, var dens anvendelse i det foreliggende tilfælde derfor i strid med det effektivitetsprincip, der følger af første kontroldirektiv (præmis 53-57).

3) Den omhandlede tyske regel kan efter sit indhold kun finde anvendelse på forhold, der kan konstateres før udløbet af fristen for afgivelse af tilbud eller ansøgning om prækvalifikation, men kan derimod ikke finde anvendelse på forhold, som først opstår senere. Oberlandesgericht havde imidlertid anvendt reglen således, at den fandt anvendelse på alle udbyderens beslutninger under udbuddet, hvilket var i strid med første kontroldirektiv. Den nationale ret skal fortolke den nationale ret i overensstemmelse med formålet i første kontroldirektiv, og er en sådan fortolkning ikke mulig, skal den nationale ret forkaste nationale bestemmelser i strid med direktivet. (Præmis 68-63).

EF-domstolen besvarede herefter nogle spørgsmål fra Oberlandesgericht i overensstemmelse med det anførte.

EF-domstolens dom af 13. november 2007, sag C-507/03, Kommissionen mod Irland

Den irske stat kunne overlade udførelse af en bilag I B-tjenesteydelse til det irske postvæsen uden forudgående offentliggørelse, da der ikke var ført bevis for noget grænseoverskridende element

Den irske regering indgik en kontrakt med det irske postvæsen, der har betegnelsen »An Post«, om, at modtagere af sociale ydelser kunne hæve ydelserne på posthusene.

(Det bemærkes, at »An Post« betyder »Postvæsnet«. Ordet »An« synes at være gælisk).

Sagen var anlagt af Kommissionen med påstand om, at det skulle konstateres, at Irland havde overtrådt reglerne i traktatens artikel 43 EF og 49 EF om henholdsvis den frie etableringsret og den frie udveksling af tjenesteydelser samt principperne om ligebehandling og gennemsigtighed ved at have indgået kontrakten uden en forudgående offentliggørelse.

EF-domstolen udtalte (noget sammentrængt):

Der var tale om en tjenesteydelse, som var omfattet af bilag I B i det dagældende tjenesteydelsesdirektiv 92/50 (nu bilag II B i udbudsdirektivet af 2004). Sådanne tjenesteydelser er ikke omfattet af udbudspligten, fordi de ikke umiddelbart frembyder nogen grænseoverskridende

interesse. Fællesskabsrettens grundlæggende principper, herunder principperne om fri etableringsret og fri udveksling af tjenesteydelser, gælder ganske vist for indgåelse af offentlige kontrakter om sådanne tjenesteydelser, såfremt sådanne kontrakter alligevel frembyder en grænseoverskridende interesse, ligesom der kan blive tale om forskelsbehandling, hvis der ikke er gennemsigtighed (præmis 25-31). Det påhvilede imidlertid Kommissionen at bevise, at den omhandlede kontrakt havde haft en vis interesse for en virksomhed i en anden medlemsstater, og at denne virksomhed var blevet afskåret fra at tilkendegive sin interesse før kontrakten, fordi den ikke havde haft adgang til passende information for tildelingen af kontrakten. Et sådant bevis var ikke ført, og Kommissionen kunne ikke påberåbe sig nogen formodning for, at der forelå et traktatbrud (præmis 32-34).

Irland blev herefter frifundet.

EF-domstolen har i flere tidligere afgørelse fastslået, at der kan være pligt til en forudgående offentliggørelse vedrørende offentlige ordregiveres indgåelse af kontrakter, der ikke er omfattet af udbudsdirektivernes udbudspligt. Dette gælder således bl.a. domstolens domme af 21. juli 2005, Coname, og 13. oktober 2005, Parking Brixen, begge vedrørende tjenesteydelseskoncessioner.

Den her resumerede dom introducerer som betingelse for en sådan pligt, at der skal foreligge et grænseoverskridende element. Dommen blev afsagt af EF-domstolens store afdeling, hvilket må tages som udtryk for, at der er tale om principiel modifikation af den hidtidige praksis.

Betingelsen om et grænseoverskridende element er gentaget og udbygget i EF-domstolens dom af 15. maj 2008 i sagerne C-147/06 og C-148/06, Secap, der er resumeret nedenfor. Betingelsen har næppe den store betydning for danske ordregivende myndigheder, se bemærkningerne til Secap-dommen nedenfor.

EF-domstolens dom af 13. december 2007, sag C-337/06, Bayerische Rundfunk mfl.

Licensfinansiering af nogle public service tv- og radiostationer var udtryk for, at stationerne var finansieret af staten. Stationerne skulle herefter foretage EU-udbud af rengøring, da de var offentligretlige organer, og da det var uden betydning, at staten ikke kunne udøve bestemmende indflydelse på kontraktstildelingen. En undtagelse fra udbudspligten i Tjenesteydelsesdirektivet og Udbudsdirektivet vedrørende radio- og tv-stationer angår ikke kontrakter om rengøring

Tyskland har et antal tv- og radioselskaber, der udøver virksomhed i form af public service, i det følgende benævnt public service-stationerne. I hvert fald over halvdelen af public-service-stationernes indtægter består af licensbetalinger, der opkræves hos de enkelte indehavere af tv- og radioapparater. Licensens størrelse fastsættes af delstaterne, der dog i princippet har pligt til at følge indstillinger fra et særligt landsdækkende udvalg.

Den tyske grundlov indeholder en bestemmelse, der sikrer pressefriheden m.m., og denne bestemmelse fortolkes i tysk ret som et forbud mod offentlige myndigheders indblanding i public service-stationernes aktiviteter.

Det fremgår, at public service-stationerne er offentligretlige organer, der har til opgave at imødekomme almenhedens behov, jf. Tjenestey-

delsesdirektivets artikel 1, b, nu Udbudsdirektivets artikel 1, stk. 9. Det følger af de nævnte bestemmelser, at sådanne offentligretlige organer var/er omfattet af de to direktivers udbudspligt, bl.a. hvis de for over halvdelens vedkommende er finansieret af staten eller er underlagt statens kontrol. (Med hensyn til finansieringsandelen bruger Udbudsdirektivet udtrykket »størstedelen«, hvor Tjenesteydelsesdirektivet brugte udtrykket »halvdelen«, men de to bestemmelser betyder det samme, jf. præmis 30 i den her resumerede dom).

Public service-stationerne har etableret et samarbejdsorgan, i sagen benævnt GEZ, der udfører forskellige opgaver i forbindelse med licensopkrævning. GEZ er ikke en juridisk person.

Sagen angik en klage fra et rengøringsfirma til en klageinstans over, at GEZ havde indgået kontrakt om rengøring af GEZ' lokaler uden EU-udbud. Kontraktens værdi var over tærskelværdien i det dagældende tjenesteydelsesdirektiv. Klageren fik medhold, hvorefter public service-stationerne indbragte sagen for en overinstans, Oberlandesgericht Düsseldorf.

Public service-stationerne gjorde øjensynlig gældende, at de ikke var omfattet af Tjenesteydelsesdirektivets udbudspligt, dels fordi de ikke opfyldte den ovenfor nævnte betingelse om statens finansiering eller kontrol, dels fordi Tjenesteydelsesdirektivet i medfør af direktivets artikel 1, a, iv, ikke omfattede radio- og tv-selskabers indkøb m.m. (En tilsvarende bestemmelse indeholdes i Udbudsdirektivets artikel 16, b).

Oberlandesgericht Düsseldorf stillede følgende spørgsmål til EF-domstolen (af overskuelighedsgrunde gengivet stærkt sammentrængt og noget omformuleret):

Spørgsmål 1) Er public service-stationernes finansiering ved licensbetaling udtryk for, at stationerne finansieres af staten?

Spørgsmål 2) Er det en betingelse for at anse et organ for at være finansieret af staten, at staten kan udøve en direkte indflydelse ved organets tildeling af kontrakter?

Spørgsmål 3) Omfatter undtagelsen fra udbudspligt for radio- og tv-selskabers indkøb mv. tjenesteydelser, der ikke vedrører programmerne?

EF-stolen besvarede spørgsmålene således (ligeledes gengivet stærkt sammentrængt og til dels omformuleret):

Ad spørgsmål 1): Public service-stationernes finansiering ved licensbetaling er udtryk for, at stationerne finansieres af staten. EF-domstolen henviste herved til udbudsdirektivernes formål m.m. (præmis 34-50).

Ad spørgsmål 2): Det er ikke en betingelse for at anse et organ for finansieret af staten, at staten kan udøve bestemmende indflydelse ved organets indgåelse af kontrakter som den i sagen omhandlede. EF-domstolen henviste herved bl.a. til, at public service-stationernes eksistens afhænger af staten (præmis 55-60).

Ad spørgsmål 3): Bestemmelsen om undtagelse fra udbudspligt for radio- og tv-stationer omfatter kun de tjenesteydelser, der nævnes i bestemmelsen. EF-domstolen henviste herved bl.a. til, at bestemmelsen som følge af sin karakter af undtagelse fra hovedformålet må fortolkes indskrænkende, og til, at det af betragtning 25 (ved en skrivefejl angivet som 28) i præamblen til Udbudsdirektivet er anført, at undtagelsen ikke skal gælde for levering af teknisk materiel (præmis 64-65). Det fremgår,

at svaret skal forstås sådan, at radio- og tv-stationers indgåelse af en rengøringskontrakt ikke er omfattet af undtagelsen fra udbudspligt.

Som også berørt ovenfor fremgår det af dommens præmis 30, at sagen ville have fået samme udfald, hvis den havde været omfattet af det nugældende udbudsdirektiv.

EF-domstolens dom af 18. december 2007, sag C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia

En offentlig myndigheds aftale med en virksomhed om postbefordring, der ikke er omfattet af en eneret for virksomheden i overensstemmelse med Postdirektivet, skal udbydes, hvis aftalens værdi når op på tærskelværdien for tjenesteydelser. Hvis aftalens værdi er under tærskelværdien, skal der ske en passende offentliggørelse. Et statsligt postvæsen var ikke in house i forhold til staten, da virksomhedskriteriet ikke var opfyldt

Direktiv 97/67, i det følgende kaldet Postdirektivet, går bl.a. ud på følgende: 1) Hver medlemsstat skal sørge for, at der i medlemsstaten findes mindst én virksomhed, der har pligt til at udføre postbefordring, 2) medlemsstaten kan give den eller de virksomheder, der har pligt til at udføre postbefordring, eneret til at udføre befordring bl.a. af forsendelser under 350 g.

I Spanien ligger pligten til at udføre postbefordring hos det spanske post- og telegrafvæsen, et statsejet aktieselskab, der i sagen omtales som Correos. Ved den spanske lovgivning er der tillagt Correos eneret til at udføre visse former for postbefordring, tilsyneladende i overensstemmelse med Postdirektivets regler om eneret.

Efter den spanske lovgivning kan offentlige myndigheder indgå samarbejdsaftaler med Correos, og sagen angår en sådan samarbejdsaftale indgået mellem det spanske undervisningsministerium og Correos. Denne samarbejdsaftale, der er indgået uden tidsbegrænsning, går ud på, at Correos mod en nærmere fastsat betaling udfører postbefordring m.m. for undervisningsministeriet, også postbefordring, der ikke er omfattet af Correos' eneret.

En virksomhed klagede til en domstol over, at den omtalte samarbejdsaftale var indgået uden forudgående udbud. Domstolen forelagde sagen for EF-domstolen med et spørgsmål, om hvorvidt Traktatens bestemmelser om fri etableringsret og fri udveksling af tjenesteydelser m.m. var til hinder for en samarbejdsaftale som den omtalte.

EF-domstolen udtalte (Klagenævnets litrering, af forståelsesgrunde stærkt sammentrængt og til dels omformuleret):

1) Fællesskabsretten er ikke til hinder for at, at offentlige myndigheder i en medlemsstat uden udbud overlader postbesørgelse til et statsligt selskab, der har postbefordringspligten i medlemsstaten, i det omfang den overladte postbesørgelse er omfattet af en eneret, som virksomheden har fået tillagt i overensstemmelse med Postdirektivet. EF-domstolens stillingtagen skulle således kun angå postbesørgelse, der ikke er omfattet af en sådan eneret. (Præmis 39-42).

2) Afgørende for, om der var udbudspligt, dvs. i henhold til det dagældende tjenesteydelsesdirektiv, var dels, om samarbejdsaftalens værdi nåede op på direktivets tærskeværdi, dels om samarbejdsaftalen kunne anses for en egentlig aftale. Det tilkom den nationale domstol at tage stilling til disse spørgsmål. Den nationale domstol skulle herunder undersøge, om

Correos kunne forhandle aftalens indhold og betalingen, og om Correos kunne opsige aftalen. (Præmis 48 og 54-55).

3) Correos kunne ikke anses for »in house« i forhold til den spanske stat, da den ene af de to betingelser, som EF-domstolen har opstillet for at anse en selvstændig juridisk person for in house, ikke var opfyldt, dvs. en betingelse om, at den pågældende virksomhed udfører hovedparten af sin virksomhed sammen med den eller de myndigheder, der ejes af. Hovedparten af Correos' virksomhed udføres nemlig ikke for det offentlige, men for et ubestemt antal kunder. (Præmis 58-59).

(De to omtalte betingelser for at anse en selvstændig juridisk person for in house er opstillet i et antal tidligere domme fra EF-domstolen, senest i dom af 19. april 2007 i sag C-295/05). I Klagenævnets resumé af denne dom er den her omtalte betingelse kaldt »virksomhedskriteriet«.

4) Aftalen var ikke omfattet af Tjenesteydelsesdirektivets artikel 6, hvorefter direktivet ikke fandt anvendelse på tjenesteydelsesaftaler med en ordregivende myndighed på grundlag af en eneret, der er tildelt den pågældende ordregivende myndighed i overensstemmelse med traktaten. (En tilsvarende bestemmelse indeholdes i det nugældende udbudsdirektivs artikel 18). En eventuel eneret for Correos til at udføre postbesørgelse for den offentlige administration er i nemlig strid med Postdirektivet, hvis den angår postbefordring, for hvis vedkommende en tildeling af en eneret ikke har hjemmel i Postdirektivet. Domstolen fremsatte i forbindelse hermed nogle udtalelser om rækkevidden af begrebet eneret i henhold til Postdirektivet (Præmis 64-68).

5) For det tilfælde, at værdien af samarbejdsaftalen mellem undervisningsministeriet og Correos ikke nåede op på Tjenesteydelsesdirektivets tærskelværdi, fremsatte EF-domstolen nogle udførlige udtalelser, der ikke kan gengives kort (præmis 70-88). Som de mest centrale af disse udtalelser kan nævnes:

Principperne om forbud mod forskelsbehandling på grund af nationalitet, fri etableringsret, fri udveksling af tjenesteydelser og ligebehandling finder anvendelse. Der er herefter et krav om gennemskuelighed, hvorfor der skal sikres en passende grad af offentlighed til fordel for enhver potentiel tilbudsgiver. (Præmis 73-76).

Traktatens artikel 86, stk. 2 (om virksomheder, der udfører tjenesteydelser af almindelig økonomisk interesse) kan ikke påberåbes med hensyn til postbefordring, der ikke er omfattet af eneret i overensstemmelse med Postdirektivet (præmis 79-83).

EF-domstolens dom af 18. december 2007, sag C-357/06, Frigerio Luigi & C.

En italiensk lovbestemmelse om, at ordregivende myndigheder kun kan indgå kontrakter om tjenesteydelser med kapitalselskaber, var i strid med Tjenesteydelsesdirektivets artikel 26

Efter den italienske lovgivning kan offentlige myndigheder kun indgå kontrakter om udførelse af tjenesteydelser med kapitalselskaber (dvs. selskaber med begrænset hæftelse, der opfylder visse minimumskrav, i dansk ret aktie- og anpartsselskaber).

Et interessentskab, F, havde i en årrække sammen med et andet interessentskab udført renovationsarbejdet for en kommune, og F var opført på en fortegnelse over virksomheder med ret til at varetage affaldsaktivi-

teter. På et tidspunkt overdrog kommunen uden forudgående udbud renovationsarbejdet til et aktieselskab, som kommunen samtidig indtrådte i.

F klagede til en forvaltningsdomstol over, at kommunens overdragelse af renovationsarbejdet til aktieselskabet var sket uden EU-udbud. Kommunen påstod klagen afvist med den begrundelse, at F ikke havde retlig interesse, fordi F ikke var et kapitalselskab.

Forvaltningsdomstolen forelagde sagen for EF-domstolen med nogle spørgsmål, der med forskellige formuleringer sigtede til, om den ovennævnte bestemmelse i den italienske lovgivning var i overensstemmelse med fællesskabsretten.

EF-domstolen udtalte (noget sammentrængt):

Det var Tjenesteydelsesdirektivet, der fandt anvendelse.

Tjenesteydelsesdirektivets artikel 26, stk. 2, er til hinder for en national lovbestemmelse, der udelukker virksomheder med ret til at udføre en tjenesteydelse i deres egen medlemsstat fra at være tilbudsgivere med hensyn til denne tjenesteydelse på grund af den kategori af juridiske personer, de tilhører. F havde endvidere ret til at udføre affaldsaktiviteter i Italien. (Den tilsvarende bestemmelse er i dag Udbudsdirektivets artikel 4, stk. 1).

Det følger af Tjenesteydelsesdirektivets artikel 26, stk. 1, at en ordregivende myndighed ikke kan kræve, at en sammenslutning af tjenesteydere omdannes til en bestemt retlig form med henblik på afgivelse af tilbud. (Den tilsvarende bestemmelse i Udbudsdirektivet er artikel 4, stk. 2).

Den nationale domstol er forpligtet til at fortolke og anvende en national lovbestemmelse i overensstemmelse med fællesskabsretten og til om fornødent at undlade at anvende en national lovbestemmelse, der strider mod fællesskabsretten.

Det fandtes ufornødent at besvare to af de stillede spørgsmål, der direkte gik på, om den omtalte regel i den italienske lovgivning var i strid med fællesskabsretten, da den italienske domstol ved EF-domstolens udtalelser i øvrigt havde fået tilstrækkeligt grundlag til at afgøre den konkrete sag, hvorfor besvarelsen af de to spørgsmål udelukkende ville være af hypotetisk interesse.

EF-domstolens dom af 24. januar 2008, sag C-532/06, Lianakis mfl.
Nogle underkriterier angik tilbudsgivernes egnethed og var derfor i strid med Tjenesteydelsesdirektivet. Underkriterier til underkriterier skal som almindelig regel være oplyst på forhånd

En græsk kommune iværksatte et EU-udbud i henhold til det dagældende tjenesteydelsesdirektiv vedrørende en tjenesteydelse bestående af opmåling m.m. i en bydel. Kriteriet var det økonomisk mest fordelagtige bud. I udbudsbekendtgørelsen var angivet følgende underkriterier i prioriteret orden: 1) tilbudsgiverens erfaring, 2) tilbudsgiverens personale og udstyr og 3) tilbudsgiverens evne til at gennemføre undersøgelsen inden for den fastsatte tid.

Efter tilbuddenes afgivelse fastsatte ordregiveren vægtningsprocenter for de tre underkriterier, henholdsvis 60 %, 20 % og 20 %.

Ordregiveren besluttede desuden, at pointtildelingen til tilbuddene vedrørende hvert af underkriterierne efter nærmere angivne beregningsmetoder skulle ske på grundlag af følgende forhold: Vedrørende underkriterium 1) værdien af de undersøgelser, som tilbudsgiveren havde udført, vedrørende underkriterium 2) størrelsen af tilbudsgiverens personale og vedrørende underkriterium 3) omfanget af den tilbudte undersøgelse. Denne

beslutning kaldes i dommen, at ordregiveren fastsatte underkriterier til underkriterierne, hvilken terminologi benyttes i det følgende.

En tilbudsgiver, der ikke fik tildelt kontrakten, klagede til en græsk forvaltningsdomstol over, at underkriteriernes vægtning og underkriterierne til underkriterierne ikke havde været oplyst på forhånd.

Forvaltningsdomstolen forelagde sagen for EF-domstolen med et spørgsmål om, hvorvidt det var i overensstemmelse med tjenesteydelsesdirektivet først at fastsætte vægtningen af underkriterier efter udbuddet.

EF-domstolen udtalte (gengivet stærkt sammentrængt og til dels omformuleret):

1) taget op ex officio på grundlag af et indlæg fra Kommissionen: Efterprøvelsen af tilbudsgivernes kvalifikationer og tildelingen af en udbudt kontrakt kan finde sted samtidig. Der er imidlertid tale om to særskilte processer, der er omfattet af forskellige regler, og underkriterier skal have til formål at identificere det økonomisk mest fordelagtige bud. Dette var ikke tilfældet for underkriterierne i det udbud, som sagen angik, da de vedrørte tilbudsgivernes evne til at gennemføre den udbudte ydelse. De anvendte underkriterier var derfor i strid med Tjenesteydelsesdirektivets regler om vurdering af tilbudsgivernes egnethed og tildelingskriterier. (Præmis 24-32).

2) Af principperne om ligebehandling og gennemsigtighed følger, at potentielle tilbudsgivere skal kunne skaffe sig kendskab til alle forhold, som ordregiveren tager i betragtning ved udvælgelsen af det økonomisk mest fordelagtige bud. En ordregiver har derfor ikke ret til at anvende bestemmelser om vægtning eller underkriterier til underkriterier, som ikke forudgående er bragt til tilbudsgivernes kundskab. (Præmis 33-40).

EF-domstolen udtalte videre (præmis 41-44), at disse konstateringer ikke er uforenelige med domstolens dom af 24. november 2005 i sagen ATI EAC mfl., som den græske forvaltningsdomstol havde henvist til, da denne dom angik en anden situation, og da der i den blev opstillet følgende betingelser for, at en ordregiver kan undlade at oplyse vægtning af underkriterier til underkriterier på forhånd: 1) at der ikke sker ændring af de oplyste underkriterier, 2) at der ikke sker ændringer af betydning for tilbuddenes udformning, og 3) at der ikke sker diskrimination af tilbudsgivere.

Følgende bemærkes:

En pligt til forhåndsoplysning af underkriteriernes indbyrdes vægtning følger i dag af § 4, stk. 2, i Udbudsdirektivet. Derimod indeholder Udbudsdirektivet ikke en regel om, at principperne for pointtildeling vedrørende de enkelte underkriterier skal være oplyst på forhånd.

For det tilfælde, at pointtildelingen sker på grundlag af bestemte forhold, i dommen omtalt som underkriterier til underkriterierne, opstiller den her resumerede dom et krav om, om disse forhold skal være oplyst på forhånd. Derimod tager dommen ikke stilling til, om principperne for pointtildeling skal oplyses på forhånd.

Den i dommen omtalte tidligere dom af 24. november 2005, ATI EAC mfl. angik et tilfælde med noget anderledes omstændigheder end den foreliggende sag. ATI EAC-sagen drejede sig om, hvorvidt den indbyrdes vægtningen af underkriterierne til et underkriterium med deraf følgende pointtildeling skulle have været oplyst på forhånd, og EF-domstolen nåede frem til, at ordregiveren ikke havde haft pligt til dette. Oplysningsni-

veauet var imidlertid langt højere i ATI EAC-sagen end i den foreliggende sag, idet underkriteriernes vægtning og underkriterierne til det omtalte underkriterium var oplyst på forhånd.

EF-domstolens dom af 14. februar 2008, sag C-450/06, Varec

Fortrolige oplysninger kan unddrages fra en klagers aktindsigt, men klageorganet skal selv have de nødvendige oplysninger, og der skal før udlevering af muligt fortrolige oplysninger indhentes en udtalelse fra den berørte virksomhed

Denne dom angik en klage til en belgisk domstol over et EU-udbud vedrørende indkøb af dele til kampvogne. Klagen var indgivet af en tilbudsgiver, der ikke havde fået kontrakten. Klageren havde ikke fået aktindsigt i hele tilbuddet fra den valgte tilbudsgiver, og der forelå under sagen et spørgsmål om konsekvenserne heraf.

Den belgiske domstol forelagde sagen for EF-domstolen med et spørgsmål, der gik på, om det efter første kontroldirektiv og EU-udbudsreglerne er berettiget at unddrage fortrolige oplysninger og forretningshemmeligheder fra en klagers aktindsigt.

EF-domstolen besvarede spørgsmålet bekræftende og henviste herved til forskellige forhold, herunder at udlevering af visse oplysninger til en konkurrent kan være konkurrencefordrejende. EF-domstolen udtalte desuden bl.a., at klageorganet selv skal have de nødvendige oplysninger (præmis 53), og at klageorganet inden udleveringen af eventuelt fortrolige oplysninger til en klager skal indhente en udtalelse fra den berørte virksomhed (præmis 54).

Dommen har næppe den store umiddelbare interesse set fra en dansk synsvinkel, idet Klagenævnet for Udbud administrerer klageres aktindsigt i overensstemmelse med dommen i medfør af Forvaltningslovens § 15, stk. 1. Referatet ovenfor er derfor yderst summarisk.

Retten i Første Instans' dom af 12. marts 2008 i sag T-332/03, European Service Network mod Kommissionen

Ligebehandlingsprincippet har til formål at sikre konkurrencen og give tilbudsgiverne ens chancer. Gennemsigtighedsprincippet er et supplement til ligebehandlingsprincippet og skal sikre mod favorisering og vilkårlighed. Ved udbud af kontrakter om tjenesteydelser er visse fordele for den hidtidige tjenesteyder uundgåelige. Udbyderens forsømmelser med hensyn til at give tilbudsgiverne oplysninger havde ikke haft indflydelse på tilbudsvurderingen.

Dommen er særdeles udførlig. Nedenstående referat er yderst summarisk og omfatter kun de dele af dommen, der skønnes at have nogenlunde almen udbudsretlig interesse.

Kommissionen iværksatte et EU-udbud vedrørende en tjenesteydelse. Tildelingskriteriet var det mest fordelagtige cost benefit-forhold.[3] Som underkriterier var angivet nogle kvalitative underkriterier samt prisen. De kvalitative underkriterier var, stærkt sammentrængt gengivet: 1. teknisk værdi, 2. arbejdsmetoder, 3. kreativitet og 4. tidsplan.

[3] »le rapport coût-efficacité le plus avantageux». Dette tildelingskriterium skal formentlig ses på baggrund af, at der tilsyneladende ikke på udbuddets tidspunkt var faste regler, om hvilke tildelingskriterier EU-institutionerne skulle anvende. Efter de nugældende regler skal EU-institutionerne anvende tildelingskriterier svarende til Udbudsdirektivets tildelingskriterier, jf. Gennemførelsesforordningens artikel 138.

I udbudsbetingelserne var angivet, at tilbuddene ville få tildelt points i relation til hvert af de kvalitative underkriterier inden for en skala med et nærmere angivet maksimum for hvert underkriterium, således at tilbuddene højst kunne få 100 points for de kvalitative underkriterier tilsammen. Fastsættelsen af de enkelte maksima var udtryk for en indbyrdes vægtning af de kvalitative underkriterier.

I udbudsbetingelserne var endvidere angivet, at tilbud, der ikke opnåede mindst 50 % af de mulige points pr. kvalitativt underkriterium og mindst 60 points tilsammen for de kvalitative underkriterier, ikke ville blive taget i betragtning.

Følgende fremgik desuden af udbudsbetingelserne: Når der var tildelt tilbuddene points for de kvalitative underkriterier, ville Kommissionen sætte »prisfaktoren« i relation til »kvalitetsfaktoren«. Det var tilsyneladende ikke angivet, hvorledes denne relation ville blive beregnet.

Der indkom tilbud fra nogle tilbudsgivere, herunder den virksomhed, der aktuelt udførte den udbudte tjenesteydelse. Kommissionen tildelte tilbuddene points vedrørende de kvalitative underkriterier og beregnede derefter den omtalte relation mellem prisfaktoren og kvalitetsfaktoren. Denne beregning blev foretaget ved brug af følgende formel:

$$\frac{\text{samlet pointtal for de kvalitative underkriterier x 1 mio.}}{\text{tilbudspris}}$$

Beregningen førte til den bedste relation for tilbuddet fra den aktuelle tjenesteyder, efter det foreliggende reelt som følge af en lav tilbudspris, hvorfor Kommissionen besluttede at indgå kontrakt med den aktuelle tjenesteyder.

En af de andre tilbudsgivere anlagde sagen med påstand om annullation af udbuddet og under påberåbelse af forskellige anbringender. Rettens afgørelse kan gengives således:

1) Ad et anbringende om overtrædelse af ligebehandlingsprincippet ved et krav i udbudsbetingelserne om, at en ny kontraktpart skulle gennemgå en obligatorisk indkøringsperiode på tre måneder uden betaling:

Ikke taget til følge, bl.a. med henvisning til, at der ikke var tale om en obligatorisk indkøringsperiode på tre måneder (præmis 77). Ud fra en samlet vurdering forelå der ikke en overtrædelse af ligebehandlingsprincippet (præmis 87).

2) Ad et anbringende om overtrædelse af ligebehandlingsprincippet ved et krav om, at en ny kontraktpart skulle betale for forskellige oplysninger m.m.:

Ikke taget til følge (præmis 95), da der ikke var stillet et sådant krav (præmis 93).

3) Ad et anbringende om overtrædelse af ligebehandlingsprincippet ved, at alene den hidtidige tjenesteyder havde adgang til forskellige væsentlige oplysninger m.m.:

Retten udtalelser vedrørende dette anbringende (præmis 97-178) er særdeles omfattende og kan ikke gengives kort. Fra udtalelserne kan nævnes: Ligebehandlingsprincippet har til formål at fremme konkurrencen, og det følger af ligebehandlingsprincippet, at alle tilbudsgivere skal have ens chancer (præmis 125). Gennemsigtigtighedsprincippet er et supplement (»corrollaire«) til ligebehandlingsprincippet og har som hoved-

formål at sikre mod favorisering og vilkårlighed (præmis 126). At alene den hidtidige tjenesteyder har visse oplysninger m.m., er en integreret og uundgåelig konsekvens ved udbud af ydelser, der hidtil er udført af en enkelt kontraktpart (præmis 142). Der skulle foretages en afvejning (præmis 147), og visse oplysninger, der var fremkommet for sent fra Kommissionen, var ikke afgørende for tilbudsudformningen (præmis 151). Kommissionen havde udvist forskellige forsømmelser med hensyn med hensyn til at give tilbudsgiverne oplysninger (præmis 164-166), men forsømmelserne havde ikke haft indflydelse på tilbudsvurderingen (præmis 173 og 177).

Anbringendet blev herefter ikke taget til følge (præmis 178).

4) Ad et anbringende om, at Kommissionen havde vurderet tilbuddene i strid med den tilbudsvurdering, der var angivet i udbudsbetingelserne.

Anbringendet sigtede navnlig til, at den anvendte formel for relationen mellem de kvalitative underkriterier og prisen efter sagsøgerens opfattelse ikke tillagde de kvalitative underkriterier tilstrækkelig vægt.

Anbringendet blev ikke taget til følge, da der ikke var grundlag herfor (præmis 201). Herved bl.a. henvist til nogle formler opstillet af Retten (præmis 197).

5) Ad et anbringende om, at Kommissionens vurdering af sagsøgerens tilbud med hensyn til tilbuddets kvalitet m.m. var sket i strid med udbudsbetingelserne:

Ikke taget til følge (præmis 227), idet Kommissionen efter Rettens vurdering havde foretaget tilbudsvurderingen i overensstemmelse med udbudsbetingelserne (præmis 225).

Kommissionen blev herefter frifundet. En yderligere påstand, der ikke er refereret ovenfor, blev dog afvist.

Rettens dom af samme dag i sag T-345/03, Evropaïki Dynamiki mod Kommissionen (er set benævnt Cordis), angår en særlig delaftale under samme udbud.

Retten i Første Instans' dom af 12. marts 2008 i sag T-345/03, Evropaïki Dynamiki mod Kommissionen (er set benævnt Cordis)

Udbyderen tilsidesatte ligebehandlingsprincippet ved ikke at give tilbudsgiverne alle nødvendige oplysninger med den konsekvens, at kun den valgte tilbudsgiver som følge af sit samarbejde med den aktuelle tjenesteyder havde alle oplysningerne. Tildelingsbeslutningen annulleret

Sagen angår et EU-udbud vedrørende en tjenesteydelse, iværksat af Kommissionen. Sagen var anlagt af en tilbudsgiver, der ikke havde fået tildelt kontrakten, med påstand om annullation af tildelingsbeslutningen.

Dommen angår samme udbud som Rettens dom af samme dag i sag T-332/03, European Service Network mod Kommissionen, men angår en særlig delaftale under udbuddet. Med hensyn til tildelingskriteriet og principperne for tilbudsvurderingen ol. henvises til resuméet af dommen i European Service Network-sagen.

Rettens stillingtagen til sagsøgerens anbringender i den her resumerede dom kan gengives således:

1) Ad et anbringende om overtrædelse af ligebehandlingsprincippet ved et krav i udbudsbetingelserne om, at en ny kontraktpart skulle gennemgå en obligatorisk indkøringsperiode på tre måneder uden betaling:

Ikke taget til følge med henvisning til, at der ikke var tale om en obligatorisk indkøringsperiode på tre måneder (præmis 86). Afgørelsen svarer

til den tilsvarende afgørelse om samme spørgsmål i European Service Network-sagen (om end præmisserne ikke er identiske).

2) Ad et anbringende om overtrædelse af ligebehandlingsprincippet ved, at alle tilbudsgiverne ikke eller ikke rettidigt havde fået alle nødvendige oplysninger.

Dette anbringende sigtede til dels til, at den valgte tilbudsgiver havde samarbejde med den aktuelle tjenesteyder og ville benytte denne som underleverandør, hvorfor den valgte tilbudsgiver efter sagsøgerens opfattelse havde et bedre kendskab til den udbudte tjenesteydelse end de øvrige tilbudsgivere.

Retten fremsatte nogle generelle udtalelser om principperne om ligebehandling og gennemsigtighed. Disse udtalelser svarer til de tilsvarende generelle udtalelser om emnet i European Service Network-dommen, og der henvises om dem til resuméet af denne dom.

Med hensyn til visse af de omhandlede oplysninger tog Retten ikke anbringendet til følge med henvisning til, at forholdet ikke havde haft betydning for tilbudsvurderingen (præmis 169). Afgørelsen herom svarer til den tilsvarende afgørelse i European Service Network-sagen.

Retten lagde derimod til grund, at fuldt kendskab var nødvendigt på et andet punkt, dvs. med hensyn til opbygningen og kildekoden for et edb-system, der aktuelt blev brugt ved tjenesteydelsens udførelse. Som følge af manglende eller ufuldstændige oplysninger herom over for tilbudsgiverne var det kun den valgte tilbudsgiver og den aktuelle tjenesteyder, der havde kendskab til edb-systemet, hvilket havde givet den valgte tilbudsgiver en uberettiget fordel (præmis 175 ff.). Det var endvidere på troværdig måde påvist, at forholdet kunne have haft betydelig negativ indvirkning på sagsøgerens tilbudspris og derved kunne have frataget sagsøgeren muligheden for at få kontrakten (præmis 203).

Retten annullerede herefter Kommissionens tildelingsbeslutning.

EF-domstolens dom af 3. april 2008 i sag C-346/06, Rüffert

Udstationeringsdirektivet og traktatens artikel 49 er til hinder for en national lovbestemmelse, hvorefter offentlige byggekontrakter kun må indgås på vilkår om betaling af overenskomstmæssig mindsteløn

Referatet nedenfor er stærkt sammentrængt og kun medtaget for at henlede opmærksomheden på dommen.

Sagen angår direktiv 96/71 om udstationering af arbejdstagere som led i udveksling af tjenesteydelser, i det følgende kaldet Udstationeringsdirektivet. Dette direktiv angår virksomheder i en medlemsstat, der i forbindelse med levering af tjenesteydelser over grænserne udstationerer arbejdstagere på en anden medlemsstats område. Direktivet finder således bl.a. anvendelse, når et byggefirma i en medlemsstat udfører byggearbejde i en anden medlemsstat.

Udstationeringsdirektivet går (meget stærkt sammentrængt) ud på følgende: Medlemsstaterne påser, at virksomheder fra en anden medlemsstat sikrer udstationerede arbejdstagere de arbejds- og ansættelsesvilkår, herunder mindsteløn, som følger af lovgivning eller af kollektive aftaler, der finder generel anvendelse i den medlemsstat, hvor arbejdet udføres. Ved kollektive aftaler, der finder generel anvendelse, forstås kollektive aftaler, der skal overholdes af alle virksomheder inden for sektoren, eller – hvis sådanne aftaler ikke findes – aftaler, som er alment gældende for alle til-

svarende virksomheder i området, eller som er indgået af de mest repræsentative arbejdsmarkedsparter på nationalt plan for hele det nationale område.

Sagen angik et fængselsbyggeri i en tysk delstat foretaget af delstaten efter EU-udbud. Kontrakten blev tildelt et tysk byggefirma og indeholdt en klausul om, at byggefirmaet skulle overholde en kollektiv overenskomst om offentlige bygge- og anlægsarbejder. Dette var i overensstemmelse med delstatens lov om offentlige kontrakter, hvorefter offentlige kontrakter om bygge- og anlægsarbejder kun må gives til virksomheder, som har forpligtet sig til at betale sine ansatte den på leveringsstedet overenskomstmæssigt fastsatte løn.

Byggefirmaet antog en polsk virksomhed som underentreprenør. Efter at det var kommet frem, at den polske virksomhed udbetalte en lavere løn til sine medarbejdere end mindstelønnen i henhold til den omtalte overenskomst, hævede udbyderen kontrakten med det tyske byggefirma, der derefter gik konkurs. Der verserede herefter en retssag mellem byggefirmaets konkursbo og udbyderen, tilsyneladende om et erstatningskrav fra konkursboet.

Den tyske domstol forelagde sagen for EF-domstolen med et spørgsmål om, hvorvidt den omtalte lovbestemmelse var i overensstemmelse med traktatens regler om fri udveksling af tjenesteydelser.

EF-domstolen udtalte:

Delstatens lov om offentlige kontrakter var ikke en lov som omhandlet i Udstationeringsdirektivet, da loven ikke fastsatte en mindsteløn (præmis 24). Endvidere fandt den omtalte kollektive overenskomst efter sagens oplysninger ikke generel anvendelse, og den var heller ikke alment gældende, da den kun angik offentlige byggerier (præmis 28 og 29). Herefter, og da forskellige nærmere angivne regler i direktivet ikke fandt anvendelse, besvarede EF-domstolen det stillede spørgsmål således: Udstationeringsdirektivet og traktatens artikel 49 (om fri udveksling af tjenesteydelser) er til hinder for en national lovbestemmelse om, at en ordregivende myndighed kun må indgå kontrakter med virksomheder, som har forpligtet sig til at udbetale deres ansatte den overenskomstmæssige mindsteløn, der gælder på leveringsstedet.

Følgende bemærkes yderligere:

Udstationeringsdirektivet angår forskellige andre spørgsmål end mindsteløn, dvs. hviletidsregler m.m. EF-domstolen har også beskæftiget sig med direktivet i dom af 18. december 2007 i sag C-341/05, Laval und Partneri (også kaldet Vaxholm). Denne sag angik berettigelsen af kollektive kampskridt til gennemførelse af forskellige nationale overenskomstbestemmelser om andet end mindsteløn.

Udstationeringsdirektivet er implementeret i Danmark ved lovbekendtgørelse nr. 849 af 21. juli 2006 om udstationering af lønmodtagere. Denne lov indeholder ikke regler om mindsteløn. Arbejdsministeriet har inidlertid ved cirkulæreskrivelse nr. 114 af 18. maj 1996 tilkendegivet, at der i statslige byggekontrakter m.m. over en vis størrelse skal indsættes en klausul om, at bl.a. lønvilkår ikke må være mindre gunstige end sædvanlige vilkår. Denne cirkulæreskrivelse bygger på en ILO-konvention, til hvilken der henvises i cirkulæreskrivelsen. I Konkurrencestyrelsens vejledning om sociale aftaler henvises s. 8 hertil og udtales desuden, at en virksomhed, der er etableret i et andet EU-land, ikke kan udelukkes fra at

deltage i et udbud, blot fordi den ikke har tilsluttet sig en kollektiv overenskomst i Danmark.

Umiddelbart forekommer det usikkert, om den omtalte cirkulæreskrivelse kan opretholdes efter den her resumerede dom, og om en offentlig ordregiver kan fastsætte som vilkår for et EU-udbud, at tilbudsgiverne skal aflønne deres ansatte svarende til dansk mindsteløn.

EF-domstolens dom af 3. april 2008, sag C-444/06, Kommissionen mod Spanien

Spanien havde overtrådt 1. kontroldirektiv som følge af, at der i visse tilfælde ikke er mulighed for at klage over en tildelingsbeslutning før kontraktsindgåelsen. Spanien havde derimod ikke overtrådt direktivet ved en regel om, at ugyldige kontrakter kan opretholdes midlertidigt under visse betingelser

Ved denne dom statueredes, at Spanien havde overtrådt 1. kontroldirektiv på grund af følgende: Den spanske lovgivning om offentlige kontrakter var indrettet sådan, at der i visse tilfælde ikke var mulighed for at klage over en tildelingsbeslutning fra en ordregiver før ordregiverens indgåelse af kontrakt med den valgte tilbudsgiver.

Derimod havde Kommissionen ikke godtgjort, at Spanien havde overtrådt kontroldirektivet ved en regel i den spanske lovgivning, hvorefter kontrakter, der er erklæret ugyldige, under visse betingelser kan opretholdes midlertidigt for at undgå at forstyrre den offentlige tjeneste alvorligt. Herved bl.a. henvist til, at formålet med denne bestemmelse ikke var at forhindre ugyldigheden af en kontrakt, men at undgå uforholdsmæssige og eventuelt skadelige konsekvenser for almenvellet.

EF-domstolens dom af 8. april 2008, sag C-337/05, Kommissionen mod Italien

Italien havde overtrådt de tidligere indkøbsdirektiver ved en fast praksis om indkøb af helikoptere uden EU-udbud. En virksomhed, der er delvis privatejet, er aldrig in house i forhold til en offentlig ordregiver, heller ikke selvom den private ejerandel er en minoritetsandel

Ved denne dom statueredes, at Italien havde overtrådt de tidligere indkøbsdirektiver ved en fast praksis om indkøb af helikoptere fra helikopterproducenten Augusta uden forudgående EU-udbud og uden at følge procedurerne i direktiverne.

EF-domstolen udtalte herunder bl.a.:

Helikopterfirmaet Augusta kunne ikke som påberåbt af Italien anses for »in house« i forhold til den italienske stat med den begrundelse, at Augusta delvis ejes af staten. EF-domstolen henviste herved til, at Augusta er delvis privatejet og derfor ikke opfylder det af EF-domstolen opstillede kontrolkriterium, hvorefter en virksomhed for at være in house i forhold til en ordregiver skal være undergivet samme kontrol fra ordregiveren som ordregiverens kontrol med sine egne tjenestegrene. Udtalt, at en privat ejerandel under alle omstændigheder udelukker, at kontrolkriteriet er opfyldt, også selvom den private ejerandel er en minoritetsandel (præmis 38).

Italien kunne ikke påberåbe sig forskellige traktatbestemmelser om legitime nationale hensyn og den offentlige sikkerhed m.m. som begrundel-

se for at undlade udbud. Herved bl.a. henvist til, at helikopterne til dels blev brugt til civile formål (præmis 42-49).

Italien kunne ikke påberåbe sig en undtagelsesbestemmelse i de tidligere indkøbsdirektiver om indkøbsaftaler, der er hemmelige, eller som ledsages af særlige sikkerhedsforanstaltninger. (Den tilsvarende bestemmelse i Udbudsdirektivet 2004/18 er artikel 14). Herved henvist til, at Italien ikke havde godtgjort, at formålet ikke kunne forfølges inden for rammerne af en udbudsprocedure (præmis 53).

Italien havde ikke som hævdet kunnet iværksætte udbud efter forhandling i medfør af de tidligere indkøbsdirektivers regler om udbud efter forhandling med hensyn til varer, der kun kan overdrages til en bestemt leverandør m.m. (De tilsvarende regler i Udbudsdirektivet 2004/18 er artikel, litra 1, a og b). Herved bl.a. henvist til, at Italien ikke havde godtgjort, at udelukkende Augustas helikoptere havde de krævede tekniske egenskaber (præmis 59).

EF-domstolens dom af 10. april 2008, sag C-393/06, Ing. Aigner

En ordregiver, der driver virksomhed under Forsyningsvirksomhedsdirektivet, er ikke omfattet af dette direktiv med hensyn til anden virksomhed. Et fjernvarmeselskab var et offentligretligt organ. Alle kontrakter, der indgås af et offentligretligt organ, er omfattet af udbudsdirektiverne, også kontrakter, der angår rent erhvervsmæssige aktiviteter

Aktieselskabet Fernwärme Wien varetager fjernvarmeforsyningen i Wien og har reelt monopol herpå. Denne aktivitet er omfattet af Forsyningsvirksomhedsdirektivet. Herudover driver Fernwärme Wien på almindelige markedsvilkår virksomhed med etablering af køleanlæg, hvilket ikke er omfattet af Forsyningsvirksomhedsdirektivet. Fernwärme Wien ejes og kontrolleres af byen Wien.

Sagen angik et udbud iværksat af Fernwärme Wien vedrørende udførelse af et køleanlæg. Udbuddet blev ikke foretaget som EU-udbud, da Fernwärme Wien ikke mente at have pligt hertil. Efter at Fernwärme Wien havde meddelt en tilbudsgiver, at tilbudsgiverens tilbud ikke kom i betragtning, klagede tilbudsgiveren til et klageorgan og gjorde gældende, at udbuddet var omfattet af EU-udbudsreglerne.

Klageorganet stillede tre spørgsmål til EF-domstolen. Spørgsmålene kan lidt omformuleret gengives således:

Spørgsmål 1): Er en ordregiver, der udøver virksomhed omfattet af Forsyningsvirksomhedsdirektivet, også omfattet af dette direktiv med hensyn til en anden virksomhed, som ordregiveren udøver?

Spørgsmål 2): Er et selskab som Fernwärme Wien et offentligretligt organ?

Spørgsmål 3): Er et offentligretligt organ omfattet af udbudsdirektiverne med hensyn til en erhvervsmæssig virksomhed, som det offentligretlige organ udøver ved siden af sin virksomhed som offentligretligt organ, og som regnskabsmæssigt m.m. er klart adskilt fra denne virksomhed?

EF-domstolen besvarede spørgsmålene således (noget sammentrængt og af forståelsesgrunde til dels omformuleret):

Ad spørgsmål 1): En ordregiver, der udøver virksomhed omfattet af Forsyningsvirksomhedsdirektivet, er ikke omfattet af dette direktiv med hensyn til en anden virksomhed, som ordregiveren udøver. Herved bl.a. henvist til, at Forsyningsvirksomhedsdirektivet har begrænset rækkevidde og for så vidt skal fortolkes indskrænkende (præmis 27).

Ad spørgsmål 2): Et selskab som Fernwärme Wien er et offentligretligt organ, da det opfylder udbudsdirektivernes betingelser herfor (præmis 34-46). Herved bl.a. henvist til, at Fernwärme Wien reelt har monopol på levering af fjernvarme (præmis 44). Det er uden betydning, at Fernwärme Wien ved siden af sin virksomhed til imødekommelse af almenhedens behov også udøver erhvervsmæssig virksomhed (»udøver andre former for virksomhed med profit for øje«, præmis 47).

Ad spørgsmål 3): Ordregivende myndigheder, herunder offentligretlige organer, skal udbyde alle kontrakter [dvs. om anskaffelser omfattet af udbudsdirektiverne]. Hvis kontrakterne har relation til en aktivitet omfattet af Forsyningsvirksomhedsdirektivet, skal fremgangsmåden i dette direktiv følges. Alle andre kontrakter skal udbydes efter Udbudsdirektivet (præmis 56-58). Det er uden betydning, om det offentligretlige organ fører særskilt regnskab for sine erhvervsmæssige aktiviteter ud over sin virksomhed til imødekommelse af almenhedens behov, idet det er særdeles tvivlsomt, om aktiviteterne i praksis kan holdes ude fra hinanden (præmis 49-54).

Følgende bemærkes yderligere:

Om begrebet »offentligretligt organ«, dvs. en særlig type ordregiver, der er omfattet af udbudsdirektivernes udbudspligt, henvises til definitionerne i Udbudsdirektivets artikel 1, stk. 9, og Forsyningsvirksomhedsdirektivets artikel 2, stk. 1, a. De to definitioner er formuleret lidt forskelligt, men karakteriseres i dommen som enslydende (præmis 35). De er overtaget fra de tidligere udbudsdirektiver og skal utvivlsomt forstås i overensstemmelse med dem, hvilket også fremgår af, at dommen henviser til forskellige afgørelser vedrørende begrebet offentligretligt organ under de tidligere udbudsdirektiver.

Klagenævnet har i sit resumé af en af de tidligere afgørelser, dvs. dom af 27. februar 2003 i sag C-373/00, Adolf Truley, givet en generel fremstilling af begrebet offentligretligt organ. Adolf Truley-sagen minder meget om den aktuelle sag, og EF-domstolens udtalelser i den her resumerede dom synes ikke at være udtryk for noget nyt.

EF-domstolens dom af 15. maj 2008, sager C-147/06 og C-148/06, Secap

Traktatens grundlæggende regler gælder kun for kontrakter under tærskelværdien, hvis kontrakterne har en klar grænseoverskridende interesse. Der kan i den nationale lovgivning fastsættes kriterier herom

En italiensk lov om offentlige bygge- og anlægsarbejder indeholdt en regel om unormalt lave bud ved udbud med tildelingskriteriet laveste pris. Denne regel kan kort gengives således:

Tilbud, hvis tilbudsbeløb i et nærmere angivet omfang lå under gennemsnittet af alle tilbudsbeløb, skulle anses som unormalt lave bud, og udbyderen skulle med hensyn til sådanne tilbud forholde sig således:

Hvis kontraktens værdi nåede op på eller oversteg Bygge- og anlægsdirektivets tærskelværdi, skulle udbyderen følge regler svarende til direktivets artikel 30 om fremgangsmåden med hensyn til unormalt lave bud (hvorefter udbyderen skulle kontrollere sammensætningen af det eller de pågældende tilbud; de tilsvarende regler er i dag indeholdt i Udbudsdirektivets artikel 55).

Hvis kontraktens værdi ikke nåede op på tærskelværdien, skulle udbyderen automatisk udelukke unormalt lave bud fra at komme i betragtning, medmindre der var indkommet mindre end 5 tilbud.

Sagen angik to udbud iværksat af en italiensk kommune vedrørende bygge- og anlægsarbejder. Værdien af begge udbud lå under Bygge- og anlægsdirektivets tærskelværdi. Tildelingskriteriet var øjensynligt laveste pris ved begge udbud. I udbudsbetingelserne for begge udbud var angivet, at udbyderen ikke automatisk ville undlade at tage unormalt lave bud i betragtning.

To virksomheder, der havde afgivet tilbud ved hver sit af de to udbud, klagede til en italiensk forvaltningsdomstol over, at udbyderen ved begge udbud havde taget unormalt lave bud i betragtning. Virksomhederne gjorde gældende, at udbyderen havde været uberettiget hertil som følge af den omtalte italienske lovbestemmelse om automatisk udelukkelse af unormalt lave bud ved indgåelse af kontrakter under tærskelværdien.

Forvaltningsdomstolen frifandt udbyderen med begrundelse, at udbyderen ikke havde haft pligt til automatisk at udelukke unormalt lave bud, og at udbyderen havde været berettiget til i stedet for – hvilket var sket – at kontrollere de pågældende tilbuds sammensætning (dvs. havde været berettiget til at følge den omtalte italienske lovregel, der svarede til Bygge- og anlægsdirektivets regel om fremgangsmåden ved unormalt lave bud).

De to virksomheder indbragte sagen for en ankeinstans, der øjensynligt var i tvivl om, hvorvidt den omtalte italienske lovbestemmelse om automatisk udelukkelse af unormalt lave bud ved indgåelse af kontrakter under tærskelværdien var i strid med EU-retten. Ankeinstansen forelagde derfor sagen for EF-domstolen med spørgsmål om, hvorvidt udbudsdirektivernes regler om fremgangsmåden ved unormalt lave bud er udtryk for grundlæggende fællesskabsretlige principper.

EF-domstolen kommenterede forelæggelsen ret udførligt og udtalte herunder bl.a.:

De fremgangsmåder, der er fastsat i udbudsdirektiverne, finder kun anvendelse ved indgåelse af kontrakter, hvis værdi [når op på eller] overskrider tærskelværdien (præmis 19).

Med hensyn til kontrakter under tærskelværdien skal de ordregivende myndigheder imidlertid overholde traktatens grundlæggende regler, navnlig forbuddet mod forskelsbehandling på grund af nationalitet (præmis 20).

Dette forudsætter dog, at de pågældende kontrakter under tærskelværdien har en klar grænseoverskridende interesse (præmis 21). En national regel om automatisk udelukkelse af unormalt lave bud vil således ved kontrakter med klar grænseoverskridende interesse være i strid med traktatens grundlæggende regler om fri bevægelighed og i strid med det generelle forbud mod forskelsbehandling. En sådan regel vil også stride mod de ordregivende myndigheders egen interesse (præmis 29).

Den ordregivende myndighed skal vurdere, om en kontrakt under udbudsdirektivernes tærskelværdi har grænseoverskridende interesse, men spørgsmålet skal kunne indbringes for domstolene. Der kan endvidere i den nationale lovgivning fastsættes kriterier for, hvornår en kontrakt har klar grænseoverskridende interesse, bl.a. kriterier vedrørende kontraktens størrelse og udførelsesstedet (præmis 30-31).

Selvom der foreligger en klar grænseoverskridende interesse, vil en automatisk udelukkelse af unormalt lave bud dog være acceptabel, hvis udelukkelsen er begrundet i et usædvanligt stort antal bud, således at det ville overstige ordregiverens kapacitet at følge udbudsdirektivernes regler om fremgangsmåden ved unormalt lave bud. Kriterier herom kan fastsættes i den nationale lovgivning eller af den ordregivende myndighed selv. Grænsen på 5 tilbud i den italienske lovregel er ikke rimelig (præmis 32-33).

Den italienske ankeinstans skulle foretage en indgående vurdering af, om der forelå en klar grænseoverskridende interesse i hovedsagen (præmis 34).

EF-domstolen besvarede herefter de stillede spørgsmål i overensstemmelse med det anførte.

Følgende bemærkes:

EF-domstolen har i en række tidligere afgørelser statueret, at de ordregivende myndigheder har pligt til at overholde almindelige principper om ligebehandling og gennemsigtighed med hensyn til kontrakter, der ikke er omfattet af udbudspligten efter udbudsdirektiverne, fx dom af 14. juni 2007 i sag C-06/05, Medipac-Kazantzkis. Af disse afgørelser er fremgået, at der derfor gælder en vis form for offentliggørelsespligt for sådanne kontrakter, se fx dom af 21. juli 2005 i sag C-231/03, Coname.

Det synes at være nyt, at disse forpligtelser forudsætter et grænseoverskridende element. Dette er første gang nævnt i dom af 13. november 2007 i sag C-507/03, Kommissionen mod Irland (An Post), som blev afsagt af domstolens store afdeling. Den her resumerede dom følger dette op og uddyber det.

Det nye kriterium om et grænseoverskridende element har dog næppe den store umiddelbare interesse for de danske ordregivende myndigheder. De retningslinjer, der følger af den omtalte praksis fra EF-domstolen, er implementeret i Danmark ved Tilbudslovens afsnit II, som ikke anvender begrebet grænseoverskridende element, og som danske ordregivende myndigheder skal følge under alle omstændigheder.

Retten i Første Instans' dom af 21. maj 2008 i sag T-495/04, Belfass mod Rådet

Udbyderens afvisning af et tilbud, fordi tilbuddet ikke opfyldte et krav i udbudsbetingelserne om et bestemt timetal, skulle ske under overholdelse af reglerne om unormalt lave bud, da disse regler omfatter alle underkriterier. Udbyderen frifundet for krav fra tilbudsgiver om erstatning til dækning af positiv opfyldelsesinteresse, da det ikke var bevist, at tilbudsgiveren ville have fået kontrakten, hvis udbyderen ikke havde overtrådt udbudsreglerne, og da det tværtimod kunne lægges til grund, at tilbudsgiveren ikke ville have fået kontrakten

Rådet iværksatte et EU-udbud vedrørende rengøring. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud. Tilbudsvurderingen blev foretaget ved brug af en evalueringsmodel, der tilsyneladende svarede nogenlunde til den evalueringsmodel, der blev anvendt i sagen T-332/03, European Service Network mod Kommissionen, se resuméet af Rettens dom af 12. marts 2008 i denne sag.

I tilbuddene skulle gives oplysning om tilbudsgiverens timesats ved aflønningen af rengøringspersonalet og om antallet af de arbejdstimer, der

ville blive anvendt ved rengøringsarbejdets udførelse. I udbudsbetingelserne var endvidere angivet, at et tilbud ikke ville blive taget i betragtning, hvis tilbudsgiverens timesats lå under en overenskomstmæssig belgisk timesats, og/eller hvis antallet af de arbejdstimer, der ville blive anvendt, lå mere end en bestemt procentdel under gennemsnittet for arbejdstimerne i henhold til alle tilbud.

Udbuddet omfattede to delaftaler. En tilbudsgiver B afgav tilbud vedrørende begge delaftaler. Udbyderen afviste B's tilbud vedrørende delaftale 1 med henvisning til, at B's timepris vedrørende denne delaftale lå under den overenskomstmæssige belgiske mindsteløn. Udbyderen afviste endvidere B's tilbud vedrørende delaftale 2 med henvisning til, at antallet af de arbejdstimer, som B ville anvende i denne delaftale, lå under den omtalte procentdel af gennemsnittet for arbejdstimerne i henhold til alle tilbud.

B anlagde herefter sagen og gjorde forskellige anbringender gældende. Retten tog stilling til sagen således:

1) Ad et anbringende vedrørende afvisningen af B's tilbud om delaftale 1 gående ud på (stærkt sammentrængt gengivet), at udbyderen burde have indset, at angivelsen af timesats i B's tilbud skyldtes en regnefejl, hvorfor udbyderen burde have foretaget nærmere undersøgelser:

Ikke taget til følge med henvisning til, at der af nærmere angivne grunde ikke var tale om en åbenlys fejl i B's tilbud som omhandlet i Gennemførelsesforordningens artikel 148, stk. 3. Udbyderen kunne derfor ikke kritiseres for ikke at have givet B mulighed for at berigtige fejlen (præmis 71).

Det bemærkes, at den omtalte regel i Gennemførelsesforordningens artikel 148, stk. 3, går ud på, at den ordregivende myndighed »kan« kontakte en tilbudsgiver om en åbenlys skrivefejl i tilbuddet. En tilsvarende regel må antages at gælde for udbud efter udbudsdirektiverne. Det fremgår ikke, om Rettens formulering skal forstås sådan, at en ordregivende myndighed efter omstændighederne har pligt til at tage en sådan kontakt.

2) Ad forskellige anbringender vedrørende afvisningen af B's tilbud om delaftale 2. Disse anbringender gik på den ene side ud på, at klausulen i udbudsbetingelserne om afvisning af tilbud med et lavt antal arbejdstimer i sig selv var diskriminerende m.m., og gik på den anden side ud på, at udbyderen før afvisningen af B's tilbud burde have fulgt fremgangsmåden med hensyn til unormalt lave bud (Gennemførelsesforordningens artikel 139, stk. 1, der svarer til Udbudsdirektivets artikel 55 og lignende bestemmelser i de tidligere udbudsdirektiver).

Retten tog kun stilling til anbringendet om, at udbyderen skulle have fulgt fremgangsmåden ved unormalt lave bud. Rettens udtalelser kan formentlig gengives således (noget sammentrængt og til dels omformuleret):

Gennemførelsesforordningens regel om fremgangsmåden ved unormalt lave bud svarer til de tilsvarende regler i udbudsdirektiverne (præmis 93). Reglen har til formål at sikre en sund konkurrence og indeholder et grundlæggende krav om, at udbyderen skal kontrollere ethvert unormalt lavt bud ved en kontradiktorisk procedure (præmis 97-98). Dette grundlæggende krav finder anvendelse på alle underkriterier til tildelingskriteriet det økonomisk mest fordelagtige tilbud, for så vidt som det er muligt at fastlægge en objektiv tærskel for, hvornår et tilbud er unormalt lavt (præmis 100). Udbyderen havde endvidere afvist B' s tilbud, fordi

timetallet i tilbuddet var unormalt lavt, og det var derfor en overtrædelse af udbudsreglerne, at udbyderen ikke før afvisningen havde fulgt fremgangsmåden i henhold til Gennemførelsesforordningens regel om unormalt lave tilbud (præmis 103-104).

Retten annullerede herefter udbyderens beslutning om at afvise B's tilbud vedrørende delaftale 2.

En påstand fra B om, at udbyderen skulle erstatte B's manglende fortjeneste ved ikke at have fået kontrakten vedrørende delaftale 2, blev ikke taget til følge, da det ikke var bevist, at B ville have fået denne kontrakt, hvis udbyderen ikke havde afvist B's tilbud om delaftale 2, og da det tværtimod efter sagens oplysninger kunne lægges til grund, at B ikke ville have fået kontrakten (præmis 125-126).

EF-domstolens dom af 19. juni 2008 i sag C-454/06, Pressetext Nachrichtenagentur GmbH

Væsentlige ændringer af en udbudspligtig aftale bevirker, at der foreligger en ny aftale med deraf følgende ny udbudspligt. En intern omstrukturering hos ordregiverens medkontrahent er ikke en væsentlig ændring, og det er i princippet heller ikke en væsentlig ændring, at en medkontrahent, der er en juridisk person, skifter ejerkreds. EU-retten indeholder på sit nuværende udviklingstrin ikke et forbud mod tidsubegrænsede aftaler om tjenesteydelser. En aftaleklausul om uopsigelighed i en kortere periode medfører ikke risiko for konkurrencefordrejning under forudsætning af, at den ikke systematisk genindsættes

I 1994, dvs. før Østrigs tiltrædelse af fællesskabet, indgik den østrigske stat en aftale med et østrigsk nyhedsagentur, APA, om adgang til nogle databaser og adgang til at udsende pressemeddelelser. Aftalen indeholdt forskellige regler om vederlaget herfor. Det var et led i aftalen, at den tidligst kunne opsiges pr. 31. december 1999.

APA er et andelsselskab, hvis andelshavere er den østrigske radiofoni og stort set alle østrigske dagblade.

I 2000 oprettede APA et andelsselskab med betegnelsen APA-OTS, i hvilket APA ejer alle andele, og overførte nogle aktiviteter til APA-OTS. Den omtalte aftale med den østrigske stat blev i forbindelse hermed i hvert fald delvis ændret til at angå APA-OTS i stedet for APA.

I 2001 blev aftalens regler om vederlag ændret på forskellig måde i forbindelse med, at Østrig overgik til Euro.

I 2005 blev aftalen ændret på ny, dels ved forlængelse af uopsigeligheden til 31. december 2008, dels ved ændring af en rabatbestemmelse.

I 2006 klagede et andet nyhedsagentur til et østrigsk klageorgan og gjorde gældende, at der skulle have været foretaget EU-udbud før ændringen i 2000 af aftalen til at angå APA-OTS og før ændringerne af aftalen i 2001 og 2005.

Klageorganet forelagde sagen for EF-domstolen med 7 spørgsmål. De første tre spørgsmål kan yderst sammentrængt og omformuleret gengives således:

Spørgsmål 1: Var det i strid med Tjenesteydelsesdirektivet, at ændringen af aftalen i 2000 til at angå APA-OTS skete uden forudgående EU-udbud, og har det betydning i denne forbindelse, at APA kan videreoverdrage andelene i APA-OTS?

Spørgsmål 2: Var det i strid med Tjenesteydelsesdirektivet, at ændringen af aftalen i 2000 i forbindelse med Østrigs overgang til Euro skete uden forudgående EU-udbud?

Spørgsmål 3: Var det i strid med Tjenesteydelsesdirektivet, at ændringen af aftalen i 2005 skete uden forudgående EU-udbud?

De øvrige spørgsmål, dvs. spørgsmål 4-7, angik traktatens forbud mod misbrug af dominerende stilling m.m. samt forholdet mellem første kontroldirektiv og klagereglerne i den østrigske lovgivning.

EF-domstolen kommenterede spørgsmål 1-3 udførligt og udtalte herunder bl.a.:

Generelt: Selvom den oprindelige aftale blev indgået før Østrigs tiltrædelse af fællesskabet, finder fællesskabsreglerne anvendelse på aftalen (præmis 28). Ændring af en udbudspligtig aftale bevirker, at der foreligger en ny aftale, hvis de nye bestemmelser i aftalen er væsentligt forskellige fra de oprindelige bestemmelser og derfor bærer præg af, at det var parternes vilje at genforhandle aftalens væsentlige elementer. (Præmis 34. Den danske oversættelse af denne præmis forekommer usikker, hvorfor resuméet her bygger på den franske og den tyske version af dommen).

Ad spørgsmål 1: Ændringen af aftalen i 2000 til at angå APA-OTS var ikke en væsentlig ændring, men var derimod en intern omstrukturering hos ordregiverens medkontrahent (præmis 45). Ændringer i ejerkredsen for en medkontrahent, der er en juridisk person, er endvidere i princippet ikke en væsentlig ændring (præmis 51-52).

Ad spørgsmål 2: Ændringen af aftalen i 2001 som følge af Østrigs overgang til Euro var en ikke-væsentlig justering (præmis 57-69).

Ad spørgsmål 3: Forlængelsen af uopsigeligheden ved aftalen i 2005 var ikke en væsentlig ændring (præmis 79). Herved henvist til, at der ikke på fællesskabsrettens nuværende udviklingstrin er noget til hinder for tidsubegrænsede tjenesteydelsesaftaler (præmis 74). Desuden henvist til, at aftalen ikke var blevet opsagt, således at der ved ændringen i 2005 kun var tale om en forlængelse på 3 år, og til, at det ikke var påvist, at en sådan uopsigelighedsklausul indebærer risiko for konkurrencefordrejning under forudsætning af, at den ikke systematisk genindsættes i aftalen (præmis 79). Ændringen af rabatbestemmelsen var endvidere af nærmere angivne grunde ikke væsentlig (præmis 81-87).

EF-domstolen besvarede spørgsmål 1-3 i overensstemmelse med det anførte og fandt det herefter ufornødent at besvare de øvrige spørgsmål (præmis 89).

Retten i Første Instans' dom af 10. september 2008 i sag T-59/05, Evropaïki Dynamiki mod Kommissionen

Når en forbigået tilbudsgiver har anmodet om en begrundelse for tildelingsbeslutningen, er det ønskeligt, at udbyderen sender tilbudsgiveren evalueringsdokumentet, om nødvendigt med udeladelse af fortrolige oplysninger

Kommissionen iværksatte et udbud vedrørende en tjenesteydelse. Tildelingskriteriet var det økonomisk mest fordelagtige bud på grundlag af et underkriterium om pris og følgende kvalitative underkriterier (stærkt sammentrængt gengivet): 1. kvaliteten af den tilbudte løsning, 2. løsningens opfyldelse af udbyderens behov og 3. kvalitetskontrol.

Tilbudsvurderingen blev foretaget ved brug af følgende evalueringsmodel:

Tilbuddene fik tildelt points i relation til hvert af de kvalitative underkriterier inden for en skala med et nærmere angivet maksimum for hvert underkriterium, således at tilbuddene højst kunne få 100 points for de kvalitative underkriterier tilsammen. Fastsættelsen af de enkelte maksima var udtryk for en indbyrdes vægtning af de kvalitative underkriterier. Tilbud, der ikke opnåede mindst 50 % af de mulige points pr. kvalitativt underkriterium og mindst 65 points tilsammen for de kvalitative underkriterier, blev ikke taget i betragtning. De opnåede points blev divideret med tilbudsgiverens vægtede tilbudspris, og det tilbud, der herved opnåede det højeste tal, var det økonomisk mest fordelagtige tilbud. Udbyderen udfærdigede et evalueringsdokument om tilbudsvurderingen.

Sagen var anlagt af en tilbudsgiver, der ikke havde fået kontrakten, idet tilbudsgiverens tilbud ved den omtalte beregning var blevet placeret som nr. 4.

Sagsøgeren gjorde forskellige anbringender gældende, men fik ikke medhold i nogen af dem. Kun et anbringende om, at udbyderen havde givet en utilstrækkelig begrundelse for tildelingsbeslutningen, og Rettens udtalelser om dette anbringende skønnes at have almen udbudsretlig interesse.

Fra Rettens udtalelser om det omtalte anbringende kan nævnes:

Selvom udbyderens evalueringsdokument var beklageligt kortfattet, opfyldte det udbyderens forpligtelse til (dvs. efter anmodning) at give en begrundelse for tildelingsbeslutningen (præmis 133).

Når en tilbudsgiver har anmodet om en begrundelse for tildelingsbeslutningen, er det ønskeligt, at udbyderen sender tilbudsgiveren evalueringsdokumentet, om nødvendigt med udeladelse af fortrolige oplysninger (præmis 135).

Retten i Første Instans' dom af 10. september 2008 i sag T-272/06, Evropaïki Dynamiki mod EF-domstolen

Annullation af beslutning om ikke at prækvalificere en tilbudsgiver som følge af, at udbyderen havde givet en urigtig og vildledende begrundelse for beslutningen

EF-domstolen iværksatte et begrænset udbud vedrørende en tjenesteydelse. Efter tilbuddenes modtagelse meddelte udbyderen en tilbudsgiver E, at E ikke var blevet prækvalificeret, fordi tilbuddet ikke opfyldte betingelserne herfor. Under en efterfølgende korrespondance henviste udbyderen til, at der efter udbudsbekendtgørelsen skulle prækvalificeres 5 virksomheder, og at E var blevet vurderet som nr. 6. E anlagde herefter sagen ved Retten i Første Instans.

Retten konstaterede:

1) E's tilbud var indgået i tilbudsvurderingen og var blevet vurderet ved denne. Det var således ikke rigtigt, at E ikke var blevet prækvalificeret. Der kunne ikke tages hensyn til et anbringende fra udbyderen om, at vurderingen af E's tilbud blot var sket for en sikkerheds skyld (præmis 36).

2) Udbyderen havde under korrespondancen med E ladet forstå, at E's referencer var for gamle. Dette var imidlertid vildledende, idet udbyderen ikke havde anset alle referencerne som for gamle (præmis 37 ff.).

Retten udtalte, at udbyderen som følge af disse forhold havde handlet i strid med gennemsigtighedsprincippet og begrundelsesreglen i Finansfor-

ordningens artikel 100 (præmis 43), og annullerede udbyderens beslutning om ikke at prækvalificere E.

Dommen foreligger ikke på dansk, og resuméet ovenfor bygger på den franske udgave af dommen. I resuméet er anvendt ordet »prækvalificere«, der ikke synes at have et umiddelbart sidestykke på fransk, hvor dommen bruger udtryk som udvælge (sélectionner) og tage i betragtning (retenir) m.m.

EF-domstolens dom af 2. oktober 2008, sag C-157/06, Kommissionen mod Italien

Italien havde overtrådt Indkøbsdirektivet ved at tillade offentlige ordregivere at indkøbe helikoptere til politi og brandvæsen uden EU-udbud

Ved denne dom blev det fastslået, at Italien havde overtrådt indkøbsdirektivet 93/36 ved udstede en bekendtgørelse, hvorefter offentlige ordregivere kunne indkøbe helikoptere til politi og brandvæsen uden EU-udbud.

EF-domstolen traf en lignende afgørelse ved dom af 8. april 2008 i sag C 337/05, Kommissionen mod Italien, vedrørende en fast italiensk praksis om indkøb af helikoptere uden EU-udbud.

Refereres i øvrigt ikke, da resultatet forekommer oplagt.

Retten i Første Instans' dom af 8. oktober 2008 i sag T-411/06, Sogelma mod Det Europæiske Genopbygningsagentur

Begrundelsen for udbyderens annullation af et udbud skal i en klar og relevant form angive de væsentlige faktiske og retlige omstændigheder, der ligger til grund for annullationen, men begrundelsen kan være kortfattet og behøver ikke angive samtlige omstændigheder. Det var ikke i strid med udbudsreglerne, at udbyderens beslutning om annullation af udbuddet først blev truffet efter godt ½ år

Det Europæiske Genopbygningsagentur (AER), der er en EU-institution, iværksatte i september 2005 et udbud vedrørende fjernelse af ueksploderede bomber i nogle vandveje. Der indkom bl.a. tilbud fra et konsortium med deltagelse af et selskab S.

I marts 2006 anmodede udbyderen tilbudsgiverne om supplerende oplysninger, og i oktober 2006 annullerede udbyderen udbuddet med den begrundelse, at ingen af de modtagne tilbud opfyldte de krævede tekniske betingelser. Udbyderen anførte desuden, at nogle nøglepersoner hos S ikke opfyldte udbudsbetingelsernes krav. Efter at S havde anmodet udbyderen om en uddybning, oplyste udbyderen yderligere, at udbyderen havde valgt at annullere udbuddet og iværksætte et nyt udbud som følge af, at de tekniske omstændigheder var ændret i betydeligt omfang.

Sagen var anlagt af S mod udbyderen med påstand om annullation af udbyderens beslutning om at annullere udbuddet og iværksætte et nyt udbud. Det meste af dommen angår forskellige formelle spørgsmål om overholdelse af søgsmålsfrist og S' kompetence til at anlægge sagen m.m. Disse dele af dommen refereres ikke.

Retten tog stilling til sagens realitet således (gengivet stærkt sammentrængt og af forståelsesgrunde til dels omformuleret):

1) Ad et anbringende fra S om, at udbyderen ikke havde givet tilstrækkelig begrundelse for annullationen af udbuddet og beslutningen om at iværksætte et nyt udbud, og om, at den givne begrundelse var ulogisk og selvmodsigende:

Retten henviste til Finansforordningens artikel 101, hvorefter der skal gives tilbudsgiverne en begrundelse for en beslutning om annullation af et udbud. Retten udtalte videre, at en sådan begrundelse klart og utvetydigt skal angive de betragtninger, som udbyderen har lagt til grund (præmis 119). Begrundelsen skal dog ikke angive samtlige relevante momenter, og det er tilstrækkeligt, at begrundelsen på en kortfattet måde angiver de væsentlige retlige og faktiske omstændigheder i en klar og relevant form (præmis 120). udbyderen havde endvidere givet en kortfattet, klar og relevant begrundelse (præmis 123). Den givne begrundelse var endvidere ikke selvmodsigende (præmis 130-131) og svarede til den egentlige begrundelse (præmis 142).

Udbyderen blev herefter frifundet for S' annullationspåstand.

2) Ad en erstatningspåstand fra S:

Udbyderen blev frifundet med henvisning til, at udbyderen ikke havde overtrådt udbudsreglerne (præmis 148), og til, at det ikke var retsstridigt, at der var gået mere end 6 måneder mellem udbyderens anmodning om supplerende oplysninger og annullationen (præmis 149). Der var endvidere ikke årsagsforbindelse mellem den begåede tid og S's udgifter til udarbejdelse af tilbud (præmis 150).

EF-domstolens dom af 13. november 2008, sag C-324/07, Coditel Brabrant

In house-begrebets kontrolkriterium er opfyldt, hvis der ikke er privat deltagelse i den virksomhed, der er tale om, og hvis virksomhedens formål er at udøve opgaver af offentlig interesse. Dette gælder, selvom virksomhedens ledelse har selvstændige beføjelser, og beslutninger i virksomheden træffes ved stemmeflerhed blandt de offentlige myndigheder, der ejer virksomheden

En belgisk kommune ejede et telekommunikationsnet, der var etableret i kommunens område. Efter at have gjort forgæves forsøg på at finde en koncessionshaver til drift af telekommunikationsnettet eller en køber af nettet meddelte kommunen uden forudgående udbud eller annoncering et fælleskommunalt selskab, Brutélé, koncession på drift af nettet. Kommunen indtrådte samtidig i Brutélé.

Brutélé, der synes at være en væsentlig belgisk teleoperatør, er et andelsselskab, hvis andelshavere er kommuner og en kommunal sammenslutning, der kun består af kommuner.

En belgisk virksomhed, Coditel, der tilsyneladende er en privat teleoperatør, anlagde sag mod kommunen ved en belgisk domstol og gjorde gældende, at kommunen havde overtrådt fællesskabsretten ved tildele Brutélé driften af telekommunikationsnettet uden forudgående offentliggørelse (lidt omformuleret af forståelsesgrunde).

Koncessionen til Brutélé vedrørende driften af telekommunikationsnettet angik en tjenesteydelse, og koncessioner om tjenesteydelser er ikke omfattet af EU-udbudsreglerne. Dette er fastslået i flere domme fra EF-domstolen og er nævnt udtrykkeligt i Udbudsdirektivets artikel 17.

EF-domstolen har imidlertid i flere afgørelser tilkendegivet, at ordregivende myndigheders anskaffelser af ikke-udbudspligtige ydelser skal ske efter en passende offentliggørelse, således dom af 21. juli 2005 i sag C-231/03, Coname (om tjenesteydelseskoncessioner) og dom af 15. maj

2008 i sagerne C-147/06 og C-148/06, Secap (om anskaffelser under tærskelværdien med klar grænseoverskridende interesse).

EF-domstolen har endvidere i nogle afgørelser opstillet to betingelser for, at en virksomhed kan anses for »in house« i forhold til en ordregivende myndighed med den konsekvens, at den ordregivende myndighed kan foretage udbudspligtige anskaffelser fra den pågældende virksomhed uden EU-udbud, således fx dom af 19. april 2007 i sag C-295/05, kaldet Asemfo eller Tragsa. De to betingelser er 1) kontrolkriteriet, dvs. at den ordregivende myndighed skal udøve kontrol med virksomheden svarende til den kontrol, den udøver med sine egne tjenestegrene, og 2) virksomhedskriteriet, dvs. at virksomheden skal udføre hovedparten af sine opgaver sammen med den eller de virksomheder, den ejes af.

Når en virksomhed er in house i forhold til en ordregivende myndighed, kan den ordregivende myndighed således foretage udbudspligtige anskaffelser fra virksomheden uden forudgående udbud. Heraf må så meget mere følge, at en ordregivende myndighed kan foretage ikke-udbudspligtige anskaffelser fra en in house-virksomhed uden den forudgående offentliggørelse med hensyn til ikke-udbudspligtige anskaffelser, som EF-domstolen ellers har foreskrevet, jf. ovenfor. Dette fremgår bl.a. direkte af den her resumerede dom (præmis 26).

Afgørende for den retssag, som Coditel havde anlagt mod kommunen ved en belgisk domstol, var derfor, om Brutélé kunne anses for in house i forhold til kommunen. Den belgiske domstol var i tvivl på dette punkt, idet den anså det for tvivlsomt, om kontrolkriteriet var opfyldt, dvs. om kommunen kunne anses for at udføre samme kontrol med Brutélé som med sine egne tjenestegrene. Tvivlen skyldtes, at kommunen som én andelshaver blandt mange i Brutélé kun havde begrænset indflydelse på Brutélé's dispositioner. Den belgiske domstol stillede derfor EF-domstolen nogle spørgsmål, der sigtede til, om kontrolkriteriet var opfyldt.

EF-domstolen fremsatte i præmis 28 og fremefter en lang række udtalelser om kontrolkriteriets indhold. Disse udtalelser sigter efter deres formulering først og fremmest til kontrolkriteriets indhold i relation til tjenesteydelseskoncessioner, men skal utvivlsomt forstås som sigtende til kontrolkriteriets indhold i almindelighed. Fra udtalelserne kan nævnes, gengivet sammentrængt og af forståelsesgrunde til dels omformuleret:

Kontrolkriteriet er ikke opfyldt, hvis den virksomhed, der er tale om, har en eller flere private deltagere (præmis 30 og 32).

Selvom virksomhedens ledende organer har selvstændige beføjelser, er kontrolkriteriet opfyldt, hvis virksomhedens formål er at udføre en opgave af offentlig interesse, således at virksomheden ikke varetager andre opgaver end de opgaver, der hører under de tilsluttede offentlige myndigheder (præmis 38 og 39).

Dette gælder så meget mere i et tilfælde som det foreliggende, hvor de kommuner, der er tilsluttet Brutélé, har særlig indflydelse på Brutélé's aktiviteter i deres eget område (præmis 40, der må forstås således).

Kontrolkriteriet er opfyldt, selvom kontrollen med virksomheden føres i fællesskab af de offentlige myndigheder, der ejer den, således at afgørelser i givet fald træffes ved stemmeflerhed (navnlig præmis 54).

EF-domstolen besvarede herefter de stillede spørgsmål i overensstemmelse med det anførte.

Følgende bemærkes:

Kontrolkriteriet og virksomhedskriteriet blev første gang opstillet i EF-domstolens dom af 18. november 1999 i sag C-107/98, Teckal (ganske kort udtrykt i præmis 50 i denne dom). Begge kriterier er senere uddybet i forskellige afgørelser fra EF-domstolen.

Således som kontrolkriteriet er blevet uddybet i den her resumerede dom, synes det efterhånden nærmest kun at gå ud på, at der ikke må være privat deltagelse i den virksomhed, der er tale om. Hvis denne forståelse er rigtig, er kontrolkriteriets formulering (kontrol svarende til kontrollen med egne tjenestegrene) blevet fuldstændig misvisende.

EF-domstolens dom af 16. december 2008, sag C-213/07, Michaniki
Bygge- og anlægsdirektivets regler om udelukkelse er udtømmende, men er ikke til hinder for fastsættelse af yderligere nationale udelukkelsesgrunde til sikring af ligebehandling og gennemsigtighed under forudsætning af, at sådanne nationale regler ikke går ud over, hvad der er nødvendigt for at opnå dette formål. Nationale regler, der afskærer ejere mfl. af visse virksomheder fra at levere til det offentlige, går ud over det nødvendige, hvis reglerne ikke giver mulighed for i det enkelte tilfælde at godtgøre, at der ikke foreligger reel risiko for konkurrencefordrejning

Sagen angår reglerne i det tidligere bygge- og anlægsdirektivs artikel 24 om udelukkelse af tilbudsgivere. Efter disse regler kunne de ordregivende myndigheder udelukke virksomheder, der var under konkurs eller i skatterestance m.m., fra deltagelse i en udbudsprocedure.

(Udbudsdirektivets artikel 45 indeholder lignende regler og indeholder derudover en regel om, at virksomheder, der har deltaget i en kriminel organisation m.m., skal udelukkes).

Med betegnelserne »ejere« og »ejet« sigtes i det følgende til ejere, hovedaktionærer, og ledere mfl.

Den græske forfatning indeholder nogle regler om mediernes ejerforhold med henblik på at sikre demokratiet og modvirke korruption. Disse regler går bl.a. ud på, at virksomheder, som leverer til det offentlige, ikke må være ejet af ejere af medievirksomheder eller af ægtefæller og slægtninge til ejere af medievirksomheder.

I henhold til en hjemmel i forfatningen er de nævnte regler udmøntet i en særlig lovgivning. Af denne lovgivning fremgår bl.a., at ægtefæller og slægtninge til ejere af en medievirksomhed kan være ejere af virksomheder, der leverer til det offentlige, hvis de kan godtgøre, at de er økonomisk uafhængige af medievirksomhedens ejer.

Sagen angik en græsk ordregivende myndigheds EU-udbud af et bygge- og anlægsarbejde i henhold til det tidligere bygge- og anlægsdirektiv. Kontrakten blev tildelt en virksomhed, hvis hovedaktionær var slægtning til et bestyrelsesmedlem i en medievirksomhed. Tildelingen skete, efter at et kontrolorgan havde tilkendegivet, at den omtalte hovedaktionær var økonomisk uafhængig af det omtalte bestyrelsesmedlem.

En forbigået tilbudsgiver anlagde ved en græsk domstol sag mod kontrolorganet og den græske stat. Tilbudsgiveren gjorde gældende, at den omtalte lovgivning, hvorefter ægtefæller og slægtninge kan godtgøre økonomisk uafhængighed, er i strid med de nævnte forfatningsbestemmelser.

Den græske domstol forelagde sagen for EF-domstolen med tre spørgsmål, der stærkt omformuleret og sammentrængt kan gengives således:

1) Indeholder Bygge- og anlægsdirektivets regler om udelukkelse af tilbudsgivere en udtømmende opregning af de tilfælde, hvor der kan ske udelukkelse?

2) Hvis disse regler ikke er udtømmende, er de omtalte græske regler så i strid med proportionalitetsprincippet?

3) Hvis udelukkelsesreglerne i Bygge- og anlægsdirektivet er udtømmende, er disse regler så i strid med traktaten?

EF-domstolen udtalte (af forståelsesgrunde stærkt sammentrængt og noget omformuleret):

Ad spørgsmål 1: Bygge- og anlægsdirektivets opregning af udelukkelsesgrunde er udtømmende (præmis 43), men er ikke til hinder for, at medlemsstaterne fastsætter yderligere udelukkelsesgrunde for at sikre principperne om ligebehandling og gennemsigtighed (præmis 47), under forudsætning af, at sådanne udelukkelsesforanstaltninger ikke går ud over, hvad der er nødvendigt for at opnå dette formål (præmis 48).

Ad spørgsmål 2: Nationale regler, der generelt afskærer en virksomhed fra at levere til det offentlige på grund af ejerforhold etc., uden at der gives mulighed for at godtgøre, at der ikke foreligger nogen reel risiko for konkurrencefordrejning og korruption m.m., går ud over, hvad der er nødvendigt for at opnå ligebehandling og gennemsigtighed (præmis 60 samt 62 og følgende).

Ad spørgsmål 3: Det var ufornødent at besvare dette spørgsmål.

Afgørelsen svarer reelt ganske til EF-domstolens senere afgørelse i dom af 19. maj 2009, Assitur, vedrørende udelukkelsesgrundene i det tidligere tjenesteydelsesdirektiv.

Klagenævnet for Udbud

RESUMÉER AF AFGØRELSER OM UDBUD FRA EF-DOMSTOLEN OG RETTEN I FØRSTE INSTANS 2003-2005

NB! Resuméernes henvisninger til retsregler m.m. vil/kan efterhånden blive forældede, da resuméerne principielt er udarbejdet kort efter afgørelserne

Dette hæfte indeholder resuméer af afgørelser inden for udbudsområdet truffet af EF-domstolen og Retten i Første Instans 2006-2008, og som er optaget på EF-domstolens websted http://curia.eu.int/.

Resuméerne er udarbejdet af Klagenævnet for Udbud, der har ansvar for dem alene.

Den dato, der angives ved begyndelsen af hvert resumé, er datoen for den pågældende afgørelse. Den betegnelse for sagen, der angives ved hvert resumé, er EF-domstolens officielle betegnelse, sådan som den er angivet på Internettet.

Særligt om afgørelserne fra *Retten i Første Instans* bemærkes:

Afgørelserne om udbud fra Retten i Første Instans angår udbud foretaget af EU-organerne, dvs. Kommissionen, Rådet og Parlamentet mfl., idet Retten i Første Instans er klageorgan vedrørende sådanne udbud.

For EU-organernes udbud gælder nogle regler, der er indeholdt i to forordninger, dels »Finansforordningen«, dvs. Rådets forordning nr. 1605/2002 med senere ændringer, dels »Gennemførelsesforordningen«, dvs. Kommissionens forordning nr. 2342/2002 med senere ændringer.

De pågældende regler svarer i det væsentlige til de udbudsregler, der gælder for de ordregivende myndigheder i medlemsstaterne. Afgørelserne om udbud fra Retten i Første Instans kan derfor have en vis almen interesse, for så vidt som de (reelt) kan bidrage til fortolkningen af de udbudsregler, der gælder for de ordregivende myndigheder i medlemsstaterne, dvs. Udbudsdirektivet og Forsyningsvirksomhedsdirektivet m.m.

I resuméerne af afgørelser fra Retten i Første Instans er som almindelig regel kun medtaget de dele af afgørelserne, der belyser forståelsen af almindelige udbudsretlige principper. Resuméerne omfatter således principielt ikke dele af afgørelserne, der angår specifikke reguleringer af EU-organernes optræden eller formelle spørgsmål om Rettens kompetence.

NB! Resuméernes henvisninger til retsregler m.m. vil/kan efterhånden blive forældede, da resuméerne principielt er udarbejdet kort efter afgørelserne.

Indholdsfortegnelse vedrørende afgørelsernes dato og betegnelse

23. januar 2003, sag C-57/01, Makedoniko Metro og Michaniki 8

Retten i Første Instans' dom af 25. februar 2003 i sag T-4/01, Renco mod Rådet 9

Retten i Første Instans' dom af 25. februar 2003 i sag T-183/00, Strabag Benelux mod Rådet 10

27. februar 2003, sag C-327/00, Santex 10

27. februar 2003, sag C-373/00, Adolf Truley 12

9. april 2003, sag C-424/01, CS Austria 16

10. april 2003, sager C-20/01 og C28/01, Kommissionen mod Tyskland 17

15. maj 2003, sag C-214/00, Kommissionen mod Spanien 17

22. maj 2003, sag C-18/01, Korhonen mfl. 18

19. juni 2003, sag C-249/01, Hackermüller 19

19. juni 2003, sag C-315/01, GAT 20

19. juni 2003, sag C-410/01, Fritsch, Chiari & Partner mfl. 21

16. oktober 2003, sag C-252/01, Kommissionen mod Belgien 22

16. oktober 2003, sag, C-283/00, Kommissionen mod Spanien 22

16. oktober 2003, sag C-421/01, Traunfellner 23

16. oktober 2003, sag C-244/02, Kauppatalo Hansel 24

4. december 2003, sag C-448/01, EVN og Wienstrom 25

Retten i Første Instans' kendelse af 14. januar 2004 i sag T-202/02, Makedoniko Metro og Michaniki mod Kommissionen 27

12. februar 2004, sag C-230/02, Grossmann Air Service 28

18. marts 2004, C-314/01, Siemens og ARGE Telekom & Partner 29

24. juni 2004, sag C-212/02, Kommissionen mod Østrig 31

Retten i Første Instans' kendelse af 27. juli 2004 i sag T-148/04 R, TQ3 Travel Solutions Belgium mod Kommissionen 32

9. september 2004, sag C-125/03, Kommissionen mod Tyskland 32

14. september 2004, sag C-385/02, Kommissionen mod Italien 33

14. oktober 2004 i sag C-340/02, Kommissionen mod Frankrig 34

14. oktober 2004, sag C-275/03, Kommissionen mod Portugal 35

Retten i Første Instans' kendelse af 10. november 2004 i sag T-303/04 R, Evropaïki Dynamiki mod Kommissionen 36

18. november 2004, sag C-126/03, Kommissionen mod Tyskland 37

Retten i Første Instans' kendelse af 22. december 2004 i sag T-303/04 R II, Evropaïki Dynamiki mod Kommissionen 39

11. januar 2005, sag C-26/03, Stadt Halle mfl. 39

13. januar 2005, sag C-84/03, Kommissionen mod Spanien 40

Retten i Første Instans' kendelse af 31. januar 2005 i sag T-447/04 R, Capgemini Nederland mod Kommissionen 41

3. marts 2005. sager C-21/03 og C-34/03, Fabricom 42

3. marts 2005, sag C-414/03, Kommissionen mod Tyskland 43

Retten i Første Instans' dom af 17. marts 2005 i sag T-160/03, AFCon Management Consultants mfl. mod Kommissionen 44

2. juni 2005, sag C-15/04, Koppensteiner 44

Retten i Første Instans' kendelse af 2. juni 2005 i sag T-125/05 R, Umwelt- und Ingenieurtechnik Dresden mod Kommissionen 45

16. juni 2005, sager C-462/03 og C-463/03, Strabag 46

Retten i Første Instans' dom af 6. juli 2005 i sag T-148/04, TQ3 Travel Solutions Belgium mod Kommissionen 47

21. juli 2005, sag C-231/03, Coname 49

8. september 2005, sag C-129/04, Espace Trianon og Sofibail 50

Retten i Første Instans' kendelse af 20. september 2005 i sag T-195/05 R, Deloitte mod Kommissionen 50

13. oktober 2005, sag C-458/03, Parking Brixen 52

20. oktober 2005, sag C-264/03, Kommissionen mod Frankrig 53

27. oktober 2005, sager C-187/04 og C-188/04, Kommissionen mod Italien 54

27. oktober 2005, sag C-234/03, Contse mfl. 55

27. oktober 2005, sag C-525/03, Kommissionen mod Italien 56

10. november 2005, sag C-29/04, Kommissionen mod Østrig 56

24. november 2005, sag C-331/04, ATI EAC mfl. 57

Indholdsfortegnelse vedrørende afgørelsernes emner

Om klageadgang. Har næppe særlig generel interesse 8

Klage over, at udbyderen ved tilbudsvurderingen lagde vægt på, at klagerens tilbudspris på nogle punkter var unormalt lav, ikke taget til følge, da udbyderen havde fulgt fremgangsmåden med hensyn til unormalt lave bud, uden at klageren var kommet med en overbevisende forklaring. Klage over udbyderens beregning af klagerens samlede tilbudspris heller ikke taget til følge 9

Klage over tilbudsvurdering i relation til nogle underkriterier ikke taget tilfølge 10

En klagefrist på 60 dage var ikke i sig selv strid med første kontroldirektiv, men der skulle ses væk fra fristen som følge af sagens omstændigheder 10

Almenhedens behov er et fællesskabsretligt begreb. Bedemandsvirksomhed kan opfylde almenhedens behov. Bygge- og anlægsdirektivets fortegnelse over offentligretlige organer er ikke udtømmende. Udførlig beskrivelse af udbudsdirektivernes formål. Erhvervsdrivende offentligretlige organer. Kriteriet om, at et offentligretligt organ skal være undergivet offentlig kontrol 12

Ved afgørelse om opsættende virkning må der tages hensyn til en forhåndsvurdering af klagesagens udfald 16

Tyskland havde overtrådt Tjenesteydelsesdirektivet ved indgåelse af kontrakter om bortledning af spildevand og bortskaffelse af dagrenovation 17

Spanien havde ikke gennemført første kontroldirektiv fyldestgørende 17

Om begrebet almenhedens behov uden for det erhvervs- og forretningsmæssige område 18

Om klageadgang for tilbudsgivere med ukonditionsmæssige tilbud 19

Et klageorgan må tage et forhold op ex officio, men parterne skal have adgang til at udtale sig om forholdet, og klageorganet må ikke afvise klagen som følge af forholdet. Referencer til andre kunder og mulighed for besigtigelse inden for en vis afstand fra udbyderens etableringssted må ikke bruges som underkriterier 20

Der må ikke stilles krav om inddragelse af et mæglingsorgan før en klage 21

Tjenesteydelsesdirektivet fandt ikke anvendelse på en tjenesteydelse, der af militære grunde skulle ledsages af særlige sikkerhedsforanstaltninger, jf. direktivets artikel 4, stk. 2 22

Et statsejet aktieselskab, der stod for fængselsbyggeri, var omfattet af udbudspligten 22

Hvis udbudsbetingelserne ikke angiver mindstekrav for alternative tilbud, kan alternative tilbud ikke tages i betragtning. Henvisning til en national regel om, at alternative tilbud skal være ligeværdige, er ikke tilstrækkelig angivelse af mindstekrav 23

Udbudsdirektiverne regulerer ikke udbyders annullation af udbud. En sådan annullation skal overholde de grundlæggende fællesskabsretlige principper såsom ligebehandlingsprincippet. Det er ikke en betingelse, at udbyders annullation kun sker i undtagelsestilfælde eller har vægtige grunde 24

Levering af energi fra vedvarende energikilder kan anvendes som underkriterium og kan vægtes højt, men udbyderen skal kunne kontrollere kriteriets opfyldelse, og kriteriet skal angå kontraktens genstand. En udbyder skal annullere udbudet, hvis et klageorgan har annulleret et underkriterium som ulovligt 25

Et erstatningskrav mod Kommissionen i anledning af henlæggelse af en klage afvist. Desuden afvist en påstand om pålæg til Kommissionen 27

Der er klageadgang for potentielle tilbudsgivere, men klager fra sådanne over diskriminerende udbudsbetingelser skal indgives straks og må ikke afvente udbudets afslutning. Der må ikke stilles krav om inddragelse af et mæglingsorgan før en klage 28

Ordregiver må i opfyldelsesfasen begrænse brugen af underentreprenører, hvis formåen ikke har kunnet efterprøves i udvælgelsesfasen 29

Det følger af kontroldirektiverne, at alle tilbudsgivere skal have underretning om tildelingsbeslutningen, og at der derefter skal gå rimelig tid inden kontraktsindgåelsen 31

Det er en betingelse for opsættende virkning, at der foreligger uopsættelighed. Denne betingelse forudsætter, at manglende opsættende virkning medfører et alvorligt og uopretteligt tab hos den, der har fremsat begæringen om opsættende virkning, og dette vil i princippet ikke være tilfældet, hvis der kan betales erstatning. I den foreliggende sag var betingelsen kun opfyldt, hvis manglende opsættende virkning ville true sagsøgerens eksistens, hvilket imidlertid ikke var tilfældet 32

Tyskland havde overtrådt Tjenesteydelsesdirektivet som følge af manglende EU-udbud. EF-domstolen behandler en sag om en medlemsstats overtrædelse af fællesskabsretten, selvom medlemsstaten har erkendt overtrædelsen 32

Bygge- og anlægsdirektivet overtrådt som følge af manglende EU-udbud. Betingelserne for udbud efter forhandling i artikel 7, stk. 3, var ikke opfyldt. En særlig formulering i den italienske version af direktivet var uden betydning 33

Det følger af principperne om ligebehandling og gennemsigtighed, at et udbud klart skal definere kontraktens art og kriterierne for tildeling af den. Der kunne ikke indgås kontrakt om projektering m.m. på grundlag af en projektkonkurrence

om analyse. Bistand ved valg af tilbudsgiver er ikke omfattet af Tjenesteydelsesdirektivets regler om projektkonkurrencer 34

Den portugisiske lovgivning om offentlige myndigheders erstatningsansvar var i strid med første kontroldirektiv 35

Det er en betingelse for opsættende virkning, at der foreligger uopsættelighed. Dette forudsætter, at den begærende part ville lide et uopretteligt tab, hvis der ikke meddeles opsættende virkning, hvilket ikke er tilfældet, hvis der senere kan betales erstatning. I den foreliggende sag var betingelsen om uopsættelighed kun opfyldt, hvis manglende opsættende virkning ville true klagerens eksistens eller ændre klagerens markedsposition uopretteligt, og dette var ikke tilfældet. Der var endvidere ikke årsagsforbindelse mellem det af klageren hævdede tab og den beslutning, som klageren ønskede udsat ved begæringen om opsættende virkning 36

Udbudspligt, eventuelt som hasteprocedure, for en kommunes antagelse af underleverandør til affaldsbortskaffelse, som kommunen udførte for anden myndighed som kommerciel opgave, selvom den anden myndighed havde foretaget EU-udbud. Undtagelsesbestemmelsen i Tjenesteydelsesdirektivets artikel 11, stk. 3, d, skal fortolkes indskrænkende og kunne ikke anvendes. Ikke taget stilling til, hvordan medlemsstaten skulle gennemføre dommen 37

Begæring om opsættende virkning på ny afslået 39

Der skal kunne klages over en ordregivende myndigheds beslutning om ikke at foretage EU-udbud. Der er udbudspligt ved en ordregivende myndigheds overladelse af udførelsen af en tjenesteydelse til et selskab, som den ordregivende myndighed ejer sammen med en eller flere private virksomheder 39

Statueret, at Spanien på nogle punkter ikke havde implementeret Indkøbsdirektivet og Bygge- og anlægsdirektivet rigtigt 40

Et sagsanlæg ikke tillagt opsættende virkning, selvom der forelå »fumus boni juris«, da der ikke forelå uopsættelighed 41

Ligebehandlingsprincippet er til hinder for, at personer, der har udført forberedende arbejde vedrørende et udbud, ubetinget afskæres fra at afgive tilbud. Udbyders afvisning af et tilbud med den begrundelse, at tilbudsgiveren er »inhabil«, skal meddeles tilbudsgiveren i rimelig tid inden tildelingsbeslutningen 42

Tyskland havde overtrådt Tjenesteydelsesdirektivet ved manglende EU-udbud. Tysklands erkendelse afskar ikke Kommissionen fra at anlægge sagen. Ikke taget stilling til, om der var pligt til at ophæve en kontrakt indgået i strid med direktivet 43

Udbyderen overtrådte ligebehandlingsprincippet ved ikke at undersøge, om den valgte tilbudsgiver som følge af forbindelse til et medlem af udbyderens bedømmelsesudvalg skulle udelukkes fra at afgive tilbud. En forbigået tilbudsgiver blev ikke tillagt erstatning til dækning af positiv opfyldelsesinteresse, da det ikke med sikkerhed kunne fastslås, at den forbigåede tilbudsgiver ville have fået kontrakten, hvis den valgte tilbudsgiver var blevet udelukket, men blev tillagt erstatning til dækning af negativ kontraktinteresse, da udbyderens tilsidesættelse af fællesskabsretten havde påvirket den forbigåede tilbudsgivers muligheder for at få tildelt kontrakten 44

Det følger af første kontroldirektiv, at et klageorgan skal undlade at anvende en national regel, der forhindrer klageorganet i at efterprøve udbyderes annullation af udbud 44

Det er en betingelse for opsættende virkning, at den begærende part vil lide et alvorligt og uopretteligt tab, hvis der ikke meddeles opsættende virkning, og det var ikke bevist, at manglende opsættende virkning ville påføre sagsøgeren et sådant tab. Medmindre der foreligger særlige omstændigheder, kan et tab ikke betragtes som uopretteligt eller vanskeligt opretteligt, hvis der senere kan betales erstatning 45

Om anvendelsesområdet for Forsyningsvirksomhedsdirektivet 93/38 46

Et tilbud var ikke unormalt lavt, og reglerne om unormalt lave tilbud var irrelevante, da udbyderen ikke havde anset tilbuddet for unormalt lavt.

Udbudsreglerne stiller ikke krav om, at en tilbudsgiver har det nødvendige personale på tilbuddets tidspunkt. Udbyderen kunne indgå en midlertidig kontrakt med den valgte tilbudsgiver for en kortere periode, indtil tilbudsgiveren opfyldte udbudsbetingelsernes krav 47

Koncessionskontrakter om tjenesteydelser er ikke nødvendigvis omfattet af udbudspligten. Medmindre der foreligger særlige omstændigheder, skal tildeling af sådanne kontrakter dog ske under iagttagelse af gennemsigtighed, således at virksomheder fra andre medlemsstater kan tilkendegive deres interesse i kontrakten. Det var ikke en særlig omstændighed, at ordregiveren delvis ejede den virksomhed, der fik tildelt en koncessionskontrakt, da ordregiverens ejerandel var lille, og da virksomheden var åben for privat kapital..... 49

Første kontroldirektiv er ikke til hinder for en national bestemmelse, hvorefter en klage fra et konsortium, der ikke er en juridisk person, skal indgives af samtlige medlemmer af konsortiet 50

Ikke opsættende virkning, selvom der forelå »fumus boni juris«, da der ikke forelå uopsættelighed, idet en uoprettelig skade, som sagsøgeren ville lide ved manglende opsættende virkning, ikke var tilstrækkeligt alvorlig, samt da en interesseafvejning talte mod opsættende virkning. Generel beskrivelse af Rettens praksis med hensyn til opsættende virkning 50

Definition af koncessioner om tjenesteydelser. Der skal være mulighed for konkurrence med hensyn til sådanne koncessioner. Kriterierne for at anse en virksomhed som »in house«..... 52

En fransk lovbestemmelse om, at offentlige bygherrer kunne antage en fransk fuldmægtig, var i strid med traktatens artikel 49 og Tjenesteydelsesdirektivet 53

Italien havde overtrådt Bygge- og anlægsdirektivet ved, at nogle koncessioner om motorvejsudfletninger var meddelt uden EU-udbud..... 54

Tjenesteydelse omfattet af Tjenesteydelsesdirektivets bilag I B. Et udvælgelseskriterium og nogle vurderingskriterier var i strid med traktatens artikel 49 om fri udveksling af tjenesteydelser. Generelt om betingelserne for nationale foranstaltninger, der kan hæmme den frie udveksling af tjenesteydelser..... 55

Sagsanlæg fra Kommissionen afvist, da den påberåbte overtrædelse var ophørt før udløbet af den frist, der var fastsat i Kommissionens begrundede udtalelse..... 56

Overtrædelse af Tjenesteydelsesdirektivet ved indgåelse af kontrakt uden EU-udbud med et selskab, som ordregiveren ejede, men som kort derefter delvis blev overdraget til en privat virksomhed 56

Om under hvilke betingelser en udbyder kan undlade på forhånd at oplyse den indbyrdes vægtning af underkriterier til et underkriterium. Artikel 36 i Tjenesteydelsesdirektivet og artikel 34 i Forsyningsvirksomhedsdirektivet 93/38 skal fortolkes på samme måde 57

Resuméer

Retten i Første instans' kendelse af 26. maj 1998, sag T-60/98 R, Ecord Consortium mod Kommissionen
Tilbud modtaget efter tilbudsfristens udløb som følge af tilbuddets adressering. Ikke opsættende virkning for et sagsanlæg med hensyn til, om tilbuddet var indgivet rettidigt, da udbyderen klart havde angivet, hvem tilbuddet skulle sendes til, hvorfor der ikke forelå »fumus boni juris«

Kommissionen iværksatte et begrænset udbud vedrørende en tjenesteydelse. I opfordringen til de prækvalificerede virksomheder om at afgive tilbud angav Kommissionen, at tilbud skulle sendes til en konsulentvirksomhed på en nærmere angivet adresse, og at Kommissionen ikke måtte nævnes som adressat, idet dette kunne medføre, at tilbuddet først blev modtaget efter tilbudsfristens udløb.

Et konsortium, der afgav tilbud, sendte sit tilbud med angivelse af den omtalte konsulentvirksomhed som adressat, men nævnede også Kommissionen i adressatangivelsen. Som følge af Kommissionens procedurer for postmodtagelse medførte dette, at tilbuddet først blev modtaget af konsulentvirksomheden efter tilbudsfristens udløb. Kommissionen afviste derfor tilbuddet som for sent indgivet.

Konsortiet anlagde derefter sag mod Kommissionen ved Retten i Første Instans og påstod principalt Kommissionen tilpligtet at tage konsortiets tilbud i betragtning. Konsortiet begærede endvidere sagsanlægget tillagt opsættende virkning, og kendelsen af 26. maj 1998 er Rettens afgørelse af spørgsmålet om opsættende virkning.

Retten tog ikke begæringen om opsættende virkning til følge med henvisning til, at der ikke forelå »fumus boni juris«[1], idet konsortiet ikke havde fulgt angivelsen af, at Kommissionen ikke måtte nævnes som adressat.

23. januar 2003, sag C-57/01, Makedoniko Metro og Michaniki
Om klageadgang. Har næppe særlig generel interesse

Den græske stat udbød i henhold til Bygge- og anlægsdirektivet projektering, opførelse, selvfinansiering og udnyttelse af en metro. Udbudet var opdelt i forskellige faser, dvs. prækvalifikation, afgivelse af tilbud, vurdering af tilbudene, forhandlinger med den foreløbigt udvalgte tilbudsgiver og indgåelse af kontrakt.

Der prækvalificeredes et antal sammenslutninger af entreprenører. I udbudsbetingelserne var anført, at de prækvalificerede sammenslutninger kunne udvides med nye deltagere indtil afgivelsen af tilbud.

Efter tilbudenes indgivelse indledte udbyderen forhandlinger med en af de prækvalificerede sammenslutninger. Parterne kunne imidlertid ikke nå til enighed, hvorfor udbyderen erklærede forhandlingerne afsluttet og indledte forhandlinger med en anden tilbudsgiver.

Den sammenslutning af entreprenører, der havde været forhandlet med, klagede til et klageorgan over udbyderens beslutning om at afbryde

[1] Dvs. en røg af god ret, altså sandsynlighed for, at sagsanlægget var berettiget.

forhandlingerne. Klageorganet afviste imidlertid klagen med henvisning til, at sammenslutningens sammensætning i strid med udbudsbetingelserne var blevet ændret efter tilbudets indgivelse. Sammenslutningen anlagde derefter erstatningssag mod udbyderen ved en forvaltningsdomstol, men denne afviste sagen med en tilsvarende begrundelse.

Sammenslutningen appellerede til en overinstans. Denne stillede et præjudicielt spørgsmål til EF-domstolen, som omformulerede spørgsmålet til at gå ud på to spørgsmål, nemlig (noget sammentrængt):

1) Er Bygge- og anlægsdirektivet til hinder for nationale bestemmelser, som forbyder ændring af en tilbudsgivers sammensætning efter tilbudets afgivelse?

2) I hvilket omfang giver første kontroldirektiv, direktiv 89/665, en sådan tilbudsgiver klageadgang?

EF-domstolen besvarede spørgsmålene således:

Ad spørgsmål 1): Bygge- og anlægsdirektivet er ikke til hinder for nationale bestemmelser som omhandlet.

Ad spørgsmål 2): EF-domstolen henviste til de almindelige fællesskabsretlige principper og udtalte, at det tilkom den nationale domstol at tage stilling til, om disse principper fandt anvendelse i sagen, og om sammenslutningen også i sin nye sammensætning havde haft interesse i kontrakten og havde lidt skade ved udbyderens beslutning om at afbryde forhandlingerne. EF-domstolen besvarede herefter spørgsmålet med, at hvis en udbyders beslutning skader de rettigheder, som fællesskabsretten tillægger en sammenslutning af entreprenører, skal sammenslutningen havde adgang til klageprocedurerne i henhold til første kontroldirektiv.

Sagen synes meget konkret og har næppe særlig generel interesse.

Set fra en dansk synsvinkel er besvarelsen af spørgsmål 1) vel ret oplagt. Det forekommer mere interessant at stille det omvendte spørgsmål, dvs. om EU's udbudsregler er til hinder for at *tillade* ændringer i en tilbudsgivers sammensætning under et udbudsforløb. Kommissionen berørte dette emne i sit indlæg i sagen, og også Østrig berørte det i et indlæg. Domstolen kom imidlertid ikke ind på emnet.

Domstolens besvarelse af spørgsmål 2) synes reelt at svare til den danske regel om, at der er klageadgang for den, der har retlig interesse i at klage.

Retten i Første Instans' dom af 25. februar 2003 i sag T-4/01, Renco mod Rådet

Klage over, at udbyderen ved tilbudsvurderingen lagde vægt på, at klagerens tilbudspris på nogle punkter var unormalt lav, ikke taget til følge, da udbyderen havde fulgt fremgangsmåden med hensyn til unormalt lave bud, uden at klageren var kommet med en overbevisende forklaring. Klage over udbyderens beregning af klagerens samlede tilbudspris heller ikke taget til følge

Rådet iværksatte et udbud vedrørende en rammekontrakt om bygningsvedligeholdelse m.m. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud.

Der indkom tilbud fra tre tilbudsgivere, hvorefter Rådet besluttede at indgå kontrakt med en af tilbudsgiverne. De to andre tilbudsgivere anlagde derefter begge sag mod Rådet ved Retten i Første Instans. Den dom, som dette resumé angår, er Rettens afgørelse i sagen anlagt af den ene til-

budsgiver, medens Rettens dom af 25. februar 2003 i sag T-183/00, Strabag Benelux mod Rådet, angår sagen anlagt af den anden tilbudsgiver.

Som begrundelse for ikke at tildele sagsøgeren kontrakten havde Rådet bl.a. angivet, at sagsøgerens tilbudspris på forskellige punkter var unormalt lav, og at sagsøgerens samlede tilbudspris som følge af sin sammensætning på et nærmere angivet punkt var højere end den valgte tilbudsgivers samlede tilbudspris. Rådet havde før tildelingsbeslutningen anmodet sagsøgeren om nærmere oplysning om de dele af sagsøgerens tilbudspris, som Rådet anså for unormalt lave.

Sagsøgeren gjorde bl.a. gældende. at den nævnte begrundelse var udtryk for en tilbudsvurdering i strid med udbudsbetingelserne, men fik ikke medhold. Retten udtalte bl.a. at Rådet ikke klart og i betydelig grad havde overskredet grænserne for sin skønsbeføjelse ved at tage hensyn til de mange unormalt lave priser i sagsøgerens tilbud. Retten henviste herved til, at Rådet havde fulgt fremgangsmåden med hensyn til unormalt lave bud i § 30, stk. 4, i det tidligere Bygge- og anlægsdirektiv (der var gældende for udbuddet i medfør af en regel i den dagældende finansforordning), og at der ikke var fremkommet en overbevisende forklaring fra sagsøgeren på de pågældende priser (præmis 77-78). Rådet havde heller ikke udøvet et åbenbart urigtigt skøn ved sin beregning af sagsøgerens samlede tilbudspris (præmis 83).

Er kun refereret i det omfang dommen skønnes at have almen udbudsretlig interesse.

Retten i Første Instans' dom af 25. februar 2003 i sag T-183/00, Strabag Benelux mod Rådet

Klage over tilbudsvurdering i relation til nogle underkriterier ikke taget tilfølge

Rådet iværksatte et udbud vedrørende en rammekontrakt om bygningsvedligeholdelse m.m. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud.

Der indkom tilbud fra tre tilbudsgivere, hvorefter Rådet besluttede at indgå kontrakt med en af tilbudsgiverne. De to andre tilbudsgivere anlagde derefter begge sag mod Rådet ved Retten i Første Instans. Den dom, som dette resumé angår, er Rettens afgørelse i sagen anlagt af den ene tilbudsgiver, medens Rettens dom af 25. februar 2003 i sag T-4/01, Renco mod Rådet, angår sagen anlagt af den anden tilbudsgiver.

Sagsøgeren gjorde forskellige anbringender gældende, herunder at udbyderen havde bedømt sagsøgerens tilbud forkert i relation til nogle af underkriterierne til tildelingskriteriet. Sagsøgeren fik ikke medhold.

Refereres i øvrigt ikke, da dommen ikke skønnes at have almen udbudsretlig interesse, i hvert fald ikke på tidspunktet for udarbejdelse af dette resumé (december 2009).

27. februar 2003, sag C-327/00, Santex

En klagefrist på 60 dage var ikke i sig selv strid med første kontroldirektiv, men der skulle ses væk fra fristen som følge af sagens omstændigheder

En italiensk myndighed udbød den 23. oktober 1996 i henhold til Indkøbsdirektivet indkøb af nogle hjælpemidler til levering i patienternes hjem. I udbudsbekendtgørelsen var angivet, at kun virksomheder, der i de sidste tre år havde haft en omsætning ved en ydelse som den udbudte på

mindst tre gange værdien af den udbudte kontrakt, ville få adgang til at afgive tilbud.

Efter at en virksomhed, Santex, havde tilkendegivet over for udbyderen, at man anså den citerede klausul for en ulovlig konkurrencebegrænsning, meddelte udbyderen den 25. november 1996, at klausulen kunne forstås som en henvisning til tilbudsgivernes samlede omsætning, således at omsætningen på hjælpemidler som de udbudte blot ville indgå i vurderingen af tilbudene.

Den virksomhed, som hidtil havde udført leverancen, protesterede herimod. Den 24. februar 1997 besluttede udbyderen at udelukke de virksomheder, der ikke opfyldte klausulen i dens oprindelige formulering, herunder Santex, fra at afgive tilbud. Den 8. april 1997 besluttede udbyderen at tildele den hidtidige leverandør kontrakten.

Santex anlagde herefter sag mod udbyderen ved en italiensk forvaltningsdomstol. Udbyderen og den hidtidige leverandør, der indtrådte i sagen, gjorde for forvaltningsdomstolen gældende, at sagen var anlagt for sent, idet der i henhold til den italienske lovgivning gælder en frist på 60 dage for klager over en forvaltningsafgørelse.

Forvaltningsdomstolen stillede nogle spørgsmål til EF-domstolen.

Det fremgår, at 60-dages fristen i den foreliggende sag løb fra udbudsbekendtgørelsen. Forvaltningsdomstolen henviste imidlertid til en særlig regel i den italienske lovgivning, hvorefter en regel kan tilsidesættes, hvis den er i strid med en trinhøjere regel og berører en individuel rettighed. Forvaltningsdomstolen henviste herved bl.a. til Menneskerettighedskonventionen. Forvaltningsdomstolen henviste også til, at den omhandlede klausul i udbudsbetingelserne var i strid med Indkøbsdirektivets artikel 22 (om krav til tilbudsgivernes formåen), og anførte, at udbyderen havde forhindret et sagsanlæg inden fristens udløb ved at forlede Santex til at tro, at klausulen ville blive fortolket restriktivt eller omformuleret.

Efter en omformulering af forvaltningsdomstolens spørgsmål udtalte EF-domstolen (stærkt sammentrængt):

Som udtalt i dom af 12. december 2002, Universale-Bau, er første kontroldirektiv ikke til hinder for nationale klagefrister, og en klagefrist på 60 dage er rimelig. Også en klagefrist, der løber fra meddelelsen af den pågældende retsakt eller fra den dag, da den berørte har fået fuldt kendskab til den, er i overensstemmelse med effektivitetsprincippet. De konkrete omstændigheder kan imidlertid bevirke, at fristen bliver i strid med effektivitetsprincippet, og i den foreliggende sag havde udbyderen ved sin skiftende handlemåde gjort det uforholdsmæssigt vanskeligt for Santex at udøve sine rettigheder i henhold til fællesskabsretten.

Den nationale domstol skal i videst muligt omfang fortolke den nationale lovgivning i overensstemmelse med fællesskabsretten, og er en sådan fortolkning ikke mulig, er den nationale domstol forpligtet til at anvende fællesskabsretten og skal herved om nødvendigt undlade at anvende en national bestemmelse.

EF-domstolen besvarede herefter de omformulerede spørgsmål ved at udtale at første kontroldirektiv skal fortolkes således: Hvis en ordregivende myndighed har gjort det umuligt eller uforholdsmæssigt vanskeligt for en unionsborger at udøve sine rettigheder i henhold til fællesskabsretten, skal de nationale retsinstanser realitetsbehandle en klage over udbudsbe-

kendtgørelsen, idet de i givet fald gøre brug af deres adgang i henhold til national ret til at undlade at anvende nationale præklusionsregler.

Det er bemærkelsesværdigt, at forvaltningsdomstolen fandt det nødvendigt at forelægge sagen for EF-domstolen, når forvaltningsdomstolen (efter sin angivelse) havde adgang i national ret til at se bort fra klagefristen. Det var måske tvivlsomt, om denne adgang i virkeligheden var til stede. Sagen kan give en fornemmelse af, at forelæggelsens egentlige formål var at få opbakning i forhold til appelinstansen, der på et tidspunkt i forløbet havde ophævet forvaltningsdomstolens bestemmelse om opsættende virkning.

27. februar 2003, sag C-373/00, Adolf Truley

Almenhedens behov er et fællesskabsretligt begreb. Bedemandsvirksomhed kan opfylde almenhedens behov. Bygge- og anlægsdirektivets fortegnelse over offentligretlige organer er ikke udtømmende. Udførlig beskrivelse af udbudsdirektivernes formål. Erhvervsdrivende offentligretlige organer. Kriteriet om, at et offentligretligt organ skal være undergivet offentlig kontrol

Begrebet »offentligretligt organ«. Terminologi

Denne dom angår et emne, som EF-domstolen har beskæftiget sig med i flere domme, nemlig begrebet »offentligretligt organ«. Dette begreb er reelt næppe særligt indviklet, men forståelsen kompliceres af rent sproglige årsager. I det følgende forsøges en sproglig forenkling med henblik på at gøre det lettere at forstå og fastholde begrebet.

Alle udbudsdirektiverne indeholder en regel om, at »offentligretlige organer« er omfattet af udbudspligten. I de såkaldt klassiske udbudsdirektiver, dvs. Bygge- og anlægsdirektivet, Indkøbsdirektivet og Tjenesteydelsesdirektivet, er reglen placeret i artikel 1, b. I Forsyningsvirksomhedsdirektivet står reglen i artikel 1, 1.

Selvom reglen er formuleret lidt forskelligt i de enkelte direktiver, skal den formentlig forstås ganske på samme måde, uanset hvilket direktiv, der er tale om. Denne antagelse bekræftes af EF-domstolens dom af 12. december 2002, Universale-Bau, ved hvilken EF-domstolen bortfortolkede en særlig formulering i Bygge- og anlægsdirektivet.

Reglen består af en hovedregel med en undtagelse. Hovedreglen kan lidt forenklet gengives sådan:

Et offentligretligt organ er et organ,

a) som har til opgave at opfylde almenhedens behov,
b) som er en juridisk person,
c) og som finansieres eller kontrolleres af det offentlige.

Organer, der opfylder disse tre betingelser, kaldes i det følgende *almene organer*.

Som nævnt er der imidlertid en undtagelse. Den går ud på, at et alment organ alligevel ikke er et offentligretligt organ med udbudspligt, hvis organets virksomhed er *erhvervsmæssig*.

Undtagelsen er i alle udbudsdirektiverne indeholdt i udformningen af betingelsen om, at organet skal have til formål at opfylde almenhedens behov. Formuleringen er lidt forskellig fra direktiv til direktiv, men dette er givetvis ikke udtryk for nogen realitetsforskel. I Indkøbsdirektivet, som den her resumerede dom angår, lyder formuleringen: »…ethvert organ,

hvis opgave det er at imødekomme almenhedens behov, dog ikke på det industrielle eller forretningsmæssige område…«.

Almene organer, hvis virksomhed er erhvervsmæssig, og som derfor ikke er offentligretlige organer med udbudspligt, benævnes i det følgende *erhvervsmæssige almene organer*. Almene organer, hvis virksomhed ikke er erhvervsmæssig, og som derfor er offentligretlige organer med udbudspligt, benævnes i det følgende *ikke-erhvervsmæssige almene organer*. Som følge af brugen af disse betegnelser er referatet nedenfor af de præjudicielle spørgsmål i sagen og af EF-domstolens svar til dels formuleret noget anderledes end spørgsmålene og svarene selv.

EF-domstolen har i nogle afgørelser taget stilling til, hvornår et alment organ skal anses for erhvervsmæssigt. Det drejer sig om dom af 15. januar 1998, Mannesmann Anlagenbau (Strohal), 10. november 1998, BFI Holding (Arnhem), 10. maj 2001, Agorà, og den her resumerede dom. Af disse domme kan tilsyneladende bl.a. udledes følgende:

Et alment organ er kun erhvervsmæssigt med deraf følgende fritagelse for udbudspligt, hvis dets virksomhed udelukkende er erhvervsmæssig.

Hvis et alment organ derimod både driver erhvervsmæssig og ikke-erhvervsmæssig virksomhed, skal organet anses for et ikke-erhvervsmæssigt alment organ med deraf følgende udbudspligt. Dette gælder, selvom den ikke-erhvervsmæssige del af organets virksomhed er relativt ubetydelig.

Se også resuméet nedenfor af dommen af 22. maj 2003, Korhonen mfl. Denne dom beskæftiger sig ligeledes med begrebet ikke-erhvervsmæssige almene organer.

<u>Resumé af dommen</u>

Den her resumerede dom drejede sig et kommunalt aktieselskab, Bestattung Wien GmbH (Bestattung Wien), der gennem et holdingselskab ejes af Wiens Kommune. Som ofte med hensyn til domme vedrørende præjudicielle spørgsmål er det vanskeligt at få hold på, hvad sagens faktum nærmere gik ud på, men følgende synes at fremgå:

Bestattung Wien udøver egentlig begravelsesvirksomhed, dvs. ligbrænding, jordfæstelse og drift af kirkegårde ol. Denne form for virksomhed omtales i sagen som »bedemandsydelser i snæver forstand«.

Bestattung Wien udøver imidlertid også virksomhed med udfærdigelse af dødsattester og dødsannoncer, iklædning og kistelægning og transport af kiste m.m. Sådanne aktiviteter omtales i sagen som »bedemandsydelser i vid forstand«. Dommen og dens sagsfremstilling tyder på, at Bestattung Wiens hovedopgave er at udføre bedemandsydelser i »vid« forstand, og at Bestattung Wien reelt er den eneste bedemandsvirksomhed i Wien. Hvis dette er rigtigt forstået, er Bestattung Wiens udførelse af bedemandsydelser i »snæver« forstand kun en mindre del af virksomheden. Dette synes dog ikke egentligt udtalt i dommen.

Hertil kommer følgende, der spillede en betydelig rolle i sagen: I henhold til den østrigske lovgivning skal myndighederne foranledige bisættelse af afdøde personer, hvis der ikke er sket bisættelse inden en bestemt tid efter dødsfaldet. I sådanne tilfælde er det i Wien øjensynlig Bestattung Wien, der sørger for dødsannoncer, iklædning, kistelægning og transport af kisten m.m., dvs. netop bedemandsydelser i »vid« forstand.

Bestattung Wien udbød et indkøb af ligkistetilbehør. Udbudet skete ikke som EU-udbud, øjensynlig fordi Bestattung Wien ikke anså sig for

omfattet af udbudsdirektiverne. En tilbudsgiver, der ikke fik tildelt ordren, klagede til et østrigsk klageorgan (Vergabekontrollsenat) og gjorde gældende, at man havde været den eneste tilbudsgiver, hvis tilbud opfyldte udbudsbetingelserne.

Under sagen for klageorganet blev der øjensynlig rejst spørgsmål, om Bestattung Wien er et offentligretligt organ med udbudspligt efter Indkøbsdirektivet.

Bestattung Wien gjorde om dette spørgsmål tilsyneladende følgende gældende: Kun selskabets udførelse af bedemandsydelser i »snæver« forstand sker til opfyldelse af almenhedens behov. Udførelsen af bedemandsydelser i »vid« forstand sker derimod ikke til opfyldelse af almenhedens behov. Da den sidstnævnte virksomhed er den overvejende del af Bestattung Wiens aktiviteter (?), er Bestattung Wien herefter ikke et offentligretligt organ med EU-udbudspligt.

Bestattung Wien gjorde tilsyneladende også gældende, at selskabet ikke er et offentligretligt organ, fordi selskabet er helt uafhængigt af det offentlige, dvs. at Bestattung Wien ikke opfylder betingelsen om at være finansieret eller kontrolleret af det offentlige.

Endvidere gjorde Bestattung Wien øjensynlig gældende, at selskabet ikke er et offentligretligt organ, fordi selskabet ikke er nævnt i fortegnelsen over offentligretlige organer i bilag I til Bygge- og anlægsdirektivet (som Indkøbsdirektivets artikel 1, b henviser til).

Klageorganet stillede nogle præjudicielle spørgsmål til EF-domstolen, der svarede som nedenfor angivet.

Spørgsmål 1, a): Skal definitionen af begrebet almenhedens behov i artikel 1, b i Indkøbsdirektivet udledes af medlemsstaternes nationale retsordner?

Besvaret med, at begrebet almenhedens behov er et fællesskabsretligt begreb.

Herved henvist til udbudsdirektivernes formål, der beskrives således: At fjerne hindringerne for den frie udveksling af varer og tjenesteydelser og dermed at beskytte interesserne hos forretningsdrivende i en medlemsstat, der ønsker at tilbyde varer og tjenesteydelser til ordregivende myndigheder i en anden medlemsstat. Desuden at fjerne risikoen for, at der indrømmes indenlandske bydende eller ansøgere en fortrinsstilling ved de ordregivende myndigheders indgåelse af kontrakter, og at fjerne muligheden for, at et organ, der er finansieret af staten, lokale myndigheder eller andre offentligretlige organer, lader sig lede af andre hensyn end økonomiske.

Udtalt, at under hensyn til dette dobbelte formål, der er at åbne for konkurrence og skabe gennemsigtighed, må begrebet offentligt organ forstås bredt.

Desuden udtalt, at selvom et organ ikke er medtaget på fortegnelsen over offentligretlige organer i bilag I til Bygge- og anlægsdirektivet, skal det undersøges konkret, om et organ opfylder almenhedens behov. Denne udtalelse betyder øjensynlig, at den omtalte fortegnelse ikke er udtømmende, og at et organ godt kan være et offentligretligt organ, selvom det ikke er medtaget i fortegnelsen.

Spørgsmål 1, b): Er en subsidiær forpligtelse hos myndighederne tilstrækkelig til at udgøre almenhedens behov?

Spørgsmålet sigtede til den omtalte pligt for Bestattung Wien til at sørge for bisættelse, hvis der ikke er sket bisættelse inden en bestemt tid efter

dødsfaldet. Tankegangen bag spørgsmålet synes at være: Bedemandsydelser i »vid« forstand opfylder muligvis ikke i sig selv almenhedens behov. Men skal sådanne ydelser i hvert fald anses for at opfylde almenhedens behov, hvis der er en lovbestemt pligt til udføre dem?

Besvaret med, at bedemands- og begravelsesvirksomhed kan opfylde almenhedens behov. At myndighederne har en lovbestemt pligt til at sørge for bisættelser, hvis der ikke er sket en sådan inden en bestemt frist, er et indicium herfor.

Herved bl.a. udtalt: Det anførte gælder, selvom det antages, at bedemandsvirksomhed i »snæver« forstand kun udgør en relativt ubetydelig del af den virksomhed, der udøves af en bedemandsforretning, når denne virksomhed fortsætter med at opfylde almenhedens behov. I henhold til fast retspraksis afhænger spørgsmålet, om et alment organ er et offentligretligt organ med deraf følgende udbudspligt, ikke af omfanget af den erhvervsmæssige del af organets virksomhed. Herved henvist til nogle af de domme, der er nævnt ovenfor.

Spørgsmål 2): Er det for at karakterisere et organ som et erhvervsmæssigt alment organ a) en ufravigelig forudsætning, at der foreligger en udviklet konkurrence, eller b) afhænger forholdet af de faktiske eller retligt omstændigheder?

Spørgsmålet sigtede tilsyneladende til, at Bestattung Wien ikke har konkurrence med hensyn til udøvelse af bedemandsvirksomhed. Spørgsmålet bekræfter for så vidt antagelsen ovenfor af, at Bestattung Wien er den eneste bedemandsvirksomhed i Wien.

Besvaret således: At der foreligger en udviklet konkurrence, er ikke i sig selv i sig selv nok til at karakterisere et alment organ som et erhvervsmæssigt alment organ. Spørgsmålet måtte afgøres af den østrigske klageinstans under hensyn til samtlige relevante og faktiske omstændigheder, herunder omstændighederne ved oprettelsen af det pågældende organ og de betingelser, der regulerer dets virksomhed. Herved bl.a. henvist til, at domstolen i dom af 10. november 1998, BFI Holding (Arnhem), har udtalt, at et krav om, at der ikke findes konkurrence, for at et organ kan karakteriseres som et ikke-erhvervsmæssigt alment organ, ville tømme begrebet offentligretligt organ for indhold, men at eksistensen af konkurrence dog kan være et indicium for, at der er tale om et erhvervsmæssigt alment organ.

Spørgsmål 3): Er betingelsen i Indkøbsdirektivets artikel 1, b om, at det pågældende organ skal være undergivet offentlig kontrol, også opfyldt, når der blot er tale om en efterfølgende kontrol som en nærmere beskrevet kontrol udøvet af en østrigsk kontrolinstans?

(Den beskrevne kontrol er en kontrol som den, der omtales i EF-domstolens svar.)

Besvaret med (noget sammentrængt), at en almindelig efterfølgende kontrol ikke er tilstrækkelig, men at kriteriet er opfyldt i tilfælde, hvor det offentlige ikke kun kontrollerer organets regnskaber, men også organets drift, og hvor det offentlige har adgang til at aflægge organet kontrolbesøg og videregive resultaterne af disse kontrolbesøg til en myndighed, der ejer organet.

<u>Kommentarer til dommen</u>

Forståelsen af dommen kompliceres dels af, at det som ovenfor anført er vanskeligt at få hold på, hvad sagens faktum nærmere gik ud på, dels af,

at de præjudicielle spørgsmål og svarene på dem i overensstemmelse med traditionen er formuleret abstrakt. Hertil kommer, at besvarelsen af spørgsmålene i et vist omfang forekommer uklar, og at besvarelsen af spørgsmål 2 kun til dels synes at være et svar på spørgsmålet, sådan som det var formuleret.

Men sammenfattende synes EF-domstolens udtalelser at betyde følgende: Bestattung Wien skal anses for et ikke-erhvervsmæssigt alment organ og er derfor et offentligretligt organ, der er omfattet af udbudsdirektivernes udbudspligt, fordi Bestattung Wiens bedemandsvirksomhed opfylder almenhedens behov, fordi Bestattung Wiens bedemandsvirksomhed ikke udelukkende udøves erhvervsmæssigt, og fordi Bestattung Wien er under det offentliges kontrol. Det er uden betydning, at Bestattung Wien ikke er medtaget på fortegnelsen over offentligretlige organer.

Dette er næppe meget andet, end hvad der fremgår af flere tidligere domme fra EF-domstolen. Af størst interesse er måske dommens angivelser om, at bedemandsvirksomhed kan opfylde almenhedens behov, og at fortegnelsen over offentligretlige organer ikke er udtømmende, samt dommens beskrivelse af udbudsdirektivernes formål.

9. april 2003, sag C-424/01, CS Austria

Ved afgørelse om opsættende virkning må der tages hensyn til en forhåndsvurdering af klagesagens udfald

For et østrigsk klageorgan (Bundesvergabeamt) verserede en klagesag vedrørende et udbud, der øjensynlig var foretaget i henhold til Indkøbsdirektivet.

Der forelå for klageorganet spørgsmål om at træffe midlertidige foranstaltninger i anledning af klagen, dvs. – med den danske terminologi – at tillægge klagen opsættende virkning. Den nævnte danske terminologi bruges i det følgende.

Sagen for EF-domstolen angik forståelsen af artikel 2, stk. 4, i første kontroldirektiv. Denne bestemmelse går (kort gengivet) ud på følgende: Medlemsstaterne kan foreskrive, at en klageinstans ved sin afgørelse af, om der skal tillægges en klage opsættende virkning, foretager en afvejning af fordele og ulemper ved opsættende virkning.

Det østrigske klageorgan var i tvivl, om man ved afgørelsen om opsættende virkning må lægge vægt på en forhåndsvurdering af klagesagens forventede udfald, dvs. om klagesagen kan ventes at ende med annullation af den påklagede beslutning.

Klageorganet spurgte derfor EF-domstolen (noget sammentrængt), om en klageinstans efter artikel 2, stk. 4, i første kontroldirektiv, er forpligtet eller berettiget til at tage hensyn til muligheden for annullation af udbyderens beslutning ved afgørelsen af, om der skal tillægges en klage opsættende virkning.

EF-domstolen svarede (stærkt sammentrængt): Artikel 2, stk. 4, i første kontroldirektiv forbyder ikke nationale regler, hvorefter en klageinstans ved afgørelsen om opsættende virkning tager højde for udsigten til, at klageren får medhold i realiteten. De nationale regler ikke må være mindre gunstige end dem, der gælder for tilsvarende søgsmål på grundlag af national ret (ækvivalensprincippet), og de må heller ikke gøre det umuligt eller uforholdsmæssigt vanskeligt at udøve rettighederne i henhold til fællesskabets retsorden i praksis (effektivitetsprincippet).

Afgørelsen blev truffet ved kendelse med henvisning til, at besvarelsen af det østrigske klageorgans spørgsmål ikke gav anledning til nogen rimelig tvivl.

10. april 2003, sager C-20/01 og C28/01, Kommissionen mod Tyskland

Tyskland havde overtrådt Tjenesteydelsesdirektivet ved indgåelse af kontrakter om bortledning af spildevand og bortskaffelse af dagrenovation

Statueret, at Tyskland havde overtrådt Tjenesteydelsesdirektivet som følge af nedennævnte forhold.

1) En tysk kommune havde uden EU-udbud indgået kontrakt med en virksomhed om bortledning af spildevand.

Overtrædelsen var erkendt af Tyskland, hvis indsigelser under sagen alene var af formel karakter.

2) En anden tysk kommune havde ved udbud efter forhandling uden udbudsbekendtgørelse indgået kontrakt med en virksomhed om bortskaffelse af dagrenovation. Dagrenovationen skulle behandles »termisk«, og det var af miljømæssige hensyn et led i udbudsbetingelserne, at behandlingsanlægget skulle ligge i regionen. Som følge af denne betingelse var der efter kommunens opfattelse ikke andre virksomheder end den valgte, der kunne udføre opgaven, hvorfor man havde anset sig berettiget til at foretage udbud efter forhandling uden udbudsbekendtgørelse i medfør af Tjenesteydelsesdirektivets artikel 11, stk. 3, b. Efter denne bestemmelse kan et sådant udbud foretages, hvis tjenesteydelsen af bl.a. tekniske grunde kun kan overdrages til en bestemt tjenesteyder.

Tyskland synes at have erkendt overtrædelsen og fremsatte i første række forskellige formelle indsigelser. Tyskland gjorde dog alligevel gældende som et subsidiært anbringende, at det havde været berettiget at foretage udbudet som sket.

EF-domstolen udtalte (stærkt sammentrængt), at der kan tages miljømæssige hensyn ved tildeling af en kontrakt, og domstolen henviste herved til dommen af 17. september 2002 i sagen Concordia Bus Finland. Det var imidlertid ikke bevist, at termisk affaldsbehandling skulle være en teknisk grund, der er omfattet af Tjenesteydelsesdirektivets artikel 11, stk. 3, b, eller at det det af miljømæssige grunde skulle være nødvendigt, at affaldsbehandlingen foregik i nærheden.

15. maj 2003, sag C-214/00, Kommissionen mod Spanien

Spanien havde ikke gennemført første kontroldirektiv fyldestgørende

Referatet nedenfor er yderst sammentrængt og summarisk.

I dommen statuerede EF-domstolen, at Spanien ikke havde gennemført første kontroldirektiv fyldestgørende som følge af nedennævnte forhold.

1) Efter de spanske klageregler omfattede de retsmidler, der garanteres i første kontroldirektiv, ikke beslutninger truffet af offentligretlige organer, der har karakter af privatretlige selskaber. (Se om begrebet offentligretlige organer resuméet ovenfor af domstolens dom af 27. februar 2003, Adolf Truley.)

2) Efter de spanske regler forudsatte midlertidige foranstaltninger (dvs. bestemmelse om opsættende virkning) almindeligvis, at der forinden var indgivet klage over en beslutning fra den ordregivende myndighed.

Derimod fik Kommissionen ikke medhold i en påstand om, at de spanske regler ikke gav tilstrækkelig mulighed for at påklage visse beslutninger fra de ordregivende myndigheder.

Se også resuméet nedenfor af EF-domstolens dom af 16. oktober 2003 i sagen C-283/00, Kommissionen mod Spanien.

22. maj 2003, sag C-18/01, Korhonen mfl.

Om begrebet almenhedens behov uden for det erhvervs- og forretningsmæssige område

Som ofte med hensyn til præjudicielle afgørelser er det vanskeligt at forstå, hvad sagens faktum gik ud på. Med hensyn til den resumerede dom kan forholdet hænge sammen med, at EF-domstolen ikke havde fuldstændige oplysninger om faktum, hvilket er nævnt i dommen.

Men sagens faktum synes i hovedtræk at gå ud på følgende:

En finsk kommune besluttede at etablere et såkaldt teknologisk vækstcenter, bestående af erhvervsejendomme, der skulle opføres og derefter udlejes til forskellige teknologi-virksomheder. Den nærmere gennemførelse af projektet blev i første omgang overladt til et regionalt udviklingsselskab, der for størstedelen ejes af den omtalte kommune og andre kommuner i regionen.

Projektets første fase gik ud på opførelse af nogle bygninger, som skulle udlejes til en nærmere angivet virksomhed, og det regionale udviklingsselskab indhentede tilbud på en tjenesteydelse bestående af planlægning og gennemførelse af denne fase. Derefter tilkendegav udviklingsselskabet imidlertid, at projektet skulle varetages af et særligt ejendomsselskab, og at den omtalte tjenesteydelse skulle udbydes i EU-udbud. Det nævnte ejendomsselskab benævnes i sagen Taitalo.

Der blev derefter foretaget EU-udbud af den omtalte tjenesteydelse, og der blev indgivet tilbud i henhold til dette udbud. På et tidspunkt herefter blev Taitalo stiftet. Taitalo overtog projektet og traf bestemmelse om tildeling af kontrakt i henhold til EU-udbudet.

Nogle forbigåede tilbudsgivere klagede til et klageorgan, dvs. det finske konkurrenceråd, og gjorde gældende, at den finske lovgivning om offentlige kontrakter var blevet tilsidesat ved det omtalte EU-udbud.

Taitalo gjorde for klageorganet gældende, at man ikke var ordregivende myndighed i henhold til Tjenesteydelsesdirektivet, og klageorganet stillede i den anledning nogle spørgsmål til EF-domstolen.

Sagen for EF-domstolen drejede sig om, hvorvidt Taitalo skulle anses for et offentligretligt organ i henhold til Tjenesteydelsesdirektivets artikel 1, b. Afgørende herfor var, om Taitalo opfyldte betingelsen i bestemmelsens første led om, at det pågældende organ skal have til opgave at imødekomme almenhedens behov, dog ikke på det erhvervs- og forretningsmæssige område. Det synes klart, at Taitalo opfyldte de øvrige betingelser i artikel 1, b.

Taitalos synspunkt om, at man ikke var ordregivende myndighed i henhold til direktivet, var begrundet med, at Taitalos aktiviteter falder inden for det erhvervs- og forretningsmæssige område, således at Taitalo ikke opfyldte første led i artikel 1, b. Som begrundelse herfor henviste Taitalo til, at projektets finansiering i det væsentlige varetages af den private sektor (præmis 46).

Om begrebet offentligretligt organ henvises i øvrigt til den udførlige redegørelse i resuméet ovenfor af EF-domstolens dom af 27. februar 2003, Adolf Truley, hvor der også nævnes nogle andre domme om emnet.

Om Taitalo var oplyst: Taitalo er et aktieselskab, der fuldstændig ejes af den omtalte kommune. Taitalos formål er (kort gengivet) at købe, sælge, udleje og administrere ejendomme. Taitalos bestyrelse består af tre medlemmer, der alle er ansat i – og utvivlsomt er udpeget af – kommunen.

EF-domstolen udtalte:

1) Taitalos aktiviteter i sagen imødekommer almenhedens behov. Herved henvist til, at aktiviteter som de omtalte er egnede til at stimulere den økonomiske og sociale udvikling og skabe arbejdspladser og højere skatteindtægter (præmis 45).

2) Spørgsmålet, om de omtalte behov hos almenheden falder uden for det erhvervs- og forretningsmæssige område, var vanskeligere (præmis 46).

EF-domstolen foretog i præmis 47-51 og 57-59 en gennemgang af begrebet det erhvervs- og forretningsmæssige område, og gav i præmis 52 en redegørelse for udbudsdirektivernes formål. De pågældende bemærkninger synes ikke at være andet, end hvad domstolen har udtalt i flere tidligere domme.

Domstolen henviste videre til en oplysning fra den finske regering om, at opnåelse af fortjeneste ikke er hovedformålet med selskaber som Taitalo, idet sådanne selskaber ifølge den finske lovgivning primært skal fremme de almene interesser for indbyggerne i lokalområdet. Domstolen henviste desuden til, at der var ydet offentlig støtte til projektet (præmis 54 og 55).

Domstolen udtalte, at det herefter var sandsynligt, at Taitalos aktiviteter med hensyn til det omtalte projekt faldt uden for det erhvervs- og forretningsmæssige område. Det tilkom imidlertid det nationale klageorgan, der var den eneste med tilbundsgående kendskab til sagens akter, at vurdere forholdet (præmis 55 og 56).

3) Det var uden betydning, at de lokaler, der skulle opføres, kun skulle udlejes til en enkelt virksomhed.

19. juni 2003, sag C-249/01, Hackermüller

Om klageadgang for tilbudsgivere med ukonditionsmæssige tilbud

En østrigsk ordregiver udskrev en projektkonkurrence om arkitektydelser vedrørende opførelse af en bygning. Der indkom nogle projektforslag, hvorefter udbyderen besluttede at gøre brug af et af forslagene.

En af de andre forslagsstillere (Hackermüller) klagede til det østrigske klageorgan Bundesvergabeamt. Klagen var tilsyneladende begrundet med, at udbyderens tildelingsbeslutning var sket i strid med tildelingskriteriet.

Bundesvergabeamt afviste imidlertid klagen med begrundelse, at Hackermüller ikke var klageberettiget, fordi han havde oplyst sin identitet i sit projektmateriale, hvilket som følge af udbudsbetingelserne sammenholdt med nogle østrigske regler medførte, at udbyderen ikke kunne tage hans projekt i betragtning.

Hackermüller indbragte Bundesvergabeamts afgørelse for den østrigske forfatningsdomstol, der annullerede Bundesvergabeamts afgørelse

med følgende begrundelse (noget sammentrængt): Efter EF-domstolens nyere praksis er det tvivlsomt, om et klageorgan kan afskære en tilbudsgiver fra at klage med den begrundelse, at udbyderen ikke skulle have taget tilbudet i betragtning, når udbyderen faktisk har taget tilbudet i betragtning.

Sagen verserede herefter igen for Bundesvergabeamt, der stillede to spørgsmål til EF-domstolen, som efter en vis omformulering udtalte (stærkt sammentrængt og til dels omformuleret):

Ad spørgsmål 1): Artikel 1, stk. 3, i første kontroldirektiv er ikke til hinder for, at der kun er klageadgang for personer, der ønsker at få tildelt en kontrakt, hvis de har lidt eller vil kunne lide skade som følge af den påståede overtrædelse.

Ad spørgsmål 2): Artikel 1, stk. 3, i første kontroldirektiv er til hinder for, at en tilbudsgiver nægtes klageadgang med den begrundelse, at udbyderen ikke burde have taget klagerens tilbud i betragtning. Tilbudsgiveren skal i forbindelse med den klage, som han således skal have adgang til, have mulighed for at anfægte klageorganets synspunkt om, at tilbudsgiverens tilbud ikke burde være taget i betragtning.

EF-domstolens svar på spørgsmål 1) kan læses direkte ud af artikel 1, stk. 3, i første kontroldirektiv.

Rækkevidden af domstolens svar på spørgsmål 2) forekommer derimod umiddelbart usikker, idet de to led i svaret nærmest synes at stride mod hinanden. Reelt betyder svaret måske ikke andet, end at tilbudsgiveren skal have adgang til at udtale sig for klageorganet om spørgsmålet, om hans tilbud skulle have været afvist. Dette er en selvfølgelighed set fra en dansk synsvinkel.

19. juni 2003, sag C-315/01, GAT

Et klageorgan må tage et forhold op ex officio, men parterne skal have adgang til at udtale sig om forholdet, og klageorganet må ikke afvise klagen som følge af forholdet. Referencer til andre kunder og mulighed for besigtigelse inden for en vis afstand fra udbyderens etableringssted må ikke bruges som underkriterier

En østrigsk myndighed udbød som EU-udbud indkøb af en gadefejningsmaskine. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud tilsyneladende på grundlag af følgende underkriterier, der ville blive vægtet på nærmere angiven måde: 1) Pris og 2) antal af referencer til kunder vedrørende fejemaskiner i de alpine områder.

Der indkom et antal tilbud. Udbyderen afviste tilbudet fra tilbudsgiveren med den laveste tilbudspris (GAT) med begrundelse, at dette tilbud ikke var i overensstemmelse med udbudsbetingelserne på grund af følgende: a) Den tilbudte maskine kunne ikke anvendes ved en temperatur på -5º som foreskrevet. b) GAT havde ikke opfyldt en betingelse om, at der skulle være mulighed for besigtigelse inden for 300 km fra udbyderens etableringssted. c) Der sattes spørgsmålstegn ved tilbudsprisen. d) GAT havde trods opfordring ikke redegjort tilstrækkeligt for visse tekniske forhold ved den tilbudte maskine.

Udbyderen besluttede derefter at indgå kontrakt med en af de andre tilbudsgivere. GAT klagede til et østrigsk klageorgan, Bundesvergabeamt, og gjorde gældende, at udbyderens afvisning af GAT's tilbud var uberettiget. GAT gjorde herved forskellige anbringender gældende.

Det synes at fremgå, at Bundesvergabeamt af sig selv blev opmærksom på, at underkriteriet om antal af referencer til kunder i de alpine områder kunne være i strid med EU-retten, men at GAT ikke havde gjort dette gældende. Det synes videre at fremgå, at den østrigske forfatningsdomstol i en afgørelse havde udtalt tvivl med hensyn til, om et klageorgan har mulighed for at inddrage forhold ex officio, idet artikel 2, stk. 8, i første kontroldirektiv foreskriver en kontradiktorisk klageprocedure.

I hvert fald til dels på denne baggrund forelagde Bundesvergabeamt sagen for EF-domstolen med en række spørgsmål. EF-domstolen udtalte (stærkt sammentrængt og til dels omformuleret, Klagenævnets litrering):

1) Første kontroldirektiv er ikke til hinder for, at et klageorgan af egen drift i en klagesag inddrager forhold, som klageren ikke har gjort gældende. Klageorganet skal blot respektere parternes ret til at blive hørt om forholdet (præmis 49).

2) Klageorganet må imidlertid ikke afvise klagen med den begrundelse, at klagerens eventuelle tab ville være indtrådt under alle omstændigheder, fordi udbudsproceduren under alle omstændigheder var uretmæssig som følge af det forhold, som klageorganet har taget op af egen drift.

3) Referencer til andre kunder må ikke anvendes som underkriterium til tildelingskriteriet det økonomisk mest fordelagtige bud, men er et egnethedskriterium. Herved bl.a. udtalt, at der som underkriterier kun kan vælges forhold, der er egnet til at identificere det økonomisk mest fordelagtige bud, og at en simpel referenceliste ikke er egnet til dette (præmis 66).

4) Et kriterium om, at den tilbudte genstand skal kunne besigtiges inden for en afstand på 300 km, kan ikke anvendes som underkriterium til tildelingskriteriet det økonomisk mest fordelagtige bud. Herved henvist til Indkøbsdirektivets artikel 23, stk. 1, d, hvorefter de ordregivende myndigheder kan forlange nærmere angivne beviser for leverandørens tekniske formåen. Desuden henvist til, at et kriterium som omtalt ikke identificerer det økonomisk mest fordelagtige tilbud.

5) Et erstatningsretligt spørgsmål besvaredes ikke, da Bundesvergabeamt ikke har kompetence vedrørende erstatning.

19. juni 2003, sag C-410/01, Fritsch, Chiari & Partner mfl.

Der må ikke stilles krav om inddragelse af et mæglingsorgan før en klage

En østrigsk myndighed udbød en tjenesteydelsesaftale bestående af tilsynsvirksomhed i forbindelse med udførelse af betalingsanlæg for vejafgifter. En tilbudsgiver, der ikke fik tildelt kontrakten, klagede til et østrigsk klageorgan, Bundesvergabeamt.

Udbyderen gjorde for Bundesvergabeamt gældende, at klageren ikke var klageberettiget, fordi man ikke før klagen til Bundesvergabeamt havde indbragt sagen for et særligt mæglingsorgan, Bundes-Vergabekontrollkommission.

Bundesvergabeamt stillede nogle spørgsmål til EF-domstolen, der udtalte: Artikel 1, stk. 3, i første kontroldirektiv er til hinder for at anse en klager for at have tabt sin interesse i den omhandlede kontrakt, fordi klageren har undladt at inddrage et mæglingsorgan som Bundes-Vergabekontrollkommission før iværksættelsen af en klageprocedure som fastsat i direktivet. Herved henvist til første kontroldirektivs effektivitets- og hurtighedsformål.

16. oktober 2003, sag C-252/01, Kommissionen mod Belgien
Tjenesteydelsesdirektivet fandt ikke anvendelse på en tjenesteydelse, der af militære grunde skulle ledsages af særlige sikkerhedsforanstaltninger, jf. direktivets artikel 4, stk. 2

Sagen angik en kontrakt mellem den belgiske stat og en virksomhed om en tjenesteydelse bestående af overvågning af den belgiske kyst fra luften. Overvågningens formål var tilsyneladende at sikre vandtransporten.

Kontrakten blev indgået uden forudgående EU-udbud, og Kommissionen gjorde under sagen gældende, at der skulle have været foretaget EU-udbud i henhold til Tjenesteydelsesdirektivet.

Belgien blev imidlertid frifundet med henvisning til, at tjenesteydelsen af nærmere angivne militære grunde skulle ledsages af særlige sikkerhedsforanstaltninger, hvorfor Tjenesteydelsesdirektivet i medfør af direktivets artikel 4, stk. 2, ikke fandt anvendelse.

16. oktober 2003, sag, C-283/00, Kommissionen mod Spanien
Et statsejet aktieselskab, der stod for fængselsbyggeri, var omfattet af udbudspligten

Sagen angik et statsejet spansk aktieselskab, der står for byggeri af fængselsbygninger. Ved dommen statueredes, at aktieselskabet er omfattet af udbudspligten i henhold Bygge- og anlægsdirektivets regel om offentligretlige organer (artikel 1, b).

Spanien havde bl.a. gjort gældende, at aktieselskabet ikke var omfattet af udbudspligten, fordi selskabet var af privatretlig karakter, og det var tilsyneladende generelt opfattelsen i Spanien, at udbudsdirektivernes udbudspligt ikke omfatter selskaber af privatretlig karakter. Denne opfattelse fremgår tilsvarende af EF-domstolens dom af 15. maj 2003 i sagen C-214/00, Kommissionen mod Spanien, til hvilken dom der også henvises i den her resumerede dom. Spanien fik ikke medhold i synspunktet.

Dommen refereres ikke nærmere, da resultatet forekommer åbenbart set fra en dansk synsvinkel.

En sondring mellem offentlig ret og privatret spiller vistnok en central rolle i visse retsordener, måske navnlig de romanske. Den spanske tankegang gik tilsyneladende ud på, at det må være denne sondring, der ligger bag udbudsdirektivernes regler om udbudspligt, således at udbudspligten omfatter organer, der hører under den offentlige ret, mens den ikke omfatter organer, der hører under privatretten, som fx et aktieselskab. Man kunne vel finde en vis bestyrkelse for en sådan tankegang i, at tre af udbudsdirektiverne i titlen taler om »offentlige« aftaler, og at udbudspligten ud over offentlige myndigheder omfatter »offentligretlige« organer, jf. fx Bygge- og anlægsdirektivets artikel 1, b.

For en nordisk jurist, der ikke er dybt indlevet i en sondring mellem offentlig ret og privatret som noget fundamentalt, må det på den anden side være umiddelbart indlysende, at udbudsdirektivernes regler om udbudspligt skal forstås ud fra reglernes eget indhold, og at et aktieselskab ikke er undtaget fra udbudspligten, blot fordi det er et aktieselskab.

Se også resuméet ovenfor af dommen af 15. maj 2003.

16. oktober 2003, sag C-421/01, Traunfellner

Hvis udbudsbetingelserne ikke angiver mindstekrav for alternative tilbud, kan alternative tilbud ikke tages i betragtning. Henvisning til en national regel om, at alternative tilbud skal være ligeværdige, er ikke tilstrækkelig angivelse af mindstekrav

En østrigsk myndighed udbød i november 1997 et bygge- og anlægsarbejde bestående af fornyelse af en motorvejsstrækning. Tildelingskriteriet var tilsyneladende tilbudenes økonomiske og tekniske kvalitet, uden at der var angivet underkriterier (?). I udbudsbetingelserne var anført, at vejbelægningen skulle udføres af beton. Det var videre anført, at tilbudsgiverne kunne afgive alternative tilbud under forudsætning af, at de tillige afgav tilbud i overensstemmelse med udbudsbetingelserne. Der var ikke angivet mindstekrav for alternative tilbud.

Tilbudet med den laveste tilbudspris var et alternativt tilbud fra Traunfellner GmbH (Traunfellner), gående ud på udførelse af vejbelægning af asfalt i stedet for beton. Efter at have indhentet nogle tekniske oplysninger fra Traunfellner besluttede udbyderen i marts 1998 at indgå kontrakt med en anden tilbudsgiver, der havde afgivet det laveste tilbud i overensstemmelse med udbudsbetingelserne. Udbyderen angav som begrundelse for ikke at antage Traunfellners alternative tilbud, at dette tilbud ikke var ligeværdigt med kravene i udbudsbetingelserne. Dette sigtede til en regel i den østrigske lovgivning om offentlige kontrakter, hvorefter et alternativt tilbud kun kan antages, hvis den tilbudte ydelse er ligeværdig med hensyn til kvaliteten.

Traunfellner klagede i april 1998 til et klageorgan, Bundesvergabeamt, der imidlertid straks afviste klagen. Bundesvergabeamt angav som begrundelse herfor, at Traunfellners alternative tilbud afveg i så betydeligt omfang fra udbudsbetingelserne, at der ikke var tale om et forskriftsmæssigt alternativt tilbud, således at det var uden betydning om tilbudet var ligeværdigt med kravene i udbudsbetingelserne. Bundesvergabeamt udtalte videre, at tilbudet under alle omstændigheder ikke var ligeværdigt.

Traunfellner indbragte sagen for den østrigske forfatningsdomstol, der i november 2000 ophævede Bundesvergabeamts afgørelse med henvisning til, at den ikke var tilstrækkeligt begrundet. Sagen verserede herefter igen for Bundesvergabeamt, der i september 2001 stillede nogle spørgsmål til EF-domstolen.

EF-domstolen tog stilling til spørgsmålene som nedenfor angivet. (Af overskuelighedsgrunde er referatet af spørgsmålene og besvarelsen stærkt sammentrængt og omformuleret):

1) Er et tilbud om udførelse af vejbelægning af asfalt, når udbudsbetingelserne angår vejbelægning i beton, et alternativt tilbud i Bygge- og anlægsdirektivets forstand?

Udtalt, at EF-domstolen ikke havde kompetence til at besvare spørgsmålet. Herved henvist til, at spørgsmålet sigtede til at få EF-domstolens afgørelse af, om Traunfellners tilbud var alternativt, men at EF-domstolen i præjudicielle sager alene har kompetence til at fortolke fællesskabsretten.

2) Er henvisning til en national retsregel om, at alternative tilbud skal være ligeværdige, en tilstrækkelig angivelse af de mindstekrav, som et alternativt tilbud skal opfylde, jf. Bygge- og anlægsdirektivets artikel 19, stk. 1?

Besvaret med, at en sådan henvisning ikke er en tilstrækkelig angivelse af de mindstekrav, som alternative tilbud skal opfylde.

3) Er Bygge- og anlægsdirektivets artikel 30 om tildelingskriterier sammenholdt med gennemsigtighedsprincippet og ligebehandlingsprincippet til hinder for, at alternative tilbud alene vurderes ud fra, om de er ligeværdige med kravene i udbudsbetingelserne?

Besvaret med, at Bygge- og anlægsdirektivets artikel 30 om tildelingskriterier kun finder anvendelse på alternative tilbud, som udbyderen lovligt har taget i betragtning i medfør af direktivets artikel 19. Herved henvist til, at hvis udbudsbetingelserne ikke som foreskrevet i artikel 19 angiver de mindstekrav, som alternative tilbud skal opfylde, kan alternative tilbud ikke tages i betragtning.

Nogle yderligere spørgsmål afvistes med begrundelse, at de var af hypotetisk karakter som følge af, at de angik forhold, om hvilke der ikke var tvist i sagen for Bundesvergabeamt.

16. oktober 2003, sag C-244/02, Kauppatalo Hansel

Udbudsdirektiverne regulerer ikke udbyders annullation af udbud. En sådan annullation skal overholde de grundlæggende fællesskabsretlige principper såsom ligebehandlingsprincippet. Det er ikke en betingelse, at udbyders annullation kun sker i undtagelsestilfælde eller har vægtige grunde

En finsk kommune udbød i henhold til Indkøbsdirektivet levering af elektricitet i en periode, tilsyneladende som offentligt udbud. Tildelingskriteriet var laveste pris.

Efter at have modtaget tilbudene blev udbyderen opmærksom på, at man havde overset, at et leverandørskifte ville medføre visse omkostninger i sig selv. Udbyderen annullerede derfor udbudet og iværksatte et nyt udbud, der var tilrettelagt således, at disse omkostninger ville blive opvejet.

Den tilbudsgiver, hvis tilbud havde haft den laveste pris under det første udbud, klagede til et klageorgan og gjorde gældende, at annullationen af dette udbud havde været uberettiget. Klageorganet gav ikke tilbudsgiveren medhold, hvorefter tilbudsgiveren indbragte klageorganets afgørelse for en ankeinstans.

Ankeinstansen forelagde sagen for EF-domstolen med følgende to spørgsmål (lidt sammentrængt):

1) Kan en udbyder efter Indkøbsdirektivet annullere et udbud med tildelingskriteriet laveste pris, når udbyderen efter have modtaget tilbudene har konstateret, at det ikke er muligt tildele kontrakten på en måde, der er den mest fordelagtige?

2) Har det betydning i denne forbindelse, at forholdet skyldes en forudgående fejl hos udbyderen selv?

EF-domstolen omformulerede spørgsmålene til at angå et enkelt spørgsmål af sålydende indhold (lidt sammentrængt og omformuleret):

Kan en udbyder efter Indkøbsdirektivet annullere et udbud med tildelingskriteriet laveste pris, når udbyderen efter at have modtaget tilbudene bliver opmærksom på, at udbyderen som følge af sin egen fejl ved udbudets tilrettelæggelse ikke har mulighed for at opnå det økonomisk mest fordelagtige bud?

Den væsentligste realitetsforskel mellem de to spørgsmål fra den finske ankeinstans og EF-domstolens omformulerede spørgsmål synes at

være anvendelsen af udtrykket »det økonomisk mest fordelagtige bud« i EF-domstolens omformulering.

EF-domstolen udtalte, at besvarelsen af det omformulerede spørgsmål klart følger af domstolens praksis, hvorfor afgørelsen blev truffet ved kendelse.

EF-domstolen henviste til to tidligere afgørelser, nemlig dom af 16. september 1999, Fracasso og Leitschutz, vedrørende Bygge- og anlægsdirektivet, og dom af 18. juni 2002, HI Hospital Ingenieure, vedrørende Tjenesteydelsesdirektivet.

EF-domstolen udtalte videre, at der ikke er grund til at fortolke bestemmelser under samme fællesskabsretlige område forskelligt, dvs. at EF-reglerne om udbyderes annullation af udbud er de samme, uanset hvilket udbudsdirektiv udbudet er foretaget under.

(Det fremgår, at dette i hvert fald gælder for udbud under Bygge- og anlægsdirektivet, Indkøbsdirektivet og Tjenesteydelsesdirektivet, og det gælder formentlig også for udbud under Forsyningsvirksomhedsdirektivet.)

EF-domstolens beskrivelse af reglerne om udbyderes annullation af udbud er i det væsentligste indeholdt i domstolens henvisning til de to omtalte tidligere domme. Beskrivelsen kan sammenfattes således:

Udbydernes annullation af udbud er ikke reguleret i udbudsdirektiverne, men er undergivet fællesskabsrettens grundlæggende principper, dvs. principperne om etableringsfrihed, fri udveksling af tjenesteydelser, ligebehandling, gennemsigtighed og forbud mod forskelsbehandling på grundlag af nationalitet. Det er ikke en betingelse, at en annullation kun sker i undtagelsestilfælde eller har vægtige grunde.

EF-domstolen besvarede herefter det omformulerede spørgsmål med, at en udbyder kan annullere et udbud som omhandlet i spørgsmålet, forudsat at udbyderen ved sin beslutning om annullationen overholder fællesskabsrettens grundlæggende principper, såsom ligebehandlingsprincippet.

4. december 2003, sag C-448/01, EVN og Wienstrom

Levering af energi fra vedvarende energikilder kan anvendes som underkriterium og kan vægtes højt, men udbyderen skal kunne kontrollere kriteriets opfyldelse, og kriteriet skal angå kontraktens genstand. En udbyder skal annullere udbudet, hvis et klageorgan har annulleret et underkriterium som ulovligt

Sagen angik et udbud af levering af elektricitet, og det fremgår, at udbyderen ønskede, at der i videst muligt omfang skulle leveres strøm fra vedvarende energikilder, dvs. vandkraft m.m. Dommen synes ikke at indeholde en egentlig forklaring på, hvorfor dette ønske fandt udtryk på den måde, der beskrives nedenfor.

Den østrigske stat udbød som offentligt udbud i henhold til Indkøbsdirektivet en rammekontrakt vedrørende levering af elektricitet i en periode på to år til alle offentlige bygninger i et nærmere angivet område. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud på grundlag af følgende underkriterier: Pris, der ville blive vægtet 55%, og energi fra vedvarende energikilder, der ville blive vægtet 45%.

I udbudsbetingelserne anførtes: Udbyderen var bekendt med, at en forsyningsvirksomhed af tekniske grunde ikke kan garantere, at strøm til en

bestemt aftager hidrører fra vedvarende energikilder, men kun virksomheder, der i de foregående to år havde rådet, eller i de kommende to år ville råde, over energi fra vedvarende energikilder svarende til det forventede udbudte forbrug, ville komme i betragtning.

Det anførtes desuden bl.a., at der med hensyn til underkriteriet om energi fra vedvarende energikilder kun ville blive taget hensyn til den elektricitetsmængde fra sådanne kilder, som tilbudsgiveren var i stand til at levere ud over det forventede udbudte forbrug. Dette var efter det oplyste begrundet i et ønske om forsyningssikkerhed.

En tilbudsgiver, der ikke fik tildelt kontrakten, klagede til et østrigsk klageorgan (Bundesvergabeamt), som stillede nogle spørgsmål til EF-domstolen.

EF-domstolen tog stilling til sagen således (Klagenævnets litrering, omformuleret og stærkt sammentrængt af overskuelighedsgrunde):

1) Kan et kriterium om energi fra vedvarende energikilder anvendes som underkriterium til tildelingskriteriet det økonomisk mest fordelagtige bud?

Besvaret bekræftende med formulering svarende til formuleringen vedrørende miljøkriterier i EF-domstolens dom af 17. september 2002, Concordia Bus Finland, til hvilken der også henvistes.

(Dvs. at der kan tages hensyn til miljøkriterier, der er forbundet med kontraktens genstand, som ikke tillægger udbyderen et ubetinget frit valg, som er nævnt udtrykkeligt i udbudet, og som overholder fællesskabsrettens grundlæggende principper.)

2) Er det tilladeligt at vægte et underkriterium om energi fra vedvarende energikilder så højt som 45%?

Besvaret med, at dette er tilladeligt. Herved bl.a. henvist til, at fællesskabet tillægger det stor vægt, at de vedvarende energikilders andel i elektricitetsproduktionen forøges, jf. direktiv 2001/77 om fremme af elektricitet produceret fra vedvarende energikilder.

3) Er det tilladeligt at bruge et underkriterium om energi fra vedvarende energikilder, når udbyderen ikke kan kontrollere underkriteriets opfyldelse (hvilket udbyderen i den konkrete sag som nævnt havde erklæret at være ude af stand til)?

Besvaret med, at dette ikke er tilladeligt. Herved udtalt, at en objektiv og gennemsigtig vurdering af tilbudene forudsætter, at udbyderen faktisk er i stand til at vurdere, om tilbudene opfylder underkriterierne. Et underkriterium, hvortil der ikke er knyttet krav, der gør det muligt at foretage en effektiv kontrol med nøjagtigheden af de tilbudsgivernes oplysninger, er derfor i strid med de fællesskabsretlige regler for offentlige kontrakter.

Det østrigske klageorgan havde henvist til, at udbyderen ikke havde krævet redegørelser for tilbudsgivernes leveringsforpligtelser og kontrakter om elektricitetsforsyning. Dette sigtede øjensynlig til, at udbyderen ved at kræve sådanne redegørelser kunne have opnået en vis kontrol med hensyn til tilbudsgivernes opfyldelse af kravet om rådighed over strøm fra vedvarende energikilder, og i hvilket omfang tilbudsgiverne kunne levere sådan strøm. EF-domstolen omtalte ikke emnet i sin begrundelse.

4) Var det tilladeligt, at udbyderen ikke havde fastsat et bestemt tidspunkt, på hvilket kravet om rådighed over strøm fra vedvarende energikilder skulle være opfyldt?

(Idet dette krav tilsyneladende kunne opfyldes ved en sådan rådighed på et eller andet tidspunkt i de foregående eller kommende to år)

Besvaret med, at forholdet kunne være en tilsidesættelse af principperne om ligebehandling og gennemsigtighed, hvis forholdet gjorde det vanskeligt eller umuligt for tilbudsgiverne at kende den nøjagtige rækkevidde af det omhandlede krav og at fortolke det på samme måde. Det tilkom det østrigske klageorgan at vurdere spørgsmålet.

5) Var det tilladeligt, at vurderingen med hensyn til tilbudenes opfyldelse af underkriteriet om energi fra vedvarende energikilder skulle angå den elektricitetsmængde, der oversteg det forventede forbrug i henhold til udbudet, i stedet for den elektricitet, der kunne leveres i henhold til dette?

Besvaret med at dette ikke var tilladeligt. Bl.a. udtalt, at underkriteriet som følge af forholdet ikke kunne anses for at være forbundet med kontraktens genstand, og at underkriteriet derfor kunne medføre en uberettiget forskelsbehandling af tilbudsgiverne.

6) Er første kontroldirektiv til hinder for en national regel, hvorefter et klageorgans annullation af en ulovlig beslutning er betinget af, at den ulovlige beslutning har haft væsentlig betydning for udbudsprocedurens udfald?

(Spørgsmålet sigtede til, at den østrigske lovgivning om offentlige kontrakter indeholder en sådan regel.)

Henvist til, at det østrigske klageorgan ikke havde givet nogen forklaring med hensyn til, om spørgsmålets besvarelse var nødvendig for afgørelsen af den foreliggende tvist. Spørgsmålet måtte derfor anses for hypotetisk, hvorfor det ikke kunne antages til realitetsbehandling,

7) Medfører EU-reglerne om offentlige kontrakter pligt for en ordregivende myndighed til at annullere et udbud, når et klageorgan har statueret, at et af de fastsatte underkriterier er ulovligt og derfor har annulleret udbyderens beslutning om at anvende underkriteriet?

Besvaret med, at EU-reglerne medfører en sådan pligt. Herved udtalt, at hvis et klageorgan annullerer en beslutning vedrørende et underkriterium, kan den ordregivende myndighed ikke fortsætte udbudsproceduren og se bort fra underkriteriet, idet dette ville være det samme som at ændre underkriterierne.

Dette spørgsmål skulle tilsyneladende ses på baggrund af, at den østrigske lovgivning om offentlige kontrakter indeholder en regel, hvorefter et klageorgan ikke kan annullere udbyderens beslutninger, når kontrakten er tildelt.

Den nærmere rækkevidde af besvarelsen forekommer usikker, men det er muligt, at besvarelsen kan fortolkes således: En ordregiver har pligt til at annullere et udbud i alle tilfælde, hvor ordregiveren bliver opmærksom på en ulovlighed ved udbudet.

Retten i Første Instans' kendelse af 14. januar 2004 i sag T-202/02, Makedoniko Metro og Michaniki mod Kommissionen

Et erstatningskrav mod Kommissionen i anledning af henlæggelse af en klage afvist. Desuden afvist en påstand om pålæg til Kommissionen

Kendelsen angår samme udbud som EF-domstolens dom af 23. januar 2003 i sag C-57/01, Makedoniko Metro og Michaniki.

Der var tale om et græsk udbud vedrørende projektering og opførelse m.m. af en metro. Der indkom tilbud fra nogle konsortier, herunder fra et konsortium M. Udbyderen indledte forhandlinger med M, men afbrød senere forhandlingerne. M klagede til et græsk klageorgan, der imidlertid

afviste sagen med henvisning til, at der var sket ændringer i M's sammensætning efter indgivelsen af M's tilbud.

M appellerede til en overinstans, der forelagde sagen for EF-domstolen. Ved dommen af 23. januar 2003 udtalte EF-domstolen bl.a., at det dagældende bygge- og anlægsdirektiv ikke var til hinder for nationale regler, der forbyder ændring i en tilbudsgivers sammensætning efter tilbuddets indgivelse.

Sideløbende med klagen til de græske klagemyndigheder havde M klaget til Kommissionen, der efter at have indhentet forskellige oplysninger m.m. besluttede ikke at foretage sig videre.

M anlagde derefter sag mod Kommissionen ved Retten i Første Instans, dels med påstand om erstatning som følge af Kommissionens beslutning om ikke at foretage sig videre i anledning af M's klage, dels med påstand om, at Retten skulle pålægge Kommissionen at sende en note til alle sine tjenestegrene med henblik på at genoprette M's navn og ære.

Rettens kendelse af 14. januar 2004 afviste begge M's påstande og dermed sagen i sin helhed.

Med hensyn til erstatningspåstanden henviste Retten til, at Kommissionen ikke er forpligtet til at indlede en traktatbrudsprocedure, hvorfor Fællesskabet ikke kan blive erstatningsansvarligt for Kommissionens undladelse af at indlede en sådan procedure (præmis 43). Retten henviste videre til, at Kommissionen ikke har pligt til at iværksætte den særlige procedure i § 3 i 1. kontroldirektiv (hvorefter Kommissionen kan henvende sig til en medlemsstat m.m. i anledning af overtrædelser af udbudsreglerne, præmis 50).

Med hensyn til påstanden om et pålæg til Kommissionen om at genoprette M's navn og ære henviste Retten til, at Fællesskabets Retsinstanser ikke kan påbyde en fællesskabsinstitution at træffe foranstaltninger (præmis 53).

12. februar 2004, sag C-230/02, Grossmann Air Service

Der er klageadgang for potentielle tilbudsgivere, men klager fra sådanne over diskriminerende udbudsbetingelser skal indgives straks og må ikke afvente udbudets afslutning. Der må ikke stilles krav om inddragelse af et mæglingsorgan før en klage

Det østrigske finansministerium foretog i juli 1998 et udbud af charterflyvning for regeringen og dens delegationer. Udbudet synes at være foretaget som EU-udbud, men det fremgår ikke, i henhold til hvilket direktiv udbudet skete, og om udbudet var begrænset eller offentligt.

En virksomhed, Grossmann, indhentede udbudsbetingelserne, men afgav ikke tilbud.

I begyndelsen af oktober 1998 gav udbyderen Grossmann underretning om, at man ville tildele kontrakten til en nærmere angivet tilbudsgiver, og udbyderen må i forbindelse hermed have givet den valgte tilbudsgiver underretning om tildelingen.

Nogle uger senere klagede Grossmann til et klageorgan, Bundesvergabeamt. Efter det foreliggende gjorde Grossmann over for klageorganet gældende, at udbudsbetingelserne indeholdt nogle diskriminerende krav, dvs. krav, som kun den valgte tilbudsgiver kunne opfylde.

I januar 1999 afviste Bundesvergabeamt klagen med henvisning til a) at Grossmann ikke havde retlig interesse i at klage, idet Grossmann ikke kunne levere alle de udbudte ydelser, b) at Grossmann ikke havde afgivet

tilbud og c) at Bundesvergabeamt ikke havde kompetence til at annullere en indgået kontrakt. Afgørelsen blev truffet med henvisning til nogle regler i den østrigske lovgivning om offentlige kontrakter.

I december 2001 ophævede den østrigske forfatningsdomstol Bundesvergabeamts afgørelse med den begrundelse, at Bundesvergabeamt ikke havde forelagt sagen for EF-domstolen til afklaring af, om Bundesvergabeamts fortolkning af en af de omtalte regler i den østrigske lovgivning var forenelig med EU-retten.

Sagen verserede herefter igen for Bundesvergabeamt, der i maj 2002 forelagde sagen for EF-domstolen med nogle spørgsmål. EF-domstolen omformulerede spørgsmålene og udtalte herefter (af forståelsesgrunde stærkt sammentrængt og til dels omformuleret):

1) Første kontroldirektiv er ikke til hinder for at afvise en klage over et udbud fra en virksomhed, der ikke har afgivet tilbud, fordi man fandt udbudsbetingelserne diskriminerende, men som ikke har klaget over udbudsbetingelserne før kontraktens tildeling.

2) Første kontroldirektiv er derimod til hinder for at afskære en klage med den begrundelse, at klageren ikke har indbragt sagen for et mæglingsorgan.

Det synes at fremgå, at udtalelsen under punkt 1) skal forstås således:

Det forhold, at en klager ikke har afgivet tilbud i henhold til det udbud, der klages over, kan ikke i sig selv begrunde afvisning af klagen. Tværtimod kan der være klageadgang for en virksomhed, der har afstået fra at afgive tilbud som følge af diskriminerende vilkår i udbudsbetingelserne. (Præmis 29.)

Derimod er det i overensstemmelse med første kontroldirektiv at afvise en klage fra en sådan virksomhed, hvis klagen først er indgivet efter meddelelsen om kontraktens tildeling, idet en sådan afvisning ikke kan skade den effektive virkning af første kontroldirektiv. Tværtimod strider det mod første kontroldirektivs formål om hurtighed og effektivitet, at en sådan virksomhed først indgiver klage efter meddelelsen om kontraktens tildeling. (Præmis 37-39.)

Udtalelsen under punkt 2) svarer ganske til den tilsvarende udtalelse i EF-domstolens dom af 19. juni 2003 i sagen Fritsch, Chiari & Partner mfl., til hvilken der også henvises i den her resumerede dom.

18. marts 2004, C-314/01, Siemens og ARGE Telekom & Partner

Ordregiver må i opfyldelsesfasen begrænse brugen af underentreprenører, hvis formåen ikke har kunnet efterprøves i udvælgelsesfasen

En østrigsk myndighed foretog i september 1999 et begrænset udbud i henhold til Tjenesteydelsesdirektivet vedrørende etablering af et landsdækkende edb-system baseret på chipkort. Der er tilsyneladende tale om et system for personoplysninger i stil med fx det danske system for sygesikringskort.

I udbudsbetingelserne var angivet, at underentreprise var tilladt for indtil 30% af arbejderne under forudsætning af, at tilbudsgiveren beholdt visse centrale dele af ydelsen.

Der indkom tilbud fra fire prækvalificerede tilbudsgivere, hvorefter udbyderen i december 2000 tilkendegav, at man ville indgå kontrakt med en af tilbudsgiverne.

Der foregik herefter en klagesag for et klageorgan, Bundesvergabeamt. Klagesagen havde et kompliceret forløb.

Først klagede de tre tilbudsgivere, der ikke havde fået tildelt kontrakten, til Bundesvergabeamt med påstand om annullation af tildelingsbeslutningen, subsidiært om annullation af udbudet.

Den 19. marts 2001 afviste Bundesvergabeamt klagen med begrundelse, at klagerne som følge af forskellige forhold ikke havde retlig interesse i at klage.

Den 28. og 29. marts 2001 klagede to af de tre tilbudsgivere til Bundesvergabeamt med påstand om annullation af en beslutning fra udbyderen om ikke at tilbagekalde udbudet m.m. Bundesvergabeamt tillagde den nye klage opsættende virkning, idet Bundesvergabeamt pålagde udbyderen ikke at indgå kontrakt indtil 20. april 2001. Den 20. april 2001 annullerede Bundesvergabeamts udbyderens beslutning om ikke at tilbagekalde udbudet.

Desuagtet indgik udbyderen den 23. april 2001 kontrakt med den valgte tilbudsgiver bl.a. med henvisning til, at Bundesvergabeamts afgørelse af 20. april 2001 ikke var retligt bindende, fordi afgørelsen var vanskeligt forståelig. Udbyderen indbragte endvidere afgørelsen af 20. april 2001 for den østrigske forfatningsdomstol.

Den 30. april 2001 klagede en af tilbudsgiverne til Bundesvergabeamt over forskellige beslutninger truffet af udbyderen, og den 17. maj 2001 indgav en anden af tilbudsgiverne en lignende klage til Bundesvergabeamt.

Den 12. juni 2001 ophævede forfatningsdomstolen Bundesvergabeamts afgørelse af 19. marts 2001 om afvisning af den oprindelige klage. Forfatningsdomstolen henviste herved til, at Bundesvergabeamt burde have forelagt sagen for EF-domstolen. Den 2. marts 2002 ophævede forfatningsdomstolen Bundesvergabeamts afgørelse af 20. april 2001 med henvisning til, at afgørelsen gik ud på en logisk umulighed.

Sagen verserede herefter igen for Bundesvergabeamt, der ved kendelse af 11. juli 2001 stillede fire spørgsmål til EF-domstolen, som tog stilling til spørgsmålene ved den her resumerede dom.

EF-domstolen afviste tre af spørgsmålene som hypotetiske, men besvarede det fjerde spørgsmål. Dette spørgsmål kan meget kort gengives således:

Skal en kontrakt, der er tildelt i henhold til et EU-udbud, anses for ugyldig, hvis udbudsbetingelserne indeholdt en bestemmelse, der strider mod EU-retten, og hvis ulovlige kontrakter er ugyldige efter national ret?

Forståelsen af spørgsmålet forudsætter lidt forklaring.

a) Omtalen af en bestemmelse, der strider mod EU-retten, sigtede til udbudsbetingelsernes klausul om, at underentreprise (kun) var tilladt for 30 % af arbejderne og under forudsætning af, at tilbudsgiveren beholdt visse centrale dele af ydelsen.

Bundesvergabeamt anså øjensynlig denne klausul for at være i strid med EF-domstolens dom af 2. december 1999 i sagen Holst Italia. I henhold til denne dom kan der ved udbud i henhold til Tjenesteydelsesdirektivet som dokumentation for egnethed henvises til ressourcer hos andre under forudsætning af, at der virkelig rådes over disse ressourcer. En lignende afgørelse med hensyn til Bygge- og anlægsdirektivet er dom af 18. december 1997, Ballast Nedam Groep.

b) At spørgsmålet gik ud på, om en kontrakt som omhandlet skal anses for »ugyldig«, sigtede til en regel i den østrigske lovgivning, hvorefter aftaler, der strider mod lov og ærbarhed, er ugyldige.

I sammenhængen bemærkes, at Dansk ret indeholder en lignende regel, jf. herved Danske Lovs 5-1-2. Ingen har vist i Danmark har gjort gældende, at kontrakter indgået i strid med EU's udbudsregler skulle være ugyldige som følge heraf.

EF-domstolen udtalte (stærkt sammentrængt):

Tjenesteydelsesdirektivet er ikke til hinder for begrænsning i brugen af underentreprise, når den ordregivende myndighed ikke har været i stand til at efterprøve underentreprenørernes formåen i forbindelse med vurderingen af tilbudene og valget af tilbudsgiver, præmis 45 og 46. Den omhandlede klausul i udbudsbetingelserne angik imidlertid ikke udvælgelses- og vurderingsfasen. Klausulen angik derimod den fase, hvor kontrakten skulle opfyldes, og klausulen tilsigtede at undgå, at centrale dele af arbejdet blev udført af enheder, hvis formåen udbyderen ikke havde kunnet efterprøve ved udvælgelsen, præmis 47. Det tilkom Bundesvergabeamt at efterprøve, om dette forholdt sig således, samme præmis.

EF-domstolen besvarede herefter Bundesvergabeamts spørgsmål således (stærkt sammentrængt): 1. kontroldirektiv medfører pligt for medlemsstaterne til at give mulighed for, at der kan klages over udbudsbetingelser, som er i strid med EU's udbudsregler.

24. juni 2004, sag C-212/02, Kommissionen mod Østrig

Det følger af kontroldirektiverne, at alle tilbudsgivere skal have underretning om tildelingsbeslutningen, og at der derefter skal gå rimelig tid inden kontraktsindgåelsen

Sagen var anlagt af Kommissionen med påstand om, at EF-domstolen skulle konstatere, at Østrig ikke havde overholdt sine forpligtelser i henhold til kontroldirektiverne som følge af, at den østrigske lovgivning ikke i alle tilfælde åbnede mulighed for forbigåede tilbudsgivere for at få udbyderens tildelingsbeslutning annulleret.

Det fremgår, at de østrigske klageorganer ikke har kompetence til at annullere udbyderens beslutning om at indgå kontrakt med den valgte tilbudsgiver, når kontrakten først er indgået. Kommissionen henviste til, at efter østrigsk lovgivning faldt tildelingsbeslutningen endvidere sammen med kontraktsindgåelsen, ligesom almindeligvis kun den valgte tilbudsgiver fik underretning om tildelingsbeslutningen. Disse forhold førte ifølge Kommissionen til, at forbigåede tilbudsgivere i visse tilfælde var afskåret fra at opnå annullation af udbyderens tildelingsbeslutning.

Kommissionen fik medhold. EF-domstolen udtalte bl.a. (en del sammentrængt): Af kontroldirektiverne følger, at alle tilbudsgivere skal have underretning om tildelingsbeslutningen før kontraktsindgåelsen, og at der skal gå en rimelig tid mellem denne underretning og kontraktsindgåelsen (præmisserne 21 og 23).

Det synes at fremgå af dommen, at de østrigske regler er blevet ændret i overensstemmelse med Kommissionens synspunkter, men at dette er sket efter udløbet af en frist, der var fastsat af Kommissionen i dennes begrundede udtalelse, hvorfor der ikke kunne tages hensyn til det (præmis 27-28).

Retten i Første Instans' kendelse af 27. juli 2004 i sag T-148/04 R, TQ3 Travel Solutions Belgium mod Kommissionen

Det er en betingelse for opsættende virkning, at der foreligger uopsættelighed. Denne betingelse forudsætter, at manglende opsættende virkning medfører et alvorligt og uopretteligt tab hos den, der har fremsat begæringen om opsættende virkning, og dette vil i princippet ikke være tilfældet, hvis der kan betales erstatning. I den foreliggende sag var betingelsen kun opfyldt, hvis manglende opsættende virkning ville true sagsøgerens eksistens, hvilket imidlertid ikke var tilfældet

Kendelsen angår spørgsmålet om opsættende virkning i den sag, der blev afgjort ved Rettens dom af 6. juli 2005 i sag T-148/04. Sagen var anlagt af en tilbudsgiver, der ikke havde fået tildelt kontrakten i henhold til et udbud. Med hensyn sagens faktum henvises til Klagenævnets resumé af dommen af 6. juli 2005.

Ved kendelsen af 27. juli 2004 bestemte Retten, at sagsanlægget ikke skulle have opsættende virkning, Retten begrundede denne afgørelse med, at det bl.a. er en betingelse for opsættende virkning, at der foreligger uopsættelighed, og at denne betingelse ikke var opfyldt.

Retten udtalte herunder om kravene til at anse betingelsen om uopsættelighed for opfyldt: Den part, der har fremsat begæring om opsættende virkning, skal udsættes for et alvorligt og uopretteligt tab, hvis der ikke gives opsættende virkning (præmis 41), og en økonomisk skade kan i princippet ikke betragtes som uoprettelig eller blot vanskeligt oprettelig, hvis der senere kan betales erstatning (præmis 43). I den foreliggende sag var begæringen om opsættende virkning kun tilstrækkeligt begrundet, hvis manglende opsættende virkning ville true sagsøgerens eksistens (præmis 46), men noget sådant var ikke oplyst (præmis 48 og følgende). En ikke-økonomisk skade vedrørende sit renommé, som sagsøgeren havde påberåbt sig, kunne heller ikke begrunde opsættende virkning (præmis 54-55).

9. september 2004, sag C-125/03, Kommissionen mod Tyskland

Tyskland havde overtrådt Tjenesteydelsesdirektivet som følge af manglende EU-udbud. EF-domstolen behandler en sag om en medlemsstats overtrædelse af fællesskabsretten, selvom medlemsstaten har erkendt overtrædelsen

Sagen drejede sig om nogle kontrakter om afhentning af affald, indgået af nogle tyske kommuner.

De pågældende kontrakter var indgået uden EU-udbud, og Tyskland erkendte, at dette var en overtrædelse af Tjenesteydelsesdirektivet. Sagen drejede sig kun, om hvorvidt EF-domstolen skulle tage spørgsmålet under realitetsbehandling.

Kontrakterne havde løbet til den 31. december 2003, dvs. længe efter udløbet af den frist for at bringe overtrædelserne til ophør, som Kommissionen havde fastsat i sin begrundede udtalelse. Det synes at fremgå, at der ikke havde været hjemmel efter tysk ret til at bringe kontrakterne til ophør på et tidligere tidspunkt, således at den eneste mulige sanktion i anledning af overtrædelsen af Tjenesteydelsesdirektivet var erstatningsansvar for de pågældende kommuner.

Tyskland havde over for Kommissionen erkendt, at kontrakterne var indgået i strid med Tjenesteydelsesdirektivet, og Tyskland havde over for Kommissionen givet tilsagn om, at det ville blive sikret, at tilsvarende

overtrædelser ikke fandt sted i fremtiden. Tyskland gjorde gældende, at disse tilkendegivelser var tilstrækkelig overholdelse af de krav, som Kommissionen havde stillet til Tyskland i sin begrundede udtalelse, således at der ikke forelå en overtrædelse, som EF-domstolen skulle tage stilling til.

EF-domstolen udtalte (temmelig sammentrængt):

Første kontroldirektiv giver medlemsstaterne mulighed for at begrænse sanktionen for overtrædelse af udbudsreglerne til erstatningsansvar, når kontrakten er indgået. Dette er imidlertid ikke ensbetydende med, at offentlige ordregivere under alle omstændigheder skal anses for at have handlet i overensstemmelse med fællesskabsretten (præmis 15). Endvidere afskar det ikke EF-domstolen fra at behandle sagen, at Tyskland havde erkendt overtrædelsen. I modsat fald kunne medlemsstaterne blot ved at erkende en overtrædelse afskære EF-domstolen fra at tage stilling til overtrædelsen og fastslå dens grundlag (præmis 16).

Tyskland fik herefter ikke medhold i sit anbringende om, at EF-domstolen ikke skulle tage sagen under realitetsbehandling, og EF-domstolen statuerede, at Tyskland havde overtrådt Tjenesteydelsesdirektivet ved, at de omtalte kontrakter ikke var indgået i overensstemmelse med direktivet.

14. september 2004, sag C-385/02, Kommissionen mod Italien

Bygge- og anlægsdirektivet overtrådt som følge af manglende EU-udbud. Betingelserne for udbud efter forhandling i artikel 7, stk. 3, var ikke opfyldt. En særlig formulering i den italienske version af direktivet var uden betydning

En italiensk ordregivende myndighed indgik uden EU-udbud kontrakter om opstemning og vandstandsregulering af nogle bjergfloder. Kommissionen anlagde sag mod Italien ved EF-domstolen og gjorde gældende, at de omtalte kontrakter skulle have været udbudt i medfør af Bygge- og anlægsdirektivet.

Italien gjorde gældende, at der ikke var udbudspligt, fordi kontrakterne var omfattet af Bygge- og anlægsdirektivets artikel 7, stk. 3, hvorefter der i forskellige tilfælde kan indgås bygge- og anlægskontrakter efter forhandling uden forudgående udbudsbekendtgørelse. Der forelå under sagen spørgsmål, om kontrakterne var omfattet af følgende bestemmelser i artikel 7, stk. 3 (referatet nedenfor af EF-domstolens udtalelser er stærkt sammentrængt):

Litra b) bl.a. om arbejder, der af tekniske årsager kun kan overdrages til en bestemt entreprenør: EF-domstolen udtalte, at det var Italien, der skulle bevise, at der var tale om et sådant arbejde. Italien havde imidlertid kun påberåbt sig forholdet i generelle vendinger og var ikke fremkommet med en detaljeret redegørelse. Bestemmelsen kunne herefter ikke finde anvendelse.

Litra c) om tilfælde af tvingende nødvendighed, der under ingen omstændigheder må kunne tilskrives den ordregivende myndighed: EF-domstolen udtalte, at bestemmelsens betingelser ikke var opfyldt, og henviste desuden bl.a. til, at nogle påberåbte forhold skyldtes ordregiverens egen planlægning.

Litra e) om arbejder, der er en gentagelse af tilsvarende arbejder, dog kun på visse betingelser, herunder at bestemmelsen kun kan benyttes in-

den for tre år efter indgåelsen af den oprindelige kontrakt: EF-domstolen udtalte, at bestemmelsen ikke fandt anvendelse som følge af, at treårsfristen var overskredet.

Italien gjorde på dette punkt gældende, at artikel 7, stk. 3, e) skal forstås således, at treårs-fristen løber fra færdiggørelsen af arbejdet i henhold til den oprindelige kontrakt. Italien byggede dette anbringende på den italienske version af Bygge- og anlægsdirektivet.

EF-domstolen gennemgik de danske, engelske, spanske og portugisiske versioner af direktivet og konstaterede herefter, at artikel 7, stk. 3, e) går ud på, at treårs-fristen løber fra indgåelsen af den oprindelige kontrakt. EF-domstolen henviste herved til, at der er tale om en undtagelsesbestemmelse, som skal fortolkes snævert. EF-domstolen henviste videre til, at det følger af retssikkerhedshensyn, at treårs-fristens begyndelsestidspunkt skal kunne fastlægges med sikkerhed og på objektiv måde. Det var uden betydning, om der havde været tale om en undskyldelig retsvildfarelse som følge af den italienske udformning af bestemmelsen.

EF-domstolen konstaterede herefter, at Italien havde overtrådt Bygge- og anlægsdirektivet som følge af, at der ikke var sket EU-udbud af de omtalte kontrakter.

14. oktober 2004 i sag C-340/02, Kommissionen mod Frankrig

Det følger af principperne om ligebehandling og gennemsigtighed, at et udbud klart skal definere kontraktens art og kriterierne for tildeling af den. Der kunne ikke indgås kontrakt om projektering m.m. på grundlag af en projektkonkurrence om analyse. Bistand ved valg af tilbudsgiver er ikke omfattet af Tjenesteydelsesdirektivets regler om projektkonkurrencer

En fransk ordregivende myndighed skulle ombygge et rensningsanlæg for at få det til at opfylde nogle europæiske miljønormer. Arbejdet med projektering og udførelse af ombygningen blev opdelt tre faser, nemlig:

1. fase: Analyse af, hvad der skulle gøres.

2. fase: Detailprojektering med konsekvensanalyse og bistand ved udvælgelsen af tilbudsgivere til arbejdets udførelse.

3: fase: Indhentelse af tilbud på arbejdets udførelse og udførelse af arbejdet.

Den ordregivende myndighed afholdt en projektkonkurrence vedrørende 1. fase efter EU-udbud herom, hvorefter myndigheden tildelte opgaven i henhold til 2. fase til vinderen af projektkonkurrencen. Der blev derefter foretaget et EU-udbud vedrørende 3. fase.

Under sagen gjorde Kommissionen gældende, at opgaven i henhold til 2. fase skulle have været udbudt særskilt i henhold til Tjenesteydelsesdirektivet.

Frankrig gjorde heroverfor gældende (Klagenævnets litrering):

1. Udbud af opgaven i henhold til 2. fase havde ikke været nødvendig, fordi det i udbudet af projektkonkurrencen om 1. fase var anført, at vinderen af projektkonkurrencen kunne anmodes om at medvirke ved gennemførelsen af sit forslag som led i den kontrakt, der skulle indgås om opgaven i 2. fase.

2. Der kunne indgås kontrakt om 2. fase uden forudgående udbudsbekendtgørelse i medfør af Tjenesteydelsesdirektivets artikel 11, stk. 3, litra c. (I henhold til denne bestemmelse kan der indgås aftale uden forudgående udbudsbekendtgørelse, når aftalen er et led i en projektkonkurrence, i hvis vilkår det er fastsat, at kontrakt skal indgås med vinderen.)

Frankrig fik ikke medhold.

Ad Frankrigs første anbringende udtalte EF-domstolen: Ligebehandlingsprincippet i Tjenesteydelsesdirektivets artikel 3, stk. 2, og gennemsigtighedsprincippet kræver, at enhver kontrakts genstand og kriterierne for tildeling af den defineres klart. Dette er nødvendigt for vurderingen af, hvilken af de i Tjenesteydelsesdirektivet fastsatte fremgangsmåder, der skal følges. Den blotte mulighed for tildeling af en kontrakt på grundlag af tildelingskriterier for en anden kontrakt er ikke tilstrækkelig (præmis 34-36).

Ad Frankrigs andet anbringende udtalte EF-domstolen: Tjenesteydelsesdirektivets artikel 11, stk. 3, litra c, er en undtagelse fra et grundlæggende traktatprincip og må derfor fortolkes snævert. I hvert fald den del af opgaven i henhold til 2. fase, der gik ud på bistand ved udvælgelse af tilbudsgivere, var ikke et planlægnings- eller projekteringsarbejde, der er omfattet af definitionen af projektkonkurrencer i direktivets artikel 1, litra g. Endvidere må artikel 11, stk. 3, litra c, forstås sådan, at bestemmelsen kun omhandler tilfælde, hvor der er en direkte funktionel sammenhæng mellem projektkonkurrencen og den aftale, der indgås på grundlag af den, idet aftalen i henhold til bestemmelsen skal være »et led« i projektkonkurrencen. Opgaven i henhold til 2. fase havde imidlertid ikke været et led i projektkonkurrencen, idet denne kun havde angået 1. fase. Hertil kom: Betingelsen i artikel 11, stk. 3, litra c, om at det skal være fastsat i projektkonkurrencens vilkår, at aftale skal indgås med vinderen, var ikke opfyldt, idet det i vilkårene for projektkonkurrencen kun var angivet, at vinderen kunne anmodes om at medvirke i 2. fase. Tjenesteydelsesdirektivets artikel 11, stk. 3, litra c, fandt herefter ikke anvendelse (præmis 37-43).

Klagenævnet har i flere kendelser udtalt, at et EU-udbud skal indeholde en klar og præcis angivelse af, hvad der udbydes, eller en lignende formulering. Dette er i god overensstemmelse med EF-domstolens udtalelser ad Frankrig første anbringende.

En formel indsigelse, i hvilken Frankrig ikke fik medhold, er ikke omtalt i referatet ovenfor.

14. oktober 2004, sag C-275/03, Kommissionen mod Portugal

Den portugisiske lovgivning om offentlige myndigheders erstatningsansvar var i strid med første kontroldirektiv

Denne sag var indbragt af Kommissionen, fordi Portugal efter Kommissionens opfattelse ikke havde implementeret første kontroldirektiv fyldestgørende på grund af følgende: Efter den portugisiske lovgivning om offentlige myndigheders ansvar er det en betingelse for at få en offentlig myndighed pålagt erstatningsansvar, at den erstatningssøgende beviser, at den offentlige myndighed har handlet groft uagtsomt (»fautivement«) eller forsætligt.

Kommissionen gjorde gældende, at den omtalte regel i den portugisiske lovgivning er i strid med artikel 2 c) i første kontroldirektiv, hvorefter medlemsstaterne skal påse, at der er mulighed for at tilkende skadelidte personer skadeserstatning, og at reglen desuden er i strid med artikel 1, stk. 1, hvorefter medlemsstaterne skal sikre, at der kan indgives klage effektivt og navnlig så hurtigt som muligt. Kommissionen anførte herved, at det som følge af reglen er meget vanskeligt eller umuligt at få pålagt en offentlig ordregiver erstatningsansvar, og at det kan tage lang tid.

EF-domstolen tiltrådte Kommissionens synspunkter, og Kommissionen fik således medhold.

Portugal havde fremsat forskellige anbringender, bl.a. at reglen ikke håndhæves strengt i retspraksis, og at det kun skyldtes nærmere angivne indenrigspolitiske forhold, at en planlagt indførelse af en formodning for fejl ikke var gennemført.

EF-domstolen henviste heroverfor til, at det af hensyn til retssikkerheden er nødvendigt, at retsstillingen er klar og præcis. EF-domstolen henviste videre til, at bestemmelsen om, at det påhviler skadelidte at bevise, at der er handlet groft uagtsomt eller forsætligt, ikke var ophævet ved udløbet af den frist, der var fastsat i Kommissionens begrundede udtalelse. Domstolen henviste desuden til sin praksis, hvorefter en medlemsstat ikke kan påberåbe sig forhold i sin nationale retsorden som begrundelse for tilsidesættelse af forpligtelser i henhold til et direktiv.

Retten i Første Instans' kendelse af 10. november 2004 i sag T-303/04 R, Evropaïki Dynamiki mod Kommissionen

Det er en betingelse for opsættende virkning, at der foreligger uopsættelighed. Dette forudsætter, at den begærende part ville lide et uopretteligt tab, hvis der ikke meddeles opsættende virkning, hvilket ikke er tilfældet, hvis der senere kan betales erstatning. I den foreliggende sag var betingelsen om uopsættelighed kun opfyldt, hvis manglende opsættende virkning ville true klagerens eksistens eller ændre klagerens markedsposition uopretteligt, og dette var ikke tilfældet. Der var endvidere ikke årsagsforbindelse mellem det af klageren hævdede tab og den beslutning, som klageren ønskede udsat ved begæringen om opsættende virkning

Kommissionen iværksatte i 2001 et udbud vedrørende it-ydelser. Udbuddet var opdelt i flere delaftaler, herunder delaftale 4, der angik datastyring og informationssystemer, og delaftale 5, der angik internet og intranet. På grundlag af udbuddet indgik Kommissionen kontrakt med et konsortium vedrørende delaftale 4 og kontrakt med et andet konsortium, der omfattede en virksomhed E, vedrørende delaftale 5.

Ydelserne under delaftale 4 viste sig at have et væsentligt større omfang end forudsat, hvorimod ydelserne under delaftale 5 fik et mindre omfang.

I 2003 iværksatte Kommissionen et udbud vedrørende en it-ydelse om data- og informationssystemer, tilsyneladende til afløsning af delaftale 4. Et konsortium, der havde deltagelse af E, afgav tilbud i henhold til det nye udbud, men fik ikke tildelt kontrakten.

E anlagde derefter sag mod Kommissionen ved Retten i Første Instans og begærede sagsanlægget tillagt opsættende virkning, således at Kommissionens indgåelse af kontrakt i henhold til det nye udbud blev udsat. Rettens kendelse af 10. november 2004 angår spørgsmålet om opsættende virkning.

Retten udtalte i kendelsen (sammentrængt og til dels omformuleret gengivet):

Det er bl.a. en betingelse for opsættende virkning, at der foreligger uopsættelighed (præmis 41). Uopsættelighed forudsætter, at den begærende part ville lide et alvorligt og uopretteligt tab, hvis der ikke tillægges opsættende virkning (præmis 65).

Der forelå imidlertid ikke årsagsforbindelse mellem det af E hævdede tab og de dispositioner hos Kommissionen, som E's begæring om opsæt-

tende virkning angik. Retten henviste herved til følgende: Det, som E ønskede, var, at Kommissionen i videre omfang end sket ville gøre brug af delaftale 5 i henhold til det oprindelige udbud i stedet for at indgå kontrakt på grundlag af det nye udbud. E havde derimod ikke gjort gældende, at Kommissionens gennemførelse af det nye udbud var behæftet med fejl, og Kommissionen havde tilkendegivet, at den ikke ville gøre brug af delaftale 5 i stedet for ydelserne i henhold til det nye udbud. Den opsættende virkning, som E ønskede, ville således ikke have indvirkning på Kommissionens brug af delaftale 5. (Præmis 66 og følgende).

Selvom det skulle antages, at der var årsagsforbindelse mellem det af E hævdede tab og Kommissionens indgåelse af kontrakt i henhold til det nye udbud, var betingelsen om uopsættelighed alligevel ikke opfyldt. Et tab er ikke uopretteligt eller vanskeligt opretteligt, hvis der senere kan betales erstatning, og under de foreliggende omstændigheder ville der kun foreligge uopsættelighed, hvis manglende opsættende virkning ville true E's eksistens eller ændre E's markedsposition på uoprettelig vis (præmis 71 til 73). På grundlag af en gennemgang af E's situation konstaterede Retten herefter, at der ikke var tale om noget sådant (præmis 74 og følgende). Et af E hævdet ikke-økonomisk tab vedrørende E's renommé var ikke en skade som omtalt (præmis 82).

E's begæring om opsættende virkning blev herefter ikke taget til følge.

Efter kendelsen gjorde E over for Retten gældende, at der var fejl i kendelsens gennemgang af E's situation. Dette førte til, at Retten den 22. december 2004 i sag T-303/04 R II afsagde endnu en kendelse om opsættende virkning. Ved denne kendelse blev begæringen om opsættende virkning på ny afslået.

E hævede senere sagen, hvilket bl.a. fremgår af Rettens kendelse af 4. november 2008 i sag T-304/04 DEP.

18. november 2004, sag C-126/03, Kommissionen mod Tyskland

Udbudspligt, eventuelt som hasteprocedure, for en kommunes antagelse af underleverandør til affaldsbortskaffelse, som kommunen udførte for anden myndighed som kommerciel opgave, selvom den anden myndighed havde foretaget EU-udbud. Undtagelsesbestemmelsen i Tjenesteydelsesdirektivets artikel 11, stk. 3, d, skal fortolkes indskrænkende og kunne ikke anvendes. Ikke taget stilling til, hvordan medlemsstaten skulle gennemføre dommen

Et tysk regionalt aktieselskab foretog efter Tjenesteydelsesdirektivet et udbud af affaldsbortskaffelse i den pågældende region, Donauwald-regionen. En kommune, dvs. München Kommune, afgav tilbud i henhold til udbudet og fik tildelt opgaven i henhold til dette.

München Kommune indgik kontrakt med et renovationsselskab om renovationsselskabets udførelse af opgaven som underleverandør. Denne kontrakt blev indgået uden EU-udbud. Følgende synes at fremgå: Kontrakten mellem kommunen og renovationsselskabet blev indgået efter, at kommunen havde fået tildelt opgaven i henhold til regionens udbud. Renovationsselskabet havde imidlertid afgivet et tilbud til kommunen forinden, og kommunen havde ved sit tilbud til regionen oplyst, at opgaven ville blive udført af renovationsselskabet som underleverandør.

Sagen var anlagt af Kommissionen med påstand om konstatering af, at Tyskland havde overtrådt Tjenesteydelsesdirektivet ved, at München Kommune ikke havde foretaget EU-udbud af sin overladelse af opgavens

udførelse til et renovationsselskab. Tyskland påstod frifindelse, og det fremgår, at Tyskland til støtte herfor gjorde de anbringender gældende, der nævnes nedenfor.

EF-domstolen afgjorde sagen således:

1) Ad anbringender fra Tyskland dels om, at der ikke var tale om en offentlig aftale som omhandlet i Tjenesteydelsesdirektivets artikel 1, a, dels om at München Kommune ikke skulle anses for en ordregivende myndighed i henhold til artikel 1, b.

Tyskland henviste til støtte for disse anbringender til, at der var tale om en selvstændig økonomisk virksomhed, der klart var adskilt fra kommunens almennyttige virksomhed og underlagt konkurrence.

Anbringenderne ikke taget til følge navnlig med henvisning til, at lokale myndigheder er ordregivende myndigheder i henhold til direktivets artikel 1, b, og til, at artikel 1, a ikke sondrer mellem opgaver, der tjener til at imødekomme almenhedens behov, og andre opgaver (præmis 18).

2) Ad anbringende fra Tyskland om, at udbud ikke var nødvendigt, fordi regionen havde foretaget EU-udbud af opgaven:

Anbringendet ikke taget til følge med henvisning til, at der var tale om to forskellige aftaler (præmis 19).

3) Ad anbringende fra Tyskland om, at EU-udbud ikke var nødvendigt, fordi der ikke skete anvendelse af Münchens egne midler:

Anbringendet ikke taget til følge med henvisning til, at det omtalte forhold ikke er afgørende for udbudspligten (præmis 20).

4) Ad anbringende fra Tyskland om, at Tjenesteydelsesdirektivet ikke fandt anvendelse som følge af undtagelsesbestemmelsen i direktivets artikel 1, a, ii, sammenholdt med Forsyningsvirksomhedsdirektivets artikel 7. (Ifølge den sidstnævnte bestemmelse gælder Forsyningsvirksomhedsdirektivet under visse betingelser ikke for kontrakter, der indgås med henblik på videresalg eller udlejning til tredjemand).

Anbringendet ikke taget til følge med henvisning til, at Forsyningsvirksomhedsdirektivets artikel 7 kun gælder for aftaler, der er omfattet af Forsyningsvirksomhedsdirektivet, og at den aftale, som sagen angik, ikke var omfattet af Forsyningsvirksomhedsdirektivet (præmis 21).

5) Ad anbringende fra Tyskland om, at det ikke have været praktisk muligt at foretage EU-udbud, fordi München Kommune for at bevise sin tekniske formåen skulle meddele navnet på underentreprenøren ved sin afgivelse af tilbud i henhold til regionens udbud:

Anbringendet ikke taget til følge med henvisning til, at kommunen før sin afgivelse af tilbud til regionen kunne have foretaget et hasteudbud i henhold til reglerne herom i Tjenesteydelsesdirektivets artikel 20 (præmis 22).

6) Ad anbringende fra Tyskland om, at aftalen mellem kommunen og renovationsselskabet kunne være indgået ved udbud efter forhandling uden udbudsbekendtgørelse i medfør af Tjenesteydelsesdirektivets artikel 11, stk. 3, d. (Efter denne bestemmelse kan der under visse betingelser ske udbud efter forhandling uden udbudsbekendtgørelse, når det ikke er muligt at overholde de almindelige tidsfrister.)

Anbringendet ikke taget til følge. Bl.a. henvist til, at artikel 11, stk. 3, d, er en undtagelsesbestemmelse og derfor må fortolkes indskrænkende, og at bevisbyrden for, at bestemmelsens betingelser er opfyldt, påhviler den, der påberåber sig bestemmelsen. Desuden bl.a. henvist til, at kommunen som nævnt kunne have foretaget et hasteudbud. (Præmis 23).

7) Ad anbringende fra Tyskland om, at der ikke var pligt til at opsige kontrakten med renovationsselskabet, selvom Kommissionen fik medhold i sagen.

EF-domstolen tog ikke stilling til dette anbringende, men henviste blot til, at domstolen ved en traktatbrudsprocedure alene skal tage stilling til, om en fællesskabsbestemmelse er tilsidesat, og at det fremgår af traktatens artikel 228, stk. 1 EF, at den pågældende medlemsstat skal gennemføre de foranstaltninger, der er nødvendige til dommens opfyldelse.

Som det fremgår, blev ingen af Tysklands anbringender taget til følge, og EF-domstolen gav derfor Kommissionen medhold. EF-domstolen konstaterede således, at Tyskland havde overtrådt Tjenesteydelsesdirektivet ved, at München Kommunes aftale med renovationsselskabet var indgået uden EU-udbud.

Retten i Første Instans' kendelse af 22. december 2004 i sag T-303/04 R II, Evropaïki Dynamiki mod Kommissionen

Begæring om opsættende virkning på ny afslået

Ved denne kendelse blev en begæring fra en sagsøger om opsættende virkning afslået. Kendelsen er en fortsættelse af Rettens kendelse af 10. november i samme sag, betegnet med journalnummer T-303/04 R, der ligeledes afslog sagsøgerens begæring om opsættende virkning.

Der henvises til resuméet af kendelsen af 10. november 2004, hvor kendelsen af 22. december 2004 også er omtalt.

11. januar 2005, sag C-26/03, Stadt Halle mfl.

Der skal kunne klages over en ordregivende myndigheds beslutning om ikke at foretage EU-udbud. Der er udbudspligt ved en ordregivende myndigheds overladelse af udførelsen af en tjenesteydelse til et selskab, som den ordregivende myndighed ejer sammen med en eller flere private virksomheder

En tysk kommune, Stadt Halle, indgik uden EU-udbud kontrakt med et anpartsselskab, RPL Lochau, om bortskaffelse og behandling af affald. Anpartsselskabet ejes gennem nogle andre selskaber med ca. 75 % af kommunen og ca. 25 % af en privat virksomhed.

En virksomhed, der var interesseret i at få tildelt opgaven, klagede til en klageinstans, Vergabekammer, og nedlagde påstand om, at Stadt Halle skulle tilpligtes at foretage EU-udbud. Stadt Halle påstod klagen afvist med henvisning til den tyske lovgivning om offentlige kontrakter, idet denne lovgivning efter Stadt Halles opfattelse kun giver adgang til at klage, hvis der er indledt en formel udbudsprocedure, og således ikke giver adgang til at klage over beslutninger om ikke at foretage udbud. Stadt Halle gjorde desuden gældende, at der som følge af Stadt Halles kontrol over RPL Lochau var tale om en »in house-ydelse«, som ikke er omfattet af de EU-retlige udbudsregler.

Vergabekammer tog klagerens påstand til følge, hvorefter Stadt Halle indbragte sagen for en ankeinstans, Oberlandesgericht Naumburg. Ankeinstansen stillede en række spørgsmål til EF-domstolen. Det fremgår, at baggrunden for forelæggelsen for EF-domstolen var, at det var tvivlsomt, hvorledes den tyske lovgivning om offentlige kontrakter skulle forstås med hensyn til de punkter, som Stadt Halles anbringender vedrørte.

EF-domstolen omformulerede de første af spørgsmålene til at gå ud på følgende (af forståelsesgrunde stærkt sammentrængt og delvis omformuleret):

1) Fra hvilket tidspunkt i en anskaffelsesprocedure skal der være klageadgang i henhold til første kontroldirektiv, og er det en betingelse for klageadgangen, at der er iværksat en formel udbudsprocedure?

2) Er der udbudspligt, når en ordregivende myndighed ønsker at overlade en tjenesteydelse til et selskab, som den ordregivende myndighed selv ejer majoriteten af?

EF-domstolen besvarede spørgsmålene således (af forståelsesgrunde omformuleret og stærkt sammentrængt):

Ad spørgsmål 1:

Der er ikke adgang til at klage over interne overvejelser og forberedende handlinger som fx undersøgelse af markedet (præmis 35). I øvrigt må klageadgangen ikke betinges af, at kontraktsproceduren er nået til et bestemt stadium (præmis 38). Der skal således kunne klages over en ordregivende myndigheds beslutning om ikke at foretage EU-udbud, fordi dette efter myndighedens opfattelse ikke er nødvendigt (præmis 36).

Ad spørgsmål 2 (Klagenævnets litrering):

a) Der er ikke udbudspligt for opgaver, som en ordregivende myndighed udfører med sine egne ressourcer og tjenestegrene (præmis 48).

b) Derimod er der som almindelig regel udbudspligt, når en ordregivende myndighed ønsker at overlade en opgave til et selskab, der er en selvstændig juridisk person, også selvom dette selskab er en del af den ordregivende myndighed (præmis 47).

c) Hvis den ordregivende myndighed udøver samme kontrol med det pågældende selskab som med sine egne tjenestegrene, og selskabet udfører hovedparten af sin virksomhed sammen med den eller de lokale myndigheder, det ejes af, er der dog ikke udbudspligt (præmis 49 indtil sidste punktum).

d) Den ordregivende myndighed kan ikke udøve kontrol som omtalt under punkt c, hvis en del af selskabet er privatejet, også selvom den privatejede del er en minoritetsandel (præmis 49, sidste punktum). Der er derfor udbudspligt, når en ordregivende myndighed ønsker at overlade udførelsen af en tjenesteydelse til et selskab, som den ordregivende myndighed ejer sammen med en eller flere private virksomheder (præmis 52).

Om EF-domstolens udtalelser under punkt c bemærkes:

Disse udtalelser havde ikke direkte betydning for sagens afgørelse. Udtalelserne svarer til sidste punktum i præmis 50 i EF-domstolens dom af 18. november 1999 i sagen C-107/98, Teckal, der også nævnes flere steder i den her resumerede dom. I Teckal-dommen statuerede EF-domstolen, at der var udbudspligt ved en kommunes indkøb af varer fra et fælleskommunalt indkøbsselskab, som kommunen ejede sammen med nogle andre kommuner.

Nogle yderligere spørgsmål fra Oberlandesgericht Naumburg bortfaldt som følge af EF-domstolens svar på spørgsmålene 1) og 2).

13. januar 2005, sag C-84/03, Kommissionen mod Spanien

Statueret, at Spanien på nogle punkter ikke havde implementeret Indkøbsdirektivet og Bygge- og anlægsdirektivet rigtigt

Indkøbsdirektivet og Bygge- og anlægsdirektivet er implementeret i spansk ret ved en lov om offentlige myndigheders aftaler. Kommissionen

havde anlagt sagen, fordi implementeringen efter Kommissionens opfattelse ikke var sket rigtigt på de nedennævnte punkter.

Kommissionen fik medhold. EF-domstolen afgjorde sagen således:

1) Udtalt, at den spanske lov var i strid med direktiverne, fordi udbudspligten i henhold til loven ikke omfattede offentligretlige organer af privatretlig karakter. (Betegnelsen offentligretlige organer sigter til sådanne organer som defineret i de to direktivers artikel 1, b.)

Afgørelsen svarer på dette punkt til de lignende afgørelser i EF-domstolens domme af 15. maj 2003 i sag C-214/00, Kommissionen mod Spanien, og 16. oktober 2003 i sag C-283/00, Kommissionen mod Spanien, til hvilke der også henvises i den her resumerede dom.

2) Udtalt, at den spanske lov var i strid med direktiverne, fordi udbudspligten i henhold til loven ikke omfattede samarbejdsaftaler mellem forskellige offentlige myndigheder.

3) Indkøbsdirektivet og Bygge- og anlægsdirektivet indeholder i henholdsvis artikel 6 og artikel 7 nogle bestemmelser om, at der under visse betingelser kan ske udbud efter forhandling, når de oprindelige udbudsbetingelser ikke ændres væsentligt.

Disse bestemmelser var implementeret ved en regel i den spanske lov. Direktivbestemmelsernes betingelse om, at de oprindelige udbudsbetingelser ikke må ændres væsentligt, var i den spanske regel blevet til, at de oprindelige udbudsbetingelser ikke må ændres, bortset fra prisen, der dog ikke må forhøjes med mere end 10 %.

Spanien gjorde gældende, at det er uklart, hvad der ligger i direktivbestemmelsernes betingelse om, at de oprindelige udbudsbetingelser ikke må ændres »væsentligt«. Spanien gjorde videre gældende, at den spanske regel havde til formål af retssikkerhedsmæssige grunde at undgå denne uklarhed.

EF-domstolen udtalte imidlertid, at den spanske regel var i strid med direktiverne. EF-domstolen henviste herved bl.a. til, at den spanske regel gik ud på at opstille en ny betingelse for anvendelsen af de omtalte bestemmelser i direktiverne, og at denne nye betingelse kunne svække både bestemmelsernes rækkevidde og karakter af undtagelser (præmis 49).

4) Ifølge den spanske lov kan der under visse betingelser ske udbud efter forhandling uden forudgående udbudsbekendtgørelse, når der er tale om ensartede varer.

Spanien gjorde på dette punkt gældende, at reelt var tale om rammeaftaler, der var dækket af en anden regel i den spanske lov.

EF-domstolen udtalte imidlertid, at den omtalte spanske regel var i strid med de to direktiver. EF-domstolen henviste herved bl.a. til, at Spanien ikke havde bevist, at reglen var en loyal gennemførelse (præmis 58).

Retten i Første Instans' kendelse af 31. januar 2005 i sag T-447/04 R, Capgemini Nederland mod Kommissionen

Et sagsanlæg ikke tillagt opsættende virkning, selvom der forelå »fumus boni juris«, da der ikke forelå uopsættelighed

Kommissionen iværksatte et udbud vedrørende udvikling og installering af nogle informationssystemer. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud.

Efter tilbuddenes modtagelse indgik Kommissionen kontrakt med en tilbudsgiver, hvorefter en anden tilbudsgiver anlagde sag mod Kommissi-

onen og påstod sagsanlægget tillagt opsættende virkning. Rettens kendelse af 31. januar 2005 angår spørgsmålet om opsættende virkning.

Retten udtalte bl.a.

Der forelå »fumus boni juris[2]« (præmis 88). Retten henviste på dette punkt til følgende:

Kommissionen syntes umiddelbart at have foretaget en åbenbar fejlagtig tilbudsvurdering ved at acceptere, at den valgte tilbudsgivers tilbud med hensyn til visse poster ikke angav en pris eller angav en nul-pris, og det kunne ikke udelukkes, at Kommissionen som følge af forholdet skulle have afvist den valgte tilbudsgivers tilbud (præmis 82). Vurderingen havde sammenhæng med, at tilbudspriserne ifølge udbudsbetingelserne ville blive sammenlignet post for post, se præmis 77 og følgende.

Det kunne ikke udelukkes, at den valgte tilbudsgivers tilbud ikke opfyldte et krav i udbudsbetingelserne om nationale grænseflader (præmis 87).

Der forelå imidlertid ikke uopsættelighed (præmis 105). Fra Rettens udtalelser på dette punkt kan nævnes (noget omformuleret):

Formålet med opsættende virkning er ikke at sikre erstatning for et tab, men at undgå en alvorlig og uoprettelig skade, og Kommissionen ville efter en eventuel annullation af tildelingsbeslutningen skulle træffe de nødvendige foranstaltninger for at beskytte sagsøgerens interesser på en passende måde (præmis 89 og 96). Sagsøgerens eventuelle skade ville endvidere ikke være uoprettelig, hvis der kunne betales erstatning, og sagsøgeren havde ikke gjort gældende, at Kommissionens tildelingsbeslutning medførte en trussel mod sagsøgerens eksistens (præmis 98 og 102).

Begæringen om opsættende virkning blev herefter ikke imødekommet.

Retten synes ikke at have truffet afgørelse i selve sagen.

3. marts 2005. sager C-21/03 og C-34/03, Fabricom

Ligebehandlingsprincippet er til hinder for, at personer, der har udført forberedende arbejde vedrørende et udbud, ubetinget afskæres fra at afgive tilbud. Udbyders afvisning af et tilbud med den begrundelse, at tilbudsgiveren er »inhabil«, skal meddeles tilbudsgiveren i rimelig tid inden tildelingsbeslutningen

Nogle regler i den belgiske lovgivning gik ud på følgende:

a) Personer, der har udført nærmere angivne forberedende arbejder vedrørende bygge- og anlægsarbejder, indkøb eller tjenesteydelser, er ikke berettiget til selv at afgive tilbud vedrørende de pågældende bygge- og anlægsarbejder, indkøb eller tjenesteydelser.

b) Det samme gælder virksomheder, der har en nærmere angivet tilknytning til personer som de omtalte, medmindre virksomheden godtgør, at den ikke opnår en uberettiget fordel som følge af denne tilknytning.

Et belgisk selskab, Fabricom SA, anlagde ved en belgisk domstol sag mod den belgiske stat med påstand om annullation af de omtalte regler. Den belgiske domstol forelagde sagen for EF-domstolen, der udtalte (Klagenævnets litrering):

1) Bygge- og anlægsdirektivet, Indkøbsdirektivet og Tjenesteydelsesdirektivet er til hinder for en regel, der ikke giver de under a) nævnte personer mulighed for at bevise, at den viden, de har opnået, ikke kan fordreje konkurrencen.

[2] Dvs. »en røg af god ret«, altså sandsynlighed for, at sagsanlægget var berettiget.

Herved henvist til: Det følger ikke af ligebehandlingsprincippet, at en person, der har udført forberedende arbejder, skal behandles på samme måde som enhver anden bydende. En sådan person kan have opnået en fordel, som han kan gøre brug af ved udformningen af sit tilbud, eller kan have påvirket udbudsbetingelserne til gunst for sig selv (præmis 29-31). En regel, der ikke giver en sådan person mulighed for at bevise, at disse forhold ikke gør sig gældende, rækker imidlertid videre end nødvendigt for at opnå ligebehandling og kan medføre udelukkelse af de omtalte personer fra at give tilbud, selvom der ikke ville være nogen som helst risiko for konkurrenceforvridning herved (præmis 34-35).

2) Kontroldirektiverne er til hinder for, at en ordregivende myndighed helt frem til tidspunktet for undersøgelsen af tilbudene kan afvise tilbud fra en virksomhed som omtalt under b), selvom virksomheden bekræfter (»affirme«), at den ikke har opnået en uberettiget fordel.

Herved bl.a. henvist til, at hvis den ordregivende myndighed havde en sådan adgang helt frem til et meget sent tidspunkt under udbudet, ville den ordregivende myndighed kunne fratage den pågældende virksomhed muligheden for at gøre udbudsreglerne gældende, hvilket kunne skade kontroldirektivernes effektive virkning (præmis 44 og 45).

EF-domstolens udtalelse under 2) skal tilsyneladende forstås sådan: En ordregivende myndigheds afvisning af et tilbud med den begrundelse, at tilbudsgiveren er »inhabil«, skal meddeles den pågældende tilbudsgiver i rimelig tid før tildelingsbeslutningen, således at tilbudsgiveren får mulighed for at klage til en klageinstans inden tildelingsbeslutningen.

Dette er direkte udtrykt i punkt 51-52 i Generaladvokatens forslag til afgørelse, der blev fulgt vedrørende punkt 2).

3. marts 2005, sag C-414/03, Kommissionen mod Tyskland

Tyskland havde overtrådt Tjenesteydelsesdirektivet ved manglende EU-udbud. Tysklands erkendelse afskar ikke Kommissionen fra at anlægge sagen. Ikke taget stilling til, om der var pligt til at ophæve en kontrakt indgået i strid med direktivet

En tysk ordregivende myndighed indgik i 1994 en 10-årig kontrakt om affaldsbortskaffelse, og ved dommen konstateredes, at Tyskland havde overtrådt Tjenesteydelsesdirektivet som følge af, at kontrakten var indgået uden EU-udbud. Tyskland erkendte overtrædelsen.

Tyskland gjorde gældende, at Kommissionen som følge af Tysklands erkendelse ikke havde været berettiget til at anlægge sagen ved EF-domstolen, men Tyskland fik ikke medhold i dette anbringende.

Under sagen blev der procederet om, hvorvidt den ordregivende myndighed havde pligt til at ophæve kontrakten. EF-domstolen tog ikke stilling til dette spørgsmål, men henviste blot til traktatens artikel 228, stk. 1 EF, hvorefter den pågældende medlemsstat skal træffe de foranstaltninger, der er nødvendige til opfyldelse af en dom fra EF-domstolen.

Dommen svarer til tidligere afgørelser fra EF-domstolen, således dom af 9. september 2004 i sag C-125/03 og dom af 18. november 2004 i sag C-126/03, begge Kommissionen mod Tyskland.

Retten i Første Instans' dom af 17. marts 2005 i sag T-160/03, AFCon Management Consultants mfl. mod Kommissionen

Udbyderen overtrådte ligebehandlingsprincippet ved ikke at undersøge, om den valgte tilbudsgiver som følge af forbindelse til et medlem af udbyderens bedømmelsesudvalg skulle udelukkes fra at afgive tilbud. En forbigået tilbudsgiver blev ikke tillagt erstatning til dækning af positiv opfyldelsesinteresse, da det ikke med sikkerhed kunne fastslås, at den forbigåede tilbudsgiver ville have fået kontrakten, hvis den valgte tilbudsgiver var blevet udelukket, men blev tillagt erstatning til dækning af negativ kontraktinteresse, da udbyderens tilsidesættelse af fællesskabsretten havde påvirket den forbigåede tilbudsgivers muligheder for at få tildelt kontrakten

Kommissionen iværksatte et udbud vedrørende en tjenesteydelse. Tildelingskriteriet var øjensynlig det økonomisk mest fordelagtige tilbud.

Der indkom tilbud fra et antal tilbudsgivere, herunder fra et konsortium G. Et bedømmelsesudvalg under Kommissionen vurderede G's tilbud som det økonomisk mest fordelagtige.

Bedømmelsesudvalgets formand redegjorde herefter over for Kommissionen for, at et medlem af bedømmelsesudvalget var ansat i et datterselskab til et af de selskaber, der indgik i G. Kommissionen nedsatte derefter et nyt bedømmelsesudvalg uden deltagelse af den pågældende person. Også det nye bedømmelsesudvalg vurderede G's tilbud som det økonomisk mest fordelagtige, hvorfor Kommissionen indgik kontrakt med G.

En anden tilbudsgiver, en virksomhed A, anlagde sag mod Kommissionen ved Retten i Første Instans, der tog stilling til sagen ved dommen af 17. marts 2005.

Retten udtalte, at Kommissionen burde have iværksat en undersøgelse af, om der forelå en »hemmelig forståelse« mellem G og det omtalte medlem af bedømmelsesudvalget med den konsekvens, at G skulle udelukkes fra at afgivet tilbud. Ved ikke at gøre dette havde Kommissionen overtrådt ligebehandlingsprincippet (præmis 90 og følgende).

Kommissionen var herefter erstatningsansvarlig over for A og blev dømt til at betale et beløb til A til dækning af A's udgift til udarbejdelse af tilbud. Herved henvist til, at Kommissionens tilsidesættelse af fællesskabsretten under udbuddets gennemførelse havde påvirket A's mulighed for at få tildelt kontrakten (præmis 98 og følgende).

Der var derimod ikke grundlag for at tillægge A erstatning af mistet fortjeneste, da det ikke med sikkerhed kunne fastslås, at A ville have fået kontrakten, hvis G var blevet udelukket fra at afgive tilbud (præmis 113).

Referatet ovenfor er yderst summarisk, da dommen ikke skønnes at have almen udbudsretlig interesse ud over det anførte.

2. juni 2005, sag C-15/04, Koppensteiner

Det følger af første kontroldirektiv, at et klageorgan skal undlade at anvende en national regel, der forhindrer klageorganet i at efterprøve udbyderes annullation af udbud

Et østrigsk statsligt selskab foretog et EU-udbud efter Bygge- og anlægsdirektivet 92/50 af nogle nedbrydningsarbejder m.m. Efter at have åbnet tilbudene konstaterede udbyderen, at alle tilbudspriser var væsentligt højere end forventet, og udbyderen annullerede derefter udbudet.

En tilbudsgiver klagede til et klageorgan, Bundesvergabeamt, bl.a. med påstand om annullation af annullationen af udbudet.

Efter den østrigske lovgivning om offentlige kontrakter har et klageorgan ikke kompetence til at annullere en udbyders annullation af et udbud, hvis udbyderens annullation er foretaget efter tilbudenes åbning. Efter Bundesvergabeamts opfattelse var denne regel muligvis i strid med artikel 1, stk. 1, sammenholdt med § 2, stk. 1, b, i første kontroldirektiv. Ifølge disse regler skal medlemsstaterne sikre mulighed for hurtig og effektiv klage over de ordregivende myndigheders beslutninger, ligesom de nationale klageorganer skal have beføjelse til bl.a. at annullere ulovlige beslutninger.

Bundesvergabeamt stillede på denne baggrund nogle spørgsmål til EF-domstolen, der udtalte (af overskuelighedsgrunde noget ombrudt og til dels omformuleret):

1) § 1, stk. 1, og § 2, stk. 1, b, i første kontroldirektiv er til hinder for en national regel, hvorefter et klageorgan ikke kan efterprøve og annullere en ordregivers beslutning om annullation af et udbud, hvis ordregiverens beslutning er truffet efter tilbudenes åbning (præmis 36 og 37).

2) Reglerne i § 1, stk. 1, og § 2, stk. 1, b, i første kontroldirektiv er ubetingede og tilstrækkeligt præcise til, at borgerne kan påberåbe sig dem direkte. Et nationalt klageorgan har derfor pligt til at undlade at anvende nationale regler, der forhindrer overholdelsen af § 1, stk. 1, og § 2, stk. 1, b, i første kontroldirektiv (præmis 38 og 39).

EF-domstolen henviste til forskellige tidligere afgørelser, bl.a. dom af 18. juni 2002 i sag C92/00, HI Hospital Ingenieure Krankenhaustechnik Planungsgesmbh, i hvilken domstolen slog fast, at udbyderes annullation af udbud er omfattet af første kontroldirektiv. (Præmis 29 og 30.)

Retten i Første Instans' kendelse af 2. juni 2005 i sag T-125/05 R, Umwelt- und Ingenieurtechnik Dresden mod Kommissionen

Det er en betingelse for opsættende virkning, at den begærende part vil lide et alvorligt og uopretteligt tab, hvis der ikke meddeles opsættende virkning, og det var ikke bevist, at manglende opsættende virkning ville påføre sagsøgeren et sådant tab. Medmindre der foreligger særlige omstændigheder, kan et tab ikke betragtes som uopretteligt eller vanskeligt opretteligt, hvis der senere kan betales erstatning

Kommissionen iværksatte et udbud vedrørende forbedring af et atomkraftværk i Ukraine m.m. Der indkom tre tilbud, hvorefter Kommissionen indgik kontrakt med en af tilbudsgiverne.

En anden tilbudsgiver, hvis tilbud var blevet afvist som ukonditionsmæssigt, anlagde sag mod Kommissionen ved Retten i Første Instans og gjorde forskellige anbringender gældende. Sagsøgeren begærede sagsanlægget tillagt opsættende virkning, hvilket Retten tog stilling til i kendelsen af 2. juni 2005.

Retten henviste til, at det er en betingelse for opsættende virkning, at der foreligger uopsættelighed, hvilket forudsætter, at den begærende part vil lide et alvorligt og uopretteligt tab, hvis der ikke meddeles opsættende virkning (præmis 38). Sagsøgeren havde imidlertid ikke ført bevis for, at manglende opsættende virkning ville påføre sagsøgeren et sådant tab (præmis 41). Medmindre der foreligger særlige omstændigheder, kan et tab endvidere ikke betragtes som uopretteligt eller blot vanskeligt opretteligt, hvis der senere kan betales erstatning (præmis 42).

Betingelsen om uopsættelighed var herefter ikke opfyldt, hvorfor begæringen om opsættende virkning ikke blev taget til følge.

Sagsøgeren hævede tilsyneladende senere sagen, hvilket synes at fremgå af Rettens kendelse af 7. oktober 2005 i sag T-125/05.

16. juni 2005, sager C-462/03 og C-463/03, Strabag

Om anvendelsesområdet for Forsyningsvirksomhedsdirektivet 93/38

Det statslige østrigske jernbaneselskab foretog et EU-udbud af udførelse af jernbaneanlæg m.m. Udbudet blev øjensynlig foretaget som udbud efter forhandling i medfør af de særlige regler herom i Forsyningsvirksomhedsdirektivet 93/38. Efter at udbyderen havde besluttet at indgå kontrakt med en tilbudsgiver, klagede to andre tilbudsgivere til et klageorgan, Bundesvergabeamt. I sin afgørelse i klagesagen udtalte Bundesvergabeamt bl.a., at udbudet ikke var omfattet af Forsyningsvirksomhedsdirektivet 93/38, og at det derfor ikke havde været berettiget at foretage udbud efter forhandling.

Baggrunden for Bundesvergabeamts opfattelse om, at udbudet ikke var omfattet af Forsyningsvirksomhedsdirektivet 93/38, var formuleringen af direktivets artikel 2, stk. 2.

Efter litra c i denne bestemmelse omfatter direktivet »drift« af jernbanenet m.m. Vedrørende visse andre former for virksomhed omfatter direktivet efter formuleringen derimod ikke alene drift, men også »tilrådighedsstillelse«, jf. bestemmelsens litra a. Formuleringen af artikel 2, stk. 2, kan således ud fra en modsætningsslutning tyde på, at direktivet ikke gælder for »tilrådighedsstillelse« af jernbanenet, og Bundesvergabeamt forstod artikel 2, stk. 2, på denne måde. Desuden var det Bundesvergabeamts opfattelse, at de udbudte opgaver angik »tilrådighedsstillelse« af jernbanenet og ikke drift.

Af forskellige grunde kom Bundesvergabeamt senere i tvivl om rigtigheden af den omtalte forståelse af direktivet. Bundesvergabeamt tog sagen op igen og stillede nogle spørgsmål til EF-domstolen. Disse spørgsmål gik (af overskuelighedsgrunde sammentrængt og forenklet) ud på følgende:

1) Skal artikel 2, stk. 2 i Forsyningsvirksomhedsdirektivet 93/38 forstås sådan, at direktivet ikke gælder for tilrådighedsstillelse af jernbanenet?

2) Hvad sigtes der til med begreberne drift henholdsvis tilrådighedsstillelse?

3) Skulle Bundesvergabeamt se bort fra en østrigsk lovregel, der sidestiller drift og tilrådighedsstillelse af jernbanenet?

EF-domstolen udtalte (stærkt sammentrængt, Klagenævnets litrering):

a) Det afgørende for, om Forsyningsvirksomhedsdirektivet 93/38 finder anvendelse, er den virksomhed, som ordregiveren udøver, og forbindelsen mellem denne virksomhed og kontrakten. Direktivet finder således anvendelse, hvis ordregiveren udøver en af de former for virksomhed, der er omhandlet i direktivets artikel 2, stk. 2, og hvis indgåelsen af den pågældende kontrakt er et led i denne virksomhed (præmis 37).

b) Bundesvergabeamts spørgsmål vedrørende den omtalte regel i den østrigske lovgivning byggede på den forudsætning, at de udbudte arbejder ikke var omfattet af Forsyningsvirksomhedsdirektivet 93/38, fordi de gik ud på tilrådighedsstillelse af jernbanenet. Denne forudsætning var imidlertid fejlagtig, idet det afgørende for, om direktivet finder anvendelse,

som nævnt er den virksomhed, som ordregiveren udøver, og forbindelsen mellem denne virksomhed og kontrakten (præmis 41 og 42).

Forståelsen af dommen vanskeliggøres bl.a. af, at dommen ikke indeholder nærmere oplysninger om karakteren af de udbudte opgaver, og det kan således ikke ses, hvorfor Bundesvergabeamt anså opgaverne som et led i tilrådighedsstillelse.

Det er dog muligvis forsvarligt at anse dommen som udtryk for, at Forsyningsvirksomhedsdirektivet 93/38 uanset formuleringen af direktivets artikel 2, stk. 2, omfatter tilrådighedsstillelse af jernbanenet m.m. Det bestyrker måske denne forståelse, at det nye forsyningsvirksomhedsdirektiv 04/17 udtrykkeligt omfatter tilrådighedsstillelse af jernbanenet m.m., jf. artikel 5, stk. 1, i dette direktiv.

Retten i Første Instans' dom af 6. juli 2005 i sag T-148/04, TQ3 Travel Solutions Belgium mod Kommissionen

Et tilbud var ikke unormalt lavt, og reglerne om unormalt lave tilbud var irrelevante, da udbyderen ikke havde anset tilbuddet for unormalt lavt. Udbudsreglerne stiller ikke krav om, at en tilbudsgiver har det nødvendige personale på tilbuddets tidspunkt. Udbyderen kunne indgå en midlertidig kontrakt med den valgte tilbudsgiver for en kortere periode, indtil tilbudsgiveren opfyldte udbudsbetingelsernes krav

Dommens sagsfremstilling forekommer noget ufuldstændig og til dels uklar, og også præmisserne forekommer til dels uklare, men dommen kan formentlig gengives således:

En virksomhed T udførte rejsebureauvirksomhed for Kommissionen i henhold til en kontrakt, der udløb 31. marts 2004. Virksomheden blev udøvet i Kommissionens lokaler.

I juli 2003 iværksatte Kommissionen et udbud vedrørende rejsebureauvirksomhed for nogle af Fællesskabets institutioner. Virksomheden skulle udøves i institutionernes lokaler. I udbudsbetingelserne var angivet, at kontrakt skulle indgås med virkning senest fra 1. juli 2004, og at en nødvendig IATA-licens til billetudstedelse skulle foreligge inden kontraktstart. Grunden til, at der ikke var angivet et bestemt tidspunkt for kontraktstart, var, at der var forskellige opsigelsestidspunkter for de enkelte institutioners aktuelle kontrakter.

Tildelingskriteriet var det økonomisk mest fordelagtige tilbud på grundlag af følgende underkriterier: 1. Pris og 2. Kvalitet. Til underkriterium 2. Kvalitet var efter det foreliggende knyttet følgende delkriterier: a. personale, b. tekniske og logistiske hjælpemidler, c. administration og formidling af oplysninger og d. evnen til at forhandle sig frem til de bedste billetpriser.

Tilbudsfristen udløb tilsyneladende omkring 1. december 2003, og ved tilbudsfristens udløb var der indkommet tilbud fra flere tilbudsgivere, herunder fra T og fra en virksomhed W. Kommissionen besluttede i februar 2004 at indgå kontrakt med W.

Det udbud, som sagen angik, trådte i stedet for et tidligere udbud, der havde angået rejsebureauvirksomhed for alle Fællesskabets institutioner. Dette udbud var imidlertid blevet annulleret, fordi nogle af institutionerne ikke ønskede at deltage.

I marts 2004 blev Kommissionen opmærksom på, at det forhold, at nogle af institutionerne ikke ønskede at deltage, betød, at W først kunne

opnå den krævede IATA-licens i løbet af foråret 2004. Den nærmere sammenhæng i denne forbindelse synes ikke at fremgå af dommen, og det fremgår således ikke, hvorledes forholdet kunne have betydning, selvom de pågældende institutioners manglende deltagelse var kommet på det rene allerede før udbudsbekendtgørelsen.

Kommissionen anmodede derfor i marts 2004 T om forlængelse af den eksisterende kontrakt til sidst i juni 2004. Efter at T havde afslået dette, indgik Kommissionen den 31. marts 2004 en midlertidig aftale med W om W's udførelse af rejsebureauvirksomheden fra egne lokaler (hvilket W åbenbart havde IATA-licens til). Denne midlertidige aftale løb til 19. maj 2004, da W opnåede den nødvendige IATA-licens til den udbudte virksomhed. Den blev derefter formentlig afløst af en kontrakt i henhold til udbuddet.

T anlagde sag mod Kommissionen ved Retten i Første Instans, der i dommen af 6. juli 2005 tog stilling til sagen således (sammentrængt og til dels lidt omformuleret gengivet):

1) Ad et anbringende fra T om, at W's tilbud skulle have været afvist som unormalt lavt:

Ikke taget til følge. Henvist til Gennemførelsesforordningens regler om unormalt lave tilbud (der svarer til Udbudsdirektivets 55). Udtalt, at disse regler var irrelevante, da Kommissionen ikke havde anset W's tilbud for unormalt lavt (præmis 50). Desuden foretaget en detaljeret gennemgang af W's tilbud mundende ud i, at W's tilbud på et punkt ikke var unormalt lavt (præmis 61), at T på et andet ikke punkt ikke havde bevist, at W's tilbud var unormalt lavt (præmis 63), og at Kommissionen på et tredje punkt med føje havde anset W's tilbud for pålideligt og troværdigt (præmis 69).

2) Ad et anbringende fra T om, at Kommissionen ved tilbudsvurderingen havde lagt vægt på, at W's tilbud omfattede en deling af rabatter mellem W og Kommissionen, selvom det ikke fremgik af udbudsbetingelserne, at der ville blive lagt vægt på en sådan deling:

Ikke taget til følge. Henvist til, at Kommissionen ikke havde lagt vægt på forholdet ved tilbudsvurderingen (»som et tildelingskriterium«), men alene havde taget forholdet i betragtning ved vurderingen af W's tilbuds kvalitet for at sikre, at den økonomiske del af W's tilbud i sin helhed var pålideligt og troværdigt og ikke unormalt lavt (præmis 70).

3) Ad et anbringende fra T om, at Kommissionen ved tilbudsvurderingen havde tildelt W's tilbud et for højt pointtal i relation til underkriterium 2. Kvalitet, selvom W ikke ville ansætte, hvad der efter T's opfattelse var tilstrækkeligt personale:

Ikke taget til følge med henvisning til, at W's forudsætninger om personalets størrelse kunne hænge sammen W's produktivitet og effektivitet (præmis 89). Også henvist til, at hverken Finansforordningen eller Gennemførelsesforordningen kræver, at en tilbudsgiver råder over det nødvendige personale på tilbuddets tidspunkt, og at dette personale først skal være til stede ved kontraktstart (præmis 90).

4) Ad et anbringende om, at Kommissionen ved tilbudsvurderingen havde tildelt W's tilbud et for højt pointtal i relation til underkriterium 2. Kvalitet, selvom Kommissionen vidste, at W ikke fra begyndelsen kunne udføre den udbudte opgave fra institutionernes lokaler som krævet, og at W ikke fra begyndelsen havde den IATA-licens, der var krævet i udbudsbetingelserne:

Ikke taget til følge. Henvist til, at grunden til, at W ikke havde den krævede IATA-licens fra begyndelsen, var, at nogle af institutionerne havde besluttet ikke at gøre brug af den udbudte rejsebureauvirksomhed, og at Kommissionen først i marts 2004 var blevet opmærksom på forholdet (præmis 91). Desuden henvist til, at Kommissionens indgåelse af den midlertidige kontrakt med W havde hjemmel i en bestemmelse i Gennemførelsesforordningen, hvorefter der kan gennemføres udbud med forhandling uden forudgående udbudsbekendtgørelse, når tvingende grunde gør dette strengt nødvendigt som følge af uforudseelige begivenheder, der ikke kan tilskrives den ordregivende myndighed, og som kan bringe Fællesskabets interesser i fare (præmis 95 og følgende, en noget lignende bestemmelse er indeholdt i Udbudsdirektivets artikel 11, nr. 1, litra c). Også henvist til, at W opnåede den krævede IATA-licens før det tidspunkt for kontraktstart, der i udbudsbetingelserne var angivet som seneste tidspunkt (præmis 94).

T fik således ikke medhold.

Retten havde ved en kendelse af 27. juli 2004 i sag T-184/04 R afslået en begæring fra T om opsættende virkning.

Som følge af de omtalte uklarheder i dommen er dommens rækkevidde formentlig begrænset. Dommens sagsfremstilling gør det også vanskeligt at forestille sig, hvorledes en tilsvarende sag ville være blevet afgjort af Klagenævnets for Udbud. Bl.a. forekommer det vanskeligt at vurdere berettigelsen af Kommissionens midlertidige kontrakt med W.

21. juli 2005, sag C-231/03, Coname

Koncessionskontrakter om tjenesteydelser er ikke nødvendigvis omfattet af udbudspligten. Medmindre der foreligger særlige omstændigheder, skal tildeling af sådanne kontrakter dog ske under iagttagelse af gennemsigtighed, således at virksomheder fra andre medlemsstater kan tilkendegive deres interesse i kontrakten. Det var ikke en særlig omstændighed, at ordregiveren delvis ejede den virksomhed, der fik tildelt en koncessionskontrakt, da ordregiverens ejerandel var lille, og da virksomheden var åben for privat kapital

Af overskuelighedsgrunde er referatet noget sammentrængt og forenklet.

En italiensk kommune overlod drift og vedligeholdelse m.m. af et gasforsyningsanlæg til et fælleskommunalt selskab. En virksomhed, der indtil da havde udført de pågældende ydelser, klagede til en italiensk forvaltningsdomstol og gjorde gældende, at der skulle have været foretaget EU-udbud. Forvaltningsdomstolen forelagde sagen for EF-domstolen, der udtalte:

Det forudsattes, at der var tale om en koncessionskontrakt om tjenesteydelser, således at sagen derfor hverken var omfattet af Tjenesteydelsesdirektivet eller Forsyningsvirksomhedsdirektivet (præmis 9 og 10).

Tildelingen af en sådan koncessionskontrakt til en national virksomhed kan udgøre en forskelsbehandling af virksomheder i andre medlemsstater i strid med Traktatens artikel 43 EF og 49 EF (om etableringsfrihed og fri udveksling af tjenesteydelser), hvis der ikke er gennemsigtighed. En sådan forskelsbehandling er en indirekte forskelsbehandling på grund af nationalitet, hvilket er i strid med de nævnte traktatbestemmelser. Der kan dog foreligge særlige omstændigheder, fx en meget begrænset økonomisk

betydning, der bevirker, at virksomheder i andre medlemsstater ikke er interesserede i at få koncessionskontrakten. (Præmis 17-20.)

Det tilkom herefter den nationale domstol at tage stilling til, om tildelingen af koncessionskontrakten til det fælleskommunale selskab opfyldte de krav til gennemsigtighed, som – uden nødvendigvis at medføre en forpligtelse til udbud – ville gøre det muligt for en virksomhed uden for Italien at tilkendegive sin interesse i at få tildelt koncessionskontrakten (præmis 21).

Manglende opfyldelse af kravet om gennemsigtighed kunne ikke begrundes med, at kommunen var medejer af det fælleskommunale selskab. Dels udgjorde kommunens ejerandel kun 0,97 %, hvilket ikke gav kommunen mulighed for at udøve kontrol med koncessionshaveren (præmis 24), dels var det fælleskommunale selskab i hvert fald delvis åbent for privat kapital, hvorfor det ikke kunne anses for et »internt« organ (præmis 26).

8. september 2005, sag C-129/04, Espace Trianon og Sofibail.
Første kontroldirektiv er ikke til hinder for en national bestemmelse, hvorefter en klage fra et konsortium, der ikke er en juridisk person, skal indgives af samtlige medlemmer af konsortiet

En belgisk offentlig ordregiver iværksatte et udbud vedrørende et byggeri. Efter at der var indkommet tilbud fra forskellige virksomheder, besluttede udbyderen at indgå kontrakt med en af tilbudsgiverne.

En af de tilbudsgivere, der ikke fik tildelt kontrakten, var et konsortium, der bestod af to aktieselskaber, E og S. E klagede over udbyderens tildelingsbeslutning til en belgisk forvaltningsdomstol (Conseil d'État), og kort derefter klagede også S til forvaltningsdomstolen.

Forvaltningsdomstolen afviste klagen fra E, fordi denne klage ikke var indgivet af personer, der i henhold til E's vedtægter kunne tegne E. Forvaltningsdomstolen stillede herefter EF-domstolen nogle spørgsmål, der sigtede til, om første kontroldirektiv medførte pligt til at tage sagen under realitetsbehandling på grundlag af klagen fra S alene. Baggrunden var, at forvaltningsdomstolen efter belgisk ret kun havde kompetence til at behandle sagen, hvis både E og S havde indgivet klage.

EF-domstolen udtalte (af overskuelighedsgrunde lidt omformuleret og sammentrængt):

1) Første kontroldirektiv er ikke til hinder for en national bestemmelse, hvorefter en klage fra et konsortium, der ikke er en juridisk person, skal indgives af samtlige medlemmer af konsortiet.

2) Det forholder sig på samme måde, hvis alle medlemmer af et konsortium har klaget, men klagen fra et af konsortiets medlemmer afvises.

Retten i Første Instans' kendelse af 20. september 2005 i sag T-195/05 R, Deloitte mod Kommissionen
Ikke opsættende virkning, selvom der forelå »fumus boni juris«, da der ikke forelå uopsættelighed, idet en uoprettelig skade, som sagsøgeren ville lide ved manglende opsættende virkning, ikke var tilstrækkeligt alvorlig, samt da en interesseafvejning talte mod opsættende virkning. Generel beskrivelse af Rettens praksis med hensyn til opsættende virkning

Denne kendelse er Retten i Første Instans' afgørelse om opsættende virkning i en sag, der blev afgjort ved Rettens dom af 18. april 2007 i sag T-195/05 (ved hvilken Kommissionen blev frifundet). Med hensyn til sa-

gens faktum og emne henvises til Klagenævnets resumé af dommen af 18. april 2007.

Kendelsen af 20. september 2005 er imidlertid interessant, fordi den tager stilling til alle betingelserne for, at Retten tillægger et sagsanlæg opsættende virkning.

Hjemlen for Retten til at træffe bestemmelse om opsættende virkning er Traktatens artikel 243 EF, hvorefter Domstolen i sager, der er indbragt for den, kan foreskrive de nødvendige foreløbige forholdsregler.

Efter Rettens praksis gælder følgende betingelser, der alle skal være opfyldt, for opsættende virkning:

1) Der skal foreligge »fumus boni juris«, dvs. en røg af god ret, altså sandsynlighed for, at sagsanlægget er berettiget.
2) Der skal foreligge uopsættelighed.
3) En interesseafvejning skal tale for opsættende virkning.

De to første betingelser følger af artikel 104, stk. 2, i Rettens procesreglement, hvorefter en begæring om foreløbige forholdsregler skal angive de omstændigheder, der medfører uopsættelighed, og de faktiske og retlige grunde til, at den begærede foreløbige forholdsregel umiddelbart forekommer berettiget. (Procesreglement for De Europæiske Fællesskabers Ret i Første Instans af 2. maj 1991 med senere ændringer).

Af Rettens afgørelser om opsættende virkning fremgår, at der stilles meget strenge krav for at anse betingelse 2, *uopsættelighed*, opfyldt. Følgende går med lidt forskellige formuleringer igen i Rettens afgørelser:

Uopsættelighedsbetingelsen er principielt ikke opfyldt, hvis sagsøgeren kan kompenseres ved erstatning, og uopsættelighed forudsætter normalt, at sagsøgeren vil lide et både alvorligt og uopretteligt (eller i hvert fald vanskeligt opretteligt) tab, hvis der ikke tillægges opsættende virkning. Det synes at fremgå af Rettens praksis, at en sagsøger principielt kun anses for at ville lide et alvorligt og uopretteligt (eller eventuelt vanskeligt opretteligt) tab, hvis manglende opsættende virkning vil true sagsøgerens eksistens. Til tider bruger Retten i øvrigt ordet »skade» i stedet for »tab«.

Betingelsen om uopsættelighed er således meget vanskelig at opfylde, og konsekvensen er, at Retten kun undtagelsesvis meddeler opsættende virkning. Et sjældent eksempel på opsættende virkning er Rettens kendelse af 20. juli 2006 i sag T-114/06 R, Globe mod Kommissionen, hvor Retten nærmest bagatelliserede betingelsen om uopsættelighed. Af kendelsen af 20. juli 2006 fremgår, at dette skyldtes, at Kommissionen i den pågældende sag tilsyneladende havde begået en grov overtrædelse af udbudsreglerne. En klar og udpræget »fumus boni juris« kan således efter omstændighederne slå igennem over for de normalt strenge krav til uopsættelighed – og kan øjensynligt også have betydning for betingelse 3, interesseafvejning, se sidste afsnit nedenfor.

Betingelse 3, *interesseafvejning*, belyses bl.a. i kendelsen af 20. september 2005, jf. sidste afsnit nedenfor.

Fra Rettens udtalelser i kendelsen af 20. september 2005 kan nævnes:

Ad betingelse 1, fumus boni juris: Retten foretog i præmis 82 og følgende en ret omfattende gennemgang af sagsøgerens anbringender og udtalte på flere punkter, at der var tale om forhold, som burde behandles nærmere (»grundigt«) under selve sagen. Retten konkluderede i præmis

123, at sagsøgerens anbringender ikke på det pågældende stadium af sagen kunne forkastes som helt ubegrundede, og at betingelsen om fumus boni juris herefter var opfyldt.

Ad betingelse 2, uopsættelighed: Manglende opsættende virkning ville medføre en uoprettelig skade (præmis 148), fordi sagsøgerens tab var meget vanskeligt for ikke at sige umuligt at opgøre (præmis 146-147). Skaden ville imidlertid ikke være tilstrækkeligt alvorlig (præmis 157 til 159), da sagsøgeren var en meget stor, verdensomspændende virksomhed (præmis 158). Uopsættelighedsbetingelsen var herefter ikke opfyldt.

Ad betingelse 3, interesseafvejning: Der var tale om en foranstaltning til fremme af folkesundheden, hvorfor gennemførelsen af kontrakten med den valgte tilbudsgiver var af væsentlig almen interesse (præmis 163). Der måtte desuden tages hensyn til interesserne hos den valgte tilbudsgiver (præmis 164). Den konstaterede fumus boni juris var endvidere ikke særligt udpræget og kunne ikke bevirke, at interesseafvejningen faldt ud til fordel for opsættende virkning (præmis 165). Betingelsen vedrørende interesseafvejning var herefter ikke opfyldt.

13. oktober 2005, sag C-458/03, Parking Brixen

Definition af koncessioner om tjenesteydelser. Der skal være mulighed for konkurrence med hensyn til sådanne koncessioner. Kriterierne for at anse en virksomhed som »in house«

Dommens præmisser er meget lange. Af overskuelighedsgrunde er gengivelsen af dem nedenfor meget stærkt sammentrængt og til dels omformuleret

En italiensk kommune overlod driften af to parkeringspladser til et aktieselskab, der var oprettet af kommunen. En virksomhed klagede til en forvaltningsdomstol og gjorde gældende, at der skulle have været foretaget EU-udbud. Forvaltningsdomstolen stillede nogle spørgsmål til EF-domstolen, der udtalte:

1) Ad et spørgsmål fra forvaltningsdomstolen, om der var tale om koncessioner:

Der var ikke forelagt tilstrækkelige oplysninger om aftalen vedrørende den ene parkeringsplads til, at EF-domstolen kunne bistå forvaltningsdomstolen med hensyn til denne aftale (præmis 31-36).

Med hensyn til den anden parkeringsplads fremgik det, at det kommunale aktieselskab opkrævede parkeringsafgifter af brugerne og betalte en årlig godtgørelse til kommunen. Når en tjenesteyders vederlag på denne måde ikke hidrører fra den pågældende offentlige myndighed, men derimod hidrører fra tredjemænd som betaling for brugen af en parkeringsplads, påtager tjenesteyderen sig risikoen for driften af de pågældende tjenester, hvilket er kendetegnende for en koncession om tjenesteydelser. Aftalen om den pågældende parkeringsplads var derfor en koncession. Tjenesteydelsesdirektivet omfatter endvidere ikke koncessioner om tjenesteydelser. (Præmis 37-43, navnlig 40 og 42.)[3]

2) Ad et spørgsmål fra forvaltningsdomstolen, om der havde været udbudspligt:

[3] Det nugældende udbudsdirektiv 2004/18 EF omfatter heller ikke koncessioner om tjenesteydelser, jf. artikel 17 i dette direktiv. Det samme gælder som almindelig regel det nugældende Forsyningsvirksomhedsdirektiv 2004/17/EF, jf. dette direktivs artikel 18.

Det følger af Traktatens artikel 43 EF og 49 EF (om fri etableringsret og fri udveksling af tjenesteydelser) samt af principperne om ligebehandling, forbud mod forskelsbehandling og gennemsigtighed, at medlemsstaterne ikke må opretholde en national lovgivning, der tillader tildeling af offentlige tjenesteydelseskoncessioner, uden at der er mulighed for konkurrence. (Præmis 44-55, navnlig 52.)[4]

3) Ad et anbringende fra Italien om, at det kommunale selskab ikke var en selvstændig enhed i forhold til kommunen:

Traktatens artikel 12 EF (om forbud mod forskelsbehandling på grund af nationalitet), artikel 43 EF og artikel 49 EF samt de almindelige principper, som disse bestemmelser er udtryk for, finder ikke anvendelse på koncessioner om tjenesteydelser, hvis ordregiveren fører samme kontrol med den virksomhed, der får koncessionen, som med sine egne tjenestegrene, og hvis denne virksomhed udfører hovedparten af sin virksomhed sammen med den myndighed, den ejes af. Disse to betingelser skal fortolkes restriktivt, og bevisbyrden påhviler den, der påberåber sig, at de er opfyldt (præmis 62 og 63).

EF-domstolen udtalte videre, at det kommunale selskab i den foreliggende sag ikke opfyldte betingelsen om være undergivet ordregiverens kontrol 100 %. EF-domstolen henviste herved bl.a. til, at selskabets bestyrelse havde vidtgående selvstændige beføjelser, at kommunen i praksis ikke udøvede driftsmæssig kontrol, og selskabet havde pligt til at give adgang for kapitaltilførsel udefra (præmis 67-70).

Domstolens afgørelse vedrørende spørgsmål 1) svarer til afgørelsen i dom af 21. juli 2005 i sagen Coname.

Afgørelsen vedrørende spørgsmål 2) og 3) svarer til den tilsvarende afgørelse i domstolens domme af 11. januar 2005, Stadt Halle, og 18. november 1999, Teckal, til hvilke domme der også henvises i den her resumerede dom.

20. oktober 2005, sag C-264/03, Kommissionen mod Frankrig

En fransk lovbestemmelse om, at offentlige bygherrer kunne antage en fransk fuldmægtig, var i strid med traktatens artikel 49 og Tjenesteydelsesdirektivet

Referatet nedenfor er meget stærkt sammentrængt.

En fransk lov om offentlige byggerier indeholdt nogle regler, hvorefter en bygherre kunne overlade det til en fuldmægtig at udføre forskellige opgaver i forbindelse med et byggeri, bl.a. underskrift på entreprisekontrakter efter bygherrens valg af entreprenør og modtagelse af arbejdet m.m. Det var anført i loven, at fuldmægtigen repræsenterede bygherren over for tredjemand.

Det fremgik af den franske lov, at det kun var nærmere angivne franske selskaber og personer, der kunne antages som fuldmægtig. Sagen var

[4] Den danske udgave af dommen bruger i den centrale præmis 52 udtrykket »offentligt udbud« og kan derfor forstås sådan, at der med hensyn til koncessionskontrakter om tjenesteydelser skal foretages et egentligt offentligt udbud med en udbudsbekendtgørelse i EF-Tidende. Dette kan dog ikke være meningen. Den franske udgave af dommen bruger udtrykket »mise en concurrence«, hvorimod offentligt udbud på fransk hedder procédure ouverte eller appel d'offres public. Den tyske udgave af dommen, der er originalversionen, bruger udtrykket »Ausschreibung«, hvorimod offentligt udbud på tysk hedder offene Verfahren.

anlagt, fordi dette efter Kommissionens opfattelse var i strid med Traktatens artikel 49 EF (om fri udveksling af tjenesteydelser) og med Tjenesteydelsesdirektivet.

Frankrig gjorde gældende, at der ikke var tale om tjenesteydelser, og at fuldmægtigens hverv med at repræsentere bygherren var udøvelse af offentlig virksomhed. Frankrig henviste endvidere til EF-domstolens dom af 12. juli 2001, Ordine.

EF-domstolen udtalte:

Det var uden betydning, at kravet om, at fuldmægtigen skulle være fransk, var blevet ophævet efter sagens anlæg (præmis 29).

En ordregivers antagelse af en fuldmægtig i henhold til de omtalte regler var en gensidigt bebyrdende aftale om tjenesteydelser (præmis 35-45).

Fuldmægtigens beføjelser gik ikke alene ud på repræsentation af bygherren, men gik også ud på en række andre funktioner (præmis 46). Repræsentationsfunktionerne var omfattet af Tjenesteydelsesdirektivet bilag I B (præmis 55). Det synes forudsat, at de øvrige funktioner var omfattet af direktivets bilag I A (se præmis 62).

Ordine-dommen ændrede ikke i ovenstående (præmis 56).

EF-domstolen konkluderede herefter, at de omtalte regler var i strid med Tjenesteydelsesdirektivet og Traktatens artikel 49 EF. Kommissionen fik således medhold.

27. oktober 2005, sager C-187/04 og C-188/04, Kommissionen mod Italien

Italien havde overtrådt Bygge- og anlægsdirektivet ved, at nogle koncessioner om motorvejsudfletninger var meddelt uden EU-udbud

En italiensk offentlig ordregiver gav en virksomhed koncessioner vedrørende nogle udfletningsanlæg, der havde til formål at forbinde forskellige motorveje. Sagen var anlagt af Kommissionen, der gjorde gældende, at Italien havde overtrådt Bygge- og anlægsdirektivet, fordi der ikke var sket forudgående EU-udbud.

Italien gjorde gældende, at der ikke var pligt til EU-udbud, fordi koncessionshaveren havde anlagt og administrerede de berørte motorveje i henhold til en tidligere koncession. Dette medførte efter Italiens opfattelse, at de nye arbejder dels var omfattet af den oprindelige koncession, dels ikke var bygge- og anlægsarbejder med selvstændig økonomisk eller teknisk funktion, jf. direktivets artikel 1, c).

EF-domstolen udtalte, at der var tale om bygge- og anlægsarbejder omfattet af Bygge- og anlægsdirektivet. EF-domstolen henviste desuden til sin praksis, hvorefter undtagelser fra de almindelige traktatrettigheder skal fortolkes snævert, og hvorefter den, der påberåber sig en sådan undtagelse, har bevisbyrden for at, betingelserne er opfyldt.

EF-domstolen konstaterede herefter, at Italien havde overtrådt Bygge- og anlægsdirektivet som følge af, at de omtalte koncessioner var meddelt uden EU-udbud.

27. oktober 2005, sag C-234/03, Contse mfl.

Tjenesteydelse omfattet af Tjenesteydelsesdirektivets bilag I B. Et udvælgelseskriterium og nogle vurderingskriterier var i strid med traktatens artikel 49 om fri udveksling af tjenesteydelser. Generelt om betingelserne for nationale foranstaltninger, der kan hæmme den frie udveksling af tjenesteydelser

En spansk offentlig ordregiver foretog to udbud vedrørende tjenesteydelser i forbindelse med åndedrætsterapi i hjemmet ol. De to udbud, der angik hver sin spanske provins, blev tilsyneladende gennemført som offentlige udbud i henhold til Tjenesteydelsesdirektivet. Sagen angik spørgsmålet, om et enslydende udvælgelseskriterium og nogle enslydende vurderingskriterier ved begge udbud var i strid med EU-retten.

Det omtvistede udvælgelseskriterium gik ud på, at tilbudsgivere for at komme i betragtning skulle råde over mindst et forretningslokale med nærmere angivet daglig åbningstid i den pågældende provinshovedstad.

De omtvistede vurderingskriterier gik ud på, at der ved vurderingen af tilbudene ville blive tildelt nærmere angivne points a) til tilbudsgivere, der ved tilbudets afgivelse havde anlæg til iltproduktion m.m. inden for en nærmere angivet afstand fra den pågældende provins, således at der blev givet points i forhold til anlæggenes kapacitet, b) til tilbudsgivere, der ved tilbudets afgivelse havde forretningslokaler med nærmere angivet åbningstid i bestemte byer, og c) til tilbudsgivere, der allerede udførte tjenesteydelsen.

Nogle virksomheder klagede til en spansk forvaltningsdomstol over de omtalte kriterier, men fik ikke medhold. Virksomhederne indbragte sagen for en ankeinstans, der stillede nogle spørgsmål til EF-domstolen.

EF-domstolens bemærkninger kan meget stærkt sammentrængt og til dels ombrudt og omformuleret gengives således:

De omhandlede tjenesteydelser var omfattet af Tjenesteydelsesdirektivets bilag I B, præmis 47, og tjenesteydelserne var således ikke undergivet Tjenesteydelsesdirektivets regler om udbudspligt og tildelingskriterier, præmis 47-48. Det foreliggende spørgsmål var herefter, om de omtvistede kriterier var i strid med Traktatens artikel 49 EF om fri udveksling af tjenesteydelser, præmis 49.

De omtvistede kriterier kunne alle hæmme den frie udveksling af tjenesteydelser i henhold til Traktatens artikel 49 EF, og EF-domstolen har i sin praksis fastslået, at nationale foranstaltninger, der kan hæmme udøvelsen af grundrettighederne i traktaten, skal opfylde følgende betingelser:

1. De skal anvendes uden forskelsbehandling.
2. De skal være begrundet i tvingende almene hensyn.
3. De skal være egnede til at sikre virkeliggørelsen af deres formål.
4. De må ikke gå ud over, hvad der er nødvendigt for at opnå formålet.

(Præmis 33, jf. præmis 25.)

Det tilkom den nationale domstol at efterprøve, om disse betingelser var opfyldt, således at den nationale domstol herved skulle tage EF-domstolens bemærkninger om spørgsmålet i betragtning, præmis 34.

EF-domstolens bemærkninger om spørgsmålet gik meget stærkt sammentrængt ud på:

U*dvælgelseskriteriet:*

Ad betingelse 1.: Det tilkom den nationale domstol at tage stilling til, om udvælgelseskriteriet nemmere kunne opfyldes af spanske erhvervsdrivende end af andre, præmis 37.

Ad betingelse 2.: Betingelsen var opfyldt, præmis 40.

Ad betingelse 3. og 4.: Kravet om forretningslokale i de pågældende provinshovedstæder var åbenbart urimeligt, for så vidt som kravet gik ud på, at tilbudsgiverne skulle have sådanne forretningslokaler ved tilbudets afgivelse, præmis 43-46.

V*urderingskriterierne:*

EF-domstolens bemærkninger herom indeholdes i præmis 47-78, der ikke kan gengives kort. Nedenfor nævnes blot enkelte af de bemærkninger, der synes at være mest repræsentative.

Ad betingelse 1.: Pointtildelingen for lokale iltanlæg m.m. og pointtildelingen til tilbudsgivere, der allerede udførte tjenesteydelsen, var udtryk for forskelsbehandling, præmis 76-78.

Ad betingelse 2.: Betingelsen var opfyldt, præmis 52.

Ad betingelse 3. og betingelse 4.: Pointtildelingen for lokale iltanlæg m.m. var ikke var knyttet til kontraktens formål, præmis 62 og 70, og pointtildelingen for at have forretningslokaler i bestemte byer ved tilbudets afgivelse var åbenbart uforholdsmæssig, præmis 55.

27. oktober 2005, sag C-525/03, Kommissionen mod Italien

Sagsanlæg fra Kommissionen afvist, da den påberåbte overtrædelse var ophørt før udløbet af den frist, der var fastsat i Kommissionens begrundede udtalelse

Sagen angik en italiensk bekendtgørelse fra 2002, der gav den italienske statsskovstyrelse og det italienske civilforsvar bemyndigelse til ved underhåndsaftaler at anskaffe forskelligt udstyr og få udført forskellige tjenesteydelser til bekæmpelse af skovbrande. Sagen var anlagt af Kommissionen, der gjorde gældende, at bekendtgørelsen var i strid med Indkøbsdirektivet og Tjenesteydelsesdirektivet samt med Traktatens bestemmelser om fri etableringsret og fri udveksling af tjenesteydelser.

EF-domstolen afviste sagen med henvisning til, at den italienske bekendtgørelse var ophørt med at gælde før udløbet af den frist, der var fastsat i Kommissionens begrundede udtalelse.

10. november 2005, sag C-29/04, Kommissionen mod Østrig

Overtrædelse af Tjenesteydelsesdirektivet ved indgåelse af kontrakt uden EU-udbud med et selskab, som ordregiveren ejede, men som kort derefter delvis blev overdraget til en privat virksomhed

En østrigsk kommune stiftede den 16. juni 1999 et aktieselskab til at foretage affaldsbehandling. Den 25. juni 1999 besluttede kommunen at give aktieselskabet eneret på affaldsbortskaffelse m.m. i kommunens område, og kontrakt herom mellem kommunen og aktieselskabet blev indgået den 15. september 1999.

Den 1. oktober 1999 besluttede kommunen at overdrage 49 % af aktierne i aktieselskabet til en privat virksomhed, hvilket blev gennemført den 13. oktober 1999. Kommunen ejede herefter 51 % af aktierne. I forbindelse med overdragelsen blev det vedtaget, at hver af de to aktionærer skulle udpege en administrator, således at aktieselskabet skulle ledes af de to administratorer, der tegnede selskabet i forening.

Den 1. december 1999 begyndte aktieselskabet sin virksomhed.

Kommissionen gjorde under sagen gældende, at det var en overtrædelse af Tjenesteydelsesdirektivet, at kommunens kontrakt med aktieselskabet om affaldsbortskaffelse m.m. var indgået uden overholdelse af fremgangsmåden i henhold til direktivet.

EF-domstolen udtalte (gengivet sammentrængt, noget ombrudt og omformuleret):

Det relevante tidspunkt var ikke tidspunktet for indgåelsen af kontrakten mellem kommunen og aktieselskabet. De efterfølgende begivenheder måtte tages i betragtning, og tildelingen af kontrakten skulle vurderes i lyset af dem. Der var tale om en kunstig konstruktion, og det ville stride mod Tjenesteydelsesdirektivets effektive virkning, hvis de ordregivende myndigheder kunne gennemføre foranstaltninger til sløring af tildelingen af tjenesteydelseskontrakter. (Præmis 37-42.)

En ordregivende myndighed kan ikke uden at følge fremgangsmåden i Tjenesteydelsesdirektivet indgå aftale om udførelse af tjenesteydelser med et selskab, som ordregiveren ejer sammen med en eller flere private virksomheder (præmis 49).

EF-domstolen konstaterede herefter, at Østrig havde overtrådt Tjenesteydelsesdirektivet ved, at den omhandlede kontrakt var indgået uden overholdelse af fremgangsmåden i henhold til direktivet.

Afgørelsen er i overensstemmelse med EF-domstolens dom af 11. januar 2005, Stadt Halle, til hvilken der også henvises i præmisserne.

En lignende afgørelse med hensyn til Indkøbsdirektivet er EF-domstolens dom af 18. november 1999, Teckal, til hvilken Kommissionen også henviste i sin procedure.

24. november 2005, sag C-331/04, ATI EAC mfl.

Om under hvilke betingelser en udbyder kan undlade på forhånd at oplyse den indbyrdes vægtning af underkriterier til et underkriterium. Artikel 36 i Tjenesteydelsesdirektivet og artikel 34 i Forsyningsvirksomhedsdirektivet 93/38 skal fortolkes på samme måde

En italiensk ordregivende myndighed udbød driften af buskørsel i et område. Det fremgår ikke, hvilket udbudsdirektiv udbudet blev foretaget efter. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud på grundlag af fire underkriterier, herunder et underkriterium om »organisation og støtteforanstaltninger«. Ifølge udbudsbetingelserne ville underkriterierne blive vægtet med tilsammen 100 points, heraf 25 points til underkriteriet om organisation og støtteforanstaltninger.

Det fremgik af udbudsbetingelserne, at underkriteriet om organisation og støtteforanstaltninger angik a) antallet af garager og parkeringspladser, b) kontrolforanstaltninger m.m., c) antal chauffører m.m., d) antal forretningssteder og e) antal medarbejdere beskæftiget med tilrettelæggelse af skiftehold. Det var ikke angivet i i udbudsbekendtgørelsen eller udbudsbetingelserne, hvorledes tilbudene ville blive bedømt på disse punkter.

Efter at have modtaget tilbudene besluttede udbyderen at fordele de 25 points for underkriteriet om organisation og støtteforanstaltninger mellem punkterne a)-e) med et nærmere angivet antal points til hvert af disse punkter (henholdsvis 8, 7 og 6 points til de tre første punkter og 2 points til hvert af de to øvrige). Udbyderen besluttede derefter at indgå kontrakt med en af tilbudsgiverne.

Flere andre tilbudsgivere klagede til et klageorgan med henvisning til, at udbyderens vurdering af tilbudene med hensyn til punkterne a)-e) havde været afgørende for tildelingsbeslutningen. Klagerne gjorde gældende, at dette var en overtrædelse af Tjenesteydelsesdirektivets artikel 36, stk. 2, hvorefter underkriterierne til tildelingskriteriet det økonomisk mest fordelagtige bud så vidt muligt skal angives i prioriteret rækkefølge. Klageorganet tog ikke klagen til følge.

Klagerne indbragte sagen for en forvaltningsdomstol, der stillede nogle spørgsmål til EF-domstolen. Disse spørgsmål gik i deres kerne ud på, om det var tilladeligt, at udbyderen ikke på forhånd havde oplyst den indbyrdes vægtning af punkterne a)-e).

EF-domstolen udtalte (noget sammentrængt og til dels omformuleret, Klagenævnets litrering):

A. Tjenesteydelsesdirektivets artikel 36 og artikel 34 i Forsyningsvirksomhedsdirektivet 93/38 skal fortolkes på samme måde. Det var derfor ikke nødvendigt at tage stilling til, hvilket af de to direktiver, der fandt anvendelse (præmis 20).

B. Principperne om ligebehandling og gennemsigtighed kræver, at potentielle tilbudsgivere på forhånd har kendskab til alle forhold, som ordregiveren tager i betragtning ved udvælgelsen af det økonomisk mest fordelagtige bud og om muligt disse forholds relative betydning (præmis 24).

C. Fællesskabsretten er ikke til hinder for, at ordregiveren fordeler den oplyste vægt for et underkriterium mellem under-underkriterier til dette underkriterium under forudsætning af,

1) at der ikke herved sker ændring af de underkriterier, der er oplyst i udbudsbekendtgørelsen eller udbudsbetingelserne, og
2) at der ikke herved sker ændringer i forhold, som kunne have påvirket tilbudenes udformning, hvis de havde været kendt på forhånd, og
3) at der ikke herved sker diskrimination af tilbudsgivere.

Det tilkom den nationale domstol at tage stilling til, om betingelserne under 1)-3) var opfyldt.

Klagenævnet for Udbud

RESUMÉER AF AFGØRELSER FRA EF-DOMSTOLEN OG RETTEN I FØRSTE INSTANS JULI 1997–2002

NB! Resuméernes henvisninger til retsregler m.m. vil/kan efterhånden blive forældede, da resuméerne principielt er udarbejdet kort efter afgørelserne

Dette hæfte indeholder resuméer af afgørelser inden for udbudsområdet truffet af EF-domstolen og Retten i Første Instans juli 1997-2002, og som er optaget på EF-domstolens websted http://curia.eu.int/.

Resuméerne er udarbejdet af Klagenævnet for Udbud, der har ansvar for dem alene.

Den dato, der angives ved begyndelsen af hvert resumé, er datoen for den pågældende afgørelse. Den betegnelse for sagen, der angives ved hvert resumé, er EF-domstolens officielle betegnelse, sådan som den er angivet på Internettet.

Særligt om afgørelserne fra *Retten i Første Instans* bemærkes:

Afgørelserne om udbud fra Retten i Første Instans angår udbud foretaget af EU-organerne, dvs. Kommissionen, Rådet og Parlamentet mfl., idet Retten i Første Instans er klageorgan vedrørende sådanne udbud.

For EU-organernes udbud gælder nogle regler, der er indeholdt i to forordninger, dels »Finansforordningen«, dvs. nu Rådets forordning nr. 1605/2002 med senere ændringer, dels »Gennemførelsesforordningen«, dvs. nu Kommissionens forordning nr. 2342/2002 med senere ændringer.

De pågældende regler svarer i det væsentlige til de udbudsregler, der gælder for de ordregivende myndigheder i medlemsstaterne. Afgørelserne om udbud fra Retten i Første Instans kan derfor have en vis almen interesse, for så vidt som de (reelt) kan bidrage til fortolkningen af de udbudsregler, der gælder for de ordregivende myndigheder i medlemsstaterne, dvs. Udbudsdirektivet og Forsyningsvirksomhedsdirektivet m.m.

I resuméerne af afgørelser fra Retten i Første Instans er som almindelig regel kun medtaget de dele af afgørelserne, der belyser forståelsen af almindelige udbudsretlige principper. Resuméerne omfatter således principielt ikke dele af afgørelserne, der angår specifikke reguleringer af EU-organernes optræden eller formelle spørgsmål om Rettens kompetence.

NB! Resuméernes henvisninger til retsregler m.m. vil/kan efterhånden blive forældede, da resuméerne principielt er udarbejdet kort efter afgørelserne.

Indholdsfortegnelse vedrørende afgørelsernes dato og betegnelse

EF-domstolens dom af 17. juli 1997, sag C-43/97, Kommissionen mod Italien 8

EF-domstolens dom af 17. september 1997, sag C-54/96, Dorsch Consult 8

EF-domstolens dom af 16. oktober 1997, sag C-304/96, Hera 8

EF-domstolens dom af 18. december 1997, sag C-5/97, Ballast Nedam Groep 9

EF-domstolens dom af 15. januar 1998, sag C-44/96, Mannesmann Anlagenbau (Strohal) 10

Retten i Første instans' kendelse af 26. maj 1998, sag T-60/98 R, Ecord Consortium mod Kommissionen 12

EF-domstolens dom af 17. september 1998, sag C-323/96, Kommissionen mod Belgien 12

EF-domstolens dom af 24. september 1998, sag C-76/97, Tögel 13

EF-domstolens dom af 24. september 1998, sag C-111/97, EvoBus Austria 14

EF-domstolens dom af 10. november 1998, sag C-360/96, BFI Holding (ofte kaldet Arnhem el. lign.) 14

EF-domstolens dom af 17. december 1998, sag C-306/97, Connemara Machine Turf 16

EF-domstolens dom af 17. december 1998, sag C-353/96, Kommissionen mod Irland 18

EF-domstolens dom af 4. februar 1999, sag C-103/97, Josef Köllensperger 18

EF-domstolens dom af 4. marts 1999, sag C-258/97, Hospital Ingenieure Krankenhaustechnik Planings-Gesellschaft 18

EF-domstolens dom af 19. maj 1999, sag C-225/97, Kommissionen mod Frankrig 18

EF-domstolens dom af 16. september 1999, sag C-27/98, Metalmeccanica Fracasso og Leitschutz Handel und Montage 19

EF-domstolens dom af 28. oktober 1999, sag C-81/98, Alcatel Austria mfl. 20

EF-domstolens dom af 28. oktober 1999, sag C-328/96, Kommissionen mod Østrig 20

EF-domstolens dom af 18. november 1999, sag C-107/98, Teckal 21

EF-domstolens dom af 18. november 1999, sag C-275/98, Unitron Scandinavia og 3-S 22

EF-domstolens dom af 2. december 1999, sag C-176/98, Holst Italia 22

Retten i Første Instans' dom af 6. juli 2000, sag T-139/99, Alsace International Car Services mod Parlamentet 23

Retten i Første Instans' kendelse af 20. juli 2000, sag T-169/00 R, Esedra mod Kommissionen 24

EF-domstolens dom af 26. september 2000, sag C-225/98, Kommissionen mod Frankrig 25

EF-domstolens dom af 3. oktober 2000, sag C-380/98, University of Cambridge 27

EF-domstolens dom af 5. oktober 2000, sag C-16/98, Kommissionen mod Frankrig 28

EF-domstolens dom af 5. oktober 2000, sag C-337/98, Kommissionen mod Frankrig 29

EF-domstolens dom af 7. december 2000, sag C-324/98, Teleaustria og Telefonadress 29

EF-domstolens dom af 7. december 2000, sag C-94/99, ARGE Gewässerschütz 30

EF-domstolens dom af 1. februar 2001, sag C-237/99, Kommissionen mod Frankrig 31

EF-domstolens dom af 8. marts 2001, sag C-97/00, Kommissionen mod Frankrig 31

EF-domstolens dom af 10. maj 2001, sager C-223/99 og C-260/99, Agorà 32

EF-domstolens dom af 21. juni 2001, sag C-439/00, Kommissionen mod Frankrig 33

EF-domstolens dom af 12. juli 2001, sag C-399/98, Ordine degli Architetti delle Province di Milano et Lodi 34

EF-domstolens dom af 18. oktober 2001, sag C-19/00, SIAC Construction 36

EF-domstolens dom af 27. november 2001, sager C-285/99 og C-286/99, Impresa Lombardini 38

EF-domstolens kendelse af 3. december 2001, sag C-59/00, Vestergaard 39

Retten i Første Instans' dom af 26. februar 2002, sag T-169/00, Esedra mod Kommissionen 40

Retten i Første Instans' dom af 11. juni 2002, sag T-365/00, Alsace International Car Services mod Parlamentet 42

EF-domstolens dom af 18. juni 2002, sag C-92/00, HI Hospital Ingenieure Krankenhaustechnik PlanungsgesmbH 44

EF-domstolens dom af 17. september 2002, sag C-513/99, Concordia Bus Finland 45

EF-domstolens dom af 14. november 2002, sag C-411/00, Felix Swoboda 47

Retten i Første Instans' dom af 28. november 2002, sag T-40/01, Scan Office Design mod Kommissionen 49

EF-domstolens dom af 12. december 2002, sag C-470/99, Universale-Bau 50

Indholdsfortegnelse vedrørende afgørelsernes emner

Italien havde ikke gennemført Indkøbsdirektivet rettidigt 8

Om Tjenesteydelsesdirektivets anvendelse i Tyskland, selvom det ikke var gennemført der 8

Bygge- og anlægsdirektivets artikel 30, stk. 4, om unormalt lave bud skal forstås efter ordlyden 8

Som dokumentation for egnethed kan der henvises til kvalifikationer hos datterselskaber under forudsætning af bevis for, at der reelt rådes over kvalifikationerne 9

Om erhvervsdrivende aktieselskaber som ordregivere. EU-støtte medfører ikke udbudspligt i sig selv 10

Tilbud modtaget efter tilbudsfristens udløb som følge af tilbuddets adressering. Ikke opsættende virkning for et sagsanlæg med hensyn til, om tilbuddet var indgivet rettidigt, da udbyderen klart havde angivet, hvem tilbuddet skulle sendes til, hvorfor der ikke forelå »fumus boni juris« 12

Det flamske parlament skulle overholde Bygge- og anlægsdirektivet 12

Tjenesteydelsesdirektivets henvisning til CPC-nomenklaturen er bindende. Udrykningskørsel m.m. er omfattet af både bilag I A og bilag I B til direktivet og dermed af direktivets artikel 10. Skønnes i øvrigt uden interesse set fra en dansk udbudsretlig synsvinkel 13

Om et østrigsk klageorgans kompetence. Er uden interesse set fra en dansk udbudsretlig synsvinkel 14

Et erhvervsdrivende organ kan opfylde kriteriet om »almenhedens behov«. Koncerndeltageres status som offentligretlige organer skal vurderes særskilt. En slags obiter dictum om koncessionsbegrebet 14

Et aktieselskab oprettet af staten og under væsentlig kontrol af staten var en ordregivende myndighed 16

Statueret, at Irland havde tilsidesat det tidligere indkøbsdirektiv som følge af, at en ordregivende myndighed ikke havde udbudt et indkøb..... 18

Statueret, at et bestemt østrigsk organ er en ret. Er uden interesse set fra en dansk synsvinkel 18

Forskellige spørgsmål vedrørende Tjenesteydelsesdirektivet. Uden interesse set fra en dansk udbudsretlig synsvinkel 18

Statueret, at Frankrig på nogle punkter ikke havde gennemført andet kontroldirektiv behørigt 18

Udbyder var ikke forpligtet til at tildele den eneste tilbudsgiver kontrakten 19

I henhold til første kontroldirektiv skal der være mulighed for at få tildelingsbeslutningen annulleret 20

Statueret, at Østrig havde overtrådt Bygge- og anlægsdirektivet, første kontroldirektiv og traktatens artikel 30 (nu 28) ved et offentligt byggeri 20

Indkøbsaftale med en fælleskommunal sammenslutning skulle udbydes efter Indkøbsdirektivet 21

Det danske Klagenævn for Udbud kan stille præjudicielle spørgsmål til EF-domstolen. Om forståelsen af indkøbsdirektivets artikel 2, stk. 2. Traktatens forbud mod forskelsbehandling på grundlag af nationalitet medfører en gennemsigtighedsforpligtelse..... 22

Som dokumentation for egnethed kan der henvises til ressourcer hos andre under forudsætning af bevis for, at der virkelig rådes over disse ressourcer 22

Udbyderen havde ikke pligt til at kontrollere, at den valgte tilbudsgiver opfyldte et krav i udbudsbetingelserne om, at den udbudte tjenesteydelse skulle udføres i overensstemmelse med national lovgivning. En tilbudsgiver, hvis tilbud var ukonditionsmæssigt, havde retlig interesse i at anlægge sag med påstand om annullation for at få mulighed for at afgive tilbud under et eventuelt nyt udbud..... 23

Ikke opsættende virkning, da betingelsen om uopsættelighed ikke var opfyldt..... 24

Forudgående vejledende bekendtgørelse er ikke obligatorisk efter Bygge- og anlægsdirektivet. Tildelingskriterium om lokal beskæftigelse var lovligt. Der skal ved begrænset udbud prækvalificeres mindst fem ansøgere. Forskellige overtrædelser..... 25

Om forståelsen af kriteriet om, at driften for mere end halvdelens vedkommende skal være finansieret af det offentlige. Generelle bemærkninger om udbudsdirektivernes formål..... 27

Om opdeling af kontrakter under Forsyningsvirksomhedsdirektivet. Forbudet mod forskelsbehandling beskytter også potentielle tilbudsgivere..... 28

Beslutning om ikke at foretage udbud var truffet før direktivets ikrafttræden og var dermed lovlig. Nogle senere forhandlinger efter direktivets ikrafttræden angik ikke grundlæggende kontraktbestemmelser..... 29

Koncession om udgivelse af telefonbøger var omfattet af Forsyningsvirksomhedsdirektivet. Der er ikke udbudspligt for koncession om tjenesteydelser efter dette direktiv, men bl.a. principperne om ligebehandling og gennemsigtighed skal overholdes 29

Tilbudsgivere, der modtog statsstøtte, kunne komme i betragtning..... 30

Almene boligselskaber var ordregivere omfattet af Bygge- og anlægsdirektivet. Generelle bemærkninger om udbudsdirektiverne formål..... 31

Statueret, at Frankrig ikke havde gennemført direktiv 97/92 rettidigt 31

Et organ, der udelukkende drev erhvervsmæssig virksomhed, var ikke et offentligretligt organ 32

Frankrig havde ikke rettidigt gennemført en ændring af Forsyningsvirksomhedsdirektivet 33

Ved en offentlig myndigheds overladelse af et infrastrukturarbejde til en grundejer skal grundejeren forpligtes til at følge Bygge- og anlægsdirektivet. Om forståelsen af begrebet »entreprenør« i Bygge- og anlægsdirektivets artikel 1, a..... 34

Generelle bemærkninger om tildelingskriteriet det økonomisk mest fordelagtige bud. Der må kun anvendes underkriterier, der har til formål at identificere det økonomisk mest fordelagtige bud, og udbyder ikke må have frit valg ved tildelingen. Udbyder skal fastholde den samme fortolkning af underkriterierne gennem hele udbudet. Forsyningssikkerhed kan indgå som underkriterium 36

Italiensk lovgivning om vurdering af tilbud som unormalt lave var i strid med Bygge- og anlægsdirektivets artikel 30, stk. 4. Uden egentlig interesse set fra en dansk udbudsretlig synsvinkel 38

Traktatens grundlæggende bestemmelser skulle anvendes på udbud under tærskelværdien 39

Udbyderen overtrådte ikke forhandlingsforbuddet ved at indhente en lang række oplysninger fra en tilbudsgiver om tilbuddets indhold. Udbyderen overtrådte heller ikke ligebehandlingsprincippet ved fra tilbudsgiveren at indhente regnskaber, der skulle have været vedlagt ansøgningen om prækvalifikation. Udbyderen var berettiget til ved vurderingen af tilbudspriserne for en tjenesteydelse at tage hensyn til tjenesteydelsens forventede omfang. Diverse klagepunkter ikke taget til følge..... 40

Udbyderen af en tjenesteydelse havde pligt til at opsige den kontrakt, der var indgået på grundlag af udbuddet, efter at det var konstateret, at den valgte tilbudsgiver udførte tjenesteydelsen ulovligt 42

Udbyders annullation af udbud er ikke reguleret i Tjenesteydelsesdirektivet, men er underkastet fællesskabsrettens grundlæggende principper og er derfor omfattet af første kontroldirektiv. Også taget stilling til nogle andre spørgsmål, der er mindre interessante fra en dansk udbudsretlig synsvinkel. Et østrigsk klageorgan kunne stille præjudicielle spørgsmål til EF-domstolen 44

Der må under visse forudsætninger anvendes underkriterier om miljøforhold. Det er uden betydning, om sådanne kriterier kun kan opfyldes af et mindre antal virksomheder 45

Om tjenesteydelser, der såvel omfatter enkeltydelser under Tjenesteydelsesdirektivets bilag I A som enkeltydelser under direktivets bilag I B. Direktivets artikel 10 skal følges, og der skal ikke lægges vægt på den samlede tjenesteydelses primære formål. Der må ikke ske kunstig sammenlægning for at øge andelen af enkeltydelser under bilag I B. Kategori 20 i bilag I B omfatter ikke selve transporten. Udbudsdirektivernes formål. Tjenesteydelsesdirektivet skal overholdes, selvom der ikke foreligger et grænseoverskridende element..... 47

Trods grove overtrædelser af udbudsreglerne skulle udbyderen ikke erstatte en forbigået tilbudsgivers positive opfyldelsesinteresse, da tilbudsgiverens tilbud var ukonditionsmæssigt, selvom det var indgået i tilbudsvurderingen, hvorfor der ikke var årsagsforbindelse mellem overtrædelserne og tilbudsgiverens hævdede

tab. Krav, der er fastsat som mindstekrav, skal overholdes også ved udbud med forhandling 49

Et organs faktiske virksomhed er afgørende for, om organet skal anses for at imødekomme almenhedens behov. Første kontroldirektiv er ikke til hinder for klagefrister, og frister på 14 dage var rimelige. Hvis ordregiver på forhånd har fastlagt kriterierne for udvælgelse af virksomheder til at give tilbud, skal disse kriterier oplyses 50

Resuméer

EF-domstolens dom af 17. juli 1997, sag C-43/97, Kommissionen mod Italien

Italien havde ikke gennemført Indkøbsdirektivet rettidigt

Statueret, at Italien ikke havde gennemført Indkøbsdirektivet rettidigt.

EF-domstolens dom af 17. september 1997, sag C-54/96, Dorsch Consult

Om Tjenesteydelsesdirektivets anvendelse i Tyskland, selvom det ikke var gennemført der

Sagen angik en tvist om et tysk udbud af tjenesteydelser på arkitektområdet og det bygningstekniske område. Den tyske instans, som sagen verserede for (Vergabeüberwachungsausschuß des Bundes), stillede et spørgsmål til EF-domstolen om anvendelsen af Tjenesteydelsesdirektivet. Spørgsmålet havde reference til det tyske organs kompetence i forbindelse med, at Tjenesteydelsesdirektivet ikke var gennemført i Tyskland. EF-domstolens besvarelse af spørgsmålet kan have interesse i en generel EU-retlig sammenhæng (om borgerne kan påberåbe sig ikke implementerede direktivbestemmelser for nationale domstole mv.), men skønnes uden interesse set fra en dansk udbudsretlig synsvinkel.

Dommen indeholder endvidere en afgørelse om, at det tyske organ kunne stille præjudicielle spørgsmål til EF-domstolen. Også denne del af dommen skønnes uden interesse set fra en dansk udbudsretlig synsvinkel.

EF-domstolens dom af 16. oktober 1997, sag C-304/96, Hera

Bygge- og anlægsdirektivets artikel 30, stk. 4, om unormalt lave bud skal forstås efter ordlyden

En italiensk sundhedsmyndighed udbød arbejdet med ombygning m.m. af en bygning. I udbudsbekendtgørelsen var angivet, at kontrakten ville blive tildelt den tilbudsgiver, hvis bud medførte det højeste nedslag i forhold til en nærmere angivet grundpris. Det laveste tilbud lå ca. 17 % under grundprisen. Udbyderen afviste dette tilbud med den begrundelse, at det var unormalt lavt, hvorefter udbyderen tildelte en anden tilbudsgiver kontrakten. Dette var i overensstemmelse med en italiensk lov, hvorefter tilbud på offentlige bygge- og anlægskontrakter indtil 1. januar 1997 skulle udelukkes, hvis tilbudsprisen lå under en vis grænse i forhold til de øvrige tilbudspriser.

Den tilbudsgiver, der havde afgivet det laveste bud, indbragte sagen for en italiensk forvaltningsdomstol og gjorde gældende, at udbyderen havde overtrådt Bygge- og anlægsdirektivets artikel 30, stk. 4. Denne bestemmelse foreskriver en bestemt procedure med hensyn til tilbud, der forekommer unormalt lave. Bestemmelsen indeholder en særlig undtagelse om, at udbyderen indtil udgangen af 1992 under visse betingelser ikke behøver følge proceduren.

Den italienske forvaltningsdomstol spurgte EF-domstolen, om medlemsstaterne kan indføre midlertidige undtagelser med hensyn til et direktivs ikrafttræden i tilfælde, hvor der allerede i direktivet er fastsat en frist

til dette formål. EF-domstolen omformulerede spørgsmålet til at gå ud på, om Bygge- og anlægsdirektivets artikel 30, stk. 4, skal fortolkes således, at det efter udgangen af 1992 er tilladt en ordregivende myndighed at afvise bud, der er unormalt lave, uden at følge den procedure, der er foreskrevet i bestemmelsen.

Den italienske regering udtalte i et procesindlæg, at det var unødvendigt at besvare forvaltningsdomstolens spørgsmål som følge af, at den italienske minister for offentlige arbejder i et cirkulære havde opfordret de berørte myndigheder til at fortolke den omtalte lov i overensstemmelse med Bygge- og anlægsdirektivet.

EF-domstolen antog imidlertid sagen til realitetsbehandling med henvisning til (noget sammentrængt), at det efter domstolens faste praksis udelukkende tilkommer de nationale retsinstanser, for hvem en tvist er indbragt, at vurdere, om en præjudiciel afgørelse fra domstolen er nødvendig, og hvorefter en afvisning af et spørgsmål fra en national retsinstans kun er mulig, hvis den ønskede fortolkning af fællesskabsretten savner enhver forbindelse med hovedsagen.

EF-domstolen henviste til en dom fra 1995 om den bestemmelse i det tidligere bygge- og anlægsdirektiv, der svarer til det nugældende direktivs artikel 30, stk. 4. Domstolen henviste videre til, at den i den pågældende dom har udtalt, at den omtalte undtagelse i bestemmelsen kun kan anvendes i tilfælde, hvor den endelige ordretildeling finder sted inden udgangen af 1992, og at der er tale om en midlertidig undtagelsesordning af exceptionel karakter, som må fortolkes snævert.

EF-domstolen konkluderede herefter, at det efter udgangen af 1992 ikke er tilladt for en ordregivende myndighed at afvise unormalt lave bud uden at følge den procedure, der foreskrives i Bygge- og anlægsdirektivets artikel 30, stk. 4.

EF-domstolens dom af 18. december 1997, sag C-5/97, Ballast Nedam Groep

Som dokumentation for egnethed kan der henvises til kvalifikationer hos datterselskaber under forudsætning af bevis for, at der reelt rådes over kvalifikationerne

For at komme i betragtning ved udbud af offentlige belgiske bygge- og anlægsarbejder skulle en tilbudsgiver være forhåndsgodkendt af den belgiske minister for offentlige arbejder. På et tidspunkt traf ministeren afgørelse om ikke at forny forhåndsgodkendelsen af en hollandsk entreprenør. Afgørelsen blev begrundet med, at den hollandske entreprenør var et holdingselskab, der ikke selv udførte entreprenørarbejder, og som til dokumentation for sine kvalifikationer henviste til arbejder udført af datterselskaber. Den hollandske entreprenør indbragte sagen for en belgisk forvaltningsdomstol, der forelagde sagen for EF-domstolen.

Ved dom i sagen af 14. april 1994, sag C-389/92 (ligeledes benævnt Ballast Nedam Groep), udtalte EF-domstolen bl.a. (lidt sammentrængt), at det tidligere bygge- og anlægsdirektiv skulle fortolkes således, at direktivet tillader, at der ved bedømmelsen af en godkendelsesansøgning fra den dominerende juridiske person i en koncern tages hensyn til kvalifikationerne hos de selskaber, der hører til koncernen, når den dominerende juridiske person godtgør, at den reelt disponerer over de nødvendige kvalifikationer hos de pågældende selskaber. Domstolen bemærkede, at det til-

kommer den nationale ret at tage stilling til, om det tilstrækkelige bevis i denne henseende er ført.

Den belgiske forvaltningsdomstol stillede senere EF-domstolen et spørgsmål, om hvorvidt ordene i domstolens dom af 14. april 1994 »tillader, at…der tages hensyn til« kvalifikationerne hos de øvrige selskaber i koncernen, skal forstås således, at udbyderen er forpligtet til at tage hensyn til disse kvalifikationer.

Ved den her resumerede dom besvarede EF-domstolen dette spørgsmål bekræftende.

Domstolens dom af 2. december 1999 i sagen Holst Italia, se resuméet nedenfor, går ud på en lignende afgørelse med hensyn til Tjenesteydelsesdirektivet.

EF-domstolens dom af 15. januar 1998, sag C-44/96, Mannesmann Anlagenbau (Strohal)

Om erhvervsdrivende aktieselskaber som ordregivere. EU-støtte medfører ikke udbudspligt i sig selv

Den her refererede dom og EF-domstolens dom af 10. november 1998 i sagen BFI Holding (Arnhem) angik i væsentlig grad det samme spørgsmål, dvs. om der er udbudspligt for et offentligt ejet aktieselskab, der både udfører offentlige serviceydelser og driver egentlig erhvervsmæssig virksomhed. I begge sager besvarede domstolen spørgsmålet bekræftende.

En lignende afgørelse er EF-domstolens dom af 27. februar 2003, Adolf Truley. I resuméet af denne dom er medtaget et indledende afsnit om begrebet »offentligretligt organ« med et forsøg på en terminologisk forenkling.

Se også EF-domstolens dom af 10. maj 2001 i sagen Agorà og resuméet af denne dom nedenfor.

Den her resumerede dom drejede sig om følgende:

Det østrigske statstrykkeri er oprettet i henhold til lov og har til hovedformål at udføre statslige trykningsopgaver som trykning af en lovtidende, pas, kørekort etc. Statstrykkeriet kan dog også udøve anden trykkerivirksomhed og kan deltage i virksomheder. Statstrykkeriet er efter det foreliggende et aktieselskab.

På et tidspunkt erhvervede statstrykkeriet et andet aktieselskab. Dette selskab stiftede endnu et aktieselskab, Strohal Rotationsdruck GesmbH (Strohal Rotationsdruck), i hvilket det af statstrykkeriet ejede aktieselskab har så godt som hele aktiekapitalen. Statstrykkeriet ejer således reelt Strohal Rotationsdruck, der har til formål at fremstille tryksager ved rotationstryk.

Der blev øjensynligt herefter taget skridt til et byggeri, der skulle rumme Strohal Rotationsdruck's trykningsanlæg. Det synes at fremgå, at byggeriet blev finansieret af statstrykkeriet, og at det skete med EU-støtte.

I forbindelse med byggeriet foretog statstrykkeriet et udbud af nogle installationsarbejder. Senere tilkendegav statstrykkeriet, at Strohal Rotationsdruck selv var ansvarlig for det pågældende udbud og aftaleindgåelsen i henhold til det. Udbudet blev ikke foretaget som EU-udbud.

En østrigsk virksomhed indklagede Strohal Rotationsdruck for et klageorgan og gjorde øjensynligt gældende, at Strohal Rotationsdruck skulle anses som ordregiver i henhold til Bygge- og anlægsdirektivet, således at det omtalte udbud skulle have været gennemført som EU-udbud.

Klageorganet (Bundesvergabeamt) stillede EF-domstolen en række spørgsmål, der navnlig sigtede til, om statstrykkeriet og Strohal Rotationsdruck skulle anses for ordregivende myndigheder i henhold til Bygge- og anlægsdirektivet.

EF-domstolen udtalte (Klagenævnets litrering):

1) Ad statstrykkeriet: Afgørende for, om statstrykkeriet skulle anses for en ordregivende myndighed i henhold til Bygge- og anlægsdirektivet, var om statstrykkeriet er et offentligretligt organ i medfør af direktivets artikel 1, b. Statstrykkeriet opfyldt endvidere de tre betingelser, der stilles i denne bestemmelse, og som skal være opfyldt samtidig. Statstrykkeriet var således oprettet til at imødekomme almenhedens behov, dog ikke af industriel og kommerciel karakter (første betingelse). Det var uden betydning, at statstrykkeriet desuden kunne udøve andre former for virksomhed, og at imødekommelsen af almenhedens behov udgjorde en relativt ubetydelig del af statstrykkeriets virksomhed. Statstrykkeriet var desuden en juridisk person (anden betingelse). Endvidere var statstrykkeriet undergivet statens kontrol, ligesom staten havde aktiemajoriteten i statstrykkeriet, og statstrykkeriet opfyldt således bestemmelsens tredje betingelse om, at organet skal være undergivet kontrol eller for mere end halvdelens vedkommende være finansieret af bl.a. staten m.m. Statstrykkeriet var herefter en ordregivende myndighed i henhold til Bygge- og anlægsdirektivet.

2) Ad Strohal Rotationsdruck: Et selskab, der driver forretningsvirksomhed, og i hvilket en ordregivende myndighed ejer en majoritetsandel af kapitalen, skal ikke anses for et offentligretligt organ i henhold til Bygge- og anlægsdirektivets artikel 1, b, alene fordi selskabet er oprettet af den ordregivende myndighed, eller fordi denne ordregivende myndighed til selskabet overfører midler fra aktiviteter, den udøver med henblik på at imødekomme almenhedens behov, der ikke er af industriel eller kommerciel karakter. Denne udtalelse må skulle forstås således: Strohal Rotationsdruck skulle ikke selv anses for en ordregivende myndighed i henhold til Bygge- og anlægsdirektivet, fordi Strohal Rotationsdruck's formål ikke var at imødekomme almenhedens behov, men alene gik ud på at udføre trykkeriopgaver generelt. Det var uden betydning, at statstrykkeriet reelt ejede Strohal, og at statstrykkeriet finansierede Strohal Rotationsdruck's byggeri.

3) Ad statstrykkeriets overførelse af det omhandlede udbud til Strohal Rotationsdruck: En bygge- og anlægskontrakt, der er omfattet af Bygge- og anlægsdirektivet, er fortsat omfattet af direktivet, selvom den ordregivende myndighed overdrager sine rettigheder og forpligtelser i henhold til kontrakten til en ikke ordregivende myndighed. Domstolen henviste herved til en formålsfortolkning af direktivet. Domstolen udtalte videre, at der kun kan gøres undtagelse fra det anførte, hvis det godtgøres, at kontrakten fra begyndelsen er omfattet af den ikke ordregivende myndigheds formål, og at det tilkom det østrigske klageorgan at tage stilling til, om dette var godtgjort i sagen.

4) Ad den eventuelle betydning af, at byggeriet skete med EU-støtte: Artikel 7, stk. 1 i forordning 2081/93 (hvorefter de støttede foranstaltninger skal være i overensstemmelse med traktaten, fællesskabets politikker og reglerne for indgåelse for offentlige kontrakter m.m.) betyder ikke, at modtagerne af støtte skal underkaste sig klageprocedurerne i henhold til

første kontroldirektiv, når de ikke selv er ordregivende myndigheder. Denne besvarelse kan vel sammenfattes således, at det var uden betydning for sagen, at byggeriet skete med EU-støtte.

Retten i Første instans' kendelse af 26. maj 1998, sag T-60/98 R, Ecord Consortium mod Kommissionen

Tilbud modtaget efter tilbudsfristens udløb som følge af tilbuddets adressering. Ikke opsættende virkning for et sagsanlæg med hensyn til, om tilbuddet var indgivet rettidigt, da udbyderen klart havde angivet, hvem tilbuddet skulle sendes til, hvorfor der ikke forelå »fumus boni juris«

Kommissionen iværksatte et begrænset udbud vedrørende en tjenesteydelse. I opfordringen til de prækvalificerede virksomheder om at afgive tilbud angav Kommissionen, at tilbud skulle sendes til en konsulentvirksomhed på en nærmere angivet adresse, og at Kommissionen ikke måtte nævnes som adressat, idet dette kunne medføre, at tilbuddet først blev modtaget efter tilbudsfristens udløb.

Et konsortium, der afgav tilbud, sendte sit tilbud med angivelse af den omtalte konsulentvirksomhed som adressat, men nævnede også Kommissionen i adressatangivelsen. Som følge af Kommissionens procedurer for postmodtagelse medførte dette, at tilbuddet først blev modtaget af konsulentvirksomheden efter tilbudsfristens udløb. Kommissionen afviste derfor tilbuddet som for sent indgivet.

Konsortiet anlagde derefter sag mod Kommissionen ved Retten i Første Instans og påstod principalt Kommissionen tilpligtet at tage konsortiets tilbud i betragtning. Konsortiet begærede endvidere sagsanlægget tillagt opsættende virkning, og kendelsen af 26. maj 1998 er Rettens afgørelse af spørgsmålet om opsættende virkning.

Retten tog ikke begæringen om opsættende virkning til følge med henvisning til, at der ikke forelå »fumus boni juris«[1], idet konsortiet ikke havde fulgt angivelsen af, at Kommissionen ikke måtte nævnes som adressat.

EF-domstolens dom af 17. september 1998, sag C-323/96, Kommissionen mod Belgien

Det flamske parlament skulle overholde Bygge- og anlægsdirektivet

Sagen angik det særlige flamske parlaments opførelse af en parlamentsbygning i Bruxelles.

Opførelsen skete uden EU-udbud og uden overholdelse af reglerne for tildeling af kontrakter i Bygge- og anlægsdirektivet og det tidligere bygge- og anlægsdirektiv 71/305 som ændret ved direktiv 89/440. Endvidere blev et enkelt arbejde tildelt ved udbud efter forhandling. Kommissionens påstand gik ud på, at EF-domstolen skulle fastslå, at disse forhold var i strid med de nævnte direktiver.

Belgien gjorde gældende, at overholdelse af direktiverne ikke havde været nødvendig og henviste til støtte herfor til to anbringender: Dels at byggeriet var omfattet af undtagelsesreglerne i Bygge- og anlægsdirektivets artikel 4 om beskyttelse af medlemsstaternes væsentlige interesser m.m., dels (kort gengivet) at den belgiske forfatning ikke gav mulighed for at pålægge det flamske parlament at følge EU's udbudsregler.

[1] Dvs. en røg af god ret, altså sandsynlighed for, at sagsanlægget var berettiget.

Med hensyn til det første af de nævnte anbringender udtalte EF-domstolen, at der intet var fremkommet til støtte for det, og at anbringendet herefter ikke kunne tages til følge. Med hensyn til det andet anbringende henviste domstolen til sin faste praksis, hvorefter en medlemsstat ikke kan påberåbe sig forhold i sin nationale retsorden til støtte for manglende overholdelse af et direktiv. Dette anbringende kunne derfor heller ikke tages til følge.

EF-domstolen dømte herefter Belgien i overensstemmelse med Kommissionens påstand.

EF-domstolens dom af 24. september 1998, sag C-76/97, Tögel

Tjenesteydelsesdirektivets henvisning til CPC-nomenklaturen er bindende. Udrykningskørsel m.m. er omfattet af både bilag I A og bilag I B til direktivet og dermed af direktivets artikel 10. Skønnes i øvrigt uden interesse set fra en dansk udbudsretlig synsvinkel

Sagen angik en klage fra en østrigsk vognmand over, at en socialforsikringsinstitution ikke havde foretaget EU-udbud af sygetransport. Det østrigske klageorgan (Bundesvergabeamt), der behandlede sagen, stillede en række spørgsmål til EF-domstolen.

Nogle af spørgsmålene havde reference til det østrigske klageorgans kompetence i forbindelse med, at Tjenesteydelsesdirektivet ikke var gennemført rettidigt i Østrig. EF-domstolens besvarelse af de pågældende spørgsmål kan have interesse i en generel EU-retlig sammenhæng (om borgerne kan påberåbe sig ikke implementerede direktivbestemmelser for nationale domstole mv.), men skønnes uden interesse set fra en dansk udbudsretlig synsvinkel.

Det østrigske klageorgan spurgte endvidere, om udrykningskørsel og sygetransport ledsaget af en redder hører under Tjenesteydelsesdirektivets bilag I A, kategori 2 (Landtransport, CPC-referencenummer 712) eller bilag I B, kategori 25 (Sundheds- og socialvæsen, CPC-referencenummer 93). Den omtalte kategorisering er afgørende for, om der er udbudspligt, jf. direktivets afsnit II.

EF-domstolen henviste til, at det af præamblen til Tjenesteydelsesdirektivet fremgår, at henvisningen til CPC-nomenklaturen i direktivets bilag I A og I B er bindende. Domstolen henviste videre til, at CPC-referencenummer 93 klart udelukkende vedrører de lægelige aspekter af sundhedsvæsnet, og at dette referencenummer ikke omfatter landtransport i forbindelse hermed, hvilket er omfattet af CPC-referencenummer 712.

Domstolen konkluderede herefter, at udrykningskørsel og sygetransport ledsaget af en redder hører under begge kategorier, dvs. både under bilag I A, kategori 2, og bilag I B, kategori 25, således at en aftale om sådanne tjenesteydelser er omfattet af direktivets artikel 10 (hvorefter den indbyrdes værdirelation er afgørende ved aftaler om tjenesteydelser, der omfatter begge bilag).

EF-domstolens dom af 24. september 1998, sag C-111/97, EvoBus Austria

Om et østrigsk klageorgans kompetence. Er uden interesse set fra en dansk udbudsretlig synsvinkel

Sagen angik en klage over et østrigsk trafikselskabs administration af et udbud om indkøb af busser. Det østrigske klageorgan (Bundesvergabeamt), der behandlede sagen, stillede nogle spørgsmål til EF-domstolen.

Spørgsmålene havde udelukkende reference til det østrigske klageorgans kompetence i forbindelse med, at andet kontroldirektiv, direktiv 92/13, ikke var gennemført rettidigt i Østrig. EF-domstolens besvarelse af spørgsmålene kan have interesse i en generel EU-retlig sammenhæng (om borgerne kan påberåbe sig ikke implementerede direktivbestemmelser for nationale domstole mv.), men skønnes uden interesse set fra en dansk udbudsretlig synsvinkel.

EF-domstolens dom af 10. november 1998, sag C-360/96, BFI Holding (ofte kaldet Arnhem el. lign.)

Et erhvervsdrivende organ kan opfylde kriteriet om »almenhedens behov«. Koncerndeltageres status som offentligretlige organer skal vurderes særskilt. En slags obiter dictum om koncessionsbegrebet

Den her refererede dom og EF-domstolens dom af 15. januar 1998 i sagen Mannesmann Anlagenbau (Strohal) angik i væsentlig grad det samme spørgsmål, dvs. om der er udbudspligt for et offentligt ejet aktieselskab, der både udfører offentlige serviceydelser og driver egentlig erhvervsmæssig virksomhed. I begge sager besvarede domstolen spørgsmålet bekræftende.

En lignende afgørelse er EF-domstolens dom af 27. februar 2003, Adolf Truley. I resuméet af denne dom er medtaget et indledende afsnit om begrebet »offentligretligt organ« med et forsøg på en terminologisk forenkling.

Se også EF-domstolens dom af 10. maj 2001 i sagen Agorà og resuméet af denne dom nedenfor.

Den her resumerede dom er yderst udførlig, og nedenstående resumé har nødvendigvis måttet udformes som en særdeles sammentrængt gengivelse. Realiteten synes dog relativt enkel, se slutningen af resuméet.

To hollandske kommuner stiftede et aktieselskab, der fik til formål at udføre affaldsindsamling og renholdelse af veje m.m. til imødekommelse af almenhedens behov. Samtidig indgik de to kommuner aftaler med aktieselskabet om udførelsen af affaldsindsamlingen m.m. i kommunerne, således at kommunerne betalte aktieselskabet vederlag herfor. De to kommuners overdragelse af de pågældende opgaver til aktieselskabet medførte en eneret for dette til at udføre opgaverne i kommunerne og blev i aftalerne benævnt koncessioner.

Ifølge vedtægterne kunne aktieselskabets aktionærer kun være offentligretlige juridiske personer o.l., og de to kommuner skulle have flertal i bestyrelsen. Det synes imidlertid at fremgå, at aktieselskabet skulle drive egentlig erhvervsvirksomhed inden for sit formål. Aktieselskabet blev senere organiseret som del af en koncern med et holdingselskab og to aktieselskaber.

En virksomhed, der udfører indsamling af affald, anlagde sag mod de to kommuner ved en hollandsk domstol og gjorde gældende, at kommu-

nernes overdragelse af indsamling af affald m.m. til aktieselskabet skulle have været i EU-udbud i henhold til Tjenesteydelsesdirektivet. Den hollandske domstol forelagde sagen for EF-domstolen.

Sagens centrale spørgsmål var, om aktieselskabet skulle anses for en ordregivende myndighed i henhold til Tjenesteydelsesdirektivet artikel 1, b, idet det i så fald ville følge af direktivets artikel 6, at kommunernes overdragelse af opgaverne til aktieselskabet ikke krævede EU-udbud. Efter artikel 6 kræver indgåelse af aftaler om tjenesteydelser med en ordregivende myndighed nemlig ikke EU-udbud, hvis overdragelsen sker på grundlag af en eneret og i overensstemmelse med love eller administrative bestemmelser, der er forenelige med traktaten. Sagens problem var for så vidt det omvendte af, hvad der er sædvanligt i tvister om udbudspligt efter EU's udbudsdirektiver. Hvis aktieselskabet var en ordregivende myndighed, krævede overdragelsen af de omhandlede opgaver til selskabet *ikke* forudgående EU-udbud. (Derimod var aktieselskabet i så fald naturligvis selv omfattet af udbudspligten i henhold til udbudsdirektiverne.)

Afgørende for, om aktieselskabet var en ordregivende myndighed efter artikel 1, b, var om aktieselskabet skulle anses for et offentligretligt organ i henhold til bestemmelsens andet led. Afgørende i denne henseende var endvidere, om aktieselskabet opfyldt kriteriet om, at opgaven skal være at imødekomme almenhedens behov, idet de øvrige kriterier var opfyldt. Det, der gav den hollandske domstol anledning til tvivl, var ordene »dog ikke på det erhvervs- og forretningsmæssige område« i den pågældende sætning i artikel 1, b, øjensynligt fordi aktieselskabet havde til formål at drive erhvervsmæssig virksomhed. Den hollandske domstol stillede derfor EF-domstolen en længere række spørgsmål, der alle havde reference til de nævnte ord i artikel 1, b.

EF-domstolen udtalte (Klagenævnets litrering):

1) I anledning af, at Frankrig under sagen havde gjort gældende, at der ikke var udbudspligt, fordi de to kommuners overdragelse af opgaver til aktieselskabet var koncessioner: Domstolen beskæftigede sig ikke nærmere med spørgsmålet, da aktieselskabets vederlag for udførelse af opgaverne bestod alene i en pris og ikke i retten til at udføre tjenesteydelsen. Den pågældende udtalelse i dommen forekommer uklar, men skal tilsyneladende forstås som en slags »allerede fordi«-afgørelse af indhold nogenlunde således: Det var åbenbart, at der ikke var tale om koncessioner, og domstolen havde herefter ikke anledning til at tage stilling til det nøjagtige indhold af koncessionsbegrebet eller til, om Tjenesteydelsesdirektivet kan omfatte koncessioner.

2) Den omtalte sætning i direktivets artikel 1, b skal fortolkes sådan, at fællesskabslovgiver har sondret mellem almenhedens behov, dog ikke på det erhvervs- og forretningsmæssige område, på den ene side, og almenhedens behov på det erhvervs- og forretningsmæssige område på den anden side. Dette må efter sammenhængen skulle forstås således: Kriteriet om, at opgaven skal være at imødekomme almenhedens behov, kan opfyldes af et organ, der driver erhvervsmæssig virksomhed. Et sådant organ kan altså godt være et offentligretligt organ og dermed ordregiver i henhold til artikel 1, b.

3) Begrebet almenhedens behov, dog ikke på det erhvervs- og forretningsmæssige område, udelukker ikke behov, som imødekommes eller kan imødekommes af private virksomheder. Dette må efter sammenhæn-

gen skulle forstås således: Et organ, der driver erhvervsmæssig virksomhed, kan godt være et offentligretligt organ og dermed ordregiver i henhold til direktivets artikel 1, b, selvom der optræder private aktører inden for samme erhvervsmæssige område.

4) Det er ikke afgørende for, om et organ er et offentligretligt organ i henhold til den omhandlede regel i artikel 1, b, hvilket omfang imødekommelsen af almenhedens behov, dog ikke på det erhvervs- og forretningsmæssige område, har inden for organets virksomhed. Dette må efter sammenhængen skulle forstås således: Et organ, der driver erhvervsmæssig virksomhed, kan opfylde kriteriet om at imødekomme almenhedens behov, blot det pågældende organ ikke udelukkende optræder erhvervsmæssigt.

5) Det er ligeledes uden betydning, om den erhvervsmæssige virksomhed udøves af en særskilt juridisk person, der tilhører samme gruppe eller »koncern« som organet. Det spørgsmål, som denne udtalelse var svar på, sigtede tilsyneladende til organiseringen af det omtalte aktieselskab som en del af en koncern med et holdingselskab. Udtalelsen må skulle forstås således: Et organ, der er et offentligretligt organ i henhold til artikel 1, b, er stadig et offentligretligt organ, selvom et selskab inden for samme koncern udøver erhvervsmæssig virksomhed. Domstolen tilføjede, at det forhold, at et selskab i en koncern er et offentligretligt organ, omvendt ikke i sig selv medfører, at de øvrige deltagere i koncernen også skal anses for offentligretlige organer, og domstolen henviste herved til dommen af 15. januar 1998, Mannesmann Anlagenbau (Strohal), se resuméet af denne dom ovenfor. Domstolen understregede således, at koncerndeltageres eventuelle status som offentligretlige organer skal vurderes særskilt for hver koncerndeltager.

6) Spørgsmålet, om der er tale om almenhedens behov, dog ikke på det erhvervs- og forretningsmæssige område, skal vurderes objektivt, således at den retlige form er uden betydning. Det spørgsmål, som denne udtalelse var svar på, sigtede tilsyneladende til, at kommunernes overdragelse af opgaver til aktieselskabet ikke havde udtrykkelig hjemmel i den hollandske lovgivning.

Dommen virker umiddelbart særdeles indviklet og vanskeligt forståelig og er navnlig kompliceret af, at den hollandske domstols spørgsmål og EF-domstolens svar i overensstemmelse med praksis er formuleret abstrakt.

Afgørelsens hovedlinjer synes dog enkle nok: Det omtalte aktieselskab var et offentligretligt organ og dermed en ordregivende myndighed, fordi det havde til opgave at imødekomme almenhedens behov, og fordi det ikke udelukkende drev erhvervsmæssig virksomhed.

Det fremgår, at EF-domstolen ved sin vurdering af sagen anlagde en formålsfortolkning i relation til udbudsreglernes formål, således som det er domstolens praksis.

EF-domstolens dom af 17. december 1998, sag C-306/97, Connemara Machine Turf

Et aktieselskab oprettet af staten og under væsentlig kontrol af staten var en ordregivende myndighed

Et irsk aktieselskab, der i sagen benævnes Skovkontoret, udbød i 1994 indkøb af gødningsstoffer uden udbudsbekendtgørelse i EF-Tidende. En forbigået tilbudsgiver anlagde sag mod Skovkontoret ved en irsk domstol

og gjorde gældende, at indkøbet skulle have været udbudt efter det tidligere indkøbsdirektiv, direktiv 77/62 med senere ændringer. Det afgørende for sagen var, om Skovkontoret skulle anses for en ordregivende myndighed.

Skovkontoret er oprettet af den irske stat og har til formål at drive skovbrug og opretholde og vedligeholde en skovbrugsindustri m.m. Skovkontoret driver endvidere et antal nationalparker. Skovkontorets ledelse udnævnes af staten, og statens regler om aflønning og arbejdsbetingelser gælder for Skovkontorets medarbejdere. Staten har instruktionsbeføjelser over for Skovkontoret i nærmere bestemt omfang, og visse af Skovkontorets dispositioner skal godkendes af staten.

Den irske domstol spurgte EF-domstolen, om Skovkontoret skal anses for en ordregivende myndighed i henhold til det tidligere indkøbsdirektiv og i henhold til det gældende indkøbsdirektiv.

Med hensyn til det tidligere indkøbsdirektiv var det afgørende, om Skovkontoret skulle anses for at »svare til« en offentligretlig juridisk person i medfør af dette direktivs artikel 1, b. I et bilag til direktivet var for Irlands vedkommende angivet, at bestemmelsen omfattede »andre offentlige myndigheder, hvis offentlige indkøbsaftaler er undergivet statens kontrol«.

EF-domstolen udtalte:

Sagen kunne kun høre under det tidligere indkøbsdirektiv, da udbudet var foretaget og kontrakten var tildelt før fristen for gennemførelse af det nugældende indkøbsdirektiv. Domstolen skulle derfor kun svare på, om Skovkontoret var en ordregivende myndighed i henhold til det tidligere indkøbsdirektiv.

Samordningen på fælleskabsniveau af fremgangsmåderne ved offentlige indkøb har til formål at fjerne hindringerne for varernes frie bevægelighed, og for at give dette princip fuld virkning skal begrebet ordregivende myndighed fortolkes formålsbestemt. Den irske stat har som følge af sine beføjelser over for Skovkontoret mulighed for at kontrollere Skovkontorets økonomiske aktivitet. Selvom ingen bestemmelser udtrykkeligt fastsætter, at den statslige kontrol specifikt omfatter indkøb, kan staten i det mindste indirekte udøve en sådan kontrol.

Skovkontoret skulle herefter anses for at være en offentlig myndighed, hvis offentlige indkøbsaftaler er undergivet statens kontrol, jf. den ovenfor nævnte angivelse for Irlands vedkommende i et bilag til direktivet, og Skovkontoret var derfor en ordregivende myndighed i henhold til det tidligere indkøbsdirektiv.

Selvom domstolen ikke tog stilling til, om Skovkontoret er en ordregivende myndighed efter det nugældende indkøbsdirektiv, synes det åbenbart, at Skovkontoret er en ordregivende myndighed i henhold til dette direktivs artikel 1, b.

Ved dom afsagt samme dag i sagen C-353/96, Kommissionen mod Irland, blev Irland dømt i sagens anledning for ikke at have overholdt det tidligere indkøbsdirektiv, se resuméet straks nedenfor.

EF-domstolens dom af 17. december 1998, sag C-353/96, Kommissionen mod Irland

Statueret, at Irland havde tilsidesat det tidligere indkøbsdirektiv som følge af, at en ordregivende myndighed ikke havde udbudt et indkøb

Sagen angik det udbud, som er omhandlet i EF-domstolens dom af 17. december 1998 i sagen C-306/97, Connemara Machine Turf, se resuméet umiddelbart ovenfor.

Ved den her resumerede dom blev Irland i sagens anledning dømt for ikke at have overholdt det tidligere indkøbsdirektiv.

EF-domstolens dom af 4. februar 1999, sag C-103/97, Josef Köllensperger

Statueret, at et bestemt østrigsk organ er en ret. Er uden interesse set fra en dansk synsvinkel

Statueret, at det østrigske organ Tiroler Landesvergabeamt er en ret i henseende til traktatens artikel 177 (nu artikel 234 EF) og første kontroldirektiv. Er uden interesse set fra en dansk udbudsretlig synsvinkel.

EF-domstolens dom af 4. marts 1999, sag C-258/97, Hospital Ingenieure Krankenhaustechnik Planings-Gesellschaft

Forskellige spørgsmål vedrørende Tjenesteydelsesdirektivet. Uden interesse set fra en dansk udbudsretlig synsvinkel

Sagen angik en klage over et udbud af tjenesteydelser vedrørende teknisk rådgivning m.m. ved opførelsen af et børnehospital i Østrig. Den østrigske forvaltningsdomstol, der behandlede klagesagen, stillede forskellige spørgsmål til EF-domstolen.

Spørgsmålene havde navnlig reference til den østrigske lovgivning om offentlige udbud i forbindelse med, at Tjenesteydelsesdirektivet ikke var gennemført rettidigt i Østrig. EF-domstolens besvarelse af de pågældende spørgsmål kan have interesse i en generel EU-retlig sammenhæng (om borgerne kan påberåbe sig ikke implementerede direktivbestemmelser for nationale domstole mv.), men skønnes uden interesse set fra en dansk udbudsretlig synsvinkel.

Et spørgsmål, om de omhandlede tjenesteydelser var omfattet af Tjenesteydelsesdirektivet, blev besvaret med, at det var åbenbart, at de var det. Heller ikke på dette punkt har dommen interesse set fra en dansk udbudsretlig synsvinkel, da forholdet også i Danmark ville blive anset for åbenbart.

EF-domstolens dom af 19. maj 1999, sag C-225/97, Kommissionen mod Frankrig

Statueret, at Frankrig på nogle punkter ikke havde gennemført andet kontroldirektiv behørigt

Statueret, at Frankrig ikke havde gennemført andet kontroldirektiv, direktiv 92/13, behørigt på nogle punkter. Det drejede sig om den attestationsordning, der er foreskrevet i direktivets kapitel 2, og om den forligsprocedure, der er omtalt i direktivets kapitel 4.

Efter direktivets artikel 2, stk. 1, kan medlemslandene ved direktivets gennemførelse vælge mellem forskellige foranstaltninger. Frankrig har valgt at indføre de foranstaltninger, der er nævnt i bestemmelsens litra c, dvs. bl.a. at det pålægges udbyderen at betale erstatning i stedet for at an-

nullation af udbyderens beslutninger.[2] Kommissionen gjorde gældende, at den franske gennemførelse af direktivet var utilstrækkelig på dette punkt, men fik ikke medhold.

EF-domstolens dom af 16. september 1999, sag C-27/98, Metalmeccanica Fracasso og Leitschutz Handel und Montage

Udbyder var ikke forpligtet til at tildele den eneste tilbudsgiver kontrakten

En østrigsk ordregivende myndighed udbød efter Bygge- og anlægsdirektivet opsætning af et autoværn på en motorvej. Der indkom fire tilbud. Udbyderen forkastede tre af tilbudene af forskellige grunde og annullerede derefter udbudet, fordi man havde bestemt sig til en ændret udførelse af autoværnet. Under en klagesag for klageorganet Bundesvergabeamt bestred den tilbudsgiver, hvis tilbud ikke var blevet forkastet, dvs. den eneste resterende tilbudsgiver, berettigelsen af annullationen af udbudet.

Efter en bestemmelse i den østrigske lovgivning om offentlige kontrakter kan et udbud tilbagekaldes, når der efter forkastelse af tilbud kun resterer én tilbudsgiver, og udbyderens annullation af udbudet havde efter det foreliggende hjemmel i denne bestemmelse. Bundesvergabeamt stillede imidlertid EF-domstolen et spørgsmål, der sigtede til, om den pågældende bestemmelse er i overensstemmelse med Bygge- og anlægsdirektivets artikel 18, stk. 1 (om tildeling af ordrer efter udelukkelse af tilbudsgivere, der ikke opfylder betingelserne med hensyn til økonomisk, finansiel og teknisk formåen).

EF-domstolen udtalte (Klagenævnets litrering, noget sammentrængt):

1) Der kan ikke af Bygge- og anlægsdirektivet udledes nogen forpligtelse til at indgå kontrakten i tilfælde, hvor der kun er én egnet tilbudsgiver. En ordregivende myndigheds beføjelse til at undlade at tildele en udbudt kontrakt eller til at gøre udbudsproceduren om er endvidere ikke efter direktivet er betinget af, at der foreligger vægtige grunde eller undtagelsestilfælde. Direktivets formål går ud på at udvikle en effektiv konkurrence og at sætte de ordregivende myndigheder i stand til at sammenligne forskellige bud og acceptere det mest fordelagtige bud, og når der kun er ét bud tilbage, er den ordregivende myndighed ikke i stand til at sammenligne priser m.m. Domstolen konkluderede, at en ordregivende myndighed ikke er forpligtet til at tildele ordren til den eneste bydende, der er blevet anset for egnet.

2) Direktivets artikel 18, stk. 1, kan påberåbes af borgerne for de nationale domstole. Denne udtalelse kan have interesse i en generel EU-retlig sammenhæng, men er en selvfølgelighed set fra en dansk udbudsretlig. synsvinkel.

Efter Klagenævnet for Udbuds praksis kan et EU-udbud kun annulleres, hvis der foreligger en saglig grund. Den under punkt 1) refererede udtalelse fra domstolen om, at en ordregivers undladelse af at indgå kontrakt m.m. ikke er betinget af vægtige grunde o.l., kunne efter formuleringen ses som udtryk for, at denne praksis er af tvivlsom holdbarhed. Udtalelsen skal dog utvivlsomt forstås på baggrund af omstændighederne i den konkrete sag og synes reelt at være i god overensstemmelse med den omtalte praksis hos Klagenævnet. Domstolens udtalelser under punkt 1) går i vir-

[2] Danmark har valgt at gennemføre de foranstaltninger, der nævnes i bestemmelsens litra a og b, dvs. bl.a. at give mulighed for annullation af udbyderens beslutninger.

keligheden på, at udbyderens annullation af udbudet og iværksættelse af nyt udbud var sagligt begrundet i de bærende hensyn bag EU's udbudsregler.

EF-domstolens dom af 28. oktober 1999, sag C-81/98, Alcatel Austria mfl.

I henhold til første kontroldirektiv skal der være mulighed for at få tildelingsbeslutningen annulleret

Sagen angik en klage over et udbud efter Indkøbsdirektivet af et edb-system ved det østrigske motorvejsnet. Klagesagen verserede for det østrigske klageorgan Bundesvergabeamt.

Bundesvergabeamt stillede tre spørgsmål til EF-domstolen om anvendelsen af første kontroldirektiv, direktiv 89/665. Disse spørgsmål havde reference til Bundesvergabeamt's kompetence i henhold den østrigske lovgivning og første kontroldirektiv. Sagens hovedproblem kan tilsyneladende sammenfattes således:

Efter den østrigske lovgivning kunne Bundesvergabeamt kun annullere[3] afgørelser fra en ordregivende myndighed, indtil denne havde meddelt et såkaldt tilslag (»Zuschlag«). Ved begrebet tilslag forstås tilsyneladende en skriftlig og offentliggjort (?) meddelelse om, hvilken tilbudsgiver, der vil få tildelt kontrakten. Tilslag blev i praksis meddelt i forbindelse med kontraktsindgåelsen og kom derfor først til de andre tilbudsgiveres kundskab efter denne, hvilket øjensynlig havde til konsekvens, at Bundesvergabeamt typisk var afskåret fra at annullere selve beslutningen om tilslag.

EF-domstolen udtalte:

Ad spørgsmål 1 (lidt sammentrængt): Artikel 2, stk. 1, a og b, sammenholdt med artikel 2, stk. 6, i første kontroldirektiv skal forstås således, at medlemsstaterne er forpligtet til at indføre en klageprocedure, hvorefter klageren kan få ordregiverens beslutning om, med hvem der skal indgås kontrakt, kendt ugyldig.

Ad spørgsmål 2 og 3: Refereres ikke, da disse spørgsmål og besvarelsen udelukkende ses at have reference til Bundesvergabeamt's kompetence.

EF-domstolens dom af 28. oktober 1999, sag C-328/96, Kommissionen mod Østrig

Statueret, at Østrig havde overtrådt Bygge- og anlægsdirektivet, første kontroldirektiv og traktatens artikel 30 (nu 28) ved et offentligt byggeri

Statueret, at Bygge- og anlægsdirektivet, første kontroldirektiv 89/665 samt traktatens artikel 30 (nu artikel 28 EF, om forbud mod kvantitative indførselsrestriktioner m.m.) var overtrådt i forbindelse med et stort offentligt østrigsk byggeri.

Sagen angik først og fremmest en række formelle spørgsmål, der skønnes uden interesse for forståelsen af EU's udbudsregler.

[3] I den danske udgave af dommen »tilsidesætte som ugyldige», i den tyske udgave »nichtig erklären«.

EF-domstolens dom af 18. november 1999, sag C-107/98, Teckal
Indkøbsaftale med en fælleskommunal sammenslutning skulle udbydes efter Indkøbsdirektivet

I henhold til en italiensk lovgivning om offentlige virksomheder havde et antal kommuner oprettet et konsortium, hvis formål var at stå for produktion og forvaltning af varmeforsyning m.m. Konsortiet var en selvstændig juridisk person. Dets øverste organ var et repræsentantskab bestående af repræsentanter for kommunerne, men bestyrelsen og direktøren var ikke ansvarlige over direkte over for kommunerne. Konsortiet skulle have balance på budgettet og drive økonomisk forsvarlig virksomhed og skulle forrente den kapital, som kommunerne havde indskudt i det. Et eventuelt overskud skulle fordeles mellem kommunerne eller indgå i et reservefond eller geninvesteres.

En af de deltagende kommuner indgik uden udbud aftale med konsortiet om drift og vedligeholdelse af varmeanlæg og levering af brændsel til forskellige kommunale bygninger. Et italiensk firma, der driver virksomhed med vedligeholdelse af varmeanlæg og levering af fyringsolie, anlagde sag mod kommunen ved en italiensk forvaltningsdomstol og gjorde gældende, at den omtalte aftale skulle have været udbudt i henhold til EU´s udbudsdirektiver.

Den italienske forvaltningsdomstol forelagde sagen for EF-domstolen. Forvaltningsdomstolen bemærkede herved, at den fandt det vanskeligt at afgøre, om sagen hørte under Indkøbsdirektivet eller Tjenesteydelsesdirektivet, men at den ikke kunne udelukke, at Tjenesteydelsesdirektivets artikel 6 fandt anvendelse. (Efter denne bestemmelse finder udbudspligten under visse forudsætninger ikke anvendelse på tjenesteydelsesaftaler, der tildeles et organ, som selv er ordregivende myndighed). Forvaltningsdomstolen bad derfor EF-domstolen fortolke Tjenesteydelsesdirektivets artikel 6.

EF-domstolen omformulerede spørgsmålet til at gå ud på (kort gengivet), om EU's udbudsregler finder anvendelse, når en ordregiver under de foreliggende omstændigheder overdrager en opgave til en sammenslutning, som ordregiveren selv deltager i.

EF-domstolen udtalte (Klagenævnets litrering):

1) Det relevante direktiv var Indkøbsdirektivet, da værdien af det, der skulle leveres, var større end tjenesteydelserne

2) Indkøbsdirektivet indeholder ikke en regel svarende til Tjenesteydelsesdirektivets artikel 6, og Indkøbsdirektivet finder anvendelse, når en ordregivende myndighed vil indgå en gensidigt bebyrdende skriftlig aftale med en institution, der formelt er forskellig fra den, om levering af varer. Det er uden betydning, om den pågældende institution selv er en ordregivende myndighed.

3) Også den pågældende institution skal foretage EU-udbud, hvis den selv er en ordregivende myndighed (præmis 45).

EF-domstolens dom af 18. november 1999, sag C-275/98, Unitron Scandinavia og 3-S

Det danske Klagenævn for Udbud kan stille præjudicielle spørgsmål til EF-domstolen. Om forståelsen af indkøbsdirektivets artikel 2, stk. 2. Traktatens forbud mod forskelsbehandling på grundlag af nationalitet medfører en gennemsigtighedsforpligtelse

Sagen angik Indkøbsdirektivets artikel 2, stk. 2. Denne bestemmelse går (lidt sammentrængt) ud på: En ordregivende myndighed, der giver en ikke ordregivende myndighed ret eller eneret til at udføre tjenesteydelser, skal foreskrive, at det pågældende organ ved indgåelse af indkøbsaftaler respekterer princippet om forbud mod forskelsbehandling på grundlag af nationalitet.

Det danske Klagenævn for Udbud stillede nogle spørgsmål til EF-domstolen om den nævnte bestemmelse, og EF-domstolen udtalte (Klagenævnet litrering):

1) Det danske Klagenævn for Udbud er en ret i henseende til traktatens artikel 177 (nu artikel 234 EF), dvs. at Klagenævnet for Udbud kan stille præjudicielle spørgsmål til EF-domstolen.

2) Indkøbsdirektivets artikel 2, stk. 2, har selvstændig betydning i forhold til Tjenesteydelsesdirektivet.

3) Den ordregivende myndighed kan ikke kræve, at organet med ret/eneret til at udføre tjenesteydelser følger Indkøbsdirektivets udbudsprocedurer ved indkøb af varer. Den ordregivende myndighed skal derimod kræve, at organet respekterer princippet om forbud mod forskelsbehandling på grundlag af nationalitet.

4) Det nævnte princip må ikke fortolkes indskrænkende. Dette indebærer navnlig en gennemsigtighedsforpligtelse med henblik på, at den ordregivende myndighed kan konstatere, at princippet overholdes.

De sidste bemærkninger synes at være udtryk for en generel holdning i retning af øget anvendelse af traktatens grundlæggende principper på udbud, der ikke er omfattet af udbudspligten i henhold til udbudsdirektiverne, herunder en holdning om, at traktatens grundlæggende principper kan medføre en form for udbudspligt i sig selv. Holdningen uddybedes i EF-domstolens dom af 7. december 2000, Teleaustria og Telefonadress, i hvilken der også henvises til den her refererede dom.

EF-domstolens dom af 2. december 1999, sag C-176/98, Holst Italia

Som dokumentation for egnethed kan der henvises til ressourcer hos andre under forudsætning af bevis for, at der virkelig rådes over disse ressourcer

En italiensk kommune udbød i henhold til Tjenestydelsesdirektivet driften af rensningsanlæg og kloakrensning. Tildelingskriteriet var det økonomisk mest fordelagtige bud. I udbudsbekendtgørelsen var anført, at interesserede virksomheder skulle fremlægge dokumentation bl.a. for at have drevet et rensningsanlæg inden for de sidste tre år.

En af tilbudsgiverne var et tysk aktieselskab, der var stiftet af nogle tyske selskaber m.m. med henblik på at sætte disse i stand til at indgå kontrakter om indsamling og behandling af vand i udlandet. Det tyske aktieselskab havde ikke drevet et rensningsanlæg inden for de sidste tre år og fremlagde i stedet som dokumentation for sin egnethed forskellige oplysninger om en af stifterne, en tysk offentlig sammenslutning.

Udbyderen indgik kontrakt med det tyske aktieselskab, og en forbigået tilbudsgiver anlagde sag mod kommunen ved en italiensk forvaltnings-

domstol med påstand om annullation af tildelingsbeslutningen. Den forbigåede tilbudsgiver støttede påstanden på, at det tyske aktieselskab ikke havde fremlagt den krævede dokumentation. Forvaltningsdomstolen forelagde sagen for EF-domstolen.

EF-domstolen henviste til Tjenesteydelsesdirektivets artikel 31, stk. 3, og artikel 32, stk. 2, c (henholdsvis om, at en tjenesteyders økonomiske og finansielle formåen kan godtgøres ved ethvert dokument, som udbyderen finder egnet, og om at den tekniske formåen bl.a. kan godtgøres ved oplysning om de involverede teknikere m.m., uanset om de hører til tjenesteyderens virksomhed).

EF-domstolen udtalte videre: Det følger af de nævnte bestemmelsers formål og ordlyd, at ingen kan udelukkes fra deltagelse i en udbudsprocedure alene med den begrundelse, at han agter at benytte ressourcer, som tilhører en eller flere andre juridiske personer. En tjenesteyder, der ikke selv opfylder mindstekravene for deltagelse i et udbud, kan derfor henvise til kvalifikationerne hos tredjemænd, som agtes benyttet.

EF-domstolen udtalte desuden (noget sammentrængt): Et selskab, der henviser til kapaciteten i sammenslutninger eller virksomheder, som det er knyttet til, må imidlertid godtgøre, at det virkelig disponerer over disse sammenslutninger eller virksomheders ressourcer i nødvendigt omfang. Det tilkommer den nationale ret at afgøre, om et sådant bevis er ført. Ved denne bevisvurdering må der hverken på forhånd udelukkes visse former for bevis eller opstilles en formodning for, at tjenesteyderen råder over ressourcer, alene fordi disse tilhører samme koncern eller sammenslutning.

Retten i Første Instans' dom af 6. juli 2000, sag T-139/99, Alsace International Car Services mod Parlamentet

Udbyderen havde ikke pligt til at kontrollere, at den valgte tilbudsgiver opfyldte et krav i udbudsbetingelserne om, at den udbudte tjenesteydelse skulle udføres i overensstemmelse med national lovgivning. En tilbudsgiver, hvis tilbud var ukonditionsmæssigt, havde retlig interesse i at anlægge sag med påstand om annullation for at få mulighed for at afgive tilbud under et eventuelt nyt udbud

Parlamentet iværksatte et udbud vedrørende kørsler med chauffør, tilsyneladende i Strasbourg-området. I udbudsbetingelserne var angivet, at kørslerne skulle udføres med »anonyme« køretøjer. Det var desuden angivet, at nationale (dvs. franske) regler for kørslerne skulle overholdes. Efter at der var indkommet tilbud, besluttede Parlamentet at indgå kontrakt med en tilbudsgiver, der bestod af en sammenslutning af taxivognmænd i Strasbourg. En anden tilbudsgiver, en virksomhed, der ligeledes var beliggende i Strasbourg, anlagde sag mod Parlamentet ved Retten i Første Instans med påstand om annullation af Parlamentets beslutning om at indgå kontrakt med den valgte tilbudsgiver. Retten tog stilling til sagen således (Klagenævnets litrering):

Anbringende 1): Den valgte tilbudsgivers køretøjer opfyldte ikke kravet i udbudsbetingelserne om, at kørslerne skulle ske i anonyme køretøjer.

Dette anbringende sigtede til følgende: Efter sagsøgerens opfattelse kunne kørsel med anonyme køretøjer efter fransk lovgivning ikke ske ved brug af taxier. Den valgte tilbudsgiver benyttede imidlertid taxier til de

udbudte kørsler, og Parlamentet havde derfor handlet i strid med udbudsreglerne ved at indgå kontrakt med den valgte tilbudsgiver.

Parlamentet bestred, at fransk lovgivning skulle forstås som hævdet af sagsøgeren, og gjorde gældende, at fransk lovgivning skulle forstås på en nærmere angiven anden måde, som den valgte tilbudsgiver opfyldte. Parlamentet anførte desuden, at Parlamentet ville have pligt til at opsige kontrakten med den valgte tilbudsgiver, hvis Parlamentets forståelse af fransk lovgivning viste sig at være forkert.

Retten tog ikke anbringendet til følge. Retten henviste til, at sagsøgeren ikke havde ført bevis for, at Parlamentet fortolkede den franske lovgivning klart forkert (præmis 43). Retten henviste desuden til, at Parlamentet ikke havde pligt til at kontrollere, at den valgte tilbudsgiver udførte kørslerne i overensstemmelse med fransk lovgivning, og at det var den valgte tilbudsgivers forpligtelse at sørge for dette (præmis 44). Retten henviste videre til den nævnte tilkendegivelse fra Parlamentet om eventuel opsigelse af kontrakten (præmis 45).

Anbringende 2): Parlamentet havde udsat tilbudsgivere med limousinekøretøjer for forskelsbehandling.

Det forekommer lidt uklart, hvad dette anbringende sigtede til, men det var tilsyneladende følgende: Efter sagsøgerens opfattelse gik den franske lovgivning ud på, at anonym kørsel kun kan udføres med »limousiner«, og bl.a. sagsøgerens tilbud var derfor gået ud på kørsel med limousiner. I Frankrig beskattes limousiner imidlertid højere end taxier, og der var derfor efter sagsøgerens opfattelse sket en forskelsbehandling til skade for bl.a. sagsøgeren. Anbringendet var for så vidt en slags uddybning af anbringende 1.

Retten tog ikke anbringendet til følge med begrundelse reelt svarende til begrundelsen ad anbringende 1 (præmis 52-54).

Anbringende 3): Den valgte tilbudsgiver opfyldte ikke et kvalifikationskrav i udbudsbetingelserne:

Afvist, da anbringendet for fremsat for sent (præmis 67).

Parlamentet havde gjort gældende, at sagsøgeren ikke havde retlig interesse i sagsanlægget, da sagsøgeren ikke kunne få tildelt kontrakten som følge af, at sagsøgerens tilbud ikke opfyldte nogle nærmere angivne krav til den udbudte kørsels omfang.

Parlamentet fik imidlertid ikke medhold på dette punkt. Retten henviste til, at sagsøgeren havde retlig interesse i at anlægge sagen for at få mulighed for at afgive tilbud under et nyt udbud, hvis sagsøgeren fik medhold i sin påstand om annullation af tildelingsbeslutningen (præmis 33).

Som det fremgår, fik sagsøgeren ikke medhold i sagens realitet. Rettens afgørelse herom blev imidlertid reelt ændret ved Rettens dom af 11. juni 2002 i sag T-365/00, efter at det som følge af en fransk dom var konstateret, at det var sagsøgerens forståelse af fransk lovgivning, der var den rigtige, og at Parlamentets forståelse var forkert.

Retten i Første Instans' kendelse af 20. juli 2000, sag T-169/00 R, Esedra mod Kommissionen

Ikke opsættende virkning, da betingelsen om uopsættelighed ikke var opfyldt

Denne kendelse er Rettens afgørelse om opsættende virkning i den sag, der blev afgjort ved Rettens dom af 26. februar 2002 med sagsnummer T-169/00.

Sagen angik et udbud iværksat af Kommissionen vedrørende drift af en børneinstitution. Sagen var anlagt af en tilbudsgiver, der ikke havde fået tildelt kontrakten. Sagsøgeren gjorde gældende, at Kommissionen havde overtrådt udbudsreglerne på forskellige punkter.

Ved kendelsen af 20. juli 2000 afslog Retten en begæring fra sagsøgeren om opsættende virkning. Rettens afgørelse herom blev begrundet med, at betingelsen om uopsættelighed ikke var opfyldt, idet det ikke var bevist, at sagsøgeren ville lide et alvorligt og uopretteligt tab, hvis der ikke blev givet opsættende virkning (præmis 53).

Refereres i øvrigt ikke, da afgørelsen indgår som et led i Rettens faste praksis med hensyn til opsættende virkning. Der henvises om denne praksis til Klagenævnets resumé af Rettens kendelse af 20. september 2005 i sag T-195/05 R, Deloitte mod Kommissionen (se Klagenævnets samling af resuméer af afgørelser om udbud fra EF-domstolen og Retten i Første Instans 2003-2005).

EF-domstolens dom af 26. september 2000, sag C-225/98, Kommissionen mod Frankrig

Forudgående vejledende bekendtgørelse er ikke obligatorisk efter Bygge- og anlægsdirektivet. Tildelingskriterium om lokal beskæftigelse var lovligt. Der skal ved begrænset udbud prækvalificeres mindst fem ansøgere. Forskellige overtrædelser

Sagen angik et stort antal skolebyggerier gennem en årrække i den franske region Nord-Pas de Calais. Kommissionen gjorde gældende, at Bygge- og anlægsdirektivet (til dels det tidligere bygge- og anlægsdirektiv 71/305 med senere ændringer) var overtrådt på et antal punkter. EF-domstolen tog stilling til sagen således (Klagenævnets litrering):

1) Påstand om, at Bygge- og anlægsdirektivet var overtrådt som følge af, at der ikke var udsendt forudgående vejledende bekendtgørelser i medfør af direktivets artikel 11, stk. 1: Ikke taget til følge med henvisning til, at det af direktivets artikel 12, stk. 2, og artikel 13, stk. 4, fremgår, at en sådan vejledende bekendtgørelse ikke er obligatorisk. Også henvist til forarbejderne til det tidligere bygge- og anlægsdirektiv, herunder at et forslag fra Kommissionen om, at den vejledende bekendtgørelse skulle være obligatorisk, ikke blev fulgt af Rådet.

2) Påstand om, at Bygge- og anlægsdirektivets artikel 30, stk. 1, (om tildelingskriterier) var overtrådt som følge af, at der ved nogle af de omhandlede udbud var anvendt et tildelingskriterium om benyttelse af lokal arbejdskraft: Ikke taget til følge. Udtalt, at artikel 30, stk. 1, ikke udelukker enhver mulighed for, at de ordregivende myndigheder kan benytte en betingelse om bekæmpelse af arbejdsløshed som et kriterium, under forudsætning af, at betingelsen er i overensstemmelse med alle de grundlæggende principper i fællesskabsretten, herunder navnlig princippet om forbud mod forskelsbehandling, som dette følger af traktatens bestemmelser om etableringsretten og den frie udveksling af tjenesteydelser. Udtalt, at kriteriet skal være udtrykkeligt nævnt i udbudsbekendtgørelsen. Endvidere henvist til, at Kommissionen ikke havde gjort gældende, at kriteriet var uforeneligt med fællesskabsrettens grundlæggende principper, eller at det ikke havde været offentliggjort i udbudsbekendtgørelsen.

Dommen indeholder vedrørende dette punkt også nogle bemærkninger om forståelsen af Beentjes-dommens afgørelse med hensyn til en betin-

gelse om beskæftigelse af langtidsledige (dom af 29. september 1988 i sag C-31/87). Herunder udtalt, at den pågældende betingelse i Beentjessagen var et tildelingskriterium.[4]

3) Påstand om, at direktivets artikel 22 (om antallet af prækvalificerede) var overtrådt som følge af, at det i nogle af udbudsbekendtgørelserne var angivet, at højst fem ansøgere ville blive opfordret til at afgive bud: Taget til følge med henvisning til, at det antal virksomheder, som en ordregivende myndighed opfordrer til at afgive bud ved et begrænset udbud, under ingen omstændigheder kan være mindre end fem.

4) Påstand om, at direktivets artikel 30, stk. 2 og det tidligere direktivs artikel 29, stk. 2, (om tildelingskriterier) var overtrådt som følge af, at angivelsen af tildelingskriteriet i de fleste af udbudsbekendtgørelserne blot var gået ud på en henvisning til en fransk lovgivning om tildeling af offentlige kontrakter: Taget til følge bl.a. med henvisning til, at Frankrig ikke havde bevist rigtigheden af et anbringende om, at tildelingskriterierne var udtrykkeligt nævnt i udbudsbetingelserne.

5) Påstand om, at traktatens artikel 59 om fri udveksling af tjenesteydelser (nu artikel 49 EF) var overtrådt som følge af, at et stort antal af udbudsbekendtgørelserne havde angivet arbejder, der skulle udføres, ved henvisninger til franske erhvervsvirksomheders klassifikationer af forskellige arbejder: Taget til følge. Udtalt, at der var tale om en indirekte forskelsbehandling og dermed en restriktion for den frie udveksling af tjenesteydelser. Herved henvist til, at det i princippet kun var franske ansøgere, der umiddelbart kunne gennemskue klassifikationernes betydning, og at det var vanskeligere for bydende fra andre medlemsstater at afgive bud inden for fristen, når de først skulle indhente oplysninger om referencernes genstand og indhold.

6) Påstand om, at traktatens artikel 59 (nu artikel 49 EF) og artikel 26 i det tidligere bygge- og anlægsdirektiv var overtrådt som følge af, at det i nogle af udbudsbekendtgørelserne var krævet, at arkitekten skulle være medlem af den franske arkitektsammenslutning, og at der i en enkelt udbudsbekendtgørelse var stillet krav om en nærmere angivet erhvervskvalifikation: Erkendt af Frankrig og taget til følge.

7) Påstand om, at direktiverne var overtrådt som følge af, at regionen ikke havde givet Kommissionen meddelelse om indgåede kontrakter m.m.: Erkendt af Frankrig og taget til følge.

[4] Dommen synes at medføre uklarhed med hensyn til, hvorledes vilkår om beskæftigelse af lokal arbejdskraft ol. forholder sig til udbudsreglernes system. Et sådant vilkår er traditionelt blevet opfattet som en »supplerende betingelse«, der skal nævnes i udbudsbekendtgørelsen, og ikke som et tildelingskriterium. Den her resumerede dom ser derimod tilsyneladende et sådant vilkår som et særligt tildelingskriterium, der kan anvendes ved siden af udbudsdirektivernes sædvanlige tildelingskriterier eller som underkriterium til tildelingskriteriet det økonomisk mest fordelagtige bud, men som dog skal nævnes udtrykkeligt i udbudsbekendtgørelsen. Konsekvensen synes at være, at en tilbudsgivers opfyldelse af vilkår som de omhandlede kan indgå i udbyderens tildelingsbeslutning

EF-domstolens dom af 3. oktober 2000, sag C-380/98, University of Cambridge

Om forståelsen af kriteriet om, at driften for mere end halvdelens vedkommende skal være finansieret af det offentlige. Generelle bemærkninger om udbudsdirektivernes formål

Sagen angik en tvist mellem universitetet i Cambridge og det britiske finansministerium, om hvorvidt universitetet skulle anses for et offentligretligt organ i henhold til Bygge- og anlægsdirektivets artikel 1, b og Tjenesteydelsesdirektivets artikel 1, b.

Følgende synes at fremgå: I hvert fald i alt væsentligt drejede tvisten sig om, hvorvidt universitetet opfylder betingelsen i bestemmelsen om, at driften for mere end halvdelens vedkommende skal være finansieret af ordregivende myndigheder (staten m.m.). Universitetet gjorde gældende, at det ikke opfylder denne betingelse som følge af, at dets indtægter hidrører fra forskellige kilder, hvorimod finansministeriet mente, at universitetet opfylder betingelsen.

Den engelske domstol, der behandlede sagen, stillede fire spørgsmål til EF-domstolen, og EF-domstolens besvarelse kan gengives således:

Ad spørgsmål 1: Formålet med udbudsdirektiverne er at fjerne hindringerne for den frie udveksling af goder og tjenesteydelser og følgelig at beskytte interesserne hos de erhvervsdrivende, der er etableret i en medlemsstat, og som ønsker at tilbyde goder eller tjenesteydelser til ordregivende myndigheder i en anden medlemsstat. Formålet med direktiverne er således at fjerne risikoen for, at der indrømmes indenlandske bydende eller ansøgere en fortrinsstilling ved de ordregivende myndigheders indgåelse af kontrakter.

Stipendier og tilskud, der betales til støtte for forskningsarbejde, skal betragtes som finansiering, der ydes af en ordregivende myndighed, hvilket også gælder, selvom modtageren er en person, der som tjenesteyder er en del af universitetet. Støtte til studerende fra lokale uddannelsesmyndigheder, svarende til undervisningsgebyret, skal ligeledes betragtes således.

Derimod skal betalingen fra ordregivende myndigheder som modydelser for kontraktsbestemt forskning eller for rådgivning eller tilrettelæggelse af konferencer ikke betragtes som finansiering ydet af en ordregivende myndighed.

Ad spørgsmål 2 og 3: Udtrykket »mere end halvdelen« i den omhandlede bestemmelse skal forstås bogstaveligt, og der skal ved beregningen tages hensyn til samtlige indtægter, herunder indtægt ved forretningsmæssig aktivitet.

Ad spørgsmål 4 (stærkt sammentrængt): Beregningen af, om et organ som et universitet for mere end halvdelen finansieres af ordregivende myndigheder, skal foretages årligt på grundlag af de – eventuelt forventede – tal, der er tilgængelige ved begyndelsen af regnskabsåret.

EF-domstolens dom af 5. oktober 2000, sag C-16/98, Kommissionen mod Frankrig

Om opdeling af kontrakter under Forsyningsvirksomhedsdirektivet. Forbudet mod forskelsbehandling beskytter også potentielle tilbudsgivere

Dommens præmisser er særdeles udførlige, og gengivelsen af dem nedenfor er stærkt sammentrængt og til dels angivet i en anden rækkefølge end i dommen.

Et fransk regionalt foretagende på departementsplan (departementet Vendée), der består af forskellige fælleskommunale sammenslutninger med ansvar for elforsyning, udbød 37 kontrakter om udførelse af elforsynings- og vejbelysningsarbejder i regionen. Der var tale om en række enkeltstående vedligeholdelses- og udvidelsesarbejder på de eksisterende el- og vejbelysningsnet i departementet. Det regionale foretagende var tilsyneladende koordinator og administrator af udbudene, og de enkelte kontrakter skulle indgås særskilt med vedkommende fælleskommunale sammenslutning.

Alle kontrakterne blev udbudt samtidig i en fransk publikation. Der sendtes, ligeledes samtidig, udbudsbekendtgørelser til EF-Tidende med hensyn til seks af kontrakterne. Øjensynlig skulle det efter udbyderens opfattelse vurderes særskilt for hver af kontrakterne, om den pågældende kontrakts værdi nåede op på Forsyningsvirksomhedsdirektivets tærskelværdi, og dette var efter det foreliggende kun tilfældet for de seks kontrakter, for hvis vedkommende der blev sendt udbudsbekendtgørelser til EF-Tidende.

Kommissionen gjorde under sagen navnlig gældende, at de 37 kontrakter angik ét enkelt arbejde, og at der derfor var sket overtrædelse af Forsyningsvirksomhedsdirektivets artikel 14, stk. 13, hvorefter ordregiverne ikke må omgå direktivet ved at opdele kontrakterne.

EF-domstolen afgjorde sagen således:

Bedømmelsen af, om der var tale om et enkelt arbejde, skulle ske under hensyn til den økonomiske og tekniske funktion af de omhandlede el- og vejbelysningsnet. Et elforsyningsnet og et vejbelysningsnet har ikke samme økonomiske og tekniske funktion, og vurderingen skulle derfor foretages særskilt for elforsyningsnettene og vejbelysningsnettene.

Med hensyn til vejbelysningsnettene påhvilede det Kommissionen at godtgøre, at disse net teknisk og økonomisk kunne betegnes som en enhed på departementsniveau. Kommissionen havde imidlertid ikke anført sådanne forhold, og selvom hvert offentligt vejbelysningsnets økonomiske og tekniske funktion i departementet var den samme, kunne alle de omhandlede vejbelysningsnet ikke betragtes som en helhed, der har samme økonomiske og tekniske funktion på departementsplan. Kommissionens synspunkt om, at der var sket omgåelse i form af opdeling, blev derfor ikke taget til følge med hensyn til vejbelysningsnettene.

Med hensyn til elforsyningsnettene henviste EF-domstolen til direktivets formål, som er at sikre virksomheder fra andre medlemsstater mulighed for at byde på kontrakter eller grupper af kontrakter, som kan være af interesse for dem. Domstolen udtalte, at flere arbejder kan udgøre ét arbejde i direktivets forstand, hvis dette formål skal nås. Domstolen henviste desuden til, at elforsyningsnettene kunne forbindes indbyrdes, og at de som helhed opfyldt samme økonomiske og tekniske funktion, dvs. at sælge elektricitet til forbrugerne i departementet. Der var endvidere væsentlige forhold i sagen, der talte for, at kontrakterne om elnettene skulle opfat-

tes under ét på departementsniveau, fx det samtidige udbud, ligheder mellem udbudsbekendtgørelserne, den fælles geografiske ramme, og at det udbydende regionale foretagende havde det overordnede ansvar for koordinationen. Kontrakterne om elforsyning skulle derfor ses som dele af ét enkelt arbejde, der var blevet kunstigt opdelt.

Kommissionen fik således medhold med hensyn til elforsyningsnettene.

Det var endvidere en overtrædelse af direktivets artikel 4, stk. 2, om forbud mod forskelsbehandling, at alle kontrakterne om elforsyning var udbudt i en fransk publikation, medens kun nogle af dem var udbudt i EF-Tidende. Domstolen henviste herved til, at artikel 4, stk. 2, omfatter potentielle tilbudsgivere, og at bestemmelsen derfor også beskytter dem, der er blevet afholdt fra at byde, fordi de er blevet stillet ringere som følge af den af ordregiveren fulgte procedure.

Sagen omfattede forskellige andre spørgsmål, der skønnes mindre væsentlige.

EF-domstolens dom af 5. oktober 2000, sag C-337/98, Kommissionen mod Frankrig

Beslutning om ikke at foretage udbud var truffet før direktivets ikrafttræden og var dermed lovlig. Nogle senere forhandlinger efter direktivets ikrafttræden angik ikke grundlæggende kontraktbestemmelser

Dommen er særdeles udførlig, og nedenstående resumé er et yderst sammentrængt referat.

Sagen angik et anlæg af en bybane i Rennes. Anlægsarbejdet tildeltes en entreprenør efter forhandling uden forudgående udbud, og Kommissionen gjorde under sagen gældende, at der skulle være sket udbud i henhold til Forsyningsvirksomhedsdirektivet.

Frankrig blev imidlertid frifundet med henvisning til, at beslutningen om at gennemføre en procedure med forhandling uden forudgående udbud blev truffet længe før Forsyningsvirksomhedsdirektivets ikrafttræden. Nogle efterfølgende forhandlinger efter direktivets ikrafttræden gjorde ingen forskel, da Kommissionen ikke havde godtgjort, at disse forhandlinger var udtryk for vilje hos parterne til at genforhandle grundlæggende kontraktbestemmelser.

EF-domstolens dom af 7. december 2000, sag C-324/98, Teleaustria og Telefonadress

Koncession om udgivelse af telefonbøger var omfattet af Forsyningsvirksomhedsdirektivet. Der er ikke udbudspligt for koncession om tjenesteydelser efter dette direktiv, men bl.a. principperne om ligebehandling og gennemsigtighed skal overholdes

En østrigsk statsvirksomhed, der har til opgave at sørge for, at der udfærdiges telefonbøger, ønskede at udlicitere opgaven hermed i form af en offentlig tjenestydelseskoncession. De ydelser, der skulle udføres af tjenesteyderen, skulle gå ud på indsamling og bearbejdelse af abonnentdata, trykning af telefonbøger, og udførelse af reklamevirksomhed. Tjenesteyderens vederlag herfor skulle tilsyneladende bestå af, at tjenesteyderen oppebar indtægten ved salg af telefonbøger og reklameindtægter.

Efter at den østrigske statsvirksomhed havde annonceret om tjenesteydelsen i en avis, klagede to virksomheder til et østrigsk klageorgan

(Bundesvergabekontrollkommission). Klagerne gjorde gældende, at der skulle ske udbud af tjenesteydelsen i medfør af EU's udbudsregler.

Det østrigske klageorgan stillede nogle spørgsmål til EF-domstolen. Disse spørgsmål gik kort gengivet ud på 1) om tjenesteydelsen var omfattet af Forsyningsvirksomhedsdirektivet eller Tjenesteydelsesdirektivet, og 2) om tjenesteydelsen skulle egentligt udbydes i henhold til vedkommende direktiv.

EF-domstolen besvarede spørgsmålene således:

Ad 1) Da der var tale om ydelser direkte forbundet med en virksomhed vedrørende ydelser af offentlige teletjenester, var aftalen om tjenesteydelsen omfattet af Forsyningsvirksomhedsdirektivet.

Ad 2) På grundlag af en gennemgang af Forsyningsvirksomhedsdirektivets forhistorie og forarbejder konstaterede EF-domstolen, at koncessionskontrakter om tjenesteydelser ikke er omfattet af Forsyningsvirksomhedsdirektivet, idet fællesskabslovgiver har besluttet, at de ikke skal være omfattet af dette direktiv.

EF-domstolen understregede imidlertid, at de ordregivende myndigheder er forpligtet til at overholde traktatens grundlæggende regler i almindelighed og princippet om forbud mod forskelsbehandling på grundlag af nationalitet i særdeleshed. Domstolen udtalte videre, at dette navnlig indebærer en gennemsigtighedsforpligtelse, der består i at sikre en passende grad af offentlighed til fordel for enhver potentiel tilbudsgiver, der gør det muligt at åbne markedet for tjenesteyderne for konkurrence og at kontrollere, at udbudsprocedurerne er upartiske.

EF-domstolens dom af 7. december 2000, sag C-94/99, ARGE Gewässerschütz

Tilbudsgivere, der modtog statsstøtte, kunne komme i betragtning

Det østrigske Land- og Skovbrugsministerium iværksatte et udbud i henhold til Tjenesteydelsesdirektivet af prøveudtagninger og analyser af vand fra en række søer og floder. Der indkom forskellige tilbud, herunder fra to østrigske forsknings- og forsøgscentre, der begge modtager statstilskud.

En virksomhed, der efter det foreliggende var en af de øvrige tilbudsgivere, klagede til et østrigsk klageorgan (Bundesvergabekontrollkommission) og gjorde gældende, at de to forsknings- og forsøgscentre som følge af deres statstilskud ikke kunne komme i betragtning ved tildelingen af opgaven. Det østrigske klageorgan gav ikke klageren medhold, hvorefter klageren indbragte sagen for ankeinstansen (Bundesvergabeamt).

Ankeinstansen stillede en række spørgsmål til EF-domstolen, og domstolen besvarede spørgsmålene således:

Det er ikke en tilsidesættelse af EU's ligebehandlingsprincip i sig selv, at organer, som modtager offentlig støtte, får adgang til at deltage i en udbudsprocedure vedrørende en offentlig kontrakt. I modsat fald ville fællesskabslovgiver have fastsat udtrykkelige bestemmelser herom. Domstolen henviste herved bl.a. til, at begrebet tjenesteydere i henhold til Tjenesteydelsesdirektivets artikel 1, c bl.a. omfatter offentlige organer, der tilbyder tjenesteydelser.

At en ordregivende myndighed tager tilbud i betragtning fra organer, som modtager offentligt tilskud fra ordregiveren selv eller andre ordregivende myndigheder, og som følge deraf kan afgive væsentligt lavere bud end andre bydende, udgør ikke skjult forskelsbehandling og er ikke i strid

med traktatens artikel 59 (om fri udveksling af tjenesteydelser, nu artikel 49 EF). Statsstøtte ydes ganske vist almindeligvis til virksomheder i den stat, der yder støtten, men den heraf følgende ulige behandling af virksomheder fra andre medlemsstater ligger i selve begrebet statsstøtte.

EF-domstolen udtalte dog videre: Det kan ikke udelukkes, at de ordregivende myndigheder under visse særlige omstændigheder skal eller kan tage hensyn til, at der er tale om tilskud, og navnlig om støtte, der ikke er i overensstemmelse med traktaten, og i givet fald udelukke de bydende, der modtager en sådan støtte eller et sådant tilskud.[5]

EF-domstolens dom af 1. februar 2001, sag C-237/99, Kommissionen mod Frankrig

Almene boligselskaber var ordregivere omfattet af Bygge- og anlægsdirektivet. Generelle bemærkninger om udbudsdirektiverne formål

Ved dommen fastsloges, at franske almene boligselskaber m.m. er offentligretlige organer i henhold til artikel 1, b i Bygge- og anlægsdirektivet.

EF-domstolen fremhævede, at begrebet ordregiver i direktivets artikel 1 skal fortolkes formålsbestemt i lyset af udbudsdirektivernes formål, som domstolen beskrev således, øjensynlig til dels med reference til den konkrete sag:

At fjerne hindringerne for den frie udveksling af tjenesteydelser og varer og følgelig at beskytte interesserne for de erhvervsdrivende, der er etableret i en medlemsstat, og som ønsker at tilbyde goder eller tjenesteydelser til ordregivende myndigheder i en anden medlemsstat.

At fjerne risikoen for, at der indrømmes indenlandske bydende eller ansøgere en fortrinsstilling ved de ordregivende myndigheders indgåelse af kontrakter, og at fjerne muligheden for, at et organ, der er finansieret af staten, lokale myndigheder eller andre offentligretlige organer, lader sig lede af andre hensyn end økonomiske.

Bortset fra de nævnte formålsangivelser har dommen næppe særlig interesse set fra en dansk synsvinkel, idet almene boligselskaber i Danmark anses for ordregivere i henhold til udbudsdirektiverne, og idet det formentlig er oplagt, at almene boligselskaber m.m. som de franske i Danmark ville være blevet anset således.

EF-domstolens dom af 8. marts 2001, sag C-97/00, Kommissionen mod Frankrig

Statueret, at Frankrig ikke havde gennemført direktiv 97/92 rettidigt

Statueret, at Frankrig har tilsidesat sine forpligtelser i henhold til direktiv 97/92 om ændring af Bygge- og anlægsdirektivet, Indkøbsdirektivet og Tjenesteydelsesdirektivet, idet Frankrig ikke inden den fastsatte frist har vedtaget de love og administrative bestemmelser, der er nødvendige for at efterkomme direktivet.

Frankrig havde ikke bestridt, at direktiv 97/52 ikke var gennemført rettidigt, men havde anmodet domstolen om at fastslå, at proceduren til direktivets gennemførelse var ved at blive afsluttet. Domstolen nævnede

[5] Statsstøtte er principielt forbudt i henhold til artikel 87 EF, men der gælder forskellige undtagelser herfra, således som det også er nævnt i bestemmelsen.

imidlertid ikke dette i domskonklusionen og pålagde Frankrig at betale sagsomkostninger.

EF-domstolens dom af 10. maj 2001, sager C-223/99 og C-260/99, Agorà

Et organ, der udelukkende drev erhvervsmæssig virksomhed, var ikke et offentligretligt organ

Afgørelsen angik en italiensk virksomhed, der i det følgende benævnes Ente, og som arrangerer messer, udstillinger og kongresser ol. Ente er en privatretlig juridisk person, der ikke virker med fortjeneste for øje, og som udøver sin virksomhed i det offentliges interesse med det formål at fremme handelen. Ente skal basere driften på overskud, effektivitet og rentabilitet. Ente kan optage lån og kan deltage i andre selskaber med lignende formål.

Der verserede for en italiensk forvaltningsdomstol to sager, i hvilke det øjensynlig var afgørende, om Ente skal anses for et offentligretligt organ i henhold til Tjenesteydelsesdirektivets artikel 1, b og dermed en ordregivende myndighed.

Den ene sag var anlagt af en virksomhed benævnt Agorà og drejede sig om aktindsigt vedrørende et udbud foretaget af Ente. Efter den italienske lovgivning om offentlige kontrakter afhang Agorà's ret til aktindsigt tilsyneladende af, om Agorà skulle anses for en ordregivende myndighed. Den anden sag angik en klage fra et rengøringsfirma over Ente's manglende udbud af en rengøringsopgave.

Den italienske forvaltningsdomstol forelagde de to sager for EF-domstolen og stillede i begge sager EF-domstolen et spørgsmål, om Ente skal anses for et offentligretligt organ i henhold til Tjenesteydelsesdirektivets artikel 1, b. EF-domstolen behandlede sagerne sammen og besvarede spørgsmålene under ét ved samme dom.

Det, der voldte den italienske forvaltningsdomstol tvivl, var betingelsen i Tjenesteydelsesdirektivets artikel 1, b om, at organets opgave skal være at imødekomme almenhedens behov, dog ikke på det erhvervs- og forretningsmæssige område, idet bestemmelsens betingelser i øvrigt var opfyldt.

EF-domstolen udtalte:

I anledning af et anbringende fra Ente om, at det i henhold til den italienske lovgivning var uden betydning for sagen anlagt af Agorà, om Agorà var en ordregivende myndighed: Udtalt (sammentrængt og til dels ombrudt), at det efter EF-domstolens faste praksis udelukkende tilkommer den nationale retsinstans at vurdere relevansen af de spørgsmål, den stiller EF-domstolen, og at EF-domstolen kun kan afvise at besvare et præjudicielt spørgsmål fra en national retsinstans, bl.a. når spørgsmålet savner enhver forbindelse med hovedsagen. Da den italienske forvaltningsdomstol klart havde angivet, at besvarelsen af det stillede spørgsmål var nødvendig for forvaltningsdomstolens afgørelse, antog EF-domstolen sagen mod Agorà til realitetsbehandling.

EF-domstolen fremhævede, at de tre betingelser i Tjenesteydelsesdirektivets artikel 1, b skal være opfyldt samtidig.

EF-domstolen omformulerede den italienske forvaltningsdomstols spørgsmål til (lidt sammentrængt) at gå ud på, om et organ, der har til formål at organisere messer ol., og som ikke virker med fortjeneste for øje, men hvis drift er baseret på kriterier om overskud, effektivitet og ren-

tabilitet, imødekommer almenhedens behov, dog ikke på det erhvervs- og forretningsmæssige område.

EF-domstolen henviste videre til følgende (noget sammentrængt, Klagenævnets litrering):

1) Organisering af messer etc. imødekommer almenhedens behov. 2) Opregningen af offentligretlige organer i Bygge- og anlægsdirektivets bilag I, som Tjenesteydelsesdirektivets artikel 1, b henviser til, viser, at offentligretlige organer i almindelighed varetager behov, som opfyldes på anden måde end gennem markedet, og som staten af hensyn til almenvellet vælger selv at imødekomme, eller med hensyn til hvilke den ønsker en afgørende indflydelse. 3) Et organ som beskrevet i det omformulerede spørgsmål bærer selv den økonomiske risiko. 4) Der er konkurrence inden for området, hvilket kan være et indicium for, at der er tale om opfyldelse af behov inden for det erhvervs- og forretningsmæssige område. 5) En fortolkende meddelelse fra Kommissionen (EFT 1998, C 143, s. 2) om anvendelse af reglerne om det indre marked på messe- og udstillingsområdet giver støtte for, at afholdelse af messer og udstillinger har erhvervs- eller forretningsmæssig karakter, og det fremgår, at der ikke er tale om behov, som almindeligvis varetages af offentligretlige organer, jf. ovenfor. 6) Det forhold, at et organ som Ente handler internationalt, nationalt og lokalt på et konkurrencepræget område, synes at bekræfte, at et sådant organ opfylder almenhedens behov inden for det erhvervs- og forretningsmæssige område.

EF-domstolen besvarede herefter det omformulerede spørgsmål således (noget sammentrængt og sprogligt forenklet): Et organ som beskrevet i det omformulerede spørgsmål handler inden for det erhvervs- og forretningsmæssige område og er derfor ikke et offentligretligt organ som omhandlet i Tjenesteydelsesdirektivets artikel 1, b.

Forståelsen af EF-domstolens afgørelse kompliceres af omformuleringen af den italienske forvaltningsdomstols spørgsmål til at gå ud på et abstrakt spørgsmål. Forståelsen kompliceres også bl.a. af, at dommen kun indeholder sporadiske oplysninger om Ente, hvorfor det kan være lidt svært at få hold på, hvilke karakteristika ved Ente afgørelsen reelt lægger vægt på.

Afgørelsen skal sammenholdes med domstolens domme af 15. januar 1998 i sagen Mannesmann Anlagenbau (Strohal) og af 10. november 1998 i sagen BFI Holding (Arnhem), til hvilke afgørelser der også henvises i dommen. De to afgørelser er begge resumeret ovenfor.

Se også EF-domstolens dom af 27. februar 2003, Adolf Truley. I resuméet af denne dom er medtaget et indledende afsnit om begrebet »offentligretligt organ« med et forsøg på en terminologisk forenkling.

Den her resumerede afgørelse må skulle forstås således: Ente var ikke et offentligretligt organ i henhold til Tjenesteydelsesdirektivets artikel 1, b, fordi Ente *udelukkende* drev erhvervsmæssig virksomhed.

EF-domstolens dom af 21. juni 2001, sag C-439/00, Kommissionen mod Frankrig

Frankrig havde ikke rettidigt gennemført en ændring af Forsyningsvirksomhedsdirektivet

Statueret, at Frankrig ikke rettidigt havde gennemført direktiv 98/4 om ændring af Forsyningsvirksomhedsdirektivet.

Forholdet var erkendt af Frankrig, der imidlertid havde henvist til, at gennemførelsen var i gang.

EF-domstolens dom af 12. juli 2001, sag C-399/98, Ordine degli Architetti delle Province di Milano et Lodi

Ved en offentlig myndigheds overladelse af et infrastrukturarbejde til en grundejer skal grundejeren forpligtes til at følge Bygge- og anlægsdirektivet. Om forståelsen af begrebet »entreprenør« i Bygge- og anlægsdirektivets artikel 1, a

Dommens sagsfremstilling og præmisser er særdeles udførlige, og nedenstående er et yderst sammentrængt referat.

Sagen angik et omfattende kommunalt bygge- og anlægsprojekt i Milano, benævnt »Scala 2001«. Projektet bestod af restaurering og ombygning af Scala-teatret, ombygning af et kommunalt ejendomskompleks og opførelse af et nyt meget stort teater, Bicocca-teatret. Dette teater skulle placeres i Bicocca-området, et tidligere industriområde. Projektet var knyttet til et privat projekt om byplanmæssig ændring af Bicocca-området (tilsyneladende til beboelsesområde) og en række ombygninger i området i forbindelse hermed.

Efter den nationale og regionale italienske lovgivning skulle der for at opnå byggetilladelse betales et beløb til kommunen til dennes udgift til infra- og servicestruktur (veje, kloakker, belysning, skoler, kirker, sportsanlæg, kulturelle indretninger etc.). Der var dog også mulighed for, at bygherren mod reduktion i beløbet udførte infra- og servicestrukturarbejder selv og stillede dem vederlagsfrit til rådighed for kommunen.

Med hjemmel i denne lovgivning indgik Milano Kommune en aftale med bygherrerne for projektet i Bicocca-området om, at disse bygherrer skulle opføre Bicocca-teatrets »ydre skal« og sørge for tilslutning til installationer som et infra- og servicestrukturarbejde samt vederlagsfrit overdrage teatret til kommunen. Arbejderne under tag på Bicocca-teatret skulle derimod varetages af kommunen, der ville foretage offentligt udbud af disse arbejder.

Nogle arkitektsammenslutninger mfl. anlagde sag mod kommunen ved en italiensk forvaltningsdomstol med påstand om annullation af kommunens beslutninger med hensyn til opførelsen af Bicocca-teatrets ydre skal. Sagsøgerne gjorde bl.a. gældende, at der skulle have været foretaget EU-udbud af dette arbejde. Bygherrerne for Bicocca-området mfl. procestilvarsledes under sagen.

Forvaltningsdomstolen forelagde sagen for EF-domstolen med spørgsmål, om de relevante italienske lovbestemmelser var stridende mod Bygge- og anlægsdirektivet.

EF-domstolen udtalte (Klagenævnets litrering):

1) Ad et anbringende fra kommunen og de procestilvarslede om, at der ikke var forbindelse mellem sagen og forvaltningsdomstolens spørgsmål, fordi sagen drejede sig om sagsøgernes interesse i udbud af tjenesteydelser (arkitektopgaver) i henhold til Tjenesteydelsesdirektivet, hvorimod forvaltningsdomstolens spørgsmål angik Bygge- og anlægsdirektivet: Bl.a. udtalt, at det efter domstolens faste praksis tilkommer den nationale ret at vurdere nødvendigheden af en præjudiciel afgørelse og relevansen af de stillede spørgsmål. (Der er her tale om en standardformulering, der er brugt nogenlunde enslydende i flere domme fra domstolen, således fx også i dommen af 10. maj 2001, Agorà). Endvidere henvist til, at et EU-

udbud for opførelsen af Bicocca-teatret også ville kunne omfatte projekteringsarbejdet, hvilket i øvrigt fremgår af Bygge- og anlægsdirektivets artikel 1, a. Forvaltningsdomstolens spørgsmål skulle derfor besvares.

2) Under en sag i henhold til traktatens artikel 177 (nu artikel 234 EF) er domstolen ikke kompetent til at træffe afgørelse om nationale reglers forenelighed med fællesskabsretten. Domstolen omformulerede derfor forvaltningsdomstolens spørgsmål til at gå ud på, om Bygge- og anlægsdirektivet er til hinder for en national lovgivning på området for byplanlægning, når denne lovgivning tillader, at indehaveren af en byggetilladelse og en godkendt udstykningsplan direkte gennemfører et infra- og servicestrukturarbejde, som helt eller delvis fradrages i det beløb, der skal betales for tilladelsens udstedelse, og som overstiger direktivets tærskelværdi.

Det fremgår, at der med ordene »direkte gennemfører« sigtes til den omtalte mulighed efter den italienske lovgivning for, at en bygherre selv udfører infra- og servicestrukturarbejder og stiller dem vederlagsfrit til rådighed for kommunen mod reduktion i det beløb, der skal betales for byggetilladelsen.

3) På grundlag af en yderst detaljeret gennemgang af Bygge- og anlægsdirektivets artikel 1, a statuerede domstolen, at den »direkte gennemførelse« (se ovenfor) af et infra- og servicestrukturarbejde som opførelse af Bicocca-teatrets ydre skal er et offentligt bygge- og anlægsarbejde i henhold til Bygge- og anlægsdirektivet. EF-domstolen henviste herved til direktivets formål og til, at fortolkningen af direktivet må foretages på en måde, der sikrer, at direktivets effektive virkning ikke tilsidesættes i situationer, der er særegne som følge af bestemmelser i national ret (præmis 55). Af dommens præmis 88-96 fremgår endvidere, at ordet »entreprenør« i direktivets artikel 1, a ikke nødvendigvis sigter til den, der skal udføre det byggearbejde, der er tale om, og at det er tilstrækkeligt for karakteriseringen som entreprenør, at den pågældende kan få byggearbejdet udført af andre.

4) Domstolen udtalte videre, at direktivets effektive virkning tilgodeses, hvis en national lovgivning om »direkte gennemførelse« af et infra- og servicestrukturarbejde gør det muligt at forpligte den pågældende grundejer til at følge fremgangsmåderne i Bygge- og anlægsdirektivet, således at grundejeren anses som indehaver af en fuldmagt fra kommunen. Herved henvist til, at noget sådant i øvrigt er udtrykkelig fastsat i direktivets artikel 3, stk. 4, med hensyn til koncessioner (præmis 100).

5) Domstolene besvarede herefter det omformulerede spørgsmål (punkt 2 ovenfor) bekræftende.

6) Forvaltningsdomstolen havde stillet endnu et spørgsmål. EF-domstolen afviste imidlertid dette spørgsmål med henvisning til, at forvaltningsdomstolen i forbindelse med spørgsmålet hverken havde præciseret, hvilke bestemmelser i fællesskabsretten, den ønskede fortolket, eller havde givet en præcis angivelse af de berørte aspekter i den italienske lovgivning. Det var derfor ikke muligt at afgrænse det konkrete problem med hensyn til fortolkningen af de relevante bestemmelser i fællesskabsretten.

EF-domstolens dom af 18. oktober 2001, sag C-19/00, SIAC Construction

Generelle bemærkninger om tildelingskriteriet det økonomisk mest fordelagtige bud. Der må kun anvendes underkriterier, der har til formål at identificere det økonomisk mest fordelagtige bud, og udbyder ikke må have frit valg ved tildelingen. Udbyder skal fastholde den samme fortolkning af underkriterierne gennem hele udbudet. Forsyningssikkerhed kan indgå som underkriterium

Et irsk amt udbød et kloakeringsarbejde m.m. som offentligt udbud i henhold til det tidligere bygge- og anlægsdirektiv (direktiv 71/305 med senere ændringer). Tildelingskriteriet var det mest fordelagtige tilbud på grundlag af pris, omkostninger og teknisk værdi.

Arbejdets omfang kunne tilsyneladende ikke fastlægges på forhånd. I hvert fald skulle prisangivelserne i tilbudene ske ved angivelse af enhedspriser for en række enkeltarbejder, hvis omfang var anslået i udbudsbetingelserne. Desuden skulle der i tilbudene foretages en beregning af den samlede tilbudspris på grundlag af enhedspriserne i det pågældende tilbud og det anslåede omfang af enkeltarbejderne. Det synes dog at fremgå, at tilbudene ikke nødvendigvis skulle angive enhedspriser for samtlige enkeltarbejder (?). I udbudsbetingelserne var endvidere anslået et foreløbigt basisbeløb på 90.000 irske pund (IEP) for materialer, og det var angivet, at tilbudsgiverne skulle forhøje dette beløb med en procentsats til faste omkostninger og fortjeneste m.m.

En kontrakt udformet efter de beskrevne principper karakteriseres i dommen som en kontrakt af typen »measure and value«. Det fremgår ikke, om der er tale om et særligt irsk begreb.

Der indkom et antal tilbud. Tilbudet med den laveste tilbudspris, knap 5,4 mio. IEP, blev indgivet af virksomheden SIAC Construction Ltd (SIAC). Udbyderens rådgivende ingeniør foretog herefter en vurdering af de tre tilbud, der havde de laveste tilbudspriser, og indstillede, at tilbudet med den næstlaveste tilbudspris, ca. 5,5 mio. IEP, blev antaget.

Som begrundelse herfor angav ingeniøren: De tre laveste tilbud havde samme tekniske værdi. SIAC, der havde afgivet det laveste tilbud, havde imidlertid undladt at foretage prisangivelser med hensyn til en væsentlig del af enkeltarbejderne, ligesom SIAC ikke havde medtaget beløbet til materialer. Endvidere havde SIAC ikke angivet et færdiggørelsestidspunkt. På denne baggrund fandt ingeniøren, at en hensigtsmæssig styring af arbejdet på grundlag af SIACs tilbud ville blive yderst vanskelig eller umulig. Ingeniøren henviste videre til, at tilbudet med den næstlaveste tilbudspris var mere velafbalanceret, og at dette tilbud kunne vise sig at blive mindre bekosteligt.

Udbyderen indgik derefter kontrakt med den tilbudsgiver, hvis tilbud havde den næstlaveste tilbudspris, hvorefter SIAC anlagde sag mod udbyderen ved High Court øjensynlig med påstand om, at udbyderens tildelingsbeslutning var i strid med reglen om tildelingskriterier i artikel 29 i det tidligere bygge- og anlægsdirektiv (det nuværende bygge- og anlægsdirektivs artikel 30). Efter at High Court havde frifundet udbyderen, ankede SIAC til Supreme Court, der stillede EF-domstolen et præjudicielt spørgsmål, om hvorvidt en udbyder i en situation som den foreliggende har pligt til at tildele kontrakten til tilbudet med den laveste tilbudspris.

I referatet af EF-domstolens udtalelser nedenfor anvendes begrebet »underkriterier« i det omfang, hvor domstolens udtalelser tydeligvis sigter

til dette begreb, uanset at den danske udgave af dommen ikke anvender ordet underkriterier.

EF-domstolen udtalte:

Angivelsen i det tidligere bygge- og anlægsdirektivs artikel 29 af underkriterier til tildelingskriteriet det økonomisk mest fordelagtige bud er ikke udtømmende. De ordregivende myndigheder kan imidlertid kun vælge underkriterier, der har til formål at identificere det økonomisk mest fordelagtige bud, og et tildelingskriterium, der giver den ordregivende myndighed frit valg ved tildelingen, vil være i strid med artikel 29. Forsyningssikkerhed kan i princippet indgå som underkriterium, hvilket i så fald skal være nævnt i udbudsbetingelserne eller udbudsbekendtgørelsen.

Ligebehandlingsprincippet medfører en forpligtelse til gennemsigtighed, hvilket betyder, at underkriterierne skal være angivet i udbudsbekendtgørelsen eller udbudsbetingelserne på en sådan måde, at alle rimeligt oplyste og normalt påpasselige bydende kan fortolke dem på samme måde.

Gennemsigtighedsforpligtelsen medfører også, at udbyderen skal fastholde den samme fortolkning af underkriterierne gennem hele udbudet.

Endelig skal underkriterierne anvendes på en objektiv måde og skal anvendes ens i forhold til alle bydende. Udbyderens anvendelse af en sagkyndig vurdering af forhold, der først bliver kendt med sikkerhed i fremtiden, er som udgangspunkt egnet til at sikre overholdelse af dette princip.

EF-domstolen besvarede herefter det stillede spørgsmål således (lidt opbrudt af overskuelighedsgrunde):

Det tidligere bygge- og anlægsdirektivs artikel 29 tillader, at udbyderen, når tildelingskriteriet er det økonomisk mest fordelagtige bud, tildeler kontrakten til den tilbudsgiver, der ifølge en sagkyndig vurdering sandsynligvis har afgivet det laveste tilbud.

Det er en betingelse, at de bydende er blevet behandlet lige. Dette forudsætter, at der er blevet sikret gennemsigtighed og objektivitet. Det er navnlig en forudsætning, at underkriterierne er klart nævnt i udbudsbekendtgørelsen eller udbudsbetingelserne, og at den sagkyndige vurdering på alle væsentlige punkter er i overensstemmelse med almindelige faglige standarder (»…bygger på objektive faktorer, der i overensstemmelse med sagkyndige regler betragtes som relevante og hensigtsmæssige…«).

EF-domstolens svar på det stillede spørgsmål har reference til de faktiske omstændigheder, der set ud fra en dansk synsvinkel forekommer noget særegne. Forståelsen af sagen kompliceres endvidere af, at dommens sagsfremstilling virker meget kortfattet. Der var uenighed mellem SIAC og udbyderen om, hvorledes udbudsbetingelserne skulle forstås, men som følge af den kortfattede sagsfremstilling er det vanskeligt at forstå, hvad denne uenighed nærmere drejede sig om. Det kunne virke, som om udbudet var uklart og for så vidt var i strid med gennemsigtighedsprincippet, men Supreme Court's spørgsmål til EF-domstolen kom ikke ind på dette forhold.

Dommens generelle udtalelser om principperne for anvendelse af tildelingskriteriet det økonomisk mest fordelagtige bud forekommer imidlertid interessante. Selvom disse udtalelser direkte kun refererer til det tidligere bygge- og anlægsdirektiv, kan de utvivlsomt anvendes på EU's udbudsregler generelt.

EF-domstolens dom af 27. november 2001, sager C-285/99 og C-286/99, Impresa Lombardini

Italiensk lovgivning om vurdering af tilbud som unormalt lave var i strid med Bygge- og anlægsdirektivets artikel 30, stk. 4. Uden egentlig interesse set fra en dansk udbudsretlig synsvinkel

For en overordnet italiensk forvaltningsdomstol, Consiglio di Stato, verserede to sager om hver sit udbud af arbejde ved vejanlæg. I begge udbud synes tildelingskriteriet at have været laveste pris. Sagerne var indbragt af to tilbudsgivere, hvis tilbud var blevet afvist med den begrundelse, at de var unormalt lave, og de to tilbudsgivere gjorde gældende, at afvisningen var i strid med Bygge- og anlægsdirektivets artikel 30, stk. 4, om udbyderens fremgangsmåde med hensyn til tilbud, der forekommer unormalt lave.

Afvisningen af de to tilbud var sket i henhold til en italiensk lovgivning om offentlige bygge- og anlægsarbejder. Af dommen synes at fremgå, at der efter denne lovgivning og den dertil knyttede administrative praksis gælder følgende for udbud, for hvis vedkommende tildelingskriteriet er laveste pris:

a) Der skal i udbudet angives en udbudssum, dvs. en slags foreløbig angivelse af prisen for arbejdet, og tilbud, hvis pris er en bestemt procentsats lavere end udbudssummen, skal vurderes som muligvis unormalt lave. Den nævnte procentsats beregnes for hvert udbud på grundlag af de fremkomne tilbudspriser og ud fra nogle komplicerede regler, der ikke kan gengives kort.

b) Tilbudsgiverne skal i forbindelse med tilbudet på nogle særlige skemaer give begrundelse for poster i tilbudsprisen, der tilsammen udgør mindst 75 % af denne. For et tilbud, der er vurderet som muligvis unormalt lavt i henhold til beregningen under a), foretager udbyderen en vurdering af den nævnte begrundelse og tager på grundlag af denne vurdering stilling til, om det pågældende tilbud endeligt skal anses for unormalt lavt og derfor skal afvises. Der indhentes ikke yderligere oplysninger fra tilbudsgiveren, og denne får ikke lejlighed til at udtale sig.

c) Ved den vurdering af tilbudsgiverens begrundelse for tilbudsprisen, der er nævnt under b), må udbyderen kun tage hensyn til besparelser, tekniske forhold og særligt gunstige betingelser for tilbudsgiveren. Udbyderen må derimod ikke tage hensyn til forhold, for hvilke der gælder en mindsteværdi. (Det fremgår ikke, hvad dette sigter til).

Dommen indeholder ikke oplysninger om den nærmere baggrund for de beskrevne regler eller for deres formål.

Consiglio di Stato stillede EF-domstolen nogle spørgsmål, der sigtede til, om de beskrevne regler er i overensstemmelse med fællesskabsretten.

EF-domstolen bemærkede, at den under en sag om præjudiciel forelæggelse i henhold til artikel 234 EF ikke har kompetence til at afgøre, om nationale regler er forenelige med fællesskabsretten, men at EF-domstolen dog er beføjet til at forsyne den nationale ret med fortolkningsbidrag, der gør det muligt for den nationale ret at vurdere spørgsmålet. (Domstolen har fremsat en tilsvarende udtalelse i adskillige andre domme, bl.a. i dommen af 12. juli 2001, Ordine…, der er resumeret ovenfor.)

EF-domstolen omformulerede herefter spørgsmålene fra Consiglio di Stato til (af forståelsesgrunde yderst sammentrængt) at gå ud på, om Byg-

ge- og anlægsdirektivets artikel 30, stk. 4, er til hinder for nationale bestemmelser og praksis, hvorefter

1) udbyder kan afvise et tilbud som unormalt lavt ud fra en beregning på grundlag af alle tilbudspriser og derefter udelukkende ud fra en vurdering af en obligatorisk begrundelse ved tilbuddets indgivelse for 75 % af tilbudsprisen, og hvorefter

2) udbyder ved vurderingen af en tilbudsgivers begrundelse for tilbudsprisen kun må tage hensyn til besparelser, tekniske løsninger og den bydendes særligt gunstige betingelser, men derimod ikke må tage hensyn til fastsatte mindsteværdier.

EF-domstolen fremkom med nogle yderst udførlige præmisser, i hvilke der bl.a. henvistes til direktivets formål og principperne om ligebehandling og gennemsigtighed, og EF-domstolen besvarede herefter de omformulerede spørgsmål bekræftende, dvs. at Bygge- og anlægsdirektivets artikel 30, stk. 4, er til hinder for nationale bestemmelser som beskrevet i spørgsmålene.

EF-domstolen bemærkede yderligere (ligeledes stærkt sammentrængt), at direktivets artikel 30, stk. 4, ikke i princippet er til hinder for et krav om, at der sammen med et tilbud skal gives begrundelse for tilbudsprisen, men at udbyderen skal kunne foretage en fornyet vurdering af, om tilbudet er unormalt lavt.

Sagen synes uden egentlig interesse set fra en dansk udbudsretlig synsvinkel, da en lovgivning som den omhandlede ikke findes i Danmark.

EF-domstolens kendelse af 3. december 2001, sag C-59/00, Vestergaard

Traktatens grundlæggende bestemmelser skulle anvendes på udbud under tærskelværdien

Et dansk boligselskab, der er en ordregivende myndighed i henseende til EU's udbudsdirektiver, holdt en licitation vedrørende opførelse af et antal boliger. Byggeriet nåede ikke op på Bygge- og Anlægsdirektivets tærskelværdi, og der blev ikke foretaget EU-udbud.

I licitationsbetingelserne var angivet, at der skulle anvendes udvendige døre og vinduer af et bestemt fabrikat. En tømrermester klagede til Klagenævnet og gjorde gældende, at denne klausul var i strid med traktatens artikel 6 (nu artikel 12 EF) om forbud mod forskelsbehandling på grund af nationalitet og artikel 30 (nu artikel 28 EF) om varernes frie bevægelighed.

Ved kendelse af 11. november 1998 statuerede Klagenævnet, at klausulen ikke var en overtrædelse af de nævnte bestemmelser.

Tømrermesteren indbragte sagen for Vestre Landsret, der stillede EF-domstolen nogle præjudicielle spørgsmål, og ved den her resumerede kendelse udtalte EF-domstolen:

Traktatens artikel 30 (nu artikel 28 EF) er til hinder for, at en ordregivende myndighed vedrørende et byggeri, der ikke overskrider Bygge- og anlægsdirektivets tærskelværdi, indsætter en bestemmelse om, at der skal anvendes et bestemt fabrikat, såfremt denne bestemmelse ikke ledsages af bemærkningen »eller dermed ligestillet«.

EF-domstolen henviste herved til, at resultatet klart fremgår af retspraksis, og at lovligheden af et udbud af en bygge- og anlægskontrakt foretaget af en ordregivende myndighed skal vurderes i relation til trakta-

tens grundlæggende bestemmelser, herunder princippet om varers frie bevægelighed.

Retten i Første Instans' dom af 26. februar 2002, sag T-169/00, Esedra mod Kommissionen

Udbyderen overtrådte ikke forhandlingsforbuddet ved at indhente en lang række oplysninger fra en tilbudsgiver om tilbuddets indhold. Udbyderen overtrådte heller ikke ligebehandlingsprincippet ved fra tilbudsgiveren at indhente regnskaber, der skulle have været vedlagt ansøgningen om prækvalifikation. Udbyderen var berettiget til ved vurderingen af tilbudspriserne for en tjenesteydelse at tage hensyn til tjenesteydelsens forventede omfang. Diverse klagepunkter ikke taget til følge

Kommissionen iværksatte et begrænset udbud vedrørende en tjenesteydelse bestående af drift af en børneinstitution i Bruxelles til brug for ansatte ved Fællesskabets institutioner. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud på grundlag af underkriterierne 1. Pris og 2. Kvalitet. Til underkriterium 2. Kvalitet var knyttet forskellige delkriterier vedrørende pædagogisk arbejdsplan og foranstaltninger med hensyn til vikariering for fraværende personale m.m.

Der indkom tilbud fra nogle virksomheder, herunder fra en virksomhed E, der hidtil havde udført den udbudte tjenesteydelse. Efter at Kommissionen havde besluttet at indgå kontrakt med en anden tilbudsgiver, anlagde E sagen ved Retten i Første Instans.

E's anbringender og Rettens stillingtagen til dem kan gengives således (Klagenævnets litrering):

Anbringende 1): Kommissionen havde overtrådt ligebehandlingsprincippet ved at give E en kortere tilbudsfrist end de andre tilbudsgivere.

Dette anbringende sigtede til følgende: I udbudsbetingelserne, der blev sendt til de prækvalificerede i oktober i vedkommende år, var fristen for at afgive tilbud fastsat til den 6. januar i det følgende år. På et tidspunkt meddelte Kommissionen de prækvalificerede, at fristen var udsat til den 7. februar, men som følge af en fejl blev den nye frist i meddelelsen til E angivet som 7. januar. E afleverede sit tilbud på denne dag og blev da gjort bekendt med, at fristen rettelig udløb 7. februar. E tog derfor sit tilbud tilbage og afleverede det senere på ny, tilsyneladende efter at have omarbejdet det. Ifølge E medførte de nævnte forhold, at E fik mindre tid end de øvrige tilbudsgivere til at tilrettelægge udarbejdelsen af sit tilbud, bl.a. fordi en del af E's medarbejdere havde ferie i en periode i januar.

Retten tog ikke anbringendet til følge navnlig med henvisning til, at de forhold, som E havde påberåbt sig, måtte tilskrives E selv (præmis 43).

Anbringende 2): Kommissionen havde overtrådt forhandlingsforbuddet[6] ved at indhente oplysninger fra den valgte tilbudsgiver om uddannelsesplan for personalet:

[6] Det forhandlingsforbud, der var tale om, var indeholdt i Gennemførelsesforordningens artikel 99, hvorefter enhver kontakt mellem udbyderen og tilbudsgiverne efter tilbuddenes åbning var forbudt bortset fra i tilfælde, hvor et tilbud nødvendiggjorde, at der indhentedes yderligere oplysninger, eller med henblik på at korrigere åbenlyse materielle fejl i et tilbud. Reglen er senere afløst af en lignende regel i artikel 148 i Gennemførelsesforordningen. Denne regel bruger vendingen »skrivefejl«, hvor den gamle regel talte om »materielle« fejl. Det forekommer umiddelbart lidt vanskeligt at vurdere, om der med formuleringen af den nye regel er tilsigtet en begrænsning i udbydernes adgang til at indhente oplysninger fra tilbudsgiverne.

Ikke taget til følge, da de indhentede oplysninger alene gik ud på oplysninger om indholdet af den valgte tilbudsgivers tilbud uden at ændre dette (præmis 54).

Anbringende 3): Kommissionen havde overtrådt forhandlingsforbuddet ved at indhente oplysninger fra den valgte tilbudsgiver om diverse planlagte tests med henblik på at begrænse fravær hos medarbejderne:

Ikke taget til følge med begrundelse svarende til begrundelsen ad anbringende 2 (præmis 56).

Anbringende 4): Kommissionen havde overtrådt forhandlingsforbuddet ved at indhente bekræftelse fra den valgte tilbudsgiver på, at tilbudsgiveren selv ville afholde udgiften til museumsbesøg og udflugter:

Ikke taget til følge, da det var et krav i udbudsbetingelserne, at tilbudsgiverne selv skulle afholde de pågældende udgifter, uden at det var fastsat, at dette skulle angives udtrykkeligt i tilbuddene. Den valgte tilbudsgivers bekræftelse af, at tilbudsgiveren ville afholde udgifterne, ændrede derfor ikke tilbuddet (præmis 58).

Anbringende 5): Kommissionen havde overtrådt forhandlingsforbuddet ved at indhente detaljerede oplysninger fra den valgte tilbudsgiver om, hvorledes arbejdet i børneinstitutionen ville blive organiseret og fordelt på deltidsansatte medarbejdere:

Ikke taget til følge med begrundelse svarende til begrundelsen ad anbringende 2 (præmis 60).

Anbringende 6): Kommissionen havde overtrådt forhandlingsforbuddet ved at indhente ret omfattende oplysninger fra den valgte tilbudsgiver om påtænkte hygiejne- og rengøringsforanstaltninger:

Ikke taget til følge med begrundelse svarende til begrundelsen ad anbringende 2 (præmis 62).

Anbringende 7): Kommissionen havde overtrådt ligebehandlingsprincippet ved at foretage tilbudsvurderingen på en partisk måde, bl.a. som følge af, at der i tilbudsvurderingen havde deltaget personer, der var fjendtligt stemt over for E, herunder en forældrerepræsentant, der havde klaget over E's drift af børneinstitutionen (klagen gik tilsyneladende ud på, at der var blevet udøvet pædofili):

Ikke taget til følge, da tilbudsvurderingen ikke havde været partisk (præmis 80).

Anbringende 8): Kommissionen havde været uberettiget til at tage den valgte tilbudsgivers tilbud i betragtning, idet den valgte tilbudsgiver ikke havde vedlagt ansøgningen om prækvalifikation regnskaber som krævet i udbudsbekendtgørelsen.

Dette anbringende sigtede i det væsentligste til følgende: Den valgte tilbudsgiver, der bestod af en sammenslutning af 7 virksomheder, havde alene vedlagt ansøgningen regnskaber for 4 af de 7 virksomheder, medens regnskaberne for de 3 øvrige virksomheder først var blevet indsendt senere efter anmodning fra Kommissionen.

Anbringendet blev ikke taget til følge, da forholdet var omfattet af Kommissionens skønsmargin (præmis 98). Også bl.a. henvist til, at Kommissionen havde kontrolleret den valgte tilbudsgivers økonomiske formåen efter bedømmelseskomitéens indstilling om at indgå kontrakt med den valgte tilbudsgiver (præmis 105).

Anbringende 9): Kommissionen havde været uberettiget til at tage den valgte tilbudsgivers tilbud i betragtning, idet den valgte tilbudsgiver klart ikke havde den nødvendige tekniske formåen:

Ikke taget til følge, da der ikke var grundlag herfor (præmis 125).

Anbringende 10): Kommissionen havde overtrådt ligebehandlingsprincippet ved at give den valgte tilbudsgivers tilbud en højere karakter end E's tilbud i relation til underkriterium 1. Pris.

Dette anbringende sigtede til, at Kommissionen beregnet tilbudspriserne på grundlag af tilbuddenes enhedspriser pr. barn og den forventede belægning i børneinstitutionen. Efter E's opfattelse havde Kommissionen været uberettiget til at tage hensyn til den forventede belægning.

Retten foretog i præmis 136-141 en detaljeret gennemgang af prisoplysningerne i de to tilbud og udtalte derefter bl.a., at E's synspunkt savnede enhver logik (præmis 144). Retten konkluderede, at Kommissionen ikke havde begået en åbenbar fejl ved bedømmelsen af de to tilbud i relation til underkriterium 1. Pris (præmis 146). Anbringendet blev således ikke taget til følge.

Anbringende 11): Kommissionen havde overtrådt ligebehandlingsprincippet ved at give den valgte tilbudsgivers tilbud en højere karakter end E's tilbud i relation til underkriterium 2. Kvalitet:

Retten foretog i præmis 155 og følgende en detaljeret gennemgang af Kommissionens vurdering af de to tilbud i relation til det nævnte underkriterium. Retten konkluderede, at Kommissionen ikke havde udøvet et alvorligt og åbenbart fejlskøn ved at anse den valgte tilbudsgivers tilbud for bedre end E's tilbud i relation til underkriterium 2. Kvalitet (præmis 181). Anbringendet blev således ikke taget til følge.

Anbringende 12): Kommissionen havde ikke givet E en tilstrækkelig begrundelse for tildelingsbeslutningen:

Ikke taget til følge, idet Kommissionen efter E's anmodning om begrundelse havde redegjort for de points, der var blevet tildelt E's tilbud og den valgte tilbudsgivers tilbud (præmis 192).

Anbringende 13): Kommissionen havde udøvet magtfordrejning som følge af, at den reelle begrundelse for ikke at tildele E kontrakten var anklager fra forældre om, at der var begået pædofili i E's lokaler:

Ikke taget til følge, da der ikke var grundlag for at fastslå, at Kommissionen ved tilbudsvurderingen havde forfulgt et andet formål end hensynet til at finde det økonomisk mest fordelagtige tilbud (præmis 199).

E fik således ikke medhold i nogen af sine anbringender, og Kommissionen blev derfor frifundet for en erstatningspåstand fra E.

Retten havde ved en kendelse af 20. juli 2000 afslået en begæring fra E om opsættende virkning.

Retten i Første Instans' dom af 11. juni 2002, sag T-365/00, Alsace International Car Services mod Parlamentet

Udbyderen af en tjenesteydelse havde pligt til at opsige den kontrakt, der var indgået på grundlag af udbuddet, efter at det var konstateret, at den valgte tilbudsgiver udførte tjenesteydelsen ulovligt

Denne dom er en fortsættelse af Rettens dom af 6. juli 2000 i sag T-139/00 mellem de samme parter.

Sagen angik et udbud, der var iværksat af Parlamentet, vedrørende kørsler med chauffør tilsyneladende i Strasbourg-området. I udbudsbetingelserne var angivet, at kørslerne skulle udføres i overensstemmelse med

national (dvs. fransk) lovgivning. Sagsøgeren var en tilbudsgiver A, der ikke havde fået kontrakten.

A anlagde sag mod Parlamentet ved Retten i Første Instans og gjorde gældende, at Parlamentet havde handlet i strid med udbudsreglerne ved at antage tilbuddet fra den valgte tilbudsgiver, selvom den valgte tilbudsgiver udførte kørslerne i strid med fransk lovgivning. Parlamentet gjorde heroverfor bl.a. gældende, at den valgte tilbudsgivers udførelse af kørslerne skete i overensstemmelse med fransk lovgivning. Ved Rettens dom af 6. juli 2000 blev Parlamentet frifundet bl.a. med begrundelse, at A ikke havde bevist, at Parlamentets fortolkning af fransk lovgivning var klart forkert.

For udbuddet var kørslerne blevet udført af nogle vognmænd, og ved en endelig dom af 7. april 2000 havde en fransk domstol idømt vognmændene straf for at have udført kørslerne på den måde, som den valgte tilbudsgiver i henhold til udbuddet udførte kørslerne på.

Den franske dom indgik ikke i grundlaget for Retten i Første Instans' dom af 6. juli 2000. Efter afsigelsen af Rettens dom af 6. juli 2000 sendte A imidlertid den franske dom til Parlamentet som dokumentation for, at den valgte tilbudsgiver udførte kørslerne i strid med fransk lovgivning. Sagsøgeren anmodede samtidig Parlamentet om at tildele A kontrakten om kørslerne eller iværksætte et nyt udbud. Parlamentet afslog A's anmodning med henvisning til, at den valgte tilbudsgivers udførelse af kørslerne efter Parlamentets opfattelse af nærmere angivne grunde ikke var i strid med fransk lovgivning. A anlagde derefter på ny sag mod Parlamentet ved Retten i Første Instans, nu med påstand om annullation af Parlamentets beslutning om at afslå den nævnte anmodning fra A.

Retten afgjorde den nye sag ved dommen af 11. juni 2002. I denne dom lagde Retten som følge af den franske dom til grund, at den valgte tilbudsgiver udførte kørslerne i strid med fransk lovgivning (præmis 70), og Retten udtalte, at Parlamentet havde udøvet et åbenbart urigtigt skøn ved at afslå den nævnte anmodning fra A (præmis 71). Retten annullerede Parlamentets beslutning om at afslå A's anmodning, og A fik for så vidt medhold.

Retten frifandt imidlertid Parlamentet for en erstatningspåstand fra A. Retten henviste herved til, at det tab, som A hævdede at have lidt som følge af Parlamentets afslag på A's anmodning, bestod i chancen for at få tildelt kontrakten i det tilfælde, at Parlamentet havde imødekommet anmodningen. Der var imidlertid ikke grundlag for at antage, at Parlamentet, hvis det havde imødekommet A's anmodning, ville have tildelt A kontrakten eller ville have iværksat et udbud, som A ville have været i stand til at deltage i. (Præmis 79-80).

EF-domstolens dom af 18. juni 2002, sag C-92/00, HI Hospital Ingenieure Krankenhaustechnik PlanungsgesmbH

Udbyders annullation af udbud er ikke reguleret i Tjenesteydelsesdirektivet, men er underkastet fællesskabsrettens grundlæggende principper og er derfor omfattet af første kontroldirektiv. Også taget stilling til nogle andre spørgsmål, der er mindre interessante fra en dansk udbudsretlig synsvinkel. Et østrigsk klageorgan kunne stille præjudicielle spørgsmål til EF-domstolen

Wiens kommune udbød efter Tjenesteydelsesdirektivet projektledelsen for tilrettelæggelse af madforsyningen til Wiens sygehusvæsen. Efter tilbudenes indgivelse annullerede udbyderen udbudet. På forespørgsel fra en af tilbudsgiverne angav udbyderen som begrundelse for annullationen, at man havde besluttet sig til at decentralisere madforsyningen, hvorfor det ikke længere var nødvendigt at udpege en ekstern projektleder.

Den pågældende tilbudsgiver, en tysk virksomhed, klagede til et østrigsk klageorgan (Vergabekontrollsenat) med påstand om ophævelse af annullationen af udbudet. Klageren gjorde navnlig gældende, at annullationen var et udslag af national diskrimination, idet annullationen efter klagerens opfattelse havde til formål at favorisere en østrigsk virksomhed, som udbyderen havde samarbejde med i forvejen, og som også havde indgivet tilbud.

Det østrigske klageorgan stillede nogle præjudicielle spørgsmål til EF-domstolen, der først konstaterede, at klageorganet er en ret ifølge traktatens artikel 234 EF, således at klageorganet kan stille præjudicielle spørgsmål til EF-domstolen.

EF-domstolen besvarede derefter de stillede spørgsmål således, til dels efter en vis omformulering:

1) Om udbyders beslutning om annullation af et udbud af en tjenesteydelse hører under de »beslutninger«, der er omhandlet i artikel 1, stk. 1, i første kontroldirektiv.

(Efter den nævnte bestemmelse skal medlemsstaterne indføre procedurer for klager over, at beslutninger fra ordregivende myndigheder er i strid med fællesskabsretten om offentlige kontrakter.)

EF-domstolen besvarede spørgsmålet bekræftende. Domstolen henviste til, at Tjenesteydelsesdirektivet ikke indeholder bestemmelser om, under hvilke betingelser en udbyder kan annullere udbudet, men at udbyderes beslutninger om annullation af et udbud er underkastet fællesskabsrettens grundlæggende principper. EF-domstolen henviste herved til en række af disse principper, dvs. principperne om etableringsfrihed og fri udveksling af tjenesteydelser samt ligebehandlingsprincippet og gennemsigtighedsprincippet. Også bl.a. henvist til, at enhver anden fortolkning ville skade den effektive virkning af første kontroldirektiv.

2) Om en national ordning kan begrænse prøvelsen af en udbyders annullation af et udbud af en tjenesteydelse til, om annullationen er sket »vilkårligt«.

(Spørgsmålet refererede øjensynlig til den østrigske lovgivning om offentlige udbud. Det fremgår ikke, hvad der sigtes til med begrebet vilkårligt.)

EF-domstolen besvarede spørgsmålet benægtende. Domstolen henviste til, at omfanget af den kontrol, der er foreskrevet i første kontroldirektiv, skal bedømmes efter direktivets formål under hensyntagen til, at direktivets effektivitet ikke bringes i fare. Også henvist til, at der ikke kan fore-

tages en indskrænkende fortolkning af direktivets angivelse af kontrollens omfang.

3) Om hvilket tidspunkt, der er afgørende for bedømmelsen af lovligheden af en ordregivende myndigheds beslutning om at annullere et udbud.

(Spørgsmålet sigtede øjensynlig til den østrigske lovgivning om offentlige udbud, efter hvilken der er forskel på kontrolmyndighedernes kompetence alt efter, om udbyderen har meddelt »tilslag« eller ikke.)

EF-domstolen svarede, at forholdet ikke er reguleret af første kontroldirektiv og derfor skal afgøres efter national ret. Domstolen udtalte videre, at de nationale forskrifter ikke må være mindre gunstige end dem, der gælder for tilsvarende søgsmål i national ret (ækvivalensprincippet), og at de nationale forskrifter ikke må gøre det umuligt eller uforholdsmæssigt vanskeligt at udøve rettighederne efter fællesskabets retsorden (effektivitetsprincippet).

Spørgsmålene 2) og 3) havde som nævnt reference til den østrigske lovgivning om offentlige udbud og synes uden den store interesse set fra en dansk udbudsretlig synsvinkel.

Som det fremgår, gik besvarelsen af spørgsmål 1) efter sit indhold ud på, at udbyderes annullation af udbud er omfattet af første kontroldirektiv og dermed af medlemsstaternes pligt til at indføre klageprocedurer. Selvom om besvarelsen umiddelbart kun angår udbud i henhold til Tjenesteydelsesdirektivet, kan der ikke være tvivl om, at den dækker udbud efter alle udbudsdirektiverne.

For at nå frem til besvarelsen af spørgsmål 1) måtte EF-domstolen reelt foretage en slags præjudiciel fastlæggelse af begrebet »fællesskabsretten om offentlige kontrakter« i artikel 1, stk. 1, i første kontroldirektiv med henblik på at fastslå, hvilket materielle regler, der regulerer udbyderes annullation af udbud. Den nævnte fastlæggelse gik som refereret ud på, at Tjenesteydelsesdirektivet ikke indeholder sådanne materielle regler, men at udbyderes annullation af udbud reguleres af fællesskabsrettens grundlæggende principper. Vurderingen ville tydeligvis have været den samme, selvom der havde været tale om et af de andre udbudsdirektiver.

Klagenævnet for Udbud har gentagne gange statueret, at udbyderen af et EU-udbud kun kan annullere udbudet, hvis der er saglig grund hertil, hvilket også er forudsat i Østre Landsrets dom af 16. august 2000 i sagen 5. afd. B 1654-97, Handelshøjskolen i København og Forskningsministeriet mod Højgaard & Schultz A/S. Reelt synes der at være god overensstemmelse mellem denne praksis og EF-domstolens besvarelse af spørgsmål 1).

EF-domstolens dom af 17. september 2002, sag C-513/99, Concordia Bus Finland

Der må under visse forudsætninger anvendes underkriterier om miljøforhold. Det er uden betydning, om sådanne kriterier kun kan opfyldes af et mindre antal virksomheder

Helsingfors Kommune udbød driften af bybuskørslen på nærmere angivne ruter. Udbudet skete tilsyneladende som offentligt udbud i henhold til Tjenesteydelsesdirektivet. Tildelingskriteriet var det økonomisk mest fordelagtige tilbud på grundlag af følgende underkriterier: a) pris, b) ma-

teriellets kvalitet og c) drift inden for området kvalitet og miljø. Tildelingen skete ved brug af følgende evalueringsmodel:

Ad a) pris: Tilbudet med den laveste tilbudspris fik 86 points og de øvrige tilbud fik points efter følgende formel: (Laveste tilbudspris/tilbudspris) x 86.

Ad b) materiellets kvalitet: Der blev bl.a. givet points for busser med kvælstofudledning og støjniveau under nærmere angivne grænser. Det synes at fremgå, at kun naturgasdrevne busser kunne komme under disse grænser og dermed opnå points på dette punkt.

Ad c) drift inden for området kvalitet og miljø: Der blev givet points for »en helhed af kvalitative kriterier« og for en miljøcertificering.

Sagen angik en enkelt af ruterne. Den tilbudsgiver, der fik flest points med hensyn til denne rute og derfor fik tildelt driften af den, var kommunens eget busselskab, der havde afgivet tilbud på lige fod med de andre tilbudsgivere. Den tilbudsgiver, der havde opnået næstflest points med hensyn til den pågældende rute (Concordia), klagede uden resultat til de finske konkurrencemyndigheder og anlagde derefter sag ved en finsk domstol med påstand om annullation.

Concordia gjorde gældende, at tildelingskriterierne ved offentligt udbud altid skal være af økonomisk karakter, og at der derfor ikke måtte tages hensyn til bussernes kvælstofudledning og støjniveau, fordi disse forhold ikke var af økonomisk karakter. Concordia gjorde desuden gældende, at tildelingen af points med hensyn til kvælstofudledning og støjniveau favoriserede den valgte tilbudsgiver, fordi denne var den eneste, der havde mulighed for at anvende materiel, der kunne opnå points på dette punkt, dvs. naturgasdrevne busser. Concordia henviste herved til, at der kun var optankningsmuligheder i Finland for 15 naturgasdrevne busser, og at den valgte tilbudsgiver havde bestilt 11 sådanne busser.

Den finske domstol stillede nogle spørgsmål til EF-domstolen, der besvarede spørgsmålene således (gengivet stærkt sammentrængt og til dels ombrudt):

1) Tjenesteydelsesdirektivet kræver ikke, at alle underkriterier til tildelingskriteriet det økonomisk mest fordelagtige tilbud nødvendigvis skal være af rent økonomisk karakter, jf. bl.a. at direktivets artikel 36 nævner æstetiske forhold som et muligt underkriterium. Endvidere udelukker direktivet ikke, at en ordregivende myndighed anvender kriterier om bevarelse af miljøet ved vurderingen af, hvilket tilbud der er det økonomisk mest fordelagtige. Det er dog en forudsætning, at underkriterierne er forbundet med kontraktens genstand, at underkriterierne ikke tillægger den ordregivende myndighed et ubetinget frit valg, at underkriterierne er udtrykkeligt nævnt i udbudsbekendtgørelsen eller udbudsbetingelserne, samt at underkriterierne overholder fællesskabsrettens grundlæggende principper, navnlig ligebehandlingsprincippet.

Denne forudsætning var opfyldt, idet følgende var tilfældet med hensyn til kriterierne om kvælstofudledning og støjniveau: Disse kriterier var forbundet med kontraktens genstand, dvs. transport med bybus, kriterierne overlod ikke den ordregivende myndighed et ubetinget frit skøn, idet de angik objektivt målelige krav, kriterierne var nævnt i udbudsbekendtgørelsen, og kriterierne stred ikke mod ligebehandlingsprincippet, jf. om det sidste punkt 2) nedenfor.

2) Ligebehandlingsprincippet er ikke i sig selv til hinder for, at der tages hensyn til kriterier om beskyttelse af miljøet, selvom sådanne kriterier

kun kan opfyldes af et mindre antal virksomheder, herunder den ordregivende myndigheds egen transportvirksomhed.

Domstolen henviste herved til, at de anvendte tildelingskriterier var objektive og anvendtes på alle tilbud uden forskel, at der kunne tildeles points for andre forhold vedrørende materiellet end kvælstofudledning og støj, og at Concordia havde fået tildelt ordren vedrørende en anden rute, uanset at der ved dette udbud direkte var krævet benyttelse af natur(?)gasdrevne busser. Henvisningen til disse forhold må efter sammenhængen forstås som en angivelse om, at der ikke havde været hensigt til favorisering af den valgte tilbudsgiver.

3) Det ville ikke gøre nogen forskel, hvis sagen hørte under Forsyningsvirksomhedsdirektivet. EF-domstolen henviste herved til, at reglerne om tildelingskriterier i det væsentlige er ens i alle udbudsdirektiverne.

Baggrunden for den finske domstols spørgsmål på dette punkt var tilsyneladende tvivl med hensyn til, om sagen hørte under Tjenesteydelsesdirektivet eller Forsyningsvirksomhedsdirektivet. EF-domstolen tog imidlertid ikke stilling til, hvilket af de to direktiver om sagen hørte under, da den finske domstol ikke havde spurgt udtrykkeligt om dette (og efter det foreliggende også fordi spørgsmålet, som det fremgår, var uden betydning for sagens realitet).

EF-domstolen har med denne dom taget stilling til et spørgsmål, der længe er blevet oplevet som både brændende og usikkert, dvs. i hvilket omfang der må tages hensyn til miljøforhold ved vurderingen af, hvilket tilbud der er det økonomisk mest fordelagtige. Det centrale i afgørelsen synes at være angivelserne om, at underkriterierne til tildelingskriteriet det økonomisk mest fordelagtige tilbud skal have forbindelse med kontraktens genstand, men at de ikke nødvendigvis alle skal være af rent økonomisk karakter.

EF-domstolens udtalelse om, at underkriterierne ikke må overlade den ordregivende myndighed et ubetinget frit valg, skal vel ses i relation til sagens omstændigheder og kan ikke være en tilkendegivelse om, at der så vidt muligt skal anvendes en evalueringsmodel med pointgivning ved bedømmelsen af det økonomisk mest fordelagtige tilbud.

EF-domstolens dom af 14. november 2002, sag C-411/00, Felix Swoboda

Om tjenesteydelser, der såvel omfatter enkeltydelser under Tjenesteydelsesdirektivets bilag I A som enkeltydelser under direktivets bilag I B. Direktivets artikel 10 skal følges, og der skal ikke lægges vægt på den samlede tjenesteydelses primære formål. Der må ikke ske kunstig sammenlægning for at øge andelen af enkeltydelser under bilag I B. Kategori 20 i bilag I B omfatter ikke selve transporten. Udbudsdirektivernes formål. Tjenesteydelsesdirektivet skal overholdes, selvom der ikke foreligger et grænseoverskridende element

Den østrigske nationalbank udbød en tjenesteydelse bestående af flytning af nationalbanken til nye lokaler. En virksomhed klagede over tildelingsbeslutningen til et klageorgan (Bundesvergabeamt).

Nationalbanken gjorde for klageorganet bl.a. gældende, at langt den overvejende del af tjenesteydelsen bestod af koordination og logistik og derfor var omfattet af CPC-nomenklaturens gruppe 74 (støtte- og hjælpetransport) og dermed af kategori 20 i bilag I B til Tjenesteydelsesdirekti-

vet, således at udbudet i henhold til direktivets artikler 9-10 ikke var undergivet direktivets udbudsregler.

Det østrigske klageorgan stillede nogle spørgsmål til EF-domstolen.

Kommissionen og den østrigske nationalbank påstod sagen for EF-domstolen afvist med forskellige begrundelser. Bl.a. gjorde nationalbanken gældende, at der ikke var noget grænseoverskridende element i sagen.

EF-domstolen antog imidlertid sagen til realitetsbehandling. Domstolen udtalte på dette punkt bl.a., at det forhold, at der eventuelt ikke var noget grænseoverskridende element i sagen, ikke fritog ordregiveren for at overholde Tjenesteydelsesdirektivet. Domstolen henviste herved til direktivets præambel, hvorefter direktivet bl.a. tilsigter at afskaffe enhver praksis, der er konkurrencebegrænsende i almindelighed.

Om sagens realitet udtalte EF-domstolen (stærkt sammentrængt og til dels ombrudt, Klagenævnets litrering):

1) Ad aftaler, der såvel omfatter tjenesteydelser, der hører under Tjenesteydelsesdirektivets bilag I A, som tjenesteydelser, der hører under direktivets bilag I B:

a) Afgørelsen af, hvilke bestemmelser i direktivet, der finder anvendelse, skal træffes i overensstemmelse med det klare kriterium i direktivets artikel 10 (hvorefter den indbyrdes værdi er afgørende). Derimod skal der ikke - som hævdet af den østrigske regering - lægges vægt på aftalens primære formål. EF-domstolen henviste herved til udbudsdirektivernes formål, som går ud på at fjerne risikoen for, at der indrømmes indenlandske bydende en fortrinsstilling, og at udelukke muligheden for, at ordregiverne lader sig lede af andre hensyn end økonomiske. Domstolen henviste videre til præamblen til Tjenesteydelsesdirektivet, hvorefter visse tjenesteydelser i en overgangsperiode alene skal være omfattet af en overvågningsmekanisme.

b) Tjenesteydelsesdirektivet foreskriver på ingen måde, at der skal foretages en særskilt tildeling vedrørende tjenesteydelserne under bilag I B. Tværtimod ville direktivets artikel 10 blive indholdsløs, hvis der blev stillet krav om en sådan adskillelse.

Noget andet kan alene antages, hvis den ordregivende myndighed kunstigt lader tjenesteydelser af forskellig art være omfattet af samme aftale alene for at forøge aftalens andel af tjenesteydelser omfattet af bilag I B, og uden at der er en eller anden form for tilknytning mellem tjenesteydelserne som følge af et fælles formål m.m.

2) Det tilkom det østrigske klageorgan at tage stilling til, hvilket af bilagene til Tjenesteydelsesdirektivet og hvilke CPC-referencenumre de i sagen omhandlede enkelte tjenesteydelser hørte under. EF-domstolen bemærkede dog, at de omhandlede tjenesteydelser ikke alle var støtte- og hjælpetransportydelser i henhold til kategori 20 i bilag I B (CPC-gruppe 74), således som det var hævdet af Kommissionen, idet kategori 20 i bilag I B ikke omfatter selve transporten.

I overensstemmelse med traditionen er dommens sagsfremstilling ganske kortfattet, og det er vanskeligt at få hold på, hvad sagens problem egentlig drejede sig om, og hvorfor sagen blev forelagt for EF-domstolen. Noget kunne måske tyde på, at sagens problem gik ud på følgende: På baggrund af den østrigske lovgivning om offentlige kontrakter (?) mente den østrigske regering og den østrigske nationalbank, at den samlede tjenesteydelse ikke var undergivet Tjenesteydelsesdirektivets udbudsregler, fordi tjenesteydelsens primære formål var omfattet af Tjenesteydelsesdi-

rektivets bilag I B. Som det fremgår, afviste EF-domstolen et sådant synspunkt og henviste i stedet til (en bogstavelig) anvendelse af reglen i direktivets artikel 10. Konsekvensen heraf fremgår ikke af dommens sagsfremstilling.

Retten i Første Instans' dom af 28. november 2002, sag T-40/01, Scan Office Design mod Kommissionen

Trods grove overtrædelser af udbudsreglerne skulle udbyderen ikke erstatte en forbigået tilbudsgivers positive opfyldelsesinteresse, da tilbudsgiverens tilbud var ukonditionsmæssigt, selvom det var indgået i tilbudsvurderingen, hvorfor der ikke var årsagsforbindelse mellem overtrædelserne og tilbudsgiverens hævdede tab. Krav, der er fastsat som mindstekrav, skal overholdes også ved udbud med forhandling

Kommissionen iværksatte et udbud vedrørende indkøb af kontormøbler. Udbuddet angik flere kategorier af møbler. Med hensyn til en af kategorierne anså Kommissionen alle tilbud for uantagelige, hvorfor Kommissionen iværksatte et nyt udbud efter forhandling vedrørende den pågældende kategori. Sagen angår dette udbud.[7]

Tildelingskriteriet vat øjensynlig det økonomisk mest fordelagtige tilbud. Der indkom et antal tilbud. Kommissionen udelukkede nogle tilbud, der klart ikke opfyldte udbudsbetingelsernes krav. Kommissionen foretog derefter en tilbudsvurdering af de øvrige tilbud og besluttede på grundlag af vurderingen at indgå kontrakt med en af de pågældende tilbudsgivere. En anden af de tilbudsgivere, hvis tilbud var indgået i tilbudsvurderingen, anlagde derefter sagen ved Retten i Første Instans med påstand om erstatning af sit tab ved ikke at have fået tildelt kontrakten (positiv opfyldelsesinteresse).

Retten konstaterede, at Kommissionen havde begået følgende overtrædelser (Klagenævnets litrering):

1) Kommissionen havde givet sagsøgeren nærmere angivne urigtige oplysninger, efter at sagsøgeren havde anmodet om aktindsigt (præmis 27).

2) Kommissionen havde uberettiget givet den valgte tilbudsgiver forlængelse af fristen for at afgive tilbud. (Præmis 33. Forlængelsen skyldtes, at Kommissionen havde angivet en forkert adresse, da den sendte udbudsbetingelserne til den valgte tilbudsgiver).

3) Kommissionen havde uberettiget taget hensyn til bedømmelser af de tilbudte møbler foretaget af visse medarbejdere, selvom der var nærmere angivne fejl i disse bedømmelser (præmis 50, 63 og 68).

4) Kommissionen havde uberettiget taget den valgte tilbudsgivers tilbud i betragtning, selvom visse af de møbler, som den valgte tilbudsgiver havde tilbudt, ikke opfyldte nogle krav, der i udbudsbetingelserne var angivet som ufravigelige (præmis 94). Herved bl.a. udtalt, at selvom den ordregivende myndighed har en vis forhandlingsbeføjelse ved udbud efter

[7]Udbuddet efter forhandling (i den nutidige terminologi »med« forhandling) blev iværksat efter artikel 6, stk. 3, litra a i det dagældende indkøbsdirektiv, der fandt anvendelse i henhold til de regler, der da var gældende for Kommissionens udbud. Bestemmelsen gik ud på, at der under visse forudsætninger kunne iværksættes udbud efter forhandling, når der ved et forudgående udbud ikke var indkommet egnede tilbud m.m. (En lignende regel er indeholdt i Udbudsdirektivets artikel 30, stk. 1, litra a).

forhandling, skal krav, som den ordregivende myndighed selv har fastsat som ufravigelige, respekteres (præmis 76).

Retten karakteriserede Kommissionens overtrædelser som grove (præmis 121). Retten frifandt imidlertid Kommissionen for sagsøgerens erstatningskrav med den begrundelse, at der ikke var årsagssammenhæng mellem Kommissionens overtrædelser og sagsøgerens hævdede tab, idet sagsøgerens tilbud på visse punkter ikke opfyldte ufravigelige krav i udbudsbetingelserne, hvorfor det ikke var bevist, at Kommissionen burde have tildelt sagsøgeren kontrakten (præmis 121).

EF-domstolens dom af 12. december 2002, sag C-470/99, Universale-Bau

Et organs faktiske virksomhed er afgørende for, om organet skal anses for at imødekomme almenhedens behov. Første kontroldirektiv er ikke til hinder for klagefrister, og frister på 14 dage var rimelige. Hvis ordregiver på forhånd har fastlagt kriterierne for udvælgelse af virksomheder til at give tilbud, skal disse kriterier oplyses

En østrigsk renovationsvirksomhed, der i dommen benævnes EBS, udbød som begrænset udbud et bygge- og anlægsarbejde vedrørende udbygning af Wiens hovedrensningsanlæg. I udbudsbekendtgørelsen var angivet: Ved udvælgelsen af de virksomheder, der ville blive opfordret til at afgive tilbud, ville der blive lagt vægt på forskellige referencer, og oplysningerne herom fra de virksomheder, der havde anmodet om at komme i betragtning, ville blive evalueret efter et pointsystem, der var deponeret hos en notar. De fem virksomheder, der derved blev placeret bedst, ville blive opfordret til at afgive tilbud.

To østrigske virksomheder, der havde anmodet om at komme i betragtning, fik ved brev af 7. juli 1999 fra EBS meddelelse om, at de ikke var blandt de bedst placerede, og at de derfor ikke ville blive opfordret til at afgive tilbud. De to virksomheder indgav den 3. august 1999 klage til et klageorgan (Vergabekontrollsenat). Det synes at fremgå, at EBS for klageorganet gjorde gældende, at de to virksomheders klage var indgivet for sent, dvs. efter udløbet af en klagefrist på 14 dage, der er fastsat i Land Wiens lovgivning om offentlige kontrakter.

Der forelå for klageorganet spørgsmål, om EBS skulle anses for ordregiver i henhold til Bygge- og anlægsdirektivet. Afgørende herfor var, om EBS kunne anses for et »offentligretligt organ«, jf. direktivets artikel 1, b, stk. 2.

Om EBS var oplyst: EBS er en juridisk person, og EBS er for mere end halvdelens vedkommende kontrolleret af Wiens Kommune. EBS opfylder således klart de to sidste led i definitionen af begrebet »offentligretligt organ« i den nævnte bestemmelse. Klageorganet var imidlertid i tvivl med hensyn til, om EBS opfylder definitionens første led, dvs. at organet skal være oprettet specielt med henblik på at imødekomme almenhedens behov, dog ikke behov af industriel og kommerciel karakter. Klageorganet lagde ganske vist til grund, at EBS opfylder denne betingelse i dag som følge af, at EBS fra 1985 har haft til opgave at drive det omhandlede rensningsanlæg. Det, som voldte klageorganet problemer, var at EBS ved sin stiftelse i 1976 var blevet oprettet som en rent kommerciel virksomhed, og at EBS' senere overtagelse af opgaver til imødekommelse af almenhedens behov var sket uden vedtægtsændringer.

Klageorganet stillede nogle spørgsmål til EF-domstolen, der udtalte (stærkt sammentrængt og til dels ombrudt, Klagenævnets litrering):

I resuméet under punkt 1) straks nedenfor er af sproglige nemhedsgrunde anvendt formuleringen »almenhedens behov« som sigtende til ordene »almenhedens behov, dog ikke behov af industriel eller kommerciel karakter« i første led i Bygge- og anlægsdirektivets artikel 1, b, stk. 2.

1) Ad et spørgsmål, der sigtede til, om EBS skal anses for at være oprettet specielt med henblik på at imødekomme almenhedens behov, jf. første led i Bygge- og anlægsdirektivets artikel 1, b, stk. 2: Der skal tages hensyn til den faktiske virksomhed, som en enhed udøver. Spørgsmålet, om der er tale om almenhedens behov, skal vurderes objektivt, og den retlige form er uden betydning. EF-domstolen henviste herved til sin tilsvarende udtalelse i dommen af 10. november 1998, BFI Holding (Arnhem), med hensyn til den lignende bestemmelse i Tjenesteydelsesdirektivet. EF-domstolen henviste videre til, at selvom det ikke formelt er fastsat i EBS' vedtægter, at virksomheden har til opgave at imødekomme almenhedens behov, kan det dog konstateres objektivt, at EBS har en sådan opgave. EF-domstolen henviste desuden til udbudsdirektivernes formål og anførte, at hensynet til at sikre den effektive virkning af reglen om begrebet »offentligretligt organ« er til hinder for at anlægge en forskellig vurdering alt efter, om en enheds vedtægter er blevet tilpasset den faktiske virkelighed eller ikke. Domstolen besvarede herefter det stillede spørgsmål med, at en enhed, som ikke er oprettet specielt med henblik på at imødekomme almenhedens behov, men som senere har fået overdraget varetagelsen af dette behov, opfylder betingelsen i Bygge- og anlægsdirektivets artikel 1, b, stk. 2, første led.

2) Ad et spørgsmål, om første kontroldirektiv er til hinder for klagefrister: Opfyldelsen af første kontroldirektivs formål vil blive bragt i fare, hvis klagere på ethvert tidspunkt i en udbudsprocedure kunne påberåbe sig overtrædelse af bestemmelserne om indgåelse af offentlige kontrakter og dermed forpligte ordregiverne til at omgøre en udbudsprocedure for at afhjælpe overtrædelserne. Rimelige søgsmålsfrister opfylder det effektivitetskrav, der følger af første kontroldirektiv, for så vidt som dette krav er udtryk for anvendelse af det grundlæggende retssikkerhedsprincip. Endvidere var de frister, der var tale om i sagen (14 dage), rimelige. EF-domstolen besvarede herefter spørgsmålet med, at første kontroldirektiv ikke er til hinder for nationale bestemmelser om, at klager skal være indgivet inden for en bestemt frist, såfremt den pågældende frist er rimelig.

3) Ad et spørgsmål, om Bygge- og anlægsdirektivet er til hinder for, at de virksomheder, som opfordres til at afgive tilbud, udvælges i henhold til udvælgelseskriterier, som ikke er oplyst på forhånd: Domstolen henviste til, at EBS fra begyndelsen havde fastlagt udvælgelseskriteriernes vægt, men at man ikke havde angivet noget herom i udbudsbekendtgørelsen. Det, som klageorganet ønskede oplyst, var herefter alene, om udvælgelseskriterierne ved et begrænset udbud skal oplyses i tilfælde, hvor ordregiveren har fastlagt dem på forhånd. Domstolen udtalte videre, at Bygge- og anlægsdirektivet ikke indeholder særlige[8] bestemmelser om forudgå-

[8] Den rigtige danske oversættelse havde formentlig været »generelle« eller »specifikke« i stedet for »særlige«. Det er i hvert fald det, der synes at være meningen. I de tyske, engelske og franske udgaver af dommen bruges ordene »besondere«, »specific«, og »spécifique«.

ende offentliggørelse af udvælgelseskriterier, men at ligebehandlingsprincippet, som ligger til grund for udbudsdirektiverne, medfører en forpligtelse til gennemsigtighed. EF-domstolen henviste desuden til forskellige regler i Bygge- og anlægsdirektivet og Forsyningsvirksomhedsdirektivet. Domstolen konkluderede, at Bygge- og anlægsdirektivet skal fortolkes sådan, at en ordregiver, der ved et begrænset udbud på forhånd har fastsat regler for afvejning af kriterierne for udvælgelse af interesserede virksomheder til at afgive tilbud, er forpligtet til at angive disse regler i udbudsbekendtgørelsen eller udbudsbetingelserne (udbudsmaterialet).[9]

[9] Angivelsen af, at oplysning om de omhandlede regler kan være indeholdt i udbuds*betingelserne* (udbudsmaterialet) er ikke ganske forståelig, da udbudsbetingelserne vel typisk kun sendes til de virksomheder, der *er* udvalgt til at give tilbud. Formuleringen refererer dog formentlig blot til formuleringen af spørgsmålet fra den østrigske klageinstans.

Klagenævnet for Udbud

Emneregister

for

Kendelser fra

Klagenævnet for Udbud

Danske retsafgørelser

Nyere afgørelser fra EF-domstolen og

Retten i Første Instans

om udbud

Del 2: Afgørelser fra 2009 og fremefter

Ajourført til og med 31. marts 2010

(ajourføringerne er markeret med fed skrift)

Dette emneregister omfatter henvisninger til følgende afgørelser:

1) Klagenævnet for Udbuds kendelser
2) De danske retsafgørelser om udbudsret, som Klagenævnet for Udbud har kendskab til
3) De afgørelser om udbudsret, som EF-domstolen har truffet fra juli 1997 og fremefter, og som har interesse set fra en dansk udbudsretlig synsvinkel. (Henvisninger til enkelte tidligere afgørelser fra EF-domstolen er medtaget)
4) Nyere afgørelser om udbudsret fra Retten i Første Instans

Af praktiske grunde, herunder overskuelighedsgrunde, er emneregistret opdelt i to dele. Opdelingen er foretaget i forbindelse med en ajourføring af emneregistret pr. 30. september 2009.

Denne del 2 af emneregistret omfatter afgørelser afsagt fra og med 2009. Emneregistrets del 1 omfatter afgørelser til og med 2008 (men omfatter også henvisninger til enkelte senere danske domme, der har relation til kendelser fra Klagenævnet fra før 2009).

Klagenævnets kendelser er alle indeholdt i Klagenævnets websted, www.klfu.dk, sammen med resuméer af kendelserne. Der er i Klagenævnets websted desuden medtaget resuméer af de danske retsafgørelser og af afgørelserne fra EF- domstolen og Retten i Første Instans.

Hvis andet ikke fremgår, angår henvisningerne i emneregistret kendelser fra Klagenævnet for Udbud.

Danske domme fra de overordnede retter er angivet med følgende forkortelser:

HR: Højesteretsdom

VL: Vestre Landsrets dom

ØL: Østre Landsrets dom.

Domme trykt i Ugeskrift for Retsvæsen angives på traditionel måde med betegnelsen UfR efterfulgt af årgang og sidetal samt et bogstav (H for højesteretsdom, V for Vestre landsretsdom og Ø for Østre landsretsdom).

Domme fra Retten i Første Instans er angivet med betegnelsen Retten.

Emneregistret er uoverskueligt på skærmen, og overskuelighed opnår man kun ved at udskrive emneregistret på papir. Udskrivning bør helst ske i duplex, dvs. udskrift på begge sider af papiret. Alle moderne printere har en funktion til udskrivning i duplex.

Men man kan **søge i den elektroniske version** af emneregistret. (Fremgangsmåden ved søgning afhænger af browser og browserversion m.m. og kan derfor ikke angives generelt).

Emneregistret er resultatet af et uhyre omfattende arbejde, der er udført løbende gennem mange år, og mangelfuldheder og fejl har utvivlsomt ikke kunnet undgås. Klagenævnet for Udbud modtager meget gerne oplysning om mangelfuldheder og fejl, der er opdaget af brugere.

Emneregistrets del 2 ajourføres løbende. Den her foreliggende version af del 2 er ajourført til og med 31. marts 2010. Ajourføringerne i forhold til den seneste ajourføring af emneregistret pr. 31. december 2009 er markeret med fed skrift.

Oversigt over emneregistrets rubrikker

Aktindsigt
Alternative tilbud
Annullation, Klagenævnets, af udbyders beslutninger
Annullation, udbyders af udbud
Arbejdsmiljø

Begrundelse, udbyders
Bevisbyrde
Bilag II A og II B i Udbudsdirektivet og Bilag XVII A og XVII B i Forsyningsvirksomhedsdirektivet
Boligselskaber

Domstolsprøvelse

Effektivitetsprincippet
Entreprenørbegrebet
Erstatning
EU-støtte
Evalueringsmodeller

Forbehold i tilbud (dvs. afvigelser fra udbudsbetingelserne, uanset om de er benævnt forbehold, samt uklarheder i tilbud)
Forhandlingsrestriktioner
Formål, udbudsdirektivernes
Forsvarsanskaffelser
Forsyningsvirksomhedsdirektivet, sager om (det nugældende eller tidligere forsyningsvirksomhedsdirektiv)
Frister, se klagefrist, spørgsmålsfrist og tilbudsfrist
Færgefart

Gennemsigtighedsprincippet
Grundlæggende element
Grænseoverskridende element

Hasteprocedure

In house, se samarbejde mellem ordregivende myndigheder

Inhabilitet, herunder teknisk dialog

Jernbaneloven

Klageadgang
Klagefrist
Kompetence, Klagenævnets
Koncerner
Koncession
Konkurrencepræget dialog
Konsortier
Kontraheringspligt
Kontrakt
Kontrol af oplysninger i tilbud eller ansøgninger
Kontroldirektiverne
Kontroltilbud
Kvantitative indførselsrestriktioner

Langvarige kontrakter
Leasing
Legitimation
Ligebehandlingsprincippet
Lokal tilknytning

Miljøhensyn
Mindstekrav (også kaldet minimumskrav, dvs. krav, som et tilbud skal opfylde for at komme i betragtning)

Nationalitet, forbud mod forskelsbehandling på grundlag af
Nomenklaturer

Offentligretlige organer
Omvendt licitation (dvs. udbud eller licitation vedrørende et byggeri, der ikke må koste over et bestemt beløb)
Oplysninger fra udbyder, herunder besvarelse af spørgsmål
Opsigelse eller ophævelse af kontrakt
Opsættende virkning
Optioner
Ordregivende myndighed

Partnering
Passivitet
Postbefordring
Pris
Prissætning
Private, overladelse af opgaver til
Projektkonkurrencer, sager om
Proportionalitetsprincippet
Præjudicielle spørgsmål
Prækvalifikation
Prøvetid
Pålæg til udbyder

Rammeaftaler
Referenceprodukter
Retsvirkning af Klagenævnets afgørelser

Sagsomkostninger
Sale and lease back
Samarbejde mellem ordregivende myndigheder (herunder indkøbscentraler, in house og sammenslutninger af ordregivende myndigheder)
Selskaber
Sideordnede udbud/licitationer
Sociale hensyn
Spørgsmål til tilbudsgivere
Spørgsmålsfrist (dvs. frist for spørgsmål fra tilbudsgivere)
Standarder
Standardforbehold
Standstill
Statsstøtte
Stillingsfuldmagt
Supplerende kontraktsbetingelser

Tavshedspligt
Tegningsberettigelse
Tekniske specifikationer
Tilbagekaldelse
Tilbudsfrist
Tilbudslovens afsnit I
Tilbudslovens afsnit II
Tildeling, herunder tilbudsvurdering
Tildelingskriterier
Traktaten
Tærskelværdi

Udbud med forhandling (tidligere benævnt udbud efter forhandling)
Udbudsdirektiver, indplacering under og diverse spørgsmål om
Udbudspligt og –ret
Udelukkelse (dvs. om de økonomiske aktører som sådan kan eller skal udelukkes fra at komme i betragtning, fordi de omfattes af en udelukkelsesgrund, der ikke behøver at være angivet i udbudsdokumenterne)
Udvælgelse (også kaldet kvalifikation, dvs. om de krav, som de økonomiske aktører som sådan skal opfylde for at komme i betragtning)
Uklarhed i klage
Uklarhed i udbud
Underhåndsbud
Underretning til tilbudsgivere og ansøgere
Underskrift
Ungdomsboliger, støttede private
Unormalt lave tilbud

Vedståelsesperiode
Virksomhedsoverdragelse
Vægtning inden for rammer

Ændring af projekt

Åbning af tilbud

Aktindsigt	6/8-09 (Conva Tec mod Region Hovedstaden, Klagenævnet er rekursmyndighed efter Forvaltningsloven med hensyn til danske regler om aktindsigt)
Alternative tilbud	19/5-09 (Anker Hansen mod Rudersdal Kommune, overtrædelse ved at tage alternative tilbud i betragtning, selvom det var angivet i udbudsbekendtgørelsen, at alternative tilbud ikke ville blive taget i betragtning), 25/5-09 (NCC mod Vejdirektoratet, udbyderen var berettiget til at lægge et beløb til tilbudspriserne i nogle alternative tilbud for at kunne sammenligne dem med tilbudspriserne i hovedtilbuddene)
Annullation, Klagenævnets, af udbyders beslutninger Hvis andet ikke er angivet, har Klagenævnet truffet beslutning om annullation	7/1-09 (MFI mod Udenrigsministeriet), 20/1-09 (Neupart mod Økonomistyrelsen), 2/2-09 (Damm Cellular mod Forsvarets Materieltjeneste, ikke taget stilling til en påstand om annullation, da udbyderen havde annulleret udbuddet), 17/2-09 (CLS mod Miljøministeriet, ikke annullation), 4/3-09 (Berendsen mod Frederikssund Kommune), 21/4-09 (Hoffmann mod Hørsholm Karlebo), 23/4-09 (Saver mod Region Midtjylland, påstand om annullation afvist, da Klagenævnet havde truffet bestemmelse om annullation i en anden sag vedrørende samme udbud), 13/5-09 (Billetlugen mod Det Kgl. Teater, ikke annullation), 19/5-09 (Anker Hansen mod Rudersdal Kommune), 26/5-09 (Oberthur mod Region Nordjylland, ikke annullation), 10/7-09 (NCC mod Billund Kommune, annullation af udbudsprocedure, der endnu ikke var afsluttet), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune), 4/8-09 (Mölnlycke mod Region Hovedstaden, ikke annullation), 6/8-09 (Conva Tec mod Region Hovedstaden, ikke annullation), 13/8-09 (SundVikar mod Hillerød Kommune, ikke annullation), 26/8-09 (Barslund mod Københavns Kommune, ikke annullation), 11/9-09 (Mecanoo mod Århus Kommune, ikke annullation), 15/9-09 (Almenbo mod Nygårdsparken, ikke annullation), 1/10-09 (Cimber Air mod Forsvarskommandoen, ikke annullation), 5/10-09 (Akso Nobel mod Tønder Kommune), 14/10-09 (Frederik Petersen mod Viborg Kommune), 16/10-09 (Konkurrencestyrelsen mod Region Sjælland og Region Hovedstaden), 6/11-09 (Hettich mod Region Sjælland), 11/11-09 (Yding mod Viborg Kommune, ikke annullation), 8/12-09 (Ricoh mod SKI), 11/12-09 (Tabulex mod Tønder Kommune), 21/12-09 (Ergolet mod Københavns Kommune, annullation af tildelingsbeslutningen, men ikke af udbuddet, da Klagenævnet ikke har hjemmel til at annullere et afsluttet udbud)**, 12/1-10 (Børge Jakobsen mod Sorø Kommune), 5/2-10 (Klaus Kristoffer Larsen mod Hedensted Kommune, af nærmere angivne grunde ikke annullation), 12/2-10 (Nøhr & Sigsgaard mod Kriminalforsorgen, ikke annullation), 24/2-10 (Atea mod Økonomistyrelsen, annullation af udbyders afvisning af at prækvalificere en virksomhed, men ikke annullation af tildelingsbeslutningen, da Klagenævnet ikke havde grundlag for at tage stilling til, om virksomheden skulle have været prækvalificeret), 4/3-10 (Dansk Flygtningehjælp mod Hvidovre Kommune), 5/3-10 (Gorm Hansen og Søn mod Greve Kommune mfl.), 10/3-10 (Mantova mod Undervisningsministeriet), 24/3-10 (Almenbo mod Nygårdsparken, ikke annullation, da udbyderens overtrædelse ikke havde haft konkret betydning for tildelingsbeslutningen), 25/3-0 (Visma mod Hillerød Kommune), 26/3-10 (Einar Kornerup mod Parkvænget)**
Annullation, udbyders af udbud	15/1-09 (Ortos mod Odense Kommune, udbyderen havde saglig grund til at at annullere udbuddet som følge af fejl ved udbuddet, og det var uden betydning, at annullationen skete efter klagen til Klagenævnet), 2/2-09 (Damm Cellular mod Forsvarets Materieltjeneste, udbyderen havde saglig grund til at annullere udbuddet, da udbyderen havde begået grove fejl ved at rette henvendelse til tilbudsgiverne om forståelsen af tilbuddene), VL 15/5-09 (udbyderens annullation af udbuddet var ikke i strid med gennemsigtighedsprincippet, da der ikke var grundlag for at antage, at den angivne begrundelse for annullationen var ukorrekt), Retten 2/6-09 (AVLUX, om udbyders adgang til annullation)**, 4/8-09 (Mölnlycke mod Region Hovedstaden, udbyder kan ikke ændre en tilkendegiven tildelingsbeslutning uden at annullere udbuddet),** 1/10-09 (Cimber Air mod Forsvarskommandoen, når udbyderen har givet tilbudsgiverne underretning om tildelingsbeslutningen, kan udbyderen ikke rette en fejl i udbuddet, men skal i stedet annullere udbuddet og dermed tildelingsbeslutningen), 25/11-09 (Jens Jensen mod Viborg Kommune, udbyderens annullation af et udbud som følge af fejl i udbudsbetingelserne var berettiget, selvom udbyderen havde givet tilbudsgiverne underretning om alle tilbudspriser; udbuddet kunne annulleres i sin helhed, selvom fejlene ikke angik alle dele af udbuddet)**, 25/1-10 (J.H. Schultz mod Kulturarvstyrelsen, udbyderen havde ikke løftet sin bevisbyrde for, at udbyderen kunne og ville have annulleret udbuddet, hvis udbyderen havde indset, at den valgte tilbudsgivers tilbud var ukonditionsmæssigt), 11/2-10 (Einar J. Jensen mod Guldborgsund Kommune, ordregiverens annullation af en licitation efter Tilbudslovens afsnit I som følge af fejl i licitationsbetingelserne var ikke usaglig), Retten 2/3-10 (Evr. mod Kommissionen, udbyderen var ikke forpligtet til at ind-**

	gå kontrakt med den eneste konditionsmæssige tilbudsgiver, men kunne have annulleret udbuddet), 10/3-10 (Mantova mod Undervisningsministeriet, ordregiveren kunne genoptage tilbudsvurderingen som følge af fejl i denne uden at annullere tilbudsindhentningen og iværksætte en ny tilbudsindhentning, angår Tiludslovens afsnit II)
Arbejdsmiljø	
Begrundelse, udbyders	VL 15/5-09 (der var ikke grundlag for at antage, at udbyders begrundelse for annullation af udbuddet var ukorrekt), Retten 20/5-09 (VIP Car, udbyders oplysning om tilbuddenes samlede pointtal var ikke tilstrækkelig oplysning om det valgte tilbuds karakteristika og relative fordele, og tilbudsprisen i det valgte tilbud var blandt dette tilbuds karakteristika og relative fordele), EF-domstolen 4/6-09 (Kommissionen mod Grækenland, udbyders meddelelse af begrundelse for et tilbuds afvisning efter ca. to måneder opfyldte ikke direktivets krav om, at begrundelsen skulle gives hurtigst muligt), 17/6-09 (Gottlieb mod Sct. Hans, overtrædelse ved, at udbyderens begrundelse for afvisning af et tilbud som ukonditionsmæssigt ikke angav alle grundene til afvisningen), 4/8-09 (Mölnlycke mod Region Hovedstaden, Udbudsdirektivets artikel 41 overtrådt ved, at udbyderens redegørelse ikke var skriftlig), 6/8-09 (Conva Tec mod Region Hovedstaden, overtrædelse ved, at udbyderens meddelelse om tildelingsbeslutningen ikke indeholdt en summarisk begrundelse med hensyn til hver enkelt af de udbudte rammeaftaler), Retten 9/9-09 (Brink's Security, oplysning om den valgte tilbudsgiver og de points, der var tildelt klagerens tilbud og den valgte tilbudsgivers tilbud, var tilstrækkelig begrundelse)
Bevisbyrde	24/3-09 (FMT mod Vestforbrænding, udbyderen kunne tage et tilbud i betragtning, selvom tilbudsgiveren ikke havde overholdt en forskrift om fremgangsmåden ved henvendelser fra tilbudsgiverne, da udbyderen havde løftet sin bevisbyrde for, at tilbudsgiveren ikke havde opnået en fordel ved den henvendelse, der var tale om), EF-domstolen 4/6-09 (Kommissionen mod Grækenland, bevisbyrden påhviler den, der påberåber sig en undtagelsesbestemmelse om fritagelse for udbudspligten), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, udbyderen havde bevisbyrden for, at nogle underkriterier, der kunne forstås som udvælgelseskriterier, ikke var blevet anvendt således, og for, at udbyderens grove overtrædelser ikke havde påvirket tilbudsvurderingen), **EF-domstolen 15/10-09 (Kommissionen mod Tyskland, den, der påberåber sig en undtagelse fra udbudspligten, har bevisbyrden),** 3/12-09 (Bent Klausen mod Norddjurs Kommune, tilbudsgiveren havde bevisbyrden for, at tilbuddet var vedlagt en krævet oplysning om referencer, og bevisbyrden var ikke løftet), 18/12-09 (Almenbo mod Nygårdsparken, en virksomhed havde bevisbyrden for årsagsforbindelse mellem virksomhedens hævdede tab og ordregiverens manglende tilbudsindhentning efter Tilbudslovens afsnit II, og denne bevisbyrde var ikke løftet**), 25/1-10 (J.H. Schultz mod Kulturarvstyrelsen, udbyderen havde ikke løftet sin bevisbyrde for, at udbyderen kunne og ville have annulleret udbuddet, hvis udbyderen havde indset, at den valgte tilbudsgivers tilbud var ukonditionsmæssigt),19/2-10 (Humus mod Fredensborg Kommune, det var ikke godtgjort, at nogle oplysninger i tilbud var åbenbart urigtige), Retten 2/3-10 (Evr. mod Kommissionen, det var beklageligt, at udbyderen ikke havde sikret sig bevis for afsendelsen af en uddybende begrundelse til en tilbudsgiver efter anmodning, men forholdet havde ikke påvirket tilbudsgiverens retsstilling; en postkvittering og en erklæring fra en postfunktionær kunne ikke sidestilles med dokumentation for et anbefalet brev), 4/3-10 (Dansk Flygtningehjælp mod Hvidovre Kommune, ordregiveren havde vurderet tilbuddene i forhold til hinanden i relation til et underkriterium og havde ikke godtgjort, at det samme ikke havde været tilfældet med hensyn til de øvrige underkriterier), 24/3-10 (Almenbo mod Nygårdsparken, udbyderen havde bevisbyrden for, at en tilbudsgiver ikke havde fået en fordel som følge af personsammenfald, og denne bevisbyrde var ikke løftet), 25/3-0 (Visma mod Hillerød Kommune, udbyderen havde bevisbyrden for, at betingelserne for udbud med forhandling uden forudgående udbudsbekendtgørelse i Udbudsdirektivets artikel 31, stk. 1, litra b) var opfyldt, og denne bevisbyrde var ikke løftet)**
Bilag II A og II B i Udbudsdirektivet og Bilag XVII A og XVII B i Forsyningsvirksomhedsdirektivet (i de tidligere direktiver henholdsvis Bilag I A og	4/3-09 (Berendsen mod Frederikssund Kommune, overtrædelse af Udbudsdirektivet og Tilbudslovens afsnit II ved indgåelse af kontrakt vedrørende tøjvask), 10/3-09 (Munkebjerg mod Økonomistyrelsen, begrænset udbud vedrørende hotelophold), 11/3-09 (Danske Kroer og Hoteller mod Økonomistyrelsen, tilsvarende), 6/4-09 (Danacare mod Brøndby Kommune mfl., begrænset udbud vedrørende levering af vikarer), 4/6-09 (Eurest mod CBS, begrænset udbud vedrørende kantinedrift, forskellige overtrædelser af principperne om ligebehandling og gennemsigtighed), 13/8-09 (SundVikar mod Hillerød Kommune, indhentning af tilbud efter Tilbudslovens afsnit

B og Bilag XVI A og B)	II vedrørende en bilag II B-tjenesteydelse, diverse klagepunkter, en evalueringsmodel, hvorefter tilbuddene blev vurderet i forhold til hinanden i relation til et underkriterium om pris, var ikke en overtrædelse af udbudsreglerne), 15/9-09 (Almenbo mod Nygårdsparken, overtrædelse ved indgåelse af aftale om Bilag II A-tjenesteydelse under tærskelværdien uden forudgående annoncering, undtagelsesbestemmelserne i Tilbudslovens § 15 c fandt ikke anvendelse)**, 17/2-10 (Excellent Match mod DONG, der var vide rammer for udbyderens skøn med hensyn til, hvilke virksomheder der skulle indgås kontrakt med på grundlag af et udbud af en bilag XVII B-tjenesteydelse), 4/3-10 (Dansk Flygtningehjælp mod Hvidovre Kommune, diverse overtrædelser), 10/3-10 (Mantova mod Undervisningsministeriet, konstateret en overtrædelse, desuden forskellige udtalelser om tilbudsvurdering)**
Boligselskaber	
Domstolsprøvelse	ØL 29/6-09 (flertalsafgørelse i Klagenævnets kendelse af 14/4-08 kendt ugyldig som følge af utilstrækkelig begrundelse)**, Retten i Herning 5/11-09 (Kommuner mod AV Form, en eventuel sagsbehandlingsfejl i forbindelse med Klagenævnets meddelelse til indklagede om klagen medførte ikke ugyldighed af Klagenævnets senere kendelse i sagen)**
Effektivitetsprincippet	
Entreprenørbegrebet	
Erstatning	9/1-09 (C.C. Brun mod Storebælt, ikke erstatning til forbigået tilbudsgiver til dækning af negativ kontraktsinteresse, da udbyderen havde været forpligtet til ikke at tage tilbuddet i betragtning som følge af forbehold, hvorfor der ikke var årsagsforbindelse mellem udbyderens ansvarspådragende adfærd og tilbudsgiverens udgift til udarbejdelse af tilbud), 12/1-09 (Jysk Erhvervsbeklædning mod Hjørring Kommune, erstatning til dækning af forbigået tilbudsgivers negative kontraktsinteresse skønsmæssigt fastsat til 75.000 kr., ikke erstatning for mistede vareprøver, da tab ikke var godtgjort), 13/2-09 (Labofa mod SKI mfl., erstatning til negativ kontraktsinteresse fastsat til ca. 126.000 kr., erstatningsansvaret og erstatningens størrelse var anerkendt af udbyderne), ØL 5/3-09 (udbyderen pålagt erstatning til dækning af tilbudsgivernes udgift til udarbejdelse af tilbud, da udbyderen ikke havde foretaget en professionel og forsvarlig tilbudsvurdering), ØL 30/3-09 (ikke erstatning til forbigået tilbudsgiver til dækning af positiv opfyldelsesinteresse, da ikke bevist, at tilbudsgiveren ville have fået kontrakten, hvis udbyderen ikke havde overtrådt udbudsreglerne, men erstatning til dækning af negativ kontraktsinteresse, da tilbudsgiveren ikke ville have afgivet tilbud, hvis han på forhånd havde kendt udbyderens overtrædelser), Århus Ret 6/5-09 (erstatning 6 mio. kr. til forbigået tilbudsgiver til dækning af positiv opfyldelsesinteresse, da det var overvejende sandsynligt, at tilbudsgiveren ville have fået kontrakten, hvis udbyderen ikke havde overtrådt udbudsreglerne), 18/5-09 (Brøndum mod Ringgården, ikke erstatning til dækning af forbigået tilbudsgivers positive opfyldelsesinteresse, da udbyderen ville have overtrådt udbudsreglerne ved at tildele tilbudsgiveren kontrakten; udtalt, at Klagenævnet herved havde måttet tage stilling til hypotetiske forhold; udbyderen pålagt at erstatte tilbudsgiverens udgift ved udarbejdelse af tilbud, da tilbudsgiveren ikke kunne forudse en af udbyderens overtrædelser), Retten i Horsens 20/5-09 (ikke erstatning af forbigået tilbudsgivers positive opfyldelsesinteresse, da udbyderen kunne have annulleret udbuddet; erstatning til negativ kontraktsinteresse, da tilbudsgiveren ikke kunne forudse, at udbyderen ville overtræde udbudsreglerne ved tilbudsvurderingen), 20/5-09 (MFI mod Udenrigsministeriet, ikke erstatning af forbigået tilbudsgivers negative kontraktsinteresse, da tilbudsgiverens tilbud var ukonditionsmæssigt og derfor ikke måtte tages i betragtning, hvorfor der ikke var årsagsforbindelse mellem udbyderens overtrædelser og tilbudsgiverens forgæves udgift til udarbejdelse af tilbud), 27/5-09 (Serviceselskabet mod Region Midtjylland, forbigået tilbudsgiver ikke tillagt erstatning til dækning af positiv opfyldelsesinteresse, da det ikke var bevist eller sandsynliggjort i overvejende grad, at tilbudsgiveren ville have fået en kontrakt, hvis udbyderen ikke havde overtrådt udbudsreglerne; tilbudsgiveren tillagt erstatning af negativ kontraktsinteresse, da tilbudsgiveren ikke havde kunnet forudse udbyderens overtrædelser, og da det ikke havde påhvilet tilbudsgiveren ikke at afgive tilbud som følge af et ulovligt underkriterium), Retten 9/9-09 (Brink's Security, om betingelserne for erstatning), 5/11-09 (Saver mod Region Midtjylland, ikke erstatning af forbigået tilbudsgivers positive opfyldelsesinteresse, da ikke bevist eller sandsynliggjort i overvejende grad, at tilbudsgiveren ville have fået en kontrakt, hvis udbyderen ikke havde overtrådt udbudsreglerne; erstatning til negativ kontraktsinteresse, da det ikke have påhvilet tilbudsgiveren ikke at afgive tilbud som følge af et underkriterium, der rettelig var et udvælgelseskriterium, og da udbyderen ikke kunne forudse udbyderens yderligere overtrædelser af udbudsreglerne), 14/12-09 (Ortos

	mod Odense kommune, forbigået tilbudsgiver tillagt erstatning af negativ kontraktsinteresse, da tilbudsgiveren ikke kunne forudse, at udbyderen ville overtræde udbudsreglerne ved tilbudsvurderingen, hvorfor der var årsagsforbindelse), 15/12-09 (Sahva mod Odense Kommune, forbigået tilbudsgiver tillagt erstatning af negativ kontraktsinteresse, da tilbudsgiveren ikke kunne forudse, at udbyderen ville overtræde udbudsreglerne ved tilbudsvurderingen, hvorfor der var årsagsforbindelse; en indsigelse under erstatningssagen om, at tilbudsgiverens tilbud var ukonditionsmæssigt, ikke taget til følge), 16/12-09 (Jysk-Fynske Bandagerier mod Odense Kommune, forbigået tilbudsgiver tillagt erstatning af negativ kontraktsinteresse, da tilbudsgiveren ikke kunne forudse, at udbyderen ville overtræde udbudsreglerne ved tilbudsvurderingen, hvorfor der var årsagsforbindelse; en indsigelse under erstatningssagen om, at tilbudsgiverens tilbud var ukonditionsmæssigt, ikke taget til følge), 18/12-09 (Almenbo mod Nygårdsparken, en virksomhed havde bevisbyrden for årsagsforbindelse mellem virksomhedens hævdede tab og ordregiverens manglende tilbudsindhentning efter Tilbudslovens afsnit II, og denne bevisbyrde var ikke løftet)**, 25/1-10 (J.H. Schultz mod Kulturarvstyrelsen, forbigået tilbudsgiver tillagt 800.000 kr. til dækning af positiv opfyldelsesinteresse, da tilbudsgiverens tilbud var det eneste konditionsmæssige tilbud, hvorfor tilbudsgiveren ville have fået kontrakten, hvis udbyderen ikke havde overtrådt udbudsreglerne, og da udbyderen ikke havde løftet sin bevisbyrde for, at udbyderen kunne og ville have annulleret udbuddet), 27/1-10 (Billetlugen mod Det Kongelige Teater, forbigået tilbudsgiver tillagt erstatning 300.000 kr. til dækning af negativ kontraktsinteresse, da det var overvejende sandsynligt, at tilbudsgiveren ikke ville have afgivet tilbud, hvis tilbudsgiveren havde vidst, at udbyderen ville overtræde udbudsreglerne ved tilbudsvurderingen, hvorfor der var årsagsforbindelse mellem udbyderens overtrædelse og tilbudsgiverens forgæves udgift til udarbejdelse af tilbud), 9/2-10 (Barslund mod Københavns Kommune, ikke erstatning af forbigået tilbudsgivers positive opfyldelsesinteresse, da tilbudsgiveren ikke ville have fået kontrakten, selvom udbyderen ikke havde overtrådt udbudsreglerne; tilbudsgiveren tillagt erstatning af negativ kontraktinteresse, da det var overvejende sandsynligt, at tilbudsgiveren ikke ville have afgivet tilbud, hvis tilbudsgiveren vidst, at udbyderen ikke ville foretage en lovlig tilbudsvurdering)**
EU-støtte	
Evalueringsmodeller	7/1-09 (MFI mod Udenrigsministeriet, en vurderingsmodel, hvorefter tilbud, der ikke opnåede et bestemt antal points, ikke ville blive taget i betragtning, var ikke i strid med udbudsreglerne) 21/4-09 (Hoffmann mod Hørsholm Karlebo, en pointmodel kunne under ekstreme forudsætninger føre til uhensigtsmæssige resultater, men havde ikke gjort det i det konkrete tilfælde, hvorfor den ikke var uegnet til at identificere det økonomisk mest fordelagtige tilbud), 19/5-09 (Anker Hansen mod Rudersdal Kommune, en pointmodel var uegnet i relation til et underkriterium om tilbudspris, da tilbudsprisens betydning ikke kom tilstrækkeligt til udtryk, hvorfor modellen ikke var egnet til at adskille tilbuddene fra hinanden), Retten 20/5-09 (VIP Car, viser et eksempel på en kompliceret beregningsmodel), 26/5-09 (Oberthur mod Region Nordjylland, udbyderen havde ikke pligt til på forhånd at oplyse om den anvendte vurderingsmodel, allerede fordi modellen ikke var fastlagt før tilbuddenes modtagelse), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, en pointmodel medførte en vilkårlig og uigennemsigtig pointtildeling), 4/8-09 (Mölnlycke mod Region Hovedstaden, udbyder har ikke pligt til på forhånd at give oplysning om en evalueringsmodel; udbyderens evalueringsmodel kunne føre til resultater i strid med udbudsreglerne, men havde ikke gjort det i det konkrete tilfælde), 13/8-09 (SundVikar mod Hillerød Kommune, en evalueringsmodel, hvorefter tilbuddene blev vurderet i forhold til hinanden i relation til et underkriterium om pris, var ikke en overtrædelse af udbudsreglerne, angår en tilbudsindhentning efter Tilbudslovens afsnit II vedrørende en Bilag II B-tjenesteydelse)**, 12/2-10 (Nøhr & Sigsgaard mod Kriminalforsorgen, udbyderens tilbudsvurdering i relation til underkriteriet pris efter en skala fra 2 til 5 afspejlede ikke prisforskellene mellem tilbuddene), 10/3-10 (Mantova mod Undervisningsministeriet, en sprogligt baseret tilbudsevaluering er lovlig, og der er ikke krav om en pointmodel, angår Tilbudslovens afsnit II)**
Forbehold i tilbud (dvs. afvigelser fra udbudsbetingelserne, uanset om de er benævnt forbehold, samt uklarheder i tilbud)	7/1-09 (MFI mod Udenrigsministeriet, et tilbud måtte ikke tages i betragtning, da det ikke var i overensstemmelse med forskellige krav i udbudsbetingelserne, herunder et krav, der var ændret uden oplysning til tilbudsgiveren), 2/2-09 (Damm Cellular mod Forsvarets Materieltjeneste, tilbud med rette afvist som ukonditionsmæssigt, da det tilbudte udstyr ved en demonstration, der var fastsat i udbudsbetingelserne, ikke levede op til nogle ufravigelige mindstekrav), 10/2-09 (Gustav H. Christensen mod Vejdi-

	rektoratet, udbyderen var berettiget til ikke at tage et tilbud i betragtning, da tilbudsgiverens referencer i det væsentligste ikke som krævet i udbudsbetingelserne angik arbejdsopgaver som den udbudte), 17/2-09 (CLS mod Miljøministeriet, forhandlingsforbuddet overtrådt ved forhandling om et forbehold om tilbudsgiverens erstatningsansvar, da forbeholdet reelt angik tilbudsprisen), 21/4-09 (Hoffmann mod Hørsholm Karlebo, overtrædelse ved at tage et tilbud i betragtning, selvom tilbuddet ikke som krævet i udbudsbetingelserne angav pris for nogle delydelser), 22/4-09 (Harry Andersen mod Billund Kommune, et tilbuds manglende opfyldelse af et krav om oplysning af underentreprenører medførte ikke pligt for udbyderen til at afvise tilbuddet, da der efter AB 92 er ret til at antage underentreprenører, og da kravet ikke angik et grundlæggende element), 26/5-09 (Oberthur mod Region Nordjylland, overtrædelse ved at tage et tilbud i betragtning, selvom tilbuddet indeholdt et forbehold, der ikke kunne prissættes) 17/6-09 (Gottlieb mod Sct. Hans, tilbud med rette afvist som ukonditionsmæssigt, da tilbuddet afveg fra udbudsbetingelserne på en række punkter, og da udbyderen som følge af nogle af afvigelserne havde pligt til at afvise tilbuddet), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved at tage et tilbud med forbehold om grundlæggende elementer i betragtning; det var uden betydning, at udbudsbetingelserne tillod forbehold uden at sondre mellem forbehold om grundlæggende og ikke-grundlæggende elementer; overtrædelse ved et underkriterium om tilbudsforbehold), 4/8-09 (Mölnlycke mod Region Hovedstaden, overtrædelse ved at indgå kontrakt med en tilbudsgiver om et produkt, hvis tilbud ikke omfattede produktet; udbyderen var berettiget, men ikke forpligtet til at afvise tilbud, der ikke opfyldte udbudsbetingelsernes krav vedrørende referencelister, oplysning om omsætning, sproglig udformning og beskrivelse af en tilbudt vare), 12/8-09 (Novalis mod Personalestyrelsen, som følge af en angivelse i udbudsbetingelserne af, at tilbud med forbehold ville blive anset for ukonditionsmæssige, var udbyderen forpligtet til at afvise et tilbud, der indeholdt nogle forudsætninger, som måtte forstås som forbehold; udbyderen havde ikke pligt til at spørge tilbudsgiveren om, hvorledes forudsætningerne skulle forstås), Retten 2/7-09 (sag T-279/06, Europaïki Dynamiki mod ECB, en forbigået tilbudsgiver havde ikke retlig interesse i at klage over tildelingsbeslutningen, da tilbuddet som ukonditionsmæssigt ikke kunne komme i betragtning), 26/8-09 (Barslund mod Københavns Kommune, udbyderens angivelse af, at tilbud ikke må indeholde forbehold, medfører pligt for udbyderen til at afvise alle tilbud med forbehold, et forbehold om vinterforanstaltninger angik i det konkrete tilfælde ikke et grundlæggende element), 11/9-09 (Mecanoo mod Århus Kommune, udbud med forhandling, udbyderen havde ikke pligt til under forhandlingerne at drøfte samtlige forhold i tilbuddene), Retten 9/9-09 (Brink's Security, en tilbudsgiver behøver ikke have de nødvendige medarbejdere ved tilbuddets afgivelse), 10/12-09 (DCP mod Universitets- og Bygningsstyrelsen, udbyderen var berettiget til at afvise et tilbud, da en arbejdsklausul ikke som krævet var underskrevet, og udbyderen måtte ikke tage hensyn til en underskrevet arbejdsklausul, som tilbudsgiveren indsendte senere), 15/12-09 (Sahva mod Odense Kommune, en indsigelse fra udbyderen under erstatningsspørgsmålets behandling om, at klagerens tilbud var ukonditionsmæssigt, ikke taget til følge), 16/12-09 (Jysk-Fynske Bandagerier mod Odense Kommune, en indsigelse fra udbyderen under erstatningsspørgsmålets behandling om, at klagerens tilbud var ukonditionsmæssigt, ikke taget til følge), 17/12-09 (Uggerly mod Aalborg Kommune, en angivelse i et tilbud var ikke et forbehold om et grundlæggende element)**, 12/1-10 (Børge Jakobsen mod Sorø Kommune, en angivelse i et tilbud kunne forstås således, at tilbudsgiveren ikke ville acceptere et grundlæggende element i tilbuddet, hvorfor udbyderen var forpligtet til at afvise tilbuddet; udbyderen var desuden forpligtet til at afvise tilbud, der indeholdt Dansk Byggeris Standardforbehold, da udbudsbetingelserne klart og ubetinget angav, at disse standardforbehold ikke ville blive accepteret), 25/1-10 (J.H. Schultz mod Kulturarvstyrelsen, udbyderen tog klagerens tilbud i betragtning, men gjorde under erstatningsspørgsmålets behandling gældende, at tilbuddet var ukonditionsmæssigt, denne indsigelse blev ikke taget til følge)**
Forhandlingsrestriktioner	2/2-09 (Damm Cellular mod Forsvarets Materieltjeneste, udbyderen havde saglig grund til at annullere udbuddet, da udbyderen havde begået grove fejl ved at rette henvendelse til tilbudsgiverne om forståelsen af tilbuddene), 17/2-09 (CLS mod Miljøministeriet, forhandlingsforbuddet overtrådt ved forhandling om et forbehold om tilbudsgiverens erstatningsansvar, da forbeholdet reelt angik tilbudsprisen), 21/4-09 (Hoffmann mod Hørsholm Karlebo, forhandlingsforbuddet gælder i partneringfasen), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved efter tilbudsafgivelsen at indlede forhandlinger med tilbudsgiverne om finansiering), 11/9-09 (Me-

	canoo mod Århus Kommune, udbud med forhandling, som følge af omstændighederne var det ikke i strid med udbudsreglerne, at udbyderen ved tildelingsvurderingen lagde vægt på muligheden for bearbejdelse af tilbuddene og yderligere tiltag efter kontraktsindgåelsen), 1/10-09 (Cimber Air mod Forsvarskommandoen, udbyderen måtte ikke indhente prisoplysninger fra en tilbudsgiver), 6/11-09 (Hettich mod Region Sjælland, overtrædelse ved at tage et tilbud i betragtning, selvom det ikke opfyldte udbudsbetingelsernes krav om udfyldelse af et skema), 11/11-09 (Yding mod Viborg Kommune, tilbud med rette afvist som følge af en bemærkning, der efter placeringen og ordlyden var et forbehold om et grundlæggende element), Retten 10/12-09 (Antwerpse, udbyderens indhentning af supplerende oplysninger fra nogle tilbudsgivere om deres tilbuds prismæssige sammensætning var ikke i strid med forhandlingsforbuddet), 17/12-09 (Uggerly mod Aalborg Kommune, det var ikke i strid med ligebehandlingsprincippet, at udbyderen efter tildelingsbeslutningen, men før kontraktsindgåelsen, holdt et møde med den valgte tilbudsgiver)**, 26/3-10 (Einar Kornerup mod Parkvænget, overtrædelse af ligebehandlingsprincippet og Tilbudslovens § 11, stk. 2, ved at tage reviderede tilbud i betragtning, selvom udbyderen ikke havde tilkendegivet en procedure for forhandlinger med tilbudsgiverne)**
Formål, udbudsdirektivernes	
Forsvarsanskaffelser	16/2-09 (Saab Danmark mod Forsvarets Materieltjeneste, Klagenævnet har ikke kompetence til at behandle en klage over anskaffelser omfattet af Traktatens artikel 296 om beskyttelse af sikkerhedsinteresser)
Forsyningsvirksomhedsdirektivet, sager om (det nugældende eller tidligere forsyningsvirksomhedsdirektiv)	EF-domstolen 4/6-09 (Kommissionen mod Grækenland)**, EF-domstolen 10/9-09 (Eurawasser, koncessionsbegrebet er det samme i de to udbudsdirektiver; der kan foreligge en tjenesteydelseskoncession under Forsyningsvirksomhedsdirektivet, selvom tjenesteyderens økonomiske risiko er meget begrænset), 17/2-10 (Excellent Match mod DONG, udbud af Bilag XVII B-tjenesteydelse)**
Færgefart	
Gennemsigtighedsprincippet	15/1-09 (Ortos mod Odense Kommune, gennemsigtighedsprincippet overtrådt ved modstridende angivelser i udbudsbekendtgørelsen og udbudsbetingelserne, ved indgåelse af kontrakt med et senere begyndelsestidspunkt end angivet i udbudsbekendtgørelsen, ved utilstrækkelig beskrivelse af det udbudte og ved at lægge vægt på tilbuddenes angivelser om nogle krav, der var udtømmende beskrevet i udbudsbetingelserne m.m.), Retten 28/1-09 (Centro Studio Manieri, gennemsigtighedsprincippet har til formål at sikre ligebehandlingsprincippets overholdelse og beskytte tilbudsgiverne mod tab), 12/3-09 (Lyreco mod Varde Kommune, forskellige overtrædelser, herunder ved anmodning om oplysning om priser og rabatter på produkter, der ikke var omfattet af det udbudte), 21/4-09 (Hoffmann mod Hørsholm Karlebo, forskellige overtrædelser ved tilbudsvurderingen), 23/4-09 (Saver mod Region Midtjylland, overtrædelse ved prissætning på baggrund af uklare angivelser i udbudsbetingelserne), 13/5-09 (Billetlugen mod Det Kgl. Teater, overtrædelse ved tilbudsvurdering i strid med udbudsbetingelserne), VL 15/5-09 (gennemsigtighedsprincippet har til formål at sikre ligebehandlingsprincippets overholdelse; udbyderens annullation af udbuddet var ikke i strid med gennemsigtighedsprincippet, da der ikke var grundlag for at antage, at den angivne begrundelse for annullationen var ukorrekt), 4/6-09 (Eurest mod CBS, begrænset udbud af Bilag II-tjenesteydelse, overtrædelse af gennemsigtighedsprincippet ved forskellige uklarheder), 10/7-09 (NCC mod Billund Kommune, omvendt licitation, overtrædelse ved sammenblanding af mindstekrav med tildelingskriterium og tilbudsvurdering og ved, at et underkriterium angik et byggeprojekt, der ikke var omfattet af det udbudte), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, længere række overtrædelser bl.a. ved uigennemsigtig og inkonsekvent tilbudsvurdering), 4/8-09 (Mölnlycke mod Region Hovedstaden, overtrædelse ved upræcise angivelser om, hvad udbyderen ville lægge vægt på), Retten 9/9-09 (Brink's Security, gennemsigtighedsprincippet har til formål at undgå favorisering), 14/10-09 (Frederik Petersen mod Viborg Kommune, overtrædelse af principperne om ligebehandling og gennemsigtighed ved anvendelse af tildelingskriteriet det økonomisk mest fordelagtige tilbud, selvom det udbudte var så detaljeret beskrevet i udbudsbetingelserne, at det reelt kun var muligt at vurdere tilbuddene på grundlag af tilbudsprisen), 6/11-09 (Hettich mod Region Sjælland, overtrædelse ved at tage et tilbud i betragtning, selvom det ikke opfyldte udbudsbetingelsernes krav om udfyldelse af et skema), EF-domstolen 12/11-09 (Kommissionen mod Grækenland, principperne om ligebehandling og gennemsigtighed betyder, at tilbudsgiverne og potentielle tilbudsgivere skal have ens chancer), 8/12-09 (Ricoh mod SKI, overtrædelse af gennemsigtighedsprincippet og Udbudsdirektivets artikel 53 ved at beregne tilbudspriserne på grundlag af et gennemsnit m.m.

	og ved at lægge vægt på et forhold, der ikke fremgik af udbudsbetingelserne), 21/12-09 (Ergolet mod Københavns Kommune, overtrædelse af gennemsigtighedsprincippet bl.a. ved manglende angivelse af de forventede anskaffelser under en rammeaftale), EF-domstolen 23/12-09 (Serrantoni, traktatens grundlæggende principper gælder ved anskaffelser under tærskelværdien under forudsætning af, at der foreligger en grænseoverskridende interesse; medlemsstaterne har en vis skønsmargin, men proportionalitetsprincippet skal overholdes)**, 4/3-10 (Dansk Flygtningehjælp mod Hvidovre Kommune, et underkriterium medførte manglende gennemsigtighed)**
Grundlæggende element	22/4-09 (Harry Andersen mod Billund Kommune, et krav om oplysning om underentreprenører angik ikke et grundlæggende element), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved at tage et tilbud i betragtning, selvom det indeholdt forbehold om flere grundlæggende elementer), 26/8-09 (Barslund mod Københavns Kommune, et forbehold om vinterforanstaltninger angik i det konkrete tilfælde ikke et grundlæggende element), 11/11-09 (Yding mod Viborg Kommune, en bemærkning i et tilbud måtte forstås som et forbehold om tidsplanen og dermed om et grundlæggende element), 17/12-09 (Uggerly mod Aalborg Kommune, en angivelse i et tilbud var ikke et forbehold om et grundlæggende element)**, 12/1-10 (Børge Jakobsen mod Sorø Kommune, nogle fravigelser fra AB 92, der var fastsat i udbudsbetingelserne, udgjorde grundlæggende elementer i disse)**
Grænseoverskridende element	EF-domstolen 23/12-09 (Serrantoni, traktatens grundlæggende principper, navnlig ligebehandlingsprincippet, gælder ved anskaffelser under tærskelværdien under forudsætning af, at der foreligger en grænseoverskridende interesse)
Hasteprocedure	EF-**domstolen 15/10-09 (Kommissionen mod Tyskland, udtalt, at der kunne have været iværksat et udbud i form af hasteprocedure vedrørende et it-system til registrering af motorkøretøjer som følge af, at det hidtidige system var brudt sammen)**
Inhabilitet, herunder teknisk dialog	24/3-09 (FMT mod Vestforbrænding, udbyderen kunne tage et tilbud i betragtning, selvom udbyderen var medejer af tilbudsgiveren, men interessesammenfaldet som følge af medejerskabet skulle indgå i vurderingen af, om udbyderen havde forskelsbehandlet tilbudsgiverne, hvilket ikke var sket), 14/9-09 (Vision Area mod Københavns Bymuseum, det var ikke i strid med ligebehandlingsprincippet at prækvalificere et konsortium, der som underleverandør anvendte en virksomhed, som havde udført et begrænset arbejde for udbyderen i forbindelse med udarbejdelsen af udbudsbetingelserne)**, 24/3-10 (Almenbo mod Nygårdsparken, udbyderen havde bevisbyrden for, at en tilbudsgiver ikke havde fået en fordel som følge af personsammenfald mellem udbyderens rådgiver og tilbudsgiveren, og denne bevisbyrde var ikke løftet), 26/3-10 (Einar Kornerup mod Parkvænget, et tilbud på facaderenovering kunne tages i betragtning, selvom tilbudsgiveren før licitationen havde givet et overslag over udgiften, og selvom tilbudsgiveren havde stået for en del af den løbende vedligeholdelse)**
Jernbaneloven	
Klageadgang	7/5-09 (Cimber Air mod Forsvarskommandoen, en forbigået tilbudsgiver havde retlig interesse i at klage til Klagenævnet, og der kræves ikke »loyal« retlig interesse; det var uden betydning, at tilbudsgiveren havde rettet henvendelse til den valgte tilbudsgiver og til politikere og medier), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, en forbigået tilbudsgiver kunne som klageberettiget nedlægge påstand om en hvilken som helst overtrædelse af udbudsreglerne uden hensyn til, om overtrædelsen havde haft betydning for vurderingen af klagerens tilbud), Retten 2/7-09 (sag T-279/06, Europaïki Dynamiki mod ECB, en forbigået tilbudsgiver havde ikke retlig interesse i at klage over tildelingsbeslutningen, da tilbuddet som ukonditionsmæssigt ikke kunne komme i betragtning), Retten 9/9-09 (Brink's Security, klage ikke taget til følge, da den angik den valgte tilbudsgivers overholdelse af kontrakten og ikke tildelingsbeslutningen), 1/10-09 (Cimber Air mod Forsvarskommandoen, klageren var ikke ved passivitet afskåret fra at fremsætte et klagepunkt, selvom klageren havde haft anledning til at gøre forholdet gældende over for udbyderen tidligere), 16/10-09 (Konkurrencestyrelsen mod Region Sjælland og Region Hovedstaden, klageren kunne nedlægge påstand om annullation af udbyderens beslutninger om forlængelse af en rammeaftale, selvom rammeaftalen var udløbet og klagen først var indgivet 15 måneder efter udløbet)**, Retten 19/3-10 (Evr. mod Kommissionen, en deltager i et tilbudsgivende konsortium, der ikke var en juridisk person, kunne anlægge sag mod udbyderen)**
Klagefrist	EF-domstolen 11/6-09 (Kommissionen mod Frankrig, en national regel om, at en stand-still periode kunne forkortes i visse tilfælde, var ikke i strid med kontroldirektiverne; en regel om, at der først kunne klages en vis tid efter forhåndsorientering til

	udbyderen, var derimod i strid med direktiverne)**, EF-domstolen 28/1-10 (Kommissionen mod Irland, det var i strid med 1. kontroldirektiv, at en regel om klagefrist blev anvendt på andre beslutninger end dem, som reglen udtrykkeligt angik, og at reglen var formuleret på en måde, der gav anledning til retsusikkerhed), EF-domstolen 28/1-10 (Uniplex, en regel om klagefrist skal løbe fra det tidspunkt, hvor klageren kendte eller burde kende den påberåbte overtrædelse af udbudsreglerne)**
Kompetence, Klagenævnets	12/2-09 (NCC mod Vejdirektoratet, Klagenævnet efterprøver ikke en udbyders skøn med hensyn til den relative vurdering af tilbuddene, af nærmere angivne grunde taget stilling til udbyderens pointtildeling vedrørende et underkriterium), 16/2-09 (Saab Danmark mod Forsvarets Materieltjeneste, Klagenævnet har ikke kompetence til at behandle en klage over anskaffelser omfattet af Traktatens artikel 296 om beskyttelse af sikkerhedsinteresser), 4/3-09 (Berendsen mod Frederikssund Kommune, anmodning om betinget pålæg om udbud afvist, da et sådant påbud ikke ville medføre ændring af retsstillingen), 17/4-09 (Lambæk mod Ældre Sagen mfl., Klagenævnet havde ikke kompetence til at behandle en klage over en licitation iværksat af en forening; klage over foreningens tekniske rådgiver afvist med henvisning til, at Tilbudsloven kun gælder for udbydere), 6/5-09 (Henrik Kejser mod Betaniaforeningen, Klagenævnet havde ikke kompetence til at behandle en klage over en velgørende forening), 13/5-09 (Billetlugen mod Det Kgl. Teater, påstand om pålæg af lovliggørelse af udbuddet afvist, da udbuddet var afsluttet), 29/6-09 (Master Data mod Københavns Kommune, udbyderen pålagt at betale sagsomkostninger til en klager, selvom klagen var tilbagekaldt som følge af et forlig mellem klageren og udbyderen; det strider mod Klagenævnets faste praksis, at Klagenævnet anså sig for kompetent til at træffe afgørelsen, og afgørelsen kan næppe tages som udtryk for en praksisændring på dette punkt), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, en overtrædelses væsentlighed er uden betydning for Klagenævnets afgørelse med hensyn til, om der foreligger en overtrædelse), 6/8-09 (Conva Tec mod Region Hovedstaden, Klagenævnet har ikke efter Lov om Klagenævnet for Udbud kompetence med hensyn til danske regler om aktindsigt, men er rekursmyndighed i henhold til Forvaltningsloven med hensyn til partsaktindsigt i udbudssager), 11/9-09 (Mecanoo mod Århus Kommune, klage over tilbudsvurderingen afvist, da Klagenævnet ikke erstatter udbyderens skøn med sit eget), 1/10-09 (Cimber Air mod Forsvarskommandoen, Klagenævnet havde ikke grundlag for at tilsidesætte udbyderens skøn ved tilbudsvurderingen), 6/11-09 (Hettich mod Region Sjælland, ikke grundlag for at tilsidesætte udbyderens skøn om betydningen af en uklar angivelse i et tilbud), 11/12-09 (Tabulex mod Tønder Kommune, Klagenævnet havde ikke hjemmel til at pålægge ordregiveren at bringe en ulovligt indgået aftale til ophør; en påstand om lovliggørelse afvist, da det ikke ville medføre ændring i ordregiverens retsstilling at tage påstanden til følge), 17/12-09 (Uggerly mod Aalborg Kommune, nogle påstande afvist, da Klagenævnet havde taget stilling til dem tidligere), 21/12-09 (Ergolet mod Københavns Kommune, Klagenævnet har ikke hjemmel til at annullere et afsluttet udbud)**, 25/3-0 (Visma mod Hillerød Kommune, påstande om pålæg om lovliggørelse af et afsluttet udbud afvist, ligeledes afvist en påstand om pålæg til udbyderen om at ophæve den indgåede kontrakt eller om konstatering af, at udbyderen efter EU-retten havde pligt hertil)**
Koncerner	
Koncession	**EF-domstolen 10/9-09 (Eurawasser, koncessionsbegrebet er det samme i de to udbudsdirektiver, der kan foreligge en tjenesteydelseskoncession under Forsyninsvirksomhedsdirektivet, selvom tjenesteyderens økonomiske risiko er meget begrænset), EF-domstolen 15/10-09 (Acoset, nogle ordregivende myndigheder kunne uden forudgående offentliggørelse give et selskab koncession på udførelse af en tjenesteydelse, selvom selskabet havde privat deltagelse, da den private deltager var fundet gennem et EU-udbud), EF-domstolen 25/3-10 (Helmut Müller, begrebet koncession forudsætter, at der overføres råderet fra koncessionsgiveren til koncessionshaveren, og at koncessionshaveren får i hvert fald en væsentlig del af en driftsrisiko, tidsubegrænsede koncessioner er formentlig i strid med EU-retten; en planmyndigheds meddelelse af eneret til at bebygge et område var ikke en udbudspligtig koncession om et bygge- og anlægsarbejde)**
Konkurrencepræget dialog	14/9-09 (Vision Area mod Københavns Bymuseum, betingelserne for konkurrencepræget dialog var opfyldt, da udbyderen ikke kunne præcisere de tekniske og finansielle vilkår), EF-domstolen 10/12-09 (Kommissionen mod Frankrig, en særlig fransk fremgangsmåde ved indgåelse af kontrakter havde ikke hjemmel i reglerne om konkurrencepræget dialog)
Konsortier	21/10-09 (Rindum Skole mod Ringkøbing-Skjern Kommune, udbyderen kunne kræve

	dokumentation fra alle deltagerne i et konsortium med hensyn til udelukkelsesgrundene i Udbudsdirektivets artikel 45), EF-domstolen 23/12-09 (Serrantoni, en italiensk regel om, at et konsortium og et medlem af konsortiet ikke kan afgive tilbud under samme udbud, var i strid med proportionalitetsprincippet)**, Retten 19/3-10 (Evr. mod Kommissionen, en deltager i et tilbudsgivende konsortium, der ikke var en juridisk person, kunne anlægge sag mod udbyderen)**
Kontraheringspligt	**25/1-10 (J.H. Schultz mod Kulturarvstyrelsen, udbyderen havde ikke løftet sin bevisbyrde for, at udbyderen kunne og ville have annulleret udbuddet, hvis udbyderen havde indset, at den valgte tilbudsgivers tilbud var ukonditionsmæssigt), Retten 2/3-10 (Evr. mod Kommissionen, udbyderen var ikke forpligtet til at indgå kontrakt med den eneste konditionsmæssige tilbudsgiver, men kunne have annulleret udbuddet), 26/3-10 (Einar Kornerup mod Parkvænget, overtrædelse af Tilbudslovens § 8 ved ikke at indgå kontrakt med den tilbudsgiver, hvis tilbud udbyderen havde anset for det økonomisk mest fordelagtige)**
Kontrakt	15/1-09 (Ortos mod Odense Kommune, en udbyder kan indgå kontrakt med en tilbudsgiver, selvom fristen for vedståelse af tilbuddet er udløbet), Retten 9/9-09 (Brink's Security, klage ikke taget til følge, da den angik den valgte tilbudsgivers overholdelse af kontrakten og ikke tildelingsbeslutningen)
Kontrol af oplysninger i tilbud eller ansøgninger	6/4-09 (Danacare mod Brøndby Kommune mfl., udbyderen havde ikke pligt til at kontrollere oplysningerne i et tilbud), 23/4-09 (Saver mod Region Midtjylland, udbyderen havde ikke pligt til at kontrollere, om tilbudsgiverne havde de nødvendige kørselstilladelser), 5/8-09 (Poul Hartmann mod Region Hovedstaden, det tilkommer udbyderen at fastsætte, hvordan det skal konstateres, om tilbudte produkter opfylder mindstekravene, og udbyderen havde valgt hensigtsmæssige afprøvningsmetoder og gennemført afprøvningen forsvarligt), Retten 9/9-09 (Brink's Security, en tilbudsgiver behøver ikke have de nødvendige medarbejdere ved tilbuddets afgivelse), 1/10-09 (Cimber Air mod Forsvarskommandoen, udbyderen har som udgangspunkt ikke pligt til at kontrollere oplysningerne i et tilbud, men det kan være i strid med ligebehandlingsprincippet, hvis udbyderen lægger åbenbart urigtige oplysninger i et tilbud til grund for tilbudsvurderingen)**, 19/2-10 (Humus mod Fredensborg Kommune, do., det var ikke godtgjort, at det nogle oplysninger i tilbud var åbenbart urigtige)**
Kontroldirektiverne	EF-domstolen 11/6-09 (Kommissionen mod Frankrig, en national regel om, at en stand-still periode kunne forkortes i visse tilfælde, var ikke i strid med kontroldirektiverne; en regel om, at der først kunne klages en vis tid efter forhåndsorientering til udbyderen, var derimod i strid med direktiverne)**, EF-domstolen 28/1-10 (Kommissionen mod Irland, det var i strid med 1. kontroldirektiv, at udbyderen ikke gav en tilbudsgiver underretning om sin beslutning om at indgå kontrakt med en anden tilbudsgiver, men kun havde givet underretning om sin beslutning om at indlede forhandlinger med den anden tilbudsgiver; det var desuden i strid med 1. kontroldirektiv, at en regel om klagefrist blev anvendt på andre beslutninger end dem, som reglen udtrykkeligt angik, og at reglen var formuleret på en måde, der gav anledning til retsusikkerhed), EF-domstolen 28/1-10 (Uniplex, en regel om klagefrist skal løbe fra det tidspunkt, hvor klageren kendte eller burde kende den påberåbte overtrædelse af udbudsreglerne)**
Kontroltilbud	
Kvantitative indførselsrestriktioner	
Langvarige kontrakter	
Leasing	
Legitimation	
Ligebehandlingsprincippet **Denne rubrik er en slags opsamlingsrubrik, der ved lejlighed kan forkortes væsentligt eller eventuelt helt fjernes**	15/1-09 (Ortos mod Odense Kommune, ligebehandlingsprincippet overtrådt ved indgåelse af kontrakt med et senere begyndelsestidspunkt end angivet i udbudsbekendtgørelsen og ved at lægge vægt på tilbuddenes angivelser om nogle krav, der var udtømmende beskrevet i udbudsbetingelserne m.m.), Retten 28/1-09 (Centro Studio Manieri, om forholdet mellem ligebehandlingsprincippet og gennemsigtighedsprincippet), 12/3-09 (Lyreco mod Varde Kommune, længere række overtrædelser af ligebehandlingsprincippet ved udformning af udbudsbetingelserne og tilbudsvurderingen), 24/3-09 (FMT mod Vestforbrænding, udbyderen kunne tage et tilbud i betragtning, selvom udbyderen var medejer af tilbudsgiveren, men interessesammenfaldet som følge af medejerskabet skulle indgå i vurderingen af, om udbyderen havde forskelsbehandlet tilbudsgiverne, hvilket ikke var sket), 21/4-09 (Hoffmann mod Hørsholm Karlebo, overtrædelse ved at tage et tilbud i betragtning, selvom tilbuddet ikke som krævet angav pris for nogle delydelser, og ved at lægge vægt på et delkriterium, der ikke fremgik af udbudsbetingelserne), 23/4-09 (Saver mod Region Midtjylland, overtræ-

	delse ved prissætning på baggrund af uklare angivelser i udbudsbetingelserne), 13/5-09 (Billetlugen mod Det Kgl. Teater, overtrædelse ved tilbudsvurdering i strid med udbudsbetingelserne), VL 15/5-09 (det var ikke i strid med gennemsigtighedsprincippet, at udbyderen ikke på forhånd havde oplyst om et forhold, som udbyderen lagde afgørende vægt på, da gennemsigtighedsprincippet har til formål at sikre ligebehandlingsprincippets overholdelse, og da den manglende oplysning ikke havde ført til ulige behandling af tilbudsgiverne), ØL 19/5-09 (tillagt en tilbudsgiver erstatning af negativ kontraktsinteresse, da udbyderen havde overtrådt ligebehandlingsprincippet til skade for denne tilbudsgiver), 26/5-09 (Oberthur mod Region Nordjylland, overtrædelse ved at tage et tilbud i betragtning, selvom tilbuddet indeholdt et forbehold, der ikke kunne prissættes), 4/6-09 (Eurest mod CBS, begrænset udbud af Bilag II-tjenesteydelse, overtrædelse af ligebehandlingsprincippet ved diverse uklarheder ol. samt ved udformning af udbudsbetingelserne og gennemførelse af udbuddet på en sådan måde, at kun den aktuelle tilbudsgiver kunne afgive et konditionsmæssigt tilbud), EF-domstolen 9/6-09 (Kommissionen mod Tyskland, ligebehandlingsprincippet skal overholdes ved offentlige myndigheders indtræden i et samarbejde uden udbud), 10/7-09 (NCC mod Billund Kommune, omvendt licitation, overtrædelse ved sammenblanding af mindstekrav med tildelingskriterium og tilbudsvurdering og ved, at et underkriterium angik et byggeprojekt, der ikke var omfattet af det udbudte), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse på en lang række forskellige punkter), 4/8-09 (Mölnlycke mod Region Hovedstaden, overtrædelse ved upræcise angivelser om, hvad udbyderen ville lægge vægt på), Retten 9/9-09 (Brink's Security, ligebehandlingsprincippet har til formål at sikre sund konkurrence), 29/9-09 (Lekolar mod Sydjysk Kommuneindkøb, et krav i udbudsbetingelserne om, at tilbuddene skulle omfatte et stort antal produkter, var ikke i strid med ligebehandlingsprincippet), 30/9-09 (Dansk Erhverv mod Region Nordjylland, et mindstekrav om, at de udbudte tjenesteydelser skulle udføres i udbyderens område eller inden for en bestemt afstand fra dette, var ikke i strid med ligebehandlingsprincippet), 1/10-09 (Cimber Air mod Forsvarskommandoen, det kan være i strid med ligebehandlingsprincippet, hvis udbyderen lægger åbenbart urigtige oplysninger i et tilbud til grund for tilbudsvurderingen; det var ikke i strid med ligebehandlingsprincippet, at udbyderen under et udbud med forhandling kun gav nogle oplysninger til den ene tilbudsgiver, da den anden tilbudsgiver måtte formodes at kende oplysningerne), 14/10-09 (Frederik Petersen mod Viborg Kommune, overtrædelse af principperne om ligebehandling og gennemsigtighed ved anvendelse af tildelingskriteriet det økonomisk mest fordelagtige tilbud, selvom det udbudte var så detaljeret beskrevet i udbudsbetingelserne, at det reelt kun var muligt at vurdere tilbuddene på grundlag af tilbudsprisen), 21/10-09 (Rindum Skole mod Ringkøbing-Skjern Kommune, et krav om, at danske ansøgere skulle give dokumentation med hensyn til udelukkelsesgrundene i Udbudsdirektivets artikel 45 ved en serviceattest er ikke i strid med forbuddet mod forskelsbehandling som følge af nationalitet), 6/11-09 (Hettich mod Region Sjælland, overtrædelse ved at tage et tilbud i betragtning, selvom det ikke opfyldte udbudsbetingelsernes krav om udfyldelse af et skema), EF-domstolen 12/11-09 (Kommissionen mod Grækenland, principperne om ligebehandling og gennemsigtighed betyder, at tilbudsgiverne og potentielle tilbudsgivere skal have ens chancer; det var i strid med ligebehandlingsprincippet, at udbudsbekendtgørelsen besværliggjorde visse potentielle udenlandske tilbudsgiveres mulighed for at dokumentere deres kvalifikationer), 2/12-09 (Løgten Murerforretning mod Norddjurs Kommune, overtrædelse ved til dels at begrunde afvisningen af et tilbud med, at en vedlagt erklæring ikke var vedlagt), 3/12-09 (Bent Klausen mod Norddjurs Kommune, overtrædelse ved til dels at begrunde afvisning af et tilbud med, at en bankerklæring ikke opfyldte et krav i udbudsbetingelserne, da udbudsbetingelserne ikke havde stillet det pågældende krav), Retten 10/12-09 (Antwerpse, udbyderens indhentning af supplerende oplysninger fra nogle tilbudsgivere om deres tilbuds prismæssige sammensætning var ikke i strid med ligebehandlingsprincippet), EF-domstolen 23/12-09 (Serrantoni, traktatens grundlæggende principper, navnlig ligebehandlingsprincippet, gælder ved anskaffelser under tærskelværdien under forudsætning af, at der foreligger en grænseoverskridende interesse; medlemsstaterne har en vis skønsmargin, men proportionalitetsprincippet skal overholdes)**, 2/2-10 (VKAREN mod Odense Kommune, det var ikke i strid med ligebehandlingsprincippet, at en ordregiver ved en fejl undlod at underrette en virksomhed om en tilbudsindhentning efter Tilbndslovens afsnit II, selvom ordregiveren tidligere havde lovet virksomheden at give en sådan underretning), 4/2-10 (Brøste mod Aabenraa Kommune, overtrædelse ved at tage et ukonditionsmæssigt tilbud i betragtning ved en tilbudsindhentning efter Tilbudslovens afsnit II)**

Lokal tilknytning	30/9-09 (Dansk Erhverv mod Region Nordjylland, et mindstekrav om, at de udbudte tjenesteydelser skulle udføres i udbyderens område eller inden for en bestemt afstand fra dette, var ikke i strid med ligebehandlingsprincippet)
Miljøhensyn	
Mindstekrav (også kaldet minimumskrav, dvs. krav, som et tilbud skal opfylde for at komme i betragtning)	7/1-09 (MFI mod Udenrigsministeriet, et tilbud måtte ikke tages i betragtning, da det ikke var i overensstemmelse med forskellige krav i udbudsbetingelserne, herunder et krav, der var ændret uden oplysning til tilbudsgiveren, en vurderingsmodel, hvorefter tilbud, der ikke opnåede et bestemt antal points, ikke ville blive taget i betragtning, var ikke i strid med udbudsreglerne), 2/2-09 (Damm mod Forsvarets Materieltjeneste, tilbud med rette afvist som ukonditionsmæssigt, da det tilbudte udstyr ved en demonstration, der var fastsat i udbudsbetingelserne, ikke levede op til nogle ufravigelige mindstekrav), 12/3-09 (Lyreco mod Varde Kommune, overtrædelse ved, at nogle delkriterier til underkriterier angik mindstekrav), 21/4-09 (Hoffmann mod Hørsholm Karlebo, overtrædelse ved at tage et tilbud i betragtning, selvom det ikke indeholdt nogle krævede angivelser om delpriser), 22/4-09 (Harry Andersen mod Billund Kommune, et tilbuds manglende oplysning om underentreprenører medførte ikke pligt for udbyderen til at afvise tilbuddet), 25/5-09 (NCC mod Vejdirektoratet, nogle krav i udbudsbetingelserne vedrørende opfyldelse af udbyderens målsætning m.m. var underkriterier, ikke mindstekrav, da de var tydeligt angivet som mindstekrav, og da de var af abstrakt karakter), 10/7-09 (NCC mod Billund Kommune, omvendt licitation, overtrædelse ved sammenblanding af mindstekrav og tildelingskriterium), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved, at nogle underkriterier angik mindstekrav), 5/8-09 (Poul Hartmann mod Region Hovedstaden, mindstekrav skal være udformet som mindstekrav og således, at tilbudsgiverne ikke er i tvivl om, at der er tale om mindstekrav), 6/8-09 (Conva Tec mod Region Hovedstaden, nogle mindstekrav var ikke egnede som mindstekrav, da konstateringen af, om kravene var opfyldt, afhang af subjektive og skønsmæssige vurderinger), Retten 9/9-09 (Brink's Security, en tilbudsgiver behøver ikke have de nødvendige medarbejdere ved tilbuddets afgivelse), 30/9-09 (Dansk Erhverv mod Region Nordjylland, et mindstekrav om, at de udbudte tjenesteydelser skulle udføres i udbyderens område eller inden for en bestemt afstand fra dette, var ikke i strid med ligebehandlingsprincippet), **4/2-10 (Brøste mod Aabenraa Kommune, overtrædelse ved at tage et tilbud i betragtning under en tilbudsindhentning efter Tilbudslovens afsnit II, selvom tilbuddet ikke opfyldte et mindstekrav), 5/3-10 (Gorm Hansen og Søn mod Greve Kommune mfl., overtrædelse ved at tage et tilbud i betragtning, selvom tilbuddet ikke opfyldte nogle mindstekrav i licitationsbetingelserne)**
Nationalitet, forbud mod forskelsbehandling på grundlag af	21/10-09 (Rindum Skole mod Ringkøbing-Skjern Kommune, et krav om, at danske ansøgere skulle give dokumentation med hensyn til udelukkelsesgrundene i Udbudsdirektivets artikel 45 ved en serviceattest er ikke i strid med forbuddet mod forskelsbehandling som følge af nationalitet), EF-domstolen 12/11-09 (Kommissionen mod Grækenland, det var i strid med ligebehandlingsprincippet, at udbudsbekendtgørelsen besværliggjorde visse udenlandske potentielle tilbudsgiveres mulighed for at dokumentere deres kvalifikationer)
Nomenklaturer	
Offentligretlige organer	
Omvendt licitation (dvs. udbud eller licitation vedrørende et byggeri, der ikke må koste over et bestemt beløb)	10/7-09 (NCC mod Billund Kommune, overtrædelse af principperne om ligebehandling og gennemsigtighed ved underkriteriernes udformning og ved tilbudsvurderingen)**, 4/3-10 (Dansk Flygtningehjælp mod Hvidovre Kommune, angår tilbudsindhentning efter Tilbudslovens afsnit II)**
Oplysninger fra udbyder, herunder besvarelse af spørgsmål	7/1-09 (MFI mod Udenrigsministeriet, et tilbud måtte ikke tages i betragtning, da det ikke var i overensstemmelse med forskellige krav i udbudsbetingelserne, herunder et krav, der var ændret uden oplysning til tilbudsgiveren), 17/2-09 (CLS mod Miljøministeriet, overtrædelse ved besvarelse af spørgsmål fra potentielle tilbudsgivere uden orientering til de øvrige potentielle tilbudsgivere, ved telefonisk besvarelse af spørgsmål fra potentielle tilbudsgivere og ved manglende besvarelse af et spørgsmål fra en potentiel tilbudsgiver; der skal orienteres om alle spørgsmål og svar), 24/3-09 (FMT mod Vestforbrænding, udbyderen var berettiget til ikke at tage et tilbud i betragtning, fordi tilbudsgiveren ikke havde overholdt en forskrift om fremgangsmåden ved henvendelser fra tilbudsgiverne, men udbyderen var ikke forpligtet til ikke at tage tilbuddet i betragtning, da tilbudsgiveren ikke havde opnået en fordel ved den henvendelse, der var tale om), VL 15/5-09 (det var ikke i strid med gennemsigtighedsprincippet, at udbyderen ikke på forhånd havde oplyst om et forhold, som udbyderen lagde afgørende vægt på, da gennemsigtighedsprincippet har til formål at sikre ligebehandlingsprin-

	cippets overholdelse, og da den manglende oplysning ikke havde ført til ulige behandling af tilbudsgiverne), 26/5-09 (Oberthur mod Region Nordjylland, udbyderen havde ikke pligt til på forhånd at oplyse om den anvendte vurderingsmodel, allerede fordi modellen ikke var fastlagt før tilbuddenes modtagelse), 4/6-09 (Eurest mod CBS, begrænset udbud af Bilag II-tjenesteydelse, overtrædelse af principperne om ligebehandling og gennemsigtighed ved uklare oplysninger og ved, at væsentlige oplysninger først blev givet kort før tilbudsfristens udløb), Retten 9/9-09 (Brink's Security, udbyderen havde pligt til efter anmodning at oplyse, hvem der havde foretaget tilbudsvurderingen), 16/6-09 (Tødin mod Tønder Kommune, en udbyder har ikke pligt til på forhånd at oplyse om omfanget af tidligere indkøb af produkter som de udbudte), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved fastsættelse af fristen for spørgsmål fra tilbudsgivere), 4/8-09 (Mölnlycke mod Region Hovedstaden, udbyder har ikke pligt til på forhånd at oplyse om en evalueringsmodel)
Opsigelse eller ophævelse af kontrakt	ØL 30/3-09 (udbyderens fejlagtige tilbudsvurdering var ikke så kvalificeret, at den kunne begrunde et pålæg om opsigelse af kontrakten med den valgte tilbudsgiver)**, Retten i Herning 5/11-09 (Kommuner mod AV Form, udbyderen pålagt at søge kontrakten med den valgte tilbudsgiver bragt til ophør, bl.a. henvist til, at kontrakten indeholdt forbehold om Klagenævnets afgørelse vedrørende opsættende virkning)**
Opsættende virkning Rubrikken angår sager navnlig for Klagenævnet, hvor der har været spørgsmål om opsættende virkning. **Hvis andet ikke er angivet, har Klagenævnet *ikke* truffet bestemmelse om opsættende virkning**	15/1-09 (Ortos mod Odense Kommune), 20/1-09 (Neupart mod Økonomistyrelsen), 2/2-09 (Damm mod Forsvarets Materieltjeneste), 10/2-09 (Gustav H. Christensen mod Vejdirektoratet), 12/2-09 (NCC mod Vejdirektoratet), 17/2-09 (CLS mod Miljøministeriet), 11/3-09 (Danske Kroer og Hoteller mod Økonomistyrelsen), 24/3-09 (FMT mod Vestforbrænding), 6/4-09 (Danacare mod Brøndby Kommune mfl.), 13/5-09 (Billetlugen mod Det kgl. Teater), 26/5-09 (Oberthur mod Region Nordjylland), 4/6-09 (Eurest mod CBS), 16/6-09 (Tødin mod Tønder Kommune), 17/6-09 (Gottlieb mod Sct. Hans), 10/7-09 (NCC mod Billund Kommune, **opsættende virkning**), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, ikke opsættende virkning, da dette ikke kunne ventes at føre til et uopretteligt tab for klageren), 4/8-09 (Mölnlycke mod Region Hovedstaden), 5/8-09 (Poul Hartmann mod Region Hovedstaden), 12/8-09 (Novalis mod Personalestyrelsen), 13/8-09 (SundVikar mod Hillerød Kommune), 26/8-09 (Barslund mod Københavns Kommune), 11/9-09 (Mecanoo mod Århus Kommune), 14/9-09 (Vision Area mod Københavns Bymuseum), 29/9-09 (Lekolar mod Sydjysk Kommuneindkøb, ikke opsættende virkning med henvisning til, at klageren ikke havde afgivet tilbud, hvorfor opsættende virkning ikke var nødvendig for at afværge et uopretteligt tab hos klageren), 30/9-09 (Dansk Erhverv mod Region Nordjylland), 1/10-09 (Cimber Air mod Forsvarskommandoen), 14/10-09 (Frederik Petersen mod Viborg Kommune), 19/10-09 (DSV mod Vestforbrænding), 6/11-09 (Hettich mod Region Sjælland), 11/11-09 (Yding mod Viborg Kommune), 1/12-09, Løgten Murerforretning mod Norddjurs Kommune), 2/12-09 (Løgten Murerforretning mod Norddjurs Kommune), 3/12-09 (Bent Klausen mod Norddjurs Kommune), 10/12-09 (DCP mod Universitets- og Byggestyrelsen), 21/12-09 (Ergolet mod Københavns Kommune), **4/2-10 (Brøste mod Aabenraa Kommune, ikke taget stilling til en begæring om opsættende virkning, da ordregiveren havde annulleret tilbudsindhentningen), 5/2-10 (Klaus Kristoffer Larsen mod Hedensted Kommune), 11/2-10 (Einar J. Jensen mod Guldborgsund Kommune), 12/2-10 (Nøhr & Sigsgaard mod Kriminalforsorgen), 24/2-10 (Atea mod Økonomistyrelsen), 4/3-10 (Dansk Flygtningehjælp mod Hvidovre Kommune), 5/3-10 (Gorm Hansen og Søn mod Greve Kommune mfl.), 24/3-10 (Almenbo mod Nygårdsparken), 25/3-0 (Visma mod Hillerød Kommune), 26/3-10 (Einar Kornerup mod Parkvænget)**
Optioner	5/10-09 (Akso Nobel mod Tønder Kommune, en option skulle medregnes i udbyderens forhåndsskøn med hensyn til, om anskaffelsens værdi nåede op på Udbudsdirektivets tærskelværdi)
Ordregivende myndighed	
Partnering	21/4-09 (Hoffmann mod Hørsholm Karlebo, udbud af partneringaftale om et byggearbejde, forhandlingsforbuddet gælder i partneringfasen), 11/12-09 (Tabulex mod Tønder Kommune, overtrædelse ved at indgå en partnerskabsaftale vedrørende en ityddelse uden udbud)
Passivitet	1/10-09 (Cimber Air mod Forsvarskommandoen, klageren var ikke ved passivitet afskåret fra at fremsætte et klagepunkt, selvom klageren havde haft anledning til at gøre forholdet gældende over for udbyderen tidligere), 16/10-09 (Konkurrencestyrelsen mod Region Sjælland og Region Hovedstaden, klageren kunne nedlægge påstand om annullation af udbyderens beslutninger om forlængelse af en rammeaftale, selvom rammeaftalen var udløbet og klagen først var indgivet 15 måneder efter udløbet)

Postbefordring	
Pris	17/2-09 (CLS mod Miljøministeriet, forhandlingsforbuddet overtrådt ved forhandling om et forbehold om tilbudsgiverens erstatningsansvar, da forbeholdet reelt angik tilbudsprisen), 6/4-09 (Danacare mod Brøndby Kommune mfl., udbyderen kunne give tilbuddene samme karakter vedrørende et underkriterium om pris, selvom der var små prisforskelle mellem dem), 23/4-09 (Saver mod Region Midtjylland, overtrædelse ved at lægge nogle beløb til tilbudspriserne på baggrund af uklare angivelser i udbudsbetingelserne af, hvordan den udbudte kørsel ville blive honoreret), 19/5-09 (Anker Hansen mod Rudersdal Kommune, en pointmodel var uegnet i relation til et underkriterium om tilbudspris, da modellen medførte, at prisforskelle ikke kom tilstrækkeligt til udtryk, hvorfor modellen var uegnet til at adskille tilbuddene fra hinanden), Retten 20/5-09 (VIP Car, tilbudsprisen var blandt det valgte tilbuds karakteristika og relative fordele), 25/5-09 (NCC mod Vejdirektoratet, udbyderen var berettiget til at lægge et beløb til tilbudspriserne i nogle alternative tilbud for at kunne sammenligne dem med tilbudspriserne i hovedtilbuddene), 16/6-09 (Tødin mod Tønder Kommune, udbyderen var berettiget til at beregne tilbudspriserne på grundlag af en del af de tilbudte produkter), 1/10-09 (Cimber Air mod Forsvarskommandoen, udbyderen måtte ikke indhente prisoplysninger fra en tilbudsgiver), 21/12-09 (Ergolet mod Københavns Kommune, en formel for tildeling af points i relation til et underkriterium om pris var i strid med gennemsigtighedsprincippet, da formlen bevirkede, at underkriteriet ikke blev vægtet som angivet i udbudsbetingelserne)**, 12/2-10 (Nøhr & Sigsgaard mod Kriminalforsorgen, udbyderens tilbudsvurdering i relation til underkriteriet pris efter en skala fra 2 til 5 afspejlede ikke prisforskellene mellem tilbuddene)**
Prissætning	23/4-09 (Saver mod Region Midtjylland, uberettiget prissætning på baggrund af uklare angivelser i udbudsbetingelserne af, hvordan den udbudte kørsel ville blive honoreret), 25/5-09 (NCC mod Vejdirektoratet, udbyderen var berettiget til at lægge et beløb til tilbudspriserne i nogle alternative tilbud for at kunne sammenligne dem med tilbudspriserne i hovedtilbuddene), 26/5-09 (Oberthur mod Region Nordjylland, overtrædelse ved at tage et tilbud i betragtning, selvom tilbuddet indeholdt et forbehold, der ikke kunne prissættes), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, tilbuddenes manglende opfyldelse af et underkriterium, der reelt var et mindstekrav, ville skulle prissættes, hvilket ville påvirke tilbudsvurderingen i relation til nogle andre underkriterier), 26/8-09 (Barslund mod Københavns Kommune, et forbehold om vinterforanstaltninger kunne prissættes; prissætning skal foretages sådan, at der skabes fuld sikkerhed for, at tilbudsgiveren ikke opnår en økonomisk fordel, og en prissætning på grundlag af en sandsynlighedsberegning opfyldte ikke dette krav)
Private, overladelse af opgaver til	**EF-domstolen 15/10-09 (Acoset, nogle ordregivende myndigheder kunne uden forudgående offentliggørelse give et selskab koncession på udførelse af en tjenesteydelse, selvom selskabet havde privat deltagelse, da den private deltager var fundet gennem et EU-udbud)**
Projektkonkurrencer, sager om	11/9-09 (Mecanoo mod Århus Kommune, udbud med forhandling på grundlag af projektkonkurrence)
Proportionalitetsprincippet	EF-domstolen 19/5-09 (Assitur, proportionalitetsprincippet skal overholdes ved fastsættelsen af nationale udelukkelsesgrunde), EF-domstolen 23/12-09 (Serrantoni, traktatens grundlæggende principper, navnlig ligebehandlingsprincippet, gælder ved anskaffelser under tærskelværdien under forudsætning af, at der foreligger en grænseoverskridende interesse; medlemsstaterne har en vis skønsmargin, men proportionalitetsprincippet skal overholdes; en italiensk regel om, at et konsortium og et medlem af konsortiet ikke kan afgive tilbud under samme udbud, var i strid med proportionalitetsprincippet)
Præjudicielle spørgsmål	
Prækvalifikation	20/1-09 (Neupart mod Økonomistyrelsen, overtrædelse ved at afvise to anmodninger fra samme virksomhed om prækvalifikation, dissens), 10/3-09 (Munkebjerg mod Økonomistyrelsen, udbyderen kunne kræve, at anmodninger om prækvalifikation blev indgivet gennem Internettet ved brug af en særlig software; udbyderen var forpligtet til at afvise en anmodning om prækvalifikation, da anmodningen ikke som krævet indeholdt oplysning om gæld til det offentlige), 14/9-09 (Vision Area mod Københavns Bymuseum, det var ikke i strid med ligebehandlingsprincippet at prækvalificere et konsortium, der som underleverandør anvendte en virksomhed, som havde udført et begrænset arbejde for udbyderen i forbindelse med udarbejdelsen af udbudsbetingelserne)**, 24/2-10 (Atea mod Økonomistyrelsen, udbyderens afvisning af en ansøgning om prækvalifikation som følge af manglende opfyldelse af et krav var uberettiget, da udbudsbekendtgørelsen var uklar på det pågældende punkt, og da ansøgningen måtte fortolkes som opfyldende kravet; Klagenævnet havde ikke**

	grundlag for at tage stilling til, om ansøgeren skulle have været prækvalificeret), 10/3-10 (Mantova mod Undervisningsministeriet, ordregiveren måtte ikke tage nogle ansøgninger om prækvalifikation i betragtning, da nogle krævede regnskabsoplysninger først blev indsendt senere på ordregiverens anmodning)
Prøvetid	
Pålæg til udbyder	4/3-09 (Berendsen mod Frederikssund Kommune, anmodning om betinget pålæg om udbud afvist, da et sådant påbud ikke ville medføre ændring af retsstillingen), 13/5-09 (Billetlugen mod Det Kgl. Teater, påstand om pålæg af lovliggørelse af udbuddet afvist, da udbuddet var afsluttet), 19/5-09 (Anker Hansen mod Rudersdal Kommune, ikke pålæg om at indgå kontrakt med klageren, allerede fordi udbuddet som følge af udbyderens overtrædelser ikke kunne danne grundlag for en lovlig tildelingsbeslutning), **Retten i Herning 5/11-09 (Kommuner mod AV Form, udbyderen pålagt at søge kontrakten med den valgte tilbudsgiver bragt til ophør, bl.a. henvist til, at kontrakten indeholdt forbehold om Klagenævnets afgørelse vedrørende opsættende virkning),** 11/12-09 (Tabulex mod Tønder Kommune, Klagenævnet havde ikke hjemmel til at pålægge ordregiveren at bringe en ulovligt indgået aftale til ophør; en påstand om lovliggørelse afvist, da det ikke ville medføre ændring i ordregiverens retsstilling at tage påstanden til følge)**, 25/3-0 (Visma mod Hillerød Kommune, påstande om pålæg om lovliggørelse af et afsluttet udbud afvist, ligeledes afvist en påstand om pålæg til udbyderen om at ophæve den indgåede kontrakt eller om konstatering af, at udbyderen efter EU-retten havde pligt hertil)**
Rammeaftaler	16/10-09 (Konkurrencestyrelsen mod Region Sjælland og Region Hovedstaden, forlængelse af en rammeaftale var i strid med Udbudsdirektivet, da ordregiveren skulle have iværksat et nyt EU-udbud så betids, at der kunne indgås ny aftale ved rammeaftalens udløb; ændring af begyndelsestidspunktet med mere end et år for 2-årige rammeaftaler indgået på grundlag af et EU-udbud var i strid med Udbudsdirektivet, det var uden betydning, at tilbudsvurderingen var trukket ud), 21/12-09 (Ergolet mod Københavns Kommune, overtrædelse af gennemsigtighedsprincippet bl.a. ved manglende angivelse af de forventede anskaffelser under en rammeaftale)
Referenceprodukter	12/3-09 (Lyreco mod Varde Kommune, overtrædelse af Udbudsdirektivets artikel 23, stk. 8, ved angivelse af bestemte fabrikater og produkter), 19/5-09 (Anker Hansen mod Rudersdal Kommune, tilsvarende), 14/10-09 (Frederik Petersen mod Viborg Kommune, tilsvarende, henvist til, at kontraktens genstand kunne beskrives uden henvisning til referenceprodukter)
Retsvirkning af Klagenævnets afgørelser	
Sagsomkostninger	13/5-09 (Billetlugen mod Det Kgl. Teater, udbyderen ikke pålagt sagsomkostninger, selvom overtrædelse var konstateret), 29/6-09 (Master Data mod Københavns Kommune, udbyderen pålagt at betale sagsomkostninger til en klager, selvom klagen var tilbagekaldt som følge af et forlig mellem klageren og udbyderen; det strider mod Klagenævnets faste praksis, at Klagenævnet anså sig for kompetent til at træffe afgørelsen, og afgørelsen kan næppe tages som udtryk for en praksisændring på dette punkt)
Sale and lease back	
Samarbejde mellem ordregivende myndigheder (herunder indkøbscentraler, in house og sammenslutninger af ordregivende myndigheder)	EF-domstolen 9/6-09 (Kommissionen mod Tyskland, nogle offentlige myndigheder kunne uden udbud indgå i et samarbejde om forbrænding af renovation), EF-domstolen 10/9-09 (Sea, kontrolkriteriet for in house er opfyldt, når selskabets aktiviteter er begrænset til at angå de ejende ordregivende myndigheders område, og når de ejende ordregivende myndigheder udøver en bestemmende indflydelse på selskabets strategi og vigtige beslutninger; den blotte mulighed for privat deltagelse i selskabet er ikke til hinder for at anse det for in house), **EF-domstolen 15/10-09 (Acoset, nogle ordregivende myndigheder kunne uden forudgående offentliggørelse give et selskab koncession på udførelse af en tjenesteydelse, selvom selskabet havde privat deltagelse og derfor ikke kunne være in house, da den private deltager var fundet gennem et EU-udbud)**
Selskaber	EF-domstolen 23/12-09 (Serrantoni, en italiensk regel om, at et konsortium og et medlem af konsortiet ikke kan afgive tilbud under samme udbud, var i strid med proportionalitetsprincippet)
Sideordnede udbud/licitationer	
Sociale hensyn	
Spørgsmål til tilbudsgivere	12/8-09 (Novalis mod Personalestyrelsen, udbyderen havde ikke pligt til at spørge en tilbudsgiver om, hvorledes nogle forudsætninger i tilbuddet skulle forstås), 1/10-09 (Cimber Air mod Forsvarskommandoen, udbyderen måtte ikke indhente pris-

	oplysninger fra en tilbudsgiver), Retten 10/12-09 (Antwerpse, udbyderen kunne indhente supplerende oplysninger fra nogle tilbudsgivere om deres tilbuds prismæssige sammensætning)
Spørgsmålsfrist (dvs. frist for spørgsmål fra tilbudsgivere)	14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse af Udbudsdirektivets artikel 39 ved at fastsætte en spørgsmålsfrist, der udløb godt en måned før tilbudsfristen), 11/11-09 (Yding mod Viborg Kommune, en spørgsmålsfrist, der udløb 19 dage før tilbudsfristen, var i strid med Udbudsdirektivets artikel 39, stk. 2)
Standarder	
Standardforbehold	26/8-09 (Barslund mod Københavns Kommune, standardforbehold om vinterforanstaltninger angik i det konkrete tilfælde ikke et grundlæggende element og kunne prissættes, men prissætningen måtte ikke ske ved en sandsynlighedsberegning)**, 12/1-10 (Børge Jakobsen mod Sorø Kommune, udbyderen var forpligtet til at afvise tilbud, der indeholdt Dansk Byggeris standardforbehold, da udbudsbetingelserne klart og ubetinget angav, at disse standardforbehold ikke ville blive accepteret)**
Standstill	6/4-09 (Danacare mod Brøndby Kommune mfl., et brev er ikke hurtigst mulige kommunikationsmiddel), EF-domstolen 11/6-09 (Kommissionen mod Frankrig, en national regel om, at en stand-still periode kunne forkortes i visse tilfælde, var ikke i strid med kontroldirektiverne; en regel om, at der først kunne klages en vis tid efter forhåndsorientering til udbyderen, var derimod i strid med direktiverne), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, stand-still fristen løb ikke fra udbyderens første underretning, der ikke opfyldte kravene til underretning, men fra udbyderens senere behørige underretning)**, Retten i Herning 5/11-09 (Kommuner mod AV Form, når en klage til Klagenævnet er begæret opsættende virkning i standstill-perioden, og klageren eller Klagenævnet har underrettet udbyderen herom, må udbyderen ikke indgå kontrakt, før Klagenævnet har truffet afgørelse vedrørende opsættende virkning),** Retten 10/12-09 (Antwerpse, udbyderen kunne indhente supplerende oplysninger fra nogle tilbudsgivere, efter at en tilbudsgiver i standstill-perioden havde protesteret mod tildelingsbeslutningen, idet standstill-reglerne ellers ville være uden indhold)**, 17/2-10 (Excellent Match mod DONG, standstill-reglerne angår ikke Forsyningsvirksomhedsdirektivet)**
Statsstøtte	EF-domstolen 23/12-09 (CoNISma, at et organ modtager offentlig finansiering eller statsstøtte, er ikke i sig selv til hinder for, at organet afgiver tilbud under et EU-udbud)
Stillingsfuldmagt	
Supplerende kontraktsbetingelser	
Tavshedspligt	
Tegningsberettigelse	
Tekniske specifikationer	14/10-09 (Frederik Petersen mod Viborg Kommune, overtrædelse af Udbudsdirektivets artikel 23, stk. 8, ved henvisning til referenceprodukter, også selvom det skete med tilføjelsen »som« eller tilføjelsen »eller tilsvarende«
Tilbagekaldelse	
Tilbudsfrist	14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved efter tilbudsfristens udløb at indhente årsrapporter for tilbudsgiverne)
Tilbudslovens afsnit I	17/4-09 (Lambæk mod Ældre Sagen mfl., Tilbudsloven gælder kun for udbydere og gælder ikke for udbydernes tekniske rådgivere)**, 11/2-10 (Einar J. Jensen mod Guldborgsund Kommune, ordregiveren havde ikke pligt til at opfordre de samme virksomheder, der havde afgivet tilbud under en annulleret licitation, til at afgive tilbud under en ny licitation, der trådte i stedet for den annullerede), 5/3-10, (Gorm Hansen og Søn mod Greve Kommune mfl., overtrædelse ved at tage et tilbud i betragtning, selvom tilbuddet ikke opfyldte nogle mindstekrav i licitationsbetingelserne), 26/3-10 (Einar Kornerup mod Parkvænget, overtrædelse af ligebehandlingsprincippet og Tilbudslovens § 11, stk. 2, ved at tage reviderede tilbud i betragtning, selvom udbyderen ikke havde tilkendegivet en procedure for forhandlinger med tilbudsgiverne, desuden overtrædelse af Tilbudslovens § 8 ved ikke at indgå kontrakt med den tilbudsgiver, hvis oprindelige tilbud udbyderen havde anset for det økonomisk mest fordelagtige)**
Tilbudslovens afsnit II	4/3-09 (Berendsen mod Frederikssund Kommune, overtrædelse af Udbudsdirektivet og Tilbudslovens afsnit II ved anskaffelse af en bilag II B-ydelse om tøjvask), 10/3-09 (Munkebjerg mod Økonomistyrelsen, begrænset udbud vedrørende hotelophold omfattet af Bilag II B og Tilbudslovens afsnit II), 11/3-09 (Danske Kroer og Hoteller mod Økonomistyrelsen, tilsvarende), 13/8-09 (SundVikar mod Hillerød Kommune, diverse klagepunkter, en evalueringsmodel, hvorefter tilbuddene blev vurderet i forhold til hinanden i relation til et underkriterium om pris, var ikke en overtrædelse af

	udbudsreglerne), 15/9-09 (Almenbo mod Nygårdsparken, overtrædelse ved indgåelse af aftale om Bilag II A-tjenesteydelse under tærskelværdien uden forudgående annoncering, undtagelsesbestemmelserne i Tilbudslovens § 15 c fandt ikke anvendelse), 30/9-09 (Dansk Erhverv mod Region Nordjylland), 5/10-09 (Akso Nobel mod Tønder Kommune, en option skulle medregnes i ordregiverens forhåndsskøn med hensyn til, om anskaffelsens værdi nåede op på Udbudsdirektivets tærskelværdi, og der skulle derfor have været iværksat et EU-udbud i stedet for en tilbudsindhentning efter Tilbudslovens afsnit II)**, 2/2-10 (VKAREN mod Odense Kommune, det var ikke i strid med forbuddet mod forskelsbehandling i Tilbudslovens § 15 d, stk. 1, at en ordregiver ved en fejl undlod at underrette en virksomhed om en tilbudsindhentning efter Tilbndslovens afsnit II, selvom ordregiveren tidligere havde lovet virksomheden at give en sådan underretning), 4/2-10 (Brøste mod Aabenraa Kommune, overtrædelse af Tilbudslovens § 15 d, stk. 1, ved at tage et tilbud i betragtning, selvom tilbuddet ikke opfyldte et krav i betingelserne for tilbudsindhentningen), 4/3-10 (Dansk Flygtningehjælp mod Hvidovre Kommune, diverse overtrædelser), 10/3-10 (Mantova mod Undervisningsministeriet, konstateret en overtrædelse, desuden forskellige udtalelser om tilbudsvurdering)**
Tildeling, herunder tilbudsvurdering	15/1-09 (Ortos mod Odense Kommune, overtrædelse ved, at nogle delkriterier var udvælgelseskriterier, der ikke kunne anvendes ved tilbudsvurderingen; en udbyder kan indgå kontrakt med en tilbudsgiver, selvom fristen for vedståelse af tilbuddet er udløbet), Retten 28/1-09 (Centro Studio Manieri, udbyderen har en vid skønsmargen), 12/2-09 (NCC mod Vejdirektoratet, udbyderen var af nærmere angivne grunde berettiget til at tildele tilbuddene fra en tilbudsgiver vedrørende delentrepriser forskellige points i relation til et fælles underkriterium; Klagenævnet efterprøver ikke en udbyders skøn med hensyn til den relative vurdering af tilbuddene, af nærmere angivne grunde taget stilling til udbyderens pointtildeling vedrørende et underkriterium), ØL 5/3-09 (udbyderen ikke havde foretaget en professionel og forsvarlig tilbudsvurdering), 12/3-09 (Lyreco mod Varde Kommune, overtrædelse ved at lægge vægt på de samme forhold i relation til flere underkriterier og ved at vurdere tilbud i relation til et underkriterium om kvalitet på grundlag af en lille del af de tilbudte produkter), 6/4-09 (Danacare mod Brøndby Kommune mfl., udbyderen kunne give tilbuddene samme karakter vedrørende et underkriterium om pris, selvom der var små prisforskelle mellem dem), 21/4-09 (Hoffmann mod Hørsholm Karlebo, overtrædelse ved at tage et tilbud i betragtning, selvom det ikke indeholdt nogle krævede angivelser om delpriser, og ved at lægge vægt på et delkriterium, der ikke fremgik af udbudsbetingelserne), 13/5-09 (Billetlugen mod Det Kgl. Teater, tilbudsvurdering i strid med udbudsbetingelserne), 19/5-09 (Anker Hansen mod Rudersdal Kommune, tilbudsvurdering i strid med udbudsbetingelserne; hvis flere tilbud får samme pointtal ved tilbudsvurderingen, skal udbyderen foretage en mere tilbundsgående tilbudsvurdering), 25/5-09 (NCC mod Vejdirektoratet, udbyderen var berettiget til at lægge et beløb til tilbudspriserne i nogle alternative tilbud for at kunne sammenligne dem med tilbudspriserne i hovedtilbuddene), 4/6-09 (Eurest mod CBS, overtrædelse ved udformning af udbudsbetingelserne og gennemførelse af udbuddet på en sådan måde, at kun den hidtidige tjenesteyder kunne afgive et konditionsmæssigt tilbud), 16/6-09 (Tødin mod Tønder Kommune, udbyderen var berettiget til at beregne tilbudspriserne på grundlag af en del af de tilbudte produkter), 10/7-09 (NCC mod Billund Kommune, omvendt licitation, overtrædelse ved sammenblanding af mindstekrav og tilbudsvurdering), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved at lægge vægt på forhold, der ikke var nævnt i udbudsbetingelserne, ved uigennemsigtig og inkonsekvent tilbudsvurdering, ved ubegrundet tildeling af lavt pointtal til et tilbud og ved at tage et tilbud med forbehold om grundlæggende elementer i betragtning; også overtrædelse ved at lægge vægt på en tilbudsgivers økonomiske forhold ved tilbudsvurderingen og på tilbudsgivernes kendskab til udbyderens forhold), 4/8-09 (Mölnlycke mod Region Hovedstaden, udbyder kan ikke ændre en tilkendegiven tildelingsbeslutning uden at annullere udbuddet**,** overtrædelse ved at indgå kontrakt med en tilbudsgiver om et produkt, hvis tilbud ikke omfattede produktet; udbyderen var berettiget, men ikke forpligtet til at afvise tilbud, der ikke opfyldte udbudsbetingelsernes krav vedrørende referencelister, oplysning om omsætning, sproglig udformning og beskrivelse af en tilbudt vare), 26/8-09 (Barslund mod Københavns Kommune, overtrædelse ved anvendelse af en pointmodel, der afveg fra den pointmodel, der var beskrevet i udbudsbetingelserne), 11/9-09 (Mecanoo mod Århus Kommune, klage over tilbudsvurderingen afvist, da Klagenævnet ikke erstatter udbyderens skøn med sit eget; som følge af omstændighederne var det ikke i strid med udbudsreglerne, at udbyderen ved tildelingsvurderingen lagde vægt på muligheden for bearbejdelse af tilbuddene og yderligere

	tiltag efter kontraktsindgåelsen), 1/10-09 (Cimber Air mod Forsvarskommandoen, når udbyderen har givet tilbudsgiverne underretning om tildelingsbeslutningen, kan udbyderen ikke rette en fejl i udbuddet, men skal i stedet annullere udbuddet og dermed tildelingsbeslutningen**,** udbyderen må ikke foretage tilbudsvurderingen ud fra formodninger om egenskaberne ved det tilbudte; Klagenævnet havde ikke grundlag for at tilsidesætte udbyderens skøn ved tilbudsvurderingen), 16/10-09 (Konkurrencestyrelsen mod Region Sjælland og Region Hovedstaden, indgåelse af kontrakter på grundlag af et EU-udbud var af forskellige grunde ensbetydende med direkte tildeling uden EU-udbud), 6/11-09 (Hettich mod Region Sjælland, ikke grundlag for at tilsidesætte udbyderens skøn om betydningen af en uklar angivelse i et tilbud; overtrædelse ved forskellig angivelse af underkriterierne og deres vægtning i udbudsbekendtgørelsen og udbudsbetingelserne og ved at lade nogle delkriterier indgå vægtet, selvom de i udbudsbetingelserne var angivet prioriteret), 8/12-09 (Ricoh mod SKI, overtrædelse af gennemsigtighedsprincippet og Udbudsdirektivets artikel 53 ved at beregne tilbudspriserne på grundlag af et gennemsnit m.m., ved at lægge vægt på et forhold, der ikke fremgik af udbudsbetingelserne, og ved tilbudsvurdering i strid med udbudsbetingelserne i øvrigt), Retten 10/12-09 (Antwerpse, udbyderen kunne ændre tildelingsbeslutningen på grundlag af nogle supplerende oplysninger, der var indhentet efter protest fra en tilbudsgiver i standstill-perioden), 21/12-09 (Ergolet mod Københavns Kommune, en formel for tildeling af points i relation til et underkriterium om pris var i strid med gennemsigtighedsprincippet, da formlen bevirkede, at underkriteriet ikke blev vægtet som angivet i udbudsbetingelserne)**, 12/2-10 (Nøhr & Sigsgaard mod Kriminalforsorgen, udbyderens tilbudsvurdering i relation til underkriteriet pris efter en skala fra 2 til 5 afspejlede ikke prisforskellene mellem tilbuddene), 17/2-10 (Excellent Match mod DONG, der var vide rammer for udbyderens skøn med hensyn til, hvilke virksomheder der skulle indgås kontrakt med på grundlag af et udbud af en bilag XVII B-tjenesteydelse), 4/3-10 (Dansk Flygtningehjælp mod Hvidovre Kommune, overtrædelse ved at anvende et i øvrigt uegnet underkriterium på en måde, der gav den valgte tilbudsgiver en utilbørlig konkurrencefordel), 10/3-10 (Mantova mod Undervisningsministeriet, en sprogligt baseret tilbudsevaluering er lovlig, og der er ikke krav om en pointmodel; ordregiveren kunne genoptage tilbudsvurderingen som følge af fejl i denne uden at annullere tilbudsindhentningen og iværksætte en ny tilbudsindhentning), 26/3-10 (Einar Kornerup mod Parkvænget, overtrædelse af ligebehandlingsprincippet og Tilbudslovens § 11, stk. 2, ved at tage reviderede tilbud i betragtning, selvom udbyderen ikke havde tilkendegivet en procedure for forhandlinger med tilbudsgiverne, desuden overtrædelse af Tilbudslovens § 8 ved ikke at indgå kontrakt med den tilbudsgiver, hvis oprindelige tilbud udbyderen havde anset for det økonomisk mest fordelagtige)**
Tildelingskriterier	7/1-09 (MFI mod Udenrigsministeriet, en vurderingsmodel, hvorefter tilbud, der ikke opnåede et bestemt antal points, ikke ville blive taget i betragtning, var ikke i strid med udbudsreglerne), 15/1-09 (Ortos mod Odense Kommune, overtrædelse ved, at nogle delkriterier var udvælgelseskriterier, der ikke kunne anvendes ved tilbudsvurderingen), 12/3-09 (Lyreco mod Varde Kommune, overtrædelse ved, at nogle delkriterier til underkriterier angik mindstekrav, som alle tilbud skulle opfylde, og ved nogle underkriterier, som udbudsbetingelserne ikke gav mulighed for at vurdere tilbuddene efter), 21/4-09 (Hoffmann mod Hørsholm Karlebo, overtrædelse ved at lægge vægt på et delkriterium, der ikke fremgik af udbudsbetingelserne), 23/4-09 (Saver mod Billund Kommune, et underkriterium om erfaring var rettelig et udvælgelseskriterium), 19/5-09 (Anker Hansen mod Rudersdal Kommune, en pointmodel var uegnet i relation til et underkriterium om tilbudspris, da tilbudsprisens betydning ikke kom tilstrækkeligt til udtryk, hvorfor modellen ikke var egnet til at adskille tilbuddene fra hinanden; hvis flere tilbud får samme pointtal ved tilbudsvurderingen, skal udbyderen foretage en mere tilbundsgående tilbudsvurdering; overtrædelse ved at anvende et kriterium om kompetenceprofil som underkriterium), 25/5-09 (NCC mod Vejdirektoratet, nogle krav i udbudsbetingelserne vedrørende opfyldelse af udbyderens målsætning m.m. var underkriterier, ikke mindstekrav, da de var tydeligt angivet som mindstekrav, og da de var af abstrakt karakter), 27/5-09 (Serviceselskabet mod Region Midtjylland, det påhvilede ikke en tilbudsgiver ikke at afgive tilbud som følge af et ulovligt underkriterium), 4/6-09 (Eurest mod CBS, overtrædelse ved udformning af udbudsbetingelserne og gennemførelse af udbuddet på en sådan måde, at kun den hidtidige tjenesteyder kunne afgive et konditionsmæssigt tilbud), 16/6-09 (Tødin mod Tønder Kommune, det fremgik klart af udbudsbetingelserne, at et underkriterium om sortiment sigtede til, at udbyderen ville lægge vægt på antallet af tilbudte produkter), 10/7-09 (NCC mod

	Billund Kommune, omvendt licitation, overtrædelse ved sammenblanding af mindstekrav og tildelingskriterium og ved, at et underkriterium angik forventet pris for et byggeprojekt, der ikke var omfatte af det udbudte), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved, at nogle underkriterier angik tilbudsgivernes egnethed eller mindstekrav og ved, at nogle underkriterier var uigennemsigtige og til dels indbyrdes overlappende; også overtrædelse ved fastsættelse af vægtning af nogle underkriterier under ét og ved et underkriterium om tilbudsforbehold; udbyderen havde bevisbyrden for, at nogle underkriterier, der kunne forstås som udvælgelseskriterier, ikke var blevet anvendt således), 13/8-09 (SundVikar mod Hillerød Kommune, en evalueringsmodel, hvorefter tilbuddene blev vurderet i forhold til hinanden i relation til et underkriterium om pris, var ikke en overtrædelse af udbudsreglerne, angår en tilbudsindhentning efter Tilbudslovens afsnit II vedrørende en Bilag II B-jenesteydelse), 26/8-09 (Barslund mod Københavns Kommune, der kunne stilles krav om og lægges vægt på cv'er for nøglepersoner, da der ikke var tale om en vurdering af tilbudsgivernes generelle egnethed, dissens), 14/9-09 (Vision Area mod Københavns Bymuseum, angivelse af underkriterier i prioriteret rækkefølge i stedet for vægtet ikke tilsidesat), 1/10-09 (Cimber Air mod Forsvarskommandoen, nogle delkriterier var ikke udvælgelseskriterier, da de ikke angik tilbudsgivernes generelle egnethed, et andet delkriterium var til dels et udvælgelseskriterium, da det til dels var relateret til den enkelte tilbudsgivers evne eller egnethed), 14/10-09 (Frederik Petersen mod Viborg Kommune, overtrædelse af principperne om ligebehandling og gennemsigtighed ved anvendelse af tildelingskriteriet det økonomisk mest fordelagtige tilbud, selvom det udbudte var så detaljeret beskrevet i udbudsbetingelserne, at det reelt kun var muligt at vurdere tilbuddene på grundlag af tilbudsprisen), 6/11-09 (Hettich mod Region Sjælland, overtrædelse ved forskellig angivelse af underkriterierne og deres vægtning i udbudsbekendtgørelsen og udbudsbetingelserne og ved at lade nogle delkriterier indgå vægtet, selvom de i udbudsbetingelserne var angivet prioriteret), EF-domstolen 12/11-09 (Kommissionen mod Grækenland, kriterier, der i det væsentlig angår tilbudsgivernes evne til at udføre den udbudte opgave, må ikke bruges som tildelingskriterier)**, Retten 2/3-10 (Evr. mod Kommissionen, der må ikke anvendes delkriterier, som ikke er oplyst på forhånd, men udbyderen kan under visse betingelser uden forudgående oplysning anvende vægtningskofficienter vedrørende underkriterierne), 4/3-10 (Dansk Flygtningehjælp mod Hvidovre Kommune, overtrædelse ved fastsættelse af et underkriterium, der medførte manglende gennemsigtighed og risiko for forskelsbehandling og derfor var uegnet til at identificere det økonomisk mest fordelagtige tilbud)**
Traktaten	16/2-09 (Saab Danmark mod Forsvarets Materieltjeneste, Klagenævnet har ikke kompetence til at behandle en klage over anskaffelser omfattet af Traktatens artikel 296 om beskyttelse af sikkerhedsinteresser), EF-domstolen 23/12-09 (Serrantoni, traktatens grundlæggende principper, navnlig ligebehandlingsprincippet, gælder ved anskaffelser under tærskelværdien under forudsætning af, at der foreligger en grænseoverskridende interesse; medlemsstaterne har en vis skønsmargin, men proportionalitetsprincippet skal overholdes)
Tærskelværdi	5/10-09 (Akso Nobel mod Tønder Kommune, en option skulle medregnes i ordregiverens forhåndsskøn med hensyn til, om anskaffelsens værdi nåede op på Udbudsdirektivets tærskelværdi), EF-domstolen 23/12-09 (Serrantoni, traktatens grundlæggende principper, navnlig ligebehandlingsprincippet, gælder ved anskaffelser under tærskelværdien under forudsætning af, at der foreligger en grænseoverskridende interesse; medlemsstaterne har en vis skønsmargin, men proportionalitetsprincippet skal overholdes)**, 5/2-10 (Klaus Kristoffer Larsen mod Hedensted Kommune, værdien af et antal kontrakter om snerydning ol., der blev indgået samtidig og på grundlag af samme tilbudsindhentning, skulle sammenlægges ved beregningen af kontraktternes værdi i forhold til Udbudsdirektivets tærskelværdi)**
Udbud med forhandling (tidligere benævnt udbud efter forhandling)	11/9-09 (Mecanoo mod Århus Kommune, udbud med forhandling på grundlag af projektkonkurrence, udbyderen havde ikke pligt til under forhandlingerne at drøfte samtlige forhold i tilbuddene), 1/10-09 (Cimber Air mod Forsvarskommandoen, det er en betingelse for udbud med forhandling i medfør af Udbudsdirektivets artikel, 30, stk. 1, a, at alle tilbud er ukonditionsmæssige), **EF-domstolen 15/10-09 (Kommissionen mod Tyskland, betingelserne for udbud med forhandling efter Indkøbsdirektivets artikel 6, stk. 3, litra c-d var ikke opfyldt),** 16/10-09 (Konkurrencestyrelsen mod Region Sjælland og Region Hovedstaden, betingelserne for udbud med forhandling efter Udbudsdirektivets artikel 31, stk. 1, c og stk. 4, litra a, var ikke opfyldt)**, 25/3-0 (Visma mod Hillerød Kommune, udbyderen havde bevisbyrden for, at betingelserne for udbud med forhandling uden forudgående udbudsbekendtgørelse**

	i Udbudsdirektivets artikel 31, stk. 1, litra b) var opfyldt, og denne bevisbyrde var ikke løftet)
Udbudsdirektiver, indplacering under og diverse spørgsmål om	3/4-09 (Smith & Nephew mod Region Nordjylland, Udbudsdirektivets artikel 51 fandt ikke anvendelse), 4/6-09 (Eurest mod CBS, begrænset udbud af Bilag II-tjenesteydelse, bekendtgørelse i EF-Tidende og udbyders tilkendegivelse af at ville overholde en fristregel i Udbudsdirektivet bevirkede ikke, at direktivet fandt anvendelse i sin helhed), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse af Udbudsdirektivets artikel 39), EF-domstolen 10/12-09 (Kommissionen mod Frankrig, medlemsstaterne kan ikke fastsætte andre fremgangsmåder for ordregivende myndigheders indgåelse af kontrakter end dem, der er fastsat i udbudsdirektiverne)
Udbudspligt og –ret	EF-domstolen 4/6-09 (Kommissionen mod Grækenland, undtagelsesbestemmelser om fritagelse for udbudspligt skal fortolkes snævert, og bevisbyrden påhviler den, der påberåber sig undtagelserne), 16/10-09 (Konkurrencestyrelsen mod Region Sjælland og Region Hovedstaden, indgåelse af kontrakter på grundlag af et EU-udbud var af forskellige grunde ensbetydende med direkte tildeling uden EU-udbud), **EF-domstolen 15/10-09 (Kommissionen mod Tyskland, der skulle have været iværksat udbud vedrørende et it-system til registrering af motorkøretøjer, selvom det hidtidige system var brudt sammen),** EF-domstolen 10/12-09 (Kommissionen mod Frankrig, medlemsstaterne kan ikke fastsætte andre fremgangsmåder for ordregivende myndigheders indgåelse af kontrakter end dem, der er fastsat i udbudsdirektiverne) **EF-domstolen 25/3-10 (Helmut Müller, udbudspligten omfatter ikke salg af fast ejendom og omfatter kun gensidigt bebyrdende aftaler, der giver ordregiveren en økonomisk fordel; opfyldelse af en byplanmæssig interesse er ikke en økonomisk fordel)**
Udelukkelse (dvs. om de økonomiske aktører som sådan kan eller skal udelukkes fra at komme i betragtning, fordi de omfattes af en udelukkelsesgrund, der ikke behøver at være angivet i udbudsdokumenterne)	EF-domstolen 19/5-09 (Assitur, en medlemsstat kan fastsætte andre udelukkelsesgrunde end dem, der er angivet i Tjenesteydelsesdirektivet, med det formål at sikre overholdelsen af principperne om ligebehandling og gennemsigtighed, under forudsætning af, at de nationalt fastsatte udelukkelsesgrunde er i overensstemmelse med proportionalitetsprincippet, en italiensk lovbestemmelse, hvorefter virksomheder med et indbyrdes kontrolforhold ubetinget skulle udelukkes, var i strid med proportionalitetsprincippet), 19/10-09 (DSV mod Vestforbrænding, at en virksomhed tidligere havde ophævet en kontrakt med udbyderen og tabt en efterfølgende voldgiftssag om ophævelsen, var ikke en »alvorlig fejl«, der kunne begrunde udelukkelse af virksomheden ved et nyt udbud fra samme udbyder i medfør af Udbudsdirektivets artikel 45, stk. 2, litra d), 21/10-09 (Rindum Skole mod Ringkøbing-Skjern Kommune, udbyderen kunne kræve dokumentation fra alle deltagerne i et konsortium med hensyn til udelukkelsesgrundene i Udbudsdirektivets artikel 45, et krav om, at danske ansøgere skulle give dokumentationen ved en serviceattest er ikke i strid med forbuddet mod forskelsbehandling som følge af nationalitet), EF-domstolen 23/12-09 (CoNISma, national ret må ikke udelukke universiteter ol., der har ret til at tilbyde tjenesteydelser, fra at afgive tilbud under EU-udbud vedrørende de pågældende tjenesteydelser)
Udvælgelse (også kaldet kvalifikation, dvs. om de krav, som de økonomiske aktører som sådan skal opfylde for at komme i betragtning)	15/1-09 (Ortos mod Odense Kommune, overtrædelse ved, at nogle delkriterier var udvælgelseskriterier, der ikke kunne anvendes ved tilbudsvurderingen), 10/2-09 (Gustav H. Christensen mod Vejdirektoratet, udbyderen var berettiget til ikke at tage et tilbud i betragtning, da tilbudsgiverens referencer i det væsentligste ikke som krævet i udbudsbetingelserne angik arbejdsopgaver som den udbudte) 10/3-09 (Munkebjerg mod Økonomistyrelsen, udbyderen var forpligtet til at afvise en anmodning om prækvalifikation, da anmodningen ikke som krævet indeholdt oplysning om gæld til det offentlige), 11/3-09 (Danske Kroer og Hoteller mod Økonomistyrelsen, tilsvarende), 24/3-09 (FMT mod Vestforbrænding, udbyderen kunne tage et tilbud i betragtning, selvom udbyderen var medejer af tilbudsgiveren, men interessesammenfaldet som følge af medejerskabet skulle indgå i vurderingen af, om udbyderen havde forskelsbehandlet tilbudsgiverne; udbyderen var berettiget til ikke at tage et tilbud i betragtning, fordi tilbudsgiveren ikke havde overholdt en forskrift om fremgangsmåden ved henvendelser fra tilbudsgiverne, men udbyderen var ikke forpligtet til ikke at tage tilbuddet i betragtning, da tilbudsgiveren ikke havde opnået en fordel ved den henvendelse, der var tale om), 3/4-09 (Smith & Nephew mod Region Nordjylland, udbyderen var forpligtet til at afvise et tilbud, da tilbudsgiveren havde vedlagt en serviceattest, der ikke opfyldte udbudsbetingelsernes krav til serviceattestens alder; Udbudsdirektivets artikel 51 fandt ikke anvendelse), 22/4-09 (Harry Andersen mod Billund Kommune, et tilbud kunne tages i betragtning, selvom det ikke som krævet indeholdt oplysning om underentreprenører), 23/4-09 (Saver mod Region Midtjylland, et tilbud måtte ikke tages i betragtning, da det ikke som krævet var vedlagt tilbudsgiverens seneste regnskab; et underkriterium om erfaring var

	rettelig et udvælgelseskriterium), EF-domstolen 19/5-09 (Assitur, om betingelserne for fastsættelse af nationale udelukkelsesgrunde), 19/5-09 (Anker Hansen mod Rudersdal Kommune, et underkriterium om kompetenceprofil var rettelig et udvælgelseskriterium), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved, at nogle underkriterier angik tilbudsgivernes egnethed; udbyderen havde bevisbyrden for, at nogle underkriterier, der kunne forstås som udvælgelseskriterier, ikke var blevet anvendt således: også overtrædelse ved efter tilbudsfristens udløb at indhente årsrapporter for tilbudsgiverne og ved at lægge vægt på en tilbudsgivers økonomiske forhold ved tilbudsvurderingen), 4/8-09 (Mölnlycke mod Region Hovedstaden, udbyder var berettiget, men ikke forpligtet til at afvise tilbud, der ikke opfyldte udbudsbetingelsernes krav vedrørende referencelister og oplysning om omsætning m.m.; regnskaber, hvoraf fremgik, at en tilbudsgiver ikke havde ansatte, var dokumentation for, at tilbudsgiveren ikke kunne være i restance med sociale bidrag), 26/8-09 (Barslund mod Københavns Kommune, der kunne stilles krav om og lægges vægt på cv'er for nøglepersoner, da der ikke var tale om en vurdering af tilbudsgivernes generelle egnethed, dissens), Retten 9/9-09 (Brink's Security, en tilbudsgiver behøver ikke have de nødvendige medarbejdere ved tilbuddets afgivelse), 1/10-09 (Cimber Air mod Forsvarskommandoen, nogle delkriterier var ikke udvælgelseskriterier, da de ikke angik tilbudsgivernes generelle egnethed, et andet delkriterium var til dels et udvælgelseskriterium, da det til dels var relateret til den enkelte tilbudsgivers evne eller egnethed), EF-domstolen 12/11-09 (Kommissionen mod Grækenland, det var i strid med ligebehandlingsprincippet, at udbudsbekendtgørelsen besværliggjorde visse potentielle udenlandske tilbudsgiveres mulighed for at dokumentere deres kvalifikationer; kriterier, der i det væsentlig angår tilbudsgivernes evne til at udføre den udbudte opgave, må ikke bruges som tildelingskriterier), 1/12-09, Løgten Murerforretning mod Norddjurs Kommune, tilbud med rette afvist som ukonditionsmæssigt, da tilbudsgiveren ikke havde underskrevet en erklæring om gæld til det offentlige), 2/12-09 (Løgten Murerforretning mod Norddjurs Kommune, tilbud med rette afvist som ukonditionsmæssigt, da tilbudsgiveren ikke havde underskrevet en erklæring om gæld til det offentlige, dog overtrædelse af ligebehandlingsprincippet ved yderligere at begrunde afvisningen med, at en vedlagt erklæring ikke var vedlagt), 3/12-09 (Bent Klausen mod Norddjurs Kommune, tilbud afvist med rette, da tilbudsgiveren ikke havde bevist, at tilbuddet var vedlagt en krævet oplysning om referencer, men overtrædelse ved til dels at begrunde afvisningen med, at en bankerklæring ikke opfyldte et krav i udbudsbetingelserne, da udbudsbetingelserne ikke havde stillet det pågældende krav)**, 10/3-10 (Mantova mod Undervisningsministeriet, ordregiveren måtte ikke tage nogle ansøgninger om prækvalifikation i betragtning, da nogle krævede regnskabsoplysninger først blev indsendt senere på ordregiverens anmodning)**
Uklarhed i klage	
Uklarhed i udbud	7/1-09 (MFI mod Udenrigsministeriet, et tilbud måtte ikke tages i betragtning, da det ikke var i overensstemmelse med forskellige krav i udbudsbetingelserne, herunder et krav, der var ændret uden oplysning til tilbudsgiveren), 15/1-09 (Ortos mod Odense Kommune, gennemsigtighedsprincippet overtrådt bl.a. ved utilstrækkelig beskrivelse af det udbudte), 12/3-09 (Lyreco mod Varde Kommune, overtrædelse ved anmodning om oplysning om priser og rabatter på produkter, der ikke var omfattet af det udbudte), 23/4-09 (Saver mod Region Midtjylland, uklare angivelser om, efter hvilke principper en udbudt kørsel ville blive honoreret), 4/6-09 (Eurest mod CBS, begrænset udbud af Bilag II-tjenesteydelse, overtrædelse af principperne om ligebehandling og gennemsigtighed ved diverse uklarheder), 16/6-09 (Tødin mod Tønder Kommune, det fremgik klart af udbudsbetingelserne, at udbyderen ville lægge vægt på antallet af tilbudte produkter), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, uklare underkriterier m.m.), 4/8-09 (Mölnlycke mod Region Hovedstaden, overtrædelse ved at lade udbuddet omfatte et produkt, der ikke var beskrevet i udbudsbekendtgørelsen), 10/12-09 (DCP mod Universitets- og Byggestyrelsen, et krav om vedlæggelse af nøgletal var ikke uklart og var ikke fremkommet for sent, hvorfor udbyderen skulle afvise et tilbud, der ikke var vedlagt nøgletal)**, 24/2-10 (Atea mod Økonomistyrelsen, et krav til ansøgninger om prækvalifikation var uklart, og udbyderen kunne bl.a. derfor ikke afvise en ansøgning med begrundelse, at ansøgningen ikke opfyldte kravet)**
Underhåndsbud	
Underretning til tilbudsgivere og ansøgere	4/3-09 (Berendsen mod Frederikssund Kommune, overtrædelse af Udbudsdirektivet ved manglende underretning om anskaffelse af en bilag II B-ydelse om tøjvask), 6/4-09 (Danacare mod Brøndby Kommune mfl., et brev er ikke hurtigst mulige kommunikationsmiddel), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved

	underretning til tilbudsgivere om, at de ikke havde fået kontrakten, uden samtidig underretning om, hvem der havde fået kontrakten, samt ved, at underretningen var telefonisk), 6/8-09 (Conva Tec mod Region Hovedstaden, overtrædelse af Udbudsdirektivets artikel 41 ved ikke hurtigst muligt at underrette en tilbudsgiver om afvisning af tilbuddet), 11/9-09 (Mecanoo mod Århus Kommune, overtrædelse ved ikke at give en tilbudsgiver underretning om tildelingsbeslutningen med summarisk begrundelse på engelsk)**, EF-domstolen 28/1-10 (Kommissionen mod Irland, det var i strid med 1. kontroldirektiv, at udbyderen ikke gav en tilbudsgiver underretning om sin beslutning om at indgå kontrakt med en anden tilbudsgiver, men kun havde givet underretning om sin beslutning om at indlede forhandlinger med den anden tilbudsgiver)**
Underskrift	
Ungdomsboliger, støttede private	27/3-09 (Ungdomsboliger i Aalborg mod Velfærdsministeriet, ansøgning om støtte afslået med rette, da ansøgningen ikke opfyldte normkravene; det var uden betydning, at ansøgeren var villig til at ændre sit projekt)
Unormalt lave tilbud	
Vedståelsesperiode	15/1-09 (Ortos mod Odense Kommune, en udbyder kan indgå kontrakt med en tilbudsgiver, selvom fristen for vedståelse af tilbuddet er udløbet), 16/10-09 (Konkurrencestyrelsen mod Region Sjælland og Region Hovedstaden, en ordregiver må ikke indgå kontrakt efter vedståelsesfristens udløb, hvis kontraktgrundlaget har ændret sig, det var uden betydning, at tilbudsvurderingen var trukket ud)
Virksomhedsoverdragelse	4/6-09 (Eurest mod CBS, begrænset udbud af Bilag II-tjenesteydelse, overtrædelse af principperne om ligebehandling og gennemsigtighed ved manglende oplysning om, hvilke medarbejdere der skulle overtages i henhold til Virksomhedsoverdragelsesloven), Retten 9/9-09 (Brink's Security, om betingelserne for, at der foreligger virksomhedsoverdragelse ved udbud af tjenesteydelser; det er ikke sig sig selv tilstrækkeligt, at den tjenesteydelse, som udføres af den gamle og den nye virksomhed, er den samme)
Vægtning inden for rammer	
Ændring af projekt	19/5-09 (Anker Hansen mod Rudersdal Kommune, nogle rettelser i udbudsbetingelserne var som følge af deres karakter ikke overtrædelse), 14/7-09 (Updata mod Lyngby-Taarbæk Kommune, overtrædelse ved efter tilbudsfristens udløb at anmode tilbudsgiverne om nye tilbud med forlænget kontraktperiode og ændret ydelse; dette var tilfældet, selvom der var tale om et funktionsudbud, hvor løbende justeringer måtte forudses)
Åbning af tilbud	

Klagenævnet for Udbud

Emneregister

for

Kendelser fra

Klagenævnet for Udbud

Danske retsafgørelser

Nyere afgørelser fra EF-domstolen og

Retten i Første Instans

om udbud

Del 1: Afgørelser til og med 2008

februar 2010

(enkelte senere tilføjelser kan have fundet sted)

Dette emneregister omfatter henvisninger til følgende afgørelser:

1) Klagenævnet for Udbuds kendelser
2) De danske retsafgørelser om udbudsret, som Klagenævnet for Udbud har kendskab til
3) De afgørelser om udbudsret, som EF-domstolen og Retten i Første Instans har truffet fra juli 1997 og fremefter, og som har interesse set fra en dansk udbudsretlig synsvinkel. Henvisninger til enkelte tidligere afgørelser fra EF-domstolen er dog medtaget.

Af praktiske grunde, herunder overskuelighedsgrunde, er emneregistret opdelt i to dele. Opdelingen er foretaget i forbindelse med en ajourføring af emneregistret pr. 30. september 2009.

Denne del 1 af emneregistret omfatter afgørelser afsagt til og med 2008 (men omfatter også henvisninger til enkelte senere danske domme, der har relation til kendelser fra Klagenævnet fra før 2009). Emneregistrets del 2 omfatter afgørelser fra og med 2009.

Klagenævnets kendelser er alle indeholdt i Klagenævnets websted, www.klfu.dk, sammen med resuméer af kendelserne. Der er i Klagenævnets websted desuden medtaget resuméer af de danske retsafgørelser og af afgørelserne fra EF- domstolen og Retten i Første Instans.

Hvis andet ikke fremgår, angår henvisningerne i emneregistret kendelser fra Klagenævnet for Udbud.

Danske domme fra de overordnede retter er angivet med følgende forkortelser:

HR: Højesteretsdom

VL: Vestre Landsrets dom

ØL: Østre Landsrets dom.

Domme trykt i Ugeskrift for Retsvæsen angives på traditionel måde med betegnelsen UfR efterfulgt af årgang og sidetal samt et bogstav (H for højesteretsdom, V for Vestre landsretsdom og Ø for Østre landsretsdom).

Domme fra Retten i Første Instans er angivet med betegnelsen Retten.

Emneregister er uoverskueligt på skærmen, og overskuelighed opnår man kun ved at udskrive emneregistret på papir. Udskrivning bør helst ske i duplex, dvs. udskrift på begge sider af papiret. Alle moderne printere har en funktion til udskrivning i duplex.

Men man kan **søge i den elektroniske version** af emneregistret. Fremgangsmåden ved søgning afhænger af browser og browserversion m.m. og kan derfor ikke angives generelt.

Emneregistret er resultatet af et uhyre omfattende arbejde, der er udført løbende gennem mange år, og mangelfuldheder og fejl har utvivlsomt ikke kunnet undgås. Klagenævnet for Udbud modtager meget gerne oplysning om mangelfuldheder og fejl, der er opdaget af brugere.

Emneregistrets del 1 er endeligt udformet i februar 2010 og ajourføres kun, hvis der senere afsiges en retsafgørelse med relation til en kendelse fra Klagenævnet fra før 2009.

Emneregistrets del 2 ajourføres derimod løbende.

Oversigt over emneregistrets rubrikker

Aktindsigt
Alternative tilbud
Annullation, Klagenævnets, af udbyders beslutninger
Annullation, udbyders af udbud
Arbejdsmiljø

Begrundelse, udbyders
Bevisbyrde
Bilag II A og II B (tidligere I A og I B)
Boligselskaber

Domstolsprøvelse

Effektivitetsprincippet
Entreprenørbegrebet
Erstatning
EU-støtte
Evalueringsmodeller

Forbehold i tilbud (dvs. afvigelser fra udbudsbetingelserne, uanset om de er benævnt forbehold, samt uklarheder i tilbud)
Forhandlingsrestriktioner
Formål, udbudsdirektivernes
Forsvarsanskaffelser
Forsyningsvirksomhedsdirektivet, sager om (det nugældende eller tidligere forsyningsvirksomhedsdirektiv)
Frister, se klagefrist, spørgsmålsfrist og tilbudsfrist
Færgefart

Gennemsigtighedsprincippet
Grundlæggende element
Grænseoverskridende element

Hasteprocedure

In house, se samarbejde mellem ordregivende myndigheder
Inhabilitet, herunder teknisk dialog

Jernbaneloven

Klageadgang
Klagefrist
Kompetence, Klagenævnets
Koncerner
Koncession
Konkurrencepræget dialog
Kontraheringspligt
Kontrakt
Kontrol af oplysninger i tilbud eller ansøgninger
Kontroldirektiverne
Kontroltilbud
Kvantitative indførselsrestriktioner

Langvarige kontrakter
Leasing
Legitimation
Ligebehandlingsprincippet
Lokal tilknytning

Miljøhensyn
Mindstekrav (også kaldet minimumskrav, dvs. krav, som et tilbud skal opfylde for at komme i betragtning)

Nomenklaturer

Offentligretlige organer
Omvendt licitation (dvs. udbud eller licitation vedrørende et byggeri, der ikke må koste over et bestemt beløb)
Oplysninger fra udbyder, herunder besvarelse af spørgsmål
Opsigelse eller ophævelse af kontrakt
Opsættende virkning
Ordregivende myndighed

Partnering
Passivitet
Postbefordring
Pris
Prissætning
Private, overladelse af opgaver til
Projektkonkurrencer, sager om
Proportionalitetsprincippet
Præjudicielle spørgsmål
Prækvalifikation
Prøvetid
Pålæg til udbyder

Rammeaftaler
Referenceprodukter
Retsvirkning af Klagenævnets afgørelser

Sagsomkostninger
Sale and lease back
Samarbejde mellem ordregivende myndigheder (herunder indkøbscentraler, in house og sammenslutninger af ordregivende myndigheder)
Selskaber
Sideordnede udbud/licitationer
Sociale hensyn
Spørgsmål til tilbudsgivere
Spørgsmålsfrist (dvs. frist for spørgsmål fra tilbudsgivere)
Standarder
Standardforbehold
Stand-still
Statsstøtte
Stillingsfuldmagt
Supplerende kontraktsbetingelser

Tavshedspligt
Tegningsberettigelse
Tekniske specifikationer
Tilbagekaldelse
Tilbudsfrist
Tilbudslovens afsnit I
Tilbudslovens afsnit II
Tildeling, herunder tilbudsvurdering
Tildelingskriterier
Traktaten
Tærskelværdi

Udbud med forhandling (tidligere benævnt udbud efter forhandling)
Udbudsdirektiver, indplacering under og diverse spørgsmål om
Udbudspligt og –ret
Udelukkelse (dvs. om de økonomiske aktører som sådan kan eller skal udelukkes fra at komme i betragtning, fordi de omfattes af en udelukkelsesgrund, der ikke behøver at være angivet i udbudsdokumenterne)
Udvælgelse (også kaldet kvalifikation, dvs. om de krav, som de økonomiske aktører som sådan skal opfylde for at komme i betragtning)
Uklarhed i klage
Uklarhed i udbud
Underhåndsbud
Underretning til tilbudsgivere og ansøgere
Underskrift
Ungdomsboliger, støttede private
Unormalt lave tilbud

Vedståelsesperiode
Virksomhedsoverdragelse
Vægtning inden for rammer

Ændring af projekt

Åbning af tilbud

Aktindsigt	21/9-95 (Semco mod Brønderslev Kommune, aktindsigt for klager skulle afgøres efter Forvaltningsloven ud fra en afvejning efter dennes § 15, stk. 1; Klagenævnet har truffet lignende afgørelser adskillige gange senere, dog ikke i kendelsesform), 27/8-97 (DAF mod Haderslev Kommune, ikke aktindsigt for brancheorganisation), 17/10-97 Tårnby Kommune, delvis aktindsigt for brancheorganisation i henhold til Offentlighedsloven), 23/9-05 (Sjælsø Entreprise mod Statsbiblioteket, klager tillagt aktindsigt i de andre tilbudsgiveres tilbud med visse undtagelser; Forvaltningslovens § 15, stk. 1, afskærer ikke automatisk en klager fra aktindsigt i de andre tilbudsgiveres tilbud), 11/12-05 (Jan Houlberg mod Skatteministeriet, klager afskåret fra aktindsigt i det vindende tilbud i medfør af Forvaltningslovens § 15, men tillagt aktindsigt forskellige andre bilag, udgangspunktet er nærmest, at der er fuld aktindsigt i alle bilag), 28/2-06 (S-Card mod Rigspolitiet, klagers aktindsigt omfattede ikke de andre tilbudsgiveres forretningshemmeligheder; udbyderens rapport om udbuddet var ikke et internt arbejdsdokument, men nogle interne arbejdsdokumenter var stadig interne, selvom udbyderen havde sendt dem til Klagenævnet; ved EU-udbud skal udbyderen udfærdige et dokument som grundlag for tildelingsbeslutningen, og dette dokument er ikke et internt arbejdsdokument i relation til reglerne om aktindsigt), 13/2-07 (Plantware mod Amagerforbrændingen, nogle betingelser i kontrakten med den valgte tilbudsgiver var uden betydning for omfanget af klagerens aktindsigt, da spørgsmålet skulle afgøres efter Forvaltningslovens § 15, stk. 1)
Alternative tilbud	18/11-96 (European Metro Group mod Ørestadsselskabet, mindstekrav for alternative tilbud var ikke angivet tilstrækkeligt præcist, for så vidt stadfæstet ved ØL 16/9-02, ikke taget stilling til spørgsmålet i Højesterets senere dom af 31/3-05 i UfR 2005 s. 1799 H), 31/8-98 (Miri mod Ringsted Kommune, bestemmelser i udbudsbetingelserne måtte forstås som mindstekrav, alternativt tilbud kan tages i betragtning, selvom hovedtilbuddet ikke er konditionsmæssigt), 14/9-98 (Handelskammeret mod Danmarks Statistik, mindstekrav var ikke angivet tilstrækkeligt præcist), 22/10-98 (Mangor og Nagel mod Middelfart Kommune, udbudsbetingelserne gav ikke mulighed for alternative tilbud), 14/10-03 (KK Ventilation mod Vejle Amt, et tilbud var ikke alternativt, selvom det blev betegnet sådan), EF-domstolen 16/10-03 (Traunfellner, hvis udbudsbetingelserne ikke angiver mindstekrav for alternative tilbud, må alternative tilbud ikke tages i betragtning, henvisning til en national regel om, at alternative tilbud skal være ligeværdige, er ikke tilstrækkeligt), 9/6-04 (Per Aarsleff mod Fyns Amt mfl., overtrædelse af Bygge- og anlægsdirektivet ved angivelse, der kunne forstås sådan, at tilbudsgivere ved at afgive alternative tilbud kunne ændre tildelingskriteriet), 21/6-04 (Banverket mod Nordjyske Jernbaner, udbud efter forhandling efter Forsyningsvirksomhedsdirektivet, mindstekrav for alternative tilbud var ikke angivet tilstrækkeligt klart), 16/12-04 (Brunata mod diverse boligselskaber, hvis mindstekrav for alternative tilbud ikke er angivet, må alternative tilbud ikke tages i betragtning), 15/12-05 (Air Liquide mod Roskilde Amt mfl., overtrædelse ved manglende angivelse af mindstekrav for alternative tilbud), 5/9-06 (Joca mod Reno Syd, en angivelse i udbudsbetingelserne var et sideordnet udbud og angik ikke alternative tilbud), 10/11-06 (Svend Andresen mod Århus Amt, angivelse i udbudsbetingelserne af, at der kunne gives alternative tilbud, var ukorrekt, da der var tale om sideordnede licitationer), 14/12-06 (Baxter mod Roskilde Amt, utilstrækkelig angivelse af de mindstekrav, som alternative tilbud skulle opfylde), 8/1-08 (WAP mod Ørestadsparkering, der kan gives mulighed for alternative tilbud ved konkurrencepræget dialog), 28/10-08 (Bjarne Larsen mod Morsø Kommune, udbyderen kunne ved tilbudsindhentning efter Tilbudslovens afsnit II indgå kontrakt på grundlag af et alternativt tilbud, da betingelserne ikke indeholdt forbud mod alternative tilbud), 5/11-08 (Brøndum mod Ringgården, overtrædelse ved manglende angivelse af mindstekrav for alternative tilbud), 26/11-08 (NCC mod Vejdirektoratet, udbudsbetingelsernes beskrivelse af mindstekravene til alternative tilbud var tilstrækkelig præcis, men overtrædelse ved at tage et alternativt tilbud i betragtning, selvom tilbuddet ikke opfyldte udbudsbetingelsernes krav til alternative tilbud; endvidere var det ikke godtgjort. at udbyderens prissætning af det alternative tilbud ikke havde givet tilbudsgiveren en konkurrencemæssig fordel; desuden overtrædelse ved en angivelse i udbudsbetingelserne af, at det stod udbyderen frit for, om et uopfordret alternativt tilbud ville komme i betragtning)
Annullation, Klagenævnets, af udbyders beslutninger Hvis andet ikke er angivet, har Klagenævnet truf-	3/11-94 (Kenn Sonne), 22/6-95 (Kommunernes gensidige Forsikringsselskab mod Vibo mfl., ikke annullation), 25/10-95 (Siemens mod Esbjerg Kommune), 23/1-96 (PAR mod Glostrup Kommune, ikke annullation), 26/4-96 (Pihl & Søn mod Avedøre Kloakværk), 7/6-96 (Handelskammeret mod Horsens Kommune, ikke annullation), 13/9-96 (Tårnby Kommune, Klagenævnet kan annullere udbyders annullation af udbud, dog ikke annullation), 16/10-96 (Danske Vognmænd mod Stevns Kommune, ikke an-

fet beslutning om annullation	nullation), 18/11-96 (European Metro Group mod Ørestadsselskabet, ikke annullation), 10/2-97 (Dafeta mod Lynettefællesskabet), 19/6-97 (Højgaard & Schultz mod Hundested Boligselskab), 19/6-97 (Handelshøjskolen, ikke annullation, se også ØL 16/8-00), 19/8-97 (Poul Hansen mod Vejdirektoratet, ikke annullation), 8/6-98 (LR mod Skovbo Kommune, ikke annullation af kontrakt indgået uden pligtigt udbud), 14/9-98 (Handelskammeret mod Danmarks Statistik, ikke annullation), 4/12-98 (Humus mod Herning Kommune, ikke annullation), 1/3-99 (Enemærke & Petersen mod Fællesorganisationens Boligforening, ikke annullation), 9/3-99 (Technicomm mod DSB), 11/6-99 (Hoffmann & Sønner mod Aalborg Lufthavn, ikke annullation), EF-domstolen 28/10-99 (Alcatel Austria, belyser eventuelt retsvirkningerne af annullation), 15/12-99 (Lifeline mod Dansk Hunderegister), 17/12-99 (Renoflex mod Søllerød Kommune), 28/12-99 (Skjortegrossisten mod Post Danmark, ikke annullation), 9/2-00 (PAR mod Udenrigsministeriet), 2/5-00 (Uniqsoft mod Odense Kommune, ikke annullation), 16/5-00 (DTL mod Reno Syd, ikke annullation), 21/6-00 (Arriva mod HT, ikke annullation), 27/6-00 (Dapa mod Vestforbrænding), 8/8-00 (Visma mod Københavns Amt, ikke annullation), 27/9-00 (Svend B. Thomsen mod Blåvandshuk Kommune), 14/12-00 (Renoflex mod Vestforbrænding), 27/4-01 (DTL mod Nyk. F. Kommune, ikke annullation), 2/5-01 (Magnus mod Told og Skat), 22/6-01 (Kommune og Amts Revision mod Ikast Kommune, ikke annullation), 12/7-01 (PAR mod Kulturministeriet, ikke annullation), 6/8-01 (Oxford Research mod Faaborg Kommune, ikke annullation), 24/10-01 (Eiland mod Vestsjællands Amt), 26/10-01 (Eterra mod Esbjerg Kommune), 3/1-02 (AC-Trafik mod Frederiksborg Amt, ikke annullation), 27/2-02 (Vindtek mod Holstebro Kommune), 2/4-02 (ISS mod Rigshospitalet, ikke annullation), 10/5-02 (Ementor mod Århus Amt), 9/8-02 (Kommunernes Revision mod Arbejdsmarkedsstyrelsen, ikke annullation), 12/8-02 (Milana mod Vestsjællands Amt), 27/11-02 (Aon mod Odense Kommune), 19/3-03 (Forlev Vognmandsforretning mod Høng Kommune, ikke annullation), 7/8-03 (KAS mod Århus Kommune, ikke annullation), 17/11-03 (Helsingør Kommune mod Stengade 56), 16/12-03 (Bilhuset Randers mod Sønderhald Kommune), 19/12-03 (Nibe Entreprenør & Transport mod Støvring Kommune), 13/1-04 (Pihl & Søn mod Hadsund Kommune), 10/3-04 (Brd. Thybo mod AA 1938), 26/8-04 (Per Aarsleff mod Amager Strandpark, ændret ved ØL 5/2-08), 6/10-04 (Leif Jørgensen mod Nordborg Kommune), 11/10-04 (Weilbach mod Kort- og Matrikelstyrelsen, ikke annullation), 14/10-04 (SK Tolkeservice mod Københavns Amt, ikke annullation eller pålæg om nyt udbud, da udbyderen kunne indgå ny kontrakt uden EU-udbud), 29/10-04 (Flemming Damgaard mod Helle Kommune), 26/11-04 (Pihl & Søn mod Kriminalforsorgen, ikke annullation), 16/12-04 (Brunata mod diverse boligselskabsafdelinger), 2/3-05 (Pumpex mod Hedensted Kommune), 8/4-05 (Danske Arkitektvirksomheder mod Forsvarets Bygningstjeneste, ikke annullation), 7/6-05 (Bladt mod Storebælt, ikke annullation), 17/6-05 (Gladsaxe Kommune mod Hareskovbo), 25/10-05 (Hoffmann mod Skjern Kommune), 15/12-05 (Air Liquide mod Roskilde Amt), 25/1-06 (Sjælsø Entreprise mod Statsbiblioteket), 13/3-06 (Kirudan mod Kolding Kommune, ikke annullation), 2/5-06 (DA mod Albertslund Boligselskab mfl., annullation af beslutning om prækvalifikation), 6/7-06 (Logstor mod Viborg Fjernvarme), 5/9-06 (Joca mod Reno Syd, annullation af flere beslutninger; ikke annullation af udbyders sammenligning af tilbuddene, da dette ikke var en beslutning, og da Klagenævnet kun kan annullere beslutninger), 6/9-06 (Sahva mod Københavns Kommune, ikke annullation), 26/10-06 (Novartis mod HS), 13/11-06 (Cowi mod Sønderjyllands Amt, annullation af udbyders beslutning om ikke at tage et tilbud i betragtning), 8/12-06 (Nethleas mod Økonomistyrelsen, ikke annullation), 14/12-06 (Baxter mod Roskilde Amt mfl.), 20/2-07 (Bangs Gård mod Esbjerg Kommune), 12/2-07 (Dansk Høreteknik mod Københavns Kommune), 19/3-07 (STB Byg mod Hedensted Kommune, ikke annullation, allerede fordi udbyderen var berettiget til ikke at tage klagerens tilbud i betragtning), 28/3-07 (Fujitsu Siemens mod Finansministeriet og SKI, delvis annullation), 26/4-07 (MT Højgaard mod Aalborg Lufthavn), 27/4-07 (CT Renovation mod Skive-Egnen, ikke annullation), 6/6-07 (Rengøringsgrossisten mod Skive Kommune), 18/6-07 (KPC Byg mod Odense Tekniske Skole), 13/7-07 (Magnus mod Skat), 19/7-07 (ISS mod Skejby Sygehus, ikke annullation), 10/8-07 (MT Højgaard mod Lejerbo), 15/8-07 (Stürup mod Billund Kommune, ikke annullation), 29/8-07 (Sectra mod Region Syddanmark), 3/9-07 (SP Medical mod Skat, opretholdt af Retten i Horsens 20/5-09), 16/10-07 (Kuwait Petroleum mod Sønderborg Kommune), 17/10-07 (Triolab mod RH, ikke annullation), 23/11-07 (Sejlstrup Entreprenørforretning mod Hjørring Kommune, ikke annullation), 14/12-07 (Thomas Borgå mod Skive Kommune, ikke annulation), 12/2-08 (Rengøringsgrossisten mod Skive Kommune), 14/2-08 (Jysk Erhvervsbeklædning mod Hjørring Kom-

	mune), 27/3-08 (AV Form mod Esbjerg Kommune mfl., opretholdt ved Retten i Herning 5/11-09), 10/4-08 (MT Højgaard mod Slots- og Ejendomsstyrelsen m.m., ikke annullation), 14/4-08 (Damm mod Økonomistyrelsen, ikke annullation som følge af sagens forløb for Klagenævnet), 16/4-08 (Boligkontoret mod Lægeforeningens boliger, ikke annullation), 29/5-08 (Hermedico mod Høje-Taastrup Kommune mfl., ikke annullation), 30/5-08 (Serviceselskabet mod Region Midtjylland), 11/7-08 (Labofa mod SKI mfl., delvis annullation, selvom klagen var indgivet ½ år efter tildelingsbeslutningen, da udbyderens overtrædelser var grove, delvis ikke annullation), 12/9-08 (Master Data mod Københavns Kommune), 2/10-08 (C.C. Brun mod Storebælt, ikke annullation), 5/11-08 (Brøndum mod Ringgården), 26/11-08 (NCC mod Vejdirektoratet), 17/12-08 (Bandagist-Centret mod Århus Kommune, ikke annullation), 19/12-08 (UAB mod Ringsted Kommune, ikke annullation),
Annullation, udbyders af udbud	2/4-96 (Esbjerg Oilfield Services mod Svendborg Kommune, annullation berettiget, da udbuddet var behæftet med væsentlige fejl), 7/6-96 (Handelskammeret mod Horsens Kommune, manglende orientering om nogle af udbydernes annullation af udbuddet var i strid med Indkøbsdirektivet), 13/9-96 (Tårnby Kommune, annullation af udbud skal have saglig begrundelse, Klagenævnet kan annullere udbyders annullation af udbud), 19/6-97 (Handelshøjskolen, Klagenævnets kendelse ændret ved ØL 16/8-00), 9/7-97 (vognmand Bomholt, annullation var sagligt begrundet og derfor berettiget), 3/7-98 (Nybus mfl. mod Storstrøms Trafikselskab, forbehold i udbud om delvis annullation var lovligt, hvis udbyderen vurderede spørgsmålet sagligt, hvilket var sket), EF-domstolen 16/9-99 (Metalmeccanica, udbyder var ikke forpligtet til at tildele den eneste tilbudsgiver kontrakten), 27/10-99 (Humus mod Bobøl, det var i strid med Indkøbsdirektivet, at udbyder havde forbeholdt sig ret til frit at annullere udbuddet, stadfæstet af VL 7/5-01), 29/5-00 (Arriva mod HT, annullation var sagligt begrundet og derfor berettiget), 11/8-00 (Kirkebjerg mod Ribe Amt, det var i strid med udbudsreglerne, at udbyder havde forbeholdt sig ret til at lade entreprisen helt eller delvis udgå, og udbyders delvise annullation var uberettiget i sig selv, da en annullation af et udbud skal angå hele udbuddet, desuden i strid med gennemsigtighedsprincippet, at udbyder trods annullationen havde indgået kontrakt om det annullerede), ØL 16/8-00 (Handelshøjskolen, det var tilstrækkelig saglig begrundelse for annullation af udbud, at der var opstået begrundet retlig tvivl om udbuddets lovlighed, og der var ikke grundlag for at antage, at det egentlige formål med annullationen var et ønske om at afbøde klagen til Klagenævnet), 19/1-01 (Zealand Care mod Frederikshavn Kommune, mistanke om inhabilitet hos udbyders indkøbschef var saglig begrundelse for annullation), 2/5-01 (Magnus mod Told og Skat, bestemmelse i udbudsbetingelserne om, at udbyder kunne vælge at afvise alle tilbud, var i strid med EU's udbudsregler), 12/7-01 (PAR mod Kulturministeriet, annullation af projektkonkurrence, fordi der ikke kunne prækvalificeres et tilstrækkeligt antal udenlandske virksomheder, var saglig, den meddelte begrundelse for annullationen var dog utilstrækkelig, stadfæstet ved ØL 3/5-02), 22/3-02 (Johs. Sørensen mod Århus Kommune, udbyders annullationsadgang ophører ikke ved meddelelsen om kontraktstildelingen), EF-domstolen 18/6-02 (Hospital Ingenieure, udbyders annullation af udbud er ikke reguleret i Tjenesteydelsesdirektivet, men er underkastet fællesskabsrettens grundlæggende bestemmelser og er derfor omfattet af første kontroldirektiv), 12/8-02 (Milana mod Vestsjællands Amt, udbyders annullation af udbud som følge af fejl i tilbuddene var uberettiget), 19/12-02 (Joca mod Haslev Kommune, ikke pligt til at udforme et udbud i overensstemmelse med et tidligere annulleret udbud om samme ydelse), 14/10-03 (KK Ventilation mod Vejle Amt, forbehold om at forkaste alle tilbud var i strid med Tilbudsloven), EF-domstolen 16/10-03 (Kauppatalo Hansel, udbudsdirektiverne regulerer ikke udbyders annullation af udbud, men en annullation skal overholde de grundlæggende fællesskabsretlige principper; det er ikke en betingelse, at annullation kun sker i undtagelsestilfælde eller har vægtige grunde), EF-domstolen 4/12-03 (EVN og Wienstrom, udbyder skal annullere udbuddet, hvis et klageorgan har annulleret et underkriterium som ulovligt), 13/1-04 (Pihl & Søn mod Hadsund Kommune, udbyder havde pligt til at annullere udbuddet, da den oplyste vurderingsmodel havde vist sig sagligt uanvendelig), 10/3-04 (Brd. Thybo mod AA 1938 (da der ikke var fastsat underkriterier til tildelingskriteriet det økonomisk mest fordelagtige bud, skulle udbyderen have annulleret licitationen eller gennemført den efter tildelingskriteriet laveste pris, på det sidstnævnte punkt »overruled« ved 5/11-08, Brøndum mod Ringgården), 9/7-04 (H.O. Service mod Boligf. 32, forbehold mellem frit at vælge mellem tilbuddene og forkaste alle bud var i strid med Tilbudsloven), 23/9-04 (Glatførebekæmpende vognmænd mod Nordjyllands Amt, Tjenesteydelsesdirektivet overtrådt ved forbehold om annullation af udbuddet), 11/10-04 (Weilbach mod Kort- og Matrikelstyrelsen, Tjenesteydelsesdi-

	rektivets artikel 36 overtrådt ved forbehold om annullation af udbuddet), 14/10-04 (SK Tolkeservice mod Københavns Amt, tilsvarende), 14/1-05 (Bakkely mod menighedsråd, udbyders annullation af en licitation var usaglig, da annullationen reelt var begrundet med udbyders ønske om at undgå en bestemt tilbudsgiver; når udbyder annullerer en licitation på grund af fejl og derefter iværksætter en ny licitation, skal udbyder som udgangspunkt anmode de samme virksomheder om at afgive tilbud), 18/4-05 (Løgten mod Århus Kommune, overtrædelse af Tilbudslovens ligebehandlingsprincip og gennemsigtighedsprincippet ved annullation uden saglig grund og ved angivelse af urigtig begrundelse for annullationen), EF-domstolen 2/6-05 (Koppensteiner, de nationale klageorganer skal kunne efterprøve udbyderes annullation af udbud), 7/7-05 (Brunata mod diverse boligselskabsafdelinger, der kunne ved erstatningsafgørelsen ikke lægges vægt på hypotetiske indsigelser om, at udbyderne kunne have annulleret udbuddet, »overruled« ved 18/5-09, Brøndum mod Ringgården), 22/9-05 (Vestegnens Tolkeservice mod Københavns Amt, tilsvarende, do.), 4/5-06 (Buus Totalbyg mod Bjerringbro Kommune, forbehold om at forkaste alle tilbud var i strid med Tilbudsloven), 30/8-06 (Alliance mod Retten i Odense, udbyder annullerede udbuddet, fordi tilbudsprisen i det økonomisk mest fordelagtige bud oversteg udbyders formåen, og fordi der var opstået usikkerhed om udbyders behov, annullationen var ikke usaglig), 12/7-07 (Dansk Høreteknik mod Københavns Kommune, udbyderen kunne eller skulle have annulleret udbuddet, da udbyderens ønsker ikke var tilstrækkeligt beskrevet i udbudsbetingelserne), 24/4-07 (Konkurrencestyrelsen mod Silkeborg Kommune, udbyders annullation af udbud var i strid med ligebehandlingsprincippet, fordi annullationen var til skade for tilbudsgiveren med det økonomisk mest fordelagtige bud og var begrundet i uunderbyggede formodninger og subjektive forventninger om, at tilbudsgiveren ikke ville opfylde nogle krav i udbudsbetingelserne, ændret ved VL 15/5-09), 23/11-07 (Sejlstrup Entreprenørforretning mod Hjørring Kommune, udbyders annuullation som følge af fejl i udbudsbetingelserne var ikke usaglig), 8/1-08 (WAP mod Ørestadsparkering, det var i et særlig komplekst udbud ikke usagligt at udskyde dele af det udbudte til en senere konkurrencepræget dialog eller at annullere udbuddet delvist), Retten 8/10-08 (Sogelma mod Rådet, begrundelsen for udbyderens annullation af udbuddet skal i en klar og relevant form angive de væsentligste omstændigheder, der ligger til grund for beslutningen, men begrundelsen kan være kortfattet og behøver ikke angive samtlige omstændigheder; det var ikke i strid med udbudsreglerne, at beslutningen om annullation af udbuddet først blev truffet efter ½ år), 20/10-08 (TagVision mod Egedal Kommune, udbyderen havde saglig grund til at annullere udbuddet, fordi nogle forhold, som udbyderen lagde vægt på, ikke fremgik af udbudsbetingelserne, herefter ikke anledning til at tage stilling til, om udbyderen også kunne annullere udbuddet, fordi der var blevet tildelt tilbuddene points vedrørende et underkriterium om økonomi ved et skøn i stedet for ved en beregning), 5/11-08 (Brøndum mod Ringgården, hvis tildelingskriteriet er det økonomisk mest fordelagtige bud og de kvalitative underkriterier er uegnede, har udbyderen saglig grund til at annullere udbuddet og må ikke anvende tildelingskriteriet laveste pris, dette er udtryk for en bevidst ændring af Klagenævnet praksis), 17/12-08 (Bandagist-Centret mod Århus Kommune, ikke taget stilling til, om udbyderen kunne tilbagekalde tildelingsbeslutningen i stedet for at annullere udbuddet)
Arbejdsmiljø	16/10-96 (Danske Vognmænd mod Stevns Kommune, krav til tjenesteydelsen begrundet i arbejdsmiljømæssige hensyn var lovlige), 27/9-00 (Svend B. Thomsen mod Blåvandshuk Kommune, det kunne ikke udelukkes, at bl.a. et tildelingskriterium om arbejdsmiljø var egnet til at identificere det økonomisk mest fordelagtige bud)
Begrundelse, udbyders	9/10-96 (Elinstallatørernes Landsforening mod Københavns Lufthavne, tilstrækkelig begrundelse for afslag på prækvalifikation), 1/3-99 (Enemærke & Petersen mod Fællesorganisationens Boligforening, begrundelsen for afvisning af tilbud som ukonditionsmæssigt skal henvise til konkrete forhold), 8/3-99 (FRI mod Nykøbing F. Kommune, udbyder gav forkert begrundelse for afvisning af tilbud som ukonditionsmæssigt), 28/12-99 (Skjortegrossisten mod Post Danmark, ikke fyldestgørende begrundelse), 29/5-00 (Arriva mod HT, do.), 8/8-00 (Visma mod Københavns Amt, udbyders afvisning af tilbud som ukonditionsmæssigt var berettiget, men udbyders begrundelse herfor var uholdbar), 9/10-00 (Dapa mod Kolding Kommune, afvisning af anmodning om prækvalifikation var berettiget, men begrundelsen var forkert), 14/12-00 (Renoflex mod Vestforbrænding, fyldestgørende begrundelse), 12/7-01 (PAR mod Kulturministeriet, den meddelte begrundelse for annullation af udbuddet var utilstrækkelig), 14/10-02 (Informationsteknik Scandinavia mod Udenrigsministeriet, udbyders begrundelsespligt omfatter ikke oplysninger til vurdering af beslutningens lovlighed), 23/3-04 (Tolkeservice mod Viborg Amt, udbyder overtrådte Tjenesteydelsesdirekti-

	vets artikel 12, stk. 1, ved ikke efter anmodning at give den egentlige begrundelse for ikke at prækvalificere klageren), 11/10-04 (Weilbach mod Kort- og Matrikelstyrelsen, Tjenesteydelsesdirektivets artikel 12 overtrådt ved for sen og delvis forkert begrundelse, en e-mail var tilstrækkelig skriftlig anmodning), 30/11-04 (Finn Hansen mod Vendersbo, Tilbudslovens § 12 overtrådt), 2/3-05 (Pumpex mod Hedensted Kommune, Tilbudslovens § 12 sigter til den reelle tildelingsbeslutning og ikke indgåelsen af kontrakt med den valgte tilbudsgiver), 9/3-05 (A-1 Communication mod Københavns Amt, anmodninger efter Tjenesteydelsesdirektivets artikel 12, stk. 1, behøver ikke at være formuleret i overensstemmelse med bestemmelsen; bestemmelsen overtrådt), 26/10-06 (Novartis mod HS, ufuldstændig begrundelse), Retten 18/4-07 (Deloitte mod Kommissionen, udbyderens begrundelse for afvisning af et tilbud havde klart og utvetydigt angivet grunden til afvisningen), 23/11-07 (Sejlstrup Entreprenørforretning mod Hjørring Kommune, klage over manglende begrundelse for annullation af licitation taget til følge, da udbyderen ikke havde givet en skriftlig begrundelse og ikke havde bevist, at der var givet en fyldestgørende mundtlig begrundelse), Retten 10/9-08 (Evr. Dynamiki mod Kommissionen, når en tilbudsgiver har anmodet om en begrundelse for tildelingsbeslutningen, er det ønskeligt, at udbyderen sender tilbudsgiveren evalueringsdokumentet, om nødvendigt med udeladelse af fortrolige oplysninger), Retten 10/9-08 (Evr. Dynamiki mod EF-domstolen, annullation af beslutning om ikke at prækvalificere en virksomhed, da udbyderen havde givet en urigtig og vildledende begrundelse for beslutningen), Retten 8/10-08 (Sogelma mod Rådet, begrundelsen for udbyderens annullation af udbuddet skal i en klar og relevant form angive de væsentligste omstændigheder, der ligger til grund for beslutningen, men begrundelsen kan være kortfattet og behøver ikke angive samtlige omstændigheder)
Bevisbyrde	7/8-03 (KAS mod Århus Kommune, en udbyder, der har mundtlig kommunikation med en tilbudsgiver, har bevisbyrden med hensyn til, hvilke oplysninger der er givet tilbudsgiveren), 13/3-06 (Kirudan mod Kolding Kommune, udbyder havde ikke godtgjort, at tilbudsvurderingen var saglig), 6/11-06 (Thorup Gruppen mod Skjern Kommune, udbyderen havde ikke afkræftet en formodning for, at udbyderen havde overtrådt udbudsreglerne), 12/2-07 (Dansk Høreteknik mod Københavns Kommune, tilsvarende), 14/5-08 (Trans-Lift mod DSB, udbyderen havde ikke løftet sin bevisbyrde for, at tilbuddene var vurderet efter de fastsatte underkriterier og kun dem), 2/7-08 (Scan-Plast mod Herning Kommune, ordregiveren havde bevisbyrden for, at telefoniske anmodninger om tilbud var identiske), 26/11-08 (NCC mod Vejdirektoratet, udbyderen har bevisbyrden for, at en prissætning ikke har givet tilbudsgiveren en konkurrencefordel)
Bilag II A og II B (tidligere I A og I B)	EF-domstolen 14/11-02 (Felix Swoboda, om tjenesteydelser, der omfatter enkeltydelser både under Tjenesteydelsesdirektivets bilag I A og bilag I B), 8/4-03 (Dansk Taxi Forbund mod Vestsjællands Amt, akut ambulancekørsel og liggende patienttransport var omfattet både af Tjenestydelsesdirektivets bilag I A og I B og skulle udbydes efter artikel 10, siddende patienttransport skulle udbydes, ydelserne kunne udbydes samlet), 28/4-03 (Centralforeningen af Taxiforeninger mod Vestsjællands Amt, tilsvarende), 9/3-05 (A-1 Communication mod Københavns Amt, en ordregiver, der udbød en bilag I B-ydelse efter Tjenesteydelsesdirektivet, skulle gennemføre udbuddet efter direktivets regler om udbudspligtige tjenesteydelser), 2/9-05 (Tipo mod Københavns Kommune, om de regler i Tjenestydelsesdirektivet m.m., der gælder henholdsvis ikke gælder, ved et udbud omfattet af direktivets bilag I B), EF-domstolen 20/10-05 (Kommissionen mod Frankrig, tjenesteydelsen repræsentation er omfattet af Tjenesteydelsesdirektivets bilag I B), EF-domstolen 27/10-05 (Contse mfl., om ordregiverens forpligtelser med hensyn til tildeling af ordrer vedrørende tjenesteydelser omfattet af bilag I B), 2/11-05 (Klaus Trier mod Københavns Amt, ikke overtrædelse af ligebehandlingsprincippet, at ordregiver kun indhentede tilbud fra virksomheder i sit eget område med hensyn til tjenesteydelse omfattet af Tjenesteydelsesdirektivets bilag I B), EF-domstolen 13/11-07 (Kommissionen mod Irland, indgåelse af kontrakt om en bilag I B-tjenesteydelse kunne ske uden forudgående offentliggørelse, da der ikke forelå et grænseoverskridende element), 14/12-07 (Thomas Borgå mod Skive Kommune, ligebehandlingsprincippet og Udbudsdirektivets artikel 23 overtrådt ved indgåelse af kontrakt om bilag II B-tjenesteydelser), 10/7-08 (European mod Kystdirektoratet, overtrædelse ved angivelse i udbudsbetingelserne af, at den udbudte tjenesteydelse var en bilag II B-ydelse, selvom den var en bilag II A-ydelse)
Boligselskaber	EF-domstolen 1/2-01 (Kommissionen mod Frankrig, udbudspligt for almene boligselskaber), 17/7-02 (Lyngby-Taarbæk Kommune mod Carlshøj, værdien af administrationen af et alment boligselskabs afdelinger skulle ikke sammenlægges ved beregningen af forholdet til tærskelværdien), 25/11-02 (Skousen mod AAB, et alment boligsel-

	skabs enkelte afdelinger skulle anses som ordregivere), 30/8-04 (Benny Hansen mod Vangsgade 6, byggefirma, der opførte boliger for et alment boligselskab, var omfattet af Tilbudsloven), 16/12-04 (Brunata mod diverse boligselskabsafdelinger, ved fælles indkøb fra flere afdelinger er den samlede værdi afgørende i relation til tærskelværdien), 17/6-05 (Gladsaxe Kommune mod Hareskovbo, uden betydning i relation til tærskelværdien, at nogle etaper af en ombygning udførtes af forskellige afdelinger, da boligorganisationen stod for den overordnede styring)
Domstolsprøvelse	ØL 7/10-02 (FRI mod Klagenævnet og Kulturmst., retlig interesse i et sagsanlæg mod Klagenævnet, i hvert fald fordi Klagenævnets kendelse indeholdt en særdeles alvorlig kritik af klageren, Klagenævnets afgørelse ikke ugyldig), ØL 3/3-03 (PAR mod Videnskabsmst., Klagenævnets kendelse af 8/10-97 i sagen PAR mod Københavns Pædagogseminarium indbragt for landsretten ved et sagsanlæg fra klageren mod indklagede, men retssagen afvist, da projektet var opgivet og en afgørelse ikke ville ændre retsstillingen mellem parterne, hvorfor sagsøgeren ikke længere havde retlig interesse)
Effektivitetsprincippet	5/9-06 (Joca mod Reno Syd, indgåelse af kontrakt på dagen for tilbudsfristens udløb var i strid med principperne om ligebehandling og effektivitet), 27/6-08 (DA mod Handels- og Søfartsmuseet, overtrædelse af effektivitetsprincippet og Lov om Klagenævnet for Udbud ved opfordring til de prækvalificerede om at frafalde klageadgangen)
Entreprenørbegrebet	EF-domstolen 12/7-01 (Ordine, om forståelsen af begrebet entreprenør i Bygge- og anlægsdirektivets artikel 1, a), 29/2-02 (Økonomi- og Erhvervsmst. mod Farum Kommune, do.), EF-domstolen 18/1-07 (Auroux mfl., do.)
Erstatning	VL 14/3-00 (IBF Nord mod Aalborg Kommune, erstatning for mistet fortjeneste til uretmæssigt forbigået tilbudsgiver), 20/8-01 (Svend B. Thomsen mod Blåvandshuk Komm., erstatning for forgæves udgifter til udarbejdelse af tilbud), 22/11-01 (Magnus mod Told og Skat, udbyder pålagt at betale erstatning ca. 200.000 kr. til dækning af klagers arbejde i anledning af udbuddet, klager havde ikke tilsidesat sin tabsbegrænsningspligt ved at arbejde med udbudssagen), 3/7-02 (Judex mod Århus Amt, udbyder pålagt erstatning 2 mio. kr. til dækning af positiv opfyldelsesinteresse, ved VL 16/3-04 ændret til erstatning 150.000 kr. til dækning af negativ kontraktsinteresse), 18/10-02 (Vindtek mod Holstebro Kommune, erstatning ca. 94.000 kr. til tilbudsgiver, hvis tilbud med urette var blevet forkastet, tilbudsgiveren havde pligt til at begrænse sit tab ved at tage andet arbejde), Retten 28/11-02 (Scan Office Design mod Kommissionen, forbigået tilbudsgiver ikke tillagt erstatning af positiv opfyldelsesinteresse, da tilbudsgiverens tilbud var ukonditionsmæssigt, hvorfor der ikke var årsagsforbindelse mellem udbyderen overtrædelser og tilbudsgiverens hævdede tab; tilbuddet var indgået i tilbudsvurderingen), 24/3-03 (Villy Antonsen mod Aars Kommune, frifindelse for erstatningskrav, da klagerens tilbud ville have været ukonditionsmæssigt og der derfor ikke var årsagssammenhæng), 7/4-03 (Ementor mod Århus Amt, erstatningskrav afvist, da både udbyder og den virksomhed, der var indgået kontrakt med, kunne være erstatningsansvarlige, og da Klagenævnets kompetence ikke omfatter en sådan situation), 28/5-03 (Bilhuset Ringsted mfl. mod Ringsted Kommune, ikke erstatningsansvar for formel overtrædelse), 6/11-03 (Hedeselskabet mod Løkken-Vrå Kommune, erstatning til positiv opfyldelsesinteresse m.m., dog reduceret pga. egen skyld), HR 10/2-04 (UfR 2004 s. 1284H, Skjortegrossisten mod Post Danmark, ikke erstatning til forbigået tilbudsgiver uanset fejl i udbuddet, da tildelingsbeslutningen var truffet sagligt på grundlag af fastsatte underkriterier, heller ikke erstatning til negativ kontraktsinteresse, da klageren ikke ville have undladt at afgive tilbud, såfremt klageren vidste, at der ville ske overtrædelse af udbudsreglerne), Retten 14/2-04 (Makedoniko mod Kommissionen, erstatningskrav mod Kommissionen i anledning af henlæggelse af en klage afvist), 9/3-04 (Georg Berg mod Køge Kommune, frifindelse for erstatningskrav, da et eventuelt erstatningsansvar ikke var forårsaget af udbyderens overtrædelse af udbudsreglerne), 24/3-04 (Eriksson mod Fuglebjerg Kommune, frifindelse for erstatningskrav, da der ikke var årsagssammenhæng, idet klagerens tilbud skulle have været afvist som ukonditionsmæssigt), 14/4-04 (Nibe Entreprenør & Transport mod Støvring Kommune, erstatning til positiv opfyldelsesinteresse til tilbudsgiver, der ville have fået kontrakten, hvis udbyder ikke havde begået fejl), 29/4-04 (KAS mod Århus Kommune, udbyder var ikke erstatningsansvarlig trods en urigtig oplysning, da oplysningen var givet under en uformel mundtlig kontakt, og da tilbudsgivere må indhente oplysninger på en professionel måde), 20/8-04 (Miri mod Esbjerg Kommune, erstatning til positiv opfyldelsesinteresse til eneste konditionsmæssige tilbudsgiver, ændret ved VL 31/3-06, se nedenfor), 13/9-04 (Brd. Tybo mod AAB 1938, erstatning til positiv opfyldelsesinteresse til tilbudsgiver, der ikke havde fået kontrakten), 1/11-04 (H.O. Service mod Boligf. 32, udbyder havde pligt til at betale positiv opfyldelsesinteresse

	til forbigået tilbudsgiver, men frifindelse, da tab ikke var sandsynliggjort; ved Esbjerg rets dom af 30/4-07, se nedenfor, tillagt tilbudsgiveren erstatning af positiv opfyldelsesinteresse på grundlag af nye oplysninger), 2/12-04 (Banverket mod Nordjyske Jernbaner, frifindelse, da udbyderens overtrædelse ikke havde haft betydning for denne tilbudsgivers tilbudsafgivelse), 3/2-05 (Sammenslutningen af Glatførebekæmpende vognmænd mod Nordjyllands Amt, frifindelse, da der ikke var årsagssammenhæng mellem udbyderens overtrædelser og tilbudsgiverens tab), 1/3-05 (BN Produkter mod Odense Renovationsselskab, erstatning til negativ kontraktsinteresse fastsat svarende til tilbudsgiverens udgift til tekniske undersøgelser; ikke grundlag for at erstatte tilbudsgiverens interne omkostninger ved udarbejdelse af tilbud eller advokatomkostninger), 7/3-05 (Flemming Damgaard mod Helle Kommune, erstatning til positiv opfyldelsesinteresse med udgangspunkt i tilbudsgiverens dækningsbidrag, men med en vis reduktion som følge af sparet risiko), 8/3-05 (Per Aarsleff mod Amager Strandpark, erstatning 5 mio. kr. for mistet dækningsbidrag, udbyderen frifindet ved ØL 5/2-08), Retten 17/3-05 (AFCon mod Kommissionen, forbigået tilbudsgiver ikke tillagt erstatning af positiv opfyldelsesinteresse, da det ikke med sikkerhed kunne fastslås, at tilbudsgiveren ville have fået kontrakten, hvis udbyderen ikke havde overtrådt udbudsreglerne, men tilbudsgiveren tillagt erstatning af negativ kontraktsinteresse, da udbyderens overtrædelse havde påvirket tilbudsgiverens mulighed for at få kontrakten), HR 31/3-05 i UfR 2005 s. 1799 H (European Metro Group mod Ørestadsselskabet, ligebehandlingsprincippet tilsidesat ved, at et ingeniørfirma, der havde været rådgiver for en tilbudsgiver, havde deltaget i evalueringen af tilbuddene, men ikke erstatningspligt, bl.a. fordi klager var gået ind i sagen med kendskab til ingeniørfirmaets dobbeltrolle), 6/4-05 (SK mod Københavns Amt, ikke dækning af positiv opfyldelsesinteresse, da ikke bevist eller sandsynliggjort, at klager ville have fået kontrakten; tillagt erstatning af negativ kontraktsinteresse, denne erstatning skulle ikke dække advokatomkostninger og andre udgifter for Klagenævnet, da sådanne udgifter er omfattet af sagsomkostningerne), 3/5-05 (Taxa Stig mod Vestsjællands Amt, frifindelse, da ikke lidt tab, også frifindelse ved UfR 2008 s. 1331 Ø, der angik nogle yderligere spørgsmål), 14/6-05 (HP Gruppen mod Hjørring Kommune, erstatning 2 mio. kr. til dækning af positiv opfyldelsesinteresse), 4/7-05 (J.A. Mortensen mod Kulturministeriet, frifindelse på grund af egen skyld), 7/7-05 (Brunata mod diverse boligselskabsafdelinger, erstatning til dækning af positiv opfyldelsesinteresse fastsat svarende til nettofortjenesten, solidarisk ansvar for flere udbydere; der kunne ikke lægges vægt på hypotetiske indsigelser om, at udbyderne kunne have annulleret udbuddet, på det sidste punkt »overruled« ved 18/5-09, Brøndum mod Ringgården; erstatningen forhøjet ved VL 30/4-07), 22/9-05 (Vestegnens Tolkeservice mod Københavns Amt, ikke erstatning til dækning af positiv opfyldelsesinteresse, da ikke bevist eller sandsynliggjort, at klageren ville have fået kontrakten, skønsmæssig erstatning til negativ kontraktsinteresse; der kunne ikke lægges vægt på en hypotetisk indsigelse om, at udbyder kunne have annulleret udbuddet, på det sidste punkt »overruled« ved 18/5-09, Brøndum mod Ringgården), 30/9-05 (Løgten mod Århus Kommune, erstatning af negativ kontraktsinteresse til dækning af udgiften ved tilbud under en licitation, der trådte i stedet for en anden licitation, der var annulleret med urette), ØL 19/12-05 (Køster mod Morsø Kommune, erstatning til dækning af positiv opfyldelsesinteresse til tilbudsgiver, der som lavestbydende skulle have haft kontrakten, hvis udbyder ikke havde annulleret udbuddet som følge af egne fejl), 20/1-06 (Bakkely mod menighedsråd, frifindelse, da udbyder havde været berettiget til ikke at anmode klageren om at give tilbud), 23/2-06 (Hoffmann mod Skjern Kommune, erstatning til dækning af positiv opfyldelsesinteresse, da det var sikkert, at klageren ville have fået kontrakten, hvis udbyderen ikke havde begået overtrædelserne, erstatningen skønsmæssigt fastsat til 1 mio. kr.), VL 31/3-06 (Miri mod Esbjerg Kommune ikke erstatning til positiv opfyldelsesinteresse til forbigået tilbudsgiver, da udbyder kunne have annulleret udbuddet og iværksat et nyt udbud uden fejl, og da det ikke var bevist, at tilbudsgiveren ville have fået tildelt kontrakten ved et sådant udbud), 26/4-06 (Air Liquide mod Roskilde Amt mfl., ikke erstatning til dækning af positiv opfyldelsesinteresse, da det ikke var bevist, at tilbudsgiveren ville have fået kontrakten, hvis udbyder ikke have begået fejl; tilbudsgiveren tillagt erstatning til dækning af negativ kontraktsinteresse, da udbuddet ikke var professionelt tilrettelagt og styret), 28/4-06 (Adelholm mod Faber Invest, erstatning til dækning af positiv opfyldelsesinteresse, da udbyderen ville have tildelt klageren kontrakten, hvis udbyderen ikke havde begået overtrædelserne; erstatningen fastsat skønsmæssigt til 50.000 kr. da der skulle fratrækkes beløb til dækning af faste udgifter og sparet risiko), 31/5-06 (J. Olsen mod Ramsø Kommune, erstatning til forbigået tilbudsgiver fastsat skønsmæssigt til 25.000 kr. til dækning af negativ kontrakt-

	sinteresse; ikke erstatning til dækning af positiv opfyldelsesinteresse, da udbyder som følge af de begåede fejl havde pligt til ikke at indgå kontrakt med nogen tilbudsgiver), 19/1-07 (P. Jensen og Sønner mod Blaabjerg Kommune, udbyder skulle erstatte udgiften til udarbejdelse af et tilbud, der var nytteløst som følge af udbyderens egne fejl m.m., også selvom tilbuddet kunne have været afvist på grund af forbehold; efter karakteren af udbyderens fejl havde tilbudsgiveren ikke udvist egen skyld), 21/2-07 (MT Højgaard mfl. mod Frederiksborgcentret, ordregiver var erstatningsansvarlig over for tilbudsgiverne ved en tilbudsindhentning, idet der skulle have været gennemført EU-udbud, dog ikke erstatning for forgæves tilbudsomkostninger, da tilbudsgiverne var professionelle entreprenørvirksomheder, der havde valgt at afgive tilbud, ved ØL 19/5-09 tillagt en tilbudsgiver erstatning af negativ kontraktsinteresse, da udbyderen havde overtrådt ligebehandlingsprincippet til skade for denne tilbudsgiver), 4/4-07 (Cowi mod Sønderjyllands Amt, erstatning til dækning af positiv opfyldelsesinteresse, da tilbudsgiveren ville have fået kontrakten, hvis udbyderen ikke havde overtrådt udbudsreglerne; erstatningen fastsat skønsmæssigt på baggrund af tilbudsgiverens og branchens sædvanlige overskudsgrad og nogle generelle synspunkter om erstatningsudmåling), Esbjerg ret 30/4-07 (erstatning til dækning af positiv opfyldelsesinteresse til tilbudsgiver, der ville have fået kontrakten, hvis Tilbudsloven ikke var overtrådt, erstatningen fastsat under hensyn til, at opgaven ikke ville have belastet tilbudsgiverens faste omkostninger ret meget, og at tilbudsgiveren ikke havde tilsidesat sin tabsbegrænsningspligt), 12/7-07 (Dansk Høreteknik mod Københavns Kommune, ikke erstatning til dækning af positiv opfyldelsesinteresse, da udbyderen anså klagerens produkter for reelt uantagelige, hvorfor udbyderen ikke have pligt til at indgå kontrakt med klageren, ligesom udbyderen kunne eller skulle have annulleret udbuddet; skønsmæssigt fastsat erstatning til dækning af negativ kontraktsinteresse), 20/8-07 (Dansk Industri mod Silkeborg Kommune, udbyderen skulle ikke betale erstatning i anledning af usaglig annullation af udbud, da udbyderen kunnet have annulleret udbuddet lovligt, også stillingtagen til annullationen ved VL 15/9-08), 21/9-07 (Joca mod Reno Syd, skønsmæssigt fastsat erstatning 650.000 kr. til forbigået tilbudsgiver, da det var godtgjort, at tilbudsgiveren ville have fået kontrakten, hvis udbyderen ikke havde overtrådt udbudsreglerne), ØL 11/10-07 (Unicomputer mod Greve Kommune, udbyderens overtrædelse af forhandlingsforbuddet ved forhandlinger med SKI-leverandører medførte ikke erstatningsansvar over for en virksomhed, der ikke var SKI-leverandør), 4/12-07 (Magnus mod Skat, erstatning for positiv opfyldelsesinteresse 1,5 mio. kr. til tilbudsgiver, der ikke havde fået kontrakten, selvom udbyderen kunne have annulleret udbuddet på grund af fejl; dissens for erstatning 500.000 kr. til dækning af negativ kontraktsinteresse, dissensen tiltrådt ved ØL 5/3-09), 7/12-07 (Scan-Plast mod Herning Kommune, overtrædelse af Tilbudsloven ved ikke at afholde udbud, ikke erstatning til virksomhed, der som følge heraf var afskåret fra at afgive tilbud), 9/1-08 (Thorup Grupppen mod Ringkøbing-Skjern Kommune, erstatningskrav afvist, da det påberåbte tab var forårsaget af udbyderens handlinger efter licitationen) , Retten 21/5-08 (Belfass mod Rådet, ikke erstatning til forbigået tilbudsgiver til dækning af positiv opfyldelsesinteresse, da det ikke var bevist, at tilbudsgiveren ville have fået kontrakten, hvis udbyderen ikke havde overtrådt udbudsreglerne), 14/7-08 (Thomas Borgå mod Skive Kommune, erstatning af negativ kontraktsinteresse til tilbudgiver, der ikke havde fået kontrakten vedrørende en bilag II B-tjenesteydelse, da tilbudsgiverens udgifter var forårsaget af ordregiverens ansvarspådragens adfærd ved indhentning af tilbud), 1/10-08 (MT Højgaard mod Slots- og Ejendomsstyrelsen mfl., ikke erstatning til positiv opfyldelsesinteresse til forbigået tilbudsgiver, da det var helt overvejende sandsynligt, at udbyderne også ved en rigtig tilbudsvurdering ville have anset den valgte tilbudsgivers tilbud som det økonomisk mest fordelagtige; heller ikke erstatning til negativ kontraktsinteresse, da den forbigåede tilbudsgiver ville have afgivet tilbud, selvom tilbudsgiveren havde vidst, hvordan udbyderne ville vurdere tilbuddene, og da udbyderne ikke havde tilsigtet forskelsbehandling), UfR 2008 s. 1331 Ø (ordregiver var ikke erstatningsansvarlig i anledning af indgåelse af kontrakt om en tjenesteydelse uden udbud, da det på kontraktens tidspunkt var fast antaget, at tjenesteydelsen ikke var udbudspligtig; ordregiver skulle ikke betale erstatning til en potentiel tilbudsgiver i anledning af, at en tillægskontrakt var indgået uden udbud, da det ikke var overvejende sandsynligt, at den potentielle tilbudsgiver ville have fået tildelt en kontrakt, og da den potentielle tilbudsgiver ikke havde haft udgifter i anledning af, at der ikke var foretaget udbud)
EU-støtte	EF-domstolen 15/1-98 (Mannesmann el. Strohal, EU-støtte medfører ikke udbudspligt i sig selv)
Evalueringsmodeller	10/2-97 (Dafeta mod Lynettefællesskabet, vægtningsmodel var i strid med både gen-

	nemsigtighedsprincippet og ligebehandlingsprincippet og var uegnet til at identificere det økonomisk mest fordelagtige tilbud), 29/10-97 (Esbjerg Renovationsselskab mod Rødding Kommune, vægtningsmodel var i strid med ligebehandlingsprincippet), 28/12-99 (Skjortegrossisten mod Post Danmark, et pointsystem var i strid med gennemsigtighedsprincippet), 27/6-00 (Dapa mod Vestforbrænding, Klagenævnet ønskede af forskellige grunde ikke at beskæftige sig med en klage over udbyders vægtningsmodel), 14/12-00 (Renoflex mod Vestforbrænding, udbyders evalueringsmodel indebar uigennemsigtighed med risiko for forskelsbehandling og var konkret anvendt forkert), 24/10-01 (Eiland mod Vestsjællands Amt, vægtningsmodel var i strid med gennemsigtighedsprincippet), 3/1-02 (AC-Trafik mod Frederiksborg Amt, en udbyder, der havde angivet underkriterierne prioriteret, havde ikke pligt til at oplyse om en vægtningsmodel og en pointskala, der ville blive anvendt ved vurderingen af tilbuddene), 2/4-02 (ISS mod Rigshospitalet, vægtningsmodel var uegnet, da den reelt kun lagde vægt på laveste pris), 8/8-03 (Eurodan mod Sønderborg Andelsboligforening, tilbud vurderet i strid med vægtningsmodel, men rigtig anvendelse ville have ført til samme resultat), 11/3-05 (MT Højgaard mod Frederiksberg Boligfond, ikke pligt til at vægte underkriteriet pris med en bestemt vægt, underkriterier var uegnede til at identificere det økonomisk mest fordelagtige bud; udbyder havde ikke pligt til at fastsætte vægtningen af underkriterier på et bestemt tidspunkt), 13/9-05 (Navigent mod Arbejdsmarkedsstyrelsen, ikke pligt til at vægte prisen med en vis større procentdel), 2/5-06 (DA mod Albertslund Boligselskab mfl., udbyders vægtning inden for rammer var i strid med gennemsigtighedsprincippet og Udbudsdirektivets § 53, stk. 2), 14/12-06 (Baxter mod Roskilde Amt mfl., evalueringsmodel, hvorefter vægtningsprocent var lig maksimumspoints, var ikke i strid med udbudsreglerne), 12/2-07 (Dansk Høreteknik mod Københavns Kommune, tildeling af points skal ske ud fra tilbuddenes forhold til underkriterierne og ikke ud fra tilbuddenes forhold til hinanden), 19/7-07 (ISS mod Skejby Sygehus, ikke taget stilling til det principielle spørgsmål, om en vurderingsmodel, der kunne føre til forkerte resultater, generelt var i strid med udbudsreglerne) 29/8-07 (Sectra mod Region Syddanmark, en evalueringsmodel om rangordning af tilbuddene i forhold til det bedste tilbud var i strid med principperne om ligebehandling og gennemsigtighed, opretholdt ved ØL 30/3-09), 22/10-07 (Grønbech mod Albertslund Boligselskab, der er ikke pligt til at oplyse beregningsmodeller for tilbudsvurdering i udbudsbetingelserne; en vurderingsmodel, hvorefter tilbuddene for hvert underkriterium tildeltes karakter efter en karakterskala, var ikke uproblematisk, men havde i det konkrete tilfælde ikke ført til usaglig forskelsbehandling), 14/2-08 (Jysk Erhvervsbeklædning mod Hjørring Kommune, overtrædelse af ligebehandlingsprincippet ved at vurdere tilbuddene i forhold til hinanden i stedet for i forhold til underkriterierne), 16/4-08 (Boligkontoret mod Lægeforeningens boliger, et underkriterium om tilbudsforbehold var i strid med Udbudsdirektivet), 10/7-08 (European mod Kystdirektoratet, overtrædelse af ligebehandlingsprincippet ved anvendelse af pointmodel, der førte til vilkårlige konsekvenser), 12/9-08 (Master Data mod Københavns Kommune, rammerne for vægtning af de enkelte underkriterier var passende i sig selv, men det var i strid med Udbudsdirektivet, at de var fastsat sådan, at underkriterierne kunne skifte plads i vægtningsrækkefølgen; det var ikke i sig selv en overtrædelse, at underkriteriet pris kun skulle vægtes med 15-25 %), 3/10-08 (Creative mod Århus Kommune, Udbudsdirektivet indeholder ikke regler om, hvornår udbyderen skal fastsætte den endelige vægtning af underkriterierne i tilfælde, hvor udbyderen har fastsat en relativ vægtning; en udbyder har ikke pligt til at anvende et pointsystem ved tilbudsvurderingen)
Forbehold i tilbud (dvs. afvigelser fra udbudsbetingelserne, uanset om de er benævnt forbehold, samt uklarheder i tilbud)	EF-domstolen 22/6-93 (sag C-243/89, Kommissionen mod Danmark, Storebæltsagen, hvis et tilbud indeholder forbehold om en grundlæggende bestemmelse i udbudsbetingelserne, må tilbuddet ikke tages i betragtning), 8/3-95 (Henning Larsen mod Kulturministeriet, formulering af forudsætning i tilbud var tilbudsgivers risiko), 4/6-96 (Dansk Industri mod Kolding Kommune, udbyder var uberettiget til at tage ukonditionsmæssigt tilbud i betragtning), 26/4-96 (Pihl & Søn mod Avedøre Kloakværk, tilbudsgiver har risikoen for forståelsen af forbehold), 18/11-96 (European Metro Group mod Ørestadsselskabet, forbehold kan tages ved udbud efter forhandling, for så vidt stadfæstet ved HR 31/3-05 i UfR 2005 s. 1799 H), 19/6-97 (Højgaard & Schultz mod Hundested Boligselskab, forbehold med usikker rækkevidde gjorde tilbuddet ukonditionsmæssigt, andre forbehold skulle prissættes), 19/8-97 (Poul Hansen mod Vejdirektoratet, udbyder måtte ikke spørge tilbudsgiver om forståelsen af et forbehold, ændret ved VL 28/9-01), 8/10-97 (PAR mod Københavns Pædagogseminarium, overtrædelse ved spørgsmål til tilbudsgivere om prisen), 9/10-97 (Arkitektgruppen mod Hinnerup Kommune, ukonditionsmæssigt tilbud antaget, hvilket var ulov-

	ligt), 14/1-98 (Xyanide mod Københavns Kommune, udbyder burde ikke have forstået, at et forbehold i tilbuddet skyldtes en fejl), 26/1-98 (Albertsen & Holm mod Københavns Belysningsvæsen, tilbud var ukonditionsmæssigt som følge af forbehold), 3/7-98 (Nybus mfl. mod Storstrøms Trafikselskab, oplysning i tilbuddet om, at tilbudsgiver ikke ville have alt nødvendigt materiel ved kontraktens ikrafttræden, var som følge af omstændighederne ikke et ukonditionsmæssigt forbehold), 31/8-98 (Miri mod Ringsted Kommune, alternativt tilbud kan tages i betragtning, selvom hovedtilbuddet er ukonditionsmæssigt, tilbudsgivers manglende udfyldelse af en blanket, dvs. tilbudslisten, var ikke tilsidesættelse af en grundlæggende udbudsbetingelse), 23/11-98 (Marius Hansen mod Forskningsministeriet, et forbehold var mindre væsentligt og gjorde ikke tilbuddet ukonditionsmæssigt, nogle bemærkninger i tilbuddet var ikke forbehold, og prissætning af dem var derfor ulovlig), 1/3-99 (Enemærke & Petersen mod Fællesorganisationens Boligforening, udbyders afvisning af tilbud som ukonditionsmæssigt var i strid med forbuddet mod anvendelse af referenceprodukter og med gennemsigtighedsprincippet), 8/3-99 (FRI mod Nykøbing F. Kommune, et forbehold gjorde et tilbud ukonditionsmæssigt), 10/6-99 (Højgaard & Schultz mod Odder Kommune, en bemærkning i et tilbud var et forbehold om et grundlæggende element, hvorfor tilbuddet var ukonditionsmæssigt), 11/6-99 (Hoffman & Sønner mod Aalborg Lufthavn, et tilbud var ikke ukonditionsmæssigt som følge af mindre afvigelser fra udbuddet), 16/7-99 (Holst Sørensen mod Vendsyssel Øst, mindre afvigelser fra udbudsbetingelserne, udbyder var berettiget til at tage tilbuddet i betragtning, men kunne også have afvist det som ukonditionsmæssigt), 7/9-99 (Håndværksrådet mod Køge Boligselskab, for uklar angivelse af, hvilke forbehold, der ville blive accepteret), 27/10-99 (Humus mod Bobøl, et tilbud vedrørende kompostbeholdere opfyldte udbudsbetingelserne, stadfæstet ved VL 7/5-01), 17/12-99 (Renoflex mod Søllerød Kommune, udbyder måtte ikke tage et tilbud i betragtning, da det ikke indeholdt tilstrækkelige oplysninger), 27/6-00 (Dapa mod Vestforbrænding, udbyders afvisning af et tilbud som ukonditionsmæssigt var uberettiget, det gjorde ikke den valgte tilbudsgivers tilbud ukonditionsmæssigt, at denne tilbudsgiver ikke havde alt nødvendigt materiel i en overgangsperiode), 8/8-00 (Visma mod Københavns Amt, principielle bemærkninger om tilbud, der afviger fra udbud, herunder at flere mindre ikke grundlæggende afvigelser tilsammen kan udgøre en grundlæggende afvigelse, der gør tilbuddet ukonditionsmæssigt, klagerens tilbud herefter med rette anset ukonditionsmæssigt, også den valgte tilbudsgivers tilbud var ukonditionsmæssigt), 7/12-00 (FRI mod Kulturministeriet, vedlæggelse af standardforbehold var et forbehold om grundlæggende elementer, synes reelt ændret på dette punkt ved ØL 7/10-02), 2/5-01 (Magnus mod Told og Skat, mulighed for at tage forbehold om alle elementer i udbuddet stred mod gennemsigtighedsprincippet), 6/8-01 (Oxford Research mod Faaborg Kommune, udbyder var berettiget og forpligtet til ikke at tage tilbud, der overskred et fastsat sidetal, i betragtning), 14/9-01 (Judex mod Århus Amt, tilbud, der ikke opfyldte Arbejdstilsynets krav, var ukonditionsmæssigt), Retten 28/11-02 (Scan Office Design mod Kommissionen, forbigået tilbudsgiver ikke tillagt erstatning af positiv opfyldelsesinteresse, da tilbudsgiverens tilbud var ukonditionsmæssigt, hvorfor der ikke var årsagsforbindelse mellem udbyderen overtrædelser og tilbudsgiverens hævdede tab; tilbuddet var indgået i tilbudsvurderingen), 29/4-03 (Lindpro mod Jørgen Mortensen & Sønner, udbyder har altid ret til at se bort fra tilbud, der afviger fra det udbudte, opretholdt ved ØL 7/12-04), 8/8-03 (Eurodan mod Sønderborg Andelsboligforening, ved vurderingen af, om afvigelser fra licitationsbetingelserne gjorde et tilbud ukonditionsmæssigt, skulle der tages hensyn til, at udbyder havde ønsket flere projekter at vælge imellem, ligesom klager burde indse, at klager som tidligere rådgiver var inhabil, hvis licitationsbetingelserne skulle forstås anderledes), 12/8-03 (Skanska mod Vejle Kommune, hvis sikker prissætning af et forbehold ikke er mulig, må tilbuddet ikke tages i betragtning), 15/8-03 (Bravida mod Statens Forskn., ligeledes), 16/2-04 (Eurofins mod Ringkjøbing Amt, udbyder skulle afvise et tilbud, da tilbudsgiveren ikke inden tilbudsfristens udløb havde indsendt en krævet dokumentation), 17/2-04 (Analycen mod Ringkjøbing Amt, do.), 20/2-04 (Miri mod Esbjerg Kommune, galvaniseret jern opfyldte ikke udbudsbetingelsernes krav om rustfrit metal, opretholdt ved VL 31/3-06), 8/3-04 (Eurofins mod Århus Amt, udbyder skulle afvise et tilbud, da tilbudsgiveren ikke inden tilbudsfristens udløb havde indsendt en krævet dokumentation), 7/6-04 (Analycen mod Vestsjællands Amt, tilbud afvist med rette, da det ikke opfyldte udbudsbetingelsernes krav på en række punkter), 9/6-04 (Per Aarsleff mod Fyns Amt mfl., en mulig dansk praksis om, at der tages standardforbehold, som derefter frafaldes ved kontraktsindgåelsen, er uden betydning ved fortolkningen af EU's udbudsregler), 26/8-04 (Per Aarsleff mod Amager Strandpark, tilkendegivelse om, at tilbud med

	væsentlige forbehold ville blive afvist, var ikke tilstrækkelig præcis til at give udbyder pligt til at afvise tilbud med forbehold om et ikke grundlæggende element; som følge af sagens omstændigheder gjorde klausul i standardforbehold om vinterforanstaltninger tilbuddet ukonditionsmæssigt, hvilket derimod ikke var tilfældet med hensyn til klausul i standardforbeholdene om prisregulering, ændret ved ØL 5/2-08 med hensyn til forbeholdet om vinterforanstaltninger), 2/9-04 (BN Produkter mod Odense Renovationsselskab, ligebehandlingsprincippet overtrådt ved, at udbyder ikke havde afvist nogle tilbud, der ikke var vedlagt en krævet dokumentation), 8/10-04 (Virklund Sport mod Randers Kommune, tilbud fra en tilbudsgiver, der først efter tilbudsfristens udløb gav en krævet oplysning om ibrugtagningsdato, måtte ikke tages i betragtning), 29/10-04 (Flemming Damgaard mod Helle Kommune, Tilbudslovens § 8 overtrådt ved valg af ukonditionsmæssigt tilbud, tilbudssummen skal kunne udledes umiddelbart af tilbuddet), 22/11-04 (Dansk Restproduktion mod Århus Kommune, tilbud fra tilbudsgiver, der ikke som krævet havde fremsendt regnskaber, måtte ikke tages i betragtning; hvis udbyder har taget et tilbud med et ikke grundlæggende forbehold i betragtning, må udbyder ikke senere afvise tilbudddet), 26/11-04 (Pihl & Søn mod Kriminalforsorgen, tilbudsgiver har risikoen for, om et forbehold er uklart, et forbehold kunne ikke prissættes, hvorfor afvisning af tilbuddet var sket med rette, et forbehold om tidsplan angik et grundlæggende element, et andet forbehold angik ikke et grundlæggende element, da udbudsbetingelserne var uklare på det pågældende punkt, generelle bemærkninger om forbehold), 16/12-04 (Brunata mod div. boligselskabsafdelinger, nogle forbehold kunne ikke prissættes, hvorfor tilbuddet ikke måtte tages i betragtning; udbyders vurdering af, om et tilbud må tages i betragtning, skal ske på grundlag af tilbuddets eget indhold), 2/3-05 (Pumpex mod Hedensted Kommune, overtrædelse af Tilbudsloven ved at tage tilbud i betragtning trods forbehold, der ikke kunne prissættes med sikkerhed), 9/3-05 (A-1 Communication mod Københavns Amt, beslutning om ikke at tage et tilbud i betragtning, fordi tilbudsgiveren efter udbyderens opfattelse begik ulovligheder, var saglig), 18/4-05 (Løgten mod Århus Kommune, nogle forbehold angik ikke grundlæggende elementer), 7/6-05 (Bladt mod Storebælt, når udbyder har prissat et forbehold, skal udbyder ved vurderingen af tilbuddet anse tilbuddet for at opfylde det krav, som forbeholdet angår), 16/1-06 (MT Højgaard mod DR, nogle standardforbehold angik ikke grundlæggende elementer), 25/1-06 (Sjælsø Entreprise mod Statsbiblioteket, tilbud med forbehold måtte ikke tages i betragtning, da det var angivet i udbudsbetingelserne, at forbehold ikke ville blive accepteret), 4/5-06 (Buus Totalbyg mod Bjerringbro Kommune, udbyder var berettiget, men ikke forpligtet, til ikke at tage et tilbud i betragtning, fordi tilbuddet afveg fra licitationsbetingelserne, udbyder skulle have prissat nogle afvigelser), 6/7-06 (Logstor mod Viborg Fjernvarme, nogle forbehold angik grundlæggende elementer, andre ikke), 13/11-06 (Cowi mod Sønderjyllands Amt, en bemærkning i et tilbud var sagligt begrundet i udbudsbetingelsernes udformning og kunne ikke begrunde undladelse af at tage tilbuddet i betragtning), 14/12-06 (Baxter mod Roskilde Amt, overtrædelse ved, at udbudsbetingelserne gav mulighed for forbehold på alle punkter og angav, at tilbudsgiverne skulle kapitalisere forbehold),19/1-07 (P. Jensen og Sønner mod Blaabjerg Kommune, udbyder skulle erstatte udgiften til udarbejdelse af et tilbud, der var nytteløst som følge af udbyderens egne fejl m.m., også selvom tilbuddet kunne have været afvist på grund af forbehold), 19/3-07 (STB Byg mod Hedensted Kommune, et forbehold om tidsplan angik et grundlæggende element, også selvom forbeholdet gik ud på en tidligere igangsættelse end angivet i tidsplanen), 28/3-07 (Fujitsu Siemens mod Finansministeriet og SKI, udbyder var forpligtet til at afvise et tilbud, der ikke opfyldte nogle krav, der i udbudsbetingelserne var betegnet som minimumskrav), 16/4-07 (STB Byg mod Hedensted Kommune, som følge af forbehold i et tilbud var udbyderen berettiget til ikke at tage tilbuddet i betragtning, hvorfor Klagenævnet ikke havde anledning til at tage stilling til, om der var tale om et grundlæggende element), 2/5-07 (Bent Vangsøe mod Ørestadsselskabet, en uklar bemærkning i et tilbud kunne forstås som et forbehold om et grundlæggende element, hvorfor udbyderen skulle afvise tilbuddet), 10/8-07 (MT Højgaard mod Lejerbo, tilbud med forbehold om tidsplan måtte ikke tages i betragtning, opretholdt ved Århus Ret 6/5-09), 29/8-07 (Sectra mod Region Syddanmark, tilbudsgiveren havde risikoen for ikke klart og overbevisende at have redegjort for, hvordan en angivelse i tilbuddet skulle forstås, opretholdt ved ØL 30/3-09), 17/10-07 /Triolab mod HS, overtrædelse ved, at udbudsbetingelserne gav mulighed for forbehold på alle punkter og angav, at tilbudsgiverne skulle kapitalisere forbehold), 3/12-07 (Stina mod Lemvig Kommune, forbehold om tidsplan angik et grundlæggende element, hvorfor tilbuddet ikke måtte tages i betragtning), 18/1-08 (Eurofins mod Aalborg Kommune, en bemærkning i et tilbud om prisregulering var et forbe-

	hold, der bevirkede, at tilbuddet ikke måtte tages i betragtning), 31/3-08 (Cowi mod Kort og Matrikelstyrelsen, forbehold om tidsplan angik et grundlæggende element), 15/4-08 (FSB mod Lægeforeningens boliger, generelle bemærkninger om principperne for udbyderens håndtering af forbehold, et underkriterium om forbehold var i strid med Udbudsdirektivet), 14/5-08 (Trans-Lift mod DSB, et tilbud måtte ikke tages i betragtning, da et gelænder, der efter udbudsbetingelserne skulle være 1 m højt, ifølge tilbuddet kun havde en højde på 95 cm, et underkriterium om forbehold var uden mening og var i strid med Forsyningsvirksomhedsdirektivet), 27/6-08 (DA mod Handels- og Søfartsmuseet, overtrædelse ved at gennemføre en projektkonkurrence, selvom alle projektforslag oversteg udbyderens oplyste økonomiske ramme betydeligt, og selvom det vindende forslag var ukonditionsmæssigt), 9/7-08 (Informi mod Kulturarvsstyrelsen, et tilbud var ukonditionsmæssigt, da det afveg fra udbudsbetingelserne på et punkt, over for hvilket der efter udbudsbetingelserne ikke kunne tages forbehold; udbudsbetingelserne var ikke uklare med hensyn til, hvad der kunne tages forbehold for), 10/7-08 (European mod Kystdirektoratet, en angivelse i et tilbud om udførelse af en tjenesteydelse var ikke et forbehold, da kun udbyderen vidste, at tjenesteydelsen ikke kunne udføres som angivet, og burde have oplyst dette i udbudsbetingelserne), 10/9-08 (LK Gruppen mod Københavns Kommune, udbudsbetingelserne stillede ikke krav om, at nogle granitfliser skulle have farvenuancer nøjagtigt svarende til udbyderens granitprøver, hvorfor udbyderen var uberettiget til at afvise et tilbud om granitfliser, hvis farvenuancer ikke svarede til prøverne, dissens), 17/9-08 (Bien-Air mod København og Århus Universiteter, et tilbud skulle tages i betragtning, da det opfyldte udbudsbetingelsernes kravspecifikation, og det gjorde ingen forskel, at tilbuddet omfattede yderligere funktioner), 18/9-08 (XO Care mod Københavns og Århus Universiteter, udbyderne kunne fortolke en angivelse i et tilbud som et forbehold om et krav, der efter udbudsbetingelserne ikke kunne tages forbehold om), 2/10-08 (C.C. Brun mod Storebælt, et tilbudsforbehold om tidsplan angik et grundlæggende element, i hvert fald fordi licitationsbetingelserne angav, at tidsplanens overholdelse var af største vigtighed, hvorfor tilbuddet ikke måtte tages i betragtning), 16/12-08 (Elindco mod Universitets- og Byggestyrelsen, et tilbudsforbehold angik et grundlæggende element, hvorfor tilbuddet ikke måtte tages i betragtning)
Forhandlingsrestriktioner	7/7-95 (Valles Trans-Media mod Københavns Kommune, ikke overtrædelse), 31/1-96 (Jørgensen og Meklenborg mod Skov- og Naturstyrelsen, præcisering af tilbud efter udbyders forespørgsel var berettiget), 26/4-96 (Pihl & Søn mod Avedøre Kloakværk, overtrædelse ved bortforhandling af forbehold), 31/10-96 (Semco mod Brønderslev Kommune, overtrædelse), 19/6-97 (Højgaard & Schultz mod Hundested Boligselskab, overtrædelse), 19/8-97 (Poul Hansen mod Vejdirektoratet, udbyder måtte ikke spørge tilbudsgiver om forståelsen af et forbehold, ændret ved VL 28/9-01), 23/11-98 (Marius Hansen mod Forskningsministeriet, forhandling om forbehold, der ikke gjorde tilbuddet ukonditionsmæssigt, var lovlig), 17/12-99 (Renoflex mod Søllerød Kommune, overtrædelse), 2/5-00 (Uniqsoft mod Odense Kommune, overtrædelse), 8/8-00 (Visma mod Københavns Amt, som følge af, at Klagenævnet statuerede, at den valgte tilbudsgivers tilbud var ukonditionsmæssigt, ønskede nævnet ikke selvstændigt at beskæftige sig med en klage over, at udbyderen havde forhandlet med den valgte tilbudsgiver), 7/12-00 (FRI mod Kulturministeriet, bortforhandling af forbehold var ikke en overtrædelse af EU's forhandlingsforbud som følge af helt særegne omstændigheder, dvs. den klagende organisations misbrug af sin klageadgang til at søge de bærende principper bag udbudsdirektiverne modvirket, afgørelsen stadfæstet ved ØL 7/10-02, men med begrundelse, at forhandlingen som følge af sagens omstændigheder ikke indebar konkurrencefordrejning), 27/4-01 (DTL mod Nyk. F. Kommune, tvivlsomt om forhandlingsforbuddet gælder mellem udbyder og en afdeling hos udbyder), 14/9-01 (Judex mod Århus Amt, under et udbud efter forhandling må tilbudsgiverne ikke spilles prismæssigt ud mod hinanden), 24/10-01 (Eiland mod Vestsjællands Amt, henvendelse til tilbudsgivere var i strid med ligebehandlingsprincippet og forhandlingsforbuddet), Retten 26/2-02 (Esedra mod Kommissionen, det var ikke en overtrædelse af forhandlingsforbuddet, at udbyderen indhentede en lang række oplysninger fra en tilbudsgiver om tilbuddets indhold), 14/10-02 (Informationsteknik Scandinavia mod Udenrigsmst., forhandling var ikke i strid med forhandlingsforbuddet), 19/12-02 (Joca mod Haslev Kommune, ikke overtrædelse), 6/2-03 (Hedeselskabet mod Løkken-Vraa Kommune, overtrædelse af forhandlingsreglen i Tilbudslovens § 11), 15/8-03 (Bravida mod Statens Forskn., forespørgsel til tilbudsgiver om forståelsen af en detalje ville ikke være i strid med forhandlingsforbuddet), 29/11-03 (Unicomputer mod Greve Kommune, indkøb gennem SKI fritager ikke for overholdelse af forhandlingsforbuddet), 10/3-04 (Brd. Thybo mod AA 1938, forhandling i strid med Tilbudslo-

	ven), 6/5-04 (Sereno mod Vejle Amt, klage over, at udbyder ikke havde taget hensyn til klagerens tilsagn om støtte til en klinik, ikke taget til følge, da udbudsbetingelserne ikke omfattede mulighed for at give et sådant tilsagn, og da det ville have været en overtrædelse af forhandlingsforbuddet at tage hensyn til det), 9/7-04 (H.O. Service mod Boligf. 32, da tildelingskriteriet laveste bud skulle have været anvendt, var det i strid med Tilbudslovens § 10 at forhandle med andre end lavestbydende), 26/8-04 (Per Aarsleff mod Amager Standpark, kontraktsforhandlinger efter tildelingsbeslutningen var ikke i strid med forhandlingsforbuddet), 30/9-04 (Colas mod Videbæk kommune, under forhandlinger i medfør af Tilbudsloven må tilbudsgiverne ikke spilles ud mod hinanden; Tilbudslovens regler om forhandling omfatter ikke kontraktsforhandlinger, men der må ikke under sådanne ske ændring af et grundlæggende element), 8/10-04 (Virklund Sport mod Randers Kommune, Tilbudslovens regler om forhandling gælder ikke for ukonditionsmæssige tilbud), 26/11-04 (Pihl & Søn mod Kriminalforsorgen, efterfølgende kontakt om et forbehold om et grundlæggende element var i strid med forhandlingsforbuddet), 16/12-04 (Brunata mod diverse boligselskabsafdelinger, overtrædelse af ligebehandlingsprincippet ved at give en tilbudsgiver lejlighed til at ændre tilbuddet med hensyn til et grundlæggende element), 2/3-05 (Pumpex mod Hedensted Kommune, overtrædelse af Tilbudslovens § 11 ved ikke at angive procedure for forhandlingerne), 9/3-05 (A-1 Communication mod Københavsn Amt, overtrædelse af forhandlingsforbuddet), 11/3-05 (MT Højgaard mod Frederiksberg Boligfond, afklarende henvendelse fra udbyder var ikke overtrædelse af forhandlingsforbuddet), 25/10-05 (Hoffmann mod Skjern Kommune, Tilbudsloven overtrådt ved forhandlinger med tilbudsgiver uden for rammerne af dennes tilbud og uden en på forhånd tilkendegivet procedure), 15/12-05 (Air Liquide mod Roskilde Amt mfl., overtrædelse af forhandlingsforbuddet), 20/12-05 (Adelholm mod Faber Invest, hvis udbyder ikke kan blive enig med lavestbydende under forhandlinger i medfør af Tilbudslovens § 10, må udbyder ikke af denne grund tildele ordren til næstlavestbydende eller indlede forhandlinger med denne), 4/5-06 (Buus Totalbyg mod Bjerringbro Kommune, udbyder overtrådte Tilbudsloven ved efter tildelingsbeslutningen at få den valgte tilbudsgiver til at frafalde et forbehold), 6/7-06 (Logstor mod Viborg Fjernvarme, forskellige overtrædelser af forhandlingsforbuddet), 5/9-06 (Joca mod Reno Syd, i specielle tilfælde kan der aftales ændringer efter kontraktsindgåelse), 6/9-06 (Sahva mod Københavns Kommune, der kan holdes kontraktsforhandlinger med den valgte tilbudsgiver og kan herunder gennemføres mindre ændringer og præciseringer), 6/11-06 (Thorup Gruppen mod Skjern Kommune, overtrædelse af Tilbudsloven ved at give de andre tilbudsgivere underretning om indholdet af en tilbudsgivers tilbud), 13/11-06 (Cowi mod Sønderjyllands Amt, udbyder kunne uden at overtræde forhandlingsforbuddet have stillet spørgsmål til en tilbudsgiver om, hvilke geotekniske undersøgelser tilbudsgiveren havde regnet med), 14/12-06 (Baxter mod Roskilde Amt mfl., overtrædelse), 3/9-07 (SP Medical mod Skat, krav om oplysning om underleverandører var en ordensforskrift og kunne opfyldes ved en teknisk afklaring, opretholdt af Retten i Horsens 20/5-09), 22/10-07 (Grønbech mod Albertslund Boligselskab, forhandlingsforbuddet ikke overtrådt ved et afklarende møde), 2/10-08 (C.C. Brun mod Storebælt, hjemlen i Udbudsdirektivet og Tilbudsloven til forhandling henholdsvis indhentelse af underhåndsbud, hvis der ikke er indkommet forskriftsmæssige bud, finder anvendelse, hvis alle tilbud indeholder forbehold, og det kræves ikke, at forbeholdene skal angå grundlæggende elementer; hjemlen i Tilbudslovens § 11 til forhandling med tilbudsgivere omfatter ikke en ukonditionsmæssig tilbudsgiver), 16/10-08 (Grønbech mod Albertslund Boligselskab, der var ikke før indgåelsen af kontrakten med den valgte tilbudsgiver sket ændringer af kontraktsgrundlaget i strid med Udbudsdirektivet)
Formål, udbudsdirektivernes	Er beskrevet i adskillige domme fra EF-domstolen, således fx i EF-domstolens dom af 27/2-03, Adolf Truley. Se også EF-domstolens dom af 14/11-02, Felix Swoboda, hvor det bl.a. udtales, at Tjenesteydelsesdirektivet skal overholdes, selvom der ikke foreligger et grænseoverskridende element
Forsvarsanskaffelser	
Forsyningsvirksomhedsdirektivet, sager om (det nugældende eller tidligere forsyningsvirksomhedsdirektiv)	18/11-96 (European Metro Group mod Ørestadsselskabet, angår en række forskellige spørgsmål, delvis stadfæstet ved HR 31/3-05 i UfR 2005 s. 1799 H), 23/4-97 (Crocus mod Århus Havn, udbudspligt for anlægsarbejder, der skulle ses som en helhed), 12/9-97 (Abtech mod Sydbus, indkøb af læskærme til busstoppesteder var omfattet af Indkøbsdirektivet og var ikke bygge- og anlæg i henhold til Forsyningsvirksomhedsdirektivet), 10/11-98 (Dansk Taxi Forbund mod Århus Amt, udbud af handicapkørsel skulle ske efter Tjenesteydelsesdirektivet, ikke Forsyningsvirksomhedsdirektivet), 18/3-99 (Seghers mod Vestforbrænding), 19/3-99 (Technicomm mod DSB, det var i strid med bl.a. Forsyningsvirksomhedsdirektivet, at udbyder tog et nyt tilbud fra en

	tilbudsgiver i betragtning, selvom udbyder havde truffet beslutning om ikke at fortsætte forhandlingerne med denne tilbudsgiver), EF-domstolen 5/10-00 (Kommissionen mod Frankrig i sag C-16/98, om opdeling af kontrakter under Forsyningsvirksomhedsdirektivet), EF-domstolen 5/10-00 (Kommissionen mod Frankrig i sag C-337/98, ikke udbudspligt efter Forsyningsvirksomhedsdirektivet, da beslutningen om ikke at udbyde var truffet længe før direktivets ikrafttræden, og da der ikke efter denne var genforhandlet grundlæggende kontraktsbestemmelser), EF-domstolen 7/12-00 (Teleaustria og Telefonadress, ydelser vedrørende telefonbøger ol. hører under Forsyningsvirksomhedsdirektivet; der er ikke udbudspligt for koncessioner om tjenesteydelser efter Forsyningsvirksomhedsdirektivet, dog understregning af, at navnlig princippet om gennemsigtighed skal overholdes), 4/11-03 (Bombardier mod Lokalbanen, et tilbud kunne afvises under et udbud efter forhandling efter Forsyningsvirksomhedsdirektivet, da det ikke opfyldte nogle ufravigelige krav), 21/6-04 (Banverket mod Nordjyske Jernbaner, udbud efter forhandling efter Forsyningsvirksomhedsdirektivet, mindstekrav for alternative tilbud var ikke angivet tilstrækkeligt præcist, et underkriterium var for uklart), 6/10-04 (Leif Jørgensen mod Nordborg Kommune, ethvert rendegraverarbejde er bygge- og anlægsarbejde og dermed omfattet af Tilbudslovens udbudspligt, dog ikke med hensyn til arbejde, der dækkes af Forsyningsvirksomhedsdirektivet; afgørelsen er forældet på det sidstnævnte punkt, se Tilbudslovens § 1), 2/12-04 (Banverket mod Nordjyske Jernbaner, Forsyningsvirksomhedsdirektivets regel om angivelse af mindstekrav for alternative tilbud gælder ved udbud efter forhandling kun for den første tilbudsafgivelse), EF-domstolen 16/6-05 (Strabag, om anvendelsesområdet for Forsyningsvirksomhedsdirektivet 93/38), EF-domstolen 24/11-05 (ATI EAC, Forsyningsvirksomhedsdirektivets artikel 34 og Tjenesteydelsesdirektivets artikel 36 skal fortolkes på samme måde), EF-domstolen 11/5-06 (Cabotermo og Consorzio Alizei, de to forsyningsvirksomhedsdirektivers regel om indgåelse af aftaler om tjenestydelser uden udbud finder ikke anvendelse uden for direktivernes område), 6/7-06 (Logstor mod Viborg Fjernvarme, forskellige overtrædelser), 26/4-07 (MT Højgaard mod Aalborg Lufthavn, forskellige overtrædelser), EF-domstolen 18/7-07 (Kommissionen mod Grækenland, konkret afgørelse), 21/8-07 (Centralforeningen mod Midttrafik, en kontrakt var ikke indgået på grundlag af udbuddet; standstillordningen gælder ikke for udbud efter Forsyningsvirksomhedsdirektivet), 24/8-07 (LSI Metro Gruppen mod Ørestadsselskabet), 14/1-08 (samme mod samme), 18/1-08 (Eurofins mod Aalborg Kommune), EF-domstolen 9/4-08 (Ing. Aigner, en ordregiver, der driver virksomhed under Forsyningsvirksomhedsdirektivet, er ikke omfattet af dette direktiv med hensyn til anden virksomhed), 14/5-08 (Trans-Lift mod DSB)
Færgefart	5/4-01 (Sømændenes Forbund mod Nordjyllands Amt og Læsø Kommune, om klageadgang for Sømændenes Forbund efter Lov om færgefart), 5/2-03 (Scandlines mod Ærøske Trafikselskab, Klagenævnet ikke kompetent til at tage stilling til, om Lov om færgefart strider mod EU-retten)
Gennemsigtighedsprincippet	EF-domstolen 25/4-96 (sag C-87/94, Kommissionen mod Belgien, sagen om de wallonske busser, det var i strid med principperne om ligebehandling og gennemsigtighed, at udbyderen tog hensyn til ændringer i det valgte tilbud efter tilbuddets afgivelse og til angivelser i tilbuddet, der ikke svarede til udbudsbetingelserne), 10/2-97 (Dafeta mod Lynettefællesskabet, en vægtningsmodel var i strid med gennemsigtighedsprincippet), 1/3-99 (Enemærke & Petersen mod Fællesorganisationens Boligselskab, henvisning til referenceprodukt var i strid med gennemsigtighedsprincippet), 18/3-99 (Seghers mod Amagerforbrændingen, ikke overtrædelse), EF-domstolen 18/11-99 (Unitron Scandinavia og 3-S, princippet om forbud mod national diskrimination må ikke fortolkes indskrænkende, hvilket medfører en gennemsigtighedsforpligtelse), 28/12-99 (Skjortegrossisten mod Post Danmark, det var i strid med gennemsigtighedsprincippet, at udbyder havde anvendt tildelingskriterier og et pointsystem, der ikke fremgik af udbudsbetingelserne), 11/8-00 (Kirkebjerg mod Ribe Amt, det var i strid med gennemsigtighedsprincippet, at udbyderen efter at have annulleret et udbud desuagtet indgik kontrakt med en af tilbudsgiverne), EF-domstolen 7/12-00 (Teleaustria og Telefonadress, der er ikke udbudspligt for koncessioner om tjenesteydelser efter Forsyningsvirksomhedsdirektivet, dog understregning af, at navnlig princippet om gennemsigtighed skal overholdes), 14/12-00 (Renoflex mod Vestforbrænding, udbyders evalueringsmodel indebar uigennemsigtighed med risiko for forskelsbehandling), ubegrænset adgang til at tage forbehold var i strid med gennemsigtighedsprincippet), 27/4-01 (DTL mod Nyk. F. Kommune, klage over, at et underkriterium var beskrevet forskelligt i udbudsbekendtgørelsen og udbudsbetingelserne, ikke taget til følge, da forholdet ikke havde medført uklarhed), 2/5-01 (Magnus mod Told og Skat, mulighed for at tage forbehold om alle elementer i udbuddet stred mod gennemsigtig-

	hedsprincippet), 24/10-01, Eiland mod Vestsjællands Amt (evalueringsmodel var i strid med gennemsigtighedsprincippet), 7/8-03 (KAS mod Århus Kommune, gennemsigtighedsprincippet overtrådt ved, at udbyderen havde givet en fejlagtig oplysning til en enkelt tilbudsgiver), 10/10-03 (Statsansattes Kartel mod Trafikministeriet, det var i strid med gennemsigtighedsprincippet, at udbyder stillede spørgsmål som ordregiver, når spørgsmålet reelt blev stillet som tilsynsmyndighed), 22/3-04 (J.A. Mortensen mod Kulturministeriet, udbyderen havde overtrådt gennemsigtighedsprincippet, fordi licitationsbetingelserne kunne forstås sådan, at udbyderen også var udbyder af en anden licitation med en anden udbyder), 2/9-04 (BN Produkter mod Odense Renovationsselskab, gennemsigtighedsprincippet overtrådt ved krav om, at affaldscontainere skulle opfylde en bestemt standard, da standarden ikke omfatter containere som de pågældende), 23/9-04 (Glatførebekæmpende vognmænd mod Nordjyllands Amt, gennemsigtighedsprincippet overtrådt ved uklarhed i udbudsbetingelserne, hvorefter tilbudsgiverne ikke kunne konstatere, hvordan tildelingsbeslutningen ville blive truffet), EF-domstolen 14/10-04 (Kommissionen mod Frankrig, det følger af principperne om ligebehandling og gennemsigtighed, at et udbud klart skal definere kontraktens art og kriterierne for tildeling af den), 14/10-04 (SK Tolkeservice mod Københavns Amt, som følge af gennemsigtighedsprincippet skulle en ordregiver, der udbød en ikke udbudspligt tjenesteydelse efter Tjenesteydelsesdirektivet, gennemføre udbuddet efter direktivets regler om udbudspligtige tjenesteydelser; desuden overtrædelse af gennemsigtighedsprincippet og ligebehandlingsprincippet ved at lægge vægt på forhold, der ikke var omtalt i udbudsbetingelserne, og ved at vurdere forholdene usagligt), 29/10-04 (Flemming Damgaard mod Helle Kommune, Tilbudslovens ligebehandlingsprincip og gennemsigtighedsprincippet overtrådt ved, at udbyder lagde vægt på efterfølgende prisoplysninger fra en tilbudsgiver, idet tilbudssummen skal kunne udledes umiddelbart af tilbuddet), 22/11-04 (Dansk Restproduktion mod Århus Kommune, angivelse af, at kontrakt ville blive indgået efter forhandling, var i strid med gennemsigtighedsprincippet; hvis udbyder har taget et tilbud med et ikke-grundlæggende forbehold i betragtning, må udbyder som følge af gennemsigtighedsprincippet ikke senere afvise tilbuddet på grund af forbeholdet), 30/11-04 (Finn Hansen mod Vendersbo, det var i strid med Tilbudslovens § 6 og gennemsigtighedsprincippet, at udbyder lagde et beløb til tilbudspriserne for at gøre tilbuddene sammenlignelige), 9/3-05 (A-1 Communication mod Københavns Amt, en ordregiver, der udbød en ikke udbudspligtig ydelse efter Tjenesteydelsesdirektivet, skulle som følge af gennemsigtighedsprincippet gennemføre udbuddet efter direktivets regler om udbudspligtige tjenesteydelser; overtrædelse ved at lægge vægt på forhold, der ikke var omtalt i udbudsbetingelserne, og ved at vurdere forholdene usagligt), 11/3-05 (MT Højgaard mod Frederiksberg Boligfond, overtrædelse ved manglende oplysning om vægtning af visse underkriterier), 18/4-05 (Løgten mod Århus Kommune, overtrædelse af Tilbudslovens ligebehandlingsprincip og gennemsigtighedsprincippet ved annullation uden saglig grund og ved angivelse af urigtig begrundelse for annullationen), 2/9-05 (Tipo mod Københavns Kommune, principperne om ligebehandling og gennemsigtighed gælder ved udbud af en tjenesteydelse omfattet af Tjenesteydelsesdirektivets bilag I B), 11/11-05 (Blue Line mod Storstrøms Trafikselskab, udbyderens ombytning af en primær og en subsidiær leverandør var i strid med principperne om ligebehandling og gennemsigtighed), EF-domstolen 24/11-05 (ATI EAC, om under hvilke betingelser udbyder kan undlade på forhånd at oplyse om den indbyrdes vægtning af delkriterier til et underkriterium), 2/5-06 (DA mod Albertslund Boligselskab mfl., udbyders vægtning inden for rammer var i strid med gennemsigtighedsprincippet og Udbudsdirektivets § 53, stk. 2), 5/9-06 (Joca mod Reno Syd, uklarheder i udbudsbetingelserne i strid med gennemsigtighedsprincippet), 6/9-06 (Sahva mod Københavns Kommune, udbudsbetingelsernes struktur medførte ikke uklarheder), 10/11-06 (Svend Andresen mod Århus Amt, ved tildelingskriteriet det økonomisk mest fordelagtige bud medfører sideordnede licitationer risiko for manglende gennemsigtighed), 14/12-06 (Baxter mod Roskilde Amt mfl., længere række overtrædelser af gennemsigtighedsprincippet), 12/2-07 (Dansk Høreteknik mod Københavns Kommune, tilbudsgiverne må kunne forvente, at det er oplyst på forhånd, hvis udbyderen vil lægge afgørende vægt på, at de tilbudte produkter har nogle bestemte egenskaber, overtrædelse ved ikke at have udformet en skriftlig tilbudsvurdering senest samtidig med tildelingsbeslutningen), 27/4-07 (CT Renovation mod Skive-Egnen, indgåelse af kontrakt for et kortere tidsrum end angivet i udbudsbekendtgørelsen var i strid med gennemsigtighedsprincippet), 6/6-07 (Rengøringsgrossisten mod Skive Kommune, overtrædelse af gennemsigtighedsprincippet ved uoverensstemmende angivelser i udbudsbetingelserne og udbudsbekendtgørelsen), EF-domstolen 14/6-07 (Medipac-Kazantzkis, Indkøbsdirek-

	tivet gælder ikke for udbud under tærskelværdien, men principperne om ligebehandling og gennemsigtighed skal følges under sådanne udbud), EF-domstolen 18/7-07 (Kommissionen mod Grækenland, antagelse af tilbud i strid med udvælgelseskriterier angår ligebehandlingsprincippet, ikke gennemsigtighedsprincippet), 13/7-07 (Magnus mod Skat, overtrædelse af Udbudsdirektivet ved modstridende angivelser i udbudsbekendtgørelsen og udbudsbetingelserne, ufyldestgørende beskrivelse af det udbudte i udbudsbekendtgørelsen), 29/8-07 (Sectra mod Region Syddanmark, overtrædelse ved manglende angivelse af, hvorledes tilbud på optioner ville indgå i tilbudsvurderingen, opretholdt ved ØL 30/3-09), 3/9-07 (SP Medical mod Skat, overtrædelse ved ufuldstændige oplysninger om den udbudte leverance og ved at lægge vægt på forhold, der ikke var omfattet af udbudsbetingelserne, opretholdt af Retten i Horsens 20/5-09), 17/10-07 (Triolab mod RH, overtrædelse ved ikke at have udformet en skriftlig tilbudsvurdering, ved, at udbudsbetingelserne gav mulighed for forbehold og forhandling på samtlige punkter, og ved angivelse af, at nogle udbudsretligt meningsløse standardbetingelser fandt anvendelse), 12/2-08 (Rengøringsgrossisten mod Skive Kommune, overtrædelse af gennemsigtighedsprincippet ved henvisning til Tjenesteydelsesdirektivet, der var ophævet), 14/2-08 (Jysk Erhvervsbeklædning mod Hjørring Kommune, overtrædelse af gennemsigtighedsprincippet ved modstridende angivelser i udbudsbekendtgørelsen og udbudsbetingelserne), Retten 12/3-08 (Europ. Service Network mod Kommissionen, gennemsigtighedsprincippet er et supplement til ligebehandlingsprincippet og skal sikre mod favorisering og vilkårlighed), Retten 12/3-08 (Evr. Dynamiki mod Kommissionen, do.), 27/3-08 (AV Form mod Esbjerg Kommune mfl., krav om, at tilbuddene skulle omfatte mindst 4.000 varenumre, var i strid med principperne om ligebehandling og gennemsigtighed**,** opretholdt ved Retten i Herning 5/11-09), 29/4-08 (Funder Ådalkonsortiet mod Vejdirektoratet, udbyderen havde ikke pligt til i udbudsbetingelserne at angive retningslinjer for tildeling af karakter vedrørende de enkelte underkriterier, men overtrædelse af gennemsigtighedsprincippet ved anvendelse af en uklar fremgangsmåde ved ændring af udbudsbetingelserne), 30/5-08 (Serviceselskabet mod Region Midtjylland, et underkriterium var ikke uklart beskrevet i udbudsbetingelserne), 27/6-08 (DA mod Handels- og Søfartsmuseet, overtrædelse af bl.a. gennemsigtighedsprincippet ved gennemførelse af projektkonkurrence), 11/7-08 (Labofa mod SKI mfl., gennemsigtighedsprincippet overtrådt ved forskellige uklare angivelser i udbudsbetingelserne; angivelser i udbudsbetingelserne af, at nogle møbler »ca.« skulle have bestemte dimensioner, var ikke en overtrædelse af gennemsigtighedsprincippet), 12/9-08 (Master Data mod Københavns Kommune, det fremgik ikke tilstrækkelig præcist af udbudsbetingelserne, hvad der ville blive lagt vægt på i forhold visse af underkriterierne), 5/11-08 (Brøndum mod Ringgården, et underkriterium var uklart og gav ikke tilbudsgiverne mulighed for at vurdere, hvilket indhold de skulle give tilbuddet; overtrædelse ved forskellige angivelser i udbudsbetingelserne og udbudsbekendtgørelsen; hvis tildelingskriteriet er det økonomisk mest fordelagtige bud og de kvalitative underkriterier er uegnede, har udbyderen saglig grund til at annullere udbuddet, hvorimod det ville stride mod gennemsigtighedsprincippet at anvende tildelingskriteriet laveste pris, dette er udtryk for en bevidst ændring af Klagenævnet praksis), 17/12-08 (Bandagist-Centret mod Århus Kommune, overtrædelse af gennemsigtighedsprincippet ved anmodning om oplysning af rabatter på produkter, der ikke var nævnt i tilbudslísten, men som naturligt hørte under det udbudte), 19/12-08 (UAB mod Ringsted Kommune, overtrædelse af Udbudsdirektivets regler om rammeaftaler ved kontraktsbestemmelse om option på forlængelse af kontrakten efter dens udløb efter 3 år, selvom optionen ifølge udbudsbetingelserne skulle udnyttes inden et år fra tildelingsbeslutningen)
Grundlæggende element	EF-domstolen 22/6-93 (sag C-243/89, Kommissionen mod Danmark, Storebæltsagen, hvis et tilbud indeholder forbehold om en grundlæggende bestemmelse i udbudsbetingelserne, må tilbuddet ikke tages i betragtning), 9/6-04 (Per Aarsleff mod Fyns Amt mfl., klausul i standardforbehold om vinterforanstaltninger angik ikke et grundlæggende element), 26/8-04 (Per Aarsleff mod Amager Strandpark, klausul i standardforbehold om vinterforanstaltninger angik som følge af sagens omstændigheder et grundlæggende element og gjorde derfor tilbuddet ukonditionsmæssigt, hvilket derimod ikke var tilfældet med hensyn til klausul i standardforbeholdene om prisregulering; tilkendegivelse om, at tilbud med væsentlige forbehold ville blive afvist, var ikke tilstrækkelig præcis til at give udbyder pligt til at afvise et tilbud med forbehold om et ikke grundlæggende element, ændret ved ØL 5/2-08 med hensyn til forbeholdet om vinterforanstaltninger), 30/8-04 (Benny Hansen mod Vangsgade 6, forbehold om, at bygherren skulle stille sikkerhed, angik efter sin beskaffenhed et grundlæggende element), 30/9-04 (Colas mod Videbæk Kommune, om et element er grundlæggende,

	afhænger af en fortolkning af licitationsbetingelserne), 8/10-04 (Virklund Sport mod Randers Kommune, nogle krav i licitationsbetingelserne var grundlæggende elementer ud fra en konkret vurdering), 26/11-04 (Pihl & Søn mod Kriminalforsorgen, et forbehold om tidsplan angik et grundlæggende element, et andet forbehold angik ikke et grundlæggende element, da udbudsbetingelserne var uklare på det pågældende punkt), 16/12-04 (Brunata mod diverse boligselskabsafdelinger, overtrædelse af ligebehandlingsprincippet ved at give en tilbudsgiver lejlighed til at ændre tilbuddet med hensyn til et grundlæggende element), 18/4-05 (Løgten mod Århus Kommune, nogle forbehold angik ikke grundlæggende elementer), 25/10-05 (Hoffmann mod Skjern Kommune, overtrædelse af Tilbudsloven ved at tage et tilbud i betragtning, selvom tilbuddet afveg fra licitationsbetingelserne med hensyn til flere grundlæggende elementer), 16/1-06 (MT Højgaard mod DR, nogle standardforbehold angik ikke grundlæggende elementer), 6/7-06 (Logstor mod Viborg Fjernvarme, nogle forbehold angik grundlæggende elementer, andre ikke), 19/3-07 (STB Byg mod Hedensted Kommune, et forbehold om tidsplan angik et grundlæggende element, også selvom forbeholdet gik ud på en tidligere igangsættelse end angivet i tidsplanen), 26/4-07 (MT Højgaard mod Aalborg Lufthavn, forbehold vedrørende forsikring og vejrlig angik ikke grundlæggende elementer), 2/5-07 (Bent Vangsøe mod Ørestadsselskabet, en uklar bemærkning i et tilbud kunne forstås som et forbehold om et grundlæggende element, hvorfor udbyderen skulle afvise tilbuddet), 10/8-07, MT Højgaard mod Lejerbo, tilbud med forbehold om tidsplan måtte ikke tages i betragtning, opretholdt ved Århus Ret 6/5-09), 3/12-07 (Stina mod Lemvig Kommune, forbehold om tidsplan angik et grundlæggende element, hvorfor tilbuddet ikke måtte tages i betragtning), 18/1-08 (Eurofins mod Aalborg Kommune, en bemærkning i et tilbud om prisregulering var et forbehold, der bevirkede, at tilbuddet ikke måtte tages i betragtning), 31/3-08 (Cowi mod Kort og Matrikelstyrelsen, forbehold om tidsplan angik et grundlæggende element), 2/10-08 (C.C. Brun mod Storebælt, et tilbudsforbehold om tidsplan angik et grundlæggende element, i hvert fald fordi licitationsbetingelserne angav, at tidsplanens overholdelse var af største vigtighed, hvorfor tilbuddet ikke måtte tages i betragtning), 16/12-08 (Elindco mod Universitets- og Byggestyrelsen, et tilbudsforbehold om tidsplan angik et grundlæggende element, hvorfor tilbuddet ikke måtte tages i betragtning, det var angivet i licitationsbetingelserne, at tidsplanen var et grundlæggende element)
Grænseoverskridende element	EF-domstolen 25/4-96 (sag C-87/94, Kommissionen mod Belgien, sagen om de wallonske busser, Forsyningsvirksomhedsdirektivet skulle følges, selvom alle tilbudsgivere var belgiske), EF-domstolen 14/11-02 (Felix Swoboda, Tjenesteydelsesdirektivet skal overholdes, selvom der ikke foreligger et grænseoverskridende element), 18/9-07 (Kortegaard mod Kolding Kommune, et krav om, at nogle planter skulle være af dansk herkomst, var i strid med traktatens forbud mod kvantitative indførselsrestriktioner), EF-domstolen 13/11-07 (Kommissionen mod Irland, indgåelse af kontrakt om en bilag I B-tjenesteydelse kunne ske uden forudgående offentliggørelse, da der ikke forelå et grænseoverskridende element), 31/3-08 (Cowi mod Kort og Matrikelstyrelsen, ligebehandlingsprincippet ikke overtrådt ved, at et udbud var udformet ud fra en forventning om, at det danske marked kunne levere den udbudte ydelse), EF-domstolen 15/5-08 (Secap, traktatens grundlæggende regler gælder kun for kontrakter under tærskelværdien, hvis kontrakterne har en klar grænseoverskridende interesse)
Hasteprocedure	23/1-96 (PAR mod Glostrup Kommune, hasteprocedure ikke lovlig), EF-domstolen 18/11-04 (Kommissionen mod Tyskland, udbudspligt eventuelt som hasteprocedure for en kommunes antagelse af underleverandør til affaldsbortskaffelse), 11/3-05 (MT Højgaard mod Frederiksberg Boligfond, hasteprocedure var uberettiget, da behovet for hasteprocedure skyldtes udbyder selv)
Inhabilitet, herunder teknisk dialog	7/7-95 (Valles Trans-Media mod Københavns Kommune, ikke overtrædelse), 23/8-95 (B4 mod Holbæk Kommune, overtrædelse), 13/6-96 (FRI mod Roskilde Kommune, ikke overtrædelse), 18/11-96 (European Metro Group mod Ørestadsselskabet, ikke overtrædelse, for så vidt ændret ved HR 31/3-05 i UfR 2005 s. 1799 H), 8/1-97 (Handelskammeret mod Rigshospitalet, ikke overtrædelse), 17/3-98 (Konkurrencestyrelsen mod Tårnby Kommune, ikke overtrædelse), 1/7-98 (C.F. Møller mod Vestsjællands Amt, ikke overtrædelse), 15/12-99 (Lifeline mod Dansk Hunderegister, det var i strid med Tjenesteydelsesdirektivet, at et af udbyderens bestyrelsesmedlemmer, der tillige repræsenterede flere tilbudsgivere, havde deltaget i gennemgangen af tilbuddene), 30/1-01 (DTL mod Haderslev Kommune, tilbud fra et interessentskab, som udbyder var interessent i, kunne tages i betragtning), 30/6-03 Skanska mod Løgstør Kommune, tilbud taget i betragtning i strid med »inhabilitetsreglen« i Tilbudslovens § 5), 8/8-03 (Eurodan mod Sønderborg Andelsboligforening, klager burde indse, at klager som tidligere rådgiver var inhabil, hvis licitationsbetingelserne skulle forstås på en bestemt

	måde), 17/11-03 (Helsingør Kommune mod Stengade 56, tildeling til virksomhed, der havde ejersammenfald med udbyder, var ikke i strid med Tilbudslovens inhabilitetsregler, men derimod med lovens ligebehandlingsprincip), 13/1-04 (Pihl & Søn mod Hadsund Kommune, prækvalifikation af tilbudsgiver var i strid med ligebehandlingsprincippet, da tilbudsgiverens forudgående rådgivning dannede grundlag for udbuddet), 20/2-04 (Miri mod Esbjerg Kommune, udbyder måtte ikke lade medarbejdere fra en tilbudsgivers underleverandør deltage i evalueringen, opretholdt ved VL 31/3-06), EF-domstolen 3/3-05 (Fabricom, personer, der har udført forberedende arbejde vedrørende et udbud, må ikke ubetinget afskæres fra at give tilbud, udbyders afvisning af et tilbud med begrundelse, at tilbudsgiveren er »inhabil«, skal meddeles tilbudsgiveren i rimelig tid inden tildelingsbeslutningen), Retten 17/3-05 (AFCon mod Kommissionen, udbyderen overtrådte ligebehandlingsprincippet ved ikke at undersøge, om en tilbudsgiver skulle udelukkes som følge af tilbudsgiverens forbindelse med et medlem af udbyderens bedømmelsesudvalg), HR 31/3-05 i UfR 2005 s. 1799 H (European Metro Group mod Ørestadsselskabet, ligebehandlingsprincippet tilsidesat ved, at et ingeniørfirma, der havde været rådgiver for en tilbudsgiver, deltog i evalueringen af tilbuddene), Retten 14/2-06 (TEA-CEGOS og STG mod Kommissionen, udbyderen havde med rette afvist tilbud fra to tilbudsgivere, der tilhørte samme »juridiske gruppe«, da forholdet medførte risiko for konkurrencefordrejning og interessekonflikt), 2/5-06 (DA mod Albertslund Boligforening mfl., overtrædelse ved at prækvalificere en virksomhed, der i vidt omfang havde rådgivet udbyder i forbindelse med udbuddet), 23/8-06 (Hedeselskabet mod Sønderjyllands Amt, et tilbud må ikke tages i betragtning, hvis tilbudsgiveren har udført forberedende arbejde, der har medført en konkurrencefordel), Retten 18/4-07 (Deloitte mod Kommissionen, tilbud fra et konsortium vedrørende en evalueringsopgave afvist med rette, da konsortiets hoveddeltagere til dels selv udført de opgaver, der skulle evalueres, og derfor befandt sig i en interessekonflikt), 24/8-07 (LSI Metro Gruppen mod Ørestadsselskabet, udbyderen kunne prækvalificere virksomheder, der havde stillet medarbejdere til rådighed for forberedelsen af det udbudte projekt, en udbyder må ikke undlade at prækvalificere en virksomhed med den begrundelse, at en ansat hos udbyderen har tætte forbindelser til virksomheden, opretholdt ved ØL 18/9-09), 8/1-08 (WAP mod Ørestadsparkering, kontrakten kunne tildeles en tilbudsgiver, selvom tilbudsgiveren havde samarbejde med en person, der tidligere havde været ansat hos udbyderens rådgiver), 14/1-08 (LSI mod Metroselskabet, Klagenævnet har ikke kompetence til at tage stilling til, om en udbyder har overtrådt Forvaltningslovens inhabilitetsregler; forbindelse mellem en ansat hos udbyderen og en tilbudsgiver havde ikke påvirket udbudsprocessen således, at der ved tildelingsbeslutningen var sket overtrædelse af ligebehandlingsprincippet, opretholdt ved ØL 18/9-09)
Jernbaneloven	4/10-02 (Statsansattes Kartel mod Trafikministeriet, Klagenævnet kan tage stilling til overtrædelse af EU's udbudsregler ved udbud af jernbanedrift, men kunne ikke tage stilling til Trafikministeriets afgørelse som tilsynsmyndighed)
Klageadgang	26/4-96 (Pihl & Søn mod Avedøre Kloakværk, Klagenævnet kompetent til på udbyders anmodning at tage stilling til, om klagerens tilbud var ukonditionsmæssigt), 11/10-96 (Luis Madsen mod Odense Kommune, ikke klageadgang for ansatte eller deres fagforening), 31/10-96 (Semco mod Brønderslev Kommune, taget stilling til, om forhandlinger med klager var i strid med forhandlingsforbuddet), 23/4-97 (Crocus mod Århus havn, klageadgang for potentiel tilbudsgiver), 9/7-97 (klageadgang for tilbudsgiver over udbyders annullation af udbud), 15/1-98 (Miljøforeningen mod Københavns Lufthavne, ikke klageadgang for miljøforening, generelle bemærkninger om retlig interesse som betingelse for klageadgang), 27/4-98 (Handelskammeret mod Danmarks Statistik, ikke selvstændig klageadgang for Handelskammerets underorganisationer), 8/6-98 (LR mod Skovbo Kommune, klageadgang for potentiel tilbudsgiver over manglende udbud), 28/9-98 (Humus mod Esbjerg Kommune, forbigået tilbudsgiver havde retlig interesse og dermed klageadgang, denne ikke afskåret ved passivitet), Retten 6/7-00 (Alsace International Car Services mod Kommissionen, en tilbudsgiver, hvis tilbud var ukonditionsmæssigt, havde retlig interesse i at anlægge sag mod udbyderen for at få mulighed for at afgive tilbud under et eventuelt nyt udbud), 7/12-00 (FRI mod Kulturministeriet, bortforhandling af forbehold var ikke en overtrædelse af EU's forhandlingsforbud som følge af helt særegne omstændigheder, dvs. den klagende organisations misbrug af sin klageadgang til at søge de bærende principper bag udbudsdirektiverne modvirket), 5/4-01 (Sømændenes Forbund mod Nordjyllands Amt og Læsø Kommune, om klageadgang for Sømændenes Forbund efter Lov om færgefart), 10/5-02 (Ementor mod Århus Amt, udbyder havde accepteret, at en virksomhed indtrådte som prækvalificeret, og virksomheden var herefter klagebe-

	rettiget), 8/5-03 (Dansk Taxi Forbund 7. kreds mod Vestsjællands Amt, lokal afdeling af klageberettiget organisation var ikke klageberettiget), 28/5-03 (Bilhuset Ringsted mfl. mod Ringsted Kommune, nogle virksomheder var ikke klageberettigede, da de ikke havde givet tilbud, og da der ikke var oplyst andre omstændigheder, der kunne begrunde retlig interesse i at klage), EF-domstolen 19/6-03 (Hackermüller, om klageadgang for tilbudsgivere med ukonditionsmæssige tilbud), EF-domstolen 19/6-03 (Fritsch, der må ikke stilles krav om inddragelse af et mæglingsorgan før en klage), 12/8-03 (Skanska mod Vejle Kommune, en tilbudsgiver havde retlig interesse i at klage, selvom tilbuddet eventuelt var ukonditionsmæssigt), EF-domstolen 12/2-04 (Grossmann Air Service, der er klageadgang for potentielle tilbudsgivere, men klager fra sådanne skal indgives straks og må ikke afvente udbuddets afslutning; der må ikke stilles krav om inddragelse af et mæglingsorgan før en klage), 12/10-04 (Køster Entreprise mod Morsø Kommune, en tilbudsgiver havde retlig interesse i at klage over udbyderens fejl under et udbud, som udbyderen annullerede pga. fejlene, også selvom tilbudsgiveren ikke afgav tilbud under et nyt udbud), 14/7-05 (Nabofronten mod Østkraft, klage fra en sammenslutning af personer afvist, da sammenslutningen ikke var en juridisk person, og da sammenslutningens medlemmer ikke havde retlig interesse), 10/3-06 (FFF og LO mod Viborg Amts trafikselskab, varetagelse af ansættelsesretlige hensyn var ikke retlig interesse i at klage til Klagenævnet), 14/7-06 (Heine Petersen mod Økonomistyrelsen, virksomhed som konsulent og rådgiver for en potentiel tilbudsgiver var ikke retlig interesse i at klage til Klagenævnet), 6/11-06 (Thorup Gruppen mod Skjern Kommune, klageadgang for en arkitekt, der havde udført arkitektarbejdet ved udformningen af en tilbudsgivers tilbud), 16/4-07 (STB Byg mod Hedensted Kommune, tilbudsgiver, hvis tilbud med rette var afvist på grund af forbehold, havde retlig interesse i at klage til Klagenævnet over alle forhold ved licitationen), 21/8-07 (Centralforeningen mod Midttrafik, en organisation, der har klageadgang, er ikke klageberettiget med hensyn til tvister om indgåede kontrakter), EF-domstolen 3/4-08 (Kommissionen mod Spanien, overtrædelse af 1. kontroldirektiv ved, at der i visse tilfælde ikke er mulighed for at klage over en tildelingsbeslutning før kontraktsindgåelsen, ikke overtrædelse ved en regel om, at ugyldiggjorte kontrakter kan opretholdes midlertidigt), 27/6-08 (DA mod Handels- og Søfartsmuseet, overtrædelse af effektivitetsprincippet og Lov om Klagenævnet for Udbud ved opfordring til de prækvalificerede om at frafalde klageadgangen), 23/9-08 (Holstebro Brandkorpsforening mod Holstebro Kommune, en faglig organisation havde ikke klageadgang)
Klagefrist	EF-domstolen 12/12-02 (Universale-Bau, 1. kontroldirektiv er ikke til hinder for klagefrister, og frister på 14 dage er rimelige), EF-domstolen 27/2-03 (Santex, en klagefrist på 60 dage var ikke i sig selv i strid med første kontroldirektiv, men der skulle ses væk fra den som følge af sagens omstændigheder), EF-domstolen 11/10-07 (Lämmerzahl, en national regel om klagefrist må ikke anvendes sådan, at den gør klage praktisk umulig eller uforholdsmæssigt vanskelig; national ret skal fortolkes i overensstemmelse med 1. kontroldirektiv, og hvis dette ikke er muligt, skal den nationale domstol se væk fra nationale bestemmelser i strid med direktivet), EF-domstolen 3/4-08 (Kommissionen mod Spanien, overtrædelse af 1. kontroldirektiv ved, at der i visse tilfælde ikke er mulighed for at klage over en tildelingsbeslutning før kontraktsindgåelsen)
Kompetence, Klagenævnets	25/10-95 (Siemens mod Esbjerg Kommune, danske regler om fortrolighed lå uden for Klagenævnets kompetence), 26/4-96 (Pihl & Søn mod Avedøre Kloakværk, Klagenævnet var kompetent til på udbyders anmodning at tage stilling til, om klagerens tilbud var ukonditionsmæssigt, men var ikke kompetent til at tage stilling til, hvem der skulle have ordren), 14/3-97 (Immuno mod sygehusvæsnet, Klagenævnet var kompetent til at påkende en indsigelse om, at sagen var omfattet af traktatens artikel 36), 23/4-97 (Crocus mod Århus Havn, ikke anledning for Klagenævnet til at beskæftige sig med gennemførelsen af et udbud, der ikke var sket som EU-udbud), 1/5-97 (LR mod Solrød Komme, Klagenævnet ikke kompetent til at tage stilling til opsigelse af kontrakt), 19/8-97 (Poul Hansen mod Vejdirektoratet, Klagenævnet var ikke kompetent til at tage stilling til, hvem der skulle have kontrakten), 17/10-97 (Tårnby Kommune, Klagenævnet var kompetent til at tage stilling til aktindsigt i medfør af offentlighedsloven), 14/1-98 (Xyanide mod Københavns Kommune, taget stilling til et præjudicielt bevisspørgsmål), 22/1-98 (Unitron mfl. mod Fødevareministeriet, Klagenævnet ønskede ikke at beskæftige sig med gennemførelsen af et udbud, der var foretaget som ikke EU-udbud), 25/1-98 (Konkurrencestyrelsen mod Tårnby Kommune, Klagenævnet er kompetent til at færdigbehandle en sag, selvom klager har tilbagekaldt den), 8/6-98 (LR mod Skovbo Kommune, forudsætning om, at Klagenævnet kan annullere beslutning om kontrakt indgået uden forudgående pligtigt udbud), 27/11-98 (Turist-

	vognmændenes Landsforening mod Ribe Amt, Klagenævnet er kompetent til at foretage en præjudiciel vurdering i henhold til andre retsregler end de EU-retlige), 18/3-99 (Seghers mod Amagerforbrændingen, Klagenævnet havde ikke kompetence til at tage stilling til, om udbyderen var afskåret fra at indgå kontrakt med en bestemt tilbudsgiver), 8/6-99 (Farum Menighedsråd mod Kirkeministeriet, Klagenævnet var ikke kompetent til at tage stilling til, om Kirkeministeriet kunne udbyde en tjenesteydelse på det folkekirkelige område), 10/12-99 (Herning Bladet mod Herning Kommune, klage ikke færdigbehandlet efter at klageren havde tilbagekaldt den, da der ikke forelå ganske særlige grunde), 8/11-00 (Friedmann mod Forskningsministeriet, foretaget et præjudcielt skøn med hensyn til, om klageren ville have haft pligt til at udføre et arbejde til nogle bestemte priser), 22/3-02 (Johs. Sørensen mod Århus Kommune, Klagenævnet kunne ikke beskæftige sig med, om udbyders annullation af udbuddet var en privatretlig misligholdelse, da dette afhang af dansk aftale- og entrepriseret), 4/10-02 (Statsansattes Kartel mod Trafikministeriet, Klagenævnet kan tage stilling til overtrædelse af EU's udbudsregler ved udbud af jernbanedrift, men kunne ikke tage stilling til Trafikministeriets afgørelse som tilsynsmyndighed), 5/2-03 (Scandlines mod Ærøske Trafikselskab, Klagenævnet ikke kompetent til at tage stilling til, om Lov om færgefart strider mod EU-retten), 7/4-03 (Ementor mod Århus Amt, erstatningskrav afvist, da både udbyder og den virksomhed, der var indgået kontrakt med, kunne være erstatningsansvarlige, og da Klagenævnets kompetence ikke omfatter en sådan situation), 8/4-03 (Dansk Taxi Forbund mod Vestsjællands Amt, påstand om overtrædelse af danske regler afvist), 28/4-03 (Centralforeningen af Taxiforeninger i Danmark mod Vestsjællands Amt, tilsvarende), EF-domstolen 19/6-03 (GAT, et klageorgan må tage et forhold op ex officio, men parterne skal have lejlighed til at udtale sig), 5/8-03 (Georg Berg mod Køge Kommune, Klagenævnet ikke kompetent til at tage stilling til kontraktsforholdet mellem udbyder og en entreprenør), 12/8-03 (Skanska mod Vejle Kommune, Klagenævnet ikke kompetent til at udpege laveste konditionsmæssige tilbud), 15/8-03 (Bravida mod Statens Forskn., Klagenævnet kunne tage stilling til prissætninger, som først var foretaget efter klagen), 30/9-04 (Colas mod Videbæk Kommune, Klagenævnet ønskede ikke at tage stilling til nogle påstande, der sigtede til, at udbyder havde haft pligt til at indgå kontrakt med klageren), 15/12-05 (Air Liquide mod Roskilde Amt mfl., påstand om pålæg om nyt udbud afvist, bl.a. fordi udbudspligt ved indgåelse af ny kontrakt fulgte af Udbudsdirektivet), 19/12-05 (Kirkebjerg mod HS, klagesag færdigbehandlet, selvom klagen var tilbagekaldt), 13/2-06 (Haubjerg Interiør mod Vejle Amt, klage afvist, da den angik spørgsmålet, om udbyderen havde misligholdt en rammeaftale med klageren), 5/9-06 (Joca mod Reno Syd, Klagenævnet kan kun annullere beslutninger), 6/9-06 (Sahva mod Københavns Kommune, Klagenævnet kan ikke pålægge udbyder at ophæve en indgået kontrakt), 6/11-06 (Thorup Gruppen mod Skjern Kommune, Klagenævnet var kompetent, da klagen angik overtrædelse af Tilbudsloven, selvom den muligvis reelt vedrørte et ophavsretligt spørgsmål), 13/11-06 (Cowi mod Sønderjyllands Amt, afvisning af påstande om konstatering af det økonomisk mest fordelagtige bud og af, at udbyderen ikke kunne have annulleret udbuddet), 8/12-06 (Nethleas mod Økonomistyrelsen, nogle påstande afvist, da de var fremsat meget sent trods Klagenævnets opfordring om præcisering af klagen), 21/2-07 (MT Højgaard mfl. mod Frederiksborgcentret, Klagenævnet var ikke kompetent til at tage stilling til, om ordregivers brug af ideer i et tilbud var en ophavsretskrænkelse), 22/2-07 (Platech Arkitekter mod Rødding Kommune, Klagenævnet var ikke kompetent til at behandle en klage vedrørende udbud af en tjenesteydelse under Udbudsdirektivets tærskelværdi), 4/7-07 (Dansk Taxi Råd mod Nordjyllands Trafikselskab, klage afvist, da den angik indholdet af rammekontrakter og udbyderens forpligtelser i henhold til dem), 21/8-07 (Centralforeningen mod Midttrafik, Klagenævnet har ikke kompetence med hensyn til tvister om indgåede kontrakter), 29/8-07 (Sectra mod Region Syddanmark, ikke taget stilling til klage over pointtildeling), 18/9-07 (Kortegaard mod Kolding Kommune, Klagenævnet havde ikke kompetence til at tage stilling til en licitation i henhold til Tilbudsloven vedrørende et vareindkøb og har ikke kompetence til at tage stilling til klager over kontraktretlige spørgsmål, licitationen var sket før 1. juli 2007), 17/10-07 (Triolab mod RH, ikke taget stilling til en påstand om konstatering af, at klagerens tilbud var det økonomisk mest fordelagtige), 30/11-07 (Ejnar Kristensen mod Vejen Kommune, Klagenævnet var ikke kompetent til at tage stilling til en klage over licitation efter Tilbudsloven vedrørende en kontrakt om tjenesteydelser, licitationen var sket før 1. juli 2007), 21/12-07 (Damm mod Økonomistyrelsen, klage over overtrædelse af ligebehandlingsprincippet afvist, da klagen ikke angik det udbudsretlige ligebehandlingsprincip, hvorfor Klagenævnet ikke var kompetent), 9/1-08 (Thorup Grupppen mod Ringkøbing-Skjern Kommune, er-

	statningskrav afvist, da det påberåbte tab var forårsaget af udbyderens handlinger efter licitationen og derfor ikke var omfattet af Klagenævnets kompetence), 14/1-08 (LSI mod Metroselskabet, Klagenævnet har ikke kompetence til at tage stilling til, om en udbyder har overtrådt Forvaltningslovens inhabilitetsregler; en stillingtagen til udbyderens tilrettelæggelse af arbejdet uden stillingtagen til udbyderens beslutninger ligger uden for Klagenævnets kontrol med ordregivernes overholdelse af ligebehandlingsprincippet), 14/4-08 (Damm mod Økonomistyrelsen, en påstand afvist, da klageren ikke havde præciseret, hvad den sigtede til, hvorfor Klagenævnet ikke kunne behandle den forsvarligt), 30/4-08 (SCA mod Sorø Kommune (udbyderens afvisningspåstand ikke taget til følge, da Klagenævnet ikke fandt klagerens påstande uegnede til behandling), 14/5-08 (Trans-Lift mod DSB, Klagenævnet havde ikke kompetence til at tage stilling til, om de varer, som den valgte tilbudsgiver leverede, svarede til de tilbudte varer), 27/6-08 (DA mod Handels- og Søfartsmuseet, overtrædelse af effektivitetsprincippet og Lov om Klagenævnet for Udbud ved opfordring til de prækvalificerede om at frafalde klageadgangen), 2/10-08 (C.C. Brun mod Storebælt, ikke taget stilling til, om udbyderen havde vurderet tilbuddene rigtigt i relation til nogle af underkriterierne, da Klagenævnet ikke tager stilling til, hvilken pointtildeling en tilbudsvurdering skal give sig udslag i, udbyderens afvisningspåstand ikke fulgt), 3/10-08 (Creative mod Århus Kommune, klage over udbyderens tildeling af points til klagerens tilbud og den valgte tilbudsgivers tilbud ikke taget til følge, da det var godtgjort, at den valgte tilbudsgivers tilbud bedre end klagerens opfyldte udbudsbetingelsernes krav på det pågældende punkt), 16/10-08 (Grønbech mod Albertslund Boligselskab, nogle klagepunkter afvist, da Klagenævnet ved en tidligere kendelse havde taget stilling til de pågældende spørgsmål; Klagenævnet har ikke kompetence til at tage stilling til tvister vedrørende indgåede kontrakter), 6/11-08 (Dansk Taxi Råd mod Region Sjælland, Klagenævnet har kompetence til præjudicielt at tage stilling til dansk ret), 10/12-08 (Nordjysk Kloak mod Aalborg Kommune, klage over udbyderens pointtildeling ikke taget til følge, da Klagenævnet ikke havde grundlag for at tilsidesætte udbyderens skøn)
Koncerner	EF-domstolen 18/12-97 (Ballast Nedam Groep, som dokumentation for egnethed kan henvises til datterselskaber), EF-domstolen 10/11-98 (BFI Holding el. Arnhem, koncerndeltageres status som offentligretlige organer skal vurderes særskilt), EF-domstolen 2/12-99 (Holst Italia, som dokumentation for egnethed kan henvises til ressourcer hos andre, hvis der rådes over dem), 30/1-01 (DTL mod Haderslev Kommune, tilbud fra et interessentskab, som udbyder var interessent i, kunne tages i betragtning), 26/10-01 (Eterra mod Esbjerg Kommune, en tilbudsgiver, der var koncerndeltager, havde ikke bevist, at man rådede over de nødvendige ressourcer)
Koncession	21/10-98 (R98, synes at begrunde udbudspligt i henhold til Tjenesteydelsesdirektivet med, at der ikke forelå koncession), EF-domstolen 10/11-98 (BFI Holding el. Arnhem, en slags obiter dictum om koncession under Tjenesteydelsesdirektivet), 9/11-99 (More Group mod Århus Kommune, i hvert fald principperne i Tjenesteydelsesdirektivet skulle anvendes på en koncessionsaftale, der var udbudt i henhold til Bygge- og anlægsdirektivet), EF-domstolen 7/12-00 (Teleaustria og Telefonadress, der er ikke udbudspligt for koncessioner om tjenesteydelser efter Forsyningsvirksomhedsdirektivet, dog understregning af, at navnlig princippet om gennemsigtighed skal overholdes), EF-domstolen 12/7-01 (Ordine, ved overladelse af et infrastrukturarbejde til en grundejer skal denne forpligtes til at følge Bygge- og Anlægsdirektivet), EF-domstolen 21/7-05 (Coname, koncessionskontrakter om tjenesteydelser skal tildeles sådan, at virksomheder fra andre medlemsstater kan tilkendegive deres interesse), EF-domstolen 13/10-05 (Parking Brixen, lignende, definition af koncession), EF-domstolen 27/10-05 (Kommissionen mod Italien, en tidligere koncession om motorvejsanlæg fritog ikke for udbudspligt vedrørende udbygning af anlægget), EF-domstolen 18/7-07 (Kommissionen mod Italien, det er et fællesskabsretligt spørgsmål, om en aftale er en koncession, og national ret er uden betydning; definition af koncession)
Konkurrencepræget dialog	8/12-06 (Nethleas mod Økonomistyrelsen, udbyder havde foretaget en fuld forsvarlig forhåndsvurdering af de tekniske muligheder), 8/1-08 (WAP mod Ørestadsparkering, udbyderen har et vist begrænset skøn med hensyn til, om betingelserne for konkurrencepræget dialog er opfyldt; der kan gives mulighed for alternative tilbud ved konkurrencepræget dialog), 14/4-08 (Damm mod Økonomistyrelsen, overtrædelse af Udbudsdirektivet ved anvendelse af udbudsformen konkurrencepræget dialog, selvom betingelserne herfor ike var opfyldt, dissens, flertallets afgørelse kendt ugyldig ved ØL 29/6-09 som følge af mangelfuld begrundelse)
Kontraheringspligt	EF-domstolen 16/9-99 (Metalmeccanica, udbyder var ikke forpligtet til at tildele den

	eneste tilbudsgiver kontrakten), 20/2-04 (Miri mod Esbjerg Kommune, en pligt for udbyder til at antage det eneste konditionsmæssige tilbud måtte i hvert fald forudsætte, at udbyderen ikke havde været berettiget til at annullere udbuddet), 30/9-04 (Colas mod Videbæk Kommune, Klagenævnet ønskede ikke at tage stilling til nogle påstande, der sigtede til, at udbyder havde haft pligt til at indgå kontrakt med klageren), 12/10-04 (Køster Entreprise mod Morsø Kommune, udbyderen skulle have indgået kontrakt med klageren, hvis udbyderen ikke havde annulleret udbuddet, opretholdt ved ØL 19/12-05)
Kontrakt	21/3-02 (Holsted Minibus mod Næstved Kommune, om lovligheden af kontraktsbestemmelser om gensidig prøvetid), 27/4-07 (CT Renovation mod Skive-Egnen, indgåelse af kontrakt for et kortere tidsum end angivet i udbudsbekendtgørelsen var i strid med principperne om ligebehandling og gennemsigtighed), 6/9-06 (Sahva mod Københavns Kommune, udbudsbetingelserne behøver ikke indeholde udkast til kontrakt), 26/10-06 (Novartis mod HS, tilsvarende), 1/10-08 (MT Højgaard mod Slots- og Ejendomsstyrelsen mfl., EU-udbudsreglerne regulerede ikke, om udbyderne kunne indgå kontrakt efter Klagenævnets afgørelse i kendelse af 10/4-08 i samme sag), 16/10-08 (Grønbech mod Albertslund Boligselskab, der var ikke før indgåelsen af kontrakten med den valgte tilbudsgiver sket ændringer af kontraktsgrundlaget i strid med Udbudsdirektivet), 19/12-08 (UAB mod Ringsted Kommune, overtrædelse af Udbudsdirektivets regler om rammeaftaler ved kontraktsbestemmelse om option på forlængelse af kontrakten efter dens udløb efter 3 år, selvom optionen ifølge udbudsbetingelserne skulle udnyttes inden et år fra tildelingsbeslutningen)
Kontrol af oplysninger i tilbud eller ansøgninger	14/1-98 (Xyanide mod Københavns Kommune, klage over, at udbyder vidste, at den valgte tilbudsgiver havde begået uregelmæssigheder, ikke taget til følge, da udbyders kendskab ikke var bevist), 27/11-98 (Turistvognmændenes Landsforening mod Ribe Amt, udbyderen havde ikke pligt til at kontrollere rigtigheden af oplysning i tilbud), Retten 6/7-00 (Alsace International Car Services mod Kommissionen, udbyderen havde ikke pligt til at kontrollere, at den valgte tilbudsgiver opfyldte et krav i udbudsbetingelserne om, at tjenesteydelsen skulle udføres i overensstemmelse med national lovgivning), 21/3-02 (Holsted Minibus mod Næstved Kommune, udbyder havde ikke pligt til at undersøge, om en tilbudsgiver opfyldte en specifik dansk lovregel), 23/9-04 (Glatførebekæmpende vognmænd mod Nordjyllands Amt, udbyder har ikke pligt til at sikre, at tilbudsgiverne har nødvendige godkendelser og autorisationer), 6/9-06 (Sahva mod Københavns Kommune, udbyder kan lægge en oplysning i et tilbud til grund for sin vurdering af tilbuddet), 8/12-06 (Nethleas mod Økonomistyrelsen, ikke pligt for udbyder til at kræve dokumentation for visse oplysninger ved anmodning om prækvalifikation), 28/3-07 (Fujitsu Siemens mod Finansministeriet og SKI, der forelå ikke særlige omstændigheder, der forpligtede udbyderen til at iværksætte undersøgelser af, om tilbuddenes oplysninger var korrekte), 18/9-07 (Kortegaard mod Kolding Kommune, en udbyder har almindeligvis ikke pligt til at kontrollere, at den tilbudte ydelse opfylder de stillede krav), 14/4-08 (Damm mod Økonomistyrelsen, udbyder har ikke pligt til at kræve dokumentation for ønskede oplysninger), 30/5-08 (Serviceselskabet mod Region Midtjylland, der forelå ikke særlige omstændigheder, der kunne føre til en pligt for udbyderen til at kontrollere eller kræve dokumentation for oplysninger i tilbuddene), 11/9-08 (Pro-Safe mod Farvandsvæsnet, en udbyders kontrol af, om tilbud opfylder udbudsbetingelserne, skal ske ved at sammenholde tilbuddene med udbudsbetingelserne, og udbyderen skal kun indhente yderligere oplysninger, hvis der foreligger særlige omstændigheder), 17/9-08 (Bien-Air mod København og Århus Universiteter, der forelå ikke særlige omstændigheder, der kunne føre til en pligt for udbyderen til at kontrollere rigtigheden af en angivelse i et tilbud om, at det opfyldte et ufravigeligt mindstekrav)
Kontroldirektiverne	3/5-05 (Taxa Stig mod Vestsjællands Amt, hverken 1. kontroldirektiv eller Lov om Klagenævnet for Udbud medførte pligt for udbyder til at opsige en indgået kontrakt), EF-domstolen 18/7-07 (Kommissionen mod Tyskland, der var pligt til at ophæve en 30-årig kontrakt indgået i strid med Tjenesteydelsesdirektivet), EF-domstolen 11/10-07 (Lämmerzahl, klagefrister i national ret må ikke gøre en klage praktisk umulig eller uforholdsmæssigt vanskelig, om nødvendigt pligt til at se bort fra national ret), EF-domstolen 3/4-08 (Kommissionen mod Spanien, overtrædelse af 1. kontroldirektiv ved, at der i visse tilfælde ikke er mulighed for at klage over en tildelingsbeslutning før kontraktsindgåelsen)
Kontroltilbud	18/9-98 (FRI mod Frederiksberg Kommune, kontroltilbud er ikke i strid med EU's udbudsregler), 27/4-01 (DTL mod Nyk. F. Kommune, udbyder har ikke efter EU's udbudsregler pligt til at oplyse, at der vil blive indhentet et kontroltilbud, tvivlsomt om forhandlingsforbuddet gælder mellem udbyder og en afdeling hos udbyder)

Kvantitative indførselsrestriktioner	16/10-96 (Danske Vognmænd mod Stevns Kommune, ikke i strid med forbuddet med kvantitative indførselsrestriktioner, at en krævet renovationsbil alene kunne købes hos én dansk forhandler), 18/9-07 (Kortegaard mod Kolding Kommune, et krav om, at nogle planter skulle være af dansk herkomst, var i strid med traktatens forbud mod kvantitative indførselsrestriktioner)
Langvarige kontrakter	5/11-03 (Tilsynsrådet mod Rønnede Kommune, kontrakt om vejvedligeholdelse i 14 år med mulighed for forlængelse i 3 år var ikke i strid med udbudsdirektiverne eller traktaten), 27/4-06 (Unicomputer mod SKI, det var i strid med Indkøbsdirektivet, at nogle rammeaftaler var uden tidsbegrænsning, ændret ved ØL 11/10-07), EF-domstolen 18/7-07 (Kommissionen mod Tyskland, der var pligt til at ophæve en 30-årig kontrakt indgået i strid med Tjenesteydelsesdirektivet), 18/2-08 (Willis mod Lejerbo, en kontrakt med mulighed for en varighed på 8 år var ikke i strid med udbudsreglerne, da ordregiveren til enhver tid kunne opsige kontrakten), EF-domstolen 19/6-08 (Pressetext, udbudsreglerne indeholder ikke forbud mod tidsubegrænsede tjenesteydelsesaftaler; en aftaleklausul om uopsigelighed i et kortere tidsrum medfører ikke risiko for konkurrencefordrejning under forudsætning af, at klausulen ikke systematisk genindsættes)
Leasing	29/1-02 (Økonomi- og Erhvervsmst. mod Farum Kommune, anvendelse af finansieringsformen sale and lease back fritog ikke for udbudspligten, se også kendelse af 18/7-02 i samme sag), 3/7-02 (Judex mod Århus Amt, ligebehandlingsprincippet overtrådt ved, at udbyder havde indgået kontrakt om leasing, selv det var indkøb, der var udbudt), 16/12-03 (Bilhuset Randers mod Sønderhald Kommune, generelt om udbyders forhåndsvurdering i relation til tærskelværdi bl.a. med hensyn til leasing, forhåndsvurdering må ikke foretages efter prisen for et enkelt fabrikat, udbyders forhåndsvurdering var ikke saglig)
Legitimation	8/5-06 (Pankas mod Korsør Kommune, et krav i udbudsbetingelserne om, at kontrakten skulle underskrives af en tegningsberettiget, var ikke til hinder for, at tilbud blev underskrevet i henhold til stillingsfuldmagt)
Ligebehandlingsprincippet	23/8-95 (B4 mod Holbæk Kommune, overtrædelse), 21/2-96 (IBF Nord mod Aalborg Kommune, overtrædelse, tilbud var ikke modtaget rettidigt), EF-domstolen 25/4-96 (sag C-87/94, Kommissionen mod Belgien, sagen om de wallonske busser, det var i strid med principperne om ligebehandling og gennemsigtighed, at udbyderen tog hensyn til ændringer i det valgte tilbud efter tilbuddets afgivelse og til angivelser i tilbuddet, der ikke svarede til udbudsbetingelserne), 26/4-96 (Pihl & Søn mod Avedøre Kloakværk, overtrædelse ved at tage tilbud i betragtning trods uklare forbehold), 16/10-96 Danske Vognmænd mod Stevns Kommune, ikke forskelsbehandling, at en krævet renovationsbil kun kunne købes hos én dansk forhandler), 10/2-97 (Dafeta mod Lynettefællesskabet, en vægtningsmodel var i strid med ligebehandlingsprincippet, da den reelt kun kunne føre til antagelse af en bestemt tilbudsgiver), 29/10-97 (Esbjerg Renovationsselskab mod Rødding Kommune, overtrædelse), 18/3-99 (Seghers mod Amagerforbrændingen, ikke overtrædelse), EF-domstolen 18/11-99 (Unitron Scandinavia og 3-S, princippet om forbud mod national diskrimination må ikke fortolkes indskrænkende, hvilket medfører en gennemsigtighedsforpligtelse), 15/12-99 (Lifeline mod Dansk Hunderegister, det var i strid med Tjenesteydelsesdirektivet, at et af udbyderens bestyrelsesmedlemmer, der tillige repræsenterede flere tilbudsgivere, havde deltaget i gennemgangen af tilbuddene), 17/12-99 (Renoflex mod Søllerød Kommune, det var en overtrædelse af ligebehandlingsprincippet, at udbyder havde givet en virksomhed tilsagn om at kontakte den, hvis den ikke gav tilstrækkelige oplysninger til brug for prækvalifikationen), 9/2-00 (PAR mod Udenrigsministeriet, overtrædelse ved ikke at forhandle med alle tilbudsgivere ved udbud efter forhandling), 14/3-00 (Unitron mod Fødevareministeriet, se også EF-domstolen 18/11-99 i Unitron Scandinavia og S-3, om Indkøbsdirektivets artikel 2, stk. 2, dvs. respekt af princippet om forbud mod forskelsbehandling ved overdragelse af eneret til at indgå indkøbsaftaler), 21/6-00 (Arriva mod HT, om tilladelige modeller for regulering af tilbudspriser i tilfælde, hvor den hidtidige tjenesteyders medarbejdere skal overtages, opretholdt ved HR 11/5-07 i UfR 2007 s. 2106 H), 8/8-00 (Visma mod Københavns Amt, grov overtrædelse), 11/8-00 (Kirkebjerg mod Ribe Amt, det var i strid med ligebehandlingsprincippet, at udbyderen efter at have annulleret et udbud desuagtet indgik kontrakt med en af tilbudsgiverne, desuden i strid med ligebehandlingsprincippet, at udbyder før valget af tilbudsgiver havde foretaget langvarige undersøgelser vedrørende et fabrikat, der var angivet i nogle af tilbuddene, men ikke dem alle, idet tilbud på grundlag af EU-udbud principielt skal bedømmes på det grundlag, der foreligger ved tilbuddenes modtagelse), 27/9-00 (Svend B. Thomsen mod Blåvandshuk Kommune, det var i strid med ligebehandlingsprincippet, at der ikke ved udbuddet blev givet nog-

	le oplysninger, som kun den hidtidige tjenesteyder var bekendt med), EF-domstolen 5/10-00 (Kommissionen mod Frankrig i sag C-16/98, forbuddet mod forskelsbehandling beskytter også potentielle tilbudsgivere), 4/12-00 (Renoflex mod Vestforbrænding, udbyders evalueringsmodel indebar risiko for forskelsbehandling), EF-domstolen 7/12-00 (ARGE, det er ikke i strid med ligebehandlingsprincippet, at tilbudsgivere, der modtager statsstøtte, kommer i betragtning ved et EU-udbud, dog et vist forbehold navnlig med hensyn til ulovlig statsstøtte), 27/4-01 (DTL mod Nyk. F. Kommune, tvivlsomt om ligebehandlingsprincippet gælder mellem udbyder og en afdeling hos udbyder, men ikke anledning til at tage stilling), Retten 26/2-02 (Esedra mod Kommissionen, det var ikke en overtrædelse af ligebehandlingsprincippet, at udbyderen fra en tilbudsgiver indhentede nogle regnskaber, der skulle have været vedlagt ansøgningen om prækvalifikation), 3/4-02 (Villy Antonsen mod Aars Kommune, klausul om, at tilbudsgivere skulle være lokale, var i strid med Tjenesteydelsesdirektivets forbud mod forskelsbehandling), 3/7-02 (Judex mod Århus Amt, ligebehandlingsprincippet overtrådt ved, at udbyder havde indgået kontrakt om leasing, selvom det var indkøb, der var udbudt), 27/11-02 (Aon mod Odense Kommune, udbyder havde lagt vægt på nogle forhold, der ikke fremgik af udbuddet, herunder et forhold i strid med ligebehandlingsprincippet), 19/12-02 (Joca mod Haslev Kommune, ikke overtrædelse), 6/2-03 (Hedeselskabet mod Løkken-Vraa Kommune, overtrædelse af forbuddet mod forskelsbehandling i Tilbudslovens § 6), 27/5-03 (Eriksson mod Fuglebjerg Kommune, udsættelse af tidspunktet for tilbudsåbning og sammenblanding af to entrepriser ved tildelingsbeslutningen var i strid med Tilbudslovens ligebehandlingsprincip), 28/5-03 (Bilhuset Ringsted mfl. mod Ringsted Kommune, manglende afholdelse af testkørsler angivet i udbudsbetingelserne var overtrædelse af Indkøbsdirektivet og gennemsigtighedsprincippet, men ikke af ligebehandlingsprincippet), 7/8-03 (KAS mod Århus Kommune, ligebehandlingsprincippet overtrådt ved, at udbyderen havde givet en fejlagtig oplysning til en enkelt tilbudsgiver), 29/9-03 (Unicomputer mod Greve Kommune, indkøb gennem SKI fritager ikke for overholdelse af ligebehandlingsprincippet), 10/10-03 (Statsansattes Kartel mod Trafikministeriet, det var i strid med ligebehandlingsprincippet, at udbyder stillede spørgsmål som ordregiver, når spørgsmålet reelt blev stillet som tilsynsmyndighed), 14/10-03 (KK Ventilation mod Vejle Amt, Tilbudslovens ligebehandlingsprincip overtrådt ved antagelse af tilbud om udførelse af flere entrepriser under ét), 17/11-03 (Helsingør Kommune mod Stengade 56, tildeling til virksomhed, der havde ejersammenfald med udbyder, var i strid med Tilbudslovens ligebehandlingsprincip), 21/11-03 (Harry Andersen mod Vejle Amt, det var i strid med Tilbudslovens ligebehandlingsprincip at tage et tilbud, der var modtaget efter tilbudsfristens udløb, i betragtning), 19/12-03 (Nibe Entreprenør & Transport mod Støvring Kommune, det var i strid med Tilbudsloven, at udbyder tog hensyn til en tilbudsgivers fradragspris ved samlet udførelse af 2 entrepriser, og at udbyderen forbeholdt sig at reducere projektet med indtil 30 %), 20/2-04 (Miri mod Esbjerg Kommune, udbyder måtte ikke lade medarbejdere fra en tilbudsgivers underleverandør deltage i evalueringen, opretholdt ved VL 31/3-06), 30/9-04 (Colas mod Videbæk Kommune, det var en overtrædelse af Tilbudslovens ligebehandlingsprincip, at udbyderen betragtede et tilsagn fra en tilbudsgiver om udførelse af merydelser som en reduktion i tilbudsprisen), EF-domstolen 14/10-04 (Kommissionen mod Frankring, det følger af principperne om ligebehandling og gennemsigtighed, at et udbud klart skal definere kontraktens art og kriterierne for tildeling af den), 14/10-04 (SK Tolkeservice mod Københavns Amt, overtrædelse af gennemsigtighedsprincippet og ligebehandlingsprincippet ved at lægge vægt på forhold, der ikke var omtalt i udbudsbetingelserne, og ved at vurdere forholdene usagligt), 29/10-04 (Flemming Damgaard mod Helle Kommune, Tilbudslovens ligebehandlingsprincip og gennemsigtighedsprincippet overtrådt ved, at udbyder lagde vægt på efterfølgende prisoplysninger fra en tilbudsgiver, idet tilbudssummen skal kunne udledes umiddelbart af tilbuddet), 30/11-04 (Finn Hansen mod Vendersbo, det var i strid med Tilbudslovens § 6 og gennemsigtighedsprincippet, at udbyder lagde et beløb til tilbudspriserne for at gøre tilbuddene sammenlignelige), 16/12-04 (Brunata mod diverse boligselskabsafdelinger, overtrædelse af ligebehandlingsprincippet ved at give en tilbudsgiver lejlighed til at ændre tilbuddet med hensyn til et grundlæggende element), 9/3-05 (A-1 Communication mod Københavns Amt, overtrædelse ved at lægge vægt på forhold, der ikke var omtalt i udbudsbetingelserne, og ved at vurdere forholdene usagligt), Retten 17/3-05 (AFCon mod Kommissionen, udbyderen overtrådte ligebehandlingsprincippet ved ikke at undersøge, om en tilbudsgiver skulle udelukkes som følge af tilbudsgiverens forbindelse med et medlem af udbyderens bedømmelsesudvalg),18/4-05 (Løgten mod Århus Kommune, overtrædelse af Tilbudslovens ligebehandlingsprincip og gennem-

	sigtighedsprincippet ved annullation uden saglig grund og ved angivelse af urigtig begrundelse for annullationen), Retten 6/7-05 (TQ3 mod Kommissionen, udbudsreglerne kræver ikke, at en tilbudsgiver har det nødvendige personale på udbuddets tidspunkt, og udbyderen kunne indgå kontrakt med den valgte tilbudsgiver for en kortere periode, indtil tilbudsgiveren opfyldte udbudsbetingelsernes krav), 2/9-05 (Tipo mod Københavns Kommune, principperne om ligebehandling og gennensigtighed gælder ved udbud af en tjenesteydelse omfattet af Tjenesteydelsesdirektivets bilag I B), 7/9-05 (Dansk Byggeri mod Vejle Kommune, et bagatelagtigt forhold var ikke en overtrædelse af ligebehandlingsprincippet; der måtte indrømmes en fejlmargin med hensyn til en opgørelse, der nødvendigvis måtte være behæftet med en vis usikkerhed), 2/11-05 (Klaus Trier mod Københavns Amt, ikke overtrædelse af ligebehandlingsprincippet, at ordregiver kun indhentede tilbud fra virksomheder i sit eget område med hensyn til tjenesteydelse omfattet af Tjenesteydelsesdirektivets bilag I B), 11/11-05 (Blue Line mod Storstrøms Trafikselskab, udbyderens ombytning af en primær og en subsidiær leverandør var i strid med principperne om ligebehandling og gennemsigtighed), 15/12-05 (Air Liquide mod Roskilde Amt mfl., overtrædelse af ligebehandlingsprincippet ved angivelse af, at virksomheder, der var udbyder bekendt, ikke skulle medsende dokumentation for formåen), 20/12-05 (Adelholm mod Faber Invest, overtrædelse af Tilbudslovens ligebehandlingsregel ved med urette at anse et tilbud for tilbagekaldt), 3/2-06 (J. Olsen mod Ramsø Kommune, Tilbudslovens regel om ligebehandling overtrådt ved betaling af et beløb for udarbejdelse af tilbud til den ene tilbudsgiver, men ikke til den anden), 5/9-06 (Joca mod Reno Syd, opfordring til at afgive supplerende tilbud som følge af uklarhed i udbudsbetingelserne var i strid med ligebehandlingsprincippet), 14/12-06 (Baxter mod Roskilde Amt mfl., overtrædelse ved at lægge vægt på udstyr, der ikke var omfattet af det udbudte, og ved opfordring til tilbudsgiverne om at oplyse rabatter på varer, der ikke var omfattet af det udbudte), 16/4-07 (STB Byg mod Hedensted Kommune, krav om anvendelse af bestemte produkter og om, at glas skulle leveres fra fabrikker tilsluttet en bestemt organisation, var i strid med ligebehandlingsprincippet), 24/4-07 (Konkurrencestyrelsen mod Silkeborg Kommune, udbyders annullation af udbud var i strid med ligebehandlingsprincippet, fordi annullationen var til skade for tilbudsgiveren med det økonomisk mest fordelagtige bud og var begrundet i uunderbyggede formodninger og subjektive forventninger om, at tilbudsgiveren ikke ville opfylde nogle krav i udbudsbetingelserne, ændret ved VL 15/5-09), 27/4-07 (CT Renovation mod Skive-Egnen, underkriterium om et vist lokalt kendskab samt indgåelse af kontrakt for et kortere tidsrum end angivet i udbudsbekendtgørelsen var i strid med ligebehandlingsprincippet), 6/6-07 (Rengøringsgrossisten mod Skive Kommune, overtrædelse af ligebehandlingsprincippet ved uoverensstemmende angivelser i udbudsbetingelserne og udbudsbekendtgørelsen), EF-domstolen 14/6-07 (Medipac-Kazantzkis, Indkøbsdirektivet gælder ikke for udbud under tærskelværdien, men principperne om ligebehandling og gennemsigtighed skal følges under sådanne udbud), EF-domstolen 18/7-07 (Kommissionen mod Grækenland, antagelse af tilbud i strid med udvælgelseskriterier angår ligebehandlingsprincippet, ikke gennemsigtighedsprincippet; det generelle ligebehandlingsprincip har ikke selvstændig betydning ved siden af en direktivregel, der udmønter princippet), 24/8-07 (LSI Metro Gruppen mod Ørestadsselskabet, det ville være en overtrædelse af ligebehandlingsprincippet, hvis en udbyder undlader at prækvalificere en virksomhed, fordi en ansat hos udbyderen har tætte forbindelser til virksomheden), 3/9-07 (SP Medical mod Skat, overtrædelse af ligebehandlingsprincippet ved at lægge vægt på forhold, der ikke var omfattet af underkriterierne, opretholdt af Retten i Horsens 20/5-09), 17/10-07 Triolab mod RH, overtrædelse på en række punkter), 14/12-07 (Thomas Borgå mod Skive Kommune, ligebehandlingsprincippet overtrådt ved indgåelse af kontrakt om bilag II B-tjenesteydelser), 21/12-07 (Damm mod Økonomistyrelsen, klage over overtrædelse af ligebehandlingsprincippet afvist, da klagen ikke angik det udbudsretlige ligebehandlingsprincip), 14/1-08 (LSI mod Metroselskabet, en stillingtagen til udbyderens tilrettelæggelse af arbejdet uden stillingtagen til udbyderens beslutninger ligger uden for Klagenævnets kontrol med ordregivernes overholdelse af ligebehandlingsprincippet; forbindelse mellem en ansat hos udbyderen og en tilbudsgiver havde ikke påvirket udbudsprocessen således, at der ved tildelingsbeslutningen var sket overtrædelse af ligebehandlingsprincippet), Retten 12/3-08 (Europ. Service Network mod Kommissionen, ligebehandlingsprincippet har til formål at sikre konkurrencen og give tilbudsgivern ens chancer, ved udbud vedrørende tjenesteydelser er visse fordele for den hidtidige tjenesteyder uundgåelige), Retten 12/3-08 (Evr. Dynamiki mod Kommissionen, do., udbyderen overtrådte ligebehandlingsprincippet ved ikke at give alle tilbudsgiverne de nødvendige oplysninger med den konsekvens, at

	kun den valgte tilbudsgiver som følge af sit samarbejde med den hidtidige tjenesteyder havde oplysningerne). 27/3-08 (AV Form mod Esbjerg Kommune mfl., krav om, at tilbuddene skulle omfatte mindst 4.000 varenumre, var i strid med principperne om ligebehandling og gennemsigtighed**,** opretholdt ved Retten i Herning 5/11-09), 14/5-08 (Trans-Lift mod DSB, overtrædelse af ligebehandlingsprincippet ved åbning af tilbud før tilbudsfristens udløb og ved at tage et tilbud i betragtning, selvom et gelænder, der skulle være 1 m højt, ifølge tilbuddet kun havde en højde på 95 cm), 29/5-08 (Hermedico mod Høje-Taastrup Kommune mfl., overtrædelse ved ikke at sende svar på spørgsmål til alle tilbudsgivere samtidig), 30/5-08 (Serviceselskabet mod Region Midtjylland, overtrædelse ved at tage et tilbud i betragtning, selvom det ikke som krævet var vedlagt tilbudsgiverens seneste regnskab), 27/6-08 (DA mod Handels- og Søfartsmuseet, en række overtrædelser af ligebehandlingsprincippet ved projektkonkurrence), 2/7-08 (Scan-Plast mod Herning Kommune, ligebehandlingsprincippet ikke overtrådt ved telefoniske anmodninger om tilbud, da bevist, at anmodningerne var identiske), 10/7-08 (European mod Kystdirektoratet, en angivelse i udbudsbetingelserne om kontrol af den valgte tilbudsgivers udstyr var en overtrædelse af ligebehandlingsprincippet, da kontrollen først skulle finde sted efter tildelingsbeslutningen, ligebehandlingsprincippet overtrådt ved væsentlig ændring af udbudsbetingelserne og ved anvendelse af en pointmodel med vilkårlige konsekvenser), 11/7-08 (Labofa mod SKI mfl., overtrædelse af ligebehandlingsprincippet ved at tage nogle tilbud i betragtning, selvom tilbuddene ikke opfyldte udbudsbetingelsernes dokumentationskrav m.m.), 12/9-08 (Master Data mod Københavns Kommune, det var en overtrædelse af ligebehandlingsprincippet, at udbyderen havde afprøvet brugervenligheden af den valgte tilbudsgivers it-system, men ikke havde afprøvet brugervenligheden af klagerens it-system, og at udbyderen havde fejlvurderet klagerens tilbudspris som følge af forkert forudsætning om kontraktsperiodens længde), 3/10-08 (Creative mod Århus Kommune, det var ikke i strid med ligebehandlingsprincippet, at udbyderen i henhold til udbudsbetingelserne kun foretog en kvalitetsvurdering af en mindre del af de ønskede produkter; udbyderen har ikke pligt til at anonymisere vareprøver ved kvalitetsvurdering), 16/10-08 (Grønbech mod Albertslund Boligselskab, det kunne efter sagens oplysninger ikke lægges til grund, at den valgte tilbudsgivers tilbudspriser vedrørende nogle andre entrepriser var gjort afhængige af, at tilbudsgiveren fik tildelt den entreprise, som sagen drejede sig om)
Lokal tilknytning	23/1-96 (PAR mod Glostrup Kommune, tildelingskriterium om lokal tilknytning var ulovligt), 26/1-98 (Albertsen & Holm mod Københavns Belysningsvæsen, do.), 16/5-00 (DTL mod Reno Syd, do.), EF-domstolen 26/9-00 (Kommissionen mod Frankrig, der kan eventuelt anvendes et tildelingskriterium om beskæftigelse af lokal arbejdskraft, hvilket i så fald skal være nævnt i udbudsbekendtgørelsen; krav om at arkitekten skulle være medlem af den franske arkitektsammenslutning, stred mod traktaten og Bygge- og anlægsdirektivet), 3/4-02 (Villy Antonsen mod Aars Kommune, klausul om, at tilbudsgivere skulle være lokale, var i strid med forbuddet mod forskelsbehandling), 2/11-05 (Klaus Trier mod Københavns Amt, ikke overtrædelse af ligebehandlingsprincippet, at ordregiver kun indhentede tilbud fra virksomheder i sit eget område med hensyn til tjenesteydelse omfattet af Tjenesteydelsesdirektivets bilag I B), 16/4-07 (STB Byg mod Hedensted Kommune, krav om, at glas skulle leveres fra fabrikker tilsluttet en bestemt organisation, var i strid med ligebehandlingsprincippet), 27/4-07 (CT Renovation mod Skive-Egnen, underkriterium om et vist lokalt kendskab var i strid med ligebehandlingsprincippet), 3/9-07 (SP Medical mod Skat, et krav om medarbejdere tæt på udbyderen var opfyldt af medarbejdere i Tyskland, opretholdt af Retten i Horsens 20/5-09), 18/9-07 (Kortegaard mod Kolding Kommune, et krav om, at nogle planter skulle være af dansk herkomst, var i strid med traktatens forbud mod kvantitative indførselsrestriktioner), 12/2-08 (Rengøringsgrossisten mod Skive Kommune, et udvælgelseskriterium om repræsentation i lokalområdet var i strid med ligebehandlingsprincippet)
Miljøhensyn	EF-domstolen 17/9-02 (Concordia, der må under visse betingelser anvendes underkriterier om miljøforhold; det er uden betydning, om sådanne kriterier kun kan opfyldes af et mindre antal virksomheder), EF-domstolen 10/4-03 (Kommissionen mod Tyskland, der kan tages miljømæssige hensyn ved tildelingen af en kontrakt), EF-domstolen 4/12-03, EVN og Wienstrøm, lignende)
Mindstekrav (også kaldet minimumskrav, dvs. krav, som et tilbud skal opfylde for at komme i betragtning)	Retten 28/11-02 (Scan Office Design mod Kommissionen, mindstekrav skal respekteres også ved udbud med forhandling), 8/10-04 (Virklund Sport mod Randers Kommune, tilbud fra en tilbudsgiver, der først efter tilbudsfristens udløb gav en krævet oplysning om ibrugtagningsdato, måtte ikke tages i betragtning), 15/12-05 (Air Liquide mod Roskilde Amt mfl., nogle underkriterier var minimumskrav og kunne derfor ikke

	anvendes som underkriterier), 24/1-06 (Jan Houlberg mod Skatteministeriet, et tilbud med rette ikke taget i betragtning, da det ikke opfyldte et minimumskrav i udbudsbetingelserne), 6/9-06 (Sahva mod Københavns Kommune, det var uden betydning, at et tilbud ikke opfyldte et krav i udbudsbetingelserne, da kravet var uden mening), 14/12-06 (Baxter mod Roskilde Amt mfl., underkriterierne må ikke sammenblandes med de mindstekrav, der skal opfyldes af alle tilbudsgivere), 28/3-07 (Fujitsu Siemens mod Finansministeriet og SKI, udbyder var forpligtet til at afvise et tilbud, der ikke opfyldte nogle krav, som i udbudsbetingelserne var betegnet som minimumskrav), 16/10-07 (Kuwait Petroleum mod Sønderborg Kommune, overtrædelse ved at lægge vægt på nogle krav, som alle tilbud skulle opfylde), 14/2-08 (Jysk Erhvervsbeklædning mod Hjørring Kommune, overtrædelse ved at tage et tilbud i betragtning, selvom tilbuddet ikke opfyldte udbudsbetingelsernes krav til den udbudte ydelse), 27/3-08 (AV Form mod Esbjerg Kommune mfl., udsendelse af tilbudsliste med de centrale udbudte varer 3 uger før tilbudsfristens udløb og krav om, at tilbudsgivernes varekataloger skulle være dateret senest dagen før, var i strid med udbudsreglerne, opretholdt ved Retten i Herning 5/11-09), 12/9-08 (Master Data mod Københavns Kommune, et krav i udbudsbetingelserne om, at et tilbudt it-system skulle være et standardsystem, kunne ikke fortolkes sådan, at systemet skulle være implementeret hos andre), 17/9-08 (Bien-Air mod København og Århus Universiteter, der forelå ikke særlige omstændigheder, der kunne føre til en pligt for udbyderen til at kontrollere rigtigheden af et angivelse i et tilbud om, at det opfyldte et ufravigeligt mindstekrav), 18/9-08 (XO Care mod Københavns og Århus Universiteter, udbyderen kunne fortolke en angivelse i et tilbud som et forbehold om et krav, der efter udbudsbetingelserne ikke kunne tages forbehold om)
Nomenklaturer	EF-domstolen 24/9-98 (Tögel, Tjenesteydelsesdirektivets henvisning til CPC-nomenklaturen er bindende), 20/9-99 (Jyllandsposten mod Århus Kommune, om fortolkning af CPC-nomenklaturen), 8/4-03 (Dansk Taxi Forbund mod Vestsjællands Amt , Tjenesteydelsesdirektivets henvisning til CPC-nomenklaturen angår nomenklaturen ved direktivets udstedelse), 28/4-03 (Centralforeningen af Taxiforeninger mod Vestsjællands Amt, tilsvarende)
Offentligretlige organer	EF-domstolen 15/1-98 (Mannesmann el. Strohal, erhvervsdrivende aktieselskab), EF-domstolen 10/11-98 (BFI Holding el. Arnhem, om udbudspligt for erhvervsdrivende organ), EF-domstolen 3/10-00 (University of Cambridge, om forståelsen af kriteriet om, at driften for mere end halvdelens vedkommende skal være finansieret af det offentlige), EF-domstolen 10/5-01 (Agorà, ikke udbudspligt for organ, der udelukkende drev erhvervsmæssig virksomhed), EF-domstolen 12/12-02 (Universale-Bau, et organs faktiske virksomhed er afgørende for, om det skal anses for at opfylde almenhedens behov), EF-domstolen 27/2-03 (Adolf Truley, bl.a. om erhvervsdrivende offentligretlige organer og om kriteriet om, at organet skal være undergivet det offentliges kontrol), EF-domstolen 22/5-03 (Korhonen, om begrebet almenhedens behov uden for det erhvervs- og forretningsmæssige område), 11/8-03 (Kruse & Mørk mod Jetsmark, et kraftvarmeværk var ikke et offentligretligt organ efter Bygge- og anlægsdirektivet og var dermed ikke omfattet af Tilbudslovens § 1, stk. 2), 3/10-06 (MT Højgaard mfl. mod Frederiksborgcentret, en ikke-erhvervsdrivende fond var et offentligretligt organ, da der var tilstrækkelig sandsynlighed henholdsvis formodning for, at betingelserne var opfyldt), EF-domstolen 13/12-07 (Bayerische Rundfunk, nogle licensfinansierede public service-stationer var offentligretlige organer), EF-domstolen 9/4-08 (Ing. Aigner, alle kontrakter, der indgås af offentligretlige organer, er omfattet af udbudsdirektiverne, også kontrakter, der angår rent erhvervsmæssige aktiviteter)
Omvendt licitation (dvs. udbud eller licitation vedrørende et byggeri, der ikke må koste over et bestemt beløb)	18/6-07 (KPC Byg A/S mod Odense Tekniske Skole, viser et eksempel på omvendt licitation; sagen for Klagenævnet angik kun spørgsmål om byggeriets forhold til Udbudsdirektivets tærskelværdi), 19/8-07 (MT Højgaard mod Lejerbo, for at komme ned på det beløb, som bygherren kunne betale, skulle tilbuddenes ydelser reduceres efter en reduktionsliste, der indgik i udbudsbetingelserne, dette medførte prissammenligning af usammenlignelige tilbud, hvilket var i strid med principperne om ligebehandling og gennemsigtighed)
Oplysninger fra udbyder, herunder besvarelse af spørgsmål	25/10-95 (Siemens mod Esbjerg Kommune, udbyder skulle have givet yderligere oplysninger m.m.), 18/9-98 (FRI mod Frederiksberg Kommune, om fristen for udbyders besvarelse af spørgsmål i henhold til Tjenesteydelsesdirektivets artikel 19, stk. 6), 15/12-99 (Lifeline mod Dansk Hunderegister, det var i strid med Tjenesteydelsesdirektivet, at udbyderen besvarede spørgsmål fra potentielle tilbudsgivere uden samtidig at sende spørgsmålene og svarene til de andre potentielle tilbudsgivere, og nogle af besvarelserne var i sig selv i strid med direktivet), 27/9-00 (Svend B. Thomsen mod Blåvandshuk Kommune, det var i strid med ligebehandlingsprincippet, at der ikke ved

	udbuddet blev givet nogle oplysninger, som kun den hidtidige tjenesteyder var bekendt med), 3/1-02 (AC-Trafik mod Frederiksborg Amt, en udbyder, der havde angivet underkriterierne prioriteret, havde ikke pligt til at oplyse om en vægtningsmodel og en pointskala, der ville blive anvendt ved vurderingen af tilbuddene), 26/8-04 (Per Aarsleff mod Amager Strandpark, tilkendegivelse om, at tilbud med væsentlige forbehold ville blive afvist, var ikke tilstrækkelig præcis til at give udbyder pligt til at afvise tilbud med forbehold om et ikke grundlæggende element), EF-domstolen 24/11-05 (ATI EAC, om under hvilke betingelser udbyder kan undlade på forhånd at oplyse om den indbyrdes vægtning af delkriterier til et underkriterium), 13/7-07 (Magnus mod Skat, overtrædelse af Udbudsdirektivet ved ikke at oplyse underkriteriernes vægtning i udbudsbetingelserne, men først under en spørgerunde), 22/10-07 (Grønbech mod Albertslund Boligselskab, der er ikke pligt til at oplyse beregningsmodeller for tilbudsvurdering i udbudsbetingelserne), EF-domstolen 24/1-08 (Lianakis, delkriterier til underkriterierne skal være oplyst på forhånd), 29/2-08 (Karl Jensen mod Hobro Boligforening, overtrædelse af ligebehandlingsprincippet ved besvarelse af spørgsmål fra en tilbudsgiver uden at oplyse besvarelsen over for de andre tilbudsgivere), 27/3-08 (AV Form mod Esbjerg Kommune mfl., udsendelse af tilbudsliste med de centrale udbudte varer 3 uger før tilbudsfristens udløb var i strid med udbudsreglerne, opretholdt ved Retten i Herning 5/11-09), 15/4-08 (FSB mod Lægeforeningens boliger, beskrivelsen af en udbudt ydelse skal sætte tilbudsgiverne i stand til at overskue konsekvenserne af at afgive tilbud, herunder den økonomiske risiko), 29/5-08 (Hermedico mod Høje-Taastrup Kommune mfl., overtrædelse ved ikke at sende svar på spørgsmål til alle tilbudsgivere samtidig), 11/7-08 (Labofa mod SKI mfl., udbyderens svar på spørgsmål fra tilbudsgiverne under en tidligere annulleret annullation var uden betydning), 17/12-08 (Bandagist-Centret mod Århus Kommune, udbyderen har ikke pligt til på forhånd at oplyse beregningsmetoder for tilbudsvurdering)
Opsigelse eller ophævelse af kontrakt	Retten 11/6-02 (Alsace International Car Services mod Parlamentet, udbyderen havde pligt til at opsige den kontrakt, der var indgået på grundlag af udbuddet, efter at det var konstateret, at den valgte tilbudsgiver udførte tjenesteydelsen ulovligt), 3/5-05 (Taxa Stig mod Vestsjællands Amt, hverken 1. kontroldirektiv eller Lov om Klagenævnet for Udbud medførte pligt for udbyder til at opsige en indgået kontrakt), EF-domstolen 18/7-07 (Kommissionen mod Tyskland, der var pligt til at ophæve en 30-årig kontrakt indgået i strid med Tjenesteydelsesdirektivet), UfR 2008 s. 1331 Ø (en ordregivers indgåelse af en tillægskontrakt om en udbudspligtig tjenesteydelse ikke kendt ugyldig eller uvirksom, da tillægskontraktens indgåelse var sagligt begrundet, og da der ikke generelt er pligt til at opsige en kontrakt, der er indgået i strid med udbudsreglerne)
Opsættende virkning Rubrikken angår navnlig sager for Klagenævnet, hvor der har været spørgsmål om opsættende virkning. Hvis andet ikke er angivet, har Klagenævnet truffet bestemmelse om opsættende virkning Rubrikken omfatter desuden enkelte afgørelser fra Retten i Første Instans	8/3-95 (Henning Larsen mod Kulturministeriet, ikke opsættende virkning), 7/7-95 (Valles Trans-Media mod Københavns Kommune, ikke opsættende virkning), 25/10-95 (Siemens mod Esbjerg Kommune), 2/4-96 (Esbjerg Oilfield Services mod Svendborg Kommune, ikke opsættende virkning), 26/4-96 (Pihl & Søn mod Avedøre Kloakværk), 16/10-96 (Danske Vognmænd mod Stevns Kommune), 28/2-97 (Kiras mod Kolding Kommune, ikke opsættende virkning), 19/6-97 (Højgaard & Schultz mod Hundested Boligselskab, ikke opsættende virkning), 19/9-97 (Handelshøjskolen, Klagenævnets afgørelse ændret ved ØL 16/8-00), 17/3-98 (Konkurrencestyrelsen mod Tårnby Kommune, ikke opsættende virkning), Retten 26/5-98 (Ecord Consortium mod Kommissionen, ikke opsættende virkning, da betingelsen om fumus boni juris ikke var opfyldt), 1/7-98 (C.F. Møller mod Vestsjællands Amt), 3/7-98 (Nybus mfl. mod Storstrøms Trafikselskab, ikke opsættende virkning), 23/11-98 (Marius Hansen mod Forskningsministeriet, ikke opsættende virkning), 4/12-98 (Humus mod Herning Kommune, ikke opsættende virkning), 9/3-99 (Technicomm mod DSB), 4/6-99 (Acer mod Indkøbs Service, ikke opsættende virkning), 4/6-99 (BCP mod samme, do.), 10/6-99 (Højgaard & Schultz mod Odder Kommune), 16/7-99 (Holst Sørensen mod Vendsyssel Øst, ikke opsættende virkning), 17/9-99 (Kraftvarmeværk mod Energistyrelsen, ikke opsættende virkning), 27/10-99 (Holst Sørensen mod Vendsyssel Øst, ikke opsættende virkning), 9/11-99 (More Group mod Århus Kommune, ikke opsættende virkning), 15/12-99 (Lifeline mod Dansk Hunderegister, ikke opsættende virkning), 17/12-99 (Renoflex mod Søllerød Kommune), 21/6-00 (Arriva mod HT, ikke opsættende virkning), 27/6-00 (Dapa mod Vestforbrænding), Retten 20/7-00 (Esedra mod Kommissionen, ikke opsættende virkning, da uopsættelighedsbetingelsen ikke var opfyldt), 8/8-00 (Visma mod Københavns Amt, ikke opsættende virkning), ØL 16/8-00 (Handelshøjskolen, Klagenævnet havde ikke haft grundlag for at træffe bestemmelse om opsættende virkning), 27/9-00 (Svend B. Thomsen mod Blåvandshuk Kommune, ikke opsættende virkning), 14/12-00 (Renoflex mod Vestforbrænding),

	30/1-01 (DTL mod Haderslev Kommune, ikke opsættende virkning), 19/2-01 (Zealand mod Frederikshavn Kommune, ikke opsættende virkning), 2/5-01 (Magnus mod Told og Skat, ikke opsættende virkning), 6/8-01 (Oxford Research mod Faaborg Komm., ikke opsættende virkning), 24/10-01 (Eiland mod Vestsjællands Amt, ikke opsættende virkning), 26/10-01 (Eterra mod Esbjerg Kommune, ikke opsættende virkning), 27/2-02 (Vindtek mod Holstebro Kommune, ikke opsættende virkning), 2/4-02 (ISS mod Rigshospitalet, ikke opsættende virkning), 12/8-02 (Milana mod Vestsjællands Amt, ikke opsættende virkning) 14/10-02 (Informationsteknik Scandinavia mod Udenrigsministeriet, ikke opsættende virkning), EF-domstolen 9/4-03 (CS Austria, ved afgørelse om opsættende virkning må der tages hensyn til en forhåndsvurdering af klagesagens udfald), 27/5-03 (Eriksson mod Fuglebjerg Kommune, ikke opsættende virkning), 13/1-04 (Pihl & Søn mod Hadsund Kommune, ikke opsættende virkning), 20/2-04 (Miri mod Esbjerg Kommune, ikke opsættende virkning), Retten 27/7-04, TQ3 mod Kommissionen, ikke opsættende virkning, da uopsætteligheds-betingelsen ikke var opfyldt, idet manglende opsættende virkning ikke ville true klagerens eksistens), 26/8-04 (Per Aarsleff mod Amager Strandpark, ikke opsættende virkning), 29/10-04 (Flemming Damgaard mod Helle Kommune, ikke opsættende virkning), Retten 10/11-04 (Evr. Dyn. mod Kommissionen, ikke opsættende virkning, da uopsættelighedsbetingelsen ikke var opfyldt, idet manglende opsættende virkning ikke ville true klagerens eksistens eller ændre klagerens markedsposition uopretteligt; desuden ikke årsagsforbindelse mellem klagerens hævdede tab og den beslutning, der ønskedes udsat), 26/11-04 (Pihl & Søn mod Kriminalforsorgen, ikke opsættende virkning), Retten 31/1-05 (Capgemini mod Kommissionen, ikke opsættende virkning, selvom der forelå fumus boni juris, da uopsættelighedsbetingelsen ikke var opfyldt), Retten 2/6-05 (Umwelt mod Kommissionen, ikke opsættende virkning, da uopsættelighedsbetingelsen ikke var opfyldt, idet det ikke var bevist, at manglende opsættende virkning ville påføre klageren et alvorligt og uopretteligt tab), Retten 20/9-05 (Deloitte mod Kommissionen, ikke opsættende virkning, selvom der forelå fumus boni juris, da opsættelighedsbetingelsen ikke var opfyldt, og da en interesseafvejning talte mod opsættende virkning; resuméet indeholder en fremstilling om betingelserne for opsættende virkning), 15/12-05 (Air Liquide mod Roskilde Amt, ikke opsættende virkning), 19/12-95 (Kirkebjerg mod HS, ikke opsættende virkning), 25/1-06 (Sjælsø Entreprise mod Statsbiblioteket, ikke opsættende virkning), 6/7-06 (Logstor mod Viborg Fjernvarme, ikke opsættende virkning), 23/8-06 (Hedeselskabet mod Sønderjyllands Amt, ikke opsættende virkning), 6/9-06 (Sahva mod Københavns Kommune, ikke opsættende virkning), 26/10-06 (Novartis mod HS, ikke opsættende virkning), Retten 20/11-06 (Globe mod Kommissionen, et sagsanlæg tillagt opsættende virkning, da der forelå »fumus boni juris« og uopsættelighed, og da en interesseafvejning ikke kunne føre til andet resultat), 8/12-06 (Nethleas mod Økonomistyrelsen, ikke opsættende virkning), 14/12-06 (Baxter mod Roskilde Amt mfl., ikke opsættende virkning), 20/2-07 (Bangs Gård mod Esbjerg Kommune), 27/2-07 (Grønbech Construction mod Albertslund Boligselskab mfl., ikke opsættende virkning), 28/3-07 (Fujitsu Siemens mod Finansministeriet og SKI, ikke opsættende virkning), 18/6-07 (KPC Byg mod Odense Tekniske Skole, ikke opsættende virkning), 15/8-07 (Stürup mod Billund Kommune, ikke opsættende virkning), 24/8-07 (LSI Metro Gruppen mod Ørestadsselskabet, ikke opsættende virkning), 29/8-07 (Sectra mod Region Sydanmark, ikke opsættende virkning), 3/9-07 (SP Medical mod Skat, ikke opsættende virkning), 16/10-07 (Kuwait Petroleum mod Sønderborg Kommune, generelle bemærkninger om betingelserne for opsættende virkning), 17/10-07 (Triolab mod RH, ikke opsættende virkning), 30/11-07 (Ejnar Kristensen mod Vejen Kommune, ikke opsættende virkning), 8/1-08 (WAP mod Ørestadsparkering, ikke opsættende virkning), 27/3-08 (AV Form mod Esbjerg Kommune mfl.), 31/3-08 (Cowi mod Kort og Matrikelstyrelsen, ikke opsættende virkning), 10/4-08 (MT Højgaard mod Slots- og Ejendomsstyrelsen m.m.), 29/4-08 (Funder Ådalkonsortiet mod Vejdirektoratet, ikke opsættende virkning), 29/5-08 (Hermedico mod Høje-Taastrup Kommune mfl., ikke opsættende virkning), 26/6-08 (UAB mod Furesø Kommune mfl., ikke opsættende virkning), 12/9-08 (Master Data mod Københavns Kommune, ikke opsættende virkning), 17/9-08 (Bien-Air mod København og Århus Universiteter, ikke opsættende virkning), 3/10-08 (Creative mod Århus Kommune, ikke opsættende virkning), 16/10-08 (Grønbech mod Albertslund Boligselskab, ikke opsættende virkning), 20/10-08 (TagVision mod Egedal Kommune, ikke opsættende virkning), 26/11-08 (NCC mod Vejdirektoratet), 10/12-08 (Nordjysk Kloak mod Aalborg Kommune, ikke opsættende virkning)
Ordregivende myndighed	16/12-04 (Brunata mod diverse boligselskabsafdelinger, den ordregivende myndighed er den, der træffer tildelingsbeslutningen; den skal være angivet ens i udbudsbekendt-

	gørelsen og udbudsbetingelserne)
Partnering	
Passivitet	28/9-98 (Humus mod Esbjerg Kommune, klageadgang ikke afskåret ved passivitet), 1/3-99 (Enemærke & Petersen mod Fællesorganisationens Boligforening, ikke annullation, da klagen først var indgivet efter fem måneder), 2/5-00 (Uniqsoft mod Odense Kommune, ikke annullation trods grove overtrædelser, idet klagen først var indgivet efter ca. et år), 16/5-00 (DTL mod Reno Syd, ikke annullation, da klagen ikke var indgivet straks med begæring om opsættende virkning), 19/3-03 (Forlev Vognmandsforretning mod Høng Kommune, ikke afvisning af klage, selvom klagen var indgivet længe efter udbuddet)
Postbefordring	EF-domstolen 13/11-07 (Kommissionen mod Irland, An Post, ikke udbudspligt ved overladelse af en bilag I B-tjenesteydelse til postvæsnet), EF-domstolen 18/12-07 (Asocación, udbudspligt vedrørende postbefordring, der ikke var omfattet af postvæsnets eneret)
Pris	8/3-99 (FRI mod Nyk. F. Kommune, underkriteriet »tilbudspris« kunne anvendes, selvom opgavens omfang ikke var endeligt fastlagt), 11/6-99 (Hoffmann & Sønner mod Aalborg Lufthavn (principielle bemærkninger om betydningen af underkriteriet »pris«), 16/7-99 (Holst Sørensen mod Vendsyssel Øst, ikke grundlag for at antage, at udbyderen havde tilsidesat Tjenesteydelsesdirektivet ved sin vurdering af det økonomisk mest fordelagtige tilbud, selvom udbyderen alene havde lagt vægt på tilbudsprisen), 24/10-01 (Eiland mod Vestsjællands Amt, det var i strid med gennemsigtighedsprincippet, at en evalueringsmodel reelt alene lagde vægt på prisen), Retten 26/2-02 (Esedra mod Kommissionen, udbyderen kunne ved vurderingen af tilbudspriserne tage hensyn til tjenesteydelsens forventede omfang), 27/2-02 (Vindtek mod Holstebro Kommune, underkriteriet »delpriser« var uegnet til at identificere det økonomisk mest fordelagtige bud), 27/11-02 (Aon mod Odense Kommune, provision, som en forsikringsmægler ville modtage fra et forsikringsselskab, skulle medregnes i tilbudsprisen, hvilket skulle fremgå af udbudsbetingelserne), Retten 25/2-03 (Renco mod Rådet, klage over udbyderens beregning af klagerens samlede tilbudspris ikke taget til følge), 19/12-03 (Nibe Entreprenør & Transport mod Støvring Kommune, det var i strid med Tilbudsloven, at udbyder tog hensyn til en tilbudsgivers fradragspris ved samlet udførelse af 2 entrepriser), 13/1-04 (Pihl & Søn mod Hadsund Kommune, vurderingen af, om et tilbud er unormalt lavt, skal angå den samlede tilbudspris), 30/9-04 (Colas mod Videbæk Kommune, udbyder måtte ikke betragte et tilsagn fra en tilbudsgiver om udførelse af en merydelse som en reduktion i tilbudsprisen), 29/10-04 (Flemming Damgaard mod Helle Kommune, Tilbudslovens ligebehandlingsprincip og gennemsigtighedsprincippet overtrådt ved, at udbyder lagde vægt på efterfølgende prisoplysninger fra en tilbudsgiver, idet tilbudssummen skal kunne udledes umiddelbart af tilbuddet), 30/11-04 (Finn Hansen mod Vendersbo, udbyder skulle angive nøjagtigt, hvordan tilbudspriserne ville blive sammenlignet), 4/5-06 (Buus Totalbyg mod Bjerringbro Kommune, udbyder skulle ved tilbudsvurderingen have trukket et beløb fra klagerens tilbudspris), 6/7-06 (Logstor mod Viborg Fjernvarme, urigtig vurdering af den valgte tilbudsgivers tilbud i relation til underkriteriet pris), 6/9-06 (Sahva mod Københavns Kommune, udbyders vurdering af tilbudspris skal i videst muligt omfang foretages ved en eksakt beregning og må ikke ske ved et rent skøn), 12/2-07 (Dansk Høreteknik mod Københavns Kommune, tilsvarende), 10/8-07, MT Højgaard mod Lejerbo, overtrædelse ved prissammenligning af usammenlignelige forhold, opretholdt ved Århus Ret 6/5-09), 17/10-07 (Triolab mod RH, udbyderen kunne lade tilbudsgivernes priser for køb af udstyr fra udbyderen indgå i vurderingen af tilbudspriserne)
Prissætning	19/6-97 (Højgaard & Schultz mod Hundested Boligselskab, forbehold skulle prissættes, men prissætningen var til dels gennemført ukorrekt), 23/11-98 (Marius Hansen mod Forskningsministeriet, nogle bemærkninger i tilbuddet var ikke forbehold, og prissætning af dem var derfor ulovlig), 8/8-00 (Visma mod Københavns Amt, principielle bemærkninger om afvigende tilbud, herunder om udbyders prissætning af tilbud, der ikke afviger fra et grundlæggende element i udbuddet), 8/11-00 (Friedmann mod Forskningsministeriet, prissætning af forbehold i overensstemmelse med almindeligt kendte standardprincipper var korrekt; prissætning i overensstemmelse med nogle af klageren hævdede priser ville have været i strid med udbudsreglerne, allerede fordi det var tvivlsomt, om klageren havde haft pligt til at udføre det pågældende arbejde til disse priser), 24/10-01 (Eiland mod Vestsjællands Amt, udbyder burde have prissat forbehold om dagbøder), 30/6-03 (Skanska mod Løgstør Kommune, fejl ved prissætning af forbehold), 12/8-03 (Skanska mod Vejle Kommune, ved prissætning af forbehold må tilbudsgiveren ikke stilles bedre end tilbudsgivere, der ikke har taget forbehold; et prissat arbejde skal med sikkerhed kunne udføres for det prissatte beløb,

	og hvis sikker prissætning ikke er mulig, må tilbuddet ikke tages i betragtning, prissætning skal ske på grundlag af licitationsbetingelserne), 15/8-03 (Bravida mod Statens Forskn., ved prissætning skal udbyderen varetage interesserne hos de andre tilbudsgivere), 13/1-04 (Pihl & Søn mod Hadsund Kommune, klage over prissætning taget til følge med konkret begrundelse), 13/5-04 (Bravida mod Rødovre Boligselskab, når tildelingskriteriet er laveste pris, kan udbyderen ikke »prissætte« særlige fordele ved et tilbud og trække denne »prissætning« fra tilbudsprisen; prissætning af forbehold skal ske sådan, at tilbudsgivere ikke tiltager sig fordele ved at tage forbehold), 9/6-04 (Per Aarsleff mod Fyns Amt mfl., udbyderne skulle have prissat to forbehold, der var indeholdt i standardforbehold), 26/11-04 (Pihl & Søn mod Kriminalforsorgen, et forbehold kunne ikke prissættes, hvorfor afvisning af tilbuddet var sket med rette), 30/11-04 (Finn Hansen mod Vendersbo, det var i strid med Tilbudslovens § 6 og gennemsigtighedsprincippet, at udbyder lagde et beløb til tilbudspriserne for at gøre tilbuddene sammenlignelige), 16/12-04 (Brunata mod diverse boligselskabsafdelinger, udbyder skal foretage prissætning på egen hånd og må ikke inddrage tilbudsgiveren i prissætningen; forbehold om dagbøder og prisregulering kunne ikke prissættes med fornøden sikkerhed, hvorfor tilbuddet ikke måtte tages i betragtning), 2/3-05 (Pumpex mod Hedensted Kommune, prissætning sket med urette, overtrædelse af Tilbudsloven ved at tage tilbud i betragtning trods forbehold, der ikke kunne prissættes med sikkerhed), 18/4-05 (Løgten mod Århus Kommune, udbyder var berettiget til at forhøjelse en tilbudspris som følge af en klar skrivefejl i tilbuddet), 7/6-05 (Bladt mod Storebælt, når udbyder har prissat et forbehold, skal udbyder ved vurderingen af tilbuddet anse tilbuddet for at opfylde det krav, som forbeholdet angår), 16/1-06 (MT Højgaard mod DR, nogle prissætninger var rigtigt gennemført, undladelse af prissætning af et forbehold uden betydning var sket med rette), 4/5-06 (Buus Totalbyg mod Bjerringbro Kommune, udbyder skulle have prissat nogle afvigelser fra licitationsbetingelserne), 14/12-06 (Baxter mod Roskilde Amt mfl., det er udbyderen og ikke tilbudsgiveren, der skal prissætte forbehold), 26/4-07 (MT Højgaard mod Aalborg Lufthavn, forbehold vedrørende forsikring og vejrlig angik ikke grundlæggende elementer, men udbyderen skulle have prissat forbeholdene), 29/8-07 (Sectra mod Region Syddanmark, nogle prissætninger var uberettigede, da de pågældende forhold ikke var omfattet af udbudsbetingelsernes krav, og da en af prissætningerne var beregnet forkert, nogle andre prissætninger var berettigede for at sikre, at tilbudsgiveren ikke fik en uberettiget konkurrencefordel, opretholdt ved ØL 30/3-09), 17/10-07 (Triolab mod RH, overtrædelse ved angivelse af, at tilbudsgiverne skulle kapitalisere forbehold), ØL 5/2-08 (i sagen Per Aarsleff mod Amager Strandpark, et forbehold om vinterforanstaltninger kunne prissættes af alle involverede og angik ikke et grundlæggende element; ikke grundlag for at tilsidesætte udbyderens prissætning, der var sket inden for rammerne af udbyderens skøn ved prisfastsættelsen), 16/4-08 (Boligkontoret mod Lægeforeningens boliger, det var i strid med ligebehandlingsprincippet, at udbyderen reelt prissatte forbehold i nogle tilbud og vurderede forbehold i et andet tilbud efter et ulovligt underkriterium om forbehold), 28/10-08 (Bjarne Larsen mod Morsø Kommune, Klagenævnet havde ikke grundlag for at tilsidesætte udbyderens prissætning), 26/11-08 (NCC mod Vejdirektoratet, udbyderen havde bevisbyrden for, at en prissætning ikke havde givet tilbudsgiveren en konkurrencemæssig fordel, og det var ikke godtgjort, at prissætningen opfyldte denne betingelse)
Private, overladelse af opgaver til	EF-domstolen 18/11-99 (Unitron Scandinavia og 3-S, om meddelelse af eneret i medfør af Indkøbsdirektivets artikel 2, stk. 2), EF-domstolen 12/7-01 (Ordine, ved overladelse af et infrastrukturarbejde til en grundejer skal denne forpligtes til at følge Bygge- og Anlægsdirektivet), 30/8-04 (Benny Hansen mod Vangsgade 6, byggefirma, der opførte boliger for et alment boligselskab, var omfattet af Tilbudsloven)
Projektkonkurrencer, sager om	9/3-98 (FRI mod Ledøje- Smørum Kommune, diverse overtrædelser), 6/9-99 (FRI mod Kulturministeriet), 12/7-01 (PAR mod Kulturministeriet), EF-domstolen 14/10-04 (Kommissionen mod Frankrig, der kunne ikke indgås kontrakt om projektering m.m. på grundlag af projektkonkurrence om analyse, bistand ved valg af tilbudsgiver er ikke omfattet af Tjenesteydelsesdirektivets regler om projektkonkurrencer), 8/4-05 (DA mod Forsvarets Bygningstjeneste, bedømmelseskriterierne skal være angivet i udbudsbekendtgørelsen, ikke pligt til at offentliggøre en bedømmelse af hvert enkelt forslag), 27/6-08 (DA mod Handels- og Søfartsmuseet, lang række overtrædelser)
Proportionalitetsprincippet	6/9-99 (FRI mod Kulturministeriet, det EU-retlige proportionalitetsprincip har intet at gøre med de ordregivende myndigheders forpligtelser efter Tjenesteydelsesdirektivet)
Præjudicielle spørgsmål	14/1-98 (Xyanide mod Københavns Kommune, Klagenævnet tog stilling til et præjudicielt bevisspørgsmål), 27/11-98 (Turistvognmændenes Landsforening mod Ribe Amt, Klagenævnet er kompetent til at foretage en præjudiciel vurdering i henhold til

	andre retsregler end de EU-retlige), 8/11-00 (Friedmann mod Forskningsministeriet, foretaget et præjudicielt skøn med hensyn til, om klageren ville have haft pligt til at udføre et arbejde til nogle bestemte priser)
Prækvalifikation	23/1-96 (PAR mod Glostrup Kommune, kriterier anvendt ved prækvalifikationen kunne ikke anvendes som tildelingskriterier), 30/5-96 (Iver Pedersen mod Reno Syd, vurdering af tilbudsgivers materiel ol. skulle ske ved prækvalifikationen, ikke ved tildelingen), 13/6-96 (FRI mod Roskilde Kommune, afvisning af prækvalifikation uberettiget), 9/10-96 (Elinstallatørernes Landsforening mod Københavns Lufthavne, udvælgelse med henblik på at optimere konkurrencesituationen var lovlig), 28/2-97 (Kiras mod Kolding Kommune, lovligt at en virksomhed var blevet prækvalificeret, selvom den ikke havde indsendt seneste års regnskab), 9/3-98 (FRI mod Ledøje-Smørum Kommune, udbyder havde ikke foretaget tilstrækkelig vurdering ved prækvalifikationen m.m.; angivelse af, at der ville blive prækvalificeret minimum 5 tilbudsgivere, var ulovlig da udbyder havde haft til hensigt at prækvalificere nøjagtig 5 tilbudsgivere), 14/9-98 (Handelskammeret mod Danmarks Statistik, et kriterium kunne ikke anvendes ved prækvalifikationen, et andet kriterium var for upræcist angivet, og et tredje kriterium var anvendt korrekt), 1/3-99 (Enemærke & Petersen mod Fællesorganisationens Boligforening, referencer og kapacitet skal vurderes ved prækvalifikationen), 4/6-99 (Acer mod Indkøbs Service, udelukkelse fra prækvalifikation var berettiget, da der ikke rettidigt var indsendt krævede oplysninger), 4/6-99 (BCP mod samme, do.), 17/9-99 (Decentrale kraftvarmeværk mod Energistyrelsen, udbyder havde saglig grund til at udelukke en ansøger fra prækvalifikation på grund af risiko for, at ansøgeren ville tage uvedkommende hensyn ved opgavens udførelse), 17/12-99 (Renoflex mod Søllerød Kommune, udbyder var uberettiget til at tage en anmodning om prækvalifikation i betragtning, da der ikke var medsendt de krævede oplysninger), 9/2-00 (PAR mod Udenrigsministeriet, kvalifikationskriterier anvendt som tildelingskriterier, tilbudsgiver udvalgt, selvom tilbudsgiveren ikke havde medsendt krævede oplysninger), 16/5-00 (DTL mod Reno Syd, kvalifikationskriterier anvendt som tildelingskriterier, uberettiget at udbyder havde prækvalificeret nogle virksomheder, der ikke havde medsendt krævede oplysninger, udbyder havde pligt til at prækvalificere alle øvrige interesserede), EF-domstolen 26/9-00 (Kommissionen mod Frankrig, ved begrænset udbud skal der prækvalificeres mindst 5 ansøgere), 27/9-00 (Svend B. Thomsen mod Blåvandshuk Kommune, et tildelingskriterium hørte hjemme under prækvalifikationen og var derfor i strid med Tjenesteydelsesdirektivet, med hensyn til nogle andre tildelingskriterier kunne det ikke udelukkes, at de var egnede til at identificere det økonomisk mest fordelagtige bud), 9/10-00 (Dapa mod Kolding Kommune, afvisning af anmodning om prækvalifikation var berettiget, men begrundelsen var forkert), 6/8-01 (Oxford Research mod Faaborg Kommune, det var i strid med direktivet, at udbyder havde prækvalificeret flere tilbudsgivere end det angivne maksimale antal), 26/10-01 (Eterra mod Esbjerg Kommune, tilsvarende), Retten 26/2-02 (Esedra mod Kommissionen, udbyderen kunne fra en tilbudsgiver indhente regnskaber, der skulle have været vedlagt ansøgningen om prækvalifikation), 10/5-02 (Ementor mod Århus Amt, udbyder måtte ikke indgå kontrakt med en underleverandør til en prækvalificeret tilbudsgiver), EF-domstolen 12/12-02 (Universale-Bau, hvis udbyder på forhånd har fastlagt kriterierne for udvælgelse af tilbudsgivere, skal disse kriterier oplyses), EF-domstolen 18/3-04 (Telekom & Partner, udbyder må i opfyldelsesfasen begrænse brugen af underentreprenører, hvis formåen ikke har kunnet efterprøves i udvælgelsesfasen), 23/3-04 (Tolkeservice mod Viborg Amt, udbyders beslutning om ikke at prækvalificere en ansøger som følge af dårlige erfaringer mod denne var saglig), 15/12-05 (Air Liquide mod Roskilde amt mfl., overtrædelse af ligebehandlingsprincippet ved angivelse af, at virksomheder, der var udbyder bekendt, ikke skulle medsende dokumentation for formåen), 8/12-06 (Nethleas mod Økonomistyrelsen, ikke pligt for udbyder til at kræve dokumentation for visse oplysninger ved anmodning om prækvalifikation), EF-domstolen 18/7-07 (Kommissionen mod Grækenland, antagelse af tilbud i strid med udvælgelseskriterier angår ligebehandlingsprincippet, ikke gennemsigtighedsprincippet), 19/7-07 (ISS mod Skejby Sygehus, overtrædelse af Udbudsdirektivet ved tildelingsbeslutning i strid med prækvalifikationen), 24/8-07 (LSI Metro Gruppen mod Ørestadsselskabet, udbyderen kunne ikke undlade at prækvalificere en virksomhed med den begrundelse, at virksomheden havde erfaringer fra et tidligere lignende projekt, og udbyderen kunne prækvalificere virksomheder, der havde stillet medarbejdere til rådighed for det udbudte projekt; en udbyder må ikke undlade at prækvalificere en virksomhed med den begrundelse, at en ansat hos udbyderen har tætte forbindelser til virksomheden), 3/9-07 (SP Medical mod Skat, åbenbar skrivefejl i anmodning om prækvalifikation kunne berigtiges; en virksomhed kunne prækvalifi-

	ceres, selvom den ikke havde fremsendt regnskabsmateriale, da kravet herom var uklart, hvorfor fejlen var beskeden, og da der ikke var tale om forskelsbehandling, et krav om medarbejdere tæt på udbyderen var opfyldt af medarbejdere i Tyskland, opretholdt af Retten i Horsens 20/5-09), 19/9-07 (Råstof og Genanvendelse mod Århus Kommune, udbyderen var forpligtet til ikke at prækvalificere en virksomhed, hvis ansøgning om prækvalifikation var modtaget efter ansøgningsfristens udløb; det var uden betydning, om der forinden havde været kontakt mellem virksomheden og udbyderen, og hvad denne kontakt havde drejet sig om), 19/12-07 (HIQ Wise mod Danske Spil, udbyderen var berettiget til at afvise en anmodning om prækvalifikation fra en virksomhed, der ikke havde vedlagt den krævede dokumentation med hensyn til udelukkelsesgrundene i Udbudsdirektivets artikel 45), 15/1-08 (C.F. Møller mod Universitets- og Byggestyrelsen, angivelse i udbudsbekendtgørelsen af, at der ville blive indgået kontrakt med en gruppe af rådgivere med solidarisk ansvar, var ikke i strid med Udbudsdirektivets artikel 4, stk. 2, og udbyderen havde med rette undladt at prækvalificere en ansøger, der ikke bestod af en gruppe af rådgivere), 12/2-08 (Rengøringsgrossisten mod Skive Kommune, udbyder var berettiget til at beslutte, at en virksomhed ikke skulle prækvalificeres, og havde pligt til ikke at prækvalificere virksomheden, da den ikke rettidigt havde indsendt en krævet dokumentation for erhvervsansvarsforsikring; udbyderen overtrådte ligebehandlingsprincippet ved at prækvalificere en anden virksomhed, der ikke havde indsendt serviceattest rettidigt), 14/4-08 (Damm mod Økonomistyrelsen, udbyder har ikke pligt til at kræve dokumentation for ønskede oplysninger), 14/5-08 (Trans-Lift mod DSB, overtrædelse af Forsyningsvirksomhedsdirektivets artikel 52 ved krav om bankgaranti fra en enkelt af ansøgerne), 11/9-08 (Pro-Safe mod Farvandsvæsnet, udbyderen kunne prækvalificere en virksomhed, der ikke som krævet i udbudsbekendtgørelsen havde vedlagt ansøgningen en årsrapport for 2006/2007, da fristen for indlevering af en sådan årsrapport til Erhvervs- og Selskabsstyrelsen ikke var udløbet, og da forskelligt regnskabsmateriale, som virksomheden havde vedlagt, var tilstrækkeligt), 5/11-08 (Brøndum mod Ringgården, overtrædelse ved prækvalifikation af 6 virksomheder, selvom der efter udbudsbekendtgørelsen ville blive prækvalificeret 5 virksomheder), Retten 10/9-08 (Evr. Dynamiki mod EF-domstolen, annullation af beslutning om ikke at prækvalificere en virksomhed, da udbyderen havde givet en urigtig og vildledende begrundelse for beslutningen)
Prøvetid	21/3-02 (Holsted Minibus mod Næstved Kommune, om lovligheden af kontraktsbestemmelser om gensidig prøvetid)
Pålæg til udbyder	25/10-95 (Siemens mod Esbjerg Kommune, pålæg om gennemførelse af udbud), 12/12-96 (Entreprenørforeningen mod Sønderborg Kraftvarmeværk, pålæg om EU-udbud), 21/10-98 (R98, pålæg om at foretage udbud m.m.), 10/6-99 (Højgaard & Schultz mod Odder Kommune, udbyder pålagt at se bort fra et ukonditionsmæssigt tilbud), 14/12-00 (Renoflex mod Vestforbrænding, pålæg om at lovliggøre udbuddet ved at foretage en objektivt uangribelig evaluering af tilbuddene), 2/5-01 (Magnus mod Told og Skat, betinget pålæg om nyt udbud med klar angivelse af det udbudte), 24/10-01 (Eiland mod Vestsjællands Amt, pålæg om at foretage nyt udbud), 16/12-03 (Bilhuset Randers mod Sønderhald Kommune, betinget pålæg om nyt udbud), 14/10-04 (SK Tolkeservice mod Københavns Amt, ikke annullation eller pålæg om nyt udbud, da udbyderen kunne indgå ny kontrakt uden EU-udbud), 15/12-05 (Air Liquide mod Roskilde Amt mfl., påstand om pålæg om nyt udbud afvist, bl.a. fordi udbudspligt ved indgåelse af ny kontrakt fulgte af Udbudsdirektivet), 31/3-08 (Cowi mod Kort og Matrikelstyrelsen, ikke påbud om lovliggørelse, da der ikke var konstateret overtrædelser), Retten 14/2-04 (Makedoniko mod Kommissionen, påstand om pålæg til Kommissionen afvist)
Rammeaftaler	2/7-98 (FRI mod Københavns Lufthavne, afvigelser mellem udbudt rammeaftale og indgåede kontrakter var ulovlige, generelle bemærkninger om rammeaftaler), 29/11-03 (Unicomputer mod Greve Kommune, om forholdet mellem EU's udbudsregler og SKI-rammeaftaler), 27/4-06 (Unicomputer mod SKI, det var ikke i strid med Indkøbsdirektivet, at leverandører i henhold nogle rammeaftaler løbende kunne ændre priser og sortiment, og at rammeaftalerne var indgået med 10 leverandører, selvom der er en øvre grænse for antallet af leverandører, der kan indgås rammeaftaler med, men det var i strid med direktivet, at rammeaftalerne var uden tidsbegrænsning, på det sidstnævnte punkt ændret ved ØL 11/10-07), 18/2-08 (Willis mod Lejerbo, en kontrakt med mulighed for en varighed på 8 år var ikke i strid med udbudsreglerne, da ordregiveren til enhver tid kunne opsige kontrakten), 19/12-08 (UAB mod Ringsted Kommune, overtrædelse af Udbudsdirektivets regler om rammeaftaler ved kontraktsbestemmelse om option på forlængelse af kontrakten efter dens udløb efter 3 år, selv-

	om optionen ifølge udbudsbetingelserne skulle udnyttes inden et år fra tildelingsbeslutningen)
Referenceprodukter	18/1-94 (Paranova mod Amgros, anvendelse af referenceprodukt ikke i strid med Indkøbsdirektivet), EF-domstolen 24/1-95 (sag C-359/93, Kommissionen mod Holland, Unix-sagen, udbudsbetingelsernes angivelse af, at et styresystem skulle være af mærket Unix, var i strid med bestemmelsen om referenceprodukter i det dagældende bygge- og anlægsdirektiv, fordi der ikke var tilføjet betegnelsen »eller dermed ligestillet«), 23/8-95 (B4 mod Holbæk Kommune, overtrædelse), 16/10-96 (Danske Vognmænd mod Stevns Kommune, overtrædelse), 11/11-98 (Mousten Vestergaard mod Spøttrup Boligselskab, brug af referenceprodukt var ikke i strid med traktaten ved udbud af byggeri under tærskelværdien, ændret ved EF-domstolen 3/12-01, Vestergaard, og UfR. 2002 s. 1297 V), 1/3-99 (Enemærke & Petersen mod Fællesorganisationens Boligforening, brug af referenceprodukt var uberettiget trods henvisning til »eller dermed ligestillet«), 11/8-00 (Kirkebjerg mod Ribe Amt, tilsvarende), 3/6-03 (Haderslev Tæppelager mod Støtteforeningen, antagelse af tilbud med andet fabrikat end det foreskrevne var i strid med Tilbudsloven), 5/8-03 (Georg Berg mod Køge Kommune, Bygge- og anlægsdirektivet overtrådt ved henvisning til et referenceprodukt), 15/8-03 (Bravida mod Statens Forskn., om forståelsen af henvisninger til referenceprodukter), 29/10-04 (Flemming Damgaard mod Helle Kommune, traktatens artikel 28 overtrådt ved angivelse af produkt uden tilføjelsen »eller dermed ligestillet« eller en tilsvarende bemærkning, formuleringen »eller et tilsvarende produkt« var tilstrækkelig), 12/4-05 (Mariendal mod Nordjyllands Amt, henvisning til referenceprodukter var uberettiget og gav ikke udbyder mulighed for efter eget skøn at afvise tilbud som ukonditionsmæssige), 13/3-06 (Kirudan mod Kolding Kommune, uberettiget brug af referenceprodukter), 16/4-07 (STB Byg mod Hedensted Kommune, krav om anvendelse af bestemte produkter og om, at glas skulle leveres fra fabrikker tilsluttet en bestemt organisation, var i strid med traktatens artikel 28 og ligebehandlingsprincippet), 5/11-08 (Brøndum mod Ringgården, henvisning til bestemte varemærker m.m. var berettiget som følge af den udbudte ydelses karakter)
Retsvirkning af Klagenævnets afgørelser	1/10-08 (MT Højgaard mod Slots- og Ejendomsstyrelsen mfl., EU-udbudsreglerne regulerede ikke, hvordan udbyderne skulle forholde sig efter Klagenævnets afgørelse i kendelse af 10/4-08 i samme sag), UfR 2008 s. 1331 Ø (en ordregivers iværksættelse af udbud vedrørende en tjenesteydelse ca. 4½ år efter, at Klagenævnet havde truffet afgørelse om, at tjenesteydelsen var udbudspligtig, var en efterlevelse af Klagenævnets afgørelse og havde af forskellige grunde fundet sted inden for rimelig tid)
Sagsomkostninger	26/10-01 (Eterra mod Esbjerg Kommune, klager fik ikke medhold i klagen, men Klagenævnet tog en række forhold op ex officio og annullerede en beslutning fra udbyder, klager ikke tillagt sagsomkostninger), 6/4-05 (SK mod Københavns Amt, erstatning af negativ kontraktsinteresse skulle ikke dække advokatomkostninger og andre udgifter for Klagenævnet, da sådanne udgifter er omfattet af sagsomkostningerne), 7/7-05 (Brunata mod diverse boligselskabsafdelinger, efter erstatningsafgørelsens udfald i forhold til påstanden ikke sagsomkostninger), 25/10-05 (Hoffmann mod Skjern Kommune, sagsomkostninger 400.000 kr.), 6/9-06 (Sahva mod Københavns Kommune, sagsomkostningerne fastsat under hensyn til, at klager ikke havde fået medhold i en lang række af sine påstande), 12/7-07 (Dansk Høreteknik mod Københavns Kommune, angik erstatning; som følge af sagens udfald i forhold til påstanden skulle udbyderen ikke betale yderligere sagsomkostninger), 19/7-07 (ISS mod Skejby Sygehus, ved fastsættelsen af sagsomkostningerne taget hensyn til et unødvendigt arbejde, som udbyderen havde påført klageren ved fremsendelsen af et forkert dokument samt til, at klageren kun havde fået medhold i begrænset omfang)
Sale and lease back	29/1-02 (Økonomi- og Erhvervsmst. mod Farum Kommune, anvendelse af finansieringsformen sale and lease back fritog ikke for udbudspligten)
Samarbejde mellem ordregivende myndigheder (herunder indkøbscentraler, in house og sammenslutninger af ordregivende myndigheder)	11/10-96 (Luis Madsen mod Odense Kommune, udbyders overførelse af en opgave til eget aktieselskab var en divisionering, der ikke krævede udbud), EF-domstolen 18/11-99 (Teckal, opstiller de to in house-kriterier, dvs. kontrolkriteriet og virksomhedskriteriet), EF-domstolen 11/1-05 (Stadt Halle mfl.), EF-domstolen 21/7-05 (Coname), 7/9-05 (Dansk Byggeri mod Vejle Kommune. en ordregiver kan kun overlade en udbudspligtig ydelse til et selskab uden EU-udbud, hvis ordregiveren ejer og kontrollerer selskabet 100 %; denne udtalelse er for kategorisk set i lyset af EF-domstolens senere praksis), EF-domstolen 13/10-05 (Parking Brixen), EF-domstolen 10/11-05 (Kommissionen mod Østrig), 10/3-06 (FFF og LO mod Viborg Amts trafikselskab, et fælleskommunalt trafikselskab kunne uden EU-udbud indtræde i et samarbejde med nogle andre trafikselskaber, da de af EF-domstolen opstillede betingelser for at anse en virksomhed som in house var opfyldt), EF-domstolen 11/5-06 (Cabotermo og Consorzio

	Alizei, indeholder en uddybning af betingelserne for at anse en virksomhed som in house), EF-domstolen 18/1-07 (Auroux mfl., en virksomhed var ikke in house, da den var et halvoffentligt selskab med private kapitalinteresser), EF-domstolen 19/4-07 (Asemfo, eller Tragsa, et aktieselskab, der ejedes af staten med 99 % og nogle regioner med 1 %, var tilsyneladende in house i forhold til de ejende regioner, også selvom op mod 10 % af selskabets virksomhed blev udøvet over for andre end ejerne), EF-domstolen 18/12-07 (Asociación, et statsligt postvæsen var ikke in house i forhold til staten, da virksomhedskriteriet ikke var opfyldt), EF-domstolen 8/4-08 (Kommissionen mod Italien, en virksomhed, der er delvis privatejet, er aldrig in house til forhold til en offentlig ordregiver, heller ikke selvom den private ejerandel er en minoritetsandel), EF-domstolen 13/11-08 (Coditel Brabrant, et fælleskommunalt andelsselskab var in house i forhold til en af de deltagende kommuner; synes reelt at være et brud med EF-domstolens hidtidige praksis om in house-spørgsmålet)
Selskaber	23/2-01 (Kæmpe mod Søndersø Kommune, der måtte lægges vægt på dårlige erfaringer med en tilbudsgivers anpartsselskab, men ikke på dettes nuværende økonomi), 3/1-02 (AC-Trafik mod Frederiksborg Amt, et aktieselskab under stiftelse kunne afgive tilbud, men udbyder måtte ikke lægge vægt på stifternes økonomi), EF-domstolen 16/10-03 (Kommissionen mod Spanien, et statsejet aktieselskab, der stod for fængselsbyggeri, var omfattet af udbudspligten efter Bygge- og anlægsdirektivet)
Sideordnede udbud/licitationer	3/6-03 (Haderslev Tæppelager mod Støtteforeningen, sideordnede licitationer om forskellig udførelse af samme projekt var ikke i strid med Tilbudsloven), 30/11-04 (Finn Hansen mod Vendersbo, det var ikke en sideordnet licitation, at der kunne gives tilbud på hver fagentreprise og på alle entrepriser under ét, men udbyder skulle angive nøjagtigt, hvordan tilbudspriserne ville blive sammenlignet), 5/9-06 (Joca mod Reno Syd, en angivelse i udbudsbetingelserne var et sideordnet udbud og angik ikke alternative tilbud), 10/11-06 (Svend Andresen mod Århus Amt, angivelse i udbudsbetingelserne af, at der kunne gives alternative tilbud, var ukorrekt, da der var tale om sideordnede licitationer; ved tildelingskriteriet laveste pris medfører sideordnede licitationer risiko for manglende gennemsigtighed eller for, at tildelingskriteriet ikke kan fungere; udbyder havde ikke haft saglig grund til at iværksætte en sideordnet licitation vedrørende en simpel og teknisk betydningsløs detalje), 21/7-08 (Palle W. Hansen mod Hasseris Boligselskab, det fremgik klart af udbudsbetingelserne, at der under et sideordnet udbud af 10 entrepriser kunne bydes på en eller flere eller alle entrepriser)
Sociale hensyn	EF-domstolen 3/4-08 (Rüffert, lovkrav om mindstelønsklausul i kontrakter var i strid med EU-retten)
Spørgsmål til tilbudsgivere	(31/1-96, Jørgensen og Meklenborg mod Skov- og Naturstyrelsen, præcisering af tilbud efter udbyders forespørgsel var berettiget), 19/8-97 (Poul Hansen mod Vejdirektoratet, udbyder måtte ikke spørge tilbudsgiver om forståelsen af et forbehold, ændret ved VL 28/9-01), 8/10-97 (PAR mod Københavns Pædagogseminarium, udbyderen var uberettiget til at stille spørgsmål til tilbudsgiverne), 8/3-99 (FRI mod Nykøbing F. Kommune, udbyders forespørgsel til tilbudsgiver, der havde givet et yderst lavt tilbud, var i overensstemmelse med Forsyningsvirksomhedsdirektivet), 24/10-01 (Eiland mod Vestsjællands Amt, henvendelse til tilbudsgivere var i strid med ligebehandlingsprincippet og forhandlingsforbuddet), Retten 26/2-02 (Esedra mod Kommissionen, udbyderen kunne uden at overtræde forhandlingsforbuddet stille en lang række spørgsmål til en tilbudsgiver om tilbuddets indhold), 16/12-04 (Brunata mod diverse boligselskabsafdelinger, som følge af uklarhed i udbudsbetingelserne havde udbyder pligt til at søge teknisk afklaring hos visse tilbudsgivere), 13/11-06 (Cowi mod Sønderjyllands Amt, udbyder kunne uden at overtræde forhandlingsforbuddet have stillet spørgsmål til en tilbudsgiver om, hvilke geotekniske undersøgelser tilbudsgiveren kunne have regnet med), Retten 18/4-07 (Deloitte mod Kommissionen, en udbyder, der anså en tilbudsgiver for at befinde sig i en interessekonflikt, havde ikke pligt til at indhente supplerende oplysninger fra tilbudsgiveren om spørgsmålet)
Spørgsmålsfrist (dvs. frist for spørgsmål fra tilbudsgivere)	18/9-98 (FRI mod Frederiksberg Kommune (reglen i Tjenesteydelsesdirektivet om, at der skulle kunne stilles spørgsmål indtil 6 dage før tilbudsfristens udløb, måtte forstås som sigtende til kalenderdage, af forskellige grunde ikke overtrædelse i det konkrete tilfælde)
Standarder	4/11-98 (Humus mod Herning Kommune, CEN-norm burde have været anvendt ved udbuddet), 2/4-02 (ISS mod Rigshospitalet, en europæisk standard skulle ikke anvendes, allerede fordi den ikke var offentliggjort før udbuddet)
Standardforbehold	7/12-00 (FRI mod Kulturministeriet, vedlæggelse af standardforbehold var et forbehold om grundlæggende elementer, synes reelt ændret på dette punkt ved ØL 7/10-02), 9/6-04 (Per Aarsleff mod Fyns Amt mfl., en mulig dansk praksis om, at der tages standardforbehold, som derefter frafaldes ved kontraktsindgåelsen, er uden betydning

	ved fortolkningen af EU's udbudsregler, udbyder skulle have prissat to forbehold indeholdt i standardforbehold; forbehold i standardforbehold om vinterforanstaltninger angik ikke et grundlæggende element), 26/8-04 (Per Aarsleff mod Amager Strandpark, som følge af sagens omstændigheder gjorde klausul i standardforbehold om vinterforanstaltninger tilbuddet ukonditionsmæssigt, hvilket derimod ikke var tilfældet med hensyn til klausul i standardforbeholdene om prisregulering, ændret ved ØL 5/2-08 med hensyn til forbeholdet om vinterforanstaltninger), 26/11-04 (Pihl & Søn mod Kriminalforsorgen, et standardforbehold om garanti kunne ikke prissættes, standardforbehold om vinterforanstaltninger angik efter sagens omstændigheder ikke et grundlæggende element)
Stand-still	EF-domstolen 28/10-99 (Alcatel Austria mfl., medlemsstaterne skal indføre en klageprocedure, hvorefter en klager kan få en tildelingsbeslutning kendt ugyldig), EF-domstolen 24/6-04 (Kommissionen mod Østrig, alle tilbudsgivere skal have underretning om tildelingsbeslutningen, og der skal derefter gå en rimelig tid inden kontraktsindgåelsen), 13/3-06 (Kirudan mod Kolding Kommune, samtidig fremsendelse af kontrakt til den valgte tilbudsgiver og underretning til tilbudsgiverne om tildelingsbeslutningen var i strid med principperne om ligebehandling og effektivitet), 5/9-06 (Joca mod Reno Syd, indgåelse af kontrakt på dagen for tilbudsfristens udløb var i strid med principperne om ligebehandling og effektivitet), 21/8-07 (Centralforeningen mod Midttrafik, standstill-ordningen gælder kun for udbud efter Udbudsdirektivet og ikke for udbud efter Forsyningsvirksomhedsdirektivet), 27/3-08 (AV Form mod Esbjerg Kommune mfl., ved klage i stand-still perioden må udbyderen ikke indgå kontrakt, før Klagenævnet har truffet bestemmelse om opsættende virkning, hvilket ikke afhænger af Klagenævnets underretning herom, opretholdt ved Retten i Herning 5/11-09), 19/12-08 (UAB mod Ringsted Kommune, overtrædelse af stand-still reglerne ved, at underretningen om tildelingsbeslutningen blev givet ved almindeligt brev)
Statsstøtte	EF-domstolen 7/12-00 (ARGE, det er ikke i strid med ligebehandlingsprincippet, at tilbudsgivere, der modtager statsstøtte, kommer i betragtning ved et EU-udbud, dog et vist forbehold navnlig med hensyn til ulovlig statsstøtte)
Stillingsfuldmagt	8/5-06 (Pankas mod Korsør Kommune, et krav i udbudsbetingelserne om, at kontrakten skulle underskrives af en tegningsberettiget, var ikke til hinder for, at tilbud blev underskrevet i henhold til stillingsfuldmagt)
Supplerende kontraktsbetingelser	16/10-96 (Danske Vognmænd mod Stevns Kommune, krav til tjenesteydelsen begrundet i arbejdsmiljømæssige hensyn var lovlige), EF-domstolen 26/9-00 (Kommissionen mod Frankrig, der kan eventuelt anvendes et tildelingskriterium om beskæftigelse af lokal arbejdskraft, hvilket i så fald skal være nævnt i udbudsbekendtgørelsen), 27/9-00 (Svend B. Thomsen mod Blåvandshuk Kommune, det kunne ikke udelukkes, at bl.a. et tildelingskriterium om arbejdsmiljø var egnet til at identificere det økonomisk mest fordelagtige bud), EF-domstolen 3/4-08, Rüffert, bl.a. traktatens artikel 49 er til hinder for en national lovbestemmelse om, at offentlige byggekontrakter kun må indgås på vilkår om betaling af overenskomstmæssig mindsteløn), 4/4-08 (Damm mod Økonomistyrelsen, en angivelse i udbudsbekendtgørelsen var en betingelse for kontraktsindgåelse, ikke et udvælgelseskriterium)
Tavshedspligt	25/10-95 (Siemens mod Esbjerg Kommune, ikke medhold i klage over manglende fortrolighed ved udbyders behandling af oplysninger, da en påberåbt bestemmelse i Forsyningsvirksomhedsdirektivet ikke indeholdt specielle EU-regler om fortrolig behandling af oplysninger, og da danske regler om fortrolighed lå uden for Klagenævnets kompetence)
Tegningsberettigelse	8/5-06 (Pankas mod Korsør Kommune, et krav i udbudsbetingelserne om, at kontrakten skulle underskrives af en tegningsberettiget, var ikke til hinder for, at tilbud blev underskrevet i henhold til stillingsfuldmagt)
Tekniske specifikationer	4/11-98 (Humus mod Herning Kommune, CEN-norm burde have været anvendt ved udbuddet), 14/12-07 (Thomas Borgå mod Skive Kommune, Udbudsdirektivets artikel 23 overtrådt ved indgåelse af kontrakt om bilag II B-tjenesteydelser)
Tilbagekaldelse	25/1-98 (Konkurrencestyrelsen mod Tårnby Kommune, Klagenævnet er kompetent til at færdigbehandle en sag, selvom om klager har tilbagekaldt den), 10/12-99 (Herning Bladet mod Herning Kommune, når en klage er tilbagekaldt, færdigbehandler Klagenævnet kun sagen, hvis der foreligger ganske særlige grunde, hvilket ikke var tilfældet), 19/12-95 (Kirkebjerg mod HS, klagesag færdigbehandlet, selvom klagen var tilbagekaldt), 25/3-02 (påbud givet i kendelse af 21/10-98 tilbagekaldt), 20/12-05 (Adelholm mod Faber Invest, udbyder havde bevisbyrden for, at et tilbud var tilbagekaldt)
Tilbudsfrist	21/11-03 (Harry Andersen mod Vejle Amt, det var i strid med Tilbudslovens ligebehandlingsprincip at tage et tilbud, der var modtaget efter tilbudsfristens udløb, i be-

	tragtning), 6/7-06 (Logstor mod Viborg Fjernvarme, tilbudsfristen i udbudsbetingelserne vedrørte de tilbud, som tilbudsgiverne skulle indlevere for at deltage i udbuddet, og vedrørte ikke senere supplerende tilbud), 15/8-07 (Stürup mod Billund Kommune, overtrædelse ved udsættelse af tilbudsfristen uden saglig grund; det var uden betydning, at nogle tilbudsgivere havde accepteret udsættelsen),
Tilbudslovens afsnit I	11/8-03 (Kruse & Mørk mod Jetsmark, et kraftvarmeværk var ikke et offentligretligt organ efter Bygge- og anlægsdirektivet og var dermed ikke omfattet af Tilbudslovens § 1, stk. 2; en tilkendegivelse om, at Tilbudsloven finder anvendelse, skal være udtrykkelig og utvetydig), 30/6-03 Skanska mod Løgstør Kommune, tilbud taget i betragtning i strid med »inhabilitetsreglen« i Tilbudslovens § 5; Tilbudslovens § 7 medfører kun pligt til ved tilbudsåbning at give oplysning om udtrykkelige forbehold og forhold, der ved en hurtig gennemgang må vurderes som forbehold), 17/11-03 (Helsingør Kommune mod Stengade 56, tildeling til virksomhed, der havde ejersammenfald med udbyder, var ikke i strid med Tilbudslovens inhabilitetsregler, men derimod med lovens ligebehandlingsprincip), 20/12-05 (Adelholm mod Faber Invest, hvis udbyder ikke kan blive enig med lavestbydende under forhandlinger i medfør af Tilbudslovens § 10, må udbyder ikke af denne grund tildele ordren til næstlavestbydende eller indlede forhandlinger med denne), 3/2-06 (J. Olsen mod Ramsø Kommune, en kommune havde ønsket en genbrugsstation opført ved et hvilket som helst middel, hvorfor kommunen skulle gå frem efter Tilbudsloven), 6/11-06 (Thorup Gruppen mod Skjern Kommune, overtrædelse af Tilbudsloven ved at give de andre tilbudsgivere underretning om indholdet af en tilbudsgivers tilbud), 23/2-07 (Rebo mod Damparken, en bemærkning i licitationsbetingelserne var en utvetydig tilkendegivelse om, at Tilbudsloven fandt anvendelse)
Tilbudslovens afsnit II	28/10-08 (Bjarne Larsen mod Morsø Kommune)
Tildeling, herunder tilbudsvurdering	18/11-94 (Danmarks Optikerforening mod Aalborg Kommune, ikke grundlag for at tilsidesætte udbyders vurdering af det økonomisk mest fordelagtige bud), 7/7-95 (Valles Trans-Media mod Københavns Kommune, lignende), 12/1-96 (H.C. Svendsen mod Birkerød Kommune, lignende, Klagenævnet efterprøver ikke udbyders skøn i alle enkeltheder), 23/1-96 (PAR mod Glostrup Kommune, uberettiget anvendelse af tildelingskriterium, der ikke fremgik af udbuddet), EF-domstolen 25/4-96 (sag C-87/94, Kommissionen mod Belgien, sagen om de wallonske busser, det var i strid med principperne om ligebehandling og gennemsigtighed, at udbyderen ved tildelingsbeslutningen tog hensyn til angivelser i det valgte tilbud uden reference til underkriterierne), 18/11-96 (European Metro Group mod Ørestadsselskabet, ikke noget der tydede på, at udbyder ikke havde bedømt tilbuddene sagligt og objektivt, for så vidt stadfæstet ved HR 31/3-05 i UfR 2005 s. 1799 H), 10/2-97 (Dafeta mod Lynettefællesskabet, uberettiget anvendelse af vægtningsmodel, der ikke var bekendtgjort), 28/2-97 (Kiras mod Kolding Kommune, tildelingen var foregået inden for rammerne af udbyders skøn), 1/3-99 (Enemærke & Petersen mod Fællesorganisationens Boligforening, ikke grundlag for at antage, at udbyderens vurdering af det økonomisk mest fordelagtige tilbud var usaglig), 11/6-99 (Hoffmann & Sønner mod Aalborg Lufthavn, principielle bemærkninger om betydningen af underkriteriet »pris«), 16/7-99 (Holst Sørensen mod Vendsyssel Øst, offentligt udbud, ikke grundlag for at antage, at udbyderen havde tilsidesat Tjenesteydelsesdirektivet ved sin vurdering af det økonomisk mest fordelagtige tilbud, selvom udbyderen alene havde lagt vægt på tilbudsprisen), 9/11-99 (More Group mod Århus Kommune, ikke grundlag for kritik af udbyders tildelingsbeslutning), 15/12-99 (Lifeline mod Dansk Hunderegister, bestemmelse, der var medtaget i udbudsbetingelserne, og som kunne føre til, at tildelingen ikke skete på grundlag af tildelingskriteriet, var i strid med Tjenesteydelsesdirektivet), 17/12-99 (Renoflex mod Søllerød Kommune, udbyders tildeling af ordren var uberettiget, da den valgte tilbudsgiver ikke havde givet tilstrækkelige oplysninger til brug for vurderingen i henhold til tildelingskriterierne), 28/12-99 (Skjortegrossisten mod Post Danmark, det var i strid med Indkøbsdirektivet, at udbyder havde anvendt tildelingskriterier og et pointsystem, der ikke fremgik af udbudsbetingelserne), 27/6-00 (Dapa mod Vestforbrænding, Klagenævnet ønskede ikke at beskæftige sig med en klage over udbyders vægtningsmodel og vurdering af tilbuddene, da udbyders evaluering af tilbuddene syntes at være sket sagligt, og da klageren fik medhold på nogle andre centrale punkter), 27/9-00 (Svend B. Thomsen mod Blåvandshuk Kommune, tildeling på grundlag af et ikke bekendtgjort tildelingskriterium var i strid med Tjenesteydelsesdirektivets artikel 3, stk. 2), 14/12-00 (Renoflex mod Vestforbrænding, ikke grundlag for at fastslå, at den valgte tilbudsgiver ikke havde givet det økonomisk mest fordelagtige tilbud, men udbyders evalueringsmodel indebar uigennemsigtighed med risiko for forskelsbehandling og var konkret anvendt forkert), 30/1-01 (DTL mod Haderslev

	Kommune, tilbud var ikke unormalt lavt, tilbud fra et interessentskab, som udbyder var interessent i, kunne tages i betragtning; der kunne lægges vægt på fordelen ved kun at have en entreprenør), 22/6-01 (Kommune og Amts Revision mod Ikast Kommune, udbyder havde anvendt underkriterierne prioriteret, uagtet de i udbudsbetingelserne var angivet som uprioriterede), Retten 26/2-02 (Esedra mod Kommissionen, udbyderen kunne ved vurderingen af tilbudspriserne tage hensyn til tjenesteydelsens forventede omfang), 10/5-02 (Ementor mod Århus Amt, udbyder måtte ikke indgå kontrakt med en underleverandør til en tilbudsgiver), 27/11-02 (Aon mod Odense Kommune, udbyder havde lagt vægt på nogle forhold, der ikke fremgik af udbuddet, herunder et forhold i strid med ligebehandlingsprincippet), 6/2-03 (Hedeselskabet mod Løkken-Vraa Kommune, valg af tilbudsgiver i strid med Tilbudslovens § 6), EF-domstolen 10/4-03 (Kommissionen mod Tyskland, der kan tages miljømæssige hensyn ved tildelingen af en kontrakt), 3/6-03 (Haderslev Tæppelager mod Støtteforeningen, antagelse af tilbud med et andet fabrikat end det foreskrevne var i strid med Tilbudsloven), 20/2-04 (Miri mod Esbjerg Kommune, udbyder måtte ikke lade medarbejdere fra en tilbudsgivers underleverandør deltage i evalueringen, opretholdt ved VL 31/3-06), 6/5-04 (Sereno mod Vejle Amt, klage over, at udbyder ikke havde taget hensyn til klagerens tilsagn om støtte til en klinik, ikke taget til følge, da udbudsbetingelserne ikke omfattede mulighed for at give et sådant tilsagn, og da det ville have været en overtrædelse af forhandlingsforbuddet at tage hensyn til det), 30/9-04 (Colas mod Videbæk Kommune, tilbuddene skulle vurderes ud fra den naturlige forståelse af licitationsbetingelserne, og udbyderens vurdering var til dels usaglig; det var en overtrædelse af Tilbudslovens ligebehandlingsprincip, at udbyderen betragtede et tilsagn fra en tilbudsgiver om en merydelse som en reduktion i tilbudsprisen), 2/3-05 (Pumpex mod Hedensted Kommune, en anvendt vurderingsmodel var i strid med Tilbudsloven, da tilbudsgiverne ikke kunne påregne vurdering efter en sådan model), 7/6-05 (Bladt mod Storebælt, når udbyder har prissat et forbehold, skal udbyder ved vurderingen af tilbuddet anse tilbuddet for at opfylde det krav, som forbeholdet angår), 25/10-05 (Hoffmann mod Skjern Kommune, overtrædelse af Tilbudsloven ved anvendelse af en anden pointskala end oplyst i licitationsbetingelserne), 11/11-05 (Blue Line mod Storstrøms Trafikselskab, tildeling til en primær leverandør og en subsidiær leverandør var i strid med Tjenesteydelsesdirektivet, bl.a. fordi det ikke var angivet i udbudsbetingelserne, at tildeling ville ske således), 28/2-06 (S-Card mod Rigspolitiet, ved EU-udbud skal udbyderen udfærdige et dokument som grundlag for tildelingsbeslutningen, og dette dokument er ikke et internt arbejdsdokument i relation til reglerne om aktindsigt), 13/3-06 (Kirudan mod Kolding Kommune, udbyder havde ikke godtgjort, at tilbudsvurderingen var saglig), 6/7-06 (Logstor mod Viborg Fjernvarme, urigtig vurdering af den valgte tilbudsgivers tilbud i relation til underkriteriet pris), 6/9-06 (Sahva mod Københavns Kommune, ved vurderingen af et tilbuds opfyldelse af et underkriterium om kvalitet kunne der lægges vægt på, om tilbuddet opfyldte internationale kvalitetsnormer; udbyders vurdering af tilbudspris skal i videst muligt omfang foretages ved en eksakt beregning og må ikke ske ved et rent skøn), 26/10-06 (Novartis mod HS, tilbudsvurderingen blev ikke foretaget i overensstemmelse med underkriterierne og den angivne vægtning af dem), 14/12-06 (Baxter mod Roskilde Amt mfl., ved udbud omfattende flere delaftaler skal hver delaftale vurderes for sig), 12/2-07 (Dansk Høreteknik mod Københavns Kommune, tilbuddene skal vurderes i forhold til underkriterierne og ikke i forhold til hinanden, overtrædelse ved at lægge vægt på et forhold, som udbyderen havde tilkendegivet, at der ikke ville blive lagt vægt på; tilbudsgiverne må kunne forvente, at det er oplyst på forhånd, hvis udbyderen vil lægge afgørende vægt på, at de tilbudte produkter har nogle bestemte egenskaber; overtrædelse af ligebehandlingsprincippet ved et skøn over, hvad tilbudspriserne lød på, i stedet for en beregning og ved tildeling af points vedrørende underkriteriet pris efter et skøn; overtrædelse af gennemsigtighedsprincippet ved ikke at have udformet en skriftlig tilbudsvurdering senest samtidig med tildelingsbeslutningen), 19/7-07 (ISS mod Skejby Sygehus, overtrædelse af Udbudsdirektivet ved anvendelse af et delkriterium, der ikke var angivet i udbudsbetingelserne, og ved tildelingsbeslutning i strid med prækvalifikationen), 10/8-07, MT Højgaard mod Lejerbo, overtrædelse ved prissammenligning af usammenlignelige forhold og ved at lægge vægt på et forhold, der udgjorde et udvælgelseskriterium, opretholdt ved Århus Ret 6/5-09), 29/8-07 (Sectra mod Region Syddanmark, egenskaber ved det tilbudte kunne indgå i tilbudsvurderingen vedrørende de ikke-økonomiske underkriterier, ikke taget stilling til klage over pointtildeling), 3/9-07 (SP Medical mod Skat, udbyderens skøn ved tilbudsvurderingen ikke tilsidesat, men overtrædelse ved at lægge vægt på forhold, der ikke var omfattet af underkriterierne, opretholdt af Retten i Horsens 20/5-09), 17/10-07 (Triolab

	mod RH, overtrædelse af gennemsigtighedsprincippet ved ikke at have udformet en skriftlig tilbudsvurdering), 22/10-07 (Grønbech mod Albertslund Boligselskab, overtrædelse ved vægtning i strid med udbudsbetingelserne), 14/2-08 (Jysk Erhvervsbeklædning mod Hjørring Kommune, overtrædelse af ligebehandlingsprincippet ved at vurdere tilbuddene i forhold til hinanden i stedet for i forhold til underkriterierne), 27/3-08 (AV Form mod Esbjerg Kommune, krav om, at tilbuddene skulle omfatte mindst 4.000 varenumre, og tilbudsevaluering på grundlag af prisen for nogle få af varerne var i strid med principperne om ligebehandling og gennemsigtighed, opretholdt ved Retten i Herning 5/11-09), 10/4-08 (MT Højgaard mod Slots- og Ejendomsstyrelsen m.m., overtrædelse ved vurdering af tilbuddene på en anden måde end angivet i udbudsbetingelserne), 16/4-08 (Boligkontoret mod Lægeforeningens boliger, overtrædelse af ligebehandlingsprincippet ved at lægge vægt på et forhold, der ikke var angivet i udbudsbetingelserne), 30/4-08 (SCA mod Sorø Kommune, udbyderens pointtildeling ikke tilsidesat), 14/5-08 (Trans-Lift mod DSB, udbyderen havde ikke løftet sin bevisbyrde for, at tilbuddene var vurderet efter de fastsatte underkriterier og kun dem), 30/5-08 (Serviceselskabet mod Region Midtjylland, Klagenævnet havde ikke anledning til at tilsidesætte udbyderens tilbudsvurdering i relation til underkriterierne), 26/6-08 (UAB mod Furesø Kommune mfl., Klagenævnet havde ikke grundlag for at fastslå, at udbyderne ikke havde vurderet klagerens tilbud i overensstemmelse med udbudsbetingelserne eller havde overtrådt Udbudsdirektivet i øvrigt), 27/6-08 (DA mod Handels- og Søfartsmuseet, overtrædelse ved at udpege et ukonditionsmæssigt projektforslag som vinder af en projektkonkurrence), 12/9-08 (Master Data mod Københavns Kommune, overtrædelse af ligebehandlingsprincippet ved fejlvurdering af en tilbudsgivers tilbudspris som følge af forkert forudsætning om kontraktsperiodens længde; udbyderen havde vurderet tilbuddene i forhold til underkriterierne og ikke i forhold til hinanden; den valgte tilbudsgivers tilbud opfyldte et krav i udbudsbetingelserne om, at et tilbudt it-system skulle være et standardsystem, og der kunne ikke i udbudsbetingelserne indfortolkes et krav om, at systemet skull være implementeret hos andre; nogle notater var en tilstrækkelig skriftlig tilbudsvurdering), 2/10-08 (C.C. Brun mod Storebælt, ikke taget stilling til, om udbyderen havde vurderet tilbuddene rigtigt i relation til nogle af underkriterierne, da Klagenævnet ikke tager stilling til, hvilken pointtildeling en tilbudsvurdering skal give sig udslag i, udbyderens afvisningspåstand ikke fulgt), 3/10-08 (Creative mod Århus Kommune, Udbudsdirektivet indeholder ikke regler om, hvornår udbyderen skal fastsætte den endelige vægtning af underkriterierne i tilfælde, hvor udbyderen har fastsat en relativ vægtning; en udbyder har ikke pligt til at anvende et pointsystem ved tilbudsvurderingen; klage over udbyderens tildeling af points til klagerens tilbud og den valgte tilbudsgivers tilbud ikke taget til følge, da det var godtgjort, at den valgte tilbudsgivers tilbud bedre end klagerens opfyldte udbudsbetingelsernes krav på det pågældende punkt; det var ikke i strid med ligebehandlingsprincippet, at udbyderen i henhold til udbudsbetingelserne kun foretog en kvalitetsvurdering af en mindre del af de ønskede produkter; udbyderen har ikke pligt til at anonymisere vareprøver ved kvalitetsvurdering), 16/10-08 (Grønbech mod Albertslund Boligselskab, det kunne efter sagens oplysninger ikke lægges til grund, at den valgte tilbudsgivers tilbudspriser vedrørende nogle andre entrepriser var gjort afhængige af, at tilbudsgiveren fik tildelt den entreprise, som sagen drejede sig om), 20/10-08 (TagVision mod Egedal Kommune, udbyderen havde saglig grund til at annullere udbuddet, fordi nogle forhold, som udbyderen lagde vægt på, ikke fremgik af udbudsbetingelserne, herefter ikke anledning til at tage stilling til, om udbyderen også kunne annullere udbuddet, fordi der var blevet tildelt tilbuddene points vedrørende et underkriterium om økonomi ved et skøn i stedet for ved en beregning), 5/11-08 (Brøndum mod Ringgården, hvis tildelingskriteriet er det økonomisk mest fordelagtige bud og de kvalitative underkriterier er uegnede, har udbyderen saglig grund til at annullere udbuddet og må ikke anvende tildelingskriteriet laveste pris, dette er udtryk for en bevidst ændring af Klagenævnet praksis), 10/12-08 (Nordjysk Kloak mod Aalborg Kommune, klage over udbyderens pointtildeling ikke taget til følge, da Klagenævnet ikke havde grundlag for at tilsidesætte udbyderens skøn), 17/12-08 (Bandagist-Centret mod Århus Kommune, ikke taget stilling til, om udbyderen kunne tilbagekalde tildelingsbeslutningen og i stedet skulle have annulleret udbuddet)
Tildelingskriterier	20/1-94 (MMM mod Statens Seruminstitut, underkriterierne var ikke for omfattende og generelle), 17/6-94 (Audio-Visuelt Centrum mod Odense Kommune, ønskeligt at underkriterierne havde været angivet i udbudsbetingelserne, er klart forældet), 23/1-96 (PAR mod Glostrup Kommune, to kriterier, der var anvendt ved prækvalifikationen, kunne ikke anvendes som tildelingskriterier), 16/10-96 (Danske Vognmænd mod Stevns Kommune, krav til tjenesteydelsen begrundet i arbejdsmiljømæssige hensyn

	var lovlige), 19/6-97 (Højgaard & Schultz mod Hundested Boligselskab, ukorrekt tildelingskriterium), 8/10-97 (PAR mod Københavns Pædagogseminarium, udbyder havde haft saglig grund til ikke at prioritere underkriterierne), 29/10-97 (Esbjerg Renovationsselskab mod Rødding Kommune, vægtningsmodel var i strid med ligebehandlingsprincippet), 26/1-98 (Albertsen & Holm mod Københavns Belysningsvæsen, tildelingskriterierne var uegnede til at identificere det økonomisk mest fordelagtige bud), 3/7-98 (Nybus mfl. mod Storstrøms Trafikselskab, opdeling af udbud i pakker var ikke til hinder for at finde det økonomisk mest fordelagtige tilbud), 14/9-98 (Handelskammeret mod Danmarks Statistik, tildelingskriterierne var ikke egnet til at identificere det økonomisk mest fordelagtige tilbud), 1/3-99 (Enemærke & Petersen mod Fællesorganisationens Boligforening, referencer og kapacitet skal vurderes ved prækvalifikationen og må ikke indgå i tildelingskriteriet), 8/3-99 (FRI mod Nykøbing F. Kommune, underkriteriet »tilbudspris« kunne anvendes, selvom opgavens omfang ikke var endeligt fastlagt), 16/7-99 (Holst Sørensen mod Vendsyssel Øst, offentligt udbud, nogle underkriterier refererede til tilbudsgiverens generelle egnethed og ikke det konkrete tilbud, hvorved der var sket en sammenblanding af kvalifikationskriterier og tildelingskriterier, det var ulovligt, at udbyder havde forbeholdt sig ret til frit at vælge mellem tilbuddene), 27/10-99 (Humus mod Affaldsselskabet Bobøl, det var ulovligt, at udbyder havde forbeholdt sig ret til frit at vælge mellem tilbuddene, stadfæstet ved VL 7/5-01), 15/12-99 (Lifeline mod Dansk Hunderegister, ukorrekt tildelingskriterium, det var i strid med Tjenesteydelsesdirektivet, at det ikke var nævnt i udbuddet, at underkriterierne var angivet uprioriteret), 17/12-99 (Renoflex mod Søllerød Kommune, do.), 28/12-99 (Skjortegrossisten mod Post Danmark, sammenblanding af kvalifikations- og tildelingskriterier), 9/2-00 (PAR mod Udenrigsministeriet, lignende, tildelingskriteriet var ikke egnet til at identificere det økonomisk mest fordelagtige bud), 2/5-00 (Uniqsoft mod Odense Kommune, principielle bemærkninger om forholdet mellem kvalifikationskriterier og tildelingskriterier, herunder, at et forhold efter omstændighederne kan være begge dele, konkret uretmæssig anvendelse af kvalifikationskriterier som tildelingskriterier; anvendelse af et ikke bekendtgjort tildelingskriterium og angivelse af, at udbyder ved tildelingen »især« ville lægge vægt på visse forhold, stred mod Indkøbsdirektivet), 16/5-00 (DTL mod Reno Syd, ukorrekt tildelingskriterium, kvalifikationskriterier anvendt som tildelingskriterier; hvis tildelingskriterierne er angivet i udbudsbekendtgørelsen, må de principielt ikke angives anderledes i udbudsbetingelserne), 27/6-00 (Dapa mod Vestforbrænding, Klagenævnet ønskede ikke at beskæftige sig med en klage over udbyders vægtningsmodel og vurdering af tilbuddene, da udbyders evaluering af tilbuddene syntes at være sket sagligt, og da klageren fik medhold på nogle andre centrale punkter), 11/8-00 (Kirkebjerg mod Ribe Amt, det var i strid med udbudsreglerne, at udbyder havde forbeholdt sig ret til frit at vælge mellem tilbuddene), EF-domstolen 26/9-00 (Kommissionen mod Frankrig, henvisning til fransk lovgivning om tildeling af offentlige kontrakter var ikke en tilstrækkelig angivelse af tildelingskriteriet; der kan eventuelt anvendes et tildelingskriterium om beskæftigelse af lokal arbejdskraft, hvilket i så fald skal være nævnt i udbudsbekendtgørelsen), 27/9-00 (Svend B. Thomsen mod Blåvandshuk Kommune, et tildelingskriterium hørte hjemme under prækvalifikationen og var derfor i strid med Tjenesteydelsesdirektivet, med hensyn til nogle andre tildelingskriterier kunne det ikke udelukkes, at de var egnede til at identificere det økonomisk mest fordelagtige bud, anvendelse af et ikke bekendtgjort tildelingskriterium var i strid med Tjenesteydelsesdirektivets artikel 3, stk. 2, underkriterierne skulle angives prioriteret, da der ikke var saglig grund til andet), 14/12-00 (Renoflex mod Vestforbrænding, ikke grundlag for at fastslå, at den valgte tilbudsgiver ikke havde givet det økonomisk mest fordelagtige tilbud, men udbyders evalueringsmodel indebar uigennemsigtighed med risiko for forskelsbehandling og var konkret anvendt forkert), 23/2-01 (Kæmpe mod Søndersø Kommune, om forholdet mellem udvælgelseskriterier og tildelingskriterier), 27/4-01 (DTL mod Nyk. F. Kommune, klage over, at et underkriterium var beskrevet forskelligt i udbudsbekendtgørelsen og udbudsbetingelserne, ikke taget til følge, da forholdet ikke havde medført uklarhed), 2/5-01 (Magnus mod Told og Skat, ikke anledning til at tage stilling til klage over, at underkriterierne ikke var angivet prioriteret), EF-domstolen 18/10-01 (Siac, forskellige bemærkninger om tildelingskriteriet det økonomisk mest fordelagtige bud), 24/10-01 (Eiland mod Vestsjællands Amt, et underkriterium var uden mening og var uegnet til at identificere det økonomisk mest fordelagtige bud), 3/1-02 (AC-Trafik mod Frederiksborg Amt, en udbyder, der havde angivet underkriterierne prioriteret, havde ikke pligt til at oplyse om en vægtningsmodel og en pointskala, der ville blive anvendt ved vurderingen af tilbuddene, et underkriterium kunne anvendes både som udvælgelseskriterium og tildelingskriterium, men var

	uklart, et andet underkriterium var egnet til at identificere det økonomisk mest fordelagtige bud), 27/2-02 (Vindtek mod Holstebro Kommune, nogle underkriterier var uegnet til at identificere det økonomisk mest fordelagtige bud), 21/3-02 (Holsted Minibus mod Næstved Kommune, ulovligt tildelingskriterium), 2/4-02 (ISS mod Rigshospitalet, prioritering af underkriterierne skal oplyses straks), 10/5-02 (Ementor mod Århus Amt, forskellig angivelse af underkriterierne i udbudsbekendtgørelsen og udbudsbetingelserne), 9/8-02 (Kommunernes Revision mod Arbejdsmarkedsstyrelsen, det var i strid med Tjenesteydelsesdirektivet, at underkriterierne ikke var prioriteret), EF-domstolen 17/9-02 (Concordia, der må under visse forudsætninger anvendes kriterier om miljøforhold; det er uden betydning, om sådanne kriterier kun kan opfyldes af et mindre antal virksomheder), 27/11-02 (Aon mod Odense Kommune, underkriterierne skulle ikke angives prioriteret), 3/6-03 (Haderslev Tæppelager mod Støtteforeningen, forbehold om frit valg mellem tilbuddene var i strid med Tilbudsloven), EF-domstolen 10/4-03 (Kommissionen mod Tyskland, der kan tages miljømæssige hensyn ved tildelingen af en kontrakt), EF-domstolen 19/6-03 (GAT, referencer til andre kunder og mulighed for besigtigelse inden en vis adgang fra udbyderens forretningssted må ikke bruges som underkriterier), 4/11-03 (Bombardier mod Lokalbanen, et stort antal underkriterier burde have været prioriteret i et vist omfang), EF-domstolen 4/12-03 (EVN og Wienstrom, levering af energi fra vedvarende energikilder kan anvendes som underkriterium og kan prioriteres højt), 10/3-04 (Brd. Thybo mod AA 1938 (Tilbudsloven overtrådt ved, at der ikke var fastsat underkriterier til tildelingskriteriet det økonomisk mest fordelagtige bud, udbyderen skulle have annulleret licitationen eller gennemført den efter tildelingskriteriet laveste pris, på det sidstnævnte punkt »overruled« ved 5/11-08, Brøndum mod Ringgården), 22/3-04 (J. A. Mortensen mod Kulturministeriet, Tilbudsloven overtrådt ved forbehold om frit at vælge mellem tilbuddene), 9/6-04 (Per Aarsleff mod Fyns Amt mfl., overtrædelse af Bygge- og anlægsdirektivet ved angivelse, der kunne forstås sådan, at tilbudsgivere ved at afgive alternative tilbud kunne ændre tildelingskriteriet), 21/6-04 (Banverket mod Nordjyske Jernbaner, udbud efter forhandling efter Forsyningsvirksomhedsdirektivet, et underkriterium var for uklart), 9/7-04 (H.O. Service mod Boligf. 32, de fastsatte underkriterier til tildelingskriteriet det økonomisk mest fordelagtige bud var uanvendelige, hvorfor tildelingskriteriet laveste bud skulle have været anvendt, på dette punkt »overruled« ved 5/11-08, Brøndum mod Ringgården; forbehold om frit at vælge mellem tilbuddene og forkaste alle bud var i strid med Tilbudsloven), 23/9-04 (Glatførebekæmpende vognmænd mod Nordjyllands Amt, forskellig angivelse af tildelingskriterium i udbudsbekendtgørelsen og udbudsbetingelserne, herefter pligt til at bruge tildelingskriteriet laveste pris, formentlig »overruled« ved 5/11-08, Brøndum mod Ringgården), 29/9-04 (Dansk Byggeri mod Sundby-Hvorup Boligselskab, da der ikke var fastsat anvendelige underkriterier til tildelingskriteriet det økonomisk mest fordelagtige bud, skulle udbyderen gennemføre licitationen ved anvendelse af tildelingskriteriet laveste bud, formentlig »overruled« ved 5/11-08, Brøndum mod Ringgården), 11/10-04 (Weilbach mod Kort- og Matrikelstyrelsen, Tjenesteydelsesdirektivets artikel 36 overtrådt ved forbehold om frit at vælge mellem næsten ligeværdige tilbud, udvælgelseskriterier kunne efter omstændighederne benyttes som underkriterier), EF-domstolen 14/10-04 (Kommissionen mod Frankrig, det følger af principperne om ligebehandling og gennemsigtighed, at et udbud klart skal definere kontraktens art og kriterierne for tildeling af den), 29/10-04 (Flemming Damgaard mod Helle Kommune, tildelingskriteriet var ikke i overensstemmelse med Tilbudslovens regler om tildelingskriterier), 22/11-04 (Dansk Restproduktion mod Århus Kommune, overtrædelse ved angivelse af, at tilbuddene »bl.a.« ville blive vurderet efter underkriterierne), 2/3-05 (Pumpex mod Hedensted Kommune, referencer og valg af underentreprenør kunne ikke bruges som underkriterier), 11/3-05 (MT Højgaard mod Frederiksberg Boligfond, ikke pligt til at vægte underkriteriet pris med en bestemt vægt, et underkriterium var rettelig et udvælgelseskriterium, og andre underkriterier var uegnede til at identificere det økonomisk mest fordelagtige bud; udbyder havde ikke pligt til at fastsætte vægtningen af underkriterier på et bestemt tidspunkt), 13/9-05 (Navigent mod Arbejdsmarkedsstyrelsen, det kan ikke udelukkes, at et forhold kan være både en kvalifikationsbetingelse og et underkriterium; ikke pligt til at vægte prisen med en vis større procentdel, to underkriterier kunne prioriteres sideordnet), 25/10-05 (Hoffmann mod Skjern Kommune, overtrædelse af Tilbudsloven ved ikke at angive underkriterierne prioriteret), 15/12-05 (Air Liquide mod Roskilde Amt mfl. (overtrædelse af Tjenesteydelsesdirektivet ved ikke at angive underkriterierne prioriteret), 13/3-06 (Kirudan mod Kolding Kommune, et underkriterium var uegnet, da det angik tilbudsgivernes forhold), 14/12-06 (Baxter mod Roskilde Amt mfl., underkriterierne må ikke sammenblandes med de

	mindstekrav, der skal opfyldes af alle tilbudsgivere, og må heller ikke sammenblandes med hinanden), 27/4-07 (CT Renovation mod Skive-Egnen, underkriterium om et vist lokalt kendskab var i strid med ligebehandlingsprincippet; sideordnede underkriterier opfyldte Udbudsdirektivets krav om angivelse af relativ vægtning for underkriterier), 6/6-07 (Rengøringsgrossisten mod Skive Kommune, overtrædelse af Udbudsdirektivet ved fastsættelse af et meningsløst underkriterium om eventuelle forbehold), 13/7-07 (Magnus mod Skat, overtrædelse af Udbudsdirektivet ved ikke at oplyse underkriteriernes vægtning i udbudsbetingelserne, men først under en spørgerunde; underkriterierne var uegnede til at identificere det økonomisk mest fordelagtige bud; et kriterium om tilbudsgivers erfaring var et udvælgelseskriterium og var ikke egnet til tillige at fungere som underkriterium), 19/7-07 (ISS mod Skejby Sygehus, overtrædelse af Udbudsdirektivet ved manglende angivelse af vægtning af underkriterierne), 10/8-07 (MT Højgaard mod Lejerbo, uklart underkriterium, opretholdt ved Århus Ret 6/5-09), 16/10-07 (Kuwait Petroleum mod Sønderborg Kommune, overtrædelse ved, at nogle underkriterier angik ufravigelige kontraktsvilkår), EF-domtolen 24/1-08 (Lianakis, nogle underkriterier angik tilbudsgivernes egnethed og var derfor i strid med Tjenesteydelsesdirektivet), 29/2-08 (Karl Jensen mod Hobro Boligforening, overtrædelse af Udbudsdirektivets artikel 53 ved manglende angivelse i udbudsbetingelserne af den relative vægtning af underkriterierne, det gjorde ikke forskel, at vægtningen var oplyst i et brev til tilbudsgiverne kort før tilbudsfristens udløb), 10/4-08 (MT Højgaard mod Slots- og Ejendomsstyrelsen m.m., overtrædelse ved, at samme forhold blev vurderet under to underkriterier), 16/4-08 (Boligkontoret mod Lægeforeningens boliger, et underkriterium om tilbudsforbehold var i strid med Udbudsdirektivet), 29/4-08 (Funder Ådalkonsortiet mod Vejdirektoratet, udbyderen havde ikke pligt til i udbudsbetingelserne at angive retningslinjer for tildeling af karakter vedrørende de enkelte underkriterier), 14/5-08 (Trans-Lift mod DSB, et underkriterium om forbehold var uden mening og var i strid med Forsyningsvirksomhedsdirektivet), 30/5-08 (Serviceselskabet mod Region Midtjylland, overtrædelse ved anvendelse af et udvælgelseskriterium som underkriterium; et underkriterium var ikke uklart beskrevet i udbudsbetingelserne), 27/6-08 (DA mod Handels- og Søfartsmuseet, overtrædelse af ligebehandlingsprincippet ved væsentlig ændring af bedømmelseskriterierne for projektkonkurrence), 10/7-08 (European mod Kystdirektoratet, overtrædelse ved forbehold om at forkaste alle tilbud m.m.), 12/9-08 (Master Data mod Københavns Kommune, rammerne for vægtning af de enkelte underkriterier var passende i sig selv, men det var i strid med Udbudsdirektivet, at de var fastsat sådan, at underkriterierne kunne skifte plads i vægtningsrækkefølgen; det var ikke i sig selv en overtrædelse, at underkriteriet pris kun skulle vægtes med 15-25 %), 3/10-08 (Creative mod Århus Kommune, Udbudsdirektivet indeholder ikke regler om, hvornår udbyderen skal fastsætte den endelige vægtning af underkriterierne i tilfælde, hvor udbyderen har fastsat en relativ vægtning; en udbyder har ikke pligt til at anvende et pointsystem ved tilbudsvurderingen; det var ikke i strid med ligebehandlingsprincippet, at udbyderen i henhold til udbudsbetingelserne kun foretog en kvalitetsvurdering af en mindre del af de ønskede produkter; udbyderen har ikke pligt til at anonymisere vareprøver ved kvalitetsvurdering), 5/11-08 (Brøndum mod Ringgården, et underkriterium var uklart og gav ikke tilbudsgiverne mulighed for at vurdere, hvilket indhold de skulle give tilbuddet; hvis tildelingskriteriet er det økonomisk mest fordelagtige bud og de kvalitative underkriterier er uegnede, har udbyderen saglig grund til at annullere udbuddet og skal ikke anvende tildelingskriteriet laveste pris, dette er udtryk for en bevidst ændring af Klagenævnet praksis; en angivelse i udbudsbetingelserne af, at udbyderen eventuelt ville forkaste alle tilbud, var i strid med Udbudsdirektivet), 10/12-08 (Nordjysk Kloak mod Aalborg Kommune, et underkriterium om organisationens egnethed og kompetence hos nøglepersoner kunne anvendes som tildelingskriterium, da underkriteriet angik den udbudte opgaves udførelse og derfor ikke var et udvælgelseskriterium), 17/12-08 (Bandagist-Centret mod Århus Kommune, udbyderen har ikke pligt til på forhånd at oplyse beregningsmetoder for tilbudsvurdering),
Traktaten	EF-domstolen 22/6-93 (sag C-243/89, Kommissionen mod Danmark, Storebæltsagen, angivelse i udbudsbetingelserne af, at der så vidt muligt skulle anvendes danske materialer og dansk arbejdskraft m.m., var i strid med flere traktatbestemmelser), 14/3-97 (Immuno mod sygehusvæsnet, undtagelsesbestemmelsen i traktatens artikel 36, nu artikel 30 EF, kunne ikke anvendes), EF-domstolen 26/9-00 (Kommissionen mod Frankrig, angivelse af udbudte arbejder ved henvisning til franske erhvervsvirksomheders klassifikationer var i strid med traktaten), EF-domstolen 7/12-00 (Teleaustria, de ordregivende myndigheder skal overholde traktatens grundlæggende regler, hvilket navnlig indebærer en gennemsigtighedsforpligtelse), EF-domstolen 3/12-

	01 (Vestergaard, traktatens grundlæggende bestemmelser skal anvendes på udbud under tærskelværdien), 5/11-03 (Tilsynsrådet mod Rønnede Kommune, kontrakt om vejvedligeholdelse i 14 år med mulighed for forlængelse i 3 år var ikke i strid med udbudsdirektiverne eller traktaten), 29/10-04 (Flemming Damgaard mod Helle Kommune, traktatens artikel 28 overtrådt ved angivelse af produkt uden tilføjelsen »eller dermed ligestillet« eller en tilsvarende bemærkning, formuleringen »eller et tilsvarende produkt« var tilstrækkelig), EF-domstolen 21/7-05 (Coname, det følger af traktaten, at koncessionskontrakter om tjenesteydelser skal tildeles sådan, at virksomheder fra andre medlemsstater kan tilkendegive deres interesse), EF-domstolen 13/10-05 (Parking Brixen, tilsvarende), EF-domstolen 20/10-05 (Kommissionen mod Frankrig, en fransk lovbestemmelse om, at offentlige bygherrer kunne antage en fransk fuldmægtig, var i strid med bl.a. Traktaten), EF-domstolen 27/10-05 (Contse mfl., om betingelserne for nationale foranstaltninger, der kan hæmme den frie udveksling af tjenesteydelser), 30/8-06 (Alliance mod Retten i Odense, udbyder annullerede udbuddet, fordi tilbudsprisen i det økonomisk mest fordelagtige bud oversteg udbyders formåen, og fordi der var opstået usikkerhed om udbyders behov, annullationen var ikke i strid med Traktatens grundlæggende principper), 16/4-07 (STB Byg mod Hedensted Kommune, krav om anvendelse af bestemte produkter og om, at glas skulle leveres fra fabrikker tilsluttet en bestemt organisation, var i strid med traktatens artikel 28), EF-domstolen 14/6-07 (Medipac-Kazantzkis, Indkøbsdirektivet gælder ikke for udbud under tærskelværdien, men principperne om ligebehandling og gennemsigtighed skal følges under sådanne udbud), 18/9-07 (Kortegaard mod Kolding Kommune, et krav om, at nogle planter skulle være af dansk herkomst, var i strid med traktatens forbud mod kvantitative indførselsrestriktioner), EF-domstolen 13/11-07 (Kommissionen mod Irland, indgåelse af kontrakt om en bilag I B-tjenesteydelse kunne ske uden forudgående offentliggørelse, da der ikke forelå et grænseoverskridende element), EF-domstolen 15/5-08 (Secap, traktatens grundlæggende regler gælder kun for kontrakter under tærskelværdien, hvis kontrakterne har en klar grænseoverskridende interesse)
Tærskelværdi	23/6-95 (Handelskammeret mod Frederiksberg Kommune, der skulle ske sammenlægning af værdien af flere ydelser), 23/4-97 (Crocus mod Århus Havn, nogle byggearbejder skulle ses som en helhed ved beregningen af deres forhold til tærskelværdien, ikke anledning til at tage stilling til, om projekteringsomkostninger skulle medregnes), 21/1-99 (LR mod Sorø Kommune, udbyder skulle i det konkrete tilfælde ikke foretage sammenlægning), 28/5-99 (LR mod Bramsnæs Kommune, lignende, principielle bemærkninger om sammenlægning af rengøringskontrakter; afgørelsen er forældet, se omtalen af Kommissionens synspunkter i 2/5-03, LR mod Sorø Kommune), 28/5-99 (LR mod Ramsø Kommune, tilsvarende, do.), EF-domstolen 5/10-00 (Kommissionen mod Frankrig i sag C-16/98, om opdeling af kontrakter under Forsyningsvirksomhedsdirektivet), EF-domstolen 3/12-01 (Vestergaard, traktatens grundlæggende bestemmelser skal anvendes på udbud under tærskelværdien), 21/3-02 (Holsted Minibus mod Næstved Kommune, tærskelværdien skulle beregnes efter værdien på udbudstidspunktet), 17/7-02 (Lyngby-Taarbæk Kommune mod Carlshøj, værdien af administrationen af et alment boligselskabs afdelinger skulle ikke sammenlægges ved beregningen af forholdet til tærskelværdien, selskabets vurdering af værdien med hensyn til en enkelt afdeling var ikke i strid med direktivet), 18/7-02 (Økonomi- og Erhvervsmst. mod Farum Kommune, nogle byggerier overskred tærskelværdien), 25/11-02 (Skousen mod AAB, værdien af indkøb fra et alment boligselskabs enkelte afdelinger skulle ikke sammenlægges; et indkøb skulle ikke udbydes, selvom det var budgetteret til et beløb over tærskelværdien, da værdien faktisk var under, og da udbyderens vurdering herom var saglig), 2/5-03 (LR mod Sorø Kommune, kommunen var indstillet på at følge Kommissionens synspunkter om beregning af tærskelværdien, dvs. om sammenlægning af værdien af rengøringskontrakter for forskellige institutioner), 29/11-03 (Unicomputer mod Greve Kommune, samtidige indkøb gennem SKI og uden om SKI skulle sammenlægges, ændret ved ØL 11/10-07), 16/12-03 (Bilhuset Randers mod Sønderhald Kommune, generelt om udbyders forhåndsvurdering i relation til tærskelværdi både med hensyn til køb og leasing, forhåndsvurdering må ikke foretages efter prisen for et enkelt fabrikat, udbyders forhåndsvurdering var ikke saglig), 16/12-04 (Brunata mod diverse boligselskabsafdelinger, ved fælles indkøb fra flere afdelinger er den samlede værdi afgørende), 17/6-05 (Gladsaxe Kommune mod Hareskovbo, nogle etaper af en ombygning skulle anses for ét projekt, hvorfor der skulle ske udbud af en enkelt etape under tærskelværdien; uden betydning, at etaperne udførtes af forskellige afdelinger, da boligorganisationen stod for den overordnede styring), EF-domstolen 18/1-07 (Auroux mfl., værdien af et byplanprojekt var projektets samlede værdi, herunder værdien af ejendomme, der skulle sælges som led i pro-

	jektet), EF-domstolen 14/6-07 (Medipac-Kazantzkis, Indkøbsdirektivet gælder ikke for udbud under tærskelværdien, men principperne om ligebehandling og gennemsigtighed skal følges under sådanne udbud), 18/6-07 (KPC Byg mod Odense Tekniske Skole, honorarer for tilbud vedrørende totalentreprise skulle medregnes ved vurderingen af projektets værdi)
Udbud med forhandling (tidligere benævnt udbud efter forhandling)	8/6-95 (FRI mod Kulturministeriet, udbud efter forhandling var berettiget, da alle tilbud indeholdt et ukonditionsmæssigt forbehold), 18/11-96 (European Metro Group mod Ørestadsselskabet, angår en række forskellige spørgsmål; bl.a. udtalt, at der kan tages forbehold ved udbud efter forhandling, bl.a. på dette punkt stadfæstet ved HR 31/3-05 i UfR 2005 s. 1799 H), 10/11-98 (Dansk Taxi Forbund mod Århus Amt, udbud efter forhandling var ikke i strid med Tjenesteydelsesdirektivet, da der ikke var indkommet egnede bud), 3/12-98 (Højgaard & Schultz mod Ørestadsselskabet), 9/3-99 (Technicomm mod DSB, det var i strid med udbudsbetingelserne og Forsyningsvirksomhedsdirektivet, at udbyder tog et nyt tilbud fra en tilbudsgiver i betragtning, selvom udbyder havde truffet beslutning om ikke at fortsætte forhandlingerne med denne tilbudsgiver), 18/3-99 (Seghers mod Amagerforbrændingen), 9/2-00 (PAR mod Udenrigsministeriet, uberettiget anvendelse af udbud efter forhandling), 14/9-01 (Judex mod Århus Amt, forskellige overtrædelser under udbud efter forhandling; under et sådant udbud må tilbudsgiverne ikke spilles prismæssigt ud mod hinanden), 26/10-01 (Eterra mod Esbjerg Kommune, udbud efter forhandling var uberettiget, da tilbuddene ikke var uegnede, blot fordi de var usammenlignelige, rapport skal forelægges Kommissionen straks), Retten 28/11-02 (Scan Office Design mod Kommissionen, mindstekrav skal respekteres også ved udbud med forhandling), EF-domstolen 10/4-03 (Kommissionen mod Tyskland, udbud efter forhandling var sket i strid med Tjenesteydelsesdirektivet), 4/11-03 (Bombardier mod Lokalbanen, et tilbud kunne afvises under et udbud efter forhandling, da det ikke opfyldte nogle ufravigelige krav), EF-domstolen 14/9-04 (Kommissionen mod Italien, betingelserne for udbud efter forhandling efter Bygge- og anlægsdirektivets artikel 7, stk. 3, var ikke opfyldt; fortolkning af bestemmelsen efter sammenligning af forskellige sprogversioner af direktivet), 21/6-04 (Banverket mod Nordjyske Jernbaner, udbud efter forhandling efter Forsyningsvirksomhedsdirektivet, mindstekrav for alternative tilbud var ikke angivet tilstrækkeligt klart, et underkriterium var for uklart), EF-domstolen 14/10-04 (Kommissionen mod Frankrig, betingelserne for udbud efter forhandling i Tjenesteydelsesdirektivets artikel 11, stk. 3, c, var ikke opfyldt), EF-domstolen 18/11-04 (Kommissionen mod Tyskland, betingelserne for udbud efter forhandling i Tjenesteydelsesdirektivets artikel 11, stk. 3, c, var ikke opfyldt), 2/12-04 (Banverket mod Nordjyske Jernbaner, Forsyningsvirksomhedsdirektivets regel om angivelse af mindstekrav for alternative tilbud gælder ved udbud efter forhandling kun for den første tilbudsafgivelse), 16/12-04 (Brunata mod diverse boligselskabsafdelinger, Indkøbsdirektivets artikel 6, stk. 2, sigter til, at der ikke er indkommet konditionsmæssige bud, på dette punkt »overruled« ved 2/10-08, C.C. Brun mod Storebælt), 2/10-08 (C.C. Brun mod Storebælt, hjemlen i Udbudsdirektivet til forhandling, hvis der ikke er indkommet forskriftsmæssige bud, finder anvendelse, hvis alle tilbud indeholder forbehold, og det kræves ikke, at forbeholdene skal angå grundlæggende elementer)
Udbudsdirektiver, indplacering under og diverse spørgsmål om	25/10-95 (Siemens mod Esbjerg Kommune, trafikstyringsanlæg skulle udbydes efter Indkøbsdirektivet), 18/11-98 (Dansk Taxi Forbund mod Århus Amt, udbud af handicapkørsel skulle ske efter Tjenesteydelsesdirektivet, ikke Forsyningsvirksomhedsdirektivet), 9/11-99 (More Group mod Århus Kommune, koncession vedrørende byudstyr hørte under Tjenesteydelsesdirektivet, ikke Bygge- og anlægsdirektivet, og i hvert fald principperne i Tjenesteydelsesdirektivet skulle anvendes på koncessionen), 14/3-00 (Unitron mod Fødevareministeriet, se også EF-domstolen 18/11-99 i Unitron Scandinavia og S-3, om forståelsen af Indkøbsdirektivets artikel 2, stk. 2), EF-domstolen 7/12-00 (Teleaustria og Telefonadress, tjenesteydelse om udgivelse af telefonbøger var omfattet af Forsyningsvirksomhedsdirektivet, ikke Tjenesteydelsesdirektivet), 6/10-04 (Leif Jørgensen mod Nordborg Kommune, ethvert rendegraverarbejde er bygge- og anlægsarbejde), EF-domstolen 18/1-07 (Auroux mfl., et byplanprojekt hørte under Bygge- og anlægsdirektivet, da projektets hovedformål var at udføre bygge- og anlægsarbejder), 14/12-07 (Thomas Borgå mod Skive Kommune, Udbudsdirektivets artikel 23 overtrådt ved indgåelse af kontrakt om bilag II B-tjenesteydelser), 15/1-08 (C.F. Møller mod Universitets- og Byggestyrelsen, angivelse i udbudsbekendtgørelsen af, at der ville blive indgået kontrakt med en gruppe af rådgivere med solidarisk ansvar, var ikke i strid med Udbudsdirektivets artikel 4, stk. 2), 14/5-08 (Trans-Lift mod DSB, overtrædelse af Forsyningsvirksomhedsdirektivets artikel 52 ved krav om bankgaranti fra en enkelt af ansøgerne)

Udbudspligt og –ret	3/11-94 (Kenn Sonne, udbudspligt da aftalen var indgået efter Tjenesteydelsesdirektivets ikrafttræden i Danmark), 30/5-95 (Lars Drejer mod Grenå-Hundested, ikke udbudspligt for færgeselskab), 4/6-96 (Håndværksrådet mod Kommunernes Landsforening, sidstnævnte var ordregivende myndighed og havde udbudspligt), 12/12-96 (Entreprenørforeningen mod Sønderborg Kraftvarmeværk, ordregiver pålagt at foretage EU-udbud), 7/1-97 (FRI mod Udenrigsministeriet, ikke udbudspligt vedrørende et fællesnordisk ambassadekompleks), 3/3-97 (PAR mod Udenrigsministeriet, do.), 14/3-97 (Immuno mod sygehusvæsnet, indkøb af blodprodukter skulle udbydes), 27/8-97 (DAF mod Haderslev Kommune, klagen synes reelt at være en klage over, at der var foretaget EU-udbud, ikke medhold), EF-domstolen 15/1-98 (Mannesmann el. Strohal, om udbudspligt for erhvervsdrivende aktieselskab, EU-støtte medfører ikke udbudspligt i sig selv), 22/1-98 (Unitron mfl. mod Fødevareministeriet, ikke udbudspligt for privat organisation), 8/6-98 (LR mod Skovbo Kommune, udbudspligt vedrørende rengøring), EF-domstolen 17/9-98 (Kommissionen mod Belgien, det flamske parlament skulle overholde Bygge- og anlægsdirektivet), 21/9-98 (Humus mod Miljøteam Århus, selvejende virksomhed havde udbudspligt), EF-domstolen 24/9-98 (Tögel, om udbudspligt for udrykningskørsel), 21/10-98 (R98, udbudspligt vedrørende renovation), EF-domstolen 10/11-98 (BFI Holding el. Arnhem, om udbudspligt for erhvervsdrivende organ), 11/11-98 (Mousten Vestergaard mod Spøttrup Boligselskab, udbudspligt for alment boligselskab), EF-domstolen 17/12-98 (Connemara, udbudspligt for statsligt aktieselskab), 28/5-99 (LR mod Ringsted Kommune, udvidelse af rengøringsbehov medfører ikke ubetinget pligt til nyt EU-udbud straks, ikke anledning til at tage stilling til, om der skulle være foretaget EU-udbud tidligere), 28/5-99 (LR mod Bramsnæs Kommune, en rengøringskontrakt ophørte ved det aftalte udløb med deraf følgende pligt til EU-udbud uanset mulighed i kontrakten for at aftale forlængelse), 20/9-99 (Jyllandsposten mod Århus Kommune, den blotte indrykning af annoncer er ikke udbudspligtig), EF-domstolen 18/11-99 (Teckal, indkøbsaftale med fælleskommunal sammenslutning skulle udbydes, og sammenslutningen skulle selv udbyde indkøb), 14/3-00 (Unitron mod Fødevareministeriet, se også EF-domstolen 18/11-99 i Unitron Scandinavia og S-3, ikke udbudspligt ved overdragelse af eneret til indkøbsaftaler, men princippet om forbud mod forskelsbehandling skal overholdes, jf. Indkøbsdirektivets artikel 2, stk. 2), 11/8-00 (Kirkebjerg mod Ribe Amt, når udbyder med eller uden rette har annulleret et udbud, er udbuddet bortfaldet, hvorfor der skal foretages nyt udbud, hvis udbyderen ønsker den pågældende ydelse alligevel), EF-domstolen 3/10-00 (University of Cambridge, om forståelsen af kriteriet om, at driften for mere end halvdelens vedkommende skal være finansieret af det offentlige), EF-domstolen 5/10-00 (Kommissionen mod Frankrig i sag C-337/98, ikke udbudspligt efter Forsyningsvirksomhedsdirektivet, da beslutningen om ikke at udbyde var truffet længe før direktivets ikrafttræden, og da der ikke efter denne var genforhandlet grundlæggende kontraktsbestemmelser), EF-domstolen 1/2-01 (Kommissionen mod Frankrig, udbudspligt for almene boligselskaber), VL 3/5-01 (Humus mod Århus Renholdning, supplerende indkøb skulle udbydes, ændrer Klagenævnets kendelse af 9/6-99 i samme sag, benævnt Humus mod Miljøteam Århus), EF-domstolen 10/5-01 (Agorà, ikke udbudspligt for et organ, der udelukkende drev erhvervsmæssig virksomhed), EF-domstolen 12/7-01 (Ordine, ved overladelse af et infrastrukturarbejde til en grundejer skal denne forpligtes til at følge Bygge- og Anlægsdirektivet), 29/1-02 (Økonomi- og Erhvervsmst. mod Farum Kommune, anvendelse af finansieringsformen sale and lease back fritog ikke for udbudspligten), EF-domstolen 14/11-02 (Felix Swoboda, om tjenesteydelser, der omfatter enkeltydelser både under Tjenesteydelsesdirektivets bilag I A og bilag I B), 8/4-03 (Dansk Taxi Forbund mod Vestsjællands Amt, akut ambulancekørsel og liggende patienttransport var omfattet både af Tjenestydelsesdirektivets bilag I A og I B og skulle udbydes efter artikel 10, siddende patienttransport skulle udbydes, ydelserne kunne udbydes samlet), 28/4-03 (Centralforeningen af Taxiforeninger mod Vestsjællands Amt, tilsvarende), 2/5-03 (LR mod Sorø Kommune, klage over manglende udbud af rengøring ikke taget til følge), EF-domstolen 16/10-03 (Kommissionen mod Spanien, et statsejet aktieselskab, der stod for fængselsbyggeri, var omfattet af udbudspligten efter Bygge- og anlægsdirektivet), 5/11-03 (Tilsynsrådet mod Rønnede Kommune, kontrakt om vejvedligeholdelse i 14 år med mulighed for forlængelse i 3 år var ikke i strid med udbudsdirektiverne eller traktaten), 20/11-03 (Ole Holst mod Hillerød Handelsskole, licitation vedrørende inventar til lejede lokaler var ikke omfattet af Tilbudsloven), 29/11-03 (Unicomputer mod Greve Kommune, om forholdet mellem EU's udbudsregler og SKI-rammeaftaler), 14/10-04 (SK Tolkeservice mod Københavns Amt, en ordregiver, der udbød en ikke udbudspligt tjenesteydelse efter Tjenesteydelsesdirektivet, skulle gennemføre udbuddet efter direktivets

	regler om udbudspligtige tjenesteydelser), 9/3-05 (A-1 Communication mod Københavns Amt, tilsvarende), EF-domstolen 27/10-05 (Kommissionen mod Italien, en tidligere koncession om motorvejsanlæg fritog ikke for udbudspligt vedrørende udbygning af anlægget), 3/2-06 (J. Olsen mod Ramsø Kommune, en kommune havde ønsket en genbrugsstation opført ved et hvilket som helst middel, hvorfor kommunen skulle gå frem efter Tilbudsloven), 10/3-06 (FFF og LO mod Viborg Amts trafikselskab, et fælleskommunalt trafikselskab kunne uden EU-udbud indtræde i et samarbejde med nogle andre trafikselskaber, da de af EF-domstolen opstillede betingelser for at anse en virksomhed som in house var opfyldt), EF-domstolen 11/5-06 (Cabotermo og Consorzio Alizei, de to forsyningsvirksomhedsdirektivers regel om indgåelse af aftaler om tjenesteydelser uden udbud finder ikke anvendelse uden for direktivernes område), 3/10-06 (MT Højgaard mfl. mod Frederiksborgcentret, en ikke-erhvervsdrivende fond var et offentligretligt organ med deraf følgende udbudspligt), EF-domstolen 18/1-07 (Auroux mfl., en kommunes indgåelse af kontrakt med en virksomhed om et byplanprojekt var omfattet af Bygge- og anlægsdirektivet, selvom virksomheden skulle lade bygge- og anlægsarbejder udføre ved entreprenører, og selvom virksomheden selv havde udbudspligt), 19/1-07 (P. Jensen og Sønner mod Blaabjerg Kommune, det var ikke bevist, at udbyderens beslutning om at iværksætte en licitation efter Tilbudsloven i stedet for EU-udbud var truffet på et sagligt grundlag), 20/2-07 (Bangs Gård mod Esbjerg Kommune, der skulle før indgåelse af lejekontrakt om en bygning have været gennemført EU-udbud, da ordregiveren ved lejekontrakten tilsigtede at få rådighed over et byggeri, der svarede til ordregiverens præciserede behov, jf. Udbudsdirektivets artikel 1, stk. 2, b), EF-domstolen 13/12-07 (Bayerische Rundfunk, en undtagelse fra udbudspligt vedrørende radio- og tv-stationer angår ikke rengøring), 18/2-08 (Willis mod Lejerbo, en kontrakt med mulighed for en varighed på 8 år var ikke i strid med udbudsreglerne, da ordregiveren til enhver tid kunne opsige kontrakten), EF-domstolen 8/4-08 (Kommissionen mod Italien, forskellige påberåbte undtagelser fra udbudspligten med hensyn til indkøb af helikoptere fandt ikke anvendelse), EF-domstolen 19/6-08 (Pressetext, ændringer i en indgået udbudspligtig aftale kræver kun nyt udbud, hvis ændringerne er væsentlige; en intern omstrukturering hos medkontrahenten er ikke en væsentlig ændring, og det er i princippet heller ikke en væsentlig ændring, at en medkontrahent, der er en juridisk person, skifter ejerkreds; udbudsreglerne indeholder ikke forbud mod tidsubegrænsede tjenesteydelsesaftaler), EF-domstolen 2/10-8 (Kommissionen mod Italien, overtrædelse ved indkøb af helikoptere til politi og brandvæsen uden EU-udbud)
Udelukkelse (dvs. om de økonomiske aktører som sådan kan eller skal udelukkes fra at komme i betragtning, fordi de omfattes af en udelukkelsesgrund, der ikke behøver at være angivet i udbudsdokumenterne)	Retten 17/3-05 (AFCon mod Kommissionen, udbyderen overtrådte ligebehandlingsprincippet ved ikke at undersøge, om en tilbudsgiver skulle udelukkes som følge af tilbudsgiverens forbindelse med et medlem af udbyderens bedømmelsesudvalg), EF-domstolen 9/2-06 (Cascina og Zilch, Tjenesteydelsesdirektivets artikel 29 danner grænsen for, hvornår tilbudsgivere kan udelukkes, og medlemsstaterne kan fastsætte lempeligere regler; det afhænger af national ret, om pligten til at have betalt skat m.m. er opfyldt ved indgåelse af en afdragsordning eller en klage, national ret må dog ikke helt undlade at tillægge en klage betydning), EF-domstolen 18/12-07 (Frigerio Luigi & Co., en italiensk lovbestemmelse om, at der kun må indgås kontrakter om tjenesteydelser med kapitalselskaber, var i strid med Tjenesteydelsesdirektivet), 19/12-07 (HIQ Wise mod Danske Spil, udbyderen var berettiget til at afvise en anmodning om prækvalifikation fra en virksomhed, der ikke havde vedlagt den krævede dokumentation med hensyn til udelukkelsesgrundene i Udbudsdirektivets artikel 45), EF-domstolen 16/12-08 (Michaniki, der kan fastsættes nationale udelukkelsesgrunde, men nationale regler, der afskærer ejere mfl. af visse virksomheder fra at levere til det offentlige, går ud over det nødvendige, hvis reglerne ikke giver mulighed for i det enkelte tilfælde at godtgøre, at der ikke foreligger reel risiko for konkurrencefordrejning)
Udvælgelse (også kaldet kvalifikation, dvs. om de krav, som de økonomiske aktører som sådan skal opfylde for at komme i betragtning)	EF-domstolen 18/12-97 (Ballast Nedam Groep, som dokumentation for egnethed kan henvises til datterselskaber), 16/7-99 (Holst Sørensen mod Vendsyssel Øst, offentligt udbud, nogle underkriterier refererede til tilbudsgiverens generelle egnethed og ikke det konkrete tilbud, hvorved der var sket en sammenblanding af kvalifikationskriterier og tildelingskriterier), EF-domstolen 2/12-99 (Holst Italia, som dokumentation for egnethed kan henvises til ressourcer hos andre, hvis der rådes over dem), 28/12-99 (Skjortegrossisten mod Post Danmark, sammenblanding af kvalifikations- og tildelingskriterier), 9/2-00 (PAR mod Udenrigsministeriet, kvalifikationskriterier anvendt som tildelingskriterier, tilbudsgiver udvalgt, selvom tilbudsgiveren ikke havde medsendt krævede oplysninger), 2/5-00 (Uniqsoft mod Odense Kommune, principielle bemærkninger om forholdet mellem kvalifikationskriterier og tildelingskriterier, herunder, at et forhold efter omstændighederne kan være begge

	dele, konkret uretmæssig anvendelse af kvalifikationskriterier som tildelingskriterier), 6/6-00 (Ernst og Young mod Fyns Stiftsøvrighed, om opfyldelsen af krav om dokumentation for autorisation som revisor og ansvarsforsikring), EF-domstolen 26/9-00 (Kommissionen mod Frankrig, krav om at arkitekten skulle være medlem af den franske arkitektsammenslutning, stred mod traktaten og Bygge- og anlægsdirektivet), 23/2-01 (Kæmpe mod Søndersø Kommune, om forholdet mellem udvælgelseskriterier og tildelingskriterier, der måtte lægges vægt på dårlige erfaringer med en tilbudsgivers anpartsselskab, men ikke på dettes nuværende økonomi), 3/1-02 (AC-Trafik mod Frederiksborg Amt, et underkriterium kunne anvendes både som udvælgelseskriterium og tildelingskriterium, men var uklart), Retten 26/2-02 (Esedra mod Kommissionen, det var ikke en overtrædelse af ligebehandlingsprincippet, at udbyderen fra tilbudsgiveren indhentede nogle regnskaber, der skulle have været vedlagt ansøgningen om prækvalifikation), 29/9-04 (Dansk Byggeri mod Sundby-Hvorup Boligselskab, et udvælgelseskriterium kunne ikke anvendes som underkriterium), 11/10-04 (Weilbach mod Kort- og Matrikelstyrelsen, nogle udvælgelseskriterier kunne efter sagens omstændigheder benyttes som underkriterier), 22/11-04 (Dansk Restproduktion mod Århus Kommune, tilbud fra tilbudsgiver, der ikke som krævet havde fremsendt regnskaber, måtte ikke tages i betragtning), 2/3-05 (Pumpex mod Hedensted Kommune, referencer og valg af underentreprenør kunne ikke bruges som underkriterier), 9/3-05 (A-1 Communication mod Københavns Amt, beslutning om ikke at tage et tilbud i betragtning, fordi tilbudsgiveren efter udbyderens opfattelse begik ulovligheder, var saglig), 11/3-05 (MT Højgaard mod Frederiksberg Boligfond, et underkriterium var rettelig et udvælgelseskriterium), Retten 6/7-05 (TQ3 mod Kommissionen, udbudsreglerne kræver ikke, at en tilbudsgiver har det nødvendige personale på udbuddets tidspunkt, og udbyderen kunne indgå kontrakt med den valgte tilbudsgiver for en kortere periode, indtil tilbudsgiveren opfyldte udbudsbetingelsernes krav), 13/9-05 (Navigent mod Arbejdsmarkedsstyrelsen, det kan ikke udelukkes, at et forhold kan være både en kvalifikationsbetingelse og et underkriterium), EF-domstolen 9/2-06 (Cascina og Zilch, Tjenesteydelsesdirektivets artikel 29 danner grænsen for, hvornår tilbudsgivere kan udelukkes, og medlemsstaterne kan fastsætte lempeligere regler; det afhænger af national ret, om pligten til at have betalt skat m.m. er opfyldt ved indgåelse af en afdragsordning eller en klage, national ret må dog ikke helt undlade at tillægge en klage betydning), 27/7-06 (Raunstrup Gruppen mod Frederikssund Kommune, krav om, at tilbud skulle være vedlagt forhåndserklæring fra en garantistiller, angik den udbudte ydelse og ikke tilbudsgivernes kvalifikationer), 6/10-06 (Novartis mod HS, overtrædelse af Udbudsdirektivet ved manglende egnethedsundersøgelse af tilbudsgiverne), 27/4-07 (CT Renovation mod Skive-Egnen, tilbud afvist med rette, da det ikke som krævet var vedlagt en serviceattest eller tilsvarende), 13/7-07 (Magnus mod Skat, et kriterium om tilbudsgivers erfaring var et udvælgelseskriterium og var ikke egnet til tillige at fungere som underkriterium), EF-domstolen 18/7-07 (Kommissionen mod Grækenland, antagelse af tilbud i strid med udvælgelseskriterier angår ligebehandlingsprincippet, ikke gennemsigtighedsprincippet), 10/8-07, MT Højgaard mod Lejerbo, overtrædelse ved under tilbudsvurderingen at lægge vægt på et forhold, der udgjorde et udvælgelseskriterium, opretholdt ved Århus Ret 6/5-09), EF-domstolen 18/12-07 (Frigerio Luigi & Co., en italiensk lovbestemmelse om, at der kun må indgås kontrakter om tjenesteydelser med kapitalselskaber, var i strid med Tjenesteydelsesdirektivet), 19/12-07 (HIQ Wise mod Danske Spil, udbyderen var berettiget til at afvise en anmodning om prækvalifikation fra en virksomhed, der ikke havde vedlagt den krævede dokumentation med hensyn til udelukkelsesgrundene i Udbudsdirektivets artikel 45), 15/1-08 (C.F. Møller mod Universitets- og Byggestyrelsen, angivelse i udbudsbekendtgørelsen af, at der ville blive indgået kontrakt med en gruppe af rådgivere med solidarisk ansvar, var ikke i strid med Udbudsdirektivets artikel 4, stk. 2, og udbyderen havde med rette undladt at prækvalificere en ansøger, der ikke bestod af en gruppe af rådgivere), EF-domtolen 24/1-08 (Lianakis, nogle underkriterier angik tilbudsgivernes egnethed og var derfor i strid med Tjenesteydelsesdirektivet), 12/2-08 (Rengøringsgrossisten mod Skive Kommune, et udvælgelseskriterium om repræsentation i lokalområdet var i strid med ligebehandlingsprincippet), 14/4-08 (Damm mod Økonomistyrelsen, udbyder havde ikke pligt til at kræve dokumentation for ønskede oplysninger; en angivelse i udbudsbekendtgørelsen var en betingelse for kontraktsindgåelse, ikke et udvælgelseskriterium), 14/5-08 (Trans-Lift mod DSB, overtrædelse af Forsyningsvirksomhedsdirektivets artikel 52 ved krav om bankgaranti fra en enkelt af ansøgerne), 30/5-08 (Serviceselskabet mod Region Midtjylland, overtrædelse ved at tage et tilbud i

	betragtning, selvom det ikke som krævet var vedlagt tilbudsgiverens seneste regnskab, desuden overtrædelse ved anvendelse af et udvælgelseskriterium som underkriterium), 11/9-08 (Pro-Safe mod Farvandsvæsnet, udbyderen kunne prækvalificere en virksomhed, der ikke som krævet i udbudsbekendtgørelsen havde vedlagt ansøgningen en årsrapport for 2006/2007, da fristen for indlevering af en sådan årsrapport til Erhvervs- og Selskabsstyrelsen ikke var udløbet, og da forskelligt regnskabsmateriale, som virksomheden havde vedlagt, var tilstrækkeligt), 15/9-08 (Totalrådgivergruppen mod Universitets- og Byggestyrelsen, et krav om erklæringer fra tilbudsgiverne om gæld til det offentlige m.m. skulle som en selvfølge forstås sådan, at erklæringen skulle afgives af alle deltagere i et konsortium, der afgav tilbud), 10/12-08 (Nordjysk Kloak mod Aalborg Kommune, et underkriterium om organisationens egnethed og kompetence hos nøglepersoner kunne anvendes som tildelingskriterium, da underkriteriet angik den udbudte opgaves udførelse og derfor ikke var et udvælgelseskriterium), EF-domstolen 16/12-08 (Michaniki, der kan fastsættes nationale udelukkelsesgrunde, men nationale regler, der afskærer ejere mfl. af visse virksomheder fra at levere til det offentlige, går ud over det nødvendige, hvis reglerne ikke giver mulighed for i det enkelte tilfælde at godtgøre, at der ikke foreligger reel risiko for konkurrencefordrejning)
Uklarhed i klage	8/6-99 (Farum Menighedsråd mod Kirkeministeriet, nogle klagepunkter afvist, da de var uklare)
Uklarhed i udbud	22/6-95 (Kommunernes gensidige Forsikringsselskab mod Vibo, uklart udbud med hensyn til hvem der skulle betale for en formidler m.m.), 25/10-95 (Siemens mod Esbjerg Kommune, ikke givet tilstrækkelige oplysninger i udbuddet), 30/5-96 (Iver Pedersen mod Reno Syd, uklarhed i tildelingskriterier var i strid med Tjenesteydelsesdirektivet), 7/6-96 (Handelskammeret mod Horsens Kommune, det var i strid med Indkøbsdirektivet, at kontraktsperioden var angivet anderledes end i udbudsbetingelserne, og at det ikke var angivet, at der skulle leveres til tre kommuner), 18/11-96 (European Metro Group mod Ørestadsselskabet, mindstekrav for alternative tilbud var ikke angivet tilstrækkeligt præcist, opretholdt ved UfR 2005 s. 1799 H, i hvert fald ved landsrettens dom), 8/10-97 (PAR mod Københavns Pædagogseminarium, overtrædelse), 14/1-98 (Xyanide mod Københavns Kommune, klage ikke taget til følge, da klageren ikke havde spurgt udbyder om forståelsen af det, som klager var i tvivl om), 9/3-98 (FRI mod Ledøje-Smørum Kommune, angivelse af, at der ville blive prækvalificeret minimum 5 tilbudsgivere, var ulovlig, da udbyder havde haft til hensigt at prækvalificere nøjagtig 5 tilbudsgivere, diverse uklarheder i øvrigt), 7/9-99 (Håndværksrådet mod Køge Boligselskab, for uklar angivelse af, hvilke forbehold, der ville blive accepteret), 15/12-99 (Lifeline mod Dansk Hunderegister, en tjenesteydelse var for uklart beskrevet i udbuddet), 2/5-00 (Uniqsoft mod Odense Kommune, angivelse af, at udbyder ved tildelingen »især« ville lægge vægt på visse forhold, stred mod Indkøbsdirektivet), 16/5-00 (DTL mod Reno Syd, hvis tildelingskriterierne er angivet i udbudsbekendtgørelsen, må de principielt ikke angives anderledes i udbudsbetingelserne), 8/8-00 (Visma mod Københavns Amt, omfattende uklarheder i udbud), 11/8-00 (Kirkebjerg mod Ribe Amt, uklarhed i udbud var i strid med kravet i EU's udbudsregler om klar og nøjagtig beskrivelse af det udbudte), 27/4-01 (DTL mod Nyk. F. Kommune, forskellig angivelse af underkriterium i udbudsbekendtgørelsen og udbudsbetingelserne havde ikke medført uklarhed), 2/5-01 (Magnus mod Told og Skat, mulighed for at tage forbehold over for alle elementer i udbuddet gjorde det fuldstændig uklart, hvad der var udbudt, hvilket var i strid med gennemsigtighedsprincippet, herunder pligten til en klar og præcis angivelse af, hvad der er udbudt), 24/10-01 (Eiland mod Vestsjællands Amt, uklarhed i udbudsbetingelserne i strid med ligebehandlings- og gennemsigtighedsprincippet), 26/10-01 (Eterra mod Esbjerg Kommune, forskellig angivelse af underkriterierne i udbudsbekendtgørelsen og udbudsbetingelserne), 2/4-02 (ISS mod Rigshospitalet, udbudsbetingelserne var ikke uklare), 9/7-04 (H.O. Service mod Boligf. 32, ikke pligt til at angive tildelingskriteriet i licitationsbetingelserne, da det var angivet i udbudsannoncen), 20/8-04 (Miri mod Esbjerg Kommune, en tilbudsgiver er berettiget til at lægge udbudsbetingelserne til grund for sit tilbud), 30/9-04 (Colas mod Videbæk kommune, tilbuddene skulle vurderes ud fra den naturlige forståelse af licitationsbetingelserne, og udbyderens vurdering var til dels usaglig), 2/12-04 (Banverket mod Nordjyske Jernbaner, tilbudsgivere har ikke pligt til at søge uklarheder i udbudsbetingelserne afklaret), 16/12-04 (Brunata mod diverse boligselskabsafdelinger, som følge af uklarhed i udbudsbetingelserne havde udbyder pligt til at søge teknisk afklaring hos visse tilbudsgivere), 15/12-05 (Air Liquide mod Roskilde Amt mfl., overtrædelse ved angivelser af varigheden for en udbudt rammeaftale m.m. forskelligt i udbudsbekendtgørelsen og udbudsbetingelserne), 13/3-06 (Ki-

	rudan mod Kolding Kommune, uoverensstemmelser mellem udbudsbekendtgørelsen og udbudsbetingelserne), 5/9-06 (Joca mod Reno Syd, opfordring til at afgive supplerende tilbud som følge af uklarhed i udbudsbetingelserne var i strid med ligebehandlingsprincippet), 6/9-06 (Sahva mod Københavns Kommune, det var uden betydning, at et tilbud ikke opfyldte et krav i udbudsbetingelserne, da kravet var uden mening, trods forskelle i formuleringen var der ikke reel forskel på beskrivelserne af det udbudte i udbudsbekendtgørelsen og udbudsbetingelserne, udbudsbetingelserne behøver ikke indeholde udkast til kontrakt), 26/10-06 (Novartis mod HS, udbudsbetingelserne behøver ikke indeholde udkast til kontrakt), 13/11-06 (Cowi mod Sønderjyllands Amt, en bemærkning i et tilbud var sagligt begrundet i udbudsbetingelsernes udformning og kunne ikke begrunde undladelse af at tage tilbuddet i betragtning), 14/12-06 (Baxter mod Roskilde Amt, overtrædelse ved forskellige uklarheder, bl.a. ved, at udbudsbetingelserne gav mulighed for forbehold og forhandling vedrørende samtlige punkter, og ved angivelse af, at nogle udbudsretligt meningsløse standardbetingelser fandt anvendelse), 13/7-07 (Magnus mod Skat, overtrædelse af Udbudsdirektivet ved ufyldestgørende beskrivelse af det udbudte i udbudsbetingelserne), 29/8-07 (Sectra mod Region Syddanmark, overtrædelse af gennemsigtighedsprincippet ved manglende angivelse af, hvorledes tilbud på optioner ville indgå i tilbudsvurderingen, opretholdt ved ØL 30/3-09), 3/9-07 (SP Medical mod Skat, krav om fremsendelse af regnskabsmateriale var uklart; overtrædelse af gennemsigtighedsprincippet ved ufuldstændige oplysninger om den udbudte leverance), 16/10-07 (Kuwait Petroleum mod Sønderborg Kommune, overtrædelse ved utilstrækkelig beskrivelse af det udbudte), 17/10-07 (Triolab mod RH, overtrædelse ved, at udbudsbetingelserne gav mulighed for forbehold og forhandling vedrørende samtlige punkter og ved angivelse af, at nogle udbudsretligt meningsløse standardbetingelser fandt anvendelse), EF-domtolen 24/1-08 (Lianakis, delkriterier til underkriterierne skal være oplyst på forhånd),14/2-08 (Jysk Erhvervsbeklædning mod Hjørring Kommune, overtrædelse af gennemsigtighedsprincippet ved modstridende angivelser i udbudsbekendtgørelsen og udbudsbetingelserne), 15/4-08 (FSB mod Lægeforeningens boliger, beskrivelsen af en udbudt ydelse skal sætte tilbudsgiverne i stand til at overskue konsekvenserne af at afgive tilbud, herunder den økonomiske risiko), 9/7-08 (Informi mod Kulturarvsstyrelsen, udbudsbetingelserne var ikke uklare med hensyn til, hvad der kunne tages forbehold for), 10/7-08 (European mod Kystdirektoratet, en angivelse i et tilbud om udførelse af en tjenesteydelse var ikke et forbehold, da kun udbyderen vidste, at tjenesteydelsen ikke kunne udføres som angivet og burde have oplyst dette i udbudsbetingelserne), 10/9-08 (LK Gruppen mod Københavns Kommune, udbudsbetingelserne stillede ikke krav om, at nogle granitfliser skulle have farvenuancer nøjagtigt svarende til udbyderens granitprøver, hvorfor udbyderen var uberettiget til at afvise et tilbud om granitfliser, hvis farvenuancer ikke svarede til prøverne, dissens, angår reelt forståelsen af udbudsbetingelserne), 12/9-08 (Master Data mod Københavns Kommune, det fremgik ikke tilstrækkelig præcist af udbudsbetingelserne, hvad der ville blive lagt vægt på i forhold visse af underkriterierne, et krav i udbudsbetingelserne om, at et tilbudt itsystem skulle være et standardsystem, kunne ikke fortolkes sådan, at systemet skulle være implementeret hos andre), 15/9-08 (Totalrådgivergruppen mod Universitets- og Byggestyrelsen, et krav om erklæringer fra tilbudsgiverne om gæld til det offentlige m.m. skulle som en selvfølge forstås sådan, at erklæringen skulle afgives af alle deltagere i et konsortium, der afgav tilbud), 5/11-08 (Brøndum mod Ringgården, et underkriterium var uklart og gav ikke tilbudsgiverne mulighed for at vurdere, hvilket indhold de skulle give tilbuddet, overtrædelse ved forskellige angivelser i udbudsbetingelserne og udbudsbekendtgørelsen), 17/12-08 (Bandagist-Centret mod Århus Kommune, overtrædelse af gennemsigtighedsprincippet ved anmodning om oplysning af rabatter på produkter, der ikke var nævnt i tilbudslísten, men som naturligt hørte under det udbudte)
Underhåndsbud	3/2-06 (J. Olsen mod Ramsø Kommune, det var i strid med tilbudslovgivningen at indhente tilbud som underhåndsbud, da byggeriets forventede værdi oversteg 2 mio. kr.), 30/6-06 (Raunstrup Gruppen mod Dragør Kommune, Tilbudslovens forbud mod at indhente mere end 4 underhåndsbud sigter til underhåndsbud fra mere end 4 tilbudsgivere), 2/10-08 (C.C. Brun mod Storebælt, hjemlen i Udbudsdirektivet og Tilbudsloven til forhandling henholdsvis indhentelse af underhåndsbud, hvis der ikke er indkommet forskriftsmæssige bud, finder anvendelse, hvis alle tilbud indeholder forbehold, og det kræves ikke, at forbeholdene skal angå grundlæggende elementer; udbyderen havde været berettiget til at følge Tilbudslovens hjemmel til at indhente underhåndsbud, men havde i stedet iværksat forhandlinger med tilbudsgivere i henhold til en regel i Tilbudsloven om forhandling, hvorfor sagen skulle bedømmes efter den-

	ne regel)
Underretning til tilbudsgivere og ansøgere	EF-domstolen 24/6-04 (Kommissionen mod Østrig, alle tilbudsgivere skal have underretning om tildelingsbeslutningen, og der skal derefter gå en rimelig tid inden kontraktsindgåelsen), 9/7-04 (H.O. Service mod Boligf. 32, overtrædelse af Tilbudsloven ved for sen underretning om ordretildelingen), 23/9-04 (Glatførebekæmpende vognmænd mod Nordjyllands Amt, Tjenesteydelsesdirektivets artikel 12 overtrådt ved for sen underretning til tilbudsgivere), 14/10-04 (SK Tolkeservice mod Københavns Amt, overtrædelse af Tjenesteydelsesdirektivets artikel 12), 30/11-04 (Finn Hansen mod Vendersbo, Tilbudslovens § 12 overtrådt), 2/3-05 (Pumpex mod Hedensted Kommune, Tilbudslovens § 12 sigter til den reelle tildelingsbeslutning og ikke indgåelsen af kontrakt med den valgte tilbudsgiver), EF-domstolen 3/3-05 (Fabricom, udbyders afvisning af et tilbud med begrundelse, at tilbudsgiveren er »inhabil«, skal meddeles tilbudsgiveren i rimelig tid inden tildelingsbeslutningen), 9/3-05 (A-1 Communication mod Københavns Amt, anmodninger efter Tjenesteydelsesdirektivets artikel 12, stk. 1, behøver ikke at være formuleret i overensstemmelse med bestemmelsen; bestemmelsen overtrådt), 12/4-05 (Mariendal mod Nordjyllands Amt, for sen underretning), 15/12-05 (Air Liquide mod Roskilde Amt mfl. (overtrædelse af Indkøbsdirektivet ved manglende underretning), 6/9-06 (Sahva mod Københavns Kommune, udbyders underretning om indledning af kontraktsforhandlinger med den valgte tilbudsgiver var en underretning om tildelingsbeslutningen), 19/3-07 (STB Byg mod Hedensted Kommune, for sen underretning), 26/4-07 (MT Højgaard mod Aalborg Lufthavn, overtrædelse), 15/8-07 (Stürup mod Billund Kommune, for sen underretning), 18/1-08 (Eurofins mod Aalborg Kommune, underretningspligten overholdt ved mundtlig tilkendegivelse), Retten 12/3-08 (Evr. Dynamiki mod Kommissionen, udbyderen overtrådte ligebehandlingsprincippet ved ikke at give alle tilbudsgiverne de nødvendige oplysninger med den konsekvens, at kun den valgte tilbudsgiver som følge af sit samarbejde med den hidtidige tjenesteyder havde oplysningerne), 19/12-08 (UAB mod Ringsted Kommune, udbyderens underretning til tilbudsgiverne om tildelingsbeslutningen skal indeholde oplysning om den valgte tilbudsgiver, overtrædelse af Udbudsdirektivet ved, at underretningen ikke blev sendt hurtigst muligt, og overtrædelse af stand-still reglerne ved, at underretningen blev givet ved almindeligt brev)
Underskrift	8/5-06 (Pankas mod Korsør Kommune, et krav i udbudsbetingelserne om, at kontrakten skulle underskrives af en tegningsberettiget, var ikke til hinder for, at tilbud blev underskrevet i henhold til stillingsfuldmagt)
Ungdomsboliger, støttede private	
Unormalt lave tilbud	19/12-95 (Kirkebjerg mod HS, et tilbud var ikke ukonditionsmæssigt som følge af en lav tilbudspris, men skulle behandles efter reglerne om unormalt lave tilbud), 8/3-99 (FRI mod Nyk. F. Kommune, udbyders forespørgsel til tilbudsgiver med abnormt lavt tilbud var berettiget), 30/10-01 (DTL mod Haderslev Kommune, tilbud 24 % lavere end næstlaveste tilbud var ikke unormalt lavt), EF-domstolen 27/11-01 (Impresa Lombardini, italiensk lovgivning om vurdering af tilbud var i strid med Bygge- og anlægsdirektivet), Retten 25/2-03 (Renco mod Rådet, udbyderen havde fulgt fremgangsmåden med hensyn til unormalt lave tilbud, uden at klageren var fremkommet med en overbevisende forklaring), 13/1-04 (Pihl & Søn mod Hadsund Kommune, vurderingen af, om et tilbud er unormalt lavt, skal angå den samlede tilbudspris), Retten 6/7-05 (TQ3 mod Kommissionen, et tilbud var ikke unormalt lavt, og reglerne om unormalt lave tilbud var irrelevante, da udbyderen ikke havde anset tlbuddet for unormalt lavt), 22/2-07 (Platech Arkitekter mod Rødding Kommune, Udbudsdirektivets regel om unormalt lave tilbud finder ikke anvendelse ved udbud under tærskelværdien), 4/4-07 (Cowi mod Sønderjyllands Amt, reglerne om unormalt lave bud har til formål at afskære useriøse bud, og et tilbud er ikke unormalt lavt, blot fordi tilbudsprisen er 30 % lavere end næstlaveste tilbudspris), Retten 21/5-08 (Belfass mod Rådet, udbyderens afvisning af et tilbud, fordi tilbuddet ikke opfyldte et krav om et bestemt timetal, skulle ske under anvendelse af reglerne om unormalt lave tilbud)
Vedståelsesperiode	
Virksomhedsoverdragelse	21/6-00 (Arriva mod HT, om tilladelige modeller for regulering af tilbudspriser i tilfælde, hvor den hidtidige tjenesteyders medarbejdere skal overtages), HR 11/5-07 i UfR 2007 s. 2106 H (samme sag, opretholder Klagenævnets afgørelse), 7/9-05 (Dansk Byggeri mod Vejle Kommune, nogle mindre fejl i udbyderens opgørelse af, hvilke medarbejdere, der skulle overtages fra den hidtidige tjenesteyder, var uden betydning)
Vægtning inden for rammer	2/5-06 (DA mod Albertslund Boligselskab mfl., udbyders vægtning inden for rammer var i strid med gennemsigtighedsprincippet og Udbudsdirektivets § 53, stk. 2), 12/9-08 (Master Data mod Københavns Kommune, rammerne for vægtning af de enkelte

	underkriterier var passende i sig selv, men det var i strid med Udbudsdirektivet, at de var fastsat sådan, at underkriterierne kunne skifte plads i vægtningsrækkefølgen; det var ikke i sig selv en overtrædelse, at underkriteriet pris kun skulle vægtes med 15-25 %), 3/10-08 (Creative mod Århus Kommune, Udbudsdirektivet indeholder ikke regler om, hvornår udbyderen skal fastsætte den endelige vægtning af underkriterierne i tilfælde, hvor udbyderen har fastsat en relativ vægtning; en udbyder har ikke pligt til at anvende et pointsystem ved tilbudsvurderingen)
Ændring af projekt	18/11-96 (European Metro Group mod Ørestadsselskabet, ikke pligt til nyt udbud efter mindre ændringer i projektet), 19/6-97 (Højgaard & Schultz mod Hundested Boligselskab, mindre ændringer var ikke i strid med udbudsreglerne), 3/12-98 (Højgaard & Schultz mod Ørestadsselskabet, lignende), 29/4-08 (Funder Ådalskonsortiet mod Vejdirektoratet, overtrædelse af gennemsigtighedsprincippet ved anvendelse af uklar fremgangsmåde ved ændring af udbudsbetingelserne), 29/5-08 (Hermedico mod Høje-Taastrup Kommune mfl., en mindre væsentlig ændring af udbudsbetingelserne var ikke i strid med Udbudsdirektivet), EF-domstolen 19/6-08 (Pressetext, ændringer i en indgået udbudspligtig aftale kræver kun nyt udbud, hvis ændringerne er væsentlige; en intern omstrukturering hos medkontrahenten er ikke en væsentlig ændring, og det er i princippet heller ikke en væsentlig ændring, at en medkontrahent, der er en juridisk person, skifter ejerkreds), 27/6-08 (DA mod Handels- og Søfartsmuseet, overtrædelse ved væsentlig ændring af konkurrencevilkårene for projektkonkurrence), 10/7-08 (European mod Kystdirektoratet, overtrædelse af ligebehandlingsprincippet ved væsentlig ændring af udbudsbetingelserne)
Åbning af tilbud	7/7-95 (Valles Trans-Media mod Københavns Kommune, ikke krav om oplysning om tid og sted for åbning, afgørelsen er forældet, jf. Tilbudslovens § 7, der i medfør af § 1, stk. 3, også gælder for EU-udbud), 21/2-96 (IBF Nord mod Aalborg Kommune, tilbud ikke modtaget rettidigt), 15/12-99 (Lifeline mod Dansk Hunderegister, det var i strid med Tjenesteydelsesdirektivet, at udbyder havde åbnet et tilbud inden det tilkendegivne åbningstidspunkt), 27/5-03 (Eriksson mod Fuglebjerg Kommune, udsættelse af tidspunktet for tilbudsåbning var i strid med Tilbudslovens ligebehandlingsprincip), 30/6-03 (Skanska mod Løgstør Kommune, Tilbudslovens § 7 medfører kun pligt til ved tilbudsåbning at give oplysning om udtrykkelige forbehold og forhold, der ved en hurtig gennemgang må vurderes som forbehold), 14/5-08 (Trans-Lift mod DSB, ligebehandlingsprincippet overtrådt ved åbning af et tilbud før tilbudsfristens udløb)